

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

No. 217-2025-CV-480

Andrew Foley, et al.

v.

State of New Hampshire, et al.

MOTION EXCLUDE TESTIMONY OF DEBORAH E. GREENSPAN

The defendants, by and through counsel, submit the following motion to exclude the testimony of Deborah Greenspan from the August 20, 2025 preliminary injunction hearing:

Introduction

1. The defendants have explained in detail why the plaintiffs' claims fail as a matter of law. Rather than engage with these arguments head on, the plaintiffs seek to obscure the weakness of their legal position through the testimony of numerous witnesses. One of those witnesses is Deborah E. Greenspan, a D.C.-based attorney who has administered settlement funds in other jurisdictions.

2. Attorney Greenspan is an experienced and accomplished attorney. If policymakers were looking to create a settlement process out of whole cloth, she might be able to provide useful insight. But like any witness, Attorney Greenspan's testimony must be relevant to the issues actually before the Court. No amount of experience or expertise can transform an inadmissible opinion into an admissible one.

3. Attorney Greenspan's opinions are simply a series of policy arguments that are presented in the wrong forum. The opinions themselves are premised on legal conclusions that

are beyond the scope of appropriate expert testimony and are incorrect as a matter of law. Indeed, the very fact that the plaintiffs have disclosed Attorney Greenspan as a witness confirms that they cannot prevail under the legal theories they advance. And even if Attorney Greenspan's testimony were minimally probative, it should still be excluded under Rule 403 and RSA 516:29-a.

Discussion

A. Attorney Greenspan's testimony is not admissible under Rules 401 and 402.

1. Relevance is the threshold prerequisite for evidence to be admissible. N.H. R. Evid. 401, 402. The plaintiffs advance claims under the contract clauses and equal protection provisions of the State and Federal Constitutions. They also contend that the defendants have breached an enforceable public contract that exists between them and the State by operation of RSA 21-M:11-a. Attorney Greenspan's testimony is not relevant under any of these theories.

2. "When evaluating a contract clause claim, a court must first determine whether a change in state law has resulted in a substantial impairment of a contractual relationship." *Am. Fed'n of Teachers-N.H. v. State*, 167 N.H. 294, 301 (2015) (citation and quotation marks omitted). "This inquiry, in turn, has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* (citation and quotation marks omitted).

3. When, as here, a plaintiff contends that a statute creates enforceable contractual or vested rights, courts apply the "unmistakability doctrine." *Id.* This requires a court to engage in statutory interpretation to determine whether "the challenged legislative enactment evinces the clear intent of the state to be bound to particular contractual obligations." *Id.* Likewise, when determining whether a statutory amendment substantially impairs a vested right under existing

law, a court must first interpret the amendment’s language and then compare the amendment, as interpreted, against the vested contractual right in question. *See, e.g., State Employees’ Ass’n of N.H. v. State*, 161 N.H. 730, 738–40 (2011) (conducting this analysis); *see also City of Mancheseter v. Bellenoit*, 2024 N.H. 28, ¶¶ 46–49 (MacDonald, C.J., dissenting) (reaching this question conducting this comparative analysis). In other words, all three of the components present questions of statutory interpretation.

4. It is well settled that “[t]he interpretation of a statute presents a question of law.” *In the Matter of Landgraf*, 176 N.H. 724, 727 (2024). “A witness, expert or otherwise, may not testify to conclusions of law.” *Dartmouth Coll. v. N. Branch Constr., Inc.*, No. 2009-CV-00152, 2014 N.H. Super. LEXIS 4, at *16 (Mar. 24, 2014) (citing *Saltzman v. Saltzman*, 124 N.H. 515, 524 (1984)); *Julmist v. Prime Ins. Co.*, 92 F.4th 1008, 1022 (11th Cir. 2024) (“We have repeatedly said, in a number of contexts, that we do not need, want, or accept expert testimony on questions of law.”). Attorney Greenspan’s testimony is therefore inadmissible to prove the plaintiffs’ contract clause claims.

5. Indeed, the plaintiffs’ reliance on Attorney Greenspan’s testimony demonstrates that their contract clause claim is doomed. Again, a statute only satisfies the unmistakability doctrine if its language “evinces the clear intent of the state to be bound to particular contractual obligations.” *Am. Fed’n of Teachers-N.H.*, 167 N.H. at 301. Ambiguous statutory language is, by definition, insufficiently clear to satisfy the unmistakability doctrine. *Me. Ass’n of Retirees v. Bd. of Trs. of the Me. Pub. Emples. Ret. Sys.*, 758 F.3d 23, 31 (1st Cir. 2014) (“Either characterization of [the statute] is possible. In the context of the unmistakability doctrine, this ambiguity dooms Plaintiffs’ argument.”); *see also United States v. Winstar Corp.*, 518 U.S. 839, 878 (1996) (observing that an “ambiguous term or grant of contract” will not “be construed as a

conveyance or surrender of sovereign power”). If the plaintiffs believe that extrinsic evidence is needed to establish the existence of an enforceable contract or vested right, they have necessarily failed to meet their burden under the unmistakability doctrine.

6. Attorney Greenspan’s testimony is also not admissible to prove the plaintiffs’ equal protection claims. In determining whether the challenged amendments treat similarly situated persons differently, the Court must again engage in statutory construction. *See, e.g., State v. Lilley*, 171 N.H. 766, 775–76 (2019) (interpreting ordinance to determine whether it discriminated on basis of gender). Likewise, whether the amendments impinge “statutory or common law rights applicable at the time of injury,” *Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 448–49 (2011), is a legal question, not one that is determined based on expert opinions. Attorney Greenspan’s opinions have no bearing on the resolution of these questions.

7. The same is true with respect to the plaintiffs’ standalone breach of contract claim. Whether RSA 21-M:11-a creates a contract is a legal question resolved through statutory construction, as previously discussed. In any event, it is a matter of black-letter law that sovereign immunity bars claims arising out of alleged implied-in-law contracts with the State. *XTL-NH, Inc. v. N.H. State Liquor Comm’n*, 170 N.H. 653, 657–58 (2018). Attorney Greenspan’s testimony is therefore not relevant to this claim either.

8. Accordingly, Attorney Greenspan’s testimony is not admissible to prove any of the plaintiffs’ claims. To be fair, though, it does not appear that the plaintiffs intend her testimony to operate in this way. Attorney Greenspan does not purport to offer opinions on any of the purely legal questions the plaintiffs’ claims present. She instead offers a series of statements that are, in essence, criticisms of the challenged amendments as a matter of public policy.

9. Attorney Greenspan devotes the bulk of her affidavit to describing claims processes that she has been involved with and that she apparently believes work well. *See* Greenspan Aff. ¶¶ 16–24. She then criticizes the claims process set forth in RSA 21-M:11-a, as amended, for not having certain features that those other claims processes contain. *See id.* ¶¶ 25–32. She further expresses her disagreement with the challenged amendments and her concerns about the ramifications of the amendments. *See id.*

10. For example, Attorney Greenspan asserts that “administrators are rarely able to be terminated at any time without cause or without set procedures.” *Id.* ¶ 30. She similarly asserts that the timing of the amendments at issue in this case “is inconsistent with how compensation programs are traditionally run.” *Id.* ¶ 31. She asserts that the claims process, “as amended, is at odds with how a victim’s compensation settlement fund should operate.” *Id.* She expresses concern that the challenged amendments “will chill participation in the settlement program and lead to increased litigation—the very thing the Settlement Fund Act was designed to avoid.” *Id.* She asserts that it is her opinion that the claims process, as amended, “presents an inappropriate mechanism for administering claims.” *Id.* ¶ 32.

11. None of these assertions are relevant to any issue presently before the Court. They are instead “public policy arguments . . . made in the wrong forum.” *Doe v. Comm’r, N.H. Dep’t of Health and Human Servs.*, 174 N.H. 239, 260 (2021) (citations omitted). The fact that Attorney Greenspan frames these assertions with words like “rarely,” “traditionally,” “should,” and “inappropriate” betrays that she is really offering her own policy preferences under the veneer of an expert opinion. “Because [the judiciary’s] function is not to make laws, but to interpret them, any public policy arguments relevant to the wisdom of the statutory scheme and its consequences should be addressed to the General Court.” *Id.* (citation and quotation marks

omitted). Put differently, “courts are not concerned with whether a statute is wise, reasonable, or expedient.” *Petition of Boston & Maine Corp.*, 109 N.H. 324, 325 (1969). “As is always the case with legislative enactments, the wisdom of the measure proposed is for the legislature, and not within the prerogative of [courts] to determine.” *Opinion of the Justices*, 111 N.H. 136, 143 (1971).

12. Attorney Greenspan’s testimony is also inadmissible because she premises her opinions on incorrect statements of law. Attorney Greenspan asserts that under RSA 21-M:11-a, as amended, the Claims Administrator is “subject to summary dismissal by one party” and that his determination is “subject to a veto by a defendant in the litigation.” Greenspan Aff. ¶ 11. She clarifies later in her affidavit that the “party” and “defendant” she is referring to is the “State.” *Id.* ¶ 28. She contends that the Attorney General is “by definition an agent of the State, *i.e.* the defendant in these actions.” *Id.* She similarly asserts that “the Governor (as the elected executive head of the State” is a party “alleged to be responsible for the harm suffered by plaintiffs and other victims of abuse at the YDC.” *Id.*

13. Attorney Greenspan’s repeated contention that the claims process, as amended, cannot be fair and the Administrator cannot be independent and neutral is entirely premised on the notion that the Attorney General and Governor are proxies for “the State” and are therefore “the parties alleged to have committed the wrongdoing for which the Settlement Fund was established.” *Id.* Indeed, she asserts that the amended claims process “go[es] beyond the appearance of impropriety and create[s] a clear conflict of interest, undermining the fairness and legitimacy of the settlement process.” *Id.*

14. Attorney Greenspan’s conflation of the Attorney General and the Governor with “the State,” and her assertion, based on that conflation, that the Attorney General and the

Governor are parties in the underlying litigation, reflect a profound misunderstanding of both the basic structure of New Hampshire's government and the legal theories asserted in the litigation.

15. The State of New Hampshire refers to the people of the State who created the State as a body politic, N.H. Const. pt. 2, art. 1, and retained in themselves the State's sovereign power, N.H. Const. pt. 1, art. 7. As used in this sense, "the State" has always retained the power to determine whether claimants receive compensation under the claims fund (or indeed whether the claims fund even exists) because the fund is a creature of statute enacted in the name of the people.

16. The State consists of three branches of government. *See* N.H. Const. pt. 2, art. 2 [Legislature, How Constituted]; art. 41 [Governor, Supreme Executive Magistrate]; art. 72-a [Supreme and Superior Courts]. One of those branches is the judicial branch, which, among other things, placed many claimants at YDC and other facilities through the juvenile justice system. A Claims Administrator employed by the judicial branch is just as much "an agent of the State," *Greenspan Aff.* ¶ 11, as one employed by the executive branch.

17. In the underlying litigation, however, the plaintiffs do not allege that the entire State, as a body politic, abused them. They bring claims against a single executive branch agency—DHHS—concerning how it operated the YDC and other facilities decades ago. Individual criminal actors who are alleged to have perpetrated the abuse in question have been or are being prosecuted by executive branch officials. DHHS is not led today by the same people who operated it decades ago.

18. Attorney Greenspan thus imputes to government actors today responsibility for the plaintiffs' alleged past injuries. This is manifestly wrong as a matter of law and fact. Indeed,

this type of rhetoric saps Attorney Greenspan’s testimony of all credibility and impartiality. Her assertion in this regard is a political one that holds no evidentiary value in a court of law.

19. Accordingly, Attorney Greenspan’s assertion that the amendments challenged in this case fundamentally change the claims process by putting the party responsible for the claimant’s abuse in control of whether claimants are compensated is simply wrong. For this additional reason, it is inadmissible. *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 654 F. Supp. 2d 518, 522 (E.D. La. 2009) (excluding an expert opinion that was “a misstatement of Louisiana law”); *United States v. Gallion*, 257 F.R.D. 141, 149 (E.D. Ky. 2009) (excluding expert opinions in part because they were “incorrect statements of law”); *Loeffel Steel Prods. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (“Expert opinions that are contrary to law are inadmissible.”); *see also Integra Lifesciences I, Ltd. v. Merck KGaA*, 496 F.3d 1334, 1342 (Fed. Cir. 2007) (“[W]hen an expert witness’ statement of the law is incorrect, that view of the law cannot be relied upon to support the verdict.”).

B. Attorney Greenspan’s testimony should be excluded under Rule 403.

20. Even if Attorney Greenspan’s testimony was minimally relevant to some issue before the Court, it should still be excluded under Rule 403. Rule 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

21. This case presents concrete legal questions that must be resolved through the established tools of statutory construction. Attorney Greenspan’s testimony is wholly untethered from that analysis and is essentially a policy plea as to what she thinks a claims process should look like or consist of. She makes those pleas in the wrong forum. It would be highly prejudicial

to the defendants for Attorney Greenspan's testimony to inform how this Court assesses the actual legal questions before it.

22. For similar reasons, allowing Attorney Greenspan's testimony would confuse the issues and waste time. Attorney Greenspan's opinions are based on manifestly incorrect statements of law and fact. She seeks to impute to current government officials allegations related to how a single executive branch agency operated decades ago. This testimony would serve no purpose other than to obscure the straightforward legal issues before the Court and unnecessarily use up limited judicial resources.

C. Attorney Greenspan's testimony does not satisfy the requirements of RSA 516:29-a.

23. RSA 516:29-a prescribes the standards governing when a witness can offer expert testimony. Expert testimony is not permitted unless a court finds that: "(a) [s]uch testimony is based upon sufficient facts or data; (b) [s]uch testimony is the product of reliable principles and methods; and (c) [t]he witness has applied the principles and methods reliably to the facts of the case." RSA 516:29-a, I (formatting altered).

24. In making this determination, a court must consider, "if appropriate to the circumstances, whether the expert's opinions were supported by theories or techniques that:(1) [h]ave been or can be tested; (2) [h]ave been subjected to peer review and publication; (3) [h]ave a known or potential rate of error; and (4) [a]re generally accepted in the appropriate scientific literature." RSA 516:29-a, II (formatting altered).

25. Attorney Greenspan's testimony does not satisfy these requirements. As previously discussed, her opinions are based on manifestly incorrect statements of law and fact. For this reason alone, her opinions are not "based upon sufficient facts or data." RSA 516:29-a, (a).

26. In any event, Attorney Greenspan does not explain what reliable principles and methods she has applied to reach her expert conclusions. She simply points to a number of other claims processes she has been involved with and opines that she thinks those processes are better for various reasons. She does not explain why, as an empirical matter, that would be the case. Her affidavit is instead a series of non sequiturs that move from her experience to her conclusions without any of the necessary connective tissue to satisfy RSA 516:29-a.

27. This betrays the fundamental problem with Attorney Greenspan's testimony: it is replete with legal conclusions and policy preferences masquerading as expert opinions. Under, RSA 516:29-a, this is not permissible expert testimony. Attorney Greenspan's testimony should therefore also be excluded for failing to satisfy the requirements of that statute.

Conclusion

28. For the foregoing reasons, the Court should exclude Attorney Greenspan's testimony from the August 20 preliminary injunction hearing.

WHEREFORE, the defendants request that this Honorable Court:

- A. Grant this motion;
- B. Exclude Attorney Greenspan's testimony from the August 20 preliminary injunction hearing; and
- C. Grant such further relief as the Court deems just and equitable.

Respectfully submitted,

Governor Kelly Ayotte; Attorney General John Formella; State of New Hampshire

By their attorney,

JOHN M. FORMELLA
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Date: August 15, 2025

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent via the Court's electronic filing system to all parties of record.

Date: August 15, 2025

/s/ Samuel Garland
Samuel Garland