

United States Supreme Court Declines to Review *United States v Textron* Weakening Attorney Work-Product Doctrine

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The long standing attorney work-product doctrine has protected documents prepared in *anticipation* of litigation or for trial from discovery by the opposing party, since *Hickman v Taylor*, 329 US 459 (1947). This anticipation was typically met if there was a threat of an adversary proceeding and the document was prepared after the threat became palpable. In 2009, the First Circuit Court of Appeals' decision in *United States v Textron*, 577 F.3d 31 (2009), narrowed this protection to only those documents *actually prepared for use* in litigation. On May 24, 2010, the United States Supreme Court denied certiorari, leaving the First Circuit decision to stand. While a denial of certiorari "imports no expression of opinion upon the merits of the case" (*United States v Carver*, 260 U.S. 482, 490 (1923)), *Textron* attracted massive attention and is widely viewed as a landmark decision.

In *Textron*, in-house lawyers had prepared documents to support calculation of the tax reserves for the audited financial statements. These documents arguably included legal insights and analysis, but were admittedly not prepared by the attorneys in preparation for litigation. The IRS requested these documents from Textron, which Textron refused to provide claiming the work-product privilege against disclosure. The court of appeals ruled the documents were not prepared for litigation, but were prepared in the ordinary course of business to comply with federal securities laws, and the work-product privilege did not apply. The court further noted that the "IRS access serves the legitimate and important function of detecting and disallowing abusive tax shelters." *Id* at 32.

The court of appeals in *Textron* did not provide a concrete definition of what is protected under the work-product doctrine, effectively inviting the IRS - and other litigants - to proceed aggressively with discovery during litigation emboldened by this decision. The IRS has drafted a proposed disclosure requirement, "Form UTP" (UTP stands for "uncertain tax positions") to be filed by all corporate taxpayers with assets in excess of \$10 million beginning with their 2010 return. This form is a direct outgrowth of the *Textron* decision. In its present draft, Form UTP calls for disclosures that, at its most extreme, could create a "roadmap" to certain of the taxpayer's key tax issues. Taxpayers need to review the impact of the *Textron* decision in light of current or pending IRS and state litigation and audits and take appropriate action to protect sensitive information from discovery. Litigation analysis by outside counsel may enjoy greater protection and can arguably be distinguished from documents prepared internally or by other advisors.

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