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.

ON APPEAL FROM FINAL ORDERS OF
THE WAUKESHA COUNTY CIRCUIT COURT,
THE HONRABLE KATHRYN FOSTER, PRESIDING

SUPPLEMENTAL NONPARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE AND WISCONSIN PERSONAL SERVICES ASSOCIATION

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INTRODUCTION

Amici Wisconsin Manufacturers and Commerce and Wisconsin Professional Services Association submit this supplemental amicus brief on the effect of *Newcap, Inc. v. DHS*, 2018 WI App 40, 916 N.W.2d 173 and the Attorney General Opinion OAG-4-17 (Dec. 8, 2017) ("AG Opinion") in accordance with this Court's Order 1, June 21, 2018. As argued here, the *Newcap* decision and the AG Opinion are consistent with the circuit court's order that for the Department of Health Services (DHS) to apply the "Perfection Rule," Wis. Stat. Chapter 227 requires the policy first must be legislatively authorized and promulgated as an administrative rule. R. 35:5.

The Perfection Rule for the purposes of this case was described by the circuit court.

> [DHS'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.

We agree with this description. It is also a clear statement of law, affirmed in the *Newcap* decision, that any DHS policies attempting to recoup payments from Medicaid providers that are not authorized by Wis. Stat. § 49.45(3)(f) exceed DHS's authority.

As noted by the circuit court, "topic 66 is really what's at stake here." R. 63:16; App 123. Topic #66 is set forth in DHS's Medicaid Provider Handbook and requires all Medicaid services "must meet all applicable program requirements." R. 1:14. Topic #66, while not covering the full scope of the Perfection Rule, is an appropriate proxy policy to discern the legality of DHS's recoupment policies.

Topic #66 illustrates, as noted by the circuit court, a "gotcha" mentality at DHS in recoupment cases. R. 63:19; App. 126. *Newcap* lays bare this strategy to pressure Medicaid providers in recoupment cases by essentially throwing the book at them for what are often minor infractions of policies not legally enforceable.

In *Newcap*, DHS initially recommended that Medicaid seek repayment of $1,169,837.10 from Newcap. *Newcap* at 4. Consistent with Topic #66, DHS cast a wide net by arguing that numerous administrative code provisions, federal guidance, and DHS online, unpromulgated guidance, and updates to such guidance, were applicable authorities to impose recordkeeping requirements relating to invoices and National Drug Codes (NDCs). The court found none of these authorities required the clinic to maintain invoices or provided a basis for recoupment where an NDC was missing on a claim submission. DHS recouped nothing. But the costs Newcap unnecessarily had to incur to defend itself were anything but inconsequential. *Newcap* exposes how DHS's recoupment policies threaten the livelihood of all Medicaid providers.

In this case, the circuit court put a fine point on DHS's legal strategy that was evident in *Newcap*.

> In arguing that it is authorized to recoup payments from providers for virtually any failure to comply with a policy or procedure as directed by [DHS] in its vast catalog of requirements, [DHS] does not cite to a single statute. Rather, [DHS] has daisy-chained together a variety of provisions of the administrative code and prior administrative decisions to support its position.

R: 35:3; App. 103.

In their opening brief before this Court, DHS sets forth its legal daisy-chain in a table that includes 15 rules and two statutory provisions that cobbled together, according to DHS, provide authority for Topic #66. DHS Br. 29-30. But this table evidences a disturbing strategy by

DHS to use an unpromulgated catch-all policy, Topic #66, that puts all Medicaid providers at great legal risk.

Rather than taking the unnecessary path through this DHS legal gauntlet, we ask this Court to simply rule on the validity of Topic #66 in the broader context that unpromulgated policies, particularly those not authorized by statute, are invalid and unenforceable. In that regard, this supplemental amicus brief addresses how *Newcap* and the AG Opinion affect three issues:

1. Is Topic #66 a rule required to be promulgated in accordance with Wis. Stat. Chapter 227?
2. Does DHS have the statutory authority to impose Topic #66 as a regulatory requirement?
3. Do Medicaid providers and their association have standing to initiate this declaratory action to challenge Topic #66 and other invalid and unenforceable DHS policies?

ARGUMENT

I. Topic #66 And Other DHS Policies That Are Not Promulgated in Accordance with Chapter 227 Procedures Are Invalid and Unenforceable.

The *Newcap* decision does not discuss the well-established law that a rule, as defined at Wis. Stat. 227.01(13), that is not promulgated in accordance with Chapter 227 is invalid and unenforceable. Yet, the *Newcap* court was correct on the policy underpinnings for rulemaking when finding that DHS guidance, including its online handbooks and related updates, were unenforceable because "DHS never informed the providers that their failure to include that information could result in recoupment of claims DHS had already paid." *Newcap*, ¶ 42. Notice and a meaningful opportunity to comment is one of the fundamental purposes

behind the requirement that agencies promulgate policies that have the effect of law.

The AG Opinion starts by restating this foundational Chapter 227 requirement:

> My analysis begins with the fact that every agency's rulemaking authority is defined by statute. Section 227.10 imposes a duty upon each state agency to promulgate as a rule "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat §227.10(1).
>
> OAG-4-17, ¶ 3.

By DHS's own admission, Topic #66 is a rule as defined at Wis. Stat. § 227.01 (13). It is a statement of general policy adopted by DHS to govern its enforcement and administration of Wis. Stat. § 49.45(3)(f). DHS admits:

> During audits of PHP members, OIG has sought to recover Medicaid funds based on a finding of noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy. DHS Br. 9.

The Wisconsin Supreme Court in *Dane Cnty. v. Wis. Dep't of Health & Soc. Servs.,* 79 Wis. 2d 323, 331, 255 N.W.2d 539 (1977) held that unpromulgated rules set forth in a Medicaid manual are subject to challenges in a Chapter 227 declaratory judgement proceeding. This holding was predicated on the court's determination DHS's manuals were rules.

> There is no dispute that the provisions in the manuals relied upon by the DHSS [now, DHS] were rules within the meaning of sec 227.01(3), Stats. [now, § 227.01(13)]. *Id.* 543.

Similarly, the Wisconsin Supreme Court held in *Will v. Dept. Health & Social Services* 44 Wis.2d 507, 171 N.W.2d 378 (1969) that DHS's (then DHSS) manual material used to implement the federal Social Security Act "constitutes a rule or statement of policy within the meaning of [Chapter 227]." *Id.* at 384. The agency manuals in *Dane*

County and *Will* used to implement federally funded state assistance programs are analogous to DHS's Medicaid Provider Handbook and Topic #66. Consistent with the AG Opinion, these manuals, which DHS acknowledges are the basis of recoupment actions, must be promulgated in accordance with Chapter 227.

DHS argues, however, that this challenge relating to rulemaking fails from the onset because the challenged portion of the Medicaid Provider Handbook, Topic #66, is not a rule. DHS Br. at 26. Rather, DHS asserts "Topic #66 is simply a synthesis of statutes and promulgated rules." *Id*. In this case the so-called "synthesis" entails cobbling together 15 regulations and two statutory provisions to create a regulatory cluster bomb in the form of Topic #66. And as evident in *Newcap* and this case, these legal components supposedly behind Topic #66 are ever shifting, for example, from initial audit to the Court of Appeals. But assuming Topic #66 is constructed from finite, discernible statutes and regulations that are made available to those being audited, then invalidating Topic #66 would have no legal consequence for DHS. Medicare providers, however, would get to see the legal basis hidden within the fog of Topic #66.

AG Opinion highlights that the rulemaking process is the linchpin of Chapter 227. So, it is fair to ask why DHS is so reluctant to provide the procedural safeguards the law clearly affords the public and regulated businesses when an agency imposes policy mandates. Some administrative law experts observe that agencies often avoid rulemaking because the process brings transparency and political accountability to their desired policies:

> Agencies often declined to make policy through rulemaking because of the enhanced political accountability for policy decisions that results from the use of the rulemaking process. The dominance of policy decisions made through rulemaking is transparent. Moreover, rulemaking procedures, with such requirements of notice of a proposed rule in advance of potential adoption of

> the rule, gives Congress and the White House a good opportunity to deter an agency from adopting a policy preferred by the agency but opposed by the president or by influential members of Congress.
>
> 1 Richard J. Pierce, Jr., *Administrative Law Treatise* 511 (4th ed. 2002).

While this observation relates to federal rulemaking, it rings true for Wisconsin agencies. That is, putting DHS's Perfection Rule –the Handbook, including Topic #66, and all other unpromulgated recoupment policies – through the rulemaking process would require DHS to seek input from the public and affected parties, including associations representing Medicaid providers such as amici associations, as well as approval of the governor and the legislature. Topic #66 would not fare well under such transparency and political accountability. More problematic, DHS would have to demonstrate it has statutory authority to require perfection of Medicaid providers.

II. Topic #66 is Invalid and Unenforceable because it Exceeds DHS's Statutory Authority.

This Court in *Newcap*, and all parties in that case, found DHS's recoupment authority at Wis. Stat § 49.45(3)(f), which provides, in relevant part:

> I. 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 provisions of service and the appropriateness of aggregate claims. (Emphasis added)
>
> II. 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 services 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).

The *Newcap* court concluded that "the plain language of these provisions demonstrated DHS has authority to recover payments made

to a provider when an audit reveals that the provider failed to maintain records *as required by DHS*." *Newcap* at 8.[1] (Emphasis added)

2011 Wis. Act 21 (Act 21) requires all agency authority must arise from and remain tethered to an explicit legislative delegation. For example, Wis. Stat. § 227.10 (2m), created by Act 21, prohibits agencies from issuing regulatory mandates that are not explicitly required or allowed by statute or rule. Act 21 also created Wis. Stat. § 227.11 (2)(a)3 that is the focus of the AG Opinion. This provision provides:

> A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision. Wis. Stat. § 227.11 (2)(a)3.

The phrase *"*required by [DHS] for verification of provider claims for reimbursement" in Wis. Stat § 49.45 (3)(f) is the explicit authority that may give rise to recoupment. Moreover, this phrase is the limit of DHS authority and in accordance with Wis. Stat. § 227.11 (2)(a)3. cannot be used by DHS as a statutory platform to impose more restrictive recoupment requirements. On this point, the AG Opinion provides for a three-step analytical inquiry to determine whether an agency's rule violates this Act 21 provision.

The first step is to determine whether the rule and enabling statute contain a specific requirement. OAG-4-17 ¶ 17. Wis. Stat § 49.45(3)(f) contains the specific requirement that Medicaid providers "maintain records as required by [DHS] for verification of provider claims for reimbursement." Topic #66 sets forth the requirement that Medicaid providers "must meet all applicable program requirements." R. 1:14.

[1] Relating to the previously discussed rulemaking requirement, the term "required" by DHS can only mean promulgated under Chapter 227 as required means enforceable, and that triggers rulemaking.

The second step is to compare these two requirements to determine whether Topic #66 is "more restrictive" than the statute. *Id*. ¶ 20. The AG Opinion states that a "more restrictive" requirement includes requirements that can "compel additional conduct or be more demanding on the party whom the [requirement] is enforced." *Id*. ¶ 20. Wis. Stat § 49.45(3)(f) is clear – it limits recoupment of Medicaid payments to only those instances in which providers fail to maintain records required by DHS for the specific purpose of verifying the providers claim for reimbursement. Topic #66, on the other hand, mandates compliance with all applicable requirements, which includes unpromulgated policies such as the Medicaid handbook. Topic #66, therefore, is more restrictive than Wis. Stat § 49.45(3)(f).

Finally, the third step is to determine whether Topic #66 is otherwise "explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [Chapter 227]." Wis. Stat. § 227.10(2m). *Id*. ¶ 22. Consistent with the court's ruling in *Newcap*, there is no other statutory provision that explicitly provides for recoupment.

Therefore, because the requirements of Topic #66 are "more restrictive" than those found in the Wisconsin Statutes, and no other rule or statute explicitly permits these more restrictive requirements, Topic #66 may not be "enforce[d] or administer[ed]." Wis. Stat. § 227.11 (2)(a)3. *Id*. ¶ 24.

III. The Circuit Court Correctly Determined that the Plaintiffs Have Standing and the Dispute is Ripe.

Neither the *Newcap* decision or the AG Opinion discusses the well-established law relating to standing to seek declaratory relief under Wis. Stat § 227.40(1). But DHS asserts that because the provider in *Newcap* was subject to an audit relating to findings of deficiencies, that

only those Medicaid providers that are specifically targeted by DHS for recoupment have standing to challenge DHS's illegal policies.

In their supplement brief, DHS cites *Miller Brands-Milwaukee, Inc. v. Case,* 162 Wis.2d 684, 694, 470 N.W.2d 290 (1991) when asserting this case is not ripe because the facts are insufficiently developed to avoid the court entangling itself in an abstract disagreement. DHS Supp. Br., 4. That case involved specific facts relating to an individual company's practice; that is, the factual issues not yet developed were related to the nature and purpose of Miller Brands trade spending. This case is a dispute over a matter of law, versus a fact-based dispute that would require the direct participation of association members.

DHS also cites *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship,* 2002 WI 108, ¶ 72, 255 Wis.2d 447, 649 N.W.2d 626 for the prospect PHP is using a "procedural tool for the adjudication of hypothetical issues." DHS Supp. Br., 4. That case involved Time Warner's imposition of a five-dollar late payment fee on cable customers who fail to pay their monthly cable bill on time. The court in that case noted that "a plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief under the declaratory judgment statute." *Id.* ¶ 44. It went on to find that the issue before them "is not hypothetical, abstract, or remote." *Id*. ¶ 47. Finally, it held "these are precisely the type of claims that the Uniform Declaratory Judgment Act was intended to address. A circuit court's declaration would resolve uncertainty of the lawfulness of the late-payment fees in Time Warner's cable programming contracts." *Id*. ¶ 50. We read this case as supporting our position.

The threat posed by DHS's illegal policies is anything but hypothetical. As noted by the circuit court, "We are not talking about

abstract principles of law, we are talking about whether or not the policy embodied in Topic 66 has, in fact, been employed to the full force and effect. . .” R. 63:12-13; App. 119-120.

DHS acknowledges this actual and threatened impact on PHP members:

> OIG as times characterized all the compensation a nurse received for services she provided to Medicaid patients for days, weeks, months, or even years as “overpayments.” Initial Br. 10.

Losing a year’s worth of compensation is hardly a hypothetical injury.

DHS’s position is inconsistent with the well-established law on standing and is not supported by the *Newcap* decision. “The right of meaningful access to the judicial branch of government for parties aggrieved by an action or inaction of administrative agencies is the basic tenet of the present administrative system in this country.” Ramon A. Klizke, *Administrative Decisions Eligible for Judicial Review in Wisconsin*, 61 Marq. L. Rev. 405 (1978). Wisconsin law reflects that principle. For example, the Wisconsin Supreme Court held in *Wisconsin’s Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 69 Wis. 2d 1, 6-7, 230 N.W.2d 243 (1975) that “the law of standing in Wisconsin should not be construed narrowly or restrictively.”

DHS’s position that there are insufficient facts is a thinly veiled attempt to hide behind Topic #66. It’s position that Medicaid providers can only challenge Topic #66 when an audit results in a recoupment determination will lead to unnecessary and repetitive litigation that would inflict substantial financial and professional harm on the providers and unnecessarily burden the courts.

CONCLUSION

For the foregoing reasons, WMC and WPSA respectfully request this Court affirm the judgement of the Circuit Court.

Dated this 6th day of September 2018.

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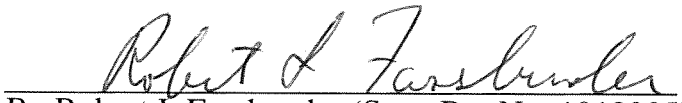
FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this supplemental non-party brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 2,934 words.

Dated this 6th day of September, 2018.

Wisconsin Personal Services Association



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CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO SECTION 809.19(12)(F), STATS.

The undersigned hereby certify that:

We have submitted an electronic copy of this supplemental non-party brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12), Stats.

We further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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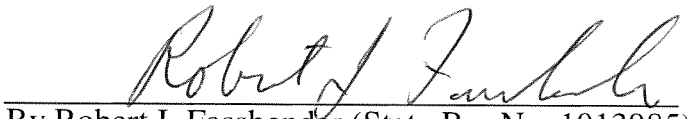
Dated this 6th day of September 2018.

Wisconsin Personal Services Association



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CERTIFICATE OF SERVICE

I, Robert I. Fassbender, attorney for Wisconsin Personal Services Association, hereby certify that on the 6th day of September, 2018, I caused three (3) true and correct copies of the foregoing supplemental non-party brief to be served upon counsel of record by placing the same in the U.S. Mail, first-class postage, as follows:

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