Insights

Bankruptcy Relief Provisions Contained in Consolidated Appropriations Act, 2021

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Congress passed the long-awaited *Consolidated Appropriations Act, 2021* ("CAA") December 22, 2020, which now is awaiting the President's signature to become law. The CAA contains several COVID-19-related amendments to the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*. ("Bankruptcy Code"), which may affect creditors. The CAA's "Bankruptcy Relief" amendments are set forth in Title X of the Act. Those amendments of greatest interest to creditors are:

Property of the bankruptcy estate. Bankruptcy Code § 541 defines what constitutes property of the estate of a debtor in a bankruptcy case. The CAA amends § 541 by adding a new § 541(b)(11) to exempt federal coronavirus relief payments ("recovery rebates made under section 6428 of the Internal Revenue Code of 1986") from being treated as property of the estate; this amendment sunsets 1 year after enactment.

Limited chapter 13 plan default relief. Chapter 13 of the Bankruptcy Code essentially is a simplified version of chapter 11, tailored to individuals with regular income. The CAA amends § 1328 to provide, among other things, that a debtor under a confirmed chapter 13 plan still may be granted a discharge so long as the debtor defaults on not more than 3 monthly payments due on a residential mortgage on or after March 13, 2020, where the defaults are caused by a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID–19) pandemic. The missing mortgage payments would still be owed to the lender, but the debtor would not lose the benefits of a bankruptcy discharge for other debts. This amendment sunsets 1 year after enactment.

Expansion of protection against discriminatory treatment. The CAA expands § 525 of the Bankruptcy Code, which protects against discriminatory treatment of debtors on account of bankruptcy filing, to ensure that such debtors have access to relief under The Coronavirus Aid, Relief and Economic Security Act, S. 3548 ("CARES Act," signed by the President on March 27, 2020) for mortgage forbearance or other COVID-19 mortgage assistance available to homeowners, or for COVID-19 eviction relief under the CARES Act available to renters. This amendment sunsets 1 year after enactment.

Creditor claims for amounts lost during CARES Act forbearance periods. The CAA amends §§ 501 and 502 of the Bankruptcy Code, which together address the filing and allowance of claims in bankruptcy cases, to establish a process by which creditors may file proofs of claim for amounts claimed to have been lost due to forbearance periods mandated by the CARES Act, and to impose related requirements for such claims. These amendments sunset 1 year after enactment.

Limited ability to modify confirmed chapter 13 plans. The CAA amends § 1329 of the Bankruptcy Code to allow modification of a chapter 13 plan to account for creditor CARES Act forbearance proofs of claim (as discussed above). This amendment sunsets 1 year after enactment.

Limited modification of treatment of unexpired leases of nonresidential real property. The CAA amends § 365(d)(3) of the Bankruptcy Code, which requires a debtor to continue to perform its obligations under an unexpired lease of nonresidential real property, to provide that debtors in so-called "subchapter V small business chapter 11 bankruptcy cases" may ask the bankruptcy court to provide an additional 60-day delay (120 days total) to pay rent if the debtor has experienced and is continuing to experience a material financial hardship, directly or indirectly, as a result of the COVID-19 pandemic. The amendment provides that any claim arising from such extension shall be treated as an administrative priority expense for purposes of the confirmation of a subchapter V small business plan. This amendment sunsets 2 years after enactment, but the provisions will continue to apply to any subchapter V small business chapter 11 bankruptcy case commenced before the sunset date.

In addition, the CAA amends § 365(d)(4), which provides that an unexpired lease of nonresidential real property is deemed rejected unless it is assumed by the debtor within 120 days following the filing of the bankruptcy case, to increase this period to 210 days. Because the bankruptcy court already has the ability under existing law to increase § 365(d)(4)'s period by 90 days, this means that a debtor under an unexpired lease of nonresidential real property can have up to 300 days to decide whether to assume or reject the lease. This amendment also sunsets 2 years after enactment, but the provisions will continue to apply to any subchapter V small business chapter 11 bankruptcy case commenced before the sunset date.

Limited relief from preferential transfers. The CAA amends § 547 of the Bankruptcy Code, which governs the recovery of so-called preferential transfers for the benefit of the bankruptcy estate, to protect deferred payments made by a debtor after March 13, 2020, from being recovered from landlords (of nonresidential real property) and suppliers of goods and services, but only to the extent 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. This amendment sunsets 2 years after enactment, but the provisions will continue to apply to any bankruptcy case commenced before the sunset date.

Limited relief from termination of utility services for individual debtors. The CAA amends § 366 of the Bankruptcy Code, regarding termination of utility services to a debtor in a bankruptcy case, to specify that the utility cannot terminate services to individual debtors for failing to furnish a security deposit, so long as the debtor pays the utility for any debt owed for services provided during the 20-day period beginning on the date of the bankruptcy filing and thereafter makes timely payments for services provided during the pendency of the case. This amendment sunsets 1 year after enactment.

Takeaway: In response to the continuing crises – both human and economic – brought on by the COVID-19 pandemic, the CAA's amendments to the Bankruptcy Code aim to help, but also further complicate, what already is a very complicated statutory scheme for creditors.

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