The Decline Of Second Injury Funds

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Second (subsequent) injury funds (SIF's) are socialized care requiring the large group of insurers, self-insurers and, in some states, employers subsidize a few. This is one bullet in the revolver used by the American Insurance Association (AIA) and other anti-SIF groups to shoot at the remaining second injury funds.

SIF's were created to accomplish two goals: 1) encourage employers to hire and retain workers with pre-existing medical conditions; and 2) provide the employer economic relief should any of these employees suffer a subsequent injury leading to a cumulative injury greater than its parts. Prior to the enactment of this mechanism, several court decisions made employers afraid to hire previously injured workers for fear they would be held financially responsible for the cumulative effects of any subsequent injury. The safety net created by second injury funds tempered this fear and opened the door to more partially disabled workers to employment opportunities.

With this as the historical backdrop, let's combine two other charges leveled by the anti-SIF groups against the remaining funds.
• The Americans with Disabilities Act (ADA) makes these funds obsolete. SIF's are no longer necessary because the ADA prohibits discrimination against disabled workers provided: 1) the employer has 15 or more employees; 2) the job can be performed if only "reasonable accommodations" are made; and 3) the accommodations do not create an undue hardship on the employer; and
• Second injury funds have failed to meet the objective of promoting the hiring of disabled workers.

An intriguing combination of charges; if ADA laws made the funds obsolete, then the SIF's no longer have need to make promoting the hiring of disabled workers a priority. Now these funds can focus on the more important goal of being a safety net for employers now REQUIRED by law to hire disabled workers.

One trade association attorney stated it best when she conceded that the ADA did effectively replace the first goal of second injury funds; she went on, however, to make the point that while the ADA created a legal requirement to assist the disabled, it did nothing to help employers bound by the law secure financing for any additional costs that may be created if and when an employee with a pre-existing medical condition is permanently and totally disabled because of the cumulative effects of a workplace injury. Should employers forced to hire disabled workers also be saddled with additional costs over which they have no control? Higher costs can result from an increase in the experience modification factor and/or the possible loss of premium credits due to increased losses.

Many view the experience modification factor argument as fallacious since experience mods are weighted more towards frequency than severity (with severe claims limited subject to a "stop gap" amount). Such counter-argument is true, unless the insured is in a state's assigned risk program making the insured subject to an Assigned Risk Adjustment Program (ARAP) factor. ARAP factors give greater weight to severity in their calculation than does NCCI or state workers' compensation rating bureaus. Short of being in the assigned risk, the lack of a second injury fund may be inconsequential in the effect on experience modification factors.

Other arguments for the dissolution of second injury funds made by anti-SIF groups include:
• They deviate from the principle that employer's costs should be internalized. All costs of doing business should be on the employer regardless of their part in creating the cost. Workers' compensation itself is a cost of doing business and all costs associated with providing this social benefit, including the costs of cumulative traumas, should be paid by the employer; with the ultimate cost being passed to the consumer rather than other employers or insurers. Anti-SIF groups argue than any increase in the cost of coverage will be more than negated by lower premiums due to the absence of carrier assessments (ultimately paid as part of the premium anyway). This leads to the next objection to second injury funds:
• Most second injury funds have accumulated large unfunded deficits;
• Second injury funds carry a large administrative cost;
• Disputes promote attorney involvement further increasing the costs of the second injury funds specifically and workers' compensation coverage in general;
• Some states extend benefits to employees whose employer failed to secure workers' compensation coverage either because they were not required to by law or in direct violation of the law. This may be a misuse of assessed funds; employers who break the law should not be bailed out by every other employer and insurance carrier operating within the

law. Certainly no one wants the injured employee to go without care or benefits, but this is not part of the original intent of these funds. The injured employee has the court system and other government social programs from which to garner benefits; and

• Most states require the employer to know about and have noted in the employee's file any pre-existing condition in order to qualify for second injury fund protection. Due to modern employment law and privacy concerns, such questioning may be considered an invasion of the employee's right to privacy regarding his health. Navigating these waters just to qualify for second injury fund protection could be hazardous.

Second injury funds are quickly loosing favor and being legislated out of existence. Nineteen have disappeared since 1992 (incidentally, the year that the ADA was passed) and at least one more is set to dissolve by 2013. Have these funds outlived their usefulness? There seem to be more arguments against these funds than for their continuation. What do you think?