

The Consolidated Appropriations Act (2021, Pub. L. No. 116-260)

Enacted on December 27, 2020

United States Bankruptcy Court
District of Rhode Island
February 8, 2021

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- The [Consolidated Appropriations Act](#) (2021, Pub. L. No. 116-260) (“CAA”) was enacted on December 27, 2020.
- The Act includes nine bankruptcy related amendments. *See* §§ 320, 1001, 134 Stat., at 2015, 3216.
- For the most part, the Bankruptcy Code amendments will sunset in either one or two years. *See* § 320(f)(2)(A).
- One of the amendments which would make certain debtors in bankruptcy eligible for a Paycheck Protection Program “PPP” loan will become effective only when/if the Small Business Administrator (“SBA”) authorizes eligible debtors to obtain such loans. *See* § 320(f)(1)(A).

1. Covid-19 Relief Payments Not Estate Property

- The CAA amends § 541 to exclude COVID-19 relief payments from property of the bankruptcy estate, and therefore, any such payments received by a debtor are not available to pay claims of creditors.
- This provisions sunsets on December 27, 2021.

2. Utility Services for Individual Debtors

- The CAA amends § 366 of the Bankruptcy Code to provide greater protection for *individual debtors*. New subsection (d) prohibits a utility from altering, refusing, or discontinuing utility services to an *individual debtor* as long as the debtor pays the utility company for services rendered in the twenty-day post-filing period and continues to make all other post-petition utility payments, even if the debtor has not otherwise provided the utility company with adequate assurance of payment.
- This provision sunsets on December 27, 2021.

3. No Discrimination Because Of Bankruptcy Filing, § 525

- The CAA amends § 525 of the Bankruptcy Code to provide that relief under three enumerated CARES Act provisions may not be denied solely because the person is or was a debtor in a bankruptcy case.
- These CARES Act provisions are:
 - The foreclosure moratorium and right to request forbearance (15 U.S.C. § 9056);
 - The forbearance of mortgage payments for multifamily properties (15 U.S.C. § 9057); and
 - The temporary moratorium on eviction filings (15 U.S.C. § 9058)
- This amendment sunsets on December 27, 2021.

4. CARES Forbearance Claims; Modification of Chapter 13 Plan

- Under the [Coronavirus Aid, Relief, and Economic Security Act \(the “CARES Act”\)](#) enacted on March 27, 2020, mortgagors under federally-backed residential and multifamily mortgages are able to request payment forbearance because of COVID-19 financial hardships. 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.
- Procedural and administrative problems arose in Chapter 13 cases as a result of these deferred mortgage payments.
- To address such issues, the CAA permits:
 - Qualified servicers to file a proof of claim for the deferred payments, even if the claims bar date has passed. *See* 11 U.S.C. § 501(f)(1);
 - Debtors to modify a confirmed Chapter 13 plan to address the deferred mortgage payment plans;
 - The U.S. Trustee, the Chapter 13 trustee, the court *sua sponte*, or any party in interest to move for such plan modification in the event the debtor fails to do so.
- These amendments sunset on December 27, 2021.

5. New Chapter 13 Discharge For Debtors Who Default On Residential Mortgage Payments

- The CAA amends § 1328 of the Bankruptcy Code by authorizing the bankruptcy court, in its discretion, to grant a discharge to a Chapter 13 debtor who has:
 - on or after March 13, 2020, defaulted on *not more than three monthly* residential mortgage payments because of a material COVID-19 related financial hardship; or
 - entered into a qualifying loan modification or forbearance agreement with a residential mortgage lender even though the confirmed plan provides for curing defaults on such mortgage.
- **NOTE:** the debtor *will not be discharged of the mortgage debt but* will be eligible for a plan discharge on other debts even though the debtor did not pay all mortgage payments when due under the plan.
- This provision sunsets on December 27, 2021.

Motion Under §1328(i) for Discharge

- The Court has created a new event entitled “*Motion Under §1328(i) for Discharge*” in its electronic filing system.
- If the motion is granted by the Court, the discharge order will indicate it is issued under 11 U.S.C. §1328(i).
- This motion event will be removed from the Court’s electronic filing system on the provision’s sunset date of December 27, 2021.

6. Extension of Time to Assume or Reject an Unexpired Lease of Nonresidential Real Property

- The CAA amends § 365(d)(4)(A) of the Bankruptcy Code to extend by 90 days the time period in which to assume or reject an unexpired nonresidential lease of real property. A debtor or a trustee now has 210 days after the order for relief to assume or reject such leases.
- This change, which applies to cases under all chapters, sunsets on December 27, 2022.

7. Performance Extension For Commercial Real Estate Leases in a Subchapter V Cases

- The CAA amends § 365(d)(3) of the Bankruptcy Code to extend the time by which a Subchapter V small business debtor must perform under an unexpired lease of non-residential real property if the debtor is or has experienced a material financial hardship, directly or indirectly, due to COVID-19.
- This extension is for up to 60 days after the filing date. However, if the court finds the debtor is continuing to experience a COVID-19 financial hardship the period may be extended for up to an additional 60 days.
- Any deferred unpaid obligations at the time of plan confirmation are treated as administrative expenses, but the payments may be spread out over time under the confirmed plan.
- This amendment is limited to Subchapter V cases, and sunsets on December 27, 2022.

8. Preference Protections

- The CAA amends § 547 to provide that a trustee and/or debtor cannot avoid payments made by a debtor during the preference period for rental arrearages or supplier arrearages.
- To qualify for this avoidance exemption:
 - The lease or executory contract between the debtor and the counterparty must have been entered into before the bankruptcy filing;
 - The amendment of the lease or contract must have been made on or after March 13, 2020; and
 - The amendment must have provided for deferral or postponement of payments otherwise due under the lease or contract.
- This preference protection does not apply to the payment of fees, penalties, or interest imposed in the post-March 13, 2020 lease or contract amendment.
- This provision sunsets on December 27, 2022.

9. PPP Loans to Debtors or Trustees

- The CARES Act, created the PPP, a forgivable loan program administered by the SBA.
- Under regulations adopted by the SBA to administer the program, businesses in bankruptcy were disqualified from receiving PPP loans. The outcomes of challenges to this restriction have resulted in inconsistent court rulings across the country, with the trend moving toward upholding the SBA's ban.
- Section 320 of the CAA seeks to resolve the issue for certain types of debtors, but its effective date remains uncertain. The Act requires the SBA Administrator to send a letter to the Executive Office of the United States Trustee authorizing PPP loans in bankruptcy. As of February 8, 2021, such approval has not been issued.

PPP Loans to Debtors or Trustees

- The CAA amends Bankruptcy Code § 364 to permit PPP loans for only these types of debtors:
 - Subchapter V small business debtors
 - Chapter 12 debtors: family farmers and commercial fishermen
 - Chapter 13 self-employed debtors engaged in business
- When or if this provision becomes effective, it will sunset on December 27, 2022.

Unforgiven PPP Loans Have Super Administrative Priority

- Under new subparagraph (g) added to § 364 of the Bankruptcy Code, a qualifying debtor may apply for a PPP loan and obtain bankruptcy court approval to receive the loan. To the extent the loan is not forgiven, either fully or partially, it will be treated as a “superpriority” administrative expense under § 503(b), new subsection (10).
- Court approval of a PPP loan is sought by motion under § 364(g). The court must hear the motion within seven days of its filing and service.
- A debtor who receives a PPP loan may provide in the debtor’s plan that any unforgiven portion of the loan will be paid under the original terms of the loan.

Motion Under § 364(g) to Obtain Approval of a PPP Loan

- The Court has created a new event called “*Motion Under §364(g) to Obtain Approval of a PPP Loan*” in its electronic filing system, which will be available once this loan type is authorized by the SBA Administrator for qualified debtors.
- Once effective, the Court will issue an Administrative General Order setting forth the shortened response deadline and service requirements for the motion in accordance with the expedited treatment provided for in amended § 364(g)(3).

10. Customs Duties

- The CAA amends § 507(d) of the Bankruptcy Code to provide 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 for customs duties under § 507(b)(8)(F).
- This provision is favorable to customs brokers and forwarders who often pay the customs duties on behalf of their importer-clients.
- This provision sunsets on December 27, 2021.