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# 2020 Report on the Effects of Changes to Tort Laws



South Carolina Department of Insurance  
1201 Main Street, Suite 1000  
Columbia, South Carolina 29201

December 18, 2020

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The Honorable Henry McMaster, Governor  
State of South Carolina  
State House  
1100 Gervais Street  
Columbia, South Carolina 29201

The Honorable Harvey S. Peeler, Jr.  
President *Pro Tempore*  
South Carolina Senate  
213 Gressette Building  
Columbia, South Carolina 29201

The Honorable James H. Lucas  
Speaker  
South Carolina House of Representatives  
506 Blatt Building  
Columbia, South Carolina 29201

***RE: 2020 Report on the Effects of Changes to Tort Laws***

Dear Governor, Mr. President and Mr. Speaker:

Section 15 of South Carolina 2005 Act No. 32, the South Carolina Noneconomic Damage Awards Act of 2005, reads as follows:

As a majority of the health care community is insured through the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and as it is essential for the General Assembly to understand the effects of changes to tort laws, the South Carolina Department of Insurance is given authority to request data regarding changes in claims practices from the South Carolina Medical Malpractice Joint Underwriting Association (JUA) and the Patients' Compensation Fund (PCF). Such data may include paid claims, paid loss adjustment expense, case reserves, bulk reserves, and claim counts by quarter for the previous five years. The department may make such a request of the South Carolina Medical Malpractice Joint Underwriting Association and the Patients' Compensation Fund and such information must be provided within thirty days.

The Department of Insurance shall report annually to the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Governor as to whether this and other related enactments have resulted in reductions in premiums and as to any other trends of significance which might impact premium cost.

South Carolina 2019 Act No. 67 (H3760) ordered the PCF to be merged into the JUA effective January 1, 2020. The JUA was the surviving entity and was thereafter renamed the South Carolina

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Medical Malpractice Association (MMA). The Department requested that the MMA submit information relevant to the effects of tort reform. The response is enclosed for your review.

### **Report Limitations**

As noted in the response from the MMA, it is difficult to assess the effects of tort reform for a variety of reasons which are highlighted below:

#### *1. Claims Tail*

The tort reform enacted in 2005 applies prospectively only, meaning that claims that occurred prior to the effective date of July 1, 2005 were not affected by the reform. On average, claims with occurrence dates in a given year take over three years to be reported and more than five years to resolve, either by trial, mediation, or settlement. It is frequently the case that the more complicated and costly claims are typically also the longest to resolve, remaining open for much longer than the average claim.

We believe that claims under the occurrence coverage policies will likely be impacted to a greater degree by tort reform as compared to claims-made coverage policies.

#### *2. Various Factors Impacting the Marketplace*

Although a greater number of years of post-reform experience are available, measuring a given reform's impact is still complicated by the difficulty in separating the effect of tort reform from other variables such as inflation and other changes in the legal and social climate. For example, the consulting actuary for the PCF previously noted a several year industry wide decrease in medical malpractice loss trends, including in states that have not been subject to tort reform. While this trend benefitted both the JUA and the PCF, those benefits were likely not the result of tort reform. Further, the PCF experienced significant drops in exposure related to the elimination of its higher coverage limits and steady decreases in its membership prior to its merger with the JUA.

### **Tort Reform's Impact on Rates**

It is worth noting there is typically a time lag between the enactment of tort reform and the data becoming available to assess its degree of effectiveness on claims and insurance rates. The JUA historically wrote coverage limits up to \$200,000 for each medical incident with a \$600,000 annual aggregate (i.e., a \$200K/\$600K limit). The JUA did not take into consideration the impact of tort reform in its rates since the limit of liability was only \$200,000 and fell below the level of the cap on non-economic damages. The JUA had a slight rate increase in 2017 and again in 2018. Neither rate increase was related to tort reform. As noted previously, the PCF experience used in its rate analyses was subsequent to the tort reform, and therefore, the positive effects of tort reform were fully reflected in its rates, at least for the past several years.

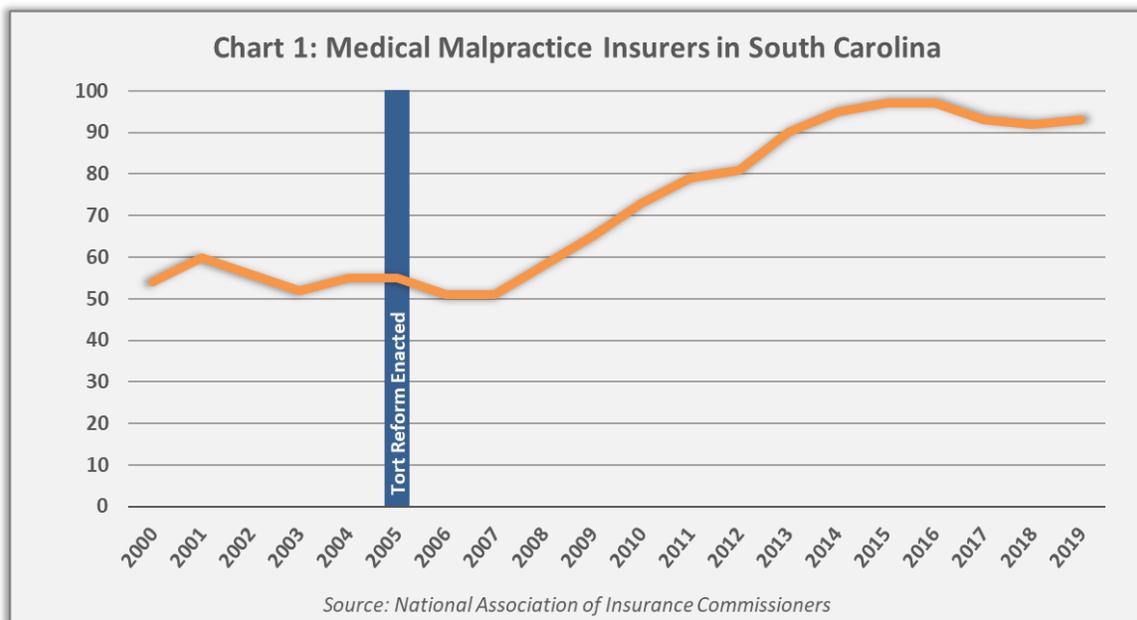
The PCF was created to provide the option of an additional layer of coverage above the JUA’s limits. The PCF offered limits ranging from \$1 million for each medical incident with a \$3 million annual aggregate (i.e., a \$1M/\$3M limit) to \$10 million for each medical incident with a \$12 million annual aggregate (i.e., a \$10M/\$12M limit). From 2008 to 2016, the PCF lowered its rates on three separate occasions as its overall experience was trending favorably during that time. In 2017, the PCF elected to change rates for some specialties, resulting in a small overall rate reduction. In 2018, the PCF Board of Governors approved an overall increase in membership fees of 5% for all limits of coverage.

In preparation for its transition to become what is now the MMA, the JUA filed updated rates with the Department in late 2019. The proposed rates were based on an analysis of combined historical JUA and PCF data and were approved by the Department for implementation on January 1, 2020. The resulting average rate impact from the filing was a 9.7% increase for MMA policyholders. Just prior to the finalization of this report, the Department approved an MMA rate filing resulting in an average increase of 6%.

## **Overall Trends in the Marketplace**

### *1. Competitive Market*

South Carolina’s medical malpractice market remains very competitive. Among U.S. states and territories, South Carolina ranked 37<sup>th</sup> in the ratio of physicians to population.<sup>1</sup>



<sup>1</sup> Based on data from “Professionally Active Physicians”, The Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/total-active-physicians/>, March 2020 and "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019," <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx>, December 2019.

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Chart 1 illustrates that the number of medical malpractice insurers doing business in South Carolina has risen significantly since the time of the reform, remaining at or above 90 since 2013. The market remains quite competitive, and there do not appear to be any problems with availability of coverage or choice among insurers.

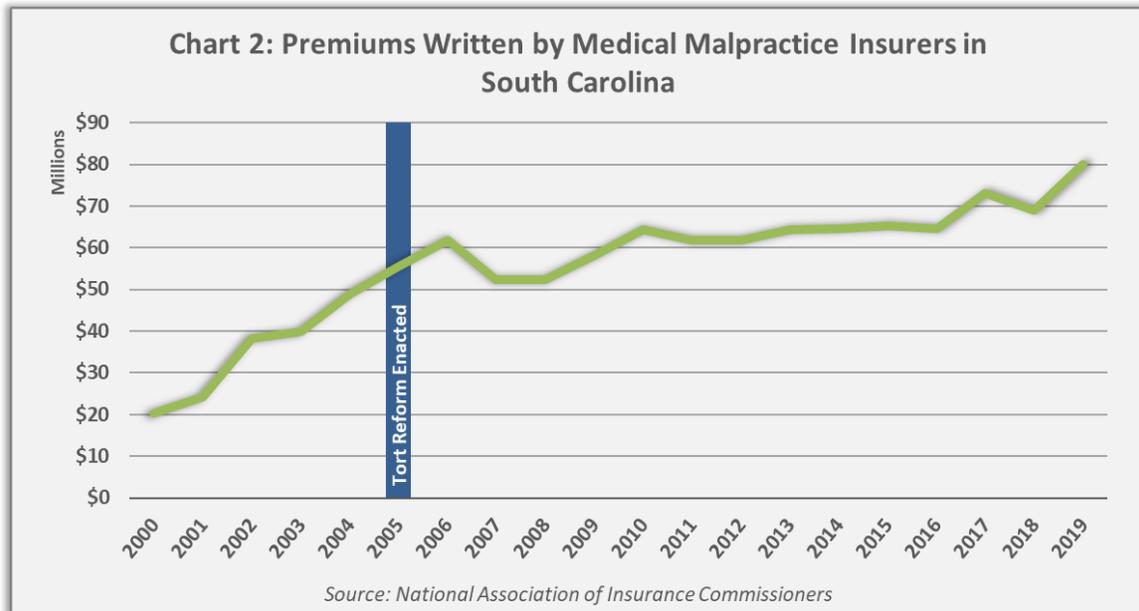


Chart 2 shows that direct premiums written remained relatively flat from 2010 to 2016 before growing by 13.1% in 2017, decreasing by 5.6% in 2018, and then increasing by 16.1% in 2019 — the latter representing the largest premium increase in ten years.

## 2. *Reduced Pool of Insureds*

While the state’s number of insurers has grown and the amount of direct premium writings has increased on the whole over the past few years, the voluntary market has experienced a substantial decrease in the pool of potential insureds.

The MMA no longer insures the majority of South Carolina’s physicians. In fact, its exposure has decreased by more than 75% since tort reform was enacted as many of the previous exposures have become employed by hospitals with the rest moving to other writers in the market. Prior studies have estimated that the percentage of independent physicians is declining, and anecdotal evidence supports these assertions. Stated differently, there are fewer physicians employed in private practice, so the available population of potential insureds is decreasing over time

## 3. *Rate Adequacy*

Rate adequacy is another gauge of the potential impact of tort reform over an extended period of time. In South Carolina, the market saw moderate rate increases following the enactment of tort reform, but as the adjustment period progressed, the market saw some rate level reductions.

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In 2020, several of the largest writers of medical malpractice insurance submitted filings with single- and in some cases double-digit rate increases. There is both anecdotal and empirical evidence available that suggests that the decreases in claims frequency have leveled off. Other commentators believe both claims frequency and claims severity are on the upswing—and the rate requests from the major carriers strongly suggest claims are expected to rise in the future.

**Conclusion**

The combination of the aforementioned factors has led to a highly competitive market for medical malpractice insurance in South Carolina. Both the Department and the MMA believe the current competitive market is likely attributable — at least in part — to the passage of tort reform legislation in 2005. In particular, the cap on non-economic damages, although rising with inflation, likely helps control costs, by controlling uncapped jury awards and also by encouraging settlements of meritorious cases. The maintenance of this cap also provides a higher degree of predictability for actuaries and claim professionals in the medical malpractice field.

Therefore, it is reasonable to conclude the 2005 reforms have contributed to the increase in competition in the marketplace. Again, it is important to stress the difficulty of determining a direct causal relationship between changes in the marketplace and the 2005 law. However, the experience of the past 15 years leads us to conclude that these reforms have at least partially contributed to the increase in competition in the marketplace.

Please do not hesitate to contact me if you have any questions or if my staff or I may provide you with any additional information. My staff and I are available to discuss any of the issues raised in this report with you at your convenience and to provide technical assistance to you and members of your staff as necessary.

Sincerely,



Raymond G. Farmer  
Director of Insurance

Enclosures

cc: The Honorable Ronnie Cromer, Chairman  
Senate Banking and Insurance Committee

The Honorable William E. Sandifer III, Chairman  
House Labor, Commerce and Industry Committee

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The South Carolina MMA is a not-for-profit association established to insure, support and defend South Carolina medical professionals. The association is managed by Marsh USA, Inc.

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December 14, 2020

Michael Wise  
South Carolina Department of Insurance  
1201 Main Street Suite 1200  
Columbia, SC 29201

RE: Impact of the 2005 Tort Reform Legislation on the premiums of the SC MMA

Dear Michael,

This letter is written in response to your request for information relating to the impact of the 2005 Tort Reform on premiums in the medical malpractice market. As you are aware the SC Joint Underwriting Association merged with the SC Patients Compensation Fund at the beginning of 2020 to create the SC Medical Malpractice Association. This merger created a single policy with limits ranging from \$1,000,000/\$3,000,000 up to \$5,000,000/\$7,000,000 eliminating the lower limit of \$200,000/\$600,000 written by the SC JUA. In previous years there was no specific credit given in the rating of the JUA as the limits fell well below the caps on non-economic damages set in the reforms.

In discussing the impact of the 2005 Tort Reform with our actuarial team we are of the opinion that the ability to isolate the specific impact of the tort reform has become more difficult over time. After the initial passing of the reforms there was a specific credit in the rates of the PCF of 5.1% on the \$1,000,000/\$3,000,000 level of coverage. As the experience has developed since those early years, we rely on historic development and actual loss results to establish the rates we charge. There is no specific factor applied any longer for the effect of the tort reform as our loss experience has developed. You could say that the baseline changed in those early years and we have built off of that over time.

While there is no current specific credit given for the reforms passed in 2005, there are factors that are impacting the competitiveness of the market that very well may be attributable to the reforms. The cap on non-economic damages, while rising from the original \$350,000 per claimant to over \$450,000 per claimant, still gives some potential protection from the runaway verdicts that have been a big fear of insurance carriers. The language around Joint and Severable Liability has also been of benefit as it assigns the percentage of liability to each defendant in a more equitable manner.

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The current medical malpractice market has many more carriers participating than were in SC prior to 2005 and it is reasonable to state that the reforms played a major role. While the majority of carriers are starting to increase their base rates, they also have a very aggressive approach to writing business and utilizing credits to gain and maintain market share.

I hope this letter has been helpful and please let me know if I can provide any additional information.

Sincerely,

Timothy Ward  
SVP Marsh  
Program Director SC MMA