Dynamic Chiropractic

YOUR PRACTICE / BUSINESS

Pre-paid Treatment Plans, Legal or Illegal?

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The general concept that pre-paid treatment plans are illegal is a false and misleading one. Examine for yourself the following points and make your own decision:

FICTION: Pre-paid treatment plans fall into the category of "insurance" and therefore, doctors are subject to penalties for "operating an insurance business without a license."

FACT: The elements of the definition of "insurance" clearly do not fit a pre-paid treatment plan as typically constructed in the chiropractic community. The five elements of the definition of "insurance," as published by the National Association of Insurance Commissioners are:

1. An insurable interest. How can insurance be purchased for an event or condition that already exists, as in the case of a patient who has an existing need for treatment before they have purchased a plan?

2. A risk of loss. The California Supreme Court has already clarified and ruled on the subject of what constitutes risk and what doesn't, pertaining to insurance and contracts. The ruling concluded that to fall into the category of an insurance type of risk, a contractual arrangement must have "loss distribution" and "risk" as part of the central theme of the contract. It was determined that fee for service contracts do not fall into the category of insurance even though they contained some degree of recognized risk, as do all types of business arrangements. To quote the California case of Transport Guarantee Co. Ltd. versus Jellins, 29 C2, 242, 249:

   "The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose."

1. "An assumption of the risk by the insurer." Our pre-paid treatment plans consist of a certain amount of treatments and services delivered in a specified manner, discounted when pre-paid. There is no assumption of risk. To further emphasize this point, here is a quote from a California court case as an example of noninsurance risk-related contracts:

   "In construing the contracts in question, it must be borne in mind that nearly every business venture entails some assumption of risk, some element of gambling...the lawyer who contracts to prosecute a case to final judgment for a fixed or contingent fee, assumes the risk of long litigation, or repeated trials and reversals."

1. "A general scheme to distribute the loss among the larger group of persons bearing similar risks." Notice that it says "general scheme," which fits the traditional concept of insurance because that's what insurance is -- a general scheme to distribute losses among their insured. Our type of pre-paid plans are not general schemes to do this. Recent investigations into this matter by two separate California attorneys, have caused them both to independently conclude that pre-paid treatment plans, as typically offered in the chiropractic community, positively do not fall into the category of "insurance."

2. "The payment of a premium for the assumption of risk." If the plan is not based on the assumption of risk of loss on your part, and no loss or contingencies by the patient, then the plan does not meet the criteria of "insurance" and therefore payment could not be considered to be a "premium."

FICTION: "Formal opinions from individual state Insurance Commissioners make it clear that many of these plan types are illegal."

FACT: This is simply not true. The NAIC published several examples of individual state determinations on this matter:

FICTION: Pre-paid treatment plans are illegal and have been "declared" such by the "insurance commissioners."

FACT: Various chiropractic journals have published articles which stated that the National Association of Insurance Commissioners have made pre-paid treatment plans illegal. Anything can be "stated" in an article, but the truth is that the National Associations of Insurance Commissioners have no authority whatsoever to declare anything illegal, as they are not an authorized legislative body. Thus, this statement is false and misleading.

OHIO DEPARTMENT OF INSURANCE: "As there is no clear definition of the 'business of insurance' the Department reviews the situation on a case-by-case basis and uses the above outlined factors in its analysis.

"...the Department looks at several factors the United States Supreme Court presented in determining whether something falls within the 'business of insurance.' These factors are:

a. Is the risk transferred and spread? b. Is the practice an integral part of the policy relationship between the insurer and the insured? c. Is the practice limited to entities in the insurance industry?

"Does Ohio Department of Insurance recognize a difference between an insurance/actuarial risk and a business risk? Yes. The difference between the two is that an insurance/actuarial risk is a risk transference (i.e., spreading) while a business risk is not."

GEORGIA ATTORNEY GENERAL OPINIONS: "Thus, whether these plans are insurance depends upon whether they also involve 'a plan for distributing individual losses.'

"Since this type of plan presumably will charge a premium which is considerably below the cost of the services potentially available to each participant, it necessarily anticipates the distribution of losses among its participants and constitutes insurance.

"In short, it is my official opinion that all of the above-discussed prepaid dental plans constitute the offering of insurance if their financial success depends upon some participants not fully utilizing the available benefits so as to offset the cost of participants who fully utilize available benefits.

"Alternatively, if in fact a plan's charges to each participant approximate the cost of the services rendered to that participant, no insurance or risk distribution among participants would be involved.

MARYLAND ATTORNEY GENERAL OPINION: "It is true that assumption of risk of loss does not automatically convert a contractual obligation into one of insurance. Were that true, all contracts of warranty would automatically become insurance contracts."

FICTION: Pre-paid treatment plans are based on an "assumption of risk" by the doctor, due to the nature of "determinable contingencies."

FACT: A "determinable contingency" is when you specifically name the exact condition or phenomena that you will be responsible for, if it occurs. An example of a health plan based on contingencies would be as follows: a patient pays his health insurance company a premium for major medical insurance. The contingency is that the patient may get sick and require treatment or hospitalization, which the insurance company would have to pay for. For this service, the patient pays the insurance company a premium, which is well below the cost of the services potentially available to them.

As long as you do not have "determinable contingencies" in your plan, then your plan will not be based on that principle. For example, ours are based on a discounted fee-for-service basis and therefore are not based on determinable contingencies.

FICTION: Pre-paid treatment plans fall into the category of insurance because there is a "distribution of loss" involved.

FACT: Without ever having talked to you, someone else's erroneous concept is that you would not want your patients coming in for their treatment. This is demonstrably not true as proven by the efforts that most practices take in ensuring that their patients actually do arrive for their appointments. The above concept is additionally proven false due to the fact that you have a refund clause that your patient is allowed a refund if they terminate care.

FICTION: The NAIC opinions and "rulings" were based on their examinations of chiropractic fee-for-service prepaid plans.

FACT: The issue addressed by the NAIC was a very narrow one: whether or not a group of doctors or a hospital which enters into an arrangement with an employer to provide future health care services to its employees for a fixed prepayment are engaged in the business of insurance. What does this have to do with chiropractors offering a pre-paid, fee-for-service treatment program? Nothing.

FICTION: The California Department of Insurance has determined that pre-paid treatment plans fall into the category of "insurance."

FACT: Again, this turns out to be false. When contacted on this matter, their response was that a fee-for-service type of pre-paid treatment plan did not fall into the category of insurance.

FICTION: You have to license yourself as an HMO.

FACT: You do not fall into the category of having to license as an HMO. Here is the California Department of Corporation's statement pertaining to the Knox-Keene Health Care Service Plan Act:

"Where a patient pays a fee-for-service charge, whether paid in full in advance of, or in installments in advance of delivery of a specified health care service, such payments cannot be reasonably construed to be the type of charge contemplated by the Act." -- DOC Commissioner's Opinion 4892H

Your Pre-Paid Plans

I suggest that you incorporate the following criteria into your pre-paid fee-for-service treatment plans:

1. Your plan should consist of a specific number of treatments over a stated period of time.

2. Always put the terms of your plan in writing in a patient/doctor service agreement.

3. Do not offer unlimited treatment.

4. Do have contingencies as part of your plan (i.e., no extra treatment if the patient gets injured or ill, etc.).

5. Ensure that you outline a multiple appointment treatment schedule and have the patient sign it.

6. Ensure that you have a recall system, whereby you can show due diligence in your efforts to get your patients to arrive for their treatment.

7. You are allowed to discount the services, based on reduced administrative expenses.

8. Have a refund clause that states that the patient may receive their unused fees (prorated) due them if they wish to cancel their treatment, or if the doctor is unable to deliver the treatment plan for any reason.

Until the confusion is resolved and intelligence prevails, you may consider the following:

1. Establish an escrow account into which all prepaid funds get deposited and only drawn out as treatment is rendered, that way you will not actually be in receipt of prepaid funds.

   Or:

2. Establish a reserve refund account, which sole purpose is to pay out any potential refunds which may be expected to occur.

   Or:

3. Establish a cooperative agreement with an associate or another doctor in your town, mutually agreeing to deliver each other's pre-paid plans if either of you should become incapacitated.

If you are officially challenged by an authorized enforcement body, I suggest that you submit a draft of your pre-paid treatment plan to your state department of insurance asking for an exemption and a determination if yours is in compliance with their regulations. Rather than making any type of blanket ruling or general law, state agencies seem to be dealing with cases on a one-on-one basis.

Conclusion

Although I am not an attorney, my opinion is that pre-paid treatment plans in and of themselves are not illegal and are not "insurance" if they are constructed as I've outlined in the section, "Your Pre-Paid Plans." But know this: the opposing viewpoints you may have recently read about are also merely opinions.

The value of pre-paid treatment plans can be enormous. They allow the doctor and patient to get the finances taken care of up front, effectively removing money as a barrier to the patient completing their full treatment program, thus getting the most benefits out of their care. I have total confidence that in the end, this matter will be completely resolved in your favor and once

again we will have prevailed. Good luck!

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