

DISTRICT COURT, COUNTY OF BOULDER, COLORADO		 COURT USE ONLY 																					
Court Address: 1776 th St. P.O. Box 4249 Boulder, CO 80306-4249																							
Plaintiffs: GENERAL ASBESTOS Defendants:		Case # 89 CV 2000 Div #																					
<table border="0"> <tr> <td>Attorney</td> <td>Conard Metcalf</td> </tr> <tr> <td>Attorney Reg. #:</td> <td>2489</td> </tr> <tr> <td>Attorney</td> <td></td> </tr> <tr> <td>Attorney Reg. #:</td> <td>Williams & Trine, P.C.</td> </tr> <tr> <td>Address:</td> <td>1435 Arapahoe Ave</td> </tr> <tr> <td></td> <td>Boulder, CO 80302</td> </tr> <tr> <td></td> <td>303-442-0173</td> </tr> <tr> <td></td> <td>303-443-7677</td> </tr> <tr> <td>Phone:</td> <td>jcmetcalf@trine-metcalf.com</td> </tr> <tr> <td>Fax:</td> <td></td> </tr> <tr> <td>e-mail</td> <td></td> </tr> </table>			Attorney	Conard Metcalf	Attorney Reg. #:	2489	Attorney		Attorney Reg. #:	Williams & Trine, P.C.	Address:	1435 Arapahoe Ave		Boulder, CO 80302		303-442-0173		303-443-7677	Phone:	jcmetcalf@trine-metcalf.com	Fax:		e-mail
Attorney	Conard Metcalf																						
Attorney Reg. #:	2489																						
Attorney																							
Attorney Reg. #:	Williams & Trine, P.C.																						
Address:	1435 Arapahoe Ave																						
	Boulder, CO 80302																						
	303-442-0173																						
	303-443-7677																						
Phone:	jcmetcalf@trine-metcalf.com																						
Fax:																							
e-mail																							
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: WAIVER OF PRIVILEGE BY UNION CARBIDE AS TO DISCLOSED DOCUMENTS																							

Plaintiffs, by their undersigned counsel, move this court pursuant to CRCP, Rule 56, to enter judgment in their favor that defendant Union Carbide Corporation has waived any privilege as to the documents attached hereto, and submits the within points and authorities in support of this motion.

Union Carbide Corporation (UCC) mined, milled and marketed asbestos fiber from 1962 to 1986. Union Carbide sold its asbestos to customers in virtually every State in the United States and in numerous other countries. Union Carbide's asbestos was incorporated into many different products including such widely used materials as brakes, ceiling tiles, floor coverings, roofing materials, plastics, dry wall tape joint compounds, drilling muds and paper products. It is as a consequence of the widespread sale and use of UCC asbestos that UCC is now being sued in numerous jurisdictions by people who have developed asbestos disease.

UCC has routinely responded to discovery in asbestos disease cases by inviting lawyers for the disease victims to visit the UCC document depository at the Kelly Drye law firm in New York and look through the thousands of documents that UCC has assembled for purposes of responding to discovery requests in asbestos disease cases. Many lawyers have accepted UCC's invitation to visit the depository and have examined the documents which it contains.

In 2001 Union Carbide produced from its Kelly Drye depository 55 boxes of documents to the Pittsburgh law firm of Goldberg Persky Jennings. As more fully discussed below, this motion for summary judgment addresses the documents produced to Goldberg Jennings, which undersigned counsel has also obtained. The manner in which the undersigned obtained the documents is important to this motion for summary judgment and is discussed below.

The documents at issue are not privileged or, if they were once subject to the attorney client privilege, that privilege has been waived:

1. The communications were not for the purpose of obtaining legal advice;
2. The communications, to the extent an attorney was involved, were for ordinary business purposes, not attorney-client purposes;
3. The communications were not intended to be attorney-client confidential and there was no expectation that they would be held in confidence as such. Rather, it was expected that the communications would be publicly communicated;
4. If the attorney client privilege attached to any portion of the documents, the privilege was waived by Union Carbide repeatedly disclosing the documents and making no effort to assert the privilege in a timely fashion;
5. If the attorney client privilege attached to any portion of the documents the privilege is waived because of the "crime-fraud" exception to the attorney client privilege.

WAIVER

The burden of establishing the applicability of a privilege rests with the claimant of the privilege. Clark v. District Court, 668 P.2d 3, 8 (1983). The privilege can be waived and the waiver can be express or implied. Id.; Miller v. District Court, 737 P.2d 834, 838 (Colo. 1987).¹

In this case the court need not reach the issue of whether the documents involved are, or are not, privileged. Assuming that there was any privilege that might have applied to any part of these documents, that privilege has been waived repeatedly by Union Carbide's massive, voluntary disclosure of the documents.

UCC's Own Determination that the documents are not privileged.

UCC, prior to making the documents available at the Kelly Drye depository, removed all documents for which it claimed privilege. In compliance with its obligations under applicable discovery rules, UCC created a "privilege log" which identified each and every document which UCC claimed to be privileged.

The privilege log is 36 pages. A copy of the privilege log is attached. (Exhibit A). None of the documents at issue herein are listed on the privilege log. UCC is a multi-billion dollar corporation with virtually unlimited resources² to examine and classify documents. Having examined and classified its own documents UCC determined which of its documents were privileged, and which of its documents were not privileged.

¹ See also, Underwriter Storage, Inc. v. United States Rubber Company, 314 F.Supp. 546 (D.D.C. 1970); International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445 (D.Mass 1988); In re Sealed Case, 877 F.2d 976 (D.C.Cir. 1989); FDIC v. Singh, 140 F.R.D. 252 (D.Me. 1992); International Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445 (D.Mass 1988).

² "As I said, Dow and Union Carbide today announced a tax free stock to stock transaction. This merger combines two of the industries most technologically advanced global companies. We will have a combined annual revenue of over \$24 billion. Operating income of \$3 billion. A market capitalization in excess of \$34 billion and assets over \$30 billion. We are creating the world's number two chemical company overall with leadership positions in both performance and basic businesses." Dow Chemical, Union Carbide Press Conference Summary August 4 1999. <http://www.dow.com/merger/pressconf.htm>

UCC determined that the documents at issue here are not privileged, and did not include them on its privilege log.

Even if any of the documents had been included on UCC's privilege log, any privilege is waived by UCC's voluntary disclosure of the documents and subsequent failure to act in response to its voluntary disclosure.

UCC's Disclosure of the Documents.

In 2001 UCC produced 55 boxes of documents to the law firm of Goldberg Persky Jennings of Pittsburgh. This production was consistent with UCC's determination [as revealed by the UCC privilege log] that the documents at issue herein were not and are not privileged. Thereafter, David Egilman, M.D., posted on his internet web-site each and every one of the documents produced by UCC to Goldberg Persky. The documents posted on Dr. Egilman's internet web-site include all documents that are the subject of this motion. The documents posted on Dr. Egilman's web-site were available to anyone and everyone on the internet for a period in excess of 3 months.³ No password and no payment were necessary to access the Union Carbide document portion of Dr. Egilman's web site during the time the documents were posted. In other words, the documents that are the subject of this motion, and many other documents, were disclosed to the world for a lengthy time. It is difficult to imagine how a broader disclosure of these UCC documents could be accomplished.

Questions arise concerning UCC's response to this massive disclosure of its documents on the internet. What action did UCC take in view of the internet disclosure to the world of its documents? Did UCC immediately protest that privileged documents were being broadcast to the world on the internet? Did UCC ever protest that privileged documents were being broadcast to the world on the internet? What action did UCC take in response to the internet disclosure of the documents it had produced to opposing counsel?

³ It is estimated that there are over 600 million internet users world wide of which 148 million to 182 million are in the U.S and Canada. *CIA - World Factbook, web:*

*Of great importance is that **not once** did Union Carbide or any attorney for Union Carbide object to Dr. Egilman, or to anyone else, that Dr. Egilman had posted privileged documents on his web-site. Nor has Union Carbide ever asserted to the Golberg Persky law firm that any privileged documents were produced to Goldberg Persky. Again, it is the documents in the production made to Goldberg Persky that are the subject of this motion.*

Counsel for Plaintiffs in this case downloaded all of the Union Carbide documents that were posted on Dr. Egilman's web-site, including the documents which are the subject of this motion. Counsel, in turn, has disclosed these documents to several hundred other attorneys who have asked for them. This cow is so far out of the barn that there is no way to ever have it returned. That is, these documents have been voluntarily disclosed and the privilege, if any, has been waived.

This combination of actions by Union Carbide [disclosing the documents at issue in this motion, while claiming privilege as to the many documents on its privilege log], and its inaction regarding the extensive disclosure of those documents, strongly suggest that Union Carbide does not actually believe that the documents are privileged. Rather, what most likely has happened is that the numerous plaintiffs' attorneys to whom the documents have been produced recognized and understood what Union Carbide did not. That the documents are devastating to UCC's litigation position.

The documents demonstrate the falsity of the positions that UCC is taking in litigation. UCC is taking positions in litigation that are contrary to the facts and beliefs acknowledged privately by UCC in these documents. Additionally, the documents show extensive knowledge by Union Carbide about asbestos health hazards; the documents show a conscious effort by Union Carbide to mislead the public, the courts and regulatory agencies regarding asbestos health hazards; and, the documents show a chilling callousness towards victims of the devastating diseases caused by asbestos.

<http://www.cia.gov/cia/publications/factbook/index.html>. And see, Affidavit of Dr. Egilman, Exhibit B.

Now,

- more than a year after the documents were produced,
- more than a year after the documents were posted on the internet for the world to see,
- more than a year after many of the documents were on plaintiffs' exhibit list filed with the court,
- more than a year after the documents have been widely disseminated border to border in the U.S.A. to attorneys, all with no objection by Union Carbide, Union Carbide is making noises about attorney client privilege as to these documents.

There is no genuine issue of material fact that Union Carbide has waived any privilege that may have applied to the Goldberg Persky document production. Union Carbide screened the documents before producing them to identify the documents to which it was going to claim privilege and listed those documents on a privilege log. The documents that are the subject of this motion do not appear on that privilege log. UCC the produced the documents to a law firm representing asbestos disease victims with claims against UCC. UCC has never told that law firm that privileged documents were mistakenly produced. The documents were then posted on the internet by Dr. Egilman, for the world to see. UCC never objected to anyone that Dr. Egilman had posted privileged documents on the internet. The documents have been shared with hundreds of plaintiff's attorneys across the country. Summary judgment on the issue of UCC having waived any privilege as to these produced documents is appropriate. CRCP, Rule 56.

WHEREFORE, plaintiffs pray that this court enter summary judgment in their favor that UCC has waived any privilege it might have claimed as to the documents produced by Union Carbide to Goldberg Persky Jennings. A list of the bates numbers of those documents is attached hereto as Exhibit C.

VERIFICATION: The undersigned verifies that the factual statements herein regarding the production of documents by UCC, the dissemination of those documents and the posting of those documents on the internet are true and correct to the best of his information, knowledge and belief.

TRINE & METCALF, P.C.
Attorneys for Plaintiffs

J. Conard Metcalf, Reg. 2489
1435 Arapahoe Ave.
Boulder, CO 80302
303.442.0173