Bond Case Briefs

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ATTORNEY-CLIENT PRIVILEGE - ARIZONA

Robert W. Baird & Co. Incorporated v. Whitten

Court of Appeals of Arizona, Division 1 - September 28, 2017 - P.3d - 2017 WL 4296583 - 774 Ariz. Adv. Rep. 4

Underwriters of municipal bond offering brought legal malpractice action against Bond Counsel, who helped them prepare official statements and related bond documents, after Underwriters were sued by bondholders.

One element of Bond Counsel's affirmative defense was that Underwriters' defense costs in bondholders' lawsuit were not reasonable. Underwriters produced Bond Litigation Counsel's billing records to Bond Counsel in the discovery process. Underwriters moved for a protective order, however, with respect to Bond Counsel's discovery requests for Underwriters' communication with its Bond Litigation Counsel, asserting, attorney-client privilege and the work-product doctrine.

The Superior Court denied Underwriters' request for a protective order, concluding that the Underwriters' claims created a waiver of the protections of the attorney-client privilege and the work-product doctrine with respect to Underwriters' communications with its Bond Litigation Counsel.

The Court of Appeals reversed, holding that Underwriters could not be said to have knowingly and voluntarily waived the privilege. The court found that the purported waiver resulted not from Underwriters' own act, but from Bond Counsel's independent decision to defend on a contributory negligence theory. In addition, the protected communications had no inherent relevance to the malpractice claims and the preservation of the privilege dd not deny Bond Counsel access to information vital to their defense.

"Underwriters' basic claim is simple: Bond Counsel committed malpractice that later required Underwriters to spend money to defend themselves. The substance of Underwriters' communications with defense counsel are not necessary to decide whether Bond Counsel committed malpractice before the bondholders ever sued Underwriters. Further, even if Bond Counsel is correct that tortious conduct by parties other than Bond Counsel led to the Bond Litigation, Underwriters' privileged communications with Bond Litigation Counsel are not inherently relevant to that defense theory."

"That is not to say that Underwriters' decision to assert the privilege is without risk to Underwriters. Indeed, the decision may well impair Underwriters' claims—to the extent that the disclosed billing records are insufficient to permit an informed assessment of how much of Bond Litigation Counsel's work related to Bond Counsel's alleged negligence, Underwriters ultimately may be unable to recover all or a portion of their damages. Underwriters' privilege, however, remains intact."

The Court of Appeals also held that:

- Underwriters did not place apportionment at issue as to waive attorney-client privilege;
- Underwriters did not put protected information at issue as to waive attorney-client privilege; and

- Preservation of attorney-client privilege for Underwriters did not deprive Bond Counsel access to information vital to their defense.

Court of Appeals would accept special action jurisdiction following trial court's denial of motion for protective order by clients, who were principle underwriters of municipal bond offering, with respect to counsel's discovery requests for information protected by attorney-client privilege and work-product doctrine in clients' legal malpractice action against counsel, who helped them prepare official statements and related bond documents, after they were sued by bondholders. Clients had no equally, plain, speedy, and adequate remedy by appeal.

Clients, who were principle underwriters of municipal bond offering, did not place apportionment at issue by filing their legal malpractice complaint against counsel, who helped them prepare official statements and related bond documents, after they were sued by bondholders, as to waive attorney-client privilege with respect to counsel's discovery requests. By commencing litigation against counsel, clients put at issue whether counsel caused them to incur cost of defending bondholders' suit against them but did not place at issue resulting in their assertion of privilege, i.e., whether persons other than counsel were responsible for some or all of claimed damages, and counsel, not clients, placed fault and damage apportionment at issue by asserting contributory negligence as affirmative defense.

Clients, who were principal underwriters of municipal bond offering, did not put protected information at issue as to waive attorney-client privilege with respect to counsel's discovery requests in clients' legal malpractice action against counsel, who helped them prepare official statements and related bond documents, after they were sued by bondholders. Substance of clients' communications with counsel was not necessary to decide whether counsel committed malpractice before bondholders ever sued clients, and, even if counsel was correct that tortious conduct by parties other than counsel led to bondholders' suit, clients' privileged communications with counsel were not inherently relevant to that defense theory.

Preservation of attorney-client privilege for clients, who were principal underwriters of municipal bond offering, did not deprive counsel access to information vital to their defense as to waive privilege with respect to counsel's discovery requests in clients' legal malpractice action against counsel, who helped them prepare official statements and related bond documents, after they were sued by bondholders. Fact that discovery counsel sought might have revealed information useful to counsel was insufficient to cause waiver.

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