Restaurants with unconfirmed bankruptcy plans may seek emergency dismissal of bankruptcy case to gain access to Restaurant Revitalization Funds

Maria G. Carr | Friday, May 28, 2021

The Restaurant Revitalization Fund, which is a $28.6 billion federal fund for struggling restaurants that was established as part of the $1.9 trillion American Rescue Plan passed on March 6, appears to be having an unintended effect on bankrupt restaurants trying to apply while their bankruptcy cases are pending. We previously summarized the key terms of the Restaurant Revitalization Fund and details regarding the portal and the initial applicants for the fund can be found here. Unlike the Paycheck Protection Program that provided loans throughout the COVID-19 pandemic, the Restaurant Revitalization Fund (the RRF) offers substantial grants, not loans, to restaurants that have struggled for the past year, and restaurants may use the grants to pay for payroll expenses, mortgage payments, rent utilities, supplies, and food and beverage expenses, among other costs. Like the Paycheck Protection Program, however, funds will be distributed on a first-come, first-serve basis, and companies that are currently in chapter 11 bankruptcy are not eligible for grants from the RRF unless the bankrupt company already has a confirmed plan of reorganization. Although companies in bankruptcy were not eligible for PPP loans for much of last year, the Small Business Administration recently revised its guidelines in April 2021 to provide the companies in chapter 11 bankruptcy are eligible for PPP loans if they have a confirmed reorganization plan.

Many companies sued the Small Business Administration throughout 2020 to contest their eligibility for PPP loans. To gain access to the RRF, however, a few bankrupt companies that have current bankruptcy cases but have not yet achieved a confirmed plan of reorganization are not filing suit, but are seeking emergency dismissal of their bankruptcy cases so that they may apply for grants from the RRF before funds run out. Earlier this month, COSI, Inc., a fast casual chain, obtained an emergency dismissal of its bankruptcy case in the United States Bankruptcy Court for the District of Delaware so that it could apply for an RRF grant. Even though COSI had achieved preliminary approval of its disclosure statement and plan, the SBA determined that COSI was not eligible to apply for the grant unless approval of the plan was final. Importantly, with the support of COSI's lenders and trade creditor interest groups, COSI also received court authorization to reinstate its bankruptcy case upon five days' notice (allowing it to come back to the bankruptcy court to finalize its plan once the grant is received). The SBA took no position on COSI's request for dismissal.

In a similar case, however, a judge in the United States Bankruptcy Court for the District of Arizona refused to allow Even Stevens Sandwiches, LLC to dismiss its bankruptcy case to obtain access to a RRF grant; instead of dismissal, the case was converted to liquidation pursuant to chapter 7 of the Bankruptcy Code. In the Even Stevens case, though, the case was administratively insolvent and the company had refused to pay past due fees.

Although the SBA's reasoning for denying RRF grants to bankrupt companies with unconfirmed plans is unknown, seeking emergency dismissal of a bankruptcy case as soon as possible may be a viable option for bankrupt restaurants hoping to gain access to the RRF before funds run out. Unlike the PPP program, it is unknown if there will be further funds available in the RRF later (or a second round of funding), so companies seeking to challenge eligibility for the RRF through litigation may be left without a remedy. The dismissal of COSI's bankruptcy case so that it may apply for a RRF grant provides important precedent, even though the issue may be relatively time-limited.

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