

**EXPERT TESTIMONY CONCERNING PURE
LEGAL ISSUES IS INADMISSIBLE UNDER
RULE 702 OF THE FEDERAL RULES OF EVIDENCE.¹**

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The first thing that a litigator should do when served with an expert designation in a federal case is ask: "Is the subject matter of the proposed expert's testimony admissible under the Federal Rules of Evidence?" Just because one may be unable to mount an attack on the credentials of an opponent's proposed expert, does not mean that the expert's testimony is admissible under the Federal Rules of Evidence. One such example is when an expert is designated to opine as to pure legal issues.

In *Turner v. J.P. Bolduc, et al. (In re Crowe Rope Industries, Ltd.)*, Adv. Proc. No. 03-1105 (Bankr. D. Me), the plaintiff Chapter 7 trustee asserted claims against officers and directors of a defunct rope manufacturing company for breach of fiduciary duties, and demanded a jury trial. The genesis of the claims was administrative insolvency to the tune of more than \$1.7 million while the debtor operated in Chapter 11.

Defendants were served with two "expert" designations, by which the trustee designated former Maine Bankruptcy Judge James A. Goodman as his sole expert witness. The designations set forth eleven subject matters (really opinions) that former Judge Goodman was going to testify about at trial. He was designated to express his "expert" opinion that while in Chapter 11, the debtor's officers and directors breached their fiduciary duties to the debtor and estate by acting recklessly, negligently and unreasonably in allowing the debtor to incur postpetition debt that they knew or should have known would not be paid. He was also designated to opine that the postpetition conduct of the directors and officers was not protected by the business judgment rule. In a nutshell, the trustee planned on parading a former bankruptcy judge in front of a jury to express opinions concerning pure legal issues and conclusions.

In deposition, former Judge Goodman admitted that he had no first-hand personal knowledge of any of the facts at issue in the action, was "probably not" an expert on corporate law, and did not consider himself to be an expert concerning corporate law or fiduciary duties owed by officers and directors of an insolvent corporation. He also testified that the presiding bankruptcy judge (who just happened to be his former law partner) had an equal or better command of the law concerning fiduciary duties owed by officers and directors of a company. Surprisingly, when asked how his "expert" testimony was going to assist the trier of fact in determining whether the defendants had breached their fiduciary duties to the debtor and bankruptcy estate, former Judge Goodman testified: "I don't know the answer to your question."

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Armed with the transcript of former Judge Goodman's deposition, the defendants filed a motion *in limine* to prohibit him from offering any expert opinions at trial. Of course, one of the linchpins to the admissibility of expert testimony is a showing by the proponent that it "will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." Fed. R. Evid. 702. Given former Judge Goodman's deposition testimony, the trustee had an insurmountable hurdle under Rule 702.

Even without the deposition transcript, under controlling law, the bankruptcy court was required to grant the defendants' *in limine* motion because it is egregious error in the First Circuit (of which Maine is a part) to permit any witness to express an opinion as to pure legal issues. *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99, 101 (1st Cir. 1997). This is so because the resolution of such issues is entrusted solely to the trial judge. *Id.* at 99. As noted by the First Circuit in *Soto-Rivera*, at least seven circuit courts of appeals have held that Rule 702 of the Federal Rules of Evidence prohibits expert testimony concerning pure legal issues. The Sixth Circuit is in the *Soto-Rivera* camp. *See, e.g., Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994) (testimony of an expert concerning police practices in a civil rights case as to the meaning of the term "deliberate indifference" was inadmissible).

The next time that you are served with an expert designation, ask yourself whether the proposed expert testimony is even within the scope of Rule 702. If it is not, promptly take a deposition and move *in limine* to prohibit the proposed "expert" from testifying at trial. The granting of such a motion can go a long way toward winning or settling a case. Nothing takes the wind out of an adversary's sails faster than knocking its expert out of a case.

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