Client Alert: Rent Abatement, PPP Loans (Maybe), and Other Bankruptcy Relief in the Appropriations Act

BY MARISSA • JANUARY 27, 2021

On December 27, 2020, the Consolidated Appropriations Act, 2021 became law. In addition to funding the government and providing coronavirus relief, the Act contains several intriguing amendments to the Bankruptcy Code. The changes discussed below are intended to make restructuring under subchapter V of chapter 11 more attractive for small businesses.

RENT ABATEMENT FOR SMALL BUSINESS TENANTS

As I have previously written in "Delaying the Inevitable? Pier 1, Chuck E. Cheese, and Rent Abatement in Bankruptcy", a business that files for chapter 11 must "timely perform" its obligations under a commercial lease. If the business wants to remain in the space post-bankruptcy it must pay all outstanding rent and charges due under the lease. While the debtor is free to negotiate the amount sufficient to "cure" the lease default, the Bankruptcy Code does not force concessions on the landlord.

Most small businesses rent their space, and their ability to pay their landlords is directly tied to the revenue they generate from sales or services performed at the leased location. Filing bankruptcy does not stop rent obligations from accruing. Prior to the most recent amendments, businesses could delay paying rent for, at most, 60 days. Recognizing the havoc coronavirus has wreaked on small businesses, the Appropriations Act has temporarily amended the Bankruptcy Code to permit small business debtors in subchapter V to defray rent payments for up to 120 days (4 months). To qualify for this extended rent abatement, the bankruptcy court must determine that the debtor is experiencing "a material financial hardship due, directly or indirectly, to [COVID-19]."

The business must still pay deferred rent, in full, as an administrative expense of the chapter 11 case. Under a subchapter V plan, however, a small business debtor may pay over the course of its plan instead of immediately at plan confirmation. These amendments thus, buy time for small business debtors struggling with rent obligations to develop a reorganization plan and spread deferred rent payments over time to avoid a cash crunch.

ELIGIBILITY TO BORROW UNDER THE PAYCHECK PROTECTION PROGRAM

The Paycheck Protection Program ("PPP") is one of the more innovative and publicized efforts from last year's CARES Act. Administered by the Small Business Administration, the question of whether a business in bankruptcy could take out a PPP loan was unsettled until the SBA answered with an unequivocal "no" in its implementation rules.

The Appropriations Act amends the Bankruptcy Code to expressly authorize small business debtors in subchapter V to obtain loans supported by the SBA including PPP loans. To the extent the loan is not forgiven, it is treated as a superior

©2026 Bowditch & Dewey LLP. All Rights Reserved.

priority administrative expense of the bankruptcy. Notwithstanding this elevated priority, subchapter V plans can repay the loan according to payment schedule in the note.

This relief comes with a giant caveat: debtors cannot access SBA loans unless and until the SBA independently determines that they are eligible for a particular program. In other words, while the Bankruptcy Code will allow it, unless the SBA changes its current position on eligibility, PPP loans will remain unavailable to companies in bankruptcy.

LIMITATIONS ON CLAWBACK

The Appropriations Act amendments impose temporary limitations on the kinds of payments that bankruptcy trustees can clawback from creditors as "preferential." In order to neutralize any decision by a business to favor one creditor over others on the eve of bankruptcy, the Bankruptcy Code allows a trustee to avoid and recover (i.e., "clawback") certain payments made to the creditor within 90 days of the bankruptcy filing if, among other things, it can be shown that the payment improved what the creditor would otherwise receive in the business's liquidation.

Acknowledging the supremely unique times we are living through, the Appropriations Act amendments offer some protection to landlords and suppliers who may have received payments from the debtor prior to the bankruptcy that were outside the ordinary course of their business relationship. Trustees are prohibited from recovering payments of rental or supplier "arrearages" made on or after March 13, 2020 to defer or postpone payments arising under the parties' agreements provided that the arrearage payments were not in excess of the outstanding balance owed and did not include fees, penalties, or interest that the debtor would not otherwise have to pay if it had timely made all contractual payments. In other words, landlords and suppliers can accept irregular and sporadic payments in exchange for extending credit to the debtor (in the form of goods, services, or leased property) without fear of preference exposure, provided they don't charge a premium for agreeing to do so.

CONCLUSION: PRAGMATIC BANKRUPTCY RELIEF

Unless extended, the foregoing amendments will automatically expire on December 27, 2022. They nevertheless offer pragmatic solutions for small businesses in financial distress during the pandemic. The rent abatement amendments buy time for the business while preserving the landlord's right to be paid in full under the lease. The loan amendments remove some (but not all) barriers to SBA relief for companies in bankruptcy. Finally, the amendments to the preference statute reflect the reality that the pandemic has disrupted normal payment transactions and ensure that creditors who continue to work with the business debtors do not face preference exposure if and when a bankruptcy is filed.

While bankruptcy relief cannot revive a business without a general improvement in economic conditions, bankruptcy gives a business the time and tools to catch improving economic tail winds and survive financial catastrophe. The Appropriations Act amendments are not a panacea to the devastation the pandemic has caused, but they add useful tools for helping businesses survive long enough to recover when the economy comes back.

©2026 Bowditch & Dewey LLP. All Rights Reserved.