

Report on Public Policy Position

Name of Section:

Elder Law & Disability Rights Section

Contact Person:

Dolores M. Coulter

E-mail:

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Other:

ABA Draft Resolution: Long Term Care Programs

Date position was adopted:

January 5, 2008

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

20

Number who voted in favor and opposed to the position:

15 Voted for position

0 Voted against position

0 Abstained from vote

5 Did not vote

Position:

Support

Explanation of the position, including any recommended amendments:

The proposed resolution urges federal, state, and local governmental units to develop and assess innovative long-term care programs, such as the "Compact for Long-Term Care" developed by the New York State Bar Association, as a reasonable and fair solution to long-term care funding.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

Janet K. Welch
Executive Director, State Bar of Michigan
306 Townsend Street
Lansing, MI 48933

Re: AE3A Draft Resolution Proposal by
the New York State Bar Association

Dear Ms. Welch:

Kathryn Grant Madigan, President of the New York State Bar Association ("NYSBA") asked that I contact you as Executive Director of the State Bar of Michigan. NYSBA intends to submit for consideration at the American Bar Association's ("ABA") 2008 Mid-year Meeting a resolution which seeks to promote an alternative method of financing long term-care needs for older adults and the disabled. To date, the Commission on Law and Aging, the Senior Lawyer's Division of the ABA, the Commission on Mental and Physical Disability Law and the ABA's Section of Real Property, Trust and Estate Law have agreed to co-sponsor the proposed Resolution.

I am enclosing for your review and consideration a copy of the proposed resolution. NYSBA very much would like your bar association to consider co-sponsoring this resolution with us. I am very interested in any comments you might have in regard to the proposed resolution and whether your bar association would consider co-sponsorship. You will find my contact information below.

Thank you in advance for you consideration of this matter.

Very truly yours,

ELLEN G. MAKOFSKY

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Immediate Past Chair of the NYSBA
Elder Law Section

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: New York State Bar Association

Submitted By: Kathryn Grant Madigan, President

1. Summary of Recommendation(s).

That the American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to develop and assess innovative long-term care programs such as the "Compact for Long-term Care" as a reasonable and fair solution to long-term care financing.

2. Approval by Submitting Entity.

The proposed Compact was approved by the New York State Bar Association Executive Committee on April 1, 2005.

3. Has this or a similar recommendation been submitted to the House or Board previously?

A similar recommendation was submitted in 2006 and withdrawn.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The proposed Compact is consistent with the ABA's policy on access to long-term care.

5. What urgency exists which requires action at this meeting of the House?

Paying for long-term care is an enormous challenge for seniors and other people with disabilities. Medicaid is currently the only government program that subsidizes long-term care. Reforming public policy to address the challenges faced by individuals requiring long-term care and the burgeoning cost of long-term care paid by Medicaid is increasingly urgent since the baby-boom generation is moving toward retirement and the aging population continues to increase at a significant rate.

6. Status of Legislation. (If applicable.)

7. Cost to the Association. (Both direct and indirect costs.) None

8. Disclosure of Interest. (If applicable.)

9. Referrals. None

10. Contact Person. (Prior to the meeting.)

Ellen G. Makofsky, Esq.
Immediate Past Chair
New York State Bar Association Elder Law Section
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11. Contact Person. (Who will present the report to the House.)

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**AMERICAN BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
COMMISSION ON LAW AND AGING
SENIOR LAWYERS DIVISION
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW
REAL PROPERTY TRUST AND ESTATE LAW SECTION
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

RESOLVED, That the American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to develop and assess innovative long-term care programs such as the "Compact for Long-term Care" as a reasonable and fair solution to long-term care financing.

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EXECUTIVE SUMMARY

1. Summary Of The Recommendation

That the American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to develop and assess innovative long-term care programs such as the "Compact for Long-term Care" as a reasonable and fair solution to long-term care financing.

2. Summary Of The Issue That The Resolution Addresses

Long-term care is required by those who need custodial care or help with the activities of daily living: eating, bathing, dressing, walking, transferring and continence. Those who have a cognitive disease such as Alzheimer's also require long-term care. Long-term care may be provided at home or in an institutional setting. Long-term care is expensive and is not covered by the Medicare program. Long-term care insurance will pay for long-term care coverage but many are uninsurable due to advanced age, pre-existing health conditions or because the insurance is unaffordable. Current law provides that eligible persons may receive long-term care coverage under the Medicaid program. In order to become eligible for Medicaid benefits the applicant must be impoverished. Contrary to what most individuals want, which is care at home, the Medicaid program has a bias for institutionalization because participants in the Medicaid program must be impoverished and therefore lack sufficient assets and income to maintain themselves at home. The Medicaid program is very costly and is a burden to the county, state and federal governments. Those who require custodial care must spend down, or try to give away, a lifetime of savings in order to become eligible for Medicaid benefits. Spouses who often live many years after the ill spouse has died are also left impoverished. Those who are forced into poverty by the requirements of the Medicaid program have lost not only their health but also their retirement nest egg and their dignity.

3. Please Explain How The Proposed Policy Position Will Address The Issue

Legislation to create a public private partnership between those who require long-term care and the government addresses the issues, by creating an innovative method to finance long-term care needs which will provide an alternative to the Medicaid program. One creative proposal to do just that is the Compact for Long-term Care. Once an individual receives a diagnosis of chronic illness, instead of giving away or spending down assets to qualify for Medicaid benefits, the individual pledges to use a defined amount of his or her existing assets to pay for long-term care needs. Until the pledged amount is spent, the individual remains responsible for his or her own needs, independent of Medicaid. Once the pledged amount is spent, participants become eligible for a subsidy paid by the government to cover approximately 90% of the participant's long-term care costs. At this point, participants pay 25% of their monthly countable income to the government's administering agency, using the remaining 75% to pay for living expenses and the portion of long-term care expenses not covered by the subsidy.

The legislation would relieve a portion of the financial stress placed upon the Medicaid system because it would discourage Medicaid planning and transfers of assets prior to eligibility. In addition, private pay dollars would be used in the initial phase of the chronic illness. Those who did not survive through the private pay status phase would never access the subsidy and would not be accessing Medicaid benefits either. Further, private pay dollars from an individual's income would continue to be used during the subsidy period reducing the amount of government dollars needed. The proposed legislation is designed to be simpler to administer than the Medicaid program resulting in reduced government costs. Under the proposed legislation more of the chronically ill could remain at home because they would have the assets set aside to maintain their homes. It would also mean that fewer government dollars would be spent during the subsidy period because home care remains cheaper than institutional care. Aside from the economic benefits, the legislation also offers a more equitable result to the seniors and people with disabilities who have the misfortune of requiring care not covered by Medicare benefits, and allows these individuals and their spouses to preserve their dignity and quality of life without the threat or reality of impoverishment.

4. Summary Of Minority Views

Many in the long-term care insurance industry oppose legislation to create an alternate method of financing long-term care because they believe if the legislation is implemented fewer people will purchase long-term care insurance.

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THE COMPACT FOR LONGTERM CARE
An Alternative Method for Financing Low-Term Care Needs

Overview: What Happens When an Individual Needs Long-Term Care

Most working people believe that when they get older Medicare and supplemental Medigap insurance will pay for their health care needs. It is true that Medicare insurance provides broad medical coverage to participants but it does not pay for those who require long-term care for an extended period of time. Those who require long-term care require custodial care or help with the activities of daily living: eating, bathing, dressing, walking, transferring and continence. Those who suffer from cognitive difficulties such as Alzheimer's disease are also said to require long-term m. Long-term care is provided both at home and in institutional settings.

The national health care insurance system which covers the elderly and disabled is not fair to those unlucky enough to have the wrong disease. If a 70 year old has chest pains and is rushed to the hospital with a heart attack which requires bypass surgery and an ensuing hospital stay, that individual's financial nest egg will remain intact because Medicare and his supplemental Medigap insurance will cover almost all of the individual's medical expenses. If instead, the 70 year old begins to forget where he left his keys, and then his car, and eventually the names of his family members, this individual's finances may be devastated because Medicare will not cover the cost of custodial long-term care expenses. While long-term care is required by many older adults and persons with disabilities, it is also expensive. The average cost in 2006 of a home health aide was \$19 per hour and the national average annual cost of nursing home care was \$66,795.

Currently Available Sources of Payment for Long-Term Care

Private pay is one source of long-term care payment. However, after a certain period of time the individual who requires and care, and his or her family will be left with few assets. Long-term care insurance is another method of payment but it is often unavailable because many applicants are uninsurable due to their age or pre-existing health conditions or because the insurance is simply unaffordable. Veteran's benefits provide some coverage for a small percentage of those who require long term care.

In order to access the long-term care that they need, many seniors and individuals with disabilities enroll in the Medicaid program. The primary prerequisite to Medicaid eligibility is that the applicant must be impoverished. This is because Medicaid is not an insurance program but rather an entitlement program that provides what the Medicare insurance program does not: coverage for long-term care. Another problem with the Medicaid program is that it incorporates a bias for institutionalized care. Those who wish to access Medicaid benefits for long-term care at home often do not have enough remaining assets and income to maintain the residence and pay for day to day non-medical bills. Thus they often find themselves reluctantly placed in a nursing home setting. Seniors and individuals with disabilities who require long-term care are often placed in an untenable

position with no readily available financing program except Medicaid, the program of last resort. To date no other reasonable, alternative program has emerged.

A New Vision for Financing Long-Term Care is Required

The Compact for Long-Term Care (the "Compact") is an alternative method of financing long-term care. It is a program which would exist separate and apart from the Medicaid program and is not intended to replace it. The Compact brings a new approach to determining an applicant's eligibility for government-subsidized, long-term care services. It would allow the elderly and disabled to access needed custodial care without the requirement of impoverishment and it is expected to curb the burgeoning costs of the Medicaid program.

The Design of the Compact

The basic purpose of the Compact is to create a partnership between those who require long-term care and the government wherein the individual would pay a fair share for long-term care services, and the government would provide support based upon that individual effort.

Under the current Medicaid system, poverty status is required before a person can receive either home care or institutional benefits. An individual who has spent down to Medicaid levels often is not left with enough assets or income to adequately maintain him or herself at home and as a result may be forced into an institution instead in order to receive benefits. Those in need of long-term care face a Hobson's choice of self impoverishment by either spending down and/or transferring assets or forego the needed benefits.

The Compact provides a simple and fair alternative approach to long-term care financing. Once an individual is diagnosed with chronic illness, the individual pledges to use a defined amount of his or her existing assets to pay for long-term care needs. Until the pledged amount is spent, the individual remains responsible for his or her own needs, independent of Medicaid. Thereafter, Compact participants would retain "private-pay status," but would become eligible for the "Compact Subsidy" paid by the government to cover approximately 90% of the participant's long-term care costs. At this point, participants pay 25% of their monthly countable income to the government's administering agency, using the remaining 75% to pay for living expenses and the portion of long-term care expenses not covered by the Compact Subsidy.

Under the Compact, Medicaid becomes the true safety net it was intended to be. The Compact proposal would relieve the ever-burgeoning financial stress placed upon the Medicaid system because the Compact would discourage divestment of assets prior to eligibility. Private pay dollars would be used in the initial phases of the chronic illness. Those who did not survive through the private pay status phase would never access the Compact Subsidy and would not be accessing Medicaid benefits either. Also, private pay dollars would continue to be used during the Compact Subsidy period thereby reducing the amount of government dollars needed. Further, government would save administrative costs because the Compact is designed to be simpler than the Medicaid program. Finally, under the Compact more of the chronically ill could remain at home because they would have the assets set aside to maintain their homes. This would mean that fewer government dollars would be spent during the Compact Subsidy period since home care remains cheaper than institutional care. Aside from the economic benefits, the Compact choice is fair to the elderly and disabled and their spouses because it allows them to preserve their dignity and quality of life.

An In-Depth Analysis of the Compact

The Compact consists of two basic phases: 1) The "Pledge Period" during which time the applicant is referred to as an "Eligible Individual," and 2) The "Compact Subsidy Period" during which time the applicant is referred to as a "Compact Participant." Highlights of each of the two phases are discussed below.

Phase I: The Pledge Period

Compact Pledge Date: The date upon which the Eligible Individual has satisfied the two requirements to enter into the Compact program contract: 1) the individual qualifies for long-term care services; and 2) the government's administrator has made a determination of the Pledge Amount, (as defined below) and the individual has agreed to the Pledge Amount.

Pledge Amount: The lesser of the average cost of care in a nursing home calculated for the three years, (known as the "Maximum Pledge Amount,") or one-half the value of the Eligible Individual's countable assets on the "Compact Pledge Date", (known as the "Dollar Pledge amount."). The remaining assets not pledged are referred to as the "Protected Amount." A Compact Participant would not be required to spend down for long-term care services any assets designated as a Protected Amount.

Once the Pledge Amount has been spent for qualified long-term care services, the Eligible Individual has satisfied his or her obligation under the Compact and enters the second phase of the Compact, which provides assistance equal to the "Compact Subsidy" amount (discussed in "Phase 11" of this report).

Countable Assets: Unless specifically exempted by the Compact rules, countable assets will be the same as those defined under current Medicaid law.

Homestead Exemption: For purposes of calculating countable assets, a Homestead is exempt regardless of value and regardless of whether the Maximum Pledge or Dollar Pledge Amount is applicable, unless the Homestead was purchased within three years of the Compact Pledge Date.

Look-Back Rules: An attractive feature of the Compact program is that once the Maximum Pledge Amount is pledged, the look-back period often associated with the Medicaid program is eliminated. Under the Compact program, when the Maximum Pledge Amount is pledged, there is no look-back period, penalty period, or review of financial documentation, making the program friendly for both the user and the administrator. Only when the Dollar Pledge Amount is pledged would a three-year look-back period apply, pursuant to which the Eligible Individual would disclose and certify, subject to penalties for perjury, a list of current assets, their values and any asset transfers for less than full consideration within the past three years. Income-tax returns, if filed, would constitute the only documents required to be submitted, although the government's administrator could request further documentation to verify assets (and values) and/or uncompensated assets transferred. While there would be no penalty period any asset transfer made within the three-year look-back period, under the Compact program, any asset transfers made within three years of the Compact Pledge Date would be added back to the sum of countable assets used for the purposes of determining the Pledge Amount.

Spousal Rules: A married couple must disclose total assets without distinction as to who owns the assets. For the first spouse requiring qualified long-term care services, the Pledge Amount would be the lesser of the Maximum Pledge Amount or one-fourth of the couple's countable assets (constituting the Dollar Pledge Amount). Assets of a non-pledging spouse who has entered into a pre-nuptial or post-nuptial agreement made more than three years prior to the Compact Pledge Date are not considered "countable assets" and would not have to be disclosed under the Compact rules.

If the Maximum Pledge Amount applies, then the Protected Amount would be equal to one-half of the couple's countable assets minus the Maximum Pledge Amount. If the Dollar Pledge Amount applies, then one-fourth of the couple's countable assets would constitute the Protected Amount.

On the death of the first spouse, if the Protected Amount passes to the surviving spouse it is not included in computing the surviving spouse's countable assets when applying for Compact coverage. Furthermore, if maintained in a segregated account, the growth and income of the Protected Amount are also protected?

No Estate Recovery: Once the Maximum Pledge or the required Dollar Pledge Amount has been satisfied, there would be no estate recovery of any Protected Amount or the Homestead.

Long-Term Care Savings Account (LTCSA): Individuals who applied for long-term care insurance and were denied coverage due to the underwriting process would have the option, under the Compact program, to place a defined amount of money in a Long-Term Care Savings Account (LTCSA) each year. The proposed computation of the maximum annual deposit amount is a sum not to exceed twice the current annual Individual Retirement Account (IRA) contribution limit allowed under the Internal Revenue Code and applicable U.S. Treasury Regulations. Amounts placed in the LTCSA annually would be eligible for the same tax deductions available to those who contribute to an IRA and would not count when computing that individual's countable assets. There would be no federal or state income tax consequences for the expenditure of funds from the LTCSA to fulfill the Pledge Amount.

When the need for care arises and an Eligible Individual makes a Compact Pledge, LTCSA funds would be the first assets expended to meet the Pledge Amount and if said funds are insufficient to fulfill the Pledge, the Eligible Individual would be required to use a portion of his/her unprotected countable assets. If any funds remain within the unprotected countable assets upon completion of the Compact Pledge, those funds would be added to the Protected Amount as the Eligible Individual entered Phase Two of the Compact Program (becoming a Compact Participant, eligible for Compact Subsidy payments). If a LTCSA holder dies without using all of the funds in the account, the remaining balance may pass to the spouse or a disabled person without the imposition of federal or state income tax. In the event the designated beneficiary of the LTCSA is a person other than the spouse or a disabled individual, the proceeds of the LTCSA will be subject to applicable state and federal income tax.

Phase II: The Compact Subsidy

Compact Subsidy: Once an Eligible Individual has fulfilled his or her Pledge obligation the government commences its coverage of qualified long-term care services. A "Compact Subsidy Amount" is the amount of money the government's administering agency would pay toward covered services provided to the Compact Participant. This amount is equal to the Medicaid rate applicable to individuals receiving standard Medicaid coverage. However, providers would charge Compact Participants a "Compact Rate" of up to 110% of the Compact Subsidy Amount. Thus, the government's liability for qualified long-term care expenses is limited to the Medicaid rate, yet providers may charge Participants at the Compact Rate, a figure that is higher than the Compact Subsidy Amount, but lower than private-pay rates. The Compact Participant is responsible for making whole the "Co-Pay Amount," which is the difference between the Compact Rate charge by the provider and the Compact Subsidy Amount paid by the government.

Treatment of Income: During the Compact Subsidy period, the Compact Participant must pay 25% of his or her Monthly Countable Income to the government's administering agency. The remaining 75% of the Compact Participant's Monthly Countable Income would constitute his or her "Monthly Income Allowance," the minimum monthly income that the Compact Participant could retain subject to the Participant's Co-Pay obligations (discussed above in "Compact Subsidy"), and subject to a floor defined as the Minimum Monthly Income Allowance. Co-Pay obligations would cease at the point where the balance remaining from the Participant's Monthly Countable Income fell below this figure.

The Role of Long-Term Care Insurance: The Compact Pledge Amount can be fulfilled in whole or in part with long-term care insurance. While certain individuals cannot afford or obtain (for medical reasons) long-term care insurance, that insurance can still play a vital role in the Compact Program. If a Compact Participant remains eligible for further long-term care insurance payments after fulfillment of the Compact Pledge, the policy would serve as a "secondary coverage" for services not paid for by the Compact Subsidy.

Conclusion

The Compact proposal is intended to serve as a model for financing long-term care that may be implemented throughout the United States to deal with the burgeoning costs of the Medicaid program. We view this proposal as a necessary step toward fairness and reform whereby citizens in need of long-term care can pledge to and actually pay a fair share of the cost in exchange for eventual government support. The cost of the Medicaid program in its present form is too great, for both the government and people in need of long-term care. Our most vulnerable citizens should not have to impoverish themselves to obtain needed services.

The United States takes justifiable pride in being a nation of laws that are just and reasonable. However, the current law does not meet that standard. The Compact for Long-term Care, if properly implemented, will improve the current system and, most importantly, help our seniors and people with disabilities and their spouses live with dignity and improved quality of life.

The New York State Bar Association urges the American Bar Association to support the development and assessment of innovative long-term care programs such as the Compact for Long-term Care as a reasonable and fair solution to long-term care financing.

Respectfully submitted,

KATHRYN GRANT MADIGAN
President
New York State Bar Association
November, 2007