

*In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division*

In the matter of:	)	Adversary Proceeding
	)	
FIRST AMERICAN HEALTH	)	Number <u>96-2010</u>
CARE OF GEORGIA, INC.,	)	
and its wholly owned subsidiaries	)	
listed on Exhibit "A"	)	
(Chapter 11 Case Nos. 96-20188 through 96-20218)	)	
	)	
<i>Debtor</i>	)	
	)	
	)	
	)	
FIRST AMERICAN HOME	)	
HEALTH OF MICHIGAN, INC.,	)	
REVEREND WILFORD WOOD,	)	
and	)	
REVEREND ROBERT NEYOME	)	
	)	
<i>Plaintiffs</i>	)	
	)	
	)	
v.	)	
	)	
BLUE CROSS AND BLUE	)	
SHIELD OF MICHIGAN,	)	
a health care corporation	)	
	)	
<i>Defendant</i>	)	

## MEMORANDUM AND ORDER

\_\_\_\_\_ In the above matter, First American Home Health Care of Michigan (hereinafter "First American") instituted an adversary proceeding on February 28, 1996 to enjoin Blue Cross Blue Shield of Michigan (hereinafter "BCBSM") from terminating a participation agreement that exists between the parties. By order dated February 29, 1996, this Court entered a Temporary Restraining Order granting to the Plaintiff the relief sought pending further hearings in the case. The parties consented to an extension of the Temporary Restraining Order in order to afford both sides more time to prepare for trial. By virtue of 28 U.S.C. § 157(b)(2)(A), this matter is a core proceeding. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a hearing on March 28, 1996 to consider the issuance of a preliminary injunction and now makes the following findings of fact and conclusions of law.

### FINDINGS OF FACT

\_\_\_\_\_ First American Home Health of Georgia, Inc. (hereinafter "Parent") and each of its twenty-one wholly-owned subsidiaries, including Plaintiff/First American, filed for relief pursuant to Chapter 11 of Title 11, United States Code (hereinafter "the Bankruptcy Code") in this Court on February 21, 1996. Debtors remain in possession of their assets and are responsible for administration of these cases as Debtors-in-Possession pursuant to 11 U.S.C. § 1107(a).

Plaintiff First American is a home health care agency as defined in 42 U.S.C.A. § 1395x(o).<sup>1</sup> A home health care agency is a private organization primarily engaged in providing nursing and other therapeutic services at the residences of its patients. BCBSM is a non-profit hospital service and medical care corporation authorized to do business in the state of Michigan pursuant to Act 350, MCL 550.1101, et. seq.<sup>2</sup> BCBSM reimburses health care companies which provide services to its insureds.<sup>3</sup> This dispute concerns the contractual right of a First American to bill BCBSM directly; thus, the terms and conditions of the participation agreement are central to the case.

On or about November 16, 1990, First American's predecessor, ABC Home Health Services, entered into a participating home health care agency contract with Defendant, BCBSM.<sup>4</sup> The contract contains several provisions that have particular relevance to this action. In pertinent part, Articles I, IV and V, which detail the contract's coverage, service, and termination requirements, contain the following language:

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<sup>1</sup> First American is a Georgia corporation with its principal place of business in Auburn Hills, Michigan.

<sup>2</sup> BCBSM is a Michigan corporation with its principal place of business in Detroit, Michigan.

<sup>3</sup> Although BCBSM is not subject to all of the general insurance laws, the State Insurance Commissioner still exercises review over this quasi-public entity.

<sup>4</sup> The contract is dated November 16, 1990. Through their agents, First American and BCBSM signed and executed the agreement on November 19 and November 29, 1990, respectively.

## Article 1 - Coverage and Service Agreements

1. BCBSM agrees to provide Home Health Care benefits for services rendered to members of its hospital service plan who meet the eligibility requirements and receive services as provided under their contract of coverage.
2. The Participating Agency agrees to provide Home Health Care services, if available and to the extent needed, to eligible BCBSM members in accordance with the manuals of guidelines issued from time to time by BCBSM.<sup>5</sup>
5. A. Provider agrees to notify BCBSM, in writing, prior to implementation of major programmatic and administrative changes, such as, but not limited to changes in:
  - 1) name
  - 2) location
  - 3) ownership
  - 4) professional and administrative staffing
  - 5) modification or expansion of service delivery
  - 6) certification
- B. Prior notification of changes is required so that BCBSM may determine provider compliance with BCBSM qualifications and contractual specifications for each treatment site. Prior notification of major programmatic or administrative changes, such as changes in location and ownership, does not ensure continued provider approval by BCBSM. Ownership and location changes, as well as other major changes, required specific BCBSM approval for provider participation.

## Article IV - Termination

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<sup>5</sup> The contract designates ABC Home Health Services as the "Participating Agency." For the purposes of this order, the terms "ABC Home Health Services" and "First American" are interchangeable.

1. The Participating Agency may terminate this contract by delivering to BCBSM written notice of its intent to do so, and BCBSM may terminate this contract as to the Participating Agency by delivering to the Participating Agency a similar notice.
2. The notice to be given under Paragraph 1 of this Article shall be given at least sixty (60) days prior to the effective date of the termination of this contract.

On such termination date and not earlier, the liability of the Participating Agency to provide Home Health Care Services under the BCBSM Home Care Program, shall cease and terminate, provided, however, that all members who have been admitted to the Participating Agency program prior to such termination shall continue to receive benefits under their respective contracts for covered services during the period of that admission.

#### Article V - Other Provisions

1. This contract shall constitute the entire contract between the Participating Agency and BCBSM.

First American and BCBSM apparently executed agreements annually that contained identical language, and the parties stipulate that the terms of the contract that control this action are identical in substance to the language quoted above. As stated in Article 1, Paragraph 5(A) & (B), the contract required First American (1) to notify BCBSM of major programmatic or administrative changes, and (2) to receive subsequently specific BCBSM approval in order to qualify for provider participation. If First American adheres to the terms of the contract, it may bill BCBSM directly for services rendered to members of BCBSM instead of charging the patients themselves. Debtor derives approximately \$55 million

annually from the totality of its services rendered throughout the State of Michigan, of which approximately \$1 million in services is billed to BCBSM.

Over the course of the parties' relationship and pursuant to the terms of the contract (Art. 1, Para. 5-A), First American notified BCBSM intermittently of numerous administrative and staffing changes and various relocations of its central business offices. Specifically, Exhibit "2" of the complaint lists a summary of correspondence between First American and BCBSM, the Michigan Department of Public Health ("MDPH") and the United States Health Care Financing Administration ("HCFA"). The parties have stipulated that Debtor undertook no "major programmatic and administrative change" as contemplated in the contract without providing notice to one or more of the above entities.

However, as previously mentioned, Paragraph "5-B" requires subsequent BCBSM approval in order for First American to achieve provider participation. Specifically, Article 1, Paragraph "5-B" states,

. . . prior notification of major programmatic or administrative changes, such as changes in location and ownership, does not ensure continued provider approval by BCBSM. Ownership and location changes, as well as other major changes, required specific BCBSM approval for provider participation.

In that regard, BCBSM's policy is to approve all providers that receive HCFA approval.<sup>6</sup> Ordinarily, upon receipt of notification that a new location has been established for providing home health care services, HCFA institutes a "survey" to examine the physical facility from which the provider operates, the abilities of its administrative and professional staff, and the quality of its delivery of home health care services to individual patients. The survey must be performed before the location can be approved, and the survey cannot be performed until the location is actually in operation and is providing health care services to patients. Thus, as a matter of course, a provider begins operating, notifies BCBSM, incurs a survey, receives HCFA approval, and subsequently, BCBSM designates the provider as a "Participating Agency." Of course, some exposure exists for the provider which ultimately fails to receive HCFA approval; however, when HCFA grants approval, BCBSM usually reimburses providers retroactively for services rendered since the location's inception.

In many aspects, First American has been a model provider. In every instance, the corporation has given written notification to BCBSM of the opening of a new

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<sup>6</sup> See Defendant's Ex. No. 3, Letter of April 22, 1990, in which Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, states that for a provider to receive BCBSM approval there are two options: (1) "[c]omplete the qualification process for each of the above locations, which includes obtaining Medicare Certification and an affiliation agreement with a BCBSM participating hospital; or (2) [*p*]rovide evidence that the Health Care Financing Administration has issued Medicare approval of the additional location as a branch of the primary location" (emphasis supplied); see also Defendant's Ex. No. 6, Letter of February 26, 1993 (letter from Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, to Stephen L. Johnson, General Counsel for ABC Home Health Care Services, Inc.).

location. From many of those locations, First American has provided home health care services, which HCFA subsequently surveyed and ultimately approved retroactively to the opening date. Insofar as the evidence revealed at the hearing, BCBSM never has disputed that First American was entitled to reimbursement for all of the services which it rendered during the interim period between the opening of a location and its ultimate approval. However, apparently due to funding shortfalls, HCFA has fallen behind in its ability to conduct and conclude surveys in as timely a fashion as it once did, which has created a great inconvenience for First American and in many ways has led to the present conflict between the parties.

Of particular importance to this order, the evidence reveals that the parties engaged in series of oral and written communications beginning on or about September 27, 1990 and ending only days prior to the filing of the petition. The relationship commenced in the fall of 1990 as First American developed an active role in the Michigan health care industry and notified BCBSM of its intentions pursuant to Article 1, Paragraph 5(A). On October 1, 1990, BCBSM acknowledged by letter that it had received First American's notification detailing First American's recent expansion and changes to its corporate structure. Within that letter, BCBSM reviewed the contract obligations as they related to expanding providers. Of particular relevance, BCBSM stated that First American may submit claims only from approved locations, at which time only one existed.<sup>7</sup> BCBSM emphasized that,

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<sup>7</sup> See Defendant's Ex. No. 2, letter from Jane Phelan, R.N. and Credentialing Analyst BCBSM, to Sue Vanderbrink, R.N. and Regional Vice President ABC Home Health Services.

"[s]ervices rendered at other than the approved treatment location, which have been paid by BCBSM may be subject to recall of money at the time of audit."<sup>8</sup>

Similarly, responding to First American's notification of seven additional provider locations, on April 22, 1992, BCBSM wrote First American informing the provider that BCBSM will reimburse only for services from HCFA approved locations. BCBSM stated that the seven new locations were not approved to use the provider code OE869, and citing the letter of October 1, 1990, BCBSM reiterated its policy that, "[s]ervices rendered at other than the approved treatment location, which have been paid by BCBSM may be subject to recall of money at the time of audit."<sup>9</sup>

In any event, First American began billing from unapproved locations during the summer of 1992.<sup>10</sup> Apparently, the unapproved locations submitted applications for benefits using the same provider code as the approved participating agencies. BCBSM discovered this violation and by letter of July 27, 1992, terminated the provider agreement

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<sup>8</sup> Id.

<sup>9</sup> See Defendant's Ex. No. 3, letter from Jane Phelan, R.N. and Senior Credentialing Analyst BCBSM, to Lloyd R. Brubaker, Executive Vice President/Finance & Accounting for ABC Home Health Care.

<sup>10</sup> In the present matter it is uncontradicted that First American has provided home health care services from locations with respect to which no document of approval executed by BCBSM has been received.

effective September 25, 1992.<sup>11</sup> However, prior to November 20, 1992, at least six of the seven unapproved locations received HCFA approval and BCBSM rescinded its termination, although another dispute soon followed.<sup>12</sup>

On or about November 19, 1992, First American notified BCBSM that three additional offices were opening. On the following day, BCBSM responded that the additional providers were unapproved and that, "[s]ervices rendered through the above locations may not be submitted to BCBSM for reimbursement until . . . approved by BCBSM . . . . Failure to comply with the above conditions may result in termination of your BCBSM Home Health Care provider number OE 869."<sup>13</sup> On February 26, 1993, BCBSM sent a similar notice to Stephen L. Johnson, General Counsel for First American.<sup>14</sup> BCBSM concluded the letter by stating the following,

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<sup>11</sup> See Defendant's Ex. No. 4, letter from Jane Phelan, R.N. and Senior Credentialing Analyst BCBSM, to Lloyd R. Brubaker, Executive Vice President/Finance & Accounting for ABC Home Health Care.

<sup>12</sup> See Defendant's Ex. No. 6, Letter of February 26, 1993 (letter from Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, to Stephen L. Johnson, General Counsel for ABC Home Health Care Services, Inc.).

<sup>13</sup> See Defendant's Ex. No. 5, letter from Jane Phelan, R.N. and Senior Credentialing Analyst BCBSM, to Sue Vanderbrink, R.N. and Senior Vice President ABC Home Health Services.

<sup>14</sup> See Defendant's Ex. No. 6, Letter of February 26, 1993 (letter from Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, to Stephen L. Johnson, General Counsel for ABC Home Health Care Services, Inc.).

Any claims that have been paid for services rendered at any non-approved location are subject to denial and recall of money. Submission of claims for services rendered through non-approved locations is considered a violation of the agreement. Such a violation will result in termination of the agreement, rescinding of the provider code OE869, and denial of payment.<sup>15</sup>

On April 23, 1993, BCBSM again advised First American that only seven of First American's eleven provider offices were approved locations, specifically enumerating in the letter the seven approved and the four unapproved locations. BCBSM repeated verbatim the above quoted language from the letter of February 26, 1993.<sup>16</sup> On January 14, 1994, the parties once more engaged in a cycle in which First American notified BCBSM of the existence of three new providers and BCBSM in turn responded that only six of thirteen First American locations had BCBSM approval and that,

. . . any claims that have been paid for services rendered at any non-approved location are subject to denial and recall of money. Submission of claims for services rendered through non-approved locations is considered a violation of the agreement. Such a violation will result in termination of the agreement, rescinding of the provider code OE869, and denial of payment.<sup>17</sup>

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<sup>15</sup> Id.

<sup>16</sup> See Defendant's Ex. No. 7, Letter of April 23, 1993 (letter from Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, to Kathy Hodges, Senior Private Account Representative).

<sup>17</sup> See Defendant's Ex. No. 11, Letter of January 14, 1994, (letter from Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, to Gunar Christensen, Regional Vice President ABC Home Health

BCBSM further explained, as it had in the previous correspondence, that "[i]n order to obtain approval for the above locations, please submit a copy of the Health Care Financing Administration (HCFA) granting branch status or complete and return the seven enclosed qualification packets one for each location."<sup>18</sup>

Although First American was well aware that the practice of billing from unapproved locations could result in the disallowance of claims and termination of the contract, First American was led to believe through a course of dealing that HCFA approval was imminent and that BCBSM always granted retroactive approval. Accordingly, First American continued to render home health care services from all of its Michigan locations and in at least some instances billed BCBSM directly regardless of whether a location possessed HCFA approval.<sup>19</sup> Gunar Christensen, Regional Vice President, testified that First American expanded rapidly over a two-year period during calendar years 1994 and 1995 and opened approximately thirty additional locations. In every instance, First American timely notified HCFA, Michigan Department of Public Health ("MDPH"), and BCBSM of each location

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Services, Inc.).

<sup>18</sup> Id.

<sup>19</sup> First American possessed a valuable economic incentive to proceed without Medicare approval. Gunar Christensen, First American's Regional Vice President, testified that without the ability to bill BCBSM directly the company's volume would decrease forty percent and accordingly, forty percent of First American's employees would be laid off.

opening. However, in August 1995, HCFA, apparently acting on communications that it had received from MDPH, notified First American that the surveyed locations had been denied certification.

In the state of Michigan, HCFA contracts with the MDPH to perform the certification surveys and make recommendations. Thus, First American is usually surveyed by MDPH, which in turn makes a recommendation to HCFA, which then issues either a certificate of accreditation or a denial. Testimony revealed that initially MDPH responded quickly to the notifications and promptly surveyed First American's additional locations in 1994. However, in 1995, HCFA changed its policies and designated home health agency certification surveys a "low priority;" the surveys were not funded except in "very limited circumstances."<sup>20</sup> As a result, the surveys have become less comprehensive and, at times during calendar year 1995, even non-existent.

At some point MDPH apparently had disapproved of First American's corporate configuration. To rectify this problem, Christensen met with representatives from the MDPH on August 31, 1995. On September 6, 1995, Christensen, seeking closure to this extended impasse, wrote the MDPH and proposed a solution to satisfy MDPH's concerns about First American. Christensen suggested a "five parent scenario" and by letter dated

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<sup>20</sup> The State of Michigan currently is researching the possibility of affordable private-sector accreditation. See Exhibit A, attached to Summary of Plaintiff (letter from Walter S. Wheeler III, Chief Bureau of Health Systems to Kathy McMahon, Executive Director Michigan Home Health Association).

October 9, 1995, the Michigan Department of Public Health responded and stated: "[W]e will recommend to the Health Care Financing Administration - Region V, the approval of your proposal to convert your current 40 existing First American Home Care of Michigan, Inc., agencies (from a one parent, 39 branch configuration) to a five parent offices, thirty-five branch office pattern." The recommendation, although contingent on both an initial provider survey at four enumerated locations and the approval of First American's board of directors, appeared to be a positive solution for all parties.<sup>21</sup>

Unaware of First American's plans to reconfigure its corporate structure and MDPH's approval letter of October 9, 1995, BCBSM notified First American on November 21, 1995, that "BCBSM is invoking the termination clause in the Home Health Care Agreement." The letter further states:

The termination action is being taken because it has been identified that your facility is submitting claims for services rendered from non-approved locations. This contract violation was identified during the July 11 through July 21, 1995, audit by BCBSM Quality and Utilization Assessment. The audit period covered claims which were incurred and paid from second quarter 1994 through first quarter 1995.

Your agency was advised on two occasions, April 23, 1993, and January 14, 1994, that any claims which have been paid for services rendered at any non-approved locations are

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<sup>21</sup> See Complaint, Ex. No. 4 (letter from Robert C. Woll, Supervisor Licensing and Certification Division MDPH to Gunar Christensen, Regional Vice President, First American).

subject to denial and recovery of money. Submission of claims for services rendered through non-approved locations is a violation of the Home Health Care Agreement, Article 1, Section 5. Such a violation results in termination of the agreement, rescinding of the provider code and denial of payment.<sup>22</sup>

BCBSM extended the termination date to March 1, 1996, in an effort to review more thoroughly First American's situation.<sup>23</sup> As previously stated, Debtors filed for bankruptcy on February 21, 1996 effectively staying the contract's termination until resolution by this Court.

At trial, Jane Phelan, a Senior Credentialing Analyst of BCBSM, testified that the non-Medicare approved sites being operated by First American provided the basis for her recommendation of termination.<sup>24</sup> She admitted that she was not aware of any quality of care issues in the rendering of services by First American. At the time of termination, Ms. Phelan was also unaware of the contents of the October 9, 1995, letter from the Michigan Department of Public Health which contained its recommendation of Debtor's new configuration for the delivery of home health care services, even though that letter pre-dated the decision to

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<sup>22</sup> See Complaint Ex. No. 6 (letter from Terry C. Radloff, Senior Contracting Coordinator BCBSM, to Gunar Christensen, Regional Vice President, First American).

<sup>23</sup> See Defendant's Ex. No. 9, Letter of January 25, 1996, (letter from Jane Phelan, R.N. and Senior Credentialing Analyst for BCBSM, to Gunar Christensen, Regional Vice President First American Home Care, Inc.).

<sup>24</sup> Ms. Phelan also testified that she was unaware of any other home health care agency being terminated from the BCBSM program for similar problems operating out of unapproved locations.

terminate.

Ms. Phelan's file contains only one audit report concerning the services rendered by First American. This report covered a limited period of time and limited number of locations, and proposed to disallow some \$77,000 of First American's approximately \$1,000,000 in annual billings as having originated from non-approved locations. The audit letter afforded First American a forty-five day response time to the proposed recoupment of the allegedly improperly paid \$77,000, but the termination letter was mailed prior to the expiration of that forty-five day period. Ms. Phelan denied that there was any connection between the audit report and the decision to terminate. Ms. Phelan testified that First American had been a troublesome provider, and that there was a six-year history of problems with utilization of unapproved locations.

First American contends that BCBSM may not terminate the contract without justifiable cause and that in this case, no cause exists. First, Debtor claims that BCBSM's sole basis for terminating the contract was First American's alleged billing from unapproved locations, which First American contends did not occur. In support of its claim, First American cites a manual issued by BCBSM. BCBSM publishes a home health care manual and makes it available to providers such as First American in an effort to set policies and

procedures whereby providers can remain in compliance with their obligations to BCBSM.<sup>25</sup>

Under "Certification and Accreditation," Paragraph 2.3 of that manual provides as follows:

The agency must be Medicare-certified or may also be accredited by the National League for Nursing (NLN) or the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO)

(emphasis supplied). First American claims that since (1) its locations have always been approved by JCAHO during each tri-annual survey,<sup>26</sup> and (2) the contract incorporates the manuals and guidelines of BCBSM, which only require JCAHO approval, First American has not breached the terms of the agreement.<sup>27</sup> Further, First American cites CFR 488.5 (a) and (b), 488.6(a), and 488.10 in support of its argument that approval by JCAHO is the equivalent of HCFA approval.<sup>28</sup>

Second, First American contends that BCBSM's course of dealing has

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<sup>25</sup> See Plaintiff's Ex. No. 2 ("Home Health Care Program Manual"). BCBSM publishes this manual in an effort to set policies and procedures whereby providers can remain in compliance with their obligations.

<sup>26</sup> Gunar Christensen testified that all of First American's location either have oral or written JCAHO approval.

<sup>27</sup> BCBSM admits that JCAHO accreditation could be used in lieu of Medicare certification.

<sup>28</sup> Jane Phelan, Senior Credentialing Analyst for BCBSM, testified that she is not familiar with the Code of Federal Regulation provisions cited by First American.

modified the scope and terms of the contract to permit First American's practice of billing from unapproved locations. In particular, First American claims that BCBSM has been aware of the unapproved billing for at least four years and has acquiesced in its enforcement of the strict terms of the agreement. Moreover, First American notes that it is the first provider that BCBSM has terminated for the reason of billing from an unapproved location.

Finally, First American also argues that the industry course of usage recognizes this type of practice by First American and that the process of approval itself—opening a branch, providing notification, commence billing, being surveyed, and receiving retroactive approval—supports First American's claim.<sup>29</sup> In this regard, First American asserts that BCBSM knew about HCFA's failure to fund the surveys and that with this knowledge the termination of the contract is unreasonable and not permitted by the modified contract.

BCBSM disputes the claims of First American and makes two basic contentions. First, BCBSM contends that the contract is terminable at will and second that if cause is required, BCBSM has established cause by proffering evidence of First American's repeated activity of providing services from non-approved locations even after receiving numerous correspondences advising that such activities could result in termination of the contract.

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<sup>29</sup> Gunar Christensen testified that HCFA also provides retroactive approval for home health care providers.

## CONCLUSIONS OF LAW

Before commencing a substantive analysis of the merits of Plaintiff's case, this Court must first decide what choice of law rule to apply. In many instances, when a choice of law issue arises, a bankruptcy court applies the law of the forum state in which it sits. However, courts and commentators have recognized that a bankruptcy court is not bound to follow this rule. *See Woods-Tucker Leasing Corp. v. Hutcheson-Ingram*, 626 F.2d 401 (1980) (applying Texas law because that state had the most significant contacts); One commentator has suggested that,

In federal matters, where conflicts of law questions arise for determination, a federal court is not bound by the forum state's conflicts rules and can apply whatever law in its independent judgment it deems applicable to the controversy.

1A Moore's Federal Practice ¶ 0.325 (1979). The Supreme Court has even intimated that bankruptcy courts should consider applying the law of the state with the most significant contacts to the dispute when a federal law does not clearly prevail. *See Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161-162, 67 S.Ct. 237, 239, 91 L.Ed. 162 (1946); *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram*, 626 F.2d at 406. *See also Chrysler Corp. v. Skyline Industrial Services, Inc.*, 448 Mich. 113, 122, 528 N.W.2d 698, 702 (1995) ("[t]he trend nationally, however, has been to adopt the Restatement approach emphasizing the law of the place having the most significant relation with the matter in

dispute"). In the present matter, federal law clearly prevails when considering Plaintiff's burden for injunctive relief; however, it is appropriate for this Court to apply Michigan law when interpreting the terms of the contract. Both corporations have their principal place of business in Michigan and conduct most, if not all, of their transactions within the state. If it were not for the bankruptcy of the Debtor's parent company, this action, in all likelihood, would have been tried in either Michigan federal or state court. Thus, federal law establishes the requirements for a preliminary injunction and Michigan law governs the terms of the contract.

The Eleventh Circuit Court of Appeals has set out the following four requirements for the issuance of a preliminary injunctive relief:

- 1) a substantial likelihood that plaintiff will prevail on the merits;
- 2) a showing that the plaintiff will suffer irreparable harm without the relief sought;
- 3) proof that the threatened injury outweighs any harm which might result to the defendant; and
- 4) a showing that the public interest will not be disserved by granting the relief sought.

Snook v. Trust Co. of Georgia Bank of Savannah, 909 F.2d 480, 483 (11th Cir. 1990);

Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville,

Fla., 896 F.2d 1283, 1284 (11th Cir.1990). Throughout the trial, the plaintiff holds the burden of persuasion of all four requirements. *See United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir.1983). The purpose of a preliminary injunction is to maintain the status quo such that neither party incurs injury before a final adjudication of their rights. *See Gates v. Detroit & M.R. Co.*, 151 Mich. 548, 551; 115 N.W. 420 (1908). Furthermore, if a preliminary injunction would effectively grant one of the parties all of its requested relief, it should not be issued. *See Epworth Assembly v. Ludington & N.R.Co.*, 223 Mich. 589, 596; 194 N.W. 562 (1923).

1. *Plaintiff, First American, has shown a substantial likelihood of success on the merits because Defendant, BCBSM, has terminated the contract without sufficient cause.*

In regard to this requirement, the threshold issue is whether the contract at issue is terminable "at will" or requires a showing of "cause" by the party desiring to end the relationship. For the purposes of the preliminary injunction, I hold that Plaintiff has made a sufficient showing of a likelihood of prevailing at trial by demonstrating that Defendant, BCBSM, terminated the contract without sufficient cause as required by the contract.

When interpreting the provider agreement, both parties offer widely varying interpretations. Plaintiff asserts that the contract requires the defendant to have "just cause" in order to terminate the agreement. Plaintiff cites the language of the contract, the course of performance between the parties, and the usage of trade within the industry. Defendant adamantly objects to Plaintiff's contentions and asserts that the plain language of the contract

permits either party to terminate the provider agreement within sixty days. Although the arguments of both parties are well reasoned, this Court agrees with Plaintiff/Debtor.

In relevant part, Article IV, paragraphs one and two of the participation agreement, provides that,

The Participating Agency may terminate this contract by delivering to BCBSM written notice of its intent to do so, and BCBSM may terminate this contract as to the Participating Agency by delivering to the Participating Agency a similar notice.

The notice to be given under Paragraph 1 of this Article shall be given at least sixty (60) days prior to the effective date of the termination of this contract.

Article IV is captioned "termination" and the contract provides no other provisions that are related to the cessation of the contract. Defendant argues that this provision enables either party to terminate the contract at will by providing a sixty-day notice. This Court disagrees and finds the language of the contract to be ambiguous. If the contract were clear on its face, it would contain language that would expressly provide termination "for cause" or "at will." Instead, this Court is unable to discern from the provision whether the sixty-day notice is the only requirement for termination or whether this paragraph merely provides a procedure for termination once the sufficient "cause" has been determined.<sup>30</sup> Therefore, the contract is ambiguous and the Court may apply all relevant rules of construction; of course, if the language of the contract had been subject to only one logical interpretation, its plain meaning would control and the inquiry would end. See New Amsterdam Casualty Co. v. Sokolowski, 374 Mich. 340, 132 N.W.2d 66 (1965).

In light of the ambiguity within the provider agreement, it is necessary to apply the rules of contractual construction. First, ambiguities within a contract will be strictly

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<sup>30</sup> The term "at will" is a term of art usually referring to contracts between employers and employees. Although that situation is not analogous to the relationship between an insurance company and health care provider, for the purpose of convenience, the term "at will" in this order refers to the ability of one of the parties to terminate the contract without cause. See generally Thomas v. John Deere Corp., 205 Mich.App. 91, 94, 517 N.W.2d 265, 267 ("[e]mployers and employees are free to bind themselves as they wish, and 'at will' and 'just cause' termination provisions are merely extremes that lie on the opposite end of the continuum of possibilities").

construed against the drafter. *See Francis v. Scheper*, 326 Mich. 441, 40 N.W.2d 214 (1949) (insurance contract construed strictly against the insurer if it is ambiguous). Here, BCBSM drafted the provider agreement and presumably included the ambiguous terms. The parties executed agreements annually, yet no evidence was produced to show that BCBSM used these opportunities to strengthen or clarify the termination requirements. More importantly, the manner in which the parties have preformed under the contract is entitled to great weight in evidencing the meaning which the parties themselves have placed upon its intent. *See Detroit Greyhound Employees Federal Credit Union v. Aetna Life Ins. Co.*, 381 Mich. 683, 685-86, 167 N.W.2d 274 (1969). The actions of the parties during the period of performance prior to the litigation often offers the best evidence as to the true meaning and intent to the terms of an agreement. More eloquently stated,

In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself; and when the difference has become serious, and beyond amicable adjustment, it can only be settled by the arbitrament of law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.

*Topliff v. Topliff*, 122 U.S. 121, 131, 7 S.Ct. 1057, 1062, 30 L.Ed. 1110. Focusing on both parties is important to this analysis. *See William C. Roney & Co. v. Federal Insurance*

Company, 674 F.2d 587, 590 (6th Cir.1982). A practical construction necessarily includes an interpretation by one party and acquiescence by the other. See Id. at 590; Davis v. Kamer Bros. Freight Lines, 361 Mich. 371, 376, 105 N.W.2d 29 (1960). Moreover, when construing a contract, a court's paramount responsibility is to effectuate the intent of the parties. See Fox v. Detroit Trust Co., 285 Mich. 669, 677, 281 N.W.2d 399 (1938). Thus, if the intent of the parties is clearly ascertainable, it shall prevail and govern the terms of the contract regardless of which entity drafted the contract.

The facts in the present instance present a clear picture; the parties established a relationship which could only be terminated "for cause." Beginning in the Summer of 1992 and reflected throughout the numerous correspondence between the parties, BCBSM continuously threatened to terminate the provider agreement if Debtor continued to bill from unapproved locations. Specifically, the letters stated that "such a violation will result in the termination of the agreement." In its correspondence, BCBSM never stated that the contract provided for termination without cause and, instead, always chose to rely on Debtor's alleged violation as the basis for termination. The expectations of the Debtor were such that it continuously attempted to maintain compliance with the provisions of the agreement in order to avoid termination of the agreement. For purposes of this motion, this Court finds that the parties actions reflected an understanding that the provider agreement could only be terminated "for cause" and that the Defendant, BCBSM, may not unilaterally terminate this

contract without cause.<sup>31</sup>

Here, Debtor has shown a substantial likelihood of success on the merits because Defendant, BCBSM, has terminated the contract without sufficient cause. Of primary importance to this determination, Debtor has shown that each provider location had JCAHO approval at all times, either oral or written and that BCBSM's own manual recognizes JCAHO approval as a type of certification or accreditation. Alternatively, because the course of performance over the life of the contract has been that services provided from unapproved locations have always been retroactively approved, because the delay in obtaining HCFA approval is beyond the control of the Plaintiff, and because the Plaintiff timely advised BCBSM of all new locations, I find that, for the purposes of this order billing from locations without HCFA approval does not constitute "for cause."

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<sup>31</sup> Because of this holding, it is not necessary to address (1) whether BCBSM has committed waiver by estoppel, See Allstate Insurance Company v. Snarski, 174 Mich.App. 148, 435 N.W. 408, or (2) whether the special relationship that exists between an insurer and health care provider creates an implied duty of good faith and fair dealing within the contract. See Harper, M.D. v. Healthsource New Hampshire, Inc., 674 A.2d 962 (N.H. 1996); Sanus/New York Life Health Plan, Inc. v. Dube-Seybold-Sutherland Management, Inc., 837 S.W.2d 191 (Tex. Ct. App. 1992). Additionally, in Michigan, the rule of construction that an agreement for an indefinite term is terminable at the will of either party applies when there is no provision concerning the term or duration of the agreement, but not in this case where the agreement, although of uncertain duration, specified the manner of termination, i.e., with notice and sixty days in advance. See Lichnovsky v. Ziebart International Corporation, 414 Mich. 228, 324 N.W.2d 732 (1982).

2. *Irreparable harm will result if the relief sought by the Debtors is not granted because the Debtors will be unable to continue to operate.*

A preliminary injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. See Niedzialik v. Barbers Union, 331 Mich. 296, 300; 49 N.W. 273 (1951); Van Buren School District v. Wayne Circuit Judge, 61 Mich. App. 6, 20; 232 N.W.2d 278 (1949). The irreparable harm in this case clearly outweighs any inconvenience or potential harm to the Defendants. As mentioned earlier, Debtor derives approximately \$55 million annually from the totality of its services rendered throughout the State of Michigan, of which approximately \$1 million in services is billed to BCBSM. While the percentage of Debtor's business attributable to BCBSM is relatively small, Debtor's inability to accept BCBSM patients for direct billing will have a substantial and adverse impact on its total operation. This is true because the home health care business is heavily dependent upon referral sources such as hospitals, nursing homes, and private physicians. The knowledge that BCBSM terminated First American as a direct billing provider, if generally known, potentially will impact the number of referrals First American receives adversely for two reasons. First, although First American apparently could continue to render the services and direct bill these patients who could then seek reimbursement by BCBSM, the additional inconvenience and uncertainty of such a billing and reimbursement arrangement would be unacceptable to many patients and therefore to their primary physicians and others who would likely find another provider for home health care services. Second, while the termination might be characterized in one sense as the result of a contractual dispute and unrelated to any quality of care issues, the specter looms that the public generally might

assume that the termination reflected adversely on the quality of care being delivered. For both reasons, the damage to First American's business is likely to be substantial.

3. *The threatened injury to First American far outweighs any harm that may result to the Defendants.*

If the relief sought by Debtor is not granted, the Debtors are out of business, its employees will be out of work, and patients who require home health services will be without, at least temporarily, needed home health care services. Conversely, the potential harm to the Defendants, if any, is completely pecuniary, does not affect people's health and well-being, is less immediate in effect, and more easily corrected at a later date than the sudden termination of health care services to infirm, disabled, or poor people. Additionally, BCBSM has always permitted retroactive approval of services rendered from unapproved locations that subsequently receive HCFA certification; thus, the possibility exists that a preliminary injunction would cause BCBSM only minimal harm, if any.

4. *The public interest will be best served by granting the relief sought.*

Finally, the public interest will not be disserved by granting the relief sought. Home health care services ensure that predominantly Medicare beneficiaries that have serious health conditions are monitored, have their wounds cleaned and dressed, have their catheters changed, are provided with physical therapy, administered sometimes life-sustaining medications, and otherwise given treatment necessary to maintain health and life. In some areas, no other home health care provider exists which could immediately substitute for the

Debtors and assume these responsibilities. While the public has an interest in insuring that patients receive adequate and qualified home health care, the issues in this case concern billing procedures rather than quality of care. Thus, the public's need for the continuation of First American far outweighs any speculation that inadequate quality of care exists.

Finally, the status quo which will be preserved by a preliminary injunction is the last actual, peaceable, non-contested status which preceded the pending controversy. Steggles v. National Discount Corp., 326 Mich. 44, 51; 39 N.W.2d 237 (1949); Van Buren School District v. Wayne Circuit Judge, 61 Mich. App. at 20; 232 N.W.2d at 237. Thus, the parties are ordered to continue their relationship and maintain a status quo substantially similar to the procedures and billing practices that were in place prior to the commencement of this litigation.

#### ORDER

Pursuant to the foregoing memorandum, IT IS ORDERED that a preliminary injunction issue prohibiting Defendant from any act to enforce its termination notice contained in the letter dated Nov. 21, 1995, or issuing any termination or modification of the agreement or Plaintiffs rights thereunder, without further order of the Court. A hearing to consider final injunctive relief will be scheduled upon the close of discovery.

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Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of July, 1996.