

COPY

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

KATHLEEN PAPA
38936 Forest Run
Oconomowoc, WI 53066

CASE NO. 15CV02403

CASE CODE NO. 30701

PROFESSIONAL HOMECARE PROVIDERS, INC.
W8145 Long Lake Dr.
Clintonville, WI 54929

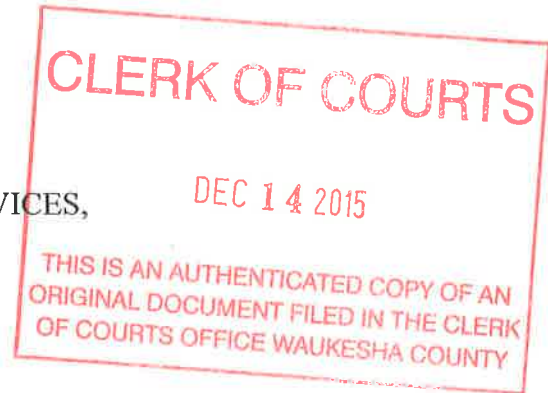
FOSTER

Plaintiffs,

-vs-

WISCONSIN DEPARTMENT OF HEALTH SERVICES,
1 West Wilson Street
Madison, WI 53703

Defendant.



SUMMONS

THE STATE OF WISCONSIN, to each person named above as a Defendant:

YOU ARE HEREBY NOTIFIED that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written Answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard any answer that does not follow the requirements of the statutes. The Answer must be sent or delivered to the Waukesha County Courthouse, 515 W. Moreland Boulevard, Waukesha, Wisconsin, and to the Plaintiffs' attorneys, von Briesen & Roper, s.c., Three South Pinckney Street, Suite 1000, Madison, WI 53703. You may have an attorney help or represent you.

If you do not provide a proper Answer within forty-five (45) days, the Court may grant a judgment against you for the award of money or other legal action requested in the Complaint and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 10th day of December, 2015.

von BRIESEN & ROPER, s.c.

By: 

Diane M. Welsh

Wisconsin State Bar No. – 1030940

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Wisconsin State Bar No. – 1065868

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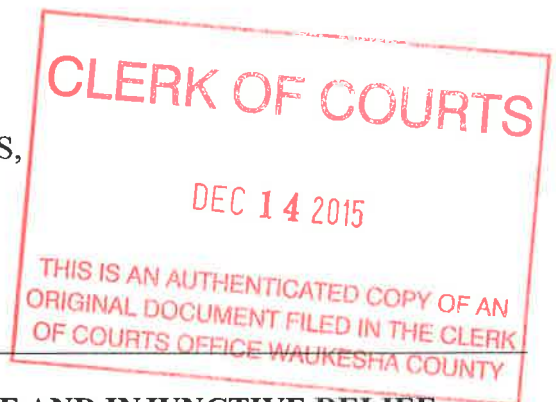
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Defendant.



COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

NOW COME the Plaintiffs Kathleen Papa and Professional Homecare Providers, Inc., by and through their attorneys, von Briesen & Roper, s.c., and hereby assert a complaint for declaratory judgment and injunctive relief, pursuant to Wis. Stat. § 227.40(1), *et seq.*, challenging the validity of Defendant Wisconsin Department of Health Services' statement of general policy regarding Medicaid reimbursement, and allege as follows:

PRELIMINARY STATEMENT

1. Kathleen Papa, R.N. and other members of Professional Homecare Providers, Inc. are certified Medicaid providers who work as nurses in independent practice, providing in-home care to children and adults with complex medical needs, permitting these individuals to live in their homes, instead of institutions. The nurses provide services to Medicaid enrollees for which the nurses obtain reimbursement from the Wisconsin Medicaid Program. The nurses bring this

action for declaratory judgment and injunctive relief under pursuant to Wis. Stat. § 227.40(1), *et seq.* and the equitable powers of the Court, challenging the validity of Defendant Wisconsin Department of Health Services’ (“DHS”) “statement of general policy” upon which DHS relies to seek recoupment of monies paid to independent nurses for Medicaid-covered services the nurses actually provided, merely because post-payments audits have found that the services or documentation fail to meet any single one of numerous, evolving requirements set forth in federal and state law, updates issued by DHS, the online Medicaid Handbook, as well as other standards deemed relevant by individual auditors in DHS’s Office of the Inspector General (“OIG”). Plaintiffs recognize—and support—the legal authority of OIG’s efforts to prevent, detect, and end fraudulent billing by Medicaid providers or recipients; however, Plaintiffs bring this action because the DHS policy and practice of extracting money from Medicaid providers who provide quality healthcare services to Medicaid enrollees, through post-payment audits, based on mere imperfections, does not further the OIG’s efforts to fight fraud. Rather, the policy and practice deprives providers of monies they are entitled to retain, is inconsistent with State Statutes governing Medicaid, is inconsistent with state and federal constitutions, and was not properly promulgated as an administrative rule.

PARTIES

2. Plaintiff Kathleen Papa is an adult citizen of the State of Wisconsin residing at 38936 Forest Run, Oconomowoc, Wisconsin. Ms. Papa is a Medicaid certified nurse in independent practice in the State of Wisconsin who provides in-home nursing services to Medicaid enrollees for which she obtains reimbursement from Medicaid.

3. Plaintiff Professional Homecare Providers, Inc. (“PHP”) is a Wisconsin corporation organized and licensed to do business in the State of Wisconsin with its principal

offices located at W8145 Long Lake Drive, Clintonville, Wisconsin. PHP is a non-profit professional organization for Wisconsin independent nurses whose members reside throughout Wisconsin and include certified Medicaid providers who provide in-home nursing services to Medicaid enrollees for which the members obtain reimbursement from Medicaid.

4. Defendant Wisconsin Department of Health Services (“DHS”) is an independent agency of the State of Wisconsin, as that term is defined in Wis. Stat. § 227.01(1), created under Wis. Stat. § 15.19, with its principal offices at 1 West Wilson Street, Madison, Wisconsin. DHS is responsible for and administers the Medicaid program in the State of Wisconsin, pursuant to Wis. Stat. § 49.45.

JURISDICTION AND VENUE

5. Pursuant to Wis. Stat. § 227.40(1), Waukesha County Circuit Court has jurisdiction over the subject matter of this proceeding and is a proper venue for this action because Plaintiff Kathleen Papa is a resident of Waukesha County.

BACKGROUND FACTS

6. Medicaid is a health care program, pursuant to 42 U.S.C. §§ 1396 *et seq.*, for eligible low-income adults, children, pregnant women, elderly adults and persons with disabilities, funded by the federal government and the states and administered by the states.

7. DHS administers the State of Wisconsin’s Medicaid program.

8. Medicaid providers enter into a contract with DHS to provide healthcare services to eligible Medicaid enrollees and to be paid for those services.

9. Plaintiff Papa and Plaintiff PHP’s members are Medicaid certified nurses in independent practice who provide home-based nursing care to children and adults with complex health needs. But for the availability of the private duty nursing provided by Plaintiff Papa,

Plaintiff PHP's members, and other independent nurses like them, many of these children and adults would be unable to remain in their own homes and would face living in institutions, with the cost of that care covered by Wisconsin Medicaid.

10. Plaintiff Papa and Plaintiff PHP's members are certified Medicaid providers who have billed the Medicaid program within the past five years for covered Medicaid services they have provided to Medicaid enrollees.

11. Medicaid reimbursement paid to Medicaid providers becomes the Medicaid providers' private property.

12. DHS may audit Medicaid providers up to five years after payment was made, to verify actual provision of Medicaid services and the appropriateness and accuracy of claims.

13. OIG is responsible for conducting audits of Medicaid providers.

14. All Medicaid providers who have billed Medicaid within the past five years, including Plaintiff Papa and Plaintiff PHP's members, have the potential to be audited by OIG. Many PHP members have already been the subject of OIG audits.

15. DHS has a "statement of general policy" that DHS may recoup payment from Medicaid providers for covered services that have been provided, and for which Medicaid has reimbursed, if a post-payment audit finds that the services fail to meet *all* applicable program requirements. Attached hereto as Exhibit A is a true and correct copy of DHS's "statement of general policy."

16. The OIG interprets this "statement of general policy" to mean that if an otherwise-covered service fails to meet any single one of the numerous requirements set forth in federal and state law, Medicaid Provider Updates issued by DHS, the online Medicaid Handbook, as well as other standards deemed relevant by individual OIG auditors, then the

service becomes a “non-covered service” and DHS is entitled to recoup all monies paid for the service.

17. During OIG audits of Plaintiff PHP’s members, OIG has applied its “statement of general policy” and has sought recovery of Medicaid funds paid for services that had, in fact, been provided, merely because the OIG auditors found some aspect of noncompliance with either a Medicaid Provider Update, the online Medicaid Provider Handbook, a provision of the Administrative Code or other standards deemed applicable by an OIG auditor.

18. Medicaid Provider Updates, the online Medicaid Provider Handbook, and certain other standards upon which the OIG auditors have relied are not promulgated as rules by DHS.

19. Medicaid Provider Updates, the online Medicaid Provider Handbook, and certain other standards upon which the OIG auditors have relied are not always consistent with each other and are not always consistent with Wisconsin Statutes governing the Medicaid program.

20. The online Medicaid Provider Handbook may be amended at any point in time by DHS.

21. DHS does not have a policy or practice to affirmatively notify Medicaid-certified providers of all applicable changes.

22. The OIG auditors’ findings of noncompliance generally do not call into question whether the healthcare services were actually provided.

23. The OIG auditors’ findings of noncompliance generally do not call into question whether the Medicaid enrollee received healthcare services which the enrollee was entitled to receive.

24. OIG auditors have alleged that services provided by Plaintiff PHP’s members were “non-covered services” due to alleged documentation shortcomings, resulting in

“overpayments” that, at times, constitute everything the PHP member was paid for weeks, months, or even years at a time.

25. OIG has demanded amounts exceeding \$100,000 from individual nurses for care that OIG does not dispute was provided for the benefit of Medicaid enrollees, following OIG’s authorization to provide the services.

26. Relying on this “statement of general policy,” OIG auditors have claimed that nurses should pay back all of their earnings for entire shifts or for the entire timeframe covered by the audit, for failing to submit their claims to the Medicaid enrollee’s employer-based health plan, even where it has previously been established that the employer-based health plan would not cover the service and OIG has authorized the care and Medicaid has paid the claims.

27. Relying on this “statement of general policy,” OIG auditors have sought to recoup funds from Medicaid-certified nurses because the nurse provided extra care, above and beyond what was on the Plan of Care.

28. Relying on this “statement of general policy,” OIG auditors have claimed that Medicaid-certified nurses must pay back their earnings for entire shifts of work because a physician did not timely sign and return a written order to the nurse, after the nurse relied on a verbal order to administer necessary healthcare to a patient.

29. PHP members who have been audited have had to invest significant time and resources, including attorneys’ fees, in order to rebut OIG’s findings and recoupment attempts.

30. DHS’s “statement of general policy” has resulted in significant financial burdens on Medicaid providers, such as Plaintiff PHP’s members. In some cases, OIG’s efforts to recoup funds have caused providers to declare bankruptcy, refrain from providing Medicaid services in the future, or both.

31. DHS's "statement of general policy" interferes with or impairs and threatens to interfere with or impair, the legal rights and privileges of Plaintiff Papa and Plaintiff PHP's members.

32. Plaintiffs dispute DHS's "statement of general policy" and DHS's interpretation of state laws and administrative regulations regarding the circumstances under which the State of Wisconsin may recoup Medicaid payments made to Medicaid providers for covered services.

33. An actual controversy exists among the parties regarding their respective rights, obligations, and legal authority in connection with DHS's "statement of general policy" regarding recoupment of Medicaid payments.

CLAIM ONE FOR DECLARATORY RELIEF

34. Plaintiffs reallege each allegation in paragraphs 1 through 33 and incorporate the same by reference.

35. DHS's "statement of general policy" is a "rule" within the meaning of Wis. Stat. § 227.10 that must be promulgated.

36. DHS's "statement of general policy" has not been promulgated as required by Wis. Stat. § 227.10.

37. DHS did not comply with the requirements set forth in Wis. Stat. § 227.114, in advancing this "rule" which has an effect on small businesses, including many of Plaintiff PHP's members.

38. Unless enjoined by this Court, DHS intends to seek to recoup payments from Plaintiffs and other Medicaid-certified providers for covered Medicaid services, if the OIG auditors determine that the provider failed to meet any one of the program requirements deemed to be relevant by OIG auditors.

39. Unless enjoined by this Court, DHS intends to administer policies and rules that were not promulgated as required by Wis. Stat. § 227.10.

CLAIM TWO FOR DECLARATORY RELIEF

40. Plaintiffs reallege each allegation in paragraphs 1 through 39 and incorporate the same by reference.

41. DHS's "statement of general policy" is inconsistent with Chapter 49 of the Wisconsin state statutes and chapters DHS 107 and 108 of the Administrative Code, which limit the circumstances under which recoupment of Medicaid payments is permitted.

42. The Wisconsin Legislature has only authorized DHS to recover Medicaid payments from Medicaid providers if it cannot be verified that the services were provided or that the amount claimed was appropriate or accurate.

43. Where the services have actually been provided and the value of payment can be verified, DHS lacks statutory authority to recover payments.

44. The Wisconsin Legislature has not authorized DHS to recover funds from Medicaid providers due to imperfect or imprecise documentation or any variation from the variety of evolving standards upon which OIG auditors rely.

45. DHS's "statement of general policy" that any compliance imperfection causes the services to be "non-covered" and therefore an "overpayment" has no basis in regulation or statute.

46. Per Wis. Stat. § 227.10(2), DHS does not have the authority to promulgate rules that authorize or facilitate the violation of Wisconsin statutes. Any such rule or policy is in excess of DHS's authority.

47. Per Wis. Stat. § 227.40(4)(a), the Court shall declare a rule invalid if it “exceeds the statutory authority of an agency” or if the rule was promulgated “without compliance with statutory rule-making.”

48. Unless enjoined by this Court, DHS intends to seek to recoup payments from Plaintiffs and other Medicaid-certified providers for covered Medicaid services, if the OIG auditors determine that the provider failed to meet any one of the program requirements deemed to be relevant by OIG auditors, even if this practice is inconsistent with Wis. Stat. § 49.45 and provisions of the Wisconsin Administrative Code.

49. Unless enjoined by this Court, DHS intends to administer policies and rules that exceed its authority by authorizing and facilitating violations of Wisconsin State Statutes, including, but not limited to, Wis. Stat. § 49.45, and administrative code provisions.

CLAIM THREE FOR DECLARATORY RELIEF

50. Plaintiffs reallege each allegation in paragraphs 1 through 49 and incorporate the same by reference.

51. Plaintiff Papa and Plaintiff PHP’s members provide healthcare services to Medicaid enrollees with the expectation that they will be reimbursed for the provision of those services.

52. In entering into the Medicaid Provider Agreement with DHS, providers do not have an understanding that DHS could order a provider to repay monies earned due to an OIG auditor’s finding of any minor imperfection or any aspect of noncompliance with any asserted program standard, for up to five years after payment was made.

53. Medicaid reimbursement paid to Medicaid providers becomes the providers’ private property.

54. DHS's "statement of general policy" violates Art. I, §§ 1 and 13 of the Wisconsin Constitution and United States Constitution Amendment V, as incorporated against the States by Amendment XIV, which require due process of the law and prohibits government taking of private property for public use, without just compensation.

55. DHS does not have the authority to promulgate rules that authorize or facilitate the violation of the guarantees provided for in the Wisconsin Constitution and the United States Constitution. Any such rule or policy is in excess of DHS's authority.

56. Unless enjoined by this Court, DHS intends to seek to recoup payments from Plaintiffs and other Medicaid-certified providers for covered Medicaid services, if the OIG auditors determine that the provider failed to meet any one of the program requirements deemed to be relevant by OIG auditors.

57. Unless enjoined by this Court, DHS intends to administer policies and rules that exceed its authority by authorizing and facilitating violations of the Wisconsin Constitution and the United States Constitution.

REQUEST FOR RELIEF

Plaintiffs therefore request that the Court issue an Order:

1. For a stay, a temporary injunction, or both prohibiting DHS from seeking to recoup payment from Plaintiff Papa and Plaintiff PHP's members for Medicaid-covered services the Plaintiffs provided on the grounds that there may be minor imperfections or imprecision in documentation or any variation from the stated standards that lead OIG personnel to conclude that the services fail to meet *all* program requirements, until this action is finally decided;

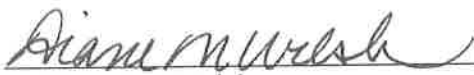
2. For Judgment declaring that DHS's "statement of general policy" violates Wisconsin State Statutes and provisions of the Wisconsin Administrative Code regarding the administration of Medicaid;

3. For a permanent injunction prohibiting DHS from seeking to recoup payments from Plaintiffs for covered Medicaid services they provided due to minor imperfections or imprecision in documentation or any variation from the stated standards; and

4. For such other relief as the Court deems just and appropriate.

Dated this 10th day of December, 2015.

von BRIESEN & ROPER, s.c.

By: 
Diane M. Welsh
Wisconsin State Bar Number 1030940
Nathan S. Fronk
Wisconsin State Bar Number 1065868
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Program Name: BadgerCare Plus and Medicaid

Handbook Area: Personal Care

03/24/2015

Covered and Noncovered Services : Covered Services and Requirements

Topic #66

Program Requirements

For a covered service to meet program requirements, the service must be provided by a qualified Medicaid-enrolled provider to an enrolled member. In addition, the service must meet all applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

