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

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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1/2/2019 4:29 PM
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POINTS AND AUTHORITIES

NATURE OF THE CASE

This appeal presents an important question regarding the scope of the attorney-client privilege and attorney work product doctrine in Illinois. The Appellate Court's decision in this case is a dramatic, unprecedented, and unwarranted expansion of the limited exception to those protections articulated in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill.2d 178 (1991). In *Waste Management*, this Court held that insurers may discover attorney-client communications and attorney work product concerning the defense of liability claims against their insureds because the insurers and insureds have a "common interest" in the insureds' defense. Ruling on motions, the Circuit and Appellate Courts erroneously extended *Waste Management*'s "common interest" exception to privilege to this malpractice case brought by the Robert R. McCormick Foundation and the Cantigny Foundation (the "Foundations") against their insurance broker, Arthur J. Gallagher Risk Management Services, Inc. ("Gallagher"), seeking damages for negligent advice that left the Foundations without coverage for an enormous securities claim. No questions are raised on the pleadings.

This Court should reverse because the ruling below significantly and improperly expands the *Waste Management* doctrine beyond any reasonable application.

ISSUE PRESENTED

Is an insurance broker sued for failing to procure coverage for a costly securities claim entitled to obtain its adversaries' privileged communications and their attorneys' work product relating to that underlying claim?

JURISDICTION

On November 16, 2017, the Circuit Court held the Foundations in civil contempt of court for failing to comply with an October 24, 2017, order of the Circuit Court. A22.

On November 20, 2017, the Foundations filed a Notice of Appeal. A23.[1] The Appellate Court had jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(5). The Appellate Court affirmed and entered judgment on July 20, 2018. The Foundations did not file a petition for rehearing. The Foundations filed their Petition for Leave to Appeal on August 24, 2018, and this Court granted the Petition on November 27, 2018. This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.

STATEMENT OF FACTS

I. The Foundations' Malpractice Case Arises From Gallagher's Failure To Procure Adequate Insurance.

A. The Foundations' loss of insurance for the LBO Litigation.

The Foundations are two of the largest charitable organizations in the United States. They engage in numerous philanthropic initiatives aimed at fostering strong communities of educated, informed, and engaged citizens. Formed over 60 years ago by the former publisher of the Chicago Tribune, Colonel Robert R. McCormick, the Foundations held significant stock in Tribune Company ("Tribune") until 2007. Then, like every other shareholder of Tribune, they sold their stock in connection with investor Sam Zell's 2007 leveraged buyout of Tribune (the "LBO"). Tribune filed for bankruptcy in December 2008. *See* C33.

Because their ability to fund extensive charitable work depends on large securities holdings, the Foundations need to maintain robust Directors and Officers (D&O) insurance that covers securities transactions. C36 ¶ 14. In 2010, their $25 million D&O policies came up for renewal. C37-38 ¶¶ 21-23. Gallagher advised the Foundations that they could obtain

[1] The Foundations' Appendix filed with this brief is cited as "A__". The common-law record in appeal no. 2-17-0939 is cited as "C__".

the same coverage provided by their expiring policies from a different insurer for $3400 less than their incumbent insurers would charge. C39 ¶¶ 29-30. The Foundations followed this advice and changed insurers for the two-year period beginning June 15, 2010.

On November 1, 2010, Tribune's creditors' committee (later supplanted by a Litigation Trustee appointed in Tribune's bankruptcy proceeding) initiated litigation against thousands of defendants, including Zell; Tribune's directors, officers, investment bankers, and valuation advisors; and every shareholder who received more than $50,000 for Tribune shares, including the Foundations. Additional lawsuits were subsequently brought against the Foundations and other shareholders by individual creditors of Tribune. All of these lawsuits were consolidated in the United States District Court for the Southern District of New York. *See* A2 ¶ 4.

When the Foundations tendered the defense of these costly lawsuits to their new insurer, they learned Gallagher's advice was wrong. The insurer denied coverage based on an exclusion not found in their prior policies. C40-43 ¶¶ 33, 44.[2] As a result, the Foundations have been forced to fund the extremely costly defense of the sprawling and complex LBO Litigation.

That defense has been successful to date, but it has been extremely expensive and the litigation likely will continue for years. Following consolidation, the District Court dismissed the follow-on cases brought against the Foundations with prejudice in their entirety. On March 29, 2016, the United States Court of Appeals for the Second Circuit

[2] Although Gallagher claimed, and the Circuit Court agreed, that the Foundations' prior policies also would have excluded coverage for the LBO Litigation, the Appellate Court reversed in 2016, holding that the prior policies' exclusion was narrower and would not have precluded coverage. *Robert R. McCormick Found. v. Arthur J. Gallagher Risk Mgmt. Services, Inc.*, 2016 IL App (2d) 150303, ¶¶ 7-8.

affirmed the dismissal, *In re Tribune Co. Fraud. Conveyance Litig.*, 818 F.3d 98, but later recalled its mandate.[3] On January 6, 2017, the District Court dismissed the Litigation Trustee's claims for actual fraudulent conveyance with prejudice. *In re Tribune Company Fraudulent Conveyance Litig.*, No. 12-mc-2296, 2017 WL 82391. On November 30, 2018, the court dismissed the other three causes of action against the Foundations with prejudice. *In re Tribune Company Fraudulent Conveyance Litigation*, No. 12-mc-2296, 2018 WL 6329139. The time to appeal those rulings has not yet run.

Gallagher has played absolutely no role in the Foundations' thus-far successful defense of the LBO Litigation, has contributed nothing to the cost of defense, and has had no contact whatsoever with the Foundations' defense counsel – except to subpoena them.

B. This malpractice case.

Filed May 24, 2013, this case alleges broker malpractice against Gallagher for negligently advising the Foundations to change their D&O insurer, costing them insurance coverage that would have paid defense and indemnity for the LBO Litigation. Gallagher advised the Foundations pursuant to a Compensation Agreement between the parties. *See* A19. Gallagher's Compensation Agreement contains no clause obligating the Foundations

[3] After the Second Circuit issued its decision, the plaintiffs filed a petition for a writ of certiorari with the United States Supreme Court. *See Deutsche Bank Tr. Co. Ams. v. Robert R. McCormick Found., et al.*, No. 16-317. Around the same time, the United States Supreme Court granted certiorari in *Merit Management Group, LP v. FTI Consulting, Inc.*, a case from the United States Court of Appeals for the Seventh Circuit that took a contrary position on a statutory-interpretation issue also present in the *Deutsche Bank* appeal. The United States Supreme Court affirmed the Seventh Circuit's decision. 138 S. Ct. 883 (2018). Subsequently, on April 3, 2018, Justices Kennedy and Thomas issued a "statement" suggesting that the Second Circuit consider recalling the mandate in the *Deutsche Bank* appeal, apparently because the United States Supreme Court lacked a quorum to hear the case due to conflicts created by the large number of parties. 138 S. Ct. 1162 (2018). The Second Circuit then recalled the mandate. *See In re Tribune Company*, 2018 WL 6329139, at *5 (discussing this issue).

to provide any information about liability claims to Gallagher or to cooperate with Gallagher in the defense of any such claims. *See* A19. For its part, Gallagher expressly disclaimed any fiduciary obligation. A20. The Compensation Agreement says only that Gallagher must indemnify the Foundations for Gallagher's own negligence, not for the Foundations' defense or liability relating to third parties' claims. *Id*.

Anticipating Gallagher might assert defenses that risk undermining their defense of the LBO Litigation, the Foundations proposed to stay this malpractice action until the LBO Litigation is resolved. *See* A10; C409. Gallagher refused their proposal. *See* A10. Instead, Gallagher followed the Litigation Trustee's lead in attacking the Foundations' conduct. Gallagher raised Affirmative Defenses contending that the Foundations' conduct in the LBO transaction was fraudulent and therefore uninsurable, and that the Foundations knew of an "ongoing, progressive loss" before they changed insurers in June 2010 and therefore would never have been entitled to coverage under an insurance policy purchased in June 2010 regardless of its terms. C348-351.

As Gallagher explained to the Circuit Court, to establish these defenses Gallagher hopes to prove facts relating to: "(1) the extent to which Plaintiffs advocated for the LBO; (2) Plaintiffs' knowledge that the unsustainable debt burden that the LBO structure placed upon the Tribune would result in its bankruptcy; and/or (3) Plaintiffs' knowledge that they would be sued as a result of their involvement of the LBO." C4456. These contentions echo the key allegations made by the Litigation Trustee:

Litigation Trustee's allegations	Gallagher's allegations
The Foundations and others "instigated a leveraged buyout." C3887 ¶¶ 1, 6, 7.	The Foundations "advocated for the LBO." C4456.
The Foundations knew that Tribune "was a terrible candidate for a highly leveraged buyout" and that the buyout was "doomed to fail from its inception." C3883 ¶¶ 6–7, 209.	The Foundations had "knowledge that the unsustainable debt burden that the LBO structure placed upon the Tribune would result in its bankruptcy." C4456.
The Foundations "knew that approval of the LBO meant an end to Tribune as a going concern." C3883 ¶ 210.	The Foundations knew "they would be sued as a result of their involvement in the LBO" because Tribune was bound to be bankrupted by the LBO. C4456.

II. Gallagher's Demand For Privileged Communications And The Rulings Below.

In March 2017 Gallagher served subpoenas on the Foundations' attorneys at Quarles & Brady ("Quarles") and Katten Muchin Rosenman ("Katten"). C3510; C3517. During the time period covered by the subpoena to it (January 1, 2008 to December 31, 2010), Quarles advised the Foundations in connection with the LBO and the Tribune bankruptcy. C4357 ¶ 2. During that same time period, Katten advised the Foundations in relation to those same matters. *Id*. ¶ 3. Katten also was the Foundations' defense counsel in the LBO Litigation, and had been since the LBO Litigation was filed in November 2010. *Id*.

Relevant to this appeal, the subpoenas sought "[a]ny and all communications" between the Foundations' outside attorneys and the Foundations "related to the Tribune Bankruptcy" and "related to the LBO Litigation." C3515; C3522. Gallagher also demanded the Foundations turn over privileged communications they had previously withheld. Gallagher argued that it needed these documents to prove its Affirmative Defenses. *See* C4370. Gallagher does not dispute that the documents it seeks include attorney-client

privileged communications and attorney work product. Rather, it asserts that it is entitled to them under the rule announced by this Court in *Waste Management, Inc. v. International Surplus Lines Insurance Co*., 144 Ill.2d 178 (1991).

After motion practice and oral argument, the Circuit Court ruled on October 24, 2017 that Gallagher is "standing in the insurer's shoes for the purpose of this malpractice issue and may bear the ultimate burden of payment of the underlying claims and defense costs, [so] Defendant's interests have become aligned with Plaintiffs in defeating or settling the underlying litigation." A15 (internal quotations omitted). The Circuit Court therefore held that Gallagher had a "common interest" with the Foundations and was entitled to the Foundations' attorney-client privileged communications and their attorneys' work product created for the purpose of defending the Foundations in the LBO Litigation. A15-16. The ultimate effect of the Order is that the Foundations may not withhold, or ask their advisors to withhold, privileged communications or work product that were created for the purpose of defending the LBO Litigation and between the filing of the LBO Litigation and the beginning of this lawsuit. The Circuit Court also denied the Foundations' request for a stay.

To preserve appeal rights, the Foundations refused to turn over the privileged documents and asked the Circuit Court to enter a "friendly" contempt order, which it did on November 16, 2017. A22. The Foundations then appealed the denial of the request for the stay and the civil contempt order. The Appellate Court, Second District, affirmed the Circuit Court in all material respects, although it vacated the contempt order. A1.

The Foundations did not seek leave to appeal the Second District's ruling on their request for a stay. Thus, this appeal solely concerns the Appellate Court's ruling affirming the Circuit Court ruling on attorney-client privilege and work product.

ARGUMENT

The Appellate Court erroneously expanded the narrow *Waste Management* "common interest" exception in three significant ways. First, the Appellate Court ignored this Court's emphasis in *Waste Management* on the unique "special relationship" between insurer and insureds. If affirmed, the Appellate Court's holding would extend the exception to any case in which two parties have a potentially similar interest in some issue. (Section I, below.) Second, the Appellate Court badly erred by relying on authorities arising in the much broader context of non-waiver by parties voluntarily sharing information in a joint defense. (Section II.) Third, the Appellate Court ruled that the Foundations retroactively created a "common interest" where none had existed by the very act of bringing a malpractice claim against Gallagher. This ruling seriously misinterprets *Waste Management*, which is based on a pre-existing cooperative agreement between insurer and insured. (Section III.)

The standard of review is *de novo*. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 27 ("the application of privilege rules in discovery . . . is reviewed *de novo*").

I. The *Waste Management* Exception Does Not Apply Because No Special Relationship Exists Between Gallagher And The Foundations.

This case arises under a Compensation Agreement between the Foundations and Gallagher. In that agreement, Gallagher agreed to indemnify the Foundations for "any loss, cost, damage or expense . . . arising from the negligent acts or omissions of Gallagher."[4] A20. Gallagher did not agree to indemnify the Foundations against claims brought by third

[4] Emphasis added throughout unless noted.

parties against the Foundations. That was the Foundations' insurers' job. Gallagher's job was to procure adequate insurance. The Foundations allege that Gallagher failed to do so, and are suing Gallagher for leaving the Foundations without defense and indemnity coverage for the multibillion-dollar claims brought against the Foundations in the LBO Litigation.

In contrast, *Waste Management* involved the fundamentally different relationship between an insurer and its insured. Under an insurance policy, the insurer takes on a duty to defend and indemnify its insured for its insured's negligence toward third parties. To further their common goal of protecting the insured from third-party claims, the insurer and insured undertake numerous additional duties of cooperation, notice, disclosure, and good faith. None of these duties, which this Court described in *Waste Management* as a "special relationship," exist in the Gallagher Compensation Agreement. As discussed next, this distinction is central to correct application of *Waste Management* to this broker malpractice dispute.

A. *Waste Management* is based on the unique and extensive special relationship between insurer and insured.

This Court held in *Waste Management* 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. 144 Ill.2d 191–95. 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 payment

if the plaintiff in the underlying lawsuit received either a favorable judgment or settlement. *Id*.

In this case there is no cooperation clause in the Compensation Agreement between Gallagher and the Foundations, so Gallagher and the courts below relied exclusively on the "common interest" prong of the *Waste Management* doctrine. A5, ¶ 10. That aspect of *Waste Management* holds that an exception to the attorney-client privilege exists when the underlying defense attorney, "though neither retained by nor in direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer." 144 Ill.2d at 194. In support of this exception to privilege, this Court explained:

> a less flexible application of the doctrine effectively defeats the purpose and intent of the parties' agreement. Insureds and insurers share a special relationship; they are in privity of contract. In a limited sense, counsel for insureds did represent both insureds and insurers in both of the underlying litigations since insurers were ultimately liable for payment if the plaintiffs in the underlying action received either a favorable verdict or settlement. 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.

Waste Management, 144 Ill.2d at 194–95.

In reaching this conclusion, this Court relied on authority discussing insurers' and insureds' obligations to one another. *Id*. at 193. In particular, the Court looked to disputes between insurers and insureds. These disputes typically involve an insurer seeking to discover its insured's privileged communications concerning the defense of a claim for which the insurer might ultimately be liable. *Id*. In analyzing those disputes, the authorities relied on by this Court pointed to specific aspects of the insurer-insured relationship that entitled the insurer to obtain privileged defense-related communications in a later dispute over insurance coverage. These aspects of the "special relationship" included:

- The insurance policies obligated the insurer to both defend and indemnify its insured against the insured's liabilities.[5]

- The policies required the insured to give notice of any liability claim and the circumstances from which it arose.[6]

- The policies required the insured to furnish "a complete investigation report of each suit or claim" and further provided, "[t]he books and records of the Insured and the books and records of all agents and representatives of the Insured shall be open to the [Insurer]."[7]

- The policies required the insured to cooperate with the insurer in the defense of any liability claim.[8]

- These policy terms led authorities cited by this Court to observe, "in its conduct of the litigation . . . the insurance company acts in a fiduciary capacity vis-à-vis its assured, and is obliged to act in the utmost good faith, without allowing its own interests to predominate over those of the assured."[9]

These extensive bilateral obligations of transparency and good faith create the "special relationship" between insurer and insured on which this Court grounded its decision in *Waste Management*. Negotiated at arm's length long before there is any dispute between the parties, this voluntary relationship allows the insurer to obtain otherwise privileged documents relating to its insured's defense of third parties' claims against the insured. *Waste Management*, 144 Ill.2d at 195. Importantly, because the parties' duties arise out of their insurance contract, both parties enter the relationship knowing that they owe each other the bilateral obligations discussed above.

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[5] *E.g.*, *Int'l Ins. Co. v. Peabody Int'l Corp*., 1988 WL 58611, at *2 (N.D. Ill. 1988).

[6] *Id.*; *Southeastern Penn. Transp. Auth. v. Transit Cas. Co.*, 55 F.R.D. 553, 554 (E.D. Pa. 1968) ("*SEPTA*").

[7] *SEPTA*, 55 F.R.D. at 554.

[8] *E.g., Peabody Int'l*, 1988 WL 58611, at *2.

[9] *Truck Ins. Exchange v. St. Paul & Marine Ins. Co.*, 66 F.R.D. 129, 132 (E.D. Pa. 1975), quoting *Shapiro v. Allstate Ins. Co.*, 44 F.R.D. 429, 431 (E.D. Pa. 1968).

These contractual obligations are amplified by statutes and common law that the Illinois General Assembly and this Court have developed to enforce insurers' duties and govern insurance coverage disputes. For example, the General Assembly included in the Illinois Insurance Code a statute penalizing insurers for "bad faith" in denying coverage to their insureds. *See* 215 ILCS 5/155. Similarly, this Court has recognized that insurers have a duty to act in good faith in responding to settlement offers made within the limits of their policies, and that if an insurer breaches this duty, it can be held liable for the full amount of a judgment against the policyholder, regardless of policy limits. *Cramer v. Ins. Exchange Agency*, 174 Ill.2d 513, 525 (1996). This Court also has held that a liability insurer that breaches its duty to defend and does not timely file a declaratory judgment action is estopped from raising contractual insurance policy defenses, such as conditions precedent and exclusions, to coverage for indemnity costs. *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127, 148 (1999).

The *Waste Management* exception to privilege arises in this unique context of mutual interests, commitments, and obligations.

B. The relationship between Gallagher and the Foundations has none of the attributes of the insurer-insured special relationship.

The Foundations' relationship with Gallagher bears none of the attributes of the insurer-insured "special relationship." Gallagher was the Foundations' insurance broker pursuant to a contract that purported to disclaim any fiduciary duty and limited Gallagher's duties to procuring certain lines of insurance coverage and related activities. A19. In contrast to an insurer, Gallagher did not agree to defend the Foundations against third-party claims, *see id*., and certainly never has done so. Nor did Gallagher agree to indemnify the Foundations for the Foundations' liability, as an insurer would; Gallagher agreed only to

indemnify them for Gallagher's negligence — presumably first to be established by the Foundations in litigation against Gallagher. *See id*. The Foundations did not agree to cooperate with Gallagher, provide it notice or any other disclosures, or open their books and records to Gallagher. *See id*. Moreover, the attorneys from whom Gallagher demands work product and the Foundations' confidential communications never had any inkling they were also defending Gallagher's interests.

In short, Gallagher has not accepted any of the duties an insurer would have – to the contrary, Gallagher expressly disclaims any such duties. Indeed, Gallagher freely admits that it wants to use the Foundations' privileged documents against their interests, while facing no extra-contractual consequences for refusing to contribute anything to the Foundations' defense of the LBO Litigation. If an insurer took the same position, it would risk the "bad faith" liability and penalties described above.

By unmooring the *Waste Management* exception from its origin in the special relationship between insurers and insureds, the Appellate Court erroneously would extend it to any case in which a malpractice defendant, indemnitor, joint tortfeasor, guarantor, surety, or equitable contributor might be better off if its opponent succeeded in defending an underlying claim.

II. The Narrow *Waste Management* Common-Interest Exception Is Different From The Joint Defense Non-Waiver Doctrine, And The Appellate Court Erred When It Conflated Them.

The Appellate Court also employed erroneous reasoning in support of its faulty conclusion. The Appellate Court confused two different "common interest" doctrines, and thus expanded *Waste Management*'s application even further beyond its proper scope.

A. The *Waste Management* exception is a narrow one that should be applied only in disputes between insurer and insured.

The *Waste Management* doctrine provides a narrow and somewhat controversial exception to the general rules of attorney-client privilege. "[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) (collecting cases from numerous jurisdictions). *See also* 3 New Appleman on Insurance Law § 17.04(a) (2018) ("Appleman") (in most jurisdictions, "an insurer is not entitled to discover the insured's privileged materials, and an insured risks waiving the privilege if it sends privileged materials to its insurer").

Given its unique nature and the sensitivity of attorney-client privileged information, *Waste Management* should be applied cautiously. Indeed, courts applying Illinois law have done just that, largely rejecting attempts to expand *Waste Management* beyond its origin in insured-insurer disputes.

For example, in *Hartz Construction Co. v. Village of Western Springs*, 2012 IL App (1st) 103108, the plaintiff tried to use *Waste Management* to import a duty to cooperate into its contract with the defendant. The First District rejected this argument, explaining that this Court's "narrow holding in *Waste Management* found a duty of cooperation related to discovery proceedings in light of express language stating the insured was to provide information and assistance as reasonably required by the insurer contained in the parties' agreement." 2012 IL App (1st) 103108, ¶ 30.

Similarly, in *Motorola Solutions, Inc. v. Zurich Insurance Co.*, 2017 IL App (1st) 161465, the insurer tried to expand *Waste Management* to force the insured to turn over

"documents created well before any [underlying] litigation had commenced." The First District rejected this attempt to expand the doctrine:

> While any condition in the policy requiring cooperation on the part of the insured is one of great importance, and its purpose should be observed," this duty is not boundless. It must remain tied to the language of the cooperation clause itself. . . . Consequently, we cannot find that *Waste Management* encompasses the situation in the case at bar with respect to the cooperation clause contained in the insurance policy.

2017 IL App (1st) 161465, ¶ 33 (internal quotations, citations, and alterations omitted). Other cases similarly cabin *Waste Management*. *See Ill. Emcasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 393 Ill. App. 3d 782, 790 (1st Dist. 2009) (rejecting attempt to extend *Waste Management* to communications with coverage counsel); *Netherlands Ins. Co. Nat'l Cas.*, 283 F.R.D. 412, 418 (C.D. Ill. 2012) (*Waste Management* did not apply in insurer-vs.-insurer contribution case because the insurers had no privity of contract, and thus no duty to cooperate and no common interest); *Kmart Corp. v. Footstar, Inc.*, 2010 WL 5101406, at *1 (N.D. Ill. Dec. 8, 2010) (declining to apply *Waste Management* to indemnitor-indemnitee relationship because, among other reasons, no cooperation clause was present).

In fact, before this case, only one Illinois decision had expanded *Waste Management* beyond its origin in insurer-insured declaratory judgment actions. *BorgWarner, Inc. v. Kuhlman Electric Corp.*, 2014 IL App (1st) 131824. That case, however, was decided on grounds not present here – a contractual cooperation clause like the one commonly found in insurance policies. BorgWarner sold a manufacturing site to Kuhlman. 2014 IL App (1st) 131824, ¶ 4. As part of that deal, BorgWarner agreed to indemnify Kuhlman against liabilities arising out of any third-party environmental claims relating to the property, on the condition that Kuhlman cooperate in connection with the

defense of those matters. *Id.* ¶ 26. BorgWarner thus undertook obligations to defend and indemnify third-party claims akin to those of an insurer.

On those facts, the First District held that "the plain language of the 1999 merger agreement's 'cooperation clause' created obligations . . . [s]imilar to the 'cooperation clause' in the *Waste Management, Inc.* insurance policies . . . Thus, we find that any expectation of attorney-client privilege was unreasonable." 2014 IL App (1st) 131824, ¶ 26.[10] The *BorgWarner* court expressly did not address the "common interest" theory Gallagher advocates in this case. *Id*. ¶ 34. Thus, to the extent *BorgWarner* is read to expand *Waste Management*, its reasoning has no application here. The Compensation Agreement between Gallagher and the Foundations did not include any duty to indemnify the Foundations against third-party claims or any duty to cooperate.

Simply put, prior decisions interpreting *Waste Management* correctly concluded that it should be construed narrowly, not extended, in situations that fall outside of its origin in insurer-insured disputes. This case – involving an insurance broker that expressly disclaims any duties beyond its narrow duty to procure insurance – is even farther afield than those prior situations.

B. The Appellate Court erroneously confused *Waste Management's* privilege exception with the joint defense non-waiver doctrine.

Rather than apply the *Waste Management* exception narrowly, however, the Appellate Court conflated it with the distinct, much broader, and widely-accepted "joint

[10] One decision by a federal magistrate judge applies an analysis similar to *BorgWarner*. *Abbott Laboratories v. Alpha Therapeutic Corp.*, 200 F.R.D. 401 (N.D. Ill. 2001). Like *BorgWarner*, *Abbott* turns primarily on an express cooperation clause in an agreement that concerned indemnification against third-party claims. 200 F.R.D. at 405–06. While *Abbott* also discussed *Waste Management*'s common-interest rationale in *dicta*, it is inapposite for the same reasons as *BorgWarner*.

defense" non-waiver rule. A6–A9. The "joint defense" non-waiver rule applies, for example, to co-defendants who voluntarily share information in furtherance of their joint defense. That non-waiver rule has been described as follows:

> if two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged [and] that related to the [common interest] matter is privileged as against third persons.

Selby v. O'Dea, 2017 IL App (1st) 1515724, ¶ 35, quoting Restatement (Third) of the Law Governing Lawyers, 76(1) (ALI 2000).

As the First District recently recognized, the *Waste Management* exception and the joint-defense non-waiver rule occur "under different circumstances and produce very different results." *Selby*, 2017 IL App (1st) 151572, ¶ 28. The *Waste Management* exception "defeats a claim of privilege," but the joint-defense non-waiver rule avoids waiver of privilege. *Id*. ¶¶ 28–31 (emphasis in original).

Unlike the *Waste Management* exception, the joint-defense non-waiver rule has been adopted in almost every jurisdiction. Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795, 809 (2017) ("An overwhelming majority of states have concluded that attorney-client privilege is not waived when privileged information is shared with co-parties."). These jurisdictions have applied the non-waiver rule to situations "where the parties' interests are aligned and the joint communications further the joint defense or joint legal interest." Appleman § 17.04(2)(b). In contrast, in *Waste Management*, "the insureds and insurer were not jointly represented by counsel and a coverage dispute arose while the underlying action was pending." *Id.* Hence, "the traditional formulation of the joint defense/common interest

doctrine would be inapplicable because their interests were not aligned." *Id*. Therefore *Waste Management* invoked a different rationale: a common interest arising from the special relationship between insurer and insured.

Despite this clear distinction between the doctrines, the Appellate Court relied on the joint-defense non-waiver rule, not the special relationship-based *Waste Management* exception. The joint-defense non-waiver rule is the subject of every one of the judicial opinions on which the Appellate Court relied. *See* A6–A7. *Selby* expressly distinguished the non-waiver rule and the *Waste Management* common-interest doctrine and found that the *Waste Management* common-interest doctrine was "not applicable" in the joint defense context. *Selby v. O'Dea*, 2017 IL App (1st) 1515724, ¶¶ 30–31. *McPartlin* involved the non-waiver rule for co-defendants in a criminal case. *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979). *LTV Securities Litigation* involved the non-waiver doctrine among potential co-defendants in a securities fraud case. *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604 (N.D. Tex. 1981).

The secondary sources the Appellate Court cited also dealt with the joint-defense non-waiver rule, not the *Waste Management* exception. *See* A7. One source, a law review article, clearly was discussing non-waiver doctrines applicable to the voluntary sharing of privileged information among allied parties. *See* Neary, 65 U. Kan. L. Rev. at 795–96 ("approximately ninety percent of jurisdictions recognize an exception [] known as the common interest doctrine. The common interest doctrine allows parties sharing a common interest in a legal matter to share privileged information without waiving attorney-client privilege."). Another argued against extending the common interest exception among co-defendants in qui tam cases where the government declines to intervene – a situation that

has nothing to do with the one in this case. *See* George S. Mahaffey Jr., *Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 Rev. Litig. 629, 633 (2004). Most astonishingly, a third warned – on the very page cited by the Appellate Court – that a "common interest" doctrine like the one espoused by the Appellate Court "lumps together and mangles two separate concepts; 'the allied lawyer doctrine,' which is applicable when parties with separate lawyers consult, and 'the joint client doctrine,' which applies when two clients share the same lawyer." 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, 277 (5th ed. 2007).

By basing its analysis on the much broader and quite different joint defense doctrine, the Appellate Court erroneously concluded that the *Waste Management* exception "is not limited to the context of the insurer-insured relationship. In fact, the doctrine arises just as often in the contexts of patent laws, mergers and acquisitions, and antitrust litigation…." A7 ¶ 14. This is plainly wrong. No court has ever applied the *Waste Management* exception in such situations. *See* Section II.A, *supra*. Merger candidates and antitrust defendants would be stunned to learn that by sharing discrete confidences, they have thrown open their attorneys' entire files to their merger partners, co-defendants, or other aligned parties. But that is where the Appellate Court's decision would take Illinois law, venturing far beyond the limited exception to privilege applied in *Waste Management*.

Moreover, there is no analogy between this case and the joint defense common-interest situation relied on by the Appellate Court. Non-waiver common-interest situations involve a party's voluntary choice to create a relationship in furtherance of a common interest (such as a joint defense group among defendants). The purpose of this non-waiver

rule is clear: to protect confidential communications within the group from the prying eyes of common opponents. *See*, *e.g.*, *Selby*, 2017 IL App (1st) 1515724, ¶ 51. But that is not the situation here. The Foundations do not wish to share their privileged communications with Gallagher and would gain nothing by doing so.

III. The Foundations Did Not Waive Privilege By Suing Gallagher For Broker Malpractice.

The Appellate Court's ultimate conclusion that "by suing Gallagher, the Foundations have given Gallagher a stake in the LBO litigation," A8 ¶ 15, further distinguishes this case from *Waste Management*. This holding has no basis in *Waste Management* because Gallagher, unlike an insurer, never had a non-adversarial interest in the Foundations' defense.

Unlike an insurer that issues a policy promising in advance to defend and indemnify its insured against subsequent liability claims, Gallagher never promised to defend or indemnify the Foundations for their liability. Gallagher merely promised to indemnify the Foundations for Gallagher's own negligence. To establish Gallagher's negligence, the Foundations had to sue Gallagher. The parties therefore never shared a non-adversarial "common interest" like the one in the insurer-insured relationship.

The Appellate Court ignored this important distinction. Instead, it concluded Gallagher had the "mutual interest" required by *Waste Management* because, it "stands in the insurer's shoes for the purpose of this malpractice action, precisely because it sued Gallagher. . . ." A8 (emphasis in orig.). *See* A8; *Robert R. McCormick Found. v. Arthur J. Gallagher Risk Mgmt. Servs., Inc.*, 2016 IL App (2d) 150303, ¶¶ 7–8.

But the opinions cited by the Appellate Court for this proposition merely held that both insurance agents and insurance brokers owe a duty to exercise ordinary care in

procuring insurance and may be liable for "benefit of the bargain" damages if they fail to do so. *Skaperdas v. Country Cas. Ins. Co.*, 2013 IL App (4th) 120986 ¶ 23, *aff'd* 2015 IL 117021; *Lake County Grading Co. v. Great Lakes Agency, Inc.*, 226 Ill. App.3d 697, 731-32 (2d Dist. 1992). None of those opinions held that the broker or agent "stands in the shoes" of an insurer for any purpose, let alone for the purpose of invading the plaintiff's privileges.

Moreover, this situational alignment of interests does not change the nature of the relationship between the Foundations and Gallagher, which is a contractual indemnity relationship under the Compensation Agreement, and not the pre-existing "special relationship" comprising an insurance policy's extensive bilateral commitments.

The Appellate Court's notion that the institution of adversarial proceedings created a "common interest" that dispelled the Foundations' reasonable expectation of confidentiality would further expand the *Waste Management* doctrine across new frontiers. Illinois litigants contemplating indemnity, contribution, surety, or guaranty claims would face a Hobson's choice: forgo recovery or surrender privilege in the defense of their underlying liability, even to parties that would have no right to invade that privilege absent an adversarial claim. If allowed to stand, the new rule fashioned by the Appellate Court would allow litigants to free-ride on their opponents' attorneys' work product and privileged communications and thus undermine the purpose of the attorney-client privilege and the work product doctrine in numerous unprecedented contexts. The narrow *Waste Management* doctrine in no way compels or justifies this result.

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: January 2, 2019

Respectfully submitted,

THE ROBERT R. MCCORMICK FOUNDATION AND THE CANTIGNY FOUNDATION

By: */s/ David E. Schoenfeld*
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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 22 pages.

/s/ David E. Schoenfeld

CERTIFICATE OF SERVICE

The undersigned, David E. Schoenfeld, an attorney, certifies that on January 2, 2019, the foregoing **Brief and Appendix 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.

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APPENDIX

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2018 IL App (2d) 170939
No. 2-17-0939 & No. 2-17-0940
Opinion filed July 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE ROBERT R. McCORMICK FOUNDATION and THE CANTIGNY FOUNDATION, Plaintiffs-Appellants, v. ARTHUR J. GALLAGHER RISK MANAGEMENT SERVICES, INC., Defendant-Appellee.	)	Appeal from the Circuit Court of Du Page County. No. 13-L-481 Honorable Kenneth L. Popejoy, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court, with opinion.
Justices Zenoff and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 These consolidated interlocutory appeals are a sequel to an appeal we decided over two years ago, *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2016 IL App (2d) 150303 (*Foundations I*). In these appeals, however, we consider the scope of attorney-client privilege and whether the trial court should have granted a renewed request for a stay.

¶ 2 Plaintiffs, the Robert R. McCormick Foundation and the Cantigny Foundation (the Foundations) sued their former insurance broker, Arthur J. Gallagher Risk Management Services, Inc. (Gallagher). The Foundations were formerly the second largest shareholder group

in the Tribune Company (Tribune), a large multimedia corporation. The Foundations sold their preferred stock for some $2 billion during a leveraged buyout (LBO) of the company in 2007. Less than one year after the transaction, Tribune filed for bankruptcy protection. The buyout itself, as we noted in *Foundations I*, left many Tribune creditors "holding the proverbial bag." *Id.* ¶ 3.

¶ 3 After the LBO, in 2009, the Foundations hired Gallagher to procure for them directors' and officers' (D&O) liability insurance. Gallagher obtained $25 million in D&O coverage for the Foundations through (what was essentially) a single policy with Chubb Insurance (Chubb). The Foundations allege that in 2010 Gallagher advised that they could obtain the same coverage—"apples-to-apples"—at a reduced premium with (what was essentially) a $25 million policy from Chartis Insurance (Chartis). The Foundations purchased the Chartis policy and let the Chubb policy lapse.

¶ 4 Soon after Tribune exited bankruptcy in 2011 (see *In re Tribune Co.*, 464 B.R. 126 (Bankr. D. Del. 2011)), aggrieved shareholders filed a number of federal suits across the country against more than 5000 defendants; the suits were eventually consolidated in the Southern District of New York. See *In re Tribune Co. Fraudulent Conveyance Litigation*, 831 F. Supp. 2d 1371 (J.P.M.L. 2011). The Foundations were named as defendants in three of the suits (which remain ongoing, as we discuss below). These suits generally allege that the Foundations—through their directors and officers, and acting in concert with other "controlling shareholders"—orchestrated the LBO through actual and constructive fraud. Accordingly, the suits seek to unwind the LBO and to claw back creditors' funds.

¶ 5 Relevant here, when the Foundations tendered the suits (the LBO litigation) to Chartis under their D&O policy, Chartis denied coverage under a policy exclusion for claims "in any

way relating to any purchase or sale of securities." The Foundations, asserting that Chubb would have defended and indemnified them under their former policy, sued Gallagher for breach of contract and professional negligence resulting in a loss of coverage. On Gallagher's motion for summary judgment, the trial court determined that an exclusion in the Chubb policy, too, would have barred coverage for the LBO litigation. In *Foundations I*, we held that the Chubb exclusion in question did not necessarily bar coverage, and we reversed the court's judgment. On remand, Gallagher tendered several affirmative defenses and the parties proceeded with discovery.

¶ 6 During discovery, Gallagher subpoenaed the Foundations and their legal counsel for, among other things, the following:

> "1. Any reports or opinion letters prepared for *** the Foundations *** relating to the Tribune Co. or the LBO.
>
> 2. Any and all communications related to the Foundations' Director[s'] and Officers['] insurance policy or coverage.
>
> 3. Any and all communications with the Foundations related to the Tribune Bankruptcy.
>
> 4. Any and all communications with the Foundations related to the LBO Litigation."

The Foundations indicated that there were documents and electronic communications responsive to Gallagher's request (and filing a roughly 40-page privilege log (see Ill. S. Ct. R. 201(n) (eff. July 1, 2014)) but refused to tender them, citing attorney-client privilege. The Foundations then asked the court to quash the subpoenas or, in the alternative, "stay or phase" the case until the completion of the LBO litigation. Gallagher, in turn, sought an order to compel production and opposed the Foundations' stay request.

¶ 7 After a hearing, the trial court denied the Foundations' request for a stay and ordered the Foundations to tender the requested materials. Specifically, the court noted that by suing Gallagher the Foundations had aligned Gallagher's interest with their own in the underlying litigation—that is, that Gallagher "may bear the ultimate burden of payment of the underlying claims and defense costs." Accordingly, under an exception to the attorney-client privilege, which was set forth by our supreme court in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 190 (1991), the court found that the Foundations must tender the requested materials. The court also stated, however, that it would be willing to consider a protective order limiting Gallagher's use of any disclosure. As to the Foundations' request for a stay, the court noted that it had denied a similar request in April 2014, and it once again declined to issue a stay.

¶ 8 The Foundations appealed the trial court's denial of the stay (No. 2-17-0940). The Foundations also sought to test the trial court's discovery ruling and, in a separate order, were held in "friendly contempt," which they also appeal (No. 2-17-0939). We have jurisdiction over both matters (Ill. S. Ct. R. 304(b)(5) (eff. Mar. 8, 2016); R. 307(a)(1) (eff. Nov. 1, 2017)), which we have consolidated at the parties' request. Now, with some modifications, we affirm the judgment of the trial court.

¶ 9 We turn first to the trial court's contempt finding, under which we review the propriety of the underlying discovery order. See *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). The attorney-client privilege, of course, protects the confidences communicated between attorney and client. But that privilege, as with so many legal concepts, is not without its exceptions. Indeed, Illinois has "a strong policy of encouraging disclosure," and thus "the privilege, not the duty to disclose, *** is the exception." *Waste Management*, 144 Ill. 2d at 190. Accordingly, our task is to

construe the privilege "within its narrowest possible limits." *Id*. We review *de novo* questions concerning the application of and exceptions to the privilege. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 65.

¶ 10 In *Waste Management*, 144 Ill. 2d 178, our supreme court discussed two exceptions to the attorney-client privilege. The first exception relied on a "cooperation clause" in an insurance contract in that case. *Id.* at 192. Here, the parties agree that there was no cooperation clause in the Foundations' brokerage contract with Gallagher, so the first *Waste Management* exception is irrelevant. See, *e.g.*, *Western States Insurance Co. v. O'Hara*, 357 Ill. App. 3d 509, 516 (2005).

¶ 11 The second *Waste Management* exception, however, does apply. Finding this exception "equally compelling," our supreme court held that, under the common-interest doctrine, the attorney-client privilege did *not* bar discovery of communications or documents, created in defense of two previously settled lawsuits, in a subsequent coverage dispute regarding one of those suits. See *Waste Management*, 144 Ill. 2d at 193. Such materials are, in essence, deemed to have been prepared for the benefit of both parties, as the suit has joined their interests. See *id*. As our supreme court explained, the common-interest doctrine has its roots in the dual-representation doctrine—*i.e.,* where one lawyer represents two joined parties, such as two criminal codefendants—which is a historical exception to the attorney-client privilege. See *id.* at 193-94. However, the court made clear that this exception to the attorney-client privilege "may properly be applied where the attorney, though neither retained by nor in direct communication with the insurer, acts for the mutual benefit of both [parties]"; this is true regardless of whether the parties retained the same lawyer or even had joined interests at the time of the communication. *Id*. at 194. As the court recognized, this situation is, of course, likely to arise in coverage litigation between insurers and insureds, but it is by no means limited to that context.

Id. at 193. Instead, the exception depends not on the nature of the parties but on the "commonality of interests" between them, or who might be "ultimately liable for payment if the plaintiffs in the underlying action received either a favorable verdict or settlement." *Id*. at 194-95.

¶ 12 The common-interest exception also has its limits. For example, while it might be said that the parties have a common interest in defeating the underlying litigation, and thus are entitled to discovery concerning that litigation, the same cannot be said for coverage matters. On the question of coverage, the parties are diametrically opposed, and so the common-interest rationale does not apply to attorney-client communications concerning coverage. *Id*. at 200-01; see also *id*. at 209 ("[w]hile the parties are now adverse concerning the issue of coverage, no such adversity exists as to the underlying litigation").

¶ 13 Here, the Foundations' core argument is that the *Waste Management* common-interest doctrine should not apply to this broker-malpractice lawsuit. In support of that argument, the Foundations recite our observation that other jurisdictions have criticized *Waste Management*. See generally *Allianz Insurance Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 664-66 (2007) (collecting cases). Accordingly, the Foundations urge us to apply *Waste Management* "cautiously" and not to "expand" its holding to discovery in broker-malpractice litigation.

¶ 14 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. See generally Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U.

Kan. L. Rev. 795 (2017) (collecting cases, statutes, and court rules; arguing that Kansas's failure to recognize the doctrine harms its interests); see also *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979). Some jurisdictions even recognize a more expansive variation of the doctrine, one that applies not just to litigants in pending suits but also to *potential* litigants. See *Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶ 39 (citing *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981)). And, as noted, the doctrine is not limited to the context of the insured-insurer relationship. In fact, the doctrine arises just as often in the contexts of patent law, mergers and acquisitions, and antitrust litigation (see *id.*; see also Neary, *supra* at 797-98; 1 Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, 277 (5th ed. 2007))—areas of the law that have little to do with insurance coverage. It appears that our criticism in *Allianz* might be attributable to a simple problem of nomenclature; as one scholar points out, courts use some two dozen different terms to refer to essentially the same thing: the common-interest doctrine. See George S. Mahaffey Jr., *Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 Rev. Litig. 629 (2004). In short, our criticism of *Waste Management* focused narrowly on that decision and failed to recognize that the concepts underlying that decision have received near-universal acceptance. Accordingly, our criticism of *Waste Management* should not be considered persuasive.

¶ 15 Turning back to the matter at hand, we reject the Foundations' argument that *Waste Management* does not apply to this case. Illinois courts have recognized that, although the dispute in *Waste Management* arose from an insured-insurer relationship, "parties do not have to match the classic profile of an insurer and insured for the concepts in *Waste Management, Inc.* to apply." *BorgWarner, Inc. v. Kuhlman Electric Corp.*, 2014 IL App (1st) 131824, ¶ 33 (citing

Hartz Construction Co. v. Village of Western Springs, 2012 IL App (1st) 103108, ¶ 30). We also reject the Foundations' argument that they have no mutual interest with Gallagher in the LBO litigation. This case involves a professional-negligence suit against an insurance broker for the alleged loss of $25 million in defense and indemnity coverage under a D&O policy. As we said in *Foundations I*, Gallagher "stands in the insurer's shoes for the purpose of this malpractice action" precisely because the Foundations *sued* Gallagher for (the alleged loss of) coverage. See *Foundations I*, 2016 IL App (2d) 150303, ¶ 6 (and cases cited therein); see also *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 35 (discussing duty insurance broker owes to insured). In short, by suing Gallagher, the Foundations have given Gallagher a stake in the LBO litigation. Were Gallagher an insurance company, the Foundations could not deny it discovery on the ground of the attorney-client privilege per *Waste Management*. And, if the Foundations are successful in *this* suit, that is what Gallagher would be in a sense: a *de facto* insurer, liable to the Foundations for both the Foundations' liability to the LBO plaintiffs and the Foundations' defense costs in the LBO litigation. Accordingly, because Gallagher might be "ultimately liable" in the LBO litigation (see *Waste Management*, 144 Ill. 2d at 193), we find that a commonality of interests exists between the Foundations and Gallagher.

¶ 16 We also reject the Foundations' argument that Gallagher's interests are somehow lessened by the fact that the Foundations might have already spent some $25 million in defense of the LBO litigation, which is now entering its eighth year. The mere fact that the Foundations might have already spent money they hope to assign to Gallagher as costs does not extinguish Gallagher's right to examine what it is being asked to pay for. We note that, in *Waste Management*, our supreme court held that there were common interests in an ongoing coverage dispute over *already settled* lawsuits (see *id.*), and there is no real difference between that

scenario and this one.

¶ 17 The parties have argued *Waste Management*'s application as an all-or-nothing question. However, although we find that it does apply, we must apply it fairly. As we noted, the common-interest exception applies only to those matters on which the parties might share liability, such as the LBO litigation, and not to those matters on which the parties are opposed, such as coverage. See *Selby*, 2017 IL App (1st) 151572, ¶ 26. Accordingly, we vacate the portion of the trial court's discovery order compelling the Foundations to tender information on the issue of coverage; in all other respects, the discovery order is affirmed. As we modify the discovery order and find that the Foundations' challenge to the order was undertaken in good faith, we vacate the trial court's contempt finding. See *BorgWarner*, 2014 IL App (1st) 131824, ¶ 35. On remand, the trial court may consider entering protective orders concerning the information shared between the parties, subject to the court's discretion. See generally *Selby*, 2017 IL App (1st) 151572, ¶ 115.

¶ 18 We note that, at oral argument, the Foundations expressed great concern that a federal court—particularly the court overseeing the LBO litigation in New York—might view the common-interest exception differently and that a protective order might not prevent the LBO plaintiffs from obtaining through Gallagher the discovery the Foundations share with Gallagher. Those fears, however, are entirely baseless. First, Illinois and the Second Circuit, where the LBO litigation is being heard, have consistently applied the common-interest exception in similar fashion (compare *Waste Management*, 144 Ill. 2d 178, with *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) (citing *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989)), so this would hardly be a question of first impression for a district court in that circuit. But more importantly, even if it were, we are satisfied that anything the Foundations disclose to Gallagher

as a result of the trial court's order could not be obtained *through Gallagher*. Were Gallagher subpoenaed by the LBO plaintiffs, principles of comity would compel the federal court to defer to the trial court's previously issued protective order, unless modified. See, *e.g.*, *Donovan v. Lewnowski*, 221 F.R.D. 587, 588 (S.D. Fla. 2004) (citing *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 499-500 (D.Md. 2000)). Moreover, because disclosure here would be made pursuant to state law, the Foundations would not waive any claim of privilege in a federal proceeding. See Fed. R. Evid. 502(c)(2). Thus, while the Foundations' disclosure "cannot be privileged from [the party] who may bear the ultimate burden of payment," the disclosure is apt to retain its "privileged status as to party opponents in the underlying litigation." *Waste Management*, 144 Ill. 2d at 209.

¶ 19 We turn then, finally, to the issue of the stay. A trial court's decision to grant or deny a stay will not be overturned absent an abuse of discretion. See *State Farm Fire & Casualty Co. v. John*, 2017 IL App (2d) 170193, ¶ 18 (citing *Allianz Insurance Co. v. Guidant Corp.*, 355 Ill. App. 3d 721, 730 (2005)). In support of their argument that a stay should be granted, the Foundations invoke the rule set forth in *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976). Under the *Peppers* doctrine, a court considering a declaratory judgment action—such as coverage litigation—should generally stay that action to refrain from deciding issues of ultimate fact that might bind the parties in the underlying litigation. *State Farm*, 2017 IL App (2d) 170193, ¶ 23. As we recently explained:

> "The classic scenario [under *Peppers*] is where an insured is sued and the allegations of the complaint potentially fall within the scope of the insurance policy, thus triggering the insurer's duty to defend, but the insurer denies coverage based on an intentional-injury exclusion in the policy. Courts have explained that, in such circumstances, the issue of

the insured's intent should be litigated in the underlying tort action, not the declaratory judgment action. [Citations.]" *Id.*

¶ 20 We note that there is some irony to the Foundations' invocation of the *Peppers* doctrine, in that the Foundations wish for Gallagher to be treated as an insurer when it comes to issuing a stay under *Peppers*, but *not* when it comes to sharing information pursuant to the common-interest doctrine under *Waste Management*. In any event, with respect to the stay, the Foundations allege that a stay is warranted because there are "overlapping issues" in the LBO litigation and this malpractice litigation and that, thus, a finding on an affirmative-defense issue here could prejudice the Foundations there. We agree with the Foundations that what they knew of the LBO and when they knew it are likely to be critical factors in both suits.

¶ 21 Like the trial court, we are mindful that the LBO litigation, eight years in, is still in the pleading stages and appears unlikely to be resolved any time soon. See *Deutsche Bank Trust Co. Americas v. Robert R. McCormick Foundation*, 584 U.S. ___, ___, 138 S. Ct. 1162, 1163 (2018) (statement of Kennedy, J., and Thomas, J., respecting the petition for *certiorari*); see also *In re Tribune Co. Fraudulent Conveyance Litigation*, No. 11-md-2296 (RJS), 2017 WL 82391 (S.D.N.Y. Jan. 6, 2017). The issuance of a stay requires careful evaluation. For one thing, the current status of the LBO litigation counsels in favor of a stay here, particularly since liability has not yet been determined there. See *State Farm*, 2017 IL App (2d) 170193, ¶¶ 23-30. By the same token, as the trial court noted, Gallagher must not be prejudiced by the loss of evidence in this proceeding, especially as the LBO litigation might not be resolved for years to come.

¶ 22 It is not clear, however, that this litigation must be stayed at this time to avoid prejudicing the Foundations in the LBO litigation. That could change. But for now, discovery could move forward *and* this case could be resolved on grounds that do not implicate the factual matters in

the LBO litigation. We believe that the trial court on remand will be in the best position to allow the parties to proceed with discovery and then to stay this litigation if necessary and if the LBO litigation has not yet concluded.

¶ 23 For these reasons, the trial court's discovery order is affirmed as modified and the contempt order is vacated. The court's judgment denying a stay is affirmed without prejudice, pending discovery, dispositive motions, and the status of the LBO litigation.

¶ 24 No. 2-17-0939, Affirmed as modified; contempt order vacated; cause remanded.

¶ 25 No. 2-17-0940, Affirmed and remanded with directions.

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CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DuPage County, Illinois

505 N. County Farm Road
Wheaton, IL 60187

KENNETH L. POPEJOY
Circuit Judge

October 24, 2018

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Re: The Robert R. McCormick Foundation and The Cantigny Foundation vs. Arthur J. Gallagher Risk Management Services, Inc.
Case No. 2013 L 481

LETTER OF OPINION AND ORDER

Relying on *Waste Management* and a selection of its prodigy cases, Defendant has served subpoenas on: (1) Plaintiffs' Legal Counsel – Quarles & Brady, LLP and Katten Muchin Rosenman, LLP – and (2) Plaintiffs' Advisors – Advisory Research, Inc., The Blackstone Group, L.P., and FTI Consulting Inc. Plaintiffs subsequently filed Motions to Quash each of these subpoenas as well as a Motion for a Protective Order. Each of these motions will be discussed in turn.

Motion to Quash Subpoenas served on Plaintiffs' Legal Counsel

Plaintiffs assert nearly all of the documents requested by Defendant's subpoenas to their legal counsels are protected by either the attorney-client privilege or work product privilege. However, neither of these privileges are applicable if Plaintiffs and Defendant share a common interest in the requested documents. The common interest doctrine was

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outlined by the Illinois Supreme Court in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill.2d 178 (1991).

Plaintiffs argue *Waste Management* is inapplicable to the case at bar for two reasons: (1) *Waste Management* applies in the context of an insured-insurer declaratory judgment action, and (2) the parties in *Waste Management* had a unique relationship which required the insured to cooperate with the insurer. Plaintiffs also argue *Waste Management* should not be applied so broadly as to permit disclosure that is irrelevant to the litigation. Finally, Plaintiffs argue that even if Defendant was an insurer of Plaintiffs, it has abandoned Plaintiffs by its conduct and is therefore not entitled to discovery of the subpoenaed documents.

Defendant counters, arguing Plaintiffs' are seeking for Defendant to be their 'de facto' insurer, thereby creating a commonality of interests between Plaintiffs and Defendant with respects to the defense of the underlying litigation pending in the Southern District of New York. Defendant contends that Plaintiffs' only step away from this characterization of the parties' relationship when it would be advantageous for their position – i.e. the discovery of documents.

In *Waste Management*, the Illinois Supreme Court held, based on the facts presented, two rationales, both sufficient independent of each other, rendered the attorney-client privilege and attorney work product privilege inapplicable, thereby justifying disclosure of the requested documents. *Waste Management* at 191. First, the contractual duty to cooperate with the insurer contained within the insurance policy rendered any expectation of privilege unreasonable under the facts presented. *Id.* In the case presently before this Court, no contractual duty to cooperate exist between the parties. Therefore, discovery of the subpoenaed documents are not justified on this basis. However, as noted above, the two rationales supporting disclosure were sufficient independent of each other. *Id.* Therefore, this Court moves on to discuss the second rational.

Under the facts presented in *Waste Management*, disclosure of the requested documents was appropriate when the parties shared a common interest in the requested documents. *Id.* at 193. The common interest doctrine provides that when an attorney acts for two different parties who have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties. *Id.* While typically the common interest doctrine applies where an attorney provided joint or simultaneous representation of the parties, it may also be applied where the attorney, though neither retained by or in direct communication with one of the parties, acts for the mutual benefit of both of the parties. *Id.* The *Waste Management* Court held, under the facts presented, that the insured and insurers did indeed share a common interest in defeating or settling the underlying litigation. *Id.* at 194. As such, any communications that were of a kind reasonably calculated to protect or further those common interest must be disclosed. *Id.*

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As noted above, Plaintiffs' first argue *Waste Management* is inapplicable to the case at bar because this is not an insured-insurer declaratory judgement action. This Court notes that *Waste Management* has never been interpreted so narrowly. Regardless, while Plaintiffs and Defendant do not stand in a traditional insurer-insured relationship, the Second District Appellate Court, on March 31, 2016, held on this very case, that Defendant "stands in the insurer's shoes for the purpose of this malpractice action." *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2016 IL App (2d) 150303, ¶ 6. Undoubtedly, the documents in Plaintiffs' possession related to the underlying litigation were created in an attempt to minimize their liability. As Defendant is "standing in the insurer's shoes for the purpose of this malpractice issue" and may bear the ultimate burden of payment of the underlying claims and defense costs, Defendant's interests have become aligned with Plaintiffs in defeating or settling the underlying litigation.

It is irrelevant to this consideration that the attorney has neither been retained nor in direct communication with the 'insurer' regarding the underlying litigation. *Waste Management,* 144 Ill.2d at 194. The common interest doctrine may even be applied when the insurer provided no defense nor did it participate in the defense of the underlying litigation. *Id.* Therefore, the fact that Defendant has not participated in Plaintiffs' defense in the underlying litigation, does not prohibit application of the common interest doctrine to the facts currently before this Court.

Second, Plaintiffs argue the parties in *Waste Management* stood in a unique relationship that required the insured to cooperate with the insurer. This Court again notes that the *Waste Management* Court held that either rational were sufficient on their own to justify disclosure of the requested documents. As the common interest exception exists separate and apart from a written contractual duty between parties, the lack of a cooperation clause does not prevent application of the common interest exception. Therefore, this argument similarly lacks merit.

Third, Plaintiffs argue the holding of *Waste Management* should not be applied so broadly as to permit disclosure of documents and communications irrelevant to the current litigation. This Court agrees. Here, however, Plaintiffs seek, among other things, to have Defendant compensate them for costs which arose as a result of the underlying litigation. Plaintiffs argue that absent Defendant's malpractice, insurance coverage would have covered the costs of defending and covering potential settlement amounts in the underlying litigation. As such, any documents which were created for the common interest of limiting Plaintiffs', and thereby Defendant's, liability in the underlying litigation, is directly applicable to the potential damages in the case at bar. As documents related to the underlying litigation are relevant to the litigation before this Court, Plaintiffs' third argument fails.

Finally, Plaintiffs argue that even if Defendant was an insurer of Plaintiffs, Defendant has abandoned Plaintiffs by its conduct and is not entitled to discovery of subpoenaed documents. Illinois Appellate Courts have outlines found approaches for an insurer wishing to challenge coverage under a policy. *Allianz Insurance Co., v. Guidant*

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Corp., 373 Ill.App.3d 652, 673 (2nd Dist. 2007), *citing Insurance Co. of Illinois v. Markogiannakis*, 188 Ill.App.3d 643, 652 (1st Dist. 1989). First, the insurer may seek a declaratory judgment regarding its obligations before or pending trial of the underlying action. Second, the insurer may defend the insured under a reservation of rights. Third, the insurer may refuse either to defend or to seek a declaratory judgment. Fourth, the insurer may concurrently seek a declaratory judgment and defend under a reservation of rights. *Id.* In this case, Defendant chose the third method as the insurer-insured relationship is not immediately apparent and court intervention was required to establish the existence of such relationship. As there has yet to be a declaration by a court to the contrary, Defendant continues to bear the potential responsibility for settlement and litigation costs in the underlying litigation. Accordingly, a commonality of interest continues to exist between Plaintiffs and Defendant.

While this Court believes Defendant is entitled to documents related to Plaintiffs' defense of the underlying LBO litigation, this Court does not believe that Defendant is entitled to subpoenaed documents between Plaintiffs and their legal counsel related to insurance coverage issues under *Waste Management*. In *Illinois Emasco Insurance Co. v. Nationwide Mutual Insurance Company*, the 1st District Court of Appeals drew a distinction between non-privileged communications regarding the underlying litigation and privileged communications regarding coverage issued that could arise in subsequent actions. 393 Ill.App.3d 782 (1st Dist. 2009). The *Emasco* Court emphasized that *Waste Management's* holding still preserves the attorney-client privilege for communications between attorneys and their clients regarding coverage issues presented in the declaratory judgment action. *Id.* at 790.

Here, in subpoenas to both Quarles & Brady, LLP and Katten Muchin, Defendant has requested "[a]ny and all communications related to the Foundations' Director and Officer's insurance policy and coverage." This request creates a factual distinction between the case currently before this Court and *Waste Management*. Notably different from the case at bar, the Defendant in *Waste Management* sought only the defense files in the underlying litigations. Here, Defendant seeks documents created before the existence of the underlying litigation – prior to a commonality of interests before Plaintiffs and Defendant. As Defendant seeks more than defense files in the underlying litigation, this Court relies on *Emasco* for guidance for this specific request. *See also Motorola Solutions, Inc. v. Zurich Insurance Co.*, 2017 IL App (1st) 161465.

Similar to *Emasco*, this Court believes a distinction must be drawn between non-privileged communications regarding the underlying litigation and privileged communications regarding coverage issues that could arise.

ACCORDINGLY, THIS COURT FINDS DOCUMENTS BETWEEN PLAINTIFFS AND THEIR COUNSEL REGARDING INSURANCE COVERAGE ARE NOT DISCOVERYABLE BY DEFENDANT UNDER THE COMMON INTEREST EXCEPTION AND PLAINTIFFS' MOTION TO QUASH IS GRANTED.

October 24, 2017

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Motion to Quash Subpoenas served on Plaintiffs' Advisors

Plaintiffs note that "thousands of pages of communications between Plaintiffs, Blackstone, Advisory Research, and FTI" have already been produced. Plaintiffs argue that the documents which have not been produced are protected by the attorney-client privilege and/or the work product privilege.

As acknowledged by Defendant in their Combined Response, some of the communications between the Advisors and its attorneys may indeed be privileged if for the purpose of rendering legal advice. However, due to the common interest between Plaintiffs and Defendant, as outlined in great detail above, documents or communications between the Advisors and Plaintiffs' attorneys related to the underlying litigation are discoverable by Defendant. As Defendant is "standing in the insurer's shoes for the purpose of this malpractice issue" and may bear the ultimate burden of payment of the underlying claims and defense costs, Defendant has an interest in fully understanding the claims against Plaintiffs and the evidence relevant to the underlying litigation. To the extent Plaintiffs' Advisors are in possession of relevant documents, Defendant is entitled to production of same.

However, the *Waste Management* case is not directly applicable to the case at bar in regards to specific types of communications. First, based on *Emasco*, to the extent Plaintiffs' Advisors had conversations regarding insurance coverage issues with Plaintiffs, discovery is not appropriate if the communications or documents are entitled to protection under the attorney-client privilege or attorney work product privilege. Additionally, Plaintiffs' Advisors may have retained their own legal counsel, with the purpose of obtaining legal advice. These were not a category of document sought in *Waste Management*. Therefore, to the extend Plaintiffs' Advisors retained their own legal counsel, with the purpose of securing legal advice, the attorney-client privilege and work product privilege is still applicable under *Waste Management.* Accordingly, these documents may still claim protection.

As opposed to quashing these subpoenas as a whole, this Court finds it more appropriate for Plaintiffs to claim a privilege for each specific document in a 201(n) privilege log. Then, should Defendant deem appropriate, objections may be raised as to the privilege asserted on specific documents. **THEREFORE, PLAINTIFFS' MOTION TO QUASH IS DENIED.**

Plaintiffs' Motion for a Protective Order

Plaintiffs have asked this Court to enter a protective order: (1) barring Defendant's attempts to obtain documents protected under the attorney-client privilege and attorney work product, or (2) ending, staying, or phasing discover into Defendant's First and Second Affirmative Defenses.

With respect to Plaintiffs' first request, given this Court's ruling on Plaintiffs' motions outlined above, a protective order barring production of documents protected by

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attorney-client privilege or attorney work product is moot. **ACCORDINGLY, PLAINTIFFS' MOTION FOR PROTECTIVE ORDER ON THIS ISSUE IS DENIED.**

This Court also denies to grant a protective order ending, staying, or phasing discovery into Defendant's First and Second Affirmative Defenses. As noted in Defendant's response memorandum, in its order dated April 3, 2014, this Court declined to stay or phase discovery of this matter. No new developments have arisen since the April 3, 2014 order was entered that would warrant reconsideration of this ruling.

As a final note, as production of some of the documents requested by Defendant is being ordered, this Court is willing to consider entry of a protective order limiting the use and disclosure of documents responsive to Defendant's requests.

The court-ordered status date of November 7, 2017 at 9:00 am in courtroom 2020 shall stand with all attorneys to appear at said time and place.

Respectfully,

Kenneth L. Popejoy
Circuit Court Judge

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Compensation Agreement

RRM Foundations & Arthur J. Gallagher Risk Management Services, Inc.

THIS COMPENSATION AGREEMENT is made and entered into and effective the 15th day of June, 2009 ("Effective Date") by and between RRM FOUNDATIONS, an Illinois Corporation ("Client"), and ARTHUR J GALLAGHER RISK MANAGEMENT SERVICES, INC., an Illinois corporation ("Gallagher").

I. TERM AND TERMINATION

This Agreement shall commence on the Effective Date for a term of one (1) year and shall automatically renew on the first anniversary of the Effective Date and annually thereafter for additional one- (1) year terms but may be terminated by either party at any time upon thirty (30) days prior written notice.

II. OBLIGATIONS OF GALLAGHER

Gallagher will provide the services set out on Exhibit A attached hereto (collectively, the "Services") to Client. If the Services include the placement of insurance coverages, Gallagher will use its commercial best efforts to secure such insurance coverages on Client's behalf. In the event an insurance company cancels or refuses to place such insurance coverages, Gallagher will use its commercial best efforts to obtain the coverage from another insurance company.

III. OBLIGATIONS OF CLIENT

Client shall remunerate Gallagher an annual fee of $22,000 for the Services, which such fee may be revised at the time of renewal of this Agreement by the execution of an amendment to this Agreement signed by the parties hereto. If work is required to be performed in addition to the Services, Client agrees to compensate Gallagher for such additional work at its usual and customary rates.

IV. DISCLOSURES

A. In addition to such fees and commissions provided herein, Gallagher may also receive investment income on fiduciary funds temporarily held by it, such as premiums or return premiums. Other parties, such as excess and surplus lines brokers, wholesalers, reinsurance intermediaries, underwriting managers, captive managers and similar parties, some of which may be owned in whole or in part by Gallagher's corporate parent, may earn and retain usual and customary commissions and fees in the course of providing insurance products to clients. Any such fees or commission will not constitute compensation to Gallagher under Section III. above.

B. Gallagher's fees under this Agreement shall be earned on the Effective Date (and any renewal thereof), and payable on invoicing. Client is responsible for payment of premiums for all insurance placed by Gallagher on its behalf. If any amount is not paid in full when due, including premium payments to insurance companies, that nonpayment will constitute a material breach of this Agreement that will allow Gallagher to immediately terminate this Agreement, at its option, without notice to Client. In addition, and not in lieu of the right to terminate, Gallagher reserves the right to apply return premiums or any other payment up to $5,000 received by Gallagher on Client's behalf to any amounts owed by Client

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to Gallagher unless such return premiums or other payments are disputed by Client.

C. Where applicable, insurance coverage placements which Gallagher makes on Client's behalf, may require the payment of federal excise taxes, surplus lines taxes, stamping or other fees, to the Internal Revenue Service (federal), various state(s) departments of revenue, state regulators, boards or associations. In such cases, Client is responsible for the payment of such taxes and/or fees, which will be identified separately by Gallagher on invoices covering these placements. Under no circumstances will these taxes or other related fees or charges be offset against the amount of Gallagher's brokerage fees or commissions referred to herein.

D. Gallagher will not be operating in a fiduciary capacity, but only as Client's broker, obtaining a variety of coverage terms and conditions to protect the risks of Client's enterprise. Gallagher will seek to bind those coverages based upon Client's authorization, however, Gallagher can make no warranties in respect to policy limits or coverage considerations of the carrier. Actual coverage is determined by policy language, so read all policies carefully. Contact Gallagher with questions on these or any other issues of concern.

V. INDEMNIFICATION

A. Gallagher agrees to indemnify and hold Client harmless from any loss, cost, damage, or expense (including reasonable attorney's fees) arising from the negligent acts or omissions of Gallagher.

B. Client agrees to indemnify and hold Gallagher harmless from any loss, cost, damage, or expense (including reasonable attorney's fees) arising from the negligent acts or omissions of Client, including any financial obligation to pay premiums to any insurance company.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the date first written above.

ARTHUR J GALLAGHER RISK MANAGEMENT SERVICES, INC.		RRM FOUNDATIONS	
By:		By:	John J Miller
Name:	Mike Pesch	Name:	John J Miller
Title:	Area President	Title:	Director of Finance

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June 15, 2009

EXHIBIT A

The following outlines services provided by Gallagher over the term of this Agreement:

- Use its best efforts to secure the following lines of insurance coverage on Client's behalf: Property, General Liability, Automobile, Workers' Compensation, Umbrella, Directors & Officers Liability, Employment Practices Liability, Fiduciary Liability, Crime, and Excess Directors & Officers Liability
- Consult with **RRM Foundations** to formulate a marketing strategy that focuses on delivering a cost-effective risk management strategy and structure based upon current market conditions.
- Work with **RRM Foundations** to produce comprehensive underwriting data and criteria for insurance carrier negotiations.
- Formally present coverage submissions to agreed upon insurance carrier(s) and negotiate terms on behalf of **RRM Foundations.**
- Summarize the results of executing the marketing strategy developed with **RRM Foundations** and communicate program recommendations.
- Provide consultation to **RRM Foundations** on exposures, existing coverage, and the desirability and/or feasibility of potential program changes when recommended by Gallagher or when requested by the client.
- Request change endorsements, when requested by the client or when otherwise necessary, ensuring accuracy and delivery in a timely manner.
- Administration of insurance program, including policy review and issuance, invoicing, coordination and/or issuance of required documentation, i.e., automobile identification cards, certificates of insurance, and other program administration, as required by the client.
- Review accounting and billing data received from insurance markets on client's behalf to ensure accuracy.

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ORDER - BLANK 2116 (Rev. 2/16)

STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF DU PAGE
IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

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4129

In Re Robert R. McCormick Foundation et al.

vs

Arthur J. Gallagher Risk Management Services, Inc.

17 L 481
CASE NUMBER

e-FILED
NOV 16, 2017 11:50 AM
Chris Kachiroubas
CLERK OF THE
18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS
File Stamp Here

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter, **IT IS HEREBY ORDERED:**

1. On October 24, 2017, the Court issued an Order denying Plaintiffs' Motion for a Protective Order. By that same Order, the Court denied in part Plaintiffs' Motions to Quash subpoenas served on their legal counsel, Querrey & Brady LLP and Katten Muchin Rosenman, LLP, and their advisors, Advisory Research, Inc., The Blackstone Group, L.P., and FTI Consulting, Inc., and granted Defendants' Motion to Compel Production of Documents.

2. Plaintiffs have informed Defendant and the Court that they will not comply with the Order. The Court therefore holds Plaintiffs in civil contempt of court. Plaintiffs are fined $50. Plaintiffs may purge themselves of their civil contempt by complying with the Court's order of October 24, 2017.

3. All written discovery not subject to appeal shall be completed by January 16, 2018.

4. This matter is continued for a status hearing regarding the status of written discovery and a plan for oral fact discovery on January 22, 2018 at 9:00 a.m. The parties shall

Name: _____ ☐ PRO SE
DuPage Attorney Number: _____
Attorney for: _____
Address: _____
City/State/Zip: _____
Telephone Number: _____
Email: _____

ENTER: Confer in advance of the hearing about which depositions can proceed pending appeal.

_____
Judge

Date: 11/16/17

CHRIS KACHIROUBAS, CLERK OF THE 18th JUDICIAL CIRCUIT COURT ©
WHEATON, ILLINOIS 60187-0707

REQUIRED ADDENDUM

C 4595 V3

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APPEAL TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL DIST[RICT] DUPAGE COUNTY, ILLINOIS CIVIL DEPARTMENT, LAW DIVISION

THE ROBERT R. MCCORMICK FOUNDATION and THE CANTIGNY FOUNDATION, *Plaintiffs-Appellants,* v. ARTHUR J. GALLAGHER RISK MANAGEMENT SERVICES, INCORPORATED, *Defendant-Appellee.*	Circuit Court Case No.: 13 L 481 Hon. Kenneth L. Popejoy

NOTICE OF APPEAL

Plaintiffs hereby appeal to the Illinois Appellate Court, Second District pursuant to Illinois Supreme Court Rule 304(b)(5) from the following orders entered in this matter in the Circuit Court of the Eighteenth Judicial District, DuPage County, Illinois, Civil Department, Law Division: The order dated November 16, 2017 holding the Foundations in civil contempt of court for failure to comply with the Court's October 24, 2017 letter of opinion and order, and the Court's October 24, 2017 letter of opinion and order.

By this appeal, Plaintiffs request that the Appellate Court (a) reverse and vacate the Circuit Court's order of November 16, 2017; (b) reverse and vacate the Circuit Court's order of October 24, 2017; and (c) remand the case to the Circuit Court for entry of an order consistent with the reversal and vacatur of the above-referenced orders, and further proceedings as necessary.

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Dated: November 20, 2017

Respectfully submitted,

THE ROBERT R. MCCORMICK FOUNDATION and THE CANTIGNY FOUNDATION

By: /s/ Matthew C. Wolfe
One of Their Attorneys

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Firm No. 17044

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CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on November 20, 2017, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served by electronic mail upon the following:

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/s/ Matthew C. Wolfe

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

THE ROBERT R. MCCORMICK FOUNDATION
Plaintiff/Petitioner

Appellate Court No: 2-17-0939
Circuit Court No: 2013L000481
Trial Judge: KENNETH L POPEJOY

v.

ARTHUR J. GALLAGHER RISK MANAGEMENT SERVICES, INC.
Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

THE ROBERT R. MCCORMICK FOUNDATION
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Defendant/Respondent

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