



Financial Restructuring & Reorganization ADVISORY ■

DECEMBER 5, 2019

“Waving” Farewell to Opposition of Stay Relief: Forbearance Agreements and Prepetition Waivers

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The filing of a bankruptcy petition triggers an automatic stay, which enjoins most collection and enforcement actions by creditors, collection agencies, or governmental agencies against the debtor or the debtor’s property. It is perhaps one of the most important protections – and even a powerful tool – available to debtors in a bankruptcy. Concomitantly, the automatic stay also serves as an inconvenience to lenders seeking to exercise their remedies after the debtor’s default. One way lenders attempt to combat the delay in exercising their remedies caused by the automatic stay is to include a provision for a waiver of the automatic stay.

While Georgia courts have held that prepetition waivers of the debtor’s right to contest stay relief are enforceable, such agreements are not per se enforceable, nor are they self-executing in favor of the lenders. Although there is no uniform test for enforceability, bankruptcy courts in Georgia have considered various factors – commonly referred to as “Desai” factors – in determining whether a prepetition waiver of the automatic stay should be enforced. These factors include:

- The sophistication of the party making the waiver;
- The consideration for the waiver, including the creditor’s risk and length of time the waiver covers;
- Whether other parties would be affected by the waiver, including the unsecured creditors and junior lienholders; and
- The feasibility of the debtor’s plan.

In *In re Orchard Hills Baptist Church, Inc.*, the court considered these factors after the lender moved for relief from the automatic stay under Sections 362(d)(1) & (2). Central to the issue of stay relief was the enforceability of the waiver provision in the forbearance agreement, which stated in relevant part:

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[Debtor] agree[s] that, in the event that a petition for relief is filed under the Bankruptcy Code by or against the [Debtor], *they will not oppose any motion or application filed by the Lender requesting immediate relief from the automatic stay* by 11 U.S.C. § 362 to permit Lender to exercise its rights and remedies as a secured party under the Loan and Collateral documents (emphasis added).

The court found that the waiver was enforceable and that there was no compelling equitable reason to forgo its enforcement. Nevertheless, the court next considered whether the lender was entitled to relief from the stay. Despite the waiver's enforceability, the court rejected the lender's argument that the waiver itself constituted "cause" for relief from stay under Section 362(d)(1), explaining that the language in the waiver did not entitle the lender to relief but merely gave the lender the ability to seek such relief *unopposed* by the debtor/borrower. Applying Section 362(d)(2), which contemplates the equity in the collateral and whether the collateral is necessary to an effective reorganization, the court granted the lender relief from stay. The lender proved there was no value in the collateral and, because the lender's motion was unopposed via the waiver provision, the debtor could not meet its burden of proving that the property was necessary to an effective reorganization. Thus the lender was entitled to relief from stay.

Although stay relief waivers may not be self-fulfilling, lenders considering including such automatic stay waivers in their forbearance agreements should take note of the Desai factors in determining whether the waiver's enforcement would not violate public policy.

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