

Missouri

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

In Missouri, an insurer must acknowledge notice of a claim within ten working days, unless payment is made within that time period. *See* 20 CSR 100-1.030. Claim forms, including a proof of loss, must also be promptly provided to the insured. In most circumstances, "promptly" means within ten working days. *See id.* Investigation of a claim shall be completed within thirty days after notification unless this time period becomes unreasonable. *See* 20 CSR 100-1.050. If the investigation continues for more than forty-five days after the insurer receives the completed proof of loss from the insured, the insurer must send a letter to the insured advising that additional time is needed to complete the investigation and the reasons for additional time must be listed. *See id.* For every forty-five days thereafter, an additional letter must be sent to the insured setting forth the reasons for the delay. *See id.* The insurer also must respond within ten days to any communications from the insured that require a response. *See* 20 CSR 100-1.030.

The insurer has fifteen working days after it receives the proof of loss to advise the insured whether the claim is being accepted, denied, or further action is being taken. *See* 20 CSR 100-1.050. A denial of a claim must be made in writing and shall include every specific policy provision upon which the insurer relies. *See id.*

Missouri has enacted the Unfair Claims Settlement Practices Act (Act). *See* Mo. Rev. Stat. §§ 375.1000–1018 (2016). The Act outlines broad standards for the investigation and disposition of claims. *See id.* The Act also lists a series of "improper claims practices" and the procedures for the Director of Insurance to investigate and discipline insurers for the commission of improper acts. *See id.*

Mo. Rev. Stat. § 374.1000(2) (2016) makes clear the Act does not create a private cause of action. *See also Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 400 (Mo. App. E.D. 2007). However, under Mo. Rev. Stat. § 375.1009 and § 375.1010, the Director of Insurance is entitled to investigate the claims practices of insurers and initiate administrative proceedings against them, including proceedings for issuance of cease-and-desist orders and the imposition of penalties.

Violations of the Act are not wholly irrelevant to the insured's or a third party's private actions against insurers. The Act is an expression of Missouri public policy concerning insurance claims handling. *See Brawner v. Brawner*, 327 S.W.2d 808, 812 (Mo. 1959) (stating the "statutes are the very highest evidence of public policy and binding on the courts") (overruled on unrelated grounds); *see also* 30 Mo. Prac., Ins. Law & Prac., § 1:6.

Moreover, the above-cited state regulations were adopted to aid in the Act's interpretation. The Act is also relevant in determining whether an insurer's conduct constitutes a waiver; was vexatious under Missouri's vexatious-refusal-to-pay statutes;

Michael Shunk

mshunk@bakersterchi.com

Clay Crawford

ccrawford@bakersterchi.com

or constitutes “bad faith” in refusing to settle the claim of a third party. See Mo. Rev. Stat. §§ 375.296 and 375.420 (2016); see also 30 Mo. Prac., Ins. Law & Prac., §§ 5:20-30, 7:39-7:44, and 8:1-8:3.

Standards for Determination and Settlements

Under the Unfair Claims Settlement Practices Act, codified as Mo. Rev. Stat. §§ 375.1000 to 375.1018 (2016), an insurer engages in an improper claims practice if it commits any of the acts enumerated in Section 375.1007 with such frequency as to indicate a general business practice to engage in improper conduct. The prohibited conduct includes, but is not limited to, attempting to settle claims in bad faith, denying claims without reasonable investigation, failing to adopt and implement reasonable standards for investigation and settlement, and causing unreasonable delays. See *id.* Insurers must attempt in good faith to effectuate the prompt, fair, and equitable settlement of claims when the insurer’s liability has become “reasonably clear.” See Mo. Rev. Stat. § 375.1007(4).

As noted above, under the Act, there is no private cause of action for the commission of unfair claims practices. Rather, insureds must bring a breach of contract claim against the insurer if (1) coverage is wrongfully denied; or (2) to seek recovery above what the insurer is willing to pay. In first-party insurance disputes, these breach of contract claims are often accompanied by vexatious-refusal-to-pay claims for extra-contractual liability. See Mo. Rev. Stat. §§ 375.296 and 375.420 (2016).

PRINCIPLES OF CONTRACT INTERPRETATION

The primary rule of judicial construction of an insurance policy is for the court to enforce the insurance contract according to the parties’ intent as expressed in the language of the freely entered contract, unless doing so would violate applicable federal or state law. *Todd v. Missouri United School Ins. Council*, 223 S.W.3d 156 (Mo. banc 2007); *Bowan ex rel. Bowan v. General Sec. Indem. Co. of Arizona*, 174 S.W.3d 1 (Mo. App. E.D. 2005). When analyzing an insurance policy, the court considers the entire policy, and not just isolated provisions or clauses. *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 47 (Mo. banc 2009). The court will strive to give each policy provision a reasonable meaning and avoid interpreting the policy in a way that renders one or more provisions “useless” or “redundant.” *Lero v. State Farm Fire and Cas. Co.*, 359 S.W.3d 74, 83 (Mo. App. W.D. 2011).

The terms of an endorsement and the terms of the printed policy should be reconciled if reasonably possible, but if there is an irreconcilable conflict, the terms of the endorsement will be given effect. *MFA Mut. Ins. Co. v. Dunlap*, 525 S.W.2d 766 (Mo. App. 1975); *White v. Illinois Founders Ins. Co.*, 52 S.W.3d 597, 598 (Mo. App. E.D. 2011). In addition, the construction the parties have placed upon the insurance contract by their actions is significant. *Stone v. Farm Bureau Town & Country Ins. Co. of Mo.*, 203 S.W.3d 736, 745 (Mo. App. S.D. 2006).

Since policies are generally intended to protect the insured from a covered risk, where it is reasonably possible, policies will be interpreted to provide coverage rather than to defeat it. *Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. banc 2010). Where one clause appears to provide coverage but another clause indicates that such coverage is not provided, then the policy is ambiguous, and “the ambiguity will be resolved in favor of coverage for the insured.” *Rice*, 301 S.W.3d at 48; see *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 689 (Mo. banc 2009) (“Missouri law is well-settled that where one provision of a policy appears to grant coverage and another to take it away, an ambiguity exists that will be resolved in favor of coverage.”). However, the mere fact that a policy contains a limitation on coverage or an exclusion does not necessarily render the policy ambiguous. *Floyd-Tunnell v. Shelter Mut. Ins. Co.*, 439 S.W.3d 215, 221 (Mo. banc 2014).

Whether a policy is ambiguous or not is determined from an examination of the specific facts of the case and the relevant policy provisions. *Dahmer v. Hutchison*, 315 S.W.3d 375 (Mo. App. S.D. 2010). When a court finds an

ambiguity, the court will resolve the ambiguity against the insurer. *Swadley v. Shelter Mut. Ins. Co.*, 513 S.W.3d 355, 357 (Mo. banc 2017). Moreover, when an ambiguity is at issue, evidence of subsidiary agreements, the relationship of the parties, the policy's subject matter, the facts and circumstances surrounding the policy's execution, and the practical construction the parties have placed on the contract by their actions is admissible. *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991).

CONTRACT INTERPRETATION

Common Issues

1. Faulty Workmanship as an "Occurrence" [What is the state of the common law in your state on this subject?]

There is a split of authority in Missouri on this issue. One view stems from *Am. States Ins. Co. v. Mathis*, 974 S.W.2d 674 (Mo. App. 1998), in which the court concluded the costs of repairing and/or replacing defective construction work were "normal" consequences of the work itself. On this basis, the court found that shoddy work did not qualify as an "accident" within the meaning of the CGL." See *Am. Family Mut. Ins. Co. v. Mid-American Grain Distributors, LLC*, 958 F.3d 748, 754 (8th Cir. 2020) and *View Homeowner's Ass'n v. The Burlington Ins.*, 552 S.W.3d 726, 731 (Mo. App. 2018).

The second view is represented by *Village at Deer Creek Homeowners Ass'n v. Mid-Continent Cas. Co.*, 432 S.W.3d 231, 246 (Mo. App. 2014), where the court concluded that negligent construction constituted an "occurrence" such that any ensuing damage qualified as covered property damage under the subject CGL. This case has not been overruled or even criticized by any Missouri court.

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

Yes, pursuant to RSMo. 434.100, "in any contract or agreement for public or private construction work, a party's covenant, promise or agreement to indemnify or hold harmless another person from that person's own negligence or wrongdoing is void as against public policy and wholly unenforceable." The statute still allows a party to indemnify another for its own negligence and does not void contracts that require one party to make another party an additional insured on the first party's insurance policy.

There are public entity exceptions, and the statute does allow limited indemnity obligations if covered by "specified limits of insurance" and the party providing the insurance had the opportunity to recover the cost of the insurance in the construction contract. In that case the indemnity obligation is limited to the amount of coverage procured.

CHOICE OF LAW

When more than one state has a connection with, or a relationship to, the insurance contract in question, the

resolution of a substantive issue under the contract requires a determination, be it express or implied, of what state's law governs the issue's disposition. *Markway v. State Farm Mut. Auto. Ins. Co., Inc.*, 799 S.W.2d 146 (Mo. App. W.D. 1990). Generally, the forum court determines, according to its conflict-of-laws rules, whether a given law is substantive or procedural, but in making this determination, the court considers the interpretation of foreign law by courts of that state. *Noe v. U.S. Fidelity & Guaranty Co.*, 406 S.W.2d 666, 668 (Mo. 1966). In insurance policy cases, the "substantive" law the court must apply includes the execution, interpretation, and validity of the contract; the existence of an insurable interest; and damages for vexatious delay in the insurer's performance. *Kellogg v. National Protective Ins. Co.*, 155 S.W.2d 512 (Mo. App. 1941); *Grider v. Twin City Fire Ins. Co.*, 426 S.W.2d 698 (Mo. App. 1968); and *Handly v. Lyons*, 475 S.W.2d 451 (Mo. App. 1971).

Missouri has adopted Sections 188 and 193 of the Restatement (Second) of Conflict of Laws (1971) for choice-of-law issues in casualty insurance contracts. *Viacom, Inc. v. Transit Cas. Co.*, 138 S.W.3d 723, 724-25 (Mo. 2004) (citing *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co. of North Carolina*, 716 S.W.2d 348, 358 (Mo. App. W.D. 1986)). Section 188, which applies to policies that do not contain choice-of-law provisions, provides that the law of the state with the most significant relationship to the transaction and the parties governs. *Viacom, Inc.*, 138 S.W.3d at 725 (citing Restatement (Second) of Conflict of Laws § 188(1)).

Section 188(2) of the Restatement sets forth what contacts are to be taken into account: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Viacom, Inc.*, 138 S.W.3d at 725 (citing Restatement (Second) of Conflicts of Laws § 188(2)).

In addition, Section 193 of the Restatement states the "validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied." *Crown Ctr.*, 716 S.W.2d at 358 (citing Restatement (Second) of Conflicts of Laws § 193); see also *Viacom, Inc.*, 138 S.W.3d at 725. Under Section 193, the location of the insured risk is given greater weight than any other single contact in determining which state's law controls, although less weight when the policy covers a group of risks scattered throughout two or more states. *Viacom, Inc.*, 138 S.W.3d at 725.

DUTIES IMPOSED BY STATE LAW

Duty to Defend

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1. Standard for Determining Duty to Defend

An insurance company has a duty to defend an insured when the insured is exposed to potentially covered liability. *McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 170 (Mo. banc 1999). If there is even an arguable question of coverage under the policy, the insurer is required to provide a defense. *Id.* To extricate itself from a duty to defend the insured, the insurance company must prove that there is *no possibility* of coverage. *Id.*; *Truck Ins. Exch. v. Prairie Framing, L.L.C.*, 162 S.W.3d 64, 79 (Mo. App. W.D. 2005).

The duty to defend is usually determined by comparing the language of the insurance policy with the allegations in the petition or complaint filed against the insured. See *McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168, 170 (Mo. banc 1999). The duty to defend is broader than the duty to indemnify. *Id.* If the petition against the insured alleges facts that state a claim potentially within the policy's coverage, the insurer must provide a defense to the insured. See *Lampert v. State Farm Fire & Cas. Co.*, 85 S.W.3d 90, 93 (Mo. App. E.D. 2002).

The insurer's investigation can expand its duty to defend, however, such that the duty is not determined solely by comparing the language of the petition or complaint with the insurance policy. See *State ex rel. Inter-State Oil Co. v. Bland*, 190 S.W.2d 227, 229 (Mo. banc 1945); see also *Allen v. Bryers*, 512 S.W.3d 17, 31 (Mo. banc 2016); *Allen v. Continental Western Ins. Co.*, 436 S.W.3d 548, 552-53 (Mo. banc 2014); and *Trainwreck West Inc. v. Burlington Ins. Co.*, 235 S.W.3d 33, 42 (Mo. App. E.D. 2007).

Under Missouri law, an insurer has a duty to defend its insured against allegations that implicate coverage *regardless of whether those claims are groundless or valid*. *Custom Hardware Engineering & Consulting, Inc. v. Assurance Co. of America*, 295 S.W.3d 557, 561 (Mo. App. E.D. 2009). The insurer has a duty to defend even if the petition alleges alternative facts stating covered as well as non-covered excluded claims. See *Union Pac. R. Co. v. Am. Family Mut. Ins. Co.*, 987 S.W.2d 340, 345-46 (Mo. App. E.D. 1998). So long as one count in a petition against the insured is potentially covered, although other counts are not, the insurer must defend the insured against *all* claims. *Scottsdale Ins. Co. v. Ratcliff*, 927 S.W.2d 531, 534 (Mo. App. E.D. 1996). Thus, so long as the petition or complaint states a potential or possible claim that would be covered, the insurer must defend its insured. See *Prairie Framing*, 162 S.W.3d at 83. Under Missouri law, any ambiguity over the insurer's defense obligation is resolved in the insured's favor. *Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864, 867 (Mo. App. E.D. 1997).

A breach by an insurer of its defense obligation may expose the insurer to substantial liability, including extra-contractual liability. If an insurer unjustifiably refuses to defend a claim brought against its insured, the insurer will be "liable to the insured for all resultant damages from that breach of contract," up to the insurer's policy limit, plus attorney fees, expenses, and other damages. *Williams v. Employers Mut. Cas. Co.*, 845 F.3d 891, 902 (8th Cir. 2017); *Schmitz v. Great Am. Assur. Co.*, 337 S.W.3d 700, 710 (Mo. banc 2011) and *Allen v. Bryers*, 512 S.W.3d 17, 38 (Mo. banc 2016). In the event the insurer's breach of its defense obligation is determined to have been in bad faith, the insurer may be required to indemnify the entire judgment entered against its insured, regardless of its policy limits. *Allen*, 512 S.W.3d at 38-39.

2. Issues with Reserving Rights

Missouri imposes upon insurers a duty to issue a "proper reservation of rights letter "that is timely and clear and that fully informs the insured" of the insurer's coverage position. *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16, 22-23 (Mo. App. W.D. 2014); *Kinnaman-Carson v. Westport Ins. Corp.*, 283 S.W.3d 761 (Mo. banc 2009); and *Butters v. City of Independence*, 513 S.W.2d 418, 424-25 (Mo. 1974).

Absent a reservation of rights, the insurer will be estopped to deny coverage once it assumes control over the insured's defense. *Kinnaman-Carson*, *supra*. Specifically, the insurer's defense of an action against its insured with knowledge of grounds for non-coverage under its policy and

without advising the insurer of its coverage position under a reservation of rights letter will bar the insurer from later denying liability due to non-coverage. *Advantage Bldgs.*, 449 S.W.3d at 24.

Moreover, Missouri law treats the insurer's decision to defend its insured under a reservation of rights as the equivalent of a refusal to defend. *Butters v. City of Independence*, 513 S.W.2d 418, 425 (Mo. 1974). The insurer's decision to file a declaratory judgment action is considered a coverage declination as well. *Allen*, 512 S.W.3d at 32. Therefore, Missouri law vests the insured with an absolute right to refuse a reservation of rights defense. *Id.*

If the insured refuses to accept a reservation of rights defense, the insurer has three options: (1) defend the insured without a reservation of rights; (2) deny the claim and withdraw from defending the insured and lose control over the litigation; or (3) file a declaratory judgment action to determine the scope of the policy's coverage. *See Allen*, 512 S.W.3d at 32; *Ballmer v. Ballmer*, 923 S.W.2d 365, 369 (Mo. App. W.D. 1996). *See also Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700, 710 (Mo. banc 2011) ("[The insurer] cannot have its cake and eat it too by both refusing coverage and at the same time continuing to control the terms of settlement in defense of an action it had refused to defend.").

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

Missouri has long recognized a cause of action for an "invasion of privacy." *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 477 (Mo. banc 1986) (citing *Munden v. Harris*, 134 S.W. 1076 (Mo. App. 1911)).

In supplementing the Federal Gramm-Leach-Bliley Act, Missouri enacted Mo. Rev. Stat. § 362.422 (2016), which governs the disclosure of nonpublic personal information to nonaffiliated third parties. Among other things, Section 362.422 authorizes a state agency with primary regulatory authority to adopt rules and regulations in furtherance of the Federal Act. *See id.*

Based on the authority granted by Section 362.422, the Missouri Department of Insurance has adopted 20 CSR 100-6.100 and 100-6.110 to address the privacy of financial information. *See Mo. Rev. Stat. § 362.422 (2016)*. These regulations require insurers to give notice to their insureds of their privacy policies detailing the types of nonpublic information they collect, the types of such information they disclose, to whom the information is disclosed, and setting forth the policies and procedures in place to protect the security of nonpublic personal information. *See 20 CSR 100-6.100*. Also, insurers must also give their insureds the opportunity to "opt out" of a disclosure of nonpublic personal information to a "nonaffiliated third party." *See id.*

These regulations require insurance companies to implement a comprehensive written information security program to include administrative, physical, and technological safeguards for the protection of customer information. *See 20 CSR 100-6.110*. This program must ensure the security and confidentiality of customer information as well as protect against anticipatory threats to the information and unauthorized access by others to the protected information. *See id.*

Issues of privacy within the insurer-insured relationship often arise in cases where the insurer denies the insured's first-party insurance claim because of the insured's intentional acts, such as arson and fraud. Due to these privacy concerns, the Missouri Supreme Court Missouri, in *Overcast v. Billings Mut. Ins. Co.*, held that Missouri's vexatious-refusal-to-pay statute, Mo. Rev. Stat. § 375.420 (2016), does not preempt all tort actions brought by insureds against their insurers on first-party insurance claims, and, therefore, insureds may sue their insurers for

defamation based on the publication of a declination letter setting forth an arson defense. 11 S.W.3d 62, 69-70 (Mo. banc 2000). The elements of defamation under Missouri law follow: (1) publication; (2) of a defamatory statement; (3) that identifies the plaintiff; (4) that is false; (5) that is published with the requisite degree of fault; and (6) damages the plaintiff's reputation. *Id.* at 70.

Thus, in *Overcast*, where the insurer sent a denial letter by mail, the Missouri Supreme Court concluded the insurer was subject to liability for defamation because the insurer was aware that the arson allegation would be published to third parties. *Id.* at 70. The Missouri Supreme Court in *Overcast* further held there is no statutory immunity in Missouri for statements made while denying claims. *Id.* at 71. Thus, under *Overcast*, where the insureds do not specifically request the reasons why their claim was being denied, they do not consent to the defamation. *Id.* at 71-72.

1. Criminal Sanctions

The Director of the Missouri Department of Insurance is not empowered to issue criminal sanctions. However, the Director, under Mo. Rev. Stat. § 374.046 (2016), is empowered, upon a showing by substantial and competent evidence that a person has engaged, is engaging, or has taken a substantial step toward engaging, in an act, practice, omission, or course of business constituting a violation of the insurance laws of Missouri, as enumerated by state statute, to: (1) order the person to cease and desist from engaging in illegal conduct; (2) enter a curative order directing the person to take such steps as are necessary and appropriate to comply with the State's insurance laws; (3) order a civil penalty or forfeiture, as set forth in Mo. Rev. Stat. § 374.079 (2016); and (4) award reasonable costs of the investigation.

The authority to enter cease-and-desist orders and impose penalties also exists under the Unfair Claims Settlement Practices Act. *See* Mo. Rev. Stat. §§ 375.1000-1018 (2016). In particular, under Sections 375.1009 and 375.1010, the Director of Insurance is entitled to investigate the claims practices of insurers and initiate administrative proceedings against them, including proceedings for issuance of cease-and-desist orders and the imposition of penalties.

2. The Standards for Compensatory and Punitive Damages

In cases involving a first-party losses, the insured may recover the following damages under Missouri's vexatious-refusal-to-pay statutes: (1) the amount of the covered loss; (2) twenty percent of the first \$1,500 of the loss; (3) ten percent of the amount of the loss in excess of \$1,500; and, (4) reasonable attorney fees. *See* Mo. Rev. Stat. §§ 375.296 and 375.420 (2016). These statutory penalties generally pre-empt the award of punitive damages in first-party insurance claims. There are exceptions, such as the defamation cause of action discussed above. *See Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 69-70 (Mo. banc 2000).

In third-party claims, the insurer is liable for the entire amount of the judgment, so long as the claim is covered by the insurer's policy. *See Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 563-64 (Mo. App. S.D. 1990). Missouri follows the "judgment" rule. Therefore, the insurer is liable for the entire judgment regardless of whether the insured has no legal liability to satisfy the judgment, whether by the insured's agreement with the claimant judgment creditor or because of bankruptcy. *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 93 (Mo. App. W.D. 2005).

Historically, punitive damages could be recovered if the insurer's refusal to settle a third-party claim was willful or wanton. See *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 756 (Mo. 1950). In *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16, 29 (Mo. App. W.D. 2014), the Missouri Court of Appeals upheld the submission of a punitive damage claim in a bad-faith action based on a jury instruction that directed the jury to award punitive damages if the jurors found that the insurer had acted with evil motive or reckless indifference to the insured's rights. Under Missouri law, the submissibility of punitive damages must meet the clear and convincing evidence standard. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

However, as of August 2020, Missouri has enacted substantial changes to the statute authorizing the recovery of punitive damages. Now, Mo. Rev. Stat. § 510.261 provides that, "[e]xcept as otherwise provided by statute, punitive damages shall not be awarded unless the claimant proves by clear and convincing evidence that the defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others."

3. State Arbitration and Mediation Procedures

The Missouri Arbitration Act prohibits mandatory arbitration provisions in insurance contracts. Mo. Rev. Stat. § 435.350 (2016), entitled "Validity of arbitration agreement," provides that insurance policy arbitration provisions are invalid, unenforceable, and revocable:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract, *except contracts of insurance and contracts of adhesion*, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Contracts which warrant new homes against defects in construction and reinsurance contracts are not 'contracts of insurance or contracts of adhesion' for purposes of the arbitration provisions of this section. (Emphasis added.)

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012, bars the Federal Arbitration Act's preemption of the Missouri Arbitration Act's exclusion of arbitration provisions from insurance contracts, as set forth in Section 435.350. *Sturgeon v. Allied Professional Ins. Co.*, 344 S.W.3d 205, 210 (Mo. App. E.D. 2011).

4. State Administrative Entity Rule-Making Authority

Rulemaking is an executive power. Mo. Const. Art. IV, § 16. However, the rulemaking authority of the Director of the Missouri Department of Insurance must be authorized by a law because all duties and organization of the Department of Insurance are determined by law. Mo. Const. Art. IV, § 36(b). See *State ex rel. Royal Ins. v. Dir. of Missouri Dept. of Ins.*, 894 S.W.2d 159, 161 (Mo. banc 1995). In particular, the Director of Insurance is empowered by the Missouri General Assembly to promulgate "reasonable rules, regulations and orders as are necessary to carry out and effectuate the provisions of" the Missouri Unfair Claims Practices Act. Mo. Rev. Stat. § 375.1018 (2016).

EXTRACTIONAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

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3. First Party

The Missouri Supreme Court's decision in *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 67 (Mo. banc 2000), is the leading first-party case addressing extra-contractual claims. Under Missouri law, the tort of bad faith does not apply to first-party claims. *See id.* When an insurer wrongfully refuses to pay a first-party claim, the insurer is deemed to have breached its contract and its liability to the policyholder is limited to damages for breach of contract. *See id.*

If a court or jury determines the insurer's refusal to pay was vexatious, the insured may recover penalties, interest, and attorney fees under Missouri's vexatious-refusal-to-pay statutes, Mo. Rev. Stat. §§ 375.296 and 375.420 (2016). Section 375.296 allows recovery after the insurer has refused to pay and thirty days have passed. Section 375.420 does not have a time-limit requirement.

4. Third-Party

Missouri courts have long recognized the right of the insured to recover against a third-party liability insurer under the tort of bad faith when the insurer refuses to settle a third-party claim within policy limits. *See Overcast*, 11 S.W.3d at 67. A bad faith refusal to settle action will lie when a liability insurer:

- Reserves the exclusive right to contest or settle a claim;
- prohibits the insured from voluntarily assuming any liability or settling the claim without the insurer's consent; and
- is guilty of fraud or bad faith in refusing to settle a claim within the policy limits.

Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 827 (Mo. banc 2014). A demand by the insured to settle a claim is not an essential element of a bad faith claim under Missouri law. *Scottsdale Ins. Co.*, 448 S.W.3d at 828. Nor is an excess judgment. *Id.*

"An insurer "may be liable over and above its policy limits if it acts in bad faith ... in refusing to settle the claim against its insured within its policy limits **when it has a chance to do so.**" *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014) (emphasis in original). Accordingly, it is essential in a third-party bad faith claim that the insured actually had the opportunity to settle. The viability of current bad faith claims often turn on this issue.

Also, as noted above, an insurer may be exposed to extra-contractual liability in bad faith if the insurer wrongfully refuses to provide its insured a defense. *Allen v. Bryers*, 512 S.W.3d 17, 38-39 (Mo. banc 2016). In the event the insurer's breach of its defense obligation is determined to have been in bad faith, the insurer may be required to indemnify the entire judgment entered against its insured, regardless of its policy limits. *See id.*

Whether the insurer's refusal to pay the loss was willful is determined by the facts as presented at the time the insured demanded payment under the policy limits. *See JAM Inc. v. Nautilus Ins. Co.*, 128 S.W.3d 879, 897-98 (Mo. App. W.D. 2004). This right to sue for bad faith may be assigned by the insured to the third-party claimant. *See Scottsdale Ins. Co.*, 448 S.W.3d at 830; *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 564-65 (Mo. App. S.D. 1990).

Section 537.065, RSMo. (2021), largely governs the ability of a third-party to pursue a bad-faith failure to settle claim against an insurer. That section bars the personal injury claimant from

entering into a non-execution agreement with a tort-feasor unless the tortfeasor's insurer has first refused an opportunity to defend the insured without a reservation of rights.

Missouri courts have expressly advised that insurers with good faith coverage questions in similar scenarios should file a declaratory judgment action simultaneous to the underlying personal injury action and seek a stay of the personal injury lawsuit proceedings until the declaratory judgment action is decided. See *State ex rel. Mid-Century Ins. Co., Inc. v. McKelvey*, 666 S.W.2d 457, 459 (Mo. App. 1984) and *U-Haul Co. of Mo. v. Carter*, 567 S.W.3d 680, 683 n. 4 (Mo. App. 2019) Section 537.065 (4) codifies the right to intervene and meaningfully participate in the litigation.

Section 537.065 further requires:

- An insured to provide notice to the insurer of a “contract not to execute” within 30 days after its execution;
- that judgment may not be entered against a tortfeasor until 30 days after such notice is received;
- that all terms of the covenant not to execute must be in writing to be enforceable; and
- that any agreement between the tort-feasor and claimant be admissible in evidence in an action for bad faith against the insured.

The legal consequences of an insurer's breach of contract includes insurer's loss of the contractual right to demand that the insured comply with certain prohibitory and affirmative policy provisions, including the duty to cooperate. See *Allen*, 512 S.W.3d at 36; *Truck Ins. Exch. v. Prairie Framing, L.L.C.*, 162 S.W.3d 64, 89 (Mo. App. W.D. 2005).

Thus, once an insurer refuses to defend its insured without condition, the insured may enter into an agreement with the plaintiff to limit the insured's liability to the insurer's policy limits. See *Allen*, 512 S.W.3d at 35-36; § 537.065, RSMo. (2021). These agreements are typically followed by judgments to which the insured does not offer any defense and for which the insurer has no right to relitigate liability or damages. See Section VII. C. below.

Section 537.058, RSMo. (2017) establishes threshold requirements for a time limited demand to be admissible as evidence of an insurer's bad faith. These include:

- Any time-limited demand to settle must be transmitted to the tortfeasor's liability insurer, must be sent in writing by certified mail, and must reference the statute.
- A time-limited demand must be left open for “not less than 90 days” from receipt by the insurer.
- The demand must specify a dollar amount or “applicable policy limits,” and must specify who will be released and what claims will be released if accepted.
- There must be an unconditional release of the insured for all liability in exchange for the payment demanded.
- The demand must reference a claim number, if known, the date and location of the loss, and a description of the injuries sustained by the claimant.
- The demand must be accompanied by a list of the names and addresses of all healthcare

providers who treated the claimant from the date of the incident, and a HIPAA-compliant medical authorization.

- If the claimant asserts a claim for wage loss, the demand must be accompanied by a list of all employers from the date of the incident until the date of the demand, accompanied by a written authorization to obtain employment records necessary to verify wages, earnings, compensation, or profits “however denominated.”
- Claimant cannot demand that payment of the settlement funds be earlier than 10 days following the insurer’s receipt of a fully-executed unconditional release of the insured by the claimant.

A demand that does not meet these requirements “shall not be considered as a reasonable opportunity to settle for the insurer” and “shall not be admissible” in any lawsuit seeking extracontractual damages. Mo. Rev. Stat. § 537.058. Still evolving is the question of whether all demands for policy limits must be made in compliance with the new § 537.058, or if demands can evade the requirements of the statute if they are not *time limited*. We expect to see active development on how § 537.058 is applied.

Fraud

In Missouri, the elements for common-law fraud are:

- A false and material representation;
- the defendant’s knowledge of the representation's falsity or ignorance of truth;
- the defendant’s intent that the representation be acted upon by the plaintiff in a manner reasonably contemplated;
- the plaintiff’s ignorance of the falsity of the representation;
- the plaintiff’s rightful reliance on the truth of the statement and his right to rely thereon; and
- proximate injury.

See *Crest Trimble v. Pracna*, 167 S.W.3d 706, 712 (Mo. banc 2005); *Construction II, Inc. v. Hart*, 487 S.W.3d 85, 99 (Mo. App. W.D. 2016); and *Minor v. Terry*, 475 S.W.3d 124, 138 (Mo. App. E.D. 2014).

Intentional or Negligent Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress include a showing by the plaintiff that:

- The defendant’s conduct was extreme and outrageous;
- the defendant acted in an intentional or reckless manner; and
- such conduct resulted in severe emotional distress that is medically diagnosable and medically significant.

See *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. banc 1997); *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303 (Mo. banc 1993); and *Hendrix v. Wainwright Indus.*, 755 S.W.2d 411 (Mo. App. E.D. 1988).

The elements of a cause of action for negligent infliction of emotional distress include a showing by the plaintiff that:

Missouri

- The defendant should have realized its conduct involved an unreasonable risk of causing distress; and
- the emotional distress or mental injury must be medically diagnosable and sufficiently severe to be medically significant.

See *Gibson*, 952 S.W.2d at 248–49; *Nickel v. Stephens College*, 480 S.W.3d 390, 400 (Mo. App. W.D. 2015); and *Thornburg v. Federal Express Corp.*, 62 S.W.3d 421, 427 (Mo. App. W.D. 2001).

State Consumer Protection Laws, Rules and Regulations

These issues as applied to insurers are covered under Missouri's Unfair Claims Settlement Practices Act and Missouri's Unfair Trade Practice Act. See Mo. Rev. Stat. §§ 375.1000–375.1018 (2016); Mo. Rev. Stat. §§ 375.930–375.948 (2016). While both acts are still in effect, the Unfair Claims Settlement Practices Act essentially clarified, if not replaced, the provisions in the Unfair Trade Practice Act. See Section I. B. above for a summary of the protections afforded consumers and insureds under these enactments.

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

The Missouri Supreme Court, in noting the insurer-insured relationship is most closely analogous to the attorney-client relationship, has held that an insured's claim file belongs to the insured and that the insured is entitled to discover the contents of the file. See *Grewell v. State Farm Mut. Auto. Ins. Co.*, 102 S.W.3d 33, 37 (Mo. banc 2003). If an insurer refuses to produce its claim file in response to the insured's request, the insurer may be exposed to liability in an action for breach of fiduciary duty and punitive damages. *Grewell v. State Farm Mut. Auto. Ins. Co.*, 162 S.W.3d 503 (Mo. App. W.D. 2005).

Also, since the insurer-insured relationship is analogous to the attorney-client relationship, where an insurance policy subjects the insurer to a defense obligation, communications between the insured and insurer are privileged. See *id.*; see also *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45 (Mo. App. S.D. 2008).

Discoverability of Reserves

A federal court in Missouri has held that reserve information may be protected by the work-product doctrine if the information relates to specific claims. *Spirco Environmental, Inc. v. American Intern. Specialty Lines Ins. Co.*, 2006 WL 2521618, at *2 (E.D. Mo. August 30, 2006). The court in that case found the documents sought were accurately described in the privilege log, related to the insurer's actions regarding reserves for the specific claim, and the plaintiff did not show a need for the information that was as important as the "insurer's need to accurately assess its potential loss on its policies." *Id.* at *1. The documents regarding reserves were therefore protected by the work-product doctrine. See *id.* at *2.

The United States Court of Appeals for the Eighth Circuit has also ruled on this issue. In *Simon v. G.D. Searle*, the Eighth Circuit ruled that risk management documents, such as those involving reserves, which concern specific claims, are protected as work-product materials. 816 F.2d 397 (8th Cir. 1987) (construing Minnesota law). However, the documents might not be so protected if they relate to the company's reserve policies generally, as they did in that case. The court in *Simon* based its ruling on the fact that the risk management documents had not been prepared "for the purposes of litigation," noting reserve information serves many business planning functions but does not appear to enhance the defense of any particular lawsuit. *Id.* at 401.

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Missouri courts have only addressed this issue indirectly. Missouri law generally holds that the reinsured insurer is the beneficiary of a reinsurance contract, and not the original insured. *Allendale Mut. Ins. v. Grist*, 731 F.Supp. 928, 930 (Mo. App. W.D. 1989). In addressing this general rule, the court noted there is no privity of contract between the original insured and the reinsurer; therefore, the reinsurer cannot be liable to the original insured unless the reinsurance policy imposes a contractual duty to the original insured. *See id.*; *see also First Nat'l. Bank v. Higgins*, 357 S.W.2d 139, 143 (Mo. banc 1962); *J.C. Penney Life Ins. Co. v. Transit Cas. Co. in Receivership*, 299 S.W.3d 668, 674 (Mo. App. W.D. 2009).

Attorney/Client Communications

In addressing issues between an excess insurer and the primary insurer for a bad-faith-duty-to-settle claim, a federal district court sitting in Missouri, in citing a case from another jurisdiction, noted that no attorney-client privilege attaches to communications between an attorney and an insurer where the attorney represents both the insured and the insurer. *Cent. Nat'l Ins. of Omaha v. Med. Protective Co.*, 107 F.R.D. 393, 394 (Mo. App. E.D. 1985).

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

A misrepresentation in an insurance application can be material in one of two ways:

- Where the misrepresentation would affect a reasonable insurer's determination of whether the insured posed an acceptable risk for the insurer for the correct premium to assess; and
- where the misrepresentation would have been relied upon by the insurer acting in accordance with industry custom and standards.

Adams v. Columbia Mut. Ins. Co., 978 S.W.2d 10, 11 (Mo. App. W.D. 1998).

Concerning misrepresentations in the application for insurance, "an applicant who is able to read is legally bound to know the contents of the application she signed," so that the incorrect answers cannot be treated as mistakes. *Schnatzmeyer v. Nat'l Life Ins. Co.*, 791 S.W.2d 815, 820–21 (Mo. App. E.D. 1990). "This is not affected by the fact that she relied upon or trusted the agent to prepare the application for the policy." *Id.*; *see also Miller v. Plains Ins. Co.*, 409 S.W.2d 770, 772–73 (Mo. App. 1966). But, the insurer may be bound by false answers in a policy application if "the agent knows the truth . . . should know the truth from the circumstances . . . [or] fills out the application without questioning the applicant." *Priesmeyer v. Shelter Mut. Ins. Co.*, 995 S.W.2d 41, 48 (Mo. App. W.D. 1999).

To void a policy based on a misrepresentation in the application, the insurer generally must demonstrate that the representation was both false and fraudulently made. *See Shirkey v. Guarantee Trust Life & Ins. Co.*, 141 S.W.3d 62, 67 (Mo. App. W.D. 2004). However, an insurer may void the policy by showing that the representation was false and material, without proof of fraud, if one of four conditions is met:

Missouri

- The representation is warranted in the application to be true;
- the policy is expressly conditioned upon the truth of the representation;
- the policy provides that falsity in the application will void the policy; or
- the application is incorporated into and attached to the policy.

Keystone Mut. Ins. Co. v. Kuntz, 507 S.W.3d 162, 167 (Mo. App. S.D. 2016); *Continental Cas. Co. v. Maxwell*, 799 S.W.2d 882, 888 (Mo. App. W.D. 1990); and *New York Life Ins. Co. v. Feinberg*, 229 S.W.2d 531, 539 (Mo. 1950).

In addition, “the failure to answer questions under oath constitutes failure to comply with a condition precedent to suit. ‘False swearing . . . [however,] voids the policy and forfeits the whole sum due if the policy so provides.’” *Farm Bureau Town & Country Ins. Co. of Mo. v. Crain*, 731 S.W.2d 866, 875 (Mo. App. S.D. 1987).

Failure to Comply with Conditions

Under Missouri law, conditions in insurance policies barring coverage if the insured fails to give timely notification of a claim are valid and enforceable. However, coverage will not be denied for breach of notice and cooperation conditions unless the insurer can demonstrate that it has been prejudiced by the insured’s violation of the conditions. See *Johnston v. Sweany*, 68 S.W.3d 398, 401–02 (Mo. banc 2002). Moreover, when an insurer breaches its defense obligation by refusing to provide its insured with an unconditional defense, the insured is relieved of the duty to comply with policy conditions, including the duty to cooperate. See *Allen v. Bryers*, 512 S.W.3d 17, 36 (Mo. banc 2016); *Truck Ins. Exch. v. Prairie Framing, L.L.C.*, 162 S.W.3d 64, 89 (Mo. App. W.D. 2005).

Missouri distinguishes between “occurrence” and “claims made” policies and only imposes the judicially-created prejudice rule in the case of “occurrence” policies. See *Southeast Bakery Feeds, Inc. v. Ranger Ins. Co.*, 974 S.W.2d 635, 639 (Mo. App. E.D. 1998); see also *Grissom v. First Nat’l Ins. Agency*, 371 S.W.3d 869 (Mo. App. S.D. 2012).

Challenging Stipulated Judgments: Consent and/or No-Action Clause

Mo. Rev. Stat. § 537.065 (2017) provides the mechanism for insureds to foreclose personal liability to the claimant by entering into a statutory contract with the claimant. Under such an agreement, the claimant and the insured agree that the claimant will only seek collection of a judgment entered against the insured from available insurance proceeds. Although not required by Section 537.065, the result of such an agreement is that insureds in practice agree to the entry of consent judgments against them. Moreover, such judgments bear no resemblance to what they would have been had they been the product of an adversarial proceeding. Typically, the damage awards are inflated and are designed to expose the insurer to extra-contractual liability or substantial interest payments under the policy supplementary payments provisions.

Following a Section 537.065 agreement, the claimants must then take their chances by seeking recovery of their judgment from the policyholders’ insurers. In response, insurers may assert any coverage defenses they possess against their insureds. However, as to these judgments, the insurers have no right to relitigate their insureds’ liability or the claimants’ damages. *Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700, 708-10 (Mo. banc 2011). Restated, the underlying judgment is conclusive in a subsequent action to satisfy the judgment under the judgment debtor’s insurance policy. *Allen v. Bryers*, 512 S.W.3d 17, 32-33 (Mo. banc 2016). Thus, when an insurer had the opportunity to defend its insured but wrongfully refused to do so, the insurer is barred from relitigating any facts that actually were determined in the underlying case and were necessary to the judgment. *Id.* at 33

(citing *Assurance Co. of America v. Secura Ins. Co.*, 384 S.W.3d 224, 233 (Mo. App. E.D. 2012)).

Mo. Rev. Stat. 537.065 was amended by the Missouri General Assembly in 2017 to grant insurers intervention as a matter of right after their insureds enter into a Section 537.065 agreement with the claimant. Under the amended statute, the insurer has thirty days in which to intervene once it receives notice of the Section 537.065 agreement. No judgment may be entered against the insured during this thirty-day window.

The amended statute is silent as to what an insurer may do upon intervention. It is assumed the right of intervention will permit insurers to litigate liability and damages. However, no Missouri appellate court has yet addressed the boundaries of what an insurer may do upon intervention. At this time, the intervention remedy under Section 537.065 is untested and it is uncertain whether intervention will provide insurers with a viable prophylactic measure against the worst aspects and abuses of uncontested and/or stipulated judgments that follow Section 537.065 agreements in Missouri.

Preexisting Illness or Disease Clauses

For group health insurance policies issued in the State of Missouri, Mo. Rev. Stat. § 376.426(5) (2016) limits application of preexisting illness clauses to “a disease or physical condition for which medical advice or treatment was received by the person during the twelve months prior to the effective date of the person’s coverage.”

There are also standards for preexisting illnesses under Medicare supplement policies and certificates. Under 20 CSR 499-3.650(5)(A)(1), a Medicare supplement policy or certificate shall not exclude or limit benefits for losses incurred more than six months from the coverage’s effective date because the loss involves a preexisting condition. Further, the regulation prohibits insurers from defining a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six months before the coverage’s effective date.

Statutes of Limitations and Repose

There is a split of authority concerning the applicable statute of limitations. Most Missouri courts have held that the insured has ten years under Mo. Rev. Stat. § 516.110 (2016) (setting time limit for bringing suits on contracts) to file an action on an insurance policy. *See, e.g., Johnson v. State Mut. Life Assur. Co. of America*, 942 F.2d 1260 (8th Cir. 1991). *See also Oates v. Safeco Ins. Co. of Am.*, 583 S.W.2d 714, 715-21 (Mo. banc 1979) (ten-year statute of limitations applies to uninsured motorist claim); *Taylor v. Farmers Ins. Co., Inc.*, 906 S.W.2d 882, 886-87 (Mo. App. S.D. 1995) (accord); and *Messner v. American Union Ins. Co.*, 119 S.W.3d 642 (Mo. App. S.D. 2003) (ten-year statute of limitations applied to action to recover underinsured motorist coverage benefits). *But see Crenshaw v. Great Central Ins. Co.*, 527 S.W.2d 1 (Mo. App. 1975) (statute of limitations applicable to wrongful death claims governed claim for uninsured motorist coverage for damages because of the wrongful death of the insured killed in an automobile accident with an uninsured motorist).

It has been held, however, on at least one occasion, that the five-year statute of limitations under Mo. Rev. Stat. § 516.120 (2016) applied to an insured’s claim; however, in that instance, the insured’s claim was based on the insurer’s negligent payment of policy proceeds to the wrong beneficiary. *See Curnes v. Equitable Life Assurance Soc’y of U.S.*, 6 S.W.3d 175 (Mo. App. S.D. 1999).

Missouri has a statute of repose. Mo. Rev. Stat. § 516.097 (2016). However, the statute, by its terms, is limited to tort actions against architects, engineers, or builders of defective improvements to real property. Under Section

516.097, the action must be brought within ten years of the improvement's completion. See *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991). Section 516.097 has no bearing on insurance claims generally.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

Missouri makes a distinction between "occurrence" and "claims made" policies. Under an "occurrence" policy, the policy covers negligent acts or omissions that occur within the policy period, "regardless of when the negligent acts or omissions are discovered or the claim is made." *Southeast Bakery Feeds, Inc. v. Ranger Ins. Co.*, 974 S.W.2d 635, 639 (Mo. App. E.D. 1998). In contrast, the trigger of coverage in a claims-made policy is the transmittal of the notice of claim to the insurer such that there could be coverage for a loss that occurred before the policy's effective date. See *id.*

Under Missouri law, in determining when an "occurrence" takes place, courts focus on when the resulting damage occurs, and not the time of the negligent act. *Hawkeye-Sec. Ins. Co. v. Iowa Nat'l. Mut. Ins. Co.*, 567 S.W.2d 719, 720 (Mo. App. 1978); *Kirchner v. Hartford Accident & Indem. Co.*, 440 S.W.2d 751, 756 (Mo. App. 1969). The United States Court of Appeals for the Eighth Circuit, applying Missouri law, reaffirmed this basic principle, holding "the time of the occurrence . . . is the time *when the complaining party was actually damaged.*" *Nationwide Ins. Co. v. Central Missouri Elec. Co-op., Inc.*, 278 F.3d 742, 746 (8th Cir. 2001)(citing *Shaver v. Insurance Co. of North America*, 817 S.W.2d 654, 657 (Mo. App. S.D. 1991)(quoting *Kirchner v. Hartford Accident & Indem. Co.*, 440 S.W.2d 751, 756 (Mo. App. 1969)).

In cases involving long-tail claims, such as progressive occupational diseases resulting from exposure to asbestos-containing materials or environmental contamination, the time-of-occurrence determination under Missouri law is not settled. The extant authorities suggest that Missouri would apply either the injury-in-fact trigger or the exposure trigger.

The Eighth Circuit, in *Nationwide Ins. Co. v. Central Missouri Elec. Co-op., Inc.*, noting that coverage under Missouri law is triggered by the occurrence of damages, and not by the time of the insured's negligent acts, discussed the various "trigger" theories employed by different jurisdictions to determine when damage occurs for coverage purposes. The Eighth Circuit explained:

There are multiple approaches to addressing this issue. For example, "[i]f coverage is triggered at the time that personal injury or property damage becomes known to the victim or property owner, the approach is identified as the "manifestation theory." If coverage is triggered when real personal injury or actual property damage first occurs, the approach is called the "injury in fact theory." If coverage is triggered when the first exposure to injury-causing conditions occurs, then the court is said to have chosen the "exposure theory." Finally, if coverage is triggered in a manner such that insurance policies in effect during different time periods *all* impose a duty to indemnify, then the approach is labeled a "continuous" or "multiple" trigger theory.

278 F.3d at 747 (quoting *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F.Supp. 474, 478-79 (E.D. Mich. 1989)) (citations omitted) (emphasis in original).

In *Nationwide*, the Eighth Circuit observed that it is not entirely clear which of these approaches is appropriate under Missouri law. 278 F.3d at 747. Previously, the Eighth Circuit had forecasted that Missouri would apply an "exposure" theory. See, e.g., *Continental Ins. Co. v. Northeastern Pharm. & Chem. Co., Inc.*, 842 F.2d 977, 984 (8th

Cir. 1988) (en banc). However, after the Eighth Circuit's decision in *Continental Ins. Co.*, the Missouri Court of Appeals decided *Shaver v. Insurance Co. of North America*, 817 S.W.2d 654 (Mo. App. S.D. 1991). In *Shaver*, the court held that coverage was triggered "when the complaining party was actually damaged," i.e., an injury-in-fact analysis. 817 S.W.2d at 657.

The *Shaver* decision comports with an early decision by the Missouri Supreme Court addressing trigger of coverage in a progressive occupational injury case. In *Tomnitz v. Employers Liability Assur. Corp.*, 121 S.W.2d 745 (Mo. 1938), the court held an "injury-in-fact" is necessary to establish a covered "occurrence." See also *D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899, 906 (Mo. banc 2010) ("Viewed in the light most favorable to the verdict, there is evidence to support Sherry's [construction defect] claim that the cause of the damage commenced during the policy period and, therefore, constituted an insurable "occurrence.").

The *Shaver* decision comports with the views of other courts addressing the "occurrence" issue under Missouri law, all of which have applied an "injury-in-fact" trigger in progressive injury cases. See, e.g., *Independent Petrochemical Corp. v. Aetna Cas. & Surety Co.*, 654 F.Supp. 1334 (D. D.C. 1986) (applying Missouri law); *Monsanto Co. v. Aetna Cas. & Surety Co.*, No. 88C-JA-118 (Del. Super. Ct., New Castle, April 15, 1994) (1994 Del. Super. LEXIS 182) (applying Missouri law); and *Standard Asbestos Mfg. & Insulating Co. v. Royal Indem. Co.*, CV80-14909 (Mo. Cir. Ct., Jackson Cty., April 3, 1986).

Ultimately, regardless of trigger theory, it may make little difference if a Missouri court were to apply the "exposure" trigger versus the "injury-in-fact" trigger. In many cases involving progressive occupational injuries and environmental contamination, an actual injury occurs upon the claimant's exposure to the injurious condition. Therefore, the two theories may largely overlap in application.

Allocation Among Insurers

Missouri has established standards governing the apportionment of the same risk among multiple insurers of that risk. Missouri courts also make distinctions between primary and excess insurers in allocation cases. Despite the presence of "other insurance" clauses in primary insurance policies, all primary insurance proceeds must typically be exhausted before an excess insurer has a duty to pay its insurance proceeds. Missouri courts have made clear that "a primary insurer cannot use an 'other insurance clause' to require an umbrella carrier to share in its liability." *Smith v. Wausau Underwriters Ins. Co.*, 977 S.W.2d 291, 294 (Mo. App. W.D. 1998) (quoting *LeMars Mut. Ins. Co v. Farm and City Ins. Co.*, 494 S.W.2d 216, 219 (Iowa 1992)).

Missouri generally follows the "mutual repugnancy" rule. When "other insurance" clauses in the policies issued by concurrent insurers are "mutually repugnant," each concurrent insurer must share in paying its portion of the loss. *Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 178 (8th Cir. 1989). The proportion of the loss each insurer is required to pay is based on the proportion its policy limits bear to the aggregate policy limits of the other concurrent insurers. *Id.* at 178-80. For example, if an excess insurer's policy limits are seventy-five percent of the total amount of available excess insurance proceeds, that insurer is responsible for seventy-five percent of the excess liability remaining after all primary policy proceeds have been exhausted. See *id.*

Missouri follows a different allocation rule between insurers when an indemnity contract is involved. When an enforceable indemnity agreement is in place, the indemnitee's primary insurance carrier is not required to exhaust its policy limits before all available insurance coverage, including excess coverage, under the indemnitor's policies is extinguished in payment of the claim. *Federal Ins. Co. v. Gulf Ins. Co.*, 162 S.W.3d 160, 164-66 (Mo. App. E.D. 2005). Restated, Missouri gives "controlling effect" to the indemnitor's indemnity obligation over the "other insurance" clauses in the insurance policies available to the indemnitor and indemnitee. *Id.* at 165. Otherwise, as

observed by Missouri's courts, a contrary rule, would render the indemnity contract between the insureds and their agreed-to risk allocation scheme ineffectual. *Id. See also Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 587 (8th Cir. 2002).

In long-tail claims, involving progressive injuries, Missouri case law is limited. The leading case is *Continental Cas. Co. v. Med. Protective Co.*, 859 S.W.2d 789, 792 (Mo. App. E.D. 1993), in which the Missouri Court of Appeals, applying an exposure analysis, allocated a claim amongst the insured's several consecutive primary insurers on a *pro rata* basis based on each insurer's time on the risk.

In contrast, the Missouri Court of Appeals has held the "all sums" allocation method applies to claims against excess insurers for bodily injury from asbestos exposure at the insured's sites. *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 266 (Mo. App. W.D. 2017). Under the "all sums" approach, an insured may select a policy amongst the range of years triggered by the occurrence at issue and hold that policy responsible for the entire loss. *Id.* at 266 and n. 15. In turn, the targeted insurer may then seek contribution from other implicated insurers under common-law contribution or according to each insurer's "other insurance" clause. *Id. See also Viacom, Inc. v. Transit Cas. Co.*, 138 S.W.3d 723, 726 (Mo. banc 2004); *Doe Run Resources Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 474-75 (Mo. App. E.D. 2013).

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

There is no statutory claim for contribution by one insurer against another insurer under Missouri law. Statutory contribution in Missouri only exists between joint tortfeasors. Mo. Rev. Stat. § 537.067 (2016).

The typical claim by one insurer against another is in equity, usually a claim for equitable contribution. *Heartland Payment Systems, L.L.C. v. Utica Mut. Ins. Co.*, 185 S.W.3d 225, 232 (Mo. App. E.D. 2006). Moreover, a claim for equitable subrogation exists in favor of an excess insurer that has paid a claim that should have been paid by a primary insurer. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 830-31 (Mo. banc 2014).

Elements

The right to equitable contribution applies when several insurers are obligated to indemnify the same loss and one insurer has paid more than its share of the loss. *Heartland Payment Systems, L.L.C. v. Utica Mut. Ins. Co.*, 185 S.W.3d 225, 232 (Mo. App. E.D. 2006). To maintain a claim for equitable contribution, the two insurers must cover the same insured, the same interest, and the same risk. *Id.*

DUTY TO SETTLE

The "bad faith" cause of action is based upon the insurer's action in taking control of the settlement negotiations and litigation against its insured under a liability insurance policy, which creates a fiduciary relationship between the insurer and the insured. *See Freeman v. Leader Nat'l. Ins. Co.*, 58 S.W.3d 590, 598 (Mo. App. E.D. 2001). It is the existence of this fiduciary relationship, in addition to the good faith and fair dealing covenant under the insurance policy, that exposes the insurer to tort liability for failing to exercise good faith in evaluating and negotiating third-

party claims against its insured. *Id.*

The elements of a bad faith claim are stated above in Section V.A.2.

An insurer's bad faith is a state of mind, which is demonstrated by the insurer's acts and circumstances. *See Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655, 662 (Mo. App. W.D. 2008). Circumstances that Missouri courts have considered as evidence of an insurer's bad faith in refusing to settle a claim within policy limits include, but are not limited to, the following:

- The insurer sought to require the insured to contribute to a settlement after the insurer refused to pay its coverage limit. *McCombs v. Fidelity & Cas. Co. of N.Y.*, 89 S.W.2d 114 (Mo. App. 1935).
- The insurer was acting subservient to the direction of a reinsurer. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750 (Mo. 1950).
- The insurer denied the claim without undertaking a reasonable investigation. *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (Mo. App. W.D. 1965).
- The insurer did not consider its trial counsel's recommendations. *McCombs v. Fidelity & Cas. Co. of N.Y.*, 89 S.W.2d 114 (Mo. App. 1935).
- The insurer acted on its stated policy never to pay its full liability limit on a claim. *Id.*
- The insurer disregarded strong evidence of liability and damages. *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo. App. S.D. 1990). In *Ganaway*, the insurer, in rejecting a policy limits demand, rested on an erroneous coverage position.
- The insurer failed to respond to a policy limit demand, with a short time limit, although the insurer was on notice that the plaintiff's claim was a serious one that exposed the insured to liability well in excess of his policy limits. *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655 (Mo. App. W.D. 2008).
- The insurer sought to escape payment of its entire policy limit by engaging in conduct that sought to limit its payment to two-thirds of the policy limit. *Rinehart v. Shelter Gen'l Ins. Co.*, 261 S.W.3d 583 (Mo. App. W.D. 2008).
- The insurer did not consider the insured's interest because it was irrelevant to its coverage decision, made its "no coverage" decision before any investigation, and which the insurer confirmed after an inadequate investigation limited to coverage only. *Shobe v. Kelly*, 279 S.W.3d 203 (Mo. App. W.D. 2009).

Moreover, a meritorious coverage defense and a successful declaratory judgment action may not provide a defense to a bad-faith-failure-to settle claim. In *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16 (Mo. App. W.D. 2014), the Missouri Court of Appeals upheld a bad faith award against an insurer, *although the insurer had successfully litigated its coverage defenses in a separate declaratory judgment action and had received a declaration of no coverage*. The court, in subjecting the insurer to liability in bad faith, held the insurer had failed to reserve its right to deny coverage because its two reservation-of-rights letter did not timely, fully, or unambiguously explain the insurer's coverage position or how the cited policy provisions affected the insured's position.

Missouri courts have held that once the insurer has, in good faith, exhausted its policy limits on behalf of one insured, its duty to defend is terminated as to additional insureds who may remain in the case and who may incur liability. *See Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864, 872 (Mo. App. E.D. 1997); *National Beef*

Packing Co., LLC v. Zurich American Ins. Co., 336 S.W.3d 181, 185-88 (Mo. App. W.D. 2011).

Finally, the Missouri General Assembly, in an effort to ameliorate the impact of time-limited settlement demands on setting up insurers for bad faith, enacted Mo. Rev. Stat. § 537.058 (2017), to govern time-limited settlement demands. Section 537.058 requires: (1) the demand to be sent to the tortfeasor's insurer by certified mail, return receipt requested; (2) requires the demand to remain open for at least ninety days from the date the demand is received by the insurer; and (3) requires the demand to include the following information:

- Amount of monetary payment requested or request for applicable policy limits;
- Date and location of the loss;
- Claim number, if known;
- Description of known injuries;
- Parties to be released if demand is accepted;
- Description of claims to be released if demand is accepted;
- An offer of unconditional release for the insurer's insureds from all present and future liability for that occurrence under Section 537.060;
- List of names and addresses of health care providers from date of injury to date of demand, along with HIPAA-compliant authorizations;
- Names and addresses of claimant's employers from date of injury until date of demand, along with employer authorizations, if the claimant asserts a claim for lost wages or like claim.

Upon receipt of a time-limited demand under Section 537.058, the insurer may ask for clarification of the terms without it being considered a counteroffer or rejection of the demand. After acceptance of the time-limited demand, the insurer may provide payment to the claimant in the form of cash, money order, wire transfer, cashier's check, draft or bank check, or electronic funds transfer. A claimant may require payment within a specified period of time, but not less than ten days after written acceptance of the demand.

Notably, in any lawsuit filed by a claimant as an assignee of the tortfeasor (or by the tortfeasor for the claimant's benefit, a time-limited demand that does not comply with Section 537.058 terms "shall not be considered as a reasonable opportunity to settle for the insurer and shall not be admissible in any lawsuit alleging extra-contractual damages against the tort-feasor's liability insurer."

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Under a life insurance contract, if the insured has not reserved the right to change the beneficiary, the beneficiary's interest vests upon the policy's issuance. *Blum v. New York Life Ins. Co.*, 95 S.W. 317, 319 (Mo. 1906); *see also Fendler v. Roy*, 58 S.W.2d 459 (Mo. 1932). This principle is applicable even though the insured and the beneficiary are divorced after the policy was issued. *See Service Life Ins. Co. of Fort Worth v. Davis*, 466 S.W.2d 190 (Mo. App. 1971).

If the insured has reserved the right to change the beneficiary, a named beneficiary's interest is a contingency

until the insured's death. *Service Life Ins. Co. of Fort Worth*, 466 S.W.2d 190, 195 (Mo. App. 1971). When the right to change the beneficiary is reserved, the insured can change the beneficiary designation without the consent and the knowledge of a named beneficiary. *Western & Southern Life Ins. Co. v. Cash*, 454 S.W.2d 584, 587 (Mo. App. 1970).

A provision reserving the power to change the beneficiary will prescribe the manner in which a change of beneficiary is to be effected. The policy may require a written request in the form prescribed by the insurer to be made and delivered to the insurer. Other provisions may require such a request and the return of the policy to the insurer and the endorsement of the change thereon. *Persons v. Prudential Ins. Co. of America*, 233 S.W.2d 729 (Mo. 1950). When the policy's provisions have been met and the insurer's records reflect the request, a change of beneficiary has been accomplished.

The specific requirements for changing a beneficiary must be construed in light of two doctrines. First, the policy provision that pertains to changing a beneficiary is for the benefit of the insurance company, and the insurance company may waive the requirements therein. *Glass v. Transamerica Life Ins. Co.*, 322 S.W.3d 556, 559 (Mo. App. S.D. 2010). If the insured's intent is established, the insurer may waive compliance with all the requirements by making the desired change. *Dunnavant v. Mountain States Life Ins. Co.*, 67 S.W.2d 785, 789-90 (Mo. App. 1934); see also *Bell v. Garcia*, 639 S.W.2d 185 (Mo. App. E.D. 1982).

In addition, "Missouri recognizes the equitable doctrine of substantial compliance to carry out the intent of the insured where the insured has not strictly complied with the method set forth by an insurance policy to change the beneficiary." *Anglen v. Heimburger*, 803 S.W.2d 109, 112 (Mo. App. W.D. 1990). This doctrine "makes an incomplete or irregular change of beneficiary effective against the original beneficiary where the insured has done all within his power to exercise his right to change the beneficiary." *Id.*

Effect of Divorce on Beneficiary Designation

Under Missouri law, a policy may provide that a divorce will revoke the designation of a spouse as a beneficiary. *General American Life Ins. Co. v. Barrett*, 847 S.W.2d 125 (Mo. App. W.D. 1993).

INTERPLEADER ACTIONS

Rule 52.07 of the Missouri Rules of Civil Procedure provides that a stakeholder may bring an interpleader action if the stakeholder is or may be exposed to double or multiple liability.

Section § 507.060, RSMo. (2018) addresses the "multiple claimants, insufficient limits" problem that gives rise to so many bad-faith failure to settle claims. That section offers protection to an insurer when the following requirements are met:

- An interpleader action is filed within 90 days after receiving the first offer of settlement;
- The insurer's applicable limits of coverage are deposited with the court within 30 days of the court's order granting interpleader; and
- The insurer defends its insureds in good faith.

Missouri

When the requirements of this section are met, the insurer “shall not be liable to any insured or defendant for any amount in excess of the plaintiff’s contractual limits of coverage in the interpleader or any other action.” § 507.060(4). This does not entitle the insurer to a release from liability. *Garrison Prop. & Cas. Ins. Co. v. McWhirt*, 653 S.W.3d 648, 652-653 (Mo. App. 2022). At minimum, however, the statute may be advanced as an affirmative defense to a future bad faith claim. See id at 652.

Availability of Fee Recovery

“It is well settled that in a case where interpleader properly lies, the stakeholder is entitled to reasonable attorney’s fees as part of his costs.” *Northwestern Nat’l Ins. Co. v. Mildenberger*, 359 S.W.2d 380, 387 (Mo. App. 1962). An award of attorney fees is permitted because an interpleader action is an equitable remedy, existing independent of Mo. Rev. Stat. § 507.060 and Mo. R. Civ. P 52.07, and is governed by equitable principles. *Insurance Co. of North America v. Skyway Aviation, Inc.*, 828 S.W.2d 888, 892 (Mo. App. W.D. 1992).

In those cases where attorney fees have been paid to the stakeholder out of the fund, the trial court has discretion to allow the successful claimant to collect those fees from the unsuccessful claimant. *See Mix v. Broyles*, 567 S.W.2d 696, 699 (Mo. App. 1978).

Differences in State vs. Federal

Federal law does not extend the remedy of interpleader to include bad-faith protection in the way that § 507.060 has done. However, the protections of that statute are available to an insurer regardless of whether the case is filed in state or federal court.