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ATTORNEY GENERAL OPINION NO. 89- 112

Pamela Scott
Chief Attorney
Kansas Insurance Department
420 SW 9th
Topeka, Kansas 66612-1678

Re: Insurance -- Prepaid Legal and Dental Service Plans
-- Definitions; Prepaid Service Plan

Synopsis: An organization which collects a periodic fee on a prepaid basis in return for a promise to provide selected dental services in the future at no charge or at a discount must conform to the requirements of the prepaid legal and dental service plans act, unless exempted by statute. Cited herein: K.S.A. 1988 Supp. 40-4201; 40-4203; 40-4207; 40-4209; 40-4211, as amended by L. 1989, ch. 145, § 1; 1987 House Bill No. 2564.

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Dear Ms. Scott:

On behalf of the State Insurance Commissioner you request our opinion regarding prepaid dental service plans. Specifically, you ask whether an organization which offers to arrange for the provision of dental services on a prepaid basis is a prepaid service plan regulated by K.S.A. 1988 Supp. 40-4201 et seq.

A prepaid service plan is any legal entity which "collects periodic fees on a prepaid basis . . . in connection with

for-profit legal or dental coverage. . . ." K.S.A. 1988 Supp. 40-4201(a). Article 42 of Chapter 40 of the Kansas Statutes Annotated places various statutory requirements on such plans. For example, individuals who solicit members on behalf of the plan must be registered with the insurance commissioner. K.S.A. 1988 Supp. 40-4203. The plan holds the membership fees in a fiduciary capacity, and must deposit the fees in a bank account established for the plan. K.S.A. 1988 Supp. 40-4207. Any person acting as a prepaid service plan must hold a certificate of registration issued by the commissioner of insurance. K.S.A. 1988 Supp. 40-4209(a). Additionally, securities or irrevocable letters of credit must be deposited with the insurance commissioner by the plan. K.S.A. 1988 Supp. 40-4211, as amended by L. 1989, ch. 145, § 1.

Prepaid service plans are generally not considered to be the business of insurance. Fundamentally, such plans are similar to insurance because the subscriber pays a fee in return for a promise to deliver services under certain contingencies. Annotation, Prepaid Legal Services Plans, 93 A.L.R. 3d 199 (1979). However, insurance is defined by our courts as a contract to indemnify another against certain risks. The business of the promisor must include as its principal purpose and object an assumption of the risk. State, ex rel. v. Anderson, 195 Kan. 649, 662-63 (1965). In short, there must be a transfer of risk arising from a fortuitous event. Prepaid plans generally do not involve an assumption or transfer of such risk, because they generally allow the subscriber to receive the benefit of the agreement at their own choosing, at least in a limited sense. For example, many prepaid legal services include "drafting of a will, a separation agreement, the purchase of a house," and other non-fortuitous events which precipitate the retention of a lawyer. Feinstein v. Attorney General, 36 N.Y. 2d 199, 326 N.E. 2d 288, 293 (1975) (prepaid legal plans not prohibited by New York insurance law, on their face not insurance).


Because the prepaid legal and dental service plans are not insurance, they escaped regulation prior to passage of 1987 House Bill No. 2564. The law was adopted by the 1987 legislature as a means of protecting consumers from poorly operated prepaid plans. An example was cited involving a legal plan which became insolvent closed its doors, leaving the consumers without the bargained-for service. See Minutes of the House Committee on Insurance, March 31, 1987; Minutes of the Senate Committee on Financial Institutions and


Insurance, April 9, 1987, 1987 House Bill No. 2564. During committee discussion, the conferee representing Blue Cross/Blue Shield objected to the bill unless it could be limited to prepaid legal plans because the dental plans should be treated as insurance. Senate Committee Minutes, at page 2. The conferee for the Kansas Department of Insurance had previously explained to the House Committee that if the law were to be limited to legal plans only, the agency would have a problem, because there were a number of dental plans. House Committee Minutes, at page 1. The law was eventually passed with legal and dental plans being included.

The prepaid service plans law is obviously an attempt by the legislature to protect consumers from financially unsound or unscrupulous organizations which bring together service providers and service plan members, but which are not regulated under the insurance statutes. The protections granted by the statutes may not be avoided by calling the organization something other than a prepaid plan.

Therefore it is our opinion that an organization which collects a periodic fee on a prepaid basis, whether referred to as a fee, premium, or monthly dues, and in return promises selected dental services to be provided in the future at no cost or at a discount must conform to the requirements of the prepaid legal and dental service plans act unless exempted by statute.

Very truly yours,


ROBERT T. STEPHAN
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Mark W. Stafford
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