

THE STATE OF NEW HAMPSHIRE  
BUREAU OF SECURITIES REGULATION

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IN THE MATTER OF:

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LOCAL GOVERNMENT CENTER, \* No: 03-C-662

INC., ET ALS \*

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\* \* \* \* \*

DEPOSITION OF GREGORY S. FRYER

Deposition taken at the law offices of Bernstein  
Shur, 670 North Commercial Street, Manchester,  
New Hampshire, on Thursday, March 22, 2012  
commencing at 9:30 a.m.

1 three opinions. Under the Summary of Conclusions, the  
 2 next to last sentence states, "In my judgment, those  
 3 cases do not" -- I'm sorry. The last paragraph says,  
 4 "On the basis of my understanding of the facts and my  
 5 reviews of published case law and other authority, I  
 6 believe that the Bureau has a reasonable basis to  
 7 conclude that the sale of these participation  
 8 interests involves the sale of investment contracts  
 9 under the New Hampshire Securities Act," is that  
 10 correct?

11 A. Yes.

12 Q. So the first opinion you've given is that the  
 13 Bureau has a reasonable basis to conclude that the  
 14 participation interests involved the sale of  
 15 investment contracts under New Hampshire law, correct?

16 A. I don't know that that's the first opinion  
 17 that I expressed, but that is my opinion, yes.

18 Q. In the next sentence you state, "I further  
 19 believe that such position is consistent with  
 20 previously published views expressed by the Bureau  
 21 about the nature and elements of investment  
 22 contracts," is that correct?

23 A. Yes.

1 on that point are that the Bureau has a reasonable  
 2 basis to conclude that the sale of participation  
 3 interests involved the sale of investment contracts  
 4 under the Securities Act, that the Bureau's view is  
 5 consistent with its previously published views, and  
 6 that although a court could conclude differently, the  
 7 Bureau has reasonable and justifiable grounds to  
 8 examine these as securities. Is that fair to say on  
 9 the question that you were retained for? Those are  
 10 the three opinions you've expressed?

11 A. I understand why you broke it into those  
 12 three. I'm not sure I would. If I were describing my  
 13 own opinion, I'm not sure I would describe it that  
 14 way. I would back up a little bit. I would say  
 15 first, in my opinion, there is no case law in New  
 16 Hampshire that answers this question. Second, when I  
 17 survey case law from around the country with  
 18 particular emphasis on federal cases, this type of  
 19 arrangement, there's not a thousand cases describing  
 20 whether these types of arrangements are or are not  
 21 securities. In contrast, if you were to ask me  
 22 whether interests in limited liability companies were  
 23 securities, there are thousands of cases across the

1 Q. And then on page 5 in the last paragraph you  
 2 state, "Although a court might reasonably draw the  
 3 line here based on the principal function served by  
 4 these interests, the Bureau has reasonable and  
 5 justifiable grounds to look at the manner in which  
 6 this function is being performed and to conclude that  
 7 interests in this common enterprise constitute  
 8 securities," is that correct?

9 A. Yes.

10 Q. Those are the three opinions you express in  
 11 your report?

12 A. That's your analysis of my report. I don't  
 13 know how many opinions I expressed. The report I  
 14 think speaks for itself. I have a sentence on page 2  
 15 that says that in my judgment, those cases do contain  
 16 helpful discussions. That's an expression of opinion.  
 17 There are a number of statements here that could be  
 18 fairly characterized as opinions that are all part of  
 19 the general conclusion that I've reached.

20 Q. Fair enough, but if the question is whether  
 21 risk pool participation interests offered through LGC  
 22 constitutes securities within the meaning of New  
 23 Hampshire law, the opinions you express specifically

1 country on that question and the great wave of  
 2 authority leads to a pretty clear answer except  
 3 perhaps at the margins but a pretty clear outcome.  
 4 This is not one of those cases. There is one case  
 5 that I found -- there may be others -- but only one  
 6 case that I found that dealt with risk pools,  
 7 interests in risk pools, and I wouldn't consider that  
 8 to be an overwhelming weight of judicial authority  
 9 across the country.

10 Q. What was that case?

11 A. It was a case in Indiana.

12 Q. Was that mentioned in your report?

13 A. Yes.

14 Q. Apart from whether a court could find one way  
 15 and whether it is reasonable for the Bureau to have  
 16 the opinion that these are securities, do you have an  
 17 opinion on whether these participation interests are  
 18 securities?

19 A. My opinion is that it's not a slam dunk  
 20 either way. Since the question was formulated as a  
 21 matter of New Hampshire law, I would say that I come  
 22 out believing that as a matter of New Hampshire law,  
 23 they likely are securities.

1 Q. You don't actually state that in your  
 2 February 17th report, do you?  
 3 A. I don't. The conclusion I state is a more  
 4 limited conclusion and it's one that I think is very  
 5 reasonable and very defensible.  
 6 Q. That is, that it's reasonable for the Bureau  
 7 to have the opinion that they are securities and that  
 8 a court might find differently?  
 9 A. That a court might well find differently,  
 10 yes. I'm sorry. I misspoke. That a court might well  
 11 support that conclusion by the Bureau.  
 12 Q. And a court might well find otherwise.  
 13 A. It might.  
 14 Q. You're not sitting here expressing a  
 15 confident opinion that these participation interests  
 16 are securities under New Hampshire law, are you?  
 17 A. I'm expressing a confident opinion that the  
 18 attributes of these participation interests are ones  
 19 that can easily be concluded to be investment  
 20 contracts.  
 21 Q. Okay, but that's not the same as saying that  
 22 based on your understanding of the facts and  
 23 circumstances here and the research that you have

1 is an opinion expressed in a context where there's no  
 2 clear authority one way or the other. It is a limited  
 3 opinion. It is a reasoned opinion.  
 4 Q. Is it fair to say that if the Bureau took the  
 5 position that these were not securities, that you  
 6 would also find that to be a reasonable and  
 7 justifiable position?  
 8 A. I think that would be a reasonable opinion to  
 9 draw. I don't know that I would consider it to be as  
 10 consistent with its other opinions as to other  
 11 instruments, but as I said, this is a debatable  
 12 proposition. Were a court to conclude that these are  
 13 securities, I would be perfectly comfortable with that  
 14 position and I think that if New Hampshire choses to  
 15 regulate them as securities, then I think that that is  
 16 likely the better answer.  
 17 Q. But would you also find it reasonable if the  
 18 Bureau took the position that these were not  
 19 securities?  
 20 A. Yes.  
 21 Q. And it would be reasonable for a court to  
 22 conclude that they were not securities as well?  
 23 A. More reasonable if the agency in charge of

1 done, that it is your opinion that in fact these  
 2 participation interests offered by LGC to the  
 3 municipalities are in fact investment contracts under  
 4 New Hampshire law. You're not offering that opinion,  
 5 are you? What you're saying is they could be.  
 6 A. I'm offering a more limited opinion and I'm  
 7 saying that it is not -- there's a dearth of authority  
 8 on the particular participation interests offered here  
 9 and if we were to change the facts a little bit, if  
 10 the New Hampshire Bureau were of the opinion that  
 11 these were not investment contracts, I expect that  
 12 that opinion would be given weight by a court as well  
 13 and in that case, a court might well conclude that  
 14 these are not securities. Given the absence of  
 15 authority, given the principles that have been stated,  
 16 particularly in prior Supreme Court cases and given  
 17 the positions that the New Hampshire Bureau of  
 18 Securities has expressed in the past on admittedly  
 19 very different securities, I believe that a court in  
 20 this case should give deference to the opinion of the  
 21 New Hampshire Securities Bureau and I believe that a  
 22 court might well conclude more likely than not, if I  
 23 were a betting man, conclude that these are, but that

1 administering a statute that has almost no case law  
 2 concluded that they were not, a court's determination  
 3 that they were not would be more reasonable under  
 4 those circumstances than the other way around, and I  
 5 think here we face a situation where it is the other  
 6 way around.  
 7 Q. You're suggesting that the court should give  
 8 deference to the Bureau's opinion?  
 9 A. Yes.  
 10 Q. Based on the Bureau's historic view of what  
 11 is a security, is that correct?  
 12 A. No, not exactly. I think that courts do and  
 13 should give deference to administrative agencies that  
 14 are charged with the responsibility for administering  
 15 and enforcing highly technical provisions of their own  
 16 regulations, and that deference by courts is certainly  
 17 not unlimited. There are many instances where the  
 18 Supreme Court has ruled against the Securities &  
 19 Exchange Commission, so there are outer limits. I  
 20 don't believe we're anywhere close to the outer limits  
 21 in this case on these facts in this context in a state  
 22 such as New Hampshire where there is a paucity of  
 23 litigation over securities definitional questions

1 which is not necessarily a bad thing, that there's a  
2 paucity of litigation. In that context I think it  
3 makes complete sense for courts to give considerable  
4 deference to the agency that is entrusted with the  
5 authority to administer that important set of  
6 regulations.

7 Q. Your opinion is regarding the risk pool  
8 participation interests offered by LGC, correct?

9 A. Yes.

10 Q. Were you asked to opine about membership  
11 interests in the New Hampshire Municipal Association,  
12 LLC?

13 A. No.

14 Q. So you don't have any opinion about that?

15 A. I'm not familiar with the facts of that. I  
16 don't have any opinion.

17 MR. RAMSDELL: Can we take a break for a  
18 couple minutes?  
19 (There was a short recess.)

20 Q. In your summary of facts in your report at  
21 page 1 under letter A, you give an introduction about  
22 The LGC operating risk pools -- and by the way, if I  
23 summarize something unfairly, please straighten me

1 agreement for the risk pool with the Town of Belmont  
2 and it has attached to it the Town's resolution and  
3 some other exhibits. So take a minute and look at it  
4 and my question is going to be whether that refreshes  
5 your recollection as to whether you actually reviewed  
6 any participation agreements.

7 A. (Reviewing Fryer Exhibit 2.)

8 Q. Did you review any participating agreements?  
9 Does that refresh your recollection as to whether you  
10 reviewed any participation agreements?

11 A. You know, I'm not recognizing this document.  
12 I'm not sure if it's a function of old age or a  
13 function of my never having seen it or a function of  
14 my having kind of flipped through it, but I'm not  
15 familiar with the contents of this document.

16 Q. So as you sit here, you don't recall actually  
17 looking at any participation agreements?

18 A. You know, my recollection is that I did, but  
19 when I look at this document, if you were to represent  
20 to me that this is the only form of participation  
21 agreement that was used, I can honestly say -- there  
22 are things about the formatting that I would think  
23 would ring a bell.

1 out. I'm not trying to do that. I'm not trying to  
2 trap you or trick you or anything like that. I think  
3 I'm fairly summarizing, but I think you're going to  
4 tell me where I get it wrong -- and you mention that  
5 the participation interests in the pooled risk  
6 management programs are not regulated as insurance  
7 products. Did you actually review any participation  
8 agreements?

9 A. I think I did. To be candid, I would not  
10 spend a lot of time with them, so I think in that  
11 packet of materials from Bernstein Shur there were  
12 sample agreements.

13 Q. I don't want you to guess, so let me show you  
14 an agreement that was produced in discovery and see if  
15 --

16 MR. RAMSDELL: Could you mark that as  
17 Exhibit 2, please?  
18 (Fryer Exhibit 2 marked for Identification.)

19 Q. While you're looking at that, I'm just going  
20 to represent to you that Exhibit 2 is an application  
21 and participation agreement that was produced by the  
22 LGC in discovery. You can see it's bates stamped at  
23 the bottom and it's an application and participation

1 Q. Well, I'm willing to represent to you that I  
2 am unaware of any participation agreements in a  
3 significantly different format.

4 A. Okay.

5 Q. So things like names are changed and things  
6 like that and there may be some subtle changes over  
7 the years, but I don't think anybody is going to  
8 disagree that that is in fact the model, if you will,  
9 participation agreement in this case.

10 A. Okay, I accept that.

11 Q. So you don't think you saw that?

12 A. Again, as I said before, when I look at this  
13 document, it does not ring a bell in my memory.  
14 Whether that's a function of poor memory or that I  
15 didn't spend a lot of time with the document, I don't  
16 know. What I do know is that as I sit here today, I'm  
17 not familiar with the contents of this 30-page  
18 instrument.

19 Q. And it's fair to say that in your written  
20 report in this case at no point do you discuss any of  
21 the actual terms of any participation agreement, is  
22 that correct?

23 A. No, I don't think it would be fair to say

1 that at no point did I discuss any of the terms.

2 Q. Okay. What about the terms of the  
3 participation agreements do you discuss in your  
4 report?

5 A. (No response.)

6 Q. Maybe it's a semantic difference, so I'll try  
7 to ask the question differently.

8 A. Maybe I'm not hearing your question. Was the  
9 question whether I discussed with others any of the  
10 terms by which municipalities participate in this or  
11 is the question whether my report discusses the terms?

12 Q. My question is whether in your report you  
13 reference any of the specific terms of any of the  
14 participation agreements as opposed to referencing  
15 your general understanding of what the participation  
16 interests -- what their function is.

17 A. No, I think that my knowledge about these  
18 arrangements is more fairly characterized as a general  
19 understanding, correct or not -- I don't profess to be  
20 an expert in the facts -- a general understanding  
21 about the nature of the relationship. And this  
22 expression of opinion is not predicated on a close  
23 contractual analysis of this document. It is not

1 was superseded by an amended petition?

2 A. That's not at the front of my brain. Now  
3 that you mention it, it does seem vaguely familiar,  
4 but I'm not sure. If it were a trick question, you  
5 would have gotten me on that one.

6 Q. It's not a trick question.

7 MR. RAMSDELL: Can we mark this as Exhibit 3,  
8 please.

9 (Fryer Exhibit 3 marked for Identification.)

10 A. (Reviewing Fryer Exhibit 3.)

11 Q. I'm going to represent to you that what has  
12 been marked as Exhibit 3 is the Bureau of Securities  
13 Regulation amended petition in this case that  
14 superseded the Staff petition. Have you reviewed this  
15 amended petition?

16 A. No, I have not.

17 Q. Is this the first time you've seen it?

18 A. Yes.

19 Q. I would say we're not going to use that  
20 anymore, but I'm deathly afraid we're going to lose  
21 it. In paragraph C of your summary of facts, you  
22 state in the last sentence that LGC was the sole  
23 member of each of these limited liability companies,

1 referenced in the opinion and if I spent that much  
2 time with it, I'm pretty certain even in my advanced  
3 age that I would recall it.

4 Q. So you didn't, for example, go through the  
5 participation agreement or a participation agreement  
6 and review it for the purpose of finding out whether  
7 what was explained to you about the participation  
8 agreements was in fact true.

9 A. That's fair.

10 Q. And if I understand your previous testimony  
11 correctly, you have never seen any kind of membership  
12 interest or document related to a membership interest  
13 in the New Hampshire Municipal Association, LLC and  
14 weren't asked to look at those?

15 A. That's true.

16 Q. In paragraph B of your summary of facts you  
17 talk about the Staff petition for relief that was  
18 issued in September 2011, correct?

19 A. Yes.

20 Q. Did you actually review the amended petition  
21 in this case?

22 A. I think so.

23 Q. Again, are you aware that the Staff petition

1 is that correct?

2 A. That's what it says, yes.

3 Q. Can you tell me why you included that in your  
4 report? What is the significance of that statement?

5 A. Well, it's probably significant in a number  
6 of ways. It's significant in the sense that if the  
7 municipalities were members, we would not be here  
8 today. It would very clearly be an investment  
9 contract and probably LGC would have dealt with it as  
10 such as would the Bureau have long ago, so we would  
11 not be debating this question.

12 Q. Okay. Any other significance?

13 A. That's one significance. A second  
14 significance is that LGC, Inc. is referenced as being  
15 the parent, promoter, sponsor, what have you, and this  
16 demonstrates the structure by which it has chosen to  
17 pursue these risk pool programs.

18 Q. Are you offering an opinion on the legality  
19 or even the wisdom of that structure?

20 A. No.

21 Q. At the beginning of your summary of  
22 conclusions you state, "Whether participation  
23 interests of this sort are securities within the