

SECOND REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 589

97TH GENERAL ASSEMBLY

Reported from the Committee on Small Business, Insurance and Industry, February 27, 2014, with recommendation that the Senate Committee Substitute do pass.

4693S.02C

TERRY L. SPIELER, Secretary.

AN ACT

To repeal sections 1.010, 379.200, 537.065, 537.067, and 538.210, RSMo, and to enact in lieu thereof eight new sections relating to civil actions for damages.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 1.010, 379.200, 537.065, 537.067, and 538.210, RSMo, are repealed and eight new sections enacted in lieu thereof, to be known as sections 1.010, 375.417, 375.418, 375.419, 379.200, 537.065, 537.067, and 538.210, to read as follows:

1.010. **1.** The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

2. The general assembly expressly excludes from this section the common law of England as it relates to claims arising out of the rendering of or failure to render health care services by a health care provider, it being the intent of the general assembly to replace those claims with statutory causes of action.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

375.417. 1. As used in sections 375.417 and 375.418, the following
2 terms mean:

3 (1) "Duty to defend", the duty arising under a contract of
4 insurance to provide a defense to the insured as required under the
5 insurance contract;

6 (2) "Duty to indemnify", the duty of an insurer to pay settlements
7 or judgments on account of the actual or potential liability of an
8 insured for damages as required under the insurance contract;

9 (3) "Insured", a person or entity who is or may be entitled to a
10 defense or indemnification under a contract of insurance;

11 (4) "Reservation of rights", a statement by or on behalf of an
12 insurer of the reasons which may relieve the insurer of its duty to
13 defend or duty to indemnify.

14 2. A reservation of rights shall:

15 (1) Be made in writing and be sent to the insured by mail, or
16 delivered to the insured either in person or by electronic means
17 pursuant to section 379.011;

18 (2) Be so provided to an insured no later than sixty days after
19 the insurer has both:

20 (a) Received notice of the claim or suit against the insured; and

21 (b) Become aware of a basis for asserting its reservation of
22 rights; and

23 (3) State with reasonable specificity the basis for the reservation
24 of rights.

25 3. When an insurer has communicated a reservation of rights, the
26 fact that the insurer has:

27 (1) Communicated the reservation of rights;

28 (2) Offered to defend subject to a reservation of rights;

29 (3) Provided a defense subject to a reservation of rights;

30 (4) Initiated or participated in a declaratory judgment action or
31 other action in which a judicial determination of coverage under a
32 contract of insurance is sought or made or;

33 (5) Declined or refused to withdraw a reservation rights;

34 shall neither constitute, nor be evidence of, breach of any duty owed to
35 the insured, whether in tort, contract, or otherwise. In applying this
36 section, it is the intent of the general assembly to reject and abrogate
37 the holdings contained in *Butters v. City of Independence*, 513 S.W.2d

38 418 (Mo. 1974), *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475 (Mo.
39 App. W.O. 1992), *State ex rel. Mid-Century Ins. Co. v. McKelvey*, 666
40 S.W.2d 457 (Mo. App. 1984), and *Truck Ins. Exch. v. Prairie Framing,*
41 *LLC*, 162 S.W.3d 64 (Mo. App. W.D. 2005), and other decisions holding or
42 otherwise suggesting that an insurer may be found to have breached
43 the duty to defend under the circumstances listed in this subsection.

44 4. Where an insurer offers or provides a defense subject to a
45 reservation of rights, the insured remains bound by any and all
46 provisions in the insurance contract including but not limited to any
47 duty to cooperate.

48 5. Nothing in this section shall be construed to create any
49 obligation to defend or indemnify which is not expressly set forth in
50 the insurance contract.

51 6. Nothing in this section shall change the obligations an insurer
52 may have with regard to the payment of minimum limits under the
53 Missouri motor vehicle financial responsibility law prescribed in
54 section 303.190.

55 7. This section does not apply to any insurance contract which
56 does not contain an express duty to defend.

57 8. Notwithstanding the provisions set forth in this section, any
58 reservation of rights sent within sixty days of the effective date of this
59 section shall meet the requirements of subdivision (2) of subsection 2
60 of this section.

375.418. If an insurer breaches its duty to defend, in the absence
2 of a final adjudication of bad faith, the insurer shall be liable for any
3 judgment against the insured or any reasonable settlement made by the
4 insured, but only up to the applicable limits of liability of the insurance
5 contract. The insurer shall be liable for reasonable attorney fees and
6 statutory court costs incurred by the insured in conducting the defense
7 of the suit. In applying this section, it is the intent of the general
8 assembly to reject and abrogate any previous case law which holds or
9 otherwise suggests that a breach of the duty to defend, without a final
10 adjudication of bad faith, allows for an award of damages in excess of
11 the applicable limits of liability stated in the insurance contract,
12 including but not limited to, the holding contained in *Columbia Cas. Co.*
13 *v. HIAR Holding, LLC*, 411 S.W. 3d 258 (Mo. 2013). This section shall
14 apply to all causes of actions, suits, and claims unless there has been

15 a final judgment entered against the insurer before the effective date
16 of this section, holding that the insurer breached its duty to defend the
17 insured.

375.419. When an insurer offers or provides a defense to a
2 lawsuit filed against its insured, the insurer shall have the
3 unconditional right to intervene in any such lawsuit. It is the intent of
4 the general assembly to reject and abrogate any holding or suggestion
5 contained in *State ex rel. Mid-Century Ins. Co. v. McKelvey*, 666 S.W.2d
6 457 (Mo. App. 1984), *State ex rel. Rimco, Inc. v. Dowd*, 858 S.W.2d 307
7 (Mo. App. 1993), and all other decisions which hold or suggest
8 otherwise. Nothing in this section shall be construed to require an
9 insurer to intervene in any such lawsuit.

379.200. 1. Upon the recovery of a final judgment against any person,
2 firm or corporation by any person, including administrators or executors, for loss
3 or damage on account of bodily injury or death, or damage to property if the
4 defendant in such action was insured against said loss or damage at the time
5 when the right of action arose, the judgment creditor shall be entitled to have the
6 insurance money, provided for in the contract of insurance between the insurance
7 company, person, firm or association as described in section 379.195, and the
8 defendant, applied to the satisfaction of the judgment, and if the judgment is not
9 satisfied within thirty days after the date when it is rendered, the judgment
10 creditor may proceed in equity against the defendant and the insurance company
11 to reach and apply the insurance money to the satisfaction of the judgment. This
12 section shall not apply to any insurance company in liquidation.

13 2. No party shall add or join any other or different cause of
14 action to a claim brought pursuant to this section, whether in the
15 petition or by way of any counterclaim, cross-claim, or third-party
16 claim.

17 3. In any proceeding brought to garnish on an insurance contract
18 under this section or any other rule or provision of law:

19 (1) The judgment creditor shall have the burden of showing that
20 the judgment was the result of a contested adversarial proceeding. If
21 the judgment on which the garnishment was initiated was entered
22 without trial by jury, the judge who entered that judgment shall not
23 make the determination called for by this subdivision. As used in this
24 section, a "contested adversarial proceeding" means a proceeding in
25 which all parties have the opportunity to conduct discovery, present

26 **evidence, and cross-examine witnesses and the judgment debtor's**
27 **insurer defended, or expressly declined to defend, its insured;**

28 **(2) If it is determined that coverage is provided for the loss, but**
29 **the evidence does not show that the judgment resulted from a contested**
30 **adversarial proceeding, the insurer shall have the right to trial by jury**
31 **on the issue of the damages to be assessed against the judgment debtor**
32 **as in the case of default judgments.**

33 **4. Nothing in this section shall be construed to create any**
34 **obligation to defend or indemnify which is not expressly set forth in**
35 **the insurance contract.**

537.065. 1. Any person having an unliquidated claim for damages against
2 a tort-feasor, on account of bodily injuries or death, may enter into a contract
3 with such tort-feasor or any insurer in his behalf or both, whereby, in
4 consideration of the payment of a specified amount, the person asserting the
5 claim agrees that in the event of a judgment against the tort-feasor, neither he
6 nor any person, firm or corporation claiming by or through him will levy
7 execution, by garnishment or as otherwise provided by law, except against the
8 specific assets listed in the contract and except against any insurer which insures
9 the legal liability of the tort-feasor for such damage and which insurer is not
10 excepted from execution, garnishment or other legal procedure by such
11 contract. Execution or garnishment proceedings in aid thereof shall lie only as
12 to assets of the tort-feasor specifically mentioned in the contract or the insurer
13 or insurers not excluded in such contract. Such contract, when properly
14 acknowledged by the parties thereto, may be recorded in the office of the recorder
15 of deeds in any county where a judgment may be rendered, or in the county of the
16 residence of the tort-feasor, or in both such counties, and if the same is so
17 recorded then such tort-feasor's property, except as to the assets specifically listed
18 in the contract, shall not be subject to any judgment lien as the result of any
19 judgment rendered against the tort-feasor, arising out of the transaction for
20 which the contract is entered into.

21 **2. No agreement under this section shall condition the protection**
22 **of the assets of the alleged tort-feasor on the performance of any future**
23 **act.**

24 **3. No insurer shall be required to enter into an agreement under**
25 **this section. The fact that an insurer has not entered into an**
26 **agreement under this section shall not be evidence of the commission**

27 of a tort or breach of contract.

537.067. 1. In all tort actions for damages[, if a defendant is found to
2 bear fifty-one percent or more of fault, then such defendant shall be jointly and
3 severally liable for the amount of the judgment rendered against the defendants.
4 If a defendant is found to bear less than fifty-one percent of fault, then the
5 defendant shall only be responsible for the percentage of the judgment for which
6 the defendant is determined to be responsible by the trier of fact; except that, a
7 party is responsible for the fault of another defendant or for payment of the
8 proportionate share of another defendant if any of the following applies:

- 9 (1) The other defendant was acting as an employee of the party;
- 10 (2) The party's liability for the fault of another person arises out of a duty
11 created by the federal Employers' Liability Act, 45 U.S.C. Section 51.

12 2. The defendants shall only be severally liable for the percentage of
13 punitive damages for which fault is attributed to such defendant by the trier of
14 fact.] **the liability of each defendant for compensatory or punitive
15 damages shall be several only and shall not be joint. Each defendant
16 shall be liable only for the amount of damages allocated to that
17 defendant in direct proportion to that defendant's percentage of fault.
18 A separate several judgment shall be rendered against that defendant
19 for that amount.**

20 2. **To determine the amount of judgment to be entered against
21 each defendant, the court shall multiply the total amount of damages
22 recoverable by the plaintiff with regard to each defendant by the
23 percentage of each defendant's fault. That amount shall be the
24 maximum recoverable against that defendant.**

25 3. **In assessing percentages of fault the trier of fact shall
26 consider the fault of all persons or entities who contributed to the
27 alleged injury or damages, regardless of whether the person or entity
28 was, or could have been, named as a party to the suit.**

29 4. **Negligence or fault of a nonparty may be considered if the
30 plaintiff entered into a settlement agreement with the nonparty or if
31 the defending party gives notice before trial, in accordance with
32 requirements established by court rule, that a nonparty was wholly or
33 partially at fault. Assessments of percentage of fault of nonparties shall
34 be used only in the determination of the percentage of fault of named
35 parties. Where fault is assessed against nonparties under this section,**

36 **finding of fact shall not subject any nonparty to liability in any action**
37 **or be introduced as evidence of liability in any action.**

38 [3.] **5.** In all tort actions, no party may disclose to the trier of fact the
39 impact of this section. **In any action for damages, no attorney shall**
40 **contract for, charge, or collect a contingent fee in excess of the**
41 **following amounts:**

42 (1) **Thirty-three percent of the first fifty thousand dollars of**
43 **damages;**

44 (2) **Twenty-five percent of the next fifty thousand dollars of**
45 **damages;**

46 (3) **Fifteen percent of the next five hundred thousand dollar of**
47 **damages; and**

48 (4) **Ten percent of any amount of damages exceeding six hundred**
49 **thousand dollars.**

50 **In no case shall an attorney collect fees, charges, or any other costs**
51 **which in the aggregate total more than thirty-three percent of the total**
52 **damages.**

538.210. 1. **A statutory cause of action for damages against a**
2 **health care provider for personal injury or death arising out of the**
3 **rendering of or failure to render health care services is hereby created,**
4 **replacing any such common law cause of action. The elements of such**
5 **cause of action are that the health care provider failed to use that**
6 **degree of skill and learning ordinarily used under the same or similar**
7 **circumstances by similarly situated health care providers and that such**
8 **failure proximately caused injury or death.**

9 2. In any action against a health care provider for damages for personal
10 injury or death arising out of the rendering of or the failure to render health care
11 services, no plaintiff shall recover more than three hundred fifty thousand dollars
12 for noneconomic damages irrespective of the number of defendants.

13 [2.] **3.** (1) Such limitation shall also apply to any individual or entity, or
14 their employees or agents that provide, refer, coordinate, consult upon, or arrange
15 for the delivery of health care services to the plaintiff; and

16 (2) Who is a defendant in a lawsuit brought against a health care provider
17 under this chapter, or who is a defendant in any lawsuit that arises out of the
18 rendering of or the failure to render health care services.

19 (3) No individual or entity whose liability is limited by the provisions of

20 this chapter shall be liable to any plaintiff based on the actions or omissions of
21 any other entity or person who is not an employee of such individual or entity
22 whose liability is limited by the provisions of this chapter.

23 Such limitation shall apply to all claims for contribution.

24 [3.] 4. In any action against a health care provider for damages for
25 personal injury or death arising out of the rendering of or the failure to render
26 health care services, where the trier of fact is a jury, such jury shall not be
27 instructed by the court with respect to the limitation on an award of noneconomic
28 damages, nor shall counsel for any party or any person providing testimony
29 during such proceeding in any way inform the jury or potential jurors of such
30 limitation.

31 [4.] 5. For purposes of sections 538.205 to 538.230, any spouse claiming
32 damages for loss of consortium of their spouse shall be considered to be the same
33 plaintiff as their spouse.

34 [5.] 6. Any provision of law or court rule to the contrary notwithstanding,
35 an award of punitive damages against a health care provider governed by the
36 provisions of sections 538.205 to 538.230 shall be made only upon a showing by
37 a plaintiff that the health care provider demonstrated willful, wanton or
38 malicious misconduct with respect to his actions which are found to have injured
39 or caused or contributed to cause the damages claimed in the petition.

40 [6.] 7. For purposes of sections 538.205 to 538.230, all individuals and
41 entities asserting a claim for a wrongful death under section 537.080 shall be
42 considered to be one plaintiff.

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