HR 2723, The Dingell-Norwood Bill:
A Direct Liability Threat to Employers Through the Impairment of ERISA Preemption

Executive Summary

(Prepared by Schnader Harrison Segal & Lewis LLP)

The following memorandum details our analysis of whether HR 2723, if enacted, would subject employers to suits under state law arising from health plan claims. We conclude that this bill would entangle employers extensively in personal injury litigation in the state courts.

ERISA PREEMPTION

Supporters of the Dingell-Norwood bill are asserting that the proposed legislation would not subject employers to suit under state law. This argument may be based upon the fact that the bill is drafted in a potentially misleading manner. Although Title I nominally leaves intact all aspects of ERISA protection, Title III eviscerates ERISA preemption in connection with medical benefit claims.

Section 302(a) would repeal ERISA preemption in connection with a claim under state law to recover damages resulting from personal injury or for wrongful death against any person. The term "personal injury" is then broadly defined, and would include, for example, compensation for alleged emotional distress and lost job opportunities, as well as any value of denied benefits. The bill explicitly allows suits against "any person" for alleged harms, including any of the employer's employees who participated in a decision to deny a benefit. In short, the first portion of Section 302(a) would end ERISA preemption as we know it in the context of health benefit claims.

"EXCEPTION FOR EMPLOYERS"

We suspect that supporters of the Dingell-Norwood bill commonly point to their "Exception for Employers and Other Plan Sponsors" for the proposition that the bill would not allow suits against employers. Such an assertion is erroneous.

For those health plans in which employers retain the discretion to resolve benefit claims, a "Special Rule" would swallow the "Exception." Nearly any managed care decision entails a "discretionary act," thus triggering the Special Rule and employer liability. Under current law, such managed care decisions would justify preemption of state law, judging employee benefit cases under uniform federal common law. The Dingell-Norwood bill would stand this principle on its head and subject all "discretionary" benefit decisions by ERISA fiduciaries of self-administered group health plans to state court lawsuits. The result for such plans, including many Taft-Hartley plans jointly administered by unions, could be a tidal wave of state court claims.
In plans where the employer delegates authority over managed care decisions to an insurance company or third-party administrator, an employer could argue that it exercised no discretionary authority because all of its authority was delegated. However, the employer would likely find itself in court defending against a variety of persuasive arguments to overcome such a contention. First, the plaintiff could argue that the discretionary acts of the insurance company or third-party administrator are imputed to the employer as the acts of an agent. This contention would have a solid common law basis, and is commonplace in personal injury litigation. Second, the plaintiff could assert that the employer's discretionary act in selecting the insurer or third-party administrator led to the injury.

Finally, the plaintiff could allege that the employer had a sufficiently high degree of involvement in the underlying decision that the employer actually made the decision to deny the benefit, rather than the third party. This final argument is particularly important. Even when an employer delegates responsibility, it commonly retains the right to

override the third party in a given decision. This authority, whether exercised or not in a particular case, would undoubtedly lead to an employer's liability. Although the legislation would exempt employers from liability when they grant "extra-contractual" benefits, the exemption would offer no tangible protection to employers in the ordinary resolution of benefit claims.

The Dingell-Norwood bill would change the substantive rules for litigating benefit claims so that plaintiffs would have many arguments for suing employers in virtually any case under state law. The bill would also ensure plaintiffs a sympathetic state court forum for their claims.

PUNITIVE DAMAGES

If supporters of the Dingell-Norwood bill take the position that the language restricting punitive damage claims provides reliable protection to employers, they are clearly incorrect. By its plain language, the provision does not include "employers" within the scope of protection in limiting punitive damages. Ironically, the provision gives insurance companies broader protection than employers. Furthermore, the protection of this provision is incomplete even as to health plans and insurance companies. The shield applies only to claims that went through an external appeal process. Because the legislation explicitly allows an individual to bring suit before he or she exhausts administrative remedies, the external appeal hurdle is nearly meaningless. Any plaintiff can be expected to contend his or her injury commenced as soon as the benefit was allegedly denied, thus allowing a request for punitive damages against all defendants.

CONCLUSION

In conclusion, the Dingell-Norwood bill would dramatically change the way that group health benefit claims are litigated in the United States. State personal injury law would come to dominate virtually all aspects of managed care. Employers would be subject to state law causes of action, replete with jury trials, extra-contractual damages, and punitive damages. It would be an entirely new day in this aspect of employee benefits law. Anyone who claims the contrary is simply failing to comprehend the thrust of the legislation.

M E M O R A N D U M

August 31, 1999

TO: THE BUSINESS ROUNDTABLE

FROM: DAVID E. KENTY, ESQUIRE
FRANK C. SABATINO, ESQUIRE

RE: THE DINGELL-NORWOOD BILL: A DIRECT LIABILITY THREAT TO EMPLOYERS THROUGH THE IMPAIRMENT OF ERISA PREEMPTION

I. **INTRODUCTION**

You have requested our opinion concerning the impact of the Dingell-Norwood Bill upon preemption under Section 514 of the Employee Retirement Income Security Act, 29 U.S.C. Section 1144 ("ERISA"). Specifically, you have asked whether this Bill, if enacted, would subject employers to suits under state law for damages (including extra-contractual and punitive damages) allegedly arising from the processing of group health plan claims covered by ERISA. We conclude that this Bill would entangle employers extensively in personal injury litigation in the state courts.

Our analysis will be divided into two parts. First, we shall review the relevant portions of the proposed legislation that, in our view, would allow suits against employers under state law. Second, we shall discuss exactly how this Bill would subject employers and other plan sponsors to various types of state law liability that already exist.

II. **ANALYSIS**

A. **The Statutory Language**

We understand that supporters of the Dingell-Norwood Bill are asserting that this proposed legislation *would not* subject employers and other plan sponsors to suit under state law. This argument may, in part, be based upon the fact that the Bill is drafted in a potentially misleading manner.

The Bill consists of six Titles. By far the lengthiest portion is Title I, captioned "The Bipartisan Consensus Managed Care Improvement Act of 1999," which makes up 54 pages of the 66-page bill. Section 152(a)(2) of Title I nominally leaves intact all aspects of ERISA preemption with the statement "nothing in *this title* shall be construed to affect or modify the provisions of section 514 of the Employee Retirement Security Act of 1974 with respect to group health plans" (emphasis added). However, what the Bill would give with one hand, it would divest with the other.

Title III, which incorporates Title I by reference, contains Section 302, which would eviscerate ERISA preemption in connection with medical benefit claims. Our analysis of this statutory language is divided into two parts. First, we shall review specifically those provisions that apply to ERISA preemption. Second, we shall examine what the Bill provides in connection with punitive damages.

1. **The Bill's Provisions Concerning ERISA Preemption**

The current preemption scheme in ERISA Section 514 is tripartite. First, Section 514(a) broadly preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. Section 1144(a). Then, Section 514(b)(2)(A) saves from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. Section 1144(b)(2)(A). Finally, Section 514(b)(2)(B) contains a "deemer" clause which, in effect, fully reinstates ERISA preemption for self-funded employee benefit plans.[1] 29 U.S.C. Section 1144(b)(2)(B).

The drafters of the Dingell-Norwood Bill's current Section 302 may have had this tripartite scheme in mind, because they adopted a similar approach for their provision. However, the end result would be quite different.

As shall be explained below, Section 302 would engraft three separate clauses on ERISA's preemption regime. The first would broadly repeal ERISA preemption in connection with any claims for health care benefits. Second, there is an "Exception for Employers and Other Plan Sponsors" that, standing alone, would reinstate ERISA preemption in some cases. However, the Bill also contains a "Special Rule" that, we believe, would significantly contract the "Exception."

(a) The Repeal of ERISA Preemption

Our analysis must begin with Section 302(a) of the Dingell-Norwood Bill, which states:

> (a) IN GENERAL. - Section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144) is amended by adding at the end of the following subsection:
>
> > "(e) PREEMPTION NOT TO APPLY TO CERTAIN ACTIONS ARISING OUT OF PROVISION OF HEALTH BENEFITS. –
> >
> > "(1) NON-PREEMPTION OF CERTAIN CAUSES OF ACTION.--
> >
> > "(A) IN GENERAL.–Except as provided in this subsection, nothing in this title shall be construed to invalidate, impair, or supersede any cause of action by a participant or beneficiary (or the estate of a participant or beneficiary) under State law to recover damages resulting from personal injury or for wrongful death against any person–

[1] The current ERISA preemption scheme is explained in detail in many cases. *See, e.g.*, *FMC Corp. v. Holliday*, 498 U.S. 52, 56-65 (1990).

> "(i) in connection with the provision of insurance, administrative services, or medical services by such person to or for a group health plan as defined in section 733), or
>
> "(ii) that arises out of the arrangement by such person for the provision of such insurance, administrative services, or medical services by other persons."

As quoted above, Section 302(a) would repeal ERISA preemption in connection with a claim "under state law to recover damages resulting from *personal injury* or for wrongful death against any person" (emphasis added). The term "personal injury" is defined in the following manner:

> (C) PERSONAL INJURY DEFINED – For purposes of this subsection, 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.

The plain language of the foregoing provision demonstrates that the definition of "personal injury" is quite broad. Assume, for example, that a plan participant seeks mental health benefits, and that the application is denied under the employer's group health plan. Assume also that the participant claims that this denial caused the participant to suffer emotional distress and to lose other job opportunities. Finally, assume that the participant sues the employer under state law to recover not only the value of the denied benefits, but also compensation for the alleged emotional distress and lost job opportunities.

The foregoing language of Section 302(a) would clearly abrogate ERISA preemption as a defense to such a suit. Indeed, the participant could sue "any person" for the alleged harm, including *any of the employer's employees who participated in the decision to deny the benefit*. Thus, an employer could be liable, not only in its own right, but also vicariously for the actions of its employees on the ground that, in denying the claim, the employees acted within the scope of their employment. Furthermore, as will be described in the next section of this memorandum, the participant would be able to sue for punitive damages. In short, the first portion of Section 302(a) of the Dingell-Norwood Bill would end ERISA preemption as we know it in the context of health benefit claims.

(b) The "Exception" and the "Special Rule"

It is true that Section 302 would contain an "Exception for Employers and Other Plan Sponsors," which states as follows:

> (A) IN GENERAL.–Subject to subparagraph (B), paragraph (1) does not authorize–

(i) any cause of action against an employer or other plan sponsor maintaining the group health plan (or against an employee of such an employer or sponsor acting within the scope of employment), or

(ii) a right of recovery or indemnity 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 under paragraph (1).

We suspect that supporters of the Dingell-Norwood Bill commonly point to this provision for the proposition that the proposed legislation would not allow for suits against employers. However, the very next line of the statute that follows this "Exception" states:

(B) SPECIAL RULE.–Subparagraph (A) shall not preclude any cause of action described in paragraph (1) against an employer or other plan sponsor (or against an employee of such an employer or sponsor acting within the scope of employment) if–

(i) such action is based on the employer's or other plan sponsor's (or employee's) *exercise of discretionary authority to make a decision on a claim for benefits covered under the plan or health insurance coverage in the case at issue*; and

(ii) the exercise by such employer or other plan sponsor (or employee) of such authority resulted in personal injury or wrongful death.

(Emphasis added).

We shall now examine the Special Rule from three perspectives. The first is the extent to which it would affect self-administered plans. Second, we shall discuss its impact in a situation in which the employer delegates the decision-making process to an insurer or third-party administrator. Third, we shall discuss the extent to which the Special Rule would relegate the litigation of welfare benefit claims under ERISA to the forum of state court.

(i) Self-Administered Plans

For those plans in which employers retain the discretion to resolve benefit claims, the "Special Rule" would swallow the "Exception." Nearly any managed care decision, such as pre-certification of treatment or utilization review, entails a "discretionary" act. Until now, this fact has been considered as a justification for preempting state law and judging welfare benefit cases under a uniform federal common law of trusts.[2] The Dingell-Norwood Bill would stand this principle on its head and subject all "discretionary" benefit decisions by ERISA fiduciaries of self-administered group health plans to state court litigation. The result for such plans could be a tidal wave of state law claims.[3]

Let us return to our example of the suit against an employer for the denial of mental health benefit claims under state law. The participant would clearly be suing under state law in connection with an "exercise of discretionary authority to make a decision on a claim for benefits covered under the plan." Thus, the "Special Rule" would provide that the claim could be brought under state law for all the damages mentioned above. Additionally, the participant's claim against any of the employer's employees who were involved in the decision would remain intact.

Let us alter the hypothetical slightly. Assume that the employee's application for mental health benefits sought in-hospital treatment. Assume also that, upon the advice of its medical officer, the employer approved the treatment on an out-patient basis. If plaintiff alleged that the out-patient treatments were inadequate and led to a "personal injury," then he or she could sue the employer under state law for the full range of allowable damages.

There is language in the "Exception" that would theoretically shield an employer from a lawsuit until the plaintiff has exhausted the "internal or external review" of the claim in question. However, there is a "futility" exception in the statute that, in our view, would likely permit plaintiffs to circumvent the need to exhaust administrative remedies. This futility exception will be discussed in the portion of this memorandum that concerns punitive damages. We do not view this exhaustion requirement as a source of effective protection.

This rule concerning self-administered plans would apply to all employers that operated their plans in-house. It would also apply to many, if not most, self-insured jointly-administered Taft-Hartley welfare plans that maintain their own staffs to process claims. These plans would become subject to all liability allowed by state personal injury law. Furthermore, the employees and trustees of such plans, some of whom are invariably union officers, could be hauled into state court routinely and sued for damages in connection with benefit claims. Taft-

---

[2] *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-15 (1989).

[3] Even under the broad preemption provisions in the current version of ERISA, some courts have shown sympathy to such claims. *E.g.*, *Cooney v. South Central Bell Telephone Co., et al.*, 1992 U.S. Dist. LEXIS 2402 (E.D. La. 1992) (recognizing state law causes of action against employer), *vac'd on rehearing*, 1992 U.S. Dist. LEXIS 17356 (on grounds of ERISA preemption). The situation would become much worse under the Dingell-Norwood Bill.

Hartley plans could be compelled to forego managed care procedures or to face the cost of personal injury litigation, thereby expending precious resources either way. Unions, in turn would face the unpalatable choice of sacrificing wage compensation in order to boost employer contributions, or seeing care for members that is actually needed and cost-effective cut back.

(ii) Delegated Plans

In most plans, the employer delegates authority over managed care decisions to an insurance company or a third-party administrator. Theoretically, such an employer would have a defense not open to an employer that sponsors a self-administered plan. The Special Rule authorizes a state law action based on the employer's "exercise of discretionary authority to make a decision on a claim for benefits ...." In a delegated plan, an employer could argue that it exercised *no* discretionary authority because all of its authority was delegated to a third party.

However, a plaintiff could make several powerful arguments to overcome such a contention. First, the plaintiff could argue that the discretionary acts of the insurance company or third-party administrator that actually rendered the decision in question should be imputed to the employer as the acts of an agent. This contention would have a solid common law basis,[4] and is commonplace in personal injury litigation. Second, the plaintiff could assert that the employer's discretionary act in selecting the insurer or third-party administrator that ruled on the claim in question actually caused the injury.[5]The word "employer" in the text of this provision should not be given undue emphasis. The Illustrations set forth in Section 411 demonstrate that the

---

[4] *Schleier v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*, 876 F.2d 174 (D.C. Cir. 1989) (District of Columbia); *Pickett v. Cigna Healthplan of Texas, Inc.*, 742 F. Supp. 946, (S.D. Tex. 1990) (Texas); *Sloan v. Metropolitan Health Council of Indianapolis, Inc.*, 516 N.E.2d 1104 (Ind. App. 1987) (Indiana); *Miller v. Kurkjian*, No. CIV. A. 95-1723B (Mass. Sup. 1999) (Massachusetts); *Boyd v. Albert Einstein Med. Ctr.*, 547 A.2d 1229 (Pa. 1988) (Pennsylvania); *Independence HMO, Inc. v. Smith*, 733 F. Supp. 983 (E.D. Pa. 1990) (Pennsylvania); *Lazorko v. Pennsylvania Hosp.*, 1998 WL 405055 (E.D. Pa. 1998) (Pennsylvania); *Jones v. Chicago HMO Ltd. of Illinois*, 703 N.E.2d 502 (Ill. App. 1998) (Illinois); *Petrovich v. Share Health Plan of Illinois, Inc.*, 696 N.E.2d 356 (Ill. App. 1998) (Illinois); *Paterno v. Albuerne*, 855 F. Supp. 1263 (S.D. Fla. 1994) (Florida); Restatement (Second) of Torts, Section 429 (Negligence in Doing Work Which is Accepted in Reliance on the Employer's Doing the Work Himself). *See also* Black's Law Dictionary at 758 (6th ed. 1990) ("... the negligence of an agent acting within the scope of his employment is chargeable to his principal").

[5] *Accord* Restatement (Second) of Torts, Section 411 (Negligence in Selection of Contractor):

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
> (b) to perform any duty which the employer owes to third persons

principle is fully applicable when one company contracts with another company to perform a certain delegated task. Finally, the plaintiff could allege that the employer had a sufficiently high degree of involvement in the underlying decision to render the employer liable as the real actor.[6]

This third point is particularly important. Even when an employer has delegated responsibility for benefit decisions to an insurance company or a third party administrator, the employer commonly retains the right to override the third party in any given decision. In those situations in which the employer did direct an override, and thereby subjected the plaintiff to an alleged injury, the plaintiff could sue the employer under state law, averring that the employer's discretionary act in directing the override caused the injury. In those cases in which the employer had such discretionary override authority but failed to use it, the plaintiff could alternatively argue that: (1) the failure to exercise the override authority constituted a discretionary act that gave rise to liability under state law, or (2) the third party's conduct should be imputed to the employer under the agency argument outlined in the preceding paragraph.

We understand that there is a provision in the Dingell-Norwood Bill that supposedly applies to situations in which employers involve themselves in the process of ruling upon benefit claims. Subsection (2)(C)(ii) of the "Exception" states that an "exercise of discretionary authority," for which an employer may be sued under state law, shall "not be construed to include ... any decision to provide extra-contractual benefits." Supporters of the Dingell-Norwood Bill, we are told, take the position that this language protects employers from state law liability if they participate in the approval of benefit claims. This argument lacks any merit.

In the context of an ERISA claim, an "extra-contractual" benefit is a benefit not required by the plan document. Thus, Section (2)(C)(ii) *only* protects an employer if, for some reason, it bestows upon *(i.e.*, makes a "decision to provide") an employee a benefit that is not contemplated or authorized by the plan document. Absolutely no protection is extended to the employer that denies a claim or grants less that a participant requests, as when a request for hospital treatment is answered with an offer of outpatient treatment. If advocates of this Bill claim that Section (2)(C)(ii) offers any tangible protection, they are pointing to a mirage.

The following hypothetical will demonstrate the extent to which Section (2)(C)(ii) lacks any substance. Assume that an employee applies for coverage of cosmetic surgery, a benefit that is excluded by the relevant plan document. Section (2)(C)(ii) would only provide protection if the employer used its influence to *grant* the benefit. Absolutely no protection would

---

[6] Restatement (Second) of Torts, Section 410 (Contractor's Conduct in Obedience to Employer's Directions):

> The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.

be provided if the employer simply encouraged enforcement of the plan document and consequent denial of the benefit.

In most cases, the "protection" provided by Section (2)(C)(ii) would be useless, because it is difficult to envision many cases in which an employer would be sued by a participant or beneficiary for *granting* a benefit. Perhaps more importantly, an employer should as a general rule be wary of ever granting an "extra-contractual benefit," because the ultimate result could be liability from another body of law.

The whole philosophy of ERISA is that benefits should be dispensed under terms that are plainly set forth in written documents fairly applied to all employees and dependents. Employers can enmesh themselves in significant trouble if they selectively grant "extra-contractual" benefits in some cases and withhold them in others. The tax-exempt status of a welfare plan can be threatened by extending benefits on terms that are not authorized by the governing plan documents. Similarly, in the cosmetic surgery hypothetical used above, an employer that grants the "extra-contractual" benefit to one employee may be sued under a variety of antidiscrimination laws if it withholds the same benefit from other similarly-situated employees in different protected classifications. In short, an employer that engages in the type of conduct protected by Section (2)(C)(ii) is likely to run afoul of other labor laws.

(iii) The Significance of the State Court Forum

As explained above, the Dingell-Norwood Bill would change the substantive rules for litigating benefit claims to such an extent that plaintiffs would have many arguments for suing employers under state law in virtually all managed care personal injury cases. The Bill would also ensure plaintiffs a sympathetic state court forum for the resolution of their claims.

Anyone who has ever been involved in litigating a lawsuit knows that the selection of the forum may have a dramatic impact on the results. When suing employers and ERISA plans, plaintiffs tend to favor state courts because such courts: (1) regularly deal with personal injury litigation, and (2) are naturally unsympathetic to arguments that the tort law that they oversee is preempted. Employers and plans tend to favor federal courts because those courts tend to have: (1) greater empathy with the problems of administering employee benefits, (2) greater willingness to find preemption of state law, and (3) greater uniformity in results (whereas state courts can be balkanized by state boundaries). Anyone who doubts these truisms should examine the voluminous case law in which plaintiffs have attempted to litigate their claims against employers in state court, while employers have sought the federal forum.

Until now, ERISA has permitted employers to remove to federal court virtually all employee welfare benefit claims litigation brought in state court on the ground that ERISA completely preempts the field of employee benefits litigation. The Supreme Court has held that ERISA is one of a narrow category of statutes in which Congress intended that federal law should provide the sole jurisdictional basis, even if a plaintiff frames his or her claim entirely under state law.[7]

---

[7] *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63-67 (1987).

The Dingell-Norwood Bill would destroy this avenue of removal, as ERISA would no longer preempt the field. In effect, Congress would be stating that many employee benefit claims should be litigated under state law. ERISA preemption, to the extent that it survived, would merely be an affirmative defense for specific cases. Such a defense is not a basis for removal.[8] Thus, in the absence of diversity or supplemental jurisdiction, all welfare benefit cases covered by ERISA would be subject to litigation in state court.

2. Punitive Damages

Section 302 of the Dingell-Norwood Bill contains a provision that, on its face, is designed to limit the extent to which a plan or "issuer" of insurance would be liable for "punitive, exemplary, or similar damages." The provision states:

> (B) LIMITATION ON PUNITIVE DAMAGES.–The plan or issuer is not liable for any punitive, exemplary, or similar damages in the case of a cause of action brought under subparagraph (A) if–
>
> (i) it relates to an externally appealable decision (as defined in subsection (a)(2) of section 103 of the Bipartisan Consensus Managed Care Improvement Act of 1999);
>
> (ii) an external appeal with respect to such decision was completed under such section 103;
>
> (iii) in the case such external appeal was initiated by the plan or issuer filing the request for the external appeal, the request was filed on a timely basis before the date the action was brought or, if later, within 30 days after the date the externally appealable decision was made; and
>
> (iv) the plan or issuer complied with the determination of the external appeal entity upon receipt of the determination of the external appeal entity.
>
> The provisions of this subparagraph supersede any State law or common law to the contrary.

If supporters of the Dingell-Norwood Bill take the position the foregoing language provides reliable protection to employers from punitive damage claims, they are clearly incorrect. First, and most importantly, the provision does not include *employers* within the limitation of

[8] *See also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983).

liability for punitive damages. Thus, this provision, by its plain language, does not provide *any* shield to employers.

Second, the provision does not apply to employees of employers who are involved in a benefit denial. A company employee who participated in the decision-making that led to a denial could be sued and subject to the full extent of liability. The only parties covered are plans themselves and "issuers" of health insurance. Ironically, this provision would give insurance companies broader protection than employers.

Finally, the protection of this provision is incomplete even as to plans and insurance companies. By its plain language, this "shield" applies only to claims that are covered by "an external appeal" within the meaning of "Section 103" of the Bill. Significantly, another section of this same Bill states:

> (3) FUTILITY OF EXHAUSTION.–An individual bringing an action under this subsection is not required to exhaust administrative processes under section 102 or 103 of the Bipartisan Consensus Managed Care Improvement Act of 1999 where the injury to or death of such individual has occurred before the completion of such processes.

Under this provision, a plaintiff would not have to exhaust administrative remedies if he or she could establish that his or her "injury" commenced prior to the expiration of the external appeal process. This should not be a terribly difficult hurdle. Almost all plaintiffs can be expected to contend that their emotional distress (and resulting physical injury) commenced as soon as their benefits were denied. Thus, a "futility" argument could subject the defendant both to suit under the Special Rule and to punitive damages.

Let us return once more to the example of the participant who brings a state court action as described above. Assume that the complaint contains a claim for punitive damages. The only parties covered by the shield would be an insurance company and the employer's benefit plan. Furthermore, by alleging that the emotional distress or out-of-pocket injury arose as soon as the benefit claims were denied, the participant may be able to prevent the shield from being asserted by *any* defendant.

B. The Consequences of This Bill

One of the primary reasons for ERISA preemption was to permit employers that maintain employee benefit plans in various states to be subject to one body of law, rather than to the laws of the various states covered by the plan. Section 302 of the Dingell-Norwood Bill would change all of that. For example, assume that a plan based in New York City included company employees throughout the United States. Assume also that a participant in Florida unsuccessfully applied for a certain benefit covered by the plan. The plan, and its employees, would then be subject to suit in Florida under Florida personal injury law.

691896

The reason for this conclusion is simple. Under ERISA Section 514, as currently constituted, an employee benefit plan cannot be subject to the same causes of action that can be brought against an insurance company under state law for denying a claim. The new Bill would permit just that result. Consequently, ERISA plans would be subject to laws that apply to insurers. Employers that sponsor plans would be subject to the laws of the different states in which the plans operate.

Under state law, moreover, an insured individual who is denied a particular benefit from an insurance company can generally sue the insurer not only for a contractual breach of the insurance contract, but also under the tort of "bad faith" for extra-contractual and punitive damages arising from the denial.[9] At the present time, ERISA preempts state statutory or common law claims for breach of the duty of good faith when asserted against an employer for employee benefits.[10] That would change if the Dingell-Norwood Bill were enacted.

The proposed legislation would subject employers and their ERISA plans not only to state law, but also to state judicial procedures. Without total ERISA preemption, there would be no basis to remove group health plan claims to federal court. Therefore, in the absence of diversity jurisdiction, one would have to litigate in state court. Furthermore, whereas the current ERISA remedial scheme requires that all cases be tried without a jury, the new legislation would subject employers and their ERISA plans to state law procedures, which generally involve jury trials.

---

[9] For a complete discussion of these causes of action under state law, *see Couch on Insurance,* 2d at 248-70 (1983). According to the *Couch* treatise, the tort of bad faith had its "genesis" in the California Supreme Court decision of *Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 566, 108 Cal. Rptr. 480 (1973). The treatise also notes that after *Gruenberg*, bad faith claims have been raised "in virtually every jurisdiction." *Couch on Insurance*, 2d at 255.

The following list of cases recognizing the theory is added for illustrative purposes: *Wagner v. Midwestern Indemnity Co.*, 83 Ohio St.3d 287, 699 N.E. 2d 507 (1998) (Ohio); *Time Insurance Co. v. Burger*, 712 So. 2d 389 (Fla. Sup. Ct. 1998) (Florida); Vining *v. Enterprise Financial Group*, 148 F.3d 1206 (10th Cir. 1998) (Oklahoma); *Mendes v. Hawaii Insurance Guaranty Association*, 87 Haw. 14, 950 P.2d 1214 (1998) (Hawaii)*; State Farm Fire & Casualty Co. v. Simmons*, 963 S.W. 2d 42 (Tex. Sup. Ct. 1997) (Texas); *Polesi v. Nationwide Mutual Fire Insurance Co*., 126 F.3d 524 (3d Cir. 1997) (Pennsylvania); *Walston v. Monumental Insurance Co.*, 129 Idaho 211, 923 P.2d 456 (1996) (Idaho); *Billings v. Union Bankers' Insurance Co.*, 918 P.2d 461 (Ut. Sup. Ct. 1996) (Utah); *White v. J.C. Penney Life Insurance Co.*, 861 F. Supp. 25 (S.D. W.Va. 1994) (West Virginia); *Duncan v. Provident Mutual Life Insurance Co.*, 310 S.C. 465, 427 S.E.2d 657 (1993) (South Carolina); *Pickett v. Lloyd's*, 131 N.J. 457, 621 A.2d 445 (1992) (New Jersey).

[10] *See Bast v. Prudential Insurance Co*., 150 F.3d 1003, 1008-09 (9th Cir. 1998); *In re Life Insurance Co. of North America*, 857 F.2d 1190, (8th Cir. 1988); *Anschultz v. Connecticut General Life Insurance Co.*, 850 F.2d 1467, 1468-69 (11th Cir. 1998); *Powell v. Chesepeake and Potomac Telephone Co.*, 780 F.2d 419, 423-25 (4th Cir. 1985).

When one contemplates the extent to which Section 302 of the Dingell-Norwood Bill would subject employers and their ERISA plans to state law, one is tempted to recall the admonition of Justice O'Connor in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). *Pilot Life*, of course, is a seminal decision on ERISA preemption, which held that state remedies and state substantive law could not be asserted by a plan participant who is complaining about the denial of an employee benefit claim. Writing for a unanimous Court, Justice O'Connor explained the following:

> In sum, the detailed provisions of Section 502(a) of ERISA set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest *in encouraging the formation of employee benefit plans*. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely *undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA*.

(Emphasis added). The Dingell-Norwood Bill would achieve the very result feared by Justice O'Connor in *Pilot Life*.

II. <u>CONCLUSION</u>

The Dingell-Norwood Bill would dramatically change the way that group health benefit claims are litigated in the United States. State personal injury law, both procedural and substantive, would come to dominate virtually all aspects of managed care. Employers would be subject to state law causes of action, replete with jury trials, extra-contractual damages, and punitive damages. It would be an entirely new day in this aspect of employee benefits law. Anyone who claims the contrary is simply failing to comprehend the thrust of the legislation.