The "New and Improved" PPP Loan Package!

By Thomas J. Salerno
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"No soup for you!"
Larry Thomas as Yev Kassem
"Seinfeld" (November 2, 1995)

What a fitting end for a disastrous year! While Rome burned and Nero played golf, on December 23, 2020 our elected representatives finally passed the *Combined Consolidated Appropriations Act, 2021*, which includes the *Coronavirus Economic Relief for Transportation Services Act* and *Coronavirus Response and Relief and Relief Supplemental Appropriations Act* (H.R. 133) (the "**CARES ACT II**")[1], which provides for another $284.45 billion in "PPP Second Draw Loans" ("**PPP III Loans**"). While over four months had passed since the lapse of the prior PPP loan program, battered and punch drunk struggling businesses throughout the U.S. breathed an audible sigh of relief. As CARES Act II contained numerous provisions related to stimulus and aid availability separate from PPP III Loans, there were the stirrings of holiday grumblings like last week's bad turkey leftovers about a possible veto of CARES Act II. Say it ain't so! Hasn't 2020 been difficult enough already?

While an anxious country desperately watched Mar-a-Lago for signs of white smoke from the chimney,[2] and despite threats of veto, the President signed CARES Act II on Sunday, December 27, 2020. On to the next COVID crisis!

For those of us in the bankruptcy world, our collective eyes were focused on what CARES Act II would do to help resolve the whirling litigation dervish debacle related to eligibility of debtors to get PPP Loans. As has now been widely reported, litigation has been filed, and continues, over the prior PPP law's wholesale exclusion of debtors to be considered for any PPP loans.[3] So while Congressional committees wrote, rewrote and haggled over language in the proposed legislation, the public discourse among bankruptcy types (and conveyed to Congress through various means) was to fix this issue definitively.[4]

1 Not to be confused with *Sister Act II*, which was certainly more entertaining. If you're one of those legislation groupies and want to read the whole law, it is available at https://www.congress.gov/bill/116th-congress/house-bill/133?r=1&s=2. It is a page-turner for sure. Versions of this bill have been circulating since July 2020, before the prior PPP loans expired.

2 *See, e.g.* "As Bills Pile Up, Many Anxiously Keep Tabs On Stimulus Bill", *New York Times* (December 27, 2020).

3 *See, e.g*. Salerno, Weidner, Simpson & Ebner, "This DIP Loan *Should* Be Brought To You By Someone Who CARES)! (Or "You Can't Get There From Here")", *ABI Headlines* (April 1, 2020); Salerno & Simpson, "This DIP Loan *Should* Be Brought To You By Someone Who CARES! (Or "You Can't Get There from Here"): A Please for Rationality, Part Two 1/2", *ABI Journal* (June 2020); Salerno, "Reports Of A 'Debtor Bar' for PPP Loans Have Been 'Exaggerated'", *ABI News And Analysis* (July 2, 2020); Barlow, "A New Challenge For Debtors Who Received PPP Loans Under The CARES Act", ABI News (August 5, 2020).

4 *Id. See also* Letter from ABI Executive Director Amy Alcote Quackenboss to leadership of both the House and Senate urging them to "consider the negative implications of the SBA's [April 24, 2020 policy statement disqualifying debtors from PPP Loans]," and to avoid discriminatory treatment of debtors in bankruptcy cases. Letter dated December 16, 2020; Salerno, "Proposed Extension Of The PPP Loan Program: A Nice First Step…" *American Bankruptcy Institute Journal* (September 2020); Salerno, "Update On Proposed Extension Of The PPP Loan Program—Gotta Read The Fine Print!", *ABI Headlines* (November 24, 2020) ("**Fine Print Article**").

Did CARES Act II "fix" the issue and definitively do away with any future litigation in this area? Of course not. Instead, there is a mixed bag in CARES Act II — some good news for some debtors, bad news for other debtors, and a pretty much sure bet for future litigation concerning the latter.

I. CARES ACT II'S DEBTOR ELIGIBILITY PROVISIONS

Let's start by turning the frown into a smile! CARES Act II does indeed make PPP III Loans available to some debtors, so that's better than a sharp stick in the eye! It contains the following language:

> "(a) IN GENERAL.—Section 364 of title 11, United States Code, is amended by adding at the end the following:
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> "(g)(1) The court, after notice and a hearing, may authorize a debtor in possession or a trustee that is authorized to operate the business of the debtor under ***section 1183, 1184, 1203, 1204, or 1304 of this title*** to obtain a loan under paragraph (36) or (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), and such loan shall be treated as a debt to the extent the loan is not forgiven under section 1106 of the CARES Act (15 U.S.C. 9005) or subparagraph (II) of such paragraph (37), as applicable, with priority equal to a claim of the kind specified in subsection (c)(1) of this section."
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> CARES Act II (emphasis added).

What this language does, of course, is make the PPP III Loans available to subchapter V, chapter 12 and chapter 13 debtors — but excludes by omission all other chapter 11 debtors (who are authorized to act under Bankruptcy Code §§ 1106 and 1107). As previously reported, this was no typographical error as the issue had indeed been communicated numerous times through various channels to legislators during the process.

Anyone who has either experienced the need for serious medical services for COVID related treatment or knows someone who has,[5] the care required is neither simple nor inexpensive. Indeed, the average national cost of hospitalization for COVID-19 treatment ranges from about $52,000 to nearly $80,000 (depending upon age).[6] It is health care professional intensive. So, for example, under CARES Act II a critical care hospital overwhelmed by indigent COVID patients[7] that incurs debt that is in excess of the current subchapter V debt limits of $7.5 million and needs to file chapter 11 cannot seek to obtain a PPP III Loan in its chapter 11 under CARES Act II.[8] So much for the Congressional salute to those on the healthcare front line.

The CARES Act II's provisions in this regard are even more ironic (or perhaps hypocritical) when juxtaposed with the original rationale expressed by the Small Business Administration ("**SBA**") in its dogged defense over is prior exclusion of all debtors from PPP loans. Even assuming, *arguendo*, that the stated rationale of the SBA for excluding debtors in the original (and now expired) PPP provisions of the CARES Act (the "**SBA Rule**") has some basis in fact (*i.e*. as defended in the now infamous April 24, 2020 administrative rule that categorically denied debtors in bankruptcy from accessing the PPP Loans on the basis that debtors "present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans"), how does the latest CARES Act II make any sense whatsoever? How does Congress justify allowing some debtors to access the PPP Loans (*i.e.* subchapter V, chapter 12 and chapter 13 debtors), while denying the same loans to a business or individual who happen to have more than $7.5 million of

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5 Given the prevalence of the hospitalization needed for infected U.S. residents, the odds are most of us at least know someone who has been hospitalized for treatment. In the U.S., as of the third week in December, there have been over 19 million total cases and 332,246 deaths. *See CDC COVID Data Tracker* (December 29, 2020). On a national level, the CDC is forecasting between 9200 and 23,000 new COVID 19 hospital admissions by January 18, 2021. *CDC COVID 19 Forecasts: Hospitalizations* (December 29, 2021). To put this in perspective, this grim figure (which unfortunately is not yet final by any means) shows that COVID 19 deaths are almost at the combined total of U.S. fatalities in both WW II (approximately 292,000) and Viet Nam (58,220). *See* "U.S. Coronavirus Deaths Now Surpass Fatalities In The Vietnam War", *National Geographic* (April 28, 2020).

6 *See, e.g.* "Average Cost Of Hospital Care For COVID-19", *HealthCare Finance* (November 5, 2020). Moreover, those patients that require intensive care treatment and intubation will have costs that are materially higher.

7 These patients cannot be denied hospitalization if they are in danger of dying, regardless of their ability to pay. *See, e.g.* the Emergency Medical Treatment and Labor Act ("**EMTALA**", 42 U.S.C. §1395dd) that requires anyone coming to an emergency room to be stabilized and treated, regardless of insurance status or ability to pay. The treating hospital can seek to be reimbursed, but interestingly EMTALA has not been funded since its enactment in 1986, leaving the financial burden of treating these patients on the treating hospital. Uninsured and impecunious people tend to use emergency rooms as their primary care physicians, and only go to such places when they become seriously ill (as is happening with COVID 19 cases).

8 One version of the law under consideration expressly included critical care hospitals in the debtor eligibility category, but that was ultimately not agreed upon and did not make it into the final CARES Act II bill.

debt (thereby putting them outside the debt limits of subchapter V)?

As the loans max out at a certain level, and assuming all other criteria are met (need for funds, appropriate use of the funds, etc.), why is a debtor with $7.5 million in debt somehow qualify, yet one with $7,500,001 does not? Perhaps Congress believes that all debtors are deadbeats, but debtors owing more than $7.5 million in debt are riskier deadbeats. The result of this is stunningly obvious and foreseeable — more litigation related to discriminatory treatment violative of Bankruptcy Code §525![9] Moreover, as CARES Act II has now made the discrimination explicit (and it is no longer a question of SBA rule-making fiat), the post-CARES Act II litigation will likely not revolve around the issues related to the lawfulness of the SBA rule making powers under the Administrative Procedures Act .[10] The discrimination is now statutory, not rule based. I know I feel better about that.

II. CARES ACT II'S IMPACT ON CURRENT LITIGATION.

What impact will these provisions in CARES Act II have on the pending litigation over the SBA's exclusion of debtors from prior PPP loans? The question is interesting to be sure. On the one hand, the SBA can certainly argue that the CARES Act II is a material change in the law that existed at the time that debtors were excluded from PPP loans. Is it fair? No, but when did fair ever enter into it?[11]

On the other hand, debtors can argue that the CARES Act II provisions show that the stated rationale for the SBA's exclusions in the past under the SBA Rule were simply unfounded and the new provisions show Congress' intent that at least some debtors were worthy enough to be included in the PPP III Loans. Moreover, nothing in the CARES Act II provisions deal with the issue of unfair discrimination under Bankruptcy Code §525, and indeed (and this is a stretch), CARES Act II is a way for Congress to remedy the discrimination the SBA was regularly practicing under the prior law. In those jurisdictions wherein the argument that the SBA Rule excluding debtors was exceeding its statutory authority or otherwise unlawful because it was arbitrary and capricious and therefore unlawful,[12] the CARES Act II provisions highlight the arbitrary and capricious nature of the SBA Rule.

III. SO WHAT NOW?

On the bright side, there is over $284 billion in new PPP III Loan money available to at least some categories of debtors. On the dark side, not all debtors are created equally as far as eligibility is concerned. New litigation clouds are forming on the horizon. For the non-eligible debtors, and to paraphrase Yev Kassem, "No PPP III Loan for you!"

At least for now….

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9 "Why, one is tempted to ask. Perhaps it is as simple as Orwell's prophetic statement in 1945—all debtors are equal but some are more equal than others." Fine Print Article.

10 *See* 5 U.S.C. §706(2) (C); *Chevron, U.S.A., Inc. v. Natl. Res, Def. Council, Inc.,* 467 U.S. 837 (1984).

11 By way of analogy, in most states, any use of marijuana was illegal until either (or both) medicinal and/or recreational use became legalized (most fairly recently). So if you had to pay a fine or were otherwise penalized before the change in the law—so what? That was then and this is now. Life can be tough that way, get over it.

12 Unfortunately for debtors, those places do not include either the Fifth or the Eleventh Circuits, which have ruled that the SBA Rule excluding debtors from the scope of PPP loans is not arbitrary or capricious in violation of the Administrative Procedures Act and the SBA had immunity from bankruptcy court injunctions. *See USF Fed. Credit Union v. Gateway Radiology Consultants PA (In re Gateway Radiology Consultants PA)*, No. 20-13462, 2020 WL 7579338 (11th Cir. Dec. 22, 2020) (which, interestingly, referenced the bankruptcy court's finding that the SBA action was discriminatory to debtors in violation of Bankruptcy Code §525, yet did not explicitly rule or address that separate legal issue); *Hidalgo Cty. Emergency Serv. Found. v. Carranza (In re Hidalgo Cty. Emergency Serv. Found.)*, 962 F.3d 838 (5th Cir. 2020) (which reversed the bankruptcy court's injunction against the SBA based on the provisions of the anti-injunction act protecting the SBA, without otherwise expressly opining on the anti-discrimination or lawfulness of the SBA Rule). *See also* Rochelle, "Eleventh Circuit Bans Chapter 11 Debtors From Receiving 'PPP' Loans", *Rochelle's Daily Wire* (December 29, 2020).

The Gift That Keeps on Giving: "New and Improved" PPP Loan Package—Part 2!

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December 31, 2020

"Mother may I?"
Children's Game (Timeless)

Just when you think the new *Combined Consolidated Appropriations Act, 2021*, which includes the *Coronavirus Economic Relief for Transportation Services Act* and *Coronavirus Response and Relief and Relief Supplemental Appropriations Act* (H.R. 133) (the "**CARES ACT II**"),[1] at least settled some aspects of the issue of eligibility for the $284.45 billion in "PPP Second Draw Loans" ("**PPP III Loans**")[2]—Congress sends another zinger your way!

Buried in the tome-like legislation is this gem:

> **(1) EFFECTIVE DATE.—The amendments made by subsections** (a) through (e) [*i.e.* the 364 amendments and related amendments] **shall**— (A) **take effect on the date on which the Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements, any debtor in possession or trustee** that is authorized to operate the business of the debtor under section 1183, 1184, 1203, 1204, or 1304 of title 11, United States Code, **would be eligible for a loan** under paragraphs (36) and (37) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)); and (B) apply to any case pending on or commenced on or after the date described in sub-paragraph (A).
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> CARES Act II, Section 320(f)(1) (emphasis added).

So, CARES Act II is really saying that some debtors are eligible for PPP III Loans, but only if the Small Business Administration (SBA) decides that is the case. Apparently, Congress was concerned about stepping on the SBA bureaucratic toes, and threw in this "mother may I" clause. This is a curious use of legislative dynamic. Usually Congress passes laws and administrators administer those laws. Here, in effect, Congress is giving the SBA (the administrator) the ultimate power to decide if a law ever takes effect.

Those glass-is-half-full folks will point to the section that says the SBA might decide that its prior pronouncements and litigation positions (up to and including circuit courts of appeal) were simply wrong. So we all have

1 Available at https://www.congress.gov/bill/116th-congress/house-bill/133?r=1&s=2 .

2 *See* Salerno, "The New And Improved' PPP Loan Package!" *ABI Headlines* (December 30, 2020) ("**New PPP Article**"). Many thanks to Brendan G. Best, Esq. for his insights for this update.

that going for us.

Let's consider the "glass being not only half-empty, but also cracked and rapidly losing water" perspective. The SBA gets the final say as to whether all of these PPP III Loan eligibility provisions become effective at all. There is no deadline for the SBA to provide such consent, nor is there any congressional parameters given to the SBA to consider whether to grant such approval. Hence, we are left to the unbridled discretion of the SBA and are to trust in its infinite wisdom.

Of course, we are not writing on a clean slate here. The SBA has publicly and proudly announced how it views *any* debtor having access to PPP loans. In its April 24, 2020 administrative rule ("**SBA Rule**"), the SBA proclaimed:

> The Administrator, in consultation with the Secretary [of the Treasury], determined that providing PPP loans to debtors in bankruptcy would present an unacceptable high risk of an unauthorized use of funds or non-payment of unforgiven loans.

In addition, a number of lower courts, and at least the 11th Circuit Court of Appeals,[3] have found that the SBA Rule is not arbitrary or capricious as a legal matter.

Accordingly, at least two things follow from this:

FIRST, either the SBA has a dramatic change of heart as to its views of the fiscal wisdom of providing PPP loans to debtors,[4] or the SBA can prevent the PPP III Loan provisions from going to *any* debtors in bankruptcy.

SECOND, if the SBA has this Dickensesque change in perspective, one is left to wonder how the SBA (in the pending litigation regarding the alleged arbitrary and capricious nature of the SBA Rule's wholesale exclusion of debtors) explains why prior to December 23, 2020, all debtors were "unacceptably high risks," but post-CARES Act II, some are suddenly fine and some not so much. It is one thing for the SBA to say Congress "made them do it," but given this power under Section 320(f)(2) of CARES Act II, the decision is squarely in the SBA's power.

Of course, absent a constitutional crisis, there will undoubtedly be a change in administration in a matter of days, and with it a change in the Secretary of the Treasury as well as a change in the Administrator for the SBA. [5]While reasonable minds can differ, it is more likely than not that the Biden administration's SBA/Treasury may well take a more "debtor friendly" view than Mr. Mnuchin and and Ms. Carranza. As such, the betting odds in Vegas are saying the SBA will (upon the change in administration) give the approval necessary for CARES ACT II's limited debtor eligibility rules to move forward.[6]

The foregoing notwithstanding, there is the possibility that there will be "no soup" for anyone! And the litigation carousel continues.

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3 *See USF Fed. Credit Union v. Gateway Radiology Consultants PA (In re Gateway Radiology Consultants PA)*, No. 20-13462, 2020 WL 7579338 (11th Cir. Dec. 22, 2020); New PPP Article.

4 This is not outside of the range of possibilities. Anyone who has seen *A Christmas Carol* knows dramatic changes of heart can and do happen during the holiday season!

5 *See, e.g.*, CHC Urges Biden To Choose Latinos To Head Education Department, SBA", *The Hill* (December 19, 2020).

6 The unfettered discretion of the SBA is precisely the concern pointed out when the prior versions of the law were being considered—putting discretion in the hands of the SBA was tantamount to killing any PPP loan availability to any debtor. See Salerno, "Proposed extension of the PPP Loan Program: A Nice first Step…" *ABI Journal* at 9 (September 2020).