

Eleventh Circuit Joins Fifth in Holding that the SBA May Deny Paycheck Protection Program Loans to Debtors in Bankruptcy

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In June of 2020, **Miller Canfield reported** that the Fifth Circuit held that a Texas bankruptcy court had exceeded its authority when it ordered the SBA Administrator to make a Paycheck Protection Program (PPP) loan available to a debtor in bankruptcy. We added at the time that "whether other circuits follow the Fifth's lead remains to be seen." Now, the Eleventh Circuit has agreed with the Fifth, issuing a comprehensive opinion to explain its reasoning.

The PPP was a central component of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Through August 2020, the PPP allowed 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 stated that applicants involved in bankruptcy are ineligible. The question remains important, as the federal government is considering another wave of funding for the PPP program.

A number of bankrupt debtors have sued the SBA over the bankruptcy exclusion, with mixed results. Until now, the Fifth Circuit was the only circuit court to weigh in, and it determined that bankruptcy courts do not have the authority to issue a preliminary injunction against the SBA Administrator to require it to make PPP loans available to bankrupt debtors. On December 22, 2020, the Eleventh Circuit agreed, though on different grounds. Unlike the Fifth, the Eleventh Circuit did not reach the question of whether bankruptcy courts can enjoin the SBA. Instead, it analyzed the merits of the issue and found that the SBA acted reasonably and did not exceed its authority in determining that bankrupt debtors are to be excluded from the PPP program.

What does this mean for lenders? Two federal appellate courts have now held that the SBA may exclude bankrupt debtors from consideration for PPP loans. Although these holdings are limited to the states within those circuits, even if a bankruptcy court elsewhere should issue an injunction against the SBA, the injunction would not necessarily translate into a requirement that a specific lender make a PPP loan to a bankrupt debtor.

Miller Canfield is following the implementation of the CARES Act and 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 facts and guidance available at the time of publication and may be subject to change.