

LENDER LIABILITY LAW REPORT

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Edited by Helen Davis Chaitman, Esq.

District of Columbia Federal Court Grants Mortgage Lender Summary Judgment on Claim that it Conspired to Violate the False Claims Act by Submitting Forged Documents to HUD but Declines to Dismiss Other Claims

The United States District Court for the District of Columbia granted a mortgage lender's motion for summary judgment as to claims against the lender for conspiracy to violate the False Claims Act and for actual damages thereunder, but denied the lender summary judgment as to all other claims against it arising out of its submission of forged documents to HUD. *United States of America, ex rel. Fago v. M&T Mortgage Corp.*, Civ. Action No. 03-1406 (D.D.C. Oct. 2, 2007). The court reasoned that a lender cannot conspire with itself or its employees and therefore granted summary judgment under the "intra-enterprise conspiracy doctrine." The court also found that the plaintiff failed to prove any proximately caused damage resulting from alleged forgeries on documents by the lender's employees and granted the lender summary judgment as to the claim for damages under the False Claims Act. However, the court refused to dismiss claims for statutory fines.

• **FACTS.** M&T Mortgage Corp. ("M&T") engaged in the home mortgage lending business as a subsidiary of M&T Bank. Ann Fago began work in M&T's post-closing department in July 2001. The post-closing department would receive mortgage loan binders and, as part of Fago's duties, she and others would review the binders to make sure they were complete so that they could be sent to the United States Department of Housing and Urban Development ("HUD") to be insured by the government.

HUD required that mortgage loan binders be submitted within sixty days of closing or there would be a more cumbersome administrative process to go through to obtain the HUD insurance. Because of increased volume in applications in 2002, and to avoid problems with the 60-day rule, Fago and others in the post-closing department began forging signatures on unsigned documents

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contained in the mortgage loan binders that they received prior to their submission to HUD. A total of 53 mortgage loan binders submitted to HUD contained forged signatures.

• **LITIGATION.** The United States sued M&T at the request of Fago alleging violations of the False Claims Act ("FCA") in that (i) M&T knowingly presented false claims to the government in violation of 31 U.S.C. § 3729(a)(1), (ii) it knowingly made or used false records or statements so that the government would pay false claims in violation of 31 U.S.C. § 3729(a)(2), and (iii) it engaged in a conspiracy to defraud the government by having false claims paid in violation of 31 U.S.C. § 3729(a)(3). The government further sought a declaratory judgment that M&T's forgery of documents violated 31 U.S.C. § 3729(a)(2) and injunctive relief.

On December 30, 2005, M&T filed a motion for summary judgment as to 15 of the loan files. Thereafter, on April 11, 2006, the court struck four of the declarations submitted by M&T on the ground that the witnesses had not been disclosed as required by Fed. R. Civ. P. 26(a)(1). See *United States ex rel. Fago v. M&T Mortgage Corp.*, 2006 WL 949899 (D.D.C. Apr. 11, 2006). That same day, M&T filed a supplemental motion for summary judgment as to the other 38 loan files. Once again, the government

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