STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case Nos. 2016AP2082 and 2017AP634

KATHLEEN PAPA and
PROFESSIONAL HOMECARE
PROVIDERS INC.,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES,

Defendant-Appellant.

APPEAL FROM FINAL ORDERS OF THE
WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE KATHRYN FOSTER, PRESIDING
WAUKESHA COUNTY CASE NO. 15CV2403

PLAINTIFFS-RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Kathleen Papa, R.N., and the members of the Professional Homecare Providers, Inc. ("PHP") (collectively, "Plaintiffs-Respondents" or "the Nurses") submit this supplemental brief pursuant to the Court's Order of June 21, 2018. For the reasons set forth below, this Court's decision in *Newcap, Inc. v. Department of Health Services*, 2018 WI App 40, supports the circuit court's declaratory judgment and injunction entered in this case, as does the 2017 opinion of the Attorney General ("2017 Opinion") previously cited by the Nurses as supplemental authority. Defendant-Respondent Department of Health Services' interpretations of *Newcap* and the 2017 Opinion are off-target and minimize significant aspects of these authorities. (*See* DHS Supp. Brief, 8/7/18.) As explained further below and in the Nurses' initial brief, this Court should affirm the circuit court.

ARGUMENT

I. The *Newcap* Decision Supports the Injunction Entered in This Case.

This Court asked the parties to address the effect of *Newcap* on the current dispute. *Newcap* supports the Nurses' position in this case and the circuit court's decision.

A. Newcap *Confirms That The "Perfection Rule" Exceeds the Department's Authority and Does Not Permit Recoupment*.

1. The *Newcap* Facts and Holding.

Newcap, Inc. ("Newcap") is a community action program that offers family planning services in northeastern Wisconsin. 2018 WI App 40, ¶ 5. In 2013, the Department audited Newcap to determine whether pharmacy services it provided to Wisconsin Medicaid and BadgerCare Plus members were documented and billed appropriately. *Id.* Initially, the Department sought to recover $1,169,837.10 paid to Newcap for allegedly billing Medicaid "for drugs at a price that was more than the acquisition cost." *Id.,* ¶ 6. The audit also found that Newcap had not retained some invoices for drugs and had submitted 38 claims that contained either a missing or erroneous National Drug Code. *Id*.

Following the submission of rebuttal material, the Department abandoned its claim that it was entitled to recoup $185,074.80 based on the billing rates. *Id.*, ¶ 7. The Department indicated it was recouping the funds because Newcap failed to maintain some invoices for prescription drugs and because it had submitted some claims with missing or erroneous National Drug Codes. *Id.*, ¶ 7. The administrative law judge and the Department affirmed the recoupment action, over Newcap's arguments that (1) the clinics were not required by any law or policy to

maintain invoices for drugs; (2) although the Department had the authority to deny claims with missing codes, it did not have the authority to recoup on this basis; and (3) the Department lacked the statutory authority to recoup. *Id.*, ¶¶ 9-12.

Newcap petitioned for judicial review, and the circuit court reversed the Department's decision. *Id*. ¶ 12. The Department appealed. *Id*. ¶ 12.

This Court ruled in favor of Newcap, agreeing that the Department could not recoup payments from Newcap because no administrative code provision required the clinic to keep invoices for prescription drugs. *Id*. ¶¶24-35. The Court rejected the Department's attempt to rely on a 1994 Federal Register excerpt for this requirement, because "in order for a provider's failure to maintain records to form the basis for a recoupment action, the recordkeeping requirement must have been imposed ***by DHS for the purpose of verifying the provider's Medicaid reimbursement claim***." *Id*. ¶ 33 (emphasis added).

The Court also agreed that Newcap's failure to include correct NDCs on some claim forms submitted for reimbursement was not a basis for recoupment. *Id*. ¶¶ 36-43. Notably, this was because a "claim" is not a record required to be kept by the Department under Wis. Stat. § 49.45(3)(f)1. *Id*. Similarly, claim forms with incorrect or missing NDCs

did not demonstrate "overpayments" under Wis. Stat. § 49.45(2)(a)10.a. *Id.* ¶ 39. The Court also distinguished between the Department's authority to *reject* payments and its ability to *recoup* payments which the Department had already made. *Id.* ¶ 41.

In the process of rendering these rulings, the Court also determined that Wis. Stat. § 49.45(3)(f) permits the Department to recoup payments from a provider if the provider's claims cannot be verified based on an audit of the records the Department requires the provider to maintain under Wis. Stat. § 49.45(3)(f)(1). *Id.* ¶¶ 18-22. Further, the records the Department requires to verify services must be provided at the time of the audit. *Id.* ¶¶ 22-23.

This Court affirmed the circuit court, and no party appealed.

2. The *Newcap* Decision Supports the Circuit Court's Decision.

The orders issued by the circuit court here are wholly consistent with the *Newcap* Decision and should be affirmed. As this Court did in *Newcap*, the circuit court relied on the express language of Wis. Stat. § 49.45(3)(f) to determine the Department's recoupment authority.

After reviewing multiple examples of the Department's recoupment actions (R.63:21-23) [1] and considering legal argument, the circuit court held that under Wis. Stat. § 49.45(3)(f), the Department has the authority to recover payments from Medicaid providers "limited to payments for which either (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." (R.35:6) Further, "[t]he Department's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. § 49.45(3)(f), as described above, imposes a "Perfection Rule" which exceeds the Department's authority." (R.35:4, 5, 6). Similarly, the *Newcap* decision held that the omissions or errors on claim submissions that are not required to verify services did not provide a basis for recoupment. *Newcap*, ¶¶ 36-43.

Consistent with *Newcap,* errors in complying with the recordkeeping requirements of Wis. Admin. Code chs. DHS 105-107 also do not render a payment made by DHS for the services an "overpayment" permitting

[1] Unlike the Department's recoupment effort in *Newcap*, the examples provided by the Nurses did not involve any provider who failed to submit records which the auditor had requested (*e.g.,* R.11, 12, 13, 14, 15, 16, 17, 45:13-63).

reimbursement. *Newcap*, ¶ 40; *see also id*. ¶ 41. The circuit court's order closely parallels the *Newcap* decision:

***Papa* Circuit Court Order**	***Newcap* Holding**
The Department of Health Services' authority under Wis. Stat. §§ 49.45(3)(f) and 49.45(2)(a)10 to recover payments from Medicaid providers is limited to payments for which either (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 (R.35-6; App.106)	The Department of Health Services' authority under Wis. Stat. § 49.45(3)(f)1. to recover payments from Medicaid providers is limited to payments for which the Department is unable, from records the Department requires providers to keep for the purpose of verifying the provider's reimbursement claim, to verify. *Newcap*, ¶ 33.
The Department's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. § 49.45(3)(f), as described above, imposes a "Perfection Rule" which exceeds the Department's authority. This recoupment policy, including the standard as set forth in the Medicaid Provider Handbook at Topic # 66, is also a rule not properly promulgated under Wis. Stat. § 227.10(1) (R.35-6; App.106)	The Department may not recoup funds for a failure to maintain records unless the recordkeeping requirement was imposed by the Department for the purpose of verifying the provider's Medicaid reimbursement claim, *Newcap*, ¶ 33; the Department may not recoup funds for missing or invalid NDCs on claim forms because such claims are not "records" under Wis. Stat. § 49.45(3)(f), *Newcap*, ¶ 37.

The circuit court granted injunctive relief consistent with these declarations. (R.35-6, App.106; R.55-2, App.158.)

In other words, *Newcap* supports the circuit court's limit on using a perfection rule as a basis for recoupment. Whereas an auditor might find an imperfection in provider records and issue an audit finding and recommend sanctions against a provider, Wis. Stat. § 49.45(2)(a)13. *Newcap*

confirms that such imperfections *alone* do not justify recoupment. *Newcap*, ¶¶ 40-43.

Where there are records required to be maintained by statute or administrative rule to verify that services are provided and that the records have not been provided or the records are inadequate to *verify the claim for reimbursement*, then recoupment may be appropriate. The Nurses have never suggested otherwise. The Nurses do take issue with recoupment where the required documents were provided and verify that services were provided, but an auditor finds the documents lacking in some manner. (*e.g.,* PHP Br., at 22-23.)

Put another way, imperfections in the *required* records do not permit recoupment unless the records are so lacking that the Department is unable to verify that a service was actually provided, or the amount claimed was accurate or appropriate for the service that was provided. Wis. Stat. § 49.45(3)(f). Moreover, where the asserted imperfections involve records that the provider is not required by law to keep for the purpose of verifying reimbursement, then errors or omissions in those records do not justify recoupment at all. *Newcap*, ¶ 33. The same is true for errors or omission on claim forms. *Id.* ¶ 37.

Importantly, and consistent with the circuit court, *Newcap* sets forth a process for analyzing the type of recordkeeping requirement that may permit recoupment, should a provider fail to keep or maintain the subject record. The Court considered whether the requirement was set forth by statute or administrative code, and whether it is consistent with Wis. Stat. § 49.45(3)(f). *See Newcap*, ¶ 33. Statements in guidance documents or from the federal government are unlikely to suffice, because these are not requirements imposed by the Department pursuant to Wis. Stat. § 49.45(3)(f)1. and may not relate to verification of Medicaid reimbursement. *Id*. ¶¶ 32-34. The Department's own guidance documents, such as its "Forward Health Updates" and online provider handbook, might inform providers what recordkeeping requirements are, but do not themselves set these requirements. *Id*. ¶ 42.

Even where administrative rules discuss recordkeeping, *Newcap* shows that not all administrative rules can be used to support recoupment for recordkeeping errors. For example, the *general* requirement in Wis. Admin. Code § DHS 106.02(9)(d)2. for providers to retain "all evidence" necessary to support their claims is not the same as a *specific* requirement that a provider retain a certain record, to the point that failure to do so justifies recoupment. *Newcap*, ¶ 26 ("the general reference to 'all evidence

of claims for reimbursement' in § DHS 106.02(9)(d)2. cannot reasonably be interpreted as informing providers of a specific requirement that they retain invoices documenting their purchase of prescription drugs"). This logic was repeated elsewhere throughout the opinion, as the Court considered and rejected various administrative code provisions for the Department's recoupment action. *E.g.*, *Newcap*, ¶¶ 27-31, 39-41.

This specificity in recordkeeping requirements is consistent with the circuit court: relying on general language enables arbitrary recoupment under a perfection standard, whereas specific recordkeeping requirements supply providers with useful information about which records are required to verify reimbursement amounts. Indeed, if errors or omissions in *any* record permitted recoupment, there would have been no basis for this Court's interpretation of Wis. Stat. § 49.45(3)(f)1. and finding that only specified records could satisfy a recordkeeping requirement. *Newcap*, ¶ 20.

Newcap reinforces the circuit court's decision in this case.

3. The Department's Interpretation of *Newcap* is Incorrect.

The Department claims *Newcap* "essentially guts" the Nurses' claims in this case and the circuit court orders. (DHS Supp. Br. at 7.) This statement is both overly dramatic and incorrect.

The Nurses' initial brief argued that Wis. Stat. § 49.45(3)(f) limits the Department's recoupment authority, and that imperfections in paperwork cannot alone justify recoupment unless the Department is unable to verify from the records that a service was actually provided, or the amount claimed was inaccurate or inappropriate for the service that was provided. (*E.g.*, Papa Br., at 22.) This remains true after *Newcap*, which reinforced the statutory language that that this rule only applies to records required by the Department to be kept for purposes of verification. Where those essential records are not available to auditors during the audit process, it is self-evident that the Department cannot verify that services were provided under Wis. Stat. § 49.45(3)(f)1. *Newcap's* logic supports the Nurses' prior briefing and the circuit court orders.

The Department contends that a conflict between the circuit court's interpretation of Wis. Stat. § 49.45(3)(f) and the *Newcap* decision undermines all of the declaratory and injunctive relief ordered by the circuit court, but it is wrong. (DHS Supp. Br. at 7.) As explained above, there is no conflict. The circuit court found that Wis. Stat. § 49.45(3)(f) does not permit recoupment except under the circumstances provided for in that statute—inability to verify from records that services were provided, or the amount claimed was inaccurate or inappropriate for the service.

(R.35-6; App.106.) This plain language reading does not "force" the Department to accept any records the provider might have as proof the service was provided, and the circuit court never said so in its orders. (E.g., R.35-4 to R.35-7, App. 104-107.) *Newcap* merely continued the plain reading of Wis. Stat. § 49.45(3)(f), interpreting the statute to apply, as it says, only to "records as required by the department for verification of provider claims for reimbursement." *Newcap*, ¶¶ 16-17.

The Department would have the Court ignore the flip side of the *Newcap* opinion, which confirms that **the Department cannot recoup for imperfections, omissions, and errors in a record which is *not* required for purposes of verification** under Wis. Stat. § 49.45(3)(f)1. This interpretation of the statutory limits fully supports the circuit court's declaratory judgment findings, as well as its order enjoining the Department from recouping beyond the situations allowed in Wis. Stat. § 49.45(3)(f). As the circuit court held and as *Newcap* confirms, the Department lacks statutory authority to demand perfection in any and all records the providers keep and to recoup funds for services when those records contain errors or omissions.

The Department cannot have the it both ways: it cannot interpret Wis. Stat. § 49.45(3)(f) broadly for purposes of what record may justify

recoupment, but narrowly for what record a provider may produce to show services were provided. *Newcap* applied a narrow interpretation of the statute to both scenarios: only some records are required to be kept for purposes of verifying services, and only omissions in those same records will permit recoupment under Wis. Stat. § 49.45(3)(f)1. *Newcap*, ¶¶ 20, 35, 37. So did the circuit court, by closely scrutinizing the rules the Department cited as a source for recoupment authority and recordkeeping requirements. (R.35-3 to R.35-4, App. 103-104.) *Newcap* thus tracks the circuit court's declarations and injunctions in this case.

The circuit court should be affirmed.

B. *This Case Remains Ripe for Judicial Review.*

The Department uses this Order for Supplemental Briefing as an opportunity to rehash its argument that this case is not ripe for judicial review. (DHS. Supp. Br. at 4-6; *see also* DHS Substitute Br. at 21-25; DHS. Reply Br. at 3-5.)[2] *Newcap* does not mention the concept of ripeness—let alone declare any law on the topic. Hence, the Department's argument on this issue is wholly unrelated to this Court's Order for Supplemental Briefing and should be disregarded.

[2] The Nurses have also already addressed ripeness (Resp. Br. at 54-58).

That said, to the extent this Court considers *Newcap* as it relates to ripeness, then it should consider how *Newcap* demonstrates the Department's policy and practice of exceeding its statutory and regulatory authority at the expense of Medicaid providers. This Court should also consider how *Newcap* exemplifies the considerable burden and cost to providers of pursuing their due process remedies, which was recognized by the circuit court (R.35:5; R.63:26; *Newcap*, ¶¶ 6-12). The experience of Newcap—like that of the Nurses—shows the compelling need for this Court to uphold the circuit court's enunciation of the clear legal standards set forth by Wis. Stat. § 49.45(3)(f). Simply put, Medicaid-certified providers are entitled to clarification as to the validity of the Department's recoupment policy. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44, 309 Wis. 2d 365, 749 N.W.2d 211. The declaratory judgment is necessary to guide the Department's auditors to prevent unwarranted, burdensome recoupment efforts from the start; to inform attorneys and administrative law judges, so that due process is afforded at the administrative agency level; and to act as precedent for the courts.

As the circuit court found, it is a poor use of the Nurses' resources—as well as the Department's and the courts'—to litigate each provider's action individually, when uncertainties regarding the applicability of the

perfection rule are common across providers. (E.g., R.65-20:3-18, App. 117.) It should not take years of administrative and court proceedings to ascertain whether the basis for a Department's recoupment claim is an administrative rule or recordkeeping requirement the Department has created for the purpose of verifying provider reimbursement claims—as happened in *Newcap*, ¶¶ 5-12—but this is what the Department suggests. (DHS Supp. Br. at 5.)

Finally, it is no barrier to this Court's decision that the Perfection Rule, including as set forth in Topic #66, is unpromulgated. *See* also, *Dane Cnty. v. Wis. Dept. of Health & Soc. Servs.*, 79 Wis. 2d 323, 331, 255 N.W.2d 539, 544 (1977) (holding county could challenge manual provision which had not been promulgated as rule by Department).

Newcap did nothing to bolster the Department's ripeness argument, and the numerous examples of recoupment actions that the Nurses cited in the circuit court continue to demonstrate that this matter is justiciable. This Court should affirm the circuit court.

II. The 2017 Attorney General Opinion Supports the Circuit Court's Orders.

This Court asked the parties to address the impact of a 2017 Attorney General Opinion ("the Opinion") that evaluated an administrative rule relating to installation of sprinklers for multi-family

dwellings. (Order, 6/21/18.) The Nurses provided the Opinion to the Court in their Notice of Supplemental Authority to this Court last year. (Not. of Suppl. Auth., 12/13/17.) The Department had the opportunity respond in their subsequently-filed reply brief, but made only passing reference to the Opinion in a footnote. (DHS Reply Br., 1/10/18, at 10 n.4.) The Department contends that the Opinion has no effect on this case because neither the Perfection Rule nor Topic #66 are rules to which the Opinion or Wis. Stat. § 227.10(2m) apply. (DHS Supp. Br. at 11-12.) Not only are these policies "rules" under the Opinion (and Wis. Stat. § 227.01(13), but they become even more so when interpreting the Opinion in tandem with *Newcap*.

A. *The 2017 Attorney General Opinion*.

The Opinion discussed a rule regarding sprinklers for multi-family dwellings that was enacted before 2011 Wisconsin Act 21 became law. As the Opinion states, "Act 21 completely and fundamentally" altered the prior balance of agency authority, "moving discretion away from agencies and to the Legislature." OAG-4-17, ¶ 7. One way it did so was to revise Wis. Stat. § 227.11(2)(a)1.-3. to remove inherent or implied agency authority to "promulgate rules or enforce standards, requirements, or thresholds" and to clarify that agencies only possess authority "'that is

explicitly conferred on the agency by the legislature'." *Id.* ¶ 8 (quoting Wis. Stat. § 227.11(2)(a)1., 2.). As a result, where statutory provisions provide a specific standard or requirement, the agency lacks authority to impose a standard or requirement on the same subject. *Id.* ¶ 10. No standard, requirement, or threshold may be enforced by an agency where it is not explicitly required or permitted by a statute or properly-promulgated rule. *Id.* ¶ 11.

The Opinion evaluated the sprinkler rule under this new rubric. Under the rule, sprinkler systems were required for fire abatement for multifamily dwelling units of over 4 units, although the companion statute set the limit at more than 20 units. *Id.* ¶ 15. The Opinion assessed whether the rule contained a standard, requirement, or threshold more restrictive than statute, in violation of Wis. Stat. § 227.11(2)(a)3. *Id.* ¶ 16. To do so, it first applied a three step analysis that examined whether the rule and statute governed the same subject matter or conduct, next compared the two standards to determine whether the rule was more restrictive, and third evaluated whether the rule was "otherwise explicitly permitted by statute or by a rule" under Wis. Stat. § 227.10(2m). *Id.* After undertaking this analysis, the Opinion concluded the sprinkler rule and statute did govern the same conduct, that the rule was more restrictive, and that the

rule was not authorized by any other statute or rule. *Id*. ¶¶ 18-23. Hence, the rule could not be enforced or administered under Wis. Stat. § 227.11(2)(a)3. *Id*. ¶ 24.

The Opinion then evaluated whether the sprinkler rule could be enforced "because it was validly promulgated before Act 21." *Id*. ¶ 30. The Opinion evaluated various provisions of Act 21 to conclude that the rule could not be enforced. *Id*. ¶ 31 ("Though the Sprinkler Rule may have been promulgated in accordance with the procedural requirements in chapter 227, it could not be lawfully promulgated now, and certainly cannot be enforced or administered now, regardless of its pre-Act 21 validity.") (internal punctuation and quotation marks omitted).

B. *The Attorney General Opinion Supports the Declaratory Judgment*.

Applying the Opinion to the facts at hand, the Perfection Rule, including Topic #66, plainly contains a "standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold" contained in the relevant statute, OAG-4-17, ¶ 16, because the Department is using it to initiate recoupment actions in situations beyond those allowed in Wis. Stat. § 49.45(3)(f)1. The facts of *Newcap* exemplify the Perfection Rule in action, as the Department demanded perfection in records it did not require to be kept to verify reimbursement claims, yet

still attempted to recoup from Newcap when it found lapses in these records. *Newcap*, ¶¶ 1, 3, 6-7, 45. This, along with similar recoupment efforts cited by the Nurses, shows the Department is implementing a standard more restrictive than the statute, contrary to the Department's claims. (DHS Supp. Br. at 11.)

Newcap also helped clarify that general statements about recordkeeping, either in rules themselves or guidance documents like Topic #66, do not meet the statutory standard of records "required by" the Department to be kept to verify reimbursement. *See* Wis. Stat. § 49.45(3)(f)(1). Hence, the Department's reliance on these guidance documents for recoupment is also in excess of statute as described in the Opinion. The Department's attempt to paint these guidance documents as simply reiterations of the rules is not valid when the Department uses the guidance documents to form an independent basis for recoupment, as the Nurses have witnessed.

The Department's policy of recouping based on a perfection standard ticks all the boxes in the Opinion for an improper agency action: the policy regulates the same subject as Wis. Stat. § 49.45(3)(f), is more restrictive than the statute, and is not otherwise authorized by statute or rule. The Opinion also confirms that the application of the Perfection Rule

including as set forth as Topic #66, can be challenged, regardless of when these unpromulgated rules were created. OAG-4-17, ¶ 2, 30-33.

Because the Department's recoupment policy exceeds its statutory authority, this Court should affirm the circuit court.

CONCLUSION

The circuit court decision and orders should be affirmed.

Respectfully submitted this 6th day of September, 2018.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font, subject to this Court's granting of the motion to exceed the word limit filed herewith. The length of this brief is 3,869 words.

Dated this 6th day of September, 2018.

/s/ Diane M. Welsh
Diane M. Welsh

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of September, 2018.

/s/ Diane M. Welsh
Diane M. Welsh