

# TAKING BACK CONTROL OF HEALTHCARE LITIGATION

STRATEGIC APPROACH TO EVALUATING, SETTling OR TRYING YOUR CASE:  
ANCHORING VALUE AND DEFENDING DAMAGE

John E. Hall, Jr., Esq.  
Hall Booth Smith, PC  
Partner

Mr. Rick Farlow  
Vice President  
BerkleyMed

Mr. Richard . Henderson  
Vice President  
TransRe

H | B | S

HALL BOOTH SMITH, P.C.  
ATTORNEYS AT LAW

 | BerkleyMed  
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*We value risk.*



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# STATUS QUO HAS LED TO AN INCREASE IN SEVERITY AND FREQUENCY OF CLAIMS/SUITS

- Reality of increase in severity is sinking in
- Causing even more frequency
- Causing higher settlement rates and value
- Causing less trial and testing of plaintiffs
- Helps contribute to higher verdicts
- Leading to a beginning of a long hard market

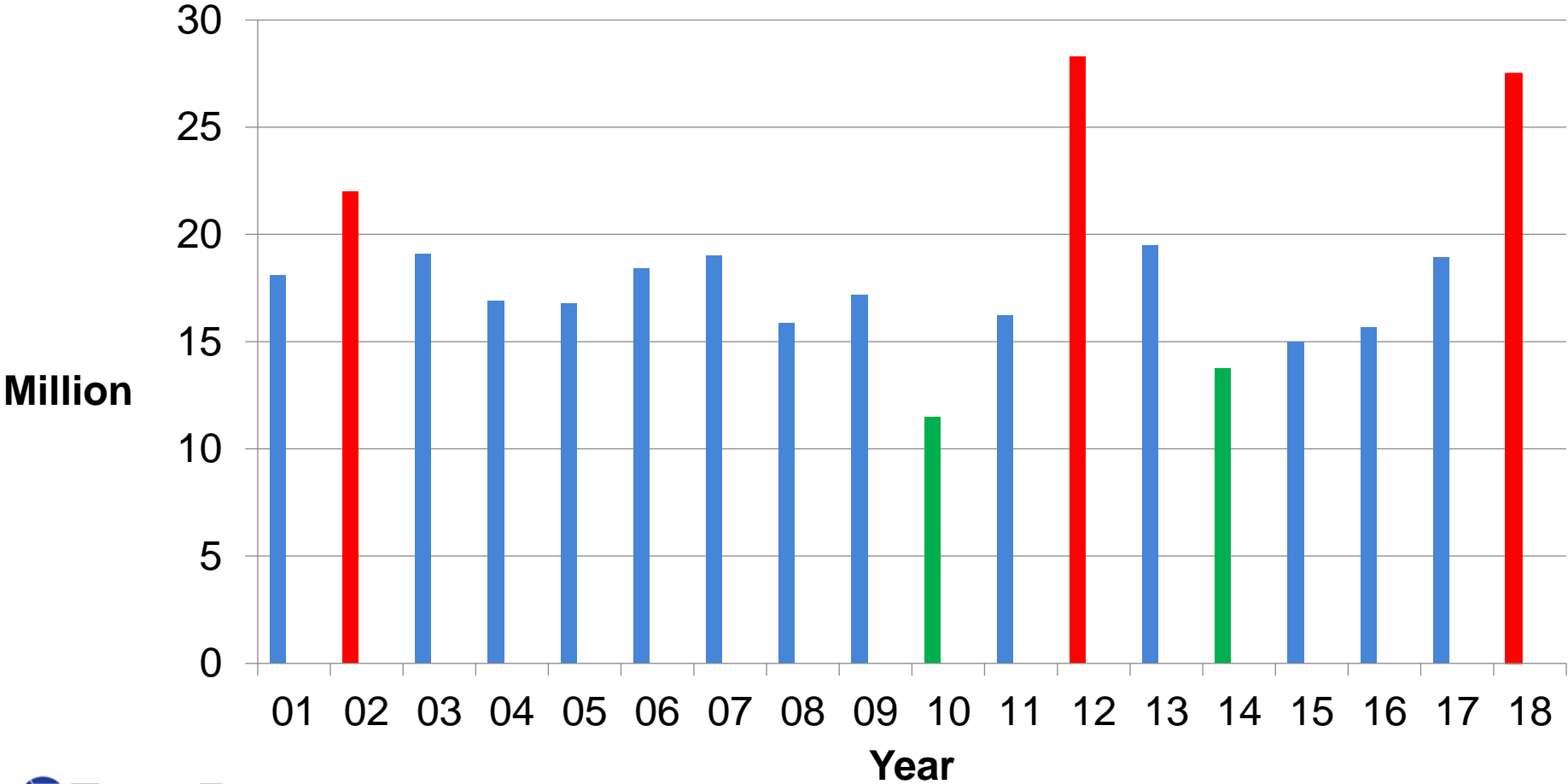


# PLAINTIFF LEADS

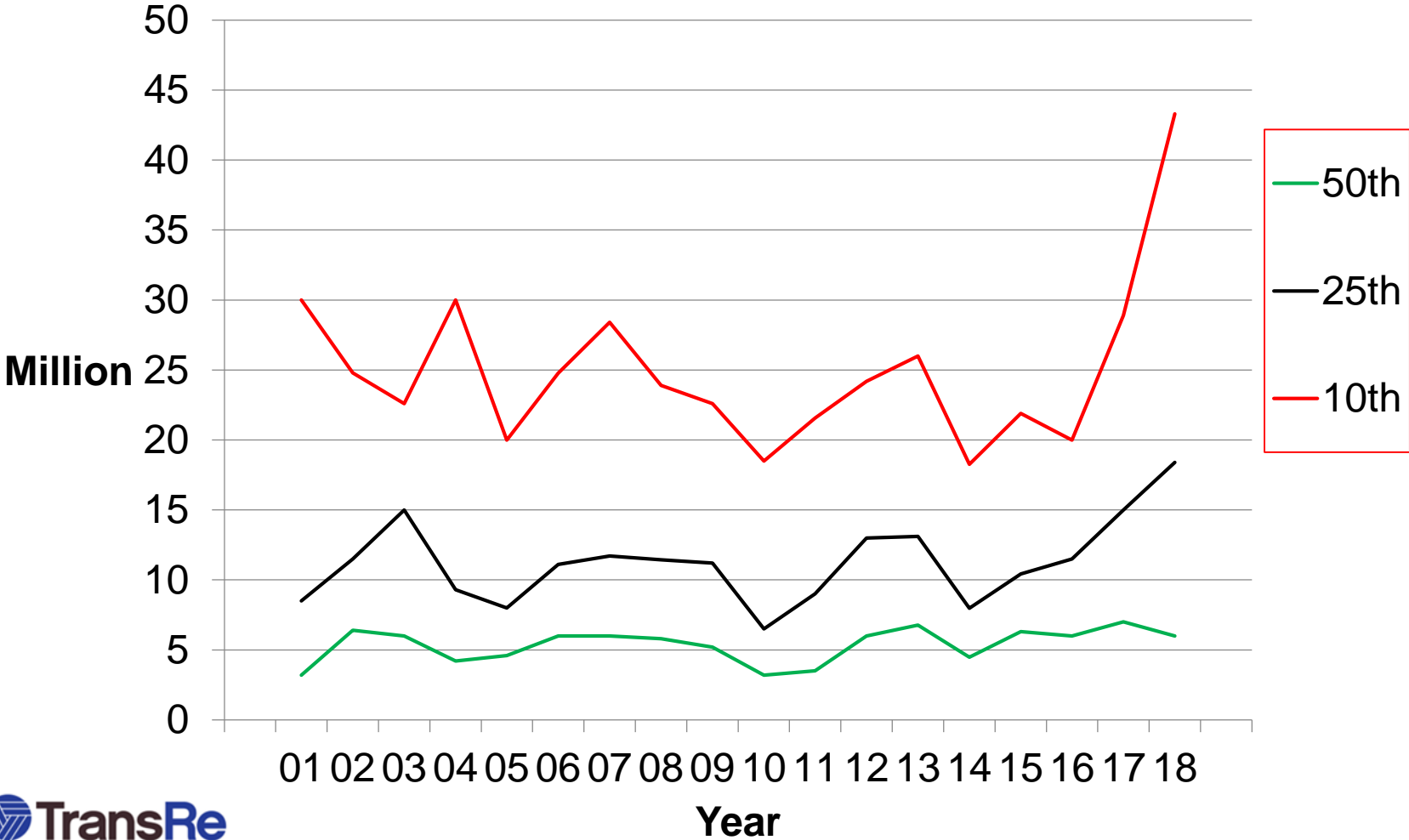
- Tradition has been that plaintiff develops the damages, and defense is not involved in those early stages of development
- Typically, defense is focused on challenging liability through standard of care or causation
- Common wisdom has been if we spend too much time on damages, it will undermine the standard of care or causation defenses



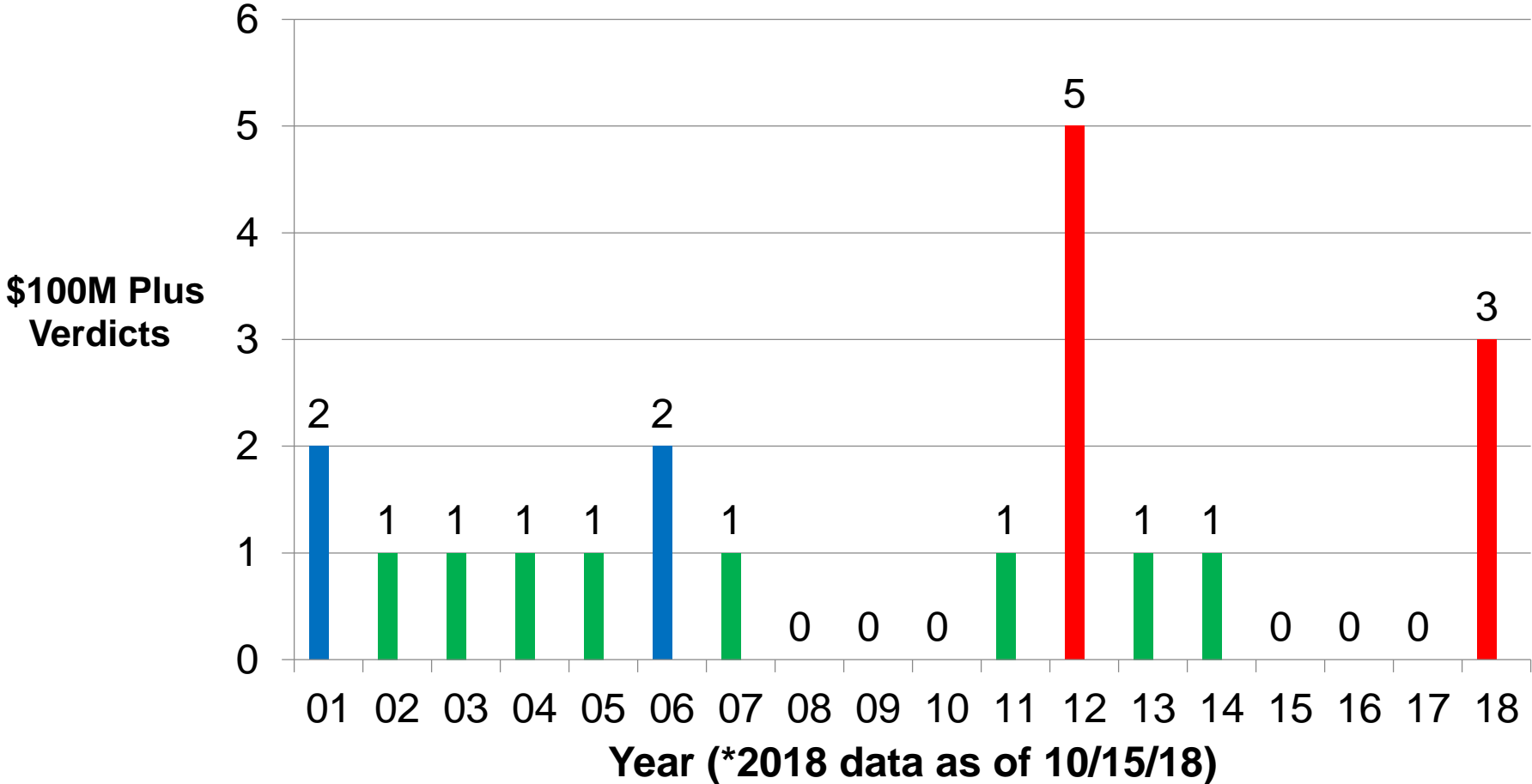
# AVERAGE TOP 50 MED MAL VERDICTS



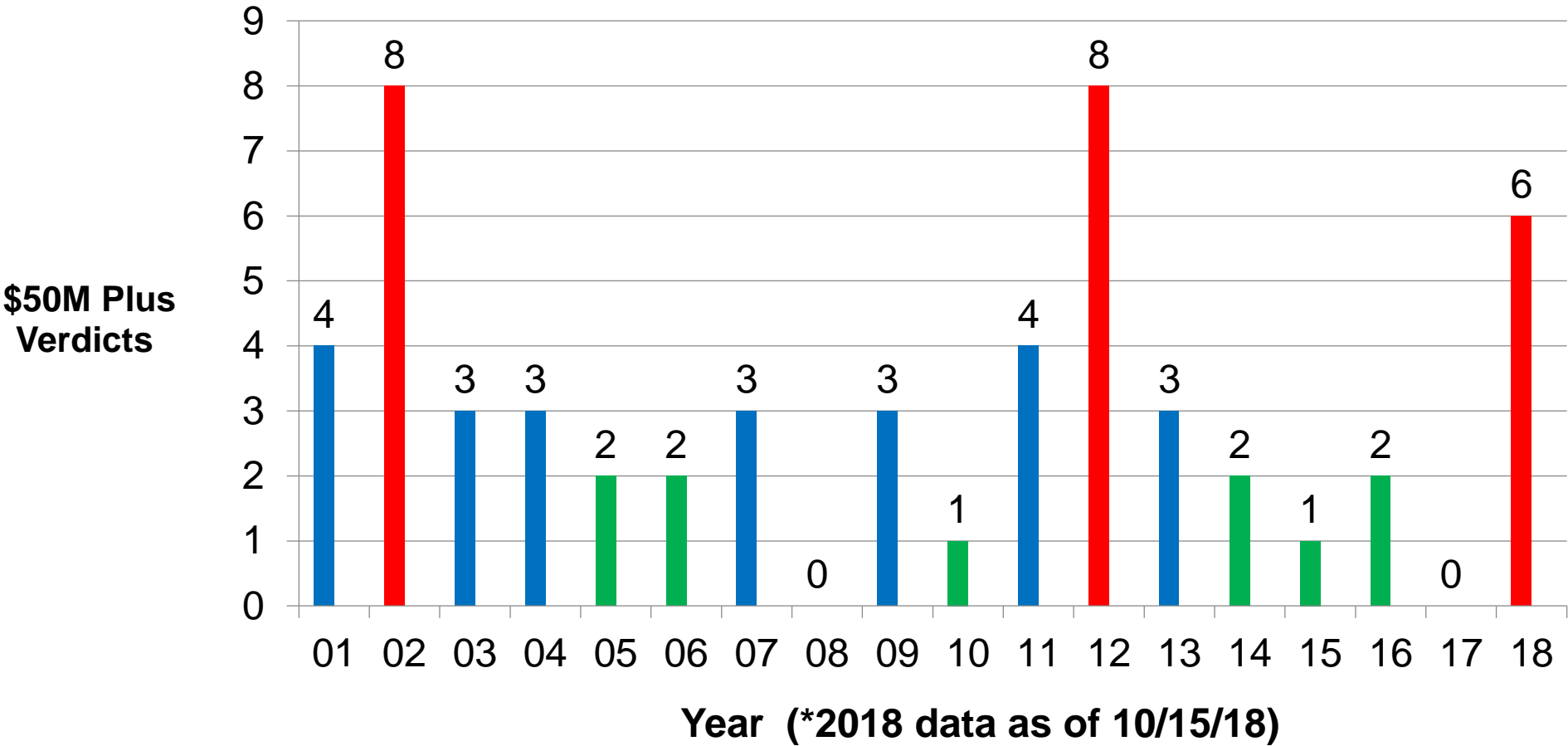
# LARGEST (10<sup>TH</sup>/25<sup>TH</sup>/50<sup>TH</sup>) VERDICTS, 2001-17



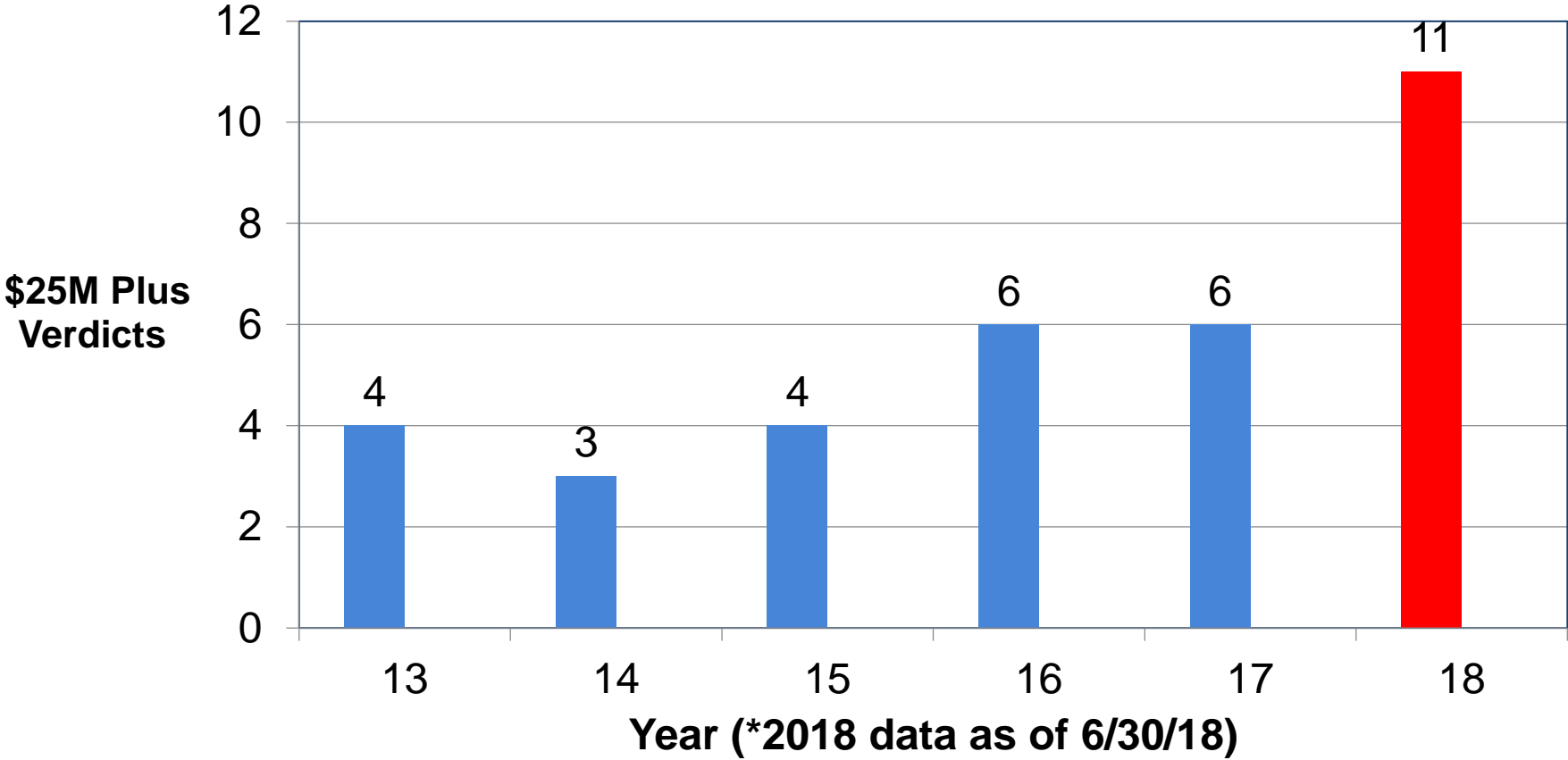
# \$100M+ VERDICTS, 2001-18



# \$50M+ VERDICTS, 2001-18

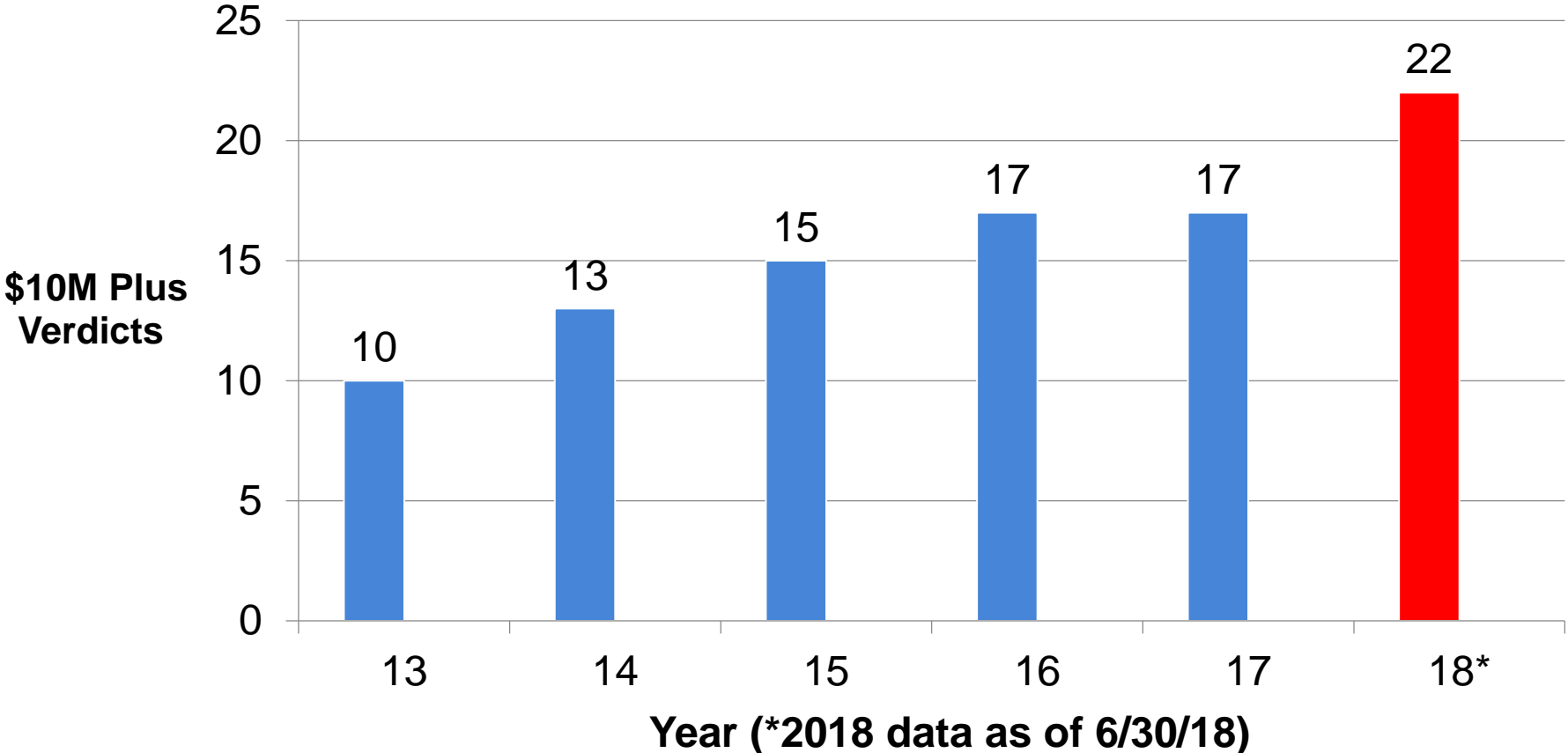


# \$25M+ VERDICTS, 1<sup>ST</sup> 6 MONTHS OF 2013-18

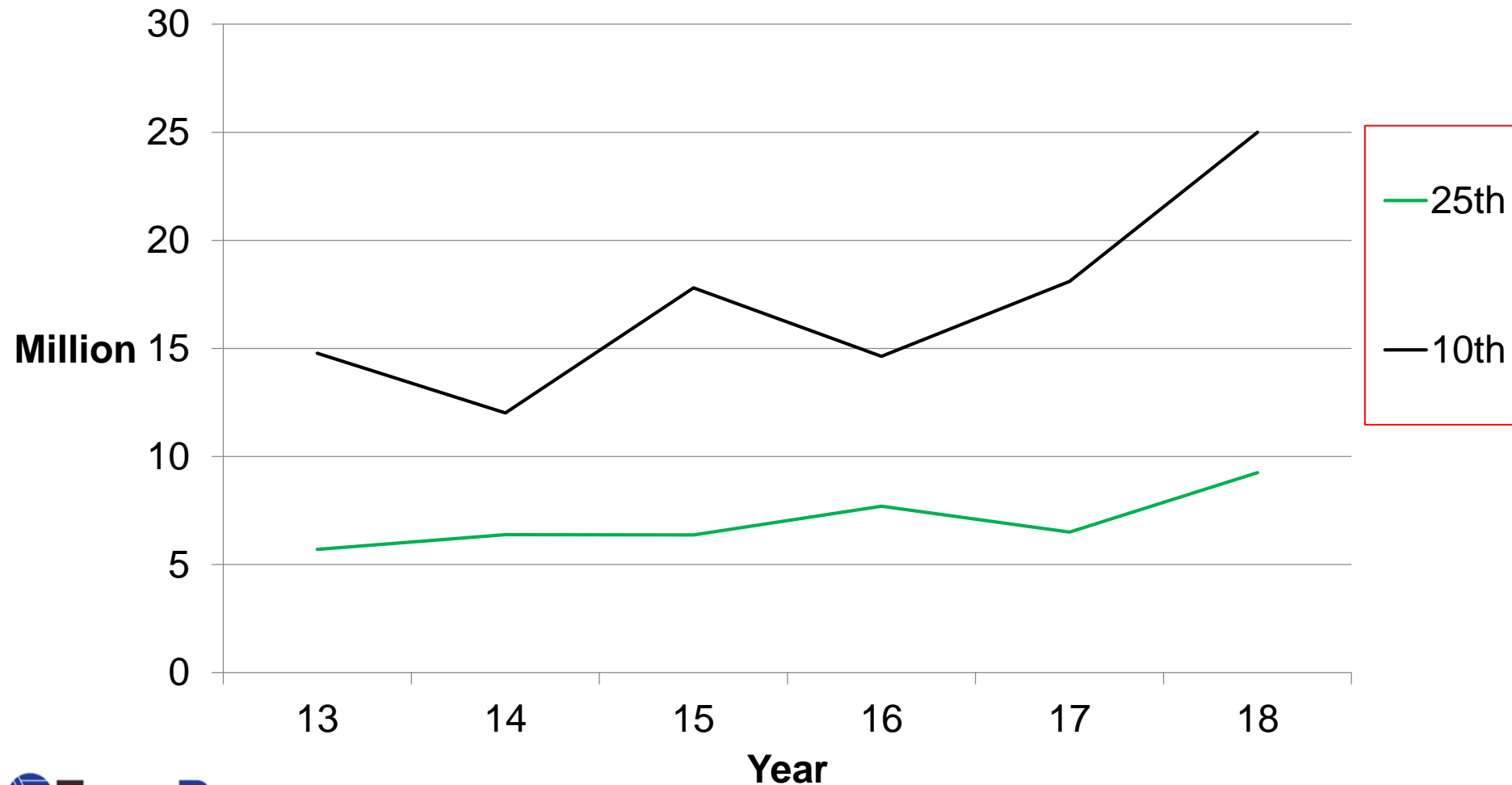




# \$10M+ VERDICTS, 1<sup>ST</sup> 6 MONTHS OF 2013-18

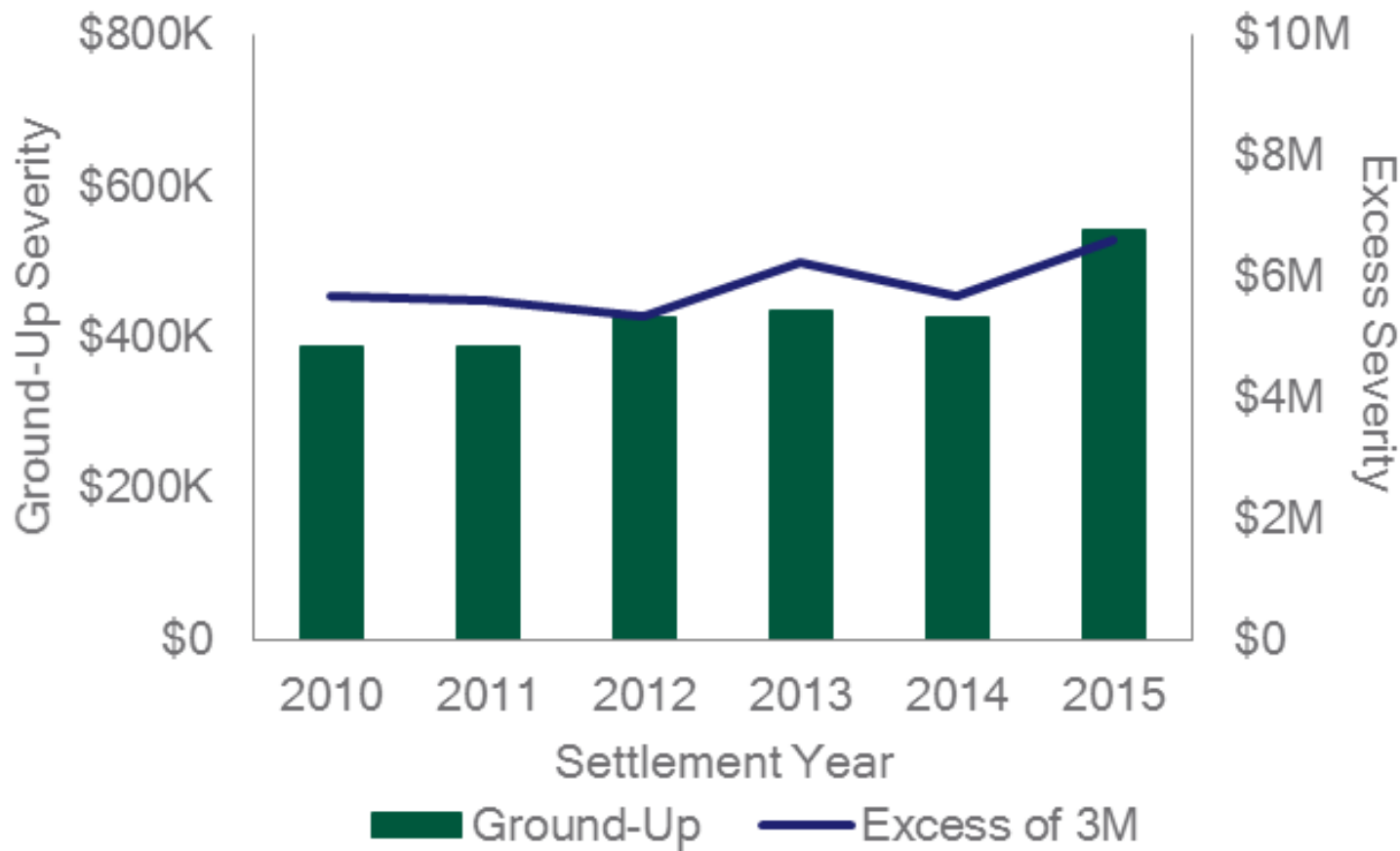


# 10<sup>TH</sup>/25<sup>TH</sup> LARGEST VERDICTS, 1<sup>ST</sup> 6 MONTHS, 2013-28



# Average Claim Severity by Settlement Year

## All Departments



# WHAT IS CAUSING THE INCREASE IN SEVERITY AND FREQUENCY?

- Well funded plaintiff attorneys
- Enhanced plaintiff attorney intranet and communication
- Publicity of large settlements and verdicts
- Third Party Liability Funding
- Plaintiff strategies- reptile
- Lifecare plans
- Settlement of co-defendants financing plaintiff case
- Complacent Claim Handlers, Complacent Defense Attorneys



# PROBLEMS

- Exaggerated damages are killing the system – Plaintiffs provide inflated numbers
- Economic damages are being wildly exaggerated



# TIME FOR A PARADIGM SHIFT?



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# TAKING BACK CONTROL

- While the plaintiff's strategy of setting value is clear, it is not inevitable
- Defendant has a role to play and with a focused strategy can be instrumental in setting the case value.



- **OUR PROGRAM IS DESIGNED TO CHALLENGE PLAINTIFF'S PROOF OF THEIR NUMBERS**
- **SHOW THE VALUE IN THE CASE**
- **CREATE THAT VALUE ABSENT PLAINTIFF'S NUMBER**
- **UTILIZE THAT HEAD START TO FACTOR INTO WHETHER TO SETTLE THE CASE (HOW MUCH) OR TRY IT**
- **HAVE A FIRM PLAN IN PLACE TO SETTLE OR TRY THE CASE**
- **TRY DEFENSIBLE CASES**
- **SETTLE CONCERNING CASES AT A "REALISTIC NUMBER" OR TRY IT OVER VALUE**
- **BE PREPARED TO GO THE DISTANCE**





- 1. DEVELOP EARLY RESOLUTION STRATEGY**
- 2. SHIFT OUR MINDSET TO EVALUATE EARLY, SET STRATEGY AND STAY ON THAT COURSE**
- 3. CHANGE THE STATUS QUO ON DEFINING DAMAGES AND NEGOTIATING**
- 4. WIN THE PSYCHOLOGICAL WAR OF VALUE AND RESOLUTION**
- 5. PLAN OF ACTION**

# 1. DEVELOP AN EARLY RESOLUTION STRATEGY

# DEVELOP AN EARLY RESOLUTION STRATEGY

- **Realistic and fair early review of case in 120 days**
- **Settlement or trial**
  - (See evaluation following)
- **Number and strategy stays in place unless drastic change**
  - must be a consistent truth teller
- **Plaintiff's are talking**



# RESOLUTION STRATEGY

## SETTLE OR TRY

### High defensibility - low and moderate severity

- Trial
- Stop funding the plaintiffs against us
- Clog the courts system forcing judges to return to their roles as gate keepers.

### High defensibility - high severity

- Determine risk tolerance number within 120 days and then if does not settle, TRIAL

# RESOLUTION STRATEGY

## SETTLE OR TRY

### High defensibility - high severity

- Determine risk tolerance number within 120 days and then if does not settle, TRIAL

### LOW or moderate defensibility - low, moderate, high severity

- Establish your anchor number and drive early settlement to it
- But try if number not right

# STAYING WITH THE VALUE

- **Have and opinion on defensibility**  
No 50/50
- **We are skilled in dealing with sympathy**
- **Purposeful evaluation ranges**  
not 1 to 30 million
- **Concise and logical evaluation reports**  
no more than 15 pages
- **Be aware of changing circumstance and reevaluate if needed**
- **However, absent change, manage the file based on the set value**
- **Including taking to trial if not in that range**
- **Trial**



# DEFENSE INDUSTRY RESPONSE

1. Look at the whole case including damages for settlement and trial
2. Mandate early evaluation including defense costs
3. Develop an Early Resolution strategy
4. Anchor the value of the case
5. Make Early offers
6. Uniform and consistent strategic approach to trial or settlement



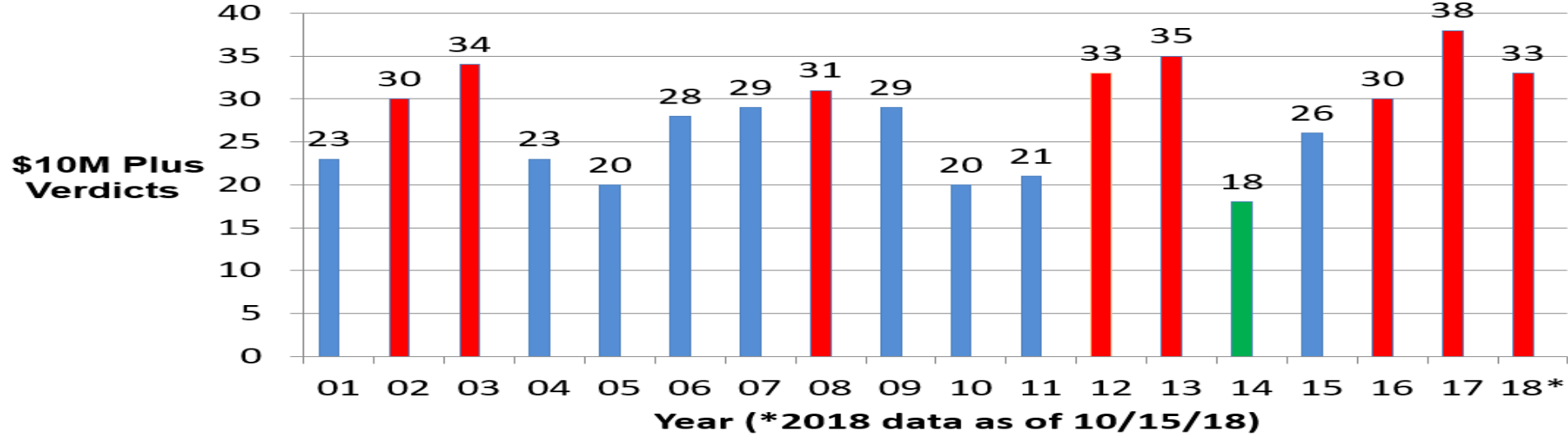
## 2. SHIFT OUR MINDSET TO EVALUATE EARLY, SET STRATEGY AND STAY ON THAT COURSE



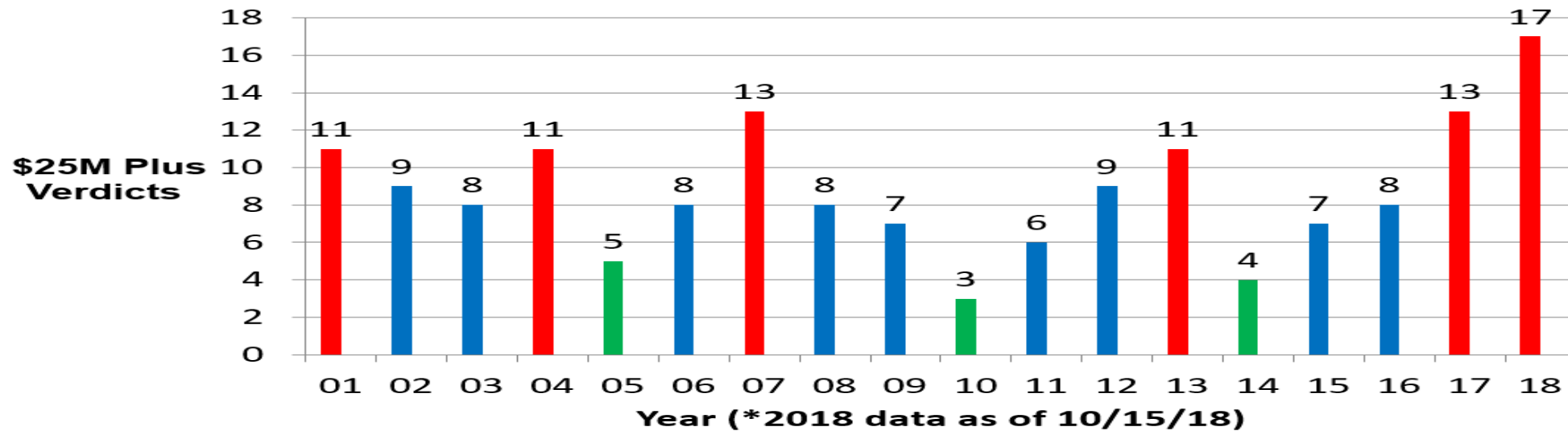


- 1. AGGRESSIVE EARLY EVALUATION**
- 2. SET RESOLUTION STRATEGY**
- 3. TEAM TO IMPLEMENT BY CLAIMS AND LEGAL**

## \$10M+ Verdicts, 2001-18



## \$25M+ Verdicts, 2001-18



# DEVELOP THE RIGHT TEAM

- **Local Counsel**
- **National Counsel**
- **Claims Focus**

# NATIONAL EXPOSURE TEAM

With a National Team, the focus is on a “team approach” to the defense of catastrophic injury cases

The program is designed to assure that these dangerous cases have the appropriate resources dedicated to them



# NATIONAL EXPOSURE TEAM

## National Counsel:

- Review the litigation file created by the local counsel, as well as the pertinent medical records, depositions, reports and other file materials
- Assist in the retention of experts, recommending additional areas of specialization or particular experts in germane fields
- Bring special expertise at dealing with plaintiff theories
  - Reptile Theory



# NATIONAL EXPOSURE TEAM

- Assist
- Evaluation of potential for liability
- Estimation of probable damages
- Devise strategies for successful and timely resolution of the litigation



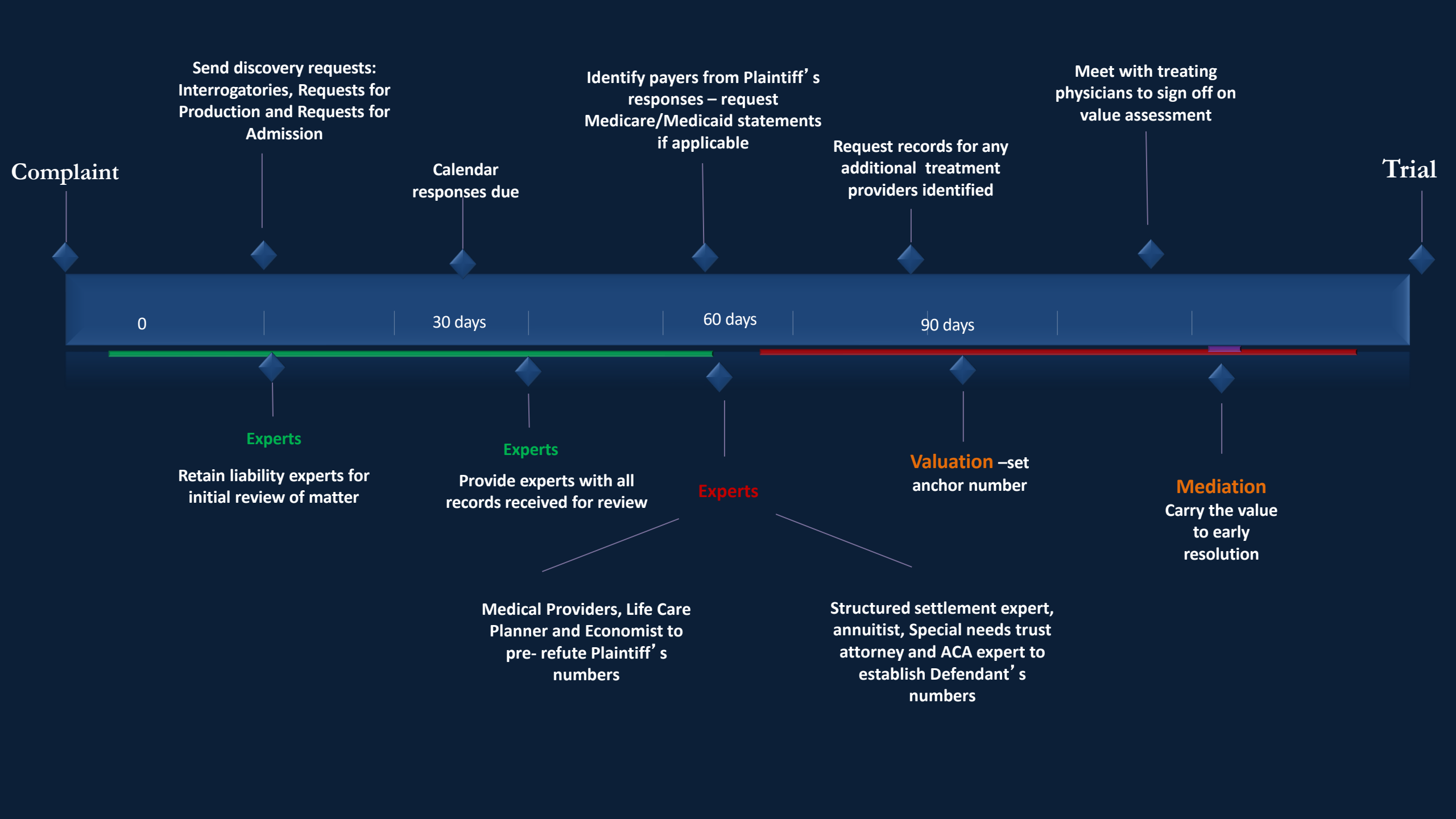
# 3. CHANGE THE STATUS QUO DEFINING DAMAGES AND NEGOTIATING

# CHANGE THE STATUS QUO DEFINING DAMAGES AND NEGOTIATING

- Do not wait for plaintiff
- Defense must set the value of the case from the beginning, regardless of liability
- Do this by propounding the right discovery, obtaining the right experts, and identifying the right areas where value will be challenged
- Must do this within the first 120 days of litigation







# RESEARCH STUDIES ON CONCESSION EFFECTS: EXAMINING LIABILITY AND DAMAGES

## Study 3: 776 mock jurors – Medical Malpractice Trial – 6 groups

- Low Plaintiff Demand (\$250k) or High Plaintiff Demand (\$5M);
- Defendant responses:
  - 1) Counter anchor of “no more than \$50,000”;
  - 2) Ignore Demand; argue only for no liability/no money;
  - 3) Attack demand as outrageous and show’s Plaintiff’s entire case is not credible.

## **Damages Findings:**

- For individual jurors, average damages jumped from \$225,765 to \$1,859,137 as the demand increased from \$250,000 to \$5 million
- Defense response made no difference on damages when the demand was \$250k
- When demand was \$5M, the defense counter anchor lowered damages by 41%

## **Liability Findings**

- High demand slightly increased defense verdicts (63.4% vs. 70.7%)
- Defense response made no difference on liability when the demand was \$5M (No concession effect)
- Defense attacks to credibility increased plaintiff verdicts when the demand was \$250k (backfired when plaintiff request perceived as reasonable)



**Jury studies show that when defendants produced no testimony contesting plaintiff's damage estimates, jurors felt they had no choice but to rely on the plaintiff's damages evidence**



# LOOK AT THE WHOLE CASE INCLUDING DAMAGES FOR SETTLEMENT AND TRIAL

- Obtain medical records and your own evaluation of need early
- Checklist of experts and discovery to provide the necessary information and accurately set the value
- Do this EARLY, through discovery and expert review
- Crucial to develop own number – do not rely on Plaintiff's calculations
- Factor in defensibility, Exposure and defense costs
- Factually based and supportable for post trial evaluation.
- Do this on an aggressive timeline



# DEFEND LIABILITY & DEVELOP THE VALUE

- 1) **What was plaintiff's Pre-event status/Pre-existing condition**
- 2) **Has plaintiff been taken care of well / Managed by real providers**
- 3) **What are the real costs since the event until the present - Actual costs vs. Billed**
- 4) **Show what collateral sources have been (trial/settlement)**
- 5) **Set the real value of the case early**
- 6) **Strategies for real future costs and supporting value**
  - a) Use ACA to show value
  - b) Special Needs Trust
  - c) Use annuity testimony to show value of money
  - d) Undermine the plaintiff proof by showing exaggerated future costs of care



# DEVELOPING THE VALUE

- **Undermine the plaintiff proof by showing exaggerated future costs of care**
- **Undermine the life care plan**
- **Using the Plaintiff's life care plan to establish your case**
- **Using the Plaintiff's economist to establish your case**
- **Using life expectancy to show real costs**
- **Plaintiff's created tool**



# 4. WIN THE PSYCHOLOGICAL WAR OF VALUE AND RESOLUTION

WOULD YOU PAY \$1,000 DOLLARS FOR A COAT?



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# MAKE THE 1<sup>ST</sup> OFFER OR NOT?

- In research by Kellogg faculty, they dug deep into the question of, "Should you make the first offer, or let the other person do it?"
- There is a widespread, almost unquestionable, assumption that it is wise and strategic to let the other person talk first - and that it is suicidal to make the first offer.
- Conversely, several research investigations show a strong and powerful positive effect of making the first offer.
- The negotiator who puts the first offer on the table has an advantage, other factors remaining constant.
- That means that if you and I have done equal preparation and have similar leverage points, you will have an advantage if you make the first offer.
- Opening offers also influence the offers that the other party (the opponent) makes.
- Meaning, if you open first, the other party's counteroffer is influenced by your offer - not good for them.



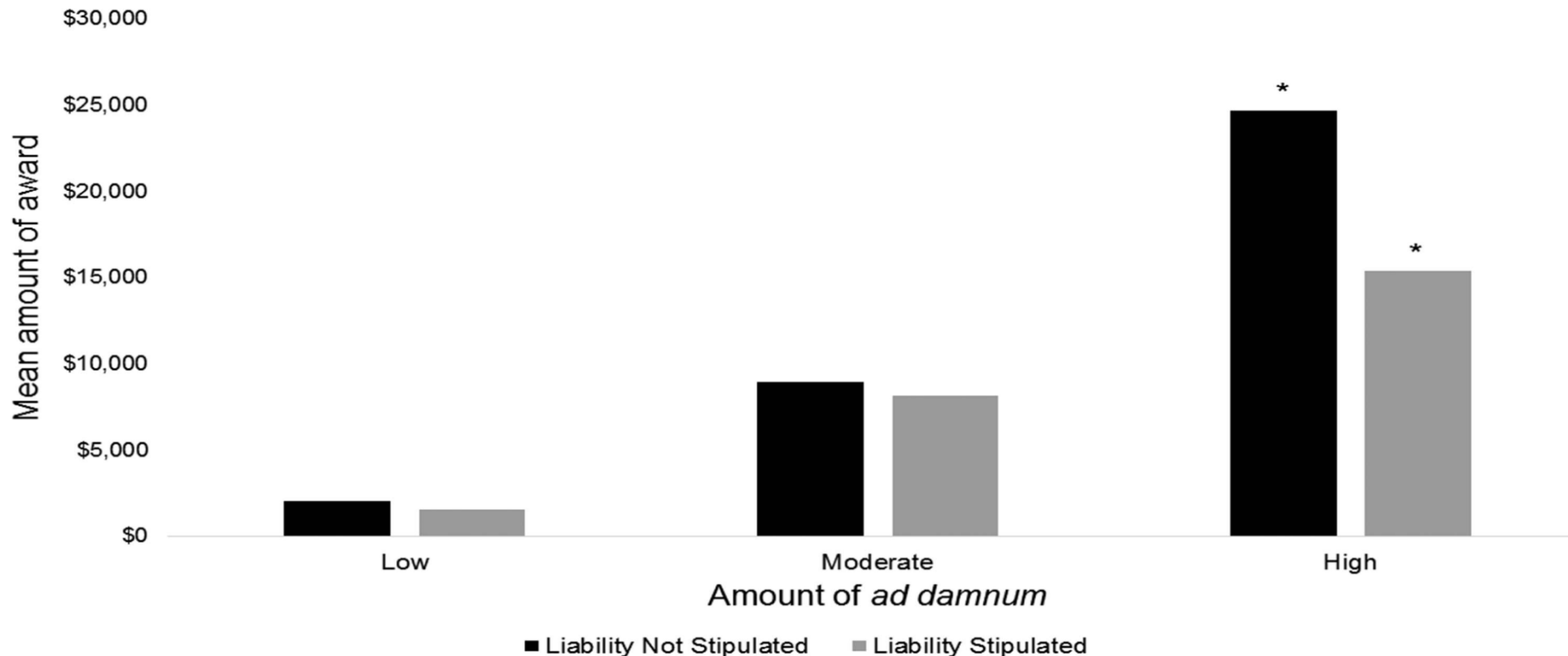
# EARLY RESOLUTION BASED ON ACCURATE VALUE NUMBER

- Data shows that resolution of a claim within 6 months and/or prior to the suit being filed can lead to a cost reduction of as much as 50%.
- Develop damages at beginning of case to establish a base line early.
- Stick to your value to send a message to Plaintiff attorneys.



# RESEARCH STUDIES ON THE IMPACT OF ANCHORING ON PERSONAL INJURY LAWSUITS

Study 1: 248 mock jurors – 3 levels of Plaintiff requests; No defense response



\*Bars marked by asterisks indicate a significant difference,  $p < .05$

# ADDITIONAL FINDINGS

- Anchoring effects persists even when anchors are extreme. One study tested demands ranging from \$100 to \$1 billion. Both the absurdly low and inordinately high demands produced anchoring effects.
- Within 31 actual audiotaped jury deliberations; there were 1,624 references to the attorney's recommendations – mentioned by 86% of the jurors.
- Anchors are strongest when supported by logic: (e.g., X times the amount of medicals; X amount for each year of defendant's poor conduct)
- Even jurors who criticized the plaintiff anchors as too high or outrageous use the number as a starting point (e.g., "I'll give them half.")
- Some attorneys worry juries will interpret an alternative response as a concession of liability at worst, or a damages floor at best.



# RESEARCH STUDIES ON THE IMPACT OF ANCHORING ON PERSONAL INJURY LAWSUITS

- Study 2: 265 mock jurors
- Four groups:
  - 1. Contested liability and offered alternative damages;
  - 2. Stipulated liability and offered alternatives damages;
  - 3. Contested liability and provided no suggestion for damages;
  - 4. Stipulated liability and provided no suggestion for damages
- **Awards lower – by 43% – when the defense offered an alternative damages amount (i.e., anchoring and adjustment heuristics)**



**In cases where there is not a credible defense, average damage awards were also 22% lower when defendant stipulated to liability – though all found liability**

# ANCHOR THE VALUE OF THE CASE

- **Make the first offer, do not ask for a demand**
- **When you have a number, be prepared to offer it, (Appropriately and strategically)**
- **Before mediation - negotiate based on supportable value concepts**
- **Only mediate to close final gaps, do not fall into mediating every case**



# PRESENTING ACTUAL VALUE AT MEDIATION

## Settlement presentations

At every mediation we should prepare and be able to present, if strategically advantageous, the following models of future medical expenses, along with annuity costs for those models

- (1) Plaintiff's Life Care Plan
- (2) Plaintiff's Life Care Plan with Insurance
- (3) Defendant's Life Care Plan
- (4) Defendant's Life Care Plan with Insurance
- (5) Future costs of care under Medicare/Medicaid





# 5. PLAN OF ACTION

# PLAN OF ACTION

1. **Develop damage information for the fact witness, including parties, employers and friends**
  - a) Depositions
    - i. Primary care giver
    - ii. Immediate family
    - iii. Rehab neuro specialists
  - b) Discovery
    - i. Itemized billing
    - ii. Lien records
    - iii. Insurance
    - iv. Agreements with 3<sup>rd</sup> parties
2. **Develop a true record of actual costs of damages**
  - a) Real v. Billed
  - b) Paid v. Real
  - c) Collateral Sources
  - d) Other Sources



# PLAN OF ACTION

3. **Develop realistic care plans**
  - a) Real world what do they need
  - b) Real world costs of the same
4. **Aggressive motion on collateral source issues**
  - a) Real costs
  - b) Collateral source expansion
  - c) ACA use
  - d) Medicaid, Medicare; applications and payments
  - e) Social Security Benefits; SSD applications
  - f) Charitable benefits
  - g) Coverage through spouse or others
  - h) Follow up with requests for admissions
5. **Aggressively use vocational and rehab experts**
  - a) What can they do
  - b) What are the mitigating opportunities
  - c) Make the plaintiff strong and capable



# PLAN OF ACTION

6. **Aggressively look at co-morbidities**
  - a) What was their baseline
  - b) What would it have cost to keep them at baseline
  - c) What did the injury add on?
7. **Aggressively pursue life expectancy**
  - a) Set the ceiling
  - b) Use proactive review to lower
  - c) Annuities
8. **Manage money**
  - a) Show how money is really managed
    - i. Financial planning experts
    - ii. Trust account experts
    - iii. Annuities
9. **Establish cost-of-living prior to injury**
  - a) Use of government statistics



# THANK YOU

John E. Hall, Jr, Esq.  
[jhall@hallboothsmith.com](mailto:jhall@hallboothsmith.com)

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[rfarlow@berkleymed.com](mailto:rfarlow@berkleymed.com)

Richard Henderson  
[rhenderson@transre.com](mailto:rhenderson@transre.com)