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# Legislators target abuses in a growing insurance field

## Regulators hope that ADR can help protect disability policyholders.

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special to the national law journal

long-term health care is arguably the No. 1 problem facing seniors in the United States. To address the potentially staggering costs of care, more than 8 million Americans already have purchased long-term care insurance (LTCI) policies. With tens of millions of baby boomers entering their 60s, and as a result of federal and state programs that promote long-term care insurance to reduce the strain on Medicaid budgets, the number of policyholders is expected to increase dramatically in the near future. The viability of LTCI depends upon prompt, fair claims-resolution procedures.

Lawmakers, regulators and insurers are working to address problems uncovered in recent investigations, which showed that some insurers have engaged in delay and denial tactics that make it difficult, if not impossible, for policyholders to be paid. A common approach to claims-practice problems has emerged in recently proposed federal and state legislation, and in expected revisions to model regulations promulgated by the National Association of Insurance Commissioners (NAIC): the requirement of an alternative method of dispute resolution to provide independent review of claims denials.

The increased use of alternative dispute resolution could provide an ideal solution for desperate policyholders who need quick, inexpensive ways to challenge benefit denials. However, there is concern that most of the proposals for independent review address the problem of claims denials too narrowly, and do not provide an alternative process that fully meets the needs of this vulnerable population.

Long-term care refers to the many services beyond medical and nursing care used by people who have disabilities or chronic illnesses. LTCI pays for these services, which usually are not covered by ordinary health insurance policies or Medicare. Medicaid will pay for long-term care only if an individual has spent most of his savings or other assets.

Payment of LTCI benefits is triggered by a determination that an insured cannot engage in one or more activities of daily living or has cognitive impairment. Long-term care insurance typically covers nursing home care, and often also covers help in a policyholder's home, community programs (such as adult day care) and assisted living services that are provided in a special residential setting other than the policyholder's home.

**Proposed legislation would provide broad independent review.**

LTCI is in relative infancy as an insurance product, but the market is expected to grow dramatically. According to the U.S. Census Bureau, the boomer generation, those born between 1946 and 1964, by 2030 will include 57.8 million people between the ages of 66 and 84. U.S. Census Bureau, Press Release, "Facts for Features," Jan. 3, 2006, citing to original population projection from bureau at www.census.gov/ipc/www/usinterimproj/. Some studies predict that more than two-thirds of all Americans above the age of 65 will require long-term care services at some point in their lives. Representative Bart Stupak, D-Mich., "Long-term Care Insurance: Are Consumers Protected for the Long Term?," written statement opening hearings by the House Committee on Energy and Commerce's oversight and investigations subcommittee, July 24, 2008, available at http://energycommerce.house.gov/cmte_mtgs/110-oi-hrg.072408.LongTermCare.shtml.

### What's pushing LTCI

The growth of LTCI also is being driven by the recent expansion of the federal-state LTCI Partnership Program, which encourages people who might otherwise turn to Medicaid to finance their long-term care by purchasing LTCI. If people who purchase qualifying policies deplete their insurance benefits, they may retain a specified amount of assets and still qualify for Medicaid.

Although the vast majority of LTCI claims are paid promptly, there is growing concern about the rising number of complaints regarding delayed payment and unfair claims denials. The LTCI industry and state and federal officials were shaken by a March 2007 *New York Times* article that recounted systemic problems in LTCI claims handling. Charles Duhigg, "Aged, Frail and Denied Care by Their Insurers," N.Y. Times, March 26, 2007, available at www.nytimes.com/2007/03/26business/26care.

The *Times* article, which focused primarily on Conseco Inc., its subsidiary Bankers Life and Casualty Co., and Penn Treaty American Corp., reviewed 400 of thousands of grievances and lawsuits filed in recent years on behalf of elderly policyholders. Policyholders contended that claims were wrongly denied on pretexts such as failure to submit unimportant paperwork, lack of minute details in daily nursing notes and failure to fill out the correct forms (after the insurer sent them incorrect forms).

Policyholders complained that insurers determined certain facilities to be inappropriate even though they were licensed by state regulators. A former Bankers Life agent testified that Conseco and Bankers Life "made it so hard to make a claim that people either died or gave up." According to a former regulator, "the bottom line is that insurance companies make money when they don't pay claims."

In May 2008, Conseco entered into a multistate regulatory settlement agreement, providing for a $2.3 million fine and $30 million in claims-handling improvements and restitution. Conseco faces an additional $10 million fine if problems are not corrected. News Release, National Association of Insurance Commissioners, "State Insurance Regulators Fine Conseco," May 7, 2008, available at

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www.naic.org/Releases/2008_docs/conseco_fine.htm.

Data collected by the NAIC indicate that nationwide complaints to state insurance departments about LTCI rose by 92% between 2001 and 2006, and that complaints involving claim denials resulted, in most cases, in reversals that favored consumers—a pattern of error not typically found in other lines of health-related insurance.

In hearings held in July before the House Committee on Energy and Commerce's oversight and investigations subcommittee, consumer advocates and individuals testified to continuing unfair claims-processing practices and unjust claims denials. Testimony of Al Bode, Bonnie Burns and Jack E. Vogelsong before the House Committee on Energy and Commerce's oversight and investigations subcommittee, July 24, 2008, available at http://energycommerce.house.gov/cmte_mtgs/110-oi-hrg.072408.LongTermCare.shtml.

Bonnie Burns, a training and policy specialist with California Health Advocates, offered multiple examples of disputes regarding appropriate facilities or care alternatives, including denial of benefits because the assisted living facility chosen by the policyholder had only six beds as opposed to the 10 beds required in her policy.

Policyholder advocates and attorneys acknowledge that most insurance companies handle claims properly, but point out that many policyholders are not mentally or physically able to navigate the claims process, and lack a support network to assist them.

**Short of a lawsuit, the remedies available are limited.**

Short of a lawsuit, the remedies available to policyholders are limited to an insurer's internal appeal process and complaint to the relevant state insurance department, which can investigate claims handling and assist in the resolution of complaints but has no power to order payment of benefits. As a practical matter, policyholders are forced to seek recourse through the potentially expensive and lengthy process of litigation. Meanwhile, care costs mount and the policyholder must rely on personal or family resources and attempt to qualify for Medicaid.

Policyholder advocates and representatives agree that many insurers will pay benefits only when confronted with the prospect of defending their actions before a hostile jury and exposure to punitive damages. With the assistance of counsel, most lawsuits are settled confidentially through negotiation or mediation.

The *Times* article prompted a flurry of activity by regulators and federal and state lawmakers. The only state legislation passed to date is in Iowa, after the *Des Moines Register* examined a series of LTCI complaints and in an April 2008 editorial decried a "complaint handling process that's cloaked in secrecy" and unresponsive to the needs of senior Iowans. Editorial, "Assurance Denied: Troubles with long-term-care insurance," Des Moines Register, April 6, 2008, available at www.desmoinesregister.com.

This legislation, proposed federal and state legislation, and expected NAIC action all focus on independent review of claims denials. These proposals promise to expand the available dispute-resolution options, but policyholder advocates and practitioners urge careful analysis and consideration of provisions pertaining to scope of review, independence of reviewers and the extent to which independent review may affect existing alternatives and legal remedies.

The Iowa statute allows a policyholder to request "independent review of a denial of coverage based on a benefit trigger determination" conducted by a "qualified licensed health care professional" selected from a group certified by the insurance commissioner. The law provides tight deadlines for the independent review process. The decision of the independent reviewer is binding on the insurer. An insured may appeal the decision to a court, but the findings of fact by the independent reviewer are "conclusive and binding." HF 2694, available at http://coolice.legis.state.ia.us.

## Model regulations

A NAIC task force is using the Iowa statute as a template for a model regulation on independent review that NAIC hopes to have in place by December 2009. Although the structure, scope and binding effect of the review process are all being debated, recently circulated proposed language would limit review of claims denials to "benefit trigger" determinations, and provides that the independent reviewer's decision would be binding on both the insurer and the policyholder. The draft regulation would narrowly apply only to policies issued after an adopted regulation's effective date, whereas the Iowa statute applies to requests for benefit trigger determinations beginning next year, regardless of when the policy was issued.

Anticipating action by the NAIC and state legislatures, John Hancock Life Insurance Co. this year voluntarily implemented an independent review process for newly issued LTCI policies that is limited to benefit-trigger determinations. John Hancock has established a group of "independent review entities" through which a policyholder may select an independent reviewer. Notably, under the John Hancock program, as in Iowa, the decision of the independent reviewer is expressly binding on John Hancock, but not on the policyholder, leaving the policyholder free to pursue existing remedies at any point in the claims process. Testimony of Thomas E. Samoluk, John Hancock Vice President and Counsel for Government Affairs, July 24, 2008, before the House Committee on Energy and Commerce's oversight and investigations subcommittee, available at http://energycommerce.house.gov/cmte_mtgs/110-oi-hrg.072408.LongTermCare.shtml. During the July 2008 congressional hearings, Stupak, the subcommittee chairman, openly challenged other long-term care insurers to follow John Hancock's lead on independent review. Id.

Legislation proposed by New York Governor David Patterson earlier this year would require LTCI companies to establish external review options for "adverse claim determinations that relate to the disabilities of the insured." Press Release, "Governor Patterson Announces Legislation to Encourage Long Term Care Planning and Help People Remain at Home," May 19, 2008, available at www.-state.ny.us/governor/press/press_-0519082.html. This language appears to extend the review option beyond benefit-trigger determinations and could encompass, for example, disputes regarding appropriate care facilities.

## Federal legislation

The broadest independent review provisions are found in federal legislation introduced last year by Senator Amy Klobuchar, D-Minn. Her Long Term Care Insurance Integrity Act, S. 2268, would require a long-term care insurer to develop and implement expeditious claims-dispute resolution procedures that offer "one or more alternative means of dispute resolution involving independent third-party review under appropriate circumstances by entities that are mutually acceptable to the issuer and the enrollee involved."

The bill, co-sponsored by senators Barbara A. Mikulski, D-Md., and Barbara Boxer, D-Calif., has been referred to the Senate Committee on Health, Education, Labor and Pensions. Klobuchar is working closely with other interested members of Congress, including Senator Charles E. Grassley, R-Iowa, the NAIC and advocacy groups to explore a variety of dispute resolution alternatives for LTCI claims.

The reaction of policyholder advocates and representatives to proposals for independent review has been mixed. Although some plaintiffs' attorneys and consumer advocates contacted by the author commended this reform effort, many observed that strict limitation of independent review to benefit-trigger decisions leaves unaddressed many of the systemic problems and types of recurring disputes identified in the *Times* article and in the congressional testimony. There was considerable skepticism about the independence of a review process that is set up by and paid for by insurers. There was uniform opposition to a process that is binding on policyholders or that limits existing legal remedies, as policyholders are likely to be unrepresented in the independent-review process.

The growth in the LTCI market presents a major challenge to insurers, regulators and the legal system to ensure that disputed claims under these policies are resolved fairly and promptly.

Independent-review programs limited to benefit-trigger determinations address one significant category of potential disputes, but fail to provide effective alternatives for resolution of other common types of claims denials. They also fail to address the policyholder's critical need for an advocate in the claims process. Lawmakers and regulators should therefore continue to explore expanded alternative dispute resolution opportunities for LTCI claims, in particular a mediation program in which independent advocacy is available to policyholders. NLJ