

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BONNIE L. GEISSAL, BENEFICIARY AND
REPRESENTATIVE OF THE ESTATE OF JAMES W.
GEISSAL, DECEASED, Petitioner v. MOORE MEDICAL
CORPORATION, ET. AL.

CASE NO: 97-689 C.I.

PLACE: Washington, D.C.

DATE: Wednesday, April 29, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BONNIE L. GEISSAL, BENEFICIARY :

4 AND REPRESENTATIVE OF THE :

5 ESTATE OF JAMES W. GEISSAL, :

6 DECEASED, :

7 Petitioner :

8 v. : No. 97-689

9 MOORE MEDICAL CORPORATION, :

10 ET. AL. :

11 - - - - -X

12 Washington, D.C.

13 Wednesday, April 29, 1998

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 11:04 a.m.

17 APPEARANCES:

18 S. SHELDON WEINHAUS, ESQ., St. Louis, Missouri; on behalf
19 of the Petitioner.

20 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the Petitioner.

24 BRADLEY J. WASHBURN, ESQ., St. Louis, Missouri; on behalf
25 of the Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-689, Bonnie Geissal v. the Moore Medical
5 Corporation.

6 Very well, Mr. Weinhaus.

7 ORAL ARGUMENT OF S. SHELDON WEINHAUS

8 ON BEHALF OF THE PETITIONER

9 MR. WEINHAUS: Mr. Chief Justice, and may it
10 please the Court:

11 In this case, Mr. Geissal, who is now dead, was
12 terminated from his employment by Moore Medical
13 Corporation at a time when he had cancer and was dying of
14 cancer. He was offered immediately COBRA continuation and
15 at the same time his wife had always carried health
16 insurance coverage with her own employer which covered
17 dependents, including Mr. Geissal.

18 He was allowed to continue to make COBRA
19 payments for 6 months, when all of a sudden Moore Medical
20 announced that it was not responsible for his health
21 insurance coverage, they wrongly accepted COBRA payments,
22 they would pay him back, and they would not pay any of his
23 bills.

24 This case was brought, using the wording of the
25 statute, and the wording is simple, and that's where we

1 start with, that coverage must be offered to the
2 individual of the same quality as given to employees, and
3 that would be true -- if employees got dual coverage, he
4 would be entitled to dual coverage, required to offer the
5 same policy, and it must extend for at least the period
6 beginning on the date of the qualifying event and ending
7 not earlier than the earliest of the following, and one of
8 them is, when -- the date on which he becomes -- first
9 becomes qualified after the date of election for further
10 insurance.

11 Now, in this instance, Moore Medical Corporation
12 took the position that he first became, after the date of
13 election, covered by the wife's policy and therefore was
14 not entitled to the coverage. At that point, litigation
15 ensued.

16 QUESTION: Mr. Weinhaus, would you explain to me
17 what your client stands to recover now? Were Mr.
18 Geissal's medical expenses actually paid by the other
19 policy?

20 MR. WEINHAUS: We know some of them were paid.
21 We do not know whether all of them were paid. My
22 understanding, some were not paid, but unfortunately in
23 this case what the magistrate judge did is, after denying
24 our motion for summary judgment, turned around and, sua
25 sponte, without development of anything in the record,

1 declared summary judgment for Moore Medical Corporation,
2 so there is no record and, while Moore Medical does
3 continuously argue, in the absence of a record, that we
4 lost nothing, we don't think that's true.

5 QUESTION: Well, presumably your client ought to
6 know whether something was lost or not. Is there no
7 claim?

8 MR. WEINHAUS: Well --

9 QUESTION: What is the claimed injury now?

10 MR. WEINHAUS: Well, the claimed injury are,
11 amongst other things, we have at least the deductible that
12 we have to pay for, and we have to face health care
13 providers who may hereafter bill us.

14 In these cases, in the health insurance field,
15 the health providers do not send the bill to the patient,
16 usually, they send them to the health institution which is
17 paying the bills.

18 QUESTION: How long ago did this death occur?

19 MR. WEINHAUS: Well, it now occurred a couple of
20 years ago, but --

21 QUESTION: But you don't have any bills and we
22 don't know if there's any injury.

23 MR. WEINHAUS: We have not been told of any
24 bills. The only bills I know of in which there's likely
25 injury is what I call the Greek trip in which he received

1 medication in the Greek Islands, for which --

2 QUESTION: It's just hard to picture what
3 remains of the claim, if anything.

4 MR. WEINHAUS: Well, what also remains of the
5 claim is this. There may be, in fact, double coverage. I
6 don't know here. We have not gotten that far. Moore says
7 there's no double coverage, and at the same time it says
8 there is double coverage.

9 We are entitled, under ERISA --

10 QUESTION: I thought the argument was you would
11 not be entitled to double coverage and one aspect of this
12 that I hope you will clarify, you're talking about maybe
13 bills coming in later, but there are insurance policies.
14 You have both insurance policies and were told that the
15 only difference is in the deductible, and is there another
16 difference? What about the cap on total benefits?

17 MR. WEINHAUS: Well, there's certainly a
18 difference in the cap on total -- well, there's no
19 difference -- there is and there isn't. Each one has a
20 million dollars coverage, so that in essence, had he
21 survived, or had he lived, or had he been willing to
22 assume financial responsibility for more than a million
23 dollars of debt, he could have proceeded.

24 QUESTION: Well, that's very interesting, but he
25 didn't live.

1 MR. WEINHAUS: He did not live.

2 QUESTION: He's dead now, and that's all
3 irrelevant, isn't it, unless, indeed, the bills presented
4 are over a million dollars, or over whatever the limit
5 was.

6 MR. WEINHAUS: Yes, but the --

7 QUESTION: And are they?

8 MR. WEINHAUS: Well, we don't -- we have not --
9 we did not get that far in discovery because of the way
10 that the magistrate handled that, but presuming that they
11 are --

12 QUESTION: Is there a realistic possibility that
13 they are?

14 MR. WEINHAUS: There's a realistic possibility,
15 for the Greek trip, that there are.

16 QUESTION: But wouldn't -- if he took a trip to
17 the Greek Islands, wouldn't he know how much that cost?

18 MR. WEINHAUS: Yes, but -- and we know that
19 Aetna did not pay that. Now, whether Moore --

20 QUESTION: There's another question I had about
21 how this works is, let's assume he's still -- he's just
22 sick, he's not dead, and he's still working, and he's got
23 this dual coverage. Who pays first in these dual coverage
24 situations, his employer or the other, or is it -- how is
25 that worked out?

1 MR. WEINHAUS: Ordinarily, the rule is, his
2 employer and, as pleaded in the case, and as uncontested
3 in the case, Moore was the primary carrier. Moore would
4 pay first and, in fact, even in this case, as --
5 notwithstanding their argument, if Moore was required to
6 pay us the benefit, which is all ERISA allows us in any
7 event, if Moore is required to pay the benefit they have
8 promised to us, and if Aetna's entitled to get from us,
9 then, what Moore has paid us in reimbursement, in
10 subrogation, Aetna would have to pay us our additional
11 deductible.

12 Aetna would have to pay us whatever our premiums
13 cost to make sure that we would not have that. We do have
14 a claim. Even if it's a small claim, it still exists, and
15 Aetna would be -- would have to submit to that.

16 QUESTION: All right. Your claim, as I
17 understand it, is, at a minimum, the claim for the Greek
18 Island trip, which Aetna has not yet paid.

19 MR. WEINHAUS: Yes.

20 QUESTION: And number 2, I think your answer is,
21 assuming, though it didn't get raised explicitly by
22 anybody, that there's nothing in the COBRA act which
23 provides that -- your answer may be assuming that there's
24 nothing in the COBRA act that provides that COBRA coverage
25 will be secondary coverage, necessarily.

1 MR. WEINHAUS: There is nothing that provides
2 COBRA coverage will be secondary. In fact, COBRA says it
3 must be of the same quality as offered to regular
4 employees, and the same quality offered to regular
5 employees is that Moore will be primary.

6 QUESTION: Okay. Then I take it it's fair to
7 say that the situation we're in on standing is this. It
8 may ultimately turn out that you have no recoverable
9 claim, but at this point that is an evidentiary matter and
10 nobody can determine that at this point. Is that a fair
11 statement?

12 MR. WEINHAUS: That's a fair statement.

13 QUESTION: Okay.

14 MR. WEINHAUS: It has not been developed because
15 of the decision of the magistrate to grant summary
16 judgment sua sponte.

17 QUESTION: Mr. Weinhaus --

18 QUESTION: Well, but you claim you have a claim.

19 MR. WEINHAUS: We certainly claim we have a
20 claim, and we know it's at least of the deductible amount,
21 plus whatever premiums they say we would have had to pay.

22 QUESTION: May I be blunt about one aspect of
23 this. Going in, he's still alive, and he's suing, and he
24 could linger for a long time, and maybe he could exceed
25 even the maximum under the policy.

1 MR. WEINHAUS: That was his major concern.

2 QUESTION: But he's now dead, as Justice Scalia
3 has pointed out. The statute provides for attorney's
4 fees, doesn't it?

5 MR. WEINHAUS: Yes, it does.

6 QUESTION: Is that an element that stays on,
7 that -- you have the argument that the deductible, you'd
8 have to -- you're out of pocket the extra \$350, but then
9 you'd have to pay back the premiums to Moore, which amount
10 to in excess of \$2,500, so you net -- you'd be a net
11 loser, unless what you're saying is, if we prevail, then
12 we get our attorney's fees from the beginning of this
13 representation.

14 MR. WEINHAUS: Well, not only that, but I don't
15 think -- I think we're entitled to the entire benefit. If
16 it comes out to \$120,000 --

17 QUESTION: But suppose it was nothing else,
18 could you say, yeah, we still have a claim. It's her
19 claim. It's her claim to get her counsel fees paid.

20 MR. WEINHAUS: And in addition to that, though,
21 Your -- that's correct, but in addition to that, she has
22 the right to say, I want the whole benefit, \$120,000.
23 It's true, Aetna may say to me, give us back 80, give us
24 back 110, or give us back everything, except we're going
25 to pay you what you had to pay in addition.

1 QUESTION: This was a death benefit?

2 MR. WEINHAUS: No. This is health insurance
3 benefits.

4 QUESTION: Well, why would you be paid \$120,000
5 in a lump sum?

6 MR. WEINHAUS: Well, it's my understanding --
7 again, these are from off-the-record statements of
8 counsel, is that they paid -- that Aetna paid \$120,000.

9 QUESTION: To whom?

10 MR. WEINHAUS: To health care providers, to
11 hospitals, to doctors.

12 QUESTION: And you think you have a right to
13 obtain that?

14 MR. WEINHAUS: What ERISA says is that you're
15 not entitled to any damages. You are only entitled to --
16 besides fees, and there are penalties too here, that you
17 are entitled to the benefit, and if we're entitled to 120
18 from Moore, we're entitled to 120 from Moore.

19 Now, Aetna may be in a position, again,
20 depending upon what the law is, to say, uh-uh, we paid
21 120. Now you owe that to us, less your costs and
22 expenses.

23 QUESTION: But you say that doesn't defeat your
24 claim against Moore.

25 MR. WEINHAUS: That doesn't defeat our \$120,000

1 claim in any way, and every other employee of Moore would
2 have the same right to make that same claim if Moore did
3 not pay the bills and some secondary carrier that they
4 also had paid the bill. We're the same as them, and
5 that's real --

6 QUESTION: I guess the issue on that would be
7 whether there's standing when somebody brings a claim
8 which is confronted with a counterclaim of a greater
9 amount than the claim, is there still standing to be the
10 claim. I suppose there is.

11 QUESTION: You mentioned penalties, and are --

12 MR. WEINHAUS: Well, there are also penalties,
13 because --

14 QUESTION: Are those penalties that go into the
15 pocket of the plaintiff?

16 MR. WEINHAUS: Oh, yes, those are penalties that
17 go into the pocket of -- because our theory is, on that,
18 is that if you do not give a proper notice under the
19 statute you're -- this employer is subject to a penalty of
20 up to \$100 a day for not giving a proper notice, and
21 while --

22 QUESTION: But I thought that was a claim that
23 hasn't yet been adjudicated.

24 MR. WEINHAUS: Because this claim has not been
25 adjudicated, but on the adjudication of the claim, if we

1 are correct that they should have continued the policy, at
2 that point in time we are entitled to a penalty of up to
3 \$100 a day being assessed, and that goes to the plaintiff,
4 and at the time they announced this, Mr. Geissal was very
5 much alive and very much concerned about having the
6 wherewithal to survive, if he could.

7 QUESTION: Are you going to get to the merits,
8 do you think?

9 (Laughter.)

10 MR. WEINHAUS: Well, the merits of it are, of
11 course, in the plain meaning of the statute itself, Your
12 Honor, because he was covered already under the wife's
13 policy, the TWA health insurance plan at the time.

14 Now, we are told by the Eighth Circuit that that
15 plan did not become effective until after his election.
16 Now, that is not correct at all, because under ERISA a
17 plan becomes effective when you're covered.

18 Under ERISA, as he would be a beneficiary in the
19 wife's plan, he would be entitled to sue immediately for
20 any plan violation. He would have a right under ERISA,
21 section 502(a)(1), to sue to clarify his rights to future
22 benefits. He would have a right immediately to ask for a
23 copy of the summary plan description and ask for plan
24 information.

25 That right does not start with his termination

1 by Moore, or, worse yet, with the date of his election.

2 QUESTION: Why don't you focus on the exact
3 statutory language that you're relying on, Mr. Weinhaus.

4 MR. WEINHAUS: Yes. The exact statutory
5 language is -- appears on page 23 of our brief. It's --
6 basically says the coverage must extend for at least the
7 period beginning on the date of the qualifying event --
8 now, that is the date of termination -- and ending not
9 earlier than the earliest of the following, the date on
10 which the qualified beneficiary first becomes after the
11 date of election.

12 Now, he -- therefore, under this statute he is
13 immediately covered -- as long as he chooses to elect, he
14 is immediately covered from the date of his termination.
15 Under COBRA, the employer must give you a notice of
16 election, right to elect, within 45 days of the qualifying
17 event. The employer must give the individual 60 days to
18 make the election, and then the individual has yet another
19 90 days to pay the premium.

20 And, incidentally, COBRA's not a free gift.
21 Under the statute it's 102 percent of the employer's cost
22 and as a result, upon his death he immediately becomes
23 covered if he ultimately elects, and none of these cases
24 go into the fact that in fact this coverage continues
25 until at least the date of the election, because it says,

1 it does not end -- end is Congress' words -- not earlier
2 than the date of the following, the date he first becomes,
3 after the date of election, covered.

4 So their -- under their --

5 QUESTION: And you say he never first became
6 covered after the date of election here.

7 MR. WEINHAUS: He never became covered, first
8 became covered after the date of --

9 QUESTION: Or he never --

10 MR. WEINHAUS: He was already covered.

11 QUESTION: He never became covered. He was
12 covered, period.

13 MR. WEINHAUS: He was already -- there was
14 nothing new. First becomes means there must be some
15 change in status, some change in position, and that did
16 not occur here.

17 I'd like to reserve the rest of my time for
18 rebuttal if I may, Your Honor.

19 QUESTION: Very well, Mr. Weinhaus.

20 Mr. Feldman.

21 ORAL ARGUMENT OF JAMES A. FELDMAN

22 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONER

24 QUESTION: Mr. Feldman, the Government asserts
25 as the rationality of the position that you're supporting

1 here that it retains the status quo, but it really doesn't
2 always retain the status quo, because it could be that the
3 additional coverage was acquired after the termination
4 event, but during the period before the election, and then
5 the first becomes would still not apply, isn't that right?

6 MR. FELDMAN: Yes, that's correct.

7 QUESTION: So you're not really preserving the
8 status quo that existed at the time of the person's
9 employment.

10 MR. FELDMAN: I think the general idea is to
11 preserve the status quo, and especially in a case like
12 this it would affect the --

13 QUESTION: And you explain this as a glitch.
14 They just didn't do it quite right.

15 MR. FELDMAN: I wouldn't say it's a glitch. I
16 would say that that was a consequence, a necessary
17 consequence, and one that Congress would have wanted, of
18 their decision to hinge everything from the date of
19 election and not from the date of the termination.

20 The date of termination only sets the notice
21 requirements going in. It's the date of election that
22 determines -- that you're supposed to look at to determine
23 when coverage -- when you can terminate coverage.

24 Having done that, they can't -- there's no way
25 to be sure that somebody in the position of the decedent

1 here at the date that -- let's say -- let's take someone
2 who loses their job on day 1.

3 On day 2, they go get another job. The employer
4 says, do you want health insurance, I don't have much of a
5 policy but we have something to offer you, and the
6 employee says, sure.

7 On -- 30 days later the employee gets a notice
8 that you're entitled to COBRA coverage, and you have 60
9 days to elect, blah, blah, blah.

10 Well, in that case, under respondent's view,
11 because the employee has already accepted coverage under
12 the new job, before he knew the consequences of doing
13 that, he can't get COBRA coverage or at least it would
14 have to terminate right at the day of election.

15 Now, I think that that's a consequence that
16 Congress didn't want. In other words, the only way
17 Congress --

18 QUESTION: But Mr. Feldman, don't they have the
19 gap exception to take care of that?

20 MR. FELDMAN: Well --

21 QUESTION: You posed the case where there was
22 significantly less insurance under the new policy.

23 MR. FELDMAN: Let me -- that is a view -- the
24 significant gap explanation is one that's been adopted by
25 the courts of appeals that have agreed with respondent in

1 the courts below.

2 And they've done that because they realize that
3 Congress generally didn't intend the harsh consequences of
4 someone who was, let's say relying on their own insurance
5 and let's say a family may have been relying very heavily
6 on the employee's insurance and had a supplemental policy
7 also that the spouse had, and those courts have felt,
8 well, Congress couldn't have intended that they lose their
9 primary health coverage just because -- when they
10 terminate their job just because they have some very
11 inadequate coverage under the spouse's policy, so they
12 look at whether there's a significant gap.

13 Under our view, that significant gap inquiry,
14 which isn't triggered by any text in the statute --

15 QUESTION: I'm just saying that it's
16 ameliorated. It's not quite as stark as you say, because
17 they do concede that if there's a significant gap then you
18 retain the --

19 MR. FELDMAN: That would only be the case if you
20 adopt -- if it were true that there is a significant gap
21 inquiry that's required under the statute.

22 Under our view, that doesn't fit into the
23 statutory language, and the way --

24 QUESTION: Because it continues anyway. Because
25 it continues anyway --

1 MR. FELDMAN: Yes. The way that the problem is
2 resolved --

3 QUESTION: if it was not first -- right.

4 MR. FELDMAN: That's right. The way that the
5 problem is resolved is by giving the employee the
6 opportunity to elect. If the employee believes that the
7 other policy is inadequate, the employee will probably
8 elect COBRA coverage and the employee is entitled to get
9 it.

10 If the employee believes that the other coverage
11 is fully adequate, then the employee certainly will not
12 elect COBRA coverage because it's expensive.

13 QUESTION: But the point is, he is in a position
14 to assess whether there's a gap or not.

15 MR. FELDMAN: Right, and he's also in -- I might
16 add that if you look at the significant gap inquiry, it's
17 very hard to work, because the plan administrator has to
18 make the determination sometime after the date of election
19 of comparing the provisions of the two policies.

20 The plan administrator has to know the
21 provisions of the other policy, which the plan
22 administrator may well not have, has to know the medical
23 condition of the decedent to determine whether, in light
24 of that -- not of the decedent, of the employee in most
25 cases, to determine whether, in light of that, the gap is

1 significant.

2 That's an inquiry that's very difficult to make.
3 Under our view, Congress left -- the statute works quite
4 well where those decisions are left up to the employee.

5 In our view also the plain language of the
6 statute is sufficient to resolve the case. The statute
7 says that the employer may terminate coverage on the date
8 on which the qualified beneficiary first becomes, after
9 the date of election, covered under any other plan.

10 QUESTION: Would your argument be the same -- it
11 wouldn't be as good, but would you take the same position
12 if it said, first is covered?

13 MR. FELDMAN: I think argument would be the
14 same, but I do think that becomes is the word that really
15 makes it unambiguous. Or, put it the other way, I think
16 becomes is probably stronger than first, but I think when
17 operating together they plainly convey the meaning that
18 Congress intended here.

19 If you -- if a plan administrator asks, on the
20 date after the date of election says, has this employee
21 today first become covered under any other plan, I think
22 the only possible answer is no. He hasn't first become
23 covered because he was covered all along.

24 QUESTION: First is really a redundant or
25 emphatic word. You can't second become. You either

1 become or you don't become, right?

2 MR. FELDMAN: Right. I -- generally, yes. I
3 mean, there are cases --

4 QUESTION: You either become or you already
5 were, one or the other.

6 (Laughter.)

7 MR. FELDMAN: That's correct. That's correct.
8 But the -- that's correct. It's the becomes is -- carries
9 the major part of the weight, and I do think first adds to
10 it.

11 But in any event, because on the date after the
12 date of election it cannot be said that the employee has
13 first become covered under the other plan, and that won't
14 be true at any other future date if there's continuous
15 coverage, the employer cannot terminate COBRA coverage
16 on -- just right after the date of election on the basis
17 that the employee has first become covered by a plan that
18 he had, in fact, all along.

19 In our view, that fits well within the purposes
20 of the statute because, as I said, it provides -- it
21 enables employees who are relying on that coverage and who
22 may have had wholly inadequate second coverage to make the
23 decision of what kind of coverage is adequate for them,
24 and to have that for this temporary period of time for up
25 to 18 months in a case like this, while they make whatever

1 other plans they wanted.

2 In response -- I just want to add, because I do
3 think that the hardest case for us is the case where the
4 employee -- the case that Justice Scalia raised, which is
5 where the employee gets the coverage during the election
6 period, that really it's necessary to allow that to
7 happen, because that is the only -- the only way that
8 Congress could ensure itself that an employee, when it
9 made an election with respect to the new policy, when it
10 decided it wanted the coverage -- when he decided he
11 wanted coverage under the new policy, it was the only way
12 that Congress could be sure that that was an informed
13 choice.

14 And it's also clear from the general structure
15 of the statute that Congress wanted those -- the employee
16 to have that choice. For example, when a -- let's take on
17 the 65th day, or the 70th day, long after the date of
18 election, and an employee who is covered under COBRA gets
19 a new job, well, at that point, when the new employer
20 says, do you want health insurance under this job, or
21 health coverage, the employee is not -- just because he's
22 offered the health insurance, COBRA coverage doesn't
23 terminate.

24 The statute says it's when he becomes covered
25 under the new plan, not when he becomes eligible under the

1 new plan, and that shows that Congress wanted people to
2 have the opportunity to make the choice as to whether they
3 wanted the COBRA coverage or whether they wanted the new
4 coverage.

5 If you adopt the view of respondent and the
6 court of appeals, the employees wouldn't have that choice
7 very frequently.

8 I think our view is also supported by related
9 provisions of COBRA which provide, for example, that the
10 coverage that's provided under COBRA has to be identical
11 to the coverage that the employee had while working for
12 the former employer, and it's consistent with that purpose
13 to permit employees who had dual coverage, who felt it was
14 necessary because of extraordinary medical needs, because
15 of the inadequacy of a spouse's plan, or perhaps just
16 because of their own very strong desire to have security
17 with respect to their medical costs, to permit employees
18 who are in that situation who had dual coverage before for
19 sometime, to be able to also continue the dual coverage
20 during the temporary COBRA period so long as they're
21 willing to pay for it.

22 QUESTION: The temporary period in this case
23 would be 18 months?

24 MR. FELDMAN: It would be 18 months unless some
25 other qualifying event occurs -- unless some other

1 terminating event occurs, of which there are several
2 others, in addition to the one that's at issue in this
3 case.

4 QUESTION: Mr. Feldman, because it is
5 jurisdictional, can you explain why the Eighth Circuit
6 thought the 54(b) issue -- they said it was -- they
7 considered it a close question, and then didn't expand on
8 it, whether there was an immediately appealable judgment,
9 final judgment --

10 MR. FELDMAN: I don't understand why they said
11 that, because in looking at it myself I didn't see why it
12 was a close question, so in my view it was a valid 54(b)
13 certification and therefore it was validly before the
14 court of appeals.

15 QUESTION: I note that Count IV is discrete.
16 That was for the information reporting. But Count III,
17 maybe that had something to do with why this wasn't
18 finished.

19 MR. FELDMAN: Perhaps it did, but I didn't -- it
20 seemed to me that the issues that were before the court,
21 which were I and II, I was the basic COBRA coverage count,
22 and II -- wait a minute, I'm forgetting here exactly what
23 II was.

24 In any event, I thought that those counts were
25 plainly separate counts that could be resolved on a

1 strictly legal basis that this was, and that they were
2 therefore suitable for a resolution under -- for partial
3 summary judgment under section 50 -- Rule 54(b).

4 If there's no other further questions, that
5 concludes my argument.

6 QUESTION: Thank you, Mr. Feldman.

7 Mr. Washburn.

8 ORAL ARGUMENT OF BRADLEY J. WASHBURN

9 ON BEHALF OF THE RESPONDENTS

10 MR. WASHBURN: Mr. Chief Justice, and may it
11 please the Court:

12 I believe that the petitioner's argument in this
13 case is very disingenuous in a couple of respects. One,
14 of course, has already been addressed by the Court's
15 questions, concerning the blatant attempt at double
16 recovery of insurance benefits. This was never an evil
17 that COBRA was trying to remedy when it was passed to
18 protect people without insurance --

19 QUESTION: Well, why is that relevant? I mean,
20 if he gets \$120,000 from you, and if Aetna wants their
21 money back, they'll get their money back. What's the
22 problem? I mean, what's the problem insofar as it
23 concerns us in this case?

24 MR. WASHBURN: Well, it concerns us, of course
25 is, is that we don't want to pay Aetna.

1 QUESTION: I know it concerns you, but our basic
2 problem is to decide this particular case.

3 MR. WASHBURN: Right.

4 QUESTION: And how is it relevant to our
5 problem?

6 MR. WASHBURN: Well, I think that you have to
7 look at the statute, and the statute as a whole, and we
8 have to -- based upon a holistic look at the statute, have
9 to determine the intent of Congress, and I don't believe
10 that Congress was trying to protect people and allow them
11 to, in essence, win a medical lottery.

12 If they're entitled to a double recovery,
13 everybody who is sick, or even people who aren't sick
14 really would -- should elect COBRA --

15 QUESTION: I don't quite see that, because I
16 thought most insurance policies have in them clauses so
17 that you can't get a double recovery, and one way is, they
18 may have to pay the money back. Another way is, insurance
19 company 2 sues insurance company 1. I thought the
20 insurance industry is filled with devices in contracts
21 that prevent that.

22 MR. WASHBURN: That is correct, Justice Breyer.

23 QUESTION: All right. So is that really a
24 prob -- a --

25 MR. WASHBURN: We don't intend to pay twice.

1 That's certainly -- but it is certainly a problem with
2 this.

3 The other matter that's so disingenuous to my
4 way of thinking is, is complaints about the status of the
5 record.

6 QUESTION: Well, I mean, if you start out
7 saying, this is disingenuous, they don't want double
8 recovery, and then you tell us there's not going to be
9 double recovery, it seems to me that your opening salvo is
10 rather ineffective.

11 MR. WASHBURN: I'm sorry, Justice. I think that
12 it is important that they don't be -- that they're not
13 entitled to double recovery, and I'm wanting to make sure
14 that they're not entitled to double recovery, because we
15 certainly don't want to have to end up paying twice.

16 QUESTION: But what do they call the insurance
17 clauses that prevent -- accommodation clauses, is --

18 MR. WASHBURN: Coordination --

19 QUESTION: Coordination --

20 MR. WASHBURN: -- clauses, Justice.

21 The other issue is, is the complaints about the
22 status of the record. The petitioner made the record.
23 They're the ones that took the interlocutory appeal. They
24 were the ones that prepared the affidavit. The affidavit
25 was prepared some, almost 2 years after the date of the

1 qualifying --

2 QUESTION: Well, they took an interlocutory
3 appeal because they were thrown out as a matter of law on
4 the meaning of this statute, isn't that right?

5 MR. WASHBURN: That is correct, Justice, but
6 what -- it's my position --

7 QUESTION: And nothing to do -- if the statute
8 means what you say it means, then I don't see how any of
9 the rest of this is relevant, because you're not entitled
10 to more than one policy, as you read it.

11 MR. WASHBURN: That's correct, Justice.

12 QUESTION: You say this statute just protects
13 the person against the loss of any insurance, and that --
14 so you present a stark question of statutory
15 interpretation on which you divide -- you prevailed on
16 your reading, and the rest of it seems to me, as Justice
17 Breyer suggested, not relevant to the question before us,
18 which is what does this provision mean.

19 MR. WASHBURN: Okay. I'll address that,
20 Justice. The -- what the provision means, and to look at
21 it and also -- I'd like to point to the Court on pages 1
22 and 2 of the reply brief of the respondent, they sat there
23 and said that my analysis of the COBRA statute as a whole
24 was seriously flawed, and therefore my analysis of what
25 the plain meaning of 1162(d)(2) is was therefore wrong.

1 COBRA works this way, and if you look at
2 section -- and it's at 10a of the appendix of the
3 Government's brief. COBRA, your insurance from your group
4 health plan ceases at the qualifying event, and some
5 companies may obviously have a situation where they let
6 you keep it to the end of the month, or whatever, and that
7 is set forth clearly at 1165(1)(A). Coverage stops at
8 that point in time.

9 What happens is, is then there's this election
10 period where there's a period of time after the qualifying
11 event that the employer has to give notice, and then
12 within 60 days after the notice, the beneficiary, or
13 beneficiaries, as the case may be, have to elect to have
14 coverage, and then within 45 days later they have to pay
15 the premium.

16 Assuming there's notice, assuming there's
17 election, and assuming there's payment of premiums, what
18 happens is, then the policy, and only then, does the
19 policy become effective as of the qualifying date.

20 It's like any other claims-made insurance policy
21 that has a retroactive date. Even though it's paid,
22 purchased on one date, paid for on another date, it can
23 still relate back to a much farther date, and that's what
24 happens here.

25 There is no COBRA coverage until there is an

1 election, and I believe that both the petitioner and the
2 Government seem -- the Government to a lesser extent, they
3 both seem to be making this fallacious understanding of
4 the statute, and --

5 QUESTION: Why did Congress use the word,
6 continuation coverage? It didn't say, renewal, or -- it
7 says continuation.

8 MR. WASHBURN: I'm sorry, Justice Ginsburg,
9 where --

10 QUESTION: I thought that the statute uses the
11 words, continuation coverage.

12 MR. WASHBURN: It does at times, yes.

13 QUESTION: -- section 1162.

14 MR. WASHBURN: Right, and 1161, also.

15 QUESTION: That -- at least that caption seems
16 to run counter to what you're describing, which is a
17 termination and then a revival.

18 MR. WASHBURN: Well, it's new coverage, but it's
19 coverage that relates back to the qualifying event.

20 Somebody, just because they quit working for a
21 company, or are terminated from their company on
22 January 1, doesn't have free right and free mandatory
23 insurance from January 1 through, say, 60 days, through
24 February 28, or --

25 QUESTION: You get it retroactively when you pay

1 the premium.

2 MR. WASHBURN: You get it ret --

3 QUESTION: I don't see how that affects the
4 issue that's before us here.

5 MR. WASHBURN: How it affects the issue before
6 us, Justice Scalia is, is what we have to do is, is to
7 interpret the plain meaning of the statute is, is I
8 believe we have to focus on that clause, after the date of
9 election, set forth in 1162, and that extremely dangling
10 prepositional clause is set off, and it's an independent
11 prepositional clause, and what it -- the whole statute is
12 talking about is, is --

13 QUESTION: Where do we find this independent
14 clause in the brief?

15 MR. WASHBURN: In the -- I'm using the
16 Government's brief.

17 QUESTION: Yes.

18 MR. WASHBURN: It's at -- at page 5a.

19 QUESTION: And whereabouts on the page?

20 MR. WASHBURN: On the very first paragraph.

21 QUESTION: Thank you.

22 QUESTION: Will you deal with, before you get to
23 the after, first become?

24 MR. WASHBURN: The Government's position is, is
25 that becomes is an extremely strong word. I take extreme

1 exception with that position, that becomes is a strong
2 word. It's an extremely passive word, in fact, and it's a
3 very amorphous term. We're not really sure what becomes
4 is.

5 If they use a strong active verb like, it only
6 originates at that point in time, I can understand that,
7 but if you look at the dictionary definitions set forth by
8 the petitioner at paragraph 24, and the Government's
9 position wasn't anything much different than that, it
10 defines become to pass from one state to another, to enter
11 into some -- assuming or receiving new properties or
12 qualities, additional matter, or a new character.

13 Well, it's our contention that the -- in this
14 case the Aetna plan, the preexisting spousal insurance
15 plan, took on an extremely new character. It became the
16 primary insurance, and so there was coverage.

17 QUESTION: This first becomes coverage --

18 MR. WASHBURN: Yes.

19 QUESTION: I mean, I'd like to get your answer
20 to Justice Scalia's question. I mean, you had a point,
21 which was quite right, that if on -- he's fired on, say,
22 January 1, or leaves the job. He gets his notice, let's
23 say on February 1. He has until April 1 to elect. Now,
24 if he elects on, let's say, March 15, he's covered back to
25 January 1.

1 What's the relevance of that point? That was
2 what I think Justice Scalia asked, and --

3 MR. WASHBURN: Well, first of all the relevance
4 is, is that the petitioner --

5 QUESTION: Throughout this whole period, of
6 course, he's covered by the Aetna policy.

7 MR. WASHBURN: Right.

8 QUESTION: So -- it has to do with what happened
9 to the Aetna policy. He didn't first become covered by
10 the Aetna policy after the election period. He was
11 covered by the election policy forever. I mean, long
12 before -- by the Aetna policy.

13 MR. WASHBURN: I appreciate that position.

14 QUESTION: But what's your answer? I mean,
15 that -- go back to Justice Scalia's question. What is
16 the -- what is the point?

17 MR. WASHBURN: My answer to it is this -- as the
18 Eleventh and the Eighth Circuit in this case found out is,
19 is that the -- this statute talks about the suspension of
20 coverage, when coverage may end, and its -- is -- coverage
21 may end only after the date of election. That is the
22 first time that the employer has the right to suspend the
23 coverage.

24 We -- it's axiomatic, as an employer, we don't
25 have the right to suspend something that's never been

1 elected. We can't suspend it. It's simple. I mean, it's
2 that --

3 QUESTION: So --

4 MR. WASHBURN: So what the point becomes is, is
5 that the exact date of the obtention of this preexisting
6 policy really doesn't have a whole lot to do with it, and
7 let me give you a hypothetical that may somewhat clear it
8 up. Let's change the facts of this situation only
9 slightly.

10 Mr. Geissal was working for Moore Medical. His
11 wife, instead of being a long-term employee of TWA, became
12 an employee of TWA only 6 months before Mr. Geissal was
13 terminated, and the TWA plan has a 1-year preexisting
14 condition clause.

15 QUESTION: Your point basically is, don't pay
16 that much attention to the words become after the date of
17 election and first, for the reason that, until the
18 election, there was nothing in effect, so it's natural for
19 Congress to have used those words, since the election
20 created a nothing into a something.

21 MR. WASHBURN: That's correct.

22 QUESTION: It really has nothing to do with the
23 issue before us.

24 MR. WASHBURN: That's absolutely correct.

25 QUESTION: That's your argument. Good. If I

1 understand that, then, let's go to the question of why
2 Congress might have wanted it, and I take it that the
3 reason they might have wanted this interpretation that the
4 petitioners have is because they figure all of us -- you
5 know, many people in this room, hundreds of people have
6 coverage through their employer, their spouse works, he or
7 she has coverage as well, so everybody has two policies,
8 basically, the potential for two. Not everybody in the
9 world, but huge numbers.

10 And what Congress is interested in, after all,
11 is that when you lose -- when one spouse loses one job,
12 they want a conscious choice, or otherwise you're covered
13 for 18 months. So during the 18 months period, if you
14 don't make a conscious choice to go choose something else,
15 you're still covered by your employer. If you make a
16 conscious choice, the employer should be off the hook.

17 Now, I mean, that's an obvious reading, I guess,
18 of the purpose. That seems to be what I got out of the
19 other side's briefs. What's your response?

20 MR. WASHBURN: That basically gets back to the
21 preservation of the status quo argument. First of all, if
22 Congress were so concerned about the preservation of the
23 status quo, their -- the provisions also in the same sub-
24 sub-subsection of this act, also (ii), deals with
25 medicare, and medicare is a mandatory event that causes

1 termination.

2 It talks about eligibility for medicare being a
3 terminating event, and medicare has -- is substantially
4 different in the character of the policies between the
5 normal group health plan and this group health plan.

6 For one thing is, is almost all group health
7 plans have prescription medication health. Whether
8 it's -- there's a co-pay, or whether they pay all of it,
9 or whatever, there's something in there. Medicare
10 certainly doesn't have that type of provision.

11 So there's two points is, is one is there's no
12 issue here, and there's nothing that can be gleaned from
13 the face of the act that shows that Congress was concerned
14 about the preservation of -- an identical preservation of
15 the status quo, and there's --

16 QUESTION: So that's your point on this one, I
17 take it, is look, all Congress wanted is to give you the
18 18 months if there's no other coverage in the family.

19 MR. WASHBURN: Right, without the free --

20 QUESTION: That's -- all right. And if there
21 is -- now, that -- if we bought that argument, I mean, I
22 think that would work a major change in COBRA, wouldn't
23 it?

24 MR. WASHBURN: No, I don't believe that it
25 would.

1 QUESTION: Now, aren't lots of people covered
2 with two policies because the spouses both work, or not?

3 MR. WASHBURN: I have --

4 QUESTION: What do you -- you're in this -- I
5 mean, just speaking out of your experience, this is
6 your -- basically I gather you've represented a lot of
7 these cases. Are most -- I just -- on the basis of
8 acquaintanceship, it seems to me a lot of people have both
9 spouses working and they each have a policy at their place
10 of employment, so on the basis of that, wouldn't you say
11 this would suddenly make this 18-month business pretty
12 meaningless, if we accept your interpretation?

13 MR. WASHBURN: Justice Breyer, I do assume that
14 there's probably a lot of people who do have this
15 situation, that there are a lot of people with preexisting
16 spousal insurance. To the extent that it does cause those
17 people to not be able to have double coverage, yes, it --

18 QUESTION: All right. If Congress really
19 intended so to limit the 18-months -- you know, this looks
20 like -- I would think that this extra 18-month safety
21 valve that they build in would in vast numbers of cases
22 become meaningless, and wouldn't we expect to find
23 something in the legislative history, or some place, that
24 would suggest that this limitation, so major a limitation
25 was intended?

1 MR. WASHBURN: I don't know the -- I certainly
2 don't know the answer to that. This -- as cited by the
3 petitioner, there is a law review article that said this
4 was a midnight passage and that there really isn't a lot
5 of legislative history on this.

6 The act was passed primarily -- it was a budget
7 act. It was a comprehensive budget act, and it was passed
8 in response to staggering budget deficits, and one of the
9 concerns was, was that the Government not have to be the
10 health insurance of last -- health insurer of last resort,
11 and to save the Government money. That was really
12 probably what --

13 QUESTION: Well, Mr. Washburn, under the COBRA
14 scheme, I take it that your client, the insurance company,
15 is paid a premium for the COBRA coverage. It isn't as
16 though it's free.

17 MR. WASHBURN: That's correct, we are paid a
18 premium, but the practical matter is, is the cost of
19 providing benefits to COBRA are always substantially -- or
20 not always, but they as a rule are substantially greater
21 than the premiums that are received, because people --

22 QUESTION: How is that?

23 MR. WASHBURN: Well, because people --

24 QUESTION: I assume you make that back from the
25 employer when you sell the employer the whole package. I

1 mean, you've got to get it from somewhere.

2 MR. WASHBURN: Justice Scalia -- I'm sorry.
3 We're self-insured. This is not an insurance plan. We're
4 a self-funded group health plan.

5 QUESTION: No, but I mean, if you're losing
6 money on the premiums that you get from the retired
7 employees, or the terminated employees --

8 MR. WASHBURN: Mm-hmm.

9 QUESTION: -- of this employer, you would not
10 sell insurance to this employer unless, when you sell
11 insurance to the employer, you get enough premiums from
12 his current employees, contributed to by the employer or
13 not, to make up for that loss.

14 MR. WASHBURN: That is correct.

15 QUESTION: So, you know, you're happy. It works
16 out okay.

17 MR. WASHBURN: Well, the insurance company may
18 be happy, but the employer and the existing employees may
19 not be happy, because of -- particularly with small
20 groups, COBRA --

21 QUESTION: It comes out of their pockets.

22 MR. WASHBURN: It comes out of their pockets
23 and, in fact, what it may have the long-term effect of
24 doing is, is causing a lot of particularly smaller plans
25 to just cancel the group health insurance leaving

1 everybody bare, the COBRA people plus all of the
2 employees.

3 If I may, I'd like to finish my -- the
4 hypothetical I was creating on the situation where we just
5 changed the facts, where -- that Mrs. Geissal only went to
6 work for TWA 6 months before the date of the election and
7 it had a 12-month exclusion, so if you take even the
8 petitioner's position is, he was terminated and 6 months
9 later he first became covered by another plan without a
10 preexisting condition clause, because 6 months after the
11 qualifying event there is now no longer a preexisting
12 limitation in the Aetna or TWA plan.

13 So now, even using his analogy, he obviously
14 first becomes covered by another group health plan that
15 does not contain a preexisting condition, exclusion, or
16 limitation, so obviously, if you even take that, you can
17 see that there is nothing about having preexisting spousal
18 insurance coverage that caused -- that was bothering
19 Congress, that there's an obvious situation --

20 QUESTION: Well, it may have been bothering
21 Congress, but if I understand what you're saying, it --
22 you're saying it shouldn't bother us because that's not
23 the case here.

24 MR. WASHBURN: It's not the case --

25 QUESTION: I think you're saying there's another

1 ground upon which you ought to win this case.

2 MR. WASHBURN: Right.

3 QUESTION: And it's not a ground that was passed
4 upon, as I understand it, in the summary judgment that was
5 entered.

6 MR. WASHBURN: Justice Souter, I believe that
7 the plain language of the statute dictates --

8 QUESTION: No, the plain language of the statute
9 may dictate it, but the -- as I understand it, the summary
10 judgment was not entered on the assumption that the policy
11 coverage to which the statute applies is as you have just
12 described it.

13 If you are correct, perhaps there is another
14 basis upon which you should win this case, but I didn't
15 understand that to be the basis upon which summary
16 judgment was granted here.

17 MR. WASHBURN: Summary judgment was granted here
18 is, is because the trial judge determined that -- he went
19 along with what the Eleventh Circuit and national
20 companies and now the Eighth Circuit ruled.

21 QUESTION: Okay, and that's a different issue.
22 That's an issue of law.

23 MR. WASHBURN: Right.

24 QUESTION: And now, if I understand what you're
25 saying, you're raising an issue of fact under the policy

1 to be applied to that law, but that was a stage to which
2 the lower courts never progressed, isn't that the case, or
3 am I misunderstanding you?

4 MR. WASHBURN: Maybe I'm not making myself
5 perfectly clear, Justice. I was trying to make a
6 hypothetical to show --

7 QUESTION: You're not suggesting those
8 hypothetical facts are the facts of this case.

9 MR. WASHBURN: No, they're not the facts of this
10 case.

11 QUESTION: Okay.

12 MR. WASHBURN: There was -- as I understand it,
13 Mrs. Geissal had been covered for years by the TWA plan.

14 QUESTION: You're just basically saying there
15 are situations in which there could be a preexisting
16 policy but yet it still -- that policy wouldn't amount --
17 would not first become applicable, and so forth.

18 MR. WASHBURN: Right, and all I'm just showing
19 is, is that --

20 QUESTION: Yes.

21 MR. WASHBURN: -- a supercilious approach to
22 looking at just the date of obtention of the spousal
23 policy really isn't in keeping with the act, and I'm just
24 showing that the pure position of, say, all pre-existing
25 spousal coverage is exempt from COBRA makes no sense

1 because of this hypothetical situation.

2 QUESTION: Yes, with the hypothetical -- I mean,
3 that's clever. I mean, it's a very -- it's -- I take it
4 your hypothetical argument is that there will be a bunch
5 of COBRA policies that will coexist with a spouse's pre --
6 you know, preexisting policy, and now when COBRA ends the
7 spousal's policy kicks in only because the COBRA has
8 ended, because under the rules, COBRA would have been the
9 first payor.

10 And so you're saying at least in that situation
11 the spouse's policy became -- what's the word, became --

12 MR. WASHBURN: Became primary.

13 QUESTION: Became primary, and you say therefore
14 it became -- first became coverage. That's your argument.
15 Is that right?

16 MR. WASHBURN: It's one of my arguments, yes.

17 QUESTION: All right. But I mean, that's the
18 hypothetical argument. All right -- which I thought was a
19 very interesting argument, and my concern with that
20 argument is simply that that would turn the statute on a
21 real patchwork, since sometimes the COBRA policy is the
22 first payor, sometimes, I would guess, the COBRA policy is
23 the second payor, and you couldn't make it, and sometimes
24 there would be policies in respect to portions of which
25 the COBRA would be the first and portions of which the

1 COBRA would be the second.

2 So if we accepted that argument, what we had
3 read -- read into this statute would be a hodge-podge, and
4 nobody would probably know who was covered under what.

5 MR. WASHBURN: Justice, if I may, I --

6 QUESTION: Yes. Is that -- yes.

7 MR. WASHBURN: -- get into that. This is
8 basically a coordination of benefit rules. The National
9 Association of Insurance Commissioners has model 120, that
10 talks about the coordination of benefits if there's COBRA,
11 and 38 States, including Missouri and Connecticut, which
12 are the only two States that have any nexus whatsoever to
13 this case, have adopted the model code from the NAIC.
14 What it does --

15 QUESTION: This is not a coordination of
16 benefits provision, and this is probably your -- your
17 hypothetical is probably why Congress did not key this to
18 primary coverage. It just said coverage, and the question
19 of primary coverage, secondary coverage, is something to
20 be thrashed out later on. Isn't -- in this and in every
21 case. Isn't that true?

22 MR. WASHBURN: Well, I don't know that primary
23 and secondary coverage should be thrashed out in every
24 single case. There aren't a lot of cases out there
25 holding what primary and secondary coverage is.

1 QUESTION: But could you explain to me, in the
2 context of this case, he gets sick. He's covered under
3 your company's insurance and his wife's policy. Who pays?
4 There must be something in your policy and their policy
5 about coordination of benefits.

6 MR. WASHBURN: Our policy, our plans -- our
7 plan, ERISA plan, sits there and says that Aetna would
8 pay, that they're primary, and that is also in accordance
9 with the NAIC model code that COBRA --

10 QUESTION: That any other insurance -- you have
11 the, I would think that you insure your own and the
12 spouses would be secondary, but you say no, that -- if you
13 employ someone, any other insurance that that person has
14 would be primary and not yours?

15 MR. WASHBURN: No. While Mr. Geissal was
16 working for us, under the coordination of benefit rules we
17 were his primary insurer.

18 Under our plan, and also under the model rules
19 of the NAIC as adopted by 38 States, we became secondary
20 immediately upon -- assuming that we were -- assuming we
21 gave him COBRA, or this Court were to order us to give him
22 COBRA continuation insurance, under the model code we
23 would be secondarily liable to anything that just
24 wasn't -- an allowable expense that wasn't paid by Aetna.

25 QUESTION: What body of law determines whether

1 you shift from being primarily liable as the employer to
2 secondarily liable? You said something about a model
3 code, but a model code is not law unless somebody enacts
4 it.

5 MR. WASHBURN: Well, in my brief I did cite that
6 Missouri and Connecticut have adopted the model code,
7 Justice.

8 QUESTION: And is that a matter determined by
9 State law rather than ERISA law?

10 MR. WASHBURN: Yes, it is, and it's definitely
11 within the exception for matters of insurance. It's not a
12 matter of Federal preemption, something that -- certainly
13 far afield from what we're arguing about here.

14 QUESTION: Because there, there is a difference
15 between the two of you on what the law is, I thought.
16 Maybe I misunderstood Mr. Weinhaus, but I thought he said
17 that the employer, even with COBRA coverage, would remain
18 the primary insurer and Aetna would remain the secondary,
19 just as it was before.

20 MR. WASHBURN: That is what they pled in the
21 lower -- in the trial court. I think it was paragraph 15
22 of Count I. They said that Moore Medical plan would be
23 primary. We disputed that. We've denied it all along,
24 and we believe the law is substantially in our favor on
25 who would be primary and who would be secondary, assuming

1 that there even were COBRA.

2 QUESTION: Mr. Washburn, can I ask you just to
3 comment on one thing that the other side raised, the
4 significant gap argument, that they say under your view
5 you have a significant gap problem. Under their view the
6 injured -- the ill person makes the decision right away
7 and there isn't a significant gap problem.

8 MR. WASHBURN: Okay. I could talk -- I don't
9 have a whole lot of time to talk on that, and I could talk
10 for a long time on that, but assuming it's the individual,
11 the ill person who has the right to make that election,
12 essentially that just reads away the sub-subsection that
13 we've been talking about. It makes it a nullity.

14 It takes away the employer's expansive rights
15 and liberal rights to terminate COBRA coverage. It's now
16 totally in the hands of the ill person, and it's not --
17 they can make the election, and it's not that situation.

18 The gap has to do with whether there's a gap
19 between the policies. Obviously, you know, there's always
20 going to be a gap when you have to drop one policy.

21 QUESTION: But if there is a significant gap, in
22 your view, what happens?

23 MR. WASHBURN: Well, under the status of the law
24 basically in the Eighth Circuit if there is a
25 substantial -- if there were a substantial gap, then COBRA

1 continuation insurance coverage would have to be offered,
2 and obviously the -- two courts have now held in this case
3 that there was no significant gap, and there is no
4 significant gap in this case.

5 If there are no more questions --

6 QUESTION: Thank you, Mr. Washburn.

7 Mr. Weinhaus, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF S. SHELDON WEINHAUS

9 ON BEHALF OF THE PETITIONER

10 MR. WEINHAUS: I only have one answer, Justice
11 Ginsburg, to your question as to what law prevails here in
12 terms of how that -- how the coverage should be read, and
13 that's a decision of this Court some years ago, FMC v.
14 Halliday Corporation, in which you held self-insured funds
15 are not subject to State insurance regulations at all.

16 QUESTION: Mr. Weinhaus, could you -- I meant to
17 ask this of Mr. Feldman, too, but maybe you can satisfy
18 me. I -- you and he have given some reasons why this --
19 it makes sense to read first becomes as you do with regard
20 to (i), but the first becomes clause also applies to
21 (ii), first becomes after the date of the election in the
22 case of a qualified beneficiary other than a qualified
23 beneficiary described in section 11 -- of this title,
24 entitled to benefits under medicare.

25 Why does it make any sense to say, well,

1 we're -- the -- we're going to allow medicare benefits to
2 eliminate your -- the employer's continuing obligation to
3 give you this coverage, but only if those medicare
4 benefits first become available after the election?
5 What's the reason for that?

6 MR. WEINHAUS: I do know -- of course, I can't
7 speak to what Congress intended as to medicare, but I do
8 know in the early history, when COBRA was being discussed,
9 that in fact Congress really carved out -- they said first
10 becomes for other insurance, and they left out the first
11 becomes for medicare, so I tend to believe that Congress
12 always believed there was some slight difference between
13 the two and the way it was going to treat it, but I
14 can't --

15 QUESTION: But they end up treating the two of
16 them the same, and I must say, it doesn't make any sense
17 to me with respect to medicare, since that's mandatory. I
18 mean, it's not something you have the option of taking on
19 or not.

20 MR. WEINHAUS: If there are no other questions,
21 Justice, we would rest.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Weinhaus. The case is submitted.

24 (Whereupon, at 12 noon, the case in the above-
25 entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

BONNIE L. GEISSAL, BENEFICIARY AND REPRESENTATIVE OF THE ESTATE
OF JAMES W. GEISSAL, DECEASED, Petitioner v. MOORE MEDICAL
CORPORATION, ET. AL.

CASE NO: 97-689

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Maria Fedirko-----

(REPORTER)