

Chapter 21

Waiver of Bankruptcy Protections in Prebankruptcy Workout Agreements

- § 21:1 Introduction
- § 21:2 Typical scenario
- § 21:3 Enforceability of relief from stay waiver provisions—
General provisions
- § 21:4 Enforcing the waiver
- § 21:5 Refusing to enforce waiver
- § 21:6 Enforceability of waiver in serial filing cases
- § 21:7 Enforceability of other provisions
- § 21:8 Practice issues regarding waivers—Advisability—
Creditor's standpoint
- § 21:9 Negative factors for creditors
- § 21:10 Advisability—Debtor's standpoint
- § 21:11 Types of waiver provisions
- § 21:12 Form acknowledgment and relief from stay waiver

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

§ 21:1 Introduction

Secured creditors sometimes demand that workout agreements include provisions in which the debtor waives bankruptcy protections. This chapter discusses the enforceability of these waiver provisions and the practical considerations in negotiating and drafting these provisions for prebankruptcy workout agreements. While the emphasis of this chapter is on out of court workout agreements which provide for relief from the stay in any later bankruptcy case, this chapter will also discuss the enforceability of agreements entered into during a bankruptcy case in a second bankruptcy case and, to a lesser extent, waiver of other types of bankruptcy protections.

A waiver of the automatic stay was first enforced in a published decision in 1984. Early on there was a great division in the cases, with a number of the case decisions enforcing the waiver and others not. Later cases trended toward a middle position, some courts giving presumptive effect to the waiver while taking other factors into consideration, and other courts giving the waiver less weight among a series of factors. There is a developing consensus well illustrated by the 2004 case of *In re Deb-Lyn, Inc.*¹ that the prebankruptcy waiver is not binding on the debtor except in a bad faith, single asset case with no possibility of reorganization, or in a case in which the previous waiver was approved by a court, particularly as a part of confirmation of a plan of reorganization. The existence of other creditors in a commercial case who would be adversely affected in a significant financial way by relief from the automatic stay is likely to be an important factor. In most cases where such creditors exist, a waiver by the debtor will not be treated as binding or even a material consideration.

More recently, courts have increasingly looked at a variety of factors to determine the enforceability of the relief from automatic stay waiver. In *In re Frye*,² the court surveyed seven other cases to develop a list of 10 factors to review in determining whether a provision in an agreement giving the right to ex parte relief from the stay in any subsequent bankruptcy case is enforceable. In 2008, the court in *In re Bryan Road, LLC*³ used at least four factors, adopted from *In re Sky Group Intern., Inc.*,⁴ in deciding to enforce a prepetition waiver. Although courts have not agreed upon one standard set of factors, it seems clear that courts look at the particu-

[Section 21:1]

¹*In re Deb-Lyn, Inc.*, 42 Bankr. Ct. Dec. (CRR) 175, 2004 WL 452560 (N.D. Fla. 2004).

²*In re Frye*, 320 B.R. 786, 53 Collier Bankr. Cas. 2d (MB) 1225 (Bankr. D. Vt. 2005), subsequent determination, 323 B.R. 396 (Bankr. D. Vt. 2005), order amended, 2005 WL 1915845 (Bankr. D. Vt. 2005). The court reviewed six of the 10 factors regarding the enforceability of prepetition waivers, but withheld final decision pending an additional hearing). In *In re Frye*, 323 B.R. 396 (Bankr. D. Vt. 2005), order amended, 2005 WL 1915845 (Bankr. D. Vt. 2005), the court ruled on the four remaining factors and ultimately held the prepetition waiver was enforceable.

³*In re Bryan Road, LLC*, 382 B.R. 844, 49 Bankr. Ct. Dec. (CRR) 176 (Bankr. S.D. Fla. 2008).

⁴*In re Sky Group Intern., Inc.*, 108 B.R. 86, 22 Collier Bankr. Cas. 2d (MB) 403 (Bankr. W.D. Pa. 1989).

lar circumstances of each case rather than uniformly holding that a prepetition automatic stay waiver is or is not enforceable.

§ 21:2 Typical scenario

Typically, negotiations over bankruptcy waiver provisions occur between a debtor in default and a secured creditor who is entitled to exercise its right to foreclose on collateral. The debtor is optimistic that with additional time, and perhaps given other concessions, it will be able to resolve its problems without filing a bankruptcy case. The secured creditor may be willing to delay exercising its rights and to grant concessions. The secured creditor may believe this approach is preferable to a bankruptcy filing. The secured creditor may also believe that it too will be benefited by the forbearance. Other times, the secured creditor believes that the debtor will not succeed and that a later foreclosure or bankruptcy is inevitable. Thus, often the essence of the workout agreement between the debtor and the secured creditor is that there will not be a later bankruptcy; and if the debtor does not succeed in solving its problems in the negotiated time period, the debtor will cooperate with the secured creditor by acceding to a foreclosure on the collateral or even perhaps by delivering a deed-in-lieu of foreclosure.

The secured creditor and its counsel, knowing that an agreement not to file bankruptcy is not enforceable as a matter of public policy,¹ may consider whether they can protect the secured creditor's position if the debtor does file bankruptcy by having the debtor waive the protection of the automatic stay.² Indeed the debtor may be desperate to obtain concessions from the secured creditor, and may be willing to promise almost anything in return. Counsel for the debtor should normally advise the debtor to refuse to agree to such a waiver. Counsel for both the secured creditor and the debtor should consider whether the waiver is enforceable and what other ramifications may follow from having a waiver in a prebankruptcy workout agreement. They

[Section 21:2]

¹E.g., *In re Citadel Properties, Inc.*, 86 B.R. 275, Bankr. L. Rep. (CCH) P 72301 (Bankr. M.D. Fla. 1988) (rejected on other grounds by, *In re Victoria Ltd. Partnership*, 187 B.R. 54, 27 Bankr. Ct. Dec. (CRR) 1210, Bankr. L. Rep. (CCH) P 76666 (Bankr. D. Mass. 1995)); *In re Club Tower L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991).

²See 11 U.S.C.A. § 362(a).

need to anticipate the positions that may be taken in negotiations. Will the other side really insist on its position to the end? Is it really nonnegotiable? How insistent should each side be?

While waiver provisions are most often seen in the context of a defaulted real estate loan, they also occur in the context of other types of commercial loans. Also, those waiver provisions now address a broader range of bankruptcy issues, such as disputes as to the validity and enforceability of the creditor's claims, affirmative claims of the debtor, the use of cash collateral, cramdown, and dischargeability.

§ 21:3 Enforceability of relief from stay waiver provisions—General provisions

As described above, the courts have been generally unified in their position that waivers of the automatic stay are not per se enforceable, but they are divided on what factors should be used to determine whether such waivers should be enforced in particular circumstances. Although the rulings in this area appear to be decisions of law, it is apparent that the underlying facts are very important and provide the real explanation for most of the variations in the rulings. Before discussing the specifics of these cases, a few preliminary observations are in order.

First, although waivers of the automatic stay are sometimes stated to be self executing, it would be a serious error for a secured creditor to attempt to foreclose without an order of the bankruptcy court granting relief from the automatic stay. All of the cited cases arise in the context of a filed motion for relief from the stay and courts have several times commented that such a motion is necessary.¹ To attempt to foreclose without filing a relief from stay motion may very well draw a sanction under Bankruptcy Code section 362(h)² or other applicable law. Given that fact, a secured creditor who wants to obtain a waiver and who does

[Section 21:3]

¹See 11 U.S.C.A. § 362(d).

²11 U.S.C.A. § 362(h) provides “An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” Some courts have held that sanctions under such section are only available to individual debtors. See e.g., *In re Goodman*, 991 F.2d 613, 24 Bankr. Ct. Dec. (CRR) 300, 28 Collier Bankr. Cas. 2d (MB) 1261, Bankr. L. Rep. (CCH) P 75229 (9th Cir. 1993). Even

not want to appear overreaching should draft language appropriate for a hearing.

Second, nearly all of the decided cases, particularly those that appear to enforce the waiver, arise in the relief from automatic stay context with a common fact pattern: a single asset case with little or no equity in the property. It seems clear in many of these cases that in the prebankruptcy workout the secured creditor has given a substantial concession. Therefore, if a bankruptcy case is filed and the stay remains in place, the secured creditor has not received the benefit of its bargain: the debtor had promised not to resist the creditor at the end of the forbearance period and then reneged. In most cases, the court has gone out of its way to make clear that there is no equity in the property and that an effort at reorganization would be hopeless. In these cases it is probable that the real basis for granting relief from the stay was that there were sufficient other facts to constitute “cause” for relief from the stay or that the case was filed in bad faith, which in itself is cause. In these cases, the prebankruptcy agreement is essentially treated as additional evidence supporting a finding of “cause” or bad faith.³

Third, a distinction should be made between an outright waiver of a bankruptcy right, such as the right to oppose a motion for relief from the stay, and stipulations of fact that would support a motion for relief from the stay. For example, the debtor may agree that there is no equity in the property or that reorganization would be hopeless, and the facts that support these conclusions may be spelled out in detail. Such stipulations of fact are more likely to be effective as factors a court may consider.⁴

§ 21:4 Enforcing the waiver

Although the cases enforcing the waiver appear to be based on law, the finding of relief from stay in these cases is actually based on the totality of the facts. One of the earliest leading cases finding in favor of a relief from stay waiver is

so, other sanctions may still be available. *In re Goodman*, 991 F.2d 613, 24 Bankr. Ct. Dec. (CRR) 300, 28 Collier Bankr. Cas. 2d (MB) 1261, Bankr. L. Rep. (CCH) P 75229 (9th Cir. 1993).

³In fact, none of the reported decisions appears to support the proposition that a waiver will be enforced per se, without the introduction of any evidence and over the objection of other parties in interest.

⁴See § 21:7.

*In re Citadel Properties, Inc.*¹ In *Citadel*, the secured creditor agreed to a forbearance on its real estate foreclosure in exchange for an agreement that it would be entitled to immediate relief from the stay should the debtor file a bankruptcy case. Following several earlier decisions issued by the court in the Middle District of Florida,² the court in *Citadel* followed the provisions in the prepetition agreement.³

Another leading case “enforcing” a relief from stay waiver is *In re Club Tower, L.P.*⁴ In *Club Tower*, the bankruptcy court upheld a provision in a forbearance agreement that entitled the secured creditor to immediate relief from the automatic stay. The court distinguished an agreement waiving the benefits of the automatic stay from an absolute waiver of the debtor’s right to file bankruptcy, which the court indicated would not be enforceable.

A third case supporting the secured creditor is *In re Orange Park South Partnership*.⁵ In *Orange Park*, the debtor entered into a prepetition stipulation in a foreclosure action. The stipulation waived the debtor’s defenses to the claim of the mortgagee, conceded that there was no equity in the property encumbered by the mortgage, and agreed that any subsequent bankruptcy filing by the debtor or a related partnership to whom the debtor deeded the real property would be admitted to be totally unfounded and filed solely for purposes of delay. After entering into the stipulation, a new partnership was created, the debtor delivered to it a deed for the real property, and the new partnership filed a

[Section 21:4]

¹*In re Citadel Properties, Inc.*, 86 B.R. 275, Bankr. L. Rep. (CCH) P 72301 (Bankr. M.D. Fla. 1988) (rejected on other grounds by, *In re Victoria Ltd. Partnership*, 187 B.R. 54, 27 Bankr. Ct. Dec. (CRR) 1210, Bankr. L. Rep. (CCH) P 76666 (Bankr. D. Mass. 1995)).

²The court cited with approval *Matter of International Supply Corp. of Tampa, Inc.*, 72 B.R. 510 (Bankr. M.D. Fla. 1987); *Matter of B.O.S.S. Partners I*, 37 B.R. 348, Bankr. L. Rep. (CCH) P 69733 (Bankr. M.D. Fla. 1984); and upheld *Matter of Gulf Beach Development Corp.*, 48 B.R. 40 (Bankr. M.D. Fla. 1985). In *Gulf Beach Dev. Corp.*, the court upheld the terms of a prepetition agreement in which the debtor received a foreclosure forbearance in exchange for agreeing that the mortgage would be entitled to immediate relief from the automatic stay should the debtor file protection under the Bankruptcy Code.

³*Citadel*, 86 B.R. at 276–277.

⁴*In re Club Tower L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991).

⁵*In re Orange Park South Partnership*, 79 B.R. 79 (Bankr. M.D. Fla. 1987).

Chapter 11 bankruptcy case. The court found that the case presented many of the factors that are usually present in Chapter 11 cases not filed in good faith. The court found particularly egregious the fact that the principals of the debtor had signed prepetition stipulations admitting the case was filed in bad faith. The court did not find any evidence that the prepetition stipulation was obtained either by coercion, fraud, or mutual mistake, and upheld the stipulation. *Orange Park* is particularly noteworthy for upholding prepetition acknowledgements (as opposed to waivers of rights) and further, for upholding the prepetition stipulation not of the debtor, but of its predecessor in interest.

The *Club Tower* case was followed in *In re Cheeks*.⁶ In *Cheeks*, the court addressed the issue as to whether to enforce a prepetition agreement not to oppose a relief-from-stay motion by an individual debtor in its subsequent Chapter 13 case. The court, in upholding the waiver, found that there was no basis to limit the enforceability of relief-from-stay waivers to single-asset real estate cases or for providing more or less relief to particular classes of debtors.⁷

One court that has followed this line of cases in enforcing

⁶*In re Cheeks*, 167 B.R. 817 (Bankr. D. S.C. 1994).

⁷*In re Cheeks*, 167 B.R. 817, 819 (Bankr. D. S.C. 1994). The court also noted that the stay will not be lifted in all cases where a waiver exists; the court simply will not give weight to the debtor's objection. The court will still consider the objections of third parties. The court also found that a relief-from-stay waiver is not self-executing and must be enforced by motion.

See also *In re Powers*, 170 B.R. 480, 25 Bankr. Ct. Dec. (CRR) 1586, 31 Collier Bankr. Cas. 2d (MB) 1079, Bankr. L. Rep. (CCH) P 76057 (Bankr. D. Mass. 1994). In *Powers*, the court held that relief-from-stay waivers are not per se invalid, but are not self-executing. The court used a cause analysis and determined that an evidentiary hearing would be necessary. See also *In re Wheaton Oaks Office Partners*, (Bankr. ND Ill. 1992) (unreported). In *Wheaton*, the bankruptcy court relied upon *Citadel*, and *Club Tower* and held that a prepetition court-approved contract waiving postpetition defenses is cause for relief from the automatic stay. See also *Matter of Wheaton Oaks Office Partners Ltd. Partnership*, 27 F.3d 1234, 25 Bankr. Ct. Dec. (CRR) 1311, 31 Collier Bankr. Cas. 2d (MB) 840, Bankr. L. Rep. (CCH) P 75963 (7th Cir. 1994). See also *In re Darrell Creek Associates, L.P.*, 187 B.R. 908 (Bankr. D. S.C. 1995). See also *Matter of Hudson Manor Partners, Ltd.*, 28 Collier Bankr. Cas. 2d (MB) 221, 1991 WL 472592 (Bankr. N.D. Ga. 1991), following the *Citadel* and *Orange Park* cases. See also *In re Atrium High Point Ltd. Partnership*, 189 B.R. 599, 28 Bankr. Ct. Dec. (CRR) 254 (Bankr. M.D. N.C. 1995), where the court found that such waivers may be enforceable but did not grant relief

a prepetition waiver, also imposed *sanctions* on the debtor and its attorney. In *In re McBride Estates, Ltd.*,⁸ a consent to relief from the stay in the event of a later bankruptcy filing by the general partner of a debtor was included in a settlement agreement that was incorporated into the debtor's confirmed Chapter 11 plan of reorganization. Thereafter, the general partner filed his own Chapter 11 case. Rather than stipulating to relief from the automatic stay, the debtor resisted a motion for relief brought by the secured creditor. The bankruptcy judge found that the agreement entered into in the partnership debtor's Chapter 11 case was sufficient grounds for granting relief from the stay. On a subsequent motion, the court imposed sanctions in excess of \$4,000 on the debtor and his attorney under Bankruptcy Rule 9011 for opposing the secured creditor's motion for relief. The court agreed that a "radical new development" would have been an appropriate reason to oppose the motion for relief, but found that no such facts were presented and that the debtor had "failed to present a workable basis for relieving it of the obligations set forth in its previous agreement."⁹

Recent cases have used various combinations of factors adopted from earlier cases in deciding whether or not to enforce a prepetition waiver. *In re Frye*¹⁰ presented a case of first impression in Vermont. The court drew on several cases in identifying a total of 10 factors to consider, one of the longer lists used by a court. The first four factors were drawn from *In re Atrium*: the sophistication of the party making the waiver; the consideration for the waiver; if other parties, including other lienholders, are affected; and the feasibility of the debtor's plan.¹¹ The remaining six factors represent factors taken from a number of other cases: whether there is evidence of coercion, fraud, or mutual mistake of material

from the stay based on the facts of the case, and *In re Wald*, 211 B.R. 359, 361 (Bankr. D. N.D. 1997)

⁸*In re McBride Estates, Ltd.*, 154 B.R. 339 (Bankr. N.D. Fla. 1993).

⁹*In re McBride Estates, Ltd.*, 154 B.R. 339, 342 (Bankr. N.D. Fla. 1993). The sanction aspect of McBride was specifically disagreed with in Powers (the debtor may contest the motion to lift the stay). *In re Powers*, 170 B.R. 480, 484, 25 Bankr. Ct. Dec. (CRR) 1586, 31 Collier Bankr. Cas. 2d (MB) 1079, Bankr. L. Rep. (CCH) P 76057 (Bankr. D. Mass. 1994).

¹⁰*In re Frye*, 320 B.R. 786, 53 Collier Bankr. Cas. 2d (MB) 1225 (Bankr. D. Vt. 2005), subsequent determination, 323 B.R. 396 (Bankr. D. Vt. 2005), order amended, 2005 WL 1915845 (Bankr. D. Vt. 2005).

¹¹*In re Atrium High Point Ltd. Partnership*, 189 B.R. 599, 28 Bankr. Ct. Dec. (CRR) 254 (Bankr. M.D. N.C. 1995)

facts in obtaining the waiver;¹² whether enforcing the agreement will further public policy encouraging out of court settlements and restructuring;¹³ whether there appears to be a likelihood of reorganization;¹⁴ the extent to which the creditor would be otherwise prejudiced if the waiver is not enforced;¹⁵ the time between the date of the waiver and date of the bankruptcy filing and if there has been a compelling change in circumstances;¹⁶ and if the debtor has equity in the property and the creditor is otherwise entitled to relief from the stay under § 362(d).

In *Frye*, the court analyzed each factor separately, initially finding that six of the factors weighed in favor of enforcing the waiver. However, before rendering its final decision, the court required the parties to present additional evidence on the factors undecided in the first case. In its second decision, the court concluded that a total of nine factors weighed in favor of enforcing the waiver.¹⁷ The court determined that the final factor, even if found to weigh against enforcement, would not be enough to tip the balance. Under the totality of the circumstances, the court enforced the prepetition waiver and allowed the creditor relief from the stay.

In addition to the 10 factors outlined in *Frye*, the issue of bad faith is frequently considered by the courts. In *In re Bryan Road, LLC*,¹⁸ the court first applied four factors very similar to those cited in *Atrium* and *In re Sky Group Intern., Inc.* Because the analysis based on these four factors weighed in favor of enforcing the prepetition waiver, the court ultimately did not rule on the issue of bad faith. Nonetheless, the court found the issue worthy of brief comment and

¹²*In re Orange Park South Partnership*, 79 B.R. 79, 82 (Bankr. M.D. Fla. 1987).

¹³*In re Club Tower L.P.*, 138 B.R. 307, 313 (Bankr. N.D. Ga. 1991).

¹⁴*In re Powers*, 170 B.R. 480, 484, 25 Bankr. Ct. Dec. (CRR) 1586, 31 Collier Bankr. Cas. 2d (MB) 1079, Bankr. L. Rep. (CCH) P 76057 (Bankr. D. Mass. 1994).

¹⁵*In re Powers*, 170 B.R. 480, 484, 25 Bankr. Ct. Dec. (CRR) 1586, 31 Collier Bankr. Cas. 2d (MB) 1079, Bankr. L. Rep. (CCH) P 76057 (Bankr. D. Mass. 1994).

¹⁶*In re Merridale Gardens Limited Partnership*, unpublished op. No. 95-1-3091 PM No. 95-1-3091 PM (Bankr. D. Md. Oct. 19, 1995).

¹⁷*In re Frye*, 323 B.R. 396 (Bankr. D. Vt. 2005), order amended, 2005 WL 1915845 (Bankr. D. Vt. 2005).

¹⁸*In re Bryan Road, LLC*, 382 B.R. 844, 848–49, 49 Bankr. Ct. Dec. (CRR) 176 (Bankr. S.D. Fla. 2008).

it appears that had it decided the issue, likely it would have found that debtor acted in bad faith.

§ 21:5 Refusing to enforce waiver

The early leading case denying the secured creditor the benefit of a prepetition waiver was *In re Sky Group Intern., Inc.*¹ In this case, the bankruptcy court refused to uphold a provision in a prepetition agreement to the effect that in the event of bankruptcy, the debtor “hereby consents to relief from the automatic stay . . . to allow [the lender] to exercise its rights and remedies with respect to the property.”² The court based its refusal to uphold the debtor’s prepetition waiver of the automatic stay on the legislative history and public policy behind section 362.³

A number of other courts have refused to enforce such waivers. A particularly good example is *Farm Credit of Cent.*

[Section 21:5]

¹*In re Sky Group Intern., Inc.*, 108 B.R. 86, 22 Collier Bankr. Cas. 2d (MB) 403 (Bankr. W.D. Pa. 1989).

²*In re Sky Group Intern., Inc.*, 108 B.R. 86, 88, 22 Collier Bankr. Cas. 2d (MB) 403 (Bankr. W.D. Pa. 1989).

³The court stated:

The legislature history makes it clear that the automatic stay has a dual purpose of protecting the *debtor and all creditors* alike: “It gives the *debtor a breathing spell* from his creditors. It stops all collection efforts, all harassment, and all foreclosure action. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. *The automatic stay also provides creditors protection.* Without it, certain creditors would be able to pursue their own remedies against the debtor’s property, Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. *Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.* A race of diligence by creditors for the debtor’s assets prevents that. (Emphasis added). To grant a creditor relief from stay simply because the debtor elected to waive the protection afforded the debtor by the automatic stay ignores the fact that it also is designed to protect *all creditors* and to treat them *equally*. The orderly liquidation procedure contemplated by the Code would be placed in jeopardy, especially where (as here) none of the creditors who brought the involuntary petition was a party to the Agreement in which debtor allegedly waived its right to the automatic stay. Although waiver of a stay by the debtor apparently was possible under the old Bankruptcy Act, such a waiver is not self-executing under the Bankruptcy Code. Relief from stay must be *authorized by the Bankruptcy Court.*”

In re Sky Group Intern., Inc., 108 B.R. 86, 88–89 (Bankr. W.D. Pa. 1987) (emphasis in original). See also *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 760 F.2d 206, 207 (2d Cir. 1986); *Maritime Elec. Co. v. New Jersey Bank*, 459 F.2d 1194, 1204 (3d Cir. 1991) (creditor may not waive stay).

Florida.⁴ In that case, the district court for the Middle District of Florida declined to follow *Citadel* and refused to enforce a provision in which the debtor agreed not to contest a motion for relief from the stay in the event the debtor filed for bankruptcy protection. The provision was contained in a stipulation approved by a state court that extended the date of a foreclosure sale. The bankruptcy judge concluded that the agreement “was not in and of itself sufficient to lift the stay unless there is a showing of other criteria such as bad faith.”⁵ The district court upheld the bankruptcy court and noted that the facts of the case were different from earlier cases in which courts had expressly or implicitly determined that the debtor could not effectively reorganize. The debtor had a long history of an operating businesses, had signifi-

⁴*Farm Credit of Cent. Florida, ACA v. Polk*, 160 B.R. 870 (M.D. Fla. 1993).

⁵*Farm Credit of Cent. Florida, ACA v. Polk*, 160 B.R. 870, 873 (M.D. Fla. 1993). For other cases in which the court is less favorably inclined toward the waiver, see also *In re Jenkins Court Associates Ltd. Partnership*, 181 B.R. 33, 27 Bankr. Ct. Dec. (CRR) 128, Bankr. L. Rep. (CCH) P 76505 (Bankr. E.D. Pa. 1995) (waiver not per se enforceable; evidentiary hearing to establish stay relief grounds required); The judge stated, however:

Accordingly, the waiver of the automatic stay granted to JCP by the Debtor will not be enforced. That is not to say, however, that JCP will not receive any benefit from the waiver. The follow-up hearing will not proceed on a blank slate. On the contrary, the Court will consider the representations in the prepetition settlement agreement against whatever additional evidence might be forthcoming at the subsequent evidentiary hearing as a significant factor in its determination as to whether JCP will be granted relief.

Matter of Pease, 195 B.R. 431, 35 Collier Bankr. Cas. 2d (MB) 1408 (Bankr. D. Neb. 1996); *In re Graves*, 212 B.R. 692, 31 Bankr. Ct. Dec. (CRR) 671, 38 Collier Bankr. Cas. 2d (MB) 1791 (B.A.P. 1st Cir. 1997) (where there was a change in circumstances); and *In re South East Financial Associates, Inc.*, 212 B.R. 1003, 38 Collier Bankr. Cas. 2d (MB) 1435 (Bankr. M.D. Fla. 1997) (where enforcement could be detrimental to creditors). It should also be noted that the National Bankruptcy Review Commission makes a strong statement that such waivers should not be enforceable. In its report, “Bankruptcy: The Next Twenty Years” (U.S. Gov. 1997), the Commission makes the following recommendation:

Section 558 of the Bankruptcy Code should provide that except as otherwise provided in the title 11, a clause in a contract or lease or a provision in a court order or plan of reorganization executed or issued prior to the commencement of a bankruptcy case does not waive, terminate, restrict, condition, or otherwise modify any rights or defenses provided by title 11. Any issue actually litigated or any issue resolved by consensual agreement between the debtor and a governmental unit in its police or regulatory capacity, whether embodied in a judgment, administrative order or settlement agreement, would be given preclusive effect.

cant other creditors, and had already filed a plan of reorganization. The district court concluded:

It is the opinion of this Court that the Bankruptcy Court's holding that prepetition agreements providing for the lifting of the stay are "not per se binding on the debtor, as a public policy position," is consistent with, the purposes of the automatic stay to protect the debtor's assets, provide temporary relief from creditors and promote, equality of distribution among the creditors by forestalling a race to the courthouse. *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F2d 711, 716 (5th Cir. 1985). The automatic stay provision is intended to preclude the opportunity of one bankruptcy creditor to pursue a remedy against the debtor to the disadvantage of other bankruptcy creditors and thus, to promote the orderly administration of the bankrupt's estate. *Triangle Management Servs. v. Allstate Sav. & Loan Assoc.*, 21 BR 699 (ND Cal. 1982). No other creditors were involved in the prepetition agreement, nor did the Bankruptcy Court approve this agreement. The policy behind the automatic stay is to protect the debtor's estate from being depleted by creditors' lawsuits and seizures of property before the debtor has had a chance to marshal the estate's assets and distribute them equitably among creditors. *Martin-Trigona v. Champion Federal Sav. & Loan Assoc.*, 892 F2d 575 (7th Cir. 1989). The Bankruptcy Court correctly determined that the agreement to waive the automatic stay was not self-executing.⁶

Farm Credit, Pease, cited below, and others decided in that time frame became the new standard.

Other cases have made this position even stronger. The Ninth Circuit Court of Appeals, in *In re Cole*,⁷ in ruling that an agreement to waive the discharge granted to a debtor in a bankruptcy case was unenforceable, collected in a footnote a number of cases cited for the proposition that "self-executing clauses in pre-petition agreements purporting to provide that no automatic stay arises in a bankruptcy case are contrary to law and hence unenforceable, and . . . self executing clauses in pre-petition agreements . . . to vacate the alternate stay are likewise unenforceable."⁸

Nevertheless, as recently as 1998 in *In re Shady Grove*

⁶*Farm Credit of Cent. Florida, ACA v. Polk*, 160 B.R. 870, 873-874 (M.D. Fla. 1993).

⁷*In re Cole*, 226 B.R. 647, 33 Bankr. Ct. Dec. (CRR) 478 (B.A.P. 9th Cir. 1998).

⁸*In re South East Financial Associates, Inc.*, 212 B.R. 1003, 38 Collier Bankr. Cas. 2d (MB) 1435 (Bankr. M.D. Fla. 1997); *Matter of Gulf Beach Development Corp.*, 48 B.R. 40 (Bankr. M.D. Fla. 1985); *In re Tru Block*

Tech Center Associates Ltd. Partnership,⁹ a bankruptcy court indicated a willingness to enforce a waiver in a two-party dispute based on the financial sophistication of the borrower, significant consideration for the waiver, no internal change in circumstance, and the existence of a reasonable prospect of reorganization in a reasonable time that would benefit other parties, leading the court to conclude that “the public policy of encouraging workouts and restructuring agreements out of bankruptcy between sophisticated parties in this case overcomes the policy of affording Debtor a respite of further protection under the automatic stay.”

In *In re Trans World Airlines, Inc.*,¹⁰ the bankruptcy court in Delaware collected and reviewed a large number of the earlier cases and concluded that “as a practical matter those cases do not stand for the proposition that a significant bankruptcy law provision can be waived prepetition at the expense of the general creditor body of the estate.” In that case, with numerous other creditors, the court refused to give effect to the waiver of the stay or to an agreement not to seek to reject an existing contract.

Finally, in a more recent case, the same judge who had previously enforced a waiver and imposed a sanction on counsel in *In re McBride*, supra, refused to enforce a waiver in a significant business case distinguishing and limiting *McBride* to “a bad faith, single asset case with no possibility of reorganization coupled with a waiver of the stay previously approved by the court.”¹¹

§ 21:6 Enforceability of waiver in serial filing cases

One of the most difficult issues involving waiver enforceability arises in serial filing cases. Occasionally, a bankruptcy court order. If a stipulation approved by a bankruptcy judge, or a plan or reorganization, will contain a provision

Concrete Products, Inc., 27 B.R. 486, 10 Bankr. Ct. Dec. (CRR) 106, Bankr. L. Rep. (CCH) P 69166 (Bankr. S.D. Cal. 1983); *Matter of Pease*, 195 B.R. 431, 35 Collier Bankr. Cas. 2d (MB) 1408 (Bankr. D. Neb. 1996); and *In re Madison*, 184 B.R. 686, 34 Collier Bankr. Cas. 2d (MB) 132 (Bankr. E.D. Pa. 1995). Also see *In re Huang*, 275 F.3d 1173, 38 Bankr. Ct. Dec. (CRR) 269, 47 Collier Bankr. Cas. 2d (MB) 1060 (9th Cir. 2002).

⁹*In re Shady Grove Tech Center Associates Ltd. Partnership*, 227 B.R. 422 (Bankr. D. Md. 1998).

¹⁰*In re Trans World Airlines, Inc.*, 261 B.R. 103 (Bankr. D. Del. 2001).

¹¹*In re Deb-Lyn, Inc.*, 42 Bankr. Ct. Dec. (CRR) 175, 2004 WL 452560 (N.D. Fla. 2004).

for relief from the stay in that bankruptcy case and then purports to provide for relief from the stay in a later case(s). Courts have struggled with this situation which presents an issue similar to enforcing a prebankruptcy waiver agreement previously described. But in a serial filing, the debtor is not entitled to sympathy on the equities. Rarely are there underlying facts that would give courts inclination to be protective of the debtor. For that reason, courts have enforced stipulations entered in one case in a succeeding case on the basis of *res judicata*, although it is difficult to justify that reasoning in a later filing in which the facts are necessarily somewhat different.

One of the leading cases in this area is *In re Franklin*,¹ in which the bankruptcy court in the third of five serial bankruptcy filings upheld an order entered by the bankruptcy court in the second bankruptcy case granting prospective relief from the automatic stay in future bankruptcy proceedings pursuant to a stipulation of the parties. The secured creditor had concluded a foreclosure sale three days after the third bankruptcy petition was filed. The debtors attempted to set aside the foreclosure sale, arguing that it was prohibited by the automatic stay that arose in the third bankruptcy filing. The bankruptcy court, upholding the order entered in the second case; held that the automatic stay was not effective in the third bankruptcy case and that the sale was valid. The debtors appealed on the grounds that the bankruptcy judge in the second bankruptcy case had no jurisdiction to lift the automatic stay in future filings by means of a stipulated agreement or order. The district court and Ninth Circuit both affirmed the bankruptcy court's decision that the previous bankruptcy court had jurisdiction to approve the stipulation and that the stipulation removed the property from any automatic stay in future filings.

In a later case in the Ninth Circuit, the court reached the same result. In *Matter of Springpark Associates*,² the debtors filed a Chapter 12 case in which they executed a stipulation regarding refinancing of certain debts. The stipulation provided that the automatic stay was terminated and a waiting period was established before a foreclosure date could be

[Section 21:6]

¹*In re Franklin*, 802 F.2d 324, Bankr. L. Rep. (CCH) P 71485 (9th Cir. 1986).

²*Matter of Springpark Associates*, 623 F.2d 1377, 7 Bankr. Ct. Dec. (CRR) 1244, 23 C.B.C. 139 (9th Cir. 1980).

set and advertised. The debtors' Chapter 12 case was voluntarily dismissed, but the refinancing never materialized and the debtors filed a second Chapter 12 petition, seeking to invoke the automatic stay. The creditor, a party to the stipulation approved in the first Chapter 12 case, sought relief from the automatic stay. The bankruptcy court held that the parties were bound by the stipulation approved in the previous bankruptcy case, stating that "irreparable harm" would be caused to creditors and to the judicial process if the stipulation was not enforced. The bankruptcy court's order was affirmed by the district court and by the Ninth Circuit.

The issue of debtor bad faith is especially likely to be a factor in serial filings. In *In re Boates*,³ spouses and her husband filed a Chapter 13 case to prevent foreclosure on the family home. They continued to be delinquent in post-bankruptcy mortgage payments and the bankruptcy court granted the creditor's motion for relief from the automatic stay. Approximately two weeks later, the debtors requested and the court granted voluntary dismissal of their Chapter 13 case. The creditor moved forward with the foreclosure, but one day prior to the scheduled sale, the debtors filed an emergency petition in the state court to postpone the sale, requesting a date that was two days after the 180-day bar on filing another bankruptcy petition.⁴ The state court granted the requested extension, but only after requiring the debtors to agree an extension of the bar on refile for bankruptcy for an additional 30 days, to 210 days, and to not seek additional postponements on the sale of the home. Despite assurances given to the court, one of the debtors refiled for bankruptcy protection. Upon a motion in bankruptcy court to continue to stay, the court found that the circumstances indicated the debtor filed her second bankruptcy in bad faith. This determination was based on her representations to the state court that she would not refile in the 210-day bar and the negative impact her acts had on the creditor. As such, the court found that bad faith was enough to grant relief from the automatic stay and granted relief to the creditor.

³*In re Boates*, 2006 WL 166569 (E.D. Pa. 2006).

⁴See 11 U.S.C.A. § 109(g).

Another case that has extensively discussed this issue is *In re Abdul-Hasan*.⁵ Noting the Ninth Circuit decision in *In re Franklin*, discussed earlier, the bankruptcy court for the Central District of California enforced the provisions in an order for relief from stay granted in a prior Chapter 13 case and ruled that the prospective relief set forth in the prior order remained in effect in a subsequent bankruptcy case. The court further held that the prior relief granted removed any requirement that the creditor seek relief from the automatic stay in a subsequent filing. The debtor was collaterally estopped from attacking the previous order granting prospective relief. Further, the debtor was prevented from attacking the prior order by *res judicata*. The prior order was binding in a subsequent action involving the same parties and the same issues. The court rejected the debtor's argument that the issues presented were different because there had been a change in circumstances. The court noted that if there had been a true change in circumstances, then at the time of the subsequent filing, the debtor could have sought a temporary restraining order and injunction under section 105 of the Bankruptcy Code to extend the automatic stay to the secured creditor. The court also noted that while it would have been "more comfortable" if the original order had a six-to-twelve-month time limit, the eighteen months that had passed between the entry of the original order and the filing of the subsequent case presented no issues of estoppel or laches that would prevent enforcement of the prospective order.⁶

On the other hand, at least one court, in the case of *In re Taros*,⁷ has held that a bankruptcy court has no authority to grant prospective relief from stay. The court, quoting *In re Norris*, stated:

It is to be noted that there is nothing in the statutory language . . . which purports to enable the Bankruptcy Court to provide relief from the automatic stay in advance of the filing of a bankruptcy petition. That is, on its face, the statute makes the

⁵*In re Abdul-Hasan*, 104 B.R. 263 (Bankr. C.D. Cal. 1989) (rejected by, *In re Siciliano*, 167 B.R. 999 (Bankr. E.D. Pa. 1994)).

⁶See also *In re Powers*, 170 B.R. 480, 25 Bankr. Ct. Dec. (CRR) 1586, 31 Collier Bankr. Cas. 2d (MB) 1079, Bankr. L. Rep. (CCH) P 76057 (Bankr. D. Mass. 1994), where the waiver was in a court-approved agreement in a previous case. See also *In re Wald*, 211 B.R. 359 (Bankr. D. N.D. 1997).

⁷*In re Taras*, 136 B.R. 941 (Bankr. E.D. Pa. 1992).

stay *automatic* in all bankruptcy proceedings. In my view, a bankruptcy judge in a pending proceeding simply does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings.⁸

The court did give res judicata effect to that portion of an order from an earlier bankruptcy case that dealt with bifurcation of the mortgagee's claim.⁹

§ 21:7 Enforceability of other provisions

In addition to relief from stay waivers, creditors may seek waivers of other debtor rights in prebankruptcy agreements. One of these provisions includes a waiver of the debtor's right to discharge.

Courts have been consistent in not enforcing a waiver of the right to discharge. The early leading case in this context is *In re Levinson*.¹ In a decision ultimately affirmed by the Seventh Circuit, the bankruptcy court for the Northern District of Illinois refused to give weight to a state court consent order in which the debtor had agreed that his debt would not be discharged in a subsequent bankruptcy case. The court focused on public policy considerations in holding that a debtor may not contract away the right to a bankruptcy discharge.² The court further found that there was no effective waiver of discharge under section 727(a)(10), or effective reaffirmation of a single debt under section 524(c). *In re Levinson* has been cited with approval in *In re McClure* and *In re DePiero*.³ See also *In re Cole*, and *In re Huang*, *supra*, discussed above.

The same reasoning has been utilized in refusal to enforce

⁸*In re Taras*, 136 B.R. 941, 948 (Bankr. E.D. Pa. 1992), quoting *In re Norris*, 39 B.R. 85, 87, 12 Bankr. Ct. Dec. (CRR) 337, 11 Collier Bankr. Cas. 2d (MB) 1244 (E.D. Pa. 1984).

⁹For more recent cases enforcing a bankruptcy court approved waiver in a later case, see *In re Excelsior Henderson Motorcycle Mfg. Co., Inc.*, 273 B.R. 920 (Bankr. S.D. Fla. 2002).

[Section 21:7]

¹*In re Levinson*, 58 B.R. 831 (Bankr. N.D. Ill. 1986), judgment aff'd, 66 B.R. 548 (N.D. Ill. 1986), judgment aff'd, 831 F.2d 1292, 16 Bankr. Ct. Dec. (CRR) 1151, Bankr. L. Rep. (CCH) P 71990 (7th Cir. 1987).

²See 11 U.S.C.A. §§ 524, 727.

³*In re McClure*, 70 B.R. 955, 15 Bankr. Ct. Dec. (CRR) 1030 (Bankr. S.D. Cal. 1987). See also *In re Markizer*, 66 B.R. 1014 (Bankr. S.D. Fla. 1986) and *In re Giambitti*, 27 B.R. 492, 10 Bankr. Ct. Dec. (CRR) 347 (Bankr. D. Or. 1983).

prepetition stipulations. purporting to be reaffirmation agreements.⁴ The courts have found that these agreements did not meet the requirements of section 524(c).⁵

As in the relief from stay situation, stipulations of fact have a much better chance of being enforced in the nondischargeability context than mere waivers. A good example is illustrated by *In re Hart*.⁶ In *Hart*, the debtor executed a stipulation in a state court divorce action that included a provision that certain attorney's fees were in the nature of support. In the subsequent bankruptcy case, the court stated that "[a]lthough the [d]efendant cannot contract away his

⁴See 11 U.S.C.A. § 524(c).

⁵11 U.S.C.A. § 524(c) provides:

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6) (A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

⁶*In re Hart*, 130 B.R. 817 (Bankr. N.D. Ind. 1991).

right to discharge fees in a subsequent bankruptcy, the [d]efendant may stipulate [to] the underlying facts that the [c]ourt must examine to determine if the fees are dischargeable?”⁷ In other words, while a statement in a divorce decree cannot operate as a prebankruptcy waiver of the right to have nondischargeability issues decided in an adversary proceeding, the statement contained in a stipulation or consensual order can be given collateral estoppel effect in a subsequent dischargeability action.

**§ 21:8 Practice issues regarding waivers—
Advisability—Creditor’s standpoint**

In the context of drafting forbearance or prebankruptcy workout agreements, there are two basic types of waiver provisions. The first is a self-executing waiver. The second is a waiver coupled with acknowledgments by a debtor of facts and circumstances that, when presented as evidence together with the waiver at a relief from stay hearing, will provide grounds for the court to find that relief from stay is appropriate (or that “cause” exists). These acknowledgments will operate to weaken the debtor’s credibility at such a hearing should the debtor decide to oppose the relief from stay motion on a basis other than a dramatic change in circumstances.

As noted previously,¹ even cases upholding relief from stay waivers have done so under circumstances where “cause” or other grounds existed for the granting of relief from stay separate and apart from the waiver itself. Admissions concerning factual circumstances are likely to carry more weight than self-executing waivers. A court willing to recognize the futility of the debtor’s reorganization effort at a relief from stay hearing may be less willing to enforce a prebankruptcy self-executing waiver of the debtor’s rights without also considering whether there is independent cause for granting relief from stay (that is, whether bad faith exists, whether the debtor in fact has a realistic possibility of reorganizing, whether the bankruptcy was initiated only to delay foreclosure). Thus the secured creditor should present as a basis for stay relief not only the waiver in the prepetition workout, but also the debtor’s acknowledgment as to

⁷*In re Hart*, 130 B.R. 817, 847–848 (Bankr. N.D. Ind. 1991).

[Section 21:8]

¹See § 21:3.

factual matters that would give rise to a finding that relief from stay is appropriate.

§ 21:9 Negative factors for creditors

Before including relief from stay waivers in workout agreements, the secured creditor should consider the potential negative consequences. Of primary concern is the impression that may be created on the bankruptcy court that the secured creditor has been overreaching in insisting on the inclusion of such a provision. Such a negative impression may taint the court's view of the creditor throughout the case. The secured creditor should weigh the potential negative impression, especially where the other factual bases are not strong and there is a good chance that the court will not grant relief from the stay even with a waiver in the agreement. Along these same lines, where a bankruptcy court has found a creditor to be overreaching based on a prebankruptcy waiver agreement, the lender may find itself subject to liability, and its claim may even be equitably subordinated.¹

Similarly, an acknowledgement of certain facts, (such as value of property or financial status of the business) may set a benchmark for the bankruptcy court to later determine that a material change in circumstances has occurred, mitigating against the very relief from stay the creditor is seeking. This is because a change of circumstances may be used as a basis for not enforcing such waivers, or otherwise giving relief to a debtor from an agreement or court order.

Finally, to obtain inclusion of waiver provisions, the secured creditor may have to use bargaining chips unnecessarily. In light of issues regarding the enforceability of such provisions, a secured creditor may not want to give up more valuable benefits in a workout agreement in return for a waiver of questionable value. Thus, inclusion of waivers must be considered on a case-by-case basis.

§ 21:10 Advisability—Debtor's standpoint

Often, a debtor has little, leverage in negotiating workout

[Section 21:9]

¹See 11 U.S.C.A. § 510(c). An example of an analogous situation in which a court was critical of a lender that had tried to prevent a bankruptcy filing through "bankruptcy remote" clauses is *In re Kingston Square Associates*, 214 B.R. 713, 31 Bankr. Ct. Dec. (CRR) 615 (Bankr. S.D. N.Y. 1997).

agreements. Secured creditors often insist upon the inclusion of waivers as a prerequisite to entering into any workout agreement. From the debtor's standpoint, agreeing to a prebankruptcy waiver creates a number of issues. Although such provisions may not be considered per se enforceable by most courts, a debtor should consider that such provisions may at least substantially adversely affect the prospect of successfully defending a motion for relief from the stay. As a result, a debtor should strongly weigh the benefits it receives by virtue of the prebankruptcy workout agreement against the potential loss of the protection of bankruptcy rights.

In addition, individuals who have fiduciary duties to the debtor should be careful if the same agreement that waives valuable bankruptcy rights also contains benefits for them personally. Limited partners or minority shareholders may argue in such a case that those in control breached fiduciary duties or acted outside of the range of reasonableness in consenting to a waiver.

There is also a risk that an unsecured creditor will argue that a trustee should be appointed because by conceding to a waiver or not opposing the motion for relief, the debtor has failed to act as an appropriate representative of the estate. The unsecured creditor may also argue that a trustee should not be bound by the waiver.

Finally, both the debtor and the debtor's counsel should consider that if there is a need to later defend a motion for stay relief, counsel who participated in the negotiations may be in a difficult position having to argue against its enforceability. It may be advisable to substitute new counsel to handle the bankruptcy case.

On the other hand, it may be that the only real chance for the debtor to even attempt to reorganize or restructure debts is the forbearance agreement with its creditor. Or it may be apparent that in the totality of the circumstances, more can be gained in other parts of the negotiation if there is a concession on the waiver point. The decision is a judgment call based on the specific facts.

§ 21:11 Types of waiver provisions

While most cases dealing with prebankruptcy waivers deal with waivers of the protection of the automatic stay, the same general considerations may apply to other bankruptcy rights. For example, it is not uncommon for a prebankruptcy workout agreement to contain restrictions on the debtor's

ability to use cash collateral upon a subsequent bankruptcy filing. Other, possible waiver provisions include, but are not limited to: requirements regarding the provision of adequate protection to the lender; the granting of super-priority status for failure of adequate protection; acknowledgments as to the validity and perfection of the creditor's lien; a prohibition of the surcharge against a creditor's collateral under 11 U.S.C.A. § 506(c); shortening or waiving of the debtor's exclusive time period to file a plan of reorganization under 11 U.S.C.A. § 1121; agreements regarding the assumption or rejection of executory contracts; and agreements or acknowledgments as to nondischargeability of debt. As discussed above, very few cases have addressed prebankruptcy agreements involving these types of provisions. However, it seems likely that while most, courts will not per se uphold agreements dealing with such bankruptcy provisions, they will look to the facts and circumstances surrounding the prebankruptcy agreement and acknowledgments in the prebankruptcy agreement as a basis for making findings in the later bankruptcy case.

§ 21:12 Form acknowledgment and relief from stay waiver

The parties hereby acknowledge and agree as follows:

- a. Borrower is obligated to Lender under the *[loan documents]*;
- b. The amount owing by Borrower to Lender under the note is currently *[\$_____]*.
- c. The loan evidenced by the loan documents is and has been in default since no later than *[Date]*;
- d. Borrower's obligations under the loan documents are secured by *[Real Property]*;
- e. There is no equity in the *[Real Property]*; the approximate value of the *[Real Property]* is \$_____;
- f. Lender has agreed to defer exercise of Lender's remedies until *[Date]* solely to give Borrower an opportunity to sell *[Real Property]* and in consideration therefor, if a sale does not occur by *[Date]*, Borrower will deed *[Real Property]* to Lender;
- g. But for the forbearance and other concessions made by lender under this agreement, Borrower would have no ability to reorganize its affairs;
- h. Borrower has no equity in *[Real Property]* and any bankruptcy filing by Borrower would be for the sole purpose

of delaying Lender in the exercise of its remedies, and therefore would be in bad faith;

i. Lender will suffer material prejudice if it is further delayed in executing its remedies;

j. Lender shall be entitled to relief from the automatic stay imposed by 11 U.S.C.A. § 362 on or against the exercise of any and all rights and remedies available to Lender under this agreement or the loan documents upon the filing of a bankruptcy case by or against Borrower; and Borrower shall not oppose any motion for relief from the automatic stay brought by Lender; and

k. Borrower and Lender are each represented by their own counsel and Borrower has been fully advised concerning the affect of the acknowledgements, agreements and waivers set forth herein.