



EDUCATIONAL RESOURCES

# Managed Care Contracting Made Simple

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# Introduction



# Introduction

- Historically, DME suppliers have taken care of Medicare patients and have billed CMS directly. This is known as “Medicare fee-for-service” (or “Medicare FFS”).
- Also, historically, suppliers have taken care of state Medicaid patients and have billed state Medicaid programs directly (“Medicaid FFS”).
- All of this is changing.
- Today, about 35% of Medicare patients are covered by Medicare Managed Care Plans (commonly known as “Medicare Advantage Plans”), and about 70% of Medicaid patients are covered by Medicaid Managed Care Plans. These percentages are increasing.

# Introduction

- Here is how a Medicare Advantage Plan works:
  - Insurance company will create (and own) a subsidiary corporation (or Limited Liability Company) that will be the “Plan.” The Plan will sign a contract with CMS.
  - The contract will say that the Plan will be responsible for those Medicare patients in, e.g., Ohio, who sign up with the Plan’s Medicare Advantage Plan.
  - The Plan will market to Medicare beneficiaries in the state and persuade them to enroll in the Plan as opposed to staying with Medicare FFS or enrolling in a competing Medicare Advantage Plan.

# Introduction

- Here is how a Medicare Advantage Plan works (cont.):
  - The Plan will create a network of health care providers: hospitals, physicians, labs, DME suppliers, home health agencies, etc. A provider will join the network by signing a contract with the Plan.
  - When a Medicare patient sees a Plan provider, the Plan provider will bill (and receive payment from) the Plan. The Plan, in turn, receives payment from CMS.
  - The Plan's goal is for the money it receives from CMS to be more than what the Plan pays providers, with the Plan pocketing the "spread."

# Introduction

- A Medicaid Managed Care Plan works essentially the same way:
  - Sparsely populated states may have only one, or just a couple, Medicaid Managed Care Plan.
  - More populous states will have a number of Plans that compete with each other.

# Challenges Facing Suppliers



# Challenges Facing Suppliers

- As DME suppliers are being drawn into the Medicare and Medicaid Managed Care arenas, they are facing a number of challenges:
  - A Plan may be closed to new DME suppliers. Essentially, the Plan says to the supplier that wants to be admitted into the Plan's network:
    - We have enough DME suppliers to service our covered lives. We don't need you in our network.
  - A Plan will announce on, e.g., 01/01/21, that
    - it has been paying \$100 for Product A,
    - it should have been paying only \$80 for Product A, and
    - therefore, the Plan will retroactively recoup the difference back to 12/31/19.

# Challenges Facing Suppliers

- As DME suppliers are being drawn into the Medicare and Medicaid Managed Care arenas, they are facing a number of challenges (cont'd):
  - The Plan's contract will state that the supplier must take assignment from the covered life (i.e., the supplier cannot sell an item to the covered life for cash).
  - The Plan's contract will state that the supplier must adhere to the Plan's manuals, policies, and other written guidelines as amended from time to time. Said another way, the supplier must adhere to outside documents that are not part of the contract.
  - The Plan's contract will state that the Plan can amend the contract from time-to-time (including modifying the reimbursement) upon giving written notice to the supplier.

# Challenges Facing Suppliers

- As DME suppliers are being drawn into the Medicare and Medicaid Managed Care arenas, they are facing a number of challenges (cont'd):
  - The Plan's contract will allow the Plan to terminate the contract without cause upon giving prior written notice to the supplier.
  - The Plan will enter into a sole source contract with ABC Medical Equipment, Inc. This means that the Plan's covered lives can only secure DME from ABC.

# Preparing for the Negotiation Process



# Preparing for the Negotiation Process

- In entering into contract negotiations with a Plan, the DME supplier should take several steps to improve its position under the contract.
- The supplier should evaluate its reasons for entering into the contract.
  - For example, does the supplier really need the contract? Is the supplier discovering that so many of its existing and prospective patients are covered by the Plan that it is important for the supplier to secure the contract?
  - The supplier should have a sense of its strengths and weaknesses, conditions influencing the market, and the competition. In doing so, the supplier will have an understanding of how strong or how weak its bargaining position is.

# Preparing for the Negotiation Process

- In entering into contract negotiations with a Plan, the DME supplier should take several steps to improve its position under the contract (cont'd).
  - Find out information about the Plan. For example, the supplier should attempt to determine how many other DME suppliers are already in the Plan's network or whether the Plan intends to expand.
  - The supplier should have an understanding of the Plan's market position and how it handles contracts with other health care providers/suppliers.
  - The supplier should seek to determine if the Plan is financially solvent.
  - A telling fact about any Plan is its age and its market share.

# Preparing for the Negotiation Process

- In entering into contract negotiations with a Plan, the DME supplier should take several steps to improve its position under the contract (cont'd).
  - Obtain a copy of the contract proposed by the Plan as well as collateral documents incorporated by reference in the contract and review them carefully.
  - Prepare a list of questions to ask the Plan regarding the contract including:
    - The amount of time the current contract form has been used;
    - Whether or not the Plan knows of other DME suppliers that would be willing to discuss the terms of the contract (essentially asking the Plan for references);
    - The terms that are most commonly modified in the contract; and
    - Any significant modifications made to the form contract within the past 12 to 18 months.

# Preparing for the Negotiation Process

- In entering into contract negotiations with a Plan, the DME supplier should take several steps to improve its position under the contract (cont'd).
  - By taking these steps, the supplier will have the basic information necessary to review the contract and prepare a list of issues to be addressed during negotiations with the Plan.

# Understanding the Current Legal Climate

- The supplier should determine whether its state has an “any-willing provider” law and, if it does, whether such law extends to DME suppliers.
- If the supplier desires to join with other suppliers in order to negotiate as a group, the supplier should have an understanding of antitrust laws. For example, such laws prohibit suppliers from engaging in price fixing or restraint of trade or market allocation.

# Negotiating Contract Terms

- The supplier's ability to negotiate specific terms depends on the amount of leverage it has in its market.
- Suppliers need to educate Plans concerning the suppliers' costs in providing the products and services required under the contract.
- Before the supplier can do this, however, it must know its costs.



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# Key Contract Provisions



# Definitions

- Important provisions in a contract are the definitions because they set forth the rules of the game for how the contract will be implemented.

# Identification of the Parties

- Most Plans identify DME suppliers by tax identification numbers.
- Subsidiaries or affiliated entities need to be listed as parties to the contract or enter into separate contracts with the Plan if they are to be a part of the Plan.

# Covered Services

- Covered services should be defined specifically and any products and services that the supplier will not be providing eliminated from the contract.

# Medical Necessity

- Medical necessity needs to be defined in the contract with specific procedures for determining medical necessity and for bearing the risk of error if the products/services are provided and later determined not to have been medically necessary.
  - For example, a BCBS contract defines “Subscriber” as “any person with whom [BCBS] has entered into an agreement to provide coverage.” The contract defines “Subscriber Contract” as the contract under which BCBS “or the Plan Sponsor provided benefits to Subscribers for Health Services.” The contract states that “Medical Necessity” has the meaning as defined in the Subscriber Contract; that in the judgment of BCBS’s Utilization Review Process, the DME is appropriate and is consistent with the diagnosis and treatment plan; and that in accordance with accepted medical standards in the State of \_\_\_\_\_, cannot be omitted without adversely affecting the subscriber’s condition.

# Hold Harmless

- This concept is seen most often in its benign form, that is, where the supplier agrees to hold a covered life harmless and not seek reimbursement directly from him or her for covered services rendered.
  - This is a fairly standard and nonnegotiable provision in managed care contracts.
  - This is where the definition of “covered services” is critical.
- Suppliers should watch for provisions that require them to hold the Plan harmless from findings of supplier negligence arising from the supplier’s compliance with the Plan’s policies.

# No Disparagement

- These are basically “no slander” clauses under which the supplier agrees not to disparage the Plan.
  - Unfortunately, “disparagement” is almost never defined.
  - Consequently, Plans read this term broadly.

# Passive Amendment

- Be aware of passive amendment provisions that state that amendments to the contract offered in writing to the supplier that are not expressly rejected in writing by the supplier within a certain time frame are automatically deemed accepted by the supplier.

# Passive Amendment

- In the managed care arena, passive amendment provisions are most often used to add new Plan products and payment schedules when the supplier has agreed in advance to accept all new products meeting certain criteria.
  - For example, a BCBS contract states:
    - “The Agreement may be modified and/or amended at any time by Blue Cross upon at least forty five (45) days’ prior written notice to the Provider; provided, however, that forty five (45) days’ advance written notice shall not be required in those circumstances when Blue Cross modifies the fee schedule to correct errors or omissions or to reflect state or federal regulatory requirements, in which case Blue Cross shall provide as much advance notice as is reasonably practical. In the event of any amendment by Blue Cross, Provider shall have 45 days to reject the amendment and terminate the agreement in writing; otherwise, the parties will assume that the amendment has been accepted by the Provider.”

# Waiver of Legal Rights & Remedies

- Under the guise of expedience and efficiency, many contracts specify that, in the event of a dispute between the parties, the matter will be resolved through mandatory arbitration in lieu of litigation.
- Suppliers should be sure that in relinquishing their legal rights to enforce the contract through certain mechanisms, those rights are waived only for defined actions under the contract, such as failure to pay, and not for all disputes that could arise.

# Incorporation of Collateral Documents

- Many important terms are attached to the contract or are incorporated by reference in exhibits, schedules, and handbooks.
- Typically, utilization review, quality assurance programs, payment terms, and provider due-process rights are contained in collateral documents.
- The Plan will argue that the terms of the contract do not articulate the mutual promises of the parties; but that the contract, instead, includes what is written in the contract as modified by the more specific terms in the Plan's manuals and other collateral documents.

# Incorporation of Collateral Documents

- The Plan will claim that because it has the right to modify its manuals during the term of the contract, it also has the right to modify the contract itself.
  - For example, an MVP Health Plan contract states: “Ancillary Provider agrees to ... be bound and abide by all of MVP’s programs, protocols, rules and regulations including, without limitation, MVP’s quality improvement program, credentialing process, peer review systems, member grievance system and utilization management program.”

# Incorporation of Collateral Documents

- The Plan will claim that because it has the right to modify its manuals during the term of the contract, it also has the right to modify the contract itself (cont'd).
  - As another example, a BCBS contract states:
    - “To promote efficiency and network consistency, Blue Cross shall have the right at any time to issue Provider Bulletins pursuant to this Agreement for the purpose of implementing certain policies, procedures and requirements relating to this Agreement ... and Provider shall comply with such Provider Bulletins ... . Blue Cross shall provide Provider with at least forty five (45) days’ advance written notice from date of publication on [link to BCBS’s website] of any new Provider Bulletins, unless such Provider Bulletins are issued to comply with a state or federal regulatory or accreditation requirement or to address only minor administrative or operational clarifications, as reasonably determined by Blue Cross with which case Blue Cross shall provide as much advance notice as is reasonably practical.”

# Set-Off Provisions

- A set-off provision allows the Plan to control the money during a dispute. It allows the Plan to withhold disputed amounts from future payments to the supplier.
  - Because these provisions allow the Plan to make a unilateral decision, they are susceptible to abuse.
  - The supplier should attempt to have set-off provisions removed from the contract.

# Set-Off Provisions

- On the other hand, because set-off provisions can serve a valid purpose when they are exercised in good faith as a means to correct true mistakes, completely eliminating them may not be possible.
  - The next best option is to build limitations and protections into set-off provisions.
  - For example, an Amerigroup contract states: “Amerigroup shall be entitled to offset and recoup an amount equal to any overpayment or improper payments made by Amerigroup to Provider against any payments due and payable by Amerigroup to Provider under this Agreement ... .”

# Mission or Inadequate Provisions

- Frequently, the interpretation of a contract hinges on a single word or phrase that has no defined meaning.
- This may occur simply because the parties do not consider the potentially competing definitions of a specific term or because the Plan chooses to define a term in a way that is advantageous to it.

# Evergreen Clauses

- An evergreen clause automatically renews the contract for another term if the contract is not terminated within a specified notice period prior to the end of the current year.
- This clause usually serves no rational purpose and is difficult to manage.
- Such a clause actually serves as a disincentive for the parties to regularly renegotiate the contract in the ordinary course of business.
- An evergreen clause is undesirable because a supplier that fails to provide notice of its intent to renegotiate within the specified time is obligated to provide services and products for another year at what may become below-market rates.

# Evergreen Clauses

- Another pitfall occurs when the supplier engages in good faith negotiations that continue past the date by which the termination notice is required thinking that it would be inappropriate.
  - For example, a BCBS contract states: “[T]his Agreement shall ... automatically renew for each subsequent renewal term ... .”

# Remedy for Unexcused Delay in Payment

- It is reasonable to negotiate a contractual provision obligating the Plan to pay interest if payment is not made within a specified period after the receipt of a clean claim.
- State prompt-pay laws have created a similar remedy by requiring a Plan to pay a specified rate of interest if payment is not made within a certain number of days of receiving a clean or complete claim.
- However, these laws often give definitions of clean and complete claims that are too vague to be of practical assistance in enforcing the prompt-pay penalty.
- Suppliers should work with the Plans to specifically define “complete claim” in the context of what that Plan expects, consistent with the applicable state’s prompt-pay regulations.

# Payment Forfeiture for Late Claims

- Plans want claims to be submitted in a timely fashion so that the Plans can better manage their accounts. However, Plans should not be allowed to require suppliers to forfeit all payments on claims that miss the deadline.
  - To avoid such disputes, suppliers should attempt to negotiate a more reasonable incentive for the prompt submission of claims.

# Audit Definitions

- The contract should define the scope of the Plan's audit rights.
- The most common scope of an audit is one that determines whether all products and services appear on the bill and whether the supplier's records support the bill.
- Plans often try to expand this scope in an attempt to second guess medical necessity issues through an audit.
- Although it is appropriate for a Plan to have a role in determining medical necessity, these issues are best addressed through the contract's utilization review provisions where the parties can specify standards and procedures.

# Audit Definitions

- Plans also perform audits as a way of challenging a provider's rates.
  - This practice is inappropriate because rates are addressed separately in the contract, and no supplier intends to give a Plan a unilateral right to revise its rates through an audit.
- The time limits within which an audit can be performed should be specified.

# Attorney's Fees

- Plans may include in the contract a clause requiring the losing party in a dispute to pay the attorney's fees of the winning party.
- Plans have a greater incentive and greater resources with which to litigate or arbitrate a dispute.
- The added risk that the Plan may have to pay the supplier's attorney's fees is usually not material in the Plan's calculations.
- For suppliers, however, the added risk of paying attorney's fees may act as a disincentive to pursue the matter.

# Discretion Left to the Plan

- An obvious dangerous clause is one that allows the Plan to define a term of the contract unilaterally.
- It sometimes may be necessary to leave some terms of the contract to the Plan's discretion, but these terms should relate to minor issues only.
- Even then, the Plan's discretion should be severely limited by identifying standards under which it can be exercised.

# Insurance and Indemnification

- Each party should carry its own professional and general liability insurance for its own acts or omissions.
- Suppliers should only be required to insure against their own liability and not the liability of the Plan.
- Avoid insurance or indemnification provisions that shift the risk of loss for the Plan's acts to the supplier.

# Claims Processing

- Claims processing is one of the most routinely disputed provisions of contracts between Plans and DME suppliers.
- At the source of many of these conflicts are state laws requiring prompt payment of clean claims submitted to Plans.
- There are two key time limits that are of specific concern to suppliers in claims processing:
  - First, the contract will contain a clause requiring the supplier to submit a claim within a certain time period after provision of services or products in order to be paid.
  - Second, the contract should contain a clause requiring the Plan to pay a clean claim within a certain amount of time.

# Claims Processing

- The supplier should request that the contract discuss what constitutes a clean claim by describing the information required and discussing a method for resolving disagreements between the parties.
- The contract should also include specific penalties such as late payment penalties, interest payments, and in some cases, termination of the contract in the event of continued delay or non-payment.
  - For example, an Amerigroup contract states that a clean claim is a “claim received by Amerigroup for adjudication, in a nationally accepted format in compliance with standard coding guidelines, and which requires no further information, adjustment, or alteration by the Provider of the services in order to be processed and paid by Amerigroup.”

# Marketing

- The supplier should request the right to review all marketing materials referring to the provider before they are used by the payor.
- Conversely, the contract may impose restrictions on how the supplier can market to, or otherwise communicate with, the Plan's covered lives. For example:
  - The contract may require the supplier to “obtain Payor’s and HMO’s approval for Covered Person communications ... .”
  - The contract might contain the following provision: “Provider shall not conduct marketing activities unless expressly approved in writing and only after all training and credentialing required under the applicable State Contract ... .”

# Marketing

- The contract between CMS (or the state Medicaid program) and the Plan might define “marketing” as “any written or oral communication from [MCO] or its representative that can reasonably be interpreted as intended to influence a Participant to enroll, not to enroll, or to disenroll from a health care delivery system.”
  - Even though this definition does not specifically apply to actions by suppliers, it may be construed to be applicable to the definition of marketing set out in the contract between the Plan and the supplier.
  - As such, there is a risk that a communication by a supplier notifying patients that the supplier has terminated its contract with the Plan and providing patients with a list of other Plans with which the supplier remains in network may be viewed as a marketing activity as it may influence the recipient to enroll with a particular Plan.

# Marketing

- Separate and apart from the supplier's contractual obligations, guidance regarding communications with patients may be set out, e.g., in the Medicaid program's Managed Care Manual for Medicaid Providers ("Manual").
- The Manual may set out a process for suppliers to educate their patients about their choices between the different Plans.
  - For example, the Manual may state that "[I]f a Provider chooses to educate [its] patient ... [the Provider and its staff] must ensure that the patient is aware of all plan choices and use materials approved by the Department for this education."
  - It is not uncommon for a state Medicaid program to publish a flyer/template for suppliers to utilize when communicating with their patients. The template may require the supplier to identify all Plans with which it is contracted and, also, direct the patient to the Medicaid program's Participant Enrollment Services in order to learn more about Plan choice.

# Marketing

- The state Medicaid program may give the supplier the option to include a preferential statement regarding a certain Plan in the flyer/letter if the preference is a benefit to the patient and not just a benefit to the supplier.
- If the supplier is given such an option, it is likely that the flyer/letter must be submitted for approval by the preferred Plan and the state Medicaid program.
- The Medicaid program will likely instruct suppliers not to include any false or disparaging statements regarding Plans.

# Marketing

- The Manual may prohibit the supplier from contacting patients by telephone to
  - inform them that the supplier has terminated its agreement with ABC Plan and
  - suggest that the patient switch out of the ABC Plan.
- For example, the Health Plan Outreach Guidelines in a state may prohibit “face-to-face outreach by the Health Plan directed at participants or potential enrollees, including direct or indirect door-to-door contact, telephone contact, or other cold-call activities ... .”
  - While the above language applies to telephone calls by the Plan, the state Medicaid program may apply the restrictions to suppliers.

# Marketing

- Assume that a supplier terminates its contact with ABC Plan and desires to direct its patients to XYZ Plan. Assume that the supplier desires to run Facebook ads that inform patients of the termination and the desire by the supplier that the patients switch Plans.
- The supplier needs to carefully word such an ad.
- The ad cannot be misleading. For example, if the ad says that ABC Plan is reducing patient choice, such a statement may be misleading. ABC Plan might argue that the supplier can remain in network with ABC Plan so long as the supplier is willing to accept the lower reimbursement.

# Marketing

- In addition, the supplier may be required to obtain approval of the Facebook ad by the state Medicaid program and ABC Plan.
- The Manual may require the supplier to use materials (intended to educate patients) that have received the prior approval by the state Medicaid program.
- Lastly, it is important that the Facebook ad not be looked at as tortious interference with ABC Plan's business.

# Marketing

- A properly-worded Facebook ad might say something like the following:
  - You have a choice in your Medicaid Managed Care Plan. If you have respiratory problems, diabetes, or use oxygen, incontinence products or a wheelchair, please make sure that your provider of choice for medical equipment and supplies is in-network with the Medicaid Managed Care Plan you choose.
- By broadly stating facts not specifically identifying ABC Plan, this language should eliminate the risk of ABC Plan objecting to the ad on the grounds that it is misleading or defamatory.
- In addition, as the ad does not specifically identify ABC Plan and is not specifically targeted to ABC Plan members, it significantly reduces the risk of a tortious interference claim.

# Marketing

- Assume the supplier will terminate its contract with ABC Plan because the supplier cannot accept ABC Plan's reimbursement cuts.
- A properly worded letter from the supplier to its ABC Plan patients might say something like the following:
  - The purpose of this letter is to inform you of an upcoming change in the provision of our products and services. On [date], we will no longer be contracted with ABC Plan and will not be able to continue to service your durable medical equipment or medical supply needs under the ABC Plan.
  - The [name of state] Medicaid program requires most individuals with a Medicaid card to pick a health plan for their care coordination services. The health plan you pick will provide you with all of your health care needs and help coordinate your care.

# Marketing

- A properly worded letter from the supplier to its ABC Plan patients might say something like the following (cont'd):
  - The health plans you may be required to pick go by the following names: (i) \_\_\_\_\_ and (ii) \_\_\_\_\_.
  - We provide health care to the following population: (i) Family Health Plans; (ii) Seniors and Persons with Disabilities; and (iii) ACA Adults.
  - We also contract with the following Health Plans to provide services to our patients: (i) Health Plan 1; (ii) Health Plan 2; (iii) Health Plan 3; (iv) Health Plan 4; (v) Health Plan 5; (vi) Health Plan 6; and (vii) Health Plan 7.

# Documentation Review

- If a contract requires that a supplier adhere to the Plan's policies and procedures, the supplier must be allowed to review them prior to executing the contract.

# Medical Records

- The HIPAA privacy standards allow for broad sharing of information between suppliers and Plans for the purposes of receiving payment for services rendered.
- No business associate language is required.

# Reimbursement

- The most important clause in a contract is the reimbursement provision.
- Contracts should include a provision to renegotiate the reimbursement provision based on defined events.
- Suppliers should be realistically self-critical in evaluating their ability to fulfill the contract terms.
- The primary risk to the supplier lies in whether it understands clearly enough its costs to provide the products and services for which the supplier is contracting.
- Suppliers should carefully analyze the reimbursement provisions to determine whether the reimbursement amounts listed provide adequate compensation for the products and services provided.

# Term

- Suppliers may wish to enter into a contract for an initial term of one year with a longer renewal term so that they can have flexibility in addressing any shortfalls to the fee schedules that occur during the initial year.
- Suppliers should closely track contract renewal dates as well as deadlines for modification.

# Termination

- Specifying the factors that may lead to termination, such as the failure of the Plan to make payment, is vital.
- Post-termination obligations are important. Regardless of the reason for the termination, the obligations to continue treating the Plan's members should be clear, defined, and time-limited.
  - For example, a BCBS contract states:
    - “This Agreement may be terminated without cause by a Party upon prior written notice to the other Party with termination to become effective 130 days after receipt of written notice. If the Agreement is so terminated, Blue Cross, at its discretion, may extend the terms of the current Agreement for a period of up to an additional 180 days, to allow Blue Cross proper notification of Subscribers and continuity of care practices.”

# Onerous Termination Provisions

- Suppliers that wish to terminate their relationship with a Plan have less leverage if they have agreed to onerous termination provisions.
- If the cost of contract termination is too high for the supplier, the supplier will have less leverage with which to press for fair and reasonable terms in negotiations to extend or replace the contract.

# Subcontracting

- A DME supplier that is a party to a contract may desire to subcontract out certain responsibilities to another supplier. Before doing so, the supplier (contracted with the Plan) should determine if the contract addresses subcontracting.
  - For example, a BCBS contract states: “All subcontracts of Provider under this Agreement must be in writing. All subcontracts of Provider are subject to Blue Cross review and approval, upon request of Blue Cross. All subcontractors of Provider shall meet all applicable terms and conditions of this Agreement. Subcontracts shall not abrogate or alter Provider’s responsibilities under this Agreement.”
  - For example, an Amerigroup contract states: “Unless otherwise approved by Amerigroup in writing, Provider shall not use any subcontracted provider to furnish Covered Services to Covered Persons.”

# Assignment

- Assume that a supplier (that is contracted with a Plan) sells its assets to another supplier and, in so doing, desires to transfer (or assign) its contract to the purchaser. The seller must first review the contract to determine if it allows assignment.
  - For example, a BCBS contract states: “This Agreement ... shall not be assigned or transferred by Provider without the written consent of Blue Cross, such consent not to be unreasonably withheld.”

# Appeals

- Before the supplier signs a contract, the supplier should determine what the contract says about the Provider's appeal rights.
  - For example, a BCBS contract states: "The Provider and Subscriber shall have the right to appeal Utilization Review decisions through Blue Cross' Utilization Review Process as set forth in the Provider Policy & Procedure Manual."

# Home Set-Ups

- The DME supplier needs to determine if the contract requires the supplier to conduct home set-ups and training.
  - For example, a BCBS contract states: “When appropriate or requested by the Subscriber, Provider will set up the DME at the Subscriber’s home and provide training to the Subscriber and his or her family.”

# Voluntary Repayments

- Some contracts will impose on the supplier the affirmative obligation to voluntarily repay claims that should never have been paid to the supplier in the first place.
  - For example, a BCBS contract states: “Provider shall promptly report and return overpayment of any kind to Blue Cross.”

# Collection of Copayments

- Many contracts expressly require the supplier to make a good faith effort to collect copayments and deductibles.
  - For example, a BCBS contract states: “Provider agrees to make a good faith effort to collect any deductible, coinsurance, and/or copayment amounts due from Subscribers. This provision shall not prohibit Provider from collecting a lesser amount on individual hardship cases as determined by Provider.”



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# Using Another Supplier's Third- Party Payer Contract



# Using Another Supplier's Third-Party Payer Contract

- A challenge faced by many DME suppliers is that Plans have closed panels. This means that the Plan tells the DME supplier: “We have enough DME suppliers on our provider/supplier panel. We don’t need you. Therefore, we will not sign a contract with you.”
- The end result for the DME supplier is that if a patient wants to obtain a product from the DME supplier and if the patient is covered by the contract for which the DME supplier is not on the panel, the DME supplier must turn the patient away unless the patient is willing to pay cash to the DME supplier without getting reimbursed by the Plan.

# Using Another Supplier's Third-Party Payer Contract

- As a workaround, the DME supplier may want to enter into an arrangement with another DME supplier to gain access to the other DME supplier's contract.
- For example, the two suppliers may want to do the following:
  - Supplier A is a party to Contract 1. Supplier B is not a party to Contract 1.
  - When a patient under Contract 1 wants to purchase a product from Supplier B, Supplier B will take care of the patient.

# Using Another Supplier's Third-Party Payer Contract

- For example, the two suppliers may want to do the following (cont'd):
  - Supplier B will
    - handle intake, assessment and coordination of care (collectively referred to as “intake”),
    - deliver and set up the equipment, and
    - handle the subsequent maintenance and repairs.
  - Supplier A will submit a claim under Contract 1. Upon receipt of payment under Contract 1, Supplier A will
    - pay a large percentage (e.g., 92%) to Supplier B and
    - retain the balance.

# Using Another Supplier's Third-Party Payer Contract

- The problem with this arrangement is that it likely violates the federal anti-kickback statute (“Federal AKS”), the federal False Claims Act (“Federal FCA”), and their state counterparts.

# Using Another Supplier's Third-Party Payer Contract

- Here are how the Federal AKS and Federal FCA may come into the picture:
  - Federal AKS – This statute makes it a felony for (i) Supplier A to give anything of value in exchange for receiving the referral of a patient covered by a government health care program and (ii) Supplier B to receive anything of value in exchange for referring (or arranging for the referral of) a patient covered by a government health care program. In the eyes of the Plan, the supplier is Supplier A: it is the party to the contract and it is billing and collecting under the contract. The kickback issue arises because (i) Supplier B is referring or arranging for the referral of the patient to Supplier A and (ii) Supplier A is, in turn, remitting, e.g., 92% of the payment to Supplier B.

# Using Another Supplier's Third-Party Payer Contract

- Here are how the Federal AKS and Federal FCA may come into the picture (cont'd):
  - Federal FCA – This statute prohibits Supplier A from submitting “false claims” ... and Supplier B cannot conspire (or collaborate) with Supplier A for the submission of false claims. When Supplier A submits a claim to the Plan, Supplier A is representing that it is the supplier ... that it took care of the patient and, therefore, deserves to be paid. In fact, this is not the case. The true supplier is Supplier B; it is the entity that does all of the work. All Supplier A does is submit a claim under the contract. Hence, the claim submitted is a false claim. And Supplier B will have collaborated with Supplier A in the submission of the false claim.

# Using Another Supplier's Third-Party Payer Contract

- So now that we have talked about what Supplier A and Supplier B cannot do, let's talk about what they can do.

# Using Another Supplier's Third-Party Payer Contract

- If Supplier A and Supplier B desire to enter into a Subcontract Agreement (“SA”), here are the steps they should take:
  - Review the Contract - The parties need to review Supplier A’s contract to determine if it addresses subcontract arrangements. The contract may say nothing about whether or not Supplier A can subcontract out its responsibilities to Supplier B. If the contract is silent, in order to avoid problems under the Federal AKS and Federal FCA, the SA should be structured as set out hereafter. On the other end of the spectrum, the contract may prohibit Supplier A from subcontracting out its services. The contract may very well take the middle road and provide for one of the following: (i) Supplier A can subcontract out its services but must first notify the Plan who the subcontractor will be; (ii) Supplier A can subcontract out not more than, e.g., 20% of its services; (iii) Supplier A can subcontract out its services only if the Plan approves the subcontractor in advance; or (iv) Supplier A can only subcontract out specifically delineated services.

# Using Another Supplier's Third-Party Payer Contract

- If Supplier A and Supplier B desire to enter into a Subcontract Agreement (“SA”), here are the steps they should take (cont’d):
  - Supplier A Must Retain a Level of Operational Responsibilities and Financial Risk – So that it can credibly assert that it is the supplier, Supplier A must have a level of operational responsibilities and financial risk. For example, Supplier A needs to handle the intake. This means that Supplier A must determine if the patient qualifies for coverage under the contract. Supplier B can gather information and documents and forward them to Supplier A; but it is Supplier A, not Supplier B, that must determine if the patient is to receive the product. If the patient later has a maintenance/repair need, he needs to call Supplier A; Supplier A can, in turn, direct Supplier B to handle the repair/maintenance. Further, Supplier A will be obligated to pay Supplier B regardless of whether or not the Plan pays Supplier A. In other words, Supplier A’s obligation to pay Supplier B for its services is absolute.

# Using Another Supplier's Third-Party Payer Contract

- If Supplier A and Supplier B desire to enter into a Subcontract Agreement (“SA”), then here are the steps they should take (cont’d):
  - Inventory – Under the SA, Supplier B will deliver the product to the patient “for and on behalf of Supplier A.” At the time of delivery, title to the product needs to be in Supplier A’s name. This can be accomplished in one of several ways: (i) Supplier A can purchase the inventory, take possession of it, and deliver it to Supplier B; (ii) Supplier A can purchase the inventory, not take possession of it, and direct the manufacturer to deliver the inventory (on behalf of Supplier A) to Supplier B; (iii) Supplier B can purchase the inventory, and on a regular basis, Supplier A can purchase inventory from Supplier B and Supplier B can segregate Supplier A’s inventory in Supplier B’s warehouse; or (iv) Supplier B can purchase the inventory when Supplier B is about to deliver the product to the patient’s home, then title will transfer to Supplier A and Supplier A will have the obligation to purchase the product from Supplier B.

# Using Another Supplier's Third-Party Payer Contract

- If Supplier A and Supplier B desire to enter into a Subcontract Agreement (“SA”), then here are the steps they should take (cont’d):
  - Supplier B’s Services – The SA can provide that Supplier B’s services include the following: (i) deliver the product to the patient, educate the patient on how to use the product, and set the product up for the patient; (ii) obtain information and documents from the patient and his physician and transmit them to Supplier A so that Supplier A can conduct the intake; and (iii) at the direction of Supplier A, provide maintenance and repair services to the patient. The labels on the products delivered to the patients need to reflect Supplier A.

# Using Another Supplier's Third-Party Payer Contract

- If Supplier A and Supplier B desire to enter into a Subcontract Agreement (“SA”), then here are the steps they should take (cont’d):
  - Flow of Money – At the end of the day, Supplier B will be referring (or arranging for the referral of) patients to Supplier A and Supplier A will be paying money to Supplier B. The most conservative course of action is as follows: (i) if Supplier A purchases inventory from Supplier B, the purchase price must be fair market value (“FMV”) and must be pursuant to a price list attached to the SA and (ii) Supplier A pays fixed annual compensation (e.g., \$48,000 over the next 12 months) to Supplier B in which such compensation is the FMV equivalent of Supplier B’s services. If fixed annual compensation is not feasible, a less conservative course of action is: (i) if Supplier A purchases inventory from Supplier B, the purchase price must be FMV and must be pursuant to a price list attached to the SA and (ii) Supplier A pays a fixed fee per each unit of service provided by Supplier B, such compensation is the FMV equivalent of Supplier B’s services, and the compensation is set out in a fee schedule attached to the SA. If the parties want to strengthen their position that the compensation paid to Supplier B is FMV, the parties can order an FMV evaluation and report from an independent third party.



EDUCATIONAL RESOURCES

# Thank you

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 HOME HEALTH



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