IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, on behalf of itself and all others similarly situated,	)	**No. 02 C 5893**
Plaintiffs,	)	**Judge Ronald A. Guzmán**
v.	)	
HOUSEHOLD INTERNATIONAL INC., et al.,	)	
Defendants.		

ORDER

Household has requested a voir dire of plaintiff's expert witness, Catherine Ghiglieri, to determine whether she was admonished about the Court's ruling regarding evidence of the terms of the consolidated settlement between Household and the various state attorneys general and enforcement agencies. Prior to trial, this Court ruled that, in keeping with the spirit of Federal Rule of Evidence 408, plaintiffs could not rely upon evidence of the terms of the settlements (as opposed to the various AG investigatory findings) to prove defendants' knowledge of predatory lending practices within its organization. However, the Court has also ruled that otherwise inadmissible facts or data relied upon by experts may be admitted to assist the jury in evaluating the expert's opinion. That these two rulings might overlap is not an issue previously raised by either plaintiffs or defendants. It appears that this is what happened in the cross-examination of Ms. Ghiglieri.

The relevant questioning actually began much earlier than the particular answers to which defendants' counsel appears to be objecting. It began when Ms. Ghiglieri was asked if she knew the percentage of Household's loans that generated complaints about effective rate usage. She answered that although she did not know the percentage she knew it to be a large number of loans because Household calculated refunds of $1.2 billion for the effective rate presentation complaints. (Real Time Tr. at 710-11.) A similar question regarding insurance packing results in a similar answer (a referral to $160 million in refunds set aside for insurance packing allegations) (Real Time Tr. at 718-19.) Questions about whether Household engaged in a "dialogue" with the State of California regulators regarding the legality of its prepayment penalties led to the following exchange:

> Q. And the first paragraph says, Tom Detelich, Tom Schneider and I met with representatives of the California Department of Corporations on Monday to discuss the AMTPA prepayment penalty/late fee preemption. The meeting went very well. The response from the DOC was guardedly positive for the prepayment penalty preemption. They did not object to the preemption. Do you see that?

Ms. Ghiglieri responds:

> A. Yes. But the remainder of the sentences go to what I was talking about, which is they went into California; they said this is what we want to do; California said we don't see anything at the moment, but we want you to send us additional information. I did not see a follow-up from this discussion where California blessed it. In fact, I think California *participated in the settlement regarding prepayment penalties* -- well, I guess that was a couple of years later.

(Real Time Tr. at 765-66 (emphasis added).) As can be seen, the witness' mention of the settlement comes in response to defense counsel's cross-examination that attempted to force her to admit that the State of California investigation did not agree with her conclusion that defendants were engaged in predatory lending practices. This was the

thid indication that the witness would be relying on the terms of the settlement agreement, including the fact that so many states joined in it, as support for her opinion that Household was engaged in widespread predatory lending practices. At this point, it should not have been a surprise to defense counsel.

But defense counsel did not object, ask for sidebar or request that the Court take any corrective action in any of the prior occasions or on this occasion. Instead, he moved on to the issue of flipping or refinancing loans. His approach here was to point out that the number of complaints about this alleged abuse is so small as to be insignificant. Once again, Ms. Ghiglieri's answer was a reference to the terms of the settlement to corroborate her conclusion that the problem was a large one.

> Q. What percentage of Household loans are you now saying -- what percentage of Household refinances are you now saying constitute flipping?
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> A. I don't know the number, but I do know that *when they looked at it internally for refunding for loan flipping, it came out to -- I think it was $60 million.* So it was a large number of loans that they flipped.

(*Id.* at 769 (emphasis added).) Ms. Ghiglieri, it appears, was again relying upon the amount of money Household contemplated paying out as reparation for the alleged loan flipping in the settlement agreement with the various state regulatory agencies as one of the bases for her conclusion that the problem was widespread. Again, counsel did not object, ask for a sidebar or request clarification from the Court regarding the witness' testimony about the settlement agreement terms. Instead, he proceeded to a new set of questions.

Defense counsel then asked the witness if she was familiar with the term "tone at the top." She answered:

> Well, "Tone At the Top" is a term that came into being with Sarbanes-Oxley, and it has to do with corporate governance. And in the Bank Directors College classes that I hold for the bank directors, this is something that we teach them: How important "Tone At the Top" is. And that means that they have a corporate culture that requires ethical behavior, and they have a code of conduct; and, then, they check to make sure that the way that their employees are behaving is in compliance with that. And that's what Household didn't do here. They didn't focus on compliance during this 1999 to 2002 time frame, to make sure that what Mr. Gilmer was saying was, in fact, happening.
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> And, really, how could they have because the products that they were offering consumers, the way that they were training their employees and the way they were compensating their employees, how could they expect anything else other than predatory lending to be conducted?

(*Id.* at 805.)

Counsel then attempted to establish once again that these were her opinions and not ones necessarily shared by other regulators.

Q. Those are your opinions?

A. Yes.

Q. And you believe the regulators, who you referred to in your direct testimony, share those opinions?

A. Many of them shared my opinions, yes.

Q. And there are many other regulators who don't share those opinions, correct?

A. I'm not sure I understand. That didn't think they engaged in predatory lending?

Q. Correct.

(*Id.* at 805-06.) Predictably, as she had done several times previously, the witness countered this assertion by pointing out that all of the regulators ultimately did agree with

her as evidenced by their participation in the multi-state settlement with Household regarding its alleged predatory lending.

> A. There were a few states that issued reports that didn't show those types of violations. And I don't know how expansive their -- the scope of their -- examination. But, ultimately, all 50 states came to an agreement with Household and fined them $484 million for these predatory lending practices.

(*Id.* at 806-07.) That the regulators of all fifty states believed Household was engaged in predatory lending practices because they all agreed to fine Household $484 million, is a predictable response to a question that implied that some state regulators did not conclude Household was a predatory lender.

After this response, as on all of the other prior occasions, defense counsel did not object, move to strike, ask for a sidebar or in any other way manifest either surprise or a belief that he had been prejudiced. Instead, he forged ahead on the same topic, *i.e.*, whether there were regulators who disagreed with Ms. Ghiglieri's conclusions. In particular, he attempted to point out the inadequacies in the examinations done by the states of Washington and Minnesota to undermine her opinion. Defense counsel did this by directing Ms. Ghiglieri's attention to earlier reports that appear to conclude that Household was not engaged in predatory lending. Of course, the witness' response was that, after a full investigation and sharing of information, all of the states concurred with her as evidenced by their participation in a collective effort to obtain reparations in the settlement for Household's predatory lending practices.

The Court sees no basis for conducting voir dire of this witness to determine whether she was admonished about the Court's ruling regarding use of the terms of the

settlement agreement as evidence that Household engaged in predatory lending practices. First, as pointed out above, there were two rulings by the Court which might arguably apply to the situation, yet neither of those rulings directly addressed the precise issue raised by Ms. Ghiglieri's answers. The ruling most on point held that the evidence underlying Ms. Ghiglieri's expert opinions would be admitted for a limited purpose – to assist the jury in evaluating the expert's opinions. The jury was instructed in this regard with a joint instruction agreed to by the parties. It is clear, from her testimony, that Ms. Ghiglieri relied upon the existence and terms of the multi-state settlement in reaching her conclusions regarding predatory lending. Even so, in direct examination she was not asked and did not testify regarding the settlement itself or the terms of the settlement. Rather, her testimony revolved around the examinations done by the various state agencies, their findings and the conclusions she reached from this material. This testimony comported with both of the Court's prior rulings. It was not until cross-examination that testimony regarding the terms of the settlement was elicited. On each such occasion, her answer was responsive to the question. Moreover, it was clear early in the examination that when questioned about the validity of the examinations done by state regulators, their conclusions, the size of the examinations and about seemingly contradictory earlier investigations, her response would be that the actions ultimately taken by the various state regulatory agencies which, culminated in a large settlement with Household, justified her conclusions. In spite of this, no objection was made when the first rather vague reference was made to the settlement. No objection was made when the second reference was made to the settlement. No objection was made when the third

or fourth references were made to the settlement. And, rather than objecting on the last such occasion, counsel responded by turning the answer to his benefit:

> Q: Did you know that the market cap of Household's stock went up, in response to that settlement, by $3.3 billion the next two days? Did you know that?
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> A. I have no knowledge of that.
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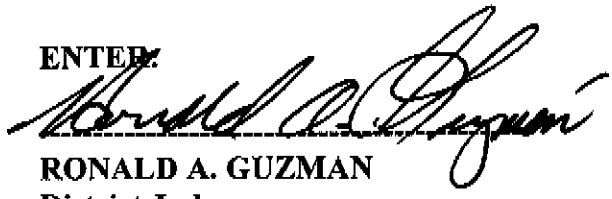
> Q. I didn't think so.

(*Id.* at 865.) Whatever objections there might have been to Ms. Ghiglieri's answers, they have clearly been waived. First, the answers were elicited on cross-examination, not in direct. Second, her answers were responsive to the questions. Third, counsel was given a clear indication that the witness would be relying on the terms of the settlement agreement early on and nevertheless persisted in continuing with that line of questioning without seeking the Court's assistance or in any way objecting to the witness' use of the settlement agreement terms in her answers. Fourth, counsel went a step further and actually utilized the witness' response regarding the size of the settlement to force from her a favorable admission regarding one of the key issues in the case. An attorney cannot continue a course of cross-examination in the belief that it is advantageous to his case while harboring or saving a potential objection to the witness' answers to be used only if it turns out the cross-examination is not as successful as he had wished. An objection not seasonably raised is waived. Finally, neither side sought a clarification of the Court's ruling that evidence regarding the underlying bases of Ms. Ghiglieri's opinions may be introduced even though it is clear from the deposition testimony that she relied extensively on the cooperative investigations and the results of those investigations - the ultimate result being the $484 million settlement.

For all of the foregoing reasons, the application to conduct a voir dire of plaintiff's expert witness, Ms. Ghiglieri, is denied.

Dated: April 6, 2009

SO ORDERED **ENTER:**



RONALD A. GUZMAN
District Judge