

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING)
File No. 2014-CFPB-0002)

In the matter of:)

PHH CORPORATION, PHH MORTGAGE)
CORPORATION, PHH HOME LOANS,)
LLC, ATRIUM INSURANCE)
CORPORATION, AND ATRIUM)
REINSURANCE CORPORATION)

**RESPONDENTS' OBJECTION TO ENFORCEMENT COUNSEL'S
REQUEST FOR ISSUANCE OF A SUBPOENA REQUIRING PRODUCTION OF
ALL COMMUNICATIONS BETWEEN RESPONDENTS AND THE MI COMPANIES**

INTRODUCTION

Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents"), request that the Tribunal deny Enforcement Counsel's request for issuance of a subpoena to Respondents ("Request"), as inappropriate, unreasonable, excessive in scope, and unduly burdensome. 12 U.S.C. § 1081.208(d). Enforcement Counsel's Request misconstrues the law underlying Respondents' judicial estoppel claim and is unrelated to the proceedings before the Tribunal. Furthermore, the Request, purportedly seeking a "limited production of documents," is, in fact, exceedingly broad, seeking communications between Respondents and *any* mortgage insurance company over an unrestricted time period. For these reasons, the Request should be denied.

ARGUMENT

The Hearing Officer has discretion to refuse issuance of a subpoena that is “unreasonable, oppressive, excessive in scope or unduly burdensome.” 12 C.F.R. 1081.208(d). As an initial matter, Enforcement Counsel do not cite any authority for their use of a subpoena to a party to this action during the proceeding, and there is nothing in the Bureau’s Rules that would appear to permit such a discovery tool under these circumstances. Enforcement Counsel’s ability to gather information and documentary evidence is through the issuance of a Civil Investigative Demand (“CID”) or Investigational Hearing. *See* 12 C.F.R. §§ 1080.6 and 1080.7. Respondents were served with – and previously responded to – an overly broad CID. Indeed, Enforcement Counsel incorporate the “definitions” of that CID into the subpoena they now request. Enforcement Counsel decided to file their Notice of Charges (“NOC”) against Respondents based on their investigation. However, because Enforcement Counsel have initiated formal adjudicative proceedings, where discovery is limited, they cannot now resort to demanding subpoenas for materials not requested during the investigation. Indeed, Enforcement Counsel tout the affirmative disclosure obligations of Rule 206 in order to curb discovery during the administrative process and the Bureau’s Rules only provide for expert discovery and depositions where witnesses are unavailable. *See* 77 Fed. Reg. 39058, 39070 (June 29, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-06-29/pdf/2012-14061.pdf> (“Because this approach renders traditional document discovery largely unnecessary, it will lead to a faster and more efficient resolution of Bureau administrative proceedings, saving both the Bureau and respondents the resources typically expended in the civil discovery process.”). The Commentary to Rule 208 only refers to the ability of respondents to seek subpoenas, it makes no mention of Enforcement Counsel’s ability to supplement its investigative procedures with an additional

weapon in its arsenal, the ability to serve subpoenas on respondents. *See, e.g., id* at 39071 (“a respondent may seek production of other documents pursuant to subpoena”); *id.* at 39073 (“Section 1081.208 permits a respondent to seek other documents from the Bureau through a subpoena.”); *id.* at 39074 (“In addition, **respondents** will have the ability to conduct some limited discovery, including document subpoenas, depositions of third-parties who are unavailable for the hearing, and, in some circumstances, limited expert discovery.”) (emphasis added).

Further, if this is now a permissible procedure, that is, that the parties can now issue subpoenas to obtain additional evidence in support of their positions as the hearing proceeds, then the “re-opening” of discovery needs to be extended to all parties and the Tribunal should make this clear in its decision.

Separate and apart from the fact that Respondents do not believe the Bureau’s Rules allow Enforcement Counsel to proceed in this manner, the Request is completely without basis. Apparently unable to defend their representations to the U.S. District Court in connection with the Florida Consent Orders, Enforcement Counsel yet again conflate judicial estoppel with *equitable* estoppel. In doing so, Enforcement Counsel asserts that the requested communications are relevant to Respondents’ judicial estoppel defense, purportedly for purposes of determining whether Atrium and the mortgage insurance companies “acted in reliance” on the Consent Orders, and to “test whether they changed their conduct as a result.” Request at 2. Reliance, however, is not an element of judicial estoppel. *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980) (“Judicial estoppel, . . . although otherwise similar to the equitable estoppel rule against inconsistency, does not require proof of privity, reliance, or prejudice.”) (citation omitted). Rather, application of judicial estoppel is generally based on three factors: “(1) the

party to be estopped is asserting a position that is irreconcilably inconsistent with one he or she asserted in a prior proceeding; (2) the party changed his or her position in bad faith, i.e., in a culpable manner threatening to the court's authority or integrity; and (3) the use of judicial estoppel is tailored to address the affront to the court's authority or integrity." *Montrose Med. Grp. v. Bulgar*, 243 F.3d 773, 777-78 (3d Cir. 2001).¹ Enforcement Counsel's reliance on *Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984)² for the proposition that reliance is relevant to Respondents' defenses is misplaced. The Court in *Heckler* considered the principle of *equitable* estoppel, which, unlike judicial estoppel, does require a party to have acted in reliance upon an opponent's prior position. While Respondents were, in fact, entitled to rely on the Consent Order with UGI, reliance is not an issue before this Tribunal and, as such, communications allegedly evidencing "reliance" are not relevant to the proceedings.

Furthermore, Enforcement Counsel's request is excessive in scope and unduly burdensome. Enforcement Counsel seek "*all* communications between Respondents and *any* mortgage insurance company" regarding the administrative proceeding before this Tribunal, the CFPB's investigation underlying that proceeding, and the actions brought by the CFPB against United Guaranty Corporation, Republic Mortgage Insurance Company, Radian Guaranty, Inc., Mortgage Guaranty Insurance Corporation, and Genworth Mortgage Insurance Corporation,

¹ Respondents' defense of judicial estoppel is quite simple: the CFPB represented to the U.S. District Court that permitting the continued ceding payments would be lawful and therefore the District Court would not be acting improperly in approving and entering the Consent Order. The CFPB is now estopped from opportunistically taking the opposite position (that the same exact ceding payments were in fact free-standing violations of a criminal statute) in these proceedings. Given how straightforward this defense is, it is quite telling that the CFPB persists in attempting to divert the Tribunal's attention by recasting Respondents' meritorious defense of judicial estoppel as the straw man of equitable estoppel.

² Enforcement Counsel mistakenly refer to *Heckler v. Community Health Servs*, 467 U.S. 51 (1984), as *Horan v. Reliance Standard Life Ins. Co.*, No. 12-7802, U.S. Dist. LEXIS 11427 (D.N.J. Jan. 30, 2014), another case, which, in any event, also involves only *equitable* estoppel.

including any CFPB investigation or settlement negotiations underlying such actions. Request, Exhibit A, Attachment A (emphasis added). Enforcement Counsel have failed to tailor their subpoena to meet its narrow, but immaterial purpose—to determine Atrium’s reliance on the UGI consent order in continuing to accept ceded premiums. Request at 2.

First, Enforcement Counsel’s Request includes even the most general communications about this administrative proceeding with various MI companies, including communications regarding the agreement as to the language of the Protective Order, as well as its coverage and scope once entered. Such communications are not relevant to Respondents’ defense regarding judicial estoppel; yet they are plainly encompassed by Enforcement Counsel’s Request.

Second, the subpoena would also include Atrium’s communications with “any mortgage insurance company,” which far exceeds the purported purpose of Enforcement Counsel’s Request, which focuses on *one* agreement with *one* MI company.

Third, Enforcement Counsel’s Request is not limited to a time period that is relevant to Respondents’ reliance on the UGI Consent Order. While reliance is immaterial to Respondents’ judicial estoppel claims, it is unclear why Enforcement Counsel would seek communications evidencing reliance up to the present date, long after commutation of the agreement. Further, communications between Respondents and the MI companies regarding this administrative proceeding do not bear relevance to any claims or defenses currently pending before the Tribunal. In addition, demanding communications between, *inter alia*, “counsel” is particularly inappropriate. Enforcement Counsel have absolutely no basis to request such communications and indeed cite no such basis in their Request.

CONCLUSION

The hearing in this matter has now commenced. The Request is simply an attempt by Enforcement Counsel to unnecessarily burden and harass Respondents as they defend against the NOC. Further, the broad scope of the Request makes clear that it is intended to acquire communications for purposes other than those stated in their Request. Enforcement Counsel have been aware of Respondents' position for several months, and have not previously requested the production of any supplemental materials. The Tribunal should not permit Enforcement Counsel to abuse discovery in an attempt to burden Respondents at this late stage of the proceedings.

Dated: May 5, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 5th day of May, 2014, I caused a copy of the foregoing Objection to Enforcement Counsel’s Request for Issuance of a Subpoena to Respondents, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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