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2 HIF096.140

3 HEARING ON THE COST OF THE MEDICAL LIABILITY SYSTEM PROPOSALS

4 FOR REFORM, INCLUDING H.R. 5, THE HELP EFFICIENT, ACCESSIBLE,

5 LOW-COST, TIMELY HEALTHCARE (HEALTH) ACT OF 2011

6 WEDNESDAY, APRIL 6, 2011

7 House of Representatives,

8 Subcommittee on Health

9 Washington, D.C.

10 The Subcommittee met, pursuant to call, at 9:32 a.m., in
11 Room 2123 of the Rayburn House Office Building, Hon. Joe
12 Pitts [Chairman of the Subcommittee] presiding.

13 Members present: Representatives Pitts, Burgess,
14 Whitfield, Shimkus, Myrick, Murphy, Blackburn, Gingrey,
15 Latta, Lance, Cassidy, Guthrie, Barton, Pallone, Dingell,
16 Capps, Schakowsky, Gonzalez, Weiner, and Waxman (ex officio).

17 Staff Present: Clay Alspach, Counsel, Health; Debee
18 Keller, Press Secretary; Katie Novaria, Legislative Clerk;

19 John O'Shea, Professional Staff Member, Health; Monica Popp,
20 Professional Staff Member, Health; Heidi Stirrup, Health
21 Policy Coordinator; Phil Barnett, Democratic Staff Director;
22 Stephen Cha, Democratic Senior Professional Staff Member;
23 Alli Corr, Democratic Policy Analyst; Ruth Katz, Democratic
24 Chief Public Health Counsel; Karen Lightfoot, Democratic
25 Communications Director, and Senior Policy Advisor; Karen
26 Nelson, Democratic Deputy Committee Staff Director for Health;
27 and Rachel Sher, Democratic Senior Counsel.

|

28 Mr. [Pitts.] Subcommittee will come to order. Chair
29 recognizes himself for 5 minutes for an opening statement.
30 An article in Health Affairs in September 2010 titled
31 ``National Costs of the Medical Liabilities System''
32 estimated that the medical liability cost including defensive
33 medicine were \$55.6 billion in 2008 dollars, or 2.4 percent
34 of total health care spending. According to the Kaiser
35 Family Foundation, total payments on medical malpractice
36 claims in 2009 totaled \$3,471,631,100. The average claims
37 payment for 2009 was \$323,273.

38 Let me share with you what this means to my home State
39 of Pennsylvania. According to Kaiser again, Pennsylvania
40 ranks second behind New York in the total dollars paid out in
41 malpractice claims at \$295,459,500 and the average claims
42 payment in Pennsylvania was higher than the national average.
43 Pennsylvania also paid more malpractice claims than any state
44 except New York, California, and Florida with 767 paid claims
45 in 2009. According to the Pennsylvania Department of Health,
46 nearly 20 percent of the physicians who practice primary care
47 say they will leave Pennsylvania in 5 years or less, and only
48 one in three physicians who complete their medical degree in
49 Pennsylvania plan to remain in the State to practice. Over
50 the years, numerous physicians have called my office to tell

51 me how the medical liability climate in Pennsylvania has
52 affected their practices. Usually these are OB-GYN's, but
53 sometimes doctors from other specialties call. Up until a
54 few years ago they would tell me and my staff that while they
55 had planned to practice for 5, 6, or even more years they
56 were retiring early because they just couldn't afford their
57 malpractice insurance premiums. Or, they would say they were
58 forced to move their practices to nearby Delaware State to
59 remain financially viable. Recently doctors have begun to
60 tell me they are moving to North Carolina to set up practice.

61 Apparently other States have a much less onerous medical
62 malpractice climate and Pennsylvania's loss is their gain.
63 My home State consistently ranks as having one of the worst
64 medical liability climates in the Nation. The high legal
65 costs paid by Pennsylvania healthcare providers increase
66 overall healthcare costs, limit access to medical care, and
67 inhibit job growth. We all agree that patients who are
68 injured by medical mistakes should be promptly and fairly
69 compensated. However, capping non-economic medical
70 malpractice awards does not deny patients their day in court
71 or fair compensation. It merely reigns in over the top
72 verdicts and allows conscientious doctors to afford insurance
73 coverage and serve their patients.

74 The current medical liability system does not work for

75 anyone especially patients who need access to quality
76 healthcare. Like it or not, patients are inescapably
77 intertwined in this malpractice mess where some receive
78 unlimited court awards and the rest of us are left with
79 limited healthcare and higher cost. We need to find a
80 balance where conscientious doctors can afford insurance
81 coverage and patients can get quality care when and where
82 they need it.

83 I now yield the rest of my time to Dr. Gingrey.

84 [The prepared statement of Mr. Pitts follows:]

85 ***** COMMITTEE INSERT *****

|
86 Dr. {Gingrey.} Mr. Chairman, thank you so much for
87 yielding to me on such an important issue. And as we know
88 this country is on the verge of a medical liability crisis.

89 Focusing on just my specialty Obstetrics and Gynecology,
90 each OB-GYN will be sued three times in their careers. Think
91 about 25 to 30 years of practice. Even though 50 percent of
92 these cases are eventually dropped, dismissed, or settled
93 without a payment for the plaintiff, 30 percent of OB-GYN
94 fellows report increasing caesarean deliveries over
95 traditional birth, but the rate in this country is probably
96 now 29 percent. Twenty-six percent have stopped performing
97 or offering traditional births altogether over this fear of
98 being sued and ending their career. But why is this
99 significant?

100 As I say, the caesarean sections can cost our health
101 system twice as much if not three times as much as routine
102 vaginal birth and that is just one example of what is
103 referred to as defensive medicine. It is a glaring example,
104 however. The order of tests or procedures simply to protect
105 a medical provider from a lawsuit is really mounting. You
106 can't get--go to emergency room with a headache without
107 coming out with a bill for a CT scan or an MRI.

108 Studies, most notably one that was done by

109 Pricewaterhouse Coopers, show that this defensive practice
110 that doctors are engaging in across all specialties quite
111 frankly resulted in about \$210 billion in additional
112 healthcare costs in 2008 and today these costs are certainly
113 much higher because of the Patient Protection and Affordable
114 Care Act. I have realized my time is running pretty short
115 here and I know I am going to have to yield back, but I want
116 to thank the chairman for yielding time. Maybe I can get
117 someone else to yield me a little bit more time so I can
118 finish my full statement, but it will go in the record and
119 this is hugely important. I am so grateful for the witnesses
120 and I look forward to your testimony. And I yield back, Mr.
121 Chair. Thank you for the time.

122 [The prepared statement of Dr. Gingrey follows:]

123 ***** COMMITTEE INSERT *****

|
124 Mr. [Pitts.} The Chair thanks the gentleman. The Chair
125 recognizes the Ranking Member of the Subcommittee, Mrs.
126 Capps, for 5 minutes.

127 Mrs. {Capps.} Thank you, Mr. Chairman. Before we begin
128 this hearing I would like to say that this is a bill we have
129 heard before; a bill on which we have disagreed before.
130 While the goal is clear, meaningful tort reforms that
131 protect patients and medical professional and reduce
132 healthcare costs it is also clear that differences in our
133 approach remain. We certainly should be looking at ways to
134 bring down the cost of medical malpractice insurance, but the
135 bill before us today only limits the amount of money that
136 patients who have been wrongfully harmed can collect to
137 compensate them for their injuries. It does nothing to solve
138 the root of that problem, reducing the incidents of
139 malpractice.

140 I believe we should be focused on improving patient care
141 and reducing the astounding number of costly, preventable,
142 medical errors that claim 98,000 lives every year. Reducing
143 medical errors would not only save lives, it would save a lot
144 of money. And as the number of studies have shown, focusing
145 on improving patient care and reducing error has led to
146 dramatic drops in medical malpractice payment. These

147 medical--these studies are instructive on how to reduce the
148 actual not-hypothetical cost of malpractice.

149 Another area where I think we should set the record
150 straight is the notion that excessive or frivolous lawsuits
151 are because of rising premiums. The problem is that the
152 lawsuits affected by the bill are by definition not
153 frivolous. Where large damages are awarded the jury has
154 found that the patient has been severely harmed. And in
155 fact, over the last 5 years malpractice insurance payments to
156 patients have actually gone down all while premiums have
157 continued to go up which raises the question of what is the
158 real driving force for these expenses. There is also no
159 evidence that capping the damages an injured person receives
160 because of malpractice is the most effective way to solve
161 this problem. It will not lower premiums. It will not even
162 stabilize them. Instead, this proposal will penalize
163 innocent victims of medical neglect--negligence.

164 Furthermore, H.R. 5 goes far beyond protections between
165 patients and doctors. In fact, what is concerning is the
166 extent to which this bill would protect drug companies and
167 HMO's from lawsuits in cases where they have clearly hurt
168 people. This expands the issue far beyond what many feel is
169 the proper scope of this type of policy.

170 Lastly, we disagree about the extent of what the Federal

171 Government's role in tort reform should be. At our
172 governor's hearing a few weeks ago we repeatedly heard these
173 governors stress that the needs of their States were
174 different from one another and that to meet the needs of
175 their states they needed flexibility. I find it ironic that
176 this majority who for so long has been champions of State
177 government, State and local control are supporting a bill
178 that would impose a federal one-size fits all solution with
179 no flexibility in an area that has been traditionally a
180 matter of State law. I believe there can be State solutions
181 to this problem and I am interested in seeing how the
182 provisions of the Affordable Care Act can help solve them.
183 The healthcare law authorizes \$50 million over 5 years in
184 grants to States to explore new approaches to settling losses
185 including health court and disclose and offer models. This
186 commitment to state solutions is also echoed in the
187 President's budget which this year proposes \$250 million in
188 grants for States to rewrite their own malpractice laws in
189 ways that seek to balance the interest of both doctors and
190 patients. I look forward to seeing the innovative state
191 solutions that these grants will spur. Despite the good
192 intentions for this bill, H.R. 5 does not help patients. It
193 does not help the medical profession move toward lowering
194 healthcare costs in a really meaningful way. Instead, it

195 just shifts the costs of malpractice from the party at fault
196 to injured individuals, their families, and taxpayers through
197 publicly funded programs such as Medicare, Medicaid, and
198 disability benefits. And I yield back the balance of my
199 time.

200 [The prepared statement of Mrs. Capps follows:]

201 ***** COMMITTEE INSERT *****

|
202 Mr. [Pitts.} Chair thanks the gentlelady and now
203 recognizes the Chairman Emeritus of the Full Committee, Mr.
204 Barton for 5 minutes.

205 Mr. {Barton.} Thank you, Mr. Chairman, and I am going
206 to yield some of that time to Dr. Burgess and also to Dr.
207 Gingrey.

208 Thank you for holding this hearing. As we have seen in
209 my home State of Texas, medical malpractice reform can work.
210 In Texas they have had cost savings of over \$879 million.
211 They have also added 21,640 positions since they did reform
212 back in 2003. Of those 21,640 new doctors, over 1,200 have
213 come from the great State of New York. In 2003, New York and
214 Texas had basically the same medical malpractice premiums.
215 Since Texas implemented its reform package, Texas's premiums
216 have decreased by 28 percent while New York State's--excuse
217 me, have increased by over 60 percent. The result is
218 obvious. Doctors are coming to Texas. They are leaving New
219 York. This is going to be a good hearing and we look forward
220 to our testimony from our witnesses. And at this point in
221 time I would like to yield 3 minutes to Dr. Burgess.

222 [The prepared statement of Mr. Barton follows:]

223 ***** COMMITTEE INSERT *****

|
224 Dr. {Burgess.} And I thank the gentleman for yielding.
225 Mr. Chairman, this is an important hearing. First want to
226 welcome Dr. Lisa Hollier who is an OB-GYN like me from Texas,
227 that is--and she is going to share with us some of the good
228 news that has come from on the ground, in the State of Texas
229 since 2003 when Texas enacted its own liability reform--truly
230 a 21st century solution to a problem that has been with us
231 for a long time.

232 Now, the President in his State of the Union Address
233 said that medical malpractice reform is needed to reign in
234 frivolous law suits. Mr. President, I could not agree more.
235 In fact, the very next morning I penned a letter in my own
236 hand as you can see to the President saying I want to work
237 with you on this. He asked for ideas from on both sides of
238 the aisle. I sent the letter down to the White House. I
239 will ask unanimous consent to insert this as part of the
240 record and Mr. President, I am still waiting on a response
241 and I was serious about this offer. As you can see from this
242 hearing many of us are serious about this today.

243 I am so painfully aware that many doctors are forced to
244 practice defensive medicine, or retire, or run for Congress
245 in the face of constant threat of non-meritorious lawsuits
246 and unsustainable medical liability insurance. I do not

247 believe we need to study this anymore. In Texas, we know
248 what works. Liability reform served as a catalyst to bring
249 doctors to underserved regions of the state including those
250 that had no access to a physician in the past.

251 Texas is one of the largest States in the Union, has a
252 diverse population, diverse economy and geography, yet our
253 reforms have proven successfully tailored to adapt and
254 produce across the State results. Eighty-two Texas counties
255 have seen a net gain in emergency room doctors including 26
256 counties who had none. The Texas State Board of Medical
257 Examiners in 2001 licensed 2,088 new doctors, the fewest in a
258 decade. Today, they are challenged to keep up with the
259 physicians who now want to practice in our state. In 2008,
260 over 3,600 new doctors--the highest number ever recorded. In
261 my field of obstetrics, Texas saw a net loss of 14
262 obstetricians in the 2 years prior to reform. Since then the
263 state has experience a net gain of 192 obstetricians and over
264 25 rural counties that never had one now do.

265 Texas has enjoyed a 62 percent greater growth in newly
266 licensed physicians in the past 3 years compared to the 3
267 years preceding liability reform Texas has benefitted. I am
268 happy to share this success that we are experiencing so that
269 all States can reap the benefit. I have introduced H.R. 896
270 based on Texas reforms but there are other ideas from small

271 to bold and we should be considering them. At this point I
272 will yield the balance of the time to Dr. Gingrey.

273 [The prepared statement of Dr. Burgess follows:]

274 ***** COMMITTEE INSERT *****

|
275 Dr. {Gingrey.} Yeah, Mr. Chairman, I appreciated the
276 Vice Chairman for yielding to me. I was beginning to like
277 the sound of my voice when I got cut off a few minutes ago.

278 I was talking about the Provider Shield Act. I want to
279 get to the more important act, H.R.5, but as Mr. Waxman, the
280 Committee Ranking Member knows himself there is a growing
281 concern among the provider and business community that
282 Obamacare will increase the threat of liability tremendously
283 and drive many providers out of practice if they follow their
284 own medical subspecialty guidelines over the treatment edicts
285 of Secretary Sebelius. And that bill, then H.R. 816 the
286 Provider Shield Act would protect medical providers from
287 these edicts and it has gained some bipartisan support.

288 But even if H.R. 816 becomes law, the crises that \$200
289 billion in costs will inflict on our healthcare system
290 remains and therefore I have introduces and we will talk
291 about a bi-partisan bill legislation H.R. 5 the Health Act,
292 along with Congressman David Scott and Chairman Lamar Smith
293 of the Judiciary Committee to help bring meaningful medical
294 liability reform to this country once and for all. If
295 healthcare costs are truly a national concern then solutions
296 to bring down these costs are desperately needed. And with
297 that Mr. Chairman, I will yield back the expired time.

298 Mr. {Pitts.} Chair thanks the gentleman. If there is
299 no one else from the minority wishing to make an opening
300 statement I will now welcome and introduce our distinguished
301 panel of witnesses. I would like to thank you for appearing
302 before the committee this morning. Your willingness to take
303 time out of your busy schedules underscores just how
304 important this issue is to all of you as it is to all of us.

305 Your written testimony will be made a part of the
306 record. We ask that you take 5 minutes each to summarize
307 your testimony and at this point I will introduce the
308 witnesses in which order I ask them to testify.

309 The first witness is Dr. Lisa Hollier. Dr. Hollier
310 practices obstetrics and gynecology in Houston, Texas and is
311 a Professor of OB-GYN and Director of the Lyndon B. Johnson
312 Residency Program at the University of Texas Medical School
313 at Houston. She is also a fellow of the American College of
314 Obstetricians and Gynecologists.

315 The next witness is Ms. Joanne Doroshow. Ms. Doroshow
316 is President and Executive Director Center for Justice and
317 Democracy, a public Interest organization in New York City
318 that is involved in educating the public about issues
319 relating to civil justice system.

320 The next witness is Dr. Allen Kachalia. Dr. Kachalia is
321 a practicing physician at Brigham and Women's Hospital

322 Harvard Medical School. He is the Medical Director for
323 Quality and Safety at Brigham and Women's Hospital. He also
324 has a law degree and conducts research and teaches about
325 legal matters in medicine including the Medical Professional
326 Liability System.

327 The next witness is Mr. Brian Wolfman. Mr. Wolfman has
328 been a practicing lawyer for more than 25 years. He is a
329 Visiting Professor of Law and Congress-Director, Institute
330 for Public Representation at Georgetown Law School. He also
331 spent almost 20 years with the Litigation Group of Public
332 Citizen in Washington, D.C.

333 And the final witness is Dr. Troy Tippet. Dr. Tippet
334 is a practicing neurosurgeon with more than 35 years of
335 experience. He is also past President of both the American
336 Association of Neurological Surgeons and the Florida Medical
337 Associations. Thank you for coming this morning. Dr.
338 Hollier, you are recognized for 5 minutes.

|
339 ^STATEMENTS OF LISA HOLLIER, MD, MPH, FELLOW, AMERICAN
340 COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PROFESSOR AND
341 DIRECTOR, LYNDON B. JOHNSON RESIDENCY PROGRAM, UNIVERSITY OF
342 TEXAS MEDICAL SCHOOL AT HOUSTON; JOANNE DOROSHOW, EXECUTIVE
343 DIRECTOR THE CENTER FOR JUSTICE AND DEMOCRACY; ALLEN B.
344 KACHALIA, MD, JD, MEDICAL DIRECTOR OF QUALITY AND SAFETY,
345 BRIGHAM AND WOMEN'S HOSPITAL, HARVARD MEDICAL SCHOOL; BRIAN
346 WOLFMAN, VISITING PROFESSOR, GEORGETOWN UNIVERSITY CENTER LAW
347 CENTER, CO-DIRECTOR, INSTITUTE FOR PUBLIC REPRESENTATION; AND
348 TROY M. TIPPETT, MD, PAST PRESIDENT, AMERICAN ASSOCIATION OF
349 NEUROLOGICAL SURGEONS, PAST PRESIDENT, FLORIDA MEDICAL
350 ASSOCIATION

|
351 ^STATEMENT OF LISA HOLLIER

352 } Dr. {Hollier.} Thank you, Chairman Pitts. We applaud
353 you and the subcommittee for holding this hearing. My name
354 is Dr. Lisa Hollier and I am an obstetrician/gynecologist
355 from Houston, Texas speaking on behalf of the American
356 Congress of Obstetricians and Gynecologists (ACOG), an
357 organization representing more than 54,000 physicians and
358 partners in women's health dedicated to improving the
359 healthcare of women. ACOG ultimately could not support

360 passage of the Health Reform Bill in large part because it
361 didn't include meaningful liability reform, an issue we see
362 as critical to reforming our healthcare system.

363 We simply cannot build a reformed healthcare system on
364 top of the broken medical liability system. Without
365 meaningful reform, the doctors will continue to be driven out
366 of their home States or out of their practices. When OB-
367 GYN's discontinue the practice of obstetrics, curtail their
368 surgical services or close their doors, women's healthcare
369 suffers. For these reasons, ACOG strongly supports H.R. 5,
370 the Health Efficient Accessible Low-Cost Timely Healthcare
371 Act introduced by ACOG fellow representative, Phil Gingrey.

372 Additionally, we appreciate the support from the 17
373 members of the committee who have cosponsored H.R. 5
374 including seven on the health subcommittee. Thank you
375 Representatives John Shimkus, Mike Rogers, Sue Myrick, Marsha
376 Blackburn, Bob Latta, Cathy McMorris Rodgers, and Brett
377 Guthrie.

378 Every day OB-GYN's are faced with exposure to law suits.
379 In fact, 90 percent of ACOG fellows report that they have
380 been sued at least once and OB-GYN's are sued an average of
381 2.7 times during their careers. Nearly two-thirds of OB-
382 GYN's have changed their practice during the last 3 years
383 because of the high risk of liability claims. These changes

384 include increasing the number of caesarean deliveries,
385 reducing or not offering trial of labor after caesarean,
386 decreasing the number of high risk patients they accept, and
387 even stopping the practice of obstetrics altogether due to
388 professional liability concerns. The average age at which
389 physicians cease practicing obstetrics is now 48, an age once
390 considered the midpoint of an OB-GYN's career.

391 Our current tort system fails providers and fails
392 patients. It is costly, time consuming, inefficient, and
393 unjust with widely variable and unpredictable monetary
394 judgment. The system is wholly incompatible with the
395 Institute of Medicine's vision for the future healthcare
396 system as safe, effective, patient centered, timely,
397 efficient, and equitable. This is a national problem which
398 demands a national solution.

399 That national solution including caps on noneconomic
400 damages and other reforms like those found in Texas and
401 California would stabilize the medical liability insurance
402 market, reduce healthcare cost, eliminate physician flight
403 from high risk States and protect a patient's access to the
404 healthcare they need. This is why we fully support H.R. 5,
405 the Health Act.

406 H.R. 5 promotes speedy resolution of claims, fairly
407 allocates responsibility, compensates patient injury,

408 maximizes patient recovery, puts reasonable limits on the
409 awarded punitive damages, ensures payment of medical
410 expenses, allows State flexibility, and saves the Federal
411 Government money. We know these reforms work. The landscape
412 in my home State of Texas changed dramatically after
413 implementing medical liability reform in 2003.

414 Statewide, 21,640 doctors have been newly licensed in
415 Texas since its passage. Texas physicians have also seen
416 their liability insurance premiums cut on average 28.3
417 percent and claims and lawsuits in most Texas counties have
418 been cut in half. Additionally the State has gained 269
419 obstetricians after a net loss of 14 obstetricians from 2001
420 to 2003. Twenty-two rural counties added at least one
421 obstetrician and 10 counties added their first obstetrician.
422 Blanco County which had no obstetrician's pre-reform added
423 eight. In all, 57 Texas counties have seen a net gain in
424 obstetricians including 28 medically underserved counties and
425 20 counties designated as partially medically underserved.

426 These figures show that a primary result of these
427 reforms is increased access to care for women across Texas.
428 H.R. 5 holds the promise that increased access to care for
429 even more women nationwide. We urge this subcommittee and
430 the U.S. House to give H.R. 5 speedy approval so that we can
431 better serve our patients. Thank you, Chairman Pitts for

432 your commitment and your leadership on this issue.

433 [The prepared statement of Dr. Hollier follows:]

434 ***** INSERT 1 *****

|
435 Mr. {Pitts.} Chair thanks the gentlelady and recognizes
436 Ms. Doroshow for 5 minutes.

|
437 ^STATEMENT OF JOANNE DOROSHOW

438 } Ms. [Doroshow.] Thank you, Chairman Pitts and members
439 of the committee. The Center for Justice and Democracy of
440 which I am Executive Director is a national public interest
441 organization dedicated to educating the public about the
442 importance of the civil justice system. My testimony will
443 focus primarily on medical malpractice issues since these
444 issues clearly are the driver for H.R. 5.

445 I would like to first note that thanks to 30 years of
446 insurance and medical industry lobbying the medical
447 profession now has more legal protections for their
448 negligence than any other profession in the country. As a
449 result the number of injured patients bringing medical
450 malpractice claims has reached historic lows. At the same
451 time, premiums have been stable or dropping since 2006 and
452 have further to drop until the soft market ends and this is
453 no matter whether a State has passed tort reform or not.

454 Despite this, a myth exists of medical malpractice
455 litigation is a huge driver of our healthcare costs. This is
456 even though the Congressional Budget Office found that H.R. 5
457 would result in extremely small healthcare savings, about 0.4
458 percent. Of this, a trivial amount, 0.3 percent or less is

459 due to slightly less utilization of healthcare services that
460 is defensive medicine and 0.2 percent or less is due to
461 reduced insurance premiums for doctors. As small as these
462 figures are even they are inflated because CBO ignored
463 factors that would likely increase the deficit.

464 In fact, when I met with CBO to discuss these
465 admissions, they did not deny that liability restrictions
466 lead to more injuries and deaths and could create new burdens
467 on States and federal deficits since the cost of injuries are
468 not eliminated by enacting tort reform but merely shifted on
469 to some--on someone else including the government. In fact,
470 one of the three studies CBO does mention now that there
471 would be a 0.2 percent increase in the nation's overall death
472 rate by enactment of H.R. 5. How could this possibly be an
473 acceptable trade off?

474 And it is not like we don't have history as a guide
475 here. In fact, history repeatedly shows for example that
476 capping damages will not lower insurance rates because what
477 drives these rate hikes has nothing to do with the State's
478 tort law. It is driven by the insurance underwriting cycle
479 and investment income and remedies that do not specifically
480 address this cycle will fail to stop these wild price
481 gyrations in the future. In fact, when I returned to New
482 York we will be preparing a major new campaign to expose the

483 insurance industry's major role in the pricing of medical
484 malpractice insurance and to hold them accountable for
485 creating cyclical insurance crises for doctors in this
486 country. And we hope everyone on this panel joins us in
487 this.

488 As for H.R. 5, this bill would establish a permanent
489 across the board \$250,000 cap on compensation for noneconomic
490 damages in medical malpractice cases. Noneconomic damages
491 compensate for injuries like permanent disability,
492 disfigurement, blindness, loss of a limb, a damaged
493 reproductive system, paralysis, or physical pain and
494 suffering. Such caps are incredibly cruel and unfair.

495 H.R. 5 would also limit state statute limitations laws,
496 an idea that lacks complete logic from a deficit reduction
497 standpoint since its only impact would be to cut off
498 meritorious claims. It would impose national wage controls
499 on an injured patient's attorney preventing the patient from
500 getting decent legal assistance. It would limit punitive
501 damages even though only one percent of medical malpractice
502 plaintiffs even receive punitive damages. Where is the
503 crisis demanding that Congress interfere with State law in
504 this area?

505 It would eliminate joint several liabilities which CBO
506 itself says could cause a deficit increase not decrease. Dr.

507 Lora Ellenson, a pathologist at New York Presbyterian
508 Hospital whose now 13-year-old son Thomas was brain damaged
509 at birth due to negligence last month told the New York Daily
510 News ``My son cannot walk or talk. He is not able to carry
511 out activities of daily living: eating, dressings,
512 toileting, bathing without constant assistance from an adult.
513 As a physician I have to come face to face with the knowledge
514 that mistakes are made. Like most physicians I live with the
515 reality that we might one day make an error and be sued.
516 When that day comes I will be grief stricken. Not because of
517 the process, although I am sure that won't be pleasant, but
518 due the fact that I may have caused someone irreparable
519 damage. My only hope is that the damaged person can get what
520 they need to live in the best way they are able. As a
521 physician I want to know that there will be compensation to
522 rebuild a life that has been diminished, yet as a mother I
523 also know that no typical physician nor the system within
524 which they operate can possibly understand the true depths of
525 these mistakes.'' I wish Dr. Ellenson's perspective were
526 more represented by the physicians on this panel today. A
527 study done in her hospital and other studies around the
528 country have found that implementing comprehensive patient
529 safety programs not only decreased severe adverse outcomes,
530 but can also have an immediate impact on claims and

531 compensation payments. That should be our focus, not
532 stripping away the rights of children like Thomas Ellenson.
533 Thank you.

534 [The prepared statement of Ms. Doroshow follows:]

535 ***** INSERT 2 *****

|
536 Mr. {Pitts.} Chair thanks the gentlelady and recognizes
537 Dr. Kachalia for 5 minutes for your opening statement.

|
538 ^STATEMENT OF ALLEN B. KACHALIA

539 } Dr. {Kachalia.} Mr. Chairman and members of the
540 committee, I thank you for the opportunity to testify today.
541 It is a privilege to be here. I am here today because I was
542 asked to speak with regard to the evidence related to the
543 need that we have for malpractice reform and the measures
544 that are currently under consideration. It is exciting to
545 see that Congress is considering malpractice reform
546 especially given the need we have today to improve our
547 healthcare system comprehensively.

548 I will quickly cover three main points: 1, what do we
549 know about malpractice system performance; 2, what reform
550 needs do we have; and 3, what does the evidence tell us with
551 regard to the traditional tort reform measures that have been
552 enacted in the States. I will base my testimony on both my
553 clinical and research experience that you mentioned earlier.

554 So first I would like to start by discussing why we need
555 malpractice reform. We have a malpractice system that
556 theoretically exists to 1, duly compensate injured patients,
557 and to 2, reduce substandard care. However, there is general
558 agreement among many experts that the system is not serving
559 these functions well. If we turned to frequently cited

560 evidence with regard to performance of the malpractice
561 system, we can learn that patients claim compensation in only
562 about 2 percent of negligent injuries that occur. And even
563 less frequently do they receive payment.

564 However, the problem is not just from the patient side.
565 There is also a problem from the physician perspective. If
566 we look at claims that have been filed there is concern that
567 too low number of the claims that are filed actually contain
568 negligence--approximately one in six. More recently
569 generated evidence, however, indicates that about 60 percent
570 of filed claims may actually have an error in them, but still
571 the malpractice system does not seem to adjudicate these
572 claims properly with about a quarter of them being improperly
573 adjudicated. Now, this type of inaccuracy can actually
574 undermine both patient and physician confidence in our
575 system.

576 Compounding these problems in data that demonstrates
577 that the majority of our premium dollars seem to go to fund
578 overhead costs rather than compensating patients. All of
579 this occurs in the context of which there are very high
580 insurance premiums for many physicians and of course we
581 cannot ignore the emotional costs that can be associated with
582 a law suit whether or not the suit has merit. There are also
583 unwanted, indirect offenses of the malpractice system. This

584 includes of course defensive medicine and the fact of the
585 possibility of litigation that is always present can
586 undermine the trust that we need in the patient/physician
587 relationship.

588 So what these findings show is what they show us what we
589 need from reform. We need improvements that will actually
590 fix the liability related shortcomings for both patients and
591 physicians and a system that will perform these functions
592 much more efficiently. But our reform targets should
593 probably not stop there. Reform should also address how well
594 the malpractice system improves the quality of care that we
595 provide. After all, this is one of the system's main goals.

596 So therefore, as Congress considers any reform it
597 becomes important for Congress to determine what their
598 primary goal is. Will legislation start in one area alone or
599 will it try to tackle multiple problems at once and what is
600 the interaction between making those choices? However,
601 regardless of the approach that is taken, it remains
602 important to contemplate any new reforms with the current
603 evidence as to what we know in mind.

604 So if I can turn to the evidence here there is a number
605 of States have enacted tort reform over the years there has
606 been a growing base on the evidence that we have with regard
607 to the effect of these reforms. Last year we completed a

608 review of the evidence on the effect of many traditional tort
609 reforms and briefly here is what we learned.

610 For caps on damages, the evidence seems to indicate that
611 caps can lower the average size of claims payments which
612 shouldn't be surprising because that is what they are
613 designed to do and this actually appears to translate into
614 lower premiums for physicians. There is good evidence to
615 also suggest that caps made less in defensive practices,
616 however, the effect of caps on the overall quality of care
617 remains unknown.

618 For statute of limitations there is reasonable evidence
619 to show that they may lower premiums but it is unclear what
620 the statute of limitations do with regard to claims frequency
621 and they also do not appear to change the average award size.
622 The evidence on defensive practices and other care related
623 metrics is limited in this regard.

624 For attorney fee limits, overall the evidence shows that
625 fee limits do not seem to translate to lower claims
626 frequency, cost, or insurance premiums and there is little
627 evidence as to what happens with regard to care related
628 metrics. So in summary as we continue to focus on how lower
629 costs and improved quality in healthcare today, our medical
630 malpractice system is a good target. Based on data on system
631 performance as we consider how to reform the system it

632 becomes important to evaluate reforms not just on liability
633 consequences for patients and providers, but also to consider
634 the effects on overall cost and quality of care.

635 As a practical matter, Congress may offer incremental
636 reform, but it is important to keep in mind that the ultimate
637 goal of reform should be reform that addresses all the ails
638 of our system and that veil consideration of more
639 comprehensive reforms has also been put out there by members
640 of Congress. I would like to emphasize that regardless of
641 the type of reform that is passed, it is critical to measure
642 its impact and to have plans that call for proper and timely
643 adjustments based on what the data tells us. Just as we
644 continue to seek better data and evidence in medical care, we
645 should ask the same of our liability system. Thank you.

646 [The prepared statement of Dr. Kachalia follows:]

647 ***** INSERT 3 *****

|

648 Mr. {Pitts.} Chair thanks the gentleman and recognizes
649 Mr. Wolfman for 5 minutes.

|
650 ^STATEMENT OF BRIAN WOLFMAN

651 } Mr. {Wolfman.} Chairman Pitts and members of the
652 committee, thank you for the opportunity to appear today in
653 opposition to H.R. 5. I want to focus on what H.R. 5 calls
654 medical product claims: suits brought by patients claiming
655 that their injuries were caused by a defective or mislabeled
656 drug or medical device. I will address three particularly
657 harmful attributes of H.R. 5: its limits on noneconomic
658 damages, attorney fees, and punitive damages.

659 The act would limit noneconomic damages to \$250,000.
660 What does that mean in human terms? My written testimony
661 answers this question in detail, but today I will focus on
662 one example. In *Wyeth v. Levine*, Diana Levine, a musician
663 lost an arm because of the negligence of a huge drug company
664 Wyeth. She was awarded \$5 million in noneconomic damages.
665 Ms. Levine experiences phantom pain in her missing arm every
666 day, sometimes excruciating. She had been a well-known
667 Vermont musician who loved to play and create music, but her
668 life was fundamentally altered forever. She is beset by
669 depression, the mental anguish that frays relationships, and
670 undermines desire from living a life that will never be fully
671 restored. The idea that \$250,000 can fully compensate for

672 these life altering injuries is, to be blunt, absurd, and
673 that H.R. 5 fixes noneconomic damages at \$250,000 forever
674 regardless of the impact of inflation underscores the
675 conclusion that the cap is not a genuine attempt at gauging
676 the impact on real people's lives of noneconomic injuries.

677 Wyeth defended this case with great tenacity. Ms.
678 Levine's lawyers were required to hire four experts, take
679 wide ranging discovery, conduct a trial, defend pre and post
680 trial motions, and defend lengthy multi-year appeals. The
681 financial impact of Ms. Levine's injuries became so severe
682 that she went into massive debt during the case and had to
683 take out a large loan against her judgment. In preparing for
684 this testimony I asked Ms. Levine's small town Vermont lawyer
685 if he would have taken on Ms. Levine's case had the law
686 limited economic damages to \$250,000. His answer: one word,
687 no.

688 Studies show that a \$250,000 cap on noneconomic damages
689 disproportionately harms women, members of minority groups,
690 and older people all of whom rely heavily on noneconomic
691 damages to be made whole. Society should compensate harm and
692 discourage negligent conduct just as much when it is visited
693 upon a relatively poor person as when it is visited upon
694 someone who is economically advantaged.

695 The act would also limit contingent attorney fees to

696 just 15 percent on recoveries over \$600,000. Those figures
697 appear to be plucked out of the air with no explanation of
698 how they would correct a supposed distortion in the market
699 for contingent fee legal services. For someone who does not
700 understand the economic reality of risk taking in a free
701 enterprise economy, this provision may appear pro-consumer.
702 After all, limiting the lawyer's recovery helps the client,
703 right? Wrong.

704 The free market does not cap contingent fees at 15
705 percent because lawyers are not willing to offer that term in
706 a free market to their clients. The risk and expense of
707 complex medical products litigation is too great. Ms. Levine
708 audibly obtained a significant verdict but her lawyer did not
709 know that result going in. He knew that Wyeth was likely to
710 put on a formidable defense and take the case all the way to
711 the Supreme Court. Viewed in hindsight, of course, Ms.
712 Levine would have done better if a large chunk of her
713 lawyer's fee had been paid to her. But if the Congress of
714 the United States had demanded that a small town Vermont
715 lawyer limit his fees to 15 percent, Ms. Levine never would
716 have been able to find a competent lawyer to take her case in
717 the first place.

718 H.R.5 also bars punitive damages in cases where the
719 product was approved by the FDA. Given the reality of FDA

720 regulation, that makes no sense. Prescription drugs are FDA
721 approved after relatively small clinical trials that do not
722 always unearth all of the product's hazards and side effects.
723 After approval the product is used by the public at large, a
724 sort of mammoth clinical experiment and the manufacturer
725 learns more about the product. In fact, fully half of all
726 drug labeling updates to warn of serious adverse drug
727 reactions occurs seven or more years after the drug is
728 approved. Many drug liability suits concern information that
729 not before the FDA at the time of the drug's approval. And
730 so it is irrational to immunize the manufacturer based on
731 that approval particularly where the manufacturer was grossly
732 negligent in assuring that its product label remained up to
733 date. But H.R. 5 would do just that.

734 For this reason as well, H.R. 5 would undermine consumer
735 health and safety and the committee should reject it. Thank
736 you.

737 [The prepared statement of Mr. Wolfman follows:]

738 ***** INSERT 4 *****

|
739 Mr. {Pitts.} The Chair thanks the gentleman and
740 recognizes Dr. Tippett for 5 minutes.

|
741 ^STATEMENT OF TROY M. TIPPETT

742 } Dr. {Tippett.} Thank you Chairman Pitts and--thank you
743 Chairman Pitts and Ranking Member Pallone for holding this
744 important hearing to consider this essential business of
745 fixing our country's broken medical liability system. I am
746 grateful for the opportunity to appear before this
747 distinguished committee on behalf of the Health Coalition on
748 Liability and Access or HCLA to strongly endorse and support
749 passage of H.R. 5, the Health Act of 2011 as it was
750 originally introduced in January.

751 HCLA represents a broad, national coalition of
752 physicians, hospitals, employers, healthcare liability
753 insurers and those who have joined together to seek some
754 common sense solutions that will help reduce healthcare costs
755 for all Americans and insure patient access to quality
756 medical care by enacting medical liability reform at the
757 federal level. We believe all Americans pay the price when
758 the profits of personal injury lawyers take precedence over
759 patient care.

760 Today our current medical liability system increases
761 healthcare costs to unsustainably high medical insurance
762 premiums and by encouraging the practice of defensive

763 medicine. It reduces access to care as we see more and more
764 physicians, particularly younger physicians avoid high risk
765 specialties and procedures that are the frequent target of
766 lawsuit abuse. Also, it has become a significant factor in
767 the erosion of the all important doctor/patient relationship.
768 HCLA believes H.R. 5 is the kind of comprehensive solution
769 that would bring fairness and common sense back to our
770 medical liability system. Any reform legislation should
771 include the following points.

772 There should be no limit on awards for economic damages.
773 It should have a reasonable statute of limitations on the
774 medical malpractice claims. It should have a reasonable
775 limit of \$250,000 on awards for noneconomic damages, and it
776 should have a replacement of joint and several liability with
777 a fair share rule. And there should be limits on the
778 contingency fees that lawyers can charge so that more that
779 that money goes back to the patient, and it should have a
780 collateral source rule reform.

781 Last month, the CBO published two reports that clearly
782 show enactment of this legislation and similar legislation
783 would help lower healthcare costs by lowering medical health
784 insurance liability premiums by reducing the practice of
785 defensive medicine and by lowering private health insurance
786 premiums. The CBO estimated that passage of legislation

787 would save the government \$62 billion. Now, I don't know
788 where you come from, but in my part of the woods that is a
789 significant amount of money. \$62 billion is worth saving. A
790 number of States have made significant gains in reducing
791 medical lawsuit in views, but as personal injury lawyers work
792 State by State to overturn liability reforms and expand areas
793 open to litigation it is clear that medical liability remains
794 a national problem that requires a comprehensive federal
795 solution.

796 We look forward to working with the committee and others
797 in Congress to develop the kind of federal remedy that will
798 bring consistency and common sense back to the system. There
799 can be no real healthcare reform without meaningful medical
800 liability reform. We ask you to please pass H.R. 5.

801 [The prepared statement of Dr. Tippett follows:]

802 ***** INSERT 5 *****

|
803 Mr. {Pitts.} Chair thanks the gentleman. I would like
804 to thank the panel for their opening statements and I will
805 now begin the questioning and recognize myself for 5 minutes
806 for that purpose.

807 Dr. Hollier, you have been practicing in Texas for a
808 number of years. Some of that time was before the State
809 enacted medical liability reform. Can you tell us how things
810 have changed for you since medical liability reform in terms
811 of your ability to provide healthcare to your patients,
812 please?

813 Dr. {Hollier.} Thank you, Mr. Chairman. The reforms in
814 Texas have truly changed the climate in which we practice
815 medicine. I work in a medical school and I counsel medical
816 students on a routine basis. Before the passage of medical
817 liability reforms, many of my students asked questions and
818 were very concerned about entering a specialty such as
819 obstetrics because of professional liability concerns. In
820 the era after our reforms had passed, those medical students
821 have regained their interest in our specialty and are excited
822 about the practice of obstetrics.

823 We have seen literally hundreds of thousands of extra
824 patient visits because we have increased access to doctors
825 across the State of Texas because those doctors are more able

826 to provide the care that our patients need.

827 Mr. {Pitts.} Thank you. Dr. Tippett, in order to help
828 us understand why a doctor might practice defensive medicine,
829 can you give us some sense of what it means professionally to
830 be named a defendant in a malpractice suit? Even in the case
831 doesn't result in a judgment against you, most neurosurgeons
832 have been sued. Would you please elaborate?

833 Dr. {Tippett.} Yes, thank you very much. Well, in
834 Florida you can count on the one out of one permanent
835 resident year just about these days unfortunately, but just--
836 my--when I first started practicing in Pensacola, Florida in
837 1976 I will never forget it. Within a year of when I started
838 practice, one day I opened the door and there is a Deputy
839 Sheriff. He is handing me this subpoena and I am, you know,
840 I am kind of naïve. I didn't know what. I said what in the
841 world is this and I opened it up and said you are being sued.
842 And I--you would have thought I had stuck my hand in
843 electrical current with a hot--with cold water on my face. I
844 mean it is that shocking.

845 And the devastation doesn't stop for about 4 years after
846 that I can tell you. It doesn't go away. First of all I
847 say, well, I don't even know who this patient is. Well, it
848 turns out it was a patient that I had walked in the room that
849 they were operating on when I was a resident in Memphis,

850 Tennessee several years before. I didn't have any idea who
851 the patient was. Well, they tried to get him to drop me from
852 the trial. Of course they didn't. I ended up--I had just
853 started my practice in Pensacola. I had to take time out of
854 my practice. I would go to Memphis, Tennessee for the trial.
855 I sat in the courtroom for a week not--my name is not
856 mentioned one time. At the end of the presentation of the
857 plaintiff's case the judge--the first time my attorney says
858 anything is will you dismiss my client and the judge says
859 yes. And so you know I am kind of stunned. I don't know
860 what is going on. I am walking out of the room and the
861 plaintiff's attorney stops me and says--shakes my hand and
862 says, you know, no offense. And I am saying--here, you know
863 I have just been stabbed in the back and no big deal. And
864 that is just one. I could go on with other.

865 Mr. {Pitts.} Thank you. Dr. Kachalia, you and your
866 colleague Michelle Mello have done an exhaustive review of
867 this issue, possibly the most exhaustive review to date.
868 From what I can tell, part of your message is that the data
869 regarding some aspects of medical liability reform are not
870 robust at this time. However, there does seem to be mature
871 data about caps on noneconomic damages. I found it
872 interesting in your research that caps do not seem to reduce
873 the number of claims, but study--studies of the effects on

874 caps on claim payouts have found a significant effect--
875 typically on the order of 20 to 30 percent reduction in the
876 average award size. If the number of claims remains stable,
877 it would seem that patients are still able to bring cases,
878 but the number of unpredictably high awards is reduced. That
879 seems like exactly what we would want medical liability
880 reform to do. In your opinion is that a fair thing to say?
881 Would you elaborate?

882 Dr. {Kachalia.} So, I think you are right with regard
883 to what we would want liability reform to do which is to
884 bring--if awards are thought to be excessive to make them
885 more reasonable. And with regard to caps they do seem to--as
886 you pointed out, they do seem to lower the average payment
887 and the premiums to go with it. And they--from what we can
888 see from the evidence they don't seem to have an effect on
889 the total number of claims that occur. So if caps were
890 working without harming patient access to compensation, that
891 is exactly how we would want them to work, but most of these
892 studies weren't necessarily--they don't necessarily tell us
893 as you pointed out--there is very little data with regard to
894 what happens to patient access to compensation in overall
895 quality of care. So those still remain unknown questions.
896 But you are right, at the end of the day to some extent caps
897 can help lower the premiums which is what they are meaning to

898 do.

899 Mr. {Pitts.} My time is expired. Chair recognizes the
900 ranking member for 5 minutes for questions.

901 Mr. {Pallone.} Thank you, Mr. Chairman. I do
902 appreciate your having this hearing today because I can't
903 support and never have supported H.R. 5, but I do understand
904 that medical malpractice and liability is a real problem for
905 doctors in my home State in the country. But I also think we
906 can't forget that medical malpractice reform also affects
907 patients and any truer form has to take a balanced approach
908 and include protections for the legal rights of patients,
909 because many people are serious injured through medical
910 malpractice.

911 Now I want to focus on three things which I have been
912 articulating for years about H.R. 5. It has been around--I
913 don't know how many times we have taken this up, you know,
914 since--when the Republicans were in the majority. I have
915 three problems with it. First of all it extends way beyond
916 medical malpractice. You know it has new protection and
917 nursing home, pharmaceuticals, device, insurance companies
918 and others and I really feel very strongly that if we are
919 really going to focus on this issue it just should be medical
920 malpractice. It shouldn't be all these other types of tort
921 reform.

922 The second thing is that the 250,000 cap is just
923 unworkable and unrealistic. I mean it has been around for
924 10, 20 years and you know, with inflation and everything you
925 talk about \$250,000 cap I just think is unrealistic. And the
926 last thing is I don't believe that just having caps is going
927 to truly control premiums. I think the only--I mean it may
928 be a factor, but a more important factor is actually having
929 some kind of controls on the premiums themselves. You know
930 some kind of you know actual way of saying, you know,
931 premiums can't go above a certain amount, whatever. So those
932 are my questions. I want to ask questions and I am going to
933 try to get all three in in the 3 minutes that I have left.
934 Let me start with Ms. Doroshow.

935 First of all, this \$250,000 cap, it seems to me it is
936 very unrealistic and secondly the idea of just tort reform
937 being an answer to reducing or controlling premiums for
938 doctors--I mean isn't it true that in California example--I
939 know Mr. Waxman has often used this as an example that you
940 know when they just did the tort reform premiums kept going
941 up. And it wasn't until they actually instituted something I
942 guess with one of their propositions that actually said--that
943 addressed prices. And so if you would ask me that a 250 cap
944 and the need for price controls or however you want to call
945 it and not just talking about the caps?

946 Ms. {Doroshow.} Well, look at California because that
947 was the State that first enacted a \$250,000 cap in 1975
948 without an inflation adjustment. And I think if you were to
949 adjust to today this would be well over a million dollars in
950 terms of a limit. It is incredibly low and cruel amount of
951 money that as Brian mentioned has a disproportionate impact
952 on seniors, children, low wage earners, women who don't work
953 outside the home.

954 In terms of the insurance issue, after the cap passed
955 rates went up about 450 percent until 1988 when Prop 103
956 passed. This is the strongest insurance regulatory law in
957 the country and since then rates have stayed below what the
958 national average is. And in the last hard market between
959 2001--2003 there were--or 2005 there were three attempts by
960 insurers in California to raise rates. Because of Prop 103
961 there is a hearing requirement. The consumer groups came in,
962 challenged the rate hikes and all three of them were reduced
963 saving doctors about \$66 million in California. Nothing will
964 work unless you institute insurance reform.

965 Mr. {Pallone.} All right, let me just--and I appreciate
966 this answer to the questions, but Mr. Wolfman, to my third
967 point which is this bill you know not just dealing with all
968 these other tort reforms with farm devices, all that. I mean
969 is that necessary? Isn't the problem primarily with doctors?

970 Why are we throwing all the--the kitchen sink in here?

971 Mr. {Wolfman.} Representative Pallone, as I said the--
972 this bill seems--I am not here to speak about malpractice,
973 but this seems particularly ill fitted to claims against
974 device and drug manufacturers that bring out enormous or war
975 chests to litigate cases. And the notion that you in
976 difficult cases where you need the best lawyers, the notion
977 that you can go forward when there is extreme negligence with
978 no opportunity for punitive damages. A \$250,000 cap and
979 these draconian nonmarket limitations on attorney's fees is
980 just fantastic. It is not going to happen. And--

981 Mr. {Pallone.} Well, let me say this, Mr. Chairman, you
982 know I just want you to know that if you and the Republicans
983 were willing to work with us on these three issues, you know
984 unrealistic cap, just narrowing this to doctors or medical
985 malpractice, and third you know including actual going after
986 the rates and actually controlling rates then I think we
987 could come to a workable solution. But the way H.R. 5 is
988 now, it is going to--same thing over and over again. It will
989 never go anywhere and it is just a waste of time.

990 Mr. {Pitts.} Gentleman's time is expired. Chair
991 recognizes the Vice Chairman of the committee, Dr. Burgess
992 for 5 minutes for questions.

993 Dr. {Burgess.} I thank the chairman. You know I am

994 actually tempted to ask the gentleman from New Jersey if he
995 would look at 896 since he just made that gracious offer. On
996 the other hand, Texas receives so many of your recently
997 educated physicians from New Jersey that I am worried about
998 disrupting our physician workforce pipeline because as you
999 know we did pass a year ago or sign into law a year ago a
1000 bill. You may have heard of it called the Patient Protection
1001 and Affordable Care Act which is going to ensure according to
1002 congressional an additional 32 million people. And although
1003 I have my doubts about that figure, they are all going to
1004 need doctors. In Texas we may be well on the way to
1005 satisfying that demand because we have done the right thing
1006 with liability reform on the ground in Texas.

1007 I am so intrigued by the concept of what has been talked
1008 about on limiting attorney's fees. You know, maybe doctors
1009 have gone about it the wrong way. Maybe we should have gone
1010 to the billable hour several years ago and not let Medicare
1011 dictate our fees as has happened in this country for years.
1012 But we do live under a federally imposed fee schedule and
1013 maybe if we could apply that to our legal brethren maybe some
1014 of these problems would go away as well so I am going to be
1015 on the phone to Dr. Berwick shortly after this hearing ends
1016 and see if we cannot extend the benefits of the sustainable
1017 growth rate formula to the Nation's attorneys.

1018 Well, we did pass medical liability reform in 2003. Dr.
1019 Hollier, do recall did anything similar to the proposition in
1020 California pass that limited--was a price control on medical
1021 liability, the cost of the insurance itself, or were simply
1022 the reforms that we built into the system? Of course the
1023 legislature passed the law in June of 2003. The State
1024 passed--the people of the State of Texas passed a
1025 constitutional amendment in September of 2003 that allowed
1026 the law to circumvent the court's process and become
1027 immediately implemented. That seemed to me to be the big
1028 break point, not putting a cap on what malpractice insurance
1029 can charge. Can you address that?

1030 Dr. {Hollier.} Yes, sir, there were no additional
1031 measures such as those implemented in California. Liability
1032 premiums for physicians began to decrease relatively soon
1033 after the September passage of the amendment. And physicians
1034 had seen their liability premiums decrease by about 28
1035 percent keeping many of these doctors in their practice
1036 keeping patients with the ability to access the specialty
1037 care that they need close to home.

1038 Dr. {Burgess.} Yeah, of course you work in a medical
1039 school and it is not just a medical school. It is my medical
1040 school, so I am grateful for your service there. But give us
1041 an idea of what that 28 percent means to the practicing OB-

1042 GYN in the greater Houston metropolitan area.

1043 Dr. {Hollier.} For many physicians prior to liability
1044 reform, obstetrician/gynecologists were paying premiums in
1045 excess of \$100,000, some as high as \$150,000. So 28 percent
1046 reductions are very important. And what it means for our
1047 doctors is that we can continue to stay in practice and
1048 provide care for our patients.

1049 Dr. {Burgess.} And the story about counties in Texas
1050 having ER doctors and OB-GYN's that had never had one before
1051 is that just some fantasy made up by doctors or is that an
1052 actual fact?

1053 Dr. {Hollier.} That is an actual fact, Representative
1054 Burgess.

1055 Dr. {Burgess.} And you know we talk about Texas, but
1056 let me talk about New York for a moment because I happened to
1057 be in New York a couple of weeks ago and the New York Times
1058 had this wonderful ad. When these doctors say we need
1059 liability reform there are 350,000 reasons to trust them and
1060 there you see what I like to call mature physicians standing
1061 there holding infants in their arms. And I asked--this was
1062 given to me by the head of the Greater New York Hospital
1063 Association, and I asked him what the liability premium was
1064 in the city of New York for an OB-GYN and he said in excess
1065 of \$200,000. And clearly that is a barrier for the young

1066 physician getting out of their medical school and their
1067 residency experience. And they probably owe--well, Dr.
1068 Hollier or Dr. Kachalia, tell us what is a young doctor
1069 likely to owe today getting out of a 4 year OB-GYN residency?
1070 \$150,000 in student loans, \$200,000?

1071 Dr. {Hollier.} I think that is a reasonable estimate,
1072 sir.

1073 Dr. {Burgess.} And on top of that before they can
1074 deliver their first baby a \$200,000 liability payment because
1075 no one can afford to practice--you couldn't dare run the risk
1076 of practicing without liability insurance. So how in the
1077 world are we asking our cadre of young doctors to begin
1078 practice in--with this environment in the city of New York?
1079 No wonder they look to the allegiant fields of Houston,
1080 Texas, and Fort Worth, Texas. They may not be green fields,
1081 because it is pretty hot in the summertime, but they are
1082 certainly greener fields than in New York. Thank you, Mr.
1083 Chairman. I will yield back the balance of my time.

1084 Mr. {Pitts.} Chair thanks the gentleman and now
1085 recognizes the gentleman from Texas, Mr. Gonzalez for
1086 questions.

1087 Mr. {Gonzalez.} Thank you very much, Mr. Chairman. Dr.
1088 Hollier, do we have a medical malpractice--not an emergency,
1089 but let--not a crisis, but do we have medical malpractice

1090 problems in the State of Texas?

1091 Dr. {Hollier.} Sorry, sir. I think the climate in
1092 Texas has changed dramatically post reform. And I think our
1093 patients have had significant benefits.

1094 Mr. {Gonzalez.} Well, let me ask you. I will put it
1095 this way. Do we have occurrences of medical malpractice in
1096 Texas?

1097 Dr. {Hollier.} Yes, sir.

1098 Mr. {Gonzalez.} But those doctors make mistakes?

1099 Dr. {Hollier.} Yes, sir.

1100 Mr. {Gonzalez.} And sometimes they are pretty serious
1101 mistakes?

1102 Dr. {Hollier.} Yes, sir.

1103 Mr. {Gonzalez.} All right, you know a lot of doctors,
1104 don't you, I assume? And if I was a member of your family
1105 would there be certain doctors that you would not recommend
1106 that I go to, honestly?

1107 Dr. {Hollier.} I don't have a list in my mind such as
1108 that.

1109 Mr. {Gonzalez.} Okay. Dr. Tippett, in Florida are
1110 there occurrences of medical malpractice?

1111 Dr. {Tippett.} Yes, sir, there are occurrences of
1112 malpractice, but what we are talking about here is to try to
1113 continue to provide access to medical care in the State of

1114 Florida. In South Florida, for example, most--

1115 Mr. {Gonzalez.} And Doctor, I only have 5 minutes and I
1116 understand where you are going, but since I only have the 5
1117 minutes I would like to get where I would like get but I end
1118 up in this discussion. You know a lot of doctors. If I was
1119 a member of your family would there be certain doctors that
1120 you wouldn't recommend I see?

1121 Dr. {Tippett.} Would not recommend you see?

1122 Mr. {Gonzalez.} Sure.

1123 Dr. {Tippett.} I would put it in the other way. There
1124 are certain doctors that I would prefer over some other
1125 physicians. For example, I sent my daughter yesterday to my
1126 partner. I think that--

1127 Mr. {Gonzalez.} But why would I send them to the
1128 doctors at the bottom of the list?

1129 Dr. {Tippett.} I am sorry?

1130 Mr. {Gonzalez.} Why wouldn't you send your daughter to
1131 those doctors at the bottom of this hierarchy of qualified
1132 doctors? You are sending them to the one that you respect
1133 the most. I understand that. But you must have questions
1134 about all those others that are practicing that you would not
1135 send your daughter to.

1136 Dr. {Tippett.} Well, I wouldn't send my daughter to
1137 every doctor in town. I would only pick out as you would in

1138 your family the one you thought that was most appropriate.

1139 Mr. {Gonzalez.} Well, that is my point.

1140 Dr. {Tippett.} It is not always based on quality of the
1141 care. It is based on whether all of those factors--

1142 Mr. {Gonzalez.} Qualifications, ability, and competency
1143 in every profession including the legal. That is why we have
1144 malpractice suits, because I will tell you this. In my
1145 private conversations with my friends who are doctors they
1146 would definitely tell me who to stay away from. And I
1147 venture to guess anybody up here today that has a dear friend
1148 or a family member or even Dr. Burgess himself who is a
1149 physician before he came to Congress obviously--knows those
1150 members of the medical profession that pose a danger to their
1151 patients.

1152 But like any profession we are going to have that. The
1153 problem is the profession doesn't really discipline and
1154 regulate itself. Most professions don't. So somehow we have
1155 to have a system that will protect the rights of those
1156 patients. I understand where we are all coming from:
1157 Affordable healthcare, quality healthcare, defensive medicine
1158 and so on. So let us look at the Texas experiment. This is
1159 the goal standard, the goal standard.

1160 Average liability premium for internal medicine--
1161 malpractice premiums for internal medicine are 27 percent

1162 higher in Texas than in States without caps because what we
1163 are trying to do is take that basic cost out of the equation
1164 and provide quality healthcare for everyone. But if someone
1165 is injured as a result of negligence they may just be left
1166 out in the cold. But let us just leave that aside. What we
1167 are trying to accomplish is reducing malpractice insurance
1168 premiums. General surgeons, OB-GYN malpractice premiums for
1169 doctors averaged across specialties are six percent higher in
1170 Texas than in States without caps. Malpractice premiums for
1171 general surgery are 21 percent higher in Texas than in States
1172 without caps.

1173 Those are the realities and we also know that the
1174 practice of defensive medicine may be an issue, but studies
1175 also show that that may be more attributable to
1176 overutilization because we know that is out there. It also
1177 may be due to unreasonable patients that is bigger--I have
1178 got an insurance company or the government's going to pay so
1179 run every test that you can run on me. There are other
1180 reasons for the increased testing other than what we have
1181 referred to as defensive medicine. I am just saying let us
1182 be fair to the physician, but let us be fair to the patient
1183 and make sure that they have an adequate remedy when they are
1184 injured, disfigured, and disabled. Thank you, I yield back.

1185 Mr. {Pitts.} Chair thanks the gentleman. Yields 5

1186 minutes to the gentleman from Georgia, Dr. Gingrey.

1187 Dr. {Gingrey.} I thank the chairman for yielding. Let
1188 me first go to Ms. Doroshow. I see that you represent the
1189 Center for Justice and Democracy. Let me ask you a series of
1190 questions and these are just strictly yes or no. Do you
1191 believe that all Americans in this country deserve justice?

1192 Ms. {Doroshow.} Yes.

1193 Dr. {Gingrey.} That is easy. Do you believe that
1194 medical providers should be held financially responsible for
1195 their share of medical errors?

1196 Ms. {Doroshow.} If they are fully responsible.

1197 Dr. {Gingrey.} Yes or no? Their share of medical
1198 errors?

1199 Ms. {Doroshow.} Well, are you talking about the--

1200 Dr. {Gingrey.} If I say their share, obviously the
1201 question means they are not fully responsible. They have
1202 made some responsibility. I am asking you yes or no, should
1203 they be held financially responsible for their share of the
1204 medical error?

1205 Ms. {Doroshow.} If the--

1206 Dr. {Gingrey.} Yes or no?

1207 Ms. {Doroshow.} Yes, but--

1208 Dr. {Gingrey.} All right, your answer is yes. I have
1209 got another--a number of questions so we need to move on. Do

1210 you believe that medical providers should be sued and held
1211 financially responsible for medical errors that they did not
1212 cause? Surely you can answer that yes or no.

1213 Ms. {Doroshow.} I think not. That is correct.

1214 Dr. {Gingrey.} They should be?

1215 Ms. {Doroshow.} No, they shouldn't.

1216 Dr. {Gingrey.} Thank you. I expected that. Do you
1217 believe that off duty medical providers who happen to witness
1218 a horrible car crash and step in because victim's life hangs
1219 in the balance should have liability protections
1220 understanding that oftentimes they would be working without
1221 the benefit of any medical equipment or a stable environment?
1222 They are on the street. They are trying to provide emergency
1223 care. Should they be held liability?

1224 Ms. {Doroshow.} These are good Samaritan laws and they--
1225 -most States have them. That is different from an emergency
1226 room law.

1227 Dr. {Gingrey.} So most States have a law that would
1228 hold them not liable?

1229 Ms. {Doroshow.} Right.

1230 Dr. {Gingrey.} Your answer is yes.

1231 Ms. {Doroshow.} They are not expected to encounter--

1232 Dr. {Gingrey.} Thank you. So basically the reason I
1233 ask you these questions is justice is a subject term for your

1234 organization. Is it not? Is justice a subjective?

1235 Mr. {Doroshow.} Exactly. I mean this is a
1236 determination by the jury if you are talking about a lawsuit
1237 and that is what we believe in, the judge and jury.

1238 Dr. {Gingery.} Well, we don't have a jury here. We
1239 just simply have a panel of witnesses--

1240 Ms. {Doroshow.} Well, we are talking about the civil
1241 justice system.

1242 Dr. {Gingrey.} And I am asking you pretty
1243 straightforward yes or no question. Okay. Well, let me move
1244 on. Thank you very much for your response. I am going to go
1245 to Dr. Tippett. Dr. Tippett, thank you for your testimony.
1246 I have heard from many medical providers that in the bill
1247 PPACA, Affordable Care Act we sometimes refer to it on this
1248 side as Obama Care, not pejoratively of course. We--you know
1249 it has created some new liability concerns. How does Obama
1250 Care create new liability concerns, Dr. Tippett?

1251 Dr. {Tippett.} Well, there are any number of ways and
1252 it is so we don't yet know about what many things that may
1253 come of this progress, but of this bill. But for example if
1254 some panel determines that you can't have this sort of
1255 treatment under Medicare and you have the treatment anyway,
1256 and things don't go well, you may be sued in that regard. We
1257 considered this bill when we looked at it overall as a growth

1258 industry for the plaintiffs bar in terms of things that they
1259 could find that doctors do wrong. When there--comparative
1260 effectiveness I think is probably the most fertile ground for
1261 the plaintiffs bar. Any time--

1262 Dr. {Gingrey.} Well, let me--I want to interrupt you
1263 just for a second because I get your drift. Do you then
1264 think that medical providers need to be protected from these
1265 new liability causes of action that may be embedded in the
1266 new Obama Care law?

1267 Dr. {Tippett.} Absolutely, yes, sir.

1268 Dr. {Gingrey.} Well, I want to once again let the panel
1269 know that I have a bipartisan bill, bipartisan bill H.R. 816
1270 and I hope Congress will move quickly because if Obamacare is
1271 going to deepen this liability crisis it must be stopped.
1272 And of course that is what the provider shield law will
1273 actually do, and I think it is very important that we get
1274 that passed. Let me in my remaining minute to go to Dr.
1275 Hollier. Dr. Hollier, it is great to have you as a witness
1276 because you are a fellow OB-GYN, an American College of OB-
1277 GYN. And I am a very, very proud member and I practiced in
1278 that specialty as you probably know for 26 years delivering
1279 over 5,000 babies, so it is near and dear to my heart and I
1280 appreciate you being with us. According to studies almost 30
1281 percent of OB-GYN's have increased the number of caesarean

1282 deliveries and 26 percent have stopped performing or offering
1283 traditional deliveries because of liability concerns and
1284 defensive medicine. Is that correct?

1285 Dr. {Hollier.} Yes, sir. According to our recent
1286 surveys by the American Congress of Obstetricians and
1287 Gynecologist our physicians are increasing those.

1288 Dr. {Gingrey.} All right, very quickly are caesarean
1289 deliveries more expensive than traditional--let us say a VBAC
1290 vaginal birth after a caesarean delivery?

1291 Dr. {Hollier.} Yes, sir.

1292 Dr. {Gingrey.} You state in your testimony that
1293 patients who eventually receive compensation through our
1294 current liability system obtain less than 50 percent of the
1295 amount awarded. What happens to the remaining 50 percent of
1296 the judgment or settlement?

1297 Dr. {Hollier.} That goes to the attorney, sir.

1298 Dr. {Gingrey.} It goes to who?

1299 Dr. {Hollier.} The attorneys.

1300 Dr. {Gingrey.} Okay. Thank you and I see my time is
1301 expired. I yield back.

1302 Mr. {Pitts.} Chair thanks the gentleman. Now
1303 recognizes the Ranking Member from California, Mr. Waxman for
1304 5 minutes of questions.

1305 Mr. {Waxman.} Thank you very much, Mr. Chairman. I

1306 think medical malpractice is a real problem. I don't think
1307 the system is a very good one. People who should be
1308 compensated when they are hurt are often not because their
1309 cases are not attractive enough for a lawyer to take on.
1310 Some people are overcompensated. There is not justice in the
1311 system and this has been a perplexing issue for many, many
1312 years.

1313 In California, we adopted a law that--called MICRA which
1314 has been the law that many other States are emulating and a
1315 good part of the bill, H.R. 5 is based on MICRA. But I have
1316 a question about whether we ought to be doing this at the
1317 federal level. States have tried different approaches.
1318 There is no perfect approach to this unless you want to say
1319 it is about the providers. Providers will never be
1320 responsible even when they are negligent or even in reckless.
1321 I don't think that makes any sense. I don't like some of
1322 these caps. Frankly it is such a low cap and hasn't been
1323 expanded so that--\$250,000 seems to be an inadequate
1324 compensation for people who are going to live the rest of
1325 their lives disfigured and in pain.

1326 So I think it is still a state matter because the States
1327 have jurisdiction over insurance. The States have
1328 jurisdiction over licensure. One of the ways to deal with
1329 doctors who commit malpractice is to--is for--to have their

1330 peers under state law do something about it. That is a state
1331 matter. All States have already examined this issue of
1332 medical reform, liability reform and they have their own
1333 different systems, but we want to now in this bill preempt
1334 the whole matter and make it a one size fits all. That is
1335 why the National Conference of State Legislatures has written
1336 to express its strong bipartisan opposition to H.R. 5, and
1337 Mr. Chairman, I would like to ask unanimous consent to put
1338 their letter into the record.

1339 Mr. {Pitts.} Without objection, so ordered.

1340 [The information follows:]

1341 ***** COMMITTEE INSERT *****

|
1342 Mr. {Waxman.} Ms. Doroshow, am I correct in my
1343 statement that States are trying different things out?

1344 Ms. {Doroshow.} That States--

1345 Mr. {Waxman.} Are doing different things on their own?

1346 Ms. {Doroshow.} Well, yeah they have for 35 years.

1347 Mr. {Waxman.} Now Section 11 of this bill spells out to
1348 the extent to which State medical liability laws would be
1349 abolished or prevented from being enacted in the first place,
1350 in other words preempted. Ironically, the title of this
1351 section is State Flexibility and Protection of State's Rights
1352 but it preempts the States if they don't follow the federal
1353 model.

1354 Professor Wolfman, can--what would this Section 11 mean
1355 for existing or potential state medical liability reform
1356 laws?

1357 Mr. {Wolfman.} Well, essentially it is essentially one
1358 way preemption. What it does is it preempts States. For
1359 instance if a State had a law saying or a policy that you
1360 know the jury can determine what is appropriate noneconomic
1361 damages that would be preempted. But if a State had a
1362 provision that was more punitive in my view, you know a
1363 \$200,000 cap, that would not be preempted.

1364 Mr. {Waxman.} That would--

1365 Mr. {Wolfman.} One way.

1366 Mr. {Waxman.} There is a provision in this bill that
1367 says if it--if there is greater protection in healthcare
1368 providers and healthcare organizations--

1369 Mr. {Wolfman.} That is correct.

1370 Mr. {Waxman.} --that would not be preempted.

1371 Mr. {Wolfman.} That is absolutely correct.

1372 Mr. {Waxman.} But the bill goes on to preempt State
1373 laws to protect consumers?

1374 Mr. {Wolfman.} That is correct. It is one way.

1375 Mr. {Waxman.} That is a one way preemption.

1376 California's law has worked as I understand it to hold down
1377 insurance premium from malpractice, but that also seems to
1378 have been part of the insurance reforms adopted by the state.
1379 I don't know if any of you--Ms. Doroshow, you have lived in
1380 California over--

1381 Ms. {Doroshow.} Yes. What--

1382 Mr. {Waxman.} Is that an accurate statement?

1383 Ms. {Doroshow.} It is the Prop 103 insurance regulatory
1384 law that passed in 1988 that is primarily responsible for
1385 that. Yes, for controlling rates in California.

1386 Mr. {Waxman.} Do you know if any evaluation has been
1387 done of the California medical situation to see whether it
1388 has stopped excessive practice in medicine or defensive

1389 medicine?

1390 Ms. {Doroshow.} In--

1391 Mr. {Waxman.} Or is defensive medicine practiced in
1392 California the same as other places?

1393 Ms. {Doroshow.} As well as Texas. I mean, it--when you
1394 enact these caps and other tort reforms it has absolutely no
1395 effect on that issue. I mean, how could it? You are just
1396 limiting one small measure of damages and in a case it is not
1397 is going to change somebody's practice. And I think that is
1398 generally what has been true. It certainly was true
1399 according to a very well known article about Texas, McAllen,
1400 Texas in the New Yorker Magazine where they talked to some
1401 cardiologist and sat down and said they acknowledged the
1402 \$250,000 cap had practically wiped out law suits in that
1403 state and yet they were still practicing the same kind of
1404 tests. And they attributed it--admitted that it was due to
1405 overutilization, having nothing to do with the legal system.

1406 Mr. {Waxman.} I would like my colleagues that support
1407 this bill which may well be almost all the Republicans, maybe
1408 all of them. I still think there are state's rights and
1409 state's prerogatives and this really tramples on all of that.
1410 And that troubles me a lot. All answers to questions are not
1411 found in Washington, D.C. Yield back my time.

1412 Mr. {Pitts.} Chair thanks the gentleman and now

1413 recognizes the gentleman from Kentucky, Mr. Guthrie for 5
1414 minutes of questions.

1415 Mr. {Guthrie.} Thank you, Mr. Chairman. My friend from
1416 Texas said who is left out in the cold and what is fair for
1417 the patient. And in the terms of access to legal
1418 representation and you would have to say perhaps that there
1419 would be if you limit fees--obviously if you are going to
1420 limit price, price controls--you know people are going to in
1421 turn to that business as often. But the question as I have
1422 listened to the Texas story and I can tell you about Kentucky
1423 is what is fair for the patient in term of access to
1424 healthcare? I mean, that is the issue that we have. I
1425 believe if I am correct 22 rural counties gained OB-GYN's and
1426 10 counties had an OB-GYN that did not have. In my situation
1427 I have three children. If I had a fourth, we couldn't have
1428 the same doctor who delivered the first three because he
1429 doesn't practice OB because of medical malpractice
1430 specifically for that. Two hospitals in my hometown, one
1431 doesn't do OB anymore because of medical malpractice. Now
1432 there is a hospital across town you can go to, but if you get
1433 into rural parts of Kentucky, it--you can't--and it is part
1434 of the eastern part of the state you have to drive a couple
1435 hours to Lexington. You know about disproportionate effect
1436 on the poor. Not that middle class and upper middle class

1437 people don't have to drive two hours, but they can afford it
1438 a lot easier than somebody that is poor.

1439 And I am telling you if you give free healthcare to
1440 somebody in parts of my state they are not going to be able
1441 to go to a doctor unless they drive two or--over two hours
1442 because of access to medical care. An OB-GYN that I am very
1443 close to has to pay \$105,000 for healthcare OB-GYN practice
1444 in Kentucky. So that is why we are losing people practicing.

1445 So even if you admit and I think you would have to if
1446 you are a person that doesn't believe in--if you--economics
1447 and you said the free market of price controls would perhaps
1448 limit some people to big awards, the overall--what we have to
1449 look at and Ms. Doroshow, is it a fair argument to look at to
1450 say well, what about the access? Because you know some
1451 people are arguing that tort reform didn't change the issues
1452 in Texas. You know the evidence seems to say they did, but I
1453 can tell you we are losing OB-GYN's. If it is not tort
1454 reform for some reason in Kentucky and it is the access to
1455 care not something that we as policymakers have to make
1456 decisions when we--what is fair for one patient--maybe access
1457 to the legal. What is fair for one patient-- access to care.

1458 Ms. {Doroshow.} Well, I would point you to page 23 of
1459 my written testimony where it describes study after study
1460 after government study showing that medical malpractice

1461 issues have absolutely nothing to do with the access to care
1462 argument. And frankly, if the argument is that insurance
1463 rates are too high as they have been three times in the last
1464 30 years as we have gone through this cyclical market, the
1465 solutions to that problem lie with the insurance industry.
1466 They should not be solved on the backs of injured patients.
1467 And we are dedicated. We have an organization called
1468 Americans for Insurance Reform that is dedicated to try to
1469 help get some control over the property, casualty insurance
1470 industry. That is one of the least regulated industries in
1471 the country. They are exempt from anti-trust laws and that
1472 is something that Congress could do is to get rid of the
1473 anti-trust exemption that--

1474 Mr. {Guthrie.} What about the Texas situation? The
1475 Texas--didn't--I am asking. I am not trying to lead you in a
1476 way or Mr. Wolfman, did Texas malpractice reform not lower
1477 premiums? Is that--are you thinking it was something outside
1478 of? Because they didn't put caps in control.

1479 Ms. {Doroshow.} Texas--right after the law was passed
1480 in 2003, Texas insurers went in for between a 35 and 65
1481 request for rate hikes. That is because we are in a hard
1482 market in this country. It was happening in every State in
1483 the country. In 2006, rates stabilized everywhere in the
1484 country. In every State in the country no matter whether

1485 they passed these laws or not and that simply as--

1486 Mr. {Guthrie.} But so the access in these rural
1487 counties in Texas--was it, you don't think--

1488 Ms. {Doroshow.} The access to the rural counties--look
1489 in 2007 there is a big Texas observer article called Baby I
1490 Lied. It was all about how misrepresenting the medical
1491 societies word in terms of where the access was going to
1492 improve in those rural counties and they were not--they had
1493 not improved. And I would also point you to this very
1494 important study by Charles Silver, David Hymen, Bernard
1495 Black, the impact of the 2003 medical malpractice and its cap
1496 on physicians supply. Basically the account--

1497 Mr. {Guthrie.} I am not cutting you off because I don't
1498 want to hear it and I--

1499 Ms. {Doroshow.} Well, this is--

1500 Mr. {Guthrie.} --understand--

1501 Ms. {Doroshow.} --this is the actual analysis of what
1502 happened to physician supply in Texas. The--

1503 Mr. {Guthrie.} But I know we are losing OB-GYN's in
1504 Kentucky and rural part and maybe there are lots other but as
1505 a doctor, I know you just--what you said. I am not trying to
1506 cut you off because I don't want to hear it. I just want to
1507 give Dr. Hollier--I guess you have 20 seconds to say that.

1508 Dr. {Hollier.} Thanks. Ranks of rural obstetricians

1509 increased by 27 percent. Imagine yourself 9 months--

1510 Mr. {Guthrie.} Because of malpractice or that is the
1511 question that--that is this--

1512 Dr. {Hollier.} Yes.

1513 Mr. {Guthrie.} You are not denying the increase, right,
1514 Dr. Doroshow?

1515 Ms. {Doroshow.} Yeah, I am denying it.

1516 Mr. {Guthrie.} You are denying that it increased?
1517 Okay.

1518 Ms. {Doroshow.} According to this study, population
1519 went up 2 percent. OB-GYN's went up 1.6 percent annually
1520 since the cap passed.

1521 Mr. {Guthrie.} But we have OB-GYN's in Bowling Green.
1522 The question is we don't have then in some county--

1523 Ms. {Doroshow.} Well there are dual problems that are
1524 very common in every single State. The way to fix that
1525 problem is to provide incentives for doctors to go into those
1526 areas not to cap damages for the entire state.

1527 Mr. {Guthrie.} But they did in Texas. That is the
1528 question. Thanks. I yield back.

1529 Mr. {Pitts.} Chair thanks gentleman and recognizes
1530 gentlelady from California, Mrs. Capps for 5 minutes.

1531 Mrs. {Capps.} Thank you, Mr. Chairman. As I touched on
1532 in my opening today I believe that in order to solve the

1533 issues of rising malpractice costs, we can't ignore one of
1534 the major issues here which is reducing the incidents of
1535 malpractice, bringing down the astounding number of costly
1536 medical errors that claim 98,000 lives a year. I want to be
1537 clear many of these deaths would be wholly preventable
1538 through the adoption of simple measures like increased focus
1539 on communication between doctors and nurses, appropriate
1540 staffing levels as increasing the use of simple but effective
1541 checklists.

1542 To that end, I join with my colleague Mr. Holt on--in
1543 introducing the Medical Checklist Act of 2010 in the 111th
1544 Congress. Checklists have long been used in commercial
1545 aviation as well as the number of other fields to ensure that
1546 complicated procedures are performed safely. They have been
1547 used because they work and their increased use in medical
1548 centers--settings is one way to improve patient test--safety.
1549 In your testimony, Ms. Doroshow, you spoke of the importance
1550 of focusing on patient safety and highlighted how one study
1551 in obstetrics department was able to reduce medical errors in
1552 claims by 99.1 percent by instituting a department wide
1553 program focused on ways that they can improve patient care;
1554 for example, establishing new drug protocols, improving
1555 communications between medical staff. What kind of
1556 incentives do you believe prompted the implementation of this

1557 systemic approach to improving patient safety? Do you think
1558 this kind of program could be replicated in other hospitals
1559 or other branches of medicine?

1560 Ms. {Doroshow.} Absolutely and in fact it is not the
1561 only--it is New York Presbyterian Cornell Medical Center
1562 study beginning in 2002. At the request of the insurance
1563 carrier for this hospital, they implemented these things and
1564 as you said claims--everything went down. But it is not the
1565 only situation where that has been repeated. We also had
1566 somebody testify before, a task force I was on from a Boston
1567 hospital the same kind of results. It is extraordinarily
1568 successful at reducing errors and claims in compensation
1569 payments.

1570 Mrs. {Capps.} And then real quickly in your reading of
1571 H.R. 5 is there anything that improves on patient protection
1572 measures that reduce the instance of medical errors?

1573 Ms. {Doroshow.} No, absolutely not.

1574 Mrs. {Capps.} Okay. Well, I think this is an area
1575 where all of us can agree that this kind of approach, these
1576 innovative approaches are--is worth learning from. I want to
1577 turn now to Dr. Kachalia. In your testimony, you described
1578 your review of the current evidence regarding the effective
1579 liability reform measures such as those contained in H.R. 5,
1580 you say for example there is not enough evidence to evaluate

1581 the impact of caps on the overall quality of care. I found
1582 the paper that you did in 2008 very interesting. You wrote
1583 that with regard to problems of liability costs and quality,
1584 there is a growing awareness and this is a quote from your
1585 statement--your letter. ``Traditional tort reform measures
1586 such as caps on noneconomic damages will not solve them.''
1587 You go on to say that ``There is also increasing recognition
1588 that such measures do little or nothing to make care safer.
1589 Would you agree then, Dr. Kachalia, that the grants program
1590 included in the Affordable Care Act that permits States to
1591 conduct pilot projects to test some of these methods is a
1592 sensible first step before we enact sweeping legislation that
1593 would impose a batter of tort reform provisions on all
1594 States? And kind of a yes or no, because I will...

1595 Dr. {Kachalia.} So--

1596 Mrs. {Capps.} Actually I have time.

1597 Dr. {Kachalia.} So yes, I actually think the grants
1598 program that is being contemplated is a great thing because
1599 as we look to improve our liability system we should be
1600 looking to see how we can improve the quality of the safety
1601 of the care that we deliver at the same time. So as we--I
1602 think there is general recognition also that we need to fix
1603 the premium problem. We need to fix this issue with
1604 excessive economic awards, but at the same time there is no

1605 reason we couldn't package this with other measures that will
1606 also help with safety. So I think a grants program to
1607 investigate and give us more data on how to fix these
1608 problems is all--would be a welcome thing.

1609 Mrs. {Capps.} And to corroborate that, Ms. Doroshow,
1610 the Affordable Care Act does include grants and encourage
1611 States to experiment with various methods to address medical
1612 liability in their state. Of course in keeping with the way
1613 that we have always treated medical as a State and not a
1614 federal issue, do you want to comment on the same kinds of
1615 programs that you have seen where States are kind of testing
1616 the waters to see if there are programs that they can
1617 implement at the state level?

1618 Ms. {Doroshow.} Yeah, I mean a number of grants were
1619 made by HHS and we are waiting to see the results of those.
1620 Most of them are very focused on patients safety which I
1621 think is the correct way to go in solving this problem.

1622 Mrs. {Capps.} Thank you. And I yield back my time but
1623 I ask unanimous consent to insert in the record a letter from
1624 the consumer watchdog that clearly shows that caps alone did
1625 nothing to decrease medical malpractice premiums by the
1626 study.

1627 Mr. {Pitts.} Without objection, so ordered.

1628 [The information follows:]

1629 ***** COMMITTEE INSERT *****

|
1630 Mr. {Pitts.} Chair now recognizes the gentleman from
1631 Illinois, Mr. Shimkus for 5 minutes.

1632 Mr. {Shimkus.} Thank you, Mr. Chairman. This is a
1633 really great hearing. I have been a member since '96. We
1634 have dealt with this numerous times. And it is not an easy
1635 issue and so I appreciate all the folks at the panel. First,
1636 Mr. Chairman, I would like to submit into the record two
1637 articles. One November 14, 2010; March 9, 2011, New York
1638 Times and I don't know who this was. And it--

1639 Mr. {Pitts.} Without objection.

1640 [The information follows:]

1641 ***** COMMITTEE INSERT *****

|
1642 Mr. {Shimkus.} It addresses an issue of loaning money,
1643 in essence usury and rates within the States. Let me read
1644 the paragraph. ``Large banks, hedge funds, and private
1645 investors hungry for a new lucrative opportunities for
1646 bankrolling other people's lawsuits pumping hundreds of
1647 millions of dollars into medical malpractice claims, divorce,
1648 Dallas Class Action incorporated all in the over sharing of
1649 potential winnings. So they are using medical issues and
1650 there is a--actually there really is a debate now in States
1651 and whether this is a State issue or federal issue I am still
1652 going to try to reconcile that be. It has been raised up,
1653 but States are--we are involved with credit card rates now
1654 here nationally. States are involved in loan sharking and
1655 pay day loan issues and rates, so I would like to submit
1656 that. And I have got some other things, but Dr. Tippett, you
1657 are a neurosurgeon? Is that correct?

1658 Dr. {Tippett.} Yes, sir, I am a neurosurgeon.

1659 Mr. {Shimkus.} And in Illinois we have gone on and off
1660 of medical liability reforms and we just had one. It just
1661 got overruled by the Supreme Court. Now we are kind of in
1662 limbo until we see if anything else could pass. Before the
1663 last passage of State Liability Reforms we did not have a
1664 single neurosurgeon south of Springfield, Illinois which is

1665 parts of 52 counties. Now as a practitioner of that
1666 specialty that is a danger sign wouldn't you think?

1667 Dr. {Tippett.} Absolutely. You talk about--everybody's
1668 talking about what do we want to do about patient safety and
1669 I am thinking when you don't have someone there to take care
1670 of the patient it is not very safe. If you have got to
1671 travel 500 miles to get to see a doctor, that is not safe.

1672 Mr. {Shimkus.} Fifty-two counties, yeah.

1673 Dr. {Tippett.} We are all for patient safety, but you
1674 have to have the physician access.

1675 Mr. {Shimkus.} Yeah, reclaiming my time. Fifty-two
1676 counties is a third of the State of Illinois, and at that
1677 time we would have to airlift folks who are in critical acts--
1678 -I mean to airlift them 100, 150 miles maybe to New York--not
1679 New York to St. Louis, Dens Sens, maybe Paducah, to other
1680 places who had across the state line who had neurosurgeons
1681 because they had lower--and that is why I think if you hear
1682 the testimony of some of the member's concerns, we are from
1683 rural districts. We are from districts that have problems
1684 with access to care and that is where our passion for this
1685 debate comes from. So I just--I will put that on the table.

1686 The other thing I found interesting, Ms. Doroshow, and I
1687 appreciate your testimony. I appreciate you raising this
1688 issue of Dr. Lora Ellenson and the quotes in there and the

1689 story. Because I think if I ask this question to everyone--
1690 this is the doctor who has the disabled son that wants a
1691 judgment to be made to pay for the care of that son for the
1692 rest of his life. No one at this panel would disagree with
1693 that. Would you? Would you, Dr. Hollier? Would you
1694 disagree?

1695 Dr. {Hollier.} Would not disagree.

1696 Mr. {Shimkus.} Ms. Doroshow, would you disagree?

1697 Ms. {Doroshow.} Would not.

1698 Mr. {Shimkus.} Yeah, Dr. Kachalia? You wouldn't
1699 disagree. Mr. Wolfman?

1700 Mr. {Wolfman.} No.

1701 Mr. {Shimkus.} Dr. Tippett?

1702 Dr. {Tippett.} Absolutely not.

1703 Mr. {Shimkus.} So no one would disagree with it. There
1704 is something that we can all agree upon. Now this debate is
1705 really about and I am not a lawyer, okay and sometimes I wish
1706 I was and sometimes I am glad I am not. But this is the
1707 issue of the second part of a medical liability claim which
1708 is pain and suffering. Now, this is in the issue because the
1709 governor of New York is trying to cap pain and suffering at
1710 \$250,000. Is that correct, Ms. Doroshow?

1711 Ms. {Doroshow.} That is--no. I mean that was--

1712 Mr. {Shimkus.} Yeah, that was in the story that you

1713 used it for?

1714 Ms. {Doroshow.} No, that is over it. That was
1715 withdrawn.

1716 Mr. {Shimkus.} Okay, but it was.

1717 Ms. {Doroshow.} That was withdrawn.

1718 Mr. {Shimkus.} But it was--

1719 Ms. {Doroshow.} It was the hospitals that were on a
1720 refined scheme that--

1721 Mr. {Shimkus.} All right, do I want to read the story
1722 that you quote in your--do I want to read the story?

1723 Ms. {Doroshow.} Well--

1724 Mr. {Shimkus.} The story--

1725 Ms. {Doroshow.} Since I wasn't involved in it--

1726 Mr. {Shimkus.} Okay. I don't want to fight this.

1727 Ms. {Doroshow.} --I can--

1728 Mr. {Shimkus.} The story is based on Cuomo had proposed
1729 capping at \$250,000. That is part of the story that you
1730 used. And I don't want to go on that fight, but that is what
1731 raised this story was her concern of Governor Cuomo's.

1732 Ms. {Doroshow.} Well--

1733 Mr. {Shimkus.} Now the issue was this. Mr. Chairman,
1734 the time is mine. The time is not the ranking member of the
1735 Full Committee's and I ask for my 15--

1736 Mr. {Pitts.} Shimkus--

1737 Mr. {Shimkus.} --seconds returned based upon the
1738 disruption by the ranking member.

1739 Mr. {Pitts.} You may proceed.

1740 Mr. {Shimkus.} Thank you, Mr. Chairman. Now the issue
1741 is this that in a court case what we should have--there is
1742 economic damages that should be recovered. This issue of
1743 pain and suffering is what is driving this. Now in
1744 California, one economic damage case recovered \$96 million.
1745 So this debate is about the pain and suffering aspect that
1746 actuarially insurers can never quantify because there is no
1747 cap. Thank you, Mr. Chairman. I yield back my time.

1748 Mr. {Pitts.} Chair thanks the gentleman and recognizes
1749 the gentleman from New York, Mr. Weiner for 5 minutes.

1750 Mr. {Weiner.} Thank you, Mr. Chairman. You know I
1751 think that Mr. Gingrey's question earlier should inform our
1752 debate about who should make these decisions. Now Mr.
1753 Gingrey suggested in his questions that you should or he
1754 should when in fact we have a history of jurisprudence in
1755 this country that empowers our constituents to make these
1756 decisions, that they are smart enough to send Mr. Gingrey to
1757 Congress. They should be smart enough to sit on a jury. Or
1758 alternatively they should be smart enough to pass State laws.
1759 It is interesting that in Mr. Gingrey's explanation of
1760 Constitutional authority for this bill, he writes the

1761 Constitutional authority in which this legislation is based
1762 is on Article I, Section VIII, Clause III of the Constitution
1763 as healthcare related lawsuits are activates that affect
1764 interstate commerce. If that is the explanation for trumping
1765 tort law in the States where does--so we can take this book--
1766 this is New Jersey's law and say that apparently Congress
1767 knows better. So we are going to trump State law. Like
1768 there is not a federal tort regime now. It is basically they
1769 are in the individual States. It is the right of the States.
1770 The Tenth Amendment of the Constitution reserves this for the
1771 States. Why stop there if we are not going allow the State
1772 to make health related tort laws then who is going to decide?
1773 I am impressed with Mr. Wolfman and by the way I am not a
1774 lawyer, but if we ever had a law firm Wolfman and Weiner, I
1775 mean, we would just--I am serious. We would just get clients
1776 just on the sheer intimidation factor. But perhaps you can
1777 talk a little bit about the idea that there are some areas of
1778 the law that we reserve for the States and the effect that
1779 this would have on the regime of State tort law because
1780 frankly, we could really go to every extreme. You really
1781 could say that every court case can be decided in this room
1782 theoretically. I mean, if you are going to say if you are
1783 going to trump State tort laws for this where does it stop?
1784 Is there no line that you don't cross? I mean, I thought

1785 that part of the ethos of this new Congress was respect for
1786 the Constitution. I mean, this basically tramples on the
1787 Tenth Amendment worse than anything I have seen in awhile.
1788 You want to comment on that, Mr. Wolfman?

1789 Mr. {Wolfman.} Yes, Mr. Weiner, that--first of all you
1790 are right that the tort system has been traditionally one in
1791 which the state has had plenary authority. And let me just
1792 add and I think that this goes to the point that was asked to
1793 me earlier. What this bill does, it not only trumps the
1794 States, but it does it in entirely a one way direction. So
1795 in other words, what it does is it is--it pretends that the
1796 state system will continue to exist and it only imposes
1797 federal law when it undermines the rights--

1798 Mr. {Weiner.} Right.

1799 Mr. {Wolfman.} --of people who are harmed. And that
1800 is--and let me make one other point. Now it is one thing to
1801 waive around a \$96 million punitive--pain and suffering
1802 judgment. There is a big difference between 250,000 and 96
1803 million. That is what we are talking about. We are talking
1804 about the people who have to live for the rest of their lives
1805 with disfigurement, phantom pain, blindness--\$250,000?

1806 Mr. {Weiner.} Well, and then there is the other
1807 question that I think is at the foundation and it is worth
1808 having a conversation here about. Who gets to make the

1809 decision? If you are patient in rural Georgia in Mr.
1810 Gingrey's district and you want a jury of your peers to hear
1811 your case or you are a doctor or you are a hospital and you
1812 want a jury of your peers to hear the case, under this law
1813 effect--under this proposal, effectively that jury is
1814 meaningless. If that jury comes to the conclusion and there
1815 are smart people in Georgia. There are smart people in Mr.
1816 Gingrey's district and they hear the evidence and they draw a
1817 certain conclusion, they are now going to be told that
1818 actually it doesn't really matter. That exercise, your state
1819 legislator that passed that law doesn't matter. The state
1820 legislature that approved it and the Governor that signed it--
1821 --doesn't matter. That jury that sat--doesn't matter. The
1822 witnesses that were called--doesn't matter. The victim
1823 himself, his or herself doesn't matter as it relates to
1824 Georgia. It only matters as it relates essentially to big
1825 Washington. You are saying it is going to be in the federal
1826 judicial system. And I would say that it is very hard for
1827 anyone to call themselves small government or respectful of
1828 the Constitution or concerned about state's rights and
1829 support the Gingrey measure. Because what you are really
1830 saying is all of those things we have heard about. Even the
1831 Texas law could theoretically be trumped tomorrow because we
1832 can just change the limit or change a word and suddenly Texas

1833 laws are thrown out. I mean, we have all these law books
1834 that are filled with what people have done. The Code of
1835 Virginia--all these different laws that were passed and now
1836 we are going to say that no, it is Washington that is going
1837 to make that decision. I, for one, find that offensive to
1838 the Constitution of the United States.

1839 Mr. {Pitts.} The gentleman's time is expired. The
1840 Chair recognizes the gentleman from Louisiana, Dr. Cassidy
1841 for 5 minutes for questions.

1842 Dr. {Cassidy.} Thank you. I will first by--end up by
1843 quoting or at least summarizing the gist of Mr. Weiner's
1844 speech from yesterday saying that we can't rely on State
1845 insurance commissioners to create standards because otherwise
1846 I think I remember him saying somebody in one state will
1847 define the lowest common denominator. And there was a basic
1848 obligation of the people who set the kind of rules in which
1849 there needs to be rules of the road. So it seems a little
1850 contradictory. That said, Mr.--Dr. Kachalia, I enjoyed your
1851 Brief if you will. I am a physician so it is--I don't want
1852 to insult you by calling it a Brief, no offense to the
1853 attorneys. But it was well referenced. I like that. I also
1854 have here a chapter from a textbook on healthcare economics.
1855 And it is saying stuff that frankly I find very disturbing.
1856 Let us see, less than half of malpractice insurance premiums,

1857 one third of one percent of total healthcare, but less than
1858 half of malpractice healthcare premiums are returned to
1859 victims of negligence and the remainder is spent on overhead
1860 and legal fees. So it is less than half. I mean, the
1861 medical loss ratio in PPACA for insurance companies is 85-15
1862 percent. This is something like 55 going to overhead and 45
1863 not. That is disturbing. It also goes on to say that there
1864 is limited evidence. Mr. Gonzalez suggested that the purpose
1865 as did you, Ms. Doroshov, the purpose of malpractice is the
1866 deter bad physicians, but this article goes on to say that
1867 there is limited evidence that bad physicians are removed
1868 through the malpractice system. Any comments upon that?

1869 Dr. {Kachalia.} If I can start, so starting with the
1870 overhead costs I do think that is one of the biggest problems
1871 that we have in our current system with the way the
1872 litigation process works you often have the need for expert
1873 testimony on both sides.

1874 Dr. {Cassidy.} So just to summarize that is money not
1875 going to victims of malpractice, it is money going to
1876 overhead?

1877 Dr. {Kachalia.} Correct.

1878 Dr. {Cassidy.} Okay. Continue.

1879 Dr. {Kachalia.} Correct. And so this is one of the
1880 problems that we have noted in the system because there--we

1881 advocate it shows that there is a need for reform in this
1882 regard because it takes way too long and it is much too
1883 expensive to adjudicate claims. So that if we--

1884 Dr. {Cassidy.} If we have somebody who is a victim of
1885 malpractice, a sponge is left in the belly, then really there
1886 is a length of time before that is adjudicated, the patient
1887 gets relief, begins to get the extra dollars she may need for
1888 her recovery and an ordinate amount is consumed in overhead?
1889 Fair example?

1890 Dr. {Kachalia.} That can be a fair example although
1891 unless people are starting to settle much more quickly, but
1892 if they--if the provider chooses not to settle, yes, that is
1893 a fair example.

1894 Dr. {Cassidy.} Okay. So Mr. Gonzalez's point that we
1895 are actually using the malpractice system to drive physicians
1896 out who shouldn't be practicing, do you think that is valid?
1897 Does that work?

1898 Dr. {Kachalia.} I don't remember his exact example but
1899 I am not sure that the medical malpractice system--because we
1900 don't see as many claims as one would expect for the amount
1901 of error that occurs. It may not necessarily be sending the
1902 right signal to all of the providers we want to send it to.
1903 I do think that to some extent it does impact people and does
1904 drive some accountability because people do worry about being

1905 sued. And I do think there is some accountability--

1906 Dr. {Cassidy.} Now, that accountability though--I am a
1907 physician, so one of the general surgeon says that when he
1908 goes to the emergency room it used to be a history and
1909 physical form. Now it is a history, physical, and CT scan
1910 form.

1911 Dr. {Kachalia.} Right.

1912 Dr. {Cassidy.} Because folks are so afraid if you come
1913 in with a headache you could have had the headache for 10
1914 years, you are getting a CT scan. I see Dr. Tippettt nodding
1915 his head. I think \$1,000 test with lots of radiation, but
1916 that way if you are sued you have got the CT scan. In fact,
1917 fair to say it also drives some of that practice, too.

1918 Dr. {Kachalia.} I think it is fair to say it drives
1919 defensive practices and also drives accountability at the
1920 same time. The question is which one is being--which one is
1921 winning the battle so to say?

1922 Dr. {Cassidy.} Now, I also read in this article from an
1923 academic textbook that only two percent of negligent victims
1924 file claims, but six percent of patients who are not victims
1925 of negligence file claims. That is incredible. Dr.--Mr.
1926 Wolfman is looking kind of surprised. I can find the exact
1927 reference and I can show the chapter. But that apparently
1928 people who aren't victims of negligence six percent of the

1929 time file malpractice claims. Dr. Tippett, how would that
1930 impact your practice?

1931 Dr. {Tippet.} Well, it--I mean, you had the perfect
1932 example. You can't get into or out of my office without
1933 having an MRI scan these days and it is not because you need
1934 one necessarily when you come in, but because when we see a
1935 patient in the office we think of a differential diagnosis
1936 rather than just to that one thing like treat a simple back
1937 pain for a few weeks to see if they are going to get better
1938 because there is one in a thousand chance that patient may
1939 have a tumor in their spine we get an MRI scan. That is
1940 unnecessary, increasing the cost of medicine. It doesn't
1941 need to be done, but nevertheless it is exactly what occurs
1942 in every ER and every doctor's office in this country.

1943 Dr. {Cassidy.} I am sorry. I am out of time. I had a
1944 question for you, Ms. Doroshow and I forgot--one question,
1945 Dr. Hollier, why is it Hollier, not Hollier as in
1946 Louisianans?

1947 Dr. {Hollier.} It is Hollier, sir.

1948 Dr. {Cassidy.} Thank you very much. I just--warms my
1949 heart.

1950 Mr. {Pitts.} Chair thanks the gentleman. Recognizes
1951 gentlelady from Illinois, Ms. Schakowsky for 5 minutes.

1952 Ms. {Schakowsky.} Dr. Tippett, you just said that you

1953 perform unnecessary procedures?

1954 Dr. {Tippett.} That is not what I said.

1955 Ms. {Schakowsky.} Yes, you used the word unnecessary.

1956 Dr. {Tippett.} No.

1957 Ms. {Schakowsky.} We could go back and ask for a
1958 reading of the transcript, but you said that--

1959 Dr. {Tippett.} Unnecessary at that particular time.

1960 Ms. {Schakowsky.} Uh-huh.

1961 Dr. {Tippett.} It is a necessary procedure in the
1962 differential diagnosis that I mentioned earlier, so it is not
1963 unnecessary. It is the question of timing. My point was--

1964 Ms. {Schakowsky.} But you are saying--now you are
1965 saying it is unnecessary because I want to know if you--when
1966 you do that you order--if you order something that is
1967 medically unnecessary do you also bill Medicare and Medicaid
1968 for or private insurance for this work?

1969 Dr. {Tippett.} I don't order tests that are
1970 unnecessary.

1971 Ms. {Schakowsky.} Excuse me?

1972 Dr. {Tippett.} I don't order tests that are
1973 unnecessary.

1974 Ms. {Schakowsky.} Well, okay, you said it was
1975 absolutely unnecessary. I wanted to just--

1976 Dr. {Tippett.} At that particular time. I am sorry I

1977 was trying to be brief in my comments--

1978 Ms. {Schakowsky.} Yeah, exactly.

1979 Dr. {Tippett.} --and I did not add to the--

1980 Ms. {Schakowsky.} You said no one leaves your office
1981 without getting an MRI because--and the implication was
1982 because you want to avoid litigation. And what I am asking
1983 you if you are billing Medicare, Medicaid, or private
1984 insurance for these procedures that you view to be
1985 unnecessary.

1986 Dr. {Tippett.} I didn't say I viewed them to be
1987 unnecessary.

1988 Ms. {Schakowsky.} You did.

1989 Dr. {Tippett.} I said--no, ma'am, I did not finish the
1990 sentence earlier when I said that test wasn't necessary at
1991 that particular time.

1992 Ms. {Schakowsky.} No, you didn't. Okay.

1993 Dr. {Tippett.} It is a necessary test to determine
1994 whether or not someone has a tumor was my entire--

1995 Ms. {Schakowsky.} Yeah, I actually wanted to start what
1996 I was saying until I heard that disturbing sentence--those
1997 disturbing remarks that actually I think there might be a way
1998 that we could be on the same side with doctors. This is not
1999 a war between doctors and lawyers. This is about people that
2000 get hurt. Now what--it is so interesting to me that injured

2001 patients become the focus. And we are going to take it out
2002 on them rather than looking at the insurance companies. And
2003 why it is that you who have maybe never been sued and
2004 doctors, the small number who actually may engage in
2005 dangerous behavior that causes patients to be injured, why
2006 you are asked to pay the similar insurance? I--there is--it
2007 doesn't-- I don't believe there is experience rating in
2008 medical malpractice insurance. Is that true, Ms. Doroshow?

2009 Ms. {Doroshow.} Right, it is rated by specialty
2010 primarily now.

2011 Ms. {Schakowsky.} You know which really, I think is
2012 unfair. All of us want to see that obstetrician
2013 gynecologist, and neurosurgeons are able to practice where
2014 they want to practice without and without any distinction
2015 from the bad actors that are in those professions. And we
2016 all admit that there have to be those. So what I wanted to
2017 ask Mr. Wolfman or Ms. Doroshow, will capping damages, that
2018 is actually making sure that the real victims lead to lower
2019 rates?

2020 Ms. {Doroshow.} Well, if history is any guide at all,
2021 it absolutely won't. You look at State after State.
2022 Missouri for example, Maryland both had severe caps in the
2023 mid-80's. They experienced very severe insurance crises in
2024 the early part of the 2000's. Missouri's rates went up 121

2025 percent. This is true in every State. Ohio passed caps.
2026 The insurers immediately went in; asked for rate hikes.
2027 Oklahoma the same thing. Mississippi the same thing. In
2028 Texas they would be--after 2003 the cap passed. The insurers
2029 immediately went in for rate hikes. Until the market
2030 stabilizes and it happens everywhere in the country
2031 irrespective of a State's tort law. States will--rates will
2032 continue to go up. That is an insurance problem that needs
2033 to be fixed.

2034 Ms. {Schakowsky.} Exactly and I think that we are
2035 absolutely looking in the wrong direction and if we want to
2036 help doctors to be able to in their view afford to practice
2037 where they want to practice, to say to people whose lives
2038 have been permanently altered that the burden is now going to
2039 be on you. And by the way, \$250,000 which was a number
2040 decided in California years and years ago would be a million
2041 dollars now. So we are not even talking about a situation
2042 where we are going to be able to people--to have people
2043 restore their lives. I think if we could work together on
2044 figure--on pointing our finger in the right direction that
2045 this is an insurance problem--it has already been stated that
2046 most people, and you stated it yourself, Dr. Kachalia, that
2047 not as many injured people actually file claims. A very
2048 small percent do because you know it is laborious, it is

2049 expensive, it is hard to do.

2050 Dr. {Kachalia.} It is not as if you want me to comment,
2051 but I do think there is a premium problem, but there is also
2052 the issue of the emotional cost of a suit that gets attached
2053 and the behaviors that result from it. So it is not just all
2054 about premiums.

2055 Ms. {Schakowsky.} Well, there is a lot of emotion
2056 attached to having the wrong breast removed or yeah. Um-hum.

2057 Mr. {Pitts.} The gentlelady's time has expired. Chair
2058 now recognizes my colleague from Pennsylvania Dr. Murphy for
2059 5 minutes.

2060 Mr. {Murphy.} Thank you, Mr. Chairman. A few questions
2061 here. First, Mr. Wolfman, I am trying to understand this--
2062 how this works. Is there a correlation between unlimited
2063 noneconomic damages and unlimited punitive damages in
2064 improvement in healthcare?

2065 Mr. {Wolfman.} I think the answer to that is yes with
2066 one caveat. I mean, that--

2067 Mr. {Murphy.} Do--was there a study that you could
2068 refer us to? I would have actually looked to see that. I am
2069 not looking for you to--I am not going to put you on the spot
2070 with a guess.

2071 Mr. {Murphy.} There are. There are some famous studies
2072 on punitive damages that show some relationship. I just--

2073 with the word unlimited, but yes and I can get those to the
2074 committee.

2075 Mr. {Murphy.} I mean, I am not talking about a single
2076 award that is given in a case, but I mean overall?

2077 Mr. {Wolfman.} Yes, yes.

2078 Mr. {Murphy.} You think you can do that for us? Thank
2079 you. So in other words feel that when we have the ability
2080 for higher damages or punitive damages not economic damages
2081 we could--expect to see overall improvement in healthcare
2082 driven by that factor separate from other things?

2083 Mr. {Wolfman.} As I understand what you are saying I
2084 think the answer is yes and I can get that to the committee.

2085 Mr. {Murphy.} Okay. Now, is there also a correlation
2086 then between the more an attorney gets paid and an
2087 improvement in healthcare?

2088 Mr. {Wolfman.} I think the answer to that is yes and no
2089 and I think it is not an easy answer that what I--the point I
2090 was making about lawyer compensation through our contingent
2091 fee system is that if you have rates that are driven by the
2092 Congress of the United States that are way below the market
2093 which is what this bill does you are not going to attract
2094 lawyers to take important difficult cases. You are not going
2095 to get the best lawyers on the most difficult cases
2096 particularly the cases for instance older people who have no

2097 wage income, people whose income so to speak would decide--

2098 Mr. {Murphy.} And the attorney wouldn't have the money
2099 to really advance this case. I understand that point.

2100 Mr. {Wolfman.} Right, that is the problem. So it--

2101 Mr. {Murphy.} You have a delay--this goes back--

2102 Mr. {Wolfman.} Your correlation that you are talking
2103 about I--with all respect doesn't ask the right question.

2104 Mr. {Murphy.} Well, I mean--

2105 Mr. {Wolfman.} The question is whether the market is
2106 going to attract people to take difficult cases.

2107 Mr. {Murphy.} It is important because then you would
2108 have the justice delayed is justice denied issue. Well, let
2109 us talk about that market. I know in Pennsylvania we have
2110 some serious problems with attracting neurologists and OB-
2111 GYN's to the market. And for some of the physicians here
2112 perhaps some of you can enlighten me on this, but I know when
2113 I have seen in States they list the number of people who have
2114 a medical degree or license in that State. My understanding
2115 they will look at all licenses including the residents and
2116 interns, semi-retired physicians and even those who may still
2117 have a license in Pennsylvania but have moved down to South
2118 Carolina or somewhere else to retire in. Is that correct?
2119 Can anybody--I see some heads nod that is correct.

2120 Dr. {Tippett.} That is correct.

2121 Mr. {Murphy.} I also hear from some top medical
2122 schools--I am on the faculty of the University of Pittsburgh
2123 School of Medicine. I should disclose that--the Department
2124 of Pediatrics. And one of the things I hear from some other
2125 departments is for example, they will have an entire class
2126 year after year of graduates from a top level residency
2127 program in OB-GYN and not a single one of those residents
2128 remains in Pennsylvania. So I go to this question then if we
2129 don't have OB-GYN's and I have friends of mine who are
2130 neurologist say they have spent years trying to attract a
2131 neurologist to join their practice. I have some neurologists
2132 here in front of us. If you don't have enough people to
2133 treat patients, what does that do in terms of delaying care?
2134 Anybody answer that for me or enough OB-GYN's in a practice
2135 to delay--does that affect care?

2136 Dr. {Hollier.} Absolutely. If you don't have available
2137 obstetrician gynecologists care is definitely affected.
2138 Imagine being 9 months pregnant in Blanco County that had no
2139 obstetricians prior to the passing of--

2140 Mr. {Murphy.} And why don't they want to stay in that
2141 State?

2142 Dr. {Hollier.} OB-GYN doctors do want to stay in the
2143 State of Texas.

2144 Mr. {Murphy.} But what are--is the cost of medical

2145 liability insurance part of that overall concern in one State
2146 versus another and they can leave and go to another State?

2147 Now I go back to Mr. Wolfman's comment at the crux of
2148 not going forward with H.R. 5 as you affect the marketplace.
2149 So I ask the physicians, does this affect the marketplace to
2150 not deal with this issue? Dr. Tippett?

2151 Dr. {Tippett.} Well, absolutely.

2152 Mr. {Murphy.} Dr. Kachalia, does that affect the
2153 marketplace?

2154 Mr. {Kachalia.} I mean I will reiterate. I think we
2155 need reform. It is going to help the marketplace.

2156 Mr. {Murphy.} Ms. Doroshow, you have a comment you want
2157 to make?

2158 Ms. {Doroshow.} Well, you know Michelle Mello from
2159 Harvard actually did a study of Pennsylvania doctors and
2160 compared access to care in Pennsylvania before and after the
2161 most recent liability insurance crisis when rates went up.

2162 Mr. {Murphy.} Um-hum.

2163 Ms. {Doroshow.} And found there is no connection
2164 whatsoever.

2165 Mr. {Murphy.} Between amount of physicians?

2166 Ms. {Doroshow.} It is in my--

2167 Mr. {Murphy.} Yeah, I appreciate that. I was a State
2168 Senator at the time and that is why I was saying that point

2169 before.

2170 Ms. {Doroshow.} You should take a look at that study.

2171 Mr. {Murphy.} If they count the number of physicians
2172 available in Pennsylvania, look at all licenses and that is a
2173 distorted statistic. I just want information, the truth, and
2174 it is--but I appreciate and Mr. Wolfman if you could get me
2175 those studies I would really be grateful. Thank you. I
2176 yield back.

2177 Mr. {Pitts.} Chair thanks the gentleman and now
2178 recognizes the Ranking Member Emeritus, Distinguished
2179 Gentleman from Michigan, Mr. Dingell for 5 minutes for
2180 questions.

2181 Mr. {Dingell.} Mr. Chairman, I thank you for your
2182 courtesy. Professor Wolfman, you described in your testimony
2183 the sad story of Diana Levine who lost her arm as a result of
2184 an inadequate labeled drug. Here is a case of noneconomic
2185 damages and it is--we find it quite overwhelming. The lady
2186 in question was a musician by trade. Without her arm it is
2187 doubtful she will ever be able to return to her profession.
2188 She found as you indicated a small town Vermont lawyer who
2189 took the manufacturer all the way to the Supreme Court. In
2190 fact, I was one of those who joined a number of my colleagues
2191 in signing an amicus curiae Brief in support of the Levine
2192 case. I find it haunting as her lawyer hesitatingly admitted

2193 that her case might never have brought to court had a
2194 \$250,000 noneconomic damages cap been in place. Obviously it
2195 isn't every day that cases are taken all the way to the
2196 Supreme Court, and I hope it isn't every day that people
2197 suffer the kind of loss that she suffered.

2198 Now, Professor Wolfman, can you provide some other
2199 examples of the types of cases that you have seen dealing
2200 with FDA approved drugs and medical devices?

2201 Mr. {Wolfman.} Yes, I can, Representative Dingell, and
2202 what I would like to do is if I could direct your attention
2203 to my testimony and I will just--I know the time is short, so
2204 but beginning at page 12 of my testimony I talk about a
2205 number of other examples and one that I think is similar to
2206 the problem of Ms. Levine is the case of Karen Bartlett. She
2207 took an anti-inflammatory drug and these were in the same
2208 family of drugs as cause terrible problems and were taken off
2209 the market, the NSAID drugs. She ended up having all these
2210 complications including blindness. I think it is just awful
2211 and it is described in some detail, page 14 of my testimony.
2212 But the defense put up by the company was--required 50
2213 pretrial motions, 50 motions during trial. She had to hire
2214 four expert witnesses, a pharmacologist, a burn surgeon,
2215 economist, a life care planner and then there was another 50
2216 post trial motions after the verdict came in. Now, no

2217 rational lawyer could take that case given the enormous
2218 amount of noneconomic damages.

2219 Mr. {Dingell.} First off the preparing of the Briefs
2220 and the appearing of the filing of the papers and paying
2221 witness fees and a wide array of other things, the cost of
2222 that had to be astronomical.

2223 Mr. {Wolfman.} Right. And so--and yes she got a
2224 significant noneconomic damage award, \$16 million, but she is
2225 going to live blind her whole life. But the point is is that
2226 no rational lawyer knew the result going in, no rational
2227 lawyer would take that meritorious case if the limit was
2228 \$250,000. It is very--it is much easier to attack these kind
2229 of awards after the fact and that is the economic problem,
2230 the economic problem in looking at it from an after the fact
2231 perspective.

2232 Mr. {Dingell.} Thank you very much. Now, Dr. Kachalia,
2233 you work as a physician at Brigham and Women's Hospital and
2234 Harvard Medical School. I am interested in your perspective
2235 on this legislation. Does capping of liability of
2236 pharmaceutical companies protect physicians from lawsuits?

2237 Mr. {Kachalia.} So, the question is in regard to how I
2238 feel about the capping with the?

2239 Mr. {Dingell.} Yeah, does it--does capping of the
2240 liability protect you from lawsuits? Yes or no.

2241 Mr. {Kachalia.} Well, if you look at the data here, it
2242 seems that the capping liability does not seem to lower the
2243 number of claims, so it may not protect us from lawsuits.

2244 Mr. {Dingell.} Just--I have limited time. Yes or no?

2245 Mr. {Kachalia.} No.

2246 Mr. {Dingell.} All right, it seems that making drug
2247 companies less responsible would not help doctors. With--is
2248 it your opinion that this would interfere with your deciding
2249 what medication is best for your patient? Yes or no?

2250 Mr. {Kachalia.} Is my question what--I am sorry. Could
2251 you repeat the question one more time?

2252 Mr. {Dingell.} Well, it may--it is my view that capping
2253 of these risks may actually encourage drug companies to
2254 withhold safety data that you could use to best determine
2255 what medication is necessary for your patient. Is that a
2256 correct assumption on my part or not?

2257 Mr. {Kachalia.} I mean it is a possibility any time you
2258 cap a company's liability.

2259 Mr. {Dingell.} Thank you. Thank you. Now, well, thank
2260 you. I notice my time is up. Thank you, Mr. Chairman.

2261 Mr. {Pitts.} Chair thanks gentleman. The chair will
2262 now recognize the Vice-Chair of the Full Committee,
2263 gentlewoman from North Carolina Mrs. Myrick for 5 minutes.

2264 Mrs. {Myrick.} Thank you, Mr. Chairman. I would like

2265 to ask a question to Doctors Tippet and Hollier. Is that
2266 correct? Can you speak to the savings to the overall system
2267 that would result if a national medical liability law like
2268 H.R. 5 went into effect? And I ask that because there have
2269 been estimates that defensive medicine costs our Nation up to
2270 200 billion a year. And according to the Congressional
2271 Budget Office's recent publication Reducing the Deficit
2272 Spending and Revenue Options, comprehensive medical liability
2273 reform would reduce the budget deficit by \$62 billion over 10
2274 years. Dr. Tippet, you want to?

2275 Dr. {Tippet.} Well, I think that--I think that figure
2276 tells us that it is difficult to quantitate the exact amount.
2277 And I can only speak to my own personal knowledge. I see it
2278 happen every day in which tests are ordered that as I said
2279 earlier if given proper time if you weren't forced to do so
2280 because of your fears that someday if you didn't think of
2281 every possible diagnosis you wouldn't have ordered that test.
2282 But maybe I see patients all the time that I am trying to
2283 operate on and they have to have a cardiology clearance when
2284 everybody knows they don't really need a cardiology clearance
2285 but it is because of some mild thing, an EKG. I mean, you
2286 could go on and on. There is a huge cost and I see every day
2287 that increases the cost to you and me and to everyone else
2288 who tries to pay but because of a fear of being sued.

2289 Mrs. {Myrick.} Dr. Hollier?

2290 Ms. {Hollier.} Representative Myrick, I think H.R. 5
2291 would produce important cost savings. What we have seen in
2292 Texas after the passage of liability reform is that a number
2293 of healthcare systems had had significant liability savings
2294 and they have reinvested those savings in new technology, in
2295 patient care, and in patient safety initiatives.

2296 Mrs. {Myrick.} Do you think the current medical
2297 professional liability system makes you a better or a safer
2298 doctor by acting as an incentive to practice good medicine?
2299 Both of you again.

2300 Dr. {Tippett.} Shall I go first? Well, I think the
2301 perfect example and I have heard over and over today how if
2302 you get--have these lawsuits then it is going to get rid of
2303 the bad doctors in the system. And I think about a pole that
2304 we just did among the leaders of neurosurgery in the United
2305 States. One hundred of our best cream of the cream
2306 leadership in neurosurgery almost all of them academics, 25
2307 percent had been sued between four and seven times for
2308 liability. Twenty-five percent--does that mean we need to
2309 get rid of all of those 25 percent? Are they bad doctors?
2310 Well, obviously not. They handle the complex cases. They
2311 take care of the most difficult patients. It is absurd.

2312 Mrs. {Myrick.} Yeah, that is a challenge in our

2313 community, too with our neurosurgeons in particular when--
2314 because it is a large hospital that does handle very
2315 complicated cases and not just--I mean, nothing is run of the
2316 mill when it comes to your brain and neurology et cetera, but
2317 it is a real concern. And we are seeing people who are--some
2318 of my friends who are in their late, maybe mid-50's and they
2319 are telling me over and over again both in OB-GYN and
2320 neurology or neurosurgeons that they are going to retire and
2321 we are losing--we stand a really strong shot of losing some
2322 really good top notch doctors. And doesn't mean that others
2323 will take their place, but they are telling me that the
2324 younger people aren't coming into their professions. And so
2325 there is this you know, what are we going to do to service
2326 the population? And that really is where I am coming from
2327 when I talk about is there a way to bring this under control
2328 so we don't have some of the so called defensive medicine. I
2329 appreciate your time and being here today. Thank you all.
2330 And I yield back.

2331 Mr. {Pitts.} Chair thanks--

2332 Dr. {Burgess.} Will you yield?

2333 Mr. {Pitts.} Go ahead.

2334 Mrs. {Myrick.} Yes.

2335 Dr. {Burgess.} I thank the gentlelady for yielding.

2336 Ms. Doroshow, I need to ask you a question about your

2337 testimony about McAllen, Texas. I am aware of Dr. Gandhi's
2338 article. I don't know if you are aware and I apologize for
2339 not having it here, but he has written a subsequent article
2340 where he questions some of his own conclusions on that. But
2341 because of the article that Dr. Gandhi wrote a couple of
2342 years ago I went to McAllen, Texas and visited with the
2343 doctors down there. The question before me was are doctors
2344 in McAllen, Texas over utilizing in order to overbill
2345 Medicare? And I think what Dr. Gandhi thought--found in his
2346 subsequent relook was that it is the publicly financed
2347 systems of medical care, Medicare, Medicaid, SCHIP which seem
2348 to be prone to this type of difficulty. You rarely see Etna,
2349 Cigna, and United sending wheelchairs to patients who don't
2350 need them. So something about the precertification process
2351 was helpful there. But the other thing and the reason that
2352 medical liability reform was important in the equation was
2353 nobody practiced in McAllen prior to 2003. The reason there
2354 are so many urological procedures done now in McAllen is they
2355 hadn't had a urologist for over a decade. There was a lot of
2356 pathology that had gone undiagnosed and untreated. So it is
2357 not just a simple equation as these sometimes draw. The
2358 President I know has made a big deal of this that Texas
2359 proves that medical liability reform does not bring down
2360 costs. I would say those two statements are true, true, and

2361 unrelated. McAllen is a different location because of some
2362 of the problems that were brought because of medical
2363 liability. Thank you, Mr. Chairman. I will yield back.

2364 Mr. {Pitts.} Chair thanks the gentleman and recognizes
2365 the gentleman from Kentucky, Mr. Whitfield for 5 minutes for
2366 questions.

2367 Mr. {Whitfield.} Thank you, Mr. Chairman. I want to
2368 thank the witnesses for being here today. We appreciate your
2369 taking time to discuss this with us. Since I was not here,
2370 maybe you have already covered this and if you have that will
2371 be fine, but it is my understanding that many medical
2372 students when they are looking for their specialty that one
2373 of the considerations that they look at is liability. And we
2374 know that a large percentage of OB-GYN physicians are sued.
2375 We know that neurosurgeons are sued and Dr. Hollier, you
2376 responded to that. Would you agree that that is an issue
2377 with--I mean, what I am concerned about we may be getting in
2378 some specialty areas that may have a shortage in the future
2379 perhaps.

2380 Dr. {Hollier.} It is an important concern. I have been
2381 counseling medical students in conjunction with UT Houston
2382 Medical School for a number of years both before and after
2383 the liability reforms in Texas. Before the reforms, one
2384 issue that always came up in speaking with medical students

2385 was their concern about entering the field of obstetrics
2386 because of the medical liability. They were seeing
2387 practicing OB-GYN's having to close their offices and stop
2388 practicing obstetrics at very young ages and that is not a
2389 future that they wanted.

2390 After the medical liability reforms, my counseling
2391 sessions are very different and medical students have a
2392 renewed interest in our specialty preserving the healthcare
2393 limit for the future.

2394 Mr. {Whitfield.} Dr. Burgess, I would be happy to yield
2395 additional time if you would like it.

2396 Dr. {Burgess.} And I thank the gentleman for yielding.
2397 Dr. Tibbett, you were starting to talk about patient safety a
2398 moment ago and how the impact of medical liability reform may
2399 in fact advance the cause of patient safety and just like
2400 you, I mean, I can recall multiple anecdotes from the past.
2401 But one of the most striking for me was my very first year in
2402 Congress I wasn't on the Health Subcommittee--Congress. I
2403 was on the Transportation Committee because that is where
2404 doctors go when they come to Congress. And the chairman at
2405 that time was a gentleman from Alaska and one afternoon I
2406 found myself in Nome, Alaska with the chairman and he had
2407 sort of a Chamber of Commerce luncheon. I was seated at a
2408 table of doctors and they were all excited about the fact

2409 that we might pass medical liability reform in Washington.
2410 And I said, so is it a problem here? They said it is an
2411 enormous problem. So I asked the gentleman sitting next to
2412 me what type of medicine do you practice? He said well, just
2413 like you I am an OB-GYN. And he said we can't get an
2414 anesthesiologist up here because of the problems with medical
2415 liability. I said wait a minute, Bubba, you can't practice
2416 OB-GYN without an anesthesiologist. What--forget an epidural
2417 in labor--what do you do if you have to do a C-section? He
2418 said we have to get them on an airy and get them to
2419 Anchorage. I mean, that is 400 miles away and this was in
2420 the middle of the summer and some of the worst weather I had
2421 ever seen in my life. I got to believe it is worse in the
2422 winter. How is patient safety advanced by putting a mother
2423 on an air ambulance to Anchorage, Alaska from Nome? I mean,
2424 that is the sort of thing we are talking about. Is that not
2425 correct?

2426 Dr. {Tippett.} Yes, sir, it certainly is. And you can
2427 go on from there. The trauma system in our country is so
2428 dependent on immediate, immediate availability of the
2429 critical specialties. You have seen that in your own body
2430 here in the last few months of what happens when you have the
2431 immediate availability of a neurosurgeon and others to take
2432 care of something like a head injury or a gunshot wound. If

2433 that goes away then you lose all of this. I applaud my
2434 dermatology colleagues but they really can't take care of a
2435 blunt gunshot wound to the brain when it comes in. And when
2436 we have medical students who are purely interested in going
2437 to dermatology now it really worries me. And when you have
2438 neurosurgeons who 68 percent of them are not doing Pediatric
2439 neurosurgery anymore it is not because they don't want to.
2440 It is because of the long problems that you have with statute
2441 of limitations and other things with taking care of child.
2442 It is a travesty.

2443 Dr. {Burgess.} Yes, sir, and you know in Texas right
2444 before we passed the reforms in 2003, the Dallas-Fort Worth
2445 area lost one of its two neurosurgeons because of the renewal
2446 for their liability premium. It was well into six figures.
2447 It was a fantastic amount of money. He said I can't do it.
2448 I am not. I am going to go work, get an academic medical
2449 center somewhere. We had one neurosurgeon. It put the
2450 entire trauma system of the Dallas-Fort Worth Metroplex at
2451 risk because one guy cannot cover an area of four million
2452 people 24 hours a day, seven days a week. And we were at
2453 risk of losing our trauma designation. So it--I mean, these
2454 are real world--patient safety isn't going to be advanced if
2455 that happens. Is that correct?

2456 Dr. {Tippett.} That is absolutely correct. I can cite-

2457 -I mean half the neurosurgeons in South Florida for example
2458 can't afford to have liability insurance. As we said here
2459 today they are having to self insure. And I talk to
2460 neurosurgeon after neurosurgeon. A young one goes down to
2461 Miami to practice and says I just can't take the emotional
2462 stress of not having liability. I mean you can imagine with
2463 the hatchet hanging over your head every day you just can't
2464 take it. And you could go on and on around the country. We
2465 are at great risk not only of having young people not go into
2466 the various specialties, but also having them limit their
2467 practice after they do. We have a big problem in
2468 neurosurgery now with neurosurgeons saying I am just going to
2469 become a spine surgeon. I am not going to take care of
2470 cranial problems. And it is purely because of this and other
2471 issues which we are talking about something to try to do
2472 something to correct that right now.

2473 I keep hearing all of this about we don't have any
2474 evidence and I keep--I am a country neurosurgeon, but it
2475 looks to me like 35 years of experience in California is a
2476 pretty good example of how things work. And I haven't really
2477 seen a lot patient people leave California because they
2478 didn't get \$250,000 cap. And I also haven't seen plaintiffs'
2479 attorneys go away in California in the last 35 years. They
2480 all seem to be doing pretty well.

2481 Mr. {Pitts.} The gentleman's time is expired. Chair
2482 recognizes gentleman from New Jersey, Mr. Lance for 5
2483 minutes.

2484 Mr. {Lance.} Thank you very much. Let me just say that
2485 in New Jersey we really do not have medical malpractice
2486 insurance reform the way it exists in States like California
2487 and Texas. And we have among the highest health insurance
2488 costs in the nation. In some surveys we are really at the
2489 top which is of course extremely expensive for everyone--our
2490 residents and the business community. And this is an issue
2491 of great importance and I support what we are trying to do
2492 here. And I know that Dr. Burgess has other questions and
2493 Mr. Chairman, I would ask that my term-time be given to Dr.
2494 Burgess.

2495 Dr. {Burgess.} I thank the gentleman for yielding. Mr.
2496 Wolfman, you cite some rather dramatic examples in your
2497 testimony. I got to tell you administration of Phenergan
2498 entering a course of a therapeutic event is something I saw I
2499 don't know how many tens of thousands of times during my
2500 professional career. True enough there can be a rare but
2501 severe reaction which is what you mentioned in your papers.
2502 Stephens-Johnsons syndrome, a fixed drug eruption doesn't
2503 happen very often. When it does it is so dramatic you will
2504 never forget it. Is it possible to construct a system to

2505 help people who are harmed by the extremely rare outliers and
2506 not punish everyone else along the way?

2507 Mr. {Wolfman.} I don't know the answer to, you know,
2508 everything that you might do to construct a person--perfect
2509 health care system with a perfect set of incentives, but let
2510 me just say this. Going back to the Phenergan issue, no
2511 question Phenergan is used, you know frequently. It was the
2512 method of administration that wasn't warned against. The
2513 company had evidence--

2514 Dr. {Burgess.} But to be fair there and we have another
2515 OB-GYN on the panel. I mean, I cannot tell you how many
2516 times I ordered the administration of Demerol and Phenergan
2517 intravenously for someone who was in pain.

2518 Mr. {Wolfman.} Well, the FDA says it is not a good idea
2519 and the--one of the competitors of Wyeth said it was not--
2520 shouldn't be done either. But I--the point is is that these
2521 cases--I tried to be fair in my testimony. I put out five
2522 examples. You could use many others. Two of them went to
2523 defendant's verdicts. You know the point was that these were
2524 all cases that were you know reasonable cases to the ball--
2525 all cases in the ballpark. None of those cases would have
2526 been brought if there was a \$250,000 cap.

2527 Dr. {Burgess.} But it was reasonable not to bring a
2528 case, but these are cases that represented the extremes of

2529 incidents in medical practice.

2530 Mr. {Wolfman.} Right.

2531 Dr. {Burgess.} Should we be legislating to the extreme?

2532 Is that the type of--is that the type of system that will

2533 yield the best, most cost effective result?

2534 Mr. {Wolfman.} Well, I think the--again there is two

2535 questions there. One is are you creating the proper

2536 incentives for the physicians? Also are you properly

2537 compensating the victim of the problem? I don't agree and we

2538 could be here all day saying that these were extreme

2539 situations. I think in these instances, for instance in Ms.

2540 Levine's situation you had a potentially very, very serious

2541 side effect that was greatly augmented by the way it was

2542 administered and she came into the hospital with a headache.

2543 So the risk benefit wasn't appropriately calculated in that

2544 situation because the company failed to warn about the method

2545 of administration.

2546 Dr. {Burgess.} Let me just interrupt you a second to

2547 Hollier--do you still give Demerol and Phenergan to women in

2548 labor?

2549 Dr. {Hollier.} Yes, sir.

2550 Dr. {Burgess.} And is it sometimes administered through

2551 an IV?

2552 Dr. {Hollier.} Yes, sir.

2553 Dr. {Burgess.} Okay. I just wanted to make sure I
2554 hadn't missed--

2555 Mr. {Wolfman.} No, no, no--

2556 Dr. {Burgess.} Shouldn't--hadn't missed something in
2557 the last 8 years.

2558 Mr. {Wolfman.} No--

2559 Dr. {Burgess.} I appreciate the continuing of this case
2560 and I am going to mark that down as one of my--

2561 Mr. {Wolfman.} With all respect, that--with all
2562 respect, that was the problem. Ms. Levine didn't get it
2563 through an IV. The testimony was clear even from the
2564 defendant's witnesses that if it had been administered
2565 through IV it was virtually certain that she would not have
2566 been harmed.

2567 Dr. {Burgess.} Let me ask you a question because you
2568 seem to have a beef with the Food and Drug Administration.
2569 And I will just tell you right now we are up against a
2570 significant problem in this country. The Food and Drug
2571 Administration has gotten so risk adverse that virtually
2572 nothing can get through. We heard from medical device
2573 manufacturers here in one of our other subcommittees the
2574 other day. There is an enormous amount of human suffering
2575 and the potential for curing disease that is essentially
2576 being left on the shelf in the pipeline going to other

2577 countries. Some panel--we have to work together to find a
2578 way to stop this top heavy, top down centralized punitive
2579 activity that is going on at the Food and Drug
2580 Administration. And unfortunately from some of the testimony
2581 you provide us here today I don't see us moving in that
2582 direction. We have got to work past this. These are not
2583 people who are bringing devices to the market that want to
2584 harm someone. These are not companies that are developing
2585 spending millions of dollars on developing new medications to
2586 harm someone. They are trying to alleviate human suffering
2587 and cure problems and prevent problems, and we have made the
2588 landscape almost unnavigable for particularly the small
2589 device manufacturers. But I will speak with the
2590 pharmaceutical industry. And thank you, Mr. Chairman. I
2591 will yield back.

2592 Mr. {Pitts.} Gentleman's time is expired. This has
2593 been an excellent panel. In conclusion I would like to thank
2594 all of the witnesses and the members that participated in
2595 today's hearing. And I remind members that they have 10
2596 business days to submit questions for the record. Members
2597 should submit their questions by the close of business on
2598 April 20, and I ask that the witnesses all agree to respond
2599 promptly to these questions. Thank you again for the
2600 excellent testimony and this Subcommittee is now adjourned.

2601 [Whereupon, at 11:52 a.m., the Subcommittee was
2602 adjourned.]