

**PPP Loan Program Expected to be Extended Until August 8, 2020  
But Can a Debtor Already in Bankruptcy  
Qualify for a PPP Loan?**

By: Martin A. Eliopoulos<sup>1</sup>  
Partner, Higgs Fletcher & Mack LLP, San Diego, California  
July 3, 2020

This article continues our discussion on PPP loans and bankruptcy.

It looks like the “Payroll Protection Program” (“PPP”) created by the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) and which expired on June 30, 2020, will be given a much-needed extension.<sup>2</sup> As of July 2, 2020, both the Senate and the House of Representatives have voted to extend the deadline for PPP loan applications until **August 8, 2020**.

President Trump is expected to sign the extension bill any day now.

That is good news for small businesses that have not yet applied for a PPP loan because there is a reported more than \$130 **B**illion of \$660 **B**illion in unused funds allocated to fund PPP loans. To date, the Small Business Administration (“SBA”) reports it has approved more than 4.9 million PPP loans totaling more than \$520 **B**illion.

But what about a small business that has already filed for Chapter 11 bankruptcy or qualifies for a filing a new Chapter 11 bankruptcy under the Small Business Reorganization Act (“SBRA”)?<sup>3</sup> Can a small business already a debtor in bankruptcy qualify for a PPP loan?

To date, some courts say “yes” and some say “no.”

We previously wrote a short article that identified several cases at the Bankruptcy Court level where small businesses already debtors in Chapter 11 bankruptcy sought injunctive relief

---

<sup>1</sup> Mr. Eliopoulos is a 29-year insolvency, business litigation and creditor rights and remedies attorney at Higgs, Fletcher & Mack LLP (HFM). The HFM insolvency team includes John Morrell, Paul Leeds, Maggie Schroedter, Kirsten Worley, and Meredith King. All attorney profiles are located at <https://higgslaw.com/attorneys/>.

<sup>2</sup> PPP loans are guaranteed by the SBA and intended to provide expeditious financial relief to qualifying small business borrowers in the United States during the COVID-19 pandemic. If the PPP loan is used for certain forgivable purposes and certain employee and compensation levels are maintained, a qualifying borrower’s responsibility to pay both principal and interest may be completely forgiven. *See* the general information for PPP Loans provided by the SBA at: <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-5>.

<sup>3</sup> On August 23, 2019, the Small Business Reorganization Act of 2019 (SBRA) was signed into law and created a new Subchapter V which went into effect on February 19, 2020. The general purpose of Subchapter V is to streamline the Chapter 11 bankruptcy process for qualifying small businesses and individuals engaged in business to administer their bankruptcy estate in an efficient and less costly manner. The CARES Act temporarily (for one year) allows companies with up to \$7,500,000 (up from \$2,725,625) in secured and unsecured non-contingent and liquidated debt to use Subchapter V to reorganize.

against the SBA because their PPP loan applications were denied solely on the basis that the small businesses were debtors in a pending bankruptcy case.<sup>4</sup>

Additional research has identified at least six bankruptcy courts that have ruled in favor of injunctive relief issuing a temporary restraining order and/or a preliminary injunction that enjoins the SBA from disqualifying a PPP loan application solely on the basis that the applicant is a debtor in a pending Chapter 11 case.

- Of those six cases, the SBA has filed four notices of appeal to the appropriate District Court and is expected to file notices of appeal to the District Court in the other two cases.
- In two of the appeals there have been requests to certify the appeals directly to the Circuit Court of Appeals – one request by the Bankruptcy Court to the 11<sup>th</sup> Circuit Court of Appeals and one request by the District Court to the 5<sup>th</sup> Circuit Court of Appeals (where the 5<sup>th</sup> Circuit has already ruled and vacated the grant of a preliminary injunction on the basis of binding 5<sup>th</sup> Circuit precedent).

The below chart summarizes the identified cases where injunctive relief has issued against the SBA and the SBA has appealed (or is expected to appeal):

Bankruptcy/Adversary Case	District Court/BAP Case	Notes
<p><i>In re Springfield Medical Systems, Inc.</i></p> <p>United States Bankruptcy Court, D. <b>Vermont</b></p> <p>Case No. 19-10285 Adversary Proc. No. 20-01004</p> <p><b>HELD:</b> TRO <b>GRANTED</b></p>		<p>SBA expected to appeal to the District Court.</p>
<p><i>In re Hidalgo County Emergency Service Found.</i></p> <p>United States Bankruptcy Court, South. Dist. of <b>Texas</b></p> <p>Case No. 19-bk-20497 Adversary Proc. No. 20-02006</p> <p><b>HELD:</b> TRO/Preliminary Injunction <b>GRANTED</b></p>	<p><b>Notice of Appeal</b> to District Court filed by SBA</p> <p>Case No. 20-cv-108</p> <p>District Court stays preliminary injunction pending appeal and certifies appeal directly to 5<sup>th</sup> Circuit</p>	<p><b>APPEAL CERTIFIED DIRECTLY TO 5<sup>TH</sup> CIRCUIT COURT OF APPEALS</b></p> <p>Case No. 20-40368</p> <p>5<sup>th</sup> Circuit Court of Appeals <b>VACATED</b> preliminary injunction; matter <b>REMANDED</b></p>

<sup>4</sup> Both the PPP Borrower Application Form submitted to the lender (SBA Form 2484) and the PPP Lender Application Form submitted to the SBA (SBA Form 2483) must **certify** that neither the applicant nor an owner of the applicant “*is presently involved in any bankruptcy.*”

Bankruptcy/Adversary Case	District Court/BAP Case	Notes
<p><i>In re Skefos</i></p> <p>United States Bankruptcy Court, W.D. <b>Tennessee</b>, Western Division</p> <p>Case No. 19-29718-L Adv. Proc. No. 20-00071</p> <p><b>HELD:</b> Preliminary Injunction <b>GRANTED</b></p>	<p><b>Notice of Appeal</b> to District Court filed by SBA</p> <p>Case No.: 2:20-cv-02416-JTF-tmp</p>	<p>SBA has filed its opening brief</p>
<p><i>In re Vestavia Hills, Ltd. DBA Mountain Royal Towers</i></p> <p>United States Bankruptcy Court Southern District of <b>California</b></p> <p>Case No. 20-00018-LA Adversary Proc. No. 20-90073</p> <p><b>HELD:</b> Preliminary injunction <b>GRANTED</b></p>		<p>SBA expected to appeal to the District Court.</p>
<p><i>In re Roman Catholic Church of the Archdiocese of Santa Fe</i></p> <p>United States Bankruptcy Court; District of <b>New Mexico</b></p> <p>Case No. 18-13027 Adversary Proc. No. 20-01026</p> <p><b>HELD:</b> Preliminary Injunction <b>GRANTED</b></p>	<p><b>Notice of Appeal</b> to District Court filed by SBA</p> <p>Case No.: 1:20-cv-00473-MV-GBW</p>	
<p><i>In re Gateway Radiology Consultants, PA</i></p> <p>United States Bankruptcy Court, M.D. <b>Florida</b>.</p> <p>Case No. 8:19-bk-04971 Adv. Proc. No. 8:20-ap-00330</p> <p><b>HELD:</b> Preliminary Injunction <b>GRANTED</b></p>	<p><b>Notice of Appeal</b> to District Court filed by SBA</p> <p>Case No. 8:20-cv-01420-TPB</p>	<p>7/1/2020 <b>Bankruptcy Court has certified the appeal for direct appeal to the 11<sup>th</sup> Circuit Court of Appeals.</b></p>

There are two other cases to note where bankrupt debtors chose to voluntarily dismiss their respective Chapter 11 bankruptcies, then apply for their respective PPP loans.

- The debtor in *In re Advanced Power Technologies, LLC* (United States Bankruptcy Court for the Southern District of Florida; Case No. 20-13304) dismissed its Chapter 11 case on an emergency basis, applied for *and received* a PPP loan, then moved the Bankruptcy Court to *reinstate* its Chapter 11 case which motion was granted.
- The debtor in *In re iThrive Health LLC* (United States Bankruptcy Court for the District of Maryland; Case No. 19-25413), after having its request for a preliminary injunction denied, moved the Bankruptcy Court to dismiss the bankruptcy case so the debtor could apply for a PPP loan. The motion to dismiss was granted but it is not yet known whether the debtor applied for and received the PPP loan.

With a new round of PPP loan applications looming, the availability for qualifying small businesses to file for Chapter 11 bankruptcy relief under SBRA, and the SBA's position to deny PPP loans to applicants in pending bankruptcy cases, there will almost certainly be more than a few bankruptcy cases where a debtor's PPP loan application is disqualified solely on the basis of the applicant's status as a debtor in bankruptcy.

There will be many interesting issues to be resolved going forward such as:

1. How will the appellate courts rule in the five (5) identified pending appeals?
2. Will there be a consensus amongst any Circuit Courts of Appeal that rule on issue of whether the SBA can disqualify a PPP loan application solely on the basis of the applicant's status as a debtor in a pending bankruptcy?
3. Will any disqualified debtors that have been, or will be, denied injunctive relief take the issue up on appeal?
4. Will the debtor in the *Advanced Power Technologies, LLC* suffer any repercussions for dismissing then reinstating its Chapter 11 bankruptcy case?<sup>5</sup>

To summarize, a qualifying small business considering filing for Chapter 11 under SBRA should, if it has time to do so, apply for a PPP loan *before* filing bankruptcy. But many a small business already facing a financial crisis due to COVID-19 may need the immediate protection of the automatic stay and simply may not have time to procure a PPP loan in advance of filing (or perhaps has already filed for bankruptcy protection before applying for a PPP loan).

Those small businesses may still be able to get their share of the more than \$130 **B**illion allocated PPP loan funds notwithstanding their bankruptcy filing.

---

<sup>5</sup> For example, the SBA Standard Loan Note (SBA Form 147) provides that an event of default includes "if Borrower or Operating Company . . . **Becomes the subject of a proceeding under any bankruptcy or insolvency law.**"