

LONG-TERM CARE INSURANCE: A LIFE RAFT FOR BABY BOOMERS

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I. INTRODUCTION

Prior to the nineteenth century, long-term care was not singled out as a service provided to either the elderly or the ill, but rather it was viewed as care that should be provided in the home.¹ This included all medical, surgical, and nursing care.² Nursing homes emerged in the United States as poor relief centers in the eighteenth century.³ Elderly individuals, who could no longer be cared for at home and those who lacked family assistance, were categorized with those dependent on state assistance, including: orphaned children, widows, the insane, the destitute, and those with substance abuse disorders.⁴ These individuals were sent to state-sponsored “poor farms” or “almshouses,” which were administered by local authorities.⁵ From the 1820’s through the end of the nineteenth

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1. Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid’s History*, 26 GA. ST. U. L. REV. 937, 940 (2010).; see PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 35–37 (1982); see generally, CHARLES E. ROSENBERG, *THE CARE OF STRANGERS: THE RISE OF AMERICA’S HOSPITAL SYSTEM* (1987) (Tracing the history of America’s hospital system).

2. Watson, *supra* note 1, at 940.

3. See David A. Bohm, *Striving for Quality Care in America’s Nursing Homes: Tracing the History of Nursing Homes and Noting the Effect of Recent Federal Government Initiatives to Ensure Quality Care in the Nursing Home Setting*, 4 DEPAUL J. HEALTH CARE L. 317, 324 (2001).

4. See ROSENBERG, *supra* note 1, at 17; BRUCE VLADECK, *UNLOVING CARE: THE NURSING HOME TRAGEDY* 33 (1980); Watson, *supra* note 1, at 941.

5. See CHARLES W. LIDZ ET AL., *THE EROSION OF AUTONOMY IN LONG-TERM CARE* 24

century, the number of these institutions expanded rapidly as America received an influx of immigrants and farmers seeking employment in the city.⁶ As a means to motivate families to find other resources to care for the elderly, local governments did nothing to improve the conditions of these almshouses.⁷ The ultimate goal was to encourage those receiving care to lead respectable lives devoid of public assistance.⁸ However, the care provided in these decaying facilities was substandard at best, and usually abusive or neglectful.⁹

In response to these publically ostracized institutions and the surge of economic dislocation during the Great Depression, cash benefit programs were created to provide the elderly and the poor with the financial means to support themselves at home.¹⁰ Advocates for creating cash benefit programs also focused on the eradication of almshouses by means of eliminating their financing.¹¹ This became a reality in 1935 when Congress passed the Social Security Old Age Assistance Act (“OAA”), which barred almshouses from receiving funds.¹² The passage of this act, which matched individual states with funds for the elderly who were retired, was the first time the federal government provided financial assistance to the elderly, and was the forefather of Medicaid.¹³

Many individuals who were in these institutions due to financial hardship were able to use their cash benefits to either return home or live in private facilities. Unfortunately, the elderly and infirm who required long-term care were left with few resources, which paved the way for private,

(1992); ROBERT STEVENS & ROSEMARY STEVENS, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID 5 (1974).

6. See Bohm, *supra* note 3, at 325–26.

7. *Id.* at 326–27.

8. *Id.* at 326 & n.42 “This was accomplished by regulating labor market forces which was designed to force an individual to make a choice between living in the deliberately deplorable almshouses or to accept low wage instead.” *Id.* at 326 n.42. It was hoped that individuals would choose the low wage job instead of living in such treacherous conditions. *Id.*

9. *Id.* at 328 & n.53; see also Martha Holstein and Thomas R. Cole, *Long-Term Care in the United States: A Historical Reflection*, in LONG-TERM CARE DECISIONS: ETHICAL AND CONCEPTUAL DIMENSIONS 26 (Laurence B. McCullough and Nancy L. Wilson eds., 1995). At the end of the nineteenth century, in the majority of almshouses there was a lack of: physical care, recreation, attention to emotional needs, and treatment for illness and insanity. Holstein, *supra*. Additionally, married couples were commonly separated. *Id.*

10. Watson, *supra* note 1, at 941.

11. *Id.*

12. See Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620; Watson, *supra* note 1, at 947 (stating that the intention of the Social Security Act of 1935 was to end almshouse care).

13. See Social Security Act of 1935, 49 Stat. at 620.; Watson, *supra* note 1, at 943 (noting that responsibility for the poor shifted from local government to the state and federal governments).

fee collecting, unregulated sanatoriums to fill the void.¹⁴ Although the care provided was often worse than the standard of care in almshouses, these private institutions were allowed to collect the resident's OAA benefits.¹⁵ By the beginning of the 1950s, the OAA cash benefits, which had been intended to provide the monetary support the elderly required to live at home, had given rise to the nursing home industry.

In 1946, Congress passed the Hospital Survey and Construction Act, generally known as the Hill-Burton Act, to promote the construction of hospitals and public health centers.¹⁶ Soon after, in 1954, the Hill-Burton Act was amended to include nursing homes, chronic disease centers, treatment centers, and rehabilitation centers.¹⁷ This changed the construction models and required non-profit nursing homes to be modeled after hospitals. More importantly, however, this was the first time legislation referred to nursing home care as part of the healthcare system rather than the welfare system.

On July 30, 1965, President Lyndon B. Johnson signed Medicare and Medicaid into law, thereby providing low-cost health and hospitalization insurance to America's elderly and medical assistance to the "worthy poor."¹⁸ Medicare was designed to provide health insurance rather than as a mean of custodial support.¹⁹ Consequently, it was carefully written to exclude any form of extensive long-term nursing care unless it was post-hospitalization, convalescent, or rehabilitative care.²⁰ Initially, the post-hospitalization extended care coverage included up to sixty days of care, but Medicare was later amended to cover up to the first 100 days of care.²¹

When Medicare and Medicaid were enacted, no one envisioned how

14. See Watson, *supra* note 1, at 944; see also DAVID BARTON SMITH, REINVENTING CARE; ASSISTED LIVING IN NEW YORK CITY 14 (2003). However, most of the sick and elderly were unable to mentally or physically care for themselves at home. SMITH, *supra*. Thus the American nursing home industry was born. See Watson *supra*.

15. Watson, *supra* note 1, at 944.

16. See Hospital Survey and Construction Act, Pub. L. No. 79-725, § 2, 60 Stat. 1041 (1946) (codified at 42 U.S.C. §§ 291-291(o) (2012)).

17. See *id.*

18. See Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286, 290 (codified as amended at 42 U.S.C. § 426 (2012)); Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 343, 343-352 (codified as amended at 42 U.S.C. § 1396(b) (2012) (describing that Medicaid is administered by each state government and is generally known as the program that cares for the poor); Watson *supra* note 1, at 953.

19. See Social Security Amendments of 1965, 79 Stat. at 290 (stating that every individual over the age of sixty-five is entitled to monthly insurance benefits, which include hospital insurance benefits).

20. See VLADECK *supra* note 4, at 48-49.

21. See Social Security Amendments of 1965, 79 Stat. at 292.

the two programs would work together. However, both programs pushed the nursing industry to expand and become more institutionalized.²² As a means to remedy the inadequate conditions of Medicaid-funded nursing homes, Congress amended Medicaid in 1967 to include a statutory definition of “skilled nursing facility” (“SNF”), which required nursing homes to provide twenty-four hour nursing services supervised by a full-time registered nurse and mandatory building code standards.²³ Shortly thereafter, Medicare discontinued its extended care coverage prompting Medicare and Medicaid to begin paying for SNFs with Medicare covering post-hospitalization short-term rehabilitative care and Medicaid covering long-term care.²⁴ However, as discussed later in this article, the coverage provided by Medicare and Medicaid is not unlimited.²⁵

This article begins in Part I by giving a brief introduction to the historical development of long-term care.²⁶ Part II focuses on what “long-term” care entails and describes the types of individuals who are in need of it.²⁷ Part III investigates the various costs of long-term care and the sources responsible for paying those costs.²⁸ Part IV provides a general overview of long-term care insurance.²⁹ Part V argues that other alternatives to long-term care insurance are not viable options to pay for long-term care.³⁰ Part VI discusses the implications of the Patient Protection and Affordable Care Act.³¹ And finally, Part VII explains who should purchase long-term care insurance and when they should purchase it.³²

II. WHAT IS LONG-TERM CARE AND WHO NEEDS IT?

Long-term care involves providing a significant amount of assistance with activities of daily living (“ADL”)³³ to an individual who cannot take care of himself or herself for an extended period of time due to a prolonged illness, disability, or cognitive impairment.³⁴ Long-term care differs from

22. See VLADECK, *supra* note 4, at 58–60.

23. See Social Security Amendments of 1967, Pub. L. No. 90–248, 81 Stat. 821, 906–907.

24. See VLADECK, *supra* note 4, at 68.

25. See *infra* Part III.

26. See *supra* Part I.

27. See *infra* Part II.

28. See *infra* Part III.

29. See *infra* Part IV.

30. See *infra* Part V.

31. See *infra* Part VI.

32. See *infra* Part VII.

33. See I.R.C. § 7702B(c)(2)(B) (2012). Activities of daily living are defined as: eating, toileting, transferring, bathing, dressing, and continence. *Id.*

34. See NAT’L ASS’N INS. COMM’RS, A SHOPPER’S GUIDE TO LONG-TERM CARE INSURANCE 2 (2009), https://www.ltcfeds.com/epAssets/documents/NAIC_Shoppers_Guide.pdf

traditional medical care in that it provides “[m]any different services [to] help people with chronic conditions overcome limitations that keep them from being independent.”³⁵ Simply, the goal of long-term care is to assist individuals in their current condition, rather than to improve or remedy medical issues.³⁶ An individual with a physical illness or disability may need help with some or all of these activities, whereas someone with cognitive impairments is likely to require additional supervision.³⁷ This care can be provided in a variety of settings, whether at home, in an adult community center, an assisted living facility, or in a nursing home.³⁸

Long-term care is classified into three categories of care, defined by the degree of assistance and the level of care required to perform ADLs. Skilled nursing care services are ordered by a physician, according to a treatment plan, and require professional health care personnel, usually a registered nurse or licensed therapist, on a daily basis.³⁹ This care is generally provided in a skilled nursing facility, but can also be provided at home with the assistance of visiting nurses. Intermediate care is provided for individuals with stable medical conditions that require daily, but not around-the-clock nursing supervision.⁴⁰ Though not as intensive as skilled nursing care, intermediate care also requires a physician treatment plan and can be provided in a nursing home, assisted living facility or home. Finally, persons without medical skills provide custodial care or personal care to assist with ADLs. It can be provided in many settings, such as nursing homes, assisted living facilities, adult day care centers, and home.⁴¹

Life expectancy at the turn of the twentieth century was approximately forty-seven years.⁴² Today it is 78.3 years, with women outliving men by an average of five years.⁴³ By 2020, it is expected to reach 79.5 years.⁴⁴ It is currently estimated that 70% of people over the age of sixty-five will need some form of long-term care services in their

[hereinafter SHOPPER’S GUIDE]; Karin C. Ottens, Note, *Using Tax Incentives to Solve the Long-Term Care Crisis: Ineffective and Inefficient*, 22 VA. TAX REV. 747, 750–751 (2003).

35. SHOPPER’S GUIDE, *supra* note 34, at 2.

36. *Id.*

37. *Id.*

38. *See infra* notes 63–67 (discussing the differences in the levels of care provided by each).

39. SHOPPER’S GUIDE, *supra* note 34, at 2.

40. *See id.*

41. *Id.*

42. William J. Brisk & Whitney A. Alexander, *Exploring The Future of Elder and Special Needs Law*, 9 NAELA J. 5, 13 (2013).

43. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012: TBL.

104. EXPECTATION OF LIFE AT BIRTH, 1970 TO 2008, AND PROJECTIONS (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0105.pdf>.

44. *Id.* (depicting the gap between men and women remaining stable).

lifetime and 40% will require some form of nursing home care.⁴⁵ Of those 40% who will need nursing home care, 10% will remain in nursing home care for five years or more.⁴⁶ The generation most likely to need long-term services is the generation known as the “Baby Boomers,” which encompasses those who were born post WWII between 1945 and 1965.⁴⁷ Baby Boomers have already begun to join and swell the ranks of the elderly.⁴⁸ The term “elderly” is typically defined as individuals over the age of sixty-five. On a national level, the population of individuals aged sixty-five and older is expected to double in the next twenty-five years.⁴⁹ Presently, 13% of the American population falls into the sixty-five-plus category, and estimates show that by 2030, it will increase to 20%.⁵⁰ However, individuals who are eighty-five and older, called the “oldest old,” are most likely to require long-term care assistance.⁵¹ This population is expected to grow dramatically in the near future.⁵² To make matters worse, Baby Boomers are more likely to be divorced and have fewer children; thereby increasing the odds that they will require long-term care outside of informal family care.⁵³

45. See John A. Pearce II et al., *Protecting Nursing Home Residents from Attacks on Their Ability to Recover Damages*, 61 RUTGERS L. REV. 705, 714 (2009); *Statistics*, GENWORTH FINANCIAL, http://www.genworth.com/content/lets_talk/united_states/english/planning_for_long_statistics.html (last visited Nov. 13, 2013).

46. Pearce II, *supra* note 45, at 714.

47. Mark B. Edwards, *Through the Looking Glass: The Future of Estate and Financial Planning*, SL002 A.L.I.-A.B.A. 1007, 1012 (2005). This generation encompasses roughly twenty-seven million more individuals than the one that came before it, and roughly ten million more than the one that follows it. *Id.*

48. Janet Kornblum, *A Nation of Caregivers*, USA TODAY (Apr. 5, 2004, 9:21 PM), http://www.usatoday.com/news/health/2004-04-05-caregivers-usat_x.htm.

49. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012: TBL. 9. RESIDENT POPULATION PROJECTIONS BY SEX AND AGE (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0009.pdf>.

50. *Population*, AGINGSTATS.GOV, http://www.agingstats.gov/Main_Site/Data/2012_Documents/Population.aspx (last visited Dec. 6, 2013).

51. *Long-Term Care Insurance: Better Information Critical to Prospective Purchasers, Before the S. Comm. on Aging 196th Cong. 4* (2000) (statement of William J. Scanlon, Dir. Health Financing and Public Health Issues, Educ., and Human Servs. Division), <http://www.gao.gov/archive/2000/he00196t.pdf> [hereinafter *Better Information*].

52. *Id.* (estimating that by 2040 the eighty-five years and older population will triple to 14 million).

53. See ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 7 (1981).

III. THE COST OF LONG-TERM CARE AND THOSE RESPONSIBLE FOR PAYING

The majority of Americans are ill prepared to face the economic upheaval long-term care can bring to an individual or family.⁵⁴ Baby Boomers are no different; a lack of financial planning has left many of them with insufficient savings to last them through the so-called “golden years.” For example, the average savings for Baby Boomers is approximately \$75,000 (excluding the equity in the home)⁵⁵ and the average 401(k) account has a balance of about \$80,000.⁵⁶ Given that a single year in a nursing home costs over \$80,000 on average, Baby Boomers risk losing all of their life savings on an unforeseen medical event.⁵⁷ While Social Security provides a limited amount of income, it is also insufficient to pay for the costs associated with long-term care.⁵⁸ Even the more affordable long-term care options generally cost more than the average retiree makes in a year.⁵⁹ To make matters worse, as long-term costs continue to increase, the median wage in the United States has dropped over eight percent in the last six years.⁶⁰ Dramatic increases in life expectancy can be attributed to medical and technological advances, which have not only increased life expectancy, but have also significantly increased the quality of life for Baby Boomers.⁶¹ However, these additional years also raise the likelihood that long-term care will become a necessity.

According to the 2012 MetLife Market Survey of Nursing Home, Assisted Living, Adult Day Services, and Home Care Costs, the average costs for varying levels of long-term care continue to increase.⁶² In 2012,

54. See Ottens, *supra* note 34, at 753.

55. See Diane R. Calmus, *The Long-Term Care Financing Crisis*, THE HERITAGE FOUNDATION 8–9 (2013), <http://www.heritage.org/research/reports/2013/02/the-long-term-care-financing-crisis>.

56. Abby Ellin, *Millionaires Don't Believe They're Rich*, ABC NEWS (July 28, 2013, 5:56 PM), <http://abcnews.go.com/m/story?id=19787629>.

57. See *infra* text accompanying note 63.

58. See *infra* note 81 and accompanying text.

59. See CARMEN DENAVAS-WALT ET AL., UNITED STATES CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011 6 (2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf> (noting that the average yearly income for retirees is \$32,454).

60. *Id.* at 7.

61. See SYLVESTER J. SCHIEBER ET AL., SOCIAL SECURITY ADVISORY BOARD, THE UNSUSTAINABLE COST OF HEALTH CARE, 10 (2009), http://www.ssab.gov/documents/TheUnsustainableCostofHealthCare_508.pdf (showing how life expectancy has increased over time).

62. SEE METLIFE MATURE MARKET INST., THE 2012 METLIFE MARKET SURVEY OF NURSING HOME, ASSISTED LIVING, ADULT DAY SERVICES, AND HOME CARE COSTS 4 (2012),

the average cost for a private room in a nursing home was \$248 daily, or \$90,520 annually.⁶³ Additionally, those requiring Alzheimer's and dementia care may have to pay approximately \$5,000 more annually.⁶⁴ Assisted living facilities, while not quite as expensive as nursing home care, average \$3,550 monthly or \$42,600 annually.⁶⁵ Adult day services are slightly less expensive, running \$70 per day.⁶⁶ For those able to remain in their homes, agency provided homemaker/companion/health aids services cost roughly \$20 per hour.⁶⁷ However, individual state costs can fall either above or below these averages.⁶⁸

According to a 2012 Generational Research study conducted by Finesse Financial, only 10% of Americans between the ages of forty-five and fifty-four, and 16% of those between fifty-five and sixty-four have purchased long-term care insurance.⁶⁹ Additionally, it is estimated that only seven to nine million individuals in the United States have acquired long-term care insurance, leaving the government to subsidize the majority of American's long-term care needs.⁷⁰ In 2009, the government subsidized roughly 67% of long-term care recipients, with Medicaid accounting for 43% and Medicare paying the remaining 24%.⁷¹ Out-of-pocket expenses accounted for 19%, long-term care insurance was only 7%, and the remaining 7% was provided by other private and public resources.⁷²

<https://www.metlife.com/assets/cao/mmi/publications/studies/2012/studies/mmi-2012-market-survey-long-term-care-costs.pdf> (depicting the increases from 2011 to 2012).

63. *Id.* Nursing homes are facilities that provide residents with a room, daily meals, nursing care, personal care, and medical services. *Id.* at 6. Residents typically need assistance with multiple ADLs and/or have limited cognitive functioning. *Id.*

64. *Id.* at 7.

65. *Id.* at 4. Assisted living facilities are for those who cannot live independently, but do not require the full scope of nursing home care. *Id.* at 7.

66. *Id.* at 5. Adult day services supply a supportive group environment for health, social, and therapeutic activities for individuals who suffer from functional and/or cognitive impairments. *Id.* at 12.

67. *Id.* at 4. Homemakers or companions provide meal preparation, transportation, light housekeeping, and companionship. *Id.* at 12. Home health aids provide hands-on assistance to individuals in their homes who require assistance with ADLs. *Id.* at 11.

68. SEE METLIFE MATURE MARKET INST., *supra* note 62, at 4–5 (noting the lowest and highest costing states for each category).

69. See FINANCIAL FINESSE, 2012 GENERATIONAL RESEARCH 12–15 (2012), http://www.financialfinesse.com/wp-content/uploads/2012/12/Financial_Finesse_Generational_Research_2012.pdf.

70. See AMERICA'S HEALTH INSURANCE PLANS, WHO BUYS LONG-TERM CARE INSURANCE IN 2010-2011? 11 (2012), <http://www.ahip.org/WhoBuysLTCInsurance2010-2011/>.

71. See KAISER COMM'N ON MEDICAID FACTS, HENRY J. KAISER FAMILY FOUND., MEDICAID AND LONG-TERM CARE SERVICES AND SUPPORT (2012), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/2186-09.pdf> [hereinafter KAISER].

72. *Id.*

However, these figures do not reflect the cost of unpaid care provided by family members.⁷³ Moreover, as Baby Boomers retire, the government will be deprived of employee tax revenue, the major funding source for Social Security entitlements, including Medicare.⁷⁴ The National Academy of Social Insurance estimates that by 2031, when the youngest Boomers have reached the age of sixty-seven, the number of Americans over sixty-five will reach seventy-five million and the “beneficiary to worker ratio” will rise from 35 per 100 in 2011 to 49 per 100 by 2030.⁷⁵ These projections underscore the fact that long-term care in America is in crisis and is poised for calamity as Baby Boomers continue to leave the labor force and enter into retirement.

One of the greatest misconceptions that middle-income Americans have is that Medicare will pay for their long-term care expenses.⁷⁶ In reality, Medicare’s coverage is quite limited. Medicare will only cover the costs of the first 100 days in a SNF if the patient receives intensive medical care in the SNF as a follow-up to a three-day hospital stay,⁷⁷ not counting the day of discharge.⁷⁸ Currently, Medicare covers all costs for the first twenty days at a SNF and also covers costs in excess of the per-day deductible during the remaining eighty days.⁷⁹ As such, coverage is terminated after the 100th day of care.⁸⁰ Additionally, Medicare does not cover homemaker services and provides home health services only to those who are confined to their home and require skilled nursing care or therapy.⁸¹ Moreover, Medicare generally limits home health services to

73. See AARP PUB. POLICY INST., VALUING THE INVALUABLE: 2011 UPDATE: THE ECONOMIC VALUE OF FAMILY CAREGIVING IN 2009 1 (2011), <http://assets.aarp.org/rgcenter/ppi/1tc/fs229-ltc.pdf>. According to AARP estimates, “about 42.1 million family caregivers in the United States provided care to an adult with limitations at any given point in time . . . during [2009].” *Id.* Additionally, “about 61.6 million provided care at some time during the year.” *Id.* The estimated economic value of family caregivers’ unpaid contributions in 2009 was approximately \$450 billion, up from approximately \$375 billion in 2007. *Id.*

74. See *How Will Boomers Affect Social Security?*, THE NAT’L ACAD. OF SOC. INS., <http://www.nasi.org/learn/socialsecurity/boomers> (last visited Nov.13, 2013).

75. *Id.* The “beneficiary-to-worker ratio” is the comparison of the number of people receiving Social Security benefits to the number of people paying into the Social Security system. *Id.*

76. See BANKERS LIFE AND CAS. CO. CTR. FOR A SECURE RET., HEALTHCARE FOR MIDDLE-INCOME AMERICANS 19 (2012), <http://www.centerforsecureretirement.com/media/150259/retirement-healthcare-report.pdf>.

77. See 42 U.S.C. § 1395x(i) (2012) (defining “post-hospital extended care services”).

78. 42 C.F.R. § 409.30(a)(1) (2013).

79. See 42 U.S.C. § 1395e(a)(3) (2012); COALITION OF WISCONSIN AGING GROUPS, MEDICARE COVERAGE IN SKILLED NURSING FACILITY (SNF) (2012), <http://cwagwisconsin.org/wp-content/uploads/2012/02/Medicare-Coverage-in-a-Skilled-Nursing-Facility-Jan-2012.pdf>.

80. See 42 U.S.C. § 1395d(a)(2) (2012).

81. See 42 U.S.C. §§ 1395f(a)(2)(C), 1395n(a)(2)(A) (2012).

twenty-eight hours per week, averaging only four hours per day, seven days a week.⁸²

Considering Medicaid pays for almost half of the long-term care costs in the United States and is funded by both federal taxes and state revenue, taxes are the largest source of long-term care funding.⁸³ Medicaid provides long-term care benefits for individuals who meet the federal poverty guidelines; however, many people who need long-term care never qualify for it.⁸⁴ Nevertheless, in order to qualify for Medicaid, individuals must meet financial qualifications as well as need-based criteria. These requirements are typically tied to Social Security Income benefits, which paid \$698 per month in 2012.⁸⁵ Those who do not initially meet the financial qualifications, must pay for nursing home costs first and then “spend down” their assets until they meet the eligibility requirements.⁸⁶ Unfortunately, because the majority of middle-class Americans have failed to plan for their future long-term care needs, Medicaid has in effect become the primary financier rather than a means of last resort for the indigent.

IV. LONG-TERM CARE INSURANCE 101

Possibly the best options for financing the potential cost of long-term care is a Long-term Care Insurance (“LTCI”) policy. These policies were introduced in the early 1980’s and have changed as the needs of caring for the elderly have advanced. Initially introduced as nursing home insurance, long-term care insurance policies sold today offer a multitude of benefit options.⁸⁷ The National Association of Insurance Commissioners offers “A Shopper’s Guide to Long-Term Care Insurance” to help individuals understand the different policies available and the different coverage options.⁸⁸ Despite the benefits, it is estimated that less than 10% of older Americans have purchased long-term care insurance.⁸⁹ In an attempt to

82. See 42 U.S.C. § 1395x(m)(7)(B) (2012).

83. See *Financing and Reimbursement*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Financing-and-Reimbursement.html> (last visited Nov. 14, 2013); see also KAISER, *supra* note 71.

84. See KAISER, *supra* note 71.

85. See *id.* (providing the Social Security Income benefits for 2012 while noting that states can, and frequently do, set higher limits).

86. See Richard L. Kaplan, *Retirement Planning’s Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 423–24 (2007).

87. See ALBERT NORMAN ET AL., *LONG TERM CARE INSURANCE: A PROFESSIONAL’S GUIDE TO SELECTING POLICIES* 44 (3d ed. 1995).

88. See SHOPPER’S GUIDE, *supra* note 34, at 1 (noting many states require insurance companies and their agents to provide this guide to prospective purchasers).

89. See *Better Information supra* note 51, at 3.

increase this number, the federal government has provided two distinct incentives: 1) tax benefits, where long-term care insurance premiums are tax-deductible; and 2) “Long-Term Care Partnerships.”⁹⁰ Many policies today incorporate both benefits.

A. INCENTIVES

State and federal tax credits and deductions have been used to encourage the purchase of LTCI. The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) included the Tax-Qualified Long-term Care Insurance Contract, and extended tax deductibility of a number of premiums and tax exemptions for particular benefits to qualified long-term care insurance policies.⁹¹ To qualify, these policies must satisfy the requirements of I.R.C. § 7702(b).⁹² If the requirements are met, the benefits received under the policy will not be included in the insured’s income up to the daily per diem amount defined in the statute, which is adjusted annually for inflation. In addition, a portion of the premiums paid may be deductible as a medical expense subject to the rules of I.R.C. §213.⁹³ The requirements for tax qualified long-term care policies vary from state to state. However, the most important components for Federal qualification are: inflation protection, benefit triggers, guaranteed renewability, and limited cash surrender value.⁹⁴ Tax-qualified policies require that an individual be expected to need care for a minimum of ninety days and be unable to perform two or more ADLs without considerable assistance or without substantial supervision due to a severe cognitive impairment.⁹⁵ These plans must also be guaranteed renewable so long as premiums are paid and cannot have a cash surrender value.⁹⁶ However, guaranteed

90. See I.R.C. §§ 213(a), 213(d)(1)(D), 7702B(b) (2012); Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6021(a)(1), 120 Stat. 4, 68 (2006) (amending 42 U.S.C. § 1396p(b)(1)(C) (2006)); RALPH C. BRASHIER, *MASTERING ELDER LAW* 394–95 (2010).

91. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 321, 110 Stat. 1936, 2054 (2000) (codified at IRC § 7702B (2000)); see also SHOPPER’S GUIDE, *supra* note 34, at 15 (explaining that paid premiums may be “included with other annual uncompensated medical expenses for deductions from [an individual’s] income in excess of 7.5% of adjusted gross income up to a maximum amount adjusted for inflation”).

92. See I.R.C. § 7702(b) (2012) (delineating the cash value accumulation test).

93. BRASHIER, *supra* note 90, at 394 (“Section 213 permits an individual to deduct that part of her medical expenses that exceeds 7.5 percent of her adjusted gross income.”).

94. SHOPPER’S GUIDE, *supra* note 34, at 11, 13, 19.

95. *Id.* at 15.

96. See *id.* at 39 (explaining what the guaranteed renewal aspect of long-term insurance entails); RAYMOND JAMES & ASSOCIATES INC., *USE YOUR ANNUITY TO PAY FOR LONG-TERM CARE INSURANCE 1* (2012), <http://www.raymondjames.com/paxpartnersja/pdfs/LTC.pdf>.

renewable only means an individual has the guaranteed opportunity to renew the policy; it does not mean it will be renewed at the same rate.

In contrast, a non-qualified policy, formerly known as traditional LTCI, typically requires substantially less to trigger payment. Non-qualified policies often include a “medical necessity” trigger for benefits to become payable.⁹⁷ Therefore, as long as a medical doctor states that an individual requires care for any medical reason, the policy will pay out. Additionally, it does not require a ninety-day use minimum or an ADL trigger. The disadvantage with these types of policies is that premiums paid may not be tax deductible and the benefits received may be considered income, thus subject to taxation.⁹⁸

As part of the Deficit Reduction Act of 2005, Congress amended portions of the Social Security Act to establish state partnership plans under 42 U.S.C. §1396(P)(b).⁹⁹ These partnership plans incentivize individuals to purchase long-term care insurance policies by allowing them to participate in what is known as “asset disregard.”¹⁰⁰ Accordingly, most state partnership programs (including Florida) offer dollar-for-dollar asset protection.¹⁰¹ Under this incentive, for every dollar of coverage that the long-term care policy pays, the beneficiary may keep in assets that would otherwise have to be spent down to qualify for Medicaid.¹⁰² Hence, when a federally tax-qualified LTCI policy is purchased from a private company, the purchaser is protected against the traditional Medicaid eligibility requirement of spending down assets.¹⁰³ These qualified plans must meet certain criteria set forth by the Federal government and individual state to be approved.

For example, a single individual is allowed no more than \$2,000 in assets to qualify for Medicaid.¹⁰⁴ If this individual purchases a partnership policy with a lifetime maximum of \$200,000, he would be allowed to retain \$202,000 in countable assets, in addition to whatever the state allows for exemptions, and will still be able to qualify for Medicaid long-term care benefits after the LTCI policy benefits are exhausted.

97. SHOPPER’S GUIDE at 15.

98. *Id.* (noting that Congress and the U.S. Department of Treasury have not clarified whether non-qualified policies will receive the same benefits as qualified policies).

99. *See* Deficit Reduction Act of 2005 § 6021.

100. *See* 42 U.S.C. § 1396p(b)(1)(C)(ii)–(iii) (2012).

101. *See* SHOPPER’S GUIDE, *supra* note 34, at 11.

102. *See* 42 U.S.C. § 1396p(b)(1)(C)(iii) (2012).

103. SHOPPER’S GUIDE, *supra* note 34, at 11.

104. *See* KAISER, *supra* note 71 (explaining that generally individuals are allowed to retain \$2,000 in assets, while couples are permitted \$3,000).

B. COMPONENTS

When purchasing long-term care insurance, the buyer has many options which will greatly affect both the amount of the premium and the quality of the policy. The first option is the maximum benefit limit, which is the total benefit that will be paid out over the life of the policy.¹⁰⁵ Policies can state this amount either in years or in monetary amounts. Most states require a minimum benefit period of one year.¹⁰⁶ Policies with longer maximum benefit periods are more expensive, as premiums are contingent upon the ultimate payout of the policy.

Long-term care insurance also includes elimination periods, also known as waiting periods or deductibles, which affect the amount of policy premiums.¹⁰⁷ The elimination period is the time frame when the benefit triggers are met and the policy begins to pay out for services.¹⁰⁸ Elimination periods can range from zero days to 100 days, with zero days being the most expensive. Some policies use calendar days to calculate the elimination period, while others use service days.¹⁰⁹ The calendar day method is a better option in that once a benefit trigger has occurred, every day of the week counts towards the elimination period. Whereas, service day eliminations only count days when the services are rendered, leading to higher out-of-pocket expenses.¹¹⁰ The length of time chosen for elimination and whether they are calendar or service days will also affect the premium amount.

One of the most important components of LTCI is inflation protection.¹¹¹ Inflation protection ensures that individuals retain enough coverage to coincide with the expanding costs of long-term care.¹¹² LTCI generally offers two different inflation protection options: 1) automatic inflation protection; and 2) special offer inflation protection.¹¹³ Automatic inflation protection increases benefit levels annually without increasing premiums. It is generally offered using either compound or simple

105. See SHOPPER'S GUIDE, *supra* note 34, at 18.

106. *Id.*

107. See Kaplan, *supra* note 86, at 431.

108. See SHOPPER'S GUIDE, *supra* note 34, at 20.

109. *Id.*

110. *Id.* For example, if an individual only receives services a few days a week, it will take much longer for the policy to take effect, thereby triggering the payment for those services. *Id.*

111. *Id.* at 21. Inflation protection can increase premium amounts by as much as 40%. *Id.* at 28.

112. See *Id.* at 40. According to the U.S. Department of Labor Bureau of Statistics, nursing home costs have increased roughly 5% every year. *Id.* at 21 n.19.

113. *Id.* at 22–23 (describing the pros and cons to each option).

inflation adjustments.¹¹⁴ Qualified long-term care policies must have either the compound or equal interest option. Compound interest is generally offered at 5% and is compounded annually to the benefit amount.¹¹⁵ With simple interest, annual increases to the benefit are equal.¹¹⁶ Special offer inflation allows the purchaser to select when to increase benefits, such as every few years. However, when the purchaser elects to increase benefits, premiums will also increase. The majority of states have mandated that LTCI companies offer the following inflation protection: 1) policies covering individuals aged sixty-one or younger must have compound annual inflation protection; 2) policies for ages sixty-one to seventy-six require some level of inflation protection; and 3) for those over seventy-six years of age, no inflation protection is necessary.¹¹⁷

C. WHEN BENEFITS BECOME PAYABLE

The trigger for benefits to be paid out in a qualified long-term care policy is a physician's determination that an individual is chronically ill, which means the individual is unable to perform at least two of the six ADLs without either hands-on assistance or stand-by assistance for a period of at least ninety days.¹¹⁸ Most policies also pay benefits for cognitive impairments if the policy allows for a cognitive impairment benefit trigger. The inclusion of benefits for cognitive impairments is extremely important because if the inability to perform ADLs is the only trigger, services for cognitively impaired individuals able to perform ADLs will not be covered.¹¹⁹ It is also important to note that most LTCI policies exclude the following conditions: mental or nervous disorders or diseases (other than Alzheimer's or other types of dementia), substance addiction, illness or injuries caused by acts of war, treatment paid for by the government, and attempted suicide or other intentionally self-inflicted injuries.¹²⁰

For services to be covered, they must be given according to a plan of care ordered by a licensed health practitioner, such as "physician . . ."¹²¹

114. SHOPPER'S GUIDE, *supra* note 34, at 22.

115. *See id.* (stating the daily benefit increases by a fixed percentage for the life of the policy or for a certain period, usually at 5%).

116. *Id.*

117. *Id.* at 11.

118. *See* I.R.C. § 7702B(c)(2)(A)(i) (2012) (defining "chronically ill individual"); H.R. 4946, 107th Cong. § 4(A) (2d Sess. 2002); Ottens, *supra* note 34, at 750–751.

119. SHOPPER'S GUIDE, *supra* note 34, at 20.

120. *Id.* at 17.

121. *See* 42 U.S.C. § 1395x(r) (2012) ("The term 'physician' . . . means a doctor of medicine

registered professional nurse, licensed social worker, or other individual who meets requirements prescribed by the Secretary [of the United States Treasury].”¹²² The plan of care: 1) assesses the physical or mental status of the patient; 2) assesses the environment where the patient resides; and 3) designs a plan that will be to best serve their individualized needs.¹²³ A non-tax-qualified policy may not require a doctor’s certification that the insured requires long-term care.¹²⁴

Once benefits become payable, policies may cover health care and/or personal care received at home, in nursing homes, assisted living facilities, and may also cover services provided at adult day care facilities, and other community centers.¹²⁵ However, coverage may vary from policy to policy, so it is best to consult with a licensed insurance agent prior to purchasing any form of long-term care insurance. Once a policy is purchased, the carrier cannot cancel the policy (except for non-payment of premiums) and the rates cannot be individually raised based upon personal health status or the use of policy benefits.¹²⁶ Nevertheless, insurers can raise premiums across the board for everyone falling into a specific policy class, which could be based upon the state in which the policy was purchased and any specific features it may include.¹²⁷

V. ALTERNATIVE OPTIONS TO LONG-TERM CARE INSURANCE

A. 401(K)

As younger Boomers and future generations begin to retire, they will be expected to rely more upon their own savings to take care of themselves. Specifically, one option for paying long-term care costs is through 401(k)

or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function . . .”).

122. I.R.C. § 7702B(c)(4) (2013).

123. See *Care Plan*, THEFREEDICTIONARY.COM, <http://medical-dictionary.thefreedictionary.com/care+plan> (last visited Nov 14, 2013) (defining the term *care plan* as “[a] carefully prepared outline of nursing care showing all of the patient’s needs and the ways of meeting them; a dynamic document initiated at admission and subject to continuous reassessment and change by the nursing staff caring for the patient . . .”).

124. See, *Claims*, LTC CONSULTANTS <http://www.ltcconsultants.com/agent/lcreports/features/policyvalue/valclaims.shtml> (last visited Nov. 14, 2013).

125. SHOPPER’S GUIDE, *supra* note 34, at 16.

126. See Elizabeth O’Brien, *Long-Term Care Coverage: Worth the Price?*, MARKETWATCH (Dec. 4, 2012, 1:08 PM), <http://www.marketwatch.com/story/long-term-care-coverage-worth-the-price-2012-12-04>.

127. *Id.*

accounts.¹²⁸ While these accounts have been available since 1981, they did not gain popularity until the 1990's. Consequently, many Baby Boomers currently retired, or retiring in the near future, were unable to save in these accounts for a great deal of their working lives. Although there is an option for older workers to pay higher "catch-up" amounts after age fifty, this option does not make up for the years before 401(k), leaving many Baby Boomers without adequate time to accumulate enough income to retire and face a catastrophic health issue.¹²⁹ Unfortunately, using 401(k) savings to pay for long-term care costs is unlikely to be a viable option for at least another twenty years, when individuals will have had the opportunity to put money aside in 401(k) throughout their entire careers.¹³⁰

B. REVERSE MORTGAGE

Over 80% of individuals seventy-five years and older own their own homes, which introduces the option of using reverse mortgages to pay for long-term care.¹³¹ A reverse mortgage is a type of loan which allows a homeowner, aged sixty-two or older, to extract equity from his or her home through payment(s) from the lender to the borrower.¹³² The homeowner may elect to receive payment by a line of credit, a lump sum, equal monthly installments, monthly term payments, or any combination thereof.¹³³ Instead of the homeowner repaying the loan monthly, the loan, including accrued interest, does not become due until: 1) the homeowner is absent from the home for more than a year; 2) the homeowner sells or otherwise transfers ownership of the home; or 3) the homeowner dies.¹³⁴ The amount the homeowner is eligible to borrow depends on several

128. Calmus, *supra* note 55, at 9.

129. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §631, 115 Stat. 38,111-12 (adding 414(v) to the Code, which allows individuals aged fifty and older to make additional elective deferrals under a retirement plan that otherwise permits elective deferrals to be made, if particular statutory requirements are satisfied).

130. See Calmus, *supra* note 55, at 9.

131. *Id.*; see also Annie E. Nelson, Note & Comment, *Reverse Mortgages: Changes Brought About by the Housing and Economic Recovery Act*, 13 N.C. BANKING INST. 337, 342-43 (2009) (discussing the various requirements that must be satisfied before a homeowner may obtain a reverse mortgage).

132. *Id.* at 342.

133. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., A TURNING POINT IN THE HISTORY OF HUD'S HOME EQUITY CONVERSION MORTGAGE PROGRAM, U.S. HOUSING MARKET CONDITIONS 7 (2008), http://www.huduser.org/periodicals/ushmc/spring08/ushmc_q108.pdf (describing the various payment options in more detail).

134. See 12 C.F.R. § 226.33(a)(2)(i)-(iii) (2012); Debra Pogrund Stark & Jessica M. Choplin, *Consumer Protection Initiatives in the EU Mortgage Market: A Behavioral Economics Based Critique and Proposal*, 25 TEMP. INT'L & COMP. L.J. 1, 39 n.208 (2011).

factors, including the homeowner's age and the value of the home.¹³⁵ The older the homeowner, the more the homeowner can borrow.¹³⁶

Reverse mortgages may be an attractive option for low-income Baby Boomers because, unlike other loan options, there is no minimum income requirement.¹³⁷ However, the requirements for reverse mortgages may present serious problems for many Baby Boomers. For instance, there must be no debt secured by the home and there must be adequate equity available.¹³⁸ This presents a problem for Baby Boomers who have borrowed against the equity in their homes to pay for things such as children's college expenses, and for those whose home value has declined. Additionally, if the owner is out of the residence for over a year, such as in a nursing home, the loan becomes due.¹³⁹ Moreover, any unused income from the reverse mortgage will be considered income when Baby Boomers apply for Medicaid.¹⁴⁰ Finally, because homeowners are required to keep mortgage insurance on the property and pay all taxes and assessment on the property, they put themselves at risk of losing their home to foreclosure once the loan becomes due if they are unable to make the monthly payments.¹⁴¹

C. ALTERNATIVE INSURANCE POLICIES

In response to the growing need for long-term care, insurance companies have developed new policies which can offer limited benefits in the event that long-term care is needed. These hybrid policies combine

135. *Reverse Mortgages can be a Costly way to Tap Home Equity*, CONSUMER REPORTS., Oct. 2008, at 12

136. *Id.*

137. See Eugenia Levenson, *Unlocking Your Home Equity*, CNN MONEY (Sept. 1, 2008) http://money.cnn.com/2008/08/26/real_estate/unlocking_equity_levenson.fortune/index.htm (explaining the advantages and disadvantages of reverse mortgages).

138. See Carolyn H. Sawyer, *Reverse Mortgages: An Innovative Tool for Elder Law Attorneys*, 26 STETSON L. REV. 617, 627-28 (1996).

139. See, 12 C.F.R. § 226.33(a)(2)(i)-(iii); Pogrund *supra* note 134, at 39 n.208.

140. See Carole Moore, *Pros and Cons of Reverse Mortgages*, BANKRATE.COM, http://www.bankrate.com/brm/news/mortgages/20070104_reverse_mortgage_a1.asp?caret=41 (last updated Oct. 1, 2007).

141. See 24 C.F.R. § 206.103 (2013); see also 24 C.F.R. § 206.205 (2013); DONALD L. REDFOOT, ET AL., REVERSE MORTGAGES: NICHE PRODUCT OR MAINSTREAM SOLUTION?: 2006 AARP NATIONAL SURVEY OF REVERSE MORTGAGE SHOPPERS 111 (2007), http://assets.aarp.org/rgcenter/consume/2007_22_rev mortgage.pdf.

long-term care benefits with either life insurance or annuities as “riders.”¹⁴² However, these hybrid plans do not qualify as partnership plans.¹⁴³

A long-term care rider may be added to a life insurance policy, which allows the purchaser to accelerate the policy’s death benefits in the event long-term care is needed.¹⁴⁴ The accelerated death benefit (“ADB”) is a tax-free advance and is usually included in the premium. This benefit allows the insured to access a percentage of the death benefit to pay for long-term care costs incurred if the insured is: diagnosed as terminally ill, in need of long-term care for an extended amount of time, or permanently confined to a nursing home and unable to perform ADLs.¹⁴⁵ These policies generally pay a percentage of the face value of the policy. The typical amount is 2% for nursing home care and 1% for home care.¹⁴⁶ The amount paid out is deducted from the benefit payable upon the death of the insured.¹⁴⁷ This means that if long-term costs exceed the policy death benefits, either the full amount of long-term care costs will not be covered or death benefits will be extinguished. Additionally, ABD policies may not include inflation protection, which may leave the policyholder with insufficient benefits to cover future long-term care costs.¹⁴⁸ Finally, ADB policies may affect Medicaid eligibility.

Another hybrid policy is an annuity with a long-term care rider. These annuities require an initial premium of \$50,000, or funding through a 1035 exchange with another annuity or a universal or whole life insurance policy.¹⁴⁹ The purchaser chooses the amount of long-term care available, generally between 200% and 300% of the face value of the annuity, and the duration of the policy and the amount of inflation protection.¹⁵⁰ If the

142. See Jennie L. Phipps, *New: A Hybrid Annuity with LTC Coverage*, BANKRATE.COM (May 5, 2010), <http://www.bankrate.com/finance/insurance/new-a-hybrid-annuity-with-ltc-coverage-1.aspx>. See generally Ashish Gupta, *Riders in Insurance Policies*, THE ECONOMIC TIMES (Dec. 30, 2007, 4:39 AM), http://articles.economictimes.indiatimes.com/2007-12-30/news/28441456_1_riders-base-policy-critical-illness (explaining policy riders contained in insurance policies).

143. See discussion on partnership plans *supra* Part IV.A.

144. U.S. Dep’t of Health & Human Servs., *Using Life Insurance to Pay for Long-term Care*, LONGTERMCARE.GOV, <http://longtermcare.gov/costs-how-to-pay/using-life-insurance-to-pay-for-long-term-care/> (last visited Nov. 15, 2013).

145. *Id.*

146. *Id.* For example, if the life insurance policy’s face value is \$200,000, the monthly payout available for nursing home care costs would be \$4,000. *Id.* However, it would only be \$2,000 for home care. *Id.*

147. *Id.*

148. See *id.*; see also *supra* Part IV.B (explaining that one of the important components of LTCI is inflation protection).

149. Phipps, *supra* note 142 (discussing the pros and cons of hybrid policies).

150. *Id.*

annuitant never receives long-term care, then the annuity will continue to grow until it reaches maturity. Benefits paid out will be deducted from the value of the annuity at maturity. Although inflation protection is available for these hybrid plans, they still do not qualify for state partnership programs and thus, beneficiaries may be required to spend down their assets before qualifying for Medicaid.¹⁵¹

Individuals may mistakenly purchase other insurance policies, such as disability and critical illness insurance, believing that these policies will cover long-term care. While these policies are important in their own right, they do not cover long-term care costs. Disability insurance is designed to replace a portion of one's income in the event of either a short or long-term disability.¹⁵² The benefit amount is payable directly to the insured to cover the regular living expenses when the insured suffers a loss of income due to an illness or accident, which satisfies the policy definition for benefit eligibility.¹⁵³ As such, benefit eligibility is based upon loss of income, not loss of ability to perform ADLs. To qualify for disability insurance, generally an individual must be below sixty-five and actively employed.¹⁵⁴ Unfortunately for Baby Boomers, coverage terminates once an individual reaches the age of sixty-five, when long-term care is most likely to be needed.

Critical illness insurance generally pays a lump sum (up to \$100,000) to cover the costs incurred when one is diagnosed with an eligible illness.¹⁵⁵ This policy is designed to assist in the substantial expenses associated with medical treatment not covered by a standard health insurance policy. Neither income, nor do the ability to perform ADLs affect benefits. This type of policy pays a one-time benefit at the time of diagnosis and then terminates. Because the average annual cost of nursing home care is \$80,000, and many individuals require years of care, the one-time benefit

151. *Id.*

152. U.S. Dep't of Health & Human Servs., *What is Covered by Health & Disability Insurance?*, LONGTERMCARE.GOV, <http://longtermcare.gov/costs-how-to-pay/what-is-covered-by-health-disability-insurance/> (last visited Nov. 15, 2013).

153. *See Disability Income Insurance*, INSURANCE INFORMATION INSTITUTE, <http://www2.iii.org/glossary/d/> (last visited Nov. 15, 2013) ("In disability insurance, ["disability" is defined as] the inability of an insured person to work due to an injury or sickness."); *see also* Julie Landry Laviolette, *Disability Insurance is a Wise Investment*, MIAMI HERALD (Sept. 28, 2013), <http://www.miamiherald.com/2013/09/27/v-fullstory/3655358/disability-insurance-is-a-wise.html>.

154. *Long-Term Care vs. Long-Term Disability vs. Critical Illness Insurance*, NEA MEMBER BENEFITS, <http://www.neamb.com/insurance/term-disability-vs-critical-illness-insurance.htm> (last visited Nov. 15, 2013).

155. *Id.* (noting that "critical illness insurance is designed for [the young] and their dependents").

amount of \$100,000 is likely to be insufficient.¹⁵⁶ Consequently, critical illness insurance is not a viable alternative to long-term care.

VI. PATIENT PROTECTION AND AFFORDABLE CARE ACT AND LONG-TERM CARE

The Patient Protection and Affordable Care Act of 2010¹⁵⁷ (“Affordable Care Act”) contained the Community Living Assistance and Support Services (“CLASS”) Act,¹⁵⁸ which was developed to provide additional aid to the populations requiring long-term care: the disabled and the elderly. Although suspended in 2011 by the Department of Health and Human Services as fiscally unsustainable,¹⁵⁹ it bears mentioning that CLASS was suspended and not repealed by Congress, thereby opening the possibility of its integration in the future.

CLASS was conceptualized to be a form of insurance providing assistance with ADLs. It was modeled after private LTCI policies, and developed as a government insurance plan.¹⁶⁰ CLASS was designed to be financed by voluntary payroll deductions.¹⁶¹ The provisions for this act were formed primarily to encourage long-term care to be provided in the home or in community centers as opposed to institutions or nursing homes.¹⁶² However, the two key problems that barred CLASS from

156. See *supra* Part III (discussing the cost of long-term care and those responsible for paying).

157. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified at scattered sections of the Internal Revenue Code and at 42 United States Code).

158. See Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 8002 124 Stat. 119, 828 (codified 42 U.S.C. § 300ll); see also U.S. DEP’T OF HEALTH & HUMAN SERVS., A REPORT ON THE ACTUARIAL, MARKETING, AND LEGAL ANALYSES OF THE CLASS PROGRAM 1 (2011), <http://aspe.hhs.gov/daltcp/reports/2011/class/index.pdf> [hereinafter CLASS PROGRAM REPORT].

159. See Scott Spoerry, *Obama Drops Long-Term Health Care Program*, CNN, (Oct. 17, 2011, 11:55AM), <http://www.cnn.com/2011/10/14/politics/health-care-program/> (describing the letter to Congress from Health and Human Services Secretary Kathleen Sebelius after a nineteen-month effort to make CLASS financially viable).

160. See John Inglehart, *Long-Term Care Legislation At Long Last?*, HEALTH AFFAIRS, <http://content.healthaffairs.org/content/29/1/8.full.html> (last visited Dec. 6, 2013).

161. See CLASS PROGRAM REPORT, *supra* note 158, at 1, 16, 42.

162. See Patient Protection and Affordable Care Act § 8002(a)(1); JOANNE KENEN, HEALTH AFFAIRS, HEALTH POLICY BRIEF: THE CLASS Act 1–3 (2011), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/HEALTHPOLICYBRIEF_46.pdf. The goals of CLASS are:

- (1) provide individuals with functional limitations with tools that will allow them to maintain their personal and financial independence and live in the community through a new financing strategy for community living assistance services and supports;
- (2) establish an infrastructure that will help address the Nation’s community living assistance services and supports needs;
- (3) alleviate burdens on family caregivers; and
- (4) address institutional bias by providing a financing mechanism that supports personal choice and independence to live in the community.

achieving this goal were that the program was voluntary and it guaranteed coverage.¹⁶³

The Affordable Health Care Act will not significantly impact long-term care coverage,¹⁶⁴ but that does not mean that steps in Florida have not been taken to offset the increase in costs for long-term care. In 2011, Florida legislature approved the expansion of Medicaid reform based upon a 2005 pilot program that enacted a managed care initiative.¹⁶⁵ However, this program did not include individuals in nursing homes or others requiring long-term care services.¹⁶⁶ The legislature rectified this problem in 2011 by replacing the fee-for-service model with a managed care capitated system for almost three million Medicaid members.¹⁶⁷ This program added disabled and elderly populations in need of long-term care and required them to enroll in Florida's Long-Term Care Managed Care Program.¹⁶⁸ The goal of this initiative was to shift services from institutions to community based settings by offering financial incentives to the managed care organizations for their assistance with the transition of care.¹⁶⁹ To date, this program has not been successful as waitlists are increasing and the Affordable Health Care Act will neither provide additional funding nor create new openings for either home or community based services.¹⁷⁰

Patient Protection and Affordable Care Act § 8002(a)(1).

163. See Alexander N. Daskalakis, Note, *Public Options: The Need for Long-Term Care, Its Costs, and Government's Attempts to Address Them*, 5 ST. LOUIS U. J. HEALTH L. & POL'Y 181, 201 (2011).

164. Gene Coffey, *The Affordable Care Act's Changes to Medicaid's Coverage for Long-Term Services and Supports*, 7 NAELA J. 93, 93 (2011).

165. See, FLA. STAT. § 409.91211 (2011) (to be repealed 2014); *Florida Medicaid Reform*, UNIV. OF FLA. COLL. OF PUB. HEALTH & HEALTH PROFESSIONS, <http://mre.php.ufl.edu/aboutfl Medicaidreform/index.htm> (last visited Nov. 15, 2013); see also FLA. AGENCY FOR HEALTH CARE ADMIN., *Florida Medicaid Reform Pilot*, http://ahca.myflorida.com/Medicaid/Medicaid_reform/index.shtml (last visited Nov. 15, 2013).

166. Elizabeth P. Allen, et al., *The Impact of State Medicaid Reform on Vulnerable Populations Needing Long-Term Care Services and Supports: An Analysis of Florida, Illinois, and New Jersey*, 8 NAELA J. 125, 138 (2012).

167. See Greg Allen, *To Cap Medicaid, Florida Looks to Managed Care*, KAISER HEALTH NEWS (Mar. 8, 2011), <http://www.kaiserhealthnews.org/stories/2011/march/08/medicaid-florida-managed-care-npr.aspx>; see also FLA. STAT. § 409.9081(1)(c) (2013); FLA. STAT. § 409.972(4) (2013). This legislation added a \$10 premium for Medicaid recipients. § 409.972(4). Additionally, it authorized charging beneficiaries a \$100 copayment for non-emergency use of emergency facilities. § 409.9081(1)(c).

168. Allen, *supra* note 167, at 139.

169. *Id.* at 144.

170. *Id.*

VII. TO BUY OR NOT TO BUY, AND IF SO, WHEN? THAT IS THE QUESTION

LTCI, while a necessary form of coverage for many, is not recommended for all consumers. A cost-and-needs based analysis is critical. On the one hand, LTCI is not recommended for individuals who: 1) cannot afford the premiums, including possible premium increases;¹⁷¹ 2) qualify for Medicaid; or 3) have few assets and/or savings. These individuals would be best suited by preparing for the income reduction that comes with retirement. On the other hand, individuals who have significant income and assets but are unable to finance the cost of long-term care on their own, should consider purchasing a LTCI policy because they would have to “spend down” a great deal of their savings in order to qualify for Medicaid assistance. Additionally, the purchase of a long-term care partnership plan would protect some of these assets under the “asset disregard” provision.¹⁷²

Financial experts generally recommend purchasing LTCI policies between the ages of fifty-five and sixty-four.¹⁷³ Before this time, individuals usually have competing needs for their finances, such as college tuition, and it is generally after this age when health complications hinder the ability to obtain coverage. However, the younger one is when they purchase LTCI, the lower the premiums will be and better chance they have at qualifying.¹⁷⁴ As these policies are medically underwritten, the older an individual becomes, the more likely they are to suffer medical conditions, which could lead to the insurance company declining the applicant.

According to a 2010 study conducted by the American Association for Long-Term Care Insurance, less than one out of ten individuals under the age of fifty is declined due to health reasons.¹⁷⁵ This percentage increases to 23% for individuals between ages sixty to sixty-nine and further rises to 45% of those between ages seventy to seventy-nine.¹⁷⁶

171. See SHOPPER’S GUIDE, *supra* note 34, at 28–29 (providing examples of expensive LTCI premiums).

172. See *supra* notes 101–03 and accompanying text discussing “asset disregard.”

173. Michele Lerner, *Long-Term Care Insurance Should Be Part of Your Financial Plan*, DAILY FINANCE (May 12, 2013, 11:50 AM), <http://www.dailyfinance.com/2013/03/12/long-term-care-insurance-should-be-part-of-your-financial-plan/>.

174. Robert DiGiacomo, *Best Age to Buy Long-Term Care Insurance?*, BANKRATE, (Oct. 21, 2011), <http://www.bankrate.com/finance/insurance/best-age-to-buy-long-term-care-insurance-1.aspx>; Lerner, *supra* note 173.

175. AM. ASS’N FOR LONG-TERM CARE INSURANCE, A SPECIAL REPORT ON LONG-TERM CARE INSURANCE PROTECTION (n.d.), <http://www.aaltci.org/subpages/resources/claimsreport.pdf>.

176. *Id.*

According to a 2012 study, 8.1 million Americans are protected by LTCL.¹⁷⁷ Of these individuals, approximately 24.7% were between the ages of forty-five to fifty-four and 54% were between the ages of fifty to sixty-four.¹⁷⁸ While the number of individuals purchasing LTCL has steadily increased, it is still less than 2.5% of the American population.¹⁷⁹

Perhaps the most important deciding factor in purchasing long-term care insurance is family health history and longevity. For those with a family history of health conditions such as Alzheimer's disease, this policy should be purchased while the individual is still insurable. Whether or not the need arises from health or longevity issues, if the odds are that an individual will require some form of long-term care in the future and the individual has assets to protect, a policy should be purchased.

VIII. CONCLUSION

Baby Boomers should be presently concerned with the cost of long-term care in the event that they become disabled or unable to care for themselves. Costs are continuing to increase and funding is disappearing.¹⁸⁰ Could the answer to this cost burden be to receive the care at home, relying on family members to reduce the cost of long-term care services? This might work today as the Baby Boomers care for their parents. But who is going to take care of the more than 70 million Baby Boomers in ten to twenty years when they need assistance themselves?¹⁸¹ In 2010, there were more than seven potential caregivers for every person over eighty years of age.¹⁸² That number will be reduced to 4.1 by 2030 and to 2.9 by 2050.¹⁸³

Medicare does not cover long-term care and due to budgetary constraints, Medicaid should not be used to fill the planning void. Other

177. *Long-Term Care Insurance Facts - Statistics*, AM. ASS'N FOR LONG TERM CARE INSURANCE, <http://www.aaltci.org/long-term-care-insurance/learning-center/fast-facts.php> (last visited Dec. 6, 2013).

178. *Id.*

179. See Marilyn Geewax, *Long-Term-Care Insurance: Who Needs It?*, NPR (May 8, 2012, 3:13AM), <http://www.npr.org/2012/05/08/151970188/long-term-care-insurance-who-needs-it> (providing that only 8 million out of about 313 million Americans have signed up for long-term care insurance).

180. See *supra* Part III.

181. See AM. HOSP. ASS'N, *WHEN I'M 64: HOW BOOMERS WILL CHANGE HEALTH CARE* 4 (2007), <http://www.aha.org/content/00-10/070508-boomerreport.pdf>.

182. DONALD REDFOOT, ET AL., AARP PUBLIC POLICY INSTITUTE, *THE AGING OF THE BABY BOOM AND THE GROWING CARE GAP: A LOOK AT FUTURE DECLINES IN THE AVAILABILITY OF FAMILY CAREGIVERS* 1 (2013), http://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-ltc.pdf.

183. *Id.* at 6.

options discussed in this article are not practical or are simply inadequate to cover the cost of long-term care.¹⁸⁴ However, LTCI may be the answer for many Baby Boomers who cannot afford to pay out-of-pocket for their own long-term care needs. Additionally, LTCI is a great option for Baby Boomers who want to ensure that the transfer of their assets to the next generation is maximized. Left without the option of receiving care at home from family, Baby Boomers are going to be forced to find the resources to pay for their own long-term care costs and LTCI is a viable option.

184. *See supra* Part V (discussing alternative options to LTCI).