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# 2016 Report on the Effects of Changes to Tort Laws



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

December 15, 2016

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# South Carolina Department of Insurance

NIKKI HALEY  
Governor

RAYMOND G. FARMER  
Director of Insurance

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December 15, 2016

The Honorable Nikki Haley, Governor  
State of South Carolina  
Office of the Governor  
1205 Pendleton Street  
Columbia, SC 29201

The Honorable Hugh K. Leatherman, Sr.  
President *Pro Tempore*  
South Carolina Senate  
111 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: 2016 Report on the Effects of Changes to Tort Laws***

Dear Governor Haley, President *Pro Tempore* Leatherman and Speaker Lucas:

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

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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.

Pursuant to the above, the Department submitted requests to the South Carolina Medical Malpractice Joint Underwriting Association (JUA) and the South Carolina Medical Malpractice Patients' Compensation Fund (PCF) requesting any information relevant to the effects of tort reform. This year the Department also elicited feedback from the insurers with the 2015 top ten medical malpractice market share in South Carolina. What follows is a summary of the responses the Department received.

### **Report Limitations**

#### *1. Claims Tail*

As is noted in the responses from both the JUA and the PCF, it is difficult to assess the effects of tort reform for a variety of reasons which are highlighted below: The tort reform enacted in 2005 applies prospectively only, meaning that any claims that occurred prior to the effective date of July 1, 2005 are not affected by the reform. On average, claims with occurrence dates in a given year take over three years to be reported and over five years to settle. It is frequently the case that the more complicated and costly claims are also the longest to settle, remaining open for much longer than the average claim.

Claims under the occurrence coverage will be subjected to greater influence of tort reforms over claims-made coverage. One of South Carolina's top medical malpractice insurers surveyed suggested that it will take time and substantial volume of closed claim data to begin to see the overall impact of tort reform on loss costs.

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

Even when more years of post-reform experience are available, measuring a given reform's impact is complicated by the difficulty in separating the effect of tort reform from variables such as inflation and other changes in the legal and social climate. For example, the consulting actuary for the PCF previously noted an industry wide decrease in medical malpractice loss trend, including in states that have not been subject to tort reform.

While they did expect this trend to impact the PCF, it would not be the result of tort reform. Further, the PCF has experienced recent and significant drops in exposure related to the elimination of unlimited coverage limits and decreases in membership. Finally, there may be a lag in implementation of reform related to uncertainty about whether the reform will ultimately be found to violate a state's laws and the length of time to resolve this uncertainty.

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

PCF stated that while the impacts from tort reform are hard to isolate, they have addressed the impact of tort reform in their rate indications. After the passage of tort reform, the PCF assumed that the overall impact of the tort reforms would decrease loss costs by five percent. This assumption was imbedded in the PCF's rate analysis.

#### *1. South Carolina Medical Malpractice Joint Underwriting Association*

The Joint Underwriting Association (JUA) writes coverage limits up to \$200,000 for each medical incident and \$600,000 annual aggregate (\$200K/\$600K). The JUA has not taken into consideration the impact of tort reform in their rates as their limit of liability is only \$200,000 and falls below the level of the cap on non-economic damages. The JUA however has maintained level rates for several years. The JUA's premium rates have actually remained level since their 2011 rate filing.

#### *2. South Carolina Medical Malpractice Patients' Compensation Fund*

The Patients' Compensation Fund (PCF) was created to provide the option of an additional layer of coverage above the JUA's limits. The PCF currently offers limits ranging from \$1 million for each medical incident and \$3 million annual aggregate (\$1M/\$3M) to \$10 million for each medical incident and \$12 million annual aggregate (\$10M/\$12M).

The PCF has lowered their rate levels since 2008 on three separate occasions as their overall experience has been favorable. In 2016, the PCF Board of Governors elected to approve a 2.5% increase in membership fees for the five limits of coverage that the PCF offers for 2016.

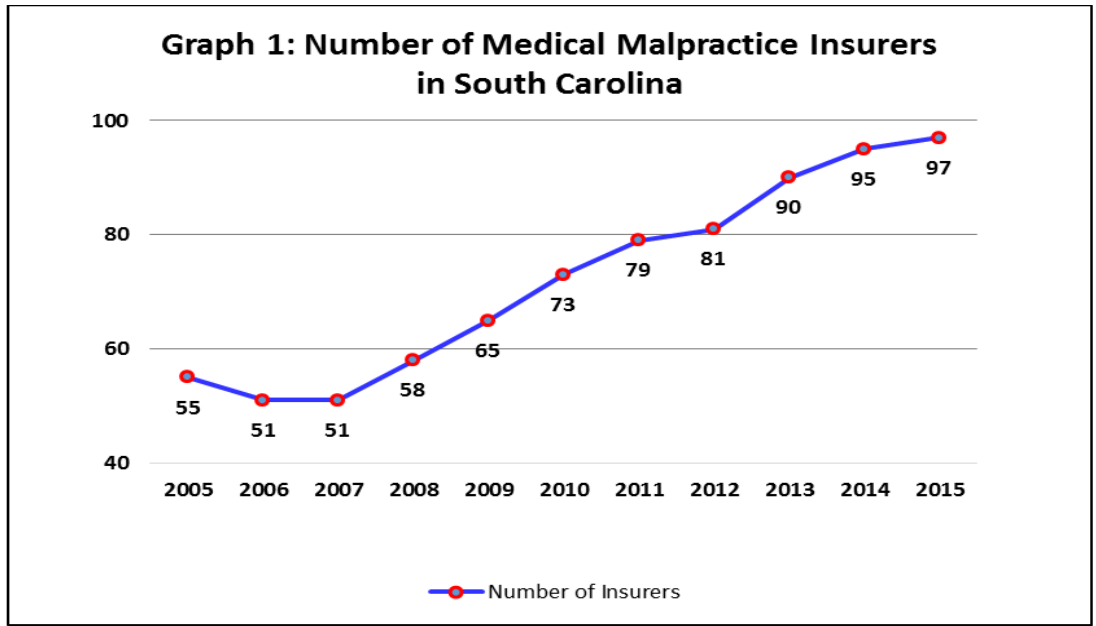
### **Overall Trends in the Marketplace**

#### *1. Competitive Market*

South Carolina's medical malpractice market is highly competitive at present. While the number of practicing physicians in South Carolina is below the national average<sup>1</sup>, the number of medical malpractice carriers writing in South Carolina grew by two carriers as illustrated in Graph 1.

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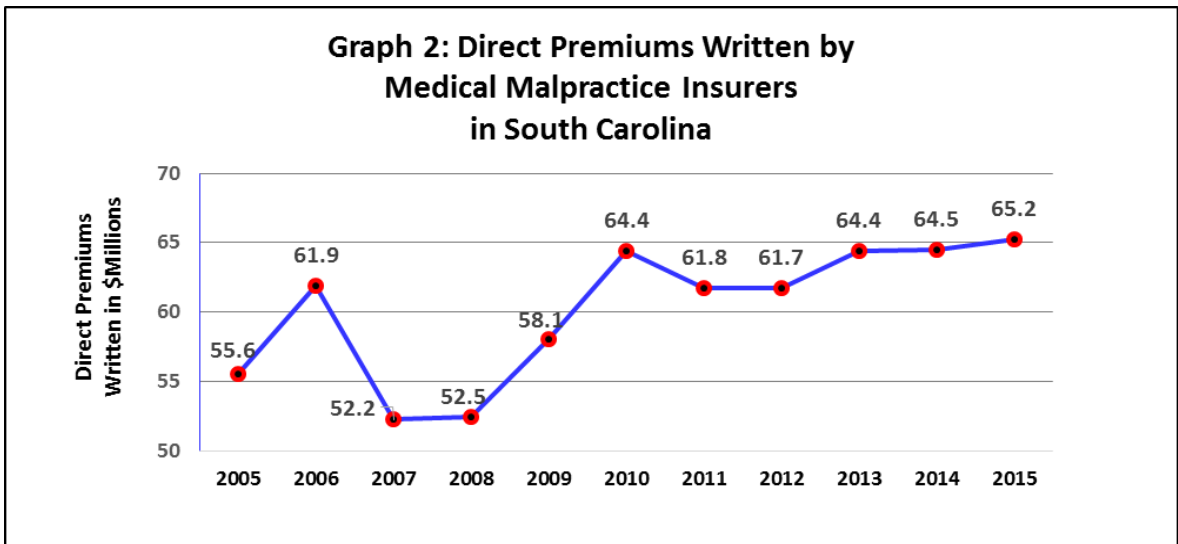
<sup>1</sup> "Total Professionally Active Physicians", The Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/total-active-physicians/> April 2016, accessed October 26, 2016



Source: "Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2000-2015" NAIC, ([http://www.naic.org/documents/research\\_stats\\_medical\\_malpractice.pdf](http://www.naic.org/documents/research_stats_medical_malpractice.pdf)), accessed October 25, 2016

The NAIC data illustrated in Graph 1 indicates that there has been a steady increase in the number of medical malpractice insurers doing business in South Carolina since the enactment of tort reform. This growth in market participants has resulted in a more competitive South Carolina medical malpractice market, resulting in downward pressure on premiums.

As Graph 2 details, there has been a slight increase in direct premiums written by insurers in South Carolina's voluntary market.



Source: "Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2000-2015" NAIC, ([http://www.naic.org/documents/research\\_stats\\_medical\\_malpractice.pdf](http://www.naic.org/documents/research_stats_medical_malpractice.pdf)), Accessed: October 25, 2016

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## 2. *Reduced Pool of Insureds*

At the same time that the state's voluntary market has seen a growth in the number of insurers and amount of direct premium writings, the market has experienced a decrease in the pool of potential insureds. This is most notably due to the acquisition of independent medical practices by large hospitals and the growth of integrated health systems as hospitals generally retain risk in the form of large deductibles, self-insurance or captives.<sup>2</sup>

The JUA and PCF reported that their exposures have decreased by more than 75% since tort reform was enacted as the majority of the previous exposures have become employed by hospitals and the others have become insured with other writers in the market.

## 3. *National Practitioner Data Bank ("NPDB")*

One of the responding insurers indicated that the best "proof" of the tort reform's stabilizing effect is the National Practitioner Data Bank ("NPDB").<sup>3</sup> The NPDB is an electronic information repository that contains information on medical malpractice payments and certain adverse actions related to health care practitioners, entities, providers, and suppliers. The NPDB's data provides a statewide view of discernable trends in the severity of claims as they are paid and closed. The PCF and JUA reported that South Carolina's data for average severity and average indemnity claims were more favorable than the national data.

## 4. *Rate Adequacy*

Rate adequacy is another gauge of the potential impact of tort reform over an extended period of time. Another responding insurer stated that during higher trend periods, an insurer's rate level often lags behind loss costs. Therefore, it is only after an adjustment period that the impact of reforms can be considered. 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.

Both the JUA and the PCF stated that while the manual rates are slightly lower, carriers have been significantly decreasing rate levels for physicians by increasing their rating plans to reduce premiums.

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<sup>2</sup> "The Transitioning Medical Professional Liability Market – Challenges in Valuing a Medical Professional Liability Company" Charles A. Wilhoite, CPA, and Scott R. Miller, Willamette Management Associates

([http://www.willamette.com/insights\\_journal/13/summer\\_2013\\_12.pdf](http://www.willamette.com/insights_journal/13/summer_2013_12.pdf)), Summer 2013, accessed December 18, 2014

<sup>3</sup> <http://www.npdb.hrsa.gov/index.jsp>

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The JUA, PCF and top medical malpractice writers all reported a more competitive market as likely being attributable, at least in part, to the passage of tort reform legislation. The Department concurs with this assessment. Therefore, it is reasonable to conclude that these reforms have 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

SOUTH CAROLINA

JUA

*the medical  
liability experts*

December 1, 2016

Nancy Johnson  
South Carolina Department of Insurance  
1201 Main Street  
Suite 10000  
Columbia, SC 29201

RE: Impact of Tort Reform on Medical Malpractice Premiums for the SC JUA

Dear Nancy:

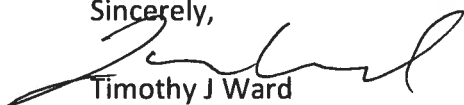
This letter is written in response to your request for information regarding the impact to the South Carolina Medical Malpractice Insurance Joint Underwriting Association (JUA) related to the passing of the Non-Economic Damages Awards Act in 2005.

The actuarial analysis that is completed annually for the JUA does not factor in a measurable impact on the rates of the JUA from tort reform due to our limit of coverage being significantly less than the non-economic caps provided in the legislation.

While the rates of the JUA are not directly impacted, due to our low policy limits, we continue to see more writers entering the medical malpractice market in South Carolina since the reforms were enacted in 2005. It is our position that the reforms passed in 2005 have played a role in the increase of other writers entering the market in South Carolina which has led to a much more competitive market.

Please let us know if we can be of further assistance.

Sincerely,



Timothy J Ward  
Program Manager SC JUA  
Senior Vice President  
Marsh & McLennan Companies



James E. Mercer, DDS  
Chairman of the Board



Phone 803-896-5290  
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South Carolina Medical Malpractice Patients' Compensation Fund

November 3, 2016

Nancy Johnson  
South Carolina Department of Insurance  
1201 Main Street, Suite 10000  
Columbia, SC 29201

Re: South Carolina Patients' Compensation Fund  
Effect of 2005 Tort Reform on Membership Fees for 2016

Dear Nancy:

We are responding to your request for information regarding membership fees of the SC Patients' Compensation Fund ("PCF"), and the effect of the Non-Economic Damages Awards Act on those rates for our members (2005 Tort Reform).

In 2016, PCF Board of Governors elected to approve an overall change of a 2.5% increase in membership fees for the five limits of coverage that the PCF offers for 2016. The issue of Tort Reform did not impact the Board's decision on the increase. Our position regarding the effect of Tort Reform has not changed from our previous position last year.

We continue to believe that with the increase of malpractice writers in the state of South Carolina and the changes that it has brought, it would be difficult to isolate tort reform as a factor in the decision of the Board to make this change in the PCF membership fees for 2016.

Please let me know if you need any further information.

Very truly yours,

Terry A. Coston, SCLA, CPM  
Executive Director