

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 PRECLUDE
THE BUREAU FROM USING THESE PROCEEDINGS TO REGULATE
THE BUSINESS OF INSURANCE OR COLLATERALLY ATTACK
THE ACTIONS OF STATE INSURANCE REGULATORS**

Pursuant to 12 C.F.R. §§ 1081.104(10) and 1081.205, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, “Respondents”), move for an Order precluding the Bureau from attempting to regulate the business of insurance or collaterally attacking the actions of state insurance regulators. In support of this Motion, Respondents state as follows:

Under the McCarran-Ferguson Act, “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.” 15 U.S.C. § 1012(b) (“McCarran-Ferguson”). A state law is “impair[ed]” under McCarran-Ferguson if application of a federal law would “frustrate any declared state policy or interfere with a State’s administrative regime.” *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999).

Central to the Bureau's allegations in this proceeding is the assertion that the reinsurance provided by Respondents Atrium and Atrium Re was purportedly not "real" reinsurance. *See, e.g.,* Order Denying Motion to Dismiss the Notice of Charges or, in the Alternative, for Summary Disposition, Dkt. 67 at 8 ("I find that RESPA Section 8(c)(2) establishes a safe harbor for salary, compensation, or other payment for services actually performed, but only if such payment is bona fide."); *id.* at 16 ("material fact" was "whether Respondents provided bona fide reinsurance.");¹

Yet, under McCarran-Ferguson, the Bureau is precluded from using RESPA to impair the Vermont and New York insurance regulatory schemes by usurping the state regulators' jurisdiction to supervise the reinsurers, or by collaterally attacking the regulators' right to determine the permissibility of reinsurance in their respective states. Likewise, the Bureau would be precluded from using RESPA to collaterally attack any determinations by the private mortgage insurers' respective state regulators approving the reinsurance arrangements at issue.

Atrium Re is licensed and regulated by the Insurance Division of the Vermont Department of Financial Regulation. Vermont has a comprehensive insurance and reinsurance regulatory regime, including extensive regulation of captive insurers. *See, e.g.,* 8 V.S.A. § 6001, *et seq.* (setting forth detailed regulation of captive insurance companies); 8 V.S.A. § 6002 (restricting captive insurers to insuring the risks of affiliated companies);² 8 V.S.A. § 6004 (governing unimpaired paid-in capital and surplus of captive insurance companies); 8 V.S.A. §

¹ Respondents note that, as demonstrated by the Milliman reports and by the substantial reinsurance claims paid by Atrium, the reinsurance clearly was *bona fide*. Since the Bureau is seeking a finding that the reinsurance is not bona fide, however, McCarran-Ferguson is implicated.

² Thus, the Bureau cannot argue that Atrium Re's reinsurance of only risks from loans made by PHH Mortgage or PHH Home Loans somehow evidences a RESPA violation without upending the Vermont statute and regulatory regime in violation of McCarran-Ferguson.

6005 (dividends approved by the regulator); 8 V.S.A. § 6008 (requiring examinations of captive insurance companies); 8 V.S.A. § 6011 (permitting captive insurance companies to provide reinsurance); 8 V.S.A. § 6015 (giving Commissioner the authority to issue regulations governing captive insurance companies); 21-020-005 Vt. Code R. §§ 1-15 (regulations governing captive insurance companies); 21-020-036 Vt. Code R. §§ 1-8 (regulations governing trust accounts, including withdrawals).³

Atrium is licensed and regulated by the Insurance Division of the New York Department of Financial Services. New York also has a comprehensive insurance and reinsurance regulatory regime. *See, e.g.*, N.Y. Ins. Law §§ 309-312 (providing for examination of insurance companies); N.Y. Ins. Law § 1114 (governing reinsurance); N.Y. Ins. Law § 1507 (permitting an insurer to share common management and personnel “with one or more other persons”); 11 N.Y. Comp. Codes R. & Regs. tit. 11, § 126.1, *et seq.* (regulating reinsurance trust agreements); 11 N.Y. Comp. Codes R. & Regs. tit. 11, § 128.0, *et seq.* (procedures for commutation of reinsurance agreements where insurer is impaired or insolvent).

Both states’ regulators regularly supervised and examined their respective licensee, Atrium or Atrium Re, pursuant to a complex state regulatory scheme covering insurance, an issue essentially and exclusively reserved for *state* regulation under McCarran-Ferguson. Moreover, the private mortgage insurers were also supervised and regulated by their respective state insurance regulators. As such, the Bureau’s attempt to second-guess the state insurance regulators and appoint itself as the arbiter of whether reinsurance was “real reinsurance” is irredeemably inconsistent with McCarran-Ferguson. *See Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 564 (7th Cir. 1999) (McCarran-Ferguson prevented federal courts from applying

³ Thus, McCarran-Ferguson precludes the Bureau from arguing that purportedly impermissible withdrawals from trust accounts somehow evidence a RESPA violation.

federal law to question actuarial practices: “Even if the formal criteria are the same under federal and state law, displacing their administration into federal court—requiring a federal court to decide whether an insurance policy is consistent with state law—obviously would interfere with the administration of the state law.”⁴

Finally, in addition to the fact that McCarran-Ferguson precludes the Bureau’s evidentiary theories under RESPA, the CFPA itself—which gave the Bureau the authority to enforce RESPA—precludes this type of collateral attack that would “affect[] the authority” of the state insurance regulators. 12 U.S.C. § 5552(d)(3) (“No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.”).

Accordingly, Respondents respectfully request entry of an Order precluding the Bureau from attempting to regulate the business of insurance or collaterally attacking the actions of state insurance regulators. Pursuant to Rule 205(b)(2), a proposed order is submitted herewith.

* * *

⁴ Some courts have concluded that because *primary* mortgage insurance is a real estate settlement service, RESPA directly regulates insurance in that context and that RESPA is therefore not subject to McCarran-Ferguson with respect to primary mortgage insurance. See *Patton v. Triad Guar. Ins.*, 277 F.3d 1294, 1299 (11th Cir. 2002) (incorrectly holding that “underwriting” means primary mortgage insurance). While Respondents disagree with those cases, they are not relevant here, since it is not disputed that RESPA does not directly regulate reinsurance.

Dated: March 19, 2014

Respectfully submitted,

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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.

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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 to Preclude the Bureau from Using these Proceedings to Regulate the Business of Insurance Or Collaterally Attack the Actions of State Regulators to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties:

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