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Federal Court Decision: No Private Right of Action Under the CARES Act, and Lenders May Impose Restrictions on Loan Eligibility

April 22, 2020

Not surprisingly, litigation has already begun surrounding the recently enacted CARES Act (i.e., the Coronavirus Aid, Relief, and Economic Security Act), which is an amendment to the Small Business Act (the "SBA"). At least one federal court has concluded that no private right of action exists under the CARES Act, and that lenders are free to impose restrictions upon who may be eligible to apply for a loan under this Act.

On April 13, 2020, in *Profiles, Inc. v. Bank of Am. Corp.,* 20-cv-00894 (D MD Apr 13 2020), the United States District Court for the District of Maryland concluded there is no private right of action under the CARES Act, and that this Act does not prohibit a financial institution from restricting loans under the Payroll Protection Program ("PPP") to applicants who do not already have a pre-existing credit or borrowing relationship with another institution.

<u>**Allegations in Class Action Complaint**</u>: On April 3, 2020, Plaintiffs filed a putative class action complaint against Bank of America Corporation and Bank of America, N.A. (collectively, "BofA"), contesting BofA's policy of accepting applications for PPP loans only from customers with pre-existing borrower relationships with BofA. Two of the named plaintiffs – Proline Products, Inc. ("Proline") and Elite Security Group ("Elite") – were already customers of BofA, but did not have a borrower relationship with BofA, who denied their applications.

On April 4, 2020, BofA amended its policy to allow depository-only customers to apply, so long as they did not have a credit or

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borrowing relationship with another financial institution.

BofA denied Proline a loan under BofA's new policy, because Proline had credit cards with two other financial institutions. Further, Elite remained concerned that its application would be denied because it had a loan with another institution, albeit not an SBA lender.

Plaintiffs twice amended their complaint, which included adding a challenge to BofA's amended policy. Plaintiffs also filed a motion for a Temporary Restraining Order and Preliminary Injunction ("TRO and PI"), seeking to enjoin BofA from imposing its own eligibility requirements for PPP loans.

Memorandum Opinion Denying Plaintiffs' Request for TRO and PI: On April 13, 2020, the Honorable Stephanie A. Gallagher issued a Memorandum Opinion, denying Plaintiffs' TRO and PI. In concluding there is no private right of action under the CARES Act, the Court found that the CARES Act does not expressly provide for a private right of action, and that nothing in the statute implied a private right of action. The court rejected Plaintiffs' reliance upon a series of cases finding a private right of action against governmental entities under 42 U.S.C. § 1983 – that statute generally provides for a private right of action against a public entity, rather than a private entity. Additionally, the PPP implemented by the CARES Act is an amendment to the SBA, and various courts have previously concluded that there is no private right of action under the SBA. The Court found nothing in the CARES Act that extended a private cause of action under the SBA.

Further, the Court held that BofA did not violate the CARES Act by refusing to offer PPP loans to businesses that had lending relationships with other institutions. The CARES Act requires lenders to consider whether the business was in operation on February 15, 2020, and paid salaries and payroll taxes to employees or independent contractors. The Court found that the statutory language of the CARES Act does not prohibit banks from considering other factors. Indeed, as the Court observed, a prior version of the bill stated that a lender "shall *only* consider" the date the business was operational and whether it paid salaries and taxes. Since that limitation was removed in the final version of the Act, the Court reasoned, it was not appropriate for the Court to reinsert it.

The Court also found that, although the CARES Act waived the restriction in the SBA that otherwise limits loans to those borrowers who are unable to obtain a loan elsewhere, this did not prohibit BofA from restricting eligibility to customers who have no loans or credit with other financial institutions. In fact, BofA did not require that the business exhaust all available lending options; rather, if the business has an existing borrower relationship with another entity, that business should process the PPP loan through that entity.

Additionally, the Court held that Plaintiffs failed to establish that, just because BofA was processing the loans based on "first come first served" basis, Plaintiffs would suffer irreparable harm if they were not awarded a TRO. As the Court noted, BofA did not preclude Plaintiffs from applying elsewhere, and Plaintiffs did not provide evidence of their attempts to obtain financing elsewhere under the PPP.

Finally, when weighing the equities and public interest, the Court found that the balance tipped in favor of BofA. While recognizing that "BofA's rigid eligibility criteria have undoubtedly made it materially harder for some small businesses to access the PPP," the Court believed that any flaws in the CARES Act are best addressed by Congress. The Court observed that BofA made a compelling argument that prioritizing existing borrowers would actually expedite the processing of loan applications, as this makes it easier to identify eligibility. While sympathetic to the difficulties faced by small business owners in applying for PPP loans, the Court concluded that "imposing a requirement that banks can only consider the two factors identified in the CARES Act would have consequences reaching far beyond the litigants in this particular case."

The Court was mindful of the fact that restricting lenders from prioritizing their own customers would dis-incentivize banks' participation in the program: "If fewer lenders are incentivized to participate in PPP, because they are prohibited from prioritizing their own customers or other entities they believe worthy of expedited consideration, then fewer American small businesses will have access to the pool of readily available PPP funds, and Congress's statutory scheme would be further frustrated."

Plaintiffs' Appeal, and the Court's Denial of Plaintiffs' Emergency Motion to Stay Pending Appeal: On April 14, 2020, the day after the Court issued its Memorandum Opinion, Plaintiffs filed: (1) a Notice of Appeal to the Fourth Circuit, and (2) an Emergency Motion for Injunctive Relief Pending Appeal. The Court set an expedited briefing schedule on the Emergency Motion, which was fully briefed.

On April 17, 2020, the Court issued a Memorandum Opinion denying Plaintiffs' Emergency Motion. In that Opinion, the Court first noted that, by requesting a "stay" pending the appeal, Plaintiffs were actually seeking to "alter the status quo, and to change BofA's behavior and direct its conduct" – thus, rendering Plaintiffs' request for mandatory injunctive relief improper. The Court then walked through each of the four criteria for issuing a stay under the Supreme Court's decision in *Nken v. Holder*, 556 U.S. 418, 433 (2009), and found that Plaintiffs failed to meet any of those criteria: (1) Plaintiffs did not offer any showing that they were likely to succeed on the appeal; (2) Plaintiffs could not show that the lack of an emergency stay would cause irreparable injury that was specifically attributable to BofA's PPP loan policies; (3) the non-movant, BofA, would endure substantial injury; and (4) the public interest "implicated in this incredibly complex situation must be struck by the legislative branch."