

# Insurance Commissioners Rule Patient Prepay Plans Illegal

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For years many practice management companies have urged their chiropractic clients to increase their cash flow by entering into prepay plans with their patients. There are usually two types of plans. The most common type of plan (type A) is where the doctor agrees to accept a certain amount per month as payment for rendering whatever chiropractic care the patient needs that month. In the second most common type of plan (type B), the doctor gives the patient a discount by accepting money up front for a pre-agreed number of visits, or visits up to a pre-agreed-upon cap.

Chiropractic attorneys have argued for years that these prepay plans are illegal and doctors who engage in them are subject to criminal prosecution and civil exposure. A number of recent court decisions, the Bulletin from the National Association of Insurance Commissioners (NAIC), and formal opinions from individual state insurance commissioners, make it clear that many of these plan types are illegal and that chiropractic doctors who engage in them are subjecting themselves to substantial criminal and civil exposure.

### Prepaid Plans Are the Business of Insurance

The operation of a prepay plan is the business of insurance. While it is not illegal to transact the business of insurance, one must be licensed as an insurance company or as a health maintenance organization to do so.<sup>1</sup>

Five elements usually must exist for an activity to constitute the business of insurance, and each of these elements exist in a typical chiropractic prepayment plan.

1. An Insurable Interest. Each person has an insurable interest in their health and welfare.
2. A Risk of Loss. Each person has a potential risk that they will need to pay for health care. If they are eligible for health care benefits through their employer, their employer has risk of loss of paying for these benefits.
3. Assumption of the Risk. In a prepay plan, a chiropractic doctor is assuming the risk that a patient will need or use chiropractic care. This risk could be from minimal to substantial, depending upon how much care each individual chiropractic patient needs.
4. Distribution of the Losses among a Larger Group of Persons Bearing Similar Risks. The chiropractic doctor who enters into these plans will find that some patients will overutilize, and some will

underutilize, making it even out for the doctor. Even where a chiropractic doctor would enter into this plan with a single patient, this analysis would still hold true, namely that the activities would be the business of insurance.<sup>2</sup>

5. The Payment of a Premium for the Assumption of the Risk. This factor would clearly apply since in all of these plans the chiropractic doctor does receive payment in advance for the assumption of an insurable risk.

The National Association of Insurance Commissioner's Bulletin Has Determined that Prepay Plans Are Illegal.

In an August 10, 1995 Bulletin, the National Association of Insurance Commissioners (NAIC) analyzed whether Type A and B prepay plans constituted the business of insurance. The NAIC concluded that when health care providers receive "prepayment (i.e., either full or partial capitation), the doctors or hospital are engaged in the business of insurance."<sup>3</sup> The NAIC Bulletin analyzed each element constituting the business of insurance and found that each element clearly applied to health care providers who would accept prepayment.<sup>4</sup> The NAIC also attached and relied on opinions from the attorney generals and insurance commissioners for the states of Georgia, Ohio, Minnesota, and Maryland, and a federal court decision out of California, all of which reached identical conclusions.<sup>5</sup>

What Liability Do Chiropractic Doctors Have Who Accept Prepayment?

1. Criminal Liability. To engage in the business of insurance, which would include operating an insurance company or a health maintenance organization, one first must have a license to do so.<sup>6</sup>

Engaging in the business of insurance without a license is a crime.<sup>7</sup> In those states where transacting insurance without a license is a misdemeanor, a conspiracy to commit a misdemeanor is a felony.<sup>8</sup> The fact that NAIC felt the need to issue its recent bulletin suggests strongly that this area is going to become an increased enforcement priority for State Department of Insurance investigators.

2. Civil Exposure. There are two areas of civil exposure for doctors who operate unlicensed prepaid plans. Patients dissatisfied with their chiropractic care from a prepay doctor can wield a powerful weapon. They have the option of turning the doctor in for criminal prosecution and/or using this claim to bolster a malpractice claim or other type of professional negligence claim. Further, many malpractice carriers will not cover a doctor for a malpractice claim if the underlying conduct was illegal. Some malpractice carriers are even no longer willing to take doctors engaged in prepay.

According to the loss statistics from the National Chiropractic Council, countersuits by chiropractic patients against chiropractic doctors in prepayment situations has been among the top five causes of malpractice claims over the last eight years.<sup>9</sup>

Conclusions

Chiropractic doctors who are operating unlicensed prepay plans should immediately stop doing so. In light of the clear evidence that this activity is illegal, it is simply foolhardy to continue to expose oneself to substantial criminal and civil penalties simply to increase one's cash flow.

## *References*

1. See e.g., *Professional Lens Plan, Inc. v. Department of Insurance* 387 So.2d 548.
2. *NAIC Bulletin*, p 6, paragraph 4.
3. *NAIC Bulletin*, p 4, paragraph A.
4. *NAIC Bulletin*, p 4-6.
5. Georgia Atty. Gen. Op., 82-71 (Aug. 21. 1982); Ohio Ins. Com. Bulletin, July 28, 1994, from David J. Randall; Minnesota Joint Bulletin, 94-3, September 26, 1994; Maryland Atty Gen. Op. 90-030, (June 19, 1990); *Mansen v. California Dental Assn.* 638 F.2d 1152 (9th 1979).
6. See e.g., Cal. Ins. Code Sec. 700(a); Cal. Health & Safety Code Sec. 1349.
7. See e.g., Cal. Ins. Code Sec. 700(b).
8. See e.g., Cal. Penal Code Sec. 182.
9. National Chiropractic Council Claims Registry 1987 to 1996.

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