

H.P. Cummings Constr. Co. v. East Shore Drywall, Inc., No. 1495-06 CnC  
(Katz, J., July 14, 2008)

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STATE OF VERMONT  
Chittenden County, ss.:

SUPERIOR COURT  
Docket No. 1495-06 CnC

H.P. CUMMINGS CONSTRUCTION CO., INC.

v.

EAST SHORE DRYWALL, INC.

#### ENTRY

This case arises out of property damage resulting from a sprinkler pipe that burst in the ceiling of the University of Vermont's Old Mill Building. Plaintiff was the general contractor and Defendant was the subcontractor, hired to install drywall, insulation, and vapor barriers. Plaintiff has filed a motion to compel discovery of an insurance claim file relating to an earlier leak in the building. Defendant objects, claiming that the file is privileged. The file consists of thirteen pages of Defendant's insurance adjuster's notes, including communications with in-house counsel.

V.R.C.P. 26(b)(3) provides, in pertinent part, that a party may obtain discovery of documents . . . otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain

the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(emphasis added).

The Reporter's Notes to V.R.C.P. 26(b)(3) reflect that the rule is intended to protect "materials not only when prepared for trial by an attorney but when prepared by the party himself or his representative, including his insurer."

Vermont Rule of Evidence 502, in turn, provides that a client has a privilege to refuse to disclose

confidential communications made for the purpose of facilitating the rendition of professional legal services . . .

(3) by him or his representative . . . to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client. . . .

Although this issue has not been decided in Vermont, other jurisdictions with identical rules have held that adjuster's claim files, especially those containing communications with in-house counsel, are protected from discovery by the attorney work product doctrine and the attorney-client privilege. Breech v. Turner, 712 N.E.2d 776, 781 (Ohio App. 1998) (citing Witt v. Fairfield Pub. Sch. Dist., 1996 WL 189040 (Ohio App. 1996)). The reasoning behind this rule is that "the insurance company is required to take such statements from its insureds to prepare a defense and is normally required to provide defense counsel to the insured as part of its coverage. Any statements made by the insured in this context are in essence communications intended for defense counsel . . ." Dennis v. State Farm Ins. Co., 757 N.E.2d 849, 854 (Ohio App. 2001); see also Ex Parte Nationwide Ins. Co., 898 S.2d 720, 724 (Ala. 2004) (insurer not obligated to disclose documents reflecting its "assessments, opinions, or conclusions.>").

Here, the claim file at issue contains notes taken by Defendant's insurance adjuster regarding an earlier leak, including the adjuster's notes regarding communications with in-house counsel. Therefore, the claims file at

issue here is privileged. For that reason, Plaintiff's motion to compel is DENIED.

Dated at Burlington, Vermont, July \_\_\_\_, 2008.

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M. I. Katz, Judge