Term and termination

When reviewing Provider Agreements I often find myself not starting at page 1 but, rather, turning the pages to find the **Term and Termination** provisions. I know it may sound cynical, but before studying the conditions set forth in the "deal" I want to know how long the payor intends the agreement to be binding, and how my client can get out if things sour.

I suggest you also consider anything to do with Term and Termination as critical for your review and negotiation. Here are the first of several "terms" you'll need to consider.

There is the **Initial Term** – the length of the deal when first signed. Most often I see agreements offered with a one-year Initial Term, but I've seen many asking the provider to agree to two, three, and even five years.

I'd be wary of any payor that digs in its heels and insists on a **first-time** agreement extending for more than one year. I believe it's not in your best interests when signing with a **new** payor to agree to more than one year, certainly not without securing a number of the protections discussed throughout this work. You should have time to test the waters to see how things play out administratively and financially. Unfortunately in the rush to get the deal done and start generating revenue, it's all too easy to lock a practice or facility into a multi-year deal. Then it may be difficult to get out if the deal is not what it seemed.

This is particularly important with capitation. Unless yours is one of the very few practices with demonstrable, profitable experience managing capitation budgets I think it's too risky to take on a multi-year Initial Term that may prove disastrous.

The second of the two "terms" is the **Renewal Term**. This is the length of time the parties consent to continue in the agreement following the Initial Term. Most agreements have an automatic renewal provision that states unless either party provides written notice of termination or non-renewal, typically 60-90 days in advance of the anniversary date, the contract will extend for another year or more under the same terms and conditions. Thus if at the end of the Initial Term things were working out OK for both parties the agreement would continue as-is for that renewal period. But if either party chose to do so it could terminate at the end of the Initial Term, or seek to amend the deal going forward.

Here are two examples.

> ***Term.*** *This Agreement shall be effective for an initial term ("Initial Term") of one (1) year(s) from the Effective Date, and thereafter shall automatically continue for additional terms of one (1) year each, unless and until terminated in accordance with this Article "XXZ.".*

Simple, straight-forward. And then here's something a little different.

> ***Term.*** *The initial term of this Agreement will commence on the Effective Date, and will continue through the last day of December of that year (the "Termination Date"). Unless otherwise terminated pursuant to Section "ABC," this Agreement will automatically renew on the Termination Date and on each two-year anniversary of such date for additional terms of two (2) years.*

So in the second example the Initial Term is actually for less than one year, but then continues with two-year renewals unless terminated by either party.

The Issue: Multi-year agreements with automatic renewals are two-edged swords. On the one hand they guarantee the practice or facility in a beneficial arrangement ongoing access to a patient population and revenue stream. However, if the agreement turns out to be a financial drain or an administrative quagmire, or if the payor unilaterally changes the deal then a multi-year term with an automatic renewal may obligate the provider to continue in a bad situation that may get even worse with time. So it's essential to closely and continuously monitor every agreement, and to know of, and act by, their respective written Notice "drop dead" dates.

For example, let's assume a January 1 anniversary date and 60 day advanced notification requirement before an automatic renewal kicks in. In that case you must complete negotiations and have any desired amendments finalized no later than October 31st (60 days in advance of the anniversary) in order to assure that the practice or facility is not automatically rolled-over into that same, perhaps unsatisfactory deal. And since it always seems to take a ridiculously long time to get any action from a payor this means it's really wise to start the negotiations process not three or four months prior to **the anniversary date** but, rather, **prior to the date by which you must give Notice.**

Possible Solutions: Payors know that an extended contract means reimbursement predictability, and it keeps everyone away from the renegotiations table for as long as possible. The key for the provider is to get some concessions that make accepting an extended arrangement worthwhile and (reasonably) safe.

If a payor suggests a multi-year deal then I recommend showing interest but certainly making it clear that you'll want guaranteed future increases ("accelerators") written into the extended contract. For example, you could ask for X% more in year two and another Y% more the following year. For capitation agreements it's beneficial to negotiate for a "re-opener" clause guaranteeing mid-contract adjustments for those times when utilization experience is some pre-negotiated amount above predictions.

I think renewals for more than one year can be great, **assuming the financial terms make sense all the way through to the end of any renewal period**, **and if after the Initial Term you're satisfied that it's been pretty easy to work with the payor** (for example, simple and accurate eligibility verification, consistently timely and accurate claims payments, easy to reach payor's staff with questions and receive answers, etc.).

Termination with-cause and without-cause

Here are two other important terms: **Termination with-cause** (for cause) and **termination without-cause**. Termination with-cause means that one party feels the other has breached the agreement to such extent that, by presenting written Notice stating the reason(s), the non-breaching party says in effect, *"You have not lived up to our understanding, we want out, and we're ending the deal very soon"* (or even immediately). So, for example, a payor might terminate with-cause if a physician lost the medical license and could no longer provide patient care, or if a facility were seriously sanctioned or lost its state credentialing. And a physician might seek to terminate with-cause if a payor consistently failed to deliver essential administrative support promised in the Provider Manual, and that failure disrupted accurate claims submission, processing, and payment.

Termination **without-cause** means that either party simply decides it doesn't want to continue. By presenting written Notice to the other party without the need to specify any reason the presenting party simply says *"We just want to end the deal as of such-and-such a date."* So, for example, a payor may decide in its "infinite wisdom" that the network is too big, and it wants to get rid of some providers. (Think of UHC drastically slashing the size of its Medicare Advantage network in 2013 but providing no reason(s) in the termination letters sent to physicians.) And a physician or facility may terminate without-cause after deciding that reimbursements were proving insufficient, and having found the payor totally unreceptive to discussing any increases. The Notice, **properly worded with your attorney's help**, would state that per such-and-such paragraph and as of such-and-such date, typically but not necessarily the anniversary date, the deal is over. *"We're outta' here!"*

And so termination without-cause is another two-edged sword, particularly if the right to get out is on short Notice, say 30 or 60 days. If things are not going well you can get out of the deal quickly, without having to suffer for months or another year or more. So that's great for you. However, a short Notice period also means the payor can unceremoniously cancel the contract and quickly separate your practice or facility from the steady revenue stream on which you counted.

Let's look at some specifics on termination and ways to protect your interests.

The Issue #1: With and without-cause termination should be options for both parties. That's equitable and appropriate. But it's not always the case. I've seen plenty of agreements where the payor has both types of termination rights but the provider does not. It's simply astonishing but not uncommon to find an agreement in which the provider is not granted the same right to terminate without-cause. So do recognize that mutual and equal rights should be a non-negotiable position for any practice or facility, and be sure to ask the payor to include such language if it's not there.

I recommend seeking protections to keep the agreement in place by reducing the chance of being terminated with-cause for a fixable breach. Of course, if a physician loses the medical license and can't legally treat patients the plan will quite reasonably terminate with-cause. That's likely not an easily fixable breach, certainly not in the short term.

However, a plan might also seek to terminate for less dramatic reasons, perhaps the practice chronically submits claims more than 60 days after the date service. Or, perhaps, your staff is using the wrong encounter codes. You may not even realize you're in violation of a payor protocol, particularly if that protocol is included in a document **Incorporated by Reference** but never delivered to the practice.

Your "breach" might be fixed easily and the deal preserved if you had the opportunity. So here's how to secure that opportunity.

Possible Solutions #1: Negotiate a **"Cure Period,"** usually 30 to 60 days, to fix an alleged breach brought to your attention by a written, with-cause termination Notice. If the issue is fixed the agreement continues as if nothing had happened. If the issue is not fixed then the agreement terminates at the end of the Notice period. But absent such a guaranteed Cure Period you have no way to maintain an agreement that could be lost for some quite innocent and unrealized violation of terms.

Here is an example pulled from a facility agreement.

> ***Breach of Agreement.*** *Except for circumstances giving rise to the Termination With Cause section, if either party fails to comply with or perform when due any material term or condition of this Agreement, the other party shall notify the breaching party of its breach in writing stating the specific nature of the material breach, and the breaching party shall have thirty (30) days to cure the breach. If the breach is not cured to the reasonable satisfaction of the non-breaching party within said thirty (30) day period, the non-breaching party may terminate this Agreement by providing written notice of such termination to the other party. The effective date of such termination shall be no sooner than sixty (60) days after such notice of termination.*

And there is this from another agreement.

***Termination for Breach**. This Agreement may be terminated at any time by either Party upon at least sixty (60) days prior written notice of such termination to the other Party upon material default or substantial breach by the other Party of one or more of its obligations under this Agreement, unless such material default or substantial breach is cured within sixty (60) days of the notice of termination; provided, however, if such material default or substantial breach is incapable of being cured within such sixty (60) day period, any termination pursuant to this Section <number> will be ineffective for the period reasonably necessary to cure such breach if the breaching party has taken all steps reasonably capable of being performed within such sixty (60) day period. Notwithstanding the foregoing, the effective date of such termination may be extended pursuant to Section <number> of this Agreement.*

And while I was working with yet another client on a different agreement an attorney suggested the following language for solidifying a Cure Period.

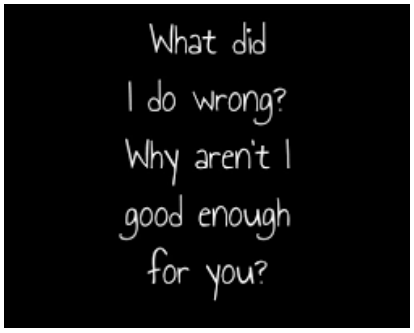
If either party fails to comply with or perform when due any term or condition of this Agreement, the other party shall notify the defaulting party of its default in writing, and the defaulting party shall have thirty (30) days to cure the default (the "Cure Period"); provided, however the Cure Period shall be extended for a period not to exceed sixty (60) days in the event the default cannot reasonably be cured prior to the expiration of the Cure Period despite the defaulting party's good faith commercially reasonable efforts to cure the default. If the default is not cured within the Cure Period, or any extension thereof, the non-defaulting party may declare, in writing and without further notice, that this Agreement is terminated.

Termination with or without-cause ("economic credentialing")

The Issue #2: Oh this can be really nasty. For economic, "political," or perceptual reasons payors may downsize panels by sending without- or with-cause termination Notices. A payor may decide that one physician is over-utilizing certain services, or is too costly, or does not see enough of the plan's Members to continue the contract. This process is often described as "economic credentialing."

Or the payor may sign a "sweetheart" deal with a hospital that results in cancellation of some/many free-standing ASC agreements in the community.

Sometimes physicians and facilities are dropped without adequate explanation or with no explanation. Again, recall United Healthcare's "evisceration" of its Medicare Advantage physician provider panels in 2013. Why? No answers provided when asked.



Typically there will be no mention of “economic credentialing” in the Provider Agreement. In some states there will be regulatory language addressing this but it may not be provider-friendly. For example, this is from an actual state regulatory appendix.

> ***Prohibited Practices – Termination:*** *<Name of payor> shall not be allowed to include clauses in physician or other Provider contracts that allow for <name of payor> to terminate the contract “without cause;” provided, however, cause shall include lack of need due to economic considerations.*

So that starts off nicely enough stating Providers can’t be dropped without-cause. But then *“…economic considerations…”* are specifically noted as an allowed reason for with-cause termination. So how might you try to protect your interests?

Possible Solutions #2: The language just described is a wide-open window to boot your practice or facility from an agreement you’d want to keep. And so if you encounter language specifically addressing or even giving the slightest hint of termination for “economic considerations” please ask your attorney if the following or something similar were inserted into the base agreement would it provide some measure of protection.

> *To the extent that <name of payor> conducts, uses or relies upon economic profiling to terminate the Agreement, <name of payor> shall make available to Medical Group on request the economic profile of Medical Group, including the written criteria by which Medical Group's performance was measured. An economic profile will be adjusted to recognize the characteristics of Medical Group's practice that may account for variations from expected costs.*

At a minimum try to include in the agreement the standards (benchmarks) by which you’d be judged individually and against other practices/facilities. Get clarification on the benchmarks a payor will use as the basis for making deselection decisions. And so that there are no surprises later on have that information inserted into the agreement or a collateral document that is **Incorporated by Reference** (and which you have in hand).