

# **Louisiana Property and Casualty Insurance Commission**

**Annual Report 2016 – 2017**



**Louisiana Department of Insurance  
James J. Donelon, Commissioner**

Louisiana Department of Insurance

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# Louisiana Property and Casualty Insurance Commission

## Message from the Chairman

I am pleased to present the 2016-2017 Annual Report of the Louisiana Property and Casualty Insurance Commission (LPCIC). The commission is composed of members representing consumers, the insurance industry, agencies across state government, and law enforcement. Our goal is to improve the state's insurance market by reviewing and examining issues affecting the availability and affordability of property and casualty insurance in the state of Louisiana.

In 2016 the Louisiana Legislature enacted laws increasing the penalties for both distracted driving and the failure to wear seat belts. While these Acts are a start, the commission and other entities concerned with highway safety continue to recommend strengthening these laws.

Distracted driving is an ever increasing problem. While vehicles become safer with technology such as accident avoidance systems, the frequency and severity of accidents outpace the benefits of technology. Surveys show that large percentages of drivers are engaged in other activities while driving: the internet—29%, phone calls—50%, taking pictures—20%, and taking videos—10%. Traffic deaths totaled 40,200 in 2016, and increase of 6% after having increased by 7% in 2015. The commission supports a complete ban on the physical manipulation of phones while driving.

The commission recommends that the Louisiana Legislature encourage the development of driverless vehicle technology. Louisiana should follow Arizona's example of welcoming field testing. Louisiana should ensure that the state's regulatory regime is coordinated and updated to accommodate the latest developments in vehicle technology. With Louisiana's auto insurance rates continuing to rank among the highest in the nation, this technology is a solution whose time is near. The commission will study this technology and its impact on automobile insurance and insurance rates. Clearly such technology will make distracted driving a thing of the past.

Auto insurance rates are rapidly increasing and the availability of auto insurance is at near crisis levels. Currently Louisiana has the 4<sup>th</sup> highest auto insurance rates in the country according to the NAIC, with an average cost of \$1,192.92 per year, per vehicle, as compared to Vermont's \$665.17 per year, per vehicle cost.

The commission has also strongly and repeatedly urged legal reforms such as reducing the civil jury trial threshold to a level more closely aligned with other states, and the repeal of the Direct Action Statute, which only serves to drive up defense costs for insurance companies as well as placing insurance front and center during jury trials. The commission will also study and prepare recommendations on limits to the Collateral Source Rule, which allows for recovery of damages

for costs not actually incurred. All of these issues have a dramatic and negative impact on Louisiana's auto insurance market, and result in decreased competition due to insurer's unwillingness to compete for business in our state.

The current legal authority for the National Flood Insurance Program (NFIP) expires October 1, 2017. It is necessary to reauthorize NFIP for a period sufficient to foster the developing market for private flood insurance as an alternative to NFIP coverage. Pursuant to the Biggert-Waters Act, federal banking regulators are developing a rule to permit lenders to accept private flood insurance in lieu of NFIP policies. The commission will study the availability and affordability of flood insurance.

We urge our Senators and Representatives in Congress to make the reauthorization of the NFIP a priority so that it does not get bogged down by the many other matters that will be under consideration at the end of September 2017.

The commission has had a productive year with presentations and discussions on the Louisiana State Uniform Construction Code, the U.S. Surgeon General's campaign to curb opioid misuse and abuse, the impact of workers' compensation reforms in Texas, and the effects of certain federal laws and programs on property and casualty insurance. The commission will continue to focus on traditional areas of interest, and it will broaden its areas of study to include future developments in property and casualty insurance of which many will be technology driven.

Louis G. Fey, Jr., CPCU, CIC, CRM, AIC  
Chairman, Louisiana Property and Casualty Insurance Commission

## Membership and Staff

### Members of the Louisiana Property and Casualty Insurance Commission as of February 1, 2017:

**Louis G. Fey, Jr., Chairman**  
Professional Insurance Agents of Louisiana

**The Honorable John Bel Edwards**  
Governor

**The Honorable Kirk Talbot**  
House Insurance Committee Chair

**The Honorable Mike Huval**  
House Insurance Committee Member

**Raymond Aleman, Jr.**  
Commissioner's Appointee

**Sheral Kellar**  
Louisiana Workforce Commission (OWCA Director)

**The Honorable Earl Taylor**  
Louisiana District Attorneys Association

**Michael Guy**  
Attorney General's Designee

**Julius W. "Will" Grubbs, Jr.**  
Consumer Representative, Speaker of the House

**Marc Carter**  
LAFAC, Inc. Representative

**Shawn Collins**  
NAMIC Representative

**Joe O'Connor**  
Property Insurance Association of Louisiana

**Staff:** Thomas D. Travis, Director  
Ron Williams, Assistant Director

**Jeff Albright, Vice Chairman**  
Independent Insurance Agents & Brokers of Louisiana

**The Honorable James J. Donelon**  
Commissioner of Insurance

**The Honorable Dan Morrish**  
Senate Insurance Committee Member

**The Honorable Ronnie Johns**  
Senate Insurance Committee Member

**Katara Williams Ph.D.**  
Louisiana Highway Safety Commission

**The Honorable Karen St. Germain**  
Commissioner of Motor Vehicles

**The Honorable Gregory Champagne**  
Law Enforcement Representative (Sheriff of St. Charles)

**Ron Henderson**  
Deputy Commissioner of Consumer Advocacy, LDI

**Christopher S. Haik**  
Consumer Representative, President of the Senate

**Leslie Sallean**  
Louisiana Surplus Lines Association Representative

**Ann Metrailler**  
PCI Representative

**Paul Buffone**  
LWCC Representative

## **State of the Market: Quick Facts (as of December 31, 2016)**

### **Automobile:**

- Competitive voluntary market is challenging.
- Increased minimum liability limits in 2010 resulted in a 15-20% premium increase.
- Parishes in the Greater New Orleans and Baton Rouge areas continue to pay the highest rates.
- Market-wide insurance premium increase of 8.9% last year.
- In 2014 Louisiana ranked second highest in combined average cost of insurance at \$1,364. \*

### **Homeowners':**

- Competitive voluntary market has been re-established since 2005.
- Insurance market stabilized due to increased number of insurers.
- Twenty-one (21) new insurers writing in Louisiana who were not here in 2005.
- Residual market share of Louisiana Citizens continues to decrease due to depopulation program and increased competition.
- Market share for the residual homeowners' market decreased from 9.8% to 1.3% since 2008, which is an 87% decrease in the homeowners' market share since 2008.
- Statewide average market-wide insurance premium increase of only 0.4% last year—lowest statewide average increase since 2005.
- Louisiana ranked third in the average cost of homeowners' insurance in 2014 at \$1,847; Florida ranked first at \$2,055; Texas ranked second at \$1,947. \*
- While Louisiana's homeowners' rates increased between 2007-2014, the rate of increase was lower than the national average for that time period.

### **Workers' Compensation:**

- Market remains competitive.
- Claim frequency decreased in recent years.
- Medical severity did not change significantly in recent years.
- Market-wide insurance premium decrease of 1.3% in 2016.
- Overall statewide 9.8% decrease approved for NCCI loss costs for 2017, which decreased across all industry groups. \*\*
- Fourth consecutive year that Louisiana had a decrease in NCCI loss costs.
- Over the last 10 years, workers' compensation loss costs have decreased by 34%.
- Over the last 20 years, workers' compensation loss costs have decreased by 50%.

\* According to the most recent NAIC data.

\*\* According to the most recent NCCI data.

Top 10 Most Expensive and Least Expensive States for Auto Insurance, 2014					
Rank	Most Expensive States	Average Expenditure	Rank	Least Expensive States	Average Expenditure
1	New Jersey	\$1,263.67	1	Idaho	\$571.94
2	Michigan	\$1,227.36	2	Iowa	\$585.71
3	New York	\$1,205.03	3	South Dakota	\$601.33
4	<b>Louisiana</b>	<b>\$1,192.92</b>	4	Maine	\$606.90
5	District of Columbia	\$1,192.45	5	North Dakota	\$630.24
6	Florida	\$1,140.84	6	Indiana	\$642.19
7	Delaware	\$1,125.74	7	North Carolina	\$643.84
8	Rhode Island	\$1,106.08	8	Wisconsin	\$646.48
9	Massachusetts	\$1,035.52	9	Nebraska	\$662.83
10	Connecticut	\$1,031.70	10	Vermont	\$665.17

Based on average automobile insurance expenditures.

Source: © 2017 National Association of Insurance Commissioners (NAIC).

Top 10 Most Expensive and Least Expensive Cities for Auto Insurance, 2014					
Rank	Most Expensive Cities	Average Car Insurance Price	Rank	Least Expensive Cities	Average Car Insurance Price
1	Detroit, MI	\$10,723	1	Winston-Salem, NC	\$969
<b>2</b>	<b>New Orleans, LA</b>	<b>\$4,310</b>	2	Greensboro, NC	\$1,090
3	Grand Rapids, MI	\$4,042	3	Raleigh, NC	\$1,098
4	Newark, NJ	\$3,525	4	Durham, NC	\$1,101
<b>5</b>	<b>Baton Rouge, LA</b>	<b>\$3,364</b>	5	Charlotte, NC	\$1,123
6	Hialeah, FL	\$3,272	6	Boise, ID	\$1,222
7	Jersey City, NJ	\$3,267	7	Rochester, NY	\$1,249
8	Louisville, KY	\$3,256	8	Fayetteville, NC	\$1,295
9	Miami, FL	\$3,169	9	Spokane, WA	\$1,308
10	Philadelphia, PA	\$2,931	10	Montgomery, AL	\$1,376
<ul style="list-style-type: none"> <li>• Based on a 26-year-old male without any history of accidents, insuring a 2012 Toyota Camry. Assumes \$100,000/\$300,000/\$50,000 liability limits with a \$500 deductible. To calculate city averages, NerdWallet used only ZIP codes within city limits and not in the city's metro area.</li> <li>• Detroit is the costliest city for auto insurance and had more than double the expenditures of the second costliest city, New Orleans.</li> <li>• Six of the least expensive cities for auto insurance were in North Carolina, led by Winston-Salem</li> </ul>					

Source: NerdWallet

## **History and Purpose**

In 1997, the Louisiana Legislature created the Council on Automobile Insurance Rates and Enforcement (CAIRE) whose thorough studies of automobile insurance and enforcement issues led the legislature to expand CAIRE's areas of study in 2001 to homeowners' and workers' compensation insurance and to name it the Louisiana Property and Casualty Insurance Commission (Act 187 of the 2001 Regular Session).

The primary purpose of the commission is "to review and examine the availability and affordability of property and casualty insurance in the state of Louisiana."

Act 590 of the 2003 Regular Session amended the LPCIC membership, which then consisted of 22 members. A representative of law enforcement is now selected jointly by the superintendent of the Louisiana State Police, the secretary of the Department of Public Safety and Corrections, the president of the Louisiana Association of Chiefs of Police and the president of the Louisiana Sheriffs' Association. Representatives of two national trade organizations and one state organization were also added to the membership.

Act 459 of the 2007 Regular Session abolished the Louisiana Insurance Rating Commission effective January 1, 2008, and provided an appointee for the commissioner of insurance.

Act 317 of the 2012 Regular Session provided for two additional members of the LPCIC—the deputy commissioner of insurance for consumer advocacy and a representative of the Louisiana Surplus Lines Association.

Act 223 of the 2014 Regular Session added another member—a representative of the National Association of Mutual Insurance Companies (NAMIC).

The LPCIC now consists of 24 members.

## **Review of Legislative Recommendations for 2016**

### **1. Maintain or strengthen statewide building codes.**

There was no legislation passed that lowered current building code standards. Act 262 (HB 960) of the 2016 Regular Session amended the Louisiana Industrialized Building Act, by enacting La. R.S. 40:1750.56(D), to require that “Any temporary housing, typically used for daily living purposes, that is provided for temporary workers shall comply with the provisions of [the Louisiana Industrialized Building Act].”

### **2. Enact legislation to address distracted driving.**

The LPCIC recommended that the legislature ban the manual use by the operator of a motor vehicle while in motion of all electronic devices not permanently installed in the motor vehicle.

Such a ban was not enacted, but Act 472 (SB 91) increased the penalties for certain uses of wireless telecommunications devices:

- For text messaging and social networking while driving, the fine increased from \$175 to \$500 for a first violation and from \$500 to \$1000 for a subsequent violation.
- For persons holding a Class "E" learner's license or intermediate license, the fine for using hand-held wireless devices increased from \$175 to \$500 for a first violation and from \$500 to \$1,000 for a subsequent violation.
- For minors using wireless telecommunications devices while driving, the fine increased from \$100 to \$250 for a first violation and from \$250 to \$500 with a sixty-day license suspension for a subsequent violation.
- For any person using wireless telecommunications devices while driving in a school zone, the fine increased from \$175 to \$500 for a first violation and from \$500 to \$1,000 with a sixty-day license suspension for a subsequent violation.

### **3. Enact legislation to increase fines and penalties for seat belt violations, including making a seat belt violation a primary cause for a traffic stop and issuance of a citation.**

Act 445 (HB 751) raised fines for first offense from \$25 to \$50 and subsequent offenses from \$50 to \$75.

### **4. Enact legislation to establish a mediation program for residential property claims.**

HB 839 relative to a property insurance mediation program for residential property insurance was introduced in the 2016 Regular Session but did not advance beyond the House Insurance Committee.

### **5. Enact legislation to lower the civil jury trial threshold.**

House Bill 89 of the 2016 Regular Session proposed a reduction of the civil jury threshold from \$50,000 to \$20,000. It did not advance beyond committee.

**6. Enact legislation to repeal the direct action statute except where the defendant cannot be served.**

There was no legislation on direct action introduced in 2016.

**7. Enact legislation to reinstate uninsured/underinsured motorist (UM) coverage as a first party coverage.**

There was no legislation on uninsured/underinsured motorist (UM) coverage introduced in 2016.

## **Review of 2016 Study Issues**

### **1. Monitor transportation network company issues**

*Monitor the effectiveness of The Transportation Network Company Motor Vehicle Responsibility Law in addressing the needs of drivers and passengers. Observe the market to ascertain any insurance trends relative to transportation networks or the sharing economy in general.*

There have been no insurance issues specific to transportation network companies (TNCs) in this state in 2016. The rapid development of autonomous or driverless vehicles in which TNCs are actively involved is a separate study issue. The LPCIC will continue to monitor TNC issues as part of a broader study of issues related to the sharing economy.

### **2. Study cybersecurity insurance issues**

*Cybersecurity is a major issue in law, technology, and national security. Insurance coverage for liabilities and losses that result from breaches of cybersecurity is a major topic of concern throughout the insurance industry. The affordability and availability of insurance coverage for cyber-related losses is a growing concern for firms of all sizes.*

Cybersecurity and insurance for cyber issues is a matter that affects the insurance industry as a payer of losses and as a target of cyber-attacks, particularly health insurers. It is a subject that also intersects with highly automated vehicles (HAV) and autonomous vehicles, the sharing economy, and any part of the economy or society that relies on computers or holds sensitive information.

The commission staff will continue to study this subject, which is a long-term issue.

### **3. Study driverless vehicle issues**

*Driverless vehicle technology will be commercially available in the foreseeable future. It may reduce the risk associated with human error, but it will also add new risk associated with cybersecurity, transportation networks, product liability for software and hardware, and other potential liabilities.*

The legislature enacted HB 1143 (Act 318) of the 2016 Regular Session by Representative Stokes, which amended La. R.S. 32:1 to include a definition of “autonomous technology” for motor vehicles operating on the roads of this state. The National Conference of State Legislatures (NCSL) notes that Louisiana is one of only nine states and DC to enact legislation on the subject as of the end of 2016. (<http://www.ncsl.org/research/transportation/autonomous-vehicles-legislation.aspx>)

Transportation advances may lead insurers to rethink their strategies related to underwriting, claims, distribution channels and product mixes. Mobility sharing and autonomous vehicles may have a transformative effect on future insurance business models. The NAIC CIPR (Center for Insurance Policy and Research) sponsored an event on “Gearing Up for Autonomous Vehicles” that addressed some of these issues and was attended by LDI and LPCIC staff. The panel discussion explored how the integration of technology into vehicles could change the automobile insurance market. (The CIPR Events Page has the materials, which may be found at

[www.naic.org/cipr\\_events.htm](http://www.naic.org/cipr_events.htm). The CIPR also maintains a web page on self-driving cars at [www.naic.org/cipr\\_topics/topic\\_self\\_driving\\_cars.htm](http://www.naic.org/cipr_topics/topic_self_driving_cars.htm).)

Like transportation networks, home-sharing, and cybersecurity, driverless vehicles present regulatory challenges across many disciplines and jurisdictions of which insurance is only one component. All stakeholders should start with the recently released *Federal Automated Vehicles Policy: Accelerating the Next Revolution in Roadway Safety*, which includes a model state policy for addressing automated vehicle issues and outlines the current regulatory framework for highly-automated vehicles (HAV) and autonomous vehicles. (<https://one.nhtsa.gov/nhtsa/av/av-policy.html>)

#### **4. Study opioid use and abuse issues**

*There is a national problem with regard to the abuse of opioids that directly and negatively affects liability and workers' compensation insurance.*

The LPCIC held a meeting focused on the issue of opioid utilization in workers' compensation that is discussed in the Minutes of the October 19<sup>th</sup> meeting and attachments in the Appendix. There was a further presentation and discussion of the issue during the February 1, 2017 meeting.

The Louisiana Transportation Research Center released a report entitled [Drugged Driving in Louisiana: Quantification of its Impact on Public Health and Implications for Legislation, Enforcement and Prosecution](#). The objectives of this research were, among other things, to evaluate laws and policies about drugged driving in Louisiana and other states, assess the availability of drugged driving data, and provide an analysis of the frequency of drugged driving. The findings reflect a lack of standardized procedures and an uneven distribution of resources throughout Louisiana. A comparison of DWI arrests, speeding violations, and crashes of drivers who tested positive for various drugs shows that drivers arrested for drugged driving have higher rates of prior unsafe driving incidents than other drivers. Survey interviews reveal an overall lack of training, resources, and testing capacities in Louisiana. This study presents recommendations for dealing with drug-impaired driving.

#### **5. Study third party litigation funding issues**

*The LPCIC intends to determine the effect that the funding of litigation by third parties may have on the affordability and availability of insurance coverage.*

#### **6. Study collateral source rule issues**

*Study the effect on insurance costs that the collateral source rule has. Examine the holding in *Hoffman v. 21st Century N. Am. Ins. Co.*, 2014-2279 (La. 10/2/15), 2015 WL 5776131 to determine how its rationale may affect premiums for liability insurance.*

The LPCIC staff is researching this issue and preparing recommendations for 2018.

## **7. Study Medicare Secondary Payer issues**

*The Medicare Secondary Payer Act has been enforced in settlement of workers' compensation matters for several years. Study the effect of the Act on the ability of the parties to ordinary personal injury claims to settle such claims.*

The LPCIC received a presentation on the Medicare Secondary Payer (MSP) Act at its November 16, 2016 meeting as reflected in the Meeting Minutes. The LPCIC will continue to study this issue as part of its monitoring of federal actions that affect property and casualty insurance.

## **8. Study bad faith law issues**

*The LPCIC intends to study how statutes that authorize bad faith damages may negatively impact premiums for property and casualty insurance coverage in Louisiana. This study will include an analysis of the criteria used by Louisiana courts to award bad faith damages and whether the legislature should establish more objective criteria to assist the courts.*

## **Recommendations for 2017**

### **1. Uniform Construction Code**

The administrator of the Louisiana State Uniform Construction Code Council (LSUCCC), Mark Joiner, and the State Fire Marshal, Butch Browning, made a presentation to the LPCIC at its November 16, 2016 meeting as reflected in the Meeting Minutes. They impressed upon the members of the commission the successful implementation of the Uniform Construction Code and the modern system employed by the State Fire Marshal to ensure the maintenance of high standards of building construction and safety.

*The LPCIC recommends that the legislature resist any efforts to weaken or diminish the current Louisiana State Uniform Construction Code and enact legislation to strengthen the Uniform Construction Code and its enforcement.*

### **2. Distracted Driving**

All forms of distracted and inattentive driving increase the risk of automobile accidents, which result in increased automobile insurance premiums. Cognitive demands of the use of hand-held devices narrow the field of vision and create distraction from the responsibilities of driving. Studies have shown that this type of distraction results in risk similar to driving with a .08 BAC and a four times greater chance of being in a traffic crash.

The Louisiana Transportation Research Center (LTRC) produced a research paper entitled *Distracted Driving and Associated Crash Risks* that evaluated the effects of various distractions on a driver's ability to control a motor vehicle. The paper is available at [http://www.ltrc.lsu.edu/pdf/2016/FR\\_530.pdf](http://www.ltrc.lsu.edu/pdf/2016/FR_530.pdf).

The National Highway Transportation Safety Administration has a website at [www.distraction.gov](http://www.distraction.gov) that addresses the issue of distracted driving.

In 2016 California enacted Assembly Bill 1785, which prohibits a person from driving a motor vehicle while holding and operating a handheld wireless telephone or a wireless electronic communication device. The Act authorizes a driver to operate a handheld wireless telephone or a wireless electronic communications device in a manner requiring the use of the driver's hand only under specified conditions.

Assembly Bill 1785, the NHSTA *Sample Texting While Driving Law*, and a chart of Distracted Driving Laws by State are attached to the Meeting Minutes for February 1, 2017.

*The LPCIC recommends that the legislature ban the manual use by the operator of a motor vehicle while in motion of all electronic devices not permanently installed in the vehicle.*

### **3. Civil Jury Threshold**

There are 14 states that have a civil jury trial threshold. Louisiana is the highest at \$50,000. Maryland is a distant second at \$15,000, followed by Rhode Island and Hawaii at \$5,000. Thirty-six states have no threshold. Lawsuits below the threshold are heard by a judge without the option

of a jury trial. Restricted access to jury trials results in more lawsuits, fewer out-of-court settlements, and higher and more frequent plaintiff verdicts by trial judges.

*The LPCIC recommends that the legislature reduce the civil jury threshold.*

#### **4. Direct Action**

Louisiana remains the only state in the Union with a pure direct action statute. The result is that only in Louisiana is a plaintiff allowed to name an insurance company as a defendant in a lawsuit in addition to or sometimes in lieu of the insured. The exposure of the insurer as a defendant to the trial jury is a negative factor in efforts to reduce the cost of liability insurance in Louisiana.

*The LPCIC recommends that the legislature repeal the direct action statute or amend it to limit the instances for naming an insurer as a defendant to those where the insured is unable to be served with process.*

#### **5. Opioid Abuse**

The LPCIC received presentations on the issue of opioid abuse and the problem of high levels of opioid prescription in workers' compensation claims.

The Surgeon General of the United States has issued new guidelines on the use of opioids and begun a national campaign to fight the misuse of opioids—[turnthetidex.org](http://turnthetidex.org).

The International Association of Industrial Accident Boards and Commissions (IAIABC) published in April 2016 a paper of the IAIABC Medical Issues Committee entitled *A Discussion on the Use of a Formulary in Workers' Compensation* that provides explanations of how formularies work and considerations for the development and implementation of a formulary in workers' compensation. It also presents brief case studies with outcomes and lessons learned for those states that have adopted formularies in workers' compensation—North Dakota, Ohio, Tennessee, Texas, and Washington. The paper may be downloaded at <https://www.iaiaabc.org/images/iaiaabc/Resources/Discussion-Use-Formulary-Work-Comp-IAIABC-04-27-16.pdf>.

In 2015, California enacted AB 1124 enabling and requiring the use of a pharmacy formulary in workers' compensation by July 1, 2017.

*The LPCIC recommends that the legislature enact a requirement for the use of a closed pharmacy formulary in workers' compensation claims.*

## **Study Issues for 2017**

### **1. Sharing Economy**

The sharing economy creates insurance and regulatory issues that will require study over several years. Of particular interest to Louisiana's tourism industry is the rise of home-sharing applications that allow a person to rent a room, apartment, or house—such as Airbnb and HomeAway. Rental of a private home creates liability risk of which neither party to the rental may be aware. Similar to transportation network drivers and passengers, there could be gaps in coverage that expose both parties to substantial risk.

The NAIC approved and published in 2016 a brief white paper entitled *Insurance Implications of Home-Sharing: Regulator Insights and Consumer Awareness*, which provides a discussion of the risks related to home-sharing. It is available on the NAIC website. ([http://www.naic.org/documents/cmte\\_c\\_sharing\\_econ\\_wg\\_related\\_white\\_paper\\_home\\_sharing.pdf](http://www.naic.org/documents/cmte_c_sharing_econ_wg_related_white_paper_home_sharing.pdf))

*The LPCIC will monitor and study issues related to the sharing economy.*

### **2. Cybersecurity and Insurance**

Cybersecurity is a major issue in law, technology, and national security. Insurance coverage for liabilities and losses that result from breaches of cybersecurity is a major topic of concern throughout the insurance industry. The affordability and availability of insurance coverage for cyber-related losses is a growing concern for firms of all sizes.

*The LPCIC will monitor and study issues related to cybersecurity and insurance.*

### **3. Driverless Vehicles**

The availability and affordability of adequate insurance coverage for individuals or entities that may make use of driverless technology is an issue that approaches as quickly as the deployment of driverless vehicle technology on the public roads.

*The LPCIC will study regulatory and insurance issues that arise with the development of driverless vehicles.*

### **4. Private Flood Insurance and NFIP Reauthorization**

Federal law permits mortgagors to purchase private flood insurance in lieu of NFIP coverage. There do not appear to be any legal or regulatory barriers to a market for private flood insurance in Louisiana in both the surplus lines and standard markets for personal lines or commercial coverages. There is presently some activity in Louisiana in the writing of surplus lines flood policies for first-dollar and excess flood coverage. In Mississippi, Alabama and Florida, there are admitted insurers writing private flood insurance.

With the need to renew the NFIP beyond September 30, 2017, private flood insurance will be an increasingly important subject as policy makers examine the use of market-based solutions to lessen the exposure of taxpayers to flood risk.

*The LPCIC will monitor and study the affordability and availability of private flood insurance and proposals for increased reliance upon the private market in the renewal of the NFIP.*

## **5. Federal Actions Affecting Insurance and Insurance Regulation**

In recent years the federal government has taken a more active role in matters of insurance regulation at the national and international level. The passage of the Nonadmitted and Reinsurance Reform Act of 2010 and the Federal Insurance Office Act of 2010 had direct effects on the state regulation of insurance and created a federal agency to monitor property and casualty insurance matters. The recent conclusion of a “covered agreement” pursuant to the Federal Insurance Office Act may, if implemented, have preemptive effects on state laws and state regulation of insurance. The Medicare Secondary Payer Act is an example of a federal law with a potential to affect the availability and affordability of insurance by impacting the cost of claims. Cybersecurity, private flood insurance, driverless vehicle technology and many other issues will involve the federal government and may impact insurance markets directly or indirectly.

*The LPCIC will monitor and study the effects of federal laws and regulations on the affordability and availability of property and casualty insurance.*

## **6. Third Party Litigation Funding**

*The LPCIC will continue to study the effect that the funding of litigation by third parties may have on the affordability and availability of insurance coverage.*

## **7. Bad Faith**

*The LPCIC will continue to study how statutes that authorize bad faith damages may negatively impact premiums for property and casualty insurance coverage in Louisiana.*

## **8. Collateral Source Rule Issues**

*The LPCIC will study the effect on insurance costs of the collateral source rule.*

## **9. Punitive Damages for Distracted Driving**

*The LPCIC will study whether or not other states have general or special statutes authorizing punitive damages, effect on the numbers of distracted driving incidents reported, and any effects on insurance.*

## Appendix

### Meeting Agendas and Minutes

- Agenda for October 19, 2016 Meeting
- Minutes for October 19, 2016 Meeting
- Attachments to Minutes for October 19, 2016 Meeting
  - Opioid Utilization in Louisiana Workers' Compensation
  - Treatment Guidelines/Pharmacy Formulary—Texas Workers' Compensation Reforms
  
- Agenda for November 16, 2016 Meeting
- Minutes for November 16, 2016 Meeting
- Attachment to Minutes for November 16, 2016 Meeting
  - Liability MSAs: Will They Become a Reality?
  
- Agenda for December 14, 2016 Meeting
- Minutes for December 14, 2016 Meeting
- Attachments to Minutes for December 14, 2016 Meeting
  - NAIC Principles for NFIP Reauthorization
  - Draft Principles for Flood Insurance Reauthorization and Reform (December 2016) (House Republicans)
  
- Agenda for February 1, 2017 Meeting
- Minutes for February 1, 2017 Meeting
- Attachments to Minutes for February 1, 2017 Meeting
  - California Assembly Bill (AB) 1785 of 2016 on Distracted Driving
  - NHTSA Sample Law to Prohibit Texting While Driving
  - Distracted Driving Laws by State, Governor's Highway Safety Association

**Louisiana Property and Casualty Insurance Commission**  
**Commission Meeting Agenda**  
**Wednesday, October 19, 2016 at 1:00 P.M.**  
**Department of Insurance – Plaza Hearing Room**  
**Final Agenda**

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- I. Call to Order**
- II. Roll Call**
- III. Discussions and Presentations**
  - A. Presentation by Gary Patureau, Exec. Dir. of the La. Assoc. of Self-Insured Employers (LASIE), on Opioid Abuse; HCR 113 and the Commission on Preventing Opioid Abuse**
  - B. Presentation by Gary Patureau, Exec. Dir. of LASIE, on the Medicare Secondary Payer Act**
  - C. Discussion of the 2015-16 Annual Report**
  - D. Discussion of 2016 Legislation**
  - E. Discussion of Any Other Matters**
- IV. Public Comments**
- V. Date for Next Meeting—November 16 (scheduled)**
- VI. Adjournment**

# **Louisiana Property and Casualty Insurance Commission**

## **Minutes of the Meeting of the Commission**

**Wednesday, October 19, 2016 @ 1:00 P.M.**

**Department of Insurance – Plaza Hearing Room**

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Members Present: Commissioner Donelon, Lou Fey (Chairman), Sen. Morrish, Rep. Talbot, Rep. Huval, Shawn Collins (for Lee Ann Alexander), Marc Carter, Chris Haik, Dir. Sheral Keller, Ron Henderson, Leslie Sallean, Mike Baron (for Dr. Katara Williams), Ann Metrailer.

Commission Staff Present: Tom Travis.

LDI Staff Present: Warren Byrd, Rich Piazza, Ileana Ledet, Danielle Blanchard, Charles Hansberry.

Others Present: Pauline Williams (OWCA), Kenneth Eichler (Work Loss Data Institute)

The meeting was called to order at 1:00 p.m. by the chairman.

Mr. Travis called the roll and reported the absence of a quorum. (Mr. Baron of LHSC came in after the roll call to create a quorum.)

Mr. Fey, the chairman, welcomed the commission members and others in attendance.

Presentations on Opioid Abuse:

Moderator: Gary Patureau, Exec. Dir. of the Louisiana Association of Self-Insured Employers (LASIE)

Presenters (by Phone):

Shavon L. Arline-Bradley, MPH, MDiv, Dir., External Engagement, Office of the US Surgeon General

Dr. Vennela Thumula, Workers' Compensation Research Institute (WCRI)

Rod Bordelon, Attorney and former Commissioner of Workers' Compensation for the State of Texas

Ms. Arline-Bradley provided an overview of the Turn the Tide Rx program of the Surgeon General's office. She discussed the three main areas of emphasis: prescribing practices of health care practitioners; information on risks of opioids for patients; and evidence based treatment for

opioid based disorders. She provided a tour of the program's website—[turnthetidex.org](http://turnthetidex.org), which has resources and information for health care practitioners and the public. A cornerstone of the program is the Prescriber Pledge, which consists of three parts: “(1) Educate ourselves to treat pain safely and effectively. (2) Screen our patients for opioid use disorder and provide or connect them with evidence-based treatment. (3) Talk about and treat addiction as a chronic illness, not a moral failing.”

Dr. Vennela Thumula of WCRI spoke on “Opioid Utilization in Louisiana Workers’ Compensation.” Her presentation included graphs showing that: 85% of those receiving pain medication receive opioids; 17% of those receiving opioids do so on a long-term basis; the opioid dose in Louisiana is much larger than most states.

Rod Bordelon presented on the topic of “Treatment Guidelines, Pharmacy Formulary, Texas Workers’ Compensation Reforms,” describing changes made to that state’s workers’ compensation system since 2005. He described the use of a pharmacy formulary in workers’ compensation and the transition from a legacy system to a mixed legacy and formulary system to the current system of all drug claims being subject to the formulary. He emphasized the reduction in opioid prescriptions, the reduction in medical disputes, and that prescriptions outside the formulary are still available through the utilization review process.

Mr. Patureau spoke on efforts to enact a workers’ compensation drug formulary system in Louisiana.

Other agenda items were deferred until the next meeting on November 16, 2016 at 10:00 a.m.

There being no objection, the chairman adjourned the meeting at 2:45 p.m.

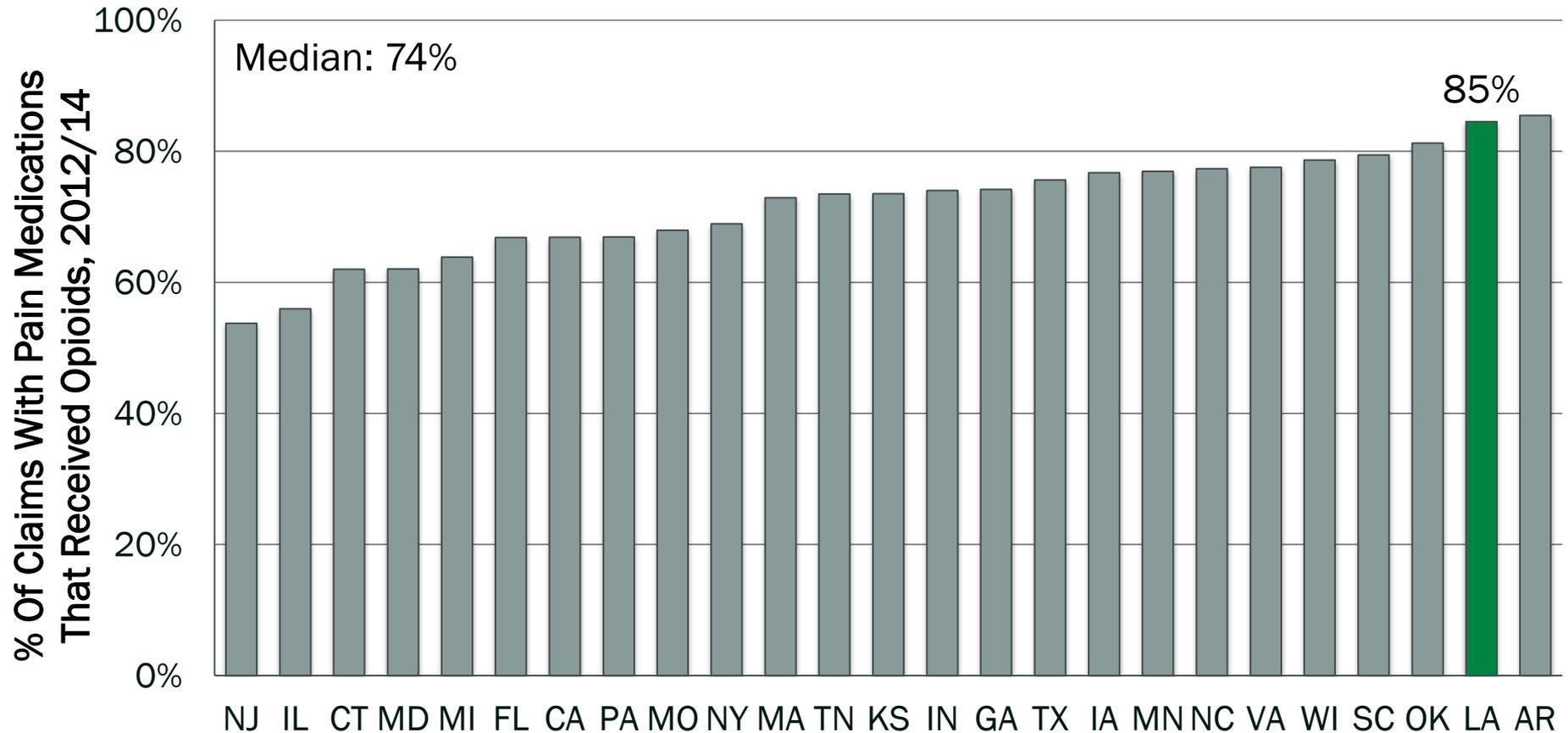


# Opioid Utilization In Louisiana Workers Compensation

October 2016

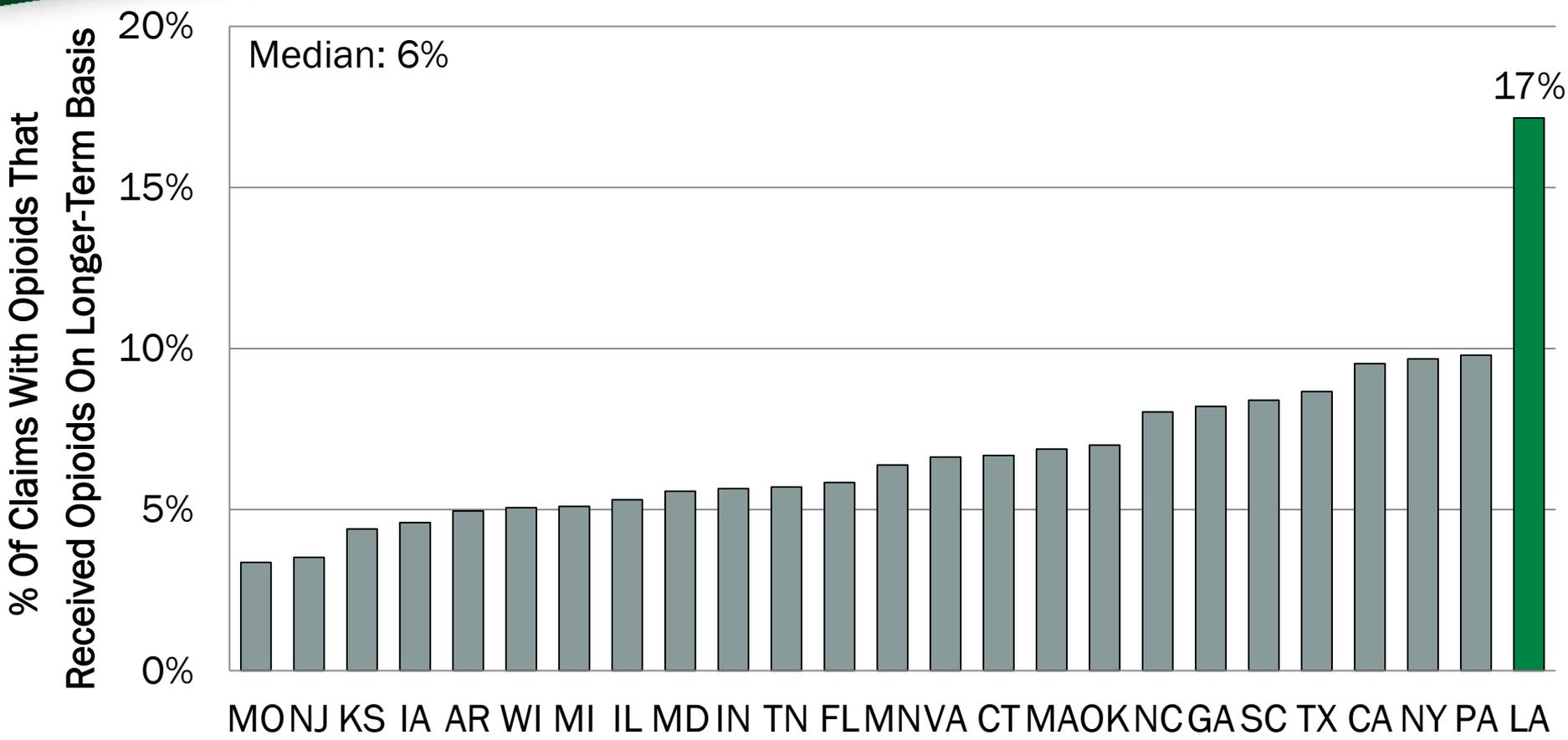


# 85% Of Injured Workers With Pain Meds. Received Opioids In LA



Nonsurgical Claims With > 7 Days Of Lost Time, Injuries Occurring From Oct 1, 2011, To Sep 30, 2012, Prescriptions Filled Through Mar 31, 2014. Source: *Interstate Variations In Use Of Opioids, 3<sup>rd</sup> Edition (2016)*

# In LA, 1 In 6 Injured Workers Received Opioids On A Longer-Term Basis



Nonsurgical Claims With > 7 Days Of Lost Time, Injuries Occurring From Oct 1, 2011, To Sep 30, 2012, Prescriptions Filled Through Mar 31, 2014. Source: *Longer-Term Use Of Opioids, 3<sup>rd</sup> Edition (2016)*

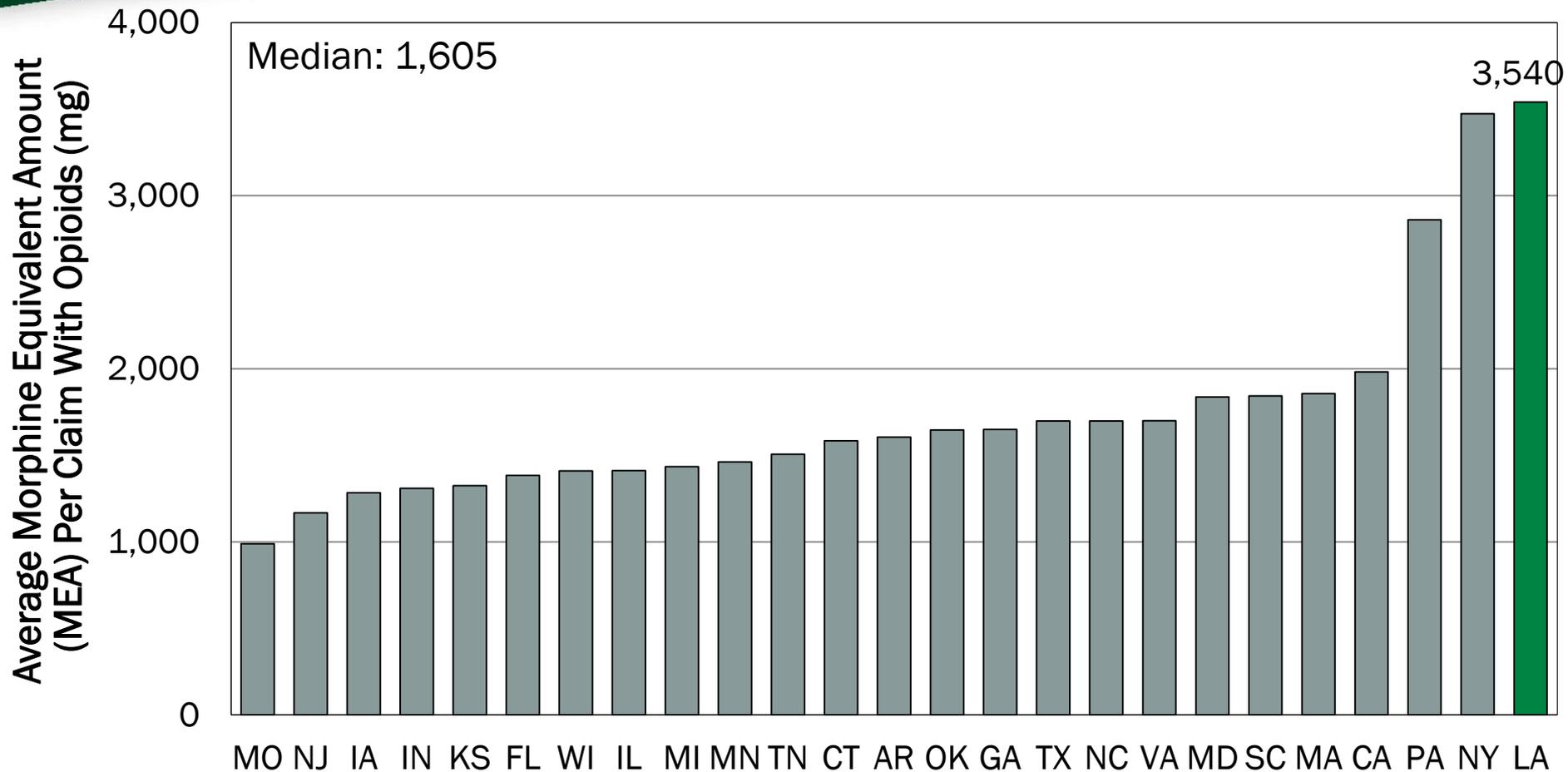


# Opioid Drugs Commonly Prescribed To LA Injured Workers, Paid Under Workers' Comp.

% Of Pain Medication Rx That Were For ...	LA	25-State Median	25-State Range
Hydrocodone-APAP (Vicodin®)	46%	30%	10%-46%
Tramadol (Ultram®)	13%	14%	11%-24%
Oxycodone Products (Percocet®, OxyContin®)	6%	9%	1%-29%
All Other Opioids (Morphine, Fentanyl, Buprenorphine, etc.)	4%	4%	2%-8%
Non-Opioid Pain Medications	30%	41%	30%-54%

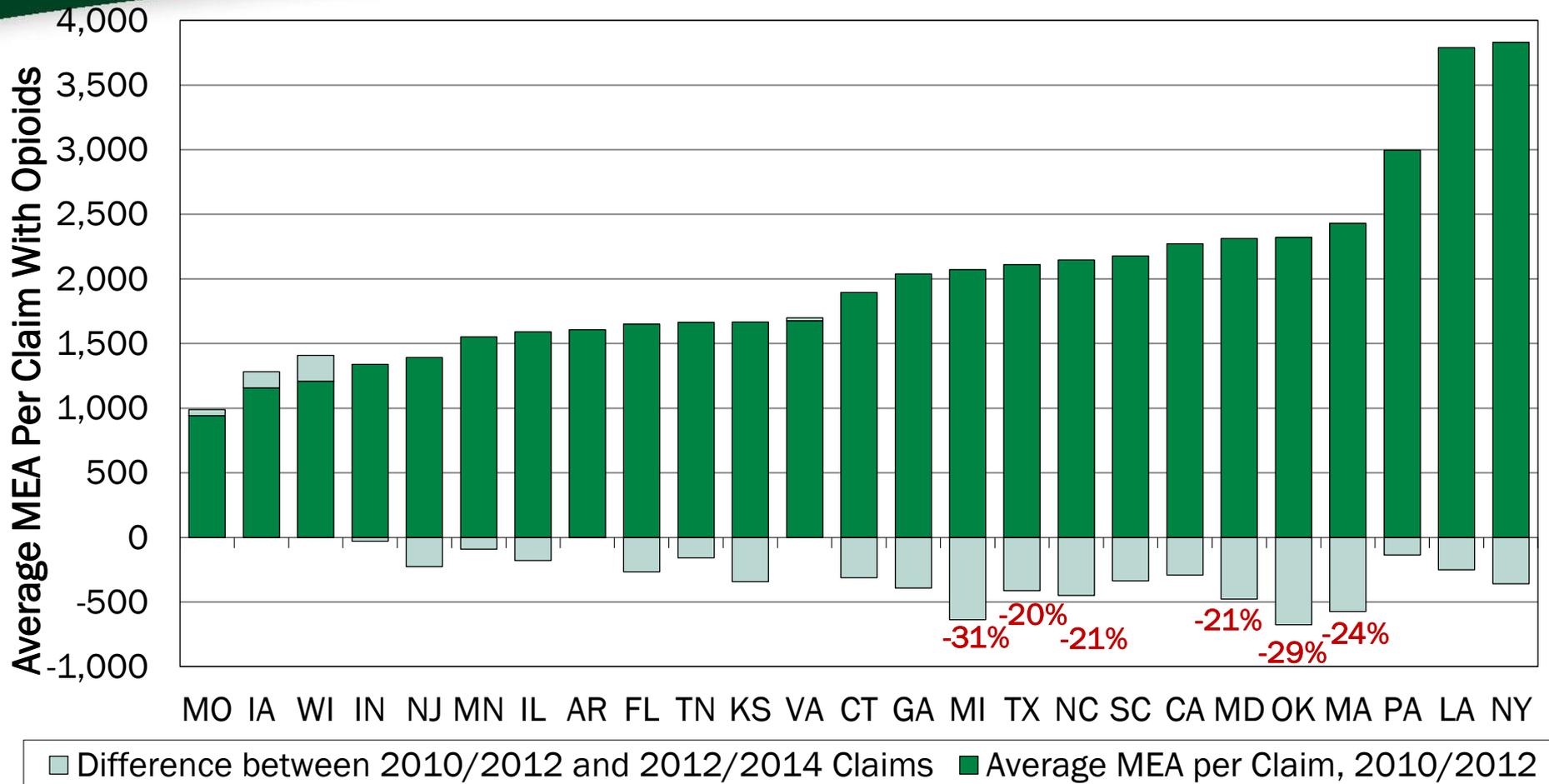
\* DEA issued a final rule to reschedule hydrocodone-combination products from Schedule III to Schedule II, effective October 2014.

# Patients In Louisiana Had Double The Amount Of Opioids Seen In The Median State



Nonsurgical Claims With > 7 Days Of Lost Time, Injuries Occurring From Oct 1, 2011, To Sep 30, 2012, Prescriptions Filled Through Mar 31, 2014; Source: *Interstate Variations In Use Of Opioids, 3<sup>rd</sup> Edition (2016)*

# Significant Reductions Seen In Amount Of Opioids Per Claim In Most States



# Several Reforms Coincided With Reductions In Opioids Received Over The Study Period

	MI	OK	MA	NC	MD	TX
% Decrease In Average Amount Of Opioids Per Claim	31%	29%	24%	21%	21%	20%
PDMP	✓	✓	✓	✓	✓	
Treatment Guidelines		✓	✓			
Drug Formulary						✓
Others			Spillover effects of group health limits			Regulated pain clinics

PDMP: Prescription Drug Monitoring Programs

# Medical Treatment Guidelines For Chronic Opioid Management Recommend

- Urine drug testing
- Psychological evaluations and treatment
- Active physical therapy

Note: Guideline recommendations are based on widely-accepted medical treatment guidelines, including ACOEM, APS/AAPM, ODG, and state guidelines (CO, CT, LA, MA, UT, WA). See Appendix B of the WCRI *Longer-Term Use of Opioids* study.

# Gap Observed Between Practice And Treatment Guidelines Recommendations

% Of Claims With Longer-Term Use Of Opioids That Received Recommended Services (in latest study period)	LA	Median State Studied	Range Among States Studied
Drug Testing	42%	40%	22%–50%
Psychological Evaluation	9%	6%	3%–29%
Psychological Treatment	4%	3%	1%–12%
Active Physical Therapy	84%	87%	78%–92%

Nonsurgical Claims With > 7 Days Of Lost Time That Were Identified As Longer-Term Users Of Opioids, Injury Year 2012, Average 24 Months Of Experience

# Key Findings From WCRI Opioid Studies For LA

- 85% of injured workers with pain meds received opioids
- 1 in 6 injured workers with opioids, received opioids on a longer-term basis, highest among study states
- Amount of opioids received by injured workers was higher in LA. Also higher in NY and PA
- Few injured workers with longer-term opioid use received guideline recommended services

# Thank You!

- For comments/questions about the findings:

Dr. Vennela Thumula  
[vthumula@wcrinet.org](mailto:vthumula@wcrinet.org)

Ms. Dongchun Wang  
[dwang@wcrinet.org](mailto:dwang@wcrinet.org)

# Treatment Guidelines Pharmacy Formulary

Texas Workers' Compensation  
Reforms

Rod Bordelon  
Principal  
Law Offices of Rod Bordelon

# Overview of Texas WC System

- More than 290 insurance companies actively writing WC
- \$2 billion in direct written premium
- Including self-insured employers and governmental entities, more than 800 insurance carriers with WC claims
- 67% of private year-round employers have WC and all governmental entities have WC
- 81% of private sector employees covered by WC

# Overview of Texas WC System

- About 225,000 new claims filed each year and about 340,000 claims receiving benefits each year
- Pharmacy accounts for 14% of medical payments
  - Opioids account for 4.6% of medical payments
- Utilizes evidence-based medicine treatment and return-to-work guidelines
- Requires certain services to be pre-authorized by the insurance carrier and allows retrospective utilization review to determine medical necessity

# Overview of Texas WC System

- Sets fee guidelines for professional, inpatient/outpatient hospital, ASC and pharmacy services and allows pharmacy contractual discounts
- Has administrative dispute resolution process for medical necessity and medical fee disputes
- Collects medical charges, payments and utilization data for all medical services
- Allows certified networks, which require employees to select network treating doctors, but allows employees choice of pharmacy

# Overview of Texas WC System

- Overall, Texas today has a healthy, stable, and cost effective system
- But that was not always the case
- Several statutory changes dating to 1989, 2003 and most recently (and effectively) 2005 helped reform the system, decrease costs and stabilize the marketplace

# Pre- 2005 in Texas

- Costs Increased
- Medical disputes increased
- Insurance premiums increased
- Insurance carrier losses increased
- More employers dropped coverage (Optional)
- More physicians and hospitals refused accepting WC patients
- More employees had difficulty finding care
- Return to Work Outcomes Deteriorated

- Texas had highest Workers' Compensation Medical Costs of all states studied
- Highest Average Medical Cost per Claim
- Highest # of Services per Claim
- Highest # of Chiro and Physical Therapy visits and services per Claim
- Hospitals provided fewer services but were paid more than other states studied

# Overview of Texas WC System

- HB7 Texas Legislature 2005 Reforms
- Medical Treatment Guidelines
- Pharmacy Formulary
- Medical Fee Guidelines
- Utilization Review Guidelines
- Reforms to Dispute Resolution & Enforcement
- Certified Networks

# Medical Treatment Guidelines - Texas

- In 2005, Texas Legislature directed the Commissioner of WC to adopt Evidence Based Treatment Guidelines, Return to Work Guidelines and a Closed Pharmacy Formulary by Rule (HB7, 2005)
- Commissioner Adopted Official Disability Guidelines (ODG) published by Work Loss Data Institute (WLDI) effective 2008

# Medical Treatment Guidelines

- ODG is widely used
- Contains print and web versions, mobile app
- Utilizes an Advisory Board of over 100 medical doctors and practitioners in all specialties
- Expedites access to Quality of Care while limiting unwarranted, excessive or inappropriate care
- Reflects medical appropriateness, not cost

# Medical Treatment Guidelines - Texas

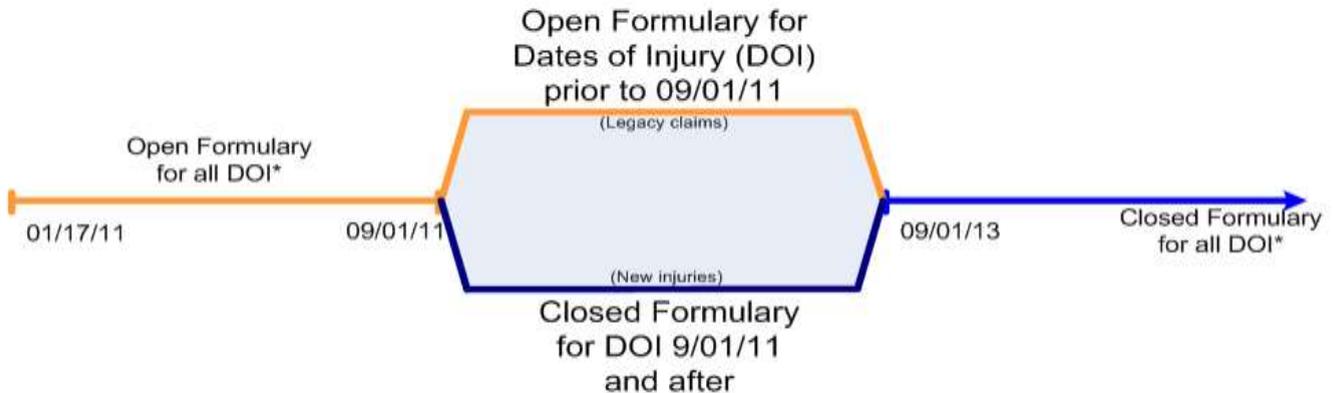
- Safeguards patients from inappropriate care
- Provides framework for addressing patient specific needs (ODG, Appendix D)
- Provides physicians greater clarity and expedites approvals and pre-authorization
- Limits denials and disputes
- Facilitates quicker resolution of disputes
- Improves reserve setting and cost containment

# Pharmacy Closed Formulary - Texas

Adopted September 2011, Formulary includes all FDA-approved drugs prescribed and dispensed for outpatient use, but excludes :

- drugs with “N” status identified in the current edition of the Official Disability Guideline (ODG) Treatment in Workers’ Comp/ Appendix A, *ODG Workers’ Compensation Drug Formulary* and any updates
- any compounded drugs that contains a drug identified with an “N” status in ODG; and
- investigational or experimental drugs as defined in Texas Labor Code §413.014(a)

# Timeline of the Closed Formulary Implementation



\*Except Old Law Claims (DOI Dec 31, 1990 and before)



# Post 2005 Reforms in Texas Success?

- Reduction in Medical Costs (WCRI 2011) - 23%
- Reduction in Insurance Premiums - 50%
- Reduction in Workplace Injuries - 27%
- Reduction in Claims Filed - 22%
- Reduction in Medical Disputes - over 40%
- Increase in Employer Participation - to 67%
- Increase in Employees Covered - to 81%

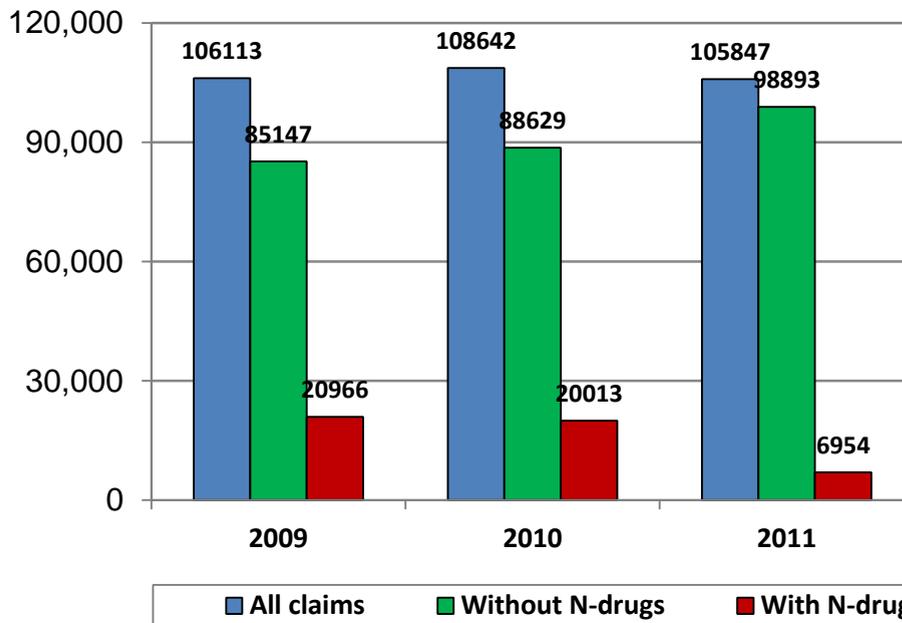
# Post 2005 Reform in Texas

- More Timely Resolution of Disputes
- Fewer Disputes over Retrospective Denials
- Improved Access to Care
- Increased # of Physicians Treating Workers' Compensation Patients to over 18,000
- Average # Claims per Physician dropped from 22 to 16
- Fewer Opioids and other not recommended drugs prescribed

# Post 2005 Reforms in Texas

- Improved Return To Work Outcomes
- % of Claims Receiving Initial Non-emergency Care within 7 days increased from 79% to 82%
- % of Injured Employees receiving Temporary income benefits who Returned to Work 6 months post injury increased from 74% to over 80%
- Median days off work decreased from 26 to 21 days

# Number of claims receiving pharmaceuticals, by injury year (Sept.–Aug.)



**Change from  
2010 (Pre-formulary) to  
2011 (Post-formulary)**

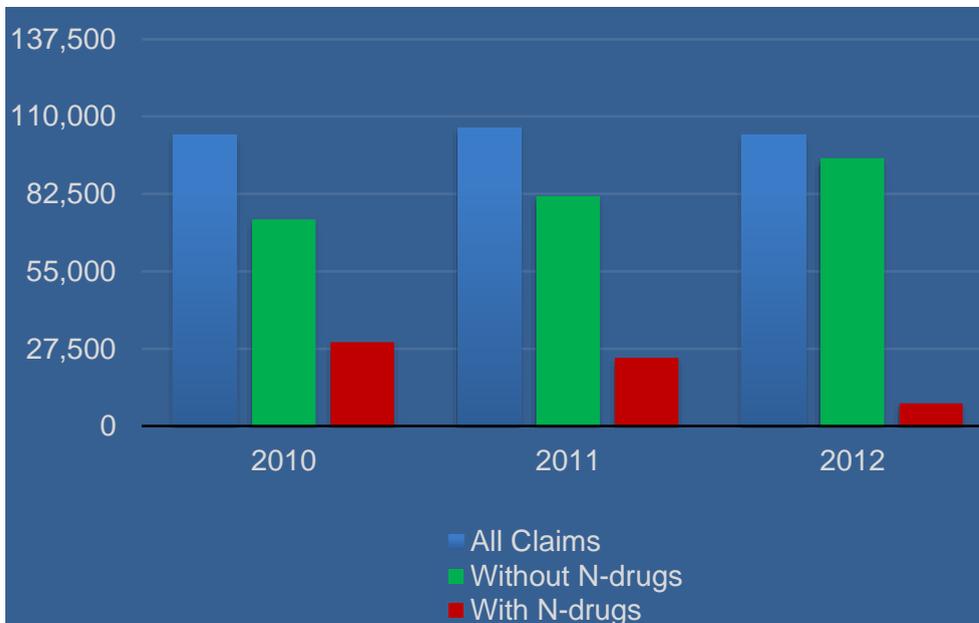
- All claims fell 2%

- Claims with Y-drugs  
increased 11%

- Claims with N-drugs  
decreased 65%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Number of claims receiving pharmaceuticals, by injury year (Sept.–Aug.)

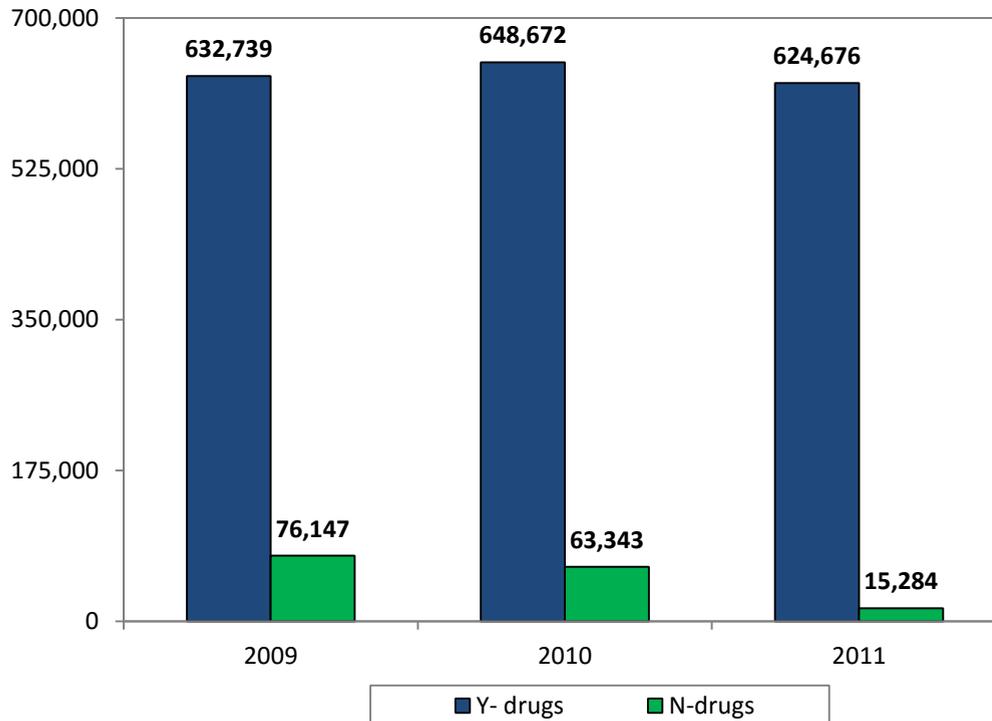


## Change from 2011 (Pre-formulary) to 2012 (Post-formulary)

- All claims fell 2%
- Claims with Other drugs increased 17%
- Claims with N-drugs decreased 67%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Number of prescriptions by drug type, by injury year (Sept.–Aug.)



## Change from 2010 (Pre-formulary) to 2011 (Post-formulary)

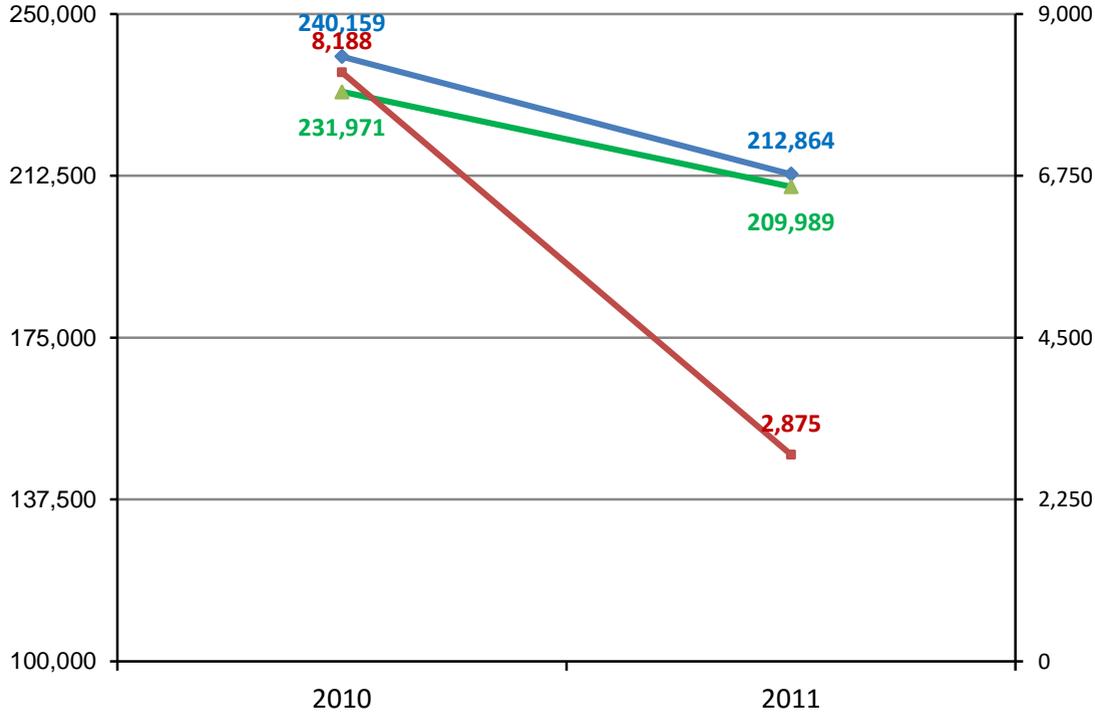
- Total prescriptions fell 10%
- Y- drug prescriptions fell 3%
- N-drug prescriptions fell 76%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Change in the number of opioid prescriptions, by injury year (Sept.–Aug.)

All/Other drugs

N-drugs



**Change from 2010 (Pre-formulary) to 2011 (Post-formulary)**

- Opioid prescriptions fell 11%
- Y-drug opioid prescriptions fell 9%
- N-drug opioid prescriptions fell 65%

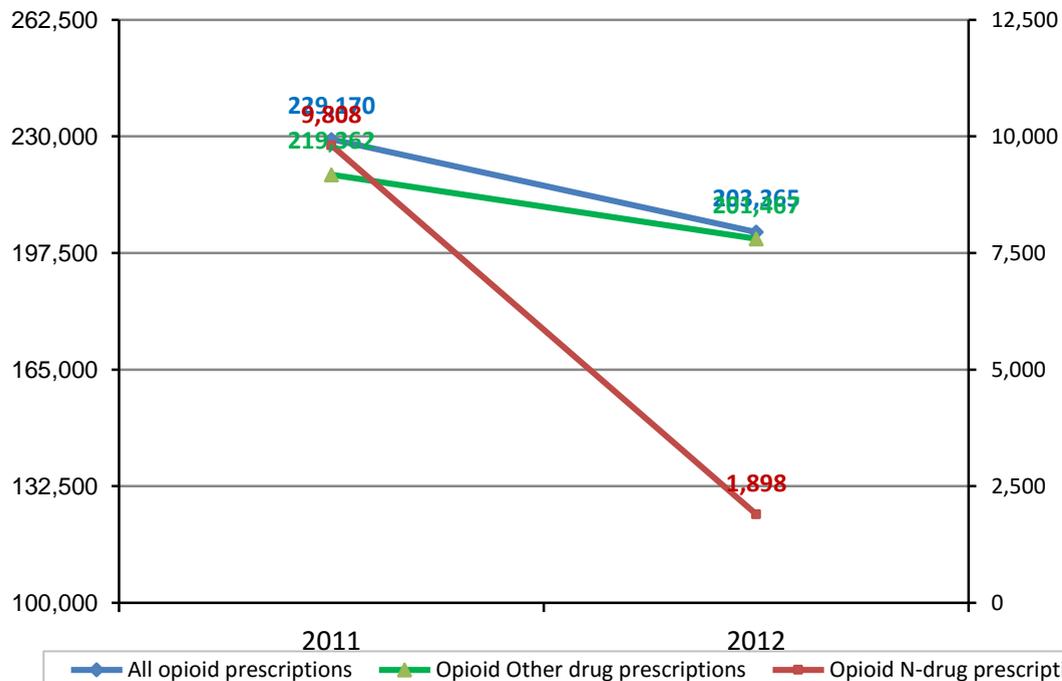
- ◆ All opioid prescriptions
- ▲ Opioid Other drug prescriptions
- Opioid N-drug prescriptions

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Change in the number of opioid prescriptions, by injury year (Sept.–Aug.)

All/Other drugs

N-drugs

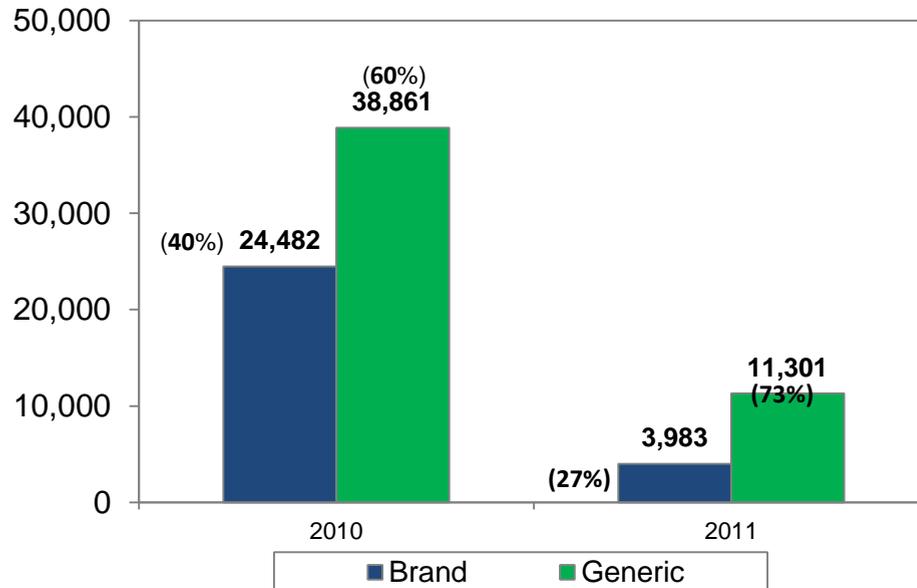


**Change from 2010 (Pre-formulary) to 2011 (Post-formulary)**

- Opioid prescriptions fell 11%
- Other opioid prescriptions fell 8%
- N-drug opioid prescriptions fell 81%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2016.

# Generic substitution: prescriptions of N-drugs, by injury year (Sept.–Aug.)



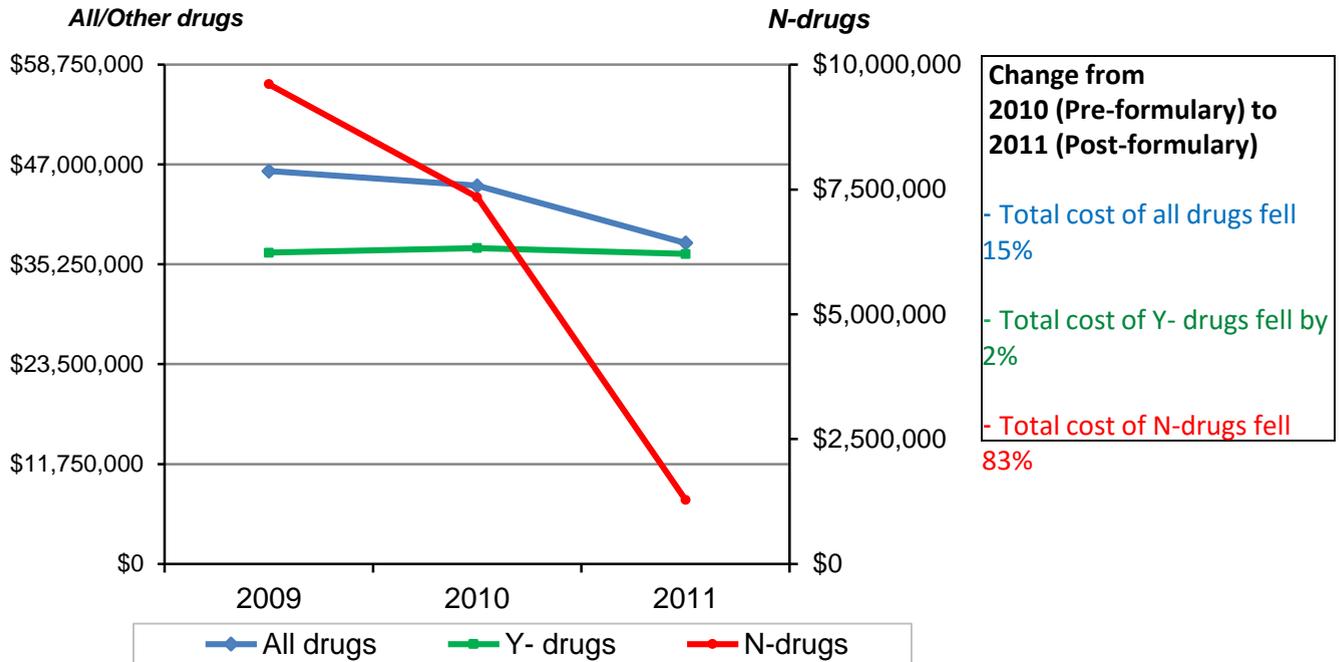
**Change from  
2010 (Pre-formulary) to  
2011 (Post-formulary)**

-Generic substitution rate for  
N-drugs increased from 60%  
to 73%

- Use of brand drugs  
decreased from 40% to 27%

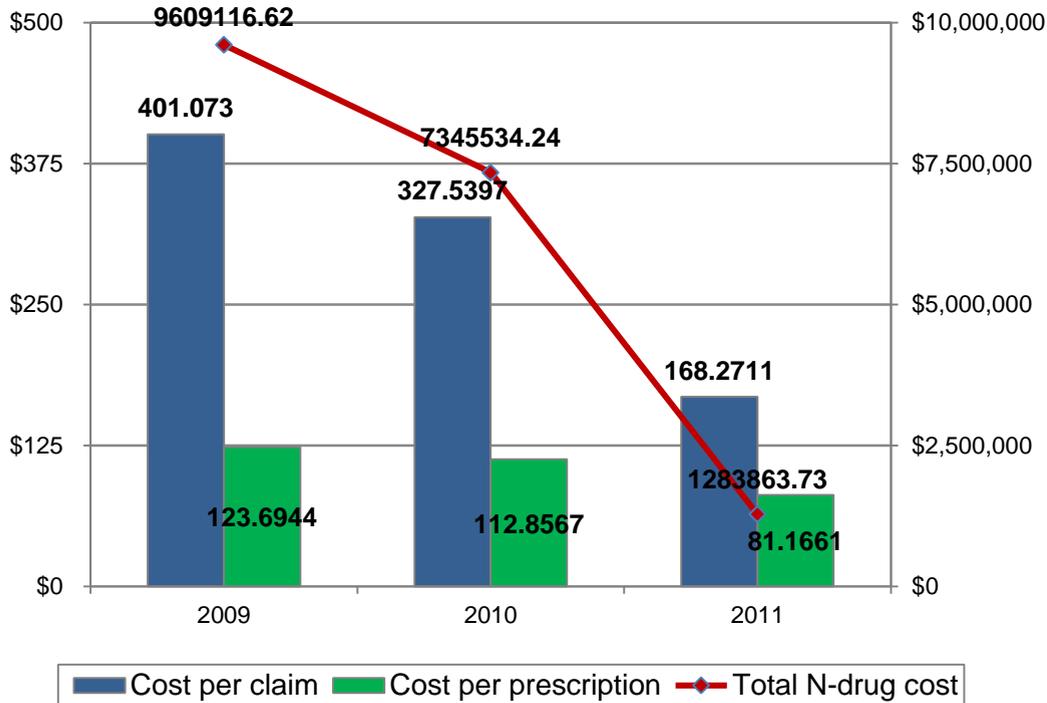
Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Total costs by injury year (Sept.–Aug.)



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Total and average costs: N-drugs, by injury year (Sept.–Aug.)

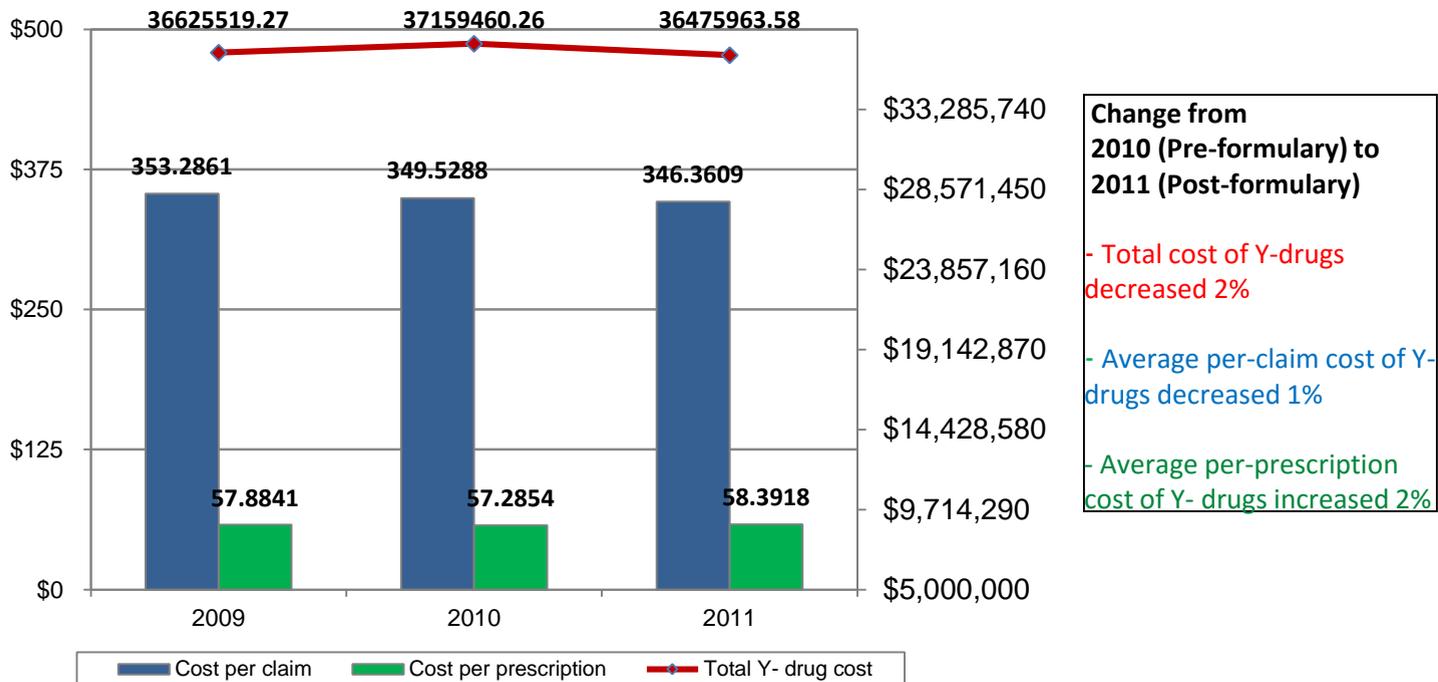


**Change from 2010 (Pre-formulary) to 2011 (Post-formulary)**

- Total cost of N-drugs fell 83%
- Average per-claim cost of N-drug fell 49%
- Average per-prescription cost of N-drug fell 28%

Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

# Total and average costs: Y- drugs, by injury year (Sept.–Aug.)



Source: Texas Department of Insurance, Workers' Compensation Research and Evaluation Group, 2015.

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**Louisiana Property and Casualty Insurance Commission**  
**Notice of Meeting and Agenda**  
**Wednesday, November 16, 2016 at 10:00 A.M.**  
**Department of Insurance – Plaza Hearing Room**

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- I. Call to Order**
- II. Roll Call**
- III. Discussions and Presentations**
  - A. Presentation by Mark Joiner, Administrator of the La. State Uniform Construction Code Council, and Butch Browning, Jr., State Fire Marshal, on the current status of building codes in Louisiana**
  - B. Presentation by Gary Patureau, Exec. Dir. of the Louisiana Association of Self-Insured Employers (LASIE), on the Medicare Secondary Payer Act**
  - C. Review of 2016 Legislative Recommendations and Legislation**
  - D. Review of the 2015-16 Annual Report**
  - E. Discussion of Any Other Matters**
- IV. Public Comments**
- V. Dates for Future Meetings—December 14, 2016 at 10:00 a.m.; February 1, 2017 at 10:00 a.m. (vote on recommendations for the annual report)**
- VI. Adjournment**

# **Louisiana Property and Casualty Insurance Commission**

## **Minutes of the Meeting of the Commission**

**Wednesday, November 16, 2016 @ 10:00 A.M.**

**Department of Insurance – Plaza Hearing Room**

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Present were the following:

Members: Commissioner Donelon, Lou Fey (Chairman), Jeff Albright (Vice Chairman), Rep. Talbot, Ray Aleman, Shawn Collins (for Lee Ann Alexander), Marc Carter, Will Grubbs Jr., Michael Guy, Chris Haik, Pauline Williams (for Dir. Sheral Keller), Ron Henderson, Leslie Sallean, Mike Baron (for Dr. Katara Williams), Ann Metrailer.

Commission Staff: Tom Travis and Ron Williams.

LDI Staff: Warren Byrd, Ileana Ledet, Charles Hansberry, Patrick Bell.

Others: David Marcase (House Insurance Staff) and Phyllis Perron.

The Chairman called the meeting to order at 10:10 a.m.

The Director called the roll and reported the absence of a quorum. (Later arriving members created a quorum.)

The Chairman welcomed everyone in attendance.

Presentation on the Louisiana State Uniform Construction Code:

Mark Joiner, Administrator, Louisiana State Uniform Construction Code Council

Butch Browning, State Fire Marshal

The Louisiana State Uniform Construction Code Council (LSUCCC) is the body vested by law with the task of maintaining the Louisiana State Uniform Construction Code (LSUCC), which is a statewide code based on national and international standards. The LSUCCC meets regularly in Baton Rouge and consists of 19 members with one representing the insurance industry. Louisiana is one of four states with a uniform statewide fire code. The state averages three to five deaths a year in commercial buildings usually attributable to a code compliance issue. The State Fire Marshal does about 20,000 plan reviews each year for life, safety, and egress compliance.

Mr. Joiner and Chief Browning impressed upon the members the importance of strong building codes and their enforcement to insurance rates and public safety.

Presentation on Medicare Secondary Payer Act: *Liability MSAs: Will they become a reality?*

Gary Patureau, Exec. Dir. of the Louisiana Association of Self-Insured Employers

Jennifer Jordan, JD, CMSP, General Counsel, MEDVAL, LLC (phone)

Christine McPherson Melancon, RN, CM, MSCC, CMSP, CNLCP, VP of Operations, Ez-MSA (phone)

The Medicare Secondary Payer (MSP) Act (42 U.S.C. 1395y(b)(2)) prevents Medicare from paying when there is another party liable for medical payments. In workers' compensation settlements, parties often allocate money to future medical care in a Medicare Set-Aside (MSA) that is sometimes approved by the Centers for Medicare and Medicaid Services (CMS). The practice is less common in liability cases. In workers' compensation cases a variety of issues have arisen particularly in areas where the calculation of future benefits is different in state law and in the guidance from CMS. In the liability arena, these issues only get worse with comparative fault, attorney fees and costs of obtaining a judgment or settlement, insurance policy limits, multiple types of damages, and other issues that complicate such cases. The consideration of Medicare issues has the potential to increase costs of insurance.

Mr. Patureau will work with the LPCIC on possible recommendations to the legislature on these issues.

Review of Legislative Recommendations for the 2016 Regular Session and the Annual Report:

The Director, Tom Travis, briefly reviewed a draft of the entry for the next Annual Report regarding the LPCIC recommendations to the legislature for 2016. There was no legislation passed on the subjects of residential property insurance mediation or civil jury threshold. There was none introduced on the subjects of direct action or uninsured/underinsured motorist (UM) coverage.

The legislature passed three bills related to recommendations in the Annual Report. Act 262 requires that temporary housing for temporary workers comply with the Louisiana Industrialized Building Act to the extent not subject to other rules. Act 472 increased fines for certain uses of wireless devices while operating a motor vehicle. Act 445 raised fines for the failure to wear a seatbelt.

The Annual Report was presented and briefly discussed.

There being no objection, the Chairman adjourned the meeting at 11:50 a.m.

## Addendum: Biographies of the Presenters on the Medicare Secondary Payer Act

### **Jennifer Jordan, JD, CMSP**

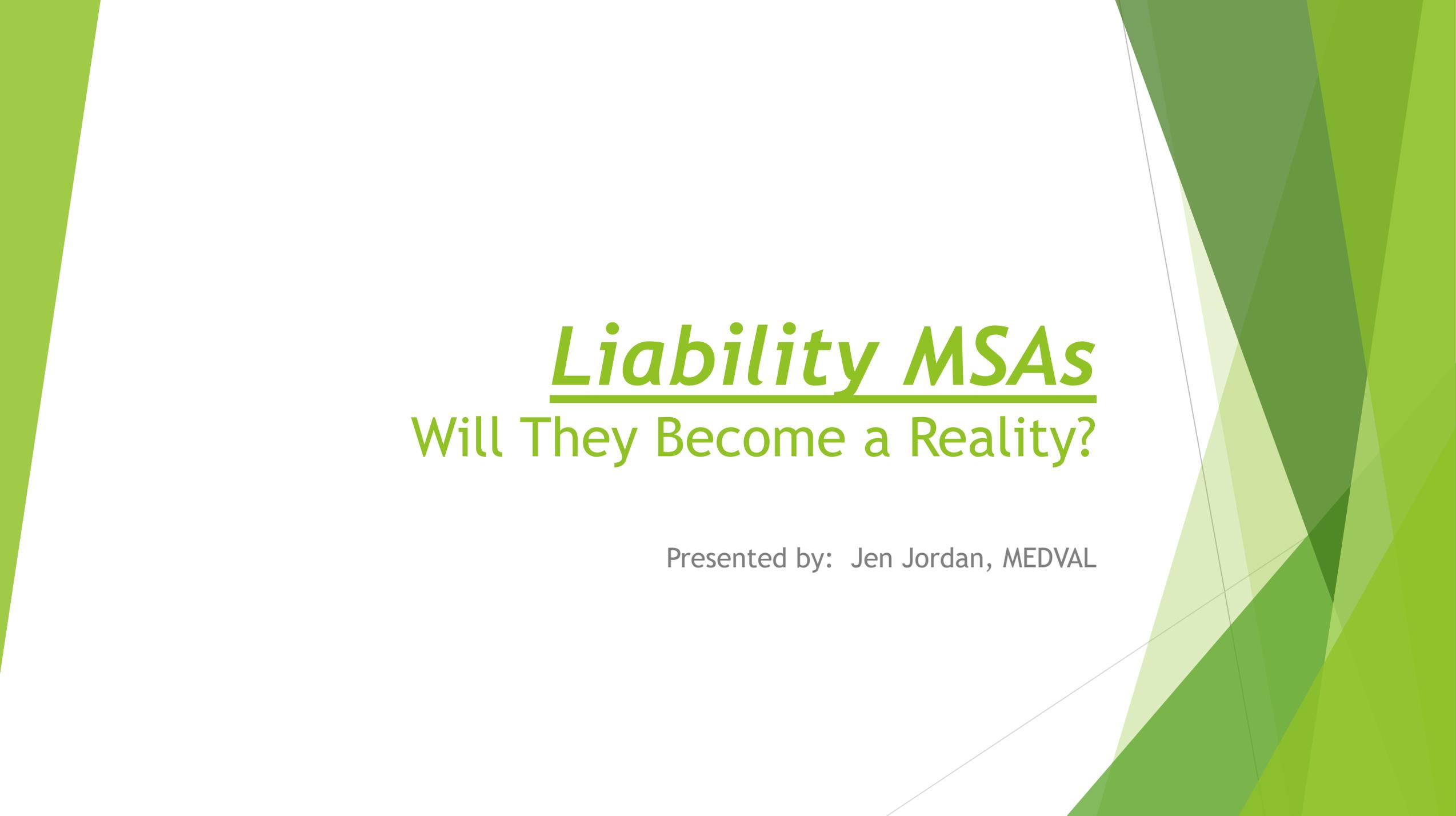
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Jennifer Jordan is general counsel of MEDVAL, LLC, a consulting firm specializing in Medicare Secondary Payer (MSP) compliance issues in insurance settlements. She possesses extensive knowledge relative to Medicare set-aside allocation recommendation and administration, conditional payment recovery and negotiation, MMSEA reporting requirements, and the underlying statutory, regulatory and administrative policies that serve as the basis of the MSP programs administered by the Centers for Medicare and Medicaid Services. Jennifer has been recognized as an expert of MSP issues by the US Department of Justice, is a frequent presenter of continuing education programs nationwide, and has been an invited author for insurance industry publications nationwide, inclusive of serving as the Editor-in-Chief of The Complete Guide to Medicare Secondary Payer Compliance published by LexisNexis. Jennifer received a 2010 Workers' Compensation Notable Person Award from LexisNexis, recognizing her as a visionary for her efforts in attempting to educate the industry in order to overcome the challenges the MSP and CMS have created in insurance settlements. Jennifer possesses an economics degree from the Virginia Polytechnic Institute & State University, and a JD and an MBA from the University of Baltimore, where she was both on Law Review and Editor-in-Chief of the Intellectual Property Law Journal. Additionally, she maintains a life insurance license for structured settlement purposes and is certified by the International Commission on Health Care Certification as a Medicare Set-Aside Certified Consultant and by LASIE as a Certified Medicare Secondary Payer Professional.

### **Christine McPherson Melancon, RN, CM, MSCC, CMSP, CNLCP**

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Christine M. Melancon is the Vice President of operations for Ez-MSA, a company specializing in Medicare Set-Asides as well as other products which assist clients with Medicare Secondary Payer (MSP) compliance. Christine is a proud graduate of Charity Hospital School of Nursing in New Orleans, La., and is a registered nurse who holds certifications as a case manager (CCM), as well as a Medicare Set Aside Consultant Certified (MSCC), and was among the first in group of those who obtained the Certified Medicare Secondary Payer Professional (CMSP) designation. In addition, Christine has earned her designation as a Certified Nurse Life Care Planner (CNLCP). Christine is a member of NAMSAP (Annual Meeting Sub-Committee), the American Association of Nurse Life Care Planners, and the Louisiana Association of Self Insured Employers (LASIE). Christine is an MSCC certified instructor through the International Commission for Health Care Certification and has served as a mentor to a multitude of individuals new to MSP compliance issues, including allocators, brokers, adjusters, and attorneys.

The background features abstract, overlapping green geometric shapes in various shades, creating a modern and dynamic feel. The shapes are primarily triangles and polygons, some solid and some semi-transparent, arranged in a way that suggests movement and depth.

# *Liability MSAs*

## Will They Become a Reality?

Presented by: Jen Jordan, MEDVAL

# Medicare Secondary Payer Compliance

Medicare is statutorily prohibited from making payments when there is another responsible payer

[see 42 U.S.C. 1395y(b)(2)]

- ▶ Group health
- ▶ Workers' compensation
- ▶ Liability insurance
- ▶ Auto
- ▶ PIP / Med-pay
- ▶ Self-insurance (includes if you simply do not have insurance)
- ▶ etc. - basically any person or entity with a legal liability to pay for medical expenses must pay before Medicare, the *Payer of Last Resort*
- ▶ ***NOTE that WC was excluded in the original Medicare Act passed in 1965 - all other forms of insurance were added in 1980***

# Medicare Secondary Payer Compliance

In workers' compensation settlements, Medicare's exclusion is equal to the future medical allocation

[see 42 C.F.R. 411.46]

- ▶ *If the settlement agreement allocates certain amounts for specific future medical services, Medicare does not pay for those services until medical expenses related to the injury or disease equal the amount of the lump-sum settlement allocated to future medical expenses*

*No similar regulation in Subpart D of the CFR that governs Medicare's exclusion for liability and no-fault insurance*

# Medicare Secondary Payer Compliance

There is no statutory or regulatory obligation, state or federal, to “protect Medicare’s interests”

There is no legal requirement in any state to obtain CMS approval of a WCMSA (although may need to get approval of settlement)

The amount of the future medical allocation is governed by state WC laws that permit the termination of medical benefits, not the MSP

# Liability MSAs

- ▶ Not as straight forward as workers' compensation MSAs where most jurisdictions provide no-fault coverage with lifetime medical benefits
  - ▶ Comparative vs. contributory negligence issues
  - ▶ Statutory caps & policy limits
  - ▶ Eggshell plaintiffs
- ▶ No longer just indemnity & medical of only injured party - other types of damages competing for settlement dollars
- ▶ Procurement costs considerations will be more significant in contingency fee situations
- ▶ Multiple defendants settling at different times?
- ▶ CMS still hasn't mastered WC, what can they possibly do with this??

# Medicare Set-Asides

- ▶ Medicare is statutorily excluded from making payments when there is another available payer to the extent of the legal obligation (i.e., if workers' compensation provides for lifetime treatment, Medicare never has to pay again).
- ▶ Compensation provided in exchange for release from future medical liability is the exclusion, regardless of whether you call it an MSA or not.
- ▶ Obtaining CMS approval of an MSA is merely an additional conservative step to ensuring that the government agrees that the amount set-aside for future medical expenses is adequate.
- ▶ CMS approval however carries an inherent cost as you must calculate certain services, frequencies and prices in a manner dictated by CMS sometimes beyond what state WC law would provide.

# WCMSA vs. LMSA

- ▶ Lifetime medical
- ▶ State law
- ▶ Voluntary CMS program available
- ▶ Commutation of future benefits

Policy limits, statutory caps,  
comparative fault

Contract law

No current formal program

Rarely pays full compensation

# Medicare Advantage Recoveries

- ▶ Medicare Advantage is Medicare for MSP purposes
- ▶ MAOs granted the same powers at the Secretary of HHS for recovery purposes
- ▶ However, MAOs are not following the same procedures:
  - ▶ Making demands with no specificity
  - ▶ Demanding payment within 30 days and immediately filing PCA for double damages
  - ▶ Pursuing the double damages even after payment made if paid after suit filed
  - ▶ Assigning receivables to collection agencies
- ▶ Case law, based upon Chevron deference, gives MAO standing to bring PCA
- ▶ Handle MAO demands with caution until this issue is resolved by the courts or Congress
- ▶ Recent 11<sup>th</sup> Circuit appellate case ruled mere existence of the no-fault insurance policy was sufficient to demonstrate responsibility of purposes of establishing standing for MAO to sue for double damages even though compensability of claim in question

# MAOs & PIP/Med-pay

- ▶ Litigation in southern Florida highlighting yet another ambiguity in MAO recovery rights.
- ▶ Demonstrates little regard for proper claim filing procedures or policy limits
- ▶ Recent case law says existence of policy sufficient for standing to file the suit even though liability to pay not demonstrated in pleadings
- ▶ Alleging priority in policy limit exhaustion
- ▶ Be cautious of nuisance settlements - attempting to call those confessed judgments
- ▶ Also be aware that if the MAO already filed suit prior to your payment, litigation may still continue to collect the double portion

# HR 6120: The Secondary Payer Advancement, Rationalization, and Clarification (SPARC) Act

## Proposed changes to Medicare Part D:

- ▶ Primary payer ceases to be responsible for drugs after ORM terminated & Medicare Part D is primary
- ▶ CMS can only recover for past Part D payments
- ▶ 3 year statute of limitations and procurement cost reduction
- ▶ CMS must share Section 111 data with PDP within 15 days of receipt
- ▶ Provisions to include PDP recovery in webportal to determine final amount

Serious yet unintended implications on MSAs - unfortunately compensability is driven by underlying legal obligations so won't stop demands for future Rx damages, just means claimants could pocket the proceeds & use Part D instead

[i.e., legislation itself shifts burden of future Rx to Medicare]

# Cost of LMSAs?

- ▶ Will delay settlements - raising MSA issues scares parties
  - learning curve difficult for those who don't understand
  - unlearning what they think they know is even worse
- ▶ Will likely increase costs - those who believe WCMSAs are done right will demand full compensation in the “interest” of Medicare” (& when that happens, most insurers pay)

**BUT** neither of those things should happen

The Medicare exclusion should be governed by the damages allocated to future medical expenses. **IF** done fairly and reasonably and the calculation methodology defensible, there should be no risk of post-settlement government actions.

**MSP does not create additional damages - the underlying state laws drive claims**

Cannot let the federal government shift the burden of their Medicare obligations onto the private sector

# QUESTIONS?

Jen Jordan, Esq., MSCC, CMSP

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**Louisiana Property and Casualty Insurance Commission**  
**Notice of Meeting and Agenda**  
**Wednesday, December 14, 2016 at 10:00 A.M.**  
**Department of Insurance – Plaza Hearing Room**

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- I. Call to Order**
- II. Roll Call**
- III. Discussions and Presentations**
  - A. Update on Federal Involvement in Insurance Regulation (by phone with NAIC Washington, DC office)**
  - B. Discussion of Private Flood Insurance and NFIP Reauthorization**
  - C. Update on NAIC Fall National Meeting**
  - D. Discussion of Any Other Matters**
- IV. Public Comments**
- V. Dates for Future Meetings—February 1, 2017 at 10:00 a.m. (vote on recommendations for the annual report)**
- VI. Adjournment**

# **Louisiana Property and Casualty Insurance Commission**

## **Minutes of the Meeting of the Commission**

**Wednesday, December 14, 2016 @ 10:00 A.M.**

**Department of Insurance – Plaza Hearing Room**

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Present were the following:

Members: Lou Fey (Chairman), Jeff Albright (Vice Chairman), Rep. Talbot, Ray Aleman, Shawn Collins (for Lee Ann Alexander), Marc Carter, Capt. Maurice Bostick (for Sheriff Champagne); Will Grubbs Jr., Michael Guy, Chris Haik, Pauline Williams (for Dir. Sheral Keller), Ron Henderson, Leslie Sallean, Mike Baron (for Dr. Katara Williams), Ann Metrailer.

Commission Staff: Tom Travis and Ron Williams.

LDI Staff: Charles Hansberry, Patrick Bell, Danielle Blanchard.

Others: David Marcase (House Insurance Staff) and Phyllis Perron.

The Chairman called the meeting to order at 10:00 a.m.

The Director called the roll and reported the presence of a quorum.

The Chairman welcomed everyone in attendance.

Presentation on Federal Involvement in Insurance Regulation and Discussion of Private Flood Insurance and NFIP Reauthorization:

Brooke Stringer, Financial Policy and Legislative Advisor, National Association of Insurance Commissioners (NAIC) Washington, DC

Ms. Stringer discussed legislation in the 114<sup>th</sup> Congress that addressed issues of insurance regulation. There were several bills that addressed issues of international standards and covered agreements pursuant to the Federal Insurance Office Act of 2010, a part of the Dodd-Frank Act. None were passed by the outgoing congress, but they will likely be reintroduced in some form in the 115<sup>th</sup> Congress. Rep. Hensarling, the chairman of the House Financial Services Committee, published a discussion draft of legislation that would make substantial changes to the Dodd-

Frank Act, abolish the Federal Insurance Office, and create an independent insurance advocate at the federal level.

Ms. Stringer discussed the Draft House Republican Principles for Flood Insurance reauthorization and Reform and the NAIC Principles for National Flood Insurance Program (NFIP) Reauthorization. (Both of which are attached.)

Ms. Stringer also discussed the Joint Notice of Proposed Rulemaking, Loans in Areas Having Special Flood Hazards: Private Flood Insurance. 81 Fed. Reg. 78063 (Nov. 7, 2016). The NAIC supports the development of a market for private flood insurance that does not infringe on state regulation of private insurance.

Update on NAIC Fall National Meeting.

The Director, Tom Travis, provided an update on property and casualty insurance issues covered at the NAIC Fall National Meeting.

There being no objection, the Chairman adjourned the meeting at 11:10 a.m.

## NAIC PRINCIPLES FOR NATIONAL FLOOD INSURANCE PROGRAM (NFIP) REAUTHORIZATION

The current NFIP reauthorization expires on September 30, 2017 and Congress will be considering potential changes and improvements to the program as part of the reauthorization process. The NFIP seeks to decrease the costs and consequences of flooding for policyholders while at the same time encouraging flood mitigation and reducing the dependence on federal disaster assistance. Given these objectives, Congress faces the challenge of trying to maintain a balance between improving the financial solvency of the program and reducing taxpayer exposure while also being mindful of affordability concerns. Congress will have to tackle the tension between risk based pricing practices and affordable rates. As Congress wrestles with how to address these challenges, state insurance regulators stand ready to assist. We encourage Congress to consider the following recommendations for reauthorizing the NFIP as part of a comprehensive approach to address the nation's flood risk.

- Support a long-term reauthorization of the NFIP to avoid short-term extensions and program lapses that create uncertainty in the insurance, housing and commercial lending markets.
- Encourage greater growth in the private flood insurance market as a complement to the NFIP to help provide consumers with more choices.
  - Support passage of the Flood Insurance Market Parity and Modernization Act (H.R. 2901/S. 1679) that clarifies private flood insurance meets the mandatory purchase requirement; that state insurance regulators have the same authority and discretion to regulate private flood insurance as they have with other similar insurance products; and that private flood insurance meets the continuous coverage requirement so policyholders have a choice to return to the NFIP without penalty, including not losing any subsidy they previously had with the NFIP.
  - Require FEMA to reinstate its prior rules allowing policyholders to cancel their NFIP policies mid-term and receive refunds on a pro-rated basis if they decide to replace their NFIP policies with private flood insurance.
  - Require FEMA to share NFIP information, including claims, elevation, and mapping data, with state insurance regulators, insurers, modelers, advisory, statistical and rating organizations in order for the private market to be able to accurately assess flood risks.
  - Require FEMA to eliminate the non-compete clause to allow the Write Your Own (WYO) insurance companies to sell private flood insurance outside of the NFIP.
- Review current NFIP training requirements for insurance producers in consultation with state insurance regulators who are tasked with licensing producers who sell NFIP policies. Ensure that any NFIP training is accurate and consistent with regard to the existence and availability of private flood insurance.
- Encourage support for mitigation planning, including mitigation discounts, such as premium discounts or insurance rate reductions to persons who build, rebuild, or retrofit certain residential properties to better resist flood events, and legislative efforts such as the Disaster Savings

Accounts Act (H.R. 2230) to allow individuals to set aside funds in a tax-preferred savings account for disaster mitigation and recovery expenses.

- Encourage careful consideration of affordability issues and the impact of NFIP policy changes on current NFIP policyholders. Certain actions should be considered within the reauthorization to address affordability, for example, potentially including continuation by FEMA of its NFIP grandfathering provisions or implementing means-tested discounts coupled with rate reform.
- Require FEMA to provide increased transparency to all stakeholders regarding its decision making process for developing and updating its flood maps and rate making.
- Encourage a coordinated effort between the public and private sector to increase overall take up rates of flood insurance, including facilitating opportunities to educate consumers about flood insurance policy options. Implement methods to ensure better compliance with the federal mandatory purchase requirement and encourage the purchase of flood insurance for those outside of special flood hazard areas.
- Consider requiring a study on alternative approaches to the flood insurance program structure, including, but not limited to, transitioning the NFIP into a residual market or a reinsurance backstop, as well as addressing issues related to the NFIP debt. The study should include an assessment of the implications of such changes on affordability, availability, the federal budget, taxpayer exposure, and the flood insurance marketplace.

**DRAFT**  
**Principles for Flood Insurance Reauthorization and Reform**  
**December 2016**

**Provide market stability through reauthorization of the National Flood Insurance Program (NFIP)**

- Reauthorize the NFIP and National Flood Mapping Program.
- Create stability in real estate markets with a defined authorization period. Between 2008 and 2012, the NFIP has been extended 17 times, and the program has lapsed 4 times during that same time period, creating needless uncertainty in the residential and commercial real estate sectors in communities across the country.

**Place NFIP on sound fiscal footing**

- Require mandatory use of reinsurance or capital markets alternatives at levels commensurate with the risk profile of the book of business, thereby providing additional taxpayer protections for major losses.
- Actively manage NFIP financial risks. Due to large scale flood disasters, the cost of flood insurance policy claims has far exceeded the amount of premiums and fees received. As a result, the NFIP has incurred debt of \$23 billion to the U.S. Treasury.
- Require risk-transfer to protect taxpayer funds. Reinsurance and capital markets alternatives can be important financial risk management tools used by FEMA to protect the NFIP from large losses and diversify risk across multiple markets. NFIP's use of all forms of risk transfers across multiple private sector markets will enable the NFIP to better withstand catastrophic events.

**Provide greater transparency, stronger public/private partnerships, and greater consumer choice to achieve public policy objectives**

- Pass the *Flood Insurance Market Parity and Modernization Act* (Ross/Murphy) in an effort to continue to grow a private flood insurance market.
- Require the elimination of the non-compete clause to allow Write Your Own companies to better develop and grow private flood insurance products and markets.
- Repeal mandatory coverage requirement for commercial properties.
- Phase out over time NFIP coverage for those residential and commercial structures over the maximum allowable coverage limits in replacement cost value.

**Provide a more open insurance rate-setting process**

- Require public process to disclose methodology and rationale for the establishment of NFIP rates and premiums.
- Promote transparency and accountability by requiring FEMA to hold public meetings and explain its premium rate structures.
- Align the NFIP with private sector practices by using replacement value of the structure, on a property-by-property basis, when calculating premiums.
- Enhance combination of risk assessment tools and mapping to determine more accurate premiums.

**DRAFT**  
**Principles for Flood Insurance Reauthorization and Reform**  
**December 2016**

**Update and reform mitigation and mapping process**

- Require the Technical Mapping Advisory Council (TMAC) to develop map standards for FEMA and non-government entities, thereby giving communities additional avenues to bypass the FEMA mapping process and develop maps that use the most updated community data and technology.
- Modernize and create greater flexibility for mitigation assistance, including adjustments to the Increased Cost of Compliance (ICC) program.
- Add flexibility in mitigation programs, including consideration of voluntary buy-outs in pre-disaster stage for severe repetitive loss properties owned by low and very low income families.

DRAFT

**Louisiana Property and Casualty Insurance Commission**  
**Notice of Meeting and Agenda**  
**Wednesday, February 1, 2017 at 10:00 A.M.**  
**Department of Insurance – Plaza Hearing Room**

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- I. Call to Order**
- II. Roll Call**
- III. Discussions and Presentations**
  - A. Discussion on Opioids—Director Kellar, OWCA**
  - B. Discuss and Vote on Recommendations for 2017**
    - 1. Maintain or strengthen the Uniform Construction Code**
    - 2. Distracted driving—ban manual use of handheld electronic devices**
    - 3. Reduce civil jury threshold**
    - 4. Repeal or amend direct action statute**
    - 5. Opioid abuse—enact workers’ compensation pharmacy formulary**
    - 6. Other recommendations**
  - C. Discuss and Vote on Study Topics for 2017**
    - 1. Sharing economy**
    - 2. Cybersecurity and insurance**
    - 3. Driverless vehicles**
    - 4. Private flood insurance and NFIP reauthorization**
    - 5. Federal involvement in and effects on insurance and its regulation**
    - 6. Third party litigation funding**
    - 7. Bad faith damages**
    - 8. Collateral source rule**
    - 9. Other study topics**
  - D. Discussion of Draft Annual Report**
  - E. Topics for Future Meetings**
  - F. Discussion of Any Other Matters**
- IV. Public Comments**
- V. Dates for Future Meetings—none scheduled**
- VI. Adjournment**

# **Louisiana Property and Casualty Insurance Commission**

## **Minutes of the Meeting of the Commission**

**Wednesday, February 1, 2017 @ 10:00 A.M.**

**Department of Insurance – Plaza Hearing Room**

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Present were the following:

Members: Commissioner Donelon, Lou Fey (Chairman), Jeff Albright (Vice Chairman), Rep. Huval, Rep. Talbot, Ray Aleman, Shawn Collins, Marc Carter, Jamie Bourg (for Paul Buffone), Ricky Edwards (for Sheriff Champagne); Will Grubbs Jr., Michael Guy, Chris Haik, Director Sheral Keller, Ron Henderson, Leslie Sallean, Mike Baron (for Dr. Katara Williams), Ann Metrailler.

Commission Staff: Tom Travis and Ron Williams.

LDI Staff: Charles Hansberry, Patrick Bell, Danielle Blanchard, Rich Piazza, Gayle Raby, Latoya Middleton.

Others: David Marcase (House Insurance Staff), Chuck Davoli, Jennifer Marusak, Kevin Cunningham, Gary Patureau, Andy Condrey, Wanda Freedman, and Phyllis Perron.

The Chairman called the meeting to order at 10:00 a.m.

The Director called the roll and reported the presence of a quorum.

The Chairman welcomed everyone in attendance.

Presentation and Discussion on Opioids:

Sheral Keller, Director, Office of Workers' Compensation Administration (OWCA), Louisiana Workforce Commission

Director Keller discussed alternatives to a closed pharmacy formulary for addressing the large number of prescriptions of opioids in workers' compensation. She presented information from the National Council of Compensation Insurers (NCCI) on opioid spending in Louisiana and nationwide. She also presented her perspective as the director of the OWCA and ensuring that any pharmacy program works with the medical treatment guidelines adopted in Louisiana.

## Discussion and Vote on Recommendations for 2017

1. Maintain or strengthen the Uniform Construction Code.

Mr. Fey and Rep. Huval each spoke briefly in support of building codes and the benefits derived from them in windstorms.

Mr. Huval moved adoption of the recommendation and Mr. Haik seconded. The motion was adopted without objection or abstention.

2. Distracted driving—ban the manual use of handheld electronic devices.

Mr. Travis directed the attention of the members to California's recently enacted AB 1785 that prohibits a person from driving a motor vehicle while holding and operating a handheld wireless telephone or electronic wireless communication device. Director Kellar asked about exceptions to which Mr. Travis replied that the exceptions were limited to certain public safety personnel. Mr. Baron of the La. Highway Safety Commission (LHSC) pointed out the difficulty of enforcing Louisiana's current laws addressing the use of handheld devices.

Mr. Grubbs moved adoption of the recommendation and Mr. Baron seconded the motion. There being no objections or abstentions, the motion was adopted.

3. Reduce civil jury threshold.
4. Repeal or amend direct action statute.

The Chair sought a motion in support of and to combine the vote on these issues. Rep. Talbot so moved and Mr. Henderson seconded. Dir. Kellar voted NO and Ms. Bourg abstained. The recommendations were adopted.

5. Opioid abuse—enact workers' compensation closed pharmacy formulary.

Jennifer Marusak of the Louisiana State Medical Society addressed the commission in opposition. She stated that the experience of Texas with a closed formulary has not been good. Several of the reforms in Louisiana workers' compensation were only recently fully implemented and should be given a chance to work.

Chuck Davoli, Vice Chairman of and labor representative on the Workers' Compensation Advisory Council, addressed the commission in opposition. He stated that a closed formulary denies medications to injured workers and creates a dual standard of care—one for injured workers' and another for everyone else. He stated that Texas is not the success story that some claim, and that many are not able to get the care they need under the current system. He

stated that in group health and Medicare, most people are subject to some type of formulary, so his objection is not to formularies in general but to the closed formulary in Texas.

Andy Condrey, claims operations manager of Gray Insurance, a Louisiana domestic insurer. He spoke on the experience of Gray Insurance, which has a substantial book of business in Texas. He stated that the implementation of the Texas closed formulary has worked quite well and that Gray Insurance has paid for alternative, non-opioid pain treatments. The doctors in Texas seldom prescribe the N-drugs and are prescribing Y-drugs or other therapies. He related his own experience with a brief use of opioids for four days and the difficulty he experienced in withdrawal.

Rep. Talbot moved the adoption of the recommendation and Rep. Huval seconded. The motion was adopted. Director Kellar voted NO and Ms. Bourg abstained.

#### Discussion and Vote on Recommendations for 2017

Director Kellar moved the adoption of the listed study topics:

1. Sharing economy
2. Cybersecurity and insurance
3. Driverless vehicles
4. Private flood insurance and NFIP reauthorization
5. Federal involvement in and effects on insurance and its regulation
6. Third party litigation funding
7. Bad faith damages
8. Collateral source rule

There being no opposition, the study topics were adopted.

Mr. Grubbs raised the issue of punitive damages for distracted driving and moved to add that to the list as a ninth topic. Director Kellar seconded the motion and there were no objections.

#### Annual Report, Future Meeting Topics, and Other Matters

Mr. Travis briefly discussed the content of the 2016-17 Annual Report and solicited comments from the members.

Mr. Travis stated that he is working on setting up a future meeting on driverless cars that may require a special meeting date to accommodate the presenters. He is also going to work on a meeting on flood insurance and an update on federal issues. He asked if the members were satisfied with the current regular meeting times.

Commissioner Donelon addressed the members on the subject of flood insurance, particularly the reauthorization of the NFIP.

There being no objection, the Chairman adjourned the meeting at 11:50 a.m.

Assembly Bill No. 1785

CHAPTER 660

An act to repeal and add Section 23123.5 of the Vehicle Code, relating to vehicles.

[Approved by Governor September 26, 2016. Filed with Secretary of State September 26, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1785, Quirk. Vehicles: use of wireless electronic devices.

Existing law prohibits a person from driving a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, as defined, unless the electronic wireless communications device is specifically designed and configured, and is used, to allow voice-operated and hands-free operation, as specified. A violation of these provisions is an infraction.

This bill would instead prohibit a person from driving a motor vehicle while holding and operating a handheld wireless telephone or a wireless electronic communication device, as defined. The bill would authorize a driver to operate a handheld wireless telephone or a wireless electronic communications device in a manner requiring the use of the driver's hand only under specified conditions. By changing the definition of a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.**

Section 23123.5 of the Vehicle Code is repealed.

**SEC. 2.**

Section 23123.5 is added to the Vehicle Code, to read:

**23123.5.**

(a) A person shall not drive a motor vehicle while holding and operating a handheld wireless telephone or an electronic wireless communications device unless the wireless telephone or electronic wireless communications device is specifically designed and configured to allow voice-operated and hands-free operation, and it is used in that manner while driving.

(b) This section shall not apply to manufacturer-installed systems that are embedded in the vehicle.

(c) A handheld wireless telephone or electronic wireless communications device may be operated in a manner requiring the use of the driver's hand while the driver is operating the vehicle only if both of the following conditions are satisfied:

(1) The handheld wireless telephone or electronic wireless communications device is mounted on a vehicle's windshield in the same manner a portable Global Positioning System (GPS) is mounted pursuant to paragraph (12) of subdivision (b) of Section 26708 or is mounted on or affixed to a vehicle's dashboard or center console in a manner that does not hinder the driver's view of the road.

(2) The driver's hand is used to activate or deactivate a feature or function of the handheld wireless telephone or wireless communications device with the motion of a single swipe or tap of the driver's finger.

(d) A violation of this section is an infraction punishable by a base fine of twenty dollars (\$20) for a first offense and fifty dollars (\$50) for each subsequent offense.

(e) This section does not apply to an emergency services professional using an electronic wireless communications device while operating an authorized emergency vehicle, as defined in Section 165, in the course and scope of his or her duties.

(f) For the purposes of this section, "electronic wireless communications device" includes, but is not limited to, a broadband personal communication device, a specialized mobile radio device, a handheld device or laptop computer with mobile data access, a pager, or a two-way messaging device.

### **SEC. 3.**

No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

## SAMPLE LAW TO PROHIBIT TEXTING WHILE DRIVING



{DATE}

The purpose of this sample legislation is to provide a framework for state legislatures to use to prohibit texting while driving. While there are many sources of driver distraction, there is heightened concern regarding the risks of texting-while-driving. The act of composing, sending or reading text messages interrupts drivers' cognitive attention, causes vision to be directed away from the road, and compromises manual control of the vehicle.

While evidence is accumulating on the effects of other sources of driver distraction, a number of states have enacted laws addressing cell phone use and/or texting while driving. Although laws alone will not fully resolve the problem, this sample language is offered as an important step in addressing the growing concern about driver distraction. As of December 2014, 169.3 billion text messages were sent in the US (includes PR, the Territories, and Guam) every month.

The U.S. Department of Transportation has held two Distracted Driving Summits in Washington, D.C. to examine the full spectrum of distracted driving across transportation modes: passenger vehicles, large trucks, trains and transit. The leading traffic safety experts, safety advocates and government officials gathered to define the problem and discuss how best to address it. The summits generated broad agreement among public and private sector organizations and policymakers about the need for texting-while-driving laws. Public surveys also confirm widespread community support for texting bans.

In further recognition of the serious risk posed by texting-while-driving and to demonstrate Federal leadership, President Obama issued an Executive Order on October 1, 2009<sup>1</sup>. The Order prohibits Federal employees from texting while driving Government owned vehicles or privately owned vehicles while on official Government business or from texting-while-driving using wireless electronic devices supplied by the Government.

Currently, 46 States, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands ban text messaging for all drivers. Fourteen states and D.C. Puerto Rico, Guam and the U.S. Virgin Islands, prohibit all drivers from using handheld cell phones while driving. However, these laws vary in their design and scope. Analysts expect that state legislatures will remain active in coming years as evidence accumulates and the call to take action on this issue becomes yet more urgent.

Texting laws are relatively new and have not been thoroughly evaluated. However, considering the rapid emergence of the problem and the growing evidence showing the threat to the safety of all road users, safety advocates and state legislatures are compelled to move forward, basing texting legislation on the broad foundation of principles learned from seat belt laws, impaired driving statutes and similar legislative initiatives, while more specific scientific evidence is gathered. This sample law reflects current circumstances and state of knowledge, but may be revised in the future to incorporate new research findings, address evolving technologies, or to harmonize with other legislation.

In addition to enacting a texting-while-driving law, states may consider other steps to address the issue, including enhanced public awareness and law enforcement programs and improved police

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<sup>1</sup> See [www.archives.gov/federal-register/executive-orders/2009-obama.html](http://www.archives.gov/federal-register/executive-orders/2009-obama.html) and click on Executive Order 13513 for more information.

crash reports that document specific distractions involved in crashes. Since the prevalence of texting is particularly high among teens, legislatures may also choose to include specific consequences under their graduated drivers licensing law for texting violations by novice drivers, such as delayed full licensure.

The following organizations participated in the development of this sample law: Advocates for Highway and Auto Safety, Alliance of Automobile Manufacturers, American Association of Motor Vehicle Administrators, American Association of State Highway and Transportation Officials, AAA, Centers for Disease Control and Prevention, CTIA- The Wireless Association, Governors Highway Safety Association, ITS America, International Association of Chiefs of Police, National Conference of State Legislatures, National Safety Council, The National Traffic Law Center of the National District Attorneys Association, Safe Kids USA, and the U.S. Department of Transportation. The sample law – either in its entirety or in its individual provisions - does not necessarily reflect the positions of any of the individual participating organizations.

## SAMPLE TEXTING WHILE DRIVING LAW



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### § 1 Short title

This act may be cited as the [State] Ban on Texting While Driving Law

### § 2 Purpose

The purpose of this subchapter is to:

- (1) Improve roadway safety for all vehicle operators, passengers, bicyclists, pedestrians and other road users;
- (2) Prevent crashes related to the act of text messaging while driving a motor vehicle;
- (3) Reduce injuries, death, property damage, health care costs, health insurance and automobile insurance rates related to motor vehicle crashes; and
- (4) Authorize law enforcement officers to stop vehicles and issue citations to persons texting while driving as a standard offense.

### § 3 Application

Except as provided in Section 4, this subchapter applies to all drivers during operation of a motor vehicle on the travel portion of public streets, roads and highways [Option: States may elect to cover only motor vehicles in motion]. This subchapter amends [insert state code] to make it unlawful to manually type or enter multiple letters, numbers, symbols or other text in a wireless communication device, or send or read data in the device, for the purpose of non-voice interpersonal communication, including texting, emailing and instant messaging.

### § 4 Exemptions

This subchapter does not apply to a driver who is:

- (1) A law enforcement, fire service, or emergency medical services professional performing official duties.
- (2) Reporting an emergency, or criminal or suspicious activity to law enforcement authorities.
- (3) Receiving messages related to the operation or navigation of a motor vehicle; safety-related information including emergency, traffic, or weather alerts; data used primarily by the motor vehicle; or radio broadcasts.
- (4) Using a device or system for navigation purposes.
- (5) Conducting wireless interpersonal communication that does not require manual entry of multiple letters, numbers, or symbols or reading text messages, except to activate, deactivate, or initiate a feature or function.

### § 5 Penalties

A driver violating this subchapter shall be subject to a penalty of:

- (1) For the 1st offense – traffic infraction or violation including a minimum fine of \$75 and action against driving privileges.
- (2) For a subsequent offense – penalties should escalate in accordance with the state's motor vehicle and traffic laws.
- (3) For any offense that results in a death or serious injury – the infraction should increase to a felony (criminal offense) with penalties consistent with state sentencing guidelines.

**Distracted Driving Laws by State**  
Updated January 2017

State	Hand-held Ban	All Cell Phone Ban		Text Messaging Ban			Crash Data
		School Bus Drivers	Novice Drivers	All Drivers	School Bus Drivers	Novice Drivers	
Alabama			16, or 17 w/ Intermediate License <6 months (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Alaska				Yes (Primary)	Covered under all driver ban		Yes
Arizona		Yes (Primary)					Yes
Arkansas <sup>1</sup>	18 - 20 years old (Primary)	Yes (Primary)	<18 (Secondary)	Yes (Primary)	Covered under all driver ban		Yes
California	Yes (Primary)	Yes (Primary)	<18 (Secondary)	Yes (Primary)	Covered under all driver ban		Yes
Colorado			<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Connecticut	Yes (Primary)	Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban		
Delaware	Yes (Primary)	Yes (Primary)	Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban		Yes
D.C.	Yes (Primary)	Yes (Primary)	Learners Permit (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Florida				Yes (Secondary)	Covered under all driver ban		Yes
Georgia		Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Guam	Yes (Primary)			Yes (Primary)	Covered under all driver ban		
Hawaii	Yes (Primary)		<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Idaho				Yes (Primary)	Covered under all driver ban		Yes
Illinois	Yes (Primary)	Yes (Primary)	<19 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Indiana			<21 (Primary) (eff. 7/2015)	Yes (Primary)	Covered under all driver ban		Yes
Iowa			Restricted or Intermediate License (Primary)	Yes (Secondary)	Covered under all driver ban		Yes
Kansas			Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Kentucky		Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Louisiana	Learner or Intermediate License (regardless of age)	Yes (Primary)	1st year of License (Primary for <18)	Yes (Primary)	Covered under all driver ban		Yes

Maine			Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Maryland	Yes (Primary)		<18 (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Massachusetts		Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Michigan		Yes (Primary)	Level 1 or 2 License (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Minnesota		Yes (Primary)	<18 w/ Learner or Provisional License (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Mississippi		Yes (Primary)		Yes (Primary)	Covered under all driver ban	Yes
Missouri						<21 (Primary) Yes
Montana						Yes
Nebraska			<18 w/ Learner or Intermediate License (Secondary)	Yes (Secondary)	Covered under all driver ban	Yes
Nevada	Yes (Primary)			Yes (Primary)	Covered under all driver ban	Yes
New Hampshire	Yes (Primary)		<18 (Primary)	Yes (Primary)	Covered under all driver ban	
New Jersey	Yes (Primary)	Yes (Primary)	Permit or Provisional License (Primary)	Yes (Primary)	Covered under all driver ban	Yes
New Mexico	In State vehicles		Learner or Provisional License (Primary)	Yes (Primary)	Covered under all driver ban	Yes
New York	Yes (Primary)			Yes (Primary)	Covered under all driver ban	Yes
North Carolina		Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban	Yes
North Dakota			<18 (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Ohio			<18 (Primary)	Yes (Secondary)	Covered under all driver ban	Yes
Oklahoma	Learner or Intermediate License (Primary)			Yes (Primary)	Covered under all driver ban	Yes
Oregon	Yes (Primary)		<18 (Primary)	Yes (Primary)	Covered under all driver ban	Yes
Pennsylvania				Yes (Primary)	Covered under all driver ban	Yes

Puerto Rico	Yes (Primary)			Yes (Primary)	Covered under all driver ban		
Rhode Island		Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
South Carolina				Yes (Primary)	Covered under all driver ban		Yes
South Dakota			Learner or Intermediate License (Secondary)	Yes (Secondary)	Covered under all driver ban		Yes
Tennessee		Yes (Primary)	Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Texas <sup>2</sup>		Yes, w/ passenger <17 (Primary)	<18 (Primary)		Yes, w/ passenger <17 (Primary)	<18 (Primary)	Yes
Utah		Yes (Primary)	<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Vermont	Yes (Primary)		<18 (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Virgin Islands	Yes (Primary)			Yes (Primary)	Covered under all driver ban		Yes
Virginia		Yes (Primary)	<18 (Secondary)	Yes (Primary)	Covered under all driver ban		Yes
Washington	Yes (Primary)		Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban		Yes
West Virginia	Yes (Primary)		<18 w/ Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Wisconsin			Learner or Intermediate License (Primary)	Yes (Primary)	Covered under all driver ban		Yes
Wyoming				Yes (Primary)	Covered under all driver ban		Yes
<b>Total States</b>	<b>14 + D.C., PR, Guam, Virgin Islands</b>  All Primary	<b>20 + D.C.</b>  All Primary	<b>38 + D.C.</b>  Primary (32 + D.C.)  Secondary (6)	<b>46 + D.C., PR, Guam, Virgin Islands</b>  Primary (41 + D.C., PR, Guam, Virgin Islands)  Secondary (5)	<b>1</b>  Primary	<b>2</b>  Primary	<b>48 + D.C., Virgin Islands</b>
<sup>1</sup> Arkansas also bans the use of hand-held cell phones while driving in a school zone or in a highway construction zone. This law is secondarily enforced.							
<sup>2</sup> Texas has banned the use of hand-held phones and texting in school zones.							