

April 13, 2020

District Court Rejects Request to Enjoin Bank from Establishing Eligibility Criteria for Paycheck Protection Program Applications Beyond Those Set Forth in the CARES Act

Court Holds that There is No Private Right of Action Under the CARES Act, and that the Act Allows Lenders to Establish Additional Eligibility Criteria for Paycheck Protection Program Loans

SUMMARY

In a decision issued today, Judge Stephanie Gallagher of the U.S. District Court for the District of Maryland denied a motion for a temporary restraining order and preliminary injunction that would have prohibited Bank of America from applying eligibility criteria for Paycheck Protection Program (“PPP”) loan applications beyond those stated in the CARES Act. The court held that the CARES Act, like the Small Business Act (“SBA”), does not include an express or implied private right of action that would allow private plaintiffs to sue banks for violating the Act’s provisions. The court also held that lenders may, consistent with the CARES Act, establish eligibility criteria for PPP applications that are not expressly listed in the Act. Though only the first decision to address this issue, the decision provides support for banks participating in the PPP program that choose to establish or prioritize categories of small business applications.

BACKGROUND

On April 7, 2020, several small businesses filed a second amended complaint against Bank of America Corp. and Bank of America, N.A. (together, “Bank of America”) in the U.S. District Court for the District of Maryland. This putative class action relates to eligibility requirements established by Bank of America for federally guaranteed loans under the Paycheck Protection Program (“PPP”), which was created by the

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recently-enacted CARES Act to guarantee payroll expenses for small businesses facing financial distress as a result of the current global pandemic.

Plaintiffs challenge Bank of America's establishment of criteria not set forth in the CARES Act for PPP loan applications from small businesses — specifically, that applicants must be (i) pre-existing borrowing clients, or (ii) pre-existing depository clients that have no credit card or loan with another financial institution. Plaintiffs allege that these criteria, and any criteria not specifically set forth in the CARES Act, are illegal.¹

Plaintiffs sought a declaratory judgment, an injunction barring the imposition of requirements on borrowers beyond those set specifically forth in the CARES Act, damages, and attorneys' fees. Plaintiffs also sought to represent a class of individuals or entities eligible for PPP loans who sought a PPP loan from Bank of America and either were denied a loan because of the bank's allegedly illegal restrictions or were chilled even from applying for a loan because of the restrictions. Simultaneous with the filing of the Second Amended Complaint, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction.² The motion argued that Plaintiffs needed immediate relief because, otherwise, they would lose access to first-come, first-served PPP loans and, if they did not receive loaned funds, their businesses would fail.

Plaintiffs asserted their claims by way of a purported implied private right of action in the CARES Act (and, by extension, the Small Business Administration's Section 7(A) loan program), and for unjust enrichment. Plaintiffs contended that Bank of America's limitations on PPP loans are illegal because “[n]othing in the PPP federal law allows for differentiation between a bank's depository-only clients with no credit cards or loans with other financial institutions and its other clients.”³ Plaintiffs also relied on the Interim Final Rule implementing the PPP, which contemplates that borrowers might be new to the lending bank,⁴ and cited public statements by members of Congress criticizing banks for imposing requirements on PPP borrowers not contained in the CARES Act.⁵ Plaintiffs also contended that Bank of America's motivation was to improperly “prioritize[] its credit profile.”⁶

THE DISTRICT COURT'S DECISION

On April 13, 2020, Judge Stephanie Gallagher denied plaintiffs' motion, thereby allowing Bank of America to continue imposing on small businesses wishing to apply for PPP loans eligibility criteria beyond those set forth in the CARES Act. Judge Gallagher held that plaintiffs failed to demonstrate any of the factors necessary for preliminary injunctive relief.

First, plaintiffs did not show likelihood of success on the merits, including because the CARES Act does not contain an express or implied private right of action. The court was persuaded on this point by uniform precedent holding that the SBA, which the CARES Act modifies but does not purport to transform, does not have a private right of action, and by the fact that the SBA includes a governmental, not private, criminal and civil enforcement regime.

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The court further held that even if a private right of action exists, the “statutory language” in the CARES Act “does not constrain banks such that they are prohibited from considering other information when deciding from whom to accept applications, or in what order to process applications [they] accept[.]”⁷ Indeed, Congress specifically considered, but did not ultimately enact, a bill version that said “a lender shall *only* consider” the eligibility criteria in the statute.⁸ The court also noted that “numerous other financial institutions have imposed additional eligibility requirements, beyond the two identified in the CARES Act” — including preferences for “regional clients, veteran-owned businesses, rural markets, and economically disadvantaged owners” — and that plaintiffs’ theory, if accepted, would render all of these requirements and preferences illegal.⁹

Second, plaintiffs did not show irreparable harm, including because “the record is not clear at this time as to how many of the [p]laintiffs applied for — or could have applied for — loans with other financial institutions.”¹⁰ Further, the harm that plaintiffs claimed they would suffer absent relief was uncertain and speculative because another lender could provide them funding, and because plaintiffs’ businesses could fail even if Bank of America were to accept their applications.

Finally, plaintiffs did not show that a temporary restraining order and preliminary injunction were required by the balance of the equities and the public interest. The court observed 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,” and “could disincentivize lenders from participating in the program altogether,” thereby “undermin[ing] Congress’s goal to maximize relief for American small businesses.”¹¹ The court also labeled “compelling” the “argument that prioritizing existing borrowers will expedite the processing of loan applications.”¹²

NEXT STEPS

Although Judge Gallagher’s opinion decided only the pending motion for a temporary restraining order and preliminary injunction and does not resolve the litigation, as a practical matter the judge’s holding as to the lack of a private right of action and her interpretation of the CARES Act “may prove fatal to Plaintiffs’ case in its entirety, absent express congressional action.”¹³ The court’s denial of the requested relief gives rise to a right of immediate appeal. Moreover, Judge Gallagher will not be the only district court judge to address these issues: A similar complaint recently was filed against Wells Fargo in the Southern District of Texas.

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ENDNOTES

- 1 Second Amended Class Action Complaint, 20 Civ. 894, ECF No. 5 (D. Md. Apr. 7, 2020) (“SAC”).
- 2 Motion for Temporary Restraining Order and Preliminary Injunction, 20 Civ. 894, ECF No. 7 (D.
- 3 Md. Apr. 7, 2020) (“TRO Motion”).
- 4 SAC ¶ 70.
- 5 TRO Motion at 14 (“the Administration has determined there is a ‘likelihood that *many borrowers*
- 6 *will be new clients of the lender*” (quoting Interim Final Rule at 21-22)).
- 7 SAC ¶¶ 76 (Senator Marco Rubio), 77 (Senator Ben Cardin), 78 (Senator Chris Van Hollen).
- 8 *Id.* ¶ 71.
- 9 Memorandum Opinion at 13-14, 20 Civ. 894, ECF No. 17 (D. Md. Apr. 13, 2020).
- 10 *Id.* at 14.
- 11 *Id.* at 15-16.
- 12 *Id.* at 17.
- 13 *Id.* at 21-22.
- Id.* at 22.
- Id.* at 16, n.9.

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