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## Orlans PC *Client Alert*

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#### **BANKRUPTCY IMPLICATIONS OF THE CONSOLIDATED APPROPRIATIONS ACT**

Tucked within the thousands of pages of the Consolidated Appropriations Act ("CAA") signed into law on December 27, 2020, are several amendments to the Bankruptcy Code which seek to resolve outstanding issues with the mortgage forbearance provisions of the March 2020 CARES Act. This Alert will discuss the three provisions of the CAA that directly and significantly impact mortgage creditors.

#### **1. Modifications to a Chapter 13 debtor's ability to obtain a discharge.**

The CAA amends 11 U.S.C. § 1328 of the Bankruptcy Code to allow the bankruptcy court discretion to grant a discharge to a Chapter 13 debtor under certain conditions even if the debtor has not completed payments to the Chapter 13 Trustee or to a creditor holding a mortgage on the debtor's principal residence.

In a correction apparently designed, in part, to address a line of cases that have denied a Chapter 13 debtor a discharge upon plan completion if he or she is delinquent on post-petition mortgage payments, the CAA amends 11 U.S.C. § 1328 to both permit debtors to avoid this result in certain circumstances and allow a discharge prior to plan completion in some instances. Specifically, a new subsection (i) has been added to 11 U.S.C. § 1328 to permit a bankruptcy court discretion to grant a Chapter 13 discharge to a debtor who has not completed plan payments to the trustee or to a creditor whose claim is secured by the debtor's principal residence provided: (1) the debtor is not more than three monthly payments past due on a "residential mortgage" claim due to a COVID-related material financial hardship on or after March 13, 2020, or (2) if it is a "residential mortgage" claim treated under 11 U.S.C. § 1322(b)(5), the debtor has entered into a forbearance agreement or loan modification with the mortgagee. The amendment to Section 1328 will sunset on December 27, 2021 unless extended.

The Section 1328 modifications have several implications for mortgage creditors. The first issue relates to the timing of this broadened discharge. Prior to this amendment, unless a debtor has moved for a hardship discharge under 11 U.S.C. § 1328(b), 11 U.S.C. § 1328(a) states that a discharge shall be granted once a debtor has completed all payments under the confirmed Chapter 13 plan. The new Section 1328(i), however, appears to grant a debtor broad latitude to seek discharge several months, or even years, prior to the scheduled plan completion date. Furthermore, since many jurisdictions have standard language in their discharge orders deeming claims secured by the debtor's principal residence, or other claims treated under Section 1322(b)(5), pre- and post-petition as current at discharge, it may be necessary to object to any motion under Section 1328(i) that seeks an early discharge, especially if the Chapter 13 Trustee has not filed a notice of final cure payment. Finally, Section 1328(i)(2)(A-B) presents two potential ambiguities: (1) it refers to a "residential mortgage" instead of a "principal residence," which could imply an intent to apply this subsection if a claim secured by residential rental properties is treated as a continuing claim under Section 1322(b)(5) and (2) fails to clarify whether the forbearance agreement requirement set forth in subsection (A) includes oral requests for forbearance that are not subsequently set forth in a written agreement.

## **2. Expansion of protection for debtors against discriminatory treatment in mortgage forbearance.**

The CAA amends 11 U.S.C. § 525, to add subsection (d), which protects against discriminatory treatment of debtors on account of a bankruptcy filing relative to relief under three CARES Act provisions. These relate to: (1) mortgage foreclosure moratorium and right to request forbearance (15 U.S.C. § 9056); (2) mortgage forbearance on multifamily properties (15 U.S.C. § 9057); and (3) the temporary eviction moratorium (15 U.S.C. § 9058). Specifically, a mortgage servicer cannot deny a borrower's ability to request or obtain a CARES Act mortgage forbearance agreement solely because the person is a current or former debtor in bankruptcy. This amendment to § 525 sunsets on December 27, 2021 and only applies to government-backed loans that are subject to these CARES Act provisions.

## **3. Secured creditors may file a supplemental claim for payments not made under a CARES Act forbearance agreement.**

The CAA amends 11 U.S.C. §§ 501 and 502 of the Bankruptcy Code to allow secured creditors to file supplemental proofs of claim for deferred CARES Act forbearance payments. Note -this only applies to federally backed mortgages and these supplemental CARES forbearance claims must be filed within 120 days after the expiration of the forbearance period under the CARES Act. An "eligible" creditor "may" file such a supplemental CARES forbearance claim under 11 U.S.C. § 501 (f)(A), but there is no requirement that they do so, if, for example, the forborne payments were already addressed with the Court through a loan modification notice or court approval. Although not technically "required," as a practical matter, mortgage servicers should update their internal processes to ensure that these supplemental claims are filed within the 120 days after the forbearance period ends. Otherwise, they risk the claim being barred, and the amounts owed being unrecoverable. However, it is uncertain if filing of these claims will

be necessary on “trustee conduit” loans in which the Chapter 13 Trustee disburses the post-petition payment, along with the pre-petition arrearage, if any, since the Trustee will already be obligated to disburse any forborne payments. Our firm will work with the Chapter 13 Trustees in our trustee conduit jurisdictions to determine how the Trustees interpret the need for a supplemental claim if they are already disbursing all the post-petition payments.

There is no “form” Supplemental CARES forbearance claim. However, Section 501 as amended states that the creditor must include (i) the relevant terms of the modification or forbearance; (ii) a copy of the modification or forbearance agreement, if it is in writing; and (iii) a description of the payments to be deferred until the loan maturity date. Once a supplemental CARES forbearance claim is filed, 11 U.S.C. § 1329 as amended provides that the debtor then has 30 days to amend their plan to address the supplemental claim. If the debtor does not amend the plan within 30 days, then any party in interest, including the Chapter 13 Trustee, U.S. Trustee, creditor, or the court, may seek to modify the plan to provide for the payment of the supplemental claim. If a plan was confirmed prior to March 27, 2020, a creditor could seek modification of the plan to have the forborne amount paid within the seven-year period as provided by the CARES Act. These amendments to 11 U.S.C. §§ 501 and 502 sunset on December 27, 2021.

### **Conclusion**

The key takeaways from the CAA's bankruptcy amendments are that servicers will need to (1) monitor confirmed Chapter 13 cases for debtors' attempts to obtain an early discharge; (2) not deny CARES Act relief (forbearance agreements) to borrowers because of a bankruptcy; and (3) file timely supplemental proofs of claim for debtors who received a CARES Act forbearance. We will await further action by the bankruptcy courts as to how they will interpret these new Amendments, especially those concerning early discharge.

For any questions, please contact Managing Bankruptcy Attorney Craig Rule at [crule@orlans.com](mailto:crule@orlans.com) or (248) 404-6728 or PA Default Practice Attorney Danielle Boyle-Ebersole at [dboyle-ebersole@orlans.com](mailto:dboyle-ebersole@orlans.com) or (610) 888-9295.

If you have other legal questions about our jurisdictions, please feel free to contact an attorney referenced below.

James Clarke, Senior Executive Counsel, [jclarke@orlans.com](mailto:jclarke@orlans.com)

Julie Moran, Senior Executive Counsel, [jmoran@orlans.com](mailto:jmoran@orlans.com)

Regina Slowey, Managing Litigation Attorney, [rslowey@orlans.com](mailto:rslowey@orlans.com)

Craig Rule, Managing Bankruptcy Attorney, [crule@orlans.com](mailto:crule@orlans.com)



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**Our mailing address is:**

Orlans PC  
1650 W. Big Beaver Rd.  
Troy, MI 48084

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