

## TEXTRON: WORK PRODUCT DOCTRINE LIMITED BY FIRST CIRCUIT

On August 13, 2009, the U.S. Court of Appeals for the First Circuit held in *United States v. Textron Inc.*, 2009 U.S.App. LEXIS 18103, that the work product doctrine does not protect tax accrual work papers from IRS discovery because the papers are prepared to support financial statements rather than “for use in possible litigation.”

Tax accrual work papers are documents prepared by a company’s accounting and tax advisors to determine the amount of necessary tax reserves and to analyze items on a company’s tax return. Public companies (and companies with publicly traded debt) are typically required to prepare and disclose tax accrual work papers to independent auditors in order to comply with FIN 48. Accordingly, tax accrual work papers can identify weak positions in a company’s tax return and, therefore, can act as a convenient roadmap for IRS auditors. This *Textron* decision may shape how advisors tasked with preparing tax accrual work papers handle such preparation. It will be interesting to see if preparers segregate the documents by issue in an effort to increase the chance of sustaining an argument that one document (discussing an issue with a high risk for litigation) was prepared “for use in possible litigation” while the remaining documents were prepared in the course of business (i.e., to identify and calculate the correct tax reserve).

Most importantly, the *Textron* decision is not limited to the tax field as the First Circuit seems to have coined a new, narrower test for application of the work product doctrine. The First Circuit concluded that any experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials. To support the opinion the First Circuit relied on an expert that stated the tax accrual work papers would have been created even if litigation was not a reasonable possibility. Based on the Court’s reasoning, it is unclear whether documents that are prepared in the course of business but which also analyze potential litigation risks will be afforded protection under the work product doctrine.

It remains uncertain whether *Textron* will petition the U.S. Supreme Court. Brown Rudnick will continue to monitor this situation and provide updates when and if developments occur.



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