

Paycheck Protection Program Litigation: Four Takeaways from the First Case

The CARES Act established a \$349 billion Paycheck Protection Program (“PPP”) that authorizes participating lenders to make federally-guaranteed loans to small businesses as part of Congress’s COVID-19 relief effort. Just days after lenders began accepting PPP applications, lawsuits were already being filed challenging how lenders administer the PPP. In *Profiles, Inc. v. Bank of America*—the first case of its kind—several small businesses in Maryland filed a putative class action alleging that Bank of America improperly imposed additional criteria not permitted by the CARES Act on PPP loan applicants. On April 13, a federal judge denied the plaintiffs’ request for a temporary restraining order that would have regulated how Bank of America receives and processes applications. Here are four takeaways from the court’s decision.

1

The district court concluded that, in accepting PPP applications, lenders are not limited to the eligibility criteria in the CARES Act.

The CARES Act directs lenders to consider two criteria when processing PPP loan applications: (1) whether the borrower was in operation on February 15, 2020, and (2) whether the borrower paid salary and payroll taxes for employees, or paid independent contractors. In *Profiles*, the plaintiffs argued that these were the only criteria that lenders can consider—in other words, lenders could not prioritize PPP applications from existing customers.

The *Profiles* court rejected this argument, concluding that 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 it accepts.” The Court found that the CARES Act’s legislative history reinforced this plain-language reading of the statute: Congress had considered a prior version of the statute that would have allowed lenders to consider “only” the statutory factors, but ultimately dropped that limitation from the final version of the bill.

As the Court recognized, “numerous” lenders have imposed PPP eligibility criteria beyond what the CARES Act provides. The Court noted that, like Bank of America, other banks required applicants to have an existing relationship with the bank, and other lenders have prioritized PPP loans for veteran-owned businesses, regional clients, or economically disadvantaged owners. The *Profiles* decision should provide helpful guidance for lenders regarding how to process PPP applications without running afoul of the CARES Act.

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2**The district court concluded that there is no private right of action to enforce the CARES Act's PPP criteria.**

The *Profiles* court also concluded that private plaintiffs had no cause of action to enforce the CARES Act. The Court's conclusion further reduces the potential litigation risk that lenders may face by adopting eligibility criteria beyond those set forth in the statute.

3**The district court stressed that the public interest warrants caution about judicial intervention into administration of the PPP.**

The *Profiles* court's decision came in the context of denying the plaintiffs' request for a temporary restraining order that would have required Bank of America to change its policy on short notice. In denying the plaintiffs' requested relief, the *Profiles* court acknowledged that it was sensitive to public policy concerns about judicial intervention into PPP loan administration, including any ruling that might deter lenders from making PPP loans. The Court was "reluctant" to enter a temporary restraining order that might "undermine Congress's goal to maximize relief for American small businesses" and noted Bank of America's "compelling" argument that prioritizing applications from existing borrowers expedited the lending process.

4***Profiles* is unlikely to be the last word: more litigation, congressional action, and executive branch enforcement may follow.**

Although the Court's decision in *Profiles* is a welcome development for lenders trying to administer PPP loans, it will not likely be the last word. For one, Court's ruling does not even end the *Profiles* case, and the plaintiffs have already noticed an appeal of the Court's order and requested emergency injunctive relief pending appeal. Nor is the *Profiles* the only case—a similar lawsuit has already been filed in the Southern District of Texas against another bank.

There is also the possibility that further congressional action will change the playing field. The *Profiles* court observed that the plaintiffs' experiences with applying for PPP loans "demonstrate a significant flaw" with the PPP—but any defects were for Congress to address if and when it amends the CARES Act, which the Court noted "is widely anticipated." Congress has already reportedly been debating legislation to further fund the PPP, including how to allocate and ensure access to PPP funds.

Finally, the absence of a private right of action does not foreclose other avenues for enforcing the CARES Act. As the *Profiles* court noted, the existence of a "robust" civil and criminal enforcement regime in the Small Business Act obviated the need for private enforcement. Among other enforcement remedies, the Small Business Administration can bring civil actions against lenders for violations of the CARES Act's PPP provisions. Lenders should therefore be mindful that other courts or enforcement agencies could reach different interpretations of the CARES Act.

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