

March 27, 2009

First Circuit to Reconsider Work Product Privilege for Tax Accrual Workpapers

Court of Appeals for the First Circuit Withdraws Opinion and Vacates Judgment in *United States v. Textron Inc.* and Orders an En Banc Rehearing

SUMMARY

On January 21, 2009, the Court of Appeals for the First Circuit issued an opinion in *United States v. Textron Inc.* affirming a District Court holding that, in many cases, tax accrual workpapers are protected from discovery by the work product privilege. However, the opinion, which was joined by two judges with one dissenting, vacated the District Court's ultimate determination that the work product privilege was not waived by disclosure of the tax accrual workpapers to an independent auditor and remanded for further consideration. On March 25, 2009, the First Circuit entered an Order (1) withdrawing the January 21, 2009, opinion and dissent, (2) vacating the judgment entered on the same date, and (3) granting the United States' petition for a rehearing en banc. The rehearing is scheduled for June 2, 2009.

DISCUSSION

In *United States v. Textron Inc.*,¹ the United States District Court for the District of Rhode Island denied the government's summons enforcement action seeking tax accrual workpapers from a subsidiary of Textron Inc. on the ground that such workpapers were protected from discovery by the work product privilege and that such privilege had not been waived by Textron's disclosure of the workpapers to an independent auditor.² For more information about the District Court's opinion, please see our memorandum entitled "Work Product Privilege for Tax Accrual Workpapers," dated September 5, 2007.

On appeal, the First Circuit affirmed the District Court's determination that Textron's tax accrual workpapers are protected by the work product privilege but vacated the determination that the work product privilege was not waived as a result of Textron's disclosure of the workpapers to an independent

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auditor.³ Two judges joined in the majority opinion and one judge filed a dissenting opinion. The First Circuit then remanded the case for the District Court to reassess the waiver issue.⁴

However, on March 25, 2009, the First Circuit entered an Order stating that a majority of the active judges on the Court had voted to rehear the case en banc.⁵ As such, the Court withdrew the January 21, 2009, opinion and dissent and vacated the judgment entered on the same date. The Court welcomed the submission of amicus briefs and scheduled the en banc hearing for June 2, 2009, at 9:30 a.m.

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ENDNOTES

¹ United States v. Textron Inc., 507 F.Supp. 2d 138 (D.R.I. 2007).

² *Id.* at 150, 154.

³ United States v. Textron Inc., 553 F.3d 87 (1st Cir. 2009), *vacated and reh'g en banc granted*, No. 07-2631 (1st Cir. Mar. 25, 2009).

⁴ *Id.* at 106.

⁵ United States v. Textron Inc., No. 07-2631 (1st Cir. Mar. 25, 2009).

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