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STATEMENT OF JOANNE DOROSHOW
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BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS

Medical Liability Reform: Stopping the Skyrocketing Price of Health Care

February 17, 2005

Mr. Chairman, members of the Committee, I am Joanne Doroshow, President and Executive Director of the Center for Justice & Democracy, a national public interest organization that is dedicated to educating the public about the importance of the civil justice system.

In addition to our normal work, CJ&D has two projects that are relevant to this discussion today: Americans for Insurance Reform, a coalition of over 100 public interest groups from around the country that seeks better regulation of the insurance industry; and the Civil Justice Resource Group, a group of 24 prominent scholars from 14 states formed to respond to the widespread disinformation campaign by critics of the civil justice system.

I appreciate the opportunity to address the issue of medical malpractice. Today, I would like to discuss why the medical malpractice bill that the House is considering, H.R. 534, would have terrible consequences for patients while doing nothing to improve the affordability or availability of insurance for doctors or reduce the costs of health care. Moreover, this particular bill fantastically overreaches, providing immunities for drug companies that have no relation whatsoever to medical malpractice issues.

INTRODUCTION AND SUMMARY

Last week, some 50 families from 26 states traveled to Washington, D.C. to voice their strong opposition to bills like H.R. 534. This bill contains many obstacles for families like them, who seek compensation for their injuries or for the death of a loved one. For example, the bill contains a devastating across-the-board $250,000 "cap" on compensation for "non-economic damages" - injuries like permanent disability, disfigurement, blindness, loss of a limb, paralysis, trauma, or pain and suffering. Moreover, the legislation is extremely broad, covering not only

cases involving medical malpractice, but also cases involving unsafe drugs and medical devices, and nursing home abuse and neglect.

The families that came to Washington last week are the forgotten faces in the debate over how to reduce skyrocketing insurance rates for some doctors, and I hope that at some point, this Committee decides to hear from them.

The bill that Congress is considering applies across the board to all cases, not just "frivolous" cases. It applies no matter how much merit a case has, or the extent of the misconduct of the hospital, doctor or drug company. The bill applies regardless of the severity of the injury. Therefore, those most hurt by the bill are the most catastrophically injured. In fact, a recent survey by the Rand Corporation found that the "most significant impact of California's 29 year old medical malpractice caps law [on which the federal bill is based] falls on patients and families who are severely injured or killed as a result of medical negligence or mistakes."[1]

Moreover, the bill undermines our constitutional right to trial by jury. The bill limits the power and authority of jurors to decide cases based on the facts presented to them. Washington politicians should not be making these decisions – juries should.

This legislation also reduces the accountability of hospitals, nursing homes, HMOs and drug companies. This will hurt patient safety.

And this bill completely ignores the insurance industry's major role in the high price of medical malpractice insurance premiums.

If doctors say they are leaving the profession or leaving certain areas of the country because they cannot afford their insurance premiums, then the solutions to those problems lie with the insurance industry – not with the legal system or patients.

Patient safety must come first. We should, for example, crack down on the small number of doctors responsible for most of the malpractice. This will reduce both incidents of malpractice and lawsuits. There are many other patient safety measures that Congress should be exploring. But we must *protect* the legal system and make it accessible for everyone seeking justice, accountability and adequate compensation for devastating injuries or death. This bill will do the opposite.

THE REAL COSTS OF MALPRACTICE AND DEFENSIVE MEDICINE

Medical malpractice claims and premiums are each a tiny percentage of the total costs of health care in this country, and have been for years. Medical malpractice payouts are less than one percent of total U.S. health care costs. All "losses" (verdicts, settlements, legal fees, etc.) have stayed under one percent for the last 18 years. Moreover, medical malpractice premiums are less

[1] See. "Rand Study: California Patients Killed or Maimed by Malpractice Lose Most Under Damage Caps," Foundation for Taxpayer and Consumer Rights, July 13, 2004, http://www.consumerwatchdog.org/healthcare/pr/pr004466.php3

than one percent of total U.S. health care costs as well. Dropping for nearly two decades, malpractice premiums have stayed below one percent of health care costs.[2]

Moreover, the Congressional Budget Office recently concluded that all the provisions of the medical malpractice bill (then called H.R. 5 in the 108th Congress), including the $250,000 cap on non-economic damages, "would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small."[3]

CBO also said, "[O]ne of the restrictions in H.R. 5—changing the rules for collateral-source benefits—would in some cases merely shift costs from malpractice insurers to providers of such collateral benefits (who in most cases are health insurers) rather than reduce costs overall."[4]

What's more, as far as defensive medicine, studies consistently show that only a very small portion of health care costs result from this. According, once again, to the CBO, "some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients.... CBO believes that savings from reducing defensive medicine would be very small." CBO also found that limiting tort liability would have no significant impact on health care spending.[5]

Similarly, in 1994, the congressional Office of Technology Assessment (OTA) found that less than 8 percent of all diagnostic procedures are likely to be caused primarily by liability concerns. OTA found that most physicians who "order aggressive diagnostic procedures . . . do so primarily because they believe such procedures are medically indicated, not primarily because of concerns about liability." The effects of "tort reform" on defensive medicine "are likely to be small."[6]

Indeed, far more costly to all Americans than malpractice lawsuits is the cost of medical errors. Total national costs of negligence in hospitals alone (lost income, lost household production, disability and health care costs) are estimated to be between $17 billion and $29 billion each year. Moreover, these figures vastly underestimate the magnitude of the problem since hospital patients represent only a small percentage of the total population at risk, and direct hospital costs are only a fraction of the total costs.[7]

In light of the fact that medical malpractice is the eighth leading cause of death in the United States, killing more people than breast cancer, AIDS and traffic deaths, medical malpractice insurance is an amazing value, covering all medical injuries for about one-half of one percent of health system costs. On the other hand, the cost of injuries due to medical errors is huge. If there is a cost problem, it is with the amount of malpractice itself.

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[2] *See,* Americans for Insurance Reform, "Think Malpractice is Driving Up Health Care Costs? Think Again," http://www.insurance-reform.org/pr/AIRhealthcosts.pdf

[3] Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* 1, 6 (Jan. 8, 2004).

[4] *Id*. at n. 13.

[5] *Id.* at 6.

[6] U.S. Congress, Office of Technology Assessment, *Defensive Medicine and Medical Malpractice*, OTA-H--6O2 (1994).

[7] Institute of Medicine, *To Err is Human: Building a Safer Health System*, 1999.

WHY RATES FOR DOCTORS WENT UP: THE INSURANCE CYCLE, NOT THE LEGAL SYSTEM

The Investment Cycle. Insurers make most of their money from investment income. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return. Insurers severely underprice their policies and insure very poor risks just to get premium dollars to invest. This is known as the "soft" insurance market.

But when investment income decreases — because interest rates drop or the stock market plummets or the cumulative price cuts make profits become unbearably low — the industry responds by sharply increasing premiums and reducing coverage, creating a "hard" insurance market usually degenerating into a "liability insurance crisis."

A hard insurance market occurred in the mid-1970s, precipitating rate hikes and coverage cutbacks, particularly with medical malpractice and product liability insurance. (This led California to enact MICRA in 1975, a law that caps non-economic damages at $250,000 with no inflationary adjustment.) A more severe crisis took place in the mid-1980s, when most liability insurance was impacted. At that time, many more states enacted "caps" after being told by insurers that this would bring rates down and guarantee stability in the insurance market.

Again in 2002, the country experienced a "hard market," this time impacting property as well as medical malpractice coverages with some lines of insurance seeing rates going up 100 percent or more.

Prior to late 2000, the industry had been in a soft market since the mid-1980s. The strong financial markets of the 1990s had expanded the usual six- to-ten year economic cycle. No matter how much they cut their rates, the insurers wound up with a great profit year when investing the float on the premium in this amazing stock and bond market. (The "float" occurs during the time between when premiums are paid into the insurer and losses paid out by the insurer —*e.g.,* there is about a 15 month lag in auto insurance and a 5 to 10 year lag in medical malpractice.) Further, interest rates were relatively high in recent years as the Fed focused on inflation.

But in 2000, the market started to turn with a vengeance and the Fed cut interest rates again and again. This became a classic economic cycle bottom.

Medical malpractice is one line of insurance that reinsurers historically have targeted for rate hikes, as well. According to Director of Insurance for the Consumer Federation of America J. Robert Hunter, when he was Federal Insurance Administrator in the 1970s, a group of insurance companies in the medical malpractice line told him that Lloyd's had just doubled its reinsurance rates while supplying no data to justify this increase.[8]

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[8] *See*, Joanne Doroshow and Adrian Wilkes, *Goliath: Lloyd's of London in the United States*, Center for Study of Responsive Law (1988), pp. 74-75.

Numerous studies examining the insurance crisis of the mid-1980s, including those conducted by the National Association of Attorneys General[9] and state commissions in New Mexico, Michigan and Pennsylvania[10] confirmed that the crisis was not caused by the legal system but rather by the insurance cycle and mismanaged underwriting by the insurance industry. Even the insurance industry admitted this internally. In 1986, Maurice R. Greenberg of American International Group told an insurance audience in Boston that the industry's problems were due to price cuts taken "to the point of absurdity" in the early 1980s. Had it not been for these cuts, Greenberg said, "[T]here would not be 'all this hullabaloo' about the tort system."[11]

As *Business Week* magazine also explained in a January 1987 editorial:

> Even while the industry was blaming its troubles on the tort system, many experts pointed out that its problems were largely self-made. In previous years the industry had slashed prices competitively to the point that it incurred enormous losses. That, rather than excessive jury awards, explained most of the industry's financial difficulties.[12]

It should also be noted that the influence of reinsurers over rates has been particularly effective, even on doctor-owned mutual insurance companies, which account for more than half the medical liability insurance in this country and should be independent of the profit considerations that motivate pricing decisions by the rest of the industry.

For example, in 1985 testimony before the Maryland Governor's task force on Maryland Mutual Society's request for a 70 percent rate increase for OB/GYNs (when a 10 percent reduction was justified), the company's president stated, "In order to keep [reinsurers'] participation on cover we had to accede to some strong suggestions from the reinsurers to beef up the rate charged to the OB's and it might be relevant to point out Med Mutual is...the only company in the state writing OB's."[13]

In 1987, after heavy lobbying by the Medical Mutual Society, Maryland's legislature passed a bill to limit collateral source payments in medical malpractice cases. According to Maryland Delegate Lawrence Wiser, in early August 1987, John Spinella, then of Medical Mutual, was asked why there was little rate reduction as a result of the new collateral source law. Spinella

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[9] Francis X. Bellotti, Attorney General of Massachusetts, et al., *Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (Boston, MA: Ad Hoc Insurance Committee of the National Association of Attorneys General, May 1986).

[10] See, e.g., New Mexico State Legislature, Report of the Interim Legislative Workmen's Compensation Comm. on Liability Insurance and Tort Reform, November 12, 1986; Michigan House of Representatives, Study of the Profitability of Commercial Liability Insurance, November 10, 1986; Insurance Comm. Pennsylvania House of Representatives, Liability Insurance Crisis in Pennsylvania, September 29, 1986.

[11] Greenwald, "Insurers Must Share Blame: AIG Head," *Business Insurance*, March 31, 1986.

[12] "What Insurance Crisis?" *Business Week*, January 12, 1987.

[13] *The Liability Insurance Crisis,* Hearings Before the Subcomm. On Economic Stabilization of the House Comm. On Banking, Finance and Urban Affairs, 99th Cong., 2nd Sess. 83 (1986)(Testimony of J. Robert Hunter) (Exh. I, Sheet 1).

replied that there would not be much rate impact because Medical Mutual still had to pay the same premiums to their London reinsurers.[14]

Finally, it should be noted that the few medical malpractice insurance companies that did pull out of the market during this recent insurance "crisis" did so because of mismanaged underwriting practices. In 2001, one of the country's largest medical malpractice insurance companies, St. Paul, pulled out of the medical malpractice insurance market, creating significant supply and demand problems in some states. According to a June 24, 2002, *Wall Street Journal* front-page investigative article, St. Paul, with a 20 percent share of the national market, pulled out after mismanaging its underwriting and reserves. A few smaller companies took St. Paul's lead and collapsed. The head of a leading medical malpractice insurer described problems in the med mal insurance market: "I don't like to hear insurance-company executives say it's the tort [injury-law] system – it's self-inflicted."[15]

As one insurance industry insider also put it in 2001: "The [medical malpractice insurance] market is in chaos.... Throughout the 1990s ... insurers were ... driven by a desire to accumulate large amounts of capital with which to turn into investment income. Regardless of the level of ... tort reform, the fact remains that if insurance policies are consistently underpriced, the insurer will lose money."[16]

The Legal System. As they do each time the market turns hard, insurers blame the legal system for the price jumps, as if lawyers miraculously engineer big awards to occur precisely as the cycle turns hard, i.e., engineering large awards in the mid-1970s, stopping for a decade, engineering large awards again in the mid-1980s, stopping for 17 years, and suddenly engineering large awards again. This is ludicrous.

Today, for example, we know that contrary to insurance company claims that medical malpractice cases are "exploding," the National Center for State Courts data shows that the number of medical malpractice filings has dropped over the last decade. The National Center for State Courts – which is the country's most accurate and comprehensive overview of state court litigation statistics – found that the 1993 to 2002 trend in medical malpractice filings per 100,000 population has only fluctuated minimally, with an overall one percent decrease in per capita

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[14] Telephone Interview by Joanne Doroshow with Delegate Lawrence Wiser, October 13, 1987.
[15] Christopher Oster & Rachel Zimmerman, "Insurers' Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, June 24, 2002.
[16] Charles Kolodkin, "Medical Malpractice Insurance Trends? Chaos!," International Risk Mgmt. Institute (Sept. 2001), *at* http://www.irmi.com/expert/articles/kolodkin001.asp

filings over the last five years.[17] Similarly, the U.S. Department of Justice found that the number of medical malpractice trials "remained stable" from 1992 through 2001.[18]

The total medical malpractice payouts are dropping also. Total damages paid to victims dropped 6.9 percent from 2001 to 2002 according to National Practitioner Data Bank (NPDB) analysis by Public Citizen. When adjusted for medical services inflation, the one-year drop was even more dramatic: 11.2 percent.[19]

Despite the amount of medical negligence currently harming patients in this country, very few victims file suit and those who do often have a very difficult time winning their cases. The 1990 Harvard Medical Practice study, which found that medical negligence in New York hospitals results in 27,000 injuries and 7,000 deaths every year, also found that eight times as many patients are injured by medical malpractice as ever file a claim; 16 times as many suffer injuries as receive any compensation.[20]

As with its predecessors, today's insurance "crisis" has absolutely nothing to do with the U.S. legal system, tort laws, lawyers or juries. It is driven by the insurance underwriting cycle and remedies that do not specifically address this phenomenon will fail to stop these wild price gyrations in the future.

Today: Stabilizing Rates and Record-Breaking Profits. A few years after the mid-1980s insurance "crisis," the insurance cycle flattened out, rates stabilized and availability improved everywhere – until 2002, over a decade later. The flattening of rates had nothing to do with tort law restrictions enacted in particular states, but rather to modulations in the insurance cycle everywhere. In 1991, Washington State's insurance commissioner Dick Marquardt concluded in a report that it was "impossible to attribute stable insurance rates to tort-law changes or the damages cap," since rates also improved in states that did not pass tort reform.[21]

We are now heading into a soft market period again, with rates dropping throughout the property-casualty industry. Indeed, "Market Scout reported recently that calendar year 2004 will end with an average 2 percent increase in composite property and casualty premiums." Richard

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[17] National Center for State Courts [NCSC], *Examining the Work of State Courts, 2003* (2004), http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html; NCSC, "Medical Malpractice Filings per 100,000 Population in 11 and 17 States, 1993-2002" (2004) (unpublished, on file with author); *see also* Center for Justice & Democracy [CJ&D], *New Data Shows Medical Malpractice Filings Have Dropped Over Last Decade; Refutes American Medical Association Claims of "Crisis" in Several States*, http://centerjd.org/press/release/030811.pdf; NCSC, *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project* (Brian J. Ostrom et al. eds., 2003).

[18] U.S. Dep't of Justice, Bureau of Justice Statistics, *Medical Malpractice Trials and Verdicts in Large Counties, 2001*, NCJ 203098, at 2 (April 2004).

[19] Public Citizen, "New 2002 Government Data Dispute Malpractice Lawsuit 'Crisis'; Malpractice Payouts Declined as Insurance Premiums Spiked; 5.2 Percent of Doctors Are Responsible for 55 Percent of Malpractice Payouts," (July 7, 2003) , http://www.citizen.org/pressroom/release.cfm?ID=1480; http://citizen.org/documents/NPDB_Data.pdf.

[20] Harvard Medical Practice Study, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990).

[21] "Health care Reform – Bush's insurance cap plan a proven failure", *The Seattle Times*, May 16, 1991.

Kerr, chairman and CEO of Market Scout (www.marketscout.com) commented, "We anticipate continued rate declines in most lines of coverage throughout 2005." [22]

Medical malpractice rates are following these precise trends. According to the quarterly Commercial Property-Casualty Market Survey from the Council of Insurance Agents and Brokers, medical malpractice rates rose only 3 percent in the last quarter of 2004. They were up only six percent in the 3rd quarter of 2004. This is after having seen increases of 63 percent and 61 percent in the same respective quarters of 2002. Clearly, the hard market is over and rates are stabilizing on their own.

For example, in Washington State, where there is currently no cap (it was declared unconstitutional), rates are again coming down, without enactment of any "tort reform." "Physicians Insurance, which covers about 70 percent of Washington's doctors - who own the mutual company - has asked for a 7.7 percent reduction of malpractice-premium rates for 2005," with the company also now reported record-breaking net income (profits). [23]

Indeed, insurance industry profits are through the roof. The property-casualty insurance industry's after-tax net income for the first half of 2004 was the highest ever: a record-breaking $23.5 billion![24] First half-year income in 2004 was up 62.2% from the first half-year income of 2003, and comes on the heels of an earlier, astounding 997 percent increase from 2002 to 2003.[25] And benefiting from profits on underwriting, the U.S. property/casualty insurance industry's net income after taxes rose 28.3 percent to $26.7 billion in the first nine months of 2004, from $20.8 billion in the first nine months of 2003.[26]

Similarly, health insurers' profits (and their executives' salaries) have also skyrocketed, as they raise premiums and limit reimbursement to doctors. "Despite a weak economy and soaring medical costs, U.S. health insurers have raked in earnings at a far greater pace than the rest of corporate America, with annual profits and margins doubling in the last four years."[27] Also "[a]verage pay for the five top executives at [the top] health insurers almost doubled [over the last four years] to $3 million a year."[28] Health insurers raised premiums 59 percent during the same four-year period.[29]

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[22] "2004 Will be Remembered as Beginning of Soft Market," *Insurance Journal,* January 14, 2005.
[23] Carol M. Ostrom, Key doctors insurer cuts '05 rates, *Seattle Times,* January 10, 2005.
[24] Insurance Services Office, Inc. [ISO] & Property Casualty Insurers Assoc. of America [PCI], *Property/Casualty Industry's First-Half Income and Surplus Rose on Strong Underwriting Results and Investment Gains* (Oct. 18, 2004).
[25] ISO & PCI, *Sharp Increase in P/C Industry's Net Income Propels Surplus Upward in 2003* (April 2004).
[26] ISO News Release, "First Nine-Month Net Gain On Underwriting In At Least 19 Years Drives Increase In U.S. Property/Casualty Industry's Net Income," Dec. 20, 2004, at http://www.iso.com/press_releases/2004/12_20_04.html
[27] Russ Britt, "Health insurers getting bigger cut of medical dollars," *Investors' Business Daily,* Oct. 15, 2004, http://investors.com/breakingnews.asp?journalid=23544168&brk=1.
[28] *Id.*
[29] Kaiser Family Found. & Health Research and Educational Trust, *Employer Health Benefits: 2004 Annual Survey* 16 (2004).

So while telling Congress that payouts to injured patients are costing insurers too much money, internally the insurance industry is "celebrating" its rapidly rising profits. "The first half [of 2004] result is far better than what was expected by industry observers earlier this year… The financial and underwriting performance of the property/casualty insurance industry during the first half of 2004 was nothing short of outstanding," said Robert P. Hartwig of the industry's trade group, the Insurance Information Institute.[30]

THE IMPACT OF "TORT REFORM" ON INSURANCE RATES

What the Studies Show. Most studies reject the notion that enactment of caps on damages will lower insurance rates. Weiss Ratings, an independent insurance-rating agency, found that between 1991 and 2002, states with caps on noneconomic damage awards saw median doctors' malpractice insurance premiums rise 48 percent – a greater increase than in states without caps. In states without caps, median premiums increased only 36 percent.[31]

Researchers at the National Bureau of Economic Research recently found: "There is a fairly weak relationship between malpractice payments (for judgments and settlements) and premiums – both overall and by specialty." Also, "past and present malpractice payments do not seem to be the driving force behind increases in premiums. Premium growth may be affected by many factors beyond increases in payments, such as industry competition and the insurance underwriting cycle."[32]

And the GAO found that multiple factors are responsible for rate variations, stating "[m]ultiple factors have contributed to the recent increases in medical malpractice premium rates." GAO finds that "state laws and regulations unrelated to tort reform, such as premium rate regulations, vary widely and can influence premium rates" and that pricing decisions are affected by "income from investments, and other market conditions such as the level of market competition among insurers and their respective market shares." GAO concludes, "[w]e could not determine the extent to which differences in premium rates and claims payments across states were attributed only to damage caps or also to these additional factors."[33]

Indeed, "tort reform" advocates have long rejected the notion that enactment of caps on damages would lower insurance rates. The American Insurance Association (AIA) and the American Tort Reform Association (ATRA) have admitted in published statements that lawmakers who enact "tort reforms" should not expect insurance rates to drop, most recently with the AIA's March 13,

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[30] Insurance Information Institute, *2004 – First Half Results*, Oct. 18, 2004.
[31] Weiss Ratings, *Medical Malpractice Caps Fail to Prevent Premium Increases*, http://weissratings.com/News/Ins_General/20030602pc.htm; http://www.weissratings.com/malpractice.asp.
[32] See, http://www.dartmouth.edu/~kbaicker/BaickerChandraMedMal.pdf
[33] *Analysis of Medical Malpractice: Implications of Rising Premiums on Access to Health Care,* General Accounting Office, GAO-03-836, Released August 29, 2003, pp. 34-35, 37. http://www.gao.gov/new.items/d03836.pdf.

2002 statement, "[T]he insurance industry never promised that tort reform would achieve specific premium savings."[34]

Recent Experience With "Tort Reform": Rate Hikes, not Decreases. In the midst of the last insurance "crisis" in the mid-1980s, state lawmakers enacted often severe tort restrictions on patients' rights after being told this was how to reduce insurance rates. These laws had absolutely no impact on insurance rates. Some states that resisted enacting any "tort reform" experienced low increases in insurance rates or loss costs relative to the national trends, and some states that enacted major "tort reform" packages saw very high rate or loss cost increases relative to the national trends. In other words, there was no correlation between "tort reform" and insurance rates.[35]

Maryland and Missouri are both examples of states that enacted severe caps on damages in the mid-1980s, only to be hit with huge rate hikes recently. For example, Maryland, an American Medical Association (AMA) "problem state"[36] and a "crisis state" according to the American College of Obstetricians and Gynecologists,[37] has had a cap on non-economic damages since 1986, originally $350,000 but later increased somewhat.[38] Despite the cap, the state experienced premiums that "rose by more than 70 percent in the last two years."[39] This caused the state to pass, once again, even more restrictions on patients' rights in a special session called by the Governor in 2004 ostensibly "to combat the high cost of malpractice insurance."[40]

Missouri, identified by the AMA as a so-called "crisis state,"[41] has had a cap on non-economic damages since 1986. The cap started at $350,000 and has been adjusted annually for inflation, reaching $557,000 in 2003.[42] "New medical malpractice claims dropped 14 percent in 2003 to what the [Missouri Department of Insurance] said was a record low, and total payouts to medical malpractice plaintiffs fell to $93.5 million in 2003, a drop of about 21 percent from the previous year." And "the National Practitioner Data Bank, a federally mandated database of malpractice claims against physicians, found that the number of paid claims in Missouri fell by about 30 percent since 1991. The insurance department's database found that paid claims against physicians fell 42.3 percent during the same time period." Yet doctors' malpractice insurance premiums rose by 121 percent between 2000 and 2003.[43]

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[34] See, http://centerjd.org/air/pr/Quotes.pdf

[35] Hunter, J. Robert, Joanne Doroshow, *Premium Deceit – the Failure of "Tort Reform" to Cut Insurance Prices,* Center for Justice & Democracy (1999).

[36] AMA, *American's Medical Liability Crisis: A National View*, http://www.ama-assn.org/ama1/pub/upload/mm/450/med_liab_20stat.pdf (June 2004).

[37] Mary Ellen Schneider, *Maryland: A State in 'Crisis' for Ob.Gyns*, OB/GYN NEWS, Oct. 15, 2004.

[38] MD. CODE ANN., CTS. & JUD. PROC. §11.108.

[39] James Dao, "A Push in States to Curb Malpractice Costs," *New York Times*, Jan. 14, 2005.

[40] *Id.*

[41] AMA, *American's Medical Liability Crisis: A National View*, http://www.ama-assn.org/ama1/pub/upload/mm/450/med_liab_20stat.pdf (June 2004).

[42] Missouri Dep't of Ins., *Medical Malpractice Insurance in Missouri; The Current Difficulties in Perspective* 7 (2003).

[43] "State report says malpractice claims fell," *Associated Press,* November 5, 2004.

In California, 13 years after the state's severe $250,000 cap on damages was enacted, "doctors' premiums had increased by 450 percent and reached an all-time high in California." But, in 1988 California voters passed a stringent insurance regulatory law, Proposition 103, which "reduced California doctors' premiums by 20 per within three years," and stabilized rates.[44] In the thirteen years after MICRA, but before the insurance reforms of Prop. 103, California medical malpractice premiums rose faster than the national average. In the twelve years after Prop. 103 (1988-2000), malpractice premiums dropped 8 percent in California, while nationally they were up 25 percent.[45] Moreover, the law has led to public hearings on recent rate requests by medical malpractice insurers in California, which resulted in rate hikes being lowered three times in the last two years.[46]

Indeed, states that have recently tried to solve doctors' insurance problems by ignoring the insurance industry's role in creating this crisis and focusing only on taking away patients' legal rights with caps on damages and other "tort reforms" have only seen insurers immediately come back for rate *hikes,* not decreases. For example:

> **Texas:** During the 2003 campaign for Prop. 12, the "tort reform" referendum that passed, ads promised rate cuts if caps were passed. After the referendum passed, major insurers requested rate hikes as high as 35 percent for doctors and 65 percent for hospitals.[47] The insurance commissioner disallowed these. In April 2004, after one insurer's rate hike request was denied, it announced it was using a legal loophole to avoid state regulation and increase premiums 10 percent without approval.[48]
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> Doctors have seen less than a 1.5% reduction in their premiums since 2003.[49] Only one company, Texas Medical Liability Insurance Association, has lowered rates, but its customers are still paying 130% more than they were 5 years ago.[50]

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[44] Foundation for Taxpayer and Consumer Rights, *How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California and How Malpractice Caps Failed* 1 (March 7, 2003), http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf.

[45] Foundation for Taxpayer and Consumer Rights, *Insurance Regulation, Not Malpractice Caps, Stabilize Doctors' Premiums*, http://www.ftcr.org/healthcare/fs/fs003013.php3 (last visited Feb. 16, 2005).

[46] Foundation for Taxpayer and Consumer Rights, "California Group Successfully Challenges 29.2% Rate Hike Proposed by California's Ninth Largest Medical Malpractice Insurer; Proposition 103 Invoked to Slash Medical Protective Company's Requested Increase by 60%," Sep 16, 2004, http://consumerwatchdog.org/insurance/pr/pr004625.php3.

[47] *E.g.* Darrin Schlegel, "Some Malpractice Rates to Rise Despite Prop. 12," *Houston Chronicle*, Nov. 19, 2003; Darrin Schlegel, "Malpractice Insurer Fails in Bid for Rate Hike," *Houston Chronicle*, Nov. 21, 2003; (October 2003 rate filing from Texas Medical Liability Insurance Association (JUA) to Texas Department of Insurance).

[48] "Insurer Switching to Unregulated Product to Raise Premiums," *Assoc. Press*, April 10, 2004.

[49] "Texas Medical Professional Liability, Quarterly Report to the Legislature, 3rd Quarter 2004, Table 1: Physicians, Surgeons, and Osteopaths," Texas Department of Insurance, Nov. 5, 2004.

[50] "Medical Malpractice Insurance: Overview and Discussion," Texas Department of Insurance, Feb. 12, 2003).

And in a 2004 filing to the Texas Department of Insurance, GE Medical Protective revealed that the state's non-economic damage cap would be responsible for no more than a 1 percent drop in losses.[51]

Florida: "When Gov. Jeb Bush and House Speaker Johnnie Byrd pushed through a sweeping medical malpractice overhaul bill … the two Republican leaders vowed in a joint statement that the bill would 'reduce ever-increasing insurance premiums for Florida's physicians . . . and increase physicians' access to affordable insurance coverage.'" But, insurers soon followed up with requests to increase premiums by as much as 45 percent.[52]

Oklahoma: After "tort reform" passed in 2003, the third-largest medical malpractice insurer in the state raised its premiums 20 percent, followed by an outrageous 105 percent rate hike in 2004.[53] The largest insurance company, which is owned by the state medical association, requested an astounding 83 percent rate hike just after "tort reform" passed (which was approved on the condition it be phased in over three years).[54]

Ohio: Almost immediately after "tort reform" passed, all five major medical malpractice insurance companies in Ohio announced they would not reduce their rates. One insurance executive predicted his company would seek a 20 percent rate increase.[55] A year later, "[e]xecutives from Ohio's top medical insurance companies said they don't expect to see malpractice premiums stabilize for several more years."[56]

Mississippi: Four months after "tort reform" passed, investigative news articles reported that surgeons still could not find affordable insurance and that many Mississippi doctors were still limiting their practice or walking off the job in protest.[57]

Nevada: Within weeks of enactment of "tort reform" in the summer of 2002, two major insurance companies proclaimed that they would not reduce insurance rates for at least another year to two, if ever. The Doctor's Company, a nationwide medical malpractice insurer, then filed for a 16.9 percent rate increase. Two other companies filed for 25 percent and 93 percent rate increases.[58]

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[51] The GE Medical Protective filing can be found at: http://www.consumerwatchdog.org/insurance/rp/rp004689.pdf.

[52] Julie Kay, "Medical Malpractice; Despite Legislation that Promised to Rein in Physicians' Insurance Premiums, Three Firms File for Big Rate Increases," *Palm Beach Daily Business Review*, Nov. 20, 2003.

[53] "Hike Approved for Premiums," *Daily Oklahoman*, April 8, 2004.

[54] *E.g.* "Oklahoma's Largest Medical-Liability Company Gets 83% Rate Increase Over Three Years," *BestWire*, Dec. 2, 2003.

[55] *E.g.* "Despite New Law, Insurance Companies Won't Lower Rates Right Away," *Associated Press*, Jan. 9, 2003.

[56] "Probe Targets Doctor Costs," *Marion Star*, April 20, 2004.

[57] *E.g.* "Miss. Tort Reform Effort Falls Short," *Commercial Appeal*, Feb. 18, 2003; Reed Branson, "Doctors In Oxford Shut, Cite Insurance," *Commercial Appeal*, Feb. 14, 2003; Ben Bryant, "Tort Reform Has Done Little to Ease Malpractice Crisis," *Biloxi Sun-Herald*, Feb. 2, 2003.

[58] *E.g.* Joelle Babula, "Medical Liability Company Requests Premium Increase," *Las Vegas Review-Journal*, Feb. 11, 2003; Babula, "State Insurance Program Holds Off on Lowering Rates," *Las Vegas Review-Journal*, Aug. 14, 2002.

History is clear on this matter: legislative attempts to reduce insurance rates by taking away the rights of the most seriously injured in our society has been and continues to be a failed public policy.

"ACCESS" CRISIS OR A "MALPRACTICE" CRISIS?

Numerous studies reject the notion that there has been any widespread access problem due to doctors' malpractice insurance problems. The GAO found that doctors' groups have misled, fabricated evidence, or, at the very least, wildly overstated their case about how medical malpractice problems have limited access to health care.

The health care access problems that GAO could confirm were isolated and the result of numerous factors having nothing at all to do with the legal system. Specifically, GAO found that these pockets of problems "were limited to scattered, often rural, locations and in most cases providers identified long-standing factors in addition to malpractice pressures that affected the availability of services."[59]

In August, 2004, the National Bureau of Economic Research researchers also found: "The fact that we see very little evidence of widespread physician exodus or dramatic increases in the use of defensive medicine in response to increases in state malpractice premiums places the more dire predictions of malpractice alarmists in doubt. The arguments that state tort reforms will avert local physician shortages or lead to greater efficiencies in care are not supported by our findings."[60]

In any event, patient safety should be our first priority. As the *Charleston Gazette* has written,

> The Medical Association has made much of the fact that Wheeling has lost all three of its neurosurgeons in the past year. But two of those neurosurgeons are near the top of the list for the number of malpractice suits brought against them. In all but one of the 19 lawsuits brought against those two doctors, the insurance company representing them settled out of court, apparently paying damages. The third neurosurgeon left town shortly after being sued for malpractice. That neurosurgeon admitted drilling into the wrong side of his patient's head during an operation, possibly leaving her permanently scarred. The same neurosurgeon lost a jury trial for $1.8 million for botching a surgery that caused multiple cerebral aneurysms and cardiac arrest. Is Wheeling really worse off for losing these doctors?[61]

Unfortunately, too little is being done to weed out the small number of doctors responsible for most malpractice. As the *New York Times* recently reported,

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[59] *Analysis of Medical Malpractice: Implications of Rising Premiums on Access to Health Care,* General Accounting Office, GAO-03-836, Released August 29, 2003, http://www.gao.gov/new.items/d03836.pdf.

[60] http://www.dartmouth.edu/~kbaicker/BaickerChandraMedMal.pdf

[61] "Malpractice Association distorts facts," *Charleston Gazette*, March 1, 2001.

> Experts retained by the Bush administration said on Tuesday that more effective disciplining of incompetent doctors could significantly alleviate the problem of medical malpractice litigation.
>
> As President Bush prepared to head to Illinois on Wednesday to campaign for limits on malpractice lawsuits, the experts said that states should first identify those doctors most likely to make mistakes that injure patients and lead to lawsuits.
>
> The administration recently commissioned a study by the University of Iowa and the Urban Institute to help state boards of medical examiners in disciplining doctors.
>
> "There's a need to protect the public from substandard performance by physicians," said Josephine Gittler, a law professor at Iowa who supervised part of the study. "If you had more aggressive policing of incompetent physicians and more effective disciplining of doctors who engage in substandard practice, that could decrease the type of negligence that leads to malpractice suits.'"
>
> Randall R. Bovbjerg, a researcher at the Urban Institute, said, "If you take the worst performers out of practice, that will have an impact" on malpractice litigation.[62]

Public Citizen's Health Research Group has made similar findings for many years.[63] The group found that only one-half of 1 percent of 770,320 licensed medical doctors face any serious state sanctions each year. "Too little discipline is still being done," the report said. "2,696 total serious disciplinary actions a year, the number state medical boards took in 1999, is a pittance compared to the volume of injury and death of patients caused by negligence of doctors…. Though it has improved during the past 15 years, the nation's system for protecting the public from medical incompetence and malfeasance is still far from adequate."

And let there be no doubt that deaths and injuries due to medical malpractice are substantial. In late 1999, the National Academy of Sciences Institute of Medicine (IOM) published *To Err is Human; Building a Safer Health System.* The study makes some striking findings about the poor safety record of U.S. hospitals due to medical errors.[64] For example, between 44,000 and 98,000 deaths occur each year in U.S. hospitals due to medical errors, the higher figure extrapolated from the 1990 Harvard Medical Practice study of New York hospitals. Even using the lower figure, more people die due to medical errors than from motor vehicle accidents (43,458), breast cancer (42,297) or AIDS (16,516).

A recent survey found, "[e]ighty percent of U.S. doctors and half of nurses surveyed said they had seen colleagues make mistakes, but only 10 percent ever spoke up." Moreover, "fifty percent of nurses said they have colleagues who appear incompetent" and "[e]ighty-four percent of physicians and 62 percent of nurses and other clinical care providers have seen co-workers

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[62] Robert Pear, "Panel Seeks Better Disciplining of Doctors," *New York Times,* January 5, 2005.

[63] *See, e.g.,* Sidney Wolfe et al., *20,125 Questionable Doctors*, Public Citizen Health Research Group, Washington, DC (2000).

[64] Kohn, Corrigan, Donaldson, Eds., *To Err is Human; Building a Safer Health System*, Institute of Medicine, National Academy Press: Washington, DC (1999).

taking shortcuts that could be dangerous to patients." Doctors and nurses do not talk about these problems because "people fear confrontation, lack time or feel it is not their job."[65]

What may seem like a recent epidemic of medical malpractice is, unfortunately, nothing new. Consider that in 1985 the director of Maternal/Fetal Medicine at Pasadena's Huntington Memorial Hospital told the American College of Obstetrics and Gynecology: "The greatest cause of malpractice is malpractice. You must understand that some of the malpractice out there is so grievous, offensive and implausible as to beggar the imagination."[66] This kind of information led *Business Week* to write in its August 3, 1987 issue, "So what can we do? Start by facing up to what the problem is not. It is not a malpractice insurance crisis. Nor, contrary to popular mythology, is the problem a lawsuit crisis. The real crisis is the degree of malpractice itself."[67]

"TORT REFORM" REDUCES PATIENT SAFETY. INCREASED DEATHS

H.R. 534 is a cruel bill that would reduce the protections and rights of citizens in every state in this country. The bill directly interferes with the independence of our nation's civil justice system, tying the hands of judges and juries who hear the evidence in a case, and undermining our country's uniquely individualized system of justice. H.R. 534 would make it more difficult or impossible for injured patients to hold accountable those who have injured them.

But in addition, more patients will die if H.R. 534 is enacted.

Take just one provision - repeal of the collateral source rule. This rule is in place because it prevents a wrongdoer from reducing its financial responsibility for the injuries it causes by the amount an injured party receives (or could later receive) from outside sources. Payments from outside sources are those unrelated to the wrongdoer, like health or disability insurance, for which the injured party has already paid premiums or taxes.

The collateral source rule is one of fairness and reason. Government benefits received by the injured victim are entitlements, which lawmakers determined should be available, and should not be manipulated to benefit wrongdoers who produce injury. The rule's premise is that the wrongdoer's liability and obligation to compensate should be measured by the harm done and the extent of the injuries inflicted. In this way, the rule helps promote deterrence of unsafe conduct.

So it may come as no surprise that a recent paper presented by the Associate Director of the American Enterprise Institute's Liability Project found that:

> [C]ollateral source reform leads to a statistically significant increase in infant mortality.... For whites, the increase is estimated to be between 10.3 and 14.6 additional deaths per 100,000 births. This represents an increase of about 3 percent. For blacks, the collateral

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[65] "Survey: 80 percent of doctors witness mistakes; But only 10 percent report errors or poor judgment, "*Reuters,* January 26, 2005. http://www.msnbc.msn.com/id/6872715/.

[66] Letter from Ralph Nader to Florida Speaker Mills and Senate President Vogt (1988).

[67] Christopher Farrell, "Let The Free Market End Malpractice Warfare," *Business Week*, August 3, 1987.

> source reversal leads to between 47.6 and 72.6 additional deaths per 100,000 births, a percentage increase between 5 and 8 percent. These results suggest that the level of care provided decreases with the passage of collateral source reform."
>
> "The relationships we estimate between reform measures and infant mortality rates appear to be causal.... In summary, these results show that collateral source reform leads to increased infant mortality."[68]

Another aspect of the bill bound to lead to increased deaths and injuries is new limits on punitive damages, and the complete elimination of punitive damages against drug companies for FDA-approved drugs and devices. Punitive damages are assessed against defendants by judges or juries to punish particularly outrageous, deliberate or harmful misconduct, and to deter the defendant and others from engaging in similar misconduct in the future.

Although rare, the prospect of having to pay punitive damages in a lawsuit by an injured patient causes companies and other wrongdoers to operate more safely. In the case of the Dalkon Shield IUD, which killed and injured thousands of women, it took 11 punitive damage awards over a number of years, totaling in excess of $24.8 million, before A.H. Robins finally agreed to urge doctors and women to remove the device and offered to pay for the removal. Robins would not have taken this needed action without "growing concern about the rising tide of punitive damages claims against the company," as reported in the *Wall Street Journal*.[69]

In a March 5, 1995 *New York Times* article, Dr. Wayne Cohen, then-medical director of Bronx Municipal Hospital, said, "The city was spending so much money defending obstetrics suits, they just made a decision that it would be cheaper to hire people who knew what they were doing."[70] In a somewhat obscure way, Dr. Cohen actually heralded one of the most important functions of lawsuits and the civil justice system: deterring unsafe practices. Numerous hospital and medical procedures have been made safer as a result of lawsuits. These include anesthesia procedures, catheter placements, drug prescriptions, hospital staffing levels, infection control, nursing home care and trauma care, all of which are documented in the Center for Justice & Democracy study, *Lifesavers: CJ&D's Guide to Lawsuits that Protect Us All*.[71]

Weakening the civil justice system in any significant respect, as does H.R. 534, will lead to more injuries and deaths. There is no question about that.

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[68] Jonathan Klick & Thomas Stratmann, "Does Medical Malpractice Reform Help States Retain Physicians and Does It Matter?" (March 8, 2004), presented at American Enterprise Institute forum, "Is Medical Malpractice Reform Good for Your Health?," Sept. 24, 2003, available at http://www.aei.org/events/eventID.614/event_detail.asp .

[69] Walsh, Mary Williams, "A.H. Robins Begins Removal Campaign for Dalkon Wearers," *Wall Street Journal*, Oct. 30, 1984; Finley, Lucinda, "Female Trouble: The Implications Of Tort Reform For Women," 64 *Tenn. L. Rev.* 847, 866 (Spring 1997).

[70] Dean Baquet and Jane Fritsch, "New York's Public Hospitals Fail, and Babies Are the Victims," *New York Times,* March 5, 1995.

[71] See, http://www.centerjd.org/free/Lifesavers.pdf.

SIMPLE SOLUTIONS TO REDUCE MEDICAL ERRORS

- **Reduce continuous work schedules.** According to studies published in the October 28, 2004, issue of the *New England Journal of Medicine*, "The rate of serious medical errors committed by first-year doctors in training in two intensive care units (ICUs) at a Boston hospital fell significantly when traditional 30-hour-in-a-row extended work shifts were eliminated and when interns' continuous work schedule was limited to 16 hours, according to two complementary studies funded by the National Institute for Occupational Safety and Health (NIOSH) and the Agency for Healthcare Research (AHRQ). Interns made 36 percent more serious medical errors, including five times as many serious diagnostic errors, on the traditional schedule than on an intervention schedule that limited scheduled work shifts to 16 hours and reduced scheduled weekly work from approximately 80 hours to 63. The rate of serious medication errors was 21 percent greater on the traditional schedule than on the new schedule.[72]

- **Better technology in hospitals to provide better care with greater consistency.** A handful of hospitals are starting to use technology to make prenatal care and delivery safer. These hospitals are using computer software that improves monitoring and treatment.[73]

- **Safer RN staffing ratios.** A 2002 study in the Journal of the American Medical Association found that patients on surgical units with patient-to-nurse ratios of 8:1 were 30 percent more likely to die than those on surgical units with 4:1 ratios.[74]

REAL INSURANCE REFORMS

For medical malpractice insurers, high-pressure tactics have paid off and will pay off again unless Congress takes responsible, remedial steps to reign in the power and control the abuses of insurance companies. Otherwise, we will never be able to deal systematically with the tactics of this industry, which consistently looks for scapegoats to cover up its own instability and mismanagement.

One thing Congress could do is repeal the insurance industry's federal anti-trust exemption. Since 1944, the McCarran-Ferguson Act has allowed insurance companies to fix prices. A law repealing the federal anti-trust exemption would ensure that all domestic and foreign insurers and reinsurers that do business in the United States are subject to federal anti-trust prohibitions applicable to other industries. Such legislation would prohibit the insurance industry from acting in concert to raise prices and would prohibit tying arrangements, market allocation among competitors and monopolization. Increased competition would bring lower prices and would increase the availability of insurance for consumers.

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[72] "Interns' Medical Errors Affected by Work Schedules," November 15, 2004, http://www.insurancejournal.com/news/national/2004/11/15/47660.htm

[73] Margaret Ramirez, "System Checks Steps in Care," *Newsday*, Oct. 7, 2003.

[74] L.H. Aiken et al., "Hospital Nurse Staffing and Patient Mortality, Nurse Burnout, and Job Dissatisfaction," 288 JAMA 1987 (Oct. 23/30, 2002).

If the McCarran-Ferguson Act were repealed, the industry-owned and controlled, for-profit Insurance Services Office, Inc. (ISO) and other rating bureaus could still jointly collect, compile and disseminate past data relating to premiums and claims. However, price-fixing agreements would be illegal. Moreover, ISO would be forced to disclose to insurance buyers the documents it prepares for insurance sellers, listing both current prices major insurers charge for auto and homeowner insurance and the ISO advisory rates.

CONCLUSION

Laws and proposals that increase the obstacles sick and injured patients face in the already difficult process of prevailing in court are certainly the wrong way to respond to any medical malpractice insurance "crisis." Tort restrictions only reduce the financial incentive of institutions like hospitals and HMOs to operate safely, when our objectives should be deterring unsafe and substandard medical practices while safeguarding patients' rights. Indeed, our goal must be to reduce medical negligence. Moreover, effective insurance reforms are the only way to stop the industry from abusing its enormous economic influence, which it uses to promote a legislative agenda that bilks taxpayers and severely hurts the American public.