

Lenders Win in Eligibility Battle – Heightened PPP Eligibility Policies Allowed

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On April 13, 2020, the United States District Court for the District of Maryland denied an emergency motion filed by a group of four small business owners in *Profiles Inc. v. Bank of America Corporation et al.*, No. 1:20-cv-00894 (D. Md. 2020) who sought an emergency restraining order and preliminary injunction against Bank of America, N.A. (the Bank), after the business owners were denied the ability to apply for a Paycheck Protection Program (PPP) loan from the Bank. The motion alleged that the Bank violated the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) and the Small Business Act by only accepting PPP applications from the Bank's existing customers who maintained borrowing relationships with the Bank or from new depositors without existing borrowing relationships with any other banks. The business owners contended that they had a statutory right to apply for a PPP loan with the Bank and that the Bank violated the CARES Act by imposing eligibility requirements in addition to the minimum eligibility standards under the PPP. The Bank argued that even if the business owners did have a statutory right to apply for a PPP loan from the Bank, that the heightened eligibility restrictions allowed the Bank to streamline its PPP application process in the face of the unprecedented demand by borrowers in the current economic climate.

U.S. District Court Judge Stephanie Gallagher ruled that the CARES Act does not provide the business owners with a private right of action against the Bank because the Act does not include an express or implied right of action in favor of applicants. The District Court further ruled that the business owners do not have a statutory right to apply under the PPP to a particular bank and that the Bank's heightened PPP loan eligibility requirements do not violate the CARES Act. Specifically, the District Court noted that the CARES Act does not prohibit the Bank "from considering other information when deciding from whom to accept applications, or in what order to process applications it accepts." The District Court also acknowledged that granting a restraining order against the Bank would conflict with the CARES Act's goal of providing relief to small businesses impacted by COVID-19 and the national shut down, and that it could discourage lenders from offering PPP loans.

On April 14, 2020, the business owners filed an interlocutory notice of appeal to the Fourth Circuit Court of Appeals and an emergency motion for interlocutory relief with the District Court, pending such appeal. On April 17, 2020, the District Court denied the emergency motion for interlocutory relief pending appeal reaffirming that the business owners did not have a private right of action under the CARES Act and did not suffer the irreparable harm necessary to grant a restraining order against the Bank's internal policy, due to the increase in new lenders offering PPP loans. Although the District Court sympathized with the business owners, it noted that "the proper balance between the competing and compelling public interests implicated in this incredibly complex situation must be struck by the legislative branch."

While the *Profiles* decision is a win for lenders, it is important to note that this case is under appeal and would not be binding on the other appellate circuits even if the Fourth Circuit affirms the District Court's opinion on appeal. On April 10, 2020, however, a similar case was filed against Wells Fargo, N.A. in the District Court for the Southern District of Texas, Houston Division, so lenders should expect to see similar cases filed across the country. For more information on the eligibility requirements under the PPP and the CARES Act, please see our CARES Act Reference Guide and latest article on the PPP.

If you have questions or would like more information, please contact Jennifer Santangelo (santangeloj@whiteandwilliams.com; 215.864.7199), Andrew Marrinucci (marrinuccia@whiteandwilliams.com; 215.864.6224) or another member of our Finance Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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