

ARTICLES

WHY COURTS SHOULD REFUSE TO ENFORCE PRE-PETITION AGREEMENTS THAT WAIVE BANKRUPTCY'S AUTOMATIC STAY PROVISION

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INTRODUCTION

For centuries parties have been free to enter into contracts and to have courts enforce them without passing judgment on their substance.¹ One noted commentator has stated that “[t]he principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements.”² Nevertheless, in certain instances, public policy concerns outweigh an individual’s right to freely contract with another party.³ As a result, state and federal legislatures have passed statutes prohibiting individuals from forming contracts that are contrary to the welfare of society.⁴ If a statute prohibiting various activities does not explicitly ban the formation of contracts with respect to those activities, “[j]udges must determine whether unenforceability [of such contracts] should be added to those sanctions provided by the legislature.”⁵ The judge’s determination should be based upon a careful balancing of factors. Specifically, a court should enforce a contract unless the potential benefit in deterring the misconduct prohibited by statute outweighs the factors favoring enforceability.⁶

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1. E. ALLEN FARNSWORTH, *CONTRACTS* § 5.1, at 345 (2d ed. 1990).

2. *Id.*

3. *Id.* at 348. Farnsworth notes that “[a] court may be moved by two considerations in refusing to enforce an agreement on grounds of public policy. First, it may see refusal as an appropriate sanction to discourage undesirable conduct, either by the parties or by others. Second, it may regard enforcement of the promise as an inappropriate use of the judicial process to uphold an unsavory agreement.” *Id.* at 346.

4. *Id.* § 5.5, at 370 (“Although many important public policies were first recognized by judges, the declaration of public policy has become increasingly the province of legislators.”). For example, certain statutes explicitly outlaw the formation of contracts where forming an agreement is an essential part of the conduct the legislature seeks to eliminate. Notable examples are usury statutes, gambling statutes, and statutes that prohibit the formation of contracts on Sunday. *Id.* at 371 nn.7 & 8.

5. *Id.* at 371.

6. *Id.* § 5.1, at 348.

In enacting the Bankruptcy Code, Congress explicitly outlined mandatory rules that enhance important public policies. These policies include granting the debtor a "fresh start" following bankruptcy⁷ and also facilitating equitable treatment of all creditors during the bankruptcy process.⁸ Additionally, section 362 of the Bankruptcy Code, better known as the automatic stay, is an invaluable tool for protecting both the debtor and the debtor's creditors during a bankruptcy proceeding.⁹ The stay prohibits any creditor from commencing or continuing any judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the debtor filed a bankruptcy petition.¹⁰ Because of the stay's importance, Congress has specifically declared the stay mandatory in all bankruptcy proceedings with only limited exceptions.¹¹

To permit parties to independently contract out of the automatic stay's protections would contradict the public policies that underlie Congress's enactment of that provision. This article examines Congress's underlying policy goals in enacting the automatic stay and concludes that under *no* circumstances should parties be entitled to cast aside the automatic stay simply by contracting out of that provision prior to a debtor's filing for bankruptcy. Enforcing pre-petition waivers of the automatic stay might initiate a slide down a slippery slope in which courts enforce pre-petition waivers of other Code provisions, such as the Bankruptcy Code's "fresh start" provisions.¹² The Bankruptcy Code would then become an "optional" device for reorganization, and all semblance of an orderly reorganization and liquidation procedure that the Code seeks to achieve would be lost in favor of unpredictable outcomes at the hands of a few independent parties.¹³

7. The "fresh start" has been one of the primary goals of both the Bankruptcy Act and the Bankruptcy Code, and embodies the notion that a debtor, by filing for bankruptcy, should be relieved of all prior debts following the termination of the bankruptcy proceeding. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). The Supreme Court in *Local Loan Co. v. Hunt* emphasized that a complete discharge of prior debts following bankruptcy gives the debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Id.* The Bankruptcy Code's "fresh start" policy was incorporated into section 524 of the Bankruptcy Code, which provides for a broad discharge of the debtor's debts following bankruptcy. *See* 11 U.S.C. § 524 (1988).

8. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97.

9. H.R. REP. NO. 595. The legislative history states that "[t]he automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." *Id.*

10. 11 U.S.C. § 362(a)(1) (1988). The stay also provides other important relief for the debtor. Specifically, the automatic stay prohibits: (1) enforcement of a judgment obtained before the filing of the petition against a debtor; (2) any act to obtain possession of or exercise control over the debtor's property; (3) any act to create, perfect, or enforce any lien against property of the debtor's estate; (4) any act to collect, assess, or recover a claim against the debtor that arose prior to the bankruptcy case; and (5) the setoff of any debt owing to the debtor that arose before the bankruptcy case. *Id.* § (a)(2)-(8).

11. *See infra* notes 17-22 and accompanying text.

12. *See supra* note 7.

13. *See Federal Nat'l. Bank v. Koppel*, 148 N.E. 379, 380 (Mass. 1925). When discussing pre-petition waivers of bankruptcy provisions, the court stated "[i]t would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect." *Id.*

Part I of this Article discusses the scope and operation of section 362 of the Bankruptcy Code—the automatic stay. Part II surveys several bankruptcy court decisions in which the court essentially enforced a pre-petition waiver of the automatic stay. Part III outlines the various reasons why pre-petition waivers of the stay should not be enforced by bankruptcy courts. Part IV addresses and strikes down the notion that enforcing pre-petition waivers of the automatic stay will promote beneficial independent workouts and restructurings and suggests that, in certain situations, dismissal of the entire bankruptcy case is a proper alternative to enforcing pre-petition waivers of the stay.

I. THE SCOPE AND OPERATION OF BANKRUPTCY CODE SECTION 362— THE AUTOMATIC STAY

The automatic stay in bankruptcy, as established by 11 U.S.C. § 362, is one of the fundamental debtor protections provided by the bankruptcy laws.¹⁴ The stay prohibits any creditor from commencing or continuing any judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the debtor filed a petition for bankruptcy.¹⁵ Although the stay prohibits creditor actions against the debtor, the stay does not curtail debtor actions that would increase the assets available in the debtor's estate.¹⁶ The stay is "automatic" because it is triggered upon a debtor's filing of a bankruptcy petition regardless of whether a debtor's creditors are aware that the debtor has filed such a petition.¹⁷ Once the stay is triggered, it "continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay."¹⁸

Section 362(b) provides certain exceptions that allow a creditor to take action against the debtor in spite of the automatic stay.¹⁹ These exceptions permit the commencement or continuation of a criminal action against the debtor, collection of alimony, and the commencement or continuation of certain governmental police or regulatory actions against the debtor.²⁰ Yet, because the scope of the automatic stay is extremely broad,²¹ the exceptions are to be narrowly construed.²²

14. H.R. REP. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97.

15. 11 U.S.C. § 362(a)(1) (1988). The stay also contains other prohibitions. *See supra* note 10.

16. *Association of St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3d Cir. 1982).

17. *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991). *See also* *NLT Computer Services v. Capital Computer Systems*, 755 F.2d 1253, 1258 (6th Cir. 1985).

18. *Pope v. Manville Forest Products Corp.*, 778 F.2d 238, 239 (5th Cir. 1985) (citing 11 U.S.C. § 362(a), (c)(2), (d), (e), (f) (1988)).

19. 11 U.S.C. § 362(b) (1988).

20. 11 U.S.C. § 362(b)(1)-(5) (1988).

21. H.R. REP. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97; *Maritime*, 959 F.2d at 1203; *Stringer v. Huet (In re Stringer)*, 847 F.2d 549, 552 (9th Cir. 1988); 2 COLLIER ON BANKRUPTCY ¶ 362.04, at 362-34 (15th ed. 1993) ("The stay of section 362 is extremely broad in scope and, aside from the limited exceptions of subsection (b), should apply to almost any type of formal or informal action against the debtor or the property of the estate.") (footnotes omitted).

22. *In re Stringer*, 847 F.2d at 552 (9th Cir. 1988). *See also* *Shamblin v. Shamblin (In re Shamblin)*, 890 F.2d 123, 126 (9th Cir. 1989).

The broad character of bankruptcy's automatic stay serves several important purposes. By prohibiting all creditors' collection efforts after the debtor has filed a bankruptcy petition, the stay provides the debtor with a "breathing spell" during which the debtor is relieved of financial pressures and is provided time to create a repayment or reorganization plan.²³ Additionally, the stay protects *creditors'* financial interests.²⁴ Without the stay, those creditors who seek the debtor's assets first will receive payment of their claims in preference to and to the detriment of other creditors.²⁵ One court has stated that "the stay protects creditors by preventing particular creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors. . . . In other words, the stay 'protects the bankrupt's estate from being eaten away by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal the estate's assets and distribute them equitably among the creditors.'"²⁶ Section 362's legislative history also emphasizes that "[b]ankruptcy 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."²⁷

As the automatic stay serves the interests of both debtors *and* creditors, the majority of courts have held that the triggering of the stay *may not be waived or limited in scope by either a creditor or a debtor*.²⁸ In fact, several courts have emphasized that the stay, being automatic, attaches "even when the debtor, by his own dereliction, fails to invoke it."²⁹

23. H.R. REP. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97 (The "breathing spell" is important as it gives the bankruptcy trustee the opportunity to inventory the debtor's position before proceeding with the administration of the case.); *Maritime*, 959 F.2d at 1204; *Association of St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3d Cir. 1982).

24. H.R. REP. No. 595.

25. *Id.*; *Parr Meadows Racing Ass'n. v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n.)*, 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058 ("The automatic stay is a crucial provision of bankruptcy law. It prevents disparate actions against debtors and protects creditors in a manner consistent with the bankruptcy goal of equal treatment."); *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986).

26. *Maritime*, 959 F.2d at 1204 (quoting *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n.*, 892 F.2d 575, 577 (7th Cir. 1989)).

27. H.R. REP. No. 595.

28. *Maritime*, 959 F.2d at 1204. *See also* *Commerzanstalt v. Telewide Sys., Inc.*, 790 F.2d 206, 207 (2d Cir. 1986) ("Since the purpose of the stay is to protect creditors as well as the debtor, the debtor may not waive the automatic stay."); *Association of St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (1982); *In re Best Finance Corp.*, 74 B.R. 243, 245 (D. P.R. 1987).

29. *University Medical Ctr. v. Bowen (In re University Medical Center)*, 93 B.R. 412, 416-17 (Bankr. E.D. Pa. 1988) (sending letters and making an oral arrangement with the debtor after the debtor filed for bankruptcy by which the debtor would repay pre-petition obligations violated the automatic stay even though the debtor acceded to the payments). *See also* *Taras v. Commonwealth Mortgage Corp. of America (In re Taras)*, 136 B.R. 941, 947-48 (Bankr. E.D. Pa. 1992) ("The effect of the stay cannot be compromised, even by the debtor, because it protects not only the debtor, but all parties interested in a bankruptcy proceeding."); *In re Shapiro*, 124 B.R. 974, 981 (Bankr. E.D. Pa. 1991); *In re Clark*, 69 B.R. 885, 889 (Bankr. E.D. Pa. 1987), *modified on other grounds*, 71 B.R. 747 (Bankr. E.D. Pa. 1987) (It is clear "that a court not only may, but *must*, raise the issue that an automatic stay attaches *sua sponte* if the parties, included the debtor, fail to do so.") (emphasis in original).

To receive relief from the stay, a creditor must file a motion pursuant to Bankruptcy Rule 9014 requesting that relief be granted.³⁰ Only the bankruptcy court with jurisdiction over a debtor's case is authorized to grant a creditor relief from the stay to allow that creditor to pursue an action against the debtor.³¹ A bankruptcy court's exclusive jurisdiction to grant relief from the stay is necessary "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general to avoid interference with the orderly liquidation or rehabilitation of the debtor."³² Section 362(d) provides that a court may grant relief from the stay only if it finds that one of two conditions is met. First, a court may grant relief for cause, including the lack of adequate protection of an interest in property of such party in interest.³³ Second, a court may grant relief with respect to a stay of an act against property if the debtor does not have equity in such property and such property is not necessary to an effective reorganization.³⁴ Absent relief from the stay, judicial actions and proceedings against the debtor are void ab initio.³⁵

Extending section 362(d)'s scope, a limited number of courts have held that the existence of a pre-bankruptcy waiver of the automatic stay between a debtor and one of its creditors constitutes sufficient "cause" pursuant to section 362(d)(1) to provide that creditor relief from the stay.³⁶ Thus, a small minority of courts have essentially enforced pre-petition waivers of the automatic stay. The merit of such decisions comprises the essence of this article.

II. THE DEBTOR'S RIGHT TO CONTRACT AWAY THE BANKRUPTCY CODE'S AUTOMATIC STAY

Over the past several years, a select number of courts have addressed the enforceability at law of a pre-bankruptcy contract that purports to exempt one party from the automatic stay by providing immediate relief from the stay upon the debtor's filing for bankruptcy.³⁷ Several bankruptcy judges, primarily in the Northern and Middle Districts of Florida and the Northern District of Georgia, have enforced contracts negotiated and signed pre-petition that

30. 2 COLLIER ON BANKRUPTCY ¶ 362.07, at 362-73 (15th ed. 1993).

31. 11 U.S.C. § 362(d) (1988); *Maritime*, 959 F.2d at 1204; *Cathey v. Johns-Manville*, 711 F.2d 60, 62-63 (6th Cir. 1983), *cert. denied*, 478 U.S. 1021 (1986) ("[T]he legislative history of § 362(d) unambiguously identifies the bankruptcy court as the exclusive authority to grant relief from the stay . . ."); *Holtkamp v. Littlefield (In re Holtkamp)*, 669 F.2d 505, 507 (7th Cir. 1982) (Section 362(d) "commits the decision of whether to lift the stay to the discretion of the bankruptcy judge.").

32. *St. Croix*, 682 F.2d at 448.

33. 11 U.S.C. § 362(d)(1) (1988).

34. 11 U.S.C. § 362(d)(2) (1988); 2 COLLIER BANKRUPTCY ¶ 362.07, at 362-61 (15th ed. 1993).

35. *Maritime*, 959 F.2d at 1206. *See also* *Shamblin v. Shamblin (In re Shamblin)*, 890 F.2d 123, 125 (9th Cir. 1989) ("Judicial proceedings in violation of [the] automatic stay are void."); *In re Ward*, 837 F.2d 124, 126 (3d Cir. 1988); *Stringer v. Huet (In re Stringer II)*, 847 F.2d 549, 551 (9th Cir. 1988).

36. *See infra* Part II.

37. Enforcing the contract in this situation simply means that a court will find sufficient "cause" pursuant to section 362(d)(1) to grant relief from the automatic stay based merely on the fact that the parties had a prior agreement for relief from the stay if the debtor filed for bankruptcy. *See supra* note 33 and accompanying text.

purport to exempt a creditor from the broad scope of the stay. As is shown *infra*, courts should refuse to enforce such agreements.³⁸

A. *The Club Tower Decision.*

*In re Club Tower L.P.*³⁹ is a recent decision in which the court enforced a pre-bankruptcy waiver of the automatic stay. In *Club Tower*, the debtor and TRST (the creditor) entered into a permanent loan agreement whereby TRST agreed to lend the debtor up to \$39 million for the purpose of providing permanent financing for the debtor's luxury high-rise apartment building.⁴⁰ In September, 1990, the debtor defaulted on its obligation to TRST under the permanent loan agreement.⁴¹ Following workout negotiations, the debtor and TRST entered into an agreement in February of 1991 (the "forbearance agreement") whereby TRST agreed to forbear exercising its rights and remedies as a secured creditor until May 31, 1991, provided that the debtor was successful in raising \$1 million in new equity to cover deferred payments of interest on the \$39 million loan.⁴²

As part of the forbearance agreement, the debtor agreed that TRST would be entitled to immediate relief from bankruptcy's automatic stay in the event that the debtor filed a bankruptcy petition under the Bankruptcy Code.⁴³ On June 6, 1991, after failing to pay TRST under its prior agreement, the debtor filed for bankruptcy pursuant to Chapter 11.⁴⁴ Following the debtor's filing of the bankruptcy petition, TRST moved the court for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and argued that the debtor acted in "bad faith" by filing for bankruptcy.⁴⁵ As an alternative argument for relief from the stay, TRST maintained that the court should grant it relief based upon the parties' prior agreement to lift the stay if the debtor ever filed for bankruptcy.⁴⁶

In a remarkable decision, Judge Robinson enforced the parties' pre-petition agreement and granted TRST relief from the automatic stay.⁴⁷ Judge Robinson concluded that because the *Club Tower* debtor agreed to waive only *a single benefit* of the Bankruptcy Code (the automatic stay) and did not waive *all of the rights and benefits* provided by the Code, the agreement did not violate public policy concerns such as the need to grant the debtor to make a "fresh start" following bankruptcy.⁴⁸ The judge distinguished the pre-petition agreement

38. See *infra* Parts III and IV.

39. 138 B.R. 307 (Bankr. N.D. Ga. 1991).

40. *Id.* at 308.

41. *Id.*

42. *Id.* at 308-09.

43. *Id.* at 309. Specifically, the clause stated that in the event the debtor files for bankruptcy, TRST "shall thereupon be entitled to relief from any automatic stay imposed by Section 362 of Title 11 of the U.S. Code, as amended, or otherwise, on or against the exercise of the rights and remedies otherwise available to [TRST]." *Id.* at 310-11.

44. *Id.* at 309.

45. *Id.*

46. *Id.*

47. *Id.* at 310.

48. *Id.* at 311-12. In emphasizing that the debtor still had most of the Bankruptcy Code's provisions at its disposal, the court in *Club Tower* stated that:

[the] Debtor still retains the benefits of the automatic stay as to other creditors, as well as all the other

in *Club Tower* from an agreement which completely prohibited a debtor from *ever* filing a bankruptcy petition, holding that the former was valid while the later was not.⁴⁹

As support for his holding, Judge Robinson also noted that “[n]o provision in the Bankruptcy Code guarantees a debtor that the stay will remain in effect throughout the bankruptcy case. To the contrary, Congress specifically provided creditors a means for obtaining relief from [the] stay.”⁵⁰ The judge added that “enforcing pre-petition settlement agreements furthers the legitimate public policy of encouraging out of court restructurings and settlements,”⁵¹ particularly where the debtor has only one asset. Therefore, the judge concluded that refusing to enforce the pre-petition agreement between the debtor and TRST “could make lenders more reticent in attempting workouts with borrowers outside of bankruptcy.”⁵² As is shown *infra*, there are several flaws with Judge Robinson’s approach.⁵³

B. Cases in Agreement With *Club Tower*—*Citadel* and *Orange Park*.

Only a handful of cases can be reconciled with Judge Robinson’s holding in *Club Tower*. One such case is *In re Citadel Properties, Inc.*⁵⁴ in which Judge Proctor enforced a pre-petition agreement providing relief from the automatic stay.⁵⁵ In *Citadel*, the debtor defaulted under its obligations to a creditor in mid-1985.⁵⁶ The two parties subsequently entered into a settlement agreement in which the debtor agreed that the creditor would be entitled to immediate relief from the automatic stay should the debtor file for bankruptcy.⁵⁷ In return for this promise, the creditor agreed to forbear enforcing a foreclosure judgment that it had previously received.⁵⁸

The *Citadel* court held that the settlement agreement was binding on the parties and that the existence of the agreement constituted sufficient “cause” pursuant to section 362(d)(1) to grant the creditor relief from the stay.⁵⁹ In support of its holding, the court cited to prior cases for the proposition that pre-petition agreements regarding relief from the stay are

benefits and protections provided by the Bankruptcy Code including but not limited to the right to conduct an orderly liquidation, discharge debt or pay it back on different terms, assume or reject executory contracts, sell property free and clear of liens, and pursue preferences and fraudulent conveyance claims.

Id. at 311.

49. *Id.*

50. *Id.*

51. *Id.* at 312 (citing *In re Colonial Ford, Inc.*, 24 B.R. 1014 (Bankr. D. Utah 1982)). Judge Robinson noted that where there is a debt between two parties and the debt only involves one asset, “filing for bankruptcy should be a last resort.” *Club Tower*, 138 B.R. at 312.

52. *Club Tower*, 138 B.R. at 312.

53. See *infra* Parts III and IV.

54. 86 B.R. 275 (Bankr. M.D. Fla. 1988).

55. *Id.* at 277.

56. *Id.* at 275.

57. *Id.*

58. *Id.*

59. *Id.* at 276.

enforceable.⁶⁰ The court also inferred that the stipulation did not violate public policy since it did not completely prohibit the debtor from filing for bankruptcy.⁶¹

In a similar case, *In re Orange Park South Partnership*,⁶² the debtor and creditor agreed prior to any filing that any future bankruptcy filing by the debtor would be “admitted to be totally unfounded and . . . for the purpose of delay.”⁶³ Such a stipulation essentially grants the creditor relief from the automatic stay since an “unfounded” or “bad faith” bankruptcy filing is sufficient grounds for a court to grant relief from the stay for “cause” pursuant to section 362(d)(1).⁶⁴ In holding that the pre-petition agreement was valid, Judge Paskay emphasized that the agreement had not been rescinded under the laws of contract: “there is absolutely nothing in this record which would warrant the conclusion that the stipulation was obtained either by coercion, fraud or by mutual mistake of material facts which have been traditionally recognized as the only valid bases to rescind an agreement.”⁶⁵ Notwithstanding this analysis, Judge Paskay failed to address the detrimental impact his decision would have on debtor and creditor protection in future bankruptcy proceedings. Specifically, the judge never contemplated that enforcing agreements which waive the benefits of the automatic stay could establish precedent for future decisions in which the court considers enforcing of waivers of other Bankruptcy Code provisions necessary for the orderly administration of a debtor’s estate, such as the debtor’s right to a “fresh start” following bankruptcy.⁶⁶ Nevertheless, relying on *Citadel* and *Orange Park*, several judges continue to enforce pre-petition agreements or stipulations that purport to relieve a creditor from the scope of the automatic stay.⁶⁷

C. Recent Decisions that have Enforced Waivers of the Automatic Stay

In the recent case of *In re Aurora Investments, Inc.*,⁶⁸ Judge Paskay enforced a stipulation in which the debtor and its principals acknowledged that if they filed for

60. *Id.* at 276. Specifically, the court cited *In re International Supply Corp.*, 72 B.R. 510 (Bankr. M.D. Fla. 1987); *In re Gulf Beach Dev. Corp.*, 48 B.R. 40 (Bankr. M.D. Fla. 1985); and *B.O.S.S. Partners v. Tucker* (*In re B.O.S.S. Partners I*), 37 B.R. 348 (Bankr. M.D. Fla. 1984) as supports for the proposition that pre-petition agreements regarding relief from the stay were enforceable in bankruptcy. *Citadel*, 86 B.R. at 276. Although the judge cited these cases as support for his proposition, *none* of these cases actually supports the claim that pre-petition waivers of the automatic stay are enforceable in bankruptcy. See *infra* subpart III.A. for a discussion of these cases.

61. *Citadel*, 86 B.R. at 275. This was similar to Judge Robinson’s analysis in *Club Tower*. See *supra* notes 48-49 and accompanying text.

62. 79 B.R. 79 (Bankr. M.D. Fla. 1987).

63. *Id.* at 80-81.

64. See *Phoenix Picadilly, Ltd. v. Life Ins. Co. of Virginia* (*In re Phoenix Picadilly, Ltd.*), 849 F.2d 1393, 1394 (11th Cir. 1988) (“An automatic stay may be terminated for ‘cause’ pursuant to section 362(d)(1) of the Bankruptcy Code if a petition was filed in bad faith.”); *Natural Land Corp. v. Baker Farms, Inc.* (*In re Natural Land Corp.*), 825 F.2d 296 (11th Cir. 1987) (court affirmed lifting of automatic stay where petition was filed in bad faith).

65. *Orange Park*, 79 B.R. at 82.

66. See *infra* notes 115-17 and accompanying text.

67. See *infra* subpart II.C.

68. 134 B.R. 982 (Bankr. M.D. Fla. 1991).

bankruptcy, such filing would be in bad faith.⁶⁹ In enforcing the stipulation, the judge, as he had done in *Orange Park*, applied contract law and stated that because the agreement was not obtained by coercion, fraud, or mutual mistake of material facts, the traditional bases to contractual recession, the parties could not escape the legal consequences of the agreement.⁷⁰

In another recently decided case, *In re Hudson Manor Partners, Ltd.*,⁷¹ Judge Robinson held that the existence of a settlement agreement, in which a creditor was entitled to immediate relief from the automatic stay if the debtor filed for bankruptcy, constituted "cause" to grant relief from the stay pursuant to section 362(d)(1).⁷² As he did in *Club Tower*, Judge Robinson noted that the agreement was valid and did not violate public policy since it did not completely prohibit the debtor from filing for bankruptcy.⁷³ Therefore, the judge reasoned, the debtor had full protection of the Bankruptcy Code with respect to the rest of its creditors.⁷⁴

III. ARGUMENTS AGAINST ENFORCING PRE-PETITION AGREEMENTS THAT WAIVE THE AUTOMATIC STAY

A. The Lack of Well-Reasoned Precedent Supporting Decisions to Enforce Pre-Petition Waivers of the Automatic Stay Has Led to Slipshod and Faulty Analysis in Similar Contemporary Cases.

Very few courts have enforced pre-petition agreements that purport to grant a creditor instant relief from the automatic stay in a future bankruptcy proceeding. As a result, the courts that *have* enforced such agreements must cite a limited number of poorly decided cases with a similar holding, or cite no cases at all in support of their decision.⁷⁵

For instance, in *In re Citadel*, Judge Proctor erroneously cited several cases in an effort to justify enforcing an independent pre-petition agreement that purported to waive the automatic stay. *None* of the three cases which Judge Proctor cited support such an enforcement. The first case the judge cited, *In re International Supply Corp. of Tampa*,⁷⁶ involved a court-approved agreement providing only that if the debtor and the creditor did

69. *Id.* at 986. Such a stipulation, if enforced, essentially grants the creditor relief from the automatic stay automatically, since a bad faith filing is enough to grant relief from the automatic stay for "cause." See *supra* note 64 and accompanying text.

70. *Aurora*, 134 B.R. at 986. Judge Paskay employed the same "lack of rescission" argument in *Orange Park*. See *supra* note 65 and accompanying text.

71. 1991 WL 472592 (Bankr. N.D. Ga. 1991).

72. *Id.* at *2. As he did *Club Tower*, Judge Robinson cited *Citadel* and *Orange Park* as support for his holding in *Hudson*. *Id.*

73. *Id.* at *2.

74. *Id.*

75. Although it might be necessary for a court to cite few or no cases in support of a holding contemplating an issue of first impression, the courts that have enforced pre-petition waivers of the stay have cited cases that clearly do not support their holdings. See *infra* notes 76-87 and accompanying text. Because the initial cases enforcing pre-petition waivers of the stay were improperly reasoned and because the majority of subsequent cases that enforced such waivers cite to the initial cases for support, the entire line of reasoning behind the cases that have enforced pre-petition waivers of the stay is suspect.

76. 72 B.R. 510 (Bankr. M.D. Fla. 1987).

not sell a piece of property by a certain date, the county court would enter a judgment of eviction with the right to immediate possession of property.⁷⁷ The pre-petition agreement in *International Supply*, unlike the agreement in *Citadel*, failed to discuss what relief would be available to the creditor if the debtor filed for bankruptcy. Furthermore, the pre-petition agreement in *International Supply* never even addressed the possibility of filing for bankruptcy.⁷⁸ Thus, *International Supply* lends no support to the notion that pre-petition agreements that purport to waive the automatic stay in bankruptcy are enforceable since the agreement in *International Supply* never contemplated a bankruptcy filing in the first place.

Another case that the *Citadel* Court cited in support of its proposition, *B.O.S.S. Partners I v. Tucker*,⁷⁹ did not involve a pre-petition agreement. Instead, the case concerned a post-petition agreement.⁸⁰ Moreover, the post-petition agreement in *B.O.S.S.*, did not mention the possibility of relief from the automatic stay.⁸¹ Instead, the court in *B.O.S.S.*, rather than the parties themselves, adopted the post-petition agreement in an order that automatically granted the creditor relief from the automatic stay if the debtor failed to satisfy certain conditions.⁸²

The court's post-filing approval of the agreement in *B.O.S.S.* distinguishes that case from the unapproved agreement in *Citadel*. Court approval of an agreement waiving a Bankruptcy Code provision is significant since the court, as an unbiased and unprejudiced overseer of the debtor's creditors and assets, is in the best position to weigh a creditor's need for relief from the stay against the need to protect the assets of the bankruptcy estate for distribution to creditors as a whole.⁸³ Permitting parties to contract for relief from stay prior

77. *Id.* at 511.

78. As in *International Supply*, in another case that Judge Proctor cited as authority, *In re Gulf Beach Dev. Corp.*, the pre-petition agreement between the debtor and the creditor failed to contemplate the consequences of either party filing for bankruptcy. 48 B.R. 40, 42 (Bankr. M.D. Fla. 1985). *Gulf Beach*, like *International Supply*, lends no support for enforcing pre-petition waivers of the stay.

79. (*In re B.O.S.S. Partners I*), 37 B.R. 348 (Bankr. M.D. Fla. 1984).

80. *Id.* at 349. The Debtors in *B.O.S.S.* filed a Chapter 11 petition on November 10, 1992. *Id.* On May 26, 1983, a creditor sought relief from the automatic stay. *Id.* The court scheduled a preliminary hearing to determine if the stay should be lifted, but prior to the hearing the parties entered into a joint stipulation that was approved by the Bankruptcy Court. *Id.* Thus, the joint stipulation in *B.O.S.S.* was entered postpetition, as opposed to the prepetition agreement at issue in *Club Tower, Citadel, and Orange Park*. See *supra* note 79 and accompanying text.

81. *B.O.S.S.*, 37 B.R. at 349. Specifically, the stipulation stated that the debtor will have until a certain time to sell a piece of property and thereafter pay a debt owed to a creditor. *Id.*

82. *Id.*

83. *Association of St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d at 446, 448 (3d. Cir. 1982) ("Because it is the bankruptcy judge who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization, it is essential that he make the determination as to whether an action against the debtor may proceed or whether the stay against such actions should remain in effect.").

Other courts have also enforced court-approved, pre-petition agreements that waive the automatic stay. See *In re Wheaton Oaks Office Partners*, 1992 WL 381047 (E.D. Ill. Dec. 10, 1992). In *Wheaton Oaks*, the district court affirmed the bankruptcy court's approval of a pre-petition reorganization plan and permitted a creditor to foreclose on a debtor's property in spite of the automatic stay. *Id.* at *1. The district court in *Wheaton Oaks* noted

to bankruptcy, without court approval, would allow creditors to circumvent the bankruptcy judge's role of protecting creditors as a whole from consuming the debtor's assets to their own detriment.⁸⁴ Thus, enforcing a *post*-petition court order granting relief from the stay, in which the court considered the various positions of the debtor and a creditor before issuing that order, is completely distinguishable from enforcing a pre-petition agreement between a debtor and creditor that waives the automatic stay. For this reason, *B.O.S.S.*, like *Gulf Beach* and *International Supply*, does not support the *Citadel* court's proposition that pre-petition agreements, granting a specific creditor relief from the automatic stay, are enforceable in bankruptcy. In sum, the court in *Citadel* failed to cite a *single case* that enforced a pre-petition agreement regarding relief from the automatic stay.

Similar slipshod analysis was apparent in *Orange Park*, where Judge Paskay did not cite a single case supporting the proposition that pre-petition waivers of the automatic stay are enforceable in bankruptcy.⁸⁵ The judge merely stated that the agreement in that case must be enforceable since it had not been rescinded and cited a case for that proposition.⁸⁶ Although such a proposition might be true in many circumstances, Judge Paskay never addressed the precedent-setting consequences of enforcing an agreement that would avoid Congressionally mandated bankruptcy provisions.⁸⁷ Without addressing these important public policy concerns, Judge Paskay's analysis in *Orange Park* was incomplete and, thus, unreliable.

B. Enforcing Pre-petition Waivers of the Stay Violates Public Policy.

In addition to the dearth of authority and precedent supporting a court's enforcement of a pre-petition agreement that waives the automatic stay, the *policy* behind the entire Bankruptcy Code supports the notion that a debtor *may not* contract away the right to automatic stay's protection in a pre-petition agreement. Judge Markovitz clearly presented such an argument in *In re Sky Group International, Inc.*⁸⁸ In *Sky Group*, Judge Markovitz ruled that a debtor's waiver of the automatic stay "is not self-executing under the Bankruptcy Code. Relief from stay *must be authorized* by the Bankruptcy Court."⁸⁹

that the "key to the analysis" was the fact that the bankruptcy court played a large role not only in approving the reorganization plan, but also in determining that the existence of the pre-petition plan itself was sufficient "cause" for relief from the stay. *Id.* at *1-2. In other words, the bankruptcy court's large role in both approving the pre-petition waiver and in determining "cause" for relief from the stay pursuant to section 362(d) eliminated the possibility of enforcing the pre-petition waiver without substantial scrutiny by a neutral and unbiased party, namely, the court. Thus, cases in which the bankruptcy court has approved the pre-petition waiver are distinguishable from cases in which the waiver was not court-approved.

84. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6296-97. See *supra* notes 8-9 and accompanying text.

85. *Orange Park*, 79 B.R. at 82.

86. *Id.*

87. See *infra* notes 115-17 and accompanying text.

88. 108 B.R. 86 (Bankr. W.D. Penn. 1989).

89. *Id.* at 89 (emphasis added). Other courts have also held that waivers of the automatic stay are not enforceable in bankruptcy. See *supra* note 28 and accompanying text.

In *Sky Group*, two parties entered into a pre-petition agreement in which the debtor explicitly agreed to waive his right to the automatic stay with respect to one creditor in the event the debtor filed for bankruptcy.⁹⁰ The *Sky Group* court specifically held that “[t]he contention that this ‘waiver’ is enforceable and self-executing is without merit.”⁹¹ To support its holding, the court examined the automatic stay’s legislative history, which emphasizes the need for both an equal treatment of creditors and also an orderly liquidation procedure.⁹² In determining that the policies of equal treatment and an orderly liquidation procedure would be violated if the court were to enforce a pre-petition waiver of the stay, Judge Markovitz stated:

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 the debtor allegedly waived its right to the automatic stay.⁹³

Sky Group is only one of many courts that have held that waivers of the automatic stay are not enforceable in bankruptcy.⁹⁴ In a recent district court decision, *Farm Credit of*

90. *Sky Group*, 108 B.R. at 88. Specifically, the clause in the agreement provided as follows: Relief from Stay. In the event that a proceeding under any bankruptcy or insolvency law is commenced by or against [the debtor] and an order for relief is entered as a result of such petition, [the debtor] hereby consents to relief from the automatic stay imposed by 11 U.S.C. § 362 to allow [the creditor] to exercise its rights and remedies hereunder with respect to the Debtor’s property.

Id.

91. *Id.* See also *In re Best Fin. Corp.*, 74 B.R. 243, 245 (D. P. R. 1987) (“A debtor cannot waive the automatic stay, since the purpose of its enactment by Congress was not only to protect debtors and creditors, but also to provide an orderly and efficient administration of a bankruptcy estate.”) (quoting *In re Nashville White Trucks, Inc.* 22 B.R. 578 (Bankr. M.D. Tenn. 1982)); *Yorke v. Citibank (In re BNT Terminals, Inc.)*, 125 B.R. 963, 971 (Bankr. N.D. Ill. 1990) (Unauthorized acts by debtors or creditors outside the provisions of the Bankruptcy Code “would make a nullity of § 362 and what it attempts to accomplish as well as invite horrendous fraud upon the court.”).

92. See *supra* note 27 and accompanying text. The court in *Sky Group* stated:

The legislative 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. . . .

108 B.R. at 88-89 (Citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97).

93. *Id.* at 89 (emphasis added).

94. See *supra* note 28 and accompanying text.

Central Florida v. Polk,⁹⁵ the court refused to enforce a pre-petition agreement that waived the automatic stay, specifically holding that the debtor may not unilaterally waive the automatic stay against the interest of his creditors.⁹⁶ In determining that such agreements are not self-executing, the court stated:

[T]he Bankruptcy Court's holding that pre-petition 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.⁹⁷

In so holding, the *Farm Credit* Court rejected the applicability of the *Citadel* line of cases,⁹⁸ stating that the fact patterns existing therein (single asset bankruptcies with very few creditors) were not present in *Farm Credit*.⁹⁹

The broad scope of the stay and the policy behind it indicates that no court should enforce a pre-petition waiver of the stay that would function to the detriment of creditors not party to that agreement.¹⁰⁰ If the entire bankruptcy proceeding consists of one debtor and one creditor, as was essentially the case in *Club Tower*, the bankruptcy case should be dismissed altogether rather than continued without the protections of the automatic stay.¹⁰¹

C. As the Bankruptcy Court May Not Grant Relief From the Automatic Stay Prior to the Commencement of the Bankruptcy Proceeding, Independent Parties Surely May Not Contract Out of the Stay Prior to the Filing of a Bankruptcy Petition.

A debtor who has filed for bankruptcy might be forced to file for bankruptcy again a few years down the road as a result of a bad business judgment or an inability to pay debts as they come due. One question that results from consecutive filings is the effect of a bankruptcy court order in the first case that purports to grant relief from the automatic stay in any future bankruptcy proceeding involving the same debtor. In answering that question, several courts have held that a bankruptcy court *may not* grant a specific creditor relief from the automatic stay in advance of the debtor's filing for bankruptcy.¹⁰² The policy of prohibiting a bankruptcy court from granting a creditor relief from the automatic stay in *future* bankruptcy proceedings applies equally to the case of two independent parties attempting to effectuate the same result.

95. 160 B.R. 870 (M.D. Fla. 1993).

96. *Id.* at 873.

97. *Id.*

98. *See supra* notes 76-82.

99. 160 B.R. at 872.

100. *See supra* notes 92-93 and accompanying text.

101. *See infra* subpart IV.B.

102. *See, e.g., In re Norris*, 39 B.R. 85, 87 (E.D. Penn. 1984).

Consider *In re Norris*¹⁰³ in which a creditor moved for relief from the automatic stay to foreclose on a mortgage following the debtor's filing for bankruptcy.¹⁰⁴ The bankruptcy court in *Norris* not only granted that creditor relief from the stay, but issued an order stating that "the filing of *any future petitions in bankruptcy shall not affect* the instant Order granting relief from the Code Section 362 stay."¹⁰⁵ The order in *Norris*, if enforced, would grant the creditor instant relief from the automatic stay if the debtor filed for bankruptcy in the future. On appeal, the district court modified the court order so that the creditor was *not* entitled to instant relief from the stay if the debtor ever again filed for bankruptcy.¹⁰⁶ In modifying the bankruptcy court order, the district court stated:

[T]here is nothing in the statutory language [of section 362(d)] which purports to enable the Bankruptcy Court to provide relief from the automatic stay in advance of the filing of the bankruptcy petition. That is, on its face, the statute makes the 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.¹⁰⁷

Other courts, in accord with *Norris*, have similarly refused to enforce court orders in prior bankruptcy proceedings brought by the same debtor.¹⁰⁸ Thus, considering the fact that "a bankruptcy judge in a pending proceeding does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings,"¹⁰⁹ it follows that *independent parties* acting outside the scope of the court also should not be permitted to contract pre-petition for relief from the stay.¹¹⁰

D. The Bankruptcy Code's Flexibility in Affording a Creditor Relief from the Automatic Stay Weighs Against Enforcing Pre-Petition Agreements that Waive the Stay.

If relief from the stay is warranted under Bankruptcy Code section 362(d)'s "cause" standard,¹¹¹ the bankruptcy court should grant relief for "cause" rather than enforce a pre-petition waiver of the stay. Pursuant to Bankruptcy Code section 362(d), a creditor may move for relief from the stay, and the bankruptcy court will determine whether sufficient

103. *Id.*

104. *Id.* at 86.

105. *Id.* (emphasis added).

106. *Id.* at 88.

107. *Id.* at 87.

108. See *In re Taras*, 136 B.R. 948; *Taylor v. Tsaforoff (In re Taylor)*, 77 B.R. 237, 240 (Bankr. 9th Cir. 1987), *aff'd in part & rev'd in part on other grounds*, 884 F.2d 478 (9th Cir. 1989) ("Even if this Panel accepts Mr. Little's argument that the intent of the order lifting the automatic stay [in a prior case] was to apply to any and all Chapter 13 petitions filed by the debtor, it is doubtful that a bankruptcy court can enter such an order.").

109. *Norris*, 39 B.R. at 87.

110. See *supra* notes 89-93 and accompanying text. Since the bankruptcy court is in a better position to weigh the needs of the debtor and creditors than two independent parties, if a bankruptcy court could not grant relief to a creditor pre-petition, surely parties acting outside the scope of the court may not contract for that result.

111. See *supra* note 33 and accompanying text.

“cause” exists to warrant that relief.¹¹² Bankruptcy Code section 362(d) affords the bankruptcy judge flexibility in determining whether relief from the automatic stay is warranted for “cause.”¹¹³ As a result of this flexibility, a bankruptcy judge will almost certainly be able to find “cause” to grant a creditor relief from the stay, if relief from the stay is warranted, while ignoring the effect of a pre-petition agreement between the parties that purports to relieve a creditor of the stay.¹¹⁴

If a creditor’s situation truly warrants relief from the stay under the broad discretionary “cause” standard, the bankruptcy court should grant the relief regardless of whether the creditor entered into a pre-petition agreement providing for such relief. Enforcing waivers of the automatic stay could inevitably lead down the slippery slope of enforcing waivers of other Congressionally mandated Bankruptcy Code provisions, such as the debtor’s right to a “fresh start” following bankruptcy.¹¹⁵ As a result, the Bankruptcy Code’s purpose of

112. See *supra* note 33 and accompanying text.

113. *Norton v. Hoxie State Bank*, 61 B.R. 258, 260 (D. Kan. 1986) (“The ‘cause’ standard is broad and extends beyond the concept of a lack of adequate protection mentioned in the statute.”); *Elliott v. Hardison*, 25 B.R. 305, 310 (Bankr. E.D. Va. 1982) (“As a court of equity the bankruptcy court has broad powers to balance the hardships to the affected parties and to fashion relief from the automatic stay accordingly.”).

114. For example, a debtor’s “bad faith” filing of a bankruptcy petition is sufficient for a court to find “cause” for relief from the stay under section 362(d). See *supra* note 63 and accompanying text. See also *Shell Oil Co. v. Waldron (In re Waldron)*, 785 F.2d 936 (11th Cir. 1986); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984).

115. Pre-petition waivers of bankruptcy’s “fresh start” provisions have typically been held void as against public policy. See *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (“For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy.”); *Alsan Corp. v. DiPierro (In re DiPierro)*, 69 B.R. 279, 282 (Bankr. W.D. Penn 1987) (“A debtor cannot contract away the right to a bankruptcy discharge in advance of the bankruptcy filing.”); *In re Markizer*, 66 B.R. 1014, 1018 (Bankr. S.D. Fla. 1986) (“Paragraph 9 of the agreement will be given no effect because it is unenforceable. An agreement to waive the benefit of a discharge in bankruptcy is wholly void, as against public policy.”); *In re Crowder*, 37 B.R. 53, 55 (Bankr. S.D. Fla. 1984) (“The State court’s reliance upon a pre-bankruptcy waiver of the debtor’s federal statutory right to discharge a debt is an obviously erroneous ruling, or so it would appear.”); *George v. George (In re George)*, 15 B.R. 247, 248-49 (Bankr. N.D. Ohio 1981) (Pre-bankruptcy waivers of dischargeability are unenforceable as “being in conflict with the purposes of the Bankruptcy Laws.”); *Johnson v. Kriger (In re Kriger)*, 2 B.R. 19, 23 (Bankr. D. Ore. 1979) (“It is a well settled principle that an advance agreement to waive the benefit of a discharge in bankruptcy is wholly void, as against public policy.”).

In the seminal case on pre-petition waivers of a debtor’s “fresh start,” the Supreme Judicial Court of Massachusetts, in *Federal National Bank v. Koppel*, stated:

It would be repugnant to the purpose of the Bankruptcy Act to permit the circumvention of its object by the simple device of a clause in the agreement, out of which the provable debt springs, stipulating that a discharge in bankruptcy will not be pleaded by the debtor. The Bankruptcy Act would in the natural course of business be nullified in the vast majority of debts arising out of contracts, if this were permissible. *It would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect.*

Koppel, 148 N.E. 379, 380 (1925) (emphasis added). *Accord, In re Weitzen*, 3 F. Supp. 698, 698 (S.D.N.Y. 1933). See also *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966).

Thus, the *Koppel* Court held that a pre-bankruptcy waiver of the broad discharge provisions in bankruptcy

providing an orderly reorganization or liquidation process would be diminished. Parties could determine their own fate by contracting for whatever relief they desire without respecting the needs of other similarly situated parties to the bankruptcy proceeding. This would be contrary to the policies of equality that run throughout the entire Bankruptcy Code.¹¹⁶ To avoid initiating the descent down the slippery slope of enforcing pre-petition waivers of Bankruptcy Code provisions, bankruptcy judges should ignore the existence of pre-petition agreements and employ their broad equitable powers to grant relief from the stay for "causes" that will exist if the creditor truly deserves such relief.¹¹⁷

The situation in *Club Tower* illustrates this concept. In that case, Judge Robinson, in enforcing the pre-petition stipulation, also noted that enforcement of the agreement was *unnecessary* since relief from the stay was warranted by the debtor's "bad faith" filing.¹¹⁸ Yet, if enforcing the agreement was unnecessary, Judge Robinson should have refused to enforce it and simply granted relief for "cause." Instead, Judge Robinson chose to continue a precedent that might be misused by future creditors in their attempt to persuade a court to enforce similar pre-petition relief agreements. Such precedent, if continued, would render the Bankruptcy Code a conglomeration of optional reorganization and liquidation procedures that may be discarded by simple contractual agreements.

IV. THE RELATIONSHIP BETWEEN PRE-PETITION CONTRACTS THAT PURPORT TO WAIVE THE AUTOMATIC STAY IN FUTURE BANKRUPTCY PROCEEDINGS AND THE PROMOTION OF WORKOUTS AND RESTRUCTURINGS

A. Enforcing Pre-Petition Contracts that Purport To Waive the Automatic Stay in Future Bankruptcy Proceeding's does not Promote Workouts and Restructurings.

In *Club Tower*, Judge Robinson, citing *In re Colonial Ford, Inc.*,¹¹⁹ stated: "Workouts and restructurings should be encouraged among debtors and creditors, particularly where, as here, there is a debt between two parties and a single asset. Under these circumstances, filing for bankruptcy should be a last resort."¹²⁰ The judge added that refusing to enforce pre-petition agreements that purported to grant one party relief from the automatic stay could "make lenders more reticent in attempting workouts with borrowers outside of bankruptcy."¹²¹

is *not* binding on the promisor because it would essentially render the Code of no effect. 148 N.E. at 379. Along these lines, because Congress enacted the automatic stay to promote both creditor and debtor protection in bankruptcy, permitting parties to contract out of the stay would virtually invalidate one of the most important purposes behind the Code's enactment, that of promoting an orderly liquidation procedure. See *supra* notes 14 and 27 and accompanying text.

116. See *supra* notes 92-93 and accompanying text.

117. See, e.g., *Hardison*, 25 B.R. at 310. One such cause might be a debtor's "bad faith" filing of a bankruptcy petition. See *infra* note 118.

118. *In re Club Tower L.P.*, 138 B.R. 307, 310 (Bankr. N.D. Ga. 1991) ("Accordingly, because the Debtor filed this bankruptcy case in bad faith, [the creditor] is entitled to relief from the automatic stay to exercise its rights and remedies as a secured creditor.").

119. 24 B.R. 1014 (D. Utah 1982).

120. *Club Tower*, 138 B.R. at 312.

121. *Id.*

However, the court in *Colonial Ford* never stated, as Judge Robinson contended in *Club Tower*, that enforcing an agreement that waives a Bankruptcy Code provision would promote out-of-court workouts and restructurings. The *Colonial Ford* court did not grant a creditor relief from the stay, but instead *dismissed* the bankruptcy case pursuant to Bankruptcy Code section 305,¹²² where an out-of-court pre-petition workout agreement between a debtor and its creditors was comprehensive and designed to end the creditor's relationship with the debtor.¹²³ The court in *Colonial Ford* suggested that *complete dismissal* of the bankruptcy case pursuant to section 305, in certain situations, would further "the policies of expedition, economy, and good sense."¹²⁴

Furthermore, the agreement in *Colonial Ford*, unlike the agreement in *Club Tower*, provided for *complete* settlement of the debtor's property and a subsequent dismissal of the entire bankruptcy case.¹²⁵ In contrast, the pre-petition agreement in *Club Tower* merely provided for *exceptions to bankruptcy* once the debtor filed a bankruptcy petition.¹²⁶ Thus, enforcing the *Club Tower* agreement did not promote out-of-court restructurings or settlements, since the parties in *Club Tower* were still enmeshed in a bankruptcy proceeding after the court granted relief from the stay. In *Colonial Ford*, enforcing the agreement permitted the court to dismiss the bankruptcy case completely, thereby promoting workouts and saving administrative expenses. As a result, enforcing the agreement in *Club Tower* did not promote the worthy goal, emphasized in *Colonial Ford*, of avoiding the expenses of filing for bankruptcy by a complete dismissal of the bankruptcy case pursuant to section 305(a).¹²⁷

B. The Dismissal Option in Two-Party Bankruptcies.

Dismissal or abstention of the entire bankruptcy case pursuant to Bankruptcy Code section 305, as ordered in *Colonial Ford*, is a useful alternative to enforcing a pre-petition agreement that waives the automatic stay.¹²⁸ In a situation where a debtor owes only one debt to a single party, it is more economical for the court to dismiss the case and let the parties

122. 11 U.S.C. § 305 (1988). Bankruptcy Code section 305(a) provides in pertinent part that:

a) the court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

1) the interests of creditors and the debtor would be better served by such dismissal or suspension

Id.

123. 24 B.R. at 1023. Specifically, the court stated that where a "workout is comprehensive, and designed to end, not perpetuate, the creditor-company relations, dismissal under section 305(a)(1) is appropriate." *Id.* In dismissing the case pursuant to Bankruptcy Code section 305, the court in *Colonial Ford* emphasized that it would be in the interests of both the creditors and the debtor to dismiss the case. *Id.* at 1020-23.

124. *Id.* at 1023.

125. *Id.* at 1014-15.

126. *Club Tower*, 138 B.R. at 309.

127. See 11 U.S.C. § 305 (1988).

128. *Colonial Ford*, 24 B.R. at 1023. Judge Robinson himself admitted that Congress, in enacting Bankruptcy Code section 305, contemplated that bankruptcy "might not always be the most efficient means of restructuring the relations of a debtor and its creditors." *Club Tower*, 138 B.R. at 312.

resolve their dispute in a state court action rather than waste both the debtor's assets and governmental resources by initiating a bankruptcy proceeding.¹²⁹ One court has stated:

[B]ankruptcy courts should become involved in cases only if the bankruptcy court's services are needed to truly reorganize a debtor who is having financial problems; however, if the matter can be dealt with by another forum, better equipped to do it and in a better position to deal with a dispute between two parties or just a few parties, the bankruptcy court should refrain from exercising its jurisdiction.¹³⁰

Following this analysis, numerous courts have held that the filing of a bankruptcy petition to resolve what is essentially a two-party dispute is an implication of a "bad faith" filing and calls for dismissal of the bankruptcy petition pursuant to section 305.¹³¹ Such a dismissal is the logical alternative to enforcing pre-petition agreements that purport to waive the Bankruptcy Code's inherent benefits. Thus, in *Club Tower*, where the dispute involved only one debtor and one creditor and the unsecured claims in that case were not substantial relative to the amount of secured claims, the case was proper for dismissal pursuant to section 305.

CONCLUSION

When contemplating whether to enforce a pre-petition agreement that automatically grants a creditor relief from the stay, a court should consider a number of factors. First, the legislative history to the automatic stay clearly certifies the bankruptcy court as the only body capable of granting a creditor relief from the stay, indicating that the orderly liquidation procedure contemplated by the Code would be placed in jeopardy if parties are permitted to independently contract out of the stay.¹³² Second, the cases that have previously enforced such waivers have not been well reasoned and have ignored the "slippery slope" consequences of their holdings.¹³³ Third, not even a bankruptcy court may grant a creditor

129. *In re Business Information Co.*, 81 B.R. 382, 387 (Bankr. W.D. Penn. 1988) ("[E]conomy and efficiency of administration must be key considerations in the abstention decision."); *In re Safon Ochart*, 74 B.R. 131, 134 (Bankr. D. P. R. 1986) ("In determining whether to abstain or not the Bankruptcy Court should take into consideration efficiency and economy of administration as primary factors."); *In re Michael S. Starbuck, Inc.*, 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981).

130. *In re Heritage Estates, Inc.*, 73 B.R. 511, 513 (Bankr. M.D. Fla. 1987). *See also In re Noco, Inc.*, 76 B.R. 839, 844 (Bankr. N.D. Fla. 1987).

131. *In re Business Information, Co.*, 81 B.R. 382, 385 (Bankr. W.D. Penn. 1988). *See also Phoenix Picadilly, Ltd. v. Life Ins. Co. of Virginia (In re Phoenix Picadilly, Ltd.)*, 849 F.2d 1393, 1394-95 (11th Cir. 1988); *In re Meadowwood Club Apts., Ltd.*, 145 B.R. 96, 98 (Bankr. M.D. Fla. 1992).

In *Phoenix Picadilly*, the Eleventh Circuit noted several factors that evidence a bad faith filing of a bankruptcy petition. 849 F.3d at 1394-95. These factors included situations where the debtor: 1) has only one asset; 2) as few unsecured creditors whose claims are small in relation to the claims of the secured creditors; 3) has few employees; and, 4) has financial problems that involve essentially a dispute between the debtor and the secured creditors which can be resolved in a pending State Court Action. *Id.* at 1394.

132. *See supra* notes 31 and 89 and accompanying text.

133. *See supra* subpart III.A.

relief from the stay prior to the debtor's filing for bankruptcy.¹³⁴ Therefore, since the bankruptcy court represents an unbiased and unprejudiced overseer that is in the best position to weigh a creditor's need for relief from the stay against the need to protect the debtor's assets,¹³⁵ two parties acting outside the scope of the bankruptcy court should also not be permitted to waive the stay. Fourth, enforcing pre-petition waivers of the automatic stay in two-party, single-asset bankruptcies does not promote time-saving workouts and settlements.¹³⁶ Rather, such cases should be dismissed pursuant to Bankruptcy Code section 305.¹³⁷

Finally, permitting parties to contract out of Bankruptcy Code provisions such as the automatic stay would eventually render the Code a conglomeration of optional laws.¹³⁸ As the Bankruptcy Code promotes public policy by providing an orderly liquidation procedure, in part through the automatic stay, parties should not be permitted to render the Code optional by contracting out of its provisions.¹³⁹

Courts should not enforce pre-petition waivers of the automatic stay. If relief from the stay is not warranted, a court should employ its broad equitable powers to find "cause" for relief from the stay pursuant to section 362(d)(1).¹⁴⁰ If the bankruptcy involves a single asset and a single creditor, the court should dismiss the case completely pursuant to section 305.¹⁴¹

134. *See supra* subpart III.D.

135. *See supra* note 83 and accompanying text.

136. *See supra* subpart IV.A.

137. *See supra* subpart IV.B.

138. *See supra* notes 13, 122-131 and accompanying text.

139. *See supra* note 27 and accompanying text.

140. *See supra* note 110 and accompanying text.

141. *See supra* notes 128-30 and accompanying text.

