

# Napa County Medical Society Alliance

## *Medical Liability Reform 2006*

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# Introduction

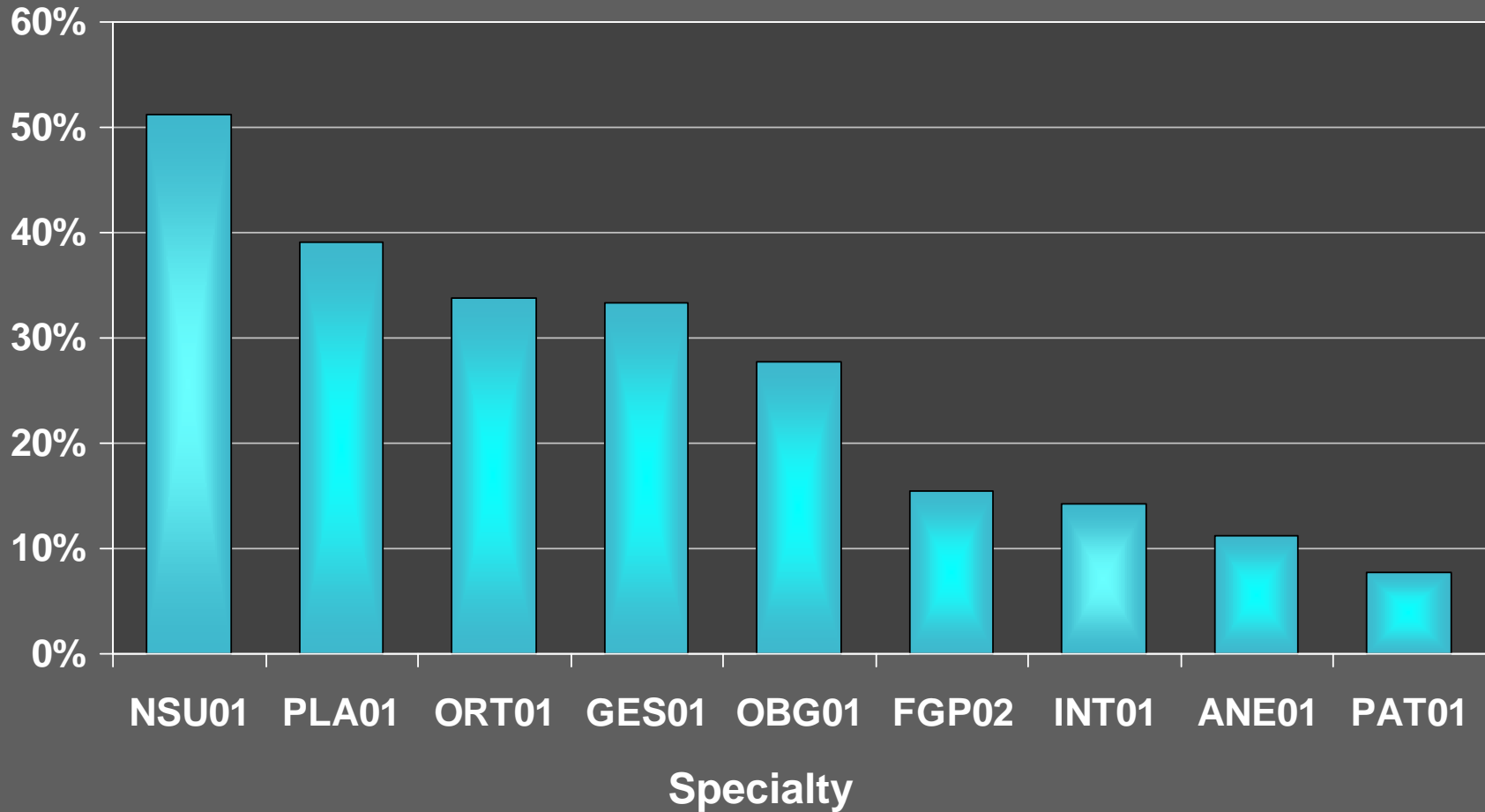
- Nature of the crisis
- State or federal issue
- California and MICRA
- Texas and HR 4

# Nature of the Crisis

# Frequency by Specialty 1995-2003



Frequency



# Frequency

## Meaning

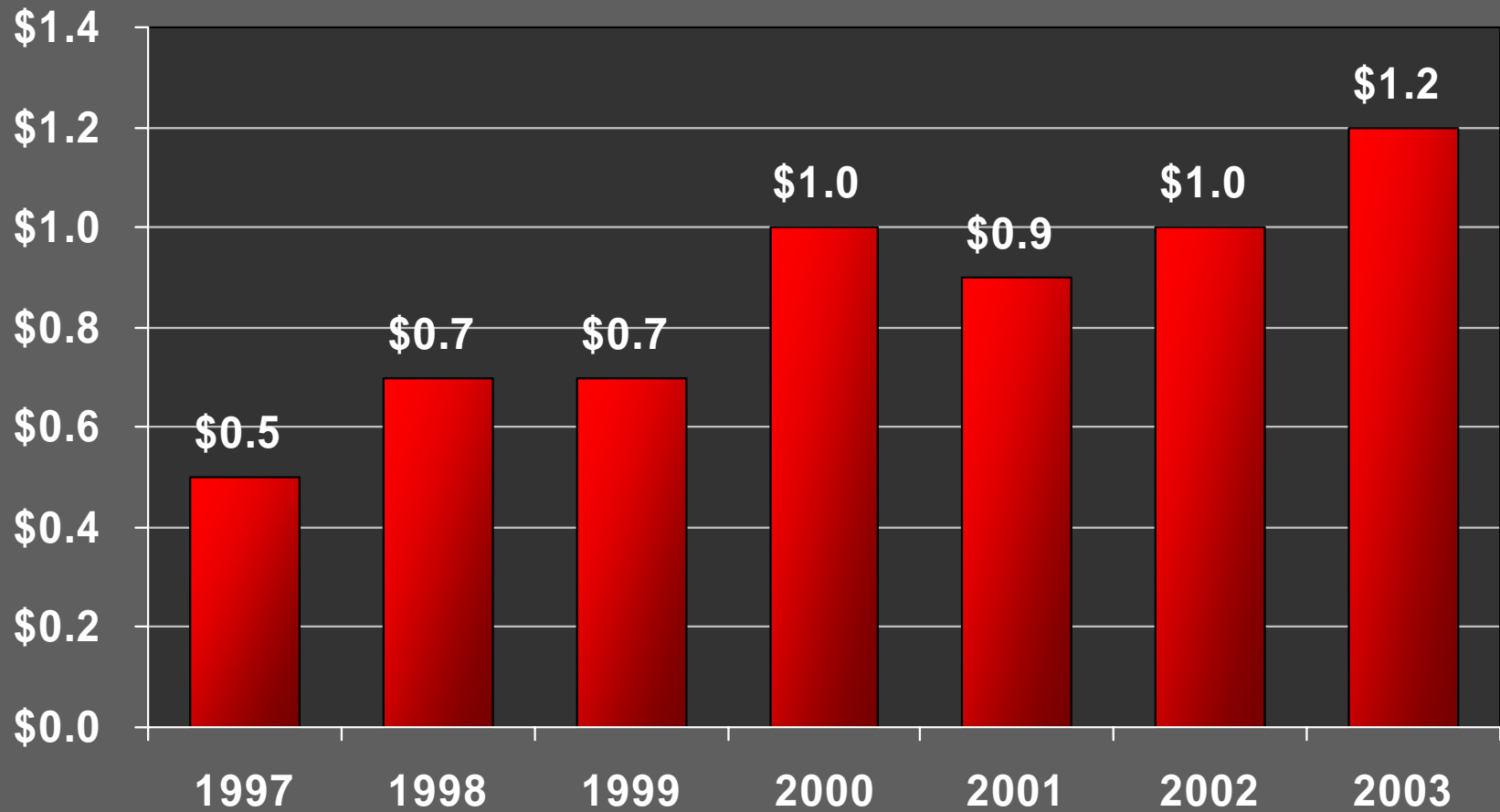
- On any given day, there are more than 125,000 malpractice suits in progress against America's 700,000 doctors.

# Medical Malpractice Award Trends 1997-2003



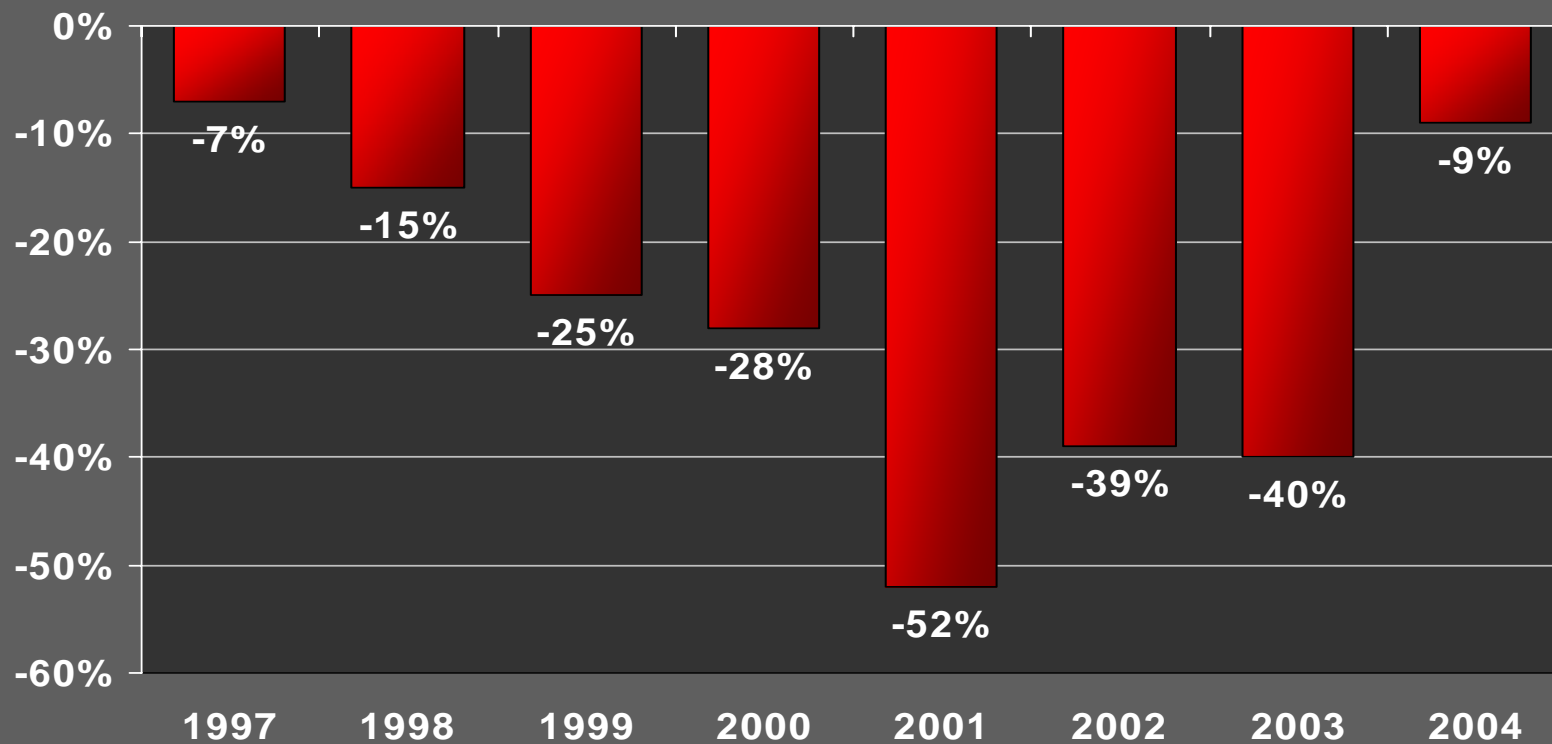
Millions

*Award Medians*



Source: Medical Liability Monitor

# Industry Aggregate Medical Malpractice Net Underwriting Profit (Loss) Ratios



Source: Insurance Expense Exhibit from Highline Data Services

# State or Federal Issue

# State or Federal Issue



- Federal Argument
  - 45% of all healthcare in the United States paid for by federal government
  - Most health insurance covers care with no or limited geographic restrictions
  - National standards of care
  - Mobile and far-flung population

# State or Federal Issue



- Healthcare:
  - If healthcare is a right, wouldn't it need to be federally grounded?
- National boards
- Specialty boards
- Medicare
- Federal government should respond when the states cannot or will not (civil rights, disaster relief)

# State or Federal Issue



- State Arguments
  - Physician licensure is by state
  - Most medical care is delivered in the community
  - Standards of medical care are defined in state law
  - Community and state standards of health care access
  - Medicaid
  - Most tort law has been state based

## Success of Reforms at the State Level



- Existing system, and existing reforms are state based
- Problems of access are local
- Crises are local
  - If it's your family, it's a crisis
- Local face of medical care
  - Your congressman vs. Congress
- Medical reforms have been the spearhead for more general reforms

# Success of Reforms at the State Level



- Would not overestimate the number of state successes nor the size of the gap on the federal side
  - 70% of the American people
  - House of Representatives 10 times over
  - Presidential support
  - Fewer than 10 senators

# MICRA

# California Crisis

- 1975
  - 80% of all malpractice litigation in the century between 1970 and 1975.
  - **MICRA**
  - Crisis over
  - Permanently

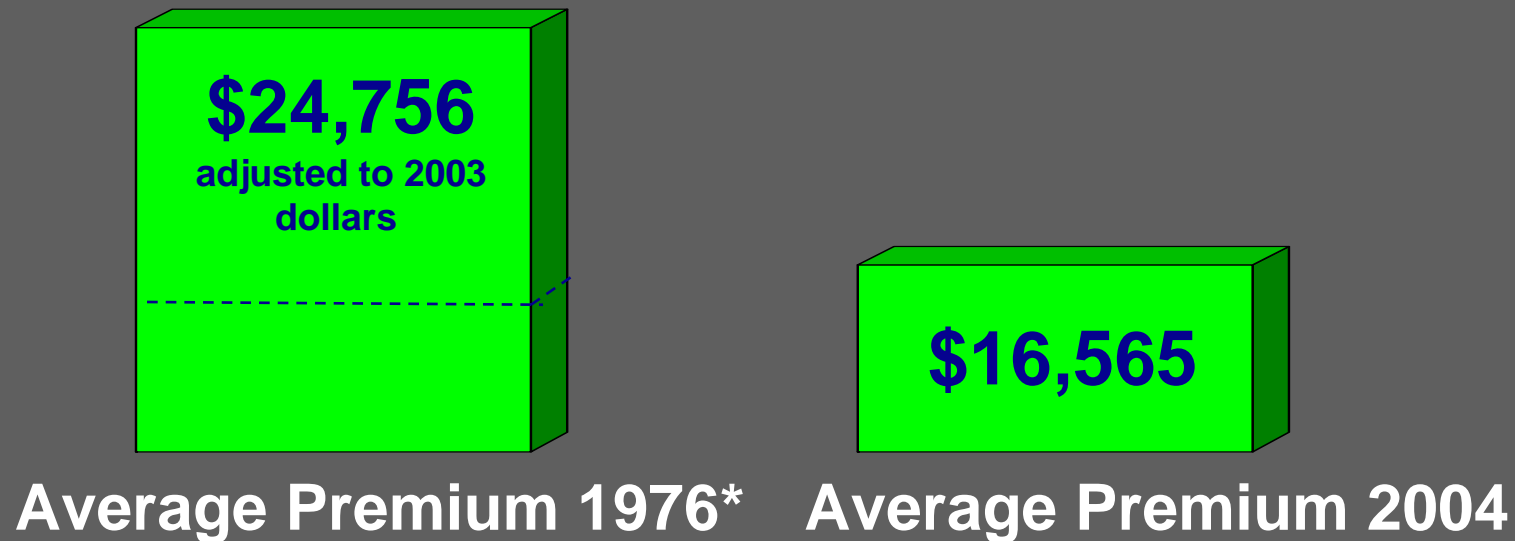
# MICRA

- 1. Mandates a \$250,000 cap on noneconomic damages ONLY.
- 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 33%



## The Doctors' Company 1976-2004

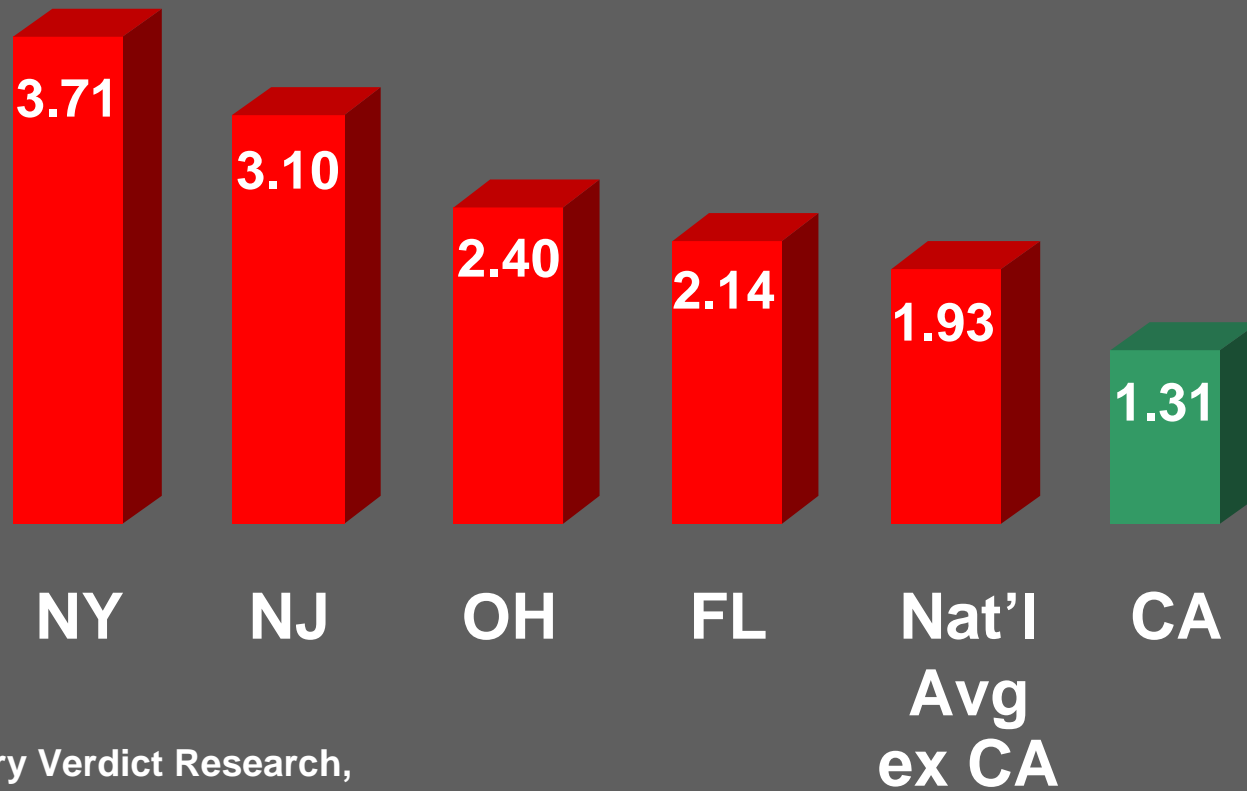


\* \$7,614 average premium adjusted to 2003 dollars based on the Average Consumer Price Index for a \$1 Million/ \$3 Million Claims-Made Policy Premium

# MICRA Reduces Verdict Cost and Frequency

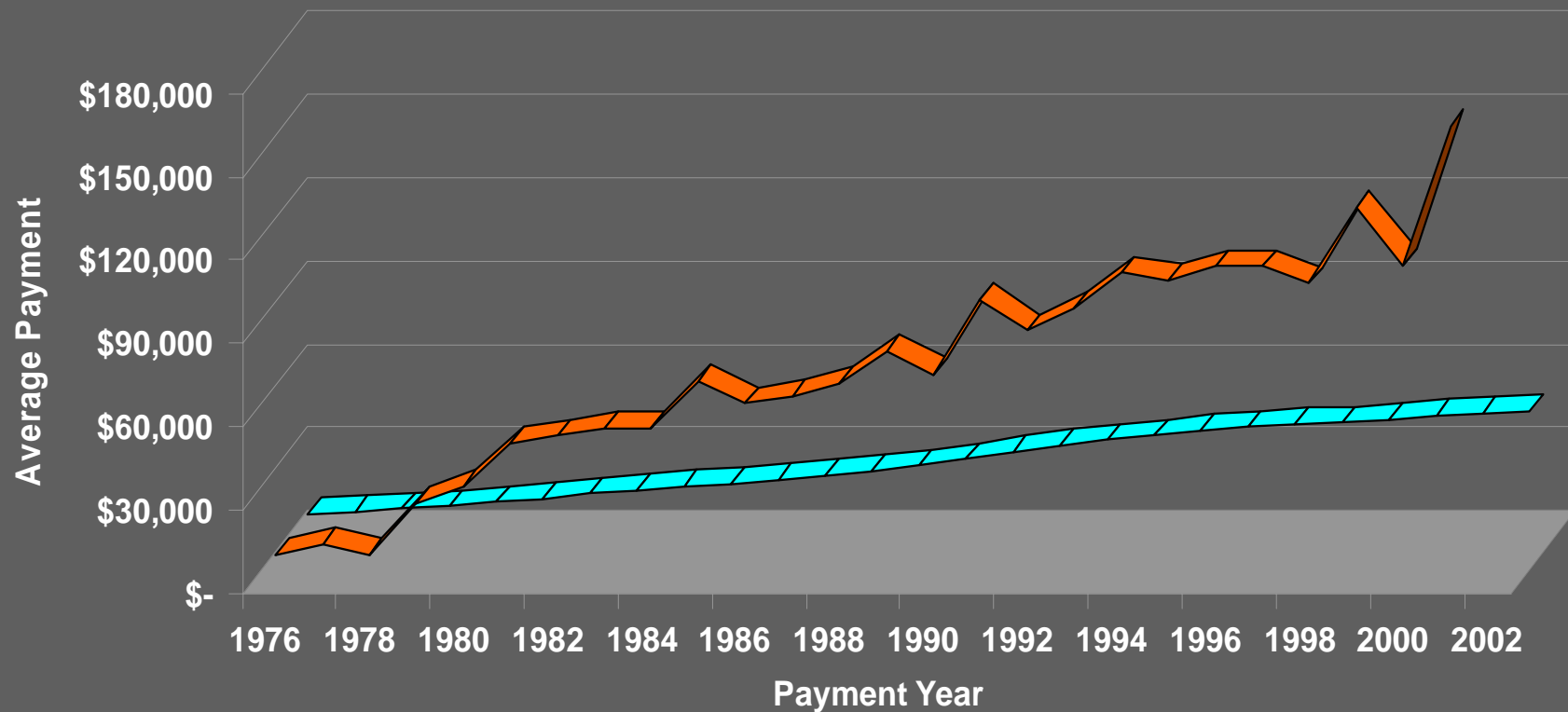


**\$1 Million+ Verdicts Per 1,000 Doctors**



Sources: Jury Verdict Research,  
AMA

# Average Medical Liability Claim in CA vs. Average Claim Adjusted for Inflation 1976-2001

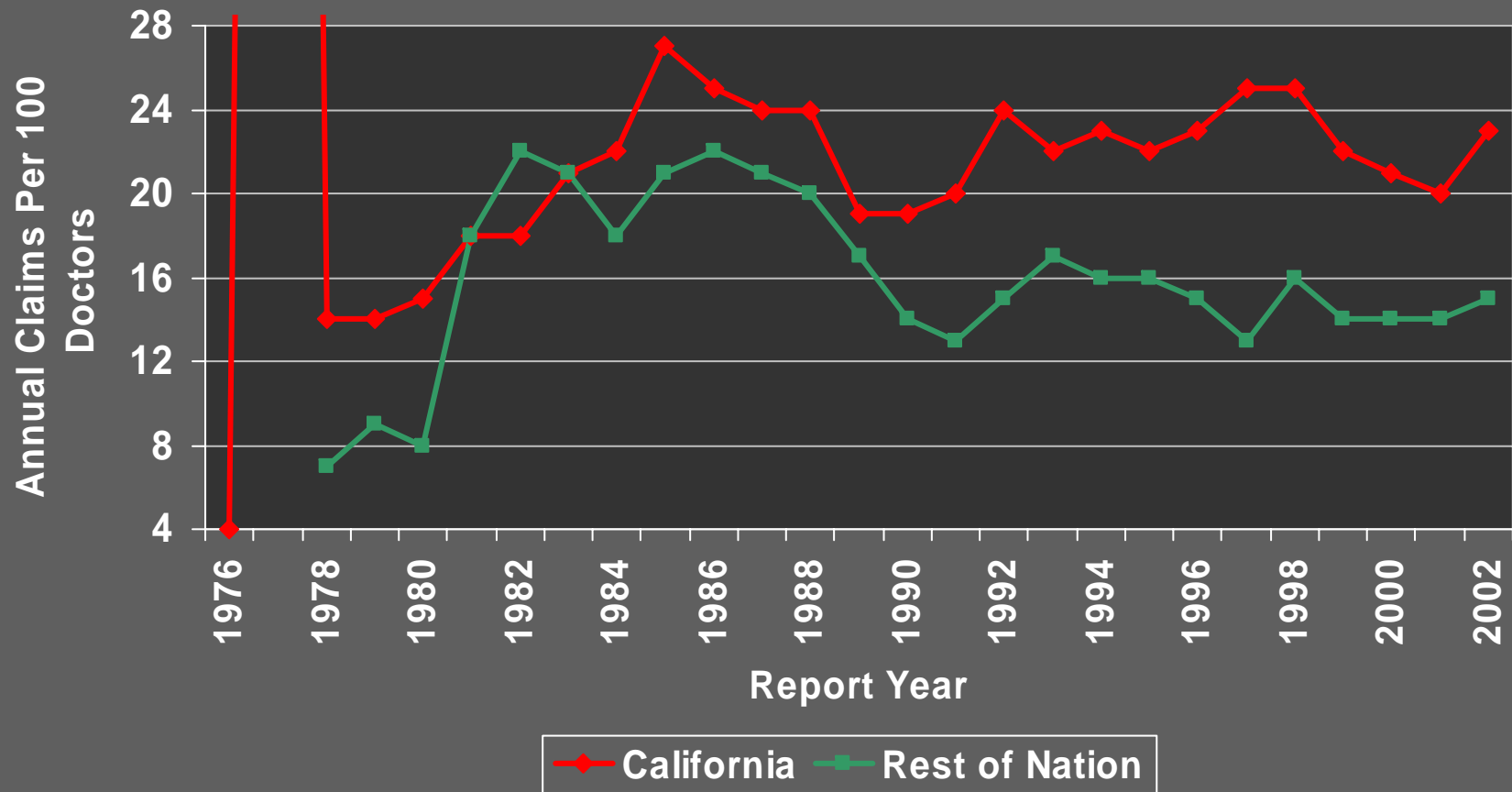


- Actual average physician medical liability claim paid in CA 1976-2001.
- Average medical liability claim in CA beginning 1976, adjusted for rate of inflation (CPI) 1976-2001.

# MICRA Does Not Limit Access to Courts



### TDC Physician Claim Frequency

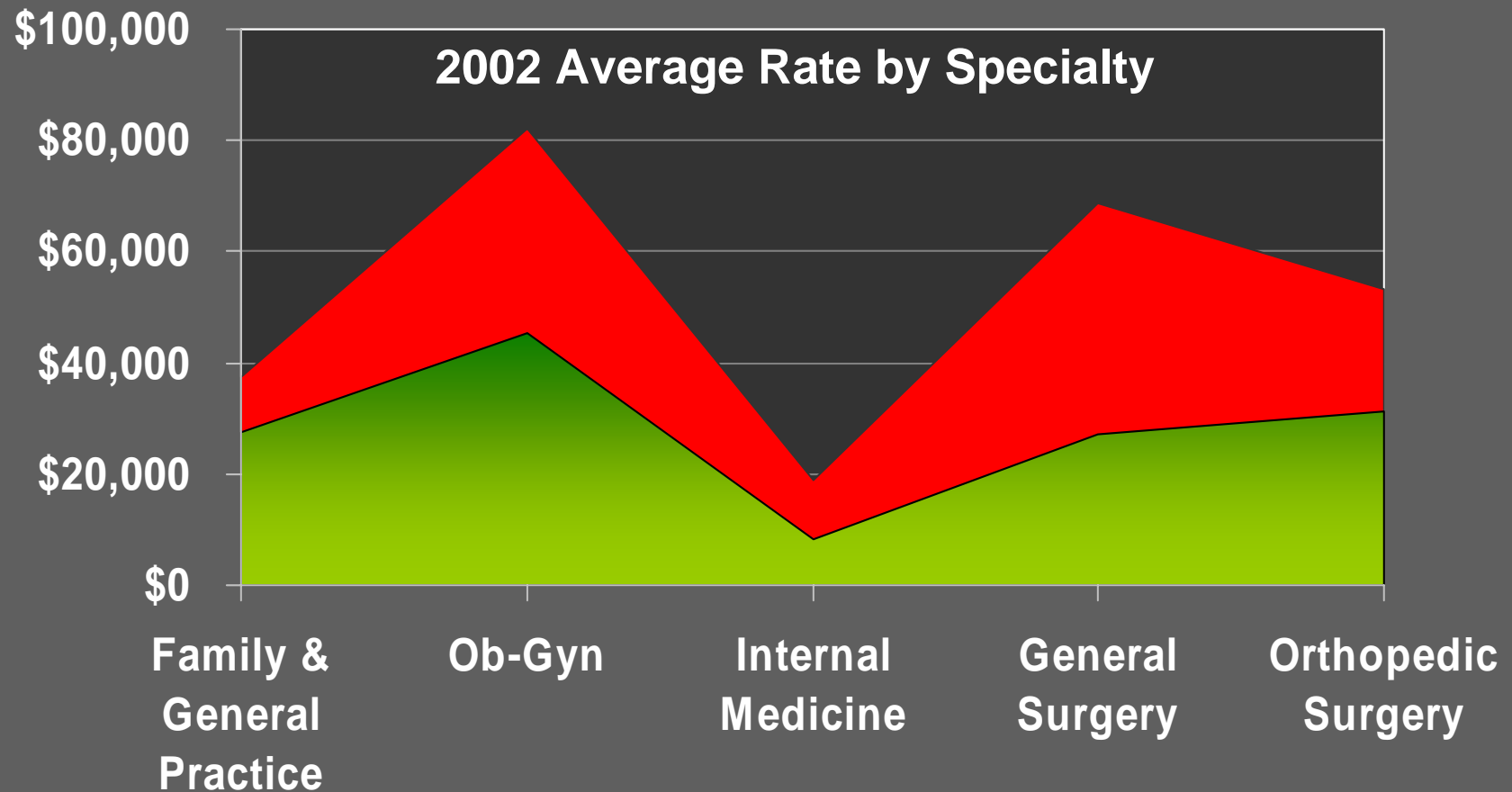


# Texas

# California vs. Texas: The Tort Tax



■ Texas    ■ California



# Texas Solution



- Comprehensive Reforms
  - \$250,000 cap on non-economic damages for physicians
  - Periodic payments
  - Joint and several liability
  - Expert witness
  - Procedural changes
- Constitutional Amendment

# Texas Results

- Rates
  - 2003: **54% rate Increase**
  - 2004: **17% rate Decrease**
  - 2005: Additional decreases
- *\*Remember the math*
- Competition
  - 11 new companies
  - State JUA: 1800 down to 166
- Access to Care
  - 3000 new physicians in Texas since 2003
- Texas is a crisis state no more

# Summary

- Health care affects everyone in the country, but is delivered locally
- Crises are felt in states and communities
- Coalitions are easier to build on the state level
- Reform is needed: there is no reason to make it an either/or proposition

# 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)**

# Additional Reforms



- Periodic payments permitted for future medical costs
- Immunity expanded for charity care
- Doctors granted a 10-year statute of repose
- “Willful or wanton” conduct must be proven to establish negligence against an emergency care physician
- Sweeping expert witness reforms

# Average Non-Economic Award in a Medical Malpractice Case



1989: \$318,666

1999: \$1,379,203

# New Reforms



- \$250,000 cap on non-economic damages for all doctors
- \$250,000 cap on non-economic damages for a hospital or nursing home
- Maximum non-economic award: \$750,000
- Wrongful death capped at \$1.5 million plus medical bills
- Periodic payments permitted for future medical costs

# Damage Cap in Healthcare Lawsuits



- 25 other states have a damage cap in healthcare lawsuits.
- Even with a cap, people are able to find an attorney.
- 86% percent of all claims closed with no indemnity.

# Litigation and Health Care



- Standard of Care
  - Medical vs. Legal
- Managed Care
  - Patients' Bill of Rights
- High-Tech, Low Touch
- Medical Miracles
- Doctor Patient Relationship
  - Adversarial
  - Time pressures

# Litigation, Medical Care Access and Cost



- Under today's guidelines for mammographic screening,

***The cost of litigation for each screening mammogram is approximately \$70.***

# Litigation, Medical Care Access and Cost



- Laparoscopic cholecystectomy
  - Complication rate is 0.3% worldwide.
  - The average indemnity is \$300,000 for these claims.
- Meaning
  - ***The litigation cost for every procedure is \$900.***

# Litigation, Medical Care Access and Cost



- The \$57,000 pill
  - Cure rate 99%
  - Average cost of wrongful death verdict \$5.7M

# 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 80% of the time, or a prosecutor who went after the innocent 80% of the time?

# Physicians in Court



- *Eight out of ten cases are found to be without merit.*

# Estimating the Costs of Defensive Medicine



- Stanford Study
  - 5-9% of health care budget:
  - \$50 billion per year
  - Current estimate \$110 billion per year.
- Example: half of eligible women have 20 mammograms over their lifetimes
  - 50% of these women will have a false positive result.

# Direct Costs

- Doctors \$6.3 billion
  - Systematic underestimation
- Hospitals and other institutions many billions more with even greater tracking error

# Where the Money Goes



- 52% of awards in excess of \$1 million
- Average cost of defending a worthless claim \$24,669
- TDC alone: *~\$500,000,00*

# Consequences

- Higher health care costs
- Higher health insurance premiums
- Higher taxes: government is the largest payor
- Decreased access to care
- Threatened quality of care

# Access to Care

- Uninsured
- Underinsured
- Community and minority clinics
- Women's healthcare
- University clinics
- *Cost shifting*

# Science on Trial

- Marcia Angell, M.D.: the experts' bought and sold opinions have become the evidence.
- “Science is sometimes messy and slow, but it’s the only method we have to answer questions about the material world and to evaluate the many health scares that recurrently sweep across the country. Like democracy, it’s better than whatever is second best, and we ignore it at our peril.”

# Science on Trial

- The growing alienation from science in our society may in fact be the most damaging aspect of these controversies.
- Junk science has produced billions of dollars of scientifically absurd decisions from Bendectin to breast implants and threatens to enshrine paid opinion instead of scientific evidence as the legal standard.
- Checkbook Homicide (Peter Huber)
  - Huge expense of paying off the few jackpot winners in the malpractice lottery directly increases the cost of medical care. This reduces access for those on the margin. For the rest of us as patients, it leaves us to be cared for by physicians harboring a siege mentality

# Litigation and the Availability of Mammography



- If half of eligible women have 20 mammograms over their lifetimes, \$70 per woman per mammogram would need to be saved beginning now to pay for the future litigation costs.

## Lawsuit Industry and Its Effect on the Profession of Medicine



- We are increasingly being reduced to a system of private justice, characterized by ad hominem judgments by the systematically unqualified, endless adjudication of the same issue by tag teams of attorneys, and class actions suits that compensate only the lawyer. The ever-present possibility of potentially enterprise destroying verdicts make today's courtrooms irresponsibly dangerous for deep pocketed defendants. In order to protect the right to a day in court for plaintiffs, we have made it increasingly unattainable for defendants.

# 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: Observations



- More than half of cases met screening criteria
- Physician reviewers were not specialists
- Did not distinguish between major and minor events
- Did not distinguish events under physician control
- Based exclusively on in-patient population
- 40-fold variation among hospitals
  - *Academic hospitals had the highest adverse event rate*
- 10-fold variation among specialties

# Harvard Study: The Actual Claims



- 51 claims
- 8 involved “negligent adverse event”
- *26 involved no medical injury at all*
- *7.6 times as many negligent adverse events as malpractice claims*
- *Likelihood of a negligent adverse event resulting in litigation 1 in 65 (1.53%)*

# Harvard Study

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

# 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*

# Randomness and the Fallacy of the Bad Doctor



- 2% of the doctors cause 50% of the losses.
  - Mirror image of causation
  - Harvard: Degree of injury, not medical negligence, predicts outcome.
- Fewer than 1% of physicians have 2 paid claims over a 10-year period of time.
  - Only one in five doctors with a single paid claim gets a second within 10 years.