

PRESENTED AT

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**Dealing with the Government:
The SBA Before and After COVID.**

A discussion of practical considerations when dealing with a government agency, remedies available against the SBA, and recent court opinions regarding the SBA and PPP loans.

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I. PRACTICE POINTERS AND GENERAL INFORMATION REGARDING LITIGATION WITH THE UNITED STATES AND ITS AGENCIES

A. Waiver of Sovereign Immunity in Bankruptcy Matters

1. Section 106 of the Bankruptcy Code sets out the Code sections for which sovereign immunity is waived as to governmental units:

(a)Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1)Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2)The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3)The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4)The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5)Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b)A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

2. Waiver of sovereign immunity is an issue in PPP litigation as more fully discussed below. The majority of PPP litigation in bankruptcy cases includes an allegation of discrimination under Section 525 (a) of the Bankruptcy Code and therefore sovereign immunity is waived. However, the prohibition against injunctions in Small Business Act Section 634(b)(1) is also at play in PPP litigation because most plaintiffs seek an injunction against the SBA's rejection of PPP applications on the basis of bankruptcy. See, for example, *In re Gateway Radiology Consultants, P.A.* 616 B.R. 833, 842-43 (Bankr. M.D. Fla. 2020).

There is no question that when Congress created the SBA, it waived sovereign immunity so that the SBA "could sue and be sued." But there was a caveat: even though Congress provided that the SBA could sue or be sued, 15 U.S.C. § 634(b)(1) provides that "no attachment, *injunction*, garnishment, or other similar process ... shall be issued against the Administrator."

At first glance, § 634(b)(1) appears plain and unambiguous. "No injunction" means no injunction. And many courts have read § 634(b)(1) that way. But that view is far from universal. Indeed, courts are split over whether the scope of the "no injunction" language in § 634(b)(1). Some courts hold that § 634(b)(1) bars injunctions in all circumstances, while other courts hold that § 634(b)(1) does not bar a court from enjoining an agency that has exceeded its statutory authority. (citations omitted).

B. Serving the United States and its Agencies

Bankruptcy Rule 7004(i) [F.R.C.P. 4(i)] governs service on the United States and its agencies:

(i) Serving the United States and its Agencies, Corporations, Officers, or Employees.

(1) *United States*. To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

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