

# ISSUES ARISING IN PPP LITIGATION

# IS A DEBTOR ELIGIBLE TO GET FUNDING UNDER THE PAYCHECK PROTECTION PROGRAM?

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- NOTHING IN THE CARES ACT EXPRESSLY STATES A DEBTOR CANNOT OBTAIN FUNDING UNDER THE PPP
- SBA FORM ASKS IF THE APPLICANT OR OWNER OF THE APPLICANT IS A DEBTOR IN A BANKRUPTCY CASE
- ANSWERING THIS QUESTION IN THE AFFIRMATIVE WILL RESULT IN THE SBA REJECTING THE APPLICATION
- DEBTORS SEEK INJUNCTIVE RELIEF TO PREVENT SBA FROM ASKING THE BANKRUPTCY ELIGIBILITY QUESTION

# DOES THE BANKRUPTCY COURT HAVE THE AUTHORITY TO ISSUE AN INJUNCTION AGAINST THE SBA?

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- SBA CLAIMS SOVEREIGN IMMUNITY UNDER THE SMALL BUSINESS ACT SEC. 634(b)(1)
- DEBTORS ASSERT POWERS UNDER SEC. 105, 106 AND 525 TO ENJOIN SBA FROM IMPOSING THE BANKRUPTCY EXCLUSION TO APPLY FOR PPP FUNDING
- WHERE AGENCY EXCEEDS STATUTORY AUTHORITY AND INJUNCTIVE RELIEF WILL NOT INTERFERE WITH AGENCY'S INTERNAL OPERATIONS, INJUNCTIVE RELIEF PERMISSIBLE. ULSTEIN MARITIME, LTD.V. US, 833 F.2D 1052 (1<sup>ST</sup> CIR. 1987)

# SEC. 525 BANKRUPTCY DISCRIMINATION

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- DEBTORS ARGUE:
  - PPP IS A GRANT PROGRAM NOT A LOAN PROGRAM, AND FALLS WITHIN SEC. 525
  - SBA'S BANKRUPTCY QUESTION IS IMPROPER, AS IT DISCRIMINATES AGAINST BANKRUPTCY DEBTORS
- SBA ARGUES:
  - SEC. 525 ONLY APPLIES TO "LICENSE, PERMIT, CHARTER, FRANCHISE OR OTHER SIMILAR GRANT"
  - PPP IS A LOAN AND NOT A GRANT,
  - EVEN IF IT'S A GRANT, IT IS NOT LIKE A LICENSE PERMIT, CHARTER OR FRANCHISE

# ISSUE ON SEC. 525 DISCRIMINATION DEPENDS ON CIRCUIT PRECEDENT

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- 5<sup>TH</sup> CIRCUIT CONSTRUES SEC. 525 NARROWLY; LOAN IS NOT A GRANT
  - SEE EXQUISITO SERVICES, INC. V. U.S.A. (IN RE EXQUISITO SERVICES, INC.) 823 F.2D 151 (5<sup>TH</sup> CIR. 1987)
- 2<sup>ND</sup> CIRCUIT CONSTRUES SEC. 525 MORE BROADLY; FUNDING THAT IS FORGIVEN IF USED PROPERLY IS A GRANT
  - SEE STOLTZ V. BRATTLEBORO HOUSING AUTH (IN RE STOLTZ), 315 F.3D 80 (2<sup>ND</sup> CIR. 2002)

# HAS SBA EXCEEDED ITS STATUTORY AUTHORITY BY EXCLUDING DEBTORS OR DEBTOR-OWNER OF APPLICANT FROM ELIGIBILITY UNDER THE PPP?

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- CARES ACT HAS LIMITED ELIGIBILITY REQUIREMENTS FOR PPP FUNDING
  - APPLICANT WAS IN OPERATION ON FEB. 15, 2020
  - APPLICANT HAD 500 OR LESS EMPLOYEES, OR LESS THAN THE STANDARD NUMBER OF EMPLOYEES FOR AN AVERAGE BUSINESS IN THAT INDUSTRY
  - APPLICANT PAID SALARIES AND PAYROLL TAXES OR PAID INDEPENDENT CONTRACTORS
  - APPLICANT CERTIFIES THAT PPP FUNDS WILL BE USED TO RETAIN WORKERS OR MAKE MORTGAGE PAYMENTS, LEASE PAYMENTS AND UTILITY PAYMENTS
- NO MENTION OF APPLICANT OR ITS OWNER BEING IN BANKRUPTCY
- NO PERSONAL GUARANTEE REQUIRED
- NO COLLATERAL REQUIRED

# WAS ADDING A BANKRUPTCY EXCLUSION TO PPP ELIGIBILITY AN ARBITRARY AND CAPRICIOUS ACT?

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- DEBTORS ARGUE:
  - CONGRESS KNOWS HOW TO MAKE NOT BEING IN BANKRUPTCY A REQUIREMENT FOR A LOAN
  - CARES ACT SEC. 4003 EXPRESSLY PROHIBITS LOAN TO MEDIUM-SIZED COMPANY (500 TO 10,000 EMPLOYEES) WHO HAVE BEEN IN BANKRUPTCY
  - SBA ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER BY INSERTING THE ADDITIONAL “NO BANKRUPTCY” REQUIREMENT FOR ELIGIBILITY UNDER PPP

# WHY DID SBA INCORPORATE AN ADDITIONAL ELIGIBILITY REQUIREMENT NOT IN CARES ACT FOR PPP FUNDING?

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- SBA ARGUES THIS IS A LOAN PROGRAM UNDER SECTION 7(A) OF SMALL BUSINESS ACT
- ALL LOANS MADE UNDER SECTION 7(A) MUST BE OF “SUCH SOUND VALUE OR SO SECURED REASONABLY TO ASSURE REPLAYMENT”
- PPP LOANS ARE MADE UNDER SAME TERMS, CONDITIONS AND PROCESSES AS OTHER SECTION 7(A) LOANS “EXCEPT AS OTHERWISE PROVIDED IN THIS PARAGRAPH”
- SBA ARGUES CONGRESS EXPRESSLY GRANTED IT RULE-MAKING AUTHORITY TO IMPLEMENT THE PPP
- LOANS TO DEBTORS WOULD PRESENT AN “UNACCEPTEDLY HIGH RISK OF AN UNAUTHORIZED USE OF FUNDS OR NON-REPAYMENT OF UNFORGIVEN LOANS”



# CHEVRON DEFERENCE QUESTION:

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- CHEVRON USA INC. V. NAT'L RESOURCES DEFENSE COUNCIL, INC., 467 US 837 (1984)
- IF STATUTE IS UNAMBIGUOUS, THEN "REVIEWING COURT MUST GIVE EFFECT TO CONGRESS' WILL IRRESPECTIVE OF ANY CONTRARY AGENCY INTERPRETATION"
- APPLICANTS ARGUE ONLY 2 CRITERIA FOR PPP FUNDING: "EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS" OR THE EXPRESSION OF ONE THING IS THE EXCLUSION OF OTHERS. SEE DV DIAMOND CLUB OF FLINT, LLC V. US SBA, \_\_\_ F. SUPP.3D \_\_\_ (D. MICH. 2020)
- SBA ARGUES ITS INTERPRETATION OF CARES ACT IS REASONABLE, SO STATUTE MUST BE AMBIGUOUS AND AGENCY'S INTERPRETATION MUST BE DEFERRED TO.