

Business Bankruptcy Amendments Hidden in 2021 Federal Appropriations Act



On December 27th the Consolidated Appropriations Act (the “Act”) was signed into law. Buried within its thousands of pages are a handful of amendments to the Bankruptcy Code, certain of which relate to corporate debtors. The following is a summary of certain of such amendments affecting corporate debtors.

Extension of Time Under Section 365(d)(4) to Assume or Reject Non-Residential Real Property Leases: Of particular concern to debtors in many lease-heavy industries, including restaurants and retailers, is the duration of time granted to lessees under unexpired leases of non-residential real property to determine whether to assume or reject such leases. Prior to the amendments, the Bankruptcy Code provided (in relevant part):

an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of—(i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan.

11 U.S.C. § 365(d)(4)(A). Subsection (B) of the provision provided for one 90-day extension for “cause,” upon motion made prior to the expiration of the initial 120-day period. Section 1001(f)(1)(B) of the Act amends this statute by replacing each instance of “120” with “210”—in other words, granting debtors an *initial* 210-day period to assume or reject non-residential real property leases (assuming a plan is not confirmed before that time), and the possibility of a 90 day extension after that initial period. This change will likely relieve some pressure facing lease-heavy debtors, who will have additional time to make decisions regarding assumption or rejection.

The amendment is effective for a two-year period; on the two-year anniversary of the Act, the statute will revert (except that the changes will continue to apply in any Subchapter V case filed prior to the two-year anniversary of the Act).

Extension of Time Under Section 365(d)(3) to Perform Under Non-Residential Real Property Leases (Subchapter V Only): Like Section 365(d)(4), Section 365(d)(3) also deals with non-residential real property leases, but 365(d)(3) concerns performance under the lease, as opposed to assumption or rejection. Specifically, Section 365(d)(3) requires that debtor/lessees must perform under such leases from and after the filing and until such lease is assumed or rejected, but permits the bankruptcy court to extend, for “cause,” the time for performance for up to 60 days.

This provision has been discussed by courts in connection with requests by debtors for “rent abatements” in light of COVID-related financial hardships, with one court in Texas most recently concluding that Section 365(d)(3) was unambiguous in providing that the Bankruptcy Code permits a 60-day extension, but no more.

In this amendment, Congress provided relief, but only to debtors in Subchapter V cases. The Act adds a new subparagraph (B) to Section 365(d)(3), which provides that the time for performance of commercial lease obligations may be extended by the court for an *additional* 60 days if the court determines “that the debtor is continuing to experience a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic.”

This change will sunset after two years, but will remain applicable to any Subchapter V case filed before that time.

Exceptions to Preference Liability In Connection With Deferral/Repayment Agreements: Perhaps recognizing the widespread inability of entities to timely pay bills during the pandemic, and the resulting entry into deferral and forbearance agreements with landlord and vendors, Congress included in the Act an exception to preference liability for payments made in accordance with such agreements.

Generally, under Bankruptcy Code Section 547, and subject to several defenses, payments made to a creditor within 90 days before a bankruptcy on account of a pre-existing debt can be avoided and recovered by the bankruptcy estate as a “preferential transfer.” Section 1001(g) of the Act introduces the terms “covered payment of rental arrearages” and “covered payment of supplier arrearages,” and provides that neither such payment may be avoided as a preference.

Covered payments of rental arrearages refer to payments of arrearages made in connection with an agreement between a debtor and a lessor to defer or postpone payment of rent and other periodic charges under a lease of non-residential real property, which agreement is made or entered into on or after March 13, 2020. A covered payment cannot exceed the amount of rent and other periodic charges agreed to under the lease before March 13, 2020, and also does not include fees, penalties, or interest greater than the amount of such fees, penalties, or interest scheduled to be paid under such lease or that the debtor would owe if the debtor had made every payment due under the lease on time and in full before March 13, 2020.

Similarly, covered payments of supplier arrearages refer to payments of arrearages made in connection with an agreement between a debtor and a supplier of goods or services to defer or postpone payment of amounts due under an executory contract for such goods or services, which agreement is made or entered into on or after March 13, 2020. A covered payment cannot exceed the amount due under the executory contract before March 13, 2020, and also does not include fees, penalties, or interest greater than the amount of such fees, penalties, or interest scheduled to be paid under such executory contract or that the debtor would owe if the debtor had made every payment due under the executory contract on time and in full before March 13, 2020.

The amendment is scheduled to expire after two years, but will remain applicable in any case filed before that time.

Priority Treatment for Customs Subrogation Claims: Bankruptcy Code Section 507(a) provides a system of special priorities for certain claims, and Section 507(d) generally provides that an entity that is subrogated to the rights of a holder of a claim specified in certain subsections of Section 507(a) is *not* also subrogated to the right of such claimholder to priority. The Act removes Section 507(a)(8)(F), which provides priority status for certain customs duties arising out of the importation of merchandise, from such rule, such that entities that are subrogated to the rights of the government in connection with such claims would also obtain the benefit of the government's priority status. This provision expires after one year.

PPP Loan Availability to Certain Debtors: After months of uncertainty regarding debtors' eligibility to obtain PPP loans, the Act provides some guidance in this regard. Specifically, the Act adds a new subsection (g) to Section 364 of the Bankruptcy Code (which generally deals with obtaining credit), which new subsection provides that the court may authorize a debtor-in-possession or trustee to obtain a PPP loan, with several important limitations. First, it limits its applicability to debtors operating under certain sections of chapters 12 and 13 and Subchapter V. It does *not* apply to chapter 11 debtors who have not filed under Subchapter V. Second, it only becomes effective on such date that the SBA Administrator informs the Director of the Executive Office for United States Trustees in writing that the above-referenced debtors should be eligible for PPP loans. And third, much like the other amendments, the amendment has an expiration date—here, two years from the date of the Act; provided that the amendment will apply to any case commenced before that date.

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The Act contains certain additional bankruptcy-related amendments that are not discussed in this Alert; in addition, the summaries contained herein are not intended to, and do not, recite every aspect of each amendment.

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