

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**IN RE: WEST VIRGINIA ASBESTOS
PERSONAL INJURY LITIGATION**

**ASBESTOS MASTER FILE
CIVIL ACTION NO: 02-C-9004**

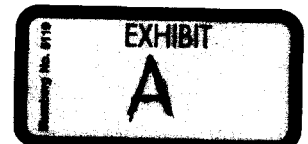
**DEFENDANT UNION CARBIDE CORPORATION'S BRIEF IN SUPPORT OF ITS
MOTION FOR PROTECTIVE ORDER**

Pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure, Defendant Union Carbide Corporation ("Union Carbide") files this Brief in Support of Its Motion for Protective Order showing that: (1) Plaintiffs have listed as potential trial exhibits several documents that are covered by Union Carbide's attorney-client or attorney work product privileges; and (2) Union Carbide has in good faith conferred with opposing counsel in an effort to resolve this dispute without court action. Because Plaintiffs' Exhibit numbers 1903, 8349, 8373, 8388, 8390, 8400, 8486, 60462, 60469, 60482, 60514, and 60630 are protected by Union Carbide's attorney-client privilege or are work product, the Court should require Plaintiffs immediately to return all copies of these documents to Union Carbide.

I. BACKGROUND

This is a mass litigation of asbestos-related litigation brought by thousands of Plaintiffs against numerous Defendants. Plaintiffs' Exhibit lists for this case include over 13,000 documents with little description of the contents of each document. Accordingly, defense counsel reviewed each of the proposed exhibits. This review revealed that several of these documents that Plaintiffs seek to use in this litigation are protected by Union Carbide's attorney-client or work product privileges. Upon discovering this fact, defense counsel has sought to recover these documents. Good faith negotiations have not resolved this dispute.

By this motion, Union Carbide seeks a protective order requiring Plaintiffs, their counsel, and their witnesses to return all copies of the documents listed as Plaintiffs' Exhibit numbers



1903, 8349, 8373, 8388, 8390, 8400, 8486, 60462, 60469, 60482, 60514, and 60630. These documents are protected by Union Carbide's attorney-client privilege and/or work product doctrine.¹

On September 16, 2002, counsel for Union Carbide sent a letter to Plaintiffs' counsel Ness, Motley seeking return of the documents set forth on the Ness, Motley exhibit list that are protected by Union Carbide's attorney-client and/or work product privileges. A true and correct copy of this letter is attached hereto as Exhibit A to the Affidavit of Elizabeth A. Price, a true and correct copy of which is attached hereto at Exhibit 1. On September 17, counsel for Union Carbide sent a similar letter to Plaintiffs' counsel Goldberg, Persky, Jennings & White. A true and correct copy of this letter is attached hereto as Exhibit B to the Affidavit of Elizabeth A. Price, at Exhibit 1. Union Carbide's counsel then met and conferred with Plaintiffs' counsel from each firm and resolved the dispute over some but not all of the documents. See Affidavit of Elizabeth A. Price, at Exhibit 1.

Union Carbide respectfully submits that the documents described in detail below are privileged and that a protective order should issue requiring that the documents and all copies in the possession of Plaintiffs, their counsel, and their witnesses, be returned to Union Carbide immediately.

II. ARGUMENT

A. This Court Has The Authority To Issue A Protective Order To Require The Immediate Return Of Union Carbide's Privileged Documents

Plaintiffs' counsel has come into possession of several documents that are protected by

¹ In so far as the documents are privileged, in order to avoid any further disclosure, Union Carbide has not attached copies of the documents to this motion. Union Carbide, however, has provided the Court with copies of these documents under separate cover.

Union Carbide's attorney-client and/or work product privileges. Union Carbide does not know how these documents came into Plaintiffs' counsel's possession and they have not disclosed their source. Any disclosure of these documents from Union Carbide was inadvertent. See Affidavit of John Myers, a true and correct copy of which is attached hereto at Exhibit 2. Regardless of the precise manner in which the documents came into Plaintiffs' counsel's possession, this Court has the authority to issue a protective order requiring the return of all privileged documents to Union Carbide. Every court has the power to provide for the orderly conduct of litigation before it. *See State ex rel. Arrow Concrete Co.*, 194 W. Va. 239, 249, 460 S.E.2d 54 (1995) ("the trial judge has broad authority to control the discovery process"). Whether under the Court's authority under Rule 26(c) of the West Virginia Rules of Civil Procedure governing the issuance of protective orders or under its general power, this Court has the authority to issue the requested protective order.

B. Union Carbide's Documents Are Protected By The Attorney-Client Privilege And/Or Attorney Work Product Doctrine

Under West Virginia law, communications between an attorney and his client are protected from disclosure by the attorney-client privilege. Based upon public policy, the purpose of this evidentiary privilege is to protect the confidential relationship between attorney and client and to promote full and open disclosure of facts so that the attorney may best represent his client. *See State v. Rodoussakis*, 204 W. Va. 58, 68, 511 S.E.2d 469 (1998) ("The venerable attorney-client privilege has as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.") (citation and internal quotation marks omitted). The attorney-client privilege protects from discovery "confidential communications made by a client or an attorney to one another[.]" *State ex rel. United Hosp. Ctr., Inc. v. Bedell*, 199 W. Va. 316, 326, 484 S.E.2d 199 (1997) (footnote omitted).

The Supreme Court of Appeals of West Virginia has identified the following as the three elements of the attorney-client privilege under West Virginia law: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be [intended] to be confidential. *Bedell*, 199 W. Va. at 236 (internal quotation marks omitted) (quoting Syllabus Point 2, *State v. Burton*, 163 W. Va. 40 (1979)). The West Virginia Rules of Evidence incorporate this privilege in Rule 501, which provides that privileges are governed by common law except as modified by Constitution, statute, or court rule. W. Va. R. Civ. P. 501.

The attorney work product doctrine was recognized by the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and incorporated in the West Virginia Rules of Civil Procedure. Rule 26(b)(3) of the West Virginia Rules of Civil Procedure preserves the rights of attorneys to thoroughly prepare cases for trial and to investigate both the favorable and unfavorable aspects of their cases, and from preventing attorneys from taking advantage of their opposing counsel's efforts. *Id.* ("Rule 26(b)(3)"). Regarding opinion work product, "revealing an attorney's thoughts and opinions to an opposing party runs contrary to the principles underlying the adversary process." *Better Gov't Bureau, Inc. v. McGraw (In re Allen)*, 106 F.3d 582, 607 (4th Cir. 1997). "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Hickman*, 329 U.S. at 516.

Pursuant to Rule 26(b)(3), writings that reflect the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" "can be discovered in only very rare and extraordinary circumstances" W. Va. R. Civ. P. 26(c); *Bedell*, 199 W. Va. at 328 (citation and internal quotation marks omitted). The work

product doctrine also extends to protect the “work product” of an attorney’s employees and agents, including investigators and consultants.

Each of the documents at issue is protected from disclosure by either the attorney-client privilege and/or attorney work product doctrine. Exhibit numbers up to #8486 were identified on the Ness, Motley Exhibit list, and Exhibit numbers #60462 and higher were identified on the Goldberg, Persky Exhibit list.

Exhibit #1903: This Union Carbide internal correspondence dated June 30, 1975, from Mr. W.C. Thurber of Union Carbide’s Metals Division discusses a communication from Mr. R.F.X. Fusaro of Union Carbide’s Law Department. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #8349: This Exhibit consists of several documents. Union Carbide claims privilege only with respect to pages AO6484-87, which are a draft letter with handwritten revisions by Mr. Fusaro (of Union Carbide’s Law Department) and a related letter from Mr. Fusaro to Mr. Myers. Union Carbide claims privilege only as to pages A 20889 and 20896 (the first and eighth pages of this exhibit). (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #8373: This Union Carbide internal correspondence dated December 31, 1974, from Dr. Rhodes of Union Carbide’s Calidria business to Mr. Morgan (of Union Carbide’s Law Department) requests legal advice concerning regulatory issues. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #8388: This Union Carbide internal correspondence dated May 12, 1975, from Mr. R.J. Klotzbach of Union Carbide’s Mining and Metals Division to several individuals including Mr. Fusaro (of Union Carbide’s Law Department), specifically states that the information contained therein is intended to be used to respond to interrogatories in a then pending legal action. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #8390: This Union Carbide internal correspondence dated May 30, 1975, from Dr. Rhodes discusses privileged communications with the Law Department. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #8400: This Union Carbide internal correspondence dated July 24, 1975, from Dr. Rhodes to several individuals including Mr. Fusaro (of Union Carbide's Law Department), relates comments from Ms. Marjorie Chamberlain (Union Carbide counsel) and seeks legal advice from Union Carbide's Law Department. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #8486: This Union Carbide internal correspondence dated April 28, 1980, from J.T. Kelly incorporates facts, figures, and other information from counsel.² (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #60462: This exhibit consists of: a letter dated December 2, 1977, from Mr. John W. Whittlesey of Union Carbide's Law Department to Dr. Rhodes discusses NIOSH and OSHA compliance; Union Carbide internal correspondence dated January 9, 1978, from Dr. Rhodes to Mr. Whittlesey explaining the attached information and pending litigation. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #60469: This letter dated October 26, 1977, from Dr. Hans Weill of Tulane University to Mr. Wendell B. Alcorn, Jr. of Cadwalader, Wickersham & Taft (counsel for the AIA) reflects Dr. Weill's opinions on certain medical literature related to asbestos.

Exhibit #60482: This exhibit contains: a letter dated June 27, 1977, from Union Carbide's Law Department to Dr. Rhodes provides information on NIOSH's request for information on asbestos from Union Carbide; Union Carbide internal correspondence dated June 15, 1977, from Dr. Rhodes to several individuals including Mr. Fusaro (of Union Carbide's Law

Department) seeking comments on a response to NIOSH's request for information on asbestos. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #60514: This Union Carbide internal correspondence dated September 22, 1976, from Dr. Rhodes to several individuals including Mr. Fusaro (of Union Carbide's Law Department), concerns revisions to the Asbestos Materials Safety Data Sheet and the attached related documents. (See Affidavit of John Myers, at Exhibit 2.)

Exhibit #60630: This exhibit consists of a letter dated April 26, 1977, from Mr. Whittlesey (Senior Labor Law Counsel for Union Carbide) to Mr. Ralph M. Sarla providing information about Union Carbide asbestos monitoring and detection practices. (See Affidavit of John Myers, at Exhibit 2.)

C. There Has Been No Waiver Of The Attorney-Client Privilege Or Attorney Work Product Doctrine

The accidental, inadvertent disclosure of privileged information by an attorney does not amount to a waiver of the attorney-client or work product privileges. In *State ex rel. Allstate Insurance Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998), the Supreme Court of Appeals of West Virginia described the analysis a trial court should follow in determining whether inadvertent production of attorney-client privileged documents results in a waiver of the privilege. 203 W. Va. at 378-79. Trial courts must consider these factors:

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, (5) whether the overriding interest of justice would be served by relieving the party of its error and (6) any other factors found to be relevant.

² This document was not included in the list of documents addressed in the initial letter to Plaintiffs' counsel concerning the Union Carbide privileged documents, but it was discussed at the meet and confer session between counsel for Union Carbide and Plaintiffs' counsel.

Id. at 377-78.

Although the precise manner in which Plaintiffs obtained the documents is not known, as set forth in the accompanying Affidavit of John Myers, Union Carbide expressed no intent to waive any privilege associated with the documents. (See Affidavit of John Myers at Exhibit 2.)

As described above, upon discovery of the inadvertent disclosure, Union Carbide's counsel promptly wrote letters to Plaintiffs' counsel identifying the documents, setting forth the basis for the privilege, and demanding the immediate return of all copies of the documents. Union Carbide's counsel then met and conferred with Plaintiffs' counsel and resolved the dispute over some but not all of the documents. Under these facts, Union Carbide cannot be said to have expressed or implied consent to waive any privilege with respect to these documents.

III. CONCLUSION

For the reasons set forth above and on the authorities cited, Union Carbide respectfully requests that this Court issue a protective order requiring Plaintiffs, their counsel, and their witnesses to immediately return to Union Carbide all copies of the documents that Plaintiffs have identified as Plaintiffs' Exhibit numbers 1903, 8349, 8373, 8388, 8390, 8400, 8486, 60462, 60469, 60482, 60514, and 60630.