

# 2015 Report on the Effects of Changes to Tort Laws



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

December 21, 2015



# South Carolina Department of Insurance

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NIKKI HALEY  
Governor

RAYMOND G. FARMER  
Director of Insurance

December 21, 2015

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: 2015 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, requires the South Carolina Department of Insurance to report annually to the Governor and the General Assembly as to whether this Act and other related enactments (“tort reform”) have resulted in reductions in premiums and any other trends of significance that might impact medical malpractice liability premium costs. Section 15 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.

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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.

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) in November requesting any information relevant to the effects of tort reform. The responses from both entities are enclosed for your review.

### **Report Limitations**

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.

#### *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 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. Thus, while it has been ten years since the reforms were enacted, there still remains quite a bit of uncertainty around the ultimate settlement value of the entire inventory of JUA and PCF claims from the years immediately following the reforms. Because of the immaturity of those years following the reforms, it remains difficult to draw conclusions regarding the reform's effect upon claim costs, and it will take substantially more time before the effects of tort reform may be reasonably assessed.

As we have previously reported, the consulting actuary for the PCF has also indicated that more years of post-reform experience are needed to confirm the presence or absence of any trends in PCF's loss experience. Based on his most recent work, the actuary estimates that the first two fiscal years affected by the reform had similar loss experience to the two years prior to the reform. In other words, PCF's actuary has not observed a measurable difference in the PCF's loss experience due to the tort reforms.

#### *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

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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.

**Tort Reform's Impact on Rates**

As of the writing of this report, the Department is not aware of any revisions by the consulting actuaries for the JUA and the PCF to their initial expectation that the long-term result of tort reform will be a one-time drop in loss costs in the area of 5% to 10% and a small decrease in long-term loss trend. They expected no significant change in claim frequency or severity in the JUA's primary layer of loss, and that all of the savings related to reform will be attributable to the PCF's layer of coverage. The actuaries estimated a 5.1% savings in the calculation of PCF rates at the \$1M/\$3M limit attributable to tort reform.

*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). As such, the JUA reports that tort reform has not directly impacted their premium rates because their policy limits are lower than the statutory cap for medical malpractice claims. The JUA's premium rates remained unchanged in 2015 as compared to the 2014 rates. JUA's 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).

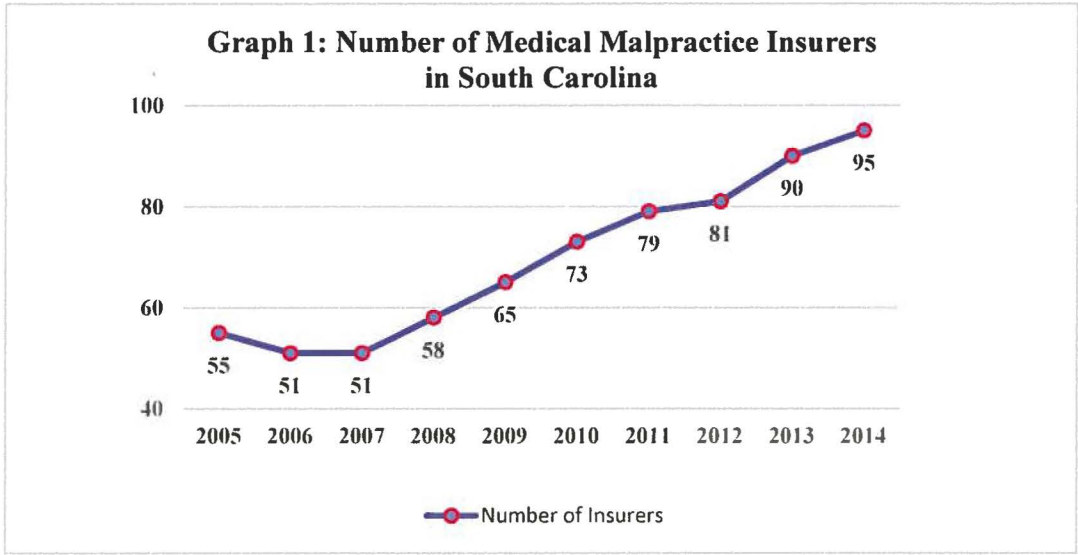
In 2015, the PCF Board of Governors elected to approve no change in membership fees for the five limits of coverage that the PCF offers.

**Overall Trends in the Marketplace**

While it is not possible to determine the specific effects of tort reform on the medical malpractice market as a whole, what follows is a brief overview to provide a general impression of the state of the marketplace.

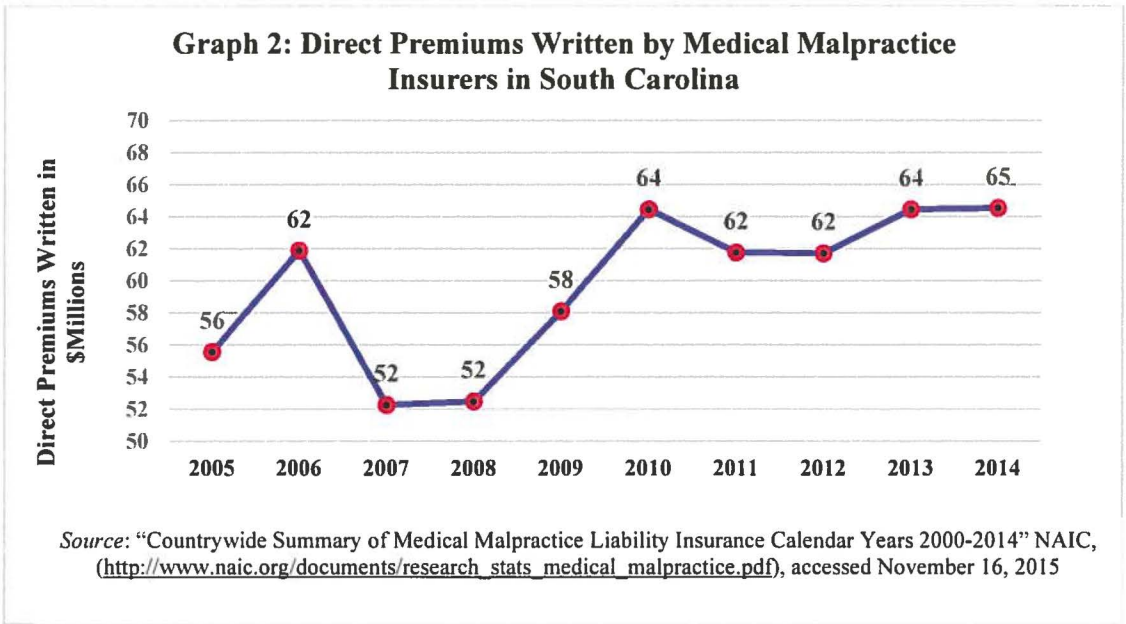
South Carolina's medical malpractice market is highly competitive at present. The following anecdotal evidence indicates that insurers (both pre-tort reform insurers and newer entrants) have an increased appetite to write coverage since the enactment of tort reform.

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 five carriers as illustrated in Graph 1.



Source: “Countrywide Summary of Medical Malpractice Liability Insurance Calendar Years 2000-2014” NAIC, ([http://www.naic.org/documents/research\\_stats\\_medical\\_malpractice.pdf](http://www.naic.org/documents/research_stats_medical_malpractice.pdf)), accessed November 16, 2015

As Graph 2 details, we have observed 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 2000-2014” NAIC, ([http://www.naic.org/documents/research\\_stats\\_medical\\_malpractice.pdf](http://www.naic.org/documents/research_stats_medical_malpractice.pdf)), accessed November 16, 2015

<sup>1</sup> “Recent Studies and Reports on Physician Shortages in the US” Center for Workforce Studies, Association of American Medical Colleges (<https://www.aamc.org/download/100598/data/>), October 2012, accessed December 17, 2014

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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 self-insure.<sup>2</sup> This trend is occurring nationally as well; the percentage of truly independent physicians was estimated to be only slightly better than one out of every three physicians (36%) in 2013, down from just over one out of every two physicians (57%) in 2000.<sup>3</sup>

The combination of the aforementioned factors has led to a highly competitive market for medical malpractice insurance in South Carolina. Both the JUA and the PCF 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.

Again, it is important to stress that it is difficult to determine 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 Robert W. Hayes, Jr., Chairman  
Senate Banking and Insurance Committee

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

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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> *Id.*



December 1, 2015

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

RE: 2015 Medical Malpractice Premiums for the SC JUA

Dear Nancy:

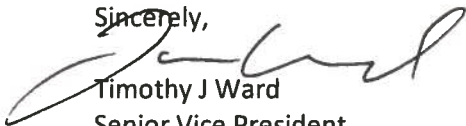
This letter is written in response to your request for information regarding the premiums set by the South Carolina Medical Malpractice Insurance Joint Underwriting Association (JUA) in 2015 and the effect of the Non-Economic Damages Awards Act on those premiums. On behalf of the JUA we provide the following information:

The premium rates set by the JUA for 2015 remain unchanged from the 2014 rates. The rates have actually remained level since the rate filing of 2011. The Tort reform legislation passed in 2005 has not directly impacted the JUA premium rates, as the JUA policy limits are below the statutory cap for non-economic damages for medical malpractice awards.

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.

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

Sincerely,



Timothy J Ward  
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 25, 2015

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 2015

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 2015, PCF Board of Governors elected to approve no change in membership fees for the five limits of coverage that the PCF offers for 2015. 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 no changes the PCF membership fees for 2015.

Please let me know if you need any further information.

Very truly yours,

Terry A. Coston, SCLA, CPM  
Executive Director