

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

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In the Matter of:

DaVita Kidney Care,

Appellant.

Docket No. 16-0240

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of:

Cary Ancheta,

Appellant.

Docket No. 16-0239

AMENDED NOTICE OF HEARING

TO: David B. Robbins
Matthew P. Gordon
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Darryl Colman, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

This Notice is provided pursuant to RCW 48.04.010 and RCW 34.05.434.

On May 5, 2017, the Office of the Insurance Commissioner ("OIC") issued both DaVita Kidney Care ("DaVita") and Cary Ancheta ("Ancheta") orders to cease and desist ("Orders") from: (1) Engaging in or transacting the unauthorized business of insurance in the state of Washington; (2) seeking, pursuing, and obtaining insurance business in the state of Washington; (3) soliciting residents of the state of Washington to sell insurance issued or to be issued by an unauthorized insurer; and (4) soliciting residents of the state of Washington to induce them to purchase insurance.

The OIC received a complaint that DaVita, a major nationwide kidney dialysis medical provider, was directing their Medicaid patients residing in Washington State to specifically enroll in

Premera's LifeWise Health Plan, because Premera's plan pays higher insurance benefits to providers for kidney dialysis treatments than does Medicaid. According to the complaint, DaVita had one employee (Ancheta) engaging in this activity. Neither DaVita nor Ancheta has a certificate of authority or insurance producer's license, or any authorization from the OIC to conduct any insurance business in the state of Washington.

Allegedly Ancheta, a financial/counselor for DaVita, was recorded when she called Premera customer service attempting to sign up approximately thirty kidney dialysis patients, most of whom were receiving Medicaid, onto Premera's LifeWise Health Plan. OIC alleges that Ancheta informed Premera that she needed the paper application for the patients so that they could be sent to the American Kidney Foundation ("AKF") who would pay the patients' health insurance premiums. OIC alleges that Ancheta knew that Premera did not accept third party payments; therefore, AKF would send the patients' health insurance premium to patients, who would then pay Premera. OIC also alleges that OIC staff obtained a copy of a Power Point presentation that was sent to DaVita financial and insurance counselors/social workers, directing them to "target" Medicaid-eligible patients to have them purchase commercial insurance, and instructing them to tell patients that by purchasing commercial insurance they would have access to better services. The patient then filled out an application for AKF. The OIC states that Premera's insurance application asks prospective insureds to affirm that premium payments are not made directly or indirectly by third-party payers.

In the Orders, the OIC concludes that both DaVita's and Ancheta's actions violated the insurance code, including RCW 48.05.030 (certificate of authority required), RCW 48.15.020 (solicitation by unauthorized insurer prohibited), and RCW 48.17.060 (license required). In the Orders, the OIC emphasizes that under RCW 48.17.010(14) a person solicits insurance by asking or urging a person to apply for a particular kind of insurance from a particular insurer. The OIC concludes in the Orders that by asking or urging patients to apply for a LifeWise Health Plan from a particular insurer, both DaVita and Ancheta solicited insurance within the meaning of the insurance code without any license to do so, and therefore violated RCW 48.17.060(1).

In their Demands for Hearing ("Demands"), DaVita Inc. (which DaVita is a division of) and Ancheta argue that DaVita is not an insurer, and Ancheta and its other insurance counselors are not insurance producers. Both argue that RCW 48.17.062(2)(b) expressly exempts from the insurance producer licensing requirements those who secure and furnish information for the purpose of enrolling individuals under insurance plans and receive no commission for such services. DaVita Inc. and Ancheta assert that DaVita's insurance counselors (including Ancheta) fall within this so-called "Insurance Counselor Exception" (RCW 48.17.062(2)(b) - "A license as an insurance producer is not required of the following: . . . A person who secures and furnishes information . . . for the purpose of enrolling individuals under plans . . . where no commission is paid to the person for the service" - this provision became law in 2007), and therefore DaVita and Ancheta do not need to obtain insurance producer licenses. DaVita Inc. and Ancheta argue that DaVita's insurance counselors (including Ancheta) are similar to financial counselors employed by other healthcare providers in Washington, including hospitals, and the Washington Health Benefit Exchange's own Washington Healthplanfinder navigators.

In their Demands, DaVita Inc. and Ancheta also challenge the Orders on the grounds that they purport to limit DaVita counselors' (including Ancheta's) ability to communicate truthful information to patients, to the detriment of patients and in contravention of federal requirements for dialysis providers. Both DaVita Inc. and Ancheta note that the Centers for Medicare and Medicaid Services ("CMS") mandate that dialysis facilities inform patients of their rights and account for patients' psychosocial needs, including "the right to be told about any financial help available[.]" DaVita Inc. and Ancheta also note that regulations promulgated by CMS require that dialysis patients "[b]e informed of services available in the facility and charges for services not covered under Medicare." 42 C.F.R. § 494.70(11).

DaVita Inc. and Ancheta also assert in their Demands that the Orders would interfere with DaVita's and Ancheta's First Amendment rights to free speech, given that the First Amendment protects DaVita's and its insurance producers' rights to convey truthful, non-misleading information about insurance options to DaVita's patients. DaVita Inc. and Ancheta also make a policy argument, and assert that the Orders serve the interests of insurers by furthering efforts to limit the number of patients afflicted with ESRD, thus reducing the number of chronically ill patients on their rolls. DaVita Inc. and Ancheta allege in their Demands that data shows that privately-insured dialysis patients are much more likely to get a kidney transplant than patients on government plans. They also note that for patients with families, coverage options for family members are often superior with private insurance. DaVita Inc. and Ancheta also assert that private insurance is often less expensive for ESRD patients, because of significant Medicare copays, and in many cases ESRD patients are ineligible for Medigap policies. Finally, DaVita Inc. and Ancheta allege that together with a policy of refusing payments from third parties, LifeWise appears to be attempting to reduce the numbers of dialysis patients on its rolls, in violation of the anti-discrimination provisions in the Affordable Care Act. DaVita Inc. and Ancheta conclude that the Orders are unsupported by facts or law, and should therefore be rescinded.

On July 10, 2017, the undersigned held a first prehearing conference. Darryl Colman, Insurance Enforcement Specialist of the OIC's Legal Affairs Division, appeared on behalf of the OIC. Attorneys David B. Robbins and Matthew P. Gordon, of Perkins Coie, LLP, represented DaVita Inc. and Ancheta.

After considering the views of the Parties, the undersigned enters the following Order:

Per WAC 10-08-085 (applicable to the above-captioned adjudicative proceedings before the OIC per WAC 284-02-070(2)(a)), and upon my own motion, since Docket Nos. 16-0239 and 16-0240 represent multiple adjudicative proceedings that involve common issues and parties, I consolidate said proceedings for purposes of the procedural dates/timelines below, and an eventual hearing on the merits (if necessary).

The parties shall complete all discovery, including depositions, by October 13, 2017.

By December 8, 2017, the parties shall serve and file dispositive Motions. By December 22, 2017, the parties shall serve and file Responses to such Motions. By January 2, 2018, the parties shall

serve and file Replies to such Responses. I expect to rule without oral argument as soon as possible after briefing is complete.

Assuming this matter is not resolved based upon the dispositive Motions, a hearing will be held at the Office of the Insurance Commissioner, 5000 Capitol Blvd., Tumwater, WA, and is scheduled for four (4) days: February 20, 2018 through February 23, 2018, beginning at 9:00 a.m., Pacific Standard Time on each day, and continuing until completed. The purpose of the hearing is to consider whether DaVita and Ancheta's actions violated the insurance code, including RCW 48.05.030 (certificate of authority required), RCW 48.15.020 (solicitation by unauthorized insurer prohibited), and RCW 48.17.060 (license required).

By February 9, 2018, the parties shall exchange witness and exhibit lists, briefs, exhibits and any other documents they expect to offer into evidence at the evidentiary hearing consistent with WAC 10-08-140, and file them with the Hearings Unit at the address below.

The hearing will be governed by the Administrative Procedure Act, RCW Chapter 34.05, and the model rules of procedure contained in WAC Chapter 10-08. All parties may be represented and may examine witnesses, respond, and present evidence and argument on all relevant issues.

A party who fails to attend or participate in the hearing or another stage of this proceeding may be held in default in accordance with RCW Chapter 34.05. See RCW 34.05.434(2)(i).

William Pardee, Presiding Officer, has been designated by the Insurance Commissioner to hear and determine this matter. The hearing will be held under the authority granted by the Insurance Commissioner per RCW Chapter 48.04.

Pursuant to WAC 284-02-070(1)(c), accommodation will be made for persons needing assistance due to difficulty with language or disability. Further, pursuant to WAC 10-08-040(2) and in accordance with RCW Chapter 2.42, if a limited English speaking or hearing impaired or speech impaired party or witness needs an interpreter, a qualified interpreter will be appointed. There will be no cost to the party or witness, except as may be provided by RCW Chapter 2.42. A Request for Accommodation form, with instructions, is attached to this Notice.

All case related documents and correspondence shall be directed to the Hearings Unit, Office of Insurance Commissioner, P.O. Box 40255, Olympia, Washington 98504-0255; HearingsU@oic.wa.gov. All interested individuals and entities who have questions or concerns concerning this proceeding should direct them to the Hearings Unit paralegal, Dorothy Seabourne-Taylor, at the same address. Ms. Seabourne-Taylor's telephone number is (360) 725-7002.

Dated: July 12, 2017



WILLIAM PARDEE
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be filed and served the foregoing Amended Notice of Hearing on the following people at their addresses listed below:

David B. Robbins
Matthew P. Gordon
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101

Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Darryl Colman, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Dated this 12th day July, 2017, in Tumwater, Washington.


Dorothy Seabourne-Taylor
Paralegal
Hearings Unit

OFFICE OF INSURANCE COMMISSIONER
HEARINGS UNIT
Fax: (360) 664-2782

To request an interpreter, complete and send this form to:

Hearings Unit
Office of Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504-0255
HearingsU@oic.wa.gov

REQUEST FOR ACCOMMODATION FOR LANGUAGE OR DISABILITY

I am a party in Matter Nos. 16-0239, 16-0240 before the Insurance Commissioner.

I request accommodation for the following disability (insert your disability):

I request an interpreter for myself or a witness who will be testifying at the evidentiary hearing.

Please check the statements that apply:

I am a non-English-speaking person and cannot readily speak or understand the English language. My primary language is _____ (insert your primary language). I need an interpreter who can translate to and from the primary language and English.

I am unable to readily understand or communicate the spoken English language because:

- I am deaf.
- I have an impairment of hearing.
- I have an impairment of speech.

[Please state below or on the reverse side any details which would assist the Commissioner or Presiding Officer in arranging for a suitable accommodation for your disability, an interpreter or in providing appropriate mechanical or electronic amplification, viewing, or communication equipment.]

Date: _____ Signed: _____

Please print or type your name: _____

Address: _____

Telephone: _____