

**ARTICLES**

## **Agents Lose First Major Ruling over Fees from PPP Lenders**

United States District Court for the Northern District of Florida rules that lenders are not required to pay agent's fees under the CARES Act absent an agreement to do so.

*By David J. Marmins and Morgan E. M. Harrison – August 25, 2020*

The question of whether accountants, lawyers, and other consultants are entitled to “agent fees” for helping small businesses obtain loans under the Paycheck Protection Program (PPP), a creature of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), has become a major source of litigation for lenders across the country. In the first decision on this issue, handed down last week, a federal district court judge out of the Eleventh Circuit dismissed a complaint filed by a CPA firm against several lenders. The court ruled that the plain language of the CARES Act and its implementing regulations do not require that lenders pay a fee to borrowers’ agents. Accordingly, the court held that, absent an agreement between the parties regarding fees, the CPA firm could not state a claim for relief against the lenders.

### **“Agent Fees” under the Paycheck Protection Program**

Since the passage of the Small Business Act of 1953, the Small Business Administration (SBA) has implemented several programs to support small businesses in the United States, including its Section 7(a) Loan Program. The Section 7(a) Loan Program allows the SBA to provide federally guaranteed financial assistance to small businesses for anything from real estate, to equipment, to working capital, depending on the type of loan.

On March 25, 2020, Congress enacted the CARES Act. Section 1102 of the CARES Act created the PPP as part of the Section 7(a) Loan Program to assist small businesses with keeping workers on their payrolls during the economic distress caused by the COVID-19 pandemic. Most notably, if a business meets all employee retention criteria and it uses the funds for eligible expenses, SBA will forgive the PPP loan.

Small businesses immediately scrambled to obtain PPP loans. Banks, credit unions, and other SBA-approved lenders in the private sector, which institutions were tasked with administering the federally funded and guaranteed loans, were inundated with loan applications. As with other Section 7(a) loans, some businesses retained accountants, lawyers, or other consultants to assist with completing the PPP application process.

The CARES Act mandates that the SBA’s administrator “shall reimburse a lender authorized to make a covered loan,” and it established the fees SBA would pay the lender. *See* Pub. L. No. 116–136, § 1102(a)(2) (to be codified at 15 U.S.C. § 636(a)(36)(P)(i)). The CARES Act further provides that “[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the [SBA] Administrator.” *Id.* (to be codified at 15 U.S.C. § 636(a)(36)(P)(ii)).

In April 2020, pursuant to the authority delegated by the CARES Act, the SBA issued an interim final rule (IFR) to implement the PPP. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020). The IFR provides that agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. It further provides a cap on the amount a lender may pay agents out of the fees it receives from SBA, in an amount not to exceed 1 percent for loans of not more than \$350,000, 0.50 percent for loans of more than \$350,000 and less than \$2 million, and 0.25 percent for loans of at least \$2 million.

Many lenders have refused to pay agent fees for PPP loans, citing the relatively simple application process and lack of agreements between them and the agents. Almost immediately, borrowers' agents filed a flurry of lawsuits alleging that lenders were wrongfully withholding fees that they were required to pay the agents under the CARES Act. One of those lawsuits was *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc., et al.*, No. 3:20CV5425-TKW-HTC, (N.D. Fla.).

### **The *Sport & Wheat* Decision**

The plaintiff in *Sport & Wheat* is a small accounting firm that assisted several of its clients with obtaining PPP loans from the defendant lenders. In its complaint, the plaintiff alleged that it was owed around \$4,500 in loan processing fees paid by SBA to the defendants. Although the plaintiff did not have a contractual agreement with any of the defendants regarding fees, the accounting firm contended that the fees were implicit under the CARES Act and its implementing regulations.

The district court disagreed. In an order dismissing the plaintiff's claims, the court noted that "[t]he central issue of first impression in this case is whether Plaintiff and others like it are entitled to any portion of the fees paid by the federal government to lenders like Defendants who were tasked with handing out hundreds of billions of dollars of 'loans' under the Paycheck Protection Program (PPP). The short answer is 'no.'"

Citing the plain language of the CARES Act, the court held that, while the statute mandates that the SBA reimburse the lender administering the PPP loan, it does not require any reimbursement for the agent facilitating the application process. Moreover, the court pointed out that the CARES Act only provides that an agent may not "collect a fee in excess of the limits established" by SBA, which is a far cry from mandating that a lender must pay the agent a fee. Finally, the court held that there is no such mandate in the implementing regulation, either, which merely caps the amount that agents can collect, and prohibits agents from collecting their fees directly from the borrowers or the PPP loan proceeds.

The court held that, to collect fees as a borrower's agent under Section 7(a), the agent must execute a "compensation agreement" and provide it to SBA on a Form 159. *See* 13 C.F.R. § 103.5(a); SBA Form 159 (rev. Apr. 9, 2018). In this case, because it was undisputed that the plaintiff did not execute a Form 159 or have an agreement with any of the defendants regarding the payment of fees, the court held that the accounting firm could not state a claim for relief against the lender and dismissed its claims.

**Conclusion**

The decision in *Sport & Wheat* was certainly an early victory for lenders. However, there is a possibility that borrowers' agents could fare better in other jurisdictions, as literally dozens of accountants and CPA firms have filed similar lawsuits against at least 100 banks in federal courts across the country. At present, though, the sole precedent is that the CARES Act does not require lenders to pay fees to agents who assisted borrowers with obtaining PPP loans.

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