



LEGAL UPDATES

Bankruptcy Court Refuses to Enforce Pre-Petition Waiver of the Automatic Stay

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A recent decision by the U.S. Bankruptcy Court for the Southern District of Illinois underscores that creditors must exercise caution in relying on pre-petition waivers of the automatic stay in collection actions. Although courts are loath to enforce pre-petition waivers of the right to file for bankruptcy generally, [1] courts sometimes will enforce waivers of the automatic stay. [2] However, courts are split as to whether these waivers are always, sometimes or never enforceable. [3] In *In re DJK Enterprises LLC*, the bankruptcy court opted for the unenforceable approach.

Background

DJK Enterprises, LLC executed a \$10.5 million promissory note and mortgage (the loan) in favor of St. Louis Bank, which was secured by real property that contained a hotel, convention center and restaurant. After DJK failed to pay the loan by the maturity date, St. Louis Bank assigned the loan to Effingham Asset Funding (EAF), giving EAF an interest in almost all of DJK's real and personal property.

DJK and EAF entered into a pre-petition forbearance agreement which included a specific term that, in the event of a bankruptcy filing, DJK agreed to waive the automatic stay if the real property was deemed property of the bankruptcy estate. A few months later, DJK filed for bankruptcy and EAF moved for relief from the automatic stay pursuant to the stay waiver in the forbearance agreement.

The Bankruptcy Court's View

In declining to enforce the parties' express stay waiver, the bankruptcy court recognized three approaches that courts have taken to pre-petition stay waivers:

1. broadly uphold the waiver,
2. treat the waiver as only one factor to consider in lifting the automatic stay, or

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3. reject the waiver as per se unenforceable.

While acknowledging that the second approach is the trending position, the court selected the third approach, emphasizing that treating pre-petition stay waivers as per se unenforceable is the best way to protect not only the debtor-in-possession, but also the debtor's other creditors.

In the court's view, a pre-petition debtor cannot simply contract away its post-petition rights, nor those of creditors that did not participate in or agree to the stay waiver. An underlying dispositive issue arose because the bankruptcy court had previously approved a settlement agreement with DJK's largest creditor of the estate, which settled a \$13 million claim for approximately \$300,000. EAF was just one of DJK's creditors, and allowing enforcement of the stay waiver would effectively terminate the case and leave all creditors with absolutely nothing.

Business Implications

This case demonstrates that creditors should not rely excessively on stay waivers. Although stay waivers are worth utilizing to increase the likelihood of collecting on one's security, courts do not always enforce them. Creditors therefore should have a contingency plan in the event of a borrower's bankruptcy.

If you have any questions about this case or its potential impact on navigating similar transactions, please contact [Erika Mortensen](#), [Monique Jewett-Brewster](#), or your regular Lathrop GPM attorney.

****Tristen Lindell**, a Summer Associate for Lathrop GPM, contributed significantly to this content.*

[1] *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1026 (9th Cir. 2012) (citing *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002)).

[2] See, e.g., *In re A. Hirsch Realty, LLC*, 583 B.R. 583, 601 (Bankr. D. Mass. 2018) (approving pre-petition stay waivers when "incorporated in court orders approving settlement agreements or orders confirming Chapter 11 plans while employing a multi-factor approach").

[3] *In re DJK Enters. LLC*, No. 24-60126, at 7–8 (Bankr. S.D. Ill. Feb. 13, 2025).