$7.5 MILLION DEBT LIMITATION FOR SMALL BUSINESS DEBTORS EXTENDED

On Saturday, President Biden signed into law the COVID-19 Bankruptcy Relief Extension Act of 2021. This act extends the $7.5 million debt limitation under the Small Business Reorganization Act of 2019 (SBRA) for another year, until March 27, 2022.

Last year, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide emergency assistance for individuals and businesses affected by the COVID-19 pandemic. The CARES Act temporarily increased the debt limitation under the SBRA from $2,725,625 to $7.5 million. The SBRA, which took effect on February 19, 2020, created Subchapter V of the Bankruptcy Code to provide a more streamlined and cost-effective reorganization option for small businesses. The $7.5 million debt limitation increase under the CARES Act was set to expire on March 27, 2021.

The COVID-19 Bankruptcy Relief Extension Act of 2021 extends the bankruptcy relief provisions of the CARES Act, which most notably includes the $7.5 million debt limitation under the SBRA, until March 27, 2022. As a result, small businesses with debts between $2,725,625 and $7.5 million will continue to be eligible for Subchapter V for another year.

For further information regarding the COVID-19 Bankruptcy Relief Extension Act of 2021 or insolvency concerns relating to bankruptcy or receivership, please contact attorney Jessica K. Haskell.

TRUMP ADMINISTRATION HALTS RESIDENTIAL EVICTIONS UNTIL DECEMBER 31, 2020

Yesterday, the Trump administration announced an order temporarily halting certain residential evictions until the end of the year. The eviction moratorium, which is being enacted by the Centers for Disease Control and Prevention pursuant to its authority under Section 361 of the Public Health Service Act (42 U.S.C. § 264 *et seq.*), seeks to prevent the further spread of COVID-19. The nationwide moratorium could apply to as many as 40 million residential tenants.

Despite its reach, the moratorium is not a blanket protection for all residential tenants. To qualify for protection under the moratorium, a tenant must expect to earn no more than $99,000 this year (or no more than $198,000 if filing a joint tax return), or not have been required to report any income in 2019 to the IRS, or have received a stimulus check under the CARES Act. Further, a tenant must provide a sworn declaration to his or her landlord indicating that (1) the tenant has used best efforts to obtain government assistance, (2) the tenant is unable to pay full rent because of a loss of household income or extraordinary medical expenses, (3) the tenant is using best efforts to make partial rent payments, and (4) eviction would cause the tenant to be homeless or live with others in close quarters.

The moratorium does not relieve a tenant of his or her obligations to pay rent, and a landlord may continue to charge applicable interest, penalties, and fees under the lease for nonpayment of rent. Landlords also may still evict tenants for reasons besides not making rent, such as criminal activity, threatening the health and safety of other tenants, damaging property, and violating other provisions under the lease. Landlords who violate the order may face criminal penalties.

The order does not apply to commercial leases, nor does it apply in any state or local area that already has a moratorium on residential evictions that provides the same or greater level of protection. Nothing in the order precludes states or local authorities from imposing additional requirements.

O’Neil, Cannon, Hollman, DeJong & Laing S.C. remains open and ready to help you. For questions or further information relating to the eviction moratorium, or insolvency concerns relating to bankruptcy or receivership, please contact the authors of this article, attorneys Jessica K. Haskell and Nicholas G. Chmurski.

CARES ACT TEMPORARILY INCREASES DEBT LIMITATION FOR SMALL BUSINESS DEBTORS

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides much-needed assistance to small businesses affected by the coronavirus pandemic. In addition to providing forgivable loans of up to $10,000,000, the CARES Act more than doubles the debt limitation under the Small Business Reorganization Act of 2019 (SBRA) for a one-year period commencing March 27, 2020. This change will allow more small businesses to reorganize under the newly created Subchapter V of Chapter 11 of the Bankruptcy Code.

Small Business Reorganization Act of 2019

Chapter 11 of the Bankruptcy Code governs business reorganization. In amendments to the Bankruptcy Code in both 1994 and 2005, Congress distinguished small businesses and attempted to provide for a streamlined small business reorganization process. Unfortunately, these efforts have largely proved unworkable for most small businesses as the amendments were tightly confined within the strictures of Chapter 11.

For many small businesses, a Chapter 11 reorganization is not practical because the traditional proceedings are expensive and cumbersome. The SBRA, which took effect on February 19, 2020, created an entirely new subchapter of Chapter 11—Subchapter V—which eliminates some of the procedural barriers and costs of a traditional Chapter 11 proceeding in an attempt to make reorganization more viable for small businesses. Subchapter V includes the following provisions:

- The court must hold a status conference within 60 days of the petition date to discuss the “expeditious and economical resolution of the case,” and the debtor must file a report 14 days before the conference detailing how it is attempting to obtain a consensual plan of reorganization;
- The debtor has the exclusive right to propose a plan of reorganization and it must be filed within 90 days of the petition date;
- There is no committee of unsecured creditors unless the court orders otherwise for cause;
- No disclosure statement is required unless the court orders otherwise for cause;
- The debtor is excused from paying quarterly U.S. trustee fees;
- The court may confirm a non-consensual plan of reorganization if the plan does not “discriminate unfairly” and is “fair and equitable” as to each class of impaired creditors that has not accepted the plan; and
- The absolute priority rule is eliminated, which makes it easier for owners to retain their stake in the business.

Cases filed under Subchapter V have similarities to cases under Chapters 12 and 13.

A trustee is appointed to investigate the financial affairs of the debtor, help administer claims, and act as a conduit for the debtor's payments under its confirmed plan. The debtor remains in possession of its property and continues to operate the business. And a plan can be confirmed without the acceptance of a class of creditors if it treats creditors within the class fairly and the debtor commits all of its projected disposable income to making payments under the plan over the course of a three- or five-year period.

To be eligible under the SBRA, a small business must be engaged in commercial or business activities and cannot have more than $2,725,625 of secured and unsecured debt. Additionally, 50% of the pre-petition debt must have been generated from commercial or business activities. A small business is ineligible if its primary activity is owning single-asset real estate. Thus, whether a business qualifies as a small business debtor largely depends on its debt threshold.

Debt Limitation Increase Under the CARES Act

While Subchapter V appears to have created a more workable framework for small business debtors looking to reorganize their financial affairs, it remains inaccessible to many businesses that might otherwise qualify because of the debt threshold proscribed in the SBRA. The CARES Act represents a significant step toward expanding the scope of Subchapter V by increasing the debt limitation under the SBRA from $2,725,625 to $7,500,000. This increase, however, is only temporary and will sunset on March 27, 2021, unless further action is taken by Congress. Some proponents of the SBRA, such as the American Bankruptcy Institute, lobbied Congress for a debt threshold of $10 million before the SBRA was signed into law. While it remains uncertain whether Congress will permanently extend or increase the new debt limitation under the SBRA, it is clear that a much greater number of small businesses will be able to take advantage of Subchapter V over the next year.

For further information regarding the SBRA, the impact of the CARES Act on your business, or insolvency concerns relating to bankruptcy or receivership, please contact attorneys Jessica K. Haskell and Nicholas G. Chmurski.

UNITED STATES SUPREME COURT CLARIFIES STANDARD ON SANCTIONS FOR VIOLATING BANKRUPTCY DISCHARGE

On June 3, 2019, the United States Supreme Court in *Taggart v. Lorenzen* unanimously held that a bankruptcy court may impose contempt sanctions against a creditor for violating a discharge order where "there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." The Court rejected the Ninth Circuit Court of Appeals' holding that a creditor's good faith belief that its collection actions did not violate the discharge order—even if unreasonable—shields the creditor from civil contempt sanctions.

A discharge order is a fundamental part of the bankruptcy system. It releases the debtor from personal responsibility for pre-bankruptcy debts, and enjoins creditors from attempting to collect a debt covered by the discharge order.

But not all debts are discharged. The Bankruptcy Code lists 19 categories of debt that are excepted from discharge. Discharge orders, however, do not specify which of the debtor's debts are discharged. As a result, it may be unclear whether a particular debt is covered by an order, leaving creditors to guess whether the debts owed to them were discharged.

In *Taggart*, the Court resolved when it is appropriate to sanction a creditor who guesses wrong and attempts to collect a debt in violation of a discharge order.

The facts of the case are unusual. Taggart transferred his interest in an Oregon limited liability company to his attorney. The company and the other owners sued Taggart in state court for transferring his interest in violation of the company's operating agreement. On the eve of trial, Taggart filed for Chapter 7 bankruptcy, which stayed the state-court litigation pending completion of the bankruptcy.

After Taggart received a bankruptcy discharge, the state-court action resumed. The state court unwound the transfer and ordered Taggart to pay the company's post-bankruptcy attorney's fees. While Taggart's discharge order would normally cover these fees, the state court concluded that Taggart "returned to the fray" of litigation after bankruptcy, thereby making him liable.

Meanwhile, Taggart returned to the bankruptcy court and asked that it hold the company and owners in contempt for violating the discharge order by seeking attorney's fees against him. The bankruptcy court denied Taggart's request, agreeing with the state court that Taggart had returned to the fray. The district court on appeal disagreed that Taggart had returned to the fray and, as a result, held that the company and owners had violated the discharge order.

On remand, the bankruptcy court imposed contempt sanctions against the company and owners for violating the discharge order. The company and owners appealed the sanctions award, and the Bankruptcy Appellate Panel reversed. Taggart appealed, and the Ninth Circuit affirmed the panel's decision. It held that a creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable."

Justice Stephen Breyer's 11-page opinion unequivocally rejected the Ninth Circuit's "good faith belief" standard, holding that civil contempt sanctions are appropriate when there is no "fair ground of doubt" as to whether a creditor's actions violated a discharge order. The Court reasoned that the Ninth Circuit's subjective standard is contrary to traditional civil contempt principles and depends too much on "difficult-to-prove states of mind." The Court similarly rejected a near strict liability standard under which a creditor who violated a discharge order would be sanctioned, even if the creditor had an objectively reasonable basis for concluding that its conduct was lawful. Because the Ninth Circuit had applied an improper standard, the Court vacated the judgment and remanded for further proceedings consistent with the opinion.

As a practical matter, although the Court did not adopt the Ninth Circuit's subjective standard, *Taggart* is still a win for creditors because it provides some needed clarity on when creditors can be sanctioned for violating a discharge order. However, while this decision may provide peace of mind to many creditors collecting a debt after bankruptcy, it is important that creditors ensure they have an objectively reasonable argument that debts they are collecting were not discharged in bankruptcy. A failure to do so may result in civil contempt sanctions, including the debtor's attorney's fees and costs, damages for emotional distress, and punitive damages.

Creditors should also be aware that *Taggart's* standard on sanctions for violating a bankruptcy discharge order does not apply to violations of the automatic stay. Accordingly, creditors' objectively reasonable belief that their actions did not violate the automatic stay may not insulate them from sanctions.

For further information, please contact Jessica Haskell at 414-276-5000 or jessica.haskell@wilaw.com.