

# Narrowing the Scope of Work-Product Protection: First Circuit Decision Puts Taxpayers on Notice

By Robin L. Greenhouse and Joseph H. Selby

Robin L. Greenhouse and Joseph H. Selby explain why the First Circuit's *Textron* decision is erroneous, and why the Supreme Court should grant *certiorari* and reverse.

## I. Introduction

On August 13, 2009, a divided U.S. Court of Appeals for the First Circuit dealt a sharp blow to taxpayer efforts to prevent the IRS from discovering tax accrual workpapers. Sitting *en banc* in *Textron, Inc.*, the court held that such workpapers are only protected by the work-product doctrine if such workpapers were "prepared for use in possible litigation."<sup>1</sup> Stopping short of requiring protected workpapers to have been prepared for the *sole* purpose of use in possible litigation, the court held that *Textron's* workpapers were independently required by statutory and audit requirements and therefore not protected.

The *Textron* decision conflicts with decisions of the other Circuit Courts of Appeals and the First Circuit's prior precedent and has broad nontax ramifications that should be of concern to any potential litigant. The *Textron* work-product standard—"prepared for use"—would not be limited to documents requested by the IRS, but would also apply to any so-called dual purpose document, *i.e.*, a document that is prepared both for business or regulatory purposes and

in anticipation of possible litigation. For example, the First Circuit's standard would require disclosure of a corporation's financial reserve analysis based on legal counsel's analysis of potential and asserted legal claims. Similarly, the standard would require disclosure of a federal agency's financial analysis based on its lawyer's legal analysis of potential and asserted legal claims.

## II. The Special Case of Tax Accrual Workpapers

Code Sec. 7602 grants the IRS "expansive information-gathering authority,"<sup>2</sup> including the authority to examine "any books, papers, records, or other data which may be relevant" to the IRS's role of enforcing the Internal Revenue laws.<sup>3</sup> This is not without limits, however—it is subject to traditional privileges and limitations, including the common law attorney-client privilege and, since 1998, the statutory tax practitioner privilege.<sup>4</sup>

Taxpayers often rely on their tax advisors—in-house and private lawyers and accountants—to provide advice regarding the taxpayer's probability of success with respect to positions that the taxpayer has taken or will take on its tax returns. Such advice, which may take the form of memoranda, communications, spreadsheets and other documents commonly referred to as "tax

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accrual workpapers,” often contain tax advisors’ mental impressions, conclusions, opinions and theories regarding legal issues that may arise in an IRS audit. Tax accrual workpapers are sensitive documents because they identify the taxpayer’s judgment about issues for which the results under the tax laws are unclear (so-called soft spots on the return). Tax accrual workpapers generally reflect the evaluation of the taxpayer’s counsel or accountants as to the risks or likelihood of success if the issues were litigated. Because of their sensitive nature, access to these workpapers has been an area of long-standing controversy between the IRS and taxpayers.

Tax accrual workpapers, when created, are generally protected by the attorney-client privilege or the tax-practitioner privilege. More and more frequently, business and regulatory exigencies require taxpayers to disclose otherwise privileged materials to third parties.<sup>5</sup> Under these circumstances, the documents are prepared for two purposes: (1) to develop and memorialize the taxpayer’s position with respect to the soft spots on its returns, and (2) for business or regulatory purposes. When such documents are disclosed to a third party, including the taxpayer’s outside auditors, the attorney-client privilege and the tax-practitioner privilege are waived.<sup>6</sup> In that event, the only thing that stands between a taxpayer’s tax accrual workpapers and the IRS is the work-product doctrine. Originally announced by the Supreme Court in *Hickman v. Taylor*,<sup>7</sup> and now embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure, the work-product doctrine prevents a party from discovering “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”<sup>8</sup>

Taxpayers have typically defended against IRS summonses seeking their tax accrual workpapers by claiming work product and maintaining that the workpapers were prepared in anticipation of litigation with the IRS. Taxpayers often rely on the affidavits of the head of the corporate tax department and the hazards of litigation percentages contained in the workpapers as evidence that the possibility of such litigation was the reason for preparing the workpapers. Additionally, taxpayers maintain that disclosure of their tax accrual workpapers to their independent auditors does

not waive the work-product privilege because the auditors are neither their adversary nor a conduit to their adversary.

In recent years, the IRS has moved away from its traditional “policy of restraint” (requesting tax accrual workpapers only in “unusual circumstances”)<sup>9</sup> and has become more aggressive in issuing summons for this work product. Buoyed by its victory in *Textron*, the IRS may now abandon its “modified policy of restraint” altogether and seek to discover a tax accrual workpapers in every examination.

### III. *Textron*

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#### A. Facts

Textron is a large-case taxpayer whose tax returns are routinely audited by the IRS. In seven of the eight previous audit cycles, “unagreed” issues were sent to IRS Appeals and three issues were litigated in court. The current work-product dispute arose out of nine “sale-in, lease-out” (SILO) transactions involving telecommunications equipment and rail equipment. The IRS classified such transactions as “listed transactions” and issued a summons requesting “all of the Tax Accrual Workpapers.”

Textron’s tax accrual workpapers consist of a spreadsheet containing lists of items on Textron’s tax returns that, in the opinion of Textron’s counsel, involved issues on which the tax laws are unclear and, therefore, may be challenged by the IRS. The workpapers also contain estimates by Textron’s lawyers expressing judgments regarding both Textron’s chances of prevailing in any litigation over these issues (in percentage terms) and the dollar amounts reserved to reflect the possibility that Textron might not prevail in such litigation. Additionally, the backup workpapers include notes and memoranda written by Textron’s in-house tax attorneys, reflecting opinions as to which items should be included on this spreadsheet and the hazard percentage that should be applied to each item.

#### B. District Court

Before the district court, Textron defended its refusal to produce the tax accrual workpapers by arguing that (i) the summons was issued for an improper purpose, (ii) the workpapers are protected by the attorney-client privilege and the tax-practitioner privilege, and (iii) that the tax accrual workpapers were prepared in anticipation of litigation and, therefore, protected by the work-product doctrine.

The district court rejected the first two arguments, finding that (i) the summons was not issued for an improper purpose, and (ii) while the workpapers are protected by the attorney-client and tax-practitioner privileges, Textron had waived the attorney-client and tax-practitioner privileges by disclosing the workpapers to its auditors. On the third point, however, the district court agreed with Textron.

In so doing, the court addressed the proper legal standard to be applied in determining whether a document was “prepared in anticipation of litigation.” The court noted that two different tests have been applied. Under the “primary motivating purpose” test (adopted by the Fifth Circuit), documents are held to be prepared in anticipation of litigation “as long as the primary motivating purpose behind the creation of a document was to aid in possible future litigation.”<sup>10</sup> Under the more expansive “because of” test (adopted by all of the other circuits to have considered the issue), the relevant inquiry is whether the document was prepared or obtained “because of” the prospect of litigation.<sup>11</sup>

The district court cited with approval to *M. Adlman*,<sup>12</sup> a Second Circuit case involving an IRS summons seeking a dual-purpose document (a detailed legal analysis of likely IRS challenges to the taxpayer’s reorganization and resulting tax refund claim), in which the Court had concluded that the “because of” test is “more consistent with both the literal terms and the purposes of [Rule 26(b)(3)].”<sup>13</sup> The district court also relied on *State of Maine v. Dept. of the Interior*,<sup>14</sup> a First Circuit decision adopting the “because of” test.

In *Maine*, the Department of Interior withheld documents requested by the State under the Freedom of Information Act relating to efforts to list Atlantic salmon in eight rivers within Maine under the protection of the Endangered Species Act. The district court adopted the more-stringent “primary motivating purpose test.”<sup>15</sup> The First Circuit reversed, however, holding that the correct test was the “because of” test adopted by the Second Circuit in *Adlman*. Relying on *Adlman*, the First Circuit held that the “primary” standard is at odds with the text

and the policies of Rule 26 because “nothing in it suggests that documents prepared for dual purposes of litigation and business or agency decisions do not fall within its scope.”<sup>16</sup> Instead, the court held that “documents should be deemed prepared for litigation and within the scope of the Rule if, *in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.*”<sup>17</sup>

Applying this standard, the district court found that Textron’s tax accrual workpapers were indeed prepared in anticipation of litigation. The court stated, “[I]t is clear that the opinions of Textron’s counsel and accountants regarding items that might be challenged by the IRS, their estimated hazards of litigation percentages and their calculation of tax reserve amounts would not have been prepared

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at all ‘but for’ the fact that Textron anticipated the possibility of litigation with the IRS.” The court concluded that “there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some adversarial proceeding.” Moreover, the court was convinced that Textron’s belief in the likelihood of litigation was well founded, given the company’s history of tax controversy with the IRS and the lack of legal clarity regarding the issues in question.

The court found unpersuasive the IRS’s reliance on the primary motivating purpose test for the proposition that tax accrual workpapers are prepared in the ordinary course of business, and therefore not protected by work product. In doing so, the court further distanced itself from the “primary purpose” test applied in the Fifth Circuit’s *El Paso* decision.

Importantly, the court held that, even if the tax accrual workpapers were needed to satisfy Textron’s compliance with generally accepted accounting principles, that would not alter the fact that the workpapers were prepared “because of” anticipated litigation with the IRS. In this regard, the court cited *Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc.*,<sup>18</sup> in which the U.S. District Court for the North-

ern District of Illinois held that an attorney's opinion letters containing an assessment of pending litigation were protected by work product, even though the securities laws required that the letters be provided to the corporation's independent auditor.

The court further concluded that disclosure of the workpapers to Textron's outside auditors did not waive the protection of the work-product doctrine. The court recognized that the work-product privilege serves a purpose different from the attorney-client and tax practitioner privileges, and thus the conduct that waives these privileges also differs. Whereas the attorney-client and tax practitioner privileges are waived by disclosure to any third party, the work product protection is waived only if disclosure is in a manner that is inconsistent with keeping the information from an adversary. According to the district court, the test for such inconsistency is whether disclosure substantially increases the opportunity for potential adversaries to obtain the information. Finding that the disclosure of Textron's tax accrual workpapers to the auditor did not substantially increase the IRS's opportunity to obtain the information contained in them, the court held that work product protection was not waived.<sup>19</sup>

### C. First Circuit Panel Decision

On January 21, 2009, in a majority decision drafted by Judge Juan Torruella,<sup>20</sup> the First Circuit upheld the district court's decision that Textron's tax-accrual workpapers are protected by the work-product doctrine. A dissenting opinion by Judge Michael Boudin took the position that dual-purpose documents are never protected, insisting that "tax-accrual workpapers are not protected because they are prepared for reasons independent of the need to prepare for or conduct litigation."

The First Circuit rejected the government's argument that disputes with the IRS do not constitute "litigation" within the meaning of Rule 26, and stated, "[T]he resolution of disputes through adversary administrative processes, including proceedings before the IRS Appeals Board, meets the definition of litigation." The First Circuit reasoned that good-faith disputes regarding the proper application of tax law arise during the audit process and, although the initial processing of these disputes in the audit process may not be adversarial, the disputes themselves are essentially adversarial and "the subject of these disputes will become the subject of litigation unless the dispute is resolved."

The First Circuit also upheld the district court's finding that the tax-accrual workpapers in issue were "prepared in anticipation of litigation," noting that one of the purposes behind the creation of the tax-accrual workpapers was the anticipation of litigation: "[T]he need to estimate the likelihood of success in litigation was a result of the need to set up a reserve fund to cover tax positions for which Textron could foresee disputes with the IRS." The First Circuit then concluded that these facts satisfy the "because of the prospects of litigation" test adopted in its own decision in *State of Maine v. United States Dep't of the Interior*:<sup>21</sup>

But, here, the function of the documents was to analyze litigation for the purpose of creating and auditing a reserve fund. It can be fairly said that "the driving force behind the preparation" of the documents, was the need to reserve money in anticipation of disputes with the IRS.<sup>22</sup>

The First Circuit rejected the IRS's argument that "the mere presence of a business or regulatory purpose defeats work-product protection" on the grounds that "dual purpose documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose."

The First Circuit also made two interesting additional observations. First, the First Circuit noted that a contrary holding could lead to "undesirable results" in other civil litigation:

Consider a document prepared to analyze a specific litigation in order to compute for an auditor how much must be retained in a litigation reserve fund. Were we to adopt the IRS position that documents created to satisfy audit reporting responsibilities were not protected, opposing counsel in the litigation might be able to discover such a memo, effectively disclosing counsel's ultimate mental impression of the case.

Second, the First Circuit stated that a particular taxpayer's history of disputes and litigation with the IRS should not be determinative of whether the taxpayer anticipated litigation:

If we were only to afford work product protection over documents of this sort by requiring a showing, as the IRS suggests, that there was some specific quantum of expectation that the position

at issue would mature into full-fledged litigation, we would essentially be offering protection only to the cantankerous and combative taxpayer who intends to thoroughly litigate every position.

Finally, the First Circuit considered whether Textron had waived work-product protection by disclosing its tax accrual workpapers to its independent auditor, Ernst & Young LLP (E&Y). Unlike the attorney-client privilege, which is waived upon disclosure of a document to any third party, the work-product privilege is waived only by disclosure of work product to a litigant's *real or potential adversary*. The First Circuit acknowledged that several courts have found no such waiver upon a taxpayer's disclosure of its tax accrual workpapers to its independent auditor.

The government argued that E&Y could be a potential adversary. The First Circuit disagreed, finding that E&Y occupied a "cooperative" position, not an adversarial one:

While it is possible to imagine circumstances where E&Y's professional obligations could cause E&Y and Textron to come into conflict on some legal question, the IRS can point to no "conceivable scenario in which E&Y would file a lawsuit against [Textron] because of something E&Y learned from [Textron's] disclosures."

The government also argued that E&Y was a conduit for a potential adversary (the IRS), since E&Y may be required to disclose the information under a valid subpoena. Although the record indicated that E&Y did not retain a copy of Textron's workpapers, E&Y did use the information (together with its own expertise) in assessing Textron's tax reserve. "Therefore, the only remaining documents which could be subjected to a risk of discovery are E&Y's own assessments, which incorporate Textron's analysis." The First Circuit stated that, under the Supreme Court's decision in *Arthur Young*, E&Y's workpapers may be discoverable, in which case the question whether Textron waived work-product protection by disclosure to E&Y depended upon the extent to which E&Y's workpapers evidenced the contents of Textron's workpapers. Since the district court did not address this issue, the First Circuit remanded for further fact finding.

Although ultimately vacated by the *en banc* court, the Panel's ruling on waiver is incorrect since it

misconstrues the meaning of a "conduit." It is well established that, under the "conduit theory," communications made to a lawyer, though made in private, are not privileged if they were made with the understanding that the lawyer would disclose them to third parties. Under those circumstances, the lawyer is considered a conduit to the third party.<sup>23</sup> E&Y would be a conduit to a potential adversary if, at the time of the disclosure to E&Y, it was understood that E&Y would disclose the information to the IRS or to another potential adversary. In *Textron*, however, the evidence established that E&Y had professional confidentiality obligations limiting disclosure and that a separate agreement memorialized its intent to maintain the confidentiality. Accordingly, there is no basis in the record for treating E&Y as a conduit to the IRS. To the contrary, the district court found that "since E&Y agreed to treat the workpapers as confidential, disclosure to E&Y did not substantially increase the likelihood that the workpapers would be disclosed to the IRS or another potential adversary."

The First Circuit's ruling also assumes in error that E&Y would not be able to claim privilege on selective portions of its workpapers that might possibly reflect Textron's work product. In a typical case in which an independent auditor is subpoenaed by the IRS to disclose a taxpayer's workpapers, the IRS is required to give the taxpayer notice to preserve any and all privileges (such as work product protection) it may have over such documents. Although the auditor might ultimately be required to turn over taxpayer documents, typically the auditor and taxpayer work together to ensure that any privileged material is redacted prior to disclosure.

Conversely, the First Circuit's ruling seems to be saying that, despite E&Y's "cooperative," non-adversarial position *vis-à-vis* Textron, if any of the protected information finds its way into E&Y's files, then there is waiver as to Textron's workpapers. This is an unworkable position and raises more questions than it answers. For example, what is the minimum spillage threshold, beyond which protection is waived? Must the auditor's workpapers include the taxpayer's information verbatim to be subject to waiver? Or is it sufficient that in looking at the documents side by side, a reasonable person would conclude that the substance of the protected material has found its way into the auditor's files and thus the protection is waived?

The First Circuit's formulation obscures what should otherwise be a bright-line test. The First Circuit's rea-

soning may well require an *in camera* inspection of the auditor's and taxpayer's workpapers in each case in which work-product protection is claimed. However, by failing to set forth standards to determine how much spillage is too much, courts, the Court is condemning taxpayers and the IRS to wander in the dark.

#### D. *En Banc* Decision

After the Panel issued its decision, both parties filed Petitions for Rehearing *En Banc*: the government, with respect to whether the documents were protected work product, and Textron, with respect to the waiver issue. On March 24, 2009, the First Circuit denied Textron's petition; on March 25, 2009, the First Circuit granted the government's petition and vacated the panel's decision. The case was argued before the five active judges on the First Circuit on June 2, 2009.

On August 13, 2009, in a 3-2 decision, the First Circuit reversed the decision of the district court. Although paying lip service to its prior decision in *State of Maine*, the First Circuit now held that dual-purpose documents are not protected: "We now conclude that under our own prior Maine precedent—which we reaffirm en banc—the Textron work papers were independently required by statutory and audit requirements and that the work product privilege does not apply."

Although the First Circuit couched its latest decision under the "because of" test laid out in *Maine*, it is plain that the Court adopted a very different legal standard:

[T]he IRS is unquestionably right that the immediate motive of Textron in preparing the tax accrual work papers was to fix the amount of the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor. And Textron may be correct that unless the IRS might dispute an item in the return, no reserve for that item might be necessary, so perhaps some of the items might be litigated. But in saying that Textron wanted to be "adequately reserved," *the district judge did not say that the work papers were prepared for use in possible litigation—only that*

*the reserves would cover liabilities that might be determined in litigation. If the judge had made a "for use" finding—which he did not—that finding would have been clearly erroneous.*<sup>24</sup>

This standard—"prepare for use in possible litigation"—is unprecedented and has never been adopted by any other court. Moreover, it should be plain to any reader that it is far different from the "because of" enunciated by the Second Circuit in *Adlman* and adopted by the First Circuit itself in *Maine*. The First Circuit attempted to address the disparity in its rearticulated standard with the phrase used in Rule 26(b)(3) of the Federal Rules of Civil Procedure (FRAP)—"prepared in anticipation

of litigation or for trial"—and concluded that the phrase "meant only that the work might be done for litigation but in advance of its institution."

In order to apply its new legal standard, the court impermissibly made factual findings that were not supported by the record. Specifically, the court found that "the immedi-

ate motive of Textron in preparing the tax accrual work papers was to fix the amount of the tax reserve on Textron's books and to obtain a clean financial opinion from its auditor." The court stated that "the purpose of the work papers was to make book entries, prepare financial statements and obtain a clean audit cannot be disputed." Moreover, the court found that "the only purpose of Textron's papers was to prepare financial statements." Finally, the court stated, "There is no evidence in this case that the work papers were prepared for such a use or would in fact serve any useful purpose for Textron in conducting litigation if it arose."

The court appears to have been swayed, at least in part, by a desire to protect the public from transactions that the IRS views as abusive. The court stated:

[T]ax collection is not a game. Underpaying taxes threatens the essential public interest in revenue collection. ... The practical problems confronting the IRS in discovering under-reporting of corporate taxes, which is likely endemic, are serious. Textron's return is massive—con-

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stituting more than 4,000 pages—and the IRS requested the work papers only after finding a specific type of transaction that had been shown to be abused by taxpayers. It is because the collection of revenues is essential to government that administrative discovery, along with many other comparatively unusual tools, are furnished to the IRS.

The court apparently believed that Textron was not playing fair when it entered into abusive transactions and hid them in a 4,000-page tax return. However, seeking the mental impressions of Textron's tax advisors concerning the likelihood that Textron will prevail in litigation with the IRS is not the only way to level the playing field between taxpayers and the IRS. Under current law, taxpayers are required to disclose listed and reportable transactions to the IRS and to reconcile book-tax differences by filing a Schedule M-3. Thus, transactions such as those entered into by Textron are required to be disclosed to the IRS, and they will be reviewed by the IRS's Office of Tax Shelter Analysis. The IRS in no way needs a taxpayer's tax accrual workpapers in order to discover whether a taxpayer has entered into an allegedly abusive transaction.

Judge Torruella's dissent vigorously argues against the majority's abandonment of the "because of" test laid out in *Maine* and its substitution with a new, stricter standard, the "prepared for use" test. The dissent argues this new standard is "an even narrower variant of the widely rejected 'primary motivating purpose' test used in the Fifth Circuit and specifically repudiated" by the First Circuit.

Moreover, the dissent points out that *Maine* explicitly adopted the standard set forth by the Second Circuit in *Adlman*, which held that similar workpapers are protected work product. In *Adlman*, the Second Circuit explicitly rejected the majority's interpretation of FRAP Rule 26(b)(3) (the text of Rule 26(b)(3) does not limit its protection to materials prepared to assist at trial but also to documents prepared in anticipation of litigation). Thus, according to the dissent, the *en banc* court's decision not only represents a striking shift for the First Circuit, it also creates a conflict with the Second Circuit.

The dissent also disagreed with the majority's characterization of the facts. The dissent explained that "Textron's litigation hazard percentages contain exactly the sort of mental impressions about the case" that the Supreme Court of the United States in

*Hickman v. Taylor* sought to protect. "In fact, these percentages contain counsel's ultimate impression of the value of the case ... [r]evealing such impression would have clear free-riding consequences."

The dissent argues that under the "because of" test articulated in *Maine*, the majority should have concluded the workpapers were protected work product. It also states that the majority should not recharacterize the district court's findings and "should accept the district court's factual conclusion that Textron created these documents for the purpose of assessing its chances of prevailing in potential litigation over its tax return in order to assess risks and reserve funds."

The dissent also accuses the majority of stretching to reach a result-oriented decision: "In straining to craft a rule favorable to the IRS as a matter of tax law, the majority has thrown the law of work-product protection into disarray." The majority has succeeded to "further the split [among the Circuits] by purporting to apply the 'because of' test while rejecting the test's protection for dual purpose documents." In fact, the majority has applied a new test that "requires that documents be actually 'prepared for use' in litigation." The dissent invites resolution: "The time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country."

## IV. Observations

On August 21, 2009, Textron filed a motion to stay the mandate of the *en banc* Court's decision pending the timely filing of a petition for certiorari. The *en banc* Court granted the motion by order dated September 16, 2009.

In the meantime, taxpayers and potential litigants should carefully review the contents of their workpapers with an eye to the possibility that they may be subject to disclosure to the IRS or another adversary. Until such time as the Supreme Court grants certiorari and reverses the First Circuit's decision, the IRS will be emboldened by *Textron*, abandon its policy of restraint and begin requesting tax accrual workpapers more frequently. Indeed, IRS Chief Counsel Wilkens has announced that the IRS is developing a new approach to obtaining companies' information on certain tax returns.<sup>25</sup> There may be some within the IRS advocating a mandatory IDR requesting tax accrual workpapers at the beginning of every audit.

The Supreme Court should and likely will grant certiorari in *Textron*. The First Circuit's decision in *Textron* not only represents a major shift from its prior decision in *Maine*, it raises conflicts with the law of other circuits, most notably the Second Circuit's decision in *Adlman*. The federal courts have long recognized that "uniformity of decision among the circuits is vitally important on issues concerning the administration of the tax laws."<sup>26</sup> The addition by *Textron* of a third "prepared for use" test alongside the existing "because of" and "primary motivating purpose" tests merely adds further confusion to an area of the federal income tax law that already is far from clear.

Perhaps most important, the First Circuit's decision, if allowed to stand, will have broad rami-

fications outside of the tax law.<sup>27</sup> The "prepared for use" test announced by the court is in no way limited to tax accrual workpapers requested by the IRS, or to disputes with the IRS. Rather, the *Textron* standard would require disclosure to any adversary in litigation of virtually all dual-purpose documents containing an analysis of a litigant's probability of prevailing in a legal dispute. As the Supreme Court stated in *Hickman v. Taylor*, opening a lawyer's files and mental processes to the "free scrutiny of their adversaries" would be "harsh and unwarranted."

Currently, *Textron's* Petition for Certiorari is due in the Supreme Court on December 24, 2009, after the publication of this article.

### ENDNOTES

<sup>1</sup> *Textron Inc.*, CA-1, 2009-2 USTC ¶50,574.  
<sup>2</sup> *Arthur Young & Co.*, SCT, 84-1 USTC ¶9305, 465 US 805, at 816.  
<sup>3</sup> Code Sec. 7602.  
<sup>4</sup> *Arthur Young*, *supra* note 2; and Code Sec. 7252.  
<sup>5</sup> Where the client is a corporation, the power to claim or waive the privilege resides in the corporation's officers and directors acting subject to their fiduciary constraints. See *CFTC v. Weintraub*, 471 US 343, 348-49 (1985).  
<sup>6</sup> Waiver of the privilege most commonly occurs when contents of the communication are disclosed to persons outside the privileged relationship. See *In re Sealed Case*, CA-DC, 82-1 USTC ¶9335, 676 F2d 793, 809 (disclosure to SEC pursuant to "voluntary disclosure" program); *F.S. Zolin*, CA-9, 87-1 USTC ¶9234, 809 F2d 1411, 1415 (disclosure to biographer).  
<sup>7</sup> *Hickman v. Taylor*, 329 US 495 (1947).  
<sup>8</sup> Fed. R. Civ. P. 26(b)(3).  
<sup>9</sup> Announcement 84-46, IRB 1984-18, 18 (Apr. 30, 1984).  
<sup>10</sup> *El Paso Co.*, CA-5, 82-2 USTC ¶9534, 682 F2d 530, 532, *cert. denied*, 466 US 944 (1984).  
<sup>11</sup> *M. Adlman*, CA-2, 98-1 USTC ¶50,230, 134 F3d 1194.  
<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, 134 F3d, at 1198, 1205.  
<sup>14</sup> *Maine v. United States DOI*, 298 F3d 60, 68 (1st Cir. Me. 2002).  
<sup>15</sup> *Maine v. United States DOI*, 124 FSupp2d 728 (D. Me. 2001).  
<sup>16</sup> *Supra* note 14, *citing Adlman*, at 1198-99.  
<sup>17</sup> *Id.*, *quoting Adlman*, at 1202.  
<sup>18</sup> *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176 (N.D. Ill. 2006).  
<sup>19</sup> Although beyond the scope of this article, the court also evaluated whether the IRS had overcome the work product protection by a showing of substantial need for the protected documents and an inability to otherwise obtain the information contained therein, or its substantial equivalent, without due hardship. The court concluded that the IRS had failed to carry the burden of demonstrating a substantial need for ordinary work product, let alone the heightened burden applicable to *Textron's* tax accrual workpapers, which constitute opinion work product. Although the court recognized that the opinions and conclusions of *Textron's* counsel and tax advisors might provide insight into *Textron's* negotiating position or litigation strategy, it held that those opinions or conclusions had little bearing on the determination of its tax liability. Moreover, the court stated that "the forced disclosure of those opinions would

put *Textron* at an unfair disadvantage in any dispute that it might arise with the IRS."

<sup>20</sup> Judge Torruella's opinion was joined by Judge William W. Schwarzer, District Judge of the Northern District of California, sitting by designation.

<sup>21</sup> *Maine*, *supra* note 14.

<sup>22</sup> *Id.*, at 70 (internal citations omitted).

<sup>23</sup> See *United States v. Tellier*, 255 F2d 441 (2d Cir. N.Y. 1958); *United States v. Edison*, 2008 U.S. Dist. LEXIS 6825, \*6 (N.D. Cal. 2008).

<sup>24</sup> Emphasis added.

<sup>25</sup> October 27, 2009, Tax Executive Institute's Annual Conference.

<sup>26</sup> *L. Keasler*, CA-8, 85-2 USTC ¶16,440, 766 F2d 1227. See also *Aeroquip-Vickers, Inc.*, CA-6, 2003-2 USTC ¶50,693, 347 F3d 173 (same); *S.G. Hill*, CA-9, 2000-1 USTC ¶50,248, 204 F3d 1214, at 1217-18 (same); *CUNA Mutual Life Ins. Co.*, CA-FC, 99-1 USTC ¶50,245, 169 F3d 737, 743 (same); and *North American Life & Casualty Co.*, CA-8, 76-1 USTC ¶9365, 533 F2d 1046, 1051 (same).

<sup>27</sup> Amicus Briefs in support of *Textron* were filed in the First Circuit by the Financial Executives International, the Association of Corporate Counsel, and the U.S. Chamber of Commerce.

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