

ELDER LAW

Rejecting Medicaid Restrictions, Long-Term Care Insurance Reform

BY DANIEL G. FISH



This year the New York State Legislature delivered the state budget a record breaking 133 days past due.¹ For the elderly, it was a time of great apprehension, caused by the governor's proposal to restrict Medicaid eligibility. Better late than never, the Senate and Assembly rejected the governor's proposal.

In his budget request in January of this year, Governor George Pataki proposed significant cutbacks in Medicaid eligibility, touted as "Medicaid reform."² He suggested that the look-back period be extended from 36 to 60 months; that a penalty period be established for home care applications; that spousal refusal be eliminated in home care cases; and that the penalty period begin to run from the time of application and not from the time of the transfer. Since some of the current provisions are embedded in federal law, the proposal included authority to seek a waiver from the U.S. Department of Health and Human Services. While the governor's proposal assumed that HHS could grand such a waiver, many groups raised serious legal questions as to whether the department had the authority to waive the federal requirements underlying these state law provisions.

The Legislature's action means that the look-back period remains at 36 months; that there is no penalty-period associated with home care applications; that spousal refusal is still available in home care cases; and that the penalty-period still begins to run from the date of the transfer. However, the underlying issue of the increase of long-term custodial care and its impact on the state budget has not disappeared.

Encouraging Long-Term Car Insurance Use

It is significant that the budget did not adopt the governor's idea to restrict Medicaid but does contain provisions to encourage the use of privately paid-for long-term care insurance. Rather than take drastic steps to cut off Medicaid eligibility, the Legislature opted to encourage utilization of private health insurance to cover the cost of long-term care. The new provisions include improvement of the Partnership policy, tax incentives, education, consumer protection and new investment strategies.

In an attempt to promote the purchase of long-term care insurance, four states³ have participated in a demonstration project. They are looking to see if they can reduce the use of Medicaid and lower state expenditures by enticing individuals to purchase private health insurance to cover the cost of nursing home care. They have created a public/private partnership between the state and private insurance companies. The private companies offer a long-term care insurance policy with state mandated minimum benefits and the state offers an incentive tied to Medicaid eligibility. Each of the four states has different requirements.

In New York, a person may not qualify for Medicaid if he or she holds assets above \$3,950. However, an individual could purchase a New York Partnership long-term care insurance policy. If an individual with a partnership policy enters a nursing home and receives benefits under the policy for three years⁴, the individual may then apply for Medicaid benefits. Medicaid will disregard all of the excess assets above \$3,950. There is no limit on the amount that can be disregarded.

However, under the old law, persons with a partnership policy who did not remain in the nursing home for the full three-year period,⁵ derived no Medicaid benefit. Since three years in a nursing home is beyond the average length of stay, this feature discourages the sale of long-term care insurance.

Connecticut's partnership plan follows a different formulation. It does not require a here-year nursing home stay paid for by a partnership policy to qualify for Medicaid coverage. Connecticut's plan allows dollar-for-dollar protection. For every dollar a partnership policy in Connecticut pays in benefits, a dollar is protected from Medicaid spend-down. For example, if a partnership policy pays \$50,000 in nursing home benefits, a person may retain \$50,000 in assets when applying for Medicaid and that amount will be disregarded.

The new law in New York allows dollar-for-dollar protection for individuals who are in a nursing home for less than three years, but more than one year. Those who remain in the nursing home more than three years can still disregard all of their excess assets upon application for Medicaid. New York now is a hybrid, retaining the old New York rule for those using partnership benefits for three years and adding the Connecticut dollar-for-dollar rule for shorter nursing home stays. This makes the New York partnership a better bargain and might convince individuals to purchase such policies.

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Not Portable

The Medicaid eligibility portion of a New York State Partnership policy is only applicable within New York. The Medicaid advantage is not portable. A senior citizen who moves from New York to another state and resides in a nursing home for three years with benefits paid by the New York State Partnership policy cannot apply the Medicaid advantage in that other state. New York is now permitted to enter into reciprocal agreements with other states that have Partnership policies. Each state would agree to honor the Partnership provisions of the other. This would make the New York Partnership policy even more attractive.

The New York state tax credit for the premium paid for long-term care insurance is increased from the current 10 percent to 20 percent.⁶ Long-Term Care Insurance Resource Centers will be created to educate the public about long-term care insurance.

Concerns have been raised about seniors who purchase long-term care insurance and then allow the policy to lapse. Senior citizens may now designate a third party to receive notice of nonpayment/cancellation notices. The theory is that the third party could act promptly upon notification of an impending lapse, to keep the policy in effect. Long-term insurance companies will now be required to give purchasers a "free-look" cancellation right of no less than 10 and no more than 20 days from the date the policy was delivered. This consumer-oriented provision would give seniors a cooling-off period.

The Health Department, Insurance Department and Office on Aging are directed to study alternative methods of financing long-term care needs, such as: combined long-term care and disability insurance; "living benefit" life insurance policies that could be used to pay long-term care insurance premiums; allowing access to life insurance to pay for long-term care premiums; tax credits and deductions for long-term care insurance purchases for persons other than the insured; and strategies to reduce the lapse of long-term care insurance policies. A report will be made to the Legislature and Governor within one year.

There are fundamental problems with long-term care insurance that no amount of adjustment will fix. The two central flaws are pre-existing conditions and premium cost. Once an individual has been diagnosed with a custodial illness, he or she cannot realistically qualify for long-term care insurance. Most individuals are not even aware of the need for long-term care insurance, as they believe that their skilled care policy will cover them. They only become aware of the need when a custodial illness strikes. And then it is too late to qualify for the long-term care insurance policy. A healthy person who seeks such coverage is often faced with the obstacle of the high cost of the premiums and the risk that premiums will be raised in the future.

In addition, the Partnership policy has its own flaw. Although savings are disregarded upon application for Medicaid, income is still counted. A certificate of deposit may be disregarded, but the interest it generates will be countable by Medicaid.

Long-term care insurance by itself cannot be expected to solve the problem of long-term care costs. However, the legislature is to be commended for rejecting the draconian proposals of the Governor and for its willingness to try to improve long-term care insurance policies.

1. The budget is due on April 1. This year the Senate and Assembly passed the budget on August 11
2. Fish, Daniel "The Medicaid \$1115 Waiver Comes to New York," New York Law Journal, March 11, 2004
3. New York, Connecticut, California and Indiana
4. Or six years of home care benefits, or a combination where two days of home care equal one day of nursing home care
5. See footnote 4, *supra*.
6. Amending §606 (aa) of the New York State Tax Law