

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED

JUN 21 2011
CLERK OF CIRCUIT COURT #77
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES SANITARY DISTRICT,)
Individually and on behalf of all others)
similarly situated,)

Plaintiff,)

v.)

SYNGENTA CROP PROTECTION, LLC, f/n/a)
SYNGENTA CROP PROTECTION, Inc., and)
GROWMARK, INC.,)

Defendants.)

Case No. 2004-L-000710

**DEFENDANT SYNGENTA CROP PROTECTION, LLC'S
RESPONSE MEMORANDUM OF LAW IN SUPPORT
OF SELF-CRITICAL ANALYSIS PRIVILEGE CLAIMS**

COMES NOW Defendant Syngenta Crop Protection, LLC ("SCP, LLC"), by and through its attorneys, and for its Response Memorandum of Law in Support of Self-Critical Analysis Privilege Claims, states as follows:

In addition to other privileges cited on its privilege log, SCP, LLC has asserted the self-critical analysis privilege. The self-critical analysis privilege, also known as the self-evaluative privilege, has been asserted as a basis to withhold production of certain documents in discovery. Syngenta has not withheld any document based solely on such privilege, but nevertheless asserts the application of the privilege. Pursuant to Rule 137 of the Illinois Supreme Court Rules, and advising the Court, Plaintiffs and their counsel of the same, SCP, LLC and its counsel are urging adoption and application of the self-critical analysis privilege in this case in a good faith argument for the extension or modification of existing law, and not for any improper purpose.

The self-critical analysis privilege is grounded in the notion that open and honest internal client discussions and analysis of acts, omissions, plans or procedures are in the public interest

and should be protected from disclosure to outside persons through discovery ,or otherwise, so as to promote such open and honest discussions. Disclosure of these types of analyses and discussions would have a chilling effect on and/or might lead to the abandonment of such helpful or corrective evaluations which could prevent future injuries, damages, negative occurrences or corrective actions. Generally, in order to make a sufficient showing to support invocation of the self-critical analysis privilege, a party must demonstrate that: (1) the information sought resulted from a self-critical analysis undertaken by the party seeking protection; (2) the public has a strong interest in protecting the free flow of the information sought; (3) the information is of the type whose flow would be curtailed if discovery were allowed; and (4) the document was prepared with the expectation that it would be kept confidential and has in fact been kept confidential. See *Tice v. American Airlines, Inc.*, 192 F.R.D. 270, 272-73 (N.D. Ill. 2000).

SCP, LLC is asserting that a handful of documents sought in plaintiff's discovery meet the test for application of the self-critical analysis privilege. SCP, LLC advises the Court that to its knowledge, no Illinois state court has adopted such privilege. Still, the self-critical analysis privilege has been analyzed in multiple contexts by both U.S. federal courts sitting in Illinois, and in Illinois state courts. See *Robbins v. Provena Saint Joseph Medical Center*, 2004 WL 502327, at *2 (N.D. Ill. March 11, 2004) (analyzing the self-critical analysis privilege and the Illinois Medical Studies Act); *Tice v. American Airlines, Inc.*, 192 F.R.D. 270, 272 (N.D. Ill. 2000) (in analyzing the self-critical analysis privilege Court acknowledges that the flow of safety information would be curtailed if discovery were permitted); *Morgan v. Union Pacific R.R. Co.*, 182 F.R.D. 261, 264 (N.D. Ill. 1998) (in analyzing the self-critical analysis privilege court recognizes that the public has a substantial interest in encouraging such entities to engage in candid and critical self-evaluation for the purposes of promoting safety); *Kingdom Authority v.*

City of Rockford, 2011 WL 245585 *4 (N.D. Ill. Jan. 26, 2011) (concluding that the elements required for the self-critical analysis privilege to apply are not present under the circumstances of the case); *Lawndale Restoration Ltd. Partnership v. Acordia of Illinois, Inc.*, 367 Ill.App.3d 24, 28-31 (Ill. App. 1 Dist. 2006) (analyzing whether the privilege should apply to insurance audit documents by examining 215 ILCS 5/155.35); *Vanek v. Nutrasweet Co.*, 1992 WL 133162 (N.D. Ill. June 11, 1992) (Court acknowledging that the self-critical analysis privilege has been recognized by some courts, but is not yet fully established in the law, analyzes whether the privilege should apply to documents created by a committee established to study diversity in the workplace).

In fact, the self-critical analysis privilege in several forms has even been codified in Illinois. See 215 Ill. Comp. Stat. 5/155.35 (1998) (protection of insurance compliance self-evaluative audit documents); 735 Ill. Comp. Stat. 5/8-2101 (2003) (purpose of the Act is to ensure that members of the medical profession will engage in self-evaluation in the interest of advancing the quality of health care). As the Illinois state legislature has endorsed the underpinnings of the self-critical analysis privilege, this Court has a good faith basis to extend the privilege to the documents at issue here.

In further support of the Court adopting the self-critical analysis privilege, there are numerous Circuit Courts and several non-Illinois federal and state courts that have analyzed the self-critical analysis privilege. See *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992); *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) (recognizing that allowing self-critical analysis to remain privileged creates an incentive for candid self-evaluation, thus assuring fairness); *In re Burlington Northern Inc.*, 679 F.2d 762, 763-766 (8th Cir. 1982); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979) (finding self-

critical analysis privilege does not apply); *Cochran v. National Processing Co.*, 2010 WL 820943 (E.D. Ky. March 4, 2010) (engaging in analysis of the privilege but finding that the documents at issue are not protected under the privilege); *Reid v. Lockheed Martin Aeronautics Co.*, 199 F.R.D. 379 (N.D. Ga. 2001) (finding self-critical analysis privilege applies to reports produced for Lockheed's Diversity Council); *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 196 F.R.D. 310 (S.D. Ohio 2000) (expressing skepticism about privilege); *Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 363 (N.D. Ohio 1999) (concluding the Sixth Circuit would adopt the self-critical analysis privilege); *Sheppard v. Consolidated Edison Co.*, 893 F.Supp. 6, 7 (E.D. N.Y. 1995) (self-critical analysis privilege applied); *Peterson v. Chesapeake & Ohio Railway Co.*, 112 F.R.D. 360, 365 (W.D. Mich. 1986) (finding that there is "merit in the argument for recognition of a self-critical analysis privilege which would facilitate improved responses to hazardous scientific and industrial accidents."); *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 685 (N.D. Ind. 1985) (analyzing the application of the privilege to issue involving product liability); *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D. D.C. 1970) (early recognition of the self-critical analysis privilege); *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004) (declining to extend privilege to an investigative report prepared after an explosion at an ice cream plant); *Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 274 Kan. 194, 220-221 (Kan. 2002) (finding that the self-critical analysis privilege does not apply); *Kansas Gas & Elec. v. Eye*, 246 Kan 419, 421-429 (1990) (ruling documents controlled by citizens' action association relating to nuclear power plant's suggestion and concern program for its employees are not privileged); *State, ex rel. Celebrezze v. CECOS Int'l, Inc.*, 583 N.E.2d 1118 (Ohio Ct. App. 1990) (holding internal audits are not protected by the self-critical analysis privilege).

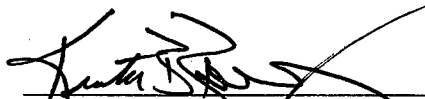
Other state legislatures have even found instances where the benefits of the self-critical analysis privilege outweigh any burden of the policy. See Iowa Code Ann. § 147.135 (West 2009) (protection of medical peer review committee evaluations); Kan. Stat. Ann. § 60-3333 (2006) (protection of environmental audit reports); Kan. Stat. Ann. § 60-3351 (2010) (protection of insurance compliance self-evaluative audit documents).

Clearly a number of courts have analyzed the privilege in an effort to thoroughly investigate its use in particular discovery scenarios. SCP, LLC requests that this court follow suit and thoroughly investigate its use in the instant matter. Based on this analysis, given the documents at issue in this case for which the privilege has been asserted, SCP, LLC strongly urges this court to adopt and apply the self-critical analysis privilege in the context present here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of June, 2011, I caused to be served the attached via **hand delivery**, upon the following counsel:

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