



## ALERTS

### 9 Ways The Recent Stimulus Bill Affects Bankruptcy

January 11, 2021

#### Highlights

In an effort to resolve divergent court rulings, the new Consolidated Appropriations Act gives the Small Business Administration discretion to determine which small and individual debtors may obtain PPP loans in bankruptcy

The CAA allows debtors in all bankruptcy cases to automatically take up to 210 days (thereby extending the statutory period by 90 days) to choose to continue with a non-residential real property lease and provides an additional grace period on payments for small business debtors after a filing

The new law also offers additional protection from “preference” claims to landlords of non-residential real property and to suppliers of goods and services who received deferred payments from a debtor

Among the provisions in the new Consolidated Appropriations Act of 2021 (CAA) are a number of [temporary amendments](#) to Title 11 of the United States Code (the Bankruptcy Code) focused on providing relief to creditors and corporate and individual debtors alike.

On Dec. 27, 2020, the president signed the CAA into law – a \$900 billion

## RELATED PEOPLE



### Paul Laurin

Partner  
Los Angeles

P 310-284-3785  
F 310-284-3894  
paul.laurin@btlaw.com



### Allison M. Scarlott

Associate  
Indianapolis

P 317-231-7833  
F 317-231-7433  
allison.scarlott@btlaw.com



### Molly N. Sigler

Associate  
Nashville, Minneapolis

P 612-367-8728  
F 615-621-6099  
molly.sigler@btlaw.com

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stimulus bill that modifies prior CARES Act legislation enacted last spring.

Nine vital aspects of the new Bankruptcy Code provisions are summarized below.

### **PPP loans to debtors or trustees**

The March 2020 CARES Act created the Paycheck Protection Program (PPP), the forgivable loan program administered by the Small Business Administration (SBA). Since the passage of the CARES Act, there has been debate over whether PPP loans are available to companies in bankruptcy. The new stimulus bill amends the Bankruptcy Code to make PPP loans available to debtors only if the SBA Administrator sends a letter to the Director of the Executive Office for United States Trustee permitting the PPP loans to be available during bankruptcy.

If the SBA Administrator allows the PPP loan during bankruptcy, the loans will be available: a) in cases filed after the date the SBA sends the letter to the Office of the United States Trustee, and b) to certain types of debtors: Subchapter V small business debtors, Chapter 12 family farmer debtors, and self-employed Chapter 13 debtors. Commentators observe that this provision does not resolve uncertainty to the extent that it invests significant discretion in the hands of the SBA administrator.

These amendments sunset on Dec. 27, 2022.

### **Terms for discharge of debts for Chapter 13 debtors**

A discharge of debts is now available, with the bankruptcy court's discretion, to a debtor who has not completed payments under a Chapter 13 plan if either: 1) the debtor defaults on up to three monthly residential mortgage payments on or after March 13, 2020, due to financial hardship caused by the COVID-19 pandemic, or 2) the Chapter 13 plan provides that the debtor can cure a default on a residential mortgage and the debtor has entered into a qualifying loan modification or forbearance agreement with the lender.

The debtor will not be discharged of the mortgage debt, but the debtor will be eligible to receive a discharge on other debts, despite not making all mortgage payments when due under the confirmed plan. This provisions sunsets on Dec. 27, 2021.

### **Protection against discriminatory treatment for companies that file bankruptcy**

The CAA amends the Bankruptcy Code to provide that a person may not be denied relief under Sections 4011 through 4042 of the CARES Act solely because the person is or has been a debtor in a bankruptcy case. The CARES Act provisions affected by this amendment are the:

- Foreclosure moratorium and right to request forbearance
- Forbearance of mortgage payments for multifamily properties
- Temporary moratorium on eviction filings

This provision sunsets on Dec. 27, 2021.

## **Plan modifications and confirmation: individual and family farmers and fishermen)**

The CARES Act allows mortgagors of federally backed residential and multifamily mortgages to request payments forbearance because of financial hardships caused by COVID-19. For residential mortgages, the forbearance period can be up to 12 months. At the end of the forbearance period, the mortgagor must pay the deferred mortgage payments in a lump-sum. These CARE Act provisions caused complications in Chapter 13 cases, so the CAA allows qualified servicers to file a proof of claim for the deferred payments, even if the claims filing deadline has passed.

The CAA also authorizes debtors to modify a confirmed Chapter 13 plan to consider the deferred payment plan. If a debtor fails to modify its plan, the bankruptcy court, the U.S. Trustee, the Chapter 13 trustee, or any party in interest may move for the modification. These amendments sunset on Dec. 27, 2021.

## **Performance under an unexpired non-residential real property lease in a Subchapter V case**

The CAA has extended the time for Subchapter V small-business debtors to perform under an unexpired non-residential real property lease if the debtor is experiencing or has experienced a material financial hardship cause by COVID-19. The debtor may extend its performance for up to 60 days after the filing and, if the court finds the debtor is continuing to experience a COVID-19 hardship, the court may extend the period for an additional 60 days.

Any deferred obligations that are unpaid at confirmation constitute an administrative expense, which the debtors may pay back over time under the confirmed plan. This amendment only applies to [Subchapter V cases](#), and it sunsets on Dec. 27, 2022.

## **Acceptance or rejection of executory contracts and leases under Section 365(d)(4)**

- Subchapter V Small Business Debtors – The CAA has extended the time for Subchapter V debtors who have been financially affected by the pandemic to assume or reject leases by an additional 60 days, to a total of 210 days after the filing of the petition, mirroring the maximum period available generally in Chapter 11 cases. The amendment further provides that any claim arising from the 60-day extension will be treated as an administrative expense priority under Section 507(a)(2) of the Bankruptcy Code.
- All debtors and trustees in chapters 7 and 11 – The CAA further extended a debtor's period to assume or reject nonresidential leases from 120 days to 210 days after the date of the relief order. This Bankruptcy Code change is effective until Dec. 27, 2022.

## **Preference protection for covered payments**

The CAA grants additional protection to landlords of non-residential real property and to suppliers of goods and services who received deferred payments from a debtor after March 13, 2020. Section 547 of the Bankruptcy Code now prevents a debtor or trustee from recovering such deferred payments as a preference so long as the debtor and landlord or supplier:

- Executed the lease or executory contract before filing bankruptcy
- Amended the lease or executory contract after March 13, 2020
- Postponed payments that were initially due under the lease or executory contract

However, the CAA expressly carves out certain fees, penalties, or interest from this preference protection exemption. This amendment remains active for the next two years and applies to bankruptcy cases filed before the two-year sunset date.

## Customs duty priority treatment

The CAA amends Section 507(d) of the Bankruptcy Code so that entities paying a customs duty to the United States government for the importation of merchandise is subrogated to the priority status of the government under Section 507(b)(8)(F). This amendment is effective for one year.

## Utilities treatment

The CAA protects individual debtors under Section 366 of the Bankruptcy Code by prohibiting utility companies from terminating service even if the debtor fails to provide adequate assurance of future utility payments, provided that the individual debtor (i) makes a utility payment within twenty (20) days of filing bankruptcy and (ii) continues to make timely payments during the case. This amendment sunsets in one year.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Paul Laurin at 310-284-3785 or [paul.laurin@btlaw.com](mailto:paul.laurin@btlaw.com), Allison Scarlott at 317-231-7833 or [allison.scarlott@btlaw.com](mailto:allison.scarlott@btlaw.com), or Molly Sigler at 612-367-8728 or [molly.sigler@btlaw.com](mailto:molly.sigler@btlaw.com).

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