

DIRECTOR'S OPINION NO. 08/2

THIS OPINION IS ISSUED BY THE DIRECTOR OF THE DEPARTMENT OF MANAGED HEALTH CARE PURSUANT TO HEALTH AND SAFETY CODE SECTION 1344 OF THE KNOX-KEENE HEALTH CARE SERVICE PLAN ACT OF 1975

DentalPlans.Com.
Richard Hirtreiter, Esq.
Vice President and General Counsel
P.O. Box 530756
St. Petersburg, Florida 33747

Dear Mr. Hirtreiter:

Pursuant to California Health and Safety Code section 1344(b), the Director of the Department of Managed Health Care (Department) has the discretion to issue interpretive opinions regarding any provision of the Knox-Keene Health Care Service Plan Act of 1975, Health and Safety Code section 1340 *et seq.*, as amended (Knox-Keene Act),¹ or any regulation promulgated pursuant to the Knox-Keene Act, at title 28 of the California Code of Regulations.

The Director has considered the request for an interpretive opinion contained in your letter on behalf of DentalPlans.Com (DP.C) dated June 16, 2005. Your request for an interpretive opinion (IO request) was submitted pursuant to section 1005 of the California Code of Regulations, title 28, and satisfies the requirements of that section. Your request raises the issue of whether DP.C is a health care service plan and subject to licensure under the Knox-Keene Act. Based on the facts described in your IO request, and on the facts obtained from other relevant materials collected by the Department² (collectively referred to herein as DP.C materials), the Director concludes that DP.C, which offers discount health care services and engages in the activities described below, is a health care service plan within the meaning of Section 1345(f) and is subject to the licensure requirements of the Knox-Keene Act.

FACTS

Your IO request and the DP.C materials provided describe business operations in which DP.C has contracted to lease networks of dentists, chiropractors, pharmacies, and other health care providers who have agreed to provide health care services at discounted rates to subscribers enrolled through the DP.C website (DP.C subscribers). DP.C also establishes and imposes material terms and conditions of enrollment and cancellation for DP.C subscribers. In addition, DP.C retains sole authority and discretion, upon termination of the contract between DP.C and a provider network, to transfer DP.C subscribers from that provider network to another.

¹ References herein to "Section" are to the sections of the Knox-Keene Act, unless otherwise specifically noted.

² Those materials are the DP.C Access Agreement DP.C submitted to the Department and the information provided at the DP.C website.

Persons enrolling through the DP.C website pay DP.C an annual program membership fee of \$79.95 to \$139.95 for individual enrollment and \$129.95 to \$189.95 for family enrollment in exchange for access to one or more of DP.C's contracted provider networks, all of which will provide dental services, and some of which will provide chiropractic, pharmacy, vision, and hearing aid services at discounted rates.

The discounted health care services that DP.C arranges for its subscribers include:

1. Dental services, regarding which DP.C represents:
...This dental network provides participants with discounts of 15 percent and up to 50 percent on dental procedures at over 61,000 available dental practice locations nationwide... With Aetna Dental Access save 15 to 50 percent on everything from general dentistry and cleanings to root canals, crowns and orthodontia. The Dent-All Nationwide Dental Program offers savings up to 20-60% at over 28,000 participating dental locations. With this program, you get complete coverage with affordable savings for you and your family. The Dent-All Nationwide program also comes with FREE added benefits. Avia discount dental plans are convenient and affordable, offering savings of up to 60% off dentist's usual fees. The UNI-CARE 200 discount dental plan ... also offers FREE bonus benefits. These bonus benefits provide discounts on prescription drugs, vision services, chiropractic treatment, and hearing devices - a \$40 value just for joining!
2. Chiropractic, vision, pharmacy, and hearing aid services, regarding which DP.C represents:
...This plan also offers FREE bonus benefits. These bonus benefits provide discounts on prescription drugs, vision services, chiropractic treatment, and hearing devices - a \$40 value just for joining!

Review of the DP.C Access Agreement reflects that DP.C's standard contract with each provider network:

1. Is a standard form contract produced by DP.C on DP.C letterhead;
2. Lacks any provision establishing the annual enrollment fee for persons selecting access to the provider network;
3. Lacks any provision obligating DP.C to deliver to a contracting provider network the enrollment fees paid to DP.C by its subscribers who access that contracting network;
4. Lacks any provision by which the provider network entity is obligated to compensate DP.C for marketing or other administrative services;
5. Provides that, if the Access Agreement is terminated, the members enrolled through DP.C are "DP.C Customers" and DP.C retains the authority and discretion to renew its subscribers "in any DP.C plan that DP.C deems appropriate;"

6. Prohibits the provider network from soliciting DP.C subscribers, and specifically, the provider network "shall not call on, solicit, take away, or attempt to call on, solicit or take away" any DP.C subscribers with whom the provider network became acquainted during the term of the contract;
7. Confirms that, as between the two parties to the contract, it is DP.C that "offers only discount and reduced rate dental plans..." and
8. Provides that DP.C must maintain a customer service phone line to receive inquiries from DP.C subscribers regarding the discounted services plan. DP.C retains authority and discretion for handling all matters regarding the DP.C website and DP.C's business, which presumably includes enrollee complaints regarding the terms and conditions of enrollment and the rendering of discounted services to which DP.C's subscribers are entitled pursuant to DP.C's contracts with provider networks. The only inquiries that DP.C refers to the provider network are inquiries regarding the operation of the provider network or regulatory matters.

Review of the DP.C website reveals that:

1. DP.C promises "three additional months free" when a person enrolls through the DP.C website, indicating that DP.C has authority to establish significant terms and conditions of enrollment;
2. Members enrolled through the DP.C website must communicate solely with DP.C customer service regarding all inquiries, concerns, and disputes arising from the delivery of services by the networks of providers with which DP.C has contracted;
3. If a subscriber fails to cancel membership within three days of purchasing the subscription, DP.C does not refund any portion of the annual fee paid to DP.C unless discounts are not delivered by the contracted network as promised by DP.C, and in that situation, DP.C refunds only a pro-rated portion of the annual fee, less a \$10.00 cancellation fee; and
4. DP.C represents that contracted networks of providers are credentialed and participate in a quality management program.

Based on the facts described above, as evidenced by the information in your IO request and the DP.C materials, the Director concludes that DP.C is a health care service plan within the meaning of Section 1345(f) and is subject to the licensure requirements of the Knox-Keene Act.

ANALYSIS

Section 1349 makes it unlawful for any health care service plan to engage in business in California without a license. Section 1345(f)(1) defines a health care service plan as any person who undertakes to arrange for the provision of health care services to enrollees, or to pay for or reimburse any part of the cost for those services in exchange for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

DP.C marketing materials demonstrate that DP.C imposes upon its subscribers an annual membership fee, which is invoiced by and paid directly to DP.C. This annual fee constitutes "a prepaid or periodic charge" within the meaning of Section 1345(f)(1).

Review of the DP.C materials discloses that DP.C arranges, through written contracts with provider networks and written agreements with subscribers enrolled at the DP.C website, for the delivery of discounted health care services to DP.C subscribers. By the express terms of its contracts with provider network entities, DP.C retains authority and discretion for establishing material terms of subscription, enrollment, and cancellation, and for handling a broad scope of inquiries and complaints arising from the services delivered by the provider networks to DP.C's subscribers.

The DP.C materials demonstrate that arrangements for the provision of health care services are not made solely by and between the enrollee and the network entity, or solely by and between the enrollee and the individual provider rendering the health care services. Instead, DP.C has arranged, through written contracts with multiple provider network entities, for: (1) a relationship between the DP.C subscriber and networks of providers that provide discounted healthcare services to DP.C members; and (2) the terms and conditions upon which the discounted rates on professional health care services are provided to DP.C subscribers. This type of activity constitutes "arranging" within the meaning of Section 1345(f)(1).

The DP.C Access Agreement specifies that the members enrolled through the DP.C website are "customers" of DP.C. If the Access Agreement is terminated, DP.C has the authority and discretion to transfer its subscribers to any other DP.C provider network that DP.C deems appropriate. Clearly, DP.C does not merely perform ministerial enrollment functions on behalf of other plans; instead, DP.C contractually retains the authority and discretion to "arrange" for the provision of health care services on behalf of its subscribers.

DP.C's marketing materials describing its discounted dental products include statements regarding the accessibility and availability of its network of health care services providers and the quality of care delivered by its contracting provider networks. These descriptions reflect actual or implied quality oversight of the provider networks, which constitutes additional "arranging" activities within in the meaning of Section 1345(f)(1).

Based on the language in Health and Safety Code section 1345(f) and the facts evidenced in the DP.C material, the Director has concluded that DP.C is a health care service plan within the meaning of the Knox-Keene Act. Specifically, DP.C receives a "prepaid or periodic charge" that is paid by its members in exchange for DP.C arranging for the provision of health care services with dentists, optometrists, chiropractors, and other health care providers.

This conclusion is consistent with Section 1399.5 of the Knox-Keene Act, in which the Legislature declared:

It is the intent of the Legislature that the provisions of this chapter shall be applicable to any private or public entity or political

subdivision which, in return for a prepaid or periodic charge paid by or on behalf of a subscriber or enrollee, *provides, administers or otherwise arranges* for the provision of health care services, as defined in this chapter, unless such entity is exempted from the provisions of this chapter by, or pursuant to, Section 1343. [Emphasis added.]

The use of the disjunctive phrase “provides, administers or otherwise arranges” in Section 1399.5 evidences the broad applicability that the Legislature intended in enacting the Knox-Keene Act, particularly Section 1345(f). This phrase unambiguously expresses the Legislature’s intent to make the provisions of the Knox-Keene Act applicable to all entities that are either primarily or secondarily obligated to exercise discretion in securing health care services.³ This phrase includes a party that arranges for discounts in connection with another person’s obligation to provide or arrange for the provision of health care services, provided it is done in return for a prepaid or periodic charge. Therefore, even if DP.C’s activity was limited to exercising discretion through the leasing of provider networks for its members to access, this activity is still within the scope of Section 1399.5. However, DP.C’s materials evidence that its business activities encompass much more than leasing provider networks on behalf of its subscribers.

The Department’s determination that DP.C is a health care service plan is consistent with Director’s Opinion 08/1 and the analysis and earlier decisions cited therein.

Based on the above legal and factual analysis, the Director concludes that DP.C is a health care service plan under the Knox-Keene Act, and therefore DP.C is subject to the licensure requirements of the Knox-Keene Act. Accordingly, DP.C must obtain a Knox-Keene license before it commences operations in California. If DP.C is already operating in California, it is not in compliance with the Knox-Keene Act.⁴

³ See Comm. Op. 4730H (1983), Comm. Op. 4664H (1983), and Comm. Op. 4614H (1983). Prior decisions of the Department were issued by the Commissioner of the Department of Corporations but are nonetheless opinions of the Department. Pursuant to Section 1341.14(a), any regulation, order, or other action, adopted by the Department of Corporations in the performance of a duty transferred to the Department by Section 1341.9 shall remain in effect and shall be deemed a regulation, order, or action of the Department.

⁴ In addition to determining the jurisdictional questions regarding the need to obtain Knox-Keene licensure, the Department’s review of the marketing materials on the DP.C website identified concerns regarding DP.C’s compliance with the requirements of the Knox-Keene Act. Examples of the identified non-compliance concerns are listed below to assist DP.C’s anticipated efforts to bring its operations into compliance through the Department’s licensure process.

- a. Advertisements that do not clearly describe the services to which discounts apply, the amount or percentage of such discounts, or the basis from which the discount is taken;
- b. Use of inexact advertising of the discounts, such as “discounts up to 50%,” and “save 10-60% for most dental services”;
- c. Use of prohibited terms in price advertising, such as “lowest” and “up to”;
- d. Use of terms such as “benefits,” “coverage,” and “no pre-existing condition exclusions,” which may mislead consumers into thinking that the product is insurance;
- e. Use of premiums, gifts, baits, bonuses, and gratuities such as “FREE bonus benefits” and “a \$40 value just for joining!”;

Interpretive opinions are often issued for the principal purpose of providing a procedure by which members of the public can protect themselves against liability for acts done or omitted in good faith in reliance upon the administrative determination made in the opinion. However, there can be no such reliance where the Director asserts jurisdiction with respect to a particular situation or determines that a legal requirement is applicable.

Dated: February 8, 2008
Sacramento, California

By order of:
LUCINDA A. EHNES
Director
Department of Managed Health Care

ORIGINAL SIGNED

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- f. Requiring prospective enrollees to join before providing membership materials, and more specifically, requiring prospective enrollees to join before disclosing a complete list of services to which discounts apply, or the exclusions, limitations, exceptions, restrictions, and other material terms and conditions;
 - g. Apparent lack of adequate contracts with providers to ensure reasonable access, including provider recognition of DP.C members and provider knowledge and acceptance of the discounts the provider is obligated to deliver to DP.C members; and
 - h. Apparent lack of fair and reasonable membership cancellation terms and conditions.