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STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE BUREAU OF SECURITIES REGULATIONS

No. C-2011000036

In the Matter of:

Local Government Center, Inc., et al.

BEFORE DONALD E. MITCHELL, ESQUIRE
PRESIDING OFFICER

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REPORT OF PROCEEDINGS

May 4, 2012

9:06 a.m.

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New Hampshire State Archives and Genealogical
Public Research Room
71 South Fruit Street
Concord, NH 03301

Court Reporter: Michele Allison, LCR, RPR, CRR

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1 APPEARANCES:

2 BERNSTEIN, SHUR, SAWYER & NELSON, P.A.

3 By: Andru H. Volinsky, Esq.

4 By: Roy W. Tilsley, Jr., Esq.

670 North Commercial Street, Suite 108

Post Office Box 1120

5 Manchester, NH 03105-1120

(603) 623-8700

6 avolinsky@bernsteinshur.com

7 rtilsley@bernsteinshur.com

8 and

9 NH Bureau of Securities Regulation

By: Earle F. Wingate, III, Esq.

10 By: Adrian LaRochelle, Esq.

State House Room 204

107 North Main Street

11 Concord, NH 03301-4989

(603) 271-1463

12 earle.wingate@sos.nh.gov

13 adrian.larochelle@sos.nh.gov

14 for the Petitioner, Bureau of
Securities Regulation;

15 PRETI, FLAHERTY, BELIVEAU & PACHIOS, Chtd., LLP

16 By: William C. Saturley, Esq.

17 By: Brian M. Quirk, Esq.

By: William H. Whitney, Esq.

57 North Main Street

18 Post Office Box 1318

Concord, NH 03302-1318

19 (603) 410-1500

wsaturley@preti.com

20 bquirk@preti.com

21 wwhitney@preti.com

22 and

23

1 APPEARANCES: (continued)

2
3 RAMSDELL LAW FIRM, PLLC
4 By: Michael D. Ramsdell, Esq.
5 69 Bay Street
6 Manchester, NH 03104
7 (603) 606-1766
8 mramsdell@ramsdelllawfirm.com

9 and

10 LOCAL GOVERNMENT CENTER
11 By: David Frydman, Esq.
12 25 Triangle Park Drive
13 Post Office Box 617
14 Concord, NH 03302-0617
15 (603) 224-7447
16 dfrydman@nhlgc.org

17 for the corporate and LLC respondents;

18
19 SHAHEEN & GORDON, P.A.
20 By: Steven M. Gordon, Esq.
21 By: Benjamin Siracusa Hillman, Esq.
22 107 Storrs Street
23 Post Office Box 2703
Concord, NH 03302
(603) 225-7262
sgordon@shaheengordon.com
bsiracusahillman@shaheengordon.com

for the Respondent Maura Carroll;

19 HOWARD & RUOFF, PLLC
20 By: Mark E. Howard, Esq.
21 By: Kimberly Myers, Esq.
22 1850 Elm Street
23 Manchester, NH 03104
(603) 625-1254
mhoward@howardruoff.com
kmyers@howardruoff.com

for the Respondent Peter J. Curro.

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1 (Whereupon the following
2 proceedings were held in the
3 presence of the Presiding
4 Officer, counsel, the parties,
5 and the public:)

6 THE PRESIDING OFFICER: Good morning,
7 ladies and gentlemen, to the fifth day in the
8 matter of the Local Government Center. Where we
9 are in the proceedings at this time is on the
10 Bureau of Securities Regulation's direct case,
11 and we have a witness to call. Mr. Tilsley.

12 MR. TILSLEY: Thank you, Mr. Mitchell.
13 I think I'll come to the gate for a little while
14 here. I'll call Gregory Fryer to the stand,
15 please.

16 THE PRESIDING OFFICER: Very good.

17 THE WITNESS: Right here?

18 MR. TILSLEY: That's it.

19 GREGORY S. FRYER,

20 having been first duly sworn,
21 was examined and testified as follows:

22 THE PRESIDING OFFICER: Please be
23 seated, sir, and state your name -- and I'll

1 remind you the stenographic record is being taken --
2 and give us your business address, please.

3 THE WITNESS: My name is Gregory Fryer. My
4 business address, I work for Verrill Dana, a law firm
5 in Portland, Maine, and the address is One Portland
6 Square, Portland, Maine.

7 THE PRESIDING OFFICER: Mr. Tilsley.

8 MR. TILSLEY: Thank you, sir.

9 DIRECT EXAMINATION

10 BY MR. TILSLEY:

11 Q. Can you recap your educational background for
12 us, sir?

13 A. Sure. I graduated from Wilton High School in
14 Wilton, Connecticut. I then went to Dartmouth
15 College. I graduated there. And then I went on to
16 law school at Cornell.

17 Q. When did you graduate from Cornell?

18 A. 1979.

19 Q. You've been employed as a lawyer since you've
20 attended Cornell?

21 A. Yes.

22 Q. Can you go over your employment history for
23 us?

1 A. Sure. I -- once I graduated from Cornell my
2 first job was with the law firm of Chadbourne, Parke,
3 Whiteside & Wolff, a midtown corporate law firm in
4 Manhattan. I worked there for a couple of years.

5 And then I moved to Atlanta. I worked at the
6 firm what was then known as Long & Aldridge. It's now
7 known as McKenna, Long & Aldridge. I worked there for
8 four years. I was their principal securities lawyer.

9 And then I moved -- I was recruited by
10 Verrill Dana to move to Maine and become their
11 principal securities lawyer, which I did starting in
12 1985 and became a partner the next year.

13 Q. And what is your current position with
14 Verrill Dana, sir?

15 A. I'm a partner.

16 Q. What professional designations do you hold,
17 if any?

18 A. I have my J.D. degree from Cornell, and
19 beyond that, none.

20 Q. Are you admitted to the bar anyplace?

21 A. Yes.

22 Q. Where?

23 A. I'm admitted in New York. I previously was

1 admitted in Georgia, and now I'm admitted in Maine.

2 Q. What does your current practice consist of,
3 sir?

4 A. It's a mix. I'd say about half of the
5 matters that I deal with pertain in my specialty to
6 securities law, and half of them are corporate law
7 matters. Typically, complex corporate law matters.

8 Q. What does your specialty in securities law
9 consist of?

10 A. Well, practicing in a relatively small state
11 I've had the luxury of having a securities practice
12 that covers, really, a very broad gamut of things.

13 I do a lot of securities offerings ranging
14 from public offerings of securities to more commonly
15 private placements of securities to raise capital for
16 companies. The companies range from the very small
17 start-up companies to quite large institutional
18 companies. So that's -- that's the securities
19 offering side of the practice.

20 I have substantial experience in SEC
21 reporting work in regulation of investment advisors,
22 and to a lesser extent regulation of broker-dealers,
23 and have some expertise in the Investment Company Act

1 regulations as well as blue sky regulations.

2 Q. How long have you specialized in securities
3 law?

4 A. For 30-some-odd years.

5 Q. I'm going to ask you, what is blue sky
6 regulations?

7 A. Blue sky law is -- it's a common name for
8 state securities laws.

9 Q. Geographically, where -- what areas does your
10 securities specialty extend into?

11 A. Principally -- I mean, predominantly I would
12 say Maine, but my securities work really covers
13 offerings all around the country. And I've done work
14 under, you know, a number of different -- a number of
15 different transactions that are not based in Maine.
16 But since my practice is in Maine I'd say most of the
17 work I've done comes from Maine-based clients.

18 Q. When you have transactions in other parts of
19 the country are you dealing with federal law or state
20 law in those parts of the country?

21 A. Both. Both.

22 Q. You've been engaged by the Bureau as an
23 expert in this case?

1 A. Yes.

2 Q. And what is the purpose for your engagement,
3 sir?

4 A. They asked me to review the circumstances
5 behind the risk pool arrangements in New Hampshire
6 offered by LGC and to express an opinion on whether I
7 thought that they were -- that they constituted
8 securities under New Hampshire law.

9 Q. And what is your familiarity with the
10 New Hampshire law on securities?

11 A. I -- it's -- I have some familiarity with
12 New Hampshire law having practiced in the state next
13 door and having done a number of offerings that extend
14 into New Hampshire. I do not regularly practice
15 New Hampshire law per se in the securities field.

16 The -- there's not a huge body of law on the
17 New Hampshire Securities Act, and much of it is very
18 similar to the law of other states. New Hampshire --
19 the New Hampshire statute was based on the Uniform
20 Act, and particularly in the area of the definition of
21 securities. The New Hampshire definition is very
22 similar to the definition that you find under federal
23 law and under Maine law, and those of most states.

1 Q. When you say that the New Hampshire law is
2 based on a Uniform Act, what does that mean?

3 A. It's based on the -- it was originally based
4 on the 1956 version of the Uniform Securities Act, and
5 it's been amended from time to time.

6 Q. How similar or different is the New Hampshire
7 law to the laws of the other states that you deal
8 with?

9 A. I'd say it's quite similar but certainly
10 not identical.

11 Q. I'm sorry?

12 A. Certainly not identical.

13 Q. What materials did you review in reaching
14 your opinion in this case, sir?

15 A. I reviewed a number of things. I reviewed
16 the risk pool statute in New Hampshire; I reviewed a
17 number of materials that have been published by LGC; I
18 reviewed some of the materials involving this
19 particular case; and then I reviewed case law and
20 other legal authorities that I thought were pertinent
21 to the question.

22 Q. What is your understanding regarding the
23 facts of this case as they relate to your opinions?

1 A. My understanding is that LGC offers some risk
2 pools to municipalities and other governmental units
3 within the State of New Hampshire. They do so under
4 an enabling statute passed by the legislature.

5 The exact character and structure of those
6 risk pools, I think, has evolved over time. But
7 presently they -- they -- they offer participation to
8 municipalities where they pool municipalities and
9 other governmental units, pool their capital, and then
10 it's managed by professional management supplied by
11 LGC. And the -- and the municipalities, you know,
12 share in the performance of that -- of those risk
13 pools.

14 Q. What is your understanding as to how
15 participation in a risk pool differs from a
16 municipality simply buying a standard insurance
17 policy?

18 A. Well, there are a lot of things that are
19 similar. Certainly, the risk management function is
20 something that they both have in common. And if you
21 look at the way the risk pools are run, they really
22 are small little specialty insurance companies.

23 They don't have actuaries on staff, but my

1 understanding is that they hire actuaries as
2 independent consultants, and they perform a lot of --
3 you know, all of the similar functions that a
4 traditional insurer would perform. And these are
5 functions that LGC and the municipalities perform
6 through the -- through the risk pools.

7 Q. Those are similarities to an insurance
8 policy. Are there any differences between the pools
9 and the insurance policies?

10 A. Yeah. I think there's some notable
11 differences. For one thing, insurance companies are
12 regulated under a completely different regulatory
13 machine. They're regulated in this state by the
14 Department of Insurance. And these risk pools, by
15 design, are not regulated by the Department of
16 Insurance.

17 Secondly, if I'm a town manager and I need to
18 obtain -- I need to deal with my property-liability
19 risks, if I buy a traditional insurance policy, if I
20 go to Hanover Insurance and buy a policy from them,
21 you know, I pay my premium, I get my coverage, and
22 that's pretty much it.

23 This is a different proposition in many

1 respects. Here the municipalities are solicited to
2 join with one another and have a common interest in a
3 pool of capital that -- that's assembled. That pool
4 of capital is managed both in terms of its investment
5 and in terms of the actual risk management function.
6 And then there's several other ancillary functions
7 that are performed by the capital pools. And
8 that's -- that's the basis on which they participate.
9 They -- it's a -- it's somewhat akin to them being
10 both policyholders and stockholders in these little
11 specialty insurance companies.

12 Q. What is your understanding regarding the
13 staff petition that brings us here today, sir?

14 A. I'm not --

15 MR. RAMSDELL: I'm going to object.

16 THE PRESIDING OFFICER: Mr. Ramsdell.

17 MR. RAMSDELL: Are we talking about the
18 original petition or the amended petition?

19 MR. TILSLEY: I can ask him about the
20 amended.

21 MR. RAMSDELL: Go ahead.

22 Q. What is your understanding regarding the
23 amended staff petition --

1 THE PRESIDING OFFICER: Mr. Tilsley, just so
2 we get off right this morning. The objection is
3 granted. And if you'd allow me to rule and then
4 proceed with your questioning.

5 MR. TILSLEY: Sure.

6 THE PRESIDING OFFICER: Thank you.

7 Q. Sir, what is your understanding regarding the
8 amended staff petition that brings us here today?

9 A. Well, I can't say that I have an intimate
10 understanding. It's -- my -- my understanding is that
11 there's a multiplicity of claims on a number of
12 different fronts, only one of which involves the
13 question of whether interest in these pools
14 constitutes securities under the New Hampshire Uniform
15 Securities Act.

16 Q. What is your understanding, sir, if any,
17 regarding the nature of the agreement between the LGC
18 and the members who participate in these groups?

19 A. Well, it's a contractual arrangement. And a
20 participating municipality is asked to provide a
21 contribution that's determined in some fashion,
22 actuarially, or whatever, in terms of the number of
23 employees covered or the particular risks covered.

1 And I believe currently, at least in some of
2 the pools, there's a contribution level that's
3 determined at the outset provisionally, and then
4 there's kind of a midcourse correction partway through
5 the year based on how the pool is doing at the time.

6 And then it's my understanding that the
7 statute requires a return of surplus and dividends, to
8 the extent that the pool has excess funds, and that
9 would occur subsequently.

10 Q. What contested issue are you giving an
11 opinion on today, sir?

12 A. Solely on the contested issue of whether
13 interests in these particular risk pools constitute
14 securities under the New Hampshire Uniform Securities
15 Act.

16 Q. Have you had an opportunity to review any
17 New Hampshire case law on this issue?

18 A. Yes. There's -- there really is no case law
19 on point. And the case law that exists on the
20 question of the definition of securities, as I recall,
21 the case actually deals with a predecessor act,
22 although a similar definition.

23 But the bottom line here is that there really

1 is very little New Hampshire law -- case law on the
2 Act as a whole and none on this particular question.

3 Q. Outside of New Hampshire have you found any
4 cases dealing with similar types of insurance pools
5 and whether or not they are securities?

6 A. I found only one case.

7 Q. And what case is that, sir?

8 A. It's a case out of Indiana, the *Naylor* case.

9 Q. And what were the facts of that case?

10 A. In that case the -- pursuant to statute, I
11 believe, the teachers in -- the Teachers Association
12 in Indiana had participated in a risk pool
13 arrangement. I'm not intimately familiar with the
14 pool arrangements, but in broad measure it was similar
15 to the risk pools authorized by New Hampshire statute.

16 In that case, unfortunately, the risk pool
17 had collapsed financially. I don't know whether it
18 was due to mismanagement or just really bad luck. And
19 the -- and the teachers were bringing a claim that
20 they had been misled in purchasing interests in that
21 particular failed risk pool.

22 THE PRESIDING OFFICER: Mr. Tilsley, do you
23 have a citation for the rest of us on the Indiana case

1 or does your witness?

2 Q. Is it in your report, Greg?

3 MR. RAMSDELL: It's an unreported decision.
4 We'll get you a copy of it in a minute.

5 THE PRESIDING OFFICER: All right. So you
6 have it?

7 MR. RAMSDELL: We do.

8 THE PRESIDING OFFICER: Very good. You can
9 proceed.

10 MR. TILSLEY: Just for the record, it's 2010
11 Westlaw 1737914. You folks do have it from the
12 dispositive motion phase of the hearing. It was
13 argued by the BSR and provided at that time.

14 THE PRESIDING OFFICER: Thank you.

15 Q. What court was the *Naylor* case decided by,
16 sir?

17 A. I believe it was the federal district court.

18 Q. And what decision did that federal district
19 court reach?

20 A. This -- it was a very preliminary decision.
21 The question was -- I believe it was a motion to
22 dismiss the claim on the pleadings and the court found
23 that there was -- it did not make any finding at all

1 on whether those interests actually were securities
2 under Indiana law but did reject the motion to
3 dismiss, a finding that there was -- there was a --
4 there was a reasonable basis to believe they might be
5 securities.

6 Q. Did you find any other cases dealing with
7 similar risk pool arrangements?

8 A. Not with -- not with these types of insurance
9 risk pools per se, no.

10 Q. Do you find that the *Naylor* case is
11 determinative of the issue as to whether the LGC pools
12 are securities?

13 A. No, not at all.

14 Q. Why not?

15 A. Well, a number of reasons. I mean, first of
16 all, it's an unreported decision. Secondly, it's
17 very -- it deals with a very early, you know,
18 potentially dispositive motion. And the ruling, you
19 know, did -- the case didn't reach a decision on the
20 merits of the claim but simply held that there was
21 enough reason to believe that it might be a security
22 that the claim would not be dismissed.

23 Q. In reaching your opinion in this case, sir,

1 what aspect of New Hampshire law are you looking at?

2 A. Well, the definition of securities in
3 New Hampshire, as is true in virtually every other
4 state, includes a long list of instruments, and in
5 that list among the items listed is a term of art,
6 investment contracts. And the focus of my work has
7 been to examine investment contract cases to determine
8 whether I felt that these interests constituted
9 investment contracts.

10 Q. What constitutes an investment contract in
11 New Hampshire, sir?

12 A. Well, there's no definitive case law in
13 New Hampshire defining it, however, I think it's
14 commonly understood in other states that investment
15 contracts has by now a fairly well-recognized meaning.

16 There's a long line of federal cases and a
17 number of U.S. Supreme Court cases dealing
18 specifically with what the parameters are for an
19 investment contract. And in most states, courts look
20 to the federal case law to help determine whether
21 something is or is not an investment contract.

22 In New Hampshire the Bureau of Securities
23 Regulation has in the past stated that it, too, looks

1 to federal law on the question of what constitutes an
2 investment contract, and so -- and that's not a
3 surprising position for the Bureau to take.

4 Q. And when you say that the Bureau has stated
5 that, where have you seen the Bureau do that?

6 A. The Bureau has published a number of
7 no-action letters and other advisory position
8 statements.

9 In particular, there was mention of this in I
10 think probably two or three different places, but two
11 that I recall, one is they published an order
12 regarding viaticals. And the second one, there was a
13 very lengthy analysis on the question of whether
14 unsecured promissory notes constitutes securities in
15 New Hampshire.

16 Q. I've got to ask you, what are viaticals?

17 A. Viatical contracts are sales of -- when you
18 have a life insurance policy that has a surrender
19 value and ultimately pays out a certain amount on
20 death, it's possible to sell an interest in that
21 policy to someone and thereby receive money for the
22 policy without giving up ownership of the policy, and
23 that's known as the viatical contract.

1 Q. In those two opinions or sources that you
2 just referenced, what did the Bureau state that the
3 New Hampshire test was to determine an investment
4 contract?

5 A. The Bureau says that -- that -- the Bureau
6 acknowledged that the New Hampshire definition
7 includes the term investment contract and said that in
8 determining whether an investment contract is present
9 the Bureau looks to federal law for guidance.

10 Q. And did it say anything about the federal law
11 that it would look to?

12 A. In particular it cited the so-called Howey
13 Test from the *W.J. Howey* case back in, I believe it
14 was 1944. It was a U.S. Supreme Court case.

15 Q. And what is the so-called Howey Test?

16 A. The Howey Test, a shorthand version of it
17 would be an arrangement by which someone invests in a
18 common enterprise with an expectation of profit from
19 the efforts of others.

20 Q. What is your understanding regarding the
21 Bureau's view as to whether participation in the LGC's
22 risk pools constitutes a security?

23 A. The Bureau --

1 MR. HOWARD: Mr. Mitchell, if I may?

2 THE PRESIDING OFFICER: Mr. Howard. Thank
3 you.

4 MR. HOWARD: Because it sounds like we've now
5 set the platform for him to render his expert opinion,
6 I wanted to renew my motion in limine to exclude his
7 expert opinion. The basis was set forth in writing in
8 our motion. That motion has been denied, but I wanted
9 to renew it for the record at this point now for all
10 the reasons set forth. Thank you.

11 THE PRESIDING OFFICER: For the previous
12 reasons set forth?

13 MR. HOWARD: Yes.

14 THE PRESIDING OFFICER: Thank you.
15 Mr. Gordon.

16 MR. GORDON: I would like to join in that
17 motion as well on the record.

18 THE PRESIDING OFFICER: Very good.

19 MR. RAMSDELL: LGC joins the motion as well.

20 THE PRESIDING OFFICER: Very good.

21 MR. RAMSDELL: All the LGC entities. I
22 apologize.

23 THE PRESIDING OFFICER: And just so the

1 record may be clear, you are joining in Mr. Howard's
2 motion --

3 MR. RAMSDELL: That is correct.

4 THE PRESIDING OFFICER: -- that was filed
5 preliminarily to the beginning of his testimony and
6 hearing?

7 MR. RAMSDELL: That's correct. He filed a
8 motion in limine a couple of weeks ago.

9 MR. HOWARD: And just so my motion is clear,
10 and I do apologize, I'm tendering it now as an
11 objection to the admissibility of his expert testimony
12 in this hearing. Thank you.

13 THE PRESIDING OFFICER: Okay. Mr. Tilsley?

14 MR. TILSLEY: Obviously, the motion has
15 already been denied on an in limine basis. Certainly,
16 Mr. Fryer is qualified to give an expert opinion on
17 securities. His opinion is certainly probative and
18 certainly will help the hearings officer understand
19 the issues in this case. Given the relaxed rules of
20 evidence in an administrative hearing, it's
21 appropriate to allow him to continue and offer his
22 expert opinion.

23 THE PRESIDING OFFICER: The objections are

1 denied. I do find this to be helpful to me. Please
2 proceed.

3 MR. TILSLEY: Thank you. I'll restate the
4 question.

5 Q. Sir, what is your understanding regarding the
6 Bureau's view as to whether participation in the LGC's
7 risk pools constitute a security?

8 A. My understanding of the Bureau's opinion is
9 that participation in LGC's risk pools do constitute
10 investment contracts within the meaning of the
11 New Hampshire Uniform Securities Act.

12 Q. A few minutes ago you talked about the Howey
13 Test in the *Howey* case. Can you tell us about the
14 *Howey* case itself? When did it come out?

15 A. It came out in 1944. And *Howey* -- it's an
16 interesting case. The W.J. Howey Company was one of
17 Florida's largest operators of orange groves. The --
18 and a very reputable company. What they did was they
19 took a large orange grove and they sold pieces of the
20 orange grove to investors. They actually -- in fact,
21 if you were -- if you were an investor you actually
22 got a warranty deed for certain metes and bounds
23 within the greater parcel.

1 They also offered their services to manage
2 the -- to manage the orange groves found within your
3 particular sub-parcel, and many of the investors did
4 take them up on that offer and some didn't.

5 Q. And what did the court rule as to whether the
6 Howey arrangement constituted a security?

7 A. The court ruled -- the court agreed with the
8 Securities and Exchange Commission that these
9 arrangements constituted investment contracts. The
10 court said that -- that the -- that the offering of
11 actual land was not dispositive; that offering it in
12 conjunction with the management services meant that
13 what -- what was being offered to these prospective
14 investors was a security.

15 Q. And what test did the court use, and how did
16 they apply that test to the facts?

17 A. The court reviewed prior state case law that
18 had used the term investment contract. And the court
19 found that the essence of the test was a -- was an
20 investment in a common enterprise with an expectation
21 of profits to be derived solely from the efforts of
22 either the promoter or some other third party.

23 Q. And how did that test get applied to the

1 *Howey* facts?

2 A. Well, in *Howey*, the -- the court looked at
3 the economics of the arrangement as a whole. I did
4 not focus on sort of the individual plots that had
5 been sold but looked at them in conjunction with one
6 another and determined that this was essentially --
7 that the investors essentially were investing in an
8 orange grove -- in an orange grove operator company;
9 that they were -- that part of the attraction of
10 purchasing these pieces of the orange grove was to
11 get -- was to gain the benefit of the services of the
12 W.J. Howey Company and to share in the profits.

13 In that case, as I recall, there was -- the
14 oranges were just harvested -- from those who did hire
15 Howey to provide the services, the oranges were
16 harvested from those -- from those sub-parcels and
17 then were sold, and then a certain portion of the
18 profits was returned on some kind of a pro rata basis
19 to the owners of the underlying pieces of real estate.

20 Q. Since being articulated in 1944, how was that
21 Howey Test developed over time?

22 A. Well, I'd have to say that it's a really
23 remarkable test in that it has really held up very

1 well over time. The -- as the court has recognized --
2 the supreme court has recognized from time to time the
3 dividing line between what is security and what is not
4 a security is sometimes -- sometimes fuzzy. The --
5 but that test has proven to be a very robust test over
6 the years since it's been cited countless times not
7 only by the supreme court and the SEC but also by
8 state courts. It's a very well-regarded set of
9 principles.

10 Q. What aspects, if any, of participation in the
11 LGC risk pools reflect attributes of an investment
12 contract?

13 A. Well, I think arguably all of them. Some of
14 the aspects, I think there's no question but that
15 they're present. I think there's no question but that
16 these participating governmental units in deciding to
17 pool their capital, there's no question whether they
18 are making an investment in a common enterprise.

19 There's also no question but that the fate --
20 how well that enterprise does depends very largely on
21 professional management that's provided by LGC. Each
22 of -- it's interesting. Each of the participants is
23 entitled to a vote at the LGC level. You have to --

1 you have the trusts, the risk pools underneath that
2 are actually, I think, currently in the form of LLCs,
3 and then you have LGC itself that acts sort of as a
4 quasi parent of these control pools.

5 And every participant, regardless of which
6 pool they're involved in, they all become members at
7 the LGC level, and they all get to vote on the board
8 of directors, and they have certain rights that are
9 very recognizable as being stockholder-type rights.

10 Q. You mentioned in your report that one of the
11 attributes is that they are a financial instrument.
12 What's a financial instrument?

13 A. Well -- so here's one of the ways that the
14 Howey Test is helpful. There are many times when
15 people pool their money but you would not consider the
16 resulting activity as involving securities.

17 So, for example, if people pool their money
18 to build a church, you know, they're investing their
19 capital, but they're not doing it with an expectation
20 of any kind of return of profit in a financial sense.

21 If people pool their money to hire lobbyists
22 to seek to overturn the Affordable Care Act, you know,
23 again, we don't -- that's not a financial instrument.

1 These are not financial objectives that are being
2 sought.

3 If people pool their capital to maintain a
4 country club, you know, absent other variables, you
5 know, these generally are for recreational purposes
6 and not for financial purposes.

7 In this case every single municipality faces
8 a risk management function that it absolutely needs to
9 perform. It has to deal with these types of claims,
10 and these claims are very expensive. And the purchase
11 of traditional insurance involves very significant
12 outlays from municipal budgets. This is an attempt to
13 save money.

14 Now, if it were simply a buying co-operative,
15 if six towns got together and hired an agent to go buy
16 insurance from Travelers Insurance Company at a better
17 price because they're a bigger customer, we would not
18 have a security here. But this is quite different.

19 Here we have a small, sort of captive
20 insurance company run by professional management. And
21 whereas if I purchase -- if I purchase security -- if
22 I purchase insurance from Travelers Insurance, there
23 are a number of things that Travelers does at the risk

1 of its stockholders, and then there are certain things
2 that affect me as a policyholder.

3 But if I -- if I invest in these risk pools,
4 I'm in. I've got -- I've got all of the normal
5 interests of a policyholder, but I also have all of
6 the normal risks of a stockholder in many respects.
7 Because we're betting that by pooling our resources
8 into a nontraditional insurance company, we're betting
9 that we're going to be able to perform that risk
10 management function, you know, cheaper.

11 Q. In your report you mention *United Housing*
12 *Foundation V. Forman* at 421 U.S. 837. Tell us a
13 little bit about that case.

14 A. Sure. That case involved the sale of
15 something that actually was called stock. And what it
16 was is it's a very large state-subsidized housing
17 co-operative project. And in order to -- in order to
18 become a tenant you actually bought a share of stock
19 at a designated price and that entitled you to -- that
20 entitled you to live in the project. And that share
21 of stock paid a certain amount per room on the way in,
22 and then if you ever left, you -- you offer the stock
23 back to the co-operative at the very same price.

1 In that case there is a -- you know, some
2 significant amount of capital. Most of the capital
3 costs were born by the state, but there's some
4 significant capital that's being put into this
5 venture, into this housing co-operative. But the
6 purpose here was not -- was not financial. It was --
7 it was residential. It was to buy access to that
8 building.

9 Q. And was the stock in the *Forman* case found to
10 be a security or not?

11 A. It was found not to be a security, not to be
12 an investment contract.

13 Q. And do you find that the LGC's --
14 participation in the LGC risk pools to be similar or
15 different to the *Forman* case?

16 A. I find it quite different. In the *Forman*
17 case the court looked to the question of whether
18 people were acting out of an investment intent. And
19 what the court found was that these residents were
20 motivated solely, solely by the desire to have a place
21 to live. And that's quite different than this case.

22 In this case there are mixed motives: A
23 desire to obtain insurance coverage that's readily

1 available in the commercial market by and large, but
2 to do so through participation in a venture that
3 offers the promise of reduced costs and potentially
4 significantly reduced costs to the participating
5 municipality.

6 Q. How is their pooling of capital in the
7 context of the LGC -- participation in the LGC risk
8 pools?

9 A. Well, there's -- it's hardly anything but a
10 pool. I mean, very large sums of money go from each
11 municipality and other governmental participants.
12 That provides the capital to help operate the pool for
13 that year. That, together with whatever capital has
14 been accumulated from prior years is what fuels the
15 business. Very, very large amounts of dollars.

16 These dollars are then invested, as would be
17 the case in an insurance company. They're invested to
18 try to get an investment return on them. And then
19 the -- the managers of the risk pool do a number of,
20 you know, very clever things to try to improve the
21 likelihood that there will be, you know, fewer claims.

22 So they go out and they do training of
23 municipalities on how to avoid risks, and a number of

1 things like that, a number of programs like that, to
2 make the overall operation of the venture more
3 successful and less expensive to run.

4 Q. You mentioned delegation of management as an
5 attribute of an investment contract. How does that
6 play in the context of the LGC risk pools?

7 A. Well, if I'm a town manager and I'm -- I'm a
8 big enough town, if I'm Manchester, there are certain
9 risks that -- and if I'm unhappy with how much
10 Travelers Insurance is going to pay me for
11 property-liability, you know, insurance, I do have the
12 alternative of perhaps self-insuring, of hiring my own
13 actuary. I've got a lot of money available, and I'll
14 just sort of play the odds and perhaps reinsure away
15 the worst of the risks, but by and large self-insure.

16 That's not what happens here. What happens
17 here is that the little towns that don't have the
18 expertise and don't have the size to be able to
19 self-insure in any kind of responsible way, they pool
20 their capital together. And LGC has developed a
21 professional staff that, you know, runs that little
22 venture and performs all the functions that you would
23 expect the executives of Travelers to perform only on

1 behalf of this small group, relatively small group of
2 participants.

3 Q. You also mentioned market investment of
4 pooled assets as an attribute of an investment
5 contract. How does that factor into your opinion with
6 regard to participation in the LGC risk pools?

7 A. I wouldn't say it's a determinate element,
8 but it's certainly a relevant factor. The -- whether
9 the investments do well or poorly does, indeed, affect
10 whether the overall venture does well or poorly.

11 If the investments do well, that helps
12 subsidize the costs, the risk, the pure risk
13 management function; and if the investments happen to
14 do poorly, then members will need to increase their
15 level of contributions to make up the difference.

16 If you look at the financial statements
17 published by LGC in the different trusts, I'll call
18 them, you'll see a fair amount of attention paid to
19 the securities investment aspects of the operations.

20 This is not an insignificant portion. I
21 believe I was looking at some recent financial
22 statements where I -- I think the level of income from
23 the securities portfolio may have been 8 or 10 percent

1 of the total contributions made by participants into
2 the pool that year. So it's a sizable contributor to
3 the overall capital that's used to run this business.

4 Q. You also mentioned return of profits as an
5 attribute of an investment contract. How does return
6 of profits factor into your opinion with regard to
7 participation in the LGC risk pools?

8 A. Yeah. Here it's complicated. And this is
9 not -- traditionally, profits are measured in a
10 different way. Here there are benefits that are
11 derived in several ways.

12 First of all, they're derived by a reduction
13 in the cost of providing the -- the risk management
14 function to begin with. Then in addition, under the
15 statutes --

16 THE PRESIDING OFFICER: Mr. Howard?

17 MR. HOWARD: I would like to levy an
18 objection at this point as to relevance. Attorney
19 Fryer has not opined that the benefits to a member are
20 part of any securities test. He's opined that profits
21 are but not benefits. So I move to strike as
22 irrelevant and preclude the testimony.

23 THE PRESIDING OFFICER: Mr. Tilsley.

1 MR. TILSLEY: I think what he's trying to
2 explain is that these type of benefits constitute
3 profits in the security world.

4 THE PRESIDING OFFICER: Strike the answer.
5 Withdraw your question. Try it again.

6 MR. TILSLEY: Sure.

7 Q. For purposes of the Howey Test, what types of
8 things can constitute a return of profits?

9 A. Well, there's a wide range of -- basically,
10 these are financial returns to the investors. They
11 can take the form of capital appreciation; they can
12 take the form of dividends; they can take the form of
13 a -- of a stated fixed return to investors.

14 There's any number of financial benefits that, you
15 know, have been treated by courts as being profits.

16 So, for example, a classic example of an
17 investment contract is a real estate -- a resort
18 condominium that's coupled with a rental pool
19 operation. In that case if I buy a -- if I buy a
20 condo in Hawaii, it's quite possible that I will
21 continue to pay into the -- into the promoter that
22 provides the financing for me to buy the condo even if
23 I participate in the -- in the rental pool.

1 The rental pool can be a source of offsetting
2 the payments. So I won't necessarily receive a
3 dividend back from this rental pool operator, but I
4 just as surely will receive -- I -- courts treat that
5 as a return of profits. So profits can arise in many
6 different contexts.

7 One thing they do share in common is they all
8 involve a -- they all involve money and a --
9 essentially a return of money, whether that's an
10 affirmative return in the form of a dividend check,
11 whether that's an offset to some other necessary cost.
12 That depends on the particular scheme involved.

13 Q. Using that definition of profit, sir, what is
14 your understanding with regard to whether or not the
15 LGC risk pools returned profits to their members?

16 A. Well, they certainly are required by statute
17 to return surplus and dividends to the participants.
18 I don't know the extent to which they do do that. I
19 know that in some prior years they provided dividends
20 back. In some years they provided, essentially, rate
21 credits for participation in future years.

22 And the big question here is: Are those
23 profits within the meaning of the Howey Test? And

1 that's a close call.

2 Q. What's your call on that close call as to
3 whether those are profits under Howey?

4 A. I think it's quite --

5 THE PRESIDING OFFICER: Mr. Gordon, please
6 come forward.

7 MR. GORDON: I'm going to object to -- he
8 said it's a close call. And if it's a close call
9 under -- as I understand the law, it's their burden of
10 proof, and a close call isn't sufficiently over the
11 line of the evidentiary burden for him to offer
12 anything at this point.

13 So I would move that his answer of close call
14 be it, and that no further questions on this issue be
15 propounded.

16 THE PRESIDING OFFICER: Mr. Tilsley.

17 MR. TILSLEY: I think the law is that there
18 has to be a reasonable probability, and that means 51
19 to 49 is a close call, but he can still offer an
20 expert opinion if he's on the 51 percent side.

21 THE PRESIDING OFFICER: Anything further,
22 Mr. Gordon?

23 MR. GORDON: No.

1 THE PRESIDING OFFICER: Okay. The objection
2 is denied. Ask your next question.

3 Q. What is your call on that close call, sir?

4 A. It's my opinion that reasonable practitioners
5 in this area can differ on whether it is or not. And
6 I would add to that that in this particular case the
7 New Hampshire Bureau of Securities has most definitely
8 formulated an opinion that it is a security. And my
9 opinion is that that judgment by that regulator is
10 entitled to deference and substantial deference.

11 Q. So what conclusion do you reach, in your
12 opinion, whether participation in the LGC pools
13 constitutes investment contracts under New Hampshire
14 law?

15 A. It's my opinion, in view of the facts and
16 circumstances of these arrangements, and in view of
17 the determination of the Bureau, it's my view that a
18 court should rule that these are securities within --
19 under New Hampshire law.

20 Q. You just mentioned deferring to the
21 regulator. Why would you defer to the regulator?

22 A. Well, these statutes don't define themselves,
23 and there's a long history of courts deferring to

1 regulate -- regulators in specialized fields to
2 determine jurisdictional questions.

3 And I think that the -- that the supreme
4 court commonly gives great weight to the Securities
5 and Exchange Commission's view on a particular
6 subject, and I would think that courts in
7 New Hampshire similarly ought to give great weight to
8 the determination of the New Hampshire Securities
9 Bureau.

10 Should that be -- is that the end of the
11 inquiry? Certainly not.

12 Q. What purpose, if any, is served by regulating
13 participation in the LGC risk pools as securities?

14 A. Well, it's interesting in you would expect
15 given the nature of the functions here that this would
16 be an activity that would be regulated by the
17 New Hampshire Department of Insurance. That's not the
18 case.

19 The legislature for whatever reason has
20 determined that these should not be regulated, and
21 therefore, these quasi insurance companies are very
22 lightly regulated. They are required to submit annual
23 reports to the Department of State, but there's not

1 the same comprehensive set of regulatory oversight
2 that would be the case if these -- if these ventures
3 were regulated by the Department of Insurance.

4 What that leaves is -- is a situation where
5 if these are securities, then misstatements made in
6 inducing towns to participate in these participation
7 pools year after year after year would constitute
8 potentially securities fraud. And so the securities
9 laws would provide a set of remedies that might not
10 otherwise exist for the protection of those who choose
11 to participate in these pools.

12 Q. One more question, sir. If I could just
13 approach for one second. You've got a white binder in
14 front of you.

15 THE PRESIDING OFFICER: Book number, please?

16 MR. TILSLEY: Book number 4 of 5. I'm going
17 to refer you to what we're going to call Exhibit 68C.

18 MR. RAMSDELL: I apologize. Can you tell
19 me -- I heard book 4, but I didn't get --

20 MR. TILSLEY: Book 4, Exhibit 68C, which is
21 page 69 --

22 MR. RAMSDELL: Oh.

23 MR. TILSLEY: -- of that exhibit.

1 Q. And sir, do pages 69 to page 75, what we're
2 calling Exhibit 68C, constitute your expert report in
3 this matter?

4 A. Yes, it is.

5 MR. TILSLEY: Consistent with our agreement
6 to strike ID once an expert has testified, I move to
7 strike the ID on 69C.

8 MR. RAMSDELL: 68.

9 MR. TILSLEY: 68C.

10 THE PRESIDING OFFICER: 68. Mr. Ramsdell?

11 MR. RAMSDELL: I object.

12 THE PRESIDING OFFICER: And the basis of your
13 objection?

14 MR. RAMSDELL: The basis of the objection is
15 there is no opinion, in that while he was asked a
16 question about his report and whether it opines
17 whether these participation agreements are securities,
18 in fact, you're going to see that there is no such
19 opinion in there about whether these constitute
20 securities. There is an opinion in there about the
21 Bureau's opinion. And, in fact, I'm moving to strike
22 his testimony in its entirety for this reason.

23 If you'll recall exactly what he testified to

1 when asked about his opinion about whether these were
2 securities, what he said was that it's his opinion
3 that reasonable practitioners can differ on this
4 issue; that he recognizes that the Bureau has a
5 particular opinion. He believes that the court could,
6 not should, not must, but could find that the Bureau's
7 opinion is entitled to deference, and therefore, find
8 these are securities.

9 That is not even a reasonable possible --
10 probability. That is "could," and "reasonable people
11 can differ." That opinion is not entitled to any
12 weight and his testimony should be stricken.

13 THE PRESIDING OFFICER: Mr. Tilsley.

14 MR. TILSLEY: I think, again, in the context
15 of this administrative hearing that the hearings
16 officer can choose to give it the weight that it
17 deserves. I would note that he testified right after
18 that remark that it was his opinion that this
19 constituted a security. So that is --

20 MR. SATURLEY: No, he hadn't.

21 THE PRESIDING OFFICER: Hang on. Please
22 continue.

23 MR. TILSLEY: So it's on the record that that

1 is his opinion. But even assuming that Mike is right,
2 that his opinion is that it's reasonable for the
3 regulator to call this a security, which is exactly
4 what we're dealing with here today, that that's an
5 opinion. That's his opinion based on reasonable
6 probability, and that's a sufficient standard,
7 particularly in the context of an administrative
8 hearing to allow testimony in.

9 THE PRESIDING OFFICER: Mr. Ramsdell, you
10 wanted to say one more thing?

11 MR. RAMSDELL: I would ask that his answer be
12 read back to the Court, then, because I do not believe
13 he offered the opinion to a reasonable probability. I
14 believe, I'll expand on what I said before, he said
15 that the court could and that reasonable practitioners
16 can disagree. That is not a reasonable probability,
17 and that -- those opinions should be stricken.

18 THE PRESIDING OFFICER: All right. Why don't
19 we take a brief recess to allow the stenographer to go
20 back, and we'll come back in five or six minutes.

21 (Recess taken.)

22 THE PRESIDING OFFICER: We've returned from a
23 brief recess to establish the record. And I would

1 recognize, Ms. Allison, if you would read back the
2 last question of Mr. Tilsley, please.

3 (Testimony was read back as requested.)

4 THE PRESIDING OFFICER: Is that the answer
5 that you're objecting to, Mr. Ramsdell?

6 MR. RAMSDELL: It must have been the question
7 before that that was -- it began with "reasonable
8 practitioners," I believe.

9 THE PRESIDING OFFICER: Okay. Let's see if
10 we can go back to the question before that. And
11 perhaps next time you can leave a representative
12 behind from your deep bench when you go out to --

13 MR. RAMSDELL: I should have done that. I
14 didn't think of that. I'm sorry.

15 THE PRESIDING OFFICER: It's quite all right.
16 If you could do so.

17 MR. RAMSDELL: I will.

18 THE PRESIDING OFFICER: I'm sorry. We will
19 have to take another brief recess. I'm going to ask
20 counsel to remain where they are and ask
21 Mr. Ramsdell to come forward.

22 (Recess taken.)

23 THE PRESIDING OFFICER: We've returned again

1 from a brief recess to assess the record, the state of
2 the record, and at this time I'm going to ask the
3 stenographer to go back two previous questions and to
4 begin to read at that point. And that point in the
5 record was following my ruling on the objection of --
6 my ruling of denying the objection of Mr. Gordon.
7 Would you please proceed, Mr. Allison.

8 (Testimony was read back as requested.)

9 THE PRESIDING OFFICER: Thank you. Anything
10 further, Mr. Ramsdell?

11 MR. RAMSDELL: Yes. I renew my motion to
12 strike.

13 THE PRESIDING OFFICER: Okay. Anything
14 further, Mr. Tilsley?

15 MR. TILSLEY: Other than to point out that in
16 addition to that opinion, which is the exact issue
17 that the hearings officer is facing, he's offering
18 expert opinion about, he also testified a couple
19 questions later that a court should rule that these
20 are securities.

21 So certainly, he's giving an opinion as to
22 what -- how the court should call this, a ball or a
23 strike, if that's what they're looking for.

1 THE PRESIDING OFFICER: One more time,
2 Mr. Ramsdell.

3 MR. RAMSDELL: I believe what he said is that
4 the court should afford the Bureau deference.

5 THE PRESIDING OFFICER: That's his opinion.

6 MR. RAMSDELL: That's correct. That is not
7 the same as an expert coming here and opining that the
8 participation agreements are securities. I do not
9 believe that his opinion as stated meets the threshold
10 of the inquiry for this Court that being whether these
11 participation agreements are securities under
12 New Hampshire law.

13 I believe his testimony should be stricken
14 and that his expert report should not be allowed in.
15 It does not contain an opinion about whether the
16 participation agreements are securities.

17 THE PRESIDING OFFICER: Mr. Gordon.

18 MR. GORDON: I would like to offer just one
19 additional perspective that --

20 THE PRESIDING OFFICER: Grounds for an
21 objection.

22 MR. GORDON: Grounds for an objection. The
23 way I heard his testimony is he breaks it down into

1 two parts. First part, as to whether or not it's a
2 security. In his opinion, reasonable practitioners
3 can differ. And then he goes to the next point that
4 deference, substantial deference, he actually used the
5 word, should be added onto the scale to assist you.

6 At the time that my client, at least, and all
7 others here were making decisions, the Bureau had not
8 weighed in on whether or not these were securities.
9 So our clients did not have the ability at that time
10 prior to the initiation of this proceeding to at all
11 calibrate the Bureau's determination that this was a
12 security. So, therefore, his opinion at this point in
13 time was never available the due deference to our
14 clients at the time decisions were being made.

15 So I think that the only factor should be is
16 to look at the first part of his testimony, and on
17 that he has not given an opinion that it is, in fact,
18 absent that additional information from the Bureau, a
19 security.

20 THE PRESIDING OFFICER: Mr. Gordon, before
21 you leave, would you agree with me, sir, that it's
22 within my authority to assign weight from zero to 100
23 on a percentage basis to this witness's testimony?

1 MR. GORDON: Well, of course, you have that
2 providence, and I don't say that you don't. But what
3 I am saying is that that portion that he has added
4 into his calibration is deserving of zero weight, and
5 therefore, it should not be considered at this point
6 in time as to whether or not the securities law was
7 violated as alleged in the petition.

8 THE PRESIDING OFFICER: Okay. Thank you.
9 Mr. Howard, by all means.

10 MR. HOWARD: I think what you meant to say
11 was, "Please don't come forward," but that's okay.

12 In my motion in limine, which I have renewed
13 here, in answer to your question, isn't it true that
14 you have the authority to assign whatever weight, that
15 analysis only comes after the evidence is ruled to be
16 admissible.

17 The basis for my motion, and many of the
18 objections here, is that under the statute for
19 admissibility in this proceeding it has to be
20 relevant, material, and reliable.

21 Phrased another way, an opinion such as his
22 that sits in neutral stasis: "A practitioner could
23 view it this way, and that's reasonable, it's not a

1 security, it's reasonable that it is a security," is
2 at best right in the middle, and therefore, it doesn't
3 tend to prove a point here.

4 So it is not relevant and it's not material,
5 and therefore, isn't admissible. We don't have to get
6 into the weight-assigning question. So we move it to
7 be stricken. Thank you.

8 THE PRESIDING OFFICER: Thank you.
9 Mr. Tilsley.

10 MR. TILSLEY: Just briefly. In terms of
11 Attorney Gordon's objection, which I think really goes
12 to the merits of the case more than it goes to
13 Mr. Fryer's testimony and admissibility --

14 THE PRESIDING OFFICER: I'm aware that some
15 cross-examination was snuck in, but go ahead.

16 MR. TILSLEY: That's been the position of BSR
17 since 2010 and nothing has changed. So the idea that
18 they somehow -- if they had only known they would have
19 fixed it, it doesn't really ring true in this case.

20 MR. HOWARD: Excuse me. If I could have a
21 representation as to when the Bureau told LGC or ever
22 took a position in 2010 that these participation
23 agreements were securities, I'd like to have it.

1 THE PRESIDING OFFICER: Okay.

2 MR. VOLINSKY: The August 2nd report.

3 MR. TILSLEY: August 2nd report, I'm sorry,
4 of 2011.

5 THE PRESIDING OFFICER: Gentlemen, before we
6 all start getting exercised here, let me deal with one
7 thing at a time. Mr. Howard has asked for a
8 representation. I believe the representation has been
9 made by the BSR through Mr. Tilsley of August 2nd of
10 2011. Is that correct, Mr. Tilsley?

11 MR. TILSLEY: That is correct.

12 THE PRESIDING OFFICER: Okay. Very good. So
13 you have your representation. Anything further,
14 Mr. Howard? Mr. Ramsdell?

15 MR. RAMSDELL: If I may. Since that
16 August 2, 2011 report was published, I believe we're
17 checking it right now, but the collective recollection
18 here is that while I'm sure that was a good-faith
19 recollection, the document is going to say whether
20 it's accurate or not, and I'd ask just for a minute
21 while that gets pulled up.

22 MR. TILSLEY: No. I'll withdraw that piece
23 in my items. I don't think it's really material to

1 the issues presented.

2 MR. RAMSDELL: Okay.

3 THE PRESIDING OFFICER: Gentlemen, give me a
4 chance. Okay? You know, the pitch has been thrown.
5 I need to call a ball or a strike, and so I just need
6 that moment.

7 Now, Mr. Tilsley, you get an opportunity to
8 respond. What is your response?

9 MR. TILSLEY: The response in this issue is:
10 I'm willing to withdraw the argument that they've
11 known about it since 2010, because apparently, I
12 misstated the facts. And I'm not -- I don't think it
13 particularly advances the issue about Mr. Fryer's
14 expert testimony.

15 I think the issue that Attorney Gordon
16 presented is an issue that goes to the merits of this
17 case not to the admissibility of Mr. Fryer's
18 testimony, and what that August report says goes to
19 the merits. And we can all argue that in post-hearing
20 briefs.

21 THE PRESIDING OFFICER: Understood. Okay.
22 We're going to take our midmorning break now. You're
23 going to find some permanent -- some date of

1 representation to be responsive to Mr. Howard. I'm
2 going to consider, if you will, these objections while
3 you are all considering what you need, too, and we'll
4 be back in 10 minutes.

5 MR. TILSLEY: Okay. Thank you.

6 THE PRESIDING OFFICER: Thank you.

7 (Recess taken.)

8 THE PRESIDING OFFICER: We've returned from a
9 midmorning recess, and we have some issues to address.
10 The first would be a representation from the BSR in
11 response to Mr. Howard's request. Mr. Tilsley.

12 MR. TILSLEY: Are you asking for the --

13 THE PRESIDING OFFICER: Mr. Howard asked --

14 MR. TILSLEY: Okay. The date of the
15 representation on securities from the Bureau is
16 August 2nd, 2011. That is in LGC Exhibit 363.
17 Page 23 of that exhibit in this BSR report indicates
18 in the third paragraph: "This brings LGC squarely
19 within the obligations detailed in RSA 421(d) and
20 subjects LGC to the full regulatory oversight of the
21 Bureau of Securities Regulation."

22 THE PRESIDING OFFICER: You have it,
23 Mr. Howard?

1 MR. HOWARD: I do. Thank you. That was
2 exactly one month before the petition was filed. My
3 initial concern was that the representation was that
4 it was in 2010. So now that that's been clarified, we
5 appreciate it.

6 THE PRESIDING OFFICER: Thank you very much.
7 Mr. Tilsley, I also understand that -- okay. Your
8 representation of 8/2 now stands where you were
9 withdrawing it before?

10 MR. TILSLEY: I, frankly, think -- I'm still
11 willing to withdraw the argument. I don't think
12 it's --

13 THE PRESIDING OFFICER: No. My question is
14 simply this: Having been given this time --

15 MR. TILSLEY: Right.

16 THE PRESIDING OFFICER: -- you are confident
17 that your representation is accurate to Mr. Howard?

18 MR. TILSLEY: August 2nd, correct.

19 THE PRESIDING OFFICER: Very good.

20 Mr. Gordon. Mr. Gordon has an objection
21 pending with respect to -- on the grounds of -- well,
22 his perspective on the legal grounds, dividing it into
23 two parts. One, that the testimony of -- that I, as

1 the fact finder, should give deference to the BSR's
2 position, and with respect to that testimony I will
3 strike that testimony; that is to say the -- the
4 opinion of the expert that I should give deference to
5 the BSR is the portion of the testimony, the opinion
6 testimony, that's being stricken.

7 With respect to Mr. Howard -- with respect to
8 the second part of Mr. Gordon's objection, which I
9 also believe is on the same grounds as Mr. Howard's,
10 which is that there is no relevancy as to its
11 admissibility because as an opinion that it could go
12 one way or the other, or words to that effect -- let
13 me first check with both counsel.

14 Is that an accurate reflection of your bases
15 for your objection? Mr. Howard first.

16 MR. HOWARD: I think it's an accurate summary
17 of the position I took, yes.

18 THE PRESIDING OFFICER: Thank you.
19 Mr. Gordon.

20 MR. GORDON: Yes.

21 THE PRESIDING OFFICER: Thank you. All
22 right. I'm going to deny those objections. I'm
23 allowing that testimony. I do believe there's

1 relevancy when an expert, if you will, leaves that
2 door open to me. I'm going to assign, therefore, the
3 appropriate weight to testimony in that regard.

4 With respect to Mr. Ramsdell, I understand
5 Mr. Ramsdell's motion first to strike the testimony,
6 which I now understand to be all opinion testimony of
7 this witness, I'm denying that objection.

8 And with respect to the -- also, the
9 objection to the submission of the expert's report, I
10 am denying that as well at this time.

11 Mr. Tilsley, please proceed with what I
12 believe you said were your last one or two questions.

13 MR. TILSLEY: 68 -- if we can just get the
14 numbers right, because it's been 20 minutes since I
15 asked the question.

16 THE PRESIDING OFFICER: 68C.

17 MR. TILSLEY: If 68C is entered as a full
18 exhibit. I have no further questions for this
19 witness.

20 THE PRESIDING OFFICER: Okay. It is in. No
21 further questions? Mr. Ramsdell, will you be doing
22 the work this morning?

23 MR. RAMSDELL: Thank you.

1 Q. You were not asked to examine any other
2 issues or offer any other opinions?

3 A. No.

4 Q. Meaning you were not?

5 A. I was asked to examine the issue of whether
6 it's securities under the Uniform -- under the
7 New Hampshire Uniform Securities Act.

8 Q. Single issue?

9 A. That issue.

10 Q. And your report that's now been moved in as a
11 full exhibit states that: "The Bureau has a
12 reasonable basis to conclude that participation
13 interests involves the sale of investment contracts
14 under New Hampshire law," correct?

15 A. Yes.

16 Q. And your report states that: "Such position
17 is consistent with previously published views
18 expressed by the Bureau about the nature and elements
19 of investment contracts"?

20 A. Yes.

21 Q. And your report also states that: "Although
22 a court might reasonably draw the line based on the
23 principal function served by the participation

1 agreements, the Bureau has a reasonable and
2 justifiable ground to look at the manner in which the
3 function is performed and conclude that the interests
4 and common enterprise constitutes security," correct?

5 A. That there are no -- that courts have not
6 decided this issue, yes.

7 Q. Well, but you also said that the court may
8 reasonably draw the line differently, correct?

9 A. If we look at federal precedence, I would
10 expect to see a split of -- a split of opinions were
11 this question presented.

12 Q. Okay. All I'm asking you is that your
13 opinion as expressed in your report is although a
14 court might reasonably draw the line here based on the
15 principal function served by these interests, correct,
16 and then you go on to say, the Bureau has reasonable
17 grounds, correct?

18 A. Yes.

19 Q. So you are saying the court may find
20 otherwise. They may find because of the principal
21 function of the participation agreement, correct?

22 A. Given the uncertainties in the case law a
23 court could rule the other way.

1 Q. Sure. And it would be reasonable to do so?

2 A. I believe it would be wrong, but it would be
3 reasonable.

4 Q. You don't actually offer an opinion on the
5 close call itself in your report, correct?

6 A. That's incorrect.

7 Q. I'm sorry. When I say "an opinion," your
8 opinions as expressed in your report, never do you
9 say, "I believe these are securities under
10 New Hampshire law," correct?

11 A. I do believe they're securities under
12 New Hampshire law.

13 Q. You do not state that in your report, do you?

14 A. I expressed my -- I was not hired as an
15 advocate. I was hired as an expert. And my expert
16 testimony is that this is a close call, and in the
17 absence of authority otherwise in New Hampshire and
18 looking at the positions the Bureau has taken in the
19 past, that a court in New Hampshire applying
20 New Hampshire law should conclude that these are
21 securities under this act.

22 Q. Okay. You have your report in front of you?

23 A. Yes.

1 Q. Okay. I'm not asking you about your
2 testimony today. I'm asking you about your report
3 that was disclosed to the respondents in this case and
4 has been submitted as an exhibit. Would you point out
5 for me where in your report you state that a court
6 should find that these are securities?

7 A. I think that is the -- although not stated in
8 so many words --

9 Q. Okay. So it's not stated in your report?

10 MR. TILSLEY: Objection. Can he finish his
11 answer, please?

12 THE PRESIDING OFFICER: I understand he's on
13 cross-examination, but would you please complete that
14 response.

15 Q. Go ahead.

16 A. Although not stated in so many words, that is
17 the conclusion being expressed by my report.

18 Q. But I wouldn't get that in plain speak, if
19 you will, from your report, would I?

20 A. You might not because you carry a certain
21 point of view. I think an objective reading of
22 this -- I certainly read it that way.

23 Q. Okay. Now, you do concede, however, it's a

1 close call?

2 A. There's an absence of authority and this is a
3 close call.

4 Q. You would find it reasonable if the Bureau
5 took the position that these are not securities,
6 correct?

7 A. I think the Bureau certainly has that
8 latitude, yes.

9 Q. And you would find that reasonable?

10 A. If the Bureau came out with a pronouncement
11 that these were not securities, I would not be
12 inclined to challenge that.

13 Q. Is that the same as saying it would be
14 reasonable?

15 A. I think the Bureau could have concluded and
16 not done violence to the authority that exists on this
17 point.

18 Q. All I'm asking is: Does that make their
19 position reasonable if they took that position?

20 A. I think that it -- it -- yes, they could --
21 they could reasonably conclude that. It is within the
22 range of reasonable conclusions that the Bureau could
23 have gone but did not.

1 Q. And if the Bureau were to take the position
2 that these participation agreements are not
3 securities, a court would be reasonable to also
4 conclude they're not securities, correct?

5 A. Well, my testimony has been stricken on this
6 point, but in my opinion a court should provide
7 deference.

8 Q. Okay. But that's not my question. My
9 question is: If the Bureau took the position that
10 these are not securities --

11 A. Yes.

12 Q. -- you would find it reasonable for the court
13 to agree?

14 A. Yes.

15 Q. You didn't review the participation
16 agreements themselves, correct?

17 A. I would -- I believe I did review them. I
18 certainly wouldn't tell you that I'm an expert in the
19 contents of them, but I believe I was provided with
20 them, and I believe I flipped through them.

21 Q. Do you remember me asking you about this at
22 your deposition?

23 A. I remember you were asking me if I was aware

1 that certain letters contained certain contents, and I
2 said no.

3 Q. You don't remember me asking you whether
4 you'd reviewed the participation agreements at your
5 deposition? That's my question. Do you remember me
6 asking you --

7 A. I don't remember you asking me that.

8 THE PRESIDING OFFICER: Okay. Mr. Fryer,
9 only one can speak at a time, as you're aware. So
10 while you may be eager to respond, just wait until the
11 question is completed.

12 Mr. Ramsdell, try it again, please.

13 Q. Do you recall me asking you at your
14 deposition whether you had reviewed the participation
15 agreements?

16 A. I do not recall.

17 Q. Okay. You know what? Let me give you a copy
18 of your deposition. I'm not going to have -- have
19 this marked as an exhibit.

20 Would you turn to page 32, please. Page 32,
21 I asked you, "Did you review any participating
22 agreements," correct? That's at line 8.

23 A. Give me a minute while I read the questions

1 leading up to it so I can remember the context of the
2 question.

3 THE PRESIDING OFFICER: Take the time that
4 you need.

5 Q. Sure.

6 A. Thank you very much. (Witness peruses
7 document.)

8 THE PRESIDING OFFICER: Let us know when
9 you're ready, Mr. Fryer.

10 A. I'm ready.

11 Q. Okay. I asked you whether you'd reviewed the
12 participation agreements, correct?

13 A. Yes.

14 Q. And you said you believed that you had,
15 correct?

16 A. Yes.

17 Q. And then we had a discussion about it. I
18 showed you a participation agreement, correct?

19 A. You showed me a particular example, yes.

20 Q. Yeah. And we had a discussion about whether
21 they all looked reasonably similar, correct?

22 A. I asked you, yes.

23 Q. Okay. And once you looked at that, you said

1 that if you had looked at a participation agreement
2 you don't recall it anymore, correct?

3 Well, okay. Would you look at page --

4 A. My answer is: "You know, my recollection is
5 that I did, but when I look at this document, if you
6 were to represent to me that this is the only form of
7 participation agreement that was used, I can honestly
8 say -- there are things about the formatting that I
9 would think would ring a bell."

10 Q. And nothing rang a bell for you, correct?

11 A. Not that day.

12 Q. Okay. In fact, we go on to page 33, you
13 said, "Again, as I said before, when I look at this
14 document, it does not ring a bell in my memory.
15 Whether that's a function of poor memory or that I
16 didn't spend a lot of time with the document, I don't
17 know. What I do know is that as I sit here today, I'm
18 not familiar with the contents of this 30-page
19 instrument." Correct?

20 A. Correct.

21 Q. And then you explained on page 34, "I think
22 that my knowledge about these arrangements is more
23 fairly characterized as a general understanding,

1 correct or not -- I don't profess to be an expert in
2 the facts -- a general understanding about the nature
3 of the relationship. And this expression of opinion
4 is not predicated on a close contractual analysis of
5 this document. It is not referenced in the opinion
6 and if I spent that much time with it, I'm pretty
7 certain even in my advanced age I would recall it."
8 Correct?

9 A. That was my testimony.

10 Q. You can't tell us today that you read any of
11 these participation agreements, can you?

12 A. Well, I testified before, and I'm testifying
13 today that I -- that I think I did.

14 Q. But you're not sure?

15 A. I testified before that I was not intimately
16 familiar with the particular 30-page document you
17 handed to me, and that continues to be true today.

18 Q. All I'm asking you is: Can you tell us as
19 you sit there today, "Yes, I know I looked at at least
20 one participation agreement," or are you just not
21 sure?

22 A. Yes, I know I looked at at least one
23 participation agreement.

1 Q. Okay. And it wouldn't be fair to say that
2 your opinions are based upon your knowledge of the
3 participation agreements itself, instead, it's a
4 general understanding of how they work, correct?

5 A. Based in part on having looked at the
6 agreement, although not having studied it in detail.

7 Q. You also haven't read the amended petition in
8 this case, have you?

9 A. Now I have.

10 Q. You have now? You had not at the time you
11 rendered your expert opinions?

12 A. No. And I don't see that -- that's
13 particularly relevant.

14 Q. But the fact is you had not?

15 A. I had not. At the time of the deposition I
16 had not.

17 Q. And you have now?

18 A. Yes.

19 Q. Okay. And your understanding of the amended
20 petition is there's a count where the definition of
21 security is important?

22 A. Yes.

23 Q. Okay. Not in your report, not here today,

1 you've not rendered any opinion on the risk capital
2 test analysis?

3 A. No.

4 Q. You're not a fan of that test, either?

5 A. I am not. And it's not to say it doesn't
6 exist, and it's not to say that if I were practicing
7 in another state I would -- I would pay it great heed.

8 Q. But we're in New Hampshire, and as far as you
9 know it's not previously been used in New Hampshire,
10 and you didn't pay it any heed here?

11 A. I found it was unnecessary to do so given my
12 conclusions on the -- on the investment contract
13 analysis.

14 THE PRESIDING OFFICER: Is this going to be
15 helpful to me, this particular line of questioning on
16 RBC?

17 MR. RAMSDELL: I don't have any more
18 questions about it.

19 THE PRESIDING OFFICER: That's what I
20 thought. We kind of lost a trail there, Mr. Fryer,
21 for a moment, so we'll allow Mr. Ramsdell to move on.
22 Go ahead.

23 MR. RAMSDELL: I just want to make sure, when

1 you say "RBC," we're not talking about -- we're
2 talking about the risk capital test not the RBC that
3 we were talking about from actuaries.

4 THE PRESIDING OFFICER: Okay. Thank you.

5 MR. RAMSDELL: Two totally separate things.
6 And I apologize, I didn't make that clear.

7 Q. You wouldn't know, but we've had a lot of
8 testimony about something else called RBC here. What
9 I asked you about is the risk capital test. You're
10 not offering an opinion about that?

11 A. I'm not.

12 Q. Okay.

13 THE PRESIDING OFFICER: Thank you for that
14 clarification. I didn't pick up.

15 MR. RAMSDELL: My fault. I should have been
16 more clear.

17 Q. The participation agreements that are at
18 issue here, they're not subject to prior New Hampshire
19 case law analysis. I think you said that this
20 morning.

21 A. On the securities law issue?

22 Q. Yes.

23 A. Correct.

1 Q. In fact, when you looked at New Hampshire's
2 case law you found the only assistance was the absence
3 of any information, correct?

4 A. There are very few cases.

5 Q. You did review some federal cases?

6 A. Yes.

7 Q. You reviewed some reported cases from other
8 states?

9 A. Yes.

10 Q. But fair to say you found no clear or uniform
11 weight or authority on the issue presented here?

12 A. That's correct. No -- actually, I found no
13 cases other than the *Naylor* case, which I don't give
14 much weight to, but it counts. I found no cases
15 dealing with these particular types of instruments.

16 Q. And so you didn't find any weight or
17 controlling or significant authority on this issue,
18 correct?

19 A. Are you asking me by analogy or right on
20 point?

21 Q. At your deposition you testified, this was
22 your phrase, that you found no clear or uniform weight
23 or authority on the issue presented here.

1 I'm happy to give you a page reference if you
2 want, but I'd ask --

3 A. That's fine.

4 Q. -- that you take my representation. Your
5 phrase was you found no clear or uniform weight or
6 authority on issue. That's all I'm asking you.

7 A. Right. No cases disposing of this issue.

8 Q. You did identify a theme in a number of
9 investment contract cases, however, correct?

10 A. (No audible response.)

11 Q. I think you identified -- okay. You didn't
12 answer the question, but you're looking at me like
13 I've got to give you more. And so I can have you say,
14 "What are you talking about?" or I could --

15 A. I don't understand your question.

16 Q. Okay. You identified at your deposition a
17 theme in some cases of decisions based on the
18 purchaser's primary motivation for entering into the
19 transaction, correct?

20 A. Yes.

21 Q. And you stated at your deposition that if the
22 presiding officer here determines that the
23 municipality's primary motivation is the determining

1 factor, you would agree that the weight of authority
2 is against the Bureau's position.

3 A. Yes. If you consider this as a unitary
4 product and that's the test to be applied, the outcome
5 would be as I said.

6 Q. Okay. Now, that single case from Indiana
7 that you mentioned a minute ago and that you described
8 a little while ago, you found that to be not
9 particularly persuasive just because that's not enough
10 case law to really flesh out the issue, correct?

11 A. Yes.

12 Q. And you'd agree with me that's not a reported
13 decision, the Indiana case, correct?

14 A. It's not a reported decision.

15 Q. Okay. And I think you said this morning, the
16 issue the court ruled on had to do with jurisdiction,
17 it didn't -- that was the procedural posture of the
18 case at the time?

19 A. Well, it was early -- it was early in the
20 process, and there was not -- not a ruling --
21 substantive ruling on the merits. It's an interesting
22 case in that it didn't come out the other way, but
23 there was no ruling on the merits.

1 Q. And when you say there was no ruling on the
2 merits, that means the court did not rule on whether
3 the instrument in front of it was a security, correct?

4 A. But interestingly --

5 THE PRESIDING OFFICER: No. Would you answer
6 his question, Mr. Fryer?

7 A. Yes.

8 Q. That's all I'm asking for.

9 THE PRESIDING OFFICER: Okay.

10 Q. And you would also agree that what the
11 Indiana court was examining was a later version of the
12 security statute, the New Hampshire's version,
13 correct, the Uniform Securities statute? Yes?

14 THE PRESIDING OFFICER: Yes or no. Then you
15 can explain.

16 A. Yes.

17 Q. Okay. And you said that at your deposition?

18 A. Yes.

19 Q. Okay. There was also a factual difference
20 that I think you pointed out this morning as well
21 having to do with, in the Indiana case the risk pool
22 was insolvent, correct?

23 A. Yes.

1 Q. Which means that at -- if a risk pool isn't
2 sufficiently funded they go insolvent, correct?
3 That's what happened in Indiana?

4 A. That's -- it's totally illogical, but I
5 suppose the answer has to be yes.

6 Q. And you understand that here there isn't an
7 issue of insolvency, correct?

8 A. That's not the test.

9 Q. I didn't ask what the test was. I'm just
10 asking if you understand that's not at issue here?

11 A. Insolvency is not -- this is not a failed
12 pool.

13 Q. Right. In fact, the claim here is that the
14 pool has too much money; you understand that?

15 A. I understand that that's one claim, yes.

16 Q. And I believe you testified this morning, you
17 did not put significant weight on the Indiana decision
18 to arrive at your opinions, correct?

19 A. That's correct.

20 Q. You did examine the Bureau's position under
21 the Howey Test, correct?

22 A. Yes.

23 Q. And you told us about the Howey Test this

1 morning. And you are aware that it's the only test
2 the Bureau's ever applied in New Hampshire, correct?

3 A. The statement of the test is the only
4 statement of the test that it's -- it's promulgated,
5 yes.

6 Q. Okay. In your report you also say that:
7 "Many New Hampshire municipalities choose not to
8 participate in risk pools and instead purchase
9 traditional insurance products," correct?

10 A. Yes.

11 Q. But you don't have any idea how many
12 New Hampshire municipalities participate in risk
13 pools, correct?

14 A. I do not know how many.

15 Q. And you don't know how many purchased
16 traditional insurance instead, correct?

17 A. That's right.

18 Q. Your understanding of the participation
19 agreements is that their predominant purpose is to
20 secure insurance coverage, correct?

21 A. That's their predominant function, yes.

22 Q. All right. And you'd agree that that
23 function or its utility is only for a finite period of

1 time?

2 A. Okay. Yes.

3 Q. Now, you believe that the participation
4 agreement has an attribute of an investment contract
5 because the benefit to be derived from it is financial
6 in nature; that's what you said this morning?

7 A. It's purely financial, yes.

8 Q. And for you what's financial in nature is the
9 coverage for the cost of the risks that may arise
10 during the term of the participation agreement,
11 correct?

12 A. Among other things.

13 Q. In fact, it's fair to say, I think you said
14 this this morning, the purchase of any insurance is
15 financial in nature, correct?

16 A. It is a financial product, yes.

17 Q. So the purchase of any insurance then has an
18 attribute of the sale of a security?

19 A. Yes, but not all of the attributes.

20 Q. I understand. You'd agree with me that the
21 contribution levels for individual members is
22 determined in a similar fashion to the purchase of
23 a -- of premiums of traditional insurance?

1 A. In a similar fashion but not in similar
2 amounts.

3 I start with the proposition that this is --
4 these participation interests are cheaper than
5 traditional insurance policies. And so they may
6 follow a similar process but they come out to a
7 different number.

8 Q. They may or they may not, correct?

9 A. They may or they may not.

10 Q. Right. Some municipalities purchase
11 traditional insurance products, correct?

12 A. Yes.

13 Q. And many municipalities enter into risk pool
14 agreements instead, correct?

15 A. I don't know how many.

16 Q. I know you don't know how many, but you're
17 not --

18 A. Right.

19 Q. You agree that there are many of them?

20 A. Yes.

21 Q. And it is your opinion that the primary
22 motivation for deciding whether to purchase a
23 traditional insurance product or enter into a risk

1 pool agreement is the cost?

2 A. Yes.

3 Q. You don't -- in your report, in your
4 discussion of profit, you don't distinguish between
5 return of profit versus the return of premiums or
6 contributions, correct?

7 A. That's right.

8 Q. Because for you profit is merely the
9 difference between what it cost to purchase insurance
10 through the risk pool and what it would cost to buy
11 equivalent coverage from a standard insurance product,
12 correct?

13 A. No, that's not true.

14 Q. Isn't that what you testified to at your
15 deposition?

16 A. No, not exactly.

17 Q. Would you turn to page 92, please. Beginning
18 at line 13 is where the question starts, and your
19 answer starts at 17. And it's actually a lengthy
20 answer that goes into the next page. And I'm happy to
21 read the entire thing if you'd like, but my point is
22 that beginning at line 21 you state: "You know
23 functionally and economically the profits here. The

1 profits to be made are the difference between what it
2 would cost for me to buy equivalent coverage from a
3 simple insurance product." Correct?

4 MR. TILSLEY: Your Honor?

5 THE PRESIDING OFFICER: Mr. Tilsley.

6 MR. TILSLEY: Just that this is a multi-page
7 answer. I'd like to make sure he has a chance to read
8 his entire answer before he answers.

9 THE PRESIDING OFFICER: All right.

10 Mr. Fryer, do you need more time to familiarize
11 yourself with your deposition testimony?

12 THE WITNESS: If the question is simply
13 whether a particular set of words were part of my
14 answer, I can answer that without extensive review.

15 THE PRESIDING OFFICER: Fine. Try it again,
16 Mr. Ramsdell, and we'll move on.

17 Q. Okay. You opined that profit can be measured
18 by the difference between what it would cost to
19 contribute into the risk pool for insurance coverage
20 and what it would cost to buy equivalent coverage from
21 a simple insurance product, correct?

22 A. My testimony was not or was certainly not
23 intended to be that it comes down to the purchase

1 price. Here it's a long-term relationship where the
2 returns are over time through continued participation.
3 And there are -- there are savings on the way in and
4 in the middle and on the back end, and all of those
5 collectively I consider to be both economically and
6 legally profit.

7 Q. I asked you at your deposition, it's on page
8 94: "When a municipality decides to participate" --
9 I'm sorry. And I'm not -- I'm just pointing out the
10 line and the question that begins at 8. Take your
11 time. But I asked you: "When a municipality decides
12 to participate in one of the risk pools, what is the
13 expected economic benefit?" Correct?

14 A. You asked me that, yes.

15 Q. And your answer was: "I think it's a factual
16 question, so I'm not totally sure, but I would expect
17 that the principal economic benefit is a lower overall
18 cost year after year of providing risk coverage.
19 There may be certain incidental benefits involving,
20 you know, reductions in risky behavior by employees.
21 You know, insurance companies do that, too. It's sort
22 of a risk management program, and the pools I'm sure
23 have risk management programs, but you know, to

1 simplify, and I think it's fair, over time the
2 municipalities that are loyal to the pools believe
3 that they get an economic benefit over time from doing
4 so and the quality of the services they are receiving,
5 et cetera, but mostly the economics are long-term
6 beneficial as compared to what it could cost them to
7 do this over here." Correct?

8 A. Yes.

9 Q. And so the economic benefit for you is the
10 difference in what they're paying to -- for risk
11 coverage than they would pay over a traditional
12 insurance product, correct?

13 A. Over time.

14 Q. And you'd agree with me that each of the
15 participation agreements is for a finite period of
16 time; may be as little as one year, correct?

17 A. On their face, yes.

18 Q. Okay. And you would agree with me that the
19 primary purpose of the participation agreements are to
20 make certain that the municipality has kept its costs
21 for the insurance coverage period over that finite
22 time of the agreement, correct?

23 A. That's the function to be performed, yes.

1 Q. That's the primary purpose for entering into
2 the agreement, correct?

3 A. Yes.

4 Q. In your report you also mention that LGC used
5 to return earnings and surplus in excess of their
6 necessary funds through cash dividends, correct? I
7 think you mentioned that this morning as well.

8 A. Yes, it's my understanding.

9 Q. You're not sure how long that practice
10 lasted?

11 A. I thought it was somewhere around 2002 or so.

12 Q. But you're not sure?

13 A. Not totally sure.

14 Q. You're not sure when the practice actually
15 changed?

16 A. Not to the date, no.

17 THE PRESIDING OFFICER: Would you keep your
18 voice up, please, Mr. Fryer.

19 Q. You have water, right? Yeah? Okay.

20 When you wrote your report you believed that
21 the amount of an individual member's dividend was
22 decided on a pro rata basis, correct?

23 A. What I thought then, what I testified was on

1 some pro rata basis, but I didn't know exactly what.

2 Q. Right. But you believed it was purely a
3 proportional or arithmetic calculation, correct?

4 A. No. I believed it was pro rata determined in
5 some way by the entity.

6 Q. You believed it was based solely on a
7 proportion of the premium dollars paid or the number
8 of members, correct?

9 A. No.

10 Q. You did not?

11 A. No.

12 Q. Okay. Would you look at page 96, please?

13 And again, I'm going to ask you about the two
14 questions that begin at page 8, and so take your time
15 and look at it.

16 But I asked you what you meant by a pro rata
17 basis, and you said, "Well, I'm not sure. It was
18 allocated among the members in a way that was
19 proportional to something. Whether it was
20 proportional to the premium dollars paid. I don't
21 know if it was proportional to the number of employees
22 covered. I don't know what the exact metric was, you
23 know, but it was somehow arithmetic is my

1 understanding as opposed to, quote, Hooksett is having
2 a bad year, we're going to give them more this year,
3 end quote."

4 And then I said, "A bad year, for example,
5 like they had more claims or a bad year -- what did
6 you mean?" And your answer was: "What I meant was
7 maybe their budget this year -- you know, they have a
8 bigger deficit this year. It's done on a pro rata
9 basis as opposed to a case by case."

10 And then I asked you one more question about
11 the pro rata, and I'll read the question if you'd
12 like, but that's on page 97. And -- I will. I just
13 don't want to mislead anybody.

14 "So is it your understanding that the
15 dividends or rates" -- we're talking about rate credit
16 we've talked about and you mentioned this morning --
17 "that analysis doesn't have anything to do with the
18 individual member's performance during a period of
19 time, that instead it's just -- whether it's by
20 numbers in the municipality, number of members or some
21 percentage, that it's just pro rata without any
22 attributes specific to that member?"

23 And your answer was: "That's my

1 understanding. I could be wrong on that, but I think
2 I went looking for that kind of thinking that that
3 would make sense, that it would be experienced rated.
4 My impression is, rightly or wrongly, that it was
5 prorated on some other basis other than experience."

6 Correct?

7 A. Yes.

8 Q. Whether a financial return is influenced by a
9 purchaser's own conduct is directly relevant to the
10 Howey Test, correct?

11 A. Yes. It's an element.

12 Q. I think the phrase you used in the deposition
13 is -- for example, if you're your own master, it's not
14 an investment contract under the Howey Test, correct?

15 A. Right.

16 Q. Here you reached your opinions without
17 knowing that the dividends are determined by
18 individual member's performance, correct?

19 A. That's a compound question. Could you ask
20 that again?

21 Q. Okay. You issued your report before I took
22 your deposition, correct?

23 A. Yes.

1 Q. When I asked you these questions at your
2 deposition, you had not seen any dividend letters that
3 went out to members with checks, correct?

4 A. That's right.

5 Q. I showed those to you at your deposition,
6 correct?

7 A. Yes.

8 Q. That was the first time you'd ever seen them,
9 correct?

10 A. Yes.

11 Q. And so the opinions you reached in your
12 report as it was authored before your deposition were
13 based on your opinion that it was purely a pro rata
14 return of any economic benefit, correct?

15 A. Well, it's correct that that was my
16 understanding at the time I rendered the opinion.

17 Q. And --

18 A. Whether that was the sole basis for that
19 opinion is a different question altogether.

20 Q. I didn't ask you if it was your sole basis.
21 You testified to the basis for your opinion this
22 morning.

23 You now know that in this close call that

1 that pro rata portion of your opinion was incorrect?

2 A. Sitting here today I do not know, in fact,
3 how LGC management does apportion those dividends.
4 And there's one line in the dividend letters that
5 says, "This is based on your experience," but so is
6 the premium charged on the way in.

7 I continue to believe that it's done on some
8 pro rata basis. I've testified that I do not know
9 what the precise metric is. I would not be surprised
10 to learn that the dividends bear a very close
11 proportion to the contributions, but I don't know
12 that.

13 Q. That's right. You don't know, do you,
14 correct?

15 A. Nor do I think it's dispositive.

16 Q. But here's what you do know: That when you
17 rendered your opinion you thought there was a pro rata
18 distribution, period. You didn't know what the basis
19 of the pro rata was, but it was pro rata, not
20 case-by-case basis, to use your phrase, correct?
21 Correct?

22 A. Correct.

23 Q. Okay. Now you've seen dividend letters that

1 say, "Your dividend is based on your claim history,"
2 correct?

3 A. Yes.

4 Q. And you don't have any reason to believe
5 that's not correct, do you?

6 A. Well, actually, I do.

7 Q. You have information that -- you just told us
8 you don't know what the basis is.

9 A. I don't know that -- when it says, "Based on
10 your experience," it is not -- there's not just one
11 answer that would be consistent with that. I've told
12 you I do not know the metric, and I believe that
13 the -- the legislature requires them to return a
14 surplus dividends -- surplus and dividends to the
15 members, and my understanding of the program is that
16 that's done on some pro rata formulaic basis.

17 THE PRESIDING OFFICER: Mr. Ramsdell, I think
18 we've gone -- I think we can move on to another topic.
19 I can't believe that I can hear anything more on your
20 respective positions as talented attorneys and
21 witnesses. Could you find another question in light
22 of the day?

23 MR. RAMSDELL: I think I can.

1 THE PRESIDING OFFICER: Thank you, sir.

2 Q. In preparation for reaching your conclusions
3 in this case, you didn't review any Securities and
4 Exchange Commission no-action letters, correct?
5 Federal security?

6 A. I didn't find any to review on this point,
7 right.

8 Q. And you didn't review any of the SEC letters,
9 no-action letters, that state that instruments that
10 are prerequisites to obtaining insurance coverage are
11 not investment contracts? You didn't review those,
12 correct?

13 A. I didn't review those in advance. I didn't
14 think they were relevant.

15 MR. RAMSDELL: Let's see what I've learned
16 from yesterday. May I have the joint exhibit that is
17 5-B? Thank you.

18 Q. Now, your -- you familiarized yourself with
19 5-B for this case?

20 A. Yes.

21 Q. Before this case did you have any familiarity
22 with 5-B?

23 A. No.

1 Q. You would agree with me that under 5-B:1 it
2 says that: "Insurance and risk management is
3 essential to the proper functioning of political
4 subdivisions"?

5 A. Yes.

6 Q. Take your time. If you want to read the
7 paragraph, that's --

8 A. I'm familiar with that, yes.

9 Q. Okay. And it states that: "Pooled risk
10 management is an essential governmental function by
11 providing" -- I can't read my writing. I should read
12 it on here.

13 It says, "Focused public sector loss
14 prevention programs, accrual of interest and dividend
15 earnings which may be returned to the public benefit
16 and establishment of costs predicated solely on the
17 actual experience of political subdivisions within the
18 state." Is that correct?

19 A. Yes.

20 Q. Now, there's nothing in here -- the word
21 investment doesn't appear, correct?

22 A. No.

23 Q. Or profit doesn't appear?

1 A. No.

2 Q. Nothing about securities in here?

3 A. No. No.

4 Q. There isn't anything in the entire statute --
5 and you're welcome to look at it. You can read the
6 whole thing if you'd like -- about having to register
7 these agreements, the participation agreements with
8 the Bureau of Securities, correct?

9 A. Correct.

10 Q. There's nothing in 5-B about saying -- that
11 says that one has to be licensed to sell securities to
12 engage in risk pools, correct?

13 A. The statute does not say that, no.

14 MR. RAMSDELL: Can I have Exhibit 273,
15 please?

16 Q. I'm going to represent to you that -- well,
17 you know what? I'll give you a copy, because I don't
18 want you to have to guess or take my representation.

19 If you'll take a look at Exhibit 273, please.
20 Have you seen this before?

21 A. No.

22 Q. Do you recognize it as a letter from the
23 Internal Revenue Service to New Hampshire Municipal

1 Association HealthTrust, Inc. in 1987 granting it
2 status or a ruling that the income from the trust is
3 excludable from gross income under Section 115 of the
4 Internal Revenue Code?

5 A. That's what the first paragraph says, yes.

6 Q. Okay. And would you agree with me that at
7 the bottom of this page part of the IRS determination
8 is that: "Under the bylaws of the trust the income of
9 the trust is earmarked for the provision of health
10 insurance protection, for the payment of benefits, or
11 to be returned to the members who made the
12 contributions in proportion to the amounts paid on
13 behalf of the employees of such member in that year,"
14 correct?

15 A. Okay. Yes.

16 Q. And would you look at the third paragraph,
17 please? It states that: "Membership in the trust is
18 limited to state municipalities that are members of
19 the association. Membership in the association is
20 limited to the municipalities of the state. Any
21 municipality that is not a member of the association
22 can simultaneously join the association and the
23 trust," correct?

1 A. Yes.

2 Q. I'm going to ask you to look on page 2. Are
3 you familiar with the revenue ruling, 77-261, the
4 income --

5 A. I am not.

6 Q. I beg your pardon?

7 A. I am not.

8 Q. You're not? Okay. I'd just ask you to look
9 beginning -- after the first sentence beginning with
10 the second sentence: "That ruling reasons that the
11 investment of positive cash balances by a state or
12 political subdivision thereof in order to receive some
13 yield on the funds until needed to meet expenses is a
14 necessary incident of the power of the state or
15 political subdivision to collect taxes and other
16 revenues for use in meeting governmental expenses.

17 "In addition to concluding that income from
18 such an investment activity was income from the
19 exercise of an essential governmental function, the
20 ruling also concluded that since state X and its
21 participating political subdivisions had an
22 unrestricted right to their proportionate share of the
23 investment fund's income, the fund's income accrued to

1 them."

2 Did I read that correctly?

3 A. Yes.

4 Q. So this has to do with providing functions,
5 essential governmental functions to political
6 subdivisions; would you agree with me on that?

7 A. For tax law purposes, yes.

8 Q. Yes. And I'd ask you to take a look at
9 Exhibit 274, and I'd ask you just to take a look at
10 it.

11 And would you agree with me that this is a
12 similar letter from the Internal Revenue Service
13 granting it -- Section 115 of the Internal Revenue
14 Code exemption for the New Hampshire Municipal
15 Association Property-Liability Trust, correct?

16 A. Appears to be, yes.

17 Q. And the same language, in fact, that I read a
18 minute ago appears in both letters?

19 A. Okay. I'll take your word for it.

20 THE PRESIDING OFFICER: Exhibit number again,
21 please?

22 MR. RAMSDELL: 273 and 274.

23 THE PRESIDING OFFICER: Thank you.

1 MR. RAMSDELL: May I have Exhibit 278,
2 please?

3 Q. Are you familiar with the State of
4 New Hampshire Department of Revenue Administration,
5 Mr. Fryer?

6 A. Do I know it exists?

7 Q. Do you know it exists? We'll start there.

8 A. Yes.

9 Q. Have you ever been there?

10 A. No.

11 Q. Have you ever done any business with them?

12 A. No.

13 Q. Do you understand their function?

14 A. I think so.

15 Q. Okay. This is a letter, would you agree with
16 me, dated May 21, 1996 to the New Hampshire Municipal
17 Association wherein the Department of Revenue
18 Administration states that it will not "Pursue the
19 question of the New Hampshire Municipal Association's
20 taxability under the New Hampshire business enterprise
21 tax RSA 77-E due to its demonstration that the
22 association is an instrumentality of political
23 subdivisions and that judicial doctrine dictates that

1 such taxability must be explicit under the law,"
2 correct?

3 A. Yes.

4 Q. Okay. Were you asked as part of your
5 engagement in this matter to look whether the -- if
6 indeed, these participation agreements are securities,
7 whether they fit on the -- under any of the exemptions
8 to the securities law?

9 A. I don't know that I was asked. I did look.

10 Q. You did? Okay. And did you look at the
11 exemption that has to do with political subdivisions?

12 A. I did.

13 Q. And organizations that provide services to
14 those functions?

15 A. I did.

16 Q. And it's your opinion that the exemption does
17 not apply or that it does?

18 A. Well, I haven't formulated an opinion on
19 that. On its face --

20 Q. Well, if you don't have an opinion, then you
21 don't have an opinion. I understand. That's all I
22 asked you for.

23 A. I don't have an opinion.

1 MR. RAMSDELL: Okay. May I have a minute
2 before I decide if I have any more questions?

3 THE PRESIDING OFFICER: Absolutely for that
4 purpose.

5 MR. RAMSDELL: Could we maybe have five
6 minutes?

7 THE PRESIDING OFFICER: Take the time you
8 need. We'll take another break. This will be the
9 exception, if you will, for our number of breaks in
10 the morning, but we're trying to wrap up the week.

11 (Recess taken.)

12 THE PRESIDING OFFICER: Ladies and Gentlemen,
13 we've returned from our third recess this morning, and
14 I believe we're prepared to advance. Mr. Ramsdell?

15 MR. RAMSDELL: I have a few questions. I
16 won't be long, hopefully.

17 Q. BY MR. RAMSDELL: As a regulator, a regulator
18 can't tell one entity that they can go ahead and do
19 something that would violate the law and hold another
20 entity responsible for doing the same thing, correct?

21 A. Okay. Yes.

22 Q. Okay. Have you seen the agreements that the
23 Bureau recently entered into with the other risk pool

1 operators in the State of New Hampshire?

2 A. I have not.

3 Q. Are you aware that the Bureau has reached an
4 agreement that will allow them to continue to enter
5 into participation agreements with municipalities and
6 not have to register as securities?

7 A. Wouldn't those just be no-action letters?

8 Q. No. They're actually agreements with the
9 entity, the risk pool operators themselves. They're
10 not no-action letters.

11 A. Well, no-action letter --

12 MR. TILSLEY: Objection, Your Honor. We
13 don't agree that it says that. If he can show us
14 where it says that, I'll withdraw the objection, but I
15 think it's a misrepresentation of what's in there.

16 THE PRESIDING OFFICER: Let's back up.
17 Mr. Ramsdell?

18 MR. RAMSDELL: He's not familiar with the
19 agreement, and the agreements are in evidence, I
20 believe. I'll leave it alone.

21 THE PRESIDING OFFICER: Thank you.

22 Q. You've testified that you believe it's
23 reasonable for the Bureau to take the position that

1 these participation agreements are securities,
2 correct?

3 A. Yes.

4 Q. And you would agree with me that here in
5 New Hampshire with the Bureau of Securities there are
6 no developed rules or regulations to look at, correct?

7 A. No. "No" is probably too strong a word, but
8 there's very little to look at, that's right.

9 Q. But the Bureau hasn't promulgated rules or
10 regulations at all?

11 A. Oh, you're talking about technical rules and
12 regulations?

13 Q. Absolutely.

14 A. No, I'm not aware of -- there's position
15 statements but not rules and regulations.

16 Q. And you would agree there's not a large body
17 of administrative decisions that you could review to
18 become better informed about their historical
19 judgment?

20 A. That would be true. Unfortunate perhaps, but
21 true.

22 Q. You did mention this morning that you
23 reviewed at least one of their decisions and one of

1 their publications, correct?

2 A. Yes.

3 Q. And I think the first one you mentioned was a
4 2004 interpretive order on viatical instruments,
5 correct?

6 A. I don't know if it was an interpretive order,
7 but it was an order, yes.

8 Q. And when you reviewed that you found that the
9 summary of the viatical instruments was incomplete,
10 correct?

11 A. Can you ask your question again?

12 Q. Sure. When you reviewed that order your take
13 on it was -- one of the things you took away from it
14 is its summary, the Bureau's summary, of what pay by
15 viatical investment is was incomplete, correct?

16 A. It was a shorthand description. Okay. Yes.

17 Q. And I asked you at your deposition how they
18 had applied the Howey Test in that case, and you said
19 you couldn't tell how they applied the Howey Test in
20 that case, correct?

21 A. Are you asking me about their description of
22 what a viatical is or are you asking me about what
23 their rationale was for determining whether it fell

1 under the Howey Test?

2 Q. Okay. First -- the first -- first I asked
3 you about its summary of what a viatical is. You
4 found that to be incomplete.

5 A. Yes.

6 Q. And I also asked you about how the Bureau had
7 applied the Howey Test to the viatical, and you said
8 that you couldn't tell from the order, correct?

9 A. That's right. The order does not lay out its
10 rationale. Just the conclusion.

11 Q. In fact, you said you couldn't see the logic
12 of the order, correct?

13 A. Not in the sense that I thought it was
14 illogical, just that it didn't spell out what the
15 logic was. I actually agree with the conclusion,
16 but...

17 Q. But you couldn't tell how they got there?

18 A. No. No. It didn't purport to explain the
19 rationale.

20 Q. And you mentioned this morning that you
21 reviewed the Bureau's 2010 statement of policy,
22 correct?

23 A. On promissory notes, yes.

1 Q. Yes. And you -- you agree that the focus of
2 the statement of policy was whether -- was that
3 secured promissory notes are not securities, correct?

4 A. No.

5 Q. Not correct?

6 A. Not correct.

7 Q. Okay. You found that the Bureau's analysis
8 in the policy statement was, quote, your words,
9 Outside the mainstream, end quote, correct?

10 A. I'm sorry. I'm not following your line of
11 questioning.

12 Q. Okay.

13 A. Did you ask me whether the thrust of the
14 policy statement was to opine on whether secured notes
15 were securities?

16 Q. Sure.

17 A. The answer would be no.

18 Q. Okay. What was the thrust of the policy
19 statement?

20 A. Focusing on unsecured notes as being in
21 New Hampshire per se securities.

22 Q. You found the Bureau's analysis to be outside
23 of the mainstream, correct?

1 A. Well within its discretion, but different
2 from what federal case law is. It's an illustration
3 of how state securities administrators can reach
4 conclusions that don't necessarily comport exactly
5 with how other states decide them or how federal
6 courts would decide them.

7 This is a matter of New Hampshire law, and
8 they determine that under New Hampshire law unsecured
9 promissory notes constitute securities.

10 Q. And their analysis to get there was to use,
11 your words, "Outside the mainstream," correct?

12 A. Yes.

13 Q. Okay.

14 A. It's an unusual analysis.

15 Q. You found the policy statement that it
16 knowingly and -- it was knowingly and intentionally
17 different than the United States Supreme Court's
18 decision on a similar issue, correct?

19 A. Sure. They -- they declined to follow the
20 *Reves* case.

21 Q. And they were critical of the *Reves* case?

22 A. And they were critical of the *Reves* case.

23 Q. In fact, the Bureau went so far as to say the

1 United States Supreme Court's analysis of the issue
2 was, quote, sophistry, correct?

3 A. I think they used that word, yes.

4 Q. The policy statement published by the Bureau
5 refers to the definition of securities in
6 New Hampshire as, quote, Nothing more than a laundry
7 list of items to be considered as securities, correct?

8 A. I don't know whether that's an accurate quote
9 or not.

10 Q. Okay. Turn to page 62 of your deposition,
11 please.

12 A. Okay.

13 Q. I asked you the question beginning at line
14 17, and it, referring to the policy statement, states
15 that the definition of securities in New Hampshire is
16 quote, Nothing more than a laundry list of items to be
17 considered in securities, correct?

18 A. I think maybe we were both reading at the
19 same time, and I said yes.

20 Q. When you say, "We were both reading at the
21 same time," are you suggesting that that is not a
22 correct answer, that's not the answer you meant to
23 give?

1 A. You've asked me whether the Bureau's policy
2 statement said these words.

3 Q. That's correct.

4 A. My testimony was I don't know whether it said
5 these words. You have brought me back to my
6 deposition in which -- and I had that -- I had that
7 policy statement with me, and so I'm conceding to you
8 that those words do appear in the policy.

9 Q. That's all I was asking. And you knew it
10 then, correct?

11 One more question about the policy statement.
12 You disagree with the policy statement's opinion that
13 quote, Securitiness needs to be determined at the time
14 of the first offering of the instrument and must
15 remain consistent throughout the life of the
16 instrument, end quote, correct?

17 A. That wouldn't be the analysis that I would
18 apply.

19 Q. You disagree with their analysis?

20 A. Yeah. I would disagree with that analysis.

21 MR. RAMSDELL: Just one second.

22 I have no further questions.

23 THE PRESIDING OFFICER: Thank you,

1 Mr. Ramsdell. Mr. Tilsley -- I'm sorry. Mr. Gordon,
2 do you have anything?

3 MR. GORDON: I just have very few questions.

4 THE PRESIDING OFFICER: Okay. By all means,
5 proceed.

6 CROSS-EXAMINATION

7 BY MR. GORDON:

8 Q. I guess it's -- I could say good afternoon.

9 A. Good afternoon to you, Mr. Gordon.

10 Q. Have you been asked to testify before the
11 New Hampshire State Legislature?

12 A. No.

13 Q. Are you aware that the New Hampshire State
14 Legislature is considering these issues now?

15 A. No.

16 Q. Are you aware that the New Hampshire State
17 Legislature was asked at one point to include these
18 participatory agreements as a security?

19 A. Recently?

20 Q. Yes.

21 A. No.

22 Q. Were you aware that the New Hampshire State
23 Legislature has not acted upon that?

1 A. No.

2 Q. Do you think it's appropriate for these
3 issues as to what is a security for a regulatory
4 function to be presented to a state body legislature?

5 A. It's certainly not inappropriate.

6 Q. And do you believe that the consequences of
7 determining whether or not these are securities or not
8 securities is a complex issue with consequences?

9 A. Can you ask the question again, please?

10 Q. Yes. Do you believe there are consequences
11 that will flow from a determination as to whether or
12 not these are or are not a security?

13 A. There certainly are consequences limited to
14 the number of risk pools it affects, but yes, there
15 are certainly consequences.

16 Q. Well, the consequences could also be to the
17 many of hundreds of thousands of lives that are
18 affected by these agreements, correct?

19 A. It's a bit dramatic, but I suppose logically
20 it could.

21 Q. Well, why is it dramatic?

22 THE PRESIDING OFFICER: Mr. Gordon, let's not
23 be argumentative.

1 MR. GORDON: Okay.

2 Q. And that there could be input that the
3 municipalities might wish to make to their
4 legislatures as to the effects those would have upon
5 them if these became a security; would you agree with
6 that?

7 A. The municipalities certainly have the right
8 to petition government if they want to make a change
9 in the law or want to try to clarify the law. That's
10 certainly their right to do so.

11 Q. Thank you.

12 THE PRESIDING OFFICER: Thank you,
13 Mr. Gordon. Mr. Howard, do you have anything?

14 MR. HOWARD: I do not have any questions for
15 this witness.

16 THE PRESIDING OFFICER: Thank you very much.
17 Mr. Tilsley, do you have redirect?

18 MR. TILSLEY: I do. Very brief. Less than
19 ten minutes.

20 THE PRESIDING OFFICER: Okay. Would you
21 please come forward.

22 REDIRECT EXAMINATION

23 BY MR. TILSLEY:

1 Q. Just a couple of quick questions, Greg.

2 At the end of Attorney Ramsdell's examination
3 you were talking about the policy statement and some
4 specific language. When you agreed to that language
5 in your deposition you had the statement in front of
6 you to read, correct?

7 A. That's my recollection, yes.

8 Q. You didn't have it in front of you today,
9 obviously?

10 A. Right.

11 Q. I want to quickly, and for me dangerously,
12 use Andy's machine here. This is Exhibit 274, I'm
13 sorry. Do you have Exhibit 274 in front of you?

14 A. Yes.

15 Q. This is that second IRS letter that you
16 looked at.

17 A. Okay.

18 Q. I just want to quickly look at the
19 highlighted portion of that.

20 One of the representations in that letter --
21 if you can read on the screen, if that's easier for
22 you, Greg. There's no highlighting on your document.

23 A. I got it. Page 2, yeah.

1 Q. On the second page, the second-to-last
2 paragraph, one of the representations that the IRS is
3 relying on appears to be that: "Under the bylaws,
4 taxpayer's net income accrues to the members, and each
5 member has a legally enforceable right to its
6 respective share of its income. Under statute,
7 taxpayer is required to return excess earnings and
8 surplus to the members." Have I read that correctly,
9 sir?

10 A. Yes.

11 Q. And I also want to go to the previous
12 exhibit, which is the first IRS letter, Number 273.
13 And on the bottom of the first page, I think you were
14 asked to read the first portion of that paragraph.

15 It indicates there that under the bylaws, I'm
16 going to paraphrase this time, the income of the trust
17 is earmarked for the provision of health insurance
18 protection, for the payment of benefits, or to be
19 returned to the members in proportion to the amounts
20 paid on behalf of the employees of such member in that
21 year.

22 Is that a representation that the IRS relies
23 on in this letter, sir?

1 A. Appears to be, yes.

2 Q. And that would be the type of proportional
3 representation that you say is a pro rata return that
4 would be consistent with a security as opposed to the
5 type of experience return that Attorney Ramsdell was
6 talking about, correct?

7 THE PRESIDING OFFICER: Mr. Ramsdell, do you
8 have anything?

9 MR. RAMSDELL: I'll let him answer.

10 A. Could you break that question apart, please?

11 Q. Sure. No problem. Does this language
12 discuss a pro rata return or a return based on actual
13 claims experience for each member?

14 A. I'm not -- it literally says who made the
15 contributions "in proportion to the amounts paid on
16 behalf of employees of such member in that year."

17 So it appears to be in proportion to the
18 payment -- the payments out are in some way
19 proportional to the payments in.

20 Q. And is that a pro rata type of analysis?

21 A. Certainly.

22 Q. And as I get to the end of that paragraph,
23 the last sentence, "The return may be made by means of

1 a reduction of contributions due in the subsequent
2 year." Is that accurate?

3 A. Yes.

4 Q. You were also, sir, asked to look at RSA
5 5-B:1. And this appears to work on the ELMO. I just
6 want to refer you -- and you were asked to read some
7 language in there. I want to refer you to some
8 language here.

9 "Accrual of interest and dividend earnings
10 which may be returned to the public benefit." Do you
11 see that in the statute, sir?

12 A. Yes.

13 Q. Interest, dividends, earnings, are those
14 types of concepts that you deal with in securities
15 law?

16 A. Yes.

17 Q. You were asked in regards to the *Naylor* case
18 to -- the distinction between the fact that the pool
19 in Indiana in *Naylor* was insolvent and the LGC pools
20 are not insolvent.

21 As -- for purposes of securities regulation,
22 does the solvency of the person offering the potential
23 security matter in terms of whether or not we have a

1 security?

2 A. The supreme court in *Howey* specifically said
3 that this is not an inquiry into whether this is
4 speculative or not. The -- if someone offers interest
5 in an already insolvent company, there's something
6 fraudulent perhaps going on. But it -- but the
7 solvency or insolvency, and particularly the solvency
8 or the future insolvency, has really nothing to do
9 with the *Howey* Test.

10 If that was the earmark of a security, then
11 the stockholders of Travelers Insurance would not be
12 purchasing securities when they purchase stock. It's
13 not a factor.

14 Q. When Attorney Ramsdell began your examination
15 he asked you some questions about whether certain
16 positions, possible positions of the Bureau whether to
17 regulate this or not regulate this as a security would
18 be reasonable; do you recall that?

19 A. Yes.

20 Q. If this type of risk pool landed on your desk
21 as a securities lawyer in New Hampshire, what would
22 you do with it?

23 MR. RAMSDELL: Objection. We're asking for

1 an undisclosed opinion.

2 THE PRESIDING OFFICER: Okay.

3 MR. TILSLEY: I don't think it's -- I don't
4 think it's an expert opinion. I'm asking him what he
5 would do if this landed on his desk.

6 THE PRESIDING OFFICER: Mr. Ramsdell?

7 MR. RAMSDELL: He's on the stand as an expert
8 witness and now has been asked an opinion question,
9 "What would you do?" That's going to elicit an expert
10 opinion.

11 THE PRESIDING OFFICER: Mr. Tilsley, anything
12 further?

13 MR. TILSLEY: Nothing further.

14 THE PRESIDING OFFICER: Okay. Objection
15 granted.

16 MR. TILSLEY: I have no further questions,
17 sir. Thank you.

18 THE PRESIDING OFFICER: Any re-cross,
19 gentlemen?

20 MR. RAMSDELL: Not from me.

21 MR. GORDON: No.

22 MR. HOWARD: No.

23 THE PRESIDING OFFICER: Thank you. If I may

1 just have a moment, please.

2 (Brief pause.)

3 THE PRESIDING OFFICER: At great risk, given
4 the history of these proceedings, Mr. Fryer, I have a
5 question. And it's different, but it's not unlike the
6 question that was just asked of you by BSR. I believe
7 that it is sufficient to allow me to ask it or I would
8 not. And here's the question:

9 You are familiar with our statute 5-B,
10 correct?

11 THE WITNESS: Yes, sir.

12 THE PRESIDING OFFICER: Being familiar with
13 5-B and with the facts in this case related to the
14 consideration of whether or not the interest or
15 products of the insurance risk pool are securities,
16 being familiar with those facts and with our statute,
17 is fair notice contained in our statute that these
18 products could be considered as securities.

19 THE WITNESS: Yes.

20 THE PRESIDING OFFICER: Thank you. The
21 answer was yes. And I'll be asking -- the answer was
22 yes. Okay? So I thank you.

23 And I'll just say that I'll also be asking a

1 similar question of anyone else who testifies with
2 respect to securities.

3 Anything further before we break for lunch?
4 Mr. Howard?

5 Believe me, all answers I assign weight to
6 vary in degrees of weight. But Mr. Howard, do you
7 have anything?

8 MR. RAMSDELL: I have a question.

9 THE PRESIDING OFFICER: Mr. Ramsdell.

10 REXCROSS-EXAMINATION

11 BY MR. RAMSDELL:

12 Q. I want to make sure I understood your answer
13 to the last question, and that is, you believe that
14 fair notice is provided in 5-B itself?

15 A. If you present 5-B to me as a securities
16 lawyer, the very first question that comes to mind is:
17 Is this a security? Is -- specifically, is this an
18 investment contract? Because it's a -- it's an
19 interest in a pool. Very first issue: Is it an
20 investment contract?

21 So yes, I would say that the statute would
22 put a securities practitioner on very fair notice of
23 the possibility that these interests are, indeed,

1 securities. And I might even go further and seek --
2 you know, seek an advisory ruling on that. I think
3 that would be prudent under the circumstances.

4 Apparently, that was not done in this case.

5 Q. Seek an advisory ruling from the Bureau?

6 A. Absolutely.

7 Q. Thanks.

8 MR. GORDON: I have a follow-up.

9 THE PRESIDING OFFICER: Mr. Gordon.

10 REXCROSS-EXAMINATION

11 BY MR. GORDON:

12 Q. Do you know when LGC first provided the
13 participatory agreement at issue to the BSR?

14 A. To the BSR or the Department of State?

15 Q. Well, I think one and the same, but...

16 A. Long ago.

17 Q. Long ago. Do you know how long ago?

18 A. I don't know how long ago.

19 Q. At least a year before the August 2nd, 2011
20 notice?

21 A. I would be speculating.

22 Q. Do you consider that to be a fairly lengthy
23 time, a year?

1 A. Less and less.

2 Q. But could be more and more?

3 A. I meant for me personally the years go by
4 faster and faster.

5 Q. But of an issue of importance waiting for a
6 determination, do you think a year or a year and a
7 half is a fairly lengthy time? Yes or no?

8 A. If your question is -- if the Bureau was
9 presented with that question and took a year to
10 respond, I would say that's a long time.

11 Q. Thank you.

12 THE PRESIDING OFFICER: Mr. Howard?

13 MR. HOWARD: Yes. Thank you.

14 CROSS-EXAMINATION

15 BY MR. HOWARD:

16 Q. Do you know when this statute 5-B went into
17 effect?

18 A. Late '80s.

19 Q. Yeah. 1987, does that sound about right?

20 A. Sounds about right, yes.

21 Q. And so if you're a lawyer sitting at your
22 desk in 1987, you're going to read this statute and
23 go, "Oh, this is a security or could be," right?

1 A. Well, it depends --

2 Q. Well, you just said you would.

3 MR. TILSLEY: Objection. Can he answer the
4 question?

5 THE PRESIDING OFFICER: Hold on. Please hold
6 on. The last question, I believe, was: "You had just
7 said you would." Is that correct?

8 MR. HOWARD: I thought that was his testimony
9 before I got up, yes.

10 THE PRESIDING OFFICER: Let's try it again.
11 Would you or wouldn't you?

12 A. The statute allows a range of structures,
13 some of which I would think clearly are not
14 securities, but some of which are quite reasonably
15 concluded to be securities.

16 So the statute itself would bring the issue
17 to mind, but the -- it would have to be the particular
18 structure presented to me that would make the
19 difference on whether I sought clarification.

20 Q. The particular structure of what?

21 A. Of the pools. The means by which these pools
22 provide the risk management function.

23 Q. Okay.

1 A. Means different -- means makes a difference.

2 Q. All right. So this statute enacted in 1987
3 which gave -- or which required notice filing to the
4 Secretary of State, which is where the Bureau of
5 Securities Regulations sits, right, their staff
6 attorneys had this statute on their desk for 25 years
7 now?

8 A. Okay. Yes.

9 Q. And they first come up with the notion in
10 2011 that this is a security.

11 A. You're telling me this --

12 Q. We established that this morning.

13 A. You're representing to me that they first
14 came up with this theory just recently?

15 Q. The first time notice was ever given was
16 August of 2011.

17 A. That's a different thing.

18 Q. Well, since they're the agency with the
19 expertise, wouldn't you expect them to have told
20 somebody, one of these pools, that, "Hey, what you're
21 doing is a security" sometime in the last 25 years?

22 A. Actually, I don't think it's the function of
23 the Bureau of Securities to run around the state and

1 hunt down what might or might not be securities.

2 Q. They don't have to run around --

3 A. If the issues are presented to them, I
4 believe they should respond. I'm not aware that the
5 issue was presented to them earlier than this.

6 Q. Okay. Do you know what notice filing is
7 required at the Secretary of State? What the pools
8 have to file with the Secretary of State?

9 A. It's a fairly extensive filing. I think
10 financial statements, et cetera.

11 Q. Right, which describes the structure of these
12 pools. The bylaws are there, right?

13 A. Yes.

14 Q. The actuarial evaluations are there, correct?

15 A. I'll accept that, yes.

16 Q. The financials are there, right?

17 A. Yes.

18 Q. And the financials include how the surplus or
19 the net assets are invested, right?

20 A. There's certainly discussion about how -- the
21 fact of investment and the manner of investment, yes.

22 Q. And all of that information has been sitting
23 at the Secretary of State's office every year for the

1 last 25 years?

2 A. Okay. I'll accept that premise.

3 MR. HOWARD: All right. Thank you.

4 THE PRESIDING OFFICER: Anyone else? Thank
5 you very much. We'll end the morning session. Could
6 I see lead counsel as we break?

7 (12:18 to 1:33 p.m. lunch break taken.)

8 THE PRESIDING OFFICER: Good afternoon,
9 Ladies and Gentlemen. We've returned from our lunch
10 recess on the fifth day of testimony. We are still in
11 the BSR's direct case.

12 And Mr. Volinsky, you have a witness to begin
13 with this afternoon.

14 MR. VOLINSKY: I do, Your Honor. Would you
15 stand for a moment?

16 Kevin Bannon,

17 having been first duly sworn,

18 was examined and testified as follows:

19 THE PRESIDING OFFICER: Please be seated,
20 sir. Would you state your name and give us your
21 business address, please.

22 THE WITNESS: Kevin Bannon, Secretary of
23 State's office, 125 Capitol Street in Concord.

1 THE PRESIDING OFFICER: Thank you.

2 Mr. Volinsky.

3 DIRECT EXAMINATION

4 BY MR. VOLINSKY:

5 Q. Mr. Bannon?

6 A. Yes.

7 Q. Would you tell us your educational
8 background, please.

9 A. Graduated from Boston College, undergraduate,
10 1976. Degrees in accounting and finance.

11 Q. Any distinctions?

12 A. Magna cum laude.

13 Q. Any other formal education?

14 A. No.

15 Q. Do you hold any professional designations?

16 A. Yes, I do.

17 Q. What are they?

18 A. Certified public accountant in the State of
19 New Hampshire and certified fraud examiner.

20 Q. When did you earn your CPA license?

21 A. 1979.

22 Q. What is a certified fraud examiner?

23 A. A certified fraud examiner is an audit

1 professional who uses means as designated by the
2 Association of Certified Fraud Examiners to perform
3 investigations and audits typically leading into the
4 judicial arena.

5 Q. When did you earn your certified fraud
6 examiner designation?

7 A. 1992.

8 Q. Have you in your professional career worked
9 in the public accounting arena?

10 A. Yes, I have.

11 Q. And by whom were you employed as a public
12 accountant?

13 A. Ernst & Young for the period 1976 to 1981.

14 Q. Have you worked in the private accounting
15 arena?

16 A. Yes, I have.

17 Q. And for whom have you worked as a private
18 accountant?

19 A. For the firm called Armatron International.
20 I was an assistant corporate controller for two years.
21 And then for about 20 years in the internal audit
22 profession with several public companies. And then as
23 a -- in the general operational finance area with

1 several private companies. And then coming back and
2 working for a regional public accounting firm in the
3 fraud and forensic arena.

4 Q. And the name of the regional firm?

5 A. Melanson, Heath & Company.

6 Q. Are they principally headquartered in Nashua?

7 A. Yes, they are.

8 Q. And you're currently employed by the Bureau
9 of Securities Regulation Department of State?

10 A. Yes.

11 Q. What's your role at the Bureau?

12 A. Forensic financial examiner.

13 Q. There's some terms that are going to come up
14 during your examination. Let me ask you to explain
15 one of them at this point. It's the acronym GASB,
16 G-A-S-B. What is GASB?

17 A. Government Accounting Standards Board.

18 Q. And what does Government Accounting Standards
19 Board have to do with the work you do as a BSR
20 employee?

21 A. Nothing, really.

22 Q. Okay. And does the GASB promulgate standards
23 for certain kinds of organizations as far as their

1 accounting is concerned?

2 A. For types of entities, government entities.
3 How one would do a financial audit in a government
4 entity.

5 Q. Did you complete or attempt to complete an
6 examination of the Local Government Center in this
7 matter?

8 A. With GASB?

9 Q. No, just generally.

10 A. Yes.

11 Q. And was that pursuant to one of the orders
12 issued in this case?

13 A. Yes.

14 Q. Did you use the GASB standards to conduct
15 your examination of the Local Government Center?

16 A. No. No, I did not.

17 Q. Are there other standards that you used for
18 that examination?

19 A. I used the standards promulgated by the
20 Association of Certified Fraud Examiners.

21 Q. Did you advise anyone at the LGC that those
22 were the standards you were using?

23 A. Yes.

1 Q. Who did you tell?

2 A. Chief financial officer, Sandal Keeffe,
3 general counsel, David Frydman, and Nancy Cones was
4 also present at the meeting we had on September 1st,
5 2011.

6 Q. And at that meeting is when you told them the
7 standards you would use?

8 A. Yeah, in detail. And then I followed up with
9 e-mails supporting what I had said in that meeting.

10 Q. Another term that's relevant to us in this
11 context is called trial balance mapping. Are you
12 familiar with that term?

13 A. Yes.

14 Q. Tell us what trial balance mapping is.

15 A. It's the process of taking what's reported in
16 the audited financial statements and mapping them back
17 to the books of records, whether it be called a trial
18 balance or general ledger, so that one would ascertain
19 that everything that was in the books and records was
20 presented in the audited financial statements.

21 Q. Is one of the purposes of an audited
22 financial statement to present the finances of the
23 entity being audited in a fair and accurate

1 representation?

2 A. Yes.

3 Q. Were you able to complete trial balance
4 mapping for the various LGC entities?

5 A. After considerable effort on my part.

6 Q. What do you mean by that?

7 A. It was a task that I had asked LGC to help me
8 do because it was quite a large task. We were
9 talking, again, about 40 financial statement accounts
10 to a couple of hundred trial balance accounts for all
11 the LGC entities for a five-year period.

12 Q. Is it unusual for either an auditor or an
13 examiner to ask the entity being examined or audited
14 to assist in the process?

15 A. Yes.

16 Q. Is it unusual or usual?

17 A. It's usual.

18 Q. Did you eventually complete your trial
19 balance mapping effort with respect to the
20 New Hampshire Municipal Association?

21 A. Yes.

22 Q. Did you complete it with respect to the
23 combined Workers' Comp. and Property-Liability, LLC?

1 A. Yes.

2 Q. Did you complete it with respect to the LGC
3 HealthTrust, LLC?

4 A. Yes.

5 Q. And did you complete it with respect to the
6 LGC parent?

7 A. Yes.

8 Q. And finally, did you complete it with respect
9 to the LGC Real Estate, LLC?

10 A. Yes.

11 Q. Let's start with the New Hampshire Municipal
12 Association. As a result of the mapping did you reach
13 any conclusions as to whether the audited financial
14 statements accurately or inaccurately present the
15 financial picture of the New Hampshire Municipal
16 Association?

17 A. Yes, I did reach a conclusion, and that
18 conclusion was they were not accurately presented.

19 Q. What -- in what way were they inaccurate?

20 A. Because they reflected a net balance between
21 gross membership dues received and amounts transferred
22 from those receipts to LGC.

23 Q. Let me, if I may --

1 MR. QUIRK: Your honor?

2 THE PRESIDING OFFICER: Mr. Quirk.

3 MR. QUIRK: May I approach?

4 THE PRESIDING OFFICER: Please.

5 MR. QUIRK: I'm going to pose an objection.

6 At this point in time I'm not sure how this is
7 relevant. NHMA is not a party to this proceeding.

8 Your order of December 2011 that dictated the
9 on-site inspection related to the entities that are
10 involved in this administrative proceeding. Now we
11 just heard testimony about NHMA. I would object to
12 that and ask that it be stricken from the record.

13 THE PRESIDING OFFICER: Mr. Volinsky.

14 MR. VOLINSKY: Yes, sir. The NHMA finances
15 are reported in consolidated financial statements of
16 the LGC parent, which is an entity at issue in this
17 matter, and it is the LGC parent's financial
18 statements that in this very respect includes a
19 misrepresentation as to funds that go from the NHMA to
20 that parent.

21 THE PRESIDING OFFICER: Mr. Bannon?

22 THE WITNESS: Yes?

23 THE PRESIDING OFFICER: Can you segregate

1 NHMA from LGC, quote, parent in your opinion?

2 THE WITNESS: It's identified separately in
3 the consolidation.

4 THE PRESIDING OFFICER: Okay.

5 THE WITNESS: So in that respect I can see it
6 by itself.

7 THE PRESIDING OFFICER: Do I understand that
8 other than some contribution from NHMA to the LGC
9 parent that the other finances of NHMA would not
10 affect the LGC parent's operation?

11 THE WITNESS: Having -- having discovered
12 what I had just mentioned, the transfer of funds from
13 NHMA to LGC and not finding -- finding that
14 inappropriate and not with the sufficient disclosures
15 that I think were necessary, it gave me pause to think
16 about the correct accounting of everything in the
17 consolidated entity.

18 THE PRESIDING OFFICER: Do we need to speak
19 any further about NHMA, then, in your opinion, other
20 than to tell me that there's a certain amount of money
21 or a manner of money going from NHMA to the LGC
22 parent?

23 THE WITNESS: Other than to say it's

1 significant in terms of determining the qualitative
2 accounting, that aspect of accounting that I had
3 noted, and that it might be reflected as well in other
4 LGC entities.

5 THE PRESIDING OFFICER: All right. I'm going
6 to grant the objection. And let's see if it is
7 reflected in the other entities which are parties to
8 this proceeding. Please proceed, Mr. Volinsky.

9 MR. VOLINSKY: Gotcha.

10 Q. With respect to the LGC parent, did you find
11 assets that from one year to the next were taken off
12 the books of the LGC parent?

13 A. Yes.

14 Q. Can you tell us what assets those were?

15 A. Scholarship fund assets, which were on the
16 parent company's books in 2009 which were not there in
17 2010 but were found in a separate trust than the
18 consolidating entity in 2010.

19 Q. So how did you become aware of this issue?

20 A. Extension of the mapping process. But as I
21 laid out the accounts for all the entities, as I
22 looked at the LGC accounts I could clearly see the
23 scholarship fund existing, growing, and then

1 disappearing from -- in 2010 from 2009.

2 Q. And did you ask anyone at the LGC about that?

3 A. Yes.

4 Q. Who did you make inquiry of?

5 A. The chief financial officer, Sandal Keeffe.

6 Q. Did she have an explanation as to what
7 happened to the scholarship account?

8 A. She had mentioned that the board had approved
9 taking those funds and putting them in a separate
10 501(c)(3) charitable entity in -- in 2009.

11 Q. When you say a separate 501(c)(3), is that a
12 separate corporation of some kind?

13 A. A trust, yes. Separate from -- not part of
14 the consolidation at all.

15 Q. When that fund was moved into the separate
16 entity, could you find a -- any kind of compensation
17 that went to the LGC in return for it providing those
18 funds?

19 A. No, I did not.

20 Q. Were you ever able to find board minutes that
21 established the separate entity and move the
22 scholarship money over?

23 A. I went back and looked at the minutes that

1 Ms. Keeffe had referred to and there was one set of
2 minutes which spoke to a contribution that was
3 contemplated being made in the name of John Andrews
4 for \$5,000, that that would be put in the scholarship
5 fund.

6 There was some discussion about setting --
7 not about setting up. There was some discussion about
8 a charitable trust as part of those minutes, but there
9 was no decision that I saw in those minutes that said,
10 "Take the funds from the LGC entity and put them
11 into -- in a separate entity's books."

12 Q. Now, does this involve a lot of money?

13 A. \$40,000. And when I did ask to see the
14 statement of those, where those monies were in 2010,
15 the balance was \$49,000. So I don't know at what
16 point, how much money there was when it was taken off
17 the LGC books and set up separately.

18 Q. Okay. Let me skip over one or two points and
19 see if I can move us along to another topic.

20 You've been in the hearing room throughout
21 the hearing that's happened so far?

22 A. Yes.

23 Q. Are you aware of testimony about \$31,000,000

1 being transferred as parent contributions from
2 HealthTrust and other entities?

3 A. Yes.

4 Q. Okay. So I'm going to ask you about that
5 issue.

6 Did you make efforts to try and trace through
7 the trial balance mapping process how and when and
8 where the money came from that was transferred in the
9 context of that parental -- set of parental
10 contributions?

11 A. Yes.

12 Q. All right.

13 A. In addition, traced it through the audited
14 financial statements. One of the steps that I wanted
15 to perform was to actually trace the funds through the
16 bank accounts to see that the monies did, in fact,
17 come from HealthTrust accounts or PLT accounts or
18 whatever. And I was able to do that in just one of
19 the many transactions that made up the \$31,000,000 of
20 HealthTrust.

21 Q. Why weren't -- I'm sorry. Go ahead.

22 A. No. Just one of many of the contributions
23 that made up the \$31,000,000.

1 Q. Did you ask for all of the transactional
2 information?

3 A. I asked for everything, yes.

4 Q. And you were provided one set of --

5 A. One transaction, right.

6 Q. Was there an explanation provided to you as
7 to why not the rest?

8 A. Yeah. The explanation was that the current
9 accounting system could not provide the necessary
10 documentation to facilitate easily putting those
11 transactions together.

12 Q. You completed a report in this case, did you
13 not?

14 A. Yes, I did.

15 Q. In your report did you include a table of the
16 transactions that went into the one aspect of
17 disclosure of the parental transfers?

18 A. Yes, I did.

19 Q. If I can refer you on to Exhibit 68, which is
20 book 4. Book 4, Exhibit 68. Then I'm going to send
21 everyone to page 10.

22 Is that the table of transactions that went
23 into the one transfer that the Local Government Center

1 was able to document for you?

2 A. Yes.

3 Q. All right. So tell us -- we're talking about
4 a three-and-a-half million dollar transfer. From
5 which entity to which entity was that booked as in the
6 financial statements? Not in your transactions.

7 A. Okay. It's in the paragraph right underneath
8 the numbers. The complexity of the transfer is
9 evident. Five transfers, you'll see them by date, of
10 varying amounts and size over three separate days from
11 two different entities and four different bank
12 accounts.

13 Q. Okay. But let me ask you to stay with me on
14 the question.

15 A. Sure.

16 Q. As far as the financial statement is
17 concerned, do these five different transactions show
18 up in the financial statement itself?

19 A. No. Just the one, the three million, five.

20 Q. And three million, five on the financial
21 statement shows up as coming from which entity to
22 which entity?

23 A. From LGC to LGC RE.

1 Q. And you actually expressed that in your
2 report, LGC to LGC RE?

3 A. Yes.

4 Q. Is there anything in the financial statement
5 that shows -- when you use the initials HT as the
6 source here, do you mean HealthTrust?

7 A. Yes, I do.

8 Q. And PLT is Property-Liability Trust?

9 A. That's correct.

10 Q. What are you indicating here for these five
11 transactions?

12 A. This is -- these are the dates and the
13 account numbers for the two entities, the HealthTrust
14 and PLT, that I found these components and added up to
15 the 3.5 million.

16 Q. Okay. So the top one, the Citizens Bank
17 account with that particular number, is that a -- an
18 LGC parent account or an HT account?

19 A. An HT account.

20 Q. And the one directly below that, is that a
21 parent account or a Property-Liability account?

22 A. Property-Liability account.

23 Q. So is it accurate to say that these transfers

1 came from these two entities and not from the parent
2 as reflected in the financial statement?

3 A. Yes.

4 Q. You can keep that in front of you and turn to
5 Exhibit 69, which is book 5. Let me turn you to
6 page 164.

7 MR. QUIRK: What's the numbering?

8 MR. VOLINSKY: 164.

9 MR. QUIRK: Thank you.

10 Q. 164. Are you there, Kevin?

11 A. Yes.

12 Q. I'll put that up on the screen. I'll zoom us
13 in. This is a schedule from the 2008 financial
14 statement, right?

15 A. Yes.

16 Q. And this is a consolidating schedule, which
17 means it produces information about each of the
18 entities and then totals it; is that right?

19 A. Yes.

20 Q. And one of those entities is Real Estate?

21 A. Yes.

22 Q. If you look on the left side, are there line
23 items for transfers to subsidiary and transfers to

1 parent?

2 A. Yes.

3 Q. And if I just walk us over on those two line
4 items, do we find the 3.5 million?

5 A. Yes.

6 Q. Coming into --

7 A. Real Estate.

8 Q. -- Real Estate? Let me slide it down a
9 little bit. So to the Real Estate column. And it's a
10 transfer to this subsidiary?

11 A. Yes.

12 Q. Does this mean transfer from parent or from a
13 sister organization?

14 A. I would say it's from the parent.

15 Q. Now, what are the implications of this? Does
16 it mean anything?

17 A. Cumulatively with the other points that we've
18 discussed thus far, it just gives me pause and concern
19 regarding the quality of -- the inaccuracy of
20 financial reporting that I was reviewing.

21 Q. So this was the only transaction that they
22 could document for you?

23 A. Yes.

1 Q. This one is, actually, when you look at the
2 underlying documents is a sister transaction,
3 HealthTrust or Property-Liability to Real Estate,
4 correct?

5 A. Correct.

6 Q. Does this enterprise have any policies or
7 procedures with respect to intercompany loans?

8 A. Yes. There was a -- I believe it was in
9 2006, there was a -- a board action to set up
10 procedures to account for intra-entity loans.

11 Q. And does it have certain parameters under
12 which loans may be made and against which may not be?

13 A. Yes. Yes.

14 Q. Is there anything about these transactions
15 that identify them as an intercompany loan that you
16 saw?

17 A. This one specifically?

18 Q. Yes.

19 A. I did not see anything that identified it
20 as...

21 Q. Okay. Were you ever provided with any
22 details of transactions between HealthTrust and
23 Workers' Comp. Trust that indicated that there were

1 intercompany loans happening there?

2 A. Not following the policy that was -- not
3 following the policy that was dictated in 2006, yeah.

4 Q. In Mr. Andrews' testimony you remember I
5 asked him if this was a matter of HealthTrust making
6 contributions to the parent and the parent making
7 contributions to Workers' Comp.?

8 A. Yes.

9 Q. Were you able to find any -- were you given
10 any documentation to follow that trail of transfers?

11 A. No. That's what I was speaking about.

12 Q. I'll switch topics on you.

13 A. Yes.

14 Q. Let me send you to Exhibit 48, which should
15 be book 3.

16 A. I don't have the book.

17 Q. You don't have 3?

18 A. I have 2, 5, and 4.

19 Q. Oh, I'm sorry. It's book 2. Sorry.

20 Exhibit 48. Are we ready? 48. I apologize. I
21 didn't number the pages in this one.

22 If you go to the middle of 48, you'll see
23 there are Bates numbers on the lower left, and I want

1 to take you to Bates number LGC-AH11748. And when you
2 get there you'll find a chart.

3 Are you there, Kevin?

4 A. Yes, I am.

5 Q. This chart is in an exhibit that's the Local
6 Government Center's document, and in it there's a
7 presentation of a ten-year history of surplus applied
8 as rate credits, '02 to '12.

9 First, am I right that the numbers in the
10 exhibit go from '03 to '09?

11 A. Yes.

12 Q. Okay. So it's not quite titled accurately.
13 But what's -- do you understand what's depicted in
14 this table?

15 A. Yes.

16 Q. And tell us what that is.

17 A. It's a depiction of rate credits that were
18 reported in those particular years for those
19 particular premium settings.

20 Q. Okay. And is there an accumulation,
21 aggregation of the premiums for the years depicted?

22 A. Yes.

23 Q. And how much is that?

1 A. One point one billion.

2 Q. Did you say billion with a "B" as in boy?

3 A. Yes.

4 Q. And of the 1.1 billion premiums, how much was
5 returned over that period -- that ten-year period by
6 the Local Government Center as a rate credit?

7 A. Thirty million, 30.2.

8 Q. And did the Local Government Center figure
9 out for us what that percentage works out to be?

10 A. It's about 2.72.

11 Q. As far as that calculation, no problems? The
12 math is correct?

13 A. (Witness nods head.)

14 Q. Yes?

15 A. Yes.

16 Q. While you were working on your examination
17 did you ask questions about rate crediting?

18 A. Yes.

19 Q. Did you have the process of rate crediting
20 explained to you factually just so you know what you
21 were talking about or looking at?

22 A. Yes.

23 Q. Who helped you understand that at the Local

1 Government Center?

2 A. Wendy Parker.

3 Q. And do you know Ms. Parker's position at the
4 Local Government Center?

5 A. I think she's an officer in Risk Services.

6 Q. Related to HealthTrust?

7 A. Yes.

8 Q. Are the rate credits applied proportionately
9 in the years that they're granted?

10 A. Yes.

11 Q. Is it a pro rata share of whatever that
12 percentage is?

13 A. Yes.

14 Q. It's not based on the particular experience
15 of a Hooksett or a Bow --

16 A. It's not what I understand.

17 Q. Of the 2.72 that Local Government Center
18 averages out for you as its rate credit -- well, let
19 me ask you this first.

20 When a rate credit is issued in a particular
21 year --

22 A. Yes.

23 Q. -- did you have any expectation as to whether

1 that rate crediting would have an impact on the Local
2 Government Center's net assets in the year --

3 A. That was my --

4 MR. QUIRK: Your Honor, can I approach?

5 THE PRESIDING OFFICER: Mr. Quirk.

6 MR. QUIRK: I understand Mr. Bannon is an
7 accountant, has some experience as an accountant.
8 We're getting into specific accounting for risk pools,
9 and I would ask for an offer of proof that he has
10 involvement with risk pools and accounting for rate
11 credits before this testimony is accepted.

12 THE PRESIDING OFFICER: Mr. Volinsky?

13 MR. VOLINSKY: Your Honor, I think this is
14 simply a matter of looking at the net assets from year
15 to year and seeing if it went down by whatever the
16 stated percentage of the surplus return is. That's
17 the point of this. And he doesn't need specific risk
18 pool experience to analyze whether it went down
19 2 percent or did not go down 2 percent.

20 THE PRESIDING OFFICER: Again, Mr. Quirk?

21 MR. QUIRK: I'll just add further,
22 Mr. Mitchell. He just testified that he didn't
23 understand rate credits until the on-site and spoke

1 with Wendy Parker. He has offered no testimony that
2 he has any experience with risk pools, rate credits,
3 or prior experience accounting for rate credits.

4 Thus, I would ask for a foundation, and if
5 that cannot be proffered, I would ask that the witness
6 not be permitted to opine on this issue.

7 THE PRESIDING OFFICER: Mr. Volinsky, I will
8 take that under advisement. You want to ask some more
9 foundational questions?

10 MR. VOLINSKY: Sure.

11 Q. Were you able to follow what Ms. Parker
12 described for you as the rate crediting process used
13 by the Local Government Center?

14 A. Yes. We went through several --

15 Q. That's just a yes or a no.

16 A. Yes.

17 Q. So following what Ms. Parker described to you
18 as their rate crediting process, yes or no, did that
19 lead you to believe that there should be a diminution
20 of net assets based on her description in a year when
21 rate credits were offered?

22 A. Yes.

23 Q. In reaching that understanding based on her

1 explanation, do you have sufficient accounting and
2 financial expertise, A, so that you could follow
3 Ms. Parker's explanation? Do you?

4 A. Yes.

5 Q. And B, so that you could look at the
6 financial documents and see if the representation that
7 a particular credit was offered in a year follows
8 through and shows up in the net assets?

9 A. As a decrement, yes.

10 THE PRESIDING OFFICER: Denied. Please
11 proceed, Mr. Volinsky.

12 Q. Okay. So following Ms. Parker's
13 explanations, did you go through and try to find if
14 there were year-to-year decreases in net assets
15 tracking the percentages that are shown as rate
16 credits?

17 A. Yes.

18 Q. And were you able to confirm or reconcile the
19 representation that they were particular rate credits
20 with decreases in the stated net assets?

21 A. I could not reconcile.

22 Q. And why not?

23 A. Because I didn't -- looking at the net asset

1 balances from the years that are represented here, I
2 did not see corresponding decrement of the amounts
3 listed here as rate credits.

4 Q. Okay. Thank you. Close that one. Different
5 topic.

6 Did you as part of your examination look at
7 the initial transfer of real estate from HealthTrust
8 to the Local Government Center Real Estate, LLC at the
9 time of the reorganization?

10 A. Yes.

11 Q. And was there real estate transferred from
12 HealthTrust to the Real Estate, LLC at the time of the
13 reorganization?

14 A. Yes.

15 Q. Was there also real estate transferred from
16 the Property-Liability Trust to the Real Estate, LLC
17 at the time of the reorganization?

18 A. Yes.

19 Q. Did you look to see if HealthTrust was
20 compensated in some way for its contribution of the
21 real estate to the Local Government --

22 MR. QUIRK: Objection.

23 THE PRESIDING OFFICER: Mr. Quirk.

1 MR. QUIRK: Just to the word "compensated."
2 He could rephrase, but it draws a legal conclusion,
3 the word "compensated."

4 THE PRESIDING OFFICER: Ask the question
5 again, Mr. Volinsky, please.

6 Q. Did HealthTrust get anything of value that
7 you could tell in return for transferring its interest
8 in the real estate to the Real Estate, LLC?

9 A. No.

10 Q. Did Property-Liability Trust receive anything
11 of value?

12 A. No.

13 Q. When you saw the lack of value, did you make
14 inquiry of anyone at Local Government Center about
15 whether HealthTrust got anything for transferring its
16 real estate?

17 A. Yes. When I was looking at rent expense in
18 that particular area, I was curious as to whether they
19 might have received some benefit for that transfer of
20 assets and was told that they did not.

21 Q. Who told you that?

22 A. The chief financial officer.

23 Q. And her name?

1 A. Ms. Sandal Keeffe.

2 Q. Did Ms. Keeffe also explain to you how the
3 rents or lease rates were determined for the LGC
4 enterprises?

5 A. Yes.

6 Q. Tell us.

7 A. They took the operating expenses for the
8 property and divided them amongst the tenants
9 according to square footage, the caveat that the
10 New Hampshire School Board Association, which was not
11 paying any rent, was not involved in that calculation.

12 Q. Did you -- did Ms. Keeffe explain to you
13 whether or not each of the LGC entities were treated
14 the same as far as determining their lease rates?

15 A. They were treated the same.

16 Q. So if the lease rates figured on the square
17 footage were below market, all the entities got the
18 benefit of that; is that right?

19 A. That's correct.

20 Q. If they were at market, all the entities paid
21 at market, right?

22 A. That's my understanding.

23 Q. If they happened to be above market, all the

1 entities paid above market?

2 A. That's my understanding.

3 Q. Turn to Exhibit 68, which is book 4 at
4 page 1. 68 at 1.

5 Did you complete a report with respect to
6 your examination in this matter?

7 A. Yes.

8 Q. And did you reach opinions as a product of
9 completing the examination?

10 A. For the work that I had -- was able to
11 complete, yes.

12 Q. Are those opinions reflected in your report,
13 which is now before you as part of 68?

14 A. Yes.

15 Q. There's one opinion I neglected to ask you
16 about, but I'll go there in a second. Is that your
17 report containing your opinions?

18 A. Yes.

19 Q. I'm sorry?

20 A. Yes.

21 MR. VOLINSKY: I move to strike the ID on 68,
22 what we're now calling sub A, and ask for its
23 admission.

1 THE PRESIDING OFFICER: Objection?

2 MR. VOLINSKY: I have one area I have to go
3 back to but --

4 MR. QUIRK: Well, depending on the area he
5 goes back to, I do object, because it's a 41-page
6 report. There are a multitude of opinions set forth
7 in the report. We have only heard a fraction of those
8 opinions this afternoon.

9 Thus, to the extent that he is offering a
10 report for the opinions that he -- he has offered on
11 the stand, I have no objection; but for those opinions
12 that are set forth in the written document that he has
13 not testified to today, I do object to its admission
14 for that purpose.

15 THE PRESIDING OFFICER: Mr. Volinsky?

16 MR. VOLINSKY: Same argument as previously.
17 It's an administrative hearing. Hearsay rules don't
18 apply in this expeditious.

19 THE PRESIDING OFFICER: I understand this is
20 a similar objection as to Mr. Coutu on Monday, and I
21 deny it for similar reasons.

22 MR. QUIRK: Could I be heard briefly? I
23 understand your ruling, and I understand that ruling

1 to be that you will afford what weight you feel
2 appropriate to the report.

3 And I would just ask that you afford
4 significant -- a significant factor when you are
5 considering what weight to apply that it was not
6 elicited through direct examination on the opinions --
7 many of the opinions in the report.

8 THE PRESIDING OFFICER: Surely, you're free
9 to cross-examine using the report as the basis, if you
10 wish. I understand your point. Mr. Volinsky?

11 MR. VOLINSKY: There was just one opinion I
12 wanted to follow up on that I neglected.

13 Q. Mr. Bannon, were you and your staff asked to
14 look at the question of whether or not the Local
15 Government Center's investments are compliant either
16 with laws governing municipalities or laws governing
17 insurance companies?

18 A. That was part of my audit report.

19 Q. And did you get some help doing that?

20 A. Yes.

21 Q. Who helped you?

22 A. William Masuck.

23 Q. Who is William Masuck?

1 A. William Masuck is a senior staff auditor with
2 the Bureau.

3 Q. So he works in the same office with you?

4 A. Yes, and I supervise his work.

5 Q. So you know what he did?

6 A. Yes.

7 Q. Can you give us the ultimate conclusion
8 whether or not, first, the LGC's investments are
9 consistent with the investment restrictions placed on
10 municipalities?

11 THE PRESIDING OFFICER: Excuse me. Wait just
12 a moment.

13 MR. QUIRK: Sorry to interrupt the flow of
14 this, but I object to this. Unless Attorney Volinsky
15 can point me to something within RSA 5-B that risk
16 pools within New Hampshire have to invest funds under
17 the municipal budget statute, I will withdraw my
18 objection, but there is no such requirement.

19 And, in fact, Mr. Bannon in his report
20 clearly states that in his opinion risk pools do not
21 need to comply with RSA 35:9. So whether they invest
22 in a certain percentage or not, it's completely
23 irrelevant unless I can have a cite as to what

1 requirement there is.

2 THE PRESIDING OFFICER: Thank you.
3 Mr. Volinsky?

4 MR. VOLINSKY: Yes, Your Honor. Whether they
5 have to or not is an issue in this case that we've all
6 briefed at least once at this point.

7 Mr. Bannon is going to give you the
8 underlying factual issue, compliant or not. And I
9 assume we're both -- both sides are going to brief it
10 again in our closing memos. But once we get to that
11 point I cannot re-call Mr. Bannon for the factual
12 information.

13 So I'd ask that you admit it provisionally
14 and then assign it the weight that you conclude
15 appropriate after you make the legal decision.

16 THE PRESIDING OFFICER: Further, Mr. Quirk?

17 MR. QUIRK: If I could.

18 THE PRESIDING OFFICER: You can approach.

19 MR. QUIRK: And I understand, obviously, that
20 we're here in an administrative hearing, but simply to
21 say afford it what weight, there has to be some
22 relevance. And I point to Mr. Bannon's report at
23 page 14: "Although there is no obligation in the

1 pooled risk statute, RSA 5-B, to follow municipal or
2 insurance law concerning investments," and then he
3 goes on to offer an opinion.

4 Thus, it's admitted by the Bureau's own
5 expert there's no requirement, and thus, it's not
6 relevant to this proceeding.

7 THE PRESIDING OFFICER: Last bite,
8 Mr. Volinsky. What are you trying to do here?

9 MR. VOLINSKY: Yes, Your Honor. I'm glad
10 Mr. Quirk read the specific cite, because it's not 5-B
11 that gets us to this point, it's 35:9 which gets us to
12 this point; and that is, that this is municipal money.
13 The bylaws of Local Government Center make it clear
14 that these are municipal monies, and we believe and
15 have argued that 35:9 which governs the investments
16 that are legal for municipalities to engage in, apply
17 in this matter.

18 THE PRESIDING OFFICER: We're going to have
19 to go one more round because of where we're going to.
20 Mr. Quirk --

21 MR. QUIRK: I thank you for your indulgence.
22 If that's the argument, that it is because of RSA
23 35:9, there's two responses to that: With complete

1 respect to you, you don't have jurisdiction over 35:9
2 matters. Secondly, he has not been qualified as an
3 expert in the field of investments.

4 THE PRESIDING OFFICER: Last. Really, last.

5 MR. VOLINSKY: I don't have a need for
6 another unless you have a question for me.

7 THE PRESIDING OFFICER: I'm just going to
8 divide you. I'm going to grant the objection. I'm
9 going to reserve, with all due respect to your
10 position, on what consideration I can give, if you
11 will, to instructions 30-B [sic] -- in any other
12 statute.

13 So it's -- your -- the question is withdrawn.
14 I don't think we got to an answer. The objection is
15 granted on the basis that I stated.

16 MR. QUIRK: Thank you.

17 MR. VOLINSKY: Thank you.

18 THE PRESIDING OFFICER: In case there's any
19 confusion here, I'm leaving open this piece about
20 jurisdiction. I'm sure that it will be briefed again.
21 I don't feel a need at this time that I have to reach
22 that far with respect to the limits on my authority as
23 an administrative hearing officer.

1 So you can proceed, Mr. Volinsky, but not
2 with that question and not -- well, not with that
3 question.

4 MR. VOLINSKY: May I ask a question of
5 Your Honor in trying to understand what your ruling
6 just was?

7 THE PRESIDING OFFICER: Well, I've said it
8 twice, and let me just say I'm granting his objection.

9 MR. VOLINSKY: Right.

10 THE PRESIDING OFFICER: Okay? And I granted
11 it with a limitation. I was granting it on grounds
12 other than would call into question at this point what
13 consideration I could give to any other law of
14 New Hampshire's Revised Statutes Annotated as I come
15 to a decision in this particular case.

16 MR. VOLINSKY: Okay. Got it.

17 Q. So let me -- and if I misunderstand, I'm sure
18 the hearing officer will correct me.

19 THE PRESIDING OFFICER: I'll look for
20 Mr. Quirk. He's been pretty alert.

21 Q. Mr. Bannon?

22 A. Yes.

23 Q. Do you have the ability to review the list of

1 securities or investments that are permissible for
2 municipalities?

3 A. Yes.

4 Q. And are you able to understand what falls
5 within and falls outside of that permissible list?

6 A. Yes.

7 Q. Same question on the insurance side. Are you
8 able to review a list of what falls within and out of
9 the permissible insurance investments?

10 A. Yes.

11 Q. And are you able, then, to go to the list of
12 stated investments held by the Local Government Center
13 and match it up, in essence, against the municipal
14 list?

15 A. Yes.

16 Q. And against the insurance list?

17 A. Yes.

18 THE PRESIDING OFFICER: Mr. Quirk?

19 MR. QUIRK: I object to this line of
20 questioning. He hasn't been qualified as an
21 investment advisor or with any specialty of
22 investments. He -- these issues regarding investments
23 for municipalities or investments for insurance are

1 just not relevant to a risk pool under 5-B.

2 If they can cite to something within RSA 5-B
3 that requires a risk pool within New Hampshire to
4 invest its monies in a certain manner, I will withdraw
5 my objection, but I am fairly confident that they
6 cannot do that.

7 THE PRESIDING OFFICER: Mr. Volinsky, any
8 response?

9 MR. VOLINSKY: I'll stand on my prior
10 comments.

11 THE PRESIDING OFFICER: Mr. Bannon?

12 THE WITNESS: Yes.

13 THE PRESIDING OFFICER: The question is
14 before you.

15 THE WITNESS: Yes.

16 THE PRESIDING OFFICER: Does it require you
17 to interpret -- excuse me. Does it require you to
18 interpret a type of investment, meaning equities,
19 bonds, money market, or investments by -- shall I say,
20 by specific companies?

21 THE WITNESS: The investments are graded.

22 THE PRESIDING OFFICER: So A, B, C type of --

23 THE WITNESS: Yeah, AAA, AA1. Each security

1 has a rating, and I'm just -- I'm just matching up
2 what's -- what's allowed under those municipal or
3 insurance regulations, how many generic lettered
4 classification, is what they call it. AAA is a
5 generic classification. And just simply count the
6 securities that are in those various grades.

7 THE PRESIDING OFFICER: Okay. Can you divide
8 your response so that you first address the insurance
9 comparison?

10 MR. QUIRK: Your Honor, I'm sorry to
11 interrupt your questioning, but it is not a simple
12 matter. And I would ask to have time to refer you to
13 the two statutes that we're actually speaking about
14 here. We've had lawyers look at those statutes.
15 They're quite complex, and it is broken down on
16 definitions.

17 And if you look at 35:9 and 402:28, I think
18 it will be clear it is not as simple as just matching
19 the language to certain investments.

20 THE PRESIDING OFFICER: Mr. Volinsky, I think
21 you'll have to do more than stand on your prior
22 comments.

23 MR. VOLINSKY: Yeah, I will. I think to the

1 extent Mr. Quirk takes issue with Mr. Bannon's
2 characterization of comparing the letter grading of
3 allowed securities to the letter grading of held
4 securities, that's an appropriate point of
5 cross-examination.

6 I believe that Mr. Bannon has started to
7 testify that essentially what he did is understand the
8 appropriate letter grading of a corporate bond, for
9 example, and compare it to the portfolio that's held
10 and then calculated how many of the Local Government
11 Center investments were in bonds and the like of
12 insufficient letter grade. And that's all I'm asking
13 him to do.

14 THE PRESIDING OFFICER: Anything further,
15 Mr. Quirk?

16 MR. QUIRK: No.

17 THE PRESIDING OFFICER: Okay. Very good.
18 I'm going to deny that objection. Continue with your
19 questioning, but, you know, keep it quite narrow,
20 Mr. Volinsky.

21 MR. VOLINSKY: Yes, sir.

22 THE PRESIDING OFFICER: Or we will be here
23 until an extreme hour tonight.

1 Q. Kevin?

2 A. Yes.

3 Q. You heard me explain that you basically
4 compared letter grading of allowed to disallowed --

5 A. Securities.

6 Q. -- securities; is that an accurate statement?

7 A. That's an accurate statement.

8 Q. Okay. So on the insurance side were you able
9 to calculate the percentage of the investments of the
10 Local Government Center that fell out of the insurance
11 statute's letter-grading quality measures?

12 A. Yes.

13 Q. And what's that percentage?

14 A. 16.9 percent.

15 Q. Okay. Let me switch you to the municipal
16 side. Did you do the same type of comparison?

17 A. Yes.

18 Q. And were you able to come to a conclusion as
19 to how many fell out of the letter-grading quality --

20 A. Yes.

21 Q. -- determinant?

22 A. Yes.

23 Q. And what was that percentage?

1 A. 17.8 percent.

2 MR. VOLINSKY: That's all I have.

3 THE PRESIDING OFFICER: Okay. Just a point
4 of clarification. How many or how much?

5 THE WITNESS: Percentage in terms of dollars
6 of the total investment value on the books.

7 THE PRESIDING OFFICER: Okay. Thank you.
8 Mr. Quirk?

9 MR. QUIRK: Thank you, Mr. Mitchell.

10 CROSS-EXAMINATION

11 BY MR. QUIRK:

12 Q. Good afternoon, Mr. Bannon.

13 A. Good afternoon.

14 Q. We'll start off this afternoon talking to you
15 about how you came to be employed by the Bureau of
16 Securities. You were hired first as a consultant in
17 June of 2011, correct?

18 A. Correct.

19 Q. And at that time in June of 2011, you had
20 been unemployed for several months, correct?

21 A. That's not correct.

22 Q. You left work for Melanson, Heath in
23 September 2010, correct?

1 A. That is correct.

2 Q. And they let you go from that employment?

3 A. Yes.

4 Q. And after Melanson, Heath let you go, you
5 were looking for a full-time job, right?

6 A. Yes.

7 Q. And it took you about nine months, and the
8 Bureau of Securities hired you as a part-time
9 consultant, correct?

10 A. Yes, they did hire me.

11 Q. And before you were let go from Melanson,
12 Heath, you had worked at some point in time for Gulf
13 Oil, correct?

14 A. Correct.

15 Q. And at Gulf Oil one of your job duties was to
16 prepare and distribute financial reports, correct?

17 A. Correct.

18 Q. And one of your jobs --

19 THE PRESIDING OFFICER: Excuse me, Mr. Quirk.
20 I'm infantry trained. I'm sorry for interrupting you,
21 please continue.

22 MR. QUIRK: Not at all. Thank you.

23 Q. We were just talking about after Melanson,

1 Heath let you go -- strike that.

2 Before you worked for Melanson, Heath, at
3 some point you were with Gulf Oil, and you testified
4 that you prepared and distributed financial reports
5 during your time with Gulf, correct?

6 A. That is correct.

7 Q. And part of your work as a consultant and
8 financial analyst for the LGC matter was to review
9 financial reports, correct?

10 A. Yes.

11 Q. And Gulf Oil fired you from your position,
12 correct?

13 A. We reached a severance agreement.

14 Q. And prior to you reaching this severance
15 agreement with Gulf Oil, they explained to you that
16 they had issues with your work performance and with
17 regards to some financial reports, correct?

18 A. I don't believe that was what was in our
19 severance agreement.

20 Q. But your job performance was inadequate
21 according to Gulf, correct?

22 A. I'm not aware that that was in the severance
23 agreement.

1 Q. Well, we asked you about your severance
2 agreement with Gulf during the deposition, and you
3 testified you couldn't talk about it because there
4 were confidentiality provisions, correct?

5 A. That's correct.

6 Q. And I will honor those confidentiality
7 provisions. But Gulf Oil was not the only employer
8 that had a confidentiality agreement with you,
9 correct?

10 A. That is correct.

11 Q. Prior to Gulf Oil's confidentiality
12 agreement, you worked for a company called EnerSys,
13 correct?

14 A. EnerSys.

15 Q. EnerSys. And for EnerSys you did internal
16 audits?

17 A. Vice president of internal audit.

18 Q. And when you were vice president of internal
19 audits, they expressed some concerns with your work
20 performance there, correct?

21 A. We had a severance agreement.

22 Q. And that's another severance agreement you
23 had that we cannot talk about, correct?

1 A. That's correct.

2 Q. And we can't talk about it, because when you
3 were -- left your employment with that company it's
4 confidential, correct?

5 A. That's correct.

6 Q. In June of 2011 when you were speaking with
7 the Secretary of State's office and considering
8 working for the state on LGC, did you tell them and
9 let them know about these prior work issues with Gulf,
10 EnerSys, and Melanson?

11 A. I didn't speak with --

12 (Court reporter inquires.)

13 THE WITNESS: I'm sorry. I did not speak
14 about those two instances with Mr. Wingate or
15 Mr. Gardner.

16 Q. So before Mr. Wingate or Mr. Gardner retained
17 your services to work on the LGC matter as a
18 consultant, you didn't tell them about these issues
19 you had?

20 A. I think they had my resume.

21 Q. Okay. But no -- we looked at your resume,
22 too. There's nowhere on your resume that would
23 disclose that you were let go and that there was some

1 confidentiality agreement, correct?

2 A. Nor should there be. They were severance
3 agreements, confidential severance agreements.

4 Q. My point is: When you look at your resume
5 you can't notice that that occurred, right?

6 A. Correct.

7 Q. Okay. And after you were hired as a
8 consultant, they hired you full time to work primarily
9 on LGC, right?

10 A. That's correct.

11 Q. Did you let them know prior to hiring you
12 full time about these issues with your prior
13 employers?

14 A. Certainly not with those two.

15 Q. Okay. So after being hired full time you
16 were assigned, I think you testified during your
17 deposition, primarily to the LGC case?

18 A. Yes.

19 Q. Okay. So how many -- what's your title at
20 the Bureau of Securities?

21 A. Forensic financial examiner.

22 Q. And how many forensic financial examiners are
23 there within the Bureau of Securities?

1 A. Just myself.

2 Q. And how many matters, approximately, does the
3 Bureau of Securities have at any one time?
4 Investigations, ongoing matters.

5 A. Probably a dozen.

6 Q. A dozen? And you were assigned even though
7 you were the only financial examiner to work primarily
8 on LGC, correct?

9 A. That's correct.

10 Q. And in particular, you were asked to head the
11 on-site examination, correct, of LGC?

12 A. Yes.

13 Q. And we're going to talk about the on-site
14 examination in a few moments, but before I do that, I
15 want to talk about your prior experience regarding
16 insurance companies, risk pools, and similar financial
17 analyses.

18 First, let's talk about: Have you ever
19 worked for an insurance company?

20 A. No, I have not.

21 Q. Ever worked for a risk pool?

22 A. No, I have not.

23 Q. Ever done a financial analysis of a risk

1 pool?

2 A. No, I have not.

3 Q. In fact, before you worked on the LGC case,
4 you weren't even aware that risk pools existed in
5 New Hampshire, correct?

6 A. That's correct.

7 Q. Have you ever done a financial analysis of an
8 insurance company prior to your work in the 1970s --
9 or leaving aside what you did in the 1970s?

10 A. No.

11 Q. Okay. So have you ever gone on site to any
12 entity that provides any type of coverage of insurance
13 or risk coverage before?

14 A. No.

15 Q. And yet, you don't have any experience with
16 setting any rates or anything like that with insurance
17 companies, correct?

18 A. That is correct.

19 Q. And notwithstanding this lack of experience,
20 you were charged with going into one of the largest
21 risk pools in the country to do an on-site exam,
22 correct?

23 A. Correct.

1 Q. And the exam was dictated by Mr. Mitchell's
2 December 2011 order, correct?

3 A. His order allowed it. I had planned it.

4 Q. And you had planned to go into LGC and review
5 documents, correct?

6 A. That is correct.

7 Q. And do some of the mapping that Attorney
8 Volinsky talked about, right?

9 A. That is correct.

10 Q. But prior to even going on site, you had
11 reviewed thousands of pages of material regarding LGC
12 and its affiliated entities, correct?

13 A. Yes.

14 Q. In fact, over 12,000 pages of documents were
15 produced from LGC to the Bureau before you even were
16 on site, right?

17 A. Correct.

18 Q. And when you were doing your financial exam
19 you were not doing a complete audit of the financials,
20 right?

21 A. That's correct.

22 Q. Okay. What you were doing, you were looking
23 at the financials, you were looking at LGC's

1 independent auditors' opinions, correct?

2 A. I would prefer to answer I was following my
3 audit plan.

4 Q. Okay. And just so we're clear, we've heard a
5 lot about financial records. Each entity has separate
6 financial statements, correct?

7 A. That is correct.

8 Q. And each entity hires --

9 A. With the exception of PLT and WC were
10 consolidated.

11 Q. Thank you. In about 2007, correct?

12 A. Right.

13 Q. And when they were unconsolidated, they each
14 had financial statements, right?

15 A. Yes.

16 Q. And after LGC performs and does their
17 financial statements, they hire an independent auditor
18 to review them, correct?

19 A. That is correct.

20 Q. And the independent auditor in this case is
21 BerryDunn, right?

22 A. Yes.

23 Q. And BerryDunn issues opinions on those

1 financial statements, correct?

2 A. Yes.

3 Q. And BerryDunn's opinions regarding the years
4 you reviewed, 2002 to 2010, was after a full audit
5 that the financial statements were fairly stated in
6 all material respects, correct?

7 A. That's what they stated.

8 Q. And we could go through each entity, but in
9 the sense of moving this along, for every single
10 entity the independent auditor reviewing those
11 financials found them to be fairly stated in all
12 material respects, correct?

13 A. Yes.

14 Q. Is it appropriate for a company in your
15 opinion to retain an independent auditor to review and
16 audit their records?

17 A. Well, in this case they were required to
18 under 5-B.

19 Q. And that's appropriate, right?

20 A. That is appropriate.

21 Q. And you have no prior experience, none, of
22 using the Government Auditing Standards for a
23 nonprofit entity such as LGC, correct?

1 A. That's not true.

2 Q. You have prior experience using the
3 Government Auditing Standards for a nonprofit?

4 A. Yes.

5 Q. We had the opportunity to take your
6 deposition in this case, right?

7 A. Yes.

8 Q. On page 70. I'll ask you to look at page 70
9 of your deposition, and at the bottom of the page, I'm
10 going to read your answer. I'll read the question.
11 "Just so the record is clear, I'm not sure I
12 understand. Do you believe using Government Auditing
13 Standards is appropriate when reviewing financial
14 documents from an entity like LGC HealthTrust?"

15 Answer, "I don't have any prior experience of
16 nonprofits using Government Auditing Standards, but
17 having read the standards, I can see that the case
18 made to use it."

19 Do you see that? Did I read that correctly?

20 A. You read it correctly.

21 Q. You weren't even aware whether GASB should
22 apply to LGC HealthTrust, correct?

23 A. Right. I raised that question.

1 Q. And Mr. Volinsky brought this out. GASB is
2 the codification of governmental accounting and
3 financial reporting standards, right?

4 A. Right. They produce standards as well as
5 generally accepted accounting principles.

6 Q. And you're aware from your review of the
7 documents and the on-site that BerryDunn references
8 and used the Government Auditing Standards when it
9 conducted its full audit, correct?

10 A. Correct.

11 Q. And within this book there is a specific
12 section on risk pools, right?

13 A. (Witness nods head.)

14 Q. And you didn't review the section on risk
15 pools prior to your on-site exam, correct?

16 A. I reviewed it when I was in a consulting role
17 with the Bureau.

18 Q. But when you were going on site, you didn't
19 review the risk pool section, did you?

20 A. Because I had reviewed it several months
21 before.

22 Q. We'll talk more about that.

23 So when you're going on site for your

1 examination, one of the issues that you highlighted in
2 your report and on your direct examination were monies
3 from HealthTrust to the parent down to Workers' Comp.,
4 correct?

5 A. Yes.

6 Q. And that was part of the 31,000,000 that you
7 were speaking of, right?

8 A. That's correct.

9 Q. We talked about that at your deposition,
10 correct?

11 A. Correct.

12 Q. And I believe you testified that there is a
13 description of the transaction of the monies going to
14 the various entities, but you would have liked to see
15 more detail, correct?

16 A. Correct.

17 Q. Okay. So for the years that you reviewed,
18 the monies were documented but you took issue with the
19 level of description, right?

20 A. Disclosure.

21 Q. And, in fact, you didn't take issue with --
22 well, strike that -- the level of disclosure, because
23 you wanted to see more written words about why the

1 transactions occurred, right?

2 A. That's correct.

3 Q. But I don't want to leave any misimpression
4 with the hearing officer. The numbers, the financial
5 numbers, were documented in the reports, correct?

6 A. Yes. But if I may, I testified earlier that
7 I subsequently found that some of the support behind
8 those numbers that you're now talking about did not
9 come from the sources that were reported.

10 Q. Okay. The numbers were in the financials,
11 right?

12 A. That's correct.

13 Q. And there's no question about that, correct?

14 A. Again, maybe it's a clarification, but I saw
15 the numbers, but I questioned -- after having the
16 problem I had with the \$3.5 million reporting on a
17 financial statement that I may question the validity
18 of --

19 Q. Just because this is a fairly important
20 point, I want to make sure it's clear. 82.

21 The bottom of the page. We went a little bit
22 back and forth on this. During your deposition I
23 asked, "But for purposes of the record, I want to be

1 clear that within each and every year," you interject
2 yes, "the financial statement had an entry for the
3 monies that went from HealthTrust to Workers' Comp.,
4 correct?"

5 "Yes."

6 "And you're taking issue with the sufficiency
7 of the disclosure?"

8 "Yes."

9 Did I read that accurately?

10 A. You read it correctly.

11 Q. And even though you take issue with the
12 description, or the lack of description in your
13 opinion, in the financials --

14 A. Disclosure.

15 Q. -- disclosure, that when you did your report
16 that was just admitted, you don't cite any reference
17 to GASB or any accounting standard that requires that,
18 correct?

19 A. Because as I said, I would -- that was not
20 part of my --

21 Q. If you could answer the question. Is there
22 any reference in your report, any reference to GASB or
23 any accounting standard cited in support of your

1 statement that more sufficiency needs to be stated on
2 the financials?

3 A. Correct. Correct.

4 Q. Correct, there's nothing in your report?

5 A. I don't recall there's anything in my report.

6 Q. Let's talk a little bit about your opinion
7 concerning investments since you provided some
8 testimony on that.

9 MR. QUIRK: Want to take a break?

10 THE PRESIDING OFFICER: I'm with you.

11 MR. QUIRK: Okay. I just want to make sure.

12 Q. Within your report you talk about the
13 investments, right?

14 A. Correct.

15 Q. And specifically, I'd like to refer -- do you
16 have your report in front of you?

17 A. Yes, I do.

18 Q. At page 14, and that is BSR 68. It's been
19 admitted as a full exhibit.

20 THE PRESIDING OFFICER: Book 4, 68.

21 MR. QUIRK: Thank you.

22 THE PRESIDING OFFICER: Page?

23 MR. QUIRK: Page 14.

1 THE PRESIDING OFFICER: Thank you.

2 MR. QUIRK: Thank you.

3 Q. Before I ask you questions about your report,
4 the Bureau of Securities has someone on staff that has
5 offered an opinion on investments, correct, in this
6 case, a Mr. Masuck?

7 A. Mr. Masuck, yes.

8 Q. Okay. And this isn't your primary role,
9 correct, in investments?

10 A. It was the on-site examination.

11 Q. But Mr. Masuck for the Bureau is more apt to
12 work in this area?

13 A. I utilized his skills, yes.

14 Q. My question was: Is he more apt to work in
15 this area?

16 A. Probably, yes.

17 Q. And yet, it's on page 14 in your report, and
18 I'm going to read from the first full bullet at the
19 top of the page. "Although there is no obligation in
20 the pooled risk statute, RSA 5-B, to follow municipal
21 or insurance law concerning investments," and then you
22 go on to offer an opinion that the current policies
23 are not in compliance. Okay? Are you with me?

1 A. Yes.

2 Q. You would agree with me that there is
3 absolutely no obligation in the pooled risk management
4 statute for risk pools to follow municipal law
5 concerning investments, correct?

6 A. Correct.

7 Q. You would also agree with me that there is
8 absolutely no obligation in the pooled risk management
9 statute, RSA 5-B, to follow insurance law concerning
10 investments, correct?

11 A. Correct.

12 Q. So if there is an allegation that the risk
13 pool, in this case LGC, failed to follow the municipal
14 budget law, you'd agree there's no obligation to do
15 so, right?

16 A. No obligation, excuse me, to --

17 Q. To follow the municipal budget law, 35:9,
18 concerning investments, correct?

19 A. Yes.

20 Q. So if there was an allegation that a risk
21 pool such as LGC failed to follow the insurance law
22 concerning investments, you would agree with me that
23 there's no obligation to do so, correct?

1 A. Again, no obligation to?

2 Q. Follow the insurance law concerning
3 investments, correct?

4 A. Right.

5 THE PRESIDING OFFICER: Would that also
6 include the municipal law, a similar opinion?

7 THE WITNESS: Yes.

8 Q. I --

9 THE PRESIDING OFFICER: Okay. And the answer
10 is yes?

11 THE WITNESS: Yes.

12 THE PRESIDING OFFICER: Thank you.

13 MR. QUIRK: Thank you.

14 THE PRESIDING OFFICER: Yeah. Sorry,
15 Mr. Volinsky.

16 MR. QUIRK: No, I asked that question
17 previously.

18 THE PRESIDING OFFICER: Sorry. I missed it.

19 MR. QUIRK: Probably wasn't as clear, so
20 thank you for clarifying that.

21 Q. Change topics. I want to talk about this
22 scholarship fund, the first topic that Mr. Volinsky
23 brought up on your direct, and that is the John B.

1 Andrews Scholarship Fund, correct?

2 A. Yes.

3 Q. And you're aware that in 2009 there was a
4 board vote to change the name to John B. Anderson --
5 John B. Andrews Scholarship Fund. It was named
6 something different previously, correct?

7 A. Yes.

8 Q. And that coincided with Mr. Andrews'
9 retirement, correct?

10 A. Yes.

11 Q. And Mr. Andrews, who is present in the
12 courtroom, was the executive director for over 35
13 years, correct?

14 A. That's my understanding.

15 Q. It's certainly within the board's prerogative
16 to name a scholarship fund after him, right?

17 A. I imagine so.

18 Q. And you're aware from your on-site exam that
19 these monies in the scholarship fund were on the trial
20 balance of two accounts: One in asset and the other a
21 liability, correct?

22 A. I think it was on the books of LGC as a
23 credit in the member balance, and BerryDunn had moved

1 the balance up as a liability.

2 Q. There were actually two accounts: One was an
3 asset and one was a liability, correct?

4 A. Yes.

5 Q. Okay. So there was no mystery, and again, no
6 issue, these numbers were right in the financial
7 statements, correct?

8 A. Yes.

9 Q. And then there was a board vote in 2009 to
10 establish a separate 501(c)(3) organization, or a
11 nonprofit, correct?

12 A. My recollection is there was not a board vote
13 to establish a 501(c)(3). I would have to take a look
14 at the board minutes. I know there was discussion
15 about setting up a trust or a nonprofit trust, but I
16 was not -- I'm not familiar that there was actually a
17 vote.

18 Q. So you're not saying there wasn't a vote;
19 you're just saying you're not familiar and can't --

20 A. If I looked at the minutes that I had looked
21 at at the time of the examination, I could probably
22 speak clearly on it.

23 Q. Okay. Assuming there's a board vote and

1 assuming they opened up a 501(c)(3) organization, the
2 monies were moved to that organization, right?

3 A. If that's what the board resolved.

4 Q. Sure. And you're aware that these monies
5 were for scholarships for children, I believe, of
6 municipal employees throughout the State of
7 New Hampshire, correct?

8 A. That's what I understood.

9 Q. And the monies were given by individuals and
10 entities who wanted to donate to a scholarship fund,
11 correct?

12 A. That's what I was told.

13 Q. We started to talk a little bit about NHMA
14 and some monies going from NHMA to LGC, the parent,
15 correct?

16 A. Correct.

17 Q. And you will agree with me that the revenue
18 to LGC from NHMA did not rise to the level of any
19 materiality as it goes to financial statements,
20 correct?

21 MR. VOLINSKY: I object, Your Honor.

22 THE PRESIDING OFFICER: Hold on, Mr. Bannon.

23 Mr. Volinsky, your objection grounds?

1 MR. VOLINSKY: This was the specific area
2 that was the subject of Mr. Quirk's objection, and I
3 was ordered to stay out of it.

4 MR. QUIRK: Okay. I'll withdraw it. I
5 thought that you allowed him to talk about it to a
6 certain limited degree, but if that was stricken, I'm
7 happy to stay out of it. I'll take Attorney
8 Volinsky's representation and move on so long as we
9 can confirm his accuracy.

10 THE PRESIDING OFFICER: If you want to -- if
11 you want to open up the door, I guess, for his
12 redirect.

13 MR. QUIRK: Due to the hour here and the late
14 time of the week, I will not open that door.

15 THE PRESIDING OFFICER: All right. Thank
16 you, Mr. Quirk. Thank you, Mr. Volinsky. We'll
17 continue.

18 Q. I want to talk to you a little bit about rate
19 setting. Okay? And more specifically, the rate
20 credits that you were answering questions to
21 Mr. Volinsky.

22 A. Yes.

23 Q. You reviewed this issue during your on-site

1 exam, correct?

2 A. Correct.

3 Q. And just to be clear, you're not an actuary,
4 right?

5 A. That's correct.

6 Q. You have no experience with setting rates?

7 A. That's correct.

8 Q. You have no idea how rates are set, correct?

9 A. That's -- I was -- I asked a lot of questions
10 and was given information on the on-site about how
11 that was done.

12 Q. No experience doing it, right?

13 A. Myself, no.

14 Q. And, in fact, you have no financial
15 accounting experience with respect to setting of
16 rates, correct?

17 A. That's correct.

18 Q. So when you offer opinions to Mr. Mitchell,
19 you have no prior experience whatsoever in any
20 financial accounting regarding rate settings or rate
21 credits, correct?

22 A. Correct.

23 Q. And, in fact --

1 A. But I believe I can give an opinion.

2 Q. I understand that's your belief, but we're
3 talking about your experience. Okay? And we're also
4 talking about the fact that you didn't review the risk
5 pool section of GASB prior to issuing your report,
6 correct?

7 A. Didn't feel it was -- I needed to.

8 Q. So I take it that's a yes, you didn't review
9 it, right?

10 A. That's correct.

11 Q. Okay. So you didn't review the risk pool
12 section in GASB, and you have no prior financial
13 accounting experience concerning rate credits,
14 correct?

15 A. I take it back. I did review the risk pool
16 section of GASB, but with regard to rates, I have not.

17 Q. Okay. And that's what we're talking about.
18 So with respect to -- and I'll take that
19 clarification.

20 You didn't review the risk pool statute in
21 GASB with respect to rates, and you have no prior
22 experience in financial accounting for rate credits,
23 correct?

1 A. Correct.

2 MR. QUIRK: Can I have 159, please?
3 Exhibit 159. Page 3 of the document. Mr. Mitchell,
4 this is LGC Exhibit 159, and page 3. I won't spend
5 too much time on it, but I just want to highlight that
6 this is a financial statement from December 31, 2010
7 and 2009, and the BerryDunn independent auditors'
8 report.

9 THE PRESIDING OFFICER: You have to give me
10 some help with the page number.

11 MR. QUIRK: It's page 3 of the document and
12 it's --

13 MR. VOLINSKY: 801 should be in the corner.

14 MR. QUIRK: 799. I'm sorry.

15 A. What book is it?

16 Q. I'll get you a copy so you have it right in
17 front of you.

18 A. Thank you.

19 Q. And I assume this document is familiar to
20 you?

21 A. Yes.

22 Q. This is one of the financial records you
23 reviewed during your on-site inspection?

1 A. Beforehand as well.

2 Q. Okay. So you reviewed this both before and
3 during your on-site inspection, correct?

4 A. Yes.

5 Q. And if you would turn to the bottom right
6 number is 799. And can you describe what that section
7 of the statement is?

8 A. The last paragraph?

9 Q. No. Just -- it's the independent auditors'
10 report, correct?

11 A. Yes.

12 Q. And the third paragraph down, I'll just read
13 it. "In our opinion, the financial statements
14 referenced to above present fairly, in all material
15 respects, the financial position of LGC HealthTrust as
16 of December 31, 2010 and 2009, and the changes in its
17 net assets and its cash flows for the years then
18 ended, in conformity with U.S. generally accepted
19 accounting principles."

20 Did I read that correctly?

21 A. Yes, you did.

22 Q. And, in fact, I will not go through each and
23 every year, but a similar statement is within all the

1 statements you reviewed from 2002 to 2010 for all of
2 the LGC entities, correct?

3 A. Correct. Except there was a restatement in
4 2005 of one of the entities, and so that was noted in
5 the financial statements.

6 MR. QUIRK: Mr. Mitchell, would it be okay if
7 we took a five-minute break, the afternoon recess, and
8 see how much we have? I don't believe I have much
9 more.

10 THE PRESIDING OFFICER: Go right ahead. In
11 fact, if we're going to make it the afternoon break,
12 take 10 minutes, and everybody consolidate their
13 thoughts.

14 MR. QUIRK: Great. Thank you.

15 (Recess taken.)

16 THE PRESIDING OFFICER: Good afternoon.
17 We've returned from the afternoon -- midafternoon
18 recess. Mr. Quirk, please.

19 MR. QUIRK: Thank you, Mr. Mitchell. No
20 further questions. Thank you, sir.

21 THE WITNESS: Thank you.

22 THE PRESIDING OFFICER: Could we please have
23 some quiet in the observer's area? Thank you.

1 Mr. Gordon, do you have any questions?

2 MR. GORDON: I do not.

3 THE PRESIDING OFFICER: Mr. Howard, do you?

4 MR. HOWARD: If I may, Mr. Mitchell?

5 THE PRESIDING OFFICER: Of course.

6 MR. HOWARD: It will only take a few minutes.

7 CROSS-EXAMINATION

8 BY MR. HOWARD:

9 Q. Mr. Bannon, I want to talk about only one
10 subject, and that's the scholarship fund.

11 A. Yes.

12 Q. In 2009 I believe you said that financials
13 show that the fund was carried as an asset and a
14 liability and had the amount of about \$40,000?

15 A. Yes.

16 Q. By 2010 a separate 501(c)(3) was set up?

17 A. Purported to be. I only saw a bank statement
18 in 2010 labeled "John Andrews Scholarship Fund" with
19 \$49,000.

20 Q. With \$49,000. Do you know where that money
21 came from?

22 A. The 49 or the 9?

23 Q. Let's start with the 49.

1 A. I was told that the \$40,000 was transferred
2 to a 501(c)(3). So I am presuming that the 40 of the
3 49 was from there.

4 And I also saw board minutes authorizing
5 \$5,000 to be spent from an unexpended account in 2009
6 for that scholarship. So I'm assuming that \$5,000
7 came from an LGC budget into that -- that Citizens
8 Bank account; that's all I recognized it as.

9 Q. As a contribution to the scholarship?

10 A. Yes.

11 Q. Do you know where the first \$40,000 came
12 from?

13 A. I was told that it was from various
14 activities, one of which being a golf tournament.

15 Q. It came from golf tournaments, didn't it?

16 A. I was told that that was one of the sources.

17 Q. LGC was doing separate fund-raisers to fund
18 the scholarship account, correct?

19 A. Yeah. And one of them might have -- one of
20 them I was told was a golf tournament.

21 Q. Right. And wouldn't it make sense that if
22 you take it from LGC and you put it over into a
23 501(c)(3) account, now the people who contribute to

1 the golf tournament or who are sponsors can take a tax
2 deduction for doing so; wouldn't that make sense?

3 A. I don't know that I need to get into that.
4 If I see an asset on the books of a company,
5 regardless of where its source is from, it was an
6 asset of the entity. And if you're telling me you're
7 going to take that asset and take it outside of the
8 consolidating entry -- entity and put it into a
9 separate account, bank account, I have an issue with
10 that.

11 Q. But if the initial \$40,000 was contributions
12 from sponsors and people who want to contribute to the
13 scholarship fund --

14 A. I don't know that, though.

15 Q. I'm asking you --

16 A. I was told --

17 Q. -- while -- while it's carried as an asset
18 and a liability, it's not really LGC's money, it was
19 scholarship money contributed by people other than
20 through premiums?

21 A. Well, the liability was member balance. It
22 probably has a different connotation.

23 Q. It might have a different connotation, but

1 maybe they just didn't know where to put it. It was
2 somebody else's money.

3 You're here saying that was member money and
4 it was wasteful spending by LGC to take that money off
5 their books and put it into a 501(c)(3).

6 A. I'm not saying it's wasteful spending. I'm
7 saying it's inappropriate accounting procedures to
8 make money off a consolidating entity's books into
9 another entity.

10 Q. Okay. But it may end up actually being a
11 more appropriate place for that money that's not even
12 LGC's, right?

13 A. That's not for me to decide.

14 Q. Okay. All right. Thank you.

15 THE PRESIDING OFFICER: Mr. Volinsky?

16 MR. VOLINSKY: I only would move to strike
17 the identification on Exhibit 48, which was the rate
18 crediting chart I used, and ask its admission. I have
19 no questions for Mr. Bannon.

20 THE PRESIDING OFFICER: Thank you. Mr.
21 Quirk?

22 MR. QUIRK: No objection.

23 THE PRESIDING OFFICER: All right. Any

1 objection?

2 MR. HOWARD: There's no objection to that,
3 Mr. Mitchell. I wanted to go back and make my
4 objection to Exhibit 68, and I think it's A, which is
5 Mr. Bannon's expert report.

6 THE PRESIDING OFFICER: Let me just declare
7 that BSR 48 is admitted as a full exhibit.

8 (BSR 48 was entered into evidence.)

9 THE PRESIDING OFFICER: Okay. Mr. Howard
10 rises for 68C? A?

11 MR. HOWARD: I believe it's A. It's
12 Mr. Bannon's expert report. And this is a procedure
13 that we have been following in this proceeding with
14 respect to, I believe it was Mr. Coutu's report. I
15 levied the objection that it was fundamentally unfair
16 to allow the admission of a written expert report on
17 issues upon which the expert did not provide oral
18 testimony.

19 I renew that objection with respect to 68A
20 and add to it that the dynamic that it puts us into is
21 the Bureau gets to select what they want the witness
22 to talk about and then put the rest of his pile of
23 opinions into evidence for you to consider without us

1 being able to properly cross-examine.

2 What it then does is shifts the burden of
3 proof to us to prove to you that that opinion's not
4 reliable; to prove to you that that opinion is not
5 relevant or material, to use the three standards under
6 the statute. They have put the burden by adopting
7 this procedure, it puts the burden on us to dispute an
8 opinion that's not being properly offered.

9 That is not a proper procedure to be
10 followed. I think it violates the procedures under
11 the statute, and I'd ask that 68A and the other expert
12 opinions under 68, particularly Mr. Coutu's, be
13 stricken from the record. Thank you.

14 THE PRESIDING OFFICER: Let me make sure I
15 understand, Mr. Howard. You are objecting a second
16 time to Mr. Coutu's citing a separate basis for --
17 or -- yes, a separate basis?

18 MR. HOWARD: There is an additional basis,
19 yes.

20 THE PRESIDING OFFICER: It would have been
21 additional if you had said that on Monday, but you're
22 rising now to object to an exhibit that's already been
23 admitted?

1 MR. HOWARD: I am. Obviously, I'm objecting
2 on 68A.

3 THE PRESIDING OFFICER: Understood.

4 MR. HOWARD: I'm adding to the argument I
5 made back on 68E, I think it is. You've already
6 overruled my initial objection. I would like you to
7 reconsider that ruling in light of my additional
8 argument.

9 THE PRESIDING OFFICER: Okay. Thank you.

10 MR. HOWARD: All right. Thank you.

11 THE PRESIDING OFFICER: Anyone else?
12 Mr. Quirk?

13 MR. QUIRK: On behalf of LGC and its
14 affiliated entities, we join Attorney Howard in his
15 objection and the grounds for which he has asserted.

16 THE PRESIDING OFFICER: On 68?

17 MR. QUIRK: 68E, yes.

18 THE PRESIDING OFFICER: I believe it's 68A.

19 MR. QUIRK: 68A, thank you.

20 THE PRESIDING OFFICER: Mr. Gordon?

21 MR. GORDON: Me, too.

22 THE PRESIDING OFFICER: Okay. Mr. Gordon
23 joins on 68A. I'm also going to deny this objection

1 to 68A and deny, Mr. Howard, your additional ground on
2 Mr. Coutu's report. I don't have the number at hand.
3 If no one else does we'll just let the record reflect
4 that it's Mr. Coutu's report. Thank you.

5 MR. VOLINSKY: I can look. Coutu is 68 "B"
6 as in boy.

7 THE PRESIDING OFFICER: 68B is Mr. Coutu's.

8 MR. GORDON: Just so the record is clear, I
9 join that portion of Mr. Howard's objection to
10 Mr. Coutu's report as well.

11 THE PRESIDING OFFICER: That was Mr. Gordon.

12 MR. QUIRK: To quote Mr. Gordon, "Me, too."

13 THE PRESIDING OFFICER: Mr. Quirk. Thank you
14 very much. Mr. Volinsky?

15 MR. VOLINSKY: This witness is completed.

16 THE PRESIDING OFFICER: Okay.

17 MR. VOLINSKY: And I believe we'll return to
18 Mr. Andrews at this juncture.

19 THE PRESIDING OFFICER: You're excused,
20 Mr. Bannon.

21 THE WITNESS: Thank you.

22 THE PRESIDING OFFICER: Thank you very much.
23 And we return to Mr. Andrews on cross-examination by

1 Mr. Ramsdell; is that the understanding?

2 MR. VOLINSKY: Yes.

3 THE PRESIDING OFFICER: Okay. And
4 Mr. Ramsdell, if I might inquire of you. There was
5 some discussion during the day, informal discussion,
6 with respect to how we might treat some of these
7 exhibits, and would you have a representation for me
8 or do we need a bench?

9 MR. RAMSDELL: We do not. We are in complete
10 agreement that with respect to the documents,
11 particularly the minutes that I was going to offer
12 through Mr. Andrews, that each side will be allowed to
13 submit copies of the minutes to you. Same exhibit
14 numbers, obviously. They're already in.

15 Each side by the end of this proceeding will
16 have highlighted any portions they specifically want
17 to draw to your attention, and we'll submit them to
18 you that way rather than continue to have them read
19 the way they have been.

20 THE PRESIDING OFFICER: Thank you very much.
21 It's my further understanding that you do have other
22 things to ask of Mr. Andrews?

23 MR. RAMSDELL: I do.

1 MR. RAMSDELL: Can I have Exhibit 77, please?

2 Q. John, I'm really going to try to focus and
3 get through this quickly. You -- when you were last
4 on the stand you had given testimony about the
5 strategic plan. And this is the only document that
6 I'm going to use. This is the strategic plan,
7 "Developing a Strategic Plan For the Local Government
8 Center's Risk Service Programs" that was presented
9 during the board retreat on July 14th and 15th of
10 2004; is that correct?

11 A. Yes.

12 MR. RAMSDELL: May I have page 5 of the
13 document, please? And for a Bates number that's L --
14 no. I think it's one more page. Thank you. We had
15 it right a minute ago. Thank you very much.

16 Q. All right. All I want to do is on this page
17 it lists: "While new competition was a catalyst for
18 the action, this strategy is part of a continuous
19 process of improving service and bringing value to our
20 members"; is that correct?

21 A. Yes.

22 Q. That was the discussion that was going on at
23 the time, correct?

1 A. Yes.

2 Q. And if I could just, "Intrinsic value of the
3 program to LGC members. Continue strong member-driven
4 organization committed to filling member, not
5 organizational needs. Contain or reduce overall costs
6 to members. Maintain competitive marketplace for
7 members in all lines. Retain members through package
8 savings and sticky services. Provide services beyond
9 insurance for all members. Improve quality of claims,
10 loss prevention, traditional and ancillary services
11 for members. Neutralize ability of competitors to
12 cherry-pick existing members. Forge stronger
13 alliances with partner groups serving members.
14 Strengthening LGC as organization relative to
15 counterparties to improve its negotiating position for
16 members' benefit. Leverage program assets to members'
17 benefit across all lines of services and products."

18 Did I read that correctly, John?

19 A. Yes.

20 Q. And were you in agreement that that was, in
21 fact, the intrinsic value of the strategic plan
22 program to the LGC members?

23 A. Yes.

1 MR. RAMSDELL: Can you put that exhibit away,
2 please? I'm sorry. May I have Exhibit 101, please?

3 Q. You with me, John?

4 A. (Witness nods head.)

5 Q. Yes?

6 A. Excuse me?

7 Q. You're with me?

8 A. Yes.

9 Q. Okay. I'm going to represent to you that
10 while you were asked questions about a defined benefit
11 plan, the existence of a defined benefit retirement
12 plan, when you were on direct examination, do you
13 remember that?

14 A. Yes.

15 Q. I'm going to represent to you, to move this
16 along, that the first -- the earliest in chronological
17 order exhibit in the list of exhibits shows that the
18 discussion about defined benefit plan began in April
19 of 2004; does that sound about right to you?

20 A. Yes.

21 Q. All that I'm going to ask you about is this
22 memorandum right here. Now we're more than two years
23 further in time. This is a memorandum to the Local

1 Government Center board of directors from the Local
2 Government Center Personnel Committee; is that
3 correct?

4 A. Yes.

5 Q. And if we take a look down, further down on
6 the first page of this document, there is a numeric
7 listing of the rationale for this unanimous
8 recommendation. And it begins with number one:
9 "Provisions for retirement for NHLGC employees are the
10 only weak area left in the employee benefits package
11 afforded employees."

12 Later on in that paragraph it says, "The LGC
13 pays 5 percent of each employee's pay into the plan
14 and employees may augment that with additional
15 contributions."

16 Now, I want to make sure we understand this
17 correctly, John. In that paragraph when it talks
18 about the LGC pays 5 percent of each employee's pay
19 into the plan, that's not under this defined benefit
20 plan, correct?

21 A. Correct. That's the ICMA-RC plan.

22 Q. Which is the plan that was in existence at
23 the time this plan was being discussed over that

1 period of years, correct?

2 A. Yes.

3 Q. Can I have the next page, please?

4 A. Yes.

5 Q. Number two: "Virtually every public employee
6 in the State of New Hampshire at the local government
7 level is enrolled in the state's defined benefit
8 pension plan," which means, last sentence, "Virtually
9 all employees served by the LGC's staff are covered by
10 a defined benefit pension plan"; is that correct?

11 A. That's correct.

12 Q. On number three, it states that there's -- a
13 defined benefit pension plan is important in three
14 respects. They were referred to as the three R's.
15 One is recruitment, that is, to recruit employees; two
16 is retention, that is, to retain employees; and three
17 is reinvigoration, to reinvigorate the organization as
18 people retire; is that correct?

19 A. Correct.

20 Q. Number four: "A defined benefit pension plan
21 provides a more predictable retirement for employees
22 because the benefit amount is established by a
23 formula."

1 Number five: "All employees would be
2 required to participate in the plan."

3 And number six: "Employees would share in
4 their purchase of past service liability."

5 What does that mean, sharing in past service
6 liability?

7 A. Well, it means that there's a -- there's a
8 cost, an up-front cost to being able to count all
9 employees' past service as of the time of the --
10 implementation of the plan, and that's called past
11 service liability. That's -- like when I testified on
12 direct examination when the -- when the state set up
13 the judges' retirement plan.

14 Q. Okay. We don't need to go there. We're only
15 talking about this plan.

16 A. Okay --

17 Q. Let me, please.

18 A. It's the same thing.

19 Q. I get you.

20 A. So we -- so --

21 Q. John.

22 A. Oh, okay.

23 Q. May we go to page 6, please, which would be

1 1740.

2 A. Yes.

3 Q. At the very top of the page, it states that:
4 "All but four employees elected to contribute toward
5 the purchase of their past service liability in a
6 total amount of \$1,229,438."

7 And then on "Future steps," it says, "Legal
8 counsel will be directed to prepare plan documents for
9 formal final adoption"; is that correct?

10 A. Correct.

11 Q. Okay. We're done with this exhibit.

12 MR. RAMSDELL: Can I have Exhibit 381,
13 please?

14 Q. There's been testimony, and, in fact, I
15 believe you were asked about rate stabilization in
16 this case, John; do you recall that?

17 A. Yes.

18 Q. Okay. This is a letter dated April 20, 2007
19 from an attorney at Hinckley, Allen, Snyder, Mark S.
20 McCue; is that correct?

21 A. Yes.

22 Q. And in the "re" line of the letter it
23 mentions "Treatment of funds under RSA 5-B"; is that

1 correct?

2 A. Correct.

3 Q. Do you remember having asked Mark McCue or
4 Hinckley, Allen, Snyder about, to get -- to have an
5 opinion for the Local Government Center on rate
6 stabilization?

7 A. Yes. The first sentence, being rendered at
8 the request of the finance committee of the board.

9 Q. Okay. I believe Attorney McCue is going to
10 testify in this proceeding, and so if you'd just -- if
11 we could go to the last page of the document, page 3,
12 please. With me?

13 A. Yes.

14 Q. Okay. The last paragraph he states that:
15 "Therefore, a decision by the board to return such
16 additional funds to members through an adjustment in
17 the ratings process, spread over a number of years to
18 address additional unexpected contingencies, whether
19 in trend or in membership growth, and to seek to
20 achieve rate stabilization, is legally supportable."

21 That's the opinion you got from your outside
22 legal counsel, correct?

23 A. Correct.

1 Q. Thank you. I'm going to ask you a couple of
2 things about issues that you've -- that you were asked
3 about during your direct examination.

4 You were asked questions about finding out in
5 2006 that there had been a problem with the
6 reorganization documents; do you recall that?

7 A. Yes.

8 Q. Do you know what the problem was?

9 A. No.

10 Q. Has it ever been your understanding that the
11 problem was a violation of RSA 5-B?

12 A. No.

13 Q. You were asked questions about your
14 relationship with Paul Genevese and about competition
15 with Primex.

16 A. Yes.

17 Q. When you advised HealthTrust, PLT, the LGC
18 board of directors, when you were giving them advice
19 when you were talking to them, was your primary
20 motivation competition with Primex or getting back at
21 Paul Genevese or was your primary motivation doing
22 what was best for the members of your organization?

23 A. It was doing what was best for the members.

1 I, you know -- we -- you know, the Primex situation
2 was fait accompli. We had to live with it. You know,
3 we adjusted our operations and stuff to do that.

4 MR. RAMSDELL: May I have Exhibit 442,
5 please?

6 Q. John, you've seen certificates of good
7 standing issued by the Secretary of State before,
8 haven't you?

9 A. Yes.

10 Q. I'm going to ask you to take a look at
11 Exhibit 442. Now, understanding you retired in
12 September of 2009, you still recognize this as a
13 certificate in good standing for the Local Government
14 Center HealthTrust, LLC signed by William M. Gardner,
15 November 8, 2011?

16 A. Yes.

17 MR. RAMSDELL: May I have Exhibit 445,
18 please?

19 A. Is this --

20 Q. I'll ask you about the document. Again,
21 would you take a look at this document.

22 A. Yes.

23 Q. "I, William M. Gardner, Secretary of State of

1 the State of New Hampshire, do hereby certify that
2 Local Government Center Property-Liability Trust, LLC
3 is a New Hampshire limited liability company formed on
4 June 26, 2003. I further certify that it is in good
5 standing as far as this office is concerned, having
6 filed the annual reports and paid the fees required by
7 law; that a certificate of cancellation has not been
8 filed, and the attached is a true copy of the list of
9 documents on file in this office," and this is dated
10 November 8th, 2011, correct?

11 A. Yes.

12 MR. RAMSDELL: I have no further questions.

13 THE PRESIDING OFFICER: Thank you,
14 Mr. Ramsdell. Mr. Volinsky?

15 MR. VOLINSKY: Just one issue, Your Honor.

16 THE PRESIDING OFFICER: I'm sorry.
17 Mr. Gordon, did you have any?

18 MR. GORDON: No.

19 THE PRESIDING OFFICER: Mr. Howard?

20 MR. HOWARD: No.

21 THE PRESIDING OFFICER: Mr. Volinsky, back to
22 you, sir.

23 MR. VOLINSKY: Just one issue. I'll be

1 brief.

2 REDIRECT EXAMINATION

3 BY MR. VOLINSKY:

4 Q. Mr. Andrews, I want to take you to the time
5 of the Joint Competition Committee. The Joint
6 Competition Committee had two board -- two or three
7 board members from the then-separate HealthTrust
8 entity, did it not?

9 A. Yes.

10 Q. And the reason that board members from
11 HealthTrust were on the Joint Competition Committee is
12 because Joint -- HealthTrust had its own set of
13 interests and concerns that those board members were
14 there to voice for the purposes of the committee; is
15 that right?

16 A. Yes.

17 Q. Same question with Property-Liability. There
18 were a couple of board members from Property-Liability
19 on the Joint Competition Committee, were there not?

20 A. Yes.

21 Q. And they were there because
22 Property-Liability had its own issues and concerns to
23 voice during the Joint Competition Committee meetings,

1 correct?

2 A. Yes.

3 Q. New Hampshire Municipal Association also had
4 a couple of board members on the Joint Competition
5 Committee, did it not?

6 A. Yes.

7 Q. And they were there to protect and advance
8 the interests of the New Hampshire Municipal
9 Association; is that right?

10 A. Yes.

11 Q. And each of those entities had different
12 interests that were brought together for discussion at
13 the Joint Competition Committee; is that right?

14 A. Yes.

15 Q. Did you recognize at the time that each of
16 those entities had different interests to protect in
17 coming together for that discussion that happened over
18 a period of time of those committee meetings?

19 A. Yes.

20 Q. Did the members of the Competition Committee
21 seem to also recognize that they had different
22 interests that needed to be the subject of robust
23 discussion in these committee meetings?

1 A. Yes.

2 Q. Who represented HealthTrust at the time of
3 the Joint Competition Committee as a lawyer?

4 A. As a lawyer?

5 Q. Yeah. Bob Lloyd?

6 A. Bob Lloyd.

7 Q. Who represented Property-Liability at the
8 time the Joint Competition Committee was meeting? Bob
9 Lloyd, right?

10 A. Bob Lloyd.

11 Q. Who represented New Hampshire Municipal
12 Association at the time of the Joint Competition
13 Committee? Bob Lloyd, again, right?

14 A. Yes.

15 Q. And when the Joint Competition Committee
16 needed legal advice as to how to go forward, it was
17 Bob Lloyd who gave them that advice, right?

18 A. Yes.

19 Q. Thank you.

20 THE PRESIDING OFFICER: Mr. Ramsdell?

21 MR. RAMSDELL: I have no questions.

22 THE PRESIDING OFFICER: Okay. And likewise,
23 Mr. Gordon, done, and Mr. Howard, done. We're done

1 with this witness, I believe.

2 Mr. Andrews, thank you very much. You're
3 excused. Mr. Volinsky?

4 MR. VOLINSKY: Mr. Mitchell, on behalf of the
5 Bureau of Securities Regulation, we rest.

6 THE PRESIDING OFFICER: Very good. Thank you
7 very much for presenting your case and in the manner
8 in which you did and the courtesies extended to myself
9 and those who have been helping me. Also, your level
10 of cooperation with opposing counsel.

11 Upon the BSR resting, it's -- I've been
12 noticed that we have some motions that we would like
13 to make at this time. And when I say "make," that
14 would include, I think, an argument. And let's see
15 where we go with those in case anyone feels the need
16 to submit, you know, any -- any supportive documents.
17 And I guess by that I mean legal memoranda in support
18 of any of these motions. Having said that, let's
19 begin with whoever would like to make the first motion
20 this afternoon.

21 Give me just a moment, Mr. Saturley, while I
22 do a little housecleaning here. Thank you very much.

23 MR. SATURLEY: Thank you, Your Honor. I can

1 do the same.

2 THE PRESIDING OFFICER: Will these all be
3 oral arguments at this time?

4 MR. SATURLEY: At this time, yes.

5 THE PRESIDING OFFICER: Okay. Thank you.
6 Please proceed, sir.

7 MR. SATURLEY: Your housekeeping is done. I
8 believe mine is done. So thank you very much.

9 At this time, Mr. Mitchell, at the conclusion
10 of the Bureau's case, the LGC entities move to dismiss
11 this matter. This is the close of the case in chief.

12 The standard typically applied at this time
13 is to examine the evidence that is presented. Perhaps
14 allowing you to view it most favorably to the
15 nonmoving party, in this instance, the Bureau, but
16 nevertheless this gives us time to frame the issue and
17 frame what has occurred to date, and I appreciate the
18 opportunity for us to do that.

19 With regards to Count One, which I'll broadly
20 call the corporate governance case, while there has
21 been some evidence with regards to the corporate
22 organization and there has been some words from
23 Mr. Volinsky's mouth with regards to an error that may

1 have occurred or a trip to Delaware, there has been
2 scant, and indeed, I would say no other evidence that
3 anything is wrong.

4 Indeed, the statute is very simple with
5 regards to what is required of a risk pool program
6 with regard to its corporate governance. We cited
7 that extensively in prior pleadings that we filed with
8 you in regards to the fact that it calls for a board
9 and bylaws, and that is the state of the evidence with
10 regards to corporate governance.

11 We most recently concluded with certificates
12 of good standing that demonstrate that these pools,
13 the two principal pools that have been discussed in
14 this case, HealthTrust and Property-Liability Trust,
15 which includes within it the Workers' Compensation
16 pool, have been certified by William Gardner, the
17 Secretary of State, as being New Hampshire LLCs in
18 good standing.

19 And so we think that that's the state of the
20 evidence with regards to Count One. And so very
21 simply, we see nothing that is before you that
22 supports the charge that's been made, and we ask that
23 that count be dismissed.

1 Count Two. Broadly speaking, the RSA 5-B,
2 the reserve case, the rate-setting case, certainly
3 there's been much more evidence, there's been much
4 more talk, there have been some expert opinions,
5 indeed, with regards to some elements of that. So I'm
6 going to linger on that, on Count -- broadly speaking,
7 Count Two I'm going to linger on that a little bit
8 more than I did on Count One.

9 In essence, I would reduce the Bureau's case
10 to the following: They say that LGC holds too much
11 capital. That's what we've heard. In order to put
12 that in perspective and to put in perspective what the
13 Bureau is saying about LGC and the board members, then
14 I would like to focus on 5-B. Pull up 5-B, please.
15 This is 5-B, the statute that's before us. I would
16 like to focus on 5-B, Section 5.

17 5-B, Section 5 is the portion of the statute
18 that lays out the standards of organization and
19 operation that apply. Section 5 of the statute is the
20 one that I'd like to focus on, and I just would like
21 to focus on a few words that are contained in the
22 statute very briefly.

23 In Section 1, it sets forth that each program

1 shall return, for instance, in Section C, the section
2 that the Bureau has focused on, each program shall
3 return all earnings and surplus in excess of any
4 amounts required for administration, claims, reserves.

5 And if I were to summarize the Bureau's case,
6 they say we have not met that. We have not returned
7 surplus sufficiently. But what the statute calls for
8 is for LGC and risk pools generally to return surplus
9 in excess of any amounts required for administration,
10 claims and reserves.

11 So then the next question in analyzing this
12 is: What are the reserves? And the reserves are
13 spoken on further in Subsection F. "The reserves
14 necessary to be maintained to meet expenses of all
15 incurred and incurred but not reported claims and
16 other projected needs of the plan."

17 So when we're examining and you are examining
18 the question in this case and the evidence that's been
19 put forth thus far, the question has to be: Have the
20 directors of this entity properly met that statute?
21 Have they returned surplus in excess of reserves
22 necessary to be maintained to meet the projected needs
23 of the plan?

1 And so I'm going to demonstrate through the
2 evidence today, specifically through the words of the
3 Bureau's own experts, what the -- what the board did,
4 did not do, and specifically how they met the
5 standards and that requirement. That's what I'm going
6 to do now through the Bureau's own experts.

7 You've heard from a couple of experts from
8 the Bureau. I'm going to speak specifically about
9 Howard Atkinson, the actuary from Washington, and
10 Michael Coutu, the insurance executive.

11 Mr. Atkinson testified in response to a
12 question from Mr. Quirk: "Projected needs of the plan
13 can include net assets, right?"

14 "Yes, it could." I just want to give you the
15 cites for the record of this rough transcript. This
16 is Howard Atkinson's transcript pages 120 and 121.
17 "Again, could projected needs of the plan, a portion
18 of the reserves, include net assets?" He conceded
19 that it could.

20 Mr. Coutu was asked: "You would agree that a
21 board of directors of HealthTrust have acted prudently
22 when they have money set aside for capital?" Capital,
23 meaning another word for net assets. And Mr. Coutu

1 agreed, "Yes, I would agree with that."

2 So when the board sets aside money for net
3 assets, they're acting prudently according to the
4 Bureau's own experts. That's page 97 from the second
5 page -- excuse me, second day's transcript.

6 From page 102 of the second day's transcript,
7 again, Mr. Coutu in response to a question: "The
8 board of directors of HealthTrust is empowered and
9 authorized to have an amount available to them to
10 establish capital adequacy for their fund." Again,
11 another word for net assets.

12 "As a board," said Mr. Coutu, "I assume that
13 would be the prerogative of the board." That's what
14 they're there for. That's what they're empowered and
15 authorized to do, to set aside capital.

16 I asked Mr. Coutu that same day, and the
17 transcript reference is page 119, I asked him, "With
18 regards to the determination of capital, with regards
19 to RBC, RBC is a perfectly acceptable method for
20 determining capital adequacy for a risk pool like
21 HealthTrust, right?" Mr. Coutu responded, "In my
22 judgment it is."

23 So the board is prudent to set aside capital

1 and using an RBC method, in the Bureau's own expert's
2 words, it is appropriate.

3 The question then -- the question then
4 becomes -- the question that's been posed and that
5 we've been discussing: "What is the right amount of
6 capital for this entity?" Mr. Coutu agreed. "What's
7 the right amount of capital for LGC for HealthTrust to
8 set aside?"

9 Well, we examined that with Mr. Coutu to try
10 to figure out what that would be. And from page 121
11 of his transcript he agreed that it was the
12 prerogative of the board of directors. It's their
13 prerogative to set a level of capital that they deem
14 prudent, and the board has the discretion to decide
15 what is an adequate or appropriate level. I asked him
16 if he agreed with that, and he did, subject to 5-B's
17 requirement to return surplus above the reserves. So
18 there's potential.

19 In terms of those competing things, the
20 ability to set aside capital and the obligation to
21 return surplus above reserves, in terms of that
22 tension, in terms of that balance, whose job is it to
23 set the balance? Mr. Coutu agreed it is the board's

1 job. "It is the board's job to decide with respect to
2 its obligations under the relevant statute what the
3 capital level should be in that balance." It is the
4 board's job.

5 Page 122. "That's what the board's there
6 for, that's their responsibility?" Mr. Coutu said,
7 "I'm agreeing with you."

8 Back to Mr. Atkinson. Page 116 of his
9 testimony. "You would agree that the board of
10 HealthTrust adopted a plan that addressed the
11 projected needs of the program," one of the types of
12 reserves called for in the statute, "based upon their
13 view, correct? You would agree that they did that?"
14 Mr. Atkinson agreed.

15 So if the board has the permission and the
16 authority under 5-B to set the projected needs of the
17 plan, to set reserves that meet the projected needs of
18 the plan, if it's their job to do that, if it's their
19 job to establish the balance between that and the
20 requirement to return surplus as conceded by the
21 Bureau's experts, then how do we know if they did it
22 right or not?

23 Well, there's no guidelines. And the

1 Bureau's experts conceded that as well; that there are
2 no guidelines to be found in 5-B. Mr. Coutu conceded
3 that, indeed, the poorly written sections of 5-B
4 created ambiguities that caused some of the issues
5 that brought us here. Page 77 of his testimony. "Do
6 you still believe that the requirements of Chapter 5-B
7 are poorly written?"

8 "I do agree they create a number of
9 ambiguities."

10 The guidelines could have been written into
11 5-B. We saw that some other states have written upper
12 limits to what capital can be kept. We know that
13 legislatures know how to do that. We know that this
14 legislature in this state has rejected certain
15 proposed upper limits. We know that 2.0, which has
16 been suggested as a potential limit, an RBC of 2.0,
17 has been described by the NAIC as a misapprehension of
18 what they mean by that upper limit.

19 We know that all of that material has been
20 submitted to this legislature and that the legislature
21 currently has understudied right now what the upper
22 limits should be; that they have asked for and
23 received recommendations from the Bureau on what the

1 upper limit should be, but they have yet to act.

2 We know that the Secretary of State's office
3 and the Bureau has rule-making power and authority and
4 has yet to exercise it.

5 In the absence of a statutory guideline, in
6 the absence of a rule-making guideline, once again, we
7 are left to the board's prerogative to try to
8 determine and establish the correct balance between
9 the projected needs of the plan and returning surplus
10 in excess of that. It's up to the board to figure out
11 where that balance is, according to the words of the
12 Bureau's own experts.

13 That is all that has been offered by the
14 Bureau with regards to 5-B. Everything else is an
15 opinion of what might be good policy, what might be a
16 tolerable limit, what might be a wonderful place to be
17 with regards to running a risk pool, but it is not the
18 law.

19 And so what is the board of LGC left with and
20 what are you left with? What have you heard in this
21 five days of testimony against them? They are left
22 with their best business judgment. They are left with
23 an obligation to act in good faith, with ordinary

1 prudence, and in the best interest of the
2 organization.

3 And the status of the evidence to date is
4 that, boy, have they done that. Every discussion,
5 every point of decision that you have heard about in
6 five days has come with extensive planning, multiple
7 consultants, advisors, evaluations, retreats,
8 assessments, communications to members, and one might
9 say an exhaustive discussion of what was to come.

10 They have heard from Peter Riemer; they have
11 heard from Jenny Emery; they have heard from Bob
12 Lloyd; they have heard from each other. That is the
13 state of the evidence; that these people have not done
14 anything willy-nilly, that they have exhaustively and
15 lengthily and thoroughly considered how to manage the
16 balance between determining and setting the projected
17 needs of the plan and how and when to return surplus.

18 When you look at the statute and you compare
19 it to the evidence that has been submitted to you, you
20 see a board doing exactly what you would want a board
21 to do and exactly what Michael Coutu conceded they
22 should be able to do: Plan, investigate, discuss,
23 act. There's nothing else before you.

1 With regards to the security plan, we
2 understand that --

3 THE PRESIDING OFFICER: Count Three?

4 MR. SATURLEY: Count Three really is the only
5 one in my understanding that applies to the entity,
6 but I'll broadly speak about Counts Three, Four, and
7 Five. I call them the securities aspects.

8 To the extent that they apply to LGC, they
9 all turn on an application of the Howey Test. And for
10 purposes of my argument with regards to the evidence,
11 because that's what we're discussing now, we've
12 already given you our motions to dismiss on the law,
13 I'm speaking now to the sufficiency of the evidence as
14 well as the law.

15 The evidence with regards to expectation of
16 profit, which is one of the key components of the
17 Howey Test, is scant. And it is a concession by
18 Mr. Fryer that a predominant function was to purchase
19 insurance for a finite period of time, and that's not
20 an expectation of profit. That's a purchase of a
21 service. He conceded that the primary purpose was to
22 cap costs and to purchase insurance for a finite
23 period of time.

1 We could go on and on about whether or not --
2 and we did this morning about fair notice. Fair
3 notice to securities lawyers, I dare say, is not the
4 same thing as fair notice to my client. But again,
5 I'm trying to direct my attention to the sufficiency
6 of the evidence, and there is no evidence other than
7 an expectation of purchasing insurance.

8 We've just had the Bureau's last expert
9 concede that the LGC entities are subject neither to
10 35:9 or the insurance statutes with regards to their
11 investments. And so, again, the evidence and the
12 concessions by the experts are such that this case
13 should be stopped.

14 Several hundred years ago in Salem,
15 Massachusetts there were efforts to just take on
16 things and push people where they shouldn't be, and
17 this should stop the way that should have stopped. I
18 ask that you examine the evidence that's been put
19 before you and determine that there is no evidence to
20 support the charges against the LGC entities that are
21 in the amended petition and to bring this to an end.

22 Thank you for your time.

23 THE PRESIDING OFFICER: Thank you for your

1 thoughtful presentation, Mr. Saturley.

2 Additional motions this afternoon? Next?

3 Mr. Gordon, please approach.

4 MR. GORDON: Good afternoon.

5 THE PRESIDING OFFICER: Good afternoon,

6 Mr. Gordon.

7 MR. GORDON: And I'm mindful of the hour as
8 well, and I appreciate the courtesy extended.

9 At this point of the proceeding I do believe
10 that the legal prism through which the evidence is to
11 be viewed by you has significantly changed. Prior to
12 this time for the introduction of any evidence the
13 state was given the reasonable inferences and the
14 benefit of those reasonable inferences to all matters
15 set forth in its complaint.

16 At this point with the close of their
17 evidence and on a motion to dismiss that burden has
18 now shifted, and I cite to you a New Hampshire Supreme
19 Court case, which I will give to you. *Gray V.*
20 *Commonwealth Land Title*. And it talks about a
21 proceeding precisely as this. And I have it right
22 here for you. Can I approach?

23 THE PRESIDING OFFICER: Absolutely.

1 MR. GORDON: I even marked it on that point,
2 which allows you as the trier of fact on a motion to
3 dismiss that when you are a sole trier of fact, you
4 have the ability and are permitted to render a verdict
5 for the defendant on the merits at the close of the
6 case. There is at this point in time no prima facie
7 standard that you need or should apply to this motion.

8 This table gets no additional benefit of
9 inferences, reasonable or otherwise, when you now
10 consider the evidence before you as to whether or not
11 the state has proven by a preponderance of the
12 evidence the claims set forth against Ms. Carroll.

13 And I suggest that if you apply a
14 preponderance of the evidence and ask yourself at this
15 point in time based upon all that you have heard to
16 this moment, all of the testimony from all of the
17 witnesses, what did Ms. Carroll do that violated the
18 formation of this entity, Count One, return of
19 surplus, Count Two, or the securities Counts Three,
20 Four, and Five? Her name has been mentioned once as a
21 pass-away in this proceeding.

22 And I don't want to repeat a refrain of
23 Mr. Howard's, but I wanted to know what my client had

1 done wrong, what acts, what specific acts, what
2 decisions did she make, what actions did she influence
3 that causes her to be here today as a defendant? And
4 I simply don't know. I've not been told before this
5 proceeding, and I certainly have not been educated
6 through evidence as to what she did wrong. What acts
7 she intentionally undertook to cause her to be in this
8 situation.

9 I start with the first observation for which
10 there is evidence, that she was the executive
11 director. And as executive director her
12 responsibilities under the bylaws, which we have
13 admitted, is somewhat limited. It is not her duty to
14 set the policy of the board. She is much more of a
15 soldier to implement the policy of the board. She
16 doesn't direct what the reserves should be. She
17 doesn't direct what the corporate structure should be.
18 She doesn't set policies on any of the substantial
19 issues that Mr. Saturley just went through for which
20 the board is given those responsibilities.

21 There is nothing in this case and nothing in
22 the law that I know of that suggests that it is her
23 responsibility, her duty, her legal obligation to

1 undertake any of those efforts. And the first part of
2 the dialogue in any determination as to whether or not
3 there has been a legal wrong, we have to begin with
4 the first inquiry: Is there a legal duty? And she
5 had no legal duty in any of the instances which form
6 Count One.

7 Now, this Court knows and understands that
8 the formulation of these entities took place in 2003,
9 and Ms. Carroll had no involvement with any of that.
10 None. She played no role in that. She was with NHMA
11 at that point in time. So when in 2003 the board
12 exercised its responsibilities, and you've heard a lot
13 of the evidence and you'll read even a little bit
14 more, she wasn't involved in that historical
15 background.

16 So I don't see -- if you look at the
17 inception of the entities under Count One, when they
18 were born she had no legal duty, no legal
19 responsibility, and factually, there is nothing in the
20 record upon which there could be even a scintilla of a
21 finding that she did.

22 Rather, in your order denying my motion to
23 dismiss you extended an argument that really had not

1 been advanced by the state, because in Count One
2 Ms. Carroll is not even mentioned in Count One. The
3 first time she's mentioned in any substantive way, I
4 believe, is Count 84.

5 So in Count One she was not mentioned, but in
6 your review of the pleading, again, in the light most
7 favorable with every reasonable inference that could
8 be drawn in favor of the BSR, you said that there
9 could be some evidence where her direction facilitated
10 the implementation and continuation of one board.
11 That was your ruling.

12 I rejoin with that that under the bylaws that
13 there was nothing that she could do. But now that the
14 evidence is all in, and again, I say that she had no
15 legal duty, what is the evidence that she did anything
16 that was improper? She just served at the board's
17 direction and followed their instructions as she was
18 required to do under the bylaws that she was required
19 to follow.

20 I believe that the BSR's position, because
21 this is the only logical extension that I can think
22 of, the only logical result if you applied their
23 approach to this precise issue, is that the only thing

1 she could do was to resign. That was the only thing
2 that she could do, because that was the only action
3 that she could take that could have any influence or
4 absolve her of any responsibility, because she could
5 not change it.

6 So I suggest to you when you look at the
7 evidence in the case, and 5-B as 5-B is, that there is
8 no difficulty in just simply concluding that there is
9 no evidence, even if you take your approach, that she
10 did anything that was improper, breached a duty that
11 facilitated the implementation of a continuation of
12 one board.

13 The next part of Count Two, and again,
14 referring to your opinion at page 8, is that you said
15 referring to Carroll, the LGC board relied on her
16 direction when deciding how to manage member funds in
17 5-B. Pools, again, taking all reasonable inferences,
18 taking those facts, furnishing them up and putting
19 them in the light most favorable to the BSR.

20 And I think it is quite clear that there is
21 no evidence that she engaged in any action as
22 executive director in deciding how to manage member
23 funds held in 5-B pools. And the reason for that is

1 that when you look at the bylaws, the legal
2 responsibility for the management of those member
3 funds is specifically directed to the board. So I
4 would suggest on that point that there is no evidence
5 with regard to any finding that she improperly
6 influenced the board in how the member funds should be
7 managed.

8 I should also point out, and there's
9 discussion of RBC, and while this is -- is not my
10 battle, because we come in at 2009, but at times in
11 understanding, as we all must do in uncharted
12 waters -- and I don't think anybody would suggest that
13 RSA 5-B is a clarity of law. Someone just prompted me
14 back here. Thank you. But there's not clarity in
15 5-B. And in that haze at times we look to what has
16 happened in the past in order to help identify the
17 issues that we now see. What has occurred in the past
18 on some of these issues so we can judge the conduct
19 that we engage in by the conduct of others?

20 And I think when you start looking at some of
21 these issues, and if you look at Exhibit 34 -- and
22 this was a HealthTrust finance document that was in
23 2002. This is a -- this was a decade, almost a decade

1 ago. Ten -- ten years of history. At that time, ten
2 years ago, they set an RBC in that case for
3 HealthTrust of 4.2. 4.2 a decade ago.

4 And if you look at those notes and those
5 minutes, you'll see that Bob Lloyd at that time asks
6 another actuary, the belt and suspenders of actuaries,
7 because Peter Riemer made the recommendation, and then
8 Bob Lloyd asked another actuary at the meeting, "Does
9 this appear reasonable?" And the answer was yes.
10 This took place nine years before we even got in the
11 mix of executive director, but that's part of the
12 history.

13 If you look at issues regarding surplus and
14 return of surplus, again, history. You'll find that
15 in 1998 the New Hampshire School Board Trust, which
16 will be Exhibit Number 23, made filings about surplus.
17 Can't do the math too quickly, but that's almost 24
18 years ago. There was -- 24 years ago there was a
19 filing in the Secretary of State's office that said
20 surplus was being returned by rate stabilization.
21 They were stabilizing rates, and by stabilizing rates
22 that was the return of surplus.

23 So there was a practice 24 years ago that

1 said, "We can return the surplus by stabilizing
2 rates." That's a long history for someone to look
3 back at and say, "Is what we're doing right?"

4 If you look at SchoolCare's Exhibit Number
5 315 at page 39, if you look at Article Two of their
6 bylaws, it says, "All earnings surplus tracking shall
7 approve for benefit of members of purpose by
8 stabilizing future benefit costs." So you have two
9 other entities, and that was in 2004, that had a
10 practice and procedure in their understanding and
11 interpretation of RSA 5-B by returning surplus through
12 stabilizing rates.

13 So when we look at what Ms. Carroll did as
14 executive director, understanding that she had no
15 particular responsibility and had no legal duty to
16 change otherwise, but if she spoke to me and said look
17 at the legal landscape, look at what has been done by
18 others to give me some guidance as to what I should do
19 and what I should say, I would look at those other
20 documents and say, "This is what others have done.
21 This was allowed. These were filings that were with
22 the Secretary of State's office."

23 And that's precisely what Mark McCue did, and

1 that's precisely what Bob Lloyd did. And if they are
2 determined to be wrong, it is not Ms. Carroll's fault.
3 She relied upon the outside expert. And, again, I say
4 with that she had no duty to even do that.

5 Now, with regard to securities, I have had a
6 number of securities cases in my life. Some good.
7 Some bad. This is the first time that the person
8 whose understanding we're trying to figure what was
9 their purpose in entering into the arrangement has not
10 testified.

11 No member has come before you and offered
12 testimony, "It was my expectation when I entered into
13 this agreement that there was profit there for me."
14 And when I heard Mr. Fryer's testimony -- and the
15 standard for me is that my client here negligently or
16 intentionally did something wrong. These are just
17 snippets of his testimony:

18 "There's not a huge body of law in
19 New Hampshire. There's no case law on point. There
20 is no New Hampshire case that I can look at. There's
21 a dividing line. Some courts would go one way. Some
22 courts could go the other. Could go either way.
23 Split of opinion. No case dealing with these types of

1 issues or instruments. No clear or direct authority."

2 I don't need -- you've heard it today, but
3 that's what I'm being charged with. My client is
4 being charged with doing something negligently, that
5 she failed to observe that, failed to follow that when
6 this expert was saying, "Could go either way depending
7 on, you know, who you spoke to."

8 And if it could go either way, this time I
9 get the benefit of the doubt. That has now passed on
10 to me. That legal benefit has now passed on to me.
11 And if it's this way, at this point in time, I win.
12 Ms. Carroll wins.

13 And you know who else wins? People who do
14 their job and try to do the best they can, follow the
15 best advice that they can get, and they follow that,
16 they dutifully perform their duties and
17 responsibilities. Those people win, too. Thank you.

18 THE PRESIDING OFFICER: Thank you,
19 Mr. Gordon. Mr. Howard, please.

20 MR. HOWARD: Mr. Mitchell, I am mindful of
21 the hour. I'm also mindful that our stenographer has
22 been working now for almost two hours straight. Would
23 you like to give her a five- or ten-minute break?

1 THE PRESIDING OFFICER: She says she's doing
2 all right.

3 MR. HOWARD: I didn't hear her say that.

4 THE PRESIDING OFFICER: She said she's doing
5 all right. And as you all know, we are all sensitive
6 to the hours of the day. I think it's been expressed
7 to me, in fact, from your table and others that there
8 are other considerations, that is, family and
9 personal. I've told you I'm prepared to be available
10 to you all 24/7, so don't feel any urgency or rush. I
11 want to hear what you have to say.

12 Mr. Gordon, of course, you know that the same
13 held true for you. And for any of you that are
14 arguing, I appreciate your sensitivity to getting the
15 case addressed, but with that, feel no -- feel under
16 no pressure, sir, to not tell me what you feel you
17 need to tell me in full this afternoon.

18 MR. HOWARD: Oh, I certainly will do that,
19 Mr. Mitchell. My only concern was for the
20 stenographer.

21 THE PRESIDING OFFICER: How long do you
22 intend to go on?

23 MR. HOWARD: I'm hoping no more than

1 15 minutes.

2 THE PRESIDING OFFICER: Oh. You just saw the
3 head nod. We could for --

4 MR. HOWARD: Something tells me I'm not last
5 in line.

6 THE PRESIDING OFFICER: No. Something tells
7 me that you're not. We don't have to brace for an
8 hour of your argument right now; is that correct?

9 MR. HOWARD: Yes, that is correct. I paused
10 for drama there. Yes, that's correct.

11 THE PRESIDING OFFICER: Let's return to the
12 issues at hand this afternoon. May I hear from you
13 about your objections?

14 MR. HOWARD: Yes. Mr. Mitchell, this morning
15 Attorney Fryer sat on the stand and told you about the
16 securities issue. In this case he said it is a close
17 call. Whether Mr. Curro should remain a respondent in
18 this case is not a close call.

19 Attorney Gordon and I had a bet at the outset
20 of this case as to whose client's name would be used
21 fewer times, his or mine. I regret to inform you that
22 I lost that bet. His client was mentioned once. My
23 client on Tuesday was mentioned three times. And the

1 Bureau has proved beyond any shadow of the doubt that
2 Peter Curro exists, but that's all that they have
3 proved.

4 Let's start from the beginning. I started
5 this case seven, eight months ago. I opened this case
6 five days ago by saying I wanted to know what my
7 client had done wrong. What are the allegations and
8 what am I defending? I stand here before you now
9 still not having an answer to that question.

10 Let's start at the beginning. Count One,
11 corporate governance. What the Bureau has proved with
12 respect to Mr. Curro -- and remember, Mr. Mitchell, my
13 comments are focused on Mr. Curro. I do not represent
14 the board of directors. There is no concept in the
15 law known as a representative defendant. I represent
16 the individual, Mr. Curro.

17 In 2003 a joint resolution of the three
18 then-existing entities, HealthTrust, NHMA, and
19 Property-Liability Trust, all took separate
20 consideration of a joint resolution to reorganize
21 their entities. Mr. Curro was a member. This was
22 proved. Mr. Curro was a member of the HealthTrust
23 board of directors at that time. And on April 7th of

1 2003 HealthTrust, as an independent board, voted seven
2 to three to pass the joint resolution to reorganize.
3 They were one of three boards to do so.

4 Mr. Curro's vote, although it wasn't
5 established by the board, he did vote for that -- it
6 wasn't established by the Bureau, I'm sorry, they
7 admitted no evidence on this. I can't dispute that he
8 did vote for that. As a vote of seven to three, his
9 vote was inconsequential. Without his vote the
10 resolution still would have passed.

11 HealthTrust as a board, their vote to
12 reorganize was inconsequential, because without the
13 vote of the other two boards upon which Mr. Curro did
14 not sit, did not have any voting privileges, and had
15 no authority or influence over whatsoever, they voted
16 separately to reorganize.

17 I'm not going to address the question of
18 whether it was even wrong or unlawful under 5-B to
19 reorganize in the fashion that they did. I adopt the
20 arguments of Mr. Saturley. The questions for you with
21 respect to Mr. Curro is: Did he do anything wrong?
22 And the answer has to be no. All he did was be there.

23 Count Two. If you read through Count Two,

1 you will see that there is no allegation of any kind
2 mentioning Mr. Curro. Throughout the course of the
3 last five days the Bureau has had several
4 opportunities to admit evidence and have a witness
5 testify; in fact, they could have called my client had
6 they chosen to, to attempt to discern what decisions
7 he was involved in, what influence he had over those
8 decisions, how he voted with respect to those
9 decisions, and whether his vote was consequential to
10 the decision of the board. I submit to you none of
11 that matters, anyway, but they could have at least
12 tried, and they didn't even try.

13 They admitted no evidence whatsoever that
14 Mr. Curro did anything other than be present at a
15 handful of meetings. I think his name was mentioned
16 three times in Mr. Volinsky's direct examination of
17 John Andrews. He pointed out on three occasions that
18 Mr. Curro was present. On one occasion the Bureau
19 pointed out that Mr. Curro said something at the
20 meeting. And that's all they've done with respect to
21 the evidence against my client.

22 Now that their case has closed, it simply
23 cannot be that he is responsible as an individual

1 under the law to be subject to penalties in whatever
2 form, whether it be injunctive relief or fines, based
3 on that evidence.

4 I'd also like to point out for you that it is
5 undisputed in the Bureau's case, it is an
6 uncontradicted fact that the board of directors for
7 HealthTrust in the reorganization and the board of
8 directors of LGC throughout this entire time period
9 had the advice of counsel on every decision that they
10 made, and certainly every decision that's being
11 criticized in this hearing.

12 In particular with respect to Count Two, the
13 return of surplus issue, the very last exhibit that
14 was presented through Mr. Andrews was the April 20th,
15 2007 letter from Attorney Mark McCue to the board
16 which specifically said that the manner in which they
17 were returning surplus was legally supportable under
18 5-B. It did not prohibit it. And if you read that
19 entire letter you will see that the board's decision,
20 apart from whether Mr. Curro was individually
21 responsible for that board's decision, the board's
22 decision was with the advice of counsel. That is --
23 those are uncontradicted facts.

1 Therefore, you cannot conclude that Mr. Curro
2 either knowingly or negligently violated 5-B. It
3 cannot be unreasonable for a member of the board of
4 directors to take action when he does so consistent
5 with the advice of the board's counsel.

6 The Bureau has had every opportunity to
7 contradict that evidence here. They could have called
8 an attorney to say that what the board did was wrong.
9 They haven't done so. They could have called a -- an
10 expert witness qualified in the topic of fiduciary
11 duties of a board of directors. It has not done so.
12 Even though it had notice on Monday that Mr. Coutu was
13 not qualified to speak on that subject, it's had all
14 week before it closed its case to put a witness on and
15 it chooses not to do so.

16 There's a concept in the jury trials that I
17 do that juries are often told that when it -- a party
18 has a witness or could address a topic by calling a
19 witness who's qualified or has personal knowledge of a
20 topic to address that topic and it doesn't do so, you
21 can draw a negative inference that the testimony would
22 not have been helpful. And I submit to you with
23 respect to this issue they don't have somebody who

1 could say this board did wrong or that Mr. Curro did
2 wrong.

3 Mr. Gordon, Attorney Gordon mentioned a few
4 moments ago -- well, strike that. I'll get to that
5 point in a moment.

6 So one other fact that I would simply like to
7 point out for you in consideration of Count Two.
8 Despite the -- or in conjunction with the absence of
9 any allegation that he did anything wrong, any
10 evidence that he took any vote, much less how he
11 voted, or any evidence that any of his votes were
12 consequential, can also point out that this board, LGC
13 since 2003, has had 31 members.

14 The clients who I originally represented, all
15 of them were off this board by 2008, I believe it is.
16 The Bureau has made a significant focus on the year
17 2010 and all the horrible things that happened in
18 2010. Mr. Curro is the only member of the board of
19 directors who's named in this suit of the 31 who sit
20 in 2010. Why is that?

21 There's absolutely no explanation for it
22 other than they want to disparage his good name. They
23 want to put on a show for the public to make it look

1 like the Secretary of State is trying to protect
2 people. All that they have accomplished is dragging
3 my client's name through the mud with no evidence and
4 no good purpose.

5 Let me quickly turn to Counts Three, Four,
6 Five, the security counts. Count Three I think we can
7 dispose of quickly. Mr. Curro is not named in Count
8 Three. And more specifically, because I recognize
9 that you earlier rejected my -- or denied my motion to
10 dismiss on Count Three, it's not just that he isn't
11 named, but Count Three is specifically addressed to
12 the entities and to agents, broker-dealers, or
13 issuer-dealers. And by definition under the statute
14 Mr. Curro cannot be one of those things, and it is not
15 alleged that he is one of those things. Count Three
16 is an easy one. There's been no evidence of it. He's
17 not even charged in Count Three.

18 Count Four alleges that Mr. Curro as a
19 director materially aided in the knowing or negligent
20 sale of unregistered securities. I ask you the
21 rhetorical question: What evidence have you heard
22 here today or this week that Mr. Curro did anything
23 other than be on a board? What action did he take as

1 a director that materially aided in the sale of
2 unregistered securities?

3 Set aside that these things aren't even
4 securities. I adopt the arguments of Mr. Saturley.
5 What did he do to materially aid the sale? There's no
6 evidence that he did anything. Were his actions
7 knowing or the -- any kind of alleged action
8 negligence? It simply cannot be.

9 The Bureau called an expert, Mr. Fryer, who
10 said a number of things, but one thing he certainly
11 said was: "Reasonable practitioners can differ on
12 whether these things are securities." The Bureau --
13 strike that.

14 It is not disputed that no lawyer ever came
15 to LGC, whether it was Mr. Lloyd or Mr. McCue, and
16 said, "You folks ought to be careful. This might be a
17 security. We need to look into it." They never
18 received any legal advice on the topic whatsoever. It
19 cannot be that if your lawyers don't even raise the
20 issue with you that you are acting negligently as a
21 director with respect to whether these membership
22 agreements, participation agreements are securities.

23 An important fact, I think, for you to

1 consider in the Bureau's woeful attempt and
2 unsuccessful attempt to prove negligence against my
3 client comes directly from the words of their own
4 expert. You asked the question of him: "Do you think
5 5-B puts you on fair notice or fair warning that these
6 might be a security?" And he said, "Yes."

7 For a quarter of a century LGC or its prior
8 predecessor entities have been filing with the
9 Secretary of State. The agency who has exclusive
10 jurisdictional authority over securities, that's their
11 expertise. That's what they do. They are the best in
12 the state at securities. Mr. Wingate, Mr. LaRochelle,
13 his colleagues, and all their predecessors, they have
14 that job because they're the best at it. If anybody
15 knows it's a security, it's them, right? That's what
16 Mr. Fryer wants you to believe.

17 They also have jurisdiction over 5-B. In
18 2009, 2010 they got enforcement jurisdiction over it,
19 but all the way back to 1987 everything about risk
20 pools, the actuarials, evaluations, the audits, the
21 bylaws, everything that would tell you this thing is a
22 security gets filed with their office.

23 For 24 years, nearly a quarter of a century,

1 not a peep from the very people who have all the
2 evidence. They don't even think it was a security,
3 but Mr. Curro is supposed to believe it was. He's
4 going to be -- at the request of the Bureau they want
5 him to be punished for selling securities when even
6 they didn't know it was one. A disingenuous argument
7 I don't think I ever heard more remarkable.

8 Finally, Count Five, and this is the one,
9 quite frankly, that really gets my dander up, not that
10 I've got much hair left to have that, but it really
11 gets my dander up. For 25 years these folks don't
12 know it's a security, but they come happily along in
13 September of 2011 and charge my client with the
14 following: Being fraudulent and deceitful in selling
15 unregistered securities to the very town he works for.

16 What evidence did you hear, Mr. Mitchell --

17 THE PRESIDING OFFICER: I'm sorry. I was
18 distracted by something in the gallery.

19 MR. HOWARD: What evidence did you hear that
20 Mr. Curro made any statement to any of the members of
21 LGC about whether this was a security or not, about
22 what the nature of the investment was or not? In
23 order to prove fraud you have to prove he said

1 something.

2 They charged Mr. Curro with making untrue
3 statements of material fact and engaging in acts or
4 practices of deceit by failing to say to the member --
5 to members that funds are being diverted to subsidize
6 the Workers' Comp. pool; that Mr. Curro failed to say
7 that funds were being diverted for nonpool
8 administrative activities; that Mr. Curro failed to
9 say that the funds were being put in risky
10 investments. What was the evidence of that here?
11 Absolutely nothing. Not one mention of it.

12 It is, quite frankly, shameful on the part of
13 the Bureau and the Secretary of State to charge
14 Mr. Curro with such serious and disparaging
15 allegations as fraud and deceit, come to this hearing,
16 take up 40 hours of your hearing time and not admit
17 one piece of evidence about it.

18 I would ask you respectfully that that count
19 as well as Counts One, Two, Three, and Four be
20 dismissed. Thank you.

21 THE PRESIDING OFFICER: Thank you,
22 Mr. Howard. We'll take a five-minute break at this
23 time.

1 (Recess taken.)

2 THE PRESIDING OFFICER: We've made those
3 administrative and technological modifications.
4 Mr. Volinsky, you wish to respond to the motions that
5 have been made, correct?

6 MR. VOLINSKY: I do, Your Honor.

7 THE PRESIDING OFFICER: All right. Please
8 proceed, sir.

9 MR. VOLINSKY: With your permission there are
10 three motions that have been made. Mr. Tilsley and I
11 will speak to all three motions with Mr. Tilsley
12 addressing the securities-based arguments and my
13 addressing the rest, if that's acceptable to you.

14 THE PRESIDING OFFICER: Let me understand
15 something. My recollection is Counts One and Two
16 don't have securities in them.

17 MR. VOLINSKY: Correct.

18 THE PRESIDING OFFICER: Okay. I will hear
19 from one of you on One and Two?

20 MR. VOLINSKY: Yes, sir.

21 THE PRESIDING OFFICER: And then I'll hear
22 from Mr. Tilsley on Three, Four, and Five?

23 MR. VOLINSKY: Correct.

1 THE PRESIDING OFFICER: Yes, that's
2 permissible.

3 MR. VOLINSKY: Thank you. So with your
4 permission, you've just heard three motions asking you
5 to stop the case. I agree with my colleagues that
6 this is a serious matter for all concerned. It's not
7 appropriately the subject of levity. It's not
8 appropriately the subject of derision. There are some
9 significant legal issues here.

10 They are issues that well could be considered
11 by the legislature, but they are also appropriate for
12 consideration by you as a person who will help
13 establish the decisional law on the matters at issue
14 and potentially could be considered by our
15 New Hampshire Supreme Court which also has the
16 authority to establish positions and to interpret
17 existing statutes as a matter of decisional law. So I
18 suggest, first of all, that whether or not any of this
19 is under consideration by a coequal branch of
20 government, it's fairly irrelevant to the topics
21 before us.

22 RSA 5-B sets standards for risk pools and
23 then provides certain exceptional franchises for risk

1 pools who meet those standards. Those franchises
2 insulate risk pools from regulation of the Insurance
3 Department. Those risk pools who meet the standards
4 are also exempt from taxation. The risk pools in this
5 state, Local Government Center foremost amongst them,
6 have enjoyed the benefits of those standards. They
7 now claim those standards are too vague to enforce.

8 Let me refer you respectfully, because I know
9 you've read this, you probably have this memorized,
10 that under 5-B:5 each pooled risk management program
11 must meet these standards. They must be governed by a
12 board, and they must be governed by written bylaws,
13 and the bylaws must meet certain parameters.

14 You have the bylaws. You now know the
15 structure of the organization. Some of that came
16 through testimony, but you have over 500 exhibits in
17 evidence in this case as well. Some contested. Some
18 by agreement. Those bylaws -- and the testimony makes
19 clear that the risk pool programs, which are what this
20 governs, not a parent entity, the risk pool programs
21 do not have bylaws. They do not have boards of
22 directors. There is a board and a set of bylaws
23 somewhere else at what's called the Local Government

1 Center parent. The Local Government Center parent
2 does not provide any insurance-type programs. It is
3 not a pooled risk management program in and of itself.

4 There is another entity, NHMA, which we heard
5 earlier through arguments and objections aren't at
6 issue. The reason they aren't at issue is because
7 NHMA is also not a pooled risk management program, and
8 therefore, there is no argument as to whether it needs
9 a separate board or a separate set of bylaws.

10 The argument is the pooled risk management
11 programs, which are HealthTrust and the combined
12 Workers' Comp. and Property-Liability programs are
13 risk pool management programs and neither of them have
14 a board of directors or a set of bylaws. That is what
15 is argued in Count One. And we suggest that with
16 respect to Count One you should not stop this case.

17 You have heard from some that Mr. Curro is a
18 board member, currently sitting board member. A board
19 member since the time before reorganization. You will
20 see from the minutes, and it's clear we need not read
21 the minutes to you, that he was involved in all of the
22 key decisions that are at issue in this case.

23 Foremost amongst them with respect to Count

1 One is the reorganization of HealthTrust where he was
2 a board member from a separate entity that had a board
3 on which he sat and that had a set of bylaws. It
4 moved from that organizational structure to no longer
5 having a board and no longer having bylaws. It did so
6 through a vote. He is one of the people who voted for
7 that.

8 Now, while I appreciate Mr. Howard's angst,
9 there were a number of other board members from his
10 era named in the case. Those board members have
11 resolved their dispute. Mr. Curro was perfectly fine
12 in not resolving his dispute, but to say he's being
13 singled out, that there's a suggestion of something,
14 selective prosecution, or we're trying to besmirch his
15 name is simply inaccurate. There was a group named.
16 Others settled. He did not. It's his prerogative.
17 That's why he's here alone.

18 With respect to Count Two, 5-B:5, 1(c) comes
19 into play, which is the directive to return all
20 earnings and surplus in excess of what I call
21 operational expenses. You heard testimony that that
22 is a somewhat unusual requirement. It is not one that
23 traditional insurance carriers or the Blue Cross Blue

1 Shield programs must operate under.

2 You were told in argument that there is no
3 evidence as to any standard other than pure discretion
4 business judgment of the board of directors sitting
5 for the Local Government Center. And I suggest that
6 the evidence is not what has been described by
7 Mr. Saturley on that point.

8 There are a number of vectors of evidence
9 that have come to you in the course of this case
10 orally. It's supported by the expert reports and by
11 the various documents. I can briefly summarize that
12 evidence.

13 Mr. Coutu testified and made a chart, which
14 has been marked as Exhibit 71, in which he made a
15 balance sheet analysis of the financial status of the
16 LGC HealthTrust program and concluded that if one
17 removed the unnecessary investments to -- unnecessary
18 in terms of their operational needs, subtracted that
19 from the net assets, you would have what would equate
20 to an RBC of 2.42.

21 Mr. Coutu also did an analysis based on the
22 financial statements and the NAIC standard for minimum
23 capital. That is Exhibit 70. And he concluded in the

1 last year for which we have numbers, which is 2010,
2 that some \$43,000,000 could be returned from net
3 assets.

4 Mr. Riemer, as you have seen and will see
5 when you read the specific minutes, recommended a
6 doubling of the net assets of the organization at a
7 time when Mr. Andrews testified they were under threat
8 from competition to Primex. I've gone through in my
9 opening all of the descriptions of unethical conduct
10 that they used against Primex before adopting the same
11 practice. But my point here is that they were at a
12 2.1 RBC prior to building the war chest.

13 And finally, Mr. Atkinson, who was the expert
14 actuary who testified and submitted a report, used a
15 stochastic model to determine appropriate net capital,
16 net assets, to be \$41.4 million. The current -- the
17 most current we have under consideration is 86.8. He
18 told you that that was 4.3 RBC. With his proposed
19 figure it's about half, and that, too, takes us to
20 about 2.1 RBC. That's Exhibit 12.

21 And I might add that Mr. Atkinson testified
22 expressly that he did not use the requirement to
23 return earnings and surplus excess of operations to

1 calculate the necessary amount of capital to be held
2 by this organization. He just did it straight up in
3 reviewing their operations and their financial
4 statements.

5 So we now have from one, two, three, four
6 directions expert and factual information suggesting
7 that the Local Government Center holds over
8 \$40,000,000 in net assets in excess of earnings and
9 surplus that should be returned.

10 You've heard testimony from Mr. Andrews and
11 Mr. Bannon about the real estate transfers that were
12 without compensation and Mr. Bannon's expressed
13 inquiry on that point of the chief financial officer.

14 There's a constructive trust there that is
15 part of the case that we'll ask you to rule on and
16 return the real estate back to HealthTrust. You've
17 heard extensive testimony about the \$18,000,000
18 subsidy paid from HealthTrust to support Workers'
19 Comp. in a less-than-transparent way. We'll ask you
20 to order that that be returned as well.

21 Those three pieces, 40,000,000, 18,000,000,
22 about 8,000,000 gives us \$66,000,000, about which
23 there's been expressed testimony in this case that

1 justifies allowing Count Two to go forward.

2 Ms. Carroll. Giving the hearing officer the
3 benefit of the ability to read the exhibits, which we
4 know you will do carefully, the LGC admitted four
5 different exhibits, 191, 194, 48, and 68, all of which
6 identify Ms. Carroll as general counsel to the
7 enterprise. She was involved as general counsel. She
8 later became interim director and then finally
9 executive director. To suggest that general counsel
10 with all of the responsibilities placed on attorneys
11 is merely a soldier implementing what she is told,
12 whether it is right or wrong, takes us a bit too far.

13 The individuals, and to some extent LGC, have
14 raised an affirmative defense of advice of counsel in
15 which each of them in different ways suggest they
16 relied on counsel's advice about the particular issues
17 in this case. Mr. Curro and Ms. Carroll have not
18 testified. And so they have not asserted a reliance
19 on counsel as of yet. They may, and then that issue
20 will be put to you, but they have not as of yet.

21 There has been much made of filings with the
22 Secretary of State -- I should actually say with the
23 Secretary of State's Corporate Division, which happens

1 to sit on the third floor of the Statehouse Annex --
2 filings made at a time before everyone in this room
3 knows that the Secretary of State and Bureau of
4 Securities Regulation had any authority to supervise
5 any risk pool other than to simply ensure that a
6 filing was made annually in a particular manner and
7 that a \$150 check was delivered.

8 There was no ability or responsibility placed
9 on the Secretary of State to analyze the activities of
10 the Local Government Center. That changed in 2010
11 with the amendments, and by 2011 there was an
12 enforcement proceeding, which is what brings us here
13 today. I don't believe that the arguments that the
14 Secretary of State was dilatory or nonfeasance in its
15 responsibilities given the statutes we know exist
16 carry any weight.

17 The board minutes that you will carefully
18 review are replete with explanations and assertions of
19 board members with Ms. Carroll in attendance,
20 Mr. Andrews in attendance, Mr. Curro participating as
21 a board member, explaining why certain activities that
22 are relevant here took place, what motivated them.
23 There is clear evidence as to knowledge that conduct

1 was wrong with respect to Count One and Two, and then
2 a decision to embrace the wrongness and proceed. That
3 is enough to permit this case to go forward.

4 There were decisions made to build a war
5 chest. You have heard that that war chest was built
6 from '04 through '10 and that there were other
7 activities taken while Ms. Carroll was executive or
8 interim executive director. The administrative
9 5 percent RBC was in place in '09. It was dropped
10 when the Secretary was given regulatory authority.
11 The IBNR was changed in its method of calculation
12 during her executive directorship.

13 And finally, although we're told that they
14 still use 4.2 RBC, there is a behind-the-surface,
15 under-the-surface change in how that is calculated
16 that was discussed at some length by Mr. Atkinson.

17 Mr. Atkinson also explained that the member
18 balance or net assets are increased because premiums
19 higher than necessary are charged to build the net
20 assets. That happened before Ms. Carroll was the
21 executive director and since. It happens through the
22 entire period of Mr. Atkinson's evaluation, which is
23 through 2011.

1 For all of those reasons -- this has been a
2 long week. I know that everyone's worked hard and
3 played -- paid good attention to what's happened. For
4 all of those reasons we believe that the arguments to,
5 quote, stop this case are not well founded and that
6 this case should continue through its appropriate
7 conclusion, at which time you may weigh all the
8 evidence, consider all the arguments, and come to a
9 well-reasoned decision. Thank you.

10 THE PRESIDING OFFICER: Thank you,
11 Mr. Volinsky. Mr. Tilsley.

12 MR. TILSLEY: Thank you, sir.

13 THE PRESIDING OFFICER: I understand that you
14 rise to address Count Three and object to motions to
15 dismiss Counts Three, Four, and Five?

16 MR. TILSLEY: That is correct. I will be
17 addressing the three securities counts. And I want to
18 start by talking about the facts that have been
19 established over the last week that are sufficient to
20 support all three of those securities counts.

21 We've established that members pay money to
22 participate in the pools. Mr. Andrews testified that
23 the pools are a common enterprise. We've heard from

1 Attorney Saturley today on these motions that we
2 haven't proven that there is an expectation of profits
3 sufficient to meet the Howey Test.

4 On Wednesday Mr. Andrews testified -- this is
5 page 155 into 156 of the preliminary transcript from
6 Wednesday. Mr. Volinsky asked him: "Do you agree
7 with me that in the" -- actually, make sure I have
8 this right. "Do you agree with me that in the way
9 pools" -- there we go. I'm sorry. A technical error.
10 I'll try this again.

11 "Do you agree with me that in the way that
12 the risk pools are set up members are led to believe
13 that if the common enterprise produces profits or
14 gains they will get the benefit of those profits or
15 gains?" And Mr. Andrews agreed, "Yes."

16 So essentially, we have an expectation of
17 profits. Members are led to believe that they will
18 get the benefit of the profits and gains produced by
19 the pools.

20 You also have, and frankly, I can't recall if
21 this is testimony or if this is in the boxes behind
22 you, but there is certainly evidence in this case,
23 documentary evidence that the bylaws of LGC provide

1 that net income accrues to the members as it is
2 earned. That is Section 5.1 of the bylaws. The net
3 income belongs to the members. That is an expectation
4 of profit under the Howey Test.

5 In addition to expectation of profit, you
6 have exhibits where the LGC advertises, markets return
7 on investment to its members through either dividends
8 or rate credits or rate stabilization. LGC Exhibit
9 209 on the first page indicates that the pools take
10 premiums, invest them, and profits are used to reduce
11 rates and offer services.

12 BSR Exhibit 58 is a marketing piece
13 attempting to get towns to essentially renew with the
14 LGC pools. That marketing piece indicates you should
15 sign the attached agreement if you like the dividends
16 that you get from participation in the LGC pools.

17 BSR Exhibit 51, the LGC Fact Book 2011
18 indicates that HealthTrust members prefer that funds
19 be returned to them in the form of rate decreases.

20 All of these materials, marketing materials
21 create an expectation of profit under the Howey Test.

22 The evidence has shown that LGC invests
23 members' contributions; that they retain surplus and

1 achieve investment income. The investments are
2 handled by LGC and its professional agents. Members
3 have no input or control over the investment and
4 management of funds.

5 The evidence will show that money that is
6 paid into the pool is subject to the risk of the
7 enterprise. There is an upside if the pool makes
8 money, and there's a downside if the pool loses money.

9 There's evidence that the LGC has not
10 registered its participation agreements as securities
11 with the Bureau.

12 There's evidence that neither the LGC nor
13 Ms. Carroll nor Mr. Curro have ever registered with
14 the Bureau.

15 There's evidence that the participation
16 agreements, which constitute a security, are signed by
17 the executive director. That would be Ms. Carroll
18 with the theory that she was the executive director.

19 There is evidence in the testimony from
20 Mr. Andrews that the board of directors on which
21 Mr. Curro sits, and you have minutes, approves the
22 form of the participation agreement that forms the
23 security. The vote -- the board votes to approve the

1 agreement, that's the security that's at issue in this
2 case. Mr. Andrews testified that the board never
3 sought a legal opinion as to whether their
4 participation agreements constituted securities.

5 We know that LGC and the pools have a
6 principal place of business in New Hampshire.

7 There was never any disclosure to cities and
8 towns and local governments that the participation
9 agreements were unregistered securities.

10 We know that member funds in the 5-B pools
11 were used for nonpool purposes, the Workers' Comp.
12 subsidy, administration, real estate. We know from
13 Mr. Andrews's testimony that the LGC did not obtain
14 written authorization from the -- each member to use
15 the members' funds for nonpool purposes.

16 We know from testimony that the LGC's ability
17 to offer lower rates by using the surplus for rates
18 stabilization or rate credits are a motivation for
19 choosing the pools over other types of insurance
20 products. We know that the common enterprise is
21 dependent on the management of LGC for success.

22 Again, in the board minutes you'll see the
23 amount of consultants that consult with the board that

1 participate in proper rate setting, claims handling,
2 actuarial calculations, reinsurance decisions. All of
3 those decisions determine whether we have a successful
4 pool and whether we have a profit or a loss on the
5 investment in the pool, and all of that is dependent
6 on LGC. The participants don't control those types of
7 decisions.

8 We know that the return of surplus through
9 rate reduction is done on a pro rata basis and is not
10 based on each member's claims history. And we know --
11 again, I'm not quite sure if this was testimony, but
12 again, it's in the exhibits.

13 In 2007 the board of LGC amended its bylaws,
14 amended its bylaws to provide that it could return
15 surplus not just through dividends but through rate
16 reductions or rate credits. That was a board decision
17 to change how they would return surplus to hold money,
18 invest it, and use it towards rate credits rather than
19 issue dividend checks in those instances where there
20 was a surplus.

21 On the current motions we've heard a lot
22 about the fact that Attorney Fryer came today and
23 said, "Well, this is a close call. How could they

1 know what to do if this is a close call?" Attorney
2 Fryer testified that the statute provides fair notice.
3 He testified that there's a mechanism for a securities
4 lawyer like him to deal with these things. You can
5 seek a no-action letter from the regulator in these
6 close call-type situations.

7 Mr. Andrews testified that the board never
8 sought a legal opinion on these securities. And as I
9 just mentioned, the board in 2007 changed its bylaws
10 to retain surplus and use it for rates rather than
11 return it as a dividend.

12 That's a change in 2007, and that's a change
13 that's applicable to securities, because they're
14 retaining the money, they're investing in it again
15 rather than returning it. And when we keep hearing
16 about the Bureau in 25 years of history, and "Where
17 were you in 1989?" remember, in 2007 this board,
18 including Mr. Curro, changed the bylaws to make this a
19 more security-like participation agreement.

20 If you look at the three securities counts, I
21 think Count Three is fairly simple. If you conclude
22 that this is a security under the Howey Test, then
23 there's liability under Count Three.

1 Attorney Saturley raised the expectation of
2 profit issue, but I think we have shown you sufficient
3 evidence to show that there is an expectation of
4 profit through Mr. Andrews' testimony that I showed
5 and through the marketing materials that I just
6 discussed.

7 Count Four, dealing in the sale of
8 unregistered securities by unlicensed broker-dealers,
9 issuer-dealers and agents. I would, again, refer the
10 hearings officer to the decision of the board to
11 change -- excuse me, to change its bylaws in 2007.

12 This is not a case of simple inaction. They
13 made a decision to change how they held money, how
14 they dealt with surplus, and they didn't seek an
15 opinion from any legal counsel as to whether that had
16 securities implications. They could have and should
17 have asked for that legal opinion. That is an action
18 by the board of directors, action by the executive
19 officers and directors on the security issues.

20 And finally, Count Five. If you look at the
21 very end of Count Five, and Count Five deals with
22 fraud, deceit, and material admissions in connection
23 with the offer of sale of securities. I refer you to

1 paragraph 127 of our complaint specifically, because I
2 think this is the strongest evidence we have on these
3 issues.

4 It's undisputed that the respondents have
5 used the money in the 5-B pools for nonpool purposes:
6 For the Workers' Comp. subsidy, for the real estate
7 situation, for the other things that LGC does. They
8 diverted money from the pools to subsidize Workers'
9 Comp. They diverted money from the pools to subsidize
10 LGC parent and the parent's administrative activities.
11 And they haven't notified the members in writing, as
12 required by securities law, that they've done this.

13 When you take -- when you sell a security
14 for -- if someone gives me their money for me to
15 invest it in ABC Company, and I decide I'm going to
16 invest it in XYZ Company, I have to get their written
17 authorization to do that. In this case they took
18 money for pool purposes, and they did not get written
19 authorization to use that money for nonpool purposes.

20 For all of those reasons, as Attorney
21 Volinsky just said, I believe we offered ample
22 evidence to support of the securities counts. In
23 terms of the legal analysis, I'll rely on the

1 pleadings we filed at the dispositive motion stage,
2 but those are the facts that are sufficient to support
3 the securities counts at this stage. Thank you.

4 THE PRESIDING OFFICER: Thank you,
5 Mr. Tilsley.

6 I thank all of you gentlemen for your
7 presentations. I'm going to take the motions under
8 advisement. I will endeavor to be able to respond,
9 that is, to have -- to rule on your motions by Monday
10 morning. I will say that is not a pledge. I won't
11 endeavor to do that.

12 You all are going to be able to help us
13 further in two ways: One, as I think I've mentioned
14 to those who have overseen the exhibits, at the end of
15 this afternoon's proceedings would you please meet
16 with Attorney Godlewski to make sure that we all agree
17 on what exhibits at this stage in the proceedings are
18 full exhibits.

19 Secondly, in the event that I should need any
20 supplemental argument, would you designate someone or
21 some phone number for me to contact over the weekend.
22 And we'll try to do that in a two-step process; that
23 is, you know, first contact everyone, if the need

1 arises, to schedule a conference call later in that
2 day. I'm sure that whatever I would have to ask of
3 you will not require any further preparation than you
4 already have undertaken to reach this stage in the
5 proceedings.

6 Thank you, again, for your attention. Monday
7 morning, can we try 9:30 on Monday morning instead of
8 9? Seeing no objection. Mr. Gordon, sir?

9 MR. GORDON: I just have a final housekeeping
10 issue.

11 THE PRESIDING OFFICER: Can I finish mine on
12 time first?

13 MR. GORDON: Oh, I thought you were done.

14 THE PRESIDING OFFICER: No objection as to
15 9:30, we'll reconvene at 9:30 on Monday, May 7th.
16 Mr. Gordon, please.

17 MR. GORDON: You had asked me to do
18 something, so I wanted to make sure I did it. We
19 talked about Mr. Coutu's minutes, and you asked me to
20 give you a cross-reference. It seems like a long time
21 ago.

22 THE PRESIDING OFFICER: It does seem like a
23 long time ago. Thank you for refreshing my

1 recollection.

2 MR. GORDON: And of the three minutes he had
3 they were Exhibits LGC 36, LGC 122, Exhibit -- and
4 then it's BSR Number 66, pages 592 through 597. And
5 the record reflects that he received these on
6 February 11th, 2012.

7 THE PRESIDING OFFICER: Okay. Thank you very
8 much. Nothing further before this hearing? The
9 hearing is adjourned -- is recessed.

10

11 (Whereupon, at 5:41 p.m., the proceedings were
12 recessed, to reconvene on Monday, May 7, 2012, at
13 9:30 a.m.)

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