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.

APPEAL FROM A FINAL ORDER OF THE
WAUKESHA COUNTY CIRCUIT COURT,
THE HONORABLE KATHRYN FOSTER, PRESIDING

PLAINTIFFS-RESPONDENTS' RESPONSE TO DEFENDANT-APPELLANT'S MOTION TO STAY CIRCUIT COURT ORDERS AND APPENDIX

INTRODUCTION

Plaintiffs-Respondents, Kathleen Papa and Professional Homecare Providers, Inc. ("PHP"), an association of independent practice nurses who are certified Medicaid providers, oppose the Motion to Stay Pending Appeal submitted by the Defendant-Appellant, the Department of Health Services ("the Department"). A stay would allow the Department to continue to recoup payments from Medicaid providers for services actually provided, in excess of its statutory authority, causing substantial harm to the Plaintiffs and their patients.

As demonstrated below, the Department fails to show that the Circuit Court erroneously exercised its discretion in denying the Department's motion for stay. The Circuit Court reasonably concluded that a stay was not warranted after examining the relevant facts, applying the appropriate legal factors, and using a rational decisional process to reach its conclusion. This Court should affirm the Circuit Court's order denying a stay pending appeal.

PROCEDURAL HISTORY

The Plaintiffs-Respondents brought this declaratory judgment action to challenge the policy the Department relied on to demand that Medicaid providers return payments for Medicaid-covered services that they ***actually provided*** to patients, solely based on findings that the providers did not meet one of more of the complex, evolving documentation requirements found in statutes, administrative code, online Medicaid Provider Handbook ("the Handbook"), provider updates issued by the Department, or other sources. (R1; Complaint).

In particular, the Department interpret and rely on Handbook Topic #66 to deem any provided service that fails to meet a standard of perfection in compliance with all applicable program requirements as "non-covered" and therefore subject to recoupment (R1).[1] Plaintiffs-Respondents argued that this "perfection rule" exceeds the Department's statutory authority to recoup Medicaid payments from providers under Wis. Stat. §§ 49.45(3)(f) & (2)(a)10 and operates as an unpromulgated rule in violation of Wis. Stat. § 227.10(2m).

On September 27, 2016, the Circuit Court issued an order granting Plaintiffs-Respondents' motion for summary judgment, 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.

(R35:6; hereafter "September Order"). 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.

---

[1] Handbook Topic 66 provides: "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." (R1, Exh. A).

§ 49.45(3)(f), as described above, imposes a 'Perfection Rule' which exceeds the Department's authority" and "is also a rule not properly promulgated under Wis. Stat. § 227.10(1)" (R35:6). 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.

(R35:6-7).

The Department filed a notice of appeal from the September Order on October 20, 2016 (R38), but did not file a motion to stay at that time.

Subsequently, the Department continued to initiate and prosecute recoupment actions against Medicaid providers in manners inconsistent with the September Order (R44, R45). In response, Plaintiffs-Respondents filed a Motion for Supplemental Relief or Sanctions on January 12, 2017 (R43). At the February 14, 2017 hearing, the Court granted, in part, the Plaintiffs-Respondents' motion (R64:41:13-43:3). On March 23, 2017, the Court issued an Order for Supplemental Relief to "restate and give effect to the declaratory judgment and injunction" previously entered and ordered the Department to pay Plaintiffs-Respondents' costs and attorneys' fees incurred in prosecuting the motion (hereinafter, "March Order") (R55). A further March 24, 2017 order set the amount of costs and fees to be paid (R54). On April 3, 2017, the Court issued a Bill of Costs and Judgment.

On April 14, 2017, the Department filed a motion in the Circuit Court for a stay pending appeal of the Final Order, the Order for Supplemental Relief, the Order for Costs and Fees, and the Bill of Costs and Judgment. (Stay Mtn. App. 101-02). The motion was fully brief by both parties. (Opp Stay App 201-253). The Court set a hearing on the motion for stay on May 16, 2017 and heard oral arguments from the parties. (Stay Mtn. App. 122-68). The Court denied the motion from the bench. (Stay Mtn. App. 167). The Court issued a written order denying the motion for stay pending appeal on May 26, 2017 (Stay Mtn. App. 169).

The Department appealed the Court's March Orders (R59). On June 19, 2017, the Department filed its motion in this Court for a stay pending appeal of the Circuit Court's Orders.

ARGUMENT

I. Standard of Review and Legal Standard for a Stay Pending Appeal

The Department's motion is before this Court on review of the circuit court's decision to deny the stay. In this posture, a motion for relief pending appeal brought under Wis. Stat. § (Rule) 809.12 is not considered *de novo* by this Court. *Gudenschwager*, 191 Wis. 2d at 439.

Rather, the standard of review in this Court is the erroneous exercise of discretion standard. "A trial court's decision to grant or deny a stay pending appeal should be reviewed under an erroneous exercise of discretion standard." *Gudenschwager*, 191 Wis. 2d at 439–40 (citations omitted). "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Id.*

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.

Id. at 440.

In this case, the Circuit Court fully considered the parties' arguments and evidence, as presented in written briefs, supporting affidavits, and oral arguments. (Opp Stay App 201-253; Stay Mtn. App. 122-168.) The Circuit Court properly applied the above factors to the relevant facts, using a rational process to reach a conclusion that a reasonable judge could reach in denying the Department's motion for stay pending appeal. The Circuit Court's exercise of discretion was not erroneous and should be upheld by this Court.

I. The Circuit Court did not erroneously exercise its discretion in denying the Department's motion for stay.

A. The Circuit Court did not erroneously exercise its discretion in determining that the Department is not likely to succeed 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 of the appeal." *Gudenschwager*, 191 Wis. 2d at 440. The Circuit Court properly considered and weighed the Department's arguments about its

likelihood of succeeding on the merits. The Department did not establish that it has more than a mere possibility of success on the merits of the appeal. It fails to show that the Circuit Court erroneously exercised its discretion in weighing this factor, as discussed below.

B. The Department did not show that the Circuit Court's decision was likely to be reversed on appeal, but reiterated the same unsuccessful arguments it originally made to the Circuit Court.

The Department seeks a stay of the Circuit Court's decisions finding that the Department was enforcing an overly broad recoupment policy that was not properly promulgated as a rule under Wis. Stat. Chapter 227 (R35:4) and that exceeds its statutory authority under Wis. Stat. § 49.45(3)(f) (R35:6).

In its motion to stay, the Department reiterated the same arguments it made on the merits before the Circuit Court issued its final decision. The Circuit Court properly concluded that the Department had not demonstrated a strong likelihood of success on appeal.

The parties fully briefed their positions on the motion for stay and presented oral argument to the Court. The Circuit Court provided a lengthy oral ruling, discussing the applicable law, the relevant facts, and the Court's rationale in finding that the Department had failed to make a strong showing that it is likely to succeed on appeal:

> I note that counsel in their briefs spent a lot of time really revisiting the original decision of the Court as well as in part the most recent events...asking for supplemental relief or an injunction to make sure that the Court's decision from last September was in fact followed.
>
> The Court has an opportunity to revisit the factors. I am not going to go through each of the cases cited because, of course, we did that and I don't think that there was a new case that the Court should consider here today, no new statutory provision and so on...

(Stay Mtn. App. 31).

The Department fails to demonstrate, or even to directly argue, that the Circuit Court erroneously exercised its discretion in concluding that the Department had not made a strong showing of its likelihood of success on the merits. Instead, the Department briefs the merits of the arguments it will raise on appeal. This Court should decline to pre-determine the merits of the Department's appeal.

The nature of the showing that a movant must make to establish a likelihood of success on appeal is illustrated by *Gudenschwager*. In

Gudenschwager, the trial court had found Wis. Stat. Chapter 980 unconstitutional. The Court concluded that the State had made a strong showing that it was likely to succeed on the merits of its appeal because the law, which recognizes a presumption that regularly-enacted statutes are constitutional, favored the State's position. *Gudenschwager* at 441. The Department made no comparable showing in this case.

Instead, in arguing for a stay in the Circuit Court, the Department reiterated the same legal arguments it made in advance of the Court's final decision. It did not identify any legal or factual error in the Circuit Court's decision to support its supposition that the Court of Appeals might reach a different result. The Department thus fails to show an erroneous exercise of discretion by the Circuit Court in concluding that the Department had not made a strong showing that it was likely to succeed on the merits on appeal.

This Court should decline to pre-judge the merits of the Department's appeal in ruling on the motion for stay. Nevertheless, to preserve their arguments and avoid any potential waiver, the Plaintiffs will briefly address their responses to the Defendant's arguments on the merits.

First, contrary to the Department's suggestion (DHS Memorandum in Support of its Motion[2], pp. 22-23), there is no requirement that a party seeking a declaratory judgment under Wis. Stat. § 227.40 articulate a specific administrative rule by number in order to have the validity of the rule(s) judicially reviewed. *See* Wis. Stat. § 227.40.

The Complaint clearly challenges the validity of the Department's recoupment policy based on a perfection rule as exemplified by the Medicaid Provider Topic #66 (R1). As the Department recognizes, Topic #66 is an amalgamation of its interpretations of several different rules within chapters DHS 106 and 107 (DHS Memo, pp. 14-16). It is this amalgamation, therefore, that gave rise to this declaratory judgment action. There is no statute which requires the Plaintiffs to enumerate each of the sections or subsections of the administrative code that the Department now relies on in order to challenge the Department's recoupment policy as a policy—or rule—which exceeds its statutory authority under Wis. Stat. §49.45(3)(f).

Further, the notion that if a state agency does not put a rule in the administrative code and give it a number then it cannot be subject to judicial review is without legal support. Relying on case law that predates 2011 Act 21 and that examined a completely different Medicaid handbook, the Department asserts that a statement of general policy set forth in the Medicaid Provider

---

[2] Citations to the Defendant-Appellant's Memorandum in Support of Motion to Stay the Circuit Court Orders will be abbreviated to DHS Memo, pp. #).

Handbook is not a "rule" and therefore cannot be challenged under Wis. Stat. § 227.40. (DHS Memo, p. 13-16). This argument ignores current Wisconsin law governing policies issued by state agencies and the explicit legislative authority for judicial review of such policies or rules.

Nonetheless, 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 Memo, p. 13). Even if that were true, rules set forth in a Medicaid handbook are subject to judicial review under the declaratory judgment provision of Chapter 227. *See Dane Cty. 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 in a Medicaid manual could be challenged by county through a declaratory judgment proceeding under Wis. Stat. ch. 227).[3]

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 case simply did not involve the Medicaid Provider Handbook. Moreover, in discussing the handbook at issue in the case, 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 *Tannler* Court was found the handbook at issue in that case to be "consistent with controlling legislation," *Id.*, the same cannot be said about the policy at issue here, set forth at Topic #66 of the Medicaid Provider Handbook. Neither state nor federal law authorize the Department to recoup payments for authorized services that were actually provided, based on a post-payment audit finding that the provider failed to meet "all applicable program requirements." *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 policies that apply 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

---

[3] 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.

by statute or by a rule that has been promulgated in accordance with this subchapter." *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 (emphasis in original; footnotes omitted).

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

C. The Department's Policy of recouping based on the perfection rule exceeds what is allowed under Wisconsin Statutes.

The Department's execution of recoupment based on a 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. (DHS Memo, pp. 15-16).

If anything, the chart underscores the lack of statutory authority for its perfection rule. The "statutory support" is mostly lacking from the chart; two statutory subsections support two phrases of the topic (DHS Memo, pp. 15-16). In comparison, fourteen portions of the topic are claim to get their support from various provisions of the administrative code. (DHS Memo, pp. 14-16). Indeed, as the Circuit 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. (R35:3).

The Department's chart cites to Wis. Stat. § 49.45(3)(f) in support of the phrase "and documentation requirements." (DHS Memo, p. 16). As the Circuit Court has ruled, this statutory provision not only fails to enable enforcement of a perfection rule, but actually specifically *restricts* the circumstances under which the Department may recoup provider reimbursements for alleged deficiencies in provider documentation (R35). The circumstances where recoupment is permitted 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); (R35:6). 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), (2m).

The Department next contends that "Topic #66 simply carries out the existing state statute"---namely Wis. Stat. § 49.45(3)(f). (DHS Memo, p. 18). This contention ignores the uncontroverted evidence presented in this case as to how the Department is actually carrying out Topic #66. The record is replete with examples of the Department pursuing recoupment where it is uncontroverted that covered services were provided by a licensed provider to a Medicaid enrollee merely due to an alleged documentation shortcoming which does not call into question that the services were provided or that the ***claims*** were both appropriate and accurate. (*See, e.g.*, Stay Mtn. App. 110-14 (The proposed decision states the Department seeks to recoup payments made for documented cares because the nurse did not countersign the Plan of Care) ; R13, R14, R15, R17 (nurses stating that recoupment is being pursued for alleged non-compliance with policies, as opposed to a lack of documentation).

Moreover, under this provision, "appropriate" and "accurate" qualify the word "claims," not services. Wis. Stat § 49.45(3)(f)1., 2. It is the "claims for reimbursement" which much be supported by the records—not the appropriateness or accuracy of the "services" as suggested by the Department (DHS Memo, p. 18).

The Department errs when it suggests that the court orders "restrict the inquiry to whether 'services' were provided." (DHS Memo, p. 18). If the service is not a covered service, as set forth at Wis. Stat. § 49.46(2)[4] or § 49.471(11), then the claim may be denied or recouped. Wis. Stat. § 49.45(3)(f)2. Nothing in the circuit court orders require the Department to pay for services that are not part of the benefit package or covered services provided by Medicaid.

The Department repeatedly refers to the underlying administrative rule that form the basis for the perfection rule as "properly promulgated state administrative code provisions" (DHS Memo, pp.18-19). To the extent these rules expressly or implicitly expand the Department's recoupment authority beyond what is permitted by statute, then the rules cannot be accurately be portrayed as "proper." Wis. Stat. § 227.10(2m).

Although the Department correctly asserts that there are federal laws which provide state Medicaid programs with the authority and duty to recoup overpayments (DHS Memo, p. 19), the Department cannot articulate a single federal law that requires a state Medicaid program to impose a perfection standard upon Medicaid providers and then to use that standard as a basis for recoupment. The notion that there should be sufficient documentation for the state agency to able to discern whether or not the payment was proper (DHS Memo, p. 19, citing the Medicaid Program Integrity Manual (Sept. 2011), correctly places the focus on the propriety of the payment. This contrasts the reality of Wisconsin audits, where the focus has been on whether the documentation perfectly complies with various rules, regulations and handbook provisions. In Wisconsin, the focus has not been on whether the documentation is sufficient to show that payment was proper, but rather on whether the documentation itself is perfect. (*See, e.g.*, R13, ¶¶ 6-7; R11, ¶¶ 9-13; R12, ¶¶ 9-13; R14, ¶ 7; R15, ¶¶ 7-8; R16, ¶¶ 10-12; R45, Exs. C, D, J; Stay Mtn. App. 110-14.)

Neither PHP nor the Circuit Court have advanced a position that hinders the Department from recouping actual overpayments to Medicaid providers. The Department cannot demonstrate that a different, more onerous interpretation of Wis. Stat. § 49.45(3)(f) is actually required by federal law.

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

The Department mistakenly argues that the Order is invalid because the Court is not allowed to issue an injunction in an action under Wis. Stat. § 227.40

---

[4] Wis. Stat. § 49.46(2) and § 49.471(11) set forth the benefits provided under the Wisconsin Medicaid programs.

(DHS Memo, pp. 20-21). 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 only statutory limit that Wis. Stat. § 227.40 places 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 that are inapplicable here. There would be no need for this subsection if, as the Department contends, Section 227.40 contained a general prohibition against a court issuing an injunction.

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

The record establishes that the injunction was necessary to prevent irreparable injury to the PHP members. Due to the Department's recoupment practices, nurses undergoing audits have had to invest significant time and resources to defend against audit findings and recoupment attempts (R12, ¶ 15; R11, ¶ 15; R16, ¶¶ 14-16; R17, ¶¶ 8-9; R13, ¶¶ 10-11; R14, ¶ 9). The Department's implementation of its policy has imposed significant financial burdens on Medicaid providers, including the nurses who are PHP members (R11, ¶ 14; R12, ¶¶ 14-15; R13, ¶ 9; R14, ¶ 8; R15, ¶ 9; R16, ¶ 13; R17, ¶ 7). In some efforts, the Department's efforts to recoup funds have caused providers to consider bankruptcy, refrain from providing Medicaid services going forward, or reduce the amount of Medicaid Services they provide (R12, ¶¶ 15-16; R11, ¶ 16; R13, ¶¶ 10-11; R15; R16, ¶ 14; R17, ¶¶ 8-9). The Department's policy has caused nurses to be hesitant to provide Medicaid services for fear that the Department

will demand recoupment of days, weeks, months, or even years of income for services they actually provided to patients (**). The stress and worry of one's personal financial ruin, feeling forced to change one's career to avoid extreme financial risks, draining one's savings to refund the Department despite doing the work, or alternatively to cover legal fees—these are all types of irreparable injury caused by the Department's overly expansive and incorrect interpretation of its recoupment authority.

The Circuit Court properly determined that the injunction was necessary to prevent irreparable injury to Medicaid providers (R55). The Department's disregard of the declaratory judgment and injunction demonstrated how essential the injunction is (R46; R64:39, lns 3-8). The Department has demonstrated that it will continue to apply its recoupment policies, even if they exceed its statutory authority. (R46)

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

As briefed previously (R47, p. 7), this case is readily distinguishable from *Madison Teachers, Inc. v. Walker*, 2013 WI 91, 351 Wis. 2d 237, 893 N.W. 2d 388. (DHS Memo, p. 21-22). *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-Respondents' 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-Respondents simply asked for the Court to enforce the specific relief already ordered in this declaratory judgment action. (R44; R47) 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. (R55) The Order makes clear that the Department cannot continue to enforce a rule of perfection which exceeds the statutory authority granted in Wis. Stat. § 49.45(3)(f) merely by holding up some other administrative rule or its interpretation thereof, as it appears the Department feels entitled to do. The Court's September Order construed the limitations of this statute and rejected the Department's attempt to daisy-chain together

various provisions of the administrative code to declare it could enforce a perfection standard and the order for supplemental relief clarifies this (R35, p. 3).

There is no legitimate basis for this Court to conclude that the Circuit Court's supplemental ruling exceeds its authority to give effect its original judgment, as permitted under Wis. Stat. § 808.07(2)(a)(3). There is also little reason to believe that this Court will rule 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.

F. 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-Respondents 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 in its Motion to Stay, the Department contended 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.

Because the Department did not timely raise an immunity defense to the Plaintiff's motion for costs and fees, it has been forfeited and it is unlikely 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. Wisconsin Dept. 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 this Court, the Department has not established 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 lawsuits 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 are procedural tools 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.

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-Respondents requested costs and fees under this provision, and the Circuit Court certainly could have used 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 supports the Court's use of its power to punish for contempt.

II. The Department fails to show that the Circuit Court erroneously exercised its discretion in concluding that the Department did not show 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.

As the Circuit Court properly concluded, the sole injury to the Department is that it will be able to recoup less from Medicaid providers, i.e., where the Department seeks to recoup payments from providers for services actually provided, solely due to documentation errors: "[T]here is going to be no irreparable injury to the Department. Audits will go on, reviews will go on, but maybe the recoupment might be a little bit less." (Stay Mtn. App. 39).

Consistent with the Circuit Court's finding, the Department produced no evidence that it will be irreparably damaged if the Court's Orders are not stayed. Even though it continues to conduct audits of Medicaid providers and issue audit findings, the Department asserts that "it will be hamstrung with respect to its ability to seek recoupment of improper Medicaid payments under its statutory authority—and as required by the federal government" (DHS Memo, p. 25). This is simply not true. The Department may continue to conduct audits

and seek recoupment of improper payments, provided it complies with the statute, as interpreted by the Circuit Court.[5] It has not been barred from enforcing state law. Further, the Department has a range of other enforcement mechanisms it may impose against providers who do not meet program requirements, up to and including terminating a provider from participation in the Medicaid program.[6]

To the extent the Department seeks to enforce provisions of the administrative code (or its interpretations thereof) in a manner inconsistent with Wis. Stat. § 49.45(3)(f), it has no legal authority to do so even absent the Court's orders and injunction. The Department cannot be said to be harmed by this statutory limitation. The Department lacks the authority to recoup payments made to providers based on its overly broad interpretations of what constitutes "improper payments" or "overpayments" that are neither supported nor required by state statute or federal law.

Likewise, the Department did not show that it was irreparably injured by what it characterizes as its "legitimate fear of negative consequences" if it takes legal positions "that could be viewed as being in conflict with the circuit court orders." (DHS Memo, p. 26). To be very clear, the Department was not called out for trying to distinguish its ongoing recoupment actions from the *Papa* orders and injunction. Rather, despite the orders and injunction, the Department repeatedly argued that the circuit court orders could be disregarded by other courts, the Secretary, or administrative law judges. Until the Circuit Court ordered it to comply with the decision, the Department continued to seek recoupment in excess of its statutory authority, the declaratory judgment, and the injunction (*see generally,* R44; R45; R47).

Further, the Department has now, on its own volition, directed the Division of Hearings and Appeals to stay pending administrative actions involving recoupment efforts, eliminating this claimed risk of "irreparable injury." Notably, the Court's decision does not preclude *all* recoupment, but only recoupment in excess of the Department's statutory authority. After this appeal is concluded, the Department will presumably resume the pending recoupment actions, consistent with this Court's decision.

---

[5] The Department does not assert that it has suspended audits. At the February 14, 2017 hearing, the Department's attorney indicated that the Department was handling 160 audits a month (R64: 19, lns. 14-15).

[6] For example, the Department may terminate a provider from Medicaid or impose "intermediate sanctions" such as pre-payment review of claims, restricting participation in the program, a correction plan, etc. *See* Wis. Admin. Code ch. DHS 106.

In contrast, if this court grants the stay that the Department now seeks, then the Department will move forward with recoupment actions under a legal standard determined to be erroneous by a court of law, at a great cost to providers and their patients (as discussed further in section IV below). This likely will create a large number of petitions for judicial review to preserve legal arguments that may arise from this appeal. In addition to creating judicial inefficiency, permitting the Department to advance recoupment efforts contrary to the circuit court's ruling will come at a great cost to providers and to Wisconsin taxpayers.

The Department also suggests that the Centers for Medicare and Medicaid Services ("CMS") might withhold federal Medicaid funds *if* there was a CMS audit and *if* CMS determined the state is not fulfilling its obligations to comply with a federal requirement (DHS Memo, pp. 27-28). The Department has provided absolutely no evidence that there is any realistic possibility of such a determination or such a subsequent cut-off of funding from the federal government. The Circuit Court properly rejected this claim of irreparable injury (Stay Tr. 40-41).

The Department fails to show that the Circuit Court erroneously exercised its discretion in concluding that the Department's claims of irreparable injury in the form of the withholding of federal Medicaid dollars was highly speculative. First, there is no legal basis to support the notion that complying with the Court's Orders would render the Department's audit and recoupment efforts substandard in the eyes of the federal government.

Second, the Department has offered no proof that CMS has raised concerns about Wisconsin's approach to recouping funds since the Circuit Court issued the order and injunction in September, 2016. Further, the Department has offered no evidence that CMS expressed concerns about how the Department handled recoupment 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 the federal government sought to defund Wisconsin Medicaid at any time.

Third, the Department has not provided evidence of a single instance of the federal government withholding any Medicaid funds to a state because the state was not zealous enough in its recoupment efforts against Medicaid providers—let alone the entire federal share of a state's Medicaid program. The notion that the federal government might withhold sixty percent of $8 billion from the State of Wisconsin under the circumstances here is far-fetched.

Based the Department's assertions, the Circuit Court reasonably concluded that the probability that the federal government will withhold its funding of Wisconsin's Medicaid program was vanishingly low. As the Court commented, "I am not gonna look at this and think that we are somehow - or that my decision might somehow jeopardize $5 billion in federal funding. I can't get my head around [it]." (Stay Mtn. App. 40).

The Department also did not demonstrate that its payment of attorneys' fees will cause irreparable harm. It is understood that the payment will be maintained in the firm's trust account and not disbursed until this Court determines that the award of fees was proper. If the Department prevails in this appeal on the issue of attorney's fees, it will be entitled to the return of the fees. Hence, regardless of the outcome, the Department will not suffer harm.

The Circuit Court properly exercised its discretion in concluding that the Department did not show that, if a stay is not granted, it will suffer an irreparable injury.

III. 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 parties. *Gudenschwager,* 191 Wis. 2d 440. As the Circuit Court correctly concluded, the Department has not, and cannot show that other interested parties will not be harmed if a stay is granted. The Circuit Court discussed this factor at length, reasoning:

> The bigger picture here [is] that we do everything we can to promote the availability of private nursing care for our complex children who need that kind of service. And to that end, they are the other interested parties.
>
> And maybe one nurse will leave the profession or two will go and do something else, or maybe 102 if this gets out that you can lose an entire year's wages because you didn't get a countersign. Yeah, that is bad. I think they should be taught how important that is, but a whole year? $100,000 in income?
>
> I have been a judge a long time, spent a lot of time in criminal court, and I have never imposed a fine anything like that for criminal behavior, never....The word Draconian comes to mind.

(Stay Mtn. App. 163-64).

As noted by the Circuit Court, the Department inexplicably suggests that a potential loss of money for the state is an irreparable harm, but that a loss of money to independent nurses is not substantial harm. (Stay Mtn. App. 165, DHS Memo, p. 27-30.)

As established through the affidavits of members of the Professional Homecare Providers and other documents submitted to the Circuit Court, it is very likely that Plaintiffs-Respondents will suffer substantial harm if the Court's Orders are stayed. (R12-3, ¶15; R11-1-2, ¶ 15; R17-2, ¶¶ 8-9; R13-2-3, ¶¶ 10-11; R15-2, ¶ 10; R14-2, ¶ 9.) The Department is auditing PHP members and is seeking to recoup payments made to PHP members (R14-2, ¶¶ 5-6; R15-2; ¶¶ 7-8; R17-2, ¶¶ 5-6.) Nurses have found other work or reduced the amount of time they are willing to work as independent Medicaid providers, based on their legitimate fears of being audited and ordered to return large sums for services they actually provided to high-needs Medicaid patients. (R13; R16; R11; R12; R15; R17; R14). This demonstrates the significant financial and emotional burden imposed on PHP's members in responding to an audit or recoupment efforts.

The Department's attorney stated that there are about ninety recoupment actions pending against Medicaid providers, totaling about $4 million. (Stay Mtn. App. 128.). This demonstrates that PHP members are at risk of such actions. The Department cannot, in good faith, assert otherwise.

The Department nevertheless suggests that the nurses are not harmed because they may request a contested case hearing if they disagree with the overpayment determination. (DHS Memo, p. 29). The Department's position ignores the real harm to nurses when the Department seeks to recoup payments from them for care they provided to Medicaid enrollees. While any provider may request an administrative hearing upon receiving the Department's Notice of Intent to Recover, the administrative hearing process does little to protect providers when the Department is advancing and applying an incorrect legal standard. Providers will still be harmed if the Department Secretary (or designee) can, after an administrative hearing, issue a final decision that is inconsistent with the Department's statutory authority[7]. Such providers face significant financial stress and the risk of bankruptcy or having to sell their homes. (R11-3, ¶ 15; R12-3, ¶ 15; R16-3). Further, some nurses facing recoupment of payments they received for past services discontinue serving Medicaid enrollees as private duty nurses. (R12-3, ¶ 15; R11-3-4, ¶ 16; R16-3, ¶ 15).

---

[7] The Department Secretary or her designee issue the final decision after receiving a proposed decision from the administrative law judge who conducts the administrative hearing. Wis. Admin. Code § 227.46(2).

The Court recognized the nurses' ability to exercise their due process rights comes at a considerable cost. (R35-5). (*See also, e.g.*, R17-2, ¶ 7; R14-2, ¶ 8; R15-2, ¶ 9; R16-2-3, ¶ 13; R12-3, ¶ 14; R11-3, ¶ 14.) It is a cost that some nurses simply cannot afford. The legal costs are even greater if the matter must be appealed to the circuit court. Hence, some nurses do not have the financial resources to ensure that the Department does not exceed its authority.

The Department also glosses over the substantial stresses the recoupment efforts create on the nurses and the families of the Medicaid enrollees they support. (*See e.g.*, R12-3, ¶ 15; R11-3, ¶ 15; R16-3, ¶¶ 14-16; R17-2, ¶¶ 8-9; R13-2-3, ¶¶ 10-11; R15-2, ¶ 10; R18-2, ¶¶ 7-8; R14-2, ¶ 9; R19-2, ¶¶ 13, 15, 17.) The record leaves no doubt that a stay would result in substantial harm to the Plaintiffs-Respondents.

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

Finally, as the Circuit Court properly found, the Department failed to meet its burden to show that a stay would cause no harm to the public interest. (Stay Mtn. App. 164-65).

It is highly likely that a stay would cause great harm to some of the Wisconsin's most vulnerable citizens and their family members who are trying to help them remain at home. (*E.g.*, R18-2, ¶¶ 7-8; R19-2, ¶¶ 13, 15, 17.) Medicaid enrollees who rely on home-based care have complex medical needs. When qualified private duty nurses are deterred from participating in Medicaid, this population suffers. The Circuit Court identified this potential harm, including the need to institutionalize patients who could otherwise be treated at home, as a "secondary or ripple effect of the audit process." (R63:12-5-11.)

All that the Circuit Court's orders require of the Department is that they comply with Wis. Stat. § 49.45(3)(f), as construed by the Court, as the correct legal standard for recoupment. Despite the clarity of the Court's Order and the Court's guidance to the Department's attorney on how the Department should proceed, the Department continues to feign confusion about what the order requires. Quite obviously, confusion will ***not*** be reduced if the Court's Orders are stayed, permitting the Department to initiate and advance recoupment efforts which exceed its statutory authority. Further, to the extent that the Department is legitimately uncertain as to how Wis. Stat. § 49.45(3)(f) applies in a specific case, the Department may choose to stay pending administrative proceedings, as it has done, pending a Court of Appeals decision. A stay of the Orders to allow the Department to continue to pursue unlawful recoupments is not warranted.

The Department makes the baseless suggestion that fraud might increase or patient safety may be put at risk if nurses know that the Department cannot pursue recoupment (DHS Memo, p. 30). First, there is nothing in the court's orders or the injunction that prevents the Department from auditing Medicaid providers and utilizing numerous other enforcement mechanisms against a provider who has not met all program requirements. There is nothing that precludes the Department from making referrals to the Nursing Board for substandard care. Medicaid fraud remains a state and federal criminal offense—and the risk of prison should serve as greater deterrent than a recoupment action. Moreover, this groundless assertion of potential harm is insulting to nurses who commit have committed their professional lives caring for some of Wisconsin's most vulnerable citizens.

The Department's requested stay poses a far greater risk to the public interest than the circuit court's orders.

Conclusion

For the reasons stated above, the Department has not made the showing required in order to stay 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-Respondents respectfully request that Court grants no stay.

Respectfully submitted this 30th day of June, 2017.

PINES BACH LLP

Diane M. Welsh, SBN 1030940
Christa O. Westerberg, SBN 1040530
Susan M. Crawford, SBN 1030716
122 W. Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
dwelsh@pinesbach.com
cwesterberg@pinesbach.com
scrawford@pinesbach.com

Attorneys for Plaintiffs-Respondents

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.

PLAINTIFFS-RESPONDENTS' APPENDIX

STATE OF WISCONSIN CIRCUIT COURT BRANCH 12 WAUKESHA COUNTY

KATHLEEN PAPA, et al.,

Plaintiffs,

v. Case No. 15-CV-2403

WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY PENDING APPEAL

INTRODUCTION

This motion seeks a stay of this Court's September 27, 2016, Order (September Order), of this Court's Orders issued on March 23 and 24, 2017 (the Order for Supplemental Relief, and the Order for Costs and Attorney Fees), and of this Court's Judgment entered on April 3, 2017, pending defendant's appeal to the Court of Appeals. The September Order declared that, when auditing certain providers of Medicaid services, the Department of Health Services (DHS) improperly sought recoupment of Medicaid funds under what the Court characterized as a "Perfection Rule" that was enforced as a rule without being promulgated under Wis. Stat. Chapter 227. The September Order also declared that DHS exceeds its authority by seeking recoupment in circumstances where the documentation shows that services were actually provided, but where there are allegedly minor errors in paperwork or other documentation requirements.

The Order for Supplemental Relief enjoined the defendant from: (1) issuing a notice of intent to recoup Medicaid funds from a Medicaid provider; or (2) proceeding with any agency action (including any administrative proceedings) in which the defendant "seeks to recoup Medicaid payments from a Medicaid provider, "if the provider's records verify that the services were provided and the provider was paid an appropriate amount for such services, notwithstanding that an audit identified other errors or noncompliance with Department policies or rules."

The Order for Costs and Attorney Fees directed the defendant to pay the plaintiffs' costs and attorney fees associated with bringing the motion for supplemental relief, and ordered the defendant to pay the sum of $25,284.50 to the plaintiffs' attorneys within 30 days of the Court's March 24, 2017, Order.

Defendant DHS has appealed all of the above-referenced orders. For the reasons that follow, DHS respectfully requests that the Court stay all of the above-referenced orders pending resolution of the defendant's appeals in this matter.

BACKGROUND

The plaintiffs, who include a nurse (Kathleen Papa) and an organization of nurses who provide contracted services to Medicaid recipients (Professional Homecare Providers, Inc.), sought declaratory and injunctive relief in a Wis. Stat. § 227.40 action regarding "Topic #66" in DHS's Medicaid Provider Handbook. The background for this litigation is as follows.

A person who is eligible for assistance under Medicaid can obtain an authorization to receive certain nursing services. Once the authorization is granted,

the recipient retains a certified nurse or nursing provider to provide the authorized services. The nurse or nursing provider then bills Medicaid for the services provided.

Medicaid expenditures in Wisconsin total more than $7 billion per year. There are more than 70,000 certified Medicaid providers in Wisconsin, and more than one million people receive assistance under Medicaid. Federal law requires that 90% of the claims for payment for Medicaid services must be paid within 30 days; thus, there is virtually no opportunity for pre-payment verification of the appropriateness or accuracy of Medicaid providers' billings.

DHS (via OIG) is authorized to conduct audits of Medicaid billings, and usually does so in response to a complaint or a concern that certain services are not being provided, are being overbilled, or are not being provided in accordance with the relevant state or federal regulations. These audits may take place months or years after the date of billing for services. Therefore, accurate record-keeping by providers is a critical element for ensuring that all services billed for were, in fact, provided and were appropriate and authorized under the law.

In certain circumstances, these audits may result in DHS seeking recoupment of funds paid to providers. The plaintiffs alleged in their briefs, but not in their complaint (and the Court so found) that DHS, when conducting such audits, employs a "perfection rule" in the form of Topic #66 in its Medicaid Provider Handbook, by which it seeks recoupment from providers based on allegedly minor

imperfections in their records.[1] The plaintiffs asked the court for declaratory relief to bar DHS from seeking recoupment based on allegedly minor imperfections in record-keeping, when, according to the plaintiffs, there is no question as to whether the services have been provided.

DHS denied that Topic #66 is an unpromulgated rule or that it employs a "perfection rule" and asserted that its auditing practices were in accordance with the relevant statutes and administrative rules. DHS's position is that a key tool for determining whether services have been properly provided (and whether they have been provided in accordance with the relevant regulations, including being medically necessary) is the documentation provided by a nurse or nursing service in the course of an audit. If such documentation is missing or incomplete, it makes verification of the provision of appropriate services more difficult.

Following briefing and oral argument, the Court entered the September Order, in which it found, *inter alia*, the following:

- DHS's Topic #66 and recoupment policy constitute a "Perfection Rule" and, 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;

- DHS 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;

(September Order at 4-5).

---

[1] None of the nurses who provided affidavits in support of plaintiffs' motion for summary judgment alleged that they had been required to repay funds pursuant to an audit by DHS.

The Court enjoined DHS from employing a "perfection rule" when auditing Medicaid providers, and held that DHS may only recoup payments from Medicaid providers where: "(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 at 6, ¶ A.)

STANDARD OF REVIEW

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).

These factors are not prerequisites but rather are interrelated considerations that must be balanced together. *Gudenschwager*, 191 Wis. 2d at 440 (internal cite omitted). In this matter, the factors relevant to issuance of a stay pending appeal all support the granting of a stay of the Court's orders.

ARGUMENT

The *Gudenschwager* factors support the granting of a stay of the Court's orders.

I. DHS has the requisite likelihood of success on appeal.

A. DHS has the requisite likelihood of success on appeal of the Court's September Order.

A stay of the Court's September Order is warranted under the first factor because DHS has a likelihood of success on the merits of the appeal. Under this factor, the movant need only demonstrate more than a mere possibility of success:

> Bearing in mind that the motion for a stay, in most instances, is addressed to the very individual who has just made the rulings the appellant is challenging on appeal, it is not to be expected that a circuit court will often conclude there is a high probability that it has just erred. However, that is not required for a stay of a judgment granting or denying an injunction . . . The "movant need not always establish a high probability of success" on appeal, but it must be more than a "mere possibility."

Scullion v. Wisconsin Power & Light Co., 2000 WI App 120, ¶ 18, citing *Gudenschwager*, 191 Wis. 2d at 441 (internal cite omitted). Here, DHS has more than a mere possibility of success on the merits of the appeal for the following reasons.

1. The plaintiffs' Wis. Stat. § 227.40 rule challenge fails from the outset because a portion of a Medicaid handbook is not a "rule."

The Wisconsin Supreme Court has held that guidance found in a Medicaid handbook is not a "rule." Plaintiffs brought an action pursuant to Wis. Stat. § 227.40 challenging the validity of DHS's "statement of general policy" found in its Medicaid Provider Handbook as Topic #66. But plaintiffs' declaratory and injunctive relief claims must fail because this section of the handbook is not a "rule" in the first instance. It "simply recites policies and guidelines, without attempting to

establish rules or regulations.'" *Tannler v. Wis. Dep't of Health & Soc. Servs.,* 211 Wis. 2d 179, 187-88, 564 N.W.2d 735 (1997).

Wisconsin Stat. § 227.01 defines "rule:"

> "Rule" means 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). A "rule" for purpose of ch. 227 is: "(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." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118 (quoting *Citizens for Sensible Zoning, Inc. v. DNR,* 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

The Wisconsin Supreme Court has already distinguished "rules" that are subject to the administrative rulemaking requirements from Medicaid policies and guidance. In *Tannler,* the court squarely held that the latter are *not* subject to ch. 227 rulemaking:

> [DHS] may use policies and guidelines to assist in the implementation of administrative rules provided they are consistent with state and federal legislation governing [Medicaid]. As long as the document simply recites policies and guidelines, without attempting to establish rules or regulations, use of the document is permissible. [DHS]'s *[Medicaid] Handbook* is a policy manual that is consistent with controlling legislation, both state and federal.

211 Wis. 2d at 187–88 (citing Wis. Stat. § 49.45(34)).

Because the handbook topic challenged by plaintiffs does not attempt to establish rules or regulations (as explained in more detail below), *Tannler* controls the outcome here. Topic #66 is not an unpromulgated rule, and because that is the only allegedly unpromulgated rule challenged by the plaintiffs in their Wis. Stat. § 227.40 action, DHS is likely to succeed on the merits of its appeal.

2. The handbook guidance simply restates state and federal law.

The above discussion illustrates that DHS's guidance is not, in fact, an unpromulgated rule. It simply summarizes federal and state law. The following chart makes that point clear. The left column tracks the language of the handbook provision and the middle column cites the statutes and promulgated rules in support. For added support, the third column provides DHS's authority and duty to recoup under federal law:

Topic #66 language.	**State statutory and admin. code provisions.**	**Federal laws.**
For a covered service to meet program requirements,	§ DHS 106.02: "Providers shall comply with the following general conditions for participation as providers . . . ." § DHS 107.02(2) and (2)(a) state that services that fail to meet program requirements or state or federal statutes, rules and regulations are not reimbursable by Medicaid.	42 U.S.C. § 1396a; 42 C.F.R. § 430.0; 42 C.F.R. Part 440 Subpart A; 42 C.F.R. Part 440 Subpart B.
the service must be provided by a qualified Medicaid-enrolled provider	§ DHS 106.02(1): "A provider shall be certified."	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 455.410;

		455.412; 447.45(f).
to an enrolled member.	§ DHS 106.02(2): reimbursement for covered services only. § DHS 106.02(3): the recipient of the services was eligible to receive Medicaid benefits.	42 U.S.C. § 1396a(a)(19); 42 C.F.R. 447.45(f).
In addition, the service must meet all applicable program requirements	§ DHS 106.02(4): shall be reimbursed only if the provider complies with applicable state and federal procedural requirements.	42 U.S.C. § 1396a(a)(30)(A); 42 C.F.R. §§ 456.1–.6; 431.960 (c).
including, but not limited to, medical necessity,	§ DHS 106.02(5): shall be reimbursed only for services that are appropriate and medically necessary for the condition of the recipient.	42 C.F.R. § 440.230.
prior authorization,	§ DHS 107.03(9): any service requiring prior authorization (PA) for which PA is denied or for which PA was not obtained prior to the provision of the service is not a covered service for Medicaid. § DHS 107.12(2)(a): prior authorization is required for all private duty nursing services.	42 C.F.R. § 440.230.
claims submission,	§ DHS 106.03(2)(b): claims shall be submitted in accordance with the claims submission requirements…. § DHS 107.02(2)(h): services that fail to meet timely submission of claims requirements are not reimbursable by Medicaid.	42 U.S.C. § 1396a(a)(37); 42 C.F.R. §§ 447.45(d)(1); 455.18.
prescription	Wis. Stat. § 49.46(2)(b)6.g.: nursing services require a physician's prescription to be covered by Medicaid. § DHS 107.12(1)(c): private duty nursing services shall be provided only when prescribed by a physician.	42 C.F.R. § 440.80.
and documentation requirements.	Wis. Stat. § 49.45(3)(f). § DHS 107.02(2)(e) and (f): services for which records are not kept or other	42 U.S.C. § 1396a(a)(27).

	documentation failure are not reimbursable by Medicaid. § DHS 107.12(4)(d) private duty nursing services that were provided but not documented are not covered services.	

The handbook topic is just a tool to implement the statutory requirements and the properly promulgated administrative rules regarding DHS's authority to recover improper Medicaid payments. It is simply a synthesis of the above-referenced statutes and promulgated rules. It is merely a reference aid; it does not set forth law-like pronouncements. It "is not intended to have the effect of law." *County of Dane v. Winsand,* 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885. Every phrase and portion of this handbook topic is *explicitly* grounded in Wisconsin statutes, federal law, and properly promulgated administrative code provisions, which plaintiffs did *not* challenge in this action. Plaintiffs' Wis. Stat. § 227.40 challenge fails from the beginning because there is no "rule" to challenge.

Because the challenged portion of the Medicaid Provider Handbook is not a "rule" as defined by Wis. Stat. § 227.01(13) in the first place, DHS is likely to succeed on the merits of its appeal.

3. Wisconsin Stat. § 49.45(3)(f) provides DHS authority to recover improper Medicaid payments for services not actually provided, and for claims that are inappropriate or inaccurate.

The circuit court declared that DHS exceeds the scope of its authority to recoup Medicaid payments when it employs the so-called "Perfection Rule." But the circuit court's order misreads the plain language of the law. A correct reading of

Wis. Stat. § 49.45, in conjunction with other state rules and federal laws, supports DHS's position that recoupment of the overpayments are within the bounds of its legal authority, and DHS is, therefore, likely to prevail on the merits in its appeal.

The text of Wis. Stat. § 49.45 provides DHS with clear authority to take the disputed recoupment action. Subsection (3)(f) says:

> (f)1. 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 provision of services *and the appropriateness and accuracy of claims*.
> 2. 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 service 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).

Wis. Stat. § 49.45(3)(f)1.–2. (emphasis added).

This provision requires Medicaid providers to "maintain records as required by [DHS] for verification of provider claims for reimbursement." Wis. Stat. § 49.45(3)(f)1. DHS has the authority to audit these records "to verify the actual provision of services *and* the appropriateness and accuracy of the claims." *Id.* And then, only after reasonable notice and opportunity for hearing (*see* Wis. Stat. § 49.45(2)(a)10.), DHS shall "recover the value of any payment made to a provider which cannot be so verified." Wis. Stat. § 49.45(3)(f)2. Subsection (3)(f)2. gives DHS the power to recover Medicaid payments when DHS cannot verify from the provider's records: (1) that actual services were provided; and (2) that the claims on which the payments were based are appropriate and accurate.

Thus, the Court's September Order is mistaken in holding that DHS can recoup payment only if it is shown that no actual services were provided, and it is mistaken in holding that DHS cannot recover payment based on a provider's failure to maintain adequate documentation of the services billed to Medicaid or the provider's failure to comply with other program requirements.

The plain language of Wis. Stat. § 49.45(3)(f), authorizes DHS to recover the value of a payment where a Medicaid provider's records do not verify the appropriateness and accuracy of the provider's claim. Despite this "appropriateness and accuracy of claims" language in the statute, the circuit court enjoined DHS from recouping a provider's Medicaid payments on any basis other than a finding that the services were not actually provided. This ruling was erroneous based on the plain text of the statute.

4. State and federal regulations give DHS the authority and the obligation to recover improper Medicaid payments, including claims that the provider cannot verify with documentation.

Relying on this clear statutory authority to recover improper Medicaid payments, DHS has promulgated rules implementing its authority to recover. These rules have the force of law and, notably, were not challenged by the plaintiffs in this action. These rules provide further basis for DHS's recovery actions.

Wisconsin Admin. Code § DHS 108.02(9)(a) involves recoupment of overpayments by DHS. It states: "If [DHS] finds that a provider has received an overpayment, including but not limited to erroneous, excess, duplicative and improper payments regardless of cause, under the program, [DHS] may recover the

amount of the overpayment." This means that DHS may recover an erroneous payment, a duplicative payment, and a payment found to be excessive.

In addition, the federal government, which regulates the administration of these programs by the states, defines an "improper payment" broadly. "[W]hen an Agency's review is unable to discern whether a payment was proper *because of insufficient or lack of documentation*, this payment must also be considered an improper payment." Publication 100-15 (Medicaid Integrity Program Manual, Sept. 2011; emphasis added). Contrary to plaintiffs' assertions, an improper payment can result from a provider's insufficient documentation.

Wisconsin Administrative Code § DHS 106.02 supplies further support for DHS's recovery authority. It reads:

> [DHS] may refuse to pay claims and *may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records* or permit authorized department personnel to have access to records required under s. DHS 105.02 (6) or (7) and the relevant sections of chs. DHS 106 and 107 for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services which are the subject of claims or for purposes of determining provider compliance with [Medicaid] requirements

Wis. Admin. Code § DHS 106.02(9)(g) (emphasis added).

Plaintiffs have argued that DHS disregards Wis. Admin. Code § DHS 107.01(1) when it demands recoupment for a provider's failure to comply with recording-keeping requirements. That provision states, in part: "[DHS] shall reimburse providers for medically necessary and appropriate health care services listed in ss. 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible

medical assistance recipients, including emergency services provided by persons or institutions not currently certified." Wis. Admin. Code § DHS 107.01(1). But DHS cannot be expected to permit a payment to stand to a provider who fails to maintain proper records to prove that *appropriate and necessary* health care services were provided. If DHS were to allow such payments, that would not only be fiscally irresponsible and in violation of federal law, but blind to the protection of patient health and safety.

5. Plaintiffs cannot challenge DHS's policy and practice in this Wis. Stat. § 227.40 action, and regardless, DHS has statutory and regulatory authority to recoup improper Medicaid payments.

Despite the fact that plaintiffs clearly challenged only Topic #66 in their complaint, in briefing to this Court they improperly expanded their Wis. Stat. § 227.40 rule challenge into a challenge of DHS's general Medicaid payment recoupment policy and practice.[2] Neither the text of the statute nor case law supports this attempt.

Wisconsin Stat. § 227.40 is the vehicle to challenge a specific agency "rule." *See* Wis. Stat. § 227.40(1). This "rule" may be a section of the administrative code. Indeed, Wis. Stat. § 227.40(5) requires the Legislature's Joint Committee on Administrative Rules to be served with a copy of the complaint. Wis. Stat. § 227.40(5). And when a rule is declared invalid, the court is required to send notice

[2] Plaintiffs asked this Court to issue a declaration on DHS's "statutory authority to recoup payments from Medicaid providers" under the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04(2). But plaintiffs' complaint, which was never amended, only brought a Wis. Stat. § 227.40 action to challenge the validity of a "rule." Wisconsin Stat. §§ 806.04 and Wis. Stat. 227.40 are not the same. The latter is far more limited.

to the legislative reference bureau, which then must insert an annotation of that judicial determination "in the Wisconsin administrative code." Wis. Stat. § 227.40(6). Case law teaches that Wis. Stat. § 227.40(4)(a) permits a challenge to a written instruction that was not, but should have been, promulgated. *See generally*, *Cholvin*, 313 Wis. 2d 749. But no case—as far as DHS can tell—has permitted the use of Wis. Stat. § 227.40 to challenge a state agency's policy and practice, as opposed to a promulgated or unpromulgated rule. That is what plaintiffs attempt here. Wisconsin Stat. § 227.40 authorizes challenges to an agency's concrete written statement, not to its policy and practice. Thus, not only were plaintiffs foreclosed from challenging a topic in a Medicaid handbook because it is not a "rule," they were also precluded from challenging DHS's more general policy and practice of recoupment in a Wis. Stat. § 227.40 action.

But even if plaintiffs could have proceeded with a more general challenge to DHS's recoupment policy and practice, Wis. Stat. § 49.45(3)(f) provides DHS with authority to recover improper Medicaid payments for services not actually provided and for claims that are inappropriate or inaccurate. And this authority is not limited by Wis. Stat. § 49.45(2)(a)10.

In addition, properly promulgated state administrative code provisions, such as Wis. Admin. Code §§ DHS 108.02(9)(a) and 106.02(9)(g)—which again, plaintiffs did not challenge in this action—supply DHS with the power to recover "erroneous, excess, duplicative and improper payments regardless of cause" and "payments made on claims where the provider fails or refuses to prepare and maintain records

. . . for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services," respectively. Moreover, federal law, which Wisconsin *must* follow to receive federal Medicaid funds, requires DHS to audit and recoup improper payments in such circumstances, as well.

Plaintiffs cannot challenge DHS's policy and practice of recoupment in a Wis. Stat. § 227.40 action. DHS is likely to succeed on the merits of its appeal regarding this issue.

6. The circuit court's injunction against DHS exceeds the bounds of its remedial powers under Wis. Stat. § 227.40.

Another reason DHS has a likelihood of success on the merits is because this Court's remedy is outside the bounds of its authority and jurisdiction under Wis. Stat. § 227.40.

Wisconsin Stat. § 227.40 authorizes a declaratory judgment action to challenge the validity of an agency rule. The statute permits the court to declare a rule invalid. *See* Wis. Stat. § 227.40(4)(a) ("In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid . . . ."). Where the court makes such a finding, the law authorizes the court to take only one more action:

> Upon entry of a final order in a declaratory judgment action under sub. (1), the court shall send an electronic notice to the legislative reference bureau of the court's determination as to the validity or invalidity of the rule, in a format approved by the legislative reference bureau, and the legislative reference bureau shall publish a notice of that determination in the Wisconsin administrative register under s.

> 35.93(2) and insert an annotation of that determination in the Wisconsin administrative code under s. 13.92(4)(a).

Wis. Stat. § 227.40(6).

Here, this Court went beyond the remedial scope of Wis. Stat. § 227.40. Instead of applying the authorized remedy, the Court enjoined DHS from recouping:

> "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 non-compliance with Medicaid policies or guidance where the documentation verifies that the services were provided."

The injunction was temporary in that it is subject to action by the Wisconsin Legislature granting such authority to DHS. Thus, this injunction went further than the Legislature allows in a Wis. Stat. § 227.40 action. For this reason alone the injunction will likely be vacated on appeal.

Also, the injunction is inconsistent with the Court's declaration and the statute. The Court recognized that under Wis. Stat. § 49.45(3)(f) and (2)(a), DHS has the authority to recover payments from Medicaid providers for which either DHS is "unable to verify from provider's records that a service was actually provided, *or an amount claimed was inaccurate or inappropriate for the service provided*." This language predominantly tracks Wis. Stat. § 49.45(3)(f)1.–2. But then the injunction limits the declaration—and statute—by preventing DHS from recovering payments when the provider's documentation does not verify "*the appropriateness and accuracy of claims*." Wis. Stat. § 49.45(3)(f)1.

Because the Court's injunction exceeds the scope of its remedial authority under Wis. Stat. § 227.40, and directly conflicts both with its declaration and with Wis. Stat. § 49.45(3)(f)1.–2., DHS will likely succeed on the merits of its appeal.

B. DHS has a strong likelihood of success on the merits regarding the Court's Order for Supplemental Relief.

The Court's Order for Supplemental Relief improperly expanded its September Order after the defendant had filed an appeal of the September Order. In *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶¶ 2, 18-21, 351 Wis. 2d 237, 893 N.W.2d 388, the Wisconsin Supreme Court held that once an appeal has been filed and the record is transmitted to the court of appeals, the circuit court has no jurisdiction to alter the judgment. Here, the Court's Supplemental Order expands the reach of the September Order in the following ways: (1) it enjoins the defendant from issuing notices of intent to recover (recoup) Medicaid funds if the findings of the initial audit appear to indicate that the services in question were actually provided; (2) it enjoins the defendant from furthering *any* agency action, including an administrative proceeding, in which the defendant seeks to recoup Medicaid funds from any Medicaid provider, if the provider's records verify that the services were provided;[3] and (3) for the first time, the Supplemental Order enjoins any administrative rules that conflict with the Court's view of the breadth of the agency's authority to seek recoupment of Medicaid funds.

Here, the Court's Order for Supplemental Relief improperly enjoins ongoing administrative proceedings, including proceedings in which no final decisions

ordering recoupment have been entered. Most significantly, the Court's Order for Supplemental Relief, for the first time, enjoins defendant from enforcing and applying existing administrative rules that run afoul of the Court's order. The Court's September Order did not purport to enjoin enforcement of any of DHS's specific administrative rules. Rather, it enjoined the defendant's "*policy* of recouping payments for noncompliance with Medicaid program requirements," which the Court characterized as an unpromulgated "Perfection Rule." (September Order at 6; emphasis added). The plaintiffs' action did not seek – and the Court's September Order did not grant – an injunction against the enforcement of any specific existing administrative rules.

By contrast, the Order for Supplemental Relief enjoins DHS from taking actions for recoupment in certain circumstances "notwithstanding that an audit identified other errors or noncompliance with Department policies *or rules*." (Order for Supplemental Relief, at 2, ¶¶ 1 and 2; emphasis added). This language of the Order for Supplemental Relief expands the Court's original judgment in violation of *Madison Teachers, Inc.* by enjoining the enforcement of existing administrative rules. As noted above, the Court's September Order referenced Topic #66 and the so-called "perfection rule" (*i.e.*, what the Court saw as an agency *policy* requiring perfection or near-perfection of documentation), but the Order did not specifically strike or reference any existing administrative code provisions.

---

[3] The Court's orders do not specify what level of documentation is necessary in order to determine whether services were actually provided.

Under the Court's language of the Order for Supplemental Relief, however, enforcement of agency rules that conflict with the Court's order is now enjoined. For example, Wis. Admin. Code §§ DHS 106.02(9)(f) and (g) state, in part:

> (f) *Condition for reimbursement.* Services covered under ch. DHS 107 are non-reimbursable under the MA program unless the documentation and medical recordkeeping requirements under this section are met.
> (g) *Supporting documentation.* The department may refuse to pay claims and may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records. . .

This rule allows recoupment based on a failure to meet all documentation and record-keeping guidelines. The Court's Order for Supplemental Relief enjoins enforcement of this rule, even though the Court's September Order did not. Likewise, the Court's September Order did not enjoin enforcement of Wis. Admin. Code § DHS 107.02(2)(e), which states, in part, as follows:

> (2) Non-reimbursable services. The department may reject payment for a service which ordinarily would be covered if the service fails to meet program requirements. Non-reimbursable services include:
>
> . . . . .
>
> (e) Services for which records or other documentation were not prepared or maintained, as required under s. DHS 106.02(9);

Enforcement of this rule in a recoupment proceeding is now enjoined by the language of the Court's Order for Supplemental Relief, which, for the first time, references agency "policies *or rules*."

Because the Court's September Order has been appealed, it cannot be expanded to enjoin the enforcement of existing administrative rules pending a

decision by the Court of Appeals. DHS's appeal is likely to succeed in vacating the Order for Supplemental Relief.

C. DHS has a substantial likelihood of success on the merits regarding the Court's Order on Costs and Attorney Fees.

The Court awarded the petitioners their costs and attorney fees incurred in bringing their motion for supplemental relief. When asked by defendant's counsel for the statutory authority for the Court's award of the petitioners' attorneys' fees, the Court cited Wis. Stat. § 808.07:

> THE COURT: I am going with – I should have announced it, but I believe that 808.07 allows that to make an order appropriate to preserve the existing state of affairs and the effectiveness of my judgment, because I don't think that is going on right now based on some of the other exhibits. I can't recite the letter off the top of my head. I think it was E, for example.

(Tr. of Feb. 14, 2017, hearing; p. 45, lines 9-15). The statutory provision that the Court appears to have been referring to is Wis. Stat. § 808.07(2)(a)3., which states as follows:

> (2) Authority of a court to grant relief pending appeal.
> (a) During the pendency of an appeal, a trial court or an appellate court may:
> . . . . .
> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

As an initial matter, the plain language of the above-referenced statutory provision does not specifically authorize the awarding of attorney fees, and the Court's award, therefore, lacks a basis in law. However, even if one assumes *arguendo* that an award of attorney fees can be made under that statutory provision, the State is immune from such an award under the doctrine of sovereign immunity.

For over 100 years, Wisconsin courts have consistently held that the State enjoys sovereign immunity and cannot be sued without its consent. *PRN Assocs. LLC v. State Dep't of Admin.,* 2009 WI 53, ¶ 51, 317 Wis. 2d 656, 683, 766 N.W.2d 559; *Fiala v. Voight*, 93 Wis. 2d 337, 342, 286 N.W.2d 824 (1980); *The Chicago, Milwaukee & St. Paul Railway Co. v. The State*, 53 Wis. 509, 513, 10 N.W. 560 (1881). Sovereign immunity derives from the Wisconsin Constitution, art. IV, § 27, which reads as follows: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."

This language has been construed repeatedly to mean that only the legislature can consent to a suit against the State. *PRN Assoc. LLC,* 2009 WI 53, ¶ 51, 317 Wis. 2d at 683-684; *State v. P.G. Miron Const. Co., Inc.,* 181 Wis. 2d 1045, 1052, 512 N.W.2d 499 (1994); *Fiala,* 93 Wis. 2d at 342; *Koshick v. State,* 2005 WI App 232, ¶ 6, 287 Wis. 2d 608, 612; *Erickson Oil Products, Inc. v. State*, 184 Wis. 2d 36, 52, 516 N.W.2d 755 (Ct. App. 1994). The State's consent to be sued must be clearly and expressly stated in the statutory language relied upon. Consent will not be implied. *Fiala*, 93 Wis. 2d at 342; *Miron,* 181 Wis. 2d at 1052-53; *Townsend v. Wisconsin Desert Horse Assoc.*, 42 Wis. 2d 414, 421, 167 N.W.2d 425 (1969); *Erickson*, 184 Wis. 2d at 52. However, there is no specific provision in Wis. Stat. § 808.07 that expressly authorizes an award of costs and attorney fees against the State.

In this matter, the Court's Order on Costs and Attorney Fees grants monetary relief against the State (DHS).[4] An action is barred by sovereign immunity if the relief sought would effectively establish the State's legal responsibility for the payment of money. *Cf. Lister v. Bd. of Regents*, 72 Wis. 2d 282, 308, 240 N.W.2d 610 (1976). *See Brown v. State*, 30 Wis. 2d 355, 381-82, 602 N.W.2d 79 (Ct. App. 1999) ("A declaration which seeks to fix the state's responsibility to respond to a monetary claim is not authorized by Wisconsin's Declaratory Judgments Act.") Because the relief sought by the defendant (and granted by the Court) effectively fixes the State's responsibility to pay the defendant's costs and attorney fees, it is barred by sovereign immunity. Thus, defendant has a likelihood of success on the merits of the Court's award of plaintiffs' costs and attorney fees.

II. If a stay of the Court's orders is not granted, DHS will suffer irreparable injury.

The second *Gudenschwager* factor weighs heavily in favor of a stay. Unless a stay is granted, DHS (and the public) will suffer irreparable injury because DHS will be hamstrung with respect to its statutory authority to conduct audits of Medicaid providers and to seek recoupment of Medicaid funds under state and federal law. The Court's Order for Supplemental Relief enjoins DHS from conducting any proceedings that conflict with the Court's view of what DHS is authorized to do under the law. If this results in a determination by the federal government that DHS is not adequately enforcing its Medicaid statutes and

[4] A state agency (here, DHS) is the State for purposes of sovereign immunity. *See Lindas v. Cady*, 142 Wis. 2d 857, 861, 419 N.W.2d 345 (Ct. App. 1987) ("An action against a state agency is an action against the state.")

regulations, Wisconsin could lose all or a portion of the $5 billion of federal Medicaid funds that are provided to Wisconsin each year.

The Medicaid budget for Wisconsin is approximately $8 billion per year, about 40% of which is paid by the State and 60% is paid by the federal government. (*See* Affidavit of Anthony J. Baize, ¶ 5, attached hereto as Exhibit A). As of March 24, 2017, there were more than one million enrolled beneficiaries in Wisconsin and there were 76,334 medical providers certified to provide Medicaid services. Just over 1,700 of those providers were private duty nurses. (Baize Aff., ¶¶ 2, 3).

"Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). The Medicaid provisions and the implementing rules adopted by the federal Centers for Medicare and Medicaid Services (CMS) set out broad requirements concerning coverage, payment, recoupment, and other subjects, which every state must follow to receive federal matching funds.[5] *See* Wis. Stat. § 49.45(1). "[O]nce a state elects to participate [in Medicaid], it must abide by all federal requirements and standards as set forth in the Act." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 977 (7th Cir. 2012) (citing *Wilder,* 496 U.S. at 502). In other words, the money the states receive from the federal government comes with strings attached.

[5] The Medicaid Act is found at 42 U.S.C. § 1396 *et seq*.

"To qualify for federal assistance, a State must submit to the [federal government] and receive approval for a 'plan for medical assistance,' § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program." *Wilder*, 496 U.S. at 502 (citing 42 C.F.R. § 430.10).[6]

A state Medicaid agency is required to establish procedures for pre-payment and post-payment claim review to ensure the proper and efficient payment of claims and management of the program. In Wisconsin, DHS is charged with responsibilities relating to fiscal matters, eligibility for benefits, and general supervision of the program. Wis. Stat. § 49.45(2). It is mandated to cooperate with federal authorities to obtain the best financial reimbursement available to the State from federal funds. Wis. Stat. §§ 49.45(2)(a)1., 7.

Federal law requires the State of Wisconsin to have a program to audit participating entities' records to insure that proper payments are made under the plan. 42 U.S.C. §1396a(a)(42)(A); (Baize Aff., ¶ 14). In turn, the federal government audits state Medicaid programs to ensure they are recovering identified improper payments and refunding the federal share to CMS. 42 C.F.R. §§ 433.300–433.322.[7]

---

[6] "The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program." 42 C.F.R. § 430.10.

[7] CMS can withhold federal funds if it finds that the state "fail[ed] to actually comply with a Federal requirement," such as enforcing record-keeping requirements "regardless of whether the [State Medicaid] plan itself complies with that requirement." 42 C.F.R. § 430.35(c).

DHS must refund the federal share (about 60%) of any identified overpayments within one year. (Baize Aff., ¶ 16). If the Wisconsin Medicaid Agency (DHS) does not substantially comply with any of the provisions of its Medicaid State Plan, federal enforcement could include the withholding of the federal share of Medicaid payments in whole or in part. (42 C.F.R. § 430.35). In such a circumstance, Wisconsin taxpayers would be responsible for approximately $5 billion annually to replace the federal share, or, in the alternative, the State would have to cut Medicaid services, cut payments for services, or remove recipients from the Medicaid program. (Baize Aff., ¶¶ 17, 18).

As the state Medicaid agency, DHS is required and authorized to set conditions of participation and reimbursement in contracts with providers (*see* Wis. Stat. § 49.45(2)(a)9.) and is authorized to establish documentation requirements to verify provider claims for reimbursement. *See* Wis. Stat. § 49.45(3)(f); 42 C.F.R. § 431.107(b). As noted above, DHS is mandated by the federal government to recover monies improperly or erroneously paid, and overpayments made, to Medicaid-certified providers. Wis. Stat. § 49.45(2)(a)10.a.; Wis. Admin. Code § DHS 107.02(2).[8] DHS shall recover money paid for services when a provider's documentation fails to verify the actual provision of services, the appropriateness of the provider's claim, or the accuracy of the provider's claim. *See* Wis. Stat. § 49.45(3)(f)1.–2.

Wisconsin Admin. Code § DHS 106.02(9)(g) gives DHS authority to recoup:

---

[8] State law also authorizes DHS "to promulgate . . . rules as are consistent with its duties in administering [Medicaid]." Wis. Stat. § 49.45(10).

> *[DHS]* may refuse to pay claims and *may recover previous payments made on claims where the provider fails or refuses to prepare and maintain records* or permit authorized department personnel to have access to records required under s. DHS 105.02 (6) or (7) and the relevant sections of chs. DHS 106 and 107 *for purposes of disclosing, substantiating or otherwise auditing the provision, nature, scope, quality, appropriateness and necessity of services which are the subject of claims or for purposes of determining provider compliance with [Medicaid] requirements*.

Wis. Admin. Code § DHS 106.02(9)(g) (emphasis added). In addition, Wis. Admin. Code § DHS 108.02(9) lays out DHS's recoupment methods, but it also refers to the authority it has to recoup for overpayments:

> DEPARTMENTAL RECOUPMENT OF OVERPAYMENTS. (a) Recoupment methods. If [DHS] finds that a provider has received an *overpayment, including but not limited to erroneous, excess, duplicative and improper payments* regardless of cause, under the program, [DHS] may recover the amount of the overpayment by any of the following methods, at its discretion:
> . . .
> 3. Requiring the provider to pay directly to the department the amount of the overpayment.

Wis. Admin. Code § DHS 108.02(9) (emphasis added).

The federal government defines "overpayment" as "the amount paid by a Medicaid agency to a provider which is in excess of the amount that is allowable for services furnished under section 1902 of the Act and which is required to be refunded under section 1903 of the Act." 42 C.F.R. § 433.304.

In September 2011, CMS issued Publication 100-15 (Medicaid Integrity Program Manual)[9] as a reference tool for state Medicaid agencies and providers.

[9] This manual may be found online at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-

This Manual provides information regarding the recovery of "improper payments," which are defined as:

> [A]ny payment that should not have been made or that was made in an incorrect amount under statutory, contractual, administrative, or other legally applicable requirement. Incorrect amounts include overpayments and underpayments. An improper payment includes any payment that was made to an ineligible recipient, payment for non-covered services, duplicate payments, payments for services not received, and payments that are for the incorrect amount. *In addition, when an Agency's review is unable to discern whether a payment was proper because of insufficient or lack of documentation, this payment must also be considered an improper payment.*

(Emphasis added.)

In summary, in exchange for federal Medicaid monies, Wisconsin agrees to provide health care to needy individuals, while complying with federal statutes, rules, guidance, and manuals having the force of law regarding many subjects, including recoupment. Wisconsin has enacted statutes and promulgated rules that give DHS authority to recover improper Medicaid payments, and plaintiffs' action did not challenge any of those statutory or code provisions. If the federal government, pursuant to an audit of Wisconsin's enforcement program, determines that the State is not, or has not been, adequately fulfilling its obligations under such a program, the State could face irreparable harm in the form of withheld federal payments and a substantially reduced ability to provide Medicaid services.

The Court's Order for Supplemental Relief specifically enjoins DHS from furthering *any* agency action (including ongoing administrative proceedings) where

---

Items/CMS1238527.html?DLPage=2&DLEntries=10&DLSort=0&DLSortDir=ascending (last visited Mar. 23, 2017).

"the provider's records verify that the services were provided."[10] This injunctive relief prevents DHS from exercising its authority under specific statutory and administrative code provisions, as noted herein. DHS also believes that it is enjoined from even making legal arguments in such proceedings that could be viewed as being in conflict with the Court's order. (*See* Affidavit of Jesús Garza, ¶¶ 14, 15, attached hereto as Exhibit B; Baize Aff., ¶¶ 17, 18). The Court's Order for Supplemental Relief presents a potential for very substantial irreparable harm to the State in the form of withheld federal Medicaid funds if the order results in a constraint on DHS's ability to enforce its auditing obligations under state and federal law, as viewed by the federal government. If such federal funds are withheld, they cannot be regained by the State in the future. In other words, any withheld funds are permanently lost. This second stay factor must be resolved in DHS's favor.

III. If a stay is granted no substantial harm will come to other interested parties.

This factor also weighs in DHS's favor. Plaintiffs have argued that they are being harmed via the expense of ongoing administrative proceedings. Any provider who is audited has the right to request a contested case hearing if they disagree with the initial Notice of Intent to Recover (NIR). Seeking such a hearing is the exercise of a provider's due process rights under the law. Plaintiffs' argument regarding harm essentially amounts to an assertion that exercising their due

---

[10] There are approximately 87 contested case hearings going on as of this date. (Baize Aff., ¶ 10), some or all of which could be subject to the Court's injunction.

process rights constitutes "harm." Plaintiffs have cited no legal authority in support of this position. As such, the granting of a stay of the Court's orders will not cause substantial harm to the plaintiffs.

IV. A stay will not harm the public interest and, in fact, is in the public interest.

This final factor also favors DHS's request for a stay. The Court's orders have created uncertainty in the marketplace. Both DHS and DHA have expressed confusion about what the Court's orders mean and how they are to be interpreted and applied. DHS does not believe that the Court's orders give clear guidance as to what is specifically meant by the so-called "Perfection Rule." It is not clear to DHS what amount of documentation is necessary to determine whether services were actually provided, and DHS does not know what legal arguments it can or can't make in the course of its audits and ongoing administrative proceedings. (Garza Aff., ¶¶ 14, 15). Attorneys representing petitioners in DHA hearings are citing the Court's orders to DHA Administrative Law Judges, who are unsure how they are supposed to proceed and what specific standards should be applied in light of these orders. (*See, e.g.*, plaintiffs' January 1, 2017 "Affidavit of Counsel," ¶ 14, Ex. H.)

Absent clear guidelines as to what constitutes the application of the "Perfection Rule" in the course of an audit, and given that the Court's Order for Supplemental Relief now also appears to enjoin the enforcement of certain unnamed existing administrative rules, it is in the public interest to reduce confusion in the marketplace and in ongoing administrative pleadings by staying the Court's Order pending review and clarification of DHS's authority by the Court of Appeals. In

addition, there is clearly a public interest in not risking the State's loss of the federal share of Medicaid dollars, as discussed in Section II above.

CONCLUSION

For the reasons set forth above, the DHS respectfully requests that the Court STAY its order of September 27, 2016, its orders of March 23 and 24, 2017, and its judgment of April 3, 2017, pending resolution of DHS's appeals to the Court of Appeals.

Respectfully submitted this 14th day of April 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General

Electronically signed by:
/s/ Christopher J. Blythe
CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147
Attorneys for Defendant

Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-0180 (Phone)
(608) 267-8906 (Fax)
blythecj@doj.state.wi.us

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 <u>must</u> 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 <u>required</u> 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 <u>may not</u> "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.

PINES BACH LLP

By: *Electronically signed by Diane M. Welsh*
Diane M. Welsh, SBN 1030940
Aaron G. Dumas, SBN 1087951
Attorneys for the Plaintiffs

Post Office Address:
Pines Bach LLP
122 W. Washington Avenue
Suite 900
Madison, Wisconsin 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
dwelsh@pinesbach.com
adumas@pinesbach.com