

SECOND REGULAR SESSION

SENATE BILL NO. 691

99TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR EMERY.

Pre-filed December 1, 2017, and ordered printed.

ADRIANE D. CROUSE, Secretary.

4028S.01I

AN ACT

To repeal sections 536.017, 536.063, 536.085, 536.087, and 536.140, RSMo, and to enact in lieu thereof six new sections relating to administrative law procedures.

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

Section A. Sections 536.017, 536.063, 536.085, 536.087, and 536.140, RSMo, are repealed and six new sections enacted in lieu thereof, to be known as sections 379.897, 536.017, 536.063, 536.085, 536.087, and 536.140, to read as follows:

379.897. 1. As used in this section, the term "administrative proceeding" shall mean any lawful investigation or proceeding inquiring into a violation of any civil statute or any valid regulation, rule, or order by any board, commission, department, officer, or other administrative office or unit of the state other than the general assembly, the courts, the governor, or a political subdivision of the state, existing under the constitution or statute to make rules or to adjudicate contested cases as defined in section 536.010.

2. Any insurer issuing a commercial casualty insurance policy in this state shall provide defense cost coverage for an administrative proceeding arising from the insured's commercial activities that would otherwise be covered under the policy. The payment of the defense cost expense for such administrative proceeding shall be in addition to the applicable limit of liability, and shall not be subject to any deductible obligation. The insurer shall not be required to pay for any fines or penalties assessed against the insured as a result of any such

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

17 proceeding.

18 **3. The director shall have authority to promulgate reasonable**
19 **rules and regulations establishing the limits of defense cost coverage**
20 **to be provided, whether in a single administrative proceeding or for all**
21 **such insureds covered under the policy. Any rule or portion of a rule,**
22 **as that term is defined in section 536.010 that is created under the**
23 **authority delegated in this section shall become effective only if it**
24 **complies with and is subject to all of the provisions of chapter 536, and,**
25 **if applicable, section 536.028. This section and chapter 536 are**
26 **nonseverable and if any of the powers vested with the general assembly**
27 **pursuant to chapter 536, to review, to delay the effective date, or to**
28 **disapprove and annul a rule are subsequently held unconstitutional,**
29 **then the grant of rulemaking authority and any rule proposed or**
30 **adopted after August 28, 2018, shall be invalid and void.**

 536.017. For purposes of this section, "taking of private property" shall
2 mean an activity wherein private property is taken such that compensation to the
3 owner of the property is required by the fifth and fourteenth amendments to the
4 Constitution of the United States or any other similar or applicable law of this
5 state. No department or agency shall transmit a proposed rule or regulation
6 which limits or affects the use of real property to the secretary of state until a
7 takings analysis has occurred. **Such takings analysis shall be performed by**
8 **the office of the attorney general.** The takings analysis shall evaluate
9 whether the proposed rule or regulation on its face constitutes a taking of real
10 property under relevant state and federal law. The department or agency shall
11 certify in the transmittal letter to the secretary of state that a takings analysis
12 has occurred. Any rule that does not comply with this section shall be invalid
13 and the secretary of state shall not publish the rule. A takings analysis shall not
14 be necessary where the rule or regulation is being promulgated on an emergency
15 basis[, where the rule or regulation is federally mandated, or where the rule or
16 regulation substantially codifies existing federal or state law].

 536.063. In any contested case:

2 (1) The contested case shall be commenced by the filing of a writing by
3 which the party or agency instituting the proceeding seeks such action as by law
4 can be taken by the agency only after opportunity for hearing, or seeks a hearing
5 for the purpose of obtaining a decision reviewable **either by a court or another**
6 **agency** upon the record of the proceedings and evidence at such hearing, or upon

7 such record and additional evidence, [either by a court or by another agency] **or**
8 **reviewable by a court in a de novo proceeding.** Answering, intervening
9 and amendatory writings and motions may be filed in any case and shall be filed
10 where required by rule of the agency, except that no answering instrument shall
11 be required unless the notice of institution of the case states such
12 requirement. Entries of appearance shall be permitted;

13 (2) Any writing filed whereby affirmative relief is sought shall state what
14 relief is sought or proposed and the reason for granting it, and shall not consist
15 merely of statements or charges phrased in the language of a statute or rule;
16 provided, however, that this subdivision shall not apply when the writing is a
17 notice of appeal as authorized by law;

18 (3) Reasonable opportunity shall be given for the preparation and
19 presentation of evidence bearing on any issue raised or decided or relief sought
20 or granted. Where issues are tried without objection or by consent, such issues
21 shall be deemed to have been properly before the agency. Any formality of
22 procedure may be waived by mutual consent;

23 (4) Every writing seeking relief or answering any other writing, and any
24 motion shall state the name and address of the attorney, if any, filing it;
25 otherwise the name and address of the party filing it;

26 (5) By rule the agency may require any party filing such a writing to
27 furnish, in addition to the original of such writing, the number of copies required
28 for the agency's own use and the number of copies necessary to enable the agency
29 to comply with the provisions of this subdivision hereinafter set forth. The
30 agency shall, without charge therefor, mail one copy of each such writing, as
31 promptly as possible after it is filed, to every party or his or her attorney who has
32 filed a writing or who has entered his or her appearance in the case, and who has
33 not theretofore been furnished with a copy of such writing and shall have
34 requested copies of the writings; provided that in any case where the parties are
35 so numerous that the requirements of this subdivision would be unduly onerous,
36 the agency may in lieu thereof (a) notify all parties of the fact of the filing of such
37 writing, and (b) permit any party to copy such writing;

38 (6) When a holder of a license, registration, permit, or certificate of
39 authority issued by the division of professional registration or a board,
40 commission, or committee of the division of professional registration against
41 whom an affirmative decision is sought has failed to plead or otherwise respond
42 in the contested case and adequate notice has been given under section 536.067

43 upon a properly pled writing filed to initiate the contested case under this
44 chapter, a default decision shall be entered against the licensee without further
45 proceedings. The default decision shall grant such relief as requested by the
46 division of professional registration, board, committee, commission, or office in the
47 writing initiating the contested case as allowed by law. Upon motion stating facts
48 constituting a meritorious defense and for good cause shown, a default decision
49 may be set aside. The motion shall be made within a reasonable time, not to
50 exceed thirty days after entry of the default decision. "Good cause" includes a
51 mistake or conduct that is not intentionally or recklessly designed to impede the
52 administrative process.

536.085. As used in section 536.087, the following terms mean:

2 (1) "Agency proceeding", an adversary proceeding in a contested case
3 pursuant to this chapter in which the state is represented by counsel, but does
4 not include proceedings for determining the eligibility or entitlement of an
5 individual to a monetary benefit or its equivalent, child custody proceedings,
6 eminent domain proceedings, driver's license proceedings, vehicle registration
7 proceedings, proceedings to establish or fix a rate, or proceedings before the state
8 tax commission;

9 (2) ["Party":

10 (a) An individual whose net worth did not exceed two million dollars at
11 the time the civil action or agency proceeding was initiated; or

12 (b) Any owner of an unincorporated business or any partnership,
13 corporation, association, unit of local government or organization, the net worth
14 of which did not exceed seven million dollars at the time the civil action or agency
15 proceeding was initiated, and which had not more than five hundred employees
16 at the time the civil action or agency proceeding was initiated;

17 (3)] "Prevails", obtains a favorable order, decision, judgment, or dismissal
18 in a civil action or agency proceeding;

19 [(4)] (3) "Reasonable fees and expenses" includes the reasonable expenses
20 of expert witnesses, the reasonable cost of any study, analysis, engineering report,
21 test, or project which is found by the court or agency to be necessary for the
22 preparation of the party's case, and reasonable attorney or agent fees. The
23 amount of fees awarded as reasonable fees and expenses shall be based upon
24 prevailing market rates for the kind and quality of the services furnished, except
25 that no expert witness shall be compensated at a rate in excess of the highest
26 rate of compensation for expert witnesses paid by the state in the type of civil

27 action or agency proceeding, and attorney fees shall not be awarded in excess of
28 seventy-five dollars per hour unless the court determines that a special factor,
29 such as the limited availability of qualified attorneys for the proceedings
30 involved, justifies a higher fee;

31 ~~[(5)]~~ (4) "State", the state of Missouri, its officers and its agencies, but
32 shall not include political subdivisions of the state.

536.087. 1. A party, **other than the state or agency**, who prevails in
2 an agency proceeding or civil action arising therefrom, brought by or against the
3 state, shall be awarded those reasonable fees and expenses incurred by that party
4 in the civil action or agency proceeding, [unless the court or agency finds that the
5 position of the state was substantially justified or that special circumstances
6 make an award unjust] **if the court or agency finds that the position of the**
7 **state falls within any of the subdivisions of subsection 2 of section**
8 **536.140 or was not substantially justified. The court or agency shall not**
9 **award such fees and expenses if the court or agency finds that special**
10 **circumstances make an award unjust.**

11 2. In awarding reasonable fees and expenses under this section to a party
12 who prevails in any action for judicial review of an agency proceeding, the court
13 shall include in that award reasonable fees and expenses incurred during such
14 agency proceeding [unless the court finds that during such agency proceeding the
15 position of the state was substantially justified, or that special circumstances
16 make an award unjust] **if the court finds that during such agency**
17 **proceeding the position of the state fell within any of the subdivisions**
18 **of subsection 2 of section 536.140 or was not substantially justified. The**
19 **court shall not award such fees and expenses if it finds that special**
20 **circumstances make an award unjust.**

21 3. A party seeking an award of fees and other expenses shall, within
22 thirty days of a final disposition in an agency proceeding or final judgment in a
23 civil action, submit to the court, agency or commission which rendered the final
24 disposition or judgment an application which shows that the party is a prevailing
25 party and is eligible to receive an award under this section, and the amount
26 sought, including an itemized statement from any attorney or expert witness
27 representing or appearing in behalf of the party stating the actual time expended
28 and the rate at which fees and other expenses are computed. The party shall also
29 allege that the position of the state [was not substantially justified] **falls within**
30 **one or more of the subdivisions of subsection 2 of section 536.140 or**

31 **was not substantially justified.** The fact that the state has lost the agency
32 proceeding or civil action creates no legal presumption that its position [was not
33 substantially justified] **falls within any of the subdivisions of section**
34 **536.140 or was not substantially justified unless the court has already**
35 **so ruled in its opinion following the inquiry provided for in subsections**
36 **1 and 2 of section 536.140.** Whether or not the position of the state **falls**
37 **within any of the subdivisions of subsection 2 of section 536.140 or** was
38 substantially justified shall be determined on the basis of the record [(], including
39 the record with respect to the action or failure to act by an agency upon which a
40 civil action is based)], which is made in the agency proceeding or civil action for
41 which fees and other expenses are sought, and on the basis of the record of any
42 hearing the court or agency deems appropriate to determine whether an award
43 of reasonable fees and expenses should be made, provided that any such hearing
44 shall be limited to consideration of matters which affected the agency's decision
45 leading to the position at issue in the fee application.

46 4. A prevailing party in an agency proceeding shall submit an application
47 for fees and expenses to the administrative body before which the party prevailed.
48 A prevailing party in a civil action on appeal from an agency proceeding shall
49 submit an application for fees and expenses to the court. The filing of an
50 application shall not stay the time for appealing the merits of a case. When the
51 state appeals the underlying merits of an adversary proceeding, no decision on
52 the application for fees and other expenses in connection with that adversary
53 proceeding shall be made under this section until a final and unreviewable
54 decision is rendered by the court on the appeal or until the underlying merits of
55 the case have been finally determined pursuant to the appeal.

56 5. The court or agency may either reduce the amount to be awarded or
57 deny any award, to the extent that the prevailing party during the course of the
58 proceedings engaged in conduct which unduly and unreasonably protracted the
59 final resolution of the matter in controversy.

60 6. The decision of a court or an agency on the application for reasonable
61 fees and expenses shall be in writing, separate from the judgment or order of the
62 court or the administrative decision which determined the prevailing party, and
63 shall include written findings and conclusions and the reason or basis
64 therefor. The decision of a court or an agency on the application for fees and
65 other expenses shall be final, subject respectively to appeal or judicial review.

66 7. If a party or the state is dissatisfied with a determination of fees and

67 other expenses made in an agency proceeding, that party or the state may within
68 thirty days after the determination is made, seek judicial review of that
69 determination from the court having jurisdiction to review the merits of the
70 underlying decision of the agency adversary proceeding. If a party or the state
71 is dissatisfied with a determination of fees and other expenses made in a civil
72 action arising from an agency proceeding, that party or the state may, within the
73 time permitted by law, appeal that order or judgment to the appellate court
74 having jurisdiction to review the merits of that order or judgment. The reviewing
75 or appellate court's determination on any judicial review or appeal heard under
76 this subsection shall be based solely on the record made before the agency or
77 court below. The court may modify, reverse or reverse and remand the
78 determination of fees and other expenses if the court finds that the award or
79 failure to make an award of fees and other expenses, or the calculation of the
80 amount of the award, was arbitrary and capricious, was unreasonable, was
81 unsupported by competent and substantial evidence, or was made contrary to law
82 or in excess of the court's or agency's jurisdiction. Awards made pursuant to this
83 act shall be payable from amounts appropriated therefor. The state agency
84 against which the award was made shall request an appropriation to pay the
85 award.

536.140. 1. The court shall [hear the case without a jury and, except as
2 otherwise provided in subsection 4 of this section, shall hear it upon the petition
3 and record filed as aforesaid] **first make an inquiry into the issues set forth**
4 **in subsection 2 of this section and shall hear the case on the petition**
5 **and record filed.**

6 2. The inquiry [may] **shall** extend to a determination of whether the
7 action of the agency:

- 8 (1) Is in violation of constitutional provisions;
- 9 (2) Is in excess of the statutory authority or jurisdiction of the agency;
- 10 (3) Is unsupported by competent and substantial evidence upon the whole
11 record;
- 12 (4) Is, for any other reason, unauthorized by law;
- 13 (5) Is made upon unlawful procedure or without a fair trial;
- 14 (6) Is arbitrary, capricious or unreasonable;
- 15 (7) Involves an abuse of discretion.

16 The scope of judicial review in all contested cases, whether or not subject to
17 judicial review pursuant to sections 536.100 to 536.140, and in all cases in which

18 judicial review of decisions of administrative officers or bodies, whether state or
19 local, is now or may hereafter be provided by law, shall in all cases be at least as
20 broad as the scope of judicial review provided for in this subsection; provided,
21 however, that nothing herein contained shall in any way change or affect the
22 provisions of [sections 311.690 and 311.700] **subsections 3 and 4 of this**
23 **section. At the conclusion of such inquiry, if the court finds that the**
24 **agency action does not fall within any of the subdivisions of this**
25 **section, the court shall issue its order affirming the agency's action,**
26 **which shall become final fifteen days thereafter unless one or more**
27 **parties apply for a de novo review under subsection 3 of this section.**
28 **If the court finds that the agency action does fall within any of the**
29 **subdivisions of this section, the court shall issue its order reversing or**
30 **modifying the agency's order, and may order the reconsideration of the**
31 **case in light of the court's opinion. Any party, other than the agency,**
32 **may make the application for a de novo review under subsection 3 of**
33 **this section within ten days of the court's order affirming or modifying**
34 **the agency's order.**

35 3. [Whenever the action of the agency being reviewed does not involve the
36 exercise by the agency of administrative discretion in the light of the facts, but
37 involves only the application by the agency of the law to the facts,] The court
38 [may] **shall** upon application of any party, **other than the agency**, conduct a
39 de novo review of [the] **an** agency decision. **Upon the demand of any party,**
40 **the de novo review shall be conducted as a civil trial before a jury.**

41 4. [Wherever under subsection 3 of this section or otherwise the court is
42 entitled to weigh the evidence and determine the facts for itself, the court may
43 hear and consider additional evidence if the court finds that such evidence in the
44 exercise of reasonable diligence could not have been produced or was improperly
45 excluded at the hearing before the agency. Wherever the court is not entitled to
46 weigh the evidence and determine the facts for itself, if the court finds that there
47 is competent and material evidence which, in the exercise of reasonable diligence,
48 could not have been produced or was improperly excluded at the hearing before
49 the agency, the court may remand the case to the agency with directions to
50 reconsider the same in the light of such evidence. The court may in any case hear
51 and consider evidence of alleged irregularities in procedure or of unfairness by
52 the agency, not shown in the record.] **In any such de novo review, the**
53 **Missouri rules of evidence shall apply, including but not limited to**

54 **admissibility of anything contained in the record filed in accordance**
55 **with 536.130. Either party may offer evidence as in any civil**
56 **trial. Prior to the de novo review, the court shall allow discovery in**
57 **accordance with the Missouri rules of civil procedure if requested by**
58 **any party.**

59 5. The court shall render judgment affirming, reversing, or modifying the
60 agency's order, and may order the reconsideration of the case in the light of the
61 court's opinion and judgment, and may order the agency to take such further
62 action as it may be proper to require; but the court shall not substitute its
63 discretion for discretion legally vested in the agency, unless the court determines
64 that the agency decision was arbitrary or capricious.

65 6. Appeals may be taken from the judgment of the court as in other civil
66 cases.

✓