

BY GREGORY G. HESSE

## Pre-Petition Waivers of the Automatic Stay: Still No Certainty as to Their Enforceability

A seemingly perpetual “hot topic” in single-asset real estate (SARE) bankruptcy cases is the enforceability of pre-petition waivers of the automatic stay.<sup>1</sup> Since the beginning of the most recent recession, courts have issued surprisingly few decisions relating to the enforceability of such waivers. However, the most recent decisions have highlighted that the courts remain split as to whether the waivers of the automatic stay are enforceable.

Further, while such waivers seem, in the abstract, to be of tremendous benefit to a secured lender, a close examination of the reported decisions reveals that such waivers may in fact be of limited benefit. For example, the cases are uniform in holding that the waivers are not self-effectuating, which requires the lender to still incur the effort and expense of filing a motion with the bankruptcy court seeking relief from the automatic stay.<sup>2</sup> Further, upon close review of the reasoning of the reported decisions, most (if not all) of the courts will only enforce a waiver if the creditor can prove a litany of factors that include whether the debtor has equity in the collateral and whether the plan that will be proposed by the debtor will not be feasible.<sup>3</sup> Notwithstanding any questions about the effectiveness of the waivers, however, secured lenders continue to negotiate for such waivers to be inserted into workout documents.

This article reviews the two most recent decisions on the issue of enforceability of waivers of the automatic stay. These decisions highlight not only the fact that uniform decisions regarding the enforceability of waivers of the automatic stay continue to elude the courts, but also the factual predicates that must be proven even if a court does in fact enforce such a waiver.

### DB Capital Holdings: Pre-Petition Waivers Are Not Enforceable

In 2011, the U.S. Bankruptcy Court for the District of Colorado issued its decision in *In re DB Capital Holdings LLC*,<sup>4</sup> holding that pre-petition waivers of the automatic stay are unenforceable

because such waivers are tantamount to an agreement not to file a bankruptcy case in violation of public policy.<sup>5</sup> *DB Capital* is a SARE case, and prior to filing for bankruptcy, the debtor defaulted on the payment of its indebtedness. The debtor and its lender subsequently entered into an amendment to the loan documents that included a provision in which the debtor agreed that if it subsequently filed for bankruptcy, it waived the benefit of the automatic stay. The debtor did in fact subsequently file for bankruptcy, and the lender filed a motion for relief from the automatic stay, alleging that cause existed to terminate the automatic stay because the debtor waived the benefit of the automatic stay. The *DB Capital* court considered the lines of cases both enforcing and refusing to enforce pre-petition waivers of the automatic stay and concluded that the reasoning of *In the Matter of Pease*<sup>6</sup> was most persuasive and held that such waivers are unenforceable.

In reaching its conclusion, the *DB Capital* court first reasoned that prior to filing for bankruptcy, the debtor does not have the capacity or authority to waive the rights bestowed upon it by the Bankruptcy Code, including the automatic stay. The court's reasoning has to do with its view that the pre-petition debtor and the post-petition debtor in possession (DIP) are “separate and distinct” entities that have different rights and duties.<sup>7</sup> Specifically, the court noted that upon filing for bankruptcy, a DIP has a fiduciary duty to take actions that are in the best interests of the estate and creditors, while the pre-petition debtor does not have such a fiduciary duty.<sup>8</sup> Thus, the court concluded that the pre-petition debtor simply does not have the capacity or authority to waive the protections of the automatic stay.<sup>9</sup>

Second, the court noted that certain sections of the Bankruptcy Code, including 11 U.S.C. §§ 541(c), 363(l) and 365(e), explicitly invalidate provisions of private agreements that deprive the debtor of the use and benefit of property upon the filing of a bankruptcy case. The *DB Capital* court specifically held that 11 U.S.C. § 363(l)<sup>10</sup> invalidates contractual provisions purporting to waive

1 See 11 U.S.C. § 362.

2 See *In the Matter of Alexander SRP Apartments LLC*, 2012 WL 1910088 (Bankr. S.D. Ga. April 20, 2012); *In re Frye*, 320 B.R. 786, 791 (Bankr. D. Vt. 2005); *In re Powers*, 170 B.R. 480, 483 (Bankr. D. Mass. 1994); *In re Cheeks*, 167 B.R. 817, 819 (Bankr. D.S.C. 1994); *In re Sky Group Int'l Inc.*, 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989).

3 See, e.g., *In re Frye*, 320 B.R. at 790; *In re Bryan Road LLC*, 382 B.R. 844 (Bankr. S.D. Fla. 2008); *In re Desai*, 282 B.R. 527 (Bankr. S.D. Ga. 2002); and *In re Atrium High Point Ltd. Partnership*, 189 B.R. 599 (Bankr. M.D.N.C. 1995).

4 *In re DB Capital Holdings LLC*, 454 B.R. 804 (Bankr. D. Colo. 2011).

5 *In re DB Capital*, 454 B.R. at 814. See also *In re Jenkins Court Assoc. Ltd. Partnership*, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995); *In re Clouse*, 446 B.R. 690 (Bankr. E.D. Pa. 2010).

6 *In the Matter of Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996).

7 *Id.* at 815; *In the Matter of Pease*, 195 B.R. at 433.

8 *In re DB Capital*, 454 B.R. at 815; *In the Matter of Pease*, 195 B.R. at 433.

9 *In re DB Capital*, 454 B.R. at 815; *In the Matter of Pease*, 195 B.R. at 433.



Gregory G. Hesse  
Hunton & Williams  
LLP; Dallas

Gregory Hesse is  
a partner with  
Hunton & Williams  
LLP in Dallas.

the automatic stay because enforcement of such waivers would deprive the DIP of its ability to sell, use or lease the lender's collateral.<sup>11</sup>

Finally, the *DB Capital* court held that the Bankruptcy Code extinguishes the private right of freedom to contract around essential Code provisions, including the benefits of the automatic stay. The court reasoned that this conclusion arises from the comprehensive nature of the Bankruptcy Code and its purpose, which is to provide a uniform collective remedy for debtors and creditors. The *DB Capital* court noted that the enforcement of a contractual waiver of the automatic stay would allow a single creditor to opt out of the process established by the Code to the potential detriment of the debtor, other creditors and other stakeholders, a result that should not be permitted.<sup>12</sup>

## Alexander SRP Apartments: Pre-Petition Waivers Are Enforceable

On the other end of the spectrum is the opinion issued in another SARE case, *In the Matter of Alexander SRP Apartments LLC*.<sup>13</sup> The facts related to the waiver of the automatic stay in *Alexander SRP* are not materially different from the facts in *DB Capital*: The debtor was a SARE debtor, it was unable to repay its loan to its lender, the parties entered into a forbearance agreement (which included a waiver by the debtor of the benefits of the automatic stay), the debtor subsequently filed for bankruptcy, and the lender filed a motion for relief from the automatic stay alleging that the pre-petition waiver was cause under 11 U.S.C. § 362(d)(1) for terminating the automatic stay.

Unlike *DB Capital*, *Alexander SRP* enforced the provisions of the waiver of the automatic stay. The court noted that the "majority" of opinions that had analyzed pre-petition waivers would enforce such waivers if "appropriate circumstances" existed to enforce the waiver.<sup>14</sup> The "appropriate cir-

cumstances" identified by the *Alexander SRP* court include the following:

- The waiver was not included in the original loan documents, but rather in a forbearance agreement executed after a maturity default;
- The lender made significant concessions in the form of a one-year forbearance;
- The debtor was a sophisticated borrower;
- The debtor did not allege or establish the existence of fraud, mistake, coercion or any other factor where public policy would negate the waiver;
- No creditors or parties in interest objected to the stay relief; and
- The debtor had no or very little equity in the property.<sup>15</sup>

While the *Alexander SRP* court enforced the waiver of the automatic stay, it emphasized that if there was "any circumstance that in equity and good conscience" that the court could not condone the obtaining or enforcement of the waiver, it would not have enforced the waiver.<sup>16</sup>

## Conclusion

The *DB Capital* and *Alexander SRP* decisions emphasize that the courts are still conflicted about the enforceability of pre-petition waivers of the automatic stay. Further, even though *Alexander SRP* enforced the waiver of the automatic stay, the court did note that (1) if the circumstances were appropriate, it would not enforce the waiver, and (2) it would enforce the waiver only after conducting a hearing in which evidence was presented about the value of the collateral and the court would be able to conclude that the debtor had little or no equity in the collateral that would provide a benefit to stakeholders other than the secured lender. **abi**

10 11 U.S.C. § 363(f) provides:

[T]he trustee may use, sell or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12 or 13 of this title may provide for the use, sale or lease of property, notwithstanding any provision of a contract, a lease or applicable law that is conditioned on the...commencement of a case under this title concerning the debtor...and that effects, or gives an option to effect, a forfeiture, modification or termination of the debtor's interest in such property.

11 *In re DB Capital*, 454 B.R. at 815; *In the Matter of Pease*, 195 B.R. at 434.

12 *In re DB Capital*, 454 B.R. at 815; *In the Matter of Pease*, 195 B.R. at 435.

13 *In the Matter of Alexander SRP Apartments LLC*, 2012 WL 191008 (Bankr. S.D. Ga. April 20, 2012).

14 *Alexander SRP*, 2012 WL 1910088, \*7. The *Alexander SRP* court noted that several courts have identified various factors to consider, but did not specifically identify the factors. The 10-factor test referenced by the *Alexander SRP* court includes: (1) sophistication of the parties; (2) consideration given by the lender for the waiver; (3) whether other parties are affected by the waiver; (4) feasibility of the debtor's plan; (5) whether there is evidence of fraud, coercion or mutual mistake of material facts in obtaining the waiver; (6) whether enforcing the agreement will further public policy encouraging out-of-court settlements and restructurings; (7) whether there appears to be a likelihood of reorganization; (8) whether the lender will otherwise be prejudiced if the waiver is not enforced; (9) the time between the date of the waiver and the date of the bankruptcy filing; and (10) whether the debtor has equity in the property and the creditor is otherwise be entitled to relief from automatic stay. See *In re Frye*, 320 B.R. at 790-91. The four-factor test referenced by the *Alexander SRP* court includes: (1) the sophistication of the parties; (2) the consideration given by the lender for the waiver; (3) whether other parties are affected by the waiver; and (4) the feasibility of the debtor's plan. See *In re Desai*, 282 B.R. at 532. See also *In re Bryan Road LLC*, 382 B.R. at 849 (stating that while these factors are relevant, the court might take into account additional factors in reaching its conclusion about enforceability of waiver of automatic stay).

15 *Id.*

16 *Id.*

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