STATE OF WISCONSIN CIRCUIT COURT BRANCH 12 WAUKESHA COUNTY

KATHLEEN PAPA, et al.,

Plaintiffs,

v. Case No. 15-CV-2403

WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY PENDING APPEAL

INTRODUCTION

This motion seeks a stay of this Court's September 27, 2016, Order (September Order), of this Court's Orders issued on March 23 and 24, 2017 (the Order for Supplemental Relief, and the Order for Costs and Attorney Fees), and of this Court's Judgment entered on April 3, 2017, pending defendant's appeal to the Court of Appeals. The September Order declared that, when auditing certain providers of Medicaid services, the Department of Health Services (DHS) improperly sought recoupment of Medicaid funds under what the Court characterized as a "Perfection Rule" that was enforced as a rule without being promulgated under Wis. Stat. Chapter 227. The September Order also declared that DHS exceeds its authority by seeking recoupment in circumstances where the documentation shows that services were actually provided, but where there are allegedly minor errors in paperwork or other documentation requirements.

The Order for Supplemental Relief enjoined the defendant from: (1) issuing a notice of intent to recoup Medicaid funds from a Medicaid provider; or (2) proceeding with any agency action (including any administrative proceedings) in which the defendant "seeks to recoup Medicaid payments from a Medicaid provider, "if the provider's records verify that the services were provided and the provider was paid an appropriate amount for such services, notwithstanding that an audit identified other errors or noncompliance with Department policies or rules."

The Order for Costs and Attorney Fees directed the defendant to pay the plaintiffs' costs and attorney fees associated with bringing the motion for supplemental relief, and ordered the defendant to pay the sum of $25,284.50 to the plaintiffs' attorneys within 30 days of the Court's March 24, 2017, Order.

Defendant DHS has appealed all of the above-referenced orders. For the reasons that follow, DHS respectfully requests that the Court stay all of the above-referenced orders pending resolution of the defendant's appeals in this matter.

BACKGROUND

The plaintiffs, who include a nurse (Kathleen Papa) and an organization of nurses who provide contracted services to Medicaid recipients (Professional Homecare Providers, Inc.), sought declaratory and injunctive relief in a Wis. Stat. § 227.40 action regarding "Topic #66" in DHS's Medicaid Provider Handbook. The background for this litigation is as follows.

A person who is eligible for assistance under Medicaid can obtain an authorization to receive certain nursing services. Once the authorization is granted,

the recipient retains a certified nurse or nursing provider to provide the authorized services. The nurse or nursing provider then bills Medicaid for the services provided.

Medicaid expenditures in Wisconsin total more than $7 billion per year. There are more than 70,000 certified Medicaid providers in Wisconsin, and more than one million people receive assistance under Medicaid. Federal law requires that 90% of the claims for payment for Medicaid services must be paid within 30 days; thus, there is virtually no opportunity for pre-payment verification of the appropriateness or accuracy of Medicaid providers' billings.

DHS (via OIG) is authorized to conduct audits of Medicaid billings, and usually does so in response to a complaint or a concern that certain services are not being provided, are being overbilled, or are not being provided in accordance with the relevant state or federal regulations. These audits may take place months or years after the date of billing for services. Therefore, accurate record-keeping by providers is a critical element for ensuring that all services billed for were, in fact, provided and were appropriate and authorized under the law.

In certain circumstances, these audits may result in DHS seeking recoupment of funds paid to providers. The plaintiffs alleged in their briefs, but not in their complaint (and the Court so found) that DHS, when conducting such audits, employs a "perfection rule" in the form of Topic #66 in its Medicaid Provider Handbook, by which it seeks recoupment from providers based on allegedly minor

imperfections in their records.[1] The plaintiffs asked the court for declaratory relief to bar DHS from seeking recoupment based on allegedly minor imperfections in record-keeping, when, according to the plaintiffs, there is no question as to whether the services have been provided.

DHS denied that Topic #66 is an unpromulgated rule or that it employs a "perfection rule" and asserted that its auditing practices were in accordance with the relevant statutes and administrative rules. DHS's position is that a key tool for determining whether services have been properly provided (and whether they have been provided in accordance with the relevant regulations, including being medically necessary) is the documentation provided by a nurse or nursing service in the course of an audit. If such documentation is missing or incomplete, it makes verification of the provision of appropriate services more difficult.

Following briefing and oral argument, the Court entered the September Order, in which it found, *inter alia*, the following:

- DHS's Topic #66 and recoupment policy constitute a "Perfection Rule" and, as applied to the Plaintiffs in this case and other providers of Medicaid-authorized care, has been enforced as a rule by the Department without being properly promulgated under Wis. Stat. Chapter 227;

- DHS exceeded its authority in enforcing an unpromulgated rule to recoup payments from providers for non-compliance with program requirements, where the services were actually provided and the payment was appropriate and accurate for the type of service;

(September Order at 4-5).

[1] None of the nurses who provided affidavits in support of plaintiffs' motion for summary judgment alleged that they had been required to repay funds pursuant to an audit by DHS.

The Court enjoined DHS from employing a "perfection rule" when auditing Medicaid providers, and held that DHS may only recoup payments from Medicaid providers where: "(1) the Department is unable to verify from a provider's records that a service was actually provided; or (2) an amount claimed was inaccurate or inappropriate for the service that was provided." (September Order at 6, ¶ A.)

STANDARD OF REVIEW

A stay pending appeal is appropriate where the moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995), citing *In Re Marriage of Leggett v. Leggett,* 134 Wis. 2d 384, 385, 396 N.W.2d 787, 788 (Ct.App. 1986).

These factors are not prerequisites but rather are interrelated considerations that must be balanced together. *Gudenschwager*, 191 Wis. 2d at 440 (internal cite omitted). In this matter, the factors relevant to issuance of a stay pending appeal all support the granting of a stay of the Court's orders.

ARGUMENT

The *Gudenschwager* factors support the granting of a stay of the Court's orders.

I. DHS has the requisite likelihood of success on appeal.

A. DHS has the requisite likelihood of success on appeal of the Court's September Order.

A stay of the Court's September Order is warranted under the first factor because DHS has a likelihood of success on the merits of the appeal. Under this factor, the movant need only demonstrate more than a mere possibility of success:

> Bearing in mind that the motion for a stay, in most instances, is addressed to the very individual who has just made the rulings the appellant is challenging on appeal, it is not to be expected that a circuit court will often conclude there is a high probability that it has just erred. However, that is not required for a stay of a judgment granting or denying an injunction . . . The "movant need not always establish a high probability of success" on appeal, but it must be more than a "mere possibility."

Scullion v. Wisconsin Power & Light Co., 2000 WI App 120, ¶ 18, citing *Gudenschwager*, 191 Wis. 2d at 441 (internal cite omitted). Here, DHS has more than a mere possibility of success on the merits of the appeal for the following reasons.

1. The plaintiffs' Wis. Stat. § 227.40 rule challenge fails from the outset because a portion of a Medicaid handbook is not a "rule."

The Wisconsin Supreme Court has held that guidance found in a Medicaid handbook is not a "rule." Plaintiffs brought an action pursuant to Wis. Stat. § 227.40 challenging the validity of DHS's "statement of general policy" found in its Medicaid Provider Handbook as Topic #66. But plaintiffs' declaratory and injunctive relief claims must fail because this section of the handbook is not a "rule" in the first instance. It "simply recites policies and guidelines, without attempting to

establish rules or regulations.'" *Tannler v. Wis. Dep't of Health & Soc. Servs.,* 211 Wis. 2d 179, 187-88, 564 N.W.2d 735 (1997).

Wisconsin Stat. § 227.01 defines "rule:"

> "Rule" means a regulation, standard, statement of policy or general order of general application which has the effect of law and which is issued by an agency to implement, interpret or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency . . . .

Wis. Stat. § 227.01(13). A "rule" for purpose of ch. 227 is: "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118 (quoting *Citizens for Sensible Zoning, Inc. v. DNR,* 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

The Wisconsin Supreme Court has already distinguished "rules" that are subject to the administrative rulemaking requirements from Medicaid policies and guidance. In *Tannler,* the court squarely held that the latter are *not* subject to ch. 227 rulemaking:

> [DHS] may use policies and guidelines to assist in the implementation of administrative rules provided they are consistent with state and federal legislation governing [Medicaid]. As long as the document simply recites policies and guidelines, without attempting to establish rules or regulations, use of the document is permissible. [DHS]'s *[Medicaid] Handbook* is a policy manual that is consistent with controlling legislation, both state and federal.

211 Wis. 2d at 187–88 (citing Wis. Stat. § 49.45(34)).

Because the handbook topic challenged by plaintiffs does not attempt to establish rules or regulations (as explained in more detail below), *Tannler* controls the outcome here. Topic #66 is not an unpromulgated rule, and because that is the only allegedly unpromulgated rule challenged by the plaintiffs in their Wis. Stat. § 227.40 action, DHS is likely to succeed on the merits of its appeal.

2. The handbook guidance simply restates state and federal law.

The above discussion illustrates that DHS's guidance is not, in fact, an unpromulgated rule. It simply summarizes federal and state law. The following chart makes that point clear. The left column tracks the language of the handbook provision and the middle column cites the statutes and promulgated rules in support. For added support, the third column provides DHS's authority and duty to recoup under federal law:

Topic #66 language.	**State statutory and admin. code provisions.**	**Federal laws.**
For a covered service to meet program requirements,	§ DHS 106.02: "Providers shall comply with the following general conditions for participation as providers . . . ." § DHS 107.02(2) and (2)(a) state that services that fail to meet program requirements or state or federal statutes, rules and regulations are not reimbursable by Medicaid.	42 U.S.C. § 1396a; 42 C.F.R. § 430.0; 42 C.F.R. Part 440 Subpart A; 42 C.F.R. Part 440 Subpart B.
the service must be provided by a qualified Medicaid-enrolled provider	§ DHS 106.02(1): "A provider shall be certified."	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 455.410;

		455.412; 447.45(f).
to an enrolled member.	§ DHS 106.02(2): reimbursement for covered services only. § DHS 106.02(3): the recipient of the services was eligible to receive Medicaid benefits.	42 U.S.C. § 1396a(a)(19); 42 C.F.R. 447.45(f).
In addition, the service must meet all applicable program requirements	§ DHS 106.02(4): shall be reimbursed only if the provider complies with applicable state and federal procedural requirements.	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 456.1–.6; 431.960 (c).
including, but not limited to, medical necessity,	§ DHS 106.02(5): shall be reimbursed only for services that are appropriate and medically necessary for the condition of the recipient.	42 C.F.R. § 440.230.
prior authorization,	§ DHS 107.03(9): any service requiring prior authorization (PA) for which PA is denied or for which PA was not obtained prior to the provision of the service is not a covered service for Medicaid. § DHS 107.12(2)(a): prior authorization is required for all private duty nursing services.	42 C.F.R. § 440.230.
claims submission,	§ DHS 106.03(2)(b): claims shall be submitted in accordance with the claims submission requirements…. § DHS 107.02(2)(h): services that fail to meet timely submission of claims requirements are not reimbursable by Medicaid.	42 U.S.C. § 1396a(a)(37); 42 C.F.R. §§ 447.45(d)(1); 455.18.
prescription	Wis. Stat. § 49.46(2)(b)6.g.: nursing services require a physician's prescription to be covered by Medicaid. § DHS 107.12(1)(c): private duty nursing services shall be provided only when prescribed by a physician.	42 C.F.R. § 440.80.
and documentation requirements.	Wis. Stat. § 49.45(3)(f). § DHS 107.02(2)(e) and (f): services for which records are not kept or other	42 U.S.C. § 1396a(a)(27).

	documentation failure are not reimbursable by Medicaid. § DHS 107.12(4)(d) private duty nursing services that were provided but not documented are not covered services.	

The handbook topic is just a tool to implement the statutory requirements and the properly promulgated administrative rules regarding DHS's authority to recover improper Medicaid payments. It is simply a synthesis of the above-referenced statutes and promulgated rules. It is merely a reference aid; it does not set forth law-like pronouncements. It "is not intended to have the effect of law." *County of Dane v. Winsand,* 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885. Every phrase and portion of this handbook topic is *explicitly* grounded in Wisconsin statutes, federal law, and properly promulgated administrative code provisions, which plaintiffs did *not* challenge in this action. Plaintiffs' Wis. Stat. § 227.40 challenge fails from the beginning because there is no "rule" to challenge.

Because the challenged portion of the Medicaid Provider Handbook is not a "rule" as defined by Wis. Stat. § 227.01(13) in the first place, DHS is likely to succeed on the merits of its appeal.

3. Wisconsin Stat. § 49.45(3)(f) provides DHS authority to recover improper Medicaid payments for services not actually provided, and for claims that are inappropriate or inaccurate.

The circuit court declared that DHS exceeds the scope of its authority to recoup Medicaid payments when it employs the so-called "Perfection Rule." But the circuit court's order misreads the plain language of the law. A correct reading of

Wis. Stat. § 49.45, in conjunction with other state rules and federal laws, supports DHS's position that recoupment of the overpayments are within the bounds of its legal authority, and DHS is, therefore, likely to prevail on the merits in its appeal.

The text of Wis. Stat. § 49.45 provides DHS with clear authority to take the disputed recoupment action. Subsection (3)(f) says:

> (f)1. Providers of services under this section shall maintain records as required by the department for verification of provider claims for reimbursement. The department may audit such records to verify actual provision of services *and the appropriateness and accuracy of claims*.
> 2. The department may deny any provider claim for reimbursement *which cannot be verified under subd. 1. or may recover the value of any payment made to a provider which cannot be so verified*. The measure of recovery will be the full value of any claim if it is determined upon audit that actual provision of the service cannot be verified from the provider's records or that the service provided was not included in s. 49.46(2) or 49.471(11).

Wis. Stat. § 49.45(3)(f)1.–2. (emphasis added).

This provision requires Medicaid providers to "maintain records as required by [DHS] for verification of provider claims for reimbursement." Wis. Stat. § 49.45(3)(f)1. DHS has the authority to audit these records "to verify the actual provision of services *and* the appropriateness and accuracy of the claims." *Id.* And then, only after reasonable notice and opportunity for hearing (*see* Wis. Stat. § 49.45(2)(a)10.), DHS shall "recover the value of any payment made to a provider which cannot be so verified." Wis. Stat. § 49.45(3)(f)2. Subsection (3)(f)2. gives DHS the power to recover Medicaid payments when DHS cannot verify from the provider's records: (1) that actual services were provided; and (2) that the claims on which the payments were based are appropriate and accurate.

Thus, the Court's September Order is mistaken in holding that DHS can recoup payment only if it is shown that no actual services were provided, and it is mistaken in holding that DHS cannot recover payment based on a provider's failure to maintain adequate documentation of the services billed to Medicaid or the provider's failure to comply with other program requirements.

The plain language of Wis. Stat. § 49.45(3)(f), authorizes DHS to recover the value of a payment where a Medicaid provider's records do not verify the appropriateness and accuracy of the provider's claim. Despite this "appropriateness and accuracy of claims" language in the statute, the circuit court enjoined DHS from recouping a provider's Medicaid payments on any basis other than a finding that the services were not actually provided. This ruling was erroneous based on the plain text of the statute.

4. State and federal regulations give DHS the authority and the obligation to recover improper Medicaid payments, including claims that the provider cannot verify with documentation.

Relying on this clear statutory authority to recover improper Medicaid payments, DHS has promulgated rules implementing its authority to recover. These rules have the force of law and, notably, were not challenged by the plaintiffs in this action. These rules provide further basis for DHS's recovery actions.

Wisconsin Admin. Code § DHS 108.02(9)(a) involves recoupment of overpayments by DHS. It states: "If [DHS] finds that a provider has received an overpayment, including but not limited to erroneous, excess, duplicative and improper payments regardless of cause, under the program, [DHS] may recover the

amount of the overpayment." This means that DHS may recover an erroneous payment, a duplicative payment, and a payment found to be excessive.

In addition, the federal government, which regulates the administration of these programs by the states, defines an "improper payment" broadly. "[W]hen an Agency's review is unable to discern whether a payment was proper *because of insufficient or lack of documentation*, this payment must also be considered an improper payment." Publication 100-15 (Medicaid Integrity Program Manual, Sept. 2011; emphasis added). Contrary to plaintiffs' assertions, an improper payment can result from a provider's insufficient documentation.

Wisconsin Administrative Code § DHS 106.02 supplies further support for DHS's recovery authority. It reads:

> [DHS] may refuse to pay claims and *may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records* or permit authorized department personnel to have access to records required under s. DHS 105.02 (6) or (7) and the relevant sections of chs. DHS 106 and 107 for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services which are the subject of claims or for purposes of determining provider compliance with [Medicaid] requirements

Wis. Admin. Code § DHS 106.02(9)(g) (emphasis added).

Plaintiffs have argued that DHS disregards Wis. Admin. Code § DHS 107.01(1) when it demands recoupment for a provider's failure to comply with recording-keeping requirements. That provision states, in part: "[DHS] shall reimburse providers for medically necessary and appropriate health care services listed in ss. 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible

medical assistance recipients, including emergency services provided by persons or institutions not currently certified." Wis. Admin. Code § DHS 107.01(1). But DHS cannot be expected to permit a payment to stand to a provider who fails to maintain proper records to prove that *appropriate and necessary* health care services were provided. If DHS were to allow such payments, that would not only be fiscally irresponsible and in violation of federal law, but blind to the protection of patient health and safety.

5. Plaintiffs cannot challenge DHS's policy and practice in this Wis. Stat. § 227.40 action, and regardless, DHS has statutory and regulatory authority to recoup improper Medicaid payments.

Despite the fact that plaintiffs clearly challenged only Topic #66 in their complaint, in briefing to this Court they improperly expanded their Wis. Stat. § 227.40 rule challenge into a challenge of DHS's general Medicaid payment recoupment policy and practice.[2] Neither the text of the statute nor case law supports this attempt.

Wisconsin Stat. § 227.40 is the vehicle to challenge a specific agency "rule." *See* Wis. Stat. § 227.40(1). This "rule" may be a section of the administrative code. Indeed, Wis. Stat. § 227.40(5) requires the Legislature's Joint Committee on Administrative Rules to be served with a copy of the complaint. Wis. Stat. § 227.40(5). And when a rule is declared invalid, the court is required to send notice

[2] Plaintiffs asked this Court to issue a declaration on DHS's "statutory authority to recoup payments from Medicaid providers" under the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04(2). But plaintiffs' complaint, which was never amended, only brought a Wis. Stat. § 227.40 action to challenge the validity of a "rule." Wisconsin Stat. §§ 806.04 and Wis. Stat. 227.40 are not the same. The latter is far more limited.

to the legislative reference bureau, which then must insert an annotation of that judicial determination "in the Wisconsin administrative code." Wis. Stat. § 227.40(6). Case law teaches that Wis. Stat. § 227.40(4)(a) permits a challenge to a written instruction that was not, but should have been, promulgated. *See generally*, *Cholvin*, 313 Wis. 2d 749. But no case—as far as DHS can tell—has permitted the use of Wis. Stat. § 227.40 to challenge a state agency's policy and practice, as opposed to a promulgated or unpromulgated rule. That is what plaintiffs attempt here. Wisconsin Stat. § 227.40 authorizes challenges to an agency's concrete written statement, not to its policy and practice. Thus, not only were plaintiffs foreclosed from challenging a topic in a Medicaid handbook because it is not a "rule," they were also precluded from challenging DHS's more general policy and practice of recoupment in a Wis. Stat. § 227.40 action.

But even if plaintiffs could have proceeded with a more general challenge to DHS's recoupment policy and practice, Wis. Stat. § 49.45(3)(f) provides DHS with authority to recover improper Medicaid payments for services not actually provided and for claims that are inappropriate or inaccurate. And this authority is not limited by Wis. Stat. § 49.45(2)(a)10.

In addition, properly promulgated state administrative code provisions, such as Wis. Admin. Code §§ DHS 108.02(9)(a) and 106.02(9)(g)—which again, plaintiffs did not challenge in this action—supply DHS with the power to recover "erroneous, excess, duplicative and improper payments regardless of cause" and "payments made on claims where the provider fails or refuses to prepare and maintain records

. . . for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services," respectively. Moreover, federal law, which Wisconsin *must* follow to receive federal Medicaid funds, requires DHS to audit and recoup improper payments in such circumstances, as well.

Plaintiffs cannot challenge DHS's policy and practice of recoupment in a Wis. Stat. § 227.40 action. DHS is likely to succeed on the merits of its appeal regarding this issue.

6. The circuit court's injunction against DHS exceeds the bounds of its remedial powers under Wis. Stat. § 227.40.

Another reason DHS has a likelihood of success on the merits is because this Court's remedy is outside the bounds of its authority and jurisdiction under Wis. Stat. § 227.40.

Wisconsin Stat. § 227.40 authorizes a declaratory judgment action to challenge the validity of an agency rule. The statute permits the court to declare a rule invalid. *See* Wis. Stat. § 227.40(4)(a) ("In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid . . . ."). Where the court makes such a finding, the law authorizes the court to take only one more action:

> Upon entry of a final order in a declaratory judgment action under sub. (1), the court shall send an electronic notice to the legislative reference bureau of the court's determination as to the validity or invalidity of the rule, in a format approved by the legislative reference bureau, and the legislative reference bureau shall publish a notice of that determination in the Wisconsin administrative register under s.

> 35.93(2) and insert an annotation of that determination in the Wisconsin administrative code under s. 13.92(4)(a).

Wis. Stat. § 227.40(6).

Here, this Court went beyond the remedial scope of Wis. Stat. § 227.40. Instead of applying the authorized remedy, the Court enjoined DHS from recouping:

> "Medicaid payments made to Medicaid-certified providers for medically necessary, statutorily covered benefits provided to Medicaid enrollees, based solely on findings of the provider's non-compliance with Medicaid policies or guidance where the documentation verifies that the services were provided."

The injunction was temporary in that it is subject to action by the Wisconsin Legislature granting such authority to DHS. Thus, this injunction went further than the Legislature allows in a Wis. Stat. § 227.40 action. For this reason alone the injunction will likely be vacated on appeal.

Also, the injunction is inconsistent with the Court's declaration and the statute. The Court recognized that under Wis. Stat. § 49.45(3)(f) and (2)(a), DHS has the authority to recover payments from Medicaid providers for which either DHS is "unable to verify from provider's records that a service was actually provided, *or an amount claimed was inaccurate or inappropriate for the service provided*." This language predominantly tracks Wis. Stat. § 49.45(3)(f)1.–2. But then the injunction limits the declaration—and statute—by preventing DHS from recovering payments when the provider's documentation does not verify "*the appropriateness and accuracy of claims*." Wis. Stat. § 49.45(3)(f)1.

Because the Court's injunction exceeds the scope of its remedial authority under Wis. Stat. § 227.40, and directly conflicts both with its declaration and with Wis. Stat. § 49.45(3)(f)1.–2., DHS will likely succeed on the merits of its appeal.

B. DHS has a strong likelihood of success on the merits regarding the Court's Order for Supplemental Relief.

The Court's Order for Supplemental Relief improperly expanded its September Order after the defendant had filed an appeal of the September Order. In *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶¶ 2, 18-21, 351 Wis. 2d 237, 893 N.W.2d 388, the Wisconsin Supreme Court held that once an appeal has been filed and the record is transmitted to the court of appeals, the circuit court has no jurisdiction to alter the judgment. Here, the Court's Supplemental Order expands the reach of the September Order in the following ways: (1) it enjoins the defendant from issuing notices of intent to recover (recoup) Medicaid funds if the findings of the initial audit appear to indicate that the services in question were actually provided; (2) it enjoins the defendant from furthering *any* agency action, including an administrative proceeding, in which the defendant seeks to recoup Medicaid funds from any Medicaid provider, if the provider's records verify that the services were provided;[3] and (3) for the first time, the Supplemental Order enjoins any administrative rules that conflict with the Court's view of the breadth of the agency's authority to seek recoupment of Medicaid funds.

Here, the Court's Order for Supplemental Relief improperly enjoins ongoing administrative proceedings, including proceedings in which no final decisions

ordering recoupment have been entered. Most significantly, the Court's Order for Supplemental Relief, for the first time, enjoins defendant from enforcing and applying existing administrative rules that run afoul of the Court's order. The Court's September Order did not purport to enjoin enforcement of any of DHS's specific administrative rules. Rather, it enjoined the defendant's "*policy* of recouping payments for noncompliance with Medicaid program requirements," which the Court characterized as an unpromulgated "Perfection Rule." (September Order at 6; emphasis added). The plaintiffs' action did not seek – and the Court's September Order did not grant – an injunction against the enforcement of any specific existing administrative rules.

By contrast, the Order for Supplemental Relief enjoins DHS from taking actions for recoupment in certain circumstances "notwithstanding that an audit identified other errors or noncompliance with Department policies *or rules*." (Order for Supplemental Relief, at 2, ¶¶ 1 and 2; emphasis added). This language of the Order for Supplemental Relief expands the Court's original judgment in violation of *Madison Teachers, Inc.* by enjoining the enforcement of existing administrative rules. As noted above, the Court's September Order referenced Topic #66 and the so-called "perfection rule" (*i.e.*, what the Court saw as an agency *policy* requiring perfection or near-perfection of documentation), but the Order did not specifically strike or reference any existing administrative code provisions.

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[3] The Court's orders do not specify what level of documentation is necessary in order to determine whether services were actually provided.

Under the Court's language of the Order for Supplemental Relief, however, enforcement of agency rules that conflict with the Court's order is now enjoined. For example, Wis. Admin. Code §§ DHS 106.02(9)(f) and (g) state, in part:

> (f) *Condition for reimbursement.* Services covered under ch. DHS 107 are non-reimbursable under the MA program unless the documentation and medical recordkeeping requirements under this section are met.
> (g) *Supporting documentation.* The department may refuse to pay claims and may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records. . .

This rule allows recoupment based on a failure to meet all documentation and record-keeping guidelines. The Court's Order for Supplemental Relief enjoins enforcement of this rule, even though the Court's September Order did not. Likewise, the Court's September Order did not enjoin enforcement of Wis. Admin. Code § DHS 107.02(2)(e), which states, in part, as follows:

> (2) Non-reimbursable services. The department may reject payment for a service which ordinarily would be covered if the service fails to meet program requirements. Non-reimbursable services include:
>
> . . . . .
>
> (e) Services for which records or other documentation were not prepared or maintained, as required under s. DHS 106.02(9);

Enforcement of this rule in a recoupment proceeding is now enjoined by the language of the Court's Order for Supplemental Relief, which, for the first time, references agency "policies *or rules*."

Because the Court's September Order has been appealed, it cannot be expanded to enjoin the enforcement of existing administrative rules pending a

decision by the Court of Appeals. DHS's appeal is likely to succeed in vacating the Order for Supplemental Relief.

C. DHS has a substantial likelihood of success on the merits regarding the Court's Order on Costs and Attorney Fees.

The Court awarded the petitioners their costs and attorney fees incurred in bringing their motion for supplemental relief. When asked by defendant's counsel for the statutory authority for the Court's award of the petitioners' attorneys' fees, the Court cited Wis. Stat. § 808.07:

> THE COURT: I am going with – I should have announced it, but I believe that 808.07 allows that to make an order appropriate to preserve the existing state of affairs and the effectiveness of my judgment, because I don't think that is going on right now based on some of the other exhibits. I can't recite the letter off the top of my head. I think it was E, for example.

(Tr. of Feb. 14, 2017, hearing; p. 45, lines 9-15). The statutory provision that the Court appears to have been referring to is Wis. Stat. § 808.07(2)(a)3., which states as follows:

> (2) Authority of a court to grant relief pending appeal.
> (a) During the pendency of an appeal, a trial court or an appellate court may:
> . . . . .
> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

As an initial matter, the plain language of the above-referenced statutory provision does not specifically authorize the awarding of attorney fees, and the Court's award, therefore, lacks a basis in law. However, even if one assumes *arguendo* that an award of attorney fees can be made under that statutory provision, the State is immune from such an award under the doctrine of sovereign immunity.

For over 100 years, Wisconsin courts have consistently held that the State enjoys sovereign immunity and cannot be sued without its consent. *PRN Assocs. LLC v. State Dep't of Admin.,* 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 683, 766 N.W.2d 559; *Fiala v. Voight*, 93 Wis. 2d 337, 342, 286 N.W.2d 824 (1980); *The Chicago, Milwaukee & St. Paul Railway Co. v. The State*, 53 Wis. 509, 513, 10 N.W. 560 (1881). Sovereign immunity derives from the Wisconsin Constitution, art. IV, § 27, which reads as follows: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

This language has been construed repeatedly to mean that only the legislature can consent to a suit against the State. *PRN Assoc. LLC,* 2009 WI 53, ¶ 51, 317 Wis. 2d at 683-684; *State v. P.G. Miron Const. Co., Inc.,* 181 Wis. 2d 1045, 1052, 512 N.W.2d 499 (1994); *Fiala,* 93 Wis. 2d at 342; *Koshick v. State,* 2005 WI App 232, ¶ 6, 287 Wis. 2d 608, 612; *Erickson Oil Products, Inc. v. State*, 184 Wis. 2d 36, 52, 516 N.W.2d 755 (Ct. App. 1994). The State's consent to be sued must be clearly and expressly stated in the statutory language relied upon. Consent will not be implied. *Fiala*, 93 Wis. 2d at 342; *Miron,* 181 Wis. 2d at 1052-53; *Townsend v. Wisconsin Desert Horse Assoc.*, 42 Wis. 2d 414, 421, 167 N.W.2d 425 (1969); *Erickson*, 184 Wis. 2d at 52. However, there is no specific provision in Wis. Stat. § 808.07 that expressly authorizes an award of costs and attorney fees against the State.

In this matter, the Court's Order on Costs and Attorney Fees grants monetary relief against the State (DHS).[4] An action is barred by sovereign immunity if the relief sought would effectively establish the State's legal responsibility for the payment of money. *Cf. Lister v. Bd. of Regents*, 72 Wis. 2d 282, 308, 240 N.W.2d 610 (1976). *See Brown v. State*, 30 Wis. 2d 355, 381-82, 602 N.W.2d 79 (Ct. App. 1999) ("A declaration which seeks to fix the state's responsibility to respond to a monetary claim is not authorized by Wisconsin's Declaratory Judgments Act.") Because the relief sought by the defendant (and granted by the Court) effectively fixes the State's responsibility to pay the defendant's costs and attorney fees, it is barred by sovereign immunity. Thus, defendant has a likelihood of success on the merits of the Court's award of plaintiffs' costs and attorney fees.

II. If a stay of the Court's orders is not granted, DHS will suffer irreparable injury.

The second *Gudenschwager* factor weighs heavily in favor of a stay. Unless a stay is granted, DHS (and the public) will suffer irreparable injury because DHS will be hamstrung with respect to its statutory authority to conduct audits of Medicaid providers and to seek recoupment of Medicaid funds under state and federal law. The Court's Order for Supplemental Relief enjoins DHS from conducting any proceedings that conflict with the Court's view of what DHS is authorized to do under the law. If this results in a determination by the federal government that DHS is not adequately enforcing its Medicaid statutes and

[4] A state agency (here, DHS) is the State for purposes of sovereign immunity. *See Lindas v. Cady*, 142 Wis. 2d 857, 861, 419 N.W.2d 345 (Ct. App. 1987) ("An action against a state agency is an action against the state.")

regulations, Wisconsin could lose all or a portion of the $5 billion of federal Medicaid funds that are provided to Wisconsin each year.

The Medicaid budget for Wisconsin is approximately $8 billion per year, about 40% of which is paid by the State and 60% is paid by the federal government. (*See* Affidavit of Anthony J. Baize, ¶ 5, attached hereto as Exhibit A). As of March 24, 2017, there were more than one million enrolled beneficiaries in Wisconsin and there were 76,334 medical providers certified to provide Medicaid services. Just over 1,700 of those providers were private duty nurses. (Baize Aff., ¶¶ 2, 3).

"Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). The Medicaid provisions and the implementing rules adopted by the federal Centers for Medicare and Medicaid Services (CMS) set out broad requirements concerning coverage, payment, recoupment, and other subjects, which every state must follow to receive federal matching funds.[5] *See* Wis. Stat. § 49.45(1). "[O]nce a state elects to participate [in Medicaid], it must abide by all federal requirements and standards as set forth in the Act." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 977 (7th Cir. 2012) (citing *Wilder,* 496 U.S. at 502). In other words, the money the states receive from the federal government comes with strings attached.

[5] The Medicaid Act is found at 42 U.S.C. § 1396 *et seq*.

"To qualify for federal assistance, a State must submit to the [federal government] and receive approval for a 'plan for medical assistance,' § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program." *Wilder*, 496 U.S. at 502 (citing 42 C.F.R. § 430.10).[6]

A state Medicaid agency is required to establish procedures for pre-payment and post-payment claim review to ensure the proper and efficient payment of claims and management of the program. In Wisconsin, DHS is charged with responsibilities relating to fiscal matters, eligibility for benefits, and general supervision of the program. Wis. Stat. § 49.45(2). It is mandated to cooperate with federal authorities to obtain the best financial reimbursement available to the State from federal funds. Wis. Stat. §§ 49.45(2)(a)1., 7.

Federal law requires the State of Wisconsin to have a program to audit participating entities' records to insure that proper payments are made under the plan. 42 U.S.C. §1396a(a)(42)(A); (Baize Aff., ¶ 14). In turn, the federal government audits state Medicaid programs to ensure they are recovering identified improper payments and refunding the federal share to CMS. 42 C.F.R. §§ 433.300–433.322.[7]

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[6] "The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program." 42 C.F.R. § 430.10.

[7] CMS can withhold federal funds if it finds that the state "fail[ed] to actually comply with a Federal requirement," such as enforcing record-keeping requirements "regardless of whether the [State Medicaid] plan itself complies with that requirement." 42 C.F.R. § 430.35(c).

DHS must refund the federal share (about 60%) of any identified overpayments within one year. (Baize Aff., ¶ 16). If the Wisconsin Medicaid Agency (DHS) does not substantially comply with any of the provisions of its Medicaid State Plan, federal enforcement could include the withholding of the federal share of Medicaid payments in whole or in part. (42 C.F.R. § 430.35). In such a circumstance, Wisconsin taxpayers would be responsible for approximately $5 billion annually to replace the federal share, or, in the alternative, the State would have to cut Medicaid services, cut payments for services, or remove recipients from the Medicaid program. (Baize Aff., ¶¶ 17, 18).

As the state Medicaid agency, DHS is required and authorized to set conditions of participation and reimbursement in contracts with providers (*see* Wis. Stat. § 49.45(2)(a)9.) and is authorized to establish documentation requirements to verify provider claims for reimbursement. *See* Wis. Stat. § 49.45(3)(f); 42 C.F.R. § 431.107(b). As noted above, DHS is mandated by the federal government to recover monies improperly or erroneously paid, and overpayments made, to Medicaid-certified providers. Wis. Stat. § 49.45(2)(a)10.a.; Wis. Admin. Code § DHS 107.02(2).[8] DHS shall recover money paid for services when a provider's documentation fails to verify the actual provision of services, the appropriateness of the provider's claim, or the accuracy of the provider's claim. *See* Wis. Stat. § 49.45(3)(f)1.–2.

Wisconsin Admin. Code § DHS 106.02(9)(g) gives DHS authority to recoup:

[8] State law also authorizes DHS "to promulgate . . . rules as are consistent with its duties in administering [Medicaid]." Wis. Stat. § 49.45(10).

> *[DHS]* may refuse to pay claims and *may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records* or permit authorized department personnel to have access to records required under s. DHS 105.02 (6) or (7) and the relevant sections of chs. DHS 106 and 107 *for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services which are the subject of claims or for purposes of determining provider compliance with [Medicaid] requirements*.

Wis. Admin. Code § DHS 106.02(9)(g) (emphasis added). In addition, Wis. Admin. Code § DHS 108.02(9) lays out DHS's recoupment methods, but it also refers to the authority it has to recoup for overpayments:

> DEPARTMENTAL RECOUPMENT OF OVERPAYMENTS. (a) Recoupment methods. If [DHS] finds that a provider has received an *overpayment, including but not limited to erroneous, excess, duplicative and improper payments* regardless of cause, under the program, [DHS] may recover the amount of the overpayment by any of the following methods, at its discretion:
> . . .
> 3. Requiring the provider to pay directly to the department the amount of the overpayment.

Wis. Admin. Code § DHS 108.02(9) (emphasis added).

The federal government defines "overpayment" as "the amount paid by a Medicaid agency to a provider which is in excess of the amount that is allowable for services furnished under section 1902 of the Act and which is required to be refunded under section 1903 of the Act." 42 C.F.R. § 433.304.

In September 2011, CMS issued Publication 100-15 (Medicaid Integrity Program Manual)[9] as a reference tool for state Medicaid agencies and providers.

[9] This manual may be found online at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-

This Manual provides information regarding the recovery of "improper payments," which are defined as:

> [A]ny payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirement. Incorrect amounts include overpayments and underpayments. An improper payment includes any payment that was made to an ineligible recipient, payment for non-covered services, duplicate payments, payments for services not received, and payments that are for the incorrect amount. *In addition, when an Agency's review is unable to discern whether a payment was proper because of insufficient or lack of documentation, this payment must also be considered an improper payment.*

(Emphasis added.)

In summary, in exchange for federal Medicaid monies, Wisconsin agrees to provide health care to needy individuals, while complying with federal statutes, rules, guidance, and manuals having the force of law regarding many subjects, including recoupment. Wisconsin has enacted statutes and promulgated rules that give DHS authority to recover improper Medicaid payments, and plaintiffs' action did not challenge any of those statutory or code provisions. If the federal government, pursuant to an audit of Wisconsin's enforcement program, determines that the State is not, or has not been, adequately fulfilling its obligations under such a program, the State could face irreparable harm in the form of withheld federal payments and a substantially reduced ability to provide Medicaid services.

The Court's Order for Supplemental Relief specifically enjoins DHS from furthering *any* agency action (including ongoing administrative proceedings) where

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Items/CMS1238527.html?DLPage=2&DLEntries=10&DLSort=0&DLSortDir=ascending (last visited Mar. 23, 2017).

"the provider's records verify that the services were provided."[10] This injunctive relief prevents DHS from exercising its authority under specific statutory and administrative code provisions, as noted herein. DHS also believes that it is enjoined from even making legal arguments in such proceedings that could be viewed as being in conflict with the Court's order. (*See* Affidavit of Jesús Garza, ¶¶ 14, 15, attached hereto as Exhibit B; Baize Aff., ¶¶ 17, 18). The Court's Order for Supplemental Relief presents a potential for very substantial irreparable harm to the State in the form of withheld federal Medicaid funds if the order results in a constraint on DHS's ability to enforce its auditing obligations under state and federal law, as viewed by the federal government. If such federal funds are withheld, they cannot be regained by the State in the future. In other words, any withheld funds are permanently lost. This second stay factor must be resolved in DHS's favor.

III. If a stay is granted no substantial harm will come to other interested parties.

This factor also weighs in DHS's favor. Plaintiffs have argued that they are being harmed via the expense of ongoing administrative proceedings. Any provider who is audited has the right to request a contested case hearing if they disagree with the initial Notice of Intent to Recover (NIR). Seeking such a hearing is the exercise of a provider's due process rights under the law. Plaintiffs' argument regarding harm essentially amounts to an assertion that exercising their due

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[10] There are approximately 87 contested case hearings going on as of this date. (Baize Aff., ¶ 10), some or all of which could be subject to the Court's injunction.

process rights constitutes "harm." Plaintiffs have cited no legal authority in support of this position. As such, the granting of a stay of the Court's orders will not cause substantial harm to the plaintiffs.

IV. A stay will not harm the public interest and, in fact, is in the public interest.

This final factor also favors DHS's request for a stay. The Court's orders have created uncertainty in the marketplace. Both DHS and DHA have expressed confusion about what the Court's orders mean and how they are to be interpreted and applied. DHS does not believe that the Court's orders give clear guidance as to what is specifically meant by the so-called "Perfection Rule." It is not clear to DHS what amount of documentation is necessary to determine whether services were actually provided, and DHS does not know what legal arguments it can or can't make in the course of its audits and ongoing administrative proceedings. (Garza Aff., ¶¶ 14, 15). Attorneys representing petitioners in DHA hearings are citing the Court's orders to DHA Administrative Law Judges, who are unsure how they are supposed to proceed and what specific standards should be applied in light of these orders. (*See, e.g.*, plaintiffs' January 1, 2017 "Affidavit of Counsel," ¶ 14, Ex. H.)

Absent clear guidelines as to what constitutes the application of the "Perfection Rule" in the course of an audit, and given that the Court's Order for Supplemental Relief now also appears to enjoin the enforcement of certain unnamed existing administrative rules, it is in the public interest to reduce confusion in the marketplace and in ongoing administrative pleadings by staying the Court's Order pending review and clarification of DHS's authority by the Court of Appeals. In

addition, there is clearly a public interest in not risking the State's loss of the federal share of Medicaid dollars, as discussed in Section II above.

CONCLUSION

For the reasons set forth above, the DHS respectfully requests that the Court STAY its order of September 27, 2016, its orders of March 23 and 24, 2017, and its judgment of April 3, 2017, pending resolution of DHS's appeals to the Court of Appeals.

Respectfully submitted this 14th day of April 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General

Electronically signed by:
/s/ Christopher J. Blythe
CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147
Attorneys for Defendant

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-0180 (Phone)
(608) 267-8906 (Fax)
blythecj@doj.state.wi.us