

LONG TERM CARE INSURANCE

(What you need to know before you buy)

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I. Overview of Contents

This paper is intended to be a primer for the Elder law Attorney to gain a quick and basic knowledge of the issues involved in examining Long Term Care Insurance (LTCI) . Many of the collateral issues concerning the purchase of LTCI such as the financial suitability of the individual for LTCI are purposely omitted from this paper. The issue of who should or should not purchase the coverage requires very sophisticated analysis of the financial profile, medical history and personal desires of the client. There are considerable treatises and scholarly articles on the suitability issue. The author has included an extensive bibliography at the end of this paper that can provide much more in depth analysis and guidance with all of the issues involving the purchase of LTCI than will be addressed herein. The Texas Department of Insurance has promulgated regulations concerning Minimum Standards for Benefits for Long-Term Care Coverage Under Individual and Group Policies found at §3.3801 of the Texas Administrative Code. Anyone preparing to advise clients in this area would be well served to acquire these sources and to study them in advance of rendering such advice. As previously stated the issue of who should purchase LTCI is subject to examination on many levels but one leading consumer group specifically recommends against the purchase of such coverage for consumers with less than \$75,000.00 in assets (not counting home or car) and less than \$30,000.00 in annual income.¹ The process of evaluating and helping clients select LTCI requires the Elder law Attorney to have knowledge of several areas other than those directly related to the terms and practices of the insurance industry. In order to understand and evaluate the efficacy of LTCI the attorney must be knowledgeable about the public sources of payment for long term care, namely the Medicare and Medicaid programs. Any attempt to evaluate the coverage or value of a policy without thorough knowledge of the availability or limits of benefits from these sources would be a disservice to the client and should not be undertaken. Additionally, the financial components of these policies and the economic analysis involved in selecting the proper coverage requires sophisticated techniques for determining the impact of changes in income and compound rates of return that most often can only be done with financial planning software or the use of a financial calculator. If the Elder law Attorney is not comfortable with these areas or does not wish to invest in the software then it may be an appropriate time to confer with a financial planner to assist in the financial analysis. With these caveats in mind we turn to the policy provisions themselves.

II. Show Me The Policy

The first task that must be completed is to obtain a copy of the policy. This may seem like a basis step but most companies will only provide their prospective buyers an outline of the policy.² The first time most consumers see the actual policy is during their 30 day "free look" period. The only problem with the "free look" period is that it is not free and it is not a look period, it is more a "have bought and paid for" period. The consumer has 30 days after they have purchased and paid for the policy to examine the policy and if they change their mind during the first 30 days they can if they follow the procedure correctly get a refund of their money.

Most companies will produce a copy of a "specimen" policy upon request of the attorney.³ It is important to keep in mind that the policy is the legally binding contract with the company and nothing that

¹ Norman, A., Polniaszek S. and Firman, J., Long Term Care Insurance A Professional's Guide To Selecting Policies , United Seniors Health Cooperative (3rd ed. 1995), at 135

² Kaplan, Natalie J. , "The Role of the Independent Advisor in Selecting A Long Term Care Insurance Policy," NELA 9th Symposium Manual, (May 1997) p. 35.

³ *id.* at 36.

is said or done by the consumer or the agent selling the policy will be remembered many years in the future when benefits are sought under the policy. Also keep in mind that the person in your office who is in fact the purchaser of the policy will in all probability be very ill or possibly totally incapacitated when someone has to knock on the door of the insurance company and obtain the benefits. Most often it will be the adult children of the purchaser or possibly the guardian of the person that will be filing the claim.

III. Clarification of Policy Terms Policy Terms

A. Benefit Triggers. These provisions are sometimes referred to as the "gatekeeper" provisions. These are conditions precedent to coverage by the LTCI policy. Usually, these provisions are based on a degree of disability that a patient must have before the policy will pay benefits. There are two standard triggers, one related to physical disability and the other to mental disability.

1. *Physical Disability.* Most policies base coverage on the need for assistance with at least two activities of daily living (ADLs) out of five from the most common scale the Katz Activities of Daily Living Scale. The five activities of daily living most commonly used are - bathing, eating, moving from one location to another (transferring), going to the toilet, and dressing.⁴ The one to be concerned about is the bathing activity. Most people will need help in the bathroom before experiencing problems in the other areas because bathrooms are dangerous places where unsteady persons are prone to fall on slippery surfaces. Many policies do not include bathing as a ADL that is a trigger. If it is included be sure to check the definition of bath to make sure that the definition of bath has not been changed to include a sponge bath.⁵ Further, for policies based on physical disability and ADLs make sure that the policy covers such care in its definition of home care benefits.
2. *Cognitive Impairment.* In addition to the ADLs triggers some policies will base eligibility for benefits on mental disability or cognitive impairment. This trigger can be vitally important because many times persons with Alzheimer's Disease and other types of dementia will physically be capable of performing the activities included in the ADLs but need prompting and supervision or protective oversight in performing these tasks. Cognitive impairment should be defined as deterioration in intellectual capacity, which requires continued supervision to protect the policyholder or others from harm.⁶

⁴ Norman, Polniaszek and Firman, supra at 51.

⁵ *id.*

⁶ *id.*

3. *Prior Hospitalization or Medical Necessity.* There are two standards or triggers that should be avoided prior hospitalization and medically necessity. Many people as they age will not suffer from a treatable medical condition or suffer an acute care episode requiring hospitalization. As they progress in age they gradually need help with their activities of daily living. If the policy requires that they be hospitalized prior to receiving benefits it will greatly reduce the chances of receiving those benefits especially if the purchase of the policy is intended to provide home health benefits. Likewise, many times people suffering from dementia that need supervision and help with bathing and dressing themselves will not have a medically treatable illness.⁷

⁷ *id.* at 49.

4. *Texas Minimum Standard Policy Requirement.* The regulations require that no policy delivered or issued in this state shall condition the eligibility for long term benefits on prior hospitalization.⁸ The regulations also prohibit any policy offering home care or home health care benefits from requiring and prior institutionalization requirement.⁹ All policies must contain provisions conditioning eligibility for benefits on the inability to perform two of the aforementioned ADLs or on the impairment of cognitive ability.¹⁰

⁸ 28 T.A.C. §3.3825(a).

⁹ 28 T.A.C. §3.3825(d) (1).

¹⁰ 28 T.A.C. §3.3818 (1) ,(2).

- B. Levels of Care. LTCI policies are sold that cover different ranges of care and care settings. Most clients seeking to purchase this type of insurance will desire to obtain coverage for care in their homes for as long as possible. The Texas regulations focus on the setting and nature of the care as well as the certification required of the provider of the service to define the different levels of care.¹¹ The different levels of care generally include skilled care, intermediate care and custodial care often referred to as personal care or home care. Another area of care that may be desirable is adult day care. This benefit can be a life saver if the primary care giver of a dementia sufferer is their spouse. The Texas regs are somewhat confusing concerning the requirement for adult day care. At 28 T. A. C. §3.3815 (b) the statement is made that no policy which provides benefits for home health care or adult day care services may exclude or limit benefits by requiring any of the following, it goes on to state things that the policy cannot contain; like a requirement that the insured have an acute condition before home health services are provided and then at section 8 it states that the policy cannot exclude coverage for adult day care services. It is critical that the provisions of the policy dealing with the delivery of the care in a home setting be clear as to who can provide the care and what qualifications the person providing the care must have. Most consumers will expect that they will be able to use low paid, noncertified workers to provide personal care or custodial type services in the home. The Texas regulations prohibit a policy from requiring that home health care services be performed at a level of certification or licensure that is greater than that required by the laws of the state to perform the service.¹² The policy should cover all of the levels of care mentioned above with the personal preference of the consumer governing the choice of the extent of the coverage for care provided in the home. The Texas regs make a vague statement that no policy may provide for skilled care only or provide significantly more coverage for skilled care than coverage for lower levels of care.¹³ What exactly is meant by "significantly more coverage" is not defined in the regulations. The policy should provide for coverage of services of home health aides or personal care attendants that are not medically trained or licensed. Finally, be sure to determine that if the level of care could legally be provided by a family member if the policy will pay benefits if a family member provides the care.
- C. Elimination Period. The elimination period is the period of time before benefits are payable after the insured qualifies under the gatekeeper provisions of the policy. Elimination periods vary in several ways. They vary in the number of days in the period and how the days are counted either per episode or lifetime and how home care days count toward the nursing home deductible and vice versa.¹⁴ The best terms to purchase and as such the most expensive are to have the days counted on a lifetime basis instead of an episode of confinement or period of care standard. The other desirable provision is to have both nursing home stays and home care count toward meeting the elimination period. Whenever home care is counted as part of the elimination period care must be taken to carefully determine how the home care component of the care is counted. Most home care is not delivered on a seven day a week basis but often is provided two to three times a week. If the home care is counted on days of service rather than number of elapsed days then the elimination period could be greatly expanded based on the calendar¹⁵. The

¹¹ 28 T.A.C. §3.3815 , §3.3806.

¹² 28 T.A.C. §3. 3815 (a) (5).

¹³ 28 T.A.C. §3.3823 (c)

¹⁴ Norman, Polniaszek and Firman, supra at 59.

¹⁵ *id.* at 62.

decision of how long should the elimination period be is similar to the decision as to how much deductible to elect on homeowner insurance.¹⁶ Policies with zero elimination periods are available but they are usually the highest cost policies, longer periods usually decrease cost. The decision of how long elimination period to select will be based on the financial situation of the consumer with consideration to the potential for future cost for care to increase dramatically. This is another analysis that calls for expertise in calculating the effects of inflation and rates of return based on assets that will be available in the next five, ten or fifteen years. These calculations can quickly get very complicated and this might be a time to bring in that financial planner you met sometime back.

- D. Inflation Protection. Most long term care policies will be purchased many years prior to the need for the benefits. The effect of the increases in the cost of long term care over a long period of time must be considered when deciding how much coverage is needed. In order to protect against the erosion of the value of a policy purchased today most consumers need to consider some type of inflation protection. Most persons over age 75 should forgo this benefit and opt for a larger daily benefit.¹⁷ This type of protection can be purchased in several different ways. The simplest method is to have an automatic increase in the benefit amount of some percentage every year. The other common method is to purchase additional benefit annually to adjust the benefit amount to reflect the most recent increases in the cost of long term care. Still another method is to have the policy cover a specific amount of the cost of the care during the life of the policy without regard to how much the cost increases. The Texas regs require that any insurer offering LTCI in the state must offer the applicant for such a policy the option to purchase a policy with one of the aforementioned options.¹⁸ In fact the regulators evidently believe that such coverage is important because they require that it be part of any policy sold unless the prospective policyholder signs a written rejection of such protection. The regs specify the language that must be included in the rejection and that the statement must say that the person has reviewed specific plans for such protection. The agent must show the applicant graphic comparisons of the benefit level increase versus a policy without the increase over a period of at least 20 years.¹⁹

¹⁶ Clyde H Farrell, Financing Long Term Care in Texas, PESI (forthcoming May 1997).

¹⁷ Norman, Polniaszek and Firman, supra at 84.

¹⁸ 28 T.A.C. §3.3820 (a) (1), (2), (3).

¹⁹ 28 T.A.C. §3.3820 (b) (1).

1. *Annual Percentage increase.* The most desirable coverage for a person of younger age would be the automatic annual increase in benefit. The question will then arise as to should the rate of increase be a compound rate or simple rate. Logic would dictate that the compound rate is much safer because over long periods the difference in the benefit can be quite large. The other choice is the rate at which the increase will be made. The rate most often offered is 5%. Some policies will offer to adjust the rate based on the consumer price index (CPI). This can offer the insured better protection in the event inflation were to return to the double digit figures that have occurred in past years. This will not offer much protection for the insured if the rate of increase in the cost of long term care exceeds the general inflation rate. The best protection would be to base the increase on the medical care component of the CPI.²⁰ The better features will likewise tend to increase the premiums.

²⁰ Norman, Polniaszek and Firman, supra at 79.

2. *Option to Purchase Additional Benefit Amount.* The best coverage for an older person may be an option to purchase additional benefit at certain intervals of the life of the policy. This right to purchase additional coverage must not be subject to any additional medical underwriting. This option gives the consumer the chance to control how much additional benefit they want to purchase and when to purchase such benefit. If the rate of inflation of the cost of care were to change dramatically over several years then the consumer will have the chance to purchase additional coverage as needed but will not have to pay for increases that are not. The downside to this type of coverage is that as the person gets older the marginal cost of the benefit is substantially higher.²¹ The other more practical problem for an elderly person is that this method requires some affirmative action to be taken by the person and it is possible that over time the elderly person may forget to take the necessary action to purchase the additional coverage. The Texas regs try to prevent such a problem by requiring that the company offer the option to purchase coverage that will increase at least 5% compounded annually unless the policyholder rejects the increase in writing.²²
 3. *Specific Percentage of Cost.* This benefit is set forth in the Texas regs as one of the options that an insurer must offer if they offer coverage in the state. This option evidently is quite rare as this writer has been unable to find any analysis of this type of coverage by any commentator on long term care insurance. This type of coverage would be very beneficial to the consumer as it would eliminate all risks associated with increases in the cost of long term care. General underwriting principals would suggest that shifting such risk to the insurance company would result in corresponding increases in premium. If affordable this type of benefit would be the safest coverage to obtain.
- E. *Miscellaneous Provisions.* These are policy provisions and other items concerning long term care policies that should be considered when comparing LTCI policies.
2. *Financial Security of the Company.* Since most consumers will not be seeking benefits under the policy they purchase for many years in the future the stability of the insurer is an important consideration when purchasing a policy. The trust placed in the company in this instance is similar to the situation encountered when purchasing life insurance. As most consumers are aware there are several companies that provide ratings based on analysis of the financial strength of the company. Each of the rating companies uses different terms to express the rating some use letters others use numbers. Below is a list of several such companies:

BEST Company 900-420-0400
Duff & Phelps, Inc. 312-368-3157
Moody's Investor Service 212-553-1653
Standard & Poor's 212-208-1527
Demotech, Inc. 614-761-8602
Fitch Investors Service, Inc. 212-908-0500

²¹ *id.* at 83.

²² 28 T.A.C. §3.3820 (a) (2).

Weiss Research, Inc. 800-289-9222²³

Many of the companies that write LTCI are rated in the highest categories by the ratings services. Only those companies with the highest ratings should be considered for purchase. If additional information is available such as complaint history or number of years selling LTCI then these can also be useful when comparing policies from different companies.

²³ Kaplan, supra at 31.

2. *Guaranteed Renewable.* All policies sold in the State of Texas must contain a renewability provision on the first page of the policy.²⁴ If the policy contains a right to renew then it must be no less favorable to the policyholder than the right of renewal defined by the regs. The regs define renewable as the right of the policyholder to continue the policy in force by the timely payment of premiums and the insurer has no right to unilaterally change any policy provisions.²⁵ The insurer does have the right to increase premiums on a class basis so you must be careful to explain to your client that the guarantee may be at a much higher premium rate in the future. Most all policies will be guaranteed renewable so it is important to check the terms of the policy to make sure they comply with the requirements of the Texas regs.

²⁴ 28 T.A.C. §3.3829(a), §3.3822.

²⁵ 28 T.A.C. §3.3822, §3.3807.

2. *Waiver of Premiums.* Most policies will include a waiver of premiums benefit which states that upon the happening of a certain event the policyholder will no longer have to pay the premiums. This is a very important thing to most consumers so the triggering event should be carefully scrutinized. The policy should waive the premiums at the time any benefits are payable under the policy. Make sure the waiver is available in the event that the insured qualifies for benefits under the home care component of the policy. Without this type of protection the policy could lapse if the insured were to become disabled and forget to pay the bill. The Texas regs contain a provision that requires that the insurer pay benefits "without prejudice" if a term of institutionalization began while the policy was in force and continues without interruption after a termination of the policy.²⁶

²⁶ 28 T. A. C. §3.3827.

2. *Protection from Unintentional Lapses.* As previously mentioned many of the consumers purchasing long term care policies will experience difficulty in their latter years with many of the day to day task that we all face in life. One problem that may arise is difficulty in paying bills on a timely basis. Unfortunately, one of the bills that the person may forget to pay may be the LTCI bill. In order to prevent this result the policy should contain a provision requiring the company to notify a third party if the payments on the policy cease. This gives an added layer of protection if the elderly person were to forget the bill the policy will not lapse.²⁷

5. *Indemnity vs. Reimbursement.* Some policies pay the full amount of the eligible benefits during the time the insured qualifies for the benefit directly to the policyholder. These policies are referred to as "indemnity" coverage policies. Other policies reimburse the cost of care actually received up to the maximum amount of the benefit. The indemnity policy is the preferred type of coverage as there is no need to account to the insurance company for the actual expenses incurred in providing the care. This can be of great value to the insured who desires to remain at home as long as possible. The indemnity policy will allow the person to pay family members that have no special training or expertise to provide care instead of hiring professionals.²⁸

²⁷ Norman, Polniaszek and Firman, supra at 98.

²⁸ Farrell, supra at 17.

6. *Nonforfeiture Protection.* A benefit that is not found in older policies and a lot of current policies is a nonforfeiture provision. This type of protection has been the focus of a lot of attention by insurance regulators and the insurance industry as of late. Claims history developed so far with these policies indicates that there is a high rate of lapses of coverage. The reasons are multifarious and can include the multitude of factors that go into purchasing a product that will not be of any use to the consumer until many years in the future. One factor that is very troubling is the potential for large increases in premiums as the insured is of advanced age and living on a fixed income. Remember from the discussion above although guaranteed renewable the premiums can be raised if the company raises the rates for an entire class of insureds. Since these policyholders will have been paying into the pool for a long time if the policy lapses for whatever reason at the latter stages of their life then the insurance company receives a windfall and the consumer get no benefit for the years they paid the policy premiums. Nonforfeiture provisions are a way of assuring that consumers will obtain some benefit for their premium dollars and at the same time providing incentive for insurance companies not to cancel whole classes of policyholders or raise rates substantially.²⁹

There are several different types of nonforfeiture protection methods available. The one recommended by National Association of Insurance Commissioners requires that after the payment of premiums for a certain number of years even if the policy lapses the consumer is entitled to a shorten benefit period. The amount of benefits the consumer is entitled to increase with the time the insured has been paying premiums. Other types of provisions provide for a return of a portion of the premiums paid if the insured cancels the policy. Still other provisions offer a life insurance benefit if the insured does not use the long term care benefit.³⁰ These types of provisions will be most important to the younger consumer as the risk of lapse of the policy increase the younger the individual is when the coverage is purchased.

V. Conclusion

This paper has avoided the discussion of the one of the most important components of the selection of a long term care policy, the cost. This was done with purpose in mind. Consumers should not select a policy based on the price. The policy should be evaluated based on the needs of the consumer and the desires for certain types of coverages. Select a policy with the appropriate combination of benefits that fulfil the consumer's desires for protection and eliminate any benefits the consumer is not particularly interested in receiving. If the policy is too expensive with the desired provisions then search for another policy. It make no sense to purchase a policy because it costs a certain amount if it does not provide the client with the protection they desire. Price will always be an important facet of any consumer purchase but in the case of long term care insurance if the consumer cannot afford the protection needed or desired then the underlying question of the suitability of the consumer for this type of insurance should be reexamined.

²⁹ Norman, Polniaszek and Firman, supra at 112.

³⁰ Norman, Polniaszek and Firman, supra at 116.

