Insurance Federation of Pennsylvania, Inc.

www.ifpenn.org

October 2, 2019

To: The Honorable Members of the Senate Judiciary Committee

From: Samuel R. Marshall

Re: Insurance concerns with reviver legislation

Thank you for the opportunity to share our concerns with the reviver measures now in the Senate, the two approaches in Senate Bill 540 and House Bill 963 and their impact on insurance.

At the outset, we emphasize several points:

- We strongly support legislative efforts to strengthen our sexual abuse laws, whether protecting children or people of all ages, and we support efforts to make sure institutions are vigilant and accountable in preventing and reporting any and all abuse.

  The prospective reforms in Senate Bill 540 and House Bill 962 (the companion bill to House Bill 963) are important measures, matching the reforms in last session's Senate Bill 261, and they should be enacted without delay. These reforms are integral to making sure the horrors of the past are not perpetuated on the children of today, and they recognize the scourge of child abuse has to be eradicated in all our institutions.

- Nonetheless, we oppose legislation that would revive sexual abuse claims that are past the relevant statutes of limitations.

  - We don't oppose a reviver because we are unsympathetic to those who have suffered abuses in the past. To the contrary, we have supported approaches such as the Victim Support Funds established by each of Pennsylvania's dioceses to give meaningful redress to these victims.

- We also don't oppose this because we are covering up or seeking to escape our own culpability in these past abuses. In all the reviver debates here and across the country, nobody has suggested that any insurer has been complicit in, knew of, condoned, furthered or profited from any of the abuses that would be revived under these bills.

We oppose a reviver for several reasons:

- First, we believe it conflicts with the Remedies Clause in the Pennsylvania Constitution: No law can retroactively take away a person's substantive rights, and a statute of limitations is just that. That is a core principle in Pennsylvania's Constitution, and it has to be respected here.

  This issue was examined by this committee in June, 2016 when considering a reviver in House Bill 1947, with legal scholars from both sides testifying. After a thorough hearing, this committee – and then the full Senate – amended and approved that bill to remove a reviver clause and include findings that, because of Pennsylvania's Remedies Clause, "the General Assembly is constitutionally precluded from adopting any retroactive changes extending a statute of limitations or invalidating a defense based on a statute of limitations that has already expired as against any particular defendant."

  We appreciate that today's hearing again reviews the legality of a reviver. We think the better analysis remains that a reviver is unconstitutional, and the proper legal remedy is to amend the Constitution. Others disagree and argue the courts should decide. That's a lengthy and, at best, uncertain process, and therefore a false hope for victims.

  House Bill 963 recognizes this quandary and starts the process of amending the Constitution. While we have insurance-specific reservations about retroactivity, that is the sounder legal approach.

- Second, a reviver presents the unique insurance concern of retroactively creating liability without retroactively allowing for a premium.

Insurance covers risks for which an insurer is able to calculate and charge a premium, and retroactive liability doesn't allow for the second part of that equation. When an insurer calculates and prices a given risk, it factors in the length of the applicable statute of limitations for that risk and the likelihood of claims being filed in that time period. Once the statute of limitations has expired, so does the insurer's ability to hold funds in reserve for that risk – because by law, the insurer no longer faces the potential liability of that risk.

Retroactively reviving liability under those insurance policies therefore imposes liability even when there are no reserves and when the insurer had no ability to price or collect a premium for that liability. And that revived liability is not only for payments to third parties, but also for the contractual duty to defend the insured entity; those legal costs are often as much as the eventual payments to third parties.

Concerns about insurance economics and about mandating insurance coverage without allowing premiums to pay for that coverage are secondary for many – but they are important concerns in assuring the predictability and stability that are the cornerstones of insurance. A fiscally sound insurance system has allowed insurance to answer many of society's problems and needs. But insurance coverage isn't the answer to every social problem, especially if it comes at the expense of that fiscal soundness.

- That's why we don't believe the reviver of insurance coverage is the answer to the problems and needs of victims of abuse whose claims are now time-barred – it isn't fiscally sound as a matter of insurance.

That doesn't mean ignoring the problems and needs of these victims. They deserve a meaningful remedy and closure to the horrors of that abuse, including the chance to confront their abuser. The Victims Support Funds are one example, providing relief without the costs and time attendant with litigation. As other institutions, public and private, are revealed to have allowed and even furthered similar past harms, these types of funds may have to be expanded and even mandated and given public funding to assure adequate redress for victims.

We have been asked about the ramifications of the Superior Court's June 11, 2019 decision in **Rice v. Diocese of Altoona-Johnstown**. Briefly, the Superior Court allowed otherwise time-barred abuse claims to proceed against the institution as opposed to the individual abuser for the intentional torts involved in the cover-up.

It is too soon to offer anything definitive on the impact of this ruling. First, it is on appeal to the Supreme Court. Second, it is a fact-specific ruling; whether its allegations can be made and proved in a broad number of cases remains to be seen.

We can share, though, some general insurance observations. First, there would be no insurance coverage for the intentional torts alleged in **Rice**. We don't cover fraud, civil conspiracies or other intentional torts of any insured.

Less clear is whether these types of complaints would nonetheless trigger an insurer's "duty to defend" the insured – and the legal costs of a defense are often as great as the indemnity payments. That will depend on how a case is pleaded – does it include a negligence claim, or is it solely based intentional torts? If it includes a negligence claim, it might trigger the cost of defense (and the likelihood of protracted litigation), even if an actual verdict is tied only to the intentional torts.

That goes to the fact-specific nature of the **Rice** decision: It is too soon to tell how complaints will be pleaded much less resolved under **Rice**.

Thank you for considering these comments. We welcome the chance to work with you and your colleagues on meaningful reforms to address the problems of sexual abuse faced by children and others today – prospective reforms such as those in Senate Bill 540 and House Bill 962 – while also addressing the problems of past victims in a legal, effective and fiscally sound way.