THE MYTHOLOGY OF WAIVERS OF BANKRUPTCY PRIVILEGES

THOMAS G. KELCH*
MICHAEL K. SLATTERY**

INTRODUCTION

Contractual waiver of privileges[1] granted by the Bankruptcy Code is surrounded by a mythology. The mythology is expressed in an assumption that bankruptcy privileges are essentially non-waivable. This assumption is then cloaked in the armor of the Constitution, statutory language and public policy.

Several recent court decisions that have enforced contractual waivers of bankruptcy privileges in certain narrow contexts have challenged this mythology. That the mythology still exists, however, is evident from cases continuing to deny the validity of such waivers and practitioners who whisper in the dark that waivers must be limited to narrow circumstances lest the whole house of cards fall to the reality that bankruptcy privileges really are not waivable.[2]

Much more important rights and privileges may be waived at a whim. We can waive the privilege against self-incrimination, the right to a jury trial, and innumerable other constitutional, statutory and common law rights without hesitation or fanfare. Thus, we may flippantly sacrifice our freedom or, perhaps, our life in a capital offense. However, we may rarely, if ever, waive the privileges provided by the Bankruptcy Code due to this bankruptcy waiver mythology.

Why do we have this mythology? How did we come to have it? Is there some historical explanation? How should attempts to waive the privileges of bankruptcy be treated in a world where this mythology is unmasked? All of these issues will be explored.

Given the law of waiver as it exists elsewhere in the law, it is maintained in this Article that the present view of contractual waiver of privileges in bankruptcy is enshrouded in falsities and half-truths that can be remedied by looking at the issue not as a sort of exalted class of bankruptcy issue but as waiver is viewed in other contexts—as a purely contractual issue. This Article will first analyze the present state of the law relating to waiver of bankruptcy

---

* Professor of Law, Whittier Law School. B.G.S., University of Michigan; J.D., *magna cum laude*, University of Michigan. The authors are indebted to Professor Frank R. Kennedy for his insightful comments on an earlier draft of this Article.

** Of Counsel, Rutan & Tucker LLP, Costa Mesa, California, specializing in bankruptcy law. B.A., 1978, Princeton University; J.D., 1982, University of Southern California School of Law.

1. The phrase, "bankruptcy privileges" is used purposefully to emphasize, as will be shown, that there are no "bankruptcy rights."

2. In regard to caution concerning practitioner overuse of waivers, see Michael St. Patrick Baxter, *Prepetition Waivers of the Automatic stay: A Secured Lender's Guide*, 52 BUS. LAW. 577 (1997).

privileges. Second, it will search for the sources of the idea that privileges in bankruptcy generally may not be waived. Third, we will analyze the concept of contractual waiver generally and determine the appropriate circumstances for enforcement of contractual waivers of statutory privileges. Fourth, this latter analysis will be applied to statutory bankruptcy privileges to ascertain when such privileges may appropriately be waived.

The thesis that will emerge is that accepted views of waivers of bankruptcy privileges are gripped by a mythology and that, properly analyzed under the law of contractual waiver, bankruptcy privileges should be freely waivable given satisfaction of certain requisites of the law of contract.

I. PRESENT LAW

A. The Present Case Law

Over the past ten years, creditors have experimented with pre-bankruptcy "workout" agreements that allow uncontested relief from stay if the borrower petitions for bankruptcy relief. It is primarily in this area that the battle over waiver of bankruptcy privileges has been fought, and it is these cases on which we will focus. Based largely on loosely articulated perceptions of public policy, the courts have been very reluctant to enforce agreements containing stay waivers. The judicial opinions in this area offer no real analysis of the issue as one of contractual waiver of a statutory right which is, as will be shown, the true issue here. The authors think this case law is the product of vestigial depression-era sympathy for borrowers that places bankruptcy and debtor-creditor law on a different plane from other law with respect to waiver.

The cases fall into three basic groups.[3] A few courts enforce waivers, most treat waivers as a factor to be considered in relief from stay litigation, and a small number flatly prohibit waivers for reasons of policy.[4]

Two cases from the late 1980s do seem to enforce relief from stay agreements.[5] These cases, *In re Club Tower* and *In re Citadel Properties*, carefully distinguish such agreements from outright waivers of the privilege of filing bankruptcy, which nearly everyone believes run counter to public policy.[6] On a close reading, it seems that the courts in both cases had more than waiver

---

3. *Id.* at 579-87.

4. *Id.*

5. *In re* Club Tower, L.P., 138 B.R. 307, 311 (Bankr. W.D. Ga. 1991) ("Pre-petition agreements regarding relief from stay are enforceable in bankruptcy."); *In re* Citadel Properties, Inc., 86 B.R. 275, 276 (Bankr. M.D. Fla. 1988) (holding that "the terms of the prepetition stipulation are binding upon the parties and that sufficient cause exists to lift the stay pursuant to section 362(d)(1)").

6. The *Club Tower* court thought that an agreement for relief from stay was merely the waiver of a "single benefit" of the bankruptcy process and allowed the debtor to retain "core rights" like the entitlement to a discharge, to assume or reject executory contracts, and to pursue preferences and fraudulent conveyances. 138 B.R. at 311.

provisions on which to rely. The courts also relied on the finding that the cases were filed in "bad faith" and should be dismissed regardless of any waiver.[7]

The majority of recent cases take a middle ground. These cases hold that the waiver is neither enforceable per se nor unenforceable. The courts start from the premise that a contractual waiver is a primary factor in determining whether relief from stay may be granted but go on to determine whether other grounds, such as bad faith or lack of possibility of reorganization, justify relief:

> [T]he waiver is a primary element to be considered in determining if cause exists for relief from the automatic stay under §362(d)(1) . . . . The burden is on the opposing parties to demonstrate that it should not be enforced . . . The court will consider other factors, such as the benefit which the debtor received for the workout agreement as a whole; the extent to which the creditor waived rights or would be otherwise prejudiced if the waiver is not enforced; the effect of the enforcement on other creditors; and, of course, whether there appears to be a likelihood of a successful reorganization.[8]

In *In re Pease*,[9] an example of the third group of cases, it was determined that a pre-petition waiver of the benefits of the stay is unenforceable per se for several reasons. First, the pre-petition debtor is an entity separate and distinct from the debtor in possession without fiduciary duties to creditors and therefore lacks the capacity to act on behalf of the debtor in possession.[10] As a result, the debtor cannot bind the estate. Second, enforcement of the waiver would run afoul of section 363(l) of the Bankruptcy Code, which allows the debtor to use property of the estate despite a contractual provision that terminates or limits the debtor's rights if the debtor is insolvent or petitions for bankruptcy relief.[11] Third, enforcement of the waiver would allow the single creditor and the debtor to opt out of the "collective" remedy of bankruptcy to the detriment of the debtor's other creditors.[12]

Thus, while there has been some movement toward allowing waivers of bankruptcy privileges, considerable opposition to enforcing such waivers still

---

7. For example, in *In re Club Tower*, the court made an alternative finding that, since the debtor had only a single asset, no employees, and only a few "de minimis" unsecured claims and had enjoyed the benefits of a pre-petition forbearance agreement, the movant was also entitled to relief because the debtor's case was filed in bad faith. *Id.* In *In re Citadel Properties*, the debtor had unsuccessfully sought pre-petition refinancing, had only one asset, had no employees, and sought bankruptcy relief one hour before a scheduled foreclosure sale. 86 B.R. at 276.

8. *In re* Powers, 170 B.R. 480, 484 (Bankr. D. Mass. 1994); *see also In re* Jenkins Court Assocs., L P., 181 B.R. 33 (Bankr. E.D. Pa. 1995); *In re* Darrell Creek Assocs., L.P., 187 B.R. 998 (Bankr. D.S.C. 1995) (citing *Powers* with approval).

9. 195 B.R. 431 (Bankr. D. Neb. 1996); *see also In re* Sky Group Int'l, Inc., 108 B.R. 86 (Bankr. W.D. Pa. 1989).

10. *In re Pease*, 195 B.R. at 433.

11. *Id*. at 434.

12. *Id*.

remains.

B. The Mythology of the Present Case Law

The present law holding that waivers of bankruptcy privileges are not enforceable or are only "factors" to consider use various supporting arguments. Upon careful analysis, each of these arguments is myth.

1. Myth No. 1: Waivers of Bankruptcy Privileges Violate the Constitution.—A number of courts have held that waivers of bankruptcy privileges, usually the privilege of filing bankruptcy but sometimes other bankruptcy privileges, violate a constitutional right to file bankruptcy.[13]

This is the most flagrantly false of the myths. The Constitution states that "Congress shall have the Power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[14] Not only is there no constitutional right to file bankruptcy, but Congress need not even create a bankruptcy law. In fact, there was (with three short unsuccessful exceptions) no bankruptcy law for more than the first 100 years of our history.[15] Thus, any "right" to file bankruptcy is statutory, not constitutional.

At least one case related to this issue leaned in a more sensible direction than those cases espousing the existence of a constitutional right to file bankruptcy. *United States v. Royal Business Funds Corp*.[16] recognized that the privilege of filing bankruptcy has limits. While the case stated that it did not intend to change the rule that a person may not waive the ability to file a bankruptcy case, it held that a debtor may, in connection with a federal receivership, enter into a stipulation that effectively limits the debtor's ability to file a bankruptcy case.[17] The case provided apparent recognition that filing bankruptcy is not a constitutional right. Perhaps this suggests movement in a direction more in keeping with the legal realities.

2. Myth No. 2: Waivers of Bankruptcy Privileges Violate Provisions of the Bankruptcy Code.—

a. Ipso facto clauses and the like.—The courts also wrestle with specific provisions of the Bankruptcy Code in analyzing bankruptcy privilege waivers. For instance, sections 541(c), 363(l), and 365(e) essentially say that a property interest becomes part of the debtor's estate which the debtor may use (or, if the property interest is an executory contract or lease, may assume) notwithstanding a contractual provision that purports to impair the debtor's rights in such property

---

13. Merritt v. Mt. Forest Fur Farms, 103 F.2d 69 (6th Cir. 1939); *In re* Pine Tree Feed Co., 112 F. Supp. 124 (D. Me. 1953); *In re Citadel Properties, Inc.*, 86 B.R. at 276 (waiver of the ability to file bankruptcy violates the Constitution but not waiver of the automatic stay); *In re* Adana Mortgage Bankers, Inc., 12 B.R. 989 (Bankr. N.D. Ga. 1980).

14. U.S. CONST. art. I, § 8.

15. *See generally* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 60-85 (1935); 1 JAMES WM. MOORE ET AL., COLLIER ON BANKRUPTCY ¶ 0.04 (14th ed. 1974).

16. 724 F.2d 12 (2d Cir. 1983).

17. *Id*. at 15-16.

if it files bankruptcy or becomes insolvent.[18] Some courts, like the court in *Pease*, have expressed concern that the enforcement of waivers of bankruptcy privileges may run afoul of these statutory provisions.[19]

While these provisions are of some relevance to the waiver issue, none of them can reasonably be interpreted to prohibit waivers of bankruptcy privileges in any significant number of circumstances. One clear fact is that no statutory provision exists that gives anyone a "right" to file bankruptcy.[20] Certain sorts of entities, like estates and trusts, cannot file at all.[21] Moreover, the courts have the ability to abstain from hearing any case.[22] Therefore, there is no statutory basis for claiming an absolute right to file bankruptcy.

It is also important not to get swept away with the provisions briefly described above that restrict the enforceability of ipso facto clauses, since these provisions are narrow in scope. Section 541(c) states that a property interest becomes part of the debtor's estate notwithstanding a contractual provision that purports to impair the debtor's property rights if it files bankruptcy or becomes insolvent.[23] All this does is cause property to become property of the estate notwithstanding a clause purporting to state otherwise. Section 541(c) does not affect waivers of bankruptcy privileges, since these waivers do not terminate or change the debtor's state law property rights upon filing. It does not prevent waiver of the privilege of a discharge or the automatic stay or the like. Property of the debtor is property of the estate whether or not the stay applies to it. Of course, it may not be property of the estate for long, but property may quickly cease to be property of the estate for many reasons, not just because of a waiver of the stay. If a stay waiver is given effect, the property remains property of the estate until it is transferred, and the debtor will still have all rights afforded under state law to reinstate its defaulted obligation, to contest the creditor's right to foreclose, and to limit the estate's monetary obligation following foreclosure.

Section 363(l), which provides that the debtor may use, sell, or lease property of the estate notwithstanding an ipso facto clause,[24] also does not affect waivers of bankruptcy privileges, because such waivers do not limit the estate's right to use, sell or lease property. So long as the property in question remains property of the estate, the estate is free to use, sell or lease it.

One could argue that the ability to use property is ephemeral if stay waivers are enforced. If such waivers are enforced, the ability to use property is a fleeting privilege that quickly vanishes upon foreclosure and sale. There are several responses to this argument. It is neither required nor intended that a debtor have a right to use property under section 363 for some specified period

---

18. 11 U.S.C. §§ 541(c), 363(l) & 365(e) (1994).

19. *In re Pease*, 195 B.R. at 434.

20. *See* Edward S. Adams & James L. Baillie, *A Privatization Solution to the Legitimacy of Prepetition Waivers of the Automatic Stay*, 38 ARIZ. L. REV. 1, 26-27 (1996).

21. *See* 11 U.S.C. §§ 101(9) & (41), 109(a) (1994).

22. *Id.* § 305.

23. *Id.* § 541(c).

24. *Id.* § 363(1).

of time. The estate's ability to use property may be terminated due to failure to comply with government regulations, or failure to maintain insurance or because a right to relief from stay otherwise exists, as in a case where the debtor voluntarily agreed to borrow more than the collateral for the debt is worth. If a debtor does any of these things, the result is effectively the same as a stay waiver. No one suggests that these events violate section 363. Note as well that even if one accepts the argument that stay waivers violate section 363(l), this does not impact other bankruptcy privilege waivers, like waiver of the discharge or of the ability to file bankruptcy itself.

Section 365(e) provides that an executory contract or lease may not be terminated or have any of its provisions terminated or modified as a result of a clause triggered on the filing of bankruptcy.[25] This provision applies only to executory contracts and leases.[26] Most of the contracts in which one finds waivers of privileges in bankruptcy are loan agreements that are neither executory contracts nor leases. Thus, to the extent that this provision does have an impact on waivers of bankruptcy privileges, it is pertinent to only a very small number of such cases. Waiver of a bankruptcy privilege, like the stay or discharge or, for that matter, the ability to file, does not terminate an executory contract or lease and does not terminate or modify any provision of such a contract or lease. Even in the case of a stay waiver, such a waiver does not terminate the contract or modify its provisions. A stay waiver simply allows the nondebtor party to proceed to terminate the contract under otherwise applicable law, if there are grounds for termination. As a result, even if such a clause were found in an executory contract or lease, the clause would not violate section 365(e) since it would not itself terminate or modify the contract or lease or any provision of the contract or lease.

We think that some arguments can be drawn from the statute to support enforcement of bankruptcy privilege waivers. Congress has said that certain contract provisions—such as those that might reduce a debtor's state law property rights upon filing—are not enforceable in a bankruptcy.[27] Congress has *not* said that stay or other waivers are unenforceable. That Congress has regulated certain types of contractual provisions and has ignored waivers of bankruptcy privileges weighs against a rule prohibiting enforcement of waivers.

Congress has also shown that it does not regard the stay as inviolate. Section 362(c)(8) expressly says that the stay will *not* prevent the Secretary of Housing and Urban Development from enforcing an insured mortgage against 5 or more dwelling units.[28] Sections 365(c)(12) & (13) state that, ninety days after the case is filed, the stay will no longer prevent the Secretary of Commerce or Transportation from enforcing a ship mortgage under the Merchant Marine Act.[29]

---

25. *Id.* § 365(e). Note that there is a similar provision in § 365(f) that allows assignment of an executory contract notwithstanding an ipso facto clause. *Id.* § 365(f).

26. *Id.* § 365(e).

27. *See, e.g.*, *id.* §§ 541(c), 363(l) & 365(e) (previously discussed).

28. *Id.* § 362(c)(8).

29. *Id.* § 365(c)(12) & (13).

Further, recently enacted section 362(d)(3) says that the stay against "single asset real estate" terminates ninety days after the case is filed, unless the debtor has filed a plan with a reasonable possibility of confirmation or has begun payments to assure its lender a fair return on the value of its collateral.[30] These exceptions, among others, show that Congress has recognized that the stay may terminate in numerous circumstances without the need for any showing of cause. Thus, Congress has recognized that the privileges of bankruptcy are not inviolate and are subject to various limitations. One can argue that freely negotiated waivers of bankruptcy privileges should be one of these limitations.

Thus, the relevant statutory provisions do not typically apply to the sorts of situations in which one finds waivers of privileges in bankruptcy cases and are generally not an impediment to waiver of bankruptcy privileges. In addition, the actions of Congress in certain areas can be interpreted as weighing against prohibitions on waivers of bankruptcy privileges.

b. The automatic stay provisions.—It has been argued, at least in the context of the automatic stay, that the plain language of the Bankruptcy Code prohibits waivers of bankruptcy privileges. Professor Daniel Bogart has urged, based in part on the kind of "plain meaning" statutory analysis proposed by one of the present authors,[31] that the plain meaning of section 362 prohibits contractual stay waivers.[32]

Bogart first notes that section 362(a) makes the stay applicable to all entities.[33] There are no exceptions of significance to waivers of the stay.[34] Next, Bogart shows that the only relief from a stay provision that might be a basis for enforcement of waivers of the stay is section 362(d)(1).[35] This subsection states that relief from the stay may be granted for "cause."[36] The issue then becomes, according to Bogart, whether a waiver of the stay can constitute "cause" under section 362(d)(1).[37]

---

30. *Id.* § 362(d)(3).

31. *See* Thomas G. Kelch, *An Apology for Plain Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289 (1994).

32. Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 UCLA L. REV. 1117 (1996).

33. *Id*. at 1150.

34. *Id*.

35. *Id*. at 1150-53.

36. 11 U.S.C. § 362(d)(1) (1994). The entire argument here is based on the idea that enforcement of any contractual waiver of the stay must be analyzed simply as a ground for relief from stay; that is, stay waivers cannot be self executing. This is supported by the case law. *See* Baxter, *supra* note 2, at 591; Adams & Baillie, *supra* note 20, at 10; *In re* Psychotherapy & Counseling Ctr., Inc., 195 B.R. 522, 534 (Bankr. D.C. 1996); *In re Powers*, 170 B.R. at 483; Farm Credit of Central Florida, ACA v. Polk, 160 B.R. 870, 873-74 (M.D. Fla. 1993); *In re Sky Group Int'l, Inc.*, 108 B.R. at 88. However, the thesis of this Article is to the contrary. It is our view that such waivers should be enforceable apart from the provisions of section 362(d). In any event, for the purpose of this discussion, we will assume the non-self executing nature of stay waivers.

37. Bogart, *supra* note 32, at 1150-53.

In plain meaning analysis, the issues are what are the meanings of "waiver" and "cause," and can "waiver" be something that falls within the meaning of "cause." In answering these questions, Bogart finds that the common legal meaning of "waiver" requires a consensual act.[38] Bogart then argues that "cause" does not include consensual or voluntary acts. One foundation for this argument is that the only type of "cause" actually described in the Bankruptcy Code, the lack of adequate protection, is not characterized by voluntary acts.[39] Moreover, Bogart contends that under section 1104 of the Bankruptcy Code, another provision that uses the term "cause," the term is not intended to apply to consensual pre-petition actions.[40] Further, the term "cause" and the way it has been interpreted imply that an independent "inquiry" into cause is required by the Bankruptcy Code.[41] This too suggests that cause does not include consensual arrangements. Based on these premises, along with reference to the legal and common definitions of cause, Bogart concludes that "cause" as used in section 362(d)(1) is meant to refer to nonconsensual circumstances, not to agreements. Waiver is consensual; cause requires something nonconsensual. Therefore, "waiver" cannot be "cause."[42]

While Bogart has done an excellent analysis of the language of section 362, we disagree in part with this analysis. While it is true that "waiver" is a consensual act, there is nothing in the Bankruptcy Code or, for that matter, in accepted legal or lay use of the term "cause" that suggests that cause cannot be consensual. In fact, the legal definition of cause quoted in a footnote by Bogart makes clear that the voluntary or consensual nature of a circumstance has nothing to do with whether this circumstance constitutes "cause." "Cause" is defined as:

> Each separate antecedent of an event. Something that precedes and brings about an effect or result. A reason for an action or condition. A ground for a legal action. An agent that brings something about. That which in some manner is accountable for a condition that brings about an event or that produces a cause for the resultant action or state.[43]

Nothing in this definition suggests that a consensual act cannot be a "cause." All that is necessary to be a cause is to be an effective antecedent to an event; a voluntary action can be an effective antecedent to an event. Further, the legal and lay dictionary definitions of cause make clear that voluntary acts can be causes when they state that a cause can be "an agent that brings something about."[44] An agent bringing something about requires a volitional action.

It is also not so clear as Bogart contends that a lack of adequate protection cannot be a voluntary act. If a debtor fails to insure and properly care for

---

38. *Id.* at 1151-52.
39. *Id.* at 1152-54.
40. *Id.* at 1153-54.
41. *Id.*
42. *Id.* at 1152-53.
43. BLACK'S LAW DICTIONARY 221 (6th ed. 1990).
44. WEBSTER'S NINTH COLLEGIATE DICTIONARY 217 (1989).

property either pre- or post-petition, this failure may constitute a lack of adequate protection. In what sense is this not consensual or voluntary? Further, agreements for relief from stay are frequently made post petition. Often, the court makes no "independent inquiry" into the propriety of such agreements. The fact is that absent objection, the agreement itself is considered cause for relief from stay. Note also that the Bankruptcy Code provides no basis for distinguishing pre-petition from post-petition agreements relating to the stay. "Cause" is not bifurcated into pre- and post-filing concepts. Since it is commonly accepted that voluntary post-petition agreements can constitute grounds for relief from stay and that there is no statutory basis for distinguishing pre- and post-petition agreements of this kind, pre-petition waiver agreements should, it seems, be given at least the same effect as post-petition agreements.

Nothing about the term cause, either as used in the Bankruptcy Code, in the law generally or in common usage, suggests that a cause may not be a voluntary waiver of a privilege.[45] Thus, nothing in the Bankruptcy Code precludes grounding relief from stay on a pre-petition agreement to waive the privilege of the stay.

3. Myth No. 3: There Are Strong Public Policy Reasons Against Enforcement of Waivers of Bankruptcy Privileges.—The case law asserting that bankruptcy privileges may not be waived or may be waived only in extraordinary circumstances tends to rely on the idea that such clauses violate "public policy." Many things have been identified as public policies relevant to this issue, but we will concentrate only on what are the most prevalent and most plausible.

It is sometimes stated that the policy of promoting a "fresh start" causes waivers of bankruptcy privileges to be unenforceable.[46] The policy of a "fresh start" is, however, meant to apply only to individuals, not juridical entities. The force of this policy is nonexistent in the corporate and partnership worlds.[47] Therefore, this policy is of limited application and is not of consequence in most cases where one sees waivers of bankruptcy privileges.

Also a policy favoring reorganizations exists that militates against waivers.[48] This policy would apply to juridical entities. It would not apply when an entity files a liquidation case. Note that one can see this policy as cutting in more than

---

45. Note that probably the most common criticism of plain meaning analysis is that there is no such thing as "plain meaning" and reasonable people can always disagree about the meaning of words. It will now be argued that, by criticizing Bogart's position, we have proved this point, contrary to Kelch's "Plain Meaning" article. Kelch, *supra* note 31. While the sting of this criticism is felt, we believe that there is clear plain meaning in the terms involved in this argument. We believe that Bogart's analysis reads too much into the Bankruptcy Code provisions and the definitions of "cause" he uses. In any event, we leave this issue for the reader to decide.

46. *In re* Adana Mortgage Bankers, Inc., 12 B.R. 989, 1009 (Bankr. N.D. Ga. 1980); *see also* Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory, Practice and Law*, 82 CORNELL L. REV. 301 (1997); Adams & Baillie, *supra* note 20.

47. Tracht, *supra* note 46, at 307.

48. *See* Bruce White, *The Enforceability of Pre-Petition Waivers of the Automatic Stay*, AM. BANKR. INST. J., Jan. 15, 1996, at 26.

one direction. While refusing to enforce waivers may promote reorganizations in the context of bankruptcy cases, it may discourage ultimate rehabilitation of many entities by discouraging workouts, which are a cheaper and probably more effective means of rehabilitation. Waivers may be an effective and necessary part of many rehabilitation efforts. In any event, as will be shown, even where the promotion of reorganization policy applies, there are countervailing policies.

A policy favoring fair and equal distribution of assets to creditors is sometimes said to preclude waivers of bankruptcy privileges.[49] While a waiver of the ability to file bankruptcy may cause problems of fair and equal distribution of assets to creditors of equal priority (even this is questionable since creditors could file an involuntary case regardless of any waiver of privileges by the debtor), this is not the case regarding waiver of the stay or of a discharge. In either of these latter cases, the assets of the debtor (including any equity in property to be sold by a foreclosing creditor not subject to the stay) are still within the control of the bankruptcy court and are distributed according to the priority scheme of section 507[50]—presumably equally and fairly.

Even if one accepts these policies as weighing against enforcement of waivers, there are countervailing and opposing policies. For example, one policy oft spoken of favors workout agreements where these waivers frequently occur.[51] Another idea is that the property and other rights of parties in bankruptcy are generally determined with reference to state law.[52] As a result, one can argue that contractual waivers, like other property attributes of the estate, should be analyzed simply as a matter of state law. Therefore, if a waiver is enforceable under state contract law, it should be enforced in bankruptcy. In a similar vein, there is the longstanding policy in Anglo-American jurisprudence of freedom of contract that is promoted by enforcing waivers.[53] Economic efficiency policies also support enforcement of waivers at least in certain circumstances.[54]

The point here is that there are policies that weigh on each side of the issue of whether waivers of bankruptcy privileges should be enforced. The Supreme Court has stated that public policy concerns cannot be used to invalidate

---

49. *In re* Sky Group Int'l, Inc., 108 B.R. 86, 88 (Bankr. W.D. Pa. 1989); *see* Rafeal Efrat, *The Case for Limited Enforceability of a Pre-Petition Waiver of the Automatic Stay*, 32 SAN DIEGO L. REV. 1133 (1995); William Basin, *Why Courts Should Refuse to Enforce Pre-Petition Agreements that Waive Bankruptcy's Automatic Stay Provision*, 28 IND. L. REV. 1 (1994). Even this is questionable since creditors could file an involuntary case regardless of any waiver of privileges by the debtor. These include any equity in property to be sold by a foreclosing creditor not subject to the stay.

50. 11 U.S.C. § 507 (1994).

51. *See* Basin, *supra* note 49, at 6; Adams & Baillie, *supra* note 20, at 11.

52. Butner v. United States, 440 U.S. 48, 54-55 (1979); Taylor v. Voss, 271 U.S. 176 (1926); Connolly v. Baum, 22 F.3d 1014, 1017 (10th Cir. 1994); Boyd v. United States, 11 F.3d 59, 60-61 (5th Cir.), *cert. denied*, Boyd v. Galsby, 511 U.S. 1107 (1994); *see also* THOMAS G. KELCH & MICHAEL K. SLATTERY, REAL PROPERTY ISSUES IN BANKRUPTCY § 2.02[2] (1997).

53. *See* Adams & Baillie, *supra* note 20, at 26-27.

54. *See* Tracht, *supra* note 46.

contractual provisions, unless there are policies in existing laws and precedents that demonstrate a "well defined and dominant policy" against contract enforcement.[55] Given the opposing policies and conflicting precedent, as well as the Supreme Court's restrictive stand on when private agreements can be found unenforceable due to public policy concerns, it does not seem that there is sufficient policy horsepower to overcome contractual waivers on policy grounds.[56]

4. Myth No. 4: Waivers of Bankruptcy Privileges are Tantamount to Waiving the Ability to File Bankruptcy.—The courts generally start from the premise that a debtor's agreement not to file bankruptcy should not be enforced. A number of reported cases cite *Fallick v. Kehr*[57] for this rule. Courts then argue that, if waivers are enforced, every contract will be drafted to waive a debtor's rights in bankruptcy. *In re Adana Mortgage Bankers, Inc.*,[58] an early Bankruptcy Code case, stated:

> If an advance waiver of the right to file a bankruptcy case were enforceable, the availability of Bankruptcy Code benefits could be nullified in most commercial cases merely by the lender's inclusion of a waiver clause in the standard form of contract it requires of the borrower. The lending community, including federal agencies, through the provisions of their forms of credit instruments, would determine the extent, if any, of access to the bankruptcy courts rather than the statute itself.[59]

Judge Norton's opinion in *Adana* did not mince words on this question. The debtor "had an inviolate right of access to the courts of bankruptcy" and the consequences of the waiver of that right "are almost unthinkable."[60] Such a waiver, "even a bargained for and knowledgeable one," is void.[61]

In re Madison,[62] another recent case citing *Fallick*, accepted the same reasoning:

> Enforcement of even an agreement which only temporarily waives such rights would appear sufficient to us to undermine the Congressionally-expressed public policy underpinning the Bankruptcy Code . . . . As a matter of policy, it has been pointed out that, if agreements prohibiting

---

55. United Paperworkers v. Misco, 484 U.S. 29, 43-44 (1987).

56. The Supreme Court precedent on this issue, as well as the Court's view of the significance of public policy arguments, will be discussed in detail in Part III.B.2, *infra*. It is sufficient now to note that there are difficulties with the policy arguments advanced against waivers and that there are substantial countervailing policies.

57. 369 F.2d 899 (2d Cir. 1966).

58. 12 B.R. 989 (Bankr. N.D. Ga. 1980).

59. *Id.* at 1009.

60. *Id*.

61. *Id*.

62. 184 B.R. 686 (Bankr. E.D. Pa. 1985).

> bankruptcies were given force, the Code could be nullified in the vast majority of debts arising out of contracts . . . . Even bargained-for and knowing waivers of the right to seek protection in bankruptcy must be deemed void.[63]

This is a particularly strong statement considering the equities of the *Madison* case. The creditor was seeking to enforce an agreement in the debtor's fourth chapter 13 case that if an anticipated fifth filing were dismissed—an event that came to pass—the debtor would not file a sixth case.

If the idea that a debtor cannot waive the right to file bankruptcy is accepted, it is thought to be a close question whether agreements for relief from stay have the same effect. For that reason, some courts have held that stay waivers draw particular scrutiny in single asset cases. If enforced, it is said the practical consequences are the same as a prohibition against filing. As the court in *In re Jenkins Court Associates*[64] explained:

> Technically speaking, a waiver of the protection of the automatic stay can be distinguished from a blanket prohibition against a bankruptcy filing. In this context, however, it may be a distinction without a meaningful difference. In single asset cases, public policy behind the stay may frequently outweigh policy which favors encouraging out of court restructuring and settlements.[65]

But other courts have disagreed:

> [D]ebtor still retains the benefits of the automatic stay as to the other creditors, as well as all the other 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 conveyances. Debtor still retains the core rights under the Bankruptcy Code and has the ability to make a "fresh start." Therefore, enforcing Debtor's agreement does not violate the public policy concerns that agreements which prohibit a borrower from filing for bankruptcy violate.[66]

This seems the better reasoned view. Bankruptcy law provides a number of privileges. Waiver of any one of these privileges does not amount to waiver of all of them. While it is true that some privileges are of more value to some debtors than others, this does not affect the existence and general value of all of the privileges.

As is shown in the development of the main thesis of this Article, whether

---

63. *Id*. at 690-91.

64. 181 B.R. 33 (Bankr. E.D. Pa. 1995).

65. *Id.* at 36.

66. *In re* Club Tower, L.P., 138 B.R. 307, 311-12 (Bankr. W.D. Ga. 1991); *accord In re* Atrium High Point Ltd. Partnership, 189 B.R. 599, 607 (Bankr. N.C. 1995).

a stay waiver is tantamount to waiving the right to file bankruptcy is irrelevant since, when properly analyzed, waivers of the ability to file bankruptcy should be enforceable.

5. Myth No. 5: Waivers of Bankruptcy Privileges Violate the Rights of Third Parties.—It is not infrequently argued that waivers of bankruptcy privileges somehow impinge upon the rights of third parties.[67] This argument is generally directed at waivers of the stay. Underlying this argument is the idea that somehow creditors that are not parties to a waiver agreement have some property or other interest in the debtor's ability to file bankruptcy.

For instance, *In re Pease*[68] holds that stay waivers are per se unenforceable because, among other reasons, enforcement of the waiver would allow a single creditor and the debtor to opt out of the "collective" remedy of bankruptcy to the detriment of the debtor's other creditors. The court in *In re Sky Group International, Inc.*[69] expressed the same concerns:

> The contention that this "waiver" is enforceable and self-executing is without merit . . . .
>
> . . . .
>
> The legislative history makes clear that the automatic stay has the dual purpose of protecting the *debtor and all creditors* alike . . . .
>
> . . . .
>
> 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.[70]

Several appellate decisions have said in dicta that the stay cannot be "waived" because it is intended to benefit other creditors as well as the debtor, and the debtor is not free to waive the rights of these creditors. Based on this kind of analysis of waiver of the stay, some courts have held that a stay waiver should bind the debtor but should not prevent the debtor's third party creditors from contesting its enforcement: "These agreements do not oust this Court's

---

67. Commerzanstalt v. Telewide Sys., Inc., 790 F.2d 206, 207 (2d Cir. 1986); Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1991); *In re* Pease, 195 B.R. 431 (Bankr. D. Neb. 1996); *In re* Sky Group Int'l, Inc., 108 B.R. 86 (Bankr. W.D. Pa. 1989).

68. *In re Pease*, 195 B.R. at 431.

69. 108 B.R. 86 (Bankr. W.D. Pa. 1989).

70. *Id.* at 88-89 (emphasis in original).

jurisdiction to hear objections to stay relief filed by other parties in interest. It simply means that this Court will give no weight to a Debtor's objection as this conflicts with and is in derogation of the previous agreement."[71]

At first blush, the argument that stay waivers violate third party rights has some appeal. It breaks down on closer analysis. The argument incorrectly assumes that before the debtor files bankruptcy, all of its creditors have some legally protected expectation or property right in the potential future benefits of the debtor's automatic stay. As a practical matter, we think the argument grossly exaggerates creditors' actual expectations. It is very unlikely that creditors actually rely on the potential benefit of the stay when they extend credit. A well-counseled unsecured creditor's expectation is that an encumbered asset can be foreclosed out and that the foreclosing lender will acquire the asset by a credit bid. Junior secured creditors further assume that their interests can be foreclosed out. They are also able to, and routinely do, research public records before they lend and read senior encumbrances to look for stay waivers.

The argument also exaggerates the impairment of other creditors' legal positions. Suppose that a stay waiver is enforced. Other creditors' substantive rights under state law are not changed by this waiver. If the unsecured creditor wants to protect its claim to any equity in a property being foreclosed upon, it can pay off the lender and subrogate to the lender's claim. It can also protect its interest by advancing funds to reinstate the debt or by paying off the debt and foreclosing itself. Other creditors can also exercise their own rights under the bankruptcy law. If the property really has equity and the junior secured creditors are cash poor, they can file their own cases and might be able to stay the senior's foreclosure.

The legislative history of section 362 does support the idea that the stay protects not only the debtor but also the debtor's creditors. But when Congress said this, what it had in mind was assuring a ratable distribution among the debtor's unsecured creditors:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.
>
> . . . .
>
> The automatic stay also provides creditor 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 their claims in preference to and to the detriment of other creditors . . . .[72]

The enforcement of pre-bankruptcy agreements to allow secured creditors to exercise their contractual remedies does not run afoul of this policy. Secured

---

71. *In re* Cheeks, 167 B.R. 817, 819 (Bankr. D. S.C. 1994); *accord In re Atrium High Point Ltd. Partnership*, 189 B.R. at 607.

72. H.R. REP. NO. 95-595, 95th Cong. 1st Sess., at 340 (1977).

creditors have a contractual right, which is honored in the bankruptcy process, to be paid in full from the proceeds of their collateral before unsecured creditors get a penny. The above-quoted policy is meant to prevent a race to the courthouse by unsecured creditors resulting in piecemeal dismemberment of the unencumbered portion of the estate.

The current case law transports this legislative history into a completely different context to suggest that the stay should protect some sort of residual right of junior secured and unsecured creditors in a debtor's encumbered assets. Nothing in the legislative history supports that interpretation.

When looked at closely, it is bizarre to suggest that creditors have some proprietary or other interest in a debtor's ability to file a bankruptcy petition and get the benefit of the automatic stay. A debtor could obviously refuse to file for bankruptcy relief even if it was in the debtor's best interest to do so, and a creditor does not and should not have anything to say about this. Moreover, Congress specifically provided a right to file an involuntary petition to provide some measure of protection for creditors in a situation where a debtor's assets may be inequitably dismembered.[73] It is, then, an unwarranted claim that creditors have an interest in a debtor's ability to file bankruptcy or any of the privileges attendant thereto.

6. Myth No. 6: Waivers Give Unconscionable Advantage to Creditors.— Creditor leverage is a real concern for the courts. The hidden premise in many current cases is that creditors have superior bargaining power and should not be permitted to use it to their advantage against debtors. From this assumption, the courts reason that, if waivers of bankruptcy privileges are enforced, they will appear in every consumer credit and loan document, and no one will receive the benefits of bankruptcy. It has been said, for example: "To rule otherwise would encourage lenders to adopt standardized waiver terms in loan agreements. This would substantially undercut the relief Congress intended to provide debtors under the Bankruptcy Code."[74]

Why is this assumption made? The assumption is not supported by evidence, anecdotal or otherwise. Given the expanded lending markets, new types of lending programs, and greater competition in lending that have arisen in the past twenty years, is it not at least as likely that enforceable waivers of bankruptcy privileges would be mere bargaining chips in debtor-lender negotiations?

The traditional thinking is premised on a notion that lenders have so great a bargaining advantage that they can dictate all of the important terms of a loan transaction. This assumption is likely not true for commercial lending. Generally, parties to commercial lending transactions truly bargain over terms of loan agreements. The claimed lender bargaining advantage may also not be true for residential mortgage and other types of lending. In the case of residential mortgage lending, the terms of mortgage loans are typically set out in uniform documents prepared by secondary market loan buyers such as the Federal National Mortgage Association, who, for policy reasons, might not push for stay

---

73. 11 U.S.C § 303 (1994).

74. *In re* Pease, 195 B.R. 431, 435 (Bankr. D. Neb. 1996).

waivers. Mortgage lenders might simply require the waiver of less credit worthy buyers or demand a higher interest rate or more loan points for loans without the waiver. Federal legislation designed to assure access to consumer credit, such as the Community Reinvestment Act[75] and the Fair Housing Act,[76] doubtlessly has improved borrowers' relative leverage. Further, the growth of non-bank financial institutions that will lend to less credit worthy borrowers reduces the bargaining strength of lenders. However, in the final analysis, no one really knows whether waiver clauses would become the norm. The premise of the current case law that such clauses would become universal is just a guess by the courts.

On the other side of the equation are a number of possible benefits of allowing waivers of bankruptcy privileges. Debtors who choose to take the risk of waiving their rights may be able to obtain better credit terms, including lower points and reduced interest rates, in return for agreeing to waive privileges in the event of bankruptcy. These results may very well occur in both business and consumer markets. Thus, the credit markets may simply absorb the reality of enforceable waivers as a means of offering new and economically beneficial loan programs. It should also be noted that there are mechanisms in contract law to protect against terms that result from unequal bargaining power. Where there is an imposition due to unequal bargaining power, the law pertaining to unconscionability and adhesion contracts can protect borrowers.[77]

In short, the assumption that there will be unconscionable results from permitting waivers of bankruptcy privileges is just that—an assumption. It is equally arguable that such results will not occur, and, in fact, that there will be positive results from permitting enforcement of waivers of bankruptcy privileges for both consumers and business debtors as a result of the creation of new products in the credit markets.

C. The Sources of the Mythology

The courts have historically been solicitous of borrowers' rights. We believe this attitude, which is reflected in the current bankruptcy case law on waivers, is a carry over from the depression. During the depression, the federal and state legislatures enacted new legislation to protect the rights of necessitous borrowers. The Frazier-Lemke Act amendments to the Bankruptcy Act[78] are an important example. As originally enacted, the Act enabled a defaulting farm mortgagor to stay foreclosure and retain possession for five years by payment of the judicially-determined fair rental value of the farm, then purchase the farm for its appraised value at the end of the stay period. The Supreme Court in *Louisville*

---

75. 12 U.S.C. §§ 2901-2907 (1994).

76. 42 U.S.C. §§ 3601-3631 (1994 & Supp. I 1995).

77. *See infra* Part IV.C.

78. The Frazier-Lemke Act, ch. 869, 48 Stat. 1289 (1934) (formerly codified at 11 U.S.C. § 203(s)) (repealed 1949) (adding Subsection (s) to section 75 of the Bankruptcy Act); *see* WILLIAM L. NOSTON, JR., NORTON BANKR. L. & PROC. § 97:7 (2d ed. 1983 & Supp. 1998).

Joint Stock Bank v. Radford[79] held that the Act violated the mortgagee's Fifth Amendment protection against appropriation of property rights without just compensation.[80] However, *Wright v. Vinton Branch of the Mountain Trust Bank*,[81] the Court upheld the Act after it was amended on August 28, 1935, to eliminate the mortgagor's right to redeem for appraised value, to reduce the duration of the distressed mortgagor's stay to three years, and to authorize the court to terminate the stay on certain conditions.[82]

Some states adopted similar reforms. *Home Building & Loan Ass'n v. Blaisdell*[83] dealt with a Minnesota debtor relief statute that authorized courts to extend a mortgagor's redemption period for so long as the court determined "equitable and just" and authorized the mortgagor to retain possession in exchange for payment of a judicially-determined fair rental value. An institutional lender alleged that the statute ran afoul of the constitutional prohibition of state laws that impair contractual obligations. The Supreme Court upheld the statute as a reasonable legislative response to borrowers facing desperate economic conditions:

> An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota can not be regarded as a subterfuge or as lacking in adequate basis. . . . As the Supreme Court of Minnesota said, the economic emergency which threatens "the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.[84]

States also enacted limitations on deficiency judgments following mortgage foreclosures.[85] During the depression, the California legislature enacted a comprehensive set of rules to limit the personal liability of a real property mortgagor.[86] The California appellate courts consistently refused to enforce

---

79. 295 U.S. 555 (1935).

80. *Id.* at 602.

81. 300 U.S. 440 (1936).

82. *Id.* at 460-61.

83. 290 U.S. 398 (1933).

84. *Id*. at 444-45.

85. *See Radford*, 295 U.S. at 594 n.24 (identifying legislation then-recently enacted in several states).

86. *See* CAL. CIV. PRO. §§ 580(a), (b) & (d), 726 (West 1998). Section 726 required that a note secured by real property be enforced by foreclosure, section 580(d) and (b) prevented, respectively, a money judgment for the unpaid balance of a real-property secured note following non-judicial foreclosure of real property collateral and following any foreclosure of a purchase money loan, and section 580(a) required that an action for a deficiency judgment be brought within three months of foreclosure. Sections 726, 580(a), and (b) were enacted in 1933. Section 580(d) was enacted in 1940.

advance waivers of these protections.[87] *California Bank v. Stimson*[88] provides a good example of the judicial mind set of the time:

> We are persuaded that section 580a of the Code of Civil Procedure was enacted by the Legislature for the purpose of relieving mortgage and trust deed debtors. That the debtor class in California constitutes a substantial portion of the state's population cannot be doubted. The code section with which we are here concerned, like other statutes, was adopted to promote the public welfare by shielding the debtor class from oppression. It must therefore be construed as declarative of a public policy of the state and cannot be waived by contract (*Winklemen v. Sides*, 31 Cal.App.2d 387, 409 [88 P.2d 147]; Civ. Code, §§ 3268, 3513). That the statute here in question is not a law intended for the benefit of the person immediately concerned and can by him be waived (Civ. Code, § 3513), but was enacted for a public reason and as a declaration of public policy is evidenced by the following statement of the Supreme Court in the case of *Hatch v. Security-First National Bank*, 19 Cal.2d 254, 259 [120 P.2d 869]:
>
> > The evil which led to the enactment of this legislation became pronounced during the recent period of economic depression when creditors were frequently able to bid in the debtor's real property at a nominal figure and also to hold the debtor personally liable for a large proportion of the original debt.
> >
> > . . . .
>
> The purpose and intendment of section 580a of the Code of Civil Procedure were thus set forth in *Reynolds v. Jensen*, 14 Cal.App.3d 558, 559 [58 P.2d 687]: "These enactments were a part of a legislative plan to lighten the burdens of trust deed debtors as evidenced by numerous changes made in the laws at the same session of the legislature."
>
> We are satisfied that section 580a of the Code of Civil Procedure is a law adopted for a public reason and comes within the purview of section 3513 of the Civil Code which provides that the provisions of such a law cannot be waived by a private agreement. Any other holding would manifestly result in a loss of much of the effectiveness of the statute. Indeed, if the debtor could be permitted to waive the provisions

---

87. *See* Winklemen v. Sides, 88 P.2d 147 (Cal. Ct. App. 1939); California Bank v. Stimson, 201 P.2d 39, 41 (Cal. Ct. App. 1949); Freedland v. Greco, 289 P.2d 463 (Cal. Ct. App. 1955); Valinda Builders, Inc. v. Bissner, 230 Cal. App. 2d 106, 112 (1964). Each of these courts refused to enforce purported waivers of the debtor's rights under the California Code of Civil Procedure. CAL. CIV. PRO. §§ 580(a), (b) & (d), 726 (West 1998).

88. 201 P.2d 39 (Cal. Ct. App. 1949).

of the statute, the effect of the section could be entirely nullified.[89]

This excerpt is also a good example of how a broadly-worded exception can eclipse the general rule. The line between statutory rights "intended for the benefit of the person immediately concerned" that can be waived and rights "enacted for a public reason" that cannot is far from clear.[90] At least the court was able to find some then-recent anecdotal support for its holding in the legislative history.[91]

We believe that the depression-era courts used the public policy wild card to show paternalism towards borrowers in a time of emergency. The perception was that borrowers lacked economic clout and needed protection from their lenders. At that time, this attitude was supported both by the actual economic conditions and by the actions of the state and federal legislatures. We think that a lot of the current judicial aversion to stay waivers is tied to this sort of thinking and the precedent of the time, but this attitude lacks support in current economic conditions or recent legislation.

With respect to stay waivers, the enforcement of such waivers does not violate any long-standing and deep-rooted principle of the bankruptcy law. Before the enactment of the Bankruptcy Reform Act of 1978, a bankruptcy filing did not trigger an automatic stay of lien foreclosures. Typically, the courts created stays through court orders. The Bankruptcy Act of 1898 provided a limited automatic stay of certain actions in "straight" (liquidation) bankruptcies. Section 11[92] and Rule of Bankruptcy Procedure 401 stayed the commencement or continuation of an action to prove or enforce unsecured, dischargeable debts. Section 814, which was part of Chapter XII (the Real Property Arrangement Chapter of the Bankruptcy Act) provided that:

> The court may, in addition to the relief provided by section 29 of this title and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits against a debtor and may, upon notice for cause shown, enjoin or stay until final decree any act or the commencement or construction of any proceeding to enforce any lien upon any property of a debtor.[93]

Stays under the Bankruptcy Act were not "automatic."

Recent legislation suggests that public policy has shifted away from borrower protection. The Bankruptcy Reform Act of 1994[94] is the best example. The Reform Act made several amendments to benefit creditors. Some of the more important amendments narrow the scope of a debtor's protections under the

---

89. *Id*. at 41.

90. *Id.*; *see also infra* Part III.B.1.

91. *California Bank*, 201 P.2d at 41.

92. 11 U.S.C. § 29 (repealed 1978).

93. *Id.* § 814.

94. Pub. L. No. 103-394, 108 Stat. 4106 (1994).

automatic stay. It added a new ground for relief from stay,[95] added exceptions to the stay,[96] and expedited the resolution of motions for relief from stay.[97] State law has also moved to protect creditors.[98]

The recently-introduced McCollum-Grassley Responsible Borrower Protection Bankruptcy Act[99] would go much farther to shift the balance in favor of creditors. It would require an individual debtor to seek relief under chapter 13, rather than chapter 7, if the debtor's monthly income is at least 75% of the national median average and the debtor's projected monthly net income would enable him or her to pay secured and priority debt and repay at least 20% of unsecured debt in a five year plan.[100] Also, it limits a debtor to chapter 7 discharge no more frequently than every ten years and chapter 13 discharge to no more frequently than every five years.[101] Like the Bankruptcy Reform Act of

---

95. *See* 11 U.S.C. § 362(d)(3) (1994). The statute provides that the stay will terminate 90 days from the commencement of a "single asset real estate" case unless the court extends the stay for cause, the debtor has filed a plan with a reasonable possibility of confirmation within a reasonable time, or the debtor has commenced payments which provide its mortgagee with a reasonable return on the value of its collateral. *Id.*

The rule applies to cases in which a single property or project (other than residential property with fewer than four units) on which the debtor conducts no "substantial business . . . other than the business of operating the real property and activities incidental thereto": (a) is encumbered by liquidated, noncontingent debt of not more than $4,000,000; and (b) generates substantially all of the debtor's gross income. *Id.* § 101(51B).

96. *See id.* § 362(b)(2) (proceeding to establish paternity or to establish alimony, support, or maintenance and collect from sources other than estate); *id.* § 363(b)(3) (act to continue perfection of security interest); *id.* § 362(b)(9) (tax audit, issuance of notice of deficiency, demand for tax returns, assessment and demand for payment); *id.* § 362(b)(18) (attachment of *ad valorem* property tax lien).

97. *See id.* § 362(e) (requiring that the final hearing on a motion for relief from stay be concluded, not merely commenced, within 30 days of the conclusion of the preliminary hearing).

98. The California legislature has recently enacted several bills to protect the interests of secured creditors. Assembly Bill 3101 (effective January 1, 1995) amends California Civil Code to abrogate an appellate court holding (Cathay Bank v. Lee, 18 Cal. Rptr.2d 420 (Cal. Ct. App. 1993) (requiring very specific language to waive certain rights of a guarantor of real property-secured debt)); Senate Bill 1612 (effective September 16, 1994) amended section 2856 of the Code of Civil Procedure § 580 to abrogate an appellate court holding (Western Security Bank, N.A., v. Superior Court, 25 Cal. Rptr. 2d 908, 910 (1994) (holding that a lender who demanded payment of a letter of credit following the non-judicial foreclosure of its real property security was seeking recovery akin to a deficiency judgment)); Assembly Bill 2585 (effective January 1, 1997) established that a guarantor of a real property-secured debt could waive its rights under a then-recent appellate decision (Bank of Southern California v. Dombrow, 46 Cal. Rptr. 2d 656 (Cal. Ct. App. 1995) (limiting guarantor's liability after judicial sale to the difference between the fair value of the collateral and the amount of the guaranteed debt)).

99. H.R. 2500, 105th Cong., 1st Sess. (1997) (introduced September 18, 1997).

100. *Id.*

101. *Id.* § 121(1) & (2).

1994, the McCollum-Grassley bill narrows the scope of the automatic stay.[102] It provides that, in an individual case, the stay will terminate thirty days from filing if the debtor filed a previous case within the preceding twelve months which was dismissed.[103] To extend the stay, a party in interest must move for a determination that the subsequent case was filed in good faith.[104] The bill would also expressly authorize the bankruptcy court to grant "*in rem*" relief from a stay against the debtor and, under certain circumstances, against third parties who later acquire an interest with knowledge of the *in rem* order.[105]

The proposed legislative findings clearly show how far the current mood has swung from debtor protection:

The Congress finds the following:

> (1) Record numbers of consumer debtors are filing for bankruptcy relief, and the number of consumer debtors who do so are projected to continue to increase.
>
> (2) The present consumer bankruptcy provisions of the Bankruptcy Code encourage debtors to avoid their financial and moral responsibilities by giving too generous relief to debtors with ability to pay some part of their debts. The cost of credit is unnecessarily increased by such relief to the disadvantage of responsible American consumers.
>
> (3) The present consumer bankruptcy provisions of the Bankruptcy Code have lessened the protection which historically has been given to secured credit. Such protection encourages availability and lowers the cost of such credit to responsible American consumers.
>
> (4) The present procedural provisions of the Bankruptcy Code unnecessarily impose high administrative and participation costs upon creditors whose borrowers file for consumer bankruptcy relief.
>
> (5) The basic relief available for debtors under the present Bankruptcy Code is reasonable and necessary for those whose financial circumstances justify such relief.[106]

Though H.R. 2500 has not been enacted,[107] Representative McCollum and others introduced a more comprehensive bankruptcy reform bill, H.R. 3150, in

---

102. *Id.* § 109.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* § 2.

107. The Subcommittee on Commercial and Administrative Law held hearings on March 10, 1998.

early 1998.[108] H.R. 3150 proposes an almost identical means-based test for Chapter 7 relief as did H.R. 2500[109] with the same limitations on frequency of discharge[110] and the same early termination of the stay for if the debtor filed then dismissed a bankruptcy case in the previous year.[111] It also proposes many additional creditor protections.[112] For example, in individual cases, a debtor would not be eligible for any form of bankruptcy relief unless, within the preceding ninety days, he or she has made a good faith attempt to create a non-bankruptcy debt repayment plan.[113]

While this legislation and the legislative findings are merely proposed, they reflect a movement in public policy-evident in the Bankruptcy Reform Act of 1994 and acts of other legislatures-away from debtor protection and toward recognition of legitimate economic concerns of lenders.

The bankruptcy courts need to take note of current public policy, as reflected by the actions of the legislatures, and rid themselves of depression-era attitudes that we believe are at the bottom of the cases prohibiting and limiting waivers of bankruptcy privileges. Once they do so, we believe they will evaluate waivers of bankruptcy privileges in a more objective and legally apropos light.

II. THE LAW OF WAIVER

Having found that the present law concerning waiver of bankruptcy privileges is founded on faulty or exaggerated premises rooted, perhaps, in the attitudes of depression-era America, we must now determine a suitable method of analyzing such waivers. To do this, we will evaluate the law of waiver as it is applied in other areas of the law. In this regard we will look at the law of waiver as it relates to waivers of constitutional, statutory, and common law rights and privileges.

Before engaging in this analysis, it is instructive to notice what the true problem is here. As has been shown, the issue is not one of waiver of constitutional rights.[114] It is also not an issue of waiver of a statutory right.[115] At best, what is involved is the waiver of certain statutory privileges provided by the Bankruptcy Code.

Thus, the question is: When can a statutory privilege properly be waived? If there is a restriction on waiver of such a privilege, it would need to be a

---

108. H.R. 3150 was passed in the House on June 10, 1998.

109. Section 101 of H.R. 3150 sets a slightly more lax threshold for Chapter 7 relief than H.R. 2500. A debtor will be eligible unless, among other things, he or she has monthly income of not less than the *highest* national median family income reported for a family of the same or lesser size.

110. H.R. 3150, § 171.

111. *Id.* § 122.

112. Subtitles C, D and E of Title 1 propose new "Adequate Protections" for, respectively, secured creditors, unsecured creditors, and lessors.

113. H.R. 3150, § 104.

114. *See supra* Part III.A.

115. *See supra* Part III.B.

constitutional, statutory or common law one. But as we have seen, there is no significant restriction on waiver of bankruptcy privileges as a constitutional or statutory matter. Thus, if there is a restriction on such waivers, it must arise from otherwise applicable law, which leaves us with the common law. Here the law of contract is the relevant law that applies. As a result, the ultimate question is: when can statutory privileges be waived by contract?

A. Waiver of Constitutional Rights

Many people would probably be astonished at how easily fundamental constitutional rights may be waived. The general rule is that one may waive a constitutional right by "intentional relinquishment or abandonment of a known right or privilege."[116] In the criminal context, it is often said that waivers of constitutional rights must be "voluntary, knowing and intelligent."[117] While it is not entirely clear whether waivers of constitutional rights in the civil context must meet these standards, the cases that discuss the issue at least assume this to be the case.[118]

1. The Privilege Against Self Incrimination.—When one looks beyond general principles to specific cases, it becomes evident how easily one's fundamental constitutional rights may be waived. In the criminal context, the privilege against self incrimination may be waived, and this waiver need not even be explicit; it can be inferred from the circumstances.[119] It has even been held that silence combined with an understanding of one's rights is enough to constitute a waiver of this privilege.[120] Psychological pressure, such as police speaking about the impact of a defendant's actions and publicity from those actions on his or her family, can be applied in connection with obtaining a waiver of the self-incrimination privilege.[121] There is even some authority to the effect that the self incrimination privilege can be waived by prior agreement.[122] In the case of *Paramount Pictures Corp. v. Miskinis*, the concurring opinion states that it is possible, at least in the context of business agreements, for a party to waive by prior agreement the self incrimination privilege as it relates to business records.[123]

2. Searches and Seizures.—One can waive the immunity from warrantless and unreasonable searches and seizures under the Fourth Amendment.[124] Such

---

116. Johnson v. Zebst, 304 U.S. 458, 464 (1937).

117. D.H. OverMyer Co. v. Frick Co., 405 U.S. 174, 185 (1972).

118. *Id.*; *see also* Fuentes v. Shevin, 407 U.S. 67, 94-95 (1972); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393-94 (1937).

119. North Carolina v. Butler, 441 U.S. 369, 374 (1979).

120. *Id*. at 373; *see also* People v. Nunez, 579 N.Y.S.2d 959, 961 (N.Y. App. Div. 1992).

121. United States v. Barnett, 814 F. Supp. 1449, 1457 (D. Alaska 1992).

122. Paramount Pictures Corp. v. Miskinis, 344 N.W.2d 788, 807-09 (Mich. 1984) (Levin, J., concurring).

123. *Id*.

124. 79 C.J.S. *Searches and Seizures* §§ 111-127 (1995); State v. Manns, 370 N.W.2d 157,

a waiver occurs upon consent to a search and the validity of such consent as a waiver of constitutional rights is determined from the totality of the circumstances.[125] An interesting fact about consent in this context is that it is not the voluntariness of the consent itself that is determinative of the validity of the waiver, but rather the reasonableness of the belief of the officer that a valid consent has been given.[126] Thus, a voluntary and willing consent to waive rights need not actually be given; the question is whether the officer reasonably believed that there was such consent.

The circumstances in which such searches have been permitted shows the ease of such a consent. The consent, as in the case of waiver of self incrimination rights, need not be express but may be implied.[127] A person may ratify a search after it has occurred.[128] Consent need not then be prior to the search. In some cases consent may be given by a third party so long as this person has authority to give the consent.[129] For example, an owner of property, one in control of property or one who has joint control over property may be able to consent to a search so that the search is valid against a third party whose property happens to be at the place where the search is conducted.[130] A bailee may consent to a search of a bailor's property if the bailor has assumed the risk of this type of event.[131] A host may consent to a search of premises on which a guest's property is located, but whether the guest's property itself may be searched in such circumstances is determined on a case by case basis.[132]

Even deception may be used to gain entry and search a person's property. For example, use of undercover police to deceive the owner of their true identity

---

159 (Neb. 1985); State v. Carsey, 664 P.2d 1085, 1090 (Or. 1983); Gant v. State, 152 So. 710 (Fla. 1934).

125. 79 C.J.S. *Searches and Seizures* § 111 (1995); *see also* United States v. Oyekan, 786 F.2d 832, 838 (8th Cir. 1986); State v. Juhl, 449 N.W.2d 202, 208 (Neb. 1989); State v. White, 334 S.E.2d 786, 789 (N.C. Ct. App. 1985); People v. Driscoll, 449 N.Y.S.2d 809, 812 (N.Y. App. Div. 1982).

126. 79 C.J.S. *Searches and Seizures* § 111 (1995); *see also* United States v. Elliott, 50 F.3d 180, 186 (2d Cir. 1995); Wilkerson v. State, 594 A.2d 597, 603-04 (Md. Ct. Spec. App. 1991); McCray v. State, 486 So. 2d 1247, 1250 (Miss. 1986).

127. 79 C.J.S. *Searches and Seizures* § 112 (1995); People v. Rincon, 581 N.Y.S.2d 293, 296 (N.Y. App. Div. 1992); State v. Buschkopf, 373 N.W.2d 756, 768 (Minn. 1985).

128. Atkins v. State, 325 S.E.2d 388, 391 (Ga. Ct. App. 1984).

129. 79 C.J.S. *Searches and Seizures* § 113 (1995); United States v. Matlock, 415 U.S. 164, 171, (1974); Daniels v. State, 534 So. 2d 628, 653 (Ala. Crim. App. 1986).

130. 79 C.J.S. *Searches and Seizures* § 113 (1995); State v. Greer, 530 N.E.2d 382, 391 (Ohio 1988); *Ex parte* Hilley v. State, 484 So. 2d 485, 490-01 (Ala. 1986); State v. Johnson, 684 S.W.2d 581, 582 (Mo. Ct. App. 1984); State v. Wimer, 168 W. Va. 417, 424, 284 S.E.2d 890, 894 (W. Va. 1981).

131. 79 C.J.S. *Searches and Seizures* § 114 (1995); *In re* Javier A., 206 Cal. Rptr. 386, 392 (Cal. Ct. App. 1984).

132. 79 C.J.S. *Searches and Seizures* § 116 (1995); Ingram v. State, 703 P.2d 415, 425 (Alaska 1985).

in order to gain access to a location and search is appropriate where the scope of the visit is that intended by the consenting party.[133] Generally, these cases involve invitations to undercover police to engage in illegal activity.[134] However, some authority allows deception even as to the purpose of the visit. There are cases allowing undercover police to pose as home buyers who then use this access to search the home.[135] Here, not only is there deception concerning the identity of the party entering the premises, as in the cases noted above, but also there is deception as to the purpose of the visit that purports to be the wholly legal one of inspection of a home by a potential home buyer.

In the case of searches, waiver is determined not by the existence of actual consent, but by an officer's reasonable perception of it. Consent may sometimes be given by third parties, and deception is sometimes permissible in obtaining the consent. Thus, a broad range of circumstances exists in which Fourth Amendment rights may be easily waived.

3. Right to Counsel.—The Sixth Amendment right to counsel may also be waived. The standard used is similar to that applied to self-incrimination waivers. But again, as in the case of consent searches, deception of some kinds is allowed. It has been held that recording conversations of a defendant with a third person who was cooperating with the police did not violate the defendant's right to counsel, even though the only explicit waiver of this right by the defendant had occurred two months earlier.[136]

The point of discussing waivers of certain constitutional rights is to show that the fundamental constitutional rights that form the foundation for our system of justice and our society can be waived quite easily, even in circumstances where the force of the state is being used to deceive and place psychological pressure on the individual. The standards for waiver are not stringent.

4. Contractual Waivers of Constitutional Rights.—One might respond by saying that, although waivers of constitutional rights do occur in the circumstances described, there is a vital difference between these waivers and waivers of bankruptcy privileges. The difference is that waivers of constitutional rights generally occur in the context of a present waiver of an existing right (i.e., a party is given the opportunity at a particular point in time to either waive or not waive a right that exists at that point in time). On the other hand, in the circumstances of a waiver of bankruptcy privileges, the waiver is not a present waiver of an existing right but an anticipatory contractual waiver of a potential future privilege. This serves to distinguish the situations, since we give more credence to the present waiver of an existing privilege than to an anticipatory contractual one made before the privilege may be exercised.

Nonetheless, when carefully analyzed, this distinction does not differentiate

---

133. 79 C.J.S. *Searches and Seizures* § 120 (1995); United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990); People v. Catania, 398 N.W.2d 343, 346 (Mich. 1986).

134. 79 C.J.S. *Searches and Seizures* §120 (1995).

135. *Id*.; *see also* People v. Jaquez, 209 Cal. Rptr. 852, 857 (Cal. Ct. App. 1985); State v. Poland, 645 P.2d 784, 792 (Ariz. 1982).

136. Jenkins v. Leonardo, 991 F.2d 1033, 1038 (2d Cir. 1993).

bankruptcy waivers from the waivers of constitutional rights. There are many contexts in which we allow the waiver of constitutional rights by means of an anticipatory contractual waiver. For instance, the Supreme Court has decided that due process rights may be anticipatorily waived by contract. The seminal case on this issue is *D.H. OverMyer Co, Inc. v. Frick Co.*,[137] where it was held that procedural due process rights, like the right to a hearing, may be waived in a cognovit note that allows entry of a judgment against a debtor without a hearing or trial on the merits of the claim.[138] Similar results have been obtained in other due process cases.[139]

Likewise, it has been held that First Amendment rights of freedom of speech may be waived by contract. In *Snepp v. United States*,[140] the Court held that a CIA agent had properly waived First Amendment rights to freedom of speech concerning his experiences in the CIA by signing an agreement relating to his employment that precluded him from publishing his experiences without approval of the CIA.[141] This idea has been restated in other cases.[142]

It has even been suggested that self-incrimination rights may be waived contractually, at least in the case of commercial agreements.[143] Thus, not only is it simple to waive fundamental constitutional rights but such waivers may also validly occur by means of an anticipatory contractual waiver.

B. Waiver of Statutory Rights and Privileges

1. The Standard for Enforcement of Waivers.—Within certain parameters, statutory rights and privileges may be waived, and these rights and privileges may be waived by contract. The general standard for when such privileges may be waived and when they may not has been stated in many ways, but all of these formulations have a common theme: statutory privileges may not be waived when the statutory privilege was created for the benefit of the general public pursuant to some important public policy.

It has been said, for instance, that one cannot waive a statutory privilege if

---

137. 405 U.S. 174 (1972).

138. *Id*. at 185.

139. Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511, 515 (D.C. Cir. 1974) (noting that a person can waive due process rights in an agreement describing a lender's rights to foreclose nonjudicially on property); Bonner v. B-W Utilities, Inc., 452 F. Supp. 1295, 1303 (W.D. La. 1978) (stating that due process rights may be waived but holding that the relevant person in the case had not entered into the contract in question).

140. 444 U.S. 507 (1980).

141. *Id.* at 510 n.3.

142. Allied Artists Pictures Corp. v. Alford, 410 F. Supp. 1348, 1354 (W.D. Tenn. 1976) (determining that although one can waive First Amendment rights by agreement, such a waiver by local theaters is not binding on distributors of films). *See generally* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 479-82 (1993).

143. *See Miskinis*, 344 N.W.2d at 807-09.

the privilege was created for the benefit of the general public.[144] Similarly, it has been stated that a statutory privilege or right may not be waived if such waiver contravenes clearly enunciated public policy.[145] This idea has also been expressed as allowing waiver where the statutory right waived was created for the benefit of individuals and prohibiting waiver where the right was created for a public reason.[146] Other courts have stated the rule more generally, allowing waiver of statutory rights and privileges except when the rights or privileges involve questions of public policy.[147] Even more generally, a statutory right may not be waived where such waiver would violate the public interest.[148] Waiver is also not permissible when waiver would do "violence" to the public purpose of the law.[149]

Distinctions concerning the stringency of requirements for waiver seem to be made depending on the types of rights involved in the particular statutory provision. Statutes dealing with property rights seem to be most amenable to waiver. For instance, a statutory right may be waived when the statute has as its purpose the protection of property rights rather than the protection of the general public.[150] On the other hand, labor law cases appear to make waiver, where permissible, more burdensome by requiring that the waiver be "clear and unmistakable."[151]

---

144. Canal Elec. Co. v. Westinghouse Elec. Corp., 548 N.E.2d 182, 187 (Mass. 1990) (stating that waiver of statutory rights is permissible when the statute has the purpose of protection of property rights rather than protection of the general public); Halsrud v. Brodale, 72 N.W.2d 94, 99 (Iowa 1955) (noting that statutory rights concerning property drainage may be waived); Southwestern Bell v. Employment Sec. Review Bd., 502 P.2d 645, 651 (Kan. 1972) (confirming that a statutory right that exists to alleviate a possible distress among the public cannot be waived).

145. Allerton Constr. Corp. v. Fairway Apartments Corp., 267 N.Y.2d 860, 862 (N.Y. Sup. Ct. 1966) (finding that a party cannot waive a right conferred by statute if such a waiver "contravenes clearly enunciated public policy").

146. 28 AM. JUR. 2D *Estoppel and Waiver* § 164 (1966); Benane v. International Harvester Co., 142 Cal. App. 2d Supp. 874, 878-79 (Ct. App. Dep't Super. Ct.) (voting law held to be for a public reason and, thus, not subject to waiver); Evan v. Whicker, 59 S.W.2d 420, 423 (Tex. App. 1933) (holding that statutory rights of an individual as an individual are waivable).

147. Ostafin v. State, 564 N.W.2d 616, 618 (N.D. 1997) (finding that a criminal defendant cannot waive rights to "good time" allowances in criminal sentencing since the policy of prison order is at stake); Motor Contract Co. v. Van Der Volgen, 298 P. 705, 707 (Sup. Ct. Wash. 1931) (noting that an agreement making an otherwise non-negotiable document a negotiable one is void and not a waiver of rights to counterclaim); Wellens v. Beck, 103 N.W.2d 281, 283 (N.D. 1960) (finding that one can waive statutory right, including a setoff statute, so long as the waiver is not against public policy).

148. 6A CORBIN ON CONTRACTS § 1515, at 728 (1962).

149. *Canal Elec. Co.*, 548 N.E.2d at 187.

150. *Id*. at 187-88.

151. International Brotherhood of Teamsters v. Southwest Airlines Co., 875 F.2d 1129, 1135-36 (5th Cir. 1989); George Banta Co. Inc. v. NLRB, 686 F.2d 10, 20 (D.C. Cir. 1982); Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 393 A.2d 267, 276 (N.J. 1978); *see*

Given the different sorts of "public policy" language used by the courts in setting standards for waiver of statutory rights and privileges, it is not obvious how the standard can be generally described. It cannot be the case that just any public interest at all will make a statutory privilege exempt from waiver. If this were the case, no statutory privilege could be waived since they are all based on some sort of supposed public interest, or the legislature would have no business making the law in the first instance. It is evident then that a non-waivable statutory privilege must be imbued with a high level of public policy interest. The actual outcomes of cases are determined on a case-by-case basis by analyzing whether the public interests involved in the statute rise to this high level. How can this high level of public interest best be described?

It will not be denied that laws enacted specifically to protect public health and physical welfare fall within the rule prohibiting waiver—a high level of public interest exists here. This category explains the reticence of the courts to allow waivers of rights relating to labor laws and those meant to protect against physical injuries. But it is more than health and safety laws that are deemed exempt from waiver. Thus, a health and welfare explanation for the high level of public interest necessary to preclude waiver is too narrow to explain the cases.

Perhaps a better general way to express the standard that has emerged among most courts is to say that a statutory privilege may not be waived when there is a strong public policy for the benefit of the general public underpinning the provision. There are two elements in this formulation: first, there is the necessity of a strong public policy behind the statutory provision; second, this policy must be intended to benefit the general public. These elements are reflective of the case law and conform to the idea that we shall not allow violence to be done to the policies underlying statutory law.

The second aspect of the proposed general standard for analyzing waivers of statutory privileges contains some ambiguity. What is the "general public?" Does the term include everyone, or may it refer to some subset of the general public? Cases dealing with the meaning of "general public" do not completely answer the question. The ordinary definition of the general public includes

---

also Peter C. Schwartz, *Section 8(d) of the NLRA and the Duty to Decision-Bargain over Work Relocation: Some Observations on Management Rights After* Milwaukee Spring II, 36 SYRACUSE L. REV. 1055, 1068 (1985) (stating that general rule regarding waiver of statutory labor law rights is that such waiver must be "clear and unequivocal" and that the language of waiver must be explicit).

everyone,[152] but some cases take a more restrictive view of the general public.[153] Note also that the cited cases defining the general public are not decided in the context of determining the validity of waivers of a statutory privileges. Thus, any answer here is bound to be an extrapolation from cases not precisely on point. We will ultimately analyze the "general public" issue under broad and narrow constructions of its scope.

The proposed two prong standard must, before being applied, be reviewed under recent Supreme Court authority.

2. The Supreme Court View of Use of Public Policy to Invalidate Contractual Provisions.—If a court finds that a contractual waiver of a statutory privilege is not enforceable due to the public policy underlying the statute, the court is invalidating the contractual clause on public policy grounds. It is by this route that courts have typically invalidated waivers of bankruptcy privileges. Recent Supreme Court jurisprudence takes a dim view of the invalidation of contractual provisions on public policy grounds.

In an excellent exposition on this issue, Professor G. Richard Shell has analyzed Supreme Court precedent on public policy invalidation of contractual provisions in the *Lochner*, Warren and modern courts.[154] In this analysis, Shell concludes that the modern Supreme Court is more conservative than even the *Lochner* court in refusing to allow invalidation of contractual clauses based upon public policy concerns. The standard applied by the modern Court is that public policy defenses are limited to instances where existing laws and precedents demonstrate a "well defined and dominant policy against" contract enforcement.[155] In the field of invalidation of contractual provisions based on statutory public policies, the Supreme Court "has refused to interpret statutory policies to override private contracts unless literally compelled by Congress to do so."[156]

Shell concludes that in the modern Supreme Court, contract enforcement is a preferred jurisprudential value.[157] It is this value that underlies the Court's

---

152. Harvey v. Bell, 732 S.W.2d 138, 140 (Ark. 1987) (determining that general public means anyone and everyone, each having the right to use property to the full extent for which it is dedicated); Krebs v. Beltrami County, 6 N.W.2d 803, 805 (Minn. 1942) (noting that the general "public" said to mean those other than persons in the general vicinity of a street and to include all members of the general public who are represented by the local government); Rayor v. City of Cheyenne, 178 P.2d 115, 116 (Wy. 1947) (stating that the "general public [to whom the land was dedicated] is not confined to the citizens of a municipality, but embraces all the people"). The group is not represented merely by a city, but "by the legislature of the state." *Id.*

153. Southern Ind. Gas v. Steinmetz, 377 N.E.2d 1381, 1383 (Ind. Ct. App. 1977) (finding that general public means "a great multitude of persons who in the course of daily events would be exposed to danger of power lines"); Plancich v. State, 693 P.2d 855, 858 (Alaska 1985) (determining that general public means vessels and others who may want to use the dock facilities).

154. Shell, *supra* note 142, at 452-62.

155. *United Paperworkers*, 484 U.S. at 44; *see also* Shell, *supra* note 142, at 458-62.

156. Shell, *supra* note 142, at 480.

157. *Id*. at 452.

jaundiced view of public policy invalidation of contractual provisions. Another motivation of the Supreme Court's view is that economic efficiency is a value to be guarded in determination of these issues and that economic efficiency is generally harmed by invalidation of contractual provisions freely adopted.[158]

The ultimate arbiter of the issue of the validity of waivers of bankruptcy privileges is the Supreme Court. Thus, the standards of the Supreme Court with respect to invalidation of contractual provisions on the grounds of statutory public policy must be met before such invalidation can be countenanced. As a result, the standard that has been derived in the previous analysis of invalidation of waivers of statutory privileges must be supplemented with this authority. Therefore, it needs to be recognized that not only must a strong public policy for the benefit of the general public be found to invalidate a waiver of bankruptcy privileges but also the underlying policy must be based on existing law and precedent. In addition, the underlying policy must be a "well defined and dominant public policy against contract enforcement" and be literally compelled by the statute.

Thus, a refined version of the standard that must be met to support public policy invalidation of a waiver of bankruptcy privileges is as follows:

1. There must be a strong, well defined and dominant policy against enforcement of the waiver expressed in existing law and precedent;
2. The policy must be one designed for the benefit of the general public; and,
3. The policy of not enforcing the waiver must be one literally compelled by the language of the statue.

With this standard in mind, we will analyze whether waivers of bankruptcy privileges should be enforced.

III. APPLICATION OF THE LAW OF WAIVER TO BANKRUPTCY PRIVILEGES

Case law that has developed in the area of waiver of bankruptcy privileges does not discuss the issue as a question of contractual waiver of statutory privileges. There is no discussion of the general standards for waiver of such statutory privileges. In addition, there is no consideration of the waiver of statutory privileges in other areas of the law. Instead, the question is controlled by the mythology surrounding waiver of bankruptcy privileges that has been previously discussed.[159] Part of this mythology is the jettisoning of both discussion and application of the general rules of law that relate to waiver of statutory privileges. In the bankruptcy arena, the general law of waiver is walled off and ignored, and the issue is treated as though there is something unique about bankruptcy in this regard.

However, there is no basis for such treatment of the law of bankruptcy.[160] Indeed, given the fact that bankruptcy is statutory law and is not a fundamental liberty in our system, it is surprising to find that fundamental constitutional

158. *Id*. at 506-09.

159. *See supra* Part II.B.1-6.

160. *See supra* Part II.B.1-6.

liberties can be waived more easily than privileges in bankruptcy. One can waive the privilege against self-incrimination after being placed under psychological pressure, can be deceived out of their right not to be subjected to unreasonable searches and seizures, and can waive many important statutory privileges. However, one cannot waive one's ability to file bankruptcy or to get a discharge or, in many jurisdictions, to have the benefit of an automatic stay. This situation is peculiar and is a result of the mythology and historical curiosities described above.[161]

So how should one look at waivers of bankruptcy privileges? Such waivers should be viewed simply as contractual waivers of statutory privileges that are subject to the same rules as are applicable to all other statutory privileges. Thus, the rules regarding waivers of other statutory privileges can be applied to waiver of bankruptcy privileges.

This does not, of course, mean that the result of whether bankruptcy privileges may be waived is foreordained to come out in a particular way. Some bankruptcy privileges may be subject to waiver and others not. The main point here is to lay aside the mythology surrounding the waiver of bankruptcy privileges. This is not a special bankruptcy issue. It is just another issue of waiver of statutory privileges.

A. Waiver of Other Statutory Privileges

Before attempting to apply the general standard for waiver of bankruptcy privileges, one might, from reviewing contexts in which statutory privileges have been permitted to be waived and those where waiver has not been allowed, be able to construct an argument that debtor-creditor law, and the law of bankruptcy generally, is simply not the sort of area of law where waiver of statutory privileges has been allowed. A review of the circumstances where waiver has been allowed is, then, appropriate.

Note that, as has been mentioned before, the area of the relation of employer and employee is one where waiver of employee statutory privileges has been viewed with great suspicion and only rarely permitted. For example, employee rights to damages for negligent injury, to annuity and pension benefits, and to regulated hours of work have been held to be statutory privileges not subject to waiver.[162] Similarly, workers have been held to be unable to waive rights given under collective bargaining contracts.[163] A worker may not waive the right to workers' compensation by assigning the rights to compensation to a third person.[164] Waiver of rights to the minimum wage is not permitted.[165] Also, a person cannot waive rights to unemployment compensation.[166] It has been held

---

161. *See supra* Part II.C.

162. 28 AM. JUR. 2D *Estoppel and Waiver* § 165 (1966).

163. CORBIN ON CONTRACTS, *supra* note 148, at 731.

164. Egy v. United States Fidelity & Guarantee Co., 651 P.2d 954, 958 (Kan. Ct. App. 1982).

165. Sherba Bros., Inc. v. Campbell, 361 So. 2d 814, 815 (Fla. Dist. Ct. App. 1978).

166. Southwestern Bell v. Employment Sec. Review Bd., 502 P.2d 645, 653 (Kan. 1972).

that a union cannot waive the statutory rights of employees to their usual pay while voting.[167] The statutory right to have a union represent an employee in a grievance procedure may not be waived in a collective bargaining agreement.[168] In employer-employee relations, there are many statutory privileges that cannot be waived. This is undoubtedly due to the strong public interest in protecting the health, safety and well-being of workers.

On the other hand, in the area of regulation of property rights, it is generally accepted that statutory privileges may be waived; there is not a sufficient general public interest in these issues to invalidate waivers. It has been held that a person's statutory rights to consequential damages may be waived.[169] Statutorily mandated drainage rights on real property also have been held subject to waiver.[170] Further, the liability of one party to another for negligence may be limited, thereby constituting a waiver of rights to damages.[171] While most statutory property related rights may be waived, not all property rights may be waived. For instance, the right to appraisal before foreclosure may not be subject to waiver.[172]

In evidentiary, procedural and fundamental liberty areas, one finds that rights and privileges may generally be waived. We have already seen that constitutional privileges can be waived quite easily.[173] Statutory social worker-patient privileges may be waived under certain circumstances.[174] Even what appear to be some of the most protected statutory rights, such as the rights provided under civil rights legislation, can be waived.[175] Although it is often held that protections given by statutes of limitations cannot be waived, there are at least some circumstances where rights under these statutes may be waived. The court in *Fireman's Fund Insurance v. Sand Lake Lounge, Inc.*[176] recognized that, as a general rule, a promise to waive the benefit of a statute of limitation or an agreement not to use it as a defense is against public policy if made at the time

---

167. Benane v. International Harvester Co., 142 Cal. App. 2d Supp. 874, 880 (Cal. App. Dep't Super. Ct. 1956).

168. Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 398 A.2d 267 (N.J. 1978).

169. Canal Elec. Co. v. Westinghouse Elec. Corp., 548 N.E.2d 182, 184 (Mass. 1990).

170. Halsrud v. Brodale, 72 N.W.2d 94, 99 (Iowa 1955).

171. *See* Lee v. Sun Valley Co., 625 P.2d 361 (Idaho 1984) (enforcing waiver of rights against stable renting horses).

172. Susan E. Drake, *Debtor's Contractual Waiver of Appraisal Rights Held Invalid*, 47 S.C. L. REV. 37 (1995).

173. *See supra* Part III.A.

174. Community Serv. Soc'y v. Welfare Inspector Gen., 398 N.Y.S.2d 92, 95 (N.Y. Sup. Ct. 1977) (noting that any waiver of privilege in the social worker-patient relationship must involve the "clear relinquishment of a known right").

175. Town of Newton v. Rumery, 480 U.S. 386 (1987) (upholding contractual waiver of rights under 42 U.S.C. § 1983); Evans v. Jeff D., 475 U.S. 717 (1986) (enforcing contractual waiver of right to attorney's fees under 42 U.S.C. § 1988); *see also* Shell, *supra* note 142, at 480-82.

176. 514 P.2d 223 (Alaska 1973).

of contracting.[177] However, the court noted Corbin's statement that while parties cannot extend the statute of limitations, they can shorten it if the time period and circumstances surrounding the making of this promise are reasonable.[178] Therefore, according to the opinion in *Fireman's Fund*, the court needs to look at the reasonableness of the provision at the "inception of the loss" to determine if it was reasonable in the contract in question.[179] In *Fireman's Fund*, the court performed this analysis and found the shortened time period was unreasonable because of the uneven bargaining power in the transaction that relegated one party to a "take-it-or-leave-it" position.[180] Thus, as is typical, the bargaining power of the parties played a role in the enforceability of the contract provision.

In the area of debtor-creditor law a number of cases disallow waiver of rights and privileges given to debtors. In these types of cases, some of the best arguments against enforcement of waiver of bankruptcy privileges can be made as a matter of contract law. Debtors have been denied permission to waive the privileges of discharge, usury law, and exemptions.[181] That exemptions cannot be contractually waived is generally accepted.[182] It has also been held that rights to redemption in connection with foreclosure may not be waived.[183] While mechanics' liens have been held to be waivable, it has been held that the ability to waive rights to see records relating to construction work may not be waived.[184]

There are, nonetheless, debtor-creditor related laws that can be waived. There is authority that usury defenses can be waived in some circumstances.[185] As noted previously, mechanics liens may be waived.[186] The right of setoff provided in a statute also may be waived.[187] As described earlier, at least in a federal receivership, the right to file bankruptcy itself may be limited.[188]

While the law relating to waiver of rights in the debtor-creditor area contains inconsistencies, there does seem to be a reluctance to allow waiver of a debtor's statutory rights. This may be a result of the same historical background that has led to the mythology relating to waiver of bankruptcy privileges.

It is very difficult to sustain the waiver of privileges under health and welfare statutes, as evidenced by the labor cases. This fits well with the standard earlier

---

177. *Id*. at 226.

178. *Id*. at 226; *see also* 1A CORBIN ON CONTRACTS § 218 (1963).

179. *Fireman's Fund*, 514 P.2d at 226.

180. *Id*. at 227.

181. CORBIN ON CONTRACTS, *supra* note 148, at 731-32.

182. *See, e.g.*, Industrial Loan & Inv. Co. v. Superior Ct., 209 P. 360 (Cal. 1922); Iowa Mut. Ins. Co. v. Parr, 370 P.2d 400 (Kan. 1962).

183. Elson Dev. Co. v. Arizona Sav. & Loan Ass'n, 407 P.2d 930 (Ariz. 1965).

184. Allerton Constr. Corp. v. Fairway Apartments Corp., 267 N.Y.S.2d 860 (N.Y. Sup. Ct. 1966).

185. Dunbabin v. Brandenfels, 566 P.2d 941 (Wash. Ct. App. 1977) (finding that a settlement agreement waiving usury defense is enforceable).

186. *Allerton*, 267 N.Y.S.2d at 861.

187. Wellens v. Beck, 103 N.W.2d 281 (N.D. 1960).

188. United States v. Royal Business Funds Corp., 724 F.2d 12, 15-16 (2nd Cir. 1983).

proposed for when waivers of statutory privileges are appropriate. First, the necessity for a strong public policy is met in laws to protect the safety or general well being of workers. Second, the statute must be for the benefit of the general public, which is the case in labor and related laws. Third, the underlying policies for protection of the general public are typically contained in the literal directives of the statute. Laws directed at the safety and welfare of workers are specifically and explicitly made for the benefit of the general public—that is, those who participate in the economic world in one way or another. Thus, the language of such statutes militates against waiver.

On the other hand, property rights are more easily waived. This may be a product of either less powerful public policy interests or the fact that laws relating to property interests are directed at something less than the general public—those that own particular types of property.

In the area of evidentiary, procedural, and liberty-related laws, there is considerable leeway given in allowing waivers of rights. This is, in some cases, due to generally less forceful policy interests underlying the laws and in others, by the typical rules relating to waiver of constitutional liberty interests.[189]

In the area of debtor-creditor relations the results are mixed. We find cases going in different directions on differing sorts of debtor-creditor laws. In this domain then it may be accurate to say that waivers of different sorts of privileges are closely and individually scrutinized; generalizations cannot be made on the strength or application to the general public of the policies underlying such differing privileges. The cases dealing with waivers relating to property interests support allowing waivers in the debtor-creditor area. Thus, simply looking at the category of debtor-creditor laws and the results of cases in this area does not resolve the issue of whether bankruptcy privileges may be waived. Moreover, the results in debtor-creditor cases may be an artifact of the same history and mythology that we have seen applied to bankruptcy waivers. To resolve the issue presented, it seems necessary to apply the general standard for waiver of statutory privileges previously described to bankruptcy waivers.[190]

B. Application of the Statutory Waiver Standard to Waiver of Bankruptcy Privileges

To properly determine if waivers of statutory bankruptcy privileges are permitted as a matter of contract law, the three prongs of the standard discussed previously must be applied.[191] It is necessary first to determine if there is, in existing law and precedent, a strong, well defined and dominant public policy behind the statute militating against waiver. Second, it is necessary to ascertain whether, assuming there is a strong policy behind the law, this policy is directed at the general public. Third, the policy invalidating waiver must be literally compelled by the statute.

---

189. *See supra* Part III.A.

190. *See supra* Part III.B.

191. *See supra* Part II.B.2.

1. The Strength of the Public Policy.—The case law asserting that bankruptcy privileges may not be waived or may be waived only in extraordinary circumstances generally relies on the idea that such waivers violate public policy. Under the proposed three prong standard and Supreme Court precedent, any policy said to support invalidation of a contractual provision must be contained in existing law and precedent.[192] The existing law and precedent in this area are relatively sparse and are generally found in cases at the bankruptcy court level. The Supreme Court has not dealt with this issue. There is some legislative history that supports the stated policies, but there is also legislative history that supports countervailing policies.[193] To say that "existing law and precedent" establishes the policies argued to preclude waivers of bankruptcy privileges is a weak and suspect statement.

Moreover, as has been established,[194] the policies that are said to weigh against waiver of bankruptcy privileges are either fallacious, much more weak and restricted than appears at first blush, or are pitted against strong policies supporting such waivers. This is not the kind of "well defined and dominant" policy argument necessary to support a prohibition on waivers. In these circumstances, it is not arguable that existing law and precedent demonstrates a "well defined and dominant policy against contract enforcement."[195] Given the opposing policies and conflicting precedent, and the Supreme Court's restrictive stand on when private agreements can be found unenforceable due to public policy concerns, there is insufficient policy horsepower to overcome contractual waivers on policy grounds.

2. The Focus of the Policies.—Even if we assume that the policies against enforcement of waivers of bankruptcy privileges meet the first prong of the test for contractual waiver of statutory privileges, there is difficulty in finding that the second prong is met. Are the privileges of filing bankruptcy, and making use of the automatic stay and the discharge meant to protect the "general public?" As we have seen, what is typically meant by the "general public" is all of the public. In a sense, one may consider bankruptcy law to be a law to protect the interests of the general public. It aids most any person in financial difficulty. However, the bankruptcy law surely does not have this broad sense in the same way that health and safety laws do. The bankruptcy laws are directed at a smaller group than the group of all persons involved in the economy as workers, producers, or consumers.

One can forcefully argue, in fact, that the bankruptcy law is not directed at the general public but at a very limited group—the class of debtors and their creditors and, even more specifically, the class of debtors in financial difficulty and their creditors. This is not the "general public;" it is not the public as a whole. When looking at more specific provisions of the Code, like the discharge provisions, it becomes even more apparent that the focus of these provisions is

---

192. *United Paperworkers*, 484 U.S. at 43; *see also supra* Part II.B.2.

193. *See supra* Part II.B.2.

194. *See supra* Part II.B.2.

195. *United Paperworkers*, 484 U.S. at 43.

not the whole of the general public. The discharge provisions are aimed at only a part of the debtor class—those individuals who have not engaged in certain illegal or immoral activities and corporations successfully reorganizing.[196] Many portions of the automatic stay have the same kind of more limited characteristics. For example, all of the stay provisions relating to enforcement of liens apply only to the classes of debtors and creditors owing or owning secured debt.

Recall also that waivers of property-related laws are not closely scrutinized and typically are enforced.[197] This may be due to the fact that property-related laws often are focused on subsets of the public. Bankruptcy law may be viewed similarly.

The bankruptcy law is not directed at the "general public." It is aimed at a smaller group. Specific provisions, like those related to the discharge and automatic stay of lien enforcement that are benefits of bankruptcy that are sometimes waived, are aimed at even smaller subsets of entities. None of the even more restricted notions of the "general public" would seem to apply to these small segments of the public. These restricted "general public" cases appear to involve either the vast majority of the public or all persons engaging in a certain activity or commerce.[198] The bankruptcy law is aimed at more circumscribed groups—failing debtors and their creditors, not all persons engaging in an activity or commerce.

The conclusion on this issue is not crystalline. Certain debtor-creditor law waiver cases, like the cases stating that exemptions may not be waived, imply that the general public standard is met in the case of the bankruptcy law. On the other hand, these results may be an artifact of the courts in these cases actually applying a standard more hostile to waivers than the one proposed here and supported by contract law authority. As we have seen, the application of such hostile standards may be a result of historical concerns about debtor-creditor relations that arose out of the Great Depression. There is no doubt, however, that a strong argument can be made that the bankruptcy law is not one directed at the general public but a law directed at a certain subgroup of the larger class of debtors and, sometimes, creditors.

3. Literal Compulsion of Invalidity of Waivers.—The Supreme Court's view of invalidation of contract provisions based on public policy requires for invalidation that such invalidation be compelled by the language of the statute. From our review of relevant provisions of the statute, however, there is nothing in the language of the statute that compels invalidation of waivers of bankruptcy privileges.[199] Provisions commonly argued to be of significance here generally are not and any provisions that do have significance have this significance in only very narrow circumstances.[200]

Therefore, regardless of one's conclusion on the first and second prongs of

196. *See* 11 U.S.C. § 524, 1141 (1994).

197. *See supra* note 172 and accompanying text.

198. *See supra* notes 152-53 and accompanying text.

199. *See supra* notes 31-45 and accompanying text.

200. *See supra* notes 18-19 and accompanying text.

the waiver invalidation test, this third prong appears to destroy any possibility of prohibition of such waivers. Note that the result here applies equally to all waivers of bankruptcy privileges. The same logic applies to waiver of the ability to file bankruptcy, waiver of the stay, waiver of discharge and waiver of other provisions of the Bankruptcy Code not specifically precluded by statutory language.

C. Contractual Limitations on Waivers of Bankruptcy Privileges

Concluding that bankruptcy privileges may be waived when looked at from the perspective of the law of contractual waiver cannot end our analysis. There are other doctrines of contract law that may limit such waivers.

Foremost among these limitations is the doctrine of unconscionability. It has been said that this doctrine requires both procedural unconscionability (a problem relating to the way the contract was created) and substantive unconscionability (an oppressive provision in the contract).[201] However viewed, this doctrine focuses primarily on discrepancies in bargaining power of the parties.[202] Where there is a major difference in the bargaining power of the parties that results in a surprising or oppressive provision, the court may refuse to enforce or limit application of the provision.[203] With this focus on bargaining power, it is not shocking that the doctrine of unconscionability is most frequently found in cases of consumers and only rarely in commercial cases.[204] The doctrine has frequently been used to invalidate or limit waiver provisions in contracts.[205] Therefore, where a waiver is found to be oppressive and burdensome and is a result of unequal bargaining power, courts may refuse to enforce a waiver of bankruptcy privileges.

Similarly, there is reluctance in the courts to enforce certain sorts of boilerplate non-negotiated agreements.[206] Adhesion contracts of this kind are not enforced when the party with superior bargaining power offers a form contract on a take-it-or-leave-it basis, and the subject matter of the contract is one of

---

201. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 (1967); *see also* Arkwright Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp., 844 F.2d 1174 (5th Cir. 1988).

202. Hydraform Prods. Corp. v. American Steel & Aluminum Corp., 498 A.2d 339 (N.H. 1985); *see also* U.C.C. § 2-302, Cmt. 1.

203. *Hydraform*, 498 A.2d at 343 (citing Cryogenic Equip., Inc. v. Southern Nitrogen, Inc., 490 F.2d 696, 699 (8th Cir. 1974)).

204. HOWARD O. HUNTER, MODERN LAW OF CONTRACTS (1976); *see also* Consolidated Data Terminals v. Applied Digital Data Sys., Inc., 708 F.2d 385 (9th Cir. 1983); Earman Oil Co. v. Burroughs Corp., 625 F.2d 1291 (5th Cir. 1980).

205. E. ALLAN FARNSWORTH, CONTRACTS 326-27 (2d ed. 1990). *See generally* U.C.C. § 2-302 (1995); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

206. FARNSWORTH, *supra* note 205, at 313-14 & n.16; *see also* John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569 (D. Kan. 1986).

necessity, not reasonably available elsewhere.[207] It has been forcefully argued that the modern reality of contracts is such that a contract should be enforced only to the extent of terms that have been actually bargained over, plus any other reasonable terms contained in the contract.[208] Such an approach would also be useful in avoiding the enforcement of waivers of bankruptcy privileges where a party is unaware of the waiver or it is not a result of true bargaining and negotiation.

Thus, there are a number of contract law doctrines that may limit enforceability of waivers of bankruptcy privileges. These doctrines should be applied liberally to waivers of bankruptcy privileges so that only truly bargained for waivers of which parties are aware are enforced.

CONCLUSION

Contractual waivers of bankruptcy privileges are nothing more than waivers of statutory privileges. Whether such waivers can be enforced is a matter of contract law. The law of contract allows the waiver of statutory rights and privileges so long as the statute does not compel invalidation of the clause based on a strong, well defined, and dominant public policy in existing law and precedent enacted for the benefit of the general public. The case law in bankruptcy relating to this issue does not, however, speak in the terms of the law of contractual waivers of statutory privileges.

Instead, the bankruptcy case law speaks its own language. It does not treat the issue as one of contract law but rather as another special issue of bankruptcy law. In this connection a mythology has arisen surrounding waivers of bankruptcy privileges. This mythology, which is composed of some utter falsities and a number of half-truths, has been used to sustain a theory that bankruptcy privileges are special creatures not subject to ordinary rules concerning waiver of statutory privileges. It is this mythology that has led to the generally accepted idea that bankruptcy privileges may not be waived. The elements of this mythology are, however, unsupportable. The issue of waiver of bankruptcy privileges is just another contract question that should be answered under contract principles. A major point of this Article is to expose the mythology of the law in this area.

Whether to enforce a waiver of a bankruptcy privilege should be determined under the contract law standard for the enforcement of such waivers. The formulation of the standard settled upon here is that, for a waiver of a statutory privilege to be unenforceable, one must show that there is in existing law and precedent a strong, well defined and dominant public policy for the benefit of the general public supporting the privilege sought to be waived. Moreover, one must demonstrate that invalidation of this waiver is compelled by the language of the statute. Under this standard it has been shown that there is no strong public

---

207. Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework For U.C.C. Section 2-3002*, 67 CORNELL L. REV. 1, 9 (1981).

208. HUNTER, *supra* note 204, at 19:60-61.

policy of the kind necessary to prevent the waiver of any bankruptcy privileges, including the ability to file bankruptcy itself. Moreover, even if there were a strong policy in favor of not allowing waivers, it can be potently argued that the bankruptcy law is not intended for the benefit of the general public. Further, the language of the statute does not compel a particular conclusion on this issue. As a result, contractual waivers of bankruptcy privileges should, as a general proposition, be enforced.

This is not to say that all waivers of bankruptcy privileges should be enforced. The limitations on enforcement of onerous contract provisions imposed by contract law, like the unconscionability doctrine and law relating to adhesion contracts, must be honored. In this way, only bargained for waivers should be enforced. As a result, it might well be found that such waivers are generally unenforceable in consumer contracts. This result, however, requires case law development.

Thus, with the mythology burst, waivers of bankruptcy privileges should be viewed as contract questions and such waivers should be permitted in circumstances where waivers of other statutory privileges are permitted.