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NOTE

Second Injury Funds Nationally and in Missouri – Liability, Functionality, and Viability in Modern Times

*Rhett Buchmiller**

I. INTRODUCTION

A Second Injury Fund (“SIF”) is a statutory form of workers’ compensation relief operating under state law.¹ SIFs allow employers to reduce their own liability for a worker’s injury if part of the harm from that injury was caused by a previously existing disability.² The need for SIFs arises from the possibility that workers with prior injuries who are then reinjured are likely to experience greater harm than other workers.³ As a result, employers could be exposed to greater liability, which might incentivize employers to discriminate against potential employees with previous injuries.⁴

SIFs are designed to prevent discrimination against potential employees who have pre-existing medical disabilities by eliminating the financial burden that may be placed on the employer due to the increased risk associated with employing a previously injured employee.⁵ SIF statutes achieve their goals by allowing either the employer/insurer or the injured employee to file claims against the SIF in the state’s workers compensation system, requesting either “permanent total disability” benefits, and/or, in some states, “permanent partial disability” benefits.⁶

While a major component of workers’ compensation systems for much of the twentieth century, legislatures across the country have discontinued SIFs

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1. *Second Injury Fund*, MO. DEP’T OF LAB. AND INDUS. REL., https://labor.mo.gov/DWC/Division_Units/SIF_Unit/sif_home [perma.cc/8MJD-HHJF].

2. *Id.*

3. Harry W. Dahl, *The Iowa Second Injury Fund – Time for Change*, 39 DRAKE L. REV. 101, 103 (1989).

4. *Id.*

5. R. Shafer, *Twelve Things You Should Know About Subsequent Injury Funds and Disabled Workers*, AMAXX WORKERS COMP RESOURCE CTR. (May 8, 2010), <https://blog.reduceyourworkerscomp.com/2010/05/twelve-things-you-should-know-about-subsequent-injury-funds-and-disabled-workers/> [perma.cc/44D9-AK46].

6. *Id.*

over the last twenty years.⁷ Two main reasons inform these efforts: funding concerns and perceived redundancies created by the Americans with Disabilities Act (“ADA”).⁸

Like many other state legislatures, the Missouri General Assembly addressed the issue of what to do with their SIF in 2013. The legislature, ignoring national trends, enacted legislation intended to provide additional funds to the Missouri Second Injury Fund (“Missouri SIF”) while simultaneously narrowing its scope.⁹ This simple concept was disrupted in 2017 by the decision in *Gattenby v. Treasurer of Missouri*,¹⁰ where the Missouri Court of Appeals for the Western District effectively nullified the 2013 Amendments for a term of years.¹¹

The reasoning of *Gattenby* raised several questions about the future of the Missouri SIF. Part II focuses first on the historical origins of SIFs in order to demonstrate their purpose and illustrate how SIFs were designed to achieve their goals. Part III will then discuss recent trends nationally, especially in light of the ADA, which caused the closure of many SIFs. Lastly, Part IV will turn to the Missouri SIF and examine how Missouri conformed to national trends and what this has done recently in light of these trends.

II. LEGAL BACKGROUND

The SIF for the State of Missouri and similar injury funds across the nation were initially created for similar purposes: to stop discrimination against disabled workers in the hiring process and to encourage the retention of workers by limiting potential employer liability in case of reinjury.¹²

The operation of SIFs is best illustrated with a hypothetical scenario.¹³ During a previous job, an employee lost his right hand. Despite this, later in

7. David Tobenkin *Don't Overlook Second-Injury Funds*, SOC'Y FOR HUM. RESOURCE MGMT. (July 1, 2009), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0709employmentlaw.aspx> [perma.cc/SA7W-A3F3].

8. *Id.*

9. *Governor Nixon Signs Legislation to Address Missouri's Failing Second Injury Fund*, AARON SACHS & ASSOCIATES, P.C. BLOG (Jul. 12, 2013), <https://www.auto-injury.com/blog/2013/july/governor-nixon-signs-legislation-to-address-miss/> [perma.cc/WE8W-7MT2].

10. 516 S.W.3d 859 (Mo. Ct. App. 2017), *overruled by* *Cosby v. Treasurer of Missouri*, 579 S.W.3d 202, 205 n.5 (Mo. 2019).

11. *Id.* at 862.; *but see infra* Part III.B for a discussion of recent case law overruling *Gattenby*.

12. *Wuebbeling v. West Cty. Drywall*, 898 S.W.2d 615, 617–18 (Mo. Ct. App. 1995) (referring to permanent total disability but also saying the same concept applies to permanent partial disability).

13. For simplicity, this scenario utilizes Missouri case law but only does so to illustrate the basic functionality of the SIF, which is common to all similar funds.

life he managed to find work with a different employer, one which only required him to use one hand. While working for his new employer, he lost his left hand. Normally the loss of the left hand, while debilitating, would not totally disable him. The problem arises when the prior loss of his right hand is also considered. These two injuries, his prior right hand loss and his subsequent left hand loss, combine to create an overall greater disability – now he cannot perform any jobs at all – rendering him totally disabled. This combined effect is not attributable to either employer as each was only responsible for the injury that occurred while the employee worked for them. After the employers pay for each hand, who compensates the employee for the combined effect of both injuries?

Without SIF-like statutes, the employee’s most recent employer would bear the heavy burden of total disability liability, which in Missouri is defined as an “inability to compete on the open labor market,” instead of the injury for which the employer was actually responsible.¹⁴ With SIF-like statutes, the employer is responsible only for the disability caused by the subsequent injury that occurred while the employee was working for the employer.¹⁵ The remaining liability, namely the “extra” liability caused by the combination of the prior and subsequent injuries, would fall to the SIF.¹⁶ In short, each employer would be responsible for paying disability benefits arising from each respective injury that occurred while the employee worked for them. The SIF would be responsible for paying the excess disability caused by the combined injuries.¹⁷

New York enacted the first of these funds, the “Special Disability Fund,” in 1916.¹⁸ The Special Disability Fund set out a scheme by which employers would not be liable for the entire degree of a worker’s injury and the state would fund part of the employee’s disability benefits.¹⁹ This fund was only available if the employee was totally disabled due to the combination of a preexisting disability and the work injury itself.²⁰ An increased demand for protection of previously disabled workers due to World War II prompted the International Association of Industrial Accidents Boards and Commissions (“IAIABC”) to create a model for SIF statutes.²¹ Thirty-three states adopted a

14. Fed. Mut. Ins. Co. v. Carpenter, 371 S.W.2d 955, 957 (Mo. 1963).

15. Pierson v. Treasurer of Mo., 126 S.W.3d 386, 389 (Mo. 2004) (en banc) (per curiam).

16. *Id.*

17. *Id.* at 388–89.

18. *Second Injury Funds*, NANOPDF.COM, 2 (Apr. 30, 2018), https://nanopdf.com/download/second-injury-funds_pdf# [perma.cc/HD85-5THX] [hereinafter *SIF*]. Other similar funds are modernly referred to as “Second Injury Fund,” “Subsequent Injury Fund,” “Special Compensation Fund,” etc. *Id.* at 1.

19. *Id.* at 2.

20. *Id.*

21. *Id.*

SIF-like statute in the years immediately following World War II, with the majority adopting the model nearly as written.²² By 1991, practically all states had a SIF.²³

A. *Typical Historic Variations among Second Injury Funds*

Although adopted by a majority of jurisdictions, the model changed over time. The statutes creating these funds vary in terms of the liability imposed, funding sources, and general structure.²⁴ The model proposed by the IAIABC only allowed for liability in the event that an employee was totally disabled because the employee had previously lost a body part – hand, arm, or leg – in the past and lost their corresponding body part on the job.²⁵ Nebraska’s statute reflects a typical modern approach, as it was in effect in 1997 prior to its closure.²⁶ The statute has been reproduced below:

If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.²⁷

This statute expanded on the original model in a number of ways but was also self-limited to better conform with the original model’s intent.²⁸ Specifi-

22. *Id.*

23. *Id.* at 10.

24. *See infra* App. A (listing each state’s current or former statutes outlining liability under the relevant SIF law, with few exceptions). Further references to a state’s SIF statute will be referring to Appendix A. This appendix was compiled by the author.

25. *Second Injury Funds*, *supra* note 1, at 2.

26. *See* NEB. REV. STAT. ANN. § 48-128 (LexisNexis 2014). Often Second Injury Funds are not repealed outright; instead, they are closed from further claims. This has the purpose of allowing already adjudicated claims to continue being compensated but stops new claims from coming in.

27. *Id.*

28. *Second Injury Funds*, *supra* note 1.

cally, the Nebraska statute, which further developed the original model proposed by the IAIABC, makes compensation for the combined effect of preexisting disabilities and subsequent injuries acceptable.²⁹ It self-limits by requiring the combined effect of the two injuries to make the overall disability “substantially greater,” a minimum threshold that is present in many SIF-like statutes.³⁰

1. Acceptable Pre-Existing Disabilities

States vary in terms of what pre-existing disabilities qualify for coverage under the SIF statute in the event of subsequent injury. Some states have expanded the scope of injuries that qualify as preexisting.³¹ For instance, twelve of the most recent SIF statutes require that the preexisting disability be on a specific list of disabilities.³² Some states, such as Pennsylvania, stick closely to the original model by only allowing SIF compensation in the event of a subsequent injury if the preexisting injury is the loss of use of a hand, arm, foot, leg, or eye.³³ Other SIFs, such as Ohio, specify a lengthy list of potential preexisting disabilities, including epilepsy, amputation, black lung disease, and Parkinson’s disease.³⁴

The remaining thirty-six funds have a greater variety of potential preexisting disabilities because they do not specify a list of compensable disabilities.³⁵ However, many states, such as Nevada, require that the previous disability constitute a “hindrance or obstacle to obtaining employment.”³⁶ Courts have generally interpreted this language to mean only that a pre-existing injury has the *potential* to combine with a new injury to constitute a hindrance or obstacle in obtaining employment, not that it actually does so.³⁷ Some states have lowered their potential liability more directly by requiring the minimum

29. NEB. REV. STAT. ANN. § 48-128 (LexisNexis 2000).

30. *Id.*

31. *Second Injury Funds*, *supra* note 1, at 2–3.

32. *See* App. A. These states are Arizona, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Ohio, Pennsylvania, and Virginia.

33. 77 PA. STAT. AND CONST. STAT. ANN. § 516 (West 2019).

34. OHIO REV. CODE ANN. § 4123.343 (West 2018).

35. *See* App. A. These states are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin.

36. NEV. REV. STAT. ANN. § 616B.587(3) (LexisNexis 2014).

37. *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. Ct. App. 2005) (quoting *E.W. v. Kan. City, Mo. Sch. Dist.*, 89 S.W.3d 527, 537 (Mo. Ct. App. 2002)), *overruled on other grounds by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc)).

threshold of disability to be a certain “percent” before the preexisting disability qualifies.³⁸ The guidelines for calculating these percentages vary greatly, but many states require medical doctors to determine the percentage of disability.³⁹

Another variation occurs from the nature of the preexisting injury, with at least five states requiring the cause to be from a prior industrial accident.⁴⁰ The remaining forty-three states with functionally-equivalent SIF statutes⁴¹ use language such as “from any cause,”⁴² or “from compensable injury, occupational disease, pre-existing disease, or otherwise.”⁴³ This kind of language allows a much more expansive set of potential preexisting disabilities to qualify for SIF liability.

The most common differentiating factor between typical SIF liability in these states was the requirement that an employer be aware of the preexisting condition prior to hiring or retention of the employee.⁴⁴ Approximately twelve states required that the employer be aware of the preexisting condition at the time of hiring or the time the second injury occurred.⁴⁵ The statutory language that required the employer’s knowledge generally stated that “[i]n order to qualify for reimbursement . . . the employer must establish . . . that the employer had knowledge of the permanent physical impairment at the time that the employee was hired.”⁴⁶ Some states require written confirmation of this knowledge: “[T]he employer . . . must establish by written records that it had knowledge of the preexisting disability at the time the employee was hired.”⁴⁷ Conversely, some states, such as Minnesota, require that the preexisting disability be registered with the state or the employer prior to the subsequent injury, bypassing the need for knowledge.⁴⁸

38. Sachi Barreiro, *How Do Disability Ratings Work for Workers’ Compensation?*, ALLLAW, <http://www.alllaw.com/articles/nolo/workers-compensation/disability-ratings.html> (last visited May 23, 2019) [perma.cc/2XL7-G3AW].

39. *Id.*

40. *See* App. A. These states are Arizona, Colorado, Illinois, Rhode Island, and Texas.

41. *Id.* These states are Alabama, Arkansas, Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

42. ALASKA STAT. § 23.30.205 (West 2018).

43. KY. REV. STAT. ANN. § 342.120 (West 2018).

44. *See SIF*, *supra* note 18.

45. *See* App. A. These states are Arizona, Alaska, Florida, Louisiana, Kansas, Massachusetts, Nebraska, Nevada, New Hampshire, Rhode Island, South Carolina, and Tennessee.

46. S.C. CODE. ANN. § 42-9-400 (2018).

47. 28 R.I. GEN. LAWS § 28-37-4 (1997) (repealed 1998).

48. MINN. STAT. § 176.131 (1991) (repealed 1992).

2. Variations in Minimum Injury Thresholds to Trigger SIF Liability

The intent of SIFs has historically been to prevent employers from being saddled with extra liability for employing a worker who is more likely to incur larger disability payments than a non-disabled worker.⁴⁹ This was true with the original model proposed by the IAIABC, which only allowed for SIF liability in the event of a total disability, and it has continued with a number of modern SIFs.⁵⁰

A different type of liability emerged with the later adoption of language that allowed for liability if the preexisting and subsequent injuries combined to create a disability that was “substantially greater . . . than that which would have resulted from the subsequent injury alone.”⁵¹ Today, fifteen states define SIF eligibility as total disability – though the definition of total disability varies.⁵² The states that do not have this absolute bar to permanent partial disability claims sometimes require the employer to pay a certain amount of the combined effect.⁵³ For example, in Minnesota, the employer must pay the first fifty-two weeks of monetary benefits to the employee.⁵⁴ Other states require the combined effect to meet a statutory minimum of disability.⁵⁵ California, for example, requires the combined effect to create a permanent disability of seventy percent or more.⁵⁶

B. The Missouri SIF Historically

Missouri’s SIF was originally created in 1943, following the national trend of establishing SIFs to deal with the influx of veterans from World War

49. WORKERS’ COMP PRACTICE GRP., *Issue # 43 Status of Second Injury Funds*, SEDGWICK: SPOTLIGHT ON WORKERS’ COMP. (Dec. 7, 2012), <https://www.sedgwick.com/assets/uploads/documents/Issue-43-StatusofSecondInjuryFunds.pdf>. [perma.cc/4Q66-BS5S].

50. *Id.*

51. S.C. CODE ANN. § 42-9-400 (2018).

52. *See* App. A. (these states are Colorado, Delaware, Idaho, Illinois, Indiana, Michigan, Mississippi, Missouri, New Jersey, Pennsylvania, Tennessee, Texas, Vermont, Washington, and West Virginia); *compare* TEX. LAB. CODE ANN. § 408.161 (West 2018) (requiring the injury to result in a specific loss of major functionality, extremity, or organ in order to receive total disability benefits) *with* *Stoddard v. Hagadone Corp.*, 147 P.3d 162, 167 (Idaho 2009) (requiring the injury to only limit the employee so that no reasonable market for their services exist).

53. MINN. STAT. ANN. § 176.131 (West 1990) (repealed 1992).

54. *Id.*

55. CAL. LAB. CODE § 4751 (2019).

56. *Id.* For a discussion on how disability percentages are generally calculated, see *Settling a Case*, MO. DEP’T LAB. AND INDUS. REL., https://labor.mo.gov/DWC/Injured_Workers/settling_case#TOI10D [perma.cc/6LWU-Q6RD].

II.⁵⁷ Missouri's 1991 SIF allowed for workers' eligible preexisting disabilities to be from nearly any source that constituted a "compensable injury or otherwise."⁵⁸ Missouri's 1991 SIF also allowed for the resulting disability to be either partial or total in degree, with no minimums for the amount of change resulting from the combination.⁵⁹ Missouri's SIF has never had a knowledge or certification requirement.⁶⁰

The mode of liability for Missouri's 1991 SIF also protected employers directly by absolving them of liability and only giving the option of SIF liability to the employee via separate suit.⁶¹ The requirement for finding permanent partial disability was that the effects of the preexisting and subsequent disabilities combined were "greater than the sum of the degree or percentage of the two disabilities."⁶² For a finding of permanent total disability, the employee had to be incapable of competing on the open labor market, as established by expert testimony.⁶³ The primary difference between these two standards was that in the former, an employee was still capable of finding work while in the latter, they were not. In Missouri today, this distinction is not about the employee's ability to work anywhere but the employee's ability to compete with non-disabled workers on the open labor market.⁶⁴ Missouri's 1991 SIF also served as a fallback insurer for injured employees that worked for employers without proper workers' compensation insurance.⁶⁵

III. RECENT DEVELOPMENTS

This section will focus on the recent developments of SIF statutes nationally and in Missouri specifically.

57. Jason McClitis, *Missouri's Second Injury Fund – Should It Stay or Should It Go: An Examination of the Question Facing the Missouri State Legislature*, 74 MO. L. REV. 399, 401 (2009).

58. MO. REV. STAT. § 287.220.1 (2018).

59. *Id.*

60. *Id.*

61. *Brown v. Treasurer of Mo.* 795 S.W.2d 479, 482 (Mo. Ct. App. 1990).

62. *Id.*

63. *Id.* at 483.

64. *Id.*

65. MO. REV. STAT. § 287.220.5 (2018).

A. *National Trends in the Wake of the Americans with Disabilities Act*

Today, SIFs face extinction for two main reasons: they are subject to a greater deal of liability than anticipated and legislators see the Americans with Disabilities Act (“ADA”) as an adequate replacement.⁶⁶

Today, active SIFs have become far less common due to a number of factors, but most notably⁶⁷ because the ADA was passed in 1990.⁶⁸ The ADA’s stated purpose is to provide a “national mandate for the elimination of discrimination against individuals with disabilities.”⁶⁹ The ADA applies to employers which have fifteen or more employees,⁷⁰ whereas SIFs are not subject to this limitation.⁷¹ To achieve its goal, the ADA allows workers who believe they have been discriminated against to sue their past, present, and future employers.⁷²

In theory, the ADA “bans any discrimination against qualified handicapped job applicants.”⁷³ Therefore, the SIF’s role in preventing discrimination against people with disabilities in the hiring process “ceases to exist.”⁷⁴ Each of the eighteen states that have nullified their SIFs, through repeal or closure, have done so since the passage of the ADA.⁷⁵

66. *A Review of the South Carolina Second Injury Fund*, S.C. GEN. ASSEMBLY: LEGIS. AUDIT COUNCIL (Mar. 2007), <https://lac.sc.gov/sites/default/files/Documents/Legislative%20Audit%20Council/Reports/A-K/SIF.pdf>. [perma.cc/8DK3-8VZF] [hereinafter S.C. Audit].

67. *Id.*

68. 42 U.S.C. § 12101 (2012).

69. *Id.*

70. § 12111.

71. Timothy R. Hancock, Comment, *Apportionment Between Preexisting Conditions and Work-Related Injuries: Why Wyoming Needs a Second Injury Fund*, 11 WYO. L. REV. 525, 543 (2011).

72. *Id.*

73. Catherine M. Doud, *Oklahoma’s Special Indemnity Fund: A Fund Without A Function?*, 30 TULSA L.J. 754, 765 (1995).

74. *Id.*

75. Hancock, *supra* note 71, at 529 n.42; *see also supra* notes 64–66 and accompanying text.

The ADA is not the sole cause of the repeal of SIF-like statutes, as states like South Carolina,⁷⁶ Connecticut,⁷⁷ and Georgia⁷⁸ have abolished their SIF statutes for other reasons. Another problem SIF-like statutes have encountered is underestimated levels of liability. The loss of SIF funds came from either direct repeal of SIF statutes or the phasing out of the statutes by restricting claims for injuries that occurred past certain dates (or “sunsetting”).⁷⁹ To date, of the forty-seven states that once had an active SIF statute, eighteen states have either repealed or sunsetted their SIF statute.⁸⁰

Alternatively, opponents of SIFs argue that SIF statutes “have failed to meet the objective of promoting the hiring of disabled workers.”⁸¹ Representatives of former SIFs have opined that their states have not suffered particularly negative effects following the closure of their SIFs.⁸² However, no comprehensive studies compare the states that have eliminated their SIFs with those that have not.⁸³

B. Missouri SIF, A Work In Progress

In 1993, Missouri altered its SIF eligibility requirements in response to a wave of changes across the country.⁸⁴ Namely, the SIF was amended to include

76. South Carolina’s SIF was consistently cited by its opponents as having “billions of dollars” of unfunded liabilities. Martin M. Simons, *A Review of the South Carolina Second Injury Fund*, REIMBURSEMENT CONSULTANTS INC., <http://rcinc.us/pdfs/A%20reiew%20of%20the%20SC%20SIF.pdf> (last visited May 24, 2019) [perma.cc/F7UN-J53M].

77. Connecticut’s SIF funding was consistently outpaced by its liabilities until eventually it reached an estimated six billion dollars of liability. Zachary D. Schurin, *Monkey-Business: Connecticut’s Six Billion Dollar Gorilla and the Insufficiency of the Emergence of the ADA as Justification for the Elimination of Second Injury Funds*, 7 CONN. PUB. INT. L.J. 135, 135 (2007).

78. Georgia’s SIF had steadily increasing liability up until it sunsetted in 2006. *Subsequent Injury Trust Fund: Claims Evaluation & Payment History*, STATE OF GA., 2 (2010), <https://sitf.georgia.gov/sites/sitf.georgia.gov/files/imported/SITF/Files/Stats%20CY%202010.pdf> [perma.cc/QR56-RPSP].

79. Tobenkin, *supra* note 7.

80. See App. A (these states are Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, and West Virginia). Oregon and Wyoming are not included in this analysis, as they have never had a SIF statute, and Vermont is not included as its SIF statute was repealed before it was ever active. See S.C. Audit, *supra* note 66; Hancock, *supra* note 71.

81. Christopher Boggs, *Second Injury Funds: Are They Still Necessary or Just a Drain On the System?*, INS. J. (Mar. 25, 2015), <https://www.insurancejournal.com/blogs/academy-journal/2015/03/25/360666.htm> [perma.cc/UB7P-LFNG].

82. S.C. Audit, *supra* note 66.

83. Hancock, *supra* note 71, at 540.

84. See MO. REV. STAT. § 287.220.1 (2018).

minimum thresholds for preexisting disabilities and subsequent injuries.⁸⁵ At a minimum, to qualify for SIF coverage, a preexisting disability and the subsequent injury individually had to equal fifty weeks of compensability if done to the body as a whole – anything not an extremity – and fifteen percent disability if done to a major extremity – arm or leg.⁸⁶ Lawmakers also introduced language requiring the preexisting disability to be a “hindrance or obstacle” to employment.⁸⁷ These limitations were put in place to “eliminate inconsistencies” and “provide a more objective standard” to determine the Missouri SIF’s liability.⁸⁸ As part of the amendments, the Director of the Division of Workers’ Compensation had the ability to set surcharges to workers’ compensation premiums at an amount necessary to cover the Missouri SIF’s obligations.⁸⁹ The amendments gave the Director this power, as there was no cap on the surcharge which funded the SIF.⁹⁰ In 2005, a cap was placed on the Missouri SIF which inhibited the Missouri SIF’s ability to pay claims.⁹¹

Two audits, released in 2007, discussed the threat of insolvency faced by the SIF and offered possible solutions.⁹² The most recent audit reported that the SIF’s expenditures had more than tripled over the course of ten years, resulting in total expenditures of \$63.9 million in 2006.⁹³ The Committee on Legislative Oversight acknowledged that multiple reports found the SIF would soon be insolvent and recommended changes of its own.⁹⁴ The Committee’s report found that the SIF was struggling due to an increase in claims filed despite a consistent number of workplace injuries.⁹⁵ This change effected the solvency of the SIF because the funding remained the same but liability did

85. *Id.*

86. *Id.*

87. *Id.*

88. *Loven v. Greene Cty.*, 63 S.W.3d 278, 284 (Mo. Ct. App. 2001) (citing *Culp v. Lohr Distrib. Co.*, 898 S.W.2d 613, 614 (Mo. Ct. App. 1995), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc)).

89. *Skirvin v. Treasurer of Mo.*, No. 75541, 2013 WL 216028, at *15 (Mo. Ct. App. Jan. 22, 2013).

90. *Id.*

91. *Id.*

92. McClitis, *supra* note 57, at 408–09.

93. *Review of the Department of Labor and Industrial Relations: Second Injury Fund*, OVERSIGHT DIV.: COMM. ON LEGIS. RES., iv (2007) (recommending changes to encourage settlement of claims, increasing the minimum threshold for prior disabilities, and limiting the type of prior disability that could be considered) [hereinafter *Review*], <http://www.moga.mo.gov/oversight/over07/PDF/Second%20Injury%20Fund.pdf> [perma.cc/RG5G-Z2R4].

94. *Id.*

95. *Id.* at 3.

not.⁹⁶ The funding remained the same because the number of workplace injuries was not changing.⁹⁷ Despite this, the number of SIF claims rose, putting the SIF in the precarious position of trying to compensate more workers with the same budget.⁹⁸ To deal with the solvency issue, the audits recommended either limiting the potential liability of the SIF legislatively or increasing the statutorily authorized three percent surcharge that funded the SIF.⁹⁹

The Committee's predictions were fully realized in 2012, when the SIF began to delay payments due to insufficient funds.¹⁰⁰ From July 2012 until November 2015, the SIF did not have the necessary funds to meet its obligations for permanent partial disability claims.¹⁰¹ In fact, the SIF settled a total of only forty claims from 2010 to 2012.¹⁰² Comparing this to the 2,905 claims settled in 2009 alone,¹⁰³ this decline shows that the SIF was experiencing the effects of its limitations.

The General Assembly responded with the 2013 Amendments, which elected to limit liability and increase funding, if only for a short time.¹⁰⁴ The General Assembly authorized a three percent increase to the surcharge, which would fund the SIF, from 2014 until 2021.¹⁰⁵ This measure doubled the funding of the SIF.¹⁰⁶ Additionally, the General Assembly severely limited the combined results that qualified for liability under the SIF.¹⁰⁷ On its face, it appeared that no claims could be filed against the SIF for permanent partial disability benefits under Section 287.220.3 of the Revised Statutes of Missouri after January 1, 2014.¹⁰⁸ The General Assembly also limited the scope of preexisting disabilities that could be considered for a claim against the SIF for permanent total disability benefits.¹⁰⁹ On its face, the statute appeared to limit preexisting disabilities – no matter when they occurred – to disabilities stemming only from military duty, a prior work injury, preexisting disabilities

96. *Id.*

97. McClitis, *supra* note 57, at 408.

98. *Id.* at 409.

99. *Review*, *supra* note 93, at 33–34.

100. MO. DIV. OF WORKER'S COMP., *2017 Annual Report*, MO. DEP'T LAB. & INDUS. RELATIONS, 25 (2017) [hereinafter *2017 Annual Report*], https://labor.mo.gov/sites/labor/files/pubs_forms/DWC2017AnnualReport.pdf. [perma.cc/U6YM-B7ZW].

101. *Id.*

102. *Id.* at 23.

103. *Id.*

104. *Id.* at 3.

105. MO. REV. STAT. § 287.715.6 (2018).

106. MO. DIV. OF WORKER'S COMP., *2014 Annual Report*, DEP'T LAB. & INDUS. RELATIONS, 9 (2014), https://labor.mo.gov/sites/labor/files/pubs_forms/DWC2014AnnualReport.pdf. [perma.cc/9627-27H6].

107. MO. REV. STAT. § 287.220.3(2) (2018).

108. *Id.*

109. MO. REV. STAT. § 287.220.3(2)(a) (2018).

which directly and significantly aggravate the subsequent injury, and preexisting injuries which resulted in the loss of a major extremity.¹¹⁰ Before the 2013 Amendments took effect, 8,072 SIF claims were filed in 2013.¹¹¹ In 2014, 2015, and 2016, the SIF saw the claims filed decrease to 5,504; 3,121; and 2,469, respectively.¹¹² This significant decrease shows the beginning of a more pragmatic and sustainable Missouri SIF.

In *Gattenby v. Treasurer of Missouri*,¹¹³ the Missouri Court of Appeals for the Western District came to a controversial decision which changed this trend of reduced SIF claims.¹¹⁴ The plaintiff in *Gattenby* suffered a workplace injury to his right knee in March of 2014 and had prior injuries from 2007, 2009, and 2010.¹¹⁵ The Missouri SIF appealed a decision made by an administrative law judge that awarded permanent total disability benefits under Section 287.220.2, arguing that the administrative law judge erred in applying this section instead of the new, more stringent 2013 Amendments.¹¹⁶ In its analysis, the court parsed the language used in Section 287.220.3(1), which read “[a]ll claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection.”¹¹⁷ On its face, Section 287.220.3(1) seemed to require application of the more stringent Section 287.220.3 to any claims for injury that occurred after January 1, 2014.¹¹⁸ The Western District, however, did not agree with this interpretation.¹¹⁹

The Western District noted that when it came to occupational diseases, the General Assembly specifically wrote “subsequent” instead of “prior” or “all.”¹²⁰ The court determined that by referring to “subsequent occupational diseases” the General Assembly intended the new, more stringent, provision to apply to any claim utilizing only a subsequent occupational disease.¹²¹

The court then turned to the provision which stated, “All claims against the second injury fund for injuries occurring after January 1, 2014 . . . shall be compensated as provided in this subsection.”¹²² The court noted that the General Assembly did not make the same distinction with occupational diseases, instead the General Assembly said “subsequent compensable injuries” when

110. *Id.*

111. 2017 Annual Report, *supra* note 100, at 22.

112. *Id.*

113. 516 S.W.3d 859 (Mo. Ct. App. 2017).

114. *Id.* at 860.

115. *Id.*

116. *Id.* at 861.

117. *Id.* at 862; MO. REV. STAT. § 287.220.3(1) (2018).

118. *Gattenby*, 516 S.W.3d at 862.

119. *Id.* at 862–63.

120. *Id.* at 862.

121. *Id.*

122. *Id.* at 861.

referring to an occupational disease.¹²³ The court reasoned that since in one instance the statute said “for injuries” and in another it said “subsequent compensable injuries,” the General Assembly intended the former to encompass *all* injuries whereas the latter encompassed only compensable ones.¹²⁴ The court held that for all injuries that are not occupational diseases, both the preexisting disability and the subsequent injury must occur after January 1, 2014 for the more stringent 2013 Amendments of Section 287.220.3 to apply.¹²⁵

This resulted in the use of pre-2013 provisions of Section 287.220, which were much more favorable to the awarding of total disability benefits, in the event that any preexisting injury occurred before 2014.¹²⁶ Before *Gattenby*, SIF claims had declined from 24,313 open claims against the SIF in 2015 to 20,865 open claims in 2016.¹²⁷ Following this ruling, however, the number of claims filed against the SIF spiked to 3,953 in 2017, compared to the 3,121 and 2,469 claims filed in 2015 and 2016, respectively.¹²⁸ Despite the court’s holding in *Gattenby*, the Missouri SIF refused to compensate claims for partial disability benefits filed after 2014, following the mandate of Section 287.220.3(2).¹²⁹

This decision was validated in the recent Missouri Supreme Court decision *Cosby v. Treasurer of Missouri*.¹³⁰ In *Cosby*, the Missouri Supreme Court considered whether Section 287.220.3 applied to a plaintiff who received an injury in 2014.¹³¹ Following the clear intent of the General Assembly – evidenced by how it defined “injury” – and the plain and ordinary meaning of the statute, the court determined that Section 287.220.3 should apply to all claims for work-related injuries that occur *after* January 1, 2014.¹³²

123. *Id.* at 862.

124. *Id.*

125. *Id.*

126. *Id.* at 862–63.

127. MO. DIV. OF WORKER’S COMP., *2016 Annual Report*, MO. DEP’T LAB. & INDUS. RELATIONS, 23 (2016), <https://labor.mo.gov/sites/labor/files/2016-DWC-Annual-Report.pdf> [perma.cc/X9VR-WSQL]; MO. DIV. OF WORKER’S COMP., *2015 Annual Report*, MO. DEP’T LAB. & INDUS. RELATIONS, 23 (2015), https://labor.mo.gov/sites/labor/files/pubs_forms/DWC2015AnnualReport.pdf [perma.cc/UCT2-8UP8].

128. *2017 Annual Report*, *supra* note 100.

129. *Missouri Labor Commission States Employers Are Now Responsible for Enhanced Permanent Partial Disability Benefits in a Shift Away from the Second Injury Fund*, EDELMAN L. OFF. BLOG (Aug. 24, 2017), <http://www.edelmanlawoffice.com/missouri-labor-commission-states-employers-now-responsible-enhanced-permanent-partial-disability-benefits-shift-away-second-injury-fund/> [perma.cc/8DED-WQFE].

130. No. SC 97317, 2019 WL 2588575, at *1 (Mo. June 25, 2019).

131. *Id.*

132. *Id.* at *4.

IV. DISCUSSION

SIFs and their counterparts throughout the United States cause problems for states that retain them. They can be difficult to maintain due to their high amount of liability over time but can also be difficult to repeal because they support vulnerable, sympathetic constituents, such as war veterans.¹³³ The ADA provided legislators with the justification necessary to eliminate the SIFs of their states while limiting political backlash.¹³⁴

Discrimination against disabled workers is still a prevalent issue, and the ADA has not solved the problem.¹³⁵ Disabled workers' employment has been in decline since the ADA was passed.¹³⁶ Data shows that 2,107,000 disabled workers were employed in 2014 – an all-time low despite significant population increases.¹³⁷ This could be due in part to issues inherent with the ADA itself. The ADA has the paradoxical effect of discouraging the hiring of disabled employees despite clear impetus to hire them.¹³⁸ This is because the ADA mandates reasonable accommodations from employers for their employees.¹³⁹ These accommodations generate expenses that are avoided where possible – despite the unambiguous illegality and threat of litigation under the ADA – because accommodations can be prohibitively expensive or impractical.¹⁴⁰ This is especially true considering the thresholds for disabilities under the ADA leave much to be desired and are considered under-inclusive in terms of covering disabled workers.¹⁴¹

However, this decline has been sharper in states that have eliminated their SIFs since 2004, with a 9% decrease in disabled unemployment for SIF retaining states and a 23% decrease in disabled unemployment for SIF eliminating states.¹⁴² Despite the apparent negative impact of the ADA on hiring disabled workers, the effect is even worse in states which have no SIF to cushion the

133. Tobenkin, *supra* note 7.

134. *See* Schurin, *supra* note 77, at 136.

135. *Id.* at 155.

136. *Id.* at 154–55.

137. Lee S. VonSchrader, *Disability Statistics from the Current Population Survey*, CORNELL U. (2017), <http://www.disabilitystatistics.org/reports/cps.cfm?statistic=employment> [perma.cc/6EVG-W3C8].

138. H. Stephen Kaye, Lita H. Jans, and Erica C. Jones, *Why Don't Employers Hire and Retain Workers with Disabilities?* 21 J. OCCUPATIONAL REHAB. 526, 528–31 (2011); *contra* Les Picker, *Did the ADA Reduce Employment of the Disabled?*, THE NAT'L BUREAU OF ECON. RES. (May 25, 2009), <http://www.nber.org/digest/nov04/w10528.html> [perma.cc/J5TK-QP6Y].

139. Kaye, *supra* note 138, at 529.

140. *Id.* at 534 (explaining that the cost of reasonable accommodations for employees is not fiscally justifiable for employers compared to the risk of lawsuit).

141. Schurin, *supra* note 77, at 153–54.

142. *Id.* at 154–55.

blow.¹⁴³ This may be because the ADA and SIFs have different approaches to the same problem: the former discourages discriminatory practices and the latter encourages non-discriminatory practices.¹⁴⁴

Who should assume the liability when a SIF is repealed? In Missouri, courts have conclusively agreed that liability shifts back to the employer.¹⁴⁵ Under the ADA, employers are unable to make employment decisions based on a belief that the new employee may increase workers' compensation costs for the employer in the future.¹⁴⁶ This essentially forces the employer to accept an employee as they are, including their "high risk" nature.¹⁴⁷ This effect becomes especially pronounced in an aging workforce.¹⁴⁸ The result of forcing this "high risk" liability on the employer creates the same result as reasonable accommodations under the ADA: the threat of hard to prove litigation will not override the financial concern of potential future liability for a workplace injury.¹⁴⁹ Because SIFs are prospective in nature – whereas the ADA is retrospective in nature – the former operates as the "carrot" and the latter as the "stick."¹⁵⁰ This contradicts the common perception that the two laws overlap in their function.¹⁵¹ This is not to say that the ADA is completely irrelevant to the purposes of a SIF – but rather they are complementary.¹⁵² The ideal approach would account for both the purpose and function of SIF statutes and the ADA.¹⁵³ The ADA is capable of picking up the slack left behind by the repeal or reduction in scope of SIF statutes.¹⁵⁴ This is the approach the Missouri General Assembly took in 2013 by reducing SIF liability for the less vital issues, which are still actionable under the ADA.¹⁵⁵ This better serves the more pressing needs of permanent, totally disabled workers by increasing the SIFs overall ability to pay its liabilities.¹⁵⁶

In short, the ADA is not a compelling justification for an honest and informed legislator to eliminate SIFs altogether, as the results and methods of the

143. *Id.* at 154.

144. *Id.* at 158–59.

145. *See* Fed. Mut. Ins. Co. v. Carpenter, 371 S.W.2d 955, 957 (Mo. 1963) (“[i]n the absence of an apportionment statute or second injury fund legislation, the employer is liable for the entire disability resulting from a compensable injury . . .”).

146. Hancock, *supra* note 71, at 540.

147. Gary Kern, *Editorial: Gary Kern, in Defense of the Second Injury Fund*, LA. COMP. BLOG (Dec. 14, 2017), <http://compblog.com/editorial-gary-kern-in-defense-of-the-second-injury-fund/> [perma.cc/UA64-6RKF].

148. *Id.*

149. *Id.*

150. *Id.*

151. McClitis, *supra* note 57, at 415–16.

152. *Id.*

153. *Id.*

154. *Id.*

155. MO. REV. STAT. § 287.220 (2018).

156. McClitis, *supra* note 57, at 416.

ADA are insufficient to achieve the goals of SIFs. This begs the question of what a legislature should do if they cannot use the ADA to justify the removal of SIFs and they cannot allow the funds to continually accrue liability until the point of insolvency.¹⁵⁷

A. *The Missouri SIF's Dilemma: Wait It Out or Take Action?*

The answer is likely somewhere in the middle. States like Missouri have reduced the scope of SIFs in an effort to maintain solvency.¹⁵⁸ Ideally, limiting liability will “encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury” while still managing to keep the costs of the SIF low enough to maintain solvency.¹⁵⁹ If the holding of *Gattenby* had been left undisturbed, the results could have been contrary to the goals of the 2013 legislation; namely, reducing liability of the SIF.¹⁶⁰

Prior to *Gattenby*, the primary issue facing the Missouri SIF was its “financial status and future funding.”¹⁶¹ The 2013 Amendments purported to solve both of these issues by narrowing the types of claims that could be made against the Missouri SIF after a certain date and allowing for a temporary increase to the surcharge that funded the SIF.¹⁶²

After *Gattenby*, the less favorable 2013 Amendment language only applied to claims where both the prior and the subsequent injury occurred after January 1, 2014.¹⁶³ The result is a gradual reduction in liability to the SIF over the years, as less claims receive the more favorable pre-2013 Amendment language simply because fewer prior injuries happened before 2014. For example, in the year 2060, there will be far less claims using the pre-2013 language, simply because far fewer workers will have even been alive before 2014 to receive an injury in the first place. As time passes, the revised SIF language will achieve the ultimate goal of limiting the overall liability of the Missouri SIF. Even with the changes, SIF liability is still too high and not decreasing fast enough.¹⁶⁴ An increase in surcharges alone is insufficient to permanently

157. *Id.* at 412 (explaining that SIF liability would remain even after the law itself is repealed).

158. *See infra* Part III.B.

159. *Pierson v. Treasurer of Mo.*, 126 S.W.3d 386, 389–90 (Mo. 2004) (en banc) (per curiam) (citing *Boring v. Treasurer of Mo.*, 947 S.W.2d 483, 487–88 (Mo. Ct. App. 1997), *overruled by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc)).

160. *See Gattenby v. Treasurer of Mo.*, 516 S.W.3d 859 (Mo. Ct. App. W.D. 2017).

161. *McClitis*, *supra* note 57, at 416.

162. *See infra* Part III.B.

163. 516 S.W.3d at 862.

164. *2017 Annual Report*, *supra* note 100, at 22 (showing an increase in claims against the Missouri SIF after the *Gattenby* decision).

lower SIF liability because the surcharge increase is set to end in 2021.¹⁶⁵ The surcharge increase was meant to serve as a temporary basis for repairing an insolvent fund, but a virtually unchanged mode of liability may negate that effect.¹⁶⁶ By the time liability is lessened – which could have taken a while under *Gattenby* – the surcharge will be gone and the Missouri SIF would have been in the same financially precarious situation it found itself in to begin with.¹⁶⁷ The Missouri SIF, however, does not have this problem any longer due to the ruling in *Cosby*.

The abrogation of *Gattenby* does not necessarily solve all of the Missouri SIF's problems. The 2013 Amendments, while important to maintaining the Missouri SIF, may have actually harmed it by negatively affecting the employment rates of individuals with disabilities.¹⁶⁸ In the span of a single year following the amendments, disabled employment took a significant dip, though it quickly recovered.¹⁶⁹

V. CONCLUSION

The Missouri SIF has maintained solvency and stayed active by reducing its scope of liability. To keep the SIF functional, the General Assembly has taken steps to continuously reduce this liability as time goes on. Despite a brief period of uncertainty due to the decision in *Gattenby*, the Missouri SIF's fate was unclear. The Supreme Court of Missouri's decision in *Cosby* has helped to clarify the Missouri SIF's fate. Despite this, the road to continued solvency is not a simple one. As the Missouri SIF begins to recover financially, it may renew the vigor with which litigants pursue their claims, driving up the Missouri SIF's liability yet again. This may require continued maintenance of the Missouri SIF over time, such as structural changes to its funding or further reductions in liability.

The General Assembly should understand that the SIF is worthwhile because it produces valuable benefits for at-risk populations. The SIF's liabilities can be reduced by introducing simple, clear, and consistent legislative language – such that it avoids the issue found in *Gattenby* – that serves to protect disabled workers. In 2009, another commentator stated, “It will take a commitment by the legislature to make changes to the [Missouri SIF] and to reevaluate such

165. MO REV. STAT. § 287.715.6 (2018).

166. *Id.*

167. McClitis, *supra* note 57, at 418.

168. Compare Lee Erickson, *2014 Disability Status Report: Missouri*, CORNELL UNIVERSITY YANG TAN INST. ON EMP. AND DISABILITY, 5 (2016), http://www.disabilitystatistics.org/StatusReports/2014-PDF/2014-StatusReport_MO.pdf, [perma.cc/694B-AMP8] with Lee Erickson, *2013 Disability Status Report: Missouri*, CORNELL UNIVERSITY YANG TAN INST. ON EMP. AND DISABILITY, 5 (2015), http://www.disabilitystatistics.org/StatusReports/2013-PDF/2013-StatusReport_MO.pdf, [perma.cc/R7Z2-DGWU].

169. See *infra* note 170 and accompanying text.

changes to determine their effectiveness.”¹⁷⁰ The future effectiveness of the 2013 amendments is questionable, but the attempt to limit liability, adequately finance the SIF, and improve the labor market for disabled workers are worthwhile goals. The question remains whether the legislature will need to reevaluate the SIF and institute further changes to maintain solvency of the Missouri SIF. Doing so may just guarantee the continued protection of disabled employees by the Second Injury Fund for generations to come.

170. McClitis, *supra* note 57, at 422.

APPENDIX A: LIABILITY PORTIONS OF SIF STATUTES BY STATE

State	Sunset	No Congruent SIF	Statute
Alabama			ALA. CODE § 25-5-57 (1975) (repealed 1992)
Alaska			ALASKA STAT. § 23.30.205 (West 2018)
Arizona			ARIZ. REV. STAT. ANN. § 23-1065 (2019)
Arkansas			ARK. CODE ANN. § 11-9-525 (2019)
California			CAL. LAB. CODE § 4751 (2019)
Colorado	x		COLO. REV. STAT. § 8-46-101 (2018)
Connecticut	x		CONN. GEN. STAT. § 31-349 (2019)
Delaware			DEL. CODE ANN. TIT. 19 § 2327 (2017)
Florida	x		FLA. STAT. § 440.49 (2018)
Georgia	x		GA. CODE ANN. § 34-9-360 (2018)
Hawaii			HAW. REV. STAT. § 386-33 (2018)
Idaho			IDAHO CODE § 72-332 (2019)
Illinois			820 ILL. COMP. STAT. 305/8 (2016)
Indiana			IND. CODE ANN. § 22-3-3-13 (LexisNexis 2014)
Iowa			IOWA CODE § 85.64 (2019)
Kansas	x		KAN. STAT. ANN. § 44-567 (West 2018)
Kentucky	x		KY. REV. STAT. ANN. § 342.120 (West 2019)
Louisiana			LA. STAT. ANN. § 23:1378 (2019)

Maine			ME. STAT. tit. 39 § 57 (1990) (repealed 1991) ¹⁷¹
Maryland			MD. CODE ANN., LAB. & EMPL. § 9-802 (West 2018)
Massachusetts			MASS. GEN. LAWS ANN. ch. 152, § 37 (West 2019)
Michigan			MICH. COMP. LAWS Ann. § 418.521 (West 2019)
Minnesota			MINN. STAT. Ann. § 176.131 (West 1990) (repealed 1992)
Mississippi			MISS. CODE ANN. § 71-3-73 (West 2019)
Missouri			MO. REV. STAT. § 287.220 (2018)
Montana			MONT. CODE ANN. § 39-71-907 (West 2018)
Nebraska	x		NEB. REV. STAT. ANN. § 48-128 (LexisNexis 2014)
Nevada			NEV. REV. STAT. ANN. § 616B.587 (LexisNexis 2014)
New Hampshire			N.H. REV. STAT. ANN. § 281-A:54 (West 2019)
New Jersey			N.J. STAT. ANN. § 34:15-95 (West 2018)
New Mexico			N.M. STAT. ANN. § 52-2-6 (2018) (repealed 1996)
New York	x		N.Y. WORKER'S COMP. LAW § 15 (McKinney 2018)
North Carolina			N.C. GEN. STAT. § 97-40.1 (2018)
North Dakota			N.D. CENT. CODE § 65-04-18 (2013)
Ohio			OHIO REV. CODE ANN. § 4123.343 (Lexis Nexis 2016)

171. See also *Church v. McKee*, 387 A.2d 754, 755–56 (Me. 1978) (utilizing the liability of the now-repealed fund)

Oklahoma			OKLA. STAT. tit. 85, § 172 (2011) (repealed 2011)
Oregon		x	OR. REV. STAT. ANN. § 656.622 (West 2019)
Pennsylvania			77 PA. STAT. AND CONS. STAT. ANN. § 516 (West 2019)
Rhode Island			28 R.I. GEN. LAWS § 28-37-4 (1997) (repealed 1998)
South Carolina	x		S.C. CODE ANN. § 42-9-400 (2018)
South Dakota	x		S.D. CODIFIED LAWS § 62-4-34 (1998) (repealed 1999)
Tennessee			TENN. CODE ANN. § 50-6-2018 (2018);
Texas			TEX. LAB. CODE ANN. § 408.162 (West 2019)
Utah			UTAH CODE ANN. § 34A-2-703 (Lexis Nexis 2018) ¹⁷²
Vermont		x	Never functional ¹⁷³
Virginia			VA. CODE ANN. § 65.2-1103 (2018)
Washington			WASH. REV. CODE § 5116.120 (2018)
West Virginia	x		W. VA. CODE § 23-4-9b (2018)
Wisconsin			WIS. STAT. § 102.59 (2018)
Wyoming		x	<i>See</i> Hancock, <i>supra</i> note 71, at 543 (arguing for the implementation of a SIF in Wyoming).

172. *See* Second Injury Fund v. Streator Chevrolet, 709 F.2d 1176, 1183 (Utah 1985) (describing nature of SIF liability).

173. *See* S.C. Audit, *supra* note 66 (referencing the inoperability of Vermont's second injury fund).