

WHAT ATTORNEYS SHOULD KNOW ABOUT LONG-TERM CARE INSURANCE

Robert D. Hayes, Nancy G. Boyd, and
Kenneth W. Hollman

The financial consequences of uninsured long-term care (LTC) living can be devastating, and traditional means of coverage, such as Medicare and Medicaid, often do not, and, in the future, will not provide enough financial protection to those clients with LTC needs. Knowing this, many insurance companies now offer a variety of LTC coverage products. With the gap in LTC coverage looming for most people, and a ready market from which to purchase such insurance coverage, the authors argue that it is an attorney's professional responsibility to advise their clients of the available funding options for LTC packages and of the consequences of not planning for the contingency of prolonged and expensive LTC. The primary purpose of this article is to inform lawyers of the crucial importance of LTC insurance coverage. The authors urge attorney's with older clients to encourage clients to purchase LTC insurance packages so that assisted living services are provided for without jeopardizing the client's financial security.

The authors highlight several features of LTC policies attorneys and policyholders should take note of such as: whether benefits are daily or monthly; the level and type of care that is covered; whether there is a prehospitalization requirement prior to LTC coverage during nursing home confinement; whether the policy protects against inflation for LTC costs; what preexisting medical conditions are not covered by the

Robert D. Hayes is a Professor in the Department of Accounting at Tennessee State University. He received his Ph.D. from the University of Arkansas. He is also a CPA.

Ms. Nancy G. Boyd is an Assistant Professor in the Department of Accounting at Middle State Tennessee University. She received her B.A. from Minot State University in 1973; M.S. from University of North Dakota in 1974; C.P.A. in 1980; and an M.B.A. from Middle Tennessee State University in 1987.

Dr. Kenneth W. Hollman is chair holder of the Martin Chair of Insurance at Middle Tennessee State University. He received his M.B.A. and Ph.D. degrees from the University of Alabama. He is a Chartered Life Underwriter, a Chartered Financial Consultant, a Certified Employee Benefit Specialist, and a Certified Insurance Counselor.

LTC policy; the number of days the insured must receive in eligible services such as Medicaid or Medicare before the policy will begin paying benefits; whether the policy has a guaranteed renewability clause; and how long the LTC carrier is obligated to pay benefits. The authors also point out important factors to look at regarding the premium for a LTC policy. They recommend examining the premium cost of the policy, whether it is waived once the insured begins occupancy in a nursing home, and whether a percentage of the premium is returned to the insured if the policy is not used after a number of years. Additionally, the authors detail the list of possible exclusions a LTC policy may contain. Finally, the article concludes by profiling a typical candidate in need of LTC coverage.

The financial risk of incapacity in old age is potentially catastrophic. Even if people plan carefully, they still face the risk of losing control of their lives and their finances when they suffer from a long-term illness or condition where recovery is unlikely. Attorneys may wish to make recommendations about long-term care (LTC) protection as a key part of their overall strategy for providing future financial security for older clients. Because they or their family members may need assisted living services at some point in their lives, attorneys may also wish to consider LTC options for themselves and loved ones.

Although insurance policies designed to provide financial security to the insured despite the insured's health problems differ in their definitions of LTC and LTC services, they usually state that LTC involves human assistance over an extended period of time for people with disabilities, cognitive disorders, or prolonged physical illnesses.¹ LTC does not have the goal of providing acute care, rehabilitating people, or correcting medical problems.² Rather, its purpose is to help those with chronic illnesses and/or functional impairments to compensate for their inability to manage independently.³ LTC services usually involve custodial care consisting of hands-on assistance for people who have difficulty performing activities of daily living (ADLs), such as bathing, eating, and dressing.⁴ Under current law, a

1. See Patricia M. Anderson, *Improving Communication of Long-Term Health Care Programs*, MKTG. HEALTH SERV., Spring 1998, at 40, 40; Alfred C. Clapp, *Long-Term Care Insurance: Planners Stay on the Cutting Edge*, TR. & EST., Apr. 1996, at 46, 46.

2. See Anderson, *supra* note 1, at 40; Jean Sherman Chatzky, *Changing Places*, 6 SMART MONEY 129, 133 (1997); Peter Katt, *A Reality Check: Do You Need to Buy Long-Term Care Insurance?* AALJ, Nov. 1997, at 24, 24; James Weil, *Baby Boomers Needs Will Spur Growth of Long-Term Plans*, 28 COMPENSATION & BENEFITS REV. 49, 52 (1996).

3. See Katt, *supra* note 2, at 24.

4. See Stephanie Lee, *Blanket Your Clients' Retirement Worries*, TR. & EST., Aug. 1996, at 8, 8.

physician or other licensed health care professional must certify when a person cannot perform an ADL.⁵ Custodial care can be provided in a nursing home, adult day care center, or the patient's home.⁶

The need to plan for LTC needs can be summed up succinctly: the financial consequences of LTC can be devastating. There is at least a fifty-percent chance that the average person will need LTC services at some point in his or her life.⁷ The odds rise to sixty percent for a person over seventy-five.⁸ In addition, people who do enter a nursing home can expect their stay to average two and one-half years,⁹ with an average cost of \$47,000 per year.¹⁰ Even if people plan carefully, they still face the risk of losing control of their lives and their finances at a critical juncture. Attorneys may wish to make recommendations about LTC protection as a key part of their overall strategy for dealing with their middle-aged and elderly clients' concerns and issues.

The primary purpose of this article is to sensitize lawyers—particularly those engaged in personal financial planning—to the crucial importance of LTC coverage. Attorneys should know that there is a growing possibility that both they and their clients will eventually need expensive and protracted nonmedical services. Without LTC insurance to protect against this contingency, there is a gap in their insurance coverage. The corollary purposes of the article is to provide an easy-to-understand explanation of the LTC policy and its provisions, and to make readers aware of the recent improvements in LTC policies. It is much easier for lawyers to aid and enlighten their clients regarding LTC planning if they understand the reasons for needing LTC services and the options available for funding them, including LTC insurance plans.

I. The Importance of LTC Planning

Attorneys who provide financial planning services need to understand the importance of planning for LTC for several reasons.

5. See Donald Jay Korn, *Long-Term Care, Long-Term Concerns*, FIN. PLAN., May 1998, at 142, 144.

6. See Lee, *supra* note 4, at 8.

7. See PHYLLIS R. SHELTON, LONG-TERM PLANNING GUIDE 2 (1998).

8. See Richard L. Peck, *Answers to the Top 10 Questions about Private LTC Insurance*, NURSING HOMES, Oct. 1997, at 44, 45.

9. See Clapp, *supra* note 1, at 46.

10. See SHELTON, *supra* note 7, at 1. Average costs include room and board, drugs, and medical supplies.

First, a primary goal of financial planning is to preserve the client's capital. Massive outflows of capital for custodial care in one's later years, either at home or in an institution, could be highly disruptive to all but the most wealthy client's financial plan. Second, for attorneys who engage in financial planning, acquiring knowledge about LTC and how it can be funded is a client-service issue. Financial plans for clients who are middle-aged or elderly should include strategies for financing LTC when and if it is needed. Attorneys who represent elderly clients, or who wish to expand into this rapidly growing area of the law, have a professional responsibility to advise their clients of the available funding options and of the consequences of not planning for the contingency of prolonged and expensive LTC.

Third, attorneys who advise clients about future financial security and concerns fulfill their professional obligation when they provide informed counsel in the area of LTC. They should be familiar with federal and state statutes and regulations affecting the elderly. If they are not informed about the nuances of LTC insurance or other funding strategies, they may be held liable if a client sues them for negligence. In our litigation-prone society, there are few professions or occupations outside of medicine and public accounting where the practitioner is so exposed to risk. Hence, it is in their own self-interest that lawyers consider all options when planning for medical, financial, and quality of life decisions for elderly clients. Moreover, attorneys should make it a point to advise their clients about LTC insurance to protect the clients' assets against age-related risks.

Finally, many attorneys who think that they have adequately planned for a secure retirement and for the efficient transfer of wealth at their own death may wish to reconsider their own financial plan. They must realize that they are as vulnerable as their clients to the threat of financial instability in old age. Attorneys who plan well for their own LTC needs will probably find it easier to assist and convince their clients to do so.

II. Gerontology Reality

Recent population age shifts explain the increased attention to LTC protection. Simply stated, our population is aging. There are more elderly people in both absolute numbers and in relation to the U.S. population as a whole. One out of every four persons in the

country is over fifty.¹¹ There are currently about 34 million people in the United States over the age of sixty-five,¹² accounting for about thirteen percent of the total population.¹³ There are more senior citizens in this country than Canada has in its total population.¹⁴ By 2030, one in every five people—almost 70 million—will be over the age of sixty-five.¹⁵ About eighty percent of all Americans living today will live beyond age sixty-five;¹⁶ of those reaching that age, men and women can look forward to fifteen and to nineteen more years, respectively.¹⁷ These statistics help to explain why women have a fifty percent greater chance than men of needing LTC after age sixty-five,¹⁸ and why seventy-five percent of nursing home residents are women.¹⁹

Other statistics bear out the population's increasing longevity. The number of superannuated individuals is growing rapidly. The nation's fastest growing population subset, the group of 3.9 million people over eighty-five years old,²⁰ will more than double by 2030, and then double again by 2050.²¹ It is expected that there will be 18 million persons in the country over age eighty-five by 2050.²² Today, about 57,000 Americans are over 100 years old, and, by the year 2030, it is estimated that there will be more than one million Americans over 100 years old.²³ An astounding eight percent of today's sixty-five year olds are expected to reach age 100.²⁴

Many breakthrough drugs, treatments and cures, and preventive factors are increasing longevity. Groups reaching elderly age in the

11. See *id.* at 3.

12. See Chuck Jones, *Insurance Planning for the End of the Cycle*, LIFE ASS'N NEWS, Aug. 1998, at 60, 62.

13. See William J. Scanlon, *Future Financing of Long-Term Care*, CONSUMERS' RESEARCH, June 1998, at 16, 16.

14. See POLITICAL HANDBOOK OF THE WORLD: 1998 153 (Arthur S. Banks & Thomas C. Muller eds., SA Publications 1998) (population of Canada: 27.3 million); Jones, *supra* note 12, at 62 (currently 34 million people over age 65 in United States).

15. See Steven Brostoff, *Survey: LTC Crisis Looms, Unless . . .*, NAT'L UNDERWRITER, LH/FS ED., June 15, 1998, at 32, 32.

16. See SHELTON, *supra* note 7, at 2.

17. See Marvin Katz & Christopher Conte, *Health Is a Crucial Balancing Act*, AARP BULL., Sept. 1998, at 5, 5.

18. See Nancy L. Breuer, *Offer Long-Term Care Insurance: Uncle Sam No Longer Has His Hand Out*, WORKFORCE, July 1997, at 84, 86.

19. See Anderson, *supra* note 1, at 40.

20. See Breuer, *supra* note 18, at 85; see also Scanlon, *supra* note 13, at 16.

21. See Scanlon, *supra* note 13, at 17.

22. See *id.*

23. See Richard Austin, *IVAs Respond to Consumer Longevity Concerns*, NAT'L UNDERWRITER, LH/FS ED., Jan. 15, 1996, at 12, 12.

24. See *id.*

future should be healthier due to a better lifestyle awareness, higher fitness levels, and greater consideration for diet and health than seen in any preceding generation.²⁵ Such groups have also benefited greatly from advances in medical science and sophisticated technology, enabling them to overcome contagious diseases and recover from or live with dreaded diseases.²⁶ Additionally, longevity is expected to *continue* to increase.²⁷

All of these factors indicate that more people will die of debilitating diseases, such as arthritis and hypertension, or mental diseases, such as senility, and fewer will die of heart attacks or infectious diseases.²⁸ The evidence of this trend is clear and suggests a greater need for LTC. For example, today almost half of those over eighty-five have some type of dementia,²⁹ and over twenty percent need help bathing.³⁰ In other words, they will more likely need LTC because people who take care of themselves and live to old age are more likely to develop age-related disability conditions and to live longer with such disabilities.³¹ The need for LTC runs consistent with the fact that such people are more likely to wear out slowly than to die suddenly. Of course, enhancing longevity may not always be parallel with enhancing the quality of life.³²

Primarily because of the growing numbers and advancing ages of the elderly, the number of people needing LTC is expected to rise dramatically over the next half-century.³³ As new risks associated with chronic illness and disability increasingly plague the older population, the number needing nursing home care will also almost certainly continue to rise. While the number of people in nursing homes has actually declined in recent years, it is expected to rise from 1.5 million in 1997³⁴ to 5.3 million in 2030.³⁵ This fact is cause for great concern for those who are on fixed incomes because they feel the bite

25. See Katz & Conte, *supra* note 17, at 5.

26. See *id.*

27. See *id.*

28. See Scanlon, *supra* note 13, at 17; Douglas R. Stanton, *The Case for Nursing Home Insurance*, TR. & EST., July 1994, at 52, 60.

29. See SHELTON, *supra* note 7, at 2.

30. See Ron Panko, *Pay Me Now, Care for Me Later*, BEST's REV. L/H, Sept. 1997, at 64, 66.

31. See Scanlon, *supra* note 13, at 17.

32. See SHELTON, *supra* note 7, at 3.

33. See Scanlon, *supra* note 13, at 17.

34. See SHELTON, *supra* note 7, at 15.

35. See Stanton, *supra* note 28, at 52; Brostoff, *supra* note 15, at 32.

of inflation most sharply and will never see additional pay increases or cost-of-living adjustments in their primary source of income.³⁶

Of course, long-term care is not just an elderly issue. About forty percent of all LTC patients are under sixty-five.³⁷ Strokes, accidents, and illnesses can strike at any age.³⁸ However, the interaction of our aging population with related factors—shortage of caregivers in the home due to family member employment,³⁹ children located away from parents,⁴⁰ and the need for nursing homes as extensions of hospital stays⁴¹—are the engines which have driven up the demand for LTC in institutional settings at a frightening rate. These factors make planning for retirement in the next millennium a high wire act without the benefit of a social safety net on which to rely if things go wrong.⁴²

III. What Is LTC?

LTC is the type of care provided to a person who has a long-term illness or condition from which recovery is unlikely.⁴³ LTC patients need assistance in the activities of daily living (ADLs), either at home or in a facility.⁴⁴ The ADLs include “bathing, dressing, mobility and transferring (that is, getting out of bed), toileting, feeding oneself, and incontinence.”⁴⁵ LTC includes skilled, intermediate, and custodial care.⁴⁶

The LTC patient—a patient which pulls from the ranks of both the elderly and people of working age—is unable to manage independently, either as the result of an accident, disease, or the loss of functional ability brought on by aging.⁴⁷ LTC may involve functional infirmities (needing help with the ADLs), physical impairment (such

36. See Jones, *supra* note 12, at 62.

37. See Breuer, *supra* note 18, at 86.

38. See Lee, *supra* note 4, at 8.

39. See Weil, *supra* note 2, at 51.

40. See *id.* at 52.

41. See Scanlon, *supra* note 13, at 17; Stanton, *supra* note 28, at 55.

42. See Rick Pullen, *Lighting a Fire Under Long-Term Care*, BEST'S REV. L/H, June 1998, at 12, 12.

43. See Clapp, *supra* note 1, at 46.

44. See *id.*

45. See *id.*

46. See Lee, *supra* note 4, at 8.

47. See Scanlon, *supra* note 13, at 18.

as a stroke), or cognitive impairment (such as Alzheimer's disease).⁴⁸ Under current law, certification by a licensed health care professional of the inability to perform two or more of the ADLs for a specified period will qualify the insured for LTC coverage.⁴⁹

IV. Financial Aspects of LTC

Financial implications of a chronic disease or another condition that requires LTC are great regardless of where the LTC is delivered. Total spending for elderly LTC was \$91 billion in 1995,⁵⁰ the last year for which complete data are available. The elderly and their families paid approximately forty percent of those expenses, while Medicare and Medicaid paid approximately fifty-six percent.⁵¹ The number of seniors needing LTC is expected to double over the next thirty years as baby boomers retire.⁵²

Almost four times as many elderly people needing LTC services live outside nursing homes (at home or in a community setting) as in them.⁵³ That is, about 1.6 million people needing LTC live in nursing homes as compared to 5.7 million outside them.⁵⁴ Hence, only about twenty percent of all LTC is rendered in a nursing home.⁵⁵

About seventy percent of all home care is provided by informal, usually family, caregivers.⁵⁶ Almost one-fourth of American households provide some form of elder care,⁵⁷ and given demographic trends noted above, the number can reasonably be expected to grow. The burden of caring for an elderly parent or relative in one's home is a real and daunting challenge to many individuals and families.⁵⁸

For obvious reasons, seniors usually prefer home health care, or noninstitutional community-based alternatives, to institutional care. It is very disruptive and traumatic to relocate from familiar home surroundings to a nursing home or other LTC facility where there are

48. See Panko, *supra* note 30, at 33; Eunice E. Krieger, *Be Sure Your LTC Clients Know Their Benefits*, NAT'L UNDERWRITER LH/FS ED., Apr. 29, 1996, at 16, 16.

49. See Korn, *supra* note 5, at 144.

50. See Scanlon, *supra* note 13, at 16.

51. See *id.*

52. See Clapp, *supra* note 1, at 46; Scanlon, *supra* note 13, at 16.

53. See Scanlon, *supra* note 13, at 17.

54. See *id.*

55. See *id.*

56. See Anderson, *supra* note 1, at 40.

57. See SHELTON, *supra* note 7, at 43.

58. See Scanlon, *supra* note 13, at 16.

regimented schedules, a large number of persons receiving and giving care, and mass-produced meals and other services.⁵⁹ While one-fourth of the elderly that live at home live by themselves, seventy-five percent live within twenty-five miles of their children.⁶⁰ Only fifteen percent live with relatives.⁶¹

More and more elderly people who wish to remain at home are being forced to pay for home care services themselves. For most of them, the sad reality is that home care services are unaffordable unless plans have been made ahead of time. The average income of people over sixty-five was \$16,684 in 1996.⁶² In stark contrast, the average cost of an eight-hour shift for a home health care aide is about \$110, which amounts to about \$40,000 per year.⁶³ Clearly, the average family would become impoverished quickly in the face of merciless demands of round-the-clock home health care. Sometimes the proceeds from a LTC insurance policy is the only means to make it possible for families to provide extended home health care to a loved one.⁶⁴

The financial situation becomes even worse for seniors who go into nursing homes. As noted, the annual cost of confinement to a nursing home averages about \$47,000, or about \$129 per day.⁶⁵ The real costs, given anticipated inflation, are expected to triple over the next two decades.⁶⁶ A fifty-year old person today faces at least \$240,000 (and possibly much more) in nursing home costs if he or she enters a LTC facility at age eighty.⁶⁷ Given these figures, it is not surprising that about seventy percent of all elderly LTC expenditures are for nursing homes.⁶⁸

Even though the poverty rate among the elderly is now only twelve percent,⁶⁹ most elderly people do not have the financial resources to meet skyrocketing nursing home costs.⁷⁰ Expenses for an extended stay in a nursing home could be financially ruinous to even a wealthy family. Although the LTC crisis will eventually affect

59. See Anderson, *supra* note 1, at 41.

60. See *id.* at 40.

61. See SHELTON, *supra* note 7, at 4.

62. See Jones, *supra* note 12, at 62.

63. See SHELTON, *supra* note 7, at 1.

64. See *id.* at 19.

65. See *id.* at 1.

66. See *id.*

67. See *id.*

68. See Scanlon, *supra* note 13, at 16.

69. See Robert Hudson, *Long-Term Care: The New Risks of Old Age*, CHALLENGE, May/June 1997, at 103, 103.

70. See *id.* at 108.

eighty percent of all families in the United States only one in six will be able to pay for more than three years of LTC at \$40,000 per year.⁷¹

The average person entering a nursing home as a non-Medicaid patient exhausts all available income and financial assets within eleven months.⁷² Because depletion of personal savings is a prerequisite for entry on Medicaid rolls, only after such exhaustion will the person become eligible for, and dependent upon, welfare (Medicaid).⁷³ Reducing themselves to penury, losing the home they saved for, sacrificing the vacations they dreamed about and planned for, and becoming dependent on public assistance in their autumn years is a severely demeaning and overwhelming prospect for many elderly people.

Overall, patients in nursing homes foot one-third of the bill.⁷⁴ Their obligation comes primarily in the early months of occupancy.⁷⁵ The money is realized from the cash value or accelerated death benefits of a life insurance policy; a viatical settlement; a reverse mortgage where insureds tap into the equity in their home; a loan on the equity in the home where the interest is tax-deductible; or, for the fortunate few, a LTC insurance policy.⁷⁶ The remainder of the cost comes from several sources. Private insurance policies paid less than one percent of all nursing home costs in 1995.⁷⁷ Medicare paid about two percent, Medicaid about fifty-two percent, other nonprivate sources about five percent.⁷⁸ Other facts and figures could be cited, but they all point in the same direction. As discussed earlier, people are living longer, which increases the probability that (a) they will need LTC services during their life, and (b) their assets will be decimated before they die through inflated nursing home, home health care, or other LTC expenses.

71. See SHELTON, *supra* note 7, at 2.

72. See *id.*

73. See *id.* at 7.

74. See *id.*

75. See *id.*

76. See *id.* at 69.

77. See Scanlon, *supra* note 13, at 19.

78. See Suzanne B. Benet & Paul N. Bloom, *Marketing Long-Term Care Insurance*, MKTG. HEALTH SERV., Spring 1998, at 5, 5; Panko, *supra* note 30, at 64. See generally Hudson, *supra* note 69, at 106 (discussing out-of-pocket costs for nursing homes).

V. Government and Private Health Plan Coverage

There is a common and dangerous misconception among many senior citizens that either Medicare, Medicare supplement insurance, retiree health plans, HMOs, or group or individual health plans will pay for LTC expenses.⁷⁹ In fact, these programs (or policies) combined provide only a small portion of all institutional and noninstitutional LTC costs in the country.⁸⁰ As noted above, protection against chronic care needs is largely confined to Medicaid and out-of-pocket payments.⁸¹

A. Medicare

Medicare, a publicly financed health care program, is the cornerstone of the federal health care program for senior citizens and certain disabled individuals.⁸² The rich cannot opt out, and the poor are not excluded if they meet eligibility criteria.⁸³ However, the purpose of Medicare is to provide for acute care, such as surgery, doctor bills, and short hospital stays—and not chronic care.⁸⁴ About eighty percent of the medical costs of the elderly are for chronic care.⁸⁵ Simply put, Medicare gives low priority to the potentially severe vagaries associated with functional incapacity.

Medicare provides no coverage for either LTC, chronic illness or debility, or at-home care from nonskilled persons.⁸⁶ Nor does Medicare provide benefits for private duty nursing, intermediate care, or custodial care.⁸⁷ The fundamental orientation of Medicare is toward acute care, as contrasted to chronic care necessitated by the gradual enfeeblement resulting from aging.⁸⁸

Medicare will cover the cost of some limited home health care and some Medicare-approved convalescent skilled nursing care (short-term rehabilitation) in a Medicare-approved nursing home.⁸⁹ However, it will pay for nursing home care only if the patient has

79. See Panko, *supra* note 30, at 64; Katt, *supra* note 2, at 24.

80. See Hudson, *supra* note 69, at 105.

81. See *id.*

82. See SHELTON, *supra* note 7, at 87.

83. See Hudson, *supra* note 69, at 113.

84. See Katt, *supra* note 2, at 24.

85. See Benet & Bloom, *supra* note 78, at 5.

86. Home health caregiving is compensable only when some skilled care is provided. See Chatzky, *supra* note 2, at 132-33.

87. See SHELTON, *supra* note 7, at 96.

88. See Chatzky, *supra* note 2, at 133.

89. See SHELTON, *supra* note 7, at 88.

been in a hospital for at least three days immediately prior to entering the nursing home.⁹⁰ Even with this requirement met, Medicare will only pay for 100 days in the nursing home facility.⁹¹ Further, the patient must be getting better each day in order for the coverage to continue.⁹² Thus, Medicare is of little help if the patient enters a nursing home for intermediate or custodial care, or receives custodial care at home.⁹³ Recent changes in the Medicare system emphasize the government's determination to confine Medicare benefits to acute conditions and to contain Medicare costs within predetermined boundaries.⁹⁴

B. Medicare Supplement Insurance

Three out of four health insurance contracts involve a consumer sixty-five or older.⁹⁵ Among these senior buyers, Medicare supplement insurance ("Medigap" coverage) is the most popular insurance product.⁹⁶ Over 29 million Americans over sixty-five have this coverage.⁹⁷ It is written with private insurance companies and is designed to fill the gaps in Medicare coverage.⁹⁸

Federal guidelines state that insurance companies can now sell only ten standard Medigap plans, which differ from each other by type and level of benefits provided.⁹⁹ Each is designed to pay some or all of the difference between what Medicare pays and the actual amount of the medical bill.¹⁰⁰ The difference is comprised of Medicare deductibles and co-payments.¹⁰¹ Some Medicare supplement insurance plans pay for services not covered by Medicare, but such additional coverage provides very limited nonmedical type benefits.¹⁰² The plans usually do not cover custodial nursing care, home health care, rest home care, or adult day care.¹⁰³

90. See Lewis J. Altfest, *Do You Need Long-Term Care Insurance?* MED. ECON., Mar. 23, 1998, at 40, 40.

91. See *id.*

92. See Weil, *supra* note 2, at 50.

93. See SHELTON, *supra* note 7, at 6, 96.

94. See Breuer, *supra* note 18, at 84.

95. See Benet & Bloom, *supra* note 78, at 5.

96. See Jones, *supra* note 12, at 66.

97. See *id.*

98. See SHELTON, *supra* note 7, at 96.

99. See Chatzky, *supra* note 2, at 132.

100. See *id.*

101. See *id.*

102. See SHELTON, *supra* note 7, at 101.

103. See generally Chatzky, *supra* note 2, at 132.

C. Group or Individual Medical Policies

Employees carrying their group medical plan or individual medical policies into retirement generally have no LTC coverage.¹⁰⁴ In fact, custodial care is explicitly excluded in most individual and group health plans.¹⁰⁵ Like Medicare, these policies are designed to pay for skilled acute health care.¹⁰⁶ Together, they pay only a small percentage of all LTC costs.¹⁰⁷

D. Medicaid

Medicaid—with emphasis on chronic care needs—is the heaviest payer of LTC services. It covers about forty percent of all LTC costs¹⁰⁸ and about forty-one percent of all nursing home costs.¹⁰⁹ It is the LTC safety net for the elderly who cannot manage for themselves. Medicaid pays about seventy-one percent of all nursing home and home health care costs financed through public programs,¹¹⁰ and it provides more than one-half of all nursing home income nationwide.¹¹¹ However, Medicaid programs pay little, nine percent of the total Medicaid budget, for home health care and nothing for eight-hour shifts at home.¹¹²

Medicaid recipients must meet a severe means test, and Medicaid assistance is considered to be a painstaking and undesirable option for elders who need LTC.¹¹³ Only about thirteen percent of the elderly population (those who are “poor enough”) participate in Medicaid, and only one-quarter of the elderly entering nursing homes qualify initially for Medicaid.¹¹⁴ The rest must “spend down” their assets to federally defined poverty levels or enter an “ethical swamp” by transferring assets before they are eligible for Medicaid coverage.¹¹⁵ Additionally, Medicaid has even more stringent rules against giving property away to, for example, a close relative for a certain period of time preceding eligibility to avoid having it taken to cover LTC ex-

104. See Breuer, *supra* note 18, at 86.

105. See *id.*

106. See *id.*

107. See SHELTON, *supra* note 7, at 6.

108. See *id.* at 7.

109. See Brostoff, *supra* note 15, at 32.

110. See Weil, *supra* note 2, at 50.

111. See Stanton, *supra* note 28, at 53.

112. See SHELTON, *supra* note 7, at 7.

113. See SHELTON, *supra* note 7, at 66-67; Chatzky, *supra* note 2, at 134.

114. See SHELTON, *supra* note 7, at 7.

115. See Hudson, *supra* note 69, at 110.

penses.¹¹⁶ As a result, there is a continuing reassessment of how the Medicaid-protected group should be constituted and the services that Medicaid should provide.¹¹⁷

To qualify for Medicaid, one's income must be below the national poverty level and assets excluding the home must not be higher than a state-specified maximum amount.¹¹⁸ Any income the Medicaid-eligible nursing home resident receives (e.g., pensions, social security) may disqualify the applicant.¹¹⁹ If it does not, the income must be used to pay for care.¹²⁰ As noted, one-fourth of all nursing home residents on Medicaid were initially admitted as private-pay patients.¹²¹ Ultimately, two out of three residents end up as Medicaid recipients.¹²² The median time to "spend down" to qualify for Medicaid is eleven months.¹²³ Unfortunately, there is much evidence that nursing home occupants on Medicaid do not receive the same level of care as paying customers and are at the mercy of the system.¹²⁴ These figures highlight the limitations of government programs and reveal that the lack of planning for LTC can jeopardize the financial security and emotional well-being of elderly people.¹²⁵

VI. Recent Health Care Reforms

Some critics say that by absorbing needed investment capital from the economy, the elderly's consumption of resources endangers future generations.¹²⁶ Across the entire political landscape, there is almost a universal feeling that the burden on taxpayers to provide health and long-term care services to the elderly in the next century will be onerous.¹²⁷ Consider that in 1935, there were forty workers for each retiree; that the ratio is about 3.3 to 1 today; and that the ratio is expected to drop to 2 to 1 in the next twenty years.¹²⁸ With home

116. See SHELTON, *supra* note 7, at 62-64.

117. See Jay A. Soled, *Interaction of Long-Term Care Insurance and the Estate Tax*, EST. PLAN., Jan. 1998, at 26, 27.

118. See generally SHELTON, *supra* note 7, at 58-62.

119. See generally *id.*

120. See generally *id.*

121. See Scanlon, *supra* note 13, at 17.

122. See *id.*

123. See SHELTON, *supra* note 7, at 2.

124. See *id.* at 67.

125. See Brostoff, *supra* note 15, at 32.

126. See Hudson, *supra* note 69, at 104.

127. See Breuer, *supra* note 18, at 86, 88.

128. See SHELTON, *supra* note 7, at 8.

health care and nursing home care costs at \$125 billion and expected to grow at a rate of at least seven percent per year,¹²⁹ a natural question is from where will the tax dollars come.

Social Security, Medicare, and Medicaid take up forty-one percent of the federal budget, and each of these entitlements is facing insolvency.¹³⁰ There are 76 million baby boomers who will be reaching age sixty-five between 2011 and 2029.¹³¹ However, many people today are asking if resources should instead be diverted to education, to the reduction of the federal deficit, to social programs, or to other functions.¹³² The dilemma will not be an easy one to solve.

Recent health care reform legislation at the national level seems to indicate that Congress is attempting to rein in social welfare spending and to shift the burden of long-term care costs to individuals and their family members.¹³³ Tax law changes provide incentives for individuals to buy LTC insurance and make it easier and less expensive for employers to provide LTC insurance as an employee benefit.¹³⁴ By passing these new health tax laws, Congress implied that there is not enough tax money, and there could not be enough, to pay for LTC for everyone in the next century.¹³⁵ The new legislation encourages people to consider LTC coverage and makes transferring assets to qualify for Medicaid a criminal offense.¹³⁶

The new tax laws provide tax incentives to those purchasers of LTC policies that meet certain criteria, and were issued on or after January 1, 1997.¹³⁷ The criterion for "tax qualified" includes a ninety-day waiting period¹³⁸ and the inability to perform at least two of the ADLs.¹³⁹ As a further condition of "tax qualification," the legislation requires insurance carriers to offer policies containing standardized

129. See *id.* at 7; Allison Bell, *Agents Keep Wary Eye on Long-Term Care Inflation*, NAT'L UNDERWRITER, LH/FS ED., Aug 3, 1998, at 7, 12.

130. See SHELTON, *supra* note 7, at 8.

131. See Scanlon, *supra* note 13, at 16.

132. See Hudson, *supra* note 69, at 110.

133. See Breuer, *supra* note 18, at 85.

134. Still, only about 1,000 employers nationwide provide this coverage. See *id.* at 88.

135. See SHELTON, *supra* note 7, at 8.

136. See 42 U.S.C. § 1320a-7b(a)(6) (1996 & Supp. 1997); Breuer, *supra* note 18, at 85.

137. See 26 U.S.C. § 7702B (1996 & Supp. 1998); SHELTON, *supra* note 7, at 8.

138. See Barbara Bowers, *Short-Term Confusion in the Long-Term Care Market*, BEST'S REV. L/H, Mar. 1998, at 87, 88.

139. See Korn, *supra* note 5, at 144. For a listing of ADLs, see *supra* text accompanying note 51.

benefits—"hurdles" in the path of individuals seeking LTC coverage—that the National Association of Insurance Commissioners (NAIC) adopted in 1993.¹⁴⁰ Unfortunately, the law raised as many questions as it answered with regard to the criterion for tax qualification.

About eighty percent of the policies sold today are tax qualified.¹⁴¹ Policies with more generous provisions than those prescribed may or may not qualify.¹⁴² Their tax status at this time is literally unknown because there has been no clarification by statute or case law.¹⁴³ This presents a dilemma, of course, to attorneys and other financial planners who recommend LTC policies to clients. Despite these uncertainties, these guidelines, most of which were already being followed by the carriers, have helped to standardize policy benefits and further protect the consumer.¹⁴⁴ As a result, there is less reason today to question the quality of LTC policies as part of a personal retirement plan.¹⁴⁵

Many companies began scrambling in 1996 and 1997 to reconfigure their policies so they would be qualified for the new tax treatment.¹⁴⁶ For plans that are "qualified," the following treatments apply:

- Benefits are not considered to be taxable income, unless they are more than \$180 per day and exceed actual costs of care. The exclusion applies to amounts received up to \$175 per day, starting in 1997, and is adjusted for inflation thereafter.¹⁴⁷
- A portion of the LTC insurance premium is now treated like other medical expenses, based on a sliding scale that increases with age. The deduction for eligible LTC premiums is subject to a floor of 7.5% of income and the maximum annual deduction applies to amounts rising from \$200 for those under forty, to \$2,500 for those over seventy. However, most individuals do not have enough medical expenses to qualify for a deduction.¹⁴⁸

140. See SHELTON, *supra* note 7, at 13.

141. See Korn, *supra* note 5, at 146.

142. See *id.* at 142.

143. See *id.*

144. See SHELTON, *supra* note 7, at 8.

145. See Pullen, *supra* note 42, at 12.

146. See Jones, *supra* note 12, at 64.

147. See Korn, *supra* note 5, at 144.

148. See *id.*

- Employers will now receive a tax deduction for LTC insurance premiums paid on behalf of employees and for administrative expenses associated therewith. This should encourage the purchase of group LTC coverage by employers.¹⁴⁹
- Contributions by employers are now provided tax free to the employees.¹⁵⁰
- A portion of the LTC insurance premium will be treated like health insurance for the self-employed, based on a sliding scale that increases from forty-five percent in 1998 to one hundred percent in 2007.¹⁵¹
- In some cases, LTC insurance premiums are approved medical expenses under the new Medical Savings Accounts (MSAs), which can be set up as early as November 1998, for the self-employed or employers with fifty employees or less.¹⁵²
- LTC insurance can be paid from MSAs in 1999 and beyond for a limited number of Medicare beneficiaries.¹⁵³
- Unreimbursed expenses for qualified LTC services (not premiums) will count toward the itemized medical deduction for an individual taxpayer as well as her spouse or dependent where the individual pays for more than fifty percent of the dependent's support.¹⁵⁴

In summation, nursing home stays average about two and a half years in length¹⁵⁵ and may result in financial disaster. Further, the burden for LTC is clearly being shifted from the government to the private sector. As a result, more people are considering the purchase of LTC insurance policies. Although LTC policies offer several advantages, none are greater than the certainty of tax-free benefits. This is an advantage to policyholders in every income category.¹⁵⁶

149. See Pullen, *supra* note 42, at 12.

150. See SHELTON, *supra* note 7, at 9.

151. See *id.*

152. See *id.*

153. See *id.*

154. See *id.* at 10.

155. See Clapp, *supra* note 1, at 46.

156. See Carolyn T. Geer, *Shopper's Guide to Nursing Home Insurance*, FORBES, June 15, 1998, at 230, 230.

VII. LTC Insurance Policies

As more carriers have moved into the market and competition has become more intense,¹⁵⁷ LTC insurance has become the fastest growing insurance product available. The market "has been growing by an average of [twenty-three] percent per year since 1987."¹⁵⁸ As recently as 1986, there were about thirty companies offering LTC products.¹⁵⁹ Now there are 120 companies in the market.¹⁶⁰

There has been a parallel increase in the number of people covered in the private insurance market. There are over 5 million policies in force.¹⁶¹ However, the number of insureds is still only a small fraction of those who are likely to need LTC. Despite new tax breaks and decreasing confidence in the future of Social Security, only about six percent of the elderly and a smaller percentage of baby boomers have purchased it,¹⁶² and less than one percent of the U.S. population has LTC coverage.¹⁶³ The market remains largely confined to those who have both the financial means and the luxury of long-term time horizons in that they can foresee the eventual need for such products.¹⁶⁴

The threat of long-term care and the costs associated with it are some of the most important risks facing most elderly Americans and they may be the ones that are least insured.¹⁶⁵ The lack of LTC insurance may be the greatest threat to the financial security for older Americans today.¹⁶⁶ Unfortunately, too many elderly persons do not sense the need for and consequently fail to purchase coverage at an earlier age when premiums are lower.¹⁶⁷ The average age of a purchaser of LTC insurance is sixty-eight.¹⁶⁸

A. General Features

There are several features to LTC insurance policies. Unlike Medigap policies, no federal law prescribes the provisions that a LTC policy must contain.¹⁶⁹ However, about three-fourths of the states

157. See Chatsky, *supra* note 2, at 135.

158. Jones, *supra* note 12, at 64.

159. See Scanlon, *supra* note 13, at 19.

160. See Chatzky, *supra* note 2, at 135.

161. See SHELTON, *supra* note 7, at 10.

162. See Pullen, *supra* note 42, at 12.

163. See Bowers, *supra* note 138, at 87.

164. See Hudson, *supra* note 69, at 112.

165. See Clapp, *supra* note 1, at 46.

166. See *id.*

167. See Panko, *supra* note 30, at 66.

168. See *id.*

169. See Clapp, *supra* note 1, at 49.

have adapted a version of the Model Law dealing with sales practices and policy terms that were set forth by the National Association of Insurance Commissioners and later incorporated into the 1996 and 1997 health reform acts.¹⁷⁰ Thus, the new generation of policies has addressed the common objections to the older versions,¹⁷¹ and there is more uniformity than in previous times among the policies sold in the different states. Not only are today's policies more uniform, they are easier to read and understand, more flexible, provide better coverage, and are less expensive than the nursing-home-only coverage that insurance agents pushed in the 1980s.¹⁷²

B. Things to Look For

There are several characteristics to look for when choosing a LTC policy. Choosing one is difficult because, even with the uniformity provided with the Model Law, the consumer has a cacophony of options available. Each LTC purchaser must decide which policy provisions and riders are best for his or her particular needs. The following are several considerations that represent industry standards for a good LTC policy.

1. DAILY OR MONTHLY BENEFIT

The daily or monthly benefit structure is the method in which benefits are paid and the way policies are quoted and priced.¹⁷³ Some policies offer benefits based on "reasonable" costs in the area.¹⁷⁴ However, benefits are usually offered as optional flat amounts per day or month, typically in the amount of \$100-\$300 per day or \$3,000-\$9,000 per month.¹⁷⁵

There is some advantage in having a policy that pays on a monthly rather than a daily basis. If the monthly plan is used, and if care costs on a given day exceed the equivalent daily limit, the charges would still be covered up to the monthly limit.¹⁷⁶

170. See Scanlon, *supra* note 13, at 19.

171. See Panko, *supra* note 30, at 66.

172. See Jones, *supra* note 12, at 66; Chatzky, *supra* note 2, at 134, 135. LTC policies are marketed in several ways. They may be sold to individuals, associations, or employer groups. About 80% of all policies are sold to individuals or associations. See Frederick Schmitt, *HIAA Expects Long-Term Care Sales to Rebound*, NAT'L UNDERWRITER, PC/R&BM ED., May 27, 1996, at 6, 6.

173. See SHELTON, *supra* note 7, at 17.

174. See *id.*

175. See Katt, *supra* note 2, at 25.

176. See SHELTON, *supra* note 7, at 17.

LTC policies are offered on either an “indemnity” basis or a “reimbursement” basis.¹⁷⁷ If on the “reimbursement” basis, the policy will not pay more than the actual charge, regardless of the daily benefit selected, but the unused portion of the daily benefit can be carried over from one period to the next.¹⁷⁸ This option helps to keep the premiums down. If benefits are paid on an “indemnity” basis, the policyholder gets the daily or monthly benefit regardless of the actual charge.¹⁷⁹ The advantage of this option is that any difference can be used to cover the costs of a private room or incidental charges, such as laundry or hairdressing.¹⁸⁰

The amount of daily benefit chosen should relate to the level of perceived LTC risk, premium affordability, realistic capability of self-insuring, and how well the benefit fits the insured’s needs. There is no compulsion that the benefit selected cover all costs, because some could be paid out-of-pocket. The benefit level should also reflect the level of nursing home costs in the insured’s area, because costs vary greatly from one part of the country to another. As noted above, these costs average \$129 per day and are expected to triple in the next twenty years.¹⁸¹

2. CARE PAID FOR

The preferred plan design for a LTC insurance policy will cover costs for all categories of care—skilled, intermediate, and custodial—at the same benefit level.¹⁸² The contract should not require skilled care before intermediate or custodial benefits are paid.¹⁸³ Coverage should be available whether services are provided in a facility—such as a nursing home, assisted living facility, alternate care facility, hospice, or adult day care center—or at home.¹⁸⁴

If care is provided in a nursing home, the services should include all room, board, and care costs. If provided at home, an automatic inclusion in some policies and an option in others, the services should include a home health aide sitting with the patient, preparing meals, supervising medicine, and assisting with heavy care giving,

177. See *id.* at 18.

178. See *id.*

179. See *id.*

180. See *id.*

181. See *id.* at 1.

182. See *id.* at 15.

183. See *id.* at 36.

184. See Altfest, *supra* note 90, at 40-42.

such as bathing and washing of hair. The home health care benefit is not intended to provide twenty-four-hour a day service.¹⁸⁵ Rather, it is designed to pay for eight-hour shifts, perhaps to cover the time that the primary giver is getting some rest or is at work.¹⁸⁶

When the home health benefit is used, it should pay the equivalent of, or at least eighty percent of, the nursing home benefit, because an eight-hour shift of home health care costs almost as much as a day in a nursing home.¹⁸⁷ Although most policies require that a licensed agency provide the home health for a higher premium, the policy may allow a family member or friend to provide the care.¹⁸⁸ If such a provision is included, the policyholder may be able to purchase lesser daily benefits, because these people may work for less than an outsider.¹⁸⁹

The prospective purchaser should seek a policy that covers all physical and cognitive impairments that may manifest themselves after the policy is purchased. Alzheimer's disease and other dementias are now covered in virtually all LTC policies.¹⁹⁰ However, mental conditions of a nonorganic nature, such as schizophrenia and manic-depression, are usually not covered.¹⁹¹

3. PREHOSPITALIZATION REQUIREMENT

Many admissions to nursing homes do not follow a period of hospitalization.¹⁹² Many patients admitted to nursing homes, particularly Alzheimer's patients and the frail elderly, go directly from their residence to the nursing homes.¹⁹³ However, some older LTC policies require a prior period of hospitalization (perhaps three days) as a prerequisite for coverage during nursing home confinement.¹⁹⁴ In fact, LTC policies should require only a doctor's certification prior to nursing home entry, because prehospitalization requirements can be devastating screening devices. Policies with these coverage-limiting

185. See SHELTON, *supra* note 7, at 15.

186. See *id.*

187. See Amey Stone, *Long-Term Care Coverage Catches On*, BUS. WK., July 27, 1998, at 88, 88.

188. See SHELTON, *supra* note 7, at 16.

189. See *id.*

190. See Panko, *supra* note 30, at 66.

191. See *id.*

192. See SHELTON, *supra* note 7, at 17.

193. See *id.*

194. See Krieger, *supra* note 48, at 16.

provisions should be the subject of upgrading,¹⁹⁵ even though the premiums would be higher without them for obvious reasons.

4. INFLATION PROTECTION

The inflation protection provision is often called the “future-purchase” option and is one of the most valuable and potentially money-saving features in a LTC policy.¹⁹⁶ It may not be pushed by agents selling LTC policies because the feature may make them cost prohibitive, and hence, the sale more difficult.¹⁹⁷ Moreover, agents may not realize how essential the option is. Unfortunately, the inflation protection option was included in only a third of the LTC policies sold in the early 1990s.¹⁹⁸

Nursing home expenses have historically risen by approximately six percent per year compounded, and current projections are that they will continue to rise at that rate.¹⁹⁹ They have risen almost three times as rapidly as the Consumer Price Index in the 1990s.²⁰⁰ Therefore, the prudent LTC policy purchaser—particularly one who does not anticipate the need for LTC for ten to fifteen years—should insist on having an inflation benefit option.

Those who buy policies without inflation protection are essentially betting on the stability of LTC prices.²⁰¹ The inflation option will allow a policyholder to either buy additional coverage at certain intervals (perhaps in an amount equal to the percentage rise in inflation) or to purchase a rider that will automatically increase the daily benefit.²⁰² Refusing the protection makes sense only for the very old, for obvious reasons, or for very young purchasers who expect other assets to grow enough to compensate for the erosion in policy benefits.²⁰³

To illustrate the need for inflation protection, consider these figures. With six percent inflation, a nursing home room that costs \$3,500 a month today will cost \$6,267 in ten years, and \$11,225 in twenty years. The inflation option, usually available only at time of policy purchase, will increase benefit amounts on either a simple or

195. See SHELTON, *supra* note 7, at 36.

196. See Bell, *supra* note 129, at 7.

197. See *id.*

198. See *id.*

199. See SHELTON, *supra* note 7, at 21.

200. See Bell, *supra* note 129, at 7-12.

201. See *id.* at 7.

202. See Panko, *supra* note 30, at 67.

203. See Bell, *supra* note 129, at 7.

compound basis each year (usually by five percent) to help ensure that benefits will follow rising costs.²⁰⁴ Of course, the younger the purchaser, the greater the need for inflation protection and the greater the impact on premiums.²⁰⁵ The compound interest option will double the premium of the average policy, and the simple-interest option will increase it by fifty percent.²⁰⁶

5. PREEXISTING CONDITION

As might be expected, many LTC policies contain preexisting conditions clauses.²⁰⁷ That is, the applicant must medically qualify, and the company will not provide coverage for physical and/or mental illnesses of a policyholder which existed at policy inception or for a given period (for example, six months) prior to that.²⁰⁸ "Conditions such as Alzheimer's, AIDS, multiple sclerosis, psychiatric disorders, and other diseases are not insurable."²⁰⁹ Furthermore, the applicant must be ambulatory and be able to perform the ADLs.²¹⁰ Many companies offer immediate coverage if the condition is listed on the application.²¹¹ The preexisting conditions exclusion could easily limit coverage and should be examined carefully. Some companies do not permit a "buy-back" of this exclusion.

In general, the younger and healthier the applicant, the more likely that he or she can get a LTC policy without limitations or exclusions.²¹² The company will typically look at the applicant's medical records instead of asking for a medical exam.²¹³ However, after a certain age, usually in the seventy-two to seventy-six range, many companies will ask a paramedic to check the applicant's vital signs and assess his or her mental and physical health.²¹⁴ They may also get a nurse to test the applicant's memory and physical disabilities as part of the underwriting process.²¹⁵ Thus, persons desiring LTC coverage should apply at as young an age as possible. Those who apply later,

204. *See id.*

205. *See generally* Katt, *supra* note 2, at 25 (discussing how inflation cost increases depend on age of individual purchasing LTC coverage).

206. *See* Bell, *supra* note 129, at 7.

207. *See* SHELTON, *supra* note 7, at 29.

208. *See id.* at 28.

209. *Id.*

210. *See id.*

211. *See id.* at 29.

212. *See id.*

213. *See id.* at 28.

214. *See id.*

215. *See id.*

after they have developed health problems, may be denied coverage. And, of course, those applying at earlier ages pay smaller premiums because the chances are that they will pay for a longer period of time before they make a claim.²¹⁶

6. WAITING PERIOD

The waiting period, or elimination period, operates like a deductible.²¹⁷ It is the amount of time, usually measured in days, that the insured must receive eligible services before the policy will begin paying benefits.²¹⁸ The longer the waiting period, the lower the premium, but the greater the potential out-of-pocket costs.²¹⁹ Depending on the policy, the deductible may apply to each spell of illness, or it may apply only once in a lifetime.²²⁰ The policyholder typically has an option as to the length of the waiting period, usually twenty to 100 days, but it can also refrain from requiring a waiting period or can require as much as a year.²²¹ Some states, however, do not permit waiting periods beyond 180 days.²²²

7. GUARANTEED RENEWABILITY

When LTC policies were first issued, insurers sometimes promised more benefits than the premium structure would support.²²³ As a result, they were forced to raise premiums or cancel policies when claims were greater than expected.²²⁴ Therefore, it is important for LTC policyholders who purchased the coverage a few years ago to confirm that the policy has the guaranteed renewability feature. This means that it cannot be canceled as long as premiums are paid and that restrictions are placed on premium increases.²²⁵ The limitation is that premiums cannot be increased unless all policyholders in a class receive the same increase.²²⁶ Without these provisions, the company can revise the premium structure or cancel at any time.

216. See Altfest, *supra* note 90, at 40; Stanton, *supra* note 28, at 54.

217. See Weil, *supra* note 2, at 52 ex. 2; see also Altfest, *supra* note 90, at 42.

218. See SHELTON, *supra* note 7, at 28.

219. See Altfest, *supra* note 90, at 40.

220. See SHELTON, *supra* note 7, at 21.

221. See *id.* at 20.

222. See *id.*

223. See *id.* at 33.

224. See *id.*; Katt, *supra* note 2, at 25-26.

225. See SHELTON, *supra* note 7, at 17; Katt, *supra* note 2, at 25. This will prevent cancellation of policy even in the instance where the carrier stops issuing this kind of policy.

226. See SHELTON, *supra* note 7, at 17.

8. BENEFIT PERIOD/LIFETIME MAXIMUM

Benefit periods define how long the insurance company is obligated to pay benefits.²²⁷ Policies may have benefit periods of one year to a lifetime (i.e., unlimited), though some states restrict the minimum benefit period to at least two years.²²⁸ Maximum benefit periods in LTC policies usually range from three to six years, though some policies continue for longer periods.²²⁹ The average coverage period is four years.²³⁰ To be on the safe side, a five-year benefit period is suggested, particularly for women. Only twenty percent of the nursing home admittees over sixty-five will remain longer than five years.²³¹

A few policyholders purchase lifetime coverage, and some advisors recommend it.²³² However, because there is a small chance that it will be needed, lifetime coverage is difficult to justify and is very expensive. It may be most worthwhile for single people who do not have a network of support from family and friends and, hence, are more likely to require longer stays in nursing homes. Even then, if a person has stayed in a nursing home for five years without other expenses, that person's assets would have grown, and they would be better able to cover the cost of care past the five-year period.

9. WAIVER OF PREMIUM

The waiver of premium provision is important in a LTC policy, because it means that the policy will remain in force during all or a part of the time the insured is on benefit and may be unable to continue premium payments.²³³ In better policies, these days need not be consecutive.²³⁴ This feature enables policyholders to continue to meet personal and household expenses once LTC payments have begun. Some policies provide that the premium payment is waived from the first day of occupancy in a nursing home, while others grant the waiver only after a given number of days of occupancy.²³⁵ Ninety days is the usual period.²³⁶

227. See *id.* at 18 (benefits may also be expressed in terms of a dollar maximum, a specific daily amount times a specified number of days).

228. See *id.*

229. See *id.*

230. See Stone, *supra* note 187, at 88.

231. See SHELTON, *supra* note 7, at 19.

232. See Katt, *supra* note 2, at 25.

233. See SHELTON, *supra* note 7, at 21.

234. See *id.*

235. See *id.*

236. See *id.*

10. COST

Some Americans may have avoided buying LTC policies because of misconceptions about the cost. In fact, LTC prices have come down in recent years.²³⁷ Costs have declined five percent since 1995,²³⁸ due to improved underwriting practices, more credible loss data, and heated competition in the market.²³⁹ However, premium cost is not always the best measure of value in LTC policies. Cost-consciousness should include "concern for value-added features" as well as price.²⁴⁰

Depending on policy provisions—such as coverages, exclusions—and limitations, and underwriting factors—such as age—LTC premiums for a benefit of \$100 per day range from \$250 per year for a forty year old who rejects the inflation option to \$5,600 per year for a seventy-nine year old who purchases inflation protection.²⁴¹ These prices may seem expensive, but they are relatively insignificant when one considers the emotional consequences that LTC may have on the purchaser's family, the likelihood that coverage will be needed, and the cost that an uninsured nursing home patient could end up paying out-of-pocket.

11. RETURN OF PREMIUM OPTION

The return of premium provision provides for a return of a specified percentage of the premium to the insured's estate if the policy is not used after being in force for a specified number of years.²⁴² Any such guarantee removes funds available to help pay claims of those retaining coverage and pushes up the price.²⁴³ LTC applicants can save a hefty percentage of the annual premium by eliminating this option.²⁴⁴

12. NONFORFEITURE RIDER

Older LTC policies and some current nonqualified policies offer nonforfeiture benefits, such as a shortened benefit period or a partial benefit, if they stop paying the premium before making a claim.²⁴⁵ It

237. See Chatzky, *supra* note 2, at 135.

238. See Jones, *supra* note 12, at 64.

239. See Scanlon, *supra* note 13, at 16.

240. See Dan Kubiske, *Nursing Homes*, PROF. AGENT, May 1996, at 31.

241. See Bell, *supra* note 129, at 7.

242. See Shelton, *supra* note 7, at 29.

243. See Panko, *supra* note 30, at 66.

244. See *id.*

245. See *id.*

is similar to the nonforfeiture provision in a whole life insurance policy. This rider will also drive premium prices up sharply.²⁴⁶

Tax qualified plans also offer, with additional premium cost, a different kind of nonforfeiture option.²⁴⁷ The guarantee, if the option is taken, is that the company will pay benefits equal to the amount of premium paid in if the policy is kept in force for three years.²⁴⁸ It is probably not a good idea to exercise this option because it increases premiums by almost one-third, and the returned premium only covers LTC costs for just a short time.²⁴⁹

C. Exclusions

LTC policies contain many exclusions, some of which are found in health insurance contracts.²⁵⁰ The exclusions should be examined carefully to determine the restrictions and limitations on coverage. LTC policy benefits are generally not payable for Medicare/Medicaid reimbursement expenses; occupancy in a nursing home that is government owned or operated, domiciled outside the United States, or provides domiciliary, residential, or retirement care; and, unless specified, care provided by family members.²⁵¹ There also is no coverage for care received outside the United States.²⁵² Some policies will not pay for confinement due to mental illness or for services when no charge is made to the insured.²⁵³ Others may not pay for expenses resulting from illness or injury related to alcoholism or drug abuse or for nonorganic-based mental or nervous disorders.²⁵⁴ Individual policies may contain modifications of the above exclusions or even different ones.²⁵⁵

D. New Benefits

There are several relatively new benefit additions to the LTC insurance policies issued by different carriers. These include a cessation of premium payments after a certain number of no-claim years; alter-

246. See *id.*

247. See SHELTON, *supra* note 7, at 30.

248. See *id.*

249. See *id.*

250. See Clapp, *supra* note 1, at 50.

251. See *id.*

252. See *id.*

253. See *id.*

254. See *id.*

255. See *id.* at 48, 50; see also SHELTON, *supra* note 7, at 15-16, 29, 33-36; Breuer, *supra* note 18, at 87; Lee, *supra* note 4, at 8.

nate plans of care; assisted living centers or a similar arrangement; respite care providing caregivers, such as family members, an opportunity to take a periodic break from caregiving responsibilities; home-maker services; and adult day care.²⁵⁶ Some policies offer a cash value element, and some sell a LTC policy with a shared care rider for couples that allows either partner to use the benefits of the other's policy.²⁵⁷ One of the newer policies offers disability income coverage to age sixty-five when it is no longer needed, at which time the policy owner is given the option to convert the policy to a LTC policy with nursing home or in-home care coverage with no increase in premium.²⁵⁸

Finally, some policies now provide for a geriatric care coordinator or manager (personal care advisor) to help the insured manage the home care program.²⁵⁹ This option is helpful to those who have elderly parents living in distant locations or whose parents have illnesses that require specialized training. The manager will provide an assessment of the LTC situation and develop a plan to meet the needs of the patient, provide assistance regarding where and how available benefits will be provided, pay the bills and manage the financial accounts, and investigate local services such as adult day care and entitlement programs. When the time comes, the geriatric care manager can help in the screening and eventual selection of a nursing home. This kind of assistance and advice can greatly reduce the confusion, misunderstanding, and emotional stress that inevitably arises when adult children provide care to their elderly parents.²⁶⁰

VIII. Who Needs LTC Coverage?

The most likely candidates for LTC insurance sales are middle-income individuals who have too many assets to qualify for Medicaid and too few assets to feel comfortable about paying for LTC out of their own pockets.²⁶¹ LTC policy premium costs are prohibitive for those with scant savings, and people of modest means and little savings would likely spend down their assets after a short stay in a nurs-

256. See SHELTON, *supra* note 7, at 15-16, 29, 33-36.

257. See *id.* at 29; Stone, *supra* note 187, at 88.

258. The explanations of new benefits are covered in SHELTON, *supra* note 7, at 35.

259. See SHELTON, *supra* note 7, at 35; Breuer, *supra* note 18, at 87.

260. See Krieger, *supra* note 48, at 19.

261. See Bell, *supra* note 129, at 7.

ing home and qualify quickly for Medicaid.²⁶² Additionally, it is almost impossible for a family of modest or moderate means to be able to save for LTC expenses that can easily run to \$40,000 annually or more. On the other hand, affluent families and individuals may be able to afford LTC without insurance. That is, they can self-insure so that their resources may be sufficient to generate income for the cost of a nursing home or other LTC services.²⁶³

Many advisers suggest LTC protection for elderly couples with a net worth of \$50,000 and upwards (not including equity in the home) who desire not to dissipate their wealth on LTC.²⁶⁴ One nationally recognized certified financial planner recommends buying LTC insurance if you are fifty-five or older and have between \$200,000 and \$2 million in assets.²⁶⁵ Phyllis Shelton, a national expert on the subject, suggests that families with asset bases from \$50,000 to \$2 million consider buying LTC insurance.²⁶⁶ Other planners also start with a \$50,000 base minimum.²⁶⁷ Regarding income, one source suggests that retirees with moderate assets whose incomes from investments, social security, and all other sources exceed \$30,000 should purchase LTC insurance.²⁶⁸ A recent *Fortune* magazine article suggested that families with incomes in the \$40,000 to \$250,000 range postpone the purchase of LTC insurance at their own peril.²⁶⁹

In fact, LTC is not just for the wealthy. Research data show that most buyers of LTC insurance do not nearly qualify as affluent.²⁷⁰ In 1994, two-thirds had incomes less than \$35,000 and one-third had incomes less than \$30,000.²⁷¹ Of course, families should not purchase the coverage if they have to struggle to pay the premium.²⁷² However, the premium is relatively attractive when people buy their coverage in their forties or fifties because purchasing at younger ages not

262. See SHELTON, *supra* note 7, at 2; Scanlon, *supra* note 13, at 16; Stone, *supra* note 187, at 88.

263. See generally Bell, *supra* note 129, at 7.

264. See Jones, *supra* note 12, at 66.

265. See Alttest, *supra* note 90, at 40.

266. See SHELTON, *supra* note 7, at 11 (this does not include home and automobile).

267. See Jones, *supra* note 12, at 66.

268. See Geer, *supra* note 156, at 230.

269. See SHELTON, *supra* note 7, at 11.

270. See *id.*

271. See *id.*

272. See Jones, *supra* note 12, at 66.

only saves on premium dollars, but it also locks in coverage before a subsequent illness renders one uninsurable.²⁷³

In the final analysis, the need to purchase LTC insurance is a highly personalized decision and may hinge on several factors in addition to the extent of the buyer's personal assets and income. The need to purchase protection will depend on the buyer's age, medical history and condition, lifestyle, predisposition toward risk transfer, propensity to invest in independence, and willingness to accept the drastic reduction in income that would result from professional LTC. Once the decision is made to purchase a LTC policy, the prudent buyer will shop around to determine which policy and which new riders and policy provisions would best fit his or her needs.

IX. Sensitizing Your Clients

Most financial planning clients, particularly elderly ones, will be aware of the need for LTC. Many will have friends who are in nursing homes or who are receiving care at home. Some may have first-hand knowledge of the disastrous consequences that occurred when a friend failed to plan properly for LTC. The need for LTC is not likely to be in question with elderly clients.

However, many clients will not realize the risk they face if they do not plan for LTC expenses in their senior years. It is the attorney's job as a fiduciary to convince them. The fact is, attorneys will likely never be able to persuade their clients of the potentially financially disastrous consequences of LTC until the attorneys themselves face the reality that there is a fifty-fifty chance—especially if the attorneys are middle-aged—that they will also need LTC before death. In other words, if attorneys are to persuade clients to buy LTC insurance, then they must internalize the risk.

After the attorneys face the risk and plan for the contingency that they may need LTC, they should either prepare themselves to educate the client or become aligned with reputable LTC specialists. All specialists should be screened carefully. The attorneys should listen to the specialists' sales presentations to determine if the specialists are knowledgeable, sincere, have a professional attitude, and have a portfolio of products that will meet client needs. The focus of the presentations should be on educating clients about the LTC risk and

273. See Altfest, *supra* note 90, at 40.

helping them to internalize that risk. If a specialist cannot convince an attorney of the need for LTC insurance, then the attorney should screen other specialists. In all likelihood, if the specialists can convince the attorneys, then they can inculcate that same conviction in the clients.

Once an attorney selects a specialist, the attorney can introduce the specialist to the clients. The specialist can work with the attorney on a letter of introduction or on a script if the specialist is to meet the clients in person. If the attorney has sensitized the clients to the risk of LTC, and for the need for insurance coverage, the client will go into the meeting with a receptive mind and will be less likely to want to "think about it" after the presentation ends. The client will feel the urgency to purchase protection at that time rather than later. If the client acts promptly, the attorney did a good job.

X. Conclusion

With relatively fewer public dollars being directed toward LTC needs associated with chronic illness and disability, personal planning for LTC is becoming essential for every American. Although the LTC policy is not the only option to provide coverage against the expenses associated with LTC, and may not always be the best one, it is a viable one for most families. It enables clients to purchase protection on an installment basis with an affordable premium that offsets the risk of much larger health-care-related expenses. This is one reason why sales of LTC policies have significantly increased in recent years.

LTC insurance helps elderly policyholders to preserve the resources they have spent a lifetime accumulating, and it allows them to transfer those resources to the objects of their affection at their death. It reduces the fear that they will lose self-determination and gives them choices about how to live their lives. LTC coverage protects their independence at that stage of life when they are most vulnerable. It also permits those who are married to provide adequately for a surviving spouse.

Finally, LTC insurance provides emotional well-being to the elderly, their families, and their advocates. The fear of outliving one's income and becoming dependent may remain even if the best LTC insurance policies are in place; however, seniors can rest secure in the knowledge that benefits for LTC will be available when such an exigency occurs. In short, having LTC insurance protection means that

growing old does not have to be equated with going broke or losing dignity, control, and autonomy. For these reasons, it is important that attorneys be aware of the risk that LTC presents and of the importance of advising elderly clients about the LTC insurance policy and other options available to help them maintain happy, healthy, and independent lifestyles when care is needed.