AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Code to Code

By Tirzah Roussell

Enforceability of Pre-Petition Agreements in Bankruptcy

Tirzah Roussell
Dentons Davis Brown
Des Moines, Iowa

Tirzah Roussell is an associate with Dentons Davis Brown's Restructuring, Insolvency and Bankruptcy Practice Group in Des Moines, Iowa. She also is Membership Relations Co-Director of ABI's Young and New Members Committee.

How much can parties control federal bankruptcy policy through pre-petition settlement agreements? Parties unfamiliar with the bankruptcy process often believe that their pre-petition settlement agreements will be enforceable if a party to the agreement files for bankruptcy. Parties enter into settlements intending to bring finality to legal disputes, but many are surprised to learn that once a party to the agreement files for bankruptcy, some provisions might be unenforceable.

During negotiations in settlement agreements, pre-petition forbearance agreements or plan-support agreements, creditors often require a debtor to waive protections afforded to a debtor who has filed a petition under the Bankruptcy Code. Courts have long held that a pre-petition agreement to waive benefits conferred under bankruptcy laws is wholly void as being against public policy.[1] For example, prohibitions against the filing of a bankruptcy case are typically unenforceable.[2] Some courts have even ruled that an agreement to temporarily withhold filing a future bankruptcy action is void because it would restrain the debtor's free ability to obtain bankruptcy protection.[3]

Many agreements contain provisions in which the debtor agrees to waive the protections of the automatic stay under 11 U.S.C. § 362 or waives discharge in any future bankruptcy filing. Pre-petition waivers of the automatic stay and of the debtor's discharge generally are unenforceable, but under certain circumstances provisions waiving a debtor's bankruptcy protections might be enforceable, so parties should be versed of such exceptions when negotiating agreements.

Pre-Petition Restrictions on Bankruptcy Filings

Courts may allow pre-petition agreements that restrict a debtor's right to file for bankruptcy under certain factual circumstances. Provisions in corporate organizational documents that restrict the exercise of fiduciary duties or nullify or eliminate a debtor's ability to file for bankruptcy are typically deemed to be against public policy. However, if a corporate document with such a restrictive provision creates "a structure in which a director's duties are respected and it complies with non-bankruptcy statutes or law, it is enforceable."[4]

Earlier this year, the U.S. Bankruptcy Court for the Northern District of Illinois granted a secured lender's motion to dismiss a debtor's chapter 11 case based on lack of corporate authority to file.[5] The decision provides guidance as to how a lender can make a debtor's filing for bankruptcy more difficult.

In *In re 301 W N. Ave. LLC*, the company's operating agreement included provisions, added at the behest of the secured lender, that precluded the debtor from filing for bankruptcy without its independent manager's consent. The independent manager position was created at the request of the debtor's lender, and the agreement required that the independent manager's resignation be effective only on notice to the lender and with an acceptable replacement.

1 *See In re Intervention Energy Holdings LLC*, 553 B.R. 258, 263 (Bankr. D. Del. 2016).
2 *See In re Shady Grove Tech Ctr. Assocs. Ltd. P'ship*, 216 B.R. 386, 390 (Bankr. D. Md.) ("[P]rohibitions against the filing of a bankruptcy case are unenforceable."); *Matter of Gulf Beach Dev. Corp.*, 48 B.R. 40, 43 (Bankr. M.D. Fla. 1985) ("[The de]btor cannot be precluded from exercising right to file [for b]ankruptcy and any contractual provision to the contrary is unenforceable as a matter of law.").
3 *See, e.g., In re Madison*, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995).
4 *In re 301 W N. Ave. LLC*, 666 B.R. 583, 598 (Bankr. N.D. Ill. 2025).
5 *Id.*

The independent manager did not consent to the debtor's filing for bankruptcy, and the lender filed a motion to dismiss, arguing that the case should be dismissed, as the debtor did not have corporate authority to file. The debtor argued that a provision in its operating agreement restricting its ability to file for bankruptcy was against public policy.[6] The court stated that "[p]rovisions that place an independent manager on the board of a limited liability company, with requirements that the independent manager must participate in certain corporate decisions, such as the filing of a bankruptcy petition, are not presumptively void."[7]

The court concluded that the provision requiring the independent manager's consent was enforceable and did not violate public policy because the agreement (1) imposed express fiduciary duties of loyalty and care on the independent manager, which extended to the debtor's members and creditors; and (2) required the independent manager to consider only the debtor's interests, including the interests of the debtor's members and creditors — not the economic interests of other parties. The court further emphasized that while the independent manager was created at the request of the lender, it had "a fiduciary duty of loyalty and care similar to that of a director of a business corporation under Delaware Law."[8] The court found that the provisions restricting the debtor to file without the manager's consent were not fatal, as they were enforceable under Delaware law.

Ultimately, the court held that "if an operating agreement creates a structure in which a director's fiduciary duties are respected and that complies with nonbankruptcy statutes or law, it is enforceable." Therefore, the operating agreement restricting the debtor's ability to file was enforceable, as it "did not impermissibly restrict [the debtor's] right to file." As such, the debtor did not have authorization to file the petition, and the motion to dismiss was granted.

Pre-Petition Waivers of the Automatic Stay

While it is well-established that contractual waivers of the right to file for bankruptcy are generally prohibited, there is a split of authority as to whether pre-petition waivers of the automatic stay are enforceable.[9] Stay-waiver language in the original loan documents will not likely be enforced, as it will be viewed as standardized boilerplate language, whereas courts are more willing to grant waivers in forbearance agreements and other workouts. During workout negotiations, lenders often require a provision in the forbearance agreement to include a waiver of the automatic stay.[10]

Despite language in a waiver providing for the automatic lifting of the stay immediately upon filing of a bankruptcy petition, the creditor must still file a motion for relief from the stay.[11] Stay waivers will not prevent courts from entertaining objections of other creditors.[12] Stay-waiver provisions help lenders to (1) minimize exposure under their agreements; (2) exercise their remedies without unreasonable delay; and (3) maximize recoveries on their investments, especially when the debtor is likely to become financially distressed.

Stay waivers are commonly found in two different scenarios: (1) agreements from a subsequent bankruptcy filing when the waiver was entered into as part of a prior case and was approved by the court (often in a chapter 11 plan); and (2) forbearance agreements.[13] The modern trend is in favor of stay waivers, but courts remain split on the issue. For example, the U.S. Bankruptcy Court for the Southern District of Illinois recently held that stay waivers are *per se* unenforceable as a matter of public policy and that the only party benefiting from such a waiver is the secured lender.[14]

Courts might treat the waiver as a factor in determining whether cause exists to lift the stay,[15] whether they might reject the waiver as *per se* unenforceable and against public policy,[16] or whether they uphold the waiver in broad terms based on freedom of contract.[17] The cases that uphold waiver provisions largely focus on public-policy considerations and tend to be either single-asset real estate cases or cases where the bankruptcy was filed in bad faith. Courts typically consider the following factors when evaluating whether a waiver should be enforced:

(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;
(4) the feasibility of the debtor's plan;
(5) whether there is evidence that the waiver was obtained by coercion, fraud or mutual mistake of material facts;
(6) whether enforcing the agreement will further the legitimate public policy of encouraging out-of-court restructurings and settlements;
(7) whether there appears to be a likelihood of reorganization;
(8) the extent to which the creditor would be otherwise prejudiced if the waiver is not enforced;

6 *Id.* at 598-99.
7 *Id.* at 598.
8 *Id.* at 599.
9 *See, e.g., In re Ramirez Carrero*, No. 22-00458 MAG11, 2022 WL 1721245, at *6 (Bankr. D.P.R. May 27, 2022); *In re A. Hirsch Realty LLC*, 583 B.R. 583, 594 (Bankr. D. Mass. 2018); *In re Frye*, 320 B.R. 786, 796 (Bankr. D. Vt. 2005) (enforcing pre-petition agreement); *Shady Grove* at 386 (Bankr. D. Md. 1998) (setting forth several factors as to whether cause exists to warrant relief from stay); *In re Atrium High Point Ltd. P'ship*, 189 B.R. 599 (Bankr. M.D.N.C. 1995) (holding that pre-petition waivers are enforceable in appropriate cases).
10 *See, e.g., Sw. Georgia Bank v. Desai (In re Desai)*, 282 B.R. 527 (Bankr. M.D. Ga. 2002) (waiver provisions are not "*per se* enforceable, nor are they self-executing").
11 *See, e.g., In re Triple A & R Cap. Inv. Inc.*, 519 B.R. 581, 586 (Bankr. D.P.R. 2014); *In re Bryan Rd. LLC*, 382 B.R. 844, 848 (Bankr. S.D. Fla. 2008).
12 *See Atrium* at 607.
13 *In re Frye*, 320 B.R. at 796.
14 *In re DJK Enters. LLC*, No. 24-60126 (Bankr. S.D. Ill. Feb. 13, 2025).
15 *See, e.g., Triple A* at 581, 584 (Bankr. D.P.R. 2014).
16 *See, e.g., DJK Enters.* (stating that *per se* theory is "better approach" and finding that stay waiver in this case would benefit no one other than lender); *In re Pease*, 195 B.R. 431, 433 (Bankr. D. Neb. 1996) (rejecting stay waiver because pre-petition debtors lacked capacity to waive rights granted by Bankruptcy Code and because Code invalidates *ipso facto* clauses and extinguishes private right of freedom to contract around its essential provisions); *In re Jeff Benfeld Nursery Inc.*, 565 B.R. 603, 609 (Bankr. W.D.N.C. 2017) (concluded that stay waivers effectively render automatic stay meaningless and deprive debtor of breathing spell contemplated by Code).
17 *See, e.g., In re Club Tower LP*, 138 B.R. 307, 310-11 (Bankr. N.D. Ga. 1991); *In re Citadel Props. Inc.*, 86 B.R. 275 (Bankr. M.D. Fla. 1988)).

(9) the proximity in time between the date of the waiver and the date of the bankruptcy filing, and whether there was a compelling change in circumstances during that time; and

(10) whether the debtor has equity in the property and the creditor is otherwise entitled to relief from stay under § 362(d).[18]

Courts are more inclined to enforce the stay waiver when the agreement clearly states the parties' intention that enforcement of the waiver was the primary motivation for the creditor to enter into the agreement.[19] The enforceability of the stay waiver will ultimately depend on the facts of each case. If certain factors are present, the waiver will be enforced.

Pre-Petition Waivers of Discharge

When parties settle prebankruptcy, there is a risk that the party required to make payments under the agreement in exchange for a release might have its payment obligation discharged by filing for bankruptcy.

Section 523(a) enumerates exceptions to discharge but does not identify debts that the debtor has agreed, pre-petition, to be nondischargeable in bankruptcy. According to one scholar, "[t]he ability of an individual debtor to discharge his or her debts has been called 'the heart of the fresh-start provisions of the bankruptcy law.'"[20] Considering the presumption in favor of a discharge, the majority of courts have held that a pre-petition waiver of discharge, similar to a pre-petition restriction not to file for bankruptcy, is also contrary to public policy and is unenforceable.[21]

Some courts have allowed such discharge waivers by applying concepts of issue preclusion and collateral estoppel.[22] For example, in *In re Halpern*, the Eleventh Circuit allowed a pre-petition agreement that included a provision that the debt was nondischargeable to be enforced under collateral estoppel.[23] The court agreed that a dischargeability question could not be determined pre-petition. However, it concluded that issue preclusion could prevent the debtor from contesting whether the debt was dischargeable. In *Halpern*, the consent judgments included detailed findings and language that mirrored the Bankruptcy Code. The Eleventh Circuit held that the bankruptcy court could rely on the consent judgments "as evidence in connection with the motion for summary judgment."[24]

To survive discharge, an agreement needs to state more than that the debt is nondischargeable. Based on recent case law, the settlement should be reduced to a stipulated judgment that contains detailed findings of fact that will serve as a basis for nondischargeability and will show the parties' intent to be conclusively bound by the issues settled in any future proceeding.[25]

Conclusion

Courts generally do not favor pre-petition agreements in which a debtor waives the rights granted under the Bankruptcy Code due to public-policy considerations. While pre-petition agreements to forego bankruptcy or its benefits are generally unenforceable as against public policy, there are circumstances depending on the facts of the case in which such agreements may be enforceable. abi

Reprinted with permission from the ABI Journal, Vol. XLIV, No. 7, July 2025.

18 *See Ramirez Carrero*; *Hirsch Realty* (citing *In re Frye*, 320 B.R at 790-91)).

19 *See, e.g., In re Excelsior Henderson Motorcycle Mfg. Co. Inc.*, 273 B.R. 920, 924 (Bankr. S.D. Fla. 2002) (holding that waivers freely entered into by parties are specifically enforceable and enforcement of these provisions furthers public policy in favor of encouraging out-of-court restructuring and settlements).

20 Laura B. Bartell, "Waiver of Discharge: Is It Ever Really Voluntary?," 96 *Am. Bankr. L.J.* 449, 449 (2022).

21 *See, e.g., Bank v. China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002) (citing *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 651-54 (B.A.P. 9th Cir. 1998)); *Hebl v. Windeshausen (In re Windeshausen)*, 546 B.R. 798, 804-05 (Bankr. W.D. Wis. 2016); *Estate of McCoy v. McCoy (In re McCoy)*, No. 15–70395, 2016 WL 4268702, at *20 (Bankr. E.D. Va. Aug. 11, 2016); *Rice, Heitman & Davis SC v. Sasse (In re Sasse)*, 438 B.R. 631, 645 (Bankr. W.D. Wis. 2010).

22 *See, e.g., Klingman v. Levinson*, 831 F.2d 1292, 1296-97 (7th Cir. 1987) (holding consent judgment binding on claim under § 523(a)(4) as judgment contained detailed stipulations of fact describing dissipation of assets by trust fiduciary and provided that debt would be undischargeable in any bankruptcy proceeding of judgment debtor); *Martin v. Hauck (In re Hauck)*, 489 B.R. 208, 214-16 (D. Colo. 2013) (holding that stipulated judgment that incorporated by reference specific facts in complaint supporting plaintiff's claims for fraud, deceit and civil theft was considered to manifest intent to be conclusively bound and was given collateral estoppel effect).

23 *In re Halpern*, 810 F.2d 1061, 1064 (11th Cir. 1987).

24 *Id.* at 1064-65.

25 *In re Nicholls*, No. 10-70650-DTE, 2010 WL 5128627, at *4 (Bankr. E.D.N.Y. Dec. 10, 2010) (holding that stipulated judgment provision that debt would be undischargeable in bankruptcy would not be collateral estoppel under § 523(a)(2) because there was "no statement of facts upon which the parties agreed").