

TYPES NOT MAPPED YET December 28, 2020 | TTR not mapped yet | David A. Warfield, David D. Farrell

# Nine Bankruptcy Code amendments included in latest appropriations bill

On December 27, 2020, the Consolidated Appropriation Act (“CAA”) was signed into law. The nearly 5,600-page bill is reportedly the longest bill ever passed by Congress. In addition to funding the federal government in 2021 and providing COVID-related relief to individuals and businesses, the new law amends the Bankruptcy Code in at least nine respects. Most of the amendments sunset in either one or two years. One of the amendments will become effective only if the Small Business Administration signs off on it.

A brief description of the amendments follows.

### 1. PPP loans to debtors (or trustees)

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), enacted on March 27, 2020, created the Paycheck Protection Program (the “PPP”), the now-familiar forgivable loan program administered by the Small Business Administration (“SBA”). Almost immediately after the passage of the CARES Act, debtors began applying for PPP loans, triggering a controversy about the availability of such loans to companies in bankruptcy. The SBA consistently opposed PPP loans for debtors, and the caselaw around the country was inconsistent. As recently as December 22, 2020, the Eleventh Circuit held that debtors could not obtain PPP loans. *See USF Federal Credit Union, et al. v. Gateway Radiology Consultants, P.A.*, 2020 WL 7579338 (11th Cir. December 22, 2020).

The CAA addresses the PPP loan issue but regrettably only adds to the uncertainty. The CAA amends the Bankruptcy Code to permit PPP loans to certain debtors. However, the statute also says such PPP loans will be available only if the SBA Administrator sends a letter to the Director of the Executive Office for United States Trustee acquiescing to PPP loans in bankruptcy. Therefore, the new statute seemingly delegates to the SBA administrator the discretion whether to approve PPP loans during bankruptcy, so we do not yet know whether these PPP loans will be available.

Assuming the SBA Administrator acquiesces to PPP loans in bankruptcy, the loans will be available: (a) only in cases pending on or filed on or after the date the SBA sends the aforementioned letter to the Office of the United States Trustee, and (b) only to certain types of debtors, namely Subchapter V small business debtors, Chapter 12 family farmer debtors, and self-employed Chapter 13 debtors. This provision, if it becomes effective, will sunset on December 27, 2022.

### 2. Chapter 13 discharge available even if certain plan payments have not been made

The CAA amends Section 1328 to give the bankruptcy court discretion to grant a discharge to a Chapter 13 debtor even though the debtor defaulted on or after March 13, 2020 in not more than three monthly payments under a residential mortgage because of a material COVID-19 related financial hardship. Furthermore, the court can also grant a discharge to a debtor whose confirmed plan provides for curing defaults on a residential mortgage, and the debtor has entered into a qualifying loan modification or forbearance agreement with the lender. This does **not** mean the debtor will be discharged of the mortgage debt, but a debtor will be eligible to receive a plan discharge of other debts even though the debtor did not pay all mortgage payments when due under the plan. This provision sunsets on December 27, 2021.

### 3. No discrimination because of bankruptcy filing

The CAA amends Section 525 of the Bankruptcy Code to provide that no person may be denied relief under three enumerated CARES Act provisions solely because the person is or was a debtor in a bankruptcy case. The three CARES Act provisions are: (a) the foreclosure moratorium and right to request forbearance (15 U.S.C. § 9056), (b)

the forbearance of mortgage payments for multifamily properties (15 U.S.C. § 9057), and (c) the temporary moratorium on eviction filings (15 U.S.C. § 9058). This provision sunsets on December 27, 2021.

#### **4. CARES forbearance claims; modification of Chapter 13 plan**

Under the CARES Act, mortgagors under federally-backed residential and multifamily mortgages can request payment forbearance because of COVID-19 hardships. In the case of federally-backed residential mortgage, the forbearance period can be as long as 12 months. At the end of the forbearance periods, the mortgagor must pay the deferred mortgage payments in a lump-sum. These deferred mortgage payments caused significant procedural and administrative complications in Chapter 13 cases. To remedy these complications, the CAA allows qualified servicers to file a proof of claim for the deferred payments, even if the claims bar date has passed. The CAA also authorizes debtors to modify a confirmed Chapter 13 plan to address the deferred payment plan. If the debtor fails to modify his plan, the bankruptcy court (on its own motion), the U.S. Trustee's office, the Chapter 13 trustee and/or any party in interest may move for such a modification. These changes sunset in on December 27, 2021.

#### **5. Extended time for performance under an unexpired non-residential real property lease in a Subchapter V case**

The CAA amends Section 365(d) of the Bankruptcy Code to allow the court to extend a Subchapter V small business debtor's time to perform under an unexpired lease of non-residential real property if the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to COVID-19. The extension is limited to 60 days after the filing unless the court finds the debtor is continuing to experience a COVID-19 financial hardship, in which case the court may extend the period for an additional 60 days. Any deferred obligations that are unpaid at confirmation constitute administrative expenses, but the debtor may spread the payments out over time under the confirmed plan. These changes apply only to cases commenced under Subchapter V, and they sunset in two years on December 27, 2022.

#### **6. Extended time to assume or reject an unexpired non-residential real property lease**

The CAA amends Section 365(d)(4)(A) of the Bankruptcy Code to give the debtor (or trustee) 210 days after the order for relief to assume an unexpired non-residential real property lease, thereby extending the period under prior law by an additional 90 days. This change applies to cases under all chapters, and it sunsets in two years on December 27, 2022.

#### **7. Preferences**

The CAA amends Section 547 to prohibit a debtor or trustee from avoiding payments made by a debtor during the preference period for "covered rental arrearages" and "covered supplier arrearages." To qualify for the exemption, (a) the debtor and the counterparty must have entered into a lease or executory contract before the filing, (b) they 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. The preference exemption will **not** apply to the payment of fees, penalties, or interest imposed in the post-March 13, 2020 amendment. This provision sunsets in two years on December 27, 2022.

#### **8. Utilities**

The CAA amends Section 366 of the Bankruptcy Code to prohibit a utility from discontinuing utility services to an individual debtor so long as the individual debtor pays the utility company for services rendered in the twenty-day post-filing period and continues to make all other postpetition utility payments, even if the individual debtor did not otherwise provide the utility company with adequate assurance of payment. This provision sunsets in one year on December 27, 2021.

#### **9. Customs duties**

The CAA amends Section 507(d) of the Bankruptcy Code so that a party that pays the United States government a customs duty on behalf of an importer is subrogated to the government's priority status under Section 507(b)(8)(F) for customs duties. This provision benefits customs brokers and forwarders who frequently pay the government for customs duties on behalf of their importer-clients. This provision sunsets in one year on December 27, 2021.



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