
2019 Report on the Effects of Changes to Tort Laws



South Carolina Department of Insurance
1201 Main Street, Suite 1000
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HENRY McMASTER
Governor

RAYMOND G. FARMER
Director of Insurance

December 19, 2019

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: 2019 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 will be the surviving entity and will be renamed the South Carolina Medical Malpractice Association (MMA). Given the imminence of the merger at the time of this writing and that the JUA will be the surviving entity, the Department requested that the JUA 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 JUA, 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 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 more than 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. Although it has now been more than 14 years since the tort reform was enacted, additional time is still needed to fully assess its impact. Due to the variability in claim sizes as well as the typically lengthy claim process for medical malpractice insurance, a more substantial volume of data is necessary prior to any conclusions being drawn.

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 this trend was expected to

impact the PCF, it would not be the result of tort reform. Further, the PCF experienced significant drops in exposure related to the elimination of unlimited coverage limits and decreases in membership in recent years.

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 has historically written coverage limits up to \$200,000 for each medical incident with a \$600,000 annual aggregate (\$200K/\$600K). The JUA has not taken into consideration the impact of tort reform in its rates since the limit of liability is only \$200,000 and falls 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 the PCF has noted previously, the PCF experience used in its rate analyses was subsequent to the tort reform, and therefore, the effects of tort reform are fully reflected.

The PCF was created to provide the option of an additional layer of coverage above the JUA's limits. The PCF has offered limits ranging from \$1 million for each medical incident with a \$3 million annual aggregate (\$1M/\$3M) to \$10 million for each medical incident with a \$12 million annual aggregate (\$10M/\$12M). From 2008 to 2016, the PCF lowered its rates on three separate occasions as its overall experience was favorable. 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 the MMA, the JUA recently filed updated rates with the Department. 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 will be a 9.7% increase for MMA policyholders.

Overall Trends in the Marketplace

1. Competitive Market

South Carolina's medical malpractice market is still highly competitive. Among U.S. states and territories, South Carolina ranked 37th in the ratio of physicians to population; it was 35th last year.¹

¹ Based on data from "Professionally Active Physicians", The Henry J. Kaiser Family Foundation, <http://kff.org/other/state-indicator/total-active-physicians/>, March 2019 and "Annual Estimates of the Resident Population for the United States,

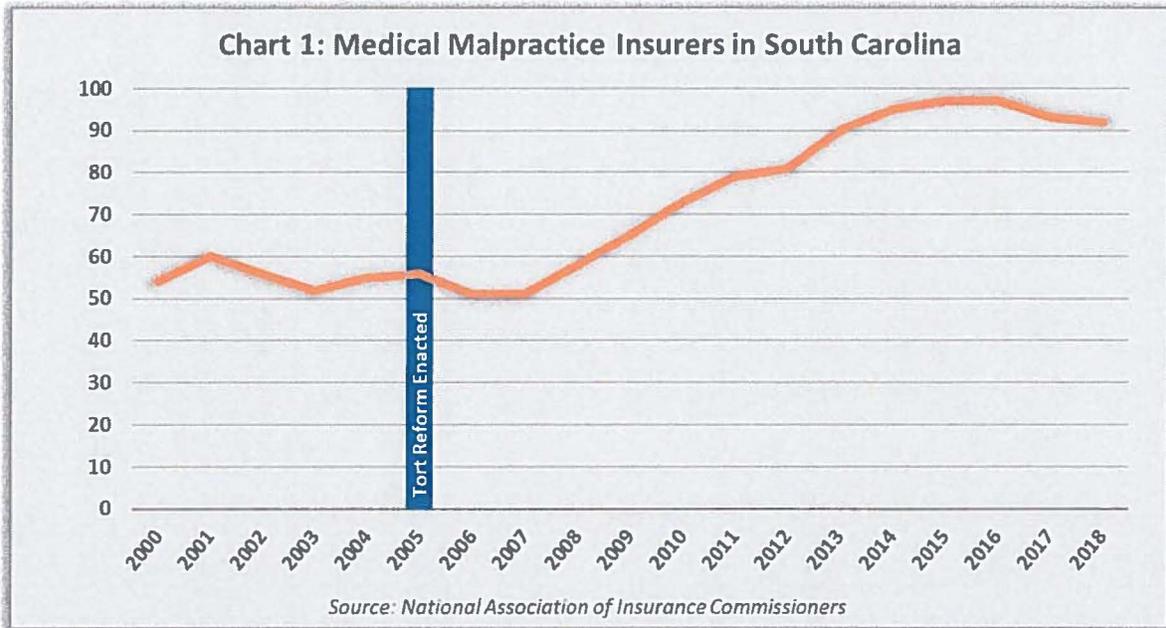
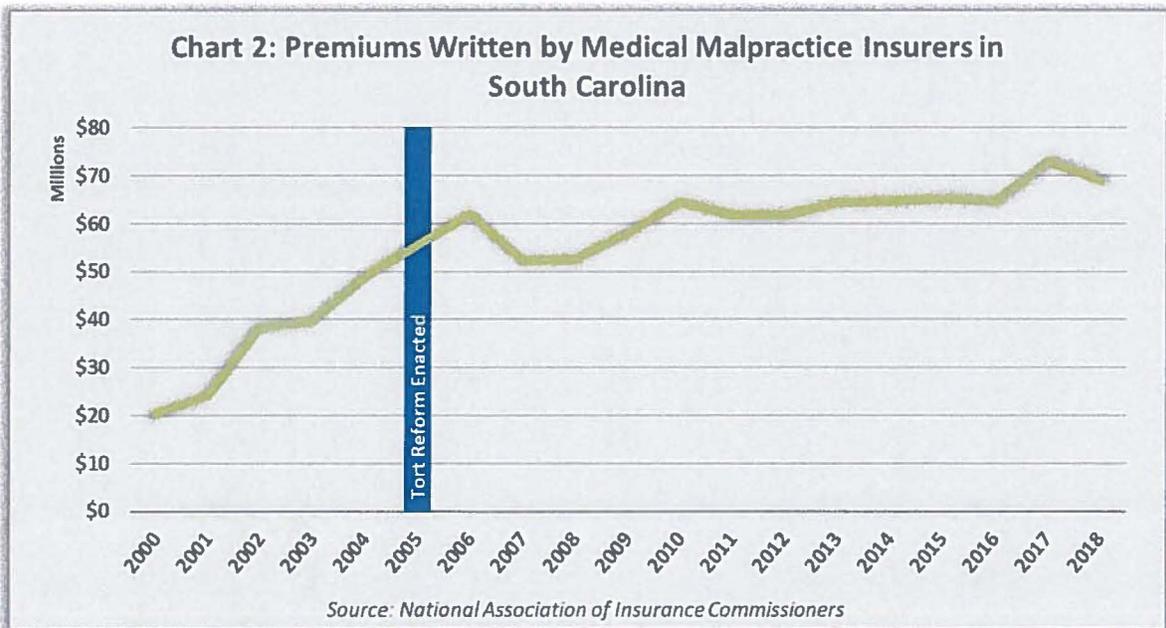


Chart 1 illustrates that the number of medical malpractice insurers doing business in South Carolina has risen significantly since the time of the reform, remaining at or above 90 since 2013. The market remains quite competitive, and there do not appear to be any problems with availability.



Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018," <http://www2.census.gov/programs-surveys/popest/tables/2010-2018/national/totals/nst-est2018-01.xlsx?#>, December 2018.

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

2. *Reduced Pool of Insureds*

While the state's number of insurers and amount of direct premium writings has remained steady over the past few years, the voluntary market has experienced a substantial decrease in the pool of potential insureds.

The JUA and PCF no longer insure most of South Carolina's physicians. In fact, both companies' exposures have 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.

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.

In 2019, some of the largest writers of medical malpractice insurance submitted filings with single- and double-digit rate increases.

Conclusion

The combination of the aforementioned factors has led to a highly competitive market for medical malpractice insurance in South Carolina. The JUA 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. Again, it is important to stress the difficulty of determining a direct causal relationship between changes in the marketplace and the 2005 law, but it is reasonable 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