



## Long-Term Care Litigation Could Affect Operations

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The aging of the baby boomer generation will lead to a higher demand for assisted living (AL) and long-term care (LTC), but it will also likely result in greater litigation. The anticipated lawsuit avalanche won't necessarily be against facilities, but will target insurance carriers that deny coverage and refuse to pay for the care of residents with LTC insurance.

For AL and LTC providers, however, the expected increase in litigation against insurance companies could have a severe financial impact: loss of cash flow and even loss of income. In a real sense, LTC providers could become the innocent bystanders that get hit by the runaway truck of insurance litigation.

The reason that people buy LTC insurance is that ordinary health insurance policies and Medicare don't usually pay for LTC expenses. Medicaid doesn't kick in until a person's assets have been depleted. The current cost of 1 day in a private nursing home averages between \$170 and \$200—or nearly \$70,000 a year. The average stay in a LTC facility is now 3 years, which explains why many people are now turning to LTC insurance.

Long-term care insurance doesn't come cheaply. A 65-year-old who is in good health can expect to pay \$2000 to \$3000 a year for a policy that covers nursing home care and home care, with premiums adjusted for inflation, according to a recent study by the American Association of Retired Persons (AARP).

Despite the steep cost of the policies, in 2007, 400,000 new policies were issued and about 180,000 Americans with LTC insurance policies were paid \$3.5 billion in benefits, according to AARP.

Many, but not all LTC insurance policies reflect the current model of aging. Over the years, LTC has evolved from the concept of a skilled nursing home as final residence to a continuum of care through the various stages of aging. The percentage of people over age 75 who live in skilled nursing homes has declined since 1985 from 10.2% to 7.4%, as more people are able to remain in their homes longer, thanks to visiting nurses and adult day care. Long-term care insurance will usually cover:

- Nursing home care
- Assisted living services that are provided in a special residential setting

- Adult day care
- Visiting nurses
- Help in the home with daily activities

The most common triggers for litigation against LTC insurers tend to be policy nonconformity, unexpected policy increases, failure to follow proper claims procedures, and denial of claims.

In many cases, insurance carriers are denying claims for AL and other services because they say the services are not covered under the policy's definition of a nursing home. Either the policyholders have failed to carefully read through their contracts or their brokers or agents have sold them contracts under false pretenses. For example, the case of *Milburn v. Life Investors Ins. Co.* involved a policyholder who moved into an "AL facility" because she required help to get out of bed, take her medication, and walk. Milburn made a claim under the nursing home benefit clause of her LTC policy. But based on the policy definition of a nursing home, the insurer denied

the claim. The court agreed with the insurance carrier that the AL facility was outside the policy's scope because it was not licensed as a nursing facility, as required under the policy.

Another example of a definition being misleading or confusing is the scope of coverage under "in-home care" clauses. Depending on the carrier, a policyholder may be required to hire in-home staff through a particular "health care agency" and not a "home care agency." However, these nuances are oftentimes left unexplained in policies, leaving policyholders surprised when their claims are denied.

Administrative policies enforced by some insurance carriers are partially responsible for the rise in lawsuits against LTC insurers, according to one report by the *New York Times*. For example, Consecro, Inc. employees have said that the company does not permit them to talk with customers for longer than 4 minutes at a time. They are also not allowed to contact fellow employees by phone to expedite resolution of claims. The rapidly growing number of lawsuits across the country gives credence to the view that policyholders confront unnecessary delays and overwhelming bu-

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reaucracies in attempting to claim policy benefits.

Many lawsuits are related to a rise in premiums. A common misconception among policyholders, perhaps fostered by brokers and agents, is that their premium cannot be increased because they purchased a policy that is “guaranteed renewable.” In protest of rising policy prices, many policyholders have stopped paying for their policies and are combating increases. For example, in a case in Iowa,<sup>1</sup> plaintiffs alleged the insurance company “fraudulently induced them and others similarly situated to them to buy certain defective, underpriced, [LTC] policies with the intent to raise their premiums at a later date.” The court dismissed the fraud claims because the signed contract explicitly reserved the insurer’s right to raise premiums, and the policyholder’s failure to understand this language before signing the contract was not grounds to later avoid it.

Most lawsuits so far have involved Conseco, its affiliate, Banker’s Life & Casualty Company, and Penn Treaty Network American. According to data from the National Association of Insurance Commissioners,<sup>2</sup> in 2005, Conseco received more than one complaint regarding LTC insurance for every 383 such policyholders, and Penn Treaty received one complaint for every 1207 LTC policyholders. Conseco is one of the largest general insurance carriers in the nation and collects billions in premiums each year. Penn Treaty focuses solely on LTC insurance and in 2004 collected approximately \$320 million in premiums.

One complication in litigation about LTC insurance is that those who are covered by the policy are usually not in a position to fight a claim denial. Many policyholders are nearing the end of their lives by the time they need to make a claim. The families then carry the burden of filing the claim and, if needed, deciding whether to litigate.

The old saying that when a company buys business insurance, they merely buy the right to sue an insurance company could soon ring true for LTC policyholders. The increase of lawsuits results from an industry-wide panic of having sold underpriced policies that many carriers assumed would lapse before they had to pay claims. To a large degree, the carriers priced and sold the policies without taking into account increased

life expectancies. Insurers are now liable for more than initially planned, and denying or slowing down claims is a way that some insurance companies have always addressed problems of cash flow and profitability.

Many states have reacted to the increase in LTC lawsuits by passing tort reform laws aimed at limiting liability claims or losses and getting care providers their insurance payments more expeditiously. Pennsylvania, for example, has barred individuals from suing for damages that were already paid for by a health insurer. And Florida shortened the statute of limitations for initiating a lawsuit against a LTC facility to 2 years. Perhaps these pro-insurance company measures will deter litigation against LTC in the future, and perhaps not.

Assisted living and LTC facility providers and other medical businesses that sometimes receive payments under LTC policies can avoid being the innocent bystanders by making a few changes to their operations. First and foremost, providers should consider changing cash flow assumptions to accommodate the fact that a higher percentage of payments may be late because of insurance disputes. Operators should also educate themselves on the nuances of LTC policies and problematic policy provisions. Providers could also offer to review the policies of prospective residents or could provide informational seminars, pointing out clauses that may be an obstacle to a grant of coverage. Keep in mind, though, that in offering to review policies, the facility should assiduously avoid doing or saying anything that could increase its liability or be misconstrued as offering legal advice. After all, as bad as the loss of cash flow might be, an even worse fate is to be dragged into a litigation that could be both costly and timely.

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“ To be 70 years young is sometimes far more cheerful and hopeful than to be 40 years old. ”

– Oliver Wendell Holmes