

The Crisis of 2002-2003: Causes and Solutions

Exploding Opposition Myths & Call to Action

**American Legislative Exchange Council
Task Force Summit Breakfast Session
March 29, 2003**

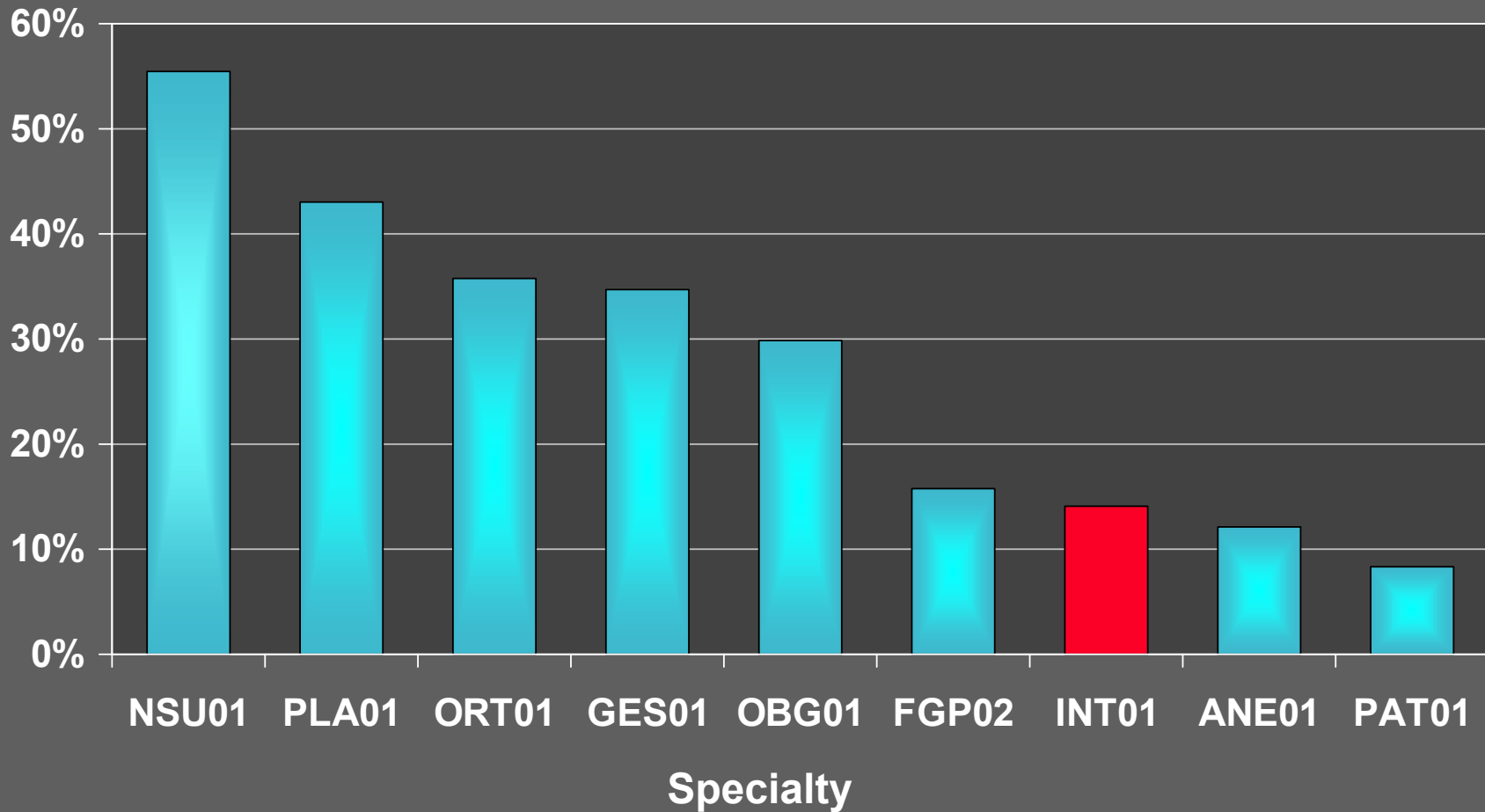
**Richard E. Anderson, M.D.
Chairman
The Doctors Company**

- Problems
 - Frequency
 - Severity
 - Randomness
 - Fallacy of the bad doctor
- Opposition Myths
- Solutions
 - Tort Reform: Theory and practice
- Call To Action

Frequency by Specialty 1995-2001



Frequency



Meaning

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

Increasing Severity: Why?



Dissatisfaction with medicine: erosion of doctor-patient relationship

- Managed care
- High -tech care
 - Sterile environment
 - Unrealistic expectations
- IOM Study

Value of money

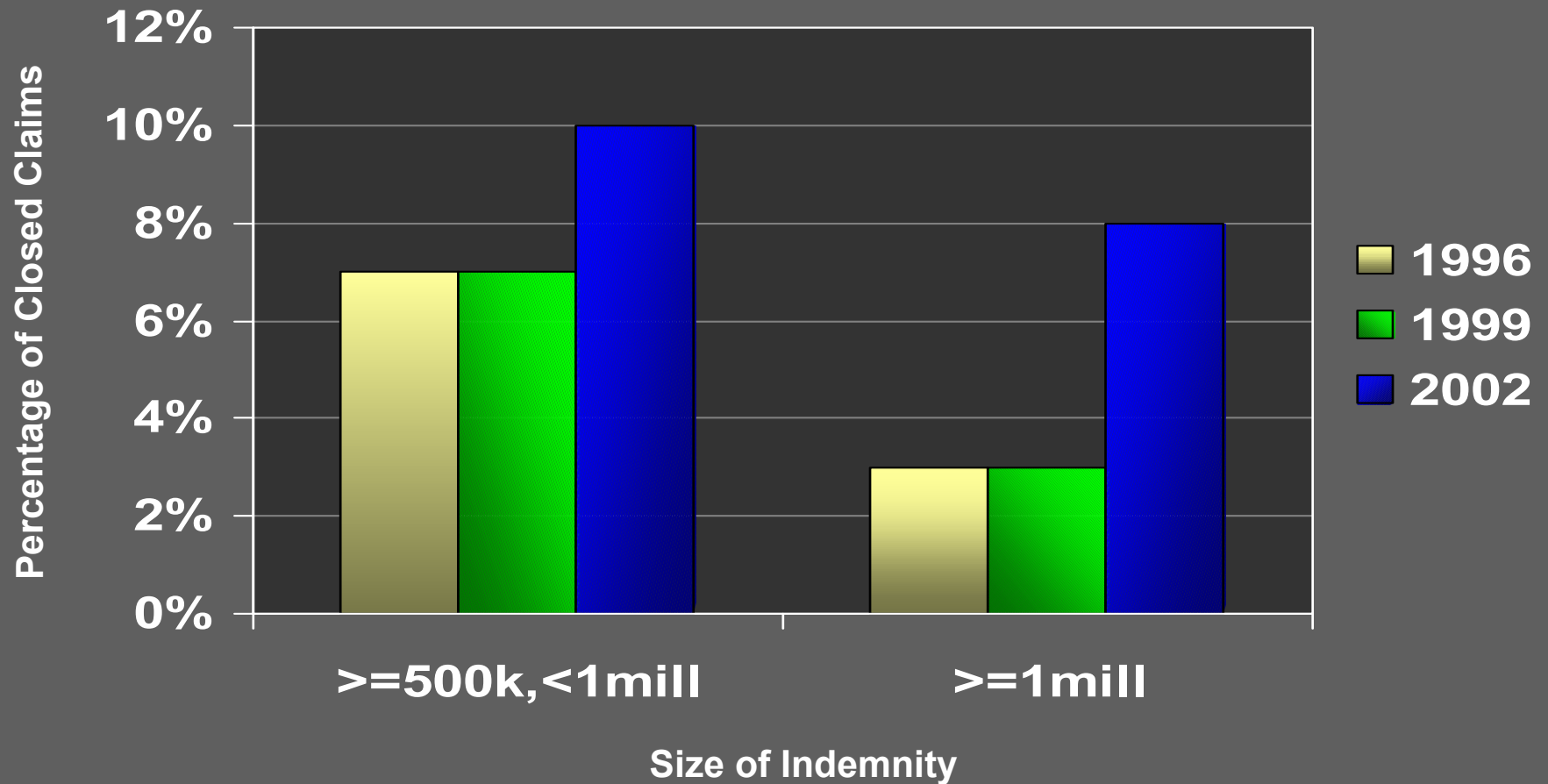
Risk-free society

Incomprehensibly large judgments in other areas

Severity – Distribution of Claims by Size of Indemnity



Distribution of Claims by Size of Indemnity
By Closing Year



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

An Equitable System?



*Fewer than 100 claims per year
account for more than half the total
indemnity paid on behalf of our
28,000 physicians.*

Implications of Unlimited Verdicts



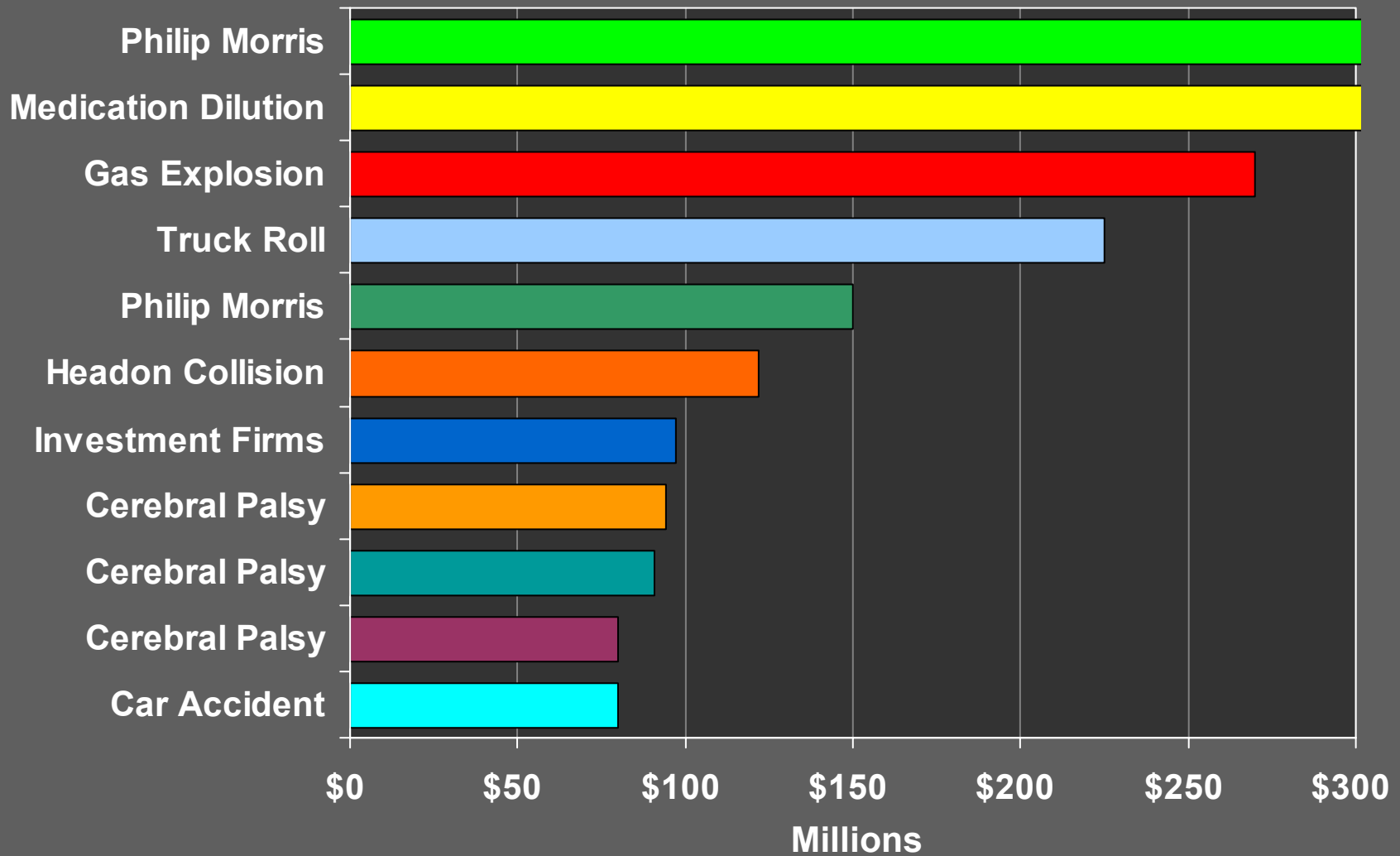
You cannot afford to go to court
Cost of settlement rises dramatically
Unlimited judgments require unlimited premiums...
System of indemnification unsustainable

The Most Expensive Claims

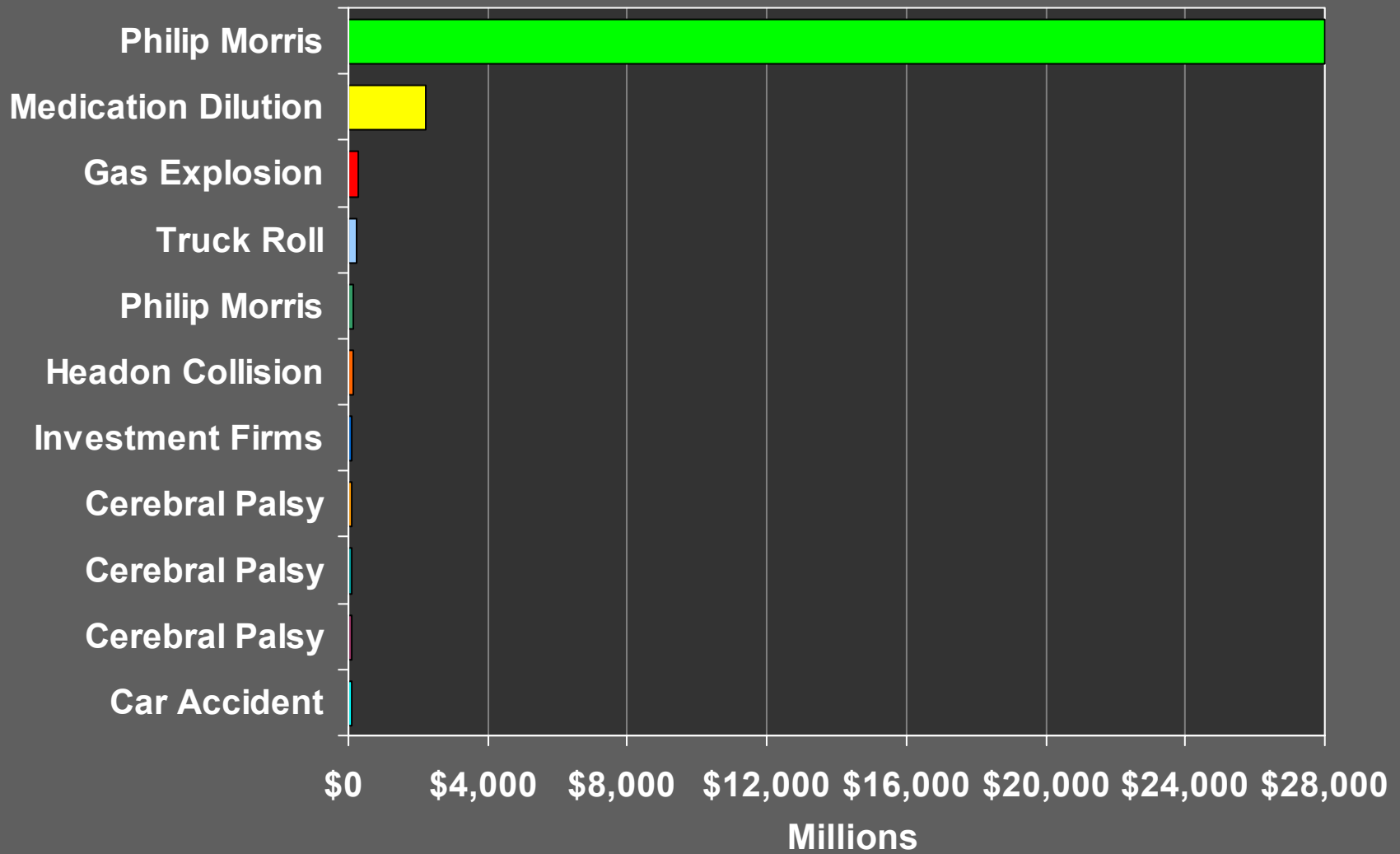


- Texas: \$268,000,000
- Many states: \$100,000,000
- Philadelphia: Jury verdicts exceed the entire state of CA over past 3 years.
- *Verdicts drive settlement value.*

Top Jury Awards of 2002



Top Jury Awards of 2002



Randomness

Harvard Medical Practice Study and the Institute of Medicine Report on Medical Errors

Institute of Medicine Study



44,000 to 98,000 deaths annually due to malpractice

Goal: 50% reduction over 5 years

Harvard Study



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: Consequent Distortions



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”

43 involved no “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%)

Malpractice Trial Outcomes:

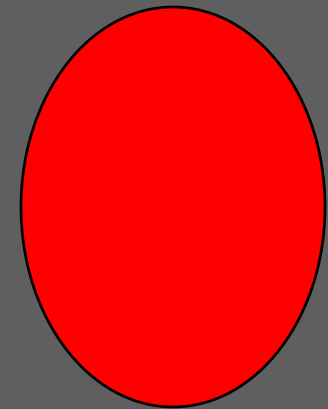
- *No correlation whatever between the presence or absence of medical negligence and outcome of malpractice litigation*

The Bad Doctor Fallacy



- 2% of the doctors cause 50% of the losses.
 - Post hoc, ergo propter hoc: The sun rises because the rooster crows
 - 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.

Trial Lawyer 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.

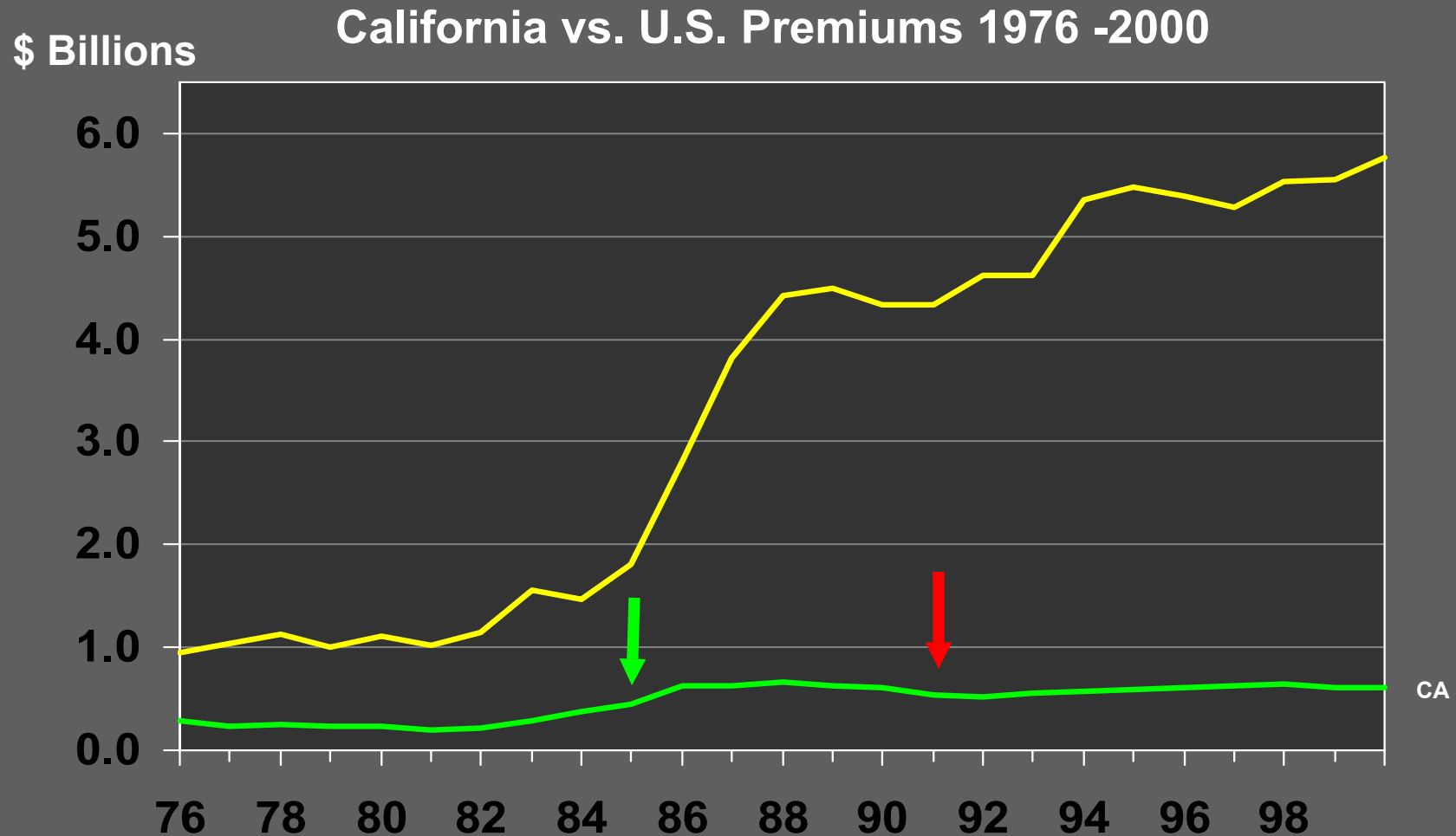
- Med mal hearings 1991
- TDC had been paying dividends for **11 years** prior to its 103 dividend.
- TDC dividends were **higher in the 5 years prior** to 103 than they were in the 5 years after.

The Proposition 103 Myth



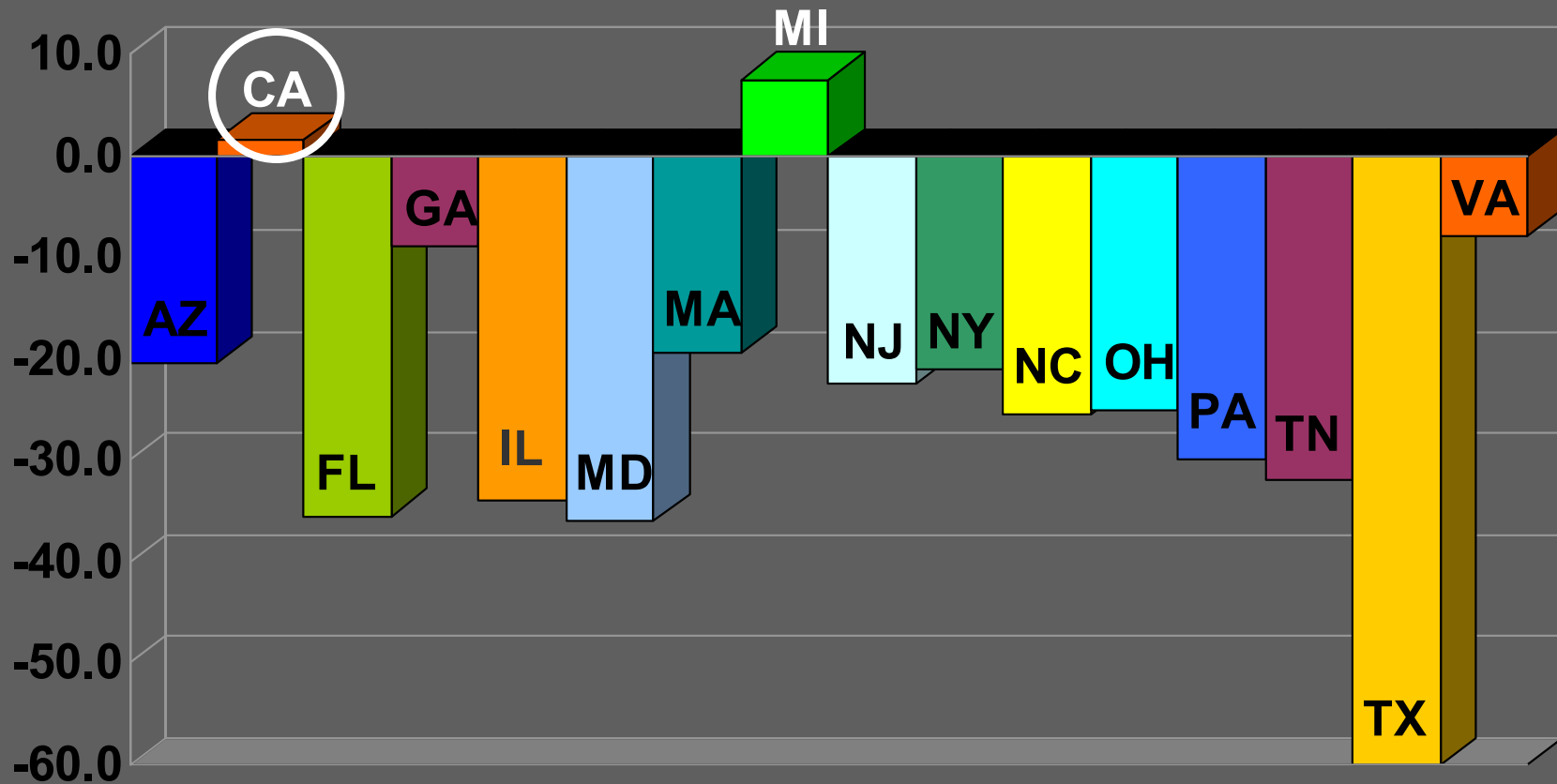
- The med mal insurers were specifically **exempted** from rate rollbacks.
- There has **not** been **a single** med mal rate increase denied under 103.

Savings from MICRA Reforms



Source: NAIC Profitability By Line By State

Underwriting Results 1991-2000 NAIC



Source: 2000 NAIC Profitability Report

The Medical Liability Crisis Is a National Issue



- Federal government pays for 45% of all medical care in the U.S.
- Many states are in crisis today and more will follow.
- HR 5 will not preempt state law wherever the state has spoken.
- Standards of care are national.
- Defensive medicine costs the nation in excess of \$100 billion annually.

Economic Loss



- Awarded for children, homemakers, and seniors.
- The \$17 million dollar two year old.

Tort Reform

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



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.

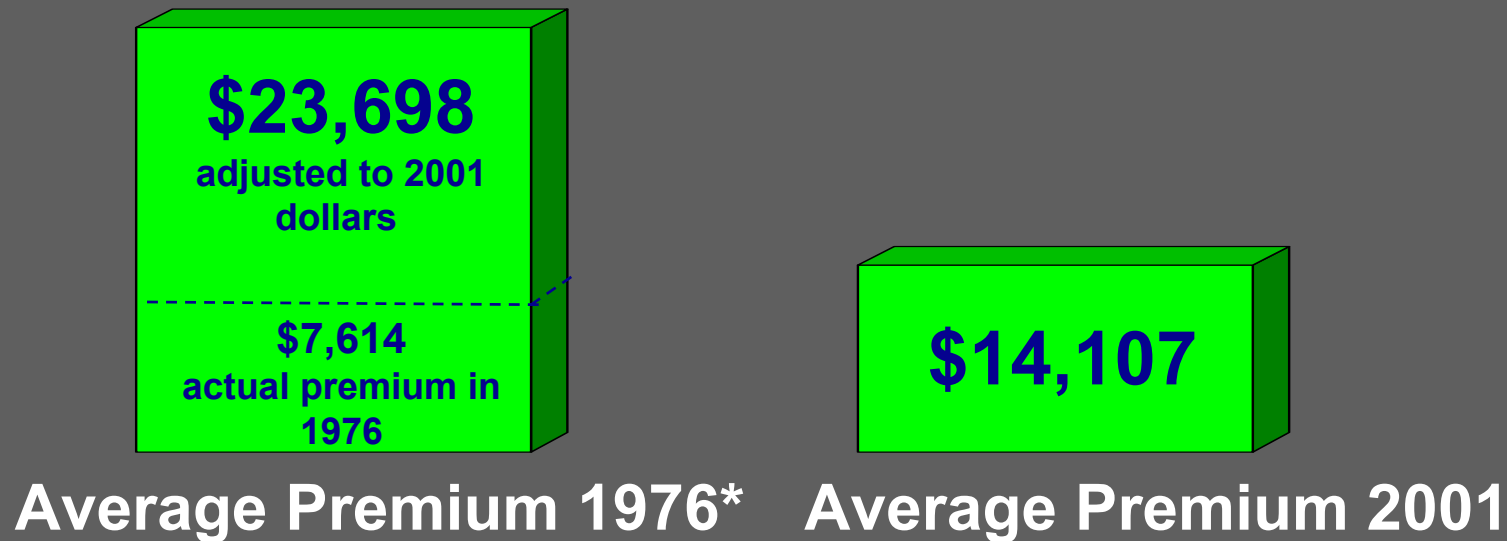
MICRA

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 1986-2002



Average Premium 1986**

Average Premium 2002

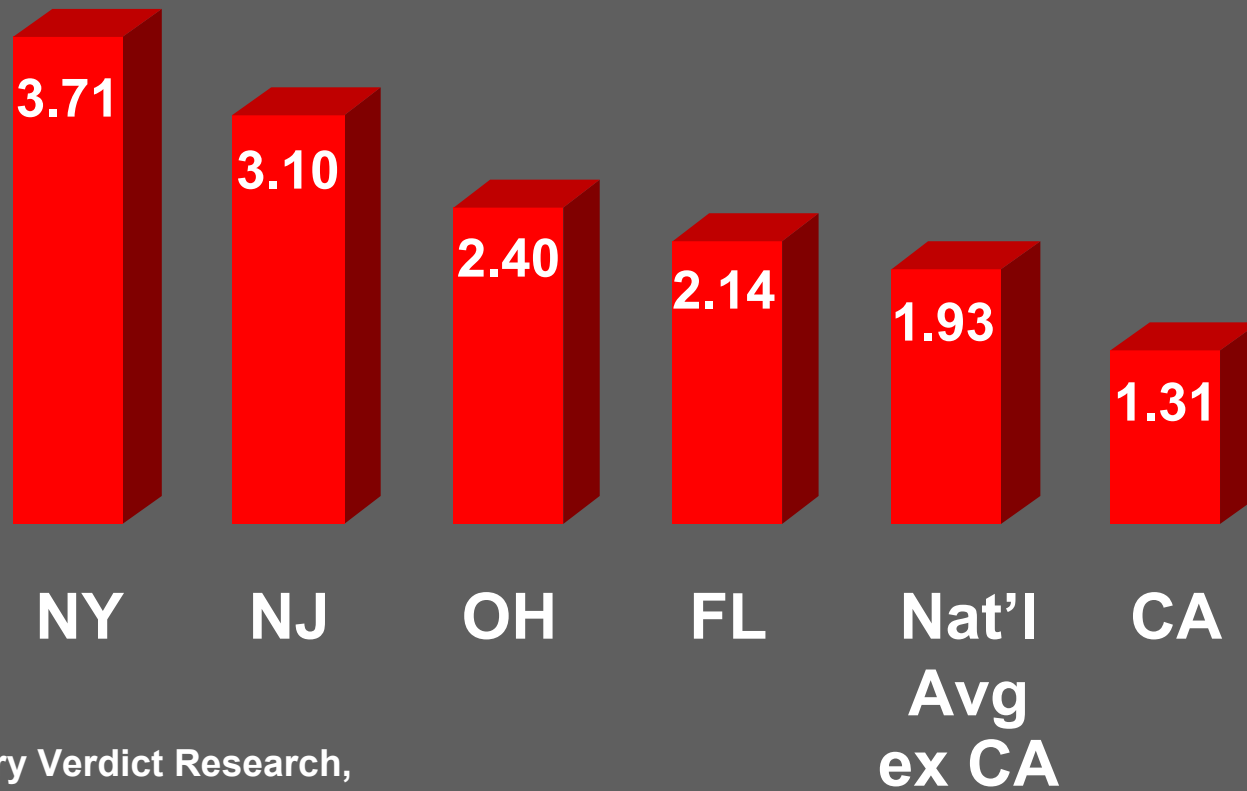
*The Doctors Company's average of all specialties including dividends for a \$1 Million/\$3 Million Mature Claims-Made Policy.

**Premium adjustments are made using the Annual Urban Price Index published by the Bureau of Labor Statistics.

MICRA Reduces Verdict Cost and Frequency

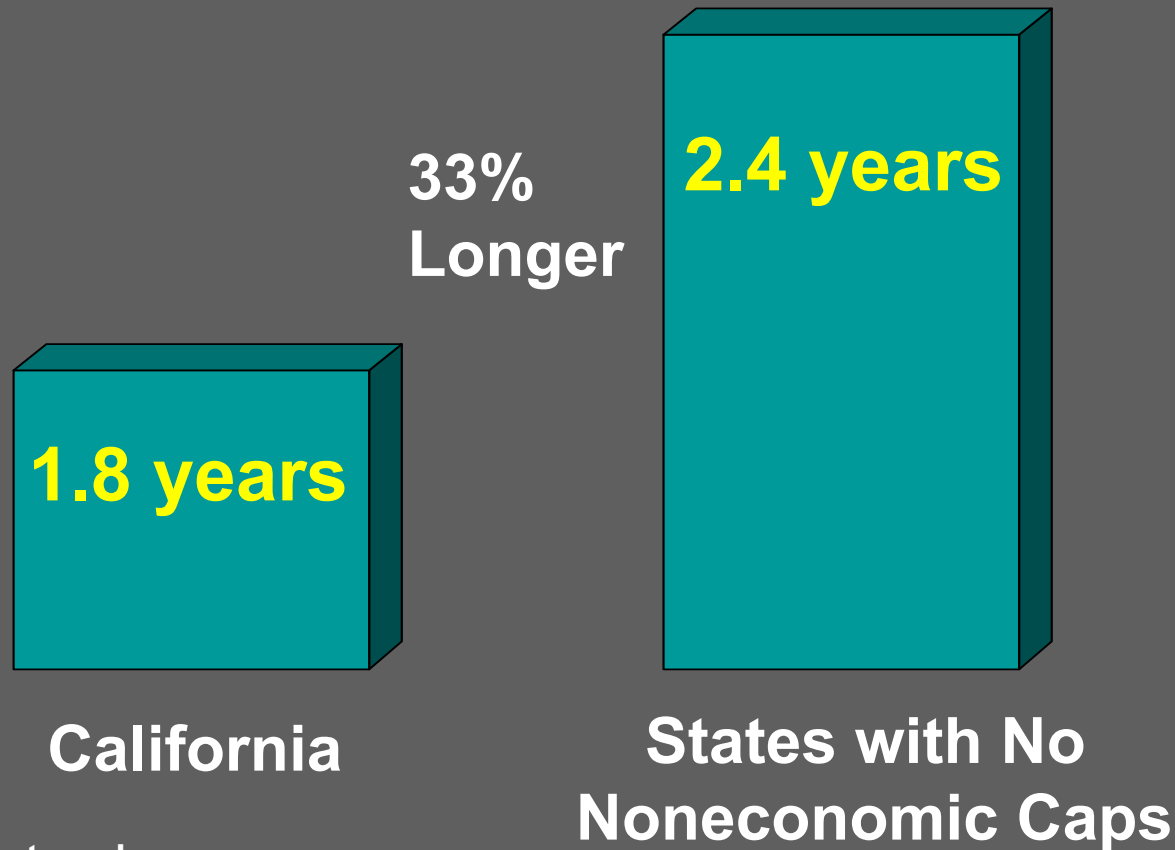


\$1 Million+ Verdicts Per 1,000 Doctors



Sources: Jury Verdict Research,
AMA

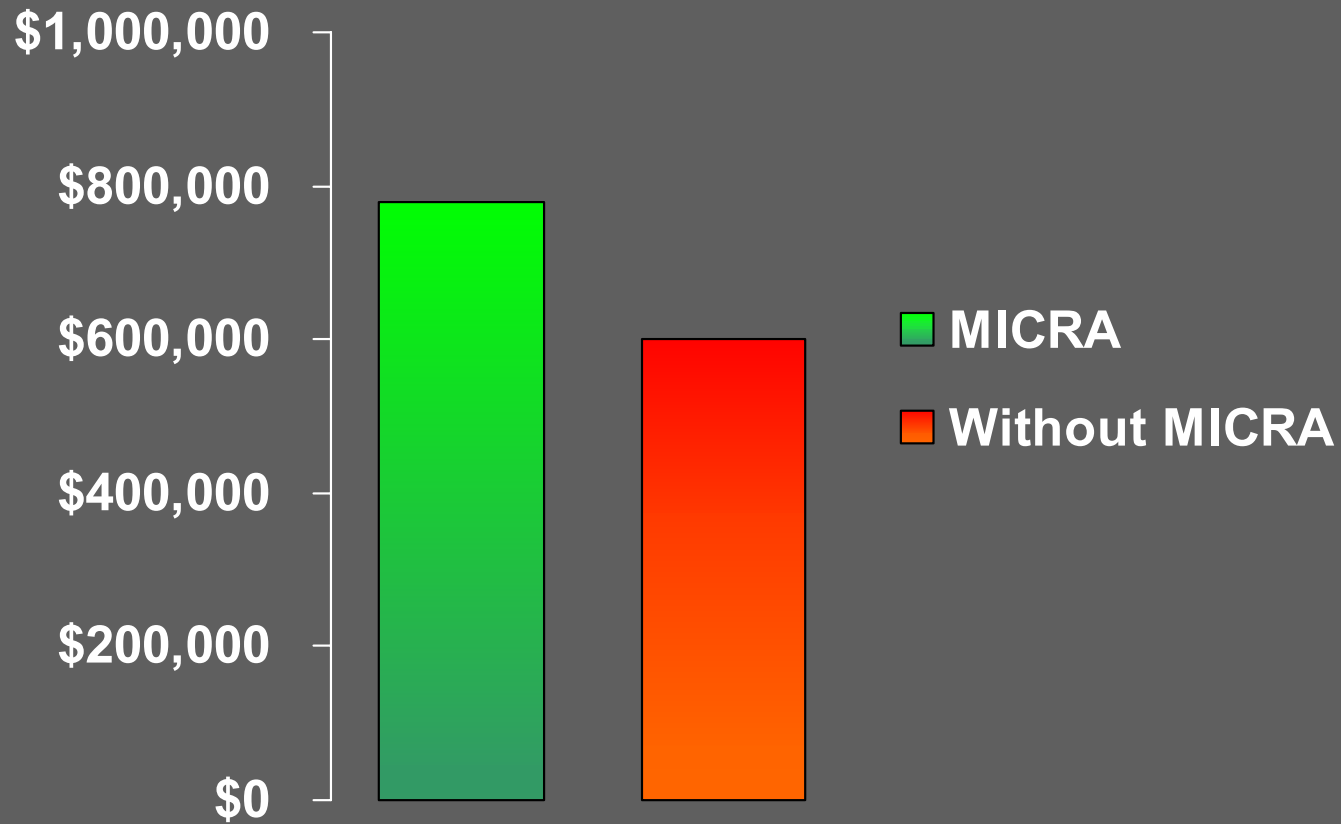
MICRA Reduces Average Time to Settlement



*Indemnity payments only

The Doctors' Company, 1997-2001

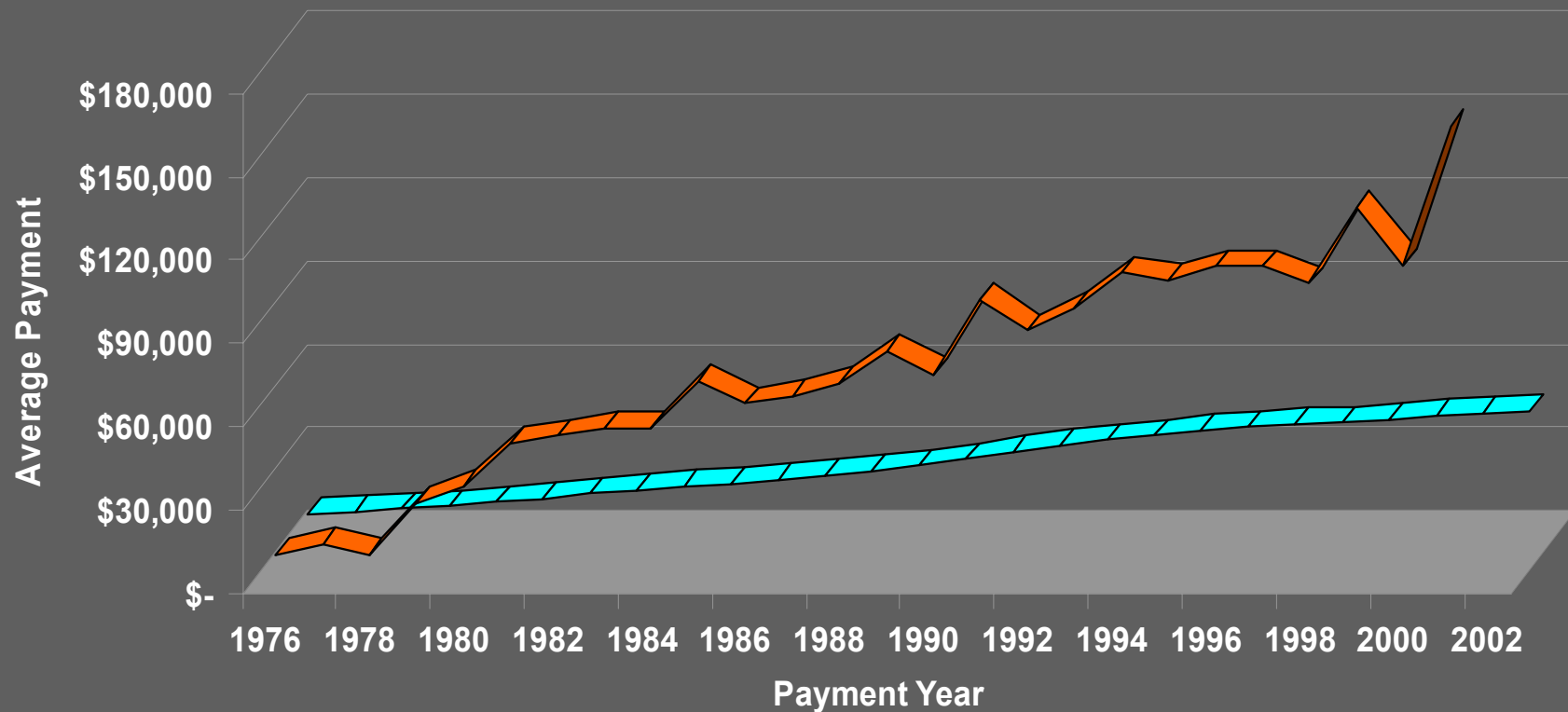
Injured Patients Benefit Directly





Proceeds of a \$1 Million Judgment

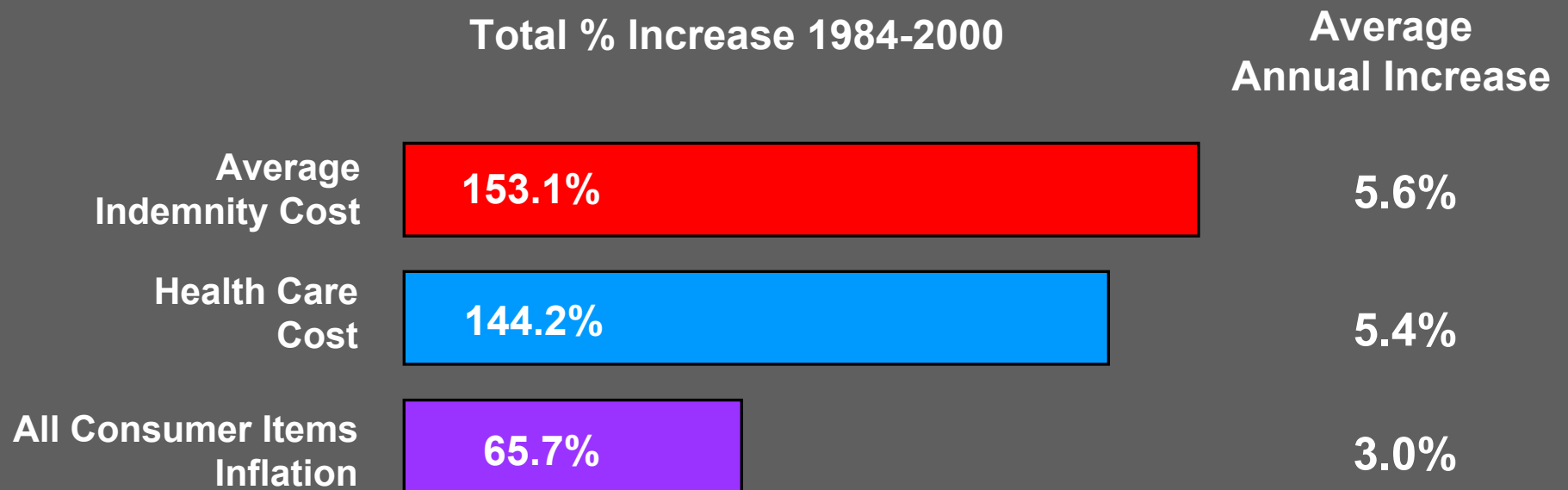
Average Medical Liability Claim in CA vs. Average Claim Adjusted for Inflation 1976-2001

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.

Increasing Cost of Malpractice Claims Despite MICRA

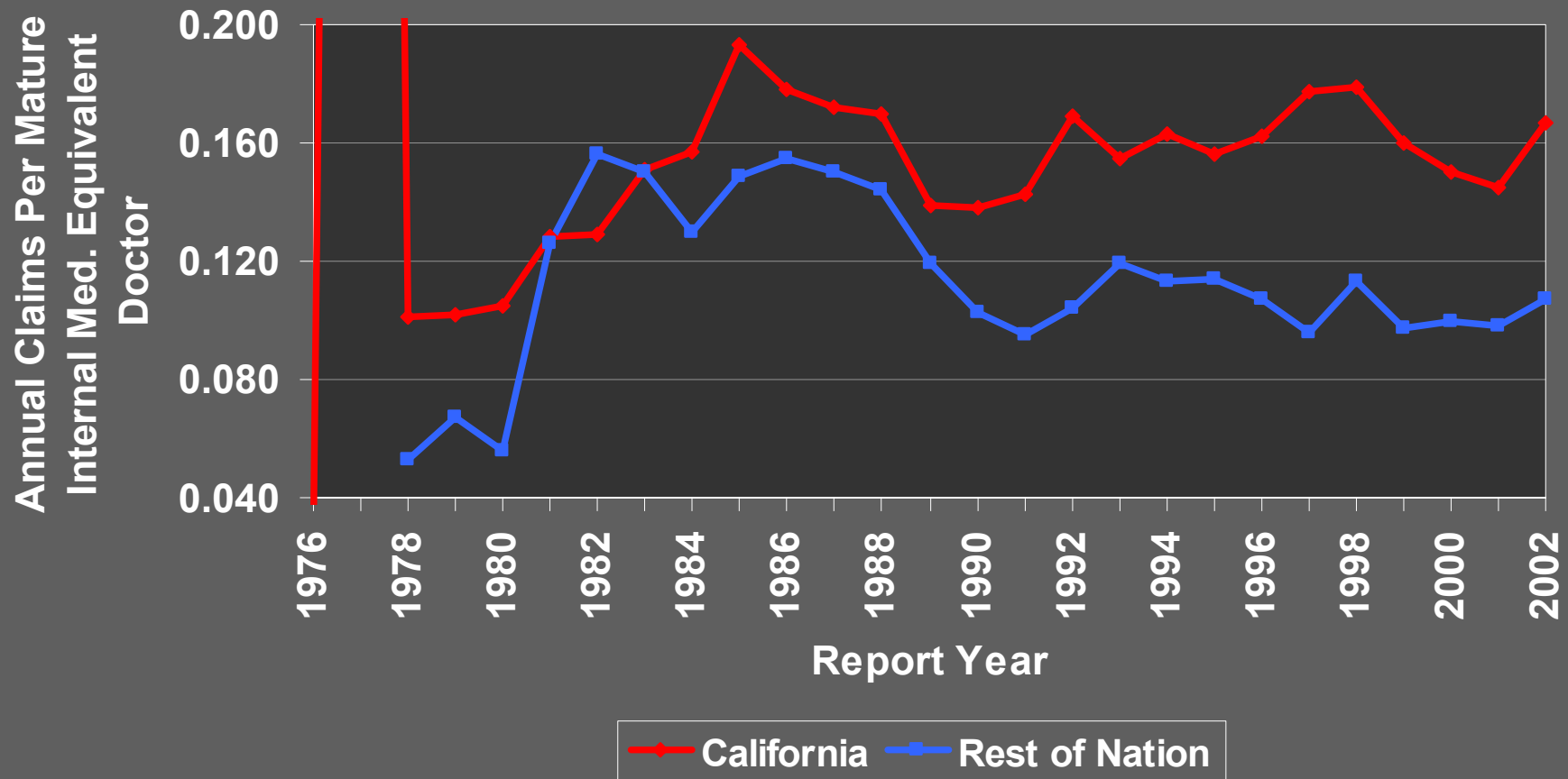


US Cities CPI vs. TDC California Allocated Claims Closed with Indemnity 70

MICRA Does Not Limit Access to Courts



TDC PHYSICIAN CLAIM FREQUENCY



Oregon: Loss of Tort Reform



Millions

\$70

\$60

\$50

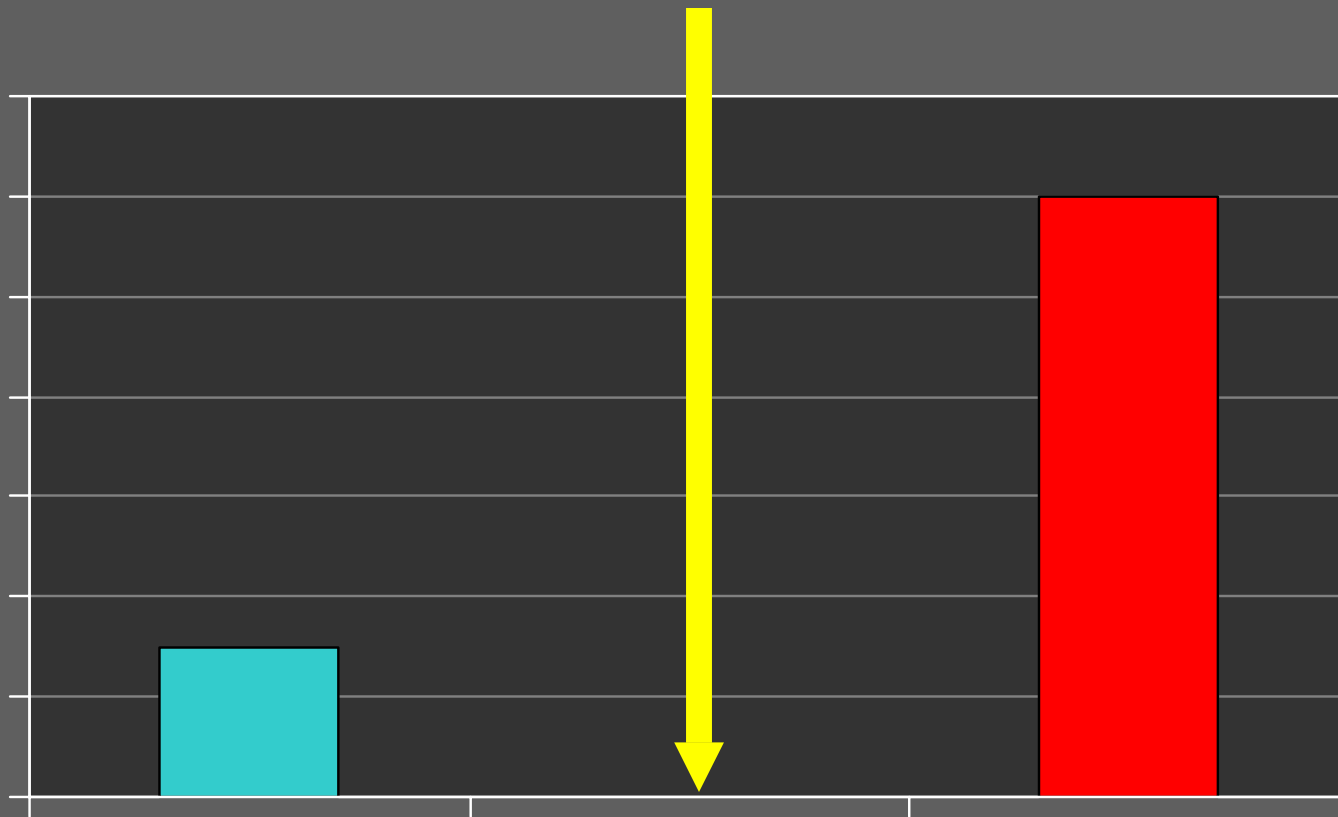
\$40

\$30

\$20

\$10

\$0



1998

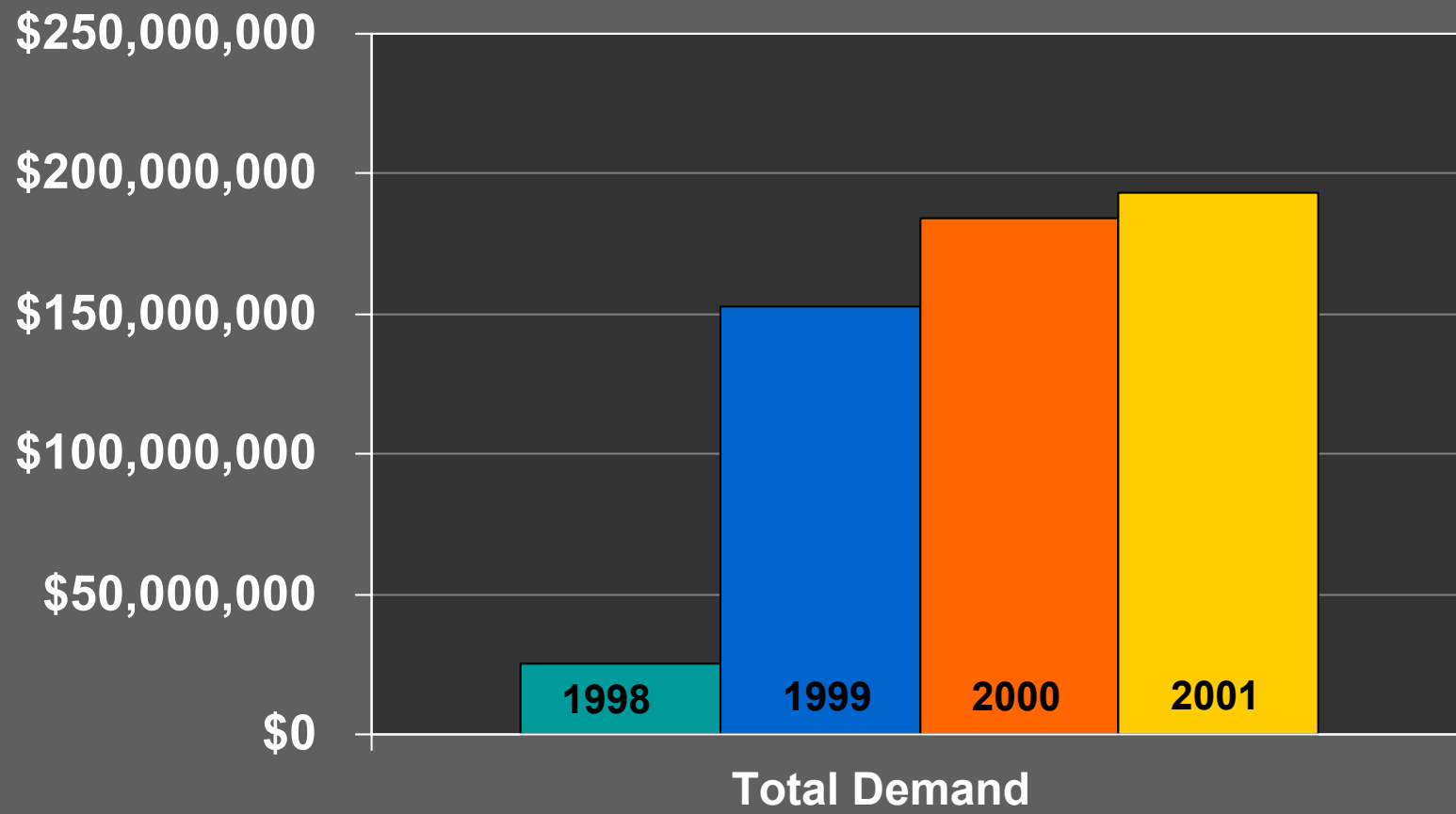
1999 Lost Tort Reform

2000

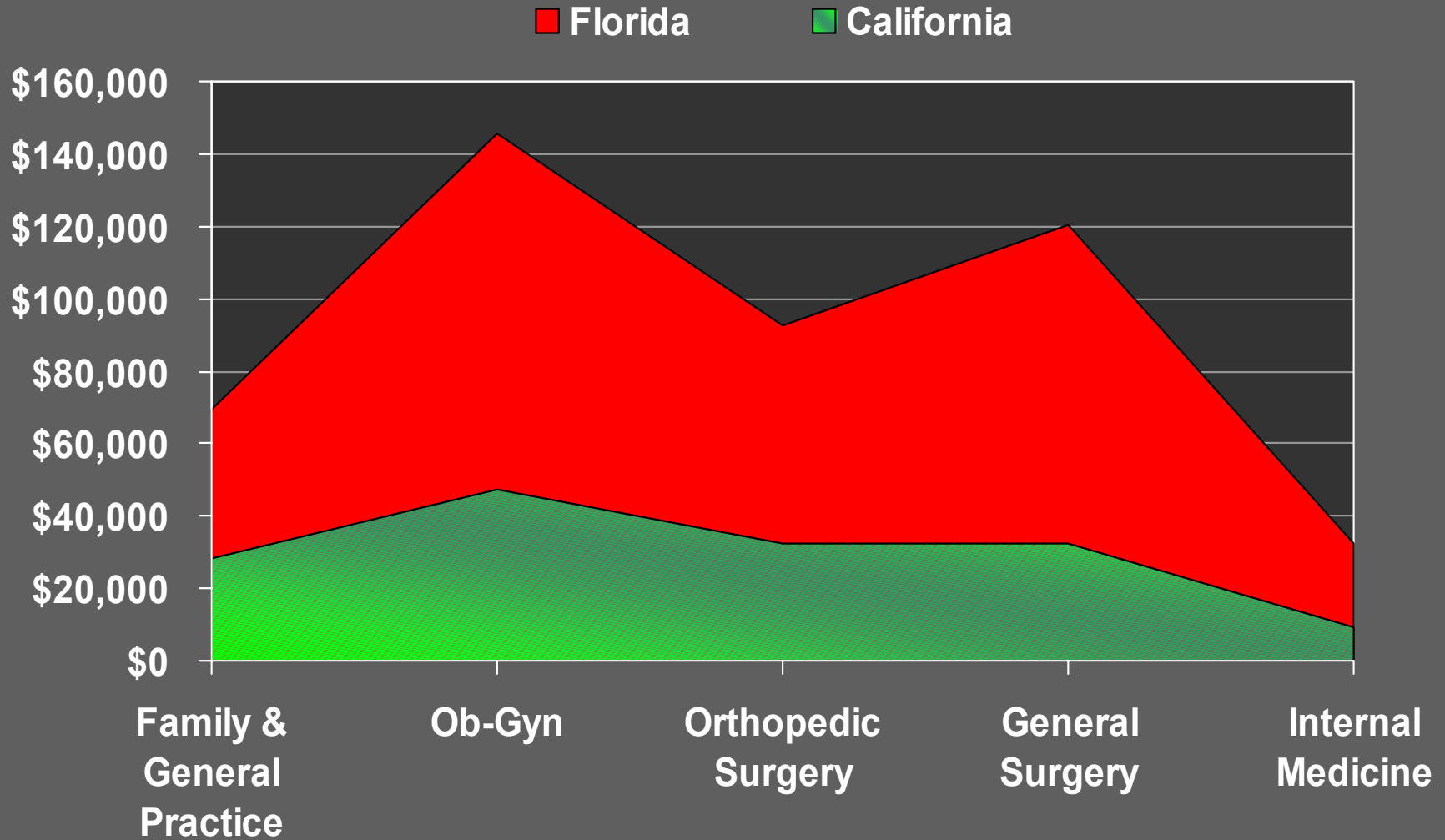
Oregon: Loss of Tort Reform



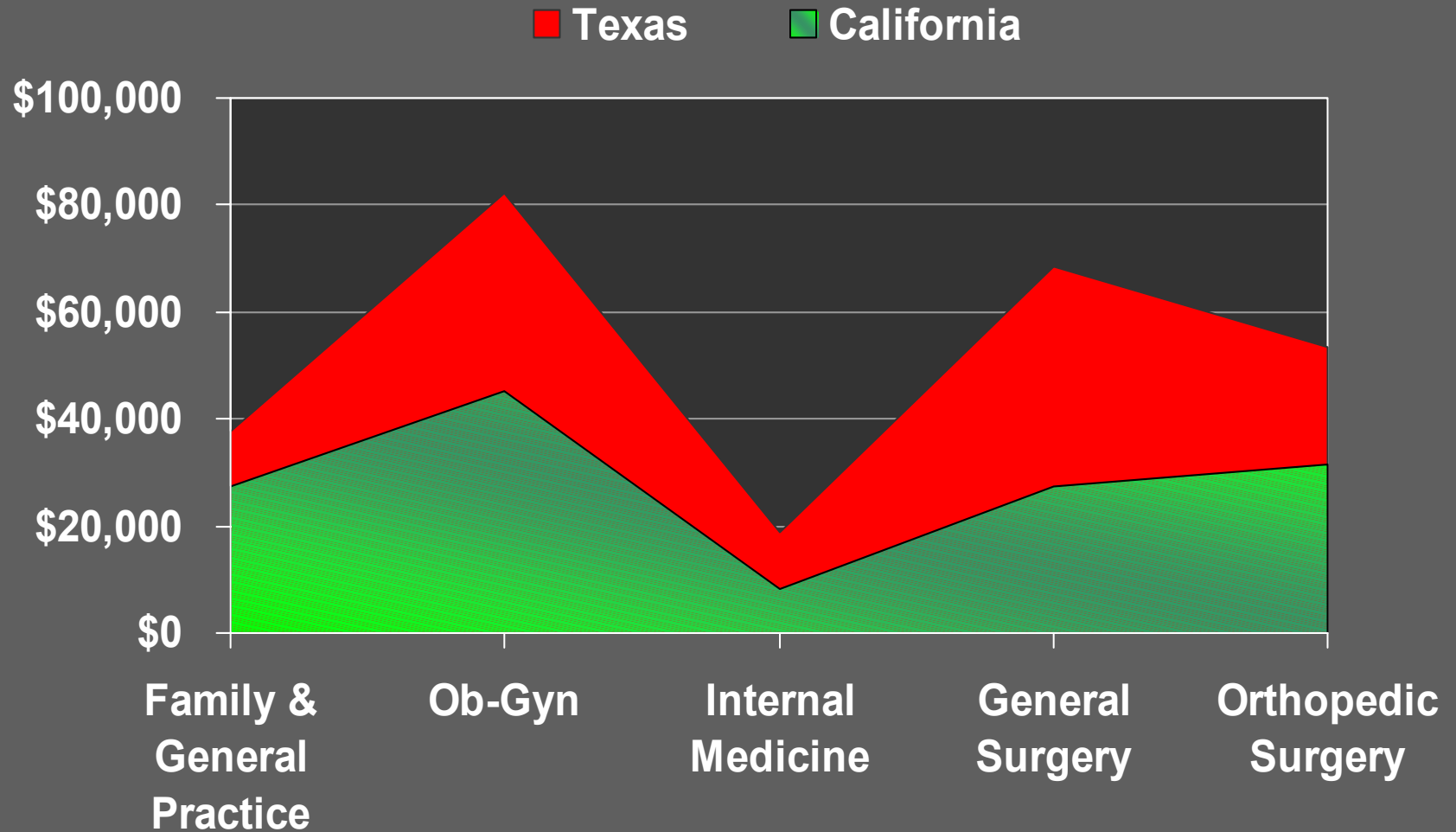
Total Plaintiff's Demand in Settled Cases



California vs. Florida Average Rate by Specialty (2002)



California vs. Texas 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.



MICRA Works



- CA: 27 year experience
- Congressional Budget Office
- Health and Human Services
- State DOIs
- American Academy of Actuaries

MICRA Works



- 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.”

Call to Action



- The time for reform is now, before more doctors leave their home state, turn away the sickest patients, or retire from the practice of medicine.
- There is an enormous amount of definitive information available now. This is not an issue that requires more study, it requires more *action*.
- You are in a position to speak forcefully to your Congressional delegation, to your legislative colleagues, and to your constituents.

Summary

- The volume of litigation is inexcusable.
- The cost of litigation is rising to unprecedented levels.
- This is a state crisis primarily because some states have effective legal reforms and some do not.
- Access to health care is imperiled.

Summary



- We are fortunate that effective and reasonable solutions are available today.
- The time for action is now. Yours is an important voice in demanding and implementing tested solutions to today's crisis.

The Medical Liability Reform Solution is a State's Rights Issue



- Myth #1. Once the Federal Government enacts medical liability reform that includes a monetary cap on non-economic damage awards, states will be powerless to change or write a law for their non-economic damage award cap or any other medical liability reform ingredient.
- **EXPLODING THE MYTH**
 - Under the federal legislative proposal, known as HR 5, state laws that set limits or other restrictions more comprehensive than HR 5 will remain in effect.
 - Under HR 5, states are allowed the flexibility to establish or maintain their own laws on damage awards whether they are higher or lower than the federal standard.

The Medical Liability Reform Solution is a State's Rights Issue



- Myth #2. The Medical Malpractice Crisis is a state issue that should be left to the states to solve and not the federal government.

- **EXPLODING THE MYTH**

- It is a national problem. Over 18 states are experiencing a medical malpractice crisis. Another dozen or more states have a looming crisis.
- Access to health care is threatened as physicians retire or leave one state to practice in another state.
- Estimated savings from federal medical liability reform could provide health care coverage to almost all of the uninsured in the states.
- Over half of the states have monetary caps. West Virginia just enacted a \$250,000 non-economic damage cap. Florida and Texas are considering the same cap. States will determine whether their current caps are effective medical liability reform or whether the federal cap is more effective.
- National and state public opinion surveys demonstrate Americans are concerned about access to health care and soaring health coverage costs. They overwhelmingly agree that medical liability laws suits are one of the main factors driving the costs and crisis.
- The cost of medical liability coverage is included in the federal government's funding of Medicare, Medicaid, and other programs. Medical liability reforms can produce significant savings in these programs. The Congressional Budget Office estimates that the Medicare Program could save \$10.8 billion over ten years.
- As to the annual cost of defensive medicine, the U.S. Department of Health and Human Services estimates that the costs could be as large as \$25.3 to \$44.3 billion annually. The U.S. House of Representatives Ways and Means Committee has requested the U.S. General Accounting Office to study and report to the Congress on the total cost savings to the Medicare Program, its beneficiaries, and the U.S. taxpayers from federal medical liability reforms.

Malpractice Victims, Who are Young, Homemaker, or a Senior, have no Economic Loss



- Myth #1. A 17-year old, who will never work again, receives no economic benefits under California's MICRA's law or federal medical liability reform proposals.

- **EXPLODING THE MYTH**

- Both the plaintiff and defense attorneys can use economic data from the U.S. Bureau of Census to establish the earning capacity of this victim.
- The economic loss for this 17-year old male, whose date of injury was January 1, 2002 and who will never work again and obtains his High School Diploma, is \$857,149. With an AA Degree, his economic future earnings damage award is \$1,108,774. If he were to graduate college and obtain his Bachelor of Arts Degree, his economic award would be \$1,520,291.

Malpractice Victims, Who are Young, Homemaker, or a Senior, have no Economic Loss



- Myth #2. A 35-year old homemaker, who dies as a result of medical malpractice, receives neither past nor future economic benefits under MICRA or federal medical liability reform proposals.
 - EXPLODING THE MYTH
 - Once again attorneys for both sides in the medical malpractice lawsuit use economic data to establish and receive compensation for economic loss.
 - The past loss of economic household services for the 35-year old woman is \$55,215.
 - The future loss of economic household services for the victim is \$347,218.
 - The total past and future economic damage award is \$402,433.

Malpractice Victims, Who are Young, Homemaker, or a Senior, have no Economic Loss



- Myth #3. Grandpa dies on January 1, 2002 at age 62 as a result of medical malpractice. Under MICRA or federal medical liability reform proposals he and his family receive no compensation for economic loss.
 - EXPLODING THE MYTH
 - Attorneys using government data can obtain past and future economic loss data. This takes into account that the male can continue his earning capacity until a retirement age of 75.
 - The past loss of economic household services for the senior is \$28,475.
 - The future economic loss of household services is \$103,074.
 - The total past and future economic damage award is \$131,549.

Medical Malpractice Premium Increases are the Result of Insurance Company Bad Investments, Stock Market Losses and not the Result of Paid Losses



- Myth #1. Medical malpractice premiums are exploding because they are tied to insurance company stock market losses, especially Enron and WorldCom.
 - EXPLODING THE MYTH
 - There is no possible way to legally raise rates to cover losses whether insurance company losses come from stock market investments or from any other investment source.
 - State insurance commissioners and insurance laws in all states require that medical malpractice insurance liability rates be based on estimates of future losses and future investment income.

Medical Malpractice Premium Increases are the Result of Insurance Company Bad Investments, Stock Market Losses and not the Result of Paid Losses



- Myth #2. Medical malpractice insurance companies have significant investments in the stock market.
 - EXPLODING THE MYTH
 - In 2001, stock market investments comprised only 9% of the investment portfolios of the entire medical liability insurance industry.
 - Over 85% of the medical liability insurance companies are invested in bonds, which include risk-free Treasury bonds.
 - Medical Malpractice insurance companies are required to follow a formula in state laws that matches bond maturities to written policies.
 - An insurer's investment income is affected more by changes in interest rates and the market value of bonds, than changes in the stock market.

Medical Malpractice Premium Increases are the Result of Insurance Company Bad Investments, Stock Market Losses and not the Result of Paid Losses



- Myth #3. The paid losses that medical malpractice insurance companies pay out are minor, especially for non-economic damage awards, and have nothing to do with premium increases.
 - EXPLODING THE MYTH
 - The losses that medical malpractice insurance companies are paying out are not only increasing rapidly, but are the direct result of frivolous lawsuits and jackpot justice where jury awards have no limits.
 - Medical malpractice premiums must cover present and future losses.
 - For the first time ever in 2000, there was a medical malpractice claim among the ten largest awards in the country. In 2001, there were two malpractice claims and two health care claims on behalf of individual patients among the ten largest awards in the country.
 - One in six physicians face a medical malpractice claim annually.
 - More than 125,000 lawsuits are pending against the country's physicians on any given day.

Insurance Reform, known in California as Prop. 103, is the Solution



- Myth # 1. California's Prop. 103 of 1988 (known by its supporters as insurance reform) and not MICRA is responsible for California's lower medical malpractice premiums.
 - EXPLODING THE MYTH
 - As to medical malpractice coverage, only 50% of California's medical providers were insured by entities subject to Prop. 103's provisions.
 - The remaining 50%, including public and private education and medical institutions, were not subject to Prop. 103 nor they receive any benefits.
 - Prop. 103 was adopted by the voters in 1989, 13 years after MICRA became law and 4 years after MICRA was declared constitutional.

Insurance Reform, known in California as Prop. 103, is the Solution



- Myth #2. Prop. 103 was implemented immediately in California and began impacting the cost of medical malpractice premiums.
 - EXPLODING THE MYTH
 - There was no immediate impact at all. Prop. 103 was challenged in the courts and was caught in the regulatory process until the 1993.
 - Prop. 103 only prohibits premium rates, including medical malpractice, from being “unfair and excessive”.
 - Prop. 103 does not require that premium rate filings be justified regardless of the amount of the proposed increase.
 - Under Prop. 103, no California medical malpractice insurance company has ever been denied a premium rate increase.

Insurance Reform, known in California as Prop. 103, is the Solution



- Myth #3. Prop. 103 reduced medical malpractice insurances rates by requiring a 20% rollback and refunds to physicians.
- EXPLODING THE MYTH
 - California medmal insurers had been paying annual dividends, a direct form of premium rate rollback.
 - In every stipulation agreement with the DOI, medmal insurers were exempted from rate rollbacks.
 - Prior to Prop. 103, The Doctors Company had been paying annual dividends for eleven years.
 - In the five years preceding Prop. 103, The Doctors Company paid out higher dividends than in the five years after its enactment.

Medical Malpractice Liability Reform will not address policing bad doctors, increasing patient safety or providing access to the courts or access to health care.



- Myth #1. Medical Liability Reform prevents quick and easy access to the courts.
 - EXPLODING THE MYTH
 - The average time to settle a claim is 33% longer (2.4 years) in a state without a monetary cap on non-economic damages than in California where the average is 1.8 years. Meritless lawsuits do not clog the courts.
 - 76% of 1,000 American adults in a national survey favor laws that guarantee injured patients full payment for past and future lost economic wages and medical costs with a reasonable limit on noneconomic damages. They are the essential components of medical liability reform.
 - Even after the passage of effective medical liability reform in California, there has been no measurable decrease in the number of medical malpractice lawsuits filed. By state law, only the health care provider can agree to settle, not the insurer. 80% of the cases are without merit.

Medical Malpractice Liability Reform will not address policing bad doctors, increasing patient safety or providing access to the courts or access to health care.



- Myth #2. Medical Liability Reform Has No Impact on Access to Health Care.

- EXPLODING THE MYTH

- 84% of 1,000 American adults in a recent national survey believe that availability and quality health care is threatened directly by exploding medical liability costs that are forcing physicians to retire or move their practice to another state where effective medical liability reform laws are in place. 71% of these same Americans believe that one of the primary factors driving up health care expenses is the rising cost of medical liability lawsuits.
- California with its effective medical liability reform in law lowers the state's annual health care costs by 6% and allows an additional \$6 billion to be spent.
- According to two recent national studies, medical liability reforms would reduce annual health care costs by at least \$100 billion so that it can be spent directly in providing access to quality medical care to the young and the old.

Medical Malpractice Liability Reform will not address policing bad doctors, increasing patient safety or providing access to the courts or access to health care.



- Myth #3. Failing to police bad doctors is the cause of exploding malpractice rates.
 - EXPLODING THE MYTH
 - According to the Harvard Study, the degree of injury, not medical negligence, predicts the medical care outcome.
 - When California enacted its medical liability reforms, it created the state medical board with the authority to license and the power to police doctors.
 - Physician owned medical liability companies developed and implement loss prevention programs that continue to improve the quality of care and reduce losses.
 - Doctors most often sued are those of high skill level who perform the most complex and high-risk procedures.
 - According to two recent national studies of the medical liability system, from 1990 to 2002, just 5% of physicians were involved in 54% of the payouts that included both jury awards and out-of-court settlements.
 - A marker of physician competence should not be based on whether a lawsuit or claim has been filed.

Medical Malpractice Liability Reform will not address policing bad doctors, increasing patient safety or providing access to the courts or access to health care.



- Myth # 4. Providing patient safety is the solution to exploding medical malpractice rates.
 - EXPLODING THE MYTH
 - Physician owned medical liability insurance companies, such as The Doctors Company, support confidential reporting systems as suggested by the Institute of Medicine and the Patient Safety Foundation.
 - According to the Stanford Study, reducing the costs of defensive medicine in states with effective medical liability reform laws lower health care costs by 5-9% annually. This translates into at least an annual savings of \$60 billion. Today, The Dept. of Health and Human Services estimates this cost at over \$100 billion.
 - HHS reports that 4 out of 5 physicians order more tests than medically necessary due to the fear of litigation.
 - Utilization of medical guidelines as risk management protocols are currently offered to the health care providers insured by physician owned medical malpractice insurance companies.

CALL TO ACTION



- The U.S. House of Representative on a bipartisan vote of 229 – 198 passed HR 5 with effective medical liability reform provisions.
- The U.S. Senate is considering its own version of effective medical liability reform.
- You can join the effort by making a personal contact with your United States Senator or local Member of the House of Representatives. Let your Congressional representative know your views on the benefits of effective medical liability reform from a state legislative perspective.
- We have provided you with an excerpt from today's presentation by The Doctors Company's Chairman of the Board, Dr. Richard E. Anderson, M.D. in order to address the key arguments used by the opponents of effective reform and explode those myths and shed the light on benefits.
- Feel free to use The Doctors Company's web site at www.thedoctors.com. Our Political Advocacy Section contains a wealth of information on medical liability issues, which includes a section entitled Focus on the States. This section provides a timely update on selected states' legislative activities addressing medical malpractice reform.