Illinois Appellate Court Extends Common Interest Doctrine

By Peter E. Cooper and Marielise Fraioli

The Appellate Court for the Second District of Illinois recently expanded the reach of Illinois' "common interest" doctrine in a professional negligence case against an insurance broker. In *The Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2018 IL App (2d) 170939 (July 20, 2018), the Court held that an insurance malpractice defendant was a *de facto* insurer and, thus, was able to secure access to documents that might otherwise be protected by the attorney-client privilege.

THE COMMON INTEREST DOCTRINE IN ILLINOIS

Analysis of *McCormick Foundation* requires an understanding of Illinois' somewhat unique application of the "common interest" doctrine.

In most jurisdictions, the "common interest" doctrine is used interchangeably with the term "joint defense privilege." That doctrine holds that, where a client communicates with its attorney in the presence of a third person who shares a common legal interest, the attorney-client privilege is not waived as to the information that is exchanged. *See Selby v. O'Dea*, 2017 IL App (1st) 151572, ¶39; *see also Pampered Chef v. Alexanian*, 737 F. Supp. 958, 964 (N.D. Ill. 2010). Rather than acting as a privilege, itself, the "joint defense privilege" serves to preserve the attorney-client privilege, where disclosure to a third-party might otherwise waive the confidentiality of the communication. *See* Restatement (Third) of the Law Governing Lawyers §76. Conversely, the other "common interest" doctrine—the one at issue in *McCormick Foundation*—acts to *compel* production of information protected by the attorney-client privilege, where the attorney effectively "acts for the mutual benefit of both [parties]…." *Waste Management v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 194 (1991).

In Illinois, the "common interest" doctrine has the capacity to both shield information from certain legal adversaries and to compel the disclosure of privileged information under other circumstances. The seminal case in this area is *Waste Management*, in which the Illinois 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. The Court reasoned that such communications and materials are, in essence, deemed to have been prepared for the benefit of both parties—both the insured and the insurer—as the suit effectively joined their interests. 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 the insured and the insurer. 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. "We believe

insurers and insureds shared a common interest in the conduct and outcome of the [underlying] litigation…Thus, insurers are entitled to the [underlying litigation] files." *Id* at. 195.

THE ILLINOIS APPELLATE COURT EXTENDS *WASTE MANAGEMENT*

The court in *McCormick Foundation* extended the *Waste Management* holding to a professional negligence action against an insurance broker. In that case, the Robert R. McCormick Foundation and Cantigny Foundation (the "Foundations") had been the second largest shareholders of the Tribune Company before its acquisition through a leverage buy-out ("LBO"). *McCormick Foundation*, ¶2. After the LBO, the Foundations purchased through defendant Gallagher a directors' and officers' ("D&O") liability policy issued by Chubb Insurance. *Id*., ¶3. Two years later, the Foundations alleged, Gallagher advised them to purchase a different policy issued by Chartis Insurance, which Gallagher represented would provide "'apples-to-apples'" coverage at a reduced premium. *Id*. Based on this advice, the Foundations allowed the Chubb policy to lapse and acquired the Chartis policy.

Unfortunately, the Tribune LBO soon proved unsuccessful, and the Tribune Company filed for bankruptcy protection. After the Tribune Company exited bankruptcy, a court appointed receiver and various aggrieved lenders and creditors sued the former shareholders and Tribune insiders, including the Foundations, for actual and constructive fraud. *Id*., ¶4. The Foundations tendered their defense to Chartis, which denied coverage under a policy exclusion—an exclusion, the Foundations alleged, that did not exist under the lapsed Chubb policy. *Id*., ¶5. When Chartis denied coverage, the Foundations sued Gallagher for breach of contract and professional negligence resulting in loss of coverage. *Id*.

During discovery, Gallagher's counsel sought the Foundations' communications with their legal counsel concerning various matters, including the underlying Tribune Company litigation. The Foundations declined to produce the information, citing the attorney-client privilege, and sought a protective order for the privileged materials. The trial court denied the motion and invoked the "common interest" exception to attorney-client privilege set forth in *Waste Management* in directing the Foundations to produce the requested materials. *Id*., ¶¶6-8.

On appeal, the Foundations argued that the *Waste Management* "common interest" doctrine did not apply to the broker negligence case. In rejecting this position, the appellate court held that application of *Waste Management* was not limited to the "'classic profile'" of an insurer and insured coverage dispute. *Id*. ¶15, citing *BorgWarner, Inc. v. Kuhlman Electric Corp.*, 2014 IL App (1st) 131824, ¶ 33. The court also rejected the Foundations' argument that they had no mutual interest with Gallagher in the LBO litigation. Observing that the case involved 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, the court held: "…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." *Id*. ¶15, citing *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2016 IL App (2d) 150303 ("Foundations I") ¶6 (and cases cited therein) and *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 35 (discussing duty insurance broker owes to insured).

In arriving at this outcome, the Court gave great weight to the function, rather than strictly the form, of the parties' relation to one another, stating:

> 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.

Id. ¶15.

CONCLUSION

The appellate court's extension of the "common interest" to a broker malpractice matter portends further expansion. The key, the Court held, was not the legal relationship of the parties, but, rather, the fact that the broker served as a "*de facto* insurer." This reasoning implies that any person who ultimately may be liable for a party's damages under a theory of legal or equitable indemnity may gain access to the privileged communications of the insured or indemnitee under the "common interest" doctrine. Thus, the *McCormick Foundation* holding may further the Illinois Supreme Court's admonition that "the [attorney-client] privilege ought to be confined within its narrowest possible limits." *Waste Management*, 144 Ill.2d at 190.

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