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Environmental Consultant/Discovery: Federal District Court (Indiana) Addresses Request for Protective Order

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A United States District Court (S.D. Indiana) in a July 21st opinion addressed a request for a protective order for a litigant's environmental consultant in a lawsuit involving underground storage tank related property damage. See *Goodman, et al. v. Shalimar Investments, L.L.C.* 2016 WL 3936048.

Defendant Shalimar Investments, L.L.C. ("Defendant" or "Shalimar") sought from the Court a:

... protective order barring Plaintiffs from inquiring during the depositions of Defendant and Golars – Defendant's environmental consultant – about "Shalimar's relationship with Golars, including any contract, payments or other consideration to or from Golars, and payments or other consideration from the Excess Liability Trust Fund, an insurer or any other entity" and vice versa. . .

The discovery is stated to pertain to Plaintiffs' (i.e., Goodman et al.) claims of Indiana Code violations, nuisance, trespass, and negligence against Defendant.

Defendant is an owner and operator of underground petroleum storage tanks. The Plaintiffs alleged that one or more of Defendant's tanks leaked and damaged their properties. Defendant allegedly failed to properly investigate or correct the problem.

Defendant argued that certain questions involving the environmental consultant violate Rule 26(b)(1).

Defendant put forth three arguments in support of its motion.

First, it argued that Plaintiffs' request for "Shalimar's and/or its environmental consultant's investigation and response to the Contamination, the costs incurred by Shalimar and/or its consultant for those activities, how those costs were itemized/invoiced by Shalimar and/or its environmental consultant, how these costs were submitted to IDEM or any other entity for reimbursement, the amount of funds recovered by Shalimar and/or its environmental consultant" violates Rule 26(b)(1).

Rule 26(b)(1) states that:

... parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Defendant argued that the requested information was privileged because it considered Golars to be a retained expert. The rationale for this argument included that Golars “may be privy to attorney-client communications.”

The Court responded that the attorney-client privilege only applies to communications – not underlying facts of the issue. It held that the Plaintiffs were not inquiring into any communications between Defendant’s attorney and Defendant or Golars.

Defendant also argued that the requested information was privileged because:

. . . [Golars] may be assisting in the preparation of work product materials.

The work-product doctrine protects the attorney’s mental processes, specifically materials prepared by an attorney or its agents in anticipation of litigation. The Court stated that Golars was hired to assist in remediation of any contamination. It further noted:

Nothing in the record suggests that Golars was initially retained or consulted in anticipation of a lawsuit. Therefore, information regarding the Shalimar-Golars relationship is not privileged.

Finally, the Defendant argued that the information was not relevant. The Court, however, stated that the deposition topic was relevant to the duty element of Plaintiffs’ negligence claim, noting:

Plaintiffs assert that Defendant “breached its duty to responsibly and timely clean up the Contamination.”

The Court noted that Plaintiffs’ deposition topic related to how and to what extent Defendant had cleaned up the Contamination. It stated that evidence revealed by such discovery topic could show whether Defendant cleaned up the contamination in a way that satisfies the alleged duty, (i.e., because the information may reveal evidence to prove or disprove Plaintiffs’ negligence claim – the information is relevant).

The Court also held the deposition topic is proportional to the needs of the case because the information may help determining whether the alleged duty is satisfied, it is important for resolving Plaintiffs’ negligence claim.

The Court stated:

. . . Defendant has received \$600,000 from the Excess Liability Trust Fund thus far, suggesting that the contamination, as well as the potential damages, are not insignificant. Supplying the requested information does not impose a great burden or expense on Defendant. Thus, in this instance the call for proportionality does not support the requested protective order.

The Court denied Defendant’s motion for a protective order.

[A copy of the decision can be downloaded here.](#)