STATE OF WISCONSIN CIRCUIT COURT BRANCH 12 WAUKESHA COUNTY

KATHLEEN PAPA and
PROFESSIONAL HOMECARE PROVIDERS, INC.

Plaintiffs,

Case No. 15-CV-2403

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO STAY PENDING APPEAL

Plaintiffs, Kathleen Papa and Professional Homecare Providers, Inc., oppose the Motion to Stay Pending Appeal submitted by the Defendant, the Department of Health and Services ("the Department"). As demonstrated below, the Department, as the party requesting the stay, has not shown and cannot show that a stay pending appeal is appropriate in this matter. The same facts and legal authority that served as a basis for this Court's Orders, now defeat the Department's motion for a stay. The Department cannot prove that no substantial harm will come to Plaintiffs or the public if a stay is granted, just as it cannot establish that it is likely to succeed on the merits of the appeal. Further, the far-fetched assertion of the harm the Department stands to suffer is without merit.

BACKGROUND

Plaintiffs, Kathleen Papa, R.N. and Professional Homecare Providers, Inc., brought this declaratory judgment action to challenge the validity of the Department's policy (and interpretations thereof) which the Department has relied on to demand that Medicaid providers return monies for Medicaid-covered services that providers actually provided to patients, solely because of findings that the providers did not meet one of more of the complex, evolving requirements found in statutes, administrative code, online Medicaid Provider Handbook, provider updates issued by the Department, or other sources deemed relevant by individual auditors in the Department's Office of the Inspector General ("OIG").

Plaintiffs argued that this "Perfection Rule" was inconsistent with the Department's statutory authority. One published provision embodying the perfection rule is Handbook Topic #66, relied on by the Department to deem as "non-covered," and therefore subject to recoupment, any provided service which failed to meet a standard of perfection in compliance with all applicable program requirements.

The Court agreed with the Plaintiffs that the Department's Perfection Rule and recoupment policy functions as an unpromulgated rule that is unauthorized by statute and therefore violates Wis. Stat. § 227.10(2m). On September 27, 2016, this Court issued an Order in this declaratory judgment action, granting Plaintiffs' motion for summary judgment and ruling that:

> 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 claims 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.

(September Order, p. 6). The Court further ruled that "[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." *Id.* Pursuant to this declaration of law, the Court issued an injunction prohibiting the Department from "applying or enforcing the Perfection Rule." The Court ordered that:

> The Department may not recoup Medicaid payments made to Medicaid-certified providers for medically necessary, statutorily covered benefits provided to Medicaid enrollees, based solely on findings of the provider's noncompliance with Medicaid policies or guidance where the documentation verifies that the services were provided.

(September Order, pp. 6-7).

The Department filed a notice of appeal on October 20, 2016, but did not file a motion to stay at that time.

The Department continued to initiate and prosecute recoupment actions in manners inconsistent with the September Order (Plaintiff's Motion for Supplemental Relief and supporting materials). In response, Plaintiffs filed a Motion for Supplemental Relief or Sanctions on January 12, 2017. At the February 14, 2017 hearing, the Court granted, in part, the Plaintiffs' motion. On March 23, 2017, the Court issued an Order for Supplemental Relief to "restate and give effect to the declaratory judgment and injunction" it had previously entered and ordered the Department to pay Plaintiffs'

costs and attorneys' fees incurred in prosecuting the motion (hereinafter, "March Order"). A further March 24, 2017 order set the amount of costs and fees to be paid.

The Department has since appealed each of the Court's March Orders and now seeks a stay of all of the Court's Orders pending resolution of its appeals.[1]

ARGUMENT

I. Legal Standard

A stay pending appeal is appropriate where the moving party:

(1) makes a strong showing that it is likely to succeed on the merits of the appeal;

(2) shows that, unless a stay is granted, it will suffer irreparable injury;

(3) shows that no substantial harm will come to other interested parties; and

(4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995), citing *In Re Marriage of Leggett v. Leggett*, 134 Wis.2d 384, 385, 396 N.W.2d 787, 788 (Ct. App. 1986).

II. Application of the *Gudenschwager* factors do not support the grant of a stay in this case.

A. The Department has not make a showing of likelihood of success on appeal.

The first factor a court considers upon a motion for stay pending appeal is whether the movant makes "a strong showing that it is likely to succeed on the merits

[1] The Court should not consider facts asserted in Defendant's brief for which there is no support in the record. Further, the Affidavit of Anthony Baize is not valid. The document indicates it was sworn to and signed in Dane County, Wisconsin, yet it has been signed by a notary public from the State of South Carolina. *See generally*, Wis. Stat. §§ 137.01(1), (5).

of the appeal." *Gudenschwager*, 191 Wis. 2d at 440. The Department has not established and cannot establish that it has more than a mere possibility of success on the merits of the appeal, as discussed below.

1. The Department's suggestion that a provision of the Medicaid Provider Handbook is not a rule and therefore cannot be challenged under Wis. Stat. § 227.40 is erroneous.

The Court properly determined that the Department's "Perfection Rule" and recoupment policy has been enforced as a rule by the Department without being properly promulgated under Wis. Stat. Chapter 227 (September Order, p. 4). The Court properly concluded that the Department's policy exceeds its statutory authority under Wis. Stat. § 49.45(3)(f) (September Order, p. 6).

Rules set forth in a Medicaid handbook are subject to judicial review under the declaratory judgment provision of Chapter 227. *See Dane Cnty. v. Wisconsin Dep't of Health & Soc. Servs.*, 79 Wis. 2d 323, 331, 255 N.W.2d 539, 544 (1977) (holding that the validity of unpromulgated rules set forth in a Medicaid manual could be challenged by county through the declaratory judgment proceeding set forth in ch. 227).[2]

Relying on outdated case law that examined a completely different Medicaid handbook, the Department asserts that a statement of general policy set forth in the Medicaid Provider Handbook is not a "rule" and therefore cannot be challenged under Wis. Stat. § 227.40. (DHS Brief, p. 6-7)[3]. This argument ignores current Wisconsin law

[2] At the time of the *Dane County* case was heard, the declaratory judgment provision was at Wis. Stat. § 227.05. The provision was renumbered to Wis. Stat. § 227.40 by 1985 Act 182, § 26, effective April 22, 1986.

[3] Citations to the Defendant's Brief in Support of Motion to Stay Pending Appeal will be abbreviated to DHS Brief, pp. #.

governing policies issued by state agencies and the explicit legislative authority for judicial review of such policies or rules.

The Department cites *Tannler v. DHSS*, 211 Wis. 2d 179, 564 N.W.2d 735 (1997) to suggest that the Medicaid handbook "simply recites policies and guidelines, without attempting to establish rule or regulations." (DHS Brief, pp. 6-7).

Notably, the handbook considered in *Tannler* was not the Medicaid Provider Handbook at issue here. Rather, the Court looked at a handbook "designed to assist state and local agencies to implement the federal-state MA program." *Tannler*, 211 Wis. 2d 184. The matter simply did not involve the Medicaid Provider Handbook. In discussing a different handbook, the *Tannler* Court indicated, "As long as the document simply recites policies and guidelines without attempting to establish rules or regulations, use of the document is permissible" *Id.*, pp. 187-88. The Court examined the specific provisions and concluded that those provisions were consistent with state and federal law. *Id.* at 188.

Although the portion of the different handbook reviewed by the *Tannler* Court was found to be "consistent with controlling legislation," *Id.*, the same cannot be said about the perfection standard as set forth at Topic #66 of the Online Medicaid Provider Handbook. Neither state nor federal law establish recoupment based on post-payment audit findings triggered by an application of a perfection rule. *Tannler* is readily distinguishable from this matter.

Furthermore, more than a decade after the Court issued the *Tannler* decision, the Legislature enacted 2011 Wisconsin Act 21, which provides the standards for the enforceability of unpromulgated agency documents that applies today.

Wis. Stat. § 227.10(2m), as enacted by 2011 Act 21, provides that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as 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." In *Coyne v. Walker*, 2016 WI 38 ¶¶ 16-23, Justice Gableman explains:

> A "rule" is defined by Wis. Stat.§ 227.01(13) as 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.'" Agencies generally must promulgate rules to take any action pursuant to the statutes they are tasked with administering unless the statute explicitly contains the threshold, standard, or requirement to be enforced. All agencies are required to promulgate rules to adopt general policies and interpretations of statutes that will govern the agency's enforcement or administration of that statute. Wis. Stat. § 227.10(1). Additionally, an agency may not "implement or enforce any standard, requirement, or threshold, including as 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 [Wis. Stat. ch. 227, subchapter II] . . ." Wis. Stat. § 227.10(2m).

Id., ¶ 19 (footnotes omitted).

Act 21 sharply curtailed state agencies' authority to enforce policies and procedures unless authorized by the Legislature and promulgated by administrative

rule. Pre-Act 21 case law construing a state agency's authority must be carefully reviewed in light of Act 21 to determine its continued validity. *See, e.g.*, OAG-01-16 (Wis. A.G. May 10, 2016) (Attorney General's opinion that Wisconsin Supreme Court's decision in *Lake Beulah Management District v. State*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, is no longer controlling in light of Wis. Stat. § 227.10(2m), enacted by Act 21).

Thus, the Department's reliance on *Tannler* is misplaced. Because the enforcement of a perfection standard is a statement of general policy issued to govern agency procedure, it meets the definition a "rule," and is subject to review under Wis. Stat. § 227.40.

2. The handbook guidance exceeds what is allowed under law.

The Perfection Rule violates Wis. Stat. § 227.10(2m) because it is not "explicitly required or explicitly permitted" by law. The Department relies on a chart, spanning nearly two pages, comparing Topic #66 language with "State statutory and admin. code provisions" that allegedly "support" the language in Topic #66.

If anything, the chart underscores the lack of legislative authority for the Department's Perfection Rule. The "statutory support" is mostly lacking from the chart. Two statutory subsections support just two phrases (and four words) of Topic #66. In comparison, fourteen portions of the topic claim to get their support from various provisions of the administrative code. (DHS Brief, pp. 8-10). Indeed, as the Court has already observed, the Department has merely "daisy-chained together a variety of

provisions of the Administrative Code and prior administrative decisions" in its effort to support its position. (September Order, p. 3).

The Department's chart cites to Wis. Stat. § 49.45(3)(f). (DHS Brief, p. 9). As the Court has ruled, this statutory provision not only fails to enable enforcement of a perfection standard, but actually specifically *restricts* the circumstances under which the Department may recoup provider reimbursements. These circumstances are those in which either (1) the Department is unable to verify from a provider's records that the service was actually provided, or (2) the amount claimed was inaccurate or inappropriate for the service provided. Wis. Stat. § 49.45(3)(f); (September Order, p. 6). Thus, any agency policy—including an administrative rule—under which the Department seeks to recover reimbursements outside of these statutory limits contravenes the statute and is unlawful. Wis. Stat. §§ 227.10(2), (3)

The Department correctly asserts that there are federal laws which provide state Medicaid programs with the authority and duty to recoup overpayments. (DHS Brief, p. 8). The Department cannot articulate a single federal law, however, that requires a state Medicaid program to impose a perfection rule upon Medicaid providers and then to use that rule as a basis for recoupment. The Department has not established that adherence to Wis. Stat. §49.45(3)(f) would be inconsistent with federal law.

3. The Department misstates the Orders and their impact.

The Department repeatedly misstates and misconstrues the Court's Orders in an apparent attempt to introduce an ill-founded parade of horribles. It first argues that the September Order held "that DHS can recoup payment only if it is shown that no actual

services were provided." (DHS Brief at 12). In fact, the September Order plainly states that the Department is authorized to recover "where a Medicaid provider's records do not verify the appropriateness and accuracy of the provider's claim." (September Order, p. 6). The Plaintiffs would not dispute that "DHS may recover an erroneous payment, a duplicative payment, and a payment found to be excessive" (DHS Brief, p. 13) – so long as "erroneous payment" is defined in a manner consistent with Wis. Stat. § 49.45(3)(f). Likewise, Plaintiffs agree that the Department may seek recoupment where a Department review "is unable to discern whether a payment was proper because of insufficient or lack of documentation" or "where the provider fails or refuses to prepare and maintain records or permit authorized Department personnel to have access" to relevant records (DHS Brief, p. 13) – so long as the ultimate focus of the inquiry is to whether services were provided as opposed to whether recordkeeping rules were perfectly followed.

As the Court made clear, the ruling does not stand in the way of the Department's ability to go after fraud, waste, and abuse. A clear distinction remains between documentation that is *insufficient* to reveal the service provided (or its propriety) and documentation that is merely *imperfect*. There is a critical difference between documentation which is insufficient to establish that appropriate, necessary, covered services were provided and documentation that fails to comply with every record-keeping provision set forth by the Department. It is the latter category that is the subject of the Plaintiffs' suit and the Court's Orders.

As a result, the Department is far off base in arguing that it would be fiscally irresponsible, in violation of federal law, and blind to the protection of patient health and safety to comply with the Court's Order. (DHS Brief, pp. 13-14). Not only is this argument unsupported by citation or logic, it does not correspond to any actual consequence of the Court's Orders.

4. The Perfection Rule is squarely within the Court's jurisdiction under Wis. Stat. § 227.40.

The Department contends that the Department should be able to completely avoid judicial review of the Perfection Rule. This argument is again based on a false distinction between "policy and practice" and an unpromulgated rule.

The Department admits that the statute "permits a challenge to a written instruction that was not, but should have been promulgated." (DHS Brief, p. 15). However, the Department states that it has not found case law allowing a challenge to "a state agency's policy and practice, as opposed to a promulgated or unpromulgated rule." *Id.*

As explained above, this is a distinction without a difference. The policy on recouping payments for any imperfection is a rule by definition. Wis. Stat. § 227.01(13). Where the Department has a policy and practice for recouping payments from Medicaid providers, that policy it must be promulgated by rule under Ch. 227. Wis. Stat §49.45(2)(a)10.c.; Wis. Stat. § 227.10(1); *see also Coyne*, 2016 WI 38, ¶ 19. The Court properly recognized that the rule is an unpromulgated rule. (September Order, p. 6).

Reviewing the validity of this policy or rule is squarely under the Court's jurisdiction under Wis. Stat. § 227.40.

5. The Court's injunction was within the bounds of its remedial powers under Wis. Stat. § 227.40.

The Department mistakenly argues that the September Order is invalid because the Court is not allowed to issue an injunction in an action under Wis. Stat. § 227.40. Section 227.40 provides that "the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of the rule brought in…circuit court." Wis. Stat. § 227.40(1). The legislature's only limit on a court's injunctive powers is that:

> Notwithstanding s. 227.54, in any proceeding under this section for judicial review of a rule, a court may not restrain, enjoin or suspend enforcement of the rule during the course of the proceeding on the basis of the alleged failure of the agency promulgating the rule to comply with s. 227.114.

Wis. Stat. § 227.40(4)(b). Section 227.114 proscribes rulemaking considerations for small businesses which are inapplicable here. There would be no need for this subsection if, as the Department contends, there was a general prohibition against a court issuing an injunction in a proceeding under Section 227.40.

A court's ability to issue an injunction under Wis. Stat. § 227.40 is, in fact, no different than under Wisconsin's general declaratory judgment statute, Wis. Stat. § 806.04—a statute which likewise neither needs nor features explicit authorization for injunctive relief. It is long-held that "[i]njunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective."

Blooming Grove v. Madison, 275 Wis. 328, 336, 81 N.W.2d 713, 717 (1957). In fact, declaratory relief and injunctive relief against administrative actions go hand in hand. *See State Pub. Intervenor v. Dep't of Nat. Res.*, 115 Wis. 2d 28, 40–41, 339 N.W.2d 324, 329 (1983). Here, the Court rightly determined that its injunction was necessary or proper to make its judgment effective. The need to follow up that ruling with the Court's grant of supplemental relief only underscores that necessity and propriety.

Finally, contrary to the Department's argument, the Court's injunction does not prevent the Department from recovering payments where the documentation cannot verify "the appropriateness and accuracy of claims." The injunction clearly protects recoupments for both appropriateness and accuracy by limiting its reach to claims that are for *medically necessary, statutorily covered* benefits that were *actually, verifiably provided* and where the recoupment is based *solely on findings of the provider's noncompliance*. (September Order, p. 6). As such, the injunction is in harmony with the remainder of the Court's declaration.

6. The Department is not likely to succeed on the merits regarding the Court's Order for Supplemental Relief.

As was briefed earlier, this case is readily distinguishable from *Madison Teachers, Inc. v. Walker*, 2013 WI 91, 351 Wis. 2d 237, 893 N.W. 2d 388. *Madison Teachers* held that, once an appeal has been perfected, a circuit court may not "take[] any action that significantly alter[s] its judgment." *Id.* at ¶ 21. In that case, a circuit court issued a declaratory judgment but twice refused plaintiffs' requests to issue an injunction. *Id.* at ¶¶ 3-8. Then, six months after the appeal was initiated, the circuit court granted a

motion for contempt and, effectively, an injunction, to a group of non-parties to the case—a different form of relief altogether from what was originally ordered. *Id.* at ¶¶ 9-13, 20. This order was the "significant alteration" of the original judgment that the Supreme Court found to "interfere" with the court's judgment pending appeal. *Id.* at ¶¶ 20-21.

Here, the motion for supplemental relief was made by original parties to the case. Plaintiffs simply asked for the Court to enforce the specific relief already ordered in this declaratory judgment action. The Court's Supplemental Order, which was issued after the Department repeatedly ignored the Court's September Order, sought to clarify and give effect to the September Order.

The Department's argument makes clear that it felt entitled to act beyond the legislative grant of authority set forth in Wis. Stat. § 49.45(3)(f), despite the Court's September Order which construed the limitations of this statute.

There is little reason to believe that the Court of Appeals will determine that the Court's supplemental ruling exceeds its authority to give effect to the Court's judgment under Wis. Stat. § 808.07(2)(a)(3). There is also little reason to believe that the Court of Appeals will rule that the Department can interpret provisions of the administrative code in a manner that is inconsistent with statute on which the code provision is based. *See* Wis. Stat. § 227.10(2m); *Coyne*, 2016 WI 38, ¶¶ 19-23.

7. The Department is not substantially likely to succeed on the merits regarding the Court's Order on Costs and Attorneys' Fees.

The Department is not likely to succeed on the merits of its challenge to the award of costs and attorneys' fees to Plaintiffs for pursuing the motion for supplemental relief after the Department repeatedly disregarded the Court's September Order. The Department does not argue that its conduct did not warrant the order for costs and fees. Rather, for the first time, the Department now contends that Wis. Stat. § 808.07(2)(a)3 does not explicitly authorize the award of costs and fees and that the State is immune from an award of fees under the doctrine of sovereign immunity. (DHS Brief, pp. 21-22).

Because the Department did not timely raise an immunity defense to the Plaintiff's motion for costs and fees, it has been forfeited. Hence, it is unlikely that the Court of Appeals will consider the issue. Sovereign immunity may be forfeited if not timely raised. *Lister v. Board of Regents*, 72 Wis. 2d 282, 296, 240 N.W.2d 610 (1976) citing *Kenosha v. State,* 35 Wis.2d 317, 327, 328, 151 N.W.2d 36 (1967) *Cords v. State,* 62 Wis.2d 42, 46, 214 N.W.2d 405 (1974); *see also, Aesthetic and Cosmetic Plastic Surgery Center, LLC v. Dep't of Transp*. 2014 WI App 88, ¶¶ 21-23, 356 Wis. 2d 197, 853 N.W.2d 607.

Even if the issue were to be reviewed by the Court of Appeals, the Department has not established that it would succeed on the merits. Under Article IV, § 27 of the Wisconsin Constitution: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." Under § 227.40, the legislature directed that "the exclusive means of judicial review of the validity of a rule shall be an

action for declaratory judgment as to the validity of the rule brought in the circuit court for the county where the party asserting the invalidity of the rule resides or has its principal place of business." Hence, by enactment of § 227.40, the legislature consented to declaratory judgment actions against state agencies.

A court's order for a remedial sanction is not a separate lawsuit. Rather, a motion for supplemental relief under Wis. Stat. § 808.07 or for remedial sanctions under § 785.04 is a procedural tool available to give effect to the Court's judgment. It is permitted by statute and by the court's inherent authority to effectuate its orders. Where the lawsuit is properly authorized by the legislature, there is no bar to the court exercising its authority to give effect to its judgment. The Department does not cite to a single case that applies the doctrine of sovereign immunity to preclude the award of costs and fees against the state as a remedial sanction. (DHS Brief, pp. 22-23). Rather, the cases address whether or not the state had consented to be sued in the first place.

Further, it does not matter that the statute does not specify that the court may order remedial sanctions against a party. Under Wis. Stat. § 808.07(2)(a)3., the court has broad authority to make ***any order*** appropriate to preserve the ***effectiveness*** of the judgment. Courts have long recognized the inherent authority of the courts to order remedial sanctions to give effect to judgments. In addition to this broad grant of authority, the Court has the authority under Wis. Stat. § 785.04(1) to impose a remedial sanction, including payment of a sum of money sufficient to compensate a party for a loss as a result of a contempt of court. Plaintiffs requested costs and fees under this provision, and the Court could certainly use this authority—in addition to its authority

under Wis. Stat. § 808.07(2)(a)3., to support the award of costs and fees. The record in this case supports the Court's use of its power to punish the Department for contempt.

B. The Department has not make a showing that it will suffer irreparable injury absent a stay.

The second consideration for a stay is whether the moving party shows that it will suffer irreparable harm absent the stay. *Gudenschwager,* 191 Wis. 2d 440. "The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant." *Id.* at 441-42. The Department has produced no evidence that it will be irreparably damaged if the Court's Orders are not stayed. Despite the fact that it is continuing to conduct audits of Medicaid providers, the Department asserts that the Orders prevent it from conducting any audits of Medicaid providers or seeking any recoupment of Medicaid funds.[4] This is simply not true. The Department is free to continue conducting these activities—it need only comply with the statute—as construed by this Court—while it does so.

The Department also raises the specter of "a determination by the federal government that DHS is not adequately enforcing its Medicaid statutes and regulations," after which "Wisconsin could lose all or a portion of the $5 billion of federal Medicaid funds that are provided to Wisconsin each year." (DHS Brief, pp. 23-24). However, the Department provides absolutely no evidence that there is any

[4] The Department does not assert that it has suspended audits. At the February 14, 2017 hearing, the Department's attorney indicated that audits were proceeding.

realistic possibility of either such a determination or subsequent cut-off of funding from the federal government.

The Department offers no evidence—either legal or practical—that complying with Wis Stat. §49.45(3)(f), as construed by the Court's Orders, would render the Department's audit and recoupment efforts substandard in the eyes of the Centers for Medicare and Medicaid Services ("CMS"), the federal government which oversees Medicaid. Although the Department points to a federal manual defining "improper payment" (DHS Brief, p. 28), the definition is not inconsistent with Wis. Stat. §49.45(3)(f). Likewise, the federal definition is entirely in line with the Court's construction of this statute.

Moreover, the Department has offered no proof CMS had raised concerns about Wisconsin's approach to recouping funds for years preceding the creation of the OIG and the Department's implementation of more aggressive recoupment efforts. The Department has offered no proof that CMS sought to defund Wisconsin Medicaid in all that time. Likewise, the Department has not established that CMS has contacted the Department since the September Order was issued, raising concerns about OIG's ability to comply with federal law.

The Department has not provided evidence of a single instance of CMS withholding any Medicaid funds to a state because the state was found not zealous enough in its recoupment efforts against Medicaid providers—let alone withholding the entire federal share of a state's Medicaid program. The notion that the federal government might withhold $5 billion from the State of Wisconsin under the

circumstances here is far-fetched. Based on the "proof" offered by the Department, the Court can reasonably conclude there is zero probability that the federal government will withhold $5 billion its share of Wisconsin's Medicaid program. There is no showing—let alone a strong showing—of an irreparable injury to the Department.

C. A stay would cause substantial harm to interested parties.

The third consideration in granting a stay is whether the moving party shows that no substantial harm will come to other interested partied. *Gudenschwager,* 191 Wis. 2d 440. The Department has not shown, and cannot show this. As established through the affidavits of members of the Professional Homecare Providers, it is very likely that Plaintiffs will suffer irreparable harm if the Court's Orders are stayed. Hubertus Aff., ¶ 15; Papa Aff., ¶ 15; Zuhse-Green Aff., ¶¶ 14-16; Rueda Aff., ¶¶ 8-9; Unke Aff., ¶¶ 10-11; Goss Aff., ¶ 10; Steger Aff., ¶ 9.

In its brief, the Department asserts that the only consequence that befalls providers as a result of the Department's recoupment efforts is the cost of "exercising their due process rights." (DHS Brief, pp. 29-30). The Department inexplicably seems to suggest that a loss of money to the state is a harm, but that a loss of money to nurses is not a harm. (DHS Brief, p. 30).

The Department's position ignores the real harm to nurses when the Department seeks recoupment from them for care they provided to Medicaid enrollees. It is true that any provider may request an administrative hearing if the provider disagrees with a Notice of Intent to Recover. However, when the Department is advancing and

applying the wrong legal standard, then the administrative hearing process is not protecting the due process rights of providers.

If the Department Secretary or her designee is free to issue final decisions that are inconsistent with the Department's statutory authority, providers will face wrongful recoupment. Steger Aff., ¶¶ 5-6; Goss Aff., ¶¶ 7-8. Rueda Aff., ¶¶ 5-6. This will likely lead to financial stress and the risk of bankruptcy or having to sell their homes. Papa Aff., ¶ 15; Hubertus Aff., ¶ 15. Further, it is highly likely that the recoupment efforts will cause some nurses to discontinue serving Medicaid enrollees as private duty nurses. Hubertus Aff., ¶ 15; Papa Aff., ¶ 16; Zuhse-Green Aff., ¶ 15.

The Court recognized the nurses' ability to exercise their due process rights comes at a considerable cost. September Order, p. 5. *See also, e.g.,* Rueda Aff., ¶ 7; Steger Aff. ¶ 8; Goss Aff., ¶ 9; Zuhse-Green Aff., ¶13; Hubertus Aff., ¶ 14; Papa Aff., ¶ 14. It is a cost that some nurses simply cannot afford. The legal costs are even greater if the matters must be appealed to the circuit court in an effort to obtain a correct decision. Hence, it is likely that some nurses will not have the financial resources to exercise their due process rights all the way through the circuit court.

The Department glosses over the substantial stresses the recoupment efforts create on the nurses and the families of the Medicaid enrollees they support. *See e.g.,* Hubertus Aff., ¶ 15; Papa Aff., ¶ 15; Zuhse-Green Aff., ¶¶ 14-16; Rueda Aff., ¶¶ 8-9; Unke Aff., ¶¶ 10-11; Goss Aff., ¶ 10; Rothfelder Aff., ¶¶ 7-8; Steger Aff., ¶ 9; Haidlinger Aff., ¶¶ 13, 15, 17. If the Orders are stayed, the Department will recoup hard-earned money from nurses. Further evidence of the likelihood of the harm by the

Department's recoupment efforts in contravention of the September Order is documented in the Plaintiffs' Motion for Supplemental Relief and formed part of the basis for the Court to grant that motion. The record leaves no doubt that a stay would result in substantial harm to the Plaintiffs.

D. A stay would cause harm to the public interest.

Finally, the Department cannot meet its burden to show that a stay would cause great harm to the public interest. In fact, it is highly likely that a stay would cause great harm to some of the Wisconsin's most vulnerable citizens and the family members who are trying to help them remain at home. See e.*g.*, Rothfelder Aff., ¶¶ 7-8; Haidlinger Aff., ¶¶ 13, 15, 17. Medicaid enrollees who rely on home-based care have complex medical needs. *Id.* When qualified private duty nurses are deterred from participating in Medicaid, this population suffers. The Court has already observed that this risk, including the potential need to institutionalize patients who could otherwise be treated at home, as a "secondary or ripple effect of the audit process." Transcript, Aug. 12, 206, p. 12, lns. 5-11.

To proceed with its program integrity efforts, all that is expected of the Department is that they would apply the Court's interpretation of Wis. Stat. § 49.45(3)(f) as the correct legal standard for recoupment. Despite the clarity of the Court's Orders and the Court's guidance to the Department's attorney on how the Department should proceed, the Department relies on its continued feigned confusion to suggest there is "confusion in the marketplace and in ongoing proceedings." Quite obviously, confusion

will not be reduced if the Court's Orders are stayed prior to a decision by the Court of Appeals. Doing so would permit the Department to initiate and advance recoupment efforts which exceed its statutory authority. The logical method for avoiding confusion would be to stay administrative proceedings pending a Court of Appeals decision, not to stay the Court's Orders.

CONCLUSION

For the reasons stated above, the Department has not made the showing required in order to obtain a stay of the Court's Orders of September 27, 2016, March 23 and 24, 2017, and its judgment of April 3, 2017 pending resolution of its appeals to the Court of Appeals. Plaintiffs respectfully request that the Court deny the Department's Motion.

Respectfully submitted the 27th day of April, 2017.

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