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Saving a Bank

by

Dennis W. Townley

This is a story with a happy ending.

The Savings Bank of Maine, a 175-year-old financial institution headquartered in Gardiner, Maine, with branches throughout the state, had a very difficult year in 2009. Like so many other banks large and small, the bank had ventured into commercial lending – particularly real estate lending – just as the recession hit, putting it in serious jeopardy of failure.

The bank's regulator, the Office of Thrift Supervision, entered Cease and Desist and Prompt Corrective Action Orders requiring the bank to sell itself or immediately raise new capital. There was no ready buyer for the bank, which was a mutual federal savings association, so finding new capital was the only available avenue. But, in this difficult economic environment, who would be willing to do the hard work of converting the bank from a mutual to a stock corporation and investing sufficient capital to meet the regulatory requirements?

It turned out there was someone. Our client, a financial industry veteran who had previously sold a medical professional financing company to GE, heard about the opportunity. He enlisted the help of a friend, who had many years of experience in mortgage banking, to assess the opportunity. They spent weeks getting to know the bank, visiting its branches and reviewing its loan portfolio. They then teamed with Keefe, Bruyette & Woods, a premier investment banking firm for the banking community, to begin work on a capital plan for the bank.

During this evaluation period, it became clear that the bank had skilled and loyal employees, an important role in its communities, and solid support from its depositors and borrowers. If the bank had new

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management and adopted a strategic plan with a more conservative lending philosophy and a vision for careful future growth, our client felt that it would be an attractive investment opportunity. Time, however, was short.

Our client approached the regulators to determine whether there was sufficient time for his team and KBW to complete the new business plan, which required the conversion of the bank under regulatory supervision from mutual to stock form, and to raise the necessary capital. The regulators advised on the immediate steps that the bank needed to take and set an accelerated timeline for the recapitalization plan. The regulators were also very supportive of the plan, provided that it met all their requirements. It was clear that recapitalization of the bank would be better for all stakeholders, including the FDIC and the bank's employees, than a forced closing.

Over a period of approximately three months, our client, working with employees of the bank, completed the business plan and helped KBW bring together a group of investors. These investors formed a holding company, based in Gardiner, Maine, to finance the transaction. On Wednesday, May 26, the recapitalization was completed with $60 million of new capital invested in the bank. The new board includes a number of individuals with long careers in banking at some of the country's premier institutions, including several with strong ties to Maine. The transaction has drawn strong endorsement from the bank's employees as well as from the Maine business community.

As you can imagine, a transaction like this was not easy, as a variety of stakeholders had to support this solution. But our client's perseverance, the support of the regulators and the experience of KBW made it possible. We now expect a bright future for the bank and its dedicated employees.

United States v. Textron and the Changing Landscape of the Work Product Doctrine

by

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In the wake of the First Circuit's decision in *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009) – holding that the work-product doctrine does not protect "tax accrual workpapers" from disclosure – corporations and their attorneys may find themselves wondering how this surprising shift in work-product jurisprudence will shape the way in which they do business.

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Textron Background

In preparing its audited financial statements, Textron calculates reserves to account for contingent tax liabilities, i.e., estimates of potential liability if the IRS decides to challenge questionable positions taken by Textron in its returns. In doing so, Textron prepares tax accrual workpapers listing each debatable item, including the dollar amount at issue and a percentage estimate of the IRS's chances of success. Only the reserve amount is included in Textron's published financial statements.

In 2003, after reviewing Textron's 2001 tax returns in connection with an audit of the company, the IRS issued an administrative summons seeking production of Textron's underlying tax accrual workpapers. Textron declined to turn over the workpapers – primarily prepared by lawyers and others in the company's tax department – on the grounds that, among other things, they constituted protected work product.

The IRS filed a petition in federal district court in Rhode Island to enforce the summons. Denying the petition, the court held that the workpapers were prepared "because of" litigation and therefore constituted work product. On appeal, a divided panel affirmed the lower court's decision. On August 13, 2009, on rehearing, the en banc court (in a 3-2 decision) held that the work-product doctrine did not protect the tax accrual workpapers from disclosure.

The Majority Decision

Framing the issue as whether the work-product doctrine applies to "a document [that] is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation," the court concluded that the workpapers were not protected from disclosure. Although the court stated that its conclusion was consistent with the "because of" test – i.e., whether the documents were prepared "because of" litigation – adopted by the First Circuit in *Maine v. United States Department of the Interior*, 298 F.3d 60 (1st Cir. 2002), the decision does not appear to apply the "because of" test but instead relies upon a new, unannounced test based on whether the materials were "prepared for use in litigation [and] whether the litigation was underway or merely anticipated." According to the court, Textron's workpapers were not work product, because they were prepared "to fix the amount of the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor" and would not "serve any useful purpose for Textron in conducting litigation if it arose."

The Dissent

In a strongly worded dissent, Judge Juan Torruella stated that under the "because of" test, Textron's workpapers constituted work product, since they were created in connection with the calculation of a reserve fund needed in case litigation subsequently arose. Although the creation of the workpapers may have stemmed in part from other business needs, "without the anticipation of litigation, there would be no need to estimate a reserve to fund payment of tax disputes." Attacking the majority for "ignor[ing] a tome of precedents from the circuit courts" and

"contraven[ing] much of the principles underlying the work-product doctrine," Judge Torruella harshly criticized the majority for essentially rejecting the established "because of" test and adopting a new test for determining whether the work-product doctrine applies. He expressed deep concern that the majority decision would have broad, negative consequences reaching beyond the discoverability of tax accrual workpapers. For example, he pointed out, under the court's new rule, documents analyzing the prospects and business risks of litigation, traditionally protected by the work-product doctrine, would be discoverable. Judge Torruella warned: "Corporate attorneys preparing such analyses should now be aware that their work product is not protected in this circuit."

Further Appellate Activity

On December 24, 2009, Textron filed a Petition For A Writ Of Certiorari with the United States Supreme Court. The First Circuit stayed issuance of the Court's mandate pending resolution of the petition. On May 24, 2010, the Supreme Court denied the petition. Companies must thus now be mindful of Judge Torruella's warning and consider *Textron's* implications when consulting with their attorneys to prepare analyses of the risks associated with litigation, both in the tax context and beyond.

Spotlight: Please Meet Our Newest Boston Partners

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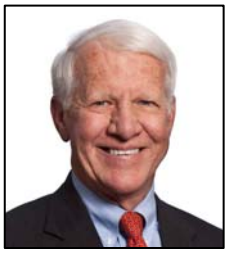
Barry Klickstein is a partner in the firm's Commercial Litigation Department and practices in the areas of complex business and commercial disputes and products liability defense. He has 35 years of trial experience in both state and federal courts. He has extensive experience handling cases involving corporate control, minority stockholder suits and securities matters. Barry represents physicians and attorneys in partnership and professional liability and practice litigation. He also represents one of the world's largest casino operators in a broad spectrum of litigation.

Barry received his J.D., *cum laude*, from the University of Pennsylvania Law School and his B.A., *cum laude*, from the University of Massachusetts at Amherst.



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Ken Grinnell is a partner in the firm's Individual Clients Department. He has decades of experience advising clients on estate planning and administration, charitable giving and tax-exempt matters. His principal areas of practice are estate planning, estate and trust administration and related tax planning, including planning for business owners and international tax planning. Ken has extensive experience advising individuals and families in connection with international estate planning, including offshore trusts and corporations. He is a member of the nationally recognized American College of Trust and Estate Counsel.

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Bill Pezzoni concentrates his practice in the areas of commercial lending, real estate law, zoning, wetlands, and land use. He assists clients with site assessment, purchase, sale and development of commercial, industrial, retail, mixed-use and residential properties; commercial and retail leasing, leasebacks and planning; and title insurance and litigation support for title issues. He also works in the areas of corporate law, finance, commercial banking, business planning and litigation. Bill is an issuing agent and provides litigation support for First American Title Insurance Company.

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