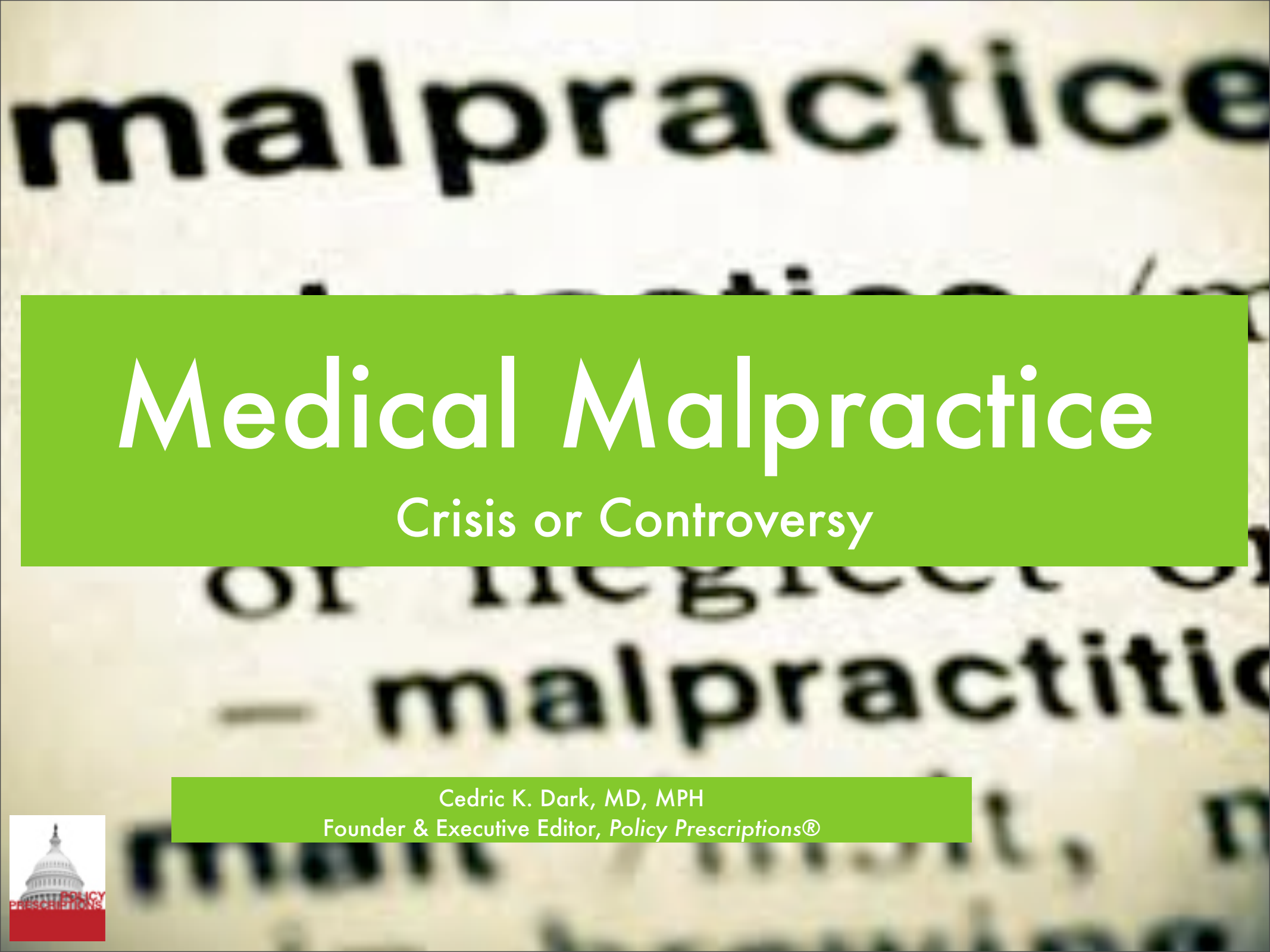


Medical Malpractice

Crisis or Controversy

Cedric K. Dark, MD, MPH
Founder & Executive Editor, *Policy Prescriptions®*

Medical Malpractice

- professional negligence by act or omission by a health care provider in which the treatment provided falls below the accepted standard of practice in the medical community and causes injury or death to the patient, with most cases involving medical error

Elements of Malpractice

- Duty owed
- Duty breached
- Damages/Injury
- Causality

1. Duty Owed

- A duty was owed: a legal duty exists whenever a hospital or health care provider undertakes care or treatment of a patient

2. Duty Breached

- A duty was breached: the provider failed to conform to the relevant standard care

3. Damages/Injury

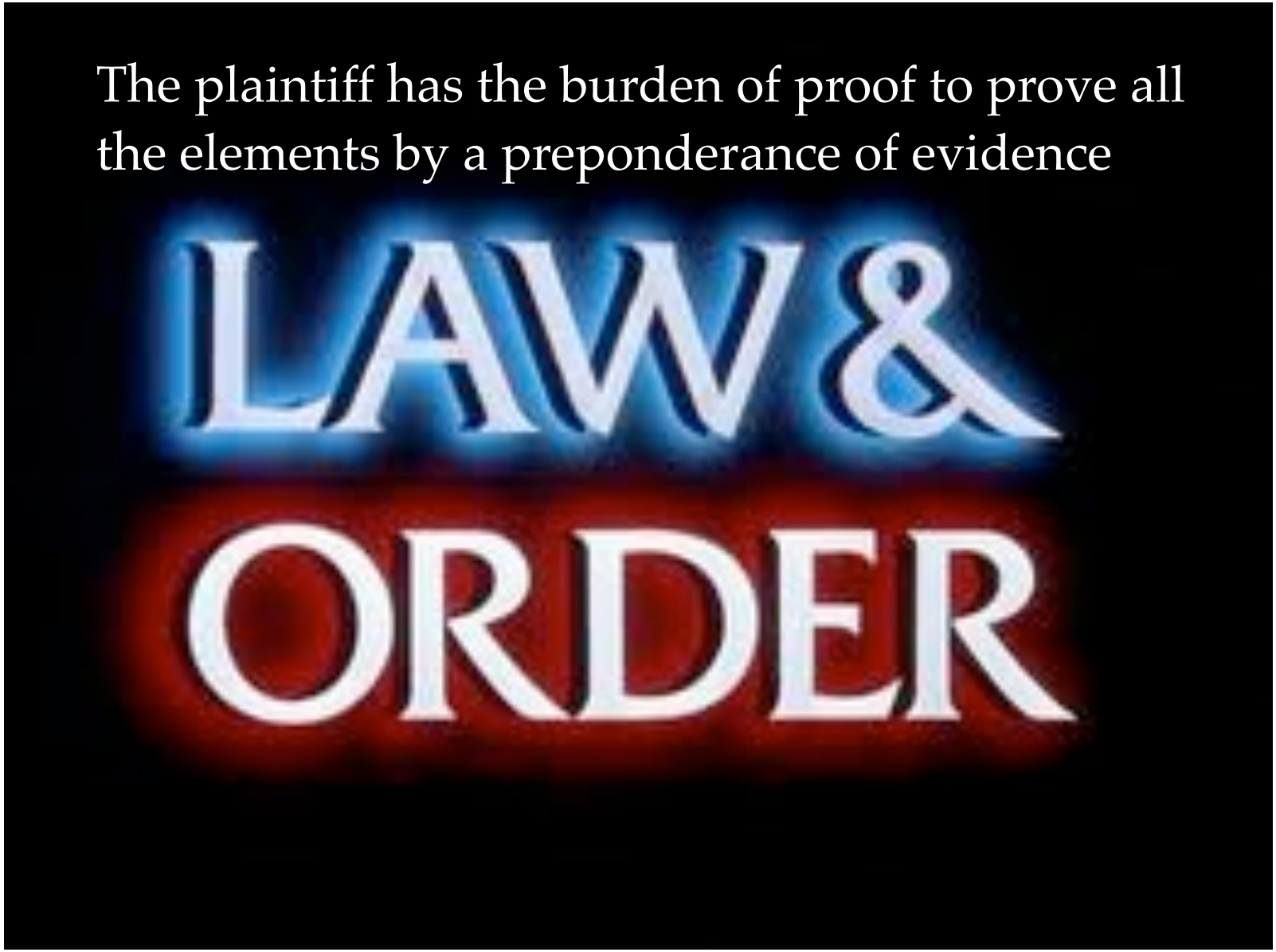
- Without damages (losses which may be pecuniary or emotional), there is no basis for a claim, regardless of whether the medical provider was negligent. Likewise, damages can occur without negligence, for example, when someone dies from a fatal disease

4. Breach causes Injury

- The breach caused an injury: The breach of duty was a proximate cause of the injury

Medical Malpractice

The plaintiff has the burden of proof to prove all the elements by a preponderance of evidence



Malpractice Risk

- Across specialties, 7.4% of physicians annually had a claim, whereas 1.6% made an indemnity payment
- Wide variation
- Mean indemnity payment was $274,887
- Less than 1% are outliers (> $1 million)

N Engl J Med. 2011 Aug 18;365(7):629-36.

Malpractice Risk

- 99% of physicians in high risk fields will have a claim in their careers

N Engl J Med. 2011 Aug 18;365(7):629-36.

Damages

- compensatory damages
  - economic and non-economic
- punitive damages
  - for wanton and reckless acts

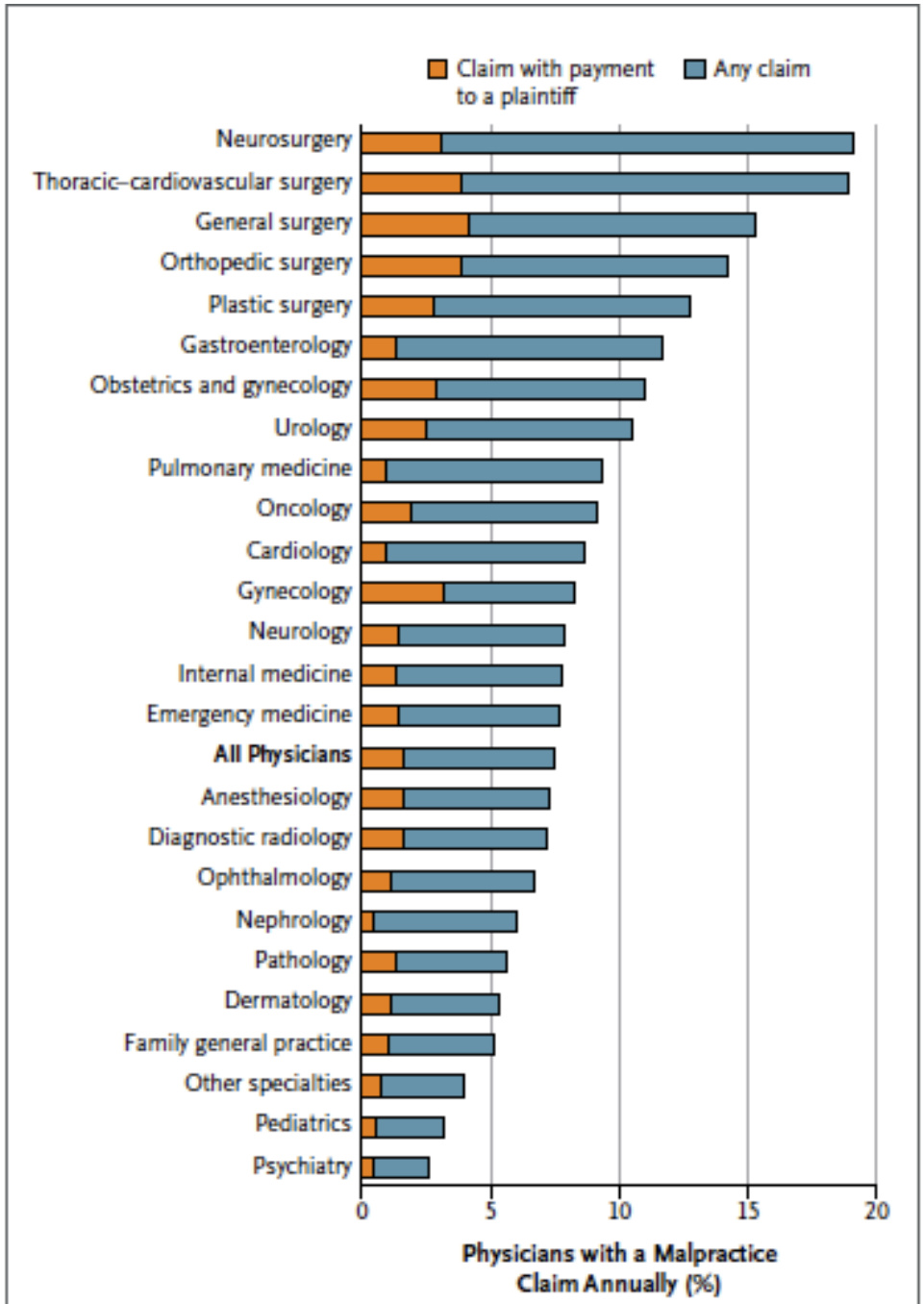


Figure 1. Proportion of Physicians Facing a Malpractice Claim Annually, According to Specialty.

N Engl J Med. 2011 Aug 18;365(7):629-36.

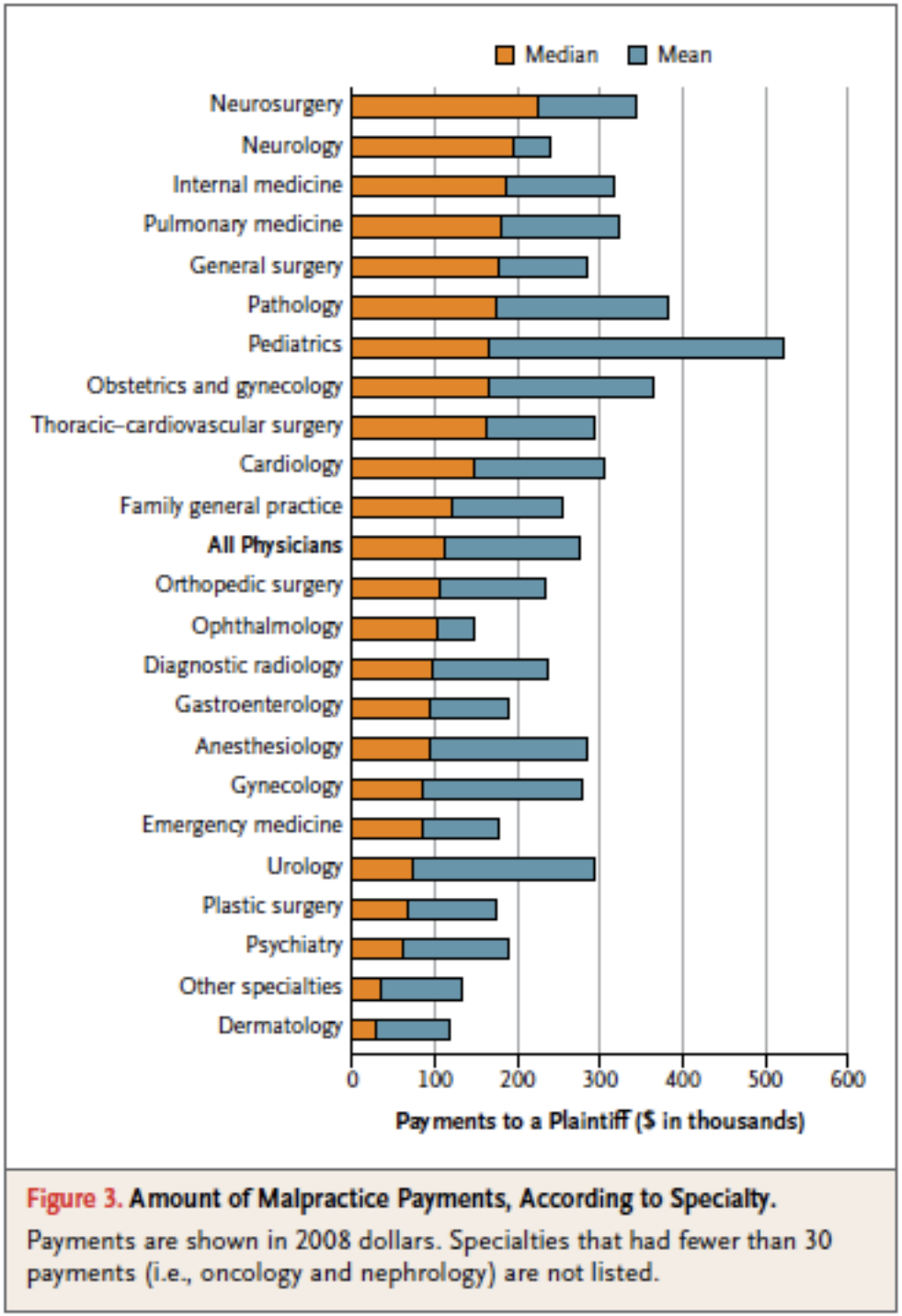


Figure 3. Amount of Malpractice Payments, According to Specialty.

Payments are shown in 2008 dollars. Specialties that had fewer than 30 payments (i.e., oncology and nephrology) are not listed.

N Engl J Med. 2011 Aug 18;365(7):629-36.

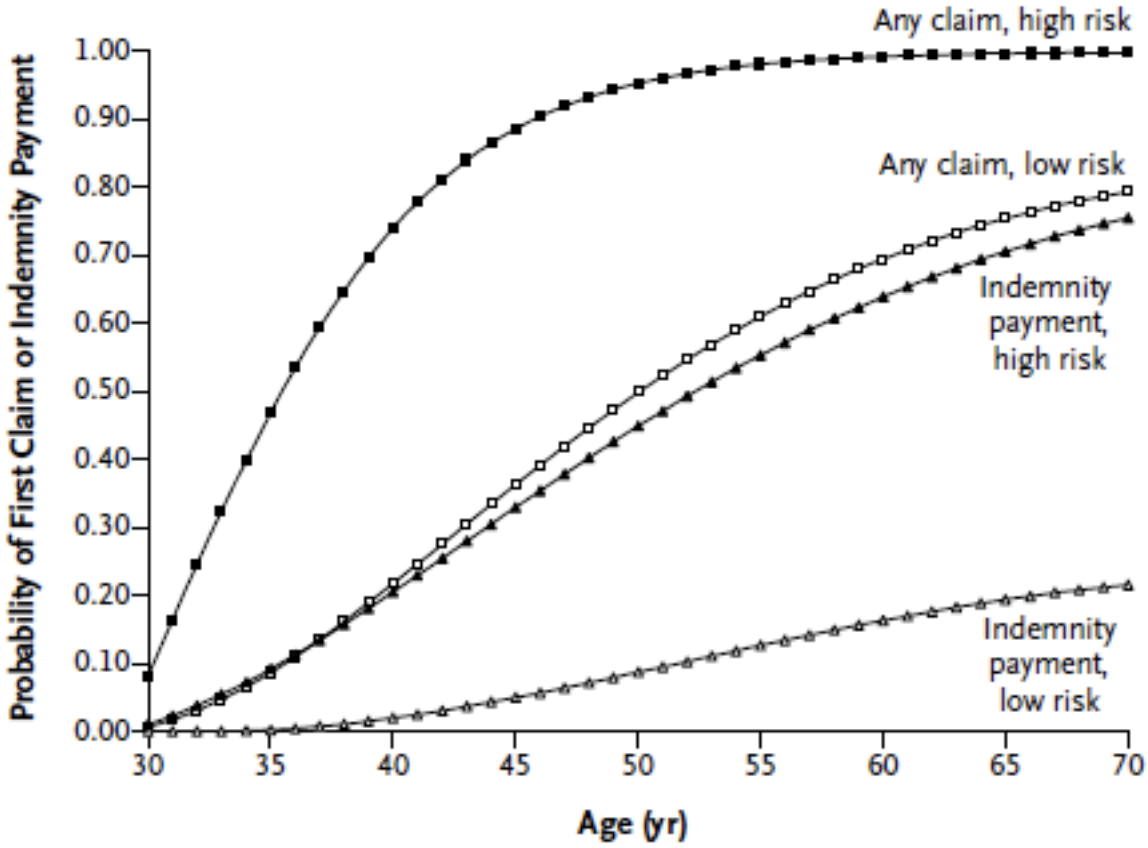


Figure 4. Cumulative Career Probability of Facing a Malpractice Claim or Indemnity Payment, According to Risk of Specialty and Age of Physician.

Cumulative probabilities were estimated from a multivariate linear regression model with adjustment for physician random effects, physician specialty, state of practice, and county demographic characteristics.

Is there a crisis?

by Andrew Wahl

Is there a crisis?

- Retiring early
- Relocating their practice to other states where insurance costs are lower
- Restricting their scope of practice to exclude or reduce high-risk procedures or avoid high-risk patients

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Access to Services

"Whoa! *That* was a good one! Try it, Hobbs — just poke his brain right where my finger is."

The Far Side
by Gary Larson

Access to Services

- Few studies have directly examined whether access to high-risk services has been affected; the evidence base is not yet sufficient to answer this question.

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Physician Supply

Most areas lack doctors

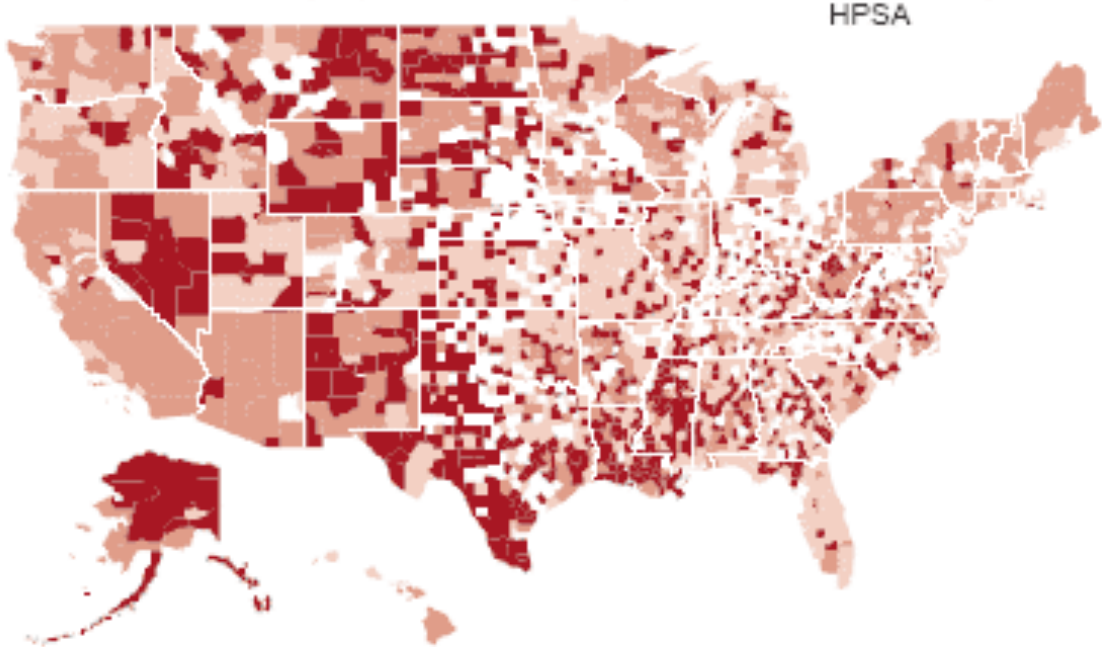
The current shortage of U.S. physicians is about 16,000, which affects about 35 million people. As of September 2005, there were 5,594 Health Professional Shortage Areas (HPSA).

Had a population-group HPSA

Had a partial-county geographic HPSA

Was a whole-county geographic HPSA

Did not have a geographic or population-group HPSA



SOURCE: GAO analysis of U.S. Department of Health and Human Services and U.S. Census Bureau data

AP

POLICY PRESCRIPTIONS

Physician Supply

- The strongest studies have found that the malpractice environment has had only small or no effects on the supply of physician services overall

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Physician Supply

- Some studies demonstrated a 3 % increase in physician supply over three years
- Others show up to a 12 % increase in per capita physician supply in states with malpractice caps

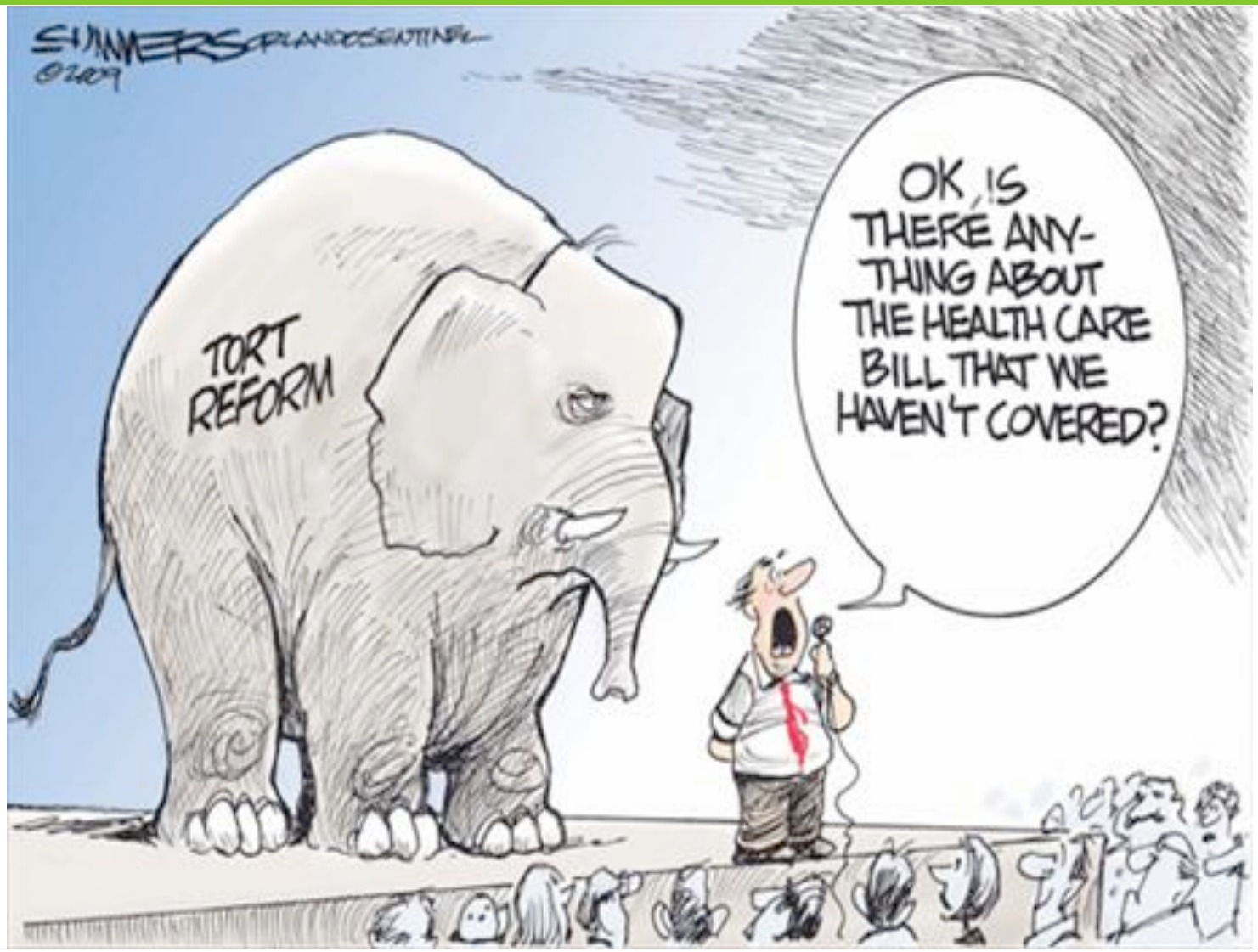
The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Physician Supply

- For every 20 % increase in premiums from one location compared to another, surgeons are 15 percent less likely to practice there (RR=0.852)
- Surgeons are over three times as likely to begin practice in areas with malpractice caps compared to areas without damage caps (RR=3.361)

Health Services Research. 2009. 44 (4): 1475-6773.

Defensive Medicine



Defensive Medicine

- "Defensive medicine" is difficult to measure, but is likely to become more prevalent when physicians perceive heightened malpractice risk

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Defensive Medicine

- 59% of physicians report ordering unnecessary medical tests
- 52% made unnecessary referrals
- 33% percent prescribe unnecessary medications

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Defensive Medicine

- Defensive medicine is estimated to cost $46 billion annually, whereas indemnity payments and administrative costs are estimated at $6 billion and $4 billion, respectively
- Health costs in the US total $2.1 trillion (or $2,100 billion)

Health Affairs. 2010; 29(9):1569-77. and Health Affairs. 2010; 29(9):1578-84.

Defensive Medicine

- In states that implement tort reform versus states that do not implement such reform, there is a 5 - 9% decrease in Medicare payments for hospital care of patients over 65 years old with ischemic heart disease

The Quarterly Journal of Economics. 1996; 111 (2): 353-390.

Cost Savings

From: The Washington Post

Cost Savings

- The approximate decrease in malpractice premium growth is about 6 - 13 % in states with malpractice caps compared to states without them

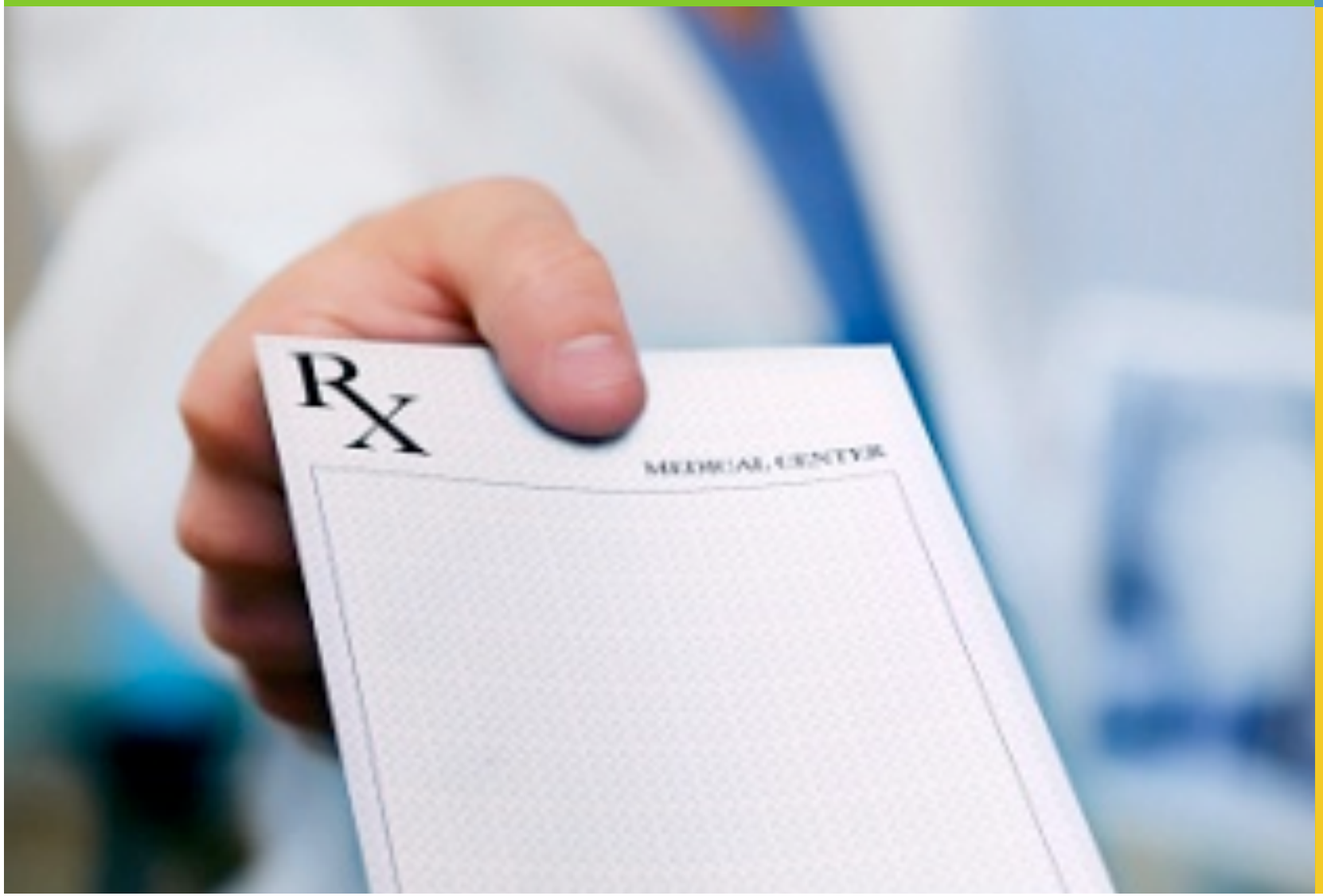
The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Cost Savings

- No statistical difference could be detected in private health insurance premiums as a result of malpractice caps

Health Services Research. 2008. 43 (6): 2124-2142.

The Prescription



Available Options

Reform	Description
Caps on damages	Caps on damages limit the amount of money that a plaintiff can take as an award in a malpractice suit. The cap may apply to noneconomic damages ("pain and suffering"), total damages (including both noneconomic damages and economic loss such as medical expenses and lost wages), or only punitive damages (damages intended to punish the defendant for particularly wanton conduct; very rare in malpractice cases). The cap may apply to the plaintiff, limiting the amount she may receive, or to each defendant, limiting the total amount for which each may be liable.
Joint-and-several liability reform	In cases involving more than one defendant, such as a physician and a hospital, this reform limits the financial liability of each defendant to the percentage fault that the jury allocates to that defendant. Without this reform, the plaintiff may collect the entire amount of the judgment from one defendant if the other(s) default on their obligation to pay, even if the paying defendant bore only a small share of the responsibility for what happened to the plaintiff.
Statutes of limitations/ statutes of repose	These reforms limit the amount of time a patient has to file a malpractice claim, typically to two or three years. Statutes of limitations bar suits unless they are filed within a specified time after the injury occurs or is discovered. Statutes of repose bar suits unless they are filed within a specified time after the medical encounter occurred, regardless of whether an injury has yet been discovered.
Attorney contingency-fee reform	This reform limits the amount of a malpractice award that a plaintiff's attorney may take in a contingent-fee arrangement. The limitation is typically expressed as a percentage of the award; it may also incorporate a maximum dollar value.
Collateral-source rule reform	This reform eliminates a traditional rule that if an injured plaintiff receives compensation for her injury from other sources, such as health insurance, that payment should not be deducted from the amount that a defendant who is found liable for that injury must pay.
Pretrial screening panels	Pretrial screening panels review a malpractice case at an early stage and provide an opinion about whether a claim has sufficient merit to proceed to trial. Typically, a negative opinion does not bar a case from going forward, but can be introduced by the defendant as evidence at the trial.
Periodic payment	This reform allows or requires insurers to pay out malpractice awards over a long period of time, rather than in a lump sum. This enables insurers to purchase annuities (sometimes called "structured settlements") from other insurance companies which cost less than paying the whole award up front. Insurers are also able to retain any amounts that the plaintiff does not actually collect during her lifespan.

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

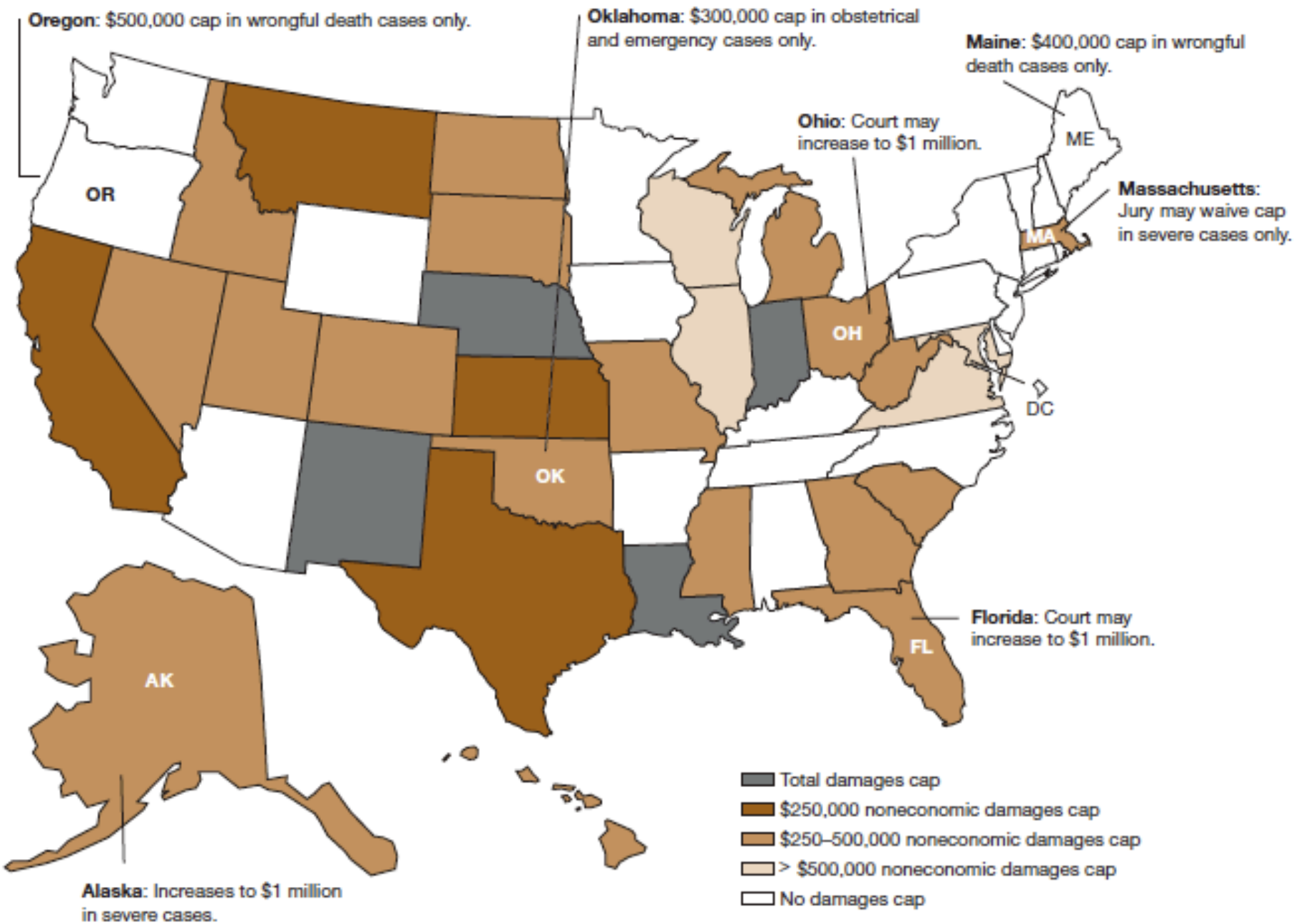
Evidenced-Based Solutions

- The only solution with a large evidence base is a cap on damages
- Joint-and-several liability reform has been found to constrain the growth of insurance premiums
- Study findings regarding shorter statutes of limitations are mixed

Malpractice Caps

- Good evidence shows that caps on damages reduce average award size by 20–30%
- Associated with small increase in physician supply
- Caps slow premium growth
- No evidence that caps decrease claims frequency
- Caps may disadvantage patients that are injured

Figure 3. Caps on noneconomic and total damages by state as of April 2006



Source: Author's analysis

The Robert Wood Johnson Foundation. (2006) Medical Malpractice: Impact of the crisis and effect of state reforms. Research Synthesis Report #10.

Malpractice Caps

- A national cap of $250,000 could save 8% on total malpractice premiums ($1.4 billion annually)
- The level of damage caps matters: caps more than $500,000 increase premiums
- No other tort reform (aside from caps) has a significant effect on premiums

The Robert Wood Johnson Foundation. (2007) Investment Returns and Size of Damage Caps Impact Rising Cost of Malpractice Premiums

Will Reform Have Impact?

- CBO estimates that implementing a package of tort reforms (caps on non-economic damages) would result in a 0.5% decrease in health expenditures

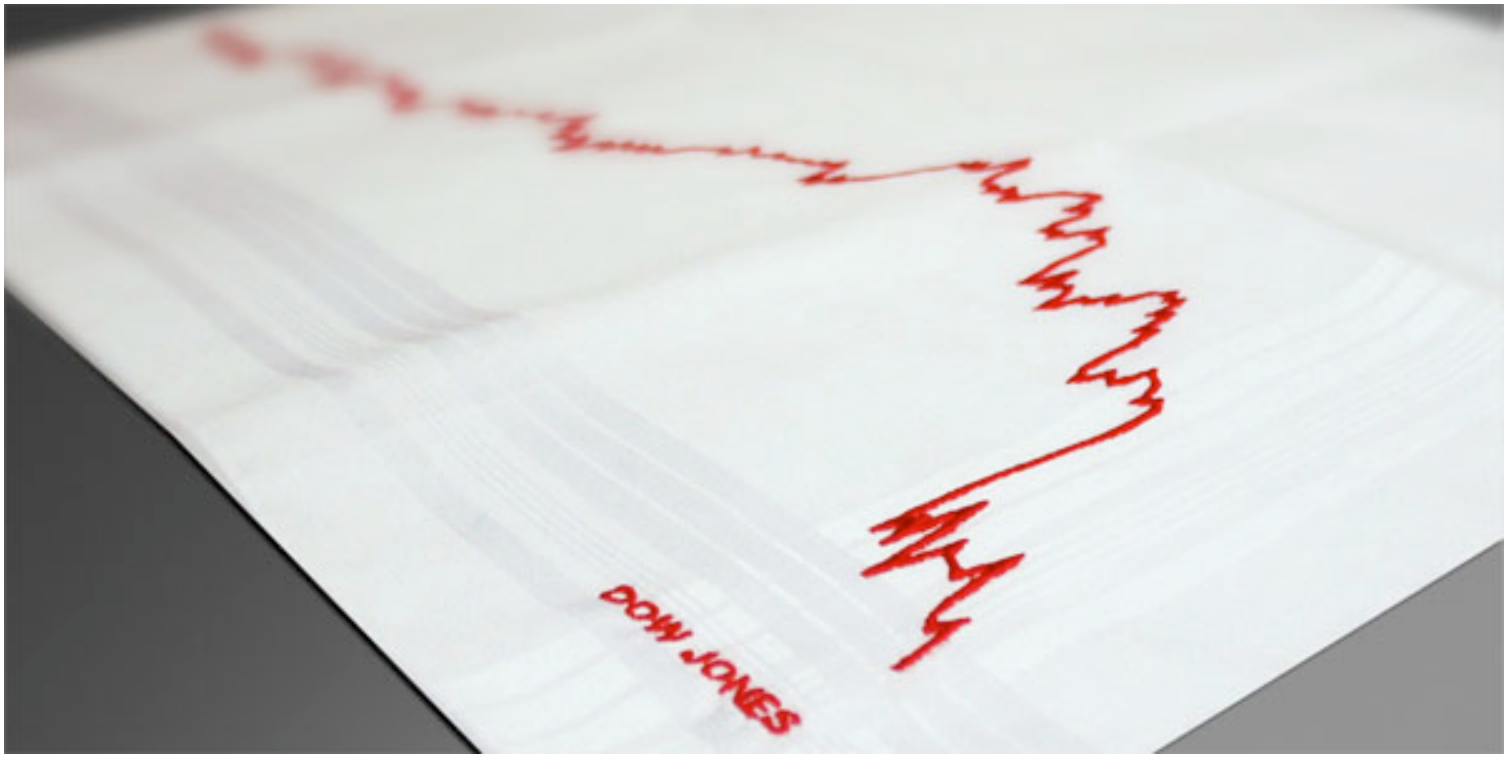
The Robert Wood Johnson Foundation. (2011)Medical Malpractice Update

My Prescription

- Implement a $250,000 - $500,000 cap to stabilize cross-state migration
- Find a way to compensate injured parties that are not necessarily injured by negligence (e.g. vaccine injury program)
- Attack the real reason for the malpractice crisis...

Why do premiums go up?

- When investment returns in the Dow Jones is higher, premium growth is constrained



The Robert Wood Johnson Foundation. (2007) Investment Returns and Size of Damage Caps Impact Rising Cost of Malpractice Premiums

Medical Malpractice Insurers' Profits Higher Than Nearly All Fortune 500 Companies

The American Association for Justice — the trial lawyers' lobby group — has **just released** an astounding statistic: medical **malpractice insurance companies**' average profits are higher than those of 99 percent of Fortune 500 companies.

From: The Washington Independent

Other ideas


.. maybe we should try to think out of the box?
Innovation Department

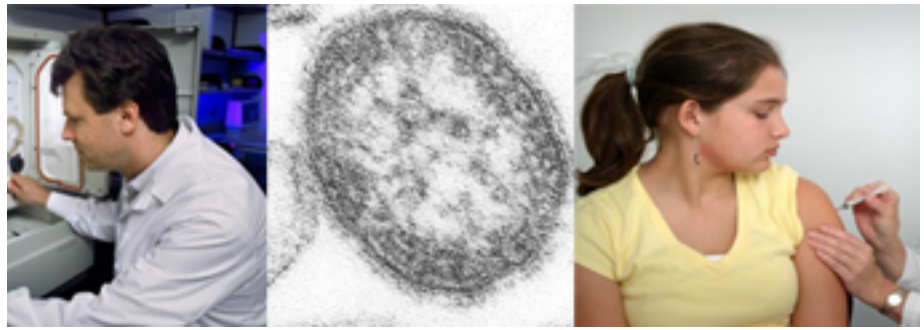
A Public Plan for MedMal

- Del. Heather Mizeur
- Expand Federal Tort Claims Act
- Gov't covers providers at FQHCs

The Baltimore Sun

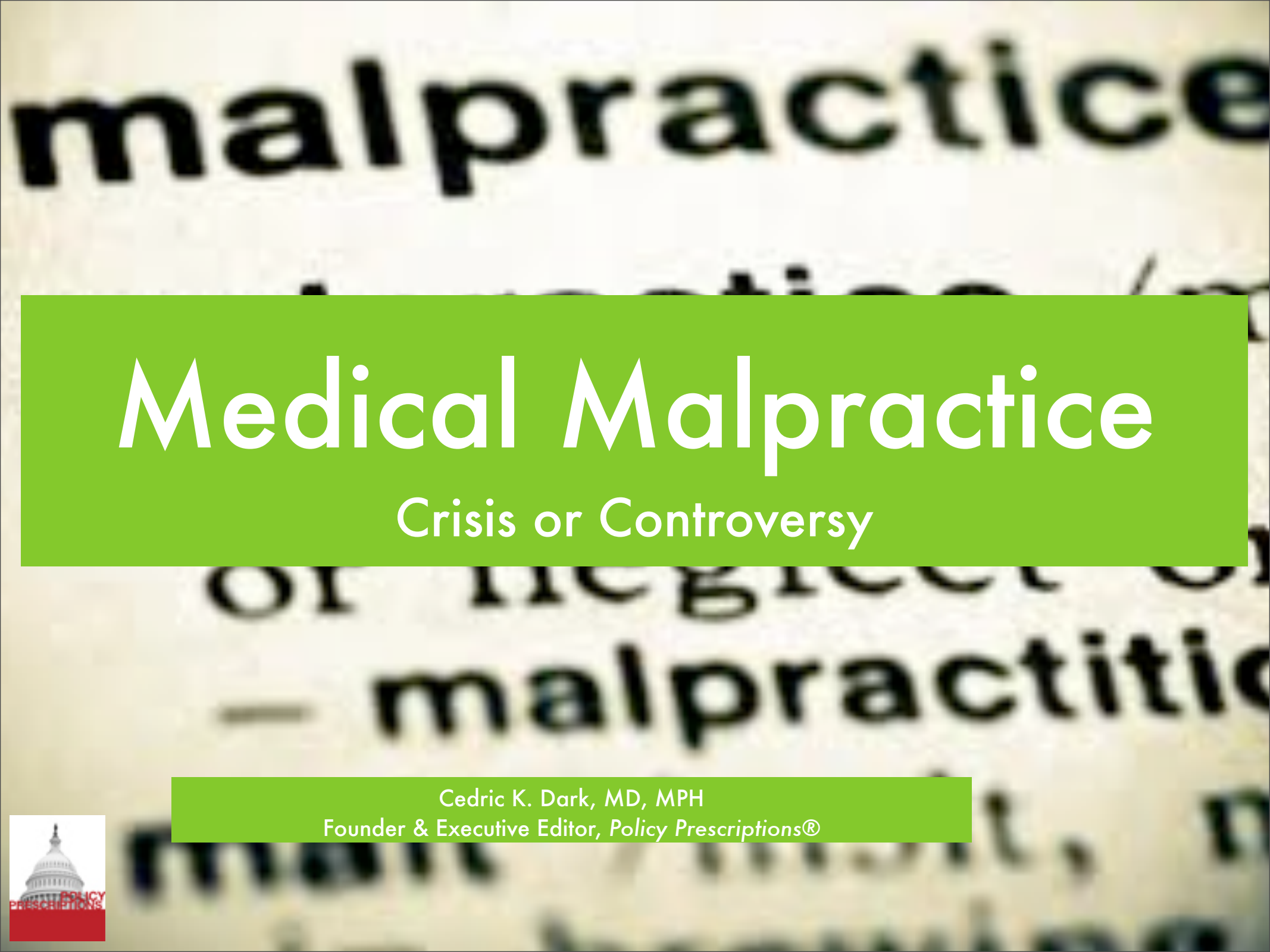
Vaccine Program

- Nat'l Vaccine Injury Compensation Program
- $0.75 tax on each vaccine
- Injured parties entitled to payment regardless of causality



Your ideas?

- What would you recommend?



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