BALCH & BINGHAM LLP

B&B REVIEW

Business Litigation News
Fall 2010

What's Inside . . .

Page 1

Trial Victory for Balch & Bingham Insurance Coverage Litigation Group

Balch & Bingham Ranks on Top among the Best Lawyers in America

Alabama Supreme Court Confirms Power of Attorney General Over Law Suits in the Name of the State

Page 2-3

D.C. Circuit holds that the Disclosure of Litigation Reserve Documents to Independent Auditors Does Not Waive Work-Product Privilege

This publication is intended to provide general information. It is not intended as a solicitation, and in the event legal services are sought, no representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers. The listing of any area of practice does not indicate any certification of expertise in the area as listed. Design, logo, and content © 2009 Balch & Bingham LLP. All rights reserved.

TRIAL VICTORY FOR BALCH & BINGHAM INSURANCE COVERAGE LITIGATION GROUP

Bruce Barze and Todd Lowther, members of Balch & Bingham's Insurance Coverage Litigation Group, obtained a $2.09 million verdict on behalf of a corporate policyholder client against Evanston Insurance Company. The lawsuit against Evanston arose out of a previous liability lawsuit against the policyholder, in the State of Ohio, which resulted in a large verdict. Evanston took over investigation, defense, and settlement of the underlying claim two years into the litigation, replaced the policyholder's chosen attorney over the insured's objections, and unsuccessfully attempted to defend the case at trial rather than settling. After the jury returned a multi-million dollar verdict against the policyholder in the underlying lawsuit, the subject lawsuit was brought against Evanston alleging, among other claims, breach of contract and bad faith failure to settle. The lawsuit was filed in federal court in the Eastern District of Tennessee, where the insured is principally located. After a four day trial, the jury returned a verdict in favor of the policyholder in the amount of $2.09 million.

BALCH & BINGHAM LLP RANKS ON TOP AMONG THE BEST LAWYERS IN AMERICA

Best Lawyers has selected 79 attorneys from Balch & Bingham's Birmingham and Montgomery, AL, Gulfport and Jackson, MS, Atlanta, GA and Washington D.C. offices for recognition in The Best Lawyers in America for 2011.

Best Lawyers is among the United States' most respected peer‐review publication in the legal profession. Their annual directory, The Best Lawyers in America, honors those who most excel in the legal profession based on the extensive evaluations of colleagues and other legal professionals.

Congratulations Everyone!

ALABAMA SUPREME COURT CONFIRMS POWER OF ATTORNEY GENERAL OVER LAW SUITS IN THE NAME OF THE STATE

Last month, the Alabama Supreme Court held that the Alabama Attorney General has the ultimate authority to direct and control litigation in which the State is interested, including lawsuits filed by local district attorneys in the name of the State.

Five Alabama district attorneys filed in their counties civil actions in the name of the State against retail pharmacies, alleging that the pharmacies' substitutions of generic drugs for name-brand drugs without express permission from the prescribing physicians constituted violations of the Alabama Pharmacy Act and the Alabama Deceptive Trade Practices Act. Greg Cook and Jason Tompkins from Balch's Birmingham office represented Walgreens, which was a named defendant in all but one of the lawsuits. CVS, Rite Aid, and Wal-Mart were named in all five lawsuits.

BUSINESS LITIGATION CONTACTS

ATLANTA

Matthew B. Ames
mames@balch.com
404-962-3531

Christopher S. Anulewicz
canulewicz@balch.com
404-962-3562

BIRMINGHAM OFFICE

Gregory C. Cook
gcook@balch.com
(205) 226-3426

MONTGOMERY OFFICE

W. Joseph McCorkle, Jr.
jmccorkle@balch.com
(334) 269-3134

GULFPORT OFFICE

Jonathan P. Dyal
jdyal@balch.com
(228) 214-0406

JACKSON OFFICE

William L. Smith
bsmith@balch.com
(601) 965-8175

Before the pharmacies answered, the Attorney General filed Rule 41 notices of dismissal on the State's behalf. One trial court held that the Attorney General lacked the authority to dismiss a civil action filed by a district attorney on the State's behalf. The trial court therefore refused to recognize the dismissal and ordered the district attorney to proceed with the case. After the trial court denied certification for interlocutory appeal, the Attorney General petitioned the Supreme Court for a writ of mandamus directing the trial court to accept his notice of dismissal. The pharmacies filed an analogous mandamus petition. Because the petition arose from the case in which Walgreens was not a party, Walgreens intervened and filed a brief in support of the mandamus petitions.

The Supreme Court granted the Attorney General's petition, which also rendered the pharmacies' petition moot. According to the Court, the Alabama Code, which defines the duties of the Attorney General, authorizes him to "attend to all cases other than criminal" cases pending in any court of the State in which the State may be concerned and states that "[a]ll litigation concerning the interest of the state . . . shall be under the direction and control of the Attorney General." The Supreme Court rejected the district attorneys' arguments that (1) Ala. Code § 36-15-14's reference only to super intendment of criminal cases denies the Attorney General authority over civil actions; and (2) the lawsuits did not involve an interest of the State, noting that the State has an interest in cases brought on its behalf and that seek to enforce its laws. Ultimately, the Supreme Court held that the statutes giving district attorneys the duty to prosecute civil actions on the State's behalf are not exceptions to and do not limit the Attorney General's ultimate authority to direct or control litigation on the State's behalf, including cases initiated by district attorneys.

D.C. CIRCUIT HOLDS THAT THE DISCLOSURE OF LITIGATION RESERVE DOCUMENTS TO INDEPENDENT AUDITORS DOES NOT WAIVE WORK-PRODUCT PRIVILEGE

The last thing a company wants is for a plaintiff's attorney who is suing the company to obtain a memorandum from its outside defense counsel stating what he thinks the company could lose in the lawsuit or the amount for which the company should settle. The issue is whether disclosure of an attorney's assessment of what a lawsuit could cost the company to a third party, such as the company's independent auditor, waives the work-product privilege. The United States Court of Appeals for the D.C. Circuit recently issued a decision that could have significant impact on the way businesses interact with independent auditors. In United States v. Deloitte, 610 F.3d 129 (D.C. Cir. 2010), the court held that (1) documents prepared by an independent auditor may be covered by the work-product doctrine if they contain mental impressions, conclusions, opinions or other legal theories of a party's attorney concerning litigation; and (2) work-product protection is not necessarily waived by the voluntary disclosure of documents to an independent auditor that is under a professional duty of confidentiality.

In Deloitte, the discovery dispute arose from ongoing tax litigation concerning Dow Chemical. During discovery, the government subpoenaed documents from Dow's independent auditor, Deloitte LLP. Deloitte produced all but three documents, which it identified as being protected as attorney work product. The three documents were: (1) a draft memorandum prepared by Deloitte that summarized a meeting between Dow employees, Dow's outside counsel, and Deloitte employee about the possibility of litigation with the IRS over the tax treatment of a transaction and the necessity of accounting for such possibility during Deloitte's ongoing audit of Dow's financial statements (the "Audit

Memo"); (2) a memorandum and attached flowchart regarding the computation of contingency reserves on the transaction (the "Reserve Memorandum"); (3) and a tax opinion prepared by Dow's outside counsel a Dow accountant and a Dow in-house attorney (the "Tax Opinion"). The district court denied the government's motion to compel, and the government appealed.

On appeal, the government contended that the Audit Memo was not work product because it was prepared during an audit. While conceding that the Reserve Memo and Tax Opinion constituted work product, the government argued that Dow had waived the privilege for those two documents by disclosing them to its independent auditor, Deloitte.

First, on the question of whether the Litigation Memo memorandum was prepared "in anticipation of litigation," the government contended that the document was produced in course of an annual audit and could not be considered work-product. The court noted that Federal Rule of Civil Procedure 26(b)(3) only partially codified the Supreme the Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947). Thus, even if the documents fell outside of the work-product definition in Rule 26(b)(3), the court held that Hickman provides for the protection of "intangible" things, such as mental impressions, independent of the federal rule. Additionally, the court focused its analysis on the content of the document rather than who created it or how the creator of the document is related to the party asserting the protection.

The court applied the "because of" test, asking whether the Audit Memo records information prepared by Dow or its representatives because of the prospect of litigation. The court relied on the Second Circuit's analysis in United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998), that held that "a document [protected by work-product doctrine] does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the outcome of the anticipated litigation." Thus, a document, containing protected work-product material prepared because of the prospect of litigation, is protected even though it may serve multiple purposes. The court vacated the district court's denial of the motion to compel on the Audit Memo and remanded for the district court to determine if the Audit Memo included statements by non-attorneys were are not intertwined with attorney mental impressions and would thus not qualify as work product and justify partial disclosure.

Second, with respect to the Reserve Memo and the Tax Opinion, the court found that companies do not necessarily waive protection by disclosing work-product to an independent auditor. Disclosure can waive protection "if such disclosure, under the circumstances, is inconsistent with the maintaining of secrecy from the disclosing party's adversary." The court found that Deloitte did not qualify as a party adversary, as "[its] power to issue an adverse [audit] opinion, while significant, does not make it the sort of litigation adversary contemplated by the waiver standard." Moreover, the court concluded that Dow had a reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information, citing Rule 301 of the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct. The Rule provides that "a member in public practice shall not disclose any confidential client information without the specific consent of the client." The D.C. Circuit affirmed the trial court's denial of the government's motion to compel with regard to the Reserve Memo and the Tax Opinion.

The D.C. Circuit's decision in United States v. Deloitte is arguably in conflict with the First Circuit's decision in United States v. Textron, 577 F.3d 21

WWW.BALCH.COM

ATLANTA OFFICE
30 IVAN ALLEN JR. BLVD., NW
SUITE 700
ATLANTA, GEORGIA 30308
(404) 261-6020

BIRMINGHAM OFFICE
1901 SIXTH AVE., NORTH
SUITE 1500
BIRMINGHAM, AL 35203
(205) 251-8100

MONTGOMERY OFFICE
105 TALLAPOOSA STREET, STE. 200
MONTGOMERY, AL 36104
(334) 834-6500

GULFPORT OFFICE
1310 TWENTY FIFTH AVENUE
GULFPORT, MS 39501
(228) 864-9900

JACKSON OFFICE
401 EAST CAPITOL STREET,
STE. 200
JACKSON, MS 39201

D.C. OFFICE
801 PENNSYLVANIA AVE., NW
SUITE 325
WASHINGTON, D.C. 20004
(202) 347-6000

For questions or additional information about items appearing in this Update, please contact your Balch & Bingham attorney.

If you no longer wish to receive the Update, have an address change, or would like to receive the Update, please contact Cimi Douglass at (404) 962-3505 or cdouglass@balch.com

BUSINESS LITIGATION CONTACTS

ATLANTA

Matthew B. Ames
mames@balch.com
404-962-3531

Christopher S. Anulewicz
canulewicz@balch.com
404-962-3562

BIRMINGHAM OFFICE

Gregory C. Cook
gcook@balch.com
(205) 226-3426

MONTGOMERY OFFICE

W. Joseph McCorkle, Jr.
jmccorkle@balch.com
(334) 269-3134

GULFPORT OFFICE

Jonathan P. Dyal
jdyal@balch.com
(228) 214-0406

JACKSON OFFICE

William L. Smith
bsmith@balch.com
(601) 965-8175

(1st Cir. 2009), where the court held that a corporation's tax accrual work papers were not prepared in anticipation of litigation. It is unclear how other jurisdictions will rule in similar cases. Similar to the D.C. Circuit, some district courts in the Eleventh Circuit have held (in unpublished opinions) that disclosure to an independent auditor does not automatically mean that protection has been waived. See Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 U.S. Dist. LEXIS 41940 (N.D. Ala. May 8, 2008); Gutter v. E. I. Dupont de Nemours & Co., No. 950-CV-2152, 1998 U.S. Dist. LEXIS 23207 (S.D. Fla. May 18, 1998). While the law in the Eleventh Circuit has not been settled, businesses now have a stronger argument that documents regarding litigation reserves either prepared by or shared with independent auditors are subject to work-product protection.