

# Hodgen Lecture: Medical Malpractice and the Surgeon

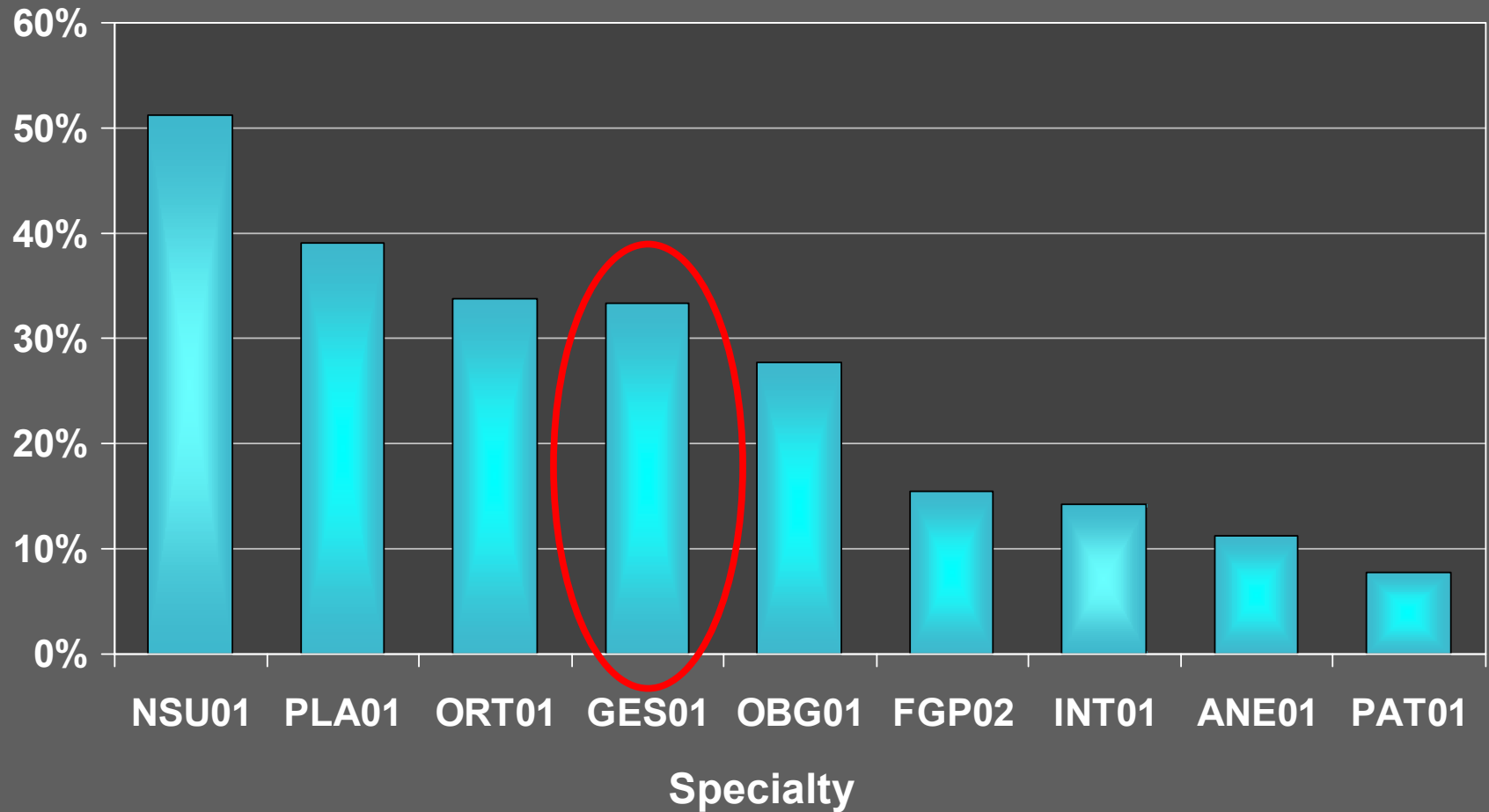
Richard E. Anderson, M.D., F.A.C.P.  
March 2, 2004

- Problems: What kind of a crisis is this?
  - Frequency
  - Severity
  - Cost: the real numbers
- Patient safety, the Harvard Medical Practice Study and the Institute of Medicine
  - Randomness
    - Fallacy of the bad doctor
- Claims profile in surgery
- Tort reform: Is this really a solution?
  - Theory and practice
    - ***The importance of caps***

# Frequency by Specialty 1995-2003



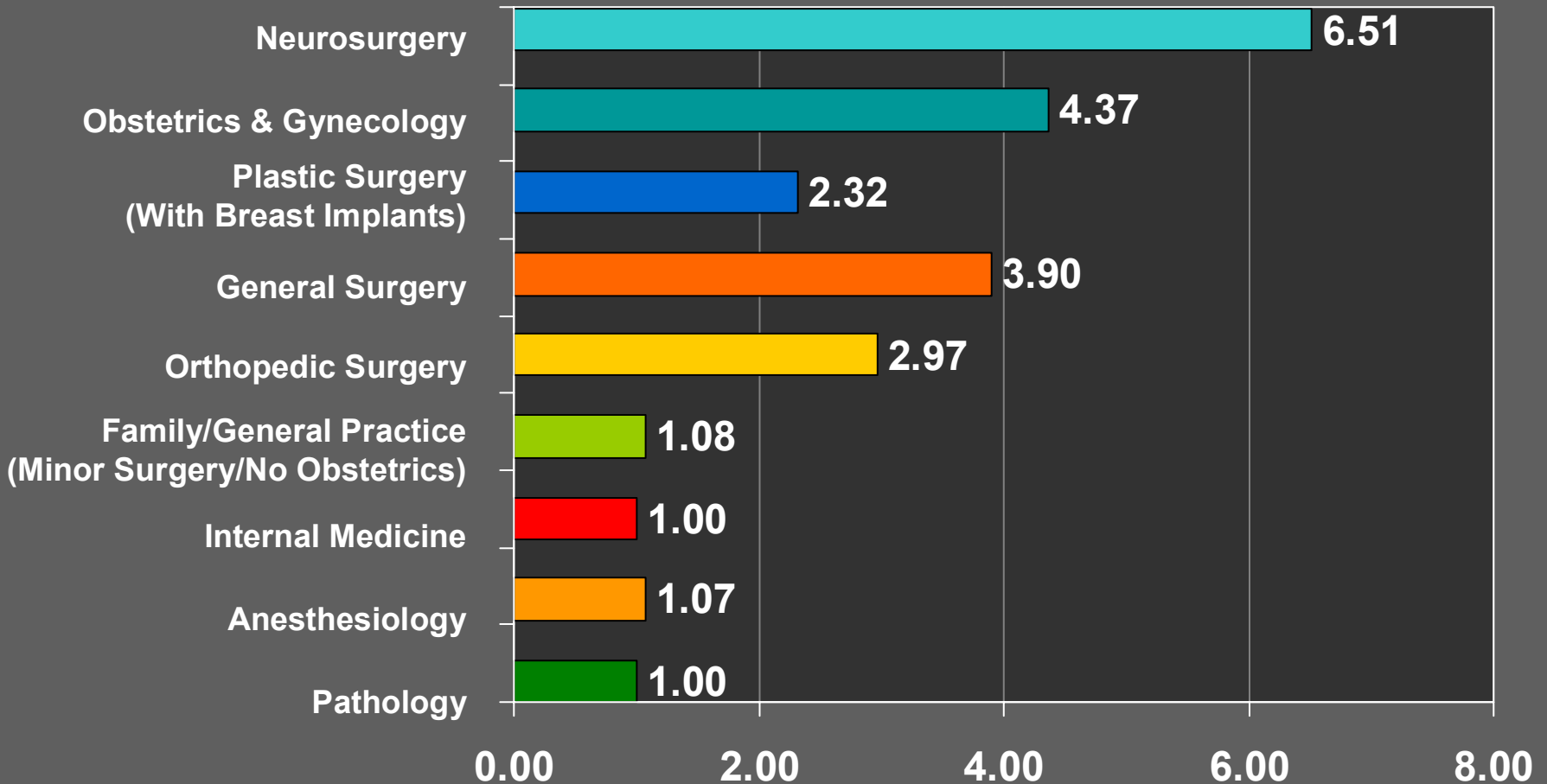
Frequency



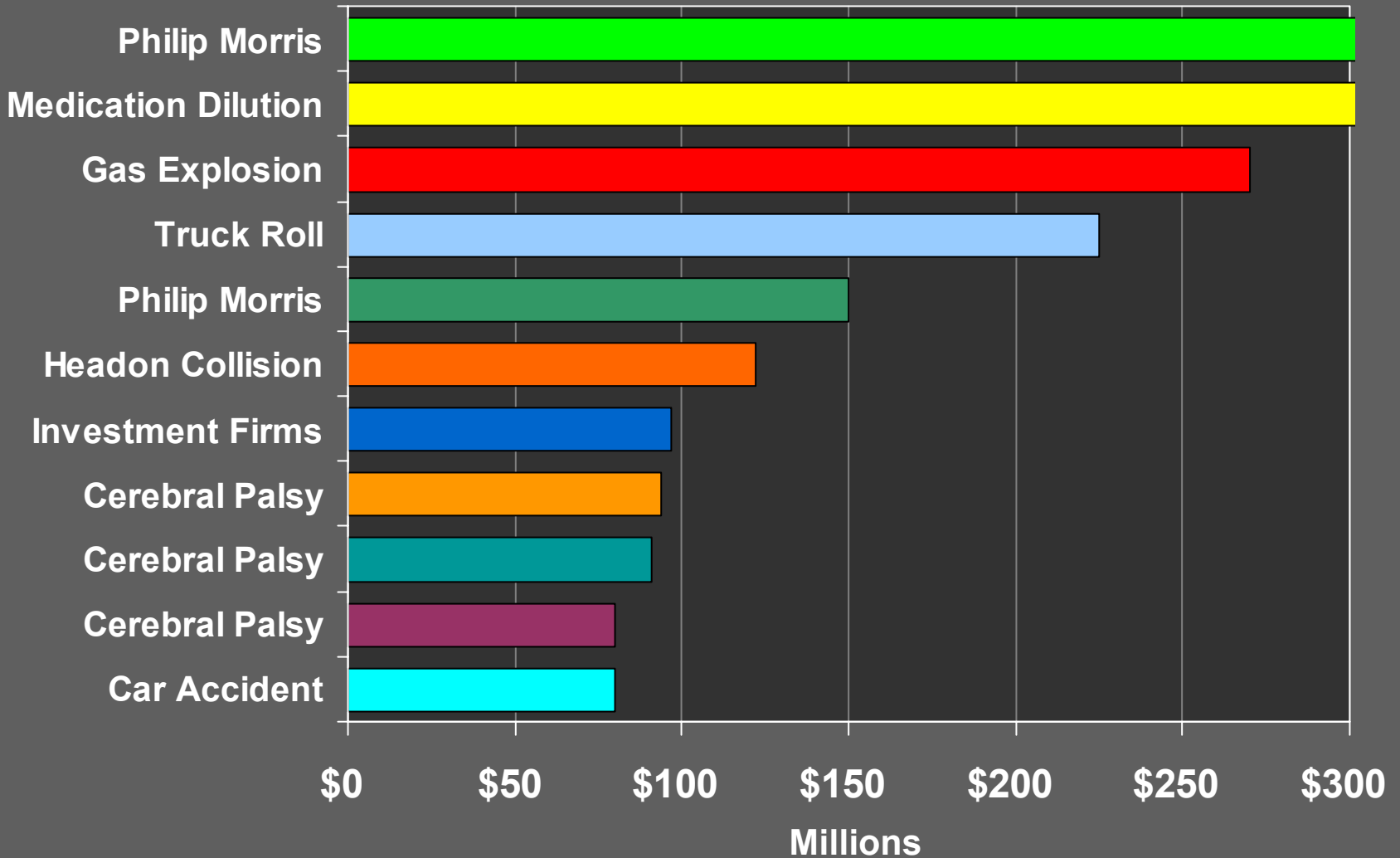
## Meaning

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

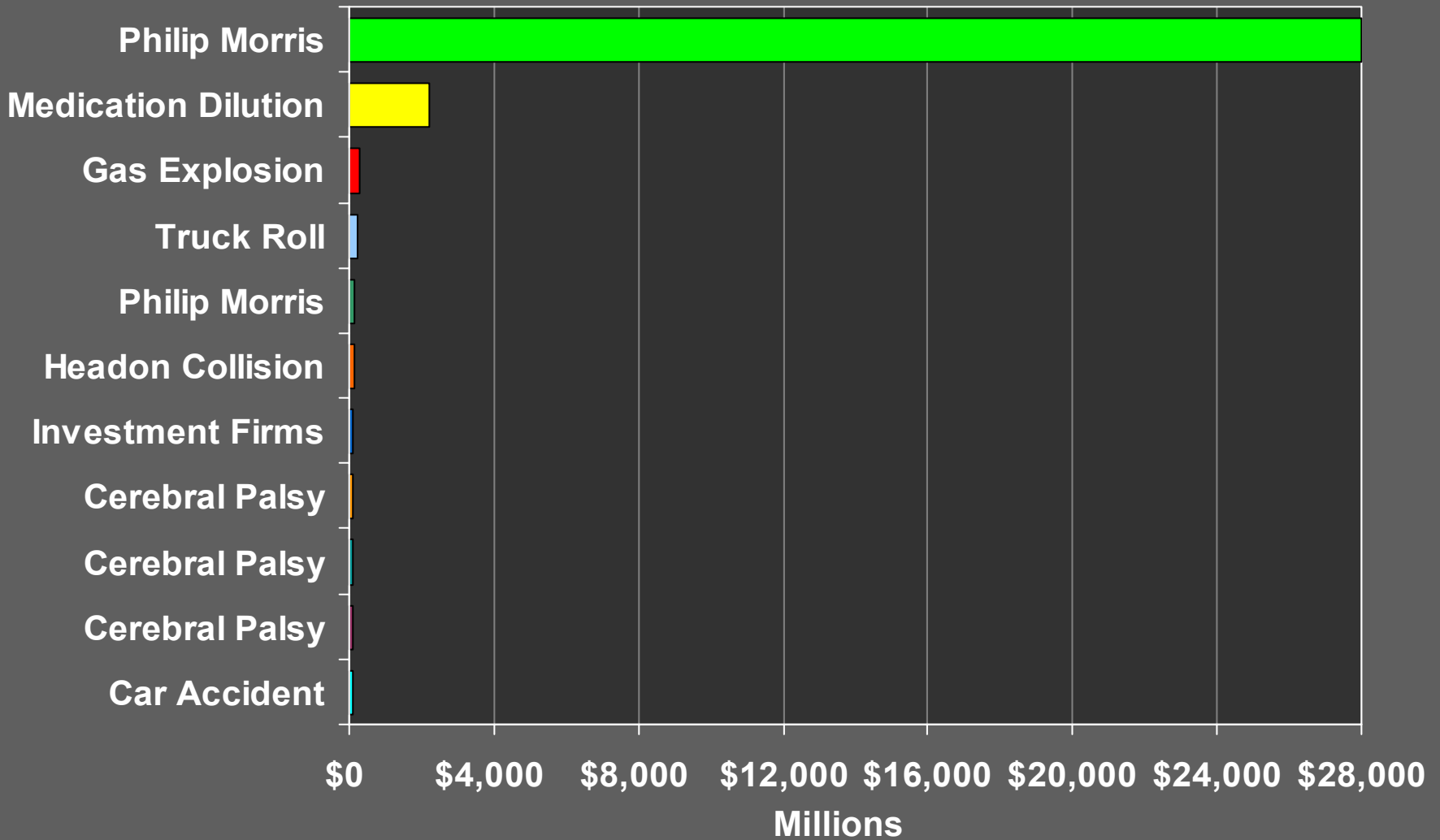
# Specialty Relativity Nationwide



# Top Jury Awards of 2002



# Top Jury Awards of 2002

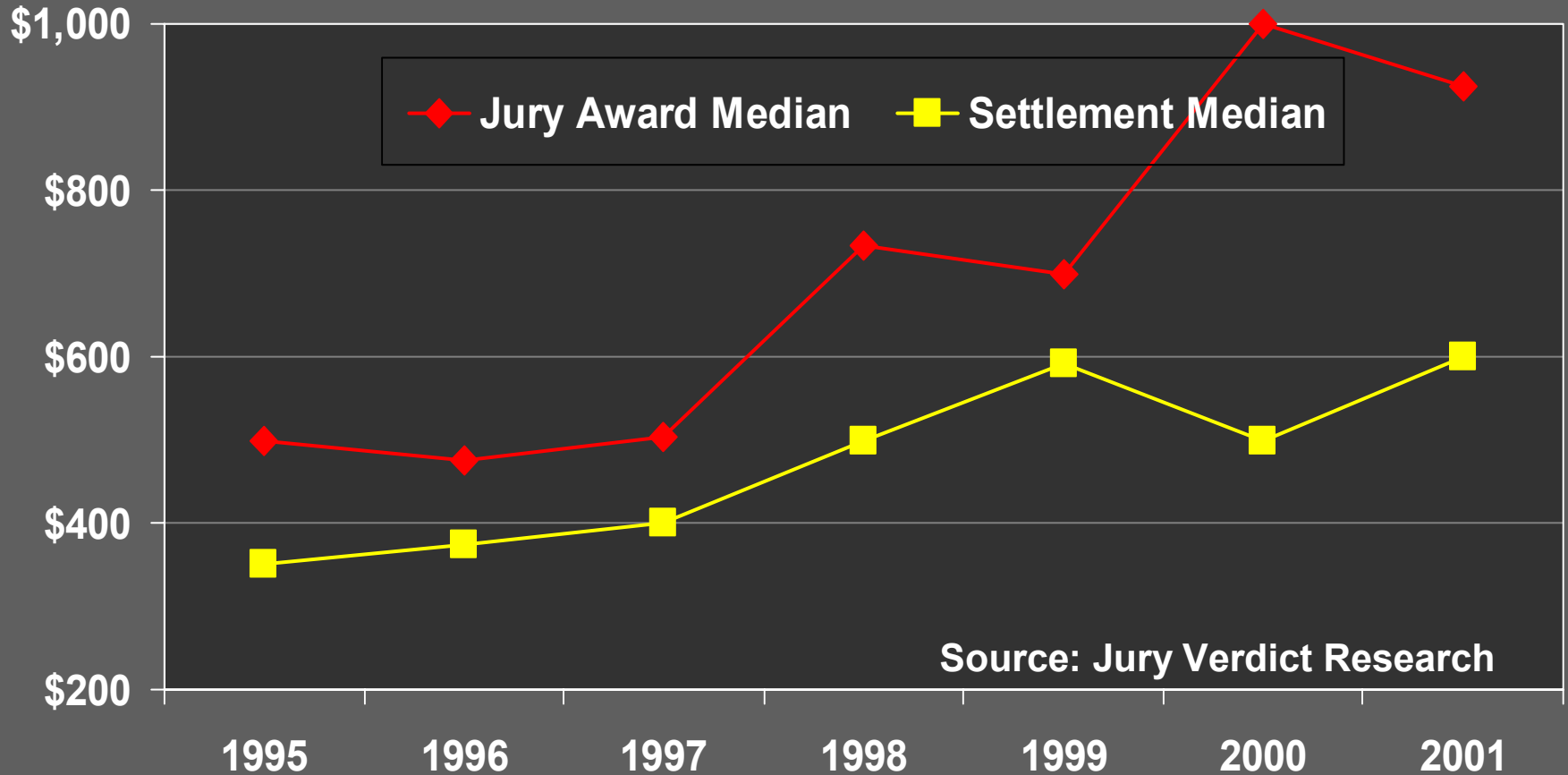


# Severity: National Medians



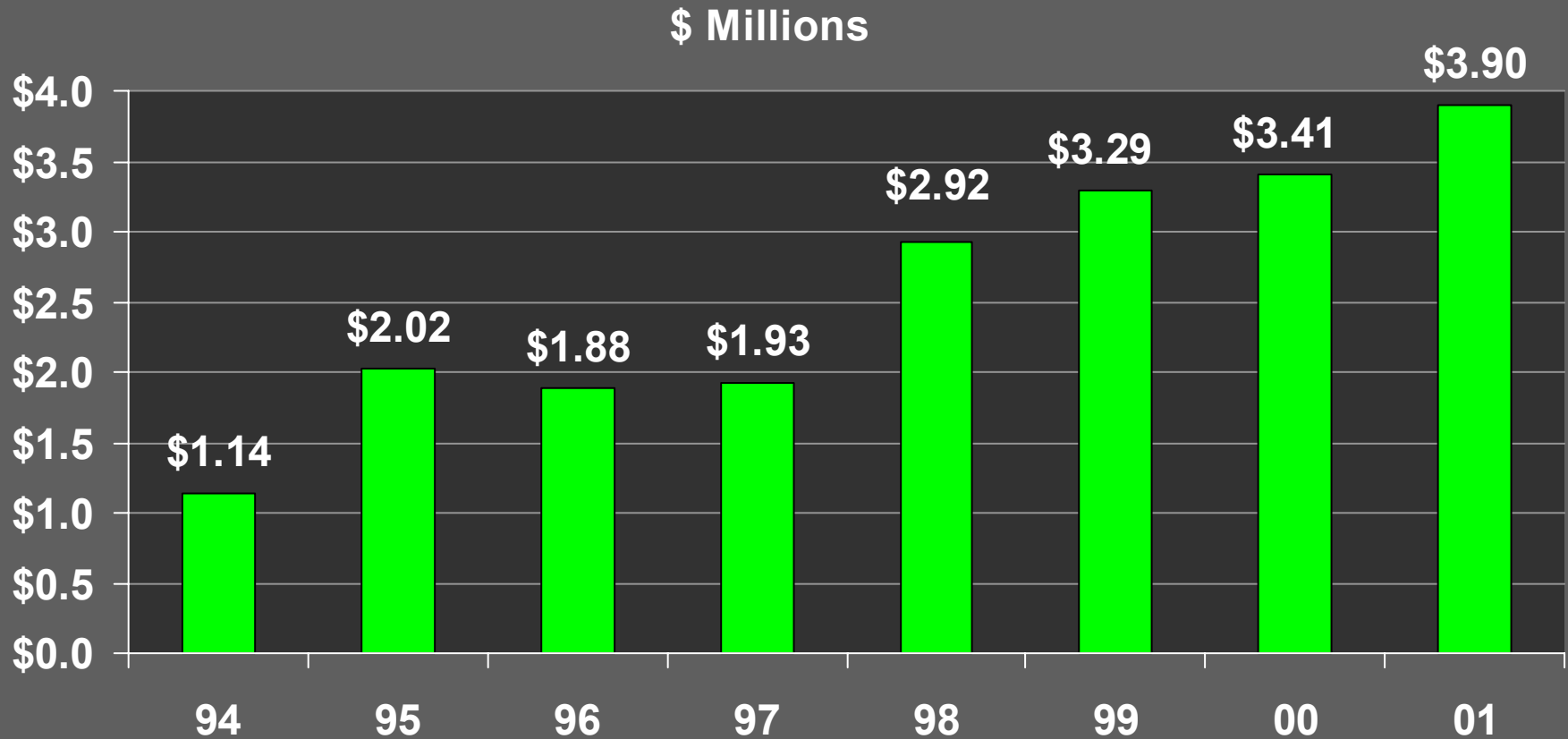
## National Jury Award and Settlement Medians for Medical Malpractice Cases

(000's)



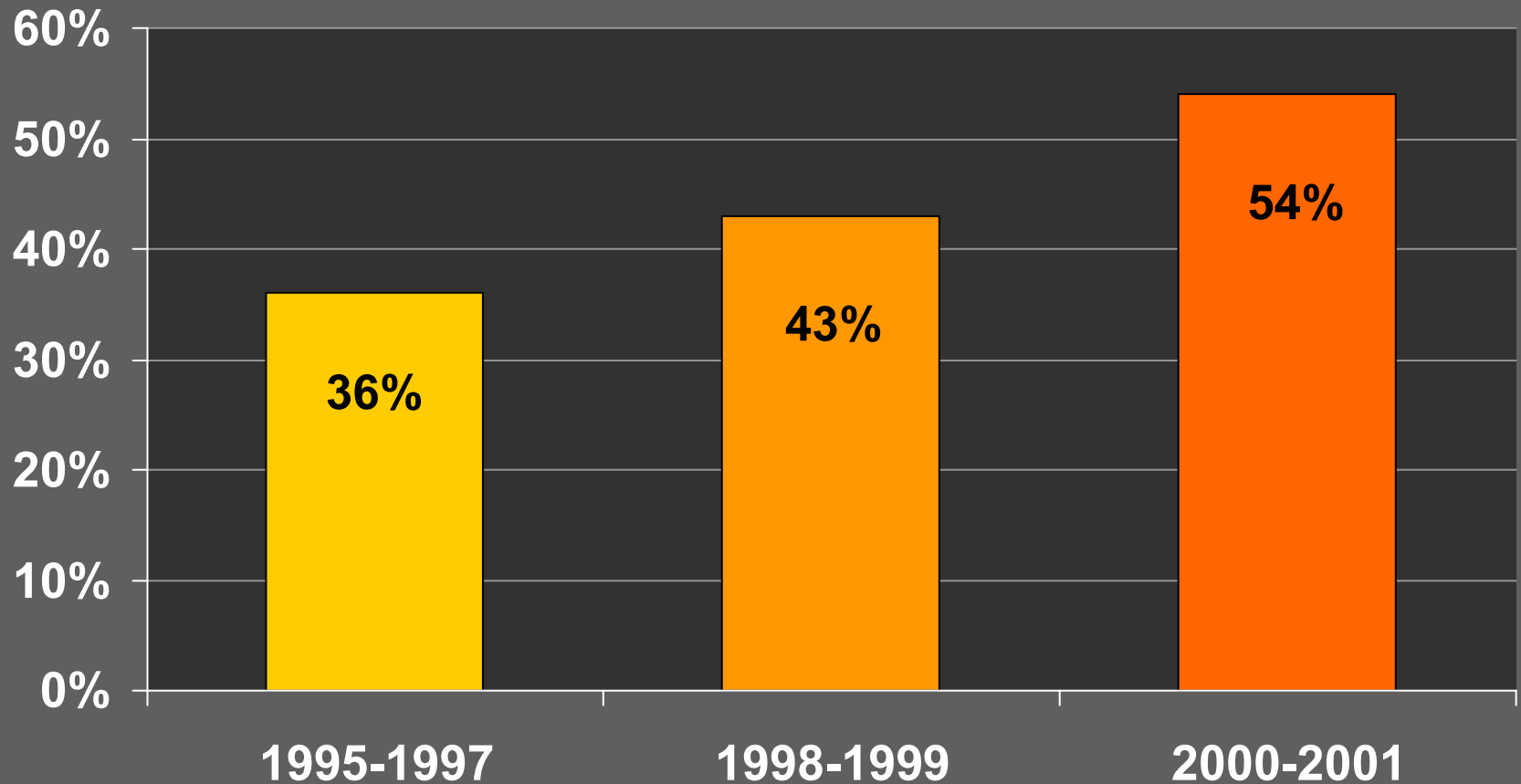
Source: Jury Verdict Research

# Average Jury Award in Medical Malpractice Cases



Source: Jury Verdict Research; Insurance Information Institute.

# Trends in Million Dollar Verdicts - Medical Malpractice



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

# The Most Expensive Claims

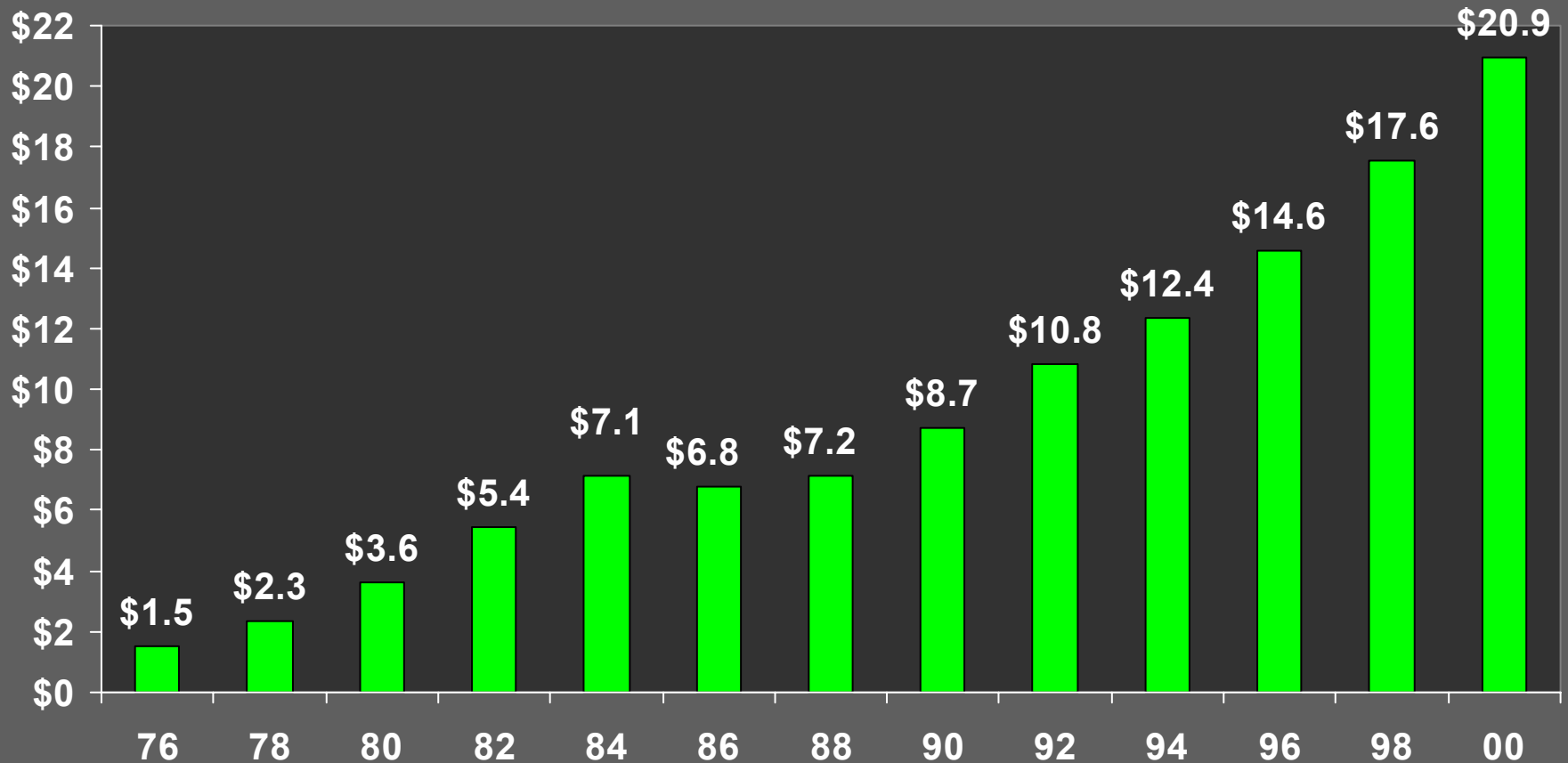


- Texas: \$268,000,000
- Many states: \$100,000,000
- Philadelphia: Jury verdicts exceed the entire state of CA over past 3 years.
- *Verdicts drive settlement value.*

# Medical Malpractice: Tort Cost Growth is Skyrocketing

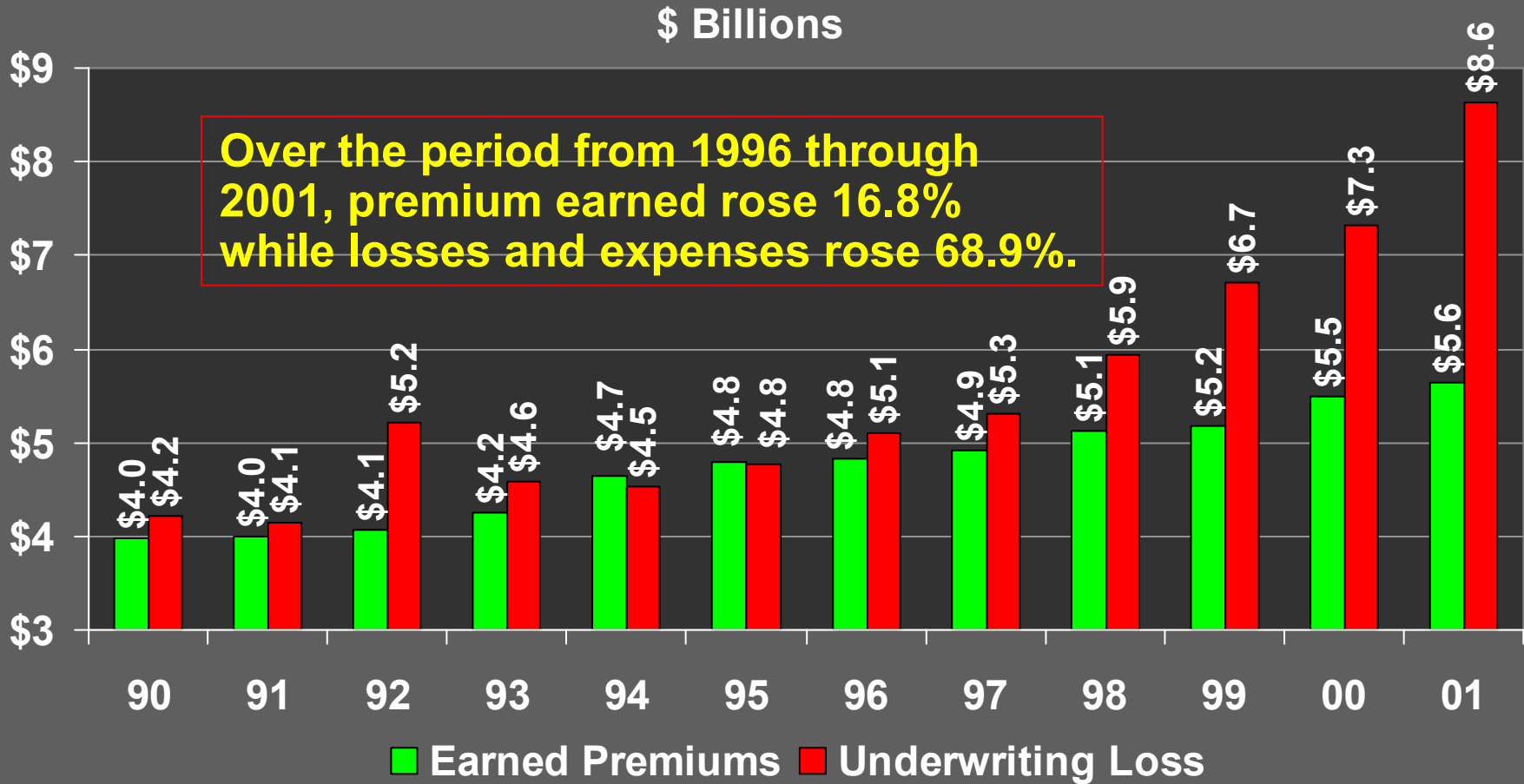


\$ Billions



- Conclusion
  - *The fundamental problem is the unprecedented increase in the cost of malpractice litigation.*

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



# 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

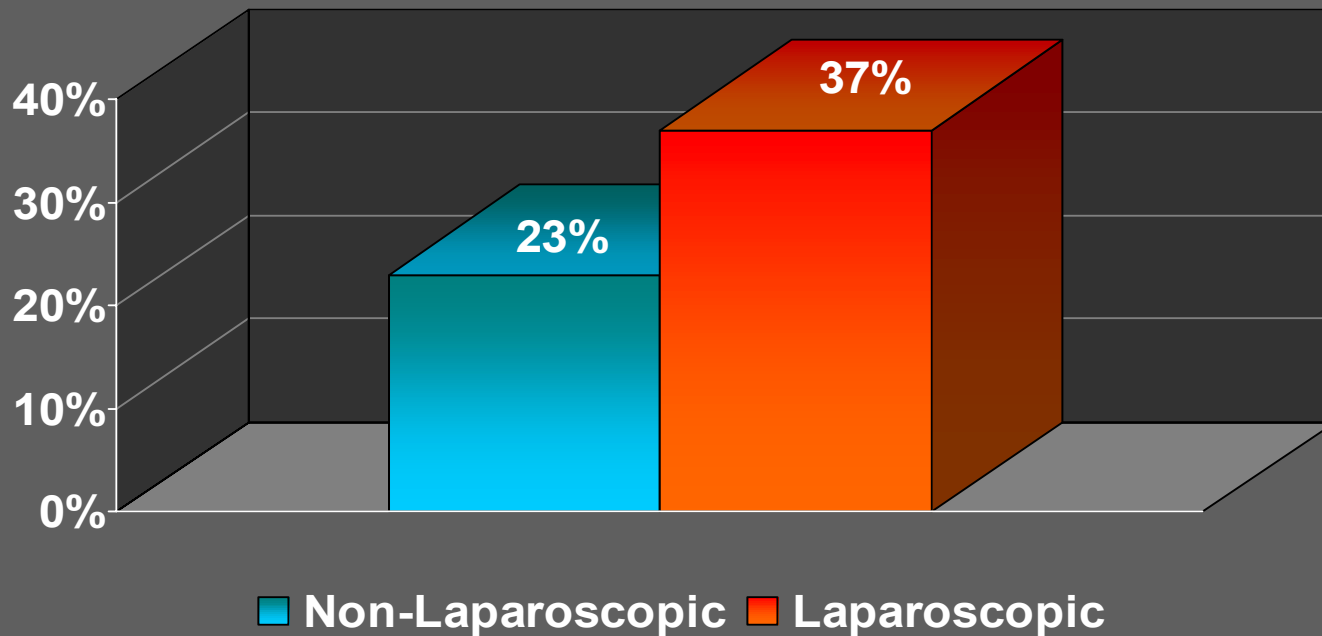
# Laparoscopic Claims Worldwide



- 50% involve bile duct injury.
- Complication rate is 0.3% worldwide.
  - Delayed recognition 62-76% (surgeon finished operation without recognizing the error).

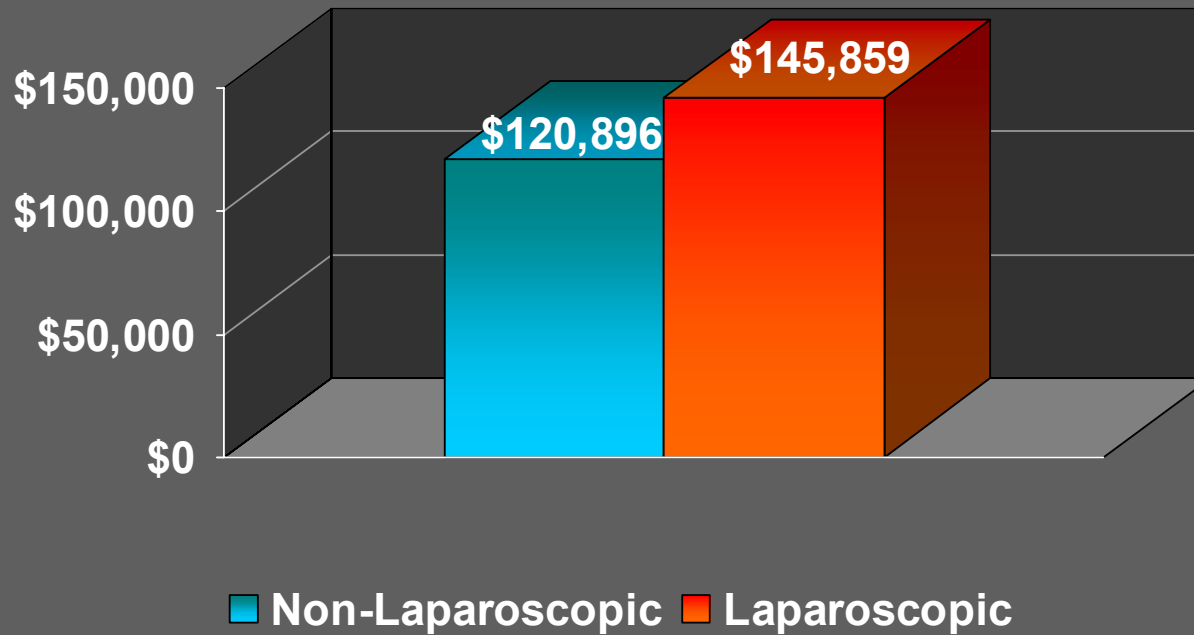
# General Surgery Claims

% of Claims With Indemnity Payments

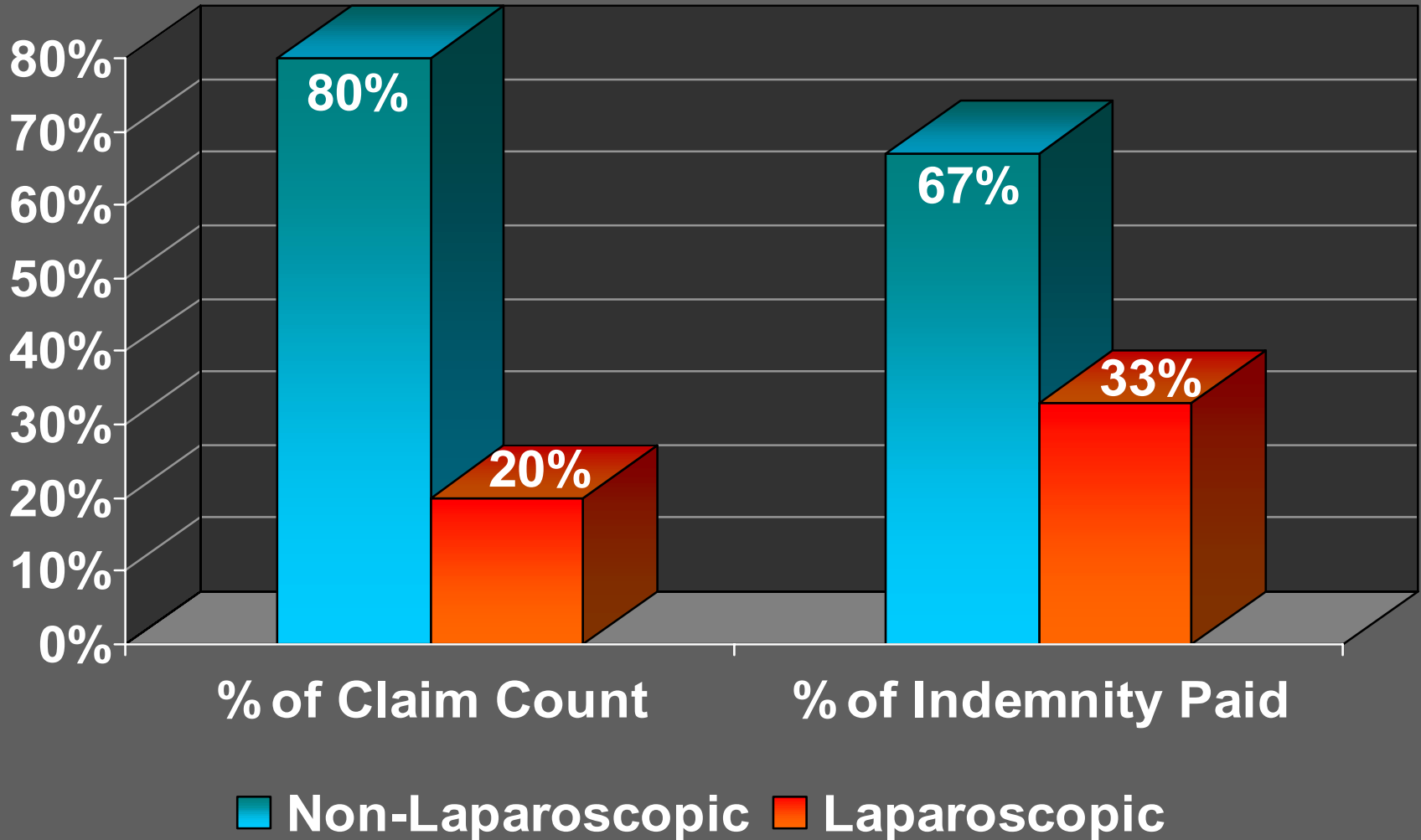


# General Surgery Claims

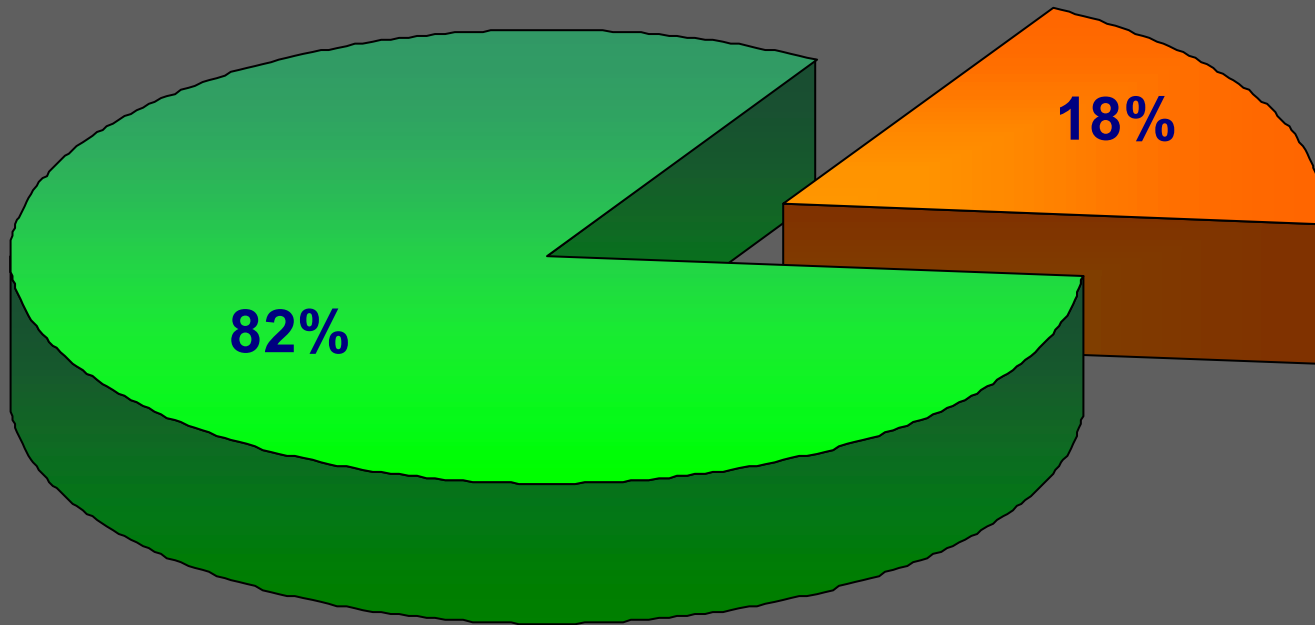
Average Paid Indemnity



# General Surgery Claims



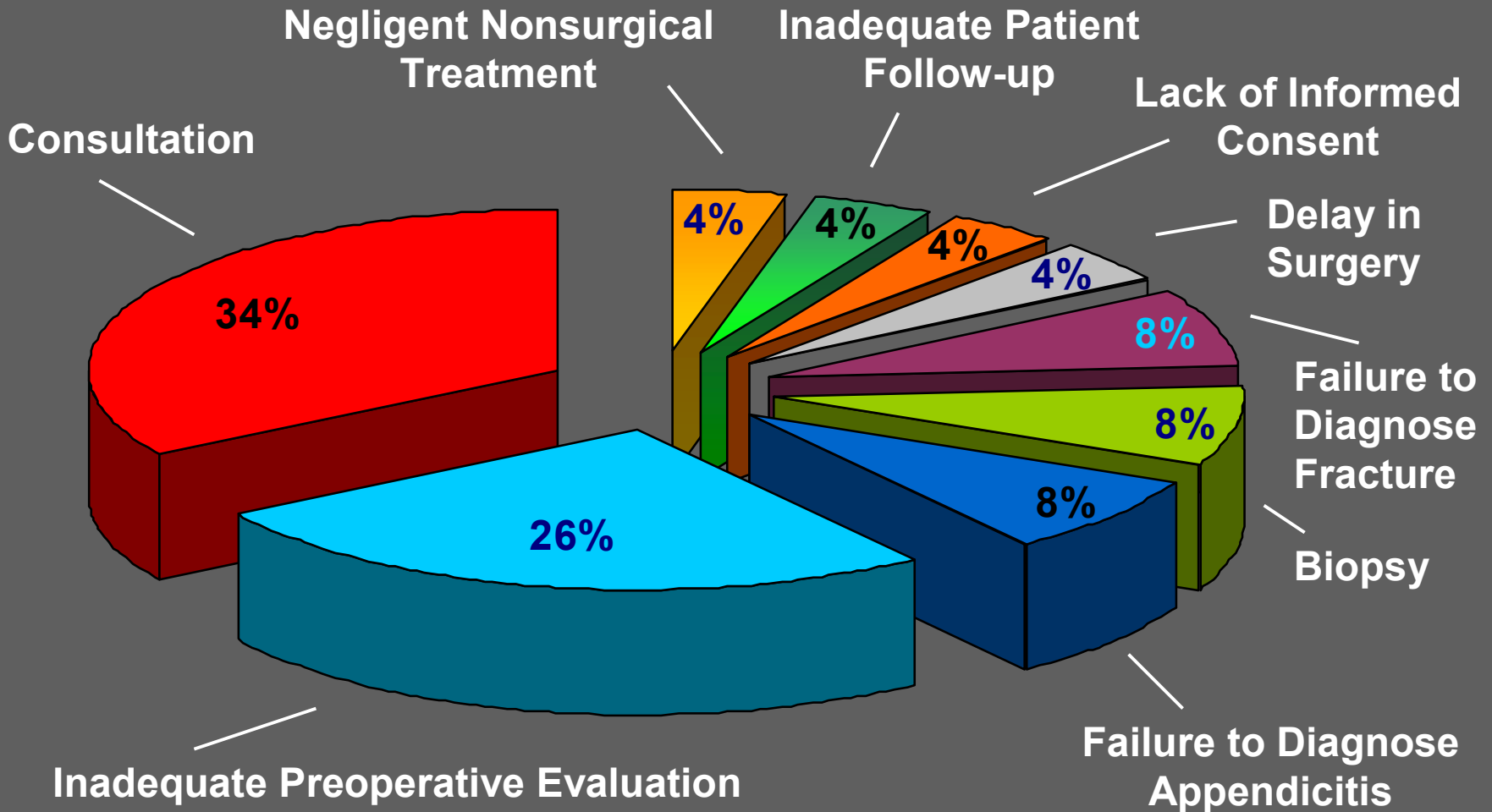
# Claim Distribution by Allegation



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

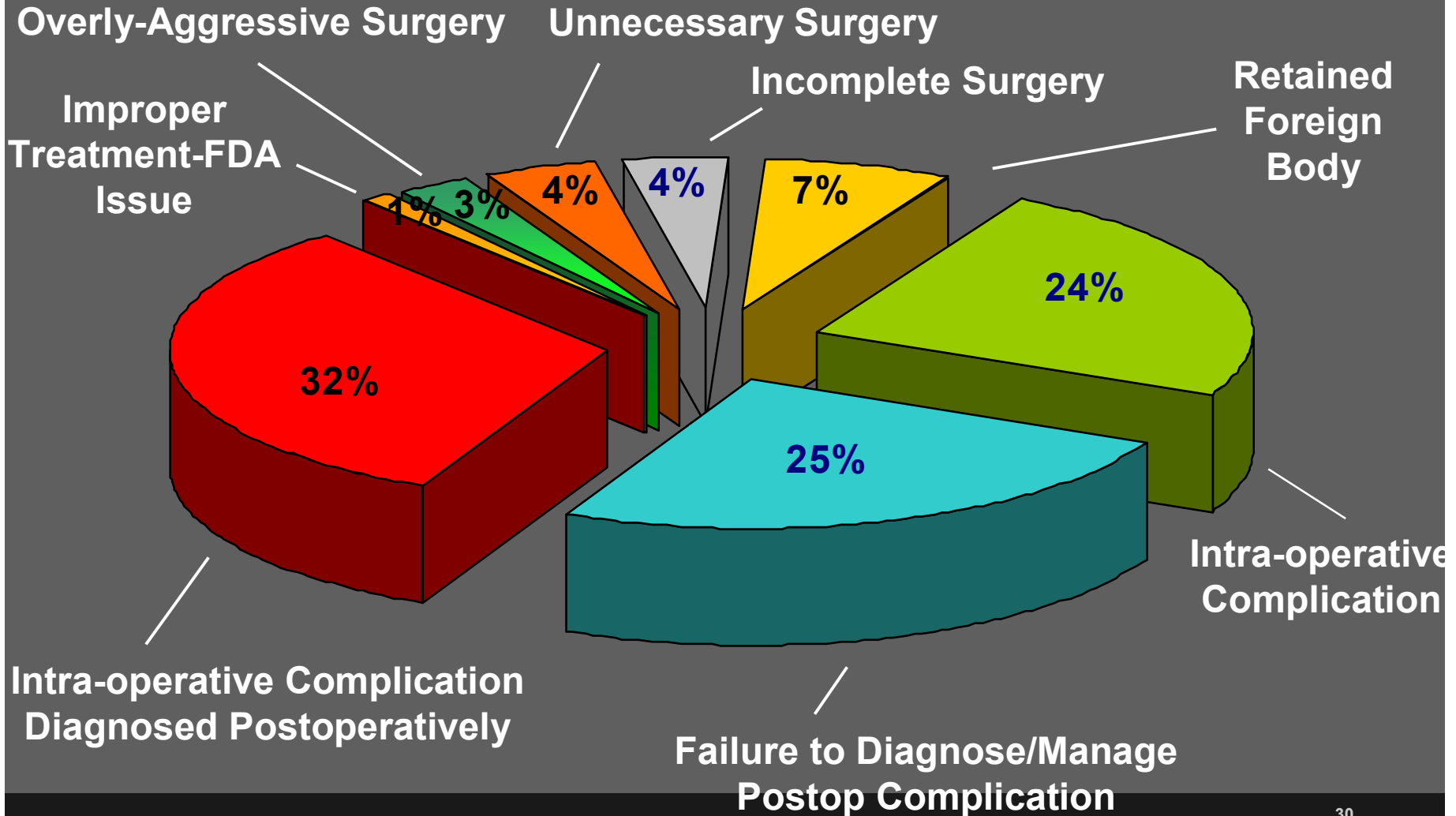
# Claim Distribution by Allegation

*Pre-Operative/Non-Operative*



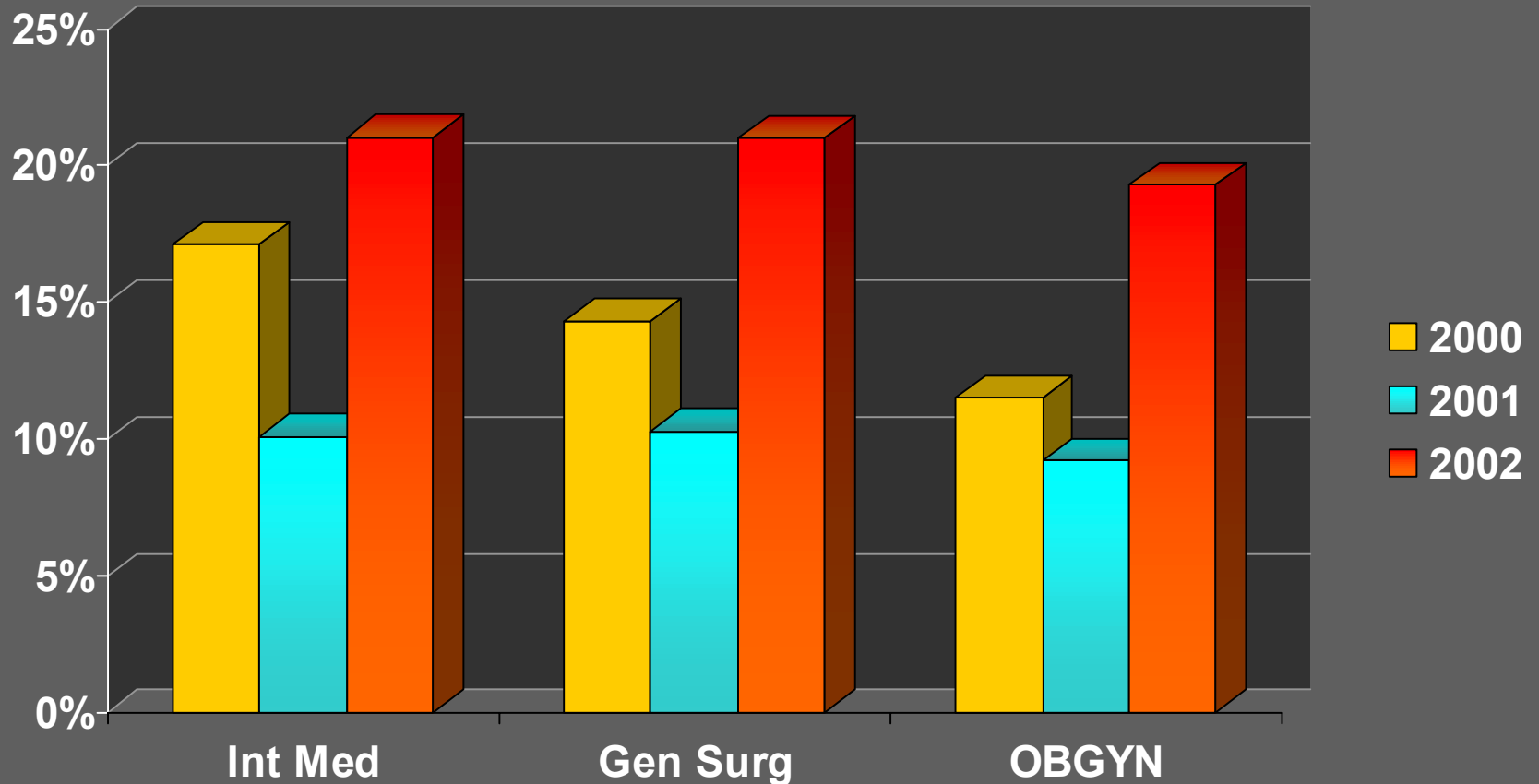
# Claim Distribution by Allegation

*Intra-Operative/Peri-Operative*

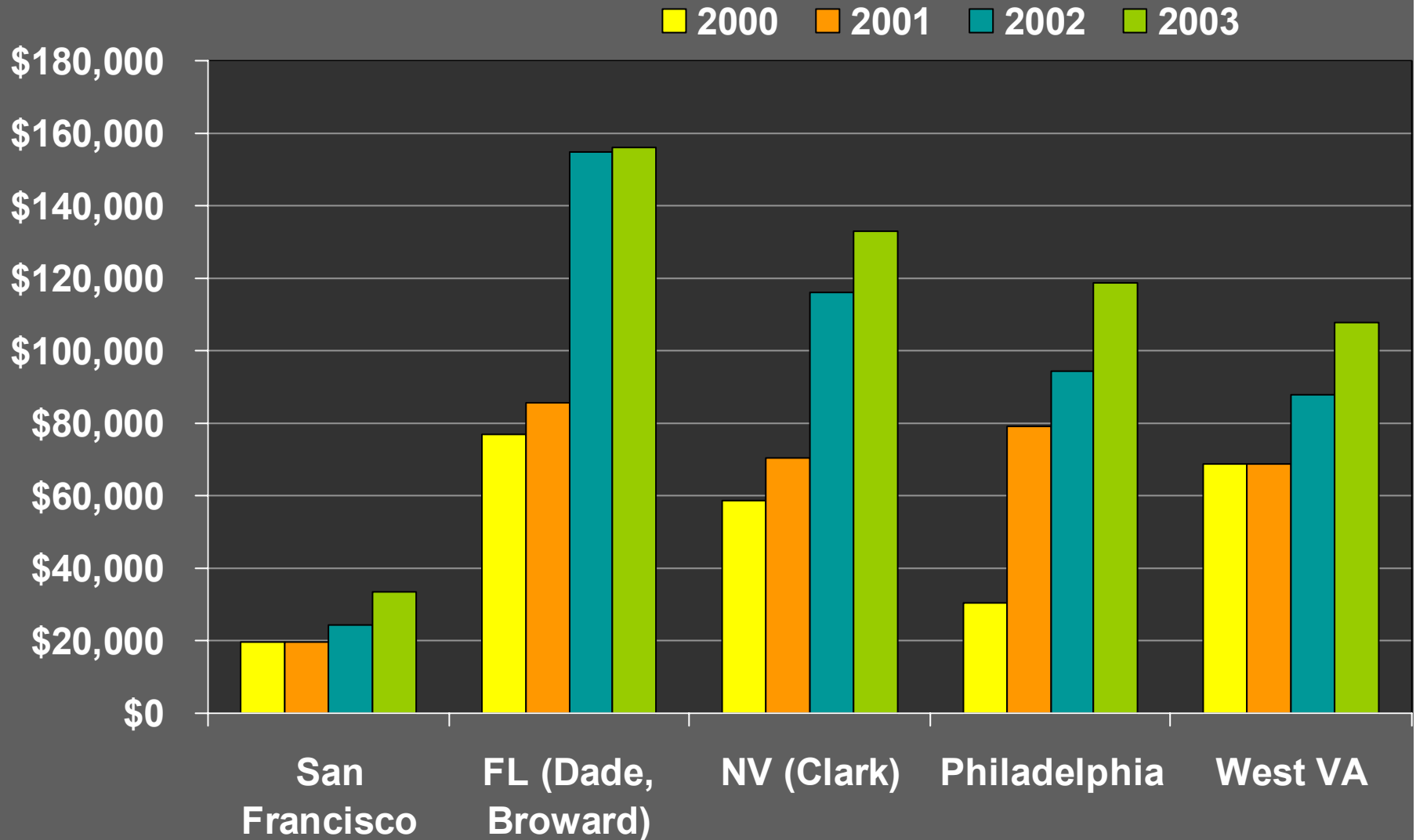


# National Rate Increases

*2003: In Missouri, rates for these specialties averaged 24% higher than in 2002.*



# Recent General Surgery Rates



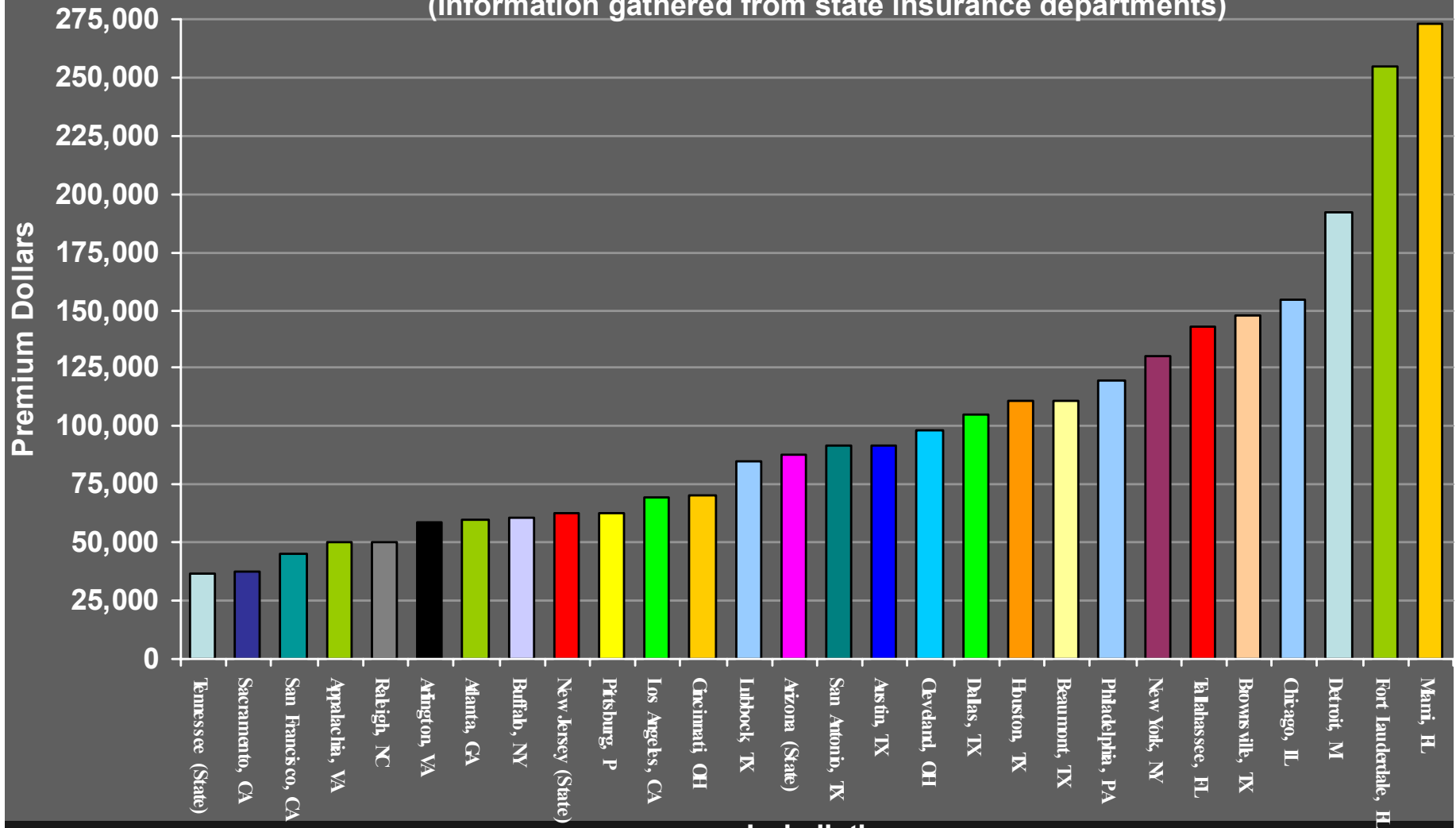
# Tort Reform

# MEDICAL MALPRACTICE RATE COMPARISON

## SPECIALTY: NEUROSURGERY



Mature Claims Made 1M/3M Limits of Liability (No Deductible)  
 (Information gathered from state insurance departments)

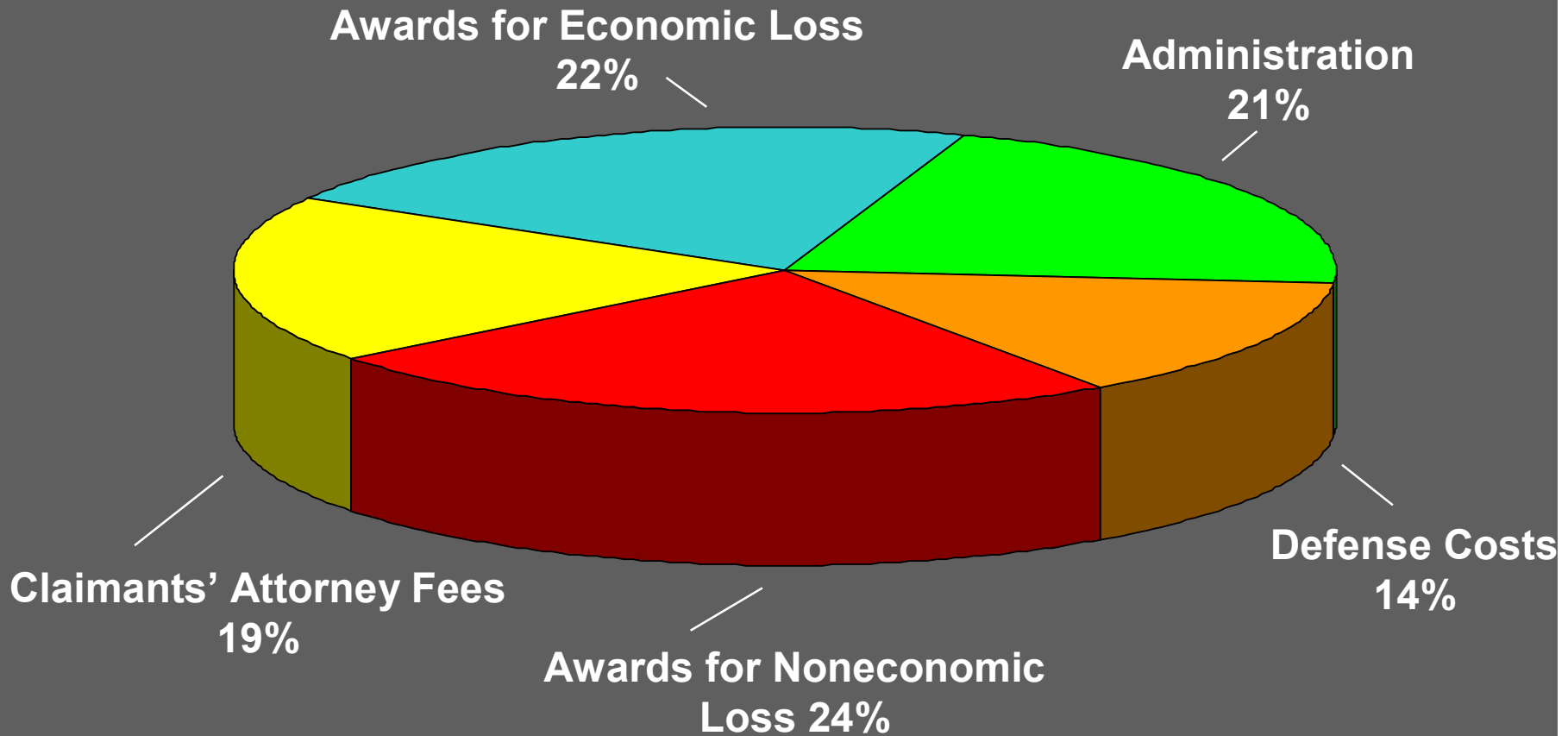


# Goals and Benefits

- **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.

- 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



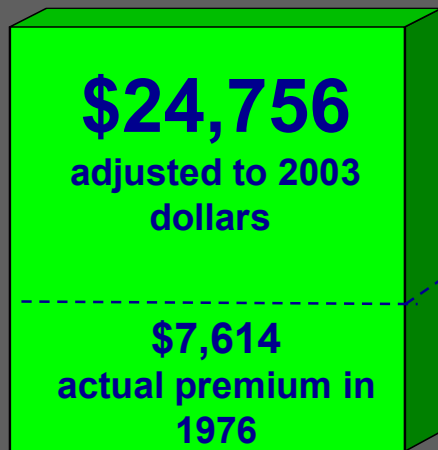
Source: Tillinghast-Towers Perrin

- 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 Helps Reduce California Medical Liability Premium Rates by 33%



## The Doctors' Company 1976-2004



Average Premium 1976\*



Average Premium 2004

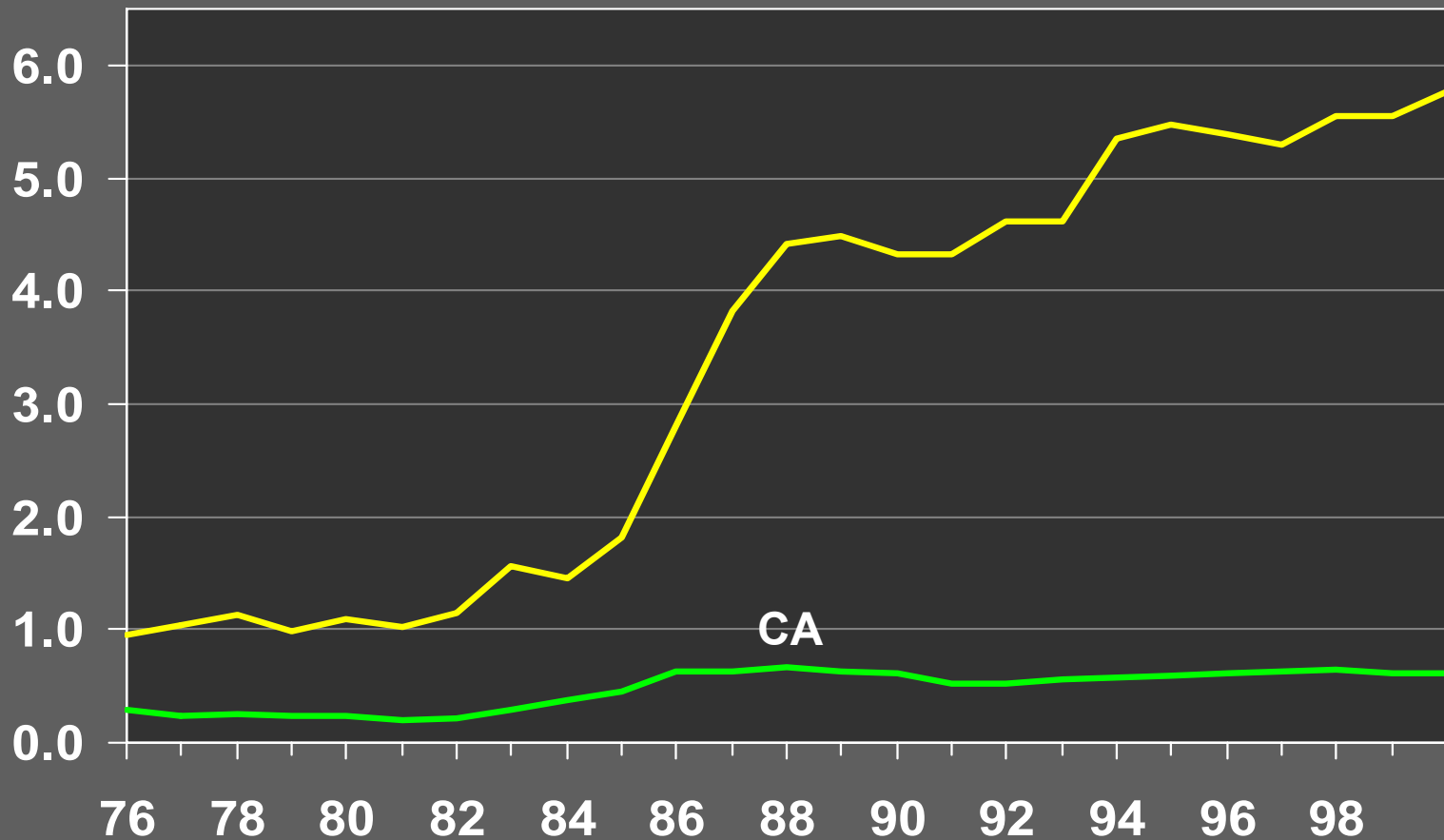
\* \$7,614 average premium adjusted to 2003 dollars based on the Average Consumer Price Index for a \$1 Million/ \$3 Million Claims-Made Policy Premium

# Savings from MICRA Reforms



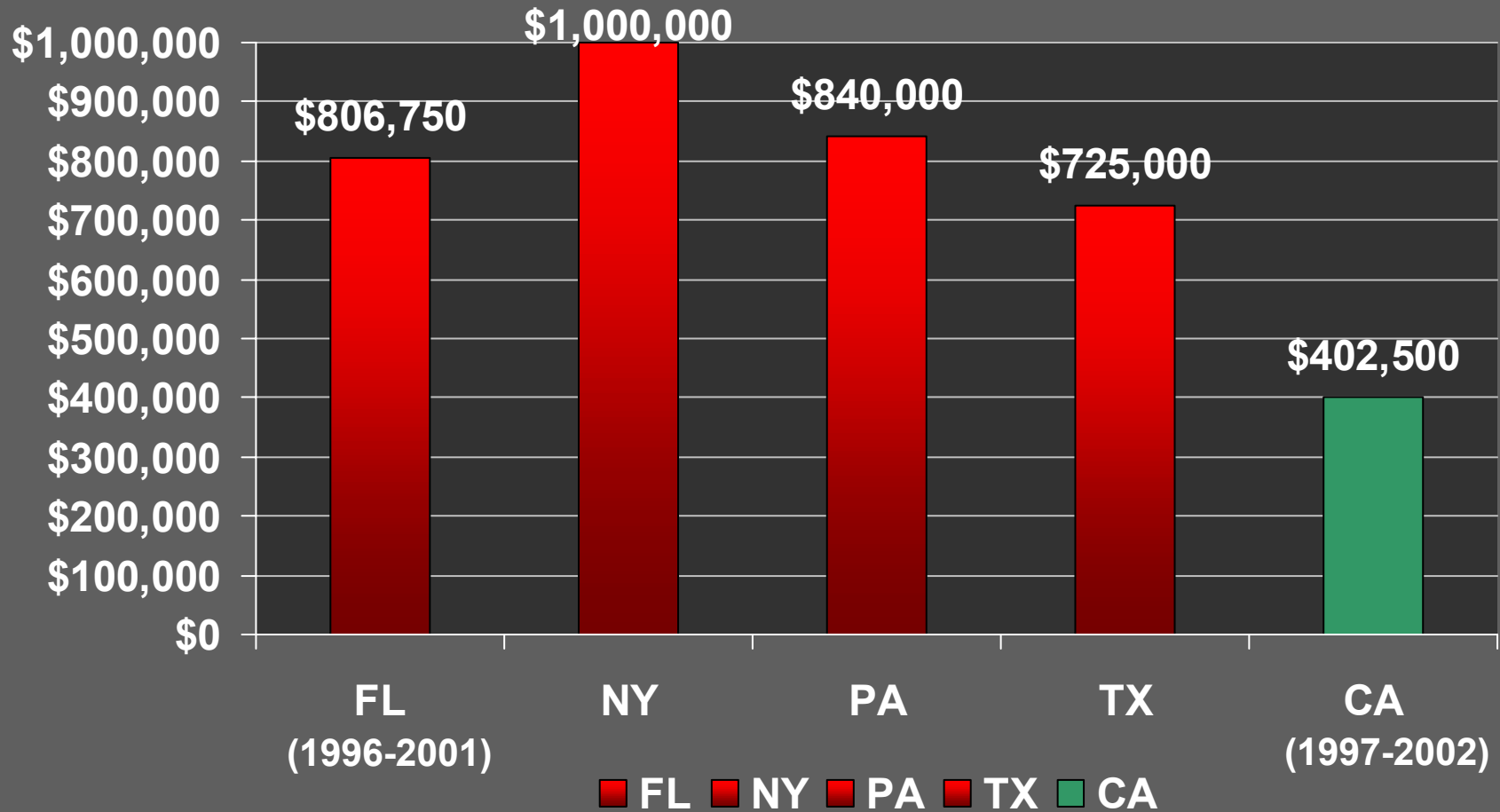
## California vs. U.S. Premiums 1976 -2000

\$ Billions



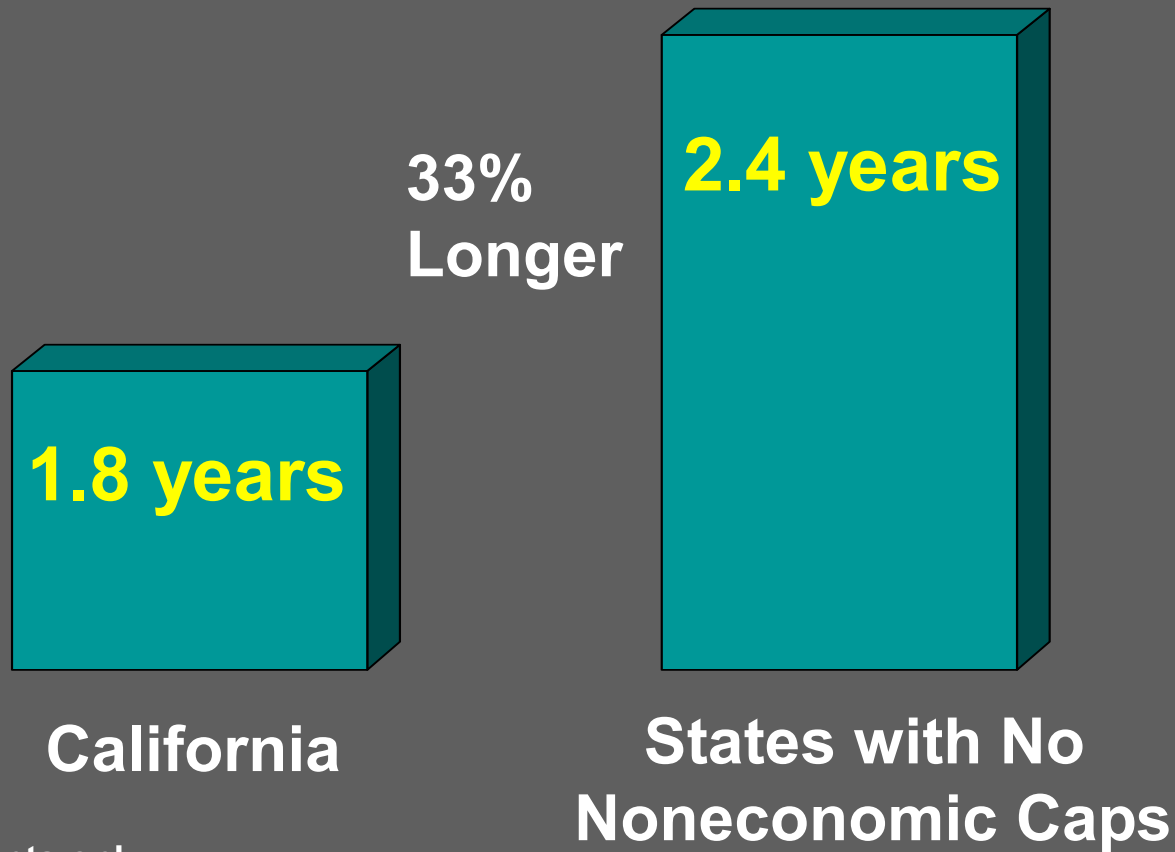
Source: NAIC Profitability By Line By State

# MICRA: Median Med Mal Jury Awards 1996-2002



Source: Jury Verdict Research

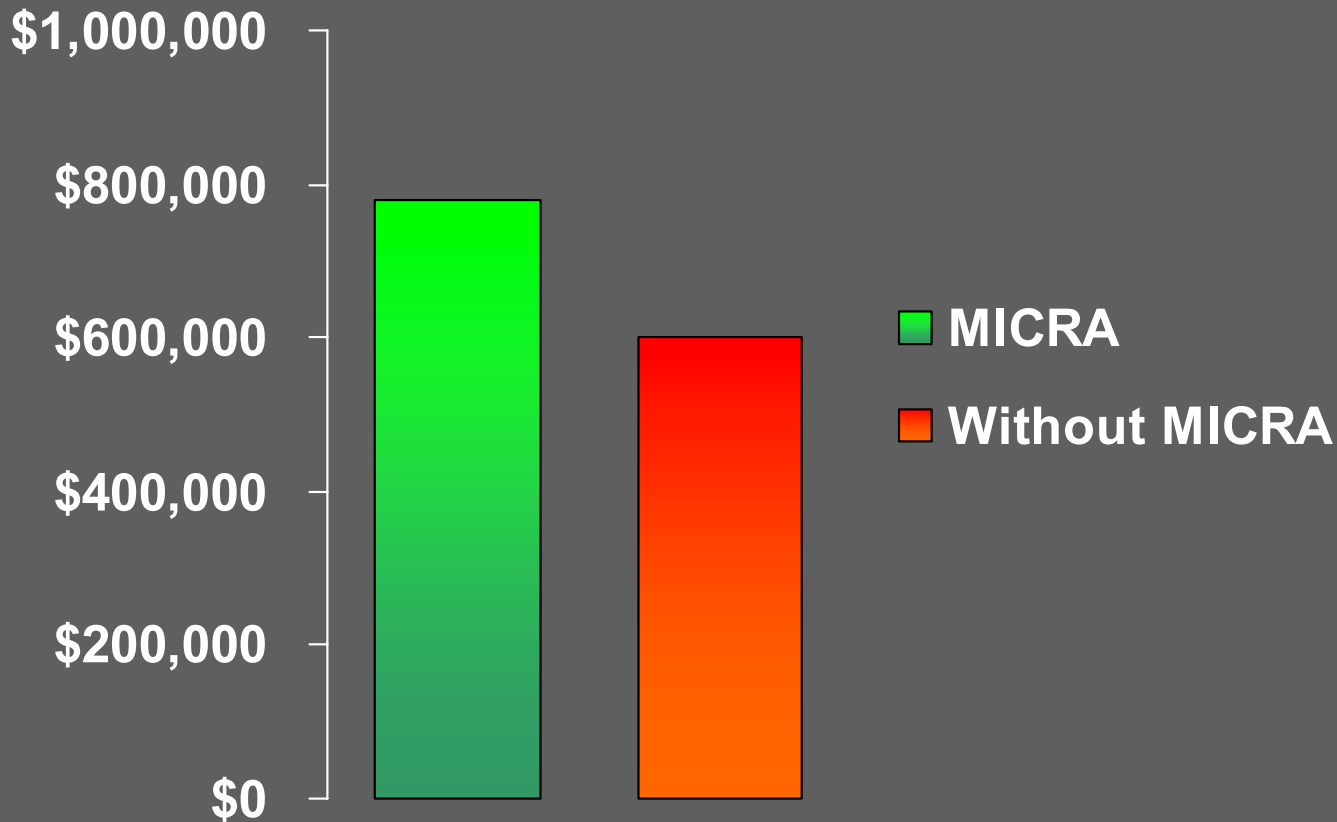
# MICRA Reduces Average Time to Settlement



\*Indemnity payments only

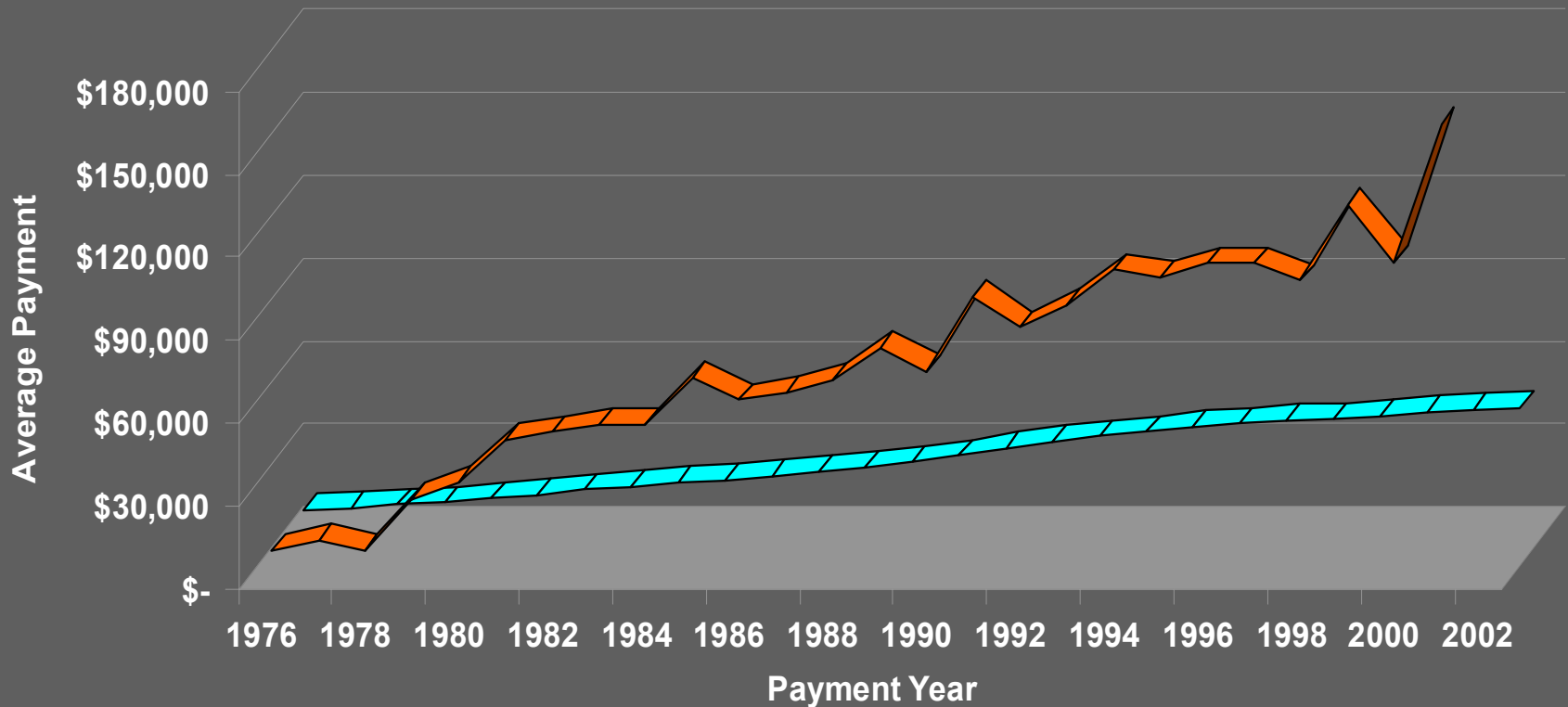
The Doctors' Company, 1997-2001

# Injured Patients Benefit Directly



Proceeds of a \$1 Million Judgment

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

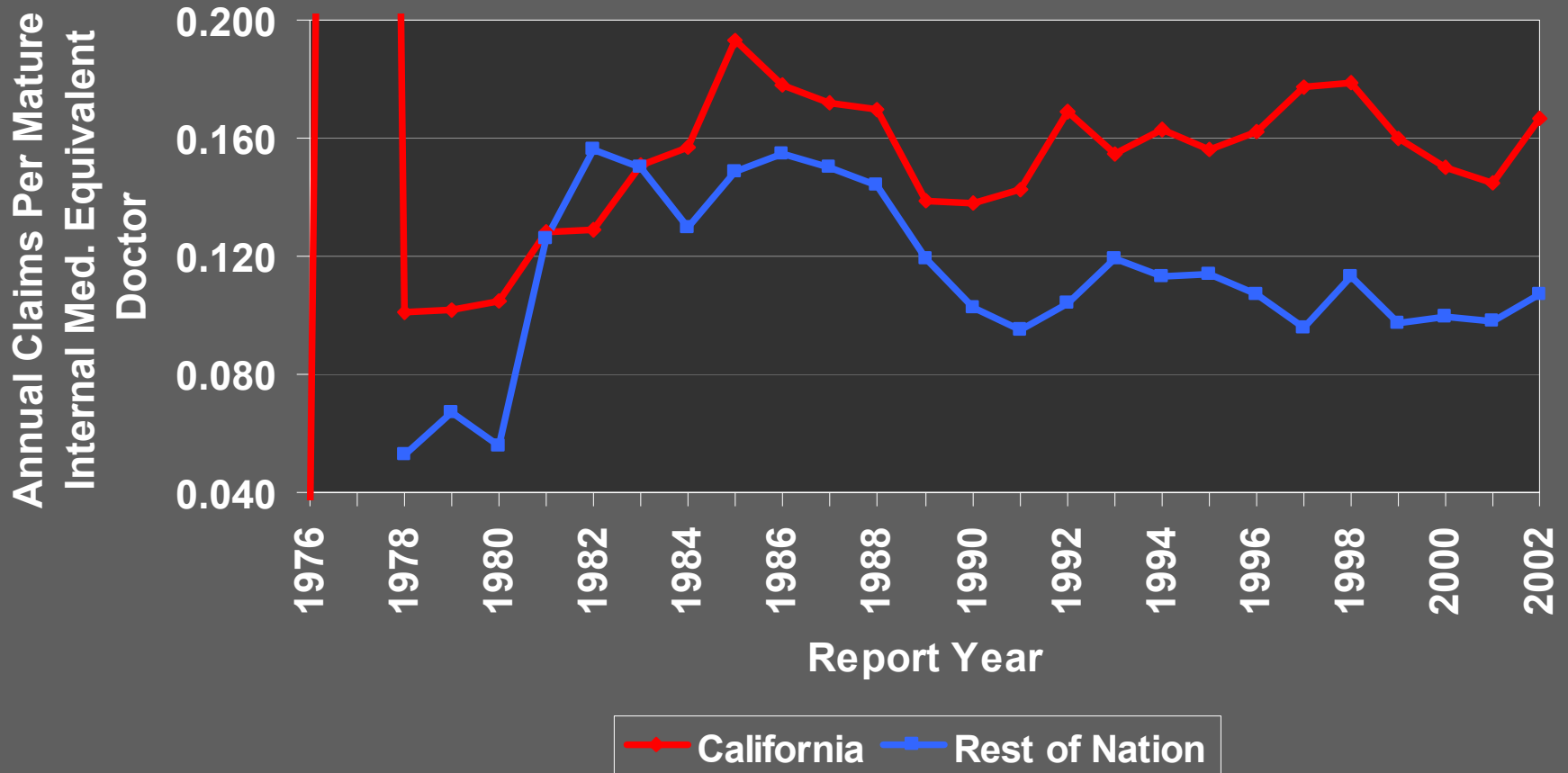


- Actual average physician medical liability claim paid in CA 1976-2001.
- Average medical liability claim in CA beginning 1976, adjusted for rate of inflation (CPI) 1976-2001.

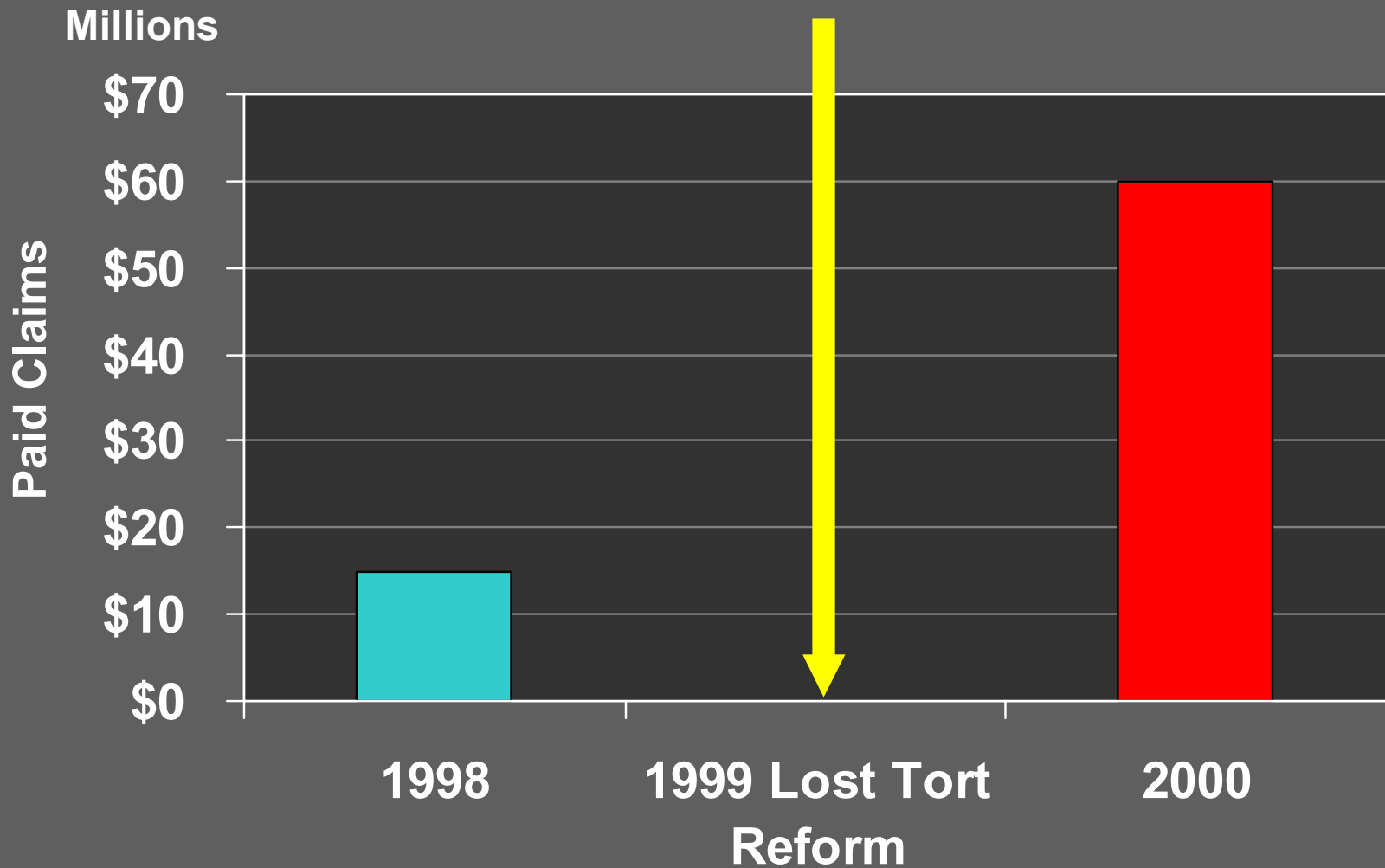
# MICRA Does Not Limit Access to Courts



## TDC PHYSICIAN CLAIM FREQUENCY



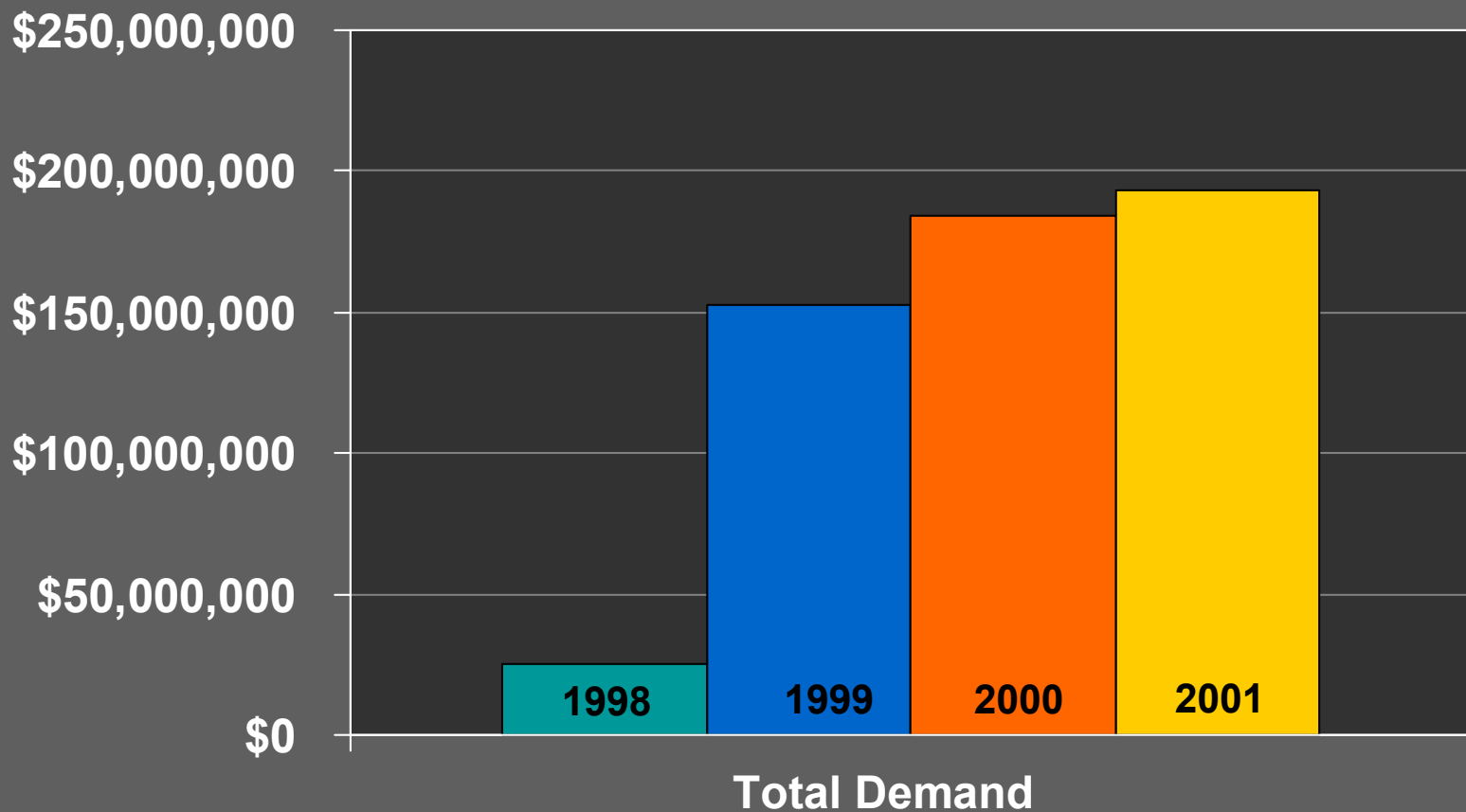
# Oregon: Loss of Tort Reform



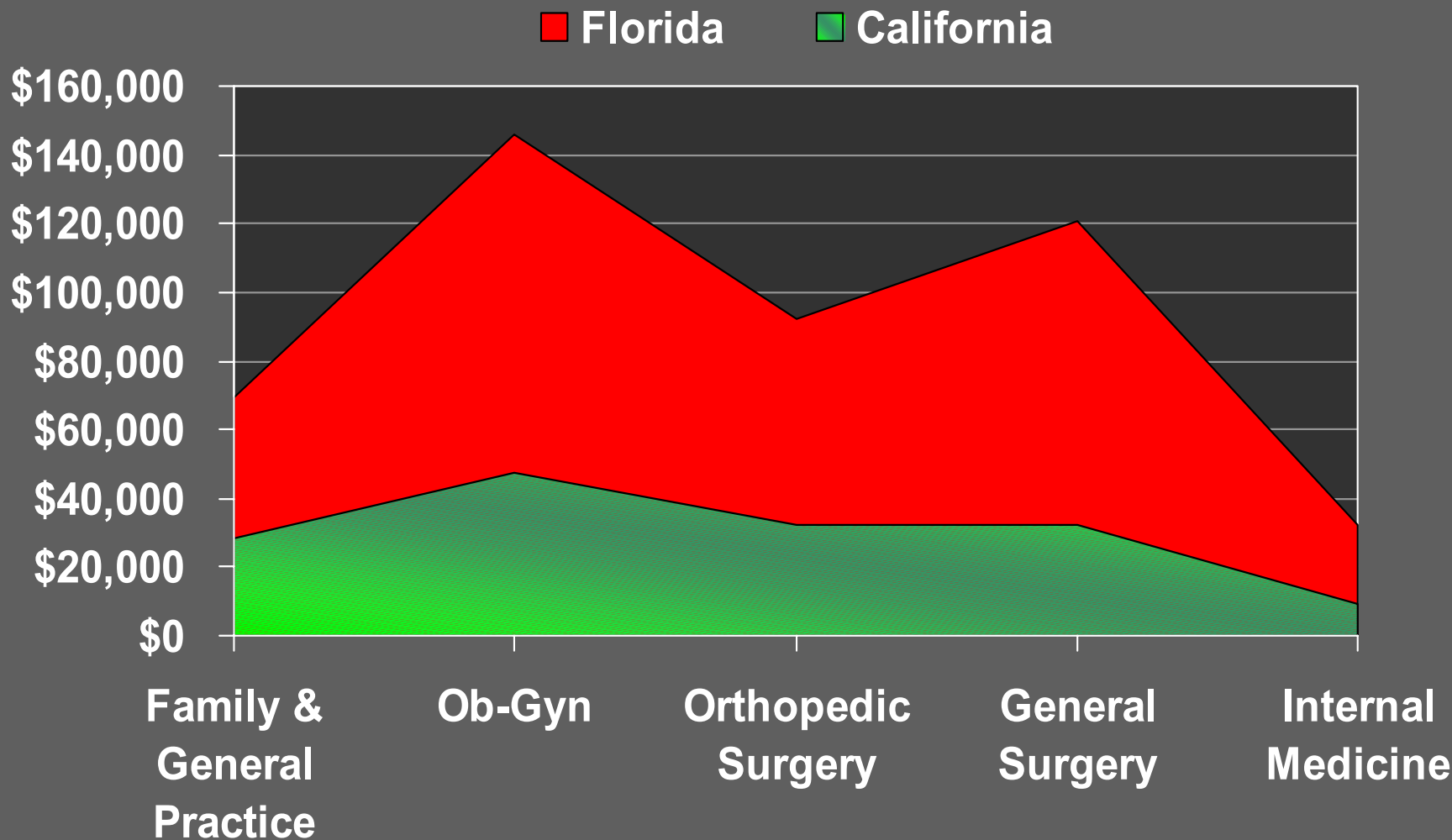
# Oregon: Loss of Tort Reform



## Total Plaintiff's Demand in Settled Cases



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



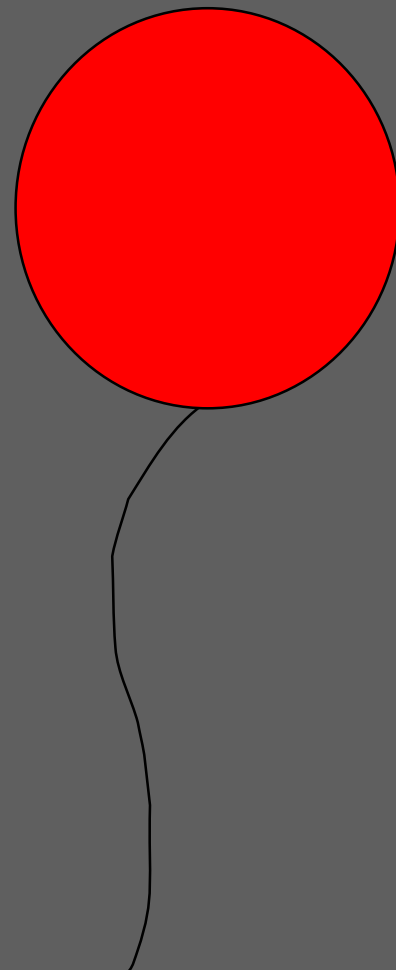
# Stanford Study: The Cost of Defensive Medicine



- 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.

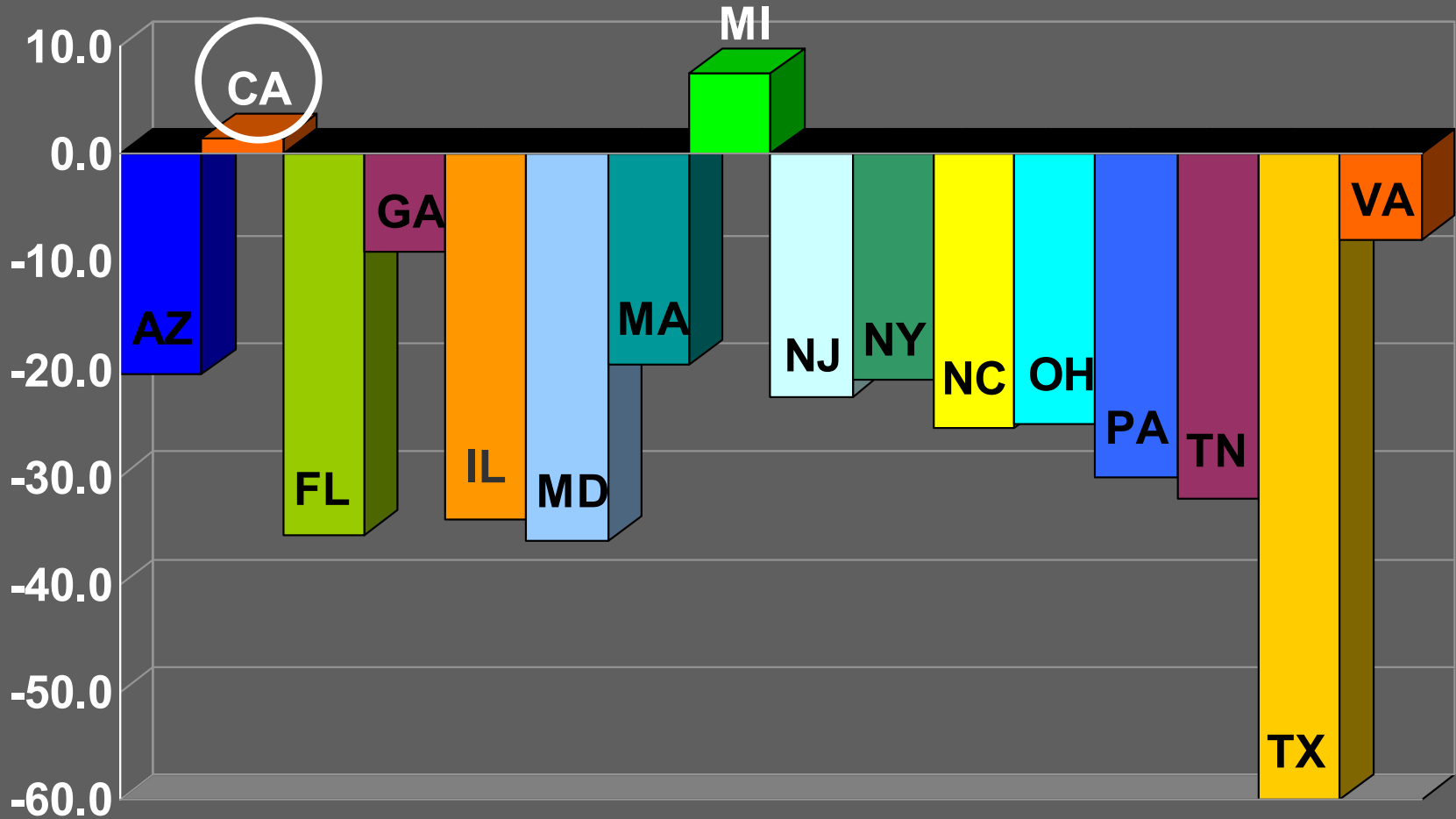
# The Proposition 103 Myth

- **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

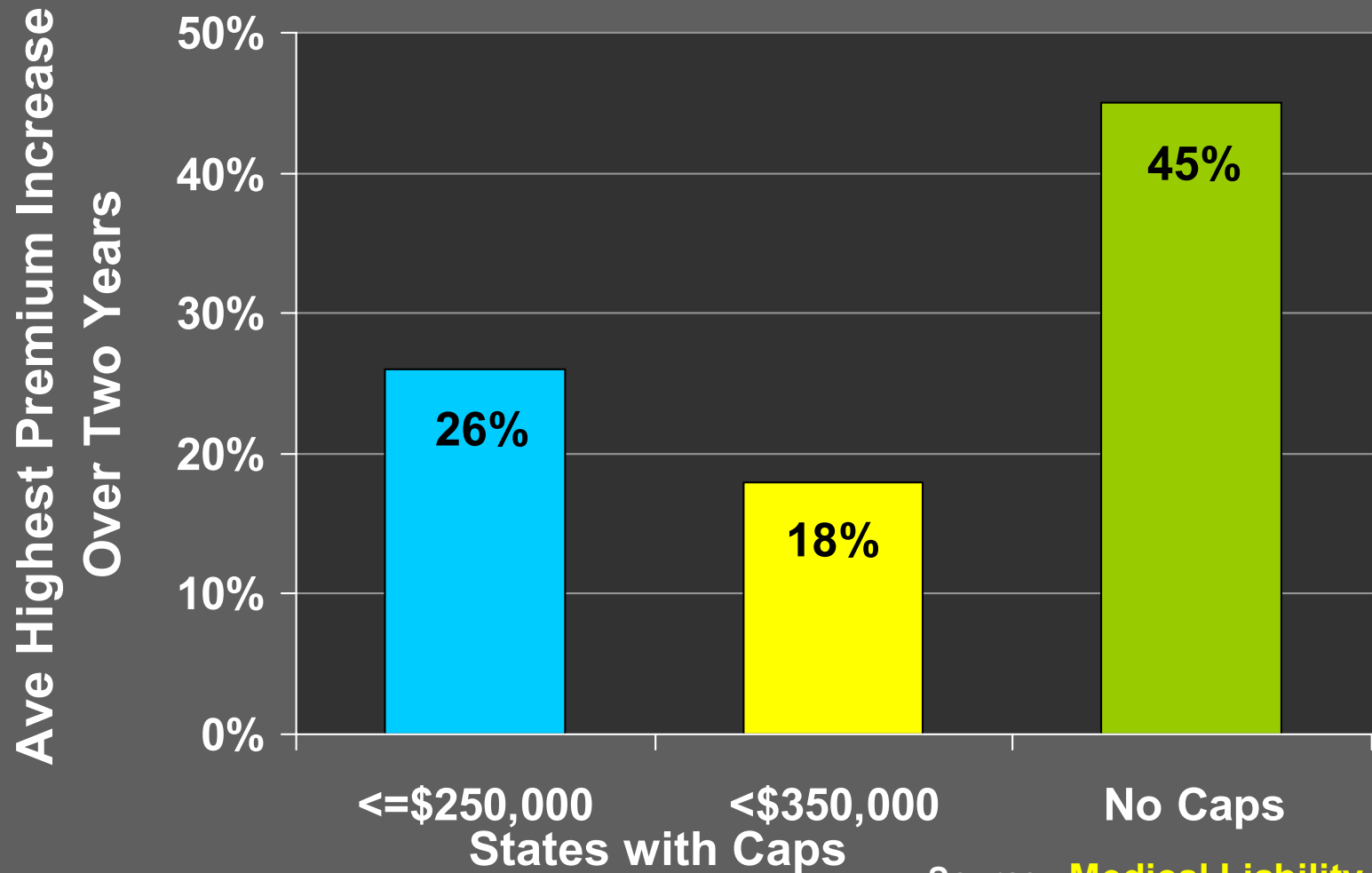
- The med mal insurers were specifically **exempted** from rate rollbacks.
- There has **not** been a single med mal rate increase denied under 103 until this year, when one company's rate increase was reduced from 16% to 10%.

# Underwriting Results 1991-2000 NAIC



Source: 2000 NAIC Profitability Report

# Impact of Caps on Premiums



Source: **Medical Liability Monitor**

- 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”

- “...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

- Frequency is stable at extremely high levels.
- Severity is rising to unprecedented levels.
- The high risk specialties are most heavily impacted.
- The widespread use of laparoscopy has increased the risk profile of surgical practice.

# Summary

- Effective tort reforms are effective and a non-economic damages cap of \$250,000 is the cornerstone of effective tort reform.
- This is a state crisis primarily because some states have effective legal reforms and some do not.
- Ineffective reforms are worse than none.