COVID-19: BANKRUPTCY CODE AMENDMENTS IN THE CONSOLIDATED APPROPRIATION ACT AND COVID-19 BANKRUPTCY RELIEF EXTENSION ACT

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On 27 March 2021, President Biden signed into law the *COVID-19 Bankruptcy Relief Extension Act* (the Extension Act). The Extension Act temporarily extends certain COVID-19 bankruptcy relief provisions enacted as part of the *Coronavirus Aid, Relief, and Economic Security Act* (the CARES Act), which were further amended and/or extended as part of the *Consolidated Appropriations Act* (the CAA). Certain of the amendments included in the CAA and the Extension Act are highlighted below:

DEBTORS AND PAYCHECK PROTECTION PROGRAM LOANS

Under the CARES Act, Congress established the Paycheck Protection Program (PPP) administered by the Small Business Administration (SBA), whereby businesses may obtain loans that would be forgiven if the borrowers used the funds for certain permitted purposes. The SBA promulgated a rule declaring debtors in bankruptcy ineligible for PPP loans. Debtors across the country have challenged this rule. The CAA attempts to address this issue by expressly authorizing certain debtors in bankruptcy to obtain PPP loans only if the SBA Administrator sends a letter to the Director of the Executive Office for United States Trustees approving the rule change. If the SBA Administrator delivers such letter, PPP funds will be available (a) in cases filed after the date of the delivery of the letter and (b) to Subchapter V small-business debtors, chapter 12 family farmer and fishermen debtors, and self-employed chapter 13 debtors. To date, the SBA Administrator has yet to deliver the letter. This provision sunsets under the CAA on 27 December 2022.

DISCRIMINATION UNDER SECTION 525

Section 525 of the Bankruptcy Code generally protects debtors in bankruptcy from certain types of discrimination based solely on the fact that the debtor has sought bankruptcy relief. The CAA amends section 525 to specify that a debtor in bankruptcy may also not be deprived of the benefit of certain provisions of the CARES Act as well due to its status as a debtor in bankruptcy, including (a) the foreclosure moratorium and right to request forbearance, (b) the forbearance of mortgage payments for multi-family properties, and (c) the temporary moratorium on eviction filings. This modification of section 525 is set to sunset on 27 December 2021.

UNEXPIRED NON-RESIDENTIAL REAL PROPERTY LEASES

Section 365(d)(3) of the Bankruptcy Code requires a debtor to continue timely performing under its unexpired non-residential real property leases, until such leases are assumed or rejected. The CAA authorizes debtors in small-business Subchapter V cases to seek a delay in performance of 60 days (up to 120 days total) under its unexpired non-residential real property leases, if the debtor has experienced and is continuing to experience a material financial hardship as a result of the COVID-19 pandemic. Additionally, and without needing to demonstrate a material financial hardship, the CAA also authorizes an additional 90-day extension to the 120-day period for the debtor to assume or reject unexpired non-residential real property leases. With this additional extension, all debtors may have up to 300 days to determine whether to assume or rejection such leases. Both of these provisions are set to expire on 27 December 2022, but they will remain applicable to any case commenced before that date.

PREFERENCES

Section 547 allows a debtor or trustee to avoid certain payments on account of pre-bankruptcy obligations while the debtor is insolvent. The CAA amends section 547 to prohibit the avoidance of payments made during the preference period after 13 March 2020, for "covered rental arrearages" and "covered supplier arrearages" that had been deferred under a forbearance or similar agreement. In order for payments to qualify for the exemption from avoidance, they must not include fees, penalties, or interest in excess of such amounts that would have accrued without any deferral.

CUSTOMS DUTIES

The CAA also amends section 507(d) of the Bankruptcy Code to allow claims arising from custom duties paid to the federal government on behalf of an importer. The provision is designed to help brokers and forwarders who pay the government for custom duties on behalf of clients and expires on 27 December 2021.

CREDITOR CLAIMS

Finally, the CAA amends sections 501 and 502 of the Bankruptcy Code to create a process by which creditors may file proofs of claim for amounts that have accrued due to the implementation of and relief afforded by the CARES Act. This provision is meant to compensate creditors for any damages incurred due to the implementation of the CARES Act, and it sunsets 27 December 2021.

SUBCHAPTER V LIMITS

The Proposed Act extends through 27 March 2022, the increased debt limits under the *Small Business Reorganization Act of 2019*, enabling more debtors to utilize the streamlined bankruptcy procedures under Subchapter V. The CARES Act previously increased these debt limits from US$2.7 million to US$7.5 million, but such increase was originally set to expire on 27 March 2021.

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