The Insurance Federation of Pennsylvania

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September 12, 2022

To: The Honorable Members of the House Republican Policy Committee

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

Re: The Supreme Court's recission of the 2003 medical malpractice venue rule

Thank you for your continued interest in this, going back to early in 2019 when the Supreme Court and its Rules Committee first raised the possibility of rescinding its 2003 medical malpractice venue rule.

The Supreme Court has spoken – the venue rule that has been in place for the past two decades is going to be rescinded effective January 1. The Rules Committee, in its report recommending this rescission, noted "the sharp divergence of opinion and rationale among the respondents." We were one of the respondents, and this isn't the result we wanted. Still, we respect and accept the decision of the Court; as insurers, we are now in the process of adjusting to the return to the old venue rule, both in handling claims and in calculating premiums.

As to what we anticipate will happen: Malpractice rates will go up. We refer you to the two actuarial studies that were done in the course of the Court's review. The first was done in 2019 by Milliman on behalf of us and others on this panel; the second was done earlier this year by Oliver Wyman at the request of the Senate Judiciary Committee. Both studies confirmed what all sides of this debate intuitively have known from the outset: Rescinding the 2003 venue rules is going to mean significantly higher malpractice costs for providers in many regions across the Commonwealth.

- There remains an element of regionalism in malpractice cases. As some of the leading plaintiff lawyers argued during this debate, that means a malpractice case brought in certain suburban and rural areas isn't as likely to lead to a malpractice award, or as high an award, as in certain urban areas. With the return to the old venue rules, plaintiffs will be able to bring more cases in those urban areas; that's going to be truer now than in 2003, given the hospital consolidations that have occurred since then. That's going to mean more cases being brought, more findings of malpractice, and higher verdicts and settlements – that's the one area of agreement among the plaintiff and defense bars, as well as providers and insurers.

- As to how quickly and how much the rates will go up, we can't be sure. The Court's Order is unclear on the timing of this rescission. Does it apply to all claims for medical malpractice filed on

or after January 1, or to all incidents of alleged malpractice that occur on or after that date? If it is the former, rates will have to be increased quickly. And that still leaves the problem of insurance policies that were priced under one venue rule but will now have to cover claims under a more expensive venue rule. Insurance depends on a level of predictability and stability; changing the venue rules after premiums have already been calculated and paid is anything but.

The number of malpractice claims has dropped or flattened over the past 20 years, as have the amounts awarded, and we hope much of that is because of improvements in the delivery of medical care. But again, the plaintiff bar has been candid in its expectations: Leading lawyers say they will be able to bring cases they previously stayed away from, and expect greater awards, as they have more favorable venues in which to bring their claims.

- We note that much of malpractice coverage is provided, in Pennsylvania, not by insurers or large self-insured hospital systems, but by Risk Retention Groups, which aren't subject to the same level of regulation and financial requirements as insurers. Past Insurance Commissioners have often cited RRGs as a reason for not increasing the private market share of the required malpractice coverage, leaving half of it for the MCARE Fund – the concern was that RRGs are too new and small to handle too much exposure. Rescinding the 2003 venue rule is going to introduce a level of volatility in malpractice liability that will be especially challenging for the smaller and less experienced RRGs.

  And much of malpractice coverage is provided by the MCARE Fund – the layer between $500K and $1 million. We expect the Fund will now see an increase in its payments and therefore the assessments it makes directly on providers.

As medical malpractice insurers, we are committed to serving the providers we insure, and to the fair and efficient handling of malpractice claims brought against them. That's not going to change, but this change makes this market that much more volatile and expensive, for us and for the providers we insure. We wish we had legislative solutions to recommend, and we're open to any ideas – but for now, we think all of us have to accept and work within the Supreme Court's decision.

- Our one recommendation is that you seek clarification from the Court that its Order applies only to alleged malpractice incidents that occur after January 1, not to claims for malpractice that occurred before then, where the insurance premiums were based on a different venue rule.

Again, thank you for your interest in this. We will keep you updated as this unfolds.