

PRESENTED AT
The University of Texas School of Law
39th Annual Jay L. Westbrook Bankruptcy Conference
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Live Webcast

**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 those 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.
 - (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.

- **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:

- **C. Handy Information for Service of Process/Noticing**

The SBA Pre-Covid

- The SBA provides loan assistance to small businesses through what are commonly known as “7(a) loans” under Small Business Act Section 207. Section 7(a) loan programs administered by the SBA pre-Covid include restrictions on the issuance or guarantee of loans. Among such requirements is that loans made under Section 7(a) “shall be of such sound value or so secured as reasonably to assure repayment.” 15 U.S.C. Section 636(a)(6).
- Prior to the Covid pandemic, borrowers who sought SBA loans were required to fill out SBA Form 1919, “SBA 7(a) Borrower Information Form”. Bankruptcy was a creditworthiness consideration, but not a bar to borrowing. Relevant questions on the form asked:
 - Section I: Applicant Business Information
 - 3. Is the Small Business Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency?
 - 6. Has the Small Business Applicant and/or its Affiliates ever filed for bankruptcy protection?
 - Section II: Principal Information
 - 24. Have you, or any business you controlled, ever filed for bankruptcy protection?

SBA Loans Post-Covid

A. Applying for PPP funds.

- When Congress passed the CARES Act on March 27, 2020, the SBA was charged with administering the program. One of the key measures in the CARES Act was the Paycheck Protection Program (“PPP”). The PPP program initially authorized \$349 billion in economic relief. Later, on April 24, 2020, Congress enacted CARES Act II adding an additional \$310 billion for PPP loans. Relying on the 7(a) language regarding creditworthiness, the SBA determined, without congressional authority, that PPP loans should not be made to applicants in bankruptcy. The SBA produced a form to be used when applying for PPP funds which lumped bankruptcy with suspension and debarment:

- Form 2483 Paycheck Protection Program – Borrower Application Form
- 1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?

What are the causes for Suspension or Debarment?

- Commission of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal laws, receiving stolen property, an unfair trade practice
- Violation of antitrust statutes
- Willful, or a history of, failure to perform
- Violation of the Drug-Free Workplace Act
- Delinquent Federal taxes (more than \$3,000)
- Knowing failure to disclose violation of criminal law

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