

This is a preliminary transcript of a Committee markup. It has not yet been subject to a review process to ensure that the statements within are appropriately attributed to the witness or member of Congress who made them, to determine whether there are any inconsistencies between the statement within and what was actually said at the proceeding, or to make any other corrections to ensure the accuracy of the record.

1 {York Stenographic Services, Inc.}

2 HIF131.000

3 MARKUP ON H.R. 5, THE ``HELP EFFICIENT, ACCESSIBLE, LOW-COST,

4 TIMELY HEALTHCARE (HEALTH) ACT OF 2011''

5 WEDNESDAY, MAY 11, 2011

6 House of Representatives,

7 Committee on Energy and Commerce

8 Washington, D.C.

9 The committee met, pursuant to call, at 10:41 a.m., in
10 Room 2123 of the Rayburn House Office Building, Hon. Fred
11 Upton [Chairman of the Committee] presiding.

12 Members present: Representatives Upton, Barton,
13 Stearns, Whitfield, Shimkus, Pitts, Bono Mack, Walden, Terry,
14 Rogers, Myrick, Sullivan, Murphy, Burgess, Bilbray, Bass,
15 Gingrey, Scalise, Latta, McMorris-Rogers, Harper, Lance,
16 Cassidy, Guthrie, Olson, McKinley, Gardner, Pompeo,
17 Kinzinger, Griffith, Waxman, Dingell, Markey, Towns, Pallone,
18 Rush, Eshoo, Engel, Green, DeGette, Capps, Doyle, Schakowsky,

19 Inslee, Baldwin, Ross, Weiner, Matheson, Butterfield, Barrow,
20 Matsui and Christensen.

21 Staff present: Clay Alspach, Counsel, Health; Gary
22 Andres, Staff Director; Jim Barnette, General Counsel;
23 Michael Beckerman, Deputy Staff Director; Mike Bloomquist,
24 Deputy General Counsel; Anita Bradley, Senior Policy Advisor
25 to Chairman Emeritus; Allison Busbee, Legislative Clerk; Paul
26 Cancienne, Policy Coordinator, Commerce, Manufacturing, and
27 Trade; Howard Cohen, Chief Health Counsel; Andy Duberstein,
28 Special Assistant to Chairman Upton; Paul Edattel,
29 Professional Staff Member, Health; Debbie Keller, Press
30 Secretary; Peter Kielty, Senior Legislative Analyst; Ryan
31 Long, Chief Counsel, Health; Carly McWilliams, Legislative
32 Clerk; Katie Novaria, Legislative Clerk; John O'Shea,
33 Professional Staff Member, Health; Monica Popp, Professional
34 Staff Member, Health; Andrew Powaleny, Press Assistant; Chris
35 Sarley, Policy Coordinator, Environment and Economy; Heidi
36 Stirrup, Health Policy Coordinator; Jimmy Widmer, Health
37 Intern; Kristin Amerling, Democratic Chief Counsel and
38 Oversight Staff Director; Phil Barnett, Democratic Staff
39 Director; Jen Berenholz, Democratic Chief Clerk; Stephen Cha,
40 Democratic Senior Professional Staff Member; Alli Corr,
41 Democratic Policy Analyst; Ruth Katz, Democratic Chief Public
42 Health Counsel; Karen Lightfoot, Democratic Communications

43 Director and Senior Policy Advisor; Karen Nelson, Democratic
44 Deputy Committee Staff Director for Health; Rachel Sher,
45 Democratic Senior Counsel; and Lindsay Vidal, Democratic
46 Press Secretary.

|

47 H.R. 5

48 10:41 a.m.

49 The {Chairman.} Good morning everyone. The committee
50 is going to come to order. The chair reminds the committee
51 that when we finished opening statements yesterday, that we
52 are on H.R. 5. The bill is open for amendment at any point.

53 [H.R. 5 follows:]

54 ***** INSERT 1 *****

|
55 The {Chairman.} In keeping with the chair's announced
56 policies from January, I will first recognize the sponsors of
57 any bipartisan amendments. Are there any such amendments to
58 be offered. Seeing none, the bill is open for amendment.
59 Who seeks to offer an amendment? The gentlelady from
60 Wisconsin.

61 Ms. {Baldwin.} Mr. Chairman, I have an amendment at the
62 desk, amendment number one.

63 The {Chairman.} The clerk will read the title of the
64 amendment.

65 The {Clerk.} An amendment by Ms. Baldwin of Wisconsin.

66 [The amendment follows:]

67 ***** INSERT 2 *****

|
68 The {Chairman.} Without objection, the amendment will
69 be considered as read and the gentlelady is recognized for 5
70 minutes in support of her amendment.

71 Ms. {Baldwin.} Thank you, Mr. Chairman.

72 Now, if there is one consistent message I have heard
73 loudly and clearly from my colleagues on the other side of
74 the aisle, it is that the Federal Government should not
75 impose its will on States or intrude in States' rights.
76 Well, Mr. Chairman, this is precisely what the underlying
77 bill would do. Medical malpractice liability is governed by
78 State law, but H.R. 5 would preempt most State laws and
79 impose a federal mandate on medical malpractice liability,
80 and this is an intrusion on States' rights. It interferes
81 with a State's ability to oversee its own citizens and its
82 own affairs, and a change in policy that I suspect violates
83 the principles of many who serve in this body and on this
84 committee.

85 My amendment is simple. It would protect a State's
86 right to maintain authority over its medical malpractice or
87 medical product liability cases. The amendment states the
88 following: ``Nothing in this Act shall be construed to
89 modify or preempt any substantive or procedural State law
90 governing medical malpractice or medical product liability

91 cases or to impair State authority regarding legal standards
92 or procedures used in medical malpractice or medical product
93 liability cases.''

94 This language may sound familiar to some who serve on this
95 panel. That is because it is 100 percent identical to the
96 language in section 2, subsection C of H.R. 816, the Provider
97 Shield Act of 2011, another bill relating to medical
98 malpractice and medical product liability cases. The bill
99 that I am referring to was drafted and sponsored by Dr.
100 Gingrey and cosponsored by other members of this committee
101 including Dr. Burgess and Mr. Murphy. In that way, I would
102 argue that it is mildly bipartisan, although I do not have
103 their cosponsorship at this moment.

104 I would assume that my colleagues included this critical
105 language in their bill because they understand the importance
106 of ensuring that States maintain the right to establish a
107 method to handle medical malpractice cases that best suit
108 each State's needs, and I am sure that Dr. Gingrey, Dr.
109 Burgess and Dr. Murphy understand that what works best for a
110 State like Wisconsin might not work well in Georgia, Texas or
111 Pennsylvania. Rather, each State should maintain the
112 authority to determine what works best without federal
113 intrusion.

114 Yesterday in my opening statement, I talked a little bit

115 about my own State, and I would like to share, since there is
116 greater attendance today, a little bit more about what is
117 working in my State and why I think it is important to
118 maintain Wisconsin's right to maintain its own medical
119 malpractice policies without federal preemption.

120 Since the 1970s, Wisconsin has maintained a medical
121 malpractice policy that has produced successful outcomes for
122 both doctors and patients. With the flexibility to think
123 creatively, Wisconsin established a system in which health
124 professionals are guaranteed access to affordable medical
125 liability coverage and injured patients and their families
126 are guaranteed to receive reasonable monetary relief for
127 their injuries. Wisconsin law requires physicians, hospitals
128 and other professionals to have medical liability insurance.
129 This private health insurance pays claims of up to \$1 million
130 for each claim arising from an occurrence in a calendar year
131 or up to \$3 million for all claims arising from all
132 occurrences in a year.

133 For medical malpractice claims that exceed the limits of
134 primary medical liability insurance coverage, all physicians
135 have access to something in Wisconsin called the Injured
136 Patients and Families Compensation Fund. Physicians
137 contribute to this fund on an annual basis. Notably, this
138 fund typically makes more money in interest than it pays to

139 injured patients in any given year. As of June 30, 2010, the
140 patients and families compensation fund in Wisconsin had
141 assets of \$855.1 million.

142 Mr. Chairman, Wisconsin's medical malpractice laws have
143 produced successful outcomes. Medical liability insurance
144 premiums paid by Wisconsin doctors have been nearly the
145 lowest in the Nation, and the number of medical negligence
146 cases has decreased significantly since this fabric of laws
147 was enacted in our State. The number of people per year who
148 have been compensated for injuries or deaths caused by
149 physician negligence has been nearly the lowest per capita in
150 the Nation, and Wisconsin medical malpractice insurers have
151 the lowest loss ratio of all States' medical malpractice
152 insurers.

153 But it is important to note that Wisconsin's medical
154 malpractice laws are a solution that seem to be working
155 really well for Wisconsin. They may not work in Georgia.
156 They may not work in Texas or Pennsylvania. But this system
157 works in my home State of Wisconsin. I would assume that my
158 colleagues would agree that States like Wisconsin should have
159 authority to do what works best but the Federal Government
160 should not come in and tell Texas, Georgia, Pennsylvania that
161 they have to adopt Wisconsin's system.

162 My amendment and the language from which it is plucked

163 in H.R. 816 would allow each State to maintain the authority
164 to determine what works best for their State without federal
165 intrusion.

166 I urge my colleagues to stand up for States' rights and
167 support my amendment, and I thank you, Mr. Chairman, for the
168 time and yield back the balance.

169 The {Chairman.} The gentlelady's time has expired. The
170 gentleman from Georgia, Dr. Gingrey.

171 Dr. {Gingrey.} Mr. Chairman, thank you, and I
172 respectfully rise in opposition to the Baldwin amendment.
173 Ms. Baldwin describes what has been done in Wisconsin, and I
174 think that medical liability reform law goes back to 1975.
175 In fact, if you look at it, if you look at every provision,
176 not just the patient injury and family compensation fund,
177 which by the way I applaud in the Wisconsin law, although
178 former governors of the State of Wisconsin have tried to raid
179 that fund several times and one time successfully to spend
180 money on other expenses. I don't know whether it is
181 education or public safety or whatever. But I do commend the
182 law that was enacted in Wisconsin in 1975.

183 H.R. 5 is legislation which has a provision, section 11-
184 -we will talk about that I am sure today in the markup--but
185 it gives States the ability, particularly in regard to their
186 caps. If they have set caps on punitive that are higher than

187 the \$250,000 provision in H.R. 5 or if they have set caps on
188 non-economic pain and suffering that are higher than \$250,000
189 in H.R. or indeed lower, those caps prevail. So we respect
190 the States' rights to do their own thing if they have
191 addressed the situation such as they have done in Wisconsin
192 and California and Texas and Florida and West Virginia and
193 many other States.

194 Now, the gentlewoman referenced my bill in regard to the
195 Provider Shield Act and suggesting maybe that it is somewhat
196 of a dichotomy that we would want our doctors and medical
197 providers to have protection, but what Obamacare law, PPACA,
198 Patient Protection and Affordable Care Act, does or
199 potentially can do by so many of its provisions--I could go
200 through and list a number of them, Mr. Chairman, section
201 2701, 2702, 3001, 3002, just go on and on and on in regard to
202 provisions in PPACA that could add causes of actions against
203 health care providers.

204 In regard to H.R. 5, nothing in this legislation, which
205 in fact is very similar to what was done in Wisconsin, allows
206 for additional causes of action and so I think while the
207 gentlewoman from Wisconsin is well intended in regard to her
208 amendment and certainly in her description of the good things
209 that were done in the State of Wisconsin, her amendment in
210 effect would just negate the beneficial aspects of the

211 federal law, H.R. 5, that would be applicable to States that
212 haven't addressed the caps on non-economic or punitive, and
213 that is really one of the most significant aspects that cause
214 the \$62 billion over 10 years additional costs in the health
215 care system.

216 So with that, I will be happy to yield time to any of my
217 other colleagues, or Mr. Chairman, I will yield back the
218 balance of my time.

219 The {Chairman.} The gentleman yields back. Are there
220 other members wishing to speak on the amendment? The
221 gentlelady from California--I am sorry, Colorado.

222 Ms. {DeGette.} Thank you, Mr. Chairman.

223 Well, actually, though, this bill preempts almost every
224 provision of State laws because what it does, is it preempts
225 all State law including joint and several liability,
226 availability of damages, attorneys' fees and periodic
227 payments. While it does leave in place some State damage
228 caps on economic, non-economic or punitive damages, it puts
229 the caps in the bill on other States that have decided not to
230 do limitations on damages including States whose limitations
231 were struck down as unconstitutional by State Supreme Courts.

232 So some States will then have their damage caps but also
233 be forced to accept federal cap mandates which would
234 undermine the work of the State legislatures, and let me give

235 you an example of California, Mr. Chairman, since you
236 mentioned California. The MICRA cap in California only
237 applies to non-economic damage claims against medical
238 providers so California would keep that cap but then it would
239 also cap punitive damages as well as non-economic damages
240 against the pharmaceutical, nursing home and insurance
241 industries.

242 And one of my concerns with this bill over the years has
243 always been that tort law, particularly with respect to
244 medical malpractice and other types of issues like that has
245 always been a State issue and so State legislatures and State
246 courts have always set forth what the laws are going to be in
247 those States, and I think if you set up a whole new federal
248 cause of action, it would not only solve the problems that
249 doctors are having with their medical malpractice insurance
250 rates and all of that, it would also be--maybe some people
251 think this is a good idea. It would be a boon for lawyers
252 because it would set up a whole separate federal cause of
253 action on what have traditionally been state tort claims.

254 And so I think that it is confusing and I think it is an
255 additional layer of litigation that may not be intended by
256 the proponents of this legislation but would be a very, very
257 real byproduct.

258 With that, I would be happy to yield to anyone on my

259 side who would care to comment. Mr. Waxman, I will yield to
260 Mr. Waxman.

261 Mr. {Waxman.} Thank you for yielding to me.

262 This has always been a States' issues. The States
263 license the doctors. I think the medical association would
264 go crazy if we tried to license doctors and all the other
265 health professionals at the federal level. This is a State
266 responsibility. Tort laws are State laws. Insurance laws
267 are State laws. In California where everyone speaks so
268 highly of MICRA, MICRA has been successful at holding down
269 insurance costs but the evidence is very slim, if
270 nonexistent, when we look at the possibility of holding down
271 services that are unnecessary or defensive medicine. But the
272 reason California's law has been successful in holding down
273 insurance rates is that California adopted by ballot
274 proposal, where we adopt so much of our law, a regulation of
275 the insurance industry.

276 We rely on a great deal on the States, and even though
277 California is held up as a model, there was an article within
278 this last week that indicated with all the budget cuts, the
279 State law policing doctors has been unable to police doctors'
280 irregular activities. They license them, and when they are
281 licensed they should follow them if they are continually
282 involved in malpractice or wrongdoing. We expect the board

283 of medical quality to review the doctors' continuing
284 licensure. Well, they can't do it at the State. You can
285 imagine what it would be like if we moved it to the federal
286 level.

287 But, Mr. Gingrey I think is incorrect when he says that
288 the bill allows States to pass their own laws. It only
289 allows the States to pass laws that are more helpful to
290 doctors and other health care providers. The provision says
291 on page 25, ``This Act shall not preempt or supersede any
292 State or federal law that imposes greater procedural or
293 substantive protections for health care providers and health
294 care organizations from liability laws or damages.'' And
295 then it goes on to say in the next section: ``No provision
296 of this Act shall be construed to preempt those State laws
297 where they are more helpful to the providers,'' but nothing
298 would allow the States to do something where they think it is
299 more appropriate to more pro-consumer. So if there is
300 preemption, that ought to be just be a preemption. In fact,
301 that is what this amendment by our colleague from Wisconsin
302 would accomplish. Let the States enact their own laws. Let
303 us see what works and let other States follow with successes
304 of what some States are doing or work their own will for
305 their own unique State problems.

306 Thank you for yielding.

307 The {Chairman.} The chair would recognize Mr. Barton.

308 Mr. {Barton.} I want to rise in opposition to the
309 amendment. I am going to yield to Dr. Gingrey and the
310 gentleman from Kentucky. But let me say this.

311 It is nice to know that the ranking member and the
312 author of the amendment are now born-again States' rights
313 advocates. In the last Congress, they were fine with
314 preempting States by requiring a mandate that everybody in
315 the country had to have insurance and mandating the coverage
316 that had to be provided and mandating the cost and the actual
317 benefits in those coverages. They were fine with that. But
318 when we come along and offer an amendment to try to bring
319 some national rationalization to medical malpractice, they
320 seem to lose their ardor for a federal preemption. I mean,
321 the point in fact of the gentlelady's amendment is, it would
322 gut the bill, and there is no reason for the bill if you
323 accept her amendment, so I would hope that we would oppose
324 it.

325 I want to yield to Mr. Whitfield for 2 minutes and then
326 obviously yield to Dr. Gingrey.

327 Mr. {Whitfield.} Thank you very much.

328 I would just make the comment that we certainly have the
329 right to be involved on this kind of issue from the federal
330 standpoint because of the financial impact that Medicaid and

331 Medicare have on our health care costs, and it has been
332 suggested that we would save about \$210 billion a year in
333 cost to the national health care system with this
334 legislation.

335 One other comment I would make. There are lots of
336 States like Kentucky that do not have medical malpractice
337 reform, and what is happening to us is, we are losing doctors
338 because they are all running across State lines like to
339 Indiana where they do have medical malpractice reform.

340 So I think that our bill will strengthen our system,
341 save money and it certainly does not prevent a person from
342 going after full economic damages, and if you look at some of
343 the awards in California, patients are being taken care of
344 because I am looking at awards here of \$84 million, \$59
345 million, \$12 million, \$27 million, so I don't think that this
346 legislation would take away any protections for patients.
347 Thank you.

348 Mr. {Barton.} And I would yield to Dr. Gingrey the
349 balance of my time.

350 Dr. {Gingrey.} I appreciate the former chairman and the
351 gentleman from Kentucky for yielding to me.

352 First, Mr. Chairman, I would like to address a question
353 to counsel. One of the members on the other side mentioned
354 that H.R. 5 would cause additional causes of action from a

355 federal perspective. Counsel, can you give us an answer to
356 that? Is that a correct statement or is that an incorrect
357 statement? It would not. Let me make sure my colleagues on
358 both sides of the aisle heard the response of counsel. It
359 would not create additional causes of action from the federal
360 perspective because of the enactment of H.R. 5.

361 Former Democrat chairman of the committee, now ranking
362 member from California, said let us see what works, you know,
363 don't rush to judgment. Well, we have had medical liability
364 reform, tort reform in existence, and yes, the State of
365 Wisconsin, certainly the state of California, the senior
366 Senator from the State of California would agree that MICRA,
367 Medical Injury Compensation Reform Act, that was passed in
368 the late 1970s in California is working and it was not
369 because of any ballot initiative. It was because of a law
370 passed in the State of California.

371 What works is 35 years of experience from California and
372 now some other States, not \$50 million in PPACA that could be
373 awarded to certain States to start pilot projects over the
374 next five years. We have waited long enough. We don't need
375 another pilot project. We have the studies and it is time to
376 act.

377 It was also mentioned that this is all about protecting
378 doctors and what is it in for the poor plaintiff. Well, if

379 you can eliminate all these frivolous lawsuits, those people
380 who are actually injured and deserve their redress of
381 grievances, their full redress of grievances without the bulk
382 of a settlement or judgment by a jury going to plaintiffs'
383 attorneys but rather to the injured plaintiffs themselves.
384 So we certainly do not take away any of that right to their
385 redress of grievances, and I yield back.

386 The {Chairman.} The gentleman's time is expired. The
387 ranking member of the committee, Mr. Waxman, is recognized
388 for 5 minutes.

389 Mr. {Waxman.} Mr. Chairman, I didn't say, and I think
390 the gentleman misunderstood if he thought I said that this
391 increases the number of causes of action. What this bill
392 does is sets in place a law for all 50 States that no single
393 State has. This isn't the MICRA law for California. The
394 MICRA law only limits non-economic damages to \$250,000 in
395 medical malpractice against health care providers such as
396 doctors or nurses. This bill goes way beyond that for
397 medical device manufacturers, pharmaceutical companies,
398 insurance companies, HMOs. MICRA only applies to
399 professional negligence.

400 Now, this bill would say that even if there is an
401 intentional tort, a doctor or health care provider assaulting
402 or raping a patient, that would have a limit on pain and

403 suffering. The loss of a spouse is different. The cap on
404 punitive damages are not capped in California. If you put
405 this bill together, it is telling all the States you may have
406 different parts of the law but now you have got to take all
407 of them because Washington is telling you what you need to
408 do, not your own constituents.

409 Now, we just heard the argument a minute ago that we
410 need this law because of the high cost of expenditures for
411 health care. Well, of course high cost of expenditures for
412 health care affect federal expenditures but they affect the
413 State and the private sector as well. I don't know what
414 would work best in Wisconsin or Texas or Louisiana or
415 anywhere else, and I don't think they ought to tell us what
416 we ought to have in California. California is quite capable
417 of making up its own decision, and it decided that in
418 addition to the MICRA law, they would have insurance reform.
419 Most States don't have the insurance reform provisions that
420 we have in California.

421 So I just want to clarify the record. This is not
422 MICRA. This is not what Wisconsin has. This is not what any
423 other State has. This is something that is nonexistent in
424 any State, and the States if they want to choose these
425 options, they should do it, but we shouldn't force them to do
426 it. That is exactly what this bill in fact does.

427 Now, let me say a word or two about the medical
428 liability system. It is a crummy system. A patient that is
429 injured by malpractice, now, we are not guaranteeing the
430 outcomes but a patient who is injured by malpractice or
431 negligence on the part of a professional, their grievances
432 should be redressed. But if they can't afford a lawyer, they
433 are not going to get into court. If their case is too small,
434 they are not going to find anybody to help bring their case.
435 If they can't afford it, they are not going to be able to pay
436 a lawyer to pursue it. Most of these cases are on
437 contingency fees. In other words, they get a lawyer to
438 represent them on the basis that if they win, the lawyer
439 will be paid. If they lose, the lawyer will not be paid.
440 Well, that is appealing to patients who feel they have a
441 claim but can't afford to pay a lawyer by the hour.

442 Now, these contingency fees are troubling because
443 lawyers sometimes come out with huge judgments and that means
444 the lawyers will often take the cases only where they expect
445 to get a huge judgment. Well, if you have been injured and
446 your injuries are not substantial enough to justify a huge
447 judgment, probably a lawyer won't take your case. That seems
448 to me the real reason for the cap on pain and suffering
449 because when you put a cap on pain and suffering, it's not
450 fair to the patient who is, let us say, is going to be

451 deformed and in pain every single day for the rest of his or
452 her life. The cap on pain and suffering serves the purpose
453 of making the case unattractive for lawyers to take on a
454 contingency fee. Well, that may be a great accomplishment.
455 There are frivolous cases that are taken but there are real
456 cases that will not be pursued.

457 So it seems to me that if we wanted to do something
458 about the medical malpractice situation, this kind of a bill
459 is not the answer. The answer ought to be something that we
460 think through together and that the President has hinted that
461 would try to compensate those who are injured and protect
462 doctors from frivolous lawsuits, perhaps with a protection if
463 certain standards in the law are met by the professional.
464 But this is a system that is going to be imposed on the
465 State, and I don't think it is a fair one to anybody
466 concerned and the ones who lose out are the ones who have
467 been injured. They lose out the most.

468 The {Chairman.} The gentleman's time is expired.
469 Members on the Republican side? Mr. Bilbray

470 Mr. {Bilbray.} Thank you, Mr. Chairman.

471 Mr. Chairman, I listened to this conversation, and I
472 just want to point out, some of us that have actually
473 provided the safety net for health care to the working class,
474 I spent 10 years supervising the health care safety net for a

475 population of over 3 million people in the county of San
476 Diego, and you learn a little bit by doing, and frankly, this
477 issue is always being brought up as somehow being the victim
478 as opposed to the perpetrator being the physician, and when
479 you get into the at-risk populations, this issue impacts the
480 capability of those of us that are providing services more
481 than probably any other single item I can point out to, and
482 perinatal service was a classic example where you had
483 volunteers not being paid one cent having to pay \$90,000 in
484 the 1980s to protect its practice when we could provide the
485 perinatal service at \$300 a child. Now, you do the math.
486 Three hundred dollars and the \$90,000 is how many children
487 aren't being born healthy because you have got a tort issue
488 hanging over the physicians who are volunteering, and is the
489 right to litigate more important than the right to be born
490 healthy.

491 So don't think those of you that say you really care
492 about the poor and the needy that this doesn't have a major
493 impact. Ask some of us that got involved. And if you don't
494 think the Federal Government has a responsibility to get
495 involved in tort in the States, then ask yourself why has the
496 Federal Government for decades been providing a special tort
497 program for physicians who work in community clinics. The
498 Federal Government has already imposed itself on those

499 issues. You and I and everybody in the Federal Government
500 has already said this is a federal issue when it comes down
501 to providing health services, that the Federal Government
502 will actually step in with federal programs on this. So to
503 now walk back and say that somehow this is intruding on and
504 we are crossing the line into States' rights, I think it is a
505 nice tactic politically but in reality we recognize that this
506 is something we have got to talk about, and let us talk about
507 the fact that is litigation the best way and most cost-
508 effective way of providing quality health care. Is
509 litigation really the way to go rather than looking at a
510 system of mediation and addressing it that way? Is the
511 courtroom where quality control is best done? And as
512 somebody who has actually had the responsibility of doing it,
513 I am telling you not, just absolutely no. So we have to be
514 brave about this.

515 And remember, California has had its MICRA, and you know
516 there are huge forces to overturn it. The fact is,
517 California is not exactly run by a bunch of right-wing pro-
518 business people. Look at the history. But even they
519 recognized that the part that we do I have is essential to
520 maintain any kind of health care structure for the over 30
521 million people that call California home.

522 But these issues have to be addressed and we have to

523 tell our friends, there has got to a better way.

524 Mr. {Weiner.} Will the gentleman yield?

525 Dr. {Gingrey.} Will the gentleman yield?

526 Mr. {Bilbray.} I yield to the gentleman from Georgia.

527 Dr. {Gingrey.} I thank the gentleman, and I will try to
528 just take about 30 seconds.

529 Another case in point in regard to the federal taking
530 over certain aspects is the national vaccine injury
531 compensation fund. If it were not for that fund, childhood
532 vaccines would be a thing of the past, and I think most of us
533 on both sides of the aisle would agree that childhood
534 vaccinations against measles, mumps, rubella, smallpox, all
535 of these things are hugely important, but the fact that the
536 vaccine manufacturers were subject to unlimited liability in
537 those instances where rarely there would be a complication
538 from a vaccine, they would no longer be in business.

539 Mr. {Bilbray.} I would like to reclaim my time.

540 Dr. {Gingrey.} And I thank the gentleman for yielding.

541 Mr. {Bilbray.} And the gentleman from California was
542 pointing out about what determines when a lawyer passes and
543 wants to take on a job. There was a big reason why the
544 gentlelady from California and I introduced a bill back in
545 the 1990s to hold harmless the materials manufacturers for
546 implants because the lawsuit wasn't going to the people who

547 made a faulty product but who had the deep pockets. That is
548 a whole different issue of what drives this machine. But the
549 problem is, the Federal Government follows its money. The
550 money of the Federal Government is going in the States to
551 provide health care, not to provide compensation to trial
552 lawyers. And the fact is, if you think that there is not a
553 draw on that, then again, go back and take a look at those of
554 us who are providing the baseline to the highest poverty
555 levels. That is where the risk has traditionally been the
556 biggest problem and that is where most of the money is being
557 drawn off more than the wealthier communities, and it is
558 something that is not frankly talked about.

559 So I ask that we take a look at this but as long as the
560 Federal Government and the federal taxpayer is being required
561 to pay into a system, we darn well have a right to determine
562 that money goes to health care and not to trial lawyers, and
563 I yield back.

564 The {Chairman.} The gentleman from New York, Mr. Engel.

565 Mr. {Engel.} Thank you. Thank you very much, Mr.
566 Chairman.

567 I want to say that I support Ms. Baldwin's amendment.
568 You know, I must confess that I am conflicted because I do
569 think that a person who has been maimed is entitled to sue
570 for pain and suffering and not have an artificial cap, but I

571 also think that the medical malpractice fees that doctors are
572 being charged are astronomical and are driving many
573 physicians out of their practice. So I do think there has to
574 be balance and I think both sides frankly have to give a
575 little bit.

576 But I don't support a cap of \$250,000 with one size
577 fitting all. I come from New York, which is a high cost-of-
578 living State, and I must say that \$250,000 is not as great in
579 New York as it might be in a rural State somewhere, a rural
580 southern State, let us say, and that is why I think this one-
581 size-fits-all is a very, very bad idea. I do think that we
582 have to look at the whole medical malpractice issue, and I
583 just don't understand why we cannot find another way other
584 than an artificial cap to do this.

585 You know, take the tax fight that we are having, and we
586 have the AMT, and the AMT, alternative minimum tax, was put
587 in in 1969, I believe, because very wealthy people were using
588 tax loopholes and not paying any taxes at all. Well, it was
589 never indexed for inflation so now you have a situation in my
590 home State of New York where average people making \$70,000
591 and \$75,000 and \$80,000 are caught in the AMT. Now, I can
592 tell you to live in New York, \$80,000 is not a heck of a lot
593 of money. It really isn't for a family of four or five,
594 given what prices are in New York. So where we want to do

595 the same thing. We want to cap it. There is no index for
596 inflation. It just doesn't work.

597 You know, I want to comment on what my good friend Joe
598 Barton said before when he said that we are newfound
599 supporters of States' rights. Well, if that is true, we
600 could say the opposite thing to my friends on the Republican
601 side. You know, they have talked a good game of States'
602 rights through the years but then when it is something that
603 they like, they want to preempt the States totally from doing
604 what is best for them. I think in my home State of New York,
605 we would want to take into account the \$250,000 is
606 insufficient in terms of capping things for pain and
607 suffering. Maybe, again, a rural State might think that is
608 fine.

609 Mr. {Barton.} Would my friend from New York yield?

610 Mr. {Engel.} Yes, I will in a second, since you called
611 me your friend and you returned the compliment.

612 Mr. {Barton.} Well, you are my friend.

613 Mr. {Engel.} I am, and you are my friend.

614 I just don't think that this is a good policy for a
615 State like mine, and in fact, I know Ms. Baldwin said this
616 but I want to repeat. The language from this amendment is
617 100 percent identical to language included in H.R. 816, which
618 is a bill sponsored by other friends of mine, Mr. Gingrey and

619 Mr. Burgess and Mr. Murphy, on medical malpractice relating
620 to the health care law. So if it is good enough for the
621 health care law, it is good enough for this, and I yield to
622 Mr. Barton.

623 Mr. {Barton.} I just want to compliment my friend from
624 New York for picking up on what I said and reversing it. I
625 knew that somebody would do it but I really thought it would
626 be Anthony Weiner. I didn't think it would be Mr. Engel. I
627 will give you the first bonus point to a member of the New
628 York delegation for hoisting me on my own petard.

629 Mr. {Engel.} Well, thank you. It probably would have
630 been Mr. Weiner but the chairman decided to call on me first,
631 so that is what happened.

632 All right. I think I have made my point. I think Mr.
633 Waxman's point about lawyers not taking cases worries me
634 because I do believe that if someone is seriously maimed or
635 injured, they have a right to be made whole, and if lawyers
636 won't take cases, then that is a problem and that is
637 something that bothers me.

638 But I want to just say to my colleagues, this is an
639 issue that won't go away, and we have to address it. We have
640 to get together, meet somewhere in the middle and address
641 this issue because it is an important issue, and I yield
642 back.

643 The {Chairman.} The gentleman yields back. Are there
644 other members on the Republican side wishing to speak? Dr.
645 Cassidy, you are recognized for 5 minutes.

646 Dr. {Cassidy.} I think we decided in 1965 that the
647 Federal Government had a role in health care. That is when
648 we passed Medicaid and Medicare, Medicaid being clearly a
649 State program that is co-administered with the Federal
650 Government. So there is no tension here. It is a question
651 of whether or not we are going to address the impact of tort
652 actions upon health care costs. Because I think we would
653 also agree that there is an impact of lawsuits upon health
654 care costs and therefore the federal taxpayer. For example,
655 it is estimated that about 1 percent of the health care costs
656 are associated with the awards given in lawsuits but about 5
657 percent may be related to defensive medicine. Clearly, that
658 impacts access. I work in a hospital for the uninsured.
659 Estimates show that every time you increase the cost of a
660 premium by 1 percent, a significant number of small
661 businesses will drop their insurance.

662 Now, on the other hand, I hear what you all are saying
663 and I can accept some of your concerns, but I think we can
664 allay those concerns. Mr. Waxman wonders if this only
665 preempts State law in one direction and not the other, but as
666 I look on page 25, line 10, it begins a passage where it says

667 that if any State law specifies a particular monetary amount
668 that may be awarded regardless of whether or not this amount
669 is greater or lesser than what is in this Act shall not be
670 preempted. So line 8 and 9, no provision of this Act shall
671 be construed to preempt, and it goes on to say, any law in a
672 State that either has a higher or lower monetary award. I am
673 specifically told by counsel that includes punitive caps. If
674 a State has a cap upon punitive damages, then that punitive
675 cap will hold. I am told that by counsel. If a State like
676 New York decides that a 250 cap is too low, all New York
677 needs to have is a cap. It can be a cap of \$1 billion, but
678 in fact, studies show that caps work.

679 Now, that is okay with me because again I am a
680 physician. I am kind of data-driven. So Mr. Waxman also
681 raised the concern that there has been no studies that show
682 that caps will lower the direct cost of health care. Here is
683 a study from the American Journal of Emergency Medicine from
684 2010 which compares the rate of head X-rays after a trauma in
685 States with caps and without caps. It shows that as much as
686 60 percent rate of ordering CT scans or other imaging studies
687 after head trauma in States with caps. This is a study which
688 shows that there is a direct positive impact upon decreasing
689 the cost of health care if we enact a cap.

690 Next, Dr. Gingrey has already mentioned that there is

691 federal precedent for this because the Vaccine injury Act has
692 statutory deadlines and a 250 cap on pain and suffering,
693 recognizing that the Federal Government has a vested interest
694 in controlling the cost of vaccines and therefore access to
695 them.

696 Mr. Waxman also raised the concern regarding rape. Rape
697 is not medical care. Rape is assault. This specifically
698 speaks of health care, not of criminal assault. If a
699 physician rapes, a physician should be thrown in jail,
700 prosecuted to the fullest extent of the law. This offers no
701 such protection and specifically says so.

702 Mr. Waxman also raised the concern that there would be
703 decreased access to tort action under a law such as this, but
704 here is an analysis of MICRA in California, and I can submit
705 this for the record, but it shows that there has been minimal
706 or no decrease in per capital incidents of lawsuit filings,
707 malpractice lawsuit filings, from 1968 to 2003, taking as an
708 inflection point 1985 when the MICRA law was declared
709 constitutional. There is no evidence that there is a
710 decreased number of court filings associated with the passage
711 of this law.

712 Dr. {Gingrey.} Will the gentleman yield?

713 Dr. {Cassidy.} Just a second. I am not sure I am
714 through yet.

715 Now, I am a relatively new member here and so I always
716 like to think the truth will prevail, and I am hoping that we
717 address some of those concerns, which are valid concerns,
718 that people will look at this and say wow, no, that's not
719 true. And going to the substance of the amendment, Wisconsin
720 can have their fun. All we are asking is that they also
721 establish a cap, whatever that cap may be, because again, it
722 is a federal interest to control health care costs and to
723 therefore increase access to care, and studies show that caps
724 actually decrease cost which other studies would suggest
725 would increase access to care.

726 I have 28 seconds. I will yield.

727 Dr. {Gingrey.} I thank the gentleman for yielding, and
728 he brought up a very important point. It is not just about
729 cost, and for course, \$62 billion is a very conservative CBO
730 estimate over 10 years is not pennies, but it is also about
731 physician workforce, and he showed the study from the College
732 of Emergency Room Physicians. That emergency room physician
733 at Tucson Medical Center, Dr. Reed, probably would not be
734 there if we don't do something about this situation because
735 these doctors are not going to go in high-risk specialties
736 and put themselves in danger of medical malpractice every
737 single day. Thank God he was there and saved our colleague's
738 life.

739 Mr. {Bilbray.} And can I reclaim my time just to say I
740 will submit these supporting documents for the record.

741 The {Chairman.} Without objection.

742 [The information follows:]

743 ***** COMMITTEE INSERT *****

|
744 The {Chairman.} The gentleman from New York, Mr.
745 Weiner.

746 Mr. {Weiner.} Thank you, Mr. Chairman.

747 Let me just stipulate something that I think is obvious
748 about these States' rights issues. We all kind of come down
749 on different places depending upon what issue it is. Mr.
750 Barton pointed that out earlier. There is a States' rights
751 caucus that one of the original 10th Amendment States' rights
752 people was the gentlewoman Ms. Blackburn. I think some of
753 you might be on it. We move back and forth. You know,
754 Congresswoman Baldwin and I spent 12 years on the Judiciary
755 Committee. We can probably do this argument from memory.

756 But let us remember something that a lot of the
757 arguments being made here today in support of the tort cap
758 would be very interesting to hear made in support of the
759 individual mandate, for example. You can say that too has an
760 impact on reducing cost and the ability of one person to opt
761 out increases the cost to everything else. Mr. Whitfield
762 said that that is why the Medicare program is a national
763 program. These are the exact arguments for why Romneycare
764 was something that he said only can be done State by State,
765 he is going to give this speech tomorrow, that in fact there
766 are lot of these issues that you need to nationalize, but it

767 does come down to the question of, if you are going to
768 nationalize the tort laws and say that even those decisions
769 what happened in an individual case, what did a doctor do, a
770 clinic do, what did a patient do, if you don't trust a jury
771 of your peers and your constituents with that, what is left?
772 Like what is really--is there anything more foundational than
773 hearing the evidence of a case and making a decision?

774 Now, I know my colleagues believe that we here in
775 Washington can make those cases. You theoretically could if
776 you want to. You would get some pushback, I am sure, but you
777 can federalize the entire thing and say every single tort
778 case should go to a federal court. Maybe you should just do
779 that and just cut out the middleman. The fact is that this
780 does save some money, hardly any but it saves some money. It
781 saves roughly \$6 billion, between \$5 and \$6 billion a year.
782 The entire expenditures in health care, as my colleagues
783 know, they frequently point out they are doctors, \$2.7
784 trillion a year, and I am not a math guy but, you know, we
785 saved \$1.2 trillion with Obamacare, with the Affordable Care
786 Act. So yes, you can probably do some things to reduce costs
787 but the question is, what responsibility ultimately do you
788 give to citizens to sit on a jury to hear their cases. Like
789 for example, why shouldn't the next thing we take over is al
790 criminal law. Because if you don't have the death penalty in

791 every State, maybe someone is going to go to the next State
792 and commit a crime, so maybe we should have a national death
793 penalty for all crimes of a certain sort. Maybe we think
794 that in some States the sentence for rape is too low or for
795 sexual abuse is too low or for assault is too low. Why don't
796 we nationalize those things because then people may go over
797 State lines to commit those crimes.

798 The question becomes, what do we leave to our citizens?
799 And tort law, a harm one person did to another as heard by a
800 jury, is the very most foundational thing. And let me just
801 say this. You know, I agree with Congressman Engle, I agree
802 with many of my colleagues, I am very concerned with what
803 insurance companies are charging but I am concerned about
804 that. Put that in the law, you know, and we might be able to
805 do business, if you do an exchange for these things,
806 insurance companies are capped or they can't raise above a
807 certain level. The fact is, you know, look, it is so
808 transparent sometimes that all my friends on the other side
809 of the aisle want to do is make sure insurance companies
810 benefit, and who is it coming out of in this case? The
811 rights of your citizens in your States, in your districts to
812 make the most foundational things.

813 You know, we trusted them to elect you. We trusted them
814 to make that decision. Why can't we trust them to sit on a

815 jury and say you know what, this case is more serious than
816 that case or this case I believe, here is what the
817 appropriate remedy should be, I trust this judge that I also
818 elected or is also appointed in my State. Why do we have
819 such contempt for that?

820 Dr. {Cassidy.} Will the gentleman yield?

821 Mr. {Weiner.} Certainly.

822 Dr. {Cassidy.} First, of course, this does not preclude
823 a jury trial. Secondly, Mr. Waxman I am told is the one that
824 authored the Vaccine Injury Act and so it may be that he
825 could give us insights why--

826 Mr. {Weiner.} I understand. Let me just come back. I
827 am not saying that you are substituting for a jury. You are
828 substituting for their judgment. That is what you are doing.
829 You are saying that oh, yeah, I want to have a jury but do
830 not cross me, your Congressman, who has decided this is the
831 cap that I want.

832 Dr. {Cassidy.} But again, Mr. Waxman--

833 Mr. {Weiner.} I will address the second part but I
834 already did once. I will stipulate to the idea there are
835 different questions on where the line should be drawn on
836 different things. I agree with that. But is there anything--
837 -I mean, torts, which is like two citizens or two entities
838 trying to decide who did what, honestly, do we really believe

839 you know what the appropriate levels should be, what the
840 appropriate caps should be in every case that you want to
841 write it here. That doesn't seem to me in any way to be a
842 conservative way to look at your role as a Congressman.

843 The {Chairman.} Are there other members wishing to
844 speak on the Republican side? Democrats? Mr. Butterfield is
845 recognized for 5 minutes.

846 Mr. {Butterfield.} Thank you very much, Mr. Chairman.

847 Many of my colleagues may know that I spent 30 years in
848 a courtroom, 15 of those as a lawyer and the other 15 as a
849 judgment. Of those 15 years, 13 years as a trial judge and
850 two years on our State Supreme Court, and so I have seen
851 medical liability cases time and time again and so I have
852 some expertise in this area.

853 I had come today prepared to speak off the cuff in
854 opposition to this amendment, but I was given a letter this
855 morning that I think ought to be read into the record. The
856 letter was written by a gentleman named Chief Justice I.
857 Beverly Lake, Jr., who was the former chief justice of our
858 State Supreme Court. I served with Justice Lake. He is a
859 very distinguished Republican in my State. If he were here
860 in Congress, he would be very comfortable on the other side
861 of the aisle.

862 The letter reads as follows: ``In my opinion, the

863 proposed cap on non-economic damages is unconstitutional. I
864 served on the North Carolina Supreme Court for 12 years and
865 was Chief Justice from 2000 to 2006. I previously served as
866 a Superior Court judge for six years, was a State senator for
867 two terms and was Deputy Attorney General for 7 years.
868 Throughout my legal career, which has spanned over 50 years,
869 I have sought to uphold the North Carolina Constitution, the
870 foundation of our laws. For over 200 years the North
871 Carolina Constitution has provided that in all controversies
872 at law respecting property, the ancient mode," which is what
873 the gentleman from New York was talking about, "the ancient
874 mode of trial by jury is one of the best securities of the
875 rights of the people and shall remain sacred and inviolable.
876 The court has long recognized that compensatory damages
877 including damages for mental and physical pain is a form of
878 property protected by the constitutional right to trial by
879 jury." He went on to say that "When I served as chief
880 justice, a unanimous court"--and I happened to be on that
881 court--"a unanimous court expressly reaffirmed the principle
882 in Ryan versus Kmart. We stated that compensatory damages
883 represent a type of property interest vesting in plaintiffs
884 while punitive damages are not a vested property interest.
885 North Carolina citizens have a sacred and inviolable right to
886 have a jury determine the amount of compensatory damages

887 including non-economic damages under our constitution. The
888 right to have a jury make that decision cannot be eliminated
889 or restricted.''

890 And then Chief Justice Lake went on to conclude by
891 addressing a case that came out of the Georgia Supreme Court.
892 My friends, Dr. Gingrey and Mr. Barrow, will probably
893 recognize this case. The Georgia Supreme Court recently
894 reached the same conclusion, striking down a similar law in
895 Atlanta Oculoplasty Surgery versus Nesselhut. In 2005, the
896 Georgia legislature enacted a \$350,000 cap on non-economic
897 damages in medical malpractice cases. Georgia's state
898 constitution protects the right to a jury trial as does ours,
899 stating the right to trial by jury shall remain inviolable.
900 Because the determination of damages has always been the
901 jury's province and non-economic damages have always been a
902 component of compensatory damages, the damages cap
903 unconstitutionally--this is the Georgia Supreme Court--the
904 damages cap unconstitutionally infringed on the right to a
905 jury trial. The court concluded the very existence of the
906 caps in any amount, in any amount is violative of the right
907 to trial by jury.

908 I ask unanimous consent to include a copy of this letter
909 for the record.

910 Dr. {Gingrey.} Will the gentleman yield?

911 Mr. {Butterfield.} Yes.

912 Dr. {Gingrey.} I thank my colleague from North Carolina
913 for yielding, and I commend the gentleman because he brought
914 up a point that, you know, this is really not or certainly
915 should not be a partisan issue. There are members on both
916 sides of the aisle that were health care professionals in
917 their previous life and there are those who were attorneys,
918 indeed, even trial attorneys, as the gentleman said as part
919 of his résumé, and certainly the Republican Supreme Court
920 justice that just happened to get that letter to him this
921 morning, you know, again, he spent his whole life in the
922 legal profession so you come at this--

923 Mr. {Butterfield.} Reclaiming my time. The point that
924 the Chief Justice is making and I am trying to make today is
925 that these damages are a property right, and your court in
926 Georgia and my court in North Carolina have expressly stated
927 that, and you cannot take away a property right once it is
928 vested. That is the point that we are trying to make. I
929 yield back.

930 The {Chairman.} The gentleman yields back. The
931 gentleman from Pennsylvania, Dr. Murphy.

932 Mr. {Murphy.} Thank you, Mr. Chairman, just a couple
933 points here.

934 I know when I was a State senator in Pennsylvania, we

935 dealt with several issues regarding medical liability reform.
936 We dealt with contributory and comparative negligence, joint
937 and several liability, contribution to vicarious liability,
938 expert testimony, periodic payments, collateral sources, pre-
939 judgment interest or delayed damages, and one would hope that
940 would have dealt with a number of things. We did not have
941 caps on punitive damages because according to the way the
942 Pennsylvania Constitution is written back in the early 1900s,
943 there are no caps to be imposed on anything so it would
944 require a constitutional change. This bill would make some
945 differences in that.

946 However, despite that, there is still some concerns in
947 Pennsylvania as there are with other states. For example, in
948 Philadelphia, you have many sites that deliver babies have
949 closed except in academic hospitals. You have medical
950 malpractice costs now that can be close to \$200,000 a year,
951 which has resulted in multiple hospitals throughout the
952 State, entire classes of OB/GYNs who graduate leave the State
953 and go to other States. In particular, a high number seem to
954 want to go to States like Texas.

955 Now, I do want to point out that we had a hearing on
956 this bill a couple of weeks ago. I specifically asked one of
957 the persons presenting at that time, I believe his name is
958 Wolfman, about this issue, and I said were there differences

959 in States that have caps and States that don't, and he said
960 yes, indeed, the States that don't have caps, there is a
961 difference, a clear difference is improved quality in medical
962 care. I believe what he was pointing to is that when you
963 have unlimited damages, health care is better, and despite my
964 asking a number of times during that for him to submit that
965 information to the committee, it has not happened nor has it
966 come to my office. My only assumption is that it doesn't
967 exist.

968 I make reference then to Dr. Cassidy's note too here on
969 some of the issues with regard to differences that have
970 occurred in States with and without punitive damages. Look
971 we all want to see better health care. If this was an issue
972 that allowing unlimited damages would yield better health
973 care, then by gosh, that is the health care we should have
974 performed. We should have said that if the way to get
975 doctors to do better care is to see them for 70 or 80 or 100
976 or \$200 million every time they do something wrong, then by
977 the time we are done with this we will have cured everything.
978 That is not the case.

979 The case is that this is a huge interstate problem
980 because States that have variability in these laws, doctors
981 do leave because they can no longer afford to practice in one
982 State or another. It is tough enough then within a State

983 where doctors flee that you have counties that may not have
984 OB/GYNs or neurologists or neuroradiologists or neurosurgeons
985 or specialists in neonatal care. That being the case, when
986 there is a high-risk delivery or pregnancy, where does that
987 mom go when minutes mean life? And if someone is having a
988 stroke, where does that patient go when even to get a
989 helicopter there and to another high-level hospital where
990 physicians are practicing, minutes mean brain death?

991 This is a huge health care issue in America across the
992 Nation, and it is important that Congress sees this as an
993 issue we have to deal with across this Nation and America
994 because delayed care is denied care is lives, and it is the
995 quality of life for so many babies and so many adults with
996 medical problems that continue on or worsen because they
997 cannot get access to care with this.

998 It is not just an argument about States' rights here.
999 Let us get back to the root of the issue. It is about
1000 patients and it is about health care, and if someone could
1001 show me that allowing anyone to sue a doctor for any amount
1002 of money brings better health care, then let us do it. That
1003 is not the case, however. We have to figure out ways to
1004 improve quality of care but that begins with allowing access
1005 to doctors, which you don't have when they flee a State, and
1006 I yield back.

1007 The {Chairman.} The gentleman from Washington State is
1008 recognized for 5 minutes.

1009 Mr. {Inslee.} I will show you one case that improved
1010 health care. It was about a little 4-year-old girl who
1011 because of a defective catheter ended up with very, very
1012 severe burns, chemical burns to her bladder, and as a result
1013 of the jury verdict by 12 citizens, not politicians, the
1014 medical care manufacturing system changed how they
1015 manufacture catheters so other 4-year-old girls didn't get
1016 burned bladders, and I can point to that case, and I will
1017 give you the name after we are done with this hearing.

1018 But I want to make two points. Both patients and
1019 physicians have legitimate concerns here, and I want to
1020 address both of them, first the patients, and I want to tell
1021 you about one patient. Let us call her Mrs. Smith. She went
1022 in, she had a lump in her breast. The doctor prescribed a
1023 biopsy. They did the biopsy. She came back, they told her
1024 she had a malignancy. She had a double radical mastectomy.
1025 She then developed an obstruction as a result of that surgery
1026 of her bowel and ended up having about two-third to three-
1027 quarters of her bowel removed. She then developed a blood
1028 clot as a result of that surgery, developed gangrene in her
1029 leg and they had to remove her leg, I believe above the knee.
1030 And after her double radical mastectomy and the removal of

1031 most of her bowel and one of her legs, a doctor had to walk
1032 into her room and explain to her that there had been a
1033 mistake in the pathology report, she actually had a benign
1034 situation and she didn't require any of those surgeries.
1035 Somebody made a mistake. And I don't know what the proper
1036 justice is in that situation but I know that is not up to 535
1037 people who never met that woman to make that decision. It is
1038 up to her neighbors, and juries ought to be able to do that.

1039 And you folks distrust jurors so much, in your bill you
1040 put it specifically that you would keep this limitation on
1041 their right to make a decision secret. In your bill it says
1042 you won't even tell the juries about the limitation. You
1043 will let them issue an award of maybe \$500,000 and you don't
1044 even tell them about that limit and then you cut it down
1045 after they leave the courthouse. I don't understand why you
1046 don't trust the people who elect you to make these decisions.
1047 That is the patient.

1048 Now let me address the physician. Physicians have real,
1049 legitimate concerns about liability that all of us
1050 understand, and there are some things we can do to reduce
1051 that concern, but let me suggest this is not the way to go
1052 about this. What I believe we owe physicians is more
1053 predictability and certainty about their standards of care.
1054 We need to have standards of care that they can point to

1055 saying I followed the standard of care, and those standards
1056 of care need to be based on medical evidence. In our health
1057 care bill that we passed, we have a variety of tools to help
1058 the industry develop more evidence-based standards of care.
1059 So when a kid comes into an ER room and they have had a bump
1060 on the head and there is a question whether or not they get a
1061 CT scan, those doctors have a standard of care to point to
1062 based on evidence that they can say I followed the standard
1063 of care and I am not liable if something goes wrong in an
1064 unpredictable way. Our health care reform bill in many, many
1065 ways is going to help the medical community move to those
1066 accountable care organizations with legitimate standard of
1067 care, and I think it is going to help the professional a lot.
1068 That is the way to go about this, not as an assault on
1069 democracy, which this bill is in its most fundamental form,
1070 and I will tell you why. You know what happens? Before you
1071 vote on this bill, go watch the movie Twelve Angry Men and
1072 watch a jury in action. They don't have lobbyists in the
1073 jury room. They don't have 30-second attack ads. They have
1074 the most pure form of democracy known to man, which are 12
1075 randomly selected citizens, and we ought to respect that and
1076 not attack it like this bill does.

1077 I will yield to anybody who wants the time.

1078 Dr. {Cassidy.} Will the gentleman yield?

1079 Mr. {Murphy.} Will the gentleman yield?

1080 Mr. {Inslee.} You guys fight it out, whoever wants to.

1081 Mr. {Murphy.} I would like that study. There is no
1082 doubt. I mean, we are not arguing the quality and importance
1083 of juries in our system. That is critically important. It
1084 has helped make our Nation great. But it is also a matter
1085 that yes, there are individual cases where people have--what
1086 we are looking at overall is this question I am still looking
1087 for, can someone show me a studying that having unlimited
1088 damages in a State makes that State's health care better than
1089 in a State that does have limits on damages. If you have
1090 available that study, I would appreciate it. I will yield.

1091 Dr. {Cassidy.} And it is important to note in the study
1092 I quoted from the American Journal of Radiology, there are
1093 currently standards as to which head-injury patients should
1094 be imaged. It is the States with caps that had a greater
1095 adherence to those standards. Standards by themselves do
1096 not, if you will, give immunity or even comfort.

1097 Mr. {Inslee.} Let me just point out the standards I am
1098 talking about. We need the medical industry to develop
1099 standards of practice--

1100 Dr. {Cassidy.} Those are there.

1101 Mr. {Inslee.} They aren't there. Here is the problem.
1102 ER doctors today do not have standards they can rely upon.

1103 That is what we need to develop, and I am out of my time.

1104 Thanks a lot.

1105 The {Chairman.} The chair would recognize the gentleman
1106 from Illinois, Mr. Shimkus.

1107 Mr. {Shimkus.} Thank you, Mr. Chairman. As much as I
1108 would like to move to the vote, this is a good debate.

1109 A couple of points that have been raised. Remember when
1110 the Secretary of HHS was here, you know, she admitted to
1111 double counting the \$500 billion, so when we talk about the
1112 \$1.2 trillion saved in the health care law, that doesn't
1113 count the \$500 billion in the double counting.

1114 States can raise the limit on this cap. That is part of
1115 this debate. My friend from Washington State does raise the
1116 issue of a standard of care, but in the health care law, no
1117 protection--if someone operates under a standard of care,
1118 there is still no protection, and this will be the same
1119 debate that we will have when we go to--there is going to be
1120 an amendment on medical devices and drugs. There we do have
1121 something that has been approved at the federal level, and
1122 the tort system can still go after them, even though our
1123 national government said these are safe for this process and
1124 procedure.

1125 The citizen, going on with Dr. Murphy, the citizen does
1126 have a right. We are talking about the rights of citizens.

1127 A citizen has a right to have a neurosurgeon when they have a
1128 major head trauma in this country but they are not in
1129 locations, especially in rural areas. Why? Because of this
1130 process.

1131 And let us conclude this with talking about the federal
1132 court and federalism. The CRS report in 2003 said enactment
1133 of tort reform legislation generally would appear to be
1134 within Congress's power to regulate commerce and would not
1135 appear to violate principles of due process or federalism.
1136 They also say in concluding that Congress has the authority
1137 to enact tort reform generally, we refer to reforms that have
1138 been widely implemented at the State level such as caps on
1139 damages, limitations on joint and several liability and on
1140 the collateral source rule. James Madison is also quoted as
1141 saying when he debated the commerce clause at the Virginia
1142 Convention when he called to ratify the convention said all
1143 agree that the general government ought to have the power for
1144 the regulation of commerce. There are regulations in
1145 different States which are unfavorable to the inhabitants of
1146 other States. This will not be the case when uniform
1147 regulations will be made by Congress, and that is the case,
1148 why is this important? Illinois has passed two pieces of
1149 tort reform legislation. They did help provide more access.
1150 They did help lower premiums. They were both struck by the

1151 State Supreme Court. That is why now for my citizens to have
1152 the same access as any other citizen of this country, we need
1153 to have medical liability reform. This is what this bill
1154 does and that is why I support it.

1155 Mr. {Weiner.} Will the gentleman yield?

1156 Dr. {Gingrey.} Will the gentleman yield?

1157 Mr. {Shimkus.} I will go to Dr. Gingrey, then I will go
1158 to you, Anthony.

1159 Dr. {Gingrey.} And I thank the gentleman for yielding,
1160 and I thank the gentleman from Washington State for bringing
1161 up the Smith case as he described. There would probably be a
1162 minimum of 10 defendants in that case, and if it were tried
1163 in the State of Georgia and if it was tried in the State of
1164 Washington, you expect the plaintiff in this particular case
1165 would probably end up with about \$100 million worth of
1166 economic award and justly so, and \$250,000 worth of non-
1167 economic if H.R. 5 becomes law, and I thank the gentleman for
1168 yielding.

1169 Mr. {Shimkus.} And I would like to the gentleman from
1170 New York.

1171 Mr. {Weiner.} I appreciate the gentleman from Illinois.

1172 I guess it does kind of beg the question, I don't
1173 disagree with the gentleman that there is a legitimate
1174 federal interest. This is the whole individual mandate

1175 argument going right now, you made a pretty good argument for
1176 why the individual mandate is constitution.

1177 But I guess the question is, where do you draw the line
1178 as an individual Member of Congress? If residents of
1179 Illinois don't have the ability to hear a trial and make
1180 their own determination what the cap or the floor should be,
1181 why would you give them any rights to hear any cases? What
1182 cases would you allow them unfettered control of? Are there
1183 any cases?

1184 Mr. {Shimkus.} Well, I would just say that States are
1185 allowed to set a cap at a level above this, so if that is the
1186 debate--my issue would be, and it is real world, is that if
1187 the State capital to metropolis right next to Paducah,
1188 Kentucky, probably 35 counties, if there is no neurosurgeon
1189 there because the specialists cannot afford medical liability
1190 and something happens, a major head trauma in south central
1191 Illinois, it is a life-and-death aspect of getting to that
1192 care. What I am trying to say in the federalism debate is
1193 that our citizens have the same right to access that service
1194 as any other citizen and I think that is what Madison was
1195 alluding to when he argued the commerce clause before the
1196 Virginia Assembly, and I yield back my time.

1197 The {Chairman.} The gentleman's time is expired. The
1198 gentlelady from Illinois.

1199 Ms. {Schakowsky.} What confuses me about this whole
1200 debate is that I think we can all agree that the problem that
1201 faces physicians is that they are charged so much money for
1202 their liability insurance that some of them find it difficult
1203 to practice. Well, why we then are looking at the victims of
1204 malpractice and not at the insurance companies really is
1205 perplexing to me.

1206 Let me give you an example. When I was early in my
1207 career here, I am here 12 years so in my second or so term,
1208 there was a hearing in Philadelphia and the insurance
1209 industry was testifying, and I said to them, well, if we were
1210 to set this \$250,000 cap, give me an estimate, would you be
1211 able to reduce your rates by 25 percent; oh, no, we couldn't
1212 make that commitment. Well, how about 20 percent; no, no,
1213 no. We got down to 5 percent and the insurance industry
1214 representative would not make any kind of commitment that as
1215 a result of limiting damages by putting a cap on liability
1216 that they would actually reduce rates. Well, I think that
1217 this committee could get together and look at what about the
1218 practices of the insurance industry that are making it
1219 impossible for doctors to practice, good doctors. I mean,
1220 why can't we work out a way that we figure out how to weed
1221 out the few bad doctors that are really causing the problem?
1222 Why can't we talk about some sort of experience rating rather

1223 than giving all specialties the same kind of rates, meaning
1224 good doctors and bad doctors. There are all kinds of way at
1225 doing insurance reform rather than taking it out on the
1226 patients and making discrimination between someone who is
1227 worth a lot of money and a child who is not. And later I am
1228 going to introduce an amendment dealing with nursing home
1229 residents who aren't really worth a nickel because they don't
1230 have--you know, they aren't worth anything to anybody. And
1231 so--

1232 Dr. {Cassidy.} Will the gentlelady yield?

1233 Ms. {Schakowsky.} Yes, I will. I will yield.

1234 Dr. {Cassidy.} Thank you. There is an article from the
1235 GAO--and I have great sympathy with what you are saying. In
1236 fact, my gut says oh, yeah, right. On the other hand, there
1237 is a GAO report from 2003, a little data--

1238 Ms. {Schakowsky.} I say go with your gut, but go ahead.

1239 Dr. {Cassidy.} I am a gastroenterologist, so that
1240 works.

1241 Ms. {Schakowsky.} See? For sure.

1242 Dr. {Cassidy.} There is a GAO report from 2003 which
1243 specifies that there is multiple factors related to increased
1244 premium cost and they specifically talk about what would be
1245 the impact of caps upon future cost and they say since some
1246 of the insurance companies' current income is there to pay

1247 future cost and because some of their income is related to
1248 investment properties, that it is like I assume landing a
1249 plane on an aircraft carrier; it is a moving deck. So it is
1250 difficult to establish a one-on-one relationship between a
1251 decrease in premium and any sort of cap.

1252 The other thing I would like to point out in that
1253 analysis done of MICRA done in California, there is--

1254 Ms. {Schakowsky.} Reclaiming my time for a minute.
1255 What you are saying is that insurance companies are partly
1256 setting their rates on the success of their investments.
1257 Well, then we shouldn't be talking about using insurance
1258 premiums as a way to talk about medical malpractice.

1259 Dr. {Cassidy.} If I may, that is only one component.
1260 Another component is future claims. And again, the same GAO
1261 report says that if you capped, at least theoretically, if
1262 you capped pain and suffering, that would allow greater
1263 predictability and instead of having wild fluctuations in
1264 premium costs, it would allow some stability thereof, and
1265 again, I am just quoting the GAO.

1266 Ms. {Schakowsky.} Well, reclaiming my time. The fact
1267 of the matter is that liability claims have been rather
1268 stable. They are pretty predictable. They have not wildly
1269 fluctuated. That is one thing that has been a pretty steady
1270 thing. So I would say that let us work together on insurance

1271 reform, and I think that we can make some serious headway
1272 with this problem, and I yield back.

1273 The {Chairman.} The gentlelady yields back. I am
1274 hoping that we can be prepared for the vote, and I have
1275 talked to Mr. Waxman, and if we can vote now, we will bring
1276 up the Barrow amendment next. We are going to limit debate
1277 to 10 minutes on either side. We will vote on that
1278 amendment. We will adjourn until precisely 1:00, if that
1279 meets everyone's approval. So if there are no other members
1280 wishing to speak on the amendment from the gentlelady from
1281 Wisconsin, the clerk will call the roll.

1282 The {Clerk.} Mr. Barton?

1283 [No response.]

1284 The {Clerk.} Mr. Stearns?

1285 [No response.]

1286 The {Clerk.} Mr. Whitfield?

1287 Mr. {Whitfield.} No.

1288 The {Clerk.} Mr. Whitfield, nay.

1289 Mr. Shimkus?

1290 Mr. {Shimkus.} No.

1291 The {Clerk.} Mr. Shimkus, nay.

1292 Mr. Pitts?

1293 Mr. {Pitts.} No.

1294 The {Clerk.} Mr. Pitts, nay.

- 1295 Mrs. Bono Mack?
- 1296 Mrs. {Bono Mack.} No.
- 1297 The {Clerk.} Mrs. Bono Mack, any.
- 1298 Mr. Walden?
- 1299 Mr. {Walden.} No.
- 1300 The {Clerk.} Mr. Walden, nay.
- 1301 Mr. Terry?
- 1302 Mr. {Terry.} Aye.
- 1303 The {Clerk.} Mr. Terry, aye.
- 1304 Mr. Rogers?
- 1305 Mr. {Rogers.} No.
- 1306 The {Clerk.} Mr. Rogers, no.
- 1307 Mrs. Myrick?
- 1308 Mrs. {Myrick.} No.
- 1309 The {Clerk.} Mrs. Myrick, no.
- 1310 Mr. Sullivan?
- 1311 [No response.]
- 1312 The {Clerk.} Mr. Murphy?
- 1313 [No response.]
- 1314 The {Clerk.} Mr. Burgess?
- 1315 Dr. {Burgess.} No.
- 1316 The {Clerk.} Mr. Burgess, nay.
- 1317 Mrs. Blackburn?
- 1318 Mrs. {Blackburn.} No.

- 1319 The {Clerk.} Mrs. Blackburn, nay.
- 1320 Mr. Bilbray?
- 1321 Mr. {Bilbray.} No.
- 1322 The {Clerk.} Mr. Bilbray, nay.
- 1323 Mr. Bass?
- 1324 [No response.]
- 1325 The {Clerk.} Mr. Gingrey?
- 1326 Dr. {Gingrey.} No.
- 1327 The {Clerk.} Mr. Gingrey, nay.
- 1328 Mr. Scalise?
- 1329 [No response.]
- 1330 The {Clerk.} Mr. Latta?
- 1331 Mr. {Latta.} No.
- 1332 The {Clerk.} Mr. Latta, nay.
- 1333 Mrs. McMorris Rodgers?
- 1334 [No response.]
- 1335 The {Clerk.} Mr. Harper?
- 1336 Mr. {Harper.} No.
- 1337 The {Clerk.} Mr. Harper, nay.
- 1338 Mr. Lance?
- 1339 [No response.]
- 1340 The {Clerk.} Mr. Cassidy?
- 1341 Dr. {Cassidy.} No.
- 1342 The {Clerk.} Mr. Cassidy, nay.

1343 Mr. Guthrie?
1344 Mr. {Guthrie.} No.
1345 The {Clerk.} Mr. Guthrie, nay.
1346 Mr. Olson?
1347 Mr. {Olson.} No.
1348 The {Clerk.} Mr. Olson, nay.
1349 Mr. McKinley?
1350 Mr. {McKinley.} No.
1351 The {Clerk.} Mr. McKinley, nay.
1352 Mr. Gardner?
1353 Mr. {Gardner.} No.
1354 The {Clerk.} Mr. Gardner, nay.
1355 Mr. Pompeo?
1356 Mr. {Pompeo.} No.
1357 The {Clerk.} Mr. Pompeo, nay.
1358 Mr. Kinzinger?
1359 Mr. {Kinzinger.} No.
1360 The {Clerk.} Mr. Kinzinger, nay.
1361 Mr. Griffith?
1362 Mr. {Griffith.} Aye.
1363 The {Clerk.} Mr. Griffith, aye.
1364 Mr. Waxman?
1365 Mr. {Waxman.} Aye.
1366 The {Clerk.} Mr. Waxman, aye.

1367 Mr. Dingell?

1368 [No response.]

1369 The {Clerk.} Mr. Markey?

1370 Mr. {Markey.} Aye.

1371 The {Clerk.} Mr. Markey, aye.

1372 Mr. Towns?

1373 Mr. {Towns.} Aye.

1374 The {Clerk.} Mr. Towns, aye.

1375 Mr. Pallone?

1376 Mr. {Pallone.} Aye.

1377 The {Clerk.} Mr. Pallone, aye.

1378 Mr. Rush?

1379 [No response.]

1380 The {Clerk.} Ms. Eshoo?

1381 Ms. {Eshoo.} Aye.

1382 The {Clerk.} Ms. Eshoo, aye.

1383 Mr. Engel?

1384 Mr. {Engel.} Aye.

1385 The {Clerk.} Mr. Engel, aye.

1386 Mr. Green?

1387 Mr. {Green.} Aye.

1388 The {Clerk.} Mr. Green, aye.

1389 Ms. DeGette?

1390 Ms. {DeGette.} Aye.

1391 The {Clerk.} Ms. DeGette, aye.
1392 Mrs. Capps?
1393 [No response.]
1394 The {Clerk.} Mr. Doyle?
1395 Mr. {Doyle.} Aye.
1396 The {Clerk.} Mr. Doyle, aye.
1397 Ms. Schakowsky?
1398 Ms. {Schakowsky.} Aye.
1399 The {Clerk.} Ms. Schakowsky, aye.
1400 Mr. Gonzalez?
1401 [No response.]
1402 The {Clerk.} Mr. Inslee?
1403 Mr. {Inslee.} Aye.
1404 The {Clerk.} Mr. Inslee, aye.
1405 Ms. Baldwin?
1406 Ms. {Baldwin.} Aye.
1407 The {Clerk.} Ms. Baldwin, aye.
1408 Mr. Ross?
1409 Mr. {Ross.} Aye.
1410 The {Clerk.} Mr. Ross, aye.
1411 Mr. Weiner?
1412 Mr. {Weiner.} Aye.
1413 The {Clerk.} Mr. Weiner, aye.
1414 Mr. Matheson?

1415 Mr. {Matheson.} No.

1416 The {Clerk.} Mr. Matheson, nay.

1417 Mr. Butterfield?

1418 Mr. {Butterfield.} Aye.

1419 The {Clerk.} Mr. Butterfield, aye.

1420 Mr. Barrow?

1421 Mr. {Barrow.} Aye.

1422 The {Clerk.} Mr. Barrow, aye.

1423 Ms. Matsui?

1424 Ms. {Matsui.} Aye.

1425 The {Clerk.} Ms. Matsui, aye.

1426 Ms. Christensen?

1427 Dr. {Christensen.} Aye.

1428 The {Clerk.} Ms. Christensen, aye.

1429 The {Chairman.} Are there other members wishing to

1430 vote? Mr. Lance?

1431 Mr. {Lance.} No.

1432 The {Clerk.} Mr. Lance, nay.

1433 The {Chairman.} I don't believe you called my name.

1434 The {Clerk.} I didn't.

1435 The {Chairman.} Mr. Upton votes no.

1436 The {Clerk.} Mr. Upton, nay.

1437 The {Chairman.} Mr. Bass?

1438 Mr. {Bass.} No.

1439 The {Clerk.} Mr. Bass, nay.

1440 The {Chairman.} Mr. Barton?

1441 Mr. {Barton.} No.

1442 The {Clerk.} Mr. Barton, nay.

1443 The {Chairman.} Cathy McMorris-Rogers?

1444 Ms. {McMorris-Rogers.} No.

1445 The {Clerk.} Mrs. McMorris-Rogers, no.

1446 The {Chairman.} Dr. Murphy?

1447 Mr. {Murphy.} No.

1448 The {Clerk.} Dr. Murphy, nay.

1449 The {Chairman.} Mr. Scalise?

1450 Mr. {Scalise.} Nay.

1451 The {Clerk.} Mr. Scalise, nay.

1452 The {Chairman.} Mr. Stearns?

1453 Mr. {Stearns.} No.

1454 The {Clerk.} Mr. Stearns, no.

1455 The {Chairman.} Are there other members wishing to cast

1456 their vote? If not, the clerk will tally the roll.

1457 The {Clerk.} Mr. Chairman, the tally is 20 aye, 29 nay.

1458 The {Chairman.} Twenty-nine nay, 20 aye. The amendment

1459 is not agreed to.

1460 Are there further amendments to the bill? The chair

1461 will recognize Mr. Barrow.

1462 Mr. {Barrow.} I thank the chair. I have an amendment

1463 at the desk.

1464 The {Chairman.} The clerk will read the title of the
1465 amendment.

1466 The {Clerk.} An amendment by Mr. Barrow of Georgia.

1467 [The amendment follows:]

1468 ***** INSERT 3 *****

|
1469 The {Chairman.} Without objection, the amendment is
1470 considered as read and the gentleman is recognized for 5
1471 minutes in support of his amendment.

1472 Mr. {Barrow.} I thank the chair.

1473 My amendment doesn't go to the wisdom of caps as a way
1474 of dealing with the problems of medical liability in this
1475 country. It really goes to the power of us to regulate in
1476 this area and it calls for restraint and the exercise of that
1477 power really doesn't exist.

1478 As for the wisdom of caps, it may seem strange to some
1479 folks that the way to address this problem is to limit the
1480 rights of the truly deserving. I understand the frustration
1481 folks have with frivolous lawsuits but so far as I have been
1482 able to tell, all experience has shown you have never been
1483 able to restrain the truly undeserving by limiting the rights
1484 of the truly deserving. You haven't been able to get at the
1485 truly greedy by limiting the rights of the truly needy. That
1486 goes to the wisdom of the measure. I am not addressing that.

1487 I want to address the power of us to regulate in this
1488 area and call for restraint in the exercise of that power
1489 that doesn't exist, and I will begin with this document right
1490 here, the Constitution. I find that the folks who adopted it
1491 adopted some amendments right at the outset. One of them,

1492 amendment seven, says something about where the value in
1493 controversy shall exceed \$20, the right of trial by jury
1494 shall be preserved. Funny thing, they didn't say where the
1495 amount in controversy exceeds \$20 but doesn't exceed
1496 \$250,000. I take my Constitution neat, just the way it is
1497 written.

1498 But let us drop down to amendment number 10, which I
1499 think is the meat and potatoes of this issue. The powers not
1500 delegated to the United States by the Constitution nor
1501 prohibited by it to the States are reserved to the States
1502 respectively or to the people. Now, I have listened with
1503 great interest to the discussion about the Federal
1504 Government's interest in this, and I have no doubt, I have no
1505 doubt whatsoever that the activities of practitioners of the
1506 healing arts, corporations, citizens, the commercial
1507 practices of purveyors of the healing arts can bring
1508 themselves within the scope of Congress's power to regulate
1509 commerce between the States. I have no doubt that the
1510 antitrust laws can reach this area. I have no doubt that the
1511 Federal Government can condition the exercise or conferring
1512 the benefits in the form of health care upon conditions for
1513 the enjoyment of it. I have no doubt the Federal Government
1514 can attach strings to what it spends money on.

1515 But this amendment addresses the fact that the bill

1516 before us goes much further than that. It purports to
1517 address directly and to regulate the relations between
1518 doctors regulated by States and their patients within the
1519 same States. Now, this is a power, and in cases where there
1520 is no federal connection and no federal dollar whatsoever.
1521 This is a square exercise of the police power that has been
1522 within the realm of the States since the beginning of the
1523 republic.

1524 A lot of the discussion so far has been on the question
1525 of well, you know, we have always done it this way, we have
1526 never gone into this area before. There is a reason why we
1527 haven't gone in this area before because this is an area that
1528 is squarely reserved to the States.

1529 Now, under our Constitution, the States are the highest
1530 authority as to what their law provides. Congress has no
1531 jurisdiction whatsoever to legislate in an area that is
1532 reserved to the States, and the relations between doctors and
1533 patients where there is no federal connection whatsoever,
1534 this is an idea that is squarely reserved to the States. So
1535 if you wanted to pass a law that said only cases involving
1536 the provision of care that the Federal Government pays for,
1537 that might be one thing. We are going way beyond that with
1538 this bill.

1539 Now, my amendment does not gut the bill. My amendment

1540 simply says that where the highest lawmaking authority in the
1541 State, where the constitution of the State has prohibited
1542 caps or where the courts have said our law, the supreme law
1543 of our State, prohibits caps and addresses the issue of the
1544 interest of health care providers versus the rights of their
1545 victims in this bill, then this bill will not affect that.
1546 So what it does is, my amendment makes room for this bill to
1547 legislate in the area where the States have moved into this
1548 area by statute. It allows them to legislate in the area,
1549 allows us to legislate in the area where they have regulated
1550 this area by ordinance, where the supreme power of the States
1551 as expressed in the Constitution of those States has said you
1552 cannot go into this area, we respect that.

1553 Now, Mr. Shimkus put his finger on a pretty good test of
1554 the police power when he cited one of the founders, Madison,
1555 in saying States pass laws that are unfavorable to the
1556 inhabitants of other States. That is a good pretty test of
1557 the commerce power. It is also good test if the police
1558 power, because when you are doing things that you think are
1559 unfavorable to the inhabitants of your State and your State
1560 only, that have no unfavorable impact on folks in other
1561 States is a pretty good measure of the police power that is
1562 reserved to the States, and if anything, if you think of the
1563 balance being struck in various States is improper and

1564 unfavorably benefits victims at the expense of providers, if
1565 that is what you think, then by definition, the nature of
1566 that problem is one that unfavorably burdens folks in that
1567 State and in that State only. It has no adverse impact on
1568 folks next door. In fact, if anything, it has a benefit on
1569 folks next door it is causes providers to go someplace else.

1570 Now, my daddy taught me a long time ago that the fittest
1571 test for the exercise of power is restraint in its exercise.
1572 That goes double when you are trying to exercise a power that
1573 you don't have to begin with, and with that, I yield back.

1574 The {Chairman.} The gentleman yields back. The
1575 gentleman from California is recognized for 5 minutes.

1576 Mr. {Bilbray.} You know, as a former local elected
1577 official, I appreciate that argument very well and I wish
1578 more people had talked about this over the last few decades,
1579 but the gentleman has to recognize that this is not just an
1580 issue in isolation. Where the federal dollar goes, not only
1581 goes the rights of the Federal Government to condition and
1582 impose but also goes to responsibility, and one effect, I
1583 will just say this as a Californian, is that yes, Nevada has
1584 physicians bailing out going into California over the tort
1585 issue, at least that is what my brothers are telling me in
1586 Vegas, but the fact that Californians are being asked through
1587 the federal system to pay taxes to subsidize States that do

1588 not have those limitations and thus as the money goes down,
1589 that is the reason why we have a 21 drinking age. I mean, we
1590 do it again and again about basically imposing on States
1591 based on the condition that we are paying for it or paying
1592 for a portion of it. That is why the Federal Government
1593 steps in on a lot of issues on this item, especially as I
1594 pointed out before, the community clinics in your State have
1595 special federal programs subsidizing and protecting them and
1596 it is basically tied to the fact that we have federal funds
1597 going in. What we have done now is expanded the Federal
1598 Government's shadow and footprint over local communities with
1599 imposition of federal mandates on health care, and can you
1600 not believe that where the federal mandate for health care
1601 and the federal funds for health care go that somehow the
1602 court in litigation is not going to follow eventually, and
1603 especially when you get to punitive.

1604 Let me just say this, and maybe we can find--when you
1605 talk about punitive damages, this is by definition a
1606 punishment. This is supposed to be a deterrent. And it is
1607 kind of interesting for myself, who is at the public agency
1608 being sued by a lot of wealthy lawyers, I want to point out,
1609 that why does punitive damages go to the attorney and the
1610 plaintiff? It seems the logic to somebody who provided
1611 health care that you are making people whole with other

1612 litigation and you are taking care of damages but when it
1613 comes to punitive damages, why is it going into some private
1614 pocket? There is maybe we can agree that all punitive
1615 damages should go to a public fund to provide health care to
1616 the public, and just like we do when we do penalties to
1617 criminal cases. But that is what is happening. This has
1618 become a lottery system, and if you put on any limits at all,
1619 you have a huge impact, and California has pointed that out,
1620 because now you have reduced the lottery factor. We reduced
1621 the gambling and the rolling of the dice, and I know there
1622 are those who say oh, attorneys will not participate if they
1623 don't have a shot at winning the lottery. Well, frankly, I
1624 don't think our courts were ever designed for that and I
1625 don't think our founding fathers ever perceived that a jury
1626 trial would be used as a lottery system rather than a system
1627 of compensation and reimbursement for property rights lost or
1628 taken.

1629 But I think that the one thing we can talk about here
1630 is, how do we address this issue and its impact, and let us
1631 face it: it is not cost-effective to have a lottery system
1632 tied into our health care system, and as long as the Federal
1633 Government is paying for it, we will get into it.

1634 And I just want to point out, there was a great argument
1635 by a colleague on the other side of the aisle about having a

1636 standard that physicians stick to or medical providers stick
1637 to, we will be able to basically be exempt from these kind of
1638 damages. Well, it is kind of interesting. We talk about
1639 look at the review that the FDA is doing. It has doubled in
1640 the last 24 months for medical devices. Is this body now
1641 willing to say if FDA approves a medical device, we will not
1642 allow tort actions against those medical devices because they
1643 played by the rules and the standards we set? No, we sort of
1644 back away from that.

1645 This is a legitimate issue we should talk about, but
1646 when it comes to punitive, the fact is, punitive damages now
1647 have become a lottery. Let us work together to eliminate
1648 that lottery system.

1649 Mr. {Weiner.} Will the gentleman yield on that final
1650 point?

1651 Mr. {Bilbray.} Go ahead.

1652 Mr. {Weiner.} You know, I guess first of all, I was
1653 taken by two points you made, one, that the founding fathers
1654 could not have imagined this scenario, therefore, we, the
1655 collective wisdom of the Energy and Commerce Committee, are
1656 going to substitute ourselves for the founding fathers,
1657 something I don't usually hear--

1658 Mr. {Bilbray.} Excuse me. My point was that they could
1659 not perceive that the Federal Government would be imposing on

1660 States that they have to spend federal funds for something
1661 that was mandated on them, and once the federal dollar goes
1662 into a State, the Federal Government's oversight on that not
1663 only is a right, it is a responsibility. If you don't want
1664 the Federal Government to be imposing restrictions on the use
1665 of federal funds, then the federal funds should never be
1666 required to go into the State or allowed into the State.
1667 That works both ways. I yield back.

1668 The {Chairman.} The gentleman's time is expired.
1669 Remember, 5 minutes remaining on each side. Mr. Waxman is
1670 recognized for 5 minutes.

1671 Mr. {Waxman.} Well, I want to yield to the author of
1672 the amendment, but I do want to point out to my colleagues
1673 that the amount of federal dollars that go to pay for medical
1674 negligence costs is a very small amount. We spent \$2.5
1675 trillion on health care in 2009, and according to the former
1676 Brookings Institution fellow Greg Block, the costs associated
1677 with medical malpractice accounted for a small and steady
1678 fraction of health care costs and could not be blamed for the
1679 continuing increase of those costs. We don't even pay for a
1680 majority of health care costs. Most health care costs are
1681 through the private sector. Most people have their health
1682 insurance through their jobs. We pay for health care under
1683 Medicare and Medicaid. It will be more when the Affordable

1684 Care Act goes into place because there will be subsidies for
1685 people to buy private insurance with federal dollars, but
1686 right now we don't pay for most of the health care. Suddenly
1687 we are going to tell all the States in the country that they
1688 can only have one system of malpractice laws, and I know my
1689 friend from Louisiana said the States have some flexibility
1690 but I don't read it that way. They have no flexibility on
1691 the cap. They have some flexibility with other laws but it
1692 is spelled out where they have flexibility and where they
1693 don't rather than let them decide for themselves.

1694 But Mr. Barrow's point is a different one, and I want to
1695 yield to him because he is speaking to the constitutional
1696 issue itself, both our federal Constitution and the State
1697 constitutions.

1698 Mr. {Barrow.} I thank the gentleman for yielding. I
1699 would simply point out again that this bill before us goes
1700 much further than the Federal dollars. It goes where Federal
1701 dollars do not go. People attach strings to benefits that
1702 are paid for by Federal dollars, that is one thing. But this
1703 goes much further than that, and goes directly to an area
1704 that is squarely reserved to the States. Look, the ability
1705 to regulate the relations between professionals of one State
1706 and the clients of that State is State action. It is not
1707 commerce. It has always been regarded as State action

1708 because it is State action, and this bill goes where Federal
1709 dollars do not go.

1710 I would say to folks who don't like the way some States
1711 are doing it, you know, there are 10 States whose
1712 Constitutions have been held to deal with this. Four of
1713 those Constitutions expressly prohibit caps, and there are
1714 six other States, like mine, where the supreme judicial
1715 authority in the State has construed the State Constitution
1716 of prohibiting caps, and there are a dozen other ones. Well,
1717 that is in litigation. If you don't like the way States are
1718 handling what our Constitution makes their business, my
1719 suggestion is that you run for the State legislature in those
1720 States. If you think you can do their job better, go do
1721 their job. But out of respect for Federalism, and the rights
1722 of the State to regulate within areas that are squarely
1723 confined to their jurisdiction, they have a right to be
1724 wrong. You may think they are wrong, but the genius of our
1725 Federal system is that time may show that the guys you think
1726 are doing it wrong are doing it right. Holmes said time has
1727 upset many fighting fates. A lot of folks here are willing
1728 to have the same old fight over and over again, but no one
1729 can prove that. In the laboratories of democracy is over
1730 time, and allowing the States that have the right to do it
1731 their way to try it their way. Because, after all, they may

1732 be right after all.

1733 Mr. {Waxman.} Gentleman yield back?

1734 Mr. {Barrow.} Yes, sir.

1735 Mr. {Waxman.} At one point someone mentioned the idea
1736 of a uniform law on the drinking age. Well, that law has not
1737 been decided by Washington. That law was fashioned in the
1738 tricky way that Washington usually works. If a State wants
1739 to get certain kinds of money, they have to pass a law to
1740 have 21 as the drinking age. This bill doesn't even go
1741 through that kind of pretense. It says, we are now
1742 establishing for the United States of America a medical
1743 malpractice law which will involve States to set the
1744 standards for medical licensure, and the courts still run the
1745 trials, but they have to do it under Federal restrictions.
1746 And I wonder if that is really Constitutional myself,
1747 although I gather it has been an open subject. But we are
1748 now establishing a Federal law. We are saying this is the
1749 only way you can do it. If there is a medical malpractice
1750 claim, it has to fit under a cap, it has to fit under these
1751 requirements. If there is intentional negligence, the
1752 punitive actions can only be at a certain amount, so even if
1753 it is a punitive thing, there is a limit on the damages. I
1754 support the gentleman's amendment, and I will yield to
1755 anybody the few seconds I have. If not, I yield it back.

1756 The {Chairman.} Gentleman yields back. Mr. Terry.

1757 Mr. {Terry.} Move to strike the last word. I rise in
1758 support of the gentleman's amendment. Now, as I have tried
1759 to reserve as much power for the States, I have stood in
1760 front of crowds for years. Well, crowds of maybe two, three,
1761 four people.

1762 Dr. {Burgess.} That was your family.

1763 Mr. {Terry.} Yeah, and that included my family.

1764 Thanks, Mike. But I have--

1765 Dr. {Burgess.} You have got good legs. You have been
1766 pretty fast, right?

1767 Mr. {Terry.} Yeah, but I always said I was a Tenth
1768 Amendment person. I really feel that we need to reserve as
1769 much for the States. When I look at Article I, Section VIII
1770 of the Constitution, I don't see a Federal power over tort or
1771 damage law. That was obviously reserved to the States. If
1772 you look at legal history, tort law was inherently a State or
1773 local issue. So, staying consistent with the same reasons
1774 why I passionately opposed the national health care bill, was
1775 that it wasn't provided within the Constitution, that it
1776 should be reserved for States. And when we look at the
1777 States, most States have done something. Some have done
1778 differently than what is specified in California or Texas,
1779 but they did it up to what was necessary for their State to

1780 keep doctors there, to keep the high risk areas, OB,
1781 emergency rooms. They dealt with those type of things.

1782 I have given a lot of thought, having legal experience
1783 and legislative experience, that probably the best way to
1784 protect physicians from frivolous lawsuits isn't necessarily
1785 a cap, but a medical review panel that is truly unbiased that
1786 is of expertise, so you know if you have deviated from the
1787 standard of care, then that person could proceed forward to
1788 the damage aspect. States that want to go there no longer
1789 can. They are pre-empted by this provision, and I would
1790 encourage my colleagues on both sides of the aisle here to
1791 actually read Section 11, because we have been told that the
1792 States still have their rights, but it is very clear in the
1793 plain language that this Act preempts all of the State laws
1794 regarding damages if they are any different than what is in
1795 here. And that is it. So, frankly, even Nebraska, that has
1796 the most prescriptive damage caps in the nation, would be
1797 preempted by this Act because they don't control attorney's
1798 fees, or they don't specifically set out the offsets, if
1799 there is any other contributions. Read it. This preempts
1800 probably every but California's and Texas's medical liability
1801 laws.

1802 So it is very clear that it violates States' rights, to
1803 me. It is very clear that it is inconsistent with the Tenth

1804 Amendment, Article I of the Constitution. Therefore, I am
1805 going to support the gentleman's amendment, and--

1806 Dr. {Gingrey.} Will the gentleman yield?

1807 Mr. {Terry.} Sure.

1808 Dr. {Gingrey.} I thank the gentleman for yielding, and,
1809 you know, he is an attorney. The author of the amendment, my
1810 good friend and colleague from the great State of Georgia is
1811 an attorney. We all carry out pocket Constitutions with us,
1812 and we can quote Article I, Section VIII, Clause III in
1813 regard to the commerce clause, and I would ask my gentleman
1814 friend on this side of the aisle from Nebraska, in regard to
1815 States' rights and the Tenth Amendment and Federalism, would
1816 he consider a vote against the Federal ban on partial birth
1817 abortion a violation of that principle? Clearly there are
1818 examples where the Federal government must act where the
1819 State governments have failed to act, or the State Supreme
1820 Court may overrule the legislatures in the various States who
1821 wanted to enact legislation. And I--

1822 Mr. {Terry.} I yield back. Frankly, that case that you
1823 mentioned is Carhart v. The State of Nebraska, so I know a
1824 little bit about that case, and it was State law that banned
1825 that. I would love to have the abortion issue back at the
1826 State level. Yield back.

1827 The {Chairman.} Gentleman's time is expired. We are

1828 prepared now, I think, to vote on this amendment, and the
1829 clerk will call the roll.

1830 The {Clerk.} Mr. Barton?

1831 Mr. {Barton.} No.

1832 The {Clerk.} Mr. Barton, nay.

1833 Mr. Stearns?

1834 Mr. {Stearns.} No.

1835 The {Clerk.} Mr. Stearns, nay.

1836 Mr. Whitfield?

1837 Mr. {Whitfield.} Nay.

1838 The {Clerk.} Mr. Whitfield, nay.

1839 Mr. Shimkus?

1840 Mr. {Shimkus.} Nay.

1841 The {Clerk.} Mr. Shimkus, nay.

1842 Mr. Pitts?

1843 Mr. {Pitts.} No.

1844 The {Clerk.} Mr. Pitts, nay.

1845 Mrs. Bono Mack?

1846 Mrs. {Bono Mack.} Nay.

1847 The {Clerk.} Mrs. Bono Mack, nay.

1848 Mr. Walden?

1849 Mr. {Walden.} Nay.

1850 The {Clerk.} Mr. Walden, nay.

1851 Mr. Terry?

- 1852 Mr. {Terry.} Aye.
- 1853 The {Clerk.} Mr. Terry, aye.
- 1854 Mr. Rogers?
- 1855 Mr. {Rogers.} Nay.
- 1856 The {Clerk.} Mr. Rogers, nay. Mrs. Myrick?
- 1857 Mrs. {Myrick.} Nay.
- 1858 The {Clerk.} Mrs. Myrick, nay.
- 1859 Mr. Sullivan?
- 1860 Mr. {Sullivan.} Nay.
- 1861 The {Clerk.} Mr. Sullivan, nay.
- 1862 Mr. Murphy?
- 1863 Mr. {Murphy.} Nay.
- 1864 The {Clerk.} Mr. Murphy, nay.
- 1865 Mr. Burgess?
- 1866 Dr. {Burgess.} Nay.
- 1867 The {Clerk.} Mr. Burgess, nay.
- 1868 Mrs. Blackburn?
- 1869 Mrs. {Blackburn.} Nay.
- 1870 The {Clerk.} Mrs. Blackburn, nay.
- 1871 Mr. Bilbray?
- 1872 Mr. {Bilbray.} Nay.
- 1873 The {Clerk.} Mr. Bilbray, nay.
- 1874 Mr. Bass?
- 1875 Mr. {Bass.} No.

1876 The {Clerk.} Mr. Bass, nay.
1877 Mr. Gingrey?
1878 Dr. {Gingrey.} No.
1879 The {Clerk.} Mr. Gingrey, nay.
1880 Mr. Scalise?
1881 Mr. {Scalise.} No.
1882 The {Clerk.} Mr. Scalise, nay.
1883 Mr. Latta?
1884 Mr. {Latta.} No.
1885 The {Clerk.} Mr. Latta, nay.
1886 Mrs. McMorris Rodgers?
1887 [No response.]
1888 The {Clerk.} Mr. Harper?
1889 Mr. {Harper.} Nay.
1890 The {Clerk.} Mr. Harper, nay.
1891 Mr. Lance?
1892 Mr. {Lance.} Nay.
1893 The {Clerk.} Mr. Lance, nay.
1894 Mr. Cassidy?
1895 Dr. {Cassidy.} Nay.
1896 The {Clerk.} Mr. Cassidy, nay.
1897 Mr. Guthrie?
1898 Mr. {Guthrie.} No.
1899 The {Clerk.} Mr. Guthrie, nay.

1900 Mr. Olson?
1901 Mr. {Olson.} Nay.
1902 The {Clerk.} Mr. Olson, nay.
1903 Mr. McKinley?
1904 Mr. {McKinley.} Nay.
1905 The {Clerk.} Mr. McKinley, nay.
1906 Mr. Gardner?
1907 Mr. {Gardner.} No.
1908 The {Clerk.} Mr. Gardner, nay.
1909 Mr. Pompeo?
1910 Mr. {Pompeo.} No.
1911 The {Clerk.} Mr. Pompeo, nay.
1912 Mr. Kinzinger?
1913 Mr. {Kinzinger.} No.
1914 The {Clerk.} Mr. Kinzinger, nay.
1915 Mr. Griffith?
1916 Mr. {Griffith.} Aye.
1917 The {Clerk.} Mr. Griffith, aye.
1918 Mr. Waxman?
1919 Mr. {Waxman.} Aye.
1920 The {Clerk.} Mr. Waxman, aye.
1921 Mr. Dingell?
1922 [No response.]
1923 The {Clerk.} Mr. Markey?

1924 [No response.]

1925 The {Clerk.} Mr. Towns?

1926 Mr. {Towns.} Aye.

1927 The {Clerk.} Mr. Towns, aye.

1928 Mr. Pallone?

1929 Mr. {Pallone.} Aye.

1930 The {Clerk.} Mr. Pallone, aye.

1931 Mr. Rush?

1932 [No response.]

1933 The {Clerk.} Ms. Eshoo?

1934 Ms. {Eshoo.} Aye.

1935 The {Clerk.} Ms. Eshoo, aye.

1936 Mr. Engel?

1937 Mr. {Engel.} Aye.

1938 The {Clerk.} Mr. Engel, aye.

1939 Mr. Green?

1940 Mr. {Green.} Aye.

1941 The {Clerk.} Mr. Green, aye.

1942 Ms. DeGette?

1943 Ms. {DeGette.} Aye.

1944 The {Clerk.} Ms. DeGette, aye.

1945 Mrs. Capps?

1946 Mrs. {Capps.} Aye.

1947 The {Clerk.} Mrs. Capps, aye.

1948 Mr. Doyle?
1949 Mr. {Doyle.} Yeah.
1950 The {Clerk.} Mr. Doyle, aye.
1951 Ms. Schakowsky?
1952 Ms. {Schakowsky.} Aye.
1953 The {Clerk.} Ms. Schakowsky, aye.
1954 Mr. Gonzalez?
1955 [No response.]
1956 The {Clerk.} Mr. Inslee?
1957 Mr. {Inslee.} Aye.
1958 The {Clerk.} Mr. Inslee, aye.
1959 Ms. Baldwin?
1960 Ms. {Baldwin.} Aye.
1961 The {Clerk.} Ms. Baldwin, aye.
1962 Mr. Ross?
1963 Mr. {Ross.} Aye.
1964 The {Clerk.} Mr. Ross, aye.
1965 Mr. Weiner?
1966 Mr. {Weiner.} Aye.
1967 The {Clerk.} Mr. Weiner, aye.
1968 Mr. Matheson?
1969 Mr. {Matheson.} Nay.
1970 The {Clerk.} Mr. Matheson, nay.
1971 Mr. Butterfield?

1972 Mr. {Butterfield.} Aye.

1973 The {Clerk.} Mr. Butterfield, aye.

1974 Mr. Barrow?

1975 Mr. {Barrow.} Aye.

1976 The {Clerk.} Mr. Barrow, aye.

1977 Ms. Matsui?

1978 Ms. {Matsui.} Aye.

1979 The {Clerk.} Ms. Matsui, aye.

1980 Ms. Christensen?

1981 Dr. {Christensen.} Aye.

1982 The {Clerk.} Ms. Christensen, aye.

1983 Mr. Upton?

1984 The {Chairman.} Nay.

1985 The {Clerk.} Mr. Upton, nay.

1986 The {Chairman.} Other members wishing to cast a vote?

1987 Ms. McMorris Rodgers?

1988 Mrs. {McMorris Rodgers.} Nay.

1989 The {Clerk.} Ms. McMorris Rodgers, nay.

1990 The {Chairman.} Other members wishing to cast a vote?

1991 If not, the clerk will report the tally.

1992 The {Clerk.} Mr. Upton, 20 ayes, 30 nays.

1993 The {Chairman.} 20 ayes, 30 nays, the amendment is not

1994 agreed to. The Committee stands in recess until 1:00.

1995 [Whereupon, at 12:23 p.m., the Committee recessed, to

1996 reconvene at 1:00 p.m., the same day.]

1997 The {Chairman.} Okay. We are ready to start again.

1998 Barely have a quorum, but we have one. Yeah. Are there

1999 other members wishing to offer amendments to the bill? The

2000 gentlelady from Colorado first? Do yours first or not?

2001 Because we can dispense with hers quickly, I am told. Yeah.

2002 The gentlelady from Colorado is recognized for what purpose?

2003 Ms. {DeGette.} Mr. Chairman, I have an amendment at the

2004 desk.

2005 The {Chairman.} She has an amendment at the desk. The

2006 clerk will report the title.

2007 The {Clerk.} An amendment offered by Ms. DeGette of

2008 Colorado.

2009 [The amendment follows:]

2010 ***** INSERT 4 *****

|
2011 Mrs. {Myrick.} Mr. Chairman, I reserve the right to
2012 object.

2013 The {Chairman.} The gentlelady from North Carolina
2014 offers a point of order, and the gentlelady is recognized for
2015 5 minutes in support of her amendment.

2016 Ms. {DeGette.} Thank you, Mr. Chairman. Mr. Chairman,
2017 I intend to withdraw this amendment because I have been
2018 advised that the parliamentarians have ruled it non-germane.
2019 But I want to put it in the record because I want to talk
2020 about one of the issues that I have been thinking a lot about
2021 with respect to medical malpractice reform, which is it is a
2022 mystery to me why every few years, like the swallows
2023 returning to Capistrano, we take up this bill, but we don't
2024 do anything to try to regulate the medical malpractice
2025 insurance industry. And so what this amendment does is it
2026 repeals certain provisions in the McCarran-Ferguson Act,
2027 which exempts medical malpractice insurers from the Federal
2028 antitrust laws.

2029 Now, I have got to tell you, I don't think there is any
2030 reason we should exempt the medical malpractice insurance
2031 industries from the antitrust laws and Federal government
2032 oversight. And, in fact, in my conversations with physicians
2033 and physicians' groups, one of the things I find is that

2034 there is increasing consolidation of insurance companies at
2035 the same time malpractice rates are continuing to go up for
2036 these doctors. And so, in spite of all of our recent efforts
2037 on health care, it seems that we are just singularly focused
2038 on putting the burden for decreasing the costs of medical
2039 malpractice insurance on America's patients, when really what
2040 we should be looking at is the antitrust aspects of the
2041 insurance industry.

2042 And there is a lot of other things we need to look at
2043 with respect to the insurance industry, too. In past years I
2044 have offered an amendment that would have had a study about
2045 the actuarial processes that insurance companies are using to
2046 set the rates for medical malpractice insurance. Because
2047 even in States that have passed caps and other types of
2048 medical malpractice reform, and even where lawsuits have gone
2049 down, and where average awards have gone down, yet doctors'
2050 medical malpractice insurance continues to increase. And I
2051 would like to find out why that is happening, and what
2052 oversight we can have over the medical malpractice insurance
2053 companies to be able to see, are these rates actually related
2054 in any way to claims or to lawsuits that individuals are
2055 filing?

2056 And so, I have got to tell you, if you do not include
2057 the insurance industry in any kind of medical malpractice

2058 reform bill, you are not going to control insurance costs for
2059 doctors, and that is plain and simple. I, like everybody,
2060 realize that there is a problem that doctors have, and that
2061 is that their rates are going up. But if their rates are
2062 only going up because of the pricing practices of the
2063 insurance companies, then that is a problem that we would
2064 have.

2065 And I just want to say, with respect to this particular
2066 amendment, why we should repeal the antitrust exemption for
2067 health insurers. The Department of Justice's antitrust
2068 division has acknowledged that abuses could arise from
2069 insurance companies' exploitation of this exemption.
2070 Christine Varney, DOJ's top antitrust lawyer, said
2071 ``Repealing the McCarran-Ferguson Act would allow competition
2072 to have a greater role in reforming health and medical
2073 malpractice insurance markets than would otherwise be the
2074 case.''

2075 I was a strong supporter and one of the original
2076 co-sponsors of the Health Insurance Industry Antitrust
2077 Enforcement Act, which was legislation that would bar health
2078 insurance insurers and medical malpractice insurance carriers
2079 from engaging in price fixing, bid rigging, or market
2080 allocations to the detriment of competition and consumers.
2081 Provider organizations, like the American Dental Association,

2082 the American Hospital Association, and the American Academy
2083 of Pediatrics endorsed that legislation, and that is because
2084 doctors and health care providers would also benefit from the
2085 increased competition. So why is this amendment not germane?
2086 Because this committee apparently does not have jurisdiction
2087 over the insurance industry.

2088 But I have got to tell you, if we don't do something
2089 about the insurance practices that we are seeing, we are
2090 never going to bring this malpractice rates for doctors under
2091 control. That is only going to harm the doctors, and it is
2092 going to harm the patients that they are trying to serve.
2093 And with that, if anyone else want to talk to this, I would
2094 be happy to yield to them. Otherwise, I will withdraw my
2095 amendment.

2096 The {Chairman.} Gentlady withdraws her amendment.
2097 Thank you. Are there other members wishing to offer
2098 amendments? Chair will recognize the gentlady from
2099 California.

2100 Ms. {Eshoo.} Thank you, Mr. Chairman. Let me just say
2101 this. I have an amendment at the desk.

2102 The {Chairman.} Clerk will report the title.

2103 The {Clerk.} An amendment offered by Ms. Eshoo of
2104 California.

2105 [The amendment follows:]

2106 ***** INSERT 5 *****

|
2107 The {Chairman.} Without objection, the amendment is
2108 considered as read, and the gentlelady is recognized for 5
2109 minutes in support of her amendment.

2110 Ms. {Eshoo.} Thank you, Mr. Chairman. I just want to
2111 start out by saying that whether I have agreed or disagreed
2112 with what members have said from both sides of the aisle
2113 today, I think that this has really been a worthwhile
2114 discussion and debate. I especially enjoyed Mr. Terry's
2115 presentation, so I think, really, kudos to all the members,
2116 who have been really serious-minded. And when we are talking
2117 about the Constitution and States' rights, I think it reminds
2118 each one of us of how weighty our decisions are here. And on
2119 that issue, before I say something brief about this
2120 amendment, and then yield back, I have never really belonged
2121 to either school of thought, where you are 100 percent a
2122 State righter, or that the Federal government should hold
2123 onto and impose its will across the board. I think that we
2124 need to pick and choose what applies and be very particular
2125 about what applies where.

2126 I am offering this amendment because it really has to do
2127 with patients and consumers. And I think sometimes in a
2128 debate like this, especially around Constitutional issues,
2129 which are very weighty, that the patients really can be left

2130 out of this. Now, when a patient sues for medical
2131 malpractice, they often can't afford to pay up front for a
2132 lawyer, either a full payment or by the hour. Attorneys will
2133 take these cases on a contingency basis, and that is, if the
2134 Plaintiff wins, then the attorney will receive a percentage
2135 of the damages they are awarded. And if the Plaintiff loses,
2136 then the attorney receives nothing. It is the way the system
2137 works today.

2138 This legislation specifies that contingency fees,
2139 regardless of the number of Plaintiffs, cannot exceed 48
2140 percent of the first 50,000 recovered, 33-1/3 percent of the
2141 next 50,000 recovered, 25 percent of the next \$500,000
2142 recovered, and 15 percent of any recovery in excess of
2143 \$600,000. I think that this provision severely restricts the
2144 average American's ability to sue for medical malpractice. I
2145 think it is just really highly intrusionary. The legislation
2146 already limits the damages a Plaintiff can receive, and I
2147 just read them out, to \$250,000. And, of course, it goes
2148 beyond that by dictating the financial agreement that I just
2149 read between a Plaintiff and their attorney.

2150 I don't know if this is the first time in the history of
2151 our country that this will be the law, but I believe it is,
2152 and I think that it is harmful. I think it will
2153 disincentivize any attorneys from taking these cases on, and

2154 then where does the average American stand? Where? How? I
2155 mean, I don't think anyone has really answered that question
2156 in the debate today. And under the contingency fee system,
2157 lawyers are paid only if they are successful. So I think
2158 that what we are doing is building in an incentive for
2159 attorneys to only accept what they would consider to be slam
2160 dunk cases. Where they may be a closer call, how does the
2161 consumer, the patient, get representation? I think it is
2162 unfair to restrict a Plaintiff attorney's fees when
2163 Defendants have no such restrictions.

2164 That is creating a real imbalance in our country. And
2165 someone said earlier, I don't know if it was on the
2166 Republican side or the Democratic side, maybe it was Engel,
2167 but we need to have a delicate balance in what we are trying
2168 to do, and I think that this just destroys that. I mean,
2169 there just won't be any balance, especially if the Defendant
2170 is a large corporation or insurance company with unlimited
2171 amounts of money to pay attorneys by the hour and hire
2172 expensive expert witnesses. The limits on contingency fees
2173 would, again, discourage attorneys for accepting cases with
2174 lower damages. Why would they do it? I mean, why would any
2175 attorney take this on? I just don't think that they will.
2176 Just like any business decision, medical malpractice cases
2177 have to have a built in system that accounts for risk. And

2178 sometimes Defendants and their attorneys win, but many times
2179 they lose, and when they lose, they get nothing.

2180 So I believe, Mr. Chairman and members of the committee,
2181 that limiting contingency fees is really anti-consumer, and
2182 that it only serves to further discriminate against those
2183 that are victims, who can't afford to pay for a trial up
2184 front and out of pocket. I also have a larger issue with the
2185 bill, is that it imposes one system on 50 States, and I don't
2186 think that that is healthy for the system, and I don't think
2187 it respects States, and I really don't think it does anything
2188 to ultimately to bring down the rates of medical malpractice
2189 insurance in our country, which is the underlying motivation
2190 of the legislation. So I thank you, and yield back.

2191 The {Chairman.} Gentlelady's time is expired. Are
2192 there other members wishing to speak on the amendment? Chair
2193 recognizes the gentleman from Louisiana.

2194 Dr. {Cassidy.} Yes. I can, again, appreciate the
2195 gentlelady's concerns, but the article I quoted later, that
2196 looked at the impact of the microlegislation in California
2197 upon the rate of lawsuits filed, and it is important to note
2198 that in California there is limitation on contingency fees.
2199 This legislation is based upon that. And in this they find
2200 that the per capita incidents of malpractice suits being
2201 filed has not decreased, statistically, since 1985, which is

2202 when micro was found to be Constitutional. So, one, we can
2203 see from empiric evidence that a State which has limitations,
2204 it has not limited the ability of Plaintiffs to file suit.
2205 Secondly, there is precedent within the Federal court system
2206 for limiting contingency fees. The Federal Torts Claims Act
2207 limits contingency fees.

2208 Next I will point out that if someone has a terrible
2209 effect, and they have very large economic damages, the
2210 attorney will receive 15 percent of that very large amount,
2211 even if it is, if you will, a billion dollars. So the larger
2212 the reward, although the percentage will decrease, the
2213 absolute amount will increase. So that will continue to be,
2214 apparently, in California, an incentive for attorneys to take
2215 these cases. There would still be a reward. That said, this
2216 analysis of the Micro Act also pointed out that one of the
2217 beneficial effects of this was to limit those cases of
2218 questionable action, those which before may have been paid
2219 off as a nuisance. Now it is not quite so profitable for
2220 those nuisance cases to be settled, and that is the first
2221 line of savings, if you will, as this case progresses.

2222 So if the argument is that it limits the ability of a
2223 Plaintiff to find a lawyer, that does not appear to be the
2224 case empirically, and there is also Federal precedent for
2225 this. Indeed, that is one of the ways that it saves money.

2226 I yield back.

2227 The {Chairman.} Mr. Pallone.

2228 Mr. {Pallone.} Thank you. I would yield to the
2229 gentlewoman from California.

2230 Ms. {Eshoo.} I thank the gentleman. And I should add,
2231 especially since the gentleman that just spoke, talking about
2232 California and the Micro Law and H.R. 5, in California there
2233 are the same limitations, but they only apply in medical
2234 malpractice cases against a health care provider. In this
2235 bill, which has these limitations that I read out, but it
2236 applies to all health care lawsuits, meaning malpractice and
2237 intentional tort cases against doctors, hospitals, nursing
2238 homes, pharmaceutical companies, medical device companies and
2239 insurance companies. So they are not one in the same, and I
2240 think it is important that the record reflect that. And I
2241 would be happy to yield to Mr. Waxman. Or Mr. Pallone needs
2242 to yield.

2243 Mr. {Pallone.} Yield to our ranking member.

2244 Mr. {Waxman.} As I understand the section that would be
2245 struck by the amendment, it is a whole section that gives to
2246 the courts the amount that lawyers could earn in each case,
2247 and then sets, even with the discretion of the court, certain
2248 limitations. In no event shall the total of all contingent
2249 fees for representing all claimants in a health care lawsuit

2250 exceed the following limits, and it goes through the amount
2251 of recovery, and then the amount that the lawyers are willing
2252 to get. I just find that very interesting, that we would
2253 micromanage--

2254 Ms. {Eshoo.} Yeah.

2255 Mr. {Waxman.} --the relationship between an attorney
2256 and a client to the point of setting that out, and then
2257 applying it everywhere in the country. It strikes me as,
2258 again, a reason why States ought to be handling this kind of
2259 matter if they feel there is a problem. I don't object to
2260 the court having the ability to look at it, but then to set
2261 it in statute that even if a court thought the amount of time
2262 and effort by the lawyer required a greater commitment of
2263 resources and time, the court then couldn't look at that in
2264 deciding the amount the lawyer would be paid. And this says
2265 the limitations in the section apply whether the recovery is
2266 by judgment, settlement. You know, what always annoys me is
2267 that, when you have these collusive agreements between the
2268 Plaintiff and the Defendant to have a settlement, but then
2269 they won't let anybody know what happened. They seal the
2270 records, and people who might be protected by knowing the
2271 information can't even get access to it, which could mean
2272 that other people will be harmed in the same way.

2273 So if we are going to start micromanaging things, it

2274 gives me the idea that perhaps we ought to attack that issue
2275 as well. But I think this is too detailed micromanagement of
2276 this relationship, especially when the lawyer is taking the
2277 case on without any payment, with the expectation that there
2278 is going to be a contingency. Otherwise, people are not
2279 going to find lawyers. Doctors won't take out on contingency
2280 fee. If they are the Defendants, they have to pay for the
2281 amount of time that was put in by the lawyer. If we required
2282 that for any Plaintiff, I think we could really hold down the
2283 number of claims, if that is our objective, but it would be
2284 so many people who would not even have access to the courts
2285 to get redress for the harm that was done them by the
2286 negligence, or intentional actions by the Defendant.

2287 I support your amendment. Thank you for yielding to me.

2288 Mr. {Pallone.} I yield back, Mr. Chairman.

2289 The {Chairman.} Gentleman yields back.

2290 Ms. {Eshoo.} Thank you, sir.

2291 The {Chairman.} If we could, I would like to dispense
2292 with the amendment before we go to the floor to vote. Are
2293 there other members wishing to speak? If not, the vote will
2294 occur on the amendment. All those in favor say aye. All
2295 those opposed say no. No. The no's appear to have it, and
2296 therefore the no's have it. The amendment is not agreed to.
2297 I would note that we have got about 10 votes or so on the

2298 House floor, so we would adjourn for about an hour and come
2299 back 5 minutes after the last vote.

2300 [Whereupon, at 1:20 p.m., the committee recessed, to
2301 reconvene at 2:20 p.m., the same day.]

2302 The {Chairman.} Committee is ready to resume. It is my
2303 understanding that the gentlelady from Illinois has an
2304 amendment to be offered.

2305 Ms. {Schakowsky.} Yes. Thank you, Mr. Chairman. I do
2306 have an amendment at the desk.

2307 The {Chairman.} Clerk will report the title.

2308 The {Clerk.} An amendment offered by Ms. Schakowsky of
2309 Illinois.

2310 [The amendment follows:]

2311 ***** INSERT 6 *****

|
2312 The {Chairman.} And it will be considered as read, and
2313 the gentlelady is recognized for 5 minutes in support of her
2314 amendment.

2315 Ms. {Schakowsky.} Yes. I wanted to talk about one
2316 particular aspect of this bill that I hope that we can work
2317 together to fix. This deals with nursing homes that are also
2318 covered by the cap on liability. It would exempt lawsuits
2319 against nursing homes from the \$250,000 cap on non-economic
2320 damages. And I hope you will consider what I have to say.

2321 You know that making decisions to put parents,
2322 grandparents or loved ones in a nursing home can be one of
2323 the most difficult decisions any of us will ever make, but it
2324 can be made easier by having confidence that we are putting
2325 them in good hands. Having worked on nursing home issues for
2326 decades now, I want to note at the outset that most of them
2327 are excellent institutions with dedicated and hard working
2328 staff. But, unfortunately, you also know that there are a
2329 number of bad actors, and we have all heard some appalling
2330 stories of abuse, neglect, mistreatment at the hands of
2331 nursing home employees.

2332 This bill will deny some of the vulnerable people in our
2333 country, the very elderly and persons with severe
2334 disabilities, the ability to hold nursing home providers

2335 accountable for pain, suffering and death that result from
2336 poor care and abuse. Because they have no earned income, the
2337 only remedy for nursing home residents is non-economic
2338 damages to compensate victims for their pain and suffering,
2339 or that are awarded by juries to penalize providers for
2340 egregious treatment. Can you put a cap on what Mary Stewart,
2341 a 72-year-old nursing home resident in Palm Beach, Florida
2342 endured? After an 18 day stay in a nursing home, she had to
2343 have her left foot amputated because it became infected with
2344 maggots. Instead of changing her bandages and cleaning her
2345 wound regularly, nursing home employees merely wrapped more
2346 bandages around it, until it was too late. And what about
2347 John Donohue from Massachusetts? The 93-year-old lost an eye
2348 when an aide's negligence caused a mechanical lift to
2349 puncture his face. The nursing home waited 15 hours to
2350 transport him to the hospital, where doctors were forced to
2351 remove his eye. He contracted an infection and died six
2352 weeks later.

2353 When his wife of 63 years could no longer care for him
2354 at home, William Kurth, and 84-year-old World War II veteran,
2355 was admitted into a nursing home. After undergoing hip
2356 surgery, Mr. Kurth was virtually immobile and at high risk of
2357 pressure ulcers. Despite this knowledge, the nursing home
2358 did not update or change Mr. Kurth's care plan.

2359 Consequently, Mr. Kurth suffered from untreated pressure
2360 ulcers, dehydration and malnutrition, all factors that
2361 contributed to his death. There is also 78-year-old Margaret
2362 Hutchison, who was admitted to a nursing home for short term
2363 rehabilitation after fracturing her hip and wrist at home.
2364 While at the nursing home, she suffered from severe pressure
2365 sores, malnourishment, dehydration, and later died.

2366 Clearly these stories underscore that additional
2367 protections are needed for this vulnerable population. No
2368 one should have to endure the pain and suffering that these
2369 victims and their families endured at the hands of
2370 negligence. And these are not frivolous claims, and this is
2371 certainly not the treatment that a family agrees to when they
2372 place their loved one in a nursing home, and they are not
2373 unique circumstances either. You have all heard these kinds
2374 of stories.

2375 Limiting civil actions against nursing homes only
2376 protects the bad actors in the nursing home industry, at the
2377 expense of seniors and persons with severe disabilities, an
2378 no facility should be allowed to get away with abuse and
2379 neglect. Large damages call attention to the problems facing
2380 seniors and nursing homes and force bad actors to improve
2381 their practices in a way that capped damages cannot. We
2382 should not protect nursing homes that abuse and neglect

2383 elderly residents. We should punish these bad actors and
2384 side with the victims and their families, who, for the rest
2385 of their lives, will suffer as a result of negligence. We
2386 should not add to their suffering.

2387 And I hope that you will support my amendment to exempt
2388 lawsuits against nursing homes from the \$250,000 cap on
2389 non-economic damages. And I yield back.

2390 The {Chairman.} Gentlelady yields back her time. Are
2391 there other members wishing to speak? Gentleman from Texas,
2392 Mr. Olson.

2393 Mr. {Olson.} I thank the Chair. I speak in strong
2394 opposition to this amendment, which excludes nursing homes
2395 from the protections contained in H.R. 5. I fail to see why
2396 we should support an amendment that would decrease senior
2397 citizens' access to long term care. A well respected risk
2398 consulting firm found that, in States that have passed
2399 meaningful medical liability reforms, the liability costs
2400 have dropped significantly post-reform. Furthermore, both
2401 the frequency and severity of claims decreased in States that
2402 have passed tort reform.

2403 Let me tell you about my home State of Texas, which
2404 enacted comprehensive tort reform in 2003. According to a
2405 study conducted by Aon Risk Consulting, a well respected risk
2406 consulting firm, data collected in the two years after post-

2407 medical liability reform in Texas reveals that the average
2408 loss cost for nursing home providers has reduced
2409 significantly. In the years leading up to the enactment of
2410 liability reform in Texas, nursing home providers submitted
2411 claims at a rate two to three times the national average, two
2412 to three times what the nation was doing. The Texas
2413 Association of Homes and Services for the Aging estimated
2414 that the premiums had increased on average from 328 per bed
2415 in 1998 to almost 3,000 per bed in 2002, one year prior to
2416 reform, a 10 percent increase. Not 10 percent, I am sorry, I
2417 apologize. A 100 percent increase in four years. A survey
2418 then found that the average loss cost per occupied bed peaked
2419 at \$6,720 in 2002, and had already declined to \$3,090 by
2420 2004, a 50 percent reduction in two years. Loss costs are
2421 trending down in Texas, and industry experts credit medical
2422 liability reforms passed in 2003 for these reductions in
2423 stabilizing the medical liability market in Texas.

2424 Nursing homes are intertwined with the current medical
2425 liability crisis, and by excluding them from H.R. 5, my
2426 Democratic colleagues are jeopardizing this nation's elderly
2427 and frail citizens ability to find a nursing home that
2428 provides quality care and a comfortable home. Two weeks ago
2429 I had met with members of the Houston medical community and
2430 talked about this issue, specifically this issue, and they

2431 were unanimous that nursing homes would have closed without
2432 meaningful tort reform in my great State. The reason the
2433 nursing homes did purchase insurance, it is not cost
2434 effective, therefore, they would have had to refuse to shut
2435 their doors. Again, we cannot turn our backs on our nation's
2436 elderly at this time. I urge the members to oppose this
2437 harmful--

2438 The {Chairman.} There other members wishing to speak on
2439 the amendment? The gentleman from Georgia, Mr. Barrow.

2440 Mr. {Barrow.} I would like to yield to the lady from
2441 Illinois, Ms. Schakowsky.

2442 Ms. {Schakowsky.} You know, you have been so interested
2443 in changing Medicare into a new kind of plan that hands them
2444 over to the insurance industry, and lets seniors fend for
2445 themselves in trying to get health care. Well, now we have
2446 got a situation here where, in order to get health care, then
2447 seniors that go to nursing homes have to submit themselves to
2448 allowing for malpractice. Your argument is so contrary to
2449 what experience has been around the country in nursing homes.
2450 I mean, are we now declaring a right for seniors to have to
2451 be in nursing homes and get maggots so that they have to have
2452 their limbs removed?

2453 Now, you know, we can weed out the bad actors with with
2454 legislation that allows bad actors to be sued and to get them

2455 out of the nursing home business, or to make them correct
2456 their ways. You know as well as I do that in State after
2457 State, in every single State that we have nursing homes,
2458 particularly those who have lower income people that are at
2459 their mercy, that these kinds of things happen. I would
2460 think that the good nursing homes would welcome the
2461 opportunity to get rid of these bad actors, and not want to
2462 let them hide behind the good operators.

2463 You know, this is a very limited amendment to this bill.
2464 Is this a new kind of defined contribution for elderly
2465 people, that they have to submit to allowing malpractice to
2466 be exacted out of them? And I just think that all of us have
2467 had experience enough with loved ones in our own districts
2468 that we know that this is a national problem, and that the
2469 way to achieve it is not to limit the liability of nursing
2470 homes who, on a regular basis some of them, are abusing in
2471 the worst possible way, and causing the premature death of
2472 many elderly people while they suck money from the government
2473 through Medicaid, as well as through the individual.

2474 So, you know, it seems to me that we ought to be able
2475 to, on some level, not just knee jerk oppose any amendment
2476 that comes over from this side, but to work together so that
2477 we could make sure that this place of last resort for people,
2478 that nursing homes, which are the end of the line, are places

2479 that we know are going to be safe. And by limiting
2480 liability, we are opening the door. We are saying we are
2481 going to let those kinds of things happen. It is surprising
2482 to me that, you know, you strongly oppose this amendment, and
2483 make it as if now we are going to prevent seniors going to
2484 nursing homes? It hasn't prevented seniors from going to
2485 nursing homes in the past, but now you want to make it easier
2486 for them to be abused.

2487 I yield back.

2488 The {Chairman.} Gentleman from Georgia still has the
2489 time. Gentleman yields back. Are there other members
2490 wishing to speak? Mr. Guthrie.

2491 Mr. {Guthrie.} Thank you, Mr. Chairman. I will yield
2492 time to Mr. Olson from Texas.

2493 Mr. {Olson.} I thank my colleague from Kentucky. And
2494 with respect to the comments from my colleague from Illinois,
2495 ma'am, you know that everything this bill, H.R. 5, every
2496 injury that anyone suffers is compensated, fully compensated
2497 under the law. There is 100 percent liability for the
2498 compensatory damages. What you are addressing is the
2499 punitive, the non-economic damages, and those are the damages
2500 that are hurting our health care system. Again, I have
2501 talked to the experts back home, just two weeks ago, and they
2502 brought up the fact that nursing homes would have had to

2503 close if they had to cover the liability that they were
2504 facing from these punitive, the non-economic damages.

2505 Again, I agree with you completely. We don't want to
2506 close these facilities. We want to make sure that our
2507 elderly have the hospitalization and medical care, the
2508 quality of life that we expect them to. But having, you
2509 know, not having a cap on punitive damages, the non-economic
2510 damages, is going to do just that. It is going to close down
2511 facilities, and we don't want that. And that is why I
2512 strongly oppose this amendment.

2513 Mr. {Barrow.} Will the gentleman yield?

2514 Mr. {Olson.} Yes, sir.

2515 Mr. {Barrow.} Is the gentleman aware of the difference
2516 between non-economic damages on the one hand and punitive
2517 damages on the other? Is the gentleman aware that punitive
2518 damages are generally non-compensatory, in the sense they
2519 are not trying to make the victim whole for something? They
2520 are intended to deter and punish really bad behavior. It is
2521 the difference between negligence and murder. On the other
2522 hand, non-economic damages are, in fact, compensatory
2523 damages. That means that do compensate the victim for things
2524 for which there is no market value, like the cost of a
2525 wheelchair or something like that. In other words, the value
2526 of your lost limb, the value of your arm, the value of a

2527 bodily function. They are compensatory damagers, but they
2528 are non-economic damages because they are not measured in the
2529 marketplace. They are not bought and sold off the shelf. So
2530 the gentleman's comments about equating the two, non-economic
2531 damages and punitive damages, is really not accurate. It is
2532 not--

2533 Mr. {Olson.} I reclaim my time and thank you very much.
2534 I appreciate the lawyerly scholaring. And again, I mean, may
2535 have not used the right terms, but the bottom line is is
2536 there are two systems of damages in county, in our tort
2537 system. There are compensatory damagers for your actual
2538 injuries. H.R. 5--

2539 Mr. {Barrow.} And non-economic damages are compensatory
2540 damages.

2541 Mr. {Olson.} --and then punitive damage, which are
2542 designed to punish. It is not really designed to fix what
2543 has happened in the treatment room. It is designed to send a
2544 message out to society. Again--

2545 Mr. {Barrow.} And if the gentleman will yield, there
2546 are two limitations in this bill. There is a limitation on
2547 punitive damages, and there is a limitation on compensatory
2548 non-economic damages, and two separate caps to two separate
2549 items.

2550 Mr. {Olson.} Exactly. And, again, my point--

2551 Mr. {Barrow.} So it is, again, inaccurate to say it
2552 doesn't apply--

2553 Mr. {Olson.} --under this bill--

2554 Mr. {Barrow.} --to compensatory damage.

2555 Mr. {Olson.} Reclaiming my time, under this bill, if
2556 you have suffered injuries, you will compensated for your
2557 injuries, just as our tort system has done. Yes, sir.

2558 Mr. {Barrow.} Not under this bill.

2559 Mr. {Olson.} And no, sir. Let me keep this in my time,
2560 please. The punitive damages, those are the ones that are
2561 drowning our system. Those are the ones that are turning and
2562 making our nursing homes look at their future and decide
2563 whether or not they can do it. Those are the ones that the
2564 trial lawyers are attracted to. They are the ones that get
2565 about 90 percent, 80 percent of that money. It doesn't go to
2566 the patients. The patients get their compensatory damages.
2567 And again, this has worked in my great State of Texas. We
2568 have got the documentation to show it. I think I have
2569 enlightened the committee here about that. And again, I
2570 would greatly oppose this amendment, and yield back my time.

2571 The {Chairman.} Gentleman yields back his time. Are
2572 there other members wishing to speak? If not, a vote occurs
2573 on the amendment. All those in favor say aye. All those
2574 opposed say no. No. No's appear to have it. No's have it.

2575 The amendment is not agreed to. Are there other members
2576 wishing to offer an amendment? Chair recognizes Mr. Waxman.

2577 Mr. {Waxman.} Mr. Chairman, I have an amendment at the
2578 desk.

2579 The {Chairman.} Clerk will report the title.

2580 The {Clerk.} Which amendment?

2581 Mr. {Waxman.} This is on the medical products.

2582 The {Clerk.} We have--

2583 The {Chairman.} Medical products?

2584 The {Clerk.} --136.

2585 The {Chairman.} 136? The clerk will report the title
2586 of the amendment.

2587 The {Clerk.} An amendment to H.R. 5 offered by Mr.
2588 Waxman.

2589 [The amendment follows:]

2590 ***** INSERT 7 *****

|
2591 The {Chairman.} Is this the medical products devices
2592 amendment?

2593 The {Clerk.} Strike medical products.

2594 The {Chairman.} That is it?

2595 The {Clerk.} Yeah.

2596 The {Chairman.} That is it? The amendment will be
2597 considered as read, and the gentleman from California is
2598 recognized for 5 minutes in support of his amendment.

2599 Mr. {Waxman.} Thank you, Mr. Chairman. This amendment
2600 would delete FDA approved drugs and devices, or as the bill
2601 refers to them, medical products from the scope of H.R. 5
2602 entirely. Lawsuits involving drugs and medical devices are
2603 not the kinds of cases that are traditionally considered
2604 medical malpractice, which is ostensibly the subject of the
2605 bill. We usually think of medical malpractice cases as those
2606 between an injured patient and his or her treating physician.
2607 Instead, these cases are filed by patients who are injured,
2608 and often killed, by defective drugs and medical devices
2609 against massive, extremely well resourced pharmaceutical or
2610 medical device companies.

2611 The many justifications we hear for why H.R. 5 is
2612 necessary simply don't apply when it comes to lawsuits
2613 relating to FDA approved drugs and medical devices. For

2614 instance, H.R. 5's proponents say the bill is necessary
2615 because it will curtail the practice of defensive medicine.
2616 They say the bill will reduce the skyrocketing medical
2617 liability insurance rates. They say the bill will address
2618 the doctor shortage cause by a liability exposure. I have
2619 yet to hear the proponents advance an argument as to why we
2620 need to include cases against pharmaceutical and medical
2621 device companies in this bill.

2622 To sweep these cases into the bill without any kind of
2623 exploration into why we should is to give the pharmaceutical
2624 and medical device industries a major and unwarranted gift.
2625 It is also dangerous. FDA has historically viewed State
2626 lawsuits as providing a valuable compliment to the agency's
2627 regulation. The FDA has said that they help to uncover post-
2628 market safety risks that are unknown to the agency at the
2629 time of approval. A former chief counsel stated FDA
2630 regulation of a device cannot anticipate and protect against
2631 all safety risks to individual consumers. ``Even the most
2632 thorough regulation of a product, such as critical device,
2633 medical device, may fail to identify potential problems
2634 presented by the product. Regulation cannot protect against
2635 all possible injuries that might result over time.'' And
2636 that is from a former chief counsel at FDA.

2637 Unless we have a system in which FDA itself takes over

2638 the drug and device development process, manufacturers will
2639 always be in a better position than FDA to know the safety
2640 profile of their products. They developed and manufactured
2641 the products, they receive the safety reports first, and they
2642 are required to alert FDA to any risks they uncover. FDA, on
2643 the other hand, is responsible for overseeing the safety of
2644 tens of thousands of drugs and medical devices. The Supreme
2645 Court recently recognized this predicament as well in
2646 upholding the ability of injured patients to sue drug
2647 companies for their injuries. The Court stated ``The FDA has
2648 limited resources to monitor the 11,000 drugs on the market,
2649 and manufacturers have superior access to information about
2650 their drugs, especially in the post-marketing phase, as new
2651 risks emerge.''

2652 Well, the bill before us would remove the tort system's
2653 invaluable layer of consumer protection at a time when FDA's
2654 ability to assure the safety of our drugs and medical devices
2655 is in great peril. The Republicans' budget resolution calls
2656 for a return to Fiscal Year 2008 funding levels for
2657 discretionary funding across all government agencies. For
2658 FDA to return to that level would mean a budget cut of over
2659 \$600 million, almost 20 percent of the agency's total budget.
2660 Cuts of this magnitude of the FDA's budget will only make
2661 worse the agency's inherent difficulty in monitoring the

2662 post-market safety of thousands of FDA drugs.

2663 The American people deserve better than this. The
2664 proponents will argue that the bill is not preempting these
2665 cases completely. The lawsuits may still go forward, albeit
2666 under the restrictive scheme imposed by the bill. But as
2667 Professor Wolfman testified at the hearing, the many
2668 restrictions in H.R. 5 will make it difficult, if not
2669 impossible, for patients injured by drugs and medical devices
2670 to even retain attorneys who will be willing to take their
2671 cases. So I would submit it is irresponsible and dangerous
2672 to sweep these very different cases into the scope of this
2673 bill, especially when there is no coherent rationale for
2674 doing so in the very first place. I would urge members to
2675 support this amendment. I would be happy to answer any
2676 questions that members may have about it.

2677 The {Chairman.} Chair would recognize Mr. Shimkus,
2678 gentleman from Illinois.

2679 Mr. {Shimkus.} Thank you, Mr. Chairman. I speak
2680 against the amendment. This is really an important debate
2681 because the point being in the legislation is that if someone
2682 is using an authorized legal product certified by the FDA,
2683 whether it is a pharmaceutical drug or a device, that has
2684 been vetted as safe. Well, what we are trying to correct is
2685 in the liability system, where the lawyers are going after

2686 all the deep pockets. Whether it is the pharmaceutical
2687 industry, whether it is the device manufacturer, we have seen
2688 the lawsuits. They sue everybody. And the case is, if the
2689 pharmaceutical product was properly prescribed and
2690 administered, and the device was properly administered, then
2691 they should not be held in this process just because they
2692 have the deep pockets.

2693 You know, punitive damages should be reserved for the
2694 egregious conduct, and we had that debate earlier. They have
2695 no place in cases involving perfectly legal product and legal
2696 conduct in which there is full compliance with all FDA safety
2697 and effective requirements. It really goes back to the
2698 debate we had earlier today about, shouldn't there be a
2699 standard of care? And if the health care industry has proven
2700 a standard of care, then they should not be held in a suit,
2701 if they have done everything right. Well, the argument in
2702 this case is the pharmaceutical drugs have been vetted by our
2703 Federal agency. The devices had been tested and proven and
2704 said, use these things.

2705 Now, this doesn't address the physician or the doctor
2706 who may do something wrong in administering, but it doesn't
2707 give the Plaintiff the right to go after a legal product
2708 legally prescribed. And so that is why, you know, I oppose
2709 this amendment. I would hope my colleagues will oppose this

2710 amendment, because this does add a cost, and it is going
2711 after industry for producing legal products that have already
2712 been vetted by the national government, by our Food and Drug
2713 Administration.

2714 Mr. {Waxman.} Will the gentleman yield?

2715 Mr. {Shimkus.} I would be happy to yield.

2716 Mr. {Waxman.} This is a situation where the FDA
2717 approves a product, and we want them to approve these
2718 products as quickly as possible. They look at the safety,
2719 they look at the efficacy, but we can't expect them to be
2720 able to know all the potential harm that could come with this
2721 product.

2722 Mr. {Shimkus.} Reclaiming my time, that is true, but it
2723 is not the drug itself, of it is not the device's fault. It
2724 may be the practitioner's fault, but you don't sue the
2725 pharmaceutical company for the practitioner misusing the
2726 drug. You don't sue the device manufacturer for the
2727 practitioner maybe abusing the product.

2728 Mr. {Waxman.} Well, let me give you an example where
2729 you might.

2730 Mr. {Shimkus.} And I will yield time to my colleague.

2731 Mr. {Waxman.} Let us say there is a drug, and it has
2732 been approved by the FDA, but then we are staring to see that
2733 this drug has some harmful side effects when it is used in a

2734 very large population. And the manufacturer may know--

2735 Mr. {Shimkus.} Reclaiming my time, then I would
2736 probably say maybe the FDA ought to recall that product. If
2737 there is now evidence that this product is not legitimate,
2738 then the FDA ought to say, hey, bad product. Get it off the
2739 shelves. Do something else.

2740 Mr. {Waxman.} Well, what if the manufacturer--

2741 Mr. {Shimkus.} It is not the drug's fault until they
2742 have said, use it.

2743 Mr. {Waxman.} If the gentleman would yield?

2744 Mr. {Shimkus.} I would yield.

2745 Mr. {Waxman.} The company may know about the problem,
2746 but the FDA may not, and therefore the company may well act
2747 in a negligent way in letting FDA know, and acting on their
2748 own to be responsible--

2749 Mr. {Shimkus.} Reclaiming my time, I think it is under
2750 the rules and regulations that if the industry knows of this
2751 and doesn't disclose it, then they are at fault. Then you
2752 have got some punitive legal court cases against them. I
2753 mean, they have to disclose that.

2754 Mr. {Waxman.} Patients are still harmed by those drugs,
2755 and there could be lawsuit, but then you get all these
2756 limitations that we have in this bill relating to
2757 doctor/patient relationship, protecting--

2758 Mr. {Shimkus.} And reclaiming my last 10 seconds, if
2759 they don't report this, then there are punitive damages under
2760 the bill. And I yield back my time.

2761 The {Chairman.} Other members wishing to seek time?

2762 Mr. {Pallone.} Mr. Chairman?

2763 The {Chairman.} Mr. Pallone?

2764 Mr. {Pallone.} Yield my time to Mr. Waxman.

2765 The {Chairman.} Chairman has recognized for 5 minutes,
2766 who yields to Mr. Waxman.

2767 Mr. {Waxman.} There are two ways this issue has come
2768 up, and one, it was a preemption completely. If it is been
2769 approved by the FDA, then the States are preempted from
2770 allowing lawsuits to take place with regard to the drug if it
2771 turns out to be harmful, with the negligence of the
2772 manufacturer as a cause for the harm. We had a situation
2773 where Dennis Quaid, the actor, found that his newborn baby in
2774 Los Angeles was given the wrong dose of a drug. And I don't
2775 remember all the details, but he wanted to pursue a lawsuit,
2776 and he was told no, you can't, the drug has been approved by
2777 the FDA. Here we could allow a lawsuit, but there could be
2778 limits on the damages, and let me tell you why this is
2779 different in this case.

2780 The drug companies are substantial organizations. They
2781 can fight lawsuits because they have a lot of money to fight

2782 them. If an injured party wants to bring a lawsuit against a
2783 drug company, they have to look for a lawyer on a contingency
2784 basis. Some of these cases can be drawn out for years, and
2785 the expenses can be enormous for the injured party's lawyer
2786 to be able to even take the case on a contingency basis and
2787 hope to recoup their investment in this case in trying to
2788 pursue it. And, therefore, a lot of people will not take the
2789 case. These are not the kind of limitations that make sense
2790 for pharmaceutical and medical devices, where you may think
2791 they make sense for a doctor, where a doctor may be sued for
2792 a frivolous lawsuit, or may well be sued, but there is a lot
2793 more sympathy for the doctors picking up and moving to
2794 another State.

2795 Here we have a drug company, who have substantial amount
2796 of money just simply to drive a lawsuit in a way that would
2797 deny the ability, especially if there are such limits on
2798 punitive damages. Let us say that somebody knew that they
2799 were doing was harmful, and they should be subject to
2800 punitive damages, but there is such a limit on punitive
2801 damages that it is not going to be as much money to really be
2802 a disincentive for those companies to act the way they may
2803 under certain circumstances. So I don't think it is
2804 appropriate to have this kind of an application to drugs and
2805 medical devices in a bill that deals with medical liability

2806 for the doctors and the nurses and the podiatrists and all
2807 the other health professionals. These are not health
2808 professionals. They are big major corporations, and they
2809 have an advantage on their side and a disadvantage for the
2810 Plaintiff when there are these limits on damages.

2811 And I don't think it is for the Federal government to
2812 tell the States that they ought to have those kinds of limits
2813 because Washington decided that an FDA approval amounts to
2814 much more than it does in reality. FDA approval is a
2815 tentative judgment that a drug should go to market and be
2816 sold. And we want that approval, even though we want
2817 continuing monitoring of that drug, and that monitoring often
2818 depends on the pharmaceutical company, or the device
2819 manufacturer, participating with the FDA. But the FDA is not
2820 equipped to follow all the liability situations, and we are
2821 not to say that they have reviewed all these liability cases
2822 in advance if they had to. The FDA would take an enormous
2823 amount of time before they approved these products and got
2824 them on the market.

2825 And that would be, I think a bad result, because we want
2826 people to have access to the products as quickly as possible,
2827 and then a post-surveillance of these drugs or devices to be
2828 sure that, when we learn more about them, we modify the
2829 warnings labels, or we modify the way that they are sold, or

2830 modify the way that they are manufactured to be sure to keep
2831 up with the latest information. If the drug company has the
2832 latest information and the FDA doesn't, and the drug
2833 companies don't own up to it, they may well try to withhold
2834 that information, and in the meantime, patients can be
2835 injured. And we shouldn't put them under these kind of
2836 severe limitations under a one size fits all Federal law, o I
2837 urge support for the amendment.

2838 The {Chairman.} Chair would recognize Mr. Bilbray for
2839 five minutes.

2840 Mr. {Bilbray.} Thank you, Mr. Chairman. And Mr.
2841 Chairman, I personally met with Mr. Quaid about his case, and
2842 I hope that we learn from that, and especially the fact the
2843 gentleman from California was talking about, making sure the
2844 FDA expedites their process. They have doubled their review
2845 time for medical devices in the last 24 months. And maybe we
2846 ought to be talking about if they spent more time worrying
2847 about safety, and less time looking at rationing care by
2848 saying that, oh, it is not cost effective to use this device,
2849 maybe we could be able to be talking about it more openly.

2850 But the issue with Mr. Quaid was classic, because it
2851 wasn't a case of the drug company was wrong, it was the
2852 labeling that was approved by the FDA. It was the labeling
2853 that wasn't read by a nurse, and it wasn't the drug company

2854 at all. But let me get around on the other side of this.
2855 This is one issue you don't talk about. You had a treatment,
2856 bendictin, that was used by women all over this country.
2857 There was a ``National Inquirer'' story in '79. It ended up
2858 being lawsuit after lawsuit after lawsuit, with no scientific
2859 data, according to the FDA, to take it off the market. But
2860 sheerly by the harassment of litigation, this product is no
2861 longer available to women across this country, and my wife
2862 was one of those that went into intensive care while she was
2863 in her first trimester of pregnancy because the litigation
2864 drove that product off the market and denied her access to
2865 that product.

2866 And you know what physicians do now? I don't need to
2867 ask these physicians that are sitting here. They prescribe
2868 the two components of bendictin separately because the
2869 private sector cannot provide it because it was driven off
2870 the market through litigation, not through science. So this
2871 does have an effect. It has an effect on what is available
2872 for consumers. And I say this, as I said to Mr. Quaid, who
2873 do I get to sue? Who do I get to take to trial for those who
2874 drove this product off the market? Who do I get to point the
2875 finger at? Which lawyers do I get to litigate with that
2876 drove it off the market because my wife didn't have the
2877 product that she had in her previous pregnancies? She didn't

2878 have the ability to get the medication that was essential to
2879 not only her, but her unborn baby. Who do I get to have
2880 justice with because this product was driven off?

2881 That baby died of crib death 3 months after her birth,
2882 and everybody who knows crib death knows one of the most
2883 important components is the development in the first
2884 trimester of the central nervous system. And I don't get the
2885 right to be able to sue. The men and women that want their
2886 babies born healthy and do not want their wives to go through
2887 the morning sickness that wife went through, we don't have
2888 the right to buy that product today. And it wasn't the FDA
2889 that took it off the market, it was lawyers that saw deep
2890 pockets, litigation, a lot of money, and not talking about,
2891 what about products that need to be out there?

2892 Mr. {Waxman.} Gentleman yield?

2893 Mr. {Bilbray.} How many are being lost? And I will
2894 just say that if we want to think that litigation is the way
2895 you do quality, I am just saying to the gentleman from
2896 California, you get a lot of people making money driving
2897 products off the market. Thank God there are products out
2898 there that were on the market long enough to win litigation.
2899 The ``National Inquirer'' and trial lawyers denied women the
2900 right to be able to do that, so now they get it bootlegged to
2901 them by their physicians by having two separate pieces of

2902 treatment, rather than having the single one that was used--

2903 Mr. {Waxman.} Gentleman yield?

2904 Mr. {Bilbray.} --effective and safe. And effective and

2905 safe to the drug administration. I will yield to the

2906 gentleman from--

2907 Mr. {Waxman.} I don't know what the gentleman is

2908 talking about. If you are talking about thalidomide, there

2909 are a lot of drugs--

2910 Mr. {Bilbray.} Excuse me, I am talking about bendictin.

2911 Mr. {Waxman.} And what was the situation with that?

2912 Dr. {Burgess.} Will the gentleman yield?

2913 Mr. {Waxman.} I yield to--

2914 Dr. {Burgess.} Bendictin was an anti-nausea medication.

2915 It was available for early pregnancy, last prescribed in the

2916 mid-1980s. It was a combination, I believe, of Vitamin B6,

2917 glucose and some other very mild anti-nausea medication. It

2918 was very effective for reasons that one ever really could

2919 adequately explain in the combination that was sold. The

2920 components, if you prescribed them individually, don't seem

2921 to have the same effect. But there was a child born with a

2922 limb reduction defect. The medication was prescribed to be

2923 given during the first trimester of pregnancy. That is when

2924 hyperemesis is a problem, during the first trimester. There

2925 is no other time that you would use it. In the PDR at the

2926 time, it said it was indicated for use of hyperemesis in the
2927 first trimester of pregnancy.

2928 Because of that, and because of a child born with a limb
2929 reduction defect, sad case to be sure, the limb reduction
2930 defect is an isolated single birth defect. Does not--

2931 Mr. {Bilbray.} But reclaiming my time, my wife's
2932 physicians had to find old bendictine that would have been
2933 taken off the market to be able to administrate it to her to
2934 get her out of intensive care. That is how important some of
2935 this stuff is, but I didn't have the right to litigate on
2936 this issue, so this works both ways. There is a price to
2937 this litigation.

2938 The {Chairman.} Gentleman's time has expired. Are
2939 there other members wishing to speak? We can go to the
2940 Democratic side first. Other members? Dr. Gingrey actually
2941 had has hand up before you. Dr. Gingrey?

2942 Dr. {Gingrey.} Mr. Chairman, I thank you, and my
2943 colleagues, Mr. Bilbray and Dr. Burgess, in talking about
2944 that particular product, as an OB-GYN physician, a little bit
2945 older than my colleagues, I know full well about the
2946 bendectine story. And, of course, that particular medication
2947 was prescription medication, but it was a combination of an
2948 over the counter vitamin, I believe B6, and an over the
2949 counter antihistamine. And they are absolutely right in

2950 regard to a perfectly safe drug that could be obtained over
2951 the counter. In fact, when it was taken off the market
2952 because of all these frivolous lawsuits, and the company went
2953 out of business, I think doctors just told the patient, go by
2954 the drugstore and pick up Vitamin B6 and this antihistamine
2955 and take it for nausea the first trimester.

2956 But getting to the specifics of the Waxman amendment, of
2957 course, I am very much opposed to it. Paragraph one of the
2958 bill, under exceptions, very clearly says a person before or
2959 after pre-market approval clearance, or licensure of such
2960 medical product, knowingly misrepresented to or withheld from
2961 the Food and Drug Administration information that is required
2962 to be submitted under the Federal Food, Drug and Cosmetic Act
2963 of the Public Health Service Act that is material and is
2964 causally related to the harm which the claimant allegedly
2965 suffered, there would be no cap on punitive damages, or pain
2966 and suffering in such situation. And I really don't see the
2967 point of this. These companies, medical device
2968 manufacturers, pharmaceutical companies, they are struggling
2969 to create jobs because of uncertainty at the FDA, Obamacare's
2970 billions of dollars in drug and device taxes.

2971 If we allow this amendment, we will further hurt job
2972 creation, we will hurt innovation, and patient access to life
2973 saving life improvement drugs and devices by allowing

2974 certain, not every, but certain trial lawyers to use these
2975 innovative companies as their personal piggy banks. Money
2976 that could be used for research and development on life
2977 saving devices and drugs will go to defend frivolous
2978 lawsuits. If drug and device manufacturers are not covered
2979 by the bill, then the cost of these products will continue to
2980 rise, perhaps causing these life saving drugs and devices to
2981 become cost prohibitive for many patients.

2982 We should be looking for ways to lower the costs of
2983 prescription drugs, medical devices, health care in general.
2984 That is one of the main purposes, of course, of this medical
2985 tort reform legislation. That, and what we talked about
2986 earlier in regard to physician work force, and not having the
2987 sub-specialist, the super-specialist, the neurosurgeons and
2988 emergency room physicians at Tucson Medical Center, as an
2989 example. And if we continue to just say that, well, you
2990 know, the little doc in rural America that has a one house
2991 shop, that is working 80 hours a week and taking care of our
2992 moms and pops and grandparents. We are compassionate for him
2993 or her, but not so compassionate to a big company that
2994 manufactured prescription drugs, like bendectin, or some very
2995 important medical device that has gone through all of the
2996 processes and the phases and the clinical trials and studies
2997 that are required by the FDA. They have dotted all the I's,

2998 crossed all their T's, and then come back and because after
2999 the fact something goes wrong, to just use them as, as I say,
3000 a personal piggy bank, it is absolutely inappropriate, and
3001 the passage of this amendment would defeat the purpose of
3002 this bill. And I strongly am opposed to it. I encourage my
3003 colleagues on both sides of the aisle to vote against the
3004 amendment, and with that I yield back.

3005 The {Chairman.} Gentleman's time has expired. Oh, I am
3006 sorry. Any Democratic members wishing? Mr. Lance is
3007 recognized.

3008 Mr. {Lance.} Thank you very much, Mr. Chairman. From
3009 my perspective, the FDA defense means that a manufacturer
3010 cannot be punished when it does not deserve to be punished.
3011 Under this defense, a manufacturer is not liable for punitive
3012 damages if it has satisfied FDA's rigorous approval process,
3013 and if the harm to the patient does not result from the
3014 company's violation of the FDA regulation. From my
3015 perspective, and I at one point in my career did practice
3016 law, punitive damages should be reserved for egregious
3017 conduct that shocks the conscience. I do not believe that
3018 punitive damages are appropriate involving perfectly legal
3019 conduct in which a manufacturer submits full documentation of
3020 the drug's or of the medical device's safety and
3021 effectiveness to the FDA and markets its drug or medical

3022 device only after the FDA independently determines that the
3023 drug should be made available to patients. Without this
3024 defense, it seems to me that Plaintiffs in medical
3025 malpractice lawsuits would name as Defendants any deep
3026 pocketed pharmaceutical or medical device manufacturer whose
3027 products are involved. And in that case, the company could
3028 end up shouldering the burden of a significant punitive award
3029 when its own conduct has been perfectly legal.

3030 Patients who are hurt during medical procedures have the
3031 right to sue whoever has hurt them, the physician, or a
3032 nurse, and they tend to sue hospitals as well. A company
3033 that has complied in good faith with the FDA's regulations is
3034 not guilty of willful, flagrant, malicious or grossly illegal
3035 behavior when a physician, or a nurse, or any other person
3036 uses its product negligently. In my judgment, it should not
3037 be threatened with punitive damages, and for that reason I
3038 respectfully oppose the amendment. Thank you, Mr. Chairman,
3039 and I yield back the balance of my time.

3040 The {Chairman.} Gentleman yields back his time. I
3041 would like to think that we could vote on this, and I want to
3042 make an announcement to the members as well. And that is
3043 that because of this markup taking so long, we are going to
3044 markup the chemical security bill not today, in case anybody
3045 is out there and wants to leave. You will remember that we

3046 have done the opening statements. You can leave. You have
3047 been wondering. We will probably mark that bill up in full
3048 committee after the next week. So it is remembering that we
3049 have done opening statements. Would also say that rather
3050 than doing the opening statements tonight for the health
3051 subcommittee markup on maintenance of effort, we will do that
3052 all tomorrow. So we will not do opening statements tonight.

3053 And Mr. Waxman and I have had a very good conversation
3054 relating to the rest of the amendments. We have tentatively
3055 come to an understanding, in terms of time constraints, for
3056 those amendments, and would like to think that we will be
3057 done pretty close to when votes occur on the floor. If not,
3058 we will come back right after votes on the floor and finish,
3059 but it shouldn't be too much after that, as we had entered
3060 into our discussion. And if there are no other members
3061 wishing to speak on this amendment, I would like to think we
3062 could put it to a vote. Ranking--

3063 Mr. {Waxman.} Roll call.

3064 The {Chairman.} Roll call vote. Debate is concluded.

3065 I will ask the clerk to ask for the names for the vote.

3066 The {Clerk.} Mr. Barton?

3067 [No response.]

3068 The {Clerk.} Mr. Stearns?

3069 [No response.]

3070 The {Clerk.} Mr. Whitfield?
3071 Mr. {Whitfield.} Nay.
3072 The {Clerk.} Mr. Whitfield, nay.
3073 Mr. Shimkus?
3074 Mr. {Shimkus.} Nay.
3075 The {Clerk.} Mr. Shimkus, nay.
3076 Mr. Pitts?
3077 Mr. {Pitts.} Nay.
3078 The {Clerk.} Mr. Pitts, nay.
3079 Mrs. Bono Mack?
3080 [No response.]
3081 The {Clerk.} Mr. Walden?
3082 [No response.]
3083 The {Clerk.} Mr. Terry?
3084 Mr. {Terry.} Nay.
3085 The {Clerk.} Mr. Terry, nay.
3086 Mr. Rogers?
3087 [No response.]
3088 The {Clerk.} Mrs. Myrick?
3089 [No response.]
3090 The {Clerk.} Mr. Sullivan?
3091 [No response.]
3092 The {Clerk.} Mr. Murphy?
3093 Mr. {Murphy.} Nay.

- 3094 The {Clerk.} Mr. Murphy, nay.
- 3095 Mr. Burgess?
- 3096 Dr. {Burgess.} Nay.
- 3097 The {Clerk.} Mr. Burgess, nay.
- 3098 Mrs. Blackburn?
- 3099 Mrs. {Blackburn.} Nay.
- 3100 The {Clerk.} Mrs. Blackburn, nay.
- 3101 Mr. Bilbray?
- 3102 Mr. {Bilbray.} Nay.
- 3103 The {Clerk.} Mr. Bilbray, nay.
- 3104 Mr. Bass?
- 3105 Mr. {Bass.} Nay.
- 3106 The {Clerk.} Mr. Bass, nay.
- 3107 Mr. Gingrey?
- 3108 Dr. {Gingrey.} Nay.
- 3109 The {Clerk.} Mr. Gingrey, nay.
- 3110 Mr. Scalise?
- 3111 Mr. {Scalise.} Nay.
- 3112 The {Clerk.} Mr. Scalise, nay.
- 3113 Mr. Latta?
- 3114 Mr. {Latta.} Nay.
- 3115 The {Clerk.} Mr. Latta, nay.
- 3116 Mrs. McMorris Rodgers?
- 3117 Mrs. {McMorris Rodgers.} Nay.

3118 The {Clerk.} Mrs. McMorris Rodgers, nay.
3119 Mr. Harper?
3120 [No response.]
3121 The {Clerk.} Mr. Lance?
3122 Mr. {Lance.} Nay.
3123 The {Clerk.} Mr. Lance, nay.
3124 Mr. Cassidy?
3125 Dr. {Cassidy.} Nay.
3126 The {Clerk.} Mr. Cassidy, nay.
3127 Mr. Guthrie?
3128 Mr. {Guthrie.} Nay.
3129 The {Clerk.} Mr. Guthrie, nay.
3130 Mr. Olson?
3131 Mr. {Olson.} Nay.
3132 The {Clerk.} Mr. Olson, nay.
3133 Mr. McKinley?
3134 Mr. {McKinley.} No.
3135 The {Clerk.} Mr. McKinley, nay.
3136 Mr. Gardner?
3137 Mr. {Gardner.} No.
3138 The {Clerk.} Mr. Gardner, nay.
3139 Mr. Pompeo?
3140 Mr. {Pompeo.} Nay.
3141 The {Clerk.} Mr. Pompeo, nay.

3142 Mr. Kinzinger?

3143 Mr. {Kinzinger.} No.

3144 The {Clerk.} Mr. Kinzinger, nay.

3145 Mr. Griffith?

3146 Mr. {Griffith.} No.

3147 The {Clerk.} Mr. Griffith, nay.

3148 Mr. Waxman?

3149 Mr. {Waxman.} Aye.

3150 The {Clerk.} Mr. Waxman, aye.

3151 Mr. Dingell?

3152 Mr. {Dingell.} Dingell votes aye.

3153 The {Clerk.} Mr. Dingell, aye.

3154 Mr. Markey?

3155 [No response.]

3156 The {Clerk.} Mr. Towns?

3157 [No response.]

3158 The {Clerk.} Mr. Pallone?

3159 Mr. {Pallone.} Aye.

3160 The {Clerk.} Mr. Pallone, aye.

3161 Mr. Rush?

3162 Mr. {Rush.} Aye.

3163 The {Clerk.} Mr. Rush, aye.

3164 Ms. Eshoo?

3165 Ms. {Eshoo.} Aye.

3166 The {Clerk.} Ms. Eshoo, aye.
3167 Mr. Engel?
3168 Mr. {Engel.} Aye.
3169 The {Clerk.} Mr. Engel, aye.
3170 Mr. Green?
3171 Mr. {Green.} Aye.
3172 The {Clerk.} Mr. Green, aye.
3173 Ms. DeGette?
3174 Ms. {DeGette.} Aye.
3175 The {Clerk.} Ms. DeGette, aye.
3176 Mrs. Capps?
3177 [No response.]
3178 The {Clerk.} Mr. Doyle?
3179 Mr. {Doyle.} Yeah.
3180 The {Clerk.} Mr. Doyle, aye.
3181 Ms. Schakowsky?
3182 [No response.]
3183 The {Clerk.} Mr. Gonzalez?
3184 [No response.]
3185 The {Clerk.} Mr. Inslee?
3186 Mr. {Inslee.} Aye.
3187 The {Clerk.} Mr. Inslee, aye.
3188 Ms. Baldwin?
3189 Ms. {Baldwin.} Aye.

- 3190 The {Clerk.} Ms. Baldwin, aye.
- 3191 Mr. Ross?
- 3192 Mr. {Ross.} Aye.
- 3193 The {Clerk.} Mr. Ross, aye.
- 3194 Mr. Weiner?
- 3195 Mr. {Weiner.} Aye.
- 3196 The {Clerk.} Mr. Weiner, aye.
- 3197 Mr. Matheson?
- 3198 [No response.]
- 3199 The {Clerk.} Mr. Butterfield?
- 3200 Mr. {Butterfield.} Aye.
- 3201 The {Clerk.} Mr. Butterfield, aye.
- 3202 Mr. Barrow?
- 3203 Mr. {Barrow.} Aye.
- 3204 The {Clerk.} Mr. Barrow, aye.
- 3205 Ms. Matsui?
- 3206 Ms. {Matsui.} Aye.
- 3207 The {Clerk.} Ms. Matsui, aye.
- 3208 Ms. Christensen?
- 3209 Dr. {Christensen.} Aye.
- 3210 The {Clerk.} Ms. Christensen, aye.
- 3211 Mr. Upton?
- 3212 The {Chairman.} Nay.
- 3213 The {Clerk.} Mr. Upton, nay.

3214 The {Chairman.} Other members wishing to cast a vote?
3215 Mr. Stearns?
3216 Mr. {Stearns.} No.
3217 The {Clerk.} Mr. Stearns, nay.
3218 The {Chairman.} Mr. Walden?
3219 Mr. {Walden.} No.
3220 The {Clerk.} Mr. Walden, nay.
3221 The {Chairman.} Ms. Bono Mack?
3222 Mrs. {Bono Mack.} No.
3223 The {Clerk.} Ms. Bono Mack, nay.
3224 The {Chairman.} Mr. Harper?
3225 Mr. {Harper.} No.
3226 The {Clerk.} Mr. Harper, nay.
3227 The {Chairman.} Mr. Matheson?
3228 Mr. {Matheson.} Nay.
3229 The {Clerk.} Mr. Matheson, nay.
3230 The {Chairman.} Are there other members wishing to cast
3231 a vote? If not, the clerk will report the tally. Oh, Mr.
3232 Barton. Mr. Barton votes no.
3233 The {Clerk.} Mr. Barton, nay.
3234 Mr. Upton?
3235 The {Chairman.} Yes?
3236 The {Clerk.} Seventeen ayes, 29 nays.
3237 The {Chairman.} Seventeen ayes, 29 nays, the amendment

3238 is not agreed to. Other members wishing to offer an
3239 amendment? Mr. Pallone?

3240 Mr. {Pallone.} Mr. Chairman, I have Pallone Amendment
3241 #1 at the desk.

3242 The {Chairman.} The clerk will report the title.

3243 The {Clerk.} An amendment offered by Mr. Pallone of New
3244 Jersey.

3245 [The amendment follows:]

3246 ***** INSERT 8 *****

|
3247 The {Chairman.} Gentleman is recognized for 5 minutes
3248 in support of his amendment.

3249 Mr. {Pallone.} Thank you, Mr. Chairman. My amendment
3250 is quite simple, and in my opinion, a common sense and
3251 realistic approach to placing caps on awards to patients
3252 harmed in medical errors. The language increases the
3253 \$250,000 cap on non-economic damages in the underlying bill,
3254 which is based on a California law passed in '75, to reflect
3255 what that value is today. That amount is equal to about \$1
3256 million, and is based on the Consumer Price Index inflation.

3257 The {Chairman.} Will the gentleman suspend for a
3258 moment? I think that the gentleman meant to bring up Pallone
3259 Amendment #2.

3260 Mr. {Pallone.} Mine says #1, but let me see.

3261 The {Chairman.} The amendment that they are circulating
3262 was the one that we had for #1. Is it irreversible injury?

3263 Mr. {Pallone.} No. If you say it is #1, I take your
3264 word for it. I mean #2.

3265 The {Chairman.} So we will re-start the clock, and we
3266 will ask if--

3267 Mr. {Pallone.} Why don't we clarify it, Mr. Chairman,
3268 before we proceed?

3269 The {Chairman.} Yeah. All right. I think we actually

3270 had it on our side as Pallone #3. Is this the million dollar
3271 cap?

3272 Mr. {Pallone.} Yes.

3273 The {Chairman.} Yeah. That is amendment #3. Okay.

3274 Mr. {Pallone.} Okay.

3275 The {Chairman.} Right. Gentleman is recognized for
3276 five minutes in support of his amendment.

3277 Mr. {Pallone.} Thank you. I don't want to repeat it.

3278 I mean, basically we are going from 250 to a million, and

3279 that is what would happen if you went from 1975, which was

3280 when the California law was passed at 250, and you use the

3281 Consumer Price Inflation factor, it would be essentially \$1

3282 million today. It also includes the same inflation adjustor

3283 based on the Consumer Price Index so that the amount of the

3284 cap can be indexed annually.

3285 Mr. Chairman, we must not forget that medical

3286 malpractice reform affects patients. Any true reform must

3287 take a balanced approach and include protections for the

3288 legal rights of patients. Medical malpractice in the U.S.

3289 has devastating consequences. It is the sixth leading cause

3290 of death in this country. In addition, a November 2010 study

3291 by the Office of the Inspector General of the Department of

3292 Health and Human Services found that approximately one in

3293 seven hospital patients experienced a medical error, 44

3294 percent of which are preventable, and that these errors cost
3295 Medicare \$4.4 billion per year. Now, H.R. 5, which, as we
3296 all know, is the same identical legislation we have
3297 considered for the past decade, is based on the '75
3298 California law known as MICRA, and that includes MICRA's
3299 monetary caps on non-economic damages. So let me be clear,
3300 in case there was any question. These caps are based on
3301 amounts created 36 years ago. We can't continue to consider
3302 this ridiculously low and arbitrary cap on non-economic
3303 damages. I think we all realistically know that 250,000 is
3304 unworkable and unrealistic. I even think that some of our
3305 doctors, in fact some of them have told me that they would
3306 agree, and would be willing to negotiate on that number.

3307 While a \$250,000 cap might have been reasonable when
3308 enacted, it is not reasonable today. The cap would also have
3309 a devastating impact, that is the 250, on children and the
3310 elderly, who are not in the work force, and thus do not
3311 suffer economic loss, such as lost wages or salary. For
3312 example, if a medical error or medical neglect were to result
3313 in the death of a child, the child's parents may not be able
3314 to bring a wrongful death lawsuit because the cost of the
3315 case is substantial, compared to the amount of the potential
3316 recovery. There is no economic loss, since the medical costs
3317 were covered under the parents' insurance coverage, and the

3318 child has no lost wages or income. Then the most that the
3319 parents can recover for their devastating loss is \$250,000,
3320 regardless of how egregious the malpractice. The cap removes
3321 any incentive, that is the 250, removes any incentive to
3322 reduce the number of medical errors because the amount of
3323 damages can be calculated as the cost of doing business.

3324 And lastly, you can't address true malpractice reform,
3325 in my opinion, without controlling the rising premiums for
3326 insurance by imposing caps on non-economic and punitive
3327 damages. That doesn't do anything, in my opinion, to rein in
3328 these rising premiums. But my main point here, Mr. Chairman,
3329 and I made it during the subcommittee hearing, and I have
3330 made it many times to my colleagues, is that this is one of
3331 the things that makes this bill unreasonable, such a low cap.
3332 I know people have been fixated on this 250 for decades. I
3333 have no idea why. It just doesn't make any sense anymore,
3334 given what has happened over the last 36 years. And I don't
3335 know if anybody else would like to take my time. Otherwise,
3336 Mr. Chairman, I would yield back.

3337 The {Chairman.} Gentleman yields back. I would just
3338 like to note that, Mr. Waxman, I agreed that we would spend
3339 15 minutes on this, 7-1/2 on each side. On our side, Dr.
3340 Gingrey is recognized.

3341 Dr. {Gingrey.} Mr. Chairman, thank you, and I won't

3342 take the full 5 minutes. I am very much opposed, of course,
3343 to the Pallone amendment, which would, as he explained, raise
3344 the cap on non-economic damage to a million dollars and index
3345 it to the Consumer Price Index. This amendment, if passed,
3346 would remove much of the benefit from the main cost saving
3347 and stabilization provision of the bill. In 2005, six years
3348 ago, an analysis in California found that if the caps were
3349 doubled from 250,000 to 500,000, it would increase the cost
3350 of the health care system in that State by 6.2 billion. So
3351 if we increase it to a million, I guess it would increase the
3352 cost in that State to 12.4 billion.

3353 The main point is that non-economic damages are not
3354 awarded to pay for goods and services, and they really have
3355 no relationship to the Consumer Price Index. So any increase
3356 in caps comes with a tradeoff of increased cost and reduced
3357 access to care. And I guess my last point, and maybe the
3358 most significant, the bill is very clear in stating that the
3359 caps in the individual States, either existing or in the
3360 future, can be higher or can be lower, and our legislation,
3361 in H.R. 5, the Health Act, in no way prevents that. In fact,
3362 a State could, if the legislature decided, could say the cap
3363 on non-economic or punitive is \$100 billion. You know, any
3364 number, infinity. They could do that, if they, in their
3365 infinite wisdom, decided that that was appropriate.

3366 So, again, I just feel like that this amendment will
3367 undo so much of the stabilization that we are looking for in
3368 regard to the predictability which leads to, of course, what
3369 the medical malpractice insurance industry uses in trying to
3370 determine their insurance rates for--

3371 Mr. {Pallone.} Will the gentleman yield?

3372 Dr. {Gingrey.} I will be glad to yield to my colleague
3373 from New Jersey.

3374 Mr. {Pallone.} I came up with a million dollars based
3375 on the Consumer Price Index. I mean, you can use other
3376 things if you want. The main thing, you know, I have said at
3377 the hearing and I have said to some of my colleagues on the
3378 other side of the aisle for years, if you want to really want
3379 to come up with a way of dealing with this issue, you have to
3380 raise the cap because it is unrealistic, you know, 35 years
3381 ago. You have to limit this reform to malpractice, not throw
3382 in, you know, tort reform for everything but the kitchen
3383 sink. And you have to do what Mr. Waxman constantly says
3384 which is that you have to have some way of actually
3385 controlling or regulating prices the way they do in
3386 California.

3387 If there was an effort on the part of the Republican
3388 side of the aisle to try to meet us on these things, then I
3389 think we could actually come up with something that we might

3390 actually come up with a consensus on.

3391 Dr. {Gingrey.} Well, reclaiming--

3392 Mr. {Pallone.} But I think if we stick with the 250, it
3393 is just not realistic.

3394 Dr. {Gingrey.} Well, reclaiming my time, the gentleman
3395 from New Jersey didn't make this comment earlier, but I think
3396 one of the members on his side of the aisle from New York
3397 did, and it was something to the effect that, you know, in
3398 New York \$250,000 doesn't go very far. You know, it is not a
3399 big number. I think that may be applicable as well to the
3400 State of New Jersey, the gentleman's State which he
3401 represents, and I guess maybe they need to talk to President
3402 Obama in regard to that, in regard to his opinion on raising
3403 taxes on anybody that makes more than \$200,000 or \$250,000
3404 for a family. I agree, it is pretty expensive to live in New
3405 York and New Jersey, but here again, it has no relationship,
3406 the punitive damage, or non-economic to the cost of goods and
3407 services. That is all calculated in the economic, the other
3408 part of the compensatory damages, and certainly inflation
3409 affects that in these judgments. We have got evidence from
3410 California over the last several years of awards that reach
3411 \$95 million of economic costs due to lost wages and medical
3412 care into the future. And yet, the limitation exists of
3413 \$250,000.

3414 So I yield back, and my time is expired and I oppose the
3415 amendment.

3416 The {Chairman.} The gentleman's time is expired. We
3417 have 2-1/2 minutes on each side. I would yield to the
3418 gentleman from New York.

3419 Mr. {Weiner.} Thank you, and I will try not to take too
3420 much time. You know, the gentleman from Georgia explains
3421 that the \$250,000 would give more predictability for the
3422 liability insurance industry, is that really what the role is
3423 of non-economic damages? Is that really what you are trying
3424 to do is to lend predictability? What you are trying to do
3425 with that portion of the damages that a jury would decide is
3426 to try to figure out how you create a structure that someone
3427 isn't incentivized to say, you know what, we are not going to
3428 put a great deal of attention into taking care of this
3429 patient because what is the worst that can happen to us?

3430 You may believe, and maybe there are some of my
3431 colleagues who do, that you should never have any non-
3432 economic damages, you should never have any punitive damages
3433 at all. I got to tell you, we are tip-toeing down to a place
3434 where pretty soon you are going to completely federalize the
3435 entire state legal regime and maybe you will have a chance to
3436 do that. But I don't believe that that should be the highest
3437 sense of responsibility, and the law should not be how we

3438 give predictability to the liability insurance industry. I
3439 can't imagine that the gentleman from Georgia when he goes
3440 home and talks about what he did this week in Congress says,
3441 ladies and gentlemen, I have done it. I have given
3442 predictability to the liability insurance industry, and I
3443 want you to express your gratitude to me by reelecting me in
3444 a couple of years.

3445 Dr. {Gingrey.} If the gentleman would yield?

3446 Mr. {Weiner.} Certainly I would.

3447 Dr. {Gingrey.} I thank the gentleman for yielding since
3448 he referenced me, but no, I won't go home and say that. I
3449 will go home and say that in this bill, which will give
3450 predictability and bring down the cost of medical malpractice
3451 insurance which will reduce the overall cost of healthcare in
3452 this country. Maybe it is only .2 of 1 percent when you
3453 figure only the cost of medical malpractice insurance. But
3454 when you add the cost of defensive medicine, you get up
3455 probably 3 or 4 percent of the total cost of healthcare.

3456 Mr. {Weiner.} Well, I appreciate it, and perhaps I hung
3457 too much on that one phrase that you used because it was kind
3458 of jarring, and I think what Mr. Pallone is trying to say
3459 here is that, you know what, if we are going to get into this
3460 risky business of Members of Congress from hundreds of miles
3461 away from Georgia and New York City saying, you know what, we

3462 are so superior, we are so smart that we are going to say the
3463 amount that is perfect for this purpose, not let juries, not
3464 let bench trials, not let judges do it, we are going to do
3465 it, and I think that what Mr. Pallone is saying, okay, if we
3466 are going to do it, at least let us try to figure out a way
3467 that we do it that has the effect that it is supposed to
3468 have. And the effect is not--

3469 Dr. {Gingrey.} But if the gentleman would further
3470 yield--

3471 Mr. {Weiner.} Let me just finish my point, and I will
3472 be glad to yield whatever few seconds I have. It is not, the
3473 purpose of his amendment, nor should this law be, to give
3474 predictability to the liability insurance industry. It
3475 should be to make sure that patients get as good a car as
3476 possible, that if someone harms them in a way that the state
3477 law is respected, they get a chance to go before a judge,
3478 before a jury of their peers to make the case so that we can
3479 apportion in a civil way how that responsibility should be
3480 portioned out and also disincentivize someone from making the
3481 same mistake in the future. That in a general sense is what
3482 we should be doing, and I think Mr. Pallone is trying to--

3483 Dr. {Gingrey.} If the gentleman would yield me that one
3484 second, I thank him. My final point is that under this law,
3485 under this bill, the states can do that. They can set that

3486 level, that cap, at whatever level they want.

3487 The {Chairman.} Other members on the Republican side
3488 wishing to use the remaining 2-1/2 minutes, if not, the vote
3489 will be on the amendment.

3490 Mr. {Pallone.} I was going to ask for a roll call, Mr.
3491 Chairman.

3492 The {Chairman.} Yes, we will have an amendment. The
3493 clerk will call the roll.

3494 The {Clerk.} Mr. Barton?

3495 Mr. {Barton.} No.

3496 The {Clerk.} Mr. Barton, nay.

3497 Mr. Stearns?

3498 [No response.]

3499 The {Clerk.} Mr. Whitfield?

3500 [No response.]

3501 The {Clerk.} Mr. Shimkus?

3502 [No response.]

3503 The {Clerk.} Mr. Pitts?

3504 [No response.]

3505 The {Clerk.} Mrs. Bono Mack?

3506 [No response.]

3507 The {Clerk.} Mr. Walden?

3508 [No response.]

3509 The {Clerk.} Mr. Terry?

3510 [No response.]

3511 The {Clerk.} Mr. Rogers?

3512 Mr. {Rogers.} No.

3513 The {Clerk.} Mr. Rogers, nay.

3514 Mrs. Myrick?

3515 [No response.]

3516 The {Clerk.} Mr. Sullivan?

3517 [No response.]

3518 The {Clerk.} Mr. Murphy?

3519 Mr. {Murphy.} No.

3520 The {Clerk.} Mr. Murphy, nay.

3521 Mr. Burgess?

3522 Dr. {Burgess.} No.

3523 The {Clerk.} Mr. Burgess, nay.

3524 Mrs. Blackburn?

3525 [No response.]

3526 The {Clerk.} Mr. Bilbray?

3527 Mr. {Bilbray.} No.

3528 The {Clerk.} Mr. Bilbray, nay.

3529 Mr. Bass?

3530 Mr. {Bass.} No.

3531 The {Clerk.} Mr. Bass, nay.

3532 Mr. Gingrey?

3533 Dr. {Gingrey.} No.

- 3534 The {Clerk.} Mr. Gingrey, nay.
- 3535 Mr. Scalise?
- 3536 Mr. {Scalise.} No.
- 3537 The {Clerk.} Mr. Scalise, nay.
- 3538 Mr. Latta?
- 3539 Mr. {Latta.} No.
- 3540 The {Clerk.} Mr. Latta, nay.
- 3541 Mrs. McMorris Rodgers?
- 3542 Mrs. {McMorris Rodgers.} No.
- 3543 The {Clerk.} Mrs. McMorris Rodgers, nay.
- 3544 Mr. Harper?
- 3545 Mr. {Harper.} No.
- 3546 The {Clerk.} Mr. Harper, nay.
- 3547 Mr. Lance?
- 3548 Mr. {Lance.} No.
- 3549 The {Clerk.} Mr. Lance, nay.
- 3550 Mr. Cassidy?
- 3551 Dr. {Cassidy.} No.
- 3552 The {Clerk.} Mr. Cassidy, nay.
- 3553 Mr. Guthrie?
- 3554 [No response.]
- 3555 The {Clerk.} Mr. Olson?
- 3556 Mr. {Olson.} No.
- 3557 The {Clerk.} Mr. Olson, nay.

3558 Mr. McKinley?

3559 Mr. {McKinley.} No.

3560 The {Clerk.} Mr. McKinley, nay.

3561 Mr. Gardner?

3562 Mr. {Gardner.} No.

3563 The {Clerk.} Mr. Gardner, nay.

3564 Mr. Pompeo?

3565 Mr. {Pompeo.} No.

3566 The {Clerk.} Mr. Pompeo, nay.

3567 Mr. Kinzinger?

3568 [No response.]

3569 The {Clerk.} Mr. Griffith?

3570 Mr. {Griffith.} No.

3571 The {Clerk.} Mr. Griffith, nay.

3572 Mr. Waxman?

3573 [No response.]

3574 The {Clerk.} Mr. Dingell?

3575 Mr. {Dingell.} Aye.

3576 The {Clerk.} Mr. Dingell, aye.

3577 Mr. Markey?

3578 [No response.]

3579 The {Clerk.} Mr. Towns?

3580 [No response.]

3581 The {Clerk.} Mr. Pallone?

3582 Mr. {Pallone.} Aye.

3583 The {Clerk.} Mr. Pallone, aye.

3584 Mr. Rush?

3585 [No response.]

3586 The {Clerk.} Ms. Eshoo?

3587 Ms. {Eshoo.} Aye.

3588 The {Clerk.} Ms. Eshoo, aye.

3589 Mr. Engel?

3590 [No response.]

3591 The {Clerk.} Mr. Green?

3592 Mr. {Green.} No.

3593 The {Clerk.} Mr. Green, nay.

3594 Ms. DeGette?

3595 [No response.]

3596 The {Clerk.} Mrs. Capps?

3597 [No response.]

3598 The {Clerk.} Mr. Doyle?

3599 Mr. {Doyle.} Yes.

3600 The {Clerk.} Mr. Doyle, aye.

3601 Ms. Schakowsky?

3602 Ms. {Schakowsky.} Aye.

3603 The {Clerk.} Ms. Schakowsky, aye.

3604 Mr. Gonzalez?

3605 [No response.]

3606 The {Clerk.} Mr. Inslee?
3607 Mr. {Inslee.} Aye.
3608 The {Clerk.} Mr. Inslee, aye.
3609 Ms. Baldwin?
3610 Ms. {Baldwin.} Aye.
3611 The {Clerk.} Ms. Baldwin, aye.
3612 Mr. Ross?
3613 Mr. {Ross.} Aye.
3614 The {Clerk.} Mr. Ross, aye.
3615 Mr. Weiner?
3616 Mr. {Weiner.} Aye.
3617 The {Clerk.} Mr. Weiner, aye.
3618 Mr. Matheson?
3619 Mr. {Matheson.} No.
3620 The {Clerk.} Mr. Matheson, nay.
3621 Mr. Butterfield?
3622 Mr. {Butterfield.} Aye.
3623 The {Clerk.} Mr. Butterfield, aye.
3624 Mr. Barrow?
3625 Mr. {Barrow.} Aye.
3626 The {Clerk.} Mr. Barrow, aye.
3627 Ms. Matsui?
3628 Ms. {Matsui.} Aye.
3629 The {Clerk.} Ms. Matsui, aye.

- 3630 Ms. Christensen?
- 3631 Dr. {Christensen.} Aye.
- 3632 The {Clerk.} Ms. Christensen, aye.
- 3633 Mr. Upton?
- 3634 The {Chairman.} No.
- 3635 The {Clerk.} Mr. Upton, nay.
- 3636 The {Chairman.} Other members wishing to vote? Mr.
- 3637 Pitts?
- 3638 Mr. {Pitts.} No.
- 3639 The {Clerk.} Mr. Pitts, nay.
- 3640 The {Chairman.} Mr. Walden?
- 3641 Mr. {Walden.} No.
- 3642 The {Clerk.} Mr. Walden, nay.
- 3643 The {Chairman.} Ms. Blackburn?
- 3644 Mrs. {Blackburn.} No.
- 3645 The {Clerk.} Ms. Blackburn, nay.
- 3646 The {Chairman.} Mr. Terry?
- 3647 Mr. {Terry.} No.
- 3648 The {Clerk.} Mr. Terry, nay.
- 3649 The {Chairman.} Ms. Bono Mack?
- 3650 Mrs. {Bono Mack.} No.
- 3651 The {Clerk.} Ms. Bono Mack, nay.
- 3652 The {Chairman.} Mr. Stearns?
- 3653 Mr. {Stearns.} No.

- 3654 The {Clerk.} Mr. Stearns, nay.
- 3655 The {Chairman.} Mr. Guthrie?
- 3656 Mr. {Guthrie.} No.
- 3657 The {Clerk.} Mr. Guthrie, nay.
- 3658 The {Chairman.} Mr. Whitfield?
- 3659 Mr. {Whitfield.} No.
- 3660 The {Clerk.} Mr. Whitfield, nay.
- 3661 The {Chairman.} Mr. Waxman?
- 3662 Mr. {Waxman.} Aye.
- 3663 The {Clerk.} Mr. Waxman, aye.
- 3664 The {Chairman.} Mr. Towns?
- 3665 Mr. {Towns.} Aye.
- 3666 The {Clerk.} Mr. Towns, aye.
- 3667 The {Chairman.} Mr. Engel?
- 3668 Mr. {Engle.} Aye.
- 3669 The {Clerk.} Mr. Engle, aye.
- 3670 The {Chairman.} I'm sorry, Mr. Shimkus?
- 3671 Mr. {Shimkus.} No.
- 3672 The {Clerk.} Mr. Shimkus, nay.
- 3673 The {Chairman.} Are there other members wishing to cast
- 3674 a vote? If not, the clerk will report the tally.
- 3675 The {Clerk.} Mr. Chairman?
- 3676 The {Chairman.} Go ahead.
- 3677 The {Clerk.} On that there were 16 ayes, 30 nays.

3678 The {Chairman.} Sixteen ayes, 30 nays. The amendment
3679 is not agreed to. For what purpose does the gentleman from
3680 the great State of Michigan seek recognition?

3681 Mr. {Dingell.} Mr. Chairman, I have an amendment at the
3682 clerk's desk.

3683 The {Chairman.} The gentleman has an amendment. Which
3684 amendment is it?

3685 Mr. {Dingell.} It is the amendment I just filed.

3686 The {Chairman.} You have got two amendments that I know
3687 that are there.

3688 The {Clerk.} We got it.

3689 The {Chairman.} Amendment number one?

3690 Mr. {Dingell.} It is number one.

3691 The {Chairman.} Number one? The clerk will report the
3692 title.

3693 Mr. {Dingell.} Amendment offered by Mr. Dingell of
3694 Michigan.

3695 [The amendment follows:]

3696 ***** INSERT 9 *****

|
3697 The {Chairman.} The amendment will be considered as
3698 read, and the gentleman is recognized for 5 minutes in
3699 support of his amendment. Might I ask the parliamentary
3700 inquiry of the gentleman? Is this the amendment that would
3701 make drugs and devices subject to punitive damages if they
3702 are misbranded?

3703 Mr. {Dingell.} Yes.

3704 The {Chairman.} The gentleman is recognized for 5
3705 minutes.

3706 Mr. {Dingell.} I thank the Chair. I want to commend
3707 the staff of both the majority and the minority. The
3708 question of punitive damages has been a matter of concern to
3709 me. If the drugs are misbranded, under the legislation as
3710 offered, they would not be subject to punitive damages in the
3711 event that there was a lawsuit or negligence or for
3712 malpractice. This would affect, of course as everyone knows,
3713 mostly the manufacturers of pharmaceuticals.

3714 Having said that, the amendment makes a simple change,
3715 and it simply changes it so that where the drugs are
3716 misbranded within the meaning of the Food and Drug Act, that
3717 they are then subject to--where there is a lawsuit in which
3718 the plaintiff prevails, subject to punitive damages, and I
3719 will be happy to yield to any of my colleagues who have a

3720 question or comment. I have to yield to the Chairman.

3721 The {Chairman.} If the gentleman will yield to me, I
3722 would just like to say that we are willing to accept the
3723 gentleman's amendment.

3724 Mr. {Dingell.} I thank you, Chairman.

3725 The {Chairman.} The purpose of the section is to say
3726 that if manufacturers of medical devices or drugs that comply
3727 with the requirements of the Food, Drug and Cosmetic Act,
3728 that they should not be held liable for punitive damages, and
3729 if someone is complying with the law and regulations, what
3730 actions are we trying to punish when in fact punitive damages
3731 are meant to punish.

3732 So your amendment clarifies that those that cause a
3733 medical product to be misbranded or adulterated can be held
3734 liable for punitive damages, and that certainly seems
3735 appropriate. I would urge all members to support the
3736 amendment, and tell the gentleman as much as I would like to
3737 have thought that we might be able to get your vote for final
3738 passage, I understand. But your amendment dramatically
3739 improves--

3740 Mr. {Dingell.} I thank the Chairman. You are always
3741 most gracious, and I seek to be as helpful as I can.

3742 The {Chairman.} And I will work with our leadership to
3743 make sure that this amendment is included on the bill that

3744 reaches the House Floor through the Rules Committee.

3745 Are there other members that wish to speak in support of
3746 the amendment? If not, all those in favor of the amendment
3747 say aye, those opposed say no. The ayes have it. The ayes
3748 have it. The amendment is agreed to.

3749 Other members that wish to offer an amendment? The
3750 gentleman again from Michigan has his second amendment that
3751 he would like to offer.

3752 Mr. {Dingell.} Chairman, you are most courteous. I
3753 have an amendment at the clerk's desk.

3754 The {Chairman.} The clerk will report--

3755 Mr. {Dingell.} It is one which appears on page 9.

3756 The {Chairman.} The clerk will report the title of the
3757 amendment.

3758 The {Clerk.} An amendment offered by Mr. Dingell of
3759 Michigan.

3760 [The amendment follows:]

3761 ***** INSERT 10 *****

|
3762 The {Chairman.} The amendment will be considered as
3763 read, and the gentleman is recognized for 5 minutes in
3764 support of his amendment.

3765 Mr. {Dingell.} Mr. Chairman, I thank you again. H.R. 5
3766 provides that punitive damages may only be awarded if the
3767 plaintiff proves by an impossible heightened standard of
3768 clear and convincing evidence that the defendant acted with
3769 malicious intent to injure the plaintiff or the defendant
3770 understood that the plaintiff was substantially certain to
3771 suffer unnecessary injury, yet deliberately failed to avoid
3772 such injury.

3773 The amendment would strike this unreasonable standard
3774 and replace it with a standard that is already understood and
3775 that is already in federal law under the Volunteer Protection
3776 Law, Public Law 105-19, a law that provides volunteers with
3777 immunity but does not protect them from punitive damages if
3778 they recklessly injure others. Requiring patients to prove
3779 that the defendant acted with malicious intent makes punitive
3780 damages, which are already rare, quite frankly, extinct.

3781 Malicious intent requires more than criminal misconduct.
3782 Punitive damages are necessary in order to deter the most
3783 flagrant abuses, such as doctors operating under the
3784 influence of alcohol or drugs or having sexual relations with

3785 patients who are unconscious. The requirement of malicious
3786 intent would protect a doctor who was drunk if he killed a
3787 patient because the Court would likely hold that a drunken
3788 doctor was unable to form the necessary intent.

3789 For example, there is another case, and I want to make
3790 it very clear, these are very, very rare cases but they are
3791 important because our doctors are almost without exception,
3792 people with great integrity and decency and concern. But
3793 there was a dentist by the name of Dr. Liana Gedz who was
3794 wheeled into the operating room to deliver her first baby by
3795 a Cesarean section. The Cesarean section was successfully
3796 performed, but the obstetrician stunned the nurses by carving
3797 his initials into the belly of the mother. Now, clearly,
3798 this is the kind of thing that is the most flagrant
3799 indifference to the health of the patients.

3800 The amendment would simply ensure that punitive damages
3801 again, which are rare, because they are not awarded in cases
3802 of simple negligence, are available only where the defendant
3803 has committed an act so atrocious and so dangerous that
3804 punishment, not just compensation to the patient, is
3805 warranted. And I will be happy to yield to any of my
3806 colleagues who have a question or a comment.

3807 The {Chairman.} Does the gentleman yield back?

3808 Mr. {Dingell.} I do.

3809 The {Chairman.} The gentleman yields back his time.
3810 Anyone on our side wishing to speak opposed to the amendment?
3811 Dr. Gingrey is recognized for 5 minutes.
3812 Dr. {Gingrey.} Mr. Chairman, thank you, and certainly I
3813 appreciate the gentleman from Michigan's amendment and his
3814 intent, but I believe that his amendment strikes language as
3815 I understand it in order to replace it with more ambiguous
3816 language. The amendment, referring to the bill, the
3817 amendment would strike lines 12 through 15 on page 9 that
3818 spell out punitive damages apply to a person that acted with
3819 malicious intent to injure the claimant or that such person
3820 deliberately failed to avoid unnecessary injury and that such
3821 person knew the claimant was substantially certain to suffer.
3822 It would replace that language with, as we read in the
3823 amendment, a person's conduct constitutes willful or criminal
3824 misconduct, gross negligence, recklessness conduct or a
3825 conscious, flagrant indifference to the health or safety of
3826 the claimant.
3827 You know, I think that the language in the bill is
3828 clear. I know the gentleman's intend to make it maybe more
3829 clear, more definitive, but I think it does just the
3830 opposite. And I just think it would lead to more confusion,
3831 and at best, it is repetitive and at worst, it appears to
3832 provide less clarity on intent for courts when deciding

3833 whether punitive damages should apply.

3834 And again, I thank the gentleman for the amendment. I
3835 thank the gentleman for working with us, and I was in favor
3836 of his first amendment, but I will have to respectfully
3837 oppose this amendment. And I yield back.

3838 The {Chairman.} The gentleman yields back. All time is
3839 expired. Those in support of the amendment will say aye,
3840 those opposed say no. The no's appear to have it. The no's
3841 have it. The amendment is not agreed to.

3842 I would tell my colleagues that it appears as though we
3843 have only four amendments remaining, and at this time I would
3844 recognize the gentleman, Mr. Pallone, to offer his amendment.

3845 Mr. {Pallone.} Thank you, Mr. Chairman. I believe this
3846 is Pallone amendment number two.

3847 The {Chairman.} The clerk will report the title.

3848 The {Clerk.} An amendment offered by Mr. Pallone of New
3849 Jersey.

3850 [The amendment follows:]

3851 ***** INSERT 11 *****

|
3852 The {Chairman.} The amendment will be considered as
3853 read, and the gentleman is recognized for 5 minutes in
3854 support of his amendment.

3855 Mr. {Pallone.} Thank you, Mr. Chairman. This amendment
3856 eliminates the monetary cap on punitive damages. As Mr.
3857 Dingell has mentioned, punitive damages are only awarded in
3858 the event of wanton and reckless conduct. By definition,
3859 these types of awards are used when a doctor puts a patient's
3860 life at risk knowingly. Furthermore, punitive damages are so
3861 rare because they are not awarded in cases of simple
3862 negligence. Rather, they are awarded by the court only in
3863 cases where the defendant has committed an act so atrocious
3864 and dangerous that punishment, not just compensation to the
3865 patient, is warranted.

3866 Despite anecdotal evidence of widespread and unbridled
3867 punitive damages awards, the truth of the matter is that
3868 punitive damages are extremely rare in medical malpractice
3869 and medical products cases. In fact, only 265 medical
3870 malpractice punitive damage awards were made in the 30 years
3871 between 1963 and 1993 in the United States. In addition, and
3872 I think perhaps more important, by basing the punitive
3873 damages cap on the level of economic losses, such as lost
3874 wages, H.R. 5 discriminates against women, minorities,

3875 children, the elderly and others who tend to have lower
3876 incomes. For example, a corporate executive earning \$200,000
3877 in salary who was injured due to egregious malpractice would
3878 be able to recover as much as \$400,000 in punitive damages,
3879 yet a stay-at-home parent victimized by identical egregious
3880 conduct would be limited to a maximum of \$250,000 in punitive
3881 damages under the bill.

3882 I think the punitive damages are necessary to deter the
3883 most flagrant abuses, and I urge my colleagues to support my
3884 amendment.

3885 Mr. Chairman, before I yield, let me just say, you know,
3886 I put this amendment and the one before on the cap up to a
3887 million before the Committee because I really believe that if
3888 the Republican side were to adopt many of the suggestions
3889 that the Democrats make, and again I go back to particularly
3890 the caps and the need to address the actual amount of
3891 insurance premiums and have some control over it and
3892 narrowing the focus of this bill to simply malpractice, then
3893 I think we might be able to come up with something that would
3894 actually move. But you know, it frustrates me and I know you
3895 say maybe it sounds naive, but it frustrates me that the
3896 Republicans continue to move a bill that we have moved so
3897 many times and goes nowhere. You know, the President has
3898 even said many times that he is willing to work with this

3899 issue, and I just don't see any effort on the part of the
3900 Republican side of the aisle to do anything to achieve a
3901 consensus or to work with us on this issue. I think it is
3902 unfortunate. You know, I am not just saying that because I
3903 am trying to be--

3904 The {Chairman.} Will the gentleman--

3905 Mr. {Pallone.} --malicious, but I just think that you
3906 know, we keep moving this same bill over and over again, and
3907 most of the Democratic amendments are really designed to try
3908 to come up with something that actually might make a
3909 difference, rather than just moving something that is going
3910 nowhere. Yeah, I would yield, certainly.

3911 The {Chairman.} I would just like to remind the
3912 gentleman that we did send a letter. The President has been
3913 very outspoken in support of tort reform for a number of
3914 years. We asked again formally, a letter that I think we
3915 will put into the record. We will ask unanimous consent to
3916 put the letter into the record, and we have received no
3917 response back.

3918 Mr. {Pallone.} Well, I think he said many times in
3919 public statements, including if I am not mistaken the State
3920 of the Union Address, that he would like to work with the
3921 other side of the aisle on this and many issues, and I just
3922 don't see how moving this bill today accomplishes anything,

3923 frankly. But I have said my peace.

3924 Dr. {Christensen.} Will the gentleman yield?

3925 Mr. {Pallone.} Yes, the gentlewoman from the Virgin
3926 Islands.

3927 Dr. {Christensen.} Thank you. I just wanted to thank
3928 you for raising the issue of the unfairness of this cap to
3929 women, minorities and the elderly because really, almost all
3930 of the provisions that we have tried to amend here today are
3931 unfair from the limiting of the contingency fees to the caps
3932 on non-economic damages, as well as the caps on punitive
3933 damages. And that is one of the reasons why I, as a
3934 physician, do oppose this bill, in addition to the fact that
3935 it really does not resolve the issue of patient safety and
3936 reducing medical errors. Thank you. I yield back.

3937 Mr. {Pallone.} Unless someone else wants my time, I
3938 would yield back, Mr. Chairman.

3939 The {Chairman.} Gentleman yields back. Members on our
3940 side? Mr. Olson is recognized for 5 minutes.

3941 Mr. {Olson.} I thank the Chair. I speak in opposition
3942 to the amendment from my colleague from New Jersey that would
3943 strike limits on punitive damages. Punitive damages are
3944 meant to punish the bad actors, not compensate the victim for
3945 injury. The punishment should be proportionate to the
3946 actions being punished. H.R. 5 allows punitive damages up to

3947 \$250,000 or twice the economic damages whichever is higher.

3948 There is no cap on economic damages.

3949 A couple of examples. The following cases from
3950 California show that reasonable [indiscernible] legal reforms
3951 such as those in H.R. 5 will still allow for very full
3952 economic damage awards to deserving victims. In December
3953 2012, a 5-year-old boy with cerebral palsy and quadriplegia
3954 was awarded \$84 million in economic damages. A 3-year-old
3955 girl with cerebral palsy was awarded \$59 million in economic
3956 damages. Under H.R. 5, these cases would generate punitive
3957 damages of \$168 million and \$118 million respectively.
3958 Unlimited costs are the result of no limits on punitive
3959 damages.

3960 I have got an example from my district, Texas 22,
3961 Kelsey-Seybold, and this is from the Chairman and Managing
3962 Director, Dr. Spencer Berthelsen. He says Kelsey-Seybold is
3963 a multi-specialty group practice serving 500,000 patients in
3964 Houston. I am summarizing here. In 2003, the Texas
3965 Professional Liability Crisis was peaking. Kelsey-Seybold
3966 was a favorite target of the lawsuits because of the size of
3967 the group. They could not obtain professional liability
3968 insurance at any price. They were forced to carry a self-
3969 insurance program. Prior to 2003 when they were self-
3970 insured, they were spending an average of \$6 million per year

3971 in professional liability costs. Once tort reform was passed
3972 in Texas, the cases against Kelsey-Seybold fell dramatically,
3973 and within 2 years, their cost for insurance had dropped to
3974 \$1 million per year. It went down from \$6 with no limits on
3975 punitive damages to \$1 million. What did they do with that
3976 \$5 million? They reinvested over 5 years in the insulation
3977 of a comprehensive electronic medical record. Just one
3978 example of the benefits of putting caps on punitive damages.

3979 In addition to punitive damages in a civil case, there
3980 are also other remedies to punish the type of intentional or
3981 gross negligent behavior that punitive damages are designed
3982 to punish and deter. These include solutions within state
3983 authority, like revoking a medical license or criminal
3984 proceedings. These types of enforcement decisions designed
3985 to punish defendants are conducted by appropriate enforcement
3986 authorities based off of standards and due process.

3987 I strongly oppose this amendment. I urge my colleagues
3988 to vote against it.

3989 Dr. {Gingrey.} Will the gentleman yield to me?

3990 Mr. {Olson.} Yes, sir. I yield back to my colleague
3991 from Georgia.

3992 Dr. {Gingrey.} I thank the gentleman from Texas. You
3993 know, just to make a quick point, I was meeting today with
3994 one of my local chamber groups from the 11th District of

3995 Georgia. We were talking about a local project, economic
3996 development, job creation, that is going to be a little bit
3997 difficult to pull off, a bit of a heavy lift. And he said to
3998 me, Congressman, can't never could. I say that because a
3999 number of my colleagues on the other side of the aisle have
4000 said, look, why do you guys, gals, Republicans on the
4001 majority side, keep pushing legislation that has no ability,
4002 no likelihood to pass? Well, you know, you all know the
4003 history of William Wilberforce. If he took that attitude,
4004 people probably would still be in servitude in the United
4005 Kingdom.

4006 We don't say that this is not a heavy lift, but we are
4007 going to pass this in Committee. We are going to pass this
4008 out of our Committee, and we are going to pass it on the
4009 House Floor. And we are going to be prepared to work with
4010 the Senate to get this bill enacted into law and work with
4011 President Obama as he pledged and committed himself to
4012 medical liability reform and understands the need and the
4013 cost savings and the increased accessibility to healthcare
4014 for all of our patients, and maybe if we do that we wouldn't
4015 need a 2,400 page bill, government takeover of healthcare to
4016 allow 10 million people to have access to health insurance
4017 because this in itself would save at least \$62 billion over
4018 10 years, and I thank the gentleman for yielding to me.

4019 Mr. {Olson.} Thank you. Reclaiming my time, Mr.
4020 Chairman. I would just like to ask unanimous consent that
4021 the letter from Kelsey-Seybold be put in the record.

4022 The {Chairman.} Without objection. Are there other
4023 members wishing to use the remaining time to speak on this
4024 amendment? If not, the vote will occur--the gentleman is
4025 recognized. Roll call vote? The time is expired. The clerk
4026 will call the roll.

4027 The {Clerk.} Mr. Barton?

4028 [No response.]

4029 The {Clerk.} Mr. Stearns?

4030 [No response.]

4031 The {Clerk.} Mr. Whitfield?

4032 Mr. {Whitfield.} No.

4033 The {Clerk.} Mr. Whitfield, nay.

4034 Mr. Shimkus?

4035 [No response.]

4036 The {Clerk.} Mr. Pitts?

4037 [No response.]

4038 The {Clerk.} Mrs. Bono Mack?

4039 [No response.]

4040 The {Clerk.} Mr. Walden?

4041 [No response.]

4042 The {Clerk.} Mr. Terry?

4043 Mr. {Terry.} No.

4044 The {Clerk.} Mr. Terry, nay.

4045 Mr. Rogers?

4046 Mr. {Rogers.} No.

4047 The {Clerk.} Mr. Rogers, nay.

4048 Mrs. Myrick?

4049 Mrs. {Myrick.} No.

4050 The {Clerk.} Mrs. Myrick, nay.

4051 Mr. Sullivan?

4052 [No response.]

4053 The {Clerk.} Mr. Murphy?

4054 Mr. {Murphy.} No.

4055 The {Clerk.} Mr. Murphy, nay.

4056 Mr. Burgess?

4057 Dr. {Burgess.} No.

4058 The {Clerk.} Mr. Burgess, no.

4059 Mrs. Blackburn?

4060 [No response.]

4061 The {Clerk.} Mr. Bilbray?

4062 [No response.]

4063 The {Clerk.} Mr. Bass?

4064 Mr. {Bass.} No.

4065 The {Clerk.} Mr. Bass, nay.

4066 Mr. Gingrey?

4067 Dr. {Gingrey.} No.
4068 The {Clerk.} Mr. Gingrey, nay.
4069 Mr. Scalise?
4070 Mr. {Scalise.} No.
4071 The {Clerk.} Mr. Scalise, nay.
4072 Mr. Latta?
4073 Mr. {Latta.} No.
4074 The {Clerk.} Mr. Latta, nay.
4075 Mrs. McMorris Rodgers?
4076 [No response.]
4077 The {Clerk.} Mr. Harper?
4078 Mr. {Harper.} No.
4079 The {Clerk.} Mr. Harper, nay.
4080 Mr. Lance?
4081 Mr. {Lance.} No.
4082 The {Clerk.} Mr. Lance, nay.
4083 Mr. Cassidy?
4084 Dr. {Cassidy.} No.
4085 The {Clerk.} Mr. Cassidy, nay.
4086 Mr. Guthrie?
4087 Mr. {Guthrie.} No.
4088 The {Clerk.} Mr. Guthrie, nay.
4089 Mr. Olson?
4090 Mr. {Olson.} No.

4091 The {Clerk.} Mr. Olson, nay.
4092 Mr. McKinley?
4093 [No response.]
4094 The {Clerk.} Mr. Gardner?
4095 Mr. {Gardner.} No.
4096 The {Clerk.} Mr. Gardner, nay.
4097 Mr. Pompeo?
4098 [No response.]
4099 The {Clerk.} Mr. Kinzinger?
4100 Mr. {Kinzinger.} No.
4101 The {Clerk.} Mr. Kinzinger, nay.
4102 Mr. Griffith?
4103 [No response.]
4104 The {Clerk.} Mr. Waxman?
4105 Mr. {Waxman.} Aye.
4106 The {Clerk.} Mr. Waxman, aye.
4107 Mr. Dingell?
4108 Mr. {Dingell.} Mr. Dingell, aye.
4109 Mr. Markey?
4110 [No response.]
4111 The {Clerk.} Mr. Towns?
4112 Mr. {Towns.} Aye.
4113 The {Clerk.} Mr. Towns, aye.
4114 Mr. Pallone?

4115 Mr. {Pallone.} Aye.

4116 The {Clerk.} Mr. Pallone, aye.

4117 Mr. Rush?

4118 [No response.]

4119 The {Clerk.} Ms. Eshoo?

4120 Ms. {Eshoo.} Aye.

4121 The {Clerk.} Ms. Eshoo, aye.

4122 Mr. Engel?

4123 [No response.]

4124 The {Clerk.} Mr. Green?

4125 Mr. {Green.} Aye.

4126 The {Clerk.} Mr. Green, aye.

4127 Ms. DeGette?

4128 Ms. {DeGette.} Aye.

4129 The {Clerk.} Ms. DeGette, aye.

4130 Mrs. Capps?

4131 [No response.]

4132 The {Clerk.} Mr. Doyle?

4133 Mr. {Doyle.} Yes.

4134 The {Clerk.} Mr. Doyle, aye.

4135 Ms. Schakowsky?

4136 [No response.]

4137 The {Clerk.} Mr. Gonzalez?

4138 [No response.]

4139 The {Clerk.} Mr. Inslee?
4140 [No response.]
4141 The {Clerk.} Ms. Baldwin?
4142 Ms. {Baldwin.} Aye.
4143 The {Clerk.} Ms. Baldwin, aye.
4144 Mr. Ross?
4145 [No response.]
4146 The {Clerk.} Mr. Weiner?
4147 Mr. {Weiner.} Aye.
4148 The {Clerk.} Mr. Weiner, aye.
4149 Mr. Matheson?
4150 [No response.]
4151 The {Clerk.} Mr. Butterfield?
4152 Mr. {Butterfield.} Aye.
4153 The {Clerk.} Mr. Butterfield, aye.
4154 Mr. Barrow?
4155 Mr. {Barrow.} Aye.
4156 The {Clerk.} Mr. Barrow, aye.
4157 Ms. Matsui?
4158 Ms. {Matsui.} Aye.
4159 The {Clerk.} Ms. Matsui, aye.
4160 Ms. Christensen?
4161 Dr. {Christensen.} Aye.
4162 The {Clerk.} Ms. Christensen, aye.

- 4163 Chairman Upton?
- 4164 The {Chairman.} No.
- 4165 The {Clerk.} Mr. Upton, Nay.
- 4166 The {Chairman.} Are there other members wishing to
4167 vote. Mr. Barton?
- 4168 Mr. {Barton.} No.
- 4169 The {Clerk.} Mr. Barton, nay.
- 4170 The {Chairman.} Mr. Stearns?
- 4171 Mr. {Stearns.} No.
- 4172 The {Clerk.} Mr. Stearns, nay.
- 4173 The {Chairman.} Mr. Griffith?
- 4174 Mr. {Griffith.} Nay.
- 4175 The {Clerk.} Mr. Griffith, nay.
- 4176 The {Chairman.} Ms. Bono Mack?
- 4177 Mrs. {Bono Mack.} No.
- 4178 The {Clerk.} Ms. Bono Mack, nay.
- 4179 The {Chairman.} Mr. Walden?
- 4180 Mr. {Walden.} No.
- 4181 The {Clerk.} Mr. Walden, nay.
- 4182 The {Chairman.} Ms. Blackburn?
- 4183 Mrs. {Blackburn.} No.
- 4184 The {Clerk.} Ms. Blackburn, nay.
- 4185 The {Chairman.} Other members wishing to cast a vote.
4186 Mr. McKinley?

4187 Mr. {McKinley.} No.

4188 The {Clerk.} Mr. McKinley, nay.

4189 The {Chairman.} Other members? Mr. Inslee?

4190 Mr. {Inslee.} Aye.

4191 The {Clerk.} Mr. Inslee, aye.

4192 The {Chairman.} Mr. Matheson?

4193 Mr. {Matheson.} No.

4194 The {Clerk.} Mr. Matheson, nay.

4195 The {Chairman.} Any other members? If not, the clerk

4196 will report the tally. Oh, Mr. Shimkus?

4197 Mr. {Shimkus.} No.

4198 The {Clerk.} Mr. Shimkus, nay.

4199 The {Chairman.} Are you ready?

4200 The {Clerk.} Mr. Chairman, on that there were 15 ayes,

4201 27 nays.

4202 The {Chairman.} Fifteen ayes, 27 nays. Let me make one

4203 comment and then I will yield to Mr. Dingell. We have three

4204 amendments left. Mr. Towns has one, Mr. Waxman has two, and

4205 Mr. Markey, if he returns. We have a time agreement on all

4206 of them. We will roll the votes until after the discussion

4207 on all three and then have a roll call on final. That is the

4208 intent to do. So we have a little time. Hopefully we will

4209 do this all before the bullets start. Mr. Dingell, did you

4210 seek recognition?

4211 Mr. {Dingell.} Mr. Chairman, I seek to strike the
4212 requisite number of words.

4213 The {Chairman.} The gentleman is recognized.

4214 Mr. {Dingell.} I would like the attention of counsel,
4215 because my purpose here is trying to go into this question of
4216 non-economic damages. As I read the bill, the ceiling on
4217 non-economic damages is \$250,000, is that right? Yes or no.

4218 {Counsel.} The cap is \$250,000.

4219 Mr. {Dingell.} Now, we have an infant, healthy infant,
4220 and that infant, through malpractice in the hospital, is
4221 rendered a vegetable. Let us go to the amount of damages
4222 that a court would give in most states. That child has no
4223 discernible earning capacity because of his infancy, is that
4224 right?

4225 {Counsel.} No, sir, in terms of--

4226 Mr. {Dingell.} He has no discernible earning capacity.
4227 So the result is that child is not going to have any really
4228 discernible economic damages.

4229 {Counsel.} No, sir, and a civil trial--

4230 Mr. {Dingell.} What economic damages that that infant
4231 will have?

4232 {Counsel.} Sir, what will happen in a civil trial, the
4233 plaintiff's attorney will bring in an expert to testify as to
4234 the earning potential of that child throughout its life.

4235 Mr. {Dingell.} That is a highly conjectural event
4236 because that child has no history of work or earnings, isn't
4237 that right?

4238 {Counsel.} No, sir, and if you, Congressman Olson, as
4239 he referenced earlier--

4240 Mr. {Dingell.} All right. Let us--

4241 {Counsel.} --the big verdicts were a result of that.

4242 Mr. {Dingell.} Let us go a little further. A housewife
4243 who has been a housewife during her whole life, has never
4244 been employed outside the home. Now, you and I happen to
4245 know that a housewife is perhaps the most honorable calling
4246 in our society, but unhappily the courts have not held that
4247 her earning capacity is of particular value. So the end
4248 result is that she is limited or her heirs are limited to
4249 \$250,000 because of the cap.

4250 What is her earning capacity?

4251 {Counsel.} Her earning capacity would be similar to
4252 what I defined earlier. You would bring in an expert to
4253 testify as to her value.

4254 Mr. {Dingell.} All right. Now, sir, you are a very
4255 wise lawyer and you are sitting down there and advising me,
4256 and you are telling me how this housewife is going to have an
4257 earning capacity or how the child, at age let us say 3
4258 months, is going to have a discernible earning capacity.

4259 What is the earning capacity of that child at age 3 months or
4260 that housewife who has never worked out of the home?

4261 {Counsel.} No, I am not--

4262 Mr. {Dingell.} Give us an intelligent speculation upon
4263 what that number might happen to be.

4264 {Counsel.} Yeah, I am not going to get into conjecture
4265 as to, you know, give a monetary value but--

4266 Mr. {Dingell.} Well, the value--

4267 {Counsel.} --if you looked at case law--

4268 Mr. {Dingell.} Counsel?

4269 {Counsel.} --you would see examples where--

4270 Mr. {Dingell.} Counsel?

4271 {Counsel.} --that would be defined.

4272 Mr. {Dingell.} In your capacity, you are telling me
4273 that there is an earning capacity for those two persons. I
4274 am asking you what that is. In view of the fact that you are
4275 telling me there is an earning capacity, I am asking you to
4276 tell me what is that earning capacity because in the one
4277 instance, the housewife has been reduced to essentially a
4278 public charge. Her children are denied the advantages of a
4279 healthy mother, the husband is denied the wife's consortium
4280 and in the case of the child, the child becomes essentially a
4281 drain upon the society and becomes a public charge or becomes
4282 a charge upon two disparate parents who now have an infant

4283 who is incapable of any support. And what I am trying to
4284 figure out is where is the justice of this speculative
4285 compensation that you are telling they might have in the way
4286 of economic damages and how are we to be assured in any
4287 peculiar fashion that they are going to have the earning
4288 capacity, either the wife or the child, to support themselves
4289 and how would the parents be having that kind of hope that
4290 some sort of blessing would be descending upon them from the
4291 Almighty so that that child would not become a public charge
4292 in the event that something bad happened to the two of them?

4293 Dr. {Gingrey.} Will the gentleman yield?

4294 Mr. {Dingell.} I think we have got some--speculation,
4295 and I want to thank counsel for it.

4296 Dr. {Gingrey.} Would the gentleman yield to me?

4297 Mr. {Dingell.} I would be happy to, but I don't have
4298 any time.

4299 Mr. {Waxman.} I ask unanimous consent the gentleman
4300 from Michigan be given one additional minute so he can yield
4301 and we can then move onto the amendments.

4302 The {Chairman.} Okay. One additional minute. The
4303 gentleman from Georgia. Would you like to--

4304 Mr. {Dingell.} I will be glad to yield to the gentleman
4305 from Georgia.

4306 Dr. {Gingrey.} I thank my friend for yielding, and I

4307 thank for the unanimous consent for additional minute to
4308 respond to the question of Counsel. I think the counsel is
4309 pretty clear in his response in regard to these two
4310 hypothetical cases that distinguish gentleman emeritus,
4311 Former Chairman asked and presented in regard to the
4312 housewife.

4313 In court, the plaintiff's attorney will probably testify
4314 to the fact that the housewife told her family members and
4315 her husband that she planned to, now that she has done her
4316 wifely duties, to go to law school and become a plaintiff's
4317 attorney and represent cases in med mal or the child that is
4318 4 years old--

4319 Mr. {Dingell.} Reclaiming my time and I say this with
4320 great respect for my good friend. This is the most
4321 conjectural and doubtful kind of expectation. I don't have
4322 any reason to assume, and I say this with all respect to my
4323 friend from Georgia, to assume that there should be any jury
4324 that is going to say or that there is going to be anybody,
4325 lawyer or doctor in this room, that is going to be able to
4326 tell me what that amount might be and how we are going to see
4327 to it that a fair measure of justice is done to that
4328 housewife or that child.

4329 The {Chairman.} The gentleman's time is expired. The
4330 gentleman from California is recognized.

4331 Mr. {Waxman.} I want to offer one of my two amendments
4332 now, and then I will hold the last one for the last--

4333 The {Chairman.} The gentleman from California is--

4334 Mr. {Waxman.} I have amendment number 2 dealing with
4335 intentional acts.

4336 The {Chairman.} The clerk will report the title.

4337 The {Clerk.} Amendment offered by Mr. Waxman of
4338 California.

4339 [The amendment follows:]

4340 ***** INSERT 12 *****

|
4341 The {Chairman.} The amendment will be considered as
4342 read, and the gentleman knows we have agreed to 15 minutes
4343 for both sides for both of these amendments, so the gentleman
4344 is recognized for--

4345 Mr. {Waxman.} Well, I will be very clear about this
4346 amendment, and I will ask for a roll call vote on it because--
4347 -first of all, I want to commend Mr. Dingell, if he is still
4348 there, for bringing up the issue that he brought up because a
4349 lot of these damages are quite conjectural.

4350 But I would submit that H.R. 5 is extreme, and I want to
4351 give you an example. I was stunned to find that the
4352 definition includes healthcare lawsuits, regardless of the
4353 theory of liability on which the claim is based. Usually we
4354 think of malpractice as negligence or breach of duty. But
4355 this language means that even if an individual commits
4356 intentional conduct which causes egregious injuries or death
4357 to patients, they are still protected under this law.

4358 The courts have said that intentional tort begins when
4359 known danger to the patient becomes a substantial certainty
4360 in the mind of the actor. Intentional torts include such
4361 claims as assault, sexual assault and rape, battery, false
4362 imprisonment, invasion of privacy, theft, misrepresentation
4363 and fraud. This type of sweeping protection is unprecedented

4364 and goes well beyond the stated intent of the sponsors of the
4365 law, of this bill.

4366 My amendment states that if it is an intentional tort,
4367 it not be included in the bill. I would hope that we could
4368 agree that H.R. 5 should not be used to protect the rare
4369 incidents of rape, assault or even pedophilia and operating
4370 while under the influence. But let me give you an example.
4371 Dr. Ben D. Ramaley, a Connecticut OB-GYN substituted his own
4372 sperm for that of a patient's husband during an artificial
4373 insemination procedure. The State Department of Public
4374 Health fined the doctor \$10,000, and they allowed him to keep
4375 his unrestricted license. There was a lawsuit, it was
4376 settled but there was no record of how much this man ever had
4377 to pay, and he was never faced with criminal charges. Now,
4378 my colleagues will say that is all okay because the bill does
4379 not apply to criminal liability. That really is a fig leaf.
4380 Intentional tort is not the same thing as criminal liability.
4381 We have an appropriately higher standard for criminal
4382 liability, proof beyond a reasonable doubt.

4383 These cases have to be selected for prosecution,
4384 prosecuted in a court of law and successfully convicted.
4385 Now, a lot of intentional torts are never prosecuted. The
4386 doctor I mentioned, Dr. Ramaley, never faced criminal charges
4387 so he would be protected under H.R. 5. It is worth noting

4388 that most incidents of sexual assault are never reported,
4389 much less investigated, much less prosecuted, and even if
4390 they are, criminal convictions take several years, and the
4391 statute of limitations would expire long before that process
4392 is completed.

4393 While these cases are rare, and we hope they are, I do
4394 want to point out in one State alone, Georgia, CBS Atlanta
4395 reported multiple instances of drug abuse, rape and child
4396 porn possessions. A urologist from Athens, Georgia, had his
4397 medical license suspended after being arrested and charged
4398 with raping a patient. An internal medicine physician
4399 voluntarily suspended his license after he was charged with
4400 sexual battery to five patients, and the Georgia Medical
4401 Board suspended the license of the emergency room doctor who
4402 was arrested for having child pornography.

4403 Now, this is rare, but there is no doubt that these
4404 kinds of things do occur, and because it is rare, removing
4405 this from the bill should not change the overall effect of
4406 this bill a great deal. I know that earlier this subject
4407 came up, and one of my colleagues said that intentional tort
4408 is a criminal matter, and therefore it should be prosecuted.
4409 Well, this bill is an extreme. California does not say that
4410 intentional torts are covered with liability caps. Texas
4411 doesn't do this. It makes no sense to protect individuals

4412 who intentionally put patients in danger. There should be no
4413 cap. It ought to be decided. Punitive damages are for
4414 punishment. To have \$250,000 as the cap is an awfully low
4415 one if you have got somebody with a record of intentional
4416 actions and reckless disregard for other people.

4417 So I would think that we ought to take intentional torts
4418 out of the bill and let the bill apply to what we ordinarily
4419 think of as negligence and failure to live up to duty. And I
4420 yield back the balance of my time and urge an aye vote.

4421 The {Chairman.} Mr. Cassidy?

4422 Dr. {Cassidy.} Well, I think this amendment, no
4423 offense, is kind of beside the point. If we look on page 9,
4424 line 12, it speaks of malicious intent. So punitive damages
4425 are allowed if somebody executes if you will malicious
4426 intent. Looking on page 21, line 9, malicious intent to
4427 injure. The term malicious intent to injure means
4428 intentionally causing or attempting to cause physical injury
4429 other than providing healthcare goods and services.
4430 Healthcare goods and services is defined above that. It is a
4431 good or service that relates to the diagnosis, prevention or
4432 treatment of any human disease, impairment or the assessment
4433 of care of the health of a human being. Clearly rape is not
4434 a healthcare good or service.

4435 So aside from criminal charges, which appropriately

4436 should be filed to the fullest extent of the law, also
4437 punitive damages can be awarded. Similarly, if there is a
4438 malicious intent because you substitute something for
4439 something else, well, that frankly could be defined as an
4440 injury to the claimant, and so this would not apply.

4441 So no offense, but it seems a little bit of a red
4442 herring to speak of something which is specifically excluded
4443 under this amendment.

4444 Mr. {Waxman.} Will the gentleman yield?

4445 Dr. {Cassidy.} I will.

4446 Mr. {Waxman.} You went through all of the points in
4447 this bill to illustrate that lawsuits can be filed for
4448 intentional torts, and a rape is an intentional tort. And if
4449 a lawsuit can be filed, I want to point out that under this
4450 bill, the damages are limited. Not only are the damages
4451 limited for the punitives but they are limited as well for
4452 the non-economic damages. What is a non-economic damage to
4453 the pain and suffering of a woman that has been raped? Well,
4454 under this bill, it can't be more than \$250,000. That is
4455 limited, the punitive damages are limited. Now, if it is an
4456 intentional tort, I would submit it ought not to be limited.

4457 Dr. {Cassidy.} Well obviously once you are beyond the
4458 reach of this bill--I am sorry, reclaiming my time--then you
4459 also have the potential for civil damages.

4460 Mr. {Waxman.} That is what we are talking about, the
4461 civil damages.

4462 Dr. {Cassidy.} But that said, the limits here are for
4463 two times the economic damages. If the economic damages are
4464 a billion dollars, it theoretically can be \$2 billion. So--

4465 Mr. {Waxman.} Will the gentleman yield further? The
4466 economic damages of a person who is the victim of a rape or
4467 an assault or something like that is limited to \$250,000, the
4468 emotional damages are limited. So you may have twice the
4469 economic damages, but that is the limit on that part of the
4470 economic damages. And therefore, if you want to have
4471 punitive damages against a very bad person for behaving in a
4472 reckless way, that is limited even further.

4473 Dr. {Cassidy.} There are two aspects to punitive
4474 damages, one of course is that which the victim receives, and
4475 theoretically, as some states, I think California has
4476 attempted, you can make an argument that those really could
4477 go to society as much as they go to the individual.

4478 But if we are speaking of punitive damages, they
4479 clearly, being able to file criminal charges against a
4480 physician, is punitive. And so--

4481 Mr. {Waxman.} But there are many cases where no
4482 criminal charges have been filed.

4483 Mr. {Murphy.} Will the gentleman yield?

4484 Dr. {Cassidy.} But that is not the fault of the
4485 legislation. That would be the oversight by the attorney. I
4486 will yield to my--

4487 Mr. {Murphy.} Gentlemen, just a question with regard to
4488 this. If a medical practitioner is being charged an issue of
4489 malpractice, it relates to the practice of medicine. The
4490 examples my friend from California bringing out were somebody
4491 would actually assault a patient is not in the practice of
4492 medicine. That person could sue and seek other civil damages
4493 in a case of a crime, as is typically happening, which has no
4494 limits on this bill as I understand it at all. It is an
4495 entirely separate issue.

4496 Mr. {Waxman.} If the gentleman would yield to me?

4497 Dr. {Cassidy.} Yes.

4498 Mr. {Waxman.} That is the point I am making. If they
4499 sue for civil damages, even for something that might be
4500 considered a crime but not prosecuted, the civil damages are
4501 limited under this bill. So if you want to sue for civil
4502 damages from an assault or a rape or putting somebody else's
4503 sperm in, it is limited.

4504 Dr. {Cassidy.} As I discussed that with Counsel, they
4505 said listen. One, you have criminal charges, which again, it
4506 is not the fault of the bill if someone elects not to
4507 prosecute; secondly, that there are the things that this bill

4508 applies to; but thirdly, if you talk about rape, that is not
4509 covered under this bill, and so that is a separate sort of
4510 civil tort.

4511 Mr. {Waxman.} If the gentleman would submit, let us ask
4512 the counsel for a clarification. As I understand it, it
4513 would be covered by this bill. It is an intentional tort,
4514 and what I hope and seek to do is to exclude intentional
4515 torts because as I understand the bill, there are limits on
4516 the punitive damages as well as the economic damages if there
4517 is a lawsuit for an intentional tort under this proposal.

4518 {Counsel.} The bill applies to healthcare goods or
4519 services, and that is defined in the bill on page 21. It
4520 relates to the diagnosis, prevention or treatment of any
4521 human disease or impairment or the assessment or care of the
4522 health of human beings.

4523 Under the hypotheticals that you have drawn, rape would
4524 not qualify under that definition.

4525 Mr. {Waxman.} What would qualify as an intentional act
4526 under this bill?

4527 {Counsel.} As an intentional act?

4528 Mr. {Waxman.} Yes.

4529 {Counsel.} It is an intentional act that falls
4530 underneath a healthcare service.

4531 Mr. {Waxman.} Well, the proposal that I have is any

4532 intentional act that would apply to any civil suit, including
4533 healthcare suits, that is based on a substantial certainty by
4534 the actor that this person is going to do harm to the
4535 individual.

4536 In effect, what you are saying is some of those would be
4537 civil suits that would not be affected by this bill, but that
4538 is not the way we read it. If you believe that you are
4539 reading it the same way that I am intending it, then you
4540 ought to support this amendment because it would clarify that
4541 it is not going to be covered, an extra protection that is
4542 not going to be covered under this legislation. I would
4543 submit that--

4544 Dr. {Cassidy.} Since I haven't been gaveled down yet, I
4545 will reply.

4546 Mr. {Waxman.} Yeah, but otherwise--

4547 Dr. {Cassidy.} Since it seems it is already the intent
4548 of the bill that those things not be covered, it seems
4549 redundant, duplicative, to accept the amendment. But that
4550 said, I yield back.

4551 The {Chairman.} I wonder if the Chairman might withdraw
4552 the amendment and maybe we can work together, perhaps to
4553 clarify the intent before the bill goes to the Floor.

4554 Mr. {Waxman.} Mr. Chair--

4555 The {Chairman.} I wonder if the gentleman might want to

4556 withdraw the amendment. Perhaps we can work together to--

4557 Mr. {Waxman.} Well, I raised an issue of a doctor who
4558 uses his own sperm. That would be covered by the bill, isn't
4559 that right, Counsel? That is a service. He is acting
4560 intentionally--

4561 {Counsel.} That is not a healthcare service under the
4562 definition of this act.

4563 Mr. {Waxman.} I can't believe that is the case. A
4564 woman goes to see a doctor. She and her husband hope to get
4565 pregnant. The husband contributes sperm, but the doctor
4566 thinks well, he will just put his sperm in instead. That is
4567 not a healthcare service?

4568 In other words, any intentional act like that is not a
4569 healthcare service. Well, that is not the way I would read
4570 this bill.

4571 {Counsel.} The limiting factor is just that, the
4572 healthcare good or service. That doesn't fit under the
4573 definition. That is the limiting factor.

4574 Mr. {Waxman.} Well, I disagree, and I think that is why
4575 we ought to have this proposal. I would ask for an aye vote,
4576 I would ask for a roll call vote. If you want to continue
4577 this discussion, we can do it.

4578 Dr. {Gingrey.} Mr. Chairman, move to strike the
4579 requisite number of words.

4580 The {Chairman.} Well, we have a little bit of a time
4581 agreement that we have now exceeded. We have got votes on
4582 the House Floor so--

4583 Mr. {Waxman.} We have got some other amendments as
4584 well. You can--

4585 The {Chairman.} So let us--

4586 Mr. {Waxman.} --if you want to.

4587 The {Chairman.} We will suspend the debate on this. We
4588 will ask for a recorded vote at the right time, and we will
4589 go to the next amendment. Is that okay?

4590 Mr. {Waxman.} It is going to be rolls.

4591 The {Chairman.} Okay. We will roll this vote. Mr.
4592 Towns is recognized to offer an amendment.

4593 Mr. {Towns.} Thank you very much, Mr. Chairman. I have
4594 an amendment at the desk.

4595 The {Clerk.} The amendment offered by Mr. Towns of New
4596 York.

4597 [The amendment follows:]

4598 ***** INSERT 13 *****

|
4599 The {Chairman.} The amendment will be considered as
4600 read, and the gentleman is recognized for 5 minutes in
4601 support of his amendment.

4602 Mr. {Towns.} Thank you very much, Mr. Chairman. I
4603 strongly believe that medical malpractice reform must remain
4604 within the purview of the states. We simply cannot afford to
4605 take a one-size-fits-all approach. I agree with my
4606 colleagues that it is a worthy goal to reduce malpractice
4607 premiums for physicians. Ultimately this would result in a
4608 lower healthcare cost for everyone, but I do not think we
4609 should do so at the expense of quality care for patients.

4610 So the first part of my amendment addresses a serious
4611 shortcoming of H.R. 5. The purposes of the bill under
4612 Section 2 provide many worthy goals for malpractice form,
4613 availability of services, defensive medicine, the fairness of
4614 the system and better sharing of information. However, there
4615 is no single goal listed on quality and no mention of medical
4616 errors.

4617 So the first part of my amendment simply adds to the
4618 goal that we should improve quality and reduce medical
4619 errors. To me, this seems like a commonsense approach.
4620 Perhaps my colleagues on the other side of the aisle
4621 accidentally omitted this aspect. But it is also possible

4622 that we simply don't know how to achieve these goals today.
4623 That is why Section 10607 of the Affordable Care Act
4624 authorized \$50 million for grants to states to fund pilot
4625 projects, to test different models, of medical malpractice
4626 reform.

4627 Funding for these projects has already begun, including
4628 one project to test health courts, an effort praised by some
4629 of our witnesses that were invited by the majority during the
4630 hearing on this topic.

4631 I firmly believe that we should not move forward with
4632 H.R. 5 until we are certain that there are no other better
4633 options out there for the states to adopt.

4634 The second part of my amendment states that the
4635 effective date for this Act does not occur until 6 months
4636 after the Secretary can certify that the following three
4637 events have occurred, the grants under Section 10607 are
4638 completed; the Secretary has provided a report to Congress on
4639 these grants; and that the Secretary has certified that the
4640 provisions of H.R. 5 can achieve the purposes of the bill
4641 better than the pilot programs.

4642 There is no one-size-fits-all approach to medical
4643 malpractice reform, and we need to recognize that. States
4644 need to have the opportunity to find a model that works for
4645 them so that we can ensure quality and affordable healthcare

4646 for everyone.

4647 I urge my colleagues to support my amendment, and I
4648 yield back the balance of my time.

4649 The {Chairman.} The gentleman yields back. The
4650 gentleman from Louisiana, Mr. Scalise.

4651 Mr. {Scalise.} Thank you, Mr. Chairman. I rise in
4652 opposition to the amendment and of course, the reason that we
4653 are bringing this legislation is to lower the cost of
4654 healthcare to allow doctors to be able to do what they are so
4655 good at what they are doing and that is providing great
4656 healthcare to patients instead of running all of these tests
4657 that many doctors will tell you are completely unnecessary
4658 for the patient's health but only designed to prevent
4659 frivolous lawsuits, and the examples are endless,
4660 unfortunately. And at least we now have legislation to
4661 address the problem. Why anybody would want to delay
4662 implementation, and in fact, if you look at the amendment, it
4663 says even if it is proven, if it is certified to save money,
4664 still you have to wait another 6 months to implement it.

4665 We should be implementing these reforms today, you know,
4666 and we need to pass this bill out of the house, put pressure
4667 on the Senate to address this problem and hopefully encourage
4668 the President to live up to some of the rhetoric that he has
4669 given where he indicates he wants to support medical

4670 liability reform. Well, here is an opportunity we are giving
4671 him with H.R. 5 to put his money where his mouth is and
4672 support proven reforms. But we surely don't want to delay
4673 these reforms another day. We have waited too long already.

4674 I know we have got the letter from the American Medical
4675 Association in support of H.R. 5, but if you look at one of
4676 the things that they point out in the AMA's letter in support
4677 of this bill, they refer to the Congressional Budget Office
4678 estimate that enacting H.R. 5 reforms would reduce the
4679 federal deficit by \$54 billion. Why would we want to put off
4680 for another day an opportunity to reduce the federal deficit
4681 by \$54 billion, let alone the \$200 billion of savings that
4682 families will benefit from if this legislation is passed.
4683 \$200 billion in reduced healthcare costs that families won't
4684 have to pay gives them money to go out and maybe afford to
4685 fill up their tank one more time with the skyrocketing gas
4686 prices. But in many cases, it is going to afford that family
4687 the ability to buy good-quality healthcare that they
4688 currently don't have that they surely won't get under
4689 Obamacare.

4690 So you have got the opportunity right here before us
4691 with H.R. 5 to truly save money for families across this
4692 country and address the skyrocketing cost of healthcare and
4693 also stop doctors from having to be focused on running all of

4694 these unnecessary tests that our family members don't want to
4695 have to go through. They don't want to have to schedule more
4696 MRIs and more CAT scans that their doctor knows that they
4697 don't even need to do, but they have got to run them because
4698 they are afraid of a frivolous lawsuit, and every doctor will
4699 tell you that. That jacks up the cost of healthcare. It
4700 puts so many inconveniences on family members that have to go
4701 through those tests, but more importantly, it saves \$200
4702 billion for families across this country. And according to
4703 the CBO as the AMA points out in support of our bill, reduces
4704 the deficit by \$54 billion. Why we would want to delay that
4705 implementation for one day is--

4706 Mr. {Towns.} Will the gentleman yield?

4707 Mr. {Scalise.} I would be happy to yield.

4708 Mr. {Towns.} You know, we bring witnesses in here to
4709 talk to us, experts, and if I recall, one of them said, you
4710 know, that we should wait and to see if we get additional
4711 information. And so funding for these projects has already
4712 begun, including one project to test health courts, an effort
4713 praised by some of the witnesses that came. These are
4714 experts. You know, why do we bring them in here if we are
4715 not going to take their advice or listen to what they say?
4716 Why would we waste their time?

4717 So the point of the matter is that they are suggesting

4718 that we do that. So why wouldn't we?

4719 Mr. {Scalise.} Well, in reclaiming my time, to answer
4720 the question, first of all, the Obama Administration didn't
4721 even request funding in next year's budget for some of those
4722 tests that you are talking about. So I think they don't even
4723 believe that they would have any kind of an impact on
4724 reducing the cost.

4725 This legislation we brought forward, this isn't me
4726 saying it, this is the American Medical Association saying
4727 it, it is the Congressional Budget Office saying that we
4728 would achieve \$54 billion in deficit reduction. That doesn't
4729 count to lower the cost of healthcare to families. We ought
4730 to be implementing those kind of reforms, right now, today.
4731 This is something that should have been done years ago. But
4732 at least we are finally here, in this Republican majority
4733 with this legislation that does address it in a way that has
4734 been scored officially to do some very positive things for
4735 families who have been looking for this kind of relief.

4736 So I don't believe we should delay it. I think experts
4737 that have looked at it clearly suggest that you would get
4738 these savings if you implemented these reforms without delay.
4739 So I would just urge rejection of the amendment and be happy
4740 to yield back the balance of my time.

4741 The {Chairman.} The gentleman yields back. All time is

4742 expired. Those in favor of the Towns amendment will say aye,
4743 those opposed say no. The no's appear--

4744 Mr. {Towns.} Mr. Chairman, I ask for a recorded vote.

4745 The {Chairman.} The gentleman asks for a roll call
4746 vote, and it will be rolled with the earlier votes.

4747 The Chair would recognize Mr. Markey for an amendment.

4748 Mr. {Markey.} I thank the Chair. My amendment is at
4749 the desk.

4750 The {Chairman.} The clerk will read the title.

4751 The {Clerk.} An amendment by Mr. Markey of
4752 Massachusetts.

4753 [The amendment follows:]

4754 ***** INSERT 14 *****

|
4755 The {Chairman.} And the amendment will be considered as
4756 read, and the gentleman is recognized for 5 minutes in
4757 support of his amendment.

4758 Mr. {Markey.} We have two values that are competing
4759 against each other here today. On the one hand, we have
4760 people who have been injured, they have been harmed, their
4761 families have been harmed and our hearts go out to them.

4762 On the other hand, we are saying that doctors have to
4763 pay premiums that are skyrocketing, and we have to do
4764 something about it. So we are faced with this tension that
4765 exists because we care about both things.

4766 So what the majority has decided is that there should be
4767 a \$250,000 limit on non-economic damages for someone who has
4768 been injured. So let us take a case. Let us just say there
4769 is a 17-year-old that had been in an operation in a hospital.
4770 The physician has made a mistake, and because they have
4771 injured the spine of the 17-year-old, that 17-year-old is
4772 going to be a quadriplegic for the rest of her life.

4773 And so they go to the jury. The jury sees this
4774 quadriplegic 17-year-old girl. They understand the totality
4775 of all the consequences for her, and they render a \$5 million
4776 non-economic damage verdict. But once this law goes into
4777 effect, all she can get is \$250,000.

4778 Now, what the other competing interest is, we want to
4779 keep insurance premiums lower. And so what my amendment says
4780 is that the jury is not being instructed that there is a
4781 \$250,000 limit. They are not told what the limit is. So the
4782 juries can return whatever verdict they want in terms of
4783 monetary compensation.

4784 Then what my amendment says is that there will be a
4785 trustee that will take a remaining \$4,750,000 that otherwise
4786 would have gone to the girl, and that will be in a fund, a
4787 fund that will be administered by the trustee to ensure that
4788 the insurance premiums of the doctors who are insured by that
4789 firm go down and that all of the decisions that have granted
4790 an award greater than \$250,000 all go into that fund. Then
4791 the insurance premiums will go down because as you look at
4792 the evidence across the whole country, there is no evidence
4793 that insurance premiums ever go down for doctors, that the
4794 insurance industry--you know, and we trust the insurance
4795 industry, huh, but maybe we should play it safe here, and
4796 that is what my amendment does. It just makes sure that all
4797 of the money, and we can actually know how much the insurance
4798 industry saved, we will know the amount because the juries
4799 will have told us how much it was and that all of that money
4800 is put in a fund for that insurance company by the trustees,
4801 and then they can say to that company, here is how low your

4802 rates have to go. Here is how much money you saved. Then we
4803 will have physicians that can stay in their specialties.
4804 Then we will have physicians that can stay in a community
4805 that otherwise they would have to move out of. Because the
4806 evidence is that there is no difference between states that
4807 have already imposed caps and states that have not imposed
4808 caps. They actually pay just about the same for premiums
4809 right now. So that means that even after the state has put a
4810 cap on, the insurance industry hasn't lowered the premiums to
4811 a point that is any lower than the states that don't.

4812 So that is where we can play a big role here, by
4813 imposing a \$250,000 cap but yet having this additional--then
4814 we will be putting the pressure on the insurance industry to
4815 lower those premiums where right now there is no such
4816 evidence that it occurs.

4817 So we don't want to cap what a victim, what this girl,
4818 can collect and then see the rates for doctors to be raised.
4819 That is a cap and raise. We want a cap and cut. And the
4820 only way we can cap and cut is if we know what it was, and we
4821 can find that out just by allowing a jury to return the
4822 verdict.

4823 And so that is what my amendment does. It is just quite
4824 simple. And then while the girl might be, you know, unhappy
4825 that she is only able to receive \$250,000 for the rest of her

4826 life and living another 60 to 70 years, at least we will know
4827 in good conscience that we did something for the doctors
4828 because we will have that trustee make sure the insurance
4829 industry then lowers the payments and the doctors will be the
4830 beneficiaries.

4831 So that is my amendment. I urge its adoption, and I
4832 think it dovetails perfectly with what the objections of the
4833 majority are in trying to help the physicians and not the
4834 insurance industry in our country. I yield back the balance
4835 of my time.

4836 The {Chairman.} The gentleman from Georgia.

4837 Dr. {Gingrey.} Mr. Chairman, I respectfully oppose the
4838 Markey amendment. The gentleman from Massachusetts is
4839 obviously a very intelligent, cerebral member and put a lot
4840 of thought into this amendment I am sure, but quite honestly,
4841 we, as we have said earlier in response also to the Towns
4842 amendment, we have had for 35 years pilot projects in the
4843 case of California, and indeed Ms. Baldwin's case in regard
4844 to what she described has been done way back in 1975 in
4845 Wisconsin. These pilot projects are the proof of the
4846 pudding. My statistics may not be exact, but over a 10-year
4847 period or so, since the passage of MICRA in California, the
4848 increase in the aggregate of the medical malpractice premiums
4849 is in the neighborhood of 150 percent over X number of years.

4850 And in states that don't have caps, it is 800 percent. So
4851 the proof to the pudding is in the eating. Clearly the
4852 Markey amendment is trying to fix something in that regard
4853 that is not broken. That is why it is so important in H.R.
4854 5, the provision in regard to the caps.

4855 The other thing that I want to point out to my
4856 colleagues is that in this country, probably 65 percent if
4857 not more, certainly more in Texas, of practicing physicians
4858 are ensured by mutual companies, like the Medical Association
4859 of Georgia Mutual Insurance Company, MAG Mutual. The Texas
4860 Medical Liability Trust whereby any savings, any reduction
4861 allows these companies to lower the premium. And you know,
4862 the doctors don't need to rely on some court-appointed
4863 trustee to do that, it is already happening. So you know,
4864 again, I know the gentleman is a senior, well-respected,
4865 intelligent. I know he thought out this amendment, but I
4866 just think that we don't need that, that the provisions of
4867 H.R. 5 worked better, and the proof of the pudding is in the
4868 MICRA law.

4869 Mr. {Markey.} Will the gentleman yield?

4870 Dr. {Gingrey.} I will be glad to yield.

4871 Mr. {Markey.} Just so you know, the Mass Medical
4872 Association, the physicians in Massachusetts, this society
4873 has endorsed my amendment. I mean, this is where physicians,

4874 at least in my State, believe they can be sure they get the
4875 lower premiums. And so, you know, I just want people to know
4876 that, that this is meant to really side with the doctors on
4877 this against the insurance industry to make sure they get
4878 the--

4879 Dr. {Gingrey.} Well, I thank the gentleman for those
4880 comments, and reclaiming my time, again, I respectfully
4881 oppose the Markey amendment and I yield back my time.

4882 Ms. {Schakowsky.} Will the gentleman yield?

4883 Dr. {Gingrey.} I am sorry. I have already yielded
4884 back. Otherwise I would have--

4885 The {Chairman.} The gentleman's time is expired. All
4886 time is expired. Those in support of the Markey amendment
4887 say aye, those opposed say no. The no's appear to have it.
4888 The no's have it. Roll call vote is asked for. We will
4889 bring up the remaining amendment? Okay.

4890 Votes have been called, so we have one remaining
4891 amendment with a time agreement of 5 minutes aside, so we
4892 will complete these votes. We will come back immediately and
4893 see if we can't debate the last amendment and start the roll
4894 call votes to finish the votes. So we have three in the cue,
4895 three votes in the cue, the Waxman vote to debate, the time
4896 agreement, five and five on the side, and final passage. We
4897 will see if we can't get started at 6:20.

4898 [Recess.]

4899 The {Chairman.} We have one last amendment to be
4900 considered. I would recognize the gentleman from California,
4901 Mr. Waxman, to offer an amendment.

4902 Mr. {Waxman.} I have an amendment. Mr. Chairman, I
4903 have an amendment at the desk.

4904 The {Chairman.} The clerk will read the title of the
4905 amendment.

4906 The {Clerk.} Amendment to H.R. 5 offered by Mr. Waxman
4907 of California.

4908 [The amendment follows:]

4909 ***** INSERT 15 *****

|
4910 The {Chairman.} The amendment will be considered as
4911 read. The staff will circulate the amendment, and the
4912 gentleman is recognized for 5 minutes in support of his
4913 amendment.

4914 Mr. {Waxman.} Mr. Chairman, this amendment is a very
4915 straightforward one. I don't know that we need a lengthy
4916 debate on it, but I do want to explain it.

4917 Oftentimes there is a settlement of a lawsuit, and as a
4918 condition for settling the lawsuit, one of the parties,
4919 usually a hospital, pharmaceutical, medical device
4920 corporation, demands that individuals agree to secrecy
4921 provisions which prohibit them from disclosing any public
4922 health and safety hazard uncovered during the litigation.
4923 What my amendment would do is to say that when you have an
4924 issue that affects public health and safety, this kind of
4925 agreement cannot be reached, and it would be up to the judge
4926 to look at the case and decide whether it can be a sealed
4927 record. It would apply in healthcare lawsuits when a
4928 protective order is requested, and then a judge can decide in
4929 his discretion if a case is covered by this bill.

4930 The kind of situation I am looking at and thinking of is
4931 when let us say a manufacturer of a product knows it is
4932 going to harm people, and they say I know you have been

4933 harmed and we are wrong. We will pay you X number of dollars
4934 to settle the lawsuit, but I want you to agree that this will
4935 all be sealed, and by sealing it, that would mean that others
4936 wouldn't know and that further harm to other people cannot be
4937 prevented.

4938 So that is what this amendment is all about. But Mr.
4939 Chairman, I am so perplexed by Counsel's explanation of the
4940 bill on intentional acts, that I want to go back to that
4941 issue in the remaining time that I have.

4942 Counsel is relying on page 21 to define a healthcare
4943 lawsuit, and it has to be an individual that provides
4944 services related to the diagnosis, prevention or treatment of
4945 any disease or impairment or the assessment or care of health
4946 of human beings. Now, the counsel said that if that person
4947 acts intentionally, with malicious intent to injure which is
4948 the next section on page 21, that it wouldn't be covered by
4949 this bill, although I don't know what would be covered. Let
4950 me ask counsel. What would be covered by malicious intent to
4951 injure in Section 13 on page 21?

4952 {Counsel.} Sir, what I said earlier is the limit on the
4953 types of cases that this bill applies to is defined by
4954 healthcare good or service because that serves as the
4955 predicate, as the basis for healthcare law.

4956 Mr. {Waxman.} So it would mean if you are providing a

4957 healthcare service and then you act with a malicious intent
4958 to injure, you would come under this law?

4959 {Counsel.} If you are performing a healthcare good or
4960 service, yes, sir.

4961 Mr. {Waxman.} Okay. I would submit my amendment, which
4962 is one of the two amendments I have pending, would say that
4963 if it is an intentional act, that shouldn't be covered by
4964 this because it puts limits on the damages, both the damages
4965 to compensatory and therefore also on the limits on the
4966 punitive damages.

4967 I would ask counsel if a Bethesda dentist who sexually
4968 assaulted a teenage girl after he put her under laughing gas
4969 to fill her cavities, would that be considered under this
4970 bill or not under this bill?

4971 {Counsel.} The hypothetical that you have drawn, I
4972 believe that that act, in terms of the rape or what you put
4973 forth, is not under the bill.

4974 Mr. {Waxman.} Not covered by the bill?

4975 {Counsel.} Yes, sir.

4976 Mr. {Waxman.} So therefore not covered by limits on
4977 punitives.

4978 {Counsel.} That is--

4979 Mr. {Waxman.} How about a psychiatrist who persuades
4980 his patient to have sex with him in order to treat her

4981 emotional problems? Is that somebody providing a healthcare
4982 service?

4983 {Counsel.} Sir--

4984 Dr. {Cassidy.} May I interject?

4985 Mr. {Waxman.} Yes.

4986 Dr. {Cassidy.} Because current ethics of a psychiatrist
4987 or a physician is that she or he should not enter into an
4988 intimate relationship with a patient.

4989 Mr. {Waxman.} Absolutely, and it may also be against
4990 the law. But if this woman sues the psychiatrist, the
4991 counsel was saying that her lawsuit wouldn't be covered under
4992 this law. My amendment made that clear. I am afraid it
4993 would be because I can't understand what the next section is
4994 about malicious intent to injure.

4995 Let me give another. And OB-GYN who performs an
4996 authorized abortion because he doesn't think the patient
4997 should have anymore children. Violation of ethics, no
4998 question about it. It is in the course of performing a
4999 health service. And our counsel says that therefore the bill
5000 wouldn't apply. I would submit that I think it would apply,
5001 and that is why we ought to adopt this other amendment that
5002 excludes this so there would be no limits on punitive
5003 damages.

5004 An elderly resident in a nursing home locked in her room

5005 alone for days because the nursing home doesn't have enough
5006 staff. That is called a false imprisonment. That person
5007 ought not to have a limit on liability, the home ought not to
5008 have a limit on liability. It is hard to assess what the
5009 actual damages would be or to say that the punitive damages
5010 ought to be limited.

5011 I talked about an infertility doctor who implants his
5012 own sperm into a patient who is treating for infertility.
5013 counsel said that person who was sued under those
5014 circumstances wouldn't be limited. It would be outside this
5015 act. I think we ought to make sure it is outside the act. I
5016 disagree with the counsel's conclusion. I would submit that
5017 if the counsel advised me that interpretation of the law,
5018 then I forgo suit, I would sue him for malpractice. It would
5019 be unintentional negligence on his part to advise me and the
5020 rest of us as he is doing. But I think that he is wrong on
5021 his legal position.

5022 So Mr. Chairman, I have two amendments, the second one
5023 which I have just offered is not to allow these secrecy
5024 agreements where the secrecy could keep public health
5025 information from getting out and preventing other diseases.
5026 I have more than expired my time, and I thank you for your
5027 courtesy in allowing me to go on and on and on.

5028 The {Chairman.} Patience.

5029 Mr. {Waxman.} Patience.

5030 The {Chairman.} The Chair recognizes Dr. Gingrey to
5031 respond to--

5032 Dr. {Gingrey.} Mr. Chairman, this is an amendment that
5033 we sort of had to quickly read, but I stand or sit in strong
5034 opposition to it. It places great restrictions of course on
5035 trial judges. The Federal Rules of Civil Procedure and
5036 comparable state procedure rules give trial judges the
5037 discretion to grant protective orders. This amendment
5038 greatly restricts that discretion for healthcare lawsuits,
5039 and in many instances, it would allow a trial judge to grant
5040 a protective order only after the judge makes specific
5041 findings.

5042 Failure to protect the confidentiality of settlement
5043 agreements would inhibit the settlement process. It would
5044 slow the payment of damages to victims of negligence. It
5045 would especially inhibit settlement of those marginal cases,
5046 and there are many of these. My colleagues, there are many
5047 of these, believe me, where a healthcare provider's guilt is
5048 in doubt but both parties wish to resolve the case quickly
5049 and quietly for the sake of all involved. The constant
5050 threat that a court could find a public safety issue, even if
5051 none really existed and thus break the confidentiality of the
5052 settlement would deter the settlement from being made in the

5053 first place. As a practical matter, this amendment
5054 essentially compels each trial court to become a documents
5055 clearinghouse. Similar attempts to implement these
5056 restrictions on judges' discretion have been opposed by the
5057 Judicial Conference of the United States and the American Bar
5058 Association. As Judge Mark Kravitz testifying on behalf of
5059 the Judicial Conference informed the House Judiciary
5060 Committee with regards to limitations on protective orders,
5061 and I quote, ``Requiring courts to review discovery
5062 information to make public health and safety determinations
5063 in every request for a protective order, no matter how
5064 irrelevant to public health or safety, will burden judges and
5065 further delay pre-trial discovery.''

5066 Beyond limiting judges' discretion, this bill also
5067 increases the burden and the cost of litigation if
5068 confidentiality and privacy are not protected, litigants will
5069 be forced to oppose any document request that an opposing
5070 party makes for information that may be sensitive or
5071 confidential. I oppose the adoption of this amendment, and
5072 with that, Mr. Chairman, I yield back the balance of my time.

5073 The {Chairman.} The gentleman yields back. All time is
5074 expired. All those in favor of the amendment say aye, those
5075 opposed say no. No's have it. Roll call vote is asked for.
5076 Roll call vote will happen.

5077 That concludes the amendments to this bill. We have
5078 four amendments that roll call votes have been ordered. The
5079 order will be the first Waxman amendment relating to
5080 intentional torts. The second rolled amendment will be the
5081 Towns amendment relating to medical malpractice. The third
5082 amendment will be the Markey amendment relating to the
5083 diversion of damage awards. The last amendment being this
5084 just debated amendment, the Waxman amendment, on protective
5085 orders at which point we will then go to final passage. So
5086 we have five recorded votes that are asked for. The first
5087 amendment again being the Waxman amendment on intentional
5088 torts, and the clerk will call the roll.

5089 The {Clerk.} Mr. Barton?

5090 Mr. {Barton.} No.

5091 The {Clerk.} Mr. Barton, nay.

5092 Mr. Stearns?

5093 [No response.]

5094 The {Clerk.} Mr. Whitfield?

5095 [No response.]

5096 The {Clerk.} Mr. Shimkus?

5097 Mr. {Shimkus.} No.

5098 The {Clerk.} Mr. Shimkus, nay.

5099 Mr. Pitts?

5100 Mr. {Pitts.} No.

5101 The {Clerk.} Mr. Pitts, nay.
5102 Mrs. Bono Mack?
5103 Mrs. {Bono Mack.} No.
5104 The {Clerk.} Mrs. Bono Mack, nay.
5105 Mr. Walden?
5106 Mr. {Walden.} No.
5107 The {Clerk.} Mr. Walden, nay.
5108 Mr. Terry?
5109 Mr. {Terry.} No.
5110 The {Clerk.} Mr. Terry, nay.
5111 Mr. Rogers?
5112 [No response.]
5113 The {Clerk.} Mrs. Myrick?
5114 Mrs. {Myrick.} No.
5115 The {Clerk.} Mrs. Myrick, nay.
5116 Mr. Sullivan?
5117 [No response.]
5118 The {Clerk.} Mr. Murphy?
5119 Mr. {Murphy.} No.
5120 The {Clerk.} Mr. Murphy, nay.
5121 Mr. Burgess?
5122 [No response.]
5123 The {Clerk.} Mrs. Blackburn?
5124 Mrs. {Blackburn.} No.

5125 The {Clerk.} Mrs. Blackburn, nay.
5126 Mr. Bilbray?
5127 [No response.]
5128 The {Clerk.} Mr. Bass?
5129 Mr. {Bass.} No.
5130 The {Clerk.} Mr. Bass, nay.
5131 Mr. Gingrey?
5132 Dr. {Gingrey.} No.
5133 The {Clerk.} Mr. Gingrey, nay.
5134 Mr. Scalise?
5135 Mr. {Scalise.} No.
5136 The {Clerk.} Mr. Scalise, nay.
5137 Mr. Latta?
5138 Mr. {Latta.} No.
5139 The {Clerk.} Mr. Latta, nay.
5140 Mrs. McMorris Rodgers?
5141 Mrs. {McMorris Rodgers.} No.
5142 The {Clerk.} Mrs. McMorris Rodgers, nay.
5143 Mr. Harper?
5144 Mr. {Harper.} No.
5145 The {Clerk.} Mr. Harper, nay.
5146 Mr. Lance?
5147 Mr. {Lance.} No.
5148 The {Clerk.} Mr. Lance, nay.

5149 Mr. Cassidy?
5150 Dr. {Cassidy.} No.
5151 The {Clerk.} Mr. Cassidy, nay.
5152 Mr. Guthrie?
5153 Mr. {Guthrie.} Nay.
5154 The {Clerk.} Mr. Guthrie, nay.
5155 Mr. Olson?
5156 Mr. {Olson.} No.
5157 The {Clerk.} Mr. Olson, nay.
5158 Mr. McKinley?
5159 Mr. {Mr. McKinley.} No.
5160 The {Clerk.} Mr. McKinley, nay.
5161 Mr. Gardner?
5162 Mr. {Gardner.} No.
5163 The {Clerk.} Mr. Gardner, nay.
5164 Mr. Pompeo?
5165 Mr. {Pompeo.} No.
5166 The {Clerk.} Mr. Pompeo, nay.
5167 Mr. Kinzinger?
5168 Mr. {Kinzinger.} No.
5169 The {Clerk.} Mr. Kinzinger, nay.
5170 Mr. Griffith?
5171 Mr. {Griffith.} Aye.
5172 The {Clerk.} Mr. Griffith, aye.

5173 Mr. Waxman?
5174 Mr. {Waxman.} Aye.
5175 The {Clerk.} Mr. Waxman, aye.
5176 Mr. Dingell?
5177 Mr. {Dingell.} Aye.
5178 The {Clerk.} Mr. Dingell, aye.
5179 Mr. Markey?
5180 Mr. {Markey.} Aye.
5181 The {Clerk.} Mr. Markey, aye.
5182 Mr. Towns?
5183 [No response.]
5184 The {Clerk.} Mr. Pallone?
5185 Mr. {Pallone.} Aye.
5186 The {Clerk.} Mr. Pallone, aye.
5187 Mr. Rush?
5188 [No response.]
5189 The {Clerk.} Ms. Eshoo?
5190 [No response.]
5191 The {Clerk.} Mr. Engel?
5192 Mr. {Engel.} Aye.
5193 The {Clerk.} Mr. Engel, aye.
5194 Mr. Green?
5195 Mr. {Green.} Aye.
5196 The {Clerk.} Mr. Green, aye.

5197 Ms. DeGette?
5198 Ms. {DeGette.} Aye.
5199 The {Clerk.} Ms. DeGette, aye.
5200 Mrs. Capps?
5201 [No response.]
5202 The {Clerk.} Mr. Doyle?
5203 [No response.]
5204 The {Clerk.} Ms. Schakowsky?
5205 Ms. {Schakowsky.} Aye.
5206 The {Clerk.} Ms. Schakowsky, aye.
5207 Mr. Gonzalez?
5208 [No response.]
5209 The {Clerk.} Mr. Inslee?
5210 Mr. {Inslee.} Aye.
5211 The {Clerk.} Mr. Inslee, aye.
5212 Ms. Baldwin?
5213 Ms. {Baldwin.} Aye.
5214 The {Clerk.} Ms. Baldwin, aye.
5215 Mr. Ross?
5216 Mr. {Ross.} Votes aye.
5217 The {Clerk.} Mr. Ross, aye.
5218 Mr. Weiner?
5219 Mr. {Weiner.} Aye.
5220 The {Clerk.} Mr. Weiner, aye.

- 5221 Mr. Matheson?
- 5222 Mr. {Matheson.} No.
- 5223 The {Clerk.} Mr. Matheson, nay.
- 5224 Mr. Butterfield?
- 5225 Mr. {Butterfield.} Aye.
- 5226 The {Clerk.} Mr. Butterfield, aye.
- 5227 Mr. Barrow?
- 5228 Mr. {Barrow.} Votes aye.
- 5229 The {Clerk.} Mr. Barrow, aye.
- 5230 Ms. Matsui?
- 5231 [No response.]
- 5232 The {Clerk.} Ms. Christensen?
- 5233 Dr. {Christensen.} Aye.
- 5234 The {Clerk.} Ms. Christensen, aye.
- 5235 Chairman Upton?
- 5236 The {Chairman.} No.
- 5237 The {Clerk.} Mr. Upton, nay.
- 5238 Mr. {Pitts.} Members not yet recorded. Mr. Stearns?
- 5239 Mr. {Stearns.} No.
- 5240 The {Clerk.} Mr. Stearns, nay.
- 5241 The {Chairman.} Mr. Whitfield?
- 5242 Mr. {Whitfield.} No.
- 5243 The {Clerk.} Mr. Whitfield, nay.
- 5244 The {Chairman.} Mr. Bilbray?

5245 Mr. {Bilbray.} No.

5246 The {Clerk.} Mr. Bilbray, nay.

5247 The {Chairman.} Dr. Burgess?

5248 Dr. {Burgess.} No.

5249 The {Clerk.} Dr. Burgess, nay.

5250 The {Chairman.} Mr. Towns?

5251 Mr. {Towns.} Aye.

5252 The {Clerk.} Mr. Towns, aye.

5253 The {Chairman.} Other members wishing to record their
5254 votes? Seeing none, the clerk will report the tally. Ms.
5255 Capps?

5256 Ms. {Capps.} Aye.

5257 The {Clerk.} Ms. Capps, aye. Mr. Upton, on that there
5258 were 18 ayes and 29 nays.

5259 The {Chairman.} Eighteen ayes, 29 nays. The amendment
5260 is not agreed to.

5261 The next vote will be the Towns amendment relating to
5262 the PPACA provisions on medical malpractice, and the clerk
5263 will call the roll.

5264 The {Clerk.} Mr. Barton?

5265 Mr. {Barton.} No.

5266 The {Clerk.} Mr. Barton, nay.

5267 Mr. Stearns?

5268 Mr. {Stearns.} No.

- 5269 The {Clerk.} Mr. Stearns, nay.
- 5270 Mr. Whitfield?
- 5271 Mr. {Whitfield.} No.
- 5272 The {Clerk.} Mr. Whitfield, nay.
- 5273 Mr. Shimkus?
- 5274 Mr. {Shimkus.} No.
- 5275 The {Clerk.} Mr. Shimkus, nay.
- 5276 Mr. Pitts?
- 5277 Mr. {Pitts.} No.
- 5278 The {Clerk.} Mr. Pitts, nay.
- 5279 Mrs. Bono Mack?
- 5280 Mrs. {Bono Mack.} No.
- 5281 The {Clerk.} Mrs. Bono Mack, nay.
- 5282 Mr. Walden?
- 5283 Mr. {Walden.} No.
- 5284 The {Clerk.} Mr. Walden, nay.
- 5285 Mr. Terry?
- 5286 [No response.]
- 5287 The {Clerk.} Mr. Rogers?
- 5288 [No response.]
- 5289 The {Clerk.} Mrs. Myrick?
- 5290 Mrs. {Myrick.} No.
- 5291 The {Clerk.} Mrs. Myrick, nay.
- 5292 Mr. Sullivan?

- 5293 [No response.]
- 5294 The {Clerk.} Mr. Murphy?
- 5295 Mr. {Murphy.} No.
- 5296 The {Clerk.} Mr. Murphy, nay.
- 5297 Mr. Burgess?
- 5298 Dr. {Burgess.} No.
- 5299 The {Clerk.} Mr. Burgess, nay.
- 5300 Mrs. Blackburn?
- 5301 [No response.]
- 5302 The {Clerk.} Mr. Bilbray?
- 5303 Mr. {Bilbray.} No.
- 5304 The {Clerk.} Mr. Bilbray, nay.
- 5305 Mr. Bass?
- 5306 Mr. {Bass.} No.
- 5307 The {Clerk.} Mr. Bass, nay.
- 5308 Mr. Gingrey?
- 5309 Dr. {Gingrey.} No.
- 5310 The {Clerk.} Mr. Gingrey, nay.
- 5311 Mr. Scalise?
- 5312 Mr. {Scalise.} No.
- 5313 The {Clerk.} Mr. Scalise, nay.
- 5314 Mr. Latta?
- 5315 Mr. {Latta.} No.
- 5316 The {Clerk.} Mr. Latta, nay.

- 5317 Mrs. McMorris Rodgers?
- 5318 Mrs. {McMorris Rodgers.} No.
- 5319 The {Clerk.} Mrs. McMorris Rodgers, nay.
- 5320 Mr. Harper?
- 5321 Mr. {Harper.} No.
- 5322 The {Clerk.} Mr. Harper, nay.
- 5323 Mr. Lance?
- 5324 Mr. {Lance.} No.
- 5325 The {Clerk.} Mr. Lance, nay.
- 5326 Mr. Cassidy?
- 5327 Dr. {Cassidy.} No.
- 5328 The {Clerk.} Mr. Cassidy, nay.
- 5329 Mr. Guthrie?
- 5330 Mr. {Guthrie.} Nay.
- 5331 The {Clerk.} Mr. Guthrie, nay.
- 5332 Mr. Olson?
- 5333 Mr. {Olson.} No.
- 5334 The {Clerk.} Mr. Olson, nay.
- 5335 Mr. McKinley?
- 5336 Mr. {Mr. McKinley.} No.
- 5337 The {Clerk.} Mr. McKinley, nay.
- 5338 Mr. Gardner?
- 5339 Mr. {Gardner.} No.
- 5340 The {Clerk.} Mr. Gardner, nay.

5341 Mr. Pompeo?
5342 Mr. {Pompeo.} No.
5343 The {Clerk.} Mr. Pompeo, nay.
5344 Mr. Kinzinger?
5345 Mr. {Kinzinger.} No.
5346 The {Clerk.} Mr. Kinzinger, nay.
5347 Mr. Griffith?
5348 Mr. {Griffith.} Nay.
5349 The {Clerk.} Mr. Griffith, nay.
5350 Mr. Waxman?
5351 [No response.]
5352 The {Clerk.} Mr. Dingell?
5353 Mr. {Dingell.} Votes aye.
5354 The {Clerk.} Mr. Dingell, aye.
5355 Mr. Markey?
5356 Mr. {Markey.} Aye.
5357 The {Clerk.} Mr. Markey, aye.
5358 Mr. Towns?
5359 Mr. {Towns.} Aye.
5360 The {Clerk.} Mr. Towns, aye.
5361 Mr. Pallone?
5362 Mr. {Pallone.} Aye.
5363 The {Clerk.} Mr. Pallone, aye.
5364 Mr. Rush?

5365 [No response.]

5366 The {Clerk.} Ms. Eshoo?

5367 [No response.]

5368 The {Clerk.} Mr. Engel?

5369 Mr. {Engel.} Aye.

5370 The {Clerk.} Mr. Engel, aye.

5371 Mr. Green?

5372 Mr. {Green.} Aye.

5373 The {Clerk.} Mr. Green, aye.

5374 Ms. DeGette?

5375 Ms. {DeGette.} Aye.

5376 The {Clerk.} Ms. DeGette, aye.

5377 Mrs. Capps?

5378 Mrs. {Capps.} Aye.

5379 The {Clerk.} Mrs. Capps, aye.

5380 Mr. Doyle?

5381 [No response.]

5382 The {Clerk.} Ms. Schakowsky?

5383 Ms. {Schakowsky.} Aye.

5384 The {Clerk.} Ms. Schakowsky, aye.

5385 Mr. Gonzalez?

5386 [No response.]

5387 The {Clerk.} Mr. Inslee?

5388 Mr. {Inslee.} Aye.

5389 The {Clerk.} Mr. Inslee, aye.
5390 Ms. Baldwin?
5391 Ms. {Baldwin.} Aye.
5392 The {Clerk.} Ms. Baldwin, aye.
5393 Mr. Ross?
5394 Mr. {Ross.} Aye.
5395 The {Clerk.} Mr. Ross, aye.
5396 Mr. Weiner?
5397 Mr. {Weiner.} Aye.
5398 The {Clerk.} Mr. Weiner, aye.
5399 Mr. Matheson?
5400 Mr. {Matheson.} No.
5401 The {Clerk.} Mr. Matheson, nay.
5402 Mr. Butterfield?
5403 Mr. {Butterfield.} Aye.
5404 The {Clerk.} Mr. Butterfield, aye.
5405 Mr. Barrow?
5406 Mr. {Barrow.} Votes aye.
5407 The {Clerk.} Mr. Barrow, aye.
5408 Ms. Matsui?
5409 [No response.]
5410 The {Clerk.} Ms. Christensen?
5411 Dr. {Christensen.} Aye.
5412 The {Clerk.} Ms. Christensen, aye.

5413 Mr. Upton?

5414 The {Chairman.} No.

5415 The {Clerk.} Mr. Upton, nay.

5416 Mr. {Pitts.} Other members wishing to cast their vote?

5417 Mr. Rush?

5418 Mr. {Rush.} Aye.

5419 The {Chairman.} Mr. Rush votes aye.

5420 The {Clerk.} Mr. Rush votes aye.

5421 The {Chairman.} Mr. Waxman votes aye.

5422 The {Clerk.} Mr. Waxman, aye.

5423 The {Chairman.} Mr. Terry?

5424 Mr. {Terry.} Votes no.

5425 The {Clerk.} Mr. Terry, nay.

5426 The {Chairman.} Mr. Sullivan?

5427 Mr. {Sullivan.} No.

5428 The {Clerk.} Mr. Sullivan, nay.

5429 The {Chairman.} Mrs. Blackburn?

5430 The {Clerk.} She is not recorded. Mrs. Blackburn, oh,

5431 you are not recorded. I am sorry.

5432 The {Chairman.} Votes nay.

5433 The {Clerk.} Mrs. Blackburn, nay.

5434 The {Chairman.} Other members wishing to cast their

5435 vote? Seeing no more, the clerk will report the tally.

5436 The {Clerk.} Mr. Chairman, on that there were 18 ayes,

5437 31 nays.

5438 The {Chairman.} Eighteen ayes, 31 nays. The amendment
5439 is not agreed to.

5440 The next vote will be the Markey amendment relating to
5441 diversion of damage awards, and the clerk will call the roll.

5442 The {Clerk.} Mr. Barton?

5443 Mr. {Barton.} No.

5444 The {Clerk.} Mr. Barton, nay.

5445 Mr. Stearns?

5446 Mr. {Stearns.} Votes no.

5447 The {Clerk.} Mr. Stearns, nay.

5448 Mr. Whitfield?

5449 Mr. {Whitfield.} No.

5450 The {Clerk.} Mr. Whitfield, nay.

5451 Mr. Shimkus?

5452 Mr. {Shimkus.} No.

5453 The {Clerk.} Mr. Shimkus, nay.

5454 Mr. Pitts?

5455 Mr. {Pitts.} No.

5456 The {Clerk.} Mr. Pitts, nay.

5457 Mrs. Bono Mack?

5458 Mrs. {Bono Mack.} No.

5459 The {Clerk.} Mrs. Bono Mack, nay.

5460 Mr. Walden?

- 5461 Mr. {Walden.} No.
- 5462 The {Clerk.} Mr. Walden, nay.
- 5463 Mr. Terry?
- 5464 Mr. {Terry.} Votes no.
- 5465 The {Clerk.} Mr. Terry, nay.
- 5466 Mr. Rogers?
- 5467 [No response.]
- 5468 The {Clerk.} Mrs. Myrick?
- 5469 Mrs. {Myrick.} No.
- 5470 The {Clerk.} Mrs. Myrick, nay.
- 5471 Mr. Sullivan?
- 5472 Mr. {Sullivan.} Votes no.
- 5473 The {Clerk.} Mr. Sullivan, nay.
- 5474 Mr. Murphy?
- 5475 Mr. {Murphy.} No.
- 5476 The {Clerk.} Mr. Murphy, nay.
- 5477 Mr. Burgess?
- 5478 Dr. {Burgess.} No.
- 5479 The {Clerk.} Mr. Burgess, nay.
- 5480 Mrs. Blackburn?
- 5481 Mrs. {Blackburn.} No.
- 5482 The {Clerk.} Mrs. Blackburn, nay.
- 5483 Mr. Bilbray?
- 5484 Mr. {Bilbray.} No.

- 5485 The {Clerk.} Mr. Bilbray, nay.
- 5486 Mr. Bass?
- 5487 Mr. {Bass.} No.
- 5488 The {Clerk.} Mr. Bass, nay.
- 5489 Mr. Gingrey?
- 5490 Dr. {Gingrey.} No.
- 5491 The {Clerk.} Mr. Gingrey, nay.
- 5492 Mr. Scalise?
- 5493 Mr. {Scalise.} Nay.
- 5494 The {Clerk.} Mr. Scalise, nay.
- 5495 Mr. Latta?
- 5496 Mr. {Latta.} No.
- 5497 The {Clerk.} Mr. Latta, nay.
- 5498 Mrs. McMorris Rodgers?
- 5499 Mrs. {McMorris Rodgers.} No.
- 5500 The {Clerk.} Mrs. McMorris Rodgers, nay.
- 5501 Mr. Harper?
- 5502 Mr. {Harper.} No.
- 5503 The {Clerk.} Mr. Harper, nay.
- 5504 Mr. Lance?
- 5505 Mr. {Lance.} No.
- 5506 The {Clerk.} Mr. Lance, nay.
- 5507 Mr. Cassidy?
- 5508 Dr. {Cassidy.} No.

5509 The {Clerk.} Mr. Cassidy, nay.
5510 Mr. Guthrie?
5511 Mr. {Guthrie.} Votes no.
5512 The {Clerk.} Mr. Guthrie, nay.
5513 Mr. Olson?
5514 Mr. {Olson.} No.
5515 The {Clerk.} Mr. Olson, nay.
5516 Mr. McKinley?
5517 Mr. {Mr. McKinley.} No.
5518 The {Clerk.} Mr. McKinley, nay.
5519 Mr. Gardner?
5520 Mr. {Gardner.} No.
5521 The {Clerk.} Mr. Gardner, nay.
5522 Mr. Pompeo?
5523 Mr. {Pompeo.} Votes no.
5524 The {Clerk.} Mr. Pompeo, nay.
5525 Mr. Kinzinger?
5526 Mr. {Kinzinger.} No.
5527 The {Clerk.} Mr. Kinzinger, nay.
5528 Mr. Griffith?
5529 Mr. {Griffith.} Nay.
5530 The {Clerk.} Mr. Griffith, nay.
5531 Mr. Waxman?
5532 Mr. {Waxman.} Aye.

5533 The {Clerk.} Mr. Waxman, aye.
5534 Mr. Dingell?
5535 Mr. {Dingell.} Aye.
5536 The {Clerk.} Mr. Dingell, aye.
5537 Mr. Markey?
5538 Mr. {Markey.} Aye.
5539 The {Clerk.} Mr. Markey, aye.
5540 Mr. Towns?
5541 Mr. {Towns.} Aye.
5542 The {Clerk.} Mr. Towns, aye.
5543 Mr. Pallone?
5544 Mr. {Pallone.} Aye.
5545 The {Clerk.} Mr. Pallone, aye.
5546 Mr. Rush?
5547 Mr. {Rush.} Aye.
5548 The {Clerk.} Mr. Rush, aye.
5549 Mrs. Eshoo?
5550 [No response.]
5551 The {Clerk.} Mr. Engel?
5552 Mr. {Engel.} Aye.
5553 The {Clerk.} Mr. Engel, aye.
5554 Mr. Green?
5555 Mr. {Green.} Aye.
5556 The {Clerk.} Mr. Green, aye.

5557 Ms. DeGette?
5558 Ms. {DeGette.} Aye.
5559 The {Clerk.} Ms. DeGette, aye.
5560 Mrs. Capps?
5561 Mrs. {Capps.} Aye.
5562 The {Clerk.} Mrs. Capps, aye.
5563 Mr. Doyle?
5564 [No response.]
5565 The {Clerk.} Ms. Schakowsky?
5566 Ms. {Schakowsky.} Aye.
5567 The {Clerk.} Ms. Schakowsky, aye.
5568 Mr. Gonzalez?
5569 [No response.]
5570 The {Clerk.} Mr. Inslee?
5571 Mr. {Inslee.} Aye.
5572 The {Clerk.} Mr. Inslee, aye.
5573 Ms. Baldwin?
5574 Ms. {Baldwin.} Aye.
5575 The {Clerk.} Ms. Baldwin, aye.
5576 Mr. Ross?
5577 Mr. {Ross.} Aye.
5578 The {Clerk.} Mr. Ross, aye.
5579 Mr. Weiner?
5580 Mr. {Weiner.} Aye.

5581 The {Clerk.} Mr. Weiner, aye.
5582 Mr. Matheson?
5583 Mr. {Matheson.} No.
5584 The {Clerk.} Mr. Matheson, nay.
5585 Mr. Butterfield?
5586 Mr. {Butterfield.} Aye.
5587 The {Clerk.} Mr. Butterfield, aye.
5588 Mr. Barrow?
5589 Mr. {Barrow.} Votes aye.
5590 The {Clerk.} Mr. Barrow, aye.
5591 Ms. Matsui?
5592 [No response.]
5593 The {Clerk.} Ms. Christensen?
5594 Dr. {Christensen.} Aye.
5595 The {Clerk.} Ms. Christensen, aye.
5596 Mr. Upton?
5597 The {Chairman.} Votes no. Other members wishing to
5598 cast a vote? Seeing none, the clerk will report the tally.
5599 The {Clerk.} Mr. Chairman, on that there were 18 ayes
5600 and 31 nays.
5601 The {Chairman.} Eighteen ayes, 31 nays, the amendment
5602 is not agreed to.
5603 The last amendment is the Waxman amendment regarding
5604 protective orders, and the clerk will call the roll.

5605 The {Clerk.} Mr. Barton?
5606 Mr. {Barton.} What is this?
5607 The {Clerk.} Mr. Barton, nay.
5608 Mr. Stearns?
5609 Mr. {Stearns.} Votes no.
5610 The {Clerk.} Mr. Stearns, nay.
5611 Mr. Whitfield?
5612 Mr. {Whitfield.} No.
5613 The {Clerk.} Mr. Whitfield, nay.
5614 Mr. Shimkus?
5615 Mr. {Shimkus.} No.
5616 The {Clerk.} Mr. Shimkus, nay.
5617 Mr. Pitts?
5618 Mr. {Pitts.} No.
5619 The {Clerk.} Mr. Pitts, nay.
5620 Mrs. Bono Mack?
5621 Mrs. {Bono Mack.} No.
5622 The {Clerk.} Mrs. Bono Mack, nay.
5623 Mr. Walden?
5624 Mr. {Walden.} No.
5625 The {Clerk.} Mr. Walden, nay.
5626 Mr. Terry?
5627 Mr. {Terry.} No.
5628 The {Clerk.} Mr. Terry, nay.

5629 Mr. Rogers?
5630 [No response.]
5631 The {Clerk.} Mrs. Myrick?
5632 Mrs. {Myrick.} No.
5633 The {Clerk.} Mrs. Myrick, nay.
5634 Mr. Sullivan?
5635 Mr. {Sullivan.} Aye.
5636 The {Clerk.} Mr. Sullivan, aye.
5637 Mr. Murphy?
5638 Mr. {Murphy.} Nay.
5639 The {Clerk.} Mr. Murphy, nay.
5640 Mr. Burgess?
5641 Dr. {Burgess.} No.
5642 The {Clerk.} Mr. Burgess, nay.
5643 Mrs. Blackburn?
5644 Mrs. {Blackburn.} No.
5645 The {Clerk.} Mrs. Blackburn, nay.
5646 Mr. Bilbray?
5647 Mr. {Bilbray.} No.
5648 The {Clerk.} Mr. Bilbray, nay.
5649 Mr. Bass?
5650 Mr. {Bass.} No.
5651 The {Clerk.} Mr. Bass, nay.
5652 Mr. Gingrey?

5653 Dr. {Gingrey.} No.

5654 The {Clerk.} Mr. Gingrey, nay.

5655 Mr. Scalise?

5656 Mr. {Scalise.} Nay.

5657 The {Clerk.} Mr. Scalise, nay.

5658 Mr. Latta?

5659 Mr. {Latta.} No.

5660 The {Clerk.} Mr. Latta, nay.

5661 Mrs. McMorris Rodgers?

5662 Mrs. {McMorris Rodgers.} No.

5663 The {Clerk.} Mrs. McMorris Rodgers, nay.

5664 Mr. Harper?

5665 Mr. {Harper.} Nay.

5666 The {Clerk.} Mr. Harper, nay.

5667 Mr. Lance?

5668 Mr. {Lance.} No.

5669 The {Clerk.} Mr. Lance, nay.

5670 Mr. Cassidy?

5671 Dr. {Cassidy.} No.

5672 The {Clerk.} Mr. Cassidy, nay.

5673 Mr. Guthrie?

5674 Mr. {Guthrie.} No.

5675 The {Clerk.} Mr. Guthrie, nay.

5676 Mr. Olson?

5677 Mr. {Olson.} No.

5678 The {Clerk.} Mr. Olson, nay.

5679 Mr. McKinley?

5680 Mr. {Mr. McKinley.} No.

5681 The {Clerk.} Mr. McKinley, nay.

5682 Mr. Gardner?

5683 Mr. {Gardner.} No.

5684 The {Clerk.} Mr. Gardner, nay.

5685 Mr. Pompeo?

5686 Mr. {Pompeo.} No.

5687 The {Clerk.} Mr. Pompeo, nay.

5688 Mr. Kinzinger?

5689 Mr. {Kinzinger.} No.

5690 The {Clerk.} Mr. Kinzinger, nay.

5691 Mr. Griffith?

5692 Mr. {Griffith.} No.

5693 The {Clerk.} Mr. Griffith, nay.

5694 Mr. Waxman?

5695 Mr. {Waxman.} Votes aye.

5696 The {Clerk.} Mr. Waxman, aye.

5697 Mr. Dingell?

5698 Mr. {Dingell.} Aye.

5699 The {Clerk.} Mr. Dingell, aye.

5700 Mr. Markey?

5701 Mr. {Markey.} Aye.
5702 The {Clerk.} Mr. Markey, aye.
5703 Mr. Towns?
5704 Mr. {Towns.} Aye.
5705 The {Clerk.} Mr. Towns, aye.
5706 Mr. Pallone?
5707 Mr. {Pallone.} Aye.
5708 The {Clerk.} Mr. Pallone, aye.
5709 Mr. Rush?
5710 Mr. {Rush.} Aye.
5711 The {Clerk.} Mr. Rush, aye.
5712 Mrs. Eshoo?
5713 [No response.]
5714 The {Clerk.} Mr. Engel?
5715 Mr. {Engel.} Aye.
5716 The {Clerk.} Mr. Engel, aye.
5717 Mr. Green?
5718 Mr. {Green.} Aye.
5719 The {Clerk.} Mr. Green, aye.
5720 Ms. DeGette?
5721 Ms. {DeGette.} Aye.
5722 The {Clerk.} Ms. DeGette, aye.
5723 Mrs. Capps?
5724 Mrs. {Capps.} Aye.

5725 The {Clerk.} Mrs. Capps, aye.
5726 Mr. Doyle?
5727 [No response.]
5728 The {Clerk.} Ms. Schakowsky?
5729 Ms. {Schakowsky.} Aye.
5730 The {Clerk.} Ms. Schakowsky, aye.
5731 Mr. Gonzalez?
5732 [No response.]
5733 The {Clerk.} Mr. Inslee?
5734 Mr. {Inslee.} Aye.
5735 The {Clerk.} Mr. Inslee, aye.
5736 Ms. Baldwin?
5737 Ms. {Baldwin.} Aye.
5738 The {Clerk.} Ms. Baldwin, aye.
5739 Mr. Ross?
5740 Mr. {Ross.} Aye.
5741 The {Clerk.} Mr. Ross, aye.
5742 Mr. Weiner?
5743 Mr. {Weiner.} Aye.
5744 The {Clerk.} Mr. Weiner, aye.
5745 Mr. Matheson?
5746 Mr. {Matheson.} Nay.
5747 The {Clerk.} Mr. Matheson, nay.
5748 Mr. Butterfield?

5749 Mr. {Butterfield.} Aye.

5750 The {Clerk.} Mr. Butterfield, aye.

5751 Mr. Barrow?

5752 Mr. {Barrow.} Votes aye.

5753 The {Clerk.} Mr. Barrow, aye.

5754 Ms. Matsui?

5755 [No response.]

5756 The {Clerk.} Ms. Christensen?

5757 Dr. {Christensen.} Aye.

5758 The {Clerk.} Ms. Christensen, aye.

5759 Mr. Upton?

5760 The {Chairman.} Votes no. How is Mr. Sullivan

5761 recorded?

5762 The {Clerk.} The gentleman is recorded aye. Mr.

5763 Sullivan off aye, on nay.

5764 The {Chairman.} Mr. Rogers?

5765 The {Clerk.} Mr. Rogers is not recorded.

5766 Mr. {Rogers.} Mr. Rogers votes no.

5767 The {Clerk.} Mr. Rogers, nay.

5768 The {Chairman.} Are there other members wishing to cast

5769 a vote on this last amendment? If not, the clerk will report

5770 the tally.

5771 The {Clerk.} Mr. Upton, on that there were 18 aye, 32

5772 nay.

5773 The {Chairman.} Eighteen aye, 32 nay. The amendment is
5774 not agreed to.

5775 At this point, the question now occurs on favorably
5776 reporting the bill, and the clerk will call the roll.

5777 The {Clerk.} Mr. Barton?

5778 Mr. {Barton.} Yes.

5779 The {Clerk.} Mr. Barton, aye.

5780 Mr. Stearns?

5781 Mr. {Stearns.} Aye.

5782 The {Clerk.} Mr. Stearns, aye.

5783 Mr. Whitfield?

5784 Mr. {Whitfield.} Aye.

5785 The {Clerk.} Mr. Whitfield, aye.

5786 Mr. Shimkus?

5787 Mr. {Shimkus.} Aye.

5788 The {Clerk.} Mr. Shimkus, aye.

5789 Mr. Pitts?

5790 Mr. {Pitts.} Aye.

5791 The {Clerk.} Mr. Pitts, aye.

5792 Mrs. Bono Mack?

5793 Mrs. {Bono Mack.} Aye.

5794 The {Clerk.} Mrs. Bono Mack, aye.

5795 Mr. Walden?

5796 Mr. {Walden.} Aye.

5797 The {Clerk.} Mr. Walden, aye.
5798 Mr. Terry?
5799 Mr. {Terry.} Nay.
5800 The {Clerk.} Mr. Terry, nay.
5801 Mr. Rogers?
5802 Mr. {Rogers.} Aye.
5803 The {Clerk.} Mr. Rogers, aye.
5804 Mrs. Myrick?
5805 Mrs. {Myrick.} Aye.
5806 The {Clerk.} Mrs. Myrick, aye.
5807 Mr. Sullivan?
5808 Mr. {Sullivan.} Aye.
5809 The {Clerk.} Mr. Sullivan, aye.
5810 Mr. Murphy?
5811 Mr. {Murphy.} Aye.
5812 The {Clerk.} Mr. Murphy, aye.
5813 Mr. Burgess?
5814 Dr. {Burgess.} Aye.
5815 The {Clerk.} Mr. Burgess, aye.
5816 Mrs. Blackburn?
5817 Mrs. {Blackburn.} Aye.
5818 The {Clerk.} Mrs. Blackburn, aye.
5819 Mr. Bilbray?
5820 Mr. {Bilbray.} Aye.

- 5821 The {Clerk.} Mr. Bilbray, aye.
- 5822 Mr. Bass?
- 5823 Mr. {Bass.} Aye.
- 5824 The {Clerk.} Mr. Bass, aye.
- 5825 Mr. Gingrey?
- 5826 Dr. {Gingrey.} Aye.
- 5827 The {Clerk.} Mr. Gingrey, aye.
- 5828 Mr. Scalise?
- 5829 Mr. {Scalise.} Aye.
- 5830 The {Clerk.} Mr. Scalise, aye.
- 5831 Mr. Latta?
- 5832 Mr. {Latta.} Aye.
- 5833 The {Clerk.} Mr. Latta, aye.
- 5834 Mrs. McMorris Rodgers?
- 5835 Mrs. {McMorris Rodgers.} Aye.
- 5836 The {Clerk.} Mrs. McMorris Rodgers, aye.
- 5837 Mr. Harper?
- 5838 Mr. {Harper.} Aye.
- 5839 The {Clerk.} Mr. Harper, aye.
- 5840 Mr. Lance?
- 5841 Mr. {Lance.} Aye.
- 5842 The {Clerk.} Mr. Lance, aye.
- 5843 Mr. Cassidy?
- 5844 Dr. {Cassidy.} Aye.

5845 The {Clerk.} Mr. Cassidy, aye.
5846 Mr. Guthrie?
5847 Mr. {Guthrie.} Aye.
5848 The {Clerk.} Mr. Guthrie, aye.
5849 Mr. Olson?
5850 Mr. {Olson.} Aye.
5851 The {Clerk.} Mr. Olson, aye.
5852 Mr. McKinley?
5853 Mr. {Mr. McKinley.} Aye.
5854 The {Clerk.} Mr. McKinley, aye.
5855 Mr. Gardner?
5856 Mr. {Gardner.} Aye.
5857 The {Clerk.} Mr. Gardner, aye.
5858 Mr. Pompeo?
5859 Mr. {Pompeo.} Aye.
5860 The {Clerk.} Mr. Pompeo, aye.
5861 Mr. Kinzinger?
5862 Mr. {Kinzinger.} Aye.
5863 The {Clerk.} Mr. Kinzinger, aye.
5864 Mr. Griffith?
5865 Mr. {Griffith.} Nay.
5866 The {Clerk.} Mr. Griffith, nay.
5867 Mr. Waxman?
5868 Mr. {Waxman.} No..

5869 The {Clerk.} Mr. Waxman, nay.
5870 Mr. Dingell?
5871 Mr. {Dingell.} No.
5872 The {Clerk.} Mr. Dingell, nay.
5873 Mr. Markey? Mr. Towns? Mr. Markey?
5874 Mr. {Markey.} Nay.
5875 The {Clerk.} Mr. Markey, nay.
5876 Mr. Towns?
5877 Mr. {Towns.} Nay.
5878 The {Clerk.} Mr. Towns, nay.
5879 Mr. Pallone?
5880 Mr. {Pallone.} Nay.
5881 The {Clerk.} Mr. Pallone, nay.
5882 Mr. Rush?
5883 Mr. {Rush.} No..
5884 The {Clerk.} Mr. Rush, nay.
5885 Mrs. Eshoo?
5886 [No response.]
5887 The {Clerk.} Mr. Engel?
5888 Mr. {Engel.} No.
5889 The {Clerk.} Mr. Engel, nay.
5890 Mr. Green?
5891 Mr. {Green.} No.
5892 The {Clerk.} Mr. Green, nay.

5893 Ms. DeGette?

5894 Ms. {DeGette.} Nay.

5895 The {Clerk.} Ms. DeGette, nay.

5896 Mrs. Capps?

5897 Mrs. {Capps.} No.

5898 The {Clerk.} Mrs. Capps, nay.

5899 Mr. Doyle?

5900 [No response.]

5901 The {Clerk.} Ms. Schakowsky?

5902 Ms. {Schakowsky.} No.

5903 The {Clerk.} Ms. Schakowsky, Nay.

5904 Mr. Gonzalez?

5905 [No response.]

5906 The {Clerk.} Mr. Inslee?

5907 Mr. {Inslee.} No.

5908 The {Clerk.} Mr. Inslee, nay.

5909 Ms. Baldwin?

5910 Ms. {Baldwin.} No.

5911 The {Clerk.} Ms. Baldwin, nay.

5912 Mr. Ross?

5913 Mr. {Ross.} No.

5914 The {Clerk.} Mr. Ross, nay.

5915 Mr. Weiner?

5916 Mr. {Weiner.} How am I recorded?

5917 The {Clerk.} The gentleman is not recorded.
5918 Mr. {Weiner.} [indiscernible].
5919 The {Clerk.} Nay.
5920 Mr. {Weiner.} Nay.
5921 The {Clerk.} Mr. Weiner, nay.
5922 Mr. Matheson?
5923 Mr. {Matheson.} Aye.
5924 The {Clerk.} Mr. Matheson, aye.
5925 Mr. Butterfield?
5926 Mr. {Butterfield.} No.
5927 The {Clerk.} Mr. Butterfield, nay.
5928 Mr. Barrow?
5929 Mr. {Barrow.} Votes no.
5930 The {Clerk.} Mr. Barrow, nay.
5931 Ms. Matsui?
5932 [No response.]
5933 The {Clerk.} Ms. Christensen?
5934 Dr. {Christensen.} No.
5935 The {Clerk.} Ms. Christensen, no.
5936 Mr. Upton?
5937 The {Chairman.} Votes aye.
5938 The {Clerk.} Mr. Upton, aye.
5939 The {Chairman.} Are there other members wishing to cast
5940 a vote? Seeing none, the clerk will report the tally.

5941 The {Clerk.} Mr. Chairman, on that there were 30 ayes
5942 and 20 nays.

5943 Mr. {Waxman.} Thirty ayes and 20 nays. The ayes have
5944 it, and the bill is favorably reported. Without objection,
5945 staff is authorized to make technical and conforming changes
5946 to the bill approved by the Committee today. Hearing no
5947 objection, so ordered.

5948 It would recognize the Ranking Member, Mr. Waxman.

5949 Mr. {Waxman.} Mr. Chairman, pursuant to House Rule 11,
5950 Clause 2 either (1) or (L), I am notifying you of the intent
5951 of minority members to submit views regarding H.R. 5 and
5952 request the requisite number of days for doing so.

5953 The {Chairman.} Without objection, so ordered, no
5954 problem.

5955 The Committee now stands adjourned.

5956 [Whereupon, at 7:08 p.m., the Committee was adjourned.]