

# BANKRUPTCY AND THE RIGHT TO CONTRACT FOR STAY RELIEF

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Your landlord and financial institution clients may have asked you recently if it is possible for a borrower to waive their right to the automatic stay protection prior to a borrower filing for bankruptcy. The automatic stay is one of the greatest protections provided by the bankruptcy code. It is also one of the most annoying to creditors. If that protection could be waived by a borrower prepetition, it would mean substantial savings in legal fees for your client.

Courts in the Eleventh Circuit have held that prepetition stay relief clauses are neither per se enforceable nor self-executing. In re Desai, 282 B.R. 527 (Bankr. M.D.Ga. 2002); In re Excelsior Henderson Motorcycle Manu. Co., Inc., 273 B.R. 920 (Bankr. S.D. Fla. 2002). It is a case-by-case analysis viewed by the totality of the circumstances. In re Bryan Road, LLC, 382 B.R. 844, 848 (Bankr. S.D.Fla. 2008). [By the same token they are not, per se, unenforceable like ipso facto provisions or contractual provisions prohibiting filing bankruptcy. See, 11 U.S.C. § 365(e)(1); In re Sunacruz Casinos, LLC, 342 B.R. 370 (Bankr. S.D. Fla. 2006)

The Desai Court delineated four factors when deciding whether to uphold enforcement of such waivers: (1) The sophistication of the party waiving its rights; (2) the consideration for the waiver, including creditor's risk and length of waiver; (3) whether other creditors are affected; (4) the feasibility of the plan. Id. at 532.

Courts tend to uphold the enforceability of waiver provisions if they are found in forbearance agreements instead of the original loan documents. Judge Olson in the Bryan Road case agreed with the analysis in Desai that as a "general proposition, prepetition waivers of stay will be given no particular effect as part of initial loan documents." In re Bryan Road, LLC, 382 B.R. at 844.

Courts tend to enforce contractual stay waivers if the provision first presented in a forbearance agreement. See, e.g., Desai, 287 B.R. at 532.

The issue facing transactional lawyers is that the clause is not self-executing. The Debtor retains the right to a hearing regarding stay relief. A contractual waiver would constitute "for cause" as grounds for stay relief but still requires

a motion and hearing. Enforcement of the waiver is subject to a final review by the bankruptcy court. The Debtor is permitted to present evidence that the forbearance agreement should not be enforced or that the equities weigh in favor of not granting stay relief. In the Matter of Alexander SRP Apartments, LLC, 2012 Bankr. LEXIS 2466 (Bankr. S.D.Ga., Apr. 21, 2012).

This means that for transactional lawyers the stay relief waiver clauses should not be included in basic loan agreements. Rather, such clauses should be utilized in forbearance agreements or post default amendments.

Although relief will be granted and the enforceability of the waiver clause upheld, the legal fees and costs incurred seeking stay relief is still incurred by the creditor.

Transactional lawyers should be cognizant of their ability to procure their client stay relief under the appropriate circumstances or at least to make it easier...pre-bankruptcy. **B**



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