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Attorney-Client Privilege

Concerned Groups File Amicus Briefs Urging Supreme Court to Review *Textron*

The U.S. Court of Appeals ruling on the discoverability of tax accrual work papers in *United States v. Textron Inc.* limits the ability of attorneys to effectively provide representation to their clients, Scott B. Smith, chair of the appellate advocacy committee of the U.S. defense bar Defense Research Institute and vice chair of the DRI's amicus committee, told BNA Feb. 2.

In *Textron*, the First Circuit ruled 3-2 that tax accrual work papers sought by the Internal Revenue Service as part of an administrative audit were not entitled to work product protection (7 CARE 1024, 8/21/09). The audit was part of an investigation into the company's alleged use of an abusive tax shelter.

The DRI filed an amicus brief with the U.S. Supreme Court Jan. 27 that said, among other issues, that a "narrow work product privilege disrupts the adversarial system by increasing the likelihood attorneys will be deposed or called to testify at trial and will be disqualified."

Another brief filed Jan. 27 by the law firm of Reed Smith LLP in support of *Textron's* petition for review of the controversial circuit court ruling said that the *Textron* ruling threatens the traditional protections offered by the work product protection (*Textron Inc. v. United States*, U.S., No. 09-750, petition filed 12/24/09). U.S. Steel Corp. and Graybar Electric joined with Reed Smith in filing the brief seeking review of the decision.

The Council on State Taxation (COST) also filed a brief Jan. 26 in support of Supreme Court review.

***Textron* Jeopardizes Attorney-Client Relationship.** The *Textron* case negatively affects the candor between client and counsel, Smith, who is also a partner with Bradley Arant Boult Cummings LLP in Huntsville, Ala., said.

"The First Circuit's decision in this case is stingy because it only protects work product documents that are specifically 'for use in litigation,'" Smith said. "The court made a 'cramped' interpretation of the work product document when it said that certain business advice documents were not protected because they had not been prepared for use in a law suit that was anticipated or had already been filed," he said.

The court's decision has major negative effects on corporations and their outside counsel, Smith said. Generally, "if a client thinks that an opponent is listening or looking in on the client's communications with the attorney—especially with regard to written communications—the client will surely be less candid with the attorney," he said.

Also, attorneys may be less able to zealously represent their clients without the proper protection, Smith said. "After all, zealousness requires honesty, candor, and full consideration of all the key issues in a client's situation. The nature of doing business in the 21st century requires that most business decisions that matter be cleared with legal counsel," he said.

"Issues associated with such matters as accounting standards and the Sarbanes Oxley Act of 2002 all require that companies assess risks when it comes to making business decisions. Businesses cannot assess risks thoroughly without consulting legal counsel," Smith said.

Furthermore, "because the court's decision is a 'know it when we see it' standard, the DRI would like the Supreme Court to grant review of the case and articulate a clearer standard and a broader protection for attorney-client work product," Smith said.

Case Affects More than Discoverability. According to Reed Smith, the implications of the case extend beyond the discoverability of tax accrual work papers.

"The opinion below deepened the already significant split among the Circuits regarding the scope of the work product privilege," the Reed Smith amicus brief said. "The split threatens the traditional protections afforded by this privilege and creates uncertainty for all companies that rely on their counsel for candid written opinions regarding the risks of potential litigation," it said.

"The first Circuit's en banc decision potentially vitiates work product protection in a wide range of common litigator-to-client communications and threatens to impair companies' abilities to obtain frank evaluations of all type of litigation risks from both in-house and retained counsel," Reed Smith said.

Meanwhile, the brief submitted by COST said that erosion of the work product privilege is deeply troubling to the American business community.

"Most COST members are regularly engaged in state tax litigation—and most significantly—often litigating the same issue in several jurisdictions," COST said. "Accordingly, COST members have a substantial inter-

est in maintaining the sanctity of the work product privilege," it said.

BY TINA CHI

The DRI brief is available at <http://taxprof.typepad.com/files/textron---dri.pdf>.