Summary of Provisions in the Consolidated Appropriations Act Amending the Bankruptcy Code

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On December 27, 2020, the Consolidated Appropriation Act ("CAA") was signed into law. The CAA amends the Bankruptcy Code in several significant respects. Most of the amendments sunset (expire unless extended) in either one or two years. The changes to the Bankruptcy Code by virtue of the CAA are summarized below.

1. Making PPP loans available to debtors (maybe):

The Coronavirus Aid, Relief and Economic Security Act (the "CARES Act") created the Paycheck Protection Program (the "PPP") and created a controversy about the availability of such loans to companies in bankruptcy. The Small Business Administration ("SBA") consistently opposed PPP loans for debtors, and the caselaw was split. On December 22, 2020, the Eleventh Circuit became the first circuit court to hold that debtors could not obtain PPP loans. See USF Federal Credit Union, et al. v. Gateway Radiology Consultants, P.A., Case No. 20-13462 (11th Cir. December 22, 2020).

The CAA amends Section 364 of the Bankruptcy Code to permit PPP loans to certain debtors and trustees. However, the CAA also provides that 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 CAA seemingly delegates to the SBA Administrator discretion whether to approve PPP loans during bankruptcy, so it remains uncertain whether PPP loans will be available to debtors.

Assuming the SBA Administrator acquiesces to PPP loans in bankruptcy, the loans will be available: (a) only in cases filed after the date the SBA sends the aforementioned letter to the Office of the United States Trustee, and (b) only to "a debtor in possession or a trustee that is authorized to operate the business of the debtor under sections 1183, 1184, 1203, 1204 or 1304." This provision, if it becomes effective, will sunset on December 27, 2022.

2. Protecting stimulus payments:

The CAA amends Section 541 of the Bankruptcy Code to exempt stimulus payments from property of the estate.

3. Chapter 13 discharge available even if certain residential mortgage 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 despite mortgage payment defaults occurring on or after March 13, 2020 (but not more than three monthly payments under a residential mortgage) because of a material COVID-19 related financial hardship. Additionally, the bankruptcy court can also grant a discharge to a debtor whose confirmed plan provides for curing defaults on a residential mortgage with a qualifying loan modification or forbearance agreement with the lender having been approved by the bankruptcy court. This does not mean mortgage debt will be discharged, but that a debtor will be eligible to receive a plan discharge on other debts even though the debtor did not pay all mortgage payments when due under the Plan. This provision sunsets (expires unless extended) on December 27, 2021.

4. The CAA fixes a problem with CARES Act forbearance claims:

Under the CARES Act, mortgagors under federally-backed residential and multifamily mortgages can request payment forbearance because of COVID-19 hardships. In some cases 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 problems in Chapter 13 cases. To fix these problems, the CAA amends Sections 501 and 502 to allow qualified servicers to file a proof of claim for the deferred payments, even if the claims bar date has passed. The CAA also amends Section 1329 to authorize debtors to modify a confirmed Chapter 13 plan to address the deferred payment. These changes sunset (unless extended) on December 27, 2021.

5. No discrimination because of bankruptcy filing:

The CAA amends Section 525 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 (unless extended).

6. Extending the time for performance under an unexpired non-residential real property lease in a Subchapter V case:

The CAA amends Section 365 in two respects. Section 365(d)(3) of the Bankruptcy Code, as amended by the CAA, only applies to Subchapter V, allowing the Subchapter V debtor to extend the time to perform under an unexpired lease of non-residential real property for an additional 60 days by bankruptcy court order if the debtor is experiencing or has experienced a material financial hardship due to COVID-19. This extension is in addition to the 60 day extension which can be allowed for all debtors by bankruptcy court order. These deferred obligations would be deemed administrative expenses, but the debtor may spread the payments out over time under the confirmed Plan. These changes sunset on December 27, 2022 (unless extended), but will continue to be applicable to Subchapter V debtors that filed before the sunset.

7. Extending the time to assume or reject an unexpired non-residential real property lease:

The CAA also amends Section 365(d)(4)(A) by changing the 120 days period to 210 days, thus giving the debtor 210 days after the order for relief (the Petition filing date in New York and New Jersey) to assume unexpired non-residential real property leases. The bankruptcy court retains discretion to extend this period for an additional 90 days. This change applies to cases under all bankruptcy chapters, and it sunsets in two years, December 27, 2022 (unless extended). Interestingly, after the sunset this change will only continue to be applicable to Subchapter V debtors. This should make for some interesting litigation in other chapter 11 cases filed within 210 days of December 27, 2022.

8. Certain private COVID relief arrangements are protected from claw back as preferences:

The CAA amends Section 547of the Bankruptcy Code 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." This amendment protects prepetition payments where the debtor and the counterparty amended a lease or contract after March 13, 2020 to defer or postpone payments otherwise due. 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 on December 27, 2022 (unless extended).

9. Utilities:

The CAA amends Section 366 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 21 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 on December 27, 2021 (unless extended).

10. Priority status for private parties who pay 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. Previously, the party paying the customs duty was subrogated to the government's rights, except for the priority status. This provision benefits customs brokers and forwarders who pay the government for customs duties on behalf of their importer-clients. This provision sunsets on December 27, 2021 (unless extended).