# United States v. Textron: The Uncertain Status of the Work Product Doctrine in the First Circuit

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Just months after the United States Supreme Court touched off a national brouhaha over the extent to which it did, or did not, radically alter the pleading standard under Rule 12(b)(6), a local controversy no less spirited or far reaching is being played out in the First Circuit over the precise contours of the work product doctrine. In United States v. Textron Inc., 2009 U.S. App. LEXIS 18103, the First Circuit, in a 3-2 *en banc* decision, ruled that the work product doctrine does not protect "tax accrual work papers" prepared by company lawyers to allow independent auditors to certify the company's public financial statements. Whether this decision will remain confined to the tax work papers for which the majority showed less than full regard, or will, in the dire pronouncements of the dissent, usher in a entirely new work product doctrine profoundly hostile to company financial documents, remains uncertain -- perhaps the Supreme Court will accept the dissent's invitation to intervene, perhaps we will have to wait for the First Circuit to apply Textron in the next case. But here's what we do know: in house counsel will want to take heed that "dual purpose" company documents -- documents prepared to allow the company to assess and evaluate potential litigation and to make business decisions influenced by the prospects of litigation -- may no longer enjoy work product protection in the First Circuit. The obvious point of uncertainty will be those financial statements prepared by companies to enable them to set the appropriate reserves for contingent liabilities, but not necessarily prepared "for use" in litigation. Potentially any and all written musings by corporate counsel on litigation for purposes of disclosing risk may be susceptible to the searching inquiry of an adversary if the court concludes, as did the Textron court with respect to tax work papers, that such musings were not prepared primarily for use at trial. This is because, in the extreme view, what the First Circuit did in Textron was jettison the long settled "because of" work product standard (a document was entitled to work product protection as long as it was prepared because of the prospect of litigation, regardless of its other purposes) in favor of a much narrower "primary purpose" or "prepared for" standard, which would require the document to have as its dominant purpose its use in potential litigation.

While it's certainly far from clear that the First Circuit is ready to embrace this view (it does not even purport to articulate a rule change), the dissent puts us loudly on notice. It declares: "Corporate attorneys preparing such analyses should now be aware that their work product is not protected in this circuit." For its part, the majority states: "to sum up, the work product privilege is aimed at protecting work done for litigation, not in preparing financial statements."

The safest course, therefore, will be to heed the dissent's advice until the significance of the Textron decision is clarified. In house counsel would be wise to keep the legal analysis in support of a financial statements to a bare minimum, and to keep it out of writing if possible. This will require a clear and perhaps renewed understanding of accounting standards and public disclosure requirements, as well as redefined expectations among company auditors. It may not be that in house counsel's work product is truly "not protected in this circuit," but prudence dictates that counsel act like it isn't until the Supreme Court or the First Circuit says differently.