New Missouri law safeguards insurers from excessive arbitration awards & findings

The legislation provides clarity on the rights of claimants, tortfeasors, and the tortfeasor's insurers.

By Cody S. Moon

Effective August 28, 2021, recently enacted **Missouri legislation** places new limits on covenants not to execute between a claimant and tortfeasor (e.g., contracts that seek to limit recovery to insurance policy proceeds).

The legislation also grants insurers an unconditional right to intervene in any action seeking personal or bodily injury damages against an insured tortfeasor, within identified parameters. The new legislation also prohibits a claimant, tortfeasor, or any other party from using an arbitration award against any liability insurer that did not agree to the arbitration. The legislation provides that an insurer's exercise of rights consistent with the revised sections cannot be **bad faith**.

As discussed further below, these changes to Missouri law should clarify certain rights of claimants, tortfeasors, and insurers going forward.

New section 537.065: Contract to limit recovery to specified assets or insurance

Section 537.065 of the Missouri Revised Statutes permits a bodily injury or personal injury claimant to contract with a tortfeasor to limit recovery to specified assets or insurance. This allows a claimant to "covenant not to execute" a judgment from a defendant tortfeasor's own assets but preserves the claimant's right to recover insurance policy proceeds from the defendant's liability insurer(s). In practice, claimants often condition these offers on the tortfeasor agreeing to not contest evidence of liability or damages, to waive procedural rights to a jury and appeal, to submit to binding arbitration, and/or to assign to the claimant the proceeds of a bad faith claim against the tortfeasor's insurer(s).

Missouri previously amended Section 537.065 in 2017 to give insurers a right to intervene in certain pending lawsuits within 30 days of receipt of notice of a contract to limit recovery to specified assets or insurance. After that amendment, some claimants began requesting tortfeasors agree to binding arbitration, in part to prevent insurers from exercising their right to intervene. When insurers sought to intervene in refiled **lawsuits** or actions to confirm arbitration awards, multiple courts denied the motions to intervene because more than 30 days had passed since receipt of written notice.

Under the newly enacted legislation, a claimant may enter into a contract to limit recovery to specified assets or insurance only if the insurer declines coverage to the insured tortfeasor, or if the insurer refuses to withdraw a reservation of rights. In light of this requirement, an insurer may issue a reservation of rights to its insured and must be given the opportunity to withdraw the reservation of rights before the insured tortfeasor can enter into such a contract with the claimant.

The new Section 537.065 protects the insurers' right to intervene by requiring a tortfeasor to provide its insurer with a copy of the executed contract to limit recovery to specified assets or insurance, and a copy of the action against the tortfeasor, within 30 days of the following:

- If an action is pending when the contract is signed, within 30 days of execution;

- If an action is pending when the contract is signed but thereafter dismissed, within 30 days after the action is refiled or a subsequent action is filed; or
- If no action is pending when the contract is signed, within 30 days after the tortfeasor receives notice of any subsequent action, by service of process or otherwise.

The new legislation prohibits a court from entering judgment against any tortfeasor until at least 30 days after the insurer receives the required notice. Once it receives notice, the insurer has a 30-day, unconditional right to intervene in any pending civil action involving the claim for damages. After intervening, the insurer has the same rights as any defendant in a civil action, including the right to conduct discovery, engage in motion practice, and have a jury trial. The insurer may also assert any rights or raise any defenses available to the tortfeasor, even if the tortfeasor previously agreed to waive those rights or defenses in a contract with the claimant.

Like the 2017 version, the new Section 537.065 applies to any covenant not to execute or contract to limit recovery to specified assets or insurance, regardless of whether the covenant or contract is referred to as a contract under the section. Additionally, all terms of the contract or covenant are now required to be in writing and signed by the parties. No unwritten term of the contract or covenant is enforceable.

Moreover, the new legislation provides that any **agreement between a tortfeasor and insured**, including any contract under Section 537.065, is admissible in evidence in any action asserting the insurer acted in bad faith. An insurer's exercise of any rights under the new section shall not constitute or be construed as bad faith.

New section 435.415 of Missouri's Uniform Arbitration Act

To avoid personal liability, including as part of covenants not to execute referenced above, some tortfeasors in Missouri have accepted claimants' demands to agree to binding arbitration. Those contracts requiring binding arbitration are often entered between a claimant and tortfeasor without first obtaining consent from the tortfeasor's insurers. In the subsequent arbitration, the tortfeasor frequently fails to fully defend itself. Generally, courts must confirm and enter judgment on the arbitration award under Section 435.415 of the Missouri Revised Statutes. Because the arbitrations often proceed without a full and vigorous defense by the tortfeasor, the resulting award may be based on inadmissible evidence, contain baseless or improper findings, and include unreasonable and excessive amounts.

Under the new legislation, if the liability insurer did not agree to the arbitration in writing, the resulting arbitration award or judgment is not binding on the insurer, is not admissible in evidence in any lawsuit against the insurer and does not provide the basis for any garnishment action or judgment against the insurer. The newly enacted Section 435.415 will therefore provide additional safeguards against claimant's and tortfeasor's use of arbitration awards and findings against insurers.

The new legislation also provides that an insurer's refusal to participate in an arbitration proceeding is not bad faith.

While Missouri remains a jurisdiction in which insurers must exercise caution, these upcoming changes provide clarity as to the rights of claimants, tortfeasors, and the tortfeasor's insurers, including some new safeguards to protect insurers' rights.

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