Federal courts disagree on the most elemental issue involving the work product protection – the scope of that protection. The United States Supreme Court may ultimately choose the proper approach.

Some courts limit work product protection to documents "prepared for the purpose of assisting an attorney in preparing for litigation, and not some other reason." Judicial Watch, Inc. v. United States Dep't of Homeland Sec., Civ. A. No. 11-00604 (CKK), 2013 U.S. Dist. LEXIS 27589, at *37 (D.D.C. Feb. 28, 2013) (citation omitted). This "assist" test protects only the type of "raw material" that lawyers prepare in connection with litigation. Other courts take a far broader view, protecting documents prepared "because of" litigation, even if they will not be used to "assist" in the litigation. McCarthy v. Wells Fargo Bank (In re El-Atari), Ch. 7 Case No. 09-14950-BFK, Adv. No. 11-01427, 2013 Bankr. LEXIS 589, at *11 (Bankr. E.D. Va. Feb. 14, 2013). An example would be a company's internal documents about how it might pay for a judgment if it loses a case – such documents would not "assist" in the litigation, but would not exist but for the litigation. Even under this broader test, the litigant must show that the withheld documents would not have been prepared "in essentially similar form" absent the litigation or anticipated litigation. Tudor Ins. Co. v. Stay Secure Const. Corp., No. 12 Civ. 3844 (LTS) (GWG), 2013 U.S. Dist. LEXIS 27195, at *15 (S.D.N.Y. Feb. 27, 2013).

Because courts apply their own work product rules without a choice of laws analysis, companies normally will not know until they are sued whether they can rely on the more liberal "because of" test – or whether they will have to meet the more demanding "assist" test.