TRAUB LIEBERMAN

INSURANCE LAW BLOG

July 14, 2021

Missouri Legislature Passes Bill to Drastically Change Missouri's "Consent Judgment" Statute

BY: Jason Taylor

On June 29, 2021, Missouri Governor Mike Parson signed SB-HB 345 into law, which will drastically change Section 537.065 of the Missouri Revised Statutes. Section 537.065 provides an insured who has been denied insurance coverage a statutory mechanism to settle certain tort claims through an agreement akin to a consent judgment. Typically referred to as a "065 Agreement," the statute allows a plaintiff and insured-tortfeasor to settle a claim for damages and specify which assets are available to satisfy the claim, typically the tortfeasor's available insurance policy. In the past, such agreements were often accomplished without the insurer's participation or even its knowledge. Under such agreements, the insured-tortfeasor assigns all rights to the insurance policy to the plaintiff and agrees not to contest the issues of liability or damages. In exchange the plaintiff agrees not to execute any judgment against the insured. The parties conduct what amounts to an uncontested and often "sham" trial resulting in a judgment far in excess of any actual damages or applicable policy limits had the case been contested. In a subsequent proceeding to collect on the judgment, the tortfeasor's insurer is bound by the determinations of liability and damages made in the underlying action.

This statutory framework presented plenty of opportunities for abuse. In 2017, the statute was amended in order to address some of those issues, including a requirement that the insured provide notice of a settlement demand under Section 065 and providing insurers a limited right to intervene in the tort action before liability and damages have been determined. Ostensibly, the intent of the 2017 amendments was to reduce the number of large and uncontested judgments and allow the insurance carrier an opportunity to continue litigating the injured party's claim where the insured has no incentive or is contractually prohibited from doing so. Yet, creative plaintiff's attorneys found several "loopholes" around these changes, most prominently, by moving their disputes from state court to binding arbitration and dispensing with notice to the insurer altogether, or at least until after the arbitration has concluded.

One example of this tactic was addressed in *Knight v. State Farm, et al.*, 2020 WL 3966759 (Mo. Ct. App. July 14, 2020). In *Knight*, the insured and claimant agreed to determine the insured's liability in binding arbitration, without the insurer's knowledge or involvement, before filing a state court lawsuit to confirm the arbitration award in favor of the plaintiff. Notice of the state court lawsuit was provided to the insurer, but only after liability had been determined in the arbitration. Not surprisingly, the insured's liability was not contested and a $6 million award was entered for the plaintiff. The state court held that that the statute merely required that insurers be notified of the 537.065 Agreement "before a judgment may be entered," but did not require that the insurer receive notice and an opportunity to intervene before the insured's liability or damages are determined. Thus, by the time the insurer received notice, it was too late: the arbitration had already occurred and the insured—and therefore, the insurer—no longer had a right to contest liability.

In the 2021 legislative session, Missouri legislators introduced SB-HB 345 in an effort to close these “loopholes” in the current version of the statute. The bill includes amendments to two statutes—Missouri Revised Statutes 435.415 and 537.065. First, the bill amends Section 435.415 to provide that “[a]ny arbitration award for personal injury, bodily injury, or death or any judgment or decree entered on an arbitration award for personal injury, bodily injury, or death shall not be binding on any insurer … *unless the insurer has agreed in writing to the arbitration proceeding.*” The bill also specifies that an insurer’s election not to participate in an arbitration proceeding does not constitute and will not be construed as “bad faith” by the insurer. This effectively closes the arbitration loophole left open by the 2017 amendments and prevents insurers from being held liable for an uncontested arbitration award when they never agreed to the proceeding.

The bill will also amend Section 537.065’s notice requirements to insurers. The amendments maintain the requirement that an insured must give 30 days’ notice of its 065 Agreement, but attempts to close the timing loophole by providing that a judgment may not be entered against any insured “for at least thirty days after the insurer” has “received written notice” of the agreement. Moreover, the amendments allow the insurer the “unconditional right” to intervene in the civil action involving claims against its insured, but now provides that the insurer has the ability to actually participate in the litigation. “Upon intervention pursuant to this section, the intervenor shall have all rights afforded to defendants under the Missouri rules of civil procedure and reasonable and sufficient time to meaningfully assert its position including, but not limited to, the right and time to conduct discovery, the right and time to engage in motion practice, and the right to a trial by jury and sufficient time to prepare for trial.” The bill further provides: “No stipulations, scheduling orders, or other orders affecting the rights of an intervenor and entered prior to intervention shall be binding upon the intervenor.” Additionally, while the amended statute preserves any claims an insured has for bad faith against its carrier, any agreement between the insured and claimant (plaintiff), including any 065 agreements under the statute, are deemed admissible as evidence in a later bad faith action against the carrier.

SB-HB 345 was signed into law on June 29, 2021, and becomes effective August 28, 2021. These amendments add much needed protections for insurers and should level the playing field by allowing insurers to protect their interests from sham proceedings and collusion. Insurers, however, should remain vigilant. Prompt and clear communications with the insured is essential, and insurers must continue to act in good-faith in protecting their insured’s interests. That conduct, together with the protections provided by the new amendments, should reduce the number of large, uncontested judgments in Missouri and provide greater clarity and predictability in handling claims in the state.