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Questions Unanswered In Work Product Protection

Law360, New York (August 10, 2010) -- The U.S. Supreme Court's denial of certiorari in Textron Inc. v. United States came as a surprise to a number of observers given its perceived importance to the business community. Indeed, all of the 11 amicus briefs submitted were in favor of the petitioner. To that chorus, First Circuit Judge Juan Torruella added his voice in dissent by expressly asking the Supreme Court to "intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country."

The court nonetheless declined that mass invitation to hear the case. Instead, the court left in place a divided, 3-2 en banc First Circuit opinion that has significant implications for companies that take a proactive approach to avoiding and resolving not just tax issues, but antitrust and other disputes as well.

Background

Textron presented the Supreme Court with a good opportunity to clarify the scope of the work product protection set forth in Federal Rule of Civil Procedure 26(b)(3), and to resolve what many view as a significant and guidance-clouding circuit split.

Rule 26(b)(3) provides — or should provide — vital protection against adversaries benefiting from parties' careful and thorough preparation regarding disputes. The rule promotes this public policy in favor of allowing parties to freely consider and prepare for lawsuits by protecting from disclosure "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." The protection is important for litigants because its breadth can be greater than that of the attorney-client privilege, as it is harder to waive and requires no transmission between attorney and client.

In the 40 years since the drafters of the Federal Rules carved out work product protection from the scope of discovery in Rule 26, courts have considered several parameters of the protection. For

example, the protection is qualified and may be overcome by a party demonstrating that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Several courts have addressed questions regarding the showing of "substantial need," the extent to which "hardship" in the absence of disclosure would be "undue," and the level of protection to be provided to materials depending on the degree to which an attorney was directly involved in their preparation. Textron presented a request for clarification regarding one of the most important parameters: the extent to which a document was prepared "in anticipation of litigation."

The drafters' commentary identifies an underlying policy that "each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side." The commentary expressly excludes documents "assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes." The commentary is silent, however, as to dual-purpose documents, i.e., those created both in anticipation of litigation and for business purposes.

Most circuits have interpreted the "anticipation of litigation" language to protect from disclosure documents that parties prepare "because of" litigation, following the Second Circuit's decision in United States v. Adlman. That interpretation potentially protects dual-purpose documents. The Fifth Circuit, however, has limited the protection to documents that parties created with the "primary motivating purpose" of aiding in litigation, which would likely exclude such documents. Other circuits have not yet expressly interpreted that language from Rule 26(b)(3).

Textron invited the Supreme Court to bring the Fifth and other unresolved circuits in line with the "because of litigation" interpretation of circuits like the Second. The materials at issue in Textron were tax accrual papers, part of which Textron's attorneys created to document aspects of various transactions. Textron was unclear how the IRS would treat such transactions. The papers provided an estimate of "the likelihood of success in the event of a dispute" with the IRS regarding each aspect, and included backup notes and memoranda regarding the attorneys' thinking on the transactions. Since the documents were created by attorneys (presumptively entitling the documents to the maximum protection allowed by Rule 26(b)(3)) and none of the other parameters were central to the appeal, the Supreme Court needed only to address the "anticipation of litigation" point.

Instead of considering the case, however, the court left in place a First Circuit en banc opinion that arguably clouds guidance even more than the split opinions that predate it.

It is clear that to Justice Boudin, who authored the en banc majority opinion, the tax accrual papers at issue simply were not work product. His reasoning is not without basis. The documents had to be prepared in conjunction with financial statements, were necessary to obtain auditor sign-off required by regulation, and contained, in essence, merely a percentage guesstimate of a potential dispute outcome so that Textron could set aside sufficient liability reserves and demonstrate to its auditors that it did so. Thus, the documents were arguably prepared in the ordinary course and pursuant to public requirements, which the commentary to Rule 26 expressly states do not qualify for protection.

Tellingly, to Justice Boudin, the documents did not feel like work product. They felt like tax documents: "Any experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." This common-sense approach can be typical of veteran judges: their wealth of experience guides them rapidly to a judgment.

For attorneys advising businesses, however, predicting that rapid judgment call may seem more difficult after Textron. First, as Justice Torruella pointed out in dissent, it provides as much guidance for business counselors as Justice Stewart's famous definition of pornography: "I know it when I see it." Second, Textron fairly can be read as adding a third facet to the circuit split: that the test in the First Circuit is now whether the document was created for case preparation — "for use in litigation" — rather than "in anticipation of litigation."

In addition to the uncertainty surrounding the scope of "anticipation of litigation," courts' general aversion to privilege and work product disputes also renders counseling more difficult. Many judges believe, correctly, that counsel should resolve such disputes without court involvement. As a result, when they face such disputes, judges may make rapid decisions that do not always fall squarely within the case law or reflect the full context in which the documents were created.

Takeaways for Counsel

The significance of this guidance-clouding decision is not limited to the tax bar. Rather, Textron has real-world importance to competition lawyers and the business people they advise. For example, in the mergers and acquisitions context, the attorney-client privilege is often unavailable for deal evaluation materials, which are routinely shared with and worked on by third parties, such as investment bankers. The work product protection could be a valuable shield to prevent the antitrust agencies from piggybacking on internal, pre-deal antitrust risk analysis. This is particularly true for sophisticated, lawyer-lean teams in which members of the corporate development team may conduct preliminary antitrust litigation risk analysis. Under the logic of Textron, however, such analysis, which is created in the ordinary course of acquisition evaluation and not solely "for use in" potential

litigation against the FTC or DOJ, is arguably not protected.

Similarly, in weighing the value of a proposed distribution agreement, a company may analyze the likelihood of a challenge by litigants or enforcers to the proposed joint venture or vertical arrangement. If the attorney-client privilege is broken or unavailable, Textron could militate for disclosure. Since the materials are intended to assess the value of a business decision — even if that value is strongly influenced by anticipated litigation — the decision suggests that they are not subject to the protection.

Finally, in responding to a government investigation and Civil Investigative Demand, in-house counsel may prepare analyses that not only assist the company response, but also capture information and learning from the response process to assist with potential related litigation. Textron suggests that the protection for such dual-purpose analysis is unavailable, while a neighboring court (the Southern District of New York) has allowed parties to withhold such materials in the past.

As a result, companies that take a proactive approach to dispute analysis and resolution are unfortunately well-advised to be equally proactive about preventing disclosure of such documents. The following suggestions may assist in that regard:

Divide and conquer. Frequently, documents serve multiple purposes by design, such as in Textron, where the tax accrual papers intentionally included the litigation assessment. Where integration is not necessary, however, consider separating the litigation risk analysis from larger business documents. It is easy to reference the risk assessment in a more general deck or memo without revealing its substance in detail, and a document that is created solely to assess legal risk is more likely to be awarded protection.

Be comprehensive and technologically savvy about protection from inadvertent production. Many disputes about the attorney-client privilege or work product protection begin when parties either (a) inadvertently produce close-call documents or (b) withhold them, but produce log entries that render the documents' content obvious to other, produced documents. To avoid such situations, utilize electronic document review program tools that allow parties to search for "near duplicates," which can help reviewing attorneys to locate all the documents related to a particular subject or containing specific language and, if appropriate, withhold all of them from production. Similarly, prepare the log of withheld documents with care. Review it for big-picture issues before providing to the other side. Do not help an adversary to pick an easy discovery fight by handing over close-call privileged and work product materials or easily challenged log entries.

Use Rule 502. It is often in all the parties' interests to enter into a comprehensive "clawback" agreement early in litigation, which provides extensive rights of return for inadvertently produced documents. Consider whether it is in yours, and if so seek its inclusion in a protective order from the court. The policy and effect of Federal Rule of Evidence 502 is to override many waivers of the work product protection or attorney-client privilege, and may avoid challenges to your close-call, withheld documents.

Do the little things and (unfortunately) get attorneys involved early. Use compliance training to heighten sensitivity to this issue of business people who assess litigation risk as part of their business analysis. Stamp documents with "work product" and, if applicable, "attorney-client privilege." Seek to add the attorney-client privilege when possible by involving attorneys early in the process. In potential work product documents, articulate the specific risk of litigation being assessed.

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At the end of the day, taking many of the suggestions above may not have changed Textron's fortunes. The reality on the ground is that the scope of "anticipation of litigation" will remain cloudy until the Supreme Court resolves the issue. Increased awareness of the issue and preemptive planning, however, may pay off in the meantime.

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