



## Benefits to Products Liability Litigation: The Self-Critical Analysis Privilege

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As companies strive to make their products as safe as possible, they face an interesting dilemma: should they test products only up to mandatory government levels, or should they go beyond? For example, if the manufacturer of a child car restraint is required only to test a product to a 30 mph impact, should that manufacturer test the product at higher speeds? And after such a test, should the company internally evaluate what happens or what is learned? Logic would suggest that companies ought to do what they can, even beyond what is required of them, to make sure their product is as safe as possible — and if learning what happens at the point of failure, above and beyond any standards, can improve a product, manufacturers should be free to conduct such research and development without fear of negative consequences. However, such testing carries a significant potential risk for companies. Should the product become the subject of a lawsuit, some or all of that testing information could be subject to discovery. The manufacturer whose research went “above and beyond” could find that research used against it in open court as supposed evidence of a product defect. This may prove to be a strong disincentive for companies to test their products beyond what is required by mandatory government regulation.

One possible solution to this dilemma is the self-critical analysis (or self-evaluation) privilege. Some courts have suggested that companies may have this common law privilege to protect certain documents from discovery. In addition, many states have promulgated statutes that protect self-critical analysis documents in the medical peer review, insurance, and environmental contexts. The public policy reasoning behind adoption of these statutes may

assist companies in the product liability context, as well as offer a model that could be adapted for future statutory initiatives.

### Foundations of the Self-Critical Analysis Privilege

First recognized over three decades ago, the self-critical analysis privilege is grounded on the premise that potentially damaging self-criticism should, at times, be protected from discovery. The reason for this protection is simple: the greater good is served by promoting (not penalizing) what companies do to improve their products and services.

The first case to recognize the self-critical analysis privilege was a medical malpractice case, *Bredice v. Doctor's Hospital*, 50 F.R.D. 249 (D.D.C. 1970). In *Bredice*, the plaintiff attempted to discover from the hospital minutes and reports of peer review meetings which included analysis and evaluation of the hospital's work and

procedures, particularly the meeting in which the plaintiff's care was evaluated. *Id.* at 249–50. The court stated that it was essential to protect the board minute meetings from discovery, because “[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded.” *Id.* at 251. The court concluded that allowing hospitals to evaluate the care they are providing without fear that such evaluation will subject them to further liability clearly benefits the public, and should therefore be protected. *Id.*

### Current Trends

Since *Bredice*, a number of courts have considered the self-critical analysis privilege — some have recognized the privilege (in the context of product liability as well as in other areas) — while others have not.

Of those courts that have acknowledged the privilege, most have required that the documents meet the following criteria: (1) the information produced must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of that information; (3) the information must be of the type whose flow would be curtailed if discovery were allowed; (4) the information must have been created with the intention that it be kept confidential and it has in fact remained confidential; and (5) the information must be subjective, rather than purely factual, in nature. *Morgan v. Union Pacific Railroad Co.*, 182 F.R.D. 261, 264–65 (N.D. Ill. 1998); see also *Tice v. American Airlines, Inc.*, 192 F.R.D. 270, 273 (N.D. Ill. 2000)

In addition, there has been discussion in the courts regarding whether a document must also be something prepared for a mandatory government report. Courts have stated that the self-critical analysis privilege is driven by a public policy that strives to “assure fairness to persons required by law to engage in self-evaluation.” *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 684 (N.D. Ind. 1985) citing *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218 (D.Mass. 1980). (emphasis in original). Accordingly, these courts believe the self-critical analysis should only be invoked to ensure that: (1) companies are not unfairly forced to produce documents that the government has required them to create; and (2) there is a free flow of information between companies and governmental agencies. *Id.*

Not all courts have required this additional element. Some courts have shown a willingness to protect information not included in governmental reports. These courts have concluded that the public policy rationale behind the self-critical analysis is quite different with regard to employment discrimination cases, for example, than for tort cases.

*Morgan*, 182 F.R.D. at 265–66. In employment discrimination cases, the courts should perhaps be more concerned with assuring fairness to companies who are legally required to engage in self-evaluation. In tort cases, however, the courts should perhaps be more concerned with promoting “public safety through voluntary and honest self-analysis. Consequently, in personal injury cases [for example] . . . whether a particular document was prepared pursuant to a governmental mandate is unrelated to the policy goals that the self-critical analysis privilege seeks to achieve.” *Id.*

In addition, some courts have pointed out that confidentiality may not be essential to the maintenance of relationships between companies and governmental agencies. For example, companies who manufacture products are required by law to make certain disclosures to the Consumer Product Safety Commission (CPSC). Therefore, the court does not need to provide further protection for such communication. Companies will make the disclosures — whether or not they believe the information will be protected — because the law requires them to do so. *Lawson v. Fisher-Price, Inc.*, 191 F.R.D. 381, 386 (D. Vt. 1999).

#### Self-Critical Analysis in the Products Liability Context

Several courts have acknowledged the self-critical analysis in the products liability context, and analysis of those decisions offers some important insights for companies. For instance, the U.S. District Court’s decision in *Shipes v. BIC* demonstrates the potentially persuasive power of self-critical analysis statutes, even if they apply to an area outside of products liability. In *Shipes*, the plaintiff sought punitive damages after being burned by an allegedly defective BIC disposable lighter. *Shipes v. BIC Corp.*, 154 F.R.D. 301, 304 (M.D. Ga. 1994). BIC sought to prevent discovery of correspondence between BIC and the CPSC under the self-critical analysis privilege. *Id.* at 306–07. In deciding to protect the documents, the court relied on the reasoning behind Georgia’s existing statutory Medical Peer Review privilege. *Id.* at 307. The court held that the statute demonstrated that the general public interest is furthered when organizations or corporations analyze their own safety records. Because the Medical Peer Review Statute offered an analogous protection sought by BIC, the court agreed that any documents submitted to the CPSC would also be protected. The court did note, however, that only information specifically created for submission to the CPSC would be protected. In addition, the court would only shield documents which contained subjective evaluations of BIC products. Factual pieces, such as a compilation of the various claims against BIC, did not contain subjective

evaluations and were therefore not protected. *Id.* at 307–08.

Other courts have found a privilege based on common law alone. In *Bradley v. Melroe Company*, the United States District Court for the District of Columbia upheld the protection of accident reports relating to a Bobcat Skid Steer Loader (“Bobcat”) manufactured by Melroe without any statutory considerations. *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992). During the course of discovery, the plaintiff learned of seven other accidents involving Bobcats. Melroe provided the plaintiff with the factual information regarding the accidents, such as the date, place of accident, and the name and address of the reporter. The plaintiff then sought production of the in-house investigative files for each of those accidents. *Id.* at 2–3. In denying the plaintiff’s motion, the court invoked the self-critical analysis privilege based on the reasoning that “the ultimate benefit to others from this critical analysis of the product or event far outweighs any benefits from disclosure.” *Id.* at 3. The court did note, however, that the plaintiff could have overcome the privilege by demonstrating substantial need for the materials. The *Bradley* court found that no need had been demonstrated because the factual materials would be sufficient. *Id.*

However, other courts have refused to uphold the self-critical analysis privilege without statutory authority. In *Scroggins v. Uniden Corp.*, the plaintiff sought damages for injury which allegedly occurred when a phone rang in his ear. *Scroggins v. Uniden Corp.*, 506 N.E.2d 83 (Ind. Ct. App. 1987). Uniden Corporation sought to protect communications between itself and the CPSC. In denying Uniden’s motion to protect the documents, the Indiana Court of Appeals noted that, in Indiana, privileges do not exist without a statute. Following that general rule, the court declined to create a privilege where the legislature had not produced one.

#### Know the Statutes

Overall, the product liability case law demonstrates the importance of existing self-critical analysis statutes, even if they are not specifically addressing products liability. For companies seeking to protect product-testing information, it is important to be aware of these existing statutes and the theories which led to their adoption. By arguing that it is clear that their particular state legislature has adopted the general premise of the self-critical analysis privilege, companies may successfully argue that the privilege applies to product-testing documents.

One important area where the self-critical analysis has been codified has been in insurance. In Illinois, the legislature established a privilege for insurance companies’

voluntary “compliance self-evaluative audit documents.” Ill. Rev. Stat. Ch. 215, §5/155/35(b)(1). In New Jersey, the state legislature has adopted a privilege for insurance companies’ “voluntary compliance review reports,” which have been defined as reviews, assessments, audits and evaluations not required by law. N.J. Rev. Stat. §17:23C-2 (2001). North Dakota, Oregon, and Michigan have also enacted laws protecting insurance company self-audit documents. N.D. Cent. Code §26.1-51-02; Or. Rev. Stat. §329 Sect 2; 2001 Mich. Pub. Acts 275.

Environmental self-audits have also received substantial protection. In Arkansas, for example, environmental audit reports are not admissible as evidence in any civil or administrative action. Ark. Code §8-1-303. In Colorado, the environmental audit report statute states the legislature’s view that “limited expansion of the protection against disclosure will encourage . . . voluntary compliance and improve environmental quality.” Col. Rev. Stat. §13-25-126.5. In most of the states which have adopted similar laws, plaintiffs are allowed to petition for *in camera* review, and if a violation of the law is found, the information will then become discoverable.

In the medical peer review context, statutes typically protect both the members of the committee which performs medical peer reviews, and the institution as a whole. A number of the statutes, such as Georgia’s, make it clear that the facts surrounding any case will be discoverable. *Shipes*, 154 F.R.D. at 307. Notes, proceedings, and minutes from medical peer review committees, however, are protected. In addition, attendees of the meetings are prohibited from being subpoenaed, if they did not have independent knowledge of the facts regarding the proceedings.

### Important Tips to Remember

It is clear that existing statutes may assist companies seeking to protect product-testing documents. It is also important for companies to consider a number of items when seeking to protect their documents. First, companies should make sure they are aware of any court decisions within their jurisdiction regarding the self-critical analysis privilege.

Second, companies must remain vigilant when creating their documents if they wish to enjoy self-evaluative protections. A protected document must be confidential in nature, and must have been kept confidential at all times. Companies need to be sure when preparing any document that they clearly express their intention that the documents should not be shared, and make sure that they are disseminated only among persons involved in self-critical analysis.

The self-critical analysis privilege is a valuable tool that supports a laudable public goal—encouraging companies to improve the goods and services they provide without fear of legal recrimination. Litigation counsel and in-house lawyers alike should take care to be familiar with the area and its potential benefits for their clients.

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