

## What A&C Said/Did BEFORE Sherman Was Awarded ElectricCo Contract

VS.

## What A&C Said/Did AFTER Sherman Was Awarded ElectricCo Contract

- ▶ A&C knew Smith was going to Sherman — **BUT DIDN'T CARE**
- ▶ A&C gave Smith a release from his non-compete — **ENABLING HIM TO COMPETE**
- ▶ A&C learned that Sherman was, in fact, developing a competing product line — **BUT DIDN'T RAISE THE ISSUE WITH SHERMAN**
- ▶ A&C secured a sample of the competing Sherman product but simply put it on the shelf — **AND NEVER ASSERTED THE DEVELOPMENT WAS TOO QUICK**
- ▶ A&C knew that Sherman was selling competing products to ElectricCo — **BUT DID NOTHING**
- ▶ A&C knew that Sherman was bidding on the ElectricCo contract — **BUT DID NOTHING**
- ▶ A&C decided not to negotiate in good faith with ElectricCo — **DESPITE COMPETITION FROM SHERMAN**

- ▶ A&C alleges **EVERYTHING** about the products is secret and protectable
- ▶ A&C alleges it should have taken Sherman **5-7 YEARS** to develop a competing product line

# Y Connector Product Differences

**28 Dimensions Are Different** than those on the RubberCo Drawings

	SHERMAN	RUBBERCO	COMPARISON		SHERMAN	RUBBERCO	COMPARISON
1	2.510" ± .002"	2.515" ± .015"	DIFFERENT	15	3.688" ± .015"	3.712" ± .015"	DIFFERENT
2	0.265" ± .030"	.248" ± .036"	DIFFERENT	16	0.325" ± .015"	0.313" ± .010"	DIFFERENT
3	0.060" ± .016"	.080" max	DIFFERENT	17	2.266" ± .015"	2.000" ± .010"	DIFFERENT
4	1.933" ± .035"	1.940" ± .010"	DIFFERENT	18	2.500" ± .015"	2.250" ± .050" **	DIFFERENT
5	1.000" ± .016"	1.000" to 1.062" ± .032"	DIFFERENT	19	3.750" ± .015"	3.500" ± .020"	DIFFERENT
6	1.031" ± .010"	1.030" ± .010"	DIFFERENT	20	1/8"R (0.125") ± .015"	0.312" ± .010"	DIFFERENT
7	20.86 degrees	22.5 ± 2 degrees	DIFFERENT	21	0.064" ± .015"	0.125" ± .015"	DIFFERENT
8	5/8" (.625") ± .016"	.500" ± .032"	DIFFERENT	22	0.950" ± .015"	0.937" ± .010"	DIFFERENT
9	3/16" (.188") ± .016"	.125" ± .032"	DIFFERENT	23	1/8"R (0.125") ± .015"	0.062" ± .010"	DIFFERENT
10	6.938" ± .015"	6.940"	DIFFERENT	24	1.375" ± .015"	1.400" ± .010"	DIFFERENT
11	13.875" ± .030"	13.625" ± .010"	DIFFERENT	25	0.125" ± .015"	0.156" ± .010"	DIFFERENT
12	4.285" ± .010"	4.282" ± .005"	DIFFERENT	26	1.188" ± .015"	1.187" ± .010"	DIFFERENT
13	7.973" ± .015"	7.994" ± .025" **	DIFFERENT	27	1.438" ± .015"	1.437" ± .010"	DIFFERENT
14	4.285" ± .015"	4.282" ± .010"	DIFFERENT				



***Four Factors  
to Consider in  
Assessing Damages  
When Allegedly  
Misappropriated  
Information Was  
NOT a Trade Secret***

*Link Co. Inc. v. Fujitsu Ltd., 230 F. Supp. 2d 492 (SDNY 2002)*

“(1) The time spent developing the information,  
(2) the money invested,  
(3) the labor invested, and  
(4) a reasonable portion of the expected  
profitability of the final product that  
incorporates the misappropriated  
information, measured at the time of a  
hypothetical negotiation for the sale  
or licensing of the property....”

***Four Factors  
to Consider in  
Assessing Damages  
When Allegedly  
Misappropriated  
Information Was  
NOT a Trade Secret***

*Link Co. Inc. v. Fujitsu Ltd., 230 F. Supp. 2d 492 (SDNY 2002)*

“(1) The time spent developing the information,  
(2) the money invested,  
(3) the labor invested, and  
(4) a reasonable portion of the expected  
profitability of the final product that  
incorporates the misappropriated  
information, measured at the time of a  
hypothetical negotiation for the sale  
or licensing of the property....”

***IN ADDITION, Plaintiff’s actual damages must  
be “DIRECTLY ATTRIBUTABLE to the unfair  
acts of the Defendant” and the evidence of  
such losses “MUST NOT BE SPECULATIVE.”***

***Examples of  
Factors, Other  
Than the Alleged  
Misappropriation,  
That May  
Contribute to  
Profits Earned***

▶ ***Reputation***

▶ ***Service options***

▶ ***Pricing***

▶ ***Advertising and marketing***

▶ ***Quality of personnel***



**Factors That Influenced ElectricCo to Award the Supply Agreement to Sherman**

FACTOR	INFLUENCED ELECTRICCO'S DECISION
▶ <b>Reputation</b>	<input checked="" type="checkbox"/> Sherman had an excellent reputation with ElectricCo.
▶ <b>Service options</b>	<input checked="" type="checkbox"/> Sherman offered cross-docking services for <b>FREE</b> — <b>A&amp;C REFUSED to match Sherman's offer.</b>
▶ <b>Pricing</b>	<input checked="" type="checkbox"/> Sherman offered competitive pricing — <b>A&amp;C REFUSED TO REDUCE ITS PRICES.</b>
▶ <b>Quality of personnel</b>	<input checked="" type="checkbox"/> Sherman had an experienced and capable management team.

## Many Notable Technological Developments Were Achieved in Less than Five Years

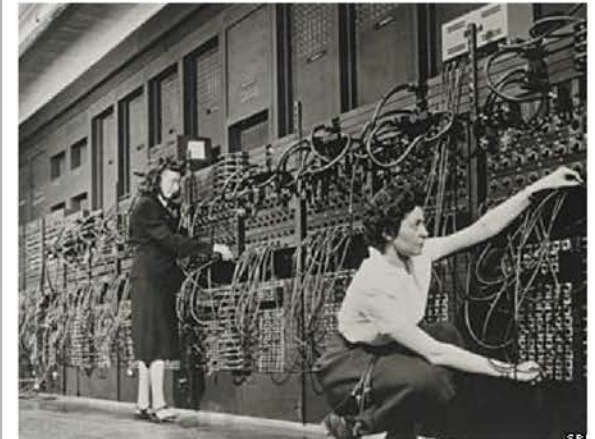
**B-17 BOMBER: LESS THAN 1 YEAR**



**USS MISSOURI: LESS THAN 3 YEARS**



**ENIAC: APPROXIMATELY 2.5 YEARS**



**1ST MANNED EARTH ORBIT: 1 YEAR**



**MICROWAVE OVEN: LESS THAN 2 YEARS**



**IPOD: 6 MONTHS**



# ***The Manufacture of Sherman's Products Was Based on Technology that Was Publicly Known for Several Decades***

**A DEVELOPMENT PERIOD OF 5 TO 7 YEARS MAKES NO SENSE**

**SLEEVE**



**Y CONNECTOR**



**H CONNECTOR**



**ELBOW**





# Industry Experts Say That A&C's Products Could Be Reverse Engineered Within 1 Year

## INDUSTRY EXPERTS

### PHIL SIMMS



- **25 years experience** in UEC industry
- Reverse engineered A&C elbow **in 12 months**

*Simms Exp. Rep. at ¶ 50; Simms Supp. Exp. Rep., Pg. 31; Simms 12/13/05 Hr. Tr. 3: 13-16*

### CRIS CARTER



- **40 years experience** in UEC industry
- **About a year** to reverse engineer products

*Carter 1/13/06 Hr. Tr. 95: 17-19; 203: 5-25*

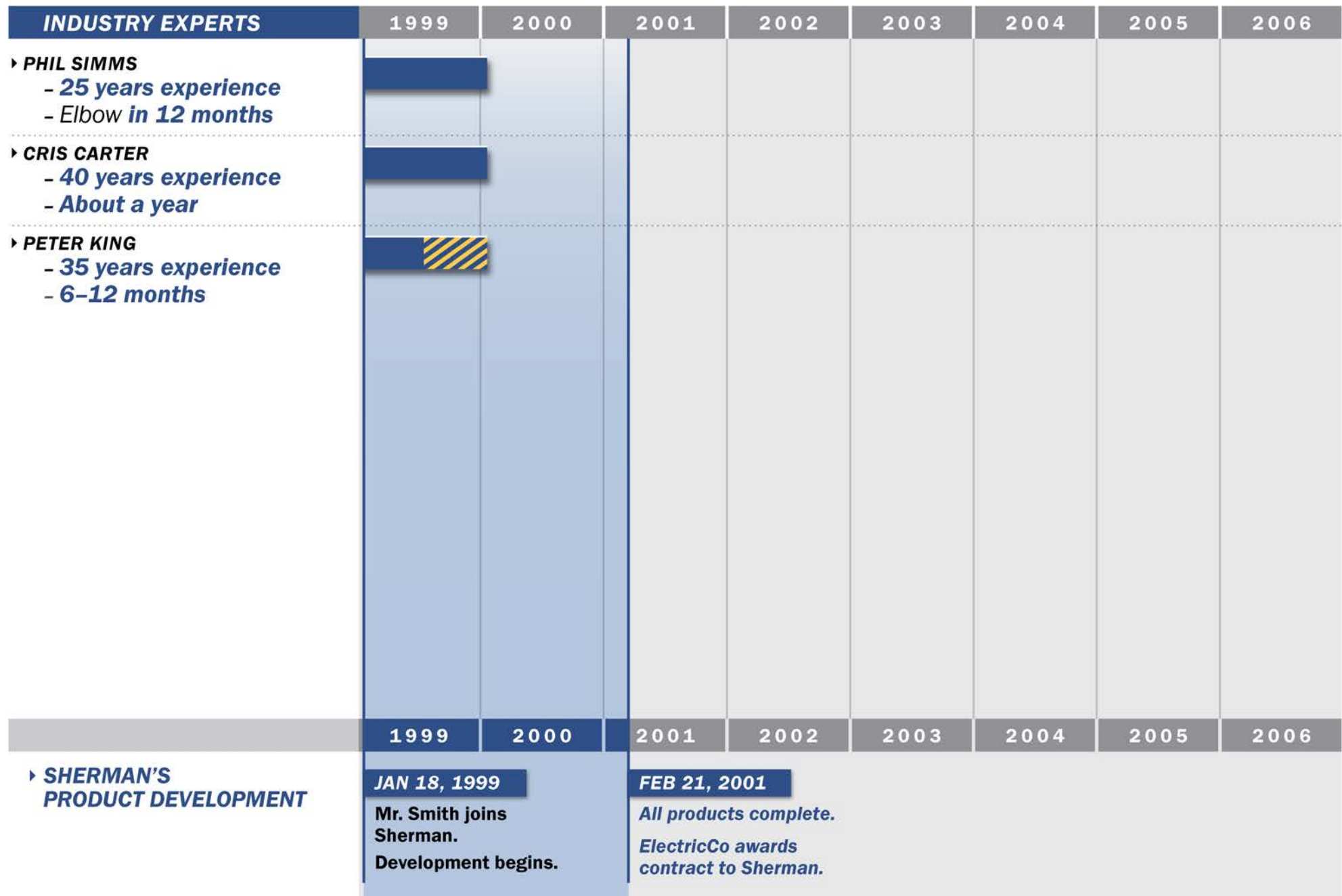
### PETER KING



- **35 years experience** in UEC industry
- **6-12 months** to reverse engineer products

*King Exp. Rep. at ¶ 59;  
King 12/13/05 Hr. Tr. 117: 8-11*

## Industry Experts Could Have Reverse Engineered A&C's Products Sooner





# A&C Admits That Its Products Can Be Reverse Engineered

## INDUSTRY EXPERTS

### PHIL SIMMS



- **25 years experience** in UEC industry
- Reverse engineered A&C elbow **in 12 months**

Simms Exp. Rep. at ¶ 50; Simms Supp. Exp. Rep., Pg. 31; Simms 12/13/05 Hr. Tr. 3: 13-16

### CRIS CARTER



- **40 years experience** in UEC industry
- **About a year** to reverse engineer products

Carter 1/13/06 Hr. Tr. 95: 17-19; 203: 5-25

### PETER KING



- **35 years experience** in UEC industry
- **6-12 months** to reverse engineer products

King Exp. Rep. at ¶ 59;  
King 12/13/05 Hr. Tr. 117: 8-11

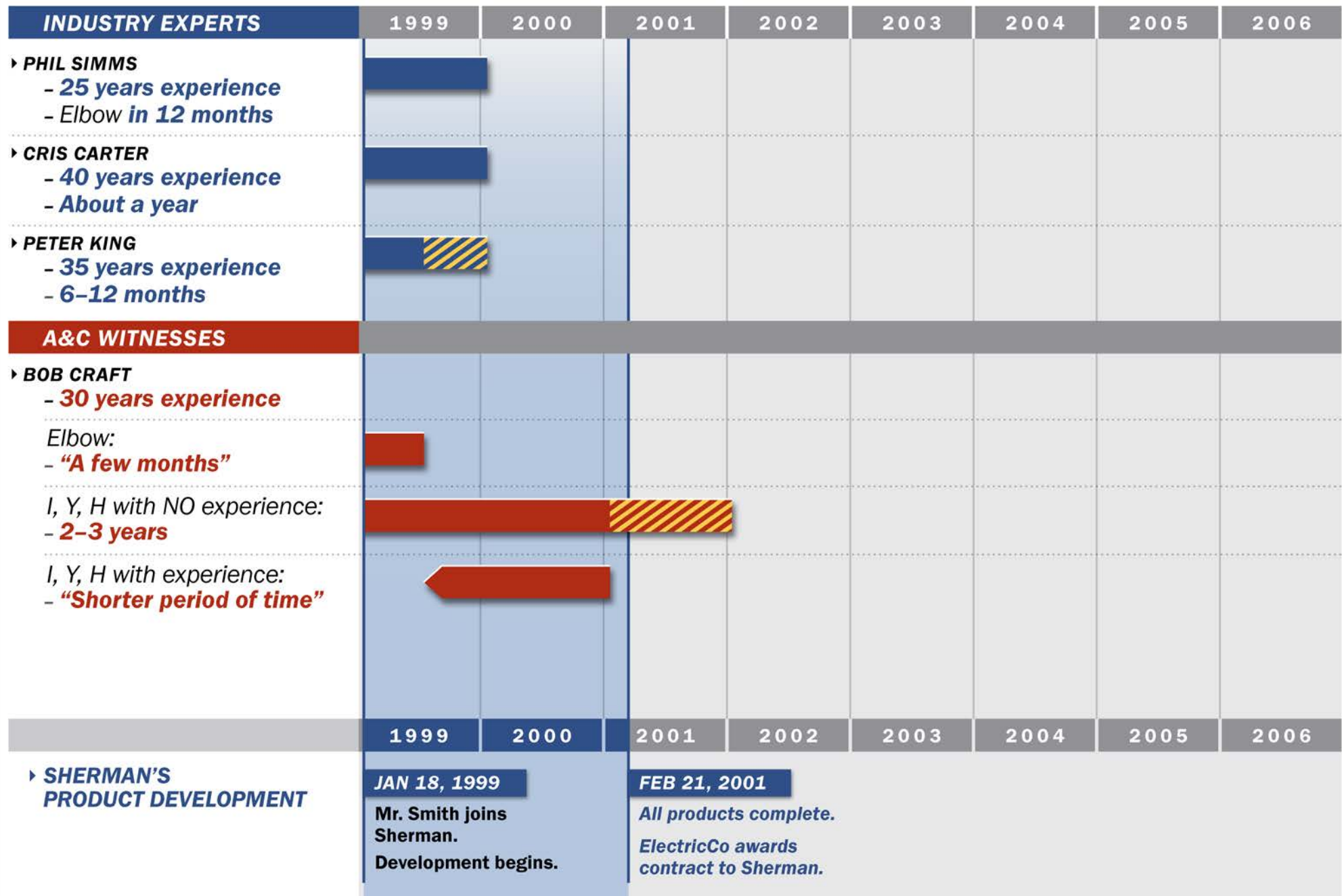
## A&C WITNESSES

### BOB CRAFT – GM OF RUBBERCO

- **30 years experience** in UEC industry
- **Admits that time to reverse engineer depends on expertise in industry:**  
Elbow:
  - **“A few months”**  
I, Y, H with NO experience:
  - **2-3 years**  
I, Y, H with experience:
  - **“Shorter period of time.”**

Craft 10/29/02 Tr. 6: 9-11; 94: 4-96: 9; 60: 19-62: 8

## A&C Admits That Time to Reverse Engineer Depends on Expertise in the Industry





# Time to Reverse Engineer Depends on Expertise in Industry

## INDUSTRY EXPERTS

### PHIL SIMMS



- **25 years experience** in UEC industry
- Reverse engineered A&C elbow **in 12 months**

Simms Exp. Rep. at ¶ 50; Simms Supp. Exp. Rep., Pg. 31; Simms 12/13/05 Hr. Tr. 3: 13-16

### CRIS CARTER



- **40 years experience** in UEC industry
- **About a year** to reverse engineer products

Carter 1/13/06 Hr. Tr. 95: 17-19; 203: 5-25

### PETER KING



- **35 years experience** in UEC industry
- **6-12 months** to reverse engineer products

King Exp. Rep. at ¶ 59;  
King 12/13/05 Hr. Tr. 117: 8-11

## A&E WITNESSES

### BOB CRAFT – GM OF RUBBERCO

- **30 years experience** in UEC industry
- **Admits that time to reverse engineer depends on expertise in industry:**  
Elbow:
  - **“A few months”**  
I, Y, H with NO experience:
  - **2-3 years**  
I, Y, H with experience:
  - **“Shorter period of time.”**

Craft 10/29/02 Tr. 6: 9-11; 94: 4-96: 9; 60: 19-62: 8

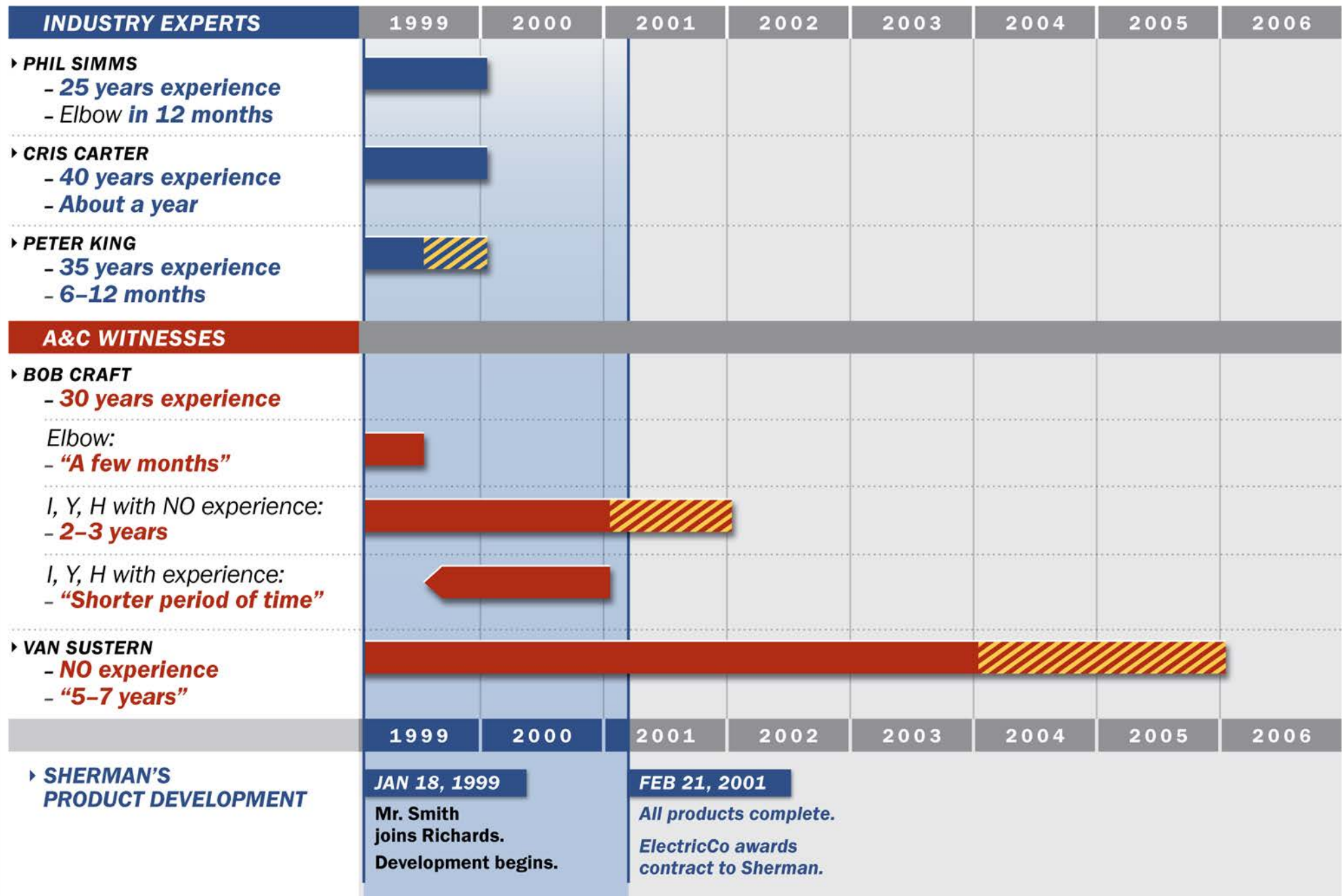
### VAN SUSTERN



- **NO experience** in UEC industry
- **“5-7 years”**

Sustern 11/22/05 Hr. Tr. 85: 1-19; 144: 3-8

## Time to Reverse Engineer Depends on Expertise in Industry





## Comparison of Damages

DAMAGES  
IN MILLIONS

\$32

\$28

\$24

\$20

\$16

\$0.8

\$0.4

**\$375,623**

**\$563,435**

**\$562,197**

**\$36.2  
MILLION**

**Clayton's  
1% running  
royalty**

**Clayton's  
1.5% running  
royalty**

**Clayton's  
head start  
benefit**

**Clayton's  
lost profits**

**A&C Could Have  
Continued Selling  
Product to  
ElectricCo IF:**

► ***A&C reduced its prices***

DID A&C DO SO?

☐

YES



NO

► ***A&C provided  
cross-docking services  
for no charge***

☐

YES

☐

NO

**A&C Could Have Continued Selling Product to ElectricCo IF:**

► ***A&C reduced its prices***

DID A&C DO SO?

☐

YES

☒

NO

► ***A&C provided cross-docking services for no charge***

☐

YES

☒

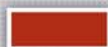
NO



## Comparison of Twist Incremental Margins to Actual RubberCo Gross Margins

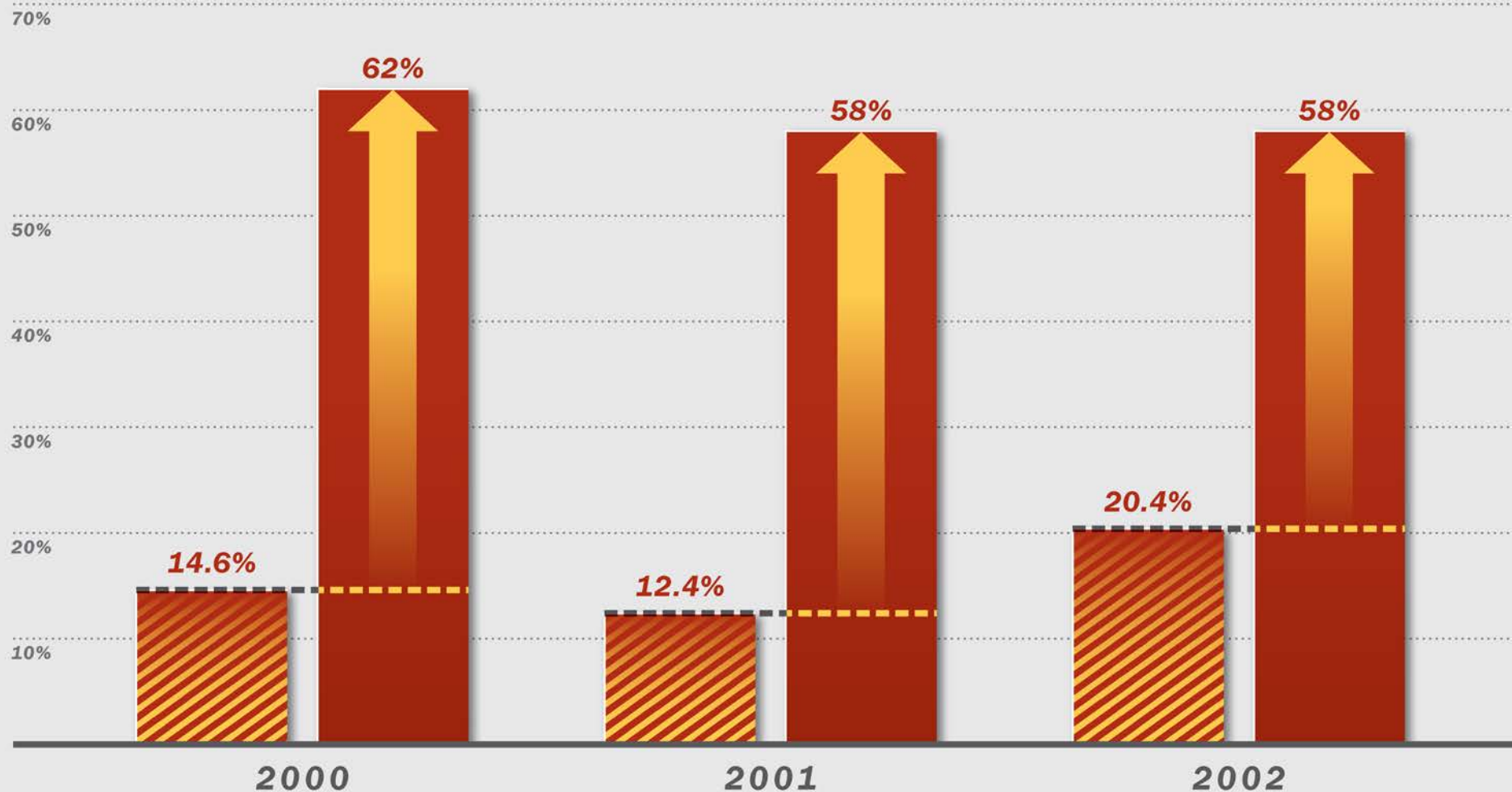


ACTUAL RUBBERCO GROSS MARGINS



TWIST'S ESTIMATED INCREMENTAL MARGINS

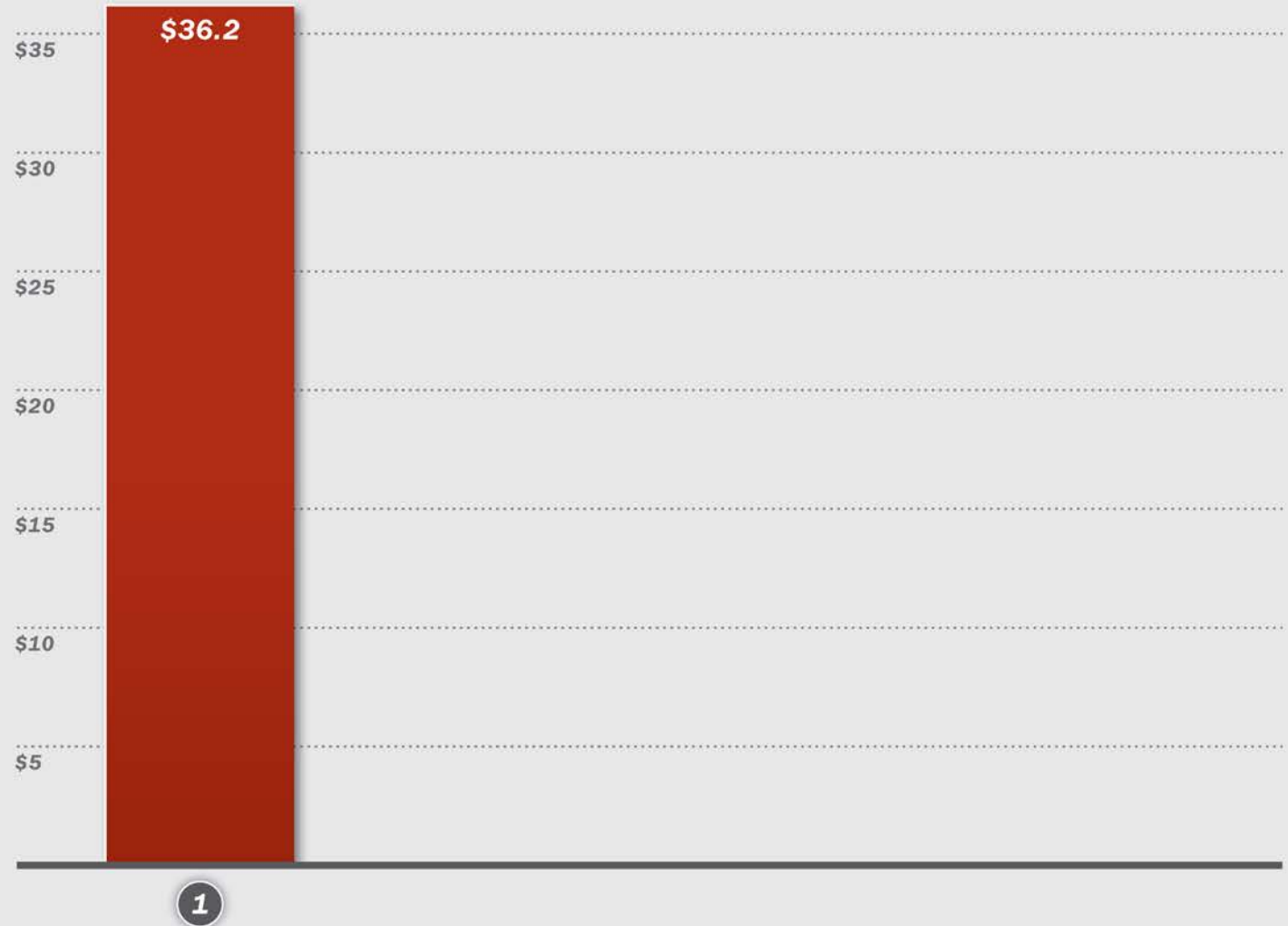
PERCENTAGE  
MARGIN



## Impact of Correcting Errors on Twist's Lost Profit Damages

**1 Twist Opinion  
\$36.2 million**

LOST PROFIT DAMAGES  
IN MILLIONS

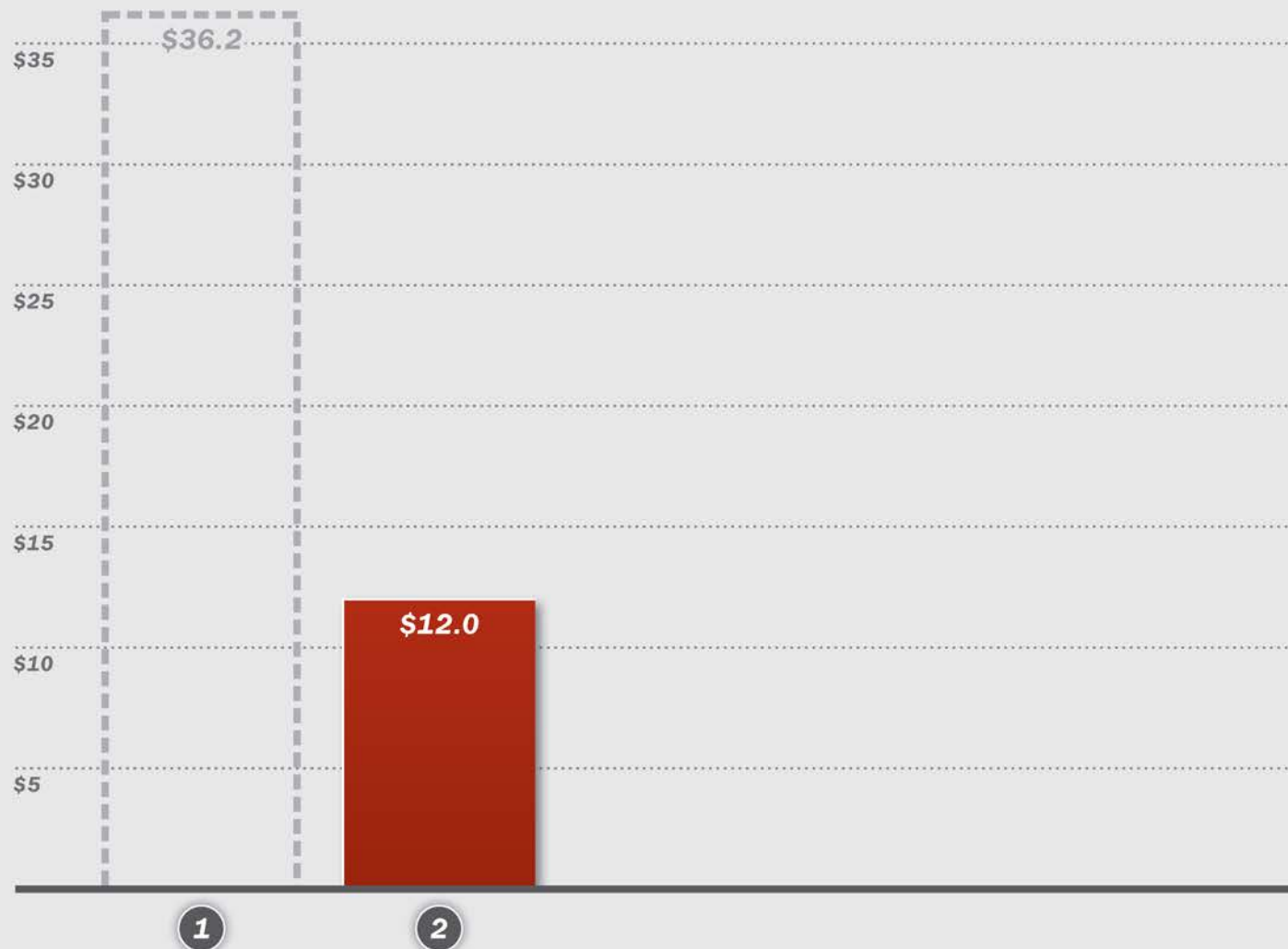


## Impact of Correcting Errors on Twist's Lost Profit Damages

① **Twist Opinion**  
**\$36.2 million**

② **CORRECT** for  
**margin**

LOST PROFIT DAMAGES  
IN MILLIONS

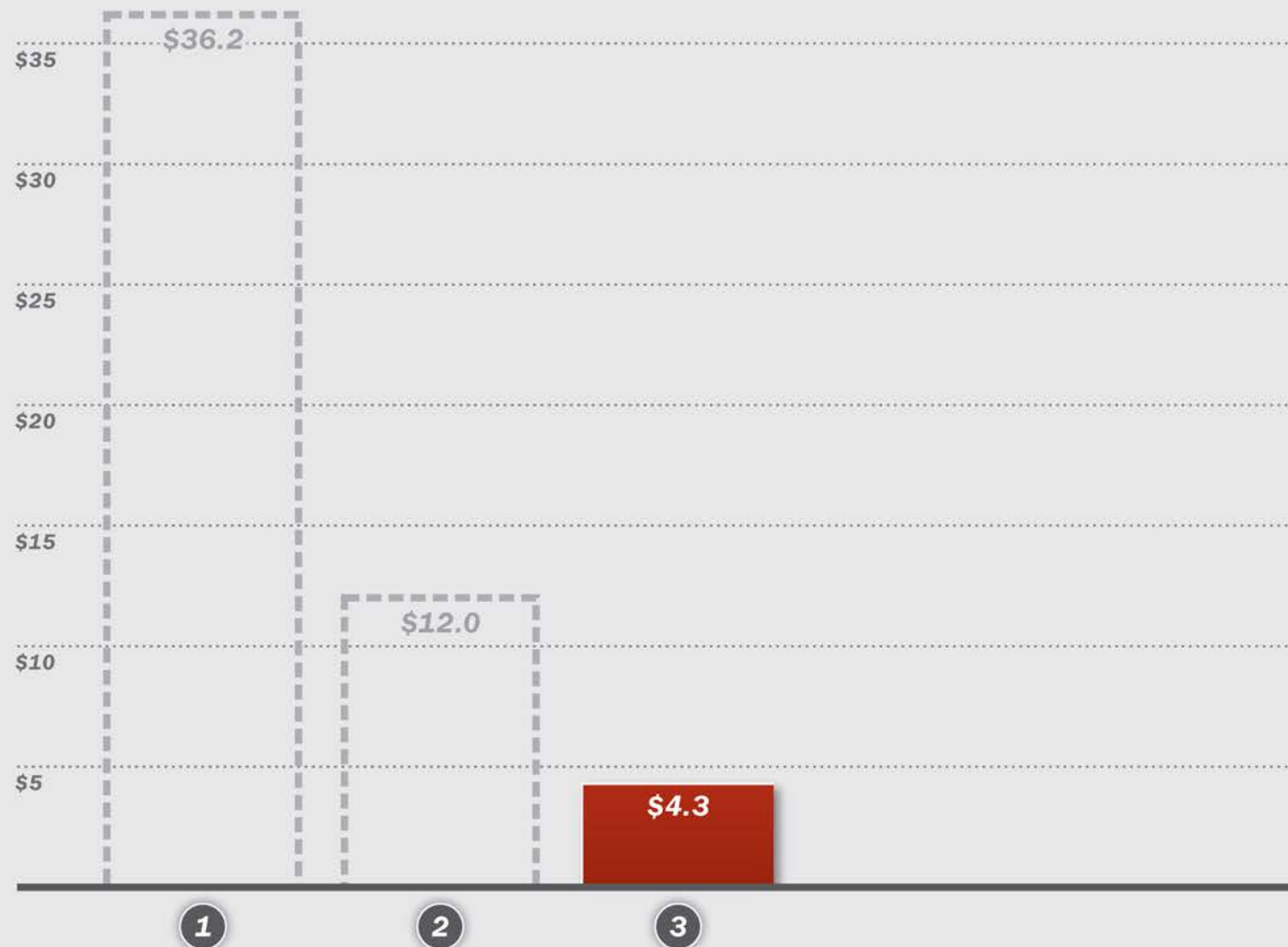




## Impact of Correcting Errors on Twist's Lost Profit Damages

- 1 **Twist Opinion**  
**\$36.2 million**
- 2 **CORRECT** for  
margin
- 3 **REDUCE** damage  
period to the end  
of 2005

LOST PROFIT DAMAGES  
IN MILLIONS



## Impact of Correcting Errors on Twist's Lost Profit Damages

- 1 **Twist Opinion**  
**\$36.2 million**
- 2 **CORRECT** for  
margin
- 3 **REDUCE** damage  
period to the end  
of 2005
- 4 **REDUCE** damage  
period to the end  
of 2003

LOST PROFIT DAMAGES  
IN MILLIONS



## Impact of Correcting Errors on Twist's Lost Profit Damages

- 1 **Twist Opinion**  
**\$36.2 million**
- 2 **CORRECT** for  
margin
- 3 **REDUCE** damage  
period to the end  
of 2005
- 4 **REDUCE** damage  
period to the end  
of 2003
- 5 **REMOVE** elbow  
and accessory  
sales

LOST PROFIT DAMAGES  
IN MILLIONS





## Impact of Correcting Errors on Twist's Lost Profit Damages

- ① **Twist Opinion**  
\$36.2 million
- ② **CORRECT** for margin
- ③ **REDUCE** damage period to the end of 2005
- ④ **REDUCE** damage period to the end of 2003
- ⑤ **REMOVE** elbow and accessory sales

LOST PROFIT DAMAGES  
IN MILLIONS

