

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 12

**FILED**  
**08-27-2016**  
**WAUKESHA COUNTY**  
**Clerk of Circuit Court**  
**Waukesha County**

KATHLEEN PAPA and  
PROFESSIONAL HOMECARE PROVIDERS, INC.

Plaintiffs,

Case No. 15-CV-2403

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES

Defendant.

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**[REVISED PROPOSED] ORDER**

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This matter came before the Court for a hearing on August 12, 2016, on Plaintiffs' Motion for Declaratory Judgment. The Plaintiffs appeared by Attorney Diane M. Welsh of Cullen Weston Pines & Bach LLP. The Defendant, the Department of Health Services ("Department"), appeared by Assistant Attorney General Christopher Blythe of the Wisconsin Department of Justice.

Plaintiffs seek a declaratory judgment limiting the scope of the Department's authority to recover past Medicaid payments under Wis. Stat. § 49.45(3)(f) to circumstances under 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. Plaintiffs seek a further declaration that the Department's policy of recouping payments due to noncompliance with program requirements in other circumstances (i.e., the Perfection Rule) is a rule that is not properly promulgated under § 227.10(1). Plaintiffs seek a determination that

this policy is unconstitutional. Plaintiffs further seek to permanently enjoin the Department from applying the Perfection Rule and recoupment policy to Plaintiffs and similarly situated Medicaid providers.

The Department opposes this action. The crux of the Department's argument is that it would be too difficult for this Court to craft an order granting the requested relief, and that each Medicaid provider subjected to recoupment should individually seek administrative and judicial review of the Department's action. The Court disagrees.

The Plaintiffs have not asked this Court to craft the general rule defining when the Department may pursue recoupment of Medicaid payments; the Legislature has already done so. Rather, the Plaintiffs have asked this Court to construe the Department's statutory authority to recoup funds from Medicaid providers under certain circumstances. This authority must be construed within the context of the requirement that the Department of Health Services shall pay certified Medicaid providers when they provide specified covered services to Medicaid enrollees. *See Wis. Stat. § 49.46(2)(a), Wis. Admin. Code § DHS 107.01.* Recoupment provides the exception to this statutory requirement and rule.

The Legislature has authorized the Department to audit the records of Medicaid providers to verify the actual provision of services. *Wis. Stat. § 49.45(3)(f)1.* The Department may recover claims where any of the following cannot be verified: (1) the actual provision of services; (2) the appropriateness of the claim; and (3) the accuracy of claim. *Wis. Stat. § 49.45(f)(2).* This provision authorizes the Department to recoup

erroneous, excessive or duplicative claims, including intentional or unintentional overbilling. It permits recoupment when the service was not appropriate because it was beyond the benefits authorized under either § 49.46(2) (identifying Medicaid covered benefits) or § 49.471(11) (identifying BadgerCare Plus Benchmark Plan benefits). This would include claims for services that are not medically necessary for a particular Medicaid enrollee or that are not among the benefits provided by Medicaid.

This provision does not, however, authorize the Department to recoup funds *solely* because a Medicaid provider has failed to comply with any or all federal or state Medicaid requirement, including those set forth in Administrative Code, the online provider handbook, or provider updates. Rather, when an audit reveals that the provider has failed to meet a specific record-keeping or other requirement of the Medicaid program, the statutes constrain the Department's authority to recoup funds from the provider only when the error is such that the Department cannot verify that the services were actually provided, or that the amount paid was inaccurate or not appropriate. This is the core ruling sought by the Plaintiffs and the Court so rules.

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 the Department in its vast catalog of requirements, the Department does not cite to a single statute. Rather, the Department has daisy-chained together a variety of provisions of the Administrative Code and prior administrative decisions to support its position. The Department attempts to expand its own authority by interpreting provisions of the Administrative Code and prior administrative decisions to permit it to recoup Medicaid

payments for any or all noncompliance with Medicaid requirements, including where a provider has not perfectly complied with provisions set forth in the Provider Handbook and provider updates. This approach exceeds the Legislature's grant of authority to the Department and therefore is impermissible under Wis. Stat. §§ 227.10 (2), (2m).

This Court's construction of the Department's authority under Wis. Stat. § 49.45 (f)(2) and related statutes does not leave the Department without a recourse should it find that a provider is not complying with the requirements of the Wisconsin Medicaid program. Where an auditor finds that the provider has failed to comply with provisions of the certification requirement or the provider agreement, but the provision of covered services can be verified by the provider's documentation, then the Department is authorized to take appropriate action under Wis. Stat. §§ 49.45(2)12., 13 and rules promulgated to implement these provisions.

For the reasons stated on the record, the Court hereby finds as follows:

1. This case presents a justiciable controversy, ripe for determination;
2. The Department's "Perfection Rule" and recoupment policy, as applied to the Plaintiffs in this case and other providers of Medicaid-authorized care, has been enforced as a rule by the Department without being properly promulgated under Wis. Stat. Chapter 227;
3. Topic #66 of the Department's Medicaid Provider Handbook, under which the Department claims authority to recoup payments paid to a Medicaid provider for covered services that were actually provided if it finds in a post-

- payment audit that the services failed to meet *all* applicable program requirements, is a “statement of general policy”;
4. The Department exceeded its authority in enforcing an unpromulgated rule to recoup payments from providers for non-compliance with program requirements, where the services were actually provided and the payment was appropriate and accurate for the type of service;
  5. The Department has legislative authority to address provider noncompliance through a variety of means other than recoupment, including corrective action plans, department monitoring, referral to appropriate regulatory agencies, suspension and termination;
  6. In applying the sanctions for noncompliance, the Department should consider the severity and scope of the provider’s previous compliance history, immediate or potential jeopardy to the patient’s health and safety, and the direct relationship to patient care;
  7. Plaintiffs’ members who have been audited by the Department were afforded due process, albeit at considerable cost to them, through the post-audit process;
  8. In order for the Department to apply the Perfection Rule as a basis for the recoupment of payments for Medicaid services, including as set forth in the Medicaid Provider Handbook Topic #66, the policy first must be legislatively authorized and promulgated as an administrative rule through the process

proscribed by Wis. Stat. § 227.10(1) after all public policy considerations have been taken into account.

NOW, THEREFORE, based on the foregoing findings and the reasons stated herein and on the record, the Court grants Plaintiffs' demand for declaratory relief and orders as follows:

- A. 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;
- B. The Department's policy of recouping payments for noncompliance with Medicaid program requirements, other than as legislatively authorized by Wis. Stat. § 49.45(3)(f), as described above, imposes a "Perfection Rule" which exceeds the Department's authority. This recoupment policy, including the standard as set forth in the Medicaid Provider Handbook at Topic # 66, is also a rule not properly promulgated under Wis. Stat. § 227.10(1);
- C. The Court does not find that the Department's recoupment practice violates the takings clauses of the Wisconsin or United States Constitutions;
- D. The Court grants a temporary injunction enjoining the Department from applying or enforcing the Perfection Rule. 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. This injunction is temporary in that it is subject to action by the Legislature granting such authority to the Department.

IT IS SO ORDERED.

**Dated this 27th day of September, 2016**

**BY THE COURT:**

Electronically signed by Hon. Kathryn W. Foster

Kathryn W. Foster, Judge