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' MEMORANDUM IN OPPOSITION TO ENFORCEMENT COUNSEL'S MOTION TO STRIKE "OPINION TESTIMONY ABOUT THE MEANING OF CONTRACTUAL PROVISIONS"

INTRODUCTION

Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents"), submit this memorandum in opposition to the portion of Enforcement Counsel's "Omnibus Motion *In Limine* to Exclude Evidence Pursuant to 12 C.F.R. § 1081.303(b)" that seeks to prevent Respondents' expert witness from opining on the meaning of certain contractual provisions in the reinsurance agreements at issue in this administrative adjudication. As explained below, Enforcement Counsel's motion misstates the issue and is inconsistent with its own position. Further, such a motion is premature and should wait until Respondents' expert witness actually testifies in this matter.

ARGUMENT

As an initial matter, Respondents believe that the Bureau's motion is misplaced. First, the Bureau complains about Michael Cascio's statement regarding his experience with

arbitration panels. Contrary to the Bureau's characterization of Mr. Casio's "experience" regarding arbitration panels as a "legal conclusion," the fact of the matter is that insurance arbitration is a highly specialized area of the law upon which an expert's experience may be of assistance to the trier of fact. *Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800, 803 (E.D. Pa. 1983) (senior partner of law firm allowed to testify as expert witness as to customary practices of insurance industry with regard to additional insured endorsements in view of partner's considerable experience in field); *see also M.D. Mark, Inc. Kerr-McGee Corp.*, 565 F.3d 753, 761 (10th Cir. 2009) (in affirming the trial court's amended judgment, the appellate court noted the testimony of certain experts including one "recognized as an expert on mergers and contracts" and another "on custom and practice in seismic data licensing," who provided testimony in support of the jury's finding that there was a breach of the terms of a licensing agreement).

Second, with respect to the Bureau's objection to the more fundamental issue – whether the various reinsurance agreements contained some limitation on the availability of assets outside the specific trust account[1] – even Mark Crawshaw, the Bureau's expert, testified that it is within the purview of actuaries to read and understand contractual provisions in order to determine, for example, whether there has been a transfer of risk. *See, e.g.*, Draft Transcript of Dr. Crawshaw's testimony on March 26, 2014 ("Crawshaw Draft Tr.") (excerpts attached as Exhibit A hereto) at 191-92 (Dr. Crawshaw testified that whether the liability was limited to the amount of funds in the trust agreement was "a crucial issue and it's an issue that's I think would be well known to

[1] The Bureau's identification of the objectionable paragraphs in Mr. Cascio's report is contained in footnote 1 of its motion and identified as paragraphs 21, 22 and 23 of the report.

anyone working in this field.").[2] Indeed, Dr. Crawshaw stated that a provision that limited Atrium's liability to "[no] more than what's in a trust account . . . was unusual compared to traditional insurance . . . ." Crawshaw Draft Tr. at 194.[3] Thus, while the Bureau strains in footnote 3 of its motion to distinguish the testimony of its expert witness, who repeatedly raised the issue of the limitation of liability in his testimony as well as in his report at pp. 12-14, the fact remains that in order to perform an actuarial analysis of the transfer of risk, understanding the underlying contract provisions is relevant to that inquiry. *See, e.g., Rush Presbyterian St. Luke's Med. Ctr. v. Safeco Ins. Co. of Am.*, 722 F. Supp. 485, 497 (N.D. Ill. 1989) (a construction expert could testify regarding specific contractual terms).

Third, it should not escape the tribunal's attention that while the Bureau now claims it is inappropriate for Mr. Cascio to opine on the meaning of certain contractual provisions because he is a "non-lawyer," the Bureau's expert witness, Dr. Crawshaw, sought to formulate his own opinion of the requirements of the UGI and Genworth agreements based in large part upon the statements of Sam Rosenthal, a non-lawyer. Stated differently, the Bureau finds it relevant and probative to rely on a non-lawyer for the meaning of certain contractual terms when it is in its

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[2] In light of the fact that the Bureau's own expert witness has designated the purported limitation on liability as a "crucial" issue, the Bureau's attempt to exclude Mr. Cascio's opinion testimony on the same issue as "irrelevant" is specious. *See* Bureau Mem. at 1 (citing 12 C.F.R. § 1081.303(b)(1-2)). Indeed, if the tribunal concludes that such testimony is irrelevant, Respondents reserve their right to strike significant portions of Dr. Crawshaw's hearing testimony and report.

[3] As the tribunal knows, Respondents have disputed the assertion that the UGI and Genworth reinsurance agreements limited the liability of Atrium to the funds in the trust account and, on the last day of the hearing before adjournment, Dr. Crawshaw testified under cross examination that performing a risk analysis with the assumption that the reinsurer's liability was limited to the funds in the trust account was a more conservative approach. While the resolution of the issue of liability rests with the tribunal, the fact of the matter is that Dr. Crawshaw had many opinions regarding this issue and the Bureau's attempt to prevent Respondents' expert from testifying on the same issue is inappropriate.

interests, yet it seeks to bar other "non-lawyers" from opining on the meaning of the same contractual terms.[4] Indeed, missing from Dr. Crawshaw's analysis is any effort on his part to discuss his understanding of the underlying contractual provisions, despite his admission that understanding provisions of such agreements is "crucial" and would be "well known to anyone working in this field." Crawshaw Draft Tr. at 192.

Fourth, in spite of the snippets of case law cited by the Bureau, the issue of the admissibility of expert testimony on purported "issues of law" is more relaxed where there is no jury present. *See, e.g., Liberty Twp. Tea Party v. IBEW*, No. 1:10cv00707, 2010 U.S. Dist. LEXIS 142839, at *4 (S.D. Ohio Oct. 28, 2010) ("However, this prohibition [against an expert testifying on issues of law] is not applicable where the court is sitting as both a trier of fact and law."); *Miller v. City of Cincinnati*, 709 F. Supp. 2d 605, 619-20 (S.D. Ohio 2008) ("An expert witness is generally prohibited from testifying on issues of law. . . . However, this prohibition is not applicable where the court is sitting as both a trier of fact and law." (citations omitted)); *Knisley v. U. S.*, 817 F. Supp. 680, 690 (S.D. Ohio 1993) ("Even judges, who are 'presumed' to

[4] The Bureau's decision to provide its expert with some, but not all, information in its possession regarding the issue of the purported limitation of liability of the reinsurer to funds in the trust account for the specific agreement is curious. For example, while Dr. Crawshaw relied upon the Milliman reports and the Investigational Hearing testimony of Mr. Rosenthal, he did not apparently review the Atrium Re Vermont Business Plan that was provided to the Bureau, nor did he apparently review the Respondents' NORA submission which explained in detail the difference in language for an agreement for a captive domiciled in Vermont and the lack of such language in the agreements for Genworth and UGI. Finally, the CFPB conducted an investigational hearing of Michael C. Schmitz, FCAS, MAAA, on December 11, 2013. Certainly the Bureau had a full and fair opportunity to question Mr. Schmitz, one of the authors of the Milliman opinions on the specific statement regarding the purported limitation of liability; yet, there is no indication in the transcript that the CFPB bothered to ask that specific question. In any event, since Dr. Crawshaw has admitted that both Atrium and Atrium Re paid every claim presented, the issue of whether there was a purported limitation on liability under either the UGI or Genworth agreements is a moot point. Similarly, the commutations of the Radian and CMG agreements which included the complete forfeiture of funds by Atrium, also renders moot the issue of the purported limitation of liability.

know the law, could frequently find help in expert legal opinion orally delivered, as opposed to being found in books.").

Indeed, the cases primarily relied upon by the Bureau were jury cases. *See, e.g.*, *Montgomery v. Aetna Casualty & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (appellate court held it to be an abuse of discretion to allow an expert to provide "a legal conclusion"); *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) (the appellate court noted that the parties chose to try the case in front of the jury as "a battle of experts opining as to whether Southern Pine had violated FAA regulations");[5] *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) ("Our judgment must therefore be guided by consideration of whether the testimony of the attorney expert aided the jury in its determination of critical issues in this case. We must also consider, however, whether the expert encroached upon the trial court's authority to instruct the jury on the applicable law, for it is axiomatic that the judge is the sole arbiter of the law and its applicability."). Since there is no jury in this action, the Bureau's assertions of harm are misplaced.

CONCLUSION

The Bureau's objections to – and efforts to strike – two opinions stated in Mr. Cascio's expert report are without merit. The opinions offered by Mr. Cascio are consistent with the type of testimony offered by actuarial experts, including the Bureau's own expert. Further, when Mr. Cascio testifies in this matter, the Bureau will have every opportunity to object to specific

[5] The Bureau's citation to *Sheet Metal Workers, Local Union No. 24 v. Architectural Metal Works, Inc.*, 259 F.3d 418 (6th Cir. 2001), in support of its position is curious given the testimony of its expert witness. In a footnote in *Sheet Metal*, the Sixth Circuit states that "the construction of unambiguous contract terms is strictly a judicial function . . . ." 259 F.3d at 424 n.4. If that is the Bureau's position, then Dr. Crawshaw's attempt to read limitations on the contractual liability of Atrium after termination is misplaced and his expert opinions, which rely heavily on the purported "limitations" on liability, are rendered meaningless.

testimony and this tribunal will have a fuller context in which to evaluate the Bureau's assertion that the testimony is beyond the scope of Mr. Cascio's expertise. Thus, the Bureau's motion is premature, and this tribunal should not grant the vague relief sought by the Bureau – the exclusion of any testimony regarding the "interpretation of contract provisions or how an arbitration panel would interpret contract provisions."

Dated: April 3, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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CERTIFICATION OF SERVICE

I hereby certify that on the 3rd day of April, 2014, I caused a copy of the foregoing Respondents' Memorandum in Opposition to Enforcement Counsel's Omnibus Motion *In Limine* to Exclude Evidence Pursuant to 12 C.F.R. § 1081.303(b) be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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