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Self-Critical Analysis Privilege: Does It Protect Manufacturers Seeking to Review and Improve Internal Practices and Procedures?

By Elisabeth M. McOmber – July 24, 2014

In the wake of GM's very public airing of its internal practices, including a much-publicized training PowerPoint page containing a list of words allegedly not to be used by GM engineers in internal reports and presentations, a few questions naturally arise: (1) whether and how product manufacturers can appropriately review, assess, and improve their internal practices and procedures while protecting these efforts from unnecessary public disclosure and from being used against them in litigation; and (2) whether public policy weighs against or in favor of such protection. Depending on the jurisdiction and court, some protection may be available under a qualified "self-critical analysis" privilege. Most courts have found that such a privilege is quite limited, however, and it is important to understand the nature of the privilege and how it has been applied to protect—or not protect—documents and other internal company information, depending on the circumstances.

The Privilege and Its Purpose

The self-critical analysis privilege, which has also been referred to by courts as the self-evaluative analysis privilege, the peer-review privilege, the deliberative privilege, and the self-evaluation privilege, is a qualified privilege designed to protect an entity's internal reviews and investigations from disclosure based on the policy of encouraging companies to assess their compliance with regulations and laws and make any necessary changes without fear of reprisal in any future litigation. *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), is widely recognized to be the first case to identify the privilege.

Bredice involved a motion to compel production in a medical malpractice action of internal minutes and reports of medical staff reviews conducted by the hospital at issue. The court found that the purpose of the medical review meetings was "the improvement, through self-analysis, of the efficiency of medical procedures and techniques" and that the undeniable value of such proceedings "would be destroyed if the meetings and the names of those participating were to be opened to the discovery process." *Bredice*, 50 F.R.D. at 250. Based on these public policy concerns, the court held that "[t]hese committee meetings, being retrospective with the purpose of self-improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest." *Bredice*, 50 F.R.D. at 251.

As one court explained over 20 years ago:

The privilege protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability.

Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 524 (N.D. Fla. 1994). This aptly describes the dilemma that manufacturers, regulators, and the public continue to face today.

Following *Bredice*, courts analyzing the privilege appear to uniformly agree that the privilege is qualified rather than absolute and thus can be overcome if the party seeking the information demonstrates that the need and relevance of the information outweighs the public policy concerns in a given case. Accordingly, several relatively uniform criteria that a party seeking to apply the privilege must demonstrate have developed: (1) the information must result from a critical self-analysis by the party seeking protection; (2) there must be a strong public interest in not chilling the free flow of the type of information being sought; (3) the information must be of a type that would be impeded or chilled if discovery were allowed; and (4) the documents and information must have been prepared with the expectation that they would be kept confidential and consistently maintained as confidential by the individual or entity at issue. *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 425–26 (9th Cir. 1992) (citing Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083 (1983)). Some courts have narrowed the requirements further, holding that the privilege applies only to materials prepared for mandatory government reports. See, e.g., *Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985). In addition, some courts have applied a balancing test to determine if the privilege is overcome, looking to criteria such as “(1) the extent to which the information may be available from other sources; (2) the degree of harm that the litigant will suffer from [its] unavailability; and (3) the possible prejudice to the agency’s investigation.” *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1100 (D.N.J. 1996).

To Protect or Not Protect—An Unresolved Question

There is no U.S. Supreme Court ruling specifically addressing the self-critical analysis privilege. While there is consistency regarding the general policies and principles underlying the privilege and the criteria that must be met for it to apply if it exists, there is little to no uniformity as to how it has been analyzed and applied by courts across the country. Further, although this article focuses on products liability actions and other similar personal injury actions against companies, courts also have reached disparate results in cases involving employment discrimination, securities litigation, aviation litigation, environmental litigation, and civil rights actions. Indeed, the only area where there appears to be some uniformity is in cases involving medical peer-review proceedings and analogous evaluations conducted by medical providers and institutions where a state statute specifically protects such information.

Courts that have applied the privilege in both products liability and other cases have treated it similarly to work product protection, ruling that the facts revealed in internal investigations and associated documents are not protected, but opinions, mental impressions, evaluations, theories,

and recommendations are protected unless substantial need is demonstrated. *See, e.g., Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992) (protecting subjective analysis but permitting factual materials to be discovered). Courts have also drawn a distinction between documents required to be submitted to an agency by law, such as materials provided to the Consumer Product Safety Commission (CPSC) pursuant to 15 U.S.C. § 2065(b), as opposed to materials created voluntarily by a manufacturer to evaluate the safety of its products. *Compare Shipes v. BIC Corp.*, 154 F.R.D. 301 (M.D. Ga. 1994) (protecting CPSC submission documents that “critically analyze BIC products, testing, or procedures”), *with Dowling*, 971 F.2d 423 (finding that “the fairness rationale offered to justify application of the privilege to documents that a party has been legally required to prepare is inapplicable to voluntarily conducted safety reviews”), and *Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004) (finding the privilege did not apply to “routine internal corporate reviews of matters related to business operations, recalls, and safety concerns” and citing *Dowling*). *See also Roberts v. Carrier Corp.*, 107 F.R.D. 678 (N.D. Ind. 1985) (distinguishing internal evaluations prepared specifically under government regulations from voluntary evaluations for other business purposes, including analyzing potential defects).

Indicative of the lack of any uniformity in application, however, courts addressing these same issues have ruled exactly the opposite of one another. A New York court found that materials required to be submitted to the CPSC were not protected by the self-critical analysis privilege, finding that the Consumer Product Safety Act did not expressly protect materials from disclosure in a personal injury action and also that the plaintiffs’ actions were brought under state rather than federal law. New York law had not recognized the self-critical analysis privilege and generally disfavored the creation of new evidentiary privileges. *Lamitie v. Emerson Elec. Co.*, 535 N.Y.S.2d 650 (App. Div. 1988). The *Lamitie* court also found that protecting the information would not further public policy goals, stating that the defendant manufacturer had not shown that “full candor with the CPSC, mandated in any event by statute, would be sufficiently enhanced by making its communications with that agency privileged to outweigh the benefits of the truth-seeking process from disclosure.” 535 N.Y.S.2d at 653–54. The District of Vermont found the same in *Lawson v. Fisher-Price, Inc.*, 191 F.R.D. 381 (D. Vt. 1999). And at least one court has held that materials created pursuant to a government-required internal investigation into an airplane crash were not protected specifically because they were required to be disseminated outside the company to a government agency. *In re Air Crash Near Cali, Colombia on Dec. 20, 1995*, 959 F. Supp. 1529 (S.D. Fla. 1997).

This is directly contrary to the express finding by the Middle District of Georgia that “[t]he consuming public is benefitted by the continued full and frank disclosure of product complaint and safety information to the CPSC. Further disclosure of self-evaluative reports would be stifled if manufacturers feared that their frank disclosures might be used against them in a civil action.” *Shipes*, 154 F.R.D. at 307. Likewise, some courts have extended protection to the exact same type of voluntary internal safety reviews rejected by the Ninth Circuit and District of Nebraska on the basis that there is a strong public interest in protecting such information and production would curtail efforts to improve safety. *See, e.g., Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 363–64 (N.D. Ohio 1999) (finding that internal safety review met the criteria established in the *Dowling* decision and production would “do great damage to this Defendant’s efforts to improve safety and the efforts of business and industry in general”).

In addition, courts have distinguished applicability of the self-critical analysis privilege based on whether the claims in the case are brought under federal or state law. Because products liability claims are typically state-law based, the availability of the protection will frequently—but not always—depend on the law in the jurisdiction in which the claims are brought or a prediction by the federal courts in that jurisdiction as to how the state courts would rule on the issue. A number of state courts have outright rejected the existence of the privilege in the given state. *See, e.g.*, [*Harris v. One Hope United, Inc.*](#), 2 N.E.3d 1132 (Ill. App. Ct. 2013); [*Uniformed Fire Officers Ass'n v. City of New York*](#), 955 N.Y.S.2d 5 (App. Div. 2012); [*In re Fisher & Paykel Appliances, Inc.*](#), 420 S.W.3d 842 (Tex. App. 2014). These decisions particularly note the absence of state statutes or court rules establishing the privilege and typically view the establishment of such a privilege as a matter for the legislature, not the courts.

Not surprisingly, federal courts have differed in their analysis as to whether the state in which they sit would recognize the privilege. This includes federal courts in the same state reaching opposite results. *Compare Shipes*, 154 F.R.D. 301 (finding that Georgia would recognize the privilege), with [*Lara v. Tri-State Drilling, Inc.*](#), 504 F. Supp. 2d 1323 (N.D. Ga. 2007) (disagreeing with *Shipes* and holding no privilege existed under Georgia law). Where cases have both state and federal law claims, federal courts apply federal law to determine whether the privilege applies. But again, these courts have reached divergent results. *Compare In re Digitek Prod. Liab. Litig.*, No. 1968, 2010 WL 519860 (S.D. W. Va. Feb. 10, 2010) (finding no Fourth Circuit court had applied the privilege and declining to acknowledge it), with *Reichhold*, 157 F.R.D. 522 (applying the privilege under federal case law even though Florida had not adopted it and finding “[t]here are sound policy reasons favoring the general adoption of a self-critical analysis privilege”).

Finally, like other privileges, even where it is recognized, the self-critical analysis can be waived and does not apply where a party seeks to rely on the underlying investigation findings. *See, e.g.*, [*Lawndale Restoration Ltd. P'ship v. Acordia of Ill., Inc.*](#), 853 N.E.2d 791 (Ill. App. Ct. 2006) (finding statutorily created self-evaluative privilege waived by voluntary disclosure of audit report); *Volpe v. US Airways, Inc.*, 184 F.R.D. 672 (M.D. Fla. 1998) (“[B]y relying on its internal investigation as an affirmative defense to liability, defendant has waived any privilege to protect the documents which comprise the internal investigation.”). Thus, in the products liability context, if a manufacturer asserts that the product at issue complies with applicable safety standards or industry practices, it arguably would be prevented from protecting any internal analysis evaluating such standards or practices.

Conclusion

In sum, courts applying the exact same policy principles to whether the self-critical analysis privilege should be applied in products liability and similar actions have reached diametrically opposed conclusions. Thus, some protection for internal reviews and assessments may be afforded in litigation depending on the jurisdiction, whether the case at issue involves state law, federal law, or mixed claims, and the particular nature of the internal analysis and needs of the plaintiff in the case. However, absent being affirmatively established by state or federal statute or the U.S. Supreme Court, the applicability of the self-critical analysis remains uncertain at best.

Keywords: litigation, products liability, internal reviews, self-critical analysis privilege, self-evaluative analysis privilege, peer-review privilege, deliberative privilege, self-evaluation privilege

[Elisabeth M. McOmber](#) is with Snell & Wilmer LLP in Salt Lake City, Utah.