



# Medical Liability Reform: Perspective of a Physician/CEO

*Richard E. Anderson, M.D., FACP*  
March 24, 2007

- Extent of the problem
- Impact on the practice of medicine
- Cost drivers of medical malpractice insurance
- Harvard, IOM, and patient safety
- Comparison of existing reforms in California and Virginia

# Why Reform the System?



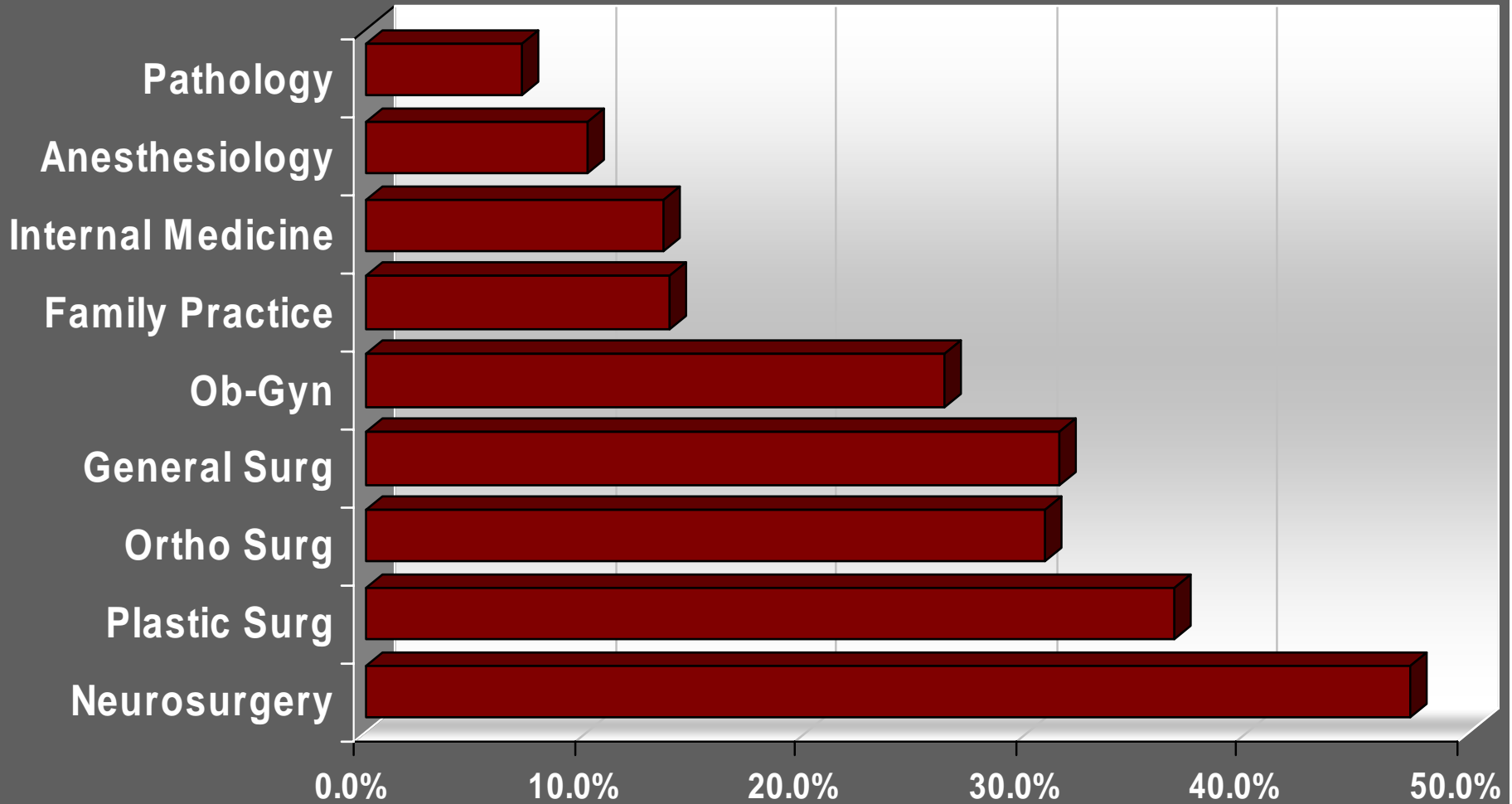
- Contain health care costs
- Increase access to care
- Reduce defensive medicine
- Protect an essential service
- Bring balance to a system that has been seriously damaged

# How Serious is the Problem?



- As we sit here today, there are more than **125,000** malpractice claims pending against America's physicians
- Next week there will be 700 more
- The **vast majority** (>75%) of malpractice claims are found to be **without merit**
- More than **50%** of all premium dollars goes to **attorneys** rather than to injured patients
- Malpractice premiums place an unfair burden on physicians

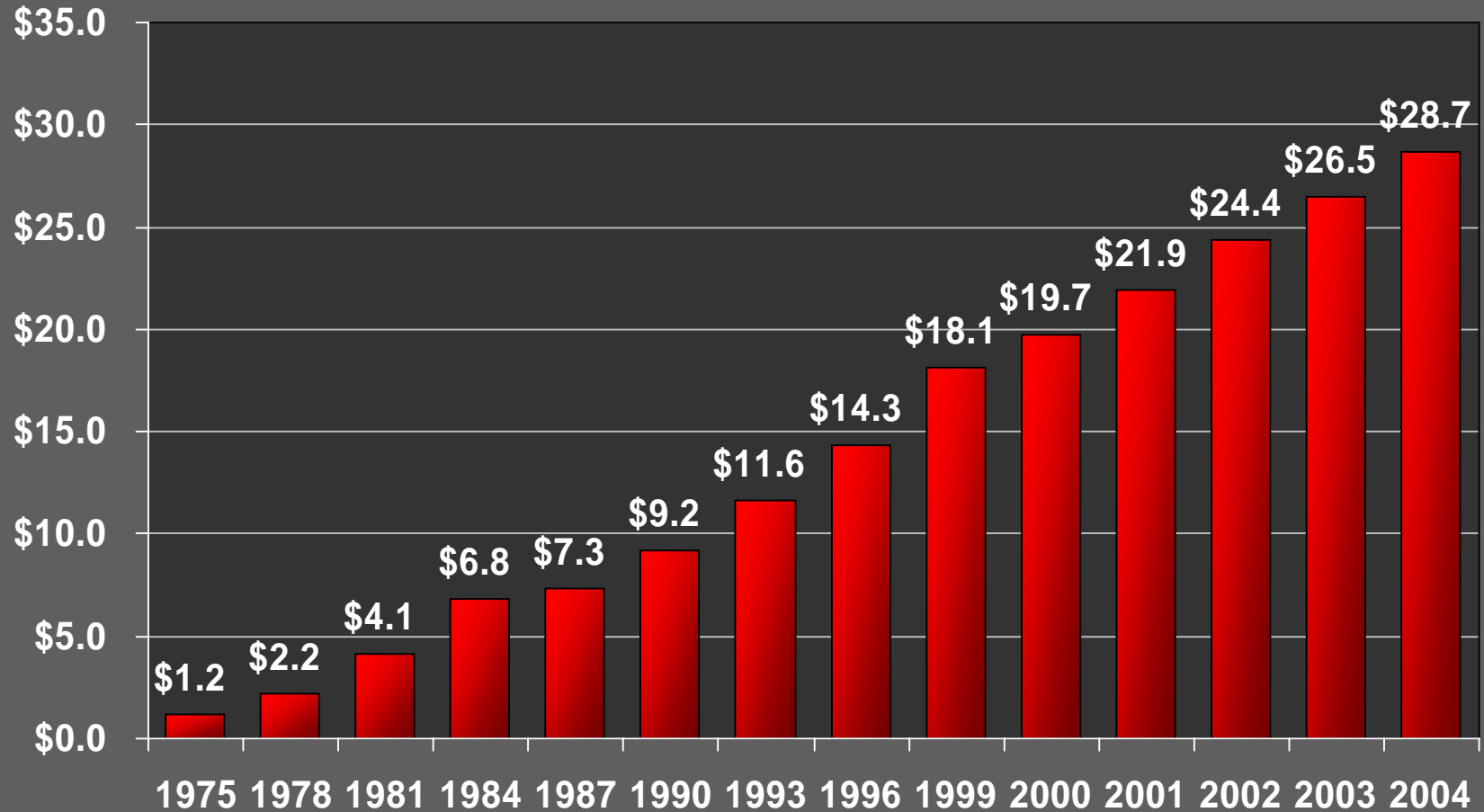
# Frequency by Specialty 1996 - 2005



# Medical Malpractice: Tort Cost Growth is Skyrocketing



\$ Billions

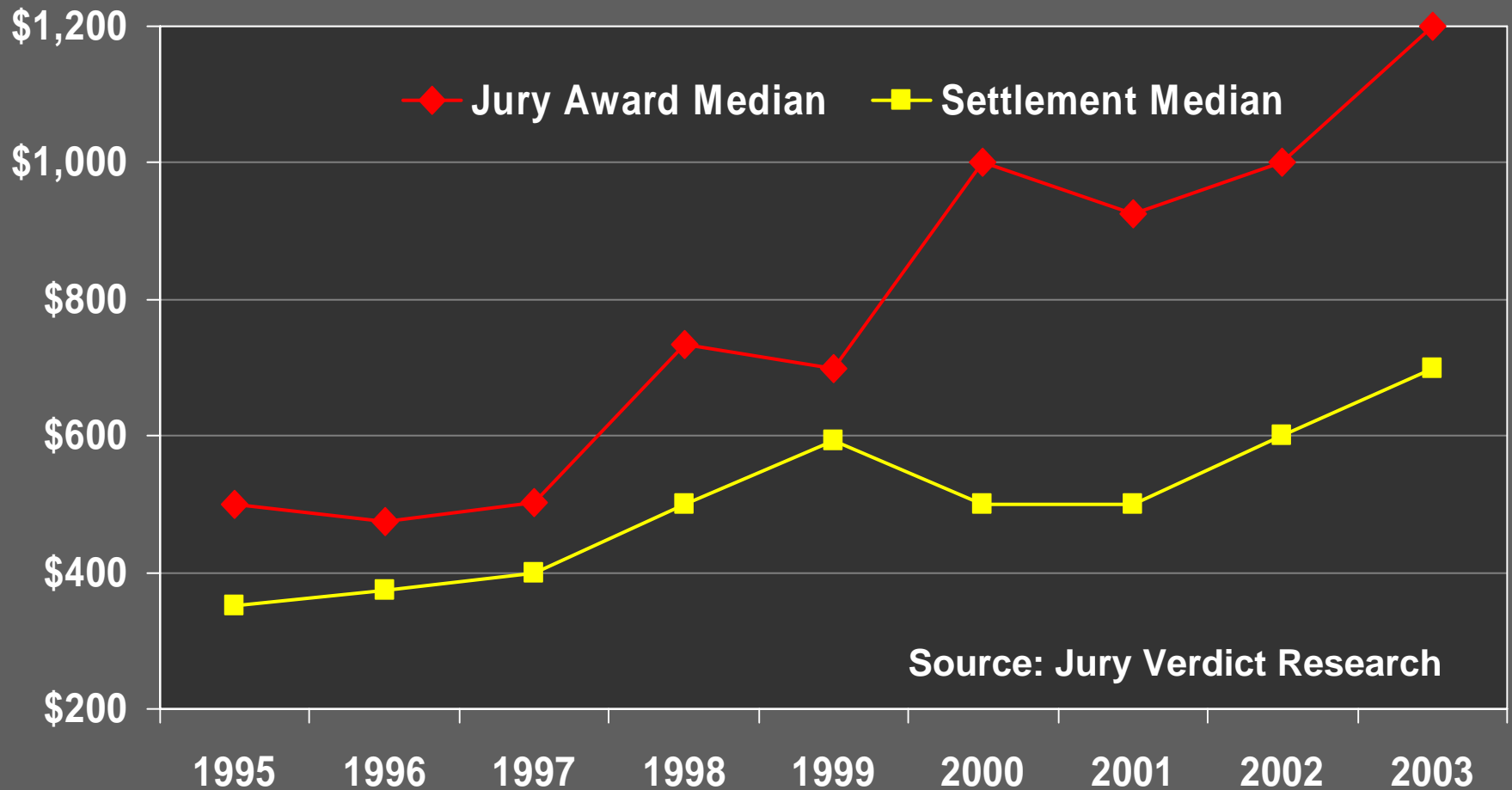


# Severity: National Medians



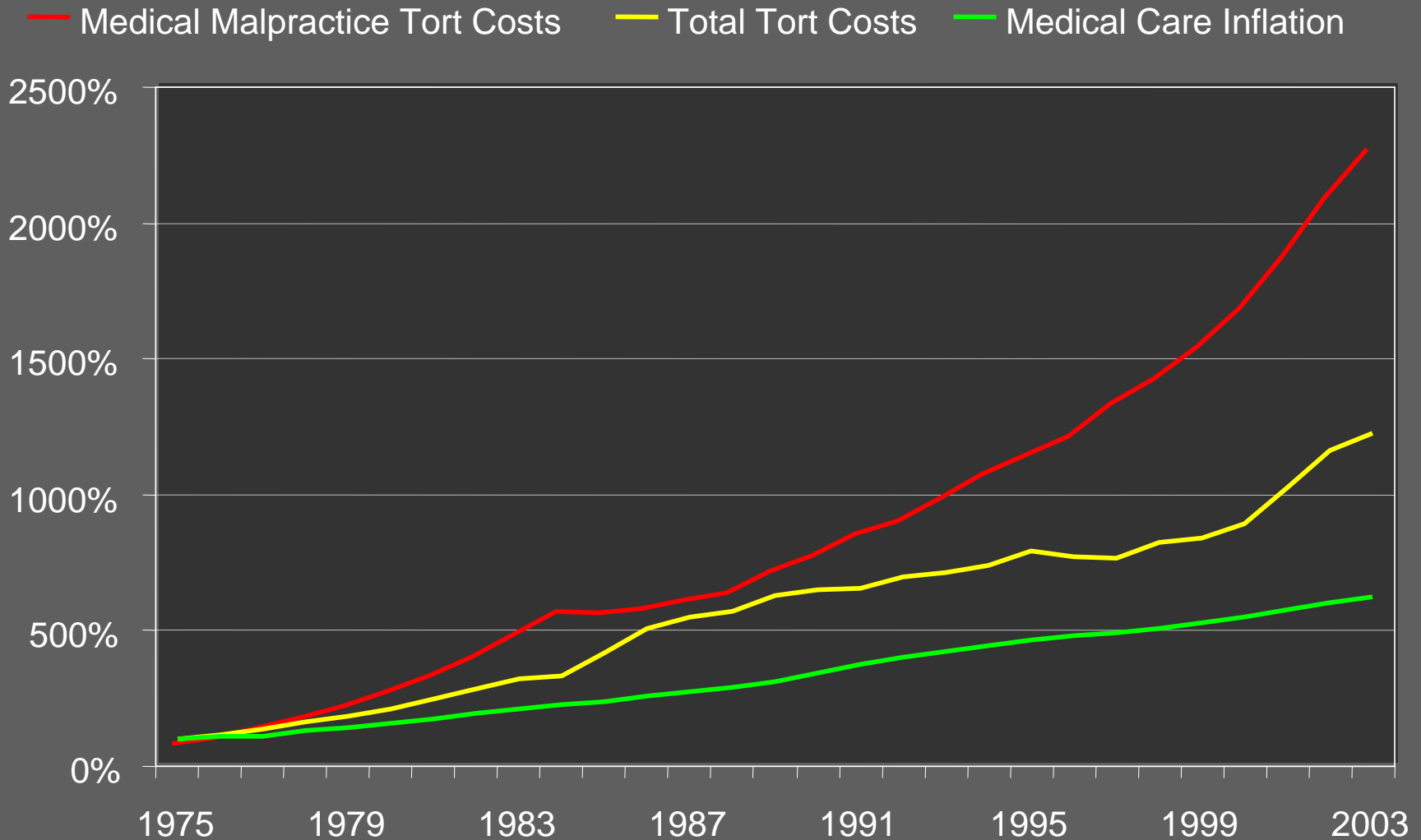
## National Jury Award and Settlement Medians for Medical Malpractice Cases

(000's)



Source: Jury Verdict Research

# Med Mal Tort Costs vs. Other Tort Costs and Medical-Care Inflation



# Standard of Care

- Level of care of the reasonably competent doctor
  - Reasonable person standard: i.e., informed consent
  - Locality rule: largely ignored
  - Based on testimony of experts
    - Respectable minority rule
  - Inexperience
    - Not a defense
    - Coincides with single national standard

S.Y. Tan, *Medical Malpractice*, 2006

- Conflict between cost and quality in the healthcare system
  - “...recognizes limited medical resources and limited insurance coverage along with a tort system that challenges the provider’s professional judgment” Boumil, p. 251
  - *Cost is rarely if ever a compelling exculpatory argument*
    - *The de facto standard of care is perfection*

- *“The challenge is evident: any effort at tort reform must consider the changing medical environment and the shared decision making authority that has emerged from changes in the health care delivery system”*

Boumil p. 251

- *Captain of the ship*
- *Respondeat superior*
- *Deep pocket*

# Deformed Standards of Care



- Virtually all care in the United States today is defensive
  - Medical standards have been replaced by *medical-legal* standards
  - Physician judgment has been devalued
  - Medical chart documentation more important than the actual care rendered to the patient
- Community standards of care not necessarily the most rational or with best supporting evidence, but rather *the care that keeps physicians out of court*

Anderson p. 217

# Impact of Rising Premiums: Examples



- ACOG issues **Red Alert** for 23 states where medical liability insurance crisis threatens access to obstetrical care
  - 35% of ObGyn residency slots are unfilled
- Many areas lack any neurosurgical coverage at all
- Applications to medical schools declined for 6 straight years while law and business school applications have increased 20-60%
- New meaning of high risk: specialties instead of patients

- Excessive litigation forces physicians to regard patients as potential adversaries
- Be wary of the facile argument that some defensive medicine is salutary
  - *By definition, defensive medicine is always wasteful*
- Devalues physician judgment
  - Turns medical practice away from “best for the patient” to ‘*necessary for the doctor*’

# What Drives the Cost of Malpractice Insurance?

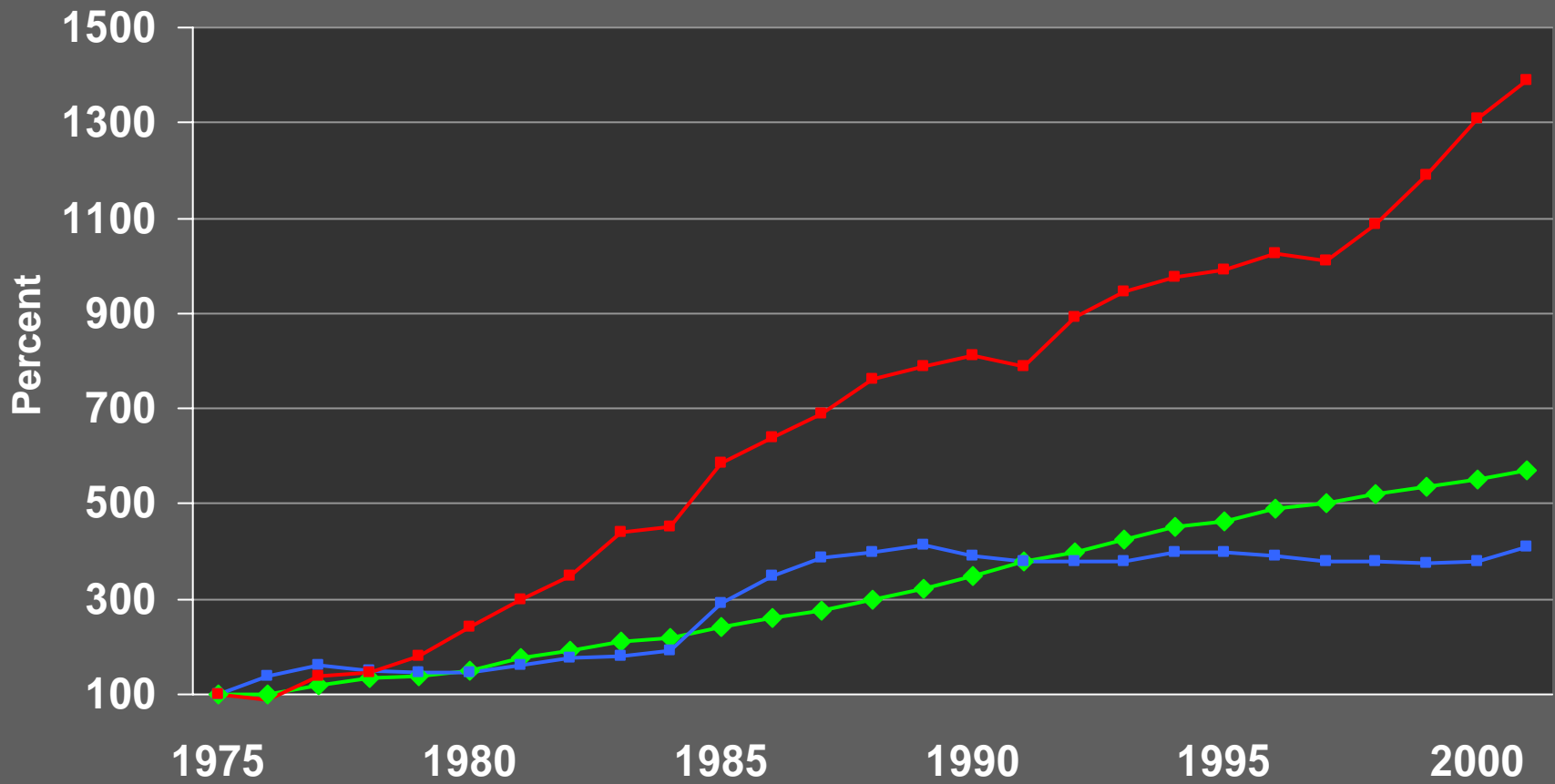
# Definition

- Combined Ratio = Loss Ratio +  
Expense Ratio

# Inflation and Per Doctor Premiums and Losses

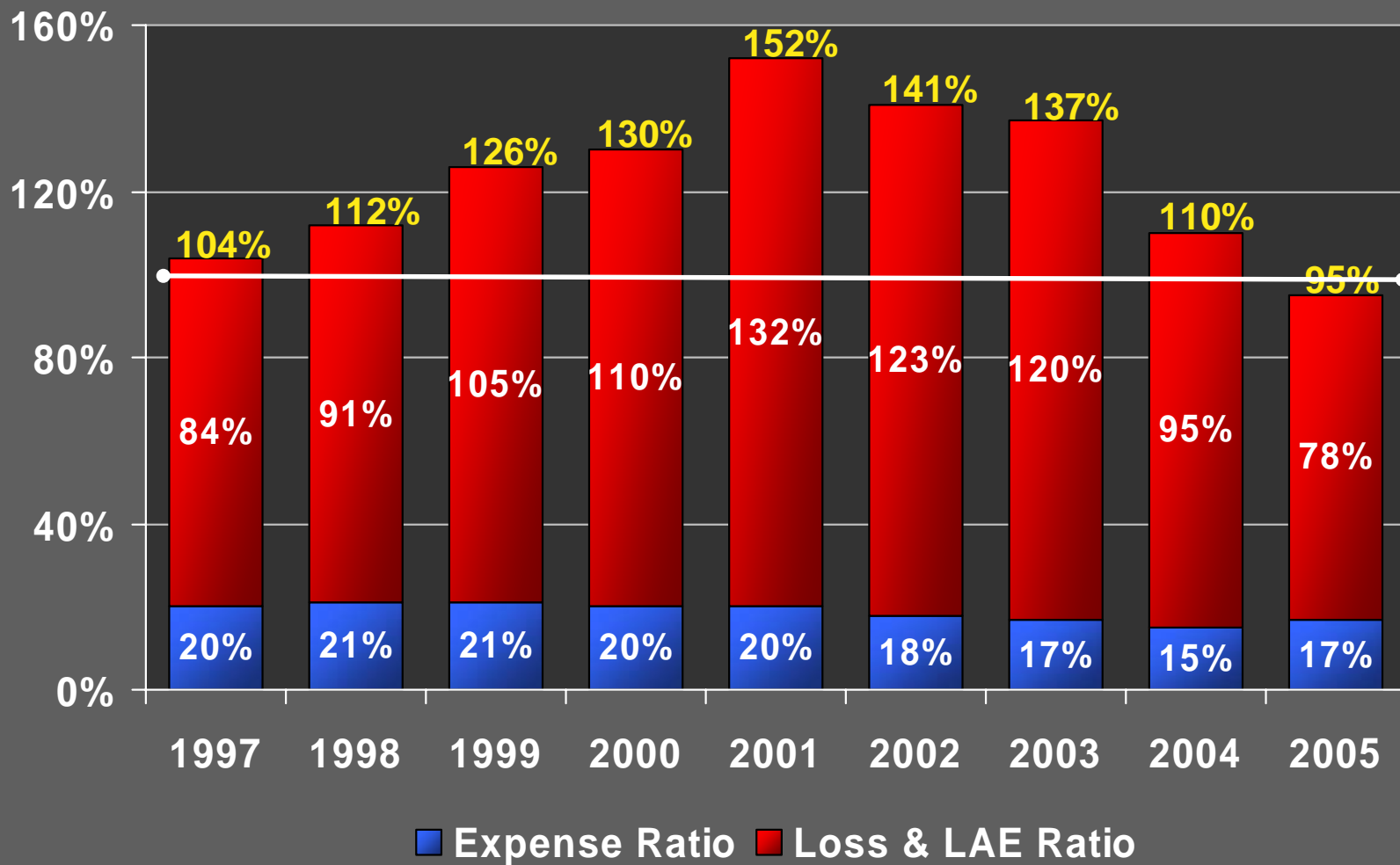


◆ Consumer Price Index    ■ Premium/Doctor    ◆ Paid Losses/Doctor

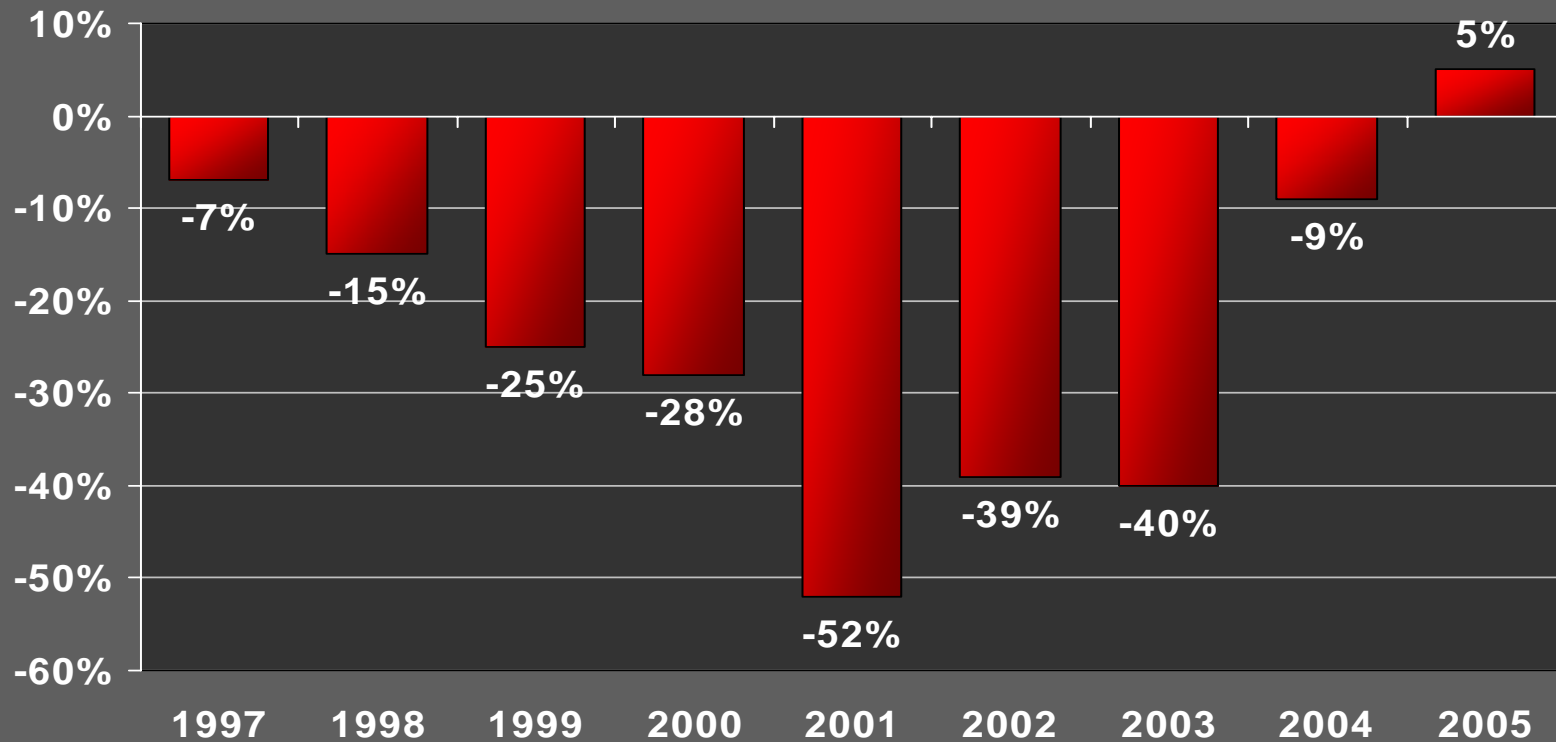


Source: Brown Brothers Harriman

# Industry Aggregate Medical Malpractice Net Loss and Expense Ratios



# Industry Aggregate Medical Malpractice Net Underwriting Profit Ratios



# **Epidemic of Malpractice? Harvard, IOM, and Patient Safety**

# Institute of Medicine Study



- 44,000 to 98,000 deaths annually due to malpractice
- Goal: 50% reduction over 5 years

# Harvard Study

- NYS 1984
- More than half of cases met screening criteria
- Concordance rate of medical reviewers on existence of an adverse event: 10%
- Failed to replicate their own data
  - 318 records, different events, similar rates
  - It doesn't matter whether we convict the guilty or the innocent, as long as the rate of incarceration matches the crime rate.

# Harvard Study

- Extrapolation: **180** *inadequately classified deaths* became 98,000 Americans dying every year due to malpractice.

# Harvard Study: The Actual Claims



- 51 claims
- 8 involved “negligent adverse event”
- *26 involved no medical injury at all*

# Harvard, IOM, and Malpractice Litigation: Final Conclusion



- Harvard Medical Practice Study (1996):  
*No correlation whatever between the presence or absence of medical negligence and outcome of malpractice litigation*

# *Medical Liability Reform*

# What Should Medical Liability Reform Look Like?



- **Sustainable** insurance system providing full indemnification of actual loss
- **More** money for injured patients
- **Faster** settlements
- **Access** to medical care without impeding access to courts for truly injured patients
- Elimination of **double** costs
- **Assurance** that money is available at the time it is needed

# MICRA: Medical Injury Compensation Reform Act 1975

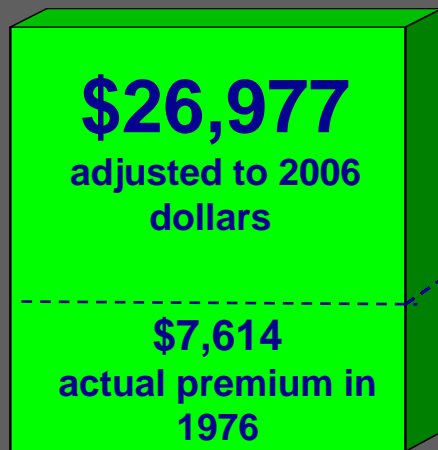


- 1. Mandates a \$250,000 cap on noneconomic damages ONLY.  
***This is the same figure that was used for the victims of 9/11***
- 2. Allows introduction into evidence of collateral sources of payment.
- 3. Allows periodic payments of future damages.
- 4. Provides for a sliding scale limit on attorneys' contingency fees.

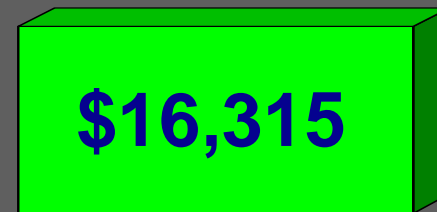
# MICRA Helps Reduce California Medical Liability Premium Rates by 40%



## The Doctors' Company 1976-2006



Average Premium 1976\*



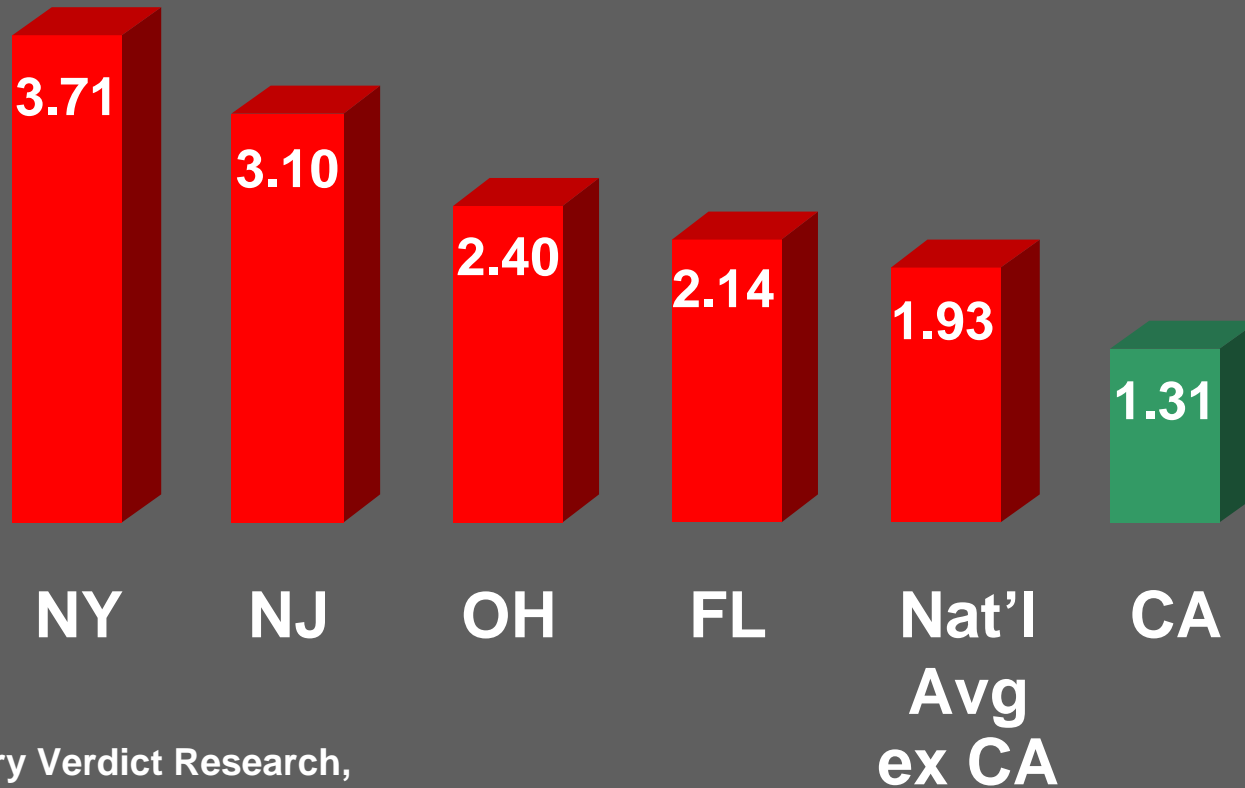
Average Premium 2006

\* \$7,614 average premium adjusted to 2006 dollars based on the Average Consumer Price Index for a \$1 Million/ \$3 Million Claims-Made Policy Premium

# MICRA Reduces Verdict Cost and Frequency



## \$1 Million+ Verdicts Per 1,000 Doctors

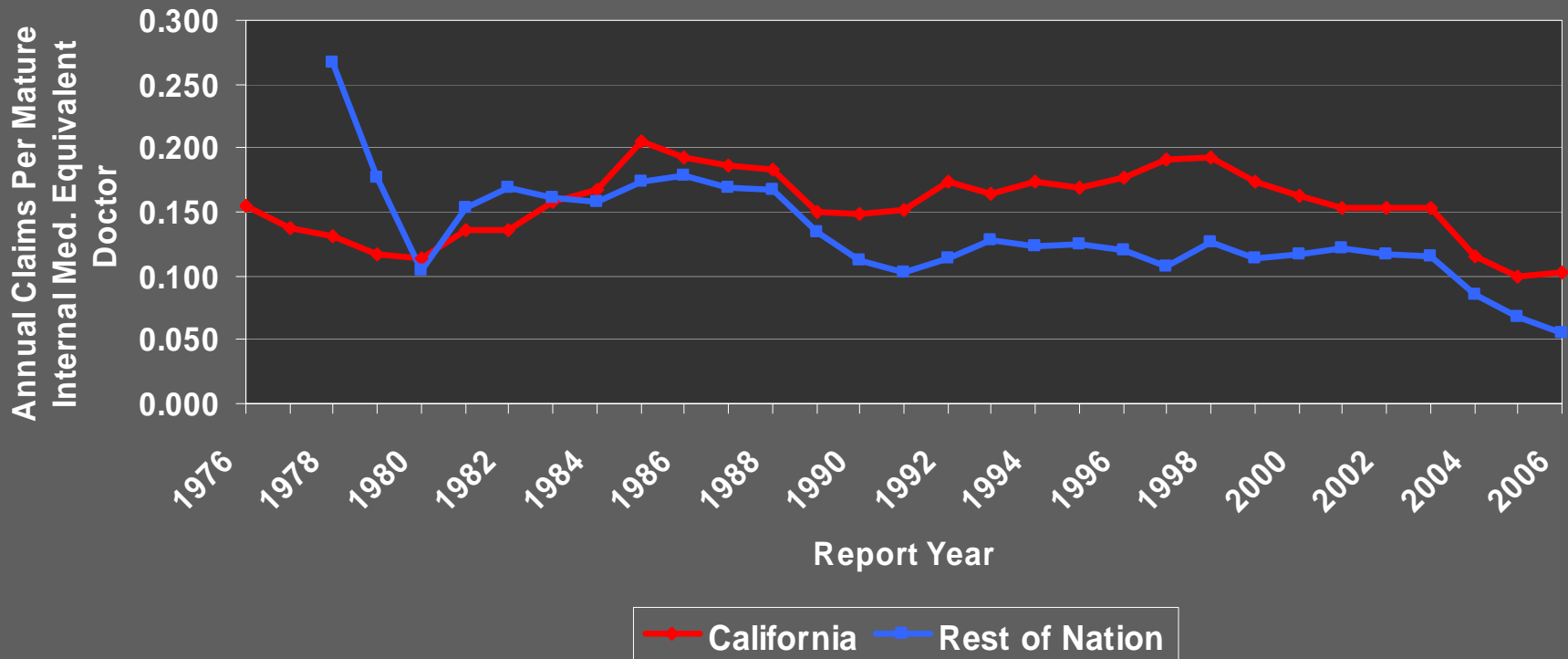


Sources: Jury Verdict Research,  
AMA

# MICRA Does Not Limit Access to Courts



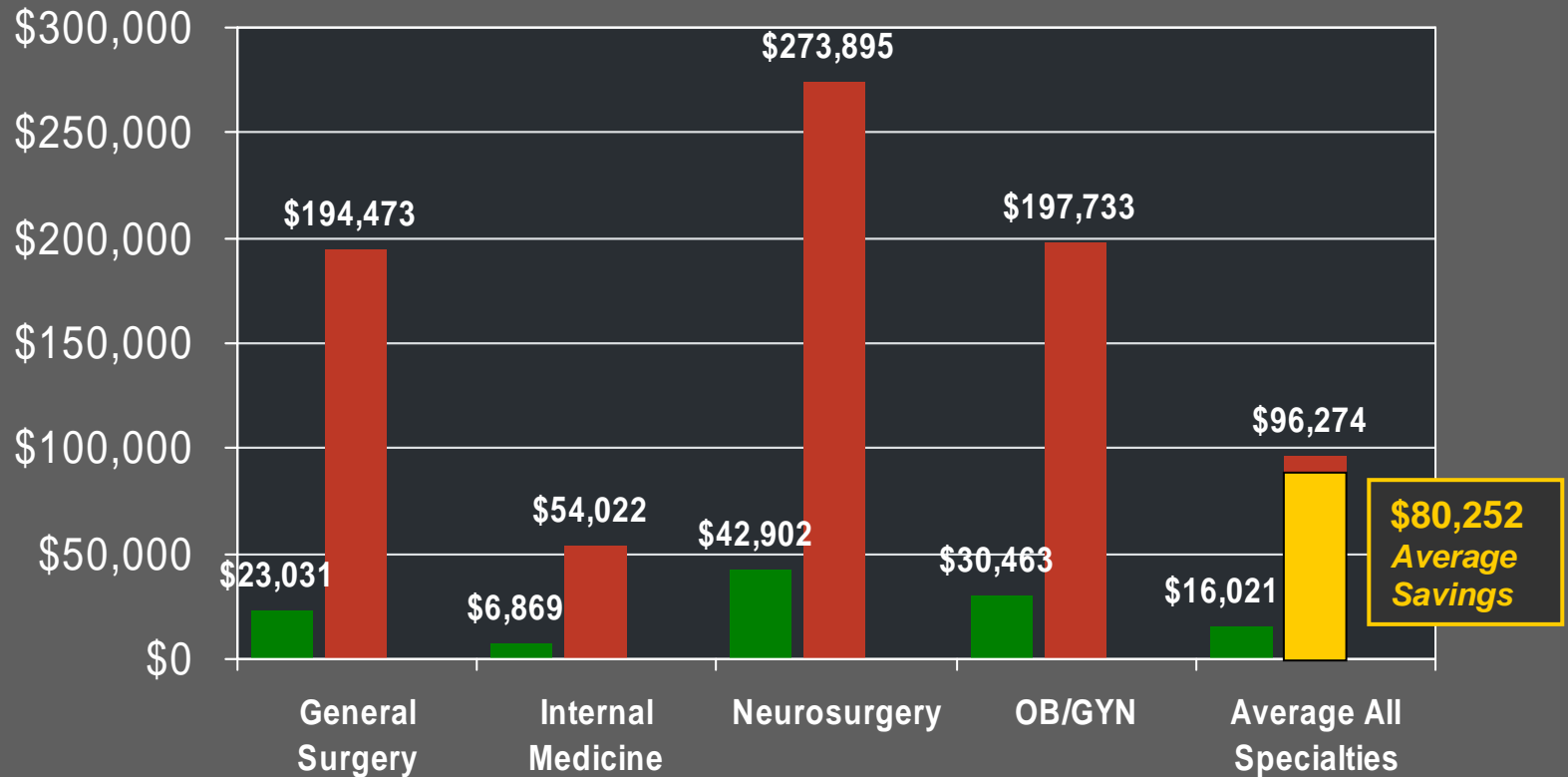
TDC PHYSICIAN CLAIM FREQUENCY



# 2006 MICRA Savings Chart



■ N. CA ■ FL-NY-MI Average ■ MICRA Savings



**Virginia**

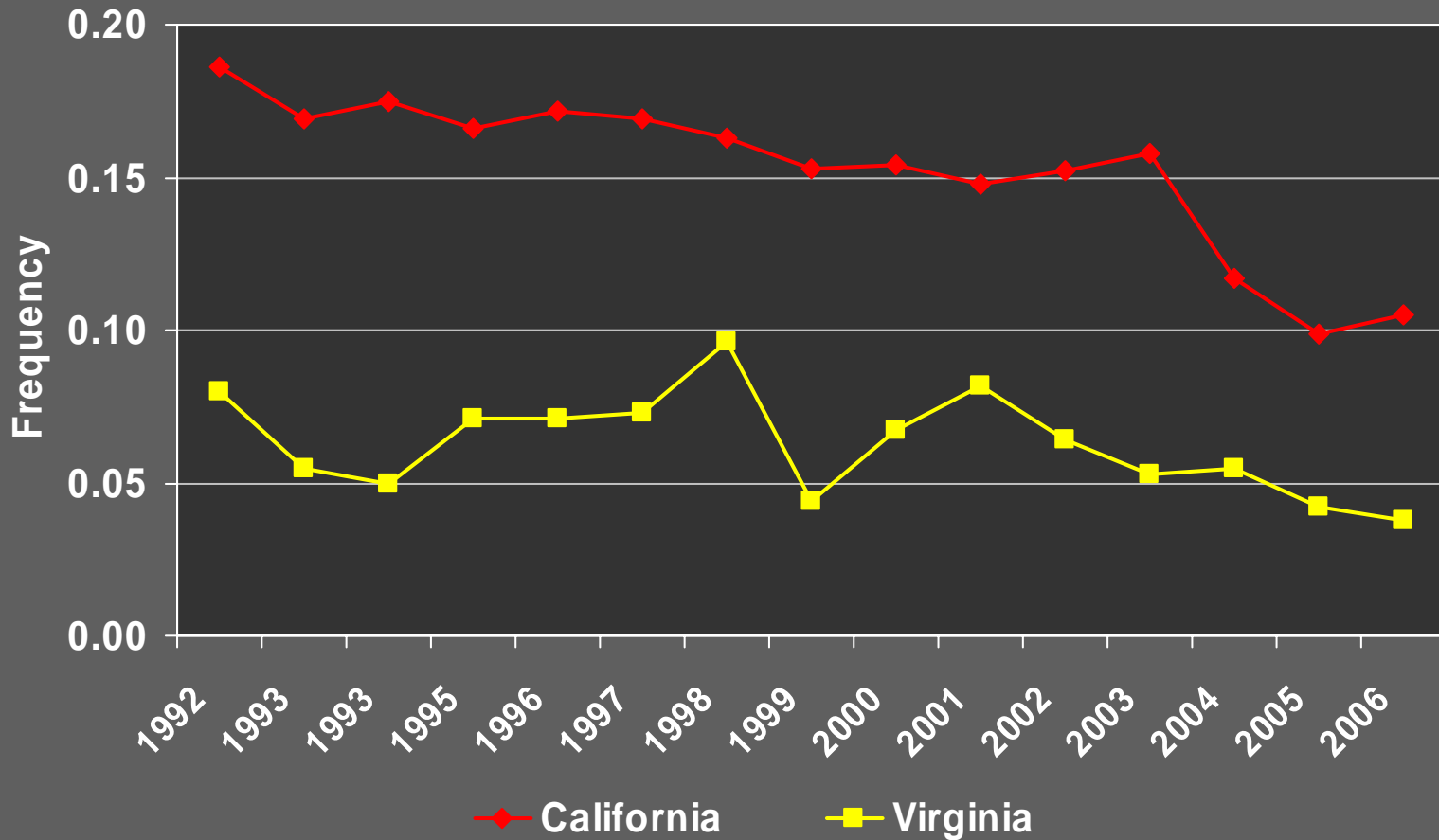
# Virginia Legal Reforms

- Unique cap on indemnity
  - Increases yearly until \$2 million
  - VA Supreme Court has twice approved
- Consequence:
  - *VA physicians carry, and pay for, twice as much professional liability insurance as 80% of the nation's doctors*
  - *VA physicians pay for a disproportionate share of the total state professional liability burden*

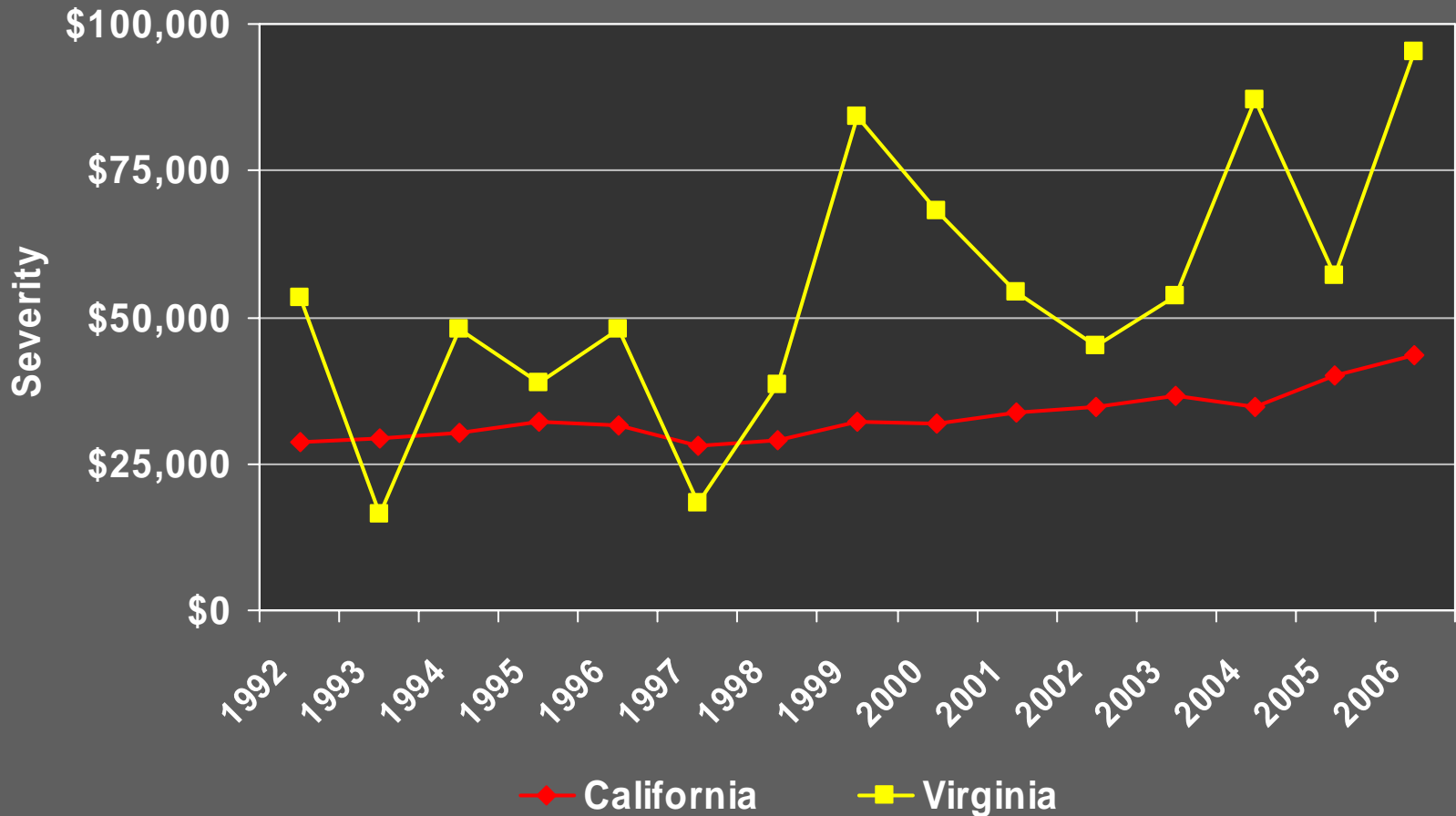
# Virginia Legal Reforms

- **No reform of**
  - *Joint and several liability*
  - *Periodic payments*
  - *Collateral source*
  - *Contingency fees*

# Frequency – California and Virginia



# Severity – California and Virginia



# Virginia

- 1998-2004, severity tripled while California's remained flat
- 1998-2004, TDC rates increased 10.3% per year but most has been between 2001 and 2004, corresponding to the increase in severity
- No increase in 2005, 2006, or 2007

# Do We Need Medical Liability Reform?



- Yes, if you believe that a system that prosecutes the innocent three quarters of the time is unacceptable
- Yes, if you believe it is wrong to put more money in the pockets of attorneys than in the hands of injured patients
- Yes, if you believe that it is wrong for 15% of America's doctor to face malpractice litigation every year
  - Or a third of plastic surgeons, OBs, ER physicians and trauma surgeons, and orthopedists
  - Or half of all neurosurgeons

# Do We Need Medical Liability Reform?



- Yes, if you believe access to care is important for all Americans
- Yes, if you believe it is wrong for 90% of America's doctors to practice defensive medicine

# Isn't the Tort System Helpful in Improving Medical Quality?



- After 30 years of legal assault on the medical profession, what have we to show for it?
- Would we tolerate a policeman who made false arrests 75% of the time? How about a prosecutor who indicted the innocent 75% of the time?

# Conclusions

- The malpractice insurance crisis is serious
- It is caused by both an extraordinarily high level of meritless litigation and a dramatic increase in the costs of indemnification
- It deforms the practice of medicine and limits access to care by our sickest and most vulnerable citizens
- Virginia's existing reforms are of definite value, but physicians bear a disproportionate amount of the total cost
- Proven legal reforms are available today

# Documentation and For More Information...



- ***Medical Malpractice: A Sourcebook for Physicians***, Humana Press, 2004
  - *The Case for Legal Reform*, Chapter 15, *Medical Malpractice: A Sourcebook for Physicians*
- ***Effective Legal Reform and the Malpractice Insurance Crisis***, *Yale Journal of Health Policy, Law and Ethics*, Volume V, Issue 1, Winter 2005
- ***Defending the Practice of Medicine***, *Archives of Internal Medicine*, Vol. 164, June 14, 2004
- ***Billions for Defense***, *Archives of Internal Medicine*, Vol. 159, Nov. 8, 1999

**The articles listed above are available at:  
[www.thedoctors.com/anderson](http://www.thedoctors.com/anderson)**

# Documentation and For More Information...



- *Marcia Boumil, Medical Liability in a Nutshell, 2<sup>nd</sup> Ed., West Legal Studies*
- *S.Y. Tan, Medical Malpractice, World Scientific, 2006*