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,
Department, Law Division No. 13 L 481,
The Honorable Kenneth L. Popejoy, Judge Presiding

RESPONSE BRIEF OF DEFENDANT-APPELLEE ARTHUR J. GALLAGHER RISK MANAGEMENT SERVICES, INC.

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POINTS AND AUTHORITIES

NATURE OF THE CASE

The appellate court engaged in a straight-forward application of the holding in *Waste Management, Inc v. International Surplus Lines Insurance Co.,* 144 Ill. 2d 178 (1991), determining that the common interest doctrine defeats the Foundations' effort to use the attorney-client privilege and/or attorney work-product doctrine to withhold from Gallagher the production of certain documents.

In *Waste Management*, this Court determined that the parties shared a common interest in defeating environmental claims brought against the insureds (the "underlying litigation") because the insurers might be "ultimately liable" for paying their insureds' liability arising out of the underlying action. 144 Ill. 2d at 193-95. Accordingly, this Court held that neither the attorney-client privilege nor the attorney work-product doctrine protected from disclosure the communications and documents that the insureds exchanged with their counsel concerning the defense of the underlying action.

In this case, the Foundations claim that, absent Gallagher's advice, they would have maintained Directors' and Officers' ("D&O") insurance coverage with the Chubb Group ("Chubb") and had they done so, there would have been defense and indemnity coverage under that policy in the amount of $25 million for the claims asserted against them arising out of the failed leveraged buy-out ("LBO") of the Tribune Company (the "LBO litigation"). Alleging that

Gallagher breached its obligations, the Foundations argue that Gallagher is liable to them for the cost of defense and liability coverage that they claim they would have had under the Chubb policy for the LBO litigation.

Applying *Waste Management's* test to the facts of this case, the appellate court found that, like the insurers in *Waste Management*, Gallagher shares a common interest in defeating the LBO litigation since it may be "ultimately liable" for the Foundations' defense costs and liability arising from the LBO litigation. A7-8, ¶15. As such, the appellate court determined that Gallagher was entitled to the communications and documents that the Foundations had exchanged with their counsel in the defense of the LBO litigation. A9, ¶17.

Even though the Foundations do not dispute that, like the insurers in *Waste Management*, Gallagher shares a common interest in defeating the underlying litigation, the Foundations nevertheless argue that the appellate court has improperly expanded *Waste Management's* common interest doctrine to this case. Br. 1, 8. The Foundations' argument is premised on its unsupported assertion that, for the common interest doctrine to apply, the parties must be in a "special relationship" of insurer-insured. Br. 12. But, as we discuss below, that is not a requirement that *Waste Management* imposes for the common interest doctrine to apply. Moreover, contrary to *Waste Management*, conditioning the applicability of the common interest doctrine on the existence of a "special relationship" would foreclose the application of the common interest doctrine in the absence of a contractual cooperation clause.

ISSUE PRESENTED

Did the appellate court correctly determine that, pursuant to *Waste Management,* Gallagher shares a common interest with the Foundations in defeating or settling the LBO litigation, such that it is entitled to the production of communications and documents that the Foundations have exchanged with their counsel concerning the defense of the LBO litigation?

STATEMENT OF FACTS

The LBO Transaction

The Foundations were two of the Tribune's largest shareholders. C256-57. From 2003 to 2006, the Foundations' shares in the Tribune lost more than one-third of their value. C236. In 2007, the Foundations supported the leveraged buyout of the Tribune. C391-92. As a result of that transaction (the "LBO"), the Foundations received a premium of approximately $34 dollars for each of their shares in the Tribune, netting the Foundations over one billion dollars. C236, 258. But the LBO saddled the Tribune with a crippling debt load that it could not sustain, ultimately causing the Tribune to file for bankruptcy shortly thereafter in 2008. C234.

The LBO Litigation

Within weeks of the Tribune's December 2008 bankruptcy filing, a committee of unsecured creditors was formed to file adversary proceedings for the benefit of Tribune's creditors (the "Creditors' Committee"). *In re Tribune Co.*, 464 B.R. 126, 141-42 (Bankr. D. Del. 2011. Counsel for the Creditors' Committee proceeded to send several requests for information to the Tribune's

former shareholders, including the Foundations. *In re Tribune Co. Fraudulent Conveyance Litigation,* (S.D.N.Y.) Dkt. No. 1754. The Foundations knew that these requests were a prelude to their being sued by the Creditors' Committee, as the Foundations openly acknowledged in a July 16, 2009 court filing that "*it is clear that the Committee…anticipates bringing a fraudulent conveyance claim against the Foundations*." *Id.*[1] (emphasis added). In addition, in April 2010, the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") appointed an independent examiner to explore potential causes of action against persons involved in the LBO, including former large shareholders such as the Foundations. C42.

On November 1, 2010, the Creditors' Committee filed a lawsuit against the Foundations and other former large shareholders, directors, and officers of the Tribune, alleging that the Foundations had been unjustly enriched, breached their fiduciary duties, and aided and abetted breaches of fiduciary duty by members of the Tribune's board of directors in connection with the LBO.[2] C40, 43. In support of their claims against the Foundations, the Creditors' Committee complaint referred to an e-mail exchange between the

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[1] This Court may take judicial notice of the Foundations' filings in another court. *Metropolitan Life Ins. Co. v. American Nat'l Bank & Trust Co.,* 288 Ill. App. 3d 760, 764 (1st Dist. 1997) (appellate court may take judicial notice of public documents that are included in the records of other courts); *Curtis v. Lofy,* 394 Ill. App. 3d 170, 172 (4th Dist. 2009) (holding that public documents, including court records, are subject to judicial notice).

[2] The Creditors' Committee was subsequently replaced by a litigation trustee, Marc S. Kirschner, who was appointed by the Bankruptcy Court to pursue the actions against the Foundations and other defendants in the LBO litigation.

Foundations' spokesperson and the Foundations' advisor, which reported that management had been on the phone all day "finishing the deal" and that the LBO was likely to be announced the following day. C648. The Foundations' spokesperson followed-up the next day with an e-mail stating that, "God understands, but may not forgive us for what we are bout [*sic*] to do to good Olde TRB." *Id.*

Other lawsuits related to the LBO were subsequently filed against the Foundations, alleging additional claims, including for fraudulent conveyance. C43. All these lawsuits were consolidated in the United States District Court for Southern District of New York (the "LBO litigation"). See A2, ¶ 4.

At this point, the various actions asserted against the Foundations in the LBO litigation have been dismissed. See *In re Tribune Co. Fraudulent Conveyance Litig.,* No. 12-mc-2296, 2017 WL 82391 (Jan. 6, 2017), 2018 WL 6329139 (Nov. 30, 2018), and 2019 WL 549380 (Feb. 12, 2019). According to the Foundations, the time to appeal the dismissal of the Litigation Trustee's fraudulent conveyance, unjust enrichment, fiduciary duty, and aiding and abetting breaches of fiduciary duty claims has yet to run. Br. 4.

The Foundations tendered the LBO litigation to their insurer (Chartis), but coverage was denied based on a securities exclusion. C531-32. The Foundations did not file a declaratory judgment action to challenge Chartis' denial of coverage.

The Claims and Defenses in this Lawsuit

In early spring 2010, the Foundations hired Gallagher as their insurance broker to advise them related to their purchase of directors' and officers' ("D&O") insurance coverage. C526. From early spring 2010 to June 2010, the parties discussed potential options for D&O coverage for the Foundations. *Id.* In June 2010, the Foundations elected to purchase D&O coverage from Chartis instead of renewing coverage through their then-existing carriers, Chubb and Philadelphia (collectively referred to herein as "Chubb"). C528. Even though the Foundations had known since 2009 that they would be sued by the Creditors' Committee and that, in addition, an independent examiner had been appointed by the Bankruptcy Court in the spring of 2010 to investigate bringing claims against the Foundations, the Foundations never advised Gallagher that they were likely to be sued in LBO litigation. C539. Nor did the Foundations even inform Gallagher that they were actively being investigated with respect to their conduct that allegedly helped achieve the LBO transaction. *Id.*

After Chartis denied the Foundations' request for coverage of the claims asserted in the LBO litigation, the Foundations sued Gallagher for professional negligence, negligent misrepresentation, breach of contract, and contractual indemnification. C502-03. The Foundations allege that, absent Gallagher's advice, they would have maintained D&O coverage with Chubb. C533. And they contend that the Chubb D&O policy, unlike the Chartis policy, would have

provided both defense and liability coverage for the claims asserted in the LBO litigation. C504-05, 513.

Gallagher disputes that it negligently advised the Foundations or that it breached any obligations owed to the Foundations. C532-37. Beyond denying these allegations, Gallagher has asserted several affirmative defenses that are relevant to the instant appeal. C538-41. Gallagher's fourth affirmative defense asserts that the Foundations' comparative negligence bars their recovery here because they concealed critical information from Gallagher during the 2010 insurance renewal process relating to their knowledge that they were about to be sued in the LBO litigation. C539-40. Had Gallagher been informed of this crucial information, Gallagher would have advised the Foundations to take steps to lock-in coverage under their existing D&O policy issued by Chubb. *Id.* Specifically, that policy permits insureds to issue a Notice of Circumstance for conditions that could one day give rise to claim. *Id.* As the Foundations allege, had a Notice of Circumstance been provided to Chubb prior to the expiration of that policy, the Foundations would have been able to lock-in coverage under the Chubb policy irrespective of the Foundations' subsequent decision to purchase a D&O policy from Chartis for later time periods. C531. Thus, to establish this defense, Gallagher seeks evidence showing that the Foundations were aware, prior to June 2010, of a condition that could give rise to a claim in the future. C1138-40.

Gallagher's second affirmative defense – the common law doctrine of fortuity – alleges that at the time the Foundations purchased the Chartis D&O policy, they were aware of an ongoing progressive loss (*i.e.*, that the investigation into their LBO-related conduct would result in them being sued). C538. Gallagher alleges that, under the doctrine of fortuity, the Foundations were not eligible for coverage for a loss that they were aware of at the time the policy incepted. *Id*. Thus, like Gallagher's comparative negligence affirmative defense, Gallagher seeks information to support its fortuity defense that shows the Foundations' knowledge of the ongoing progressive loss prior to the inception of the Chartis policy. C1138-40.

Gallagher additionally has pleaded the defense of uninsurable conduct (its first affirmative defense). C538. As that defense alleges, under Illinois law the Foundations cannot obtain coverage for something that they were never entitled to in the first instance. *Id.*

Discovery in this Lawsuit Prior to the First Appeal

When the parties initiated written discovery in 2013, Gallagher sought discovery to refute the Foundations' claims, as well as to support Gallagher's affirmative defenses. C1138-40. The Foundations stonewalled any attempt to discover evidence regarding the Foundations' conduct relating to the LBO even though such conduct was directly relevant to Gallagher's affirmative defenses, including Gallagher's comparative negligence, fortuity, and uninsurability defenses. C1270-1297. The Foundations filed a motion for protective order

seeking to block Gallagher from obtaining the discovery it sought (C1124-31); Gallagher, in turn, moved to compel production of these documents (C1132-42). In its response to Gallagher's motion to compel, the Foundations represented to the circuit court that, "[t]his lawsuit is, in every meaningful sense, an insurance coverage action. If the Foundations prove that Gallagher breached its duties to the Foundations, Gallagher will be the Foundations' de facto insurer, stepping into the shoes of Chubb/Philadelphia." C1258.

Then at the April 3, 2014 hearing on the parties' competing discovery motions, the Foundations similarly argued before the circuit court that if Gallagher "committed negligence or breached their [sic] obligations, they [sic] become our de facto insurer. In other words, they step into the shoes of the insurance that we should have obtained with their advice[.]" C1275. After hearing oral argument on the parties' respective motions, the circuit court granted Gallagher's motion to compel, denied the Foundations' motion for protective order, and ordered the Foundations to produce responsive documents. C1292.

While the Foundations subsequently made a production of documents related to its involvement in the LBO, it was incomplete. In response to Gallagher's challenge to the completeness of the Foundations' court-ordered document production, the Foundations indicated that much of what Gallagher was seeking was privileged and would be listed on a privilege log. C1169-1210. On July 15, 2014, the Foundations provided Gallagher with a nearly forty-page

privilege log pursuant to which the Foundations have withheld nearly seven hundred documents. *Id.*

As the parties were in the process of conferring on privilege issues, the circuit court determined that the parties should bring cross motions for summary judgment regarding the narrow issue whether there would have been coverage under the Chubb policy had the Foundations maintained coverage with Chubb. Finding that the Chubb policy would not have covered the LBO litigation, the circuit court granted Gallagher's motion for summary judgment. The appellate court reversed that order in *McCormick v. Gallagher,* 2016 IL App (2d) 150303 and the case was remanded to the circuit court for further proceedings. In its opinion, the appellate court, at the Foundations' urging, held that Gallagher "stands in the insurer's shoes for the purpose of this malpractice action." *Id.* at ¶ 6

Shortly after remand to the circuit court, the parties continued to meet and confer regarding privilege issues. C1217-18. At that time, Gallagher asserted that, pursuant to the holding in *Waste Management*, the documents in question were not privileged from production to Gallagher since the parties share a common interest in defeating the LBO litigation. *Id.* The parties disagreed and presented the issue to the circuit court via competing motions to compel, for a protective order, and to quash subpoenas directed to the Foundations' counsel and LBO advisors. A13-18.

The Circuit Court's October 24, 2017 Order

After extensive briefing and argument on all the motions before it, the circuit court granted, in almost all respects, Gallagher's motion and denied the Foundations' motions. A13-18. The circuit court's decision started with a discussion of the *Waste Management* decision, noting that this Court had identified two rationales, each of which provides a "sufficient independent" basis to render the attorney-client privilege and attorney work-product doctrine (collectively, the "privilege") inapplicable. A14. The circuit court explained that the first rationale for holding the privilege inapplicable in *Waste Management* was the existence of a contractual duty to cooperate, which "rendered any expectation of privilege unreasonable under the facts presented." *Id.*

The circuit court next explained that the second rationale in *Waste Management* for holding the privilege inapplicable was the common interest doctrine, which "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.* As the circuit court further explained, a common interest was found to exist in *Waste Management* because the parties shared a "common interest in defeating and settling the underlying litigation." *Id.*

Because the circuit court found that no contractual cooperation clause is present in this case, its analysis focused on whether the parties here share a

common interest in defeating the underlying litigation (*i.e.*, the LBO litigation). *Id.* at 14-15. In holding that the common interest doctrine applies here, the circuit court explained that, "[a]s [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, [Gallagher's] interests have become aligned with [the Foundations] in defeating or settling the underlying litigation." A15. As to the Foundations' argument that the common interest doctrine does not apply here because the "parties in *Waste Management* stood in a unique relationship that required the insured to cooperate with the insurer," the circuit court explained that the "common interest exception exists separate and apart from a written contractual duty between the parties" and, as such, the "lack of a cooperation clause does not prevent application of the common interest exception." *Id.*

Based on its finding that the parties share a common interest in defeating and/or settling the LBO litigation, the circuit court ordered the Foundations to produce documents to Gallagher relating to the Foundations' defense of the underlying litigation, which the Foundations had previously withheld on privilege grounds. A16. The circuit court specified, however, that Gallagher was not entitled to documents relating to insurance coverage issues. *Id.* Finally, the circuit court denied the Foundations' request to stay the case until the LBO litigation concludes. A18.

The Foundations subsequently refused to comply with the circuit court's October 24, 2017, order, leading to the entry of a contempt order against them on November 16, 2017. C1364. Thereafter, the Foundations filed a notice of appeal with respect to the circuit court's holding that *Waste Management's* common interest doctrine applies here, as well as the denial of their request for a stay.

The Foundations' Second District Appeal

The appellate court affirmed both the circuit court's decision that *Waste Management's* common interest doctrine applies here and the denial of the Foundations' request for a stay.[3] Affirming the circuit court's decision that *Waste Management's* common interest doctrine applies here, the appellate court – like the circuit court – noted that this Court in *Waste Management* had identified and discussed two separate and independent bases for why the privilege did not bar the production of documents relating to the underlying litigation: (1) the "contractual cooperation clause" argument; and (2) the "common interest doctrine." 2018 IL App (2d) 170939, ¶¶ 10-11.

In examining whether the common interest doctrine applies to this case, the appellate court explained that while the common interest doctrine is likely to arise in coverage litigation between insurers and insureds, "it is by no means limited to that context." A5. As the appellate court explained, whether the

[3] The Foundations' petition for leave to appeal did not seek review of the appellate court's decision affirming the denial of the Foundations' request for a stay. Br. 7.

common interest doctrine applies "depends not on the nature of the parties but on the 'commonality of interests' between them," and whether the party seeking the disclosure of the documents at issue "might be 'ultimately liable for payment if the plaintiffs in the underlying action received either a favorable verdict or settlement.'" A5-6, citing *Waste Management*, 144 Ill. 2d at 194-95.

Applying *Waste Management's* test to the facts of this case, the appellate court held that "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." A8. To support its finding that Gallagher might be "ultimately liable" for the underlying litigation, the appellate court explained that if the Foundations are successful in this suit, Gallagher would be 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." *Id.*

ARGUMENT

The appellate court correctly determined that *Waste Management's* common interest doctrine applies here because the Foundations and Gallagher share a common interest in defeating or settling the LBO litigation. As both the circuit court and appellate court found, since Gallagher may be "ultimately liable" for the Foundations' defense costs and liability arising from the LBO litigation, the requisite "commonality of interests" exist between the parties. A8, 15-16. Accordingly, pursuant to *Waste Management*, the courts below properly determined that the privilege did not permit the Foundations to withhold from Gallagher documents relating to the LBO litigation. *Id.*

In their briefs below, the Foundations argued – albeit unsuccessfully – that there were no "commonality of interests" between the parties with respect to the defense and/or settlement of the LBO litigation. A6, ¶14, A15. In this appeal, the Foundations have abandoned that argument, as the Foundations no longer dispute that the parties share a common interest in defeating the LBO litigation. Unable to dispute that *Waste Management's* commonality of interests exist in this case, the Foundations now contend that the common interest doctrine is inapplicable here because the parties do not have the "special relationship" of insurer-insured. Br. 8-13.

The Foundations' "special relationship" argument fails for three separate and independent reasons. *First*, the Foundations' effort to superimpose a "special relationship" requirement on the common interest

doctrine is contrary to the explicit test set forth in *Waste Management.* This Court did not find that a common interest existed in *Waste Management* because the parties had an insurer-insured relationship; rather, this Court found that a common interest existed because the insurers in that case might be "ultimately liable for payment if the plaintiffs in the underlying action received either a favorable verdict or settlement." *Waste Management*, 144 Ill. 2d at 195. Indeed, this Court explicitly rejected the argument that the common interest doctrine was inapplicable because the insurers had eschewed their core obligations as insurers (*i.e.*, the duty to defend and indemnify their insureds in the underlying litigation), unequivocally explaining that it is the "*commonality of interests which creates the exception*." *Id.* at 194 (emphasis added).

Second, at its core, the Foundations' "special relationship" argument is an effort to require a duty to cooperate in order for *Waste Management's* common interest doctrine to apply. See Br. 11 (where Foundations describe the "special relationship" as including the requirement that the insured must "*cooperate with the insurer in the defense of any liability claim*") (emphasis added). But that is directly contrary to this Court's holding in *Waste Management* which, *after* discussing the contractual cooperation clause argument, separately examined the common interest doctrine, describing it as an "equally compelling" reason why the privilege did not apply to documents involving the underlying litigation. *Waste Management*, 144 Ill. 2d at 193.

Third, contrary to the Foundations' hyperbolic claims that the appellate court's decision in this case is a "dramatic, unprecedented, and unwarranted expansion" of the common interest exception (Br. 1), the common interest present here is the same common interest that was present in *Waste Management*: a shared interest in defeating or settling the underlying litigation since Gallagher – like the insurers in *Waste Management* – might be ultimately liable for the Foundations' defense costs and liability arising from the underlying litigation. Although carefully avoided in their current brief, the Foundations have argued throughout the history of this case that Gallagher is their "*de facto* insurer" and stands in the shoes of Chubb in terms of providing defense and liability coverage to the Foundations for the LBO litigation. C1257-58. Suffice it to say, the Foundations cannot credibly argue, when it is convenient for them to do so, that the parties have a "*de facto*" insurer-insured relationship, and then later suggest that the appellate court's application of the common interest doctrine somehow constitutes an "unprecedented" or "unwarranted" expansion of the *Waste Management* common interest exception.

The Foundations' second argument for suggesting that the appellate court erroneously expanded *Waste Management's* common interest doctrine – *i.e.*, that the appellate court discussed authorities relating to the joint defense non-waiver doctrine – is a red-herring. A review of the appellate court's opinion shows that these authorities were discussed in the context of

addressing dicta from an earlier decision of the appellate court (*Allianz Ins. Co. v. Guidant Corp.*, 373 Ill. App. 3d 652, 664-66 (2d Dist. 2007)) and were not relied upon by the appellate court in determining that the common interest doctrine applies here. See A5, 7-8.

The Foundations' final argument for suggesting the appellate court has erroneously expanded *Waste Management's* common interest doctrine is that "Gallagher, unlike an insurer, never had a non-adversarial interest in the Foundations' defense." Br. 20. That argument is legally and factually incorrect. To begin, there is nothing in *Waste Management* that premises the application of the common interest doctrine upon the timing of when the indemnifying party disputes its obligations to provide indemnification for the underlying obligation. In addition, this Court very clearly held that, even though the insurer in *Waste Management* had always disputed any coverage obligation (both indemnity and the cost of defense) for the underlying litigation, the parties nonetheless shared a common interest in defeating or settling the underlying litigation. 144 Ill. 2d at 194-95.

I. The Appellate Court Correctly Determined That *Waste Management's* Common Interest Exception Applies Because, Ultimately, Gallagher Could Be Found Liable For The Foundations' LBO Litigation Defense And Liability Costs.

In *Waste Management*, this Court started its analysis by noting that, "in Illinois, we adhere to a strong policy of encouraging disclosure, with an eye toward ascertaining that truth which is essential to the proper disposition of a lawsuit." 144 Ill. 2d at 190. Because that is the long-standing policy in Illinois,

this Court explained that the "privilege ought to be strictly confined within its narrowest possible limits[,]" and "that it is the privilege, not the duty to disclose, that is the exception." *Id.*

Turning to the issue before it in *Waste Management*, this Court first examined whether the presence of a contractual cooperation clause in the parties' insurance contract rendered the claim of privilege inapplicable. 144 Ill. 2d at 192-93. Finding that the contractual cooperation obligations rendered any expectation of attorney-client privilege unreasonable, this Court held that the privilege did not bar the discovery of communications relating to the underlying lawsuit. *Id.*

This Court next separately addressed whether the common-interest doctrine rendered the privilege inapplicable. *Id.* at 193. In finding that it did, this Court described the common interest doctrine as an "equally compelling" basis that required the disclosure of the documents at issue. *Id.* This Court then explained that, "when an attorney acts for two different parties who each have a common interest, communications by either party to the attorney are not necessarily privileged in a subsequent controversy between the two parties." 144 Ill. 2d at 193. This Court further specified that, even where the attorney in question is "neither retained by nor in direct communication" with the party seeking disclosure, the common interest doctrine applies so long as the attorney "acts for the mutual benefit" of both parties with respect to the underlying litigation. *Id.* at 194.

In *Waste Management*, the insureds argued that the common interest doctrine was inapplicable in that case because the insurers had "provided no defense in the underlying suits nor did they participate." 144 Ill. 2d at 194. Rejecting that argument, this Court emphasized that, "[i]t is the *commonality of interests which create the exception*, not the conduct of the litigation." *Id.* (emphasis added).

After describing the circumstances under which the common interest doctrine applies, this Court examined whether the requisite "commonality of interests" was present in *Waste Management*. *Id.* Finding that the insurers in *Waste Management* were "ultimately liable for payment if the plaintiffs in underlying action received either a favorable verdict or settlement" (*id.* at 195), this Court held that the common-interest doctrine applied such that the privilege did not bar the disclosure of the documents to the insurers relating to the underlying litigation. *Id.*

In its opinion in the instant case, the appellate court carefully examined whether the requisite "commonality of interests" are present here. A5-8, ¶¶11, 15. Consistent with this Court's holding in *Waste Management*, the appellate court found that, since Gallagher may be "ultimately liable" for the Foundations' defense and liability costs in the LBO litigation, the parties share a common interest in defeating or settling the LBO litigation. A7, ¶15. Accordingly, the appellate court concluded that the privilege did not bar the

production of documents to Gallagher on matters which the parties ultimately might share liability (*i.e.*, the LBO litigation). *Id.*

The appellate court correctly determined that *Waste Management's* common interest doctrine applies here, as the Foundations seek to hold Gallagher liable for the cost of defense and liability that they may incur in the LBO litigation. C46. As discussed above, when it served their purposes, the Foundations have repeatedly described Gallagher as their "*de facto*" insurer for purposes of this case and that Gallagher stands in the shoes of Chubb in terms of its liability for the Foundations' defense and liability costs arising from the LBO litigation. C1257-58. That position was even adopted by the appellate court in the original appeal related to securities exclusion issues, where at the Foundations' urging it held that Gallagher "stands in the insurer's shoes for the purpose of this malpractice action." A8, ¶ 15. In short, just as the insurers in *Waste Management* were at risk of being "ultimately liable" for their insureds' liability in the underlying litigation if the insureds prevailed in the declaratory judgment action against the insurers (144 Ill. 2d at 195), Gallagher is at risk of being "ultimately liable" for the Foundations' defense and liability costs arising from the LBO litigation if the Foundations succeed in this case. Because the parties unquestionably share a "commonality of interest" in defeating and/or settling the LBO litigation, the appellate court correctly determined that, as between the parties, the privilege does not bar the production of documents involving the LBO litigation.

Unable to dispute that the parties share a common-interest in defeating and/or settling the LBO litigation, the Foundations seek to superimpose a new requirement in order for the common interest doctrine to apply: that the parties in question must have the "special relationship" of insurer-insured. But, as discussed below, the Foundations' "special relationship" argument finds no support in the *Waste Management* decision, would render the common interest doctrine indistinct from the cooperation clause exception, and ignores that the Foundations seek to have Gallagher step in the shoes of Chubb and assume the very same obligations that this Court found resulted in the application of the common interest doctrine in *Waste Management*.

A. *Waste Management* Does Not Require A "Special Relationship" Of Insurer-Insured For The Common Interest Doctrine To Apply.

The Foundations argue that, even though the parties share a common interest in defeating and/or settling the LBO litigation, this Court should nonetheless find the common interest doctrine inapplicable because the parties do not share the "special relationship" of insurer-insured. Br. 9-13. But the Foundations' argument confuses the factual setting of the *Waste Management* case (*i.e.*, that the parties there were insurers and insureds), with the basis for this Court's holding that the common interest doctrine applied in *Waste Management*. Since the parties in *Waste Management* were insurers and insureds, it would have been an easy matter for this Court to indicate that the common interest doctrine only applies in the limited context of the insurer-

insured relationship. Yet there is nothing in *Waste Management* that even implies that the common interest doctrine only applies when parties have a "special relationship" of insurer-insured.

To that point, in describing the requisites for the common interest doctrine to apply, this Court did not identify the insurer-insured relationship as a necessary pre-condition. Instead, this Court examined whether the parties shared a common interest in the underlying litigation (144 Ill. 2d at 193-95) and once it determined that a commonality of interest existed in defeating or settling the underlying litigation (*id.*), this Court found the privilege inapplicable and required that the documents relating to the underlying litigation be produced (*id.*). At no point in that analysis did this Court specify, as the Foundations' incorrectly suggest, that the insurer-insured relationship was a necessary predicate for the common interest doctrine to apply. *Id.*

The Foundations are not the first litigants to claim that *Waste Management* only applies in the insurer-insured context. Rather, numerous litigants have unsuccessfully tried to force that limitation upon *Waste Management* only to have courts time and again reject that unsupported limitation. See *Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶ 25 ("Illinois courts have never explicitly limited this doctrine to the insurer-insured relationship"); *BorgWarner, Inc. v. Kuhlman Elec. Corp.*, 2014 IL App (1st) 131824, ¶ 33 ("[t]o the extent that [indemnitees] suggest that the holding of *Waste Management,*

Inc. only applies to cases involving insurance companies, rather than other types of indemnitors . . . we reject this contention.").

While ignored by the Foundations, this Court in *Waste Management* cited to certain evidence treatises in describing the common interest doctrine. See 144 Ill. 2d at 193 (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 505.7, at 277 (5th ed. 1990); McCormick, Evidence § 91, at 219 (3d ed. 1984); 8 J. Wigmore, Evidence § 2312, at 603 (McNaughton rev. 1961)). None of those treatises predicated the applicability of the common interest doctrine on whether the parties are in the "special relationship" of insurer-insured. *Id.* Indeed, in discussing the application of the common interest doctrine, the treatises cited in *Waste Management* identified relationships beyond that of insurer-insured, including for example the denial of a claim of privilege by management in a stockholder's derivative suit with respect to communications between management and corporate counsel prior to the litigation. See e.g., McCormick, Evidence § 91, at 219, fn. 14.

And, in *Abbott Labs. v. Alpha Therapeutic Corp.*, 200 F.R.D. 401 (N.D. Ill. 2001), the United States District Court for the Northern District of Illinois applied the *Waste Management* common interest in the absence of an insurer-insured relationship. Contrary to the Foundations' misleading effort to cast aside *Abbott's* discussion of the common interest doctrine as mere *dicta* (Br. 10, fn 10), a review of that decision shows that the court devoted a separate section

of its decision that analyzed whether the common interest doctrine served to render the privilege inapplicable. 200 F.R.D. at 407-08.

Under section "C" of its decision entitled "Common Interest Doctrine," the district court in *Abbott* explained that the "*Waste Management* Court found application of the so-called common interest doctrine as an independently sufficient ground for holding the attorney-client privilege inapplicable." 200 F.R.D. at 407. Holding that the common interest doctrine applied in *Abbott*, the court explained that "Alpha's attorneys in the underlying litigation were, in effect, representing both the interests of Alpha and Abbott, as Abbott could ultimately be found liable for the claims pursuant to it agreement to indemnify." *Id.* In concluding its analysis, the court in *Abbott* found the "attorney-client privilege inapplicable to the discovery sought by Abbott under Alpha's contractual obligation to cooperate *and under the common interest doctrine* as construed by the Illinois Supreme Court in *Waste Management.*" *Id.* at 408 (emphasis added).

The Foundations mistakenly characterize *Abbott's* holding with respect to the common interest doctrine as *dicta* for the straight-forward reason that, just like the parties in *Abbott*, the Foundations and Gallagher share a common interest vis-à-vis the underlying litigation since Gallagher could ultimately be found liable for the Foundations' cost of defense and liability arising from the LBO litigation. Where that is the case, *Waste Management's* common interest

doctrine mandates that the documents and communications pertaining to the LBO litigation are not privileged from disclosure to Gallagher.

Finally, the Foundations erroneously suggest that courts applying Illinois law have "largely reject[ed]" attempts to expand *Waste Management* beyond the insurer-insured relationship. Br. 14-15. The Foundations first point to the appellate court's decision in *Hartz Constr. Co. v. Village of W. Springs*, 2012 IL App (1st) 103108. Br. 14. But contrary to the Foundations' argument, the court in *Hartz* explained that, "parties do not have to match the classic profile of an insurer and insured for the concepts in *Waste Management* to apply." 2012 IL App (1st) 103108, ¶ 30.

The Foundations' reliance on *Motorola Sols., Inc. v. Zurich Ins. Co.*, 2017 IL App (1st) 161465 to suggest that courts have refused to expand *Waste Management* outside the insurer-insured relationship (Br. 14-15) is likewise without merit. For starters, *Motorola* did not even concern whether *Waste Management* applies outside the insurer-insured relationship, as that case was a declaratory judgment action between an insurer and insured. 2017 IL App (1st) 161465, ¶¶ 4-5.[4] Nor did the appellate court in *Motorola* reject the

[4] The Foundations' suggestion that *Ill. Emasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 393 Ill. App. 3d 782 (1st Dist. 2009) rejected extending *Waste Management* outside of insurers-insureds (Br. 15) is likewise without merit. *Emasco* did not address whether *Waste Management* applies outside the insurer-insured relationship; instead, it addressed whether *Waste Management* extends to coverage-related communications. 393 Ill. App. 3d at 787. That is not an issue here, as the courts below held that Gallagher is entitled to documents involving the defense of the LBO litigation, but not coverage-related communications. A9, ¶ 17; A16.

application of the common interest doctrine because there was no contractual cooperation clause present there. Rather, the court in *Motorola* rejected the application of the common interest doctrine because the insurer there sought documents prepared years before the underlying litigation ensued (*i.e.*, for matters in which the parties in that case did not share a common interest). *Id.* at ¶39. That is not the issue here, as the documents that the circuit and appellate court held must be produced involve the defense of the LBO litigation where the parties share a common interest in defeating or settling the claims against the Foundations. A9, ¶17; A16.

The Foundations are also incorrect that *Kmart Corp. v. Footstar, Inc.*, 2010 WL 5101406 (N.D. Ill. Dec. 8, 2010) supports its contention that courts applying Illinois law have refused to extend *Waste Management* outside the insurer-insured relationship. Br. 14-15. The court in *Kmart* found that *Waste Management* was factually distinguishable from the case before it because the parties in *Kmart* (Footstar and Kmart) were actual adversarial parties in the underlying litigation, as Footstar's answer in the underlying litigation identified Kmart as the negligent party. 2010 WL 5101406, *1. Under that unique circumstance, the district court found that Kmart's attorneys never acted for the mutual benefit of the parties in underlying litigation. *Id.* By contrast, Gallagher is not a party in the LBO litigation, let alone an adverse

party to the Foundations in that litigation.[5] In short, *Kmart* does not hold that the common interest doctrine only applies to insurers and insureds.

B. Conditioning The Applicability Of The Common Interest Doctrine On The Existence Of A "Special Relationship" Would Foreclose, Contrary To *Waste Management*, The Application Of The Common Interest Doctrine In The Absence Of A Contractual Cooperation Clause.

In *Waste Management*, this Court separately analyzed what it described as two "equally significant" bases for why the attorney-client privilege and attorney work product doctrine did not protect the documents at issue from production. 144 Ill. 2d at 191. That decision first analyzed whether the existence of a contractual cooperation clause rendered the privilege inapplicable. *Id.* at 191-92. After determining that the contractual cooperation clause defeated the assertion of privilege as to documents from the underlying litigation, it next considered whether the common interest doctrine also rendered the privilege inapplicable. *Id.* at 193-95. In doing so, this Court described the common interest doctrine as an "equally compelling" basis for the disclosure of the documents at issue. *Id.* at 193.

Even though *Waste Management* expressly identifies two "equally compelling" arguments – *either one* of which renders the privilege inapplicable

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[5] Similarly, *Netherlands Ins. Co. v. Nat'l Cas.*, 283 F.R.D. 412 (C.D. Ill. 2012) did not even address, let alone reject, the application of *Waste Management's* common interest doctrine outside the insurer-insured relationship. Br. 14-15. Nor did the court there find that *Waste Management's* common interest doctrine did not apply because of a lack of "privity of contract" (Br. 15). Rather, in *Netherlands Ins.*, the court found that there was no commonality of interest with respect to the defense of the underlying litigation. 283 F.R.D. at 418.

(144 Ill. 2d at 193), the Foundations' "special relationship" argument nevertheless seeks to treat them as if they are conjunctive and not disjunctive bases for why the privilege does not apply. In doing so, the Foundations seek to engraft upon the common interest doctrine the same requirements that must be satisfied for the contractual cooperation clause argument to render the privilege inapplicable. But that would effectively write the common interest doctrine out of the *Waste Management* decision, as the Foundations' "special relationship" argument would require there to be a contractual duty to cooperate in order for the common interest exception to apply. Had this Court intended for the common interest doctrine to apply only where a contractual duty to cooperate exists between the parties, this Court would have had no need to identify the common interest doctrine as a separate and distinct basis for rendering the privilege inapplicable, since that outcome would have been dependent on a contractual duty to cooperate. The separateness of the two bases for rejecting the privilege precludes the notion that one is dependent on the other.

The Foundations' effort to render the common interest doctrine indistinct from the contractual cooperation clause argument is laid bare at pages 10 and 11 of their brief where they describe the aspects of the "special relationship" that they claim must exist for the common interest doctrine to apply. There the Foundations argue that the "special relationship" must include, among other things: (1) an obligation by the insured to "give notice of

any liability claim and the circumstances from which it arose;" (2) an obligation by the insured to furnish to the insurer the "books and records of the Insured;" and (3) an obligation by the insured "to cooperate with the insurer in the defense of any liability claim." Br. 11.

But those are all obligations that arise from a contractual duty to cooperate. In short, the Foundations' "special relationship" argument would mean that the common interest doctrine has no separate existence from the contractual cooperation clause argument, as it could only apply if a contractual duty to cooperate exists. There is no support for that position in *Waste Management* and certainly none offered by the Foundations.

C. The Common Interest Shared By The Parties Here Is The Same Common Interest That Existed In *Waste Management* And, As Such, The Appellate Court Did Not Expand The Common Interest Doctrine.

The Foundations' overwrought argument that the appellate court's decision constitutes a "dramatic, unprecedented, and unwarranted expansion" of *Waste Management's* common interest doctrine is without support. Br. 1. As discussed above, the appellate court found that the parties share a common interest in defeating and/or settling the underlying litigation for the same reason that this Court found that a commonality of interests was present in *Waste Management*: Gallagher, like the insurers in *Waste Management,* may be "ultimately liable" for the Foundations' defense costs and liability arising from the underlying litigation (here, the LBO litigation). A8.

The absolute hollowness of the Foundations' unsupported contentions that the appellate court's decision improperly expands *Waste Management's* common interest doctrine is further belied by the Foundations' argument throughout earlier phases of this case that Gallagher serves as the Foundations' "*de facto* insurer" and "stands in the shoes of Chubb" in terms providing the Foundations with coverage for the LBO litigation. C1257-58. Having taken that position time and again in this case and having succeeded in persuading the appellate court to adopt that position in the prior appeal in this case (*McCormick,* 2016 IL App (2d) 150303, ¶ 6), the Foundations cannot credibly claim that the circumstances of this case materially differ from *Waste Management*, let alone that the appellate court has engaged in some sort of dramatic, unprecedented, or unwarranted expansion of *Waste Management's* common interest doctrine.

In an effort to suggest that the appellate court's decision would unduly expand *Waste Management's* common interest doctrine, the Foundations argue that, if affirmed, the appellate court's holding would extend the common interest doctrine to "any case in which two parties have a potentially similar interest in some issue." Br. 8. But that is not true. There is nothing in the appellate court's holding – and certainly nothing identified by the Foundations – that stands for the proposition that the common interest doctrine can apply whenever parties potentially share a "similar interest in some case." That is not the common interest that the appellate court pointed to in determining

that *Waste Management's* common interest doctrine applies here. Rather, the appellate court clearly pointed to the same common interest that was present in *Waste Management* – *i.e.*, that because Gallagher "might be 'ultimately liable'" to the Foundations for "both the Foundations' liability to the LBO plaintiffs and the Foundations' defense costs in the LBO litigation," the requisite "commonality of interests exists between the Foundations and Gallagher." A8, ¶ 15.

To further its unfounded narrative that the appellate court's decision has somehow unmoored the common interest doctrine from the holding and requirements in *Waste Management*, the Foundations suggest that the appellate court's decision would lead to "merger candidates" and "antitrust defendants," who share confidences pursuant to a joint defense agreement, having "thrown open their attorneys' entire files to their merger partners, co-defendants, or other aligned parties." That exaggeration is likewise not true. The appellate court did not hold that the voluntary sharing of confidences between parties in a joint defense agreement renders the privilege inapplicable to those parties' other privileged communications not shared pursuant to the joint defense agreement. Rather, the only circumstance where the appellate court found that the privilege did not apply is to documents relating to an underlying litigation matter where the party seeking disclosure might be ultimately liable for the other party's defense costs and liability arising from the underlying litigation. A8.

II. The Appellate Court Did Not Rely Upon The Joint-Defense Non-Waiver Doctrine In Determining That The Common Interest Doctrine Applies Here.

The Foundations incorrectly argue that the appellate court relied upon the joint-defense non-waiver rule in determining that *Waste Management's* common interest doctrine applies here.

In its opinion in this case, the appellate court addressed the Foundations' citation to *Allianz Ins. Co. v. Guidant Corp.,* 373 Ill. App. 3d 652, 664-66 (2d Dist. 2007) where, over a decade ago, the appellate court observed that certain other jurisdictions had criticized *Waste Management.* A6, ¶ 14. The appellate court stated that, "[w]hile 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." *Id.* The appellate court then recognized that "every federal circuit and 46 states recognize at least some form of the common-interest exception[.]" *Id.* In doing so, it cited certain case law and secondary sources, including authorities that discussed the joint-defense non-waiver doctrine. *Id.*

Because certain of the authorities referenced by the appellate court involved a discussion of the joint-defense non-waiver doctrine, the Foundations argue that the appellate court "confused" the *Waste Management* common interest doctrine with the joint-defense non-waiver rule. Br. 16. From there, the Foundations make the unremarkable argument that the common interest

and joint-defense non-waiver doctrines are different (a point that Gallagher does not dispute). *Id.* at 17.

But the referenced portion of the appellate court's opinion (paragraphs 13 and 14), does not espouse the holding of the appellate court, which is set forth at paragraphs 11 and 15 of its opinion. See A5-8. Clearly evidencing that paragraphs 13 and 14 were an aside meant to address dicta from the appellate court's earlier decision in *Allianz*, the appellate court signaled its return to the discussion of this case in paragraph 15 where it indicated that it was "*[t]urning back to the matter at hand[.]*" A7, ¶15 (emphasis added). Thereafter, the appellate court resumed its analysis of the *Waste Management* test and the factual circumstances present in this case, holding that Gallagher is "'standing in the insurer's shoes for the purpose of this malpractice action,'" and that "because Gallagher might be 'ultimately liable' in the LBO Litigation…a commonality of interests exists between the Foundations and Gallagher." A7-8, ¶15 (internal citations omitted). In sum, the appellate court's holding shows that its decision was clearly based upon the same common interest that was present in *Waste Management* (*i.e.*, a shared liability for the underlying litigation).[6]

[6] Moreover, the Foundations' argument concerning references to authorities discussing the joint-defense non-waiver doctrine is a red-herring for the further reason that there has never been any suggestion in this case by Gallagher that the common interest doctrine applies here because of a joint-defense agreement.

III. There Is No Basis In Law Or Fact For The Foundations' Argument That The Common Interest Doctrine Does Not Apply Because Gallagher Did Not Have A "Non-Adversarial Interest" In The Foundations' Defense.

Finally, the Foundations argue that the appellate court erred because it ignored that Gallagher, unlike an insurer, never had a "non-adversarial interest in the Foundations' defense." Br. 20. This argument should be rejected for several reasons.

To begin, absent from *Waste Management* is any suggestion that, for the common-interest doctrine to apply, the parties must share "a non-adversarial" common interest in the underlying litigation that pre-dates the dispute between the parties. Tellingly, the Foundations have not identified any language from *Waste Management* where this Court so limited the common interest doctrine's application. And contrary to the Foundations' effort to re-write the holding in *Waste Management*, this Court held that a common interest can exist regardless of whether the parties had joined interests at the time of the communication. 144 Ill. 2d at 194; see also A5, ¶11. In sum, the Foundations' last argument badly conflates a meaningless factual distinction with this Court's actual holding in *Waste Management*.

In this section of their brief, the Foundations point to the facts that: (1) "Gallagher never promised to defend or indemnify the Foundations for their liability;" (2) "Gallagher merely promised to indemnify the Foundations for Gallagher's own negligence;" and (3) "[t]o establish Gallagher's negligence, the Foundations had to sue Gallagher." Br. 20. But the Foundations fail to explain

why these factual distinctions matter in terms of whether the requisite "commonality of interests" exist.

Beyond the fact that the distinctions identified by the Foundations are immaterial to whether *Waste Management's* common interest doctrine applies here, an examination of these so-called "important distinctions" shows that they are not actual distinctions. For example, while the Foundations place great weight on the fact that Gallagher indemnified the Foundations for Gallagher's own negligence and not for the Foundations' own conduct (Br. 20), the reality is that, under the circumstances here, there is no real difference. If Gallagher is shown to have breached a duty to procure adequate D&O coverage, the Foundations will argue, as they have repeatedly done so throughout this case, that Gallagher stands in the shoes of the insurer (Chubb) and, as the *de facto* insurer, has the obligation to provide the Foundations with coverage – both defense and liability – for the LBO litigation. C1257-58.

Similarly, just as the Foundations must sue Gallagher to establish Gallagher's obligation to provide the coverage that they claim they would have had under the Chubb policy, the insureds had to sue the insurers in *Waste Management* to establish the insurers' obligation to provide coverage for the underlying litigation there. That, of course, is why the Foundations have long represented to the courts below that, "[t]his lawsuit is, in every meaningful sense, an insurance coverage action." C1258. In conclusion, the distinctions identified by the Foundations are at most superficial and certainly provide no

basis, factually or legally, to suggest that the *Waste Management* common interest doctrine does not apply here.[7]

CONCLUSION

WHEREFORE Gallagher respectfully requests that this Court affirm the decisions of the circuit and appellate court and remand this case with the instruction that the Foundations produce to Gallagher any documents and communications with their counsel relating to the defense of the LBO litigation.

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Respectfully Submitted,

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[7] The Foundations also point to the fact that, unlike Gallagher, insurers face potential liability for a bad faith refusal to settle disputes. Br. 12. But absent from the Foundations' brief is any explanation for why that distinction matters in terms of the applicability of *Waste Management's* common interest doctrine. Indeed, *Waste Management* does not mention insurers' potential exposure for bad faith claims under Illinois case law, statutes or otherwise as a relevant determination in ascertaining whether a common interest exists.

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 37 pages.

/s/ *Michael T. Layden*

NOTICE OF FILING & CERTIFICATE OF SERVICE

The undersigned, Richard J. Prendergast, an attorney, certifies that on March 18, 2019, the foregoing **RESPONSE BRIEF OF ARTHUR J. GALLAGHER** 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 Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct

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