

## 2006 Excellus BCBS Physician Agreement Review sent on behalf of Nancy J. Adams

### Greetings-

Recently, a revised Excellus BCBS agreement was sent to area physicians. To assist physicians in the review of this agreement, the Medical Society requested a review from Donald Moy, Vice President and General Counsel of the Medical Society of the State of New York. You will find Mr. Moy's comments below. Please note: Section 2 B of the agreement indicates that existing employed physician contracts prevail over the agreement as do existing IPA contracts. It is our understanding that in the absence of those contracts, the signed 2006 agreement is binding. That is, should a contract between Excellus and an IPA not be renewed, a signed 2006 physician agreement would then act as an individual contract between Excellus and the physician.

These comments are intended as general information only, and are not intended as legal advice. Each physician should make an individual decision regarding the agreement. The sole purpose of these comments is to help physicians to understand the terms of the agreement so the physician can make an informed decision. These comments are not intended to induce the physician to act in any particular manner.

### Review

Per your request, this writer will summarize the salient provisions of the Excellus Participating Physician Agreement and will summarize provisions of the Settlement Agreement in Dolan et al. v. Excellus Inc. et al. ("Settlement Agreement") that apply to the Excellus Participating Physician Agreement. This writer believes that, generally, Excellus has made an effort to incorporate many of the provisions of the Settlement Agreement into the Participating Physician Agreement. The Settlement Agreement is over 70 pages in length, so it was not possible for Excellus to incorporate all the language in the Settlement Agreement into the Participating Physician Agreement. Physicians should keep in mind that whether specific language of the Settlement Agreement is incorporated into the Participating Physician Agreement or not, Excellus must administer the Participating Physician Agreement consistent with the Settlement Agreement. Accordingly, it will be a continuing effort to educate our members regarding their rights under the Settlement Agreement.

#### 1. Paragraph 6 of the Participating Physician Agreement

This paragraph requires the physician to cooperate and comply with Excellus standards and requirements including, but not limited to quality improvement, utilization management, credentialing, member grievance, and clinical encounter data collection programs.

Excellus standards and requirements may be amended from time to time.

Excellus must provide at least 90 days advance notice before these programs are implemented.

If a physician fails to comply with Excellus policies and procedures when providing covered services, Excellus has the right to withhold payment for such services, and physician may not bill the member for the services. The possibility that Excellus will withhold payment underscores the vital importance that the physician have access to all Excellus policies and procedures and be familiar with them.

#### Relevant Settlement Agreement Provisions

Section 7.5 – Excellus claims it has reduced the number of procedures requiring pre-certification. See Exhibit H of the Settlement Agreement for current pre-authorization list. Within 6 months of the Implementation Date, Excellus must post the pre-authorization requirements on its website, and update the list at least annually. The "Implementation Date" is the 41<sup>st</sup> day after the entry of the Final Order and Judgment approving the Settlement. The Final Order and Judgment was entered on December 2, 2005 which makes the Implementation Date January 12, 2006.

Section 7.6 – Excellus must provide Participating Physicians with 90 days' advance notice of all planned Material Adverse Changes to its policies and procedures affecting performance under contracts with Participating Physicians.

Section 1.45 – Defines "Material Adverse Change" as "any change in the Company's policies that could reasonably be expected to have a material adverse impact on (i) the aggregate level of payment by Company to a significant number of Participating Physicians for Covered Services (ii) a significant number of Participating Physicians' administration of their practices, or (iii) Physicians in any specialty or subspecialty".

Section 7.7 – Excellus must conduct a clinical Outreach Program to provide in-person education regarding appropriate billing practices.

Section 7.8 – Review section 7.8 to see what actions Excellus must take to disclose its payment rules.

Section 7.8(c) – Participating Physician has right to terminate agreement within 30 calendar days after receipt of notice of a Material Adverse Change.

Because of possible consequences of failure to comply with standards and requirements of Excellus under paragraph 6 of the Participating Physician Agreement, Physician must make sure that the medical practice has available all of Excellus' policies and procedures. Make sure

notices from Excellus are read. Because of the 30 day time limit, exercise care to determine whether changes to Excellus policies and procedures will constitute a Material Adverse Change to the physician.

## 2. Paragraph 7 of the Participating Physician Agreement

This paragraph states that Physician must verify a Member's enrollment in a Program and eligibility to receive Covered Services. The Participating Physician Agreement states, however, that compliance with Excellus' enrollment verification policies and procedures, and eligibility verification does not ensure that a person is, in fact, a member and eligible to receive Covered Services. The paragraph states that if Excellus subsequently determines that a person was not eligible to receive Covered Services, Excellus will be entitled to receive a refund from the Physician.

Relevant Settlement Agreement Provision – Section 7.23(g) provides that Excellus will not seek reimbursement from providers for covered services provided to insured members whose coverage is terminated retrospectively more than 120 days after the event should have occurred when Excellus has previously verified the member is eligible for benefits.

Section 7.22 – Provides that Excellus will not initiate overpayment recovery efforts more than 24 months after the original payment for the first 18 months after the Implementation Date and then 12 months after the original payment thereafter.

Section 1.51 – Defines "Overpayment" as "with respect to a claim submitted by or on behalf of a Physician (or Physician Group or Physician Organization), any erroneous or excess payment the Company makes because of payment of an incorrect rate, (e.g. inconsistent with the fee schedule), duplicative payment for the same Physician Service, payment with respect to an individual who was not a Plan Member as of the date the Physician provides the Physician Service(s) that are the subject of such payment, or payment for any Non-Covered Service".

**Comment:** It is submitted that assuming the facts required under 7.23(g) apply, section 7.23(g) of the Settlement Agreement will prohibit Excellus from demanding refund from physician where physician followed Excellus enrollment verification policies, and Excellus subsequently determines person was ineligible. Even assuming 7.23(g) does not apply, section 7.22 should limit the period which Excellus may go back and demand refund for ineligibility. The term "Overpayment" includes "payment with respect to an individual who was not a Plan Member as of the date Physician provides Physician Services(s) ..."

Accordingly, although not stated by paragraph 7 of the Participating Physician Agreement, section 7.22 and 7.23(g) of the Settlement Agreement may restrict paragraph 7 of the Participating Physician Agreement.

## 3. Paragraph 8 of the Participating Physician Agreement

This paragraph states physician will be compensated in the manner described in Exhibit A. Exhibit A states:

(1) Physician will be reimbursed in accordance with the then-current fee schedule applicable to the Program. Excellus may maintain different fee schedules for different Programs, and may maintain different fee schedules applicable to each region.

(2) Vaccines, Pharmaceuticals and Injectibles – Physician will be reimbursed for covered vaccines, pharmaceuticals, injectibles, durable medical supplies or other non-physician services in accordance with the then current fee schedule. Excellus may increase or decrease the fee schedule payment rates for such items or services to reflect changes in market prices.

### Relevant Settlement Agreement Provisions

Section 7.3 – See section 7.3 regarding requirement of Excellus – make fee schedules available. In Rochester, Participating Physician may view on the Provider website on a confidential basis, the complete fee schedule applicable to the Participating Physician.

Section 7.14a – Excellus may not reduce its fee schedule for a Participating Physician more than once a calendar year except as below. Any notice of a reduction of fee schedule will be considered a Material Adverse Change.

Excellus may increase or decrease the fee schedule payment rates for vaccines, pharmaceuticals, durable medical supplies or other goods or non-physician services to reflect changes in market rates.

7.14b – Excellus agrees to pay a fee (per applicable fee schedule) for the administration of vaccines and injectibles in addition to paying the appropriate provider for such vaccines and injectibles. Excellus must pay Participating Physician for the cost of injectibles and vaccines at the rate set forth in the applicable fee schedule.

4(a). Paragraph 9 of Participating Physician Agreement. Billing and Payment

Excelsus will not contest the timeliness of bills for Covered Services if such bills are received within 120 days after the later of (i) the date of service, or (ii) the date of the Physician's receipt of an EOB from the primary payor when Excelsus is the secondary payor.

Relevant Settlement Agreement Provision – 7.17(a) – Paragraph 9 of Participating Physician Agreement is consistent with section 7.17(a) of the Settlement Agreement.

4(b). Paragraph 9 of Participating Physician Agreement – If Physician submits claims electronically, Excelsus will “promptly” pay Physician directly.

Relevant Settlement Agreement Provision – Section 7.18. There is an interim period. Excelsus will pay electronic claims within 30 days and will pay paper claims within 45 days.

Within 24 months of the Implementation Date, Excelsus will pay electronic claims within 15 days and paper claims within 30 days.

Following Implementation Date, Excelsus will pay simple interest of 6% per annum for complete claims submitted by Class Members that are processed and finalized for payment beyond the above timeframes. The 6% interest will only apply to that portion of the timeframe prior to when a higher rate of interest is required under the New York “Prompt Pay” law.

4(c). Paragraph 9 of Participating Physician Agreement

If Excelsus determines that Physician has billed separately (using “unbundled” procedure codes) for services which should have been billed together Excelsus may rebundle the procedure codes to the correct code in order to provide the compensation intended by Excelsus.

Relevant Settlement Agreement Provision – Section 7.20 Paragraph 9 of the Participating Physician Agreement refers to Excelsus' right to “rebundle”. However, section 7.20 of the Settlement Agreement provides that Excelsus must process and make eligible for payment all physician claims pursuant to and consistent with the current version of CPT codes, guidelines and conventions as interpreted in the current volumes of the AMA's Current Procedural Terminology, Principles of CPT, coding CP T Assistant and CPT Changes.

Comment – Section 7.20 may be the most important provision of the Settlement provision applicable to coding. The Participating Physician Agreement does not incorporate any of the language of section 7.20, but physicians must be aware that Excelsus is required to comply with section 7.20.

4(d). Paragraph 9 of Participating Physician Agreement – This paragraph states where any incorrect payment or overpayment is the result of clerical or automated processing errors on Excelsus' part, Excelsus' right to make adjustments will be limited to the period 24 months from the date of claims payment for services provided through July 15, 2007 and then 12 months after the original payment thereafter.

Relevant Settlement Agreement Provision – Section 7.22 provides that Excelsus will not initiate overpayment recovery efforts more than 24 months after the original payment for the first 18 months after the Implementation Date, and then 12 months after the original payment thereafter (for at least 4 years).

Section 1.51 of the Settlement Agreement defines “Overpayment” as “any erroneous or excess payment that Company makes because payment of an incorrect rate, (e.g. incorporated with the fee schedule), duplicate payment for the same Physician Service, payment with respect to an individual who was not a Plan Member as of the date the Physician provides the Physician Service(s) that are the subject of such payment, or payment for any Non-covered Service”.

Comment – Is Paragraph 9 of the Participating Physician Agreement worded too narrowly? Paragraph 9 must be interpreted consistently with the definition of “overpayment” provided by section 1.51 of the Settlement Agreement. In the opinion of this writer, the wording in Paragraph 9 of the Participating Physician Agreement does not sufficiently encompass the definition of “Overpayment” in section 1.51 of the Settlement Agreement.

5. Paragraph 11E of Participating Physician Agreement. Definition of “Medical Necessity” is consistent with section 7.16(a) of the Settlement Agreement.

6. Paragraph 11F of the Participating Physician Agreement provides the following definition of “Emergency”:

"For purposes of this Agreement, the term "Emergency" shall mean a sudden onset of medical or behavioral condition manifesting itself by symptoms of sufficient severity, including but not limited to severe pain, that a prudent Member who possesses an average knowledge of medicine and health, could reasonably expect to result in placing the Member's health in serious jeopardy, serious impairment to bodily functions, serious dysfunction of any bodily organ or body part, or serious disfigurement of the Member."

Comment – The definition of "Emergency" provided by Paragraph 11F of the Participating Physician Agreement is consistent with the definition of "Emergency" provided under Article 49 of the New York State Public Health Law, except the Public Health Law uses the term "prudent lay person" rather than "prudent Member". The definition of "Emergency" is important because if there is a dispute whether emergency treatment was medically necessary, the definition of "Emergency" will control. The definition provided by Paragraph 11F must be interpreted consistently with the state law. The standard must incorporate the "prudent layperson" standard.

7. Paragraph 14 of the Participating Physician Agreement – Excellus recognizes that Physician owns the medical records Physician must make enrollee medical records available to the New York State Department of Health at no cost for purposes required by law.

Physician must provide Excellus or its designees with access on-site at Physician's practice, upon reasonable prior notice and during regular business hours, to all medical (subject to applicable confidentiality laws), billing, financial and other records related to services provided to Excellus Members. Physician must provide, at no cost to Excellus or the Member, copies of all such records to Excellus or its designees upon request.

Relevant Settlement Agreement Provision – Section 7.29(b) of the Settlement Agreement provides that Excellus must acknowledge that Physicians own their medical records. Section 7.29(b) states that Excellus has a right to receive or review medical records "only as reasonably needed" in the ordinary course for customary uses such as for disease management, patient management, quality review, quality management, claims payment, utilization review and audit purposes.

8. Paragraph 15 of Participating Physician Agreement – Acceptance of Patients – This paragraph addresses the limited right of Physician to close practice to all new Excellus Members. This paragraph appears consistent with section 7.13(d) of the Settlement Agreement.

9. Paragraph 20 of Participating Physician Agreement – Physician agrees to permit the use of his/her name in Excellus' promotional materials which list participating members of Excellus Programs.

Relevant Settlement Agreement Provision – Section 7.27 provides that Excellus must take steps to ensure that the Provider Website has the capacity to enable Participating Physicians to update their name, address, and telephone number. When Excellus is notified in writing by a Physician that such Physician is incorrectly listed, Excellus must delete any such erroneous electronic reference within ten business days.

10. Paragraph 28 of Participating Physician Agreement – requires Physician to maintain professional liability insurance in the amount of not less than \$1,300,000 per occurrence and \$3,900,000 annual aggregate. This is not an issue addressed in the Settlement Agreement. It is raised in this letter only to alert the fact that some physicians may only have \$1million/\$3 million coverage.

11. Paragraph 29 of Participating Physician Agreement – provides that Excellus may amend the Participating Agreement at any time upon 90 days prior written notice to Physician.

Paragraph 30B of the Participating Physician Agreement provides the circumstances in which the parties may terminate or Non-renew the Participating Physician Agreement.

Relevant Settlement Agreement Provision, Section 7.13(c) – While Excellus may amend the Participating Physician Agreement at any time upon 90 days written notice, Section 7.13(c) of the Settlement Agreement gives Participating Physician the right to terminate the agreement within 30 calendar days after receiving notice of a Material Adverse Change. Paragraph 30B of the Participating Physician Agreement fails to inform Physician of Physician's right to terminate the agreement upon receiving notice of a Material Adverse change.

Comment – Section 7.13(c) of the Settlement Agreement controls. Physician must review all amendments to the Participating Physician Agreement and determine if the amendment constitutes a Material Adverse Change, see definition of the term at section 1.41 of the Settlement Agreement. Keep in mind that section 7.13(c) requires physician to terminate within 30 days of receipt of notice of a Material Adverse Change.

12. Paragraph 30C of the Participating Physician Agreement – Permits Physician to terminate participation in an entire Product Line upon 30 days written notice where Physician can demonstrate that Excellus made a Material Adverse Change affecting that Product Line.

Relevant Settlement Agreement Provision section 7.13(b) "All Products Clauses"

- At the time the contract is initially signed, a Physician may decline without financial penalty participation in any entire product line;

- Excellus must permit a Participating Physician to subsequently terminate participation without financial penalty in any entire product time if Excellus makes a Material Adverse Change affecting that product line;
- Participating Physician must be notified in writing in advance of implementation of a new product line and will have the right to opt out before the product line is implemented or within 30 days of roll-out of the new product line.

According to section 7.13(c), existing product lines are: Managed Care (all gatekeeper, HMO and Point of Service programs); Indemnity, including PPO; Medicare; Medicaid Managed Care; Workers' Compensation; and special programs for low income and uninsured.

Comment – Pay attention to notices!

13. Paragraph 31 of Participating Physician Agreement – Participating Physician has right to opt out of new product line.

See above regarding section 7.13(b) of the Settlement Agreement.

#### The Settlement Agreement Controls in the Event of Inconsistency

This writer and representatives of the Milberg Weiss law firm held a telephone conference meeting with representatives of Excellus last week. We stated that we appreciated Excellus' efforts to incorporate some of the major provisions of the Settlement Agreement into the Participating Physician Agreement. However, we questioned Excellus regarding why some of the major provisions of the Settlement Agreement were not incorporated into the Participating Physician Agreement, and stated that we believed that in some instances, language included in the Participating Physician Agreement appeared to provide an overly narrow interpretation to a corresponding provision of the Settlement Agreement (as set forth in this letter). Excellus agreed that its cover letter that will accompany the Participating Physician Agreement will explain to the Physician that if there is any conflict between a provision of the Participating Physician Agreement and a provision of the Settlement Agreement, the terms of the Settlement Agreement will control. Section 7.29(d) of the Settlement Agreement states that Excellus's standard agreements must incorporate or be consistent with the commitments and undertakings Excellus has made in the Settlement Agreement. Section 7.29(d) states, "To the extent that company's existing standard agreements with Participating Physicians, Physician Groups or Physician Organizations, contain provisions inconsistent with the terms of the Settlement Agreement, Excellus must administer such agreements consistent with the terms of the Settlement Agreement.

#### Individually Negotiated Contracts

"Individually Negotiated Contract". This term is defined as "a contract pursuant to which the parties to the contract, as a result of negotiation, agreed to substantial modifications to the terms of Company's standard form agreement to individually sent the needs of a particular Participating Physician Group or Physician Organization".

Section 7.29(d) of the Settlement Agreement provides that a Participating Physician, Participating Physician Group or Participating Physician Organization may negotiate with Excellus and agree to an Individually Negotiated Contract that does not include some or all of the provisions of the Settlement Agreement. It is strongly cautioned that if a Physician seeks an Individually Negotiated Contract with Excellus, the Physician should consult private legal counsel so as not to inadvertently exclude significant rights provided under the Settlement Agreement.

As always, feel free to contact me with questions.

Nancy

-----

Nancy J. Adams  
Executive Director  
Monroe County Medical Society/American Academy of Pediatrics NY Chapter 1  
1441 East Avenue  
Rochester, NY 14610  
585-473-4072  
585-473-7641 fax  
585-729-5166 cell phone