PAUL HASTINGS

STAY CURRENT

June 2016

Follow @Paul_Hastings

Delaware Bankruptcy Court Refuses to Dismiss Chapter 11 Case Despite Existence of Secured Lender's "Golden Share" in Debtor's Delaware LLC Agreement: Could Bankruptcy-Remote Structures Be at Risk?

I. Introduction

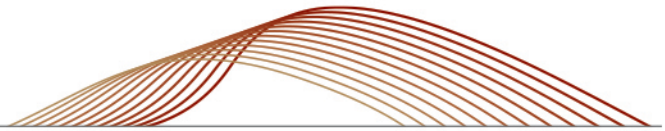
Earlier this month, the Delaware bankruptcy court denied a secured lender's motion to dismiss a chapter 11 case that had been commenced without the unanimous consent of all unitholders, as required under the debtor's LLC operating agreement.[1] The bankruptcy court concluded that the prepetition amendment to the debtor's LLC operating agreement pursuant to which the secured lender had obtained a single "golden share" (whose consent was necessary for the debtor to commence a bankruptcy case) was "tantamount to an absolute waiver" of the debtor's rights to seek bankruptcy protection and hence void as a matter of federal public policy.

The decision highlights a growing tension between two fundamental principles of bankruptcy law: (1) an entity must have proper corporate authority under its organizational documents and applicable state law to seek bankruptcy relief; and (2) prepetition agreements that prospectively prohibit bankruptcy filings or waive the debtor's rights under the Bankruptcy Code are void as against federal public policy. The Delaware bankruptcy court held that, under the specific facts of the case before it, federal public policy prevailed.

While the specific circumstances in the Delaware case may have been *sui generis*, the decision signals an increasing willingness on the part of bankruptcy courts to scrutinize bankruptcy-remote structures and, if necessary, challenge lenders' efforts to control their borrower's access to bankruptcy relief, especially where fiduciary duties of the person making the decision to seek bankruptcy relief are abrogated. The decision also serves as an important reminder to lenders: bankruptcy-remote does not necessarily mean bankruptcy-proof.

II. Background

Intervention Energy Holding, LLC ("IE Holdings") and its wholly-owned subsidiary Intervention Energy, LLC ("IE", and, together with IE Holdings, the "Intervention Energy") are private oil and natural gas exploration and production companies with operations almost entirely located in North Dakota. Both IE Holdings and IE are limited liability companies organized under the laws of the State of Delaware.



On January 6, 2012, Intervention Energy and an energy fund (“Lender”) entered into a note purchase agreement pursuant to which Lender provided up to $200 million in senior secured notes (of which approximately $140 million in principal amount were outstanding on the petition date). After a covenant default under the senior secured notes in October 2015, Intervention Energy entered into a forbearance agreement with Lender on December 28, 2015. The forbearance agreement provided, among other things, that Lender would waive all defaults under the secured notes if Intervention Energy raised $30 million of equity capital to pay down a portion of the secured notes by June 1, 2016. As a condition to effectiveness, IE Holdings agreed to amend its LLC operating agreement to (a) admit Lender or its affiliate as a member of IE Holdings with one common unit and (b) require approval of each holder of common units of IE Holdings prior to any voluntary bankruptcy filing for IE Holding or IE. IE Holdings so amended its operating agreement and delivered a single common unit to Lender for a capital contribution of $1.00. All of IE Holdings’ other 22,000,000 common units are held by Intervention Energy Investment Holdings, LLC.

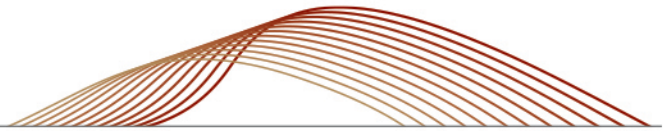
On May 20, 2016, IE Holdings and IE commenced chapter 11 cases in the Delaware bankruptcy court. Shortly after the filing, Lender moved to dismiss the chapter 11 cases on the ground that the filings were not properly authorized because Lender did not consent to the filing, as required under IE Holdings’ operating agreement.[2] It was not disputed that, but for the December 2015 amendment to the operating agreement, IE Holdings would have been authorized to seek bankruptcy relief.

In its motion to dismiss, Lender argued that (a) an entity may only commence a bankruptcy case if it properly authorized to do so under applicable state law, (b) under IE Holdings’ operating agreement, its board of managers was only authorized to file a bankruptcy petition if all unitholders approved such a decision, and (c) because Lender, as a unitholder, did not approve the filing, IE Holdings lacked the requisite corporate authority to file the petition. Lender further noted that, under the Delaware LLC Act, a Delaware LLC may agree to eliminate its member’s fiduciary duties (save for the implied contractual covenant of good faith and fair dealing), which is just what IE Holdings did in its operating agreement.[3] Under these circumstances, Lender argued, IE Holdings could also contract away its right to seek bankruptcy relief, without Lender’s consent as a unitholder.[4]

Intervention Energy responded that the provision in IE Holdings’ LLC operating agreement requiring Lender’s consent to file for bankruptcy was void as a matter of federal public policy, which uniformly disfavors contractual provisions precluding business entities from availing themselves of the rights afforded under the Bankruptcy Code. In this regard, Intervention Energy also argued that by abrogating the fiduciary duties of the unitholders, including Lender as holder of the “golden share,” the LLC amendment eliminated what could have otherwise been the redeeming factor of the arrangement with Lender.[5]

III. Bankruptcy Court’s Ruling

The bankruptcy court held that the provision requiring Lender’s consent, as a unitholder, in order for IE Holdings to file for bankruptcy was void as a matter of federal public policy.[6] The court noted that it is federal public policy to protect a person’s (including a business entity’s) right to seek bankruptcy relief, as evidenced by the extensive jurisprudence invalidating prepetition agreements that abrogate a debtor’s federal bankruptcy rights.[7] Nor can a state abrogate such rights.[8]



Here, the bankruptcy court found that the consent provision added to IE Holdings' LLC operating agreement was "tantamount to an absolute waiver" because:

- the provision at issue "place[d] into the hands of a single, minority equity holder the ultimate right to eviscerate the right of" IE Holdings to seek federal bankruptcy;
- the nature and substance of the minority equity holder's "primary relationship with the debtor is that of creditor—not equity holder;"
- the minority equity holder "owes no duty to anyone but itself in connection with [the] LLC's decision to seek federal bankruptcy relief;" and
- Lender "unequivocally intend[ed] . . . to reserve for itself the decision whether the LLC should seek federal bankruptcy relief."[9]

Notably, the bankruptcy court did not single out any particular factor as decisive. Rather, it appears that it was the combination of the foregoing factors that ultimately swayed the court to invalidate the consent provision as against federal public policy.[10]

IV. Discussion

It is well-settled that an entity must have proper corporate authority under the entity's organizational documents and applicable state law to file for bankruptcy.[11] Accordingly, courts have upheld provisions in organizational documents that require, for example, the unanimous consent of the debtor's members to file for bankruptcy, and, absent such consent, have dismissed the case.[12] At the same time, it is also well-settled that prepetition agreements that prospectively prohibit bankruptcy filings or waive the benefits conferred by the bankruptcy laws are void as against federal public policy.[13]

These two fundamental propositions have come into conflict in connection with lenders' efforts to require borrowers, as part of providing secured financing, to form special purpose entities ("SPE") or establish other corporate limitations that are designed to insulate the borrowing entity (or structure) from a bankruptcy filing.

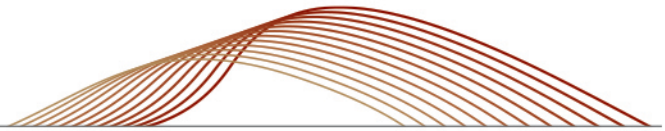
Typically, the SPE's organizational documents will contain a number of restrictions intended to make it unlikely that the SPE becomes insolvent as a result of its own activities and/or to ensure that the SPE is insulated from the consequences of any related party's insolvency. These restrictions include:

a. limiting the SPE's ability to incur indebtedness (other than its principal secured debt);

b. limiting the SPE's activities to owning and operating the collateral securing the subject debt;

c. prohibiting the SPE from consolidating or combining with another entity, liquidating or winding up, and merging or selling substantially all of its assets; and

d. requiring the SPE to have an "independent" director (in the case of a corporation) or member (in the case of an LLC) whose vote is required to file a bankruptcy petition.[14] Often the independent director must be selected from an approved list of providers of such services.



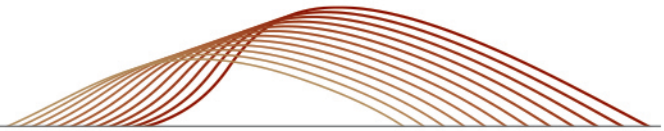
SPE structures are used in a variety of circumstances, including property-specific loan transactions, transactions involving the pooling of mortgage loans, or credit lease transactions.

However, bankruptcy-remote features are also found outside the context of the typical SPE structure. For example, in connection with forbearance agreements, lenders have in some instances required borrowers to amend their organizational documents to (i) add an "independent" director/member to their boards, (ii) require that such "independent" director/member be selected from an approved list, (iii) require that such director's/member's consent is necessary for the borrower to file for bankruptcy, and (iv) disclaim any fiduciary duties of such independent director/member to the borrower's parent. The ostensible goal of this arrangement is to block (or make extremely unlikely) a voluntary bankruptcy petition—in lieu of having the borrower directly agree not to file for bankruptcy, which would run afoul of the general prohibition against contracting away bankruptcy rights. In addition, structures involving the issuance of a "golden share" to the secured lender (as was the case in *Intervention Energy*) have been used by secured lenders. Lenders have argued that these bankruptcy-remote structures are critical to limit credit risk, which, in turn, reduces the cost of capital for borrowers, especially those in distressed situations.

Until recently, the few bankruptcy courts that have faced challenges to bankruptcy-remote structures have upheld them and dismissed cases where the requisite consent from the lender or "independent" director/member was lacking. For example, in *Global Ship Sys.*, a Georgia bankruptcy court dismissed a chapter 11 case where the filing had not been authorized by the debtor's class B shareholder, in contravention of the debtor's operating agreement.[15] In that case, the secured lender had received, at the time of the closing of its loan to the debtors, class B shares equal to a 20% equity interest in the debtors.[16] The court held that because the creditor wore "two hats" (as creditor and as class B shareholder) it had the "unquestioned right to prevent, by withholding consent, a voluntary bankruptcy case."[17] In so holding, the court emphasized the LLC members' freedom of contract in structuring LLCs under Georgia law (the law governing the debtor's LLC agreement).[18]

Moreover, in *DB Capital Holdings*, the 10th Circuit B.A.P. affirmed, in an unpublished decision, a Colorado bankruptcy court's dismissal of a chapter 11 case on the ground that the debtor's manager was not authorized to file the bankruptcy petition.[19] In that case, the debtor's LLC agreement had been amended to prohibit the debtor from filing for bankruptcy.[20] The debtor challenged that provision on the ground that it had been "executed at the demand, and for the sole benefit of" the debtor's main secured creditor.[21] While the B.A.P. acknowledged the case law prohibiting advance waivers of bankruptcy rights, it found that case law irrelevant where the members of an LLC agree among themselves not to file for bankruptcy.[22] The B.A.P. concluded that such an agreement was not, absent coercion (which was not shown here), void as against public policy.[23]

However, bankruptcy-remote SPE structures are not necessarily bankruptcy-proof. For example, in *General Growth Properties*, property-level lenders sought to dismiss the chapter 11 cases of several of General Growth's property-level subsidiaries as bad faith filings, including on the grounds that (i) the filings were engineered by replacing the independent directors on the eve of bankruptcy and (ii) the SPEs were not in financial distress, and hence the filings were premature.[24] The bankruptcy court for the Southern District of New York denied the motion to dismiss.[25] For one, the replacement of the independent directors did not constitute bad faith because, among other things, "the corporate documents did not prohibit this action or purport to interfere with the rights of a shareholder to appoint independent directors to the Board."[26] Nor were the filings premature (notwithstanding the solvency of the SPEs) because the SPEs' managers were justified in taking the interests of the parent



companies into account, given that, under applicable Delaware law, they owed fiduciary duties to the parents, as shareholders.[27]

More recently, in *In re Lake Michigan Beach Pottawatamie Resort LLC*, an Illinois bankruptcy court held that a lender's consent provision in a borrower's LLC agreement was unenforceable as a matter of federal public policy and applicable Michigan state law.[28] The court explained that bankruptcy-remote structures are only permissible as long as the "blocking" directors/members adhere to their general fiduciary duties to the company, so that there will be "at least theoretically, . . . situations where the blocking director will vote in favor of a bankruptcy filing, even if in doing so he or she acts contrary to purpose of the secured creditor for whom he or she serves."[29] In *Lake Michigan Beach*, however, the secured lender had required, as a condition to a forbearance agreement, that the borrower LLC enter into an amendment to its operating agreement (a) establishing the secured lender as a special member to the LLC, (b) requiring the consent of the special member to file bankruptcy, and (c) eliminating any duty on the part of the special member to give any consideration to the interests of the LLC or its members.[30] Because the fiduciary duties of the special member were eliminated under the amendment, the court held that the consent provision imposed, in effect, an absolute bar against bankruptcy filing and was therefore unenforceable on public policy grounds.[31]

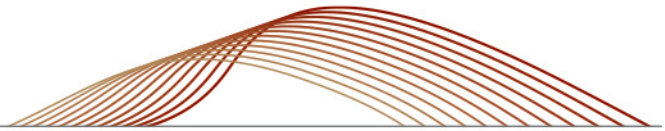
As noted above, the bankruptcy court in *Intervention Energy* similarly took issue with the fact that Lender, as holder of the "golden share," owed no duty to anyone but itself.[32] The court concluded that this arrangement, in combination with the fact that it was not disputed that Lender intended to block any voluntary bankruptcy filing, meant that the consent provision in IE Holdings' LLC operating agreement was "tantamount to an absolute waiver" of IE Holdings' right to seek federal bankruptcy relief, in violation of federal public policy.[33]

While the specific facts of *Intervention Energy* were perhaps *sui generis*—the secured creditor could block a bankruptcy filing through a single "golden share"—the case may open the door for future debtors to challenge bankruptcy-remote structures, especially where the LLC agreement abrogates the fiduciary duties of the "blocking" director/member, as was the case in both *Intervention Energy* and *Lake Michigan Resort*.

The bankruptcy court in *Intervention Energy* also briefly addressed the decisions in *Global Ship Sys.* and *DB Capital Holdings*, both of which had been cited by Lender in support of its position that the consent provision in IE Holdings' LLC operating agreement should be enforced. While the court described the *Global Ship Sys.* case as "closest on point," it nevertheless distinguished it on the ground that

> ***the method*** by which the creditor in *Global Ship Sys.* received its equity interests was not subject to question or analysis. There is no way to compare that creditor's interests to [Lender]'s contract for one golden share solely for the purpose to control any potential filing.[34]

The footnote thus reveals the court's willingness to carefully scrutinize the circumstances under which a secured lender obtained its consent rights—at the time of the original funding vs. as a condition to forbearance—and to take into account the magnitude of the lender's equity position—20% in *Global Ship Sys.* vs. 0.00005% (*i.e.*, 1/2,000,000) in *Intervention Energy*. While it is not entirely clear, the footnote suggests that the court's holding is limited to circumstances where the LLC amendment was entered into as a condition to the lender's agreement to forebear from exercising remedies.



As for the 10th Circuit B.A.P.'s decision in *DB Capital Holdings*, the court noted, without any discussion, that it disagreed with the holding in that case.[35] By doing so, the court implicitly rejected the distinction made by the 10th Circuit B.A.P. between, on the one hand, a debtor agreeing with a third party (e.g., a lender) to waive bankruptcy rights and, on the other hand, an agreement among the LLC's members (even if at the behest of the secured lender) to limit such rights.

V. Conclusion

There are two ways of reading the *Intervention Energy* decision. A narrow reading would suggest that the case, as precedent, is limited to circumstances where the bankruptcy-remote features are added as part of a forbearance or restructuring agreement. If that is the proper interpretation of the decision, financial participants in typical bankruptcy-remote structures have little to fear. However, it could be argued that the decision should be read more broadly, namely as critical of bankruptcy-remote structures where (a) the lender has no (or only an extremely limited) economic stake *qua* shareholder or unitholder, (b) the bankruptcy-remote provisions were incorporated to block any bankruptcy filing, and (c) the fiduciary duties of the decision-maker appointed pursuant to the bankruptcy-remote provisions are so circumscribed that it is practically impossible for a bankruptcy filing to be authorized. If that is the proper reading of the decision, then certain bankruptcy-remote structures could potentially be at risk. While the *Intervention Energy* decision is, of course, not binding precedent on any other court, it is noteworthy as it comes from one of the most influential bankruptcy courts in the United States.[36]

In any event, the *Intervention Energy* decision serves as an important reminder to all lenders contemplating bankruptcy-remote structures: bankruptcy-remote does not necessarily mean bankruptcy-proof. Accordingly, lenders should always consider additional safeguards, including so-called "bad boy" guaranties, *i.e.*, non-recourse guaranties by the borrower's controlling shareholder(s), which become recourse guaranties upon the occurrence of certain enumerated bad acts of the borrower, including the borrower's bankruptcy filing.[37] To date, these types of guaranties have generally been held to be enforceable.[38]

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Chicago

Chris Dickerson
1.312.499.6045
chrisdickerson@paulhastings.com

Matthew M. Murphy
1.312.499.6036
mattmurphy@paulhastings.com

Marc J. Carmel
1.312.499.6040
marccarmel@paulhastings.com

Houston

James T. Grogan
1.713.860.7338
jamesgrogan@paulhastings.com

New York

Luc A. Despins
1.212.318.6001
lucdespins@paulhastings.com

Leslie A. Plaskon
1.212.318.6421
leslieplaskon@paulhastings.com

Andrew V. Tenzer
1.212.318.6099
andrewtenzer@paulhastings.com

Michael Comerford
1.212.318.6617
michaelcomerford@paulhastings.com

G. Alexander Bongartz
1.212.318.6472
alexbongartz@paulhastings.com

[1] *In re Intervention Energy Holdings, LLC*, Case No. 16-11247(KJC), 2016 WL 3185576 (Bankr. D.Del. June 3, 2016). The chapter 11 cases are pending before Bankruptcy Judge Kevin J. Carey.

[2] IE Holding's operating agreement requires "approval of all Common Members [*i.e.*, *the unitholders*] . . . [to] commence a voluntary case under any bankruptcy." With respect to IE's chapter 11 case, Lender argued that even though the consent provision was only added to IE Holdings' LLC operating agreement, IE's chapter 11 case should also be dismissed for pragmatic reasons. Specifically, Lender argued that once IE Holdings' petition was dismissed, Lender would foreclose on its collateral, including the IE Holdings' equity in IE, and, as a result, will have the right to voluntarily dismiss IE's chapter 11 case.

[3] Section 6.4 of IE Holdings' operating agreement eliminated fiduciary duties "to the fullest extent permitted by law."

[4] In its motion to dismiss, Lender also urged dismissal of the chapter 11 cases for additional reasons: (1) Intervention Energy is unable to confirm a plan, and (2) the chapter 11 cases were filed in bad faith. The bankruptcy court decided to bifurcate determination of the issues, and addressed only the corporate authority issue in its decision. *Intervention Energy*, 2016 WL 3185576 at *1 n.5.

[5] The debtors also opposed Lender's request to dismiss IE's chapter 11 case, noting that IE's bankruptcy filing was properly authorized by its member (IE Holdings) in accordance with its LLC operating agreement.

[6] *Intervention Energy*, 2016 WL 3185576, at *6. Because the court decided the matter on federal public policy grounds, the court did not follow the parties' invitation to address what the court viewed as a question of first impression of state law, namely the scope of LLC members' freedom to contract under applicable Delaware law. *Id.* at *4.

[7] *Id.* at *5.

[8] *Id.* at *6.

[9] *Id.*

[10] Because the bankruptcy court declined to dismiss IE Holdings' chapter 11 case, it did not address Lender's argument that IE's chapter 11 case should be dismissed as a result of the dismissal of IE Holdings' case.

[11] *See*, *e.g.*, *Hager v. Gibson*, 108 F.3d 35, 39 (4th Cir. 1997) ("[W]here a voluntary petition for bankruptcy is filed on behalf of a corporation, the bankruptcy court does not acquire jurisdiction unless those purporting to act for the corporation have authority under local law 'to institute the proceedings.'") (citing *Price v. Gurney*, 324 U.S. 100, 106 (1945); *Keenihan v. Heritage Press, Inc.*, 19 F.3d 1255, 1258 (8th Cir. 1994) ("A person filing a voluntary bankruptcy petition on a corporation's behalf must be authorized to do so . . . .") (citing *Price v. Gurney*, 324 U.S. 100, 106 (1945).

[12] *See*, *e.g.*, *In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006) (dismissing chapter 11 case of debtor LLC because members did not unanimously consent to filing, as required by debtor's operating agreement). We note that, in *Orchard at Hanson Park*, the LLC members were not creditors of the debtor.

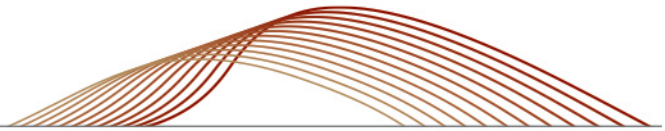
[13] *See*, *e.g.*, *In re Bay Club Partners-472, LLC*, No. 14-30394-rld11, 2014 WL 1796688 (Bankr. D. Or. May 6, 2014) (provision in debtor's LLC operating agreement prohibiting bankruptcy filing was unenforceable as a matter of federal public policy); *In re TWA*, 261 B.R. 103, 113-14 (Bankr. D. Del. 2001) (contractual provision which purports to waive debtor's right to reject contract under Bankruptcy Code violates public policy and is not enforceable); *In re Shady Grove Tech Ctr. Assocs.*, 216 B.R. 386, 390 (Bankr. D. Md. 1998) (holding that "prohibitions against the filing of a bankruptcy case are unenforceable"); see also *In re Klingman v. Levinson*, 831 F.2d 1292, 1296 n. 3 (7th Cir. 1987) (noting that prebankruptcy "stipulation that the debt owed to [creditor] would 'not be dischargeable in any bankruptcy or similar proceeding' did not constitute a waiver of [debtor's] right to have a bankruptcy court determine the dischargeability of the debt") (citation omitted); *see also N.H.L. v. Moyes et al.*, No. CV-10-01036-PHX-GMS, 2015 WL 7008213, *8 (D. Ariz. 2015) ("If a contractual term denying the debtor parties the right to file for bankruptcy is unenforceable, then a contractual term prohibiting the non-debtor party that controls the debtors from causing the debtors to file bankruptcy is equally unenforceable.").

[14] *See* U.S. CMBS Legal and Structured Finance Criteria, Standard & Poor's Ratings Services.

[15] *In re Global Ship Sys. LLC*, 391 B.R. 193 (Bankr. S.D.Ga. 2007).

[16] *Id.* at 197.

[17] *Id.* at 203. The court also noted that the consent requirement of the class B shares survived repayment of secured loan. *Id.*



[18] *Id.* at 204.

[19] *DB Capital Holdings, LLC v. Aspen HH Ventures, LLC (In re DB Capital Holdings, LLC)*, 463 B.R. 142 (B.A.P. 10th Cir. 2010).

[20] *Id.* at 2.

[21] *Id.* at 3. However, the debtor's main secured creditor was not a member of the debtor LLC.

[22] *Id.* at 3.

[23] *Id.*

[24] *In re General Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

[25] *Id.* at 72.

[26] *Id.* at 68.

[27] *Id.* at 63-65.

[28] *In re Lake Michigan Beach Pottawattamie Resorts LLC*, 547 B.R. 899, 912 (Bankr. N.D. Ill. 2016). The LLC agreement had been amended to add the debtor's secured creditor as a "special member" and require the consent of such special member in order for the debtor to file for bankruptcy. *Id.* at 903-904.

[29] *Id.* at 912.

[30] *Id.* at 910.

[31] *Id.* at 914.

[32] *Intervention Energy*, 2016 WL 3185576, at *6.

[33] *Id.*

[34] *Id.* at *6 n.25 (emphasis added).

[35] *Id.*

[36] The time to appeal the bankruptcy court's decision expires on June 17, 2016. As of the date of this Client Alert, no appeal has been filed.

[37] However, the use of such guaranties may be limited to cases where the borrower is controlled by one or a very limited number of shareholders who are prepared to place their personal credit at risk for their controlled entity to obtain a loan. Therefore, in many cases, a bad boy guaranty will not be available as an effective antidote to a future "unauthorized" bankruptcy filing.

[38] *See*, *e.g.*, *G3-Purves St. LLC v. Thomas Purves, LLC*, 953 N.Y.2d 109 (App. Div. 2012) (enforcing bad boy guaranty triggered by borrower's failure to pay certain real estate taxes and other claims related to collateral securing underlying loan); *Bank of Am. N.A. v. Lightstone Holdings LLC,* 938 N.Y.S.2d 225 (2011) (enforcing bad boy guaranty triggered by borrower's bankruptcy filing); *UBS Commercial Mort. Trust 2007-FL1 v. Garrison Special Opportunities Fund L.P.*, 938 N.Y.S.2d 230 (2011) (same); *GCCFC 2006-GG7 Westheimer Mall, LLC v. Okun*, No. 07 Civ. 10394 (NRB), 2008 WL 3891257 (S.D.N.Y. Aug. 21, 2008) (same); *see also In re Extended Stay Inc.*, 418 B.R. 49, 59 (Bankr. S.D.N.Y. 2009) (noting, in connection with lender's request to remand action against bad boy guarantor to state court, that guarantor's public policy arguments that bad boy guaranty encumbered debtors' access to bankruptcy are of "minimal relevance" given that guarantor, as president, CEO, and chairman of debtors, had authorized bankruptcy filings); *but see ING Real Estate Finance (USA) LLC v. Park Venue Hotel Acquisition LLC*, 907 N.Y.S.2d 437 (2010) (refusing to enforce bad boy guaranty where lender sued guarantor for $90 million on account of borrower's failure to pay $278,759 in real property taxes, which taxes were subsequently paid by guarantors, thereby removing the tax lien on property securing underlying loan).