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There Are Limits: The Extent of the Common Interest Exception to the Attorney-Client Privilege

The Illinois Supreme Court adopted the common interest exception to the attorney-client privilege in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 193-195 (1991). For the first time since that decision, in *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2019 IL 123936, the court revisited this issue and held that the exception did not apply in a situation in which a defendant insurance broker in a professional malpractice action sought the communications by the plaintiff with underlying defense counsel. As a result, the court held that the documents sought by the defendant insurance broker were protected from disclosure. *Robert R. McCormick Found.*, 2019 IL 123936.

This is the latest development in the attorney-client privilege in Illinois. Other recent developments and the contours of the privilege has been written about several times in this space: Donald Patrick Eckler and Matthew F. Tibble, *Attorney-Client Privilege in Malpractice Claims,* IDC QUARTERLY, Vol. 24:3, Donald Patrick Eckler, *Attorney-Client Privilege's Continued Expansion,* IDC QUARTERLY, Vol. 25:1, Donald Patrick Eckler, *At Last: The Illinois Appellate Court Formally Recognizes the Common Interest Exception to the Waiver of Privilege Rule,* IDC QUARTERLY, Vol. 28:2.

Facts of the Case

The Robert R. McCormick Foundation and the Cantigny Foundation (the Foundations) sued their insured broker Arthur J. Gallagher Risk Management Services (Gallagher) arising out of Gallagher's alleged failure to procure appropriate directors and officers insurance for the Foundations. *Robert R. McCormick Found.*, 2019 IL 123936, ¶¶ 3-4. The Foundations held large quantities of shares in the Tribune Company and prior to Tribune's bankruptcy was its second largest shareholder. *Id.* ¶ 8. The Foundations requested that Gallagher find a new D&O insurer to replace their previous coverage with Chubb with the goal of saving money on the new policy premium. *Id.* ¶ 5. Gallagher found a Chartis policy that provided a similar coverage level and was $3,400 less. *Id.* ¶ 6.

Gallagher recommended the Chartis policy and represented to the Foundations that the Chartis and Chubb policies were "apples to apples" except the premium. *Id.* ¶ 6. However, the Chartis policy had a broad exclusion for claims that in any way related to the purchase or sale of securities, while the Chubb policy had a very narrow securities exclusion that only applied to alleged violations of securities laws. *Id.* ¶ 7.

After the purchase of the Chartis policy, the Foundations sold their shares in the Tribune Company in a leveraged buyout and a year later the Tribune Company went into bankruptcy. *Id.* ¶¶ 6-9. After the Tribune Company emerged from bankruptcy, several shareholder derivative suits were filed against the Foundations and others alleging actual and constructive fraud and seeking to unwind the buyout and return the creditors' assets. *Id.* ¶ 9.

Suit Against Gallagher

The Foundations tendered the defense of these suits to Chartis, but Chartis denied the claim asserting that the policy excluded claims "in any way relating to any purchase of securities." *Id*. ¶ 10. As a result, the Foundations funded the defense of the underlying litigation themselves, but it has been expensive and is likely to continue. *Id*. Asserting that Chubb would have defended the Foundations under that policy, the Foundations sued Gallagher for breach of contract and professional negligence. *Id*. ¶ 11. The trial court disagreed with the Foundations and granted judgment to Gallagher, but the appellate court reversed finding that the Chubb policy may have provided coverage. *Id*. ¶ 12.

On remand, the matter proceeded to discovery after Gallagher echoed the allegations of the underlying litigation and contended that the Foundations had acted fraudulently and therefore their conduct was uninsurable and that they were aware of the erosion of the Tribune Company's position prior to switching insurers. *Id*. ¶ 13. To support these contentions, Gallagher subpoenaed the communications between the Foundations and their counsel in the underlying litigation. *Id*. ¶ 14. The Foundations objected on attorney-client privilege grounds, but Gallagher asserted that the common interest exception to the attorney-client privilege applied. *Id*.

The trial court ordered production of the documents, held the Foundations in friendly contempt for refusing to produce the documents, and the Foundations appealed. *Id*. ¶¶ 15-16. The appellate court agreed with Gallagher, held that *Waste Management* applied, and ordered production of the documents. *Id*. ¶ 16. Foundations' petition for leave to appeal to the Illinois Supreme Court was granted to determine the extent of the *Waste Management* decision. *Id*. ¶¶ 16-17.

The Supreme Court's Decision

After articulating the basics of the attorney-client privilege and the policy of strictly and narrowly construing the privilege to require production of documents, the court proceeded to distinguish its decision in *Waste Management*. *Robert R. McCormick Found.*, 2019 IL 123936, ¶¶ 19-21. In *Waste Management*, the insureds and the insurers filed complaints for declaratory relief regarding the duty of the insurers to defend and indemnify the insureds for personal injury and property damage allegedly caused by the operation of hazardous waste sites. *Id*. ¶ 22. The insurers sought production of the files of the insureds' defense counsel in the underlying tort litigation and the insureds objected claiming privilege and work product. *Id*. The *Waste Management* court rejected this assertion of privilege, finding that the documents had to be produced both 1) because the cooperation clause of the policies of insurance required production and 2) the common interest doctrine made the attorney-client privilege inapplicable because of the agreement between the parties. *Id*. ¶¶ 23-27.

The Foundations contended that the common interest exception does apply because there is no special relationship with Gallagher. *Id*. ¶ 28. The agreement between the Foundations and Gallagher was for the procurement of insurance and only required Gallagher to indemnify the Foundations for its own negligence and there was no cooperation clause between them. *Id*. The court pointed out that the appellate court confused the common interest exception with the joint defense and non-waiver doctrines and expanded *Waste Management* beyond its intended scope. *Id*. Further, the Foundations and Gallagher were always adversarial, whereas the insurers and insureds were aligned before the dispute arose. *Id*.

The court rejected Gallagher's argument that the special relationship should not be superimposed on the common interest doctrine as the *Waste Management* court found the cooperation clause and common interest exception were separate bases for the production of communications and that it was the commonality of interest which should apply. *Id.* .29 ¶Gallagher contended that it became the Foundations' *de facto* insurer, thus creating the interest necessary for the exception to apply. *Id*.

The court acknowledged that no Illinois court has explicitly limited the common interest doctrine to the insured-insured relationship, but found that the extension of the doctrine in *Waste Management* was based upon a finding that the parties, though not sharing the same lawyer, could be considered to have because of the relationship between them. *Id*. ¶ 30. Gallagher relied on *BorgWarner Inc. v. Kuhlman Electric Corp.*, 2014 IL App (1st) 131824, but the court rejected that argument as well. *Robert R. McCormick Found.*, 2019 IL 123936, ¶¶ 31-32. The agreement in the *BorgWarner* case was not an insurance contract, but it did contain a clause that required the parties to cooperate in the defense of underlying litigation. *Id*. ¶ 32. The *BorgWarner* court also specifically stated that it was not addressing the common interest doctrine. *Id*.

Turing back to *Waste Management*, the court noted that other courts have criticized and refused to expand its reach and that Illinois has refused to recognize the fiduciary duty exception to the attorney-client privilege. *Id.* ¶¶ 33-35. The *Waste Management* decision relied on a series of cases that all had some kind of special relationship, privity of contract, or public policy upon which to anchor the decision. *Id*. ¶ 35. The court also looked at the explicit limitation of the *Waste Management* decision to its facts as the "best indication of the limited nature" of the decision. *Id*. ¶ 36. The fact of a contract between Gallagher and the Foundations was insufficient to overcome the protection of the attorney-client privilege because neither the public policy nor indemnity considerations present in *Waste Management* were present in this case. *Id*. ¶ 37. Finally, the adversity of the Foundations and Gallagher precluded the finding of a common interest. *Id*. ¶ 38.

Conclusion

Illinois has generally construed the attorney-client privilege narrowly and has required production of documents to allow discovery. *See, e.g.*, *Consol. Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118-19 (1982) (rejecting *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and adopting the control group test for communications within corporations). The *Waste Management* decision was an example of another narrowing of the privilege. However, in *Foundations*, the Illinois Supreme Court defined strictly the showing necessary to overcome the attorney-client privilege and found similar interests are not common interests and do not defeat the ancient and venerable protections of privilege.

About the Author

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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