

May 6, 2011

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Federal Issues

U.S. Files False Claims Act Lawsuit Against Deutsche Bank and Subsidiary MortgageIT. On May 3, the United States filed a complaint in Manhattan federal court against Deutsche Bank and its wholly owned subsidiary, MortgageIT Inc., seeking damages and civil penalties under the False Claims Act. The suit alleges that the entities made repeated false certifications to the U.S. Department of Housing and Urban Development (HUD), incorrectly claiming that loans submitted for insurance under the Federal Housing Administration's (FHA) Direct Endorsement Lender program complied with FHA requirements. Specifically, the U.S. alleges that MortgageIT submitted more than 39,000 mortgages for FHA insurance between 1999 and 2009, certifying that each complied with all HUD rules. MortgageIT also filed annual certifications attesting to its compliance with HUD regulations in order to maintain its HUD-FHA approval as a Direct Endorsement Lender. Contrary to these certifications, the complaint alleges that MortgageIT underwriters wrongfully endorsed mortgages for FHA insurance that did not meet HUD-FHA guidelines by falsely certifying that they had conducted the due diligence required. Additionally, the U.S. alleges that MortgageIT and Deutsche Bank falsely certified to HUD that MortgageIT had implemented the quality control procedures HUD requires of direct endorsement lenders. As a result, the suit claims that MortgageIT and Deutsche Bank wrongfully obtained approval of these ineligible mortgages for FHA insurance and were able to make substantial profits through the resale of the subject FHA-insured mortgages. The United States is seeking treble damages and penalties of more than \$1 billion under the False Claims Act for the insurance claims already paid by HUD on the subject mortgages, and compensatory and punitive damages for those claims that HUD expects to pay in the future. It is also seeking recovery for breach of fiduciary duty, gross negligence, negligence and indemnification. [Click here for a copy of the press release.](#) [Click here for a copy of the complaint.](#)

Justice Department Reaches Settlement with Banks Regarding Alleged Lending Discrimination. On May 5, the Justice Department announced that it reached a settlement with Citizens Republic Bancorp Inc. (CRBC) and Citizens Bank of Flint, Michigan in a lawsuit alleging lending discrimination in Detroit in violation of the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA). The lawsuit filed by the Justice Department alleged that CRBC, as the successor to Republic Bank, and Citizens Bank violated the FHA and ECOA, which prohibit

discrimination on the basis of race and color in a lending institution's mortgage lending practices, by serving the credit needs of the residents of predominantly white neighborhoods in the Detroit metropolitan area to a significantly greater extent than they have served the credit needs of majority African-American neighborhoods. As part of the settlement, CRBC and Citizens Bank will open a loan production office in a majority African-American neighborhood in Detroit, conduct fair lending training for its employees, and invest approximately \$3.6 million in Wayne County, Michigan. This investment is expected to aid in neighborhood stabilization, increase the amount of credit the banks extend to majority African-American areas in Wayne County, and increase consumer financial education. The settlement remains subject to approval by the U.S. District Court for the Eastern District of Michigan. [Click here for a copy of the Justice Department's press release.](#)

FTC Settles Charges Against Companies That Compromised Sensitive Employee Data. On May 3, the Federal Trade Commission (FTC) settled with two companies that maintain large amounts of sensitive, non-public information about the employees of their business customers, including Social Security numbers, for failing to employ reasonable and appropriate measures to protect the data. The settlement orders with Ceridian Corporation and Lookout Services, Inc. require the companies to implement comprehensive information security programs and obtain independent audits of the programs biennially over the next 20 years. The FTC charged that both companies claimed that they would take reasonable measures to secure customer data, but failed to do so. The flaws in their security measures were exposed when security breaches at both companies put the personal information of thousands at risk. In December, 2009, Ceridian's web-based payroll processing application was breached, compromising the Social Security numbers and direct deposit information of approximately 28,000 employees of Ceridian's small business customers. Likewise, Lookout's web security allowed for unauthorized access to Social Security numbers of about 37,000 individuals by typing a relatively simple URL into a web browser without the need for a username or password for access. Both companies previously made representations regarding the comprehensive nature of their information security. The FTC settlement orders bar misrepresentations, including misleading claims about the privacy, confidentiality, or integrity of any personal information collected from or about customers. For a copy of the press release, please see <http://www.ftc.gov/opa/2011/05/ceridianlookout.shtm>.

Fannie Mae Announces Updates to Loan Servicing Procedures. On May 2, Fannie Mae introduced Adverse Action Notice Form 182 relating to loan modification requests. For all declined loan modification requests submitted to Fannie Mae through the HomeSaver Solutions Network (HSSN) on or after June 15, 2011, the servicer must send Form 182 (or a notice similar in form and substance) to the borrower who requested the loan modification if the borrower is not delinquent or in default. The notice must be sent within 30 days of the declination. A notice is not required if the servicer extends a counteroffer that is accepted by the borrower within the same 30-day period. A copy of the notice must be retained in the mortgage loan servicing file.

Fannie Mae also announced that effective June 1, 2011, servicers are no longer required to submit Form 571 requesting payment of incentive fees for eligible preforeclosure sales and deeds-in-lieu of foreclosures closed in HSSN. Instead, servicers will receive payment of approved incentive fees once per month during the month following the preforeclosure sale or deed-in-lieu of foreclosure.

Fannie Mae also announced that it is modifying the Servicing Guide to account for an extension of the expiration of stay of foreclosure proceedings and other legal proceedings pursuant to the Helping Heroes Keep Their Homes Act of 2010. Until December 31, 2012, foreclosure and other legal proceedings on eligible mortgage loans must be stayed for nine months following the termination of a service member's active duty. After December 31, 2012, servicers must limit the granting of a stay to no more than ninety days following termination of active duty, unless the enhanced stay is extended by Congress. For a copy of the announcement, please see <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1105.pdf>.

State Issues

South Carolina Stays Foreclosures In Effort to Stimulate Alternatives. On May 2, the Supreme Court of South Carolina ordered a statewide stay on foreclosure proceedings pending implementation of new rules designed to provide homeowners increased loan modification and loss mitigation opportunities. Under the Administrative Order, for foreclosure actions pending within the state as of May 9, 2011, the mortgagee's attorney must file with the trial court and serve upon each mortgagor a "notice of the Mortgagor's right to foreclosure intervention" before proceeding with any merits hearing or, where an order of foreclosure already has been entered, any foreclosure sale. Before continuing with any foreclosure action, the mortgagee's attorney additionally must make various certifications relating to foreclosure alternatives, including a certification that the mortgagor has been afforded a full and fair opportunity to submit information relating to the mortgagor's personal circumstances for consideration by the mortgagee. For foreclosure actions filed after May 9, 2011, the same requirements apply, and the notice of Mortgagor's right to foreclosure intervention must be served with the summons and complaint. In support of its action, the Court noted that failed or delayed loss mitigation efforts have slowed the pace of an increasingly large volume of foreclosure actions in the state's trial courts. [Click here for more information and a copy of the Court's order.](#)

Courts

Maryland Appeals Court Rules Printed MySpace Page Not Properly Authenticated & Provides Guidelines. On April 28, Maryland's highest court overturned a lower court that had ruled the MySpace profile page of a convicted murderer's girlfriend was properly authenticated evidence. The girlfriend's profile page, used by the prosecution at trial, contained threatening statements allegedly made by the defendant, the defendant's unique nickname, pictures of the defendant and his girlfriend, and a reference to the girlfriend's birthday. Testimony was also presented linking the defendant with his nickname and the girlfriend with her profile picture. In *Griffin v. Maryland*, 2011 WL 1586683, No. 74 (Ct. App. Md., Apr. 28, 2011), the court of appeals held that more is required when dealing with printouts from social networking sites, noting that anyone can set up a fake account on MySpace and "masquerade under another person's name or . . . gain access to another's account by obtaining the user's username and password[.]" Finding that the lower court simply "failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the [threatening statements]," the appeals court observed that electronically stored information, "with its potential for manipulation, requires greater scrutiny of the 'foundational requirements' than letters or other paper records, to bolster reliability," and went on to hold that such potential "requires a greater

degree of authentication [of an image printed from such a site] than merely identifying the date of birth of the creator and her visage." The court then went on to offer specific guidelines for proper authentication of such information: first, the purported creator of the profile or posting should be asked whether he created it; second, digital forensics should be performed on the purported creator's computer; and, finally, information should be obtained directly from the social networking site that links the profile to the person allegedly creating it. Significantly, none of these steps had been taken at trial in *Griffin*. [Click here for a copy of the opinion.](#)

Firm News

Please join us for a complimentary webinar

The False Claims Act and FHA Lending: What Does *U.S. v. Deutsche Bank* Mean for you? Sign up now to attend this important Webinar hosted by BuckleySandler LLP.

Webinar Topics Include:

- A summary and analysis of legal theory and corresponding charges in *U.S. v. Deutsche Bank AG, et al.*
- Pitfalls in FHA Lending: Avoiding False Claims Act liability and beyond
 - How and when are False Claims Act violations triggered?
 - What other enforcement tools are regulators using?
- What you can do now to position and protect your company
- Insights on where the government and private plaintiffs bar will go from here

Date: Wednesday, May 11, 2011

Time: 3:00 - 4:00 PM ET

Click here to register: <https://www1.gotomeeting.com/register/127579497>. After registering you will receive a confirmation email containing information about joining the webinar.

BuckleySandler's annual Fair Lending Today conference took place on May 2 at the Fairmont Hotel in Washington, DC. It was a great success, with 110 attendees from leading financial institutions across the country. The presenters examined pressing industry topics such as fair lending litigation and enforcement, fair mortgage servicing, Dodd-Frank and the Consumer Financial Protection Bureau, and trends in fair lending risk management, among others. Please join us again next year!

BuckleySandler is pleased to announce that [Andrew Sandler](#), [Benjamin Klubes](#), [Sam Buffone](#) and [David Krakoff](#) have once again been named to the Washington, D.C., "Super Lawyers" list for 2011. Only five percent of the lawyers in each state/jurisdiction are selected by Super Lawyers, and the recognition reflects not only their strong business litigation and financial services knowledge, but also their dedication to clients. Additionally, Andy Sandler was named a Washington DC Top 100 lawyer, a distinction given to the 100 lawyers who receive the highest point totals among nominees.

Specifically, their DC "Super Lawyers" designations were as follows:

- Andrew Sandler, Business Litigation Attorney (and Washington DC Top 100)
- Benjamin Klubes, Banking Attorney
- Samuel Buffone, Criminal Defense: White Collar Attorney
- David Krakoff, Criminal Defense: White Collar Attorney

About Super Lawyers. *Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas, recognizes those who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a rigorous multi--phased process that includes a statewide survey of lawyers, an independent research evaluation of candidates, and peer reviews by practice area.*

[Margo Tank](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on a legal and regulatory update on mortgage implementation issues.

[Benjamin Klubes](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida on "Litigation Challenges Involving the Mortgage Origination Process".

[Jonice Gray Tucker](#) will be speaking at the Mortgage Bankers Association's Legal Issues and Regulatory Compliance Conference on May 15 in Boca Raton, Florida. Her remarks will focus on Litigation Involving Servicing and Foreclosure.

[Warren Traiger](#) will be speaking about potential changes to the CRA regulations and the current regulatory environment during a webinar hosted by the CRA Qualified Investment Fund, on Thursday, May 19 at 2pm.

[Donna Wilson](#) will be presenting at a CLE webinar on "Emerging Class Action Threat: Consumer Personal Identification Data Strategies to Minimize Litigation Risks and Maximize Insurance Coverage" on Tuesday, May 24. This seminar will analyze the Song-Beverly Act and its impact of ruling on class action litigation under other state privacy statutes. The Webinar is sponsored by the Legal Publishing Group of Strafford Publications.

[James Parkinson](#) will be speaking at the ACI's "FCPA Compliance in Emerging Markets" program in Washington, D.C., on June 15 -16.

[Andrew Sandler](#) will be speaking at CBA Live 2011 and presenting an Annual Fair Lending Report on Tuesday, June 14 at 3:30 pm in Orlando, Florida. Mr. Sandler will be giving an overview of current regulatory and enforcement developments and discussing the most significant fair lending risks confronting consumer lenders in the next twelve months.

[Andrew Sandler](#) will be participating on a panel at the Florida Bar Annual Convention on Friday, June 24 as part of the "Presidential Showcase". On the panel with Mr. Sandler is Paul Bland, Public Justice. The Moderator is Justice R. Fred Lewis, a Justice of the Florida Supreme Court, a former Chief Justice and founder of Justice Teaching.

[Andrew Sandler](#) will be teaching the Litigation Strategy Session: Developing Strong Protocols, Admissible Documentation & Comprehensive Strategies in Order to Survive Regulatory Enforcement Actions & Litigation Workshop on Tuesday, July 26 in Chicago. This workshop precedes ACI's Consumer Finance Class Actions & Litigation Conference taking place July 27-28 at the Sutton Place Hotel, Chicago, IL.

[Jonice Gray Tucker](#) will be moderating a panel focusing on Regulatory and Litigation Developments in Servicing at the California Mortgage Bankers' Servicing Conference on August 29 in Las Vegas.

Mortgages

U.S. Files False Claims Act Lawsuit Against Deutsche Bank and Subsidiary MortgageIT. On May 3, the United States filed a complaint in Manhattan federal court against Deutsche Bank and its wholly owned subsidiary, MortgageIT Inc., seeking damages and civil penalties under the False Claims Act. The suit alleges that the entities made repeated false certifications to the U.S. Department of Housing and Urban Development (HUD), incorrectly claiming that loans submitted for insurance under the Federal Housing Administration's (FHA) Direct Endorsement Lender program complied with FHA requirements. Specifically, the U.S. alleges that MortgageIT submitted more than 39,000 mortgages for FHA insurance between 1999 and 2009, certifying that each complied with all HUD rules. MortgageIT also filed annual certifications attesting to its compliance with HUD regulations in order to maintain its HUD-FHA approval as a Direct Endorsement Lender. Contrary to these certifications, the complaint alleges that MortgageIT underwriters wrongfully endorsed mortgages for FHA insurance that did not meet HUD-FHA guidelines by falsely certifying that they had conducted the due diligence required. Additionally, the U.S. alleges that MortgageIT and Deutsche Bank falsely certified to HUD that MortgageIT had implemented the quality control procedures HUD requires of direct endorsement lenders. As a result, the suit claims that MortgageIT and Deutsche Bank wrongfully obtained approval of these ineligible mortgages for FHA insurance and were able to make substantial profits through the resale of the subject FHA-insured mortgages. The United States is seeking treble damages and penalties of more than \$1 billion under the False Claims Act for the insurance claims already paid by HUD on the subject mortgages, and compensatory and punitive damages for those claims that HUD expects to pay in the future. It is also seeking recovery for breach of fiduciary duty, gross negligence, negligence and indemnification. [Click here for a copy of the press release.](#) [Click here for a copy of the complaint.](#)

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Banking

Justice Department Reaches Settlement with Banks Regarding Alleged Lending

Discrimination. On May 5, the Justice Department announced that it reached a settlement with Citizens Republic Bancorp Inc. (CRBC) and Citizens Bank of Flint, Michigan in a lawsuit alleging lending discrimination in Detroit in violation of the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA). The lawsuit filed by the Justice Department alleged that CRBC, as the successor to Republic Bank, and Citizens Bank violated the FHA and ECOA, which prohibit discrimination on the basis of race and color in a lending institution's mortgage lending practices, by serving the credit needs of the residents of predominantly white neighborhoods in the Detroit metropolitan area to a significantly greater extent than they have served the credit needs of majority African-American neighborhoods. As part of the settlement, CRBC and Citizens Bank will open a loan production office in a majority African-American neighborhood in Detroit, conduct fair lending training for its employees, and invest approximately \$3.6 million in Wayne County, Michigan. This investment is expected to aid in neighborhood stabilization, increase the amount of credit the banks extend to majority African-American areas in Wayne County, and increase consumer financial education. The settlement remains subject to approval by the U.S. District Court for the Eastern District of Michigan. [Click here for a copy of the Justice Department's press release.](#)

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Guidelines. On April 28, Maryland's highest court overturned a lower court that had ruled the MySpace profile page of a convicted murderer's girlfriend was properly authenticated evidence. The girlfriend's profile page, used by the prosecution at trial, contained threatening statements allegedly made by the defendant, the defendant's unique nickname, pictures of the defendant and his girlfriend, and a reference to the girlfriend's birthday. Testimony was also presented linking the defendant with his nickname and the girlfriend with her profile picture. In *Griffin v. Maryland*, 2011 WL 1586683, No. 74 (Ct. App. Md., Apr. 28, 2011), the court of appeals held that more is required when dealing with printouts from social networking sites, noting that anyone can set up a fake account on MySpace and "masquerade under another person's name or . . . gain access to another's account by obtaining the user's username and password[.]" Finding that the lower court simply "failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the [threatening statements]," the appeals court observed that electronically stored information, "with its potential for manipulation, requires greater scrutiny of the 'foundational requirements' than letters or other paper records, to bolster reliability," and went on to hold that such potential "requires a greater degree of authentication [of an image printed from such a site] than merely identifying the date of birth

of the creator and her visage." The court then went on to offer specific guidelines for proper authentication of such information: first, the purported creator of the profile or posting should be asked whether he created it; second, digital forensics should be performed on the purported creator's computer; and, finally, information should be obtained directly from the social networking site that links the profile to the person allegedly creating it. Significantly, none of these steps had been taken at trial in *Griffin*. [Click here for a copy of the opinion.](#)

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We welcome reader comments and suggestions regarding issues or items of interest to be covered in future editions of InfoBytes.

Email: infobytes@bucklesandler.com

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