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STATE OF WISCONSIN
SUPREME COURT

Appeal Nos. 2016AP2082 and 2017AP634

KATHLEEN PAPA and
PROFESSIONAL HOMECARE PROVIDERS INC.,

Plaintiffs-Respondents-Petitioners,

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

NON-PARTY BRIEF OF AMICI WISCONSIN MANUFACTURERS & COMMERCE, MIDWEST FOOD PRODUCTS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, WISCONSIN DAIRY ALLIANCE, OUTDOOR ADVERTISING ASSOCIATION OF WISCONSIN, AND WISCONSIN PAPER COUNCIL

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1 Richard J. Pierce, Jr., Administrative Law Treatise (4th ed. 2002) 10, 12

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Kathleen Papa and the members of Professional Homecare Providers, Inc. (collectively, "the Nurses") are certified Medicaid providers who provide in-home care to children and adults. Wisconsin Department of Health Services' (DHS) Medicaid recoupment practices resulted in bankruptcies and the end of the Nurses' often-heroic work that so few now want to do. Fairness—and the law—demands that the Nurses, and all Medicaid providers, be given an opportunity to understand and provide input on DHS's recoupment policies. The Nurses are due notice and opportunity for comment before DHS implements enforcement actions, not *post hoc* in legal briefs. This is a bedrock principle of Wisconsin's administrative procedures statute.

INTRODUCTION

In 2017, researchers analyzed the regulatory landscape of Wisconsin.[1] They found that the Wisconsin Administrative Code contains 159,253 regulatory restrictions, amounting to roughly 12 million words. Relevant here, DHS alone had 17,390 regulatory mandates arising out of 139 rules containing 1,177 pages of regulatory directives.

[1] *A Snapshot of Wisconsin Regulation in 2017*, Policy Brief Mercatus Center, George Mason University (Aug. 8, 2017), https://www.mercatus.org/publications/urban-economics/snapshot-wisconsin-regulation-2017.

But statutes and rules are only the tip of the regulatory iceberg. Unpromulgated guidance documents reveal the full weight of the administrative state. In response to 2017 Wis. Act 369, DHS uploaded its guidance documents to its website.[2] These directives provide no meaningful opportunities for notice and comment and "supposedly" do not have the force of law. DHS's response to Act 369 entails 1,819 documents that at last count contains 21,125 pages or about 7.5 million words. There are 13 times more guidance documents than DHS rules, with a page count nearly 18 times greater.

This case involves one topic found in one guidance document—the Medicaid Provider's Handbook—known as Topic #66. This "guidance" provision states that the service provided by Medicaid providers, such as the Nurses, "*must meet all applicable program requirements, including, but not limited to* [specified requirements]." Emphasis added. Topic #66 is vacuous. *It means nothing because it means everything.* It provides no helpful information for Medicaid providers on DHS's recoupment policies.

[2] Department of Health Services, *Guidance Documents Library*, https://www.dhs.wisconsin.gov/aboutdhs/guidance-docs.htm, (last visited March 9, 2020).

If providers do not meet this open-ended, undefined directive, they are subject to recoupment actions that include all the compensation received for services provided to patients for days, weeks, months, or even years. Nurses were not given fair notice to what "all applicable requirements" meant. Only after DHS initiated Medicaid payment claw-back proceedings were they given the specifics of their offenses. Generally, DHS alleged paperwork discrepancies. But the Nurses provided the homecare services otherwise covered by Medicaid. It remains unclear what authority DHS has to recoup so much money for so much work based upon mostly technical violations.

Only through *post hoc* tables and references after the recoupment actions were initiated did the Nurses learn the basis for DHS enforcement policies. For example, to explain what it means by "applicable program requirements," DHS referenced 14 rules and two Wisconsin statutes in its circuit court brief; before this Court it now lists 16 rules, two Wisconsin statutes, six federal statutes and 14 federal regulations. R.20:22, DHS Response Brief, p. 20-21.

INTERESTS OF AMICI

Amici ("Wisconsin Employers") are associations whose members are global leaders in manufacturing and agricultural industries. They are diverse, but share concerns over the complexity, volume, and burdens imposed by agencies. On behalf of their members, they unite in long-standing advocacy for fair and balanced regulations that are all properly grounded within our constitutional framework of separation of powers.

Wisconsin Employers have an interest in assuring that Wisconsin executive branch agencies follow the statutory delegation standards and administrative procedures set forth in Wisconsin Statutes Chapter 227, including the statutory authority limits of Wis. Stat. § 227.10(2m) and the rulemaking requirement of Wis. Stat. § 227.10(1). For the regulated community, it is vitally important that agencies operate within the boundaries of their enabling statutes. And, the notice and comment requirements for rules plays a critical role in promoting fairness by providing notice, consistency, and opportunity to comment. Statutory authority and compliance with administrative procedures are legal prerequisites to regulation. This case is not just about Medicaid and DHS. It is likely to affect the entire regulated community.

ARGUMENT

I. Only Chapter 227's Rulemaking Procedures Provide Procedural Due Process, Political Accountability, and Judicial Oversight.

Chapter 227 establishes three buckets for generally applicable agency action: rulemaking, guidance, and other agency publications. Rulemaking procedures alone provide adequate due process protections for the regulated community, political accountability for agency policies, and a suitable mechanism to effectuate judicial review.

The majority of Chapter 227 Subchapter II involves the procedures an agency must follow to promulgate a rule. Notably, the process involves multiple steps engaging either the regulated community or legislative and gubernatorial branches of government. To begin, an agency must draft a statement of scope for any proposed rules and include the objective of the rule, statutory authority, and a description of the entities potentially affected. Wis. Stat. § 227.135. The scope statement must receive approval from the governor. Wis. Stat. § 227.135(2). If gubernatorial approval is given, the legislature gets the statement of scope and may require the agency to conduct a preliminary

public hearing. Wis. Stat. §§ 227.135(3)-136. This political accountability occurs before a draft rule even exists.

Next, the agency must prepare an economic impact analysis and submit it to the legislature and governor. Wis. Stat. § 227.137. Depending on the cost, the rule might fall outside the agency's authority and require passage of a bill allowing the agency to promulgate the rule. Wis. Stat. § 227.139. Afterwards, the regulated community gets further opportunity for notice and comment. Wis. Stat. § 227.16. And finally, the proposed rule goes through a complex legislative review process. Wis. Stat. § 227.19. Only then does it become a rule.

If an agency's action does not necessitate rulemaking, it might require publication and notice as a guidance document. As amended by 2017 Wis. Act 369, Chapter 227 lays out the procedure for establishing guidance and requires an agency to post any proposed guidance for public comment for 21 days. Wis. Stat. § 227.112. These new Chapter 227 procedures provide useful information on agency policies but remain a far cry from the protections afforded through rulemaking.

Rulemaking provides notice, consistency, and opportunity to comment. 1 Richard J. Pierce, Jr., Administrative Law Treatise

§ 6.8 (4th ed. 2002). Crucially, rulemaking provides "clear advance notice of permissible and impermissible conduct." *Id*. at 372. It allows the regulated community to know how and at what point the agency will act. *See Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("[T]o allow an agency to play hunt the peanut [for] information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as a mere bureaucratic sport.").

As Justice Gorsuch wrote, "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). This benefits both the regulated and regulators.

Rulemaking also provides necessary legislative and gubernatorial oversight. "[W]hen administrative agencies promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute." *Koschkee v. Taylor*, 2019 WI 76, ¶12, 387 Wis. 2d 552, 929 N.W.2d 600. But the legislature does not unreservedly surrender authority when it

delegates. It places legislative checks throughout the process. It assures agencies "remain subordinate to the legislature with regard to their rulemaking authority." *Id*., ¶20.

Finally, promulgation keeps agencies within the bounds of their legal authority. From the very start, a scope statement must include the basis for agency action, including its statutory authority and technical rationale. Wis. Stat. § 227.135. It assists not only the regulated community but also the court in determining whether an agency acted properly. *Connecticut Light & Power Co.*, 673 F.2d at 530 ("Disclosure of an agency's rationale is particularly important in order that a reviewing court may fulfill its statutory obligations to determine whether an agency's choice of rules was arbitrary or capricious."). These disclosures help bolster a rigorous judicial review.

Given the importance of Chapter 227 procedures for rules, Wisconsin Employers have significant concerns with agency rulemaking avoidance. Agency rulemaking avoidance robs those regulated of due process, eliminates effective legislative and gubernatorial oversight, and frustrates judicial review.

Richard J. Pierce, Jr. wrote how rulemaking avoidance eliminates political accountability and transparency:

> 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.

Pierce, *supra*, at 511.

Rulemaking is complex, time-consuming, and, frankly, burdensome. During the Summary Judgement Hearing in the present case, the attorney for DHS noted this concern:

> MR. BLYTHE: "[F]ederal regulations and requirements change all the time. I guess this kind of goes into the whole rule making thing. The federal rules and regs are in constant change. If a state -- I don't think it would be possible for a state to keep up with every single one of those by promulgating a rule. The rule promulgation process…it is not simple and it is not fast, and it's labyrinthian."

R.64:29-30

But as burdensome as it may be, difficulty does not excuse an agency from following the legislatively prescribed procedures laid out in Chapter 227. In a strikingly similar case to this, *Azar v. Allina Health Servs*., the federal Department of Health and Human Services (DHHS) posted a new policy without promulgation on its website, dramatically reducing payments to hospitals. 139 S. Ct. at 1808. Faced with rulemaking, DHHS warned that "providing the public with notice and a chance to comment . . . would take many years to complete." *Id*. at 1816 (internal quotations omitted).

Writing for the majority, Justice Gorsuch stated:

> [I]f notice and comment really does threaten to 'become a major roadblock to the implementation of' Medicare…the agency can seek

> relief from Congress, which—unlike the courts—is both qualified and constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy judgment.

Id. (internal citation omitted).

II. DHS's Medicaid Recoupment Policies Are Rules That Must Be Formally Promulgated Under Wisconsin's APA, Chapter 227 of the Statutes.

A rule consists of five elements: "(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." *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis.2d 804, 814, 280 N.W.2d 702 (1979) (citing Wis. Stat. § 227.01(13)).There is no dispute that DHS's enforcement policies as reflected by Topic #66 are of general application and issued by an agency. Thus, elements two and four need no further discussion.

The first element—statement of policy— broadly covers an agency's position relating to a statute. It can take different forms, but the result simply announces an agency's policy position on a matter within its jurisdiction. *Frankenthal v. Wisconsin Real Estate Brokers' Bd*., 3 Wis. 2d 249, 257b, 88 N.W.2d 352 (1958).. A statement of policy does not need a formal document or announcement but may manifest in repeated agency actions or a

change in an agency's interpretation of the law. For example, in *Wisconsin Elec. Power Co. v. DNR*, the court held that despite a rulemaking exemption for fact-specific permits, DNR's practice of "adoption and uniform application" of chlorine limitations in its permit approvals counted as a statement of policy and therefore a rule, even though DNR never announced or placed the limitations in a document of general application. 93 Wis. 2d 222, 235, 287 N.W.2d 113 (1980). In *Lamar v. DHA*, the Department of Transportation (DOT) changed its interpretation of a statute and the court ruled the changed interpretation required rulemaking, even though DOT only applied the change in an administrative proceeding and never formally announced it. 2019 WI 109, ¶39, 389 Wis.2d 486, 936 N.W.2d 573. Thus, even unwritten policies can trigger rulemaking. What matters is that the agency consistently apply those policies.

Recognizing unwritten statements of policy also fits within the broader purpose of Chapter 227. When conducting statutory interpretation, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel.*

Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. It would produce an unreasonable result if agencies could avoid notice and comment merely by enforcing its interpretation of the law through individual *actions* and never through a formal *written* pronouncement.

The recoupment practice enforced within "Topic #66" presents a statement of policy, with the operative language being "all applicable program requirements including, but not limited to." DHS did not need to cite Topic #66 in its recoupment actions. It was enough that DHS's practices consistently and repeatedly evidenced a practice relating to citing violations for technical documentation violations. Cloaking these practices as something other than policy statement of general application is akin to DNR's attempt to disguise the general application of chlorine limits as permit conditions or DOT initiating general sign removal policies one sign at a time.

DHS applied its policy with the effect of law. It recouped hundreds of thousands of dollars in previously paid wages from the nurses—driving many to bankruptcy and causing others to leave their chosen profession altogether. Regardless of whether the language of "Topic #66" intended effect of law consequences, the

actual policy enforced by DHS legally impacted the "interest of individuals in a class." *Cholvin v. DHFS,* 2008 WI App 127, ¶ 26, 313 Wis.2d 749, 758 N.W.2d 118.

Finally, "(5) to implement, interpret or make specific legislation enforced or administered by such agency" covers a variety of potential agency actions that require rulemaking. The implementation element manifests in virtually all situations. To be a rule, there is no need to show agency interpretation of its enabling legislation; it suffices to show the agency is implementing such legislation.

DHS's recoupment policies and procedures, as reflected in Topic #66, requires clarity that can only come through rulemaking. Topic #66 does not itself need promulgation as a rule, but the recoupment policies arising from it do.

If the Court finds DHS enforcement policies are not rules, then they must be guidance. But guidance provides little procedural due process for the regulated community, not enough political accountability, and a barebones framework for judicial review. From a practical standpoint, such policies would become invisible. Wisconsin Employers see many benefits in the new Act 369 guidance provisions, but there is a real danger of that the sheer

volume of documents create an impenetrable fog for the regulated community. They should not have to hunt through 20,000 pages of posted guidance for important policy pronouncements such as DHS's recoupment policies.

As it stands now, the only recoupment policies that have gone through the rulemaking process are found in Chapter DHS 108. And DHS 108.02(9) merely states that DHS may require a Medicaid provider to pay for any "overpayment." There are no meaningful guidelines as to what would be considered an overpayment. One word in a regulation does not comply with the letter, or spirit, of Chapter 227. The Nurses and all Medicaid providers deserve better. DHS's current recoupment policies are in disarray, arbitrary, but mostly unknown. All Medicaid providers, as well as DHS, would be well served if DHS provided clarity on these policies through formal rulemaking.

III. DHS's Recoupment Policies as Reflected by Topic 66 Fall Outside of The Boundaries Of Its Enabling Statutes.

Under Wisconsin law, statutory interpretation begins with the statute and gives statutory language "its common, ordinary and accepted meaning." *State ex rel. Kalal*, 271 Wis.2d, ¶ 45.

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore,

> statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole.
>
> *Id*. ¶ 46

Context and structure play a particularly important role when reviewing enabling statutes because they reveal the boundaries of the powers delegated to administrative agencies by the legislature. *Koschkee*, 387 Wis.2d, ¶ 15 ("The powers delegated to administrative agencies by the legislature include the power to promulgate rules within the boundaries of enabling statutes passed by the legislature.")

2011 Wis. Act 21 directs the courts to look for explicit authorities in the context of legislative delegated powers to administrative agencies. No one disputes that Wis. Stat. § 49.45(3)(f) sets forth the explicit boundaries of DHS recoupment authority. The Court of Appeals in *Newcap* interpreted the boundaries of this enabling statute as limiting DHS ability to recoup the full value of the claim if "actual provision of the services" "cannot be verified using the records DHS required of the provider to maintain." *Newcap, Inc. v. DHS*, 2018 WI App 40, ¶¶ 17-18, 383 Wis.2d 515, 916 N.W.2d 173.

This issue has been well briefed. Suffice to say that Wisconsin Employers agree with the Nurses' assessment that

DHS's recoupment practices wander well outside these clearly defined boundaries. Wisconsin Employers are also satisfied that if this Court orders rule promulgation of DHS's recoupment policies and practices, the statutory authority issue will be addressed at multiple junctures under Chapter 227, starting at the onset through scope statements and ending with legislative oversight.

CONCLUSION

This Court should reverse the court of appeals and reinstate the circuit court decision and orders.

Respectfully submitted this 9th day of March 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) §§ 809.19(8)(b) and (d) for a brief using a proportional serif font. The length of this brief, including footnotes, is 2,967 words.

/s/
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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

/s/
Robert I. Fassbender

CERTIFICATE OF SERVICE

I hereby certify that I caused this Motion for Leave to File a Non-Party Brief to be hand-delivered to the Supreme Court of Wisconsin on March 5, 2020.

I further certify that on March 9, 2020, I caused a copy of this Motion for Leave to File a Non-Party Brief to be served upon all parties of record via U.S. Mail to their respective counsel:

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