



1550 Liberty Ridge Drive
Suite 200
Wayne, PA 19087-5572
USA

Tel +1 610 687-5644
Fax +1 610 687-4236

milliman.com

Christopher Tait, FCAS, MAAA
Principal and Consulting Actuary
Milliman, Inc.

Additional Testimony Prepared for Senate Judiciary Committee Hearing
September 8, 2020
Legislative Budget and Finance Committee Report
“A Study of the Impact of Venue for Medical Professional Liability Actions”

Re: Jonathan Klick, Ph.D., J.D. Report Dated October 4, 2019

I was not aware of the existence of the above report until Dr. Klick’s written testimony was distributed on September 2, 2020. Since I had not seen Dr. Klick’s report, I did not have an opportunity to comment on it in my written testimony.

Dr. Klick’s report shows that he has very little understanding of the intricacies of rate determination or the regulatory environment in medical professional liability. In addition, his analysis fails to investigate data at the Pennsylvania county level, which is the only relevant information to review the potential impact of a change in the venue rule. He repeatedly criticizes the Milliman Report for arguments that we either didn’t make or didn’t reflect in our estimates.

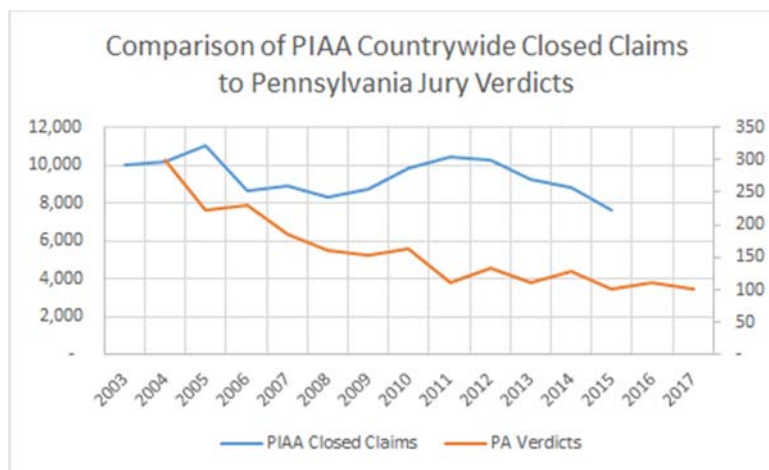
Dr. Klick Criticisms of the Milliman Report

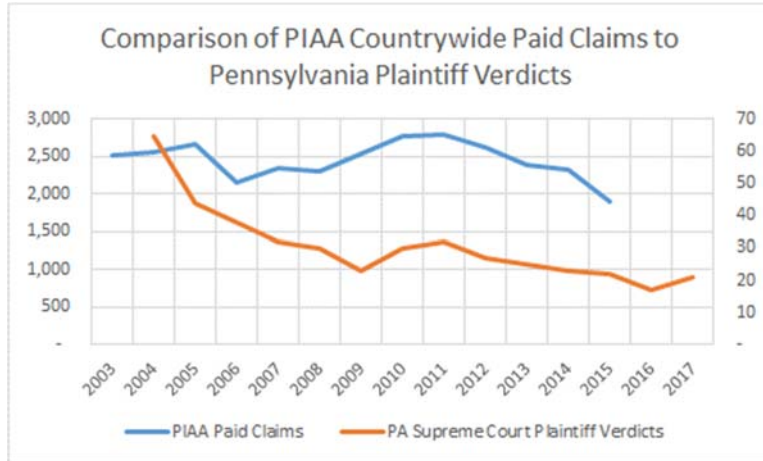
1. Dr. Klick states three primary criticisms of the Milliman Report (page 1):
 - a. First, it is not possible to sort out the specific effect of the venue rule change separately from the other changes that occurred under MCARE. If many relevant policies, regulations, and practices are changing at the same time, it is not possible statistically to isolate the effects caused by any particular part of the package of changes.
 - We held multiple discussions with insurance industry experts regarding the impact of the various other regulatory changes. Based on those discussions, there is no reason to think that the other Mcare reforms would have a varying impact by county.

- b. Second, the Milliman report provides no way for a reader to assess whether its findings are statistically significant, as opposed to merely reflecting natural random variation.
 - We didn't perform a statistical analysis. Rather, we analyzed PA specific empirical data to show the changes in the relative rates charged and the distribution of suits filed, both by county.
- c. Third, it is fatal to the Milliman conclusions to note that litigation rates, judgments and settlements, and insurance premiums were dropping in this time period nationwide, including in states that were not changing any of their medical malpractice laws. If the declines observed in Pennsylvania were also observed in states that did not move to more restrictive venue rules, it is not credible to conclude that Pennsylvania's declines were due to the venue rule change.
 - Exhibit 50 on page 105 of the LBFC Report shows that Pennsylvania had the lowest percentage increase in payouts between 1996 and 2018, compared to New York, Florida, California, and New Jersey (i.e., the other four highest payout states). This implies that the reforms in Pennsylvania had a significant impact beyond "national trends" over that time period.
2. Dr. Klick says, "Pennsylvania's changes in the post 2003 period are statistically indistinguishable from other comparable states that did not change their medical malpractice laws, including venue rules." (page 1)
 - If national trends were responsible for the decreases in Pennsylvania's MPL rates, there is no reason to think that their impact would vary by county. In particular, there is no reason to think that national trends would account for changes by county within Pennsylvania. National trends would not impact Philadelphia County materially less than the counties immediately surrounding Philadelphia. Evidence presented in our analysis shows that this clearly was the case.
3. Dr. Klick says that, "even if one examines just the effects of the MCARE Act in total, it is necessary to account for general nationwide trends in medical malpractice litigation and medical malpractice insurance. The Milliman Report analysis does not adequately account for these general trends." (page 3)
 - This misses the mark as an argument as it would only apply to overall state trends. The basis of our report is that there were varying trends at the county level, particularly when compared to Philadelphia County.
 - Our report shows the relative impact at the county level. For example, Exhibit 3, Page 1 of the Milliman Report shows that the number of filings in Philadelphia County decreased from an average of 1,204 in 2000-2002 to an average of 556 in 2004-2006. At the same time, the number of filings in the counties surrounding Philadelphia increased from an average of 184 in 2000-2002 to an average of 257 in 2004-2006. National trends had absolutely nothing to do with that shift in claims, nor did aspects of the MCARE Act other than venue reform.

- The PAJUA rate relativity for the counties surrounding Philadelphia (relative to Philadelphia) was 0.882 in the rate filing approved September 1, 2003. In the filing approved January 1, 2014 (the most recent analysis of territory relativities), that relativity had dropped to 0.623. Again, there is no reason to think that national trends would have had a materially more significant impact on the counties surrounding Philadelphia than on Philadelphia County itself.
4. Dr. Klick says, “Philadelphia County has a significantly higher poverty rate than the counties that surround it. Individuals who are poor, low income, or unemployed are likely to have significantly lower economic damages arising from a medical malpractice claim because lost wages will be negligible. If insured medical bills are effectively stripped from potential damages due to the collateral source change, plaintiffs have a substantially reduced incentive to bring a lawsuit and contingency fee-based plaintiff lawyers likewise have little incentive to take such a case.” (page 4)
 - We are assuming that the relative impact of the collateral source rule does not vary materially by county, since pre-trial medical expenses are a relatively small portion of MPL awards and the percentage of the Philadelphia County and Montgomery County populations without health insurance are similar.
 - Non-economic damages are often the largest portion of an MPL award (40% or more) and are not impacted by the collateral source rule.
 - If a trial lawyer chose not to pursue a claim involving a Philadelphia plaintiff with low wages because of the impact of the collateral source rule, that is an issue with the collateral source rule itself, not with the venue rule. Also, Dr. Klick’s hypothetical example would decrease the rates in Philadelphia, relative to surrounding counties, which is the opposite of what we have observed in the data.
 5. Dr. Klick says, “I performed an empirical analysis using the publicly available National Practitioners’ Data Bank (NPDB). While the NPDB data do not allow me to examine county level litigation, the way the Pennsylvania Supreme Court data used in the Milliman study does, ...” (page 6)
 - Note that the NPDB only includes data on claims involving physicians. It does not include claims involving facilities (note: the PA Supreme Court data includes both).
 - Nowhere in his report does Dr. Klick analyze data at the county level. This is puzzling, since he is attempting to refute the findings of the Milliman Report, which is based entirely on data sources at the county level, and venue itself is a county-by-county matter.
 6. Dr. Klick says, “Given that such a large majority of cases settle, any assessment of the effect of tort law changes that focuses only on final verdicts (such as the analysis in the Milliman Report) is surely incomplete and very likely misleading.” (page 6)
 - Dr. Klick is correct that the PA Supreme Court data only includes information on final verdicts and that a large majority of cases settle. However, the impact of those verdicts is extremely influential on the size of settlements.

- Verdict data is the only information available at the county level. It may be incomplete, but it is hardly misleading. It shows definitively that there was a shift in the distribution of claims away from Philadelphia County after the venue rule changed and also shows that the average claim size in Philadelphia County is 3x the average claim size in the surrounding counties.
 - The NPDB data contains no information at the county level, so any conclusions regarding the impact of a change in the venue rule based on that data must be considered “surely incomplete and very likely misleading” for the purposes of addressing the potential impact of a change in the venue rule.
7. Dr. Klick says, “The NPDB data suggests that Pennsylvania’s medical malpractice payment frequency (scaled by population) did not change in a statistically significant way after the MCARE changes (including the venue restriction) were adopted. If anything, the rate increased slightly (3 percent) as indicated by the number presented in the table, though the results are not statistically distinguishable from a zero effect.” (page 8)
- Given the timeframe, it is difficult to comment on Dr. Klick’s analysis of the NPDB data. We can, however, look at other data sources that show claim frequencies over this time period.
 - Below is a comparison of countrywide claim data from the Physicians Insurance Association of America (PIAA) Closed Claim Comparative report to the Pennsylvania Supreme Court data. It shows that both the number of verdicts and the number of plaintiff verdicts in Pennsylvania decreased more over this time period than the comparable countrywide data.





8. Dr. Klick says, “While the Milliman Report suggests that getting rid of the restrictive venue rule will increase the size of plaintiff medical malpractice awards (see Milliman Report Exhibit 3 page 3), the NPDB data support no such concern.” (page 9)

- Exhibit 3, Page 3 of our report shows the potential impact of a shift in the distribution of claims from the current distribution to the average distribution for 2000-2002. We are not saying that there will be a change in the average claim severity within a particular county. Rather, we are saying that the statewide average claim severity will increase because more claims will be filed in Philadelphia County where the average claim severity is 3x the average claim severity in the surrounding counties.
- The following chart shows the hypothetical impact on the statewide average claim severity of a shift in the distribution of claims from the current distribution to the pre-reform distribution. I rounded the average award sizes for display purposes, but the relative magnitude is consistent with Exhibit 3, Page 3 of the Milliman Report. Moving from 25% of the claims being filed in Philadelphia County (current split) to 45% of the claims being filed in Philadelphia County (pre-reform split) would increase the statewide average severity by 25%. Both assumptions are based on Exhibit 3, Page 2 of the Milliman Report. We aren’t assuming that more claims will be filed, just that more of the claims will be filed in Philadelphia County.

	Avg Award Size	% of Filings	
		Pre-Reform	Post-Reform
Philadelphia	1,000,000	45.0%	25.0%
Other PA Counties	350,000	55.0%	75.0%
Average Severity		642,500	512,500
Impact on severity if venue rule is reversed			25.4%

- Since the NPDB data does not contain any information at the county level, I fail to see how it can capture the change in the distribution of claims between counties that we are describing.
9. Dr. Klick says, “In the settlement regressions, the effect of Pennsylvania’s changes appears to have been to increase settlement and judgment amounts by about 17 percent (as indicated by the number in the table) relative to the rest of the country on average.” (page 10)
- We are not able to reproduce Dr. Klick’s analysis in the timeframe, so it is difficult to comment on his conclusion.
 - Based on discussions with MPL industry professionals in Pennsylvania, one impact of the Certificate of Merit was to remove the smaller, sometimes frivolous cases from the caseload. The inclusion of those claims in the pre-reform years had the impact of lowering the average claim severity. Thus, it is not surprising to see an increase in the average claim severity in the post-reform years compared to other states, since the remaining claims in Pennsylvania are more meritorious and likely larger on average than pre-reform claims.
10. Using data from the Medical Liability Monitor, Dr. Klick says, “Contrary to the Milliman conclusion, it appears as though medical malpractice rates went up when the MCARE changes (including the venue restriction) went into place by about 21 percent (the number in the table), when compared against what was happening elsewhere nationwide.” (page 11)
- The Medical Liability Monitor (MLM) contains the filed manual rates for multiple insurance carriers in each state for Internal Medicine, General Surgery, and Obstetrics/Gynecology. What it does not contain is the actual rates that are charged by those insurance carriers. On page 2 of the MLM’s October 2019 Annual Rate Survey Issue it says, “The rates reported should not be interpreted as the actual premiums an individual physician pays for coverage. They do not reflect credits, debits, dividends or other factors that may reduce or increase premiums.”
 - In a highly regulated state like Pennsylvania, insurance carriers are reluctant to file for decreases in their manual rates, since it may be hard to get rate increases approved later if the losses emerge higher than expected. Rather, they will lower charged rates by increasing the size of the schedule rating credits that they apply in the individual risk rating process. Thus, the actual rates charged in Pennsylvania are likely quite a bit lower than the manual rates shown in the Medical Liability Monitor.
 - There is no “Pennsylvania” rate in the Medical Liability Monitor for the above specialties. Rather, separate rates are shown for the rating territories used by each insurance carrier (which are not identical across carriers). Dr. Klick does not mention how he used the individual territory rates in Pennsylvania to compare to the rates in other states (note: some smaller states have a single rating territory, larger states can have 10 or more separate rating territories).

- Despite having access to rate information at the rating territory level in the Medical Liability Monitor, which would be relevant for an analysis of a venue rule that clearly has an impact that will vary by territory, Dr. Klick chose not to display any results based on that information.

Errors in Dr. Klick's October 2019 Report

1. Dr. Klick says that our report said the change in venue rule “caused a large drop in medical malpractice filings and awards, as well as a large reduction in the medical malpractice liability insurance premiums paid by Pennsylvania doctors.” (page 1)
 - We never said that the drop in statewide filings and awards was due solely to the change in the venue rule. The Certificate of Merit requirement was likely responsible for a large part of the drop in filings.
 - On page 6 of our report we state, “Our work therefore assumed that the venue reform (as opposed to the other reforms enacted in 2002-2003) extended only to the distribution of claims among counties, not to aggregate changes in the number of claims.”
2. On pages 1 and 2 of the Dr. Klick's October 2019 report he states multiple times that our report refers to changes “especially in Philadelphia County.” Instances of this are as follows:
 - a. if the venue rule were reversed, “litigation rates, judgments awarded, and malpractice insurance premiums would all rise, **especially in Philadelphia County**” (page 1)
 - b. “the Milliman Report argues that this venue restriction led to reductions in medical malpractice litigation rates and awards, as well as decreases in medical malpractice liability insurance premiums, **especially in Philadelphia County.**” (page 2)
 - c. “medical malpractice litigation filing rates and awards will increase substantially, **especially in Philadelphia County**, and doctors in Pennsylvania will end up paying more for their medical malpractice liability insurance.” (page 2)
 - We explicitly stated that our estimates did not reflect any increase in the number of claims (although we speculated that they might increase which would mean our estimates could be understated), nor did we anticipate an increase in the average award size within individual counties. Rather, we showed the potential impact of a change in the distribution of claims by county, which would increase the statewide average claim size because a larger portion of claims would be filed in Philadelphia County.
 - We emphasized the impact on counties surrounding Philadelphia, not on Philadelphia itself.

3. Dr. Klick says, “The mechanism for these outcomes, according to the Milliman Report, is that the less restrictive venue rule will allow for more frivolous medical malpractice claims to be litigated, as plaintiffs shop around for the most favorable jurisdiction.” (page 2)
 - **This is a flat out misrepresentation of our report.** The word “frivolous” does not appear anywhere in our report and we made no assumptions or allegations about potential plaintiff behavior. We merely showed the potential impact of a change in the distribution of claims filed by county, moving from the current distribution to the distribution that existed pre-venue reform change.
4. Dr. Klick goes on to say, “According to this idea, more favorable jurisdictions will generate more plaintiff wins as well as higher judgments.” (page 2)
 - Dr. Klick is now knocking down the strawman argument he made above. Again, we made no such assumptions or allegations about potential plaintiff behavior in our report. We made no comments about changes in the potential for plaintiffs to “win” anywhere in our report. Nor did we make any assumptions about higher judgments within a particular county. We did show that the size of the average award in Philadelphia County is 3x the size of the average award in the surrounding counties, so the average statewide award will increase if the distribution of claims changes.
5. Dr. Klick says, “There is no empirical basis to predict that a reversal of the 2003 venue rule would change litigation rates or awards in Pennsylvania. It is also the case that medical malpractice premiums are unlikely to be affected in a material way if the venue rule is changed.” (page 3)
 - I disagree with the first statement and strongly disagree with the second statement. We explicitly assumed no change in “litigation rates”, merely a shift in the distribution of filings between counties.
 - We interviewed individuals from multiple MPL insurance companies that write in Pennsylvania. Each of them said that their company’s rates would increase if the venue rule were reversed.
 - Based on discussions I’ve had with insurance brokers, the London market reinsurers have expressed concern about possible changes to the venue rule and indicated that reinsurance rates would increase significantly if a change is made. London reinsurance is the largest writer of excess layer insurance and reinsurance for hospitals and health systems in Pennsylvania.
6. Dr. Klick says, “The Milliman Report purports to provide evidence suggesting that the change of the venue rule in 2003 significantly reduced medical malpractice insurance premiums, the number of medical malpractice cases filed, and the size of the plaintiff judgments awarded.” (page 3)
 - We never said that the change in the venue rule significantly reduced the number of medical malpractice cases filed (note: the Certificate of Merit requirement likely caused much of the drop in filings).

- On page 6 of our report we state, “Our work therefore assumed that the venue reform (as opposed to the other reforms enacted in 2002-2003) extended only to the distribution of claims among counties, not to aggregate changes in the number of claims.”
7. Dr. Klick goes on to say, “From this evidence, the Milliman Report concludes that a return to the less restrictive venue rule that prevailed in Pennsylvania prior to 2003 will result in increases in each of these outcomes, and these increases will be large.” (page 3)
- Again, we made no assumption about increasing claim frequency.
 - We did not make any assumptions about higher judgments within a particular county. We did show that the size of the average award in Philadelphia County is 3x the size of the average award in the surrounding counties, so moving more claims into Philadelphia courts will cause the average statewide award to increase.
 - We did conclude that there would be an increase in MPL rates if the venue rule were reversed.
8. Dr. Klick says, “Failure to engage in tests of statistical significance leaves open the possibility that the declines in premiums and litigation metrics could be consistent with mere random chance alone. By not providing an assessment of these drops relative to the natural variation in the data, it is hard to draw any systematic conclusions. All of the estimates in the Milliman Report could be based on statistical noise.” (pages 4-5)
- These statements are nonsensical and ignore the actual data that has emerged in Pennsylvania subsequent to the venue rule change.
 - Exhibit 3, Page 1 of the Milliman Report shows that the number of filings in Philadelphia County decreased from an average of 1,204 in 2000-2002 to an average of 556 in 2004-2006. At the same time, the number of filings in the counties surrounding Philadelphia increased from an average of 184 in 2000-2002 to an average of 257 in 2004-2006. The number of filings in Philadelphia County continued to decline and has remained between 381 and 418 for the last eight years. The number of filings in the counties surrounding Philadelphia fell to as low as 199, but have increased to 250-272 in the last 3 years.
 - Although there is randomness in the actual number of filings each year, there was a distinct change in the distribution of claims away from Philadelphia County and towards the surrounding counties in the years following the venue rule change, which is clearly shown in Exhibit 3, Pages 1 and 2 of the Milliman Report. This is hard data, not “statistical noise” as evidenced by the fact that the distribution in any given year has not reverted to pre-2003 figures where over 40% of filings were made in Philadelphia County.
9. Dr. Klick says, “A related issue is the well-known insurance underwriting cycle in which insurers cut premiums when outside investment income is good, leading to a general downward trend in the cost of medical malpractice liability insurance. This downward

trend reverses when outside investment opportunities worsen, leading insurers to increase their premiums to re-build their reserves.” (page 5)

- These statements show that Dr. Klick has no understanding of what an insurance underwriting cycle represents, nor how insurance companies establish reserves or set rates.
- Insurance rates are prospective in nature; they cannot be set to recoup losses from prior policy periods. MPL is one of the most heavily regulated lines of business and an insurance company’s rates must be adequate, not excessive, and not unfairly discriminatory in order to be approved by regulators.
- Although investment income was a contributing factor to some of the underwriting cycles in the 1970’s and 1980’s, interest rates have been relatively low for the time period under discussion and were not a significant factor in the hardening of the MPL market in PA in the early 2000’s.
- An insurance market hardens when actual loss data emerges significantly higher than the expected losses underlying prior rate levels. It can take several years for the actual loss data to emerge and there is often a delay in preparing rate filings and going through the regulatory approval process.
- Insurers do not increase premiums to “re-build their reserves”. They increase premiums because prior rate levels were inadequate and produced underwriting losses. The new rate levels are intended to be sufficient to pay the new expected losses and expenses, plus the insurance company’s target profit margin. They are in no way an attempt to recoup prior underwriting losses.

10. Dr. Klick says, “The Milliman Report’s basic conclusion is that a reversal of Pennsylvania’s venue rule will generate more litigation in Pennsylvania, particularly in Philadelphia County as plaintiffs seek courts and juries that will be more favorable to borderline or frivolous claims. This will lead, the report continues, to increased defense costs and increased insurance costs for doctors.” (page 6)

- We did not assume that a reversal of the venue rule would generate more litigation in Pennsylvania. That is, we did not assume that there would be more filings in Pennsylvania, but we did assume that a reversal of the venue rule would shift the distribution of claims back towards Philadelphia County.
- On page 6 of the Milliman Report we state, “Our work therefore assumed that the venue reform (as opposed to the other reforms enacted in 2002-2003) extended only to the distribution of claims among counties, not to aggregate changes in the number of claims.”
- On pages 6-7 of the Milliman Report we gave several reasons why our estimates of the impact of a reversal of the venue rule may be conservative, since we did not reflect the potential impact of things like higher defense costs and the increased likelihood that more “borderline” claims would be filed.

11. Dr. Klick says, “While there are points in the Milliman Report where the authors compare a Pennsylvania number to individual numbers from other states (see, for example, Milliman Report p. 8, Tables 1 and 2), the authors provide very little documentation of what they actually do, including what exact periods they examine, beyond simply noting that they examine the change from some time before the MCARE changes and some time after these changes.” (page 13)

- Exhibit 4, Pages 1 and 2 of the Milliman Report clearly show that we compared the rate relativities of General Surgery and Obstetrics/Gynecology to those for Internal Medicine in 2003, 2004, 2017, and 2018. We don’t understand where Dr. Klick’s confusion comes from.
- Our report is thoroughly documented as to each data source used and the time periods considered, as well as the methodology employed. It is false to say that “the authors provide very little documentation of what they actually do”.

Comments on Dr. Klick’s Written Testimony

1. Dr. Klick said, “Pennsylvania actually saw a reduction in the probability a pregnant woman receives prenatal care during the first trimester after the 2003 MCARE reforms. From a baseline of about 85 percent, the number dropped about 10 percentage points relative to the changes occurring nationwide. While not a huge decline, it surely is suggestive that the MCARE reforms did not lead to an immediate improvement in this important metric of healthcare access.” (page 6)

- The following are possible explanations I received during discussions about this issue with members of the Pennsylvania medical community:
 - High-risk practices (OB/GYN, orthopedics, general surgery and neurosurgery) were struggling to attract new physicians to join their groups.
 - Some OB/GYNs were giving up obstetrics because of the high cost of the insurance.
 - Many of these high-risk physicians were experiencing difficulties in finding a liability carrier to cover them.
 - It was widely known within the physician community (specifically among physicians who were involved in training physician residents) that graduating residents looking for practices to join were being counseled to leave PA because of the litigation environment.
 - Because of the high cost of liability premiums, compensation packages for positions outside the state were far more attractive to resident graduating from PA programs.
 - A number of hospitals shuttered their obstetric departments, sending patients scrambling to locate a hospital to deliver their babies.