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Can Lenders Impose Eligibility Requirements For Payroll Protection Program Loans? Maryland Court Says Yes

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Following Congress's creation of the Payroll Protection Program (PPP), many participating financial institutions have implemented eligibility requirements for loan applicants, and are prioritizing their own customers' applications. In a case of first impression under the days-old federal emergency legislation, a Maryland United States District judge refused to enjoin Bank of America Corporation and Bank of America, N.A. (collectively, "BofA") from imposing restrictions on borrowing under the PPP, the loan program established under Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act). *Profiles, Inc. et. al. v. Bank of America Corp. et. al.*, No. SAG-20-0894, 2020 U.S. LEXIS 64330 (D. Md. April 13, 2020) (mem. op.).

Plaintiffs applied for a PPP loan from BofA. When they were rejected they filed a class action complaint alleging that BofA's loan policy violated the CARES Act by only allowing applications from clients with a depository relationship at the bank, and further requiring that those clients not have any credit card or loan with any other bank. Two of the plaintiffs had longstanding banking relationships with BofA, but BofA would not accept their applications because one had credit cards with other banks, and the other had a lending relationship with another bank. Plaintiffs alleged BofA's eligibility requirements violated the CARES Act because they unlawfully interfered with the plaintiffs' statutory right to apply for PPP loans through their lender of choice, and are inconsistent with the language in the CARES Act.

No Private Right of Action. The court first analyzed whether Congress intended for the statute to have an *implied* private right of action, since the CARES Act does not expressly provide a private right of action. The court concluded that the language of the Act did not evidence the requisite congressional intent to enable PPP loan applicants to bring civil suits against PPP lenders. The court noted that if Congress did in fact intend to create such a private right of action, it could make its intent clear in amendments to the Act.

No Violation of CARES Act. The court then analyzed whether BofA's eligibility requirements ran afoul of the CARES Act, and concluded that they did not. Although the Act provides in Section 1102(a)(2) that lenders "shall consider whether the borrower… was in operation on February 15, 2020," and "had employees for whom the borrower paid salaries and payroll taxes" (or independent contractors), nothing in the Act prohibits lenders from considering other information when deciding from whom to accept applications, or in what order to process applications. The court was persuaded by the fact that an earlier version of the bill contained the language "a lender shall *only* consider …", but that version did not win approval in a Senate committee. The court reasoned that given the plain statutory language, it was not at liberty to impose further limitations on lenders.

Injunctive Relief Factors Not Met. Since the plaintiffs did not have a private right of action, and BofA's eligibility requirements did not violate the CARES Act, the court concluded that the plaintiffs could not establish a likelihood of success on the merits. Additionally, the court found BofA's eligibility requirements did not prevent plaintiffs from applying for PPP loans with a different lender, and accordingly plaintiffs' alleged irreparable harm was speculative.

Lastly, the court found that the balance of equities and consideration of the public interest did not support injunctive relief. While the court recognized that BofA's eligibility requirements made it materially harder for some small businesses to access PPP loans, it noted that limiting banks to consideration of only the two factors identified in the CARES Act would have far reaching consequences. Given the voluntary nature of the PPP, a ruling of that magnitude would disincentivize lenders from participating in the program altogether, and fewer small businesses would have access to the pool of readily available PPP funds, which in turn would frustrate Congress's statutory scheme.

The court ultimately reasoned that the separation of powers doctrine put Congress in a better position to remedy any defects in the CARES Act, and to pass any supplemental legislation it believes would ameliorate the effects of the COVID-19 crisis. Following the court's ruling, plaintiffs filed an interlocutory notice of appeal to the Fourth Circuit Court of Appeals.

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Since the filing of the case in Maryland, several other class actions have recently been filed elsewhere (e.g. in the Southern District of Texas) against other financial institutions based on similar claims. While those courts have not yet issued rulings, for now lenders have some guidance from the Maryland case supporting their decisions to place additional eligibility requirements on applications for PPP loans.

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