

BAD FAITH BLOG

New Missouri Law Amending § 537.065 Enacted

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On June 29, 2021, Governor Parson signed into law Missouri HB 345, which amends R.S.Mo. § 537.065 (permitting contracts to limit recovery to specified assets or insurance policies) and R.S.Mo. § 435.415 (Missouri's Uniform Arbitration Act). This legislation is an effort to reform insurance "bad faith" litigation in Missouri, supplement legislation passed in 2017, and address recent tactics to avoid the statutory protections granted to insurers in 2017. The full text of the new law is available [here](#), and will be effective August 28, 2021

2017 Amendment to R.S.Mo. § 537.065 and Subsequent Litigation

In 2017, section 537.065 was amended to expressly require a tort-feasor's insurer or indemnitor be granted the opportunity to defend the tort-feasor without a reservation of rights, and the insurer's refusal of such defense, before a claimant and tortfeasor may enter into an enforceable contract to limit recovery to certain, specified assets, such as the tortfeasor's insurance policy. The 2017 amendment also added new provisions which required an insurer to be provided written notice of the execution of a § 537.065 contract, and granted the insurer a right to intervene in any pending lawsuit involving the claim for damages.

Trial courts interpreted the 2017 amendment inconsistently. Recent appellate opinions held the right to intervene in litigation against their insured does not afford insurers the right to contest the insured's liability or the claimant's damages, and the insurer must take the case as it stands. These decisions construed the amendments as having granted an insurer two specific, limited rights: (1) the right to decide whether to defend the insured in the underlying litigation, prior to the insured's entry into a § 537.065 agreement; and (2) the right to intervene in "any pending lawsuit" within thirty days of receiving notice of a § 537.065 agreement," and nothing more. A trend towards private arbitrations resulted after courts interpreted the 2017 amendment's language referencing "pending lawsuits" as limiting its application to circuit court lawsuits and not arbitration proceedings.

2021 Amendments to R.S.Mo. § 537.065

HB 345 modified section 537.065 to clarify when a claimant and tort-feasor may enter into an agreement under the statute. The new law permits such an agreement only "if the insurer has refused to withdraw a reservation of rights or declined coverage for such unliquidated claim."

Additionally, the new law specifies the timing requirements for when an insurer must receive notice of an execution of a section 537.065 agreement under certain procedural scenarios:

- If any action seeking a judgment on the claim against the tort-feasor is pending at the time of the execution, then, within thirty days after such execution, the tort-feasor shall provide the insurer with a copy of the executed contract and a copy of any such action.
- If any action seeking a judgment on the claim against the tort-feasor is pending at the time of the execution but is thereafter dismissed, then, within thirty days after the refiling of that action or the filing of any subsequent action arising out of the claim for damages against the tort-feasor, the tort-feasor shall provide the insurer with a copy of the executed contract and a copy of the refiled or subsequently filed action.
- If there is no pending action seeking a judgment on the claim against the tort-feasor at the time of execution, then, within thirty days after the tort-feasor receives notice of any subsequent action, by service of process or otherwise, the tort-feasor shall provide the insurer or insurers with a copy of the executed contract and a copy of any action seeking a judgment on the claim against the tort-feasor.

The amended statute prohibits judgment being entered against any tort-feasor, after execution of a contract under section 537.065, for at least thirty days after the insurer or insurers have received the requisite written notice.

The 2021 amendments specify express rights granted to an insurer upon intervention:

- All rights afforded to defendants under the Missouri rules of civil procedure;
- Reasonable and sufficient time to meaningfully assert its position;
- The right and time to conduct discovery;
- The right and time to engage in motion practice;
- The right to a trial by jury and sufficient time to prepare for trial.

The new law provides stipulations, scheduling orders, or other orders affecting the rights of an intervening insurer and entered prior to intervention are not binding upon the intervening insurer.

The 2021 amendments provide the terms of any covenant not to execute or of any contract to limit recovery, whether or not it specifically refers to section 537.065, must be in writing and signed by the parties to the covenant or contract. No unwritten term of such contract may be enforced against any party or insurer.

The new law also clarifies a section 537.065 agreement “shall be admissible in evidence” in any action for bad faith and that the exercise of any rights by an insurer in the statute cannot be construed to be bad faith.

Section 435.415's amendments provide any arbitration award for personal injury, bodily injury, or death, or judgment approving an arbitration award, is not binding on an insurer, is inadmissible as evidence in a suit against an insurer for any party to an arbitration award, and cannot provide the basis for a garnishment against an insurer, unless the insurer has agreed in writing to the arbitration proceeding.

The statute also provides an insurer's election not to participate in an arbitration proceeding shall not constitute, nor be construed to be, bad faith, unless otherwise required by the policy. This section shall not apply to any arbitration required by statute or arising out of an arbitration agreement preceding the date of the injury or loss which is the subject of the arbitration.

The amendments to sections 537.065 and 435.415 expand the definition of "insurer" to include any entity authorized to transact liability insurance business in Missouri, any entity formed pursuant to section 537.620 (entities created by political subdivisions of Missouri to provide liability and other insurance), and Missouri public entity risk management funds.