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DEVELOPING LITIGATION NOW ADDRESSING BANK-IMPOSED PAYCHECK PROTECTION PROGRAM RESTRICTIONS

Recently, several Maryland-based small businesses filed one of the first lawsuits arising from the Paycheck Protection Program (the “PPP”) in the United States District Court for the District of Maryland. The named plaintiffs in this putative class action lawsuit were small businesses that have long-standing banking relationships with Bank of America and were unable to apply for PPP loans through Bank of America due to its decision to only offer PPP loans to (1) companies with whom it has existing lending (as opposed to banking) relationships, or (2) companies with whom it has banking relationships who also affirm that they do not have any outstanding loans, including credit cards, with other banks.¹ The plaintiffs alleged that Bank of America “has no legal authority under the CARES Act to deny access to, restrict or otherwise impede the access of small businesses to these critically important business-saving funds,” noting also that the PPP funds can only be accessed by small businesses on a “first come, first served” basis.² The plaintiffs relied on three separate legal theories to advance lawsuit: first, that Bank of America violated the recent Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) that created the PPP (and which does not expressly provide a private right of action for PPP-related lawsuits)³ by instituting and enforcing the challenged restrictions; second, that Bank of America violated the preexisting U.S. Small Business Administration 7(a) Loan Program (which the PPP has supplemented), in instituting and enforcing the same challenged restrictions; and third, that Bank of America was and will continue to be unjustly enriched through the institution and enforcement of the challenged restrictions.⁴

Seeking immediate relief, the plaintiffs moved for a temporary restraining order to prevent Bank of America from imposing relationship requirements, or any other eligibility requirements beyond those set forth in the text of the PPP. Judge Stephanie Gallagher of the District of Maryland federal court denied the request for a temporary restraining order on April 13, after—in a sign of the times—conducting a telephonic hearing on April 10.⁵ Judge Gallagher’s decision to deny emergency relief was based primarily on the plaintiffs’ failure to show (a) that they have a private right of action available under the PPP/CARES Act, and (b) that they would suffer irreparable harm in the absence of an injunction.⁶ From a policy perspective, Judge Gallagher’s decision was grounded in her belief that “Congress is better positioned to remedy any defects in the CARES Act, and to pass supplemental legislation it believes best aimed at ameliorating the effects of the COVID-19 crisis.”⁷

The plaintiffs have – as yet – been undeterred by their failure to persuade Judge Gallagher to grant a temporary restraining order, filing a notice of appeal to the Fourth Circuit Court of Appeals on April 14,⁸ and then, on April 17, promptly filing an emergency motion for relief from the Fourth Circuit while their appeal is pending.^{9,10}

The *Profiles, Inc.* case has tapped into the concerns felt by small business owners and self-employed individuals across the country who have been unable to access funds from the PPP. Self-employed individuals have been hit the hardest: even if they were able to find a bank that would allow them to apply for PPP funding, many were unable to apply until April 10, a week after other small businesses, and only four business days before the \$349 billion appropriated by Congress for the PPP was exhausted on April 16.¹¹ While the initial request for a temporary restraining order has been denied, the *Profiles, Inc.* case is likely to be the first of many that will be filed by frustrated business owners who find themselves unable to obtain funding from the PPP.

Profiles, Inc.-like lawsuits alleging damage arising out of improper funding decisions by banks for PPP loans are likely to be only the first in multiple waves of PPP-related litigation across the country. Additional complaints may, for example, be forthcoming on behalf of business owners who allege that their forgiveness applications are improperly denied. And on the white collar front, expect to see a significant number of enforcement actions, of both a civil and criminal nature, arising from PPP loans and loan forgiveness applications.

For advice and representation specific to your situation, contact any of the Browne George Ross LLP attorneys listed above.

¹ *Profiles, Inc. et al v. Bank of America Corporation et al*, Doc. 5, Second Amended Complaint, 1:20-CV-00894 (D. Md. Apr. 7, 2020) (Gallagher, J.) (hereinafter, “*Profiles, Inc.*”).

² *Id.* at ¶6.

³ Coronavirus Aid, Relief, and Economic Security Act, § 1101 *et seq.*, H.R. 748, 116th Cong. (2019-2020).

⁴ *Profiles, Inc.* at Doc. 5.

⁵ *Profiles, Inc.* at Doc. 17, Memorandum Opinion.

⁶ *Id.*

⁷ *Id.* at p. 23.

⁸ *Profiles, Inc.* at Doc. 20, Interlocutory Notice of Appeal.

⁹ *Profiles, Inc. et al v. Bank of America Corporation, et al*, Doc. 10, Emergency Motion, 20-1438 (4th Cir. Apr. 17, 2020).

¹⁰ The plaintiffs also asked Judge Gallagher for injunctive relief while the Notice of Appeal is pending. *Profiles, Inc.* at Doc. 21, Emergency Motion [for] Injunctive Relief Pending Appeal. Judge Gallagher denied that motion on April 17. *Profiles, Inc.* at Doc. 27, Memorandum Opinion.

¹¹ Andrew Duehren, *Funding Exhausted for \$350 Billion Small-Business Paycheck Protection Program*, The Wall Street Journal, April 17, 2020, available at <https://www.wsj.com/articles/funding-exhausted-for-350-billion-small-business-paycheck-protection-program-11587048384>.