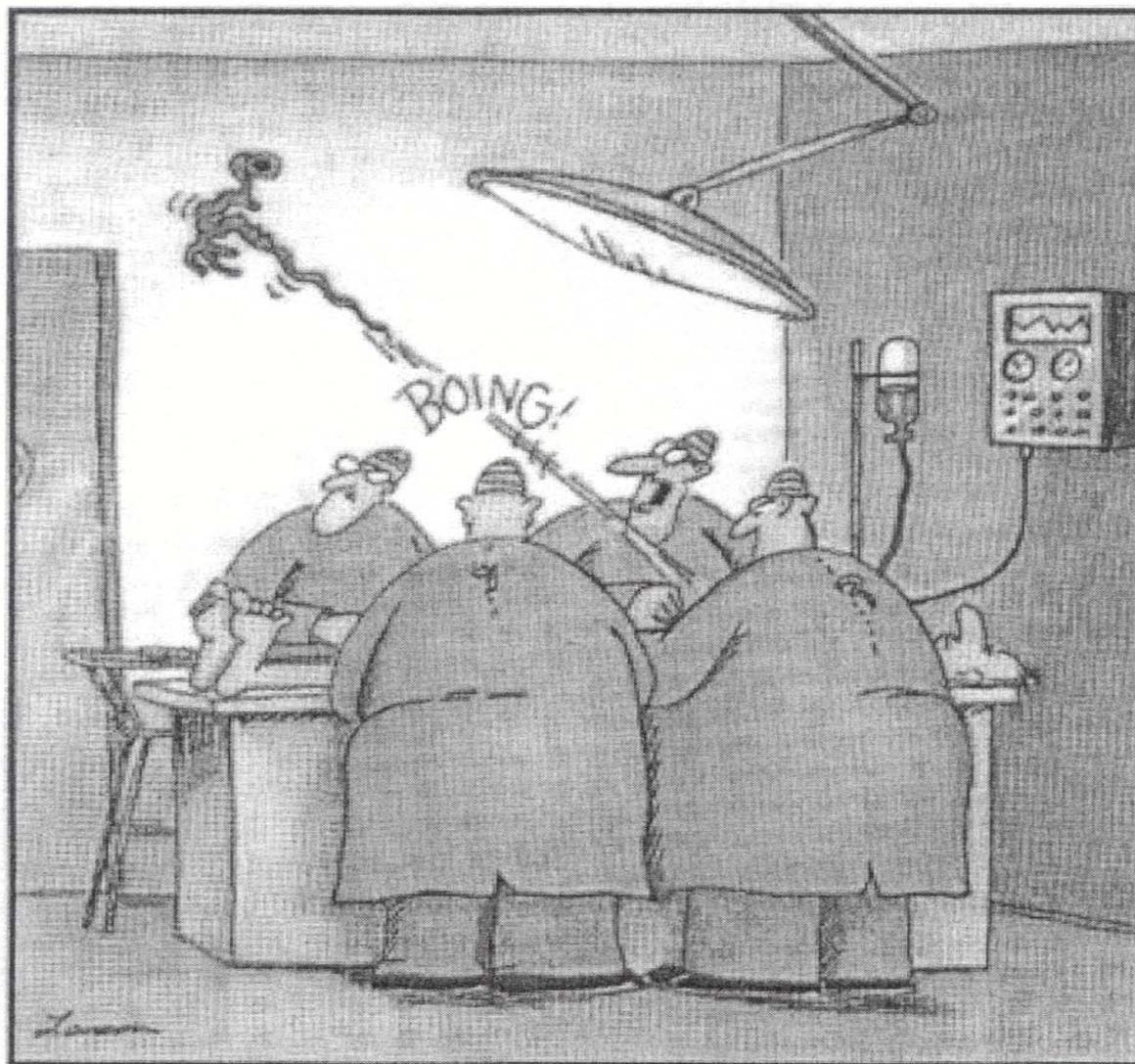


# Medical Malpractice Reform, the Practice of Surgery, and the Safety of Patients

Richard E. Anderson, M.D., F.A.C.P.  
Chairman, The Doctors Company  
October 22, 2003



"Whoa! Watch where that thing lands—  
we'll probably need it."

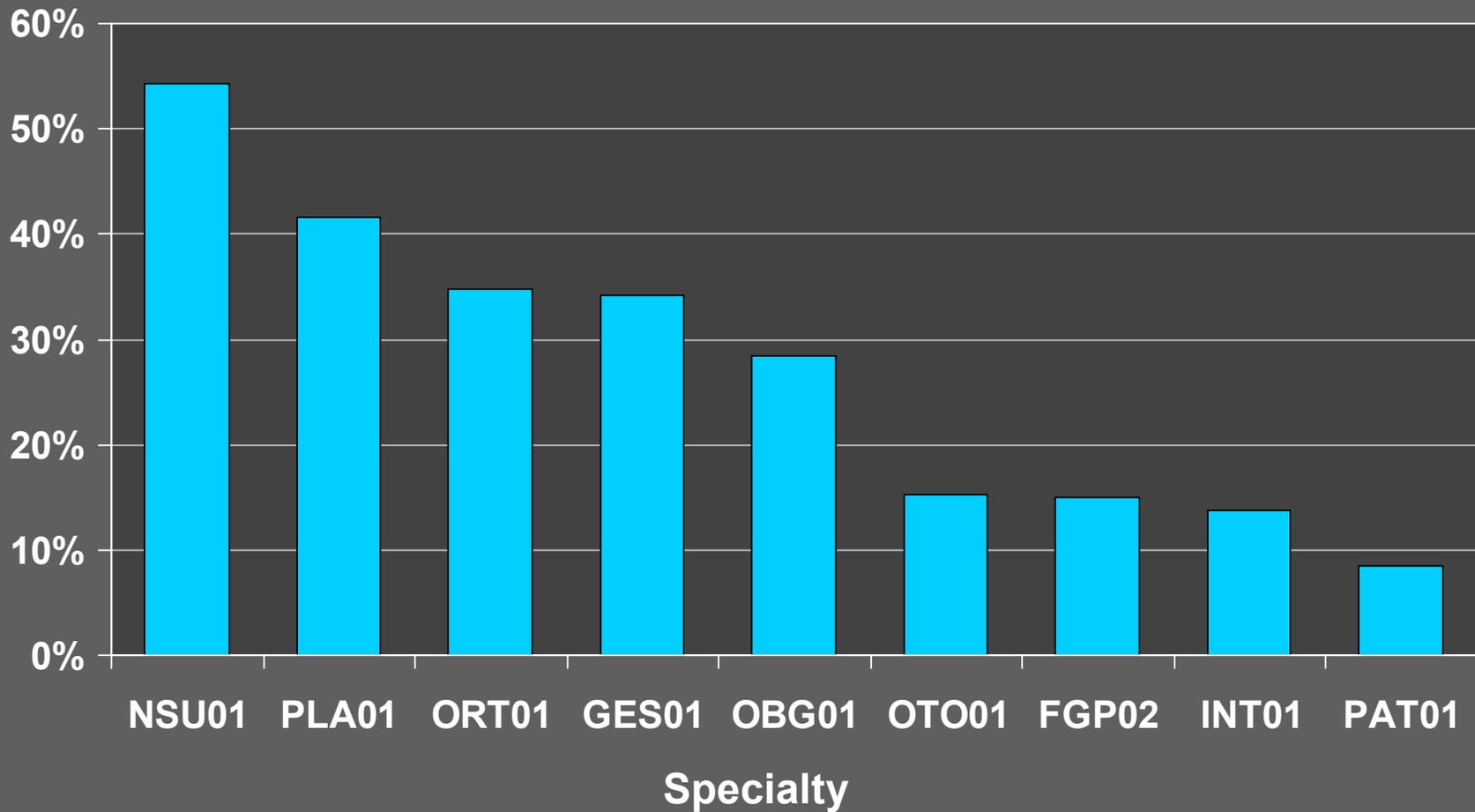
- Problems: What kind of a crisis is this?
  - Frequency
  - Severity
  - Cost: the real numbers
- Patient safety
  - Of course, but...
  - There should be a natural alliance between advocates for patient safety and malpractice reform.
  - Randomness
    - Fallacy of the bad doctor

- Professional Liability and the Practice of Surgery
- Tort Reform: Is this really a solution?
  - Theory and practice
    - *The importance of caps*

# Frequency by Specialty 1996-2002



Frequency

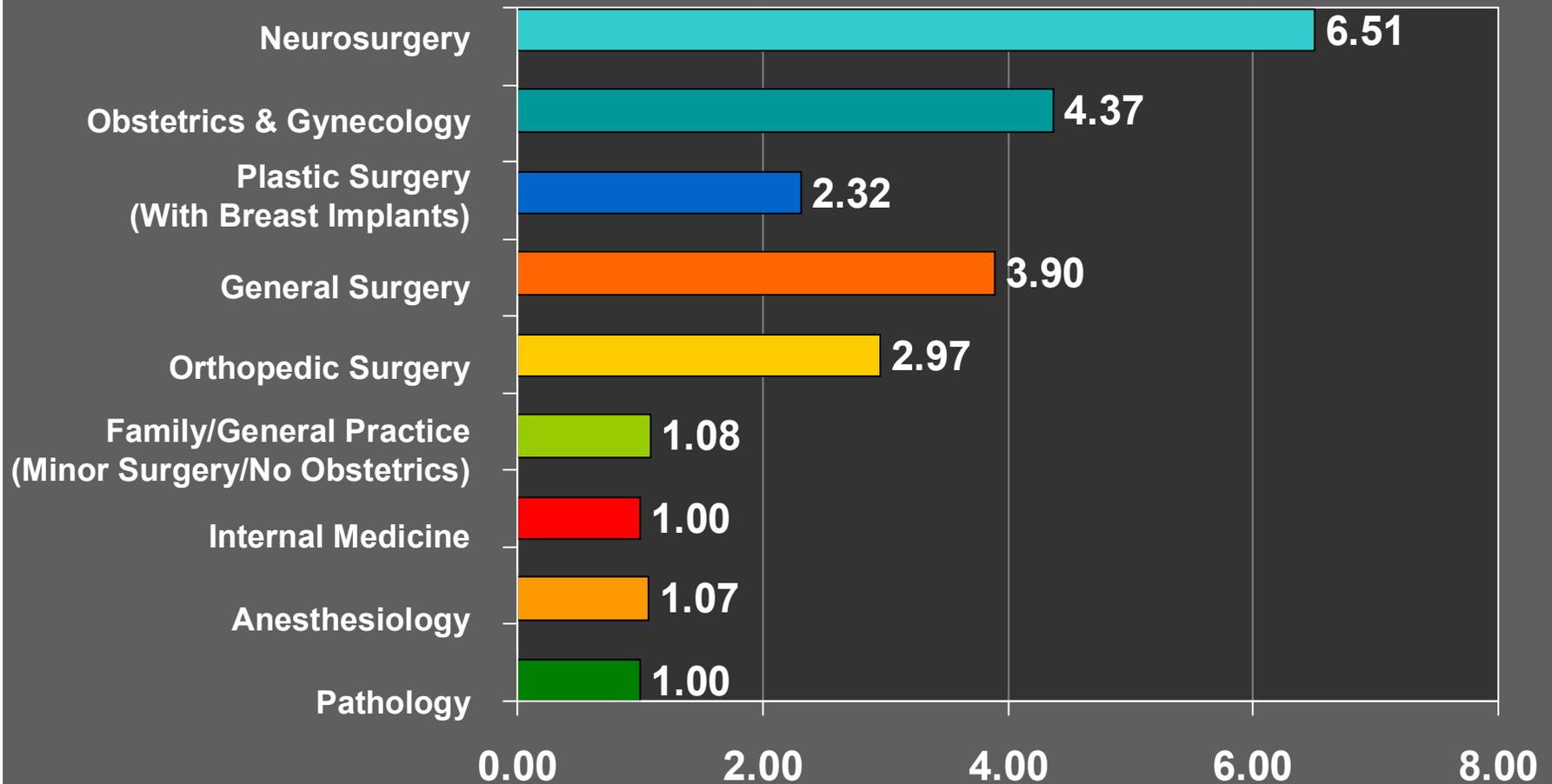


# Frequency

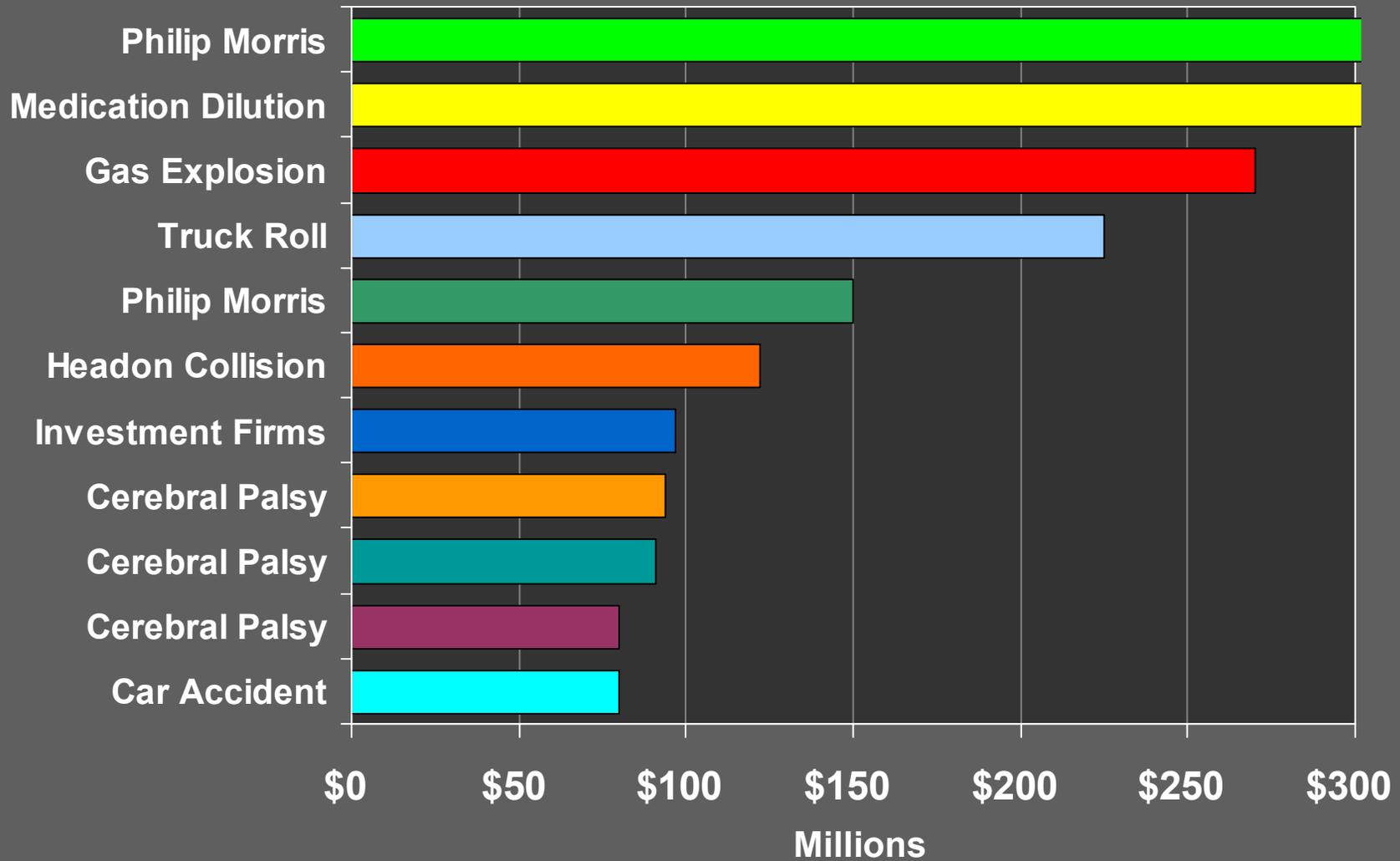
## Meaning

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

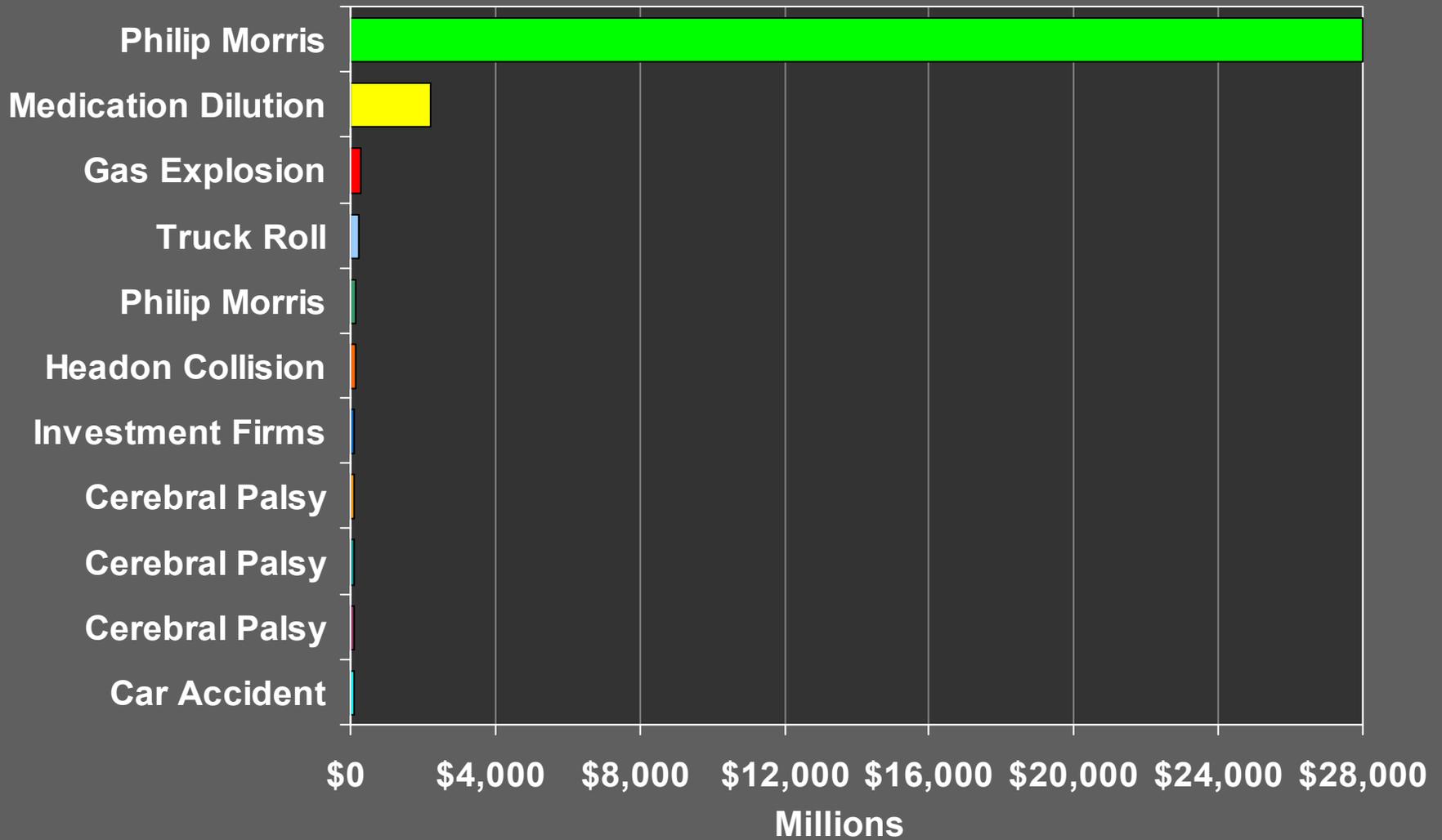
# Specialty Relativity Nationwide



# Top Jury Awards of 2002



# Top Jury Awards of 2002

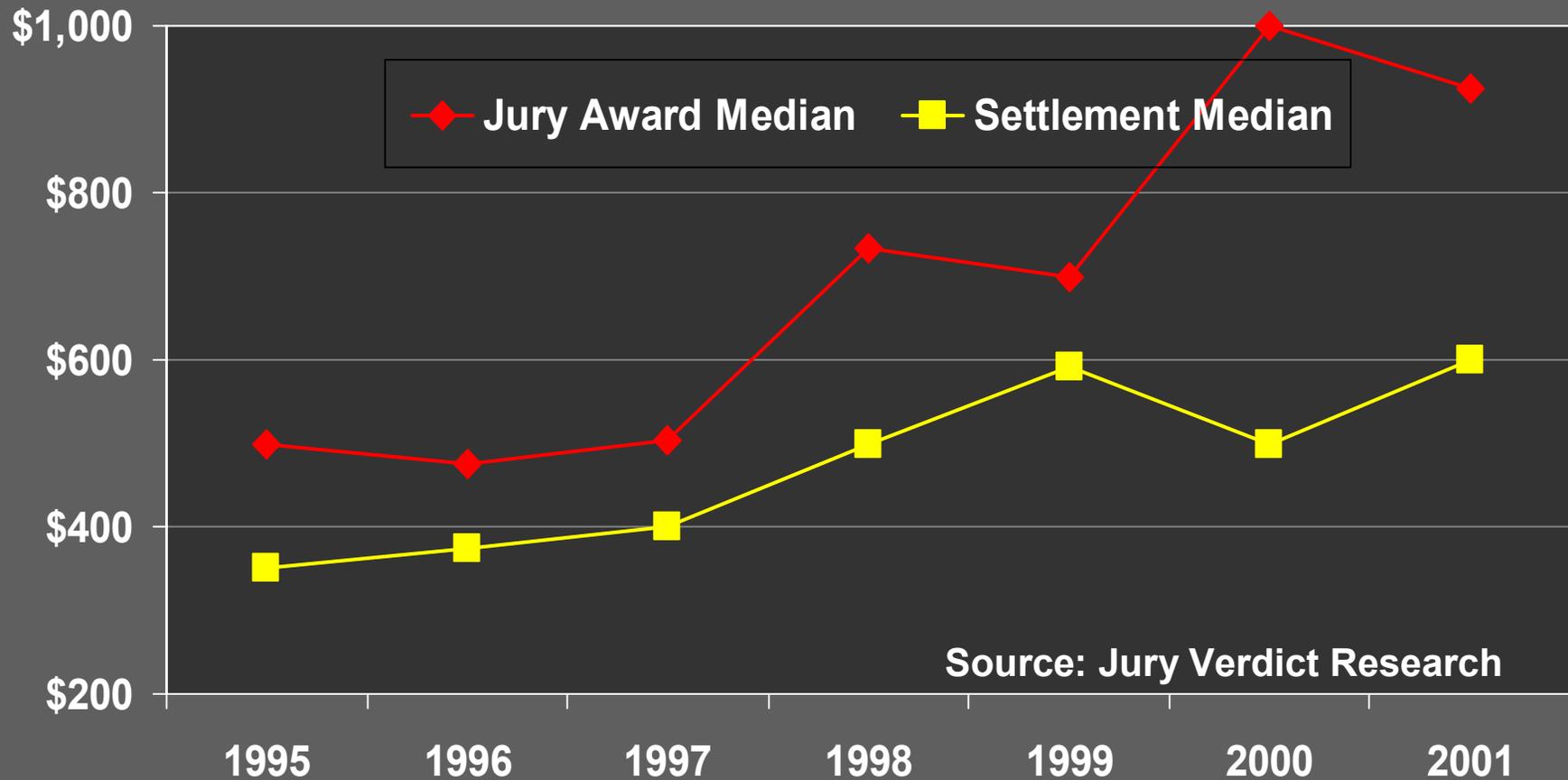


# Severity: National Medians



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

(000's)



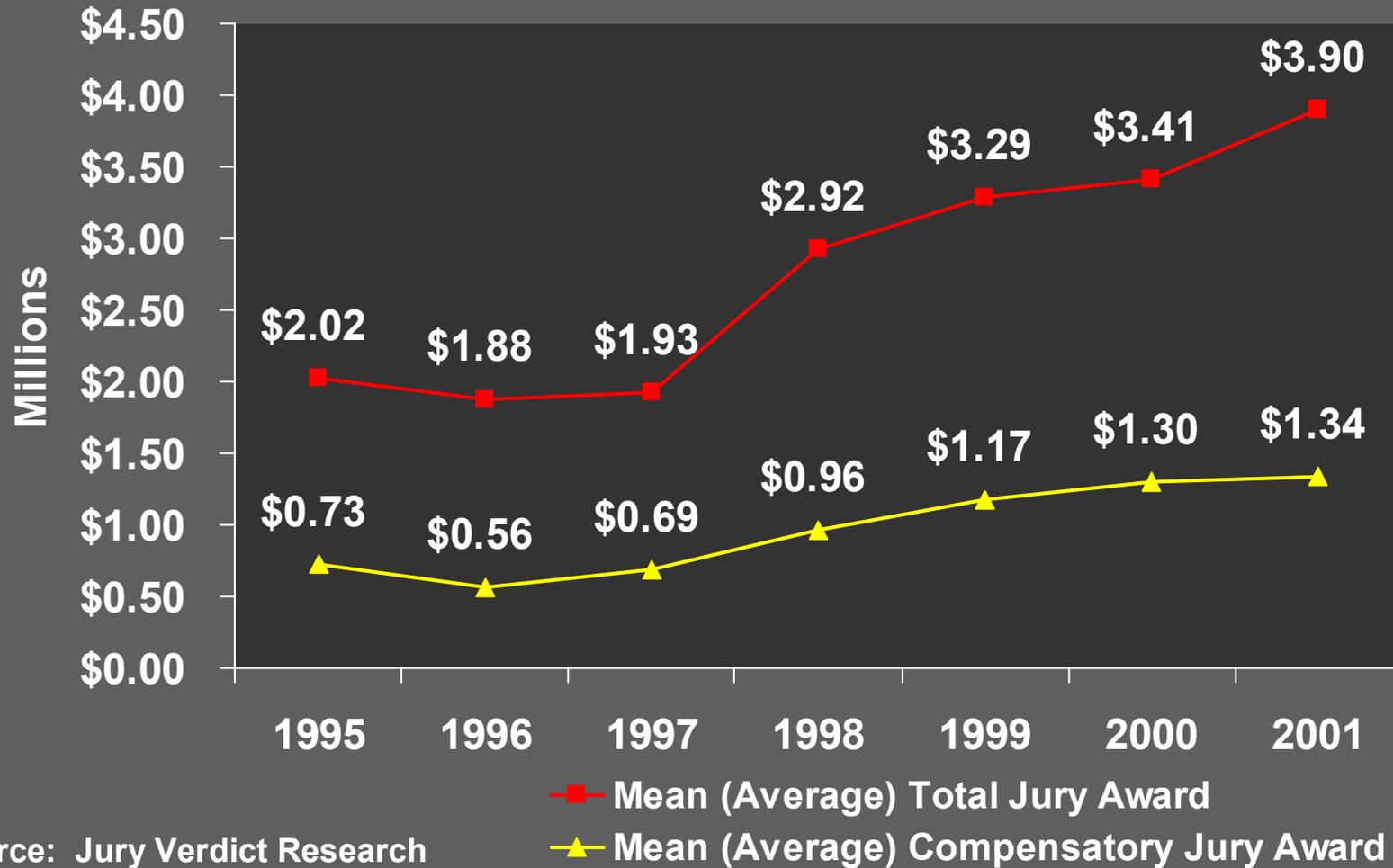
Source: Jury Verdict Research

# Average Jury Award in Medical Malpractice Cases

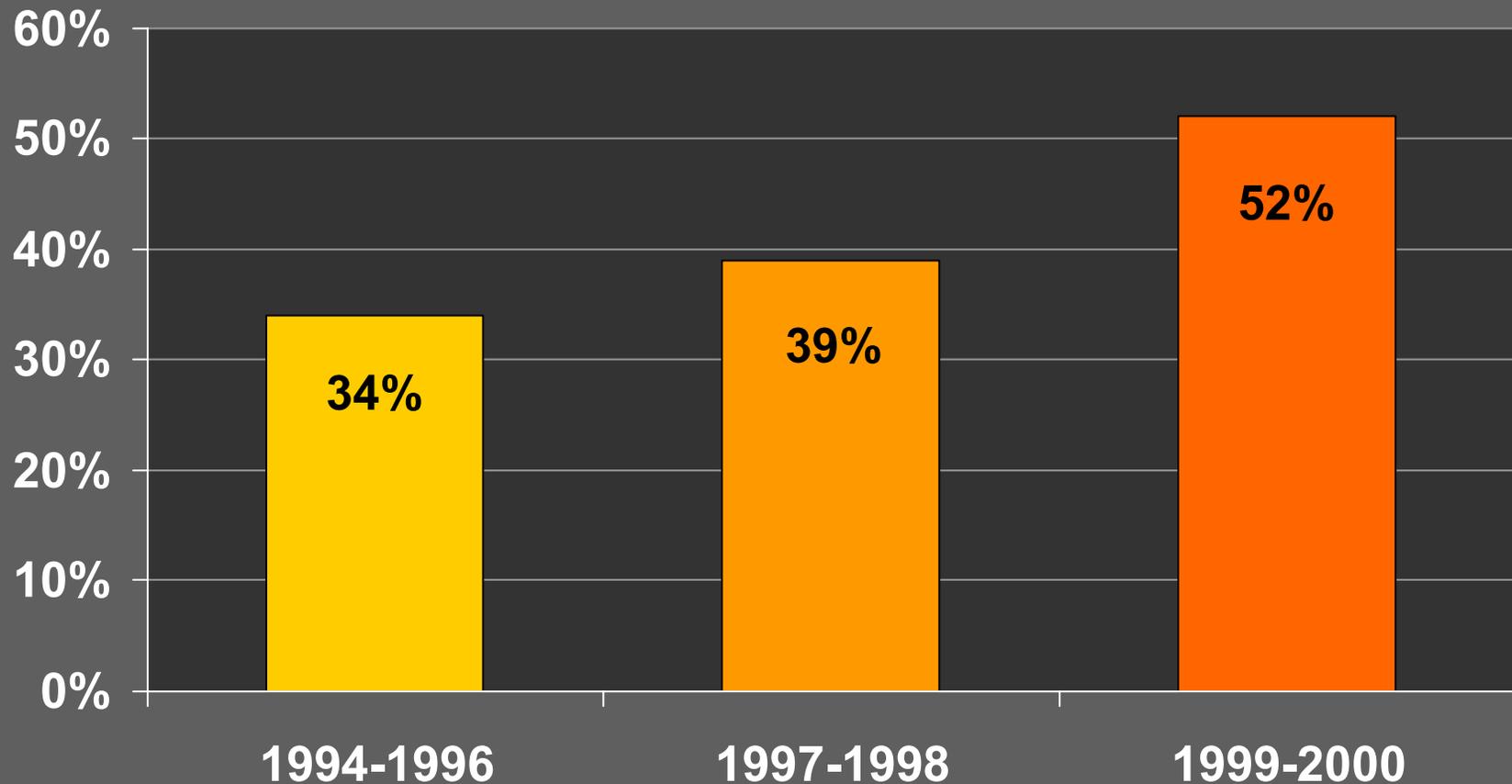


Source: Jury Verdict Research; Insurance Information Institute.

# Impact of Noneconomic Damages



# Trends in Million Dollar Verdicts - Medical Malpractice



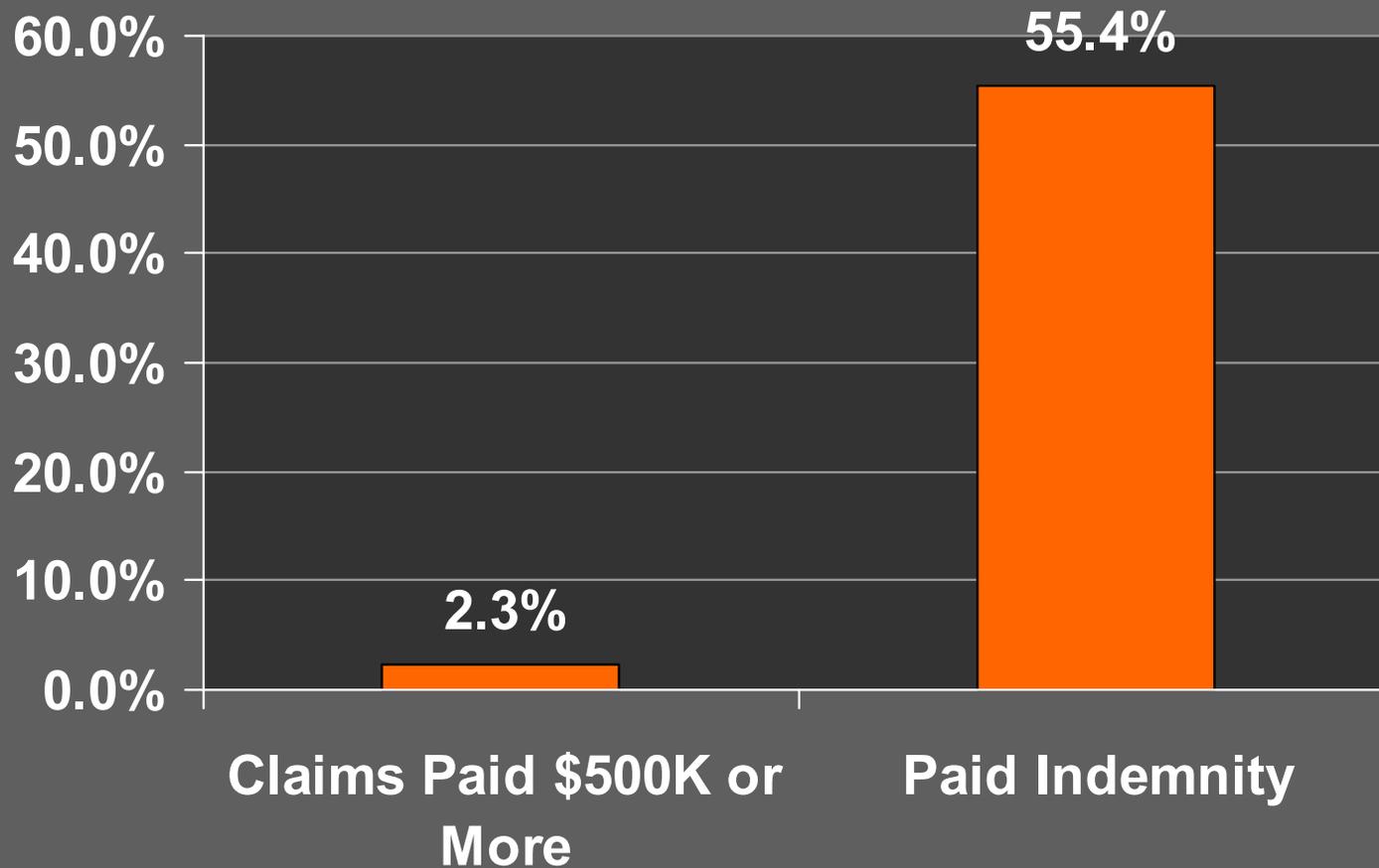
**Verdicts of \$1 million or more**

Source: Jury Verdict Research; Insurance Information Institute

## Large Claims Analysis

- Total number of claims 1998-2002: **16,398**
  - 0.8% (140) paid \$1 million or more, 28.5% of paid indemnity
  - 2.3% (378) paid \$500,000 or more, 55.4% of paid indemnity
- Total *paid* claims 1998-2002: **3,307**
  - **4.2%** (140) paid \$1 million or more, **28.5%** of paid indemnity
  - **11.4%** (378) paid \$500,000 or more, **55.4%** of paid indemnity

# Large Claims Analysis



# The Most Expensive Claims

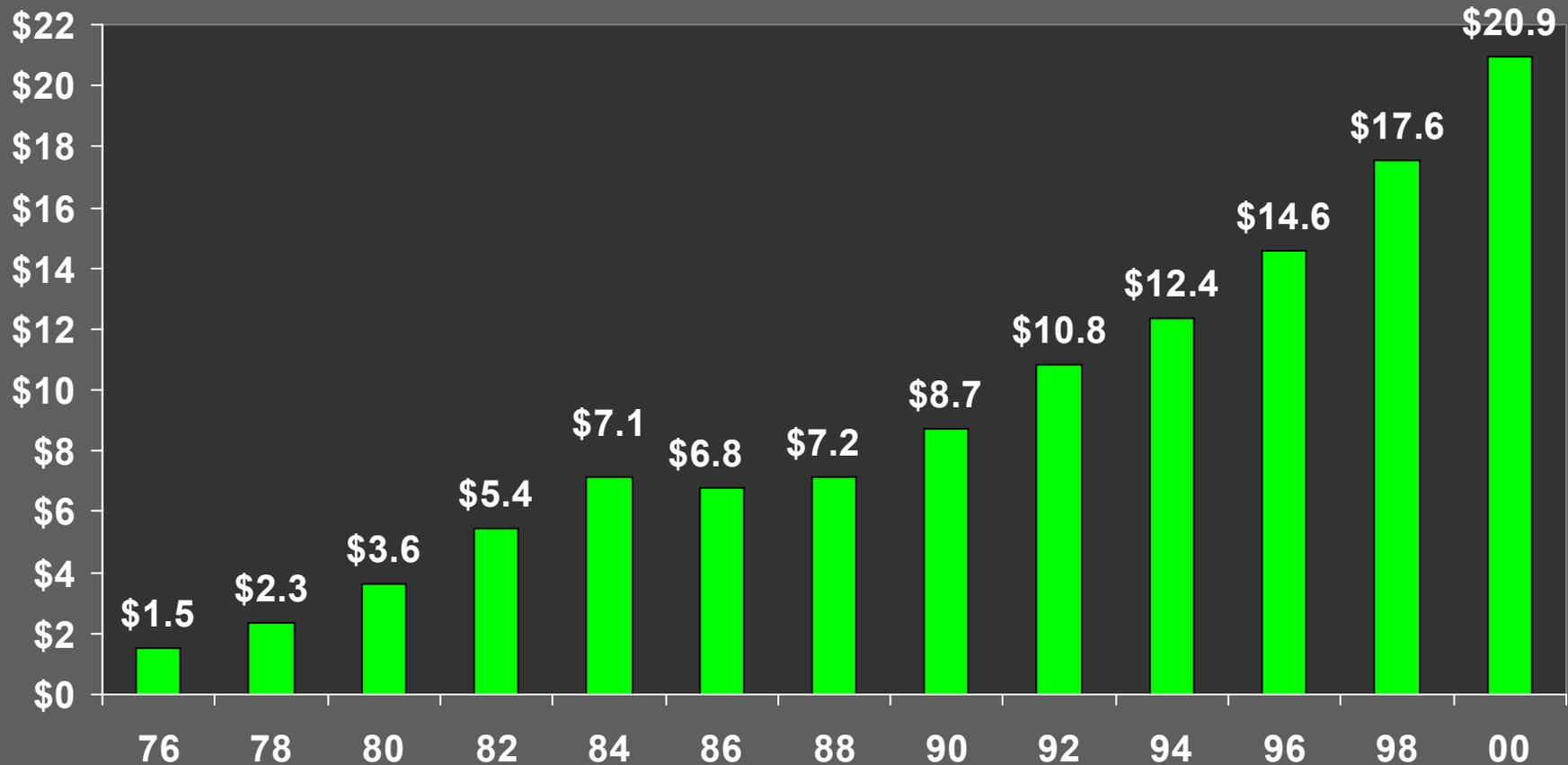


- Texas: \$268,000,000
- Many states: \$100,000,000
- Philadelphia: Jury verdicts exceed the entire state of CA over past 3 years.
- *Verdicts drive settlement value.*

# Medical Malpractice: Tort Cost Growth is Skyrocketing

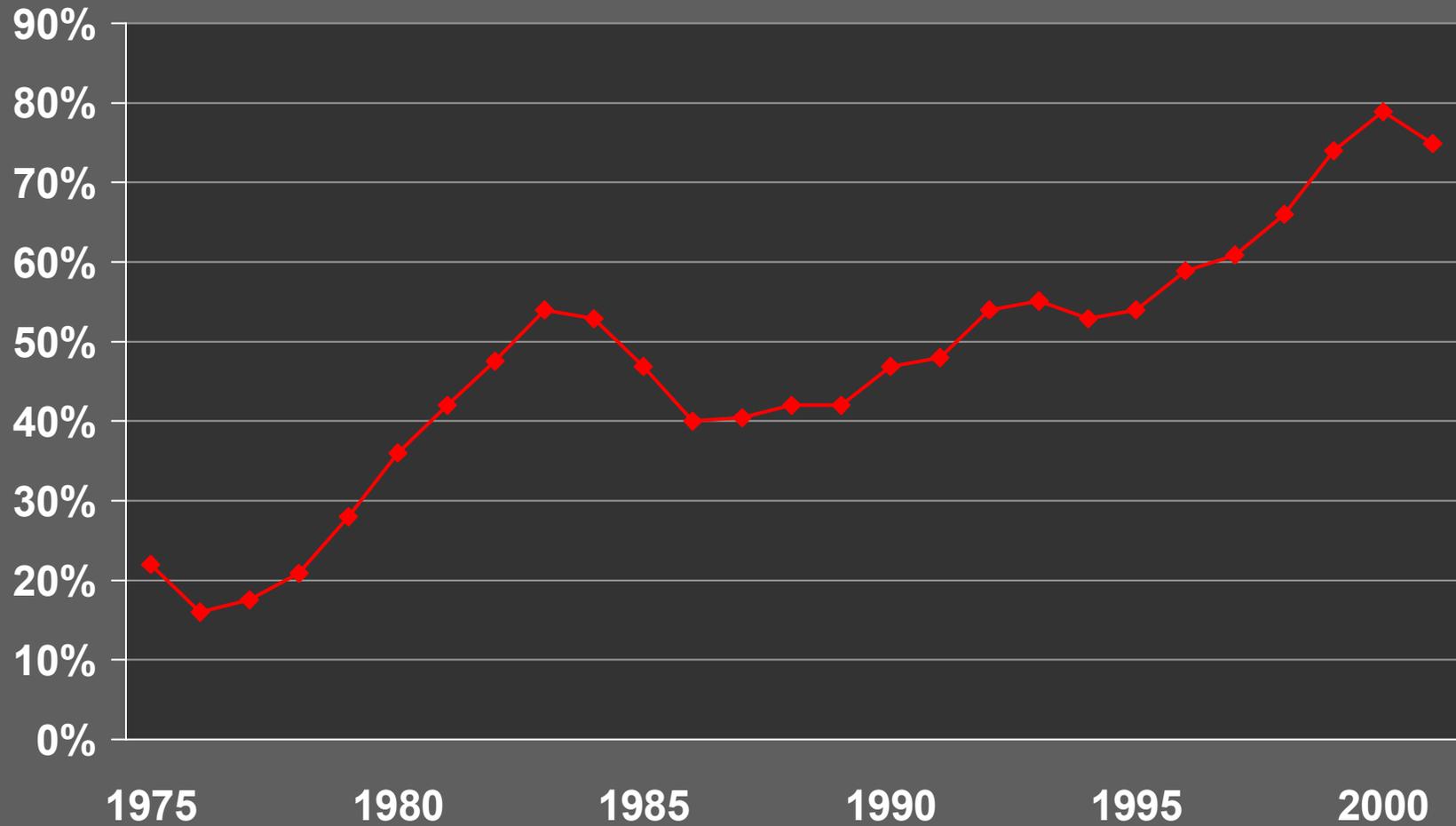


\$ Billions



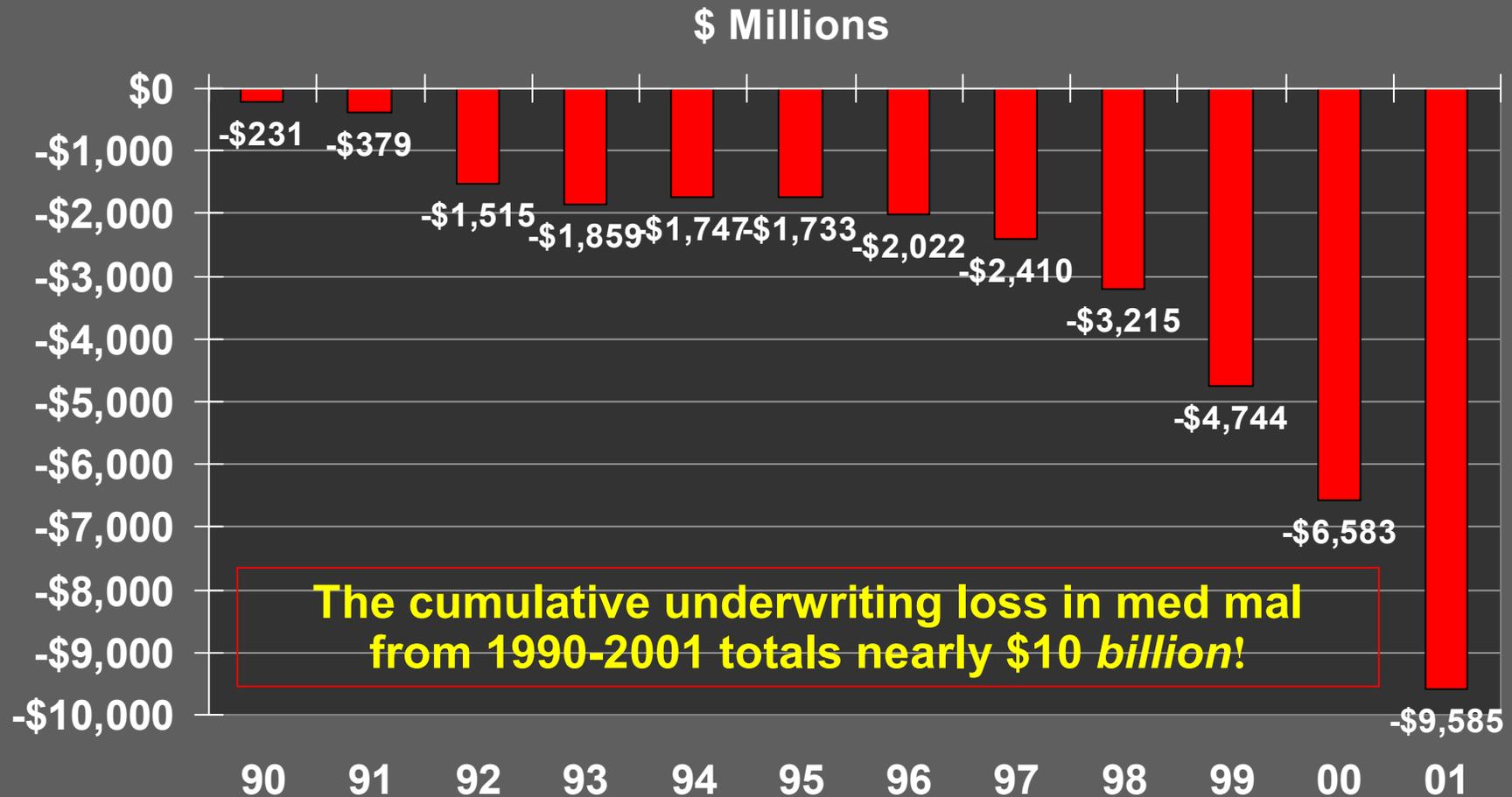
Sources: Tillinghast-Towers Perrin, US Bureau of Labor Statistics, Insurance Information Institute

# Paid Loss Ratio



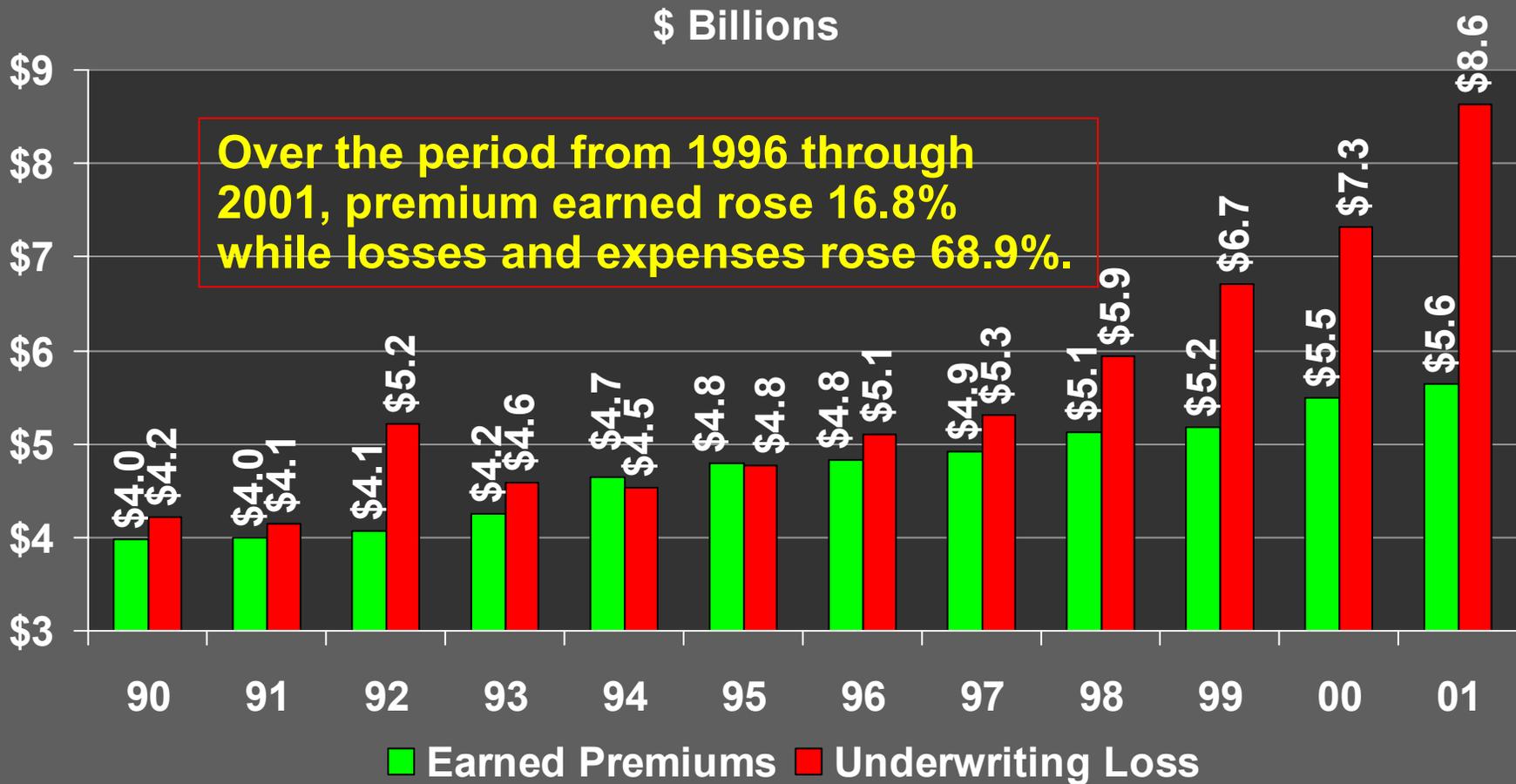
Source: Brown Brothers Harriman

# Medical Malpractice: Cumulative Underwriting Losses



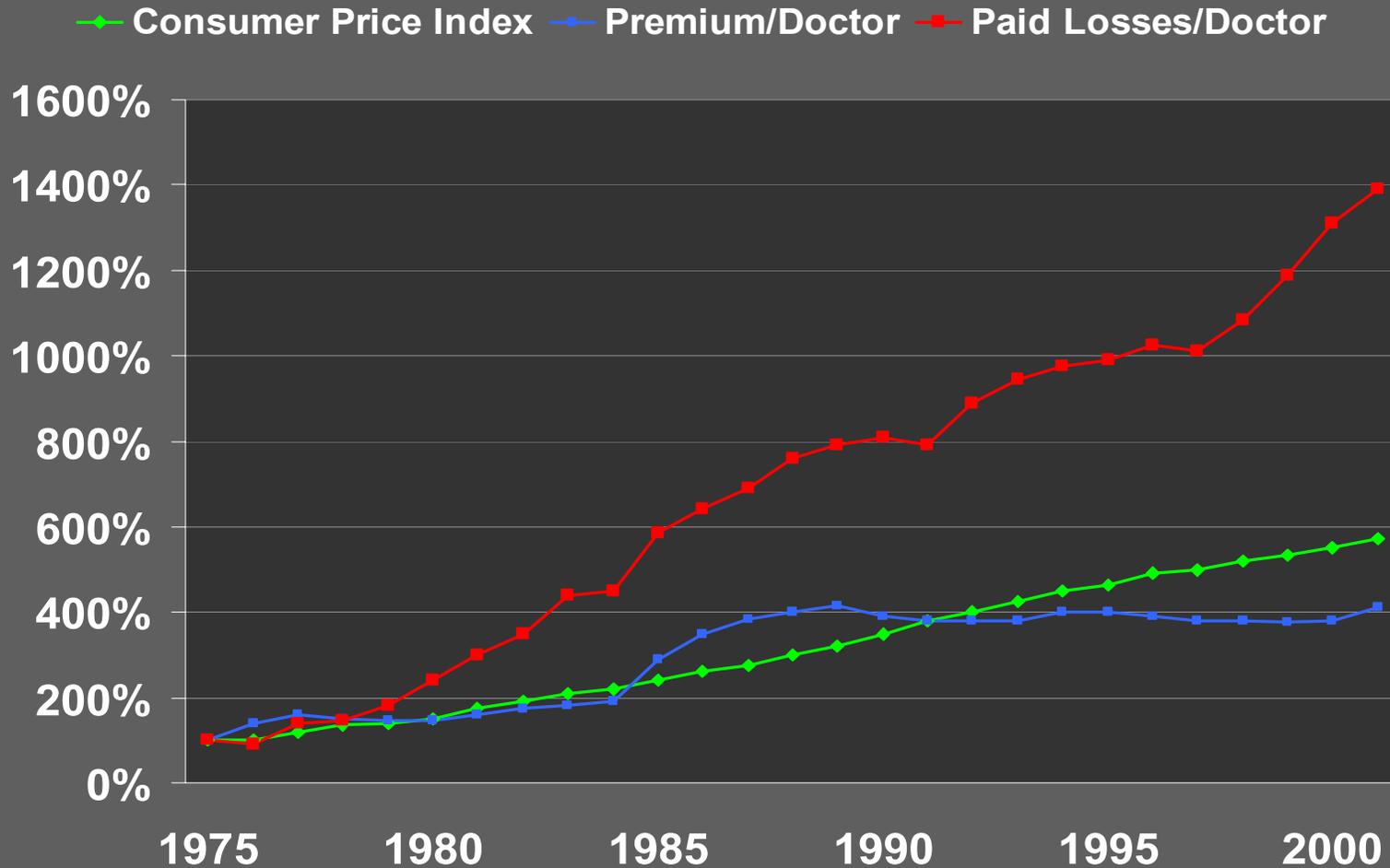
Source: Insurance Information Institute calculations based on data from A.M. Best.

# Medical Malpractice: Losses & Expenses Paid vs. Premiums Earned



Source: Computed from A.M. Best data by the Insurance Information Institute

# Inflation and Per Doctor Premiums and Losses



Source: Brown Brothers Harriman

# 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.

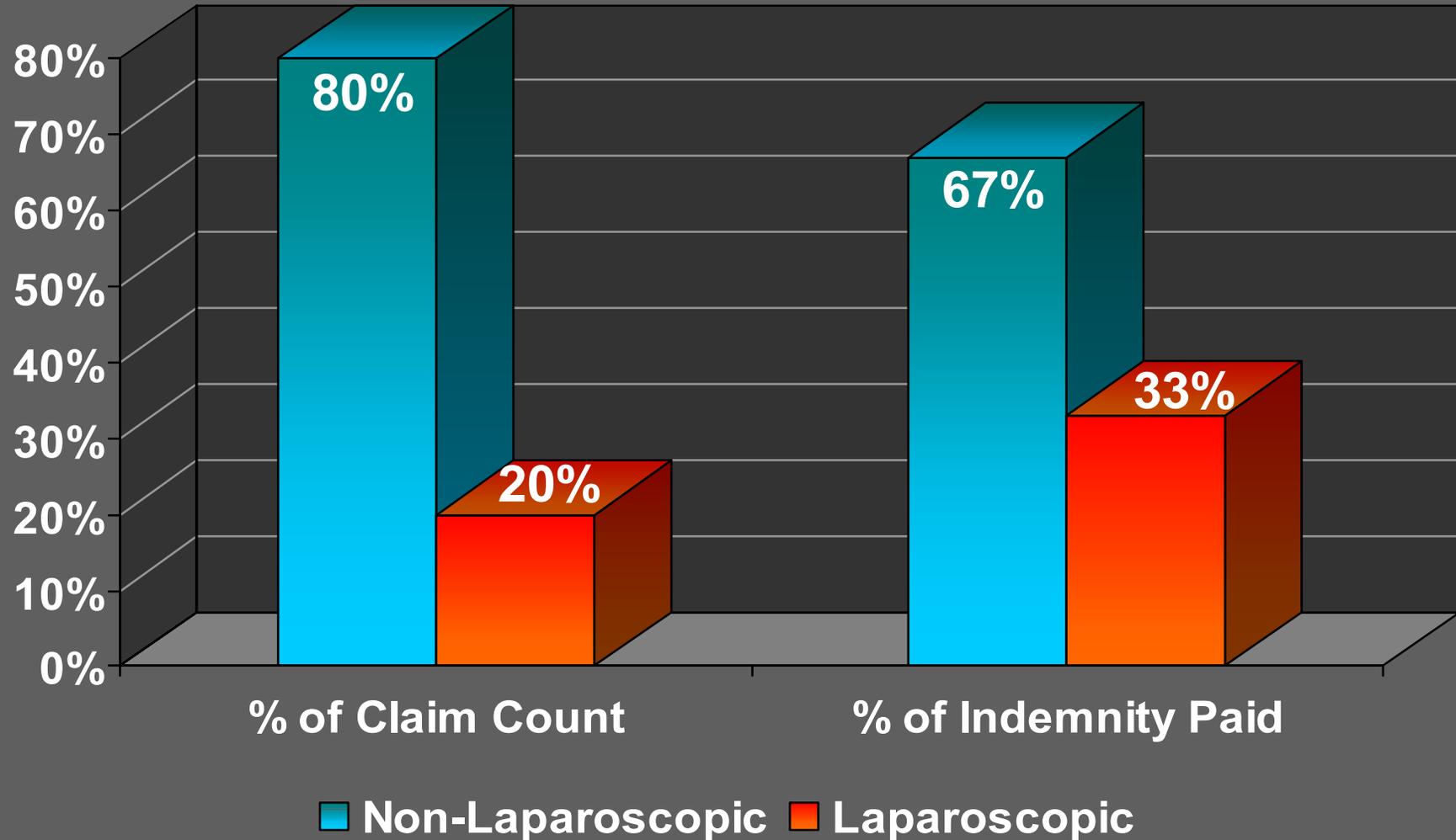
# Surgical Claims

## Laparoscopic Claims Worldwide



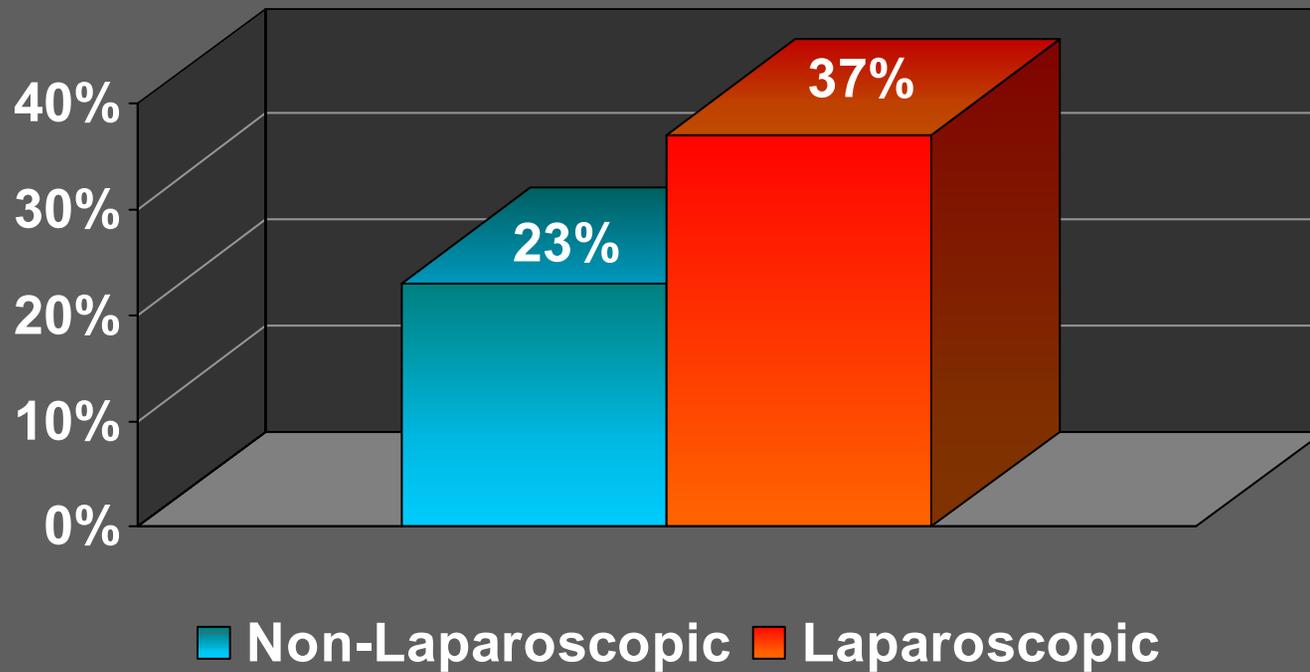
- 50% involve bile duct injury.
- Complication rate is 0.3% worldwide.
  - Delayed recognition 62-76% (surgeon finished operation without recognizing the error.
    - i.e., majority of injuries unrecognized.

# General Surgery Claims



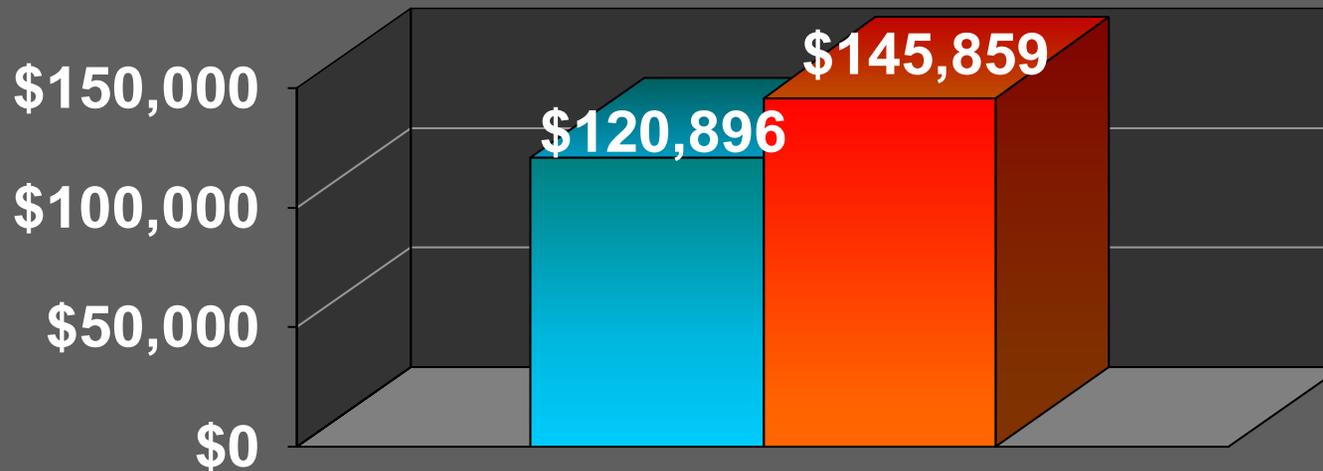
# General Surgery Claims

% of Claims With Indemnity Payments



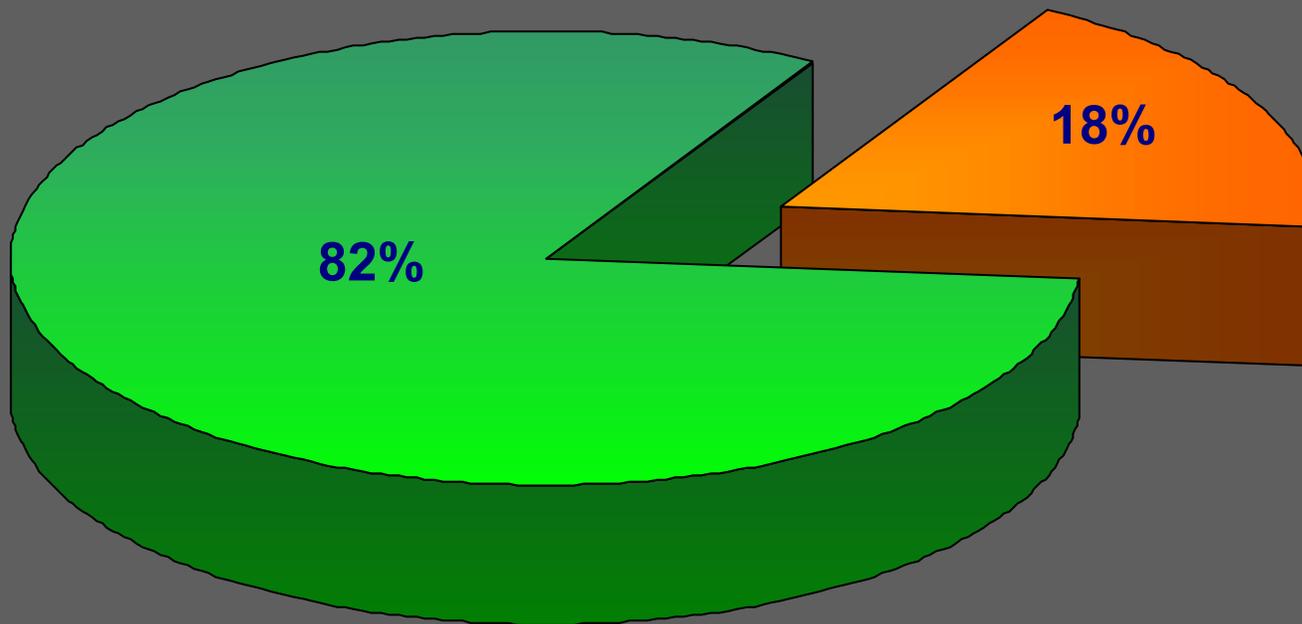
# General Surgery Claims

## Average Paid Indemnity



■ Non-Laparoscopic ■ Laparoscopic

# Claim Distribution by Allegation

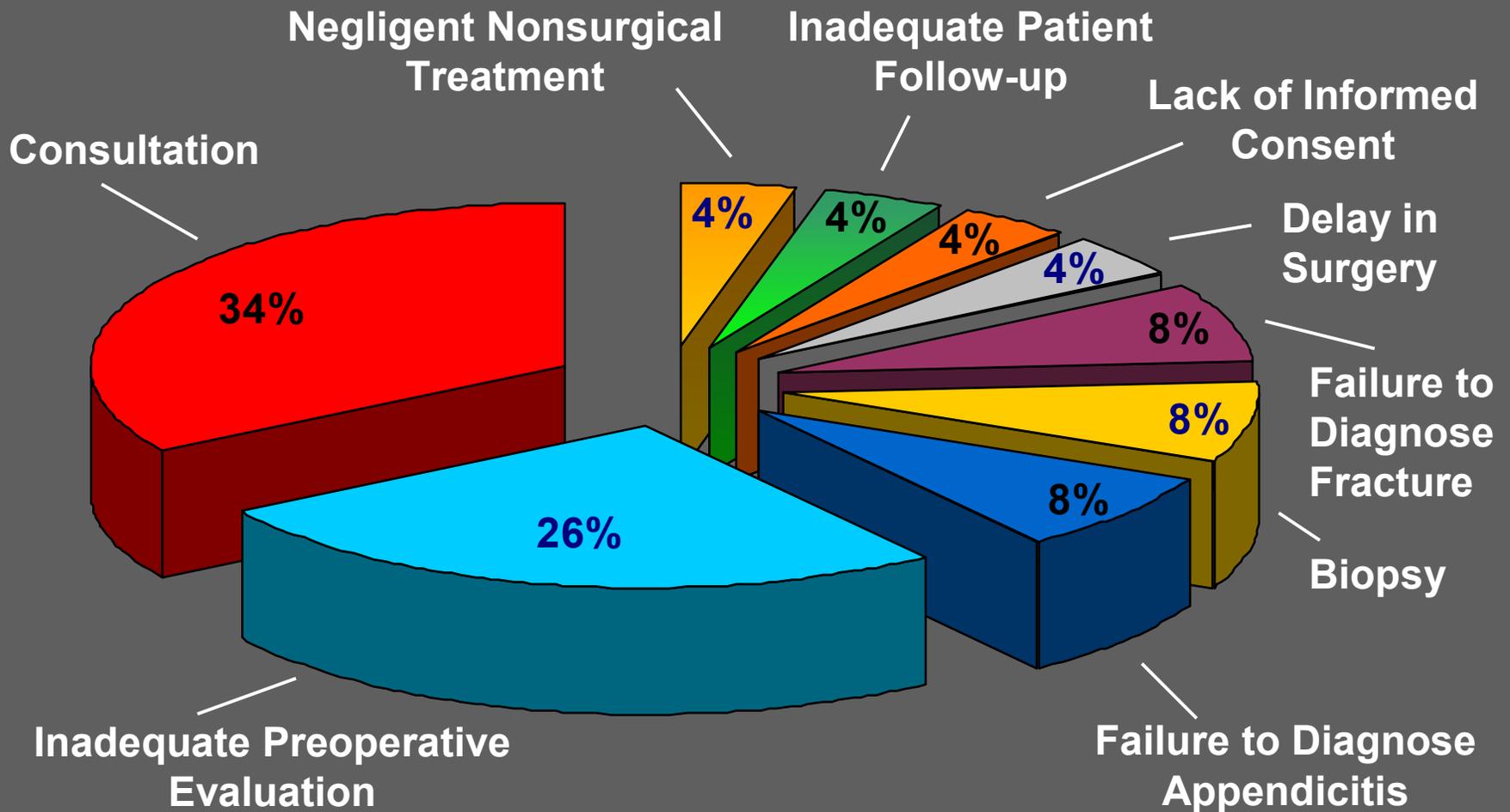


-  Pre-Operative/Non-Operative
-  Intra-Operative/Peri-Operative

# Claim Distribution by Allegation

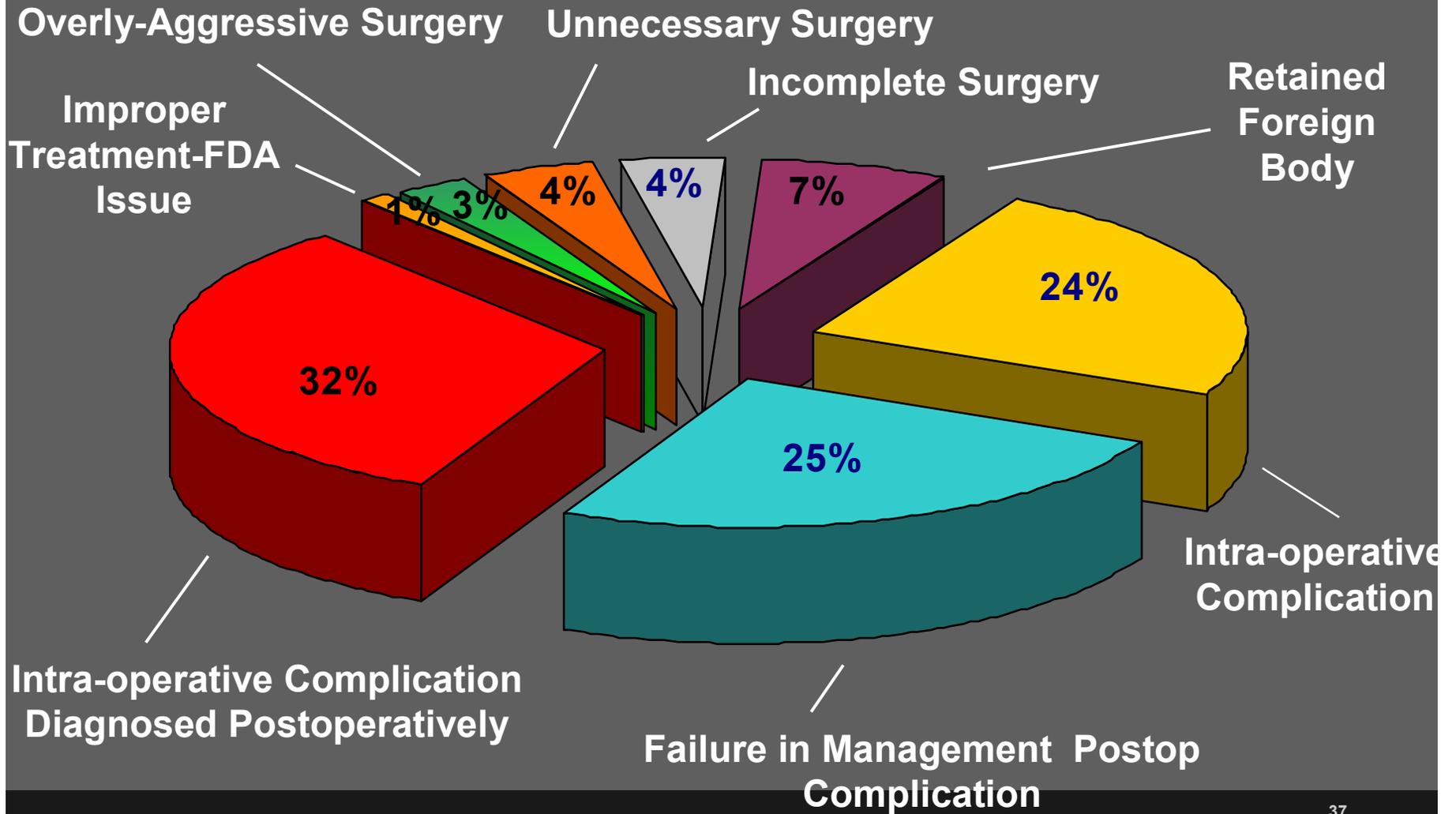


## Pre-Operative/Non-Operative



# Claim Distribution by Allegation

*Intra-Operative/Peri-Operative*

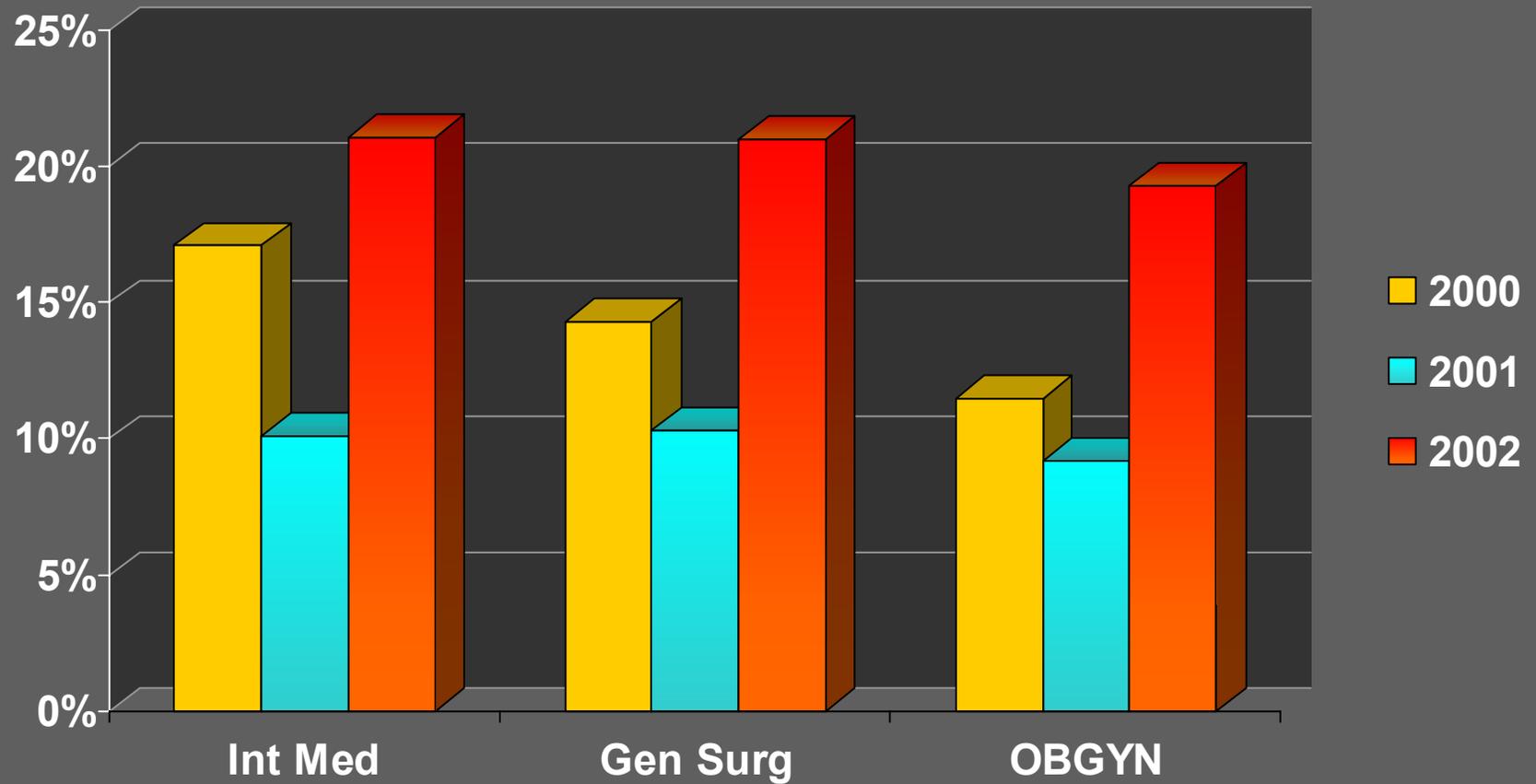


# Costs of Coverage

# Reinsurance

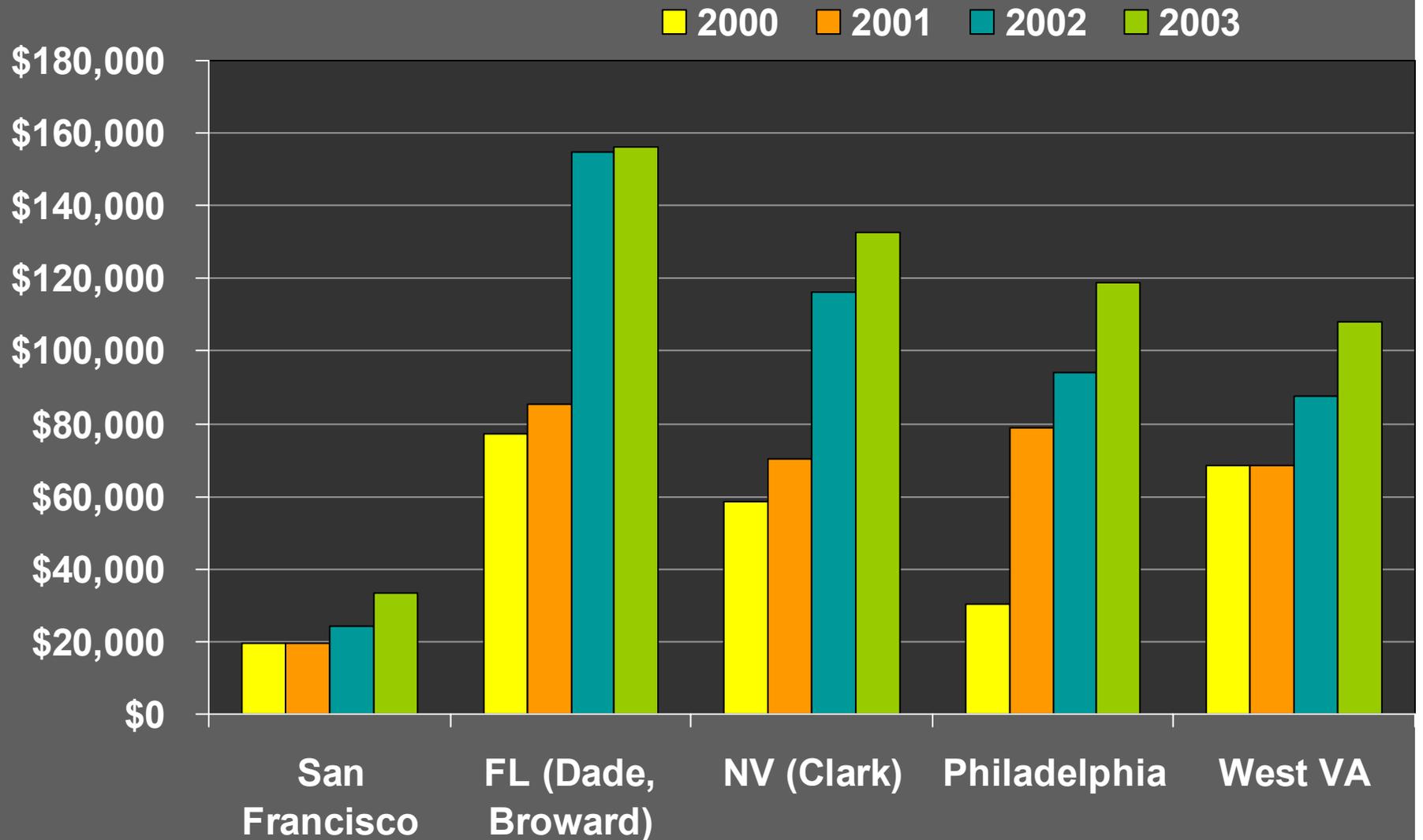
- September 11
- Effect is inversely proportional to the size of the insurance company

# Average Rate Increases

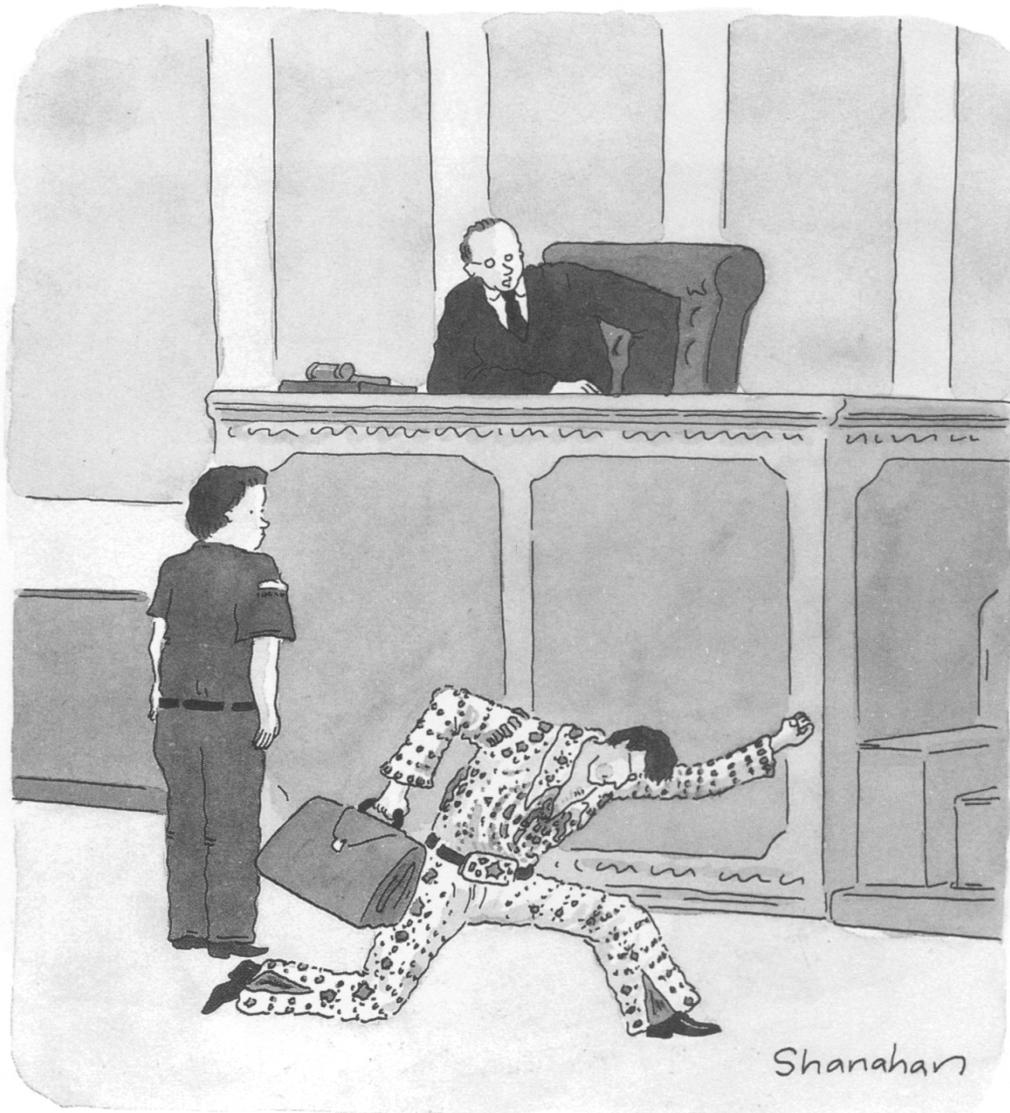


Medical Liability Monitor

# Recent General Surgery Rates



# Tort Reform



*"A unique and stirring plea, counsellor"*

# Goals and Benefits

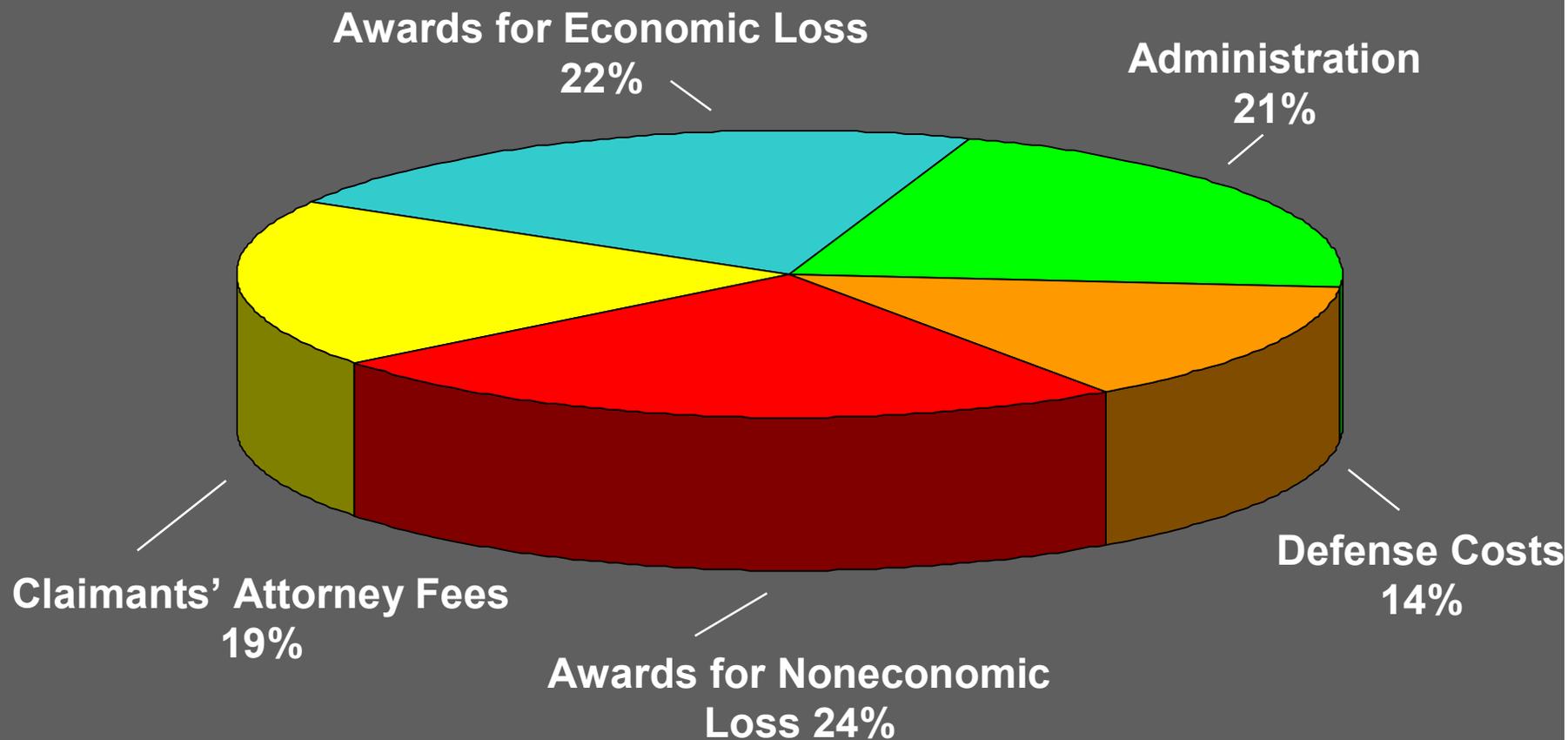


- **Sustainable** insurance system providing full indemnification of actual loss.
- **More** money for injured patients.
- **Faster** settlements.
- Preserves **access** to medical care without impeding access to courts for truly injured patients.
- Society does not incur **double** costs.
- **Assures** money is available at the time it is needed.

## MICRA: Context

- California's Litigation Fairness (U.S. Chamber 2003): 44<sup>th</sup> among the 50 states.
  - Bottom 5 in:
    - Jury predictability
    - Punitive damages
    - Class action lawsuits

# Where the Premium Goes



Source: Tillinghast-Towers Perrin

- 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.

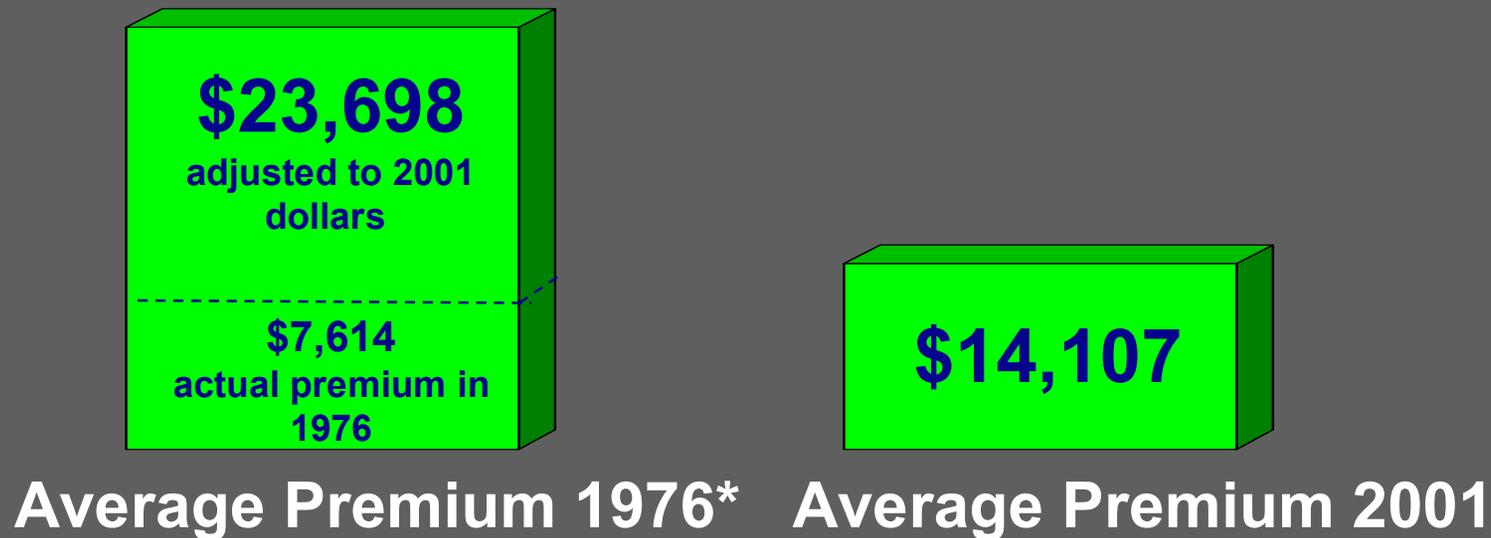
# MICRA

- 5. Provides for a shorter statute of limitations.
- 6. Requires a 90-day “Notice of Intent to Sue.”
- 7. Encourage and facilitate arbitration.

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

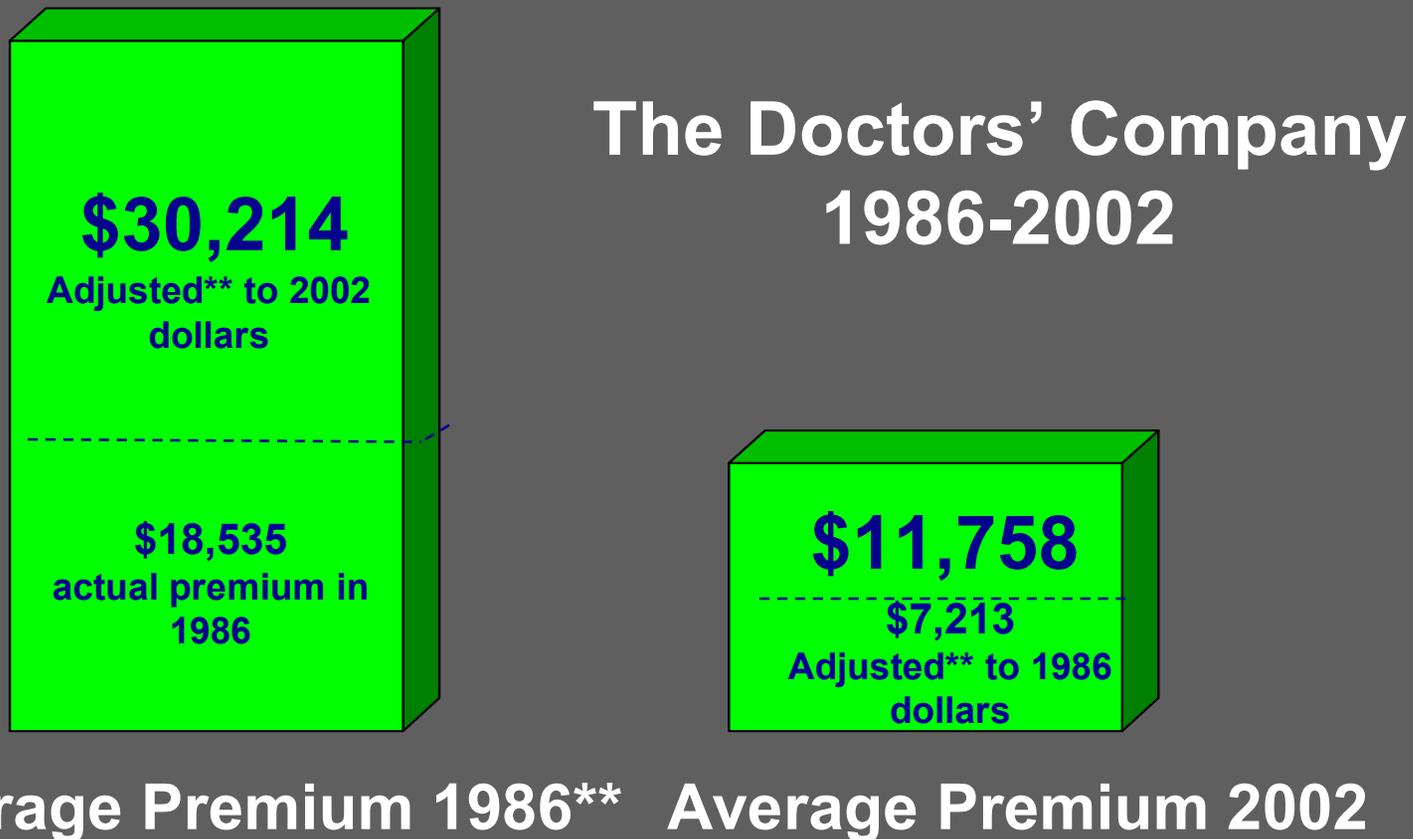


## The Doctors' Company 1976-2001



\* \$7,614 average premium adjusted to 2001 dollars on the Annual Urban CPI Index for a \$1 Million/ \$3 Million Claims-Made Policy Premium

# Tort Reform Helps Reduce Colorado Medical Liability Premium Rates by 61%

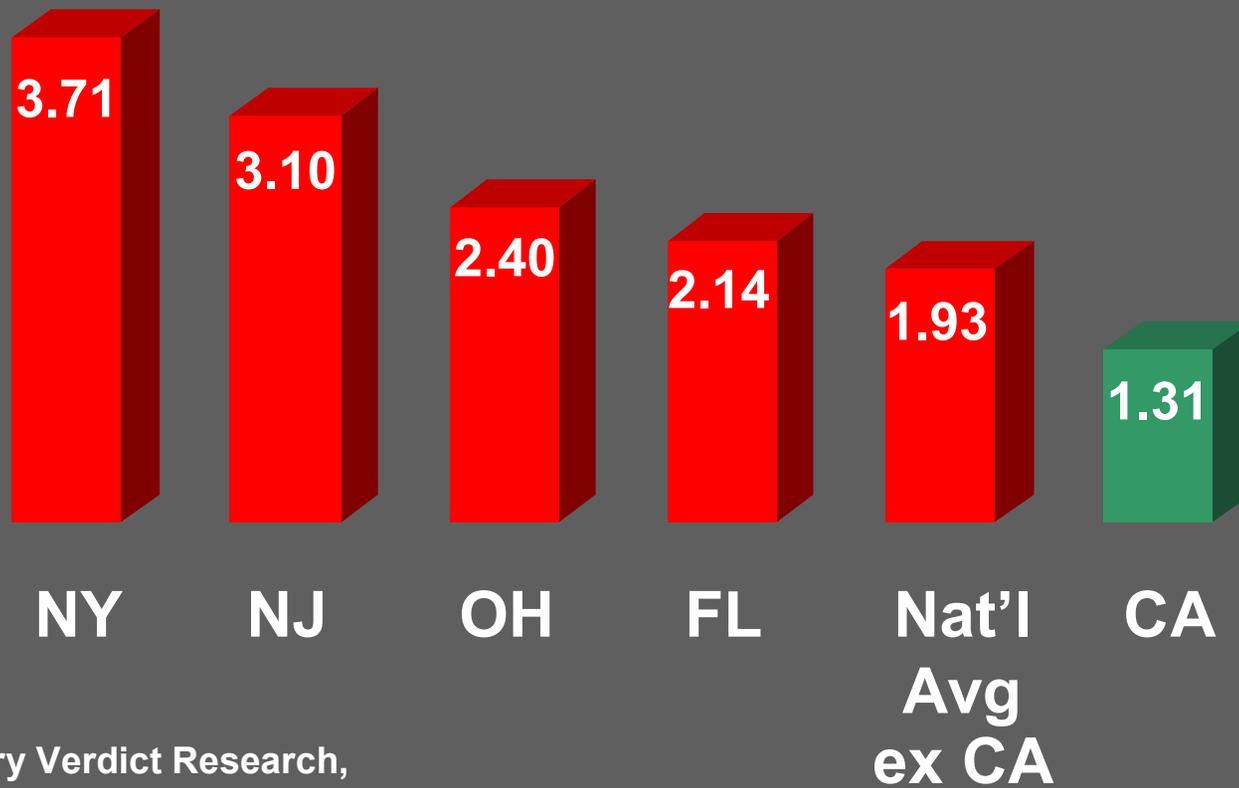


\*The Doctors Company's average of all specialties including dividends for a \$1 Million/\$3 Million Mature Claims-Made Policy.  
\*\*Premium adjustments are made using the Annual Urban Price Index published by the Bureau of Labor Statistics.

# MICRA Reduces Verdict Cost and Frequency

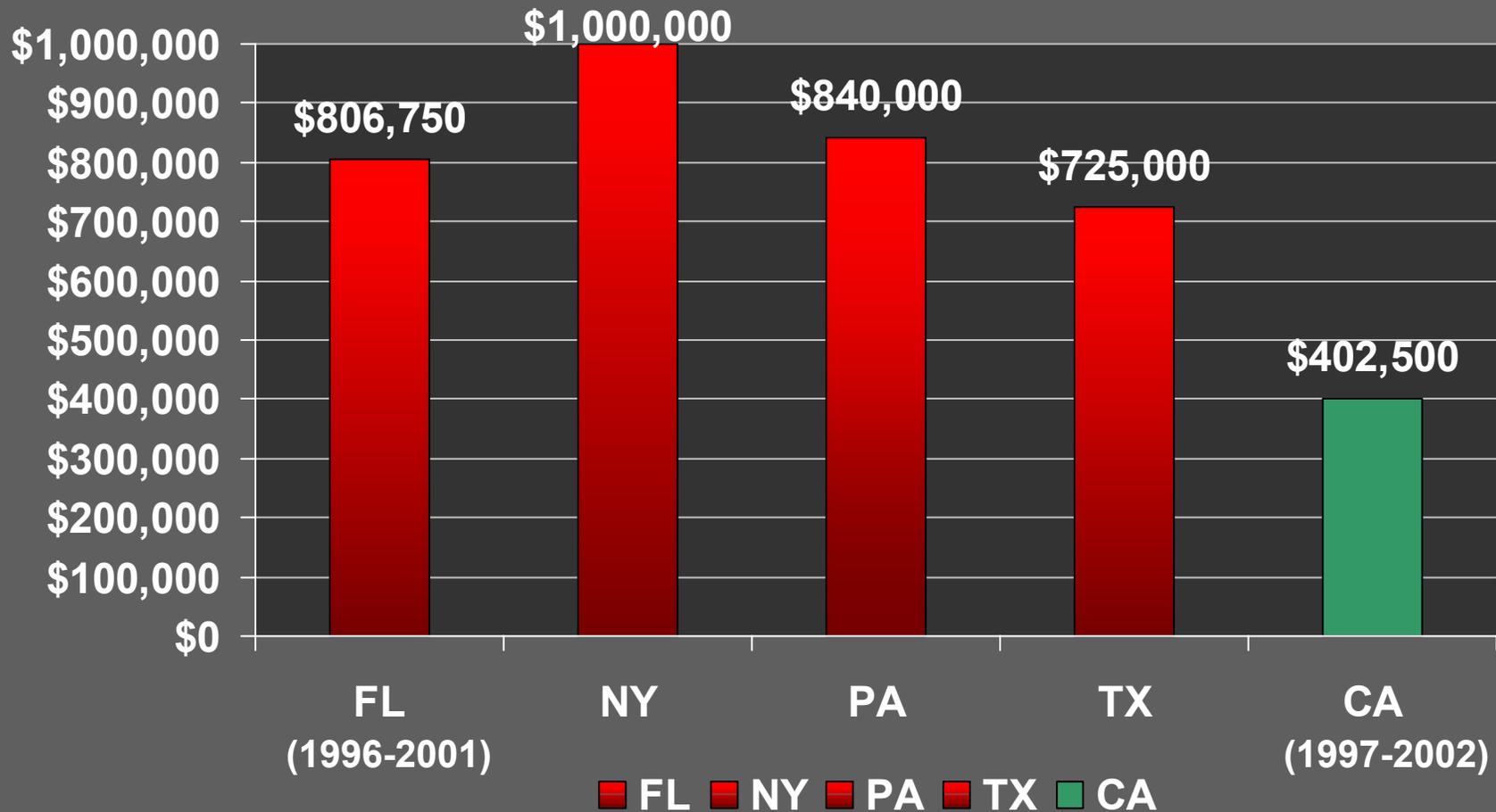


**\$1 Million+ Verdicts Per 1,000 Doctors**



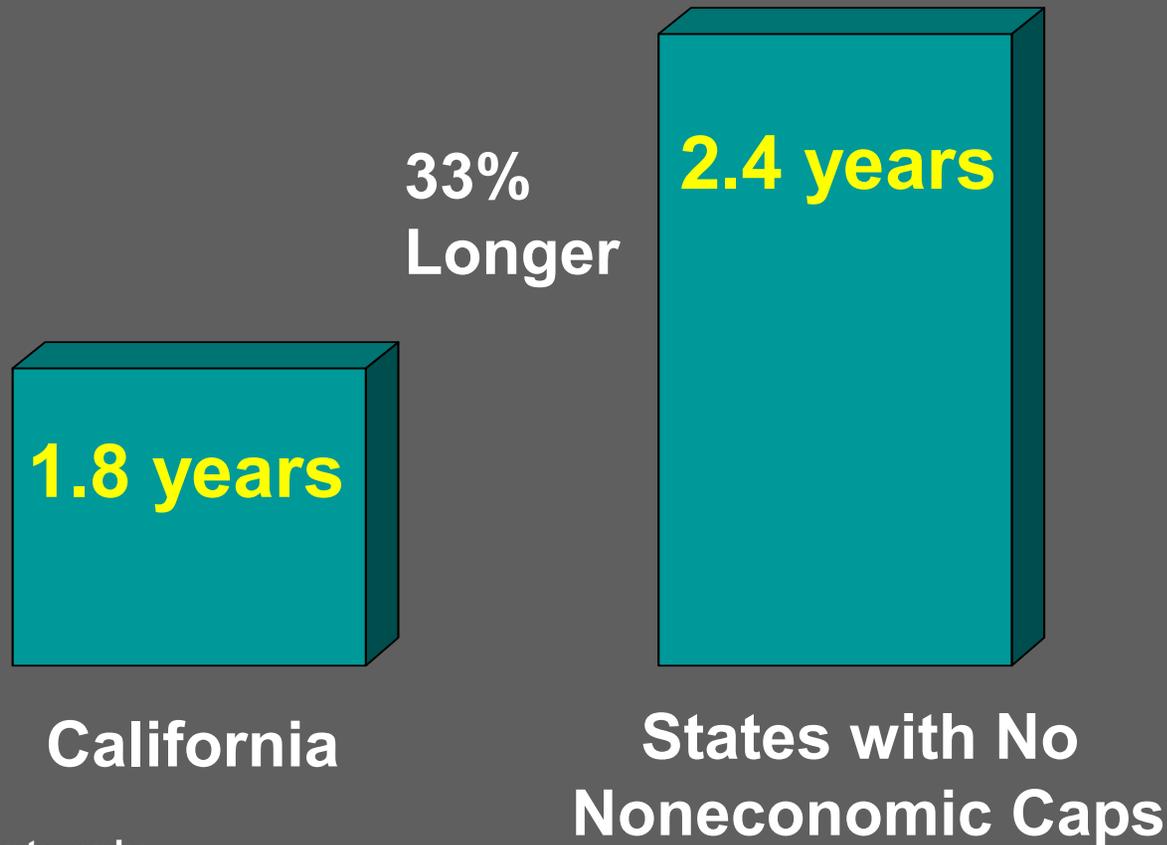
Sources: Jury Verdict Research,  
AMA

# MICRA: Median Med Mal Jury Awards 1996-2002



Source: Jury Verdict Research

# MICRA Reduces Average Time to Settlement



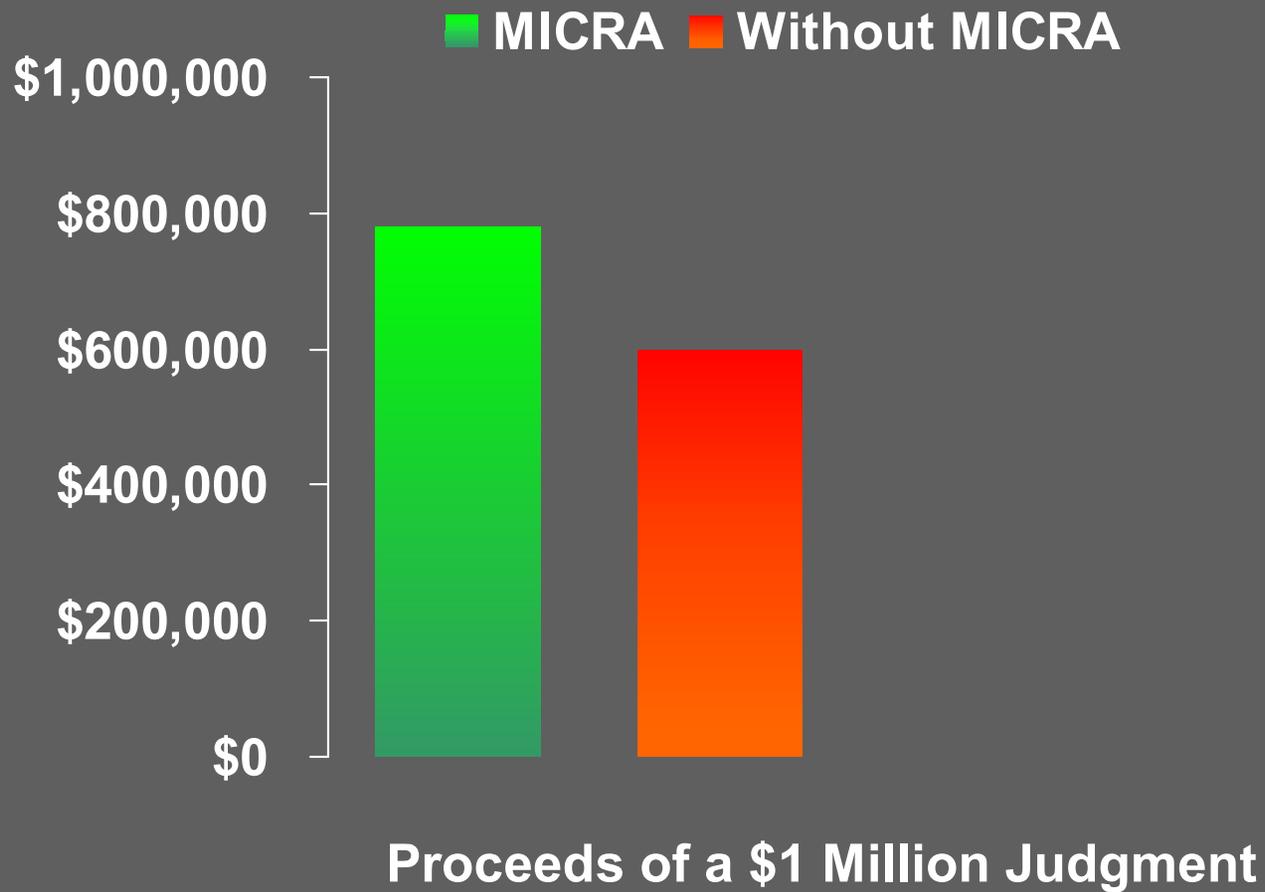
\*Indemnity payments only

The Doctors' Company, 1997-2001



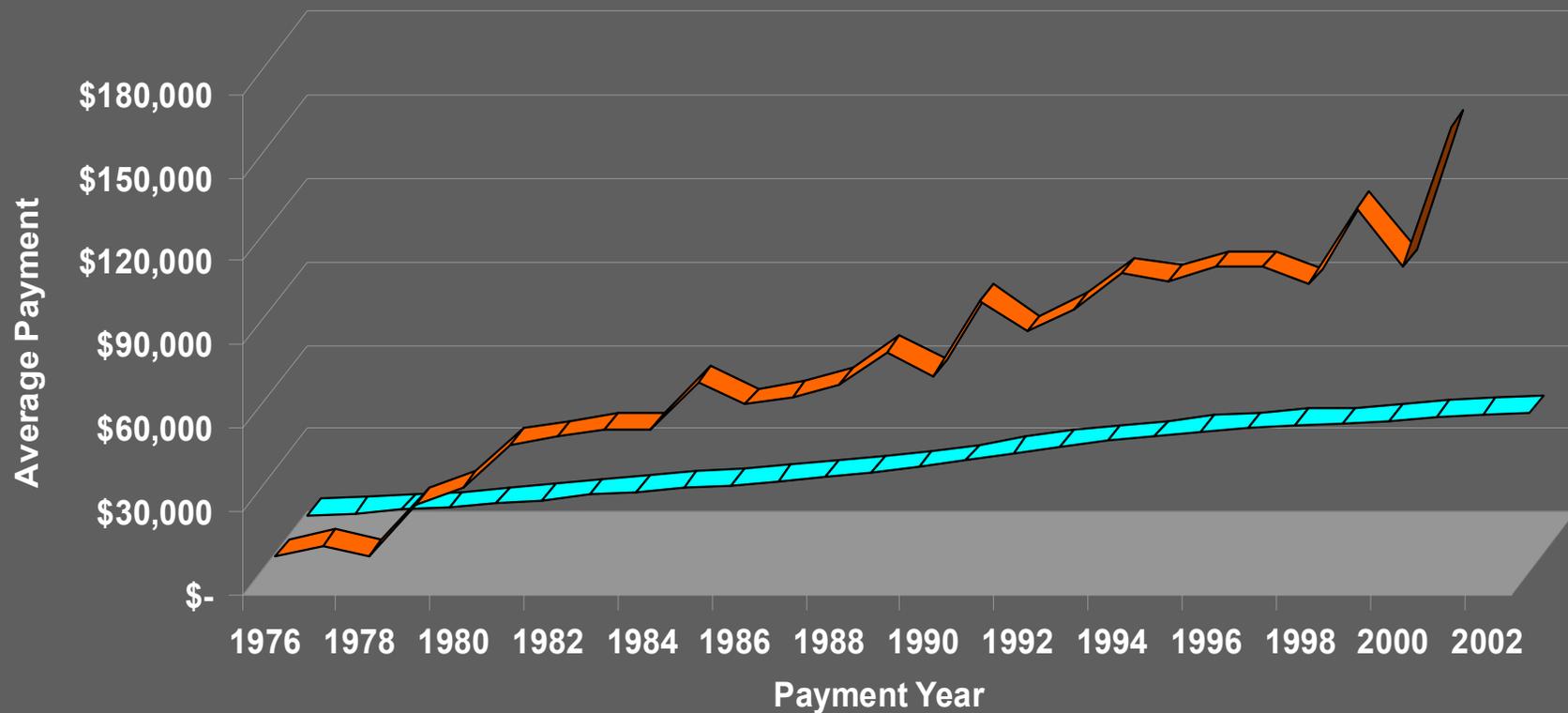
*"You have a pretty good case, Mr. Pitkin. How much justice can you afford?"*

# Injured Patients Benefit Directly



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

THE DOCTORS COMPANY

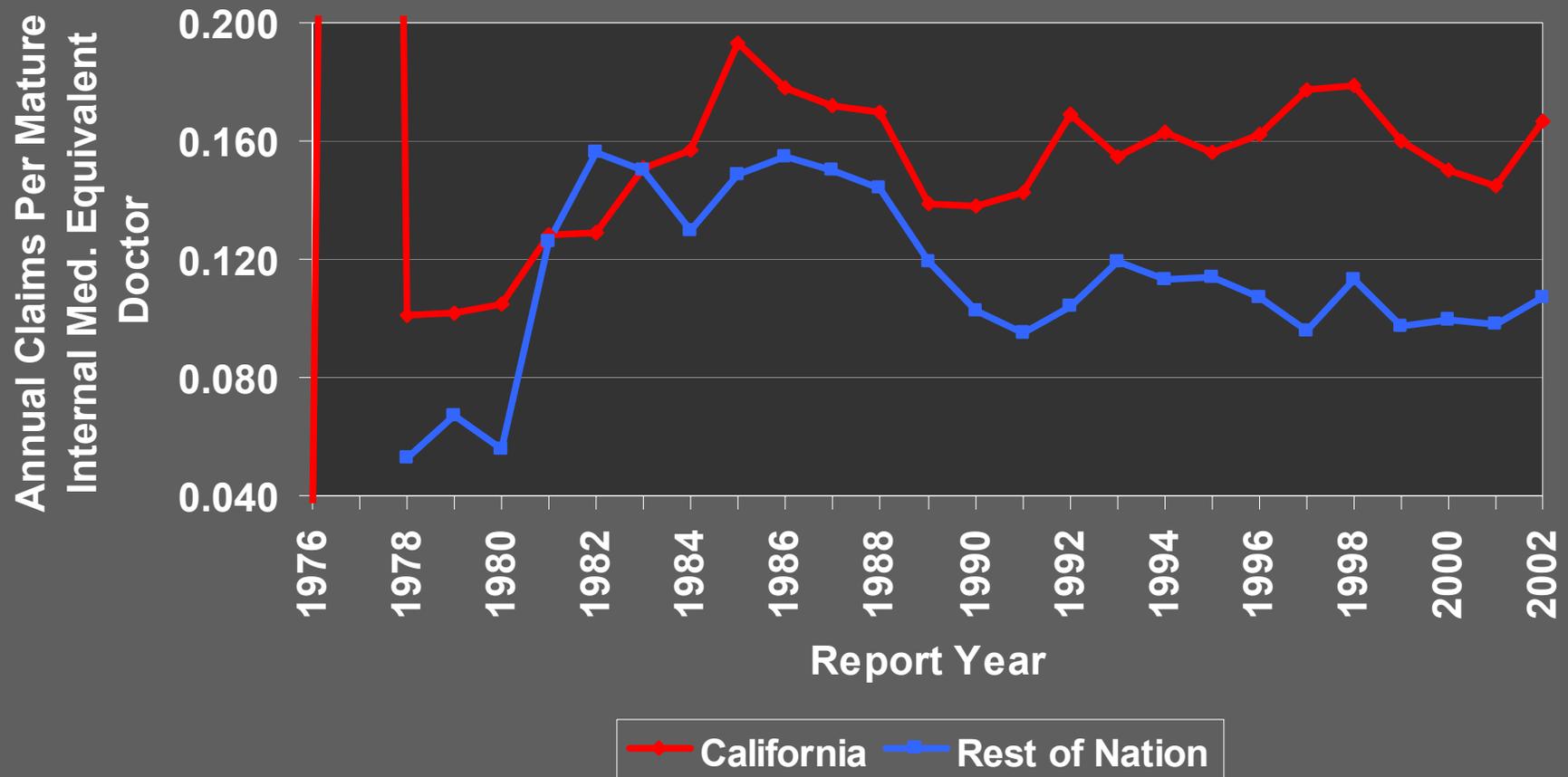


- Actual average physician medical liability claim paid in CA 1976-2001.
- Average medical liability claim in CA beginning 1976, adjusted for rate of inflation (CPI) 1976-2001.

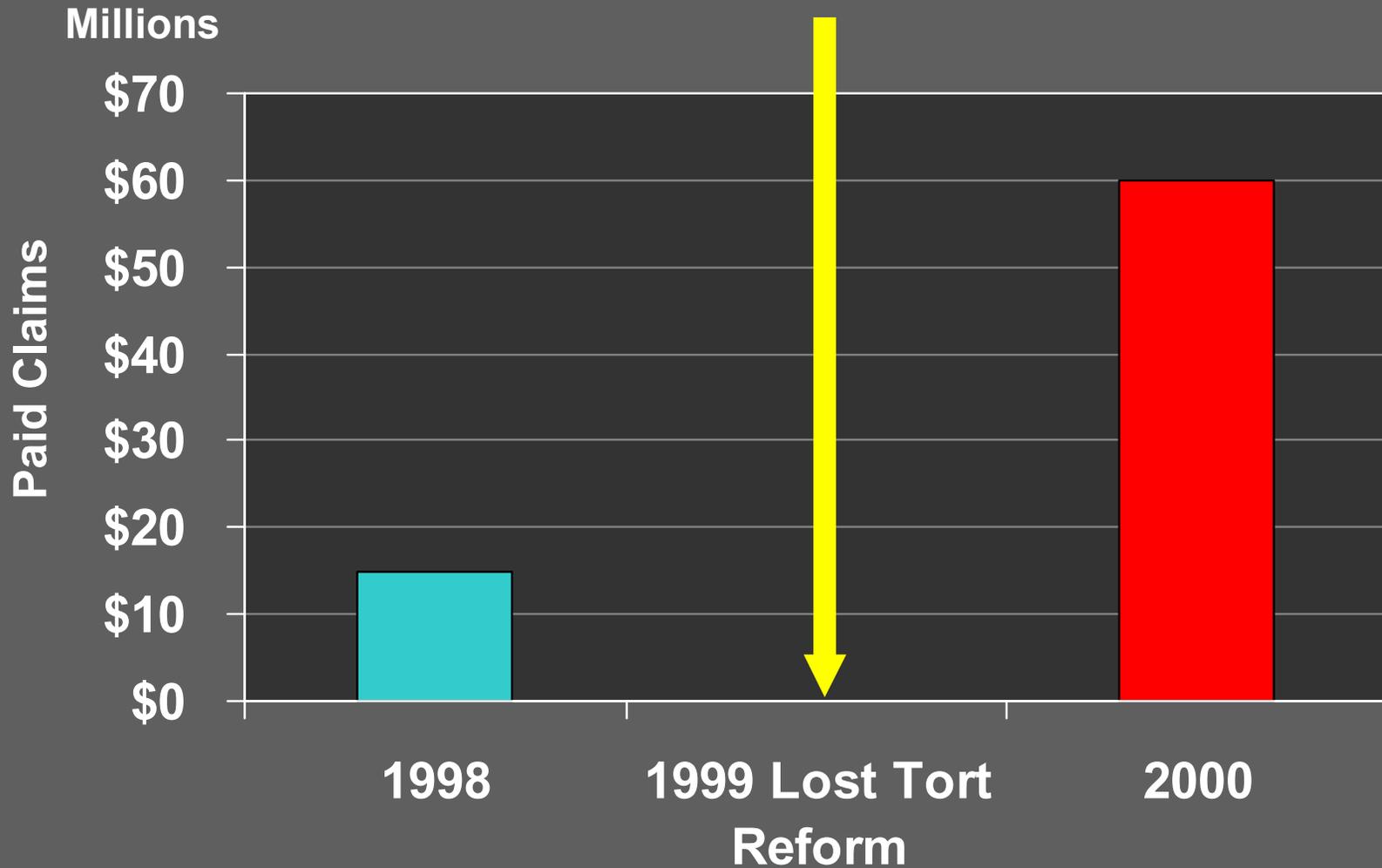
# MICRA Does Not Limit Access to Courts



TDC PHYSICIAN CLAIM FREQUENCY



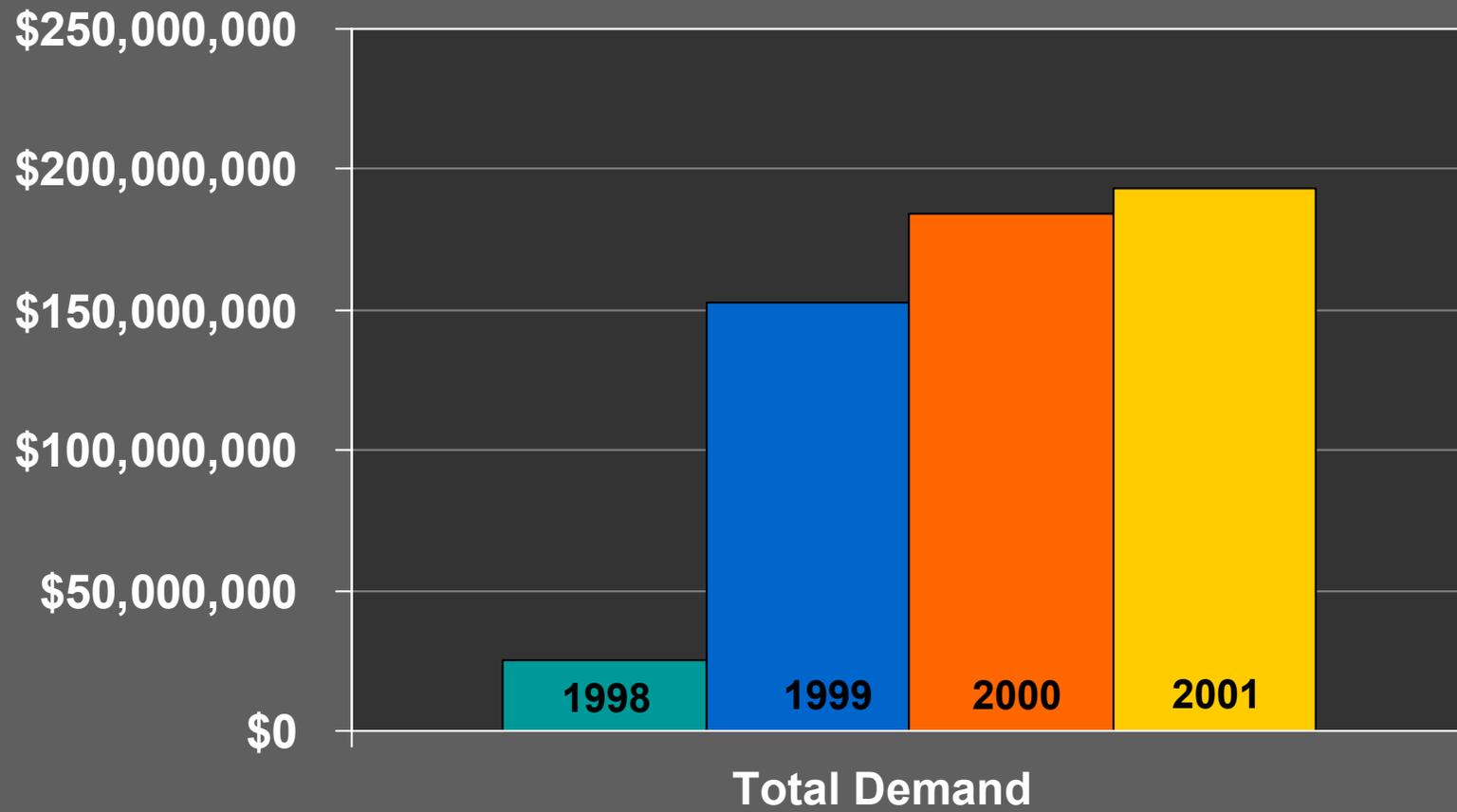
# Oregon: Loss of Tort Reform



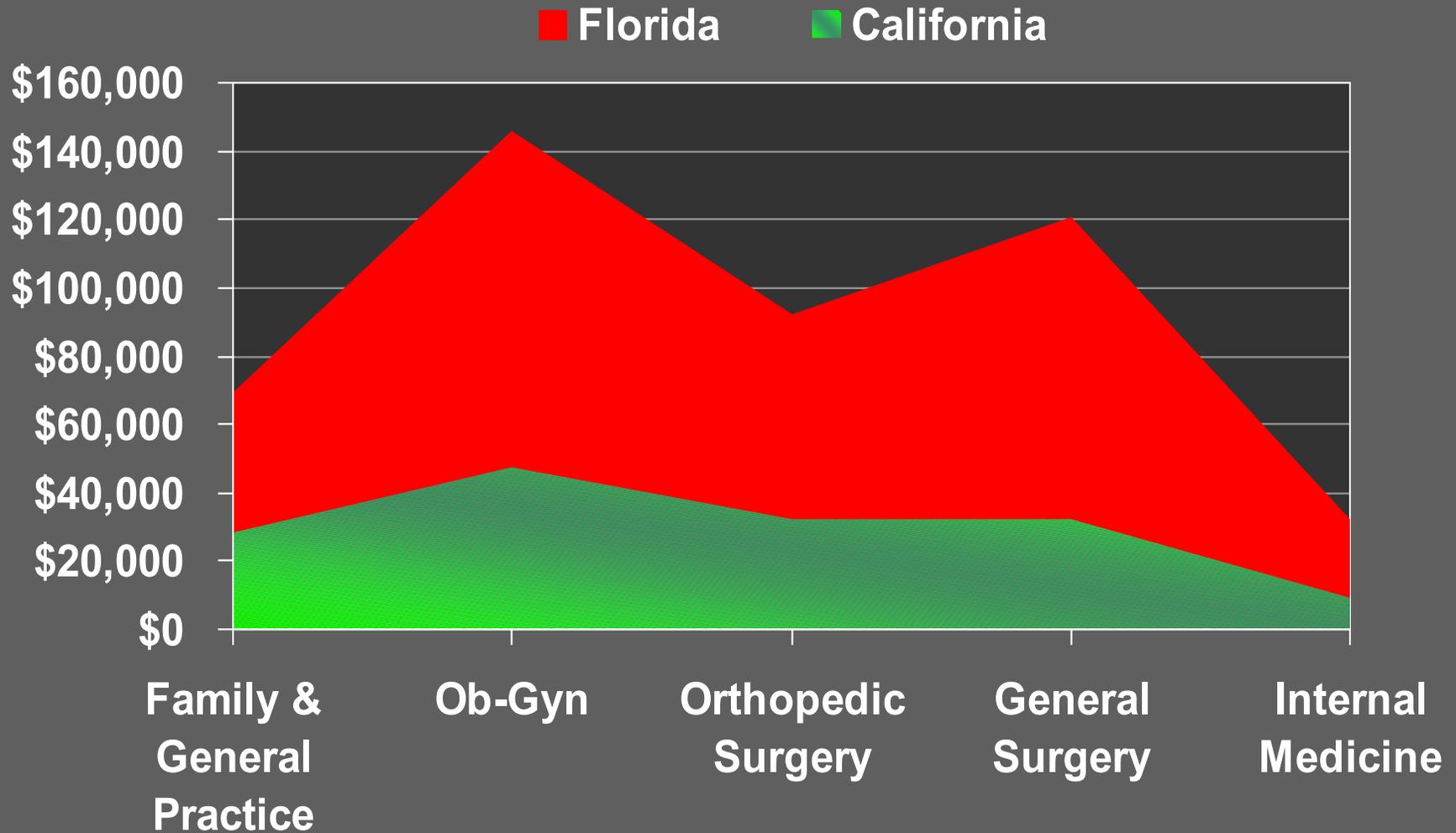
# Oregon: Loss of Tort Reform



## Total Plaintiff's Demand in Settled Cases



# California vs. Florida Average Rate by Specialty (2002)



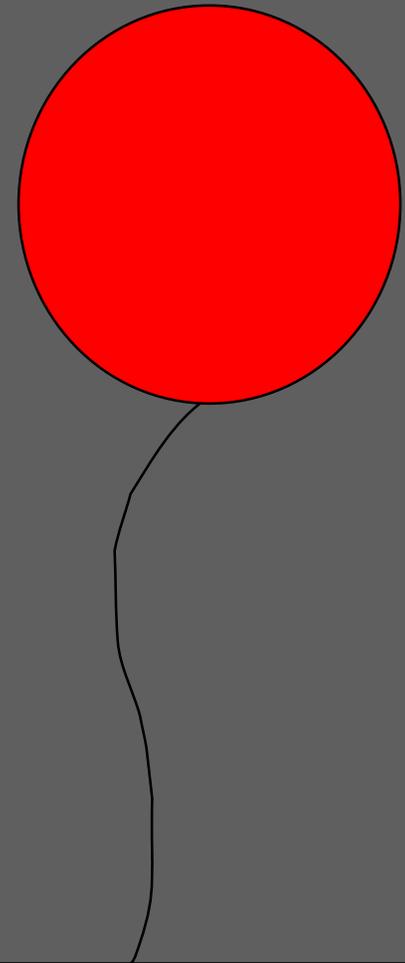
# Stanford Study: The Cost of Defensive Medicine



- States with effective tort reform lower health care costs 5-9%.
- Savings nationally would be \$50 billion.
- HHS estimates savings as high as **\$110** billion.



# Plaintiff Bar Trial Balloons and Myths



# Trial Lawyer Trial Balloons



- It's just about the few bad doctors.
- It's about insurance companies' bad investments.
- It's about insurance companies not charging enough (sic).
- It's not about MICRA, it's about Prop. 103.
- Claims losses don't matter.

# Insurance Company Investments



- Commendably, used to subsidize premium levels in relation to claims losses.
- No malpractice insurer has ever had *negative* investment income.
- Malpractice insurers average less than 10% of assets in equities.

# The Proposition 103 Myth



- **MICRA 1975**, final Constitutional Challenge 1985.
- **Prop. 103** approved 1989, final court challenge **1993**.
- Med mal hearings 1991
- TDC had been paying dividends for **11 years** prior to its 103 dividend.
- TDC dividends were **higher in the 5 years prior** to 103 than they were in the 5 years after.

# The Proposition 103 Myth



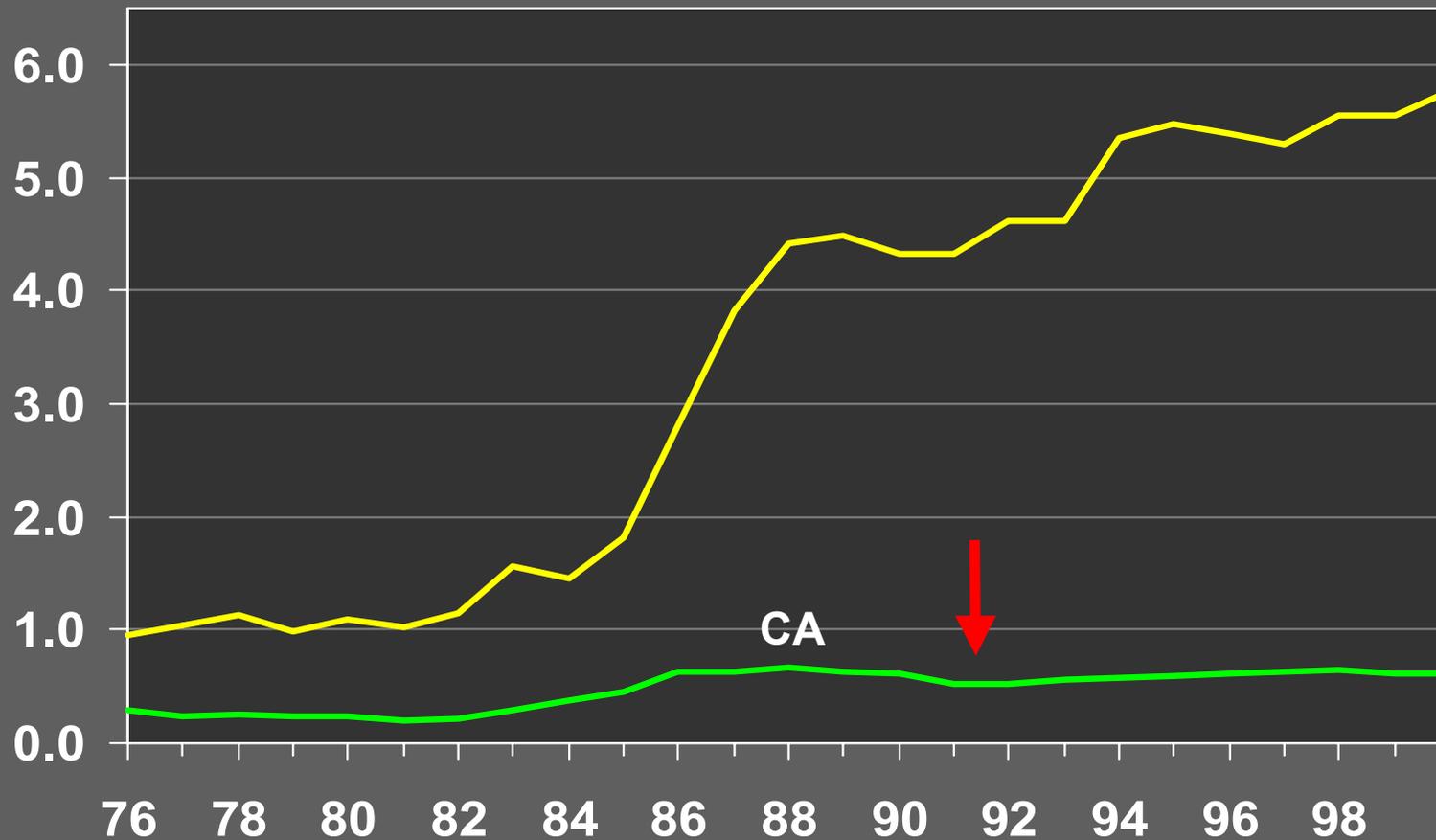
- The med mal insurers were specifically **exempted** from rate rollbacks.
- There has **not** been a single med mal rate increase denied under 103 until this year, when one company's rate increase was reduced from 16% to 10%.

# Savings from MICRA Reforms



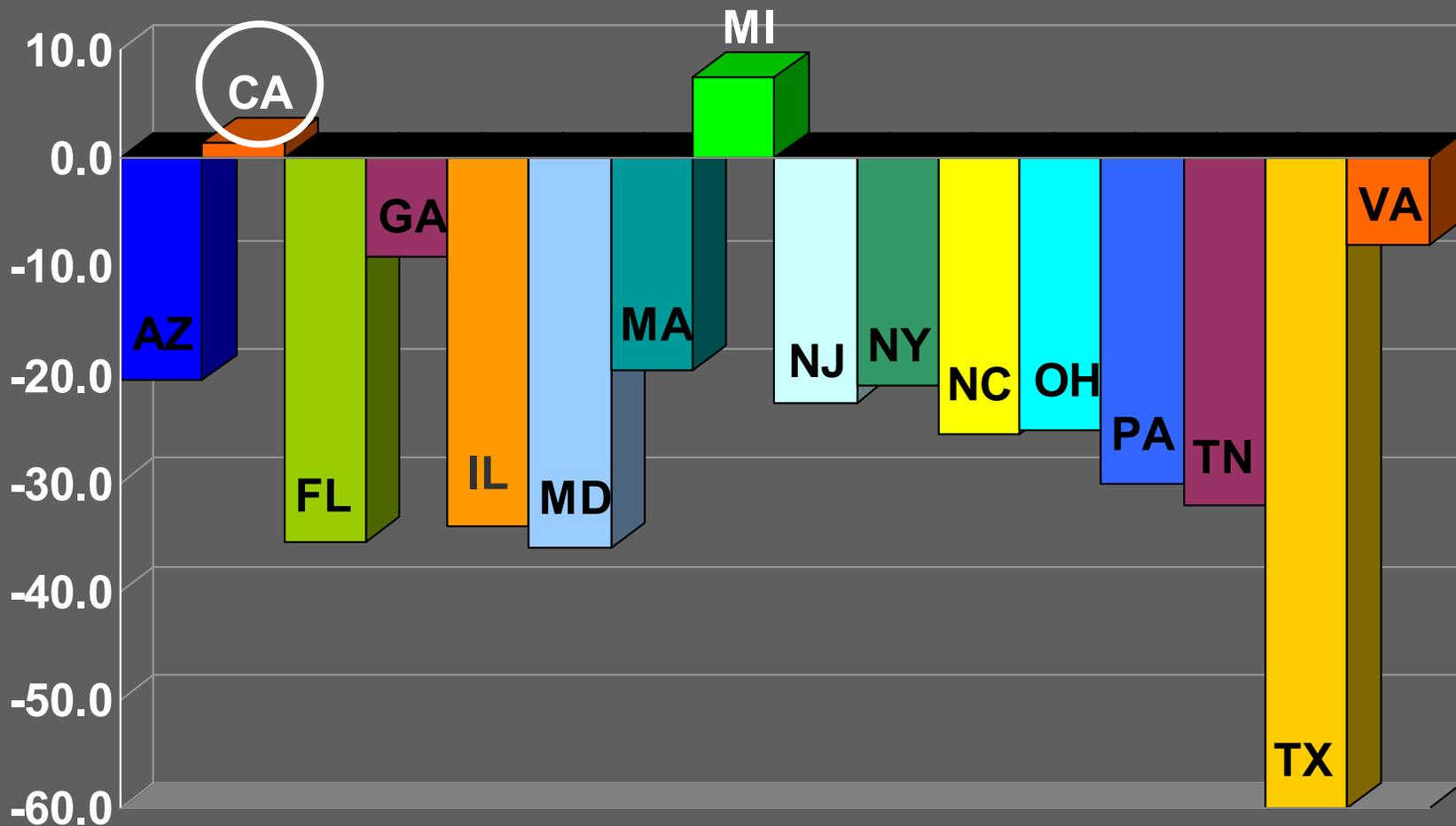
## California vs. U.S. Premiums 1976 -2000

\$ Billions



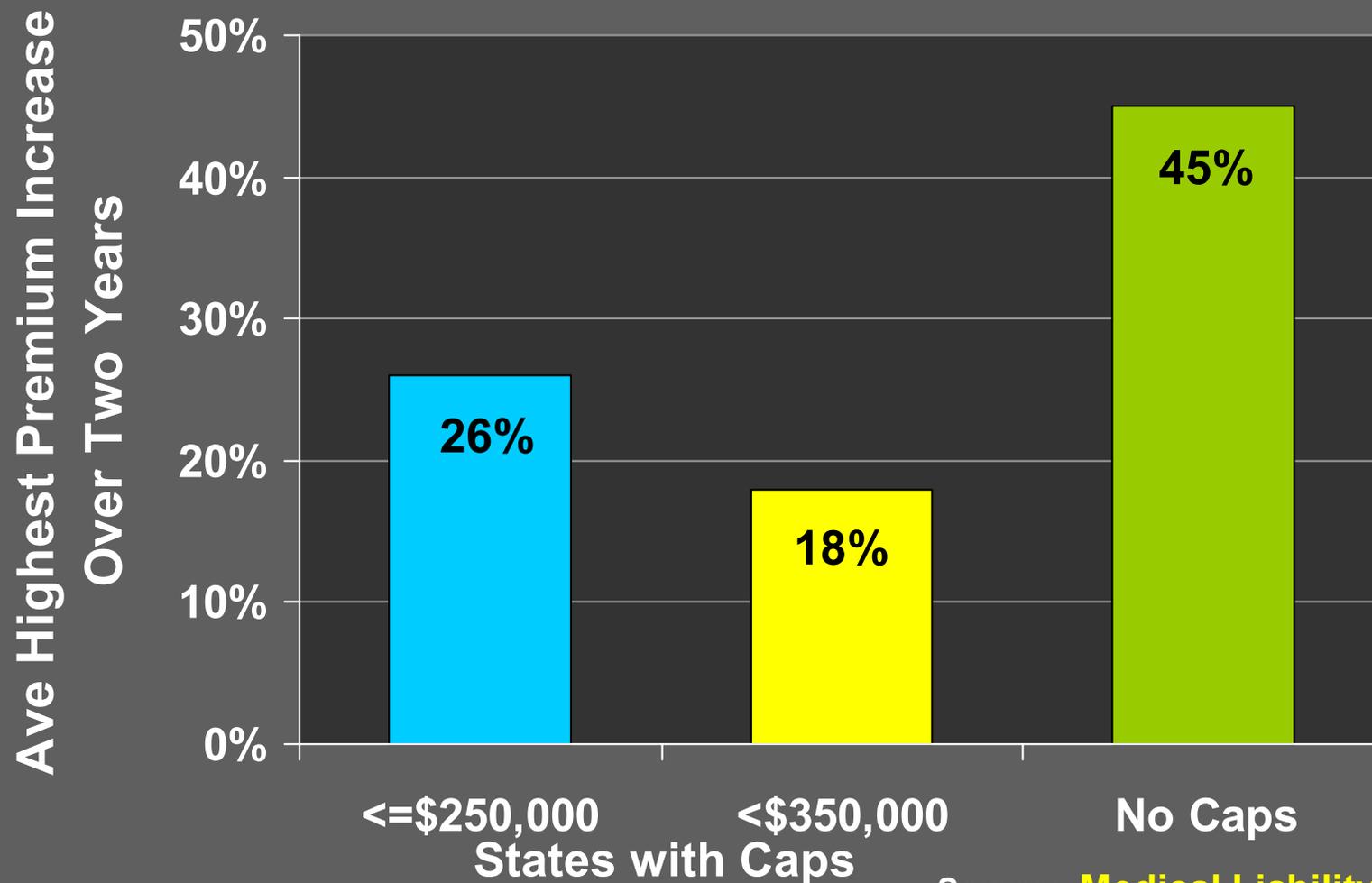
Source: NAIC Profitability By Line By State

# Underwriting Results 1991-2000 NAIC



Source: 2000 NAIC Profitability Report

# Impact of Caps on Premiums



Source: **Medical Liability Monitor**

# MICRA Works



- CA: 27-year experience (1975-2003)
- Congressional Budget Office (2002)
- HHS (2002, 2003)
- American Academy of Actuaries
- Standard and Poor's (2003)
- Milliman Report (2003)
- Medical Liability Monitor (2002, 2003)

- Florida Governor's Select Task Force
  - “The primary cause of increased medical malpractice premiums has been the **substantial increase in loss payments...**”
  - \$250,000 cap
    - “...**will bring relief** to this current crisis”
    - “Without the inclusion of a cap on potential awards of non-economic damages in a legislative package, no legislative reform plan can be successful in achieving the goal of controlling increases in healthcare costs, and thereby **promoting improved** access to healthcare”

# MICRA Works



- “...there is **no other alternative** remedy that will immediately alleviate Florida’s crisis...”
- “...a cap of \$250,000 per incident **will lead to significantly lower malpractice premiums.**”
- “If society wishes to have **unlimited judgments**, then insurance companies will be required to charge **unlimited premiums**. Unlimited medical malpractice premiums mean unlimited increases in the cost of healthcare. Unlimited increases in the cost of healthcare mean **decreased access** to healthcare. Limitations of access inevitably affect the most vulnerable members of our society.”

# Summary



- Exposure is greater.
- Financial market subsidies have ended.
- Capacity is shrinking and reinsurance is more expensive.
- Laparoscopic surgery is a genuine advance, but has increased the risk profile of the specialty.
- We know, we do not speculate, real tort reforms work.