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Jason R. McClitis

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Missouri's Second Injury Fund – Should It Stay or Should It Go?: An Examination of the Question Facing the Missouri State Legislature

I. INTRODUCTION

Missouri's Second Injury Fund ("Fund") is a workers' compensation arrangement that provides state assistance to employers by reducing their liability to employees who have preexisting disabilities and are subsequently injured on the job.¹ Throughout 2007 and 2008, the Fund was the subject of numerous headlines and debates that involved all three branches of the state government.

First, the state's highest court delivered the controversial decision of *Schoemehl v. Treasurer of Missouri*.² Here, the Missouri Supreme Court held that the surviving dependents of a deceased employee were entitled to disability benefits from the Fund under state law.³ Criticism immediately followed this opinion, as it permitted surviving dependents to step into the shoes of deceased employees and receive benefits for a disability that died with the employee.⁴

Following *Schoemehl*, the state's executive officer, then-Governor Matt Blunt, alerted state agencies that the Fund was nearing insolvency.⁵ The Governor added that the decision in *Schoemehl* only complicated the solvency issue because it extended the Fund's disability benefits liability beyond the employee to surviving dependents.⁶ Audits and actuarial reviews conducted after the Governor's alert confirmed concerns about the Fund's

1. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App. E.D. 1995), *overruled by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc).

2. 217 S.W.3d 900 (Mo. 2007) (en banc), *superseded by statute*, H.R. 1883, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008), *as recognized in* *Bennett v. Treasurer of Mo.*, 271 S.W.3d 49 (Mo. App. W.D. 2008).

3. *Id.* at 901-02.

4. *See, e.g.*, Mary Anne Lindsey & James B. Kennedy, *Employee Dies, Benefits Survive*, RISK MGMT., Sept. 1, 2007, at 10, *available at* <http://www.allbusiness.com/legal/trial-procedure-decisions-rulings/8911206-1.html>.

5. *See* SUSAN MONTEE, MO. STATE AUDITOR, LABOR AND INDUSTRIAL RELATIONS: SECOND INJURY FUND, REPORT NO. 2007-19, at 27 (2007) (Governor's letter requesting audit), *available at* <http://www.auditor.mo.gov/press/2007-19.pdf>.

6. *Id.*

solvency and projected that its resources would be depleted as early as the end of 2008.⁷

In response to growing concerns, the state legislature attempted to address the *Schoemehl* decision and the Fund's imminent insolvency. Subsequently, the legislature only addressed the *Schoemehl* decision by instituting a "fix" that abrogated future application of the *Schoemehl* decision.⁸ Despite numerous proposals, no legislation was passed to address the financial distress of the Fund. It is now the onus of the 2009 state legislature to decide what course of action to take regarding the Fund's solvency.

This Law Summary will start by explaining the concepts underlying the Fund within the workers' compensation system. It will then move to an in-depth look at the Fund's recent developments in the judicial, executive, and legislative arenas. Finally, this Law Summary will analyze and attempt to answer the ultimate question facing the 2009 state legislature: what should be done with the Fund? This will include an examination of the Fund's future liability under its current claims and the *Schoemehl* decision, the need for the Fund in the wake on anti-disability discrimination laws, and adjustments and alternatives for the legislature to consider for increasing the Fund's revenues and decreasing its expenditures.

II. LEGAL BACKGROUND

A. Workers' Compensation Generally

Today's workers' compensation laws originated from an early 1900's movement against job-related injuries and deaths resulting from worker interaction with machinery and the inadequate remedies for injured workers in the common law tort system.⁹ As a result, workers' compensation laws were established throughout the country to "provide a limited and exclusive remedy for employees injured in work-related accidents."¹⁰

7. See generally MONTEE, *supra* note 5; PRICEWATERHOUSECOOPERS LLP, *MISSOURI SECOND INJURY FUND: ACTUARIAL REVIEW 1, 3* (2007), available at http://www.dolir.mo.gov/WC/2nd_Injury_Fund.pdf [hereinafter *Actuarial Review*].

8. See 2008 Mo. Laws 442.

9. Amanda M. Jones, Comment, *Hawai'i's Workers' Compensation Scheme: An Employer's License To Kill?*, 29 U. HAW. L. REV. 211, 213-15 (2006). Prior to workers' compensation laws, injured workers rarely succeeded in suits against their employers primarily due to three common law defenses: "the fellow servant rule, contributory negligence, and assumption of risk." *Id.* at 214. The fellow servant rule proved to be most troublesome to injured workers' claims, as it released employers from liability where the injury resulted from the negligence of a fellow employee. *Id.*

10. *Id.* at 215.

In 1927 Missouri established its first set of workers' compensation laws, which provided a no-fault system of compensation for workers.¹¹ The purpose of workers' compensation laws is to satisfy injured workers' need for financial support that is not always adequately met by private insurance and tort claim awards, and to provide a less costly and more efficient process than such traditional remedies.¹² The workers' compensation system provides an alternative system to ameliorate losses sustained by employees received in the scope of work.¹³ In application, the workers' compensation system serves a "dual role" – it protects employers by limiting monetary awards and tortious lawsuits against them, while simultaneously providing employees with medical treatment for work-related injuries, payment of lost wages, additional compensation for permanent disabilities, and physical rehabilitation.¹⁴

B. The Second Injury Fund Concept

Within the workers' compensation system, the Missouri Legislature also created a scheme called the Second Injury Fund to assist employers in compensating employees with preexisting disabilities who were injured on the job. Created in 1943, the Fund operated to financially assist the physically handicapped and individuals with existing work-related disabilities and aimed to encourage employers to hire and retain previously disabled individuals.¹⁵ Specifically, the Fund also sought to limit the liability of employers in situations where an employee with a preexisting disability was injured at work and subsequently incurred a more severe disability.¹⁶ Prior to the creation of the Fund, employers were hesitant to hire such individuals due to the possibility that the preexisting disability would combine with a later on-the-job injury to produce an overall greater disability, and accordingly, increase employer liability.¹⁷ The Fund alleviated these concerns by assuring

11. *Bethel v. Sunlight Janitor Serv.*, 551 S.W.2d 616, 618 (Mo. 1977) (en banc); *Bi-State Dev. Agency v. Watson*, 40 S.W.3d 403, 405 (Mo. App. E.D. 2001).

12. *Richardson v. Belcher*, 404 U.S. 78, 83-84 (1971); Walter J. Ashbrook, Comment, *Defining "Employee" Within Arizona's Workers' Compensation Statute: An Argument for Inclusion*, 40 ARIZ. ST. L.J. 691, 694 (2008).

13. *Bethel*, 551 S.W.2d at 618. Losses sustained by employees also could include losses that were indirectly inflicted on the employees' dependents. *Id.*

14. See *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 556 (Mo. App. E.D. 2004); MO. CODE REGS. tit. 8, § 50-1.010 (2001).

15. MONTEE, *supra* note 5, at 3; see also James B. Slusher, *The Second Injury Fund*, 26 MO. L. REV. 328, 328 (1961).

16. See *Roby v. Tarlton Corp.*, 728 S.W.2d 586, 589 (Mo. App. E.D. 1987) (citing *Meilves v. Morris*, 422 S.W.2d 335, 338 (Mo. 1968)).

17. *Wuebeling v. W. County Drywall*, 898 S.W.2d 615, 617-18 (Mo. App. E.D. 1995). Slusher provided an example of the employer's dilemma: "A man with only one leg might easily become permanently and totally disabled if he were to lose his other leg in the roundhouse, and his employer might choose to forego the risk of

employers that they would not be exposed to a greater amount of liability than that which resulted from the subsequent work-related injury.¹⁸ Thus, liability for an employee's injury is shared between the employer and the Fund – the employer is responsible for the portion of the disability that can be attributed to the work-related injury, while the Fund is responsible for the remaining disability.¹⁹

The Fund primarily provides compensation to employees with a preexisting disability who sustain either a work-related permanent partial disability (“PPD”) or a permanent total disability (“PTD”).²⁰ Missouri workers’ compensation law defines permanent partial disability as “a disability that is permanent in nature and partial in degree.”²¹ In other words, it is a disability which is permanent in its duration, but is partial in the sense that the disability impairs the individual only to a degree and does not prevent the individual from acquiring some form of gainful employment.²² An individual that is found to be PPD receives benefits in a fixed amount for a predetermined number of weeks.²³

PTD is defined as an “inability to return to *any* employment and not merely [an] inability to return to the employment in which the employee was engaged at the time of the accident.”²⁴ The phrase “inability to return to any employment” refers to the employee’s inability to perform the usual duties of the employment in the manner that an average person engaged in such employment customarily performs such duties.²⁵ The words “any employment” mean “any reasonable or normal employment” or occupation, as it is not necessary that the employee be completely inactive in order to meet this statutory definition.²⁶ Individuals who are found to be PTD receive benefits in a flexible manner as the benefits are based on the continuance of

payments for this permanent and total liability by using the simple expedient of hiring another switchman.” Slusher, *supra* note 15, at 328.

18. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App. E.D. 1995).

19. *Roller v. Treasurer of Mo.*, 935 S.W.2d 739, 741 (Mo. App. S.D. 1996).

20. *See* MONTEE, *supra* note 5, at 5. PPD and PTD compensation made up 91.4% of the Fund’s expenditures in 2006, totaling over \$62 million. *Id.*

21. *See* MO. REV. STAT. § 287.190.6(1) (Supp. 2008). Missouri courts have determined that a “[p]ermanent partial disability [determination] is not dependent on the employee’s inability to work . . . [and is] ‘provided only after temporary disability compensation is discontinued.’” *See* Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 910 (Mo. App. E.D. 2008) (internal citations omitted) (citing *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 285 (Mo. App. E.D. 1997); quoting *Schuster v. State Div. of Employment Sec.*, 972 S.W.2d 377, 381 (Mo. App. E.D. 1998)).

22. Slusher, *supra* note 15, at 328.

23. *See* MO. REV. STAT. § 287.190.1.

24. *See* MO. REV. STAT. § 287.020.6 (Supp. 2008).

25. *Kowalski v. M-G Metals & Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. S.D. 1982).

26. *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo. App. E.D. 1990).

the employee's life and the particular disability that prevents the employee from working.²⁷

Section 287.220.1 of the Missouri Revised Statutes establishes the requirements for employees claiming compensation from the Fund for both PPD and PTD disabilities.²⁸ For PPDs, a parsing of the statute makes it clear that an employee seeking Fund compensation must first establish a preexisting PPD and a subsequent work-related PPD, both of which must meet certain minimum statutory requirements.²⁹ Next, and most importantly, the employee must show that the combination of the independent and preexisting disabilities resulted in a substantially greater disability than the sum of the independent disabilities.³⁰ This showing is critical to qualifying for the Fund. If the two disabilities do not combine to create a greater overall disability, the Fund's liability is not triggered and the employee is limited to recovery from the employer for the degree or percentage of disability which would have resulted solely from the work-related injury without consideration of the preexisting disability.³¹

The following example illustrates the typical application of the Fund's requirements for PPDs. John Doe, employed by the local lumber yard, previously suffered the loss of his right thumb (i.e., a preexisting PPD). One day, while completing his usual task of chopping down trees, John mistakenly leaves his left thumb in the path of a moving axe and suffers the loss of his left thumb (i.e., a subsequent work-related disability). Independently, the loss of each thumb constitutes a PPD; however, the loss of both thumbs combines to create a substantially greater permanent disability as John will not be able to perform any tasks requiring the use of at least one thumb, such as swinging an axe with a sufficiently tight grip.³²

27. See MO. REV. STAT. § 287.200.1 (Supp. 2008).

28. See MO. REV. STAT. § 287.220.1 (2000).

29. *Id.* For the preexisting PPD, the employee must show the disability is: of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation.

Id. For the subsequent PPD, the employee must show that the disability is "an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability." *Id.*

30. *Id.*

31. *Id.* "[T]he employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability." *Id.*

32. This example has been adapted from Slusher, *supra* note 15, at 329-30.

As a result, the employer would be liable for the loss of John's left thumb, the subsequent work-related disability, while the Fund would be liable for the difference between the loss of John's left thumb and John's resulting disability from the combination of the two disabilities, the loss of both thumbs.

Section 287.220.1 establishes less restrictive requirements for situations when the employee's injury results in permanent total disability. Under this section, the employee must show that the two disabilities combine to create a PTD; no minimum requirements apply.³³ If the employee can make this showing, the employer is liable solely for the disability resulting from the subsequent work-related injury and the Fund is liable for the remainder of compensation that would be due under PTD.³⁴

Returning to the previous example, assume that John Doe previously suffered the loss of his right arm at his shoulder, and subsequently suffers the loss of his left arm at his shoulder in a work-related accident. Under these facts, it is quite possible that this could constitute a PTD because the loss of both arms could result in an inability to return to any employment.³⁵ If it is determined that John suffered a PTD, John's employer would be liable for the loss of his left arm, and the Fund would be liable for the remainder due to John for PTD.³⁶

Since 1943, the Fund has undergone some minor changes, but its underlying concept has remained unchanged. In recent years, however, Missouri's Second Injury Fund has been examined and altered by the judiciary and legislature, and concerns about the solvency of the Fund have emerged. It appears that major changes are on the way for the state's Fund, including the possibility of its termination.

III. RECENT DEVELOPMENTS

A. Missouri Supreme Court's Decisions in *Schoemehl* and *Strait*

In *Schoemehl v. Treasurer of Missouri*,³⁷ the Missouri Supreme Court's holding created a new method of recovery against the Fund for dependents of deceased employees.³⁸ In *Schoemehl*, an employee sustained a work-related

33. See MO. REV. STAT. § 287.220.1.

34. *Id.*

35. Under Kansas workers' compensation law, the "loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, [constitutes] a permanent total disability." See KAN. STAT. ANN. § 44-510c(a)(2).

36. See MO. REV. STAT. § 287.220.1.

37. 217 S.W.3d 900 (Mo. 2007) (en banc), *superseded by statute*, H.R. 1883, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008), *as recognized in Bennett v. Treasurer of Mo.*, 271 S.W.3d 49 (Mo. App. W.D. 2008).

38. *Id.* at 903.

knee injury that rendered him permanently and totally disabled in combination with his preexisting disabilities.³⁹ Subsequently, the employee died from causes unrelated to his injury, and the employee's sole dependent, his wife, brought a claim for benefits from the Fund.⁴⁰ The dependent was awarded PTD benefits from the Fund from the time of the employee's injury until the date of the employee's death, a total of less than five weeks.⁴¹ The dependent appealed, arguing she was entitled to PTD benefits from the Fund for the remainder of her life because she was a dependent and therefore an "employee" under § 287.020.1.⁴² The Missouri Court of Appeals, Southern District disagreed, however, ruling that because an employee is not entitled to compensation for PTD benefits after death, the dependents of an employee are, likewise, not entitled to such benefits after the date of an employee's death.⁴³

The Missouri Supreme Court granted transfer and a majority of four held that where an injured employee receiving PTD benefits dies from causes unrelated to the work-related injury, the right to compensation for such benefits survives to the dependents of that injured employee.⁴⁴ In reaching this decision, the majority analyzed three statutory sections,⁴⁵ relying largely on language from one of these sections, § 287.230.2.⁴⁶ Specifically, this section provided that when an employee is entitled to compensation and the employee dies from a cause unrelated to his work injury, compensation ceases "unless there are surviving dependents at the time of death."⁴⁷ Further, the court found that nothing distinguished compensation for PTD benefits from other benefits, and that the definition of "employee" included the

39. *Id.* at 901; Fred Schoemehl, Injury No. 01-046332, Labor & Indus. Relations Comm'n (Dec. 9, 2005), available at <http://www.dolir.mo.gov/LIRC/wcdecisions/WCDEC05/Schoemehl,%20Fred.htm>.

40. *Schoemehl*, 217 S.W.3d at 901.

41. *Id.*

42. *Id.*; MO. REV. STAT. § 287.020.1 (Supp. 2008). The definition of employee under § 287.020.1 provides:

The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations. Except as otherwise provided in section 287.200, any reference to any employee who has been injured shall, when the employee is dead, also include his dependents, and other persons to whom compensation may be payable.

Id.

43. *Schoemehl v. Treasurer of Mo.*, No. 27418, 2006 WL 1229637, *6-7 (Mo. App. S.D. May 09, 2006).

44. *Schoemehl*, 217 S.W.3d at 901-02.

45. *Id.* (discussing MO. REV. STAT. §§ 287.230.2, 287.200.1, 287.020.1 (2000)).

46. *Id.* at 901-03.

47. *Id.* at 901.

employee's dependents, even after the employee's death.⁴⁸ Thus, because the employee's dependent was legally considered an "employee," she was entitled to continued payment of the employee's PTD benefits.⁴⁹ As a result, the court reversed the award and remanded the claim.⁵⁰

Judge Stith dissented, finding that the majority incorrectly interpreted the workers' compensation statutes.⁵¹ Specifically, Judge Stith criticized the majority for "improperly excis[ing]" statutory language that limited compensation benefits to the lifetime of the employee "only during the continuance of such disability."⁵² She argued that the injury and resulting disability to the deceased employee necessarily discontinued upon his death, and thus, the plaintiff was not entitled to PTD payments.⁵³ Additionally, in response to the plaintiff's equal protection claim arguing that dependents of employees with permanent *total* disabilities are treated worse than dependents of employees with permanent *partial* disabilities, Judge Stith stated that the calculation of benefits distinction "reflects the differing nature of the injuries for which the awards are made."⁵⁴ She explained that PPD benefits are given a fixed value to reflect the average number of weeks an injury causes the worker to suffer, while PTD benefits are flexible to ensure that the injured person will receive benefits if the disability continues.⁵⁵ Thus, she concluded, the distinction between the calculations of benefits is rational.⁵⁶

After the *Schoemehl* decision was handed down, some predicted it would have a far-reaching impact on the workers' compensation system.⁵⁷ As applied, the decision allowed surviving dependents to step into the shoes of deceased employees and receive PTD benefits for the lifetime of those dependents.⁵⁸ This creates a significant increase in the Fund's liability because where the Fund is responsible for PTD benefits and the employee dies with young dependents, the Fund would be responsible for benefits that could potentially continue for decades after the death of the disabled employee. Accordingly, determining the value of the disability benefits for

48. *Id.* at 902.

49. *Id.* at 903.

50. *Id.*

51. *Id.* at 903-04 (Stith, J., dissenting). Judges Limbaugh and Price joined. *Id.* at 903.

52. *Id.* at 904 (quoting *Leibson v. Henry*, 204 S.W.2d 310, 315 (Mo. 1947) (en banc)).

53. *Id.*

54. *Id.*

55. *Id.* at 904-05. Judge Stith supported the flexible calculation of permanent partial disability benefits "because the legislative scheme presumes that the disability preventing the employee from working will continue until the injured person dies, and a person's date of death is not predictable." *Id.* at 905.

56. *Id.* at 905.

57. *Lindsey & Kennedy*, *supra* note 4.

58. *Id.*

purposes of exposure and settlement now requires consideration of the injured employee's dependents and their potential life spans.⁵⁹

Commentators also predicted that the decision would allow cases awarding PTD benefits to be re-opened to pay benefits to the surviving dependents of deceased employees.⁶⁰ The Missouri Supreme Court addressed this issue in *Strait v. Treasurer of Missouri*.⁶¹ In *Strait*, the court determined that the *Schoemehl* decision is applicable to a deceased employee's disability benefits when the employee's claim for benefits is pending in the workers' compensation system or is pending on appeal.⁶² Thus, the *Schoemehl* decision does not apply to claims for benefits that are final and closed.⁶³ The court reasoned that prospective application of the *Schoemehl* opinion is proper for all actions pending on, and prospective to, the date on which the opinion was issued.⁶⁴ The plaintiff in *Strait* brought a claim for the lifetime PTD benefits of a deceased employee.⁶⁵ The court found that since the plaintiff's claim was still pending on the date of *Schoemehl* decision, *Schoemehl* applied and the dependents of the deceased employee were entitled to disability benefits from the Fund.⁶⁶

Judge Limbaugh dissented, arguing that *Strait* brought to light some of the "unintended and unforeseen consequences of this Court's wrongly decided opinion in *Schoemehl*."⁶⁷ Specifically, he noted that the majority's holding, which determined entitlement to disability benefits depending on whether the original claim is still pending or final and closed, was inconsistent with *Schoemehl* and workers' compensation statutes as it "limits payments only to those dependents with the perverse good fortune of having their decedents die while the case was still pending."⁶⁸ Limbaugh concluded that the majority's holding was, in his opinion, "simply a poor invention designed . . . in an effort to minimize the mischief caused by the bad decision in *Schoemehl*" and that *Schoemehl* should have been overturned.⁶⁹

59. *Id.*

60. *Id.*

61. 257 S.W.3d 600 (Mo. 2008) (en banc).

62. *Id.* at 602-03.

63. *Id.*; see also *Buescher v. Mo. Highway & Transp. Comm'n*, 254 S.W.3d 105, 108 (Mo. App. W.D. 2008) (finding that "[o]nce the time for appeal has expired, the [Labor and Industrial Relations] Commission has no authority to further delineate, expound upon, or enforce the award.").

64. *Strait*, 257 S.W.3d. at 602-03.

65. *Id.* at 600-01.

66. *Id.* at 602.

67. *Id.* at 603 (Limbaugh, J., dissenting). Judges Price and Breckenridge joined.

Id.

68. *Id.* at 604.

69. *Id.*

B. The Financial Status of the Second Injury Fund

Shortly after the decision in *Schoemehl*, concerns arose regarding the solvency of the Fund. In January 2007, then-Missouri Governor Matt Blunt requested the State Auditor's Office ("SAO") conduct an audit of the Fund.⁷⁰ Blunt stated that the Fund's resources may soon be depleted and that the *Schoemehl* decision could potentially complicate the issue, as benefits paid from the Fund would be extended to dependents of covered employees for the duration of their lives following the employee's death.⁷¹

In its official audit, the SAO surmised that the Fund would likely become insolvent during 2008.⁷² The SAO determined that changes to the workers' compensation law in 2005, which capped the Fund's surcharge rate at 3%, limited the ability of the Fund to generate sufficient revenue to cover expenditures.⁷³ Prior to the 3% surcharge cap in 2005, the surcharge rate formula was adjusted on a yearly basis to ensure sufficient funds for expenditures plus a 10% cushion.⁷⁴ Considering the history of the surcharge rate, the SAO found that the rate rarely exceeded 3% in the past.⁷⁵ As a result, the SAO concluded that the Fund was unable to accumulate an adequate amount of finances because the surcharge rate was not variable above 3%.⁷⁶

The SAO audit also addressed the decision in *Schoemehl* and concluded that the impact of *Schoemehl* on the Fund was unclear because no information regarding the existence of dependents was kept on file for claimants.⁷⁷ However, regarding the short-term impact of *Schoemehl* through 2009, the audit found the impact would likely be minimal due to the low number of PTD recipients and the even lower number of recipients who die each year.⁷⁸ The SAO reasoned that the short-term impact would be minimal because there were only 745 active claims of PTD benefits being paid by the Fund that could potentially result in additional liability from the decision.⁷⁹ Additionally, the SAO stated that the impact would be slight because, on

70. MONTEE, *supra* note 5, at 27 (Governor's letter requesting audit).

71. *Id.*

72. *Id.* at 9.

73. *Id.* at 10; *see also* S. 1 & 130, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005); MO. REV. STAT. § 287.715.2 (Supp. 2008).

74. MONTEE, *supra* note 5, at 10.

75. *Id.* "Historically, the surcharge rate has exceeded 3 percent in 3 of the previous 11 years, with a high of 4 percent in 2003 and 2004." *Id.*

76. *Id.* at 15.

77. *Id.* at 12. This audit was issued before the decision in *Strait*. *See supra* notes 61-69 and accompanying text.

78. MONTEE, *supra* note 5, at 15.

79. *Id.* These figures were as of January 30, 2007. *Id.* at 12. The Audit also noted that for these 745 cases, "the division paid \$17.8 million on those cases . . . , for an average of approximately \$23,900 per case." *Id.*

average, only thirteen PTD payment recipients died each year.⁸⁰ Thus, in the short-term, *Schoemehl* would only affect the recipients who died from 2007 through 2009, which, if came out as averaged, would be thirty-nine recipients.

Despite the findings of the SAO, then-Governor Matt Blunt determined in April 2007 that the SAO audit was inadequate due to the scope of the study and its lack of recommendations, and requested an independent actuarial review of the Fund.⁸¹ The independent actuarial review, completed in July 2007, found that the Fund would become insolvent in 2009, assuming the Fund's surcharge rate remained capped at 3%.⁸² Much like the audit, the actuarial review found that the 3% surcharge cap was the major cause of the Fund's projected insolvency.⁸³ The review stated that "it does not appear that there are many avenues available to avert the insolvency [of the Fund] short of increasing the maximum rate of assessment."⁸⁴ To allow the Fund to remain balanced at zero, the actuarial review estimated that the Fund surcharge could be set a 3.69% in 2009, and increased to 3.92% in 2012.⁸⁵

The actuarial review also made a number of findings concerning the potential effects of *Schoemehl* and the liability of the Fund if it should stop accepting claims. Regarding the effect of *Schoemehl*, the actuarial review projected that the decision would have a "very minor" financial impact on the Fund through 2012.⁸⁶ However, the actuarial review also indicated that the liability of the Fund would grow significantly after 2012 because the costs due to *Schoemehl* would start to be paid at the end of the original claimants' PTD awards.⁸⁷ The actuarial review also projected the liability of the Fund if it were to stop accepting claims or be terminated. The review estimated that if claims were no longer accepted after the 2008 year, the Fund would still be liable to disability benefits claimants for \$992 million nominally, or \$644 million in present day value.⁸⁸

80. *Id.* The average was computed using the years 2001 through 2006. *Id.*

81. *See Actuarial Review, supra* note 7. Governor Blunt requested a study that concentrated on the state's expenditures to determine what is causing their growth, along with a historical perspective of the Fund since 1993. *Id.* at 1.

82. *Id.* at 3.

83. *Id.*

84. *Id.*

85. *Id.* at 5.

86. *Id.* According to the review's calculations, the Fund will pay out about \$4 million more in benefits due to *Schoemehl* from 2008 to 2012. *Id.* at 4-5 tbls.2a & 2b.

87. *Id.* at 8. Note that the *Actuarial Review* made these determinations prior to the decision in *Strait*. *See supra* notes 61-69 and accompanying text.

88. *Actuarial Review, supra* note 7, at 5-6 & tbl.3a). The present day value figures assume earning 4% interest per year. *Id.* at 5. These values are rounded.

C. Legislative Response to Schoemehl

State legislators criticized the *Schoemehl* decision and introduced bills during the 2007 legislative session that attempted to abrogate it.⁸⁹ For instance, then-Senator Chris Koster⁹⁰ said that “the [*Schoemehl*] decision was correct based on the language in the statute, but the result was far from what anyone intended.”⁹¹ Representative Steven Hunter⁹² stated that the ruling was problematic because the Fund must pay unexpected benefits.⁹³ Hunter called for abrogation of the *Schoemehl* decision and also called for termination of the Fund.⁹⁴ Despite efforts to abrogate *Schoemehl*, however, the 2007 legislature ultimately could not come to a resolution and did not pass any bills that overturned the *Schoemehl* decision.⁹⁵

During the 2008 session, however, the legislature was able to abrogate the *Schoemehl* decision by instituting the “*Schoemehl* fix,” which invalidated the state’s court ruling.⁹⁶ The fix amended § 287.230 by adding a provision that states: “[i]n applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate the holding in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), and all cases citing, interpreting, applying, or following this case.”⁹⁷

While the “*Schoemehl* fix” has limited the payment of benefits to claimant’s dependents, questions remain regarding the solvency and future of Missouri’s Second Injury Fund. Should the Fund be eliminated or reformed? Is the Fund still needed? Are any adjustments or alternatives available to address the solvency of the Fund? The following Comment will shed light on the answers to these questions.

89. Scott Lauck, *Missouri Senate May Kill Second Injury Fund*, MO. LAW. WKLY., Feb. 19, 2007.

90. Chris Koster, Democrat for Missouri Attorney General, Biography, <http://www.chriskoster.com/bio/bio.html> (last visited Mar. 26, 2009). Koster was a Republican at the time he made this comment. *Id.*

91. Lauck, *supra* note 89.

92. Representative Steven Hunter, District 127 Republican, <http://www.house.mo.gov/billtracking/bills081/member/mem127.htm> (last visited Mar. 26, 2009).

93. Lauck, *supra* note 89.

94. *Id.*

95. Scott Lauck, *Missouri Gov. Blunt Considering Second Injury Fund Special Session*, ST. LOUIS DAILY RECORD & ST. LOUIS COUNTIAN, June 28, 2007.

96. Tony Messenger, *Missouri Legislature Ends Session with a Rush*, ST. LOUIS POST-DISPATCH, May 17, 2008, available at <http://www.stltoday.com/stltoday/news/stories.nsf/politics/story/02A29DD73BE5642E8625744C00125B10?OpenDocument>. While the legislature instituted the “*Schoemehl* fix,” it avoided proposals to terminate the Second Injury Fund and to move control of the Fund away from the attorney general. *Id.*

97. H.R. 1883, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

IV. COMMENT

As recently as 1991, second injury funds, sometimes called subsequent injury or special indemnity funds, were present in each state and in federal jurisdictions as well.⁹⁸ In recent years, however, approximately half of the states have eliminated their respective funds or “sunset-ed” their funds by refusing claims from the Fund after a certain date.⁹⁹ Only about twenty states, including Missouri, have second injury funds that remain open to new injury claims.¹⁰⁰

Missouri’s Second Injury Fund is now in a state of unrest as legislators address its financial problems. A number of Missouri legislators unsuccessfully attempted to repeal or eliminate the Fund during the 2008 session,¹⁰¹ and at this point it is unclear what the 2009 legislative session will bring for the Fund. One thing is certain – the 2009 Legislature must decide whether the Fund should stay or go. If the legislature decides to continue the Fund, it must also decide what changes are necessary to maintain the Fund. Overall, these decisions will require consideration of the future liability of the Fund, the need for the Fund, as well as potential adjustments and alternatives in order to provide adequate finances to the Fund.

98. Catherine M. Doud, Comment, *Oklahoma’s Special Indemnity Fund: A Fund Without a Function?*, 30 TULSA L.J. 745, 745 (1995).

99. Zachary D. Schurin, Note, *Monkey-Business: Connecticut’s Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the ADA as Justification for the Elimination of Second Injury Funds*, 7 CONN. PUB. INT. L.J. 135, 136 (2007) (citing U.S. CHAMBER OF COMMERCE, STATISTICS AND RESEARCH CENTER, ANALYSIS OF WORKERS’ COMPENSATION LAWS 105 chart XIII (2005)). “Alabama, Kentucky, Maine, and New Mexico have eliminated their [second injury funds] entirely.” *Id.* at 136 n.12. “[Second injury funds] in Connecticut, Florida, Kansas, Minnesota, Nebraska, Oklahoma, Rhode Island, Utah, Vermont, and West Virginia have been closed for new claims.” *Id.* “New York, South Carolina, and Georgia have enacted legislation to phase out their respective [second injury funds].” W. Frederick Uehlein & Mark Nevils, *Second Injury Funds in Flux: Opportunities, Changes, and Questions*, 17 J. WORKERS COMPENSATION 19, 19 (2008).

100. Uehlein & Nevils, *supra* note 99, at 19.

101. See H.R. 2310, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008) (proposing the repeal of the Workers’ Compensation Second Injury Fund); H.R. 2308, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008); H.R. 2309, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008); H.R. 2302, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008) (proposing the elimination of injured workers’ benefits under the Fund for permanent partial injuries).

A. Future Liability of Missouri's Second Injury Fund

The legislature must first understand that eliminating or “sunset-ing” Missouri’s Fund does not simultaneously eliminate the liability of the Fund for claims being paid. In fact, discontinuing the Fund would leave the Fund responsible for hundreds of millions of dollars of previously incurred liabilities that must be paid off in the coming decades. Early estimates show that if the Fund stopped accepting claims after January 1, 2009, the Fund would be liable for \$992 million nominally, or \$644 million in present day value.¹⁰²

If the legislature decides to eliminate the Fund despite its liability, the state may choose to rid itself of the remaining liability by obtaining a reinsurer to continue paying out already processed claims.¹⁰³ However, it is questionable whether the state would find an appealing reinsurer. The Fund’s remaining liability is a significant amount of money and as such, it is likely a reinsurer would demand a large upfront payment to assume the Fund’s liabilities.¹⁰⁴ The upfront amount requested by the reinsurer would likely be of such a magnitude that the state would prefer to address the liabilities of the Fund itself.

It is also important for the legislature to fully understand the extent of liability that will be attributed to the *Schoemehl* debacle. Despite completion of the *Schoemehl* fix, the Missouri Supreme Court’s decision may have some lingering effects on the Fund for years to come. The *Schoemehl* decision will apply to claims which are (1) pending in the workers’ compensation system, and (2) pending during the period of time between the date of the *Schoemehl* decision¹⁰⁵ and the effective date of the *Schoemehl* fix, as the fix affected a substantive right.¹⁰⁶

As a result, the application of *Schoemehl* is limited to, as Judge Limbaugh put it, “only to those dependents with the perverse good fortune of having their decedents die while the case was still pending.”¹⁰⁷ Thus, the

102. *Actuarial Review*, *supra* note 7, at 5, 6 tbl.3a; *see supra* note 88 and accompanying text.

103. A “reinsurer” is “[a]n insurer that assumes all or part of a risk underwritten by another insurer, usu[ally] in exchange for a percentage of the original premium.” BLACK’S LAW DICTIONARY 1312 (8th ed. 2004).

104. *Actuarial Review*, *supra* note 7, at 3.

105. *See supra* notes 62-66 and accompanying text.

106. *See State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. 1974) (en banc) (recognizing “that a statute shall not be applied retrospectively [except] (1) where the legislature manifests a clear intent that it do so [or] (2) where statute is procedural only and does not affect any substantive right of parties”).

107. *Strait v. Treasurer of Mo.*, 257 S.W.3d 600, 604 (Mo. 2008) (en banc) (Limbaugh, J., dissenting); *see also supra* notes 68-69 and accompanying text.

Fund's liability from *Schoemehl* will only apply to claimants who (1) had their claim in the workers' compensation system during the eighteen-month window between the *Schoemehl* decision and its subsequent abrogation, (2) received an award for PTD benefits, and (3) died from unrelated causes before the award was final and closed. It seems unlikely that a great deal of claimants will meet each of these three requirements. One attorney has gone as far as saying that the dependents of the claimants in *Schoemehl* and *Strait* may be the only people who met these requirements and thus, were awarded the PTD benefits of a dead relative.¹⁰⁸

While the number of claimants who are covered under *Schoemehl* are likely few and far between, one cannot deny the substantial lingering effect this decision could potentially have. Under *Schoemehl*, the surviving dependents are entitled to disability benefits for *their* lifetime. Accordingly, if the surviving dependents are young in age, the disability benefits could continue for many decades, and the Fund would be responsible for paying these benefits over this period of time. Thus, despite the *Schoemehl* decision's effect likely being minor in terms of number of claimants, it has the potential to constitute a significant amount of the Fund's future liability as PTD benefits claims are the costliest of claims.¹⁰⁹

B. Has the ADA Eliminated the Need for Missouri's Second Injury Fund?

It has been more than sixty years since Missouri first established the Second Injury Fund, and some believe that the Fund is no longer necessary because its underlying goals and policies are adequately supported by other law. Specifically, it is argued that Americans with Disabilities Act of 1990 (ADA)¹¹⁰ and other state law anti-discrimination provisions¹¹¹ have rendered second injury funds obsolete.¹¹² The belief is that because the ADA and state anti-discrimination laws prevent employers from discriminating against disabled workers in hiring, the additional financial incentives of second injury funds are not necessary.¹¹³ In other words, these newer laws make it "no

108. Donna Walter, *Is This the End of Schoemehl as We Know It? Missouri Supreme Court*, ST. LOUIS DAILY RECORD & ST. LOUIS COUNTIAN, July 16, 2008 (quoting James G. Krispin, attorney for dependents in *Strait*), available at http://findarticles.com/p/articles/mi_qn4185/is_20080716/ai_n27921788.

109. See *Actuarial Review*, *supra* note 7, at 7-8. Despite relatively few claims, PTD claims are costly and consisted of over 32% of the Fund's expenditures in 2008. *Id.* at 7 tbl.4a.

110. 42 U.S.C. §§ 12101-12213 (2000).

111. Doud, *supra* note 98, at 766-67.

112. *Id.* at 747.

113. *Id.* at 765.

longer . . . necessary to bribe employers into hiring and keeping handicapped workers [as] [e]mployers cannot discriminate against these workers.”¹¹⁴

Supporters of second injury funds note that the ADA and state anti-discrimination laws, despite preventing discrimination of the disabled, do not and could not adequately replace second injury funds for a number of reasons. For one, the ADA only applies to employers with fifteen or more employees,¹¹⁵ and second injury funds are still appropriate as small employers today face the same risk past employers faced – the risk of increased liability in hiring disabled persons.¹¹⁶ As a result, because small employers are outside the scope of the ADA, it is unlikely they will hire and retain workers with preexisting disabilities in the absence of a state second injury fund.¹¹⁷ The same applies for state anti-discrimination laws, which often impose minimum employee thresholds that are lower than the ADA.¹¹⁸ For example, the Missouri Human Rights Act (MHRA) makes it unlawful for employers with six or more employees¹¹⁹ to discriminate on the basis of a number of classes, including disability.¹²⁰ Despite this lower threshold, a substantial number of employers are still exempt from the prohibition against disability discrimination in Missouri – at least 83,000 employers according to 2006 U.S. Census Bureau figures.¹²¹ Thus, at least 83,000 employers in Missouri would be exempt from MHRA and ADA, and removal of the Fund would give these employers no incentive to consider hiring and retaining individuals with preexisting disabilities.

It has also been argued that second injury funds are still needed because the ADA’s threshold requirements for disability are a high bar for employees to overcome and, as a result, a number of disabled individuals are excluded from ADA protection.¹²² Under the ADA’s requirements, some disabled individuals are stuck in the middle of being disabled and being protected because their disabilities are severe enough to impact their chances of acquiring a job but not severe enough to be identified as disabled under the ADA.¹²³

114. *Id.* at 766.

115. *See* 42 U.S.C. § 12111(5)(A) (2000).

116. Schurin, *supra* note 99, at 147-48 (citing 42 U.S.C. § 12111(5)(A) (2000)).

117. *Id.* at 148-49.

118. *Id.* at 148. *See generally* JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS § 10 (2009) (survey of “State Statutes Prohibiting Discrimination on the Basis of Disability”).

119. MO. REV. STAT. § 213.010(7) (2000).

120. *See* MO. REV. STAT. § 213.055.1 (2000).

121. U.S. CENSUS BUREAU, 2006 COUNTY BUSINESS PATTERNS (NAICS), MISSOURI MAJOR INDUSTRY (2006). In 2006, Missouri had a total of 154,546 employers, with 83,089 employers employing 1 to 4 employees. *Id.*

122. Schurin, *supra* note 99, at 151.

123. *Id.* Employees did not qualify as disabled under the ADA because they were not prevented “from obtaining a job within a ‘broad range of jobs.’” *Id.* (quoting 29 C.F.R. § 1630.2(j) (1991)); *see also* 29 C.F.R. § 1630.2(g)-(j) (2008).

However, concerns regarding the threshold requirements of disability may have been rendered moot by recent amendments to the ADA. Scholars assessing the ADA Amendments Act of 2008¹²⁴ note that the definition of disability will no longer be subject to demanding standards and will “be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”¹²⁵ Additionally, the requirements for impairment are projected to be less restrictive than previous standards, and the definition of “major life activity” will be construed more broadly.¹²⁶ While the amendments have yet to be applied, it seems almost certain that the amendments will allow more employees to meet the threshold requirements of disability under the ADA.

With the recent changes to the ADA, some may conclude that the ADA, plus its amendments, can sufficiently supplant the purpose of second injury funds. However, this conclusion is far from certain. Currently, it remains to be seen whether the ADA Amendments will actually lead to more employees meeting the threshold disability requirements for protection, and, more importantly, whether employees will actually recover relief more often in ADA cases. In other words, merely meeting the threshold requirements of the ADA does not guarantee protection against discrimination or recovery from an employer. As a result, it will be difficult for the legislature to rely on changes to the ADA as a basis for eliminating the Fund for the time being.

It is also important to note that the Fund and ADA have separate goals and functions, despite the perception that they overlap. The ADA, in its broadest sense, is to *deter* employers from discriminating against applicants and employees with disabilities by holding employers liable for damages.¹²⁷ For situations relevant to the Fund, the ADA only applies to pre-employment activity – the employer’s hiring procedures and decision-making.¹²⁸

124. Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555.

125. Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, NW. U. L. REV. COLLOQUY 217, 219 (2008) (citing ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555).

126. *Id.* at 218, 221.

127. *See* 42 U.S.C. § 12101(a)(3) (2000) (finding “discrimination against individuals with disabilities persists in . . . employment”); § 12101(b)(1) (stating the one of the purposes of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

128. Specifically, the ADA precludes pre-employment questions pertaining to prior workers’ compensation claims or the existence, nature, or severity of a disability. 29 C.F.R. § 1630.13(a) (2008).

From the employer’s perspective in states with second injury funds, applicant qualifications aside, an employer can make one of two choices: one, hire the disabled applicant to avoid disability discrimination liability and have the benefit of the Fund to limit its liability in the event of an injury; or two, not hire the disabled applicant and have potential disability discrimination liability.

The goals of the Fund, however, are to *encourage* employers to hire *and retain* individuals with disabilities by providing them with the benefits of the Fund – spreading the risk of heightened liability across all employers while simultaneously limiting the liability of employers in workers’ compensation claims involving an employee with a preexisting disability.¹²⁹ Accordingly, the goals of the Fund apply to the period of employment in addition to employer pre-employment activity. Thus, its goals not only encourage employers to hire disabled workers, but they also assist employers to retain such workers as it spreads the costs of expensive disability claims across all employers of the state.¹³⁰ If the Fund were eliminated, individual employers would bear the full cost for injuries combining with a preexisting disability to create a greater or total disability.

Compared to the ADA, Missouri’s Second Injury Fund achieves broader coverage and includes policy goals that benefit applicants, employees, and employers prior to and during employment. As such, it can hardly be said that state and federal prohibitions against disability discrimination adequately replace the financial incentives of second injury funds.

C. Adjustments and Alternatives: Solutions for Funding Missouri’s Second Injury Fund

The debate regarding continuation of the Fund goes beyond the application of disability anti-discrimination laws. In Missouri, the central issues with the Fund are its financial status and future funding. With the Second Injury Fund projected to become insolvent sometime during 2009,¹³¹ the legislature must act quickly to ensure that the Fund will continue. The best way to prevent the Fund’s insolvency in the near future may be to adjust the applicable surcharge rate.

The Fund is financed by a surcharge on a percent of assessable premiums that is levied on insurance companies and self-insurers four times a year.¹³² Previously, the surcharge rate was calculated yearly on a prospective “pay-as-you-go” basis to generate enough revenue to cover the projected

129. See *supra* notes 15-16 and accompanying text.

130. Uehlein & Nevils, *supra* note 99, at 22.

131. See *supra* note 7 and accompanying text.

132. *Actuarial Review*, *supra* note 7, at 1.

For insurers, assessable premiums for a particular calendar year are written premiums before the application of a deductible credit on policies with inception dates in that calendar year. For self-insurers, assessable premiums are based on payrolls and estimated pure premiums (losses per payroll), with an experience rating modification. The surcharge rate is based on expected calendar year losses.

Id.

expenditures for the upcoming year plus a 10% cushion.¹³³ However, in 2005, the legislature capped the surcharge rate at 3%.¹³⁴

Both the actuarial review and SAO audit found the 2005 3% cap to be a major impediment to maintaining solvency of the Fund.¹³⁵ The actuarial review went as far as stating that the Fund will become insolvent in 2009 unless the 3% cap is removed or additional finances are appropriated to the Fund.¹³⁶ As a result, the surcharge rate cap has created an exclusive and inflexible financing mechanism that cannot be adjusted to meet increased expenditure demands. The legislature's days of financing by placing all their funding eggs in one rigid basket must end if the Fund is to continue paying benefits.

Removing the 3% cap and returning to the "pay-as-you-go" calculation may be the best short-term solution to the Fund's impending insolvency. Based on projections, removing the 3% cap would allow the Fund to meet all 2009 expenditures without requiring a huge surcharge. If the legislature targets a Fund balance of zero, the surcharge percent would only increase by .69% in 2009.¹³⁷ Further, returning to the uncapped "pay-as-you-go" method should not create any significant problems as it was applied before and is simple to maintain.¹³⁸ Accordingly, adjusting the surcharge rate appears to be the best and sole viable remedy for ensuring the Fund's solvency in 2009, outside of appropriating or borrowing monies.

Removal of the 3% cap, however, should not be utilized as a permanent solution. The "pay-as-you-go" mechanism is appropriate for the immediate future because it creates lower current assessments in exchange for creating more costly future assessments.¹³⁹ These costly future assessments come about because the "pay-as-you-go" funding mechanisms are calculated on a calendar year basis and do not account for the ultimate cost of claims.¹⁴⁰ Considering the future assessments, the legislature would be well-advised to limit its use of the "pay-as-you-go" mechanism to the immediate solvency issues with the Fund. Additionally, and perhaps most importantly,

133. *Id.*; MONTEE, *supra* note 5, at 10.

134. *See supra* note 73 and accompanying text.

135. *Actuarial Review*, *supra* note 7, at 12 ("The 3% cap on the surcharge effected in 2005 greatly limits [the state agency's] ability to make up prior year deficits by increasing surcharges for future years . . . [and a]dditionally, the 3% cap appears to be inadequate in the near future."); MONTEE, *supra* note 5, at 10 ("[C]apping the [F]und surcharge rate at 3 percent limits [the state agency's] ability to generate revenues sufficient to cover [F]und expenditures.").

136. *Actuarial Review*, *supra* note 7, at 10.

137. *See supra* note 85 and accompanying text.

138. *Actuarial Review*, *supra* note 7, at 12. "Pay-as-you-go" funding is reasonable to continue operating into the future so "long as inflation rates stay steady, there are no shocks to the system, the economy is growing, and the managers of the programs understand the underlying claims dynamics." *Id.*

139. *Id.* at 11.

140. *Id.*

reinstating the “pay-as-you-go” funding mechanism on a temporary basis gives the legislature sufficient time to consider and implement other methods to ensure the long-term solvency of the Fund.

With the current balance of the Fund so close to zero, the legislature will also need to consider long-term options for ensuring the Fund’s solvency. The legislature may address the long-term solvency of the Fund by adjusting its current provisions and implementing alternative funding methods used in other states. One potential adjustment, which was proposed in 2008,¹⁴¹ is to restrict or lessen the authority of the Attorney General to enter into lump sum settlements.

In cases against the Fund, the state treasurer receives advice and is represented by the Attorney General of Missouri.¹⁴² The Attorney General is entitled to defend claims against the Fund, or allowed to enter into compromise settlements.¹⁴³ Currently, the Attorney General has the authority to settle Fund claims for a maximum of \$60,000.¹⁴⁴ Prior to 2001, the Attorney General had a maximum settlement amount of \$40,000.¹⁴⁵

For a number of years, it has been a common practice of the Attorney General to enter into settlements for PPD claims and to not settle PTD claims.¹⁴⁶ For instance, in 2007, PTD lump sum payments (which are not frequent) and PPD payments (which are almost always lump sum settlements) totaled \$47.9 million – over two-thirds of the Fund’s expenditures for that year.¹⁴⁷ The total number of settlements is also high as most settlements entered into by the Attorney General are for much less than \$60,000¹⁴⁸ with the average claim settled for about \$10,000 over the past five years.¹⁴⁹

141. H.R. 2308, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008), *available at* <http://www.house.mo.gov/billtracking/bills081/biltxt/intro/HB23081.htm> (“there shall be no compromise settlements contemplated by section 287.390 paid from the second injury fund in an amount greater than ten thousand dollars”).

142. MO. REV. STAT. § 287.220.2 (2000).

143. *Id.*

144. MONTEE, *supra* note 5, at 5.

145. *Actuarial Review*, *supra* note 7, at 13.

146. *Id.* This distinction is likely the result of the payment system under each of the claims. PPD claims are more likely to settle because their awards are fixed for a period time based on statutory guidelines, which makes it easier to predict an award for purposes of settlement. *See supra* note 23 and accompanying text. PTD claims, however, are continuous for the lifetime of the employee, therefore making it difficult to predict a settlement amount. *See supra* note 27 and accompanying text.

147. *Actuarial Review*, *supra* note 7, at 7 tbls.4a & 4b. This is clearly not an ideal set of data because it includes all PPD claims. *See id.* However, because nearly all successful PPD claims involve lump sum settlements, *see supra* text accompanying note 146, the data is relevant.

148. *Actuarial Review*, *supra* note 7, at 13 tbl.9. From 1995 to 2006, the average lump sum paid per resolvable claim ranged from \$5,500 to \$10,000. *Id.*

149. *Id.*

Considering the difference between the average settlement amount and the maximum settlement amount, reducing the settlement authority of the Attorney General will not have a significant effect on settlement amounts unless it is a drastic reduction. Some legislators have pushed for such a reduction, calling for the Attorney General's settlement authority to be capped at \$10,000.¹⁵⁰

However, a reduction of this caliber is likely to impose direct costs on the Fund and the Attorney General's Office. The Fund is responsible for all legal expenses of the Attorney General's office including fees and travel costs.¹⁵¹ With a lower settlement maximum, the Attorney General may be forced to use additional resources to represent the Fund when a settlement would be more efficient. For instance, the Attorney General would not be able to settle relatively undisputed PPD claims that are clearly above their maximum settlement authority. Further, a reduction in the settlement authority would run completely counter to the reasons for the increase in settlement authority in 2001. That year, the state increased the settlement authority of the Attorney General from \$40,000 to \$60,000 to increase its efficiency in handling and settling cases, and also to lessen the number of claims in court and the Fund's exposure to long-term liabilities.¹⁵² Reducing the settlement authority of the Attorney General would return settlements to the pre-2001 form, and likely raise the same efficiency concerns a second time.

It is questionable, however, whether the 2001 increase in settlement authority is accomplishing the goals intended by its passage. Data shows that the average resolvable claim settlement amount increased from approximately \$7,000 to \$10,000 following the 2001 increase in the maximum settlement amount from \$40,000 to \$60,000.¹⁵³ Additionally, the expenditures of the Fund increased after the 2001 increase in settlement authority. The Fund's benefit expenditures increased from \$29.9 million in 2000 to \$39.3 million in 2001, and continued to rise until benefit expenditures reached \$63.8 million in 2006.¹⁵⁴ While these figures do not delineate between lump sum settlements and awards, the increase in Fund expenditures cannot be ignored. It is also questionable whether the increase in settlement authority reduced the number of claims brought in court. The number of claims filed increased from 12,060 in 2000 to 13,255 in 2001, and remained above 13,000 per year

150. See *supra* note 141.

151. MO. REV. STAT. § 287.220.2 (2000) ("Any legal expenses incurred by the attorney general's office in the handling of [Second Injury Fund] claims, including, but not limited to, medical examination fees, expert witness fees, court reporter expenses, travel costs, and related legal expenses shall be paid by the [F]und.").

152. MONTEE, *supra* note 5, at 5.

153. *Actuarial Review*, *supra* note 7, at 13 tbl.9.

154. MONTEE, *supra* note 5, at 24 app. I, tbl.I.1.

through 2005.¹⁵⁵ However, the number of claims filed did drop to 10,591 in 2006.¹⁵⁶

Considering that about two-thirds of the Fund's expenditures are lump sum settlements and that the average settlement has increased with the Attorney General's settlement authority, changes may be necessary to achieve financial stability within the Fund. A decrease in the settlement authority of the Attorney General is one solution to reducing the expenditures by the Fund, but the extent of the reduction is difficult to assess. The 2009 Legislature would be well-advised to balance the efficiency of settling claims with the need to reduce the average settlement amount when deciding whether to reduce the settlement authority of the Attorney General and by how much. A more detailed analysis of the Attorney General's efficiency served by a \$60,000 settlement authority is necessary to come up with a clear answer. It is possible that reducing the settlement authority to \$40,000 could lead to a decrease in the average amount per resolvable claim, but at the same time could lead to the inefficiencies that led to the initial increase in settlement authority.

It would be wise for the legislature to consider including an exception to the Attorney General's maximum settlement authority for dependents of claimants coming under *Schoemehl*.¹⁵⁷ Instead of continuing disability payments for decades, it may be advantageous for the state and the surviving dependents to reach a settlement. As such, an exception to the maximum settlement authority will allow the Attorney General to settle claims with surviving dependents under *Schoemehl* as it is highly unlikely a settlement will be reached with a \$60,000 settlement maximum.

The legislature may also want to consider potential adjustments to current Fund provisions in order to better defend the Fund and to place a higher burden on claimants to show the existence of liability. In order to shore up the state's defense against Fund claimants, the legislature may want to adjust the provisions on medical examination. Under the current provisions, the Fund is not entitled to have a doctor or vocational expert examine a claimant.¹⁵⁸ This limitation prevents the Fund from scrutinizing the disability level assessed by the claimant's doctor, and also prevents the Fund from verifying that the claimant has met the minimum thresholds for a claim. Accordingly, the absence of the right to examine claimants may result in claimants receiving higher awards and lump sum settlements.¹⁵⁹ Allowing the Fund to examine claimants with its doctors or vocational experts will improve defense of the Fund, and may lower the costs from awards and settlements.¹⁶⁰

155. *Id.* at 26 app. III, tbl.III.1.

156. *Id.*

157. *See supra* Part IV.A.

158. *Actuarial Review, supra* note 7, at 10.

159. *Id.*

160. *Id.*

The legislature may also place a higher burden on claimants seeking Fund benefits by requiring evidence that their employer had prior knowledge of their preexisting condition.¹⁶¹ At least eight states require prior employer knowledge before the time of the second injury,¹⁶² and some states even require the employer's knowledge to be supported with documentation.¹⁶³ Placing the burden of employer knowledge on the claimant will reduce the number of successful benefit claims and also prevent claims for *post-hoc* disabilities.

The legislature may also attempt to pursue alternative funding sources for ensuring the long-term solvency of the Fund. Often, other states use multiple mechanisms to provide adequate funding for their respective injury funds. One method the legislature should consider is the use of civil penalties. Other second injury funds often require insurers and adjusters to timely notify the employee and managing governmental agency of changes to compensation being paid under workers' compensation.¹⁶⁴ When timely notice is not provided, the state institutes civil penalties.¹⁶⁵ After collection of the civil penalties, the state then deposits all or a portion of penalties collected into the second injury fund.¹⁶⁶

Another method the legislature should consider is taxing insurance premium assessments. For instance, under Tennessee's injury fund, the state taxes certain insurance carriers on premiums collected for workers' compensation insurance in addition to a surcharge on the premiums.¹⁶⁷ After collecting the tax and surcharge, the state deposits fifty percent of the collection into the injury fund.¹⁶⁸

Inclusion of other funding sources allows the Fund to build capital to invest against future assessments. Over time, a combination of the "pay-as-you-go" surcharge plus some other form of funding will enable the Fund to

161. See, e.g., ARIZ. REV. STAT. ANN. § 23-1065(C)(2) (stating a claim is eligible where "[t]he employer had knowledge of the permanent impairment at the time the employee was hired, or that the employee continued in employment after the employer acquired such knowledge").

162. See Mark J. Nevils, *Second-Injury Funds: Still a Valuable Cost-Containment Tool*, CLAIMS Q., Mar. 2004, at 6, 7. The eight states are "Alaska, Arizona, Georgia, Louisiana, New Hampshire, Nevada, South Carolina, and Massachusetts." *Id.*

163. *Id.* These states are Alaska, Nevada, and New Hampshire. *Id.*

164. See, e.g., ALASKA STAT. § 23.30.155(c).

165. See, e.g., ALASKA STAT. § 23.30.040(f) ("All amounts collected as civil penalties under AS 23.30.155(c) shall be paid into the second injury fund."); ALASKA STAT. § 23.30.155(c) (recognizing civil penalties against insurer or adjuster for failure to provide timely notice); COLO. REV. STAT. § 8-43-203(2)(a) (recognizing penalty for failure to provide timely notice; fifty percent of penalty deposited into subsequent injury fund).

166. COLO. REV. STAT. § 8-43-203(2)(a).

167. See, e.g., TENN. CODE ANN. § 50-6-401(b).

168. *Id.* at § 50-6-401(b)-(c) (recognizing that fifty percent of revenues from premium tax are paid into second injury fund).

reconsider instituting the same or a similar surcharge cap. As a result, the Fund will be able to endure through its current near-insolvency period and build adequate funds to maintain solvency for years and decades to come.

V. CONCLUSION

The 2009 state legislature appears to have its work cut out for it in deciding what to do with Missouri's Second Injury Fund. The legislature would be well-advised to consider the future liability of the Fund, the enduring social goals it advances, and the proposed adjustments and alternatives that can be utilized to improve its short-term and long-term solvency.

It is this author's opinion that the legislature's best course of action would be to first reinstitute the "pay-as-you-go" prospective surcharge rate at a zero balance rate for three to five years in order to ensure short-term solvency. Then, the legislature would be able to freely debate, refine, and enact a number of adjustments and alternatives to the Fund's current provisions in order to build capital and ensure long-term solvency. The use of civil penalties, an employer prior knowledge requirement, and returning Attorney General's lump sum settlement authority to \$40,000 all seem appropriate. Following implementation of these modifications, the legislature should commission an actuarial review after two or three years. This will give the legislature an opportunity to determine whether the implemented modifications will adequately finance the Fund in the future. Refining and implementing new modifications would be also be appropriate at this time.¹⁶⁹

The Second Injury Fund is no small problem. It will take a commitment by the legislature to make changes to the Fund and to later reevaluate such changes to determine their effectiveness. If the legislature will make this

169. Shortly before publication, a bill proposing changes to the Fund was approved by a special committee. H.R. 522, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009), available at <http://www.house.mo.gov/billtracking/bills091/biltxt/commit/HB0522C.HTM>; see also Summary of the Committee Version of the Bill, H.R. 522, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009), available at <http://house.mo.gov/content.aspx?info=bills091/bilsum/commit/SHB522C.htm>. Some of the bill's proposed changes to the Fund include lowering the compromise settlement maximum to \$40,000, subjecting non-settling claimants to independent medical and vocational examinations, and allowing the Fund to dispute the reasonableness of medical fees. *Id.* Perhaps most importantly, the bill proposes to sunset PPD claims brought against the Fund, leaving only PTD claimants with potential access to the Fund. *Id.* Supporters of the bill assert that raising the surcharge rate will not cure the Fund's financial issue, but rather "continue to sink money into a financially distressed fund." *Id.* Further, supporters acknowledge that the bill is not a permanent fix and have included a provision to require completion of an actuarial study of the Fund in 2010. *Id.* Opponents contend that the bill deprives injured employees of their rights because the bill decreases benefits instead of increasing revenue. *Id.*

commitment, there is no doubt that the Second Injury Fund can maintain solvency in the future.

JASON R. MCCLITIS¹⁷⁰

170. Juris Doctor candidate, University of Missouri School of Law, 2009. The author would like to thank Professor Rafael Gely and Shayla Smith for their help in developing this law summary.

