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For more information,
contact:

Susan Berry
+1 713 276 7395
sberry@kslaw.com

Thad Wilson
+1 404 572 4842
thadwilson@kslaw.com

Scott Davidson
+1 212 556 2164
sdavidson@kslaw.com

Katie Dugat
+1 713 276 7419
kdugat@kslaw.com

King & Spalding

Houston
1100 Louisiana Street
Suite 4000
Houston, Texas 77002-5213
Tel: +1 713 751 3200

Lender Can Continue Policy of Eligibility Requirements for Small Business Loans

On April 13, 2020, the United States District Court for the District of Maryland (the “Court”) sided with Bank of America (“BofA”) by denying a request for a temporary restraining order (“TRO”) and preliminary injunction sought by putative class-action plaintiffs who are challenging BofA’s decision to prioritize existing customers in its application process for small-business loans under the Paycheck Protection Program (“PPP”). Plaintiffs complained that BofA’s alleged “discriminatory policies” favored certain of BofA’s clients and unfairly barred other small businesses from access to PPP loans. BofA argued, among other things, that it granted its existing customers priority in an effort to direct its resources quickly and efficiently and violated no provision of the CARES Act.¹

Over the last few weeks, PPP applications have been pouring in, and banks of all sizes are working around the clock to provide PPP loans to small businesses, processing 820,000 loans totaling roughly \$205 billion as of April 12, 2020.² A BofA spokesman said that BofA received a total of 250,000 applications seeking about \$40 billion in loans.³ Certain banks, including BofA, instituted a policy that prioritized PPP loan applications from small-business clients who are active borrowers at the bank (and not simply depositary banking customers); BofA subsequently loosened this policy to accept PPP loan applications from non-borrower banking clients who do not have a credit or borrowing relationship with another bank (the “Policy”).

THE LAWSUIT AND PLAINTIFFS’ REQUEST FOR A TRO AND PRELIMINARY INJUNCTION

In response to the Policy, on April 3, 2020, several Maryland businesses, including Profiles, Inc. (collectively, “Plaintiffs”), filed a putative class action lawsuit against BofA, accusing the bank of wrongfully limiting access to the PPP.⁴ Plaintiffs - who are seeking class certification - sought a declaratory judgment, a TRO and a preliminary and permanent injunction to enjoin the Policy, arguing (a) that BofA’s Policy unfairly excluded groups of existing customers and other companies that do not



do business with the bank and (b) that the restrictions in the Policy are unlawful because they go beyond the eligibility requirements set out in PPP regulations and the CARES Act. Notably, Plaintiffs contended that BofA is applying to PPP loans an unlawful “credit elsewhere” requirement because an applicant for an SBA loan (not under the CARES Act) generally must certify that it cannot obtain the credit elsewhere.⁵ Plaintiffs asserted that Congress expressly prohibited application of the “credit elsewhere” requirement to PPP loans in the CARES Act, and that BofA is applying a “credit elsewhere” requirement to PPP loans by mandating that every applicant certify that they “do not have a business credit or borrowing relationship with another bank.”⁶

BOFA'S OPPOSITION TO THE REQUEST FOR A TRO AND PRELIMINARY INJUNCTION

BofA responded, arguing, among other things, that the CARES Act does not create a private right of action, and even assuming that there is a private right of action, Plaintiffs cannot point to any provision of the CARES Act that BofA violated. BofA further argued that if the Court were to dictate the criteria under which banks must accept PPP loan applications, this would significantly interfere with efforts by banks like BofA to provide these essential loans. BofA pointed out that a TRO issued in this instance would chill PPP lending, not just by BofA but by other lending institutions, because lenders would risk being subject to lawsuits like the present one by participating in the PPP. In addition, BofA contended that Plaintiffs are asking the Court to impose on BofA (and, by extension, all other lenders) mandatory lending directives that have no basis in the CARES Act or its interim regulations, noting that the CARES Act does not speak to how lenders should deploy their administrative resources or lending capital among different applicant profiles.

THE COURT'S OPINION DENYING THE TRO AND PRELIMINARY INJUNCTION

By Opinion dated April 13, 2020 (“Opinion”), the Court denied Plaintiffs’ request for the TRO and preliminary injunction. In the Opinion, the Court stated, “[n]either the CARES Act nor the Interim Final Rule imposes prohibitions on what lenders may do in their processes for accepting or processing applications.”⁷ The Court found that (a) the Plaintiff could not overcome the threshold obstacle of proving that the CARES Act (or the Small Business Act, of which the PPP is now a part) provides a private right of action, and (b) regardless, BofA’s challenged conduct does not run afoul of the CARES Act.

The Court found that the CARES Act did not evidence the requisite congressional intent to create a private right of action, explaining that the “plain language of the statute does not suggest an intent to confer the particular right alleged, nor a private remedy against participating SBA lenders. To the extent Congress intends to create such a private right of action, it will be able to make its intent clear, if it ultimately amends the CARES Act, as is widely anticipated. Creation of that remedy, however, is not within the purview of this Court.”⁸

Even if there was a private right of action, the Court found that the challenged conduct does not violate the CARES Act. The statutory language of 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.”⁹ Specifically, with regards to the “credit elsewhere” argument proffered by Plaintiffs, the Court found that while Congress eliminated the “credit elsewhere” requirement with respect to PPP loans, BofA’s eligibility criteria was not akin to imposing a “credit elsewhere” requirement and serves a different purpose: “BofA does not require that prospective PPP applicants exhaust all available lending options. Instead, BofA says that if a business has an existing relationship with another credit source, then it should process a PPP loan through that entity”¹⁰ The Court also found that “numerous other financial institutions have imposed additional eligibility requirements, beyond the two identified in the CARES Act,” and provided some examples (to wit, “survey data suggests that some banks have focused on processing loans for, inter alia: regional clients, veteran-owned businesses, rural markets, and economically disadvantaged owners”).¹¹

Although the Court noted that it was “certainly sympathetic to the economic harm that Plaintiffs’ respective small businesses are enduring” caused by COVID-19 and that the eligibility requirements made it harder for some small



businesses to access the PPP, the Court nonetheless found 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.”¹²

Finding BofA’s equitable arguments compelling, the Court stated it “is reluctant to impose liability, particularly in the form of a ‘mandatory’ TRO, where doing so may undermine Congress’s goal to maximize relief for American small businesses. If fewer lenders are incentivized to participate in PPP loans because they are prohibited from prioritizing their own customers or other entities they believe worthy of expedited consideration, then fewer small businesses will have access to the pool of readily available PPP funds, and Congress’s statutory scheme would be further frustrated, despite the fact that the federal government will ultimately guarantee over \$300 billion in loans.”¹³

The Court suggested that Congress could address the flaws presented by the parties in supplemental legislation: “...given the competing policy interests, the need to balance the desire to assist the widest swath of small businesses with the need to incentivize lender participation, and the overall fluidity of this epidemic, Congress is better positioned to remedy any defects in the CARES Act, and to pass the supplemental legislation it believes best aimed at ameliorating the effects of the COVID-19 crisis.”¹⁴

CONCLUSION

Although the Opinion is limited to denying the requested TRO and preliminary injunction, it provides important insight by one court into the analysis of the alleged claims against lenders in the context of the complex and evolving PPP. Plaintiffs announced their plan to appeal. King & Spalding is monitoring related issues concerning the implementation of the PPP for its clients.

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¹ The Coronavirus Aid, Relief, and Economic Security (CARES) Act..

² <https://bankingjournal.aba.com/2020/04/aba-data-bank-paycheck-protection-program-loans-total-205-billion/>.

³ <https://www.americanbanker.com/articles/bofa-defends-giving-priority-to-customers-in-rescue-loan-program>.

⁴ *Profiles, Inc. v. Bank of America*, Case No. 20-00894 (D. Md) (filed 04/03/2020).



⁵ More specifically, applicant must certify “that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal, non-State, and non-local government sources without SBA assistance.” 13 C.F.R. 120.101; see also 15 U.S.C. § 636(a)(1)(A).

⁶ Plaintiffs’ Second Amended Class Action Complaint, at 14.

⁷ Opinion, at 6-7.

⁸ Opinion, at 13.

⁹ Opinion, at 13-14.

¹⁰ Opinion, at 14-15.

¹¹ Opinion, at 15.

¹² Opinion, at 21.

¹³ Opinion, at 22.

¹⁴ Opinion, at 23.