

The Eleventh Circuit Decides that Chapter 11 Debtors in Possession Cannot Receive Loans Under the Paycheck Protection Program (“PPP”)

By W. Glenn Jensen

As many property owners and business operators continue to face the economic malaise associated with government shutdown orders, a decline in foot traffic in many of the traditional brick and mortar businesses, and a slow roll out of the COVID-19 vaccines, a recent decision that is binding in all of the bankruptcy courts in Florida, Alabama and Georgia has decided that debtors in those states cannot obtain PPP loans.

Bankruptcy courts have been split on whether a debtor is qualified to obtain a Small Business Administration (“SBA”) PPP loan that could be forgiven provided certain conditions are met by the debtor. However, the Eleventh Circuit *In re Gateway Radiology Consultants, P.A.*, has now thrown away the proverbial “life raft” to debtors in bankruptcy by deciding that the SBA did not act improperly by its rule making authority or violate the CARES act when the SBA decided that debtors do not qualify for loans under the PPP program. The SBA excluded companies in bankruptcy from getting PPP loans because they would present an unacceptably high risk for unauthorized use of funds or non-repayment of unforgiven loans.

As a result of this decision, many of the business that relied on PPP loans as part of a restructuring effort in bankruptcy are now limited in their efforts to obtain a successful reorganization. Equally important, Congress could have fixed this problem in passing the most recent \$900 billion stimulus package that was signed by President Trump on December 27th. However, the Congressional “grinch” did not fix this problem when it allocated billions of dollars in new PPP monies to borrowers. As a result, many businesses will likely just close their doors rather than file for Chapter 11 bankruptcy and hand the lender the keys to the business. This could trigger a tsunami of guaranty litigation if the banks decide to pursue the guaranties on the debt owed.

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