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WEEKLY

Insurer stuck with \$6M award from '065 arbitration

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The Court of Appeals Western District said March 26 that an insurance company had no right to intervene in the latter stages of a case that resulted in a \$6 million award for an injured driver.

The case represents a new wrinkle in the already complex caselaw surrounding so-called 537.065 agreements, which allow a plaintiff to obtain a judgment against a defendant whose insurer has balked at providing coverage.

Until recently, such judgments typically were obtained at a bench trial before a circuit judge. But following a 2017 law change, some attorneys are taking the process outside the court system and having the matter decided by an arbitrator. Following the March 26 appellate ruling, that approach appears to remain viable.

The underlying case involves a 2017 car collision in which defendant Jeremy M. Otto was intoxicated and driving the wrong way on Interstate 29 in Andrew County, injuring plaintiff Jennifer A. Britt.

Otto was insured through American Family Mutual Insurance Company. Britt's attorneys offered to settle the case for "all applicable policy limits and payments." The insurer says it met that demand by offering the policy's \$100,000 limits. The plaintiff countered that the policy also covered "expenses incurred by an insured person for first aid to others," qualifying her for additional payments beyond the stated policy limits.

American Family filed a lawsuit in federal court in Kansas City seeking to enforce the settlement it contended had been reached. Britt and Otto argued that, by filing that action, the insurance company had opened the door for them to enter into an agreement under section 537.065 of the Revised Statutes of Missouri.

Under that law, a defendant whose insurer has declined to provide an unreserved defense allows the plaintiff to obtain a judgment against him. The plaintiff agrees to seek to collect the money solely from the defendant's insurance policy or other specified assets, and the defendant offers little or no argument at trial, often resulting in a large judgment. The plaintiff,

however, must prove that the insurance policy actually provided coverage before he or she can collect any of that money.

In 2017, in an attempt to rein in those one-sided judgments, the state legislature amended section 537.065 to require the parties to an '065 agreement to give the insurance company 30 days to intervene in "any pending lawsuit involving the claim for damages" before the judgment can be rendered.

But rather than file a lawsuit, Britt and Otto agreed to binding arbitration — a move the insurer decried in its appellate brief as an effort to "create and exploit a loophole" in the new law. In April 2018, the arbitrator entered an award for \$5,998,027. The amount included \$4 million in punitive damages, \$1.8 million for pain and suffering and about \$198,000 in various economic damages — including about \$35,000 in medical expenses for the disputed "first-aid" provision of the insurance policy.

American Family was informed of the arbitration hearing but declined to participate. Instead, the insurer sought to intervene when Britt asked the Jackson County Circuit Court to confirm the award. Judge Jennifer Phillips denied the insurer's motion to intervene and issued a judgment last May confirming the award and adding post-judgment interest.

The Western District found American Family's strategic unwillingness to participate to be fatal. Judge Cynthia L. Martin, writing for the panel, said that because American Family was notified of the arbitration proceeding but declined to take part, it had no right to intervene in the later confirmation action.

She added that even if the insurer had intervened at that stage there would have been little for it to do, as the circuit court would have no authority to re-determine any facts or legal conclusions that the arbitrator had reached. Judges Thomas H. Newton and Gary D. Witt concurred.

Clay Crawford of Foland, Wickens, Roper, Hofer & Crawford, an attorney for American Family, declined to comment on the ruling. In its brief, the insurer said it didn't take part in the arbitration proceeding because doing so would have required it to dismiss its federal action to enforce the settlement agreement.

But Thomas Hershewe of Dollar, Burns & Becker, an attorney for Britt, said the insurer could have raised those issues before the arbitrator, who ultimately ruled that the parties hadn't finalized the settlement.

"All affirmative defenses were open," Hershewe said. "They would have been allowed to ask the arbitrator to determine there was a pending settlement already."

Although its holding was narrow, the Western District's opinion detailed the case's unanswered questions. Martin was careful to say that neither the validity of the '065 agreement nor the arbitrator's legal conclusions were at issue on appeal, and she repeatedly declined to opine on how arbitration fit into the intervention law.

In an extensive footnote, Martin that "resolution of that question is not as easy as it seems," as arbitration proceedings are controlled by a contract to which the insurer is not a party.

"There is a distinct possibility that the General Assembly simply did not contemplate arbitration proceedings when it enacted section 537.065.2, as it likely did not contemplate that following enactment of section 537.065.2, the parties to a section 537.065.1 contract would elect to submit their dispute to arbitration in lieu of filing an action in a court of law," she wrote. "We leave the resolution of this question to a future case in which the issue is properly raised as a claim of error on appeal."

State lawmakers are contemplating that scenario now; a bill awaiting debate in the Senate would make such arbitration awards unenforceable unless the insurer agrees to it in writing.

In the meantime, Britt has a garnishment suit in Jackson County seeking to recover the \$6 million award from American Family. The insurer's federal suit to enforce the purported settlement has been stayed pending that case's outcome.

The Western District case is *Britt v. Otto*, WD81830. The legislative bill is SB 49.



Thomas Hershewe