The Insurance Federation of Pennsylvania, Inc.

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June 26, 2019

To: The Honorable Members of the Legislative Budget and Finance Committee

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

Re: Senate Resolution 20 – assessing the effects of the 2003 changes governing venue in medical professional liability actions

Thank you for this hearing as part of your study of the 2003 reforms to Pennsylvania's venue rules in medical malpractice actions.

Too often these issues are decided based on perception and rhetoric more than reality, and we respect that the role of this Committee is to get past that. That's the same function insurers try to provide – coverage that meets the needs of our policyholders and claimants, and priced based on facts and objective projections.

1. The impact of the 2003 venue changes – an accessible, fair, predictable and stable liability system

The general goal of a liability system – whether one is a plaintiff or defendant in a given claim, and whether one is providing or using a service or product that may lead to a claim – is that it be accessible, fair, predictable and stable.

That's the same goal we have as insurers: Insurance only works when covering risks and paying claims within that type of liability system. It attracts and retains the best of our industry, and it fosters responsible competition, lower rates, more innovative products and marketing, and better regulation – all of which addresses the primary objective of better coverage of our policyholders and claimants.

That's not hype or theory. You've seen it as a result of the medical malpractice reforms of 2002-2003, including the venue changes this Committee is evaluating. You've also seen it in other lines of coverage: The auto reforms of 1990 and the workers compensation reforms of 1993 and 1995 brought similar

predictability and stability to those liability systems, and insurers have responded with long-standing availability and affordability of coverage.

You've also seen what happens with an unpredictable and unstable liability system: Insurers tend to pull back, and rates go up and fiscal stability goes down as that instability encourages more claims and less predictability in settlements and verdicts.

The 2003 venue changes established a more predictable and stable system in which to resolve medical malpractice claims, nothing more and nothing less. They haven't limited access to the courts or imposed new requirements for the filing of malpractice claims; they simply put restrictions on the statutorily-recognized problem of venue shopping, making the filing of these claims based on where the malpractice occurred as opposed to the randomness and serendipity of attenuated and irrelevant connections.

2. The results of the current venue rules

The results of the overall reforms from 2002-2003 are self-evident: Malpractice filings quickly came down and have since flattened for the past decade-plus, and the same is true for verdicts. Insurance rates have followed the same trend, and new competitors have entered the market. In addition, the number of providers in Pennsylvania, as determined by the Mcare Fund for purposes of its annual assessments, has grown considerably since 2004, after being flat in the years of the most uncertainty in the medical malpractice area.

Segregating out the impact of the venue changes is a challenge. To that end, we and a number of other parties retained Milliman, a nationally recognized actuarial consulting firm, to report on the impact of the current venue rules and their possible rescission, with the specific purpose of distinguishing the venue reform from the other reforms. A copy of the report is attached; we've shared it with this Committee and with the Supreme Court's Civil Procedure Rules Committee, and we appreciate that the Committee has met with the Milliman team with follow-up questions.

The report is instructive on the value of the venue changes and the cost of its rescission as proposed to the Rules Committee:

- It projects the statewide impact of rescinding the venue reform will be an increase in malpractice costs of as much as 15% for physicians;

- It projects local and county impacts will be an increase in malpractice costs that range from 5% to as much as 45% in counties surrounding Philadelphia; and

- It projects that high-risk specialties could see additional increases in malpractice costs of as much as 17%.

The Milliman report emphasizes these are conservative estimates. Of particular import, it notes that health care provider consolidation has only grown since then. A number of hospitals in counties with fewer claims and lower severity are now affiliated with Philadelphia hospitals, which will mean claims in those once-local hospitals may now be brought in Philadelphia.

Going beyond the cost savings produced by the 2003 venue changes, we'd note a few other transformations in Pennsylvania's medical malpractice market. These aren't solely attributable to the venue changes, but that reform has played a large role:

- It is a far more vibrant market now than it was 15 years ago, with more and better insurers. The Insurance Department is best equipped to show that with numbers, but you've seen it as legislators: Providers are never shy with their complaints about insurance – but you haven't heard much about the cost or availability of malpractice insurance.

- That improvement is true across the state and across all types of providers, including those in high-risk specialties – a rising tide really can raise all boats. That has played a role in assuring medical care is more available across the Commonwealth, too – or at least in assuring that any lack of care isn't because of the cost or availability of malpractice coverage.

- There has also been an improvement in the voluntary market: The amount of coverage offered by the Joint Underwriting Authority, Pennsylvania's residual market mechanism, has greatly decreased. And insurers have

repeatedly urged the Insurance Department to increase the amount of coverage to be offered in the private market.

We recognize the 2003 venue changes should not be evaluated solely on savings in medical malpractice costs. As we noted at the outset, the goal of a liability system isn't just that it be predictable and stable, but that it also be accessible and fair.

As to the accessibility of the courts: These rules have taken effect, with well over a decade of consistent numbers, without complaints that they have denied plaintiffs access to the judicial system or imposed undue burdens on them. The trial bar is an able advocate for its clients, and it has considerable resources. If these venue rules were depriving its clients of access to the courts, it would have argued this with aggregate data, or at least verifiable anecdotes, long before now.

Notably, we haven't heard – in the 16 years of these venue rules – that those with malpractice claims have been limited to filing those claims in counties where taking discovery, attending hearings or going to trial would be uniquely difficult or expensive in terms of travel or availability of legal representation. Those might be valid reasons for considering a reform of the venue rules. But after sixteen years, those anecdotes or evidence have never emerged.

As to the fairness of the courts: We recognize there may be regional variations in the likelihood and amounts of verdicts and awards in our judicial system – that's what led to the problem of venue-shopping in the first place. If you really want to do away with regional variations, take the regional aspect out of our judicial system and establish a statewide medical malpractice court – something we've recommended in past sessions.

Absent a statewide court, there will be regional variations, so the issue is whether they unfairly come into play as a result of the 2003 venue changes. We've heard some contend that a given hospital may be a large employer in a rural area and therefore have an unfair advantage in a suit brought locally. We've never seen that substantiated, and hospitals are equally large employers in urban areas.

We also don't see how rescinding the 2003 changes would create a fairer liability system. It would merely return Pennsylvania to the venue rules that were expressly rejected by all three branches of government back then: Each branch

found the venue rules in place before 2003 to be unduly expansive and in need of change – in a word, unfair; and each branch agreed on the current venue rules to address that unfairness.

Granted, laws are meant to be stable, not stationary, and they can and should evolve to address changes or problems. That isn't what has been proposed here, though: Those complaining of the 2003 venue changes are proposing only a return to the old venue rules, not a new evolution of those 2003 changes.

It is tempting, when a reform has worked, to say the problem has been solved and the reform is no longer needed. Tempting but nonsensical. The 2003 venue changes aren't like training wheels on a child's bike, where they can be removed and the liability system remains reformed. To the contrary, rescinding them will inevitably bring back the problem of venue shopping the changes continue to address. We certainly haven't seen any evidence or explanation of why that wouldn't happen.

It is also tempting to say the 2003 venue changes were only part of a broader reform package, and these changes can be rescinded without losing the benefits of the other reforms. Maybe, maybe not. A package of reforms is just that – a package, where the savings and benefits of each reform work only or best when coupled with the other reforms. That is the case here, where the value of the venue changes is likely enhanced and enhances the value of the other 2003 reforms, as with the Court's Certificate of Merit requirement.

We appreciate this Committee is data-driven. We're happy to make available the experts at Milliman to explain their conclusions. We know your staff has met with them, and the Milliman report has been publicly available, so we welcome any inquiries.

In addition, we recommend the Committee look to other data sources. The Insurance Department is a good source. So might be the Annual Rate Surveys of the Medical Liability Monitor, which we understand go back 28 years, and the information on settlements and verdicts kept by the National Practitioners Data Base. To the extent we can help in obtaining that information, let us know.

We believe the 2003 venue changes have brought predictability and stability into the medical malpractice liability system, without sacrificing accessibility or fairness for patients and providers counting on that system. Others may disagree.

That's why your review is so important. It gives the Court the opportunity to consider a comprehensive record before making any decision on this. In the spirit of developing that record – a hallmark of any sound legal ruling from any court – we welcome the chance to answer any questions from the Committee and others, and to offer our insights on the comments and submissions of others.

Those who depend on a good malpractice liability system deserve nothing less.