

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 MIAMI DIVISION
4 CASE NUMBER 13-21189-CV-KMW

5 CONSUMER FINANCIAL PROTECTION BUREAU,

6 Plaintiff,

7 vs.

8 UNITED GUARANTY CORPORATION,

9 Defendant

10 ORAL ARGUMENT HELD 3-10-14
11 BEFORE THE HONORABLE KATHLEEN M. WILLIAMS
12 UNITED STATES DISTRICT COURT JUDGE

13 APPEARANCES:

14 FOR THE PLAINTIFF:

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1 THE COURTROOM DEPUTY: This Court calls Case No.
2 13-21189-CV-Williams, Consumer Financial Protection Bureau
3 versus United Guarantee Corporation.

4 Counsel, please state your appearances for the record.

5 MR. KIDER: Good afternoon, Your Honor, Mitch Kider on
6 behalf of the intervenors.

7 MR. SOUDERS: Good afternoon, Your Honor, David Souders
8 on behalf of the intervenors.

9 MR. RUSSOMANNO: Good afternoon, Your Honor, my name
10 is Chris Russomanno, Russomanno and Borrello; I am local Miami
11 counsel.

12 MS. BYRNE: Good afternoon, Your Honor, Jane Byrne
13 from Quinn, Emmanuel on behalf of United Guaranty.

14 MR. LERNER: Good afternoon, Your Honor, Scott Lerner
15 on behalf of defendant United Guarantee, also from Quinn,
16 Emmanuel.

17 MS. BRUNSWICK: Good afternoon, Your Honor, Lauren
18 Brunswick local counsel on behalf of defendant.

19 MR. KIM: Good afternoon, Your Honor, my name is Thomas
20 Kim; I am enforcement counsel for the Consumer Financial
21 Protection Bureau.

22 THE COURT: All right. We're here today -- and I am
23 just going to refer to the potential intervenors as PHH -- on
24 their motion to intervene. I have read all the submissions; I
25 would like to have some oral argument about that.

1 First, however, I have some questions, and then I will
2 turn to the parties.

3 So, Mr. Kim, why are we in fact here? Why were we
4 ever here in the Southern District of Florida?

5 I know this really has nothing to do with the request,
6 but since there is this administrative proceeding in New York
7 and CFPB is based in D.C., or the administrative proceeding is
8 in D.C. and none of these parties that I have been able to
9 ascertain have any connection to the Southern District of
10 Florida, why were we here to begin with, just out of curiosity?

11 MR. KIM: If I may I have a moment.

12 THE COURT: Sure. And while you are checking your
13 paperwork I will turn to PHH.

14 Am I the only Court who has the benefit of your
15 request to intervene of the, I think, four other Courts that
16 were originally part of the consent decree?

17 MR. KIDER: At this time, Your Honor, this is the only
18 Court. Because we believe the Statute of Limitations had run
19 on the other agreements that were, in fact, the subject of the
20 consent orders in those other Courts.

21 THE COURT: The Statute of Limitations had run in that
22 there were no payments made after the consent decrees were
23 entered into?

24 MR. KIDER: Yes, Your Honor.

25 THE COURT: All right. I think there were five cases;

1 this was the only one that had that month long period from
2 April to May when the ceded payments were addressed by -- and
3 that is a good point. So that wasn't addressed at all in the
4 other consent decrees, was it?

5 MR. KIDER: There were no other agreements that were
6 subject to the other consent decrees that involved any of the
7 intervenors because there were no payments that were going to
8 be made after the entry of the consent decree itself. There are
9 two month's worth in this consent decree.

10 THE COURT: All of April and all of May?

11 MR. KIDER: Yes.

12 THE COURT: And I will get back to you, Mr. Kim, since
13 it probably is not in your papers. Once I started looking into
14 this, and all of the attendant administrative litigation, I was
15 wondering why we had been chosen to begin with.

16 I will turn to the intervenors now. I have read your
17 papers, but I will start with the basic why; why would I reopen
18 this matter ten months later?

19 MR. KIDER: Well, Your Honor, we would ask that you
20 would reopen this matter for the benefit of interpreting and
21 enforcing your order. The Court did maintain jurisdiction for
22 those specific purposes.

23 THE COURT: For the parties, yes?

24 MR. KIDER: For the parties. There is a question as to
25 whether or not we could be considered a party by way of a

1 counter-party if nothing else. If you look at the application
2 of the consent order itself, it goes to UGI, its agents, its
3 employees and others along those particular lines, as well as
4 other persons and entities active and acting in concert or
5 participating with them who had actual notice.

6 And so certainly one could argue that the intervenors
7 fit squarely within that since in fact the very subject of the
8 consent order involved the ceding of premiums in some cases to
9 intervenor companies.

10 THE COURT: That was one question. And you did in fact
11 have notice of all of this. As early as I think it was 2012
12 your 10K you had -- you knew the Government was looking into
13 this matter and was discussing it with, at the very least,
14 United Guarantee, Radin, all the others.

15 MR. KIDER: We certainly knew that the Government was
16 looking into the question of ceding premium payments to captive
17 mortgage insurance companies.

18 We had absolutely no idea that the Government, which
19 resolved its case with UGI, and put a provision specifically in
20 there allowing future ceding of premium payments, that they
21 would come back and suggest that that somehow in and of itself
22 was unlawful.

23 And when we look at the timeliness, yes, the consent
24 order is ten months old, but in fact within three days of
25 knowing that the Government -- that the CFPB was going to

1 pursue this theory, which is contrary to what is written in the
2 consent order, within three days we moved to intervene.

3 THE COURT: You moved to intervene after they filed
4 against you administratively.

5 How can you say you did not know that your position
6 might be somehow problematic in the eyes of the Government?

7 You are certainly not saying you were a part of this
8 order; because you did not give up 4.5 million; you did not
9 agree not to do in the future what United Guarantee said it
10 would do in the future.

11 So how is it if you had concern about this and you did
12 not intervene within a month, within two months? They didn't
13 just go into Administrative Court. You all must have been
14 talking, yes?

15 MR. KIDER: In all honesty, Your Honor, the theory they
16 used did come as somewhat of a surprise to us. There are
17 different theories of liability under Section 8 of RESPA.

18 RESPA does not allow anyone to give or receive a thing
19 of value pursuant to an agreement to refer settlement service
20 business.

21 The CFPB is maintaining the position that the actual
22 ceding of premium payments themselves is a violation.

23 THE COURT: The whole premium?

24 MR. KIDER: Each and every premium that is ceded. At
25 the time they entered into the agreement with UGI everything

1 was in run-off. We were not entering into any new arrangements
2 of any sort. What was not being run-off, we were having
3 premiums ceded to us by UGI for the insurance we were provided.

4 We did not know that the Government's theory --
5 especially in light of the UGI consent order -- was going to be
6 that the ceding itself is a violation as opposed to some other
7 theories that could have been raised; such as what happened at
8 the time, was there an agreement, was there a referral.

9 In fact, no, what their theory is and what they came
10 out with goes directly on point with what is written in the
11 consent order.

12 And what they say -- and they take us all the way
13 through the end of May, and they say that each time a premium
14 is ceded it is a violation of Section 8 of RESPA itself.

15 And we actually did not think that the CFPB would
16 enter into an agreement of this sort, represent to the Court
17 that in fact for future payments this can be done knowing that
18 under Section 8 of RESPA you have to have two parties.

19 If someone is, in fact, allowed to give then the other
20 party is allowed to receive. If it's not unlawful to give, it's
21 not unlawful to receive. We did not know that they would come
22 out with this particular theory.

23 THE COURT: I have read your submissions, very fine
24 argument for the Administrative Law Judge, but I have here two
25 parties where there was no merits discussion, no -- all it was,

1 was a settlement document. And it expressly said it
2 adjudicated nothing, we admit nothing, and it allowed for
3 premiums that arose from contractual relationships that were
4 already in existence --which of course the parties knew would
5 be over within a period of two months.

6 I don't know how you can now be heard to say you can
7 raise it as a defense, as you have before the Administrative
8 Law Judge. And I think United Guarantee is there, Radin is
9 there; everybody is back there.

10 But I don't think I have the capacity, nor should I,
11 to open the case to litigate what was never before me to begin
12 with.

13 MR. KIDER: We are not asking you to open this case to
14 litigate that which was not before you. We are asking you to
15 open it to interpret the very provision that was there.

16 If it goes to only two months of our receipt, then it
17 goes to only two months of our receipt.

18 But the point of the matter is, the Court has entered
19 its consent order that said that UGI can make these payments.
20 The CFPB has maintained the position that we could not receive
21 it.

22 When I am with the Administrative Judge I can
23 certainly argue the implication going forward -- going
24 backwards as to the validity of past practices. I am not asking
25 you to look at past practices; I am looking for you to say if

1 we entered a consent order that said that UGI can make these
2 payments, they can give this then, yes, your clients who were
3 subject to receiving those payments can receive it.

4 Because it can't go both ways. They can't give it if
5 the party can't receive it.

6 In all actuality, that is what we are looking for.
7 That's all we're looking for. This is separate and apart from
8 what goes on with the Administrative Law Judge. I will argue
9 to the Administrative Law Judge about what that means and what
10 the inference for that is.

11 I am not asking the Court to litigate that particular
12 issue. I recognize it has not been litigated, that issue, but
13 Your Honor has specifically entered an order that tells UGI
14 they can make those payments.

15 And, Your Honor, ours may have only been two months,
16 but there are many more contracts out there -- I am sure they
17 have lasted longer than six months. Because I know that the
18 CFPB has been collecting that information every six months from
19 UGI and other providers as well.

20 So, I am asking the Court to interpret if they can
21 give it under that provision then, in fact, the captive insurer
22 can accept it. That is what it says.

23 THE COURT: It is what it says; although you keep
24 importing the word future into the language. I don't know that
25 it is a distinction without a difference. That is why when you

1 get into the business of reviewing consent decrees and
2 contracts and the like, it is in fact what it is.

3 What you seem to be asking me is to do appellate
4 review of the administrative process before there is any
5 determination there -- kind of do an appellate review.

6 So it's a little awkward.

7 MR. KIDER: We can take the word future out, Your
8 Honor. It's not relevant to my argument. It is simple, the CFPB
9 maintains the position that we could not receive those
10 payments, and I think that is wrong, and I think the logical
11 interpretation, I am certain, of this order is in fact that we
12 could.

13 THE COURT: That's not what you are asking me to do,
14 in candor. You are asking me to decree the payments did not
15 violate RESPA, which is something that was never before me to
16 begin with.

17 MR. KIDER: I would say this, Your Honor, the order
18 says that UGI can make these payments.

19 THE COURT: Right.

20 MR. KIDER: So, I don't agree that does not say
21 anything about its validity under RESPA because it would not be
22 in the order otherwise.

23 A Court cannot, and has not, and does not issue an
24 order or sign on a consent order that in fact would take
25 purportedly unlawful activity and legalize it.

1 There is no distinction here. I know the CFPB has
2 argued this is a little carve-out as a compromise or something
3 else. But remember Section 8 of RESPA is both a criminal as
4 well as a civil statute. It has criminal implications.

5 The Courts have said you read it the same way for the
6 criminal law as well as the civil lawsuit itself.

7 So if we have an order that says you can make a
8 payment, by necessity that order must mean that this payment is
9 acceptable under RESPA. Otherwise it -- maybe it shouldn't be
10 there.

11 THE COURT: I will give you this, it's an awkward
12 little phrase. Because certainly on the one hand, as you will
13 argue before the Administrative Law Judge, even in a consent
14 decree where merits aren't reached, the Government isn't going
15 to invite a District Court to put their imprimatur on something
16 that essentially allows for the continuation of criminal
17 misconduct.

18 Going again to my question, why did you come down to
19 all of us to begin with, just out of curiosity.

20 Let me hear from the parties to the decree, and then I
21 will come back to you.

22 MR. KIDER: Thank you.

23 THE COURT: Let me hear from United Guarantee and then
24 I will come over to you, Mr. Kim.

25 MR. KIM: Thank you, Your Honor.

1 MS. BYRNE: Your Honor, Jane Byrne again for United
2 Guarantee. Our interest here is to just protect the consent
3 order that we negotiated after many months with the Government
4 and achieving the settlement.

5 As Your Honor noted, it says what it says. I think
6 what PHH is looking for is an interpretation of that order.
7 It's going to get an interpretation of the order before the
8 Administrative Law Judge.

9 One of the tests that we have laid out in our brief
10 that I think PHH has the burden of establishing is that they
11 have suffered some kind of prejudice. And what we don't hear
12 from them is how they will be prejudiced given that they will
13 have their day in court to argue what this means, if anything,
14 vis-a-vis them.

15 THE COURT: There are no more premiums being paid
16 pursuant to this -- the relationship that was referenced in the
17 consent decree, correct?

18 MS. BYRNE: There were some premiums paid, and I
19 believe it's now terminated.

20 THE COURT: Okay.

21 MS. BYRNE: The other test we think is appropriate --
22 the Eleventh Circuit says post judgment a Court should only
23 grant intervention in highly unusual circumstances, and this
24 certainly would not meet the test. The test under the Dillard
25 case is whether one person or the other to the decree is

1 seeking judicial resolution of a dispute. We certainly are not.
2 We had a dispute, it's over, and the terms of the resolution
3 are set forth in the decree.

4 And I don't think PHH can meet that very simple
5 Eleventh Circuit test under Dillard. I think PHH has to
6 determine that their interests were not adequately represented.

7 I think the fact that they are coming here to enforce
8 that consent decree is really an admission by them that their
9 interests were adequately protected.

10 Again, they will have their day in court before the
11 Administrative Law Judge, which just last week took official
12 notice of the consent decree, and took about 15 minute of
13 argument from these parties to that proceeding up in
14 Washington.

15 THE COURT: You have entered an appearance in that
16 proceeding, correct?

17 MS. BYRNE: We have, Your Honor, for the limited
18 purpose of dealing with some document requests the Government
19 has served upon us.

20 THE COURT: So the only reason everyone is together
21 again, as it were, is to protect certain things in a discovery
22 context?

23 MS. BYRNE: That's correct.

24 THE COURT: And there's no substantive argument being
25 advanced by you or the others that had the consent decrees here

1 in South Florida.

2 MS. BYRNE: No, it's simply for discovery.

3 THE COURT: All right.

4 MS. BYRNE: As to whether their interests have been
5 represented, Your Honor, we think it has been adequately
6 represented, and they are have not met their burden under the
7 test we have set out for intervention.

8 So we would ask that Your Honor deny the request for
9 intervention and allow the Administrative Law Judge to do what
10 he has been asked to do, and that is to resolve whether or not
11 PHH properly accepted the payments that my clients have ceded
12 to them.

13 THE COURT: All right. Thank you, Ms. Byrne.

14 Mr. Kim.

15 MR. KIM: Good afternoon, Your Honor. As we laid out
16 in the papers, we think intervention can be denied on the basis
17 of the Rule 24 requirements.

18 And I just wanted to clarify how we entered the
19 consent decree to begin with.

20 THE COURT: Okay.

21 MR. KIM: And before I get to that, I think it's
22 important to point out a case that was cited in PHH's brief as
23 binding precedent on this Circuit, which would shed light on
24 why we introduced this particular carve-out petition. The case
25 is United States versus Miami.

1 In that case the Fifth Circuit -- and that was a 1981
2 case -- held that provisions of a consent decree that adversely
3 affect the contractual rights of non parties who have not
4 consented are invalid and must be stricken.

5 We were aware of case law, such as this holding, that
6 a consent decree because it's a consent decree can reflect the
7 consent of parties, a compromise of the parties, to settle the
8 agreement.

9 That is binding case law, at least in this Circuit,
10 which would prohibit the consent decree from reaching conduct
11 that goes to contractual relationship of third parties that
12 have not consented.

13 I will quote from the case, Your Honor, and I think
14 it's quite instructive here -- and again, this case was cited
15 by PHH.

16 Insofar as this decree does not affect the non
17 consenting parties and its members, or contains provisions to
18 which they do not object, the Trial Court properly exercised
19 its discretion in approving it.

20 However, parts of the decree that do affect the third
21 party that did not consent to it cannot properly be included in
22 a valid consent decree.

23 The Court there stated the third parties would be
24 prejudiced if the decree at issue there would alter its
25 contractual rights without its consent.

1 THE COURT: Here's my question then, Mr. Kim, and this
2 is where I -- yes, I am aware of the case; yes, it is an
3 appropriate consideration. But when your agency came to South
4 Florida en masse with its filings, did you not think it might
5 be prudent to let one of us know, or at the very least me since
6 I am the only one that had the ceding, that there was this
7 interest in the receipt of the premiums being somehow violative
8 of the law?

9 Because the one refrain I keep hearing is nobody would
10 invite the Court to put its imprimatur on a violation of law.
11 And throughout your briefing you are concerned about this Court
12 interfering with the jurisdiction of the agency -- of the
13 Administrative Court.

14 And I, of course, am worried about my jurisdiction. So
15 I guess I can simply ask, you would not have asked me to sign
16 something that would allow illegal activity.

17 MR. KIM: Your Honor, I have a couple of responses to
18 that very pointed and good question.

19 THE COURT: Okay.

20 MR. KIM: Robinson versus the National Basketball
21 Association, another case which was cited by PHH, it had a
22 consent order that was quite similar.

23 The consent order in that case allowed allegedly
24 illegal conduct that was merely alleged to be in violation of
25 the Sherman Anti Trust Act to continue to wind down for a

1 period of ten years until it was ultimately eliminated. And the
2 Court very pointedly said in that case, despite the objection
3 that is not a proper consent order, that as long as the consent
4 decree reflected a compromise that was fair and reasonable, the
5 key was that the issue had not been previously decided in a
6 prior forum.

7 In this case no forum has ever ruled on the legality
8 under RESPA of any special captive arrangement, much less the
9 specific captive arrangement between PHH --

10 THE COURT: Because it's all kind of new.

11 MR. KIM: It's new; it has not been adjudicated in
12 this court, in the administrative proceeding.

13 And that case, cited by PHH, makes clear that you can
14 have limited conduct that is only alleged to be illegal if it's
15 going to expire pursuant to an agreement on its own terms.

16 And the Court was clear, it was approving the consent
17 order there because it radically changed the practices and
18 ultimately ended in its elimination in the ten-year period.

19 THE COURT: I think in that case the Court knew that
20 that was the implication of its signing off on the consent
21 decree. What I am saying is obviously I was not aware of this,
22 and the phrasing is a little awkward.

23 Although it does what you intended it to do -- which
24 the Eleventh Circuit requires it to do -- and that is to not
25 interfere with third party contractual relationships,

1 understandably. But now we're in this little bit of a pickle.

2 MR. KIM: If the phrasing is awkward we apologize for
3 that. The reason we phrased it that way is there is a general
4 ten-year ban on participating in captive arrangements.

5 United Guarantee was prohibited from entering into new
6 captive arrangements, adding loans to new captive arrangements

7 So without that carve-out an argument could be made
8 the general ten year ban impaired the rights of third parties
9 that have not consented to that order.

10 So it was important to put that carve-out in to
11 clarify we weren't trying to impair the contractual rights of
12 non parties that have not consented to the decree.

13 That is the sum total of the rationale for entering
14 into this particular provision. I think under judicial
15 estoppel -- and I think it's clear what they are seeking is
16 judicial estoppel or potential collateral estoppel.

17 One of the elements is there has to be a mockery of
18 justice, some bad faith rising to a miscarriage of justice. So
19 even if intervention is allowed, I simply don't see, even if an
20 intervention is allowed, how we could possibly conclude from
21 this provision in light of U.S. versus Miami -- and maybe it
22 could have been worded better -- but how this is somehow a
23 mockery of justice to do this.

24 I wanted to address a few other points that opposing
25 counsel raised, counsel for intervenors raised. They were not

1 aware the Bureau would assert charges that the ceding of
2 payments violated RESPA.

3 I will invite your attention to the 10K filing that we
4 cited in our brief; the 10K filing specifically refers to the
5 premium ceding practices. And that investigation targeted
6 premium ceding practices and whether that would violate RESPA.

7 And this is not an exhibit to our motion, but PHH's
8 counsel discussed the negotiations between the Bureau and PHH.
9 We issued a letter prior to initiation of the administrative
10 proceeding saying we are going to file a motion for judicial
11 estoppel in the Southern District of Florida.

12 They knew about this well before we filed the
13 Administrative Proceeding. This is not new at all. I would
14 like to point out to the Court that just four days ago, on
15 Wednesday of last week, the Bureau and PHH appeared before the
16 Administrative Law Judge.

17 THE COURT: You were having quite a little discovery
18 dustup.

19 MR. KIM: It's a bit complicated. I have been able to
20 stay out of it, Your Honor

21 THE COURT: Good for you; stay out of it.

22 MR. KIM: And, Your Honor, PHH argued using different
23 terminology to ask for precisely the same relief it is asking
24 this Court to answer. Whether you dress it up in terms like
25 like interpretation of enforcement of the consent decree or

1 call it a judicial estoppel it is the same relief being sought.
2 If you look at their briefs and the arguments made in that
3 forum they merely cut and pasted almost verbatim from what is
4 argued before this Court.

5 The Administrative Law Judge is deciding the judicial
6 estoppel issue as we speak. We have never contested PHH's right
7 to make any estoppel arguments they wish to make in that forum.

8 We don't think it makes sense to seek simultaneous
9 relief in that forum and then come here and make the request
10 for the same relief here.

11 Make no mistake, it is the same relief. They say they
12 want merely intervention and enforcement of the consent decree.
13 What does that really mean?

14 As Your Honor suggested, the interpretation they seek
15 is to take a carve-out -- that is completely consistent with
16 U.S. vs. Miami -- and interpret that into a legal declaration
17 that these payments, not just the limited future expiring
18 payments, but all the payments are legal under RESPA.

19 That is a legal declaration that flies in the face of
20 the provision of consent decree.

21 And there are three provisions in the consent decree
22 that state it is not an adjudication of any legal or factual
23 issue; it affects no conclusion of fact or law. So, Your
24 Honor, it is an interpretation of that provision into a legal
25 declaration.

1 And, secondly, they want to enforce that provision.
2 What does that really mean? The provision states nothing in
3 this order shall be construed to prevent the ceding of premiums
4 on already existing contracts.

5 There is no argument or contention the Bureau has
6 sought to prevent the ceding of premiums on the contracts; that
7 was allowed to happen for a period of less than two months.
8 What they want to enforce is the legal declaration.

9 Their interpretation of that provision -- which we
10 submit is wrong -- when they say enforce against the Bureau
11 from taking an inconsistent position, a position they argue is
12 inconsistent in the administrative proceeding, that is
13 precisely estoppel, which is what they argued down in D.C. --
14 up in D.C. rather.

15 THE COURT: Let me switch back to counsel for the
16 intervenors. I did review the docket; took judicial notice of
17 the docket that you pointed out in your papers.

18 It does seem the precise issues are being litigated
19 before -- I forget the gentleman's name -- the Administrative
20 Law Judge, who seems extremely capable and would understand the
21 issue that you present.

22 But for purposes of this proceeding, this case which
23 existed for all of five days, I don't see where I can give you
24 the remedy you seek.

25 MR. KIDER: Your Honor, if I might address that.

1 THE COURT: Sure.

2 MR. KIDER: What we look for here is very different
3 than what we look for in our administrative proceeding. What
4 we look for here is an acknowledgement by this Court that if
5 UGI can make that payment, we can receive it for those two
6 months. That is what we look for.

7 The rest of the arguments will in fact go to the
8 Administrative Law Judge. The fundamental problem that we have
9 here is one party, UGI, looks at the consent order and
10 interprets it and says, yes, UGI can get these payments.
11 Another party, the CFPB, looks at it and says, no, you cannot
12 get those payments.

13 This Court maintained jurisdiction for this very
14 reason, for construction purposes, for interpretation purposes.
15 If we can get those payments for those two months we're asking
16 this Court to say so.

17 The remainder of the arguments will go to the
18 Administrative Law Judge. It's not for the Administrative Law
19 Judge to step in when a consent order was issued by this Court
20 before there was any type of an administrative proceeding at
21 all.

22 It's this Court that entered that particular order
23 that ought to be able to say, yes, you can get those payments,
24 which I believe is exactly -- I hope what was intended.

25

1 Now the difference in the cases, Your Honor -- so,
2 yes, in Robinson v. The NBA, in that particular case, in an
3 anti-trust case, someone said, you know, it's an alleged
4 anti-trust violation, we're going to let you phase it in.

5 You know what, it wasn't the party. They said, there
6 may be issues that are there, anti trust, and we're going to
7 phase those things in.

8 In this particular case we have a party over here that
9 came to this Court, availed themselves of your Court and said
10 we would like you to enter this consent order with the language
11 we have just been reviewing, and then they walk out and they
12 say you, PHH, cannot get those payments.

13 That's not right. We're very limited in what we're
14 asking because we got those payments. We absolutely received
15 those payments, and we received them because there was a
16 consent decree that said they could keep on paying them.

17 And that's why we received them. And I have a direct
18 party -- this is not an allegation that something may be
19 illegal. And RESPA is not quite that new. We have been
20 litigating RESPA cases almost 40 years. The CFPB is new to it
21 but RESPA is not that new.

22 THE COURT: Right. But HUD gave one interpretation,
23 and now this agency is giving another. Chevron deference, so
24 there you go.

25 MR. KIDER: It has nothing to do with the consent order

1 that says pay them, and then the very party comes in and says
2 you cannot receive those payments. So we are asking you to just
3 tell us, yes, you were entitled to those few payments.

4 I don't have to make a statement on the rest of it. We
5 will make those arguments about what the legal consequences are
6 in the appropriate forum. But that is what we are absolutely
7 entitled to.

8 The Miami case itself, the same thing, a contractual
9 problem does not equate to illegal conduct. What the Court in
10 that case said was, although there are parties to this conduct
11 that are not here for those contracts and may not --

12 THE COURT REPORTER: I'm sorry?

13 MR. KIDER: I apologize. The Court did not run into a
14 question of whether or not they could set aside a contract
15 because it's illegal, because of course they could have set it
16 aside because it's illegal. That was not the question in U.S.
17 v. Miami.

18 That's not the issue that was there. Contracts do not
19 equate to a question of legality. What we have is a situation
20 in which they made payments, and they believed that we were
21 under the consent order that they say they negotiated.

22 They said they were negotiating and thought they were
23 representing our interests -- and I would like to address that.

24 So they say we could make those particular payments,
25 and we took those payments. They say, no, your interpretation

1 is wrong and you should not have taken those payments, it's
2 unlawful. That is what we have here, and that could not
3 possibly be unlawful.

4 One other thing, Your Honor, the test in the Eleventh
5 Circuit has really been set out in Charles versus Thornburg.
6 And it is a test of timeliness.

7 So, let's talk about mandatory intervention under
8 24(a). Typically in the Eleventh Circuit you get that unless
9 you are untimely. And what is it that Courts in the Eleventh
10 Circuit turn on when they say, what do I mean when I talk about
11 timeliness?

12 And they say prejudice to the other parties. What kind
13 of prejudice do they mean? They don't mean prejudice if in
14 fact you intervene and then you end up being wrong and the
15 Court comes down another way. They mean prejudice by the delay
16 itself.

17 Number one, I don't believe there was a delay. Number
18 two, this was, as you pointed out, a matter that took an entire
19 four days in this court because a complaint was filed
20 simultaneously with a consent order that was then entered.

21 So any prejudice by our intervening would have always
22 been after that consent order was ordered each and every time.

23 And there is no prejudice to the parties by our
24 intervening. You are doing a simple interpretation as to
25 whether or not the intervening parties were entitled to get the

1 payments in the month of April and in the month of May. That's
2 all I asked for. That is not something for an Administrative
3 Law Judge to guess on and to do. That is an order that was
4 brought to you.

5 We didn't come here. We didn't come down to the
6 Southern District of Florida here. We did not ask for this
7 Court to enter the consent order. And now they simply don't
8 want you to interpret it.

9 My last point is, I don't want you to think that the
10 ceding problems only exists over here for my client, they only
11 exist over here; this is a bigger issue for all the other
12 Judges in the Southern District of Florida because there were
13 many ceding payments that continued to be made after this.

14 It's not merely a matter of the two ceding payments --
15 there are only the two from my client, but there are many, and
16 it involves every one of the other captive reinsurance
17 companies.

18 I would invite the CFPB to put in the record how
19 many; because they collect that information every six months.
20 There are reporting requirements. UGI has records of every
21 month's -- how many there are.

22 We asked for and did not get it. I would suggest that
23 they ought to put something in the record over here.

24 So, Your Honor, it's very limited what we're asking
25 for, and what we're asking for is, in fact, that you interpret

1 whether or not we were entitled to get those payments in April
2 or May under the terms of this consent order.

3 MR. KIDER: Thank you.

4 THE COURT: Mr. Kim, briefly.

5 MR. KIM: I would ask Your Honor to look at the actual
6 request for relief in the proposed complaint. And it seems to
7 me the request as phrased is a little different than what is
8 actually requested in the proposed complaint, which seeks an
9 interpretation of a limited carve-out, that did not address
10 those payments, into a legal declaration that those payments --
11 again not limited in time -- but those payments were legal
12 under RESPA.

13 And then, two, an enforcement of that against the
14 CFPB, a direct enforcement preventing the CFPB in the
15 administrative proceeding from taking a contrary position.
16 That would in all likelihood stop the administrative
17 proceeding in its tracks.

18 I would like to address a couple additional facts made
19 by PHH's counsel. I wanted to clarify, Your Honor, the Bureau
20 is a civil agency. Our proceeding is civil in nature, it's not
21 criminal.

22 I don't think in all the briefing we have seen one of
23 the fundamental requirements under Rule 24 has been sought to
24 be met. That requirement is you have to show that you have an
25 interest that as a practical matter may be impaired or impeded

1 by the disposition of the action. This action is closed. The
2 disposition of the action was the consent order itself. That
3 disposed of the action. It's quite clear that they are using
4 the consent order to help themselves; use it as a sword in the
5 administrative proceeding.

6 But there is no claim anywhere in the papers that the
7 consent order impairs any property or contractual right they
8 have asserted.

9 They are trying to use it offensively, not to protect
10 against any independent right they have asserted. I don't think
11 a desire to obtain a legal ruling on the basis of a consent
12 order that did not have a hearing, did not adjudicate an issue
13 of fact or law, is a legitimate interest under Rule 24.

14 There is not any impairment by the consent order; it's
15 quite the reverse. I don't think Rule 24 allows intervention
16 for an opportunistic purpose. I have not seen a single case --
17 they have scoured the country for cases -- where non parties
18 are allowed to intervene.

19 I have not seen a single case where intervention was
20 allowed to obtain an estoppel ruling from one Court or forum
21 applicable to another court or forum. That is precisely what is
22 happening here; there is no question.

23 If you read their papers, which we submitted as an
24 exhibit to our motion -- the transcript, which I have here, and
25 there may be some confidential information.

1 We have the pages that parrot the lines that the CFPB
2 cannot have it both ways, that it takes two to tango. These
3 words are lifted straight from the arguments made here.

4 We should be arguing this -- we have indeed argued it
5 before the Administrative Law Judge, who is deciding this issue
6 at this very moment.

7 MR. KIDER: Your Honor --

8 THE COURT: Let Mr. Kim finish.

9 MR. KIM: Again, I would ask the Court to look
10 carefully at the proposed complaint in intervention. The last
11 part of it, before we get to the attorney's fees, is an order
12 requiring the CFPB to abide by the legal declaration as
13 interpreted.

14 I don't see how the Court can interpret that
15 carve-out. There has not been any hearing. If it's simply a
16 judicial estoppel argument, that we have asserted a position
17 and we are inconsistent in the administrative proceeding, that
18 argument has been made and can be made in the administrative
19 proceeding.

20 Thank you.

21 THE COURT: Briefly, Mr. Kider.

22 MR. KIDER: Thank you, Your Honor. First, Your Honor,
23 this is not a judicial estoppel argument. The judicial estoppel
24 argument made, in fact, at the administrative hearing is that
25 representations made either explicitly or implicitly by the

1 CFPB would estop them from making representations and taking a
2 different position itself; very different than what we are
3 doing every here.

4 What we're doing is we are taking a provision in a
5 consent order that directly impacts us. And, yes, we have a
6 substantial interest in it. We have a property interest in it.
7 We have payments that were made to us under that specific
8 provision itself.

9 So the interest is absolutely there and, yes, that is
10 in our pleadings and in our brief as well.

11 In terms of narrowing our request, we would happily
12 narrow the request in the manner I laid it out, Your Honor, an
13 interpretation that said they were allowed to make that payment
14 and you were allowed to receive that payment.

15 That I think is fair to everyone, and would put us all
16 on the same page as to what the interpretation of this
17 particular order is.

18 Finally, I would say this, and I say it with some
19 trepidation because I recognize what I am saying, that in
20 reality it does not matter that the CFPB is pursuing this
21 civilly; Section 8 of RESPA is both a criminal and a civil
22 statute.

23 And if you are going to allow payments you have
24 effectively immunized people that are making those payments and
25 receiving those payments with or without oral argument on those

1 particular lines. Unfortunately that is the consequence, and I
2 would argue that consequence someplace else. I am not asking
3 you to rule on that; I am asking you to rule on and to
4 interpret the fact that this says you paid it, which by
5 necessity means we can get it.

6 Because the Supreme Court made it absolutely clear
7 under Section 8 of RESPA there are two parties, and the
8 complaint all along that came before you is under Section 8 of
9 RESPA.

10 The Supreme Court says there have to be two parties
11 involved. And there are two parties. So, if one is allowed to
12 make that payment one has to be allowed to get that payment.

13 So you can't have the CFPB say to this Court they
14 don't belong here, we don't want an interpretation of your
15 order, and walk next door or go to another Court and say, no,
16 they are not entitled to those payments. And that is exactly
17 what happened here.

18 Thank you

19 MS. BYRNE: May I briefly address some of counsel's
20 argument.

21 THE COURT: Sure.

22 MS. BYRNE: We just heard argument for fairness. That
23 is not the test under Rule 24. The threshold inquiry is time
24 limits. And we have not heard anything about the ten-month
25 delays; except for PHH telling us they have a substantial

1 interest in the property interest. And if they wanted the
2 bargain they are seeking now, they should have come and
3 received that ten months ago.

4 Under the law in the Eleventh Circuit, intervention
5 where there is a judgment entered is only allowed in the most
6 extraordinary of circumstances.

7 And there is case law I think which is dispositive.
8 First, where one party to a consent order -- and, Your Honor,
9 my client has spent months negotiating with the Government to
10 achieve a settlement.

11 So, under Hollywood Community Synagogue versus City of
12 Hollywood, Eleventh Circuit 2007, which is cited in our papers,
13 that satisfies the prejudice prong for denying intervention.

14 And similarly, PHH has a burden of establishing its
15 own prejudice. Under U.S. versus Jefferson, Eleventh Circuit
16 1983, there can be no prejudice where the intervenor can defend
17 its interest in its own proceeding.

18 Thank you, Your Honor.

19 THE COURT: Thank you, Ms. Byrne. I agree with counsel
20 for United Guarantee that the first question is the threshold
21 question, and the dispositive question is timeliness. It is an
22 extraordinary remedy in the Eleventh Circuit for a non party to
23 intervene and open up a case.

24 In this instance, clearly from the parties'
25 discussions, there has been a long period of debate and

1 interaction and notice and exchange far before the April
2 arrival of the parties and their consent decree, and for a long
3 time after that.

4 There was a case cited and I beg the parties'
5 indulgence I don't remember the name of the case, where nine
6 months was untimely. Here we have ten months, and we have a
7 history of interaction between all of the players.

8 The prejudice to the parties United Guarantee talks
9 about, about whether an inconsistent position would enure to
10 their detriment, the added expense of opening this up again,
11 perhaps.

12 As to prejudice to PHH, I understand your position. I
13 am not so certain about your statement about immunity. I don't
14 know how far that will get you on the criminal side of the
15 aisle. Certainly at one point in my career I would have made
16 the argument. I don't know how successful that will be.

17 But you have a forum to litigate this, and you are
18 litigating this.

19 I guess I will never know why everyone came down to
20 South Florida. But I don't think that rises to the level of an
21 unusual circumstance, such that intervention would be
22 appropriate.

23 As for exercising discretion, the consent decree says
24 what it says. If there is an argument to be made the Government
25 through its agency has made a party admission that somehow

1 relieves you from any liability, that argument can be made in
2 the administrative proceeding.

3 The only question, again that may never be answered,
4 has to do with the awkwardness of the phrasing and the global
5 nature of the conversation that was being had before everyone
6 came through, at least my doors.

7 But based on the record that I have before me I am
8 going to deny the motion for intervention.

9 All right. I would like to thank everyone for coming
10 down on relatively short notice.

11 We are adjourned in this matter.

12 HEARING CONCLUDED

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

/S/PATRICIA SANDERS

DATE FILED

PATRICIA SANDERS, RPR

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