

Alabama Supreme Court Rules That Insurer's Contribution Claim Does Not Trigger "At Issue" Privilege Waiver

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The Supreme Court of Alabama ruled that an insurer does not waive privilege as to settlement-related documents by seeking contribution for settlement costs, even though such contribution depends, in part, on the reasonableness of the settlement. *Ex parte Dow Corning Alabama, Inc.*, 2019 WL 6337291 (Ala. Nov. 27, 2019).

Dow Corning and its insurers settled a personal injury suit brought by an Alabama Electric employee who was injured while working at a Dow facility. Alabama Electric and its own insurer, National Trust, had refused to participate in the defense or settlement. Following settlement, Alabama Electric and National Trust sued Dow and its insurers, seeking a declaration that they owed no defense or indemnity. The Dow insurers counterclaimed, seeking contribution for the defense and settlement costs. In that action, Alabama Electric and National Trust sought production of documents relating to the underlying settlement, including reports and evaluations from counsel. The Dow insurers moved for a protective order on the grounds that the requested documents were subject to attorney-client privilege and work-product protection. An Alabama trial court denied the Dow insurers' motion for a protective order. The Alabama Supreme Court granted a writ of mandamus and directed the trial court to vacate its order requiring production of the requested information.

The privileged status of documents may be waived if the party asserting privilege has placed the content of those materials "at issue" in the litigation. Alabama Electric and National Trust argued that by seeking contribution for the settlement—a claim that requires a showing of the settlement's reasonableness—the Dow insurers placed the otherwise privileged settlement documents at issue. They further contended that the reports and recommendations of counsel, relating to liability exposure and potential verdict range, were relevant to evaluating the reasonableness of the settlement.

The Alabama Supreme Court disagreed. The court held that reasonableness is judged by an objective standard, such that the subjective advice of counsel is unnecessary in the reasonableness evaluation. The court further explained that non-privileged materials generated in the course of the underlying personal injury claim would be sufficient to determine Dow's potential liability and the reasonableness of the settlement.

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