

Legal Journal

EPA Rejects Self-Audit Privilege for Corporations in Environmental Litigation

by J. Daniel Hull*

I. INTRODUCTION

Corporations which conduct voluntary in-house environmental audits cannot shield the results of such investigations under a "self-audit" privilege, according to an enforcement policy recently published by the Environmental Protection Agency (EPA).

EPA's controversial "interim guidance," see, 60 *Federal Register* 16875 - 16879 (April 3, 1995), was issued after intense lobbying over the past year by industry groups who have argued that such information should be entitled to a qualified privilege from discovery under the judicially-created doctrine of "self-critical analysis". As a result of EPA's announcement, companies—particularly those firms which are closely regulated or scrutinized by environmental agencies—continue to lack incentives to conduct self-audits into pollution of air, land, and water, to remedy any violations and to report them to state and federal agencies. Before EPA issued the policy, 10 states had codified some form of an environmental self-audit privilege. Now, firms doing both in these states or in jurisdictions without the privilege (which include Pennsylvania) can no longer be assured that the results of their internal audits will be kept from an agency or out of a courtroom. Federal courts and the Congress, however, are beginning to address the issue on their own.

II. JUDICIAL DEVELOPMENT OF THE CORPORATE SELF-AUDIT PRIVILEGE

The Self-Audit Privilege (SAP) — also referred to the "self-evaluative" privilege or "self-critical analysis" privilege — is analogous to the public policy rule excluding evidence of subsequent remedial measures. See, e.g., Rule 407, Fed-

eral Rules of Evidence. The privilege was first articulated 25 years ago in the medical malpractice case of *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd without opinion*, 479 F.2d 920 (D.C. Cir. 1973). In *Bredice*, the plaintiff attempted to discover physician peer review performance records. The records reflected discussions by physicians which took place after the death of her husband. The court denied Mrs. Bredice access to the performance records on grounds that such reviews of past performance were valuable in improving health care, and would be stifled if such discussions were discoverable in litigation. The *Bredice* court noted that the protection was not inviolate and could be overcome by a "showing of exceptional circumstances". 50 F.R.D. at 250.

Since *Bredice*, the Self-Audit Privilege has been applied sporadically by federal and state courts in a number of contexts. These have included in-house confidential assessments of hospital, medical practices, employment practices, employer compliance with EEOC procedures, product safety, product liability, accident investigations, accounting records, and securities law.

In September of 1994, the U.S. District Court for the Northern District of Florida, in *Reichhold Chemicals, Inc., v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994), became the first federal court to flatly acknowledge and apply the privilege in an environmental context. *Reichhold* arose out of litigation under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund") against eight former owners of Reichhold's industrial plant site in Pensacola, Florida. Reichhold

(See EPA on page 6)