

MEDIA ALERT

FOR RELEASE – August 17, 2009

MEDIA CONTACTS:

Robin Scullin; +1 202.349.1509; scullin@acc.com

Marthea Davis; +1 202.349.1519; davis@acc.com

ASSOCIATION OF CORPORATE COUNSEL DECRIES TEXTRON DECISION **Court’s Ruling Eviscerates Practical Protection of Attorney Work Product for In House Counsel**

In response to the August 13, 2009, decision of the First Circuit Court of Appeals *en banc* to overrule its own previous panel decision and diverging from other U.S. court precedent protecting traditional interpretation of attorney work product in *U.S. v Textron*, the [Association of Corporate Counsel \(ACC\)](http://www.acc.com) issued the following statement, emphasizing the negative ramifications for corporate clients.

ACC STATEMENT

“In adopting this standard, the court seeks to promote greater convenience for government investigators at the expense of the public interest in promoting the accurate and complete preparation of corporate financial documents and audits. This decision serves as an impediment to accurately gauging corporate liability - which is a requirement of disclosure and necessary to transparency in the marketplace; and it also serves to diminish the value of the important preventive and strategic roles that in house counsel play in complex, publicly traded companies,” said ACC President, Frederick J. Krebs.

"This decision hamstring public companies’ in-house lawyers from advising auditors and financial planning in a manner that promotes accuracy and transparency in financial reporting and certification. It eviscerates the notion that the in-house lawyer can share legal assessments with company auditors without risking waiving the client’s privilege. According to the court, ‘any lawyer’ would call Textron’s counsel’s assessment of potential liability mere tax or business documents, not litigation documents. But by ‘any lawyer,’ the court’s language does not apply to the real-world circumstances of the 24,000 members of ACC,” noted ACC Senior Vice President & General Counsel, Susan Hackett.

ADDITIONAL BACKGROUND

The August 13, 2009, decision of the First Circuit Court of Appeals *en banc* to overrule its own previous panel decision protecting traditional interpretation of attorney work product in the Textron case has severe and negative ramifications for corporate clients.

The adoption of these standards enables the court to support government investigators, which will – inevitably – negate the public interest in ensuring accuracy in the preparation of corporate financial documents and audits. By ignoring - or setting aside - clear precedent to protect attorney work product, such as estimation of potential liabilities (within the First, other U.S. Circuit Courts and the U.S. Supreme Court), the court eviscerates the notion that the in-house lawyer should share legal assessments regarding potential or pending liabilities with company auditors.

As noted by the dissent in this case (whose authors wrote the panel opinion that this decision overturns): “In adopting its test, the majority ignores a tome of precedents from the circuit courts and contravenes much of the

principles underlying the work-product doctrine. It also brushes aside the actual text of Rule 26(b)(3), which "[n]owhere . . . state[s] that a document must have been prepared to aid in the conduct of litigation in order to constitute work product." Adlman, 134 F.3d at 1198." The result is that companies that empower their lawyers and auditors to work together in an effort to ensure that their financials and accounting disclosures are as accurate and well-informed as possible are punished by this decision; the court thus suggests the inconceivable: that it is more advisable for lawyers to avoid documenting or sharing information that could be used against the company's interests in litigation.

To read the amicus briefs and recent decision in their entirety, check the links below:

- [U.S. v Textron Decision, 8/13/09](#)
- [ACC-US Chamber Amicus Brief in US v. Textron, 4/22/09](#)
- [ACC-US Chamber Amicus Brief in US v Textron, 4/8/08](#)

###