



## Recent Cases Enforcing a Pre-Petition Waiver of the Automatic Stay



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In this time of COVID-19, creditors and debtors alike have looked for ways to address the financial squeeze the pandemic has imposed on the global economy. On the one hand, debtors are likely to look for more time for their business operations to return to “normal.” On the other hand, creditors are likely to look for certainty of results in an otherwise uncertain time. As a result, creditors may demand from their debtors — as part of a negotiation, a plan of reorganization or a pre-petition forbearance agreement — that the debtor agree to waive the protections of the automatic stay under 11 U.S.C. § 362 in any future bankruptcy filing.

Generally, a pre-petition waiver of a right created by the Bankruptcy Code is unenforceable.<sup>1</sup> However, under certain circumstances a waiver of the automatic stay may be enforceable, so creditor and debtor practitioners should be cognizant of those circumstances when negotiating stay waivers.

### **Factors for Evaluating Enforceability**

Courts have enforced pre-petition waivers of the automatic stay for a variety of reasons.<sup>2</sup> Yet there are two situations in particular where a waiver of the automatic stay has been enforced in a subsequent bankruptcy filing. The first situation is where the waiver was entered into as part

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<sup>1</sup> See, e.g., *In re Pease*, 195 B.R. 431, 434–35 (Bankr. D. Neb. 1996) (“Any attempt by a creditor in a private pre-bankruptcy agreement to opt out of the collective consequences of a debtor’s future bankruptcy filing is generally unenforceable. The Bankruptcy Code preempts the private right to contract around its essential provisions.”); see also *In re Jeff Benfield Nursery Inc.*, 565 B.R. 603 (Bankr. W.D.N.C. 2017).

<sup>2</sup> For a more detailed discussion on the historical enforcement of pre-petition waivers of the automatic stay, see Jeffrey W. Warren & Wendy V.E. England, “Pre-Petition Waiver of the Automatic Stay Is Not *Per Se* Enforceable,” *Am. Bankr. Inst. J.*, March 1994, and “The Enforceability of a Pre-Petition Waiver of the Automatic Stay: Beware of the Terms of a Forbearance Agreement,” *Am. Bankr. Inst. J.*, April 2008.

of a prior bankruptcy case and was approved by that court.<sup>3</sup> In this situation, courts have considered 10 factors to evaluate whether the waiver should be enforced. Those factors generally look at the nature of the negotiation, its impact on third parties, and public policy considerations, among other things.<sup>4</sup>

The second situation is where the debtor has agreed to a waiver as part of a prepetition forbearance agreement.<sup>5</sup> In these cases, courts have looked at four factors to determine whether a contractual pre-petition waiver of the automatic stay is enforceable:

- (1) the sophistication of the party making the waiver;
- (2) the consideration for the waiver, including the creditor's risk and the length of time the waiver covers;
- (3) whether other parties are affected, including unsecured creditors and junior lienholders, and;
- (4) the feasibility of the debtor's plan.<sup>6</sup>

### Recent Cases Enforcing the Waiver

Both of the situations above have arisen in recent bankruptcy cases where the court upheld the waiver granted by the debtor.<sup>7</sup> The first case, *In re A. Hirsch Realty LLC*,<sup>8</sup> addressed a waiver made as part of a prior bankruptcy proceeding.

In *Hirsch*, the secured creditor-mortgagee filed a motion for relief from the automatic stay after the debtor filed for bankruptcy on the morning of the scheduled foreclosure sale.<sup>9</sup> In support of its motion, the creditor argued that relief should be granted because the debtor waived the protections of the automatic stay as part of a loan-modification agreement, which was incorporated into and approved as part of the debtor's plan of reorganization confirmed years earlier.<sup>10</sup>

The court in *Hirsch* considered the *Frye* factors and other similar analyses, and enforced the waiver granted in the modification agreement.<sup>11</sup> The court relied on the following factors, among others, in granting the secured creditor relief from the automatic stay:

- The debtor was represented by experienced bankruptcy counsel in the prior case;
- The modification agreement was the result of an arm's-length negotiation; and
- Any increased value in the subject property after the granting of the waiver was not sufficient to overcome the binding nature of the prior order confirming the plan and approving the modification agreement.<sup>12</sup>

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<sup>3</sup> See, e.g., *In re Frye*, 320 B.R. 786 (Bankr. D. Vt. 2005).

<sup>4</sup> *Id.* at 791.

<sup>5</sup> See, e.g., *Southwest Georgia Bank v. Desai (In re Desai)*, 282 B.R. 527 (Bankr. M.D. Ga. 2002).

<sup>6</sup> *Id.* at 532.

<sup>7</sup> The *Hirsch* decision was also cited in a 2018 decision where the debtor was denied the stay pending its appeal of an order granting a creditor relief from the automatic stay. *In re Simpson*, 2018 WL 1940378 (Bankr. D. Vt. Apr. 23, 2018). In the *Simpson* decision, the court held that the debtor was not likely to succeed on the merits of its appeal on the arguments challenging the enforcement of a pre-petition waiver. In *Simpson*, the waiver was incorporated into a settlement agreement reached between the debtor and its secured lender as part of a dismissal of state court litigation, after the first bankruptcy case was dismissed. The court in *Simpson* cited *Hirsch* in determining that the applicable case law supported the enforceability of waivers of the automatic stay, in contravention of the debtor's arguments.

<sup>8</sup> 583 B.R. 583 (Bankr. D. Mass. 2018).

<sup>9</sup> *Id.* at 590-591.

<sup>10</sup> *Id.* at 591-592.

<sup>11</sup> *Id.* at 595-604.

<sup>12</sup> *Id.*

Based on these factors, the court determined that “cause” was present under 11 U.S.C. § 362(d)(1) and that relief was warranted.<sup>13</sup>

The second case, *Matter of Orchard Hills Baptist Church Inc.*,<sup>14</sup> addressed the enforceability of waiver of the right to contest a motion for relief from the automatic stay as part of a pre-petition forbearance agreement, entered into after a default on a loan secured by a mortgage. In *Orchard Hills*, the secured creditor-mortgagee filed a motion for relief from the automatic stay after the debtor filed for bankruptcy on the date of the foreclosure sale, citing the waiver in support of its motion.<sup>15</sup> In making its decision to enforce the waiver and grant the relief, the court adopted the *Desai* factors but noted that there is no uniform test and that “the foundational consideration is whether the balance of the equities favors enforcement.”<sup>16</sup> In particular, the court noted the following:

- Despite not being represented by counsel, it was sufficiently sophisticated to understand the consequences of the waiver;
- The 10 months between the date of the agreement and the subsequent bankruptcy case was sufficient consideration to support the waiver;
- No other parties would be harmed by granting relief from stay (as no other creditor objected to the motion); and
- The debtor’s prior financial performance cast significant doubt on the feasibility of a plan of reorganization.<sup>17</sup>

As demonstrated by the general factors and cases discussed above, the enforceability of a pre-petition waiver of the automatic stay will depend on the facts and circumstances of each case. However, practitioners should be aware as they negotiate these provisions and advise their clients that these waivers can and — if certain factors are present — will be enforced.

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<sup>13</sup> *Id.* at 602.

<sup>14</sup> 608 B.R. 309 (Bankr. N.D. Ga. 2019).

<sup>15</sup> *Matter of Orchard Hills Baptist Church Inc.*, 608 B.R. at 315.

<sup>16</sup> *Id.* at 317.

<sup>17</sup> *Id.* at 317-323.