ANTHEM BLUE CROSS PROVIDER August 12 REVISED AGREEMENT ANALYSIS

Anthem recently sent a second replacement contract to its Physical Therapy Network providers. Anthem's revised cover letter requests that this new contract be executed and returned to Anthem by September 12, 30 days after the date of this second notice letter. However, unlike the initial letter this version expressly states that it is not a notice of termination, and that Anthem will contact any physical therapist who does not return an executed agreement by September 12 before taking any future actions. The revised cover letter continues to state that "***The Commercial plan product reimbursement schedule is not changing from its current rate and is not negotiable"*** (emphasis in original), and that ***"However, in an effort to continue to support delivery of therapy services for workers' compensation, and align our fee schedule more competitively within the market, the workers' compensation reimbursement has been updated."*** The new rate, as provided in the revised "Plan Compensation Schedule" is ***the lesser of*** "Eligible Charges" (defined to include Anthem's bundling logic) or 75% of the OMFS. California physical therapists should compare this to the workers' compensation rates in their current contract to determine this change's impact.

This new replacement contract is significantly different from the July version in that it includes a new "Commercial Business Participation Attachment designed to cover the patients covered by Anthem products which are subject to DMHC and/or DOI jurisdiction.

The prior analysis covers the issues raised by the replacement Anthem contract as it applies to its self-insured and other business which is not subject to DMHC or DOI oversight. It also applies to the extent the Commercial Business Participation Attachment does not include superseding provisions.

The following summary is limited to the Commercial Business Participation Attachment as revised in Provider Agreement attached to Anthem's recent August 12 letter. This summary is not legal advice. Of course, each practice should make its contracting decisions based on its own analysis and the advice of its own business and legal advisors.

Commercial Business Participation Agreement (August 12 version)

Initially, physical therapists with CaliforniaCare agreements should be aware that Section 2.9 provides that the Attachment is "not intended by the parties to supersede or modify… CaliforniaCare agreement(s), nor is such CaliforniaCare agreement(s) intended to modify or supersede this attachment." Does this mean that the August 12 letter has no application to the CaliforniaCare network, even though that letter does not except that network?

In addition, the Commercial Business Participation Attachment contains extensive provisions governing provider directories and participation in Covered California, Sections 4.4 and 4.5. These generally track requirements imposed by law or Covered California. With respect to sections 4.5.4 and 4.5.5, physical therapists would be well advised to work with their practice attorney prior to making any such notice to Anthem.

Requirements to Waive California Legal Protections are Prohibited

California law: As discussed in the initial analysis, any contract provision that waives or conflicts with any provision in the Knox-Keene Act or Insurance Code is illegal. California law also mandates that all plan contracts with physical therapists be "fair" and "reasonable."

As will be discussed below, many issues raised by the initial agreement have been addressed in the Commercial Business Participation Attachment. The following summarizes those changes, as well as places where the Commercial Business Participation Attachment may continue to violate California's legal protections for health care professionals. As noted in the initial analysis, while the Anthem contract contains provisions suggesting that it will comply with more stringent state law regulations, it is difficult if not impossible to know how Anthem interprets the California requirements or how they will be implemented. It is unclear how a contract that on its face violates California law and requires physical therapists to guess as to Anthem's implementation could be either fair or reasonable.

Amendment

Section 4.1 of the Commercial Business Participation Attachment requires Anthem to give physical therapists at least 90 days prior notice of any material change. Physical therapists must notify Anthem within 30 days after receipt of this notice if they want to negotiate. If the parties are unable to negotiate an alternative, the physical therapist may terminate this attachment by notifying Anthem within 45 days after receipt of the notice. The termination would then be effective 90 calendar days after Anthem's receipt of the physical therapist's notice of intent to terminate.

While this language is better than that in Section 9.1 of the initial replacement contract, it still does not give contracting physical therapists the right to terminate the contract prior to implementation of the change as required by California law. It is not reasonable to assume that a physical therapist could receive notice of amendment from Anthem, read and evaluate it, and then return a termination notice on the same day! Yet that is the only way a physical therapist could avoid being forced to provide services under new terms with which the physical therapist did not agree. To comply with the letter and intent of California law, a physical therapist's timely termination notice should become effective on the date the change is implemented.

Continuity of Care

Section 3.2 of the Commercial Business Participation Attachment substitutes, for Commercial Business patients, continuity of care language which tracks that contained in the Knox-Keene Act, rather than the sweeping provision contained in section 8.7 of the main agreement.

Disputes

The Commercial Business Participation Attachment does not address the issues raised by the initial replacement contract's dispute resolution provisions.

As discussed in the initial analysis, the Anthem Participation Agreement replacement contract mandates exhaustion of its internal dispute mechanisms. See Section 7.1. It also establishes a 30 day "meet and confer" deadline, as well as an 18-month absolute limitation on when an arbitration can be initiated, running from when the claim was first paid or denied, regardless of how long the parties attempt to resolve the matter using the internal dispute and mediation processes. See Section 7.4. Any arbitration will be held in the city and state indicated for Anthem on the signature page of the contract – Richmond, VA for the contract IPTCA reviewed.

California law: Internal dispute mechanisms for billing and reimbursement issues must be ***optional.*** There are also strict timelines requiring plans to offer internal dispute mechanisms which resolve billing and reimbursement disputes without charge, within 45 working days of receipt, and with payment, including any interest and penalties, to be paid within 5 working days of the decision.

California law: Limitations on the filing of disputes must not be less than 365 days, and, for those ***disputes based on unfair payment patterns, that 365 days runs from the payer's most recent action.***

California law: Dispute resolution processes ***must be "fair".*** Requiring a California physical therapist to arbitrate a dispute in Richmond, Virginia is not fair.

Overpayments/Recoupment

As discussed in the analysis of the July replacement of the Participation Agreement, Section 2.7 of the Anthem Participation Agreement replacement contract gives Anthem sweeping power to recoup prior payments against future payments, even when a physical therapist has contested an overpayment.

Section 2.12 of the Commercial Business Participation Attachment provides confusing language. This section states that Anthem must notify the physical therapist of the overpayment or amount owed and request a refund in accordance with applicable law. The section then goes on to state that it may recover the overpayment by "deducting from and setting off any amount or amounts due and payable from Plan to Provider at and time under this Agreement or any other agreement between Plan and Provider, or for any other reason, an amount or amounts equal to the such overpayment to or amount owed by provider, in accordance with applicable laws and regulations. Finally, the section says, "the provider manual(s) specifies procedures concerning recoveries."

As noted in the initial analysis, under California law, overpayment demands must clearly specify the claim, patient, date of service, amount and basis. Overpayment demands cannot be made more than 365 days after the initial payment unless the overpayment was caused by "fraud or misrepresentation." Payers are prohibited from automatically recouping contested overpayments. Finally, where offsets of uncontested overpayments are made, the plan must provide "a detailed explanation identifying he specific overpayment or payments that have been offset against the specific current claim or claims."

In addition, to the extent this overpayment recovery system is implemented in a fashion that makes it impossible for the physical therapy practice to reconcile its books, it is not "fair and reasonable."

It should also be noted that the paragraph in the General Provisions of the Provider Compensation schedule (which applies to all product lines) entitled "Updates to Anthem Rate(s) Based on External Sources" also raises issues to the extent it authorizes automatic recoupment without advance notification.

Other Payers and Products

Section 2.7 of the August 12 Commercial Business Participation Attachment states that Anthem will comply with California Laws governing "Other Payers," at least as to its commercial business.[1] However, Anthem makes it clear that, while Anthem will use its "Best efforts" to assure other payers compensate physical therapists as provided in the Anthem agreement, physical therapists have no claim against Anthem if the "other payer" does not pay. On the other hand, Anthem emphasizes that physical therapists are still bound by the dispute resolution provisions of the Agreement (see discussion above) should they wish to challenge an "Other Payer's" underpayment. In addition, the physical therapist must notify Anthem or the "other payer" 30 days prior to filing a lien or sending bill(s) to collection.

Finally, Anthem requires physical therapists to follow the "other payors" specified utilization review requirements. As noted below, Plans may not allow "other payors" to impose materially different obligations or risks on physical therapists.

It is unclear how much of section 2.7 of the Commercial Business Participation Attachment supersedes the provisions of Section 2.11 of the main Participation Agreement. Anthem expressly agrees in section 2.7 that physical therapists will have the right to decline to be "leased" to other payers that do not "actively encourage" referrals. However, in other cases it may believe it still retains the right to add new Networks and bind the physical therapist to participate in them at its discretion, even though such additions would appear to be material changes to the Agreement, subject to California's 45-day notice requirements. Moreover, the provisions whereby if Anthem contracts with another entity to manage PT services, the physical therapist must contract with that entity to remain in network, and giving Anthem the right to eliminate referrals entirely and contract out to an exclusive provider of physical therapy services almost certainly continue to apply to Anthem's Commercial products.

California law: Any material change to the contract, including the addition of a new network, would be subject to the rules applicable to Amendments, thus requiring a minimum of 45 working days advance notice and the right to terminate. Similarly, requiring the physical therapist to contract with an intermediary would be subject to the Amendment requirements.

[1] With respect to Workers Compensation, physical therapists are referred to the Workers compensation attachment. It is unclear whether this means that Anthem is not agreeing to comply with California's "other payer" law as it applies to worker compensation patients.

California law: Plans cannot allow other payers to access their networks except pursuant to the same terms as those in the underlying agreement between the plan and the physical therapist. Thus, any new network must not impose materially different obligations or risks on physical therapists.

California law: To the extent Anthem has market power in a particular market, California's antitrust law, the Cartwright Act, may limit its ability to force physical therapists to participate in products they do not want as a condition of participating in products they do want.

Mandated marketing/Gag clause

In addition to the provisions governing Marketing in the main agreement, the August 12 Commercial Business Participation Attachment includes Section 2.10 which authorizes Anthem and Plans to publish the physical therapist's Tax ID Number in their marketing materials. This appears to be highly unusual and potentially opens the practice to serious risk of identity theft. In addition, Section 2.10 ends with an unusual provision denying to physical therapists the right to "reproduce, store., transmit or modify the content of [Anthem] web sites in any manner, to link to the home page, to deep link to any content, or frame any portion of [Anthem] web sites without Anthem's written permission", unless pursuant to "limited downloading and copying rights which may be expressly posted by Anthem on its web sites, and which may be amended in Anthem's sole discretion", or because California's Knox-Keene Act makes this prohibition unlawful.

As discussed in the initial analysis, Section 2.18 obligates physical therapists to market Anthem. "make reasonable efforts to assist Plans in marketing Health Benefit Plans. It further requires "to the extent permitted by the Knox-Keene Act, including Health and Safety Code Section 1395.5, Provider shall ensure that all Providers maintain reasonable Plan signs and Plan health promotion, membership and marketing materials as reasonably requested by Plans, consistent with the signage visibility and marketing support granted to third party payers other than Anthem."

Sections 3.1 and 3.3 prohibit physical therapists from disclosing "rates or specific terms of the compensation arrangement."

Section 2.3 gives Anthem the right to disclose virtually any information about the physical therapist, including rates and specific terms of the compensation arrangement:

> "Provider agrees that Anthem, Plans or their designees may use, publish, disclose, and display, for commercially reasonable general business purposes, either directly or through a third party, information related to Provider, including but not limited to demographic information, information regarding credentialing, affiliations, performance data, Anthem Rates, and any other information related to Provider for transparency initiatives."

California law: Plans are broadly prohibited from interfering with the ability of physical therapists to communicate with their patients, including but not limited to communications about

"other coverage arrangements." As noted previously, managed care contracts must be "fair and reasonable." It is not fair for Anthem to be able to disclose a physical therapist's contracted rate publicly, while at the same time prohibiting the physical therapist from disclosing it to his or her patient.

It is also interesting that section 2.18 is the only section in the main body of the inital replacement contract that references a specific provision on the Knox-Keene Act. Apparently, it is not too burdensome for Anthem to make reference to specific California laws when it believes them to be helpful to Anthem. However, the law referenced deals with trademark protection. Nothing in that statute contemplates the imposition of an affirmative obligation to post and/or distribute Anthem marketing materials. Moreover, such forced speech would appear to interfere with the physical therapists' ability to communicate with their patients.

Unfair records requests/Breach of confidentiality of medical information
As discussed in the initial analysis of the July replacement Agreement, Section 3.4 of the main agreement imposes burdensome obligations on physical therapists to provide Anthem with workspace and free copying services for onsite audits, or free copies of any and all records Anthem requests for virtually any reason including its "research." Section 3.5 requires physical therapists to transfer records without charge to another provider at Anthem's request. Section 3.6 broadly requires physical therapists to share "data" with Anthem, while providing no obligation on itself to share data with the physical therapists.

Section 2.8 of the Commercial Business Participation Attachment ***additionally*** requires physical therapists to provide, without cost, books, records and papers relating to, among other things "the services Provider provides to Members***, to the cost thereof*** (emphasis added***)***, and to payments Provider receives from Members or others on their behalf, including billing and assignment.

California law: Generally speaking, both California and Federal law limit the ability of health plans to access patient medical records except as required to pay claims and for related health plan purposes. California law further prohibits plans from requesting more than the minimum required to adjudicate claims. Health plans do not have the right to force patients to share their medical information for "research purposes" or with health care providers who those patients do not want to see. Finally, neither the imposition of uncompensated, sweeping and burdensome data sharing obligations, nor the requirement to share the practice's internal cost of providing services are "fair and reasonable".

Definition of Medical Necessity

In Article I, the definitions section of the Commercial Business Participation Attachment, Anthem defines "Medical Necessity" to require, among other things, "there must be valid, scientific evidence that demonstrating that the expected health benefits from, supply, equipment or service are clinically significant and produce a greater likelihood of benefit , without a disproportionately greater risk of harm or complications, for the Member with the particular medical condition being treated than other alternatives; and generally accepted forms of treatment that are less invasive have been tried and found to be ineffective or otherwise unsuitable."

California Law: The Knox-Keene Act mandates that (1) the physician be the determiner of the patient's needs; and (2) medical decisions not be unduly influenced by fiscal and administrative management. (Health & Safety Code §§1342, 1367.) Further, under California law, the treating physician's decision concerning medical necessity should generally be upheld. *See Sarchett v. Blue Shield of California* (1987) 43 Cal.3d 1, 233 Cal.Rptr. 76. Depending on how Anthem chooses to implement this provision, it could refuse to cover the vast majority of services provided to patients, as there is "scientific evidence" - in the form of double-blind studies - to support only a tiny fraction of the medical care provided to patients. Moreover, is "letting nature take its course" a "generally accepted form of treatment that is less invasive? If so, how long does it need to be "tried" before appropriate physical therapy, for which there is no double-blind study, "Medically Necessary."

Section 2.2 – In-Network Referrals and Transfers

Unless there is an emergency or Anthem has provided prior authorization, this section requires physical therapists to provide a specified prior written notice before "referring, admitting or arranging for admission of Members to non-Participating Providers." It is unclear what is meant by the term "Admission." Assuming that term is interpreted to cover any referral a physical therapist may make, it appears to be unfair as applied to patient-initiated requests.

Sections 2.2-2.3 Claims Submission and Payment.

The revised Commercial Business Participation Attachment requires that claims be submitted within 90 days of the date of service, and that, if Anthem requests additional information, that information must be provided within 60 days, or within 90 days of the date of service, whichever is longer. Moreover, Anthem agrees to pay these claims consistent with California's timely payment requirements (30 working days for PPOs or 45 working days for HMOs), except in cases suspended to determine Medical Necessity. In addition, Anthem reserves the right to recoup overpayments as provided in the main Participation Agreement.

California Law: As noted in the analysis of the initial, July version of the Anthem replacement contract, overpayment demands must clearly specify the claim, patient, date of service, amount and basis. Overpayment demands cannot be made more than 365 days after the initial payment unless the overpayment was caused by "fraud or misrepresentation." Payers are prohibited from automatically recouping contested overpayments. Finally, where offsets of uncontested overpayments are made, the plan must provide "a detailed explanation identifying he specific overpayment or payments that have been offset against the specific current claim or claims."

Termination

In addition to the over-reaching termination provisions in section 8.4 of the main agreement, the Commercial Business Participation Attachment includes section 3.4 which provides, among other things, that upon termination of the Commercial Business Participation Attachment, "any references to services, reimbursement or participation in Networks related to Commercial Business are hereby terminated in full and shall have no further force and effect." The impact of this language on outstanding disputes over reimbursement is unclear. Clearly, termination of this

attachment should not result in physical therapists forfeiting their rights to reimbursement for prior services. The language in this section referencing "applicable Regulatory Requirements" does not clearly extend to outstanding reimbursement issues.
Again, as discussed in the initial analysis, California law requires all managed care contract to be "fair and reasonable. Contract provisions allowing immediate termination based on subjective plan decisions or termination of individual practice employees are neither fair nor reasonable. Forfeiture of reimbursement upon termination is also unfair.

Continuing Issues applicable to Anthem's Commercial plans

Hold Harmless/Exculpatory Clause

The Commercial Business Participation Attachment does not address the issues raised by the initial replacement contract's hold harmless/exculpatory provisions.

As discussed in the initial analysis, Section 6.2 of the replacement contract provides a sweeping limitation on liability.

California law: California law makes each party to a managed care contract responsible for their own acts and omissions, and further makes contract provisions that directly or indirectly exempt anyone from responsibility for their own fraud or violation of law void as against public policy.

Notice

The Commercial Business Participation Attachment does not address the issues raised by the initial replacement contract's notice provisions.

Section 9.11 allows Anthem to provide notices by email, and it may provide notice of material changes to its provider manuals or policies by postings on its websites. It is unfair to impose an ongoing obligation on physical therapists to diligently monitor Anthem's emails for critical notices about contract changes. It is even more unfair to require physical therapists to monitor Anthem's website for material changes to its polices and provider manuals, particularly when so much of the relationship between Anthem and physical therapists has been transferred to Anthems' policies and provider manuals.

Assignment

The Commercial Business Participation Attachment does not address the issues raised by the initial replacement contract's assignment provisions.

Section 9.2 gives Anthem complete discretion to assign some or all of its obligations under the contract while prohibiting physical therapists from assigning their obligations.

Changes to physical therapist business operations

The Commercial Business Participation Attachment does not address the issues raised by the

initial replacement contract's provisions regarding changes to a physical therapist's business operations.
Section 9.3 requires physical therapists to notify Anthem of any change to its business operations, at which point Anthem can terminate the practice at its discretion. If the practice is acquired by or merges with another practice that has an Anthem contract, Anthem can require the remaining or new entity to be bound by the contract governing the practice that no longer exists.

Force Majeure

The Commercial Business Participation Attachment does not address the issues raised by the initial replacement contract's Force Majeure provisions.

Section 9.6 provides for a Force majeure clause that is dramatically broader than is customary, extending beyond wars, hurricanes and earthquakes to statutes, regulations and other governmental actions. While governmental action might impose additional obligations on Anthem, it is unclear how government action could make it impossible for Anthem to comply with its obligations under the contract? Even if it were to have its license suspended, it should presumably remain bound under the contract to pay pending claims, etc.

Choice of law

The Commercial Business Participation Attachment does not address the issues raised by the initial replacement contract's choice of law provisions.

Section 9.8 provides that the agreement is presumably governed by Indiana law (where Anthem is based), except where it is governed by Federal Law or California law. It is not reasonable to require California physical therapists to know Indiana law, or the law of whatever other state Anthem may move its headquarters.

Plan Compensation Schedule

All issues raised by the Plan Compensation Schedule remain, except as discussed above with respect to Prompt Payment.

Definitions

The definition of "Provider Charges" requires that the charges submitted to Anthem must be no higher than those submitted to any other payer or individual**.**

California law: California law prohibits plans from imposing such "most favored nations" clauses on physical therapists to the extent they offer discounts to the uninsured. Most-favored nations clauses may also raise antitrust issues.

General provisions

Prompt Payment Claim Acknowledgment and Interest
California law: Generally requires acknowledgement of claim submission within 2 days for electronic claims and 10 days for paper claims. Late payments must automatically include interest at 15% per annum for the period the claim is late. Failure to pay interest automatically results in an additional $10 penalty.

Provider Type
The definition of Physical Therapy services is narrower than that provided by California law. Compare Business & Professions Code section 2620.

Medicare Advantage
The contract includes a revised attachment relevant to Medicare Advantage. Again, as these control over the general rules above where they are more stringent, they should be reviewed carefully.

Workers Compensation
Section 3.7 provides that the "other payers'" utilization rules control.

Section 3.12 provides Anthem is only an intermediary as to Workers compensation patients and thus has no financial obligation to pay claims. Claim payment is the responsibility of the employer or other payer.

Section 3.13 provides for payment of clean claims within 30 working days or receipt.

California law: Labor Code section 4603.4 requires payment of electronic clean claims ***within 15 working days***.