

DISTRICT COURT, BOULDER COUNTY,
COLORADO
Boulder County Justice Center
1777 6th Street
P.O. Box 4249
Boulder, CO 80306

COURT USE ONLY

IN RE: ASBESTOS CASES

Attorney/Party Without Attorney:

Name(s): Mary Price Birk, #10415
Ronald L. Hellbusch, #26094
Susan R. Hahn, #27344
Address: Baker & Hostetler LLP
303 E. 17th Ave., #1100
Denver, Colorado 80203
Phone Number: 303-861-0600
Fax Number: 303-861-7805

Case No. 89 CV 2000

Div: Ctrm:

**UNION CARBIDE'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT RE: WAIVER OF PRIVILEGE BY UNION CARBIDE
AS TO DISCLOSED DOCUMENTS**

Union Carbide Corporation, by and through its counsel, Baker & Hostetler LLP, submits its Response in Opposition to Plaintiffs' Motion for Summary Judgment Re: Waiver of Privilege by Union Carbide as to Disclosed Documents, stating as follows:

STATEMENT OF BACKGROUND AND FACTS

1. A discovery dispute arose between plaintiffs and Union Carbide on January 28, 2003, as a result of plaintiffs' disclosure of a single privileged Union Carbide document [hereinafter "Document Number 1"] at a hearing in front of Magistrate Hamilton-Fieldman. After reviewing the document, Union Carbide's counsel wrote to plaintiffs' counsel on January 31, 2003, requesting that he return the document which is protected by the attorney-client privilege. See Union Carbide's Motion for Protective Order, Request for Leave to File Documents Under Seal, and Motion to Compel Production of Documents, and attached exhibits.

2. Union Carbide also reviewed the plaintiffs' exhibit list and requested the return of one other document that it knows to be privileged, not on the basis of the list,¹ but because that document recently appeared in litigation in California. [hereinafter "Document Number 2"]. Union Carbide successfully sought the return of both of these privileged documents from asbestos plaintiffs in California. Finally, Union Carbide requested that plaintiffs produce four other documents on plaintiffs' exhibit list, so that counsel could review the documents for privilege.

3. Plaintiffs' counsel failed to respond to Union Carbide's January 31, 2003 letter, failed to return the two privileged documents, and failed to produce a copy of the other four documents requested by Union Carbide. Instead of responding to the letter, plaintiffs' counsel filed a motion entitled "Plaintiffs' Motion for Summary Judgment Re: Waiver of Privilege by Union Carbide as to Disclosed Documents."

4. Plaintiffs' motion fails to address the privileged nature of the two specific documents over which Union Carbide has asserted a privilege in this litigation. Plaintiffs' motion fails to answer the question of where plaintiffs' counsel obtained the two privileged documents.

5. Plaintiffs' motion refers to a list of bates numbers of Union Carbide documents from some other jurisdiction. Plaintiffs' motion states that each document referenced on the list is a Union Carbide document disclosed "in 2001" to the law firm of Goldberg Persky & Jennings. On that basis, plaintiffs assert that the list should be declared "not privileged" by this Court.

6. Plaintiffs' list of bates numbers are not contained on any exhibit lists that have ever been disclosed by either side in Colorado. Plaintiffs never reveal the name of the litigation or the state where the alleged disclosure occurred. Plaintiffs failed to produce the documents, or to provide even a minimal description of any of the documents by date, author or recipient.

II. LEGAL ARGUMENT

A. THIS COURT IS WITHOUT SUBJECT MATTER JURISDICTION TO DECLARE THE "PRIVILEGE" STATUS AS TO A LIST OF BATES NUMBERS THAT PLAINTIFFS ASSERT WERE DISCLOSED IN UNIDENTIFIED LITIGATION IN ANOTHER STATE.

1. Plaintiffs' motion fails to state any existing controversy within the jurisdiction of this Court to decide. In this Colorado litigation, plaintiffs have designated a list of exhibits related to Defendant Union Carbide entitled "Ness, Motley, Loadholt, Richardson & Poole, Asbestos Exhibit List, Union Carbide." In plaintiffs' recent "motion for summary judgment" plaintiffs refer to a list of bates numbers allegedly referencing

¹ The plaintiffs' Colorado exhibit list contains only cryptic information including the date, author's last name, recipient's last name, and a bare description such as "memo" or "letter with enclosure" as to each exhibit.

documents disclosed in 2001 to Goldberg Persky Jennings of Pittsburgh. [hereinafter “Goldberg Persky list”]. The exhibit numbers of plaintiffs’ Colorado exhibit list do not correspond to the bates numbers on the Goldberg Persky list.

2. Subject matter jurisdiction relates to the nature of the claim and the relief sought. *Stone’s Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1113 (Colo. 1991), *reh’g denied*. A judgment rendered without subject matter jurisdiction is void, *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). The Court must have jurisdiction over the subject matter of the issue to be decided if its judgment is to be valid. *Id.*

3. Plaintiffs cannot fabricate an enormous controversy between the parties where none exists. The plaintiffs’ goal, apparently, is to divert the Court’s attention away from a few very narrow and very focused discovery issues. There is no existing controversy over a list of hundreds of bates numbers from another jurisdiction. Union Carbide has never asserted in any jurisdiction that the attorney-client privilege attaches to each of hundreds of documents contained in 55 boxes. The Court lacks subject matter jurisdiction to determine the status of a list of documents disclosed in litigation in some other state. This is particularly true here, since the Court has no idea what documents are referred to by the hundreds of bates numbers.

4. To the extent that the Goldberg Persky list actually refers to any documents over which Union Carbide has asserted a privilege in this Colorado litigation, Union Carbide’s Motion for Protective Order has addressed those issues. Union Carbide has also offered to make those documents available for the Court’s *in camera* review.

B. PLAINTIFF HAS NO STANDING TO REQUEST A DECLARATORY JUDGMENT CONCERNING THE STATUS OF DOCUMENTS.

1. The only relief sought in plaintiffs’ “motion for summary judgment” has nothing to do with any existing claim, counterclaim or cross claim. See C.R.C.P. 56(a). Rather, plaintiffs request a declaratory judgment by this Court as to the privilege status of documents that plaintiffs assert were disclosed in out-of-state litigation. Declaratory judgments are governed by the Colorado Declaratory Judgments Act, Colo. Rev. Stat. § 13-51-101 through -115 (2002).

2. Under the Colorado Declaratory Judgments Act, plaintiffs cannot seek a declaratory judgment as to the privileged or non-privileged status of a list of Union Carbide documents. The Act provides:

Who may obtain declaration. Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance,

contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Colo. Rev. Stat. § 13-51-106.

3. Plaintiffs' motion must be denied because plaintiffs have no standing under the Declaratory Judgment Act. Plaintiffs are not seeking to determine their rights under a deed, will, written contract, or implied contract, or to determine their legal relations under any statute, ordinance, contract or franchise. A declaration as to the privilege status of documents is not one of the types enumerated under the Declaratory Judgment Acts because it is a discovery issue.

4. Declaratory judgments must also be based upon an actual controversy. *Farmers Elevator Co. v. First Nat'l Bank*, 176 Colo. 168, 489 P.2d 318, 319 (1971). Plaintiff must demonstrate that there is an existing legal controversy that can be effectively resolved by a declaratory judgment, and not a mere possibility of a future legal dispute. *Board of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1053 (Colo. 1992). As set forth above, plaintiffs have failed to state any actual existing legal controversy with respect to the Goldberg Persky list.

C. PLAINTIFFS HAVE MISSTATED COLORADO LAW ON ATTORNEY-CLIENT PRIVILEGE AND INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS.

1. Colorado courts have zealously protected the sanctity of the attorney-client privilege. See *Denver Tramway Co. v. Owens*, 20 Colo. 107, 128, 36 P. 848, 855 (1894); *Losavio v. District Court*, 188 Colo. 127, 133, 533 P.2d 32, 34 (1975) (attorney-client privilege secures the "orderly administration of justice"); *Bellman v. District Court*, 187 Colo. 350, 531 P.2d 632, 633 (1975) (statements made to insurance investigator as attorney's agent are privileged); *Miller v. District Ct.*, 737 P.2d 834, 838 (Colo. 1987) (asserting mental status defense does not constitute an implied waiver of attorney-client privilege over consulting psychiatrist's testimony). See also Colo. Rev. Stat. § 13-90-107(1)(b) (2002) (codifying the common law attorney-client privilege). The applicability of the privilege does not depend on the opposing party's theories as to culpability or liability on the asserted claims in the litigation.

2. Colorado attorneys are also held to a high ethical standard with respect to an attorney's discovery that an opponent has inadvertently disclosed a privileged document. See Colorado Bar Association Ethics Committee Formal Opinion 108, adopted May 20, 2000, 29 Colo. Law. 55 (Sept. 2000). A lawyer who receives documents from an adverse party that on their face appear to be privileged or confidential has an ethical duty to notify the sending lawyer that he has the documents. Opposing counsel is not relieved of this duty unless he knows that the adverse party has intentionally waived privilege and confidentiality. Here, although the privileged nature of Document Number 1 may not be facially apparent, plaintiffs' counsel chose to ignore Union Carbide's request to have documents returned, and filed a motion related to an entirely different document list from another jurisdiction.

3. Under plaintiffs' view, the inadvertent disclosure of a privileged document to another party constitutes an automatic waiver of any privilege with respect to that document. The Colorado Court of Appeals has expressly rejected this so-called "cat out of the bag" rule in favor of the "ad hoc" approach. *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 808-809 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999).

4. Under the "ad hoc" approach, the Court must review the totality of the circumstances of the disclosure to determine if a waiver occurred. *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 808-809 (Colo. App. 1997), *rev'd on other grounds*, 978 P.2d 663 (Colo. 1999) (disclosure resulting from excusable inadvertent acts during course of discovery proceedings is not a waiver of privilege). In order to determine whether an inadvertent disclosure constitutes a waiver, the trial court should consider the following five factors regarding the circumstances attendant to the inadvertent disclosure:

- (1) the extent to which reasonable precautions were taken to prevent the disclosure of privileged information;
- (2) the number of inadvertent disclosures made in relation to the total number of documents produced;
- (3) the extent to which the disclosure, albeit inadvertent has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored;
- (4) the extent to which the disclosing party has sought remedial measures in a timely fashion; and
- (5) considerations of fairness to both parties under the circumstances.

Id. at 809.

5. Colorado's appellate courts have not had opportunity to apply this "ad hoc" approach in the reported cases. Colorado's rule is, however, in line with a majority of courts in other jurisdictions which opt for a factual approach in deciding if an inadvertent disclosure constitutes a waiver of privilege. See *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993). In *Alldread*, the magistrate judge applied the five factors and weighed all the circumstances surrounding the inadvertent disclosure before determining that the attorney-client privilege had not been waived. *Id.* at 1433. The magistrate judge concluded that the defendant had not taken reasonable precautions to protect the materials from disclosure, that the defendant could have discovered any privileged materials before disclosure, and that the disclosure was "complete" because the plaintiffs had already listened to the full content of the tapes. *Id.* Several other factors outweighed these concerns, including: (1) the defendant had immediately asserted the privilege upon learning of the disclosure, (2) the disclosure was obviously inadvertent, and (3) fairness weighed in favor of ordering the return of the privileged materials. *Id.* at 1433-34. The magistrate judge's decision was upheld by the district court judge and by the U.S. Court of Appeals for the Fifth Circuit. *Id.* See also *United*

States ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 175-185 (C.D. Cal. 2001) (supporting protection of attorney-client privilege where three out of five factors favored the defendant including the most important factor, fairness).

6. The only privileged documents currently at issue in this litigation are those identified in Union Carbide's Motion for Protective Order. Union Carbide can demonstrate that it has acted vigorously to preserve the privileges attached to these documents. As stated in the Motion for Protective Order, Union Carbide has successfully fought disclosure and dissemination of Documents Numbers 1 and 2 in California. The law firm of Waters & Kraus was ordered by the Superior Court of California to return all copies of these documents in its possession or control.

7. Union Carbide has also acted vigorously to protect its privileges with respect to any privileged documents in the possession of the law firm of Goldberg Persky Jennings & White. Union Carbide sought the return of privileged documents from the Goldberg Persky law firm in West Virginia in 2002, first informally and then by filing a Motion for Protective Order. Exhibit A, Defendant Union Carbide Corporation's Brief in Support of its Motion for Protective Order in *In Re: West Virginia Asbestos Personal Injury Litigation*, Civil Action No. 02-C-9004, Circuit Court of Kanawha County, West Virginia. (attachments to the brief are not included with Exhibit A). Plaintiffs inaccurately reported a lack of action on the part of Union Carbide to protect its privileged documents from disclosure and dissemination, without checking on the facts.

D. UNION CARBIDE WILL CONTINUE TO SEEK THE RETURN OF ITS PRIVILEGED DOCUMENTS FROM PLAINTIFFS, PLAINTIFFS' AGENTS, PLAINTIFFS' WITNESSES AND FROM THIRD PARTIES.

1. Union Carbide is investigating the plaintiffs' assertion that privileged Union Carbide documents have been published on Dr. David Egilman's website. To the extent that privileged documents have been or are being published by Dr. Egilman, Union Carbide intends to seek the return of those documents, and to seek an agreement or a court order preventing any further publication of its privileged documents.

2. Dr. Egilman's unauthorized disclosure of a privileged document does not destroy an attorney-client privilege. The attorney-client privilege protects against both disclosure and use of the privileged material. *United States ex rel. Bagley*, 204 F.R.D. at 184. The unauthorized public disclosure of a privileged document by one of plaintiffs' witnesses does not determine whether a privilege has been waived. If the Court is able to prevent the use of the privileged document against the privilege holder, then one of the two purposes of the privilege has still been achieved. As one commentator stated:

It is true that confidentiality can never be restored to a communication that has been disclosed. This loss of confidentiality can be particularly harmful when disclosure of documents is made to one who is an adversary outside the context of the litigation, such as a business competitor. But

the damage need not extend to the litigation at hand.

Litigation takes place in a controlled environment where a lack of confidentiality outside the courtroom is irrelevant to the proceedings within. For all practical purposes, a court can repair the damage done by disclosure of a confidential document by preventing use of that document at trial.

Indeed, recipients of disclosed materials can be prohibited even from basing questions on them. Thus, courts can insure that the inadvertent disclosure does not affect the outcome of the litigation.

Id., quoting Note, 82 Mich. L. Rev. at 608-609 (footnotes omitted) (emphasis added).

CONCLUSION

For the reasons stated above, in its Motion to Strike, and in its Motion for Protective Order, Union Carbide respectfully requests that the Court enter an order striking or denying Plaintiffs' Motion for Summary Judgment Re: Waiver of Privilege by Union Carbide in its entirety, and for such other relief as the Court deems appropriate.

Union Carbide respectfully requests a discovery hearing with the Magistrate Judge, as required by In Re Asbestos Cases, Amended Administrative Order Regarding Asbestos Cases (1996), ¶ IV, F, to determine the discovery issues raised in its Motion for Protective Order, Request for Leave to File Privileged Documents under Seal, and Motion to Compel Production of Documents, with Points and Authorities.

Respectfully Submitted this 25th day of March 2003.

BAKER & HOSTETLER LLP

***Duly signed original on file at the offices of
Baker & Hostetler LLP***

By: _____

Mary Price Birk, #10415
Ronald L. Hellbusch, #26094
Susan R. Hahn, #27344
303 E. 17th Avenue, Suite 1100
Denver, Colorado 80203
(303) 861-0600

ATTORNEYS FOR DEFENDANT
UNION CARBIDE CORPORATION

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of March, 2003, a true and correct copy of the above and foregoing **Union Carbide's Response in Opposition to Plaintiffs' Motion for Summary Judgment Re: Waiver of Privilege by Union Carbide as to Disclosed Documents** was sent via Justice Link, to the following:

J. Conard Metcalf, Esq.
Trine & Metcalf, P.C.
1435 Arapahoe Ave.
Boulder, CO 80302-6390

James M. Miletich, Esq.
Long & Jaudon, P.C.
1600 Ogden Street
Denver, CO 80218-1414

Karen Wheeler, Esq.
Levi & Lambdin, P.C.
6400 S. Fiddlers Green Circle, Suite 900
Englewood, Colorado 80111

Bennett L. Cohen, Esq.
John Guinn, Esq.
The Kobayashi Law Firm, P.C.
1633 Fillmore Street
Denver, CO 80206

Blair J. Trautwein, Esq.
Wick, Campbell, Bramer, et al.
P.O. Box 2166
Fort Collins, Colorado 80522

Jonathan A. Cross, Esq.
Halaby Cross & Schluter
1873 S. Bellaire Street, #1400
Denver, Colorado 80222

William F. Campbell, Esq.
White & Steele, P.C.
950 17th Street, 21st Floor
Denver, CO 80202-2804

Charles E. Weaver, Esq.
Wood Ris & Hames P.C.
1775 Sherman St., #1600
Denver, CO 80203-4313

John D. Hayes, Esq.
Senter Goldfarb & Rice LLC
400 South Colorado Blvd., #700
Denver, CO 80222

Dennis H. Markusson, Esq.
Markusson Green & Jarvis
1050 17th Street, #2300
Denver, CO 80265

Mary D. Metzger, Esq.
William W. Maywhort, Esq.
Holland & Hart LLP
8390 E. Crescent Parkway, #400
Greenwood Village, CO 80111-2800

Alice Woodall, Esq.
Steven Kaufmann, Esq.
Morrison & Foerster
370 17th Street, #5200
Denver, CO 80202

Mary Wells, Esq.
Wells, Anderson & Race LLC
1700 Broadway, Suite 1020
Denver, CO 80290

John F. Hensley, Esq.
1877 Broadway, Suite 702
Boulder, CO 80302

F. James Gallo, Esq.
1800 Glenarm Place, Suite 1400
Denver, CO 80202-3882

Thomas L. Beam, Esq.
Hall & Evans, L.L.C.
1200 17th Street, Suite 1700
Denver, CO 80202

William V. Cox, Esq.
1625 Larimer Street, #2707
Denver, CO 80202

J. Scott Lasater, Esq.
Lasater & Martin
8122 S. Park Lane, Suite 205
Littleton, CO 80120

Bradley A. Levin, Esq.
Kerri J. Anderson, Esq.
Breit Bosch Coppola Caplis & Marlin
1512 Larimer Street
Writer Square, Suite 900
Denver, CO 80202

Tracy H. Fowler, Esq.
David N. Wolf, Esq.
Snell & Wilmer
15 West South Temple, #1200
Gateway Tower West
Salt Lake City, UT 84101

Lee Mickus, Esq.
Wheeler Trigg & Kennedy PC
1801 California Street, #3600
Denver, CO 80202-2636

Peter J. Young, Esq.
141 South Center, #505
Casper, Wyoming 82601

David P. Hersh, Esq.
Diane Vaksdal Smith, Esq.
Burg & Eldredge, P.C.
40 Inverness Drive East
Englewood, CO 80112

Joel C. Maguire, Esq.
Martin & Mehaffy LLC
P.O. Box 1260
Boulder, CO 80306

***Duly signed original on file at the offices of
Baker & Hostetler LLP***
