No. 123936

IN THE
SUPREME COURT OF ILLINOIS

THE ROBERT R. MCCORMICK FOUNDATION and
THE CANTIGNY FOUNDATION,

Plaintiffs-Appellants,

v.

ARTHUR J. GALLAGHER RISK MANAGEMENT SERVICES, INC.,

Defendant-Appellee.

On Petition for Leave to Appeal from the Appellate Court of Illinois
Second District, No. 2-17-0939
There Heard on Appeal from the Circuit Court of DuPage County, Illinois, Civil Department, Law Division, No. 13 L 481

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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POINTS AND AUTHORITIES

INTRODUCTION

Gallagher's[1] erroneous brokerage advice left the Foundations without insurance for the costly LBO Litigation. The Foundations brought this malpractice action to recover the damage caused by Gallagher's error.

Now Gallagher demands access to the Foundations' privileged attorney-client communications and attorney work product, invoking the "common interest" that arises from the "special relationship" between insurers and their insured. But Gallagher is not the Foundations' insurer. It has never contributed to their defense, and never agreed to assume their liability. Gallagher disclaims all of the obligations of an insurer toward the Foundations, and asserts only an insurer's right to privileged communications. Gallagher "stands in the shoes" of an insurer only insofar as its liability will be measured by the value of the insurance it failed to procure. Gallagher had no interest whatsoever in the Foundations' defense of the LBO Litigation until the Foundations sued it. Gallagher's interest in the Foundations' privileged communications has never been, and never will be, anything but adversarial.

By disregarding the "common interest" doctrine's origin and grounding in the insurer-insured relationship and extending it to this malpractice case, the Appellate Court's unprecedented decision would throw open defense counsel's files to myriad malpractice defendants, indemnitors, contributors, sureties, guarantors, and anyone else who might benefit from another's successful defense of a third-party claim. This kind of

[1] Abbreviations used in this brief have the same meaning as in the Foundations' opening brief ("Op. Br."). The Appendix filed with the Foundations' opening brief is cited as "A__." The common-law record in appeal no. 2-17-0939 is cited as "C___." Emphasis added throughout unless noted.

situational alignment of interests bears none of the important attributes of the "special relationship" between an insurer and its insured. No Illinois appellate court has ever expanded *Waste Management*'s common interest rationale beyond its origin in the insurance relationship. The Appellant Court erred in extending that doctrine to this malpractice case, and this Court should reverse that decision.

ARGUMENT

I. *Waste Management's* Common Interest Rule Is An Insurance Doctrine And Does Not Apply To The Foundations' Relationship With Gallagher.

This Court held in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178 (1991) that in declaratory judgment litigation between an insured and its liability insurer, the insurer may in some circumstances discover attorney-client privileged communications between its insured and the insured's defense counsel in the underlying case. Based on the facts of that case, the Court identified two grounds for this exception to privilege: (1) the "cooperation clause" in the insurance contracts; and (2) the "common interest" that the insurers and insured had in the defense of the underlying lawsuit because the insurers were ultimately liable for a judgment or settlement. *Id*. at 191-195.

There is no cooperation clause in the Compensation Agreement between Gallagher and the Foundations, and Gallagher concedes that the cooperation clause rationale does not apply in this case. Gallagher and the courts below relied exclusively on the "common interest" prong of the *Waste Management* doctrine. A5 ¶ 10. *Waste Management*'s common interest rationale was based on a pre-existing contractual insurance relationship. There is no support in *Waste Management* to expand the rationale outside insurance relationships, and certainly not to a malpractice dispute like this one.

A. The "common interest" identified by *Waste Management* is based on a preexisting contractual relationship between an insurer and its insured.

The *Waste Management* Court's common interest ruling relied on the "special relationship" between insurers and insureds, including the unique obligations insurers and insureds owe each other. 114 Ill. 2d at 194. These obligations arise out of specialized provisions found in insurance contracts, including the duties to defend and indemnify, duties to provide notice and disclose books and records, and fiduciary obligations to act in good faith. *See* Op. Br. at 10-12; *Waste Management*, 144 Ill. 2d at 193-94.

The Court's analysis in *Waste Management* rested primarily on a series of insurance cases. The Court found those decisions and the text and purpose of the typical insurance contract supported the insurers' position that, because of their unique status as their insureds' defenders and indemnitors against third-party claims, they were entitled to access privileged documents and work product relating to the defense of such claims. 144 Ill. 2d at 193; *see also* Op. Br. at 10-11.

The *Waste Management* Court then applied these general precepts to a new situation, acknowledging that no Illinois case had "presented like facts." 144 Ill. 2d at 193. The Court considered the nature of the insurance relationship and determined that the requirement of joint or simultaneous representation was not necessary "where the attorney, though neither retained by nor in direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer." *Id*. at 194. In doing so, it acknowledged that a "flexible application" of the typical common interest doctrine was required to avoid defeating the purpose and intent of the parties' insurance agreement. *Id*. Crucially, the Court offered no indication that this flexible application was appropriate outside an insurance relationship or that it intended to transform the common

interest doctrine in all other contexts. *See id*. The Court then reiterated its reliance on the unique nature and importance of the insurer-insured relationship: "To deny discovery in this instance would be to disregard considerations of public policy which require encouragement of full disclosure by an insured to his insurer." *Id.* at 195.

Indeed, insurance policies "are simply unlike traditional contracts, *i.e*., they are not purely private affairs but abound with public policy considerations . . . ." *M.F.A. Mut. Ins. Co. v. Cheek*, 66 Ill. 2d 492, 500 (1977). Because of this, the Court has recognized certain specialized rules for insurance contract interpretation. For example, when the terms of an insurance contract are ambiguous, the terms should be liberally construed in favor of coverage. *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). Similarly, both statutory and common law impose unique duties of fidelity and good faith on insurers in their conduct toward their insured. *See* Op. Br. at 12.

In *Waste Management*, an insurance contract governed the parties' relationship and "privity of contract" between insurer and insured gave rise to a "special relationship." *See Waste Management*, 144 Ill. 2d at 194. This relationship and the public policy considerations applicable to insurance contracts created the "commonality of interests" on which the *Waste Management* Court based the decision Gallagher invokes.

B. Gallagher's position finds no support in *Waste Management.*

The *Waste Management* opinion offers no support for extending the application of its common interest rationale to this broker malpractice dispute. In *Waste Management*, the insurers cited the insurance policy's cooperation clause and the commonality of interest between the insurer and insured as alternative grounds to obtain their insureds' privileged defense-related communications. *See* 144 Ill. 2d at 192-93. Because the Court found both grounds "equally compelling," *id*. at 193, Gallagher argues this must mean

that the existence of an insurance contract is not required to create a "common interest" sufficient to obviate privilege. Gallagher Br. at 28-30. Otherwise, Gallagher argues, the common interest doctrine would have "no separate existence from the contractual cooperation clause argument." *Id*. at 30. Gallagher thus concludes that the common interest rationale must extend beyond the insurance context.

Gallagher's argument misreads *Waste Management* and subsequent decisions interpreting it. The *Waste Management* Court discussed both the effect of a cooperation clause on privilege and the "common interest" arising from the insurer-insured "special relationship" because cooperation clauses are found not just in insurance contracts, but in other contracts as well. For example, in *BorgWarner, Inc. v. Kuhlman Elec., Co.*, a merger agreement obligated the parties to cooperate if a potential claim for indemnified liability arose. 2014 IL App (1st) 131824; *see also Abbott Labs. v. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 405 (N.D. Ill. 2001) (applying cooperation clause found in asset purchase agreement). Conversely, however, the fact that insurance policies generally contain cooperation clauses does not render meaningless the Court's discussion of the "special relationship" between insurers and insureds. Indeed, the facts of this case illustrate the importance of these separate discussions: absent both a special insurer-insured relationship and a voluntary cooperation agreement, there is no basis to conclude the Foundations consented in any way to waive privilege.

Gallagher further overstates the overlap between *Waste Management*'s cooperation clause and common interest analyses. Gallagher Br. at 29-30. The notice and inspection obligations cited by the authorities on which the *Waste Management* Court relied as the basis for the "special relationship" underlying the commonality of interest

between insurers and insureds are independent of the cooperation clause. *See*, *e.g.*, *Int'l Ins. Co. v. Peabody Int'l Corp.*, 1988 WL 58611, at *2 (N.D. Ill. 1988) (quoting separate notice and cooperation conditions); *Southeastern Penn. Trans. Auth. v. Transit Cas. Co.*, 55 F.R.D. 553, 554 (E.D. Pa. 1972) (quoting separate administration of claims and inspection conditions that require disclosure of pleadings and books and records without reference to "cooperation"). These obligations, like the insurer's reciprocal duties to investigate, defend, settle, and generally act in good faith toward the insured, further distinguish the "special relationship" underlying *Waste Management*'s common interest doctrine from Gallagher's position as a malpractice defendant.

Failing to contend with *Waste Management*'s reliance on a dozen insurance decisions, Gallagher seeks refuge in the *Waste Management* Court's citation to several evidence treatises that describe the common interest doctrine in more general terms. *Id*. at 24. Even these authorities demonstrate that Gallagher's relationship with the Foundations is too remote and antagonistic to afford it any claim to their privileged communications. For example, the Court cited a discussion in McCormick on Evidence of the common interest that arises when two parties affirmatively "engage the same attorney to represent their respective interests." *Waste Management*, 144 Ill. 2d at 190, 193; *see* McCormick, Evidence § 91, at 219 (3d ed. 1984). Explicitly addressing privilege issues arising in the context of the insurer-insured relationship, the treatise notes that the attorney-client privilege is limited to communications the claimant reasonably believed would be confidential. *Id*. at 220 ("Here again, it seems the communicating client, knowing that the attorney represents the other party also, would not ordinarily intend that the facts communicated should be kept secret from him"). In this case, however, the

Foundations had no reason whatsoever to think their attorneys would share any confidences with Gallagher. Even by the Appellate Court's flawed analysis, no "common interest" arose between the Foundations and Gallagher until the Foundations filed this lawsuit. The requisite commonality of interest to obviate the attorney-client privilege cannot arise between parties who are adverse at all relevant times. *See*, *e.g.*, *Netherlands Ins. Co. v. Nat'l Cas. Co.*, 283 F.R.D. 412, 418 (C.D. Ill. 2012).

Nor can Gallagher even claim the same indemnification obligation toward the Foundations that an insurer would have. As explained in the Foundations' opening brief, the insurer-insured relationship is a unique contractual relationship negotiated at arm's length long before any dispute over the scope of that relationship arises. The insurer agrees to defend and indemnify its insured against other parties' claims that the insured was negligent. *See* Op. Br. at 9. Here, Gallagher expressly disclaimed having any such obligation. A20. Instead, it agreed to indemnify the Foundations against Gallagher's own negligence – in other words, its malpractice in procuring insurance for the Foundations. Thus, as the Appellate Court implicitly acknowledged, A8 ¶ 15, it was only Gallagher's negligence and this resulting adversarial lawsuit that gave Gallagher any interest in the Foundations' defense of the LBO Litigation.

The interdependent, fiduciary nature of the insurer-insured special relationship is the lynchpin of *Waste Management*'s common interest doctrine in circumstances where, as here, the parties had no agreement to share counsel or even to share confidences. Because of the preexisting contractual relationship between insurer and insured, as well as the well-established public policy supporting insurance relationships, the *Waste Management* insurers were entitled to the insureds' privileged communications despite

the insurers' breach of their own obligations. *See Waste Management*, 144 Ill. 2d at 205-206. In contrast, Gallagher's claim to the Foundations' documents does not arise from a relationship it had with the Foundations despite breaching its duties to them. Rather, Gallagher (and the Appellate Court) contend Gallagher's rights arose because Gallagher breached its duties, causing the Foundations to sue. Nothing in *Waste Management* supports rewarding Gallagher's breach with access to the Foundations' privileged communications and work product.

II. The Court Should Not Expand *Waste Management*'s Common Interest Doctrine Beyond The Insurance Context.

No Illinois appellate court has expanded *Waste Management*'s common interest doctrine outside the insurance context. There is no support for such an expansion in any opinion applying *Waste Management*, including the Appellate Court opinion below.

A. Illinois courts have correctly resisted expanding *Waste Management.*

Gallagher fails to rebut the fact that no Illinois appellate court has ever extended *Waste Management*'s common interest doctrine to a broker malpractice case, or to any non-insurance case.

1. No Illinois appellate court has expanded *Waste Management*'s common interest doctrine beyond the insurer-insured relationship.

Illinois appellate courts have rejected all efforts to expand *Waste Management*'s common interest rationale beyond the insurer-insured context. Op. Br. at 14-15 (collecting citations). Gallagher does not meet this point squarely by citing decisions that expand *Waste Management*'s common interest doctrine, because none exist. Instead, Gallagher resorts to arguing factual distinctions in decisions that Gallagher concedes did not in fact expand *Waste Management*. *See* Gallagher Br. at 26-28.

For example, Gallagher does not dispute that both *Hertz Const'n Co v. Village of Western Springs*, 2012 IL App (1st) 103108 (2012), and *Motorola Sols. v. Zurich Ins. Co.*, 2017 IL App (1st) 161456, refused to extend *Waste Management* in any respect, let alone beyond the insurer-insured relationship. Gallagher Br. at 26-27. Gallagher simply argues at length that these authorities do not affirmatively foreclose such expansion—a strawman argument the Foundations never asserted. *Id.*

Similarly, in *Kmart Corp. v. Footstar, Inc.*, 2010 WL 5101406 (N.D. Ill. 2010), Footstar sought as Kmart's indemnitor to compel Kmart to turn over privileged defense communications. *Id*. at *1. The court rejected Footstar's request because: (1) Kmart and Footstar were adversaries in the underlying tort case; (2) the same defense counsel did not represent Kmart and Footstar; and (3) there was no cooperation agreement between the parties. *Id*. Tellingly, the first and last of these distinctions both strongly undermine Gallagher's claim to the Foundations' privileged communications and work product. The Foundations never agreed to cooperate with Gallagher in the defense of the LBO Litigation. Moreover, according to the Appellate Court, the Foundations gave Gallagher a stake in the LBO Litigation by suing Gallagher. A8 ¶ 15. But that suit simultaneously created an adversarial relationship. Hence Gallagher never had a non-adversarial interest in the Foundations' defense.

Indeed, courts have rejected efforts to expand *Waste Management* even within the insurance context. For example, in *Netherlands Insurance Company v. National Casualty Company*, 283 F.R.D. 412 (C.D. Ill. 2012), the underlying plaintiffs were injured in a truck accident and sued numerous parties. The underlying defendants' various insurers filed insurance coverage litigation against each other. In the coverage

litigation, one insurer (National) sought to use *Waste Management* to force the others to turn over privileged defense counsel files. *Id.* at 417. The court first ruled that *Waste Management* did not apply because, like here, there was no duty to cooperate absent an express agreement to do so. *Id*. at 418. National also claimed that it had a "common interest" with the other insurers and their insureds because they all worked together to settle the underlying cases. *Id*. The court rejected this attempt to expand *Waste Management* outside its origin in the relationship between insurer and insured: "Commonality is not somehow created, as argued by National, by the fact that these entities worked together to settle the underlying cases. . . . the insurance companies have different insureds whose legal positions were at all times adverse to each other, even as they worked together to try to reach settlement." *Id*. Accordingly, "[n]either the duty to cooperate nor the doctrine of common interests applies to avoid the attorney-client privilege asserted in this case." *Id*.

Gallagher's position is even farther afield. Gallagher claims only that it has a situational "common interest" in the Foundations' successful defense of the LBO Litigation, created by the Foundations' lawsuit. Gallagher has done nothing to assist the Foundations in their defense of the LBO Litigation, nor has it acknowledged any obligation to assist them in settling the LBO Litigation. To the contrary, Gallagher has worked at cross-purposes with the Foundations by trying to obtain their privileged documents to develop evidence and obtain findings that could never help, and only hurt, the Foundations' defense of the LBO Litigation. Neither *Waste Management* nor any other principle should afford Gallagher access to the Foundations' confidences because of its adversarial relationship to the Foundations.

2. The little authority relied on by Gallagher does not support is position.

Gallagher's strained effort to overcome the absence of Illinois appellate authority applying *Waste Management*'s common interest doctrine outside its original insurance context merely underscores the futility of that effort. *See* Gallagher Br. at 23-26.

Gallagher resorts to truncating a quote from *Selby v. O'Dea*, 2017 IL App. (1st) 151572, ¶ 25; *see* Gallagher Br. at 23. What the court actually wrote was, "While Illinois Courts have never explicitly limited this doctrine to the insurer-insured relationship, that is the situation where it is most obviously applicable, as *Waste Management* itself noted." *Selby*, 2017 IL App. 151572, ¶ 25 (language omitted from Gallagher brief underscored). Read in full, this statement hardly supports the expansion of *Waste Management's* common interest doctrine beyond its "most obvious[]" application in the insurer-insured relationship. Unsurprisingly, therefore, the *Selby* court declined to do so. *Id.*, ¶ 27.

Gallagher's reliance on *BorgWarner, Inc. v. Kuhlman Electric Corp.*, 2014 IL App (1st) 131824 is no more persuasive. There, unlike here, BorgWarner and Kuhlman Electric expressly agreed in their indemnification agreement that Kuhlman Electric would cooperate in connection with BorgWarner's defense of claims against Kuhlman Electric. *Id.*, ¶ 26. The appellate court based its decision entirely on the parties' cooperation agreement, a ground not present here. Tellingly, the court expressly declined to rule on the "common interest" doctrine asserted here by Gallagher. *Id.*, ¶ 34.

Lacking any real support in Illinois appellate jurisprudence, Gallagher belabors a federal magistrate judge's decision in *Abbott Labs. v. Alpha Therapeutic Corp.*, 200 F.R.D. 401 (N.D. Ill. 2001). As in *BorgWarner*, an asset purchase agreement required Abbott to indemnify Alpha against certain third-party claims, and Alpha to cooperate

with Abbott in connection with any indemnification. *Id.* at 405. The magistrate judge handling the discovery dispute examined the agreement closely and concluded it "impose[d] the same 'broad duty of cooperation'" as the cooperation clause at issue in *Waste Management*. *Id*. at 406. No such cooperation agreement exists here, of course. The *Abbott* court then continued with an unnecessary discussion regarding why *Waste Management*'s common-interest rationale also would require Alpha to disclose its privileged communications. *Id.* at 407-08. That discussion, however, turns on a key fact that further distinguishes *Abbott* from this case. In *Abbott*, the parties' indemnification agreement created a "common interest" in Alpha's defense before the parties became adversarial. *Id.* at 407 (despite the parties' subsequent adversity, "those [common] interests did in fact exist for at least some of the time during the underlying litigation, and at those times the attorneys for Alpha would be said to have been acting in the common interest of both Alpha and Abbott"). Here, of course, because there was no pre-existing indemnification or cooperation agreement, Gallagher's interest in the Foundations' defense arose when the Foundations sued Gallagher. *See* A8 ¶ 15.

None of these authorities support extending *Waste Management*'s common interest doctrine to this broker malpractice case.

B. The Appellate Court's flawed reasoning provides no basis to expand *Waste Management.*

Gallagher also fails to rehabilitate or excuse the Appellate Court's flawed analysis. Its opinion offers no basis to expand *Waste Management* to cover this dispute.

As discussed in the Foundations' Opening Brief, Gallagher has no greater interest in the Foundations' defense than any malpractice defendant, indemnitor, contributor, guarantor, or surety would have in another party's success in minimizing its liability to a

third party. As a consequence, the Appellate Court's determination that this interest is enough to invoke *Waste Management's* common interest doctrine would dramatically expand that doctrine far beyond its origin in the insurer-insured relationship.

Gallagher responds that the Appellate Court likened Gallagher's situational alignment with Foundations' interests to the contract-based common interest identified *Waste Management*. *See* Gallagher Br. at 31-32, 34. But this begs the crucial question Gallagher cannot answer: why should its adversarial interest as a malpractice defendant in the Foundations' ability to defend themselves in the LBO Litigation create the same entitlement to their privileged communications as an insurer who undertakes a fiduciary obligation to defend and assume its insured's liabilities? In fact, these interests differ in a crucial way. Gallagher's potential liability was created not by agreement, but by adverse legal action. Unlike a contract between an insurer and its insured, the Foundations' malpractice suit against Gallagher cannot be said to knowingly waive or relinquish privilege in the defense of an indemnified third-party claim.

Moreover, Gallagher does not even try to defend the Appellate Court's misplaced reliance on authority relating to the joint-defense non-waiver principle. Rather than grappling with how conflating these concepts would expand *Waste Management's* common interest doctrine, *see* Op. Br. at 19, Gallagher simply minimizes this fundamental flaw in the Appellate Court's analysis as a meaningless "aside." Gallagher Br. at 34 (citing A7 ¶ 15). But the Appellate Court's conflation of these "very different" concepts, *see Selby*, 2017 IL App. 151572, ¶ 27, is not so easily dismissed. The Appellate Court itself tacitly emphasized the importance of its error by asserting

(incorrectly) that the joint-defense non-waiver authorities it discussed at length were "the concepts underlying [the *Waste Management*] decision." A7 ¶ 14.

In the Appellate Court, as here, the Foundations argued that the Courts should not expand the unique and frequently criticized *Waste Management* doctrine beyond its narrow, traditional, and more well-grounded application in insurance coverage disputes between insurer and insured. The Appellate Court acknowledged, "the Foundations urge us to apply *Waste Management* 'cautiously' and not to 'expand' its holding to discovery in broker-malpractice litigation." A6 ¶ 13.

In the next paragraph, however, the Appellate Court rejected the Foundations' premise by contending nearly every other court in the land already applies the same "common interest" doctrine that *Waste Management* embraced:

> While it is true that this court and others have been critical of *Waste Management* (see *id*.), we acknowledge today that our criticism might have been unfair and ultimately unwarranted. While not every jurisdiction adheres to the precise contours of a rule like the one set forth in *Waste Management*, every federal circuit and 46 states recognize at least some form of the common-interest exception to the attorney-client privilege in discovery.

A6 ¶ 14. The court then devoted more than a page to discussing only joint-defense non-waiver authorities, relying on those authorities to assert that criticism of *Waste Management* "might be attributable to a simple problem of nomenclature." *Id.* ¶ 14.

The Appellate Court simply was wrong. The difference between the joint-defense non-waiver rationale erroneously ascribed to *Waste Management* and the common-interest doctrine actually embraced by *Waste Management* is not just "nomenclature." Though related to the *Waste Management* exception, the joint defense non-waiver rule "in fact occurs in very different circumstances and produces very different results."

Selby, 2017 IL App. 151572, ¶ 27. The difference in results is that the joint-defense doctrine extends privilege, but *Waste Management*'s common-interest doctrine obviates privilege. Moreover, the very different circumstances in which they occur would produce a much broader application of *Waste Management* under the Appellate Court's interpretation. *See* Op. Br. at 19. Gallagher's only answer to this problem is denial: having dismissed the Appellate Court's analytical shift to a much broader concept as an "aside," Gallagher asserts that the Appellate Court did not hold that *Waste Management*'s restriction of attorney-client privilege and work product would extend to joint defense sharing. Gallagher Br. at 32. But Gallagher offers no reason why this extension would not be the result if the rules governing joint defense sharing are, as the Appellate Court asserted, "the concepts underlying [*Waste Management*]."

By shifting the conceptual underpinning of *Waste Management*'s common interest doctrine onto the broader the joint-defense relationship, the Appellate Court's decision would expand *Waste Management*'s scope to myriad such relationships. While a joint defense non-waiver agreement might obviate privilege in specific voluntarily-shared confidences, the *Waste Management* common interest doctrine, focusing as it does not on sharing of individual communications but rather on a general "commonality of interests," would vitiate all privilege between joint defendants. The joint-defense authorities relied upon by the Appellate Court do not support such an expansion. Nor does *Waste Management*. This Court should reverse the Appellate Court and make clear that no such expansion is warranted.

C. Certain principles of insurance law affect this dispute, but this does not give Gallagher the rights an insurer would have.

Finally, Gallagher argues that because the Foundations and the courts have occasionally referred to Gallagher as a "de facto insurer" in the six years this litigation has been pending, that should give Gallagher rights it would have if it were an insurer.

Gallagher's assertion stems from the Appellate Court's 2016 decision in this case. To prove their malpractice claims, the Foundations had to show that the insurance policies Gallagher advised them to drop would have provided a defense and indemnity against the LBO Litigation – unlike the replacement insurance that Gallagher recommended. To this end, the Foundations and Gallagher filed cross-motions for partial summary judgment regarding a securities exclusion that Gallagher claimed would have barred coverage under the prior insurance. The Circuit Court granted Gallagher's motion and the Foundations appealed.

Because Gallagher argued that the exclusion would have barred coverage for that LBO Litigation, it was, for purposes of policy interpretation, standing in the shoes of the insurer. Similarly, although the Foundations no longer had the policy at issue (because of Gallagher's malpractice), under the benefit-of-the-bargain damages theory underlying this malpractice case, *see Skaperdas v. Country Cas. Ins. Co.*, 2013 IL App (4th) 120986, ¶ 23, *aff'd*, 2015 IL 117021, the Foundations argued from the insured's point of view. Therefore, applying the basic principle of Illinois insurance law that exclusions in an insurance policy are construed narrowly and against the insurer, the Appellate Court construed the exclusion against Gallagher as the "de facto insurer." Having done so, it reversed the Circuit Court, and granted the Foundations' motion for partial summary judgment. *McCormick v. Gallagher Risk*, 2016 IL App (2d) 150303, ¶ 16.

There end the similarities between Gallagher and an insurer. Gallagher did not issue an insurance policy agreeing in advance to defend the Foundations against third-party claims. Gallagher disclaims all responsibilities of an insurer. Nor did the Foundations choose to have Gallagher defend and indemnify them; they wanted insurance for that. Instead they got this malpractice claim. Now, Gallagher's purported common interest arises solely in the adversarial context created by Gallagher's breach and the Foundations' lawsuit. That purely adversarial relationship should not entitle Gallagher to obtain the Foundations' most sensitive communications.

D. *Waste Management* is an outlier even in the insurance context.

"[A]lmost every foreign jurisdiction that has considered the holding of *Waste Management* has assailed the decision as unsound and improperly reasoned." *Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 664 (2d Dist. 2007).[2] Tellingly, other courts part ways with *Waste Management* over the precise issue on which this case turns.

Other jurisdictions have found that the *Waste Management* rule goes "too far . . . . As a matter of general privilege law, there is no automatic waiver of the attorney-client privilege merely because an insured and its insurer have a 'common interest' in the outcome of a particular issue. That waiver may be found only when there has been a dual representation of both parties, or the privilege has otherwise been waived by, for example, a party's conduct, or by contract." *North River Ins. Co. v. Philadelphia Reins. Corp.*, 797 F. Supp. 363, 367-68 (D.N.J. 1992); *see also*, *e.g.*, *Remington Arms. Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 416 (D. Del. 1992) ("simply because an insured

[2] As discussed in the Foundations' Opening Brief and below, the Appellate Court walked back this assessment, but did so on erroneous grounds. Op. Br. at 16-20; *supra* at 13-15.

has a duty to cooperate with assigned defense counsel, the insured should not lose his rights . . . protected by the attorney-client privilege"); *Bituminous Cas. Corp. v. Tonka Corp.,* 140 F.R.D. 381, 386 (D. Minn. 1992) (finding unsound *Waste Management's* conclusion that "because an insured agrees to cooperate with the insurance company, in the event he is sued or otherwise makes a claim under the policy, that (sic) the insured has thereby forever contractually waived the attorney-client privilege."). Here, Gallagher asserts the exact argument criticized in *North River:* that its situational interest in the Foundations' successful defense entitles it to invade their confidences, despite the fact that there has been no voluntary, knowing dual representation, agreement, or waiver of the kind required by other courts.

The Foundations recognize that *Waste Management* is the law of Illinois, and submit that the Court need not reconsider *Waste Management* to conclude that its "common interest" doctrine does not apply to this malpractice case. But given *Waste Management*'s limited application even within Illinois, and frequent criticism outside Illinois, the Foundations respectfully suggest that the Court should resist Gallagher's invitation to expand its "common interest" doctrine still farther.

III. Gallagher's Rhetoric And Self-Interested Actions Show That It Acts As A Malpractice Defendant, Not As An Insurer.

Finally, Gallagher's own conduct in this appeal demonstrates an interest solely in its own defense, not in the Foundations' defense of the LBO Litigation. Gallagher's statement of "facts" makes numerous argumentative assertions that have no basis in the record. Among them: "The Foundations knew" that the Tribune Creditors' Committee's requests "were a prelude to their being sued" (Gallagher Br. at 4); the Foundations knew "since 2009 that they would be sued" (*id.* at 6); and the Foundations "never advised

Gallagher that they were likely to be sued" (*id.*). No such findings have been made in any case anywhere, much less this one, which is still in the midst of fact discovery (which is stayed pending this interlocutory appeal).

Furthermore, Gallagher freely acknowledges that if given access to the Foundations' privileged communications and advice, it will use those materials in support of its fraud, negligence, and other affirmative defenses. Gallagher Br. at 7-8. Gallagher's allegations echo the LBO Litigation Trustee's most aggressive (and false) charges, even as the LBO Litigation against the Foundations continues. Indeed, Gallagher seeks to run the Trustee's playbook despite having spurned the Foundations' proposal to stay this litigation until those allegations can no longer threaten the Foundations' defense of the LBO Litigation. No insurer would ever do this except at great risk of being sued for bad faith. *See generally* 215 ILCS 5/155 (statute creating cause of action for "bad faith" against insurer); *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 519 (1996) (policyholder can sue insurer for vexatious and unreasonable conduct and recover damages above policy limits); *Peerless Enter., Inc. v. Kruse,* 317 Ill. App. 3d 133, 149 (2d Dist. 2000) (attorneys' fees awarded under 215 ILCS 5/155 based on bad faith litigation conduct).

These sharply conflicting interests underscore the Appellate Court's error in concluding that "by suing Gallagher, the Foundations have given Gallagher a stake in the LBO litigation," and thus created a common interest where none had previously existed. A8 ¶ 15. The Foundations and Gallagher are ordinary litigation adversaries. The mere fact that Gallagher would be better off if the Foundations' defense of the LBO Litigation succeeds does not create the common interest that underpins *Waste Management*. Their

relationship is not the "special" one between insurer and insured. Gallagher should not be permitted to invade the Foundations' privileged communications and mine them for material to use against the Foundations because of its adversarial relationship. If this Court allowed Gallagher to do so, it would open the door to invasion of privilege far more broadly than the *Waste Management* Court ever suggested was proper.

CONCLUSION

For the foregoing reasons, the Foundations respectfully request that the Court reverse the Appellate Court's ruling and remand the case to the Circuit Court with instructions to deny Gallagher's Motion to Compel the production of privileged documents, grant the Foundations' Motion for Protective Order preventing the production of privileged documents, and grant the Foundations' Motions to Quash as to the production of privileged documents by subpoena recipients.

Dated: April 1, 2019

Respectfully submitted,
THE ROBERT R. MCCORMICK FOUNDATION AND THE CANTIGNY FOUNDATION

By: */s/ Matthew C. Wolfe*
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

/s/ Matthew C. Wolfe

CERTIFICATE OF SERVICE

The undersigned, Matthew C. Wolfe, an attorney, certifies that on April 1, 2019, the foregoing **Reply Brief of Plaintiffs-Appellants** was electronically filed with the Clerk's Office of the Illinois Supreme Court and that a copy was served by electronic mail on the following counsel:

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Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the above statements set forth in this instrument are true and correct.

/s/ Matthew C. Wolfe

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