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The significance of the Consolidated Appropriations Act for bankruptcy trustees

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In the wake of the COVID-19 pandemic, Congress passed the much-needed Consolidated Appropriations Act of 2021 (CAA). The Bill, which supplements the sprawling Coronavirus Aid, Relief, and Economic Security (CARES) Act from March 2020 and creates economic relief for those impacted by the pandemic, was signed into law on December 27, 2020.

Beyond providing $900 billion in stimulus funding that was attached to a $1.4 trillion spending bill, there were also a slew of alterations to laws that resulted from the passage of the CAA. In particular, there were significant changes for both debtors and creditors as it relates to multiple sections of the Bankruptcy Code.

These temporary changes will have a ripple effect in the coming year, as it provides much-needed relief to both individuals and businesses impacted by the pandemic. And though we have not quite yet seen how just these measures will play out, bankruptcy trustees should expect to see a major shift in a number of aspects of their duties and responsibilities over the coming year.

The first substantial change relates to alterations to Section 364 of the Bankruptcy Code. In particular, these changes would permit bankruptcy debtors to seek financing approval through the CARE Act's Paycheck Protection Program (PPP).

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When it comes to PPP loans, the SBA's position is that debtors who are in bankruptcy are ineligible. Rather, in order for these PPP loans to become available, it is necessary for the Small Business Administration's (SBA) Administrator to send a letter to the Director of the Executive Office for United States Trustee that provides consent to PPP loans in bankruptcy, per the CAA.

Further, driving home the Administration's stance, there was an Interim Final Rule issued by the SBA in January that also stated the ineligibility of debtors in bankruptcy in respect to PPP loans.

Another change alters Section 365(d)(3) and changes a debtor's post-petition lease obligations when it comes to Subchapter V cases. Under this change, it is now possible to get an extension in upwards of 120 days after either the beginning of a case or the day the lease is assumed/rejected.

Under the terms of the CAA, this extension can be granted as long as the debtor is currently experiencing or has previously experienced financial issues related to the COVID-19 pandemic. The amendment allows for an initial 60-day extension, as well as the possible addition of another 60-day extension.

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Similarly, there has been a change to Section 365(d)(4) that modifies the rules surrounding the deadline for debtors as it relates to the assumption of leases for nonresidential real property.

Pursuant to the CAA's temporary changes to the Bankruptcy Code, there is now an extension in time for debtors or trustees to either accept or reject an unexpired lease for nonresidential real estate. Now the CAA has extended this period from 120 to 210 days — and it is also possible to get an additional extension of 90 days with a show of cause.

For individual debtors, Section 366 of the Bankruptcy Code has been amended to protect them from having their services cut off by utility companies. Under the rule change, there is a 20-day period after a bankruptcy case begins where a utility company is not permitted to end services for debtors who have been unable to "furnish adequate assurance of payment."

To be eligible, a debtor must make a payment to the utility "for any debt owed to the utility for service provided during the 20-day period beginning on the date of the order for relief." Additionally, they must make a payment to the utility "for services provided during the pendency of case when such a payment becomes due" following the day when the 20-day period ends.

Overall, there are a number of other key provisions in the CAA that provide protection against debtors as they navigate the fallout of the COVID-19 pandemic. For instance, the CAA has an impact on Section 525 of the Bankruptcy Code as it relates to the protection of debtors who have filed for bankruptcy from discriminatory treatment.

Prior to the passage of the CAA, 11. U.S.C. Section 525 said that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against" current or former debtors who have filed for bankruptcy.

Under Title X Section 1001(c) in the CAA, there is an amendment to the Bankruptcy Code that adds in that an individual cannot be denied relief through provisions of the CARES Act due to their debtor status, meaning that someone cannot be discriminated against for pursuing funding through the CARES Act. This includes receiving help through programs like the eviction moratorium and the foreclosure moratorium.

There was also a change to Section 541 of the Bankruptcy Code, which governs what is considered to be property of a debtor's estate in bankruptcy cases. Under the CAA, Section 541 is amended to exempt COVID-19 relief payments from being considered as property of a debtor's estate.

Per the law's language, this is for "recovery rebates made under Section 6428 of the Internal Revenue Code of 1986" which means that stimulus checks would not be considered to be part of a debtor's estate. However, according to a March article published by the National Consumer Law Center (NCLC), it could be possible "that a court may construe Section 6428B as a separate statute and therefore not a recovery rebate 'under Section 6428.'"

Yet the NCLC acknowledged that an interpretation such as that "would render meaningless the enactment of Code § 541(b)(11) because even the stimulus payments under the December 27, 2020 Consolidated Appropriations Act would not be protected — they were authorized under Section 6428A."

The NCLC added that "earlier stimulus payments under the CARES Act would have already been spent by debtors at the time Code § 541(b)(11) became effective" and that ultimately such a ruling "would be contrary to Congress's intent to protect stimulus payments."

The CAA also amended Section 1328, changing the rules regarding certain aspects of debtor discharge. As a result of this amendment, debtors that are under a confirmed Chapter 13 plan can still receive a discharge if the debtor defaults on a maximum of three monthly residential mortgage payments.

The payments must have been due either on or after March 13, 2020, and the missed payments need to have resulted from the COVID-19 pandemic. According to the amendment, the debtor still needs to make payments to the lending party; however they still maintain the benefits resulting from a bankruptcy discharge for their other remaining debts.

Additionally, one of the more sizable amendments that will have an impact on so many businesses throughout the country is the CAA amendment to Section 547 of the Bankruptcy Code.

This section allows a debtor or trustee to recover "preferential payments", and the amendment to this section now provides protection to lessors of nonresidential real estate as well goods/services suppliers from having to return arrearage repayments.

By enacting this amendment, debtors are protected from arrearage payments that were made before the enactment of forbearance/deferral arrangements. This type of amendment provides much-needed breathing room for debtors in a year where real estate leases proved to be a financial burden for many — especially considering that so many offices were forced to go into a remote setting. It also should be noted that this specific amendment does not impact personal property.

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The changes to the Bankruptcy Code through the CAA are not going to be permanent. In fact, a number of the provisions were slated to be sunsetted this past March. However, in an effort to extend these much-needed amendments for a longer period of time, Senators Chuck Grassley (R-IA) and Dick Durbin (D-IL) introduced the bipartisan COVID-19 Bankruptcy Relief Extension Act, which was passed on March 27, mere hours before many of provisions were about to expire.

As a result of the passage of the COVID-19 Bankruptcy Relief Extension Act, the sunset dates of CARES Act and CAA amendments have been extended to either December 27, 2021 or March 27, 2022. These changes provide a buffer period for debtors who are rapidly nearing certain deadlines, providing them with an additional period of time to get their financial affairs in order as they continue dealing with the impact of the COVID-19 pandemic.

It goes without saying that the world was turned upside down by the pandemic and though the country has made significant strides in returning to a sense of normalcy, it has also required multiple acts by Congress to help so many in the United States stay afloat financially.

Legislation such as the CARES Act and the CAA created significant financial relief while also modifying many laws in an effort to alleviate the monetary burden caused by COVID-19.

Ultimately, given the amount of changes the CAA made to the Bankruptcy Code, bankruptcy trustees will have to navigate a new set of laws throughout the course of this year and into the early part of next — and though it will be temporary, they will need to get used to seeing their roles and responsibilities shift as they resolve matters.

About the authors

 

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