

Reserving For Employment Practices Liability (EPL)

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Lisa G. Chanzit, FCAS, MAAA, ARM

Tillinghast – Towers Perrin

EPL – Definition

Liability that may arise out of:

- refusal to employ a person
- termination of that person's employment
- employment-related practices, policies, acts or omissions, such as:
 - coercion
 - demotion
 - evaluation
 - reassignment
 - discipline
 - defamation
 - harassment
 - humiliation, or
 - discrimination directed toward that person.

EPL – Causes of Action

Per Towers-Perrin's D&O survey:

- “Wrongful termination” is the most often reported claim issue
- Strong showings by “discrimination” & “harassment/humiliation”

Harassment can either be:

- quid pro quo, or
- hostile work environment

Employers liable for actions of supervisors even if not aware of harassment
- “negligent management”

EPL – Protected Classes

■ Federal Protected Classes

- gender

- race/color

- national origin

- religion/creed

- age

- disability

 - can be psychological as well as physical, especially if mental disability causes physical manifestations, or limits “major life activity”

- whistleblowers

■ Extends to marriage/association

■ Individual states may have more protected classes and apply limits to smaller organizations

EPL – Damages

- Back (and future) pay
- Hiring/reinstatement/promotion/”reasonable” accommodation
- Mental anguish/emotional distress
- Punitive damages (1/3 of plaintiff awards; 75% of these awards)
- Court costs/expert fees
- Other \$ loss
- Negative publicity

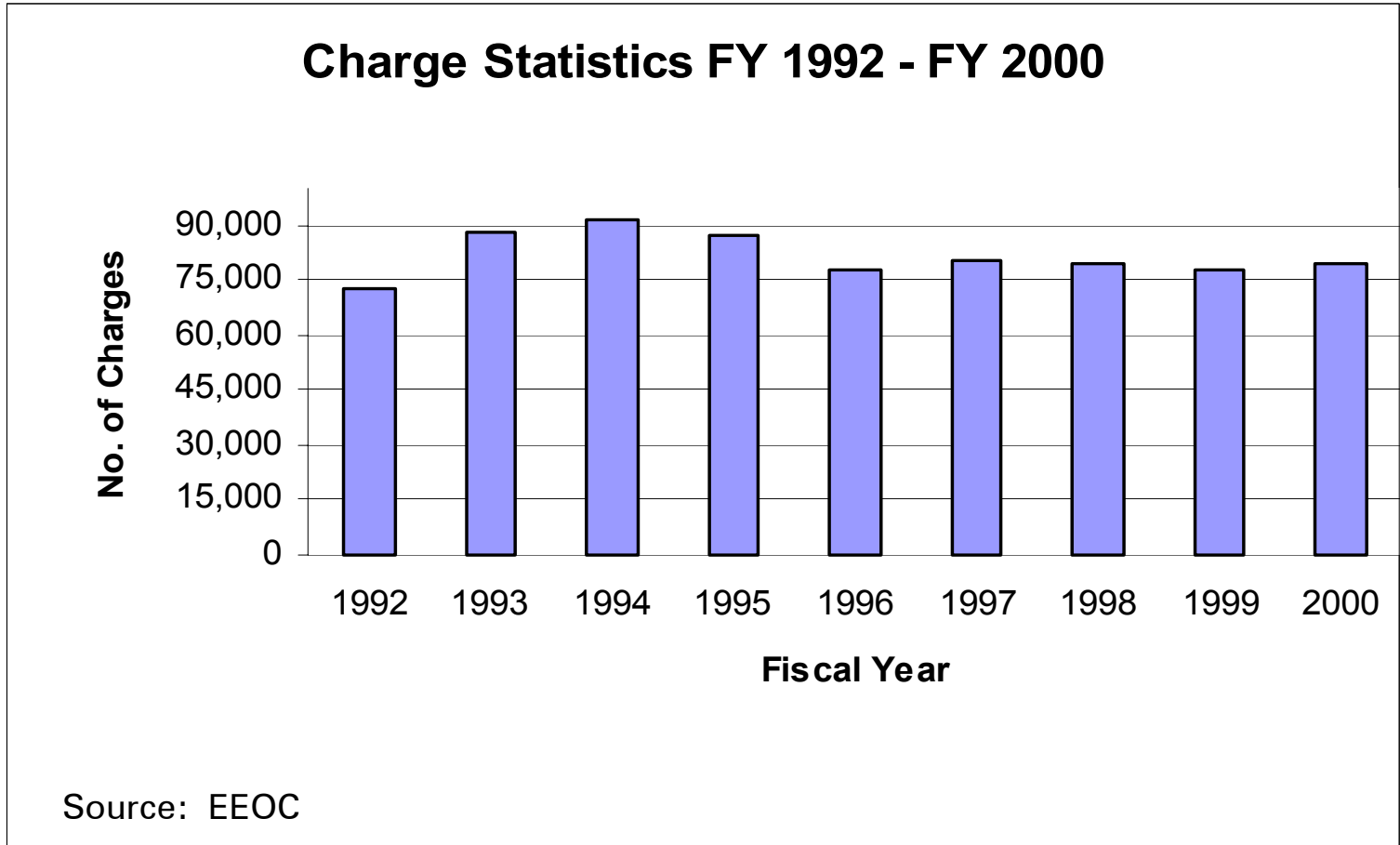
Defense costs are substantial, even when no damages are paid
May have to pay plaintiff’s attorney’s fees, court costs, etc.

Trends & Developments in EPL

■ Frequency Levels and Trends

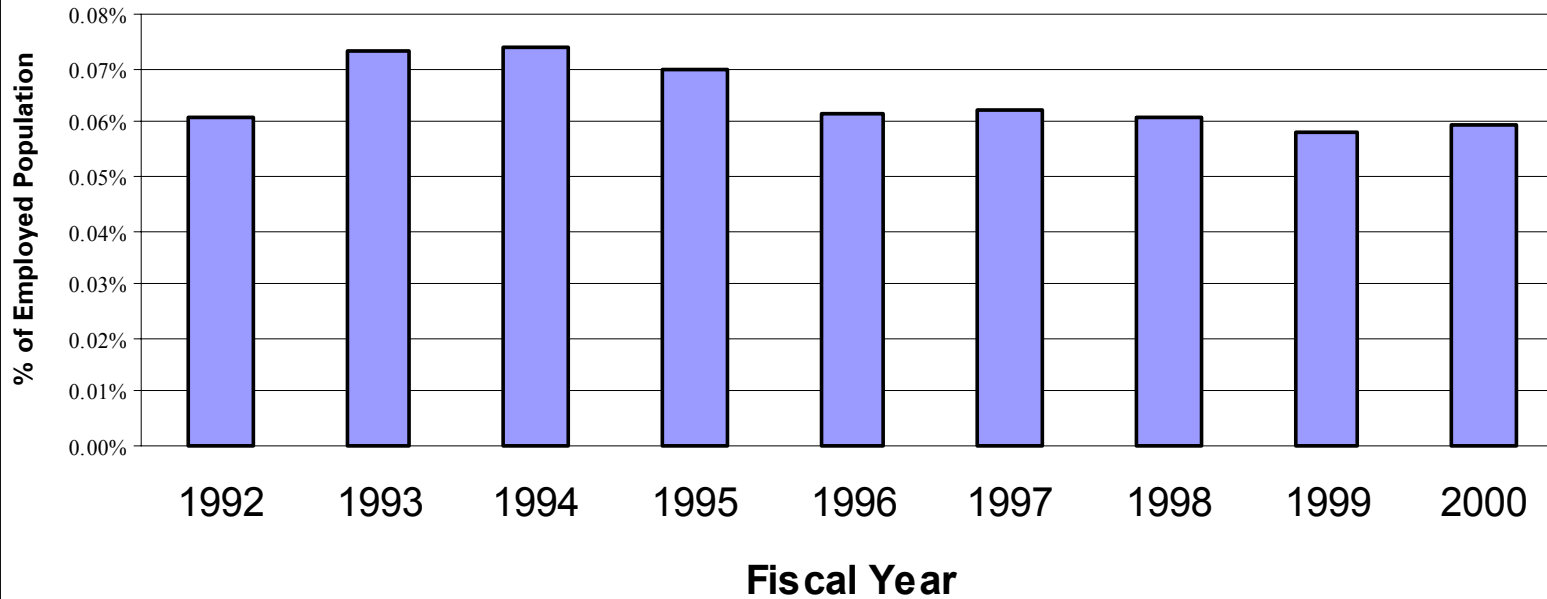
- frequency estimates range from almost 1 in 1,000 employees to about 5-6.5 per 1000 employees (may be variations in claim definition)
- 400% increase over past 20 years
- frequency varies by industry, state, size of firm, demographics of firm
- ADA claims increased dramatically in early 90's - over 90% won by defense
- according to EEOC statistics, frequency seems to have leveled off since 1997
- however, frequency may pick up again due to aging workforce, increase in whistleblower claims, impact of Internet

EEOC Frequency Statistics



EEOC Frequency Statistics

Charges as a Percentage of Employed Population FY 1992 - FY 2000



Source: EEOC

EPL: Frequency by Cause of Action

- Race
- Sex
- National Origin
- Age
- Disability
- Retaliation
- Harassment

Variables Affecting EPL Frequency

- Size
- Industry Sector
- State
- Stability of corporate structure
- Policies, procedures, environment

Trends & Developments in EPL

■ Severity Levels and Trends

- need to distinguish between single claimant claims and class action suits
- for single claimants, defense costs average \$50,000 to \$100,000 per claim
- for single claimants, monetary damages will be paid out in only 1/3 to 1/2 of the cases, also with a \$50,000 to \$100,000 average
- for class actions, damages alone have run to over \$500 million so far (but frequency is rare)
- average severity trends have leveled off of late for damages, but defense costs are trending much higher than inflation
- severity will vary with loss control practices
- severity for class actions is much higher for large organizations

Large EPL Class Action Settlements/Verdicts

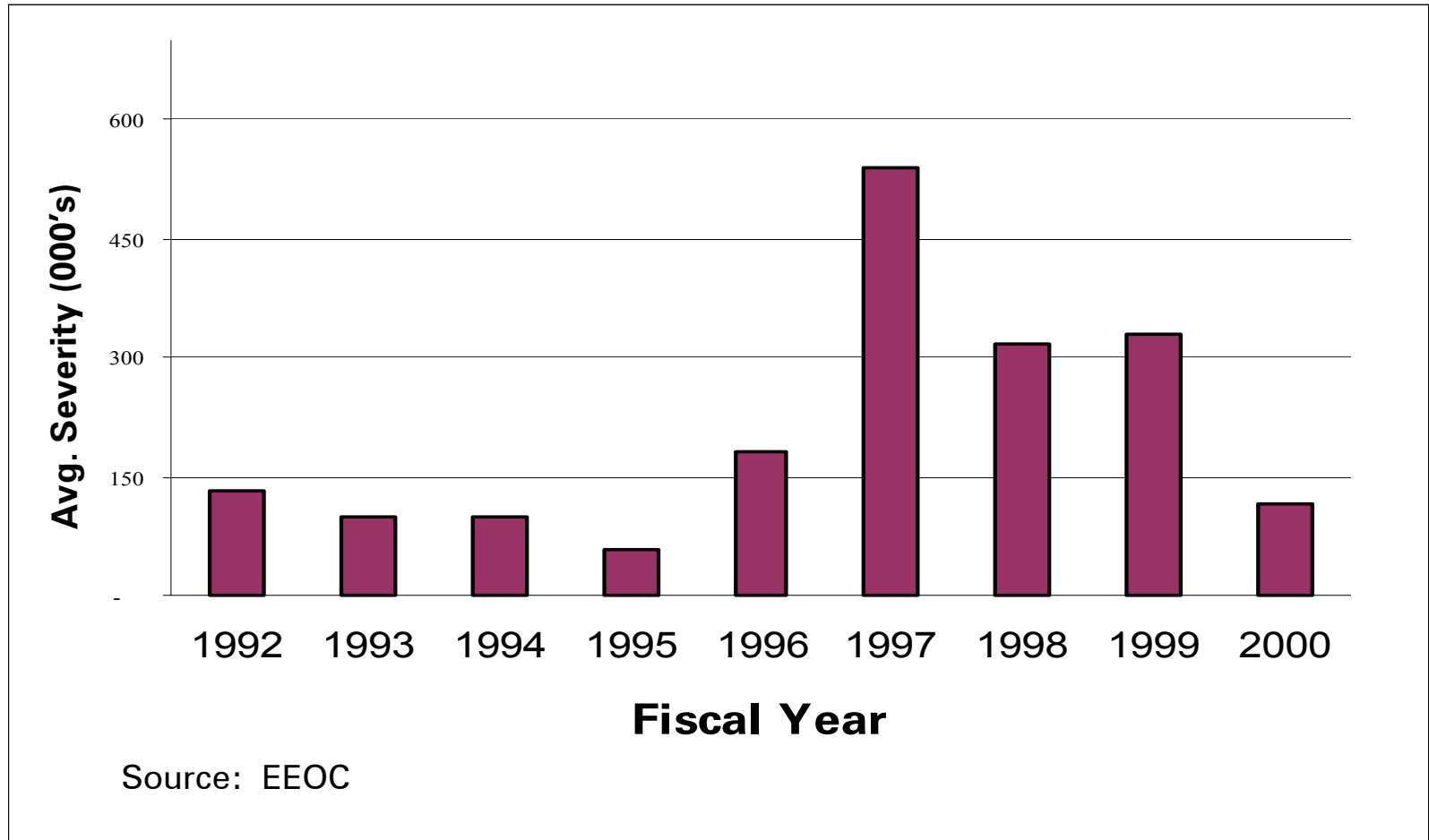
- USIA (Vof A) - \$508,000,000 - sex discrimination (3/00)
- Texaco - \$176,000,000 - race discrimination (3/97)
- State Farm - \$157,000,000 - sex discrimination (4/92)
- Coca-Cola - \$156,000,000 - race discrimination (2000)
- Interstate Bakeries - \$126,500,000 - race discrimination (8/00)
- Lucky Stores - \$107,250,000 - sex discrimination (12/93)
- Shoney's - \$105,000,000 - race discrimination (11/92)

Sources: Kaufman, Borgeest & Ryan, Tillinghast – Towers Perrin

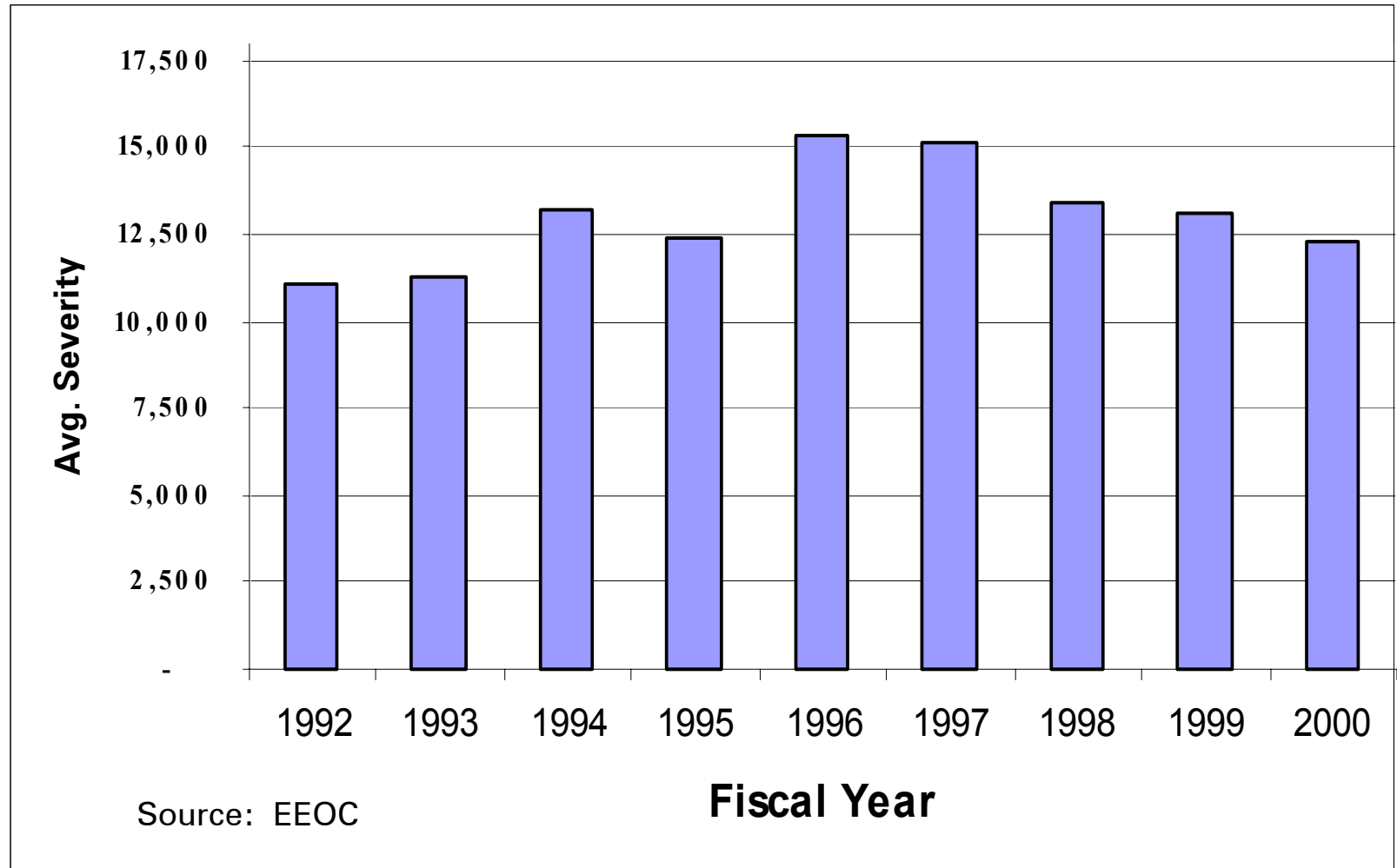
EPL Severity

- Defense costs over 50% of measurable costs
- Defense cost severity:
 - increasing complexity of claims
 - increasingly specialized defense expertise
 - increasing number of hours to defend
 - increasing hourly rates of attorneys

Average Monetary Benefit per Direct Suit or Intervention

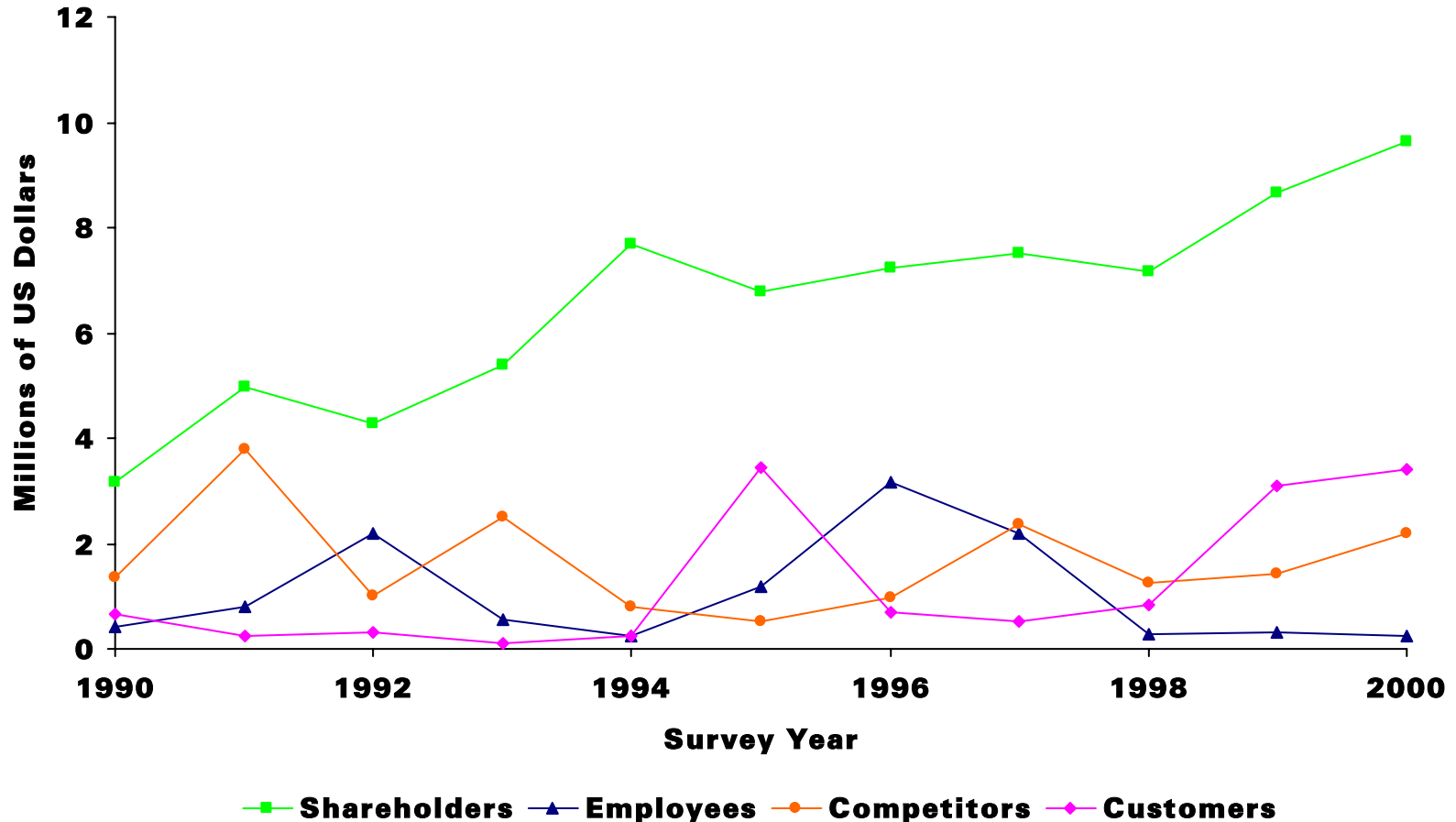


Average Monetary Benefits per Merit Resolution



Directors & Officers Liability Survey

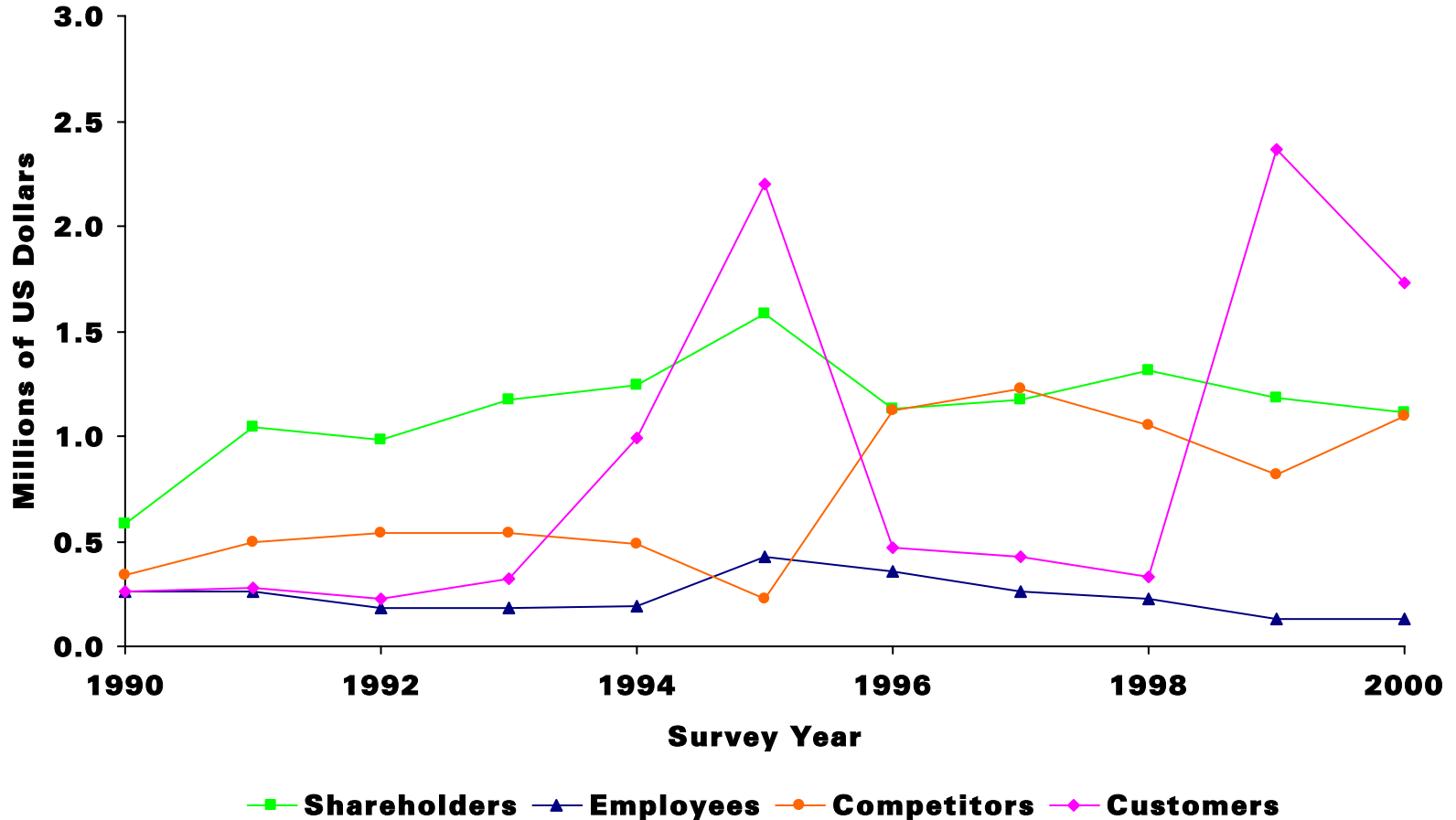
Average Indemnity Severity by Claimant



Note: Excludes claims closed w/o payment

Directors & Officers Liability Survey

Average Defense Severity by Claimant



Note: Excludes claims closed w/o payment

Future Trends

- Retaliation (“whistleblower”) claims
- Secondary claims for slander/defamation
- Aging workforce
- Internet
- Non-traditional types of workers
- EEOC rulings/guidance
- Other?