UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

United States Department of Housing and Urban Development,	)	
Petitioner,	)	HUDOHA 15-JM-0030-PH-003
v.	)	AUG 4 2015
TXL Mortgage Corporation,	)	
Respondent.	)	

For the Petitioner: Sean M. Brown, Esq.; Joel A. Foreman, Esq.; Geoffrey L. Patton. Esq.

For the Respondent: Jason W. McElroy, Esq; David M. Souders, Esq., Troy W. Garris, Esq. at Weiner Brodsky Kider PC

ORDER ON SECRETARIAL REVIEW

On June 22, 2015, the Petitioner submitted a *Petition for Review by the Secretary of an Interlocutory Order Certified by the ALJ* ("Petition"), appealing the May 13, 2015, *Order Granting in Part and Denying in Part Respondent's Motion to Dismiss*[1] ("Order") issued by Acting Chief Administrative Law Judge ("ALJ") J. Jeremiah Mahoney. In the *Order*, the ALJ dismissed Counts 4, 6, 7, 8, 9, 10 and 11 stating that each of these claims is in excess of the $150,000 jurisdictional cap under the Program Fraud Civil Remedies Act ("PFCRA"). On June 10, 2015, the ALJ issued an *Order Certifying Interlocutory Issue and Granting Stay of the Proceedings* ("Interlocutory Order") to allow Petitioner to file a Secretarial Appeal of the *Order*. In its *Petition*, the Petitioner argues that under PFCRA, the reviewing official has discretion to reduce the claim amount to fall within the jurisdictional cap of $150,000. The Petitioner requests that the Secretary modify the *Order* to reflect that the reviewing official properly reduced the claim for Counts 4, 6, 7, 8, 9, 10 and 11 to conform with the $150,000 jurisdictional cap of PFCRA.[2] On July 10, 2015, Respondent filed its *Brief in Opposition to Government's Brief in Support of Appeal for Secretarial Review* ("Opposition"). On July 16, 2015, Petitioner filed a

[1] The Order was certified by the ALJ on June 10, 2015.

[2] The Order states that there are eight claims that exceeded the jurisdictional cap. However, only seven claims are identified as having been dismissed. *See Order* at p. 2.

Motion for Leave to File a Reply Brief and a Reply Brief ("Reply Brief") in response to Respondent's *Opposition*. By Order dated July 22, 2015, I granted the Petitioner's Motion for Leave and accepted Petitioner's *Reply Brief* for consideration. The July 22, 2015, Order, also permitted Respondent to file a response to Petitioner's *Reply Brief* no later than July 27, 2015. On July 27, 2015, Respondent filed *Respondent TXL Mortgage Corporation's Sur-Reply in Opposition to Government's Reply in Support of Appeal* ("Sur-Reply").

Upon review of the entire record in this proceeding, the *Petition* is **GRANTED** for the reasons set forth below. Pursuant to 24 C.F.R. § 26.52 the ALJ's May 13, 2015, Order dismissing Counts 4, 6, 7, 8, 9, 10 and 11 is **MODIFIED** in part.

BACKGROUND

The Petitioner brought a PFCRA action based on false claims submitted to the Federal Housing Administration ("FHA"), an organizational unit of the United States Department of Housing and Urban Development ("HUD") under its Single Family Insurance Program, established in accordance with Section 203(b) of the National Housing Act (12 U.S.C. 1709(b)). Under the program, homebuyers may obtain FHA mortgages from HUD-approved lenders to purchase houses with low down payments. FHA mortgage insurance provides lenders with protection against losses if the homeowners default on their mortgage loans. The lenders bear less risk because FHA will pay a claim to them in the event of a homeowner's default. Loans must meet certain requirements established by FHA to qualify for insurance. FHA insured the twelve loans underwritten by Respondent that are the subject of the complaint. These twelve loans went into default and the respective holding mortgagees submitted FHA insurance claims for payment on the defaulted loans.

PFCRA, enacted in 1986, allows administrative agencies to pursue remedies for false or fraudulent claims for benefits or payments that the Department of Justice (DOJ) has declined to litigate.[3] *See* 31 U.S.C. § 3802. The purpose of PFCRA is to address small-dollar cases of fraud against the government because in cases of this nature, it is economically impracticable to pursue since the actual dollar loss to the government and the potential recovery in a civil suit may be exceeded by the government's cost of litigation. H.R. Rep. No. 99-1012 at 258. These unaddressed fraud cases not only cause monetary loss to the agency but "erode public confidence in the administration of these programs." *Id.* HUD implemented PFCRA in 1988. HUD's regulations at 24 CFR part 28 mirror the statute in providing a procedure for the agency to impose civil liability against persons who make, submit, or present false, fictitious or fraudulent claims to the agency.

PFCRA sets out procedures for initiating claims of alleged fraud. An investigating official, typically the Office of Inspector General at the agency, investigates suspected fraud actions and makes a referral under PFCRA to the agency's Office of General Counsel who is the reviewing official. 31 U.S.C. § 3803(a)(1); 24 C.F.R. § 28.15. The reviewing official makes the determination based on the investigating official's Report of Investigation regarding whether a

[3] The statute defines the term "claim" as any request, demand, or submission made to an authority (executive department) for property, services, or money (including money representing grants, loans, insurance, or benefits). 31 U.S.C. § 3801(a)(3)(A).

claim meets the statutory requirements. If a claim meets the statutory requirements, the reviewing official submits a written notice to DOJ seeking approval to proceed with the matter. 31 U.S.C. § 3803(a)(2); 24 C.F.R. § 28.20. Once DOJ has approved the action, an agency may then file a complaint. 31 U.S.C. § 3803(b)(2); 24 C.F.R. § 28.25.

In the instant case, HUD's Inspector General issued a Report of Investigation to the reviewing official on October 30, 2012. The reviewing official conducted a legal review of the allegations and determined the claims could be brought under the PFCRA. Subsequently, the reviewing official submitted a letter to DOJ seeking approval of the proposed administrative suit. On May 7, 2014, Petitioner received approval from DOJ to bring an administrative suit. On January 16, 2015, Petitioner filed its complaint against Respondent. Petitioner sought relief based upon Respondent's underwriting of twelve loans which resulted in claims for insurance benefits submitted to HUD. The suit alleged that these claims were false because of Respondent's false certification that each loan was eligible for insurance. Petitioner contends that the loans contained numerous material violations of FHA requirements that rendered them ineligible.

On February 13, 2015, Respondent filed an Answer, Request for Hearing, and a Motion to Dismiss. Petitioner filed an Opposition to that Motion to Dismiss on February 23, 2015. On May 13, 2015, the ALJ issued the *Order* dismissing Counts 4, 6, 7, 8, 9, 10 and 11 of Petitioner's complaint and denied Respondent's Motion on all other grounds. In the *Order*, the ALJ found that the PFCRA jurisdictional cap is determined by the mortgage insurance claim made to HUD. Therefore, the ALJ concluded that for PFCRA jurisdiction to attach, the mortgage insurance claim must not exceed $150,000. The ALJ stated that if Congress intended PFCRA to reach fraud regardless of the jurisdictional amount involved, it would have eliminated the jurisdictional cap entirely. On June 10, 2015, the ALJ issued an *Interlocutory Order* to allow Petitioner to file a Secretarial Appeal of the *Order* because the ALJ recognized the possibility of a substantial ground for difference of opinion on the implementation policy as it relates to PFCRA.

In its *Petition*, Petitioner alleges that the seven claims are not barred by the $150,000 jurisdictional cap of PFCRA because it elected to pursue amounts within the jurisdictional cap. Petitioner observes that for decades it has reduced the amount of the claim to $150,000 in order to seek a remedy for the injury to the public and stay within the jurisdictional cap of PFCRA. To support its position, Petitioner argues that 31 U.S.C. § 3803(c)(1)[4] of PFCRA gives the reviewing official discretion to reduce the amount of money being requested or demanded in violation of § 3802 to meet the jurisdictional cap of $150,000. *Petition* at p. 6. Petitioner places an emphasis on an excerpt of the statute that states, "the reviewing official 'determines' that an amount of money in excess of $150,000 is requested or demanded." *See id.* Petitioner states, "the term 'determines' is a discretionary term, providing for the consideration of various options." *Id.* Respondent filed its *Opposition* on July 10, 2015 where it argued that the text of PFCRA unambiguously prohibits actions based on claims made in excess of $150,000; that

[4] No allegations of liability under section 3802 of this title with respect to any claim made, presented, or submitted by any person shall be referred to a presiding officer under paragraph (2) of subsection (b) if the reviewing official determines that— **(A)** an amount of money in excess of $150,000; or **(B)** property or services with a value in excess of $150,000, is requested or demanded in violation of section 3802 of this title in such claim or in a group of related claims which are submitted at the time such claim is submitted.

agencies may only act based on powers enumerated by statute; and that Petitioner's reliance on certain cases and statutes to support its position was misplaced. *Opposition* at pp. 2-4.

On July 16, 2015, Petitioner filed its *Reply Brief* in which it sought to clarify arguments it felt Respondent misconstrued, as well as include new analysis of the situation based on the U.S. Supreme Court case *King v. Burwell*, which was issued on June 25, 2015. By Order dated July 22, 2015, I granted Petitioner's Motion for Leave and accepted Petitioner's *Reply Brief* for consideration. The July 22, 2015, Order, also permitted Respondent to file a response to Petitioner's *Reply Brief*, which Respondent subsequently filed on July 27, 2015.

DISCUSSION

I. PFCRA Provides Agencies With Discretion to Lower Claim Amounts to Meet the Jurisdictional Cap.

The sole question on appeal is whether Congress allowed the government to choose remedies in pursuing PFCRA actions or limited the government's choice of remedies by requiring the government to pursue the precise amount of the claim submitted to the government in furtherance of the allegedly fraudulent scheme. After reviewing PFCRA, its relationship to the False Claims Act (FCA), the case record and briefs filed on appeal, I conclude that Congress did not intend to limit the government's choice of remedies by requiring the government to only use PFCRA to pursue the precise amount of the claim submitted to the government in furtherance of the allegedly fraudulent scheme or forgo a PFCRA action.

a. Analyzing PFCRA Under the *King v. Burwell* Ambiguity Standard.

Petitioner submitted a supplemental *Reply Brief* citing a recent U.S. Supreme Court case that supports its argument that the statute allows for the reviewing official to reduce the claim amount. *See Reply Brief* at pp. 1-3. In *King v. Burwell*, the Court interpreted a section of the Patient Protection and Affordable Care Act (the Act). 192 L. Ed. 2d 483 (2006). The Supreme Court held that when a statute is ambiguous, one must look to the broader structure of the statute to determine the meaning of the unclear provision. In *King*, the Court concluded that the plain language of the text was ambiguous and therefore looked to the broader structure of the Act to determine the true meaning of Section 36B, which was at issue in the case. *Id.* at 498. The Court looked at several other provisions of the Act along with the purpose of the statute and determined the true meaning of the text. The same analysis can be applied to this case.

The parties have expressed differing opinions on how the provision "reviewing official determines" should be interpreted. Petitioner states, "the term 'determines' is a discretionary term, providing for the consideration of various options." *Petition* at p. 6. Respondent argues that the statute unambiguously prohibits the reduction of claims and cites *Roberts v. Shinseki*, 647 F.3d 1334 (Fed. Cir. 2011), to support its argument.[5] Given the parties' contrasting interpretations, the provision could be viewed as ambiguous. While both parties interpret the phrase "reviewing official determines" to hold different, but plausible meanings, the Petitioner's interpretation aligns with the intent and purpose of the statute and supports the notion that

[5] *Roberts* is not applicable here because the action in that case was not brought under the PFCRA statute.

Congress intended the statute to allow reduction of the claims for agencies to address the cases of fraud it suffers and to deter future conduct.

The transformation of HUD's own implementing regulation further supports that the provision at issue in the statute is ambiguous. HUD's current regulation reads, "Liability...shall not lie if the amount of money or value of property or services claimed exceeds $150,000 as to each claim that a person submits." The latest language of the regulation has omitted numerous words that were included when the regulation was initially implemented in 1988.[6] In the latest version, the phrase "reviewing official determines" has been completely eliminated. In the 1990's, all agencies were called upon to streamline their regulations in an effort to eliminate regulations that were overlapping and outdated and to create a better system for creating new regulations. 58 Fed. Reg. 190 (Oct. 4, 1993). As a result of this mandate, HUD refined its regulations causing phrases like that above to be omitted. In response to the President's regulatory reform initiatives, HUD stated in the preamble of the 1996 PFCRA rule update, "This final rule also streamlines the substantive provisions of the PFCRA regulations by eliminating unnecessary language and by clarifying the remaining language." 61 Fed. Reg. 186 (Sept. 24, 1996). However, the preamble does not identify what portions of the regulations were streamlined or what was clarified. It is unclear from the regulatory history whether HUD's streamlining effort of this regulation explicitly demonstrates how it viewed the role of the reviewing official or if it was simply an effort to eliminate as many words as possible in accordance with the Presidential mandate. Thus, the revision of the regulation further supports that there is ambiguity with respect to the role of the reviewing official.

When a statute is determined to be ambiguous it is necessary to consider the statute within its broader structure to determine the true meaning. PFCRA gives the reviewing official authority to (1) make determinations as to the merits of the investigating official's report of investigation (31 U.S.C. § 3803(a)(2)); (2) settle or compromise pending actions brought under the Act (31 U.S.C. § 3803(j)); and (3) decide whether to refer an action to a presiding officer after approval by DOJ (31 U.S.C. § 3803(b)(2)). *See Petition* at p. 5. In addition, the Attorney General may decide to approve the referral and still file suit under different statutes including FCA. In fact, PFCRA acknowledges that other civil remedies are available at the same time a PFCRA action is being pursued, which suggests that it is the government, acting through DOJ and the agency, that may fashion a remedy for fraud claims.[7] Each of these sections within PFCRA bestows authority upon the reviewing official to make a determination of what action should be taken based on the facts of the case. Taken together, each of the provisions relate to whether the authority – HUD – is allowed to bring an action. It would seem futile for the reviewing official to make an affirmative decision with respect to each of these portions of the PFCRA, but be prohibited from allowing the agency to go forward with the case because it cannot meet the jurisdictional cap. This structure suggests that Congress did not intend to limit the government's pursuit of PFCRA claims but instead meant for the reviewing official and DOJ

[6] 5 C.F.R. § 28.11(a)(2) enacted in 1988 stated: "In the case of allegations of liability under § 28.5(a) with respect to a claim, the reviewing official determines that, with respect to the claim or to a group of related claims submitted at the same time the claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 28.5(a) does not exceed $150,000."

[7] In *Roberts*, the court explained that the government has several mechanisms at its disposal to recover benefits resulting from fraudulent claims, and PFCRA specifically contemplates parallel proceedings. *Roberts* at 1341.

to fashion a remedy of the government's choice, including bringing an action within the jurisdictional cap. Therefore, I find that in viewing the broader structure of PFCRA, the accurate reading and interpretation of the statute permits the reviewing official to reduce the claim amount to meet the jurisdictional cap.

b. The Legislative Intent Contradicts Statutory Plain Meaning and Allows Reviewing Official to Reduce Claims.

Even if, as the ALJ found and the Respondent argues, the statute and implementing regulation are viewed as not being ambiguous, the legislative intent and purpose of the statute contradicts the ALJ's findings and Respondent's arguments. When applying the traditional rules of statutory construction, one must first determine if the statute provides a clear expression of Congress' intent and this can be determined by looking at the "plain meaning" of the statute. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (U.S. 1984); *R.G. Johnson Co. v. Apfel*, 994 F. Supp. 10, 13 (D.D.C. 1998). Where the plain language of a statute is clear, courts generally will not look to the intentions of the drafters unless it proposes a clearly contradictory legislative intent. *Apfel*, 994 F. Supp. at 13; *Qi-Zhuo v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995); *Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (U.S. 1991). One must only reach a discussion of a statute's purpose if the plain language of the statute does not provide clarity or proposes a conclusion that is in clear contradiction to the drafter's intentions. *Ron Pair Enters.*, 489 U.S. 235, 242; *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (U.S. 1980). Here, the construction of the statute offered by the ALJ and the Respondent is clearly contradictory to its legislative intent.

In viewing the purpose of PFCRA, Petitioner correctly notes that it was enacted to fill a remedial gap for those small dollar cases that DOJ chose not to pursue under FCA and other statutes. *See* H.R. Rep. 99-1012 at 257-58. PFCRA was to provide a remedy for the government to recoup some of the money or services lost as a result of fraud by third parties. *Id.* at 258. Considering Congress' purpose for the enactment of this legislation, the ALJ's reading of the meaning of the statute would foreclose agencies from pursing hundreds if not thousands of fraud cases simply because the initial claim amounts exceed the $150,000 jurisdictional cap. It is improbable that Congress would provide a remedy for the government to pursue individuals who have "robbed" it of money only for a large portion of them to escape liability because DOJ will not pursue all claims above $150,000. Congress recognized that fraud was a serious issue in federal programs and if many of these cases go unaddressed, it would erode public confidence in how the programs are administered. *See* H.R. Rep. No. 99-1012 at 258. By allowing the reduction of the initial claim amount, it affords agencies an opportunity to at least recover a portion of the government's money and also penalizes the individual in hopes of deterring future cases of fraud. If one reads the statute alone as preventing the reduction of the initial claim by the reviewing official, this reading squarely contradicts Congress' purpose. Therefore, in order to avoid any contradiction, one must consider the purpose and intent undergirding the statute, which would allow the reviewing official to reduce the claim amount to meet the jurisdictional cap.

II. Policy Considerations Support Lowering Claim Amounts to Meet the Jurisdictional Cap.

FHA is the largest insurer of mortgages in the world and provides a huge economic stimulation to the country in the form of home and community development, which trickles down to local communities in the form of jobs, building suppliers, tax bases, schools, and other forms of revenue. The FHA, which has been assisting people with purchasing homes since 1934, allows homebuyers to obtain FHA-insured mortgages from HUD-approved lenders to purchase homes with lower down payments, low closing costs and easy credit qualifying. By insuring commercial lenders against loss, HUD encourages them to invest capital in the home mortgage market. Under the FHA Single Family Insurance Program, the maximum insurable loan under the HUD FHA single family loan program has now risen to between $271,050 and $625,000. *Petition* at p. 13. In addition, home prices have increased significantly since PFCRA was passed, with a large majority of home sales occurring above $150,000. *Id* at 13 -14. Because of the rise in real estate and maximum insurable loan amounts, the subsequent claims for insurance benefits on such loans are often in excess of $150,000.

Respondent was a HUD-approved Direct Endorsement (DE) lender, which means that HUD did not review applications for mortgage insurance generated by Respondent, or other DE lenders, prior to the execution of the mortgage. Because HUD relies on the DE lenders to determine which loans should be endorsed for FHA insurance, Petitioner requires that these lenders exercise the same level of care it would exercise in obtaining and verifying information for a loan. Absent due diligence as alleged in Petitioner's Complaint, the borrowers are subject to go into default, thus resulting in a claim to the insurance fund.

As discussed above, Congress implemented PFCRA to allow agencies to pursue remedies for false or fraudulent claims for, among other things, insurance claims that the DOJ authorizes the agency to pursue as part of the whole government remedy. *See* 31 U.S.C. § 3802. Otherwise, these cases would be unaddressed. These unaddressed fraud cases not only cause monetary loss to the government, but "erode public confidence in the administration of these programs." H.R. Rep. No. 99-1012 at 258. HUD is charged with administering the FHA Single Family Insurance Program and protecting the FHA insurance fund. The only administrative remedy available to Petitioner regarding these fraudulent insurance claims is to file an enforcement action under PFCRA. Therefore, in cases in which HUD has paid out more than $150,000 due to possible fraud, and DOJ has declined to pursue FCA relief, Petitioner has for decades discretionarily reduced the amount of the *claim* to $150,000 in order to seek a remedy for injury to the public while staying within the jurisdictional cap of the PFCRA statute. [emphasis added].[8] *Petition* at p. 4.

To deter HUD-approved lenders from underwriting loans that are not eligible for FHA insurance, Petitioner must have authority to reduce the claim amounts to comply with the jurisdictional cap. PFCRA is a mechanism that allows HUD to recover the government's money that has been paid out on these fraudulent insurance claims. By deterring such conduct,

[8] In *In Re Alvarez*, HUDALJ No. 04-05-PF (June 23, 2005), the reviewing official reduced the claims to meet the jurisdictional cap, which the ALJ acknowledged in its Order. That case was adjudicated by both the ALJ and the District Court. *See id.*; *see* 2:05-cv-07903-GPS (C.D. Cal. Nov 21, 2006).

Petitioner is protecting the public confidence in the administration of the FHA Single Family Insurance Program. Based on these policy considerations, I find that PFCRA must be interpreted to allow the reduction of the claim amount to fall within the $150,000 jurisdictional cap.

III. The Secretary or Designee's Deadline Extension.

Respondent argues in its *Sur-Reply* that the Secretary, or designee, did not have authority to extend the time by which to make a determination on the *Petition*. As correctly noted by the Respondent, HUD's regulations instruct the Secretary, or designee, to issue a written determination within 30 days after receipt of an appeal for cases timely appealed under the PFCRA. 24 C.F.R. § 26.52(l)(2). The written decision of the Secretary, or designee, shall be the final agency action. But, if the appeal is from an initial decision, that initial decision shall become final if the Secretary, or designee, has not acted within 30 days. *Id.* Here, the appeal is from a certified interlocutory order not an initial decision, as described in 24 C.F.R. § 26.50. Under 24 C.F.R. § 26.52, the Secretary, or designee, shall review a certified interlocutory ruling. There is nothing that suggests that the Secretary or designee's written determination from a certified interlocutory order will not be the final agency action. In fact, pursuant to 24 C.F.R. § 26.51(d), the ALJ's *Order* shall only be effective pending review by the Secretary or designee.

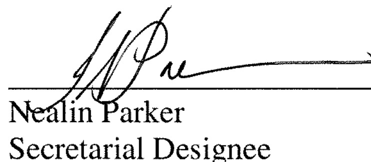
On July 16, 2015, Petitioner submitted a *Reply Brief* to incorporate recent case law to the issue. In accordance with 24 C.F.R. 26.52(d), I, as the Secretary's designee, in my sole discretion, permitted Petitioner's filing of an additional brief. In fairness, I provided Respondent an opportunity to respond to Petitioner's *Reply Brief.* To accommodate the extension of time to file and consider additional briefs, I ordered that the deadline for issuing my written determination was extended to August 17, 2015. It is axiomatic that a tribunal has the authority to issue necessary and ancillary orders to protect the judicial process as was done here by giving the Respondent an opportunity to file its *Sur-Reply*. Finally, the regulations do not prohibit the extension of time by the Secretary, or designee, for a determination to an appeal of an interlocutory ruling.

CONCLUSION

Upon review of the entire record in this proceeding, the *Petition* is **GRANTED** for the reasons set forth above. Pursuant to 24 C.F.R. § 26.52, the ALJ's May 13, 2015, Order is **MODIFIED**, in part, as it relates to the issues raised in the *Petition*.

IT IS SO ORDERED.

Dated this 4th day of August, 2015



Nealin Parker
Secretarial Designee