

Warning Paycheck Protection Program Lenders! Limitations on Permissible Loan Applicants Lead To Class Action Lawsuits

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In an effort to manage the huge volume of loan applications being received under the Paycheck Protection Program (“PPP”) created under the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 (“CARES Act”), some banks have placed limitations on those eligible to apply for PPP loans. Commonly, banks are requiring that PPP applicants have a relationship with their institutions preceding February 15, 2020 (a date specifically set forth in the CARES Act) which includes having (i) a small business checking account, operating account or other depository relationship or (ii) an outstanding loan. Over the past few days, plaintiffs have filed class action lawsuits asserting that these limitations are discriminatory and violate the CARES Act by imposing restrictions on PPP loans that are not expressly stated in the CARES Act. Despite their assertions, it does not appear likely that these plaintiffs have a private cause of action that would allow them to prevail in these lawsuits.

The first court to issue an opinion relating to these claims was the United States District Court for the District of Maryland. On April 13, 2020, in *Profiles, Inc. v. Bank of America Corp.*, No. SAG-20-0894, 2020 WL 1849710 (D. Md. Apr. 13, 2020), the court denied the plaintiff’s request for a temporary injunction and held that the CARES Act does not expressly provide a private right of action. Moreover, the court found that even assuming that Congress had intended to provide PPP applicants with a private right of action, the conduct challenged in the lawsuit did not run afoul of the CARES Act.

In the CARES Act, Congress provided 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.” Based on this language, the U.S. District Court for Maryland observed that the statutory language of the CARES Act does not prohibit banks from considering other information when deciding from whom to accept applications, or in what order to process the applications they accept. The court further noted that in a previously introduced version of the bill leading to the CARES Act, the relevant section stated, “a lender shall *only* consider “the date in which the business was operational and whether it had employees “for whom the borrower paid salaries and payroll taxes.” CARES Act, S. 3548, 116th Cong., §1102(d)(2) (B) (emphasis added). This particularly relevant legislative history bolsters the already-plain meaning of the CARES Act’s existing text. The fact that Congress considered including the word “only” in a previous version of the law that failed to win approval in a Senate committee, suggests, at the very least, courts should not read that word back into the statute that both houses of Congress enacted.

Accordingly, it appears that banks can continue to place reasonable restrictions on PPP loan applicants in order to determine from whom they will accept applications and the order in which such applications will be processed.

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