

Many states have abolished or phased out second injury funds, but these funds remain active in more than half of the states.

What is the status of the fund in your state?

South Carolina's second injury fund is due to be phased out by July 2013.

Missouri's second injury fund verges on insolvency.

Arizona Appeals Court rules second injury fund can be used to fund the state's general liabilities.

Since 1992, 19 states have either abolished or reformed their second injury funds. Some of the remaining second injury funds face challenges that may ultimately result in their demise. However, more than half of the states still have second injury funds, and millions are paid annually by either reimbursement to the employer or insurer, or directly to the injured employee. Timely identification of claims that qualify for second injury fund recovery contains claim costs for employers and insurers.

States utilize various terms in identifying such funds (e.g. special fund, second injury fund, subsequent injury fund, and special disability trust fund). In this article, the generic term "second injury fund" (SIF) will be used to describe these programs.

Each of these funds has different rules and regulations, so attention must be paid to the statutory requirements for each state. Click [here](#) for a list with useful information regarding each fund.

History and Current Status of Second Injury Funds

Second injury funds were designed to encourage employers to hire employees with disabilities and pre-existing conditions by offering cost relief should the employee experience an injury that aggravates the existing condition. For example, an employee with prior back surgery, diabetes, or carpal tunnel syndrome may pose greater risk for an additional injury than an employee who has no such condition.

The first second injury fund law was adopted by New York in 1916. A number of other states enacted similar legislation during the 1920s, but World War II was the major catalyst for the establishment of these funds. It was then, with hundreds of thousands of wounded veterans returning from war in Europe and Asia, that states started the funds to address two related needs:

- Ensure that employers did not discriminate against veterans returning from war with serious wounds, the effects of which could be compounded by a subsequent on-the-job injury
- Limit the employers' financial risk related to hiring employees such as veterans with pre-existing conditions

In September 1944, the International Association of Industrial Accident Boards and Commissions (IAIABC) approved draft model legislation that provided for Second Injury Funds supported by payment of \$500 in no-dependency fatal cases. Where an employee had sustained loss of one of two members, so loss of the other would involve permanent total disability, the employer would be liable only for the partial disability in case of subsequent loss of the second member. The balance of benefits was to come from the second injury fund.

In the months that followed, many groups worked together to get second injury fund provisions enacted in more states. As a result, two-thirds of the jurisdictions had such laws in operation before the end of World War II. In the majority of instances, those laws followed the model draft adopted by the IAIABC.

Over the years, the coverage under second injury funds expanded and began to face financial challenges for a variety of reasons.

- More injured employees became eligible for payments.
- The dollar value of the awards grew due to the rising cost of medical care.
- Assessments charged to businesses did not always keep pace.

Missouri is an example. Legislation in 2005 placed a 3 percent cap on the second injury fund surcharge on businesses' workers' compensation premiums. Reportedly in 2011, the fund collected \$43 million from businesses, while its obligations increased to \$77 million. The Missouri fund stopped settling cases in late 2009, which has increased litigation.

South Carolina's second injury fund, which is due to be phased out by July 1, 2013, stopped considering claims from injuries that happened after June 2008 because of rising losses that resulted in surcharges to employers and insurers of nearly \$200 million annually.

New York closed its fund to all new claims in July 2010 when its outstanding liabilities topped \$18 billion, according to a report by Workers' Compensation Research Institute (WCRI).

The second injury fund in Louisiana will sunset in a phased approach beginning in 2014 as follows:

- December 31, 2014: Final accident date for claims
- December 31, 2016: Supporting documentation due
- December 31, 2017: Deadline for final Board decisions
- December 31, 2017+: Reimbursements continue until all claims paid

In some states, second injury funds have been used by lawmakers to balance state budgets. In New Jersey a constitutional amendment was passed in 2010 to prohibit such raids.

On November 23, 2012, an Arizona Appeals Court ruled in [Industrial Commission of Arizona, et al v. Janice K. Brewer, Governor, et al](#), CA-CV 11-0119 (AZ App 2012) that funds could be transferred from the special fund of the Industrial Commission of Arizona (ICA) to the state's general fund. In the decision that allowed \$4.7 million to be transferred by the state legislature, the court held that the special fund was a funding source subject to legislative review and appropriation. "...Because the legislature set the percentage rate of premiums from the State Compensation Fund and private carriers to be placed in the Special Fund [sic], the funds are public monies," and is therefore a public fund.

Critics of second injury funds contend they have outlived their purpose and shift costs to businesses that may never benefit from the funds. Additionally it is argued that the American with Disabilities Act (ADA) now provides greater legal protections to workers than existed during the World War II era.

Whether the remaining second injury funds will survive as a new generation of wounded warriors returns from Iraq and Afghanistan remains to be seen.

Identifying Second Injury Claims

Opportunities for second injury fund recoveries generally apply to long-term claims. Because the value of a qualified claim is generally greater, failure to identify each and every opportunity to collect can be costly.

Regular review of both old and new claims for recovery potential can potentially capture dollars that would otherwise be lost. A claim may not show evidence of a prior impairment when it is first opened or evaluated for second injury fund possibility, but it does not mean the claim will never qualify for recovery. Such evidence often comes to light only during a later independent medical examination (IME) or a subsequent investigation.

Most second injury fund statutes indicate that in order to prove a claim there must be evidence that the claimant suffered from a known pre-existing impairment arising from a prior accident, disease, or congenital condition and that this impairment was diagnosed before the date of the second injury.

The prior impairment is generally required to have been permanent and some statutes, such as in Arizona and Nevada, actually require the prior permanent impairment to qualify as a specified percentage under the AMA guidelines (10 percent and 6 percent, respectively).

Almost all active second injury fund statutes have a notice provision that require the employer/insurer to put the fund on notice of a potential claim within a specified time. Failure to notify a fund within the statutory time limit is generally a complete bar to fund liability.

Most, but not all, second injury fund statutes contain a requirement that the employer must have knowledge of the prior impairment before the date of the second injury. Alaska, Arizona, Georgia, Louisiana, Massachusetts, New Hampshire, and Nevada are examples of states with active second injury fund statutes with a strong employer knowledge element.

Many funds require medical evidence to prove that the claimant's disability after the second injury is substantially greater than it would have been because of the combined effects of the prior and second injury. It is a common misconception that the prior disability must be to the same body part as the second injury and that the second injury must somehow directly aggravate the prior disability. Direct aggravation is not always required for the filing of a fund claim.

Conclusion

Second injury funds are there to reimburse eligible employer and insurers. While those employers and insurers continue to pay into the funds through assessments, reimbursements are only received when timely requested.

When we do not timely identify claims with second injury fund recovery potential and obtain reimbursement, Sedgwick risks exposure for errors and omissions and jeopardizes our relationships with employers and insurance carriers.

- Be aware of the requirements of the funds in the states you handle
- Continuously evaluate your claim for second injury fund recovery potential as facts develop.
- Timely make all necessary state filings.
- File all required paperwork to obtain reimbursement due.

Finally, if your client uses [Sedgwick's central subrogation services](#), refer claims with recovery potential.