SECOND INJURY FUND

Frequently Asked Questions

What is the Second Injury Fund?

The Second Injury Fund (SIF) is a fund created to reimburse employers or their insurers for workers' compensation payments made to certain injured workers. To receive reimbursement, the employer or insurer must demonstrate that the injured employee had a pre-existing, known condition and that a "second injury" made the resulting disability or cost of treatment greater than it otherwise would have been as a result of the "second injury" alone. If so, the fund would reimburse the employer, or its insurer all indemnity payments made in excess of 78 weeks and half of the medical expenses made in excess of $3,000.

Why do employers and insurers want to abolish the Second Injury Fund since they are the parties being reimbursed by the Second Injury Fund?

Employers or their insurers are the only parties receiving reimbursement from the SIF. They know that the *costs of the fund far exceed any potential benefit and that the fund has outlived its usefulness*. Spiraling assessments, unfunded liabilities and hidden extra costs of the system have simply made the price tag for the system more expensive than the benefits received. Approximately 20 cents of every premium dollar paid by employers is attributable directly or indirectly to the costs of the SIF. In 2001, *for every $1 of benefits paid directly to injured workers, employers were required to pay an additional 26.5 cents to the SIF in assessments.* Abolishing the fund and leaving the cost-spreading to the insurance mechanism will ultimately reduce the cost of workers compensation insurance.

If employers and insurers wish to abolish the Second Injury Fund, why did they actively oppose the House Budget *proviso* eliminating the Second Injury Fund?

The business community applauded the *proviso*'s elimination of the SIF but opposed the appropriation of $40 million needed to pay run-off claims already in the system. Otherwise, *the business community would have been subjected to a double assessment, making an already intolerable situation worse and increasing an already unfair burden by $40 million.*

Would elimination of the Second Injury Fund change any benefits paid to injured workers with pre-existing disabilities?

No. *Injured workers would be paid exactly the same workers' compensation benefits whether the Second Injury Fund existed or not.*

What is the trend for Second Injury Funds in other states?

The growing trend in other states is to eliminate or drastically reform Second Injury Funds. Since 1992, sixteen (16) states have abolished their Second Injury Funds (Alabama, Colorado, Connecticut, D.C., Florida, Kansas, Kentucky, Maine, Minnesota,

Nebraska, New Mexico, Oklahoma, Rhode Island, South Dakota, Utah and Vermont). On April 1, 2004, the Georgia legislature passed legislation to abolish its SIF this year. Other states are considering proposals to eliminate their funds or to drastically change their operations.

Some states have not yet experienced the problems encountered in South Carolina. For example, last year South Carolina's SIF paid $ 133 million in claims, while California's SIF paid only $ 6.5 million and Mississippi's SIF paid only $237,000 and North Carolina only $73,000. Since 1985, *nationally there has been no Second Injury Fund that still remains in existence whose growth in claims and assessments has been greater than South Carolina's.*

Is it true that the Second Injury Fund is needed to encourage employers to hire individuals with disabilities?

No. There is no evidence accumulated over the decades in which Second Injury Funds have been in operation that such funds have fostered the hiring of persons with disabilities. *In fact, there is no evidence that such funds generally, or in South Carolina specifically, have had any influence whatsoever on hiring or retention decisions.* Employment decisions are more directly and effectively impacted by the Americans with Disabilities Act that prohibits employer discrimination against qualified job applicants with a disability. While the ADA is a federal law applying to employers with 15 or more employees, *more than 85% of all jobs required to have workers' compensation insurance in South Carolina are covered under the ADA.*

This position is what the claimant-attorneys and the SIF "cottage industry" of insurance consultants argue to maintain the SIF as-is. However, there is no evidence that the SIF has encouraged anyone to hire or retain workers. *Most employers have never heard of the SIF.* Employers hire or retain previously injured or disabled workers on individual merit, because they want dedicated loyal workers, not because they plan to "game" the SIF system. It should not matter to workers whether the SIF exists, because insurers and self-insurers remain fully responsible for benefits awarded by the Workers Compensation Commission.

What is the growing Second Injury Fund "cottage industry"?

These are the consultants and attorneys needed to assist insurers and self-insurers in perfecting claims against the SIF. Their fees constitute a hidden and growing expense for the SIF system.

Why should the Second Injury Fund be closed to new claims?

The SIF is an expensive dollar-shuffling mechanism that serves no useful purpose, but it has to be paid for by annual assessments against insurers and self-insurers. These unpredictable assessments make workers compensation coverage more expensive and discourage insurers from competing in SC.

The more choices SC employers have for buying coverage, especially small employers, the more options they have for managing the cost of coverage. In the final analysis, market competition is the best consumer protection.

How does the Second Injury Fund make coverage more expensive?

The unpredictable and unrestrained assessments that SIF charges against insurers and self-insurers grow larger each year. Plus the costs of hiring consultants and attorneys and otherwise gaming the system to try to obtain reimbursement from SIF run costs up. In addition, the fact that funds used to settle claims against SIF are "everybody's money" (SIF is financed by assessing all workers compensation insurers and self-insurers), and *"everybody's money" is "nobody's money."*

What about the impact on small employers?

Small employers particularly are disadvantaged by the SIF, because they don't have the HR personnel to lay the groundwork and perfect the paperwork for claims against the SIF or the number of employees to drive repetitive recoveries. Small employers with excellent safety programs and records do not, and cannot, make use of the SIF. Nonetheless they are liable for the SIF assessments and, through their workers compensation insurance or self-insurance payments, *they wind up subsidizing the insurers and self-insurers that are most successful in gaming this system.*

In addition, *small companies in industries that are characterized as having relative young work forces, employees that turn over frequently, and employees with little medical documentation are at a distinct and permanent disadvantage in the SIF system.*

Why do the claimant attorneys want to keep Second Injury Fund as-is?

They want to continue to make money from it. The existence of the SIF makes it easier for them to settle doubtful claims, because "everybody's money is nobody's money."

Will elimination of Second Injury Fund hurt previously injured or disabled workers?

No. Injured workers will continue to receive their workers compensation benefits from their insurer or self-insured employer. The Workers Compensation Commission will continue to award benefits and the insurer or self-insured will continue to pay those awards, regardless of whether there is a SIF program.

Will closing out the Second Injury Fund result in higher workers compensation premiums?

No, because closing out SIF to new claims will reduce the overall cost of the system. Any temporary increase in loss costs will be ultimately offset by greater reductions in administrative expenses.

Are workers compensation insurers free to charge whatever they want to?

No. Workers compensation rates are subject to regulation by the SC Department of Insurance. All insurers must use a standard, regulated "loss cost". SIF assessments are "expenses" passed directly through to employers. Elimination of these pass-through assessments will ultimately reduce premiums paid by employers.

Aren't there some insurers and self-insurers that are "winners" in the SIF arena in that they collect more in reimbursements from SIF than they get assessed by SIF?

Sure, there are winners and losers in this zero-sum game. But *for every insurer or self-insured that gets more back from reimbursements than it gets assessed, there are other insurers or self-insureds that are "losers".* In addition, because of the nature of their employees, some industries are permanently disadvantage and are likely to remain "losers" over time. And even *many of the "winners" become losers, when the expenses they incur to work this unnecessary system are added in.*

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THE SOUTH CAROLINA SECOND INJURY FUND

To be or not to be?

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Second injury funds are rapidly disappearing from the workers' compensation landscape. In the last few years, sixteen states have abolished their second injury funds: Alabama (1992); Colorado (1993); Connecticut (1995); District of Columbia (1998); Florida (1997); Kansas (1993); Kentucky (1996); Maine (1992); Minnesota (1995); Nebraska (1997); New Mexico (1996); Oklahoma (2000); Rhode Island (1998); South Dakota (1999); Utah (1994) and Vermont (1999).[1] Other states are considering proposals to either eliminate their funds or to study ways to drastically change their mechanism for operating.

In New York, the first state to establish a Second Injury Fund,[2] a Study Commission was created by Executive Order to determine whether to retain its Second Injury Fund as well as other workers' compensation special funds.[3] In recent testimony before this Study Commission, Ed Reinfurt, Vice President of the Business Council of New York State, told Commission members that business recommends elimination of the Fund not only because the fund has outlived its original purpose but also because it has driven up workers' compensation costs.[4] Despite New York's workplace accident rate being 38 percent below the national average, its fund disbursements have more than doubled since 1995 while its assessments have increased from 36 to 55.5 percent of all workers' compensation costs.[5]

South Carolina's Second Injury Fund ("SIF") experience is alarmingly similar to that occurring in these other states. Since FY1998, the South Carolina SIF payouts have risen from $60.5 million to $103.3 million in 2002—an astonishing growth rate in just a four-year span. During the same period, assessments from the South Carolina SIF have increased from $57.8 million to $141.2 million. South Carolina's most recent history of assessments and payouts can be graphically depicted as follows:

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[1] Steven A. Bennett, "Second Injury Funds: Moving Into the Past Tense," AIA Issues Report (Fall 2000).

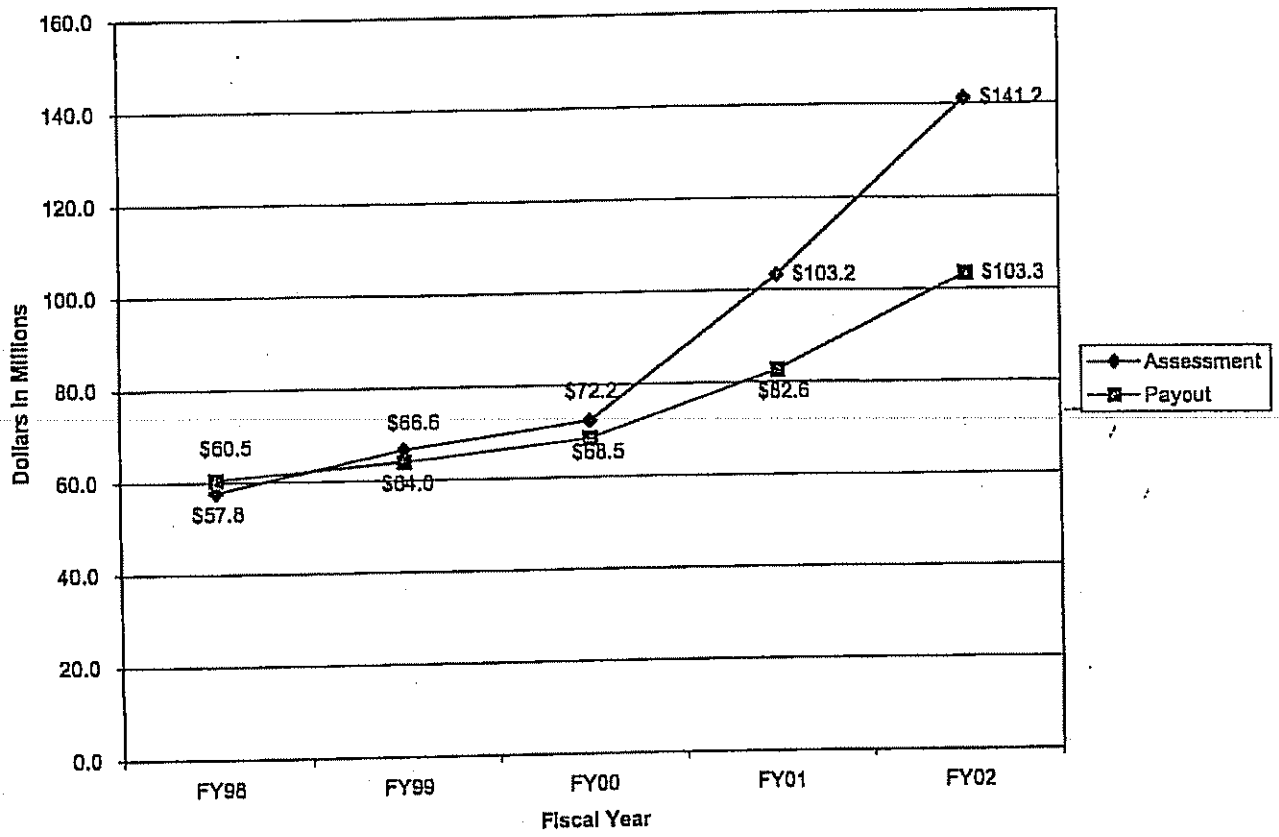
[2] New York created its Second Injury Fund in 1916 to encourage employment of injured veterans returning after World War I. In July, 1940, twelve states has some form of Second Injury Fund in existences. Another 22 states, including South Carolina, similarly enacted Second Injury Funds after World War II as an incentive to hire injured veterans returning from the battlefields of Europe, North Africa and the Pacific. At its zenith, thirty-eight states had similar funds.

[3] *Id.*

[4] News Release: The Business Council of New York State, Inc. (September 6, 2000).

[5] *Id.*

S.C. Second Injury Fund Assessments & Payouts FY98 – FY02[6]



What is even more alarming is the fact that these increasing costs of the SIF are not simply a recent occurrence. In 1985, the South Carolina SIF expended $12.3 million for second injury claims. The expenditures for 1995, however, topped $52.7 million. Thus, for the prior ten-year period from 1985 to 1995, SIF claim expenditures more than quadrupled. Despite having one of the smallest labor forces in the United States, South Carolina's SIF was among the top 5 states in dollars expended for second injury claims during this period.[7]

Increasing annual expenditures and assessments is a fairly accurate indicator of the successful utilization of the SIF for recoveries. It is also an accurate indicator of a low threshold for access to fund reimbursement. Increasing utilization of the Fund, coupled with easier access to recoveries, produces higher annual expenditures. Examination of the claim activity in the South Carolina SIF proves the truth of this statement:

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[6] S.C. Self Insurers Association, Workers' Comp News (Fall 2002).

[7] Only the SIF's in Kentucky, New York, Connecticut and Florida had a greater annual expenditure than South Carolina in 1995. While the high expenditures of New York, Connecticut and Florida can be explained by the size of the industrial work force, Kentucky's inclusion in the list is the product of its paying "black lung" occupational disease cases as second injury claims.

Second Injury Fund Claim Activity[8]

	FY 98	FY 99	FY 00	FY 01	FY 02
New Claims	7100	7913	7541	8289	10,237
Claims Paid	2867	2952	3040	3449	4065
Average Paid/Claim	$20,690	$21,256	$22,094	$23,527	$25,046
Accepted Claims	1658	1718	1855	2393	2219
Accepted/Unknown	1430	1488	1615	2092	1971
% Accepted/Unknown	86.2%	86.6%	87.1%	87.4%	88.8%
% Paid/Unknown	49.9%	50.4%	61.0%	60.6%	48.5%

As indicated in the above chart, the number of new claims for SIF reimbursement filed over the past 4 years has increased by over 44%. The number of claims paid by the SIF annually has increased by 42%. The value of an average paid claim has increased by more than 21% or more than $4300 per claim. Accepted claims, particularly those involving unknown conditions, increased significantly over the period until the last year, generally indicating a stiffening resolve by the SIF against accepting or to voluntarily paying submitted claims, particularly those involving unknown conditions.

Rising assessments from the SIF implicate "the consistency and fairness of the state's workers' compensation system."[9] The assessment level for 2001 was the highest in the history of the Fund and "equivalent to 26.5% of paid claims for the year ended December 31, 2001, [meaning] that workers' compensation carriers and self-insured entities were required to pay 26.5 cents to the Second Injury Fund for every dollar spent on indemnity payments and medical treatments."[10]

As a consequence of rising costs and expenditures, South Carolina employers, insurers and self-insureds have begun questioning the value and utility of the SIF. Some advocate reforms that would reduce utilization and payouts of the Fund, as for example eliminating the unknown conditions provisions of the law,[11] increasing the threshold number of weeks of indemnity payments borne by the employer before obtaining SIF reimbursements[12] or

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[8] D. Crossman, S.C. Second Injury Fund Handout.

[9] PHTS Workers' Compensation E-Zine (Vol. 2, No. 9, January 17, 2003).

[10] *Id.*

[11] One observer notes "The major culprit is the 'unknown conditions' clause, which enables employers to be reimbursed for injuries which were probably not originally meant to be covered by the Second Injury Fund." S.C. Self-Insurers Association, Workers Comp News (Fall 2002).

[12] In South Carolina, the threshold level of disability before a claim is eligible for reimbursement is 78 weeks of indemnity payments. By contrast, the Model Act requires the employer or insurer to be responsible for the first 104 weeks of disability. Other states require even more. Wisconsin, for example, requires 200 or more weeks of disability and requires the pre-existing disability to be of at least equal or greater degree.

eliminating or increasing the threshold medical expense necessary for SIF reimbursement.[13] But each of these measures, no matter how well intended, will not eliminate or solve the basic problems of the Fund.

If South Carolina employers are expected to shoulder the burden of these systemic costs, there must be legitimate, tangible benefit to the SIF. If not, continued operation of the SIF simply makes no sense. When the reasons advanced for the existence of the Fund are examined, the case for abolition becomes clear.

The Case for Abolition of the Second Injury Fund

South Carolina should abolish the Second Injury Fund because: (1) the SIF has outlived its usefulness in promoting the hiring of disabled workers; (2) there exist other, more effective and less expensive means of achieving this objective; (3) the pure costs of the SIF outweigh any potential social benefit; (4) the cost shifting mechanism of the SIF is particularly unfair to smaller employers and those emphasizing workplace safety; (5) the SIF generates hidden transactional costs, disputes and increased claim costs; and (6) SIF assessments are only the "tip of the iceberg" and represent substantial, unfunded liabilities. Each of these reasons are discussed below.

(1) ***The SIF has outlived its usefulness.***

The sole justification for the existence of the Second Injury Fund is to promote the hiring or retention of disabled employees by protecting employers from the higher costs that may occur when a workplace injury "combines with a prior disability to result in substantially increased medical or disability costs than the accident alone would have produced."[14] The enhanced costs sustained as a result of these second injuries to workers are then distributed among all employers in the State by assessments. For employers insured through the workers' compensation insurance market, these assessments are imbedded in the premiums paid by the employer. For self-insured employers, these assessments are fungible, additional contributions to their respective pools or payments directly to the SIF.

Whether an employer is insured by the private insurance market or bears the costs of the assessments directly as a self-insurer, the point is that the cost represented by SIF assessments is justified solely for the social purpose of encouraging the hiring/retention of workers with disabilities. However, ***there is absolutely no demonstrable evidence accumulated over the decades in which SIF's have operated that such funds have ever achieved the social purpose of fostering the employment or retention of persons with disabilities.***[15] Nor is there any demonstrable evidence that second injury funds in general, much less the South Carolina fund,

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[13] Medical benefits are reimbursed at 50% after the first $3000 when incurred during the first 78 weeks after the accident but are reimbursed at 100% for those medical expenses incurred after the 78th week.

[14] D.P. Crossman, Second Injury Fund Accountability Report for FY 1999-2000. This is the Mission Statement for the SIF.

[15] Bennett, *supra*, fn. 1 at 24.

has influenced any hiring or retention decisions. While the SIF has admittedly been successful in spreading second injury losses among all employers, "without more than [this] theoretical justification, * * * socializing losses has become an end in itself."[16]

An employer with no responsibility for injuries occurring in another employer's workplace should not subsidize that employer's losses unless the subsidy promotes a legitimate, important social goal and there is no other cost-effective means for achieving the goal. It is inequitable to shift workers' compensation costs for "subsequent injuries" based on the unsupportable justification that to do so promotes the hiring and retention of workers with disabilities. But even if evidence were available to suggest that the SIF creates an employment incentive for disabled workers, the SIF should still be abolished because other direct, cost effective means exist for achieving this goal.

(2) ***Americans With Disabilities Act of 1990 (the "ADA").***

The Americans With Disabilities Act[17] ("ADA") is a more direct, and thus certain, remedy for promoting employment and retention of workers with disabilities. The ADA prohibits certain improper inquiries about the existence or nature of a disability prior to an employment offer. It prohibits employment discrimination against a "qualified individual with a disability" and even requires prospective employers to make "reasonable accommodations," absent unreasonable hardship to the employer, for workers with disabilities. These prohibitions against discrimination apply not only to hiring, but also to advancement, retention, training and other employment opportunities afforded to employees. The ADA also provides for a system of enforcement, including private as well as public actions and damages.[18]

The ADA better serves and achieves the social purposes that originally led to the creation of the SIF. Moreover, the SIF, because of its emphasis on *known* pre-existing disabilities or conditions, actually operates to call attention to a prospective employee's prior medical condition. The SIF presently gives employers a pretext for inquiring into a new employee's medical history as well as a powerful incentive to inquire into a claimant's medical history post injury in order to hunt down a pre-existing condition to support a claim for reimbursement from the SIF.

(3) ***The hidden costs of SIF claim collections and assessment recoveries.***

Identification of the payouts of the SIF and its assessments to employers, whether insured or self-insured, is significantly understated. The SIF is a reimbursement mechanism. It does not pay until the employer has paid. The employer must still pay all claim adjustment costs

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[16] *Id.*

[17] 42 U.S.C. § 12101 *et seq.*.

[18] The ADA does not cover employers with fewer than 15 employees. However, it is doubtful that abolition of the SIF would have any impact on the hiring or retention decisions of small employers with fewer than 15 employees. If such an impact could be shown to exist, the simple solution would be to extend a state-created ADA remedy to workers with disabilities when the employer has 4 or more employees, but fewer than 15.

associated with the workers' compensation injury *as well as the costs of recovery from the SIF.* These costs include continued adjustment of the claim after the first 78 weeks of indemnity, fixed costs of the insurer or self-insurer's recovery unit, attorneys fees and other claim adjustment expenses. For most employers, the estimated net recovery and claim costs for SIF recoveries average between 10 and 15 percent of the claim cost. Thus, for every dollar of SIF recovery reimbursement, the employer actually receives a net benefit of only 85 to 90 cents.

Added to the hidden costs of the recovery are the costs of SIF financing and assessments costs. SIF assessments are calculated based upon a formula equal to 175 percent of the total disbursements made from the fund during the prior calendar year, less the net assets of the fund as of year's end, times the ratio of the employer's income benefits paid during the prior year compared to the total income payments paid by all insurers or self-insurers. In addition, the budgeted cost of the SIF operation totals more than $1.4 million per year and must be added to the assessment figure or category of "hidden" costs paid by employers.

The cost of shifting claim payments also entails substantial additional employer expenses. SIF assessments on insurers are ultimately shifted to employers in the form of increased premiums. These premiums are subject to all premium taxes, retaliatory taxes, commissions, acquisition and other expenses or charges applicable to premiums generally. Depending upon whether an employer is self-insured or insured, these additional premium charges may conservatively add another 15 percent to the cost of collecting the premium a second time.

Stated differently, for every dollar reimbursed to an employer from the SIF, the employer's combined costs of recovery and assessment collection produces a hidden cost ranging from 25 to 30 cents. If the sole justification for the SIF is promoting the hiring and retention of workers with disabilities, reliance on the ADA instead of the SIF makes sound economic sense as well.

(4) ***Inherent unfairness and inequities in the SIF cost-shifting approach.***

Second Injury Funds are especially unfair to small employers. Larger employers have more opportunity to benefit from the fund because they experience considerably more claims. Large employers are also geared to "play the game" while small employers cannot. Nonetheless, smaller employers are assessed to cover these losses even though they may never have a loss qualifying for SIF treatment. Further, for a variety of reasons, smaller employers who affiliate with a self-insured pool or fund will never receive the full benefit of a recovery since total assessments generally offset recoveries for multiple employer funds. For example, in FY 2002, the three self-insured funds receiving the highest recoveries from the SIF, also received the highest assessments for FY 2003 and their assessments more than offset in each case the benefit of the recovery.[19]

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[19] *See* Workers' Comp News, *supra* n. 6. In FY 2002, the three self-insured funds (and recoveries) were the State Accident Fund ($9,596,274); the Palmetto Hospital Trust ($3,156,609); and the S.C. Association of Counties ($1,200,412). In FY 2003, these same self-insured funds received the highest assessments: State Accident Fund ($10,459,344); Palmetto Hospital Trust ($3,209,562); and S.C. Association of Counties ($2,989,696). In each case, the amount of the assessment exceeded the amount of the recovery even before considering any hidden costs of recovery or assessment.

Workers' compensation losses should be internalized by an employer and not spread among all employers, even for a laudable but unattainable social purpose. An employer receiving reimbursement from the SIF for benefits paid to a claimant injured in his workplace has less of an incentive to adopt safe workplace practices. An employer avoiding workplace injuries in his own shop should not be forced to subsidize other employers' claims:

> The companies that have rigorous safety programs and keep their experience modification low often do not experience the benefit they should. These companies may see their premiums decrease yet they still come up short, due to the rising nature of their [SIF] assessments. This is inherently unfair. Until more is done to bring equity to the system, many businesses with safe workplaces will continue to pay artificially higher prices.[20]

It is inherently unfair to shift benefit costs to an employer who has no responsibility for the injury. Workers' compensation costs, incurred outside the risk-spreading function of insurance, should be allocated to employers in accordance with the costs of injuries to their own employees. This practice insures that costs will be distributed fairly and "encourages safety, prompt reemployment, and prevention of fraud."[21]

(4) ***Transactional costs, disputes and increased claim costs.***

The SIF is administered as a separate state agency under the auspices of the Budget and Control Board. It requires staff and other resources necessary to evaluate coverage, track payments and assessments and to provide for defense of the fund. As previously noted, these unavoidable costs become part of each employer's assessment. It is not the "fact" that such costs exist that makes these transactional costs objectionable; rather, what is objectionable is the fact that such costs are unnecessary to achieve the social goal behind creation of the SIF and that employers are having to bear the expense for both challenging and defending the same claim.

More significantly, SIF generates disputes, attorney involvement, gamesmanship and litigation. The SIF introduces another party into the workers' compensation equation and adds another layer of disputes to an already overburdened, system. Commission energy and resources are diverted resolving "second injury" disputes rather than original claims. The potential of an SIF recovery provides employers with an incentive to hunt for a preexisting injury to minimize their direct financial obligation and to shift costs to the fund. It also encourages case-dumping at the expense of other employers, raises legal costs and promotes "cooperative collusion" with claimants' attorneys to either pay or overpay claims in exchange for information that may produce a SIF recovery.

Attorneys in the workers' compensation arena advise clients to place the SIF on notice of any possible claim even before information of a prior illness or injury is known. This is

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[20] News Release, *supra* fn. 4.

[21] Bennett, *supra* fn. 1 at 24.

particularly true in injuries involving the back or other areas where some history of arthritis or other listed condition might exist or be discovered. Defense counsel conduct discovery depositions of claimants and their physicians as much to discover evidence of a "second injury" as to contest the initial claim. Employers correctly and properly question the appropriateness of a system that promotes digging for prior medical conditions that have no bearing on the claim's compensability or the claimant's disability.

SIF assessments have become so high, many insurers and self-insureds have been forced to devote valuable resources to gold-digging among their own claims files for any potential for SIF recovery. Given the size of SIF assessments, it has become vitally important to most employers to "find" second injury fund recoveries that can offset the certainty of increasing future assessments. But this "prospecting" process is a self-fulfilling prophecy—assessments drive claims, claims produce payments, claims payments fuel additional assessments. There is little doubt that the quadrupling of claims filed with the SIF in the past 4 years is the direct result of this type of prospecting activity.[22]

(5) ***Unfunded liabilities—the tip of the iceberg.***

The SIF is funded on a pay-as-you go basis, through assessments on self-insureds and insured employers. SIF assessments are based only on claims paid during the current year, even though acceptance of a claim for payment also involves accepting the liability to pay future medical or indemnity costs on the claim that have not yet become due. It is this unfunded liability for future payments on accepted claims that makes the SIF a ticking, financial time-bomb. These unfunded liabilities mean that assessments, as a tax on the cost of injuries, will be with us for years, if not decades. Current accounting principles will require insurers and self-insurers to recognize these liabilities on their own financial statements, thereby affecting the value of the enterprise.

Because the SIF does not fall within GASB 10's definition of a public entity risk pool ("PERP"), and also because the majority of the entities serviced by the fund are not governmental entities, there is no actual transfer of the financial risk to the SIF. Accordingly, accepted claims liabilities are recognized by the SIF only to the extent such claims are paid within the assessment year. ***Ultimate responsibility for the unpaid amount of accepted claims are therefore the liabilities of the participating insurers and self-insureds, not the fund.***

Accounting rule changes, adopted in 1997 by the American Institute of Certified Public Accountants and ratified by the Financial Accounting Standards Board, require immediate accrual of SIF liabilities, where assessments are based on losses,[23] to recognize that payment for

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[22] *See* PHTS Workers' Compensation E-Zine, *supra* fn. 9. For example, one self-insured association has retained lawyers to pour over its previously closed files from 1995 to the present to identify any claims that may still be pursued for potential recovery from the SIF. This project reportedly started in February, 2002, has covered approximately one-third of the closed files and has resulted in the classification of 72 files with potential for reimbursement from the SIF.

[23] Although attempts were made in 2000 to re-write the South Carolina statute to convert the SIF assessment to a premium-based assessment to avoid application of this rule, the attempt was unsuccessful. South

SIF's accepted claims is an unavoidable future obligation. These rules apply not only to all insurers, but also to any publicly held companies either reporting to the Securities and Exchange Commission and/or filing financial statements in accordance with Generally Accepted Accounting Principles ("GAAP"). Thus, alls insurers and self-insurers should recognize their share of these unfunded liabilities/future assessments on their balance sheets and financial statements.

What does all of this mean, particularly in a post-Enron world? It means that the unfunded liabilities for future claims reimbursements must be recognized by insurers and self-insurers on their balance sheets and can no longer be treated as "off-balance sheet" items. If the SIF continues as a haven for claims and a target for cost-shifting, as certainly appears to be the case, its liabilities could climb dramatically. Publicly held companies would have to accrue estimates of future liabilities for SIF assessments. Even more alarming is the fact that no one seems to know what the unfunded liabilities of the SIF are.

In 1994, a Blue Ribbon Commission studying Connecticut's SIF estimated its unfunded liability to be $6.2 billion, with a annual growth of $700 million unless curtailed. In 1995, the legislature abolished the SIF prospectively by prohibiting the filing of any new claims after 7/1/95. Thereafter, the state authorized issuance of $750 million in revenue bonds to provide the necessary capital for the SIF to aggressively settle accepted claims on a lump sum basis. The cost of the bonds will be defrayed by employer assessments over a 15-year period. In this manner, the Connecticut SIF was able to reduce its remaining unfunded liability to $1.08 billion by 1998.

Similarly, Florida conducted a review of the financial status of its fund in 1998 and found an "unfunded liability" of $4.13 billion on an undiscounted basis and $1.88 billion discounted to present value. Florida closed the fund to all new cases effective 1/1/98 and is continuing to assess employers for purposes of funding these reimbursements. The assessments for these liabilities will likely last for decades.

While Florida and Connecticut have experienced significantly larger SIF payouts than South Carolina over time, SIF expenditures in these two states grew at a rate equivalent to that being experienced by South Carolina over the most recent 4 year period. It should also be noted that in 1997 the South Carolina SIF had the fifth largest overall expenditures, immediately behind Florida and Connecticut. While the unfunded liabilities of the South Carolina SIF are most certainly less than those of either Connecticut or Florida, the conclusion is still unmistakable: The unprecedented growth of the SIF in South Carolina over the past few years indicates growth of a substantial unfunded liabilities. These ever-rising liabilities, coupled with incentives to dump cases into the fund and increasing assessments, mean that a tax on the cost of workers' compensation injuries will continue in an upward spiral for decades unless the SIF is abolished.

Carolina's assessment mechanism is a loss-based assessment that permits insurers to collect the assessment from policyholders through a premium-based factor included in the rates.

Reform versus Abolition

Some advocate reform of the SIF rather than its abolition. The reforms most commonly suggested include eliminating the unknown conditions provision of the law or increasing the eligibility threshold for medical and indemnity reimbursements from the fund. But the simple truth is that these reforms attempt to address the problem of growing assessments by restricting utilization of the fund itself. Advocacy of such reforms admit, however, not only the necessity of reducing the unfunded liabilities of the SIF but also that the fund has little utility in promoting the hiring or retention of workers with disabilities. In fact, these reforms abandon altogether the sole justification for the fund's existence, leaving the SIF proponents with no social or philosophical basis for its continued existence.

At the same time, none of these reforms address the excessive transactional costs, mounting problems and dwindling benefits of the fund's continued operation. Indeed, these reforms give stronger voice to the criticism that the success in spreading losses among all employers is sole legitimate end in and of itself when it most assuredly is not. The SIF is not an insurance mechanism and without accomplishing any social objective, it is of absolutely no value.

Often, those who urge reform of the SIF instead of its abolition are players in the system who benefit from the system itself. This includes persons employed by the SIF, those who specialize in SIF recoveries, those representing claimants who can trade prior injury information for claim payments and those whose recoveries have exceeded their assessments. But the only certainty about the continued operation of the SIF is that, if the game is played long enough, all the participating parties in the SIF will ultimately lose. Insurers and self-insureds alike will, at the end of the day, pay more in assessments than their net recoveries from the SIF.

If it is desirable to reduce the number of claims eligible for reimbursement by the SIF, then why not reduce the number of eligible claims to zero? If it is desirable to reduce the assessments from the SIF, then why not reduce the assessments as quickly as possible? If its desirable to make assessments as low as possible, then why not eliminate them altogether? If the SIF no longer serves, or has never served, as an incentive for hiring and retaining workers with disabilities, why is it worth retaining? Merely shifting claim costs for second injuries simply for the sake of spreading these costs to all employers should not become the purpose of the fund. This is particularly true when the cost for spreading these expenses itself entails a considerable expense to employers without any payback.

Second Injury Funds were created at a time when the perceived need to encourage reemployment of injured workers was high and the information regarding the effectiveness of different, more direct alternatives was lacking. Experience has demonstrated, however, that Second Injury Funds provide little or no benefit to injured workers and create significant problems for the workers' compensation system. Abolition of the SIF is the only desirable solution that makes sense.