The Insurance Federation of Pennsylvania, Inc.

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May 6, 2019

To: The Honorable Members of the House Labor and Industry Committee

From: Samuel R. Marshall, Jonathan C. Greer and Noah K. Karn

Re: House Bill 1234 – handling the Supreme Court's 2013 ruling in Tooey

Thank you for the opportunity to be here today. We appreciate the underlying problem: How best to deal with the liability established by the Supreme Court's November, 2013 ruling in a case so ballyhooed it goes by one word – "**Tooey**."

That ruling was the culmination of many years of litigation, but it was still something of a surprise. The Court determined that Section 301 of the Workers Compensation Act, covering occupational diseases, is limited to disabilities or deaths occurring within 300 weeks of the last date of employment. That wasn't the surprise, since that's what the Act says.

The surprise was what the Court did next. It didn't find that these injuries, having been "timed out" of the Workers Compensation Act, were then left without a remedy. Instead, it determined that workers with these diseases could sue their employers in civil actions, effectively creating a judicial exception to the "grand bargain" of the Workers Compensation Act where injured workers would be assured of coverage, but it would be exclusively provided under the Act, not the civil tort system.

In the five and a half years since the Court's ruling, there has been considerable angst about its consequences, maybe even outweighing the actual claims and payments. We don't mean the angst is unjustified: These are work-related illnesses, and their relief should match the relief for all other work-related illnesses under the Workers Compensation Act. That's equally fair for employers and injured workers.

But angst can sometimes obscure a workable solution, and we think that may be happening here. The approach in this bill, and one we've heard from those pushing a **Tooey** correction for the past five-plus years, is to amend the Act to retroactively turn these civil causes of action – whether pending or still to be filed - into workers compensation claims.

The problem, from an insurance perspective, is that it creates retroactive liability without retroactive premium. This wasn't part of the risk we insured when we underwrote the coverage, so we didn't charge a premium for it and we don't have – and couldn't have – reserves to cover this.

A fiscally sound insurance system is based on an insurer charging a premium for the liability it is covering. Creating liability by retroactively waiving the expiration of the applicable limitations period goes in the opposite direction. It raises legal concerns, too, under the Pennsylvania constitution – can you turn a civil cause of action (and, according to the Supreme Court in **Tooey**, was just that when the injury occurred) into a workers comp claim, even if the civil action is pending?

At the same time, we recognize the inequity here: These are work-related injuries, albeit ones recognized – or more accurately, recompensed - by the Court rather than the Workers Compensation Act.

- Why not allow these claims to be filed in the civil courts, but with the relief that is provided under the Act? That avoids the complications that come with creating retroactive causes of action while still assuring these claimants are given the same relief and remedies as all other injured workers get.

- You may even want the claims to be handled under the workers compensation system that handles the claims of all other injured workers. That might be the most efficient forum, and certainly the one with the most expertise in calculating and quickly resolving these claims. We're not sure how disruptive that would be for claims pending in civil courts, and that merits separate consideration.

Whatever you do, we'd first recommend quantifying the problem.

- After five-plus years, how many **Tooey** claims have been filed, and how many have been paid – whether by verdicts or settlements, and at what amounts? Back in 2013, we were expecting the floodgates to open, but that doesn't seem to have happened. Not that there haven't been claims, verdicts and settlements, but we're not sure they've been to the degree initially feared.

- That should be checked – and you should examine whether the numbers are going up.

- You should also compare what the claimants get, or are likely to get, in civil claims versus workers comp ones. Do that with all the relevant reductions of litigation costs, attorney fees and medical liens, and also with the possibility that the civil actions may push some employers into the protections of the bankruptcy trust system that dominates most asbestos claims now.

For all the years this issue has been around – not just since the **Tooey** ruling but in the years before, when we were in various stages of the appellate system with similar cases – I think this is the first time all sides have been together at one table, and before a full committee. For that alone, Mr. Chairman, thank you.

We hope this is a step forward in having a full discussion and understanding of the problems from all sides, and that it leads to a balanced solution that is fair to the injured workers, their employers and the fiscal soundness of handling their claims. We welcome the chance to be part of that solution.