

## Fifth Circuit Holds that SBA May Deny Paycheck Protection Program Loans to Debtors in Bankruptcy

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The Fifth Circuit has waded into the debate on whether the SBA must make Paycheck Protection Program ("PPP") loans available to debtors in bankruptcy, clearly answering "No."

The PPP, a central component of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), allows eligible small businesses to obtain guaranteed loans to pay certain expenses, such as payroll costs, rent, and utilities. Although the CARES Act does not discuss whether companies who have filed for bankruptcy protection are eligible to participate in the PPP, the Small Business Administration's form to apply for PPP funds states that applicants involved in bankruptcy are ineligible.

A number of bankrupt debtors sued the SBA over this exclusion, with mixed results. Courts in Florida, Washington, New Mexico and Tennessee found exclusion of bankruptcy debtors from the PPP program to be unlawful. The Tennessee opinion, being *Alpha Visions Learning Academy*, Adv. Proc. No. 20-00071, is thorough and analytical. Courts in New York, Maryland, Georgia and Maine found to the contrary. Before the Fifth Circuit's decision, no appellate court weighed in.

The Fifth Circuit, in a short, three-page opinion, held that the Texas Bankruptcy Court exceeded its authority when it issued a preliminary injunction that was barred by statute against the SBA Administrator, which required the SBA to make a PPP loan available to a debtor in bankruptcy.

**What does this mean for lenders?** In the Fifth Circuit, the SBA's position that bankrupt debtors may not apply for PPP loans stands. Whether other circuits follow the Fifth's lead remains to be seen. However, even in courts where the SBA may be enjoined from barring bankrupt debtors from obtaining PPP loans, these injunctions do not necessarily translate into affirmative commands to lenders that they must make PPP loans to bankrupt debtors.

Miller Canfield is following the implementation of the CARES Act, the PPP program, and their effects on bankruptcy cases. Should you have any questions regarding these matters and wish assistance, please feel free to contact us.

*This information is based on the facts and guidance available at the time of publication and may be subject to change.*