To amend the Employee Retirement Income Security Act of 1974 to preclude preemption of a State cause of action relating to a denial of a claim for benefits under a health care plan.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 26, 2009

Mr. McDermott introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend the Employee Retirement Income Security Act of 1974 to preclude preemption of a State cause of action relating to a denial of a claim for benefits under a health care plan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ERISA PREEMPTION NOT TO APPLY TO CERTAIN STATE LAW CAUSES OF ACTION.

(a) In General.—Section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144) is amended—
(1) by redesignating subsections (d) and (e) as subsection (e) and (f), respectively, and

(2) by inserting after subsection (e) the following new subsection:

“(d) PREEMPTION NOT TO APPLY TO CAUSES OF ACTION UNDER STATE LAW INVOLVING MEDICALLY REVIEWABLE DECISION.—

“(1) IN GENERAL.—Except as provided in this subsection, nothing in this title (including section 502) shall be construed to supersede or otherwise alter, amend, modify, invalidate, or impair any cause of action under State law of a participant or beneficiary under a group health plan (or the estate of such a participant or beneficiary) against the plan, the plan sponsor, any health insurance issuer offering health insurance coverage in connection with the plan, or any managed care entity in connection with the plan to recover damages resulting from personal injury or for wrongful death if such cause of action arises by reason of a medically reviewable decision.

“(2) DEFINITIONS AND RELATED RULES.—For purposes of this subsection—

“(A) MEDICALLY REVIEWABLE DECISION.—The term ‘medically reviewable decision’
means a denial of a claim for benefits under the plan.

“(B) PERSONAL INJURY.—The term ‘personal injury’ means a physical injury and includes an injury arising out of the treatment (or failure to treat) a mental illness or disease.

“(C) CLAIM FOR BENEFIT.—The term ‘claim for benefits’ means any request for coverage (including authorization of coverage), for eligibility, or for payment (or reimbursement for payment) in whole or in part, for an item or service under a group health plan or health insurance coverage.

“(D) DENIAL OF CLAIM FOR BENEFITS.—The term ‘denial’ means, with respect to a claim for benefits, a denial (in whole or in part) of, or a failure to act on a timely basis upon, the claim for benefits and includes a failure to provide benefits (including items and services) required to be provided under this title.

“(E) MANAGED CARE ENTITY.—

“(i) IN GENERAL.—The term ‘managed care entity’ means, in connection with a group health plan and subject to clause (ii), any entity that is involved in deter-
mining the manner in which or the extent
to which items or services (or reimburse-
ment therefor) are to be provided as bene-
fits under the plan.

“(ii) TREATMENT OF TREATING PHY-
SICIANS, OTHER TREATING HEALTH CARE
PROFESSIONALS, AND TREATING HOS-
PITALS.—Such term does not include a
treating physician or other treating health
care professional of the participant or ben-
eficiary and also does not include a treat-
ing hospital insofar as it is acting solely in
the capacity of providing treatment or care
to the participant or beneficiary. Nothing
in the preceding sentence shall be con-
strued to preempt vicarious liability of any
plan, plan sponsor, health insurance issuer,
or managed care entity.

“(3) EXCLUSION OF EMPLOYERS AND OTHER
PLAN SPONSORS.—

“(A) CAUSES OF ACTION AGAINST EM-
PLOYERS AND PLAN SPONSORS PRECLUDED.—
Subject to subparagraph (B), paragraph (1)
does not apply with respect to—
“(i) any cause of action against an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment), or

“(ii) a right of recovery, indemnity, or contribution by a person against an employer or other plan sponsor (or such an employee) for damages assessed against the person pursuant to a cause of action to which paragraph (1) applies.

“(B) CERTAIN CAUSES OF ACTION PERMITTED.—Notwithstanding subparagraph (A), paragraph (1) applies with respect to any cause of action that is brought by a participant or beneficiary under a group health plan (or the estate of such a participant or beneficiary) to recover damages resulting from personal injury or for wrongful death against any employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment) if such cause of action arises by reason of a medically reviewable decision, to the extent that there was direct participation by the employer
or other plan sponsor (or employee) in the decision.

“(C) Direct participation.—

“(i) Direct participation in decisions.—For purposes of subparagraph (B), the term ‘direct participation’ means, in connection with a decision described in subparagraph (B), the actual making of such decision or the actual exercise of control in making such decision or in the conduct constituting the failure.

“(ii) Rules of construction.—For purposes of clause (i), the employer or plan sponsor (or employee) shall not be construed to be engaged in direct participation because of any form of decisionmaking or other conduct that is merely collateral or precedent to the decision described in subparagraph (B) on a particular claim for benefits of a particular participant or beneficiary, including (but not limited to)—

“(I) any participation by the employer or other plan sponsor (or employee) in the selection of the group health plan or health insurance cov-
verage involved or the third party administrator or other agent;

“(II) any engagement by the employer or other plan sponsor (or employee) in any cost-benefit analysis undertaken in connection with the selection of, or continued maintenance of, the plan or coverage involved;

“(III) any participation by the employer or other plan sponsor (or employee) in the process of creating, continuing, modifying, or terminating the plan or any benefit under the plan, if such process was not substantially focused solely on the particular situation of the participant or beneficiary referred to in paragraph (1)(A); and

“(IV) any participation by the employer or other plan sponsor (or employee) in the design of any benefit under the plan, including the amount of copayment and limits connected with such benefit.”.
(b) CONFORMING AMENDMENT.—Section 502(b)(4) of such Act (29 U.S.C. 1132(b)(4)) is amended by striking “514(e)(3)” and inserting “514(f)(3)”.

c) EFFECTIVE DATE.—The amendments made by this section shall apply to acts and omissions (from which a cause of action arises) occurring on or after the date of the enactment of this Act.