

THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

BUREAU OF SECURITIES REGULATION

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IN THE MATTER OF:

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LOCAL GOVERNMENT CENTER,

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Case No: C-2011-036

INC., ET ALS

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DEPOSITION OF MICHAEL A. COUTU

Deposition taken at the law offices of Bernstein,
Shur, 670 North Commercial Street, Manchester,
New Hampshire, on Friday, March 30, 2012,
commencing at 9:00 a.m.

1 Trust of \$519,000 roughly that was also distributed or
2 dividended up to the holding company and for which
3 Health Trust did not receive any consideration.

4 There's a third piece, but let me stop there.

5 Q. I'm sorry?

6 A. There's a third piece.

7 Q. There's a third piece?

8 A. I didn't know if you wanted me to stop and
9 address what I just said or you wanted me to continue.

10 Q. Why don't you continue.

11 A. The third piece which is below the line that
12 you've just signified is a capital contribution that
13 was made to the real estate subsidiary which owns
14 currently the real estate that was made after the
15 reorganization in 2008 in the amount of \$3.5 million,
16 and again no consideration was paid to LGC or PLT and
17 in this case Workers' Comp Trust because it had a very
18 small piece of that.

19 Q. So I'm trying to understand your criticism.

20 Is it a legal consideration and the suggestion that
21 this was not permitted as a matter of corporate law?

22 A. I am not concluding here that there was
23 something that legally was awry, not the least of

1 which I'm not qualified to make that decision or
2 render that opinion. I'm saying in the normal
3 discourse of business, the transfers of monies between
4 subsidiaries or subsidiaries in a holding company in
5 the ordinary course is not an issue but is an issue in
6 connection with LGC.

7 Q. Explain.

8 A. Ordinarily in a parent subsidiary corporate
9 model, at the end of the day the commonality as
10 amongst and between the entities is the common stock
11 or other classes of stock issued by the holding
12 company. The shareholders of the common stock, their
13 interests are consolidated and unified as shareholders
14 in the stock of the corporation. In the case of a
15 risk pool structure and LGC specifically, we don't
16 have stockholders, we have stakeholders, and the
17 stakeholders are the participating members of the
18 various risk pools. If the stakeholders were exactly
19 the same in each of the risk pools -- and here I'm
20 talking about Health Trust, Property-Liability Trust
21 and Worker's Comp, and I differentiate Worker's Comp
22 because at points of time it was an independent risk
23 pool and then it was consolidated into PLT in May of

1 directors of LGC come to a different conclusion?

2 A. If the question turns on what is in the best
3 interest looking at it from a subsidiary point of
4 view, I do not believe that it was -- I don't believe
5 that the correct judgment, which is I think what
6 you're asking me to render, was rendered in this case.

7 Q. Turn to page 4, please. The second full
8 bullet point starts, "The statutory provisions of
9 Chapter 5-B..." Do you see that?

10 A. Yes.

11 Q. Before I start asking you about that -- or
12 actually, let's look at the first sentence. "The
13 statutory provisions of 5-B do not contemplate or
14 provide for the transfer of cash from one risk pool to
15 another," correct?

16 A. Yes.

17 Q. So you're making a statement about what
18 Chapter 5-B contemplates or provides for, is that
19 correct?

20 A. Yes.

21 Q. And I'm interested in the credentials you
22 have to opine what was either contemplated or provided
23 for. You don't have a law degree, correct?

1 A. I think I've testified two or three times to
2 that fact.

3 Q. Have you ever made any particular study in
4 any educational capacity of 5-B?

5 A. It's written in English and I read it as
6 such.

7 Q. So the answer to my question is no, correct?

8 A. I've got no legal training if that's the
9 question.

10 Q. That wasn't the question. I asked you
11 whether or not you made any particular study of 5-B in
12 any educational setting.

13 MR. VOLINSKY: Can I just ask what you mean
14 by educational setting?

15 MR. SATURLEY: Does he understand or does he
16 not understand?

17 MR. VOLINSKY: Does he not or does he not
18 understand? You may freely answer that question.

19 A. I understand 5-B.

20 Q. Have you studied 5-B other than to read it?

21 A. I have not studied it.

22 Q. Have you studied the legislative history?

23 A. Of 5-B?

1 Q. Yes.

2 A. I have not.

3 Q. Have you ever sat on a board of a program
4 that was subject to 5-B?

5 A. I have not.

6 Q. So the extent of your study of 5-B is your
7 individual reading of it?

8 A. That is correct.

9 Q. Okay. Now let's go to your conclusions.
10 When you conclude that the statutory provisions do not
11 contemplate or provide for the transfer of cash from
12 one risk pool to another by way of a common holding
13 company or by any other means, do you have reference
14 to anything other than the words of 5-B?

15 A. No, I do not.

16 Q. Let me give you a copy of 5-B because I'm
17 going to ask you to find for me the statutory
18 provisions of 5-B that prohibit the transfer of cash
19 from one risk pool to another.

20 A. There is none.

21 Q. And if there is none, does that mean that the
22 board had discretion to do that?

23 A. I believe, as I cited in my report, that the

1 A. I think I quoted it in my write-up.

2 Q. And your basis for stating that is what? You
3 told me you didn't have a law degree, is that right?

4 A. I did. I said I just can read English. I
5 quoted 5-B:5(1)(b) which reads, "Each pooled risk
6 management program shall be governed by a board the
7 majority of which is composed of elected or appointed
8 officials." I conclude that the words each pooled
9 risk management program means just that. Health care
10 and the attributes of health care from a risk profile
11 product program, loss characteristics, types of
12 coverage accorded is usually different than property
13 and casualty and is hugely different than worker's
14 compensation.

15 Q. Now I have to ask you about what you said.
16 Did you say usually or hugely?

17 A. Hugely as in large.

18 Q. I take it --

19 A. English was not my first tongue, so I
20 sometimes have trouble.

21 Q. So I take it you're saying it's impossible
22 for one board to manage more than one line of
23 coverage, is that correct?

1 distribution or a dividend to be paid by its
2 subsidiary. If the board of directors of the
3 subsidiary concludes that the payment of such dividend
4 or distribution would impair the insurance company's
5 ability to fulfill its obligations, the statute
6 requires you to not pay that dividend, you are
7 obligated as an officer of the insurance company to
8 not pay it, which sometimes put you in conflict with
9 the parent organization.

10 Q. On pages 10 and 11 you use the term fiduciary
11 duty.

12 A. Yes.

13 Q. And breach of fiduciary duty on a number of
14 occasions.

15 A. Yes.

16 Q. What's your training with regard to fiduciary
17 standards that allows you to opine as to fiduciary
18 standards and duties?

19 A. Understand that the majority of my career was
20 either, A, in bankruptcy work or, B, running troubled
21 insurance companies and the notion that insurance
22 companies could become insolvent was very near and
23 dear on my radar screen. To that end, I made it a

1 point to understand all of the requirements as a
2 matter of statute that bear on the issue of insolvency
3 including acts or actions by management of the board
4 which would cause or could be contributing to cause an
5 insolvency. I hired some of the lawyers best known in
6 that practice which amounted to -- on the insurance
7 side, it was LeBoeuf, Lamb out of New York and Locke,
8 Lord & Bissell out of Chicago. I met with them and
9 they wrote memorandums on extensively what constitutes
10 fiduciary duty and all of the other particulars
11 associated with potential statutory noncompliance and
12 issues of distributions related to insolvency, et
13 cetera. Then for every company I took over, the very
14 first thing I did with respect to the board is ask
15 them what they thought their duties were under the law
16 and I would say that in every case they had a
17 misconception of what it is that was required of them
18 to fully discharge their fiduciary duties. So usually
19 the first couple of board meetings was a discussion of
20 what it means to fully discharge your obligations as a
21 board member in the context of an insurance company.
22 In some cases, I might invite counsel, someone who is
23 particularly knowledgeable on such matters, to come in

1 and make a presentation and I've run, I don't know,
2 seven, eight, nine companys' boards where I repeated
3 that process.

4 Q. So outside of reading some work product
5 written by some lawyers and inviting some lawyers in
6 to give presentations to boards and asking your boards
7 what their duties were under the law and having them
8 give you the wrong answer, is there anything else that
9 I should understand that has grounded you in order to
10 opine as to breaches of fiduciary duty?

11 A. Some of the key and critical cases.

12 Q. What does that mean?

13 A. Union Indemnity was an insurance company
14 formed by the brokerage company Frank B. Hall which
15 ultimately merged into AON Corporation.

16 Q. Can I interrupt you because I'm trying to
17 understand. Are you now quoting me from a case? Is
18 that what you're saying?

19 A. I'm describing a case, yes.

20 Q. Is this case law? Is that what you're
21 saying?

22 A. Yeah.

23 Q. So you're going to interpret case law for me?

1 A. Well, I'm not going to interpret case law. I
2 can tell you what happened and why it happened.

3 Q. All I'm interested in, is that part of your
4 basis -- this case that you're about to tell me about,
5 is that part of your basis for understanding fiduciary
6 duties?

7 A. Yes.

8 Q. Can you just tell me the name of the case?

9 A. I just did. Union Indemnity.

10 Q. And I can go look it up that way?

11 A. Well, the matter ultimately settled, so it
12 didn't go to the point of an adjudicated case.

13 Q. So this is just some matter you've been
14 involved in?

15 A. No.

16 Q. Okay.

17 A. But you asked me with respect to fiduciary
18 duties have there been other things which may have
19 given me instruction or other information in regards
20 to defining my duties as a board member I believe was
21 the question.

22 Q. Okay. So this is a case that you know
23 something about that you weren't directly involved in.

1 A. Correct. It was a landlocked case, however.

2 Q. But it hasn't been reduced to an opinion,
3 however.

4 A. Not that I'm aware of.

5 Q. Anything else?

6 A. That specific case notwithstanding, there is
7 generally held, and I can't tell you to what extent,
8 there have been cases advanced to the point of
9 litigation that basically have the same common theme.
10 Any distribution that's made from an insurance company
11 which either caused or contributed to the ultimate
12 insolvency of the insurance company would make the
13 board and the officers liable. So in the runoff
14 context which is the fundamental basis of my
15 background, the notion of any distributions made,
16 whatever the form it may be, required severe and
17 thorough scrutiny of the financial condition of the
18 entity before giving effect to any such distribution
19 and the financial condition of the entity after giving
20 effect.

21 Q. And that's the basis on which you're going to
22 offer opinions with regards to breaches of fiduciary
23 duty?

1 A. I mean, that's the preponderance of it.

2 Q. And I take it that you are going to offer
3 opinions as to breaches of fiduciary duty?

4 A. In the context of this memo and what I
5 consider to be fiduciary duties or the lack thereof,
6 yes.

7 MR. VOLINSKY: For the record, when you say
8 this memo, you mean --

9 THE WITNESS: The expert report.

10 MR. VOLINSKY: That's fine. Thank you.

11 Q. Can you define for me what are the fiduciary
12 duties that the board members owe?

13 A. Well, besides the usual stuff of loyalty and
14 duty of care, it certainly seems to me that in the
15 business of pulling distributions from one risk pool
16 and transferring those proceeds to another risk pool,
17 that that falls squarely within what one's fiduciary
18 duties ought to be.

19 Q. Have you ever been accused of breaching a
20 fiduciary duty?

21 A. No, I don't think I have.

22 Q. Have you ever been sued for breaching a
23 fiduciary duty?

1 statute or should I answer from memory?

2 (Copy of RSA 5-B shown to the witness.)

3 A. (Reviewing RSA 5-B.) As I read the statute,
4 and I'm at RSA 5-B:5(I)(c) "Return all earnings and
5 surplus in excess amount required for administration,
6 claims, reserves, purchase of excess reinsurance to
7 the participating political subdivision." Earnings
8 and surplus are items that -- they may be accounting
9 items, but they represent monetary units. When you
10 talk about earnings and you say net profits, you're
11 not talking about coupons. You're talking about a
12 monetary unit, X amount of dollars. If you're talking
13 about surplus, again, you're talking about a monetary
14 unit. So if I simply substituted the words "monetary
15 unit" for the words "earning" and "surplus" and said
16 "return all monetary units in excess of," I would
17 conclude that the intent of this provision of the
18 statute is that the return is to be effectuated in
19 cash or cash equivalents.

20 Q. And so is it your conclusion that any other
21 return is a breach of the statute?

22 A. Well, I'm not a lawyer.

23 Q. But you've had plenty of opinions.

1 A. I will respond as follows. I personally
2 conclude that to satisfy the intent of the statute, it
3 requires a monetary return. I do not necessarily
4 conclude, however, that a crediting rate arrangement
5 is inviolate of the statute as read.

6 Q. Do you mean in violation of?

7 A. Yeah, in violation of.

8 Q. Would you agree with me that if the board is
9 unclear and determines that the statute is unclear,
10 that the board must fall back on their business
11 judgment consistent with their fiduciary duty in
12 determining what will satisfy the statute?

13 A. Again, the question is without giving meaning
14 to the quantity of the satisfaction, and I noted
15 previously that 2.72 in my judgment is not consistent
16 with the intent of the statute. Forget the
17 accrediting mechanism. I'm talking about the
18 quantity.

19 Q. No, I want to you answer my question. The
20 question is with regards to the mechanism. My
21 question is about the mechanism, not the way it got
22 applied.

23 MR. VOLINSKY: I think he was getting there.