

# CONTINUATION COVERAGE UNDER COBRA: A STUDY IN STATUTORY INTERPRETATION

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When Congress enacted the Consolidated Omnibus Budget Reconciliation Act (COBRA)<sup>1</sup> amendments to the Employee Retirement Income Security Act (ERISA)<sup>2</sup> in 1985, it created a piece of welfare legislation that served to redistribute wealth from employers to terminated employees. The decision to infringe on employers' property rights in such an extreme manner was prompted by Congress' growing concern that employees who lost their jobs and their health insurance at the same time would become either a drain on public resources or forced into significant debt. In an attempt to ensure that at least some terminated employees would be able to maintain access to medical care without emptying government coffers,<sup>3</sup> Congress decided to place the onus for insuring terminated employees on employers. To achieve this end, Congress compelled employers who maintained group health plans for their current employees to provide qualified beneficiaries<sup>4</sup> the option to continue receiving individual coverage at a price based on the costs the employer would incur by insuring a current employee. In conducting this coerced wealth transfer, Congress transformed health insurance from a fringe benefit that employers voluntarily offer current employees into yet another financial obligation employers must satisfy before they are permitted to conduct business in the United States.<sup>5</sup>

In enacting the COBRA amendments to ERISA, Congress' intended purpose was remedial; it wished to reduce the detrimental effect the abrupt discontinuance of health care may have on discharged employees. At the same time, Congress acknowledged that continuation coverage<sup>6</sup> imposes substantial financial and administrative burdens on

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1. 29 U.S.C. §§ 1161-68 (1994).

2. 29 U.S.C. §§ 1001-1461 (1994).

3. The legislative history to COBRA states that COBRA is the legislative effort to provide continued access to affordable private health insurance for some of those without insurance, without increasing "the staggering budget deficits now facing the United States." S. REP. NO. 146, 99th Cong., 2d Sess. 3(1986), *reprinted in* 1986 U.S.C.C.A.N. 42, 43.

4. Not all "qualified beneficiaries" are former employees. 29 U.S.C. § 1167(3)(a) (1994). Both spouses and dependents of covered employees are qualified beneficiaries. In addition, one need not be terminated in order to receive COBRA benefits. An employee may be covered if her hours have been reduced, as in the case of a layoff. 29 U.S.C. § 1163(1)-(6) (1994). Because most cases involve former employees, that term will be used to describe all qualified beneficiaries.

5. *See Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 979 (7th Cir. 1992) ("Health care as a fringe benefit for productive workers is one thing, and as a gift to persons who have been laid off or fired is another.").

6. Through COBRA continuation coverage, an employee maintains her right to participate in her former employer's group health plan for a limited period. To maintain continuation coverage, the ex-

employers. In an effort to minimize this imposition, Congress limited the time an employee is eligible for coverage and established conditions under which the employee's right to continuation coverage terminates.<sup>7</sup> Thus, a former employee's right to continuation coverage ends after eighteen or thirty-six months<sup>8</sup> and may terminate earlier if, among other reasons, the insured obtains full protection from another plan.<sup>9</sup>

Since COBRA's enactment, one of the most serious but infrequently-discussed problems in ERISA jurisprudence concerns the termination provision of the continuation coverage section. Section 1162(2)(D) indicates that an employer can terminate coverage on the "date" the former employee who elects continuation coverage becomes covered under another plan:

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 . . .

(D) The date on which the qualified beneficiary first becomes, after the date of 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 pre-existing condition of such beneficiary, or

(ii) in the case of a qualified beneficiary other than a qualified beneficiary described in section 1167(3)(C) of this title, entitled to benefits under title XVIII of the Social Security Act [42 U.S.C. 1395 (1994)]<sup>10</sup>.

Determining which insurance company bears primary liability for the insurance costs of a qualified beneficiary depends entirely on whether the language "first becomes, after the date of election... covered" is interpreted to distinguish between preexisting<sup>12</sup> and after-acquired<sup>13</sup> coverage for purposes of terminating an employee's eligibility for continued coverage. The statutory text clearly indicates that coverage acquired after the date of election (i.e. after-acquired coverage) will terminate continuation coverage rights. The language is less clear, however, on the question whether preexisting coverage terminates these rights. The circuit courts that have addressed the question of preexisting coverage have been unable to reach consensus. The Fifth and Eleventh Cir-

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employee must pay a monthly premium. The amount of the premium charged cannot be greater than 102% of the monthly premium that similarly situated beneficiaries expend for the coverage. 29 U.S.C. §§ 1162(3), 1164(1) (1994).

7. *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1994).

8. The continuation coverage period is 18 months if the qualifying event is a termination or hours reduction, 29 months if the qualifying event is Medicare entitlement and 36 months for other qualifying events. 29 U.S.C. § 1162(2) (1994).

9. Tax Reform Act5, Pub. L. No. 99-514, § 1895(d)(4)(B)(ii), 100 Stat. 2085, 2938(codified as amended at 29 U.S.C. § 1162(2)(D)(i)(1994)).

10. I.R.C. § 4980B(f)(2)(B)(iv)(I-II) (1986).

11. 29 U.S.C. § 1162(2)(D)(i) (1994) This statute underwent a significant amendment in 1989. Concerned about significant gaps in coverage between preexisting policies and COBRA continuation coverage policies, Congress amended the statute to permit an insurer to terminate COBRA coverage so long as the coverage under any other group health plan "does not contain an exclusion or limitation with respect to any preexisting condition of [the] beneficiary." 29 U.S.C. § 1162(2)(D)(i).

12. "Preexisting" coverage is any coverage, other than employer-sponsored coverage, that the employee maintains prior to the date he makes his COBRA election.

13. "After-acquired" coverage is any coverage, other than COBRA continuation coverage, that the qualified beneficiary obtains after the date of his COBRA election.

cuits treat both types of coverage the same, holding that if an employee is covered by a comparable plan on the date of election (i.e. preexisting coverage), the employer need not offer continuation coverage.<sup>14</sup> The Tenth, and more recently the Seventh Circuit, reached the opposite conclusion, contending that the existence of the language "first becomes, after the date of election... covered" means that the employer must offer COBRA continuation coverage until the employee obtains alternate coverage after the date of election.<sup>15</sup> Any preexisting coverage to which the beneficiary is otherwise entitled does not qualify as alternate coverage.

How the statutory language of Section 1162(2)(D) is interpreted is an issue of interest to insurance companies, employers, and potential and current qualified beneficiaries for several reasons. First, a single interpretation of this provision will guide insurance companies in determining what length of time they must continue to provide insurance coverage for an employee who has suffered a qualifying event but who has preexisting health insurance coverage under another group health plan. Insurance companies need an answer to this question because providing continuation coverage for terminated employees who already have preexisting coverage increases the risk of potential liability of the insurer. If an employee with preexisting coverage is not entitled to continuation coverage, however, the risk of liability shifts from the employer's insurance company to the preexisting coverage insurer.

Employers should also be interested in the answer to the interpretive question because, like insurance companies, an employer faces significant cost increases each time one of its former employees becomes eligible for continuation coverage under COBRA. Under COBRA, an employer may charge former employees only 102% of its average cost of covering its current employees.<sup>16</sup> Although it may initially appear that the additional 2% is pure profit for the employer,<sup>17</sup> in fact, the 102% rate is likely to lead to financial strain rather than profit for the employer because COBRA beneficiaries in a group health plan greatly increase the average cost of coverage.

The average cost of coverage increases because inclusion of COBRA beneficiaries in the plan increases the insurance companies' liability risk. To understand why insurance companies' risk increases with the inclusion of qualified beneficiaries, one must understand how employers insure their current employees. Insurance companies typically offer employers a group rate when they insure their current employees. Insurance companies are willing to offer a group rate because insurance companies recognize that in any group of employees there are likely to be employees who are healthy and who will rarely utilize medical services. Because not all employees will utilize

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14. *Brock v. Primedica, Inc.*, 904 F.2d 295, 297 (5th Cir. 1990); *National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc.*, 929 F.2d 1558, 1570-71 (11th Cir. 1991).

15. *Oakley v. City of Longmont*, 890 F.2d 1128 (10th Cir. 1989); *Lutheran Hosp. of Indiana v. Businessmen's Assurance Co. of Am.*, 51 F.3d 1308 (7th Cir. 1995).

16. ERISA, 29 U.S.C. § 1164(1) (1994), defines "applicable premium" as "the cost to the plan for such period of the coverage for similarly situated beneficiaries with respect to whom a qualifying event has not occurred . . ." Roughly translated, this section means that a former employee who wishes to enroll in COBRA may be required to pay no more than the average cost of medical benefits for current employees, plus a 2% administrative charge. No special premium that includes consideration of the former employee's actual medical needs is permitted.

17. In *Lutheran Hosp.*, 51 F.3d at 1312, the majority sarcastically describes the opportunity to pay 102% of the average cost of coverage as a "privilege" conferred upon qualified beneficiaries. As other places in the opinion, the majority's lack of understanding of COBRA and its costs contributes to its erroneous interpretation of the qualified beneficiary's opportunities.

their insurance, the cost to the insurance company is lower. As a result, insurance companies are willing to offer lower rates to employers that purchase insurance by group rather than individually.

When an employee suffers a qualifying event, he will opt for continuation coverage only when it is cheaper than insurance at market prices. For employees with health problems, continuation coverage is a bargain because the cost of coverage is based on group rates while the purchase of an individual policy would be cost-prohibitive. Although COBRA coverage is based on group rates and therefore costs less than most individual policies, a healthy employee may nevertheless be able to purchase individual coverage for less than the price of COBRA coverage. Thus, it is primarily those former employees with existing medical conditions who will be interested in continuation coverage.<sup>18</sup>

The employer's insurer, recognizing that only these types of high-risk employees participate in COBRA, will raise the premium rates an employer pays to reflect the increased risk. Thus, the 102% of the pre-termination premium represents a loss rather than profit for the employer and represents a bargain for those employees who wish to purchase COBRA. An interpretation of the statutory language that reduces the number of employees that may participate in an employer's COBRA plan may provide significant financial relief for that employer.

An answer is also necessary to resolve the administrative headache that differing rules in different circuits create for insurance companies. Under COBRA, upon the occurrence of a qualifying event, insurance companies are required to notify employees of their COBRA rights.<sup>19</sup> Absent proper notification of eligibility, many employers and insurance companies have been held liable for significant fines.<sup>20</sup> So long as different rules prevail in different circuits, insurance companies are faced with the daunting task of determining which employees are entitled to elect COBRA coverage and then notifying them of their rights.

In addition, the confusion surrounding the obligation of employers to provide continuation coverage has caused employers to unintentionally misinform former employees that they are entitled to continuation coverage when they were not. In many of these cases, employees have claimed that the employer is equitably estopped from denying continuation coverage even though the employer was not required by the stat-

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18. In fact, a study by the International Foundation of Employee Benefit Plans establishes that COBRA beneficiaries use 150 to 500 percent more medical services than active employees. See *South Dakota Supreme Court Holds That COBRA Remains Available Despite Medicare Coverage Obtained Prior To Termination Of Employment*, 2 No. 5 ERISA LITIG. REP. 7 (1993).

19. The notification requirements are extensive. For instance, at the commencement of coverage, the group health plan must provide written notice to each covered employee, his or her spouse and dependents, of their continuation coverage rights. 29 U.S.C. § 1166(a)(1) (1994). In addition, the employer must notify the administrator of a plan within thirty days of the termination of a covered employee. 29 U.S.C. § 1166(a)(2) (1994). Finally, the administrator must notify the covered employee, his or her spouse and dependents, of their continuation coverage rights within fourteen days of the administrator's notice that the employee was terminated. 29 U.S.C. § 1166(a)(4), (c) (1994).

20. If a court finds that the plan administrator failed to issue the required notice, it can order the administrator to pay a statutory fine of up to \$100 per day as well as attorney's fees. 29 U.S.C. § 1132(c)(1) (1994). This may amount to a significant fine because cases take several years to get to trial and the fines accumulate from the date of the qualifying event. See *Phillips v. Riverside Inc.*, 796 F. Supp. 403 (E.D. Ark. 1992) (holding pension plan administrator who failed to provide notice of continuation coverage rights liable for medical bills incurred during eighteen month period following qualifying event); *Poole v. Monmouth College*, 603 A.2d 118 (N.J. 1991).

ute to provide such coverage.<sup>21</sup> In order to ensure that COBRA is providing coverage to those former employees Congress deemed qualified, courts should adopt a single interpretation so that a uniform notification method may be developed. A clear understanding of COBRA requirements will also help to avert frequent challenges on estoppel or failure to notify grounds.

Properly interpreting statutory language is never an easy task and the COBRA interpretation question at issue has been a difficult one for courts to resolve. In fact, the circuit courts have managed to create two different and contradictory interpretations with both sides contending that their interpretation results from a plain-language analysis of the statute. According to the Seventh Circuit, the plain language clearly provides 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."<sup>22</sup> The Eleventh Circuit, by contrast, states that the language "permit[s] employers to terminate continuation coverage whenever an employee receiving such coverage was protected by another group health plan . . . . This clearly includes employees covered under their spouses' preexisting group health plans."<sup>23</sup> Obviously, both interpretations cannot reflect the "plain language" of the statute because, by definition, plain language can lead to only one answer. As a result, either one of the interpretations is "plainly" incorrect, or the language is not plain and some interpretive principle or principles must be used to determine the correct answer.

Reconciling the contradictory interpretations of Section 1162(2)(D)(i) offers an opportunity to improve the efficiency, predictability, and fairness of COBRA for all concerned. Part I of this article reviews the case law surrounding the judicial construction of what "first becomes, after the date of election... covered" means. The courts are split on this issue. The better view considers the language of the statute together with the statute's purpose, which is temporary unitary coverage. Part II reviews several commonly adopted methods of statutory construction and then applies each method, demonstrating the persuasiveness of a construction of 1162(2)(D)(i) that interprets "first becomes, after the date of election... covered" as terminating continuation coverage if an employee has preexisting coverage with no significant gaps in coverage. Part III contends that from both an economic and pragmatic point of view, the only acceptable interpretation of the statutory language would treat preexisting and after-acquired coverage the same.

## I. THE HISTORY OF THE CONTINUATION COVERAGE TERMINATION CONDITION

The first prominent court to interpret the "first becomes" language did so against a backdrop of remarkably sympathetic facts. Perhaps as a result, the court took a broad view of the employee's rights under COBRA. The Tenth Circuit, in *Oakley v. City of*

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21. *National Cos.*, 929 F.2d at 1558 (holding that a former employer was estopped to deny coverage to a former employee after representing to the employee that he was entitled to continuation coverage even though, under the COBRA statute, the employee was not eligible); *Brock*, 904 F.2d at 296.

22. *Lutheran Hosp.*, 51 F.3d at 1312.

23. *National Cos.*, 929 F.2d at 1570.

*Longmont*,<sup>24</sup> held that Oakley, a city firefighter who had received a serious head injury in an auto accident, was entitled to COBRA continuation coverage after his termination. At the time of his termination, Oakley elected to purchase continuation coverage from his employer because his insurance plan covered the expensive rehabilitative therapy he was undergoing as a result of his accident. The city rejected Oakley's election because Oakley was covered as a dependent under his wife's health insurance policy. Unfortunately for the Oakleys, the wife's insurance policy did not cover the costs of the therapy.<sup>25</sup>

Determining whether the city was obligated to offer continuation coverage required the Tenth Circuit to interpret 42 U.S.C. § 300bb-2(2)(D)(i).<sup>26</sup> The court determined that the language of Section 300bb-2(2)(D)(i) limited the employer's power to terminate or refuse to offer continuation coverage to an employee covered under a preexisting plan.<sup>27</sup> According to the court, the language "first becomes, after the date of election... covered" could only terminate the right to continuation coverage if the other coverage was acquired after the employee's date of election.<sup>28</sup> Coverage obtained prior to the date of election did not trigger the terminating condition and therefore did not permit the employer to deny continuation coverage.<sup>29</sup> Thus, Oakley's preexisting coverage did not disqualify him from receiving continuation coverage from the city.

The *Oakley* court stated that this conclusion was "premised" on the contemporaneous legislative history of the COBRA amendment.<sup>30</sup> According to the court, the legislative history supported its interpretation of Section 300bb-2(2)(B) as a limitation on the employer's power to refuse to offer continuation coverage. The court noted that the House Conference Report for the original statute indicated that coverage would last until "the qualified beneficiary is covered under another group health plan as a result of employment, reemployment, or remarriage."<sup>31</sup> Because Oakley's alternate coverage did not occur as a result of any event relating to Oakley's own employment or marital status after the qualifying event occurred, the continuation coverage could not be terminated. The amendment of Section 300bb-2(2)(B) to permit termination of continuation coverage whenever a former employee becomes covered under a group health plan "as an employee or otherwise" did not affect the *Oakley* court's reasoning. According to the court, the "otherwise" language encompassed only the events of reemployment or remarriage and was not intended to allow the employer to terminate coverage where the employee had preexisting coverage under a spouse's plan.<sup>32</sup>

The *Oakley* court's analysis of the Conference Report is problematic. First, the Tenth Circuit interpretation of the phrase "as an employee or otherwise" rested solely on its reading of the legislative history accompanying COBRA. According to

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24. 890 F.2d 1128 (10th Cir. 1989).

25. *Id.* at 1130.

26. Statutory provisions added by COBRA appear in the Internal Revenue Code of 1986 at I.R.C. § 4980B(f)(2)(B)(iv)(I) (1986), in ERISA as 29 U.S.C. § 1162(2)(D)(i) (1986), and in the Public Health Service Act as 42 U.S.C. § 300bb-2(2)(D)(i) (1986). These provisions include the same continuation coverage language.

27. *Oakley*, 890 F.2d at 1132.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (quoting H.R. 3128, 99th Cong., 1st Sess. (1985), 131 CONG. REC. 38,285-86 (1985)).

32. *Oakley*, 890 F.2d at 1132.

COBRA's legislative history, this language meant that coverage would be terminated only by reemployment or remarriage. To fully understand the language, however, one must examine the legislative history of the Tax Reform Act, where the phrase originated. While it is true that the legislative history of the COBRA provision limited termination of coverage to reemployment or remarriage, the Tax Reform Act amended COBRA's "other coverage" provision to provide for the "[t]ermination of continuation coverage upon coverage by [an]other group health plan rather than upon reemployment or remarriage."<sup>33</sup> Congress' use of such expansive language shows an intent to explicitly authorize employers to terminate continuation coverage if their former employee obtained alternate group health coverage, without regard to the timing of the acquisition.<sup>34</sup> Because the Tenth Circuit ignored this provision and chose, instead, to rely on superseded legislative history, its interpretation is flawed.

The apparent unfairness of Oakley's predicament likely motivated the *Oakley* result. At the time of the *Oakley* decision, Section 300bb-2(2)(D)(i) permitted termination of continuation coverage without regard to whether the beneficiary's preexisting condition would be covered under the spouse's policy. In Oakley's case, application of this rule denied Oakley coverage for his expensive rehabilitative therapy because Oakley's wife's coverage excluded Oakley's preexisting condition. This was, according to the Tenth Circuit, "the precise gap in coverage which troubled Congress."<sup>35</sup> Absent the intervention of the Tenth Circuit, Oakley would have had to bear the cost of his therapy. However, the *Oakley* court, apparently unable to ignore a balance of equities, mistook sympathy for justice and, in the process, established a baseline interpretation for the statutory language at issue that was inconsistent with the purpose of the COBRA statute.

Ten days after the Tenth Circuit identified the unfairness of the termination clause for those with preexisting conditions, Congress amended COBRA to include a limitation for preexisting conditions. The statute stated that any group health plan terminating coverage under COBRA could not "contain any exclusion or limitation with respect to any preexisting condition of such beneficiary."<sup>36</sup> This section of the statute, still present today, resolves the problem of gaps in coverage for preexisting conditions like that present in the *Oakley* case. The amendment, however, did not address the problem the other circuit courts were left to grapple with whether the existence of preexisting coverage without any exclusion for preexisting conditions justifies an employer's refusal to offer continuation coverage to former employees.<sup>37</sup>

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33. *National Cos.*, 929 F.2d at 1570-71 (citing Tax Reform Act, Pub. L. No. 99-514, § 1895(d)(4), 100 Stat. 2085, 2938) (emphasis added).

34. There may be instances where the preexisting group health coverage has significant gaps in coverage when compared to the employer's plan. In those cases, the former employee remains eligible for continuation coverage because the employee is not actually "covered" by the preexisting group coverage. *National Cos.*, 929 F.2d at 1571.

35. *Oakley*, 890 F.2d at 1131.

36. 29 U.S.C. § 1162(2)(D)(i) (1994).

37. Congress' failure to amend the "first becomes" language to address the *Oakley* case should not be interpreted as an approval of the decision. The proximity in time between the amendment and the *Oakley* decision, when considered in light of Congress' typically glacial decision-making pace, makes it hard to believe that Congress' action was intended to address the *Oakley* case. See Deborah A. Liebman, *Preexisting Coverage and Gaps in Coverage Under COBRA*, 17 J. OF PENSION PLANNING AND COMPLIANCE 45, 48 (Winter 1991) (agreeing that inaction in congressional amendment regarding "first becomes" language should not be considered "tacit approval" of the *Oakley* decision).

The court in *Brock v. Primedica*<sup>38</sup> answered this question for the Fifth Circuit, rejecting the Tenth Circuit's analysis of the statutory language and, instead, concluding that preexisting coverage renders an employee ineligible for continuation coverage under COBRA, absent significant gaps in coverage. Mrs. Brock was covered both by her employer's health plan and as a dependent under her husband's health plan.<sup>39</sup> At the time of her termination, Primedica informed Mrs. Brock that she would not be eligible for continuation coverage if she was covered under another health plan.<sup>40</sup> Mrs. Brock ignored this missive and attempted to continue her coverage under the Primedica policy after her termination by paying the required premium.<sup>41</sup> Once Primedica discovered that Mrs. Brock had other coverage, it denied claims she had submitted under its plan, notified her of her ineligibility and refunded her premiums.<sup>42</sup>

On appeal from summary judgment, Mrs. Brock contended that she had not been notified properly of the limitations to her eligibility for coverage and that, because Primedica accepted her premiums, it should be estopped from denying continuation coverage.<sup>43</sup> The Fifth Circuit rejected both claims. In addition, it discussed the *Oakley* decision, emphasizing that the result in that case turned not on the interpretation of the "first becomes, after the date of election, covered" language, but rather on the character of the secondary coverage.<sup>44</sup> Because of the significant gap in coverage in *Oakley*, it was proper for the Tenth Circuit to require continuation coverage. According to the *Brock* court, the *Oakley* decision and the subsequent amendment to ERISA prohibiting termination of continuation coverage where the preexisting secondary coverage excludes preexisting conditions 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."<sup>45</sup>

The court cited the legislative history accompanying the 1989 amendment in support of its interpretation.<sup>46</sup> According to the House Conference Report, a beneficiary's eligibility for continuation coverage terminates upon the obtention of other coverage unless the other coverage contains any exclusion or limitation with respect to any preexisting condition of the qualified beneficiary. The House Report explained that this exception was necessary in order to carry out the purpose of the health insurance continuation rules, "which was to reduce the extent to which certain events, such as the loss of one's job, could create a significant gap in health coverage. Such a gap in coverage occurs when the new employer group health coverage excludes or limits coverage for a preexisting condition that is covered by the continuation coverage."<sup>47</sup> Because Brock's preexisting coverage did not have a significant gap, she was not entitled to continuation coverage.

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38. 904 F.2d 295 (5th Cir. 1990).

39. *Id.* at 296.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 297.

45. *Id.* (citations omitted).

46. *Id.*

47. H.R. REP. NO. 247, 101st Cong., 1st Sess. 1452-53(1986), reprinted in 1989 U.S.C.C.A.N. 1906, 2923.



The *Brock* decision acknowledges that COBRA's goal is to ensure that the employee is actually covered under a plan. Applying this principle renders irrelevant the time at which coverage is obtained. According to the *Brock* court, attention should more properly be focused on whether there is a substantive rather than a temporal difference in the two coverages.<sup>48</sup> So long as the preexisting coverage does not exclude preexisting conditions, its existence should terminate the employer's obligation to offer continuation coverage.<sup>49</sup> In reaching this result, the court was faithful both to the statutory language and to the purpose of the statute, which is to ensure coverage without gaps for preexisting conditions.

The Eleventh Circuit decision in *National Companies*<sup>50</sup> closely followed the *Brock* analysis both in time and logic, with a more in-depth discussion of the "first becomes, after the date of election" statutory language. In *National Companies*, the qualified beneficiary, Robert Hersh, obtained individual health insurance coverage from the National Distributing Company (NDC).<sup>51</sup> His wife, who was employed by St. Joseph's Hospital as a nurse, also obtained individual coverage from her employer. Shortly before the birth of their first child, both Mr. and Mrs. Hersh sought family coverage under their respective plans. Both Mr. and Mrs. Hersh's contracts with their respective plans specified that the National Plan would be the primary insurer for Mr. Hersh and their dependents while the St. Joseph's Plan would be the primary insurer for Mrs. Hersh and a secondary insurer for Mr. Hersh and their dependents.<sup>52</sup> The two plans coordinated payments on the Hersh's claims based on this arrangement.<sup>53</sup>

Four years after Mr. Hersh made this arrangement, he received a memorandum from his employer articulating the employer's prerequisites for eligibility for COBRA continuation coverage.<sup>54</sup> According to the memorandum, an employee's right to participate in the plan would be terminated if the employee became "covered under another group health plan."<sup>55</sup> Shortly after this memorandum was disseminated, Mrs. Hersh developed complications in her pregnancy.<sup>56</sup> At the same time, Mr. Hersh was contemplating resigning his position in order to start his own business.<sup>57</sup> Because of the difficulties with Mrs. Hersh's pregnancy, the Hershes wanted to ensure that they could retain dual-family health coverage even if Mr. Hersh left his job.<sup>58</sup>

Mr. Hersh resigned from his position in reliance on NDC's assurances that he was eligible for continuation coverage and that NDC's plan would continue to cover him even though he was also covered under the St. Joseph's plan.<sup>59</sup> On his last day of work, Mr. Hersh filled out election forms and a continuation coverage agreement.<sup>60</sup> The coverage agreement Mr. Hersh signed used the obsolete pre-amendment language indicating that Mr. Hersh would continue to receive COBRA coverage until he became

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48. See generally *Brock*, 904 F.2d 295.

49. *Id.* at 297.

50. 929 F.2d at 1558.

51. *Id.* at 1562.

52. *Id.*

53. *Id.* at 1562 n.2.

54. *Id.* at 1562.

55. *National Cos.*, 929 F.2d at 1558.

56. *Id.*

57. *Id.* at 1563.

58. *Id.* at 1558.

59. *Id.*

60. *National Cos.*, 929 F.2d at 1558.

covered under another group health plan because of either employment or remarriage.<sup>61</sup>

Relying on the NDC administrators' opinion, Mr. Hersh paid premiums to continue his insurance coverage after his resignation.<sup>62</sup> After their twins were born, the Hershes submitted claims to the National plan and the St. Joseph's plan for coordination and payment. However, National denied coverage retroactively to the date of Mr. Hersh's resignation and attempted to refund the Hershes' premiums on the ground that Mr. Hersh was not entitled to coverage under the National Plan because he was already covered under the St. Joseph's plan.<sup>63</sup>

National contended on appeal that it was not required to offer continuation coverage to Mr. Hersh because he had preexisting coverage under his wife's plan. The Court of Appeals agreed that National was not obligated to offer continuation coverage to an employee who is covered under a preexisting group health plan.<sup>64</sup> After reviewing the legislative history of COBRA, together with the *Oakley* and *Brock* holdings, the court rejected the *Brock* court's conclusion that *Oakley* and *Brock* adopted the same general rule, namely, that eligibility for continuation coverage under ERISA depends on the character of the coverage. Instead, the court determined that *Oakley* had held that preexisting coverage, regardless of its scope, had no effect on an employee's right to continuation coverage.<sup>65</sup> By contrast, according to the *National Companies* court, *Brock* held that the opposite was true, assuming no significant gap in coverage.<sup>66</sup> Thus, the *National Companies* court rejected the idea that the sympathetic facts had driven the decision in *Oakley*.

Nevertheless, *National Companies* adopted the *Brock* analysis and rejected the *Oakley* approach. The court noted that when Congress passed COBRA it had two concerns in mind. On the one hand, it was concerned that employees who lost their jobs would find they had no health insurance coverage.<sup>67</sup> On the other hand, the court believed that Congress did not intend for continuation coverage to last forever; rather, it should only last until the employee was able to obtain other coverage on her own.<sup>68</sup> Requiring extended continuation coverage would be unfair to employers because it would increase too greatly the operating cost of the employer's ERISA plan. Thus, the court viewed its interpretive task as accommodating both Congress' interest in ensuring that employees had insurance with its desire not to burden employers with financing costly procedures.

Keeping the congressional goals in mind, the court found that the "first becomes, after the date of election... covered" language was not intended to limit the operation of the termination provision to only those insurance coverage contracts acquired after the date of election. Instead, the court reasoned that the language simply acknowledges that COBRA continuation coverage does not begin and, therefore, cannot be terminated before the election date simply because COBRA coverage does not exist at that

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61. *Id.*

62. *Id.*

63. *Id.* at 1564.

64. *Id.* at 1566.

65. *National Cos.*, 929 F.2d at 1569.

66. *Id.*

67. *Id.*

68. *Id.* at 1569.

time.<sup>69</sup> Because any continuation coverage would have to begin on the date of election, where a terminated employee has preexisting coverage, the termination condition is met contemporaneously with the election date. That is, the insured "first becomes, after the date of election... covered" on the date of election. According to the court, for an employee with 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."<sup>70</sup>

The court concluded that because Mr. Hersh was covered by his wife's plan, National was not under a statutory obligation to offer him continuation coverage. This finding is consistent with the congressional purpose underlying the statute, ensuring single, not double, coverage. The court did acknowledge that a significant gap between the coverage under the National plan and the St. Joseph's plan would have rendered Mr. Hersh eligible for continuation coverage.<sup>71</sup> The court reasoned that where a significant gap exists, the terminated employee is not "truly 'covered' by the preexisting group health plan, as that term is used by Congress to effectuate its intent . . . ."<sup>72</sup> Although the Hershes were personally responsible for \$6,700 worth of medical expenses, the court found that because this was not the result of a significant coverage gap, the National plan was not responsible for covering it.<sup>73</sup>

One might have thought that on the strength of the *Brock* and *National Companies* cases and because *Oakley* was decided before the 1989 amendment was enacted, subsequent courts would be more apt to conclude that preexisting coverage barred obtention of continuation coverage. But the Seventh Circuit, in a surprising decision, held that preexisting coverage does not render an employee ineligible for continuation coverage under COBRA. In *Lutheran Hospital v. Business Men's Assurance Co.*,<sup>74</sup> the Seventh Circuit was confronted by the same question at issue in *National Companies*: who among Mrs. Isch (the employee), and two insurers, should bear the cost of Mrs. Isch's hospital services. The answer to the question turned once again on whether the "first becomes, after the date of election... covered" language of Section 1162(2)(D)(i) authorized an employer to terminate a former employee's eligibility for continuation coverage under COBRA.

In *Lutheran Hospital*, Mrs. Isch was laid off from her job with Community and Family Services, Inc.<sup>75</sup> Layoffs, like terminations, trigger the continuation coverage provisions of COBRA.<sup>76</sup> At the time of her layoff, Mrs. Isch's husband received group health insurance through the Teamsters Local 135 Welfare Fund. The Teamsters plan covered Mrs. Isch as a dependent.<sup>77</sup>

Prior to her layoff, Mrs. Isch was hospitalized with a serious medical condition. Her hospitalization continued for many months. Community's prior group insurer paid

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69. *Id.*

70. *National Cos.*, 929 F.2d at 1570.

71. *Id.* at 1571.

72. *Id.*

73. *Id.*

74. 51 F.3d at 1308.

75. *Id.* at 1310.

76. Qualifying events triggering COBRA coverage include "reduction of hours" or lay-offs. 29 U.S.C. § 1163 (1994).

77. *Lutheran Hosp.*, 51 F.3d at 1310.

those medical expenses incurred for the first six days after Mrs. Isch's layoff, but refused to pay any bills for medical care received after that time. The Teamsters plan also refused to cover Mrs. Isch's expenses, claiming that Community's group health plan should provide primary coverage. The Teamsters plan admitted that it had no limitations or exclusions for the plaintiff's preexisting conditions. Therefore, the Teamsters plan would be liable for Mrs. Isch's bills if Community's insurer was not.

The lower court ruled that Mrs. Isch's coverage under the Teamsters plan satisfied the termination condition for COBRA continuation coverage.<sup>78</sup> The Seventh Circuit reversed, drawing a sharp distinction between preexisting and after-acquired health insurance coverage. Under the Seventh Circuit's reasoning, preexisting coverage can never serve to trigger the COBRA termination condition even when, as in *Lutheran Hospital*, the result would be dual coverage.

The Seventh Circuit first examined the statutory language, finding that the "first becomes, after the date of election... covered" language meant that an employee with preexisting coverage at the time of the qualifying event is nevertheless eligible for continuation coverage.<sup>79</sup> The court said that only if the employee chose to accept coverage from another plan some time beyond the election date could the employer terminate continuation coverage.<sup>80</sup> According to the Seventh Circuit, the goal of the statute was preservation of the employee's health care status quo from the employee's perspective.<sup>81</sup> Therefore, if the employee wishes to maintain dual coverage even where there is no significant gap between the two policies, that choice belongs to the employee.

The Seventh Circuit emphasized throughout its opinion that COBRA was intended to provide an employee a choice between COBRA continuation coverage and preexisting coverage. According to the court, "[b]y the terms of the statute, the individual has the choice whether to preserve the status quo and continue the prior level of coverage under COBRA or accept alternative coverage and discontinue coverage [under COBRA]."<sup>82</sup> In the court's view, it was unfair to prohibit an employee who maintained secondary or additional coverage prior to his termination from participating in COBRA because the employee's decision to add coverage or maintain secondary coverage was not a "choice". The court suggests that when an employee obtains coverage in addition to that provided by his employer, he may not have considered that this secondary coverage might ultimately become his primary coverage should he lose his job. Because he may not have considered this ultimate consequence, he should not be bound by the selection. Indeed, according to the Seventh Circuit, only if he chooses to stay with the other coverage after the date of election should he be bound by his "choice".

The Seventh Circuit's approach to interpretation of this statute works to render one COBRA notification provision meaningless. Under COBRA, all employer-administered group health plans must include a "commencement of coverage" provision which must state that obtention of another policy prior to a qualifying event will render the employee ineligible to participate in the COBRA election.<sup>83</sup> The Seventh Circuit's

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78. *Id.* at 1310-11.

79. *Lutheran Hosp.*, 51 F.3d at 1312.

80. *Id.*

81. *Id.*

82. *Id.*

83. 29 U.S.C. § 1166(a)(1) (1994). *See, e.g.*, ExcluciCare Subscription Agreement and Schedule of

analysis rewards employees who fail to read this provision of their insurance with dual coverage under the theory that these employees were not actually aware that maintaining an additional policy would terminate their right to receive COBRA benefits. Though it may be unfortunate that employees who fail to read their policies lose the right to continuation coverage, in order to give the commencement of coverage provision meaning, those employees must be held responsible for what appears in their insurance policy.

Moreover, holding employees to the terms of their insurance contracts comports with recent judicial decisions. In most recent cases, courts have held employees responsible for knowing the effect of the language that appears in contracts with their employers or others, even if they were not fully cognizant of the consequences of the agreement.<sup>84</sup> Yet, in *Lutheran Hospital*, the court departs from that approach, conferring COBRA rights on employees who failed either to read or understand the insurance policy they received when they were hired. For the Seventh Circuit's analysis to be correct, one would have to assume that the requirement that employers notify employees of their COBRA rights at the time they are hired is meaningless and that insurance policies are adhesion contracts and therefore void *ab initio*. Yet the provisions of such agreements are routinely enforced, and so the court's position on the continuation provision seems untenable.

Although the court's approach is inconsistent with another part of the statute and is contrary to the recent trend in case law, the court emphasized that both the clear language of the statute as well as the statute's purpose supported its conclusion. According to the court, 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."<sup>85</sup> This interpretation of the language is consistent with the Seventh Circuit's vision of the purpose of COBRA, which is to protect the beneficiary's health care "status quo," ensuring that "the individual is never forced to accept a lower level of health care coverage than he or she received as an employee before the qualifying event."<sup>86</sup>

The court's analysis did not end there. It also cited additional language from Section 1162 of the COBRA statute as well as the Treasury Department's proposed COBRA regulations in support of its theory that Congress had intended to require more than "bare-bones" continuation coverage.<sup>87</sup> Section 1162(1) declares that continuation coverage offered to qualified beneficiaries must be identical to the continuation coverage that is provided to similarly-situated beneficiaries under the plan whose employment has not been terminated.<sup>88</sup> The proposed treasury regulations require that an employer who offers existing employees the opportunity to participate in a cafeteria

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Benefits at 30 (1994) (on file with author). The Exclucicare Agreement states, "[a] covered person's continued Health Coverage will end at midnight on the earliest of . . . (c) the day a covered person is covered under group coverage as an employee or otherwise."

84. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Supreme Court, in enforcing arbitration agreement signed by employee at time of hire, rejects argument that employee was not fully cognizant of risks present in the proposed arbitral agreement); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992) (same); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (1992) (same).

85. *Lutheran Hosp.*, 51 F.3d at 1312.

86. *Id.*

87. *Id.* at 1313.

88. 29 U.S.C. § 1162(1) (1994).

plan, which allows an employee to choose among several group health plans, must afford COBRA beneficiaries the same opportunity to participate.<sup>89</sup> The proposed regulations also suggest that an employee who participates in the employer's separate vision and dental plans may opt to continue coverage under these plans despite the occurrence of a qualifying event.

The Seventh Circuit reasons that, because COBRA beneficiaries must be offered the same opportunities as similarly situated employees who have not suffered a qualifying event, the goal of COBRA must be to maintain the employee's health care status quo.<sup>90</sup> In fact, the idea underlying the statutory language and the proposed regulations is simply that as long as the ex-employees and the current employees are covered under the same plan, the employer cannot treat former employees worse than it treats current employees. That an employer may not reduce coverage for former employees under COBRA while maintaining coverage for current employees does not change the fact that continuation coverage is limited in time and may be terminated prematurely upon the occurrence of certain events. Indeed, prohibiting an employer from discriminating against former employees does not change COBRA from a statute intended to assure that former employees maintain some insurance coverage to one that maintains an employee's health care status quo. After all, there is nothing to prevent the employer from reducing coverage for current employees and then reducing it for COBRA beneficiaries as well. Thus, the Seventh Circuit's reliance on the proposed treasury regulations and Section 1162(1) is misplaced.

In fact, had the court examined the proposed regulations in their entirety, it would have discovered that the regulations actually undermine rather than support its position. Proposed Treasury Regulation 38 advises that the phrase "first becomes, after the date of election... covered" should be interpreted to end continuation coverage under COBRA when the qualified beneficiary is covered (i.e., actually covered, rather than merely eligible to be covered) under any other group health plan that is not maintained by the employer, even if that coverage is less valuable to the qualified beneficiary than COBRA continuation coverage.<sup>91</sup>

Whether the proposed treasury regulation provides a definitive answer to the interpretive question is another issue altogether. It is well-understood that an administrative agency's contemporaneous construction of a statute it is charged with administering should be followed absent compelling indications that it is wrong.<sup>92</sup> Further, if one were to follow the IRS's contemporaneous interpretation of the COBRA statute, then the conclusion that Congress did not intend to require employers to provide continuation coverage to qualified beneficiaries who are covered by another group health plan would be inescapable.

Despite the Seventh Circuit's conclusion to the contrary, however, proposed regulations may not be the best source for determining Congressional intent.<sup>93</sup> While

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89. Prop. Treas. Reg. § 1.162-26, 52 Fed. Reg. 22716, 22723 (1987).

90. *Lutheran Hosp.*, 51 F.3d at 1313.

91. Prop. Treas. Reg. § 1.162-26, 52 Fed. Reg. 22716, 22730 (1987); *Martin v. Prudential Ins. Co.*, 776 F.Supp. 1172, 1177 n.9 (1991).

92. *E.I. du Pont de Nemours and Co. v. Collins*, 432 U.S. 46, 55 (1977); *United States v. Turkette*, 452 U.S. 576 (1981).

93. At best, examination of proposed regulations may assist in the determination of agency, not Congressional, intent. The question at that point becomes whether Congress intended that the courts follow the agency's interpretation.

some courts do use proposed regulations in this way,<sup>94</sup> a great debate over the degree to which a court should defer to proposed regulations remains unresolved.<sup>95</sup> As the Sixth Circuit observed in *Ohio State University v. Secretary*, "the degree to which courts are bound by agency interpretations of law has been like quicksand. The standard has been constantly shifting, steadily sinking, and, from the perspective of the intermediate appellate courts, frustrating."<sup>96</sup> The proposed treasury regulations have been used frequently and interpreted in a fairly consistent manner since their introduction in 1988. Yet, the IRS has failed to finalize them and label them as interpretive regulations.<sup>97</sup> While it seems, then, that the regulations may provide some guidance to courts, it would probably be unwise to hold that they are the final word on the meaning of the statute.<sup>98</sup>

In practical effect, then, *Lutheran Hospital* revives an interpretive dilemma that might otherwise have laid dormant following the *Brock* and *National Companies* decisions. Unless reconsidered or altered through legislation, insurance companies and employers alike will continue to be confronted by the problem of how to treat terminated employees who have preexisting insurance coverage. In order to guide the final resolution of this issue, it is a useful exercise to consider which approach is most in keeping with the purpose and language of Section 1162 of COBRA. Part II suggests that lower courts would act with greater fidelity to COBRA and ERISA and general principles of statutory interpretation if they adopted the position that Section 1162 does not require employers to offer continuation coverage to employees who maintain preexisting coverage, assuming that no significant gaps in coverage exist.

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94. See *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1581 (11th Cir. 1992) (finding that the proposed regulations "represent the proper construction of COBRA in light of Congress' intent"); *Lincoln General Hosp. v. Blue Cross/Blue Shield of Neb.*, 963 F.2d 1136, 1142 (8th Cir. 1992) (proposed regulations show "regular practice" under COBRA); *Lutheran Hosp.*, 51 F.3d at 1313.

95. See *Oakley*, 890 F.2d at 1128.

96. *Ohio State Univ. v. Secretary*, 996 F.2d 122, 123 n.1 (6th Cir. 1993).

97. *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1036 n. 10 (4th Cir. 1980); *Teweleit v. Hartford Life & Acc. Ins. Co.*, 43 F.3d 1005, 1009 (5th Cir. 1995) (holding that because Proposed Regulations s. 1.162-26 were never formally adopted they have no precedential authority). The purpose of the typical interpretive rule is to interpret or clarify the nature of duties a previously enacted statute created. See *General Motors Corp. v. Ruckelshaus*, 724 F.2d 979 (D.C. Cir. 1983). Unlike legislative rules, which must go through notice and comment procedures, an interpretive rule or regulation is not controlling on a court. Although such rules lack the power to control, courts may look to interpretive rules for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

98. *But see Gaskell v. Harvard Cooperative Society*, 3 F.3d 495, 500 (1st Cir. 1993) (stating that "pending promulgation of final regulations, the Internal Revenue Service . . . consider[s] compliance with the terms of these proposed regulations to constitute good faith compliance with a reasonable interpretation of the statutory requirements.") (citations omitted).

## II. METHODS OF STATUTORY INTERPRETATION AND THEIR APPLICATION TO THE PROBLEM AT HAND

The judicial goal in matters of statutory interpretation is, in general, to give effect to the expressed intent of Congress.<sup>99</sup> To determine what Congress intended, courts traditionally start with, and, for the most part, end with, the "plain language of the statute."<sup>100</sup> The trouble arises when the scope of the statute is broad enough to encompass the subject matter of the interpretive question but the statutory language fails to address it. Where Congress has failed to anticipate the question when drafting the statutory language or the language is open to more than one fair interpretation, it is unclear how judges are to proceed. Some judges take this opportunity to manipulate the language of the statute in order to impose their own will. Other judges, including a number of Supreme Court justices, proceed by examining the text's surrounding context and structure.<sup>101</sup> Judges' consideration of context leads them in some cases to examine not simply the structure of the statute, but also the interpretations of the same language in other statutes and the canons of statutory construction. If the contextual analysis fails, judges may turn to the legislative history of the statute for further elucidation.<sup>102</sup> While Congress has endorsed none of these approaches,<sup>103</sup> the idea that judges should focus on the text, its context and the statute's structure in order to reduce judicial discretion, preventing judges from becoming the "real authors of the rule"

99. According to Hart and Sacks, the "golden rule" of statutory interpretation states that the judge's sole task is "to declare the expressed intention of the Legislature, even if that intention appears to the court injudicious . . . ." Henry Hart and Albert Sacks, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1144 (10th ed. 1958); William N. Eskridge, *The New Textualism*, 37 *UCLA L. REV.* 621, 623 (1990) (suggesting that the Supreme Court views its only role in interpreting a statute "is to divine the intent of Congress."); Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 *VAND. L. REV.* 407 (1950) (stating that the general approach to interpretation "consists essentially in a search for the intention of the author."); *Commissioner v. Engle*, 464 U.S. 206, 214 (1984); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, (1982) (stating that the intentions of the drafters of the laws "must be controlling."); *Lutheran Hosp.*, 51 F.3d at 1313. As with so many other issues in statutory interpretation, not all scholars and judges agree that the goal of the courts is to effectuate Congress' intent. One might suggest that it is impossible to glean a single intent out of Congress because it is comprised of a large group of people with diverse interests. Nevertheless, it appears that most judges use the term "intent" as a starting point in their search for the meaning of a particular statutory word or phrase.

100. *Lutheran Hosp.*, 51 F.3d at 1312.

101. William N. Eskridge, *The New Textualism*, 37 *UCLA L. REV.* 621 (1990). See *Herrmann v. Cencom Cable Associates, Inc.*, 978 F.2d 978, 983 (7th Cir. 1992).

102. *But See Note, Why Learned Hand Would Never Consult Legislative History Today*, 105 *HARV. L. REV.* 1005 (1992); *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring) (stating that the use of legislative history "creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process."). The "new textualists", like Justice Scalia, would be reluctant to consider legislative history even if other interpretive methods failed. Under the strict textualist approach, legislative history should only be considered in those rare cases where the language of the statute would lead to absurd results. See Eskridge, *supra* note 101 at 651.

103. On occasion, Congress has included clauses mandating that the language of a statute be liberally or strictly construed. See Note, *Interpretive Directions in Statutes*, 31 *HARV. J. LEGIS.* 211, 215-16 (1994) (listing statutes that contain clauses requiring that the statute be either liberally or strictly construed). One unanswered question is whether Congress could pass a general interpretive law stating that a particular method should be used to interpret certain statutes. Such an approach would likely be unconstitutional because it destroys the concept of separation of powers. Under the separation of powers theory, Congress' job is to state what a particular law means. The judiciary's job is to declare how statutes should generally be interpreted.



is currently in vogue.<sup>104</sup>

To answer the question contemplated in this article, whether the “first becomes, after the date of election, covered” language requires a distinction between preexisting and after-acquired coverage, then, one must first consider whether the plain meaning of this language can be determined. If not, additional tools of statutory interpretation must be considered and applied, including, perhaps, legislative history.

### A. Plain Language Interpretation

A strict plain meaning or “textualist”<sup>105</sup> approach to statutory interpretation posits that most interpretation questions can be resolved by applying the plain meaning of the statutory language.<sup>106</sup> This plain meaning approach emphasizes that where the plain language is sufficiently clear, other sources of meaning should not be considered. Textualists are driven by the fear that resort to other sources for interpretation, particularly legislative history, will enable the courts to do an end-run around the constitutionally-imposed method of bill creation by allowing the views of individual legislators to carry the day.<sup>107</sup> While it may be proper to consider the plain language of the statute first because the statutory text represents the choices of the democratically elected legislature and therefore best represents the views of the electorate,<sup>108</sup> the inherent problem with this approach is that the significance of the congressional enactment often cannot be determined without resort to background understandings regarding what words mean and consideration of the context or surrounding structure in which those words appear.<sup>109</sup> As Judge Easterbrook emphasizes, “[w]ords are arbitrary

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104. *Herrmann v. Cencom Cable Assoc. Inc.*, 978 F.2d at 978.

105. One might argue that it is disingenuous to use the terms “plain meaning” and “textualist” interchangeably. According to Professor William Eskridge, among others, current textualists approach statutory text slightly differently than those using the plain meaning approach. A textualist, such as Justice Scalia, is quicker to find plain meaning in the text and less receptive to the use of non-textual interpretative tools, particularly legislative history. See Eskridge, *supra* note 101, at 645-55.

106. William N. Eskridge & Philip P. Frickey, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 571 (1988) [hereinafter *Legislation*]; *But see* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y. 61, 67 (1993) (“[p]lain meaning as a way to understand language is silly.”) [hereinafter *Easterbrook*].

107. *Central States Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1346 (7th Cir. 1992).

108. Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 416 (1989). [hereinafter *Sunstein*] Professor Sunstein’s approach to plain language is based on his belief that the Framers wanted government to adopt a “public-seeking vision” when drafting statutes. This baseline presumes that the legislature is acting in the interest of its constituents at all times and that courts should presume as much when interpreting statutes. Public choice theorists reject this argument largely because it is too idealistic. See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). Judge Posner suggests that a more realistic analysis of the legislative process would take into consideration that many laws represent compromises and may not reflect the desires of Congress, much less that of the constituents. Thus, a judge interpreting a statute should not assume that legislators act responsibly or in the interest of their constituents. Rather, a judge interpreting a statute should try to put himself in the “shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him.” *Id.* at 286. This “imaginative reconstruction” requires consideration of what actually transpires at the time of the law’s enactment including, among other things, compromises among legislators with respect to statutory language.

109. See *Herrmann*, 978 F.2d at 982 (where Judge Easterbrook, writing for the majority, noted that “[s]licing a statute into phrases while ignoring their contexts—the surrounding words, the setting of the

signs, having meaning only to the extent writers and readers share an understanding. A mark such as ↑ has a meaning without language, but ‘up’ must be decoded according to rules and cultural norms.”<sup>110</sup>

Were the textualist strategy the only alternative, its major conceptual limitation, that statutory language rarely admits a single plain meaning, would more than occasionally lead to result-oriented analysis. After all, “one person’s ambiguity is another’s plain meaning.”<sup>111</sup> Where no plain meaning<sup>112</sup> can be discerned, some jurisprudential theory of meaning must be applied to provide meaningful restraints on what otherwise might become the unfettered exercise of judicial will. In other words, if the statutory language does not clearly resolve the dispute, consideration of other interpretive tools may provide an interpretation that more closely resembles what Congress would have wanted<sup>113</sup> or, at the least, what seems more in keeping with the underlying purpose of the statute.

Congress never anticipated the problems associated with applying the plain language of COBRA Section 1162(2)(D)(i) to beneficiaries who maintain preexisting coverage when COBRA was drafted. Nevertheless, both sides suggest that the “plain meaning” of the statute supports their respective interpretation. One side suggests that the inclusion of the “after the date of election” language simply acknowledges that COBRA continuation coverage cannot be terminated before the date of election of COBRA because at that point, the option to elect COBRA does not exist. Once the option to elect COBRA matures, the only relevant question is when the other coverage takes effect. In the case of preexisting coverage, the event terminating the right to continue occurs immediately; that is, the first moment after the election date that the employee becomes covered by another group health plan is the moment after the election date. Because another plan instantaneously covers him, the employee is rendered ineligible for COBRA continuation coverage. The focus, under this reading of the statute, is on whether a policy actually covers the former employee. If the employee is covered, regardless of when he received the other coverage, he is not entitled to COBRA benefits.<sup>114</sup>

enactment, the function a phrase serves in the statutory structure—is a formula for disaster.”); Sunstein, *supra* note 108, at 495 (in which Professor Sunstein contends that even in easy cases, the plain language alone may be insufficient as a means for interpretation, and that resort to background principles may be necessary); See Legislation *supra* note 106.

110. *Herrmann*, 978 F.2d at 982.

111. Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RES. 280 (1991) [hereinafter Stemple].

112. Justice Scalia, among others, has argued that he can find plain meaning in most statutes. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511. Of course, his plain meaning may not be another judge’s plain meaning. Therein lies the problem. Because interpretations of plain meaning are largely driven by the interpreters’ pre-conceptions, where plain meaning is not obvious, it is reasonable to consider whether other statutory tools may elucidate the true “plain” meaning of the statute.

113. Many scholars would disagree that the goal of statutory interpretation is to determine what Congress would have “wanted”. The idea that a collection of individuals can actually “want” something as a group is a fiction. Obviously, various members of Congress have certain objectives. Yet it is not clear that those objectives can be added together to obtain a meaningful intent. If the language fails to address the interpretive question, the court must nevertheless provide an answer. Still the most popular way of determining the answer is to consider Congressional intent as it is articulated through the language, context and structure of the statute.

114. A judicial exception to this rule has been created. If the alternate coverage contains a “signifi-

The opposing argument, that preexisting coverage does not trigger COBRA's termination provision, focuses on Congress's use of the statutory words "first becomes." According to the dictionary, "becomes" means "to come to be" or "to develop," implying some variation in the actor's status. Proponents of the Seventh and Tenth Circuit's approach contend that a change in status does not occur if, after the date of election, the beneficiary maintains the same level of insurance coverage as he did the day before the election. A change in status sufficient to trigger the termination condition occurs only if the new coverage is acquired after the date of election, so the beneficiary now owns something he did not previously own. Under this "dictionary definition" theory, coverage that exists on the date when the employee may elect continuation coverage does not terminate an employee's right to continuation coverage.

In light of these different interpretations of the plain meaning of the phrase "first becomes, after the date of election... covered," the only obvious conclusion is that the phrase has no "plain" meaning. Because Congress adopted this statute with inadequate appreciation for this interpretive problem, a method of resolving the dispute is to apply interpretive tools to assist courts in choosing the better of the two interpretations.

Where statutory language is unclear and Congress has failed to provide interpretive directions, however, there is little consensus as to which interpretive rules and processes should be applied. The inability of scholars to agree on a unifying theory of legislation has not prevented the promulgation of a variety of theoretical approaches to statutory interpretation. Together with textualism, both the legal process approach and the intentionalism school have received some level of general acceptance among scholars and judges.<sup>115</sup> Although these schools of thought differ in their emphasis on the significance of particular interpretive factors, application of each to the problem at hand yields the same result - that preexisting coverage should void the right of a former employee to obtain continuation coverage from his employer.

One of the primary methods of statutory interpretation is the "legal process" method developed by Henry Hart and Albert Sacks almost 50 years ago. The legal process approach takes the position that where the plain language of the statute fails to answer the interpretive question, the preferred interpretation is the one that advances the "purpose" of the statute.<sup>116</sup> In cases where alternate approaches exist, the legal process approach dictates that the court choose the one that best effectuates the statute's purpose.

The first task of a court applying the legal process approach is to infer the statute's purpose. To deduce purpose, the court's focus should not be on discerning the legislature's intent, but rather on "decid[ing] what meaning ought to be given to the directions of the statute in the respects relevant to the case before it."<sup>117</sup> In determining the meaning of the words, the court may not consider the impact that interest groups wield in the legislative process,<sup>118</sup> nor may it consider the pressures that frequently come to bear on legislators who must satisfy interest groups if they are to

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cant" gap in coverage, the qualified beneficiary will be entitled to COBRA continuation coverage. 29 U.S.C. § 1162(2)(D) (1994).

115. See Stempel, *supra* note 111 at 280.

116. See Hart & Sacks *supra* note 99 at 1156.

117. *Id.* at 1414.

118. *Id.*

remain in power.<sup>119</sup> Instead, the court must apply the presumption that those engaged in law making are at all times trying to act responsibly and reasonably in discharging their obligations.<sup>120</sup> The logic underlying this presumption is that the law itself is rational and any interpretation of law must be consistent with the overall legal framework. To best ensure that statutes receive a rational interpretation, Hart and Sacks suggest that a court attribute a public-minded purpose to the legislators who enact the laws.

The results of an application of the legal process approach to the problem at hand depends on the purpose of the COBRA legislation. The underlying goal of COBRA is to provide health insurance to people who have lost their jobs and would be without health insurance if not for the COBRA coverage. In other words, COBRA's purpose is to ensure seamless coverage for all working Americans. But COBRA's purpose does not extend to mandating permanent health insurance coverage for an indefinite period of time. COBRA protection is limited, terminating as early as 18 months after the date of election, or earlier if certain terminating conditions are met. Thus, the COBRA statute works as "bridge" coverage, giving the employee coverage only for the period of time the government has discerned it should take the former employee to find replacement coverage.<sup>121</sup>

Once it is recognized that COBRA's purpose is to provide temporary insurance relief to those who have lost jobs, the question then becomes: to what amount of insurance coverage is the qualified beneficiary entitled? If the purpose of COBRA is to ensure that a terminated employee receives the same amount and type of insurance that he received prior to termination, then an interpretation that allows him to maintain his current level of insurance is preferable to one that results in a change in the amount of insurance to which he is entitled. On the other hand, if the purpose of COBRA is to insure that a qualified beneficiary has some insurance coverage, an interpretation that is limited to insuring that the former employee enjoys seamless single coverage would be more appropriate.

One way to determine which expression of purpose is correct is to examine how qualified beneficiaries who obtain alternate coverage after the date of election are treated. COBRA insures that qualified beneficiaries enjoy continuation coverage after the date of election until some terminating event occurs. Thus, COBRA confers upon qualified beneficiaries a right to coverage at all times, but not double coverage. Assuming that legislators are reasonable people acting reasonably, one might surmise that Congress would want to treat qualified beneficiaries with preexisting coverage the same as those with after-acquired coverage. Reasonable legislators would be unlikely to discriminate among the beneficiaries of the statute. Thus, if beneficiaries who obtain alternate coverage after the date of election are never entitled to double coverage, then neither should beneficiaries with preexisting coverage be entitled to double coverage.

To determine how to treat beneficiaries with preexisting coverage, then, it is worth considering how the termination rules apply to a qualified beneficiary who obtains alternate coverage after the date of election. After the date of election, a qualified beneficiary may lose his right to continuation coverage if he remarries, is employed or

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119. *Id.*

120. *Id.* at 1415.

121. *Blue Cross and Blue Shield of Tex., Inc. v. Shalala*, 995 F.2d 70, 71 (5th Cir. 1993).

otherwise becomes covered. Thus, a beneficiary who obtains new employment and accepts his new employer's offer of health insurance loses his right to COBRA continuation coverage even if the new employer's health insurance policy is not as good as the COBRA employer's policy. Similarly, if the beneficiary remarries, and his spouse names him as a dependent under her coverage, he becomes ineligible for continuation coverage even if the new policy provides less coverage. Under those circumstances, courts universally agree that a COBRA employer may discontinue coverage even though the beneficiary now maintains a lower level of coverage.

The universal acceptance of this interpretation is primarily based on the supposition that the employee "voluntarily and knowingly" relinquished his right to continuation coverage. The question, then, is whether obtaining alternate coverage prior to a beneficiary's termination should be treated as a voluntary and knowing relinquishment of his continuation rights when he obtains alternate coverage that is equal to, better than, or worse than the continuation coverage. Those courts that have chosen to treat this situation differently appear to base the distinction on the belief that the beneficiary's choice of alternate coverage was neither knowing nor voluntary. Under this view, the court may be assuming that the beneficiary was unaware that he was covered as a dependent under his spouse's policy, that he was not aware that the alternate policy could become the primary policy if his employment were terminated, or that the beneficiary is incapable of properly assessing the risk that he will be terminated and that termination will result in loss of coverage if he holds another policy.

Yet this interpretation, which would allow a beneficiary to retain both his preexisting coverage and continuation coverage, is inconsistent with the treatment of a qualified beneficiary who remarries following the date of election and becomes covered as a dependent under his new spouse's policy. It is the rare employee who would be aware that remarriage after the date of election would result in loss of his continuation coverage just as it is the rare employee who would think that his status as a dependent under his spouse's coverage while he is still employed might result in his ineligibility for COBRA should he suffer a qualifying event. Yet, courts unquestioningly accept the proposition that remarriage terminates one's right to COBRA. To interpret the statute differently simply because the beneficiary was still employed when he became a dependent would be both inequitable and inconsistent.

The only way to justify such inconsistent treatment is to presume that COBRA is protectionist legislation. Under this view, the drafters of COBRA would presume that employees who become dependents under other coverage while still employed are not capable of voluntarily relinquishing their rights to COBRA, perhaps because they are, as yet, unaware of those rights. Former employees, newly informed of their COBRA rights, by contrast, are deemed to relinquish those rights voluntarily upon remarriage or reemployment. Were it not for the provision that allows one's rights to be terminated upon remarriage, this argument would have much to recommend it. But because one's decision to remarry rarely, if ever, is dependent on the awareness that such an event will result in ineligibility for COBRA, it does not make sense to attribute knowing and voluntary action to a former employee getting remarried while treating an employee prior to discharge as unaware that he is a dependent under his spouse's policy.

Moreover, it is unclear whether an employee's knowledge of his COBRA rights, particularly the termination upon remarriage provision, would be any greater after his termination than prior to it. One might argue that the notification provisions of COBRA draw to the former employee's attention his rights and obligations under COBRA

and that any subsequent action the employee engages in is undertaken with the awareness of these obligations. The employee should, however, already be aware of these rights. By law, all employers offering group health plans must provide written notice to each covered employee of his or her continuation coverage rights at the commencement of coverage.<sup>122</sup> If a court is willing to hold an employee to what he reads in the COBRA notification provision, it would seem logical to hold the employee responsible for information contained in his insurance policy.

Consequently, courts should only construe the language of the statute to ensure single coverage. A reading of the statutory language that distinguished between preexisting and after-acquired coverage would be inconsistent with the statute's careful balance between the interest in ensuring that beneficiaries receive insurance coverage and the interest in not overburdening employers. This balance is exemplified by the treatment qualified beneficiaries receive when they remarry or become employed after the date of election. Under those circumstances, the beneficiary's right to continuation coverage is summarily ended regardless of the quality of the alternate coverage. Under these circumstances, the statute's purpose is served because the beneficiary has maintained seamless single coverage. Acting reasonably, Congress would have wanted the statute to work the same way for beneficiaries with preexisting coverage. After all, Congress mandated that employees be notified at the commencement of coverage of their COBRA rights. Moreover, employees with preexisting coverage should be aware that they have preexisting coverage, as is a beneficiary after the date of election who marries someone who names him as a dependent under her policy, thus ending his COBRA eligibility. This interpretation manifests the congressional intent that COBRA is a transitional benefit designed to ensure only that a beneficiary whose employment terminates will not be without any (or comparable) health insurance for a limited period while he seeks new coverage.

## B. Intentionalism

Another major school of statutory construction suggests that the meaning of a statute should be determined by ascertaining the intent of the legislature enacting the statute.<sup>123</sup> Although similar to the legal process method in some respects, the intentionalist approach differs in that it typically involves examination not only of the text of the statute but also consideration of how the enacting legislature would have resolved the particular interpretive question. Because the focus of such an inquiry is on the enacting legislature's intent, resort to extrinsic aids, particularly legislative history, is commonplace.<sup>124</sup>

Putting aside the question whether consideration of legislative intent and legislative history is an appropriate judicial endeavor,<sup>125</sup> consideration of COBRA's legisla-

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122. 29 U.S.C. § 1166(a)(1) (1994).

123. Sunstein, *supra* note 108 at 428.

124. *Id.* at 429.

125. Scholars and judges are clearly divided over the propriety of using legislative history to determine statutory meaning. See Sunstein, *supra* note 108, at 429. See also Easterbrook, *supra* note 106 at 68. Those scholars who criticize the use of legislative history rest their argument primarily on their view that it is impossible to determine Congressional intent by examining committee reports, floor debates and the like. Considering the volume of legislation Congress passes each year, it does stretch

tive history<sup>126</sup> offers further clarification of COBRA's purpose and lends support to the theory that COBRA was adopted as a remedy designed to resolve a temporary problem. The House Committee Report accompanying COBRA states that COBRA was intended to serve as a response to "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."<sup>127</sup> The Report implies that the focus of the statute should be on those individuals who would have no health insurance at all following the occurrence of a qualifying event, not on those employees who have managed to obtain alternate coverage.<sup>128</sup>

The Report also emphasized that it was imposing the costs of insuring former employees on employers in order to avoid increasing the "staggering budget deficits now facing the United States."<sup>129</sup> Recognizing the substantial financial burden this imposes on the employers, the Report makes clear that employees' interest in continued health care should be balanced against employers' property rights. Thus, not all former employees will have "continued access to affordable private health insurance."<sup>130</sup> Only those former employees who have undergone a qualifying event will be able to purchase health insurance, and then only for a limited time and under particular circumstances.

The legislative history of the amendment to Section 1162(2)(D)(i), which limits termination of continuation coverage where a preexisting condition exists, further supports the idea that continuation coverage is limited in time and scope. According to the House Committee Report to the amendment, the purpose of the health care continuation rules is to "reduce the extent to which certain events, such as the loss of one's job, could create a significant gap in coverage."<sup>131</sup> By emphasizing that significant gaps are not allowed, the Report implies that gaps of a lesser nature will be permitted. Had Congress wished to forbid termination of the right to continuation coverage except where coverage was identical, it certainly could have done so.

Discussion of the legislative views of Section 1162(2)(D)(i) is necessarily specu-

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the imagination to suppose that every member of Congress has read every committee report or attended each floor debate. Thus, it seems unlikely that the legislative history represents the views of the legislature. Perhaps even more problematic is that the legislative history is "frequently written by well-organized private groups," thus reflecting little general congressional intent. See Sunstein, *supra* note 108, at 429. Justice Scalia suggests that using legislative history to interpret statutory language ends up increasing the power of private interest groups at the expense of the constituents for whom the legislation was passed.

According to proponents of the use of legislative history, however, legislative history may help a court in determining the statute's purpose and provide the needed context within which a court may interpret the statutory language at issue. Sunstein, *id.* at 430. Professor Sunstein suggests that, at the least, legislative history provides judges somewhere to look for meaning. In his view, judges who are unwilling to consider legislative history are more likely to impose their own views on what the statute means. Sunstein, *supra* note 108 at 430. In such a situation, in his view, the remedy is more dangerous than the disease.

126. A number of courts mention that the paucity of COBRA legislative history of COBRA is a consequence of its inclusion in the Budget Reconciliation Act.

127. H.R. REP. No. 241, 99th Cong., 2d Sess. 44 (1986), *reprinted in* 1986 U.S.C.C.A.N. 579, 622 (emphasis added).

128. *Id.*

129. *Id.*

130. *Id.*

131. H.R. REP. No. 247, 101st Cong., 1st Sess. 1452 (1989), *reprinted in* 1989 U.S.C.C.A.N. 2413, 2923.

lative because of the limited legislative history of the provision.<sup>132</sup> As a result, reviewing courts should approach any intentionalist view of that section with caution. Yet the legislative history of COBRA makes at least one thing is clear, to the extent that legislative history exists in this area, it supports the concept that COBRA is a temporary salve intended merely to ensure continued access to the health care system, not red carpet treatment.

### III. ECONOMIC AND PRAGMATIC APPROACHES

Application of each of the generally accepted interpretive tests yields the same result: consideration of substantive rather than temporal differences in the policies is a better approach to the interpretive question. If no rules of statutory interpretation existed, a court applying the "best" view of Section 1162(2)(D) would presumably select the approach that is the most economically efficient and practical. Such an approach would further the dual goals of COBRA; ensuring that employees maintain seamless health insurance coverage while protecting the employers' property rights in not having to continue paying for employees who are receiving similar benefits elsewhere.

#### A. Economic Analysis of the Section

Because COBRA forces employers to subsidize the health care of former employees, employers would like to make such coverage as rare as possible. Former employees, by contrast, would prefer to treat continuation coverage as an option to be exercised only if their medical costs will exceed the amount of premiums paid. If they remain healthy, they reject continuation coverage and if they become ill, they elect coverage. Recognizing the perverse incentives the COBRA statute creates, Congress attempted to set limits on both sides. While employers must offer the coverage, certain events will end their obligation to provide it prior to the expiration of the statutory limit. Similarly, while employees are offered a significant amount of time to decide whether to elect coverage, there is a point where employees must decide and then "ante up" the first premium. The rules governing COBRA attempt to balance the needs of the former employees against the obligations imposed on the employers.

An economic approach to the COBRA statute would also balance the needs of the employees against the obligations of the employer. Considered from an economic perspective, the interpretation that makes the most sense is the one that does not encourage insurance companies to engage in strategic, economically wasteful behavior. Only if the courts adopt the approach utilized by the Fifth and Eleventh Circuits can this goal be achieved. To understand why this is the case, it is worthwhile to examine the potential effects of the Seventh and Tenth Circuits' view of the statute. Under the Seventh and Tenth Circuits' view, a person would remain eligible to elect COBRA continuation coverage even if she was also eligible for primary coverage under a pre-existing group health insurance arrangement, such as dependent coverage under a

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132. *Harrman*, 978 F.2d at 980. As Judge Easterbrook noted, "[u]nfortunately, Congress made a mess of things in the Omnibus Budget Reconciliation Act of 1989 . . . enacted on the last day it met that year. In their rush to get out of town with a bundle of seasonal goodies for their constituents, the Members of Congress neglected . . . details . . ." *Id.*



spouse's group health plan. A primary deleterious effect of this interpretation would be the creation of a windfall for insureds with existing insurance coverage and an existing medical condition. The following example demonstrates how such a windfall might occur; Imagine an insured who is hospitalized at the time she is terminated from her job. Her projected hospital stay is three months at a cost of \$150,000. Let us assume that the insured had a preexisting qualification for coverage under her spouse's group health plan. Under the Seventh-Tenth Circuit approach, the insured would remain eligible to elect continuation coverage through her former employer.

Faced with the projected medical bills, the employer's insurer would have a financial incentive to approach the insured and offer her a financial inducement to reject the continuation coverage, thereby relieving the insurance company of any liability. The spouse's plan, faced with accepting this liability, however, would find it in its best interest to offer the insured a financial inducement to elect the continuation coverage. In the face of these competing bidders, the stakes could quickly rise to where one insurer (the losing bidder) would pay the medical bill, while the other would pay the insured an amount nearly equal to that same medical bill in order to avoid the insurance pay out.

Ironically, the higher the projected medical bills for the insured at the time she elects coverage, the greater her expected "jackpot," as the insurers would bid increasing amounts to avoid their insurance liability. More important, perhaps, is that it is only in situations where a windfall might occur that the Seventh-Tenth Circuit rule would come into play. If an insured had no preexisting medical condition at the time of her election, it is extremely unlikely that she would elect to continue paying 102% of the monthly premiums if she is already covered under another group health plan.

The rule adopted in the Fifth and Eleventh Circuits avoids this windfall effect. Under those cases, a former employee can elect to continue his coverage only when the alternatively available preexisting coverage has a "gap" for an existing medical condition. In those instances, however, there is no windfall concern because the potential windfall insurers would have no reason to bid against one another, because one insurer (the one with the "gap") would have no liability in any event. This approach satisfies both the language of the statute and the Congressional purpose underlying passage of COBRA.

## **B. Identically Situated Individuals Treated Differently**

A secondary consequence of the Fifth and Seventh Circuits' interpretation is that identically situated individuals would be treated disparately. Disparate treatment is both inequitable among the individuals affected and inconsistent with what Congress intended.

Imagine two co-workers, Mr. Smith and Mr. Jones, both of whom are laid off on the same day, and both of whom wish to keep their current coverage under their employer's group health plan. The federal government employs Mr. Smith's spouse, and he is covered under her group health plan. Mr. Jones' spouse is not employed on the day her husband is laid off, but the following day she obtains a job with the federal government. When she is hired, she, like Mrs. Smith, receives group health insurance that covers her spouse. As a result, both Mr. Smith and Mr. Jones are covered in exactly the same manner, by exactly the same insurance policy.

Under the Fifth and Seventh Circuit analyses, the treatment of Mr. Smith and Mr. Jones for COBRA purposes would be vastly different. Because Mr. Smith was already covered through his wife's policy at the time he was laid off, he could elect to continue his own coverage through his employer. Mr. Jones, on the other hand, could continue his coverage for one day, but, assuming he has elected continuation coverage, upon becoming covered under his wife's policy the next day, would lose his continuation rights.<sup>133</sup> Thus, under the Fifth and Seventh Circuits' approach, two identically situated people would receive vastly different treatment.

Differing treatment of similarly situated beneficiaries makes even less sense once one understands how the second provision of Section 1162(2)(D) has been interpreted. Section 1162(2)(D)(ii) of the statute states that an employer may cease to offer continuation coverage if the employee, "first becomes, after the date of election. . . entitled to Medicare benefits." Presumably, a court would interpret the words "first becomes" identically with respect to both provisions of Section 1162(2)(D). If the Supreme Court were to adopt the Tenth and Seventh Circuits' approach to the "first becomes" language, employees who enroll in Medicare prior to termination or layoff would be entitled to COBRA continuation coverage for the entire period even while they continue to receive Medicare benefits. Those employees who did not enroll in Medicare until after the date of the election, by contrast, would have their continuation coverage terminated.<sup>134</sup>

It seems unlikely that Congress would have wished to draw an arbitrary line between those who were lucky enough to turn 65 and enroll in Medicare before their

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133. It is important to acknowledge that had Mr. Jones failed to fill out his election form, he would be entitled to treatment identical to that of Mr. Smith. Under COBRA, the date of election and the qualifying event do not always occur on the same day. A qualified beneficiary has sixty days after notification of COBRA eligibility to elect coverage. 29 U.S.C. § 1165(1) (1994). That section also specifies that the administrator of a single employer plan has 14 days to notify the terminated or laid off employee that she is eligible for continuation coverage. Thus, a qualified beneficiary could have 74 days or longer to elect coverage under COBRA. This delay allows a qualified beneficiary ample opportunity to obtain additional coverage before electing COBRA continuation coverage. In our example, if Mr. Jones had not made his election at the time his wife obtained a position with the federal government, he would be entitled both to continuation coverage and to coverage under his wife's plan because the "other coverage" would not be considered "new" coverage under the Fifth and Seventh Circuits' interpretation. If, on the other hand, he had filled out his election form before his wife was hired, he would not be entitled to continuation coverage.

Assuming that most employees fill out their election form on the last day of work, the qualifying event and the date of election would occur on the same date and the treatment of similarly situated employees would be different and unfair. Even if the typical employee waited the full sixty days after notice to elect continuation coverage, the Fifth and Seventh Circuits' approach still treats similarly situated employees differently. Once again, we can assume that Mr. Smith was covered by his wife's federal government insurance policy prior to his layoff. Thus, Mr. Smith is entitled to continuation coverage if he elects it within sixty days after notification. Mr. Jones' wife, on the other hand, did not obtain a position with the government until forty days of Mr. Jones' eligibility period had expired. If Mr. Jones knew how the rule worked, he would wait until after his wife had obtained the position to make an election. If he was unaware of the rule's operation, he might elect coverage sometime prior to his wife's obtention of the new position and, therefore, be denied extended COBRA coverage. It seems unlikely that Congress intended a result that required employees to be aware of the inner workings of COBRA in the particular circuit in which the employee lived. Thus, even if the election date and the qualifying event do not occur at the same time, the rule adopted in the Fifth and Seventh Circuits appears to treat similarly situated employees differently. See *South Dakota Supreme Court Holds that COBRA Remains Available Despite Medicare Coverage Obtained Prior to Termination of Employment*, 2 No. 5 ERISA Litig. Rep. 7 (1993) for additional applications of this rule.

134. See Roberta Casper Watson, *COBRA Continuation Health Benefits* C980 ALI-ABA 899 (1995).

date of election and similarly situated employees, who unfortunately either had not turned 65 by the date of election or who simply failed to enroll in Medicare prior to the date of election. Because there is no reason to think that Congress wanted to treat these similarly situated employees differently, the only equitable approach is to treat the employees similarly. In other words, an employee who has Medicare coverage at any time after the date of election is not entitled to COBRA continuation coverage.<sup>135</sup> To read the statute to reach the opposite result would do violence to the notion that laws should treat similarly situated people similarly.

#### IV. CONCLUSION

Considered from virtually every interpretive angle, the inescapable conclusion is that an individual fortunate enough to obtain insurance coverage prior to the date of COBRA election should not receive treatment different than an individual who obtains alternate coverage after the date of election. Both events should serve to terminate the beneficiary's entitlement to COBRA coverage.

Although there may be some question whether the plain language of the statute supports this conclusion, there is no question that for COBRA's success, the proper interpretive analysis would be limited to insuring seamless single coverage for employees, not arbitrary dual coverage. Any other interpretation would undermine COBRA's dual goals: protecting employees from situations where their health care has been discontinued and ensuring that employers are not overburdened by the excessive administrative and operating costs that accompany COBRA's mandate that qualified beneficiaries have health coverage.

Moreover, any other interpretation does not make sense from an economic or pragmatic perspective. Considering the current political climate, it makes sense for courts to adopt an efficient and equitable interpretation of a statute especially in a case, like this one, where the fairest interpretation is one that is consistent with both the statute's purpose and language. *Lutheran Hospital* and *Oakley* must not stand.

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135. Interestingly enough, at least one circuit court has determined that eligibility for Medicare, whether it occurs before or after the date of election, serves to terminate the beneficiary's continuation coverage rights. In *Blue Cross and Blue Shield of Tex., Inc. v. Shalala*, 995 F.2d 70 (5th Cir. 1993), the Fifth Circuit found that COBRA coverage terminates when a person becomes entitled to Medicare benefits regardless of whether the eligibility began before or after the date of election. The court stated that Congress could have amended COBRA to exempt End Stage Renal Disease (ESRD) sufferers from the termination provision as it had for retirees of bankrupt companies. According to the court, "Congress' demonstrated ability to clearly amend COBRA" to exempt certain classes of people meant that its failure to do so is strong evidence that eligibility for Medicare terminates one's rights to receive continuation benefits under COBRA." *Id.* at 74.

