Part IV -- Items of General Interest

Amicus Brief in Geissal v. Moore Medical Corp.

Announcement 98-22

The Solicitor General of the United States is filing, on March 4, 1998, a brief as amicus curiae in Geissal v. Moore Medical Corp., 114 F.3d 1458 (8th Cir. 1997), cert. granted, 66 U.S.L.W. 3490 (U.S. Jan. 23, 1998) (No. 97-689). In accordance with the recommendation of Treasury and the Internal Revenue Service, the Solicitor General takes a position in the brief that is contrary to a provision in proposed Treasury Regulations relating to the group health continuation coverage requirements under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA").[1] This announcement provides for continued reliance, for purposes of the excise tax under section 4980B of the Internal Revenue Code, on the position taken in the proposed regulations pending the Supreme Court's decision in Geissal.

BACKGROUND

Upon the occurrence of certain events (such as a termination of employment other than for gross misconduct) that would

[1] COBRA added group health continuation coverage requirements to the Internal Revenue Code, the Employee Retirement Income Security Act of 1974 (ERISA), and the Public Health Service Act.

otherwise cause certain individuals to lose coverage under a group health plan subject to the COBRA continuation coverage requirements, the plan must offer to those individuals (defined in the statute as "qualified beneficiaries") the right to elect continuation coverage. Among the dates on which a group health plan may stop making COBRA continuation coverage available is the "date on which the qualified beneficiary first becomes, after the date of the election, covered under any other group health plan . . . which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary . . . ." Section 4980B(f)(2)(B)(iv) of the Code.[2]

Clause (d) of Q&A-38 of proposed Treasury Regulation 1.162-26 provides that COBRA continuation coverage can cease to be made available on "the first date after the date of the election upon which the qualified beneficiary is covered . . . under any other group health plan . . . ."[3] Thus, under the proposed regulations, group health plans would not be precluded from terminating a qualified beneficiary's COBRA continuation coverage

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[2] A group health plan may generally also stop making COBRA continuation coverage available on the date on which a qualified beneficiary first becomes, after the date of the election, entitled to Medicare benefits. See section 4980B(f)(2)(B)(iv) of the Code.

[3] The proposed regulations were published in the Federal Register on June 15, 1987 (52 FR 22716), interpreting the COBRA continuation coverage requirements under section 162(k) of the Code. In 1988, the COBRA continuation coverage provisions in the Code were moved from section 162(k) to section 4980B.

due to the beneficiary's other coverage merely because the beneficiary obtained the other coverage before the date of electing COBRA continuation coverage.[4]

A number of cases brought by qualified beneficiaries under title I of ERISA have focused on this issue. The Tenth and Seventh Circuits have held that group health plans cannot cease making COBRA coverage available due to other coverage that began before the date of the election for COBRA coverage.[5] The brief being filed as amicus curiae in Geissal supports this view. The Fifth and Eleventh Circuits, and the Eighth Circuit in Geissal, have adopted a contrary view.[6]

As noted above, proposed Treasury Regulation 1.162-26 took the position that a group health plan may cease making COBRA

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[4] Under the proposed regulations, group health plans would also not be precluded from terminating a qualified beneficiary's COBRA continuation coverage due to the beneficiary's being entitled to Medicare benefits merely because the beneficiary became so entitled before the date of electing COBRA continuation coverage. See Q&A-38(e) of prop. Treas. Reg. 1.162-26. Moreover, under the proposed regulations, group health plans would not be required to make COBRA continuation coverage available at all to someone who, on the day before the qualifying event, was already entitled to Medicare benefits. See Q&A-15(b)(2) of prop. Treas. Reg. 1.162-26.

[5] Oakley v. City of Longmont, 890 F.2d 1128 (10th Cir. 1989); Lutheran Hospital of Indiana, Inc. v. Business Men's Assurance Company of America, 51 F.3d 1308 (7th Cir. 1995).

[6] Brock v. Primedica, Inc., 904 F.2d 295 (5th Cir. 1990); National Companies Health Benefit Plan v. St. Joseph's Hospital of Atlanta, Inc., 929 F.2d 1558 (11th Cir. 1991); Geissal v. Moore Medical Corp., 114 F.3d 1458 (8th Cir. 1997).

continuation coverage available to a qualified beneficiary due to the beneficiary's other group health coverage even if the other coverage began before the date of the election for COBRA coverage. After further consideration of the issue, however, Treasury and the Internal Revenue Service now believe that the better interpretation of the statute is that a plan is not permitted to cease making COBRA coverage available merely because of other coverage (or entitlement to Medicare benefits) that began before the date of the election for COBRA coverage.

RELIANCE ON PROPOSED REGULATIONS

Q&A-6 of proposed Treasury Regulation 1.162-26 provides that, for the period before the effective date of final regulations, a group health plan must comply in good faith with a reasonable interpretation of the statutory requirements. Q&A-6 further provides that the Service will consider compliance with the terms of the proposed regulations to constitute good faith compliance with a reasonable interpretation of the statutory requirements as they existed when the proposed regulations were published (with an exception for provisions of the statute not addressed in the proposed regulations).

This announcement provides for continued reliance on Q&A-38(d) of proposed Treasury Regulation 1.162-26, pending a decision by the Supreme Court in Geissal, with respect to the treatment of certain qualified beneficiaries. (This announcement

does not affect private rights of action of qualified beneficiaries under title I of ERISA.) Specifically, the continued reliance applies with respect to a qualified beneficiary who, after the date of the election for COBRA continuation coverage, has other group health coverage that does not contain any exclusion or limitation with respect to a preexisting condition of the qualified beneficiary. Accordingly, no excise tax under section 4980B of the Code will be assessed with respect to any period before the date of the Supreme Court's decision in Geissal merely because the plan ceases to provide COBRA continuation coverage to a qualified beneficiary described in the preceding sentence, even if the other group health coverage took effect on or before the date of the election for COBRA continuation coverage.[7]

[7] This announcement also provides for continued reliance on Q&A-15(b)(2) and Q&A-38(e) of proposed Treasury Regulation 1.162-26. Accordingly, no excise tax under section 4980B of the Code will be assessed with respect to any period before the date of the Supreme Court's decision in Geissal merely because a plan does not make COBRA continuation coverage available to an individual who is entitled to Medicare benefits on the day before a qualifying event affecting the individual, or merely because a plan ceases to provide COBRA continuation coverage to a qualified beneficiary on the basis that the qualified beneficiary is entitled to Medicare benefits, even if the beneficiary became entitled to Medicare benefits on or before the date of the election for COBRA continuation coverage.

DRAFTING INFORMATION

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