

## Consumer Finance Litigation

A Burr & Forman **BLOG**

# Bankruptcy Court Declares Prohibition Against Debtors in Bankruptcy from Participating in Paycheck Protection Program Unenforceable

Published June 25, 2020

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in effort to provide support and economic relief to organizations and individuals during the Coronavirus pandemic. Pursuant to the CARES Act, Congress established the Paycheck Protection Program (PPP) to assist small businesses and self-employed individuals retain workers, cover operating costs, and maintain payroll. The Small Business Administration (SBA) backs the PPP, and is responsible for forgiving said loans if borrowers maintain payroll for eight (8) weeks and use the money for utilities, rent, etc.<sup>[1]</sup>

Nevertheless, on April 24, 2020, the SBA issued an interim final rule, which purports to disqualify bankruptcy debtors from participating in the PPP. In response to an inquiry relating to approval for PPP participation if a business is in bankruptcy, the SBA provided:

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan . . . . The Administrator, in consultation with the Secretary, determined that providing the PPP loans to debtors in bankruptcy would present an unacceptable high risk for an authorized use of funds or non-repayment of unforgiven loans.<sup>[2]</sup>

Additionally, the SBA's PPP Lender Application reinforces said sentiments that a PPP loan will not be approved unless an applicant certifies that neither the applicant nor an owner is presently involved in bankruptcy. Notably, there is no language in the CARES Act prohibiting Chapter 11 debtors from participating in the PPP.

On June 12, 2020, the United States Bankruptcy Court for the District of Arizona entered an Order finding the SBA's prohibition against debtors in bankruptcy from participating in the PPP

unenforceable.<sup>[3]</sup> Particularly, the Court held the SBA’s prohibition, precluding entities involved in a bankruptcy proceeding from participating in the PPP, exceeds the SBA’s authority and jurisdiction. The court found such prohibition to be unlawful and ordered it to be set aside.

Furthermore, the Court ordered the removal of all references relating to the involvement in bankruptcy from the underlying Plaintiff’s PPP Application, as well as any loan policies and procedures relating to said Plaintiff. Accordingly, the Court authorized Plaintiff to submit its PPP Application without reference to its involvement in bankruptcy, and ordered lenders to consider said application and any supporting documentation to be accurate and complete.

[1] SBA, “*Paycheck Protection Program Loan Information*” [here](#).

[2] SBA “*Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – promissory Notes, Authorizations, Affiliation, and Eligibility*” Interim Final Rule, Docket No. SBA-2020-0021 [here](#).

[3] *In re Andes Indus.*, Adv. No. 2:20-ap-00118-PS (U.S. Bankr. D. Az. June 12, 2020).

## Authors



**Mark H. Tyson**

Partner

Jackson, MS



**Miya A. Moore**

Associate

Birmingham, AL

Burr & Forman publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm. If legal advice is sought, no representation is made about the quality of the legal services to be performed or the expertise of the lawyers performing such service.