

# STABILITY, NOT CRISIS: MEDICAL MALPRACTICE CLAIM OUTCOMES IN TEXAS, 1988-2002

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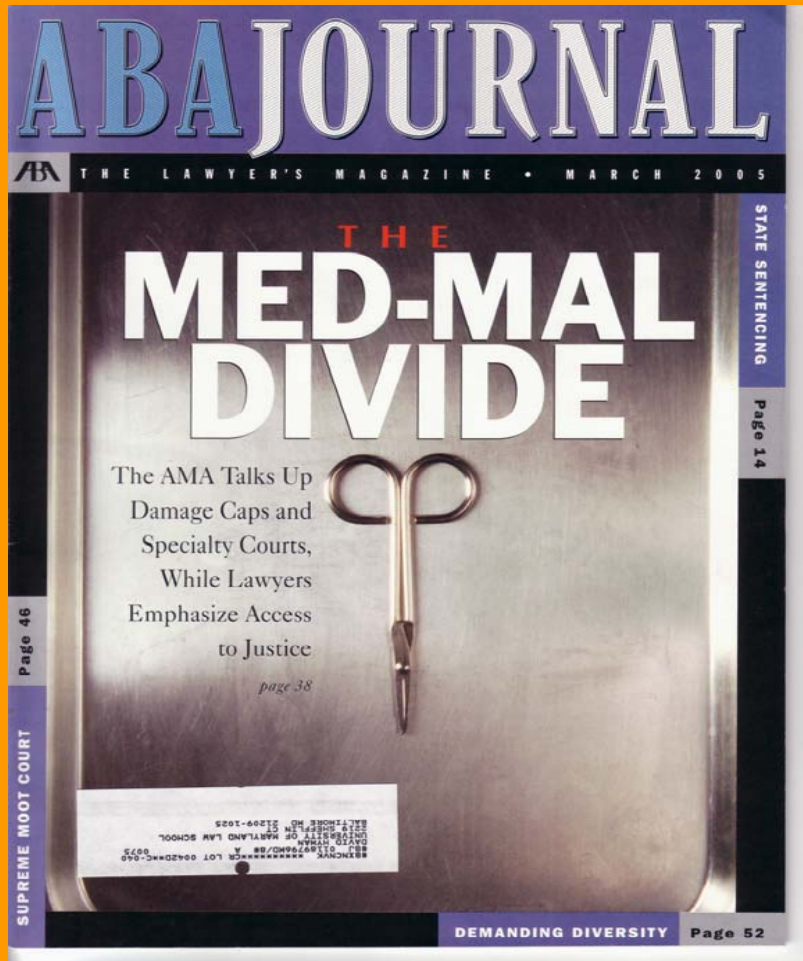
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Available for Download at <http://ssrn.com/abstract=678601>

Forthcoming, **Journal of Empirical Legal Studies** (July 2005)

# Med Mal—A Lightning Rod for Political Partisans



ABA J. Cover (2005)

**86% OF LAWSUITS FILED BY PERSONAL INJURY TRIAL LAWYERS AGAINST TEXAS DOCTORS & NURSES ARE FRIVOLOUS**  
Source: Texas Medical Association Medical Liability Study, 2001 Results

**CAUSING SCARY INSURANCE RATES & MAKING FAMILY DOCTORS DISAPPEAR**

**PHANTOM PLAINTIFFS**  
Doctors in trial lawyer-friendly counties, sued by patients they never treated.  
Source: "Texas is a medical catastrophe in the making" column, Houston Chronicle June 10, 2002

**GHOSTLY LEGAL FEES**  
Tobacco lawyers pocket \$3.3 BILLION!  
Source: "Hearted by tobacco settlement" Houston Chronicle July 2, 2002

**BURYING LEGITIMATE CLAIMS**  
Real medical claims delayed 2 1/2 years as trial lawyers overload our court system!  
Source: 2001 Texas Verdict Survey, July 2002 Research Series

**DEMOCRATS OPPOSE LAWSUIT REFORM**  
More than \$7 MILLION in trial lawyer contributions in Texas.  
Source: Texans for Lawsuit Reform 9-02

**END LAWSUIT ABUSE VOTE STRAIGHT REPUBLICAN TICKET**  
**EARLY VOTING ENDS NOV. 1<sup>ST</sup>**  
**ELECTION DAY, NOV. 5<sup>TH</sup>**  
For voting location info, go to [www.texasvictory.org](http://www.texasvictory.org)  
Polls open from 7 AM - 7 PM

Texas Tort Reform Ad (Oct. 2002)

# Holding the Lightning Rod



- “They cooked the data so much that they cooked the truth, and it's distasteful.” John Opelt, Texas Alliance for Patient Access
- “We don't get to adjust the number of claims by some economic value that has no bearing on medical liability insurance or pay today's claims in 1988 dollars. So it makes no sense to massage and distort claim counts and payouts for such irrelevant reasons.” Tom Cotten, CEO of TMLT
- “The authors of this study used data that was inflation-adjusted, population-adjusted, and health-care-cost adjusted. It was so adjusted that it became truth-adjusted.” Dr. Bohn D. Allen, president of the Texas Medical Association

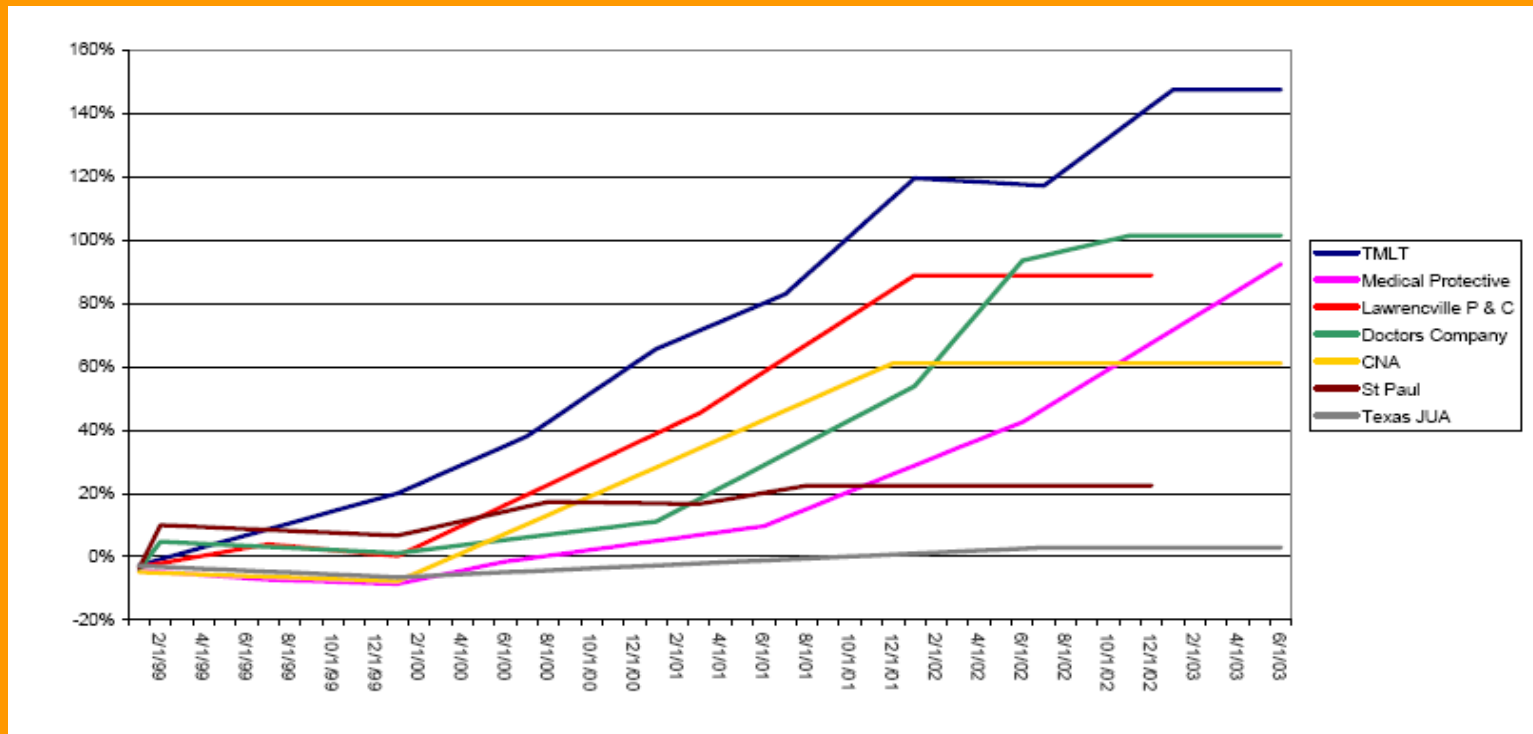
# Data Source and Independence

- We rely on a public database maintained by the Texas Department of Insurance
- We were not funded by either side in the medical malpractice reform debate
- Two of us are Democrats, two are Republicans
- Funding for our research came from University of Texas Law School and University of Illinois College of Law
- We study all available years with reliable data
  - the database determines our starting date, not us
- We're surprised by the results too . . .

# Why Study Texas?

- Texas Department of Insurance collects comprehensive data on closed med mal claims
  - *We go where the data is . . .*
  - *Only Texas and Florida allow access to claims data*
  - *Vidmar and coauthors (2005) study Florida, reach conclusions consistent with ours*
- Texas is one of first “crisis” states identified by AMA (2002)
- Large premium spike starting in late-1999
- 2<sup>nd</sup> largest state in population, 3<sup>rd</sup> in medical spending
- Largest uninsured population in nation
- Urban/rural mix
- Long viewed as plaintiff-friendly
- Adopted liability caps and other tort reforms in 2003

# Med Mal Premiums for Texas Physicians Rose Dramatically Between 1999 and 2003



Weighted average for 3 largest carriers = 110%  
(inflation adjusted)

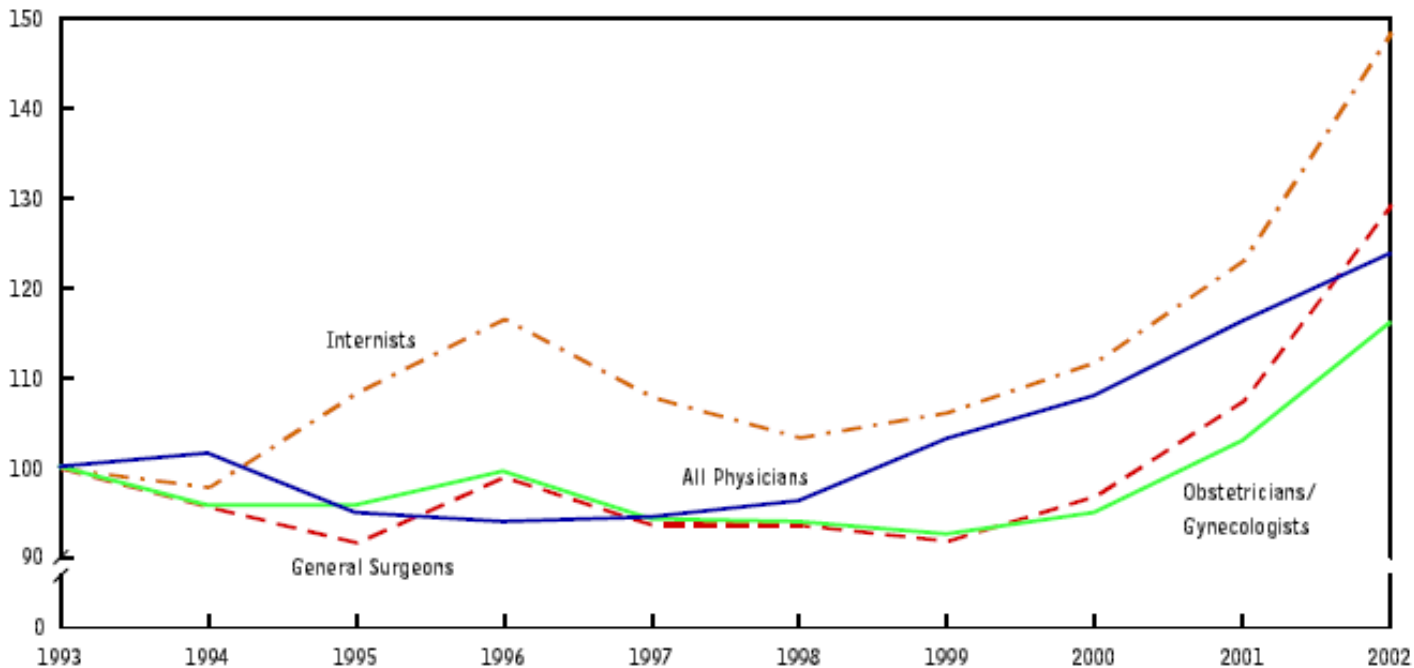
Source: Texas Dept. of Insurance, *Medical Malpractice Insurance: Overview and Discussion* (2003)

# Medical Malpractice Premiums Also Rose Sharply in Other States

**Figure 1.**

## Trends in Premiums for Physicians' Medical Malpractice Insurance, by Type of Physician, 1993 to 2002

(Index, 1993 = 100)



Source: Congressional Budget Office, Limiting Tort Liability for Medical Malpractice (Jan. 2004).

# Why Did Texas Malpractice Premiums Shoot Up?

## The Usual Suspects

- Rapidly Rising Numbers of Claims
- "Skyrocketing" Settlements
- "Out-of-Control" Juries

**We found no support for any of these.**

# The Texas Closed Claim Database

- Unique database
- Since 1988, the Texas Dept. of Insurance has required insurers to report all “closed claims.”
- **Individual reports** for all insured med mal claims involving payments > \$10,000
- Aggregate annual reports for smaller claims
- Tracks settlements, jury verdicts, defense costs, and many other matters

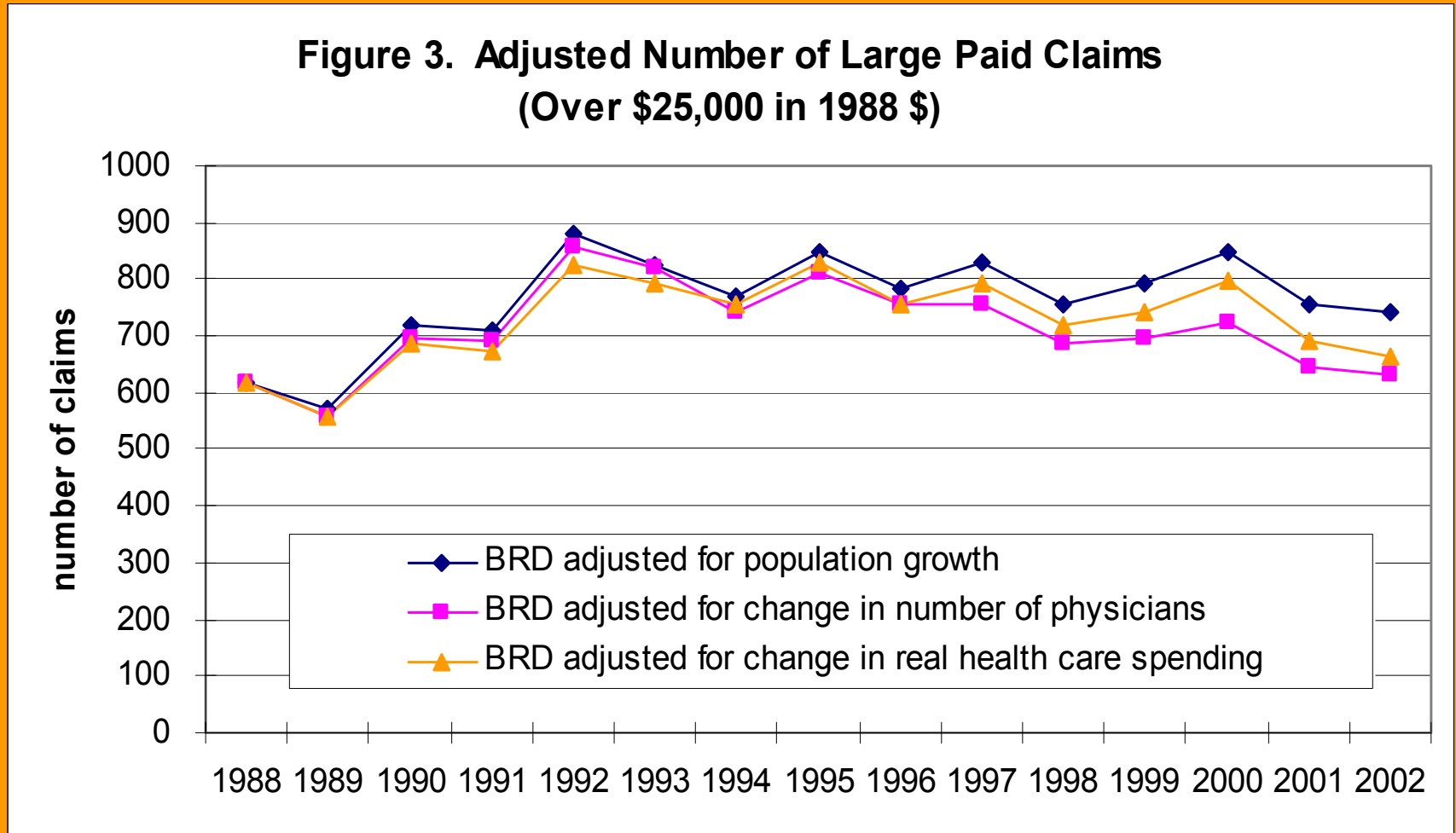
# Why Study Closed Claims? To See the Whole Iceberg, Not Just the Tip



- Most cases settle, but settlements usually are hidden from view
- Jury verdicts are rare
- In med mal cases, most jury verdicts favor defendants — but outlier verdicts can skew perceptions

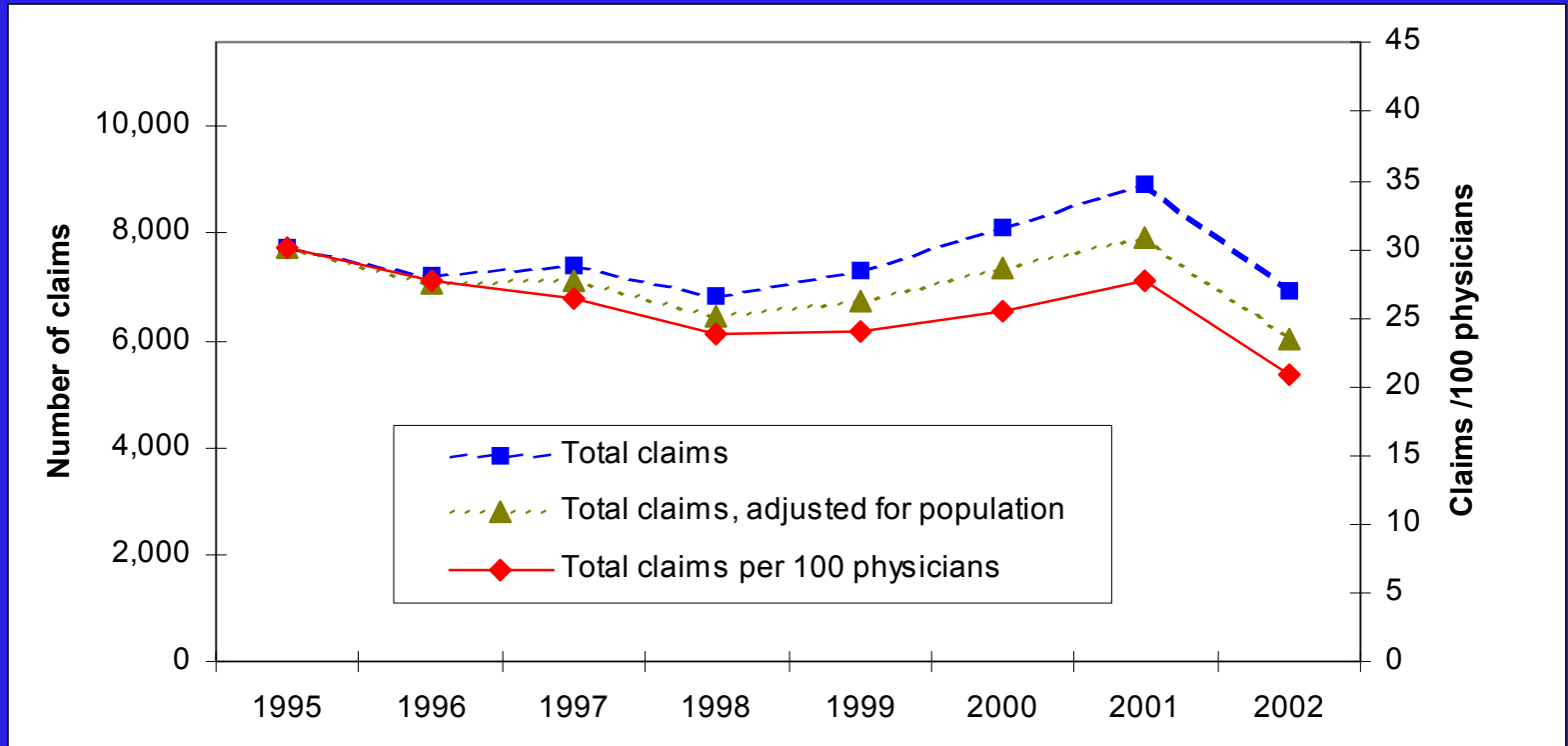
Are There More Claims?

# No Time Trend in Number of Large Paid Claims (adjusted for population growth or health care intensity)\*



\*Figures for 1988 & 1989 are unreliable due to under-reporting.

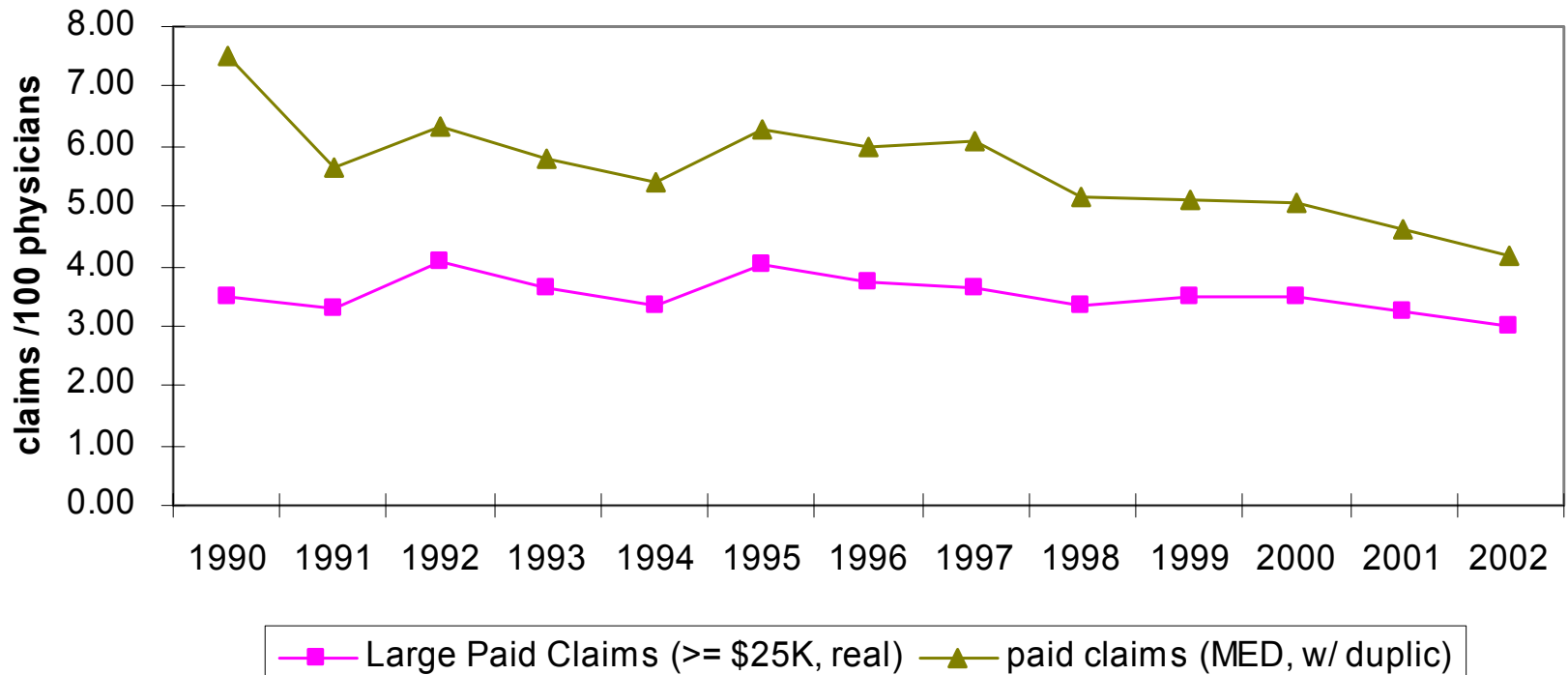
# Total Claims per 100 Practicing Texas Physicians: High But Declining\*



\*Findings reported for 1995-2002 because of under-reporting of zero- and small-payment claims 1988-1994.

# Paid Claims per 100 Practicing Texas Physicians Also Declined

Figure 14. Paid Claims per 100 Physicians

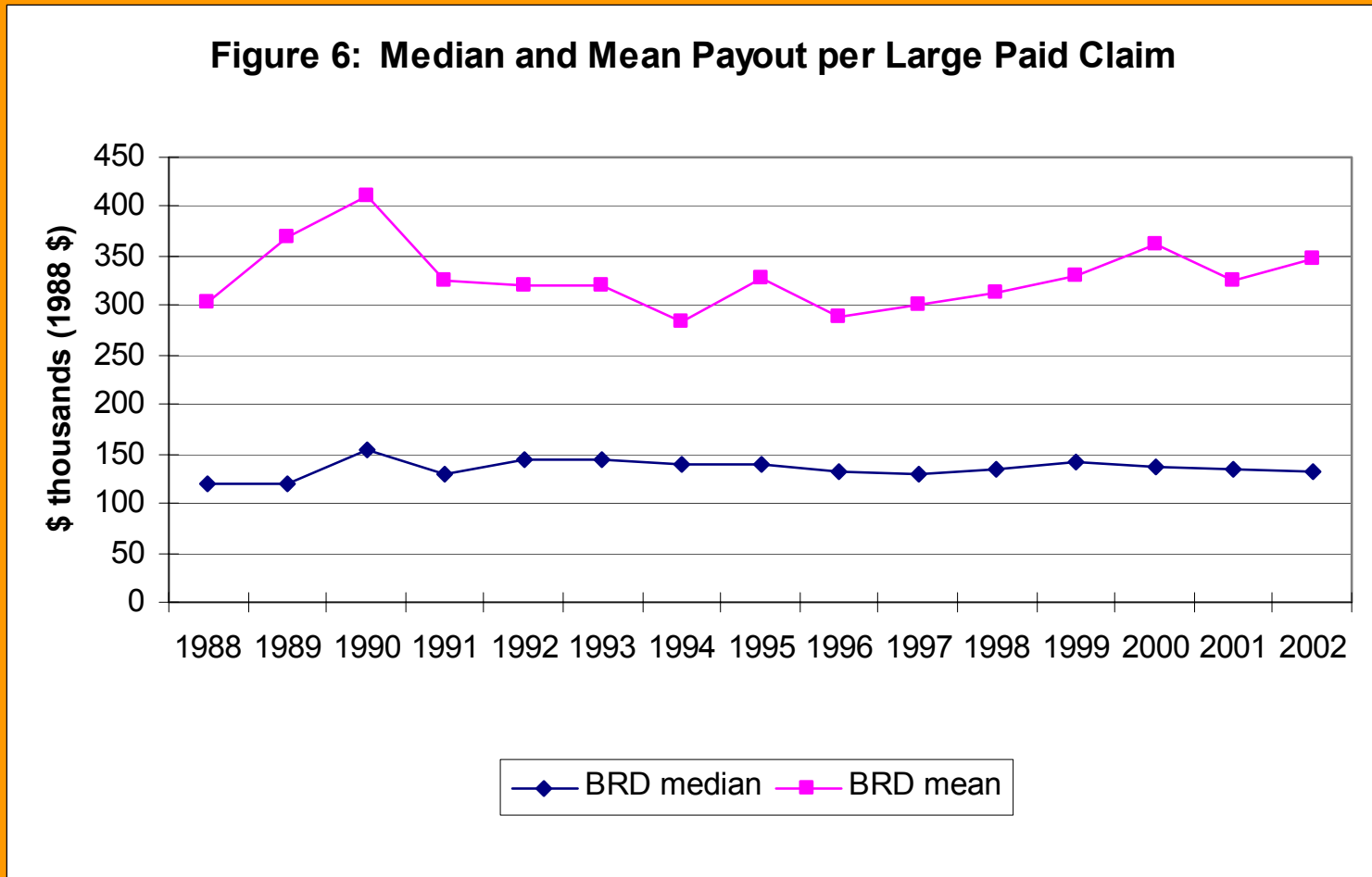


Sharp decline in smaller paid claims (under \$25,000)

These claims are getting squeezed out of the med mal system

Are Settlement  
Amounts Rising?

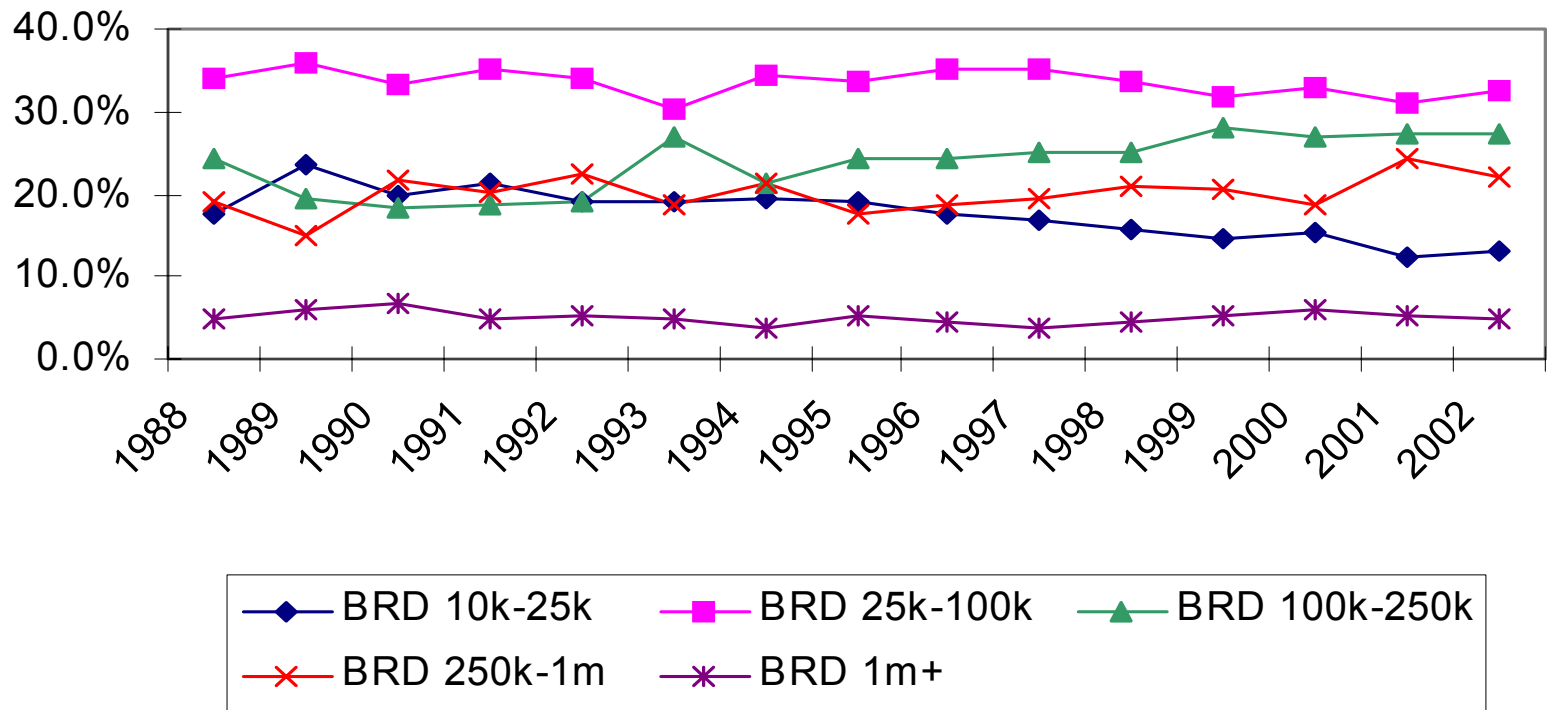
# No Trend in Average Payout per Large Paid Claim (1988 \$, adjusted for general inflation)



Estimated inflation-adjusted increase: 0.1-0.5% per year.

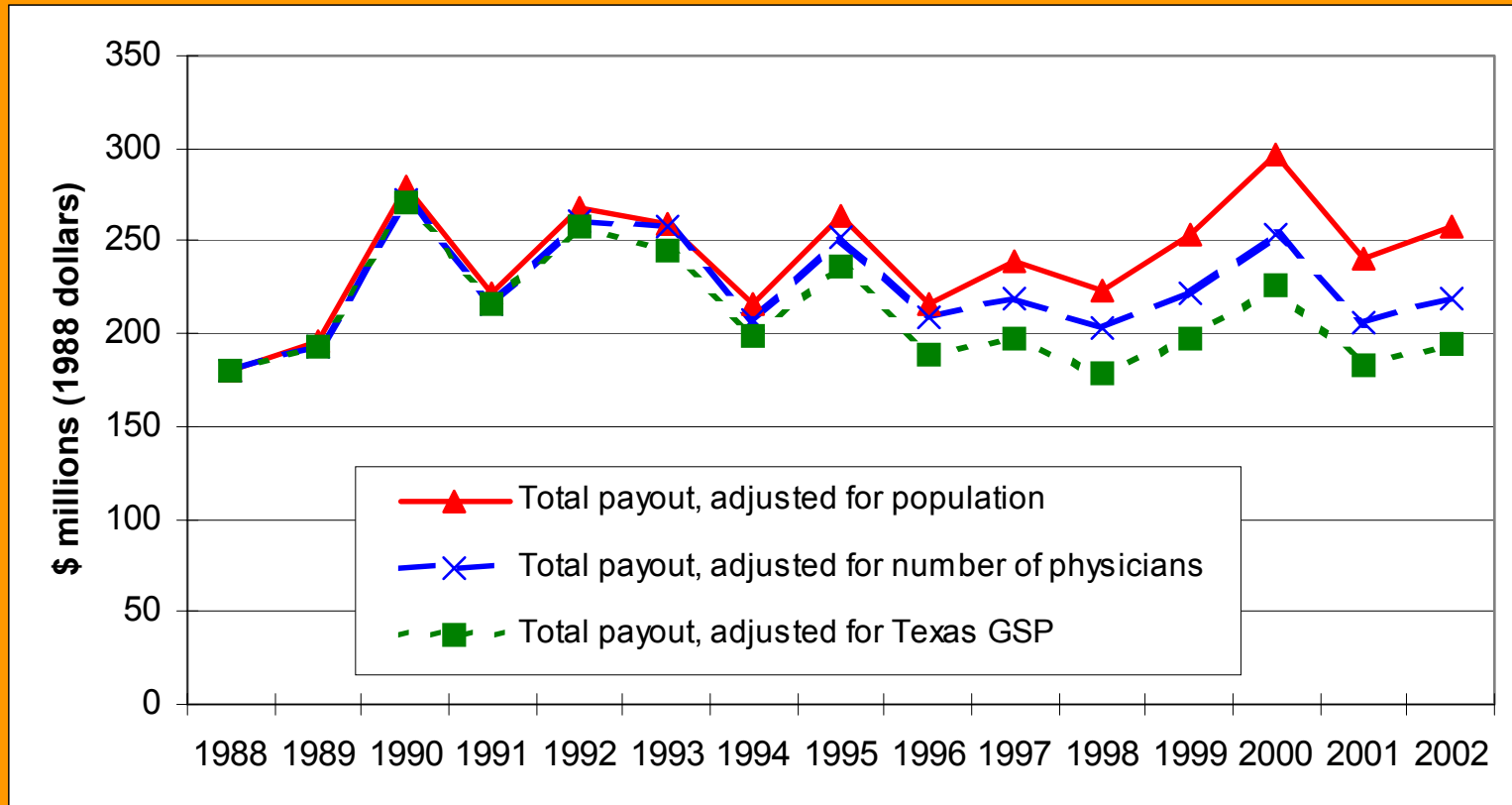
# No Trend in % of Very Large Paid Claims (Payout Over \$1 Million, in 1988 \$)\*

Figure 5. Distribution of BRD<sub>10k</sub> Claims by Payout Size



\* Payouts over \$1M were about 6% of payouts over \$10k..

# No Time Trend in Total Annual Payouts to Plaintiffs (adjusted for population and general inflation)



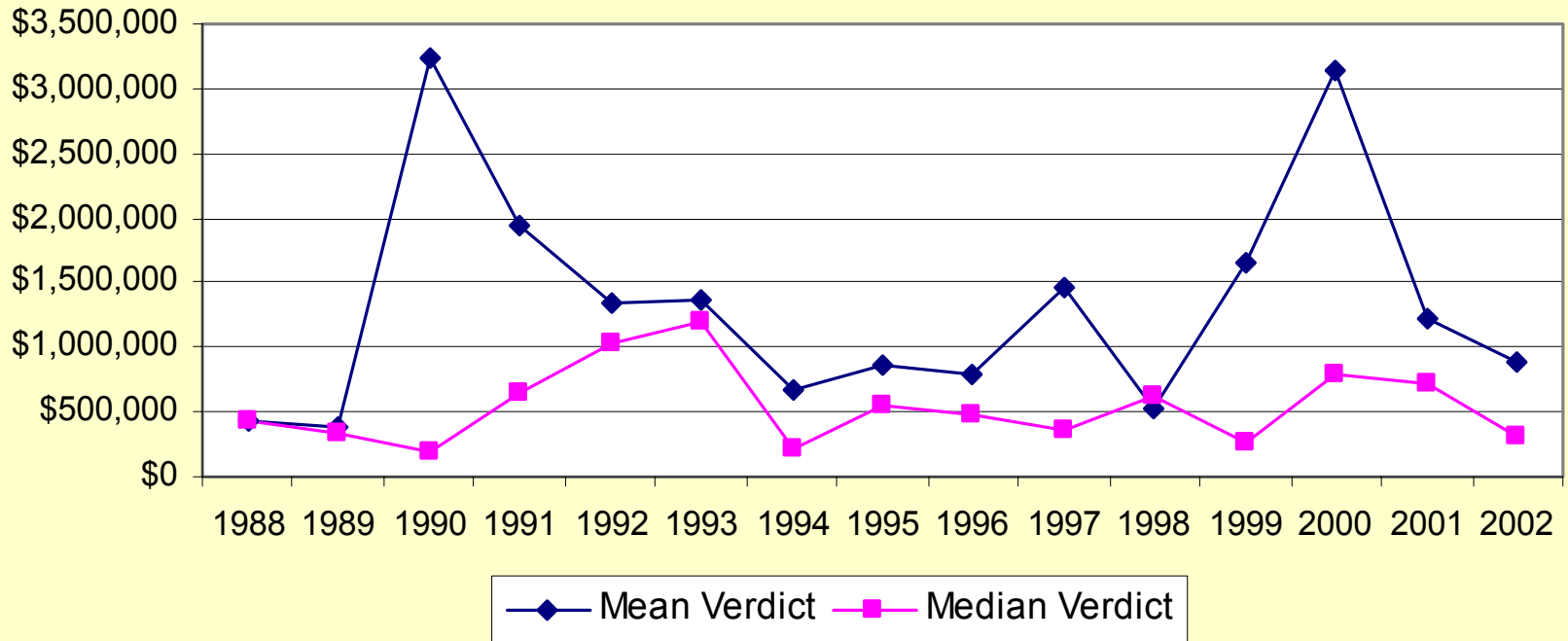
\*Figures for 1988 & 1989 are unreliable due to under-reporting.

*Are Jury Awards Rising?*

# *Possible* Time Trend in Jury Awards\*

(amounts adjusted for general inflation)

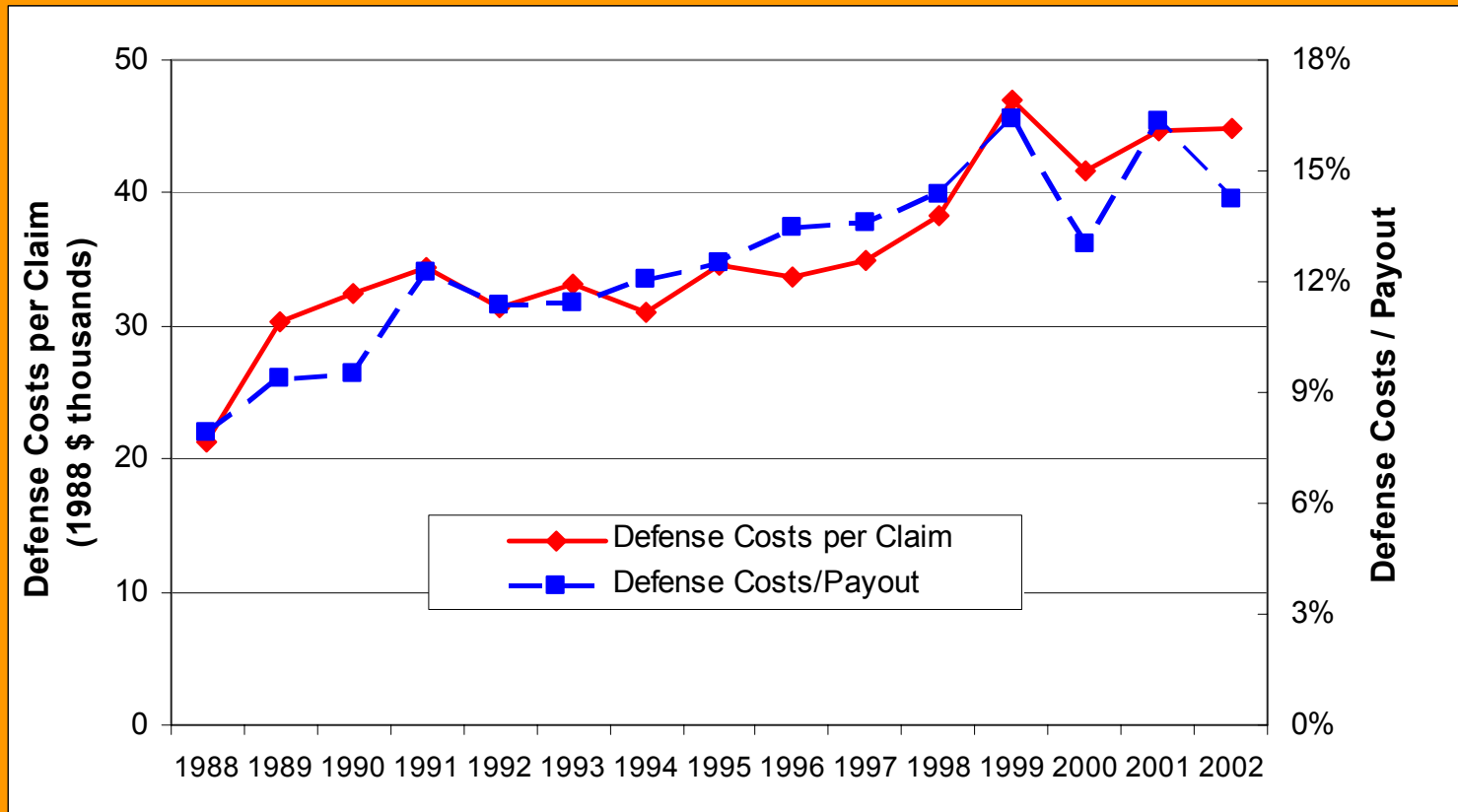
**Figure 12. Mean and Median Jury Verdicts**



\* Estimated increase 2.5-3.6% per year, but not reliably significant.

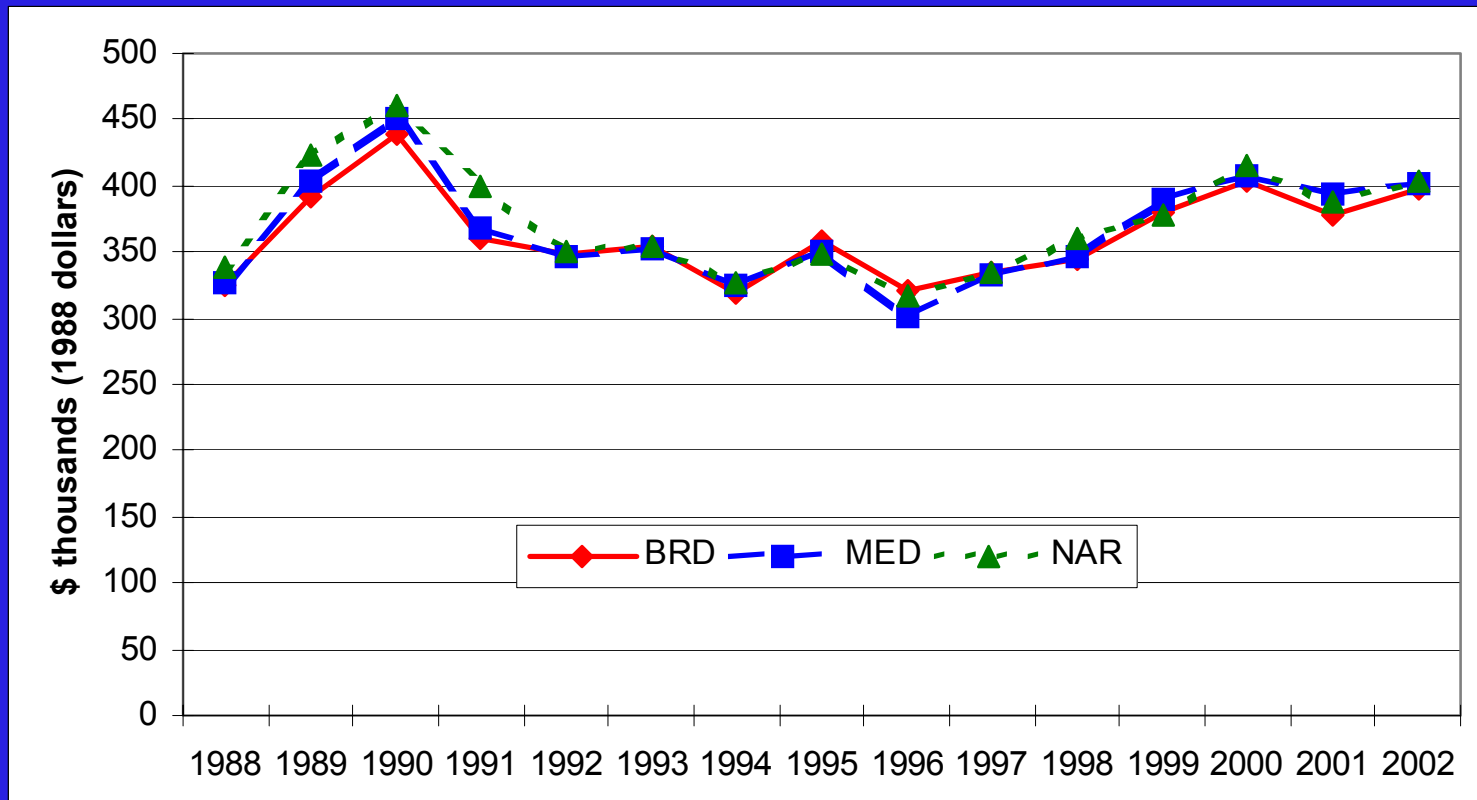
What Changes Did We Find?

# Defense costs per large paid claim increased\*



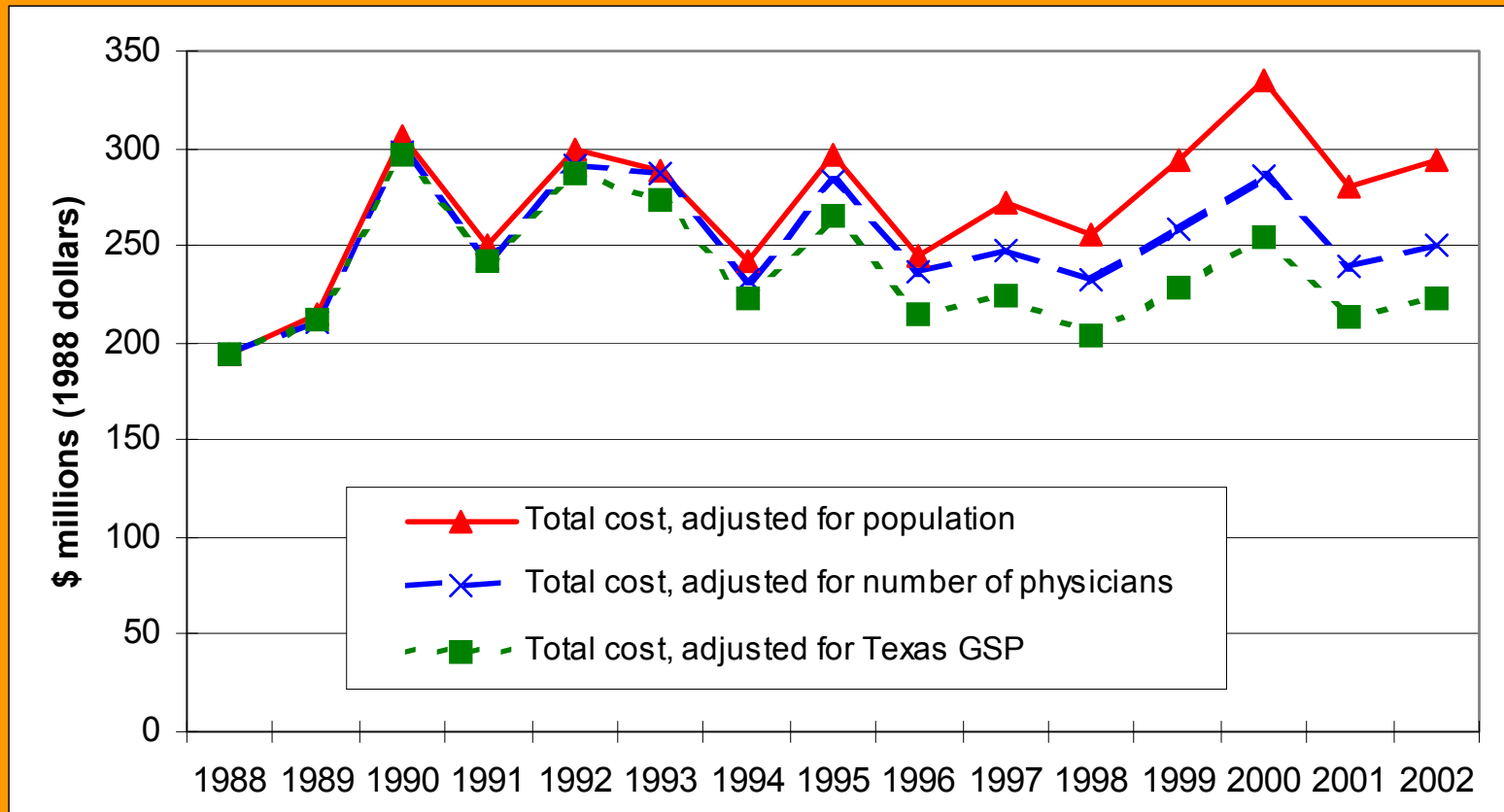
- Data limitation: We lack data on defense costs for zero- and small-payout claims (under \$10k nominal)

Total cost per large paid claim (over \$25k in 1988 \$)  
increased 0.8-1.2%/year, driven by defense costs\*



\* About 0.7% of this increase reflects rising defense costs.

# No Time Trend in Total Cost per Year



\*Figures for 1988 & 1989 are unreliable due to under-reporting.

# LIMITATIONS OF THE STUDY

- We study “closed claim reports,” not lawsuits
- We lack data on **open** claims
- We study **insured** claims: including captive insurers but excluding self-insured entities (such as UT hospital system)
- We study only Texas
- We lack data on defense costs for zero and small payout claims
- We don’t study why med mal premiums rose; we merely show that some common explanations are incorrect, at least in Texas
- We don’t study county-level trends
- We lack data on claims by physician specialty
- We don't study how well the malpractice system does at deterring error or compensating injured patients
  - other research provides evidence that the med mal system does rather badly at both tasks
- We don't study liability caps

# Does the starting year matter?

- We start our "per claim" analysis in 1988
- We start our "per year" analysis in 1990, because of underreporting in 1988-1989
- Robustness checks:
  - same per claim results if start in 1990 or 1991
  - same per year results if start in 1991
  - downward per year trend if start in 1992

# Do our adjustments matter?

- You bet.
- Many public claims about rising malpractice cost do not adjust for inflation or population
  - no respectable researcher would fail to make these basic adjustments
- Our "no crisis" results get stronger if we also adjust for medical intensity
  - based on number of physicians
  - or based on real health care spending per capita (adjusted for medical cost inflation)

# Implications of decline in smaller paid claims

- For our BRD dataset, we find:
  - 0.1-0.5% per year rise in payout per claim
- Suppose we don't take into account decline in smaller paid claims:
  - payout per claim rises by 40% from 1988-2002
  - and by 112% if we don't adjust for inflation!!
  - decline in small claims could explain difference between our TX results and Vidmar's FL results
- Malpractice insurers would report the 112%
  - PIAA and TMLT did exactly this in response to our study (similar number based on TMLT data)

# Impact of (unstudied) open claims?

- TDI data does not include open claims.
- But no reason to think the number of open claims is rising sharply
  - Total closed claims relatively low in 2001-2002
  - No population adjusted trend in number of recently closed claims (see next slide)
- If open claims are rising, insurers could make this data public. They have not done so.

# No Strong Trend in Recently Closed Claims\*

## Years Until Closed

Year of Injury	Same Year	1 yr.	2 yrs.	3 yrs.	4 yrs.
1994	4	59	131	221	204
1995	5	69	154	205	199
1996	7	64	165	244	238
1997	15	71	157	293	251
1998	7	77	179	272	248
1999	4	69	167	290	
2000	4	53	155		
2001	6	46			
2002	8				

\* Numbers are *not* population adjusted.

# Impact of (unstudied) self-insured entities?

- Self-insured entities are primarily hospitals, not physicians
- Should affect totals but not trends.
- We hope in future work to include information from one large self-insured entity (UT Medical System)

# Impact of lack of information on defense costs in zero-dollar/small claims?

- Zero-dollar claims are stable in number, and small paid claims are declining.
- Defense cost per claim is probably rising
- But defense costs are predictable
- Rough estimate (based on State of Washington data)
  - We capture ~ half of all defense costs (no reason to expect a change in this percentage over time)
  - If we include estimated defense costs in zero/small cases, real total cost per year, adjusted for inflation and population, would rise, but slowly.

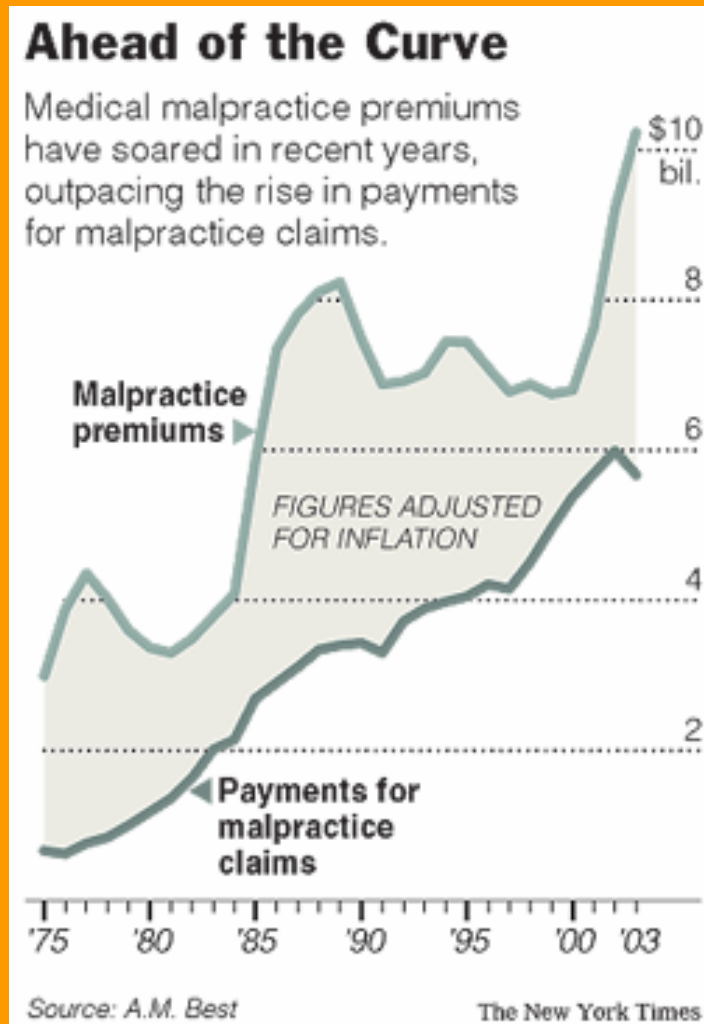
# Future Research Agenda

- Jury verdicts and post-verdict payments
- Defense costs
- Economic/non-economic/punitive damages
- County-level analysis of claim outcomes
- Compare our database with NPDB, JVR, BJS
- Malpractice rates versus claim experience
- Provider-specific analysis
- Effect of caps
- Out-of-pocket payments by physicians
- Reserves v. actual payments
- Self-insured providers

# What caused the premium spikes in Texas?

- Not malpractice claim outcomes, so far as we can tell
- We can speculate about answers
  - (beyond scope of our study):
- Perhaps insurance market dynamics
  - Low investment returns
  - Stress in reinsurance markets
  - Volatility from development/long tail/cycling
  - Malpractice as single-line undiversified business

# Is Texas Unique? (not totally)



# CONCLUSIONS

- No time trend in large paid claims (adjusted for population)
- No time trend in payout per large claim (adjusted for inflation)
- No strong trend in jury verdicts (adjusted for inflation)
- Defense costs rose (but gradually, and they remain a fraction of insurers' total costs)
- No strong trend in total cost per year (adjusted for population, inflation, and estimated defense costs)
- Something else (besides malpractice claims) must have caused the insurance premium spikes.
- Tort reforms don't address insurance market problems. So they may not prevent future premium swings.
- To understand the medical malpractice system, one needs good data.
- Premiums provide very noisy information: “The stock market predicted nine of the last five recessions.”

# Implications for other states?

- State legislators should rely less on premium spikes and provider complaints:
  - “In God We Trust, All Others Bring Data.”
- Some states may have different experiences: federal malpractice legislation v. federalism
- Risk of treatment mismatch if diagnosis is incorrect
- We need better data
  - more states should collect closed claim data
  - states should allow researcher access to this data
  - insurers should disclose their data