

RENDERED: FEBRUARY 6, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2013-CA-001050-MR  
AND  
NO. 2013-CA-001201-MR

KENTUCKY SPIRIT HEALTH  
PLAN, INC.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NOS. 12-CI-01373 AND 13-CI-00458

COMMONWEALTH OF KENTUCKY,  
FINANCE AND ADMINISTRATION  
CABINET; LORI FLANERY, IN HER  
OFFICIAL CAPACITY AS SECRETARY  
OF FINANCE AND ADMINISTRATIVE  
CABINET; COMMONWEALTH OF  
KENTUCKY, CABINET FOR HEALTH  
AND FAMILY SERVICES;  
AUDREY HAYNES, IN HER OFFICIAL  
CAPACITY AS SECRETARY OF THE  
CABINET FOR HEALTH AND  
FAMILY SERVICES; COMMONWEALTH  
OF KENTUCKY, DEPARTMENT OF  
MEDICAID SERVICES; AND LAWRENCE  
KISSNER, IN HIS OFFICIAL CAPACITY  
AS COMMISSIONER OF THE  
DEPARTMENT OF MADICAID  
SERVICES

APPELLEES/CROSS-APPELLANTS

OPINION  
AFFIRMING

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BEFORE: CAPERTON,<sup>1</sup> JONES, AND KRAMER, JUDGES.

JONES, JUDGE: This appeal and cross-appeal arise out of a declaratory judgment decision rendered by the Franklin Circuit Court. Therein, the circuit court determined that Kentucky Spirit Health Plan, Inc. (Kentucky Spirit) did not have a contractual right to terminate its Medicaid Managed Care Contract (Contract) with the Commonwealth of Kentucky, Finance and Administration Cabinet (Commonwealth) prior to the expiration of the initial three-year contractual term. The circuit court also determined that early termination of the Contract by Kentucky Spirit would constitute a breach triggering the liquidated damages provision.

On appeal, Kentucky Spirit argues that the circuit court incorrectly interpreted the Contract. The Commonwealth has also filed a cross-appeal asserting that it should not be limited to seeking only liquidated damages for Kentucky Spirit's unauthorized early termination. For the reasons more fully explained below, we affirm the circuit court's decision relating to the interpretation of the termination provision and applicability of the liquidated damages provision. However, we decline to address the issues presented by the Commonwealth's

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<sup>1</sup> Judge Caperton concurred in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

cross-appeal because those issues have not yet been fully addressed by the circuit court as part of any action by the Commonwealth seeking damages.

## I. BACKGROUND

### A. *The Medicaid Program & Kentucky*

"In 1965 Congress authorized the Medicaid program by adding Title XIX to the Social Security Act; the program was established 'for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.'" *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524, 528-29, 105 S.Ct. 2210, 2213, 85 L.Ed.2d 577 (1985) (quoting *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed.2d 784 (1980)). To be eligible for financial assistance under the program, states must develop plans for providing medical assistance to their residents and have those plans approved by the Secretary of the Department of Health and Human Services.<sup>2</sup> *Id.* In general, however, "the program was designed to provide the states with a degree of flexibility in designing plans that meet their individual needs." *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998).

Pursuant to regulations enacted by the Department of Health and Human Services, payment for Medicaid services must be made "directly by the State to the individual or entities that furnish the services." 42 Code of Federal Regulations (CFR) § 430.0. States, however, have discretion whether to pay for

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<sup>2</sup>In general, Medicaid benefits are available for "low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children." 42 CFR § 430.0.

care directly on a claim-by-claim basis (a fee-for-service system) or to contract with an organization that the state pays based on a monthly, fixed-fee basis per enrollee (a managed care system).<sup>3</sup> See *Appalachian Regional Healthcare, Inc. v. Coventry Health and Life Ins. Co.*, 714 F.3d 424, 426 (6th Cir. 2013).

In its inception, the Kentucky Medicaid program compensated providers under a fee-for-services system. *Id.* In March 2011, the Kentucky General Assembly authorized transitioning from a fee-for-service system to a managed care system.<sup>4</sup> In April 2011, the Commonwealth issued a request for bid

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<sup>3</sup> In examining Kentucky's transition to managed care, the Sixth Circuit Court of Appeals provided an excellent description of a managed care system versus fee-for-service system:

The theory of managed care is relatively simple. Rather than pay providers directly every time a Medicaid beneficiary receives care, the state instead contracts with managed-care organizations (MCOs) and pays them a flat “capitation rate” each month to provide, within certain limits, all of the care a beneficiary needs. The state pays the same amount regardless of whether the beneficiary receives healthcare services or not. So the MCO bears the risk that the costs of care may exceed the capitation payment. But on the other side, it stands to profit if beneficiaries use fewer services.

In exchange for receiving a capitation payment, an MCO is responsible for three principal tasks: enrolling Medicaid beneficiaries as members; forming a contracted network of healthcare providers to care for its members; and paying providers for their services. An MCO then directs its members to in-network providers, with whom the MCO has negotiated discounted rates. When members go out-of-network, they receive only limited benefits and may pay more for services.

*Appalachian Regional Healthcare, Inc.*, 714 F.3d at 426.

<sup>4</sup> Initially, Kentucky was scheduled to begin transitioning to managed care on October 1, 2011; this was subsequently changed to November 1, 2011.

proposals (RFPs) from managed care providers interested in contracting with the Commonwealth to administer Medicaid benefits to its residents.

### ***B. Kentucky Spirit***

On May 25, 2011, Kentucky Spirit submitted its response to the RFP. In June 2011, the Commonwealth awarded Kentucky Spirit and two other managed care providers contracts. After a period of negotiation, on July 6, 2011, Kentucky Spirit and the Commonwealth entered into a Medicaid Managed Care Contract (the Contract). Under the terms of the Contract, Kentucky Spirit agreed to administer Medicaid benefits to eligible Kentuckians in exchange for monthly "capitation payments"<sup>5</sup> from the Commonwealth. The Contract called for an initial three-year term (7/6/2011 - 7/5/2014) with the option to renew the Contract for four additional one-year terms (Renewal Term 1: 7/6/2014 to 7/5/2015; Renewal Term 2: 7/6/2015 to 7/5/2016; Renewal Term 3: 7/6/2016 to 7/5/2017; Final Renewal Term 7/6/2015-7/5/2016).

On October 17, 2012, Kentucky Spirit tendered notice of its intent to terminate the Contract effective at midnight on July 5, 2013, twelve months before the expiration of the Contract's initial term. Kentucky Spirit tendered its notice of intent to terminate pursuant to Section 39.13 of the Contract. That section provides:

The Contractor may terminate this Contract with notice given in accordance with the requirements of **Section**

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<sup>5</sup> The Contract defines a "capitation payment" as "the amount(s) to be paid monthly to the Contractor by the Commonwealth for Members enrolled based on such factors as the Member's aid category, age, gender, and service."

**40.13**<sup>[6]</sup> at least six (6) months but not more than twelve (12) months prior to the end of the initial term of this Contract or any renewal terms.

The Commonwealth responded that the Contract did not permit Kentucky Spirit to terminate prior to the end of the initial three-year term. The Commonwealth maintained that Section 39.13 permits Kentucky Spirit to terminate the Contract *only* upon expiration of the initial contract term or any of the first three renewal terms.

On October 22, 2012, Kentucky Spirit filed a complaint in Franklin Circuit Court seeking a declaration that Section 39.13 afforded it the right to terminate the Contract prior to the conclusion of the initial term. Thereafter, Kentucky Spirit and the Commonwealth filed cross-motions for summary judgment arguing that the plain language of the Contract supported their respective interpretations.

The parties' motions also addressed whether the Contract's liquidated damages provision, Section 39.11, was at issue in the event Kentucky Spirit's early termination was deemed to be a breach of the Contract. Kentucky Spirit maintained that the liquidated damages provision was the only method by which the parties had agreed to assess damages in the event of a breach and, therefore, was controlling. The Commonwealth argued that if Kentucky Spirit terminated the Contract under Section 39.13, it would be liable for liquidated damages equal to 10% of the Capitation Payment for each month up to the end of the initial contract

<sup>6</sup> Section 40.13 provides the method by which notices are to be delivered and the addresses where they are to be directed.

term, which the Commonwealth claimed bore "relation to the actual damage sustained." In the alternative, the Commonwealth argued that the liquidated damages provision should not apply because the Commonwealth's damages could be ascertained and, therefore, it was entitled to actual damages.

The circuit court ultimately ruled against Kentucky Spirit on the termination issue finding that the Contract did not permit termination by Kentucky Spirit before expiration of the initial term. In so doing, the circuit court first examined Section 39.13 and determined that it was unambiguous. The circuit court concluded that the only reasonable interpretation of Section 39.13 is that it required Kentucky Spirit to give notice to the Commonwealth in the event that it did not intend to renew the Contract after the fixed, initial three year term. The circuit court specifically rejected Kentucky Spirit's argument that Section 39.13 could be interpreted to allow termination before the end of the initial term. The circuit court rationalized that when Section 39.13 is examined in relation to the entire Contract it becomes clear that "the parties contemplated a transition period to phase out Kentucky Spirit and transition patients to another managed care provider." The circuit court also based its conclusion on the RFP and 200

Kentucky Administrative Regulations (KAR) 5:312.<sup>7</sup> In conclusion, the circuit court held:

The only reasonable interpretation . . . is to conclude that Section 39.13 is a notice provision, with the earliest possible termination date being the final date of the initial term of three years, July 5, 2014. Based on the plain meaning of the Contract's terms and an examination of the Contract as a whole, Kentucky Spirit does not have a right to terminate the Contract one year early under Section 39.13.

The circuit court then held that if Kentucky Spirit ceased performing its contractual duties prior to the end of the initial term, it would be in breach of the Contract, which would allow the Commonwealth to terminate the Contract due to Kentucky Spirit's default entitling the Commonwealth to liquidated damages under Section 39.11.

This appeal followed.

## II. STANDARD OF REVIEW

"Questions concerning the construction and interpretation of contractual terms are legal in nature as are questions regarding the existence of an

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<sup>7</sup> Pursuant to Section 39.14, the Contract includes:

1. The Medicaid Managed Care agreement;
2. The Appendices to this agreement;
3. The Request for Proposal and all attachments and addendums thereto, including Section 40--Terms and Conditions of a Contract with the Commonwealth of Kentucky, where applicable;
4. General Conditions contained in 200 KAR 5:021 and Office of Procurement Services' FAP1 10-10-00;
5. Any clarifications concerning the Contractor's proposal in response to the RFP;
6. The Contractor's proposal in response to the RFP. Provided however, by submitting materials in response to the RFP the Contractor has not fulfilled any obligation under this Contract to submit plans, programs, policies, procedures. Forms or documents etc. to the Department for approval as required by this Contract.



ambiguity." *Richey v. Perry Arnold, Inc.*, 391 S.W.3d 705, 709 -10 (Ky. 2012).

Accordingly, our review of the trial court's decision is *de novo*, meaning we afford no deference to the trial court's decision. *See Spot-A-Pot, Inc. v. State Resources Corp.*, 278 S.W.3d 158, 161 (Ky. App. 2009).

### III. ANALYSIS

#### A. *Guiding Principles in the Interpretation of Written Contracts*

"Under Kentucky law, an enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party." *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997). Contracts can be oral or written.<sup>8</sup> When parties undertake to reduce their agreement to a written document, we presume that the words they chose express their intent. *See Siler v. White Star Coal Co.*, 226 S.W. 102, 104 (Ky. 1920) ("The law presumes that the parties understood the import of their contract, and that they had the intention which its terms manifest.").

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention." *Jones v. Riddell*, 5 S.W.2d 1077, 1078 (Ky. 1928). In the case of a written contract, we first look to the parties' written agreement to ascertain their intent. *Muncey Coal Mining Co. v. Muncey*, 268 S.W. 293, 294 (Ky. 1925) ("Intention is to be gathered from the

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<sup>8</sup> Under Kentucky's Statute of Frauds, however, contracts requiring certain types of performance must be in writing. *See* Kentucky Revised Statutes (KRS) 371.010. Contracts that cannot be performed within a year fall with the Statute of Frauds. KRS 371.010(7); *Sawyer v. Mills*, 295 S.W.3d 79 (Ky. 2009).

words employed in the contract and not from any unexpressed mental intention which the parties may have entertained but which they did not express.").

In so doing, we attempt to divine intent from the scope of the entire agreement, not by relying simply on individual terms or phrases examined in isolation. *See Martin Oil & Gas Co. v. Fyffe*, 65 S.W.2d 686, 687 -88 (Ky. 1933) (holding that courts must "look to the entire instrument and deduce the intention of the parties from the language employed."); *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986) (recognizing that a contract "must be construed as a whole, giving effect to all parts and every word in it if possible."). Moreover, "words used in contracts are not given legal or technical meaning; rather, they are defined by the contract itself, or, absent that, by the usage of the average man and as they would be read and understood by him." *Neighborhood Investments, LLC v. Kentucky Farm Bureau Mut. Ins. Co.*, 430 S.W.3d 248, 251 (Ky. App. 2014).

After examining the contractual language as a whole, we must next decide whether the contract is ambiguous. An ambiguous contract is one that is susceptible to "more than one different, reasonable interpretation." *Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981); *see also Transport Insurance Co. v. Ford*, 886 S.W.2d 901, 905 (Ky.App.1994) (stating "[t]o determine that an ambiguity exists, the court must first determine that the contract provision is susceptible to inconsistent interpretations."). Determining whether the contract is ambiguous is a pivotal point in the process of contract interpretation. The outcome of this decision will dictate how the remainder of our interpretive

analysis will proceed, specifically whether we can rely on parol evidence to ascertain the parties' intent. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 107 (Ky. 2003).

"When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine that intent." *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006). We cannot use parol evidence to arrive at an interpretation that differs from the unambiguous terms used by the parties in their contract. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000).

If the contract is ambiguous, however, we must look outside the four corners of the agreement to determine which interpretation is most consistent with the parties' intent at the time they entered into the agreement. While nothing can be added to or taken from a written contract by parol evidence, it is the rule that ambiguities may be explained by parol evidence. *Stubblefield v. Farmer*, 291 Ky. 795, 165 S.W.2d 556, 557 (1942). Accordingly, when the contract at issue is ambiguous, we examine "the situation of the parties and the conditions under which the contract was written" to determine the parties' intent. *Frear*, 103 S.W.3d at 106.

However, we cannot consult parol evidence to make the initial determination of whether the contract is ambiguous. Moreover, we are mindful that "an otherwise unambiguous contract does not become ambiguous when a party asserts—especially post hoc, and after detrimental reliance by another party—that the terms of the agreement fail to state what it intended." *Id.* at 107.

Finally, because the Contract at issue involves the Commonwealth as a party, we are also mindful that "the rule in construing contracts to which the government is a party is to resolve all ambiguities, presumptions and implications in its favor. Where the public interest is affected, an interpretation is preferred which favors the public." *Codell Const. Co. v. Commonwealth*, 566 S.W.2d 161, 164 (Ky. App. 1977).

### **B. Is the Contract Ambiguous?**

With these guiding principles in mind, we now turn to the dispute at hand. Our ultimate goal is to discern the intended effect of Section 39.13. To reach that goal, we must first determine whether Section 39.13 is subject to more than one reasonable interpretation. While both parties maintain that the provision is unambiguous, they ascribe different meanings to it.

Section 39.13 states in full as follows:

#### **39.13 Termination by Contractor**

The Contractor may terminate this Contract with notice given in accordance with the requirements of Section 40.13 at least six months [January 5, 2014] but not more than twelve months prior [July 5, 2013] to the end of the initial term [July 5, 2014] of this Contract or any renewal terms.

Kentucky Spirit maintains that the unambiguous language of Section 39.13 is susceptible to only one reasonable interpretation: Kentucky Spirit had the right to terminate the Contract within a specified time before expiration of its initial term. Kentucky Spirit asserts that the circuit court erred in holding instead that Section 39.13 was a provision permitting Kentucky Spirit to provide notice of

nonrenewal. Kentucky Spirit focuses its argument on the word "termination" in this provision. Citing the dictionary definition, it argues that the word "terminate" means "to end formally and definitely (as a pact agreement, or contract)." Under its interpretation, Kentucky Spirit believes that it had the right to terminate all its obligations under the Contract prior to a conclusion of the initial term so long as it provided the notice required by Section 40.13 (registered mail to the Office of Procurement Services, Finance and Administration Cabinet) at least six months but not more than twelve months prior to the end of the initial term of the Contract or any renewal terms.

The Commonwealth maintains that Section 39.13 must be examined in light of the other contractual provisions. It argues that when Section 39.13 is considered in light of the entire Contract, the only logical and reasonable interpretation is Section 39.13 refers to when notice is to be given by Kentucky Spirit that it will not continue beyond the required three-year term in Section 8.1 or any renewal term, rather than when Kentucky Spirit may terminate its performance under the Contract. Thus, according to the Commonwealth, Kentucky Spirit has no right to terminate its performance before the initial term or any renewal terms end and no right to terminate its performance one year early on July 5, 2013.

The Commonwealth asserts that Kentucky Spirit's proffered interpretation is inconsistent with the Contract as a whole because it would afford the Commonwealth no right to advance notice of the termination and thus no transition or "wind down" period; ignores the totality of the RFP, the applicable

administrative regulations, and the Contract as a whole; and undermines the paramount public interest.

In resolving the parties' dispute, we will not examine Section 39.13 in isolation. We must consider Section 39.13 in light of the Contract as a whole.<sup>9</sup> Only then can we determine how the provision was intended to operate in the context of the greater Contract.

We begin with Section 8 of the Contract. It sets forth the initial contract term. Section 8.1 provides that "[t]he initial term of the contract shall be for a period of three (3) years from the Execution Date of the contract." The Contract was executed on July 6, 2011. Therefore, the initial term was set to run from July 6, 2011, to July 5, 2014. Section 8 further provides that the parties could renew the initial contract term for four additional, one-year terms. It goes on to require that "[t]he Department shall use its best efforts to commence negotiations with the Contractor for the next term of the agreement, within one hundred and eighty days (180) prior to the expiration of the current term [January 5, 2014] and propose rates at least one hundred and eighty days prior to expiration of the current term, unless the Department elects to terminate the Agreement hereunder." If the parties are not able to agree on the renewal terms prior to June 30, 2014, Section 8 requires the Contractor to "continue to provide services to

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<sup>9</sup> While we have examined the entire Contract, including those documents it incorporates by reference, we have limited our discussion to those provisions that we find most illuminating with respect to the purpose/intent of the disputed provision, Section 39.13. Where we do not discuss a section, the reader can assume that we found the omitted section of no material impact with respect to our ultimate decision.

Department for up to six (6) months after the end of the term [January 5, 2015], or until such time as any applicable 1915(b) waiver(s) expire, whichever is less." The Contract states that payment for these extended services shall be the same as the prior year adjusted up by 3% per annum.

Kentucky Spirit argues that it is clear under Section 8.1 that the Contract did not automatically renew. As such, it maintains that it is illogical to construe the term "terminate" in Section 39.13 as meaning notification of an intent not to renew. The main problem with Kentucky Spirit's argument in this regard is that while the renewal terms are not automatic, the Commonwealth is required under the Contract to take affirmative, automatic steps toward negotiating for renewal terms. Section 8 placed an affirmative obligation on the Commonwealth to begin the negotiations for the first renewal term no later than January 6, 2014. Likewise, Section 8.1 is clear that the Contract did not expire immediately upon completion of the initial term. It provided a mechanism for continuation of the contract term for up to six months after expiration of the initial term, even if the parties were unable to agree on the renewal terms.

The next set of relevant provisions is contained in Section 39 of the Contract. Sections 39.8 and 39.9 deal with the Commonwealth's right to terminate for convenience (Section 39.8) and default (Section 39.9). Section 39.10 governs obligations upon termination. Read together these three sections lay out a comprehensive scheme whereby the Commonwealth may terminate the Contract subject to certain notice provisions and continuation obligations by Kentucky

Spirit. For example, Section 39.8 of the Contract (termination for convenience) permits the Commonwealth to terminate the Contract for convenience. However, under this contractual provision, Kentucky Spirit "shall have a transition period of not less than three (3) nor more than (6) months to transition services, during which the terms and conditions of this Contract shall continue to apply." Likewise, Section 39.10 (obligations upon termination) states that the "contractor may be requested to continue in place for two additional months." Further, this section contains several continuing obligations beyond the "final notice of termination" emphasizing that Kentucky Spirit's obligation to perform cannot be ended immediately.

Having reviewed the Contract and all the incorporated documents (none of which reference a termination right for the contractor), we are convinced that the circuit court appropriately interpreted the Contract. We agree that the only logical interpretation of the disputed provision is a notification provision allowing Kentucky Spirit to notify the Commonwealth of its intent not to renew after the initial three-year terms or any subsequent renewal periods. This would effectively relieve the Commonwealth of its obligation to propose renewal terms and allow it to focus on securing another contractor. Moreover, we believe that it is important to consider how Section 39.13 would function in a renewal year term, under Kentucky Spirit's interpretation. As stated above, under Section 8.1 the Contract may be renewed at the end of the initial term for four additional one-year periods. To follow Kentucky Spirit's reasoning that it can terminate early under Section



39.13, during a renewal period, Kentucky Spirit could terminate six to twelve months into a one-year renewal period. Thus, under Kentucky Spirit's interpretation, it could renew the Contract at the end of the initial term, but then immediately terminate the Contract the same day simply because such termination would fall within this twelve-month period. This result would be absurd and render the renewal term completely illusory.

Additionally, having reviewed the entire Contract we believe that an overriding concern behind all its provisions was avoidance of any interruption of member benefits. To this end, the Contract specifies throughout the exact time periods the Commonwealth must provide notice of its intent to terminate and when such notice becomes effective. And, even where the Commonwealth has a right of immediate termination under the Contract, that right arises only after the Commonwealth has provided notice of a breach to Kentucky Spirit and provided it with an opportunity to cure. In the event Kentucky Spirit did not cure a material breach of the Contract, the Commonwealth could not only immediately terminate the Contract, it also had the right under the Contract to "directly operate the contractor's network, using the existing contractor's administrative organization to ensure delivery of care to members through the contractor's network until cure by the contractor of the breach . . . or until the successful transition of those members to fee for service Medicaid providers at the expense of the contractor."

Applying Section 39.13, according to Kentucky Spirit's interpretation, would provide it with a right of immediate termination at any time

after the two years. While Kentucky Spirit gave advance notice in this case, its interpretation of the provision would not have required it to advance notice. Furthermore, under Kentucky Spirit's interpretation it is not required to adhere to any transition period or to continue to provide services to members until the members could be transitioned to other providers. Such an interpretation is entirely inconsistent with the other portions of the Contract, which clearly contemplate an orderly and extended transition period with some prior notification by the terminating party.

In sum, having reviewed the entire Contract, we agree with the circuit court's conclusion that Section 39.13 is unambiguously a notice of non-renewal provision. We do not believe that the provision, when read in light of the Contract as a whole, can reasonably be interpreted to provide Kentucky Spirit with the right to terminate its obligations prior to the end of the initial three-year term.

### **C. Liquidated Damages**

Section 39.11 of the Contract entitled "Liquidated Damages" provides as follows:

The Contractor acknowledges and agrees that in the event this Contract is terminated prior to the end of the term, except at the convenience of the Commonwealth under Section 39.8 or for lack of funding under Section 30.17, the Department will incur substantial inconvenience and additional expenses and costs which are difficult or impossible to accurately estimate. The Contractor shall pay to the Department liquidated damages equal to ten percent (10%) of the Contractor's Capitation Payment. Such payment is to be made no later than thirty (30) days following the date of the notice

of termination. Finance and the Contractor agree that the sum set forth herein as liquidated damages is a reasonable pre-estimate of the probable loss which will be incurred by the Department in the event this Contract is terminated prior to the end of the Contract term.

The circuit court stated at the beginning of its opinion that one of the questions before it for resolution involved the damages in the event of early termination. It noted that Commonwealth sought a declaration that "if Kentucky Spirit in fact terminates its performance under the Contract prior to July 5, 2014, that it will be obligated to remit to the Commonwealth in accordance with Section 39.11 of the Contract liquidated damages [in addition to] compensating the Commonwealth by way of compensatory and special damages as well as attorney's fees." Finding that Kentucky Spirit had not yet ceased performance under the Contract, the circuit court held only that "if Kentucky Spirit were to cease performing its contractual duties before the end of the initial term, Kentucky Spirit would be breaching the Contract" providing the Commonwealth the "right to terminate the Contract due to Contractor default" and "triggering the liquidated damages provision." The circuit court did not address whether the Commonwealth would be entitled to any additional damages or limited to liquidated damages. Moreover, as the circuit court determined that no breach had yet occurred, it did not undertake a damages calculation.

We find no error in the circuit court's determination that this provision is applicable in the event of premature termination of the Contract term. The provision unambiguously states that if the Contract is terminated for any reason

other than for convenience of the Commonwealth under Section 39.8 or for lack of funding 39.17, Kentucky Spirit will be liable for liquidated damages. As there had been no termination at the time the circuit court rendered its decision, it did not address the other issues raised by the parties regarding the enforceability of this provision as an appropriate measure of damages or its applicability in the face of an authorized termination by Kentucky Spirit. Just as those issues were not properly before the circuit court when it rendered its opinion, they are not properly before us as part of this appeal. Accordingly, we leave those issues to be resolved by the circuit court at the appropriate time.

ALL CONCUR.

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