

Bankruptcy Law Alert

March 2021

Chapter 11 Changes for Landlords and Tenants Under Consolidated Appropriations Act

The recently enacted Consolidated Appropriations Act, 2021 (CAA) contains important temporary amendments to Chapter 11 of the Bankruptcy Code in response to the ongoing COVID-19 pandemic, including several that impact both landlords and tenants under commercial real estate leases.

Small-business debtors can seek an additional extension of time to pay rent

The CAA amends Section 365(d)(3) of the Bankruptcy Code, which allows debtor-tenants to request an order extending their time to pay rent until 60 days after the bankruptcy filing date. The extension only postpones the obligation and does not forgive payment of the rent that accrues during this period. Under the amended provision, small-business debtors (those with less than \$7.5 million in noncontingent, unliquidated debts to unrelated third parties) that elect to proceed under the small-business provisions of Subchapter V can request an additional 60-day extension (for a total of 120 days) upon a showing of material financial hardship due—either directly or indirectly—to COVID-19. Any obligations coming due during the newly extended period (days 61 through 120) must be fully paid and cannot be reduced in bankruptcy.

Deadline for assumption and rejection of unexpired leases extended

Under Section 365(d)(4), a debtor must assume or reject leases by the earlier of 120 days from the bankruptcy filing date or the date a plan of reorganization is confirmed. If the debtor does not assume or reject the lease as required, the lease is automatically rejected. Under the



new amendment, the 120-day deadline is extended by an additional 90 days for a total of 210 days for small-business debtors proceeding under Subchapter V.

Rent payments made under certain payment plans cannot be clawed back as preferential

Under Section 547, debtors may claw back certain payments made within 90 days of the bankruptcy filing date to prevent those creditors from receiving “preferential” treatment. Under the new amendment, subject to certain conditions, a debtor may not claw back as a preference any rent payments that were made during this pre-bankruptcy window under a lease modification or rent deferral agreement negotiated after March 13, 2020. The statutory protection does not apply to the payment of fees, penalties or interest made pursuant to an agreement.

These amendments sunset two years after the enactment of the CAA

These amendments are temporary and sunset on Dec. 27, 2022, two years after the enactment of the CAA. The amendments to Section 365(d)(3) and Section 365(d)(4)

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apply retroactively to any Subchapter V case commenced before the sunset date.

These amendments to the Bankruptcy Code provide powerful enhancements to debtors' and creditors' rights alike. Parties should carefully consider these protections and rights as well as the sunset deadline and retroactive effect to determine whether they can take advantage of these provisions, if they are applicable to their situation, and how they might impact other transactions involving a current or potential debtor.

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