MAINE BUREAU OF INSURANCE

R.C. *v.* BANKERS LIFE & CASUALTY CO. DOCKET NO. INS-15-500	)))))))	DECISION AND ORDER

The Superintendent of Insurance has convened this adjudicatory proceeding, pursuant to 24-A M.R.S.A. § 229 and Bureau of Insurance Rule 580, to consider the petition filed on behalf of R.C. by her attorney-in-fact, contending that R.C. suffered from cognitive impairment at the time her Bankers Life and Casualty Company home health care policy lapsed due to nonpayment of premium, that her cognitive impairment was the reason she failed to pay the premium, and that she is therefore entitled to reinstatement of her policy pursuant to 24-A M.R.S. § 2707-A, which requires an insurer to offer reinstatement of a lapsed policy if the policyholder or her authorized representative claims "that the loss of coverage was the result of the policyholder's cognitive impairment or functional incapacity" and a "medical demonstration … substantiates the existence of a cognitive impairment or functional incapacity at the time of policy cancellation to the satisfaction of the insurer."

If the insurer determines that the policyholder has not adequately substantiated a right to reinstatement, Section 2707=A and Bureau of Insurance Rule 580, § 7, grant the policyholder the right to a hearing before the Superintendent of Insurance.[1] R.C. filed a timely hearing request after Bankers Life determined that R.C. had not met her burden of proof.

This appears to be a case of first impression. It is the only adjudication to date that has been requested under Rule 580, and neither party has cited any decision arising under similar laws of other jurisdictions. Bankers Life observes that the term "cognitive impairment" is a specifically defined term in the policy, and contends that it should have the same meaning for purposes of policy reinstatement as it has for purposes of benefit eligibility. R.C., on the other hand, responds that "The proper focus of this case is whether R.C.'s cognitive state was the cause of the missed payment, not whether she was or should have been under continual supervision," which is the test that would be applied under a standard based on the policy definition.

For the reasons discussed more fully below, I conclude that R.C. interprets the statute correctly, and I find it more likely than not that R.C.'s nonpayment of premium was caused by cognitive impairment. I am therefore ordering reinstatement of her coverage retroactive to the date of lapse.

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[1] Pursuant to 24 A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance General Counsel Robert Alan Wake to serve on his behalf as hearing officer, with full decisionmaking authority.

Facts and Procedural History

Although not required by law, Bankers Life conducted an evidentiary hearing, at which R.C. presented a medical demonstration in accordance with 24-A M.R.S. § 2707. before making its final decision. The parties have submitted this matter for decision on a stipulated evidentiary record, and the facts that I have found to be material are largely uncontested.

R.C. purchased a Home Health Care Policy from Bankers Life in 1995, when she was 65 years old.[2] This policy was renewed, without incident as far as can be determined from the record, through December of 2013. However, R.C. failed to pay her 2013–2014 renewal premium.[3] As the grace period was expiring, Bankers Life extended it voluntarily, but she failed to pay by the extended deadline of February 4, 2014. As a result, the policy lapsed. At that time, she was an 83-year-old widow with no children. She lived alone in Sanford, Maine, but was in regular contact with her extended family, and had several relatives who also lived in Sanford.

In mid-February – the record does not document the date – one of R.C.'s nieces discovered that the policy had lapsed. She told the Bankers Life hearing panel that she visited her aunt and found a check dated January 8, made out to Bankers Life for $523.80, fully executed but still in the checkbook. Visiting again the next day, the niece found a Bankers Life agent's business card. She called the agent and learned that the policy had lapsed earlier that month for nonpayment of premium. She offered to forward the January 8 premium check immediately, but Bankers Life would not accept the late payment. On February 21, at the niece's request, R.C.'s primary care physician wrote a "to whom it may concern" letter advising that "she has had some changes in cognition related to normal aging," and asking the reader to "take her difficulties with cognition into account when evaluating her ability to complete documentation in a timely manner."

R.C.'s niece said this was not the only unpaid bill, and said that she took control of R.C.'s finances in February of 2014. However, R.C. continued to live alone until she was hospitalized after a fall on April 1. After a period in a rehabilitation facility, she entered a nursing home and still resides there. On July 24, 2014, R.C. was diagnosed with moderate Alzheimer's disease.

After reviewing the medical records and other documentation submitted on behalf of R.C., Bankers Life denied the request to reinstate her policy. In May of 2015, the family filed a consumer complaint with the Bureau of Insurance on R.C.'s behalf, and Bankers Life agreed to reconsider whether to reinstate the policy. They convened a 5-member hearing panel representing different work units and areas of expertise, including one panelist who is a nurse and certified dementia care provider. The panel held a hearing on August 12, 2015, at which R.C.'s family presented their case to the panel in person and through affidavits, supported by medical and financial records.

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[2] The Bankers Life Panel Decision states that the policy was purchased in 1996, but the policy documents show that 1995 was the effective date and 1996 was the first renewal date.

[3] She had the option of paying a monthly premium of $48.97, a quarterly premium of $138.39, a semiannual premium of $270.50, or a full-year premium of $523.30.

On August 26, the panel issued a written decision (the "Panel Decision") denying reinstatement, based on a finding that "has not met her burden of demonstrating that she was cognitively impaired within the meaning of her insurance policy as of February 4, 2014, the date that her policy lapsed due to non-payment of her premium." The policy definition reads as follows:

> *"Cognitive Impairment" means a deterioration or loss in intellectual capacity which requires continual supervision to protect one's self or others, as measured by clinical diagnosis or tests which reliably measure impairment in the following areas:*
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> 1. *short or long term memory;*
> 2. *orientation as to person (such as who one is), place (such as one's location), and time (such as day, date and year);*
> 3. *deductive or abstract reasoning*
>
> *Such loss of intellectual capacity can result from the following covered conditions: Alzheimer's disease, Parkinson's disease, senile dementia or other nervous or mental disorders of organic origin.*

According to the Panel Decision: "even if there were a medical test or diagnosis suggesting that [R.C.] was impaired as of February 4, 2014 (which there is not) the undisputed evidence is that on or before February 4, 2014, [R.C.] did not require continual supervision to protect herself or others."

On September 23, 2015, acting under R.C.'s power of attorney, R.C.'s niece Rachel C. filed a timely hearing request. The Superintendent issued an order on October 5 convening this adjudicatory proceeding. After a conference of counsel on October 13, the parties agreed to meet and confer on an agreed course of proceedings. The parties agreed that the evidentiary record would be consist of the record from the Bankers Life hearing, with a stipulated summary of the live presentations (which had not been transcribed), and supplemented by two additional documents filed by Bankers Life without R.C.'s objection. After briefing by the parties, the record closed on March 29, 2016, when the parties gave notice that they waived oral argument.

Standard of Review

A threshold question is the nature of the Superintendent's role in this process. Because this is a case of first impression, I specifically asked the parties to brief the standard of review. R.C. proposed applying the same standard used under M.R. Civ. P. 80B, under which the decision of a municipal tribunal such as a planning or zoning board may be reversed only for error of law, abuse of discretion, or findings not supported by substantial evidence in the record. *See e.g. Yates v. Town of Southwest Harbor*, 2001 ME 2, ¶ 10, 763 A.2d 1168. Bankers Life, on the other hand, "believes that the standard here is *de novo* review of the Administrative Record to determine whether Petitioner has met her burden of demonstrating that she was cognitively impaired within the meaning of her policy as of February 4, 2014."

Both parties proceed from the premise that this proceeding as an "appeal" of Bankers Life's Panel Decision. That is somewhat of an oversimplification – both the statute and the Rule use the term "hearing" rather than "appeal," and a testimonial hearing could be appropriate in other cases that might lack the fully developed record that was created at the Panel hearing. Nevertheless, the

concept that the Superintendent's role is quasi-appellate in nature is supported by Rule 580, which provides at Subsection 7(B) that the right to a hearing is "for the purpose of determining whether a violation of this Rule or the Maine Insurance Code has occurred." This does not require proof of willful misconduct – only that the policyholder had a right to reinstatement under the Insurance Code and the insurer failed to honor it – but it does indicate that the focus is on reviewing the insurer's decision rather than redetermining the underlying reinstatement request *de novo*.

However, consideration must also be given to the difference between administrative review of an insurance company's decision and appellate review of a governmental decision. Bankers Life was not a neutral decisionmaker, but one of the parties to the dispute, with a financial interest in the outcome. This is a situation that often arises when the federal courts review employee benefit claim adjudications under ERISA, and the Supreme Court has held that when this "systemic conflict of interest" is present,[4] the significance of that conflict will depend on the circumstances of the particular case. The insurer's decision is evaluated through an analysis that gives appropriate weight to all relevant factors. While the insurer's conflict of interest is one factor that must be considered, another crucial factor is whether "the administrator has taken active steps to reduce potential bias and to promote accuracy."[5] That standard, developed under similar fact patterns and procedural postures, provides the appropriate lens through which to review the Panel Decision.

The Panel's Factual Conclusions

I find that Bankers Life took care to provide a process that gave R.C. a full and fair opportunity to be heard. I agree with the Panel Decision's central factual conclusions, and as noted earlier, those conclusions are not at the heart of the parties' dispute.[6] What is in dispute is a question of statutory interpretation – what it means for a loss of coverage to be "the result of the policyholder's cognitive impairment or functional incapacity" within the meaning of 24-A M.R.S. § 2707-A.

Although there is evidence of a decline in R.C.'s cognitive abilities for some time preceding the lapse of her policy, the Panel accurately characterized this evidence as anecdotal and inconsistent. Many of the episodes of cognitive difficulties that were observed were identified at the time as acute and transient, and R.C. was repeatedly described in notes from medical office visits as "alert and oriented ×3" *(i.e.,* as to person, place, and time). Even after the reinstatement request was already underway, on February 21, R.C.'s primary care physician wrote a supporting letter describing her condition as "changes in cognition related to normal aging." She was diagnosed with dementia on July 14, 2014, but that disability cannot be grounds for policy reinstatement

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[4] *Conkright v. Frommert,* 559 U.S. 506, 507 (2010), *discussing Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105, 115–116 (2008).

[5] *Glenn,* 554 U.S. at 117

[6] An understanding that the dispute is more legal than factual in nature might explain why R.C., who is challenging the Panel Decision, would propose a standard that would have given great deference to the Panel's findings of fact, while Bankers Life, which is defending the Panel Decision, is comfortable with a form of *de novo* review.

unless she already "suffered from cognitive impairment or functional incapacity at the time of cancellation." 24-A M.R.S. § 2707-A.

Therefore, the Bankers Life Panel properly determined that medical tests and diagnoses conducted before the date the policy lapsed were not sufficient to establish that R.C. was impaired at that time, and that R.C. "did not require continual supervision to protect herself or others" at the time her policy lapsed, the standard spelled out in the policy language. R.C. does not contest this point. Indeed, even though her family was aware of her condition in late February and March, and intervened to an increasing degree to assist R.C. in taking care of herself, it did not rise to the level of "continual supervision," and R.C. continued to live at home until April.

Instead, R.C. contends that the Panel Decision applied the wrong legal test. For the reasons discussed below, I agree.

The Definition of Cognitive Impairment

To prevail on her claim that she is entitled to reinstatement, R.C. must prove, supported by a medical demonstration,[7] that her cognitive impairment began no later than February 4, 2014, the date the policy lapsed, and she must also prove that her loss of coverage was the result of her cognitive impairment. 24-A M.R.S. § 2707-A; Rule 580, §§ 6(A)(1) & (2).

There is no definition of "cognitive impairment" in the statute or the Rule, but there is one in the policy. Bankers Life therefore concludes that the policy definition must be the standard against which the right to reinstatement is measured.[8]

While that approach seems to make sense at first glance, it does not hold up to a careful examination. First of all, if the policy definition were to control, it would mean one of two things: either the term has such a universally understood meaning that all policy definitions are substantially similar,[9] or the Legislature chose to make the right to reinstatement mean whatever a particular insurance company chose to make it mean. Contrary to Bankers' Life's contention, that is not what the Legislature meant by the phrase "to the satisfaction of the insurer," which refers only to the policyholder's burden of proof and persuasion at the initial stage of the process. If the insurer is not satisfied, the law then gives the policyholder the further opportunity to persuade the Superintendent. At both stages, the standards the policyholder must satisfy are set by the law, not by the insurer.

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[7] The insurer may waive the medical demonstration if the medical questions are uncontested, but that was not the case here.

[8] Bankers Life argues further that the notice of the statutory right of reinstatement that it provided to R.C., in compliance with Rule 580, § 5(A)(1), should be treated as a policy endorsement (as R.C. has erroneously conceded) and that as such, it must be understood as incorporating by reference the relevant policy definitions. However, the form in question does not purport to create any contractual rights, but simply to provide notice of the policyholder's rights under Maine law, and even if it did create a contractual right of reinstatement, that would not abrogate or modify any broader reinstatement rights that are provided by law.

[9] Because Section 2707-A applies to all lines of health insurance, not just long-term care, many policies subject to this right of reinstatement will not even have "cognitive impairment" and "functional incapacity" as defined terms.

Furthermore, the "definition" in R.C.'s policy goes beyond defining what cognitive impairment means. No native English speaker would say that someone's cognition is not impaired unless she "requires continual supervision to protect one's self or others." That is not one of the criteria that defines cognitive impairment, but rather a substantive test establishing whether the policyholder's cognitive impairment is sufficiently severe to make her eligible for benefits. The policy provision in question includes a true definition of cognitive impairment, but it also incorporates a standard of proof, a benefit trigger, a list of representative examples, and a statement that certain medical conditions are covered under the policy.

A standardized definition of cognitive impairment has been established for long-term care insurance policies issued on or after October 1, 2004. Although it does not apply to R.C.'s policy,[10] it provides some useful guidance regarding the common understanding of the term "cognitive impairment" and the Legislature's likely intent when it used the term in establishing the right of reinstatement. Under the National Association of Insurance Commissioners (NAIC) Long-Term Care Insurance Model Regulation, adopted in Maine as Bureau of Insurance Rule 425, the definition of "cognitive impairment" in any long-term care insurance policy subject to the Rule must be consistent with the following standard definition:

> *"Cognitive impairment" means a deficiency in a person's short-term or long-term memory, orientation as to person, place or time, deductive or abstract reasoning, or judgment as it relates to safety awareness.*[11]

Not only is this definition a concise description of the common-sense meaning of cognitive impairment, it is also strikingly similar to the portion of the policy definition that actually defines what it means to be cognitively impaired. The only material difference is the addition of a fourth criterion – judgment as it relates to safety awareness – but that is not directly relevant to this case because a lack of safety awareness would not be the cause of a policyholder's failure to pay her premium bills on time.[12]

Bankers Life emphasizes that Rule 425 and the Model Regulation include specific standards for policy reinstatement,[13] which expressly provide that to qualify for reinstatement after a lapse in coverage, "The standard of proof of cognitive impairment or loss of functional capacity shall not be more stringent than the benefit eligibility criteria on cognitive impairment or the loss of functional

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[10] As a long-term care policy issued before October 1, 2004, R.C.'s policy is subject to 24-A M.R.S. ch. 68 (§§ 5051–5057) and Bureau of Insurance Rule 420, neither of which addresses the issues in dispute in this proceeding.

[11] Rule 425, § 5(E), *substantially identical to* NAIC Model Regulation 541, § 5(E).

[12] It is noteworthy, however, that R.C.'s history included problems with safety awareness that led to the loss of her driving privileges, apparently first through informal restrictions imposed by her family, and eventually through the revocation of her driver's license in 2013 (before she was first billed for the premium she failed to pay).

[13] Rule 580, § 3, incorporates those standards by reference for long-term care policies that are subject to Rule 425.

capacity contained in the policy and certificate."[14] However, as noted earlier, the definition in R.C.'s policy would not be permitted in a policy subject to Rule 425, which expressly prohibits policy language that makes the need for continual supervision a defining criterion for cognitive impairment. While policies subject to Rule 425 may still use the need for supervision to protect the insured or others as a benefit trigger, they may not make it part of the definition of "cognitive impairment" or part of the standard of proof that cognitive impairment exists.

The provision of Rule 425 linking the reinstatement standards to the benefit eligibility standards cannot be applied in isolation from the provisions that set limits on the benefit eligibility standards the insurer can impose. The ability to use a single definition for both purposes depends on requiring a definition that makes sense for both purposes. While the need for continual supervision and the inability to manage one's financial affairs often go together, there is no necessary connection between the two. Proof that the policyholder should have been under continual supervision might be supporting evidence that she should not be held responsible for her failure to pay premium when due, but its relevance is only indirect, and it is not be the only way financial incapacity can be proven.

The cases Bankers Life cites are not on point. *White v. Ability Insurance Co.*[15] is the only case that either party or the Superintendent has found that deals with the right to reinstatement of a lapsed policy when the lapse is due to cognitive impairment. Contrary to Bankers Life's contention, it does not stand for the proposition that the "policy definition of 'cognitive impairment' determines whether consumer qualified for reinstatement." The court merely quoted all the relevant policy language, which included a definition of "cognitive impairment" that is substantially similar to the definition in R.C.'s policy, along with a provision – not found in R.C.'s policy – stating that if the policyholder requests reinstatement of a lapsed policy, "We will require the same evidence of Cognitive Impairment or loss of functional capacity that is required for eligibility of benefits under this policy." There was no discussion of whether that language would be interpreted as requiring proof of the need for continual supervision, whether such an interpretation would have been permissible under Washington law, or of the reasons the insurer belatedly asserted that the policyholder's daughter's documentation of her cognitive impairment was inadequate. The court never reached the merits of the documentation, holding that because the insurer had accepted that documentation and failed to question it for almost a year, it "cannot wait until the reinstatement period has terminated before asserting that Ms. Silvernail failed to provide adequate documentation." And while *Lee v. Metropolitan Life Ins. Co.*[16] did enforce policy language

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[14] Rule 425, § 7(B); NAIC Model Regulation 641, § 7(B). Bankers Life emphasizes that the 2014 edition of the Model Regulation has a drafting note explaining that an amendment to Subsection 7(B) is a "clarification," not a new requirement. This drafting note has been in place since the late 1990s and does not refer to the quoted sentence, as Bankers Life implies. (That sentence is even older than the drafting note.) Instead, it refers to the clause making explicit that there must be proof that there was cognitive impairment or functional incapacity "before the grace period contained in the policy expired."

[15] No. C11-5737 RJB, 2012 U.S. Dist. LEXIS 76516 (W.D.Wa.), *reconsideration denied,* 2012 U.S. Dist. LEXIS 85521.

[16] 87 F.Supp.3d 1067, 1072–74 (N.D.Cal. 2015)

"requiring the insured to demonstrate ... that the cognitive impairment results in the insured requiring continual supervision to alleviate the insured being a danger to herself or others," that case was about a benefit claim, not a reinstatement claim.

Therefore, the statute must be understood to use the term "cognitive impairment" to mean the impairment of the policyholder's cognitive abilities, nothing more. Whether or not continual supervision is required for the protection of herself or others is a factor that need be considered only to the extent that it is relevant to the question of whether the policyholder's cognitive impairment is severe enough to have caused her to neglect paying her premium.

Proof of Timing and Causation

According to Bankers Life, the alternative to using their policy definition (a definition that has been prohibited in new policies for nearly a dozen years) would be that "to obtain reinstatement based on cognitive impairment, an insured must prove only that, at the time of policy cancellation, the insured experienced episodic forgetfulness and/or confusion consistent with normal age-related mental developments." That is a straw man. The policyholder's representatives must prove not only cognitive impairment, but also that the impairment was the cause of her lapse of coverage for nonpayment of premium. It necessarily follows that they must prove that the policyholder's impairment, at the time the policy lapsed, was more than the normal effects of aging, and was sufficiently severe that it made her unable to reliably pay her bills on time. I find that R.C. has met this standard.

Bankers Life correctly notes that a medical diagnosis of dementia in July is not conclusive proof that she was already suffering from dementia in February. By the same token, however, her primary care doctor's evaluation in February that she had "changes in cognition related to normal aging" must be seen as only one piece of evidence rather than conclusive proof that her impairment in February was not yet severe enough to cause financial incapacity. Although Bankers Life argues that the lack of any diagnosis of severe cognitive impairment before her policy lapsed "should end the inquiry," the inquiry is not whether her impairment was <u>diagnosed</u> before the policy lapsed, but whether her diagnosis demonstrates an impairment that more likely than not, based on the record as a whole, <u>existed</u> before the policy lapsed. The right to reinstatement will almost inevitably rest on medically informed hindsight, because if the policyholder's situation were fully understood before the due date for the premium, the policy would never have lapsed.

R.C. was not diagnosed with Alzheimer's disease in February, but neither was she tested for Alzheimer's disease in February. The diagnosis of dementia is a complex and difficult process. Early signs that might look clearer in retrospect are not always noticed at the time. R.C. had her ups and downs, and more often than not was found to be "alert and oriented ×3," but the lack of orientation ×3 is only one of the listed criteria for cognitive impairment. Both the policy definition and the modern definition treat impairment of memory, reasoning, and "orientation ×3" as three separate indicia of cognitive impairment, and do not require all three to be present. If anything, impairment of memory and reasoning are more important indicators of financial incapacity than impairment of orientation, and R.C.'s history shows increasing episodes involving memory loss as her condition progressed.

The most compelling evidence that R.C. was already significantly impaired at the time her policy lapsed, and that her impairment caused an inability to manage her financial affairs effectively, is the action her family took shortly after the policy lapsed. R.C.'s niece immediately tendered payment to Bankers Life, and because of this and other overdue bills, R.C.'s family took over control of her finances. It is not clear from the record precisely when R.C.'s niece discovered the unsent check, but it was within the narrow window between February 4, 2014, when the policy lapsed, and February 21. By February 21, Bankers Life had already rejected at least one offer of late payment, and the family had already responded by obtaining a supporting letter from R.C.'s doctor. Had R.C.'s niece discovered the unsent check only a few days earlier, the policy would not have lapsed in the first place and this proceeding would not have been necessary.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that R.C.'s request for policy reinstated is *GRANTED.* Bankers Life shall promptly send notice informing R.C., through counsel, that her policy shall be reinstated retroactive to the date of lapse, with no break in coverage, conditioned on the timely payment of back premium. The notice shall specify the amount of premium due and the deadline for payment, which shall be no earlier than 15 days after the date notice is given. Bankers Life shall also establish reasonable procedures and deadlines for submitting claims and proofs of loss for benefits incurred before the reinstatement date, and provide notice of those procedures either in the initial reinstatement notice or a subsequent notice.

This Decision and Order is final agency action of the Superintendent of Insurance, within the meaning of the Maine Administrative Procedure Act, 5 M.R.S. § 8002(4). It may be appealed to the Superior Court in the manner provided for by 24-A M.R.S. § 236, 5 M.R.S. §§ 11001 through 11008, and M.R. Civ. P. 80C. Any party to the proceeding may initiate an appeal within 30 days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before June 6, 2016. There is no automatic stay pending appeal. Application for stay may be made in the manner provided in 5 M.R.S. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

APRIL 27, 2016

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER