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4 HEALTHCARE (HEALTH) ACT OF 2011 AND THE COMMITTEE'S OVERSIGHT PLAN

5 Wednesday, February 9, 2011

6 House of Representatives

7 Committee on the Judiciary

8 Washington, D.C.

9 The committee met, pursuant to call, at 10:10 a.m., in Room 2141,
10 Rayburn Office Building, Hon. Lamar Smith [chairman of the committee]
11 presiding.

12 Present: Representatives Smith, Sensenbrenner, Coble, Gallegly,
13 Goodlatte, Lungren, Chabot, Issa, Pence, Forbes, King, Franks, Gohmert,
14 Jordan, Poe, Chaffetz, Reed, Griffin, Marino, Gowdy, Ross, Adams, Quayle,
15 Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters,
16 Cohen, Johnson, Pierluisi, Quigley, Chu, Deutch, Sanchez, and Wasserman
17 Schultz.

18 Staff present: Sean McLaughlin, Chief of Staff; Allison Halatei,
19 Deputy Chief of Staff/Parliamentarian; Sarah Kish, Clerk; Perry Apfelbaum,
20 Minority Staff Director.

21 Chairman Smith. [Presiding] The Judiciary Committee will come to
22 order.

23 And the clerk will call the roll to determine whether we have a
24 working quorum.

25 Ms. Kish. Mr. Smith?

26 Chairman Smith. Present.

27 Ms. Kish. Mr. Sensenbrenner?

28 Mr. Sensenbrenner. Present.

29 Mr. Coble?

30 Mr. Gallegly?

31 Mr. Goodlatte?

32 Mr. Lungren?

33 Mr. Chabot?

34 Mr. Issa?

35 Mr. Issa. Present.

36 Ms. Kish. Mr. Pence?

37 Mr. Forbes?

38 Mr. King?

39 Mr. Franks?

40 Mr. Franks. Here.

41 Ms. Kish. Mr. Gohmert?

42 Mr. Jordan?

43 Mr. Poe?

44 Mr. Chaffetz?

45 Mr. Reed?

46 Mr. Reed. Here.

47 Ms. Kish. Mr. Griffin?

48 Mr. Griffin. Here.

49 Ms. Kish. Mr. Marino?

50 Mr. Gowdy?

51 Mr. Ross?

52 Ms. Adams?

53 Ms. Adams. Present.

54 Ms. Kish. Mr. Quayle?

55 Mr. Conyers?

56 Mr. Conyers. Present.

57 Ms. Kish. Mr. Berman?

58 Mr. Nadler?

59 Mr. Nadler. Here.

60 Ms. Kish. Mr. Scott?

61 Ms. Scott. Present.

62 Ms. Kish. Mr. Watt?

63 Ms. Lofgren?

64 Ms. Jackson Lee?

65 Ms. Waters?

66 Ms. Waters. Here.

67 Ms. Kish. Mr. Cohen?

68 Mr. Cohen. Here.

69 Ms. Kish. Mr. Johnson?

70 Mr. Johnson. Present.

71 Ms. Kish. Mr. Pierluisi?

72 Mr. Quigley?

73 Ms. Chu?

74 Mr. Deutch?

75 Ms. Sanchez?

76 Ms. Sanchez. Present.

77 Ms. Kish. Ms. Wasserman Schultz?

78 Chairman Smith. The Clerk will report.

79 Ms. Kish. Mr. Chairman, 15 members responded present.

80 Chairman Smith. Okay, a working quorum is present and we will
81 proceed.

82 Pursuant to notice, our first order of business is the adoption of
83 the committee's Oversight Plan for the 112th Congress. Each member
84 should have a copy in front of them and the clerk will report the
85 Oversight Plan.

86 Ms. Kish. "Committee on the Judiciary, Oversight Plan for the
87 112th Congress.

88 "In accordance with Rule X of the House of Representatives, the
89 Committee on the Judiciary is responsible for determining whether the
90 laws and programs within its jurisdiction are implemented and carried out
91 in accordance with the intent of Congress and whether they should be
92 continued, curtailed" --

93 Chairman Smith. Without objection, the oversight plan is
94 considered as read.

95 [The information follows:]

96 Chairman Smith. And I will recognize myself for a very brief
97 statement, and without objection, the rest of my statement and, if he
98 wishes, the statement of the ranking member will be made a part of the
99 record.

100 [The statements follow:]

101 Chairman Smith. House Rule X requires every standing committee to
102 adopt an oversight plan by February 15th of each of the new Congresses.
103 Before us is the Judiciary Committee's Oversight Plan for the 112th
104 Congress.

105 Oversight is the legitimate and necessary work of Congress to
106 improve the operation and function of the executive branch and ensure
107 that Federal agencies are responsive to the interests of the American
108 people. As Congress works to draft a responsible Federal spending plan
109 and ease the Government's burden on business, robust and effective
110 oversight will be crucial to the success of such efforts.

111 The oversight plan is nonbinding, so committee members may consider
112 other subjects that fall within our jurisdiction.

113 The committee's oversight function is one of its core
114 responsibilities. The committee has always conducted robust oversight
115 and I look forward to continuing that tradition during this Congress.

116 Does the gentleman from Michigan have any additional comments to
117 make? If so, he is recognized.

118 Mr. Conyers. Thank you, Chairman Smith.

119 I look forward to continuing the fair, cooperative work that you
120 and I have engaged in over the years. I am in complete agreement with
121 the oversight document and so is every other member on this side of the
122 aisle, to my knowledge. And we are proud of the Judiciary Committee's
123 proud legacy of responsible oversight, and I think that we can all expect
124 to continue that tradition.

125 Chairman Smith. Thank you, Mr. Conyers.

126 Are there any amendments?

127 [No response.]

128 Chairman Smith. If not, the question is on adopting the Judiciary
129 Committee Oversight Plan for the 112th Congress. All in favor, say aye.

130 [A chorus of ayes.]

131 Chairman Smith. Opposed, nay.

132 [No response.]

133 Chairman Smith. The ayes have it and the oversight plan is
134 adopted.

135 Pursuant to notice, I now call up H.R. 5 for purposes of markup.

136 The clerk will report the bill.

137 Ms. Kish. H.R. 5, to improve patient access to health care
138 services and provide improved medical care by reducing the excessive
139 burden the liability system places on the health care delivery system.

140 In the House of Representatives --

141 Chairman Smith. Without objection, the bill is considered as read.

142 [The information follows:]

143 Chairman Smith. And I will recognize myself for purposes of an
144 opening statement.

145 First of all, I would like to welcome the doctors we have with us
146 today. There are several in the audience, many of whom are attending the
147 American Medical Association's annual legislative conference.

148 The HEALTH Act, H.R. 5, is modeled after California's decades-old
149 and highly successful health care litigation reforms. It addresses the
150 current crisis in health care by reining in unlimited lawsuits and making
151 health care delivery more accessible and cost effective in the United
152 States.

153 According to data of the National Association of Insurance
154 Commissioners, the rate of increase in medical professional liability
155 premiums in California since 1976 has been 280 percent lower than the
156 rate of increase experienced in other States.

157 By incorporating California's time-tested reforms at the Federal
158 level, the HEALTH Act saves taxpayers billions of dollars, encourages
159 health care practitioners to maintain their practices whenever they want
160 -- wherever they want to help people, and reduces health care costs for
161 patients. Its enactment especially will help traditionally underserved
162 rural and inner city communities and women seeking obstetrics care.

163 The reforms in H.R. 5 include a \$250,000 cap on noneconomic damages
164 and limits on the contingency fees lawyers can charge. It authorizes
165 defendants to introduce evidence showing the plaintiff received
166 compensation for losses from outside sources to prevent double
167 recoveries. It allows courts to require periodic payments for future

168 damages instead of lump sum awards that prevent bankruptcies in which
169 plaintiffs would receive only pennies on the dollar.

170 And the HEALTH Act includes provisions creating a "fair share" rule
171 by which damages are allocated fairly in direct proportion to fault and
172 reasonable guidelines but not caps on the award of punitive damages.

173 The HEALTH Act accomplishes reform without, in any way, limiting
174 compensation for 100 percent of plaintiffs' economic losses which include
175 anything to which a receipt can be attached. In fact, the HEALTH Act
176 contains the same legal reforms that have been the law in California for
177 over 30 years, and in that State, medical damages have been awarded in
178 deserving cases in the \$80 million and \$90 million range. Those
179 unlimited damages include all their medical costs, their lost wages,
180 their future lost wages, rehabilitation costs, and any other economic
181 out-of-pocket loss suffered as a result of a health care injury.

182 The HEALTH Act also does not preempt any State law that otherwise
183 caps damages.

184 The HEALTH Act reduces the waste in our health care system caused
185 by so-called "defensive medicine." This practice occurs when doctors are
186 forced by the threat of lawsuits to conduct tests and prescribe drugs
187 that are not medically required.

188 According to a Harvard University research study, 40 percent of
189 medical malpractice lawsuits filed in the United States lack evidence of
190 medical error or any actual patient injury. Many of these suits are
191 nothing more than the legalized extortion of doctors and hospitals, but
192 because there are so many lawsuits, doctors are forced to conduct medical

193 tests simply to avoid a lawsuit in which lawyers claim everything
194 possible was not done for the patient. Taxpayers pay for this wasteful
195 defensive medicine which adds to all our health care costs without
196 improving the quality of patient care.

197 In his 2011 State of the Union Address, President Obama said,
198 quote, I'm willing to look at other ideas to bring down costs, including
199 one that Republicans suggested last year: medical malpractice reform to
200 rein in frivolous lawsuits. End quote. Let's give the President
201 something to consider by favorably reporting out this crucial
202 legislation.

203 The HEALTH Act is more widely supported today than ever. Last
204 year, the Congressional Budget Office determined that this legal reform
205 package would reduce the Federal budget deficit by an estimated \$54
206 billion over the next 10 years. Another CBO report estimates that,
207 quote, premiums for medical malpractice insurance ultimately would be an
208 average of 25 percent to 30 percent below what they would be under
209 current law. End quote.

210 The Government Accountability Office has found that rising
211 litigation awards are responsible for skyrocketing medical professional
212 liability premiums. Its report states that, quote, GAO found that losses
213 on medical malpractice claims which make up the largest part of insurers'
214 costs appear to be the primary driver of rate increases in the long run.
215 End quote. The GAO also concluded that insurer profits are not
216 increasing, indicating that insurers are not charging and profiting from
217 excessively high premium rates. End quote.

218 All these recommended reforms are included in the HEALTH Act.

219 As a USA Today editorial concluded, one glaring omission from the
220 Democrats' health care law was significant tort reform. End quote.

221 We can remedy that today by favorably reporting out the HEALTH Act
222 and showing our unified commitment to significant tort reform.

223 The gentleman from Michigan, the ranking member of the Judiciary
224 Committee, Mr. Conyers, is recognized for his opening statement.

225 Mr. Conyers. Thank you, Chairman Smith.

226 And I too join in in welcoming any of our medical professionals and
227 health care people that are with us in the Judiciary Committee this
228 morning.

229 Now, 13 times since 1995 the House of Representatives have
230 considered this same measure. It has never become law. And now this is
231 the 14th try. I predict that things will not change much during the
232 course of this 112th session of Congress.

233 But why do I say that? Well, nearly 100,000 people die in this
234 country each and every year from medical malpractice, and at a time when
235 5 percent of the health care professionals -- only 5 percent, a few --
236 cause 54 percent of all medical malpractice injuries and when only one
237 out of eight malpractice victims ever file a claim in the first place,
238 the last thing we need to do is exacerbate this problem while ignoring
239 the true causes of the medical malpractice crisis in America. In other
240 words, let's just blame the lawyers. They are the ones that bring the
241 cases. So if we can cap their damages, wouldn't that solve our problems?
242 I don't think so.

243 Notice we don't cap any other law claims. Health insurance lawyers
244 aren't capped, by the way. Corporate lawyers don't have any cap.
245 Lawyers of any other specialty are not capped, but let's cap the claims
246 of people who are injured or claim to be injured in the health care
247 industry. Let's cap them because it is the lawyers that are bringing
248 these fallacious claims. But yet, 100,000 people die in this country
249 every year from medical malpractice.

250 So the bill before us, like all the other 13 bills that were before
251 us, would supersede the law in every State in the Union. Remember, my
252 friends on the right don't like big Government, but it is very important
253 that the Federal Government step in now and prevent every State by
254 determining what their cap on noneconomic damages should be and to limit
255 punitive damages and cap attorney's fees for poor victims and shorten the
256 statute of limitations for claims and eliminate joint and several
257 liability and eliminate the collateral source rule.

258 The question really before us is why again would we want a bill
259 like this. I am glad you asked that question, former Chairman.

260 First, this measure would help the producers of killer devices like
261 the Dalkon Shield, like the Cooper-7 IUD, like the high-estrogen oral
262 contraceptives, like the defective pacemakers, like Vioxx and the weight
263 loss drug phen-fen, who all completely avoid billions of dollars in
264 punitive damages. And so rather than helping doctors and victims, the
265 bill before us represents a windfall, dare I say it, for the health care
266 industry. It pads the pockets of the insurance companies and some HMO's
267 and the manufacturers and distributors of defective medical products and

268 devices, and let's not forget the pharmaceuticals. It does so at the
269 expense of innocent victims, particularly women, children, the elderly,
270 and the poor.

271 It is also clear that a legislative solution largely focused on
272 limiting victims' rights available under our State tort system will do
273 little other than increase the incidence of medical malpractice, already
274 the sixth leading cause of preventable death in our Nation. Under the
275 proposed caps on damages, Congress would be saying to the American people
276 that we are sorry, but we don't care if you lose your ability to bear
277 children. We are sorry, but we don't care if you are forced to bear
278 excruciating pain for the remainder of your life. We don't care if you
279 are even permanently disfigured or crippled for the rest of your time on
280 earth.

281 The proposed new statute of limitations takes absolutely no account
282 of the fact that many injuries caused by malpractice or faulty drugs
283 takes years and sometimes longer to manifest themselves and trace the
284 root cause.

285 The so-called periodic payment provisions are nothing less than a
286 Federal installment plan for HMO's.

287 And so I am ashamed of this measure, but this is the 14th time so
288 my shame is somewhat diminished. I am getting used to it, to this being
289 presented.

290 And I regret that my good friend from Virginia, Bob Goodlatte's
291 amendment to fix some of these problems, which I support, were withdrawn
292 from consideration just this morning.

293 This bill would allow insurance companies teetering on the verge of
294 bankruptcy -- and there are some -- to delay and then completely avoid
295 future financial obligations. They would have no obligation to pay
296 interest on amounts they owe their victims that they don't dispute.

297 And who else gets a sweetheart deal under this legislation? The
298 drug companies, most of which, I am sorry to say, are foreign.

299 A wide array of groups have expressed opposition to this measure,
300 including the American Bar Association, Public Citizen, and other groups
301 like the National Association of State Legislators.

302 I urge that we carefully consider and reject this anti-patient,
303 inhumane proposal that is before us this morning.

304 And I thank you, Mr. Chairman.

305 Chairman Smith. Thank you, Mr. Conyers.

306 Before I recognize the chairman and the ranking member of the
307 subcommittee of jurisdiction for their opening statements, I would like
308 to briefly recognize the gentleman from Wisconsin, Mr. Sensenbrenner, for
309 a statement.

310 Mr. Sensenbrenner. Mr. Chairman, when this bill was considered in
311 the 109th Congress, I recused myself because of significant investments
312 that I have in the pharmaceutical industry. The provisions relative to
313 the pharmaceutical industry in this bill are either identical or
314 substantially similar to the bill in the third preceding Congress to this
315 one, and accordingly, I want to insert in the record a statement that I
316 am recusing myself from consideration of this bill as well.

317 [The statement follows:]

318 Chairman Smith. Okay. Thank you, Mr. Sensenbrenner.

319 We will now go to the --

320 Mr. Conyers. Mr. Chairman, could I thank the former chairman of
321 this committee for his statement?

322 Mr. Sensenbrenner. You are welcome.

323 Chairman Smith. The gentleman from Arizona, Mr. Franks, the
324 chairman of the subcommittee, is recognized for an opening statement.

325 Mr. Franks. Well, thank you, Mr. Chairman.

326 Mr. Chairman, the medical liability litigation system in the United
327 States truly is broken and in desperate need of reform. The current
328 system is an ineffective mechanism for adjudicating medical liability
329 claims. This leads to increased health care costs, unfair and unequal
330 awards for victims of medical malpractice, and reduced access to health
331 care for all Americans.

332 As we learned during our full committee hearing 3 weeks ago, our
333 broken liability system drives physicians out of the practice of medicine
334 in the primes of their careers and pushes others away from high-risk
335 medical specialties. Now, this results, Mr. Chairman, in patients losing
336 access to higher quality health care. It results in women having to
337 drive great distances to deliver their babies because their local
338 hospital doesn't have an ob-gyn, those needing complicated procedures
339 being placed on waiting lists for months because the only available
340 specialist has too many patients seeking care, and in accident victims
341 losing their lives because their local emergency room no longer has a
342 trauma center.

343 Only medical reforms and liability reforms at the Federal level can
344 address the current national medical liability crisis. Unfortunately,
345 last year's massive health care overhaul did nothing to meaningfully
346 address the medical liability reform.

347 One of the largest drivers of the crisis is the practice of
348 defensive medicine. Defensive medicine, Mr. Chairman, leads doctors to
349 order unnecessary tests and procedures, not to ensure the health of the
350 patient, but out of fear of malpractice liability. A recent study in the
351 Archives of Internal Medicine revealed that 91 percent of doctors
352 practice defensive medicine. Additionally, a report of the Massachusetts
353 Medical Society found that 28 percent of tests, procedures, referrals,
354 and consultations and 13 percent of hospitals were ordered for defensive
355 reasons.

356 The costs of defensive medicine are staggering. According to a
357 Department of Health and Human Services report, the cost of defensive
358 medicine is estimated at between \$70 billion and 126 billion per year.

359 Out-of-control medical liability litigation also increases the cost
360 of health care by escalating medical liability insurance premiums. It is
361 estimated that medical liability premiums have climbed 2,000 percent
362 since 1975. That is four times the rate of inflation. Higher medical
363 liability premiums lead to increased cost through the health care system
364 and reduced access to medical services.

365 Mr. Chairman, we must reform the medical liability system in the
366 United States. Among other benefits, reform could lead to a significant
367 savings on health care, reduce the practice of defensive medicine, halt

368 the exodus of doctors from high litigation States and medical
369 specialties, improve access to health care, and save American taxpayers
370 billions of dollars annually, while increasing the affordability of
371 health insurance. We have seen the positive effects meaningful medical
372 liability reforms have had in States such as California and Texas, and
373 Mr. Chairman, it is time for the Federal Government to enact these
374 reforms for the benefit of all Americans.

375 Chairman Smith. Thank you, Mr. Franks.

376 The gentleman from New York, Mr. Nadler, is recognized for his
377 opening statement.

378 Mr. Nadler. Thank you, Mr. Chairman.

379 As I have said before in this committee, the so-called medical
380 malpractice reform is a solution in search of a problem or perhaps the
381 wrong solution for an existing problem. You want to reduce the
382 astronomical costs of health care in the country? Med mal reform will
383 solve the problem. You want to curb the practice of defensive medicine?
384 Med mal reform is sure to fix it. You want to drive frivolous lawsuits
385 out of the legal system? Med mal will do it. You want to address the
386 rising costs of doctors' insurance premiums? Med mal reform is the
387 answer.

388 I have worked on this issue off and on for more than 25 years, and
389 time and again the evidence shows that the medical malpractice reforms
390 proposed in this bill are not panaceas. Capping damages or otherwise
391 preventing people harmed by their doctors from entering the local
392 courthouse will not bring down the rising costs of health care. The

393 Affordable Health Care Act, on the other hand, which has been supported
394 by the American Medical Association and by other medical groups around
395 the country and which has been attacked by the new Republican leadership
396 from the moment they -- from before they took office, in fact, will do
397 that.

398 Now, we are told that malpractice reform will curb the widespread
399 and expensive practice of defensive medicine. Yet, experts and health
400 care analysts have not been able to determine whether or to what extent
401 defensive medicine in fact occurs.

402 On the one hand, we are told by H.R. 5 supporters that defensive
403 medicine -- that is, where a doctor orders medically unnecessary tests
404 and treatments out of fear of being sued -- is to blame for the high cost
405 of doctors' premiums. Where do these statistics come from? Nowhere.
406 Anecdotal evidence. When you ask a doctor, as one of my colleagues did
407 of our witness, Dr. Hoven, whether she engages in defensive medicine, we
408 are always told, absolutely not.

409 Yet, a simple look at the evidence tells the story. The Government
410 Accountability Office has repeated that, quote, the overall prevalence
411 and cost of defensive medicine has not been reliably measured, unquote.
412 So the truth is that we don't really know of the existence of or the
413 degree of the practice of defensive medicine. We don't know its cost or
414 whether barring meritorious cases from going forward or capping damages
415 can prevent whatever defensive medicine may be taking place.

416 Next we are told that medical malpractice reforms of the type in
417 this bill can root out all those frivolous lawsuits that supposedly drive

418 up doctors' premiums. Yet, here too a simple look at the evidence paints
419 a different picture. According to a May 2009 study by WellPoint, which
420 provides medical malpractice insurance products, the cost of malpractice
421 awards is not what is driving up the cost of our health insurance
422 premiums. Rather, it is a combination of factors, including an increase
423 in utilization, excessive price inflation for medical services, and an
424 overall unhealthier America that is more to blame.

425 Additionally, the so-called medical malpractice reform and other
426 efforts to restrict patients' rights do nothing to eliminate preventable
427 medical errors. Every year, as many as 98,000 Americans die because of
428 preventable medical errors. H.R. 5 will do nothing to help save these
429 lives.

430 Furthermore, the idea that our legal system is inundated with
431 frivolous lawsuits is not supported by the facts. A 2006 study by the
432 New England Journal of Medicine found that the contention that frivolous
433 lawsuits have overrun the judicial system is, quote, overblown. Close
434 quote. Instead, research shows that the vast majority of malpractice
435 claims, about 97 percent in fact, involved an actual medical injury and
436 that 80 percent involved a major disability or death. In fact, study
437 after study shows that most people who suffer real damages as a result of
438 medical negligence never sue.

439 Study after study also shows that the real culprit in driving up
440 malpractice insurance premium rates for doctors is the failure to
441 discipline the 2 to 3 percent of doctors who cause the overwhelming bulk
442 of valid malpractice claims. The States who are charged with this job,

443 as well as the medical profession as a whole, are not disciplining
444 dangerous doctors. Shockingly, 90 to 95 percent of all the claim dollars
445 are awarded to people who have sustained real injuries. 90 to 95 percent
446 of the claim dollars awarded that are driving up the malpractice
447 insurance premiums come from 2 to 3 percent of the doctors. While the
448 vast majority of doctors and nurses are working hard to ensure that their
449 patients have the best health outcomes, those 2 or 3 percent of the
450 doctors are injuring patients and killing patients and should not be
451 allowed the privilege of practicing medicine. We must root out those
452 rogue doctors who consistently and chronically put the public at risk and
453 who are causing the real problem. They are the ones causing the
454 malpractice insurance rates that the doctors do suffer from. Yet, H.R. 5
455 would do nothing about this problem.

456 Instead, H.R. 5 seeks to cap noneconomic damages at \$250,000, not a
457 very good deal for a child injured by a doctor, but a very good deal for
458 a doctor who may have butchered his patient. Limiting noneconomic
459 damages to \$250,000 is not only unfair to severely injured patients, but
460 it will also make it very difficult to impossible for patients to get a
461 lawyer at all to press their claims. It is going to be simply impossible
462 for a lawyer who may have to lay out expenses averaging over \$100,000 in
463 a case to take that case where his recovery, his fee may be -- or his
464 costs may be \$100,000 and his fee limited to a percent of \$250,000.

465 Finally, we are told that H.R. 5 will drive down doctors' premiums,
466 but this ignores reality. The California law, MICRA, on which H.R. 5 is
467 modeled did not reduce doctors' premiums. In fact, premiums for

468 California doctors went up with MICRA's passage in 1975 by 450 percent by
469 1988. Only after California enacted insurance reforms in 1988 did
470 insurance premiums go down, but H.R. 5 would do nothing to reform the
471 insurance industry.

472 No. H.R. 5 is mostly preoccupied with capping noneconomic damages
473 at \$250,000. When California enacted MICRA in 1975, \$250,000 seemed
474 reasonable, but in today's dollars, that \$250,000 of 1975 is worth
475 \$62,000 today. Taking the reverse, \$250,000 in 1975, if adjusted to
476 reflect inflation, would be worth almost \$2 million today.

477 While I believe a cap of any amount is wrongheaded, I do plan to
478 offer two amendments to make the cap less harmful to families harmed by
479 the negligence of their doctors. And I am going to offer another
480 amendment that I will describe when I come to it.

481 I encourage all of my colleagues to join with me in support of
482 these amendments and in opposing this bill.

483 I thank you and I yield back the balance of my time, if any.

484 Chairman Smith. Thank you, Mr. Nadler.

485 We have a number of amendments to consider today, and the gentleman
486 from Michigan is going to be recognized for purposes of offering his
487 amendment.

488 Mr. Conyers. I have an amendment at the desk, Mr. Chairman, and
489 ask that it be reported.

490 Chairman Smith. The clerk will report the amendment.

491 Ms. Kish. Amendment to H.R. 5 offered by Mr. Conyers. Page 19,
492 line 9, insert before --

493 Chairman Smith. Without objection, the amendment will be

494 considered as read.

495 [The information follows:]

496 Chairman Smith. And the gentleman from Michigan will be recognized
497 for purposes of explaining his amendment.

498 Mr. Conyers. Thank you, Chairman Smith.

499 This is a very modest amendment introduced in the hope that of all
500 the 22 amendments that have been noted in a timely fashion to be brought
501 before the committee, that there will probably be none more modest than
502 this one.

503 My amendment is called "The Intentional Tort Amendment," which
504 would exempt intentional torts from the bill's limitations on damages and
505 other restrictions. An intentional tort is when a person deliberately
506 commits harm and the victim is, therefore, entitled to sue for damages.
507 And we don't want those kinds of harms to be limited by the thrust of
508 this measure before us today.

509 Thus, for example, if a doctor intentionally rapes children or a
510 nurse sexually molests patients, the last thing that any of us would be
511 doing is capping the damages on such incidents. If a physician is
512 intoxicated when tending to patients or a foreign drug company knowingly
513 sells defective products in this country or a pharmacy gives a pregnant
514 woman an abortion pill instead of an antibiotic, we should be throwing
515 the book at them, not capping their damages.

516 Unfortunately, these are not hypotheticals. Each case I have
517 mentioned is a real-life tragedy. In Delaware, Dr. Earl Bradley has been
518 accused of assaulting 103 patients, mostly children, over a 10-year
519 period, many incidents which he actually videotaped. In Long Beach, a
520 nurse was discovered to have sexually molested several patients. In

521 Colorado, Dr. John Valentine had his license suspended because he was
522 found to have treated patients while intoxicated. In Puerto Rico,
523 GlaxoSmithKline knowingly sold 20 defective drugs to innocent consumers,
524 even after their quality manager had warned them about these problems.
525 In Colorado yesterday, we learned that a pharmacy gave a pregnant
526 19-year-old woman, Marina Silva, an abortion pill instead of the
527 antibiotic she wanted, possibly leading to a miscarriage or birth defect.

528 Are these the type of individuals and firms that anyone here would
529 really want to protect under the legislation under consideration? Do we
530 really want to say that if you are raped or molested by your doctor or
531 nurse, that you can't seek damages beyond \$250,000? I understand that
532 the supporters of this bill want to reduce the legal exposure of medical
533 professions and drug companies, but I don't think anyone here wants to
534 protect those who engage in this type of intentional misconduct.

535 And so I ask all of my colleagues on the committee to join in
536 support of this common sense amendment.

537 I thank you, Mr. Chairman.

538 Chairman Smith. Thank you, Mr. Conyers.

539 Now I will recognize myself in opposition to the amendment.

540 Let me say at the outset that I do agree with the ranking member.
541 His amendment might well be described as among the most reasonable of the
542 22 amendments we know of. However, that is not necessarily a high hurdle
543 to clear, but we appreciate the effort that he has made in that regard.

544 This amendment should be defeated because it eviscerates the bill.
545 The amendment would exclude from coverage under the bill any cause of

546 action based on an intentional tort. Black's Law Dictionary defines an
547 intentional tort as a tort committed by someone acting with general or
548 specific intent. Black's Law Dictionary then defines general intent as
549 the intent to perform an act even though the actor does not desire the
550 consequences that result. That could describe every medical malpractice
551 case under the sun. Doctors don't intend to make mistakes.

552 Regarding specific intent, Black's Law Dictionary defines it as the
553 intent to accomplish the precise criminal act that one is later charged
554 with. Consequently, the reference to specific intent is appropriate only
555 regarding a criminal charge. The bill already makes clear that its
556 protections don't apply to criminal cases.

557 So the amendment may eviscerate the entire bill while attempting to
558 duplicate a provision that already is in the bill. So this amendment
559 should be opposed.

560 I will yield the balance of my time to the gentleman from Arizona
561 for any additional comments he might have.

562 Mr. Franks. Well, Mr. Chairman, I first would just identify with
563 what you have already said.

564 The term "intentional tort," first of all, can be interpreted in
565 more ways than one and it becomes uncertain as to the ultimate impact of
566 the term. But certainly the obvious reading of it with the word
567 "intentional" in there goes to one of the elements of mens rea in
568 criminal cases, and it is almost impossible to extract it any other way.

569 And so in extending to the ranking member the most charitable
570 impact of this amendment and his intentions, it is at best redundant

571 because it repeats a provision that is already in the bill. The bill
572 does not apply any protections to criminal cases and all of the litany of
573 the cases that the gentleman spoke of, the rape of children and the
574 molestation, those are all criminal cases, and this bill specifically
575 exempts them. So the effect of this amendment could not only eviscerate
576 the bill, not only ameliorate the entire impact of the bill, but it could
577 -- at best it is redundant. So I think it should also be opposed, Mr.
578 Chairman.

579 Chairman Smith. Thank you, Mr. Franks.

580 Do other members wish to be recognized? The gentleman from North
581 Carolina, Mr. Watt, is recognized.

582 Mr. Watt. Thank you, Mr. Chairman.

583 I was going to stay out of this, but I think the chairman's
584 response to the amendment leaves me baffled for a Judiciary Committee. I
585 just can't believe that we are trying to protect a bill -- the provisions
586 of the bill to make a political point in my estimation against people who
587 are engaging in intentional misconduct. The fact that the bill exempts
588 actions based on criminal liability does not in any way mean the same
589 thing as exempting intentional torts from the scope of the bill.

590 At best, the language is ambiguous. The most plain reading of the
591 language would indicate that it applies to limit remedies for all torts
592 and simply does not apply to criminal cases.

593 Another possible reading of the bill would indicate that the
594 exception is meant to apply to civil actions brought by the government
595 based on possible criminal action.

596 Another possible interpretation is that the bill does not apply to
597 fact patterns where a criminal case has also previously been successfully
598 brought by the government. Under this interpretation, some but not all
599 or even most intentional torts would be excluded. Even under this more
600 liberal interpretation of the language, it would create a gaping loophole
601 for intentional torts such as rape or assault because such actions would
602 be subject to the many vagaries of criminal law. It requires a district
603 attorney to decide to bring the case, to have access to all the relevant
604 witnesses, have sufficient resources to win the case, to avoid
605 evidentiary problems, and to be able to prove guilt beyond a reasonable
606 doubt.

607 Given all the ambiguity and uncertainty, there is no reason we
608 should not resolve this issue by accepting this common sense amendment.
609 If the amendment is accepted, the only risk is that we will have some
610 possible redundancy in a bill that has numerous redundancies in it
611 already.

612 But if the amendment is rejected, there is very real risk, if not
613 likelihood, that we will have created a loophole to benefit health
614 professionals who engage in rape, molestation, and assault. I cannot
615 believe we are about to impose a \$250,000 limit on recoveries for
616 somebody who engages in intentional misconduct, and to try to minimize
617 the amendment and its importance I think does this committee a severe
618 injustice. And I urge my colleagues to support the amendment.

619 I yield back the balance of my time.

620 Chairman Smith. Thank you, Mr. Watt, for those comments.

621 Are there other members who wish to be recognized? The gentleman
622 from Tennessee, Mr. Cohen, is recognized.

623 Mr. Cohen. Thank you, Mr. Chairman.

624 Would you yield for a question?

625 Chairman Smith. I would be happy. Is that directed to me or to
626 another member?

627 Mr. Cohen. Well, I think to you because you responded to Mr.
628 Conyers' amendment, but if another member -- it is basically the same
629 questioning as Mr. Watt, but his wasn't a question, and that would be a
630 question, if in fact the amendment is not needed because of this criminal
631 Black's definition defense, when does that come into effect? Does there
632 have to be, as you see it, an indictment? Does the DA have to bring the
633 case? How do you determine that it is a criminal case? There could not
634 be guilt beyond a reasonable doubt in the DA's mind that he could prove
635 that, but there is a preponderance of the evidence, obviously, in a civil
636 case. And so he may not bring the indictment. Is necessary for there to
637 be an indictment made or a case brought?

638 Chairman Smith. Let me respond in the best way I can. I don't
639 believe that the examples that you have given are necessarily under the
640 category of medical malpractice.

641 But again, I want to go back to what I quoted from Black's Law
642 Dictionary, that the amendment, at least in my judgment, so hollows out
643 the bill that there is nothing left. And I do believe the bill has a
644 legitimate purpose, and that is why I oppose amendment.

645 I yield back.

646 Mr. Cohen. Thank you, Mr. Chairman.

647 I can't see how it hollows out the bill. You have still got people
648 that leave sponges in there. You have still got people that take off the
649 wrong leg. You have still got people that take out the wrong organ, that
650 perforate a gallbladder. You know, you have got a whole bunch of things
651 people can do that is medical malpractice. There are tens of thousands
652 of people dying each year, and most of them aren't intentional torts
653 where they are -- you know, the criminal courts would be just clogged if
654 that was the case. You would have hundreds of thousands of indictments
655 and doctors just, you know, with wanted posters.

656 Chairman Smith. If the gentleman would yield very quickly.

657 I understand what the gentleman is saying, but if you go back and
658 we can provide you with many, many examples of individuals who have
659 suffered as you have just described. Don't be misled by the caps.
660 Individuals can get tens of millions of dollars in coverage and in
661 reimbursements for all kinds of economic claims. And I mentioned a while
662 ago in my opening statement I think there were a couple of claims that
663 were successful in the \$80 million to \$90 million range. It is not that
664 individuals aren't going to get compensated for harm or injury that has
665 occurred to them. They are and can be even under this bill.

666 Are there any other members who wish to be recognized? The
667 gentleman from Texas, Mr. Gohmert.

668 Mr. Gohmert. Thank you, Mr. Chairman.

669 When I first heard Mr. Conyers' amendment, I was sympathetic.
670 Looking more closely at it, page 19 of the bill, health care lawsuit --

671 and that is what this will affect. It says: "Such term does not include
672 a claim or action which is based on criminal liability."

673 Now, the reason this amendment could potentially eviscerate the
674 things that are attempted under this bill is that attorneys would be able
675 to claim a general intent, unlike a criminal specific mens rea, and
676 therefore by including that in the allegations in a med mal claim, then
677 all the caps are off. All the limitations are off. All the things that
678 this bill attempts to do would be off simply by the allegation that
679 someone engaged in a general intent to do harm.

680 By having this provision in there, though, at page 19, subsection
681 7, "such term does not include a claim or action which is based on
682 criminal liability," then clearly if someone does a heinous act, as we
683 have heard of happening before -- the former chairman is exactly right.
684 I mean, there have been people under the guise of medical practice who
685 have committed rapes, sexual assaults, terrible, heinous things that were
686 criminal conduct. Well, if I put on my former judge hat or my former
687 chief justice hat and I am looking at this language and it says, a claim
688 or action is based on criminal liability, if I see in a med mal claim
689 someone says that this defendant committed a criminal act, that is based
690 on criminal liability and all the caps are off. This bill would not
691 apply.

692 So looking at it more closely, even though I was initially
693 sympathetic, I do think that we are properly covered with what is in the
694 bill.

695 Thank you.

696 Mr. Johnson. Would the gentleman yield?

697 Mr. Gohmert. Sure.

698 Mr. Johnson. As the gentleman knows, an intentional tort describes
699 a civil wrong resulting from a deliberate act. Torts generally encompass
700 injuries as a result of negligence in which a harm results from the
701 perpetrator's failure to take sufficient action and sufficient care, to
702 exercise reasonable care in fulfilling a duty owed. So all torts are not
703 intentional. In fact, most torts are not intentional. They just simply
704 encompass acts that fall below a reasonable standard of care. And so
705 from that standpoint, it is a much lower threshold than simply a criminal
706 offense that may have been intentional.

707 So I will yield back my time for a response, if necessary.

708 Mr. Gohmert. Well, I am not sure that a response is needed. I
709 understand the gentleman's point, but I do think this addresses the lower
710 threshold cases and when you have a high threshold where there is
711 specific criminal intent involved, then this bill doesn't apply. My
712 friend from Arizona asked is it possible you could have an intentional
713 tort that is not a crime, and I think that there would be in a case where
714 you had some general intent but was not near enough the specific
715 requirements of mens rea that some criminal code provision would require.
716 So --

717 Mr. Johnson. Well, suppose a plaintiff went to a prosecutor and
718 told the prosecutor that I want to prosecute Dr. A for a intentional
719 tort. Would that then render the tort immune from -- or would that cause
720 the tort to not be classified as a tort anymore since it's now --

721 Chairman Smith. The gentleman from Texas is recognized for an
722 additional minute.

723 Mr. Gohmert. Okay. Thank you, Mr. Chairman.

724 All right. To respond to that, if -- and I have been an assistant
725 district attorney before, and if somebody came and said I want to file an
726 intentional tort against a doctor --

727 Mr. Johnson. I want to file a criminal case --

728 Mr. Gohmert. A criminal case, correct. And I reclaim my time.

729 Then I know under Texas law, there is no criminal provision that
730 calls itself an intentional tort. You would have to look at specific
731 requirements under the law, see whether it meets any of the assaultive
732 offenses or whatever this individual -- sexual assault, assaultive
733 offenses. And if it did not meet the requirements, then in Texas, I
734 know, there is no such thing as just a category "intentional tort." You
735 would have to meet one of the criminal requirements, and if you do, then
736 you get indicted and it goes forward. And then if someone bases a civil
737 action upon that indicted offense, even if they were not convicted
738 because of the lower standard of proof being beyond a reasonable doubt in
739 criminal and just preponderance of the evidence in the civil, you could
740 still go forward with that lawsuit based on a criminal act. But there
741 would have to be specific evidence of a criminal act which a prosecutor
742 could see was present.

743 But the intentional tort itself -- we use that term. It is a
744 general term, but to get specific about specific about criminality, there
745 has got to be a crime in the law that is allegedly violated.

746 I yield back.

747 Chairman Smith. The gentleman's time has expired.

748 The gentleman from Florida, Mr. Deutch, is recognized.

749 Mr. Deutch. Thank you, Mr. Chairman.

750 Mr. Chairman, I am sensitive to your concerns. I would ask both of
751 you. The first question is it is news to me that in order to pursue an
752 intentional tort claim, that there needs to be a criminal action. I
753 would like to understand that better.

754 And then, Mr. Chairman, if our concern -- and I appreciate your
755 reading of the Black's Law Dictionary. If our concern is that we might
756 hollow out the bill, as has been said, if perhaps instead of referring to
757 intentional torts, Mr. Chair, perhaps we can identify some specific
758 intentional torts that would meet the qualifications as set forth in
759 Black's Law Dictionary for constituting an intentional tort under civil
760 law. If we could specify those, perhaps we could address this issue and
761 still offer the protections that we need to --

762 Mr. Gohmert. Will the gentleman yield?

763 My understanding, the way this is written, you would not have to
764 bring or pursue a criminal action in order to have a malpractice claim
765 based on criminal activity. You can just allege it. But in the civil
766 complaint, you are going to have to allege the specific facts that would
767 meet the elements required to justify a specific criminal act within
768 State or Federal law. That is my understanding.

769 But the gentleman asks a good question, but no, you wouldn't have
770 to necessarily file a criminal case first in order to be able to bring

771 this. That is the way I would certainly interpret it.

772 Mr. Watt. Would the gentleman yield just so I can ask the judge a
773 question since he is acting as the judge here?

774 So if I alleged it in my civil complaint in Texas and Texas has no
775 criminal law that covers an intentional tort, which is what you just said
776 in your earlier statement, but it was intentional, then there is no
777 criminal exemption under this bill. And that gets it thrown out of the
778 civil court. Is that my understanding of what you are saying?

779 Mr. Gohmert. Well, my point was there is no crime called
780 "intentional tort."

781 Mr. Watt. There is no crime called "intentional tort."

782 Mr. Gohmert. You are going to have to be specific --

783 Mr. Watt. But there is a tort, intentional tort, that is different
784 than the general, regular negligence tort.

785 Mr. Gohmert. Yes.

786 Mr. Watt. I have no criminal violation that triggers the exemption
787 that is in this bill. Yet, I have a specific intentional tort. And you
788 are telling me in Texas I am still going to be limited to \$250,000 under
789 this bill.

790 Mr. Gohmert. Well, I think the gentleman --

791 Mr. Watt. Is that my understanding?

792 Mr. Gohmert. If I understand correctly, the gentleman points out
793 one of the problems with this proposed amendment, using the term,
794 "intentional tort," is so all-encompassing beyond what is criminal
795 that --

796 Mr. Watt. Well, I beg to differ with you because there is a
797 definition of "intentional tort" that is much, much more narrower than
798 the definition of tort.

799 Mr. Gohmert. Only by reason of whether it is negligence, criminal
800 negligence. You could have criminal negligence that would be a crime.

801 Mr. Watt. But it wouldn't qualify under the exemption, under the
802 criminal law exemption under this --

803 Mr. Gohmert. If it is based on criminal liability and it meets the
804 elements of a crime set forth in State law, it does.

805 Mr. Watt. I don't read your proposed bill to say that at all.

806 Mr. Gohmert. Well, going back to what the bill says -- it is not
807 what I am saying -- it says here that if it is based on criminal
808 liability, which could include --

809 Mr. Watt. But there is no criminal liability in Texas. You just
810 told me that.

811 Mr. Gohmert. Not for something called "intentional tort." We have
812 all kinds of assaults. We have had doctors -- I have sentenced a doctor
813 before. There are crimes, but you can't just call it "intentional tort."

814 Mr. Deutch. Would the gentleman yield?

815 Chairman Smith. The gentleman from Florida controls the time.

816 Mr. Deutch. If I could just narrow this question perhaps, Mr.
817 Chair. And again, I ask the question of the judge, ask the question of
818 you. If what we are trying to get at here is trying to assure that the
819 patients have rights if there is a criminal case, then certainly if
820 referring generally to intentional torts is too broad, could we

821 specifically include, if not here in an amendment but as we go forward,
822 in an amendment that specifically refers to those intentional torts that
823 we are aware of, like rape, like assault, like intentional infliction of
824 emotional distress so that there is no question and so that we can avoid
825 this problem of hollowing out the bill?

826 Chairman Smith. Will the gentleman yield? The gentleman from
827 Florida yield?

828 That is a narrow question, and yes, we can take a look at that
829 between now and the floor.

830 I would like to move on and consider other amendments, but before
831 we do that, the gentleman from New York, Mr. Nadler.

832 Mr. Nadler. I would just point out very briefly that even though a
833 given tort may be a crime, the prosecutor may not, for reasons of
834 shortage of manpower or for some other reason or for reasons of not being
835 able to meet the standard of proof of beyond a reasonable doubt -- may
836 not have charged a crime, and yet the tort is an intentional tort. So
837 the bill should not apply to such intent -- that is, the noneconomic
838 damages should not apply to an intentional tort which could be prosecuted
839 as a crime whether it is or not, and I would hope that you would look at
840 that because certainly it shouldn't have to be prosecuted, in fact, but
841 simply if it is capable of being -- if it describes a crime, it is an
842 intentional tort whether it is prosecuted or not.

843 Chairman Smith. The gentleman yields back his time.

844 If there are no other members who wish to be recognized, the
845 question is on the amendment. Those in favor of the amendment, say aye.

846 [A chorus of ayes.]

847 Chairman Smith. Those opposed to the amendment, say no.

848 [A chorus of nays.]

849 Chairman Smith. In the opinion of the chair, the noes have it and
850 the amendment is not agreed to.

851 Mr. Conyers. Mr. Chairman, might I ask for a record vote?

852 Chairman Smith. The gentleman from Michigan has asked for a
853 recorded vote. The clerk will call the roll.

854 Ms. Kish. Mr. Smith?

855 Chairman Smith. No.

856 Ms. Kish. Mr. Sensenbrenner?

857 [No response.]

858 Ms. Kish. Mr. Coble?

859 Mr. Coble. No.

860 Ms. Kish. Mr. Gallegly?

861 [No response.]

862 Ms. Kish. Mr. Goodlatte?

863 Mr. Goodlatte. No.

864 Ms. Kish. Mr. Goodlatte votes no.

865 Mr. Lungren?

866 Mr. Lungren. No.

867 Ms. Kish. Mr. Lungren votes no.

868 Mr. Chabot?

869 [No response.]

870 Ms. Kish. Mr. Issa?

871 [No response.]

872 Ms. Kish. Mr. Pence?

873 Mr. Pence. No.

874 Ms. Kish. Mr. Pence votes no.

875 Mr. Forbes?

876 Mr. Forbes. No.

877 Ms. Kish. Mr. Forbes votes no.

878 Mr. King?

879 [No response.]

880 Ms. Kish. Mr. Franks?

881 Mr. Franks. No.

882 Ms. Kish. Mr. Franks votes no.

883 Mr. Gohmert?

884 Mr. Gohmert. No.

885 Ms. Kish. Mr. Gohmert votes no.

886 Mr. Jordan?

887 Mr. Jordan. No.

888 Ms. Kish. Mr. Jordan votes no.

889 Mr. Poe?

890 Mr. Poe. No.

891 Ms. Kish. Mr. Poe votes no.

892 Mr. Chaffetz?

893 [No response.]

894 Ms. Kish. Mr. Reed?

895 Mr. Reed. No.

896 Ms. Kish. Mr. Reed votes no.
897 Mr. Griffin?
898 Mr. Griffin. No.
899 Ms. Kish. Mr. Griffin votes no.
900 Mr. Marino?
901 Mr. Marino. No.
902 Ms. Kish. Mr. Marino votes no.
903 Mr. Gowdy?
904 Mr. Gowdy. No.
905 Ms. Kish. Mr. Gowdy votes no.
906 Mr. Ross?
907 Mr. Ross. No.
908 Ms. Kish. Mr. Ross votes no.
909 Ms. Adams?
910 Ms. Adams. No.
911 Ms. Kish. Ms. Adams votes no.
912 Mr. Quayle?
913 Mr. Quayle. No.
914 Ms. Kish. Mr. Quayle votes no.
915 Mr. Conyers?
916 Mr. Conyers. Aye.
917 Ms. Kish. Mr. Conyers votes aye.
918 Mr. Berman?
919 [No response.]
920 Ms. Kish. Mr. Nadler?

921 Mr. Nadler. Yes.

922 Ms. Kish. Mr. Nadler votes yes.

923 Mr. Scott?

924 Mr. Scott. Aye.

925 Ms. Kish. Mr. Scott votes aye.

926 Mr. Watt?

927 Mr. Watt. Aye.

928 Ms. Kish. Mr. Watt votes aye.

929 Ms. Lofgren?

930 [No response.]

931 Ms. Kish. Ms. Jackson Lee?

932 Ms. Kish. Ms. Waters?

933 Ms. Waters. Aye.

934 Ms. Kish. Ms. Waters votes aye.

935 Mr. Cohen?

936 Mr. Cohen. Aye.

937 Ms. Kish. Mr. Cohen votes aye.

938 Mr. Johnson?

939 Mr. Johnson. Aye.

940 Ms. Kish. Mr. Johnson votes aye.

941 Mr. Pierluisi?

942 [No response.]

943 Ms. Kish. Mr. Quigley?

944 Mr. Quigley. Aye.

945 Ms. Kish. Mr. Quigley votes aye.

946 Ms. Chu?

947 Ms. CHU. Aye.

948 Ms. Kish. Ms. Chu votes aye.

949 Mr. Deutch?

950 Mr. Deutch. Aye.

951 Ms. Kish. Mr. Deutch votes aye.

952 Ms. Sanchez?

953 [No response.]

954 Ms. Kish. Ms. Wasserman Schultz?

955 Chairman Smith. Are there any other members who wish to vote? The
956 gentleman from Iowa?

957 Ms. Kish. Mr. King?

958 Mr. King. No.

959 Ms. Kish. Mr. King votes no.

960 Chairman Smith. The clerk will report.

961 Mr. Issa. Mr. Chairman, how was I recorded?

962 Chairman Smith. The gentleman is not recorded.

963 Mr. Issa. And I vote no.

964 Ms. Kish. Mr. Issa votes no.

965 Chairman Smith. That is as close as you can come.

966 [Laughter.]

967 Ms. Kish. Mr. Chairman, 19 members voted no; 10 members voted yes.

968 Chairman Smith. The amendment is not agreed to.

969 Notwithstanding the result of that vote, I do want to say to the
970 gentleman from Florida, Mr. Deutch, that your very narrow question is

971 something that we will consider before we get to the House floor, and we
972 will talk to you more about that.

973 We will now go to the gentlewoman from California, Ms. Waters, for
974 purposes of her offering an amendment.

975 Ms. Waters. Thank you, Mr. Chairman. I have an amendment at the
976 desk.

977 Chairman Smith. The clerk will report the amendment.

978 Ms. Kish. Amendment to H.R. 5 offered by Ms. Waters. Page 14,
979 line 21 --

980 Chairman Smith. Without objection, the amendment will be
981 considered as read.

982 [The information follows:]

983 Chairman Smith. The gentlewoman from California will be recognized
984 for purposes of explaining her amendment.

985 Ms. Waters. Thank you very much, Mr. Chairman.

986 My amendment would exempt medical product manufacturers from the
987 punitive damage immunity afforded to them by H.R. 5. H.R. 5 allows
988 negligent manufacturers of FDA-approved drugs and devices not to be
989 subject to punitive damage awards even if that drug or device turns out
990 to be dangerous and defective and causes egregious injuries or death.

991 Currently the bill allows for only two exceptions to this immunity:
992 if a person knowingly misrepresents or withholds information from the FDA
993 about a defective product or if a person makes an illegal payment to the
994 FDA to get a medical product approved. My amendment would create a third
995 exception for any medical product manufacturer who negligently
996 manufactures or distributes a defective product from the liability
997 protections in this bill.

998 For example, just last Christmas pharmaceutical maker
999 GlaxoSmithKline agreed to resolve a lawsuit over charges that the company
1000 knowingly manufactured and sold contaminated drugs, including the heavily
1001 prescribed antidepressant Paxil. Glaxo was reportedly informed by the
1002 employees of the substandard conditions at one of their manufacturing
1003 plants, including bacteria-laden water used to produce the drug
1004 tablets, problems with sterility, manufacturing problems that allegedly
1005 resulted in drugs getting mixed up with other drugs, and drugs of varying
1006 strengths showing up in mislabeled bottles. Even after Glaxo was
1007 informed of these problems, they continued to manufacture and market

1008 these contaminated products to U.S. consumers. This type of grossly
1009 negligent behavior in which profits are put before the consumers' safety
1010 should not go unpunished.

1011 Another example was a bad batch of tainted heparin that was sold in
1012 the U.S. in 2008. After FDA approved this drug, health officials found a
1013 clear link between the contaminated blood thinner and several reactions,
1014 severe reactions, that contributed to 81 deaths.

1015 Under H.R. 5, these negligent drug manufacturers would be immune
1016 from liability for punitive damages for this type of reckless behavior.
1017 Punitive damages are reserved for only the very worst kinds of cases
1018 where the defendant's conduct is extremely egregious. A plaintiff
1019 generally will have to prove reckless or even intentional misconduct.
1020 Punitive damages are used to punish the defendant and to deter other
1021 similarly situated from engaging in a particular type of wrongful conduct
1022 in the future.

1023 Manufacturers who create and/or distribute a defective medical
1024 device or drug that causes injury or death should not be able to hide
1025 behind their FDA stamp of approval and avoid liability. There must be
1026 accountability. By allowing these negligent manufacturers to get "out of
1027 jail free" cards, there is no incentive to make their medical products
1028 safer for the U.S. market, patients, and consumers.

1029 This amendment would hold all manufacturers accountable for
1030 negligently manufacturing or distributing a defective product regardless
1031 if the product has been approved by the FDA. As the cases above
1032 illustrate, without the threat of full liability, especially liability

1033 for punitive damages, there are no financial disincentives for keeping
1034 profitable but dangerous drugs and medical devices off the market.

1035 And so I am presenting this exemption -- I am presenting this
1036 amendment because this exemption in the bill must be a mistake. It is
1037 difficult to believe that any Member of Congress could really support the
1038 exemption. And so I would urge my colleagues to support this amendment.

1039 Chairman Smith. Thank you, Ms. Waters.

1040 I will recognize myself in opposition to the amendment.

1041 This amendment should be opposed because litigation is threatening
1042 the viability of the lifesaving drug industry, and this amendment would
1043 weaken the provisions in the bill providing for a safe harbor from
1044 punitive damages for FDA-approved products. To help encourage new drug
1045 development and contain the cost of lifesaving drugs, the HEALTH Act
1046 contains a safe harbor from punitive damages for defendants whose drugs
1047 or medical products comply with vigorous rules and regulations.

1048 The provision is self-evidently fair. If someone claims their
1049 injury was caused by a particular ingredient in a drug when the FDA has
1050 specifically approved that ingredient as safe, how could a drug
1051 manufacturer possibly be found guilty of malicious conduct when all they
1052 did was sell a product approved as safe by the FDA?

1053 Claims for unlimited economic damages and noneconomic damages could
1054 still go forward under the HEALTH Act, but why should a manufacturer of
1055 perhaps lifesaving drugs whose product has already been approved as safe
1056 under stringent cost/benefit analysis applied by the FDA have to litigate
1057 the issue of punitive damages all the way through the case? All that

1058 does is take money away from research on lifesaving drugs and increase
1059 the cost of such drugs.

1060 FDA standards and regulations are rigorous. The regulatory
1061 objectives of the Food, Drug, and Cosmetics Act are to ensure that the
1062 manufacturer shares all risk information with the FDA so that the agency
1063 may make informed risk/benefit judgments about the utility of a
1064 pharmaceutical. These judgments occur throughout the life of the drug.
1065 Ultimately approval by the FDA reflects a risk/benefit judgment that the
1066 product will enhance public health. The entire FDA process is a lengthy
1067 one, typically taking between 5 and 7 years to complete. We should not
1068 subject those that comply with FDA standards to punitive damages.

1069 Therefore, I oppose the amendment and yield back the balance of my
1070 time.

1071 Are there any other members who wish to be heard on this amendment?

1072 If not, the question --

1073 Mr. Lungren. Mr. Chairman?

1074 Chairman Smith. The gentleman from California, Mr. Lungren, is
1075 recognized.

1076 Mr. Lungren. Mr. Chairman, I would like to speak on the amendment.

1077 Mr. Chairman, I was just thinking of the examples given by the
1078 gentlelady from California, and if in fact what she is talking about is a
1079 tainted product, that would, by definition, not fall within the
1080 exclusion. If you have a tainted product, that is not the product that
1081 was approved by the FDA or not the product that is covered in the other
1082 subsection of this amendment.

1083 Secondly, punitive damages are limited to egregious conduct --
1084 egregious conduct. And if in fact one is a manufacturer of either a
1085 pharmaceutical product or a medical device and goes through the
1086 processes, as suggested by the gentleman, that hardly qualifies as
1087 egregious conduct. But the threat that one might be subjected to a
1088 lawsuit involving punitive damages would increase the cost or the risk
1089 factor with respect to new inventions of medical devices or new drugs.
1090 That could do one of two things: either so discourage those that
1091 otherwise would try and bring advances of medical science to the benefit
1092 of patients or increase the costs so that those who do benefit from it
1093 pay far, far more.

1094 Probably most of us on this panel have had the opportunity to
1095 utilize drugs that were not available a decade or 2 decades or 3 decades
1096 ago. If one would look at longevity reports and one would look at the
1097 difference in medical science over the past generation, one would find
1098 that there are fewer surgical procedures and there is, as a result, life-
1099 extending progress that has been made precisely because of advances in
1100 the pharmaceutical industry. Less invasive surgical techniques now take
1101 place as a direct result of both improvements in pharmacology and
1102 improvements in medical devices, and we ought to understand that.

1103 This reminds me of part of what is contained in Obama Care. We
1104 decided that we would put an additional tax on anybody who has the
1105 temerity to produce a medical device in the United States, and if you
1106 produce a medical device in the United States, under Obama Care you now
1107 have an additional -- I think it is -- 2.7 or 2.9 percent tax on top of

1108 everything else.

1109 One of the largest manufacturers in my district is a company called
1110 Volcano, 600 employees. They make arterial catheters. They are one of
1111 the two best in the world today. They manufacture in the United States.
1112 What they do is, in terms of diagnosis and treatment, lifesaving. And
1113 what we have done with that provision of Obama Care is make it far more
1114 expensive for them to be able to produce this product, create
1115 disincentives for people to invest and give them capital.

1116 And now we are trying to take a reasonable approach, saying that if
1117 you follow FDA procedures, if you follow the medical community, if you
1118 follow all those standards, you have a safe harbor. In other words, we
1119 are creating an incentive for them to try and have advances in medical
1120 science.

1121 And so I would just suggest that one of the examples -- at least
1122 one of the examples -- that comes to mind that was related would not
1123 qualify for this exclusion because it would be a tainted product.

1124 Ms. Waters. Will the gentleman yield?

1125 Mr. Lungren. We are talking about that which is under the FDA-
1126 approved or under a subsection 2-2.

1127 Ms. Waters. Will the gentleman yield?

1128 Mr. Lungren. A medical product is generally recognized among
1129 qualified experts as safe and effective pursuant to conditions
1130 established by the FDA.

1131 I would be happy to yield.

1132 Ms. Waters. When you talked about and when I talked about FDA-

1133 approved, certainly the FDA could approve, but what we find is FDA
1134 inspections of drug plants are only occasional. And if in that plant you
1135 have conditions that either contaminate or confuse or mix up the product
1136 and you are told that this is happening and you continue to produce the
1137 product under those conditions, this bill would exempt.

1138 Mr. Lungren. Well, I will take back my time.

1139 I have done or did medical malpractice cases for 5 years in private
1140 practice, and if you couldn't find an attorney to make the argument that
1141 this doesn't come under FDA because it is tainted and was not, in fact,
1142 that which was approved by the FDA, then you are a pretty poor attorney
1143 and you ought to be subject to legal malpractice.

1144 Ms. Waters. Will the gentleman yield?

1145 Mr. Lungren. With that, I yield back the balance of my time.

1146 Ms. Waters. Will the gentleman yield?

1147 Chairman Smith. The gentleman yields back his time.

1148 Are there other members who wish to be recognized? Yes, the
1149 gentleman from Tennessee, Mr. Cohen, is recognized.

1150 Mr. Cohen. Thank you, Mr. Chairman.

1151 If I remember in your remarks in responding to the reason why this
1152 was a bad amendment, it is because these type of actions against these
1153 medical device companies and drug companies was hurting the drug
1154 companies and it was very costly to them and maybe ruining their
1155 opportunity and discouraging them. I have to admit I own stock in just
1156 about all the major drug companies, and I read the reports. We have done
1157 good for a long time, and I think we are still doing good.

1158 Would you help me and tell me which one of my possible stocks I
1159 have got is not doing well because of the possibility of being sued for
1160 these medical malpractice claims?

1161 Chairman Smith. We don't offer stock advice during these Judiciary
1162 Committee markups, Mr. Cohen, but --

1163 Mr. Cohen. Which of these companies is hurting? Because I got
1164 Merck and I have got all of them, really.

1165 Chairman Smith. I would sell them all.

1166 [Laughter.]

1167 Chairman Smith. If there are no other members who want to be
1168 recognized, the question is on the amendment. All in favor, say aye.

1169 [A chorus of ayes.]

1170 Chairman Smith. Opposed, nay.

1171 [A chorus of nays.]

1172 Chairman Smith. In the opinion of the chair, the nays have it.

1173 Ms. Waters. A recorded vote, please.

1174 Chairman Smith. A recorded vote has been requested, and the clerk
1175 will call the roll.

1176 Ms. Kish. Mr. Smith?

1177 Chairman Smith. No.

1178 Ms. Kish. Mr. Smith votes no.

1179 Mr. Sensenbrenner?

1180 [No response.]

1181 Ms. Kish. Mr. Coble?

1182 [No response.]

1183 Ms. Kish. Mr. Gallegly?

1184 Mr. Gallegly. No.

1185 Ms. Kish. Mr. Gallegly votes no.

1186 Mr. Goodlatte?

1187 [No response.]

1188 Ms. Kish. Mr. Lungren?

1189 Mr. Lungren. No.

1190 Ms. Kish. Mr. Lungren votes no.

1191 Mr. Chabot?

1192 [No response.]

1193 Ms. Kish. Mr. Issa?

1194 [No response.]

1195 Ms. Kish. Mr. Pence?

1196 Mr. Pence. No.

1197 Ms. Kish. Mr. Pence votes no.

1198 Mr. Forbes?

1199 Mr. Forbes. No.

1200 Ms. Kish. Mr. Forbes votes no.

1201 Mr. King?

1202 Mr. King. No.

1203 Ms. Kish. Mr. King votes no.

1204 Mr. Franks?

1205 Mr. Franks. No.

1206 Ms. Kish. Mr. Franks votes no.

1207 Mr. Gohmert?

1208 [No response.]

1209 Ms. Kish. Mr. Jordan?

1210 Mr. Jordan. No.

1211 Ms. Kish. Mr. Jordan votes no.

1212 Mr. Poe?

1213 Mr. Poe. No.

1214 Ms. Kish. Mr. Poe votes no.

1215 Mr. Chaffetz?

1216 [No response.]

1217 Ms. Kish. Mr. Reed?

1218 [No response.]

1219 Ms. Kish. Mr. Griffin?

1220 [No response.]

1221 Ms. Kish. Mr. Marino?

1222 Mr. Marino. No.

1223 Ms. Kish. Mr. Marino votes no.

1224 Mr. Gowdy?

1225 Mr. Gowdy. No.

1226 Ms. Kish. Mr. Gowdy votes no.

1227 Mr. Ross?

1228 Mr. Ross. No.

1229 Ms. Kish. Mr. Ross votes no.

1230 Ms. Adams?

1231 Ms. Adams. No.

1232 Ms. Kish. Ms. Adams votes no.

1233 Mr. Quayle?

1234 [No response.]

1235 Ms. Kish. Mr. Conyers?

1236 Mr. Conyers. Aye.

1237 Ms. Kish. Mr. Conyers votes aye.

1238 Mr. Berman?

1239 [No response.]

1240 Ms. Kish. Mr. Nadler?

1241 Mr. Nadler. Aye.

1242 Ms. Kish. Mr. Nadler votes aye.

1243 Mr. Scott?

1244 Mr. Scott. Aye.

1245 Ms. Kish. Mr. Scott votes aye.

1246 Mr. Watt?

1247 Mr. Watt. Aye.

1248 Ms. Kish. Mr. Watt votes aye.

1249 Ms. Lofgren?

1250 [No response.]

1251 Ms. Kish. Ms. Jackson Lee?

1252 [No response.]

1253 Ms. Kish. Ms. Waters?

1254 Ms. Waters. Aye.

1255 Ms. Kish. Ms. Waters votes aye.

1256 Mr. Cohen?

1257 Mr. Cohen. Aye.

1258 Ms. Kish. Mr. Cohen votes aye.

1259 Mr. Johnson?

1260 Mr. Johnson. Aye.

1261 Ms. Kish. Mr. Johnson votes aye.

1262 Mr. Pierluisi?

1263 [No response.]

1264 Ms. Kish. Mr. Quigley?

1265 Mr. Quigley. Aye.

1266 Ms. Kish. Mr. Quigley votes aye.

1267 Ms. Chu?

1268 Ms. Chu. Aye.

1269 Ms. Kish. Ms. Chu votes aye.

1270 Mr. Deutch?

1271 Mr. Deutch. Aye.

1272 Ms. Kish. Mr. Deutch votes aye.

1273 Ms. Sanchez?

1274 [No response.]

1275 Ms. Kish. Ms. Wasserman Schultz?

1276 [No response.]

1277 Ms. Kish. Mr. Goodlatte?

1278 Mr. Goodlatte. No.

1279 Ms. Kish. Mr. Goodlatte votes no.

1280 Mr. Issa?

1281 Mr. Issa. No.

1282 Ms. Kish. Mr. Issa votes no.

1283 Chairman Smith. Are there any other members who wish to be
1284 recorded? The gentleman from New York?

1285 Mr. Reed. No.

1286 Ms. Kish. Mr. Reed votes no.

1287 Chairman Smith. The gentleman from California?

1288 Ms. Kish. Mr. Berman?

1289 Mr. Berman. Aye.

1290 Ms. Kish. Mr. Berman votes aye.

1291 Chairman Smith. The clerk will report.

1292 Ms. Kish. Mr. Chairman, 11 members voted aye; 16 members voted no.

1293 Chairman Smith. Okay. The amendment is not agreed to.

1294 We will now go to the gentleman from New York for the third
1295 amendment, and the gentleman from New York, Mr. Nadler, is recognized.

1296 Mr. Nadler. Thank you, Mr. Chairman. I have an amendment at the
1297 desk, number 3, and I ask unanimous consent the reading of the amendment
1298 be dispensed with.

1299 Chairman Smith. Without objection, the amendment will be
1300 considered as read.

[The information follows:]

1301 Mr. Nadler. Thank you. Mr. Chairman, this amendment is a narrower
1302 version of a bill that I plan to introduce today, the Sunshine in
1303 Litigation Act, and similar to an amendment I offered to the underlying
1304 bill when the Judiciary Committee last considered it in 2003. The
1305 amendment is designed to protect the public's ability to gain access to
1306 critical health and safety information uncovered during health care
1307 litigation.

1308 Current law and practice allows defendants to use protective order
1309 settlements and other legal mechanisms to seal information uncovered as
1310 part of litigation. Unfortunately, the public interest in knowing about
1311 health and safety hazards is not sufficiently considered in deciding
1312 whether or not such information should be kept secret. As a result,
1313 lives are put at risk.

1314 Today we are talking specifically about medical malpractice
1315 lawsuits, cases involving injury or death allegedly caused by a health
1316 care provider or other health care related entity. Such cases could
1317 include potential wrongdoing by doctors, nurses, hospitals, medical
1318 device manufacturers, insurance companies, and so on. Allowing any of
1319 these types of entities to hide information revealed in litigation about
1320 negligence is unconscionable. Sealing information prevents people from
1321 making educated decisions about all aspects of their health care.
1322 Patients should be able to know about a doctor who has been sued hundreds
1323 of times for negligence or about a drug that its manufacturer knows is
1324 harmful. Bringing some sunshine to such court proceedings would allow
1325 patients to make educated decisions about their health care.

1326 Allowing defendants to shield their actions also prevents public
1327 scrutiny. Law enforcement and other government regulators cannot take
1328 appropriate enforcement actions if they are not even aware of problems to
1329 begin with. If we make such information available, those we count on to
1330 protect us can concentrate their limited resources on protecting the
1331 public from those who are truly dangerous. This would be an important
1332 step in reducing incidents of medical malpractice.

1333 Let me give just one example. The drug maker, Eli Lilly, settled
1334 Federal and State claims in 2005 that its drug Zyprexa caused dangerous
1335 side effects. Parts of the \$700 million settlement were the requirement
1336 that all discovery documents be returned to Eli Lilly and that parties
1337 not talk about the case publicly. The broader public did not learn of
1338 the dangerous side effects of this drug until 2 years later after
1339 documents were leaked to the New York Times. Eli Lilly later settled an
1340 additional 18,000 claims for \$500 million, but meanwhile -- meanwhile --
1341 people were still taking this dangerous drug. And the only reason these
1342 other claims came to light is because the information was leaked.

1343 What is being lost in such cases is the public interest in critical
1344 and informative material. This amendment solves this problem by
1345 prohibiting court orders which restrict access to information unless the
1346 court makes a finding, one, that such orders would not hide information
1347 relevant to the protection of public health or safety or, both, that the
1348 order is sufficiently narrow and the public interest is outweighed by the
1349 confidentiality interests at stake.

1350 The amendment would also bar agreements between parties or orders

1351 which prevent sharing information with Federal or State agencies and
1352 would make unenforceable provisions of settlement agreements between
1353 parties which block access to information unless the court makes a
1354 finding that such orders would not hide information relevant to the
1355 protection of public health or safety or that the order is sufficiently
1356 narrow and that the public interest is outweighed by the confidentiality
1357 interests at stake.

1358 A number of consumer rights groups, including Consumers Union, the
1359 Consumer Federation of America, endorsed this concept last Congress. I
1360 have here a letter of support of my bill from various consumer groups. I
1361 ask unanimous consent it be made part of the record.

1362 Chairman Smith. Without objection.

1363 [The information follows:]

1364 Mr. Nadler. Thank you.

1365 This amendment would ensure that the public interest is taken into
1366 account when a court is weighing whether or not to make information
1367 secret that would otherwise be revealed in the health care litigation.
1368 It also would allow a judge to seal records when the privacy at issue
1369 outweighs public health and safety considerations. This balanced
1370 approach would protect patients and health care consumers, making sure
1371 they have access to critical health and safety information so that they
1372 do not continue to take dangerous drugs or rely on dangerous devices
1373 while at the same time keeping records private when there is a real
1374 interest in keeping them private.

1375 I urge all members to support the amendment, and I yield back the
1376 balance of my time.

1377 Chairman Smith. Thank you, Mr. Nadler.

1378 I will recognize myself in opposition to the amendment.

1379 This amendment is similar to the Sunshine in Litigation Act which
1380 is opposed by both the Judicial Conference of the United States and the
1381 American Bar Association. Both that act and this amendment would
1382 severely limit a judge's discretion to grant a protective order.

1383 Protective orders serve an important purpose in our civil justice
1384 system. Among other things, they protect trade secrets and other
1385 intellectual property and address confidentiality and privacy concerns of
1386 both plaintiffs and defendants.

1387 I urge my colleagues to oppose this amendment, and I will yield
1388 back the balance of my time.

1389 Are there any other members who wish to be heard? The gentleman
1390 from Virginia, Mr. Scott?

1391 Mr. Scott. Yes. I yield to the gentleman from New York.

1392 Chairman Smith. Okay.

1393 Mr. Nadler. Thank you. Let me just briefly say that this
1394 amendment does limit judicial discretion, but properly so. It simply
1395 says that before -- and it does more than limit judicial discretion. It
1396 says that before the parties in a lawsuit can agree that information that
1397 was revealed in the lawsuit should remain secret, information that this
1398 drug is dangerous, that that car explodes, or whatever, the judge has to
1399 agree. And the judge is told you can keep it secret if you find that the
1400 information is not necessary to protect public health or safety or if you
1401 find it is necessary to protect public health and safety but,
1402 nonetheless, the privacy interests of the litigants outweighs the public
1403 safety consideration. The judge should have to make such a finding
1404 because otherwise information will be kept secret and people will keep
1405 using dangerous products or going to doctors who are sued and who are
1406 found guilty of medical malpractice all the time.

1407 Now, of course, the Judicial Conference doesn't want the extra
1408 workload, but all this says is you have got to approve the secrecy in a
1409 settlement and approve it by saying that either it doesn't -- the
1410 information and secrecy does not -- being secret does not harm public
1411 safety or, even if it does, that the privacy interests outweighs that
1412 consideration in the opinion of the judge. That seems to me elementary
1413 in protecting public safety. And we have seen where otherwise unsafe

1414 products continue to be used and people lose their lives.

1415 I yield back.

1416 Chairman Smith. Does the gentleman from Virginia yield back his
1417 time?

1418 Mr. Scott. I yield back.

1419 Chairman Smith. Are there any other members who wish to be heard?

1420 [No response.]

1421 Chairman Smith. If not, the question is on the amendment. All in
1422 favor, say aye.

1423 [A chorus of ayes.]

1424 Chairman Smith. Opposed, say nay.

1425 [A chorus of nays.]

1426 Chairman Smith. The gentleman from New York has requested a roll
1427 call vote, and the clerk will call the roll.

1428 Ms. Kish. Mr. Smith?

1429 Chairman Smith. No.

1430 Ms. Kish. Mr. Smith votes no.

1431 Mr. Sensenbrenner?

1432 [No response.]

1433 Ms. Kish. Mr. Coble?

1434 [No response.]

1435 Ms. Kish. Mr. Gallegly?

1436 Mr. Gallegly. No.

1437 Ms. Kish. Mr. Gallegly votes no.

1438 Mr. Goodlatte?

1439 [No response.]

1440 Ms. Kish. Mr. Lungren?

1441 Mr. Lungren. No.

1442 Ms. Kish. Mr. Lungren votes no.

1443 Mr. Chabot?

1444 [No response.]

1445 Ms. Kish. Mr. Issa?

1446 [No response.]

1447 Ms. Kish. Mr. Pence?

1448 [No response.]

1449 Ms. Kish. Mr. Forbes?

1450 Mr. Forbes. No.

1451 Ms. Kish. Mr. Forbes votes no.

1452 Mr. King?

1453 Mr. King. No.

1454 Ms. Kish. Mr. King votes no.

1455 Mr. Franks?

1456 Mr. Franks. No.

1457 Ms. Kish. Mr. Franks votes no.

1458 Mr. Gohmert?

1459 [No response.]

1460 Ms. Kish. Mr. Jordan?

1461 Mr. Jordan. No.

1462 Ms. Kish. Mr. Jordan votes no.

1463 Mr. Poe?

1464 Mr. Poe. No.

1465 Ms. Kish. Mr. Poe votes no.

1466 Mr. Chaffetz?

1467 [No response.]

1468 Ms. Kish. Mr. Reed?

1469 [No response.]

1470 Ms. Kish. Mr. Griffin?

1471 [No response.]

1472 Ms. Kish. Mr. Marino?

1473 Mr. Marino. No.

1474 Ms. Kish. Mr. Marino votes no.

1475 Mr. Gowdy?

1476 Mr. Gowdy. No.

1477 Ms. Kish. Mr. Gowdy votes no.

1478 Mr. Ross?

1479 Mr. Ross. No.

1480 Ms. Kish. Mr. Ross votes no.

1481 Ms. Adams?

1482 Ms. Adams. No.

1483 Ms. Kish. Ms. Adams votes no.

1484 Mr. Quayle?

1485 [No response.]

1486 Ms. Kish. Mr. Conyers?

1487 Mr. Conyers. Aye.

1488 Ms. Kish. Mr. Conyers votes aye.

1489 Mr. Berman?

1490 Mr. Berman. Aye.

1491 Ms. Kish. Mr. Berman votes aye.

1492 Mr. Nadler?

1493 Mr. Nadler. Aye.

1494 Ms. Kish. Mr. Nadler votes aye.

1495 Mr. Scott?

1496 Mr. Scott. Aye.

1497 Ms. Kish. Mr. Scott votes aye.

1498 Mr. Watt?

1499 [No response.]

1500 Ms. Kish. Ms. Lofgren?

1501 [No response.]

1502 Ms. Kish. Ms. Jackson Lee?

1503 [No response.]

1504 Ms. Kish. Ms. Waters? Ms. Waters?

1505 Ms. Waters. Aye.

1506 Ms. Kish. Ms. Waters votes aye.

1507 Mr. Cohen?

1508 Mr. Cohen. Aye.

1509 Ms. Kish. Mr. Cohen votes aye.

1510 Mr. Johnson?

1511 Mr. Johnson. Aye.

1512 Ms. Kish. Mr. Johnson votes aye.

1513 Mr. Pierluisi?

1514 [No response.]

1515 Ms. Kish. Mr. Quigley?

1516 Mr. Quigley. Aye.

1517 Ms. Kish. Mr. Quigley votes aye.

1518 Ms. Chu?

1519 Ms. Chu. Aye.

1520 Ms. Kish. Ms. Chu votes aye.

1521 Mr. Deutch?

1522 Mr. Deutch. Aye.

1523 Ms. Kish. Mr. Deutch votes aye.

1524 Ms. Sanchez?

1525 [No response.]

1526 Ms. Kish. Ms. Wasserman Schultz?

1527 [No response.]

1528 Ms. Kish. Mr. Goodlatte?

1529 MR. Goodlatte. No.

1530 Ms. Kish. Mr. Goodlatte votes no.

1531 Mr. Issa?

1532 Mr. Issa. No.

1533 Ms. Kish. Mr. Issa votes no.

1534 Mr. Reed?

1535 Mr. Reed. No.

1536 Ms. Kish. Mr. Reed votes no.

1537 Chairman Smith. Are there any other members who wish to record

1538 their votes?

1539 [No response.]

1540 Chairman Smith. If not, the clerk will --

1541 Mr. Gallegly. How am I recorded?

1542 Ms. Kish. Mr. Gallegly votes no.

1543 Chairman Smith. The clerk will report.

1544 Ms. Kish. Mr. Chairman, 10 members voted aye; 16 members voted
1545 nay.

1546 Chairman Smith. The majority having voted against the amendment,
1547 the amendment is not agreed to.

1548 Next up is the fourth amendment to be offered by the gentleman from
1549 New York, Mr. Nadler. Mr. Nadler actually has two amendments on the same
1550 general subject, number 4 and number 27, and we will consider them
1551 separately but we will consider them both immediately. And the gentleman
1552 from New York is recognized.

1553 Mr. Nadler. Thank you. Mr. Chairman, I call up amendment number
1554 -- whatever that amendment is -- 4. And I move the waiving of its
1555 reading.

1556 Chairman Smith. Just a minute. Before we consider the amendment
1557 as read, I would like for the clerk to at least begin reading the
1558 amendment.

1559 Mr. Nadler. I am sorry.

1560 Chairman Smith. Then we will proceed.

1561 Mr. Nadler. I am ahead of myself.

1562 Ms. Kish. Amendment to H.R. 5 offered by Mr. Nadler.

1563 Chairman Smith. Without objection, the amendment will be

1564 considered as read.

1565 [The information follows:]

1566 Chairman Smith. And the gentleman from New York is recognized.

1567 Mr. Nadler. Thank you. Mr. Chairman, thank you for recognizing
1568 me.

1569 As I discussed in my opening statement, I am against capping
1570 damages in any amount. I believe our legal system is well equipped to
1571 evaluate lawsuits and using the rules of evidence and juries to determine
1572 which suits are meritorious, which are not and, when meritorious, to set
1573 award amounts reflective of the facts and fair to the litigants in a
1574 given case.

1575 Capping damages will not reduce the cost of malpractice insurance,
1576 will not make patients safer, will not make sure that those who are
1577 harmed by their doctors are provided for, will not drive bad doctors out
1578 of practice. Capping damages helps one group of people. It gives a free
1579 ride to a doctor who seriously harms his patients or her patients.

1580 And capping awards too low also makes it very difficult to get a
1581 lawyer because, after all, if a lawyer has to lay out, let's say,
1582 \$100,000 in expenses and if his fee is going to be a percentage of the
1583 award and you set the maximum award too low, then it is not going to pay
1584 for the lawyer to take the case and you are going to find it difficult to
1585 find a lawyer.

1586 But despite my general disagreement with capping damages, I am
1587 offering an amendment that would, at a bare minimum, make the cap less
1588 draconian. California enacted MICRA on which this part of the bill is
1589 based in 1975. in 1975, they capped their noneconomic damages at
1590 \$250,000. In today's dollars, \$250,000 in 1975 is now worth \$62,000.

1591 Because of inflation, that amount keeps getting less and less. Taking
1592 this in reverse, \$250,000 in 1975, if adjusted to reflect inflation,
1593 would be almost \$2 million today.

1594 My amendment would set the cap for noneconomic damages at
1595 \$1,977,500, the amount \$250,000 would be in 2009 dollars had it been
1596 enacted in 1975, and ensure that that amount is adjusted annually for
1597 inflation. Since this bill has been based on the 1975 bill, which set
1598 \$250,000, okay, but that \$250,000 should go up with inflation so it
1599 remains the same. Otherwise, it will erode down to nothing.

1600 So I encourage my colleagues to support this amendment which would
1601 set the amount at what the \$250,000 from 1975 would be worth now and
1602 would then adjust it for inflation. What it would be worth now is
1603 \$1,977,500. I encourage my colleagues to support the amendment, and I
1604 yield back the balance of my time.

1605 Chairman Smith. Thank you, Mr. Nadler. The gentleman from
1606 Arizona, Mr. Franks, is recognized.

1607 Mr. Franks. Well, thank you, Mr. Chairman. Mr. Chairman, I hope
1608 the members oppose this amendment because essentially it diminishes the
1609 purpose for the bill in the first place.

1610 Indeed, the gentleman cites the California example but the
1611 California laws are not -- the \$250,000 award that he mentions is not
1612 indexed to inflation. The same is true of Texas and that has not
1613 resulted in low damage awards by the courts. In fact, in California over
1614 the last 10 years, and those settlements that were exceeded a million
1615 dollars, the average award in the last 10 years was \$3.37 million and the

1616 point, I guess, being, Mr. Chairman, is that this bill will not stop
1617 courts from awarding honest and applicable damages and making those harms
1618 whole.

1619 What it does is to try to take this ethereal pain and suffering
1620 issue and put some sort of sane limit on it and I think that Mr. Nadler's
1621 amendment weakens that effort and I hope that the members will oppose it.

1622 Chairman Smith. Thank you, Mr. Franks. Are there other members
1623 who wish to be heard? The gentleman from Florida, Mr. Deutch, is
1624 recognized.

1625 Mr. Deutch. Thank you, Mr. Chairman. I have a question for the
1626 amendment sponsor.

1627 Mr. Nadler, if you could just speak to the issue, this is in
1628 response to Mr. Franks about whether these non-economic damages should be
1629 construed as honest damages or not, sane limits.

1630 What's the purpose of non-economic damages? Why would a jury award
1631 non-economic damages?

1632 Mr. Nadler. Well, I assume you'll yield the time? Thank you.

1633 The purpose of non-economic damages is to ensure fairness.
1634 Economic damages are basically lost wages and medical expenses.
1635 Everything else is non-economic damages. If, God forbid, you are injured
1636 by someone's negligence and you lose the ability to walk, for example,
1637 you're going to be in a wheelchair for the rest of your life, you may
1638 have medical bills which may total a certain amount of money. You may
1639 have no economic damages. You may still be able to do your job. You can
1640 still represent your constituents in Congress, even though you're in a

1641 wheelchair, but the fact you can no longer walk is real damage and, in
1642 fact, if you're a child, you may have no economic damages because we
1643 don't know how much money you would have made. We don't know what your
1644 salary would have been. So the economic damage is zero. If you retired,
1645 the economic damage may be zero and yet you're really injured.

1646 So to say that non-economic damages, sometimes called pain and
1647 suffering, but it's really every damage, other than your medical
1648 expenses, which are paid to somebody else, not to you obviously, and your
1649 loss of wages that you shouldn't get compensated for that because of
1650 someone's negligence, you can no longer play sports, you can no longer
1651 run, you can no longer walk, maybe you can no longer see, that's non-
1652 economic damages.

1653 Now, the argument that it should continually go down, states should
1654 be limited to a certain amount, I think is unfair, but if you're going to
1655 limit it to that amount, if you're going to say it should be \$250,000, at
1656 least keep it that. Don't let the passage of time erode it down
1657 gradually to zero.

1658 If you really say that non-economic damages shouldn't be
1659 compensated at all, then say that. It would be grossly unfair for
1660 putting in a cap and not putting in an inflation limit, an inflation
1661 adjustment, rather, is saying that ultimately it goes to the zero for all
1662 practical purposes

1663 In California, it's gone from 250,000 to 262,000. Eventually, it
1664 will go to 62 cents and that -- and to call this ethereal, it's not as
1665 easy to estimate what it is as the medical bill. You know the medical

1666 bill to the penny but it's real and to say that people shouldn't be
1667 compensated is simply -- violates our entire history of legality and not
1668 only in this country but since the 10 Commandments.

1669 Mr. Deutch. Mr. Chairman, I thank the amendment sponsor for that
1670 helpful answer and to the extent I have any time, I'd yield to Ms.
1671 Jackson Lee.

1672 Ms. Jackson Lee. I rise to support the Nadler amendment, and, Mr.
1673 Nadler, I think you eloquently articulated a premise of fairness,
1674 fairness to the physician, which it should not be taken that members on
1675 this side of the aisle have any sense of not being fair, but also
1676 fairness to the patient and one of the points that you did not make and I
1677 hesitate to make it, but there is something called inflation.

1678 We're in 2011. In terms of the needs of an individual to live and
1679 a point that I want to draw upon and I'll be introducing later is the
1680 question of irreversible injuries if someone may never come back to the
1681 point of being fully able to complete the work that they have previously
1682 been doing. They may be impaired so much so that they will not have the
1683 fullness of life and the economic opportunity, but I think you made a
1684 very good point. All other expenses, other than pain and suffering.

1685 So if we want to have a balanced perspective of fairness to patient
1686 and physician, and if this is an injury that has been litigated and
1687 proven, then I don't see how in 2011 we can adhere to a cap of \$250,000
1688 that really has no basis in fairness and does not respond to the
1689 spiraling costs of living that someone has to live under.

1690 So I'd ask my colleagues to support the Nadler amendment in the
1691 spirit of fairness, not excessiveness, and in the spirit of recognizing
1692 that all of us have a place at the seat of justice, whether it is a
1693 position in the medical profession or whether it is the petitioner who
1694 simply wants to be made in some way whole. I hope that is the underlying
1695 premise of this legislation. I know it is the underlying premise of any
1696 lawyer that goes into the courtroom and certainly I know it's the
1697 underlying premise of any doctor that takes on patients.

1698 With that, I yield back to the gentleman from Florida and thank him
1699 for his kindness.

1700 Chairman Smith. The gentleman's time has expired. The gentleman
1701 from California, Mr. Lungren, wants to be recognized very briefly.

1702 Mr. Lungren. Thank you very much, Mr. Chairman. I practiced
1703 medical malpractice trial work, both before and after my career was
1704 passed. Ninety percent of my work was defense, 10 percent was
1705 plaintiffs' cases. My largest case happened to be a plaintiff's case. I
1706 was unaware either before or after that we had a paucity of lawyers
1707 willing to take legitimate cases and after my career passed, I didn't see
1708 the number of lawyers who were available to pursue these cases go down as
1709 a result of this limitation on punitive damages.

1710 Secondly. The gentleman, I think, is mistaken if he suggests that
1711 a child would not be able to receive a calculation based on expected
1712 earnings in the future if in fact the physical damage that he suffered
1713 would in any way interfere with possible job opportunities in the future.

1714 As a matter of fact, I think you'll see reflected in some of these
1715 cases from California, multimillion dollar cases, they were in fact cases
1716 involving children.

1717 In the case of non-economic damages, it is a balance that we
1718 attempt to establish. Non-economic damages are virtually impossible to
1719 actually quantify. If you were to ask me before I were to undergo a
1720 procedure, are you willing to -- what would you pay or what would you be
1721 compensated to lose the loss of -- to lose a limb, I'd probably say you
1722 couldn't give me enough money to lose a limb.

1723 There is no way to truly calculate pain and suffering and so it is
1724 a legislative decision as to what would be a reasonable amount to be
1725 added on top of the other things and so it's not the situation where
1726 we're trying to be punitive against the plaintiff but it is in fact a
1727 reflection of fairness and an attempt for us to try and create a scenario
1728 in which you do not have plaintiff malpractice cases which have an effect
1729 on causing doctors to do excessively defensive medicine or to refuse to
1730 do high-risk cases.

1731 The situation in which you have the greatest impact on the medical
1732 profession is in the high-risk cases. They are by definition high-risk
1733 and if in fact there is an untoward result, the possibility of damages is
1734 very, very large and so we try and make a balanced approach to the entire
1735 thing and I would just say that in California, the \$250,000 limit has
1736 worked very, very well.

1737 We have people all the way ranging from the Planned Parenthood
1738 Association to AIDS clinics to others who have said that if you increase

1739 this, it will have a negative impact on their ability to provide services
1740 to patients. So that's the other side of the argument.

1741 Mr. Watt. Would the gentleman yield for a question?

1742 Mr. Lungren. I was only going to be yielded to briefly but I guess
1743 I can briefly yield to you for a question.

1744 Mr. Watt. Well, thank you, sir. What is the justification for
1745 taking the power of a state court jury to determine the amount of pain
1746 and suffering, taking that away and putting it in the hands of a federal
1747 legislative body, the United States Congress? What is the justification
1748 for that?

1749 Mr. Lungren. Well, I can give you a justification for it, but I
1750 would yield to the gentleman, the chairman of the committee, who is the
1751 major sponsor of this overall effort.

1752 Mr. Watt. I hear somebody saying something about interstate
1753 commerce and that would -- so I'll wait for the response because it would
1754 seem that if the health care liability litigation system is within or
1755 affects interstate commerce, then it would seem that the ability to
1756 protect taxpayers and people with insurance from people -- from having to
1757 pay the bills of people who are uninsured would also fall -- it would
1758 also affect interstate commerce.

1759 Mr. Lungren. I'll just take back, but I can't understand, I'm
1760 sorry, I can't understand whether the gentleman's arguing for or against
1761 the current position of the Administration and the courts protecting
1762 Obamacare.

1763 Chairman Smith. In either case, the gentleman's time has expired.

1764 The gentleman from Virginia, Mr. Scott.

1765 Mr. Scott. Thank you, Mr. Chairman. Mr. Chairman, for a lot of
1766 people the non-economic damages constitutes the entire case, children,
1767 seniors, and so this limitation, I think, is just unfair and I would
1768 oppose the amendment and yield to the gentleman from New York.

1769 Mr. Nadler. Thank the gentleman from Virginia. I'd just like to
1770 commend on what the gentleman from California said a moment ago.

1771 Aside from the decision that Congress knows better than state court
1772 juries, which is an interesting decision that I disagree with obviously,
1773 that's not what we're talking about in this amendment.

1774 In this amendment, and yes, you're quite correct, it is very
1775 difficult to estimate precisely what the non-economic damages are. How
1776 much is the loss of a limb worth? How much is the fact you're going to
1777 be in a wheelchair, God forbid, for the rest of your life worth, that
1778 you're blind? Very difficult decision. Someone makes that decision.
1779 Someone made it in the case.

1780 The real question for this amendment is should that be worth less
1781 next year than now and less the year after that and eventually virtually
1782 nothing. That's what inflation does. Inflation says that if we make a
1783 decision that we should cap it at \$250,000, well, let's assume that's a
1784 reasonable decision. But that's 240 next year and 230 the year after and
1785 220 the year after and eventually virtually nothing.

1786 What this amendment does is adjust the \$250,000 from the 1975 to
1787 current values and the \$250,000 made sense in 1975 and this amount would
1788 make exactly the same amount of sense, not less/not more, now, and it may

1789 be -- and by the way, I don't agree. I mean, we've got plenty of
1790 experience, I've had personal experience where we've gone to -- I've got
1791 a lawyer and said we ought to look at that case. It's just not worth my
1792 effort because even if you win, it's only X dollars, I can't afford it.
1793 That happens all the time. You don't hear about it because you don't see
1794 the case in court. But plenty of people will tell you that in order to
1795 get a lawyer to take any tort case, not just a malpractice case but any
1796 tort case, you have to convince the lawyer of two things.

1797 One, it's a meritorious case. You know, it's a good gamble that
1798 he'll win. He's not going to spend a lot of money and lose the case in
1799 which case, since it's a contingency, he gets nothing, and, two, --

1800 Chairman Smith. Isn't that a good thing?

1801 Mr. Nadler. I'm not saying it's good or bad. I'm simply saying
1802 that, yes, fine, it's a good thing, but you have to convince the lawyer
1803 of two things.

1804 One, it's a meritorious case, fine, but, two, that the case, if he
1805 wins, there will be a large enough recovery to make it worth his while
1806 since he's going to have to spend a 100,000-200,000, whatever, in
1807 expenses and if the recovery is 250,000, of which he gets 10 percent or
1808 15 or 20 percent or whatever he gets, it's less than what he spent for it
1809 and it's not worth his time, he's not going to take the case.

1810 So obviously that's -- you're going to not have lawyers and we know
1811 of many such cases won't show up in court, but the key for this amendment
1812 is that again not whether we should make the decision, which I don't
1813 agree with but which the whole bill does, but whether, once we've made

1814 that decision, that decision should change every single year to a lower
1815 amount and my amendment says it shouldn't.

1816 I yield back.

1817 Chairman Smith. Okay. Does the gentleman from Virginia yield back
1818 his time?

1819 Mr. Scott. I do.

1820 Chairman Smith. If there are no other members who wish to speak on
1821 this amendment, the question is on the amendment. Those in favor, say
1822 aye.

1823 [Chorus of ayes.]

1824 Chairman Smith. Opposed, nay.

1825 [Chorus of nays.]

1826 Chairman Smith. The opinion of the Chair, the nays have it and the
1827 amendment is not agreed to.

1828 We'll now go to the next Nadler amendment which is Number 27 and
1829 the gentleman from New York is recognized for purposes of explaining that
1830 amendment.

1831 Mr. Nadler. Thank you. I didn't ask for Roll Call on that one.
1832 On this one I'll ask for Roll Call.

1833 Chairman Smith. Okay.

1834 Mr. Nadler. Let me just say this amendment is similar but it comes
1835 from the other end.

1836 Instead of saying let's adjust in this bill the limit to a million
1837 nine to reflect the 250 that they did in California in 1975, this says,

1838 all right, you're going to do \$250,000, fine, but put an inflation factor
1839 in it so it remains at the equivalent of \$250,000.

1840 If we don't pass this amendment, then what you're saying is that
1841 we're establishing a limit but that limit should go down every year and
1842 eventually the limit for non-economic damages, that is for everything
1843 other than medical expenses and lost wages, everything else, should be
1844 zero, for all practical purposes zero, because at the rate the \$250,000
1845 that California did is now worth \$62,000 and that's what 35 years ago.
1846 If we do this now at 250,000 in today's dollars, in 25 years it'll be
1847 worth a \$1.75, and if you don't vote for this amendment, what you're
1848 really saying is we don't believe there should be any recovery eventually
1849 for non-economic damages, and I don't think anybody can really think that
1850 someone who is terribly damaged by a negligent act, if someone is shot by
1851 negligence act and is in terrible condition -- well, this doesn't apply
1852 because it's not -- but medical malpractice, if someone is negligent
1853 because of negligence, because of someone's carelessness, is going to
1854 suffer the rest of his life, he should get no recovery for that
1855 eventually, nothing, that's what this amendment -- that's what this bill
1856 says, if you don't pass this amendment.

1857 Now it's \$250,000 but for the case that occurs 10 or 20 years from
1858 now, it's virtually nothing. If \$250,000 makes sense, then leave it
1859 \$250,000 in real dollars. We inflate almost everything else. We inflate
1860 lots of things in federal law. There's no reason this should not be
1861 inflated, too, from 250 now to maintain that value for the future, unless
1862 you really want to say that this is just a hidden way of saying people

1863 shouldn't recover for medical negligence at all for anything other than
1864 pay the hospital bill and lost wages.

1865 So I urge a vote for this amendment and I yield back the balance of
1866 my time.

1867 Chairman Smith. Thank you, Mr. Nadler. The gentleman from
1868 Arizona, Mr. Franks, is recognized.

1869 Mr. Franks. Well, Mr. Chairman, I would just very briefly oppose
1870 this amendment for the same reasons that I did the previous amendment.

1871 It essentially weakens the cap on non-economic damages and caps on
1872 non-economic damages are essential to the success of the HEALTH Act's
1873 reforms. Indeed, the savings of \$54 billion over 10 years that CBO
1874 concluded would be significantly diminished if the cap is raised over
1875 time and the key to the success of legal reforms in California is the cap
1876 on non-economic damages and with that, Mr. Chairman, I'm just going to
1877 yield back, unless there are further reasons to discuss it.

1878 Chairman Smith. Thank you, Mr. Franks. Are there any other
1879 members who wish to be recorded? If not, we'll have the Roll Call vote
1880 on this amendment and the Clerk will call the Roll. Would the Clerk
1881 suspend for a second?

1882 Let me ask the gentleman from New York this. If he'll withdraw the
1883 amendment, I'll give it some good faith negotiation effort and we'll try
1884 to see if we might be able to work out something between now and the
1885 House Floor.

1886 Mr. Nadler. The word of the Chairman is always good. With that
1887 understanding, I'll withdraw the amendment.

1888 Chairman Smith. Thank you, Mr. Nadler. The amendment is withdrawn
1889 and we will now go to the next amendment to be offered.

1890 Is the gentleman from Georgia, Mr. Johnson, prepared to offer an
1891 amendment?

1892 Mr. Johnson. I am, Mr. Chairman.

1893 Chairman Smith. Okay. The gentleman is recognized for purposes of
1894 offering Amendment Number 16.

1895 Mr. Johnson. Okay. I have got Amendment Number 16 at the desk,
1896 Mr. Chairman.

1897 Chairman Smith. The Clerk will report the amendment.

1898 Ms. Kish. Amendment to H.R. 5, offered by Mr. Johnson.

1899 Chairman Smith. Without objection, the amendment will be
1900 considered as read. The gentleman from Georgia is recognized to explain
1901 his amendment.

1902 Mr. Johnson. Thank you, Mr. Chairman. This amendment would limit
1903 the application of the bill to cases brought in federal court.

1904 The 10th Amendment to the Constitution was recently read on the
1905 House Floor, providing that powers not provided to the Federal Government
1906 nor prohibited to the states are reserved to the states or to the people.
1907 Traditionally, tort law, including medical malpractice, has been left to
1908 the states.

1909 Now there's a true disconnect here, Mr. Chairman. The same
1910 legislators who believe that health care reform and the health care
1911 reform bill should be repealed because it violates the 10th Amendment are
1912 the same legislators who support taking away a state's power to enact

1913 laws to protect its citizens in their own state courts and I think
1914 President Reagan would be appalled at this federal intrusion on states'
1915 rights.

1916 This committee should focus on the regulation of the federal
1917 judiciary and leave issues regarding state courts to the state
1918 legislators or state legislatures.

1919 Thanks, Mr. Chairman, and I yield back.

1920 Chairman Smith. Thank you, Mr. Johnson. I'll recognize myself in
1921 opposition, and I do oppose the amendment which limits the application of
1922 this bill to lawsuits brought in federal court.

1923 Nationwide, medical liability reform is needed for lawsuits brought
1924 in both federal and state courts. Limiting this bill to lawsuits filed
1925 in federal court limits the bill's effectiveness at ending frivolous
1926 medical lawsuits and thereby reducing health care costs for all
1927 Americans.

1928 Moreover, it is bringing a medical liability lawsuit is an activity
1929 that substantially affects interstate commerce. There is no federalism
1930 concern with this legislation. So I must oppose the amendment and I'll
1931 yield to the gentleman from Arizona, the Chairman of the Subcommittee for
1932 his comments.

1933 Mr. Franks. Well, Mr. Chairman, I would essentially just adopt
1934 your own comments.

1935 The fact is that the Commerce Clause clearly regulates commerce
1936 between the states and both to protect one state against another and both

1937 to try to equalize the rights of the citizens in all of the states and I
1938 think that this amendment should be opposed.

1939 Chairman Smith. Thank you, Mr. Franks. Are there any other
1940 members who wish to be recognized? The gentleman from North Carolina,
1941 Mr. Watt, is recognized.

1942 Mr. Watt. Thank you, Mr. Chairman. I'm tempted to just say go
1943 back and look at the comments I made at the hearing last week or week
1944 before last and the comments I made last year and the year before last
1945 and the year before that.

1946 It seems to me that my colleagues on this committee have lost their
1947 way on a couple of aspects. Number 1. In this particular case on the
1948 states' rights issue, I thought it was the Republican members of our
1949 committee that actually believed in states' rights and tort law has been
1950 historically one of those areas that has been the prerogative of the
1951 states.

1952 I was at Justice Scalia's meeting week before last, heard his
1953 presentation and I think this is one of the areas that he was suggesting
1954 where the Republican Party has just kind of lost sight of what this basic
1955 -- and what the constitutional framework is all about.

1956 The Commerce Clause hadn't eaten up everything that is a state
1957 prerogative. I don't know of any hospital that straddles a state line.
1958 Probably as close as you come is Charlotte, North Carolina. We're right
1959 on the South Carolina line, but we don't perform medical procedures in
1960 interstate commerce.

1961 Medical procedures are performed in a particular state and governed
1962 by the local standards of care which is what the tort law has always been
1963 about in this country.

1964 I think you fellows and ladies, lady, may have lost your way on
1965 this whole issue here by trying to federalize all tort standards here
1966 which runs very much counter to what I understood to be your -- one of
1967 the Holy Grail rails of your beliefs. So, I mean, I don't understand how
1968 you get there from here.

1969 Mr. Johnson. Would the gentleman yield?

1970 Mr. Watt. No. Let me just finish and then I'm happy to yield to
1971 you, but I want to make sure that I lecture my colleagues about this.

1972 I mean, these are the same people, as you indicated, who are saying
1973 we couldn't even do the health care legislation because we're somehow
1974 violating states' rights. It's a state prerogative. There's a bunch of
1975 state lawsuits out there about that and you guys want to have it both
1976 ways. You want to have your cake and you want to eat it, too.

1977 Medical procedures are not performed in interstate commerce and I
1978 don't know how you get there. So that's one principle that I think -- I
1979 think you've also violated the second Holy Grail or rail or whatever you
1980 call it of you all's beliefs because I thought that one of your beliefs
1981 was all about people taking personal responsibility for their own
1982 conduct.

1983 Hell. That's all tort law is about, taking responsibility for
1984 one's own conduct, and for the life of me, I can't see why you would

1985 think a trained medical professional ought to have a lower standard of
1986 care for his own personal conduct than everybody else in America has.

1987 You want welfare recipients to be personally responsible. I want
1988 doctors to be personally responsible for their own conduct and that's
1989 what this -- that's what this debate is about. I think you all have lost
1990 your way on two important things that you all have been telling us for
1991 years are just integral to your political philosophy and so, anyway, the
1992 gentleman wanted me to yield.

1993 Mr. Johnson. Yes, thank you.

1994 Mr. Watt. I'm done. I'm happy to yield to you.

1995 Mr. Johnson. Thank you, sir.

1996 Mr. Watt. If I have any time left.

1997 Mr. Johnson. I'm glad that you mentioned the meeting with Justice
1998 Scalia and the Tea Party Caucus and I would issue a -- I offered to meet
1999 with the Tea Party Caucus on this particular issue. I think it's
2000 something that is a serious issue. It's something that merits their
2001 attention and I know how much they value states' rights and I look
2002 forward to working with the Tea Party Caucus and the Tea Partiers
2003 throughout the nation to oppose this federal intervention into the 10th
2004 Amendment right of states to regulate the affairs of their citizens if
2005 they want to protect their citizens through the tort laws, through the
2006 civil process. I think that's what states have always done and I want to
2007 work with you Tea Parties to make sure that we can maintain the states'
2008 ability to see about its own citizens.

2009 Mr. Watt. Let me reclaim my time --

2010 Mr. Johnson. I'll yield back.

2011 Mr. Watt. -- just briefly, just to say I don't want to go that far
2012 as to say I'm going to work with everybody in the Tea Party, but I would
2013 like to work with my colleagues on this committee to get them back to the
2014 principles that they say that they believed in, personal responsibility
2015 and a constitutional framework that respects what the states have
2016 traditionally -- what has been sacrosanct to the states.

2017 You know, somebody please explain to me how somebody operating in
2018 an operating room in one state gets you into interstate commerce and
2019 allows the Commerce Clause to eat up everything else that the
2020 Constitution says.

2021 Chairman Smith. The gentleman's time has expired. Thank you, Mr.
2022 Watt.

2023 Mr. Watt. I yield back.

2024 Chairman Smith. Thank you, Mr. Johnson. The gentleman from Texas,
2025 Mr. Poe, is recognized.

2026 Mr. Poe. Thank you, Mr. Chairman. I find it interesting that it
2027 seems to me the same folks that were supportive of the health care and
2028 said the Federal Government had the authority to go in and regulate
2029 health care throughout the fruited plain now are arguing the states'
2030 rights argument.

2031 However, saying that, I will say this. I am very concerned that it
2032 appears that that argument is being made that we can go in and override a
2033 state constitution by federal edict, even if that state constitution
2034 prohibits caps on liability.

2035 Mr. Watt. Would the gentleman yield?

2036 Mr. Poe. No.

2037 Mr. Watt. I've got an amendment coming on that issue.

2038 Mr. Poe. Let me continue. And the concern I have is that one
2039 reason, two reasons I opposed the health care bill was I don't believe
2040 the Constitution, under the Commerce Clause, allows the Federal
2041 Government to control the nation's health care, besides the
2042 unconstitutional provision of the individual mandate requirement on
2043 Americans, and those are being litigated through our federal courts.

2044 But now we're being asked to go ahead and control liability
2045 throughout the nation and not just in federal courts but in state courts.
2046 I have no problem with this amendment applying to state -- federal courts
2047 because we're supposed to control the federal courts, but when you go to
2048 state court, this bill or the legislation overrides a state constitution
2049 that prohibits caps in liability.

2050 I got problems with that. I think it's a violation of the 10th
2051 Amendment, and I don't believe the Federal Government has any more
2052 authority to regulate health care under the Commerce Clause than it does
2053 to regulate liability caps in states under the Commerce Clause.

2054 Texas has, I think, an adequate liability reform, tort reform.
2055 It's working. People are coming to our state because of issues in other
2056 states, like New York. If New York doesn't want to have a cap and they
2057 want to allow no liability caps, that's their business, and if they want
2058 to do that in state court, I think that's a state's issue.

2059 So to be consistent, I don't believe either one of the provisions
2060 regulating national health care under the Commerce Clause is any more
2061 constitutional than regulating total liability reform in states, all
2062 under the name it's supposed to be good for the country.

2063 Mr. Johnson. Would the gentleman yield just for one comment?

2064 Mr. Poe. Yes.

2065 Mr. Johnson. Amen!

2066 Mr. Poe. I'm going to write that down. Thank you.

2067 Mr. Johnson. Would the gentleman yield?

2068 Mr. Poe. Yes.

2069 Mr. Johnson. I agree wholeheartedly with the irony of this
2070 situation where you have on one side or on one issue there being a
2071 contention that medical care, the cost of medical care affects interstate
2072 commerce, and on the other hand the involvement of the Federal Government
2073 in the laws of the state and even, indeed, as you point out, the
2074 constitutions of states.

2075 That's like comparing apples to oranges and I'd just like to make
2076 that distinction. There is certainly an Interstate Commerce Clause nexus
2077 between the cost of health care and the compulsion of individuals to have
2078 to purchase insurance to access their health care.

2079 Mr. Poe. Reclaiming my time. I think -- it's to be consistent,
2080 they're both not covered under the Interstate Commerce. I don't think
2081 the Constitution gives the Federal Government any authority in either one
2082 of those areas but now we're talking about this issue. I don't believe
2083 the Constitution gives authority. I'll yield to the Chairman.

2084 Chairman Smith. Would the gentleman please yield? Before the
2085 comments grow too loud for the gentleman from Texas, Mr. Poe, let me
2086 direct everybody's attention to Page 25 of the bill, Section C, and I'll
2087 read it to you.

2088 "State Flexibility. No provision of this Act shall be construed to
2089 preempt any state law that specifies a particular monetary amount of
2090 compensatory or punitive damages that may be awarded in a health care
2091 lawsuit, regardless of whether such monetary amount is greater or lesser
2092 than is provided for under this Act" and so forth.

2093 So let me reassure all individuals who are worried about states'
2094 rights, including the Democratic member from North Carolina who's a
2095 charter member of the States' Rights Caucus on this committee, that the
2096 law specifically exempts state laws and does not change what states have
2097 already adopted.

2098 Mr. Nadler. Will the gentleman yield? Will the gentleman yield?

2099 Chairman Smith. I'll yield back my time to the gentleman from
2100 Texas, Mr. Poe.

2101 Mr. Nadler. Will the Chairman yield? Will the gentleman yield on
2102 that point?

2103 Mr. Poe. No. Mr. Chairman, I have a question. Does not the
2104 provision in this proposed law, if a state constitution says there are no
2105 limits of liability, then this legislation will come in and override that
2106 state constitution and impose this federal mandate?

2107 Chairman Smith. I believe that the answer to that question is yes
2108 and I'll stand to be corrected if I need.

2109 Mr. Poe. All right. I yield back my time.

2110 Chairman Smith. And thank you. The gentleman yields back his
2111 time. The gentleman from New York, Mr. Nadler, is recognized.

2112 Mr. Nadler. Thank you. I want to compliment the gentleman from
2113 Texas for being consistent and I want to agree with him in part and
2114 disagree with him in part.

2115 There's no question in my mind, and I think the courts will
2116 probably bear it out, that the provisions of the Health care Act are
2117 constitutional or that the provisions of this bill are constitutional. I
2118 think the courts have held that the Interstate Commerce Clause runs that
2119 far.

2120 Having said that, having said that, a decent respect for states'
2121 rights, for local prerogative should mean that Congress should not
2122 exercise every power that we have just because we have it. We have to
2123 make judgments and everything the gentleman from Texas said about our not
2124 overriding the judgment of the Texas legislature about the caps there and
2125 whatever they have, as a matter of policy, I think is correct.

2126 The whole point of this bill or many of the provisions of this bill
2127 is to override what Texas or New York or any other state decides with
2128 respect to most of the questions in the bill. Should there be economic
2129 caps, how high should the economic caps be, should makers of devices,
2130 medical devices be included in those, should they not be, all these
2131 questions. This bill is a huge federal preemption.

2132 Now, I don't doubt that the Federal Government has the
2133 constitutional right to do that preemption, but we have the

2134 constitutional duty to decide whether, as a matter of the public welfare,
2135 as a matter of policy, as a matter of our due regard for states' rights,
2136 we should make that preemption.

2137 My answer is no. I take it the answer from the gentleman from
2138 Texas is no. I simply want to assert a different understanding of the
2139 Constitution, but even if you agree that the Constitution permits us to
2140 do something, it doesn't mean we have to do it or should do it. That's
2141 why we're elected to make those decisions and I for one think that on
2142 these questions we ought to leave it to the state legislatures and the
2143 state juries and in that respect, I agree with the gentleman from Texas.

2144 Chairman Smith. Thank you, Mr. Nadler. Are there any other
2145 members who wish to be recognized?

2146 Mr. Watt. Could I get the gentleman from New York to yield before
2147 he yields back?

2148 Mr. Nadler. I'll yield.

2149 Mr. Watt. One of those rare occasions where we have some
2150 bipartisan disagreement which I think is good in this committee. I mean,
2151 I think the gentleman is -- maybe I'm closer to Scalia on this, but I
2152 don't think the Commerce Clause allows the Federal Government to
2153 constitutionally do whatever it wants to do.

2154 I mean, we can read the Commerce Clause to be that broad but I'm
2155 not sure I would go as far as Mr. Nadler is going on this point. So I
2156 just wanted to make it clear. I just -- you know, let's go on the record
2157 here. If we believe something, let's talk about it, whether it's
2158 Democrat or Republican here.

2159 I talked about some Republican principles that I think this bill
2160 truly violates and I hope my Republican colleagues were listening to me
2161 when -- and I don't think this savings clause that you just read on Page
2162 25 helps with that. Otherwise, you'd be supporting this amendment. It
2163 wouldn't be contradictory at all.

2164 Mr. Nadler. Reclaiming my time, let me just make two observations.
2165 One, people can hold me to this, I think Justice Scalia's going to vote
2166 to uphold the constitutionality of the health care provisions, but,
2167 Number 2, again, the principles of due regard for the states, et cetera,
2168 say that we should on these issues not exercise the power that Mr. Poe
2169 thinks we don't have, that I think we do have, but it doesn't mean we
2170 should exercise the power, whether we have it or not.

2171 Mr. Watt. Would the gentleman yield?

2172 Chairman Smith. The gentleman's time has expired.

2173 Mr. Watt. Could I ask for just 30 seconds?

2174 Chairman Smith. The gentleman from North Carolina is recognized
2175 for an additional minute.

2176 Mr. Watt. I actually think that Scalia will uphold the
2177 constitutionality of the health care law, too. I think he would strike
2178 this provision down and there is a logic. I mean, I don't want to get
2179 into an extended debate about it, but I think this bill is way over the
2180 line beyond -- I mean, you can at least make reasonable arguments in the
2181 Commerce Clause area for the health care law. I don't -- I mean, I don't
2182 see how you get a medical procedure in a doctor's office or in an
2183 operating room in interstate commerce. Now maybe this -- you know, we

2184 could apply it from my perspective to Medicaid cases, Medicare cases, I
2185 mean things that we are paying for, maybe we could set the standard for,
2186 but I think this bill is way beyond anything that the court would uphold.

2187 Chairman Smith. Thank you. Mr. Watt, I don't know how Justice
2188 Scalia is going to vote. We'll probably find out within a year, but I
2189 also don't want to encourage any office pools about how they all might
2190 vote.

2191 I'd like to go on and vote on this amendment, if I could.

2192 Mr. Gohmert. Mr. Chairman?

2193 Mr. Nadler. I ask for a recorded vote.

2194 Chairman Smith. Okay. The gentleman from Texas had his hand up
2195 before we went to the recorded vote.

2196 Mr. Gohmert. Now, I won't use five minutes. I'll be brief, and I
2197 would agree with Mr. Nadler in part and disagree with him in part.

2198 I would agree that the status of the law as it stands right now
2199 from the Supreme Court, as they have contorted and twisted the
2200 Constitution, would currently allow this to be considered, but I disagree
2201 that it ultimately should be.

2202 This is an excellent bill. You know, reading through, it does some
2203 good things. It does a number of things that we've done in Texas that
2204 have really helped bring down medical costs. It will help tremendously
2205 but the reservation I have is something that I've been pretty consistent
2206 on my adult life, actually.

2207 When we impose our will on a state and say this will apply in state
2208 lawsuits, you know, if Alabama or New York want to be a haven for

2209 malpractice claims, it's great for Texas because those doctors are going
2210 to come to our state and, in fact, and actually I know some doctors that
2211 have done that since we had medical liability reform. We've gotten a lot
2212 of physicians in that came in from states and so it's up to the states
2213 whether they want to run off their good doctors, their good health care
2214 providers, but I'm reticent to allow the Congress to impose our will,
2215 overriding state law, and I'd just like to ask the Chairman is there some
2216 way we could address this before it gets to the Floor where we might
2217 could work something out?

2218 Chairman Smith. Mr. Gohmert, if you'll yield for a minute, --

2219 Mr. Gohmert. Absolutely.

2220 Chairman Smith. -- I have to confess I'm comfortable with the bill
2221 as it stands now, to tell you the truth, and with the provision that I
2222 just read on Page 24-25. That does say, quite frankly, that any state
2223 that has any level of cap, that that cap can stand, and why don't -- I
2224 can't make any promises. We can certainly consider this before we go to
2225 the House Floor, if the amendment is withdrawn, but no guarantees, only a
2226 guarantee of a good faith effort to discuss it and that's up to the mover
2227 of the amendment, Mr. Johnson, whether he would want to withdraw it or
2228 not.

2229 Mr. Johnson?

2230 Mr. Johnson. If we can talk about this further, by all means, I
2231 would withdraw this amendment and --

2232 Chairman Smith. All right. Thank you, Mr. Johnson. Without
2233 objection, the amendment is withdrawn.

2234 Mr. Johnson. But I think the Chairman deserves the courtesy of my
2235 withdrawal of this amendment. I do believe strongly in it and I believe
2236 that other members of this body do, as well, and I think it merits
2237 further discussion.

2238 Chairman Smith. We will continue to discuss it. Thank you, Mr.
2239 Johnson.

2240 We'll now go to an amendment that's going to --

2241 Mr. Watt. Does that mean the Chairman's going to withdraw the bill
2242 and continue to discuss it?

2243 Chairman Smith. No. Just withdrawing the amendment.

2244 Mr. Watt. I think that we're subverting the committee process now
2245 to the extent that you moved things beyond the committee to get worked
2246 out between --

2247 Chairman Smith. Mr. Watt, it is common procedure to have an
2248 amendment withdrawn and to consider it before we go to the House Floor.

2249 The gentlewoman from California, Ms. Sanchez, is recognized for
2250 purpose of offering her amendment.

2251 Ms. Sanchez. Thank you, Mr. Chairman. I have an amendment at the
2252 desk.

2253 Chairman Smith. The Clerk will report the amendment.

2254 Ms. Kish. Amendment to H.R. 5, offered by Ms. Sanchez. Page 15,
2255 insert after Line 18 the following and read --

2256 Chairman Smith. Without objection, the amendment will be
2257 considered as read, and the gentlewoman from California is recognized for
2258 purposes of explaining her amendment.

2259 Ms. Sanchez. Thank you, Mr. Chairman. My amendment is a very
2260 simple one. It would exempt lawsuits against nursing homes from the
2261 \$250,000 cap on non-economic damages contained in Section 4(b) of H.R. 5
2262 as originally submitted.

2263 I want to note that while many nursing homes are excellent
2264 institutions with dedicated and hard-working staff, there are a number of
2265 bad actors in that sector. In studying this issue over a number of
2266 years, I've learned of numerous cases where poor conditions or lack of
2267 care resulted in painful injury, permanent disfigurement, and loss of
2268 life. This is not what a family agrees to when they place their loved
2269 one in a nursing home and place their trust in others to provide a
2270 professional level of care.

2271 The question of how we quantify an intangible but very real harm is
2272 not an easy one and while I object to the proposed cap in general, the
2273 claims that I have seen arising from nursing homes do not seem in the
2274 least bit frivolous.

2275 I don't believe that we can put a cap on what John Donahue of
2276 Massachusetts suffered when he lost an eye due to a nurse's aide's
2277 negligence, and I don't feel we can or should limit the reimbursement for
2278 a nursing home resident like Mary Stewart of Florida whose leg had to be
2279 amputated because it became infested with maggots during an 18-day stay
2280 at a nursing home or what about patients like Margaret Hutchinson, a 78-
2281 year-old woman who was admitted to a nursing home for a short-term
2282 rehabilitation? Instead of quality care, she was underfed, suffered from
2283 dehydration, and later died.

2284 To tell a jury that there's an upper limit on suffering would make
2285 things clearly simple for a jury but I don't know how a cap brings
2286 justice to the victims or induces a change in the marketplace and the
2287 behavior that many of these bad actors engage in over and over and over
2288 again.

2289 I would also like to identify one undeniable drawback of the
2290 proposed cap. Large damages call attention to the problems facing
2291 seniors in nursing homes and force bad actors to reform their practices
2292 in a way that capped damages cannot. They simply do not provide the
2293 incentive.

2294 By 2040, the demand for long-term care services will more than
2295 double in this country. More families will be faced with the difficult
2296 choice of entrusting their loved ones to the care of others and I think
2297 we owe it to these families not to pass a law which disadvantages
2298 millions of American families at the expense of large corporations and
2299 their profits.

2300 Remember that all of us some day will arrive at that time when our
2301 loved ones may be considering placing us in nursing care and we will have
2302 been the recipients of whatever system we create now.

2303 I want to thank the Chairman for allowing the amendment and I yield
2304 back the balance of my time.

2305 Chairman Smith. Thank you, Ms. Sanchez, and I'll recognize myself
2306 in opposition to the amendment.

2307 I do oppose the amendment because it exempts nursing homes from the
2308 liability protections this bill provides. According to the Department of

2309 Health and Human Services, both the number of claims against nursing
2310 homes and the average payments made to patients or their families have
2311 risen dramatically and because the majority of nursing home patients are
2312 Medicare or Medicaid patients, the cost of litigation against nursing
2313 homes is borne largely by taxpayers.

2314 Additionally, litigation has forced nursing home providers to cut
2315 services in order to pay increasing medical malpractice insurance
2316 premiums. I see no reason to exempt nursing homes from this bill and I
2317 yield to the Chairman of the Constitution Subcommittee, Mr. Franks of
2318 Arizona, for his comments.

2319 Oh, Mr. Franks is not present. I'll yield back the balance of my
2320 time.

2321 Are there any other members who wish to be heard on this amendment?

2322 Mr. Watt. Mr. Chairman?

2323 Chairman Smith. The gentleman from North Carolina, Mr. Watt.

2324 Mr. Watt. I just wanted to comment briefly on the Chairman's
2325 response. The fact that the number of claims has gone up, I'm not sure I
2326 believe is a justification for defeating the amendment. That probably
2327 indicates a compelling justification for passing the amendment. Claims
2328 go up because nursing homes have not met the standard of care in a number
2329 of cases and to reward that with something that sanctions them not
2330 meeting a standard of care I don't think is the appropriate answer.

2331 I yield back.

2332 Chairman Smith. Thank you, Mr. Watt. Any other member wish to be
2333 recognized?

2334 [No response.]

2335 Chairman Smith. If not, the question is on the amendment. Those in
2336 favor, say aye.

2337 [Chorus of ayes.]

2338 Chairman Smith. Opposed, no.

2339 [Chorus of nays.]

2340 Chairman Smith. In the opinion of the Chair, the nos have it.

2341 Ms. Sanchez. Mr. Chairman, I'd like a recorded vote.

2342 Chairman Smith. Recorded vote has been requested. The Clerk will
2343 call the Roll.

2344 Ms. Kish. Chairman Smith?

2345 Chairman Smith. No.

2346 Ms. Kish. Mr. Smith votes no.

2347 Mr. Sensenbrenner?

2348 [No response.]

2349 Ms. Kish. Mr. Coble?

2350 Mr. Coble. No.

2351 Ms. Kish. Mr. Gallegly?

2352 [No response.]

2353 Ms. Kish. Mr. Goodlatte?

2354 [No response.]

2355 Ms. Kish. Mr. Lungren?

2356 Mr. Lungren. No.

2357 Ms. Kish. Mr. Lungren votes no.

2358 Mr. Chabot?

2359 Mr. Chabot. No.

2360 Ms. Kish. Mr. Chabot votes no.

2361 Mr. Issa?

2362 [No response.]

2363 Ms. Kish. Mr. Pence?

2364 [No response.]

2365 Ms. Kish. Mr. Forbes?

2366 Mr. Forbes. No.

2367 Ms. Kish. Mr. Forbes votes no.

2368 Mr. King?

2369 [No response.]

2370 Ms. Kish. Mr. Franks?

2371 [No response.]

2372 Ms. Kish. Mr. Gohmert?

2373 [No response.]

2374 Ms. Kish. Mr. Jordan?

2375 [No response.]

2376 Ms. Kish. Mr. Poe?

2377 [No response.]

2378 Ms. Kish. Mr. Chaffetz?

2379 [No response.]

2380 Ms. Kish. Mr. Reed?

2381 Mr. Reed. No.

2382 Ms. Kish. Mr. Reed votes no.

2383 Mr. Griffin?

2384 [No response.]
2385 Ms. Kish. Mr. Marino?
2386 [No response.]
2387 Ms. Kish. Mr. Gowdy?
2388 Mr. Gowdy. No.
2389 Ms. Kish. Mr. Gowdy votes no.
2390 Mr. Ross?
2391 [No response.]
2392 Ms. Kish. Ms. Adams?
2393 [No response.]
2394 Ms. Kish. Mr. Quayle?
2395 Mr. Quayle. No.
2396 Ms. Kish. Mr. Quayle votes no.
2397 Mr. Conyers?
2398 Mr. Conyers. Aye.
2399 Ms. Kish. Mr. Conyers votes aye.
2400 Mr. Berman?
2401 [No response.]
2402 Ms. Kish. Mr. Nadler?
2403 Mr. Nadler. Aye.
2404 Ms. Kish. Mr. Nadler votes aye.
2405 Mr. Scott?
2406 Mr. Scott. Aye.
2407 Ms. Kish. Mr. Scott votes aye.
2408 Mr. Watt?

2409 Mr. Watt. Aye.

2410 Ms. Kish. Mr. Watt votes aye.

2411 Ms. Lofgren?

2412 [No response.]

2413 Ms. Kish. Ms. Jackson Lee?

2414 Ms. Jackson Lee. Aye.

2415 Ms. Kish. Ms. Jackson Lee votes aye.

2416 Ms. Waters?

2417 Ms. Waters. Aye.

2418 Ms. Kish. Ms. Waters votes aye.

2419 Mr. Cohen?

2420 Mr. Cohen. Aye.

2421 Ms. Kish. Mr. Cohen votes aye.

2422 Mr. Johnson?

2423 [No response.]

2424 Ms. Kish. Mr. Pierluisi?

2425 [No response.]

2426 Ms. Kish. Mr. Quigley?

2427 Mr. Quigley. Yes.

2428 Ms. Kish. Mr. Quigley votes yes.

2429 Ms. Chu?

2430 Ms. Chu. Aye.

2431 Ms. Kish. Ms. Chu votes aye.

2432 Mr. Deutch?

2433 [No response.]

- 2434 Ms. Kish. Ms. Sanchez?
- 2435 Ms. Sanchez. Aye.
- 2436 Ms. Kish. Ms. Sanchez votes aye.
- 2437 Ms. Wasserman Schultz?
- 2438 [No response.]
- 2439 Ms. Kish. Ms. Adams?
- 2440 Ms. Adams. No.
- 2441 Ms. Kish. Ms. Adams votes no.
- 2442 Mr. Gallegly?
- 2443 Mr. Gallegly. No.
- 2444 Ms. Kish. Mr. Gallegly votes no.
- 2445 Chairman Smith. Mr. Goodlatte?
- 2446 Ms. Kish. Mr. Goodlatte?
- 2447 Mr. Goodlatte. No.
- 2448 Ms. Kish. Mr. Goodlatte votes no.
- 2449 Mr. Griffin?
- 2450 Mr. Griffin. No.
- 2451 Ms. Kish. Mr. Griffin votes no.
- 2452 Chairman Smith. Mr. Ross?
- 2453 Ms. Kish. Mr. Ross?
- 2454 [No response.]
- 2455 Ms. Kish. Mr. Franks?
- 2456 Mr. Franks. No.
- 2457 Ms. Kish. Mr. Franks votes no.
- 2458 Mr. Reed?

2459 Mr. Reed. No.

2460 Ms. Kish. Mr. Reed votes no.

2461 Mr. Deutch?

2462 Mr. Deutch. Aye.

2463 Ms. Kish. Mr. Deutch votes aye.

2464 Chairman Smith. Are there other members who wish to be recorded?

2465 The gentleman from Indiana, Mr. Pence.

2466 Ms. Kish. Mr. Pence.

2467 Mr. Pence. No.

2468 Ms. Kish. Mr. Pence votes no.

2469 Chairman Smith. The Clerk will report.

2470 Ms. Kish. Mr. Chairman, 11 members voted aye, 14 members voted

2471 nay.

2472 Chairman Smith. Okay. The amendment is not agreed to. We'll go

2473 to the gentlewoman from California, Ms. Chu, for purposes of her offering

2474 an amendment.

2475 Ms. Chu. Thank you, Mr. Chairman. I have an amendment at the

2476 desk.

2477 Chairman Smith. And the Clerk will report the amendment.

2478 Ms. Kish. Amendment to H.R. 5, offered by Ms. Chu, Mr. Conyers,

2479 and Mr. Johnson of Georgia.

2480 Chairman Smith. Without objection, the amendment will be

2481 considered as read. The gentlewoman from California is recognized.

2482 Ms. Chu. Thank you, Mr. Chairman. Today, I'm introducing this
2483 amendment that will repeal the outdated McCarran-Ferguson Act and restore
2484 competition to the health care industry.

2485 Under McCarran-Ferguson, insurance companies were exempt from laws
2486 that prohibit collusion, price-fixing, and monopolization. For far too
2487 long the insurance companies have been able to avoid accountability at
2488 consumers' expense.

2489 This amendment will restore free market competition to the health
2490 insurance industry and subject those industries to the same competition
2491 laws that apply to virtually every other company doing business in the
2492 United States.

2493 The current lack of antitrust enforcement under the McCarran-
2494 Ferguson Act has resulted in rapidly-increasing premiums, sky-high
2495 profits in the insurance industry, and higher costs for many businesses.
2496 Small businesses are particularly vulnerable to the exercise of market
2497 power by insurers, given their limited options, and it's made it harder
2498 for these small businesses to do the right thing and offer health
2499 insurance to their employees.

2500 By removing the unfair antitrust exemption for health insurance
2501 companies, this amendment will allow the free market to bring competition
2502 back to the insurance industry. Consumers will benefit through lower
2503 costs, more choices, and better service. Even the Federal Government
2504 will benefit from the lower cost of providing health care.

2505 In the last Congress, legislation repealing the McCarran-Ferguson
2506 Act passed with overwhelming support. So please join me in restoring

2507 free market competition to the insurance industry and repealing the
2508 outdated McCarran-Ferguson Act.

2509 Thank you. I yield back the balance of my time.

2510 Chairman Smith. Thank you, Ms. Chu. I'll recognize myself in
2511 opposition to the amendment.

2512 Repealing the McCarran-Ferguson Act has been a repeated theme of
2513 some in Congress, but this amendment has little to do with the HEALTH
2514 Act's goals of decreasing medical liability insurance costs. This
2515 amendment is targeted at health insurance, not medical liability
2516 insurance.

2517 Health insurance helps patients pay for health care, medical
2518 liability insurance protects doctors and medical personnel against
2519 lawsuits, and the two are apples and oranges.

2520 Even if this amendment would be an effective reform of the health
2521 insurance market, and I don't believe that it would, it would not reduce
2522 the cost of medical liability litigation, and I'll yield back the balance
2523 of my time.

2524 Are there other members who wish to be recognized on this
2525 amendment? The gentleman from Georgia, Mr. Johnson.

2526 Mr. Johnson. Thank you, Mr. Chairman. I move to strike the last
2527 word.

2528 Chairman Smith. Without objection, the gentleman is recognized for
2529 five minutes.

2530 Mr. Johnson. Thank you. Mr. Chairman, this is an important
2531 amendment that would repeal certain provisions of the McCarran-Ferguson
2532 Act, which exempts insurance companies from federal antitrust laws.

2533 It is essential to have a strong law regarding competition in place
2534 to ensure that consumers have better choices, lower prices, and better
2535 services. This amendment would also benefit health care providers
2536 because increased competition would mean lower costs and more choices for
2537 medical malpractice insurance.

2538 Last session, I served as Chairman of the Courts and Competition
2539 Policy Subcommittee which held a hearing on the McCarran-Ferguson repeal.
2540 Increasing competition and lowering costs for consumers, for patients and
2541 for health care providers is certainly something that members on both
2542 sides of the aisle can appreciate.

2543 Thank you, Mr. Chairman. I yield back the balance of my time.

2544 Chairman Smith. Thank you, Mr. Johnson. Does any other member
2545 wish to be heard? The gentleman from Virginia, Mr. Forbes.

2546 Mr. Forbes. Mr. Chairman, I'd like to move to strike the last
2547 word.

2548 Chairman Smith. Without objection, the member's recognized for
2549 five minutes.

2550 Mr. Forbes. Mr. Chairman, one of the things that McCarran was
2551 designed to do was to allow small insurers to aggregate data for
2552 underwriting purposes, so they could compete effectively against larger
2553 national companies. If we do pass this amendment and repeal the Act,
2554 we're actually promoting less competition to those small underwriters and

2555 I hope that we'll avoid doing that and I hope we'll reject the amendment,
2556 and I yield back.

2557 Chairman Smith. Thank you, Mr. Forbes. Any other member wish to
2558 be recognized?

2559 [No response.]

2560 Chairman Smith. If not, the question is on the amendment. Those in
2561 favor, say aye.

2562 [Chorus of ayes.]

2563 Chairman Smith. Those opposed, no.

2564 [Chorus of nays.]

2565 Chairman Smith. In the opinion of the Chair, the nos have it, and
2566 the amendment is not agreed to. We will now go to --

2567 Ms. Chu. Mr. Chairman, I ask for a recorded vote.

2568 Chairman Smith. Recorded vote has been requested. The Clerk will
2569 call the Roll.

2570 Ms. Kish. Chairman Smith?

2571 Chairman Smith. No.

2572 Ms. Kish. Mr. Smith votes no.

2573 Mr. Sensenbrenner?

2574 [No response.]

2575 Ms. Kish. Mr. Coble?

2576 [No response.]

2577 Ms. Kish. Mr. Gallegly?

2578 Mr. Gallegly. No.

2579 Ms. Kish. Mr. Gallegly votes no.

2580 Mr. Goodlatte?
2581 Mr. Goodlatte. No.
2582 Ms. Kish. Mr. Goodlatte votes no.
2583 Mr. Lungren?
2584 [No response.]
2585 Ms. Kish. Mr. Chabot?
2586 Mr. Chabot. No.
2587 Ms. Kish. Mr. Chabot votes no.
2588 Mr. Issa?
2589 [No response.]
2590 Ms. Kish. Mr. Pence?
2591 [No response.]
2592 Ms. Kish. Mr. Forbes?
2593 Mr. Forbes. No.
2594 Ms. Kish. Mr. Forbes votes no.
2595 Mr. King?
2596 [No response.]
2597 Ms. Kish. Mr. Franks?
2598 [No response.]
2599 Ms. Kish. Mr. Gohmert?
2600 [No response.]
2601 Ms. Kish. Mr. Jordan?
2602 [No response.]
2603 Ms. Kish. Mr. Poe?
2604 [No response.]

2605 Ms. Kish. Mr. Chaffetz?
2606 [No response.]
2607 Ms. Kish. Mr. Reed?
2608 Mr. Reed. No.
2609 Ms. Kish. Mr. Reed votes no.
2610 Mr. Griffin?
2611 [No response.]
2612 Ms. Kish. Mr. Marino?
2613 Mr. Marino. No.
2614 Ms. Kish. Mr. Marino votes no.
2615 Mr. Gowdy?
2616 Mr. Gowdy. No.
2617 Ms. Kish. Mr. Gowdy votes no.
2618 Mr. Ross?
2619 Mr. Ross. No.
2620 Ms. Kish. Mr. Ross votes no.
2621 Ms. Adams?
2622 Ms. Adams. No.
2623 Ms. Kish. Ms. Adams votes no.
2624 Mr. Quayle?
2625 [No response.]
2626 Ms. Kish. Mr. Conyers?
2627 Mr. Conyers. Aye.
2628 Ms. Kish. Mr. Conyers votes aye.
2629 Mr. Berman?

2630 [No response.]

2631 Ms. Kish. Mr. Nadler?

2632 Mr. Nadler. Aye.

2633 Ms. Kish. Mr. Nadler votes aye.

2634 Mr. Scott?

2635 Mr. Scott. Aye.

2636 Ms. Kish. Mr. Scott votes aye.

2637 Mr. Watt?

2638 Mr. Watt. Aye.

2639 Ms. Kish. Mr. Watt votes aye.

2640 Ms. Lofgren?

2641 [No response.]

2642 Ms. Kish. Ms. Jackson Lee?

2643 Ms. Jackson Lee. Aye.

2644 Ms. Kish. Ms. Jackson Lee votes aye.

2645 Ms. Waters?

2646 Ms. Waters. Aye.

2647 Ms. Kish. Ms. Waters votes aye.

2648 Mr. Cohen?

2649 Mr. Cohen. Aye.

2650 Ms. Kish. Mr. Cohen votes aye.

2651 Mr. Johnson?

2652 Mr. Johnson. Aye.

2653 Ms. Kish. Mr. Johnson votes aye.

2654 Mr. Pierluisi?

2655 [No response.]

2656 Ms. Kish. Mr. Quigley?

2657 Mr. Quigley. Aye.

2658 Ms. Kish. Mr. Quigley votes aye.

2659 Ms. Chu?

2660 Ms. Chu. Aye.

2661 Ms. Kish. Ms. Chu votes aye.

2662 Mr. Deutch?

2663 Mr. Deutch. Aye.

2664 Ms. Kish. Mr. Deutch votes aye.

2665 Ms. Sanchez?

2666 Ms. Sanchez. Aye.

2667 Ms. Kish. Ms. Sanchez votes aye.

2668 Ms. Wasserman Schultz?

2669 Ms. Wasserman Schultz. Aye.

2670 Ms. Kish. Ms. Wasserman Schultz votes aye.

2671 Mr. Quayle?

2672 Mr. Quayle. No.

2673 Ms. Kish. Mr. Quayle votes no. Mr. Coble votes no.

2674 Chairman Smith. Mr. Nadler, have you voted? Okay. Are there any

2675 other members who wish to vote?

2676 Mr. Nadler. Mr. Chairman? Mr. Chairman, how am I recorded,

2677 please?

2678 Chairman Smith. How is the gentleman from New York record?

2679 Ms. Kish. Mr. Nadler votes aye.

2680 Mr. Nadler. Thank you.

2681 Mr. Coble. Mr. Chairman, I want to change my vote to aye.

2682 Ms. Kish. Mr. Coble votes aye.

2683 Mr. Gallegly. How am I recorded

2684 Ms. Kish. Mr. Gallegly votes no.

2685 Mr. Coble. Mr. Chairman, I'm going to change my vote back to no.

2686 Chairman Smith. The gentleman from North Carolina votes no.

2687 Ms. Kish. Mr. Coble votes no.

2688 Chairman Smith. The Clerk will report. The Clerk will suspend.

2689 Mr. Gallegly. I'm sorry. Did you say I was recorded as no?

2690 Ms. Kish. Mr. Gallegly is recorded as no.

2691 Mr. Gallegly. I change to aye.

2692 Ms. Kish. Mr. Gallegly votes aye.

2693 Mr. Conyers. Mr. Chairman, could I ask for a point of order?

2694 Mr. Franks. Mr. Chairman, could I ask how I am recorded?

2695 Chairman Smith. How is the gentleman from Virginia recorded?

2696 Ms. Kish. Mr. Goodlatte?

2697 Chairman Smith. No. Mr. Forbes.

2698 Ms. Kish. Mr. Forbes is recorded as no.

2699 Mr. Forbes. Thank you, Mr. Chairman.

2700 Chairman Smith. The Chair hears the Ranking Member but the Chair

2701 also thinks he hears footsteps in the hall. So we'll wait just a minute

2702 more and see if there are any other members who wish to be recorded.

2703 Mr. Conyers. Mr. Chairman, the footsteps just walked past the

2704 door.

2705 Mr. Cohen. Mr. Chairman, the footsteps are people going to see
2706 their broker to sell their stocks.

2707 Ms. Kish. Mr. Chaffetz.

2708 Mr. Chaffetz. No.

2709 Ms. Kish. Mr. Chaffetz votes no.

2710 Mr. Conyers. Mr. Chairman, you may have heard Mr. Chaffetz's
2711 footsteps.

2712 Chairman Smith. The gentleman from California, Mr. Gallegly, is
2713 recognized.

2714 Mr. Gallegly. How am I recorded?

2715 Ms. Kish. Mr. Gallegly is recorded as voting aye.

2716 Mr. Gallegly. I am going to make my final vote as no.

2717 Ms. Kish. Mr. Gallegly votes no.

2718 Chairman Smith. The Clerk will report.

2719 Mr. Nadler. Mr. Chairman, Mr. Chairman?

2720 Chairman Smith. Before the Clerk reports, the gentleman from New
2721 York is recognized.

2722 Mr. Nadler. How am I recorded, please?

2723 Chairman Smith. How is the gentleman from New York recorded, Mr.
2724 Nadler?

2725 Ms. Kish. Mr. Nadler is recorded as aye.

2726 Mr. Nadler. Mr. Chairman, may I inquire of the Clerk if she's
2727 certain of that?

2728 Chairman Smith. I'll answer for Ms. Kish. She is certain.

2729 Mr. Nadler. Thank you very much.

2730 Chairman Smith. And the Clerk will --

2731 Mr. Johnson. Mr. Chairman?

2732 Chairman Smith. At this point, nobody's been recognized. Who
2733 seeks recognition? The gentleman from Georgia, Mr. Johnson.

2734 Mr. Johnson. Mr. Chairman, may I ask how am I recorded, please?
2735 Clerk. Mr. Johnson is recorded as aye.

2736 Chairman Smith. The Clerk will report.

2737 Clerk. Mr. Chairman, 13 members voted aye, 13 members voted nay.

2738 Chairman Smith. And the majority did not vote for the amendment
2739 either way, so the amendment is not agreed to.

2740 I will now go to the gentlewoman from Texas, Ms. Jackson Lee, for
2741 purposes of offering an amendment, and it's Amendment Number 11, as I
2742 understand it.

2743 Ms. Jackson Lee. It is. I have an amendment at the desk, Mr.
2744 Chairman.

2745 Chairman Smith. The Clerk will report Amendment Number 11.

2746 Ms. Kish. Amendment to H.R. 5, offered by Ms. Jackson Lee. Page
2747 15, insert after Line 18 the following, redesignate --

2748 Chairman Smith. Without objection, the amendment is considered as
2749 read. The gentlewoman from Texas is recognized.

2750 Ms. Jackson Lee. Thank you very much, Mr. Chairman. Both of us
2751 come from the great state of Texas and I think that you had good
2752 intentions and were influenced by the proposition passed by some friends
2753 and colleagues in the state of Texas.

2754 As I look at this particular legislation, H.R. 5, it is even more
2755 heinous and in some instances restrictive, though I know both of us have
2756 the good intentions to ensure justice for all.

2757 My bill speaks to what I think is the ability to work with the
2758 intent but also protect individuals that we have come to this place to
2759 protect. It carves out an exemption for health care lawsuits for serious
2760 and irreversible injury. This will exempt victims of medical malpractice
2761 that resulted in irreversible injury, including loss of limbs, loss of
2762 reproductive ability, things that -- items that can never be, in essence,
2763 recaptured, from the \$250,000 cap that H.R. 5 imposes on non-economic
2764 damages.

2765 As individuals who are blessed to have all of our limbs and use all
2766 of our senses, difficult to understand what a day-to-day life situation
2767 will be when an individual is denied these elements. We've seen it, of
2768 course, to some extent in those that we visited at Walter Reed and other
2769 places where our soldiers go.

2770 It is impossible to imagine the stress and challenges faced by
2771 someone who suffered irreversible bodily injury because of the negligence
2772 of another. Imagine going for a minor pain and leaving with an
2773 eliminated limb because of a mistake that has occurred and certainly we
2774 know that these are both limited but when they do happen, it poses a
2775 serious concern.

2776 For Connie Spears, a Texas woman from San Antonio, this was a
2777 nightmare. As a patient who had dealt with blood clots in the past, had
2778 a filter installed in one of her heart's main arteries, Ms. Spears went

2779 into a San Antonio hospital complaining of leg pain. She was made to
2780 wait, eventually treated and was discharged. However, three days later,
2781 when her legs were the odor of a -- the color, rather, of red wine, she
2782 was delirious. She called 9-1-1. When Spears, who was rendered
2783 unconscious, was treated at a different hospital, they determined that
2784 the filter in her artery was severely clotted and had caused tissue death
2785 in her legs as well as kidney failure. Weeks later, Connie Spears
2786 regained consciousness and learned that doctors had to amputate not one
2787 but both of her legs in order to save her life.

2788 She is now irreversibly damaged. As a result of negligence by the
2789 emergency room doctors who initially treated Ms. Spears, she lost her
2790 legs and nearly her life. To make matters worse, when she attempted to
2791 seek the aid of counsel, she was unable to find an attorney to represent
2792 her. They repeatedly told her you have a great case but not in Texas.

2793 In 2003, state lawmakers in Texas passed tort reform laws similar
2794 to the one proposed today that made it extremely difficult for patients
2795 that were injured, that were fairly in need of a balanced response to not
2796 be able to seek help.

2797 So I would ask my colleagues to think of the irreversible damages
2798 as relates to the caps. This is truly a nightmare. It became one again
2799 for Jennifer McCreedy, a San Antonio single mother who fell and severely
2800 injured her ankle and sought treatment in an emergency room. Despite the
2801 severity of the break, the bone in her ankle was never set, a common
2802 practice done to prevent excess swelling, and she was not seen by an
2803 orthopedic surgeon. She was sent home, told to wait until the swelling

2804 went down. However, the swelling did not go down and a surgery that
2805 should have only taken one hour took four. Because of the swelling, the
2806 surgeon had to slice her Achilles tendon and wounds that refused to heal
2807 required grafts.

2808 To date, Ms. McCreedy has endured five surgeries, has been rendered
2809 permanently disabled, curbing her ability to work and provide for her
2810 family. These are irreversible, Mr. Chairman and to my colleagues, and
2811 has eliminated the ability of a hard-working financially-secure mother
2812 and homeowner to be able to provide so much so that she's dodging
2813 creditors and nearly losing her home.

2814 We want to be fair, which I think is what we all have come to this
2815 place to do, be fair to our physicians who take an oath and to be fair to
2816 those who have been damaged, like Connie Spears in San Antonio and
2817 Jennifer McCreedy. It is impossible to be able to put a price tag on the
2818 long-term impact, stress, pain, suffering, they've already endured.

2819 So I would ask my colleagues who support this legislation to
2820 realize that the caps in an irreversible injury does not provide the
2821 balance of justice that we're obligated to commit to and I ask my
2822 colleagues to support Amendment Number 11.

2823 Mr. Chairman, I would also just ask unanimous consent to place my
2824 votes in the record of 1, 2, 3, and 16, I believe may have been
2825 withdrawn, but 1, 2, 3, where I was detained in Homeland Security. I
2826 would have voted aye for those amendments.

2827 I now yield back.

2828 Chairman Smith. Okay. Thank you, Ms. Jackson Lee. I'll recognize
2829 myself in opposition to the amendment.

2830 This amendment, by exempting cases of irreversible injury from the
2831 bill, would largely negate the bill and to no reasonable end. What this
2832 bill does is to provide for the same reasonable limits on all health care
2833 lawsuits Governor Jerry Brown signed into law in California over 30 years
2834 ago. Those reasonable tort reforms are good policy and applied to all
2835 lawsuits.

2836 The nature of the injury is irrelevant and the reforms are fairly
2837 applied equally to all cases. The HEALTH Act does not limit in any way
2838 an award of economic damages from anyone responsible for harm. Economic
2839 damages include anything whose value can be quantified, including lost
2840 wages or home services, including cost of services provided by stay-at-
2841 home mothers, medical costs, the pain-reducing drugs, therapy, and
2842 lifetime rehabilitation care and anything else to which a receipt can be
2843 attached.

2844 Only economic damages, which the federal legislation does not
2845 limit, can be used to pay for drugs and services that actually reduce
2846 pain. So nothing in the HEALTH Act prevents juries from awarding very
2847 large amounts to victims of medical malpractice.

2848 California's legal reforms, just like the HEALTH Act, cap non-
2849 economic damages at \$250,000 but do not cap quantifiable economic
2850 damages.

2851 I urge my colleagues to oppose this amendment and I'll yield back
2852 the balance of my time.

2853 Does any other member wish to be heard on this amendment? The
2854 gentleman from Virginia, Mr. Forbes, unless -- wait a second. The
2855 gentlewoman from Texas is recognized.

2856 Ms. Jackson Lee. Mr. Chairman, I would just take issue with one
2857 aspect -- well, many aspects of your statement.

2858 It is not irrelevant when you have a distinctive, irreversible
2859 injury that you cannot heal. It really speaks to the need for a
2860 different consideration for non-economic damages because you have a cap
2861 and what you have mentioned is that courts can, in essence, render
2862 judgments on other aspects but it does not take into consideration the
2863 vast needs under non-economic which are capped and you're then saying to
2864 a double amputee or others who have irreversible injuries that they are
2865 treated the same.

2866 It is not, I think, an irrelevant standard, and I thank the
2867 gentleman for yielding.

2868 Chairman Smith. Thank you, Ms. Jackson Lee. The gentleman from
2869 Virginia, Mr. Forbes, is recognized.

2870 Mr. Forbes. Thank you, Mr. Chairman. I move to strike the last
2871 word.

2872 Chairman Smith. The gentleman is recognized for five minutes.

2873 Mr. Forbes. Mr. Chairman, I would just like to echo some of the
2874 comments that you made and to suggest to put the irreversible injury
2875 exclusion in here would essentially gut the bill because many of these
2876 injuries are irreversible injuries but to suggest that you can't get

2877 adequate claims, in fact enormous claims, would be just to not understand
2878 what we've seen happen in California.

2879 In California, where they have these legal reforms and where you
2880 mentioned they have a cap on non-economic damages of \$250,000, they had
2881 some enormous claims which have adequately compensated the victims, and
2882 I'd like, Mr. Chairman, just to put a few of those in the record.

2883 On August 2010, just this past August, in Contra Costa County, it
2884 was an award of \$5.5 million. On February 2010 of last year in Riverside
2885 County, they had a \$16.5 million award. In February of last year in Los
2886 Angeles County, a \$12 million award, and in November of 2009 in Los
2887 Angeles County, they had a \$5 million.

2888 Mr. Chairman, I think that significantly shows that the
2889 compensation adequate to the victim's suffering can be given under
2890 statutes of this nature.

2891 Mr. Johnson. Would the gentleman yield?

2892 Mr. Forbes. Reject the bill. Yes, I'd be happy to yield.

2893 Mr. Johnson. I would ask the gentleman two questions. One, those
2894 three verdicts that you cited, were they all based on economic losses,
2895 economic damages?

2896 Mr. Forbes. They're all based under the California statute which
2897 limits non-economic damages to \$250,000. So I would assume that if
2898 you're the plaintiff's attorney, you would have moved to strike had that
2899 award been granted for anything other than economic damages.

2900 Mr. Johnson. Did the court reduce any pain and suffering amount in
2901 excess of \$250,000 that the jury awarded?

2902 Mr. Forbes. I can't tell you on that. I can only tell you what
2903 the ultimate decisions were and the ultimate verdicts were.

2904 Mr. Johnson. So we can't really use this information as guidance
2905 on this argument.

2906 Mr. Forbes. Oh, no, I disagree. I think you can use it very well
2907 as a guidance, that under a statute and a scheme that limits it to
2908 \$250,000, to give the impression that you're not getting adequate awards
2909 to these victims, I think would just be misleading.

2910 Mr. Johnson. Doesn't it mean that --

2911 Mr. Forbes. Because these awards were pretty substantial awards.

2912 Mr. Johnson. Doesn't this legislation mean that states are
2913 precluded, state court juries and federal juries are precluded from
2914 awarding anything in excess of \$250,000 for non-economic --

2915 Mr. Forbes. I think the Chairman has mentioned the provisions in
2916 this statute which actually protects many of the states who have current
2917 provisions, but I think if you look again at what California has, the
2918 indication is that under language in this bill, you wouldn't get an
2919 adequate verdict.

2920 I think clearly --

2921 Mr. Johnson. You could get --

2922 Mr. Forbes. -- in these four cases, you got a very adequate
2923 verdict --

2924 Mr. Johnson. Was the verdict enforceable, though, and would it be
2925 enforceable --

2926 Mr. Forbes. Well, I don't think any --

2927 Mr. Johnson. -- under this law?

2928 Mr. Forbes. -- state law is going to say the verdict is
2929 enforceable. You can always have individuals who go bankrupted, who
2930 don't have assets. That's beyond the scope of any legislation that we're
2931 talking about here.

2932 Ms. Jackson Lee. Would the gentleman yield?

2933 Mr. Forbes. Yes, ma'am.

2934 Ms. Jackson Lee. First of all, I think -- and I thank the
2935 gentleman. I think that we're creating a bill for the United States of
2936 America. We appreciate what Texas has done which I frankly believe is
2937 overly-broad, and I frankly believe that Texas is less -- excuse me --
2938 California is less restrictive. Maybe my California friends will speak
2939 to that.

2940 We have no standards here. So I think California eliminates it on
2941 the basis of finding gross negligence. If we want to amend our bill to
2942 track California, if I'm correct that it allows more latitude than what
2943 we're doing here, that's why I believe this amendment is important
2944 because we are more restrictive and therefore putting people in a
2945 predicament that I know that you, the gentleman from Virginia, would not
2946 want to have a highly-inequitable situation where people are suffering
2947 with irreversible injuries because of some action.

2948 Mr. Forbes. And I thank the lady and certainly she is absolutely
2949 right. I don't think any of us want an inequitable situation nor do we
2950 think that this statute as written would be a statute that would give an
2951 inequitable situation.

2952 Just to repeat, I think if you look at the size of these claims, I
2953 think \$16.5 million is a fairly substantial claim. It was given under
2954 provision where the non-economic damages were capped at \$250,000. A \$12
2955 million verdict is a fairly substantial and, I think, probably the
2956 parties felt very equitable for the victim. It was given under statute
2957 that capped non-economic damages at \$250,000 and all of these -- and I'll
2958 be glad to yield back to the gentle lady, but all of these amounts were
2959 done within the last year or year and a half, so they're fairly recent
2960 claims of what can be done under similar statutes, and --

2961 Ms. Jackson Lee. I will just be very brief. It was under
2962 California law. What I'm saying to the gentleman is this bill does not
2963 track California law and I'll yield back because I see the Chairman.
2964 Thank the gentleman for his courtesy.

2965 Chairman Smith. Thank you, Mr. Forbes. The gentlewoman from
2966 California, Ms. Sanchez, is recognized.

2967 Ms. Sanchez. Thank you, Mr. Chairman. I move to strike the last
2968 word.

2969 Chairman Smith. The gentlewoman is recognized for five minutes.

2970 Ms. Sanchez. Thank you. I feel compelled to sort of set to rights
2971 some of the things that are being said on the other side of the aisle.
2972 Simply because a case in California, and I am from California and
2973 familiar with the law in California, has a substantial award to a
2974 plaintiff who has been injured that is majority for economic damages,
2975 that is to compensate the loss of income that that person suffers as a
2976 result of the injury that's been -- that has happened to this person.

2977 So if you're a professional basketball player and somebody is
2978 negligent and performs medical malpractice on you and you lose both of
2979 your legs as a result of that, you're going to get a big economic damages
2980 award because that's all income that you lose as a result of no longer
2981 being able to perform that type of work.

2982 So to say that a \$12 million verdict adequately compensates
2983 somebody, I think is a misnomer. That is meant to be the bulk of which,
2984 because we do have caps in California, is meant to be for economic
2985 damages lost, lost income as a result of that damage.

2986 What we are talking about is non-economic damages being capped and
2987 that is placing a \$250,000 cap on pain and suffering and the lifestyle
2988 switches that somebody will have to make because they've been injured and
2989 under California law, because the whole pretext for this bill is that it
2990 will reduce the cost to doctors and reduce their medical malpractice
2991 insurance and keep them from practicing defensive medicine, in
2992 California, it's noteworthy that the cap was put in place in the '70s but
2993 real savings from medical malpractice premiums didn't occur until there
2994 was consequently insurance reform coupled with those caps that happened
2995 because the bulk of the cost in these cases is because of insurance
2996 companies and insurance company litigation, not because of these claims
2997 which are oftentimes valid, and in my opinion, I don't see how we can
2998 tell somebody who's been injured and lost economic income, oh, we're
2999 going to compensate you purely for your lost economic income and because
3000 that's substantial enough, you don't deserve anything else.

3001 There are two reasons why we shouldn't cap non-economic damages.
3002 Number 1, they serve as a deterrent to the person who engaged in the
3003 wrongful conduct not to do it again, and Number 2, it's meant to
3004 compensate that person for the pain and suffering and other changes to
3005 their lives that they're going to experience as a result of those
3006 injuries.

3007 So this complete pretext that because somebody got a large award,
3008 therefore somehow they've been compensated, it doesn't hold. It doesn't
3009 hold true because you are not punishing the bad actor and seeking to make
3010 a big enough disincentive for them to continue that type of behavior and
3011 you're telling the plaintiff who, by definition, a jury has found to be a
3012 lawful and victorious claimant, they're saying your claim is a valid one
3013 and we wish to compensate you. You're limiting the jury's ability to do
3014 that for somebody who has truly been wronged.

3015 So much as I am entertained by hearing the other side of the aisle
3016 say, well, they've been adequately compensated, the fact of the matter is
3017 if you limit non-economic damages, you are really actually providing a
3018 double injury to a plaintiff and the one last thing that I want to point
3019 out is that many of the worst, most egregious cases, including nursing
3020 home cases, there are no real economic damages because you're talking
3021 about retirees.

3022 So the people that you are actually double injuring tend to be
3023 people like children who are not yet in the workforce, so you can't
3024 calculate with any certainty their economic damages, the elderly who are
3025 retired, and oftentimes the poor who are wage workers, and I don't think

3026 that it's prudent for this Congress to tell the elderly, children, and
3027 the poor I'm sorry but because we want things to be efficient, whoever
3028 did this wrong to you, we're going to limit the amount of money that you
3029 can recover for non-economic damages because it's just more efficient. I
3030 don't think that that's a valid argument, and I will yield the balance of
3031 my time to the gentlewoman from Texas.

3032 Ms. Jackson Lee. Let me thank the eloquent statement that the
3033 gentle lady from California made and particularly commenting on the \$12
3034 million which was economic, and let me just put into the record that I've
3035 just secured information to suggest that the average payout in California
3036 is a \$172,180 in 2003, \$179,277 in 2004, 2005 \$204,000, 200,000 in 2006,
3037 230,000 in 2007, 231,022 in 2008, and 2009 206,000.

3038 It is a distinctive argument that we're making about the
3039 irreversible injuries and it is distinctive from the \$12 million and \$16
3040 million award that the gentleman was talking about. This is where you
3041 have Mrs. McCreedy and Mrs. Spears who will not be able to be whole
3042 without the monies on pain and suffering and this is a narrow carve-out
3043 for people who've been irreversibly injured and I yield back.

3044 Chairman Smith. Thank you, Ms. Sanchez. The gentleman from
3045 Virginia, Mr. Goodlatte, is recognized.

3046 Mr. Goodlatte. Well, thank you, Mr. Chairman, and I move to strike
3047 the last word.

3048 Chairman Smith. The gentleman is recognized for five minutes.

3049 Mr. Goodlatte. Thank you. I'm in opposition to this amendment.

3050 The underlying legislation has as one of its principle purposes to

3051 recognize that juries can act well beyond the scope of what was intended
3052 and if courts allow them to do that, juries in the imposition of non-
3053 economic losses and in the imposition of punitive damages can effectively
3054 supplant legislators. They can say we're going to try to change public
3055 policy by awarding a huge award against somebody.

3056 Now, sometimes the courts will restrain those huge awards and
3057 sometimes they will not. It seems to me it is entirely within the
3058 legislative prerogative of the Congress to step in and say that there
3059 should be a limit to the amount of non-economic losses and punitive
3060 damages that can be imposed by a jury.

3061 Mr. Johnson. Will the --

3062 Mr. Goodlatte. When I'm done, I'll yield. In Virginia, we have an
3063 overall \$2 million cap. So and that includes economic losses. So this
3064 legislation is far more generous in that regard and going back to the
3065 earlier discussion regarding whether the Federal Government should
3066 intercede in these matters, the fact of the matter is that the Federal
3067 Government is hugely into paying for health care today.

3068 In fact, the solution to the discussion that was held between Mr.
3069 Gohmert and Mr. Johnson earlier and the amendment that Mr. Johnson
3070 withdrew might very well be founded on whether or not there were federal
3071 taxpayer payments under Medicare, Medicaid, veterans benefits and
3072 military benefits and a whole host of other Federal Government
3073 expenditures that I think provide the necessary nexus to having
3074 justification for the Congress acting in this area where health care
3075 costs are rising rapidly out of control.

3076 Studies show that the State of California has a lower incidence of
3077 what's called defensive medicine than other states do and they've had
3078 great success with this reform and still provided multimillion dollar
3079 verdicts that have been upheld and paid to people who have sustained
3080 woeful grievances as a result of medical malpractice which occurs in
3081 California and every other state, but the idea that there should be an
3082 unlimited, an unlimited freedom on the part of juries to impose non-
3083 economic losses or punitive damages, I think, deserves a response from
3084 this Congress and this legislation provides that appropriate response and
3085 as a result, I oppose the amendment and support the legislation.

3086 Mr. Johnson. Would the gentleman yield?

3087 Mr. Goodlatte. I will yield to the gentleman from Georgia.

3088 Mr. Johnson. What impact, might I ask, does the 7th Amendment to
3089 the United States Constitution have on what you are advocating for? The
3090 7th Amendment, which grants the right to a trial by jury for any amount
3091 in excess of \$20, that's what the 7th Amendment says, and it recognizes -
3092 -

3093 Mr. Goodlatte. Well, reclaiming my time, Mr. Chairman, the fact of
3094 the matter is that this legislation does nothing to impair anyone's 7th
3095 Amendment rights to have a jury trial. It does not in any way --

3096 Mr. Johnson. Will the gentleman yield?

3097 Mr. Goodlatte. I will not. It does not in any way indicate in
3098 that amendment that there would be a lack of ability on the part of any
3099 legislature, state or federal, to limit the overall awards and most

3100 states do impose limitations of some kind on jury awards. So I don't
3101 think the gentleman's point is at all well-founded.

3102 Ms. Jackson Lee. Will the gentleman yield?

3103 Mr. Goodlatte. Happy to yield.

3104 Ms. Jackson Lee. Let me thank the gentleman for his analysis and I
3105 hope that the State of Virginia will be allowed to under this bill and it
3106 seems that they'll be allowed to proceed, but let me just try to defend
3107 the jury system or the judicial system.

3108 As many of you know, my colleagues on the other side of the aisle
3109 have taken to the courts to determine whether there is a constitutional
3110 basis for the Affordable Care Act. So in one instance, we are willing to
3111 yield to the --

3112 Mr. Goodlatte. Reclaiming my time, --

3113 Ms. Jackson Lee. -- judicial system and others that we're not.

3114 Mr. Goodlatte. -- Mr. Chairman, this has absolutely nothing to do
3115 with whether or not people have a right to have their day in court. It
3116 has to do with whether or not legislatures can impose parameters on that
3117 day in court and clearly in many, many instances, challenged in many,
3118 many courts, the courts have upheld the right of the state and the
3119 Federal Government to impose limitations on jury verdicts --

3120 Mr. Johnson. Would the gentleman yield?

3121 Mr. Goodlatte. -- for bringing this case.

3122 Mr. Johnson. Would the gentleman yield?

3123 Mr. Goodlatte. I would be happy to yield.

3124 Mr. Johnson. What if the United States Congress decided that it
3125 would be illegal for any jury to award anything in excess of \$1 for non-
3126 economic losses?

3127 Mr. Goodlatte. Well, we're not doing that in this case. I don't
3128 think we need to address the gentleman's concern.

3129 Mr. Johnson. Well, so the issue is whether we're not you can have
3130 an effective jury trial, a jury trial where jurors can award what they
3131 see as adequate compensation for pain and suffering and what we're doing
3132 here is limiting a jury, a state court jury's ability to do that, and I
3133 think it is definitely ironic that those who would argue that the Federal
3134 Government has no business in health care, putting its hand in health
3135 care, can turn around and put its hand on the jury system of this country
3136 enshrined in the 7th Amendment.

3137 Mr. Goodlatte. Reclaiming my time. The gentleman has gone far
3138 beyond what I have said, and I have never advocated that the Federal
3139 Government has no role in health care nor have I ever advocated that the
3140 states do not have the authority to set these limitations.

3141 Mr. Johnson. Well, where do we draw the line?

3142 Chairman Smith. The gentleman's time has expired. Without
3143 objection, the gentleman is yielded another minute.

3144 Mr. Goodlatte. I thank the Chairman. The Supreme Court has
3145 already held that the 7th Amendment does not apply to the states in
3146 imposing the kind of limitations that Virginia and California and other
3147 states have imposed and so I think the gentleman's analogy is totally
3148 inept.

3149 Ms. Jackson Lee. Will the gentleman yield just for a moment, just
3150 for a comment? In California, --

3151 Chairman Smith. The gentleman's time has expired. Who else wishes
3152 to be recognized? The gentleman from Indiana, Mr. Pence, is recognized.

3153 Mr. Watt. Mr. Chairman, are you dispensing with the going back and
3154 forth?

3155 Chairman Smith. I did not see any hand raised among my colleagues
3156 on my left.

3157 Mr. Watt. I am happy to have Mr. Pence go in front of me. I just
3158 wanted to make sure that we're following --

3159 Chairman Smith. Okay. I apologize to the gentleman. I didn't see
3160 that he was seeking to be recognized. If he seeks to be recognized,
3161 he'll be recognized now.

3162 Mr. Watt. I'm happy to have him go, if he wants to go.

3163 Chairman Smith. Okay.

3164 Mr. Watt. But I do want to be recognized.

3165 Chairman Smith. Mr. Watt, go ahead. I didn't see your hand and
3166 happy to recognize you now.

3167 Mr. Watt. All right. Let me, first of all, say I support the
3168 amendment but this discussion and Mr. Goodlatte has made some good points
3169 because he's reaffirmed that state law is all over the place on this.
3170 States and state legislators, I think, are as intelligent as us and we
3171 are up here setting one size fits all rule that applies to all states.
3172 In some cases this may be more advantageous to me than my state law. In
3173 other cases, it may not.

3174 There's at least one case, one part of the bill that would expand
3175 North Carolina state law in a direction that I've been very supportive of
3176 and were I in the state legislature, I would be vigorously supporting.

3177 The mistake I think we're making here is that we're trying to
3178 federalize something that should not be federalized. I was the first to
3179 concede, as Mr. Goodlatte suggested, that if we were doing this only with
3180 respect to Medicare or Medicaid or the things that we control at the
3181 federal level, that we spend federal dollars on, that'd be no problem I
3182 think from a constitutional perspective, but this bill goes well, well
3183 beyond the things that we are involved in as a Federal Government in ways
3184 that I think is unwise.

3185 Second. I want to make the point here, and I think this is a good
3186 place to make it because Ms. Sanchez started down this path, is this bill
3187 really is very discriminatory against poor people whose economic losses
3188 are always going to be less, against college students, against
3189 homemakers, mothers who -- are you telling me that the value of a claim
3190 for a housewife, which I hate the term, but that's -- you know, a
3191 househusband should be less important than a basketball player or -- I
3192 mean, you know.

3193 I just think we're way beyond where we ought to be on this bill and
3194 I think I guess I'm just encouraging my colleagues here to rethink what
3195 they're doing because this is a very, very unwise course and in my
3196 estimation is way beyond the constitutional framework that we should be
3197 operating because the bill is so widely drawn to apply to every

3198 situation, it applies a one size fits all set of rules to everything that
3199 happens in every state, and I think that is very unwise.

3200 So, I mean, I've said this before. I just want to make the point
3201 that I don't think that a homemaker, a mother just because she doesn't
3202 have an economic income, ought to have her medical claim diminished as a
3203 result of that and I think that's what this bill does and poor people who
3204 make less per hour, less, they're not going to be able to demonstrate the
3205 kind of economic losses here. Their claims are going to be diminished, I
3206 think, and I think that's bad public policy and we're sending the wrong
3207 message here.

3208 Ms. Jackson Lee. Would the gentleman yield?

3209 Mr. Watt. Who is asking me to yield? Oh, I should have known.

3210 Ms. Jackson Lee.

3211 Ms. Jackson Lee. Well, you're kind. It's my amendment and I
3212 appreciate the eloquent statements that you've made on the points that
3213 were raised.

3214 It will impact the very same people that we mentioned earlier in my
3215 statement dealing with individuals who work every day, Ms. Spears lost
3216 her legs and Ms. McCreedy, a single mother. These are real-life
3217 situations who are now facing a circumstance where they can't survive.

3218 But I did want to say that these cases are all over the lot and I
3219 don't know if the gentleman from Virginia who spoke awhile back knows
3220 that in the California circumstance, judges after juries decide are able
3221 to, in their judgment, reduce excessive jury decisions through what most
3222 of us know are remitters. So --

3223 Chairman Smith. The gentleman's time has expired.

3224 Ms. Jackson Lee. -- the protection is there and I ask support for
3225 the amendment. I yield back.

3226 Chairman Smith. We've had extended debate on this amendment and if
3227 there's no further members who wish to be recognized, we will vote on the
3228 amendment. The question is on the amendment. All in favor, say aye.

3229 [Chorus of ayes.]

3230 Chairman Smith. All opposed, nay.

3231 [Chorus of nays.]

3232 Chairman Smith. The nays have it. The amendment is not --

3233 Ms. Jackson Lee. Roll Call vote, please.

3234 Chairman Smith. Roll Call vote has been requested. The Clerk will
3235 call the Roll.

3236 Ms. Kish. Chairman Smith?

3237 Chairman Smith. No.

3238 Ms. Kish. Mr. Smith votes no.

3239 Mr. Sensenbrenner?

3240 [No response.]

3241 Ms. Kish. Mr. Coble?

3242 Mr. Coble. No.

3243 Ms. Kish. Mr. Coble votes no.

3244 Mr. Gallegly?

3245 [No response.]

3246 Ms. Kish. Mr. Goodlatte?

3247 Mr. Goodlatte. No.

3248 Ms. Kish. Mr. Goodlatte votes no.
3249 Mr. Lungren?
3250 [No response.]
3251 Ms. Kish. Mr. Chabot?
3252 [No response.]
3253 Ms. Kish. Mr. Issa?
3254 Mr. Issa. No.
3255 Ms. Kish. Mr. Issa votes no.
3256 Mr. Pence?
3257 Mr. Pence. No.
3258 Ms. Kish. Mr. Pence votes no.
3259 Mr. Forbes?
3260 Mr. Forbes. No.
3261 Ms. Kish. Mr. Forbes votes no.
3262 Mr. King?
3263 Mr. King. No.
3264 Ms. Kish. Mr. King votes no.
3265 Mr. Franks?
3266 Mr. Franks. No.
3267 Ms. Kish. Mr. Franks votes no.
3268 Mr. Gohmert?
3269 [No response.]
3270 Ms. Kish. Mr. Jordan?
3271 [No response.]
3272 Ms. Kish. Mr. Poe?

3273 Mr. Poe. No.
3274 Ms. Kish. Mr. Poe votes no.
3275 Mr. Chaffetz?
3276 Mr. Chaffetz. No.
3277 Ms. Kish. Mr. Chaffetz votes no.
3278 Mr. Reed?
3279 Mr. Reed. No.
3280 Ms. Kish. Mr. Reed votes no.
3281 Mr. Griffin?
3282 Mr. Griffin. No.
3283 Ms. Kish. Mr. Griffin votes no.
3284 Mr. Marino?
3285 Mr. Marino. No.
3286 Ms. Kish. Mr. Marino votes no.
3287 Mr. Gowdy?
3288 Mr. Gowdy. No.
3289 Ms. Kish. Mr. Gowdy votes no.
3290 Mr. Ross?
3291 Mr. Ross. No.
3292 Ms. Kish. Mr. Ross votes no.
3293 Ms. Adams?
3294 Ms. Adams. No.
3295 Ms. Kish. Ms. Adams votes no.
3296 Mr. Quayle?
3297 Mr. Quayle. No.

3298 Ms. Kish. Mr. Quayle votes no.
3299 Mr. Conyers?
3300 Mr. Conyers. Aye.
3301 Ms. Kish. Mr. Conyers votes aye.
3302 Mr. Berman?
3303 [No response.]
3304 Ms. Kish. Mr. Nadler?
3305 Mr. Nadler. Aye.
3306 Ms. Kish. Mr. Nadler votes aye.
3307 Mr. Scott?
3308 Mr. Scott. Aye.
3309 Ms. Kish. Mr. Scott votes aye.
3310 Mr. Watt?
3311 Mr. Watt. Aye.
3312 Ms. Kish. Mr. Watt votes aye.
3313 Ms. Lofgren?
3314 Ms. Lofgren. Aye.
3315 Ms. Kish. Ms. Lofgren votes aye.
3316 Ms. Jackson Lee?
3317 Ms. Jackson Lee. Aye.
3318 Ms. Kish. Ms. Jackson Lee votes aye.
3319 Ms. Waters?
3320 [No response.]
3321 Ms. Kish. Mr. Cohen?
3322 [No response.]

- 3323 Ms. Kish. Mr. Johnson?
- 3324 Mr. Johnson. Aye.
- 3325 Ms. Kish. Mr. Johnson votes aye.
- 3326 Mr. Pierluisi?
- 3327 Mr. Pierluisi. Aye.
- 3328 Ms. Kish. Mr. Pierluisi votes aye.
- 3329 Mr. Quigley?
- 3330 Mr. Quigley. Aye.
- 3331 Ms. Kish. Mr. Quigley votes aye.
- 3332 Ms. Chu?
- 3333 Ms. Chu. Aye.
- 3334 Ms. Kish. Ms. Chu votes aye.
- 3335 Mr. Deutch?
- 3336 Mr. Deutch. Aye.
- 3337 Ms. Kish. Mr. Deutch votes aye.
- 3338 Ms. Sanchez?
- 3339 Ms. Sanchez. Aye.
- 3340 Ms. Kish. Ms. Sanchez votes aye.
- 3341 Ms. Wasserman Schultz?
- 3342 Ms. Wasserman Schultz. Aye.
- 3343 Ms. Kish. Ms. Wasserman Schultz votes aye.
- 3344 Mr. Gallegly?
- 3345 Mr. Gallegly. No.
- 3346 Ms. Kish. Mr. Gallegly votes no.
- 3347 Mr. Chaffetz?

3348 Mr. Chaffetz. No.

3349 Ms. Kish. Mr. Chaffetz votes no.

3350 Chairman Smith. Are there any other members who wish to be
3351 recorded?

3352 [No response.]

3353 Chairman Smith. If not, the Clerk will report.

3354 Ms. Kish. Mr. Chairman, 13 members voted aye, 19 members voted
3355 nay.

3356 Chairman Smith. Okay. The majority having voted against the
3357 amendment, the amendment is not agreed to.

3358 Let me give members sort of an update here. One, we've had a very
3359 productive day. I appreciate the attendance of both Republicans and
3360 Democrats. We have finished almost half the amendments that we were
3361 aware of and I also want to say that we will continue discussions on
3362 three particular topics with various individuals involved, those subjects
3363 being intentional torts, Mr. Deutch, states rights involving Republicans
3364 and Democrats, and an indexing cap -- indexing the cap on damages that
3365 was brought up by Mr. Nadler.

3366 Those discussions will continue between now and next week when we
3367 will resume our markup after consultation with the Ranking Member. We
3368 are going to adjourn for the day and notify everyone what day next week
3369 we will finish our markup.

3370 Thank you, all, again for being here. We stand adjourned.

3371 [Whereupon, at 1:28 p.m., the committee was adjourned.]