

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’ MOTION IN LIMINE TO DISMISS
RESPONDENTS ATRIUM INSURANCE CORPORATION AND ATRIUM
REINSURANCE CORPORATION FOR LACK OF STATUTORY AUTHORITY**

Pursuant to 12 C.F.R. §§ 1081.104(10) and 1081.205, Respondents Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, the “Moving Respondents”), move for an Order striking the Bureau’s claims against them and dismissing Moving Respondents because they are neither Covered Persons nor Service Providers to Covered Persons, and accordingly are not subject to proceedings under Section 1053(b) of the Dodd-Frank Act.

At the Telephonic Scheduling Conference on February 14, 2014, the Bureau made a formal representation to the Administrative Law Judge that this matter is brought under Section 1053(b) of the Dodd-Frank Act:

HONORABLE ELLIOT: . . . Can I get a representation, I’ll ask Mr. Gordon about this, can I get a representation that this case is brought under 1053B? I see that it refers to 1053, but I don’t see 1053B anywhere. Mr. Gordon?

MR. GORDON: Yes, Your Honor, 1053B is correct.

Tr. Sched. Conf. at 17-18, Feb. 14, 2014. Section 1053(b), entitled “Special Rules for Cease-

and-Desist Proceedings,” is expressly limited to “covered person[s] or service provider[s].” 12 U.S.C. § 5563(b)(1)(A), (b)(2). “Covered Person” is defined as “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.” 12 U.S.C. § 5481(6). Moving Respondents do not “engage[] in offering or providing a consumer financial product or service.”¹ They are, however, affiliates of Respondents PHH Mortgage and PHH Home Loans (the “Lender Respondents”), which are covered persons, and PHH Corp., who may be deemed the controlling shareholder of one or both of the Lender Respondents. Accordingly, Moving Respondents could only be subject to proceedings under § 1053(b) if they were also “Service Providers” to the Lender Respondents. They are not.

“Service Provider” is defined as:

any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—(i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

12 U.S.C. § 5481(26)(A). “Service Provider” does not, however include:

a person solely by virtue of such person offering or providing to a covered person—(i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a

¹ “Consumer Financial Product or Service” is defined as “any financial product or service that is described in one or more categories under—(A) paragraph (15) [*defining Financial Product or Service*] and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (B) clause (i) [*extending credit and servicing loans*], (iii) [*providing most real estate settlement services, other than the business of insurance, or performing appraisals*], (ix) [*provision or use of credit reports*], or (x) [*debt collection*] of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A).” 12 U.S.C. § 5481(5) (with brief summaries of cross-referenced provisions added in bracketed italics).

consumer financial product or service through print, newspaper, or electronic media.

12 U.S.C. § 5481(26)(B). In addition, a “Related Person” is “deemed to mean” a Covered Person, and is defined as:

- (i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;
- (ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and
- (iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—(I) violation of any provision of law or regulation; or (II) breach of a fiduciary duty.

12 U.S.C. § 5481(25)(C).

The Notice of Charges does not include any allegation that the Moving Respondents are Covered Persons, Service Providers to PHH Mortgage or PHH Home Loans (or to any other Covered Person), or Related Persons. Yet it is the Bureau’s burden to establish the facts that would support proceeding under Section 1053(b).

Moving Respondents do not provide any “material service” to either of the Lender Respondents “in connection with the offering or provision by such covered person of a consumer financial product or service.” The term “material service” is explained in the statute with reference to two examples: participation in “designing, operating or maintaining” the consumer product or service, or “process[ing] transactions relating to the consumer financial product or service.” 12 U.S.C. § 5481(26)(A)(i), (ii). Here, there is no allegation that the Moving Respondents have engaged in either, and in fact, the Moving Respondents do not participate in “designing, operating or maintaining” the loans made by the Lender Respondents, nor do they “process transactions” relating to the loans. Moreover, they cannot be considered Service Providers to the private mortgage insurers, because private mortgage reinsurance is not a

“Financial Product or Service.” *See* 12 U.S.C. § 5481(15)(C)(i) (excluding the business of insurance). Accordingly, the Moving Respondents are not Covered Persons or Service Providers.

In sum, since Dodd-Frank Section 1053(b) only applies to Covered Persons and Service Providers, since the Moving Respondents are not Covered Persons or Service Providers under the CFPA, and since the Bureau has admitted that this proceeding is brought pursuant to Section 1053(b), the inescapable conclusion is that the Bureau cannot proceed against the Moving Respondents in this forum. Accordingly, the charges against Atrium Insurance Corporation and Atrium Reinsurance Corporation should be stricken, and they should be dismissed from this proceeding. A proposed order is submitted herewith.

Dated: March 19, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

By: /s/ David M. Souders
Mitchel H. Kider, Esq.
David M. Souders, Esq.
Sandra B. Vipond, Esq.
Rosanne L. Rust, Esq.
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 628-2000

Attorneys for Respondents
Atrium Insurance Corporation and Atrium Reinsurance
Corporation

RULE 205 CERTIFICATION

Pursuant to Rule 205(f), counsel for Respondents certifies that they have conferred with counsel for the Enforcement Division in a good faith effort to resolve the issues raised by this Motion and have been unable to resolve the matter by agreement.

By: /s/ David M. Souders
David M. Souders, Esq.
Weiner Brodsky Kider PC
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 628-2000

Attorney for Respondents
Atrium Insurance Corporation and Atrium Reinsurance
Corporation

CERTIFICATION OF SERVICE

I hereby certify that on the 19th day of March, 2014, I caused a copy of the foregoing Respondents' Motion in Limine be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

Lucy Morris Lucy.Morris@cfpb.gov	David Smith dsmith@schnader.com
Sarah Auchterlonie Sarah.Auchterlonie@cfpb.gov	Stephen Fogdall sfogdall@schnader.com
Donald Gordon Donald.Gordon@cfpb.gov	William L. Kirkman billk@bourlandkirkman.com
Kim Ravener Kim.Ravener@cfpb.gov	Reid L. Ashinoff reid.ashinoff@dentons.com
Navid Vazire Navid.Vazire@cfpb.gov	Melanie McCammon melanie.mccammon@dentons.com
Thomas Kim Thomas.Kim@cfpb.gov	Ben Delfin ben.delfin@dentons.com
Kimberly Barnes Kimberly.Barnes@cfpb.gov	Jay N. Varon jvaron@foley.com
Fatima Mahmud Fatima.Mahmud@cfpb.gov	Jennifer M. Keas jkeas@foley.com
Jane Byrne janebyrne@quinnemanuel.com	
William Burck williamburck@quinnemanuel.com	
Scott Lerner scottlerner@quinnemanuel.com	

/s/ Michael Kieval
Michael Kieval