

SUPREME COURT OF ILLINOIS

Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.

2019 IL 123936 (Ill. 2019) · No. 123936 · Decided December 15, 2020

SUMMARY

The Illinois Supreme Court held that the common-interest exception to the attorney-client privilege does not extend to a dispute between insured parties and an insurance broker accused of negligently procuring coverage, where no insured-insurer relationship or comparable cooperation obligation existed. The court distinguished its prior decision in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, and held that the subpoenaed privileged communications were not discoverable under that exception. The appellate and circuit court judgments were affirmed in part and reversed in part, and the cause was remanded.

CASE DETAILS

COURT	Supreme Court of Illinois
WRITING FOR THE COURT	Justice Thomas; Chief Justice Burke; Justice Kilbride; Justice Garman; Justice Karmeier; Justice Theis; Justice Neville
JURISDICTION	Illinois
DECIDED	December 15, 2020
DOCKET	123936
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The Foundations sought review of an appellate court decision affirming a discovery order requiring production of attorney-client privileged communications under the common-interest exception. The Illinois Supreme Court granted the Foundations' petition for leave to appeal.
STANDARD OF REVIEW	The court reviewed de novo the legal question whether the attorney-client privilege was negated by the common-interest exception. The discovery and privilege issue was considered as a question of law.
PRECEDENTIAL VALUE	Published Illinois Supreme Court opinion; precedential
PARTIES	Robert R. McCormick Foundation, Cantigny Foundation v. Arthur J. Gallagher Risk Management Services, Inc.

TOPICS

attorney client privilege

privilege

discovery dispute

insurance

civil procedure

PRACTICE AREAS

Evidence

Insurance

Legal malpractice and professional negligence

Civil procedure

QUESTIONS PRESENTED

1. Whether the common-interest exception to the attorney-client privilege recognized in *Waste Management, Inc. v. International Surplus Lines Insurance Co.* extends to a dispute between an insured and an insurance broker who allegedly negligently failed to procure appropriate insurance, where the broker had no duty to defend or indemnify the insured for the insured's own negligence.
2. Whether the appellate court's discovery order compelling production of the Foundations' attorney-client communications should be affirmed.
3. Whether the denial of a stay and the vacatur of the circuit court's contempt order should remain in effect.

HOLDINGS

1. The common-interest exception to the attorney-client privilege does not extend beyond the circumstances identified in *Waste Management* to a relationship between insureds and an insurance broker that lacks an insurer's duty to defend and indemnify the insureds for the insureds' own negligence.
2. The Foundations' attorney-client communications concerning the underlying LBO litigation remained protected from discovery because Gallagher did not establish a qualifying common interest that negated the privilege.

KEY QUOTATIONS

"We find that the common-interest exception does not extend to the facts of this case." (¶ 1)

"Thus, the attorney-client privilege is to be strictly confined within its narrowest bounds, limited solely to those communications that the claimant either expressly made confidential or that he could reasonably believe under the circumstances would be understood by the attorney as such." (¶ 20)

"It is the commonality of interests which creates the exception, not the conduct of the litigation." (¶ 26)

"We reverse the portion of the appellate court's judgment that affirmed the circuit court's order to compel discovery." (¶ 40)

FACTUAL BACKGROUND

The Foundations hired Gallagher as their insurance broker and sought directors-and-officers coverage comparable to their existing Chubb policy. Gallagher recommended a less expensive Chartist policy and represented that its coverage was equivalent, but the Chartist policy contained a broad exclusion for claims relating to the purchase or sale of securities. After the Foundations were sued in litigation arising from a prior

Tribune Company leveraged buyout and Chartis denied coverage, the Foundations sued Gallagher for failing to procure appropriate insurance. Gallagher sought privileged communications between the Foundations and their counsel concerning the underlying litigation to support defenses alleging fraud and preexisting knowledge of loss.

PROCEDURAL HISTORY

The Foundations sued their former insurance broker for breach of contract to procure insurance, contractual indemnity, professional negligence, and negligent misrepresentation after a replacement directors-and-officers policy allegedly contained a broader securities exclusion than the prior policy. The circuit court initially granted Gallagher summary judgment, but the appellate court reversed after concluding that the prior policy's exclusion did not necessarily bar coverage. On remand, Gallagher asserted defenses based on the Foundations' alleged fraud and preexisting knowledge of loss, subpoenaed communications with their attorneys, and obtained an order compelling discovery under the common-interest exception. The appellate court affirmed the discovery order, vacated the contempt order, and affirmed denial of a stay; the Illinois Supreme Court affirmed in part, reversed in part, and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The cause was remanded to the Du Page County Circuit Court for further proceedings consistent with the opinion. The circuit court was not to compel production of the privileged communications under the common-interest exception; the denial of the stay remained affirmed as modified, and the contempt ruling remained vacated.

CASES CITED

- Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill. 2d 178 (1991)
- Fischel & Kahn, Ltd. v. Van Straaten Gallery, Inc., 189 Ill. 2d 579 (2000)
- People v. Adam, 51 Ill. 2d 46 (1972)
- In re Marriage of Decker, 153 Ill. 2d 298 (1992)
- United States v. Zolin, 491 U.S. 554 (1989)
- People v. Simms, 192 Ill. 2d 348 (2000)
- Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103 (1982)
- Upjohn Co. v. United States, 449 U.S. 383 (1981)
- In re Tribune Co. Fraudulent Conveyance Litigation, 831 F. Supp. 2d 1371 (J.P.M.L. 2011)
- 2016 IL App (2d) 150303
- 2018 IL App (2d) 170939
- Selby v. O'Dea, 2017 IL App (1st) 151572, ¶ 25
- BorgWarner, Inc. v. Kuhlman Electric Corp., 2014 IL App (1st) 131824

- Motorola Solutions, Inc. v. Zurich Insurance Co., 2017 IL App (1st) 151465, ¶ 33
- Hartz Construction Co. v. Village of Western Springs, 2012 IL App (1st) 103108, ¶ 30
- Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co., 393 Ill. App. 3d 782 (2009)
- Netherlands Insurance Co. v. National Casualty, 283 F.R.D. 412 (C.D. Ill. 2012)
- Kmart Corp. v. Footstar, Inc., No. 09 C 3607 (N.D. Ill. Dec. 8, 2010)
- Allianz Insurance Co. v. Guidant Corp., 373 Ill. App. 3d 652 (2007)
- Abbott Laboratories v. Alpha Therapeutic Corp., 200 F.R.D. 401 (N.D. Ill. 2001)
- International Insurance Co. v. Peabody International Corp., No. 87 C 464 (N.D. Ill. 1988)
- MDA City Apartments LLC v. DLA Piper LLP (US), 2012 IL App (1st) 111047
- Garvy v. Seyfarth Shaw LLP, 2012 IL App (1st) 110115