

Weathering the Economic Storm: Are PPP Loans and Bankruptcy Reorganizations Mutually Exclusive Options?

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Introduced by the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act, the Paycheck Protection Program (“**PPP**”) seeks to provide short-term cash flow through federally guaranteed loans administered by the Small Business Administration (“**SBA**”) and SBA lenders. However, several SBA lenders have rejected PPP loan applications by Chapter 11 debtors, and the U.S. Treasury and the SBA have instructed borrowers to withdraw their PPP loan applications and decline funding, even if such applications have been approved, if the borrower files for bankruptcy prior to the funding of its PPP loan.

Such limitation presents a difficult choice. Must a company choose between applying for a PPP loan and filing for bankruptcy? A growing number of federal judges are saying “no” and have enjoined the SBA. This alert discusses the recent developments and unfolding options for companies trying to stay afloat while reorganizing, and SBA lenders trying to assist those in need while adhering to regulations.

SCENARIO 1: BORROWER REQUESTING PPP LOAN WHILE IN CHAPTER 11 REORGANIZATION

Hidalgo County Emergency Service Foundation v. Jovita Carranza, in her capacity as Administrator for the SBA

On April 24, in the Hidalgo County Emergency Service Foundation (“Hidalgo”) Chapter 11 bankruptcy case pending in the U.S. Bankruptcy Court for the Southern District of Texas, Chief Judge David R. Jones ordered PlainsCapital Bank to waive the SBA’s bankruptcy restriction when considering a request for a \$2.6 million PPP loan by the debtor.¹

Hidalgo is the primary emergency patient transfer provider in South Texas and applied for a PPP loan to continue employing all of its frontline medical workers during the COVID-19 outbreak. But PlainsCapital Bank, the participating lender, rejected Hidalgo’s PPP loan application because of its pending bankruptcy. Hidalgo filed an emergency application for a temporary restraining order and preliminary injunction against the SBA, seeking (1) an order requiring the SBA to remove all references to a PPP loan applicant’s status as being involved in any bankruptcy from its PPP loan application, policies and procedures, and loan agreements; (2) an order requiring the SBA to instruct all lending institutions administering PPP loans that there is no exclusion from the PPP loan program due to bankruptcy; and (3) injunctive relief and declaration that the SBA’s insertion of a bankruptcy-related exclusion to PPP loan eligibility is unlawful and discriminatory under section 525(a) of the Bankruptcy Code.

Chief Judge Jones granted Hidalgo’s motion for multiple reasons, including the public’s interest in a medical service provider maintaining 100% of its usual staffing level during the COVID-19 pandemic. The court stated that the PPP program “isn’t a loan program” but rather a “support program.”² Moreover, with respect to the discrimination toward debtor applicants, Judge Jones stated that “the people that need the most help and who have sought protection under our laws are the people who are the targets of discrimination in a government

¹ Transcript of Hearing at 32, Hidalgo Cty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cty. Emergency Serv. Found.), Ch. 11 Case No. 19-20497, Adv. No. 20-02006 (Bankr. S.D. Tex. Apr. 22, 2020).

² *Id.* at 29.

support program.”³ Thus, until the temporary restraining order expires on May 8, Hidalgo is authorized to strike language in any PPP loan application materials about its involvement in any bankruptcy.⁴

Other Chapter 11 debtors have taken similar initiatives.

Roman Catholic Church of the Archdiocese of Santa Fe v. SBA and Jovita Carranza, solely as the Administrator of the SBA

The Roman Catholic Church of the Archdiocese of Santa Fe (the “Archdiocese”), a Chapter 11 debtor in the U.S. Bankruptcy Court for the District of New Mexico, filed a complaint against the SBA on April 21.⁵ The Archdiocese similarly alleged that the SBA exceeded its statutory authority and discriminated against bankruptcy debtors by denying them access to PPP loan funds.⁶ On May 1, Judge David T. Thuma agreed with the Archdiocese and issued a final judgment against the SBA on this issue.⁷ Judge Thuma appeared to be unimpressed with the SBA’s arguments and concluded that “[w]ith only the flimsiest of justifications [the SBA] took one of many underwriting criteria from its ‘normal’ loan programs (bankruptcy status of the borrower), changed it to an eligibility condition, and then applied it to an emergency grant program where it clearly had no place. [The SBA]’s inexplicable and highhanded decision to rewrite the PPP’s eligibility requirements in this way was arbitrary and capricious, beyond its statutory authority, and in violation of” section 525(a) of the Bankruptcy Code.⁸

Springfield Hospital, Inc. v. Jovita Carranza, in her capacity as Administrator for the SBA

Springfield Hospital Inc. (“Springfield”), a non-profit critical access hospital based in Vermont and currently in a Chapter 11 proceeding, similarly filed a complaint against the SBA seeking a permanent injunction with respect to the SBA’s denying debtors’ PPP applications.⁹ On May 4, the U.S. Bankruptcy Court for the District of Vermont granted Springfield’s temporary restraining order so that its application would not be denied solely because of its bankruptcy status. In her decision, Judge Colleen A. Brown stated that, “[t]he CARES Act is not a statute enacted to increase the availability of commercial loans. Rather, the CARES Act is a grant of financial aid necessitated by a public health crisis.”¹⁰ “There are very few eligibility requirements under the CARES Act, and no underwriting mandate.... While a PPP disbursement is nominally designated as a ‘loan,’ § 1106 of the CARES Act provides for loan forgiveness – essentially treating the PPP disbursement as a grant with no repayment obligation – as long

³ Transcript, *supra* note 4 at 32.

⁴ Transcript, *supra* note 4 at 33.

⁵ Roman Catholic Church of the Archdiocese of Santa Fe v. SBA (*In re* Roman Catholic Church of the Archdiocese of Santa Fe), Ch. 11 Case No. 18-13027-t11, Adv. No. 20-01026-t (Bankr. D.N.M. Apr. 21, 2020).

⁶ *Id.*

⁷ Roman Catholic Church of the Archdiocese of Santa Fe v. SBA (*In re* Roman Catholic Church of the Archdiocese of Santa Fe), Ch. 11 Case No. 18-13027-t11, Adv. No. 20-01026-t (Bankr. D.N.M. May 1, 2020).

⁸ *Id.* at 15. Bankruptcy Code § 525(a) provides, in relevant part, that “a governmental unit may not deny ... a license, permit, charter, franchise, or other similar grant to [a bankruptcy debtor] ... solely because such bankrupt or debtor is or has been a debtor under this title”

⁹ Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp., Inc.), Ch. 11 Case No. 19-10283, Adv. No. 20-01003 (Bankr. D. Vt. Apr. 27, 2020).

¹⁰ Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp., Inc.), Ch. 11 Case No. 19-10283, Adv. No. 20-01003, slip op. at 6 (Bankr. D. Vt. May 4, 2020).

as the funds are used as the Act requires. In essence, if the borrower complies with the so-called loan program it actually gets a grant, rather than a loan.”¹¹

Interestingly, the Bankruptcy Court in the Springfield case set forth specific procedures for Springfield’s use of the PPP funds. If Springfield received any PPP funds, it would be required by the Court to deposit those funds in a specially designated, interest bearing account, immediately file notice with the court disclosing the amount of PPP funds received and the name of the lender granting the application, refrain from disbursing any of the PPP funds until the court grants approval to do so, and notify all secured creditors or the U.S. Trustee to request authority to disburse PPP funds, identify the date and purpose of each disbursement (e.g., payroll, interest payment), and provide any other information, including for purposes of showing that the PPP loan is eligible for forgiveness if and when the SBA should audit Springfield’s use of the loan proceeds.¹² Such procedures are meant to protect the SBA, the SBA lender and other parties in the case and, while they create restrictions that do not exist for PPP borrowers outside bankruptcy, are clearly intended to strike a balance between the purposes of the CARES Act and the protections afforded by the Bankruptcy Code.

But in at least two other Chapter 11 cases falling within this scenario, the relevant bankruptcy courts have reached a different conclusion. For example, Asteria Education, Inc. (“Asteria”), a debtor in a Chapter 11 case pending in the U.S. Bankruptcy Court for the Western District of Texas, filed a complaint against the SBA on April 21 in

¹¹ *Id.* at 7.

¹² *Springfield Hosp., Inc. v. Carranza (In re Springfield Hosp., Inc.)*, Ch. 11 Case No. 19-10283, Adv. No. 20-01003, Order (Doc. #19) at 5 (Bankr. D. Vt. May 4, 2020). Other bankruptcy courts have similarly enjoined the SBA. *Calais Regional Hospital and Penobscot Valley Hospital*, two Maine hospitals currently in Chapter 11 proceedings in the U.S. Bankruptcy Court for the District of Maine, warned that they could both have to close their doors by the end of June if they do not receive funding through the PPP. Both have been denied access to the PPP, and in separate lawsuits filed on April 27 argued that those rules are unlawful because they should fall within the federal legislation that originally created the program. *Calais Reg’l Hosp. v. Carranza (In re Calais Reg’l Hosp.)*, Ch. 11 Case No. 19-10486, Adv. No. 20-1006 (Bankr. D. Me. Apr. 27, 2020); *Penobscot Valley Hosp. v. Carranza (In re Penobscot Valley Hosp.)*, Ch. 11 Case No. 19-10034, Adv. No. 20-1005 (Bankr. D. Me. Apr. 27, 2020). On May 1, the bankruptcy court granted the TRO against the SBA despite being “sympathetic to the significant challenges faced by the [SBA] in the implementation of measures taken by the federal government,” *Calais Reg’l Hosp. v. Carranza (In re Calais Reg’l Hosp.)*, Ch. 11 Case No. 19-10486, Adv. No. 20-1006, Order (Doc. #21) (Bankr. D. Me. May 1, 2020), observing that “this country’s laws cannot be pushed aside, even inadvertently, during times of crisis.” *Id.* at 8; *Penobscot Valley Hosp. v. Carranza (In re Penobscot Valley Hosp.)*, Ch. 11 Case No. 19-10034, Adv. No. 20-1005, Order (Bankr. D. Me. May 1, 2020). The Dioceses of Rochester and Buffalo (the “Dioceses”), respectively, both of which have pending Chapter 11 cases in the U.S. Bankruptcy Court for the Western District of New York, filed a complaint against the SBA for its unlawful, discriminatory implementation of the PPP against prospective borrowers who are also debtors in bankruptcy. *The Diocese of Rochester et al. v. SBA et al.*, Case No. 6:20-dv-06243 EAW, (W.D.N.Y., filed Apr. 20, 2020). In their complaint, the Dioceses allege, among other things, that nothing in the SBA Interim Rules authorizes or permits the SBA to exclude debtors in bankruptcy from the PPP loan application process, and that they are businesses that Congress intended would benefit from the PPP to alleviate payroll difficulties. *Id.* at 6. Oral argument in the Dioceses cases is scheduled for May 15.

connection with the SBA's denial of Asteria's PPP loan application, and requested a temporary restraining order.¹³ The Bankruptcy Court in that case ultimately denied Asteria's request on April 30.¹⁴

SCENARIO 2: BORROWER APPLIES FOR PPP LOAN, LOAN IS APPROVED, AND BORROWER FILES CHAPTER 11 BEFORE LOAN IS FUNDED

Elemental Processing, LLC ("Elemental"), a Kentucky-based supplier of cannabidiol (CBD) and other cannabinoids from hemp, filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Eastern District of Kentucky on April 20.¹⁵ Elemental was already in receivership when the SBA granted it a \$750,000 PPP loan, but the loan was funded one day after Elemental filed its Chapter 11 petition.¹⁶ Elemental filed a motion for authority to incur debt for its PPP loan, to which the secured lender (with a first-priority lien and security interest in substantially all of Elemental's assets) objected.¹⁷ After holding an evidentiary hearing, the bankruptcy court denied Elemental's PPP motion on May 1.¹⁸

TooJay's Management LLC ("TooJay's"), which owns and operates the West Palm Beach, Florida-based TooJay's deli, bakery and restaurant chain, filed a Chapter 11 petition on April 29 in the U.S. Bankruptcy Court for the Southern District of Florida, listing a \$6.4 million PPP loan as its largest unsecured claim.¹⁹ TooJay's appears to have received its PPP loan with the support of its creditors, and so far it is unclear if the PPP loan will acquire front-stage attention.

SCENARIO 3: DEBTOR FILES CHAPTER 11 BUT SEEKS THE DISMISSAL OF THE CASE SO THAT IT CAN APPLY FOR A PPP LOAN

Multiple cases throughout the country involve the following scenario: the debtor files a Chapter 11 petition, debtor in possession (or "DIP") financing becomes problematic or economically disadvantageous vis-à-vis PPP loan support, so the debtor seeks the dismissal of the case specifically so that it can apply for a PPP loan.

Capital Restaurant Group filed an emergency motion in its Chapter 11 case pending in the U.S. Bankruptcy Court for the Northern District of Georgia seeking to dismiss its Chapter 11 case without prejudice.²⁰ Eligibility to receive SBA PPP loans played a key role in that case. The court presented the debtor with two options: dismiss the case with a one-year prohibition against refiling or remain in Chapter 11 to pursue a liquidation sale. The debtor elected to have its Chapter 11 case dismissed.²¹

¹³ *Asteria Educ., Inc., v. Carranza (In re Asteria Education, Inc.)*, Ch. 11 Case No. 20-50169-cag, Adv. No. 20-05024 (Bankr. W.D. Tex. Apr. 21, 2020).

¹⁴ *Asteria Educ. Inc.*, Docket entry April 30, 2020 (providing that application was denied for the reasons stated on the record). In similar fashion, fast casual restaurant company Cosí, Inc., a debtor in a Chapter 11 case pending in the U.S. Bankruptcy Court for the District of Delaware, sued the SBA on April 28, alleging that the SBA illegally denied its \$3.7 million emergency loan request on grounds that the company is currently undergoing bankruptcy proceedings, but reportedly the bankruptcy court denied Cosí's request on April 30.

¹⁵ *In re Elemental Processing, LLC*, Case No. 20-50640-tnw (Bankr. E.D. Ky. filed Apr. 20, 2020), Doc. #1.

¹⁶ *In re Elemental Processing, LLC*, Case No. 20-50640-tnw (Bankr. E.D. Ky.), Doc. #35 (Apr. 23, 2020).

¹⁷ *In re Elemental Processing, LLC*, Case No. 20-50640-tnw (Bankr. E.D. Ky.), Doc. #38 (Apr. 24, 2020).

¹⁸ *In re Elemental Processing, LLC*, Case No. 20-50640-tnw (Bankr. E.D. Ky.), Doc. #124 (May 1, 2020).

¹⁹ *In re TooJay's Mgmt. LLC*, Case 20-14792-EPK (Bankr. S.D. Fla.), Doc. #2 (Apr. 29, 2020).

²⁰ *In re Capital Rest. Grp., LLC*, Case 19-65910-wlh (Bankr. N.D. Ga.), Doc. #175 (Apr. 22, 2020).

²¹ *In re Capital Rest. Grp., LLC*, Case 19-65910-wlh (Bankr. N.D. Ga.), Doc. #192 (Apr. 28, 2020).

In a Chapter 11 case pending before the U.S. Bankruptcy Court for the Southern District of Florida, debtor Advanced Power Technologies LLC filed an emergency motion to voluntarily dismiss the case in order to receive PPP funds. The debtor knew it would qualify for a \$1.8 million PPP loan through the second phase of the CARES Act, but it would not receive such funding unless it could certify that it was no longer a debtor in bankruptcy.²² On April 24, the court granted Advanced Power Technologies LLC's emergency motion to voluntarily dismiss the case.²³

TAKEAWAYS

The PPP program is unquestionably suffering from legislative drafting and regulatory rulemaking. The CARES Act identified the SBA as the PPP loan administrator given the SBA's experience with SBA Section 7(a) loans. Despite their similarities in eligibility requirements, Section 7(a) loans have little in common with the emergency PPP loans which are distinguished by the loan forgiveness mechanism that the CARES Act passed as a result of the COVID-19 emergency. So, the SBA's natural preclusion from lending to bankrupt entities seems inconsistent with the intent of the CARES Act. As numerous bankruptcy courts have been quick to acknowledge, the PPP "loans" are in fact a misnomer; the PPP disbursements are effectively grants and as such are not subject to underwriting or credit diligence.²⁴ Besides, the SBA loan application form appears marred by poor drafting. As Chief Judge Jones noted in the Hidalgo case, "to have a form that simply says if an owner or a business is presently involved in a bankruptcy, I have zero idea what that means."²⁵ Being *presently involved in any bankruptcy*, as the SBA form questions, can carry a multitude of meanings thus creating an impossible situation for both borrowers and SBA lenders.²⁶

It also seems that neither the CARES Act nor the SBA have considered that the specialized scrutiny and protections afforded by the Bankruptcy Code provide superior safeguards that should allow a PPP applicant to reorganize in bankruptcy while maintaining individuals on payroll – thus ensuring that taxpayer funds are spent as intended by Congress. In the *Archdiocese* case, Judge Thuma defined the Chapter 11 system as "a hundred-eyed Argus."²⁷ And in the *Springfield* order, Judge Brown articulated procedures and safeguards in connection

²² *In re Advanced Power Tech., LLC*, Case 20-13304-PGH (Bankr. S.D. Fla.), Doc. #52 (Apr. 22, 2020).

²³ *In re Advanced Power Tech., LLC*, Case 20-13304-PGH (Bankr. S.D. Fla.), Doc. #60 (Apr. 24, 2020).

²⁴ In Hidalgo, Chief Judge Jones noted that there is no "underwriting" process involved in the emergency approval of PPP loan applications, stating that "to suggest that [the PPP program] is a program that enjoys underwriting and scrutiny in terms of who receives the money is to simply ignore the obvious [...] there is no collateral valuation, there is no credit worthiness test [...] to make that argument is simply frivolous." Transcript of Hearing at 18-19, Hidalgo Cty. Emergency Serv. Found. v. Carranza (*In re Hidalgo Cty. Emergency Serv. Found.*), Ch. 11 Case No. 19-20497, Adv. No. 20-02006 (Bankr. S.D. Tex. Apr. 24, 2020). The Archdiocese and Springfield courts echoed such observations when they concluded that the PPP "loans" are in fact grants.

²⁵ Transcript, *supra* note 4 at 33.

²⁶ Notably, the SBA Standard Operating Procedure ("SOP") for the 7(a) Program suggests that banks can consider prior bankruptcies when evaluating whether to *underwrite* the loan. U.S. SMALL BUS. ADMIN., SOP 50 10 5(K), Standard Operating Procedure (Apr. 1, 2019) at Ch. 2, III. 8.d.ii.(c). Other provisions in the SOP mention the bankruptcy of the borrower as a precluding factor when the bankruptcy has caused a prior loss to the Government. "Prior loss" is defined as the dollar amount of any deficiency on a Federal loan or federally assisted financing. *Id.* at Ch. 2, III. A. 16. As a result, one could argue that preclusion should not apply to borrowers that have not caused such loss of Federal money.

²⁷ Roman Catholic Church of the Archdiocese of Santa Fe v. SBA (*In re Roman Catholic Church of the Archdiocese of Santa Fe*), Ch. 11 Case No. 18-13027-t11, Adv. No. 20-01026-t, Op. at 11 (Bankr. D.N.M. May 1, 2020).

with the debtor's use of PPP funds that demonstrate the ability of the bankruptcy courts to satisfy the most stringent requirements.

Section 13(3) of the Federal Reserve Act ("Section 13(3)") is the authority under which the Federal Reserve System can act as a "lender of last resort" and was used extensively in response to the 2008 financial crisis. Section 13(3) precludes the provision of financial assistance to borrowers in bankruptcy or other insolvency proceedings, or for purposes of avoiding such proceedings.²⁸ The rationale is that the Federal Reserve should not bail out failing firms because it may create moral hazard and risks to taxpayers. The CARES Act, however, only contains a specific reference to Section 13(3) in connection with the \$454 billion stimulus program under Section 4003(b)(4) – it does not include a similar reference in connection with the PPP program.²⁹ Any objection that Section 13(3) stands in the way of making PPP assistance available to bankrupt entities would not seem viable.

Despite the current legislative restrictions and the resulting SBA pushback, some borrowers may find greater opportunity in the coming weeks as the courts – and eventually, Congress – weigh these arguments. It is interesting to see how many bankruptcy courts have risen to the challenge and provided interpretations that are both legally cogent and equitably sensible. The new paths opened by the bankruptcy courts may also contribute to resolving the conundrum that many SBA lenders presented with PPP loan applications have faced. Stay tuned.

Given the fast pace of developments, businesses are encouraged to seek advice from qualified legal counsel before applying or taking other actions with respect to a PPP loan.

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For more information, please see the following resources:

1. PPP Resources from the SBA and Treasury Department:

- a. [Top-Line Overview of the Program](#)
- b. [Information Sheet for Lenders](#)
- c. [Information Sheet for Borrowers](#) (updated April 2, 2020)
- d. [Borrower Application Form](#) (updated April 3, 2020)
- e. [Lender Application Form for Federally Insured Depository Institutions, Federally Insured Credit Unions, and Farm Credit System Institutions \(4/3/2020\)](#) (released April 3, 2020)
- f. [Lender Application Form for Non-Bank and Non-Insured Depository Institution Lenders \(4/8/2020\)](#) (released April 8, 2020)
- g. [Lender Agreement to participate in PPP](#) (released April 3, 2020)
- h. [PPP Program Loan Report](#) (updated April 16, 2020)
- i. [How to Calculate Loan Amounts](#)

²⁸ Federal Reserve Act, 12 U.S.C. § 343(3).

²⁹ See generally CONG. RESEARCH SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING (updated Mar. 27, 2020), <https://fas.org/sgp/crs/misc/R44185.pdf>.

- j. [Search Tools: Find an Eligible Lender](#)
2. Prior SBA Guidance on the Paycheck Protection Program:
- a. [SBA Extends Loan Repayment Safe Harbor Date, Provides Additional Guidance on Employees of Foreign Affiliates](#) (May 7, 2020)
 - b. [PPP Frequently Asked Questions](#) (updated May 5, 2020)
 - c. [Interim Final Rule 1](#) (originally posted April 2, 2020)
 - d. [Interim Final Rule on Applicable Affiliation Rules](#) (originally posted 4/3/2020)
 - e. [Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](#) (originally posted 4/14/2020)
 - f. [Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility](#) (originally posted 4/24/2020)
 - g. [Interim Final Rule Additional Criterion for Seasonal Employers](#) (originally posted 4/27/2020)
 - h. [Interim Final Rule on Disbursements](#) (originally posted 4/28/2020)
 - i. [Interim Final Rule on Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders](#) (originally posted 4/30/2020)
 - j. [Interim Final Rule on Nondiscrimination and Additional Eligibility Criteria](#) (originally posted 5/5/2020)
3. Prior Haynes and Boone Guidance on the Paycheck Protection Program and CARES Act:
- a. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated May 7, 2020)
 - b. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
 - c. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
 - d. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)
4. Resources on the EIDL Program:
- a. [Looking for an Alternative to PPP? Taking a Second Look at the Economic Injury Disaster Loan Program](#) (Haynes and Boone Alert, May 1, 2020).
 - b. [SBA's COVID-19 Disaster Loan Program](#) (Haynes and Boone Alert, March 24, 2020)
 - c. [SBA EIDL Resource Page](#)



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