

Banks Win CARES Act Referral Fees Fight

By **Rachel O'Brien**

Law360 (September 21, 2020, 7:37 PM EDT) -- A New York federal judge on Monday tossed six proposed class actions from accountants who claimed JPMorgan Chase and other banks owed them agent fees under the federal Paycheck Protection Program, ruling that the program has no such requirement.

U.S. District Judge Jed S. Rakoff dismissed the suits because the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act, which provides \$659 billion in loans for small business payroll and other expenses during the COVID-19 pandemic, doesn't back up the agents' claims.

The six actions said the CARES Act guarantees fees to agents who help prepare borrowers' bank applications for the Paycheck Protection Program, even if the agent had no agreements with the banks to do so.

But JPMorgan Chase, named in three suits, Citibank, Signature Bank and Union Bank argued the act doesn't require fees.

Judge Rakoff consolidated the six cases and ruled Monday that "absent an agreement between agent and lender, defendant banks are not required to pay agent fees under the text of the CARES Act or its implementing regulations."

The decision noted that similar suits against banks are pending in courts around the country, and only one has been decided. Like Judge Rakoff, a Florida federal judge decided in August that the CARES Act doesn't guarantee fees to agents who had no agreement with banks to provide application services.

These six suits, like others, argued the Paycheck Protection Program — PPP — automatically entitled them to a percentage of fees that lenders get from the Small Business Administration.

But banks have argued that while there's limits on how much the SBA could pay an agent, the CARES Act doesn't require that agents be automatically paid.

While the SBA oversees the program, banks disperse the forgivable loans to those who apply and qualify. Some borrowers choose to use the service of an agent to apply for the loan.

In these six cases, with several plaintiffs bringing multiple suits against different banks, the agents sought between \$78 and \$8,607 from the banks for the applications they helped prepared.

In the banks' motions to dismiss, they noted that some of the plaintiffs never even asked them for agent fees. Instead, the agents said because they knew the banks' policies were not to pay the fees, they didn't bother asking, but filed the suits.

This means those plaintiffs lack standing to sue, the banks argued. But Judge Rakoff sided with some of the plaintiffs, saying the requirement that a plaintiff submit to a policy before challenging it is excused "where a plaintiff makes a substantial showing that application for the benefit ... would have been futile."

The plaintiffs sufficiently alleged futility with regard to Chase and Signature banks, Judge Rakoff said.

As for Citi and Union banks, plaintiff Fahmia Inc. "offered nothing more than conclusory allegations that a request would be denied," he said in dismissing Fahmia's claims against the two banks.

In arguing that the CARES Act doesn't guarantee fees to agents, the banks add that there is no private right of action to enforce the act, an argument Judge Rakoff agreed with.

"Even if plaintiffs had a viable argument on the merits (which they do not), the court would dismiss their declaratory judgement claims for an independent reason: there is no private cause of action to enforce this provision of the CARES Act," he said.

In reviewing the language of the act that places limits on fees paid to agents, Judge Rakoff said, "The court finds that that language does not create an independent entitlement for agent fees; rather, it simply imposes a limit on the amount of fees an agent is permitted to collect in the event of an agreement for agent fees."

Because Congress wanted to compensate lenders for PPP loans, it did so explicitly, saying lenders "shall" be reimbursed for the loan, the judge noted in his decision.

"Indeed, if Congress had intended for agents to automatically receive a portion of the lenders' fees, it would have said so," Judge Rakoff said.

"We're pleased the court agreed with our position, the second such court to agree with lenders on this issue," JPMorgan Chase spokeswoman Amy Bonitatibus said in a statement Monday.

Counsel for the parties didn't immediately respond to requests for comment Monday.

Plaintiffs Fahmia Inc., Prinzo & Associates, LLC and James Quinn are represented by Elaine Simek Kusel, Derek Y. Brandt and Richard D. McCune, Jr. of McCune Wright Arevalo, LLP.

Plaintiff Robin Johnson d/b/a CG Johnson & Co. is represented by Jonathan D. Selbin, Michael W. Sobol, Roger Norton Heller, Anne B. Shaver and Andrew R. Kaufman of Lieff Cabraser Heimann & Bernstein, LLP

Plaintiffs Tax Divas LLC and Williams and J Bookkeeping are represented by Andrea Gold, Hassan A. Zavareei and Katherine Aizpuru of Tycko & Zavareei, LLP.

JPMorgan Chase Bank, N.A. and JPMorgan Chase & Co. are represented by Keith Hammeran, Noah Lindenfeld, Paul J. Ferak and Sylvia E. Simson of Greenberg Traurig.

Signature Bank is represented by Elizabeth M. Sacksteder of Paul Weiss Rifkind, Wharton & Garrison LLP.

MUFG Americas Holding Co. and MUFG Union Bank, N.A. are represented by Andrew Soukup, Ashley M. Simonsen and Paul Fitzgerald Downs of Covington & Burling, LLP.

Citibank, N.A. and Citigroup Inc. are represented by Andrew Spadafora, Christopher Comstock, Christopher J. Houpt, Lucia Nale and Thomas V. Panoff of Mayer Brown LLP

The cases are Robin Johnson d/b/a CG Johnson & Co, et al, v. JPMorgan Chase Bank, et al, case number 1:20-cv-04100; James Quinn, et al, v. Signature Bank, et al, case number 1:20-cv-04144; Fahmia Inc, et al, v. MUFG Americas Holding Co, et al, case number 1:20-cv-04145; Fahmia Inc, et al, v. Citibank N.A., et al, case number 1:20-cv-04146; Robin Johnson d/b/a CG Johnson & Co, et al, v. JPMorgan Chase Bank, et al, case number 1:20-cv-04858; and Tax Divas LLC, et al, v. JPMorgan Chase bank, case number 1:20-cv-05311 all in in U.S. District Court for the Southern District of New York.

--Editing by Amy Rowe.

Update: This story has been updated with a comment from JPMorgan Chase.