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Bankruptcy Preference Alert: Bankruptcy Code Temporarily Tilts in Favor of Supplier and Landlord Preference Defendants

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For a limited time only, the "Consolidated Appropriations Act, 2021" (CAA) signed into law on December 27, 2020 amends Bankruptcy Code Section 547 to shield certain deferred supplier and rent payments from avoidance as preferential transfers.

- During the COVID-19 pandemic, suppliers of goods and services and landlords have supported and continue to support struggling customers and tenants by agreeing to postpone or defer payments. For these suppliers and landlords, Congress has included in the CAA—the longest bill (5,593 pages) and one of the largest spending measures ever enacted, which combines $900 billion in stimulus relief with a $1.4 trillion omnibus spending bill—provisions designed to prevent a bankruptcy trustee or debtor-in-possession from clawing-back certain deferred payments made during the 90-day pre-petition preference period.

- Limitations on Protected Pandemic Payments:
    - Limited Duration. The amendments expire two years after enactment, but remain applicable to any bankruptcy case commenced before the December 27, 2022 sunset date.

    - Limited Scope. The protections only apply to payments of arrearages:

      i. Made after March 13, 2020 in connection with an agreement entered into on or after March 13, 2020 to defer or postpone payments under an executory contract or lease of nonresidential real property;

      ii. That do not exceed the amount due under the pre-March 13, 2020 executory contract or lease terms; and

iii. Does not include fees, penalties, or interest imposed by the post-March 13, 2020 payment deferral agreement or for payment defaults before March 13, 2020.

- Thus, suppliers or landlords seeking to avail themselves of these new payment protections must have:

i. Entered into an executory contract or lease;

ii. Amended the contract or lease after March 13, 2020; and

iii. The amendment must have deferred or postponed payments otherwise due under the contract or lease.

- While we hope that these amendments translate into a robust defense against the avoidance of payments that might otherwise fall outside the ordinary course of business defense, they also risk further complicating an already complicated analysis, and parties will likely argue different interpretations as to the scope of the protections.

- Still, on the back of the Small Business Reorganization Act of 2019's requirement that a trustee/debtor-in-possession now take into account a party's defenses to preference liability before avoiding a transfer, the CAA's amendments represent yet another score for preference defendants.

We hope you found this information useful and informative. Please contact us if you have any questions about this or any other matter.

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