

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF LEXINGTON, on behalf of
itself and all others similarly situated,

Plaintiff,

vs.

PHARMACIA CORPORATION,
SOLUTIA INC., and MONSANTO
COMPANY,

Defendants.

Case No. 1:12-cv-11645-DJC

**PLAINTIFF’S MOTION TO STRIKE
JOHN WOODYARD’S LEGAL OPINIONS**

Pursuant to Fed. R. Evid. 702, Plaintiff, Town of Lexington, hereby moves to strike or exclude John Woodyard’s legal opinions regarding his interpretation of the regulatory requirements of U.S. Environmental Protection Agency (“EPA”) regulations. (*See* Doc. 146.7 at 4-7; Woodyard Depo at 124:12-23.)

No witness, whether a fact witness or an expert witness, is allowed to testify about his or her legal opinions. Rather, interpreting the law is the Court’s job. But that is precisely what Mr. Woodyard attempts to do. In his report, Mr. Woodyard repeatedly expounded legal opinions about what EPA regulations supposedly do or do not require. And at deposition, Mr. Woodyard made crystal clear that (unlike David L. MacIntosh) his opinions were based exclusively on his reading of those regulations, not on his practical experience with how the EPA applies those regulations in the real world.

WHEREFORE, the Court should strike or exclude Mr. Woodyard's legal opinions about EPA regulations.

REQUEST FOR ORAL ARGUMENT

Lexington believes that oral argument may assist the Court and wishes to be heard.

CERTIFICATE OF GOOD-FAITH CONFERENCE

Plaintiff's counsel certify they have conferred and have attempted in good faith to resolve or narrow the issue presented in this motion, but were unsuccessful.

Respectfully submitted,

/s/ Bryan S. Gowdy

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Counsel for Town of Lexington

CERTIFICATE OF SERVICE

I certify that on this 2nd day of March, 2015, the foregoing document was filed electronically using the Court's CM/ECF system, and notice of this filing will be sent by e-mail to the following parties by operation of that electronic filing system:

**Pharmacia Corp., Solutia Inc., and
Monsanto Co.**

Richard L. Campbell
Richard P. Campbell
Brandon L. Arber
Diana A. Chang
Carol A. Rutter
Robyn D. Buck

Town of Lexington

Robert S. Chapman
Jon-Jamison Hill
Kevin J. Madonna
Esther L. Klisura
Melissa C. Allison
Scott P. Lewis
David S. Mackey
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**Town of Westport and Westport
Community Schools**

Carla Burke
Robin Greenwald
Todd D. Omen
William A. Walsh
Richard M. Sandman

/s/ Bryan S. Gowdy _____
Bryan S. Gowdy

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Case No. 1:12-cv-11645-DJC

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION
TO STRIKE JOHN WOODYARD'S LEGAL OPINIONS**

The Court must strike or exclude John Woodyard's legal opinions regarding his interpretation of the regulatory requirements of U.S. Environmental Protection Agency ("EPA") regulations. (*See* Doc. 146.7 at 4-7; Woodyard Depo at 124.) No witness, whether a fact witness or an expert witness, is allowed to testify about legal opinions. Rather, explaining the law is the Court's job. But that is precisely what Mr. Woodyard attempts to do. In his report, Mr. Woodyard repeatedly expounded legal opinions about what EPA regulations supposedly do or do not require. And at deposition, Mr. Woodyard made crystal clear that these opinions were based exclusively on his reading of those regulations, not on his practical experience with how they are applied in the real world. Under binding First Circuit precedent, such legal opinion testimony must be excluded.

ARGUMENT

I. MR. WOODYARD'S LEGAL OPINIONS AND INTERPRETATIONS OF EPA REGULATIONS ARE INADMISSIBLE

Mr. Woodyard's legal opinions regarding EPA regulations are inadmissible.

A. Expert Legal Opinions Are Inadmissible

In relevant part, Federal Rule of Evidence 702(a) provides that a “witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702(a). Ordinarily, Rule 702(a) forbids experts from rendering legal opinions because they do not “help” the jury. *Id.* For that reason, the First Circuit has explained, “[i]t is black-letter law that ‘[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.’” *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (collecting cases from the First, Second, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits). Indeed, “expert testimony proffered solely to establish the meaning of a law is presumptively improper.” *United States v. Prigmore*, 243 F.3d 1, 18 n.3 (1st Cir. 2001) And a regulation “has the status of law and, as such, its meaning must be determined in accordance with ordinary principles of statutory construction rather than by means of expert testimony.” *Wojciechowicz v. United States*, 582 F.3d 57, 73 (1st Cir. 2009).

“In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge.” *Nieves-Villanueva*, 133 F.3d at 99. “Accordingly, expert testimony on such purely

legal issues is rarely admissible.” *Id.* ““The danger is that the jury may think that the ‘expert’ in the particular branch of the law knows more than the judge—surely an impermissible inference in our system of law.”” *Id.* (citation omitted). When such legal opinion testimony “[i]s plainly not offered to assist the judge,” but rather is “presented to the jury,” it is inadmissible. *Id.* at 100. In other words, “[b]ecause the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of [Rule] 702.” *Id.*

Nevertheless, “it is often difficult to draw the line between what are questions of law, what are questions of fact, and what are mixed questions.” *Id.* (citations omitted). “Indeed, the definition of what is law and what is application or practice may be difficult to ascertain.” *Id.* “This may be particularly so when the issues involve not only a statute and formally promulgated regulations, but also guidelines, handbooks, advisory rulings, interpretive bulletins, general counsel’s letter opinions, informational notices and similar accoutrements of the modern bureaucratic state.” *Id.* But when the legal “issues raised” by the expert’s testimony are “routinely before the federal courts” and “not complex,” “the use of such testimony [i]s egregious.” *Id.* at 101.

Applying those standards, *Nieves-Villanueva* held the expert’s testimony “concerning actual personnel practices, the various categories of public employees and the like” were “unobjectionable.” *Id.* at 99. But the expert’s other testimony about “the holdings of various opinions of the Supreme Court of Puerto Rico and by reference, of this court (over objection), and to the legal conclusion that these appointments were in violation

of law (without objection)” should have been excluded. *Id.* (affirming based on harmless-error analysis).

Moreover, district courts throughout the First Circuit, including judges in the District of Massachusetts, have also routinely excluded expert legal opinion testimony. *E.g.*, *Chow v. Zimny*, 2014 WL 4964408, at *1 (D. Mass. Sept. 30, 2014) (O’Toole, J.) (excluding expert opinion “as to a key legal issue”); *United States ex rel. Dyer v. Raytheon Co.*, 2013 WL 5348571, at *10, *13 (D. Mass. Sept. 23, 2013) (Woodlock, J.) (excluding experts’ legal opinions); *OneBeacon Am. Ins. Co. v. Commercial Union Assur. Co. of Canada*, 804 F. Supp. 2d 77, 85 (D. Mass. 2011) (Tauro, J.) (“expert testimony that amounts to a statement of legal opinion or a conclusion of law is not admissible”), *aff’d*, 684 F.3d 237 (1st Cir. 2012); *Damon v. Hukowicz*, 964 F. Supp. 2d 120, 131 (D. Mass. 2013) (Neiman, M.J.) (expert’s “statements are improper legal conclusions regarding the state of the traffic laws in Massachusetts, an issue for the court not an expert to decide”); *S.E.C. v. Goldsworthy*, 2008 WL 2943398, at *4 (D. Mass. Jan. 3, 2008) (Dein, M.J.) (striking expert’s “contract interpretation on the grounds of various legal principles”); *Chapman ex rel. Estate of Chapman v. Bernard’s Inc.*, 167 F. Supp. 2d 406, 421 (D. Mass. 2001) (Gorton, J.) (expert engineer was “not qualified, however, to state conclusions of law”).¹

¹ *See also Goldenson v. Steffens*, 2013 WL 682844, at *14 (D. Me. Feb. 25, 2013) (expert “may not testify about his legal conclusions concerning whether the Defendants owed the Plaintiffs fiduciary duties or breached those duties”); *Foley v. Town of Lee*, 863 F. Supp. 2d 130, 134-35 (D.N.H. 2012) (expert’s “proffered opinions as to ‘the relevant statutes or laws regarding police authority’ are inadmissible”); *Contour Design, Inc. v. Chance Mold Steel Co.*, 794 F. Supp. 2d 315, 320 (D.N.H. 2011) (“McKenzie’s proffered opinions as to the reach of the Uniform Trade Secrets Act, and how courts otherwise define

B. Mr. Woodyard Purports To Render Legal Opinions Regarding His Interpretation Of EPA Regulations

Mr. Woodyard's report repeatedly purports to render legal opinions regarding his interpretation of EPA regulations. For instance, Mr. Woodyard opines:

- “Nowhere in the PCB regulations is there a requirement to notify EPA when PCB-containing building products are discovered.” Doc. 146.7 at 5.
- “Nowhere in the PCB regulations is there a requirement to remove PCB caulk once it is discovered.” Doc. 146.7 at 5.
- “Nowhere in the PCB regulations is there a deadline for removing or otherwise managing the caulk in place.” Doc. 146.7 at 6.
- Nowhere in the PCB regulations is there a requirement that EPA approve plans to remove or otherwise manage PCB-containing caulk.” Doc. 146.7 at 6.
- “There is no reference to secondary sources [of PCB contamination] in the PCB regulations.” Doc. 146.7 at 7.
- “Nowhere in the PCB regulations is there an indoor standard for PCBs.” Doc. 146.7 at 7.

trade secrets, run afoul of this rule [forbidding expert legal opinions]”); *Carrelo v. Advanced Neuromodulation Sys., Inc.*, 777 F. Supp. 2d 315, 320 (D.P.R. 2011) (“statements that pretend to draw ultimate legal conclusions do not properly assist the trier of fact”); *Addie v. Kjaer*, 2008 WL 5205817, at *3 n.2 (D.V.I. Dec. 11, 2008) (excluding expert “[t]o the extent he offers purely legal expertise”); *Darling v. Indymac Bank, F.S.B.*, 2007 WL 4276903, at *4 (D. Me. Dec. 3, 2007) (excluding expert’s opinions “what the penalties of noncompliance are, what remedies are appropriate (such as contract rescission, which is an equitable remedy reserved to the Court, in any event), that the circumstances demonstrate unjust enrichment, predatory lending or fraud” as “inappropriate legal conclusions”); *Carrier v. Am. Bankers Life Assur. Co. of Fla.*, 2007 WL 3124653, at *2 (D.N.H. Oct. 25, 2007) (excluding expert opinions that “merely parrot the law, which is the province of the court”); *Garcia v. Duron, Inc.*, 2001 WL 36105540, at *2 (D.P.R. Nov. 20, 2001) (excluding expert who “base[d] [his] damages determination on theories of contract law and not on economics, which is the area of his expertise”); *United States v. Franco*, 112 F. Supp. 2d 204, 218 (D.P.R. 2000) (“a substantial portion of Mr. Seltzer’s testimony was focused on what the Court considers to be legal conclusions which invade the province of the Court”).

Each of these opinions is a legal opinion based exclusively on Mr. Woodyard's reading of EPA regulations. Indeed, Mr. Woodyard admitted as much at deposition:

Q. But I am trying to understand if there is anything besides your reading of the regulation that leads you to this understanding, a discussion with EPA officials or a specific permit document that says what you just told me. Or is it a reading of the regulation themselves?

A. *It is a reading of the regulations.* It is a reading of the preambles to the historical rulemaking documents, which is helpful. And it is a look at their website, specifically as it relates to caulk and looking for any indication that removal is required. And you won't find it.

Woodyard Depo at 124:12-23 (emphasis added). But only the Court can explain its legal interpretation of the regulations to the jury, not an expert witness. Moreover, unlike Dr. David L. MacIntosh, Mr. Woodyard does not purport to opine on industry practices and customs. *See Pelletier v. Main Street Textiles, LP*, 470 F.3d 48, 55 (1st Cir. 2006) (“in general, the customs and practices of an industry are proper subjects for expert testimony”); *Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 79 (1st Cir. 2006) (“[e]xpert testimony on industry standards is common fare in civil litigation” (citations omitted)). Instead, all he has done is read the EPA regulations. Mr. Woodyard's legal opinions must therefore be excluded.

CONCLUSION

For the foregoing reasons, the Court should strike or exclude Mr. Woodyard's legal opinions about EPA regulations.

Respectfully submitted,

/s/ Bryan S. Gowdy
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Counsel for Town of Lexington

CERTIFICATE OF SERVICE

I certify that on this 2nd day of March, 2015, the foregoing document was filed electronically using the Court's CM/ECF system, and notice of this filing will be sent by e-mail to the following parties by operation of that electronic filing system:

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/s/ Bryan S. Gowdy
Bryan S. Gowdy

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Defendants.


**AFFIDAVIT OF BRYAN S. GOWDY IN SUPPORT OF PLAINTIFF'S MOTION TO
STRIKE JOHN WOODYARD'S LEGAL OPINIONS**

I, Bryan S. Gowdy, declare as follow:

1. I am an attorney duly admitted to practice by this Court. I am counsel for the Town of Lexington ("Lexington") in this lawsuit. I make this affidavit in support of Lexington's motion to strike the legal opinions of John Woodyard.

2. Attached as Exhibit A is a true and correct excerpt from the deposition transcript of John Woodyard, dated February 12, 2015. As of the date of this filing, Mr. Woodyard still has time to file an errata sheet pursuant to Fed. R. Civ. P. 30(e)(1).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on this 2nd day of March, 2015, in Jacksonville, Florida.



Bryan S. Gowdy
BBO No. 643442

EXHIBIT

“A”

In the Matter of:

TOWN OF LEXINGTON

v.

*PHARMACIA CORPORATION, SOLUTIA INC., and
MONSANTO COMPANY*

*JOHN P. WOODYARD, PE - Vol. 1
February 12, 2015*

MERRILL CORPORATION

LegalLink, Inc.

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San Francisco, CA 94108
Phone: 415.357.4300
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF LEXINGTON, on behalf of itself
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vs.

No. 12-CV-11645

PHARMACIA CORPORATION, SOLUTIA INC.,
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Defendants

VOLUME: I

PAGES: 1-152

DEPOSITION of JOHN P. WOODYARD, PE

Thursday, February 12, 2015

9:37 a.m.

Held at: Campbell, Campbell, Edwards & Conroy

One Constitution Plaza

Boston, Massachusetts

Megan M. Castro, Court Reporter (SF-028118)

APPEARANCES:

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On behalf of the Defendants

ALSO PRESENT:

Emily Tarbell

I N D E X

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JOHN P. WOODYARD, PE	
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E X H I B I T S

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Exhibit 3	Section 761.62	117

Original exhibits were retained by the court reporter and returned to Ms. Klisura along with the original deposition transcript.

1 Remediation doesn't mean removal, in other 13:55:04
2 words. You can leave it in place. You can cover 13:55:06
3 it. You can encapsulate it. You may not have to 13:55:08
4 do anything at all except mark it. I believe there 13:55:11
5 is even once place on their website in their 13:55:15
6 guidance which says you can assume it contains PCB 13:55:18
7 and do nothing. 13:55:23

8 I mean, it is plain English. So a member 13:55:24
9 of the regulated community looking at their 13:55:31
10 guidance, I am sure, would come away with a clear 13:55:34
11 impression that they don't have to do anything. 13:55:37

12 Q. But I am trying to understand if there is 13:55:39
13 anything besides your reading of the regulation 13:55:42
14 that leads you to this understanding, a discussion 13:55:44
15 with EPA officials or a specific permit document 13:55:47
16 that says what you just told me. Or is it a 13:55:51
17 reading of the regulation themselves? 13:55:56

18 A. It is a reading of the regulations. It is 13:55:58
19 a reading of the preambles to the historical 13:56:00
20 rulemaking documents, which is helpful. And it is 13:56:05
21 a look at their website, specifically as it relates 13:56:07
22 to caulk and looking for any indication that 13:56:10
23 removal is required. And you won't find it. 13:56:13

24 Q. Before our lunch break, we talked about 13:56:16