

Winter 2010

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Recommended Citation

Carrie B. Williamson, *Missouri's Section 287.865.5 Proof of Claim Filing Requirement: Are Injured Employees Getting a Fair Shake*, 75 Mo. L. REV. (2010)

Available at: <https://scholarship.law.missouri.edu/mlr/vol75/iss1/9>

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Missouri's Section 287.865.5 Proof of Claim Filing Requirement: Are Injured Employees Getting a Fair Shake?¹

I. INTRODUCTION

Most employers in Missouri must provide workers' compensation coverage for their employees.² Many opt to fulfill this requirement by taking out commercial insurance policies.³ Certain qualified employers, however, may elect to self-insure their workers' compensation obligations.⁴ To protect injured workers in the event that a self-insured employer becomes insolvent, the state has a guaranty fund in place to cover the insolvent company's workers' compensation liabilities.⁵ This protection, however, is subject to a prerequisite: to be eligible for benefit payments from the guaranty fund, the injured worker must file "a timely claim . . . according to [the] procedures set forth by a court of competent jurisdiction over the . . . bankruptcy proceedings of the insolvent [employer]."⁶

In the event that a self-insured company files a bankruptcy case, this requirement theoretically makes sense. It utilizes bankruptcy law to compel insolvent self-insured employers to disgorge remaining assets to pay workers' compensation benefits before the state takes over the payments. However, for two reasons the mechanism (the proof of claim filing requirement) for achieving this objective does not make sense. First, the proof of claim filing requirement addresses only a narrow aspect of company insolvency – full liquidation in a bankruptcy court proceeding. It does not appear to anticipate

1. The author extends her sincere appreciation to Professors Ray Phillips and Michelle Arnopol Cecil, attorneys B. Michael Korte and Robert M. Aurbauch, and the 2009-2010 Editorial Board members of the *Missouri Law Review* for their guidance and feedback on this Article and patient assistance in the writing and editorial process. Any mistakes found in this article are wholly those of the author.

2. MO. REV. STAT. § 287.280.1 (2000). For the rules describing the employers that are required to provide workers' compensation coverage, see *infra* note 13.

3. MO. REV. STAT. § 287.280.1 ("Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure his entire liability thereunder, . . . with some insurance carrier authorized to insure such liability in this state . . .").

4. *Id.* ("[A]n employer or group of employers may themselves carry the whole or any part of the [workers' compensation] liability without insurance upon satisfying the division of their ability so to do.")

5. MO. REV. STAT. § 287.865.2, .5 (Supp. 2008).

6. *Id.* § 287.865.5. The statute also requires the injured employee to file a claim in any other court proceeding that adjudicates "the delinquency" or insolvency of the self-insured employer. *Id.* The focus of this Article, however, is on the bankruptcy proof of claim filing requirement.

at least two other possible insolvency contingencies: the insolvent company that voluntarily ceases operations and the financially troubled but solvent company that seeks to reorganize in a Chapter 11 bankruptcy proceeding. Second, the proof of claim filing requirement compels the most vulnerable party in the game, the worker, who is likely unfamiliar with the complexities of corporate bankruptcy law, to file a proof of claim in bankruptcy court or lose the ability to claim workers' compensation benefits. This treatment deprives the worker of his fair shake under state workers' compensation law.

This Article argues that Section 287.865.5's bankruptcy proof of claim filing requirement is bad law because it runs counter to the purposes of Missouri's workers' compensation system. It also reveals significant gaps found at the confluence of workers' compensation law and bankruptcy law and exacerbates cracks in the systems. The cracks in turn become traps for the unwary injured worker. Because of these problems, the Section 287.865.5 proof of claim filing requirement should be amended so that it operates more in harmony with federal bankruptcy law. This Article proposes several amendments to the statutory provisions pertaining to the proof of claim filing requirement and the guaranty fund for insolvent self-insured employers in Missouri. If implemented, the proposed amendments would foster a more effective nexus between Missouri workers' compensation law and federal bankruptcy law, heighten protections of the injured worker, and conserve more of the state's limited resources.

II. LEGAL BACKGROUND

Missouri Revised Statute Section 287.865.5 of The Missouri Workers' Compensation Law⁷ contains a bankruptcy proof of claim filing requirement. The statute requires an injured worker of an insolvent, self-insured employer, as a prerequisite to receiving benefits from a state guaranty fund, to file "a timely claim . . . according to [the] procedures set forth by a court of competent jurisdiction over the delinquency or *bankruptcy proceedings* of the insolvent [employer]."⁸ To understand the issues surrounding this provision, it is first necessary to understand the basic scheme of workers' compensation law in Missouri.⁹ Key aspects of that scheme are the provisions governing em-

7. MO. REV. STAT. §§ 287.010-.810 (2000 & Supp. 2008).

8. MO. REV. STAT. § 287.865.5 (emphasis added). *See supra* note 6 and accompanying text. As stated *supra*, in note 6, the primary focus of this Article will be on the requirement to file a proof of claim in any relevant bankruptcy proceeding.

9. The Missouri legislature substantially amended the state's workers' compensation system in 2005. *See* S.B. 1 & 130, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005). Unless otherwise stated, the workers' compensation laws specifically discussed in the Legal Background Section will be those not altered by the 2005 amendments. For example, the proof of claim filing requirement found in Missouri Revised Statute Section 287.865.5 was not amended by S.B. 1 & 130. *Compare* MO. REV. STAT. § 287.865.5 (2000), *with* § 287.865.5 (Supp. 2008). For ease of reference,

ployers who self-insure workers' compensation liability and the process for the filing and adjudication of workers' claims.

After outlining Missouri's workers' compensation law, this Part will address the two primary forms of bankruptcy that insolvent employers are likely to file – Chapter 7 and Chapter 11. Additionally, it will consider the purpose of and process for filing a proof of claim in a bankruptcy court and will discuss three significant cases that applied these laws. In each of the three cases, the central issue was whether certain workers were required to file proof of claims in bankruptcy court before receiving benefits from the state guaranty fund.¹⁰

A. Missouri Workers' Compensation Law

1. Provisions Governing Employers Who Self-Insure

The State of Missouri protects Missouri workers who are injured on the job through a statutory workers' compensation system entitled "The Workers' Compensation Law."¹¹ Administered by the Division of Workers' Compensation (the Division) of the Missouri Department of Labor and Industrial Relations,¹² the system holds each employer responsible, "irrespective of negligence, to furnish compensation . . . for [the] personal injury or death of [an]

all citations will be to the current versions of the state statutes. For a discussion of the relevant changes resulting from the 2005 amendments, see the Recent Developments Section, *infra* Part III.

10. The case of *In re Wire Rope Corp. of America, Inc.* involved 154 pre-bankruptcy petition workers' compensation claimants (or potential claimants). 300 B.R. 1, 4 (Bankr. W.D. Mo. 2003). The employer, Wire Rope, filed its bankruptcy petition on May 15, 2002. *Id.* at 3. The worker in *Meadows v. Havens Erectors, Inc.* was injured on May 3, 2004. 238 S.W.3d 210, 212 (Mo. App. W.D. 2007). In *Jones v. GST Steel Co.*, the worker's constructive date of injury was May 15, 2001. 272 S.W.3d 511, 513 (Mo. App. W.D. 2009) (claim for work-related hearing loss). Because the cases involved injuries incurred and workers' compensation claims made *before* the 2005 amendments, the pre-2005 workers' compensation law was applicable. See *Wilcut v. Innovative Warehousing*, 247 S.W.3d 1, 4 (Mo. App. E.D. 2008) ("We review a worker's [sic] compensation case under the statutes in effect at the time of the accident.").

11. MO. REV. STAT. §§ 287.010-.810. Workers' compensation has been described as a unique "form of social insurance paid for by the users of products and services." Jerry W. Venters, *Calamity & Paucity – The Accord Between Bankruptcy, Insolvency, and Missouri's Workers' Compensation Laws*, 61 J. MO. B. 200, 200 (2005). Its purpose is "to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment." *James v. CPI Corp.*, 897 S.W.2d 92, 94 (Mo. App. E.D. 1995).

12. MO. REV. STAT. § 286.005.1, .3 (2000); MO. CONST. art. IV, § 49. The Labor and Industrial Relations Commission heads the department. MO. REV. STAT. § 286.005.1.

employee by accident arising out of and in the course of the employee's employment."¹³ As to the coverage of this statutory obligation, certain qualified employers may opt to self-insure.¹⁴ However, qualification to self-insure is subject to Division approval, and such approval may be obtained only after the employer's successful completion of a detailed application process.¹⁵

13. MO. REV. STAT. § 287.120.1 (Supp. 2008). Generally, the program regulates private and public sector employers maintaining five or more employees. MO. REV. STAT. §§ 287.060, .020.1, .030.1(1)-(3) (2000 & Supp. 2008). The definition of employee includes "every person in the service of any [covered] employer under any contract of hire . . . or . . . under any appointment or election." *Id.* § 287.020.1. Covered are "all injuries received and occupational diseases" (1) that occur in Missouri, (2) that occur out of state to employees working under a contract made in Missouri, or (3) that occur out of state to an employee whose primary place of work is in Missouri. MO. REV. STAT. § 287.110.2 (Supp. 2008).

14. *See* MO. REV. STAT. § 287.280.1 (2000). In a variation of the self-insurance option, groups of employers who are qualified to self-insure may choose to pool their resources to create "a group self-insurers' trust." *See id.*; MO. CODE REGS. ANN. tit. 8, § 50-3.010(4)(A) (2009). Some advantages of self-insuring include (1) attaining substantial cost savings by paying lower benefits because of "better disability management," (2) having a more "direct relationship with the employees" by administering the workers' compensation program at the workplace rather than relegating the task to an insurance carrier, and (3) more fully integrating the company's workers' compensation benefits into its overall benefits package. John F. Burton, Jr., *Workers' Compensation Self-Insurance*, in WORKERS' COMPENSATION DESK BOOK I-39, I-41 (John F. Burton, Jr. ed., 1992).

15. In the first step of the process, an executive officer of the applicant employer completes a standard form application. MO. CODE REGS. ANN. tit. 8, § 50-3.010(2). A copy of the application (Form WC-81) is appended to the end of Missouri Code of State Regulations, title 8, Section 50-3. In addition to the initial application, the Division requires further documentation of specified information. *Id.* § 50-3.010(3)(A). The additional documentation required includes "balance sheets and income statements for the last four . . . years," reports of workers' compensation benefits paid out and "current case reserves" held during the three years prior to the application, a "report reflecting the current experience modification factor calculated pursuant to the Uniform Experience Modification Plan as approved by the Missouri Department of Insurance," a statement detailing the structure under which the employer plans to administer its workers' compensation program, any Certificates of Good Standing required for the employer to operate in the state, a chart of the overall organizational structure, and any other pertinent information requested by the Division. *Id.* *See also* MO. DEP'T OF LABOR & INDUS. RELATIONS, DIV. OF WORKERS' COMP., INDIVIDUAL SELF-INSURANCE APPLICATION CHECKLIST (FORM WC-128), available at <http://www.dolir.mo.gov/wc/forms/128-Ai.doc> (last visited Oct. 16, 2009). Upon receipt of the application and supplemental documentation, the Division conducts an audit of the employer's safety programs. *See* MO. DEP'T OF LABOR & INDUS. RELATIONS, DIV. OF WORKERS' COMP., WORKERS' SAFETY PROGRAM, AUDITING PROCEDURES FOR APPLICANTS FOR INDIVIDUAL SELF-INSURANCE, available at <http://www.dolir.mo.gov/wc/forms/130-A1.pdf> (last visited Oct. 16, 2009). *See also*

Once the Division approves an application to self-insure, the newly qualified company must post a security deposit of at least \$200,000 with the Division or, if so required, a greater amount.¹⁶ In addition to the minimum security requirement, employers qualified to self-insure must obtain and retain membership in the Missouri Private Sector Individuals Self-Insurers Guaranty Corporation (Guaranty Corporation).¹⁷ Member employers are first subject to a “new” member monetary assessment and thereafter may be levied with additional annual assessments.¹⁸ The membership assessments are pooled in an “insolvency fund” and are utilized to pay workers’ compensation benefits on behalf of insolvent member employers.¹⁹

However, Guaranty Corporation is not automatically liable for all workers’ compensation claims that are made against insolvent member employers. For example, the employer’s \$200,000 security deposit, held by the Division, is first utilized and depleted to meet outstanding workers’ compensation obligations, and only after this amount is depleted does Guaranty Corporation become liable for any remaining claims.²⁰ Additionally, Guaranty Corporation’s obligations are limited to those employee claims that arise from incidents and injuries occurring while the employer was a member of Guaranty

MO. CODE REGS. ANN. tit. 8, § 50-7.040(1)(B)(3) (2009) (describing insurance carriers’ “safety and health review audit[s]”).

16. MO. CODE REGS. ANN. tit. 8, § 50-3.010(3)(B)(1). The purpose of the security deposit is to create a contingency fund to satisfy outstanding employee claims in the event that the self-insured company becomes insolvent. *Id.* The security requirement may be satisfied by the posting of a surety bond or an irrevocable letter of credit, or by “depositing in escrow approved securities” in the form of U.S. treasury bills, notes, or bonds. *Id.*

17. MO. REV. STAT. § 287.860.1 (2000). The primary purpose of Guaranty Corporation is to cover the employee workers’ compensation liabilities of insolvent member employers. H.B. 975, 86th Gen. Assem., 2d Sess. (Mo. 1992) (codified at MO. REV. STAT. § 287.860). *See also* MO. REV. STAT. § 287.867.1-.2 (2000) (describing purpose of insolvency fund).

18. MO. REV. STAT. § 287.865.7 (Supp. 2008). Any single assessment levied against all member employers, not counting new member assessments, may not exceed one million dollars. *Id.*

19. MO. REV. STAT. §§ 287.865.2, .865.5, .865.7, .867.2 (2000 & Supp. 2008). Therefore, Guaranty Corporation may aptly be described as a type of “excess insurer,” only incurring liability for any amount beyond what the insolvent employer is able to cover with its own assets. *Tague v. Mo. Private Sector Individual Self-Insurers Guar. Corp.*, 186 S.W.3d 469, 471-72 n.5 (Mo. App. W.D. 2006). An additional program, called the “Second Injury Fund,” is available to cover the obligations of an employer that “fails to insure or self-insure.” MO. REV. STAT. § 287.220.5 (2000). Separate and distinct from Guaranty Corporation and its insolvency fund, the Second Injury Fund is funded from an annual surcharge levied against “every authorized self-insurer, and every workers’ compensation [insurance] policyholder.” MO. REV. STAT. § 287.715.1 (Supp. 2008).

20. MO. REV. STAT. § 287.867.2. *See supra* note 16 and accompanying text.

Corporation and therefore subject to its annual assessment.²¹ Furthermore, Guaranty Corporation is not responsible for covering any claim that arises after a company has been judicially liquidated.²² Finally, a claimant employee of a bankrupt member employer is required to file a proof of claim in the bankruptcy proceeding before he may gain access to the insolvency fund.²³

The creation of Guaranty Corporation and its insolvency fund necessitated the establishment of a process by which a member employer is determined to be insolvent.²⁴ The statutes and regulations pertaining to Guaranty Corporation seem to provide that the Division, either on its own or in concert with findings and determinations made by Guaranty Corporation's board of directors, may declare a member insolvent. One statutory provision states that Guaranty Corporation's board of directors may make a "determination . . . that the member employer has fully expended all surety bonds, insurance or reinsurance, and all other available assets and is not able to pay compensation benefits."²⁵ If the board determines by a majority vote that a "member employer may be insolvent or in a financial condition hazardous to the em-

21. § 287.865.5 ("All incidents giving rise to claims for compensation under this chapter must occur during the year in which such insolvent member is a member of the guaranty fund . . .").

22. *Id.*

23. *Id.* The pre-2005 Section 287.865.5 provided,

[T]he employee must make timely claim for such payments according to procedures set forth by a court of competent jurisdiction over the delinquency or bankruptcy proceedings of the insolvent member. Any proceeds derived by such claim of the employee in bankruptcy shall be an offset of any amounts due and owing to the employee under the workers' compensation law.

Id. (amended 2005). According to one court, the plain language of this provision negates the existence of any "incident giving rise to claims for compensation' for which Guaranty Corporation is obligated to pay" when there is a failure to file a proof of claim. *Tague*, 186 S.W.3d at 471-72 n.5. *Tague* was decided based on pre-2005 workers' compensation law. *See id.* at 472 (employee injured in 2001); *Wilcut v. Innovative Warehousing*, 247 S.W.3d 1 (Mo. App. E.D. 2008) (choice of workers' compensation law depends on date of injury). For the 2005 amendments to this provision, see *infra* Part III.B.

24. The statutes do not specifically define what facts are sufficient to support a determination of insolvency. However, from the statutory text, it appears that "insolvency" may be construed narrowly, with the focus on whether the employer can continue to cover its workers' compensation obligations. *See* MO. REV. STAT. §§ 287.865.5, .872 (2000 & Supp. 2008). Further information about what is meant by "insolvency" can be gleaned from a list of factors that the Division may use in "determining whether an employer can meet [its workers' compensation] obligations." *See* MO. CODE REGS. ANN. tit. 8, § 50-3.010(3)(I)(1) (2009) (list of fourteen factors, including "[p]rofitability, efficiency, solvency and liquidity ratios," and "[p]rofit and loss history").

25. § 287.865.5.

ployees thereof or to the public,” the board has a duty to so inform the Division.²⁶ Alternatively, the board can “request that the [D]ivision determine the condition of any member employer which the board in good faith believes may no longer be qualified to be a member.”²⁷ The Division then must make the determination and respond to the board within thirty days.²⁸ Finally, the Division has a duty to notify the board when it independently determines that “reasonable cause” exists that a member employer is no longer financially able to self-insure.²⁹

The administrative procedures for terminating self-insurance privileges reflect similar foundations for a determination of insolvency while also suggesting additional foundations.³⁰ For example, regulations provide that the Division may “terminate the self insurance privilege if the employer is unable to demonstrate [an ability] to meet all obligations under [T]he Workers’ Compensation Act.”³¹ Also, failure to keep the required levels of security and “insolvency . . . constitute[s] cause for revocation.”³²

Once a decision to terminate a member employer’s self-insurance privilege is made, procedural due process considerations require that the employer receive reasonable notice.³³ A state regulation requires that notice of the Division’s revocation of an employer’s authority to self-insure be mailed to the employer.³⁴ When insolvency is either the ground or a ground for revocation, the revocation notice seems to be an adequate vehicle for communicating the determination of insolvency.³⁵ In addition to the regulatory notice requirement, a statute allows the Division to pass the responsibility of giving adequate notice to Guaranty Corporation.³⁶

26. MO. REV. STAT. § 287.877.1 (2000).

27. *Id.* § 287.877.2.

28. *Id.*

29. *Id.* § 287.877.3 (2000). *See also* § 287.872.1.

30. *See* MO. CODE REGS. ANN. tit. 8, § 50-3.010(3)(J) (2009). It is clear that a finding of insolvency is sufficient to trigger revocation of the authority to self-insure, but it is also possible to terminate self-insurance privileges for other reasons. *Id.*

31. *Id.* § 50-3.010(3)(I). This section also sets forth the procedural requirements necessary to revoke the privilege to self-insure, which include mailing a written notice of termination to the employer, providing a hearing before the Division director upon request, and affording the right to seek review of the director’s decision before the Labor and Industrial Relations Commission. *Id.* § 50-3.010(3)(I)(2) (citing MO. REV. STAT. §§ 287.470, .480 (2000)).

32. *Id.* § 50-3.010(3)(I)-(J).

33. *See* U.S. CONST. amend. XIV, § 1.

34. MO. CODE REGS. ANN. tit. 8, § 50-3.010(3)(I)(2). The employer then may request a review hearing. *Id.* *See supra* note 31.

35. *See supra* notes 31, 34.

36. MO. REV. STAT. § 287.872.2(1) (2000) (“The [D]ivision may [r]equire that the corporation notify the member employers and other interested parties of the determination of insolvency and of their [statutory] rights . . .”).

2. Overall Workers' Compensation Claims Process

Notice plays a pivotal role in the overall workers' compensation claims process. The essential foundation of a claim for compensation is the existence of some cognizable harm "arising out of and in the course of the employee's employment."³⁷ Once there has been an injurious event, generally the employer must receive notice of the accident, typically in writing.³⁸ This notice requirement serves to benefit the employer by allowing it the opportunity to investigate the incident giving rise to the claim.³⁹ If the employer witnesses the occurrence, there is a presumption of actual notice, which satisfies the notice requirement without further action by the employee.⁴⁰ Otherwise, the employee is required to submit a written report of the incident to his employer within thirty days of its occurrence.⁴¹ After receiving notice of the incident, the employer, in turn, has thirty days to prepare and submit a detailed report of the incident to the Division.⁴²

After the Division receives a Report of Injury from an employer, it reviews and processes the information.⁴³ "Depending on how [it] read[s] the medical diagnosis and prognosis, the case may be archived and never brought up again,"⁴⁴ or the parties may "request a dispute management meeting with a mediator on issues of medical or temporary benefits" or a case conference, where the parties attempt to negotiate a settlement.⁴⁵ If the parties cannot settle the case, the employee may proceed to file a "Claim for Compensation"

37. MO. REV. STAT. § 287.020.3(1) (Supp. 2008). This gives rise to a claim, "in a general sense of the word, against the employer." JOHN J. JOHNSON, JR. ET AL., *WORKERS' COMPENSATION IN MISSOURI* 39 (1995).

38. MO. REV. STAT. § 287.420 (Supp. 2008).

39. *Newman v. Rice-Stix Dry Goods Co.*, 73 S.W.2d 264, 267 (Mo. 1934).

40. *Snow v. Hicks Bros. Chevrolet, Inc.*, 480 S.W.2d 97, 102 (Mo. App. 1972). Almost forty years before *Snow*, the Supreme Court of Missouri endorsed the same concept in *Newman* when it stated,

[I]f [the employer] knows the facts or there is no dispute about them, failure to receive the written notice could not prejudice him. The commission is empowered to award compensation though written notice has not been given if it finds there was good cause for not giving it or that the employer was not prejudiced by failure to receive it.

73 S.W.2d at 267. Further support of the court's position can be found in Missouri Revised Statute Section 287.420 (Supp. 2008), which provides that further notice is not necessary "if the employer was not prejudiced by failure to receive the notice."

41. MO. REV. STAT. § 287.420.

42. MO. REV. STAT. § 287.380.1 (Supp. 2008); MO. CODE REGS. ANN. tit. 8, § 50-2.010(2) (2009).

43. See generally MO. REV. STAT. § 287.380.1; MO. CODE REGS. ANN. tit. 8, § 50-2.010(1)-(2).

44. JOHNSON ET AL., *supra* note 37, at 40. See Missouri Revised Statute Section 287.390 (Supp. 2008) for compromise settlement provisions.

45. MO. CODE REGS. ANN. tit. 8, § 50-2.010(4).

with the Division, which begins the adjudicative process.⁴⁶ Workers' compensation cases are ultimately heard by administrative law judges appointed by the Division.⁴⁷ Parties may apply to the Labor and Industrial Relations Commission (Commission) for review of administrative decisions and then may appeal final decisions of the Commission to the state court system.⁴⁸

B. Relevant Bankruptcy Law

An employer's bankruptcy is often fraught with pitfalls and traps for the unwary injured employee. Particularly troublesome are certain gaps that are found when the employee's workers' compensation case intersects with bankruptcy law. Some of these gaps are so significant that an unfortunate worker might find himself falling through the cracks between the two legal systems. In order to develop an understanding of the issues that arise at the critical juncture of these laws, this Sub-Part will discuss generally some pertinent aspects of bankruptcy law.

1. Bankruptcy: An Overview

Bankruptcy law serves many purposes. A primary purpose of the law is to give an insolvent party a financial "do over," free from overwhelming indebtedness.⁴⁹ It also serves as a conduit for efficiently liquidating a debtor's assets in a manner economically advantageous to his creditors.⁵⁰ Additionally, it protects "the 'going concern value' of businesses that are viable but that cannot meet their obligations."⁵¹ Finally, it allows for an orderly synchronization of multiple creditor collections levied against the debtor.⁵²

A self-insured employer wishing to file a bankruptcy petition typically will choose one of two options: file under either Chapter 7 or Chapter 11 of the Bankruptcy Code.⁵³ Certain characteristics of these chapters are similar, yet there are significant fundamental differences between them.

46. *Id.* § 50-2.010(7). This formal claim must be filed with the Division within two years of the date of the accident or within two years of the receipt of the last payment for the accident or injury. MO. REV. STAT. § 287.430 (2000). If the employer failed to file a Report of Injury with the Division, the statute of limitations increases to three years. *Id.*

47. MO. REV. STAT. § 287.610 (Supp. 2008).

48. MO. REV. STAT. § 287.480 (2000); MO. CONST. art. 5, § 18.

49. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

50. LYNN M. LOPUCKI & CHRISTOPHER R. MIRICK, *STRATEGIES FOR CREDITORS IN BANKRUPTCY PROCEEDINGS* 5 (5th ed. 2007).

51. *Id.*

52. *Id.*

53. Venters, *supra* note 11, at 202-03; Robert M. Aurbach, *Workers' Compensation and Bankruptcy: Reconciling Systems in Conflict*, *WORKERS' COMPENSATION POL'Y REV.*, Mar.-Apr. 2004, at 3, 4, available at <http://www.workerscompresources.com>.

a. Chapter 7 and Chapter 11: The Differences

In a Chapter 7 bankruptcy, a bankruptcy trustee oversees a complete liquidation of the debtor's unencumbered, non-exempt assets.⁵⁴ The proceeds obtained from the liquidation are distributed to the unsecured creditors on a pro-rata basis under an established priority scheme.⁵⁵ However, debtors in Chapter 7 bankruptcies often have little to no unencumbered, non-exempt assets.⁵⁶ In such circumstances, there may be nothing to distribute to the unsecured creditors.

Conversely, a Chapter 11 reorganization bankruptcy gives a struggling debtor breathing room from its creditors.⁵⁷ This gives the company time to regroup and restructure, with the ultimate goal of continuing as a going concern.⁵⁸ The debtor employer, as a debtor-in-possession, assumes a role similar to that of the Chapter 7 trustee.⁵⁹ It remains in possession of the business and its assets and continues to actively control the business.⁶⁰ Usually, the debtor proposes a plan of reorganization that is submitted to the court and the creditors.⁶¹ The plan may call for adjusting the length of time that the debtor has to pay certain obligations, adjusting the amount that will be paid, or both.⁶² Once confirmed by the court, the debtor implements the plan and attempts to steer the business from insolvency to profitability.⁶³

com/WCPR_Public/WCPR%20PDFs/MA04.pdf.

54. See U.S.Courts.gov, Bankruptcy Basics: Chapter 7, Liquidation Under the Bankruptcy Code, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter7.html> ("The primary role of a chapter 7 trustee in an asset case is to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors.") (last visited Dec. 30, 2009); 11 U.S.C. § 704 (2006) (entitled "Duties of trustee").

55. See 11 U.S.C. § 726 (2006).

56. If the debtor has no unencumbered, non-exempt assets, he has a "no asset" Chapter 7 bankruptcy. See Bankruptcy Basics: Chapter 7, *supra* note 54.

57. See U.S.Courts.gov, Bankruptcy Basics: Chapter 11, Reorganization Under the Bankruptcy Code, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html#debtor> (last visited Dec. 31, 2009) ("Chapter 11 is typically used to reorganize a business . . .").

58. See Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L.Q. 1375, 1432 (2004) (A Chapter 11 bankruptcy is meant "to provide an active forum for negotiation among interested parties over the appropriate structure of a reorganized firm.").

59. See 11 U.S.C. § 1107 (2006) (entitled "Rights, powers, and duties of debtor in possession").

60. *Id.*

61. See 11 U.S.C. §§ 1121(a), 1126, 1128, 1129 (2006).

62. LOPUCKI & MIRICK, *supra* note 50, at 18. For the required contents of a plan, see 11 U.S.C. § 1123 (2006).

63. For the provisions governing the confirmation process, see 11 U.S.C. §§ 1125-1129 (2006).

Alternatively, a Chapter 11 bankruptcy may be used as a mechanism for the controlled liquidation of a business.⁶⁴ Several aspects of a Chapter 11 liquidation may make it more appealing to a business and its creditors than liquidation under Chapter 7. First, the debtor stays in possession and thus in control of the business throughout the liquidation process.⁶⁵ Second, if the business is able to generate profits, continuing regular business operations during the pendency of the liquidation process ensures that more funds are available for creditors.⁶⁶ A third aspect is the benefit of time – to allow for “a slow and orderly liquidation under the supervision of the Chapter 11 stakeholders, as opposed to a rapid liquidation under Chapter 7.”⁶⁷ Finally, the business might be worth more in the marketplace as a going concern than it would be if sold in bits and pieces “at ‘fire-sale’ prices.”⁶⁸

In both the reorganization and the liquidation, a self-insured employer in Chapter 11 bankruptcy may initially attempt to meet its workers’ compensation obligations. Often, an employer-debtor will file a “first day” motion with the bankruptcy court, requesting permission to retain its self-insured status.⁶⁹ If the court approves the motion, the employer continues to be liable for workers’ compensation benefits and makes payments just as it did before the bankruptcy.⁷⁰

64. See 11 U.S.C. § 1123(b)(4) (2006) (The Chapter 11 plan can “provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests.”); 11 U.S.C. § 1123(a)(5)(d) (2006) (The plan can “provide adequate means for . . . implementation [including the] sale of all or any part of the property of the estate.”); Mann, *supra* note 58, at 1432-33.

65. See *supra* notes 59-60 and accompanying text. See generally W. HOMER DRAKE, JR. & CHRISTOPHER S. STRICKLAND, CHAPTER 11 REORGANIZATIONS 1-5 (2d ed. 2002).

66. DRAKE & STRICKLAND, *supra* note 65, at 3 & n.8.

67. *Id.* at 2-3 & n.7 (“Those having an interest in the business are, after all, generally more knowledgeable about the assets to be sold, and they have more incentive to enhance recovery through Chapter 11.”).

68. Karen Cordry, *Treatment of Workers’ Compensation Claims Under the Bankruptcy Code*, INT’L ASS’N OF INDUS. ACCIDENT BOARDS & COMMISSIONS J., Spring 2004, at 78, 78.

69. Venters, *supra* note 11, at 203. The basis for granting this motion may be found in Section 105 of the Bankruptcy Code, which provides, “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105 (2006). Alternatively, if the workers’ compensation obligations are sizeable, the employer may forfeit its self-insurance privileges and choose to insure post-petition compensation claims under a commercial policy. Venters, *supra* note 11, at 203.

70. Venters, *supra* note 11, at 203.

To the extent that being self-insured is an executory contract, and to the extent that the executory contract requires the debtor to pay past due compensation claims, the debtor may be obligated to cure any pre-petition ar-

b. Chapter 7 and Chapter 11: The Similarities

While the two bankruptcy chapters just described are significantly different from one another, there are several aspects that the two share. First, in both chapters the filing of the bankruptcy creates a bankruptcy estate, into which generally all of the employer-debtor's assets are transferred.⁷¹ Second, the initiation of a bankruptcy case triggers an automatic stay, which immediately enjoins all outside litigation and collection activities against the debtor.⁷² Third, both chapters require the debtor to file schedules identifying the debtor's creditors.⁷³ Fourth, in addition to the schedules filed by the debtor, the bankruptcy court in both chapters utilizes a claim filing system (creditors file proofs of claims) to manage the process of quantifying the debtor's obligations and establish an orderly distribution of assets.⁷⁴ Finally, at some point in the bankruptcy, the debtor obtains a discharge of its outstanding unsecured obligations.⁷⁵

One of these common aspects, the proof of claim, requires additional scrutiny. The Bankruptcy Code defines a claim as, among other things, a "right to payment."⁷⁶ Generally, any creditor may file a proof of claim.⁷⁷ If a timely proof of claim is required, but the creditor fails to act, one can be filed on the creditor's behalf by "an entity that is liable to such creditor with the debtor," by the debtor, or by the trustee.⁷⁸

In a Chapter 7 bankruptcy, an unsecured creditor who wishes to be eligible to receive distribution from the bankruptcy estate must file a proof of claim.⁷⁹ In Chapter 11, so long as the claim is accurately presented in the

rearrange owing to compensation claimants if the court approves the assumption of the debtor's self-insured status.

Id.

71. 11 U.S.C. § 541 (2006).

72. 11 U.S.C. § 362 (2006).

73. 11 U.S.C. § 521(a)(1)(A) (2006); FED. R. BANKR. P. 1007(a).

74. *See generally* 11 U.S.C. § 510 (2006).

75. Once a debt is discharged, the creditor is permanently enjoined from collecting the debt from the debtor. 11 U.S.C. § 524 (2006). A Chapter 7 discharge occurs at the close of the case. 11 U.S.C. § 727 (2006). In a Chapter 11 bankruptcy, when the plan of reorganization is approved, all allowed claims are deemed to be "new" debt, and all non-allowed obligations are discharged. 11 U.S.C. § 1141 (2006).

76. 11 U.S.C. § 101(5)(A) (2006). This right to payment is a claim regardless of whether "such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.*

77. 11 U.S.C. § 501(a) (2006).

78. 11 U.S.C. § 501(b)-(c) (2006). Such an entity may be a party who, like Guaranty Corporation, has become secondarily liable to a creditor because of some pre-defined obligation-triggering event. *See* FED. R. BANKR. P. 3005(a).

79. "An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed." FED. R. BANKR. P. 3002(a). Only

debtor's initial bankruptcy schedules, it is "deemed filed" with the bankruptcy court.⁸⁰ Thus, in a Chapter 11 bankruptcy, only a creditor "whose claim or interest is not scheduled or scheduled as disputed, contingent or unliquidated [must] file a proof of claim."⁸¹

Under either chapter, creditors who are listed in the schedules receive notice from the court of the filing of the case and the need (if any) to file a timely proof of claim.⁸² However, bankruptcy law affords some protection to "unscheduled" creditors who do not receive notice of the proof of claim filing period. The debtor's obligation to these creditors will be nondischargeable so long as the creditors received no notice and had no actual knowledge of the bankruptcy case during the claim filing period.⁸³

The creditors with claims secured by valid, perfected interests in the debtor's assets are, by virtue of their perfected security interests, protected in the bankruptcy, at least to the extent of the value of the collateral.⁸⁴ Bankruptcy law also protects administrative expenses, described as "the actual, necessary costs and expenses of preserving the estate," by affording them priority payment status in the bankruptcy proceeding.⁸⁵ Especially important under Chapter 11 (where there is an operating business), these expenses include "wages, salaries, and commissions for services rendered after the commencement of the case."⁸⁶ They are given priority "because they are viewed as necessary to the reorganization" of the debtor.⁸⁷ Additionally, bankruptcy law gives certain pre-petition expenses, such as domestic support obligations, employee wages, and health benefit plans, varying degrees of priority.⁸⁸

Applying these general rules to a workers' compensation claim in bankruptcy, if an employer commercially insures its workers' compensation liabil-

allowed unsecured claims are eligible for distributions from the bankruptcy estate. 11 U.S.C. § 726(a)(2) (2006).

80. 11 U.S.C. § 1111(a) (2006); FED. R. BANKR. P. 3003(b)(1).

81. FED. R. BANKR. P. 3003(c)(2). *See also* FED. R. BANKR. P. 3003(c)(4) (providing that "[a] proof claim . . . executed and filed in accordance with this subdivision shall supersede any scheduling of that claim").

82. FED. R. BANKR. P. 2002(f)(3).

83. 11 U.S.C. § 523(a)(3) (2006).

84. *See* 11 U.S.C. § 506 (2006). Behind the secured creditors, the unsecured creditors form a line, each vying to obtain satisfaction of their claims from any remaining unencumbered assets. *See* 11 U.S.C. § 507 (2006). The bankruptcy code also ranks these creditors by priority, with higher priority unsecured creditors at the front and the general unsecured creditors bringing up the rear. *Id.*

85. 11 U.S.C. § 503(b)(1)(A) (2006).

86. 11 U.S.C. § 503(b)(1)(A)(i).

87. Cordry, *supra* note 68, at 79.

88. *See* 11 U.S.C. § 507 (2006). The categories receive different degrees of priority, relative to how "deserving" the obligation seems to be. Cordry, *supra* note 68, at 79. Employee wages and benefits receive favorable treatment because "the fortunes of employees are normally inextricably linked to the fate of the employer." *Id.* at 83.

ity, the bankruptcy is of little concern to the worker because the insurer is directly responsible for the obligation.⁸⁹ If the employer is self-insured, however, the employee becomes a creditor in the bankruptcy.⁹⁰ In a Chapter 7 liquidation, this is the employee's only option.⁹¹

In a Chapter 11 bankruptcy, employees with workers' compensation claims are further divided into two groups: those who were injured before the filing of the bankruptcy petition and those who were injured after the bankruptcy case commenced.⁹² The reason for this division is that the two groups receive distinctively different treatment under bankruptcy law. The workers who were injured before the bankruptcy receive no priority and are general unsecured creditors – one of the lowest categories of creditors.⁹³ Members in this class often receive very little compensation because the often hefty and ongoing expenses of running the debtor's business during the pendency of the bankruptcy take priority.⁹⁴ Furthermore, under Chapter 11, there is “no provision for paying *any* pre-petition claims . . . while the case is pending.”⁹⁵ Instead, the claims will be dealt with only after the confirmation of a plan “and then paid pro rata from whatever monies are available.”⁹⁶ Unfortunately for the worker, this can be over a year after the bankruptcy is first filed.⁹⁷

Employees who are injured *after* the employer's Chapter 11 bankruptcy is filed are potentially in a better position because the Bankruptcy Code gives priority to the debtor employer's administrative expenses.⁹⁸ Administrative expenses that are allowed to be paid include “the actual, necessary costs and

89. See MO. REV. STAT. § 287.300 (2000).

90. See generally Venters, *supra* note 11, at 202-04; *supra* note 76.

91. See Aurbach, *supra* note 53, at 4 (The “[t]rustee . . . arranges for a sale of the assets of the company to accumulate funds to distribute to the creditors.”); *supra* notes 53-55 and accompanying text.

92. See Aurbach, *supra* note 53, at 5; Cordry, *supra* note 68, at 86-87. Bankruptcy law treats the “claim date” as the date of the injury. See, e.g., *In re DeRoche*, 287 F.3d 751, 753 (9th Cir. 2002); *Bliemeister v. Indus. Comm'n (In re Bliemeister)*, 251 B.R. 383, 396 (Bankr. D. Ariz. 2000), *aff'd*, 296 F.3d 858 (9th Cir. 2002).

93. See *In re Chateaugay Corp.*, 155 B.R. 625, 628 (Bankr. S.D.N.Y. 1993) (“Workers’ compensation claims arising out of pre-petition injuries are ordinarily entitled to general unsecured status.”); *In re Columbia Packing Co.*, 34 B.R. 403, 404 (Bankr. D. Mass. 1983) (holding that workers receiving benefits pre-petition had general unsecured claim in employer's bankruptcy); Cordry, *supra* note 68, at 79. There are “certain pre-petition expenses [that] are viewed as particularly deserving[, such as] employee wage and benefit claims . . . and they receive priority.” Cordry, *supra* note 68, at 79. However, these priorities are so narrowly construed that workers’ compensation benefits, *while similar in nature*, “appear to fall outside of their literal terms.” *Id.*

94. Cordry, *supra* note 68, at 79.

95. *Id.*

96. *Id.* at 81.

97. Aurbach, *supra* note 53, at 4.

98. 11 U.S.C. § 507(a)(2) (2006).

expenses of preserving the estate.”⁹⁹ In a reorganization, the employer is continuing to operate its business, and employment-related obligations that arise during the bankruptcy are considered such necessary costs and expenses.¹⁰⁰ Furthermore, federal law mandates that a debtor-in-possession obey state laws, which include relevant workers’ compensation laws.¹⁰¹ Thus, a self-insured employer’s duty to cover its post-petition workers’ compensation obligations is a priority administrative expense.

2. Bankruptcy: Jurisdictional Issues

A discussion of bankruptcy law is incomplete without at least a brief examination of relevant jurisdictional issues. Initially, an important point to remember is that, as a federal statutory enactment, bankruptcy law preempts state workers’ compensation law.¹⁰² This, in turn, ultimately determines the fate of a workers’ compensation case that is pending when the automatic stay is triggered.

Yet federal law alone does not provide a definitive answer to the question of what happens to the injured worker’s pending workers’ compensation claim after the employer’s bankruptcy is filed. On one hand, “the automatic stay prohibits the continued prosecution of any worker’s petition for benefits [with respect to] the treatment of any pending, contingent and unliquidated compensation cases.”¹⁰³ Thus, the worker himself might have to move to lift the stay in order to continue the adjudication of his compensation claim at the state level. On the other hand, even in bankruptcy the self-insured employer is still required to comply with state laws.¹⁰⁴ The employer’s “failure to seek the lifting of the automatic stay to pay its existing compensation benefits” could be considered an impermissible violation of Missouri workers’ compensation law.¹⁰⁵ This suggests that the onus to clear the way for the processing of claims for compensation should be on the employer.

Additionally, where a third party, such as an insurance company, is obligated to cover the employer’s workers’ compensation liabilities, the bankruptcy’s automatic stay may not necessarily halt ongoing proceedings under the state workers’ compensation law.¹⁰⁶ Thus, it seems possible that workers

99. 11 U.S.C. § 503(b) (2006).

100. *See* Cordry, *supra* note 68, at 78-79 (noting that post-petition “day-to-day operational costs . . . are viewed as necessary to the reorganization”).

101. 28 U.S.C. § 959(b) (2006); 11 U.S.C. § 1166 (2006).

102. U.S. CONST. art. VI, § 2.

103. Venters, *supra* note 11, at 204.

104. *Id.* (citing 28 U.S.C. § 959 (2006); 11 U.S.C. § 1166 (2006)).

105. *Id.*

106. Venters, *supra* note 11, at 205. *See* 11 U.S.C. § 362(b)(4) (2006) (excepting from the automatic stay “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s or organization’s police and regulatory power”). *See also* *Ohio v. Mansfield Tire & Rubber Co.* (*In re*

under this perhaps more fortunate circumstance may proceed to have their compensation claims adjudicated in state proceedings, regardless of the employer's bankruptcy.¹⁰⁷

The foregoing Sub-Parts illustrate the existence of a critical intersection between Missouri's workers' compensation law and federal bankruptcy law with respect to the bankrupt self-insured employer proof of claim filing requirement. In order to flesh out the confluence of the law more fully, it is important to look at the laws as applied in actual cases. Next, three such cases will be discussed.

C. Relevant Case Law

The three cases discussed in this Sub-Part each address an aspect of the proof of claim filing requirement in Missouri Revised Statute Section 287.865.5. Each case also has some connection to an employer's bankruptcy case.

In the case of *In re Wire Rope Corp. of America, Inc.*, the employer, Wire Rope, filed bankruptcy under Chapter 11 but ultimately liquidated its assets.¹⁰⁸ The central issue was whether employees with pre-petition workers' compensation claims who failed to file a proof of claim in their self-insured employer's bankruptcy case were barred from receiving workers' compensation payments from Guaranty Corporation.¹⁰⁹ Wire Rope was formerly qualified to self-insure in Missouri and, as a member of Guaranty Corporation, had paid \$810,000 into the insolvency fund.¹¹⁰ It filed a Chapter 11 bankruptcy on May 15, 2002.¹¹¹ On the same day, Wire Rope filed an emergency motion with the bankruptcy court requesting permission to continue to

Mansfield Tire & Rubber Co.), 660 F.2d 1108, 1113-14 (6th Cir. 1981). The company in *Mansfield Tire* was originally self-insured but later purchased state-sponsored insurance coverage. *Mansfield Tire*, 660 F.2d at 1110. Workers injured during the self-insured period could claim against security posted by the company while a state insurance fund paid the later claims. *Id.* at 1113. The United States Court of Appeals for the Sixth Circuit noted that none of the injured workers were compensated from bankruptcy estate assets. *Id.* It then held (1) that bankruptcy courts do not have jurisdiction to rule on the substantive law of workers' compensation cases and (2) that the administration of state workers' compensation laws is a "valid exercise of police or regulatory power of a governmental unit" that is excepted from the automatic stay. *Id.* at 1114.

107. See *Mansfield Tire*, 660 F.2d at 1113-14; *In re Wire Rope Corp. of Am.*, 300 B.R. 1, 5-6 (Bankr. W.D. Mo. 2003) ("[T]he claims [covered by Guaranty Corporation] will be processed and administered by the Division of Workers' Compensation as if no bankruptcy had been filed.").

108. *In re Wire Rope*, 300 B.R. at 3-4.

109. *Id.* at 3. Note that this case was decided in 2003, almost two years before the 2005 workers' compensation amendments were enacted. *Id.* at 11.

110. *Id.* at 3.

111. *Id.* at 4.

make expenditures as necessary to administer its workers' compensation self-insurance.¹¹² The motion was granted the next day.¹¹³

Wire Rope listed eighty-seven pre-petition claimants on a statement of pending and threatened litigation, as required by local rule,¹¹⁴ and later discovered another sixty-seven potential pre-petition claimants.¹¹⁵ No workers' compensation claimants were listed in the debtor's bankruptcy schedules.¹¹⁶ While the eighty-seven workers' compensation claimants listed in the litigation statement did receive notice of the deadline to file a proof of claim in the bankruptcy, they were not directed to actually file proof of claims, either to protect their status as unsecured creditors or to preserve their right to receive compensation payments from Guaranty Corporation.¹¹⁷ Of all the claimants and potential claimants identified, only nineteen actually filed proof of claims before the deadline.¹¹⁸

Approximately a year into the bankruptcy, Wire Rope obtained commercial workers' compensation insurance and terminated its self-insured status.¹¹⁹ A month later, the bankruptcy court confirmed a plan of liquidation and a proposed sale of the company.¹²⁰ As part of the deal, the company acquiring Wire Rope agreed to pay \$605,000 to Guaranty Corporation.¹²¹ This amount covered post-petition workers' compensation obligations incurred during the self-insured period of Wire Rope's bankruptcy.¹²² In accepting this amount, Guaranty Corporation agreed that the new company would have no obligation to cover any more of Wire Rope's pre-petition workers' compensation liabilities.¹²³

However, throughout the pendency of the bankruptcy proceeding, Guaranty Corporation maintained that it was "only required to pay compensation benefits if the injured workers properly and timely filed a proof of claim in the debtor's bankruptcy, or otherwise preserved their rights as pre-petition claimants."¹²⁴ The bankruptcy court disagreed, pointing out that initially Wire Rope was self-insured and that the injured workers did not need to file a proof of claim to get benefits because the company was ordered by the court

112. *Id.* at 3.

113. *Id.*

114. *See* BANKR. W.D. MO. R 2015-2.A.2.

115. *In re Wire Rope*, 300 B.R. at 4.

116. *Id.*

117. *Id.*

118. *Id.* The court took this low number of filed claims as evidence that the injured employees did not understand "that their [compensation] claims would suddenly be terminated if they failed to file a proof of claim." *Id.* at 8.

119. *Id.* at 4.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 3.

to continue covering the payments.¹²⁵ This created a “false sense of security” for the workers because they were still getting their workers’ compensation benefits even though Wire Rope was in bankruptcy.¹²⁶ The employees did not discover the need to file a proof of claim until well after the deadline had passed.¹²⁷

The court then explained that Guaranty Corporation itself could have filed proofs of claims in the debtor’s bankruptcy on behalf of the employee claimants under Federal Rule of Bankruptcy Procedure 3005(a).¹²⁸ Moreover, it could have objected to the confirmation of the debtor’s Chapter 11 Plan or the debtor’s motion to sell assets “on the ground that there would be insufficient funds . . . to cover all of the pre-petition workers’ compensation claims.”¹²⁹ Noting that Guaranty Corporation’s position was “grossly unfair and inequitable,” the court refused to release Guaranty Corporation from its responsibilities to the Wire Rope workers.¹³⁰ In fashioning a remedy, the court, considering the requirements of Section 287.865.5, ordered (1) Wire Rope to amend its schedules to include the employee claimants, (2) Guaranty Corporation to file proofs of claims on behalf of the workers, and (3) Guaranty Corporation to fulfill its statutory obligations to the injured employees.¹³¹

In the case of *Meadows v. Havens Erectors, Inc.*, an unusual issue was before the court.¹³² The question presented was whether under Missouri Revised Statute Section 287.865.5 an injured employee must file a proof of claim in bankruptcy court, *even if the employer had never entered into bankruptcy*.¹³³ The employer, Havens Erectors (Erectors), was self-insured and a member of Guaranty Corporation.¹³⁴ Erectors was a subsidiary of Havens Steel (Steel).¹³⁵ Steel filed a Chapter 11 bankruptcy, liquidated Erectors, and took back the subsidiaries’ assets.¹³⁶ Steven Meadows, an Erectors employee, suffered an on-the-job shoulder injury the week before the asset transfer.¹³⁷ He filed a workers’ compensation claim, and the Division entered an

125. *Id.* at 7.

126. *Id.*

127. *Id.* at 8.

128. *Id.* at 9.

129. *Id.* at 7, 9. Rule 3005(a) allows a third party obligor to file a proof of claim in the debtor’s bankruptcy. *See id.*

130. *Id.* at 10-11. The court was unsympathetic regarding the possibility that Guaranty Corporation’s insolvency fund might be inadequate to cover all obligations. *Id.* at 9 n.4 (“It is, after all, a ‘guaranty’ corporation; i.e., an insurance company of sorts.”).

131. *Id.* at 11.

132. 238 S.W.3d 210 (Mo. App. W.D. 2007).

133. *Id.* at 211-12.

134. *Id.* at 212.

135. *Id.* at 211.

136. *Id.*

137. *Id.*

award in his favor.¹³⁸ Meadows also filed a proof of claim in Steel's bankruptcy case.¹³⁹

Because Erectors was found to be insolvent,¹⁴⁰ Guaranty Corporation became obligated to pay Meadows's compensation benefits.¹⁴¹ In its role as obligor, Guaranty Corporation appealed Meadows's award to the Missouri Court of Appeals, Western District, claiming that Meadows was required to file a proof of claim against Erectors.¹⁴² The court noted that, while the company was insolvent, it was not in bankruptcy and that there was no "court of competent jurisdiction" in which the proof of claim could have been filed.¹⁴³ The court concluded that the filing of a proof of claim is required "to trigger Guaranty Corporation's obligation [only] where the insolvent member is the subject of a bankruptcy proceeding."¹⁴⁴ Because this was a case of insolvency without bankruptcy, there was *no proof of claim filing requirement* under Missouri Revised Statute Section 287.865.5.¹⁴⁵

138. *Id.* On review, the Industrial Relations Commission affirmed. *Id.* at 213.

139. *Id.* at 212.

140. "Erectors's accounts were frozen and the company stopped making payments on various workers' compensation obligations for which it was self-insured." *Id.* Erectors notified Guaranty Corporation, and the board of Guaranty Corporation found the company to be insolvent. *Id.* The Division adopted Guaranty Corporation's finding, and this "triggered Guaranty Corporation's obligation to pay the workers' compensation claims of injured Erectors employees." *Id.*

141. *Id.* at 212.

142. *Id.* at 213, 215. The court described Guaranty Corporation's argument as follows:

Guaranty Corporation contends that the statutory requirement of the proof of a bankruptcy claim should be read to require the claimant, as an unsecured creditor of the insolvent employer, band together with other creditors, unsecured or otherwise, and force the employer into bankruptcy, thereby initiating the proceeding in which he can file his proof of claim. Alternately, the appellant asserts the employee must wait until other creditors force the insolvent employer into bankruptcy, and then the employee can make his claim against the employer and initiate his workers' compensation claim.

Id. at 214.

143. *Id.* at 213-14.

144. *Id.* at 214.

145. *Id.* at 215. The court elaborated,

Guaranty Corporation's contention flies in the face of the purpose of the Workers' Compensation laws to "provide a simple and nontechnical method of compensation for injuries sustained by employees through accident arising out of and in the course of employment and to place the burden of such losses on industry." Guaranty Corporation seeks to interpose an additional requirement, not supported by the statute, on employees of insolvent, not bankrupt, members. This proposed requirement is clearly inconsistent with the purpose of Workers' Compensation and the purpose of Guaranty Corporation itself to protect such employees.

In *Jones v. GST Steel Co.*, the sole issue before the court was whether Richard Jones's failure to file a proof of claim in bankruptcy court constituted a waiver of his right to file a claim for workers' compensation benefits.¹⁴⁶ For almost thirty-four years, Jones was an employee of the Kansas City-based GST Steel Company (GST).¹⁴⁷ During the course of his employment, he was exposed to loud noises, which caused hearing loss in both ears.¹⁴⁸ Jones received a formal medical diagnosis of hearing loss on February 1, 2001, and the following month sought the advice of an attorney regarding a potential claim against GST.¹⁴⁹

On February 7, 2001, GST's parent company filed a Chapter 11 bankruptcy in North Carolina.¹⁵⁰ Three months later, GST shut down and released its employees, including Jones.¹⁵¹ The next month, the North Carolina bankruptcy court sent notices to GST's creditors, informing them of an open period and deadline for filing proof of claims.¹⁵² Jones, however, did not file a proof of claim with the bankruptcy court.¹⁵³

Just under two years after first being diagnosed with hearing loss, Jones filed a claim for workers' compensation with the Division.¹⁵⁴ His claim, alleging damage to both ears, including tinnitus and loss of hearing, stated a date of injury of May 15, 2001, the last day that Jones worked for GST.¹⁵⁵

Guaranty Corporation's principal affirmative defense in the administrative case was jurisdictional in nature. It argued that Jones waived his right to file a workers' compensation claim because he failed to comply with Missouri Revised Statute Section 287.865.5.¹⁵⁶ According to Guaranty Corporation, Jones's noncompliance barred the Division from assuming jurisdiction

Id. at 214 (citation omitted).

146. 272 S.W.3d 511, 513 (Mo. App. W.D. 2009).

147. *Id.* GST Steel Company was a fictitious name, registered to do business in Missouri by GS Technologies Operating Company, Inc. See State of Missouri Registration of Fictitious Name, No. 306570 (June 28, 1996) (on file in the Missouri Secretary of State Business Entity database). GS Technologies was headquartered in North Carolina. See GS Technologies Operating Co., Inc., 2000 Annual Registration Report (May 2, 2000) (on file in the Missouri Secretary of State Business Entity database).

148. *Jones*, 272 S.W.3d at 513.

149. *Id.*

150. See Voluntary Petition, *In re* GS Technologies Operating Co., Inc., No. 01-30321 (Bankr. W.D. N.C. Feb. 7, 2001), available at <https://ecf.ncwb.uscourts.gov/>; Voluntary Petition, *In re* GS Industries, No. 01-30319 (Bankr. W.D. N.C. Feb. 7, 2001), available at <https://ecf.ncwb.uscourts.gov/>. See also *supra* note 147 (describing the company's business organization).

151. *Jones*, 272 S.W.3d at 513.

152. *Id.* at 516. The deadline for filing was July 27, 2001. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* 515-16. Guaranty Corporation and the court in this case referenced the pre-2005 version of Section 287.865.5. *Id.* at 516.

over the matter.¹⁵⁷ It asserted that, because the Division had no jurisdiction over the matter, there was no claim and no obligation for Guaranty Corporation to cover.¹⁵⁸

Jones admitted that he had actual knowledge of GST's bankruptcy, having first learned of it some time in December 2000.¹⁵⁹ However, he denied receiving notice to file a proof of claim from the North Carolina bankruptcy court.¹⁶⁰ Further, he argued that, under Missouri Revised Statute Section 287.197, he was precluded from presenting a claim for "occupational deafness due to occupational exposure" until he was separated from the occupational hazard that allegedly caused the deafness for at least six months.¹⁶¹ The designated date of his injury was May 15, 2001, so the earliest date that he could file a workers' compensation claim was November 15, 2001.¹⁶² The time period for filing a proof of claim in the GST bankruptcy closed on July 27, 2001.¹⁶³ Therefore, Jones asserted that, at least during the open period for filing proofs of claims, he had at best only a potential, unmaturing claim.¹⁶⁴

In an administrative proceeding, the judge "concluded that proper notice of GST's bankruptcy was not given to Jones because the notice mailed by the bankruptcy court never reached him."¹⁶⁵ The administrative judge then found that, without proof that Jones actually received the notice, the Section 287.865.5 requirement to file the claim in bankruptcy court was waived by Guaranty Corporation and that the jurisdictional defense was moot.¹⁶⁶ Ruling for Jones, the administrative judge found that Jones suffered a "permanent partial disability of approximately 15.77% to the body as a whole."¹⁶⁷

Guaranty Corporation appealed the administrative ruling to the Commission, arguing for strict construction of Section 287.865.5 to require workers to file their claims during the employer's bankruptcy case or face having

157. Richard A. Jones, Injury No. 01-168328 (Mo. Div. of Workers' Compensation May 16, 2007) (admin. hearing), <http://www.dolir.mo.gov/lirc/wcdecisions/wcdec08/Jones,%20Richard.htm>.

158. *Jones*, 272 S.W.3d at 513-14.

159. *Jones*, Injury No. 01-168328 (admin. hearing).

160. *Id.*

161. *See id.*; *Jones*, 272 S.W.3d at 516. Section 287.197 was amended in 2005 to shorten the waiting period from six months to one month. MO. REV. STAT. § 287.197 (Supp. 2008).

162. *Jones*, 272 S.W.3d at 516.

163. *Id.*

164. *Id.* at 520.

165. *Id.* at 513-14.

166. *Id.* at 514.

167. *Id.* Richard A. Jones, Injury No. 01-168328 (Mo. Div. of Workers' Compensation May 16, 2007) (admin. hearing), <http://www.dolir.mo.gov/lirc/wcdecisions/wcdec08/Jones,%20Richard.htm>.

the claim barred from coverage by Guaranty Corporation.¹⁶⁸ The Commission found that Jones improperly failed to file a claim in the bankruptcy case even though the bankruptcy court sent adequate notice of the time to file a proof of claim.¹⁶⁹ It reversed the administrative decision, holding that because Jones failed to satisfy the Section 287.865.5 requirement to file a proof of claim in GST's bankruptcy, Guaranty Corporation was not liable to Jones for workers' compensation benefits.¹⁷⁰

Jones then appealed the Commission's reversal to the Missouri Court of Appeals, Western District.¹⁷¹ The court focused on the juxtaposition of the requirement in Section 287.197.7 – that Jones wait six months before submitting an occupational injury claim – with the Section 287.865.5 proof of claim filing requirement.¹⁷² Noting that a significant underpinning of the instant case was the apparent tension between the two state statutes that controlled the timing of Jones's workers' compensation claim, the court used rules of statutory interpretation to attempt to harmonize the provisions.¹⁷³

168. *Jones*, 272 S.W.3d at 514. The Commission's opinion may be found at Richard A. Jones, Injury No. 01-168328 (Mo. Labor & Indus. Relations Comm'n Jan. 2, 2008) (final admin. review), <http://www.dolir.mo.gov/lirc/wcdecisions/wcdec08/Jones,%20Richard.htm>.

169. *Jones*, Injury No. 01-168328 (final admin. review). Additionally, the Commission found that Jones admitted having actual notice of the case as early as December 2000. *Id.* It also took note of the fact that Jones received additional notice of the bankruptcy in the form of Guaranty Corporation's affirmative defense to his workers' compensation claim. *Id.* ("At best, employee should have filed a proof of claim when the Guarantee [sic] Corporation filed its answer in May of 2004 alleging its affirmative defense of the employee's failure to timely file a proof of claim."). Finally, the Commission observed that GST's bankruptcy case did not formally close until 2007. *Id.*

170. *Id.* One Commissioner dissented, remarking that the administrative judge's opinion was "well written, well reasoned and well supported." *Id.*

171. *Jones*, 272 S.W.3d at 514. In assessing the case, the Missouri Court of Appeals, Western District, first set out the appropriate standard of review for a Commission decision: "whether the award is 'supported by competent and substantial evidence upon the whole record.'" *Id.* (quoting MO. CONST. art. V, § 18). The court also acknowledged Missouri Revised Statute Section 287.495.1, which restricts the appellate review of Commission decisions to questions of law and allows for disturbance of a Commission decision only upon grounds of (1) acts beyond the Commission's authority, (2) an award obtained through fraud, (3) facts that "do not support the award," and (4) insufficient evidence to "warrant the making of the award." *Id.* (quoting MO. REV. STAT. § 287.495.1 (2000)). Pursuant to Section 287.495.1, the court found the issue on appeal was a question of the "legal consequences of the facts as found by the Commission." *Id.* at 515.

172. *Id.* at 518.

173. *Id.* at 517-18.

First, it acknowledged Guaranty Corporation's important role of providing much needed benefits to injured workers of insolvent companies.¹⁷⁴ To ensure that Guaranty Corporation's assets were not unnecessarily depleted, the court found that Section 287.865.5 should be construed to "protect[] Guaranty Corporation from claims for which compensation could have been paid, at least in part, out of [a] bankruptcy estate."¹⁷⁵ This construction of Section 287.865.5, however, did not resolve its apparent conflict with the Section 287.197.7 mandatory waiting period.¹⁷⁶ To resolve this conflict, the court employed two tenets of statutory construction: (1) when more than one statute addresses the same topic, an interpretation "that harmonizes the two" should be utilized;¹⁷⁷ and (2) the provision most specifically addressing the subject at issue should control.¹⁷⁸ Section 287.197.7, the "more specific" provision, therefore controlled.¹⁷⁹ This outcome, the court reflected, was also appropriate under Section 287.800, which at the time provided that workers' compensation laws should "be liberally construed."¹⁸⁰

The *Jones* court then found that claims filing and notice requirements should be further interpreted with "common sense and reasonableness, and that Guaranty Corporation should not be allowed to forget its purpose, which is to aid the workers of insolvent self-insured companies."¹⁸¹ The court ulti-

174. *Id.* at 518-19.

175. *Id.* at 518.

176. *See id.*

177. *Id.* "The general subject matter here is the filing of claims in the bankruptcy estate of an insolvent company that is self-insured for workers' compensation purposes." *Id.*

178. *Id.*

179. *Id.* "Section 287.197.7 deals specifically with claims of hearing loss. It provides that 'no claim . . . may be filed' until the passage of a specific period of time after separation from employment." *Id.*

180. *Id.* (quoting MO. REV. STAT. § 287.800 (2000)) (stating that the liberal construction should be "with a view to the public welfare and in furtherance of the public policy that an employee is entitled to have compensation for any injury that is clearly job-related and arises out of and in the course of his employment"). The court stated that "[p]rocedural technicalities are not to be employed in an imperious manner to frustrate and defeat substantively meritorious claims." *Id.*

Section 287.800 was amended in 2005. MO. REV. STAT. § 287.800.1 (Supp. 2008). It now requires strict construction of workers' compensation law. *Id.* *See also infra* notes 188-204 and accompanying text.

181. *Jones*, 272 S.W.3d at 518-19. The court also made other remarks about the statutes governing Guaranty Corporation. *Id.* at 519-20. Specifically, it took note of miscellaneous provisions that it found reflected a "legislative agenda that workers be fully and properly informed of their rights, so as not to be caught in a trap." *Id.* at 519. First, noted the court, Section 287.872.2(1) allows the Division to require Guaranty Corporation to "notify the member employers and *any other interested parties of the determination of insolvency and of their rights.*" *Id.* at 520. Additionally, the court stated that the 2005 legislative amendments to Section 287.865.5 prevented

mately concluded that the proof of claim filing requirement was never meant to be used by Guaranty Corporation as a shield to protect it from its own statutory obligations.¹⁸² Considering the mandatory time delay for filing an occupational deafness claim, the court determined that Jones “would have lacked *adequate* notice that he was supposed to file an unmaturing, potential claim in the bankruptcy court.”¹⁸³ Thus, the court held, Jones’s claim for

Guaranty Corporation from taking its “if you do not file a proof of claim, you are barred from the insolvency fund” position. *Id.* According to the court, the 2005 amendments achieve this result in two ways. *Id.* First, amended Section 287.865.5 requires the Division to send injured workers written notification explaining the Section 287.865.5 proof of claim filing requirement and how to submit proof of that filing with the Division and Guaranty Corporation. *Id.* (“The legislature further, to prevent injustice, now requires the *Workers’ Compensation Division* to notify all such employees in writing, so that any worker receiving the bankruptcy court notice understands that the notice from the bankruptcy court *actually applies to workers’ compensation claims*, and not merely to such matters as salary and benefit claims.”). Second, the amended section provides “in specific terms that any duty to file a proof of claim in the bankruptcy court applies only to workers who have an ‘open claim’ (a pending claim) or who have already filed a report of injury.” *Id.* However, the court’s statutory interpretation in the second point is questionable because the only place the phrase “open claim” appears is in the sentence requiring the Division to notify injured workers of the employer’s bankruptcy. *See* § 287.865.5; *infra* notes 207-10.

In its summation, the court reflected that the 2005 statutory amendments were not material to the outcome in *Jones*. *Jones*, 272 S.W.3d at 520. However, it emphasized that the amendments reinforce the idea that Guaranty Corporation was meant to protect injured workers. *Id.* The court concluded that the legislature did not intend to create procedural loopholes that deny needed benefits simply because workers were uninformed or unsophisticated in the ways of a complicated bankruptcy proceeding. *Id.*

182. *Id.* The *Jones* court found this position to be consistent with the holding in *In re Wire Rope Corp. of America, Inc.* *Id.* at 519-20. *See In re Wire Rope Corp. of Am.*, 300 B.R. 1, 10 (Bankr. W.D. Mo. 2003) (“It is difficult for this Court to find the appropriate words to express its distaste for the position taken by Guaranty Corporation. It is quite simply, unconscionable. It spits in the face of the longstanding public policy of the State of Missouri to protect workers who suffer job-related injuries and then suffer the anguish and uncertainty that surely accompany the insolvency of their employer. It ignores the claims-handling procedures that were established by this Court in the earliest days of this Chapter 11 bankruptcy proceeding. It creates unnecessary and unjustified anxiety among those injured workers who are in need of continuing medical treatment. To accept and approve the position taken by Guaranty Corporation would be contrary to the spirit of state and federal law, and would be grossly unfair and inequitable.”).

183. *Jones*, 272 S.W.3d at 520. The relevant bankruptcy law was only peripherally mentioned in *Jones*. The most specific discussion arose indirectly through the court’s comparison of Jones’s circumstances to those of the workers in the bankruptcy case *In re Wire Rope Corp. of America, Inc.* *Id.* at 519-20 (discussing *In re Wire Rope*, 300 B.R. at 8-10). For the facts of *In re Wire Rope*, see *supra* notes 108-27 and accompanying text. The *Jones* court remarked that *In re Wire Rope* was distinguish-

workers' compensation was valid, even if he had received notice of the bankruptcy deadline to file a proof of claim.¹⁸⁴

III. RECENT DEVELOPMENTS

On March 30, 2005, the Missouri legislature enacted several amendments to The Workers' Compensation Law.¹⁸⁵ Two of those amendments increased the Section 287.865.5 proof of claim filing requirement's negative impact on the injured worker. The two amendments were (1) a shift from liberally construing the workers' compensation statutes in favor of the injured worker to an application of strict statutory construction¹⁸⁶ and (2) the insertion of a jurisdictional element into the proof of claim filing requirement.¹⁸⁷ Each of these amendments will be discussed in turn.

A. Section 287.800: From Liberal to Strict Construction

Prior to 2005, Section 287.800 required that workers' compensation statutes be "liberally construed with a view to the public welfare."¹⁸⁸ Generally, the concept of liberal construction "signifies an interpretation which produces broader coverage or more inclusive application of statutory concepts."¹⁸⁹ Sometimes, however, a restrictive statutory interpretation can be considered liberally construed because "it produces a result which courts consider desirable."¹⁹⁰ Cases interpreting this provision have generally favored the more expansive concept.¹⁹¹ As applied in Missouri, expansive lib-

able because in that case many of the injured employees did not receive notice of the deadline to file claims with the bankruptcy court. *Jones*, 272 S.W.3d at 519. See *In re Wire Rope*, 300 B.R. at 4 ("[O]f the 154 total pre-petition workers compensation claimants . . . only 87 received formal notice" of the proof of claim deadline.). However, it stated that the cases were similar because, in each, the workers "understandably . . . lack[ed] information and clarification as to how to proceed." *Id.* The court also noted another similarity: that Guaranty Corporation could very well have filed proofs of claims on behalf of the workers. *Id.* The *Jones* court stated, "We are, thus, somewhat uncomfortable with Guaranty Corporation's assumption that every worker is entirely sophisticated in these matters and needs no assistance." *Id.*

184. *Jones*, 272 S.W.3d at 520.

185. See S.B. 1 & 130, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005).

186. MO. REV. STAT. § 287.800 (Supp. 2008).

187. *Id.* § 287.865.5. While there were numerous other amendments enacted in 2005, for the purposes of this Part, only the amendments made to Sections 287.800 and 287.865.5 will be discussed.

188. MO. REV. STAT. § 287.800 (2000) (amended 2005).

189. NORMAN J. SINGER & J.D. SHAMBLE SINGER, STATUTES AND STATUTORY CONSTRUCTION 106 (7th ed. 2008).

190. *Id.* at 109.

191. See *Parrott v. HQ, Inc.*, 907 S.W.2d 236, 240 (Mo. App. S.D. 1996) (stating that old Section 287.800 required "such construction as will promote the public policy

eral construction of the workers' compensation statutes gave rise to a general presumption that the injured employee should prevail.¹⁹²

In 2005, Section 287.800 was amended, and the rule became one of strict construction, where "the benefit of the doubt [is not given] to any party when weighing evidence and resolving factual conflicts."¹⁹³ As opposed to the open and expansive tenor of liberal construction, strict construction generally requires the statute to be read conservatively, with interpretation limited by the specific words used in the statute.¹⁹⁴ This is not to say that strict construction must always be rigidly applied. For example, "the language used by the legislature may be accorded a full meaning to effect its manifest purpose and intention, but the operation of the law may then be confined to cases which plainly fall within its terms, spirit and purpose."¹⁹⁵

An example of the application of strict construction in the context of a post-2005 workers' compensation case is found in *Gordon v. City of Ellisville*.¹⁹⁶ In that case, the worker claimed that he slipped while climbing out of a "tub grinder" and injured his shoulder.¹⁹⁷ An administrative law judge denied the worker's claim because the employer proved that the worker sustained a significant injury in the same shoulder in a prior non-work-related

of extending . . . benefits to the largest possible class . . . and in furtherance of the public policy that an employee is entitled to have compensation for any injury that is clearly job-related").

192. *Id.* ("[O]ur courts consistently hold that in construction of the Act, any doubt or question as to the right of an employee to compensation shall be resolved in favor of the injured employee."). For an argument in favor of a more conservative application of liberal construction, see *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 618-23 (Mo. App. W.D. 2005) (Smart, J., dissenting, Ulrich & Spinden, JJ., concurring in the dissent). In *Custer*, Judge Smart argued that an automatic presumption in favor of granting a workers' compensation award was improper. *Id.* at 621 (citing *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003) (en banc)) ("There is nothing in the constitution or [the statutes] that requires a reviewing court to view the evidence and all favorable inferences drawn therefrom in the light most favorable to the award."). Judge Smart asserted that, instead, claims should be decided with equal fairness to employer and employee alike, giving "liberal construction to the scope of the act" itself and to "the terms of the act," so that all classes of employees that the legislature meant to cover were included. *Id.* at 621-22.

193. MO. REV. STAT. § 287.800(1)-(2) (Supp. 2008). A recent Missouri case reflected that this change is a "significant departure from the prior law." *Allcorn v. TAP Enters., Inc.*, 277 S.W.3d 823, 828 (Mo. App. S.D. 2009).

194. SINGER & SINGER, *supra* note 189, at 108.

195. *Id.* at 109.

196. 268 S.W.3d 454 (Mo. App. E.D. 2008). The injury in *Gordon* took place in October 2005, after the 2005 amendments took effect. *Id.* at 457. For examples of workers' compensation cases decided under the old rule of liberal construction, see *Custer*, 174 S.W.3d 602, and the cases discussed *supra* in Part II.C.

197. *Gordon*, 268 S.W.3d at 456.

incident.¹⁹⁸ After the Commission affirmed the administrative holding, the worker appealed to the Missouri Court of Appeals, Eastern District.¹⁹⁹ One of the worker's points on appeal was that, "since he sufficiently proved that the 2005 work accident aggravated his pre-existing shoulder injury," the decision denying benefits was in error.²⁰⁰ In rejecting this argument, the court acknowledged that the "[c]ase law preceding the 2005 amendments to [T]he Workers' Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an 'aggravated condition.'"²⁰¹ However, the court noted, the current law required the work-related incident to be the "'prevailing factor in causing both the resulting medical condition and disability.'"²⁰² The court then pointed out Section 287.800's strict construction requirement and remarked that it was required to restrict its consideration of the worker's claim to the current statutory standard.²⁰³ The court concluded that the worker's claim for compensation, founded on the old law, was meritless.²⁰⁴

B. Amended Section 287.865.5

Prior to 2005, Section 287.865.5 provided that, if a worker had a claim for compensation that qualified as a Guaranty Corporation obligation, the claimant employee was required to "make timely claim" in the employer's bankruptcy.²⁰⁵ The statute further provided that any proceeds the injured employee received from the bankruptcy estate were to offset Guaranty Corporation's obligation to pay compensation benefits.²⁰⁶

The 2005 amendment to Section 287.865.5 preserved the former language and added (1) the duty of the Division to notify certain injured workers when their self-insured employers file for bankruptcy and (2) a jurisdictional element attached to the employee's duty to file a claim in his employer's bankruptcy.²⁰⁷ Under the first addition, the Division became responsible for providing written notice to each injured worker²⁰⁸ that his self-insured em-

198. *Id.* Based on the employer's expert witness testimony, the judge "found that the injury Claimant suffered from his work accident was not the prevailing factor in causing" his shoulder injury. *Id.* at 457-58.

199. *Id.*

200. *Id.* at 458.

201. *Id.* at 459.

202. *Id.* (quoting MO. REV. STAT. § 287.020.3 (Supp. 2008)).

203. *Id.*

204. *Id.*

205. MO. REV. STAT. § 287.865.5 (Supp. 2008).

206. *Id.*

207. *Id.*

208. The Division must notify "any employee . . . who has an open claim for compensation or first report of injury filed." *Id.*

ployer was “filing bankruptcy, liquidation or dissolution.”²⁰⁹ Further, the Division was tasked with including in that notice an explanation of the employee’s obligation to file a proof of claim with the proper court and to submit proof of that filing with the Division and Guaranty Corporation.²¹⁰

The second change to Section 287.865.5 purported to turn the filing of a proof of claim requirement into a jurisdictional element. It provided,

Any claimant claiming benefits [against insolvent self-insured employers] shall *before the [D]ivision of [W]orkers’ [C]ompensation for the state of Missouri attaches jurisdiction, file with the bankruptcy court* having jurisdiction over the bankruptcy of the self-insured employer, a *proof of claim* or other claim forms required by the appropriate bankruptcy court to secure a claim against the bankrupt employer. . . . Any such claimant shall provide to the Missouri private sector self-insurance guaranty corporation and to the [D]ivision . . . a copy, certified by the bankruptcy court, attesting to the filing of such claim or claim forms. . . . *Failure of the claimant to provide such information shall bar the [D]ivision from invoking jurisdiction over any matter for which an employee may otherwise be entitled to benefits under this chapter.*²¹¹

Although the jurisdictional aspect of Section 287.865.5 has not been directly addressed by a Missouri court, the Missouri Court of Appeals, Western District, skirted the issue in *Meadows v. Havens Erectors, Inc.*²¹² In *Meadows*, Guaranty Corporation’s argument was that, under amended Section 287.865.5, the worker had to file a claim in bankruptcy court before the Division and the Commission could assume jurisdiction.²¹³ Without the proof of

209. *Id.*

210. *Id.* The statute requires that a certified copy of the filed claim be submitted to both the Division and Guaranty Corporation. *Id.* The certification is to include “the date of the alleged loss alleged against the bankrupt employer; description of injuries claimed; and date the claim or claims were filed with the bankruptcy court.” *Id.*

211. *Id.* (emphasis added).

212. 238 S.W.3d 210, 211-14 (Mo. App. W.D. 2007). The court framed the issue of the case as being whether under Missouri workers’ compensation law a worker had to file a proof of claim in bankruptcy court *before* the Industrial Relations Commission could assume jurisdiction. *Id.* at 211. For a discussion of the case, see *supra* notes 132-45 and accompanying text.

213. *Meadows*, 238 S.W.3d at 211. Interestingly, the worker’s injury and subsequent filing of a claim for compensation with the Division both occurred in 2004, before the 2005 enactments, yet the court discussed Section 287.865.5 as amended. *Id.* at 212-13. It is questionable whether the 2005 amendments would have been applicable in this case. See *Wibberg v. State*, 957 S.W.2d 504, 507 (Mo. App. W.D. 1997) (when a statutory amendment divests jurisdiction, absent an explicitly expressed intent indicating otherwise, the statute is not retroactive against pending pro-

claim filing, Guaranty Corporation argued, “there [was] no incident giving rise to a claim for compensation.”²¹⁴ The court did not reach the merits of Guaranty Corporation’s proof of claim jurisdictional defense, presumably because the employer did not file a bankruptcy.²¹⁵ There are no other reported Missouri cases that address Guaranty Corporation’s Section 287.865.5 jurisdictional defense.

IV. DISCUSSION

As the previous Parts established, the Missouri legislature’s importation of a bankruptcy claim prerequisite into Missouri workers’ compensation law, as mandated by Section 287.865.5,²¹⁶ creates troubling conundrums and contradictions that ultimately lead to the unmistakable conclusion that the proof of claim filing requirement is simply bad law. This discussion will focus on the issues and difficulties that arise when attempting to determine just what Section 287.865.5 really means and what it requires of workers, the Division, Guaranty Corporation, and the courts. First, it will seek to summarize the judiciary’s perspectives and positions regarding the interpretation and application of Section 287.865.5. Second, the purposes and processes of the workers’ compensation claim system will be contrasted with the purposes and processes of the claim system as it is utilized in bankruptcy courts. Third, an exploration of the motivations of Guaranty Corporation will be attempted. Finally, a discussion of options and suggestions for the future treatment of Section 287.865.5 will be set out.

A. The Judiciary’s Perspectives and Positions: Interpreting Section 287.865.5’s Proof of Claim Filing Requirement

Section 287.865.5, both in its pre-2005 and its post-2005 amended form, contains an express proof of claim filing requirement.²¹⁷ No cases directly addressing the interpretation and application of current Section 287.865.5’s

ceedings) (citing *Mott Store Co. v. St. Louis & S. F. R. Co.*, 163 S.W. 929, 931 (Mo. 1913) (en banc)).

214. *Meadows*, 238 S.W.3d at 213.

215. *Id.* at 213-14, 215 n.3. The basis of the court’s decision was that, since the employer was not in a bankruptcy proceeding, the employee did not need to file proof of claim to avoid being barred from the Missouri workers’ compensation adjudication process. *Id.*

216. Both in its pre-2005 form and as amended by S.B. 1 & 130, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005).

217. *See supra* notes 6, 8 & 211 and accompanying text for the relevant statutory provisions. For the purposes of this Part, the post-2005 jurisdictional element, *see supra* notes 207, 211-15 and accompanying text, of amended Section 287.865.5 will be ignored.

proof of claim filing requirement, in light of the other 2005 amendments,²¹⁸ have been reported, so the future judicial treatment of the current statute is unclear. However, three opinions, outlined above, discussing the pre-2005 proof of claim filing requirement set out a clear position that is perhaps suggestive of judicial responses to come.²¹⁹ While it remains to be seen whether the reasoning in the three opinions will withstand the new standard of strict construction imposed by amended Section 287.800,²²⁰ the cases seem to be a logical starting point for future courts facing similar fact patterns.

When presented with the prospect of denying a worker's benefits because the worker failed to file a bankruptcy claim, the three cases sided decisively with the worker.²²¹ Apparent in the tone and language of the opinions was each court's strong distaste for what was perceived as Guaranty Corporation's attempted evasion of its statutory obligation to workers of insolvent self-insured employers.²²² The three cases addressed different circumstances involving a self-insured employer's insolvency.²²³ Taken separately, each case tackled a different aspect of a single issue: the proper scope and application of the proof of claim filing requirement. Taken together, they offer at least four fundamental reasons why the pre-2005 proof of claim filing requirement was bad law, and it is submitted that these reasons apply with equal force to the provision as amended.

The first reason that the proof of claim requirement of Section 287.865.5 is bad law is that, as applied, it operates to thwart the fundamental purpose of The Workers' Compensation Law, which is to provide fair compensation to injured workers.²²⁴ Judge James M. Smart of the Missouri Court of Appeals,

218. See *supra* Part III for a discussion of the relevant amendments.

219. As of the date of this Article, only the Missouri Court of Appeals, Western District, and the United States Bankruptcy Court, Western District of Missouri, have discussed Section 287.865.5 in reported opinions. See *supra* Part II.C.

220. See *supra* Part III.A.

221. The three cases are *In re Wire Corp. of America*, 300 B.R. 1 (Bankr. Mo. W.D. 2003), *Meadow v. Havens Erectors, Inc.*, 238 S.W.3d 210 (Mo. App. W.D. 2007), and *Jones v. GST Steel Co.*, 272 S.W.3d 511 (Mo. App. W.D. 2009). See *supra* Part II.C for a discussion of the cases.

222. For example, the court in *In re Wire Rope* described Guaranty Corporation's conduct as "unconscionable" and "grossly unfair and inequitable," 300 B.R. at 10, and the *Meadows* court found Guaranty Corporation's statutory interpretation "untenable in the view of its own statutory purpose." 238 S.W.3d at 215.

223. One case involved a worker employed by a company that was insolvent but not in bankruptcy. *Meadows*, 238 S.W.3d at 215. A second case involved some workers who received no notice of the employer's bankruptcy and other workers who received notice of the bankruptcy but were not informed of the need to file a bankruptcy claim to preserve the right to file a workers' compensation claim. *In re Wire Rope*, 300 B.R. at 4. The third case involved a single worker who received notice of his employer's bankruptcy but had inadequate notice of the need to file a claim. *Jones*, 272 S.W.3d at 520.

224. See *supra* notes 11-13 and accompanying text.

Western District, suggested in *Jones v. GST Steel Co.* that the requirement to file a proof of claim was meant to ensure that the insolvency fund was the fund of last resort, to be used only after all available assets of the bankrupt employer have been depleted.²²⁵ However, in the three reported cases, Guaranty Corporation attempted to use the requirement as a shield to block its obligation to pay anything to non-compliant injured workers.²²⁶ Instead of protecting the loss of a trickle of money (assuming that, as an unsecured creditor, any claimant worker would, at best, get pennies on the dollar from a bankruptcy estate distribution), Guaranty Corporation sought to avoid thousands of dollars in compensation claims.²²⁷ This conduct “flies in the face of the purpose of the Workers’ Compensation laws to ‘provide a simple and nontechnical method of compensation for injuries sustained by employees.’”²²⁸ It is also “clearly inconsistent” with the purposes of Guaranty Corporation and the insolvency fund, which serve to protect and compensate those employees.²²⁹

The second reason that the proof of claim requirement is bad law is that it can be manipulated to arrive at incongruous results. This point was brought home by the circumstances in *Meadows v. Havens Erectors*, where the injured employees could not file a proof of claim because their employer never filed for bankruptcy.²³⁰ To bar these workers from the insolvency fund because they failed to file a proof of claim in bankruptcy court indeed made no sense. Yet this was the very argument presented by Guaranty Corporation in *Meadows*.²³¹

In finding for the workers, the court in *Meadows* interpreted the requirement in Section 287.865.5 as containing an implicit prerequisite that a bankruptcy case be filed before the requirement to file a proof of claim is “triggered.”²³² However, the *Meadows* court operated under the expansive luxury of liberal statutory construction.²³³ The current law requires strict construction.²³⁴ Unfortunately, under a literal, strictly construed interpreta-

225. *Jones*, 272 S.W.3d at 517.

226. See *In re Wire Rope*, 300 B.R. at 5; *Jones*, 272 S.W.3d at 515-16; *Meadows*, 238 S.W.3d at 214.

227. See, e.g., *In re Wire Rope*, 300 B.R. at 4 (“Guaranty Corporation estimates that its potential liability for covering all of the Debtor’s pre-petition workers’ compensation claims exceeds \$1,650,000, which is more than twice the amount of the Debtor’s posted collateral of \$810,000.”).

228. *Meadows*, 238 S.W.3d at 214 (quoting *Bethel v. Sunlight Janitor Serv.*, 551 S.W.2d 616, 618 (Mo. 1977) (en banc)).

229. *Id.*

230. *Id.* Instead of filing a bankruptcy petition, the company disgorged its assets to its parent company and closed. *Id.* at 212.

231. *Id.* at 214.

232. *Id.*

233. See MO. REV. STAT. § 287.800 (2000).

234. MO. REV. STAT. § 287.800 (Supp. 2008).

tion, amended Section 287.865.5 may afford Guaranty Corporation with the opportunity to renew its position in *Meadows*.²³⁵ Future injured workers would likely counter that, even under strict construction, the *Meadows* outcome should continue to lie. The workers should prevail because, regardless of the standard of construction applied, it would still be impossible for a worker to file a proof of claim where there is no bankruptcy in the first place. Yet the costs to the workers who might be forced to re-litigate the issue in the future could be heavy.

The third reason that the proof of claim filing requirement is bad law is that it contains problematic notice issues. Amended Section 287.865.5 requires the Division to send notice of an employer's bankruptcy to any worker "who has an open claim for compensation or first report of injury filed with the division, at that employee's last known address."²³⁶ Additionally, when the employer is in bankruptcy, the bankruptcy court is required to send notice of the claims filing period to injured employees who are listed in the employer's schedules.²³⁷ The bounds of the notice requirements found in the workers' compensation and bankruptcy laws make sense because these are the claims of which the Division and the bankruptcy court would have actual knowledge.

However, problems become apparent when one considers that the workers who actually receive notice to file a bankruptcy proof of claim do not represent the entire group of potential claimants. For example, it is possible that an employer might fail to file a Report of Injury with the Division²³⁸ or fail to list all injured workers in its bankruptcy schedules.²³⁹ There are also injuries, such as occupational deafness, which have a mandatory waiting period after separation from the causal harm before any claim for compensation can even be filed.²⁴⁰ These contingencies represent examples of existing or potential claims of which the Division and the bankruptcy court would have

235. For the relevant statutory text, see *supra* note 211 and accompanying text. The language of amended Section 287.865.5 is unclear. Uncertainties in the statute include (1) whether it distinguishes between pre-petition and post-petition compensation claims; (2) whether it distinguishes between claimants with final judgments, pending cases, and unfiled compensation claims; and (3) whether workers of insolvent, but not bankrupt, employers are included in the proof of claim filing requirement. These uncertainties leave room for Guaranty Corporation to argue that, under a strict reading of the statute, workers must file a proof of claim to gain access to the insolvency fund, even in cases where it would serve no purpose to do so.

236. MO. REV. STAT. § 287.865.5 (Supp. 2008).

237. FED. R. BANKR. P. 2002(f)(3).

238. See *supra* note 42 and accompanying text.

239. See *In re Wire Rope Corp. of Am.*, 300 B.R. 1, 4 (Bankr. Mo. W.D. 2003) (eighty-seven pre-petition workers' compensation claims were not listed in the debtor employer's schedules).

240. See MO. REV. STAT. § 287.197 (Supp. 2008).

no knowledge, and, thus, the claimants described would receive no notice to make a proof of claim filing.²⁴¹

Furthermore, injured workers of insolvent, self-insured companies are potentially more transient than most workers. Many may be at greater risk of becoming unemployed through attrition. Others might be out of work due to injuries sustained on the job. The loss of current employment translates into loss of wages. The loss of wages could easily result in a forced move to seek new employment or more affordable living arrangements or, worse, the loss of a home through foreclosure or eviction. In such situations, sending notice to the workers' last known addresses would serve little purpose because they are no longer there.

While the notice requirements found in the workers' compensation and bankruptcy laws are clearly imperfect, it may very well be that they are the best system possible. However, if the state trusts that a written notice will be the only link between an uninformed worker and the Section 287.865.5 proof of claim filing requirement, there is a good chance that many workers will fall through the cracks. Under the existing statutory scheme, the uninformed worker might pay for his ignorance by losing his entire workers' compensation claim, and this is an unfair result. Instead, if the best that the worker can hope for is an imperfect notice system, the consequence for not receiving such notice should be less harsh.

The fourth reason that the proof of claim requirement is problematic is that the provision allows Guaranty Corporation to pursue legal strategies that smack of bad faith attempts to avoid its statutory responsibilities and obligations. As the *In re Wire Rope Corp. of America, Inc.* court put it,

Guaranty Corporation apparently decided to gamble under the belief that it could realize more cost-savings by springing a trap on the unwary, often unsophisticated worker who unwittingly failed to file a proof of claim after being lured into the belief that his or her compensation benefits would remain unaffected by their former employer's bankruptcy.²⁴²

Thus, if for no other reason than to remind Guaranty Corporation of its obligations, the effects of the proof of claim filing requirement on the Missouri workers' compensation system should be revisited.

241. Under such circumstances, these claims would not be discharged in the bankruptcy. *See supra* note 83 and accompanying text. If the Bankruptcy Code provides extra protection for the unnotified claimant, it seems logical that Guaranty Corporation should likewise protect uninformed injured workers who would otherwise be eligible to draw compensation from the insolvency fund.

242. *In re Wire Rope*, 300 B.R. at 9.

*B. Comparison of Workers' Compensation and
Bankruptcy Claims Systems*

In addition to the strong sentiments of the courts, other negative implications of the proof of claim filing requirement can be gleaned by examining a troublesome gap between the purposes and administration of the workers' compensation claims system and those of the bankruptcy court claims system. The purpose of The Workers' Compensation Law is to transfer to "industry the losses sustained by employees resulting from injuries arising out of and in the course of employment."²⁴³ Essentially, it serves to shift the burdens of the employees to the employers.²⁴⁴ This purpose is achieved through the administration of the laws and regulations by a centralized state workers' compensation system.²⁴⁵ The laws are designed to adjudicate workers' claims on the merits. Usually workers are rapidly included in the system when they are injured.²⁴⁶ From that point, the claim resolution process begins to work in a manner perhaps not dissimilar to that of personal injury law.²⁴⁷ It sometimes results in an informal resolution between the parties with no judicial intervention.²⁴⁸ If compromise is unsuccessful, workers have two years from the date of injury to file a claim with the Division.²⁴⁹ While it would be a gross oversimplification to call the system straightforward, when compared to the bankruptcy system, it is much less complicated.

Conversely, the core function of the bankruptcy system is to remove the burdens weighing down a debtor-employer. It is designed to give the debtor a "fresh start" financially while allowing for a fair and equitable distribution to the creditors.²⁵⁰ This purpose is administered through bankruptcy courts, which are associated with the federal district courts in every state across the nation.²⁵¹

The self-insured employers that are the subject of this Article often are sophisticated, complex companies that hire specialist lawyers to make the likewise complex Bankruptcy Code work to their advantage.²⁵² Conglom-

243. *James v. CPI Corp.*, 897 S.W.2d 92, 94 (Mo. App. E.D. 1995).

244. *See supra* note 11.

245. *See supra* notes 11-13 and accompanying text.

246. *See supra* notes 38-43 and accompanying text.

247. *See supra* notes 45-48 and accompanying text.

248. *See supra* notes 44-45 and accompanying text.

249. *See supra* note 46.

250. Jonathan T. Edwards, *The Crossroads: The Intersection of State Law Remedies and Bankruptcy*, 18 NORTON J. BANKR. L. & PRAC. 225 (2009) (citing 11 U.S.C. §§ 301, 303 (2006)). *See also supra* notes 49-52.

251. *See* 28 U.S.C. § 1408 (2006) (venue statute).

252. For example, the employer in *Jones v. GST Steel Co.* was operating under a Missouri fictitious name registration and was actually based out of North Carolina. *See supra* note 147. The corporation was itself closely associated with yet another similarly named corporation. *See supra* notes 147, 150. Both of these corporations

erate businesses, with parent companies and subsidiaries in multiple states, are likely to file for bankruptcy in a state far from Missouri's borders.²⁵³ Furthermore, bankruptcies are often volatile and unpredictable. What one day is a Chapter 11 reorganization might the next day be a liquidating Chapter 11 or even be converted to a Chapter 7. Each twist and turn of the case can result in radically different outcomes and implications for the creditors. This complexity is generally more than what the average injured worker can handle alone and is probably significantly more complex than what the worker expected when he entered the state workers' compensation system.

Finally, the overall claims process in bankruptcy generally facilitates the orderly distribution of the the bankruptcy estate's unencumbered, non-exempt assets to the debtor's unsecured creditors.²⁵⁴ This is achieved by the listing of creditors in the debtor's schedules and through the filing of proof of claims.²⁵⁵ With this information, creditors will be identified, and any remaining assets will be distributed to them according to a complicated priority scheme.²⁵⁶ The creditors who file claims are generally representing to the bankruptcy court that the debtor owes them a monetary obligation.²⁵⁷ While the bankruptcy court has jurisdiction to rule on the merits of a particular claim against the debtor, it is often ill suited to assume the adjudicative role of a state administrative judge.²⁵⁸

The comparison of the two bodies of law reveals the troubling fact that an injured worker, who might successfully navigate the adjudication of his own worker's compensation claim, is often woefully unprepared to face the labyrinth of his employer's bankruptcy case. Additionally, it shows that

filed Chapter 11 bankruptcies in North Carolina, not Missouri. *See supra* note 150. The Missouri operations were ultimately terminated. *See supra* note 151 and accompanying text.

253. Aurbach, *supra* note 53, at 3.

254. *See supra* note 74 and accompanying text.

255. *See supra* notes 73-74 and accompanying text.

256. *Id.*

257. *See supra* note 76 and accompanying text.

258. *See* Aurbach, *supra* note 53, at 4 ("In deciding requests for stay relief, the court balances the *special expertise of the court that would be given jurisdiction over the dispute* against the convenience of the transfer of jurisdiction to the debtor company." (emphasis added)).

Contested claims are, absent stay relief, tried before the Bankruptcy Court . . . in the jurisdiction where the bankruptcy petition is filed. The inconvenience to the creditor is not considered in the choice of forums, nor is the typical lack of familiarity of workers' compensation practitioners with the Bankruptcy Court's unique rules and procedures.

Id. at 5. The bankruptcy court, regardless of its level of familiarity with the relevant state workers' compensation law, determines a single "'liquidated value'" for the compensation claim. *Id.* This number "represents the *total liability* of the debtor company on the claim," even though the state compensation system probably allows for the accrual of *future* expenses. *Id.*

bankruptcy court is a less than optimal place to adjudicate a state workers' compensation claim.²⁵⁹ Conversely, when enforcement of the proof of claim filing requirement arises in state courts, those courts are less knowledgeable about and perhaps unprepared to tackle the bankruptcy aspects of the problem.

C. Motivations of Guaranty Corporation

Thus, the gaps and apparent disconnect between the relevant workers' compensation and bankruptcy laws leave some of Missouri's most vulnerable injured employees in a seriously troubling situation. But what is the position of Guaranty Corporation? Thus far, it has been painted in a decidedly unfavorable light. However, if this discussion were to proceed without an attempt to understand the issues from Guaranty Corporation's perspective, it would perhaps miss a crucial piece of the puzzle.

An interesting insight could be obtained through contemplation of the motivations that underlie Guaranty Corporation's attempted, but to date rebuffed, jurisdictional "defense" with respect to the proof of claim filing requirement. The motivations of entities such as Guaranty Corporation are most obviously derived from the very function for which they were established – to cover workers' compensation obligations of insolvent self-insuring employers.²⁶⁰ This function becomes acutely critical during difficult economic times, when companies may be more financially stressed.²⁶¹ In such an economic climate, the directors of guaranty funds must take extra precautions to ensure that their insolvency funds are adequate to protect the members' employees. These precautions can include being more watchful over the members' financial health in order to take timely action and mitigate impending guaranty obligations.²⁶²

259. A close reading of bankruptcy Judge Jerry W. Venter's order in *In re Wire Rope Corp. of America, Inc.* reveals a thoughtful, nuanced, and artful decision that knitted threads of workers' compensation law with strands of bankruptcy law that ultimately made the result come out for the worker. See 300 B.R. 1 (Bankr. Mo. W.D. 2003). See also Venters, *supra* note 11. It is inefficient to force judges to jump through complicated legal hoops just to mitigate the effects of a bad law. And, given the new rule of strict construction in Missouri's workers' compensation law, it is doubtful that the workers' compensation law could be so generously interpreted today.

260. See *supra* note 17.

261. "Should too many large companies default within a short time, the potential drawdown of the guaranty fund balances is a risk that managers increasingly attempt to mitigate." Roberto Cenicerros, *Increasing Number of Bankruptcies Trouble Workers Comp Self-Insurers: As Failures Mount, Claims Could Strain State Guaranty Funds*, BUS. INS., Dec. 15, 2008, at 4, available at 2008 WLNR 24323570.

262. *Id.* The guaranty fund could also levy additional assessments to meet future needs, or, in the case of a distressed individual employer, it could require a position of additional security to offset a future insolvency. *Id.*

Once a member employer becomes insolvent, a guaranty fund's choices become more difficult.²⁶³ At that point, the only way to increase the insolvency fund coffers is to levy an additional assessment against the remaining, solvent self-insuring members.²⁶⁴ Alternatively, the fund could seek to minimize its liability exposure by cutting off injured employees wherever the rules so allow. This difficult situation perhaps begins to explain the motivations of Guaranty Corporation in the cases discussed in this Article.

*D. Section 287.865.5's Proof of Claim Filing Requirement:
Suggested Changes*

The discussion thus far supports the conclusion that the proof of claim filing requirement in Section 287.865.5 is bad law. The follow-up query would seek a better solution. The suggestions to follow are made with an eye toward closing the troublesome gap between the provisions of workers' compensation and bankruptcy laws that are most centrally involved.²⁶⁵ The suggestions would change the workers' compensation laws to synchronize with and take advantage of the purposes and procedures of bankruptcy law while, at the same time, preserving the insolvency fund as a "safety net" of last resort.²⁶⁶ This could be achieved by (1) re-defining "insolvency" in the

263. There seems to be no provision in the law for the contingency of an insolvent insolvency fund. Once Guaranty Corporation becomes obligated to cover injured employee's benefits, the responsibility remains, regardless of whether the insolvency fund is in fact solvent. In the event of a significant increase of membership insolvency, this sets up the potential for a nasty snowball of liability, where more members' employees are drawing on the fund and fewer members are available to pay assessments to replenish it. *See generally* Cenicerros, *supra* note 261.

264. *See supra* notes 17-19 and accompanying text.

265. It is the author's intent, after brushing over the subject bodies of law with an admittedly broad stroke, to start a dialogue with respect to future avenues for improvement in the law. It is hoped that experts specializing in bankruptcy law would be invited to collaborate with experts in Missouri's workers' compensation law to arrive at an even more fully developed proposal for change.

266. Some professionals in the field of workers' compensation law advocate for a revision of the bankruptcy code to better accommodate the special circumstances underlying workers' compensation claims. *See* Aurbach, *supra* note 53; Cordry, *supra* note 68. The proposed changes include (1) recognizing that compensation claims are not a one-time expense but "a long-term, evolving process with new decisions being made at periodic intervals as the employee's medical and income needs develop" and that thus such claims "arise[] at the time the payment would be due and owing pursuant to the local workers' compensation law"; (2) giving workers' compensation claims the same priority as claims for wages under 11 U.S.C. § 507(a)(3) (2006); (3) giving workers' compensation claims priority as administrative expenses under 11 U.S.C. § 503(b)(1)(A) (2006); and (4) providing "specific exception from the automatic stay for the processing of workers' compensation claims." Cordry,

workers' compensation law, (2) clarifying the relationship of the authority to self-insure with this new definition of insolvency, and (3) amending the Section 287.865.5 requirement to file a proof of claim in bankruptcy court.

First, the workers' compensation law in Missouri should more clearly define what makes a self-insured employer "insolvent" and what such a classification actually entails. Clearly, the current law contemplates that a self-insured employer is insolvent if it can no longer meet its workers' compensation obligations.²⁶⁷ In this situation, actual insolvency should result in a revocation of authority to self-insure and the activation of Guaranty Corporation's obligation to cover the statutorily included injured worker benefits.

Without a prior finding of insolvency, it is less clear what effect an employer's bankruptcy case has on its financial and membership status with Guaranty Corporation. It would be a better construction of the law if the filing of a bankruptcy were to result in the classification of the employer in bankruptcy as "presumptively insolvent." However, that presumption would not end the analysis because employers in Chapter 11 bankruptcies often continue to pay workers' compensation benefits and may carry the obligation until the last possible point – the point of no return.²⁶⁸ Shifting the obligations of such employers to Guaranty Corporation upon the employer's filing for bankruptcy will often be premature and in conflict with the legislature's intent to make the insolvency fund a fund of last resort. Instead, the decision to trigger the insolvency fund should be linked directly to the company's continued authorization to self-insure. A presumptively insolvent classification could result in heightened scrutiny of the employer and perhaps the imposition of additional security requirements²⁶⁹ but continued authorization to self-insure. This treatment accommodates the employer in a Chapter 11 reorganization and ensures that more company assets are dedicated to covering workers' compensation obligations.

Conversely, if the employer is engaged in a liquidation form of bankruptcy, the presumptively insolvent classification should shift to a finding of actual insolvency and result in revocation of the authority to self-insure.²⁷⁰ In this instance, the insolvency and the revocation of the member's self-insurer status would activate Guaranty Corporation's obligations.

supra note 68, at 94-95. The National Council of Self-Insurers supports the proposed changes. *Id.* at 95 n.14.

267. See *supra* notes 24-29 and accompanying text.

268. "'The last thing they do before they shut off the lights is to default on paying their workers['] comp claims,' said Jeff Pettegrew, executive director of the California Self Insurers' Security Fund . . ." Cenicerros, *supra* note 261, at 4.

269. For example, additional surety postings, an additional assessment, or acquisition of an excess-insurance policy could be required.

270. Because the employer obtains a property right in continued authority to self-insure, due process considerations will likely require the revocation process to take place in the bankruptcy proceedings. See U.S. CONST. amend. XIV, § 1; 11 U.S.C. §§ 362, 525 (2006).

This amended system improves the treatment of some of the more common circumstances faced by injured workers in the realm of employer bankruptcies, but it does not resolve the central issue: who should be responsible for filing a proof of claim in a bankruptcy case? The current law places the burden entirely on the injured employee, even though he may lack the knowledge and sophistication to navigate the difficult complexities of corporate bankruptcy law. A better construct of the workers' compensation law would be to eliminate the requirement with respect to workers' injuries that occur before the filing of the bankruptcy.²⁷¹ Workers in this class should already be clearly identified to the employer, the Division, and Guaranty Corporation.²⁷² Under bankruptcy law, the liabilities to these workers should also be identified clearly in the employer's bankruptcy schedules as a general unsecured obligation.²⁷³ If they are not, the bankruptcy discharge will not relieve the employer of the obligation.²⁷⁴

This arrangement protects the bulk of the injured workers and Guaranty Corporation. If the employer files for bankruptcy under Chapter 11, the workers probably will continue to receive benefits from the company by virtue of an early order of the court allowing a continuation of its self-insured status.²⁷⁵ Also, Guaranty Corporation should initially be protected by the employer's inclusion of all pre-petition injury claims in its Chapter 11 schedules.²⁷⁶ Assuming the claims are accurately reported in the schedules, there would be no need to file a proof of claim.²⁷⁷ If the employer's scheduled workers' compensation claims are inaccurate or if claims treatment under a proposed Chapter 11 plan is objectionable, Guaranty Corporation is best equipped to respond on behalf of the workers.

If the employer instead liquidates under either chapter, Guaranty Corporation would again be in the best position to respond in bankruptcy court by filing the proofs of claims.²⁷⁸ As a secondary obligor, it is actually better equipped to file proofs of claims on behalf of the entire class of pre-petition

271. Of course, the law could become *permissive* by allowing, but not requiring, an employee to file a proof claim but mandating an offset of any recovered funds against Guaranty Corporation liability.

272. *See supra* Part II.A.2.

273. *See supra* Part II.B.1.b.

274. *See supra* note 83 and accompanying text.

275. *See supra* notes 69-70 and accompanying text.

276. *See supra* notes 80-83 and accompanying text.

277. *See supra* notes 80-81 and accompanying text.

278. Realistically, there is no practical way for Guaranty Corporation to ensure the best possible treatment of its obligations in the bankruptcy *without* becoming directly involved in the case early in the proceeding. If it must be involved, it will have the best information and knowledge and is in the best position to ensure that the employer is forced to allocate the most assets to the payment of workers' compensation obligations.

workers.²⁷⁹ In this situation, workers could then proceed with their compensation claims by substituting Guaranty Corporation for the employer and thus potentially avoid automatic stay issues.²⁸⁰ The workers would get their needed benefits, and Guaranty Corporation would, on behalf of the workers, receive any bankruptcy court disbursements.

With the treatment of pre-petition injury claims more adequately addressed, the remaining issue involves the treatment of *post-petition* injuries.²⁸¹ Unlike the employees who were injured before the filing of the bankruptcy case, this class of injured workers could not have been included in the employer's initial bankruptcy schedules. Thus, in order for the bankruptcy court to even become aware of the debtor's liability, a proof of claim must be filed. It is also important for this class of workers to actually file a claim because the claim has the potential to receive more favorable treatment – as an administrative expense.²⁸² If the claim is treated as an administrative expense, the debtor-employer could be required to fully pay the benefit obligations during the pendency of the bankruptcy.²⁸³ Therefore, it seems fair to retain a proof of claim filing requirement as to employees who are injured after the bankruptcy petition is filed.

If a requirement to file a bankruptcy proof of claim is to persist in workers' compensation law, it should apply only to post-petition injured claimants. However, two limitations should be included with the requirement. These limitations would mitigate an otherwise harsh result under Section 287.865.5 – the loss of the entire workers' compensation claim. First, the injured employee should be excused from the requirement if he can establish that he did not receive clear notice of the need to file a proof of claim. Second, even if the employee fails to file a proof of claim where it is clearly established that he should have done so, the employee's benefits under workers' compensation should not be denied completely. Instead, the allowable workers' compensation payments should be offset by the estimated amount that the employee would have received through the bankruptcy had the proof of claim been filed.

The suggested changes would probably not force a significant adjustment onto the Division or Guaranty Corporation. Furthermore, the changes would create statutory language that would be more in accord with judicial treatment of the issues and in harmony with relevant bankruptcy law. Ulti-

279. See *supra* note 78 and accompanying text.

280. See *supra* notes 106-07 and accompanying text. Alternatively, either the employer or Guaranty Corporation could file a motion for relief from the automatic stay on behalf of the class of pre-petition workers. See *supra* note 105 and accompanying text.

281. Once initiated, Guaranty Corporation's obligation to pay benefits to workers extends to all injuries that occur before an official order of liquidation is entered. See *supra* note 22 and accompanying text.

282. See *supra* notes 98-101 and accompanying text.

283. *Id.*

mately, this is an equitable solution that places Guaranty Corporation in the position the legislature intended without denying Missouri workers their fair shake under the law.

V. CONCLUSION

The proof of claim filing requirement under Missouri Revised Statute Section 287.865.5 is bad law for at least four reasons. First, it thwarts the purposes of workers' compensation law. Second, it leads to incongruous results. Third, it has inherent and problematic notice issues. And, fourth, it entices Guaranty Corporation to attempt to elude its statutory obligations.

The suggestions made herein constitute a solution to the problem. They set out a workable system where the insolvency/authority to self-insure scheme is clarified, pre-petition injured workers are under no absolute proof of claim requirement, and post-petition injured workers have a fairly applied proof of claim requirement. The suggested system is one that seeks to more thoroughly harmonize the workings of Missouri's workers' compensation laws with relevant bankruptcy laws. It also harmonizes the underlying purposes and spirit of The Missouri Workers' Compensation law with the literal letter of that law. Finally, it ensures that the most vulnerable party in the game, the worker, gets the fairest shake and the best opportunity to recover and re-enter the workforce, which is the best outcome of all.

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