

## Insurance Federation of Pennsylvania, Inc.

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September 8, 2020

To: The Honorable Members of the Senate Judiciary Committee

From: Samuel R. Marshall

**Re: The LBFC study on the 2003 medical malpractice venue reform – time to finish the job**

Senate Resolution 20 called for the Legislative Budget and Finance Committee to study the impact of the 2003 medical malpractice venue reform now under review before the Supreme Court's Civil Procedure Rules Committee and the Court itself. SR 20 wasn't open-ended; it asked the LBFC to study and assess the impact of the 2003 venue reform on four specific areas to help the Rules Committee and the Court in their deliberations; the four areas:

- The availability of medical care;
- The availability of, and access to, all specialties;
- The availability, cost and affordability of liability insurance; and
- The prompt and fair resolution of medical malpractice claims.

The LBFC issued its study on February 3. Since then, proponents and opponents of the 2003 venue reform have cited the study as buttressing their positions, referencing (and in some instances, taking poetic license with) certain provisions.

We've done that ourselves, although without the poetic license. We've emphasized the study's conclusion – albeit reduced to a footnote – that “a change in the venue rule, coupled with the regionalization of hospital services, would likely create a less predictable market in the near term. If insurance companies have a more difficult time predicting their costs, rates may destabilize soon after as they adjust to the new rule.”

**The problem with the LBFC study is that it isn't very studios** – it lacks the analytical rigor of a true study and assessment, instead setting forth a number of vague possibilities with little meaningful independent review and little effort to give an independent assessment of the areas SR 20 asked it to assess. It is more a summary of the materials it has received than a study that evaluates the arguments and evidence, does its own research, and sets forth its own findings. In that sense, the study is incomplete, certainly in fulfilling the requests assigned to the LBFC in SR 20.

- **We therefore recommend the Senate instruct the LBFC to finish its task of assessing the effects of the 2003 venue reform in the four areas noted above** – with independent conclusions from the LBFC and supporting documentation for them.

A bipartisan committee may not want to make definitive statements and findings on what can be seen as a partisan issue. But the LBFC shouldn't be so much bipartisan as nonpartisan; its value is in providing an independent analysis of these issues, not just a "some say/others say" summation, which is all the current study amounts to. It is time for the LBFC to do the rest of the work needed to make this the meaningful assessment requested by SR 20.

We'll focus on the area of greatest concern to insurers, the impact of the 2003 venue reform on the availability, cost and affordability of liability coverage.

The study says the cost of liability insurance increased through 2007 and has since declined. It doesn't say whether, or to what extent, that was the result of the 2003 venue reform, instead saying "the changes may be the result of national trends." In coming to this "conclusion," the LBFC cites only two data sources, the Medical Liability Monitor Annual Rate Survey and the Insurance Department's Annual Statistical Report.

That's woefully incomplete if the objective is to figure out the impact of the 2003 venue reform on liability insurance.

- It ignores the evidence we and others submitted to the LBFC in our actuarial report.
- It belies common sense, saying this reform and all the others enacted in 2003, and the subsequent decrease in liability insurance costs across the

Commonwealth, might be purely coincidental, that the lower liability costs that followed the 2003 reforms may be part of undefined, unexplained and unstudied “national trends.”

Pennsylvania’s liability system has been and always will be a major determinant in Pennsylvania’s liability costs. To ascribe the reduction in Pennsylvania’s medical liability costs over the last seventeen years to undefined “national trends” suggests our own liability rules are meaningless, presumably moving forward, too. We don’t agree, but the LBFC should at least be asked to explain itself.

- It even conflicts with the trial bar’s own spin of the LBFC study – that “the LBFC report reiterates what we already knew – that the cumulative effect of the nearly dozen ‘tort reform’ measure that were adopted seventeen years ago is that 50% fewer Pennsylvanians who suffered medical malpractice have been able to access justice.”
- Which is it? Either the 2003 reforms – especially that of venue – meant much, or they didn’t mean anything. That’s what the LBFC was requested to study and assess; it didn’t, at least not with any thoroughness and not with any conclusions or supporting documentation.

Quantifying the impact of a reform on insurance costs isn’t simple, but it starts in a simple place – the actuaries. Early on, we supplied an actuarial analysis prepared by Milliman, a nationally recognized actuarial consulting firm, which studied and reported on the impact of the 2003 venue reform on rates. We think the trial bar may have supplied its own actuarial report later in the process, and LBFC staff met with the Milliman team.

- The LBFC study, however, makes no mention of this. Further, the LBFC apparently didn’t retain an actuary itself, or engage those at the Insurance Department who review insurance rates.
- That’s as inexcusable as it is inexplicable. It is why we regard the LBFC study as incomplete. The Senate having requested a study that assesses the impact of the 2003 venue reforms on liability insurance, it should send this back to the LBFC to answer that question, and request that it retain its own actuarial firm to study this and to question, actuary to actuary, the submissions we and others have submitted.

- We have no problem facing scrutiny of our findings and arguments; to the contrary, our problem is when our findings and arguments get no consideration, much less scrutiny.

The LBFC study does make an observation that highlights the need for further work. It correctly notes insurers “value stability and predictability” – that’s true for all of us who depend on an accessible and accountability liability system. The study also correctly notes changing the venue rule would “likely create a less predictable market [we think it means a less predictable liability system] in the near term, and that “rates may destabilize soon after as they adjust to the new rule.”

- Those statements should sound alarms. Are there parties who don’t value predictability and stability in our liability system? Does the LBFC have a projection of how long repealing the 2003 venue reforms would create a less predictable market – how does it define “near term?” And when the LBFC study says rates may “destabilize,” does it really mean they will go up?
- Most glaring, the LBFC study refers to a less predictable, destabilized market as lasting only so long as insurers adjust to the new rule. This isn’t about a new rule – it is about returning to an old rule, a rule that created sustained market and rate instability. We have the experience of that old rule, and it wasn’t a “near term” problem that was addressed with time and experience. Just the opposite, it was a problem that only got worse over time and was addressed only by the 2003 reform.
- The LBFC may disagree. That’s what a study is meant to do – consider the arguments and evidence from all sides, do its own research, and come up with definitive findings and projections. So far, the LBFC has handed you only an interim report; it is time for it to get you the final exhaustive study requested by SR 20.

Whether the 2003 venue reform should be repealed is a momentous decision, not just for those of us providing and purchasing medical malpractice insurance, but for those having malpractice claims and all patients depending on access to affordable and high-quality care: Whether an insurer, a provider, a patient, or a

person with a malpractice claim, all of us need a liability system that is predictable and stable, is accessible, and assures accountability.

We believe Pennsylvania has that liability system now for medical malpractice, and the 2003 venue reform continues to play an integral role. The problem with the LBFC study is not that it reaches a different conclusion, but that it is inconclusive – and not because reaching a conclusion would be impossible, but because the LBFC has more work to do.

Given the importance of this issue, let's make sure the LBFC does that work, so the Rules Committee and the Supreme Court can consider the venue issue in the way a good judicial system always works – by looking at all the relevant evidence, and holding it up to questions and scrutiny, so decisions are made on the best evidence and only after thorough review.