

Chapman Client Alert

January 13, 2021

Current Issues Relevant to Our Clients

Consolidated Appropriations Act, 2021 Offers Temporary Relief to Certain Landlords and Suppliers from Preferential Transfer Liability

On December 27, 2020, the Consolidated Appropriations Act, 2021 (the “CAA”) was signed into law, which, among other things, contains an important amendment to Section 547 of the United States Bankruptcy Code (the “Code”).¹ In what appears to be a nod to suppliers of goods and services and landlords who agreed to postpone or defer payments for struggling customers and tenants during the pandemic, the CAA amendment provides that payments made by a debtor after March 13, 2020 cannot be recovered (or “clawed back” in the common parlance) from landlords of nonresidential real property and suppliers of goods and services² to the extent that such deferred payments do not include any fees, penalties, or interest in an amount greater than the fees, penalties, or interest the debtor would otherwise have owed without the deferral. To qualify for the exemption, (a) the debtor and the counterparty must have entered into a lease or executory contract before the bankruptcy filing, (b) must have amended the lease or contract after March 13, 2020, and (c) the amendment must have deferred or postponed payments otherwise due under the lease or contract.

Underscoring the purpose of many of the CAA’s provisions to provide short-term relief to individuals and businesses in light of the COVID-19 pandemic, the amendment to Section 547 of the Code will expire on December 22, 2022.

In sum, the amendments to Section 547 afford landlords and suppliers additional protection from preference actions initiated by bankruptcy trustees that might otherwise fall outside the tried and true “ordinary course” and “new value” defenses,³ among others.

[For More Information](#)

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- ¹ 11 U.S.C. §§ 101 *et seq.* Section 547 of the Code (11 U.S.C. § 547) governs the recovery of “preferential transfers” made in the 90 day period proceeding a bankruptcy filing for the benefit of a debtor’s bankruptcy estate, or in the instance of an “insider”, allows for the recovery of a transfer made within the one-year period prior to the bankruptcy filing.
 - ² Specifically referred to in the CAA as “covered rental arrearages” and “covered supplier arrearages.”
 - ³ See 11 U.S.C. § 547(c)(2); 11 U.S.C. § 547(c)(4). The “ordinary course” defense allows a party receiving the alleged preference payment to avoid returning the money by proving the payment was received in the ordinary course of business between the debtor and creditor (the “subjective test”) or by showing that the payments were made according to ordinary business terms in the

particular industry (the “objective test”). Under the “new value” defense a transfer is not avoidable if the creditor who received the payment can show that after it received the payment it provided the debtor with new value in the form of subsequent goods or services, and that the debtor did not fully compensate the creditor for this subsequent new value.

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