

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:)
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)
Local Government Center, Inc., *et al.*) Case No: C-2011000036
)

**RESPONDENT JOHN ANDREWS' MOTION TO PRECLUDE
EXPERT TESTIMONY FROM MICHAEL A. COUTU REGARDING
REAL ESTATE ISSUES**

Respondent John Andrews moves to preclude expert testimony from Michael A. Coutu regarding real estate issues, stating as follows:

Introduction

1. The Bureau of Securities Regulation (“BSR”) seeks to elicit a variety of expert opinions from Michael A. Coutu at the final hearing. One such opinion is that “LGC failed to pay fair consideration to the [HealthTrust] and [Property-Liability Trust] with respect to distributions paid to LGC in connection with real estate property acquisitions, building improvements and the like.” See Exhibit A, Coutu Expert Report, Page 17.

2. Mr. Coutu should be precluded from offering this opinion for two reasons. First, his opinion is irrelevant and unreliable because he is unqualified to opine that the real estate arrangement violated or violates RSA Ch. 5-B. Second, his opinion is unreliable because he does not know whether HealthTrust and Property-Liability Trust received non-cash benefits arising from the real estate arrangement. For these reasons, Mr. Coutu should be barred from testifying about real estate issues because his testimony will not assist the presiding officer in rendering findings of fact and conclusions of law.

Legal Standard

3. RSA Ch. 421-B sets forth the procedures that apply to the final hearing in this matter. *See* RSA 5-B:4-a, VI; RSA 421-B:26-a, I. RSA 421-B:2, VII-a defines “hearing” as “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, while RSA Ch. 421-B does not require the presiding officer to strictly apply the rules of evidence, RSA 421-B:26-a, XX does provide that the evidence must be “relevant, material and reliable” in order to be admissible at the hearing. Accordingly, though administrative agencies are not strictly bound by the rules of evidence, *see* N.H. R. Evid. 1101(a), hearings under RSA Ch. 421-B must nonetheless be conducted in a “trial-type” manner, the essence of which is a rigorous and methodical analysis of whether particular evidence is “relevant, material, and reliable.”

4. The essential purpose of a hearing is to decide the merits of an allegation. This is done by finding facts, and then applying the law to the facts. Regardless of whether the fact-finder is a jury, a judge, or an administrative hearings examiner, unreliable and irrelevant evidence should not be admitted. There is no principled reason why an administrative agency should tolerate the expenditure of scarce resources on the presentation of unreliable or irrelevant evidence.

5. The burden is generally on the proponent of expert testimony to establish the qualifications of the expert to render the opinion and to establish that the opinion is relevant and reliable. *Cook v. CTC Communications Corp.*, 2007 WL 3028415, at *2 (D.N.H. 2007) (applying Fed. R. Ev. 702). Under generally accepted principles of law

related to reliability and expert testimony, Mr. Coutu's anticipated testimony regarding the LGC defined benefit pension plan is not admissible.

Argument

I. Mr. Coutu's opinion with respect to the real estate arrangement is irrelevant and unreliable because he is unqualified to opine that the arrangement violates RSA Ch. 5-B.

6. Mr. Coutu conceded at his deposition that he has no opinion as to whether the real estate arrangement violated or violates RSA Ch. 5-B. When asked why he criticizes the real estate transactions involving LGC, HealthTrust and Property-Liability Trust, Mr. Coutu explained:

A: 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. I'm saying in the normal discourse of business, the transfers of monies between subsidiaries or subsidiaries in a holding company in the ordinary course of business is not an issue but is an issue in connection with LGC.

Exhibit B, Coutu Deposition Transcript. Page 92-93. When asked whether he recognizes that the board of directors of LGC might have had a different judgment on the matter, Mr. Coutu testified that "it is my judgment that the board did not do, I'll call it, the right thing." *Id.* at 95.

7. It is irrelevant to this proceeding whether the LGC board of directors did "the right thing" with respect to the real estate arrangements. The legal issue the presiding officer must decide is not whether the LGC board of directors made decisions that were "right" or "wrong"; the issue is whether the Respondents violated or are violating RSA Ch. 5-B.

8. As he acknowledged at his deposition, Mr. Coutu is not a lawyer and does not have a law degree. Exhibit B, Coutu Deposition Transcript. Page 8. Mr. Coutu is

thus unqualified to opine that the real estate arrangement violated or violates RSA Ch. 5-B. He acknowledged as much in his deposition. Exhibit B, Coutu Deposition Transcript. Page 92-93.

9. Because Mr. Coutu is unqualified to opine as to whether the real estate arrangement violates RSA Ch. 5-B, his opinion is irrelevant and unreliable, and should be excluded from the final hearing. *See* RSA 421-B:26-a, XX (Presiding Officer has discretion to exclude irrelevant evidence).

II. Mr. Coutu’s opinion with respect to the real estate arrangement is unreliable because Mr. Coutu does not know whether the Risk Pools receive non-cash benefits from the arrangement.

10. Mr. Coutu opines in his expert report that:

LGC failed to pay fair consideration to the [HealthTrust] and [Property-Liability Trust] with respect to distributions paid to LGC in connection with real estate property acquisitions, building improvements and the like. LGC must return all distributions from the Risk Pools to LGC in connection with real estate activity. In addition, there were other non-cash transactions which occurred in connection with the 2003 reorganization of LGC and its Risk Pools.

Exhibit A, Coutu Expert Report, Page 17-18.

11. When asked at his deposition whether HealthTrust receives any benefit from the “non-cash” transactions, Mr. Coutu testified that “[t]he only possible benefit that may arise . . . is to the extent that [HealthTrust] and [Property-Liability Trust] are leasing or renting, *and I don’t know what the arrangement is*, space at a significant and/or substantial discount to market.” Exhibit B, Coutu Deposition Transcript, Page 174 (emphasis added). Later on in his deposition, Mr. Coutu testified:

A: . . . I am aware that no consideration was paid with respect to those transfers and I am aware that there was a rental fee- and I don’t know whether it’s a rental fee or lessee fee – paid

annually. Whether or not that rental fee constitutes consideration of some kind, I don't have that as a conclusory point.

...

Q: Do you know whether the present arrangement produces an economic benefit to HealthTrust or not?

A: I think I just testified that to the extent that the rate is below market rate, it would be providing an economic benefit.

Q: And that's sort of an "if" question. I'm asking whether or not you have the facts.

A: ***I do not know whether or not the rate currently being charged for the rental of the space of the two risk pools indeed is a discount to the market.***

Coutu Deposition Transcript, Page 176-77 (emphasis added).

12. Mr. Coutu's opinion regarding the real estate arrangement is unreliable because Mr. Coutu has no knowledge of a critical fact underlying his opinion: whether the Risk Pools received, and currently receive, an economic benefit from the real estate arrangement. His opinion appears to be that the real estate arrangement is in some way unfair to the Risk Pools, yet he acknowledges that he does not know whether or not the Risk Pools benefit from the arrangement by way of a below-market rental or lease rate. Because Mr. Coutu's opinion regarding the real estate arrangement is unreliable in this respect, his opinion on the subject should be excluded from the final hearing. *See* RSA 421-B:26-a, XX (Presiding Officer has discretion to exclude unreliable evidence).

Conclusion and Prayer for Relief

13. For the foregoing reasons, Mr. Andrews requests that Presiding Officer Mitchell issue an order precluding the BSR from eliciting any expert testimony from Michael A. Coutu at the final hearing regarding real estate issues. An early ruling on this motion would narrow the issues to be decided at the final hearing and would thus assist all parties in preparing for trial.

