

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

IN THE MATTER OF:

Local Government Center, Inc.; et al

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Case No.: C-2011000036

**LGC’S MOTION IN LIMINE TO EXCLUDE TESTIMONY
OF MICHAEL A. COUTU ON TWO ISSUES OF NEW HAMPSHIRE LAW**

Respondents Local Government Center, Inc. and affiliated entities (“LGC”) move to exclude the testimony of Michael A. Coutu on (1) the meaning of certain provisions of R.S.A. 5-B, and (2) the contours of New Hampshire Law on fiduciary duties and their breach. Mr. Coutu is not qualified to offer these opinions, and his testimony in these areas is not reliable.¹

Argument: Mr. Coutu is Not Qualified by Knowledge, Skill, Experience, Training, or Education as an Expert on the Statutory and Common Law of New Hampshire, and His Testimony on These Subjects Is Not Reliable.

“A witness is ‘qualified as an expert by knowledge, skill, experience, training, or education.’” *Goudreault v. Kleeman*, 158 N.H. 236, 245 (2009)(quoting N.H. R. Evid. 702). “In deciding whether to qualify a witness as an expert, the trial judge must conduct an adequate investigation of the expert’s qualifications.” *Id.* (internal quotation marks omitted). With respect to several of the opinions Mr. Coutu offers in his Expert Witness Report (“Report”)—opinions he offers on *legal* issues, as opposed to issues concerning standards and practices in the insurance industry—Mr. Coutu has no discernible qualifications to testify as an expert. Accordingly, his opinions in these areas should be excluded.

¹ Mr. Coutu expresses many opinions. During the hearing, LGC will challenge his credentials in more areas than delineated in this Motion. The decision to reserve and to raise those challenges at that time should not be read as a concession that he is qualified in any area.

A. Mr. Coutu lacks any credentials or training that would qualify him to offer opinions on the operation of RSA 5-B.

In his Expert Witness Report, Mr. Coutu offers opinions on two subjects on which he is not qualified as an expert by knowledge, skill, experience, training, or education: (1) the meaning of certain provisions of R.S.A. 5-B; and (2) the contours of New Hampshire Law on fiduciary duties and their breach. Mr. Coutu offers the following opinions (*inter alia*) in his Expert Witness Report:

- “As currently constituted, LGC’s Board does not meet the requirements of [Chapter 5-B:5(I)(b)].” (Coutu Report at 10 (**Exhibit A** hereto) at 10).
- Provisions of LGC’s bylaws that “seek to limit the amount which could be distributed to the member political subdivisions” are “in violation of” RSA 5-B:5(I)(c). *Id.* at 12.
- “[A] rate crediting feature . . . does not satisfy the provisions of RSA Chapter 5-B:5(I)(c) with respect to the return of excess earnings and surplus.” *Id.* at 13.
- “LGC’s ‘one size fits all’ approach . . . places in peril the fiduciary duties and obligations that a dedicated board (with respect to the Risk Pools) would be required to fully discharge as a matter of law.” *Id.* at 10.
- “[T]he current board construction is fraught with conflicts” such that the Board has “fail[ed] to meet its obligations to the members of the HT risk pool.” *Id.* at 11.
- “[T]he failure to make dividend distributions to the members of HT pursuant to RSA Chapter 5-B:5(I)(c) is yet another breach of fiduciary duty.” *Id.*
- “Cash distributions made from HT and PLT to the Real Estate subsidiary . . . are further evidence of the Board’s breach of fiduciary duty owed to the these [sic] two risk pools.” *Id.*
- The fact that LGC may have “served from time to time as an executive recruiting firm where it has assisted municipalities in finding qualified candidates to fill vacant positions . . . some of whom sit on LGC’s Board . . . raises potential concerns with respect to the duty of loyalty to LGC . . .” *Id.*

Mr. Coutu does not have a law degree or other legal training. (Deposition of Michael A. Coutu, March 30, 2012) (“Coutu Dep.”)(**Exhibit B** hereto) at 97-98.) He has not studied

Chapter 5:B or its legislative history, beyond having read the statute. *Id.* at 98. Given that Mr. Coutu has no legal training and no expertise in Chapter 5:B, other than the fact that he “just can read English” (Coutu Dep. at 159), he is not qualified to offer expert testimony on the meaning of Chapter 5:B. Mr. Coutu has provided no evidence, either in his Report or at his deposition, that he possesses “knowledge, skill, experience, training, or education” (Rule 702) that would qualify him as an expert on the meaning of Chapter 5:B.

Mr. Coutu acknowledged at his deposition that he is not qualified to offer legal opinions. After explaining that the provision in RSA 5-B:5(I)(c) concerning the “[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions” required that “the return . . . be effectuated in cash or cash equivalents” (Coutu Dep. at 181)—a requirement found nowhere in the statutory text—Mr. Coutu was asked: “Q: And so is it your conclusion that any other return is a breach of the statute?” *Id.* Despite having declared in his Report that “a rate crediting feature [that is, a non-cash method of return earnings and surplus] . . . *does not satisfy the provisions of RSA Chapter 5-B:5(I)(c)* with respect to the return of excess earnings and surplus” (Report at 13 (emphasis added)), Mr. Coutu replied: “Well, I’m not a lawyer.” *Id.* When pressed on the point, he expressly declined to stand by the assertion in his Report that LGC’s practices violated the statute:

I will respond as follows. I personally conclude that to satisfy the intent of the statute, it requires a monetary return. I do not necessarily conclude, however, that a crediting rate arrangement is [in violation] of the statute as read.

Id. at 182. Mr. Coutu’s acknowledgment that he could only “personally conclude” that the statute required a monetary return, and that he could not say whether LGC’s practices in fact violated the statute, is instructive as an admission by Mr. Coutu that he has no basis for offering

an expert opinion as to the meaning of a New Hampshire statute. *See* Coutu Dep. at 92-93 (“I am not concluding here that there was something that legally was awry, not the least of which I’m not qualified to make that decision or render that opinion.”).

While administrative agencies are not strictly bound by the rules of evidence, the rules are nevertheless instructive as to the scope of evidence an agency should consider, and for what purpose. The Securities statute, which controls the hearing process in this matter, makes clear that the hearing is to be conducted in a manner akin to a trial. The definition of “hearing” under RSA 421-B:2,VII-a, is “the receipt and consideration by the department of evidence . . . in accordance with these rules and applicable law, and includes: (a) Conducting trial-type evidentiary hearings[.]” In addition, RSA 421-B:26-a,XX, states that, while the common law and statutory rules of evidence do not apply, the evidence must nevertheless be “relevant, material and reliable” in order to be admissible at the hearing. The evidentiary hearing in the instant matter must, therefore, be conducted in a “trial-type” manner, the hallmark of which must be a disciplined and structured view of what constitutes relevant, material and reliable evidence.

Mr. Coutu’s personal opinion on the operation of RSA 5-B, with no training or expertise behind it, fails to qualify as relevant, material, or reliable, and should be excluded.

B. Mr. Coutu hired attorneys to advise him on the law of fiduciary duty (in another jurisdiction). That is insufficient background to qualify him as an expert on the law of fiduciary duty in New Hampshire.

Mr. Coutu is also unqualified to offer expert testimony on the subject of New Hampshire law on fiduciaries duties and the breach of those duties. When asked at his deposition about what training he had that qualified him “to opine as to fiduciary standards and duties” (Coutu Dep. at 163), Mr. Coutu explained:

I hired some of the lawyers best known in that practice which amounted to – on the insurance side, it was LeBoeuf, Lamb out of New York and Locke, Lord &

Bissell out of Chicago. I met with them and they wrote memorandums on extensively what constitutes fiduciary duty and all of the other particulars associated with potential statutory noncompliance and issues of distributions related to insolvency, et cetera. . . . In some cases, I might invite counsel, someone who is particularly knowledgeable on such matters, to come in and make a presentation

Id. at 164-65. Beyond having hired well known lawyers to write legal memoranda and give presentations on the topic of fiduciary duties, Mr. Coutu's claim to expertise on the law of fiduciary duties appears to rest on (1) his professed acquaintance with a case called "Union Indemnity" that he "know[s] something about" (*id.* at 166), although it produced no written opinion of which he is aware (*id.* at 165-67); and (2) the fact that (according to Mr. Coutu) "there is generally held, and I can't tell you to what extent, there have been cases advanced to the point of litigation," the "common theme" of which is that "[a]ny distribution that's made from an insurance company which either caused or contributed to the ultimate insolvency of the insurance company would make the board and the officers liable." (*Id.* at 167.) LGC submits that having hired and met with lawyers and being generally aware of cases on a subject cannot be enough to qualify Mr. Coutu as an expert on New Hampshire law of fiduciary duties.

New Hampshire law is clear that "[a] witness shall not be allowed to offer expert testimony unless the court finds: (a) Such testimony is based upon sufficient facts or data; (b) Such testimony is the product of reliable principles and methods; and (c) The witness has applied the principles and methods reliably to the facts of the case.'" *Milliken v. Dartmouth-Hitchcock Clinic*, 154 N.H. 662, 667 (2006) (quoting RSA 516:29-a, I). Mr. Coutu's testimony about the meaning of a New Hampshire statute and the state of its law on fiduciary duties cannot be "the product of reliable principles and methods," as his self-described method is simply to read English and consult with lawyers. If testimony based on these "principles and methods" were deemed to be reliable, then anyone with access to a book and an attorney could testify as an

expert on any subject they had read and/or been advised on. That cannot be correct. *See State v. Wallace*, 125 N.H. 633, 635 (N.H. 1984)(proffered expert excluded because his testimony was “general and vague” and “he did not demonstrate special knowledge in [the relevant subject] area”).

Conclusion

For the foregoing reasons, LGC respectfully requests that the Hearing Officer preclude Mr. Coutu from testifying as to the meaning of R.S.A. 5-B, and New Hampshire Law on fiduciary duties.

Respectfully submitted,

Local Government Center, Inc.;
Local Government Center Real Estate, Inc.;
Local Government Center HealthTrust, LLC;
Local Government HealthTrust, LLC;
Local Government Center Property-Liability
Trust, LLC;
HealthTrust, Inc.;
New Hampshire Municipal Association
Property-Liability Trust, Inc.;
LGC-HT, LLC; and
Local Government Center
Workers' Compensation Trust, LLC

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Dated: April 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 13th day of April 2012, provided copies of the within Motion in Limine via electronic transmission to all counsel of record.

/s/ William C. Saturley