

Overview of the Texas Medical Malpractice Market

**Presented to the
Energy and Commerce Subcommittee on Health**

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Part I - ORAL TESTIMONY

I. Commissioner of Insurance – Jose Montemayor, CPA

As the first state insurance commissioner to testify before this committee, I offer some background information on my role as commissioner.

A. Texas Commissioner of Insurance - Background

- 1) Appointed by the Governor with the advice and consent of the Texas Senate
- 2) Department's chief executive and administrative officer
- 3) Approximately 940 agency employees
- 4) Approximately \$50 million budget
- 5) Establish agency operating procedures and enforce Texas insurance laws
 - Includes disciplinary and legal actions against violators
- 6) Often called to comment on pending or proposed legislation relating to insurance

II. Texas Department of Insurance – Duties

A. Regulatory Duties

- 1) Licensing insurance companies and agents
- 2) Maintaining insurer solvency
- 3) Regulating rates
- 4) Regulating policy forms (contracts)
- 5) Protecting and educating insurance consumers

- 6) Performing many other duties, from oversight of the Texas Joint Underwriting Association, Texas' insurer of last resort for healthcare providers, to reviewing insurance related appeals.

B. Other Information

- 1) 2003 Fiscal Year Report published in October 2004 listed about \$80 billion in annual written premium
 - The department licenses or registers about 2,500 insurers of all types as well as agents, escrow officers, risk managers, adjusters, and other insurance personnel in tens of thousands.
- 2) Department strives to maintain a financially safe, efficient, and fair insurance marketplace for Texas citizens

III. National Association of Insurance Commissioners (NAIC)

A. The Role of the NAIC

- 1) Organization of insurance regulators of the 50 states, District of Columbia and U.S. territories, created in 1871
- 2) Provides a forum for the development of uniform policy on Insurance matters where appropriate
- 3) First major step was to develop uniform financial reporting by insurance companies
- 4) Helps regulators fulfill the obligation to protect the interests of their state's insurance consumers

B. My NAIC Activities

- 1) Chair of the NAIC Property and Casualty Insurance
- 2) Chair of the subcommittee, Market Conditions Working Group
 - Working Group details (2003 to 2004)
 - a. Monitor availability and affordability of property and casualty insurance and, for the most distressed lines, provide reports with market-monitoring information, solutions, and regulatory responses.
 - i. The "most distressed line" was medical liability insurance
 - b. Heard testimony on causes and solutions for what came to be known as the medical liability insurance crisis.

- c. Assigned researchers to assemble and edit a final report. The result was the Medical Malpractice Insurance Report: A Study Of Market Conditions And Potential Solutions To The Recent Crisis of September 12, 2004.
 - i. Report stated that “research indicates that underwriting losses were the major factor influencing the rate increases experience by physicians and other health care providers over the past several years.”
 - ii. Report provided data, research sources, and a list of the market interventions available to state regulators.

IV. The Texas Experience - Prior to Tort Reform

A. Crisis

- 1) Nursing home licensed insurers dropped from 8 to 1
- 2) Licensed insurers for physicians medical malpractice dropped from 17 to 4
- 3) Over eleven medical malpractice insurers with more than 6,500 physicians withdrew from the market or became insolvent
- 4) Severe rate increases from 1999 to 2002
 - Seven large medical malpractice insurer increases ranged from 22.5% to 117.2%
- 5) Texas JUA insured 3,000 physicians during the crisis who were unable to find standard coverage
 - As recently as 2000, the JUA insured 100 physicians
- 6) The largest medical malpractice insurer, Texas Medical Liability Trust (a self-insurance trust for the Texas Medical Association), increased rates 147% over four years and assessed members (insureds) \$5,000 each to maintain surplus
- 7) The 1977 cap on pain and suffering originally climbed to over \$1.7 million due to inflation and became limited to only wrongful death cases due to Texas Supreme Court decisions on constitutionality

V. Texas Responds with Tort Reform

A. Texas Legislature Enacted Tort Reform

- 1) Effective September, 2003
 - Voters approved a constitutional amendment supporting the reforms the same month
- 2) The reforms included
 - Caps on non-economic damages (aka pain and suffering)
 - Periodic payment provisions for future damages as accrued
 - Prejudgment interest not awardable on future damages
 - Class Actions - require Texas courts keep plaintiff attorney fees in proportion to actual work done

B. Regulatory reforms

- 1) No significant changes. Texas continued vigorous enforcement of statutory restrictions on excessive medical liability rates.

VI. The Texas Experience - Post Tort Reform

A. New Entrants in the Medical Liability Market

- 1) A cumulative total of 19 New Medical Malpractice carriers have either entered the market or soon will. Three existing insurers announced they will expand or have expanded physician writings in Texas:

B. Licensed Neurosurgeons

- 1) A critical specialty, increased 8% after tort reform (according to the Texas State Board of Medical Examiners)
 - Some towns report an improvement in 24/7 trauma center coverage

C. Physician Rates

- 1) Rate decreases

- The largest writer, Texas Medical Liability Trust, \$189,000,000 written premium, decreased rates by 16.4%
 - CNA, a small writer, decreased rates 11.5%
- 2) Other Rate Changes
- The Doctors Company, \$15,000,000 written premium, reduced scheduled 20% increase to 0.7%
 - Medical Assurance, \$5,000,000 written premium through a purchasing group, announced an increase of 34.4% before tort reform, but effective after. They subsequently lowered these rates between 5% to 8%.
 - Other insurers eliminated increases
- 3) TDI disapproved requested increases for two large insurer's after the reforms became effective
- One insurer is currently contesting the disapproval

D. Hospital Rates

- 1) The largest writer, Health Care Indemnity, \$129,500,000 written premium, reduced rates 13% 1/1/04

E. Overall Experience

- 1) Data from medical liability insurers indicates new claims spiked the summer before tort reform became effective, but fell to significantly below pre-reform levels in early 2004.
- 2) Anecdotal evidence suggests that this lower level of claims activity persisted throughout 2004

Part II - WRITTEN TESTIMONY

I. Introduction

Professional liability is insurance not one in a hundred of our fellow citizens purchases directly. Yet, it affects us all. Whether you visit a lawyer, talk to your tax accountant, get a flu shot or a hair cut, a portion of your fee pays for professional liability.

On one hand, this raises the cost of the services received. On the other, it protects the public against professional misadventure and allows the professional to pursue a career without fear of financial catastrophe.

As we Texans learned over many years, professional liability insurance is vital for the functioning of our health care system and our economy.

II. Brief History Of Texas Medical Malpractice Market

A. Background

- In the 1940s, Texas had a system of regulated, price controlled insurance including medical malpractice. The princely sum of \$15 bought a physician \$15,000 limits to cover then rare suits. This system lasted until 1955 when premiums doubled creating the first malpractice liability crisis.
- 1955 - The Legislature removed insurance for Texas physicians, hospitals, and other professions (attorneys, architects, etc.) from regulation. Rates stabilized through competition at \$200 per year for physicians.

B. 1970's Crisis And Initiatives Implemented To Alleviate It

- In 1974, physician medical malpractice losses doubled. Rates increased as much as 400% over 1972 levels. Carriers writing medical malpractice for physicians declined from about fifty to two or three. Medical professionals asked for legislative help.
- In 1975 and 1977, the Legislature placed insurance rates for hospitals, physicians, and other healthcare providers back under rate regulation. The Texas JUA was created in 1975 to provide last resort medical malpractice coverage to medical professionals not able to obtain it in the standard market. Over 4,000 physicians received JUA coverage before the crisis moderated. A self-insurance trust (Texas Medical Liability Trust) was authorized for statewide medical association members.
- Tort reforms were enacted through the Medical Liability and Insurance Improvement Act of 1977:
 - A cap on pain and suffering damages of \$500,000 increasing with inflation.
 - Statute of limitations shortened to two years for adults and age 14 for minors.
 - Plaintiff attorneys must give ninety days notice of intent to file suit.
 - Expert witness requirements were tightened.
 - Informed consent and disclosures were standardized.
 - Carriers insuring hospitals must provide loss control information.
 - Crisis moderated in late 1970's, however the number of med-mal insurers never reached pre-crisis levels.

C. 1980's Crisis And Initiatives Implemented To Alleviate It

- Rates soared to an average of \$8,000 per physician. Over 2,000 physicians temporarily sought insurance at the JUA until the medical malpractice markets slowly recovered.
- Legislative initiatives included:
 - Market Assistance Plan (MAP) established for medical malpractice and other liability.
 - Carriers insuring physicians must provide insureds loss control information.

- Additional medical providers were brought into rate regulation.
- Established a short-lived plan to subsidize medical malpractice costs through insurers. This was the Omnibus Healthcare Rescue Act or HB18 of 1989. It provided premium discounts by paying part of the indemnity of certain claims in exchange for a physician insured providing free care to some patients and taking risk management/loss control courses. The plan was active from about 1991 to 1995.
- Rates stabilized for a period of time
 - Some legislative tort reform was delayed until 1995
 - Changed the minimum requirement for joint and several liability responsibility for an entire award from 10% to 50%.
 - Tightened venue requirements to prevent venue shopping of medical malpractice claims.
 - Strengthened the requirements for expert witnesses and required larger court bonds for a time extension to produce an expert witness.

D. 2000 - 2003 Medical Malpractice Market Before Latest Reforms

- Nursing home licensed insurers dropped from 8 to 1.
- Licensed insurers for physicians medical malpractice dropped from 17 to 4.
- Over eleven medical malpractice insurers with more than 6,500 physicians withdrew from the market or became insolvent.
- There were severe rate increases from 1999 to 2002. Seven large medical malpractice insurers increased rates ranging from 22.5% to 117.2%
- Texas JUA insured 3,000 physicians unable to find standard coverage.
- The largest medical malpractice insurer, a self-insurance trust (Texas Medical Liability Trust) for the Texas Medical Association, increased rates 147% over four years and assessed members \$5,000 each to maintain surplus.

- The 1977 cap climbed to over \$1.7 million due to inflation and became limited to only wrongful death cases due to Texas Supreme Court decisions.

III. History of Texas regulatory framework for medical malpractice markets

- A. 1948 to 1955, liability rates (including medical malpractice) were set, standard and uniform, for all insurers in accord with national statistics.
- B. 1955 to 1975, professional liability (including medical malpractice) rates were deregulated.
- C. 1975 to 1993, most professional liability rates regulated via prior approval system in accord with an adequate, reasonable, not excessive standard.
- D. 1993 to present, medical malpractice liability rates are regulated via a file and use system. Approval may be withdrawn if rates are found to be excessive after filing.

IV. Latest Texas Reforms

- A. Tort Reform (2003) and its Components
 - Caps On Non-Economic Damages. Award cannot exceed \$250,000 for physicians or \$250,000 for each healthcare institution. Aggregate cap may not exceed \$750,000 regardless of number of defendants.
 - Periodic Payments. Provides provisions for payment of future damages as accrued. Limitations on plaintiff attorney fees.
 - Prejudgment Interest. No prejudgment interest is awardable on future damages.

- Vendor's Endorsements. Insurers may not exclude physicians or other healthcare providers in product liability (i.e. drug) cases.
- Informed consent. Suits based on failure to disclose risks can be based only on risks influencing patient decisions. Created the Texas Disclosure Panel to identify such risks.
- Class Actions. Requires that a court use lodestar method of calculating attorney fees. (The lodestar method requires fees to be in proportion to the amount of actual work done on a case.) Stays proceedings pending appellate ruling on class certification.
- Emergency Care. Reduces liability for most emergency care, now including emergencies in a clinic or hospital not done by emergency specialists.
- Admissibility of Evidence. Excludes nursing home inspection reports not related to the basis of a claim.

B. Regulatory Reforms

- No significant change.

C. Other Texas Department of Insurance / Legislative Initiatives

- Updated the Texas JUA to recognize current market standards:
 - Added claims-made policies to be compatible with contemporary physician policy forms.
 - Created moderate cost, prior acts coverage for run-off (tail) of physicians caught by insurer insolvency. It can also be purchased if less expensive than the tail offered by a withdrawing company.
 - Made not-for-profit nursing homes, assisted living facilities, ambulatory surgicenters, and perfusionists eligible for JUA coverage.
- Adopted Best Practices for Risk Management and Loss Control that may be used by nursing homes.

- Initiated a rate disapproval hearing on medical malpractice business moved to a risk purchasing group (RPG) to prevent RPGs from becoming rate regulation refuges (Still pending as of February 4, 2005).

V. Reforms' Effect on Texas Medical Malpractice Market

A. How Medical Malpractice Companies Have Responded (i.e. rates)

1) Physician Rates Since September 2003

- Rate decreases
 - The largest writer, Texas Medical Liability Trust, with \$189,000,000 in written premium (2003) reduced their rates by 16.4% since September 01, 2003 (-12% on January 01, 2004 and another 5% on January 01, 2005).
 - A small writer, Continental Casualty Company, with \$800,000 in written premium (2003) reduced their rates by 11.5% on February 01, 2004.
- Proposed Rate Increases Eliminated / No Changes in Rates
 - Most companies fall into this category.
 - The Doctors Company had an indicated rate change prior to the consideration of HB 4 of about +20% but filed in October 2003 for no change. May 01, 2004 they implemented an increase of +0.7%. Doctors Company writes \$15,000,000 in physician premium (2003).
- Rate Increases Disapproved
 - The Texas Medical Liability Insurance Underwriting Association (JUA) filed for a 35.8% increase which was disapproved November 2003. The JUA has \$58,000,000 in physician premium (2003).
 - The Medical Protective Company (Med Pro) filed for a 19% increase, which was disapproved April 20, 2004. Med Pro has \$134,000,000 in physician premium (2003). Med Pro moved its physicians to its purchasing group July 01, 2004 and implemented a 10% increase. TDI staff brought an enforcement

action against this carrier. From July 12 through July 14, 2004 a hearing was held before the State Office of Administrative Hearings (SOAH) on both the 10% increase and the disapproved 19% increase.

The SOAH administrative law judge (ALJ) issued his initial Proposal For Decision (PFD) on November 23rd. The ALJ ruled that:

Based on information received from the parties on November 16, 2004, the resulting rate indications would be -5.7 percent for claims made coverage and +3.6 percent for occurrence coverage if all the ALJ's rate recommendations were utilized. The combined rate would be - 3.8 percent [i.e., lower], giving 80.0 percent weight to claims made and 20.0 percent weight to occurrence.

In doing so, the ALJ accepted TDI's actuarial analysis of the rates charged by The Medical Protective Company and MPSA Purchasing Group, Inc. However, in order to find that the rates were "excessive" the ALJ also had to find that a reasonable degree of competition does not exist in the medical professional liability insurance marketplace. The ALJ found instead that a reasonable degree of competition does exist in Texas and has proposed a decision in favor of The Medical Protective Company based on the competition part of the rate statute.

The matter has been presented to the Commissioner of Insurance for a final determination.

- Other Rate Changes
 - Prior to September APIE filed for an increase of 16.6% above their 1994 rates. This applied to non-purchasing groups physicians only. They wrote \$0 outside their purchasing groups in 2003 and \$54,000,000 within their purchasing groups (2003).
 - The Medical Assurance Company, which writes solely through their purchasing group last increased rates 34.4% effective November 15, 2003. They now report new and lower rates effective January 1, 2005, averaging between a 5 and 8 percent decrease. Medical Assurance writes \$5,000,000 in physician premium (2003).

2) Hospital Rates Since September 2003

- The largest writer, Health Care Indemnity, with \$129,500,000 in written hospital premium (2003) reduced its rates by 15% in January 01, 2004.

B. Availability of Medical Malpractice Insurance

C. New Entries Into the Market

- In late 1999, 17 companies reported writing physicians medical professional liability insurance. That number decreased to 4 by early 2002.
- Presently, a cumulative total of 15 New Medical Malpractice carriers have now either entered the market or soon will.
 - 11 risk retention groups have been registered since September 2003
 - 2 new admitted companies
 - 1 admitted company filed for a new PL program for Dentists

- 1 company has filed for a name reservation and has indicated to TDI it will soon file as an admitted carrier in Texas.
- The following companies have announced they will expand or have expanded physician writings in Texas:
 - The Doctors Company – admitted
 - Everest National Insurance Company - admitted
 - The Medical Assurance Company – admitted
 - Catlin Insurance Company Ltd. – surplus lines

D. Other HB 4 Issues

- Insurers dealt with an influx of medical liability claims that began in June 2003 and ended September / October 2003.
- New claims spiked in June, with elevated levels in July, August and a larger spike in September.
- The anomaly must be taken into consideration, though not over-adjusted for or treated as a long-term trend.
- Data from two large med mal carriers through spring 2004 indicates that reported claim activity after the spike is at levels well below normal. Anecdotal indications are this moderated claim level has continued through 2004.

Recent Entries/Applicants – Physicians and Other Medical Professional Liability Insurance (cumulative since 2003)

A. Risk Retention Groups (RRGs)

1) Registration Completed Since May 03 (As of October 2004)

- Allied Professionals Insurance Company, RRG
Registered on 2/23/04 – Active – Writing Acupuncturists, Chiropractors, Massage Therapists
- Applied Medico – Legal Solutions, RRG
Registered on 10/7/03 – Active – Writing emergency medical physicians
- CARE RRG
Registered on 2/23/04 – Active – Open to all physician specialties
- Centurion Medical Liability Protective RRG, Inc,
Registered on 7/27/04 - Active - Writing physicians
- Eldercare Mutual Insurance Company RRG
Registered on 2/13/04 – Active – Writing long-term care facilities
- Emergency Medicine RRG, Inc,
Registered on 6/9/04 – Active – Writing emergency medical physicians
- Emergency Physician Ins Co, RRG,
Registered on 10/7/03 – Active – Writing emergency medical physicians
- Green Hills Insurance Company, RRG
Registered on 05/03/2004 - Active - Has no Texas physician insureds yet

- Health Network Providers Mutual Insurance Company, RRG
Registered on 12/31/03 – Active – Writing Memorial Herman Health Network Providers only
- Lake Street Risk Retention Group, Inc.
Registered on 12/31/03 – Active – Writing hospitals and physicians
- Physicians Specialty Ltd., RRG
Registered on 1/26/04 – No Texas physicians yet. Temporarily focusing attention on ER group in CA.

2) Filed for Risk Retention Group – Registration Pending

- Oceanus Insurance Company, A Risk Retention Group
Filed for registration on 1/27/05 – Plans to write various physician specialties

B. Surplus Lines

1) Registration Completed

- Catlin Insurance Company, Ltd.
- Hudson Specialty
- Red Mountain Casualty Insurance Company

2) Filed for Surplus Lines Eligibility – Eligibility Pending

- None known pending

C. Licensed and Admitted in Texas

- Advocate, MD Insurance of the Southwest
Writing Physicians and other health care providers

- Professional Liability Insurance Company of America (PLICA)
DBA in Texas as Medical Liability Insurance Company of America (MLICA)
Began writing Physicians and other health care providers 12/1/04.
- State Farm
Writing Dentists

D. Filed for Texas Name Registration

- American Medical Physicians Assurance of Texas
Filed a name reservation as a licensed insurance company.
- Physicians Insurance Company (PIC) of Florida
Filed a name reservation as a licensed insurance company.

E. Filed Application for Charter and License in Texas - License Pending

- None known pending

(Advocate, MD applied Spring 2004 and completed the licensing process May 28, 2004.)

F. Filed Rates, Rules, and Forms - Approval Pending

- None pending after MLICA approval.

Current Entities Writing Physicians Medical Professional Liability Insurance

A. Statutory Insurers

- Texas Medical Liability Trust (a self-funded trust for TMA members)
- Texas Medical Liability Insurance Underwriting Association (JUA) (Texas residual market insurer)

B. Licensed and Admitted Insurers (As of January 2005)

- American Physicians Insurance Exchange
- Anesthesiologists' Professional Assurance Company
- Advocate, MD Insurance of the Southwest (new)
- Continental Casualty Company
- Everest National Insurance Company
- The Doctors' Company
- The Medical Assurance Company
- The Medical Protective Company
- Medical Liability Insurance Company of America (MLICA)
- National Union Fire Insurance Company of Pittsburg, PA
- Preferred Professional Insurance Company (limited to physicians in qualifying Catholic hospitals)
- Texas Hospital Insurance Exchange (Limited to hospital-employed physicians)
- Texas Medical Insurance Company

C. Surplus Lines Insurers (As of January 2005)

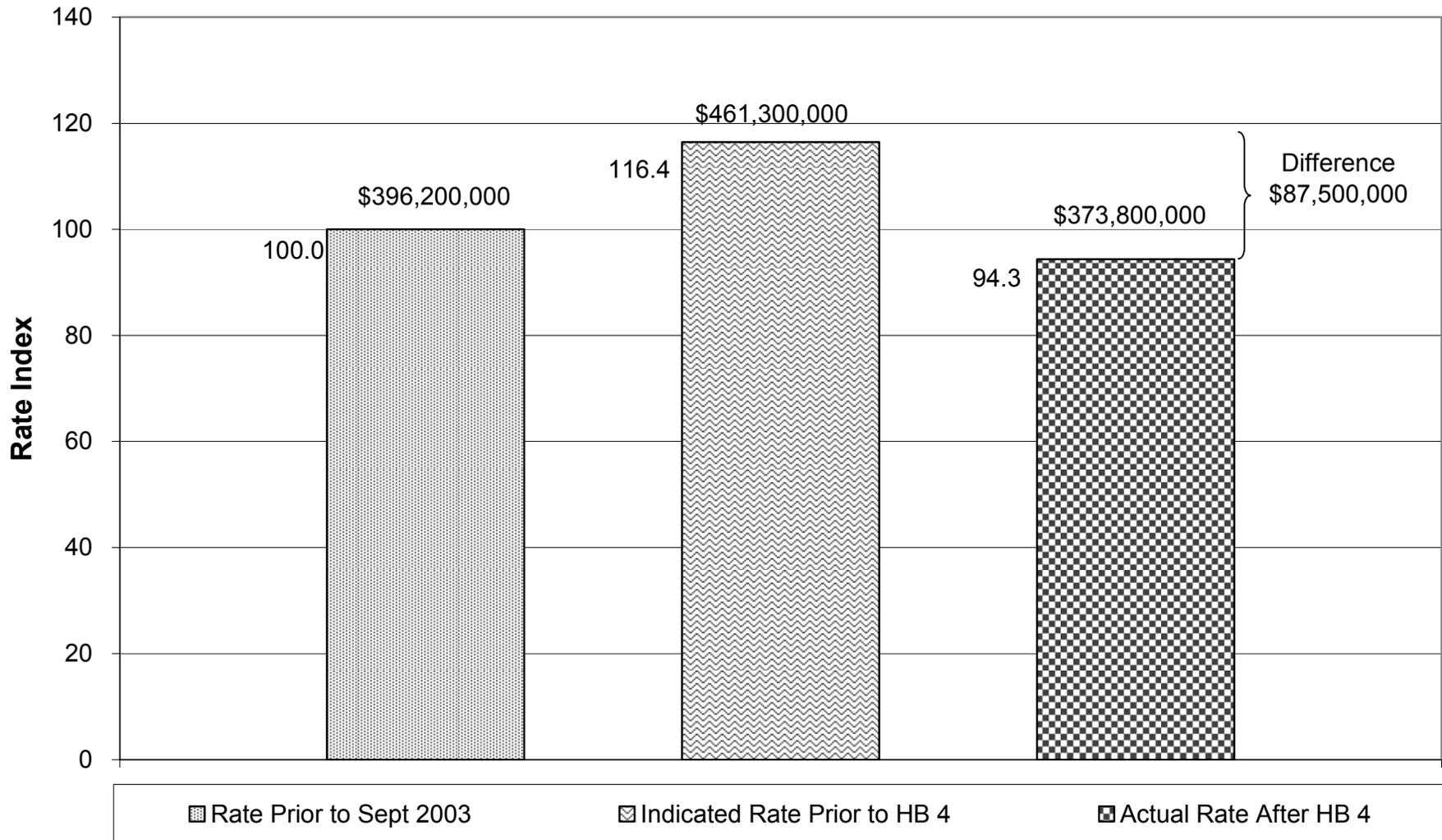
- Admiral Insurance Company
- Catlin Insurance Company, Ltd.
- Evanston Insurance Company
- General Star Indemnity Company
- Hudson Specialty
- Lexington Insurance Company
- Professional Underwriters Liability Insurance Company
- Red Mountain Casualty Insurance Company (new)
- Royal Surplus Lines Insurance Company
- Steadfast Insurance Company

D. Risk Retention Groups (As of January 2005)

- Allied Professionals Insurance Company, RRG
- Applied Medico – Legal Solutions, RRG
- CARE RRG
- Centurion Medical Liability Protective RRG, Inc,
- Eldercare Mutual Insurance Company RRG
- Emergency Medicine RRG, Inc,
- Emergency Physician Ins Co, RRG,
- Green Hills Insurance Company, RRG
- Health Network Providers Mutual Insurance Company, RRG
- Lake Street Risk Retention Group, Inc.

- National Guardian Risk Retention Group, RRG
- Oms National Insurance Company, RRG
- Ophthalmic Mutual Insurance Company RRG
- Preferred Physicians Medical RRG, Inc.

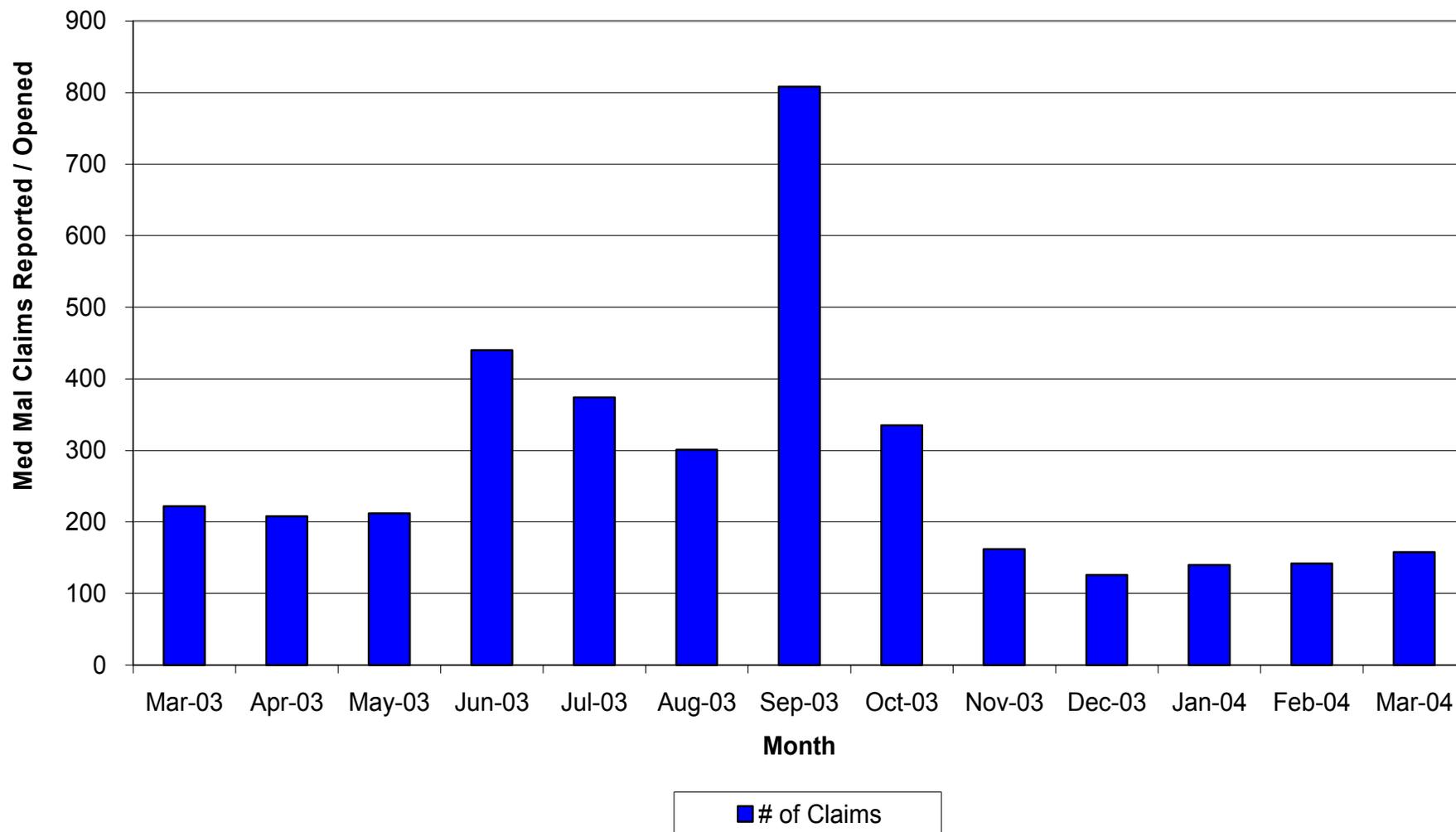
PHYSICIANS and SURGEONS MEDICAL MALPRACTICE
 Top Four Writers Filing Rates
 Indicated Rate Level vs Actual Rate Level



Top Four Writers: Texas Medical Liability Trust, Medical Protective, Doctors Company, and Texas JUA.
 Actual rate change includes rates effective January 01, 2005.

TEXAS MEDICAL MALPRACTICE

TMLT and the Texas Medical Liability Insurance Underwriting Association (JUA)
Combined Medical Malpractice Claims by Month



TEXAS MEDICAL LIABILITY INSURANCE UNDERWRITING ASSOCIATION (JUA)

Total Policy Count by Year

Date of Count	Total JUA Policies in Force at Date*	% Change from Previous Year
6/30/1997	242	
6/30/1998	200	-17%
6/30/1999	158	-21%
6/30/2000	139	-12% **
6/30/2001	168	21%
6/30/2002	751	347%
6/30/2003	2,567	242% ***
9/30/2003	2,687	5%
6/30/2004	2,690	0%
9/30/2004	2,688	0%
12/31/2004	2,613	-3%

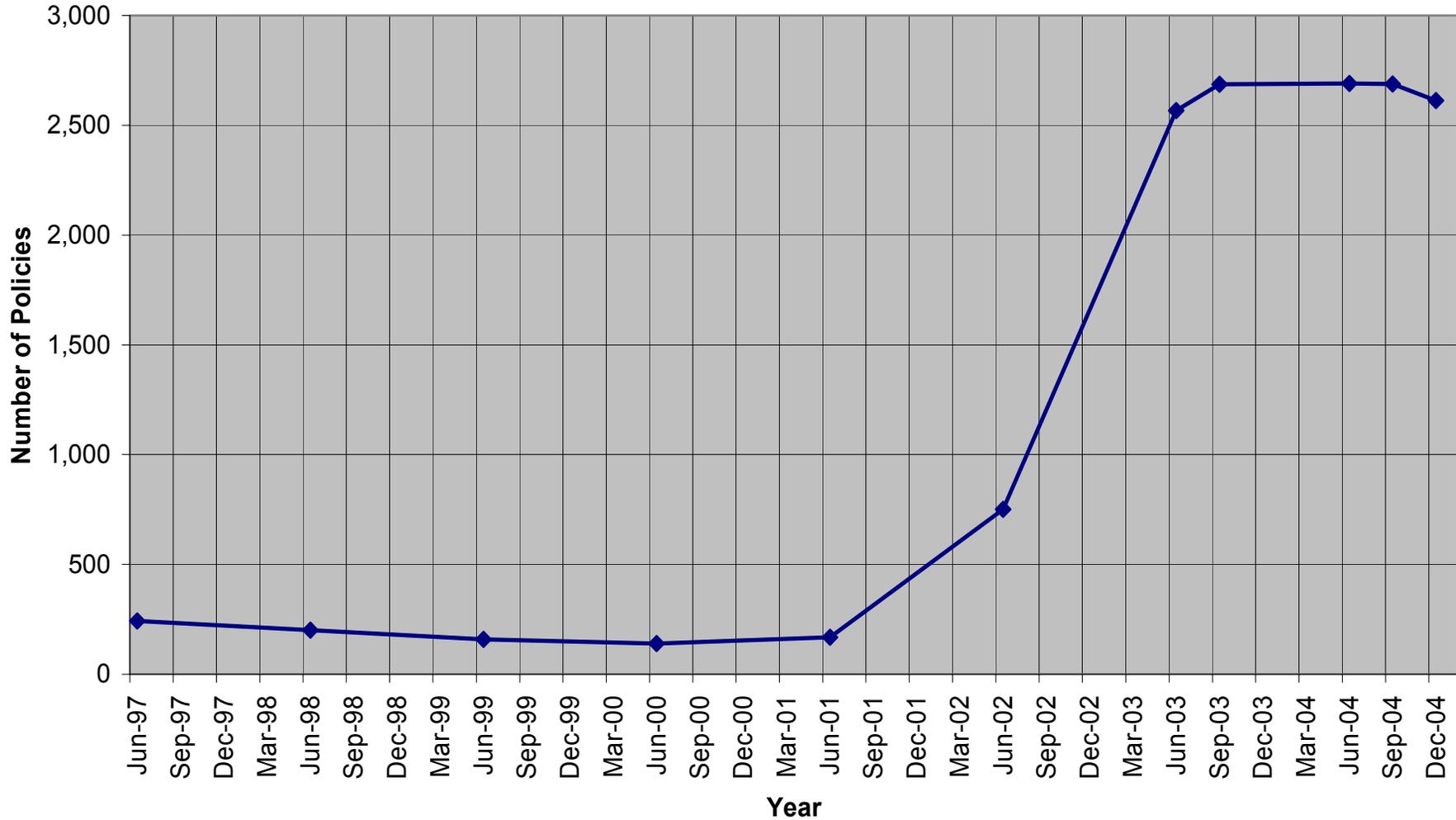
* Includes policies of all covered providers. Some providers (very few) may have two policies – one primary and one excess coverage. Covered providers include physicians, hospitals, dentists, nursing homes, nurse anesthetists, and other allied health care providers.

** The all-time low of 139 policyholders occurred in

2000.

*** A twenty-five year high of 2,687 policyholders occurred on September 30, 2003.

TEXAS MEDICAL LIABILITY INSURANCE UNDERWRITING ASSOCIATION (JUA) Number of Policies

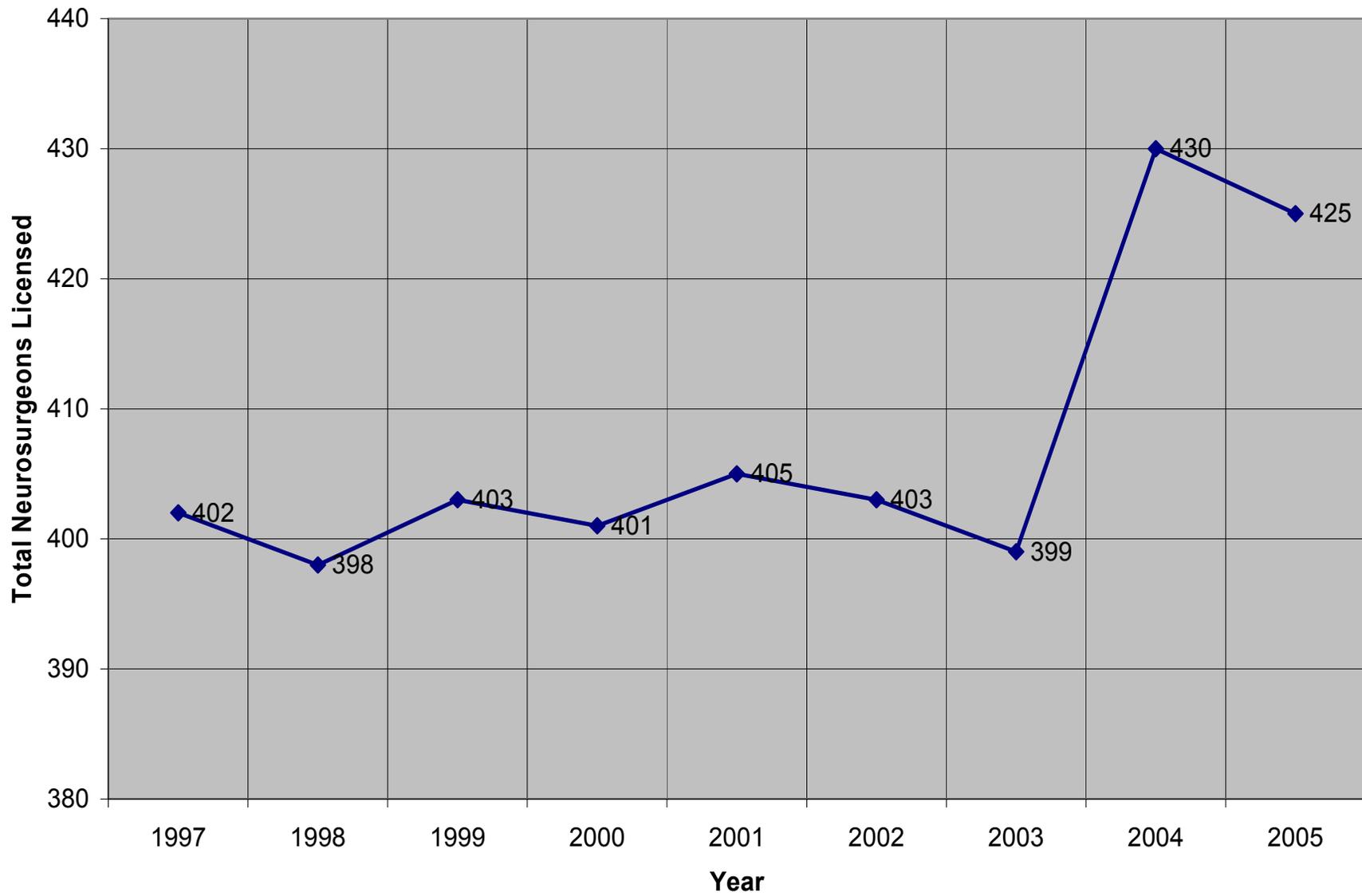


Texas Licensed Neurosurgeons by Year

Date	Number of Texas Licensed Neurosurgeons	Percent Change
Jan-97	402	
Jan-98	398	-1%
Jan-99	403	1%
Jan-00	401	0%
Jan-01	405	1%
Jan-02	403	0%
Jan-03	399	-1%
Jan-04	430	8% *
Jan-05	425	-1%

* The number of Texas licensed neurosurgeons increased 8% in one year following tort reform passage

Texas Licensed Neurosurgeons by Year



Source: Texas State Board of Medical Examiners