

SUPREME COURT OF ILLINOIS

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

2019 IL 123936 (Ill. 2019) · No. 123936 · Decided November 21, 2019

SUMMARY

The Illinois Supreme Court held that the common-interest exception to the attorney-client privilege recognized in *Waste Management, Inc. v. International Surplus Lines Insurance Co.* did not apply where an insurance broker was sued for negligently failing to procure appropriate insurance. The court distinguished the insurer-insured relationship in *Waste Management* from the parties’ relationship here, which involved an agreement to indemnify the broker’s own negligence and no duty to defend or indemnify the insureds’ conduct. The court therefore rejected Gallagher’s claim to discovery of privileged communications between the Foundations and their attorneys.

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	November 21, 2019
DOCKET	123936
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The Foundations sought review of an appellate judgment affirming an order compelling production of attorney-client privileged communications under the common-interest exception and affirming denial of a stay, while vacating a contempt order. The Illinois Supreme Court allowed the Foundations' petition for leave to appeal.
STANDARD OF REVIEW	The court reviewed the legal question concerning application of the attorney-client privilege and common-interest exception de novo.
PRECEDENTIAL VALUE	binding
PARTIES	Robert R. McCormick Foundation, Cantigny Foundation v. Arthur J. Gallagher Risk Management Services, Inc.

TOPICS

attorney client privilege

privilege

insurance

professional negligence

evidence

PRACTICE AREAS

evidence

insurance

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 negligence action against an insurance broker that had no insured-insurer relationship with the privilege claimant.
2. Whether the Foundations' communications with their attorneys concerning the underlying LBO litigation were discoverable under the common-interest exception.

HOLDINGS

1. The common-interest exception to the attorney-client privilege does not extend to the circumstances of this case because Gallagher and the Foundations did not have the special insured-insurer relationship, corresponding defense and indemnity duties, cooperation obligation, or aligned interests present in *Waste Management*.
2. The circuit court erred by ordering the Foundations to produce the subpoenaed attorney-client communications under the common-interest exception.

KEY QUOTATIONS

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

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

"We believe that the same key circumstances found in Waste Management are absent from the present case and that this reality requires a different result here." (§ 36)

"It seems to us that Gallagher's and the Foundations' interests were always adverse, and there was not a commonality of interest in the same way that is the case when an insurer has a duty to indemnify and defend from the beginning." (§ 38)

FACTUAL BACKGROUND

The Foundations retained Gallagher as their insurance broker and sought D&O coverage comparable to an expiring Chubb policy. Gallagher recommended a Chartis policy that allegedly contained a broader securities exclusion, after assuring the Foundations that the coverage was equivalent. When the Foundations were sued in Tribune-related LBO litigation and Chartis denied coverage, they sued Gallagher for losses allegedly resulting from negligent procurement of insurance. Gallagher later subpoenaed communications between the Foundations and their attorneys concerning the Tribune bankruptcy and LBO litigation to support defenses that the Foundations' conduct was fraudulent or that they had an ongoing loss before purchasing the Chartis policy.

PROCEDURAL HISTORY

The Foundations sued their former insurance broker in the Du Page County circuit court for breach of contract to procure insurance, contractual indemnity, professional negligence, and negligent misrepresentation. The circuit court initially granted Gallagher summary judgment, but the appellate court reversed after concluding that the prior Chubb policy's securities exclusion did not necessarily bar coverage. During discovery after remand, the circuit court ordered production of privileged communications under the common-interest exception and denied a stay. The appellate court affirmed the discovery order and denial of a stay, vacated the contempt order, and remanded. The Illinois Supreme Court affirmed the denial of the stay and vacatur of the contempt ruling, reversed the order compelling discovery, 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 must not compel production of the privileged communications under the common-interest exception; the denial of the stay remained affirmed.

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)
- BorgWarner, Inc. v. Kuhlman Electric Corp., 2014 IL App (1st) 131824
- Motorola Solutions, Inc. v. Zurich Insurance Co., 2017 IL App (1st) 151465
- Hartz Construction Co. v. Village of Western Springs, 2012 IL App (1st) 103108
- Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co., 393 Ill. App. 3d 782 (2009)
- MDA City Apartments LLC v. DLA Piper LLP (US), 2012 IL App (1st) 111047
- Garvy v. Seyfarth Shaw LLP, 2012 IL App (1st) 110115