THE BEST DEAL IN TOWN: BUYING PEACE FROM EXCESS LITIGATION BY INTERPLEADING POLICY LIMITS

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Recent amendments to Missouri's interpleader statute (RSMo § 507.060) provide significant protection for liability insurers seeking to avoid risky, time-consuming, and expensive excess litigation. However, the new amendments pose new questions and a thoughtful litigation and claims handling strategy is imperative.

Liability insurers often encounter a difficult situation in which multiple claimants are likely to assert claims against an insured and the value of the likely claims exceeds available policy limits. When multiple claims on a liability policy are anticipated, and the coverage isn't sufficient, the insurer is left with the unenviable task of determining how to best protect its insured's interests with the limited coverage available. In this type of scenario, if the first claimant among many makes a settlement offer for policy limits, would the insurer risk allegations of bad faith in accepting?

After all, accepting the first offer may leave the insured without remaining policy limits to resolve offers from a second or third claimant. Or, would the insurer risk an allegation of bad faith by rejecting the first policy limits settlement offer? Rejecting the offer would almost certainly result in multiple adverse judgments potentially in excess of the available limits. Either accepting or rejecting the first offer will lead to a situation where the insurer could be second-guessed, creating a real

potential for excess litigation.

While interpleader has always been an option to liability insurers, recent amendments to the statute provide additional guidance and explicit protections. The amendments provide, in part, that if an interpleader action is timely filed and the liability insurer deposits with the court all applicable coverage, the insurer "shall not be liable to any insured or for any amount in excess of the plaintiff's contractual limits of coverage in the interpleader or any other action." RSMo § 507.060.4

The insurer must continue to offer the insured a defense even after the policy limits are paid, notwithstanding contrary language in the policy. *Id*. With the new statute, the insurer can interplead and, by statute, foreclose a bad faith action from the insured or any party to the interpleader action. Or, to put it simply, an insurer may choose to promptly pay its policy limits and buy its peace.

However, the new amendments to the interpleader statute raise new questions and create new risks.

A thoughtful litigation and claims handling strategy should consider the following:

- ***First***, the interpleader statute only explicitly protects an insurer from lawsuits brought by the insured and parties named as defendants in the interpleader action. The risk, of course, is that a claimant will be missed and will be free to attempt to assert exotic claims against the insurer. To minimize the risk, it is imperative that insurers identify all potential claimants, and then, once the interpleader is filed, use litigation discovery tools to ensure that all proper claimants are identified.
- ***Second***, have all the policy limits (including potential prejudgment interest) been identified? If there is doubt, consider adding a count for a declaratory judgment to the action.
- ***Third***, ensure the interpleader action is timely. What triggers the 90-day period to start interpleader proceedings? When a claimant writes, "would you consider accepting a policy limits offer?" is the 90-limit triggered? Claims staff should be on the lookout for ambiguous offers and settlement opportunities in potential interpleader scenarios.
- ***Fourth***, consider naming lienholders as parties to the interpleader action. The interpleader statute notes that both those with claims against the insured and those with direct claims against the insurer may be appropriate defendants. One implication may be that the Missouri legislature anticipated that lienholders could be appropriate interpleader defendants.
- ***Fifth***, consider what obligations, if any, may be owed to other interested insurers. The interpleader statute does not explicitly offer protections from potential claims of other insurers and, as such, evaluating the other insurers' interests, policies, and likely responses are certainly a worthwhile step.

The types of scenarios where interpleader is appropriate are vast, and the risks of not using the mechanism where appropriate are substantial. While there certainly will be instances where an insurer may not want to interplead (e.g., where liability is doubtful, where the value of the continued provision of a defense outweighs the excess limits, and where negotiations are likely to resolve all

substantial claims within policy limits), an interpleader action often offers the safest path forward.