

**THE FIRST CIRCUIT COURT OF APPEALS GRANTS THE IRS TEXTRON, INC.'S
TAX ACCRUAL WORKPAPERS RULING THEY ARE NOT PROTECTED BY THE
WORK PRODUCT PRIVILEGE**

ABSTRACT

In U.S. v. Textron, Inc., 577 F.3d 21 (CA-1, 2009) the First Circuit Court of Appeals in a 3-2 en banc decision recently ruled that the IRS is entitled to Textron, Inc.'s tax accrual workpapers, holding that they were prepared to support its tax reserve for contingent tax liabilities in its financial statements required by the securities laws and to obtain a clean audit opinion for its certified financial statements. The majority concluded that the workpapers are not protected by the work product privilege provided in Federal Rule of Civil Procedure 26(b)(3), which protects documents that are "prepared in anticipation of litigation or for trial." The majority interpreted the doctrine to protect only documents that were "prepared for use in litigation." It reasoned that "[i]t is not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated,"... [n]or is it enough that the materials were prepared by lawyers or represent legal thinking," and"[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible ... law suit" and held that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." Also, the majority reasoned that "how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic." It ruled that the need of the IRS to detect and disallow abusive tax shelters in its duty of collecting corporate income taxes which is essential to government outweighed Textron, Inc.'s concerns.

While purporting to use the “because of” test previously adopted in the First Circuit rather than the “primary purpose” test to interpret the work product privilege, the court exacerbated a split among the circuit courts by ostensibly establishing the “prepared for” test. A sharply-worded and extensive dissent refuted the decision of the majority. Textron, Inc. has sought a writ of certiorari from the Supreme Court to review the court’s decision. Besides the split among the circuit courts, the importance of the work product privilege to the essential daily practice of attorneys nationwide in a myriad of areas increases the likelihood that the Supreme Court will grant certiorari.