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Lee Barclay, Chair  
Joe Bieniek, Manager Statistical Information  
Statistical Information Task Force  
National Association of Insurance Commissioners

Re: Model Law/Guidelines on Reporting Closed Medical Malpractice Claims

Dear Lee and Joe:

During recent conference calls, the value of information about jury verdicts has been questioned. The suggestion was made that, other than for the purpose of evaluating tort reform proposals, the information has little or no value for insurance regulators.

We believe this view is mistaken. Verdicts drive settlements. If information relating to settlements of covered claims is relevant to insurance regulation, information regarding verdicts in trials of covered claims must therefore be relevant too. The Insurance Information Institute (“III”) agrees: “Lawsuits represent only a small portion of total liability claims[.]... Nevertheless, lawsuit verdicts are important because they influence the damage amount sought by plaintiffs and the size of out of court settlements.” Insurance Information Institute, Liability System (July 2009), <http://www.iii.org/media/hottopics/insurance/liability/>.

To demonstrate the importance of verdict data, we used Google searches to gather publicly available information about the uses regulators, insurance companies, and interest groups have made of verdict information in discussions of insurance regulation. We have attached electronic files containing some of the items we found. (In many instances, we were unable to download items our searches turned up, the materials being available only to members or subscribers. This is true, for example, of many studies produced by PIAA.)

Regulators, insurance companies, and interest groups have used verdict information extensively when discussing insurance regulation. The most common use is to support or explain premium (price) increases by showing that liabilities rose. The American Medical Association asserted this in the most unambiguous way. Writing to doctors about prices for malpractice coverage, Amednews asserted,

If your liability insurance bill is bigger, here’s the main reason why: Jury verdicts in malpractice cases are on the rise for the third straight year.

Tanya Albert, Malpractice awards pushing insurance premiums higher: Juries are awarding higher dollar amounts in malpractice cases, hitting physicians in the pocketbook,

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Amednews.com (March 5, 2001), <http://www.ama-assn.org/amednews/2001/03/05/pr110305.htm>. The American Association of Neurological Surgeons made the same claim.

The most obvious reason for the rising premiums is the increase in jury awards. Jury awards for medical malpractice claims rose 76 percent from 1996 to 1999, according to Jury Verdict Research. The median award from medical malpractice rose from \$454,565 in 1996 to \$800,000 in 1999.

Jay Copp, A Profession at Risk, 10 AANS Bulletin (2001), <http://www.aans.org/library/Article.aspx?ArticleId=10022>. Attempting to explain rising prices for automobile liability coverage, the III echoed this view.

Higher jury awards in vehicular liability cases continue to put additional upward pressure on auto insurance rates. The average jury award in auto liability cases was \$261,000 in 2003, according to the most recent available data from Jury Verdict Research.

Press Release, Auto Insurance Premiums Expected to Remain Virtually Unchanged in 2006 Insurance Information Institute,

<http://www.iii.org/media/updates/archive/press.753956/index.html>. Across diverse lines of coverage, one can find statements holding rising verdicts responsible for rising prices.

Often, the connection between trial verdicts and prices is thought to be sufficiently self-evident to eliminate the need for a statement of cause and effect. The sentences below appear in a publication by the Health Coalition on Liability and Access.

According to a 2002 survey conducted by the New Jersey Hospital Association, physician insurance premiums rose an average of 250 percent in the previous three years. The situation continues to be dire: an appeals court in New Jersey recently upheld a \$70.8 million verdict, \$50 million of which was for noneconomic damages (“pain and suffering”)

Health Coalition on Liability and Access, The State of Medical Liability Reform 9 (Winter/Spring 2009), <http://www.hcla.org/pdf/HCLAReportFINAL.pdf>. This passage also demonstrates the value of information about verdict components, such as non-economic damages and punitive awards. Attempts to explain changes in insurance prices often focus on verdict components, some of which are thought to be more variable and, therefore, more expensive to insure, than others.

Emphasizing the importance of detailed information about non-economic damages, the Texas Medical Association contends that the availability of these damages has driven insurers out of the market for first-party health care coverage, not just out of the liability market but out of the first-party market as well. The section in which this assertion appears, entitled “Health care lawsuit abuse in Texas,” is rife with controversial assertions about trial results. It also reasserts

the connection between non-economic damages and the number of insurers doing business in the state.

According to state statistics, 87 percent of medical liability claims in Texas are without merit and end with no payment to the claimant. In short, Texas personal injury trial lawyers have a lottery mentality whereby they advertise for clients so they can file as many contingency fee lawsuits as possible with little regard for the merits of their clients' claims.

The jackpot in this abusive lawsuit lottery is unlimited noneconomic damages from which the lawyers receive more money than the claimants. Proof of this is very evident in review of the Texas Department of Insurance's 1989-1999 Closed Claim Data. This report documents the percentage of health care liability awards paid for noneconomic damages has shifted from one-third of the total award to two-thirds of the total award.

The growing frequency and severity of claims paid has made health care insurance unprofitable in Texas .... Texas now ranks last in health care insurance profitability. Because of lawsuit abuse and the lack of profit in this line of insurance, Texas has witnessed a three-year exodus of medical liability insurance companies; 76 percent have left the state. Today, only three private liability companies (and the nonprofit Texas Medical Liability Trust) remain.

Texas Medical Association, Nationwide Review Supports \$250,000 Hard Cap on Noneconomic Damages in Lawsuits Against Texas Health Care Providers, <http://www.texmed.org/Template.aspx?id=3173>.

One can find similar assertions about punitive damages. For example, the AMA contends that

capping punitive damages in medical malpractice cases both reduces doctors' malpractice insurance premiums and increases the number of physicians available to care for patients.... Where caps are not in place, physicians face "sky-high" premiums driven by "runaway jury awards," the association argues.

Occupational Health & Safety, Access to Care Rises with Punitive Damages Capped, AMA Says (Feb. 6, 2008), <http://ohsonline.com/articles/2008/02/access-to-care-rises-with-punitive-damages-capped-ama-says.aspx>. Not surprisingly, many proposals to limit damage awards in tort lawsuits include caps on punitive damages.

One can also find studies of punitive damages with surprising results. For example, the Bureau of Justice Statistics found that judges were more liberal with punitive damages than juries. U.S. Dept. of Justice, Bureau of Justice Statistics, Tort Trials and Verdicts in Large Counties, 1996, <http://www.ojp.usdoj.gov/bjs/abstract/ttvlc96.htm>.

Many discussions connect the liability environment, in which jury verdicts play an obvious role, to insurance market conditions, which affect the number of insurers doing business in a state and the availability of coverage for insureds. For example, a report commissioned by the NAIC contains the following observation:

There has been considerable speculation and a number of studies concerning the causes of the latest crisis in the medical liability insurance market. The studies reviewed in this report identify many factors that have contributed to the current market conditions. Some of these factors include: competitive pricing; increasing claims experience, including increasing health care costs, *jury awards* and defense and investigation costs; declining investment yields; loss reserve deficiencies; inadequate underwriting and loss control procedures; increasing reinsurance costs; and pressure to consolidate.

Eric Nordman, Davin Cermak and Kenneth McDaniel, Medical Malpractice Insurance Report: A Study of Market Conditions and Potential Solutions to the Recent Crisis 1 (NAIC, September 12, 2004) (emphasis added).<sup>1</sup> Obviously, market conditions are of great interest to regulators, as are competitiveness and access to coverage.

The III has even blamed jury verdicts for the “collapse” of insurance markets in multiple states.

In several states, the medical malpractice market has essentially collapsed, in large part due to excessive litigiousness. The average jury award in medical malpractice cases more than tripled from \$1.1 million in 1994 to \$3.5 million in 2000, according to Jury Verdict Research. Likewise, the average jury award in a vehicular liability case rose from \$187,000 to \$269,000 over the same period.

Robert P. Hartwig, Ph.D., 2001 - Year End Results, Insurance Information Institute, <http://www.iii.org/media/industry/financials/2001yearend>. Substantially the same assertion appears in later editions of this publication.

Premium regulation is a core regulatory function, and insurer solvency, market conditions and the competitiveness of insurance markets are core regulatory concerns. Trial verdicts are widely thought to bear on these matters. Consequently, regulators need to know what is happening in trial courts.

Consumer groups dispute the point that increases in insurance prices reflect rising verdicts. In a report discussing medical malpractice coverage, Americans for Insurance Reform (AIR) argues that in real dollars verdicts have been stable or declining.

The average payment for a medical malpractice verdict in 1991 was \$284,896. In 2005, the average was \$461,524. Adjusting for inflation, however, shows that the

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<sup>1</sup> This report also cites reports by the American Medical Association attributing insurance market conditions to “the frequency of million-dollar and higher verdicts.” *Id.* at 15.

average is actually declining. The 2005 average adjusted for inflation is only \$260,890 — a decline of 8 percent since 1991.

Americans for Insurance Reform, *Costs of the Current Medical Malpractice System are Much Lower than People Think*, <http://www.insurance-reform.org/issues/MedMalSystemCostsFactSheet2009F.html> (quoting Public Citizen, Congress Watch, *The Great Medical Malpractice Hoax: NPDB Data Continue to Show Medical Liability System Produces Rational Outcomes*, (January 2007) at 5, 9). The AIR report contends that sudden hikes in insurance prices reflect changes in economic conditions, not changes in liability costs. Whether AIR is right or wrong, however, does not matter. What matters is that without information about verdicts, insurance regulators cannot evaluate trends in a factor affecting core regulatory concerns.

Verdict information also figures in discussions of the manner in which insurance is marketed. Consider the following (heavily edited) excerpt from an III webpage.

Many insurers have traditionally viewed homeowners insurance as a loss leader, offering the coverage at a discount and bundling it with auto and other coverages to achieve overall profitability at the individual customer level....

The days of the loss leader homeowners policy are probably coming to an end .... [I]nsurers can no longer rely on “bundling” as a strategy to achieve overall profitability [partly because] the homeowners line is under assault from the trial bar. A recent \$32 million verdict in Texas related to mold damage underscores the fact that courts and juries appear willing to broaden coverage under homeowners policies. [T]he homeowners line, like the commercial and personal auto lines, will necessarily succumb to the mounting financial pressure.

Robert P. Hartwig, Ph.D., 2001 - First Quarter Results (Insurance Information Institute), <http://www.iii.org/media/industry/financials/2001firstquarter>.

Finally, there are innumerable many instances in which information about jury verdicts is used in discussions of matters that fall on the periphery of insurance regulation, but concerning which insurance commissioners would benefit by having good information. For example, one often reads that skyrocketing jury verdicts have hindered patients’ access to health care. This assertion could be paired with a demand for a residual market medical malpractice pool for physicians who cannot find coverage in the private market, for the creation of a state-run compensation fund for victims of certain types, or for other reforms. Insurance commissioners are invariably drawn into discussions of these matters and, therefore, should have reliable information about jury verdicts at their fingertips.

It’s important to note that the Guidelines Part A, Section 7.K. will not result in the collection of verdict amounts. While subpart (1) of the Section asks reporting entities to break down payments awarded by the court for economic and noneconomic damages, the Texas data reveal that insurers rarely pay verdict amounts. Post-verdict settlement negotiations very often result in

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an indemnity payment different from the verdict. So, we have reason to expect that for most claims verdict amounts will not be reported. We believe that it's important to add our proposed Section 7.L. to gather data on verdict amounts.

The data fields identified in the materials we submitted in proposed Section 7.L. of the Guidebook also are designed to ensure that insurers report verdicts accurately and that researchers count and characterize verdicts correctly. These fields ensure that a verdict was actually produced (many trials end in settlements, not verdicts); that responsibility for a verdict is assigned to a jury or a judge (to our knowledge, no one blames judges for driving up insurance costs or making market conditions worse; criticisms are targeted at juries); that the number of parties interested in or affected by a verdict is known (a verdict divided among several defendants imposes a different burden than an identical verdict for which only one defendant is liable); that the portion of the total verdict against all defendants for which the reporting insurer is responsible is clear (thereby avoiding double-counting of verdicts when multiple defendants are involved); that the judge or jury's breakdown of a verdict across damage categories is provided (enabling the frequency, size, and variability of different components to be assessed); and that the operation of remitters, caps and other factors on insurers' losses can be assessed. It is also worth jury verdicts provide the most reliable allocations of damages across categories (economic, non-economic, and punitive) that can be found. Insurers' reports of allocations in settled claims are estimates whose accuracy is difficult to check, except by comparing them to jury verdicts.

We designed the recommended data fields in a way that makes sense to us as researchers and that, we believe, will facilitate consistent reporting across jurisdictions. We do not wish to make the burden of reporting heavier than it needs to be, and we are certainly open to suggestions for simplifying the process. However, we think it essential for the Model Law to require the reporting of information about verdicts. The need for verdict-related information is so clear, we believe, that many jurisdictions will likely collect it in ad hoc ways if the Task Force omits the required data fields from the Model Law. That is, we predict that many jurisdictions will amend the Model Law when adopting it if verdict-related fields are omitted. The resulting inconsistencies will reduce the value of the data collected.

I submit this letter on behalf of Professors Bernard Black, David Hyman, William Sage, and Kathryn Zeiler, as well as myself.

Best wishes,

A handwritten signature in black ink, appearing to be 'CS', is placed over a light gray rectangular background.

Charles Silver