STATE OF MISSOURI

DEPARTMENT OF COMMERCE & INSURANCE

P.O. Box 690, Jefferson City, Mo. 65102-0690

INSURANCE BULLETIN 26-13

Insurance Policy Mandatory Arbitration Clauses

Issued: November 10, 2026

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To: All licensed Missouri insurance producers

From: Angela L. Nelson, Director

Re: Insurance Policy Mandatory Arbitration Clauses

The Department issues this Bulletin to advise licensed Missouri insurance producers of *Foresight Energy, LLC v. Ace American Insurance Company*, 663 F. Supp. 3d 980 (E.D. Mo. 2023). The Department recommends that producers review whether policies issued in Missouri contain a mandatory arbitration provision subject to international law and advise their customers of the impact of *Foresight* on such provision, specifically that it may be valid and enforceable.

Under Missouri law, specifically Section 435.350, RSMo, insurance policies that contain a mandatory arbitration clause requiring arbitration to resolve controversies existing between an insurer and a policyholder are invalid and unenforceable. However, in 2023, a United States District Court ruled that the invalidity and unenforceability of an insurance policy's mandatory arbitration clause is not absolute.

In *Foresight*, a coal producer operating in St. Louis sustained significant fire damage to its coal mines, causing over $115 million in losses. In resolving the resulting claims, several of the coal producer's insurers sought to invoke the mandatory arbitration clauses contained in their insurance policies. The insurance policies' mandatory arbitration clauses were subject to an international treaty, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Due to the disagreement over the mandatory arbitration clauses, the coal producer filed suit seeking to invalidate them pursuant to Section 435.350, RSMo, among other claims.

In determining whether to enforce the mandatory arbitration clauses against the coal producer, the court concluded that Section 435.350, RSMo, did not reverse-preempt the Convention under the McCarran-Ferguson Act, a federal law that permits state laws to reverse-preempt the Acts of Congress where the state law specifically regulates the business of insurance, because the McCarran-Ferguson Act only applies to domestic legislation (federal and state), and thus not to international treaties. As such, the court ruled that the mandatory arbitration clauses were enforceable against the coal producer and referred the parties to arbitration. It should be noted that the court previously reached the opposite result in a substantially identical case involving the same coal producer and many of the same insurers in which the court examined the same interplay between the Convention, the McCarran-Ferguson Act, and Section 435.350, RSMo (*Foresight Energy, LLC v. Certain London Mkt. Ins. Companies*, 311 F. Supp. 3d 1085 (E.D. Mo. 2018)). In *Foresight,* the court departed from its previous ruling due in part to the fact that the policies at issue were not governed by Missouri law (meaning Section 435.350, RSMo, was inapplicable), but rather contained New York or England choice of law provisions, meaning the coal producer was well aware of its arbitration commitments under the policy (as the court stated in *Foresight*, "[t]he Court is not persuaded that Missouri public policy was meant to relieve a sophisticated party from its contractual commitments in this manner." *Foresight*, 663 F. Supp. 3d at 987).

Due to the ruling in *Foresight,* policies issued in Missouri that contain a mandatory arbitration provision subject to international law may be found valid and enforceable against a policyholder. As such, producers should review policies issued in Missouri to determine if any contain a mandatory arbitration provision subject to international law and should inform impacted policyholders of *Foresight* and its potential impact on such arbitration provision.

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