

## Mississippi Supreme Court Dismisses Insurer's Equitable Subrogation Claim, Deeming Settlement Payment "Voluntary"

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Answering a question certified by the Fifth Circuit, the Mississippi Supreme Court ruled that an insurer was barred from seeking indemnity for a settlement because it was a "voluntary payment." *Colony Ins. Co. v. First Specialty Ins. Co.*, 2019 WL 396894 (Miss. Jan. 31, 2019).

An accident at a site owned by Omega resulted in the death of an employee of Accu-Fab & Construction. In an ensuing wrongful death suit, Omega sought coverage from Colony Insurance, Accu-Fab's insurer. Colony defended Omega under a reservation of rights, but maintained that it was not an additional insured and that even if Omega was an additional insured, coverage was barred by an exclusion. Colony filed a declaratory judgment action seeking a ruling that Omega was not covered under its policy. Thereafter, but prior to a ruling in the declaratory judgment action, Colony settled the underlying action for \$1 million, the policy limit. Colony then sued First Specialty, one of Omega's insurers, asserting equitable subrogation and implied indemnity claims.

A district court dismissed Colony's claims, finding that Mississippi's voluntary payment doctrine precluded recovery. The doctrine holds that a payment is not voluntary if it was "paid under compulsion" and the payor "was legally liable" to the payee. Colony appealed and the Fifth Circuit certified the following questions to the Mississippi Supreme Court:

- 1) Does an insurer act under "compulsion" if it takes the legal position that an entity purporting to be its insured is not covered by its policy, but nonetheless pays a settlement demand in good faith to avoid potentially greater liability that could arise from a future coverage determination?
- 2) Does an insurer satisfy the "legal duty" standard if it makes a settlement payment on behalf of a purported insured whose defense it has assumed in good faith, but whose coverage under the policy has not been definitively resolved, even if the insurer maintains that the purported insured is not actually insured under the policy?

The Mississippi Supreme Court answered the first question in the negative. The court rejected Colony's assertion that it paid under compulsion because it faced potentially greater liability if a settlement was not reached. The court explained that "a threat to sue is not considered compulsion." The court further reasoned that in light of Colony's consistent position that Omega was not entitled to coverage under

its policy, the mere possibility of liability did not amount to compulsion. Finally, the court noted that Colony was not under an immediate or urgent necessity to make the settlement payment and could have awaited a coverage ruling in the pending declaratory judgment action.

Because the first question was dispositive of the matter, the court declined to answer the second certified question.

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