



COVID-19 Update

December 2020

New COVID-19 Relief Package Provides Additional Pandemic Bankruptcy Protections

Key Notes:

- The SBA Administrator can make corporate debtors eligible for Paycheck Protection Program (PPP) loans at any time by notifying the Office of the U.S. Trustee.
- Suppliers and commercial landlords have reduced preference exposure based on payments made to cover arrearages.
- Subchapter V debtors can extend the time to perform under commercial leases beyond the initial 60 days.

On December 21, 2020, Congress passed a monumental \$900 billion pandemic relief package. It includes several changes to the Bankruptcy Code that will provide additional relief for both individual and corporate debtors, as well as additional protections for creditors impacted by the pandemic. President Trump signed the bill into law on December 27. Most of the revisions to the Bankruptcy Code are temporary and will expire after either one or two years.

As a preliminary matter, the bill makes certain changes to debtors' eligibility for CARES Act funding. First, Section 525 of the Bankruptcy Code, which governs protection against discriminatory treatment against debtors, is amended to clarify that individual debtors cannot be denied CARES Act relief on the basis of a past or present bankruptcy filing. This change expires after one year. Second, under Section 364 of the Bankruptcy Code, corporate debtors may potentially be eligible for CARES Act funding with bankruptcy court authorization. This amendment will not become effective, however, unless and until the SBA Administrator submits a written determination to the Office of the U.S. Trustee that corporate debtors are generally eligible for CARES Act funding. Provided such eligibility is

determined, the changes to Section 364 contemplate that a corporate debtor may file a motion with the bankruptcy court to obtain CARES Act funding, and the court must hold a hearing within seven days. If the court authorizes the loan, then, to the extent it is not forgiven, it will be treated as a priority claim ahead of administrative expenses under Section 503(b) and 507(b). This amendment expires two years after the bill becomes law, regardless of when or if the SBA determines corporate debtors are eligible, and existing debtors will not be grandfathered in.

Other material changes to the Bankruptcy Code contained in the bill include the following:

- **Reduced Preference Exposure for Suppliers and Commercial Landlords (11 U.S.C. § 547(b)).** A trustee cannot recover as a preference either a covered payment of rental arrearages or a covered payment of supplier arrearages, which are generally defined as past due payments deferred by agreement with a commercial landlord or a supplier of goods under an executory contract. This preference exclusion may not exceed contractually agreed amounts in place before March 13, 2020. This change expires after two years, but remains applicable to any cases filed during those two years.
- **Extension of Commercial Lease Assumption/Rejection Periods (11 U.S.C. § 365(d)).** For "small business" subchapter V debtors who experience a pandemic-related financial hardship, the bankruptcy court may extend the time for performance under a commercial real property lease beyond 60 days to the earlier of an additional 60 days or the assumption or rejection of the lease. The payment of these obligations is treated as an administrative expense. Additionally, for all debtors

leasing commercial real property, the initial period to assume or reject leases is extended from 120 days to 210 days. These changes to Section 365 expire after two years, but remain applicable to any case filed during those two years.

- **“CARES forbearance claim” (11 U.S.C. § 501).** The bill creates a new supplemental claim for mortgage lenders called a “CARES forbearance claim” for the amount of a federally backed mortgage loan or multifamily mortgage loan (as defined by the CARES Act) previously granted forbearance under the CARES Act. The supplemental claim must include details of the forbearance agreement or loan modification, and must be filed no later than 120 days after the end of the forbearance period. A debtor’s confirmed plan may be modified upon request of the debtor or any party in interest to include the CARES forbearance claim. This change to Section 501 expires after one year.
- **Chapter 13 Discharge Relief (11 U.S.C. § 1328).** The bankruptcy court may enter a Chapter 13 discharge for individuals even if (1) the debtor defaulted on a mortgage for up to three months as a result of pandemic-related financial hardship, or (2) the debtor’s plan provides for cure of a mortgage default and the debtor entered into a forbearance or loan modification agreement with a mortgage servicer. This change to Section 1328 expires after one year.

Finally, other changes to the Bankruptcy Code are relatively minor. For example, the Bankruptcy Code’s definition of “property of the estate” in Section 541(b) will be harmonized with changes made to the Tax Code by the relief bill. Further, under Section 366 of the Bankruptcy Code, individual debtors will not be required to provide adequate assurance of future payment of utilities if they make a utility payment within 20 days of filing, and continue to make utility payments as they come due. Additionally, amendments to Section 507(d) provide that an entity that is subrogated to the rights of a holder of a claim related to customs duties for the importation of merchandise is still subrogated to the right of the holder of such claim to priority under such subsection. Each of these changes to the Bankruptcy Code expires after one year.

As the economic fallout of the pandemic continues, both debtors and creditors are likely to avail themselves of these new protections when they become available.

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