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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

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

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case presents important procedural questions of justiciability associational standing and ripeness as well as substantive questions of executive branch administrative rule-making authority and responsibilities under Wis. Stats. Chapter 227 that amici Wisconsin Manufacturers and Commerce (WMC) and Wisconsin Professional Services Association (WPSA) believe have broad implications for Wisconsin business and professional associations and their respective members, many of whom are subject to extensive state government regulation. These procedural and substantive issues are intertwined, and should be resolved by this court in favor of Plaintiffs Kathleen Papa and Professional Homecare Providers, Inc. (PHP).

Government never regulates in the abstract. For many businesses and entrepreneurs, like the providers here, as well as WMC's and WPSA's respective members, their primary business risk management concern is often compliance with government regulation. Nor are the enforcement standards and remedies here hypothetical. The "clawback" recoupment remedies here, which the circuit court determined exceed the Department of Health Services'(Department) authority under Wis. Stat. § 49.45(3)(f), can push a business or family entrepreneur into bankruptcy, many years after a provider believes it has delivered services compliant under existing statutes and administrative rules.

Amici as organizations, and on behalf of their respective members, share these same interests in a declaratory judgment in this proceeding as do the parties Kathleen Papa and PHP to see that administrative regulations are both *explicitly permitted* by law, and that they are duly promulgated, as *required* by law. WMC and WPSA

have a further organizational interest, on behalf of their members, to assure that Wisconsin executive branch agencies transparently follow every statutory prescription for promulgating administrative rules under Wisconsin Statutes Chapter 227 and particularly the requirement of Wis. Stat. § 227.10(2m) that agencies regulate *only* when explicitly authorized by the legislature to do so. The unlawful administrative practices the Department followed in regulating these plaintiffs, and all regulated entities similarly situated, is all too common among executive branch agencies.

When government operates surreptitiously and fails to regulate through prescribed statutory standards and explicit administrative rule authority, the courts must hold agencies accountable, and invalidate those administrative actions, as authorized through declaratory judgement proceedings under Wis. Stat. § 227.40(4). The legislature prescribed a specific remedy for Kathleen Papa and the association of which she and many other providers are members, PHP, in the declaratory judgement provisions of Wis. Stat. § 227.40, where an agency such as the Department, or any administrative agency, is imposing standards and enforcing remedies not explicitly prescribed by either administrative rule or statute. The courts are the only recourse for remedial relief when governmental agencies overstep the bounds of their administrative authority, or fabricate remedies for alleged violations of that regulatory authority, or both.

ARGUMENT

I. The Department's Perfection Rule is Invalid and Unenforceable because it Exceeds the Department's Statutory Authority.

"Administrative agencies are creatures of the Legislature, with 'only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate.'" Wis. Atty. Gen. Opinion OAG-01-16, ¶ 20, citing *Lake Beulah Management District v. Department of Natural Resources*, 335 Wis. 2d 47, ¶ 23. "Agencies are governmental bodies created by the Legislature in order to facilitate the efficient functioning of government by implementing the policy decisions of the Legislature." *Coyne v. Walker*, 368 Wis. 2d 444, 460 (Wis., 2016).

A. Agencies are only Afforded that Authority which is Explicitly Delegated to them by the Legislature.

2011 Wis. Act 21 (Act 21) reinforces the longstanding principle that all agency authority must arise from and remain tethered to explicit legislative delegation. First, the application of Wis. Stat. § 227.10 (2m), created by Act 21, prohibits agencies from issuing regulatory mandates that are not explicitly allowed by statute or rule. Second, Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide that statutory preambles – declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties – are not to be used by agencies as a wildcard to assert regulatory authority when explicit authority does not exist.

Act 21 arose out of a Special Session, which is a "session of the Legislature convened by the governor to accomplish a special purpose."[1] The legislation was introduced as Assembly Bill 8 by the Committee on Assembly Organization, but by request of Governor Scott Walker.[2] In essence, Gov. Walker was the author of Act 21 and his intentions were always clear.

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[1] Wisconsin State Legislature Glossary. http://legis.wisconsin.gov/about/glossary/.
[2] 2011 Assembly Bill 8. http://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8.

> Laws are created by the elected officials in the legislature who have been empowered by the taxpayers, not employees of the State of Wisconsin. The practice of creating rules *without explicit legislative authority* is a constitutionally questionable practice that grants power to individuals who are not accountable to Wisconsin citizens.[3] (Emphasis ours.)

Act 21 was intended to restore Wisconsin's history of requiring clear delegation of authority in enabling legislation. This was primarily accomplished through enactment of Wis. Stat. § 227.10(2m), which provides:

> No agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, *unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule* that has been promulgated in accordance with this subchapter. . . . (Emphasis ours.)

B. The Department's Perfection Rule Does Not Rest Upon Any Explicit Statutory Authority.

As noted in Defendant-Appellant's substitute brief, within the Department's Medicaid Provider Handbook under "Covered and Noncovered Services: Covered Services and Requirements," is "Topic #66," the subject of this litigation, which reads in full:

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

Defendant-Appellant's Substitute Brief, p. 8.

Plaintiffs-Respondents in this case seek declaration that the Department's policy allowing it to recoup payments due to noncompliance with all applicable program requirements (i.e., the

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[3] Walker, Regulatory Reform Informational Paper, (Dec. 21, 2010.). http://walker.wi.gov/newsroom/pressrelease/regulatory-reform-info-paper.

"Perfection Rule") is invalid because there is no corresponding statutory authority.

The Department's authority to recover past Medicaid payments is set forth at Wis. Stat. § 49.45(3)(f), which provides that recoupment is available only when the Department is unable either to verify from the provider's records that the service was provided, or the amount claimed was inaccurate or inappropriate for the service provided. Nowhere in Chapter 49 is it found that payments can be recouped if the provider fails to meet "all applicable requirements."

The circuit court agreed:

> In arguing that it is authorized to recoup payments from providers for virtually any failure to comply with the policy or procedure as directed by the Department's vast catalog of requirements, the department does not cite to a single statute.

R.35.6; App106, The "Final Order," p. 3.

The Department's Perfection Rule is invalid and unenforceable due to the lack of explicit legislative authority.

II. The Department's Perfection Rule is Invalid and Unenforceable as an Administrative Rule Not Promulgated in Accordance with Chapter 227 Procedures.

"All agencies are required to promulgate rules to adopt general policies in interpretation of statutes that will govern the agency's enforcement or administration of that statute." *Coyne v. Walker*, 368 Wis. 2d 444, 463 (Wis., 2016), citing Wis. Stat. § 227.10(1). In Wisconsin, "The Legislature sought to promote efficiency and create a uniform set of procedures administrative agencies were to follow when promulgating rules. Chapter 227 of the Wisconsin Statutes has henceforth prescribed the procedure agencies must follow to promulgate valid rules and regulations." *Id*. at 462.

The procedures set forth in Wisconsin's Administrative Procedures and Review statute (Chapter 227) ensure the regulated community is afforded due process – the right to adequate notice and a fair hearing prior to the imposition of regulatory mandates. In that vein, imposing regulatory dictates without following formal rule-making procedures circumvents important Chapter 227 rights of the regulated for public hearings and comments (Wis. Stat. §§ 227.17 and 227.18), economic impact analysis (Wis. Stat. § 227.137), legislative review (Wis. Stat. § 227.19), and gubernatorial approval (Wis. Stat. § 227.185), as well as other safeguards.

A. The Department's Perfection Rule is a Rule under Wisconsin Law.

As noted by the Supreme Court in *Coyne*, the statutory underpinning for Wisconsin's rulemaking directive is the Chapter 227 requirement that "[e]ach agency shall 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).

Related, Wis. Stat. § 227.01 defines "rule":

> [M]eans 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).

For purposes of this case, the operative conditions defining an agency action as a rule are whether the Perfection Rule: 1) Is a statement of policy issued by the agency; 2) of general application; and, 3) with the effect of law.

The Department acknowledges that the Perfection Rule "recites policies and guidelines," thus, it is a statement of policy issued by the agency. *Defendant-Appellant's Substitute Brief*, p. 28. The Department also acknowledges that the Perfection Rule is of general application as it applies to all Medicaid-enrolled providers. *Id* at p. 8. Finally, the Department acknowledges that the Medicaid Provider Handbook, which includes the Perfection Rule, has the force of law. Id at p. 8-9. Thus, by the Department's own admission, the Perfection Rule is indeed substantively a rule.

In *Dane Cnty. v. Wis. Dep't of Health & Soc. Servs.,* 79 Wis. 2d 323, 331, 255 N.W.2d 539, 544 (1977) the court held that un-promulgated rules set forth in a Medicaid manual are subject to challenges in a Chapter 227 declaratory judgement proceeding.

B. The Department's Assertion That the Perfection Rule Is Not a Rule Is Inconsistent with Applicable Law.

The Department argued that "rules" exist in the administrative code but that the Department also issues "guidance" that is not rules, and need not be promulgated. *Defendant-Appellant's Substitute Brief*, p. 27. The Department also appears to believe that opting out of the formal rule-making process in and of itself provides an argument that the rule-making process is not triggered. *Id.* at pp 34-35.

When an agency action "was not formally promulgated and filed as a rule under the procedure set forth in ch. 227, Stats., it does not insulate [the agency action] from judicial review…" *Citizens for Sensible Zoning, Inc. v. Department of Natural Resources, Columbia County*, 90 Wis.2d 804, 280 N.W.2d 702, 710 (1979). In addition, "[s]ince 'promulgation' without compliance with statutory rule-making procedures is one ground for declaring a rule invalid under

§ 227.40, § 227.40 logically encompass policies or other statements, standards, or orders that meet the definition of "rule" under Wis. Stat. § 227.01(13) but have not been promulgated as required by Wis. Stat. § 227.10." *Heritage Credit Union v. Office of Credit Unions*, 247 Wis.2d 589, 607 (2001).

As a rule, Wis. Stat. § 227.10 requires the Perfection Rule to have been promulgated, and because it is indisputable that it was not, Wis. Stat. § 227.40 (4) required the court to invalidate it, which the circuit court did.

III. The Circuit Court Correctly Determined that the Case Presents a Justiciable Controversy in that the Plaintiffs Have Standing and the Dispute is Ripe.

The Wisconsin Supreme Court held in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 69, Wis.2d 1 (1975) (WED) at pages 6-7, "We conclude that the law of standing in Wisconsin should not be construed narrowly or restrictively. This court has held that the review provisions of ch. 227, Stats., are to be liberally construed. As Professor Kenneth Culp Davis has commented:

> The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury. Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection."

The plaintiffs/providers' interests at issue here – the Department exceeding the scope of its statutory authority under Wis. Stat. § 49.45(3)(f) to recoup Medicaid payments under an un-promulgated "Perfection Rule" – are sufficiently significant. Further, this case illustrates when associational standing becomes necessary in fulfilling the WED court's directive in protecting the "sufficiently significant" interests of an association's members through collective

action.

In *Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown*, 282 Wis. 2d 458 (2005), a Wisconsin appeals court found "compelling policy considerations" at ¶ 15 to support the court's conclusion that the Metropolitan Builders Assn. of Greater Milwaukee (MBA) should have standing on behalf of its members to challenge a municipality's development impact fees. These considerations included the fact developers individually could bring challenges to the impact fees, and judicial economy would suffer through piecemeal litigation.

Providers represented here through PHP have experienced Department inspector general audits in the past that resulted in imposition of the "Perfection Rule." Both PHP and WPSA members have legitimate concerns over damage to their interests – both financial and reputational – that would result from future Department audits conducted in the absence of state statutory or administrative rule authority, or both.

When it comes to Wis. Stat. §227.40 claims, a trade association, like PHP (and amici WMC and WPSA), also has organizational standing to bring a claim when the agency action being challenged directly harms the members that the trade association was formed to represent. Where an administrative rule is related to the mission of the trade association, that organization, on behalf of its members, clearly has a legal interest in that administrative rule. Actions by the agency which prevent the organization from participating in the promulgation process harm that interest.

Where the intersection of policy considerations of standing and ripeness occurs is illustrated in *Milwaukee Dist. Council 48 v. Milwaukee County,* 2001 WI 65, 244 Wis. 2d, 333, 627 N.W.2d 866,

where union members believed their pension benefits to be threatened by their employer. The court first granted standing to the union to assert collective action on behalf of its members' legal rights in a declaratory judgement proceeding, at ¶38. Then, noting further that "Waiting until both events (termination and loss of pension benefits) would defeat the purpose of declaratory judgement … because by that point, the status quo would be irretrievably shattered." at ¶¶ 46 and 47. Thus, the court found that requiring individual union members to wait until they had experienced employment loss, before litigating pension rights, was not a reasonable requirement for establishing the ripeness of a dispute in a declaratory judgement proceeding.

Here, PHP's members, along with the members of the WPSA are similarly situated to the union members in *Milwaukee Dist. Council 48*. The Medicaid providers' choices are bleak – if they are denied standing to pursue declaratory judgement relief. They could await the Department's inspector general's audits resulting in "clawbacks" of payments they may have received in years past – resulting in the irretrievable shattering of their financial status quo. For the small business and sole proprietors that make up the bulk of PHP's and WPSA's membership, this is the equivalent of the union members in *Milwaukee Dist. Council 48* having to lose employment before asserting pension rights. Their livelihood is gone, along with diminished future prospects.

Further, the Medicaid providers could await the uncertainty of additional sanctions that a large governmental agency may choose to devise outside of the lawful parameters of explicit statutory authority or through an un-promulgated administrative rule, or both, to impose upon them. Or, providers can await their turn amidst the uncertainty of the current Department administrative review process seeking

relief before the administrative agency and eventually the courts where, if they have sufficient resources available to individually litigate each claim, they may ultimately prevail.

The association here, PHP, serves multiple roles on behalf of its members: first, it is a "government watchdog" over the regulatory process; further, it serves as a source of accurate information and compliance training; finally, it is best positioned to defend the interests of its members in this matter.

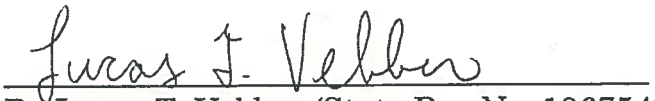
The legislature recognized the significance of merely the threat of the application of an administrative rule that impairs a legal right or privilege as the basis for a declaratory judgement proceeding. And, presciently, the legislature did *not* require a plaintiff to request the agency to pass upon the validity of the rule in question, Wis. Stat. § 227.40(1). Where, as here, the agency denies that there even *is* a rule – let alone failing to acknowledge the requirement that one must be promulgated under Wis. Stat. §227.10(2m) – standing must be granted to both Kathleen Papa and PHP, ripeness established, and the remedies plaintiffs seek, and the circuit court has already imposed, affirmed.

CONCLUSION

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

Dated this 4th day of December 2017.

Wisconsin Manufacturers and Commerce



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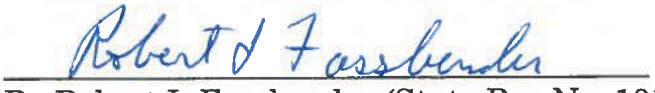

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FORM AND LENGTH CERTIFICATION

The undersigned hereby certify that this 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 2,837 words.

Dated this 4th day of December, 2017.

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

The undersigned hereby certify that:

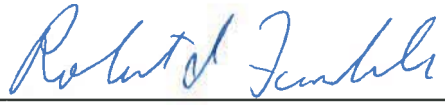
We have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

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.

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

Dated this 4th day of December, 2017.

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 4th day of December, 2017, I caused three (3) true and correct copies of the foregoing 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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