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COBRA CONTINUATION COVERAGE AND THE PLAIN
READING OF THE STATUTE: *GEISSAL v. MOORE MEDICAL
CORPORATION*

JUDITH C. BROSTRON¹

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I. INTRODUCTION

In 1986 Congress passed the Consolidated Omnibus Budget Reconciliation Act (COBRA).² This legislation amended the Employee Retirement Income Security Act (ERISA)³ by requiring employers to offer group health insurance coverage to terminated employees for a specific time period after termination. The purpose of

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²29 U. S. C. §§ 1161-1169 (1999).

³29 U. S. C. §§ 1001-1461 (1999). It also amended the Public Health Service Act and the Internal Revenue Code.

this legislation was to provide for “the growing number of Americans without any health insurance coverage and the decreasing willingness of our Nation’s hospitals to provide care to those who cannot afford to pay.”⁴

The statute requires that the group health insurance coverage extend for eighteen months or thirty-six months, depending upon the qualifying event, or until “[t]he date on which the qualified beneficiary first becomes, after the date of the election, covered under any other group health plan.”⁵ There has been a split among the Circuits as to the meaning of the “first becomes” statutory language and how this language should be applied when a terminated employee has preexisting coverage through his or her spouse’s employer at the time of termination and makes an election for COBRA continuation coverage.

The Tenth and Seventh Circuits have held that the employee is not disqualified from obtaining COBRA continuation coverage because of the spouse’s preexisting group health insurance coverage.⁶ The Fifth, Eleventh, and Eighth Circuits, on the other hand, have held that the employee is disqualified from obtaining continuation coverage because of the spouse’s preexisting group health insurance coverage.⁷ The Supreme Court recently decided the Eighth Circuit case regarding the issue of an employee’s right to COBRA continuation coverage when the employee has preexisting spousal coverage.⁸

This Paper will discuss the relevant statutes, case law and the Supreme Court’s opinion in *Geissal v. Moore Medical Corp.*⁹ It concludes that the Supreme Court correctly reversed the Eighth Circuit’s opinion in *Geissal* by applying the plain meaning of the statute and rejecting the “significant gap” theory. James Geissal was entitled to COBRA continuation coverage even though his wife had preexisting group health insurance coverage. The Fifth, Eleventh and Eighth Circuits’ significant gap theory is not supported by the plain meaning of the statute or Congress’ intent. The employee should have the choice to elect COBRA or decide whether different coverage is in his or her best interest. As long as the employee bears the risk and pays the premiums during the limited time period provided by COBRA the courts should not supplant their own views as to what constitutes adequate coverage or whether there is a significant “gap” in health insurance coverage between the employee’s coverage and the spouse’s coverage.

Part I of this paper will provide a background analysis of the statutory provision at issue and discuss the holdings of the Circuit Courts of Appeal. Part II of this paper will analyze the *Geissal* case. Part III of this paper will conclude that the Supreme Court’s opinion in the *Geissal* case is the only possible decision that could

⁴H. R. Rep. No. 99-241, pt. 1, at 44, 44 (1985), *reprinted in* 1986 U.S.C.C.A.N. 579, 622.

⁵29 U. S. C. § 1162 (2)(D)(i) (1999).

⁶*Oakley v. City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989), *cert. denied*, *Lutheran Hosp. of Indiana, Inc., v. Men’s Assurance Co. of America*, 51 F.3d 1308, 1315 (7th Cir. 1994).

⁷*Brock v. Primedica*, 904 F.2d 295, 297 (5th Cir. 1990); *National Cos. Health Benefit Plan v. St. Joseph Hosp. of Atlanta, Inc.*, 929 F.2d 1558, 1571 (11th Cir. 1991); *Geissal v. Moore Med. Corp.*, 114 F.3d 1458, 1465 (8th Cir. 1997) *rev’d*, 524 U.S. 74 (1998).

⁸*See Geissal v. Moore Medical Corp.* 141 L. Ed. 2d 64 (1998).

⁹*Id.*

preserve the plain meaning of the statute and limit judicial intrusion into the group health insurance arena.

II. BACKGROUND

A. COBRA

The obligation to provide COBRA continuation coverage applies to employers with twenty or more employees.¹⁰ The statute requires that the “qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect within the election period, continuation coverage under the plan.”¹¹ A “qualified beneficiary” is defined as the individual employee or an individual, whom on the day before the qualifying event for the employee, is a plan beneficiary as the individual’s spouse or dependent child.¹² A “qualifying event” is defined as an event which would, but for the continuation coverage provisions, result in the loss of coverage for the beneficiary.¹³ The covered qualifying events are as follows:

1. The death of the employee;
2. Termination (other than for reasons of gross misconduct) or reduction of hours of employment;
3. Divorce or legal separation of the employee and the employee’s spouse;
4. The covered employee’s qualification for Medicare;
5. The loss of dependent status under the terms of the plan for a previously dependent child;
6. A bankruptcy proceeding against the employer.¹⁴

In order to obtain COBRA continuation coverage, a qualified beneficiary must make an election to continue coverage no later than sixty days after the date on which the coverage terminates because of a qualifying event.¹⁵ The type of continuation coverage that must be made available to the qualified beneficiary is “coverage which, as of the time the coverage is being provided, is identical to the coverage provided, under the plan to similarly situated beneficiaries under the plan” whose coverage has not been terminated.¹⁶ The qualified beneficiary must pay the insurance premiums which the employer may set at no more than 102% of the premium for similarly situated beneficiaries.¹⁷ After a beneficiary elects COBRA coverage, coverage begins on the date of the qualifying event and ends eighteen months after the date of the qualifying event except in the case of bankruptcies, death

¹⁰29 U.S.C. § 1161(b) (1999).

¹¹*Id.* at § 1161(a).

¹²29 U.S.C. § 1167(3) (1999).

¹³29 U.S.C. § 1163 (1999).

¹⁴*Id.*

¹⁵29 U.S.C. § 1165(1) (1999).

¹⁶29 U.S.C. § 1162(1) (1999).

¹⁷29 U.S.C. § 1162(3) (1999).

of the employee or beneficiary, or other circumstances involving spouses and dependents.¹⁸

The employer's obligation to provide continuation coverage terminates after eighteen or thirty-six months, or when the qualified beneficiary "first becomes, after the date of the election[,] covered under any other group health plan."¹⁹ The pertinent portions of the statute as originally written in April of 1986 are as follows:

SEC. 602 CONTINUATION COVERAGE.

For purposes of section 601, the term 'continuation coverage' means coverage under the plan which meets the following requirements:

- (1) TYPE OF BENEFIT COVERAGE. * * *
- (2) PERIOD OF COVERAGE. The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:
 - (A) MAXIMUM PERIOD. * * *
 - (B) END OF PLAN. * * *
 - (C) FAILURE TO PAY PREMIUM. * * *
 - (D) REEMPLOYMENT OR MEDICARE ELIGIBILITY.

The date on which the qualified beneficiary first becomes, after the date of the election –

- (i) a covered employee under any other group health plan, or²⁰

Therefore, as originally written, the statute contemplated that COBRA continuation coverage would stop if the maximum time period were reached, the employer ceased providing health insurance coverage, the beneficiary failed to pay premiums or the beneficiary became eligible for medicare or obtained new employment and group health insurance coverage. Clearly, "reemployment" and becoming a "covered employee" pertained to after-acquired coverage.

As part of the Tax Reform Act of 1986, Congress again amended the statute to make it clear that any other after-acquired group health insurance coverage could terminate COBRA rights. The pertinent portions of the October, 1986 amendments are as follows:

SEC. 602 CONTINUATION COVERAGE.

* * *

- (2) PERIOD OF COVERAGE. * * *
- (D) GROUP HEALTH PLAN COVERAGE OR MEDICARE ELIGIBILITY.

The date on which the qualified beneficiary first becomes, after the date of the election -

- (i) covered under any other group health plan (as an employee or otherwise), or²¹

¹⁸29 U.S.C. § 1162(2)(A)(iii) (1999). If a second qualifying event occurs during the eighteen month continuation coverage period, the period of coverage is extended to thirty-six months. 29 U.S.C. § 1162(2)(A)(ii) (1999).

¹⁹29 U.S.C. § 1162(2)(D)(i) (1999).

²⁰Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 228 (1986) (codified as amended at 29 U.S.C. § 1162(2)(D)(i) (1999)).

This meant that a qualified beneficiary could lose COBRA benefits not only if the beneficiary became reemployed and covered under any other group health plan but also if the beneficiary became covered by group health insurance as a result of marriage or remarriage. Since the “first becomes, after” language was not amended Congress clearly intended only after-acquired coverage to terminate COBRA eligibility.

The clause was amended once again in 1989 to ensure that the beneficiary would not be forced to accept after-acquired coverage that contained exclusions or limitations regarding preexisting conditions. That amendment read as follows:

SEC. 602 CONTINUATION COVERAGE.

* * *

(2) PERIOD OF COVERAGE. * * *

(D) GROUP HEALTH PLAN COVERAGE OR MEDICARE ENTITLEMENT.

The date on which the qualified beneficiary first becomes, after the date of the election -

- (i) covered under any other group health plan, (as an employee or otherwise) which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary, or²²

The legislative history behind these provisions is minimal, however based on the plain meaning of the statute it is clear that Congress intended that after-acquired coverage would disqualify the beneficiary from COBRA benefits. The disqualifying after-acquired coverage would occur by reason of reemployment and also by reason of after-acquired dependent coverage. For example, if a qualified beneficiary's spouse became entitled to group health benefits, the qualified beneficiary could choose to be covered as a dependent under his spouse's coverage and terminate COBRA. The spouse of a qualified beneficiary who elected COBRA by reason of death or divorce could also by remarrying, choose to become entitled to group health insurance coverage as an eligible dependent of the new spouse's policy.

There is nothing in the statute to suggest that the beneficiary is required to terminate COBRA before the eighteen months or thirty-six months if the premiums for the replacement insurance are cheaper or free. There is also nothing in the statute to suggest that the beneficiary is entitled to maintain COBRA if the replacement policy provides less coverage or a “significant gap” in coverage than the COBRA coverage.

²¹Tax Reform Act of 1986, Pub. L. No. 99-514, Sec. 1895, 100 Stat. 2938-39 (1986) (codified as amended at 29 U.S.C. § 1162(2)(D)(i) (1999)).

²²Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, Sec. 7862, 103 Stat. 2432 (1989) (codified as amended at 29 U.S.C. § 1162(2)(D)(i) (1999)). The most recent amendment to the statute occurred in 1996 by addition of the following words between “beneficiary,” and “or.” The amendment is as follows: “(other than such an exclusion or limitation which does not apply to (or is satisfied by) such beneficiary by reason of chapter 100 of the Internal Revenue Code of 1986, part 7 of this subtitle, or title XXVII of the Public Health Service Act).” Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, Sec. 421, 110 Stat. 2088 (1996) (codified as amended at 29 U.S.C. § 1162(2)(D)(i) (1999)).

B. The Tenth Circuit

The first case to deal with Section 1162(2)(D)(i) and the continuation coverage issue was *Oakley v. City of Longmont*.²³ James Oakley suffered a permanent head injury when he was involved in an automobile collision with a drunk driver. At the time of the accident he was employed by the City of Longmont (City) as a fire fighter and was covered by the City's medical plan.²⁴ He was also covered as a dependent under the group health plan of his wife's employer.

The City first informed him that he was not eligible to maintain his medical insurance coverage for an additional eighteen months because he was a dependent under his wife's plan.²⁵ He was later notified of his option to continue his prior medical coverage for eighteen months by making the premium payments himself. The election form was timely returned. At the time of his termination he was a patient at the Bear Creek Rehabilitation Center. His wife's coverage however, did not reimburse for the cost of the rehabilitative treatment. He sued to continue his medical coverage with the City. The district court denied declaratory and injunctive relief and Mr. Oakley appealed.²⁶

The Tenth Circuit determined that COBRA continuation coverage ends on "[t]he date on which the qualified beneficiary first becomes after the date of the election covered under any other group health plan (as an employee or otherwise)."²⁷ According to the plain meaning of the statutory language, the court held that Mr. Oakley was not disqualified from COBRA coverage even though he was covered under his wife's group health plan. The court stated:

When we read the underlined introductory language in conjunction with 'covered under any other group health plan (as an employee or otherwise),' we believe the plain meaning of this subsection cannot be construed to include a spouse's preexisting group plan as a condition to terminate continuation coverage. Indeed, Mr. Oakley did not 'first become' covered under his wife's policy after the qualifying event that resulted in his termination from the City's employment. Nor did Congress intend a covered employee's termination to become a condition triggering 'other' coverage under a spouse's preexisting group plan. Consequently, only when we read the language of subsection (i) to refer to other coverage occurring after the qualifying event, do we preserve its plain meaning and give effect to Congress' intent.²⁸

²³890 F.2d 1128 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

²⁴*Id.* at 1130. He was covered by the "City of Longmont Medical and Dental Care Expense Reimbursement Plan." *Id.*

²⁵*Id.*

²⁶*Id.*

²⁷*Id.* at 1132 (quoting from 42 U.S.C. § 300bb-2(2)(D)(i). The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1161, contains the same continuation coverage rules and identical provisions as found in the Public Health Service Act at issue here and the Internal Revenue Code. *See, e.g.* 29 U.S.C. § 1162(2). *Id.* at 1131.

²⁸*Oakley*, 890 F.2d at 1132.

The court relied on congressional history and a reading of the statute as a whole.²⁹ According to the House Conference Report regarding the duration of coverage, “no coverage need be provided after (1) failure to make timely payment under the plan, (2) the qualified beneficiary is covered under another group health plan as a result of employment, reemployment, or remarriage, and (3) the qualified beneficiary becomes entitled to Medicare benefits.”³⁰ The court concluded that “Congress intended this language to refer to subsequent events related to the employee’s own employment or marital status” and since Mr. Oakley had not obtained new employment, was not reemployed, and had not remarried he still qualified for COBRA continuation coverage.³¹

C. The Fifth Circuit

The Fifth Circuit interpreted the identical statutory language regarding COBRA continuation coverage as the Tenth Circuit but came to the opposite conclusion in *Brock v. Primedica, Inc.*³² In *Brock*, the plaintiff, Karin Brock, had health insurance as a Primedica employee and was also covered as a dependent on her husband’s group health insurance plan.³³ Prior to her resignation, she received a form letter from her employer advising her that she was entitled to continue her group health insurance coverage under COBRA unless she was covered by any other group health plans.³⁴ Despite the letter, she sought to continue her coverage under COBRA and paid the premiums. Subsequently, when Primedica learned that she was covered under her husband’s policy, Primedica denied her medical claims, notified her of her ineligibility for COBRA and refunded her premium.³⁵ The district court granted defendants’ motions for summary judgment on the grounds that Brock was not entitled to continuation coverage and her state law claims were preempted by ERISA.³⁶ The Brocks appealed.³⁷

The continuation coverage language had been amended shortly after the *Oakley* decision and provided that coverage ceases on the date when the beneficiary “first

²⁹*Id.*

³⁰131 CONG. REC. 38,285-86 (daily ed. Dec. 19, 1985).

³¹*Oakley*, 890 F.2d at 1132. Even though the legislative history did not specifically address the language “covered (as an employee or otherwise)” the court was satisfied that the overall statutory scheme contemplated continuation coverage to remain available to an employee despite a spouse’s preexisting insurance coverage. *Id.* at 1133.

³²904 F.2d 295 (5th Cir. 1990). The *Brock* case was brought under ERISA. *See* 29 U.S.C. § 1162(2)(D)(i) (1999).

³³*Brock*, 904 F.2d, at 296.

³⁴*Id.*

³⁵*Id.*

³⁶*Id.*

³⁷The plaintiff’s primary argument on appeal was that she was not informed of any limitations on her eligibility, and, after having accepted the premiums, Primedica should be estopped from denying benefits. The court rejected this argument based on the form letter and because she conceded that she was so informed. The estoppel argument raised for the first time on appeal was also not properly before the court. *Id.*

becomes, after the date of the election covered under any other group health plan (as an employee or otherwise) which does not contain any exclusion or limitation with respect to any preexisting conditions of such beneficiary.”³⁸ The *Brock* court reasoned that the amendment emphasized “Congress’ concern that group health plan participants and their dependents not be placed in a situation in which they suffer a gap in the character of coverage as the result of a [‘]qualifying event[’] such as termination of employment.”³⁹ The Fifth Circuit distinguished the *Brock* case from the *Oakley* case because Oakley’s rehabilitation was not covered by his wife’s employer’s policy but was covered by Oakley’s employer’s policy, and therefore, a “gap” in coverage occurred.⁴⁰ Since no “gap” in coverage occurred in Karin Brock’s case the court held that based on congressional intent and the express mandate of the statute she was not entitled to elect continuation coverage under COBRA.⁴¹

D. The Eleventh Circuit

The Eleventh Circuit held that an insurer was estopped from disclaiming an obligation to provide continuing group health coverage for a period of thirty-six months when the ERISA provider misinformed the employee about his rights under COBRA continuation coverage and the employee relied on that information to his detriment.⁴² In *National Companies Health Benefit Plan v. St. Joseph’s Hospital of Atlanta, Inc.*, the plaintiff Robert Hersh elected COBRA continuation coverage when he resigned from the National Distributing Company (NDC).⁴³ He was also covered under the ERISA group health plan of his wife Janet’s employer, St. Joseph’s Hospital of Atlanta (St. Joseph’s).⁴⁴ After Mrs. Hersh delivered twins three months prematurely, NDC informed Mr. Hersh that he was ineligible for continuation coverage and his claims were denied. In their lawsuit against NDC, the district court held that NDC was estopped from disclaiming an obligation to provide continuing group health coverage to the Hershes for a period of thirty-six months and also awarded the Hershes damages, attorneys’ fees and costs.⁴⁵ NDC appealed.⁴⁶

³⁸See 29 U.S.C. § 1162(2)(D)(i).

³⁹See *Brock v. Primedica*, 904 F.2d at 297 (citing H.R. Rep. No. 101-247 at 1452-53, reprinted in 1989 U.S.C.C.A.N. 1906, 2922-23).

⁴⁰*Id.* at 297.

⁴¹*Id.*

⁴²See *National Cos. Health Benefit Plan v. St. Joseph’s Hosp. of Atlanta, Inc.*, 929 F.2d 1558, 1566 (11th Cir. 1991).

⁴³*Id.* at 1561.

⁴⁴Prior to Mr. Hersh’s resignation he and his wife Janet both had obtained family coverage. The National Plan served as primary insurer for Mr. Hersh and their dependents, with the St. Joseph’s Plan providing secondary coverage. The St. Joseph’s Plan was the primary insurer for Mrs. Hersh only. *Id.* at 1562.

⁴⁵*Id.* at 1561.

⁴⁶NDC argued that it was not required to offer continuation coverage, that estoppel cannot be used to modify an ERISA plan and that the damage award in excess of \$1 million plus attorneys fees of \$60,000 and 18% interest was excessive. NDC did not appeal the district court’s award of injunctive relief which requires it to provide Robert Hersh and his dependents

Prior to his resignation to start his own business, Mr. Hersh had contacted several insurance companies regarding coverage for his wife's existing pregnancy. Because complications had already started to develop, the Hershes wanted to retain dual family coverage.⁴⁷ The desire for dual coverage was communicated to NDC's operation's manager and Mr. Hersh was told that he would be eligible for continuation coverage under the National Plan.⁴⁸ Mr. Hersh completed the "Election and Terms Continuation Coverage Agreement" which provided, in part:

I understand I am eligible to continue health coverage as presently provided under the [National Plan] for up to 36 months subject to the following provisions:

3. Coverage will be terminated prior to the 36 month period for any of the following reasons:
 - a) Non-payment of premium by the covered person.
 - b) Becoming eligible for Medicare.
 - c) Becoming covered under another group health plan because of either employment or remarriage.
 - d) Termination of the Plan.⁴⁹

Mr. Hersh paid the monthly premiums and National accepted and deposited these checks.⁵⁰ Following the premature birth of the twins, who suffered from intrauterine growth retardation and respiratory distress syndrome, the Hershes submitted claims to both the National Plan and the St. Joseph Plan.⁵¹ It was recommended by the claims administrator for National that NDC retroactively revoke Mr. Hersh's policy to the date of his resignation and deny the claims.⁵² All coverage was denied retroactively and National attempted to refund the premium payments plus ten percent interest. Mr. Hersh did not accept the refunds and continued to make premium payments.⁵³

The Eleventh Circuit held that the existence of preexisting group health insurance coverage made Mr. Hersh effectively ineligible for continuation coverage under ERISA.⁵⁴ In reviewing the *Oakley* decision the Eleventh Circuit noted the Tenth Circuit's statement (in dicta) that there was a "gap" between Oakley's coverage and

with thirty-six months of coverage starting from the date of Mr. Hersh's resignation. *Id.* at 1565-66.

⁴⁷*Id.* at 1562-63. One insurance company stated that it would cover her pregnancy. *Id.* at 1563.

⁴⁸*National Cos. Health Benefit Plan*, 929 F.2d at 1563.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.* at 1564. The St. Joseph Plan contended that the National Plan was primarily responsible, however they agreed to pay a portion of the medical claims of the children on an interim basis until the disputed coverage issues were resolved. *Id.*

⁵³*Id.*

⁵⁴*National Cos. Health Benefit Plan*, 929 F.2d at 1568.

his spouse's coverage.⁵⁵ Additionally, the Eleventh Circuit noted with approval that the *Brock* court, also relying on the dicta in *Oakley*, held that "an employee is entitled to continuation coverage under her previous employer's plan if there is a significant gap in the coverage provided to the employee under her spouse's plan as compared with the employer's plan."⁵⁶

The Eleventh Circuit criticized the Tenth Circuit for the *Oakley* holding finding that the *Oakley* court "eroneously restricted the phrase 'first becomes, after the date of election ... covered,' found in ERISA's and the PHSA's continuation coverage termination provision."⁵⁷ According to the Eleventh Circuit, Congress' intentions were as follows:

Congress was concerned with the lack of group health coverage after an employee left his job; therefore, the relevant time period is that following his continuation — coverage election. In applying the termination provision at issue, then, it is clearly irrelevant whether an employee had other group health coverage prior to this election date — an employer cannot refuse to offer continuation coverage to a former employee simply because that ex-employee had other group health coverage during his employment. Instead, Congress allowed ERISA — plan sponsors to terminate continuation coverage only on the first date after the election date that the employee became covered under another group health plan. Thus, it is immaterial when the employee acquires other group health coverage; the only relevant question is when, after the election date, does that other coverage take effect. In the case of an employee covered by preexisting group health coverage, the terminating event occurs immediately; the first time after the election date that the employee becomes covered by a group health plan other than the employer's plan is the moment after the election date. In effect, such an employee is ineligible for continuation coverage.⁵⁸

E. The Seventh Circuit

The Seventh Circuit held that an employee is not disqualified from obtaining COBRA continuation coverage because of preexisting coverage under her spouse's employer's group health insurance plan and that she only loses COBRA continuation coverage if she chooses to accept alternative group health insurance after the qualifying event.⁵⁹ In *Lutheran Hospital of Indiana, Inc. v. Business Men's Assurance Co. of America*, the plaintiff Mary Isch had group health insurance coverage under her employer's plan provided by Business Men's Assurance Company of America (BMA) and also under her husband's group health insurance

⁵⁵*Id.* at 1569.

⁵⁶*Id.*

⁵⁷*Id.* at 1570.

⁵⁸*Id.*

⁵⁹*See* *Lutheran Hosp. of Indiana, Inc. v. Business Men's Assurance Co. of America*, 51 F.3d 1308 (7th Cir. 1995).

plan provided by the Teamsters.⁶⁰ After Mary Isch was stricken with Guillian Barre Syndrome she took a leave of absence from her teaching job and then was laid off for the summer. Her employer switched insurers from BMA to Associated Insurance Companies, Inc. (Associated). Associated told her employer that she would not be eligible for COBRA continuation coverage because of her coverage under the Teamster's plan.⁶¹ Plaintiffs filed a declaratory judgment action to determine who was responsible for providing benefits.

Since the holdings of the other circuits were conflicting, the Seventh Circuit attempted to effectuate Congress' intent by analyzing the plain language of the statute as follows:

The statute clearly provides that the employee's right to continuation coverage terminates only when he or she first becomes, after the election date, covered by any other group health plan. The statute does not say that an employee is ineligible for continuation coverage if he or she is covered by a preexisting group health plan. Nor does the statute say that a beneficiary's rights terminate when he or she becomes eligible for additional or alternative group health insurance. Therefore, an employee loses the right to continuation coverage only if he or she chooses after the election date to accept coverage under another group health plan.⁶²

The court stated that the distinction between "preexisting" and "after acquired" coverage is reasonable and preserves the status quo. The court also found that "the plain language of the statute dictates that an individual only loses COBRA eligibility if he or she chooses to accept alternative group health insurance after the qualifying event."⁶³ Based on the statute, the court determined that the employee has the choice to preserve the status quo and continue the same coverage with COBRA or accept alternative coverage by discontinuing COBRA but is never forced to accept a lower level of coverage during the eighteen or thirty-six month statutory period.⁶⁴

However, the court observed that if preexisting double coverage disqualifies the employee from COBRA continuation coverage the status quo is not preserved. The court also noted that an employee will not be willing to pay the premiums of up to 102% of the cost to continue COBRA coverage that is redundant or is not needed.⁶⁵ By focusing on the cases in which double coverage is not redundant the court found that the plain language of the statute does not force employees to accept inadequate

⁶⁰*Id.* at 1310.

⁶¹*Id.*

⁶²*Id.* at 1312.

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Lutheran Hosp.*, 51 F.3d at 1312. See Sarah Rudolph Cole, *Continuation Coverage Under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS. 195, 198 (1996) (The author argues that for employees with health problems the COBRA continuation coverage is a bargain because it is based on group rates and the purchase of an individual policy would be cost-prohibitive. The author also argues that even at 102% the premium is a financial strain for the employer because COBRA beneficiaries greatly increase the average cost of coverage.). *Id.* at 197.

coverage.⁶⁶ The court also found that Congress did not intend COBRA to require only “bare bones” coverage without preservation of the employee’s status quo.⁶⁷

Further, the Seventh Circuit criticized the other courts “gap analysis” finding that the “gap analysis” was used to avoid the harsh result of a misreading the statute.⁶⁸ The “gap analysis” also invited “judicial line-drawing in the absence of any specific criteria much less congressional authorization.”⁶⁹ The court also questioned how it should be determined whether or not a significant gap exists. Regarding this question, the Seventh Circuit stated that “courts should not ask or answer without congressional authorization or direction.”⁷⁰ Instead the court found that “[t]he only gap that should be relevant and judicially cognizable is that perceived by the insured individual who chooses to pay the COBRA premiums to continue her additional coverage.”⁷¹ The court stated as follows:

This whole morass can be avoided by honoring the language of the statute and the decision of the insured as to how much coverage is adequate for her own situation. Under a proper application of the statute, the employee obtains no windfall. She is only allowed to preserve the level of coverage she determined was appropriate before her termination and was willing to pay to continue afterward.⁷²

III. STATE OF THE CASE: *GEISSAL V. MOORE MEDICAL CORPORATION*

A. *The Eighth Circuit*

James Geissal was fired from Moore Medical Corporation on July 16, 1993 after having worked there for more than seven years.⁷³ At the time of his termination he was covered by both Moore’s group health insurance plan and his wife’s group health insurance plan with her employer Trans World Airlines (TWA).⁷⁴ He also

⁶⁶*Lutheran Hosp.*, 51 F.3d at 1312.

⁶⁷*Id.* at 1313.

⁶⁸*Id.* at 1313-14. (“Courts which have held that preexisting coverage was disqualifying have attempted, under the guise of this “gap analysis,” to avoid the harshest results of their statutory misreading.”)

⁶⁹*Id.* at 1314.

⁷⁰*Id.* “In the present case the district court compared the Teamsters and Associated plans and determined that there was no ‘significant’ gap, despite the fact that under the Teamsters plan the Isch family may be personally liable for \$35,000” on a post hoc consideration. *Id.* The district court attempted to put itself in the position of the employer at the time of the qualifying event finding that there was no significant gap because the Teamsters plan had a \$250,000 yearly lifetime maximum but no lifetime limit, and the Associated plan had no yearly limit but a \$1 million lifetime limit. *Id.*

⁷¹*Id.* at 1314.

⁷²*Lutheran Hosp.*, 51 F.3d at 1315.

⁷³*Geissal v. Moore Med. Corp.*, 114 F.3d 1458, 1459 (8th Cir. 1997) *rev’d*, 141 L. Ed. 2d 64 (1998).

⁷⁴*Id.* at 1459-60.

was suffering from cancer when he was fired from his job but was assured by Moore that he could maintain his group health insurance coverage under COBRA.⁷⁵ He signed an “election form” for COBRA coverage and made premium payments which Moore accepted for six months before Moore advised him that he was ineligible for COBRA continuation coverage because he was already covered under TWA’s policy.⁷⁶ Moore returned the premiums and the billings submitted by James Geissal’s medical care providers.

James Geissal sued Moore alleging that the plan violated COBRA when it canceled his insurance coverage and also that Moore was equitably estopped from denying his insurance coverage.⁷⁷ The district court granted summary judgment in favor of defendant Moore holding that COBRA does not compel an employer, in most cases, to furnish continuation coverage to a discharged employee when the employee is insured under another group health plan and that the plaintiff had not proffered facts sufficient to substantiate his claim for equitable estoppel.⁷⁸

On appeal the plaintiff argued that according to the plain language of the statute “a person is disqualified from receiving continuation benefits only if he procures other coverage after he has chosen to secure COBRA insurance; otherwise, the individual does not first become covered ‘under any other group health plan’ after the date of election.”⁷⁹ The defendant argued that because James Geissal was a beneficiary under his wife’s group health plan, this statutory exception rendered it perfectly permissible to declare him ineligible for COBRA continuation benefits.⁸⁰ The Eighth Circuit held that unless there was a significant gap in the coverage afforded under Moore’s plan and the TWA plan, Moore was under no obligation to provide continuation coverage.⁸¹

In arriving at its holding, the Eighth Circuit reviewed the conflicting opinions of the other circuits. The Eighth Circuit noted that the holding of the Tenth Circuit in the *Oakley* case “allows termination of continuation benefits only if the beneficiary obtains other insurance after the date of election.”⁸² Citing the Tenth Circuit’s analysis of the “plain language” of the statute, the Eighth Circuit reiterated the Tenth Circuit’s interpretation that *Oakley* did not “‘first become’ covered under his wife’s

⁷⁵James Geissal also requested a “service letter” from Moore detailing the grounds for his discharge. According to an affidavit filed with the district court he also declined to “consult with an attorney to investigate and to determine what rights and claims [he] might have [had] against Moore” because Moore promised him COBRA coverage. *See id.* at 1460 (quoting Geissal’s App. at 23).

⁷⁶*Id.* at 1460.

⁷⁷*Id.* James Geissal died and his wife, Bonnie Geissal, was substituted as plaintiff. *Id.*

⁷⁸*Id.* (citing *Geissal v. Moore Med. Corp.*, 927 F. Supp. 352,358-60 (E.D. Mo. 1996)).

⁷⁹*Geissal*, 114 F.3d at 1461.

⁸⁰*Id.*

⁸¹*Id.* at 1464.

⁸²*Id.* at 1461 (citing *Oakley v. City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990)).

policy after the qualifying event that resulted in his termination from the City's employment."⁸³

The Eighth Circuit examined the Seventh Circuit opinion in *Lutheran Hospital* and found that the Seventh Circuit focused on Congress' intent that a displaced employee maintain his insurance "status quo."⁸⁴ The Eighth Circuit reiterated the holding of the *Lutheran Hospital* court that "an employee loses the right to continuation coverage only if he or she chooses after the election date to accept coverage under another group health plan."⁸⁵ The Eighth Circuit disagreed with the Seventh Circuit's decision that continuation benefits were crafted to allow an individual to maintain insurance "status quo" and stated that "Congress was fundamentally interested in making affordable health care temporarily available to those who would otherwise find themselves 'without any health insurance coverage.'"⁸⁶

Noting that the "opinions of two other courts of appeals stand in direct contradiction to *Lutheran Hosp[ital]* and *Oakley*," the Eighth Circuit arrived at its "significant gap" holding.⁸⁷ Regarding the Eleventh Circuit's opinion in *National Cos.*, the Eighth Circuit focused on the Eleventh Circuit's analysis that the continuation coverage terminated after the election date "when the employee became covered under another group health plan" and therefore "[i]n the case of an employee covered by preexisting group health coverage, the terminating event occurs immediately" causing the employee to be ineligible for continuation coverage.⁸⁸ The Eighth Circuit also cited with approval the Eleventh Circuit's holding that an employee with preexisting coverage is only entitled to continuation coverage if "there is a significant gap between the coverage afforded under his employer's plan and his preexisting plan."⁸⁹ The Eighth Circuit held that "COBRA authorizes the termination of continuation coverage on the day that a former employee becomes a beneficiary under 'any other group health plan,' and we think it is largely irrelevant under the Act whether the employee obtained that coverage before or after his COBRA rights are activated."⁹⁰

Since James Geissal was covered by his wife's group health plan, the Eighth Circuit held that Moore was justified in canceling his COBRA continuation coverage

⁸³*Id.* at 1461-62 (quoting *Oakley v. City of Longmont*, 890 F.2d 1128, 1132 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).at 1132.

⁸⁴*Geissal*, 114 F.3d at 1462 (citing *Lutheran Hosp. of Indiana, Inc. v. Business Men's Assurance Co. of America*, 51 F.3d 1308, 1312-13 (7th Cir. 1995).

⁸⁵*Id.* at 1462 (quoting *Lutheran Hosp.* 51 F.3d at 1312).

⁸⁶*Id.* at 1463 (quoting H.R. Rep. No. 99-241, pt. 1, at 44 (1985), *reprinted in* 1986 U.S.C.C.A.N. 579, 622).

⁸⁷*Id.* at 1463-64 (citing *National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc.*, 929 F.2d 1558 (11th Cir. 1991) and *Brock v. Primedica, Inc.*, 904 F.2d 295 (5th Cir. 1990)).

⁸⁸*Id.* at 1463 (quoting from *National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc.*, 929 F.2d 1558, 1571 (11th Cir. 1991).

⁸⁹*Id.* at 1463 (quoting from *National Cos.*, 929 F.2d at 1571).

⁹⁰*Geissal*, 114 F.3d at 1463-64 (citations omitted).

unless there was a significant gap in the coverage.⁹¹ In determining whether there was a significant gap, the Eighth Circuit looked at “gap” tests applied by other courts. One court held that over \$7,500 in personal liability constituted a significant gap.⁹² Another court held that a significant gap would occur where an employee, “despite his other coverage, will be liable personally for substantial medical expenses to his and his family’s detriment.”⁹³ Determining that “post hoc” tests gave little guidance to employers on the front end, regarding whether termination of COBRA benefits is warranted the Eighth Circuit held that “a district court confronted with this question should measure the gap by comparing the policies’ provisions in light of information available to the employer on the day of the COBRA election.”⁹⁴ Since Geissal failed to carry her burden of proving that there was a significant gap between the Moore and the TWA plans the Eighth Circuit found that it was impossible for the court to conclude that on the election date the TWA plan offered less benefits or limited coverage for James Geissal’s cancer condition.⁹⁵

The Eighth Circuit also requested assistance from either Congress or the Supreme Court. Noting the attempts to grasp the true meaning of 29 U.S.C. § 1162(2)(D)(i) the court stated as follows:

Our efforts, though unquestionably well intentioned, have inevitably led to at least two separate and irreconcilable interpretations of the law. This deepening rift is extremely troublesome to us, especially given the proliferation of group health plans and the importance of guaranteeing equivalent protection to all ERISA beneficiaries throughout this nation. Accordingly, we suggest that some definitive action, originating either from Congress or the Supreme Court, might be appropriate.⁹⁶

B. The Supreme Court

On June 8, 1998, the Supreme Court vacated the judgment of the Eighth Circuit Court of Appeals and held that 29 U.S.C. § 1162(2)(D)(i) does not allow an employer to deny COBRA continuation coverage to a qualified beneficiary who is covered under another group health plan at the time he makes his COBRA election.⁹⁷ The Court held that “there is no justification for disparaging the clarity of § 1162

⁹¹*Id.* at 1464.

⁹²*See* McGee v. Funderburg, 17 F.3d 1122, 1126 (8th Cir. 1994).

⁹³*See* National Cos., 929 F.2d at 1571.

⁹⁴*Geissal*, 114 F.3d at 1465.

⁹⁵*Id.* at 1465. The TWA plan provided similar comprehensive medical benefits. The only difference between the plans was that TWA’s yearly deductible was \$350 more than the annual deductible under Moore’s plan and the two plans had separate lifetime maximums on benefits. *Id.* The Eighth Circuit also found that Geissal had not substantiated her allegations of detrimental reliance, and therefore the district court was correct in dismissing the equitable estoppel claim. *Id.* at 1466.

⁹⁶*Id.* at 1465-66.

⁹⁷*Geissal v. Moore Med. Corp.*, 141 L. Ed. 2d 64, 75 (1998).

(2)(D)(i).”⁹⁸ The Court focused on the plain reading of the statutory language, “first becomes...covered,”⁹⁹ and rejected Moore’s arguments that Congress meant to preserve the “status quo.”¹⁰⁰ The Court also rejected the “significant gap” theory based on the absence of any statutory support and for social policy reasons.¹⁰¹ The Court found that the issue of whether the “gap” was “significant” enough was unsuitable for courts to determine without a clear mandate from Congress and further that Congress could not have intended that the courts be injected into the insurance policy arena.¹⁰²

1. The Plain Reading of the Statute

The Supreme Court determined that under the plain reading of the statute “first becomes . . . covered” means *first* and refers to a specific event.¹⁰³ The Court stated that the event of “‘becom[ing] covered’ . . . is significant only if occurs, and ‘first’ occurs, at a time ‘after the date of the election.’”¹⁰⁴ The employer is not excused from providing COBRA coverage if the beneficiary “is” covered or “remains” covered at the time of the election.¹⁰⁵ The statute also does not specify whether the statute should be applied differently based on a finding that the insurance policy is primary or secondary. The Court found that because James Geissal was continuously a beneficiary of TWA’s group health plan, he was covered before his COBRA election and therefore did not “first become” covered under the TWA plan after the date of the election.¹⁰⁶ Based on the plain meaning of § 1162(2)(D)(i), Moore could not cut off Geissal’s COBRA coverage.¹⁰⁷

Moore interpreted the statute to mean that the first moment of prior coverage under a preexisting plan occurred after the election.¹⁰⁸ The Court found that Moore’s interpretation ignored the plain language of the statute.¹⁰⁹ The Supreme Court stated that Moore’s reading of the statute ignored the modifier “first” and equated “first becomes . . . covered” with “remains covered.”¹¹⁰ Moore also argued a policy reason for its interpretation. Since typically high risk individuals elect COBRA, Moore

⁹⁸*Id.* at 75.

⁹⁹*Id.* at 72.

¹⁰⁰*Id.* at 73.

¹⁰¹*Id.* at 74-75.

¹⁰²*Id.* at 75.

¹⁰³*Geissal*, 141 L. Ed. 2d at 72.

¹⁰⁴*Id.* at 72.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.*

¹⁰⁸*Id.* This argument was also made by the Eleventh Circuit in *National Cos. Health Benefit Plan v. St. Joseph’s Hosp., Inc.*, 929 F.2d 1558, 1570 (11th Cir. 1991).

¹⁰⁹*Geissal*, 141 L. Ed. 2d at 72.

¹¹⁰*Id.*

argued that the employer's expense may cause employers to cease offering group health plans.¹¹¹ The Court found that this factor may or may not be true, but if it were true, it would only be considered in construing the statute if it were vague.¹¹²

The Court also rejected Moore's argument that Congress could not have meant to give the qualified beneficiary more than the right to preserve the status quo. Moore argued that under a plain reading of the statute, an employee is free to claim COBRA coverage even if he has obtained new group coverage between the date of the qualifying event and the election.¹¹³ The Court assumed that that situation should be termed an anomaly; however, it found that Moore's interpretation of Congress' intent also produced an anomaly.¹¹⁴ The Court pointed out that Moore's interpretation would have the election be ineffective to cover the eighteen or thirty-six month period but would have the "surprising effect of providing continuous coverage for the period of weeks, or even days, between the event and the election."¹¹⁵ Finding that Moore's position defied normal language and common sense, the Court concluded that a line needed to be drawn somewhere between the two anomalies.¹¹⁶

In rejecting Moore's arguments regarding the anomalous consequences, the Court also focused on the "interpretive morass to which it has led in practice."¹¹⁷ Moore cited the House Reports for the original COBRA Bill for support in its argument that Congress intended that individuals like Geissal were ineligible for COBRA continuation coverage.¹¹⁸ The Court found Moore's position unpersuasive and noted that if this concern was a legitimate limit on the meaning of the statute that there would be no COBRA continuation coverage for any beneficiary with any health insurance on the date of election or any health insurance obtained thereafter.¹¹⁹

2. Significant Gap Theory

Moore argued that even though Congress meant to deny COBRA coverage to individuals with other group insurance, if a "significant gap" existed between the two plans then the beneficiary should be eligible for COBRA continuation coverage.¹²⁰ Based on the "sheer absence of any statutory support," the Supreme Court rejected

¹¹¹*Id.* at 72-73.

¹¹²*Id.* at 73.

¹¹³*Id.* at 72-73.

¹¹⁴*Id.* at 73.

¹¹⁵*Geissal*, 141 L. Ed. 2d at 73.

¹¹⁶*Id.* at 73.

¹¹⁷*Id.* at 73-74.

¹¹⁸*Id.* at 74 (citing H.R. Rep. No. 99-241, pt. 1 at 44 (1985) *reprinted in* 1986 U.S.C.A.N. 579, 622 ("The Committee [on Ways and Means] is concerned with reports of the growing number of Americans without any health insurance coverage and the decreasing willingness of our Nation's hospitals to provide care to those who cannot afford to pay.")).

¹¹⁹*Id.* at 74.

¹²⁰*Id.*

the significant gap theory.¹²¹ The Court found that the statute specifies that later-acquired coverage does not terminate COBRA rights when there is a limit in the later-acquired coverage for a preexisting condition.¹²² This is the “gap” that Congress was legislating about and not the gap or difference in coverage between the COBRA plan and the non-COBRA plan.¹²³ The Court found no difficulty applying the statute as written because once the preexisting condition was identified all a court would have to do is look at the later-acquired policy to see if that condition were excluded or limited.¹²⁴ If the later acquired policy excluded or limited coverage for the preexisting condition COBRA continuation coverage would be left undisturbed. If not, the new coverage would automatically halt the COBRA coverage.

The main problem with the “significant gap” theory was a social policy one. Courts were placed in the position of making judgments about not only the adequacy of the medical coverage but if the two policies were not identical, whether the gap in coverage between them was “significant” enough.¹²⁵ The Supreme Court found two powerful reasons to reject the significant gap analysis. First, this type of judgment is unsuitable for courts particularly without a clear mandate from Congress.¹²⁶ Second, Congress could not have intended that the courts should determine the adequacy of non-COBRA coverage in place prior to the election of COBRA while at the same time limiting the judicial intrusion by leaving the beneficiary to the terms of the non-COBRA coverage that became effective after the election.¹²⁷ Finding no congressional intent that the courts be injected into the policy arena the Supreme Court held that there was “no justification for disparaging the clarity of § 1162 (2)(D)(i).”¹²⁸

IV. THE SUPREME COURT CORRECTLY REVERSED THE EIGHTH CIRCUIT

A. *The Plain Reading of the Statute*

The Supreme Court was correct in reversing the Eighth Circuit’s opinion. As long as the employee bears the risk and pays the premiums during the limited time period provided by COBRA, the courts should not supplant their own views as to what constitutes adequate coverage or whether a “significant gap” exists.¹²⁹ This is the only result that clearly follows the plain language of the statute and applies the “first becomes, after” language in the statute. The statute clearly contemplates termination only by after-acquired coverage based on the “first becomes, after”

¹²¹*Geissal*, 141 L. Ed. 2d at 74.

¹²²*Id.*

¹²³*Id.* at 74-75.

¹²⁴*Id.* at 75.

¹²⁵*Id.*

¹²⁶*Id.*

¹²⁷*Geissal*, 141 L. Ed. 2d at 75.

¹²⁸*Id.*

¹²⁹*Lutheran Hosp. of Indiana, Inc. v. Business Men’s Assoc. of Americ*, 51 F.3d 1308, 1314 (7th Cir. 1995).

language. Moreover, the amendments demonstrate that continuation coverage is terminated by reemployment or remarriage but not by after-acquired coverage that contains preexisting condition exclusions or limitations.

The Fifth Circuit erred in the *Brock* case by misreading the statute.¹³⁰ The Fifth Circuit totally ignored the “first becomes, after the date of the election” language of the statute. The 1989 amendment to the statute providing for coverage “which does not contain any exclusions or limitations with respect to any preexisting condition” did not amend the “first becomes, after” language. In fact, none of the three amendments made to 29 U.S.C. § 1162(2)(D)(i) amended the “first becomes, after” language. It must be presumed therefore that the legislature knows what it said and intended that the words have their plain meaning.

The Seventh Circuit, in reviewing the case law in the other circuits, noted that the Tenth Circuit in the *Oakley* case held that “the clear language of the statute ‘cannot be construed to include a spouse’s preexisting group plan as a condition to terminate continuation coverage.’”¹³¹ The Seventh Circuit also noted the comment made in dicta by the *Oakley* court.¹³² Regarding the *Brock* case, the Seventh Circuit stated,

the Fifth Circuit ignored the clear holding of the *Oakley* court and fastened instead on the above-quoted reference to a “gap,” holding that since the plaintiff, Karin Brock, suffered no gap between her employer’s plan and her preexisting coverage under her husband’s plan she was not entitled to continuation coverage.¹³³

Therefore, the *Brock* holding was not persuasive to the Supreme Court and in fact the Court rejected the lower court’s misinterpretation of the “gap” referred to above.¹³⁴

The Eleventh Circuit also clearly disregarded the plain meaning of the “first becomes” language of the statute in its interpretation of Congress’ intentions in the *National Cos.* case. There would be no reason in having the word “first” modify the word “becomes” if Congress intended preexisting insurance coverage to “take effect” after the election date. And in fact preexisting coverage does not “take effect” after the election date but is “in effect” before the election date making the

¹³⁰Procedurally, the plaintiff in *Brock v. Primedica* lost on both the COBRA issue and the estoppel issue. She lost on the COBRA issue because the Fifth Circuit attempting to reconcile the case with *Oakley* held that since Brock suffered no significant gap in coverage between her policy and her husband’s policy that she was not entitled to COBRA continuation coverage. Since plaintiff paid her premiums however, she should have won on the estoppel issue. The reason she lost on the estoppel issue is because her attorney evidently failed to raise the issue at the appropriate time and did not raise it until the appeal. *Brock v. Primedica*, 904 F.2d 295, 296-97 5th Cir. 1990). The case also does not specify the amount of plaintiff’s medical claims except to state that benefits were paid by her husband’s policy. The dismissal of the claim for insurance benefits was also warranted by the Brocks’ failure to exhaust the insurance plan’s administrative review procedure prior to initiating suit. *Id.* at 297, nn.1-2.

¹³¹*Lutheran Hosp.*, 51 F.3d at 1311 (quoting from *Oakley v. Longmont*, 890 F.2d 1128, 1132 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990)).

¹³²*Id.* at 1311.

¹³³*Id.*

¹³⁴*See Geissal*, 141 L. Ed. 2d at 74-75.

coverage contrary to the plain meaning of the statute's "first becomes, after the date of the election...covered" language.¹³⁵ The Eleventh Circuit's conclusion that preexisting coverage does not "take effect" until after the election date is patently wrong; and therefore, the Eleventh Circuit's opinion in *National Cos.* was not persuasive.¹³⁶ Instead, the Supreme Court correctly followed the analyses of the Tenth Circuit in *Oakley* and the Seventh Circuit in *Lutheran Hospital*.

B. Significant Gap Theory

1. There is no Support in the Statute for the Significant Gap Theory

The significant gap theory was created as a result of a misreading of the statute.¹³⁷ This "gap" theory is also not supported by Congress' intentions. It is merely dicta from the *Oakley* case that the *Brock* court used to support its finding that since a "gap" occurred in *Oakley* but not in *Brock*, the cases were distinguishable.¹³⁸ There is nothing in the original statute or its three amendments that supports a theory that the beneficiary loses COBRA continuation coverage unless a significant gap exists in the preexisting coverage or the after-acquired coverage of the beneficiary. Instead, the statute is clear that the only "gap" that is addressed is coverage that contains exclusions or limitations for preexisting conditions.¹³⁹ Furthermore, the "exclusions or limitations" language also appears after the "first becomes, after" language in the statute which means that only after-acquired coverage and not preexisting coverage is contemplated.

2. The Significant Gap Theory is Unworkable

Courts that have utilized a "gap analysis" have been inconsistent. The Eleventh Circuit, for example, in *National Cos.*¹⁴⁰ found that \$6,700 was not a significant gap in coverage, whereas the Eighth Circuit in *McGee v. Funderburg*¹⁴¹ found that \$7,600 was a significant gap and thus allowed COBRA continuation coverage without reaching the issue of whether preexisting double coverage was disqualifying.

¹³⁵*Id.*

¹³⁶The *National Companies* case also has little precedential value. This Eleventh Circuit case is about equitable estoppel. The holding, regarding the Hershes ineligibility for continuation coverage, has no real meaning because National was equitably estopped from denying such insurance coverage for a period of 36 months from the date of Robert Hersh's resignation including the medical treatment of the twins. *National Cos. Health Benefit Plan v. St. Joseph Hosp. of Atlanta, Inc.*, 929 F.2d 1558, 1572 & n.13 (11th Cir. 1991).

¹³⁷*Lutheran Hosp.*, 51 F.3d at 1314.

¹³⁸*Id.*

¹³⁹See Omnibus Budget Reconciliation Act of 1989, *supra* note 21.

¹⁴⁰*National Cos.*, 929 F.2d at 1571. The Eleventh Circuit found that the \$6,700 financial responsibility occurred as a result of not having dual coverage, "not because the St. Joseph's Plan is inadequate. . . . [T]he National Plan alone would not put the Hershes in any better position." *Id.* The court never explained however, how it could reconcile its conclusion that this was not a significant gap between duplicate and single coverage particularly since dual coverage is what the Hershes desired.

¹⁴¹*McGee v. Funderburg*, 17 F.3d 1122 (8th Cir. 1994).

Post hoc determinations by a court after serious medical expenses have been incurred are not workable and have resulted in plaintiffs being liable for considerable out of pocket expenses even though courts have found insignificant gaps in coverage.¹⁴² An employer's attempt to determine on the date of termination whether an employee's spouse's coverage imposes a significant gap is also inappropriate since the employer stands to gain if he can eliminate future potential medical claims by the terminated employee.

3. The Adequacy of Coverage Should be Determined by the Beneficiary

The beneficiary is in the best position to determine the adequacy of group health insurance coverage to the extent that he or she is willing to pay a premium of up to 102% of the cost of group health insurance for the privilege of maintaining the same coverage or having dual coverage if necessary.¹⁴³ The Supreme Court correctly held that the statute does not allow an employer to deny COBRA continuation coverage to a qualified beneficiary who is covered under another group health plan at the time of the COBRA election.¹⁴⁴ The employee should have the choice to continue the same coverage with COBRA or accept alternative coverage by discontinuing COBRA but should never be forced to lose COBRA benefits as a result of a spouse's preexisting coverage.

V. CONCLUSION

The Supreme Court was correct in interpreting the plain wording of the statute and in interpreting Congress' intentions in passing COBRA. There is no support in the statute for Moore's and other lower court's interpretations that Congress meant for the "status quo" to outweigh the plain meaning of the statute and Congress' intent. The "significant gap" theory is unworkable ad hoc from an employer's standpoint and unworkable post hoc from a judicial standpoint. Congress never intended to inject the courts into the health insurance arena to determine whether differences in insurance coverage were "significant" enough to trigger the statute's continuation coverage. The person who is in the best position to determine whether a "significant gap" in coverage prior to the COBRA election is the beneficiary. If the beneficiary is willing to pay the 102% premium to maintain the status quo which may even be dual coverage for eighteen or thirty-six months the courts should uphold continuing COBRA coverage. If the gap theory was the intent of Congress, it is up to that body to define and incorporate such criteria into the law so that employees can balance their options in making the coverage elections. For these reasons, the Supreme Court correctly reversed the Eighth Circuit's opinion in *Geissal* and held that he was not disqualified from COBRA continuation coverage based on his wife's employer's group health coverage.

¹⁴²*National Cos.*, 929 F.2d at 1571.

¹⁴³*Lutheran Hosp.*, 51 F.3d at 1312.

¹⁴⁴*Geissal*, 141 L. Ed. 2d at 68.