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before the surgery, even with corrective lenses. Other potential complications include persistent haze or corneal scarring, the possibility of infection, abnormal epithelial healing, recurrent epithelial breakdown, corneal ulceration, loss of corneal sensitivity, elevated intraocular pressure, diurnal fluctation in vision, and damage to the tissues of the eye.

24. Excimer lasers are also used to perform another surgical procedure to correct myopia, known as laser in-situ keratomileusis, or LASIK. LASIK requires the use of a microsurgical instrument, a microkeratome, to make an incision in the cornea and create a very thin flap of corneal tissue. The laser is then used to cut the corneal tissue under the flap in order to reshape the cornea, much as with PRK, and the corneal flap is then closed.

25. As with PRK, serious harm to the patient can be caused if LASIK is not properly performed. The potential harms include those which may result from improperly performed PRK, as well as the potential for serious and permanent harm due to improper creation or management of the corneal incision and flap using the microkeratome.

26. As with PRK, even if LASIK is properly performed complications can and do occur in some patients, as described in ¶ 23. The risk of most complications is substantially lower with LASIK than with PRK; however, LASIK carries with it a risk of complications related to the creation of the corneal flap. These complications range in severity from mild to extremely severe and include inadequate size or thickness of the flap, requiring the immediate termination of the LASIK procedure and postponement of further surgery for three to six months; permanent corneal irregularities which produce serious permanent blurred vision; creation of a free corneal cap rather than a flap which is hinged to the cornea, with the possibility of loss of the corneal cap

requiring more invasive surgery; and corneal perforation requiring further surgery and potentially resulting in infection, corneal transplant, or blindness.

27. Although LASIK poses a risk of complications associated with the corneal flap which are not presented by PRK, LASIK can be used to correct more severe visual defects than PRK, and provides a faster and less painful recovery for patients than the recovery from PRK. These factors, in conjunction with significantly lower complication rates with LASIK for the complications referenced in ¶ 23 which exist with both LASIK and PRK, have resulted in LASIK becoming the preferred alternative for most patients seeking vision correction through refractive surgery.

28. Nd:YAG lasers are used, among other things, to perform a surgical procedure known as peripheral iridotomy ("PI") in the treatment of narrow angle and angle closure glaucoma. In the most serious glaucoma cases, there is often a build-up of pressure behind the iris tending to push the iris forward. In the course of performing a PI, the surgeon uses the laser to create a tiny opening in the iris to allow for the proper drainage of aqueous fluid. The surgeon places this opening as close to the limbus as possible without burning the endothelium of the cornea. The surgeon must activate the laser until the iris is broken through. The determination that the iris is broken through comes when iris pigment bursts from the epithelium or when the surgeon sees the anterior lens capsule. If the lens capsule is accidentally hit with the laser beam, a traumatic cataract can immediately develop, necessitating cataract surgery. Significant complications of a PI include a spike in intraocular pressure, which can cause further eye damage, and closure of the iridectomy. Other complications include corneal burns, lens opacities, iris atrophy, bleeding, and retinal burns.

29. Nd:YAG lasers are also used to perform a surgical procedure known as a posterior capsulotomy. Following many cataract surgeries, a portion of the lens capsule, or membrane, is left in place to maintain the normal anatomic spaces of the eye and to serve as a support for the new intraocular lens implanted during cataract surgery. In up to one-third of such cases, the remaining lens membrane develops a haziness which causes vision problems similar to the original cataract. To treat this problem, the surgeon focuses the laser precisely on the opacified membrane and vaporizes the membrane with the laser. If the procedure is not correctly performed, results may include damage to the cornea, iris, retina, or intraocular lens.

30. Argon lasers are used, among other things, to perform a surgical procedure known as a trabeculoplasty for the treatment of open angle glaucoma. When the use of medications does not adequately control the pressure buildup of glaucoma, the surgeon may perform a trabeculoplasty, using a laser to burn one or more openings into the trabecular meshwork of tissue inside the eye to allow fluids to flow more normally into and out of the eye, thereby reducing the fluid pressure in the eye. The procedure has been proven effective only with certain types of open angle glaucoma, especially pseudo-exfoliative and pigmentary glaucomas. Risks and potential complications include postoperative infection, hemorrhaging, burns to other parts of the eye, and other risks and complications of any laser surgery.

31. Argon lasers may also be used for surgical treatment of blood vessel disorders of the retina including but not limited to diabetic retinopathy, vein occlusions, and macular degeneration. These diseases are directly related to overall disease of the human system but manifest themselves, in part, in damage to the retina. If left untreated or not properly treated, severe loss of vision or complete blindness may result. The surgeon uses a laser to perform

photocoagulation, wherein a leaking blood vessel on the retina is sealed off and the tissue is converted into plasma by the laser.

32. Various opthalmic lasers may be used in other procedures to treat glaucoma, including laser gonioplasty, wherein the laser is used to contract and burn tissues at several spots around the circumference of the iris, severing tissues as necessary, thereby causing the iris to shrink away from the angle closure; and laser sclerectomy, wherein the laser is used to create a hole through the sclera (the tissue under the cornea forming the outer envelope of the eye) and then to create an opening between the anterior chamber of the eye and the subconjuctival space. These procedures carry multiple risks of complications.

33. As with any surgery, there are contraindications to all laser surgery procedures and risks of complications and adverse reactions or results. There are also alternatives including other surgical procedures which may be performed only by a physician licensed to practice medicine and surgery. These contraindications, risks, and alternatives must be evaluated by the surgeon performing the procedure and explained to the patient prior to the surgery in order for the patient to make an informed decision regarding the surgery.

34. Potential complications of laser surgical procedures include medical problems which optometrists are not trained or licensed to diagnose or treat. Some complications of laser surgical procedures may also necessitate immediate intraocular surgery which optometrists are not trained or licensed to perform. Contraindications and risks of laser surgical procedures also include medical problems and conditions beyond the eye and the immediately surrounding tissues which optometrists are not trained or licensed to diagnose or treat.

35. If complications occurring in the course of the performance of a laser surgical procedure or in the recuperation period are not recognized, diagnosed, and treated properly, serious harm could be caused to the patient, including further impairment or loss of vision and/or the discomfort, inconvenience, and costs of further corrective procedures.

36. Ophthalmologists are medical doctors and doctors of osteopathic medicine who have invested great time, expense, and effort in medical education and training. Ophthalmologists must complete at least eight years of medical training, including four years of medical school following completion of college, a one-year internship, and three or more years of clinical residency training in ophthalmology under the supervision of ophthalmologists. Many ophthalmologists also complete a one- or two-year fellowship in a sub-specialty of ophthalmology. An ophthalmologist's training includes substantial surgical training, including performing cataract surgery, laser surgery, and other forms of surgery on live human patients under the supervision of a teaching ophthalmologist.

37. Optometrists are not medical doctors or doctors of osteopathic medicine. Optometrists typically receive four years of training at a school of optometry, which generally does not include any hands-on surgical training on live patients. They may also, but are not necessarily required to, complete college before entering a school of optometry. The permissible scope of practice of optometry in Wisconsin is set forth at sec. 449.01(1), Wis. Stats.

38. Since the Optometry Examining Board adopted its motion on May 12, 2000, declaring that the use of lasers to perform surgical procedures is within optometrists' scope of practice as established by sec. 449.01(1), Wis. Stats., optometrists including defendants Burns,

Bonsett-Veal, Jens, and Stine have performed laser surgical procedures in Wisconsin and have held themselves out to their patients and to the public as qualified to perform such procedures.

39. On June 2, 2000, the Optometry Examining Board (the "Board") held a specially called meeting and, together with Secretary of Regulation and Licensing Marlene Cummings and other staff of the Department of Regulation and Licensing, spent the majority of the meeting time in closed session for purposes of consultation with legal counsel. Upon returning to open session, the Board voted unanimously to rescind its motion of May 12, 2000, declaring that laser surgical procedures were within optometrists' scope of practice as defined by sec. 449.01(1). In discussing the effect of the June 2 motion to rescind, the May 12 motion, in open session and prior to voting on the motion to rescind the May 12 motion, Board members stated that the Board was not "stating anything one way or another regarding laser procedures" but rather that, notwithstanding the May 12, motion, "[The Board has] been neutral on the subject [or laser procedures] and we'll stay that way by rescinding this [May 12] motion."

40. At the June 2, 2000, meeting the Board also voted unanimously to adopt and publish a "Statement of Scope for Proposed Rule" announcing its objective to promulgate rules addressing requirements relating to the use of laser procedures by optometrists. Adoption of such scope statement is a prerequisite for promulgation of a non-emergency administrative rule pursuant to sec. 227.135, Stats. A true and correct copy of the scope statement adopted by the Board on June 2, 2000, is attached to this complaint as Exhibit A.

41. Upon information and belief, since June 2, 2000, defendants Burns, Bonsett-Veal, Jens, and Stine have continued to perform laser surgical procedures, to offer such procedures to

patients, and to hold themselves out to current and prospective patients as being legally and professionally qualified to perform such procedures.

42. Upon information and belief, defendants Burns, Bonsett-Veal, Jens, and Stine currently perform, and hold themselves out as able to perform, only one type of procedure, PRK, notwithstanding that the medically preferable alternative for the vast majority of patients electing to have refractive surgery performed for vision correction is LASIK, not PRK.

43. The Department of Regulation and Licensing has no agency interpretation of the scope of practice of optometry set forth in sec. 449.01, Stats., and has no agency position as to whether optometrists licensed under Chapter 449, Stats., may or may not legally perform laser surgical procedures at the present time.

44. Prior to May 12, 2000, the Optometry Examining Board had issued no interpretation of the scope of practice of optometry as defined in sec. 449.01, Stats., had adopted or issued no definition or interpretation of the phrase "any optometric means or instrumentality" as used in sec. 449.01, Stats., and had issued no rulings, bulletins, guidelines, opinions, or other statements addressing whether laser surgical procedures are within the scope of practice of optometry as defined in sec. 449.01, Stats.

45. June 2, 2000, the Optometry Examining Board has not formally advised optometrists licensed under Chapter 449, Stats., as to whether optometrists may or may not legally perform laser surgical procedures at the present time. However, upon information and belief, it is the position of a majority, if not all, of the members of the Board that an optometrist's performance of laer surgical procedures, in the absence of other allegations of unprofessional conduct, would not constitute a violation of Chapter 449 and would not be grounds for any disciplinary action.

46. The performance of laser surgical procedures by optometrists creates a risk of serious harm to the citizens of Wisconsin because optometrists are not qualified to perform such surgical procedures; are not generally trained or experienced in surgical procedures; are not qualified to advise patients as to the risks, benefits, contraindications, and alternatives to particular laser surgical procedures, such that the patient may make an informed decision regarding the proposed procedure; and are not trained to recognize, diagnose, and treat properly complications which may occur in the course of laser surgical procedures and recuperation therefrom.

II. PETITION FOR DECLARATORY JUDGMENT UNDER SEC. 227.40, STATS.

Plaintiffs, by their attorneys, and pursuant to sec. 227.40, Wis. Stats., hereby petition for judicial review of the action taken by the Optometry Examining Board on June 2, 2000, adopting a scope statement for the promulgation of administrative rules to permit the use of laser procedures by optometrists who meet qualifications to be established by the Board, and thereby interpreting sec. 449.01(1) to include the performance of laser surgical procedures as being within the current statutory scope of practice of optometry, and allege as follows:

47. The allegations set forth in paragraph nos. 1 through 46 are incorporated herein fully by reference.

48 Plaintiffs satisfy the requirement for standing under sec. 227.40, Wis. Stats., to challenge the validity of the action taken by the Optometry Examining Board. The performance of laser surgical procedures by optometrists, which is outside the scope of practice permitted to optometrists under Chapter 449, Stats., interferes with and impairs the legal rights and privileges of plaintiffs' members who are physicians duly licensed to practice medicine and surgery in

Wisconsin under Chapter 448, Wis. Stats. The practice of medicine and surgery is a privilege reserved to those who meet the requirements set forth in Chapter 448, Wis. Stats., and the accompanying rules promulgated by the Medical Examining Board.

49. Sec. 449.03(1), Stats., explicitly prohibits the Optometry Examining Board from promulgating any rule which expands the practice of optometry.

50. In initiating the process of promulgating a rule addressing requirements relating to the use of laser procedures by optometrists, if the Optometry Examining Board believes itself to be in compliance with sec. 449.03(1), Stats., then the Optometry Examining Board has of necessity interpreted sec. 449.01(1), Stats., defining the practice of optometry, to encompass the performance of laser surgical procedures as being within the current scope of practice of optometry.

51. Such an interpretation of sec. 449.01(1) constitutes an interpretation of a statute which the Optometry Examining Board has adopted to govern its administration of the statute, and that interpretation is a rule pursuant to sec. 227.10(1), Stats.

52. Such rule is invalid because the performance of laser surgical procedures constitutes an expansion of the scope of practice of optometry beyond the scope of practice established by the Legislature in Chapter 449, Stats., and the Board is expressly prohibited by sec. 449.03(1), Stats., and by sec. 227.10(2), Stats., from making any rule which expands the scope of practice of optometry.

53. Such rule is invalid because it has not been promulgated as an administrative rule pursuant to the requirements set forth in Subchapter II of Chapter 227, Stats., including but not

limited to the requirements for notice, public hearings, and legislative review set forth at secs. 227.16 through 227.19, Wis. Stats.

54. Such rule is invalid because it violates the due process clauses of the United States and Wisconsin Constitutions, because the facts in the record do not show that the rule bears a reasonable relation to the legitimate governmental objective of protecting the public health and safety; to the contrary, the rule endangers the public health and safety.

55. The rule's invalidity by virtue of the fact that it exceeds the agency's statutory authority, and the rule's invalidity by virtue of the Board's failure to comply with statutorily-required procedures for promulgating administrative rules, are questions of law which this court reviews de novo.

56. The standard of review for plaintiffs' claim that the rule violates constitutional requirements of due process is whether the facts in the agency's record support the agency's action as one which will effectuate the legitimate governmental objective of the agency.

57. There exists a substantial, present, and justiciable controversy between plaintiffs and defendants the Optometry Examining Board and its members with respect to whether the action of the Optometry Examining Board on June 2, 2000, to interpret sec. 449.01(1) to include the performance of laser surgical procedures as part of the current statutory scope of practice of optometry, an interpretation necessary as a condition precedent for the Board to initiate rulemaking addressing requirements relating to the use of laser procedures, is lawful, and the issuance of a declaratory judgment will terminate the controversy or remove any uncertainty giving rise to the proceeding.

III. PETITION FOR DECLARATORY JUDGMENT UNDER SEC. 806.04, STATS.

58. The allegations set forth in paragraph nos. 1 through 58 are incorporated herein fully by reference.

59. Plaintiffs have standing to obtain a declaratory judgment pursuant to sec. 806.04, Stats., to determine the construction of sec. 449.01(1), Stats., and specifically to obtain a declaration as to whether sec. 449.01(1), Stats., authorizes optometrists licensed under Chapter 449 to perform laser surgical procedures, or whether the performance of laser surgical procedures by optometrists is beyond the current scope of practice of optometry as set forth by the Legislature in Chapter 449. The rights, status, and legal privileges of plaintiffs' members, who are physicians duly licensed and privileged to practice medicine and surgery in Wisconsin under Chapter 448, Stats., are affected and impaired by defendants' construction of sec. 449.01(1), Stats., to define the current statutory scope of practice of optometry to include the performance of laser surgical procedures, without limitation, and to permit optometrists to perform laser surgical procedures.

60. Defendants Burns, Bonsett-Veal, Jens, and Stine are proper parties defendant to this prayer for declaratory judgment both as individual optometrists who, upon information and belief, are currently performing laser surgical procedures, and as representatives of other individual optometrists unknown to plaintiffs who may likewise be currently performing laser surgical procedures and who thus share the interest of defendants Burns, Bonsett-Veal, Jens, and Stine in construing sec. 449.01(1), Stats., to permit optometrists to perform laser surgical procedures.

61. Defendants Hubbell, Griffin, LeCount, Sarazen, Griebenow, and Hinson, as members of the Optometry Examining Board, are proper parties defendant to this prayer for declaratory judgment because, as members of the Optometry Examining Board, they are misconstruing sec. 449.01(1) to include the performance of laser surgical procedures within the scope of practice of optometry; or, in the alternative, they are acting outside their statutory authority by seeking to promulgate a rule which expands the scope of practice of optometry in violation of sec. 449.03(1), Stats.

62. Plaintiffs contend that sec. 449.01, Stats., cannot be construed to include laser surgical procedures as being within the current scope of practice of optometry as that scope of practice has been established by the Legislature through statute, and that the performance of laser surgical procedures by optometrists licensed under Chapter 449, Stats., constitutes an expansion in the scope of practice of optometry which may only be granted by explicit statutory authorization.

63. The construction of sec. 449.01, Stats., is a question of law which this Court reviews de novo.

64. There exists a substantial, present, and justiciable controversy between plaintiffs and defendants Hubbell, Griffin, LeCount, Sarazen, Griebenow, and Hinson, as members of the Optometry Examining Board, with respect to the construction of sec. 449.01, Stats., and whether pursuant to that construction the Optometry Examining Board may promulgate rules addressing the performance of laser surgical procedures by optometrists.

65. There exists a substantial, present, and justiciable controversy between plaintiffs and defendants Burns, Bonsett-Veal, Jens, and Stine, with respect to the construction of sec. 449.01,

Stats., and whether pursuant to that construction these defendants and other optometrists similarly situated may legally perform laser surgical procedures.

66. This matter presents a question of great public importance because the performance of laser surgical procedures by persons who are not qualified to perform those procedures, including assessment of all risks and alternatives, provision to the patient of all information necessary for fully informed consent, and immediate and appropriate management of complications, poses a significant risk to the public health, safety and welfare.

IV. CAUSE OF ACTION OF UNFAIR COMPETITION

67. The allegations set forth in paragraph nos. 1 through 67 are incorporated herein fully by reference.

68. Defendants Burns, Bonsett-Veal, Jens, and Stine have announced, stated, advertised, or represented to one or more members of the public that each of them is professionally and legally qualified to perform laser surgical procedures.

69. On information and belief, the announcements, statements, advertisements, and representations of the defendants named in paragraph no. 68 have portrayed defendants as having the same qualifications to perform laser surgical procedures as ophthalmologists, and even as being among the most experienced and highly-trained doctors performing laser surgical procedures.

70. The announcements, statements, advertisements, and representations of the defendants named in paragraph no. 68 mislead patients electing or requiring laser surgical procedures to believe that the defendants are ophthalmologists who are highly trained in the

performance of eye surgery and who are licensed physicians and surgeons pursuant to Chapter 448, Stats.

71. On information and belief, the announcements, statements, advertisements, and representations of the defendants named in paragraph no. 68 do not inform patients that the doctor proposing to perform the surgery is an optometrist, not a medical doctor; do not inform patients that the defendants may not carry the same level of medical liability coverage, leaving the patient with less potential for recovery of damages in the event of any negligence; and do not inform patients that the defendants currently offer only one form of laser refractive surgery, PRK, while a different laser refractive procedure, LASIK, is objectively likely to be a preferable alternative for most patients.

72. When performing laser surgical procedures, the defendants named in paragraph no. 68 are performing a procedure which they are not legally entitled to perform and which may only legally be performed by physicians and surgeons licensed under Chapter 448, Stats.

73. The defendants named in paragraph no. , and other optometrists of whom these defendants are representative, are unfairly competing with physicians and surgeons licensed under Chapter 448, Stats., and are confusing and deceiving the public, not only to the detriment of physicians and surgeons licensed to perform the procedures in question, but also, and more importantly, to the detriment of the public, especially those who now or in the near future will elect or require a laser surgical procedure.

V. PETITION FOR WRIT OF MANDAMUS

74. The allegations set forth in paragraphs 1 through 73 are incorporated herein fully by reference.

75. Pursuant to Wis. Stats. sec. 449.03(2) the Optometry Examining Board chairperson and secretary have a plain and positive duty to "cause actions to be instituted" for violations of Chapter 449, Stats. Plaintiffs assert that any optometrist performing laser surgical procedures is in violation of Chapter 449, Stats.

76. Plaintiffs and the public have a clear legal right to have the Optometry Examining Board chairperson and secretary cause actions to be instituted in for practices by optometrists which are outside the lawful scope of practice of optometry, in particular, to order optometrists refrain from performing laser surgical procedures in violation of ch. 449 because laser surgical services may only be performed by a physician licensed to practice medicine and surgery.

77. Upon information and belief , the Optometry Examining Board has declined or will decline to take action against an optometrist who continues to perform laser surgincal procedures after June 2, 2000.

78. The Optometry Examining Board should be ordered to correctly interpret and appropriately enforce Chapter 449, Stats., in accordance with the purpose of the chapter which is to protect the public health, safety and welfare.

RELIEF REQUESTED

WHEREFORE, plaintiffs request that the Court grant the following relief:

1. Declaring that the action of the Optometry Examining Board on June 2, 2000, adopting a scope statement for the promulgation of rules relating to the performance of laser surgical procedures by optometrists, required as a condition precedent and rested on the Board's interpretation of sec. 449.01(1), Stats., to include the performance of laser surgical procedures as falling within the existing scope of practice of optometry as defined by statute;

2. Declaring that the interpretation of sec. 449.01(1) by the Optometry Examining Board on June 2, 2000, implicit in the Board's adoption of the scope statement for rules relating to the performance of laser surgical procedures by optometrists, is a rule pursuant to sec. 227.10(2) because it is an interpretation of a statute which the Board has adopted to govern its administration of sec. 449.01 and the remainder of Chapter 449, and that such rule is invalid on the grounds that it constitutes a rule in excess of the Optometry Examining Board's statutory authority, that it constitutes a rule not properly promulgated pursuant to the requirements of Chapter 227, and that it violates the Constitutional requirements of due process by virtue of the absence of any facts in the agency's record showing a reasonable relation between the agency's action and any legitimate governmental objective;

3. Declaring that the performance of laser surgical procedures by optometrists is beyond the current scope of practice of optometry as set forth in Chapter 449 and instead constitutes an expansion of the scope of practice of optometry; that as a result the Optometry Examining Board is prohibited by sec. 449.03(1) from promulgating administrative rules which would authorize any optometrist to perform laser surgical procedures, regardless of the specific conditions such rules might place on that expansion of the scope of practice of optometry; and that the individual defendants named herein as well as all other optometrists similarly situated may not perform laser surgical procedures absent statutory authorization expanding the scope of practice of optometry to encompass laser surgical procedures;

4. Temporarily and permanently enjoining defendants Burns, Bonsett-Veal, Jens and Stine from performing laser surgical procedures.

5. Insuring a writ of mandamus directing the Optometry Examining Board to immediately inform its licensees that the performance of laser surgical procedures is outisde the current scope of practice of optometry, and directing the Optometry Examining Board to take appropriate disciplinary action against optometrists who perform laser surgical procedures;

6. Awarding such other legal and equitable relief as the Court deems appropriate.

Dated: June 26, 2000

WHYTE HIRSCHBOECK DUDEK S.C.

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STATEMENT OF SCOPE FOR PROPOSED RULE

State of Wisconsin

DEPARTMENT OF REGULATION AND LICENSING

Scope Statement - Optometry Rules

June, 2000

Optometry Examining Board

Subject.

Requirements relating to the use of laser procedures by optometrists.

Objective of the Rule.

To create rules setting forth the following in reference to the use of laser procedures: 1) define what constitutes "laser procedures"; 2) establish the qualifications that optometrists must obtain in order to use laser procedures; 3) determine the conditions and restrictions, if any, that the Board will impose in reference to the use of laser procedures, and 4) define what constitutes unprofessional conduct in reference to the use of laser procedures.

Policy analysis.

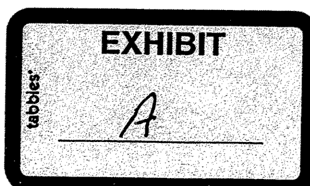
The existing rules do not address policies relating to the use of laser procedures. The proposed rules would permit the use of laser procedures by optometrists who meet the qualifications established by the Board including, but not limited to, education, training and supervised experience.

Statutory authority.

Sections 15.08 (5) (b), 227.11 (2), 449.01 (1), 449.07 and 449.08, Wis. Stats.

Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule.

50 hours



Elder Law Center

Coalition of Wisconsin Aging Groups

June 9, 1999

Rep. Glenn Grothman
Co-chair, Joint Committee for Review of
Administrative Rules
State Capitol, 15-North
P.O. Box 8952
Madison, WI 53707

Hand Delivered

Re: Goins v. Department of Health and Family Services
Case No. 99CV39; Richland County

Dear Representative Grothman:

Pursuant to Wis. Stats. § 227.40(5), enclosed for service is a copy of the Petition for Review in the above-entitled matter, which was filed in Richland County Circuit Court on April 19, 1999.

Sincerely,

Sarah J. Orr

Sarah J. Orr
Attorney

Enclosure

5900 Monona Drive • Suite 400 • Madison, WI 53716-3554 • 608/224-0660 • FAX 608/224-0607

STATE OF WISCONSIN CIRCUIT COURT RICHLAND COUNTY

Julie A. Goins,

Petitioner,

v.

Wisconsin Department of
Health and Family Services,

Respondent.

Case No.
Code No. 306

CLERK OF CIRCUIT COURT
FILED
APR 19 1999
ANN ROBINSON, Clerk
Richland County Wisconsin
Case No. 99CV37
O.J.

PETITION FOR REVIEW

Julie A. Goins, by her attorneys, the Elder Law Center of the Coalition of Wisconsin Aging Groups, brings a Petition for Review pursuant to section 227.52 *et. seq.* Wis. Stats. and alleges as follows:

1. Petitioner, whose Social Security number is 396-26-1950, is an adult female living in Lone Rock, Wisconsin, where she has been residing since 1996.

2. Respondent Wisconsin Department of Health and Family Services (DHFS) is the state agency charged with the administration of the Wisconsin state supplement portion of the federal Supplemental Security Income (SSI) program. See, Wis. Stats. § 49.77.

3. Petitioner receives federal and state SSI.

4. Respondent began withholding a portion of petitioner's monthly state SSI payment in or about April 1998.

5. Petitioner requested the assistance of Richland County Benefit Specialist Pamela Dalton to determine the reason for the reduction in her state SSI payment. Ms. Dalton was informed by Richland County Department of Social Services that the withholding was a recovery action by respondent for an alleged overpayment of state SSI.

6. On December 8, 1998, petitioner requested a hearing before the Division of Hearings and Appeals of the Wisconsin Department of Administration (the state agency designated to adjudicate contested cases involving DHFS) contesting respondent's recovery of the alleged overpayment. The hearing occurred on February 22, 1999.

7. By decision of the Division of Hearings and Appeals dated March 24, 1999, the examiner determined that the recovery of the alleged overpayment was proper. Petitioner did not request rehearing before the Division of Hearings and Appeals. Therefore, the March 24, 1999, decision is the final decision of the agency.

8. Petitioner is aggrieved by the decision because the present automatic withholding of state SSI creates financial hardship for her and she does not have the means to re-pay the balance of the alleged overpayment. As of the date of hearing, the balance was $695.43.

9. Respondent does not have statutory or regulatory authority to collect state SSI overpayments and has not promulgated administrative rules to govern the state SSI program

in accordance with the rulemaking procedures set forth in Chapter 227 of the Wisconsin Statutes.

10. The issue for determination is whether petitioner must re-pay the alleged state SSI overpayment.

11. Petitioner seeks judicial review because the respondent's decision is not based on substantial evidence, contains errors of fact and law and is not based on properly promulgated rules.

WHEREFORE, petitioner requests the following relief:

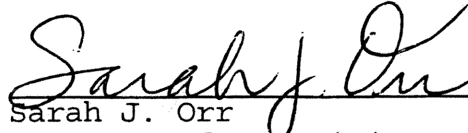
A. Reverse the final decision of the respondent and order respondent to terminate recovery of state SSI benefits from petitioner and to refund monies already withheld from petitioner's state SSI payments.

B. Pursuant to Wis. Stats. § 227.41, issue a declaratory judgment enjoining respondent from collecting state SSI overpayments.

C. Such other relief as the Court may deem proper, including the costs of initiating this petition.

Dated at Madison this 16th day of April, 1999.

Elder Law Center of the
Coalition of Wisconsin Aging Groups



Sarah J. Orr
Attorneys for Petitioner

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(608) 224-0660

MEMORANDUM

To: Members, JCRAR
From: Senator Judith Robson, Co-Chair
Representative Glenn Grothman, Co-Chair
Date: June 14, 1999
Re: Service of Lawsuit

Pursuant to s. 227.40(5), Stats, the Joint Committee for Review of Administrative Rules has been served with notice in the matter of *Julie A. Goins v. Wisconsin Department of Health and Family Services.* The case was filed in Richland County Circuit Court on April 19, 1999, and the case number is 99-CV-39. A copy of the Petition is attached.

Subchapter III of Chapter 227, Stats, establishes an action for declaratory judgment in the circuit court for Dane County to be the primary means for judicial review in a dispute concerning the validity of an administrative rule. Subject to the approval of the Joint Committee on Legislative Organization, the Joint Committee for Review of Administrative Rules may choose to be made a party to the suit, and thereby be entitled to be heard.

If you are interested in a further pursuit of the rights of the JCRAR under this suit, please forward your request in writing to the offices of the co-chairs of the committee.

ROBERT A. DeCHAMBEAU
CIRCUIT COURT BR 1

FEB 29 2000

STATE OF WISCONSIN | CIRCUIT COURT BRANCH ___ | DANE COUNTY

RAY AND WANDA MALLO,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Defendant.

CASE NO. 00CV0553

Case Classification: Declaratory Judgment

Case Code: 30701

SUMMONS

IF YOU REQUIRE THE ASSISTANCE OF AUXILIARY AIDS OR SERVICES BECAUSE OF A DISABILITY, CALL 608/266-4678 (TDD 608/266-9138) AND ASK FOR THE COURT ADA COORDINATOR.

THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT.
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

THE STATE OF WISCONSIN

TO EACH PERSON NAMED ABOVE AS A DEFENDANT;

You are hereby notified that the plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

FEB 28 2 38 PM '00
CIRCUIT COURT
DANE COUNTY, WI

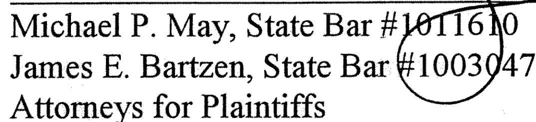
Within forty-five (45) days of receiving this Summons, you must respond with a written Answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The Court may reject or disregard an Answer that does not follow the requirements of the Statutes. The Answer must be sent or delivered to the Court, whose

address is City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to Boardman, Suhr, Curry & Field LLP, plaintiff's attorney, whose address is One South Pinckney Street, Fourth Floor, P. O. Box 927, Madison, Wisconsin 53701-0927. You may have an attorney help or represent you.

If you do not provide a proper Answer within forty-five (45) days, the Court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 28th day of February, 2000.

BOARDMAN, SUHR, CURRY & FIELD LLP
By



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STATE OF WISCONSIN	CIRCUIT COURT BRANCH ___	DANE COUNTY

RAY AND WANDA MALLO,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Defendant.

00CV0553

CASE NO.

Case Classification Code: Declaratory Judgment

Case Code: 30701

THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

FEB 28 2 38 PM '00
CIRCUIT COURT
DANE COUNTY WI

COMPLAINT FOR DECLARATORY JUDGMENT UNDER WIS. STAT. §227.40

Plaintiffs, Ray and Wanda Mallo, by their attorneys Boardman, Suhr, Curry & Field LLP, allege for their cause of action as follows:

1. This is an action for declaratory judgment under Wis. Stat. §227.40, seeking declaratory judgment that an emergency administrative rule promulgated by the Wisconsin Department of Revenue is invalid, in that the rule is contrary to the statute under which it was adopted and therefore exceeds the Department's statutory authority.

THE PARTIES

2. Plaintiffs, Ray and Wanda Mallo, are husband and wife, and are citizens of the State of Wisconsin. Plaintiffs reside in the Town of Cleveland, Taylor County. Their address is N4825 Highway 73, Gilman, Wisconsin 54433.

3. Plaintiffs are engaged in the business of farming. Plaintiffs own approximately 224 acres of land, of which approximately 150 acres are tillable and dedicated to farming, in the Town of Cleveland, Taylor County, Wisconsin. Plaintiffs' real property includes "agricultural land" as that term is defined in Wis. Stat. §70.32(2)(c).

4. The Department of Revenue (hereinafter "Department") is an administrative agency formed under the laws of the State of Wisconsin. Cate Zeuske is the Secretary of the Department.

THE CHALLENGED RULE

5. On July 26, 1995, the Wisconsin legislature enacted Wis. Stat. §70.32(2r) (the "Use Value Statute") as section 3362h of 1995 Wis. Act 27. The Use Value Statute established a mechanism for the assessment of agricultural land for property tax purposes.

6. The Use Value Statute provides for three phases in transforming agricultural land assessments from a market value system to a use value system. The first phase, created by §70.32(2r)(a), freezes assessments of agricultural land at the January 1, 1995, assessment level. This freeze, which began in 1996, lasted for at least two years.

7. The second phase, set out in §70.32(2r)(b), provides for a mixed assessment system that will last from the end of the initial freeze until no later than December 31, 2008. During this period, agricultural land will be assessed based partly on the frozen market value assessments and partly on the land's agricultural use value. The Use Value Statute provides, in §70.32(2r)(b), that in each year during this second phase, the frozen assessment is reduced

by ten percent and the use value portion of the assessment is increased by ten percent. The statute (§70.32(2r)(b)) reads:

> (b) For each year beginning with 1998 or upon completion of the farmland advisory council's recommendation and promulgation of rules and ending no later than December 31, 2008, the assessed value of the parcel shall be reduced as follows:
>
> 1. Subtract the value of the parcel as determined according to the income that is or could be generated from its rental for agricultural use, as determined by rule, from its assessed value as of January 1, 1996.
>
> 2. Multiply .1 by the number of years that the parcel has been assessed under this paragraph, including the current year.
>
> 3. Multiply the amount under subd. 1. by the decimal under subd. 2.
>
> 4. Subtract the amount under subd. 3. from the parcel's assessed value as of January 1, 1996.

8. The third phase starts no later than January 1, 2009, when the mixed assessment period ends and agricultural land will be assessed based entirely on its agricultural use value.

9. On October 1, 1997, the Department promulgated Wis. Admin. Code Tax §18.08, which provided for the assessment of agricultural land in accordance with Wis. Stat. §70.32(2r). A copy of the regulation as adopted at that time is attached as Exhibit A.

10. On November 30, 1999, the Department adopted an order to amend Wis. Admin. Code §18.08 (the "Emergency Rule"). The Department purported to act under its

authority to enact emergency rules, as established by Wis. Stat. §227.24. A copy of the order is attached as Exhibit B. The Emergency Rule eliminated the phase-in procedure adopted by Wis. Admin. Code §18.08, which was established and required by Wis. Stat. §70.32(2r) as enacted by the Legislature.

11. The Attorney General of the State of Wisconsin has rendered an opinion that the Department lacks the authority to promulgate the Emergency Rule. A copy of the Attorney General's Opinion is attached as Exhibit C.

STANDING OF THE PLAINTIFFS

12. Plaintiffs own agricultural land. The effect of the Emergency Rule will be to increase Plaintiffs' real property taxes. As calculated by the non-partisan Legislative Fiscal Bureau, Plaintiffs' taxes will increase by $0.28 per acre in 2000 due to the adoption of the Emergency Rule. The Emergency Rule impairs or threatens to impair Plaintiffs' legal rights and privileges. Plaintiffs will suffer a real injury to an interest that is protected by law.

CLAIM FOR RELIEF: FOR DECLARATORY JUDGMENT THAT THE EMERGENCY RULE EXCEEDS THE DEPARTMENT'S STATUTORY AUTHORITY

13. The Emergency Rule is contrary to the provisions of §70.32(2r) in that the Emergency Rule eliminates and fails to follow the statutory requirement of a phase-in.

14. In enacting the Emergency Rule, which fails to follow the statutory phase-in, the Department exceeded its statutory authority.

15. The Emergency Rule is inconsistent with the provisions of Wis. Stat. §227.24, which limits the duration of emergency rules to 150 days or, if extended by the Joint Committee for Review of Administrative Rules, to no more than 270 days.

WHEREFORE, Plaintiffs, Raymond and Wanda Mallo, respectfully demands judgment as follows:

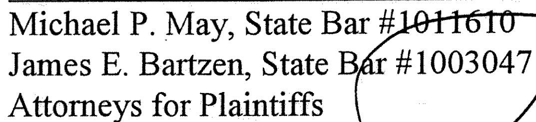
A. Declaring the Emergency Rule invalid.

B. Permanently enjoining the Department from enforcing the Emergency Rule and reinstating former Wis. Admin. Code TAX §18.08.

C. Such other relief as the Court may grant.

Dated this 28th day of February, 2000.

BOARDMAN, SUHR, CURRY & FIELD LLP
By



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Chapter Tax 18

ASSESSMENT OF AGRICULTURAL PROPERTY

Subchapter I — Assessment of Agricultural Property in 1996 and in 1997
Tax 18.01 Purpose.
Tax 18.02 Definitions.
Tax 18.03 Assessment of agricultural property in 1996 and in 1997.
Subchapter II — Assessment of Agricultural Property in 1998 and Thereafter
Tax 18.04 Purpose.
Tax 18.05 Definitions.
Tax 18.06 Land classified agricultural; categories of agricultural land.
Tax 18.07 Use–value.
Tax 18.08 Assessment of agricultural land.
Tax 18.09 Assessment of other property.

Note: Chapter Tax 18 was created as an emergency rule effective January 29, 1986. Chapter Tax 18 was repealed and recreated by emergency rule effective December 6, 1995. Chapter Tax 18 as it existed on August 31, 1996 was repealed and a new chapter Tax 18 was created effective September 1, 1996.

Subchapter I — Assessment of Agricultural Property in 1996 and in 1997

Tax 18.01 Purpose. The purpose of this subchapter is to establish definitions and provide criteria that will facilitate implementation of 1995 Wisconsin Act 27 with regard to the assessment of agricultural land in 1996 and in 1997.

History: Cr. Register, August, 1996, No. 488, eff. 9–1–96; am. Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.02 Definitions. In this subchapter:

(1) "Land devoted primarily to agricultural use" means land classified agricultural in 1995 that is not in a use that is incompatible with agricultural use on the assessment date. Swamp or waste or productive forest land located in villages and cities is not devoted primarily to agricultural use, and agricultural buildings and improvements and the land necessary for their location and convenience are not devoted primarily to agricultural use.

Note: Under prior law, swamp or waste or productive forest land located in villages and cities was classified agricultural because villages and cities were not permitted to classify land swamp or waste or productive forest land. Since 1995 Wis. Act 27 requires villages and cities to use the swamp or waste and productive forest land classifications, all such land located in villages or cities is to be reclassified swamp or waste or productive forest, according to the Wisconsin Property Assessment Manual.

Example: Twenty acres of agricultural land were sold and recorded as a legal description in April 1995 and commercial construction began in October 1995. Although the land was in agricultural use in 1995, this legal description is not devoted primarily to agricultural use due to the construction on the property.

Example: Under a conditional use permit, an owner opens a 15–acre sand and gravel quarry on a 40–acre legal description in October 1996. Although the 15 acres were in agricultural use during 1996, extraction of sand and gravel is incompatible with agricultural use. Therefore, the 15 acres are not devoted primarily to agricultural use and are not classified agricultural in 1997.

(2) "Other" means agricultural buildings and improvements and the land necessary for their location and convenience.

Example: A legal description of 40 acres is located in a village and includes a house and other agricultural buildings and improvements on 2 acres of land, 18 acres of forest, and 20 acres in corn. Although all 40 acres were classified agricultural in 1995, only the 20 acres of cropland are devoted primarily to agricultural use and are classified agricultural in 1996 and 1997; the house, agricultural buildings and improvements and 2 acres are classified "Other", and 18 acres are classified productive forest.

(3) "Parcel of agricultural land" means land devoted primarily to agricultural use within a single legal description.

Note: The definition of "parcel of agricultural land" used here implements the intent of the legislature in only freezing the assessment of agricultural land. If a "parcel of agricultural land" were defined as the complete legal description of a tract which was predominantly agricultural, the assessment of non–agricultural land within the legal description would be frozen. Similarly, the assessment of agricultural land within a legal description which was not predominantly agricultural would not be frozen.

Example: A farmer sells 5 acres of a 40–acre legal description in February 1996 and the 5 acres are recorded as a separate legal description. The farmer rents back the 5 acres and continues working the entire 40 acres. The 5 acres are a parcel of agricultural land. Had residential construction begun on the 5–acre legal description by January 1, 1997, it would not be a parcel of agricultural land.

Example: A residence and a 1–acre vegetable garden are located on a 2–acre legal description that was classified residential in 1995. Although the owner produces vegetables and may sell some at a farmer's market, the 2–acres do not constitute a parcel of agricultural land.

History: Cr. Register, August, 1996, No. 488, eff. 9–1–96; am. (intro.), Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.03 Assessment of agricultural property in 1996 and in 1997. **(1)** For assessments as of January 1, 1996 and January 1, 1997, the assessed value of each parcel of agricultural land is the assessed value of that parcel as of January 1, 1995.

(2) For assessments as of January 1, 1996 and January 1, 1997, property classified Other is assessed according to s. 70.32 (1), Stats.

Example: Thirty–seven acres of a 40–acre legal description are devoted primarily to agricultural use and are assessed as provided in sub. (1). The remaining 3 acres are needed for the location and convenience of a residence, barn, farm buildings, and well. The 3 acres, residence, buildings and facilities are assessed according to s. 70.32(1), Stats., on January 1, 1996 since they are classified "Other".

History: Cr. Register, August, 1996, No. 488, eff. 9–1–96.

Subchapter II — Assessment of Agricultural Property in 1998 and Thereafter

Tax 18.04 Purpose. The purpose of this subchapter is to provide definitions and procedures for the department and municipal assessors to classify certain real property as agricultural or other, and to value such property for property tax purposes, beginning in 1998.

History: Cr. Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.05 Definitions. In this subchapter:

(1) "Agricultural use" means any of the following:

(a) Activities included in major group 01 — agricultural production–crops, set forth in the standard industrial classification manual, 1987 edition, published by the executive office of the president, U.S. office of management and budget.

(b) Activities included in major group 02 — agricultural production–livestock and animal specialties, set forth in the standard industrial classification manual, 1987 edition, published by the executive office of the president, U.S. office of management and budget.

Note: Major group 01 — agricultural production–crops and major group 02 — agricultural production–livestock and animal specialties, set forth in the standard industrial classification manual, 1987 edition, published by the executive office of the president, U.S. office of management and budget, are reproduced in full in the Wisconsin property assessment manual under s. 73.03(2a), Stats. In addition, copies are on file with the department, the secretary of state, and the revisor of statutes.

(c) Growing Christmas trees or ginseng.

(d) Land eligible for enrollment in any of the following federal agriculture programs: the conservation reserve program 1991–1995 under 7 CFR 1410; the conservation reserve program 1986–1990 under 7 CFR 704; the feed grain program under 7 CFR 1413; the water bank program under 7 CFR 752; the agricultural conservation program under 7 CFR 701; or the dairy price support program under 7 CFR 1430 and 282.

(2) "Council" means the farmland advisory council under s. 73.03 (49), Stats.

(3) "Department" means the department of revenue.

EXHIBIT

A

(4) "Land devoted primarily to agricultural use" means land in an agricultural use for the production season of the prior year, and not in a use that is incompatible with agricultural use on January 1 of the assessment year.

(5) "Other" means agricultural buildings and improvements and the land necessary for their location and convenience.

(6) "Parcel of agricultural land" means land, contained within a single legal description, that is devoted primarily to agricultural use.

History: Cr. Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.06 Land classified agricultural; categories of agricultural land. (1) An assessor shall classify as agricultural land devoted primarily to agricultural use. Land devoted primarily to agricultural use shall typically bear physical evidence of agricultural use, such as furrows, crops, fencing or livestock, appropriate to the production season. If physical evidence of agricultural use is not sufficient to determine agricultural use, the assessor may request of the owner or agent of the owner such information as is necessary to determine if the land is devoted primarily to agricultural use.

(2) For each legal description of property that includes a parcel of agricultural land, the assessor shall indicate on the property record card, by acreage, the category of agricultural land. Categories of agricultural land are the following:

(a) First grade tillable cropland.

(b) Second grade tillable cropland.

(c) Third grade tillable cropland.

(d) Pasture.

(e) Specialty land.

History: Cr. Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.07 Use–value. (1) (a) Beginning in 1997 and each year thereafter, the council shall adopt and the department shall publish in the Wisconsin property assessment manual a use value per acre for each category of agricultural land, except specialty land, in each municipality. Use value per acre of specialty land shall be adopted and published for the municipalities in which specialty land is located. Use value per acre for each category of agricultural land in each municipality shall be calculated by dividing the net rental income per acre for that category of agricultural land in that municipality calculated under par. (b) by the capitalization rate for that municipality calculated under par. (c).

(b) *Net rental income per acre.* 1. Beginning in 1997 and in each year thereafter, net rental income per acre for each category of agricultural land in each municipality shall be calculated by subtracting average total cost of production per acre under subd. 3 from average gross income per acre under subd. 2.

2. Beginning in 1997 and in each year thereafter, average gross income per acre for each category of agricultural land in each municipality shall be calculated by multiplying the category's 5–year average yield per acre, adjusted for the typical productivity of that category, by the 5–year average market price per unit of output. Yield per acre shall be based on the federal soil conservation service's soil productivity indices and market price data shall be obtained from the Wisconsin department of agriculture, trade and consumer protection. If the federal soil conservation service and the Wisconsin department of agriculture, trade and consumer protection are unable to provide, or to provide timely, soil productivity indices and market price data, respectively, comparable data shall be obtained from other generally acceptable sources.

3. Beginning in 1997 and in each year thereafter, average total cost of production per acre for each category of agricultural land shall be calculated from farm expense information obtained from the Wisconsin department of agriculture, trade and consumer protection, the university of Wisconsin, federal agencies, or farm credit services associations. Property taxes are not a farm expense for purposes of calculating average total cost of production per acre.

(c) *Capitalization rate.* Beginning in 1997 and each year thereafter, the capitalization rate for each municipality shall be determined as follows:

1. The department shall survey each federal land credit association (FLCA) and each agricultural credit association (ACA) in Wisconsin to obtain the interest rate charged by that association for a medium–sized, 1–year adjustable rate mortgage (ARM), as of January 1 of the year prior to the assessment year. In addition, the survey shall obtain each association's stock purchase requirement, if any, for such a mortgage. The 1997 survey shall include each association's 1–year ARM rate and the stock purchase requirement for a medium–sized loan, as of January 1 for the years 1993 to 1997.

Note: If an FLCA and an ACA merge, the combined association's interest rate and stock purchase requirement shall be obtained.

Note: Each FLCA and each ACA divides loans into 3 to 5 tiers based on loan size and sets a 1–year ARM rate for each tier. Although the dollar amount of a medium–sized loan may vary among FLCAs and ACAs, each FLCA and each ACA offers medium–sized or middle tier loans at a specific 1–year ARM rate as of January 1.

2. The effective 1–year ARM rate of each FLCA and ACA for each year shall be calculated by dividing that association's 1–year ARM rate by one minus that association's stock purchase requirement as of January 1 of the same year, expressed as a percentage of the loan.

Example: If an FLCA or an ACA has a 2% stock purchase requirement, a borrower receives $98,000 of a $100,000 loan. If the 1–year ARM rate is 9%, the effective rate of the loan is 9.18% [9 / (1–.02)].

3. The statewide average effective rate for each year shall be calculated by averaging the effective 1–year ARM rates under subd. 2.

4. The statewide average effective rate for the year prior to the assessment year shall be averaged with the statewide average effective rates for the 4 prior years to obtain a statewide 5–year moving average rate.

5. The capitalization rate for each municipality for each assessment year shall be calculated by adding the statewide 5–year moving average rate for the year prior to the assessment year to the net tax rate of that municipality for the property tax levy 2 years prior to the assessment year.

(2) Not later than January 1, 1998, and each January 1 thereafter, the department shall provide assessors with the use value per acre for each category of agricultural land in each municipality, calculated under sub. (1). The use value per acre for each category of agricultural land in each municipality shall be published annually in the Wisconsin property assessment manual.

(3) (a) The assessor shall determine the use value of each parcel of agricultural land based on the use value per acre for that category of agricultural land in that municipality provided by the department, adjusted by the assessor to reflect more accurately the use value of that parcel of agricultural land.

(b) The assessor shall equate the use value of each parcel of agricultural land to the general level of assessment in the taxation district in which that parcel of agricultural land is located.

History: Cr. Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.08 Assessment of agricultural land. (1) Beginning in 1998, the assessment of each parcel of agricultural land shall be determined as follows:

(a) Subtract the use value of the parcel as determined under s. Tax 18.07 (3) (b) from its 1996 assessment.

(b) Multiply 0.1 by the number of years that the parcel has been assessed under this subchapter, including the current year.

(c) Multiply the amount under par. (a) by the decimal under par. (b).

(d) Subtract the amount under par. (c) from the parcel's 1996 assessment.

Note: If the use value of a parcel of agricultural land in any year exceeds the 1996 assessment of that parcel, the assessment for that year will be higher than the 1996 assessment.

(2) Land classified agricultural after 1998 shall be assessed using the parcel's 1996 assessment in the formula under sub. (1). The number of years factor under sub. (1) (b) will be lower for parcels classified agricultural after 1998 than for parcels classified agricultural in 1998.

(3) In 2008 and thereafter, the assessment of each parcel of agricultural land shall be its use–value, as determined under s. Tax 18.07 (3) (b).

History: Cr. Register, September, 1997, No. 501, eff. 10–1–97.

Tax 18.09 Assessment of other property. An assessor shall assess property classified as other according to s. 70.32 (1), Stats.

History: Cr. Register, September, 1997, No. 501, eff. 10–1–97.

ORDER OF THE DEPARTMENT OF REVENUE
ADOPTING AN EMERGENCY RULE

The Wisconsin Department of Revenue hereby adopts an order to amend Chapter Tax 18 implementing s. 70.32(2r), Stats.

ANALYSIS BY THE WISCONSIN DEPARTMENT OF REVENUE

Statutory Authority:	ss. 70.32(2r) and 227.24, Stats.
Statutes Interpreted:	s. 70.32(2r), Stats.

Beginning in 2000, each parcel of agricultural land shall be assessed according to its value in agricultural use.

FINDING OF EMERGENCY

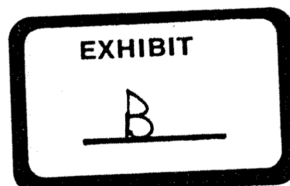
The Wisconsin Department of Revenue finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety or welfare. A statement of facts constituting the emergency is:

1995 Wisconsin Act 27 changed the way agricultural land is valued for property tax purposes. The law requires the Farmland Advisory Council to make recommendations regarding the transition from valuation under prior law to valuation under current law, and requires the department to promulgate rules to implement those recommendations.

On October 18, 1999, the Farmland Advisory Council recommended that agricultural land be assessed as of January 1, 2000 and thereafter according to value in agricultural use. Major Wisconsin farm organizations, among others, have petitioned the Department under s. 227.12, Stats., to promulgate an administrative rule implementing the Council's recommendation.

Since the Department holds assessor schools in November and typically publishes the next year's use-value guidelines prior to January 1 of that year, an emergency rule requiring assessment of each parcel of agricultural land according to its value in agricultural use is necessary for the efficient and timely assessment of agricultural land as of January 1, 2000.

This rule is therefore promulgated as an emergency rule and shall take effect upon publication in the official state newspaper. Certified copies of the rule have been filed with the Secretary of State and the Revisor of Statutes, as provided in s. 227.24, Stats.



SECTION 1. Chapter TAX 18.08 (4) is created to read:

TAX 18.08 ASSESSMENT OF AGRICULTURAL LAND AND OF PROPERTY CLASSIFIED AS OTHER

(4) Notwithstanding subs. (1), (2) and (3), in 2000 and thereafter, the assessment of each parcel of agricultural land shall be its use value, as determined under s. TAX 18.07 (3)(b).

This rule shall take effect upon publication in the official state newspaper as provided in s. 227.24(1)(c), Stats.

DEPARTMENT OF REVENUE

Dated: November 30, 1999 By: /s/ Cate S. Zeuske
Secretary of Revenue

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

I-01-00

January 14, 2000

The Honorable Chuck Chvala
State Senator
211 South, State Capitol
Madison, WI 53702

Dear Senator Chvala:

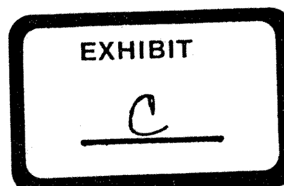
You have requested an opinion on behalf of the Senate Committee on Organization concerning the authority of the Department of Revenue ("Department") to end the process of phasing in use value assessments of agricultural land and to implement immediate, full use value assessments, through the promulgation of an emergency rule.

This office has twice defended the use value statute, Wis. Stat. § 70.32(2r), and in particular, its provisions for an initial assessment freeze and subsequent use value phase-in (Wis. Stat. § 70.32(2r)(a) and (b)). The first challenge was brought as an original proceeding in the Wisconsin Supreme Court and later dismissed by the court as premature. *See Norquist v. Zeuske*, 211 Wis. 2d 241, 564 N.W.2d 748 (1997). The second challenge was brought as a circuit court action in Dane County Circuit Court and resulted in the statute being upheld following trial. That judgment has since been affirmed by the Wisconsin Court of Appeals. A petition for review is currently pending in the Wisconsin Supreme Court. Because of this experience, we are quite familiar with the use value statute and have even had occasion to consider the issue of immediate use value implementation in the course of our defense of the earlier actions.

As explained more fully below, the Wisconsin Legislature has clearly mandated a process by which use value assessments of agricultural land will be phased in over a period of years. The Department of Revenue does not have authority to promulgate an administrative rule, emergency or otherwise, which contravenes this legislative mandate. Only the Legislature has the authority to implement immediate use valuation.

<u>Use Value Statute</u>

A single statute authorizes the use valuation of farmland for property tax purposes. Wisconsin Stat. § 70.32(2r) provides in its entirety:



(2r) (a) For the assessments as of January 1, 1996, and January 1, 1997, or until the farmland advisory council under s. 73.03(49) makes its recommendation, but not to extend beyond January 1, 2009, the assessed value of each parcel of agricultural land is the assessed value of that parcel as of January 1, 1995.

(b) For each year beginning with 1998 or upon completion of the farmland advisory council's recommendation and promulgation of rules and ending no later than December 31, 2008, the assessed value of the parcel shall be reduced as follows:

1. Subtract the value of the parcel as determined according to the income that is or could be generated from its rental for agricultural use, as determined by rule, from its assessed value as of January 1, 1996.

2. Multiply .1 by the number of years that the parcel has been assessed under this paragraph, including the current year.

3. Multiply the amount under subd. 1. by the decimal under subd. 2.

4. Subtract the amount under subd. 3. from the parcel's assessed value as of January 1, 1996.

(c) For the assessment as of the January 1 after the valuation method under par. (b) no longer applies and for each assessment thereafter, agricultural land shall be assessed according to the income that could be generated from its rental for agricultural use.

In this opinion, I follow the convention of using the term "freeze" to denote the initial period, under paragraph (a), during which agricultural assessments are set equal to their 1995 levels, and of using the term "phase-in" to denote the subsequent transition period, under paragraph (b), from market to use valuation.

The Department appoints the Farmland Advisory Council ("Council"), referred to in paragraphs (a) and (b) of the use value statute, under the authority of Wis. Stat. § 73.03(49). That statute provides:

Powers and duties defined. It shall be the duty of the department of revenue, and it shall have power and authority:

. . . .

(49) To appoint a farmland advisory council that shall do the following:

(a) Advise the department of revenue on the supplement to the assessment manual's guidelines for assessing agricultural land, and on rules to implement use-value assessment of agricultural land and to reduce expansion of urban sprawl.

(b) Recommend to the legislature an appropriate penalty for converting agricultural land to another use to discourage urban sprawl.

(c) Annually report to the legislature on the usefulness of use-value assessment as a way to preserve farmland and to reduce the conversion of farmland to other uses.

(d) Recommend a method to adjust the shared revenue formula and other formulas one factor of which is equalized value to compensate counties, municipalities and school districts that are adversely affected by use-value assessment.

(dg) Calculate the federal land bank's 5-year average capitalization rate and per-acre values based on estimated income generated from rental for agricultural use.

(dm) Carry out its duties in cooperation with the strategic growth task force of the governor's land use council.

(e) Include the following members:

1. The secretary of revenue, who shall serve as chairperson.

2. An agribusiness person.

3. A person knowledgeable about agricultural lending practices.

4. An agricultural economist employed by the University of Wisconsin System.

5. A mayor of a city that has a population of more than 40,000.

6. An expert in the environment.

7. A nonagricultural business person.

8. A professor of urban studies.

9. A farmer.

Rules of Construction

A court's purpose in interpreting a statute is to ascertain the intent of the Legislature. *Marshall-Wis. v. Juneau Square*, 139 Wis. 2d 112, 133, 406 N.W.2d 764 (1987). When interpreting a legislative enactment, first resort is always to the language of the statute. *Jungbluth v. Hometown, Inc.*, 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996). The words of a statute are to be given their ordinary meaning, with effect given to every word so as not to render any part of the statute surplusage. *County of Adams v. Romeo*, 191 Wis. 2d 379, 387, 528 N.W.2d 418 (1995).

Courts will not resort to sources other than the language of a statute to interpret it unless there is ambiguity in the statutory language. *Dept. of Transp. v. Transp. Comm.*, 111 Wis. 2d 80, 87-88, 330 N.W.2d 159 (1983). A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons. *State v. Setagord*, 211 Wis. 2d 397, 406, 565 N.W.2d 506 (1997). If a statute is ambiguous, a court looks to the subject matter, object, context and history of the statute in order to ascertain legislative intent. *Id.*

A corollary to these rules is that the mere fact that a statute is not artfully drafted does not render it ambiguous. In order for a statute to be ambiguous, it must be subject to at least two reasonable interpretations. *United Airlines, Inc. v. DOR*, 226 Wis. 2d 409, 422, 595 N.W.2d 49 (Ct. App. 1999). The existence of a disagreement regarding the meaning of a statute, in and of itself, does not make statutory language ambiguous. *See Setagord*, 211 Wis. 2d at 406.

Finally, under Wisconsin law, administrative agencies have only such power as is expressly conferred or necessarily implied by the statutes under which they operate. *City of Appleton v. Transportation Commission*, 116 Wis. 2d 352, 357-58, 342 N.W.2d 68 (Ct. App. 1983). Such statutes are generally strictly construed to preclude the exercise of power not expressly granted. *Browne v. Milwaukee Bd. of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978). Although authority has been implied from Wisconsin statutes, *see, e.g., Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975), any reasonable doubt about whether an agency has power implied by a statute should be resolved against the exercise of such authority. *Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 462, 329 N.W.2d 143 (1983).

The use value statute is simply not ambiguous with respect to the Department's lack of authority to implement immediate full use valuation.

In reality, only the first rule of statutory construction -- resort to a statute's express language -- is necessary to answer the question of the Department's claimed authority to terminate the use valuation phase-in in the year 2000. While Wis. Stat. § 70.32(2r) presents a number of difficulties of interpretation, a common sense reading unambiguously sets forth a freeze and phase-in period beginning on January 1, 1996, and ending no earlier that January 1, 2007.

Among the statute's interpretative difficulties is its reference to the recommendation of the Council in both paragraphs (a) and (b), a term that the statute does not further define. One of the difficulties here is that the statute sets the initial assessment freeze to end and the use value phase-in to begin either by January 1, 1998, or upon the Council making its recommendation, but without specifying whether the phase-in is to begin upon the earlier or later of these events.

Read as a whole, this part of the statute recognizes the possibility that use value rules might not be in place in time for the 1998 assessments. The statute therefore intends the phase-in to begin (and for the initial assessment freeze to end) "beginning with 1998 or upon completion of the farmland advisory council's recommendation and promulgation of rules," whichever is later. This interpretation is consistent with the provision in paragraph (a) that the initial assessment freeze shall "not extend beyond January 1, 2009." This provision would not be necessary if the freeze ended upon the earlier of January 1, 1998, or the Council's making its recommendation. It is also consistent with the provision of paragraph (b) that the use value phase-in is to end "no later than December 31, 2008." This provision also contemplates the possibility of the phase-in commencing later than 1998. This is because 100% use valuation would be achieved under paragraph (b) by 2007, if the phase-in began in 1998.

Another difficulty in interpretation stems from the statute's apparent contemplation of full use valuation going into effect prior to 2009, but without expressly specifying when that would occur. Paragraph (c) simply provides that full use valuation is to occur "after the valuation method under par. (b) no longer applies." Paragraph (b) states that the phase-in is to end "no later than December 31, 2008," but does not identify the event that would cause it to end earlier. An insight into this interpretative issue is gained by recognizing that if the use value phase-in begins in 1998, then, under paragraph (b)'s formula, by 2007, an agricultural parcel's assessment will equal 100% of its use value and zero percent of its 1995 assessed value. It would not be sensible to continue the calculation of assessments using paragraph (b)'s formula beyond this point. The reference in Wis. Stat. § 70.32(2r)(c) to "the valuation under par. (b) no longer appl[ying]" is therefore to the situation of farmland being assessed at 100% use value before 2009.

In sum, the common sense reading of Wis. Stat. § 70.32(2r) is that farmland is to be assessed at its 1995 assessed value in 1996 and 1997, or until the Council has recommended, and the Department has adopted, rules for implementing use value assessments, whichever is later. If necessary--that is, if the Council fails to make appropriate recommendations--the 1995 assessments are to provide the assessed value of agricultural land until as late as 2008. If the

necessary recommendations are made before 2009, then beginning with the later of 1998 or the promulgation of use valuation rules, the assessed value of farmland will equal a weighted average of the land's 1995 assessed value and its use value. The use value weight will start at 10% and increase by 10% each year. If the phase-in begins in 1998, then 100% use valuation will be achieved in 2007 and full use valuation will provide the basis of assessment thereafter. If the necessary rules and recommendations are delayed, so that the partial use value assessment of farmland does not begin until 1999, then 100% use valuation will be achieved in 2008, and full use valuation will provide the basis of assessment thereafter. If the use valuation does not begin until 2000 or later, then the weighted average formula established in Wis. Stat. § 70.32(2r)(b) will provide the assessments for agricultural land until 2009, at which time farmland will be assessed at 100% use value.

Despite the difficulties presented by the statutory language, I am unable to find a reasonable interpretation of Wis. Stat. § 70.32(2r) or Wis. Stat. § 73.03(49) which would support the Department's ending the statutory phase-in period and implementing immediate use valuation.

The Wisconsin Supreme Court in *Norquist v. Zeuske*, 211 Wis. 2d at 246, the first case challenging the constitutionality of Wis. Stat. § 70.32(2r), clearly understood the statute to mandate a phase-in period:

> ¶ 4. Thus, the statute provides for three phases in transforming agricultural land assessments for property taxes from a market value system to a use value system. The first phase, created by subsection (a), freezes assessments of agricultural land at the January 1, 1995, assessment level. This freeze, which began in 1996, will last for at least two years. Subsection (b) provides for a mixed assessment system that will last from the end of the initial freeze until 2009. During this period, agricultural land will be assessed based partly on the frozen market value assessments and partly on land's agricultural use value. In each year during this phase, the market value assessment is reduced by ten percent and the use value portion of the assessment is increased by ten percent. In 2009, the mixed assessment period ends and agricultural land will be assessed based entirely on its agricultural use value.

There appear to be two bases to the Department's claim that it has the authority to immediately terminate the phrase-in period. The first is the absence of an express definition of the event or events that would result in "the valuation method under par. (b) no longer appl[ying]," as provided in Wis. Stat. § 70.32(2r)(c). The other is the provision in Wis. Stat. § 73.03(49)(a) that the Council is to "[a]dvise the department of revenue . . . on rules to implement use-value assessment of agricultural land . . . ." As I understand this argument, under Wis. Stat. § 73.03(49), one type of advice that the Council might give would be to forego any further transition to use valuation and to implement immediate, full use value assessments.

The problem with this interpretation is that even if Wis. Stat. § 73.03(49)(a) were read as granting the Council the authority to *recommend* the immediate end of the use value phase-in, there is no other statutory provision for implementing such a recommendation. That is, Wis. Stat. § 70.32(2r) does not contain language that the method of assessment established in paragraph (b) is to be used "for each year beginning with 1998 and ending with the farmland advisory committee's recommendation and promulgation of rules, but no later than December 31, 2008." I find it facially implausible that the Legislature would intend to grant to an advisory council an authority as important as the early termination of the use value phase-in, affecting the property taxes paid by all of the state's farmland and most of its non-farm property, but without any express language evincing such purpose. In point of fact, the express language of Wis. Stat. § 70.32(2r) points to the exact opposite interpretation. Paragraph (b) provides that the issuance of the Council's recommendation causes the use value phase-in to start, not end.

The opening language in Wis. Stat. § 70.32(2r)(b) reads "[f]or each year *beginning* with 1998 *or* upon completion of the farmland advisory council's recommendation and promulgation of rules *and ending* no later than December 31, 2008, the assessed value of the parcel shall be reduced . . . ." When something is to begin either upon Event A (1998) *or* upon Event B (completion of the Council's recommendation and promulgation of rules) *and* is to end by Event C (no later than December 31, 2008), Event B is a possible beginning date, not ending date. There is no other way to read this language.

Consideration of Extrinsic Interpretative Materials

Even if Wis. Stat. § 70.32(2r) were ambiguous, I am not aware of any aspect of the statute's subject matter, object, context or history that would support the claimed authority to immediately end the use value phase-in. The extrinsic aids to interpretation with which I am familiar indicate, to the contrary, that the statute was intended to create an initial period when agricultural assessments would be frozen, followed by a gradual phasing in of use valuation over a nine-year period, through a weighted average of frozen and use value assessments.

In addition to the Legislative Fiscal Bureau analysis prepared at the time of the statute's enactment, it is significant that both the Senate and the Assembly defeated bills for immediate full use valuation of farmland. It is hard to reconcile a legislative purpose of authorizing the immediate implementation of full use valuation, with the rejection of bills authorizing immediate, full use valuation.

It is also significant that the Department originally interpreted the statute consistent with this common sense reading. Subchapter I of Wis. Admin. Code ch. Tax 18, established the assessed value of farmland for 1996 and 1997 at its 1995 assessment. Wis. Admin. Code § Tax 18.03(1). Under subchapter II, beginning in 1998, farmland was to be assessed at a value equal to a weighted average of its 1995 assessed and current use value, with the use value weight beginning at 10% and increasing 10% each year. Wis. Admin. Code § Tax 18.08(1). Wisconsin Administrative Code

§ Tax 18.08(3) reflected the fact that by beginning partial use valuation in 1998, the use value weight would reach 100% by 2007. The rules provide that in 2008 and thereafter, the assessment of agricultural land was to equal its full use value.

In addition, the use value statute is commonly understood to have resulted from a compromise between urban and rural interests which, on the one hand, allowed farmland to be assessed based on its lower use, as opposed to market, value, but which, on the other hand, attempted to cushion the impact of this change to non-farm property owners and jurisdictions through a gradual phase-in. A party wishing to challenge the Department's proposed use valuation rules would have little difficulty marshaling contemporaneous documents demonstrating this basic understanding. The *Norquist* plaintiffs introduced documents of this sort at trial. If, to the contrary, there are records reflecting a contemporaneous understanding that the Department was to have the authority to institute immediate full use valuation, they have not been shared with this office.

Finally, simply on the basis of the statutory language, the interpretation provided by the supreme court in the first *Norquist* case is sensible, straight-forward and textual. In contrast, the Department's argument is striking for its lack of textual basis and for its assumption of a legislative purpose that would almost certainly find affirmative expression, had it really existed. Accordingly, even if the Department's interpretation were regarded as reasonable, it is much less reasonable than the interpretation that would deny the agency the authority to prematurely terminate the statutory phase-in process.

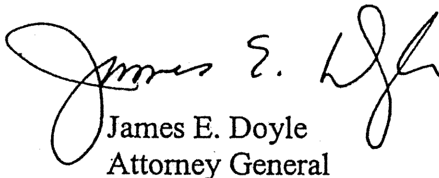
Whether an emergency justifies the Department's promulgation of emergency rules depends principally on whether the Department has the authority to terminate the use value phase-in at this time.

Your request also suggests the question of the Department's authority to implement full use valuation through the issuance of emergency rules. Wisconsin Stat. § 227.24(1)(a) authorizes state agencies to promulgate emergency rules, which are ordinarily effective for 150 days, without complying with the notice, hearing and publication requirements of formal rule-making. Emergency rule-making is permitted "if preservation of the public peace, health, safety or welfare necessitates" immediate regulatory enactment. *Id.*

There is not a great deal of decisional law interpreting agencies' emergency rule-making powers. However, it is axiomatic that an agency may not enact by emergency rule what it cannot enact by final rule. If the Department has the authority to implement immediate full use valuation of farmland, then the economic hardships facing many farms at this time, coupled with the need for timely assessment standards for property being assessed in 2000, would likely be held sufficient to justify the emergency rule-making. If, on the other hand, the Department lacks the authority to issue final rules for immediate use valuation, there can necessarily be no emergency justifying its exceeding its statutory authority.

Because the Department does not have the authority to implement immediate full use valuation, it necessarily lacks the authority to do so through its emergency rule-making powers.

Sincerely,



James E. Doyle
Attorney General

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MICHAEL NOWAKOWSKI
CIRCUIT COURT BR. 13

COPY

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

99 JUN 10 PM 1:37
DANE COUNTY, WI
CIRCUIT COURT

JUN 10 REC'D

ANN BUETTNER
Plaintiff,

vs.

WISCONSIN DEPARTMENT
OF HEALTH AND FAMILY SERVICES,

and

DEPARTMENT OF WORKFORCE
DEVELOPMENT, Division of Economic Support,
Bureau of Welfare Initiatives,

Defendants.

SUMMONS

99CV1351

Case No:__________
Case Classification 30607

THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT.
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is also served upon you, states the nature and basis of the legal action.

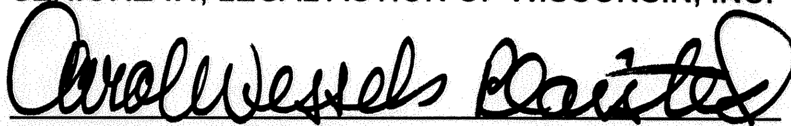
Within (45) days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is Dane County Courthouse, 210 Martin Luther King, Jr. Blvd, Madison, WI 53709-0001, and to Carol Wessels Plaisted, Attorney for Plaintiff, whose address is 230 West Wells Street, Suite 800, Milwaukee, Wisconsin 53203. You may have an attorney help or represent you.

If you do not provide a proper answer within (45) days, the court may grant judgment against you for the award of money or other legal action requested in the

complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 8th day of June, 1999.

SENIORLAW, LEGAL ACTION OF WISCONSIN, INC.



Carol Wessels Plaisted
State Bar No. 1003674
Attorney for Plaintiff

SeniorLAW
Legal Action of Wisconsin, Inc.
230 West Wells Street, Room 800
Milwaukee, Wisconsin 53203
(414) 278-7722

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

99 JUN 10 PM 1:37
CIRCUIT COURT
DANE COUNTY, WI

ANN BUETTNER
Plaintiff,

vs.

WISCONSIN DEPARTMENT
OF HEALTH AND FAMILY SERVICES,

and

DEPARTMENT OF WORKFORCE
DEVELOPMENT, Division of Economic Support,
Bureau of Welfare Initiatives,

Defendants.

ACTION FOR DECLARATORY
JUDGMENT

Case No: 99CV1351
Case Classification 30607

THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANE COUNTY CLERK OF CIRCUIT COURT.
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

Now comes the plaintiff, Ann Buettner, through her attorneys, SeniorLAW / Legal Action of Wisconsin, Inc., by Carol Wessels Plaisted, and respectfully represents that:

1. Plaintiff is an adult resident of Milwaukee County.

2. Defendant Department of Health and Family Services (DHFS), is an agency of the State of Wisconsin. Defendant DHFS is responsible for the administration of the Medical Assistance program in Wisconsin, §49.45, Stats.

3. Defendant Department of Workforce Development (DWD) is an agency of the State of Wisconsin. DWD has no statutory authority to administer the Medical Assistance Program or to issue policies and rules with regard to the Medical Assistance Program.

4. Plaintiff has been receiving Medical Assistance as an institutionalized individual since April 1, 1998. A negative notice dated April 7, 1999 was sent to plaintiff, terminating her Medical Assistance effective May 1, 1999 due to an alleged

divestment. A copy of said notice is attached to this complaint as Exhibit A.

5. The transactions which constitute the "divestment" occurred on March 14, 1998 and were known to DHFS at the time plaintiff applied and was certified as eligible for Medical Assistance. The present classification of these transactions as divestments is due to the circulation of BWI Operations Memo 99-19, a DHFS policy which purportedly clarifies the definition of divestment as it applies to certain transactions. A copy of said policy is attached to this complaint as Exhibit B.

6. BWI Operations Memo 99-19 was not promulgated as an administrative rule in accordance with Chapter 227, Stats.

7. Plaintiff seeks a declaratory judgment, pursuant to §227.40 Wis. Stats. (1997-98), as to the validity of DWD's Bureau of Welfare Initiatives (hereinafter BWI) Operations Memo 99-19, on the grounds that:

   a. The operations memo constitutes a rule that was not properly promulgated as required by §227.10, Stats.

   b. The rule appears to be promulgated by DWD, a state agency that lacks authority to administer the Medical Assistance Program; therefore, the rule is contrary to §227.10(2), Stats.

   c. The rule is contrary to §49.453(4), Stats., the statute upon which it is based; therefore, it is in excess of DHFS' authority and contrary to §227.10(2), Stats.

   d. Even if otherwise valid, the rule is being applied retroactively and affects vested rights of the plaintiff; thus it is contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, plaintiff asks that this court:

1. Review the DHFS / BWI operations memo 99-19, and find that this policy constitutes a rule within the meaning of §227.10, Stats.;

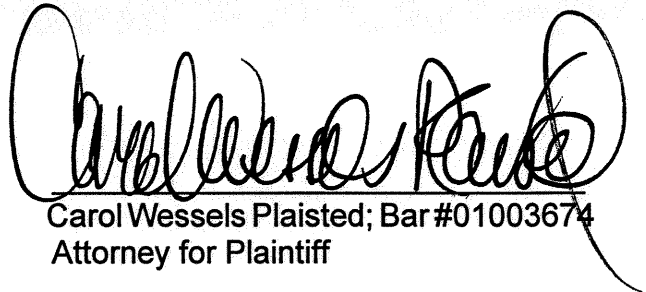
2. Enter a declaratory judgment that the rule was not properly promulgated pursuant to the requirements of Chapter 227, Stats., and therefore is invalid and unenforceable;

3. Enter a declaratory judgment that the rule is contrary to §49.453(4), Stats., and thus is in violation of §227.10(2), Stats., because it exceeds the agency's authority, and therefore is invalid and unenforceable;

4. Enter a declaratory judgment that the retroactive application of the rule violates the Due Process Clauses of the United States Constitution;

5. Plaintiff further requests that this court enter a temporary order, pursuant to §813.02, Stats., restraining DHFS from terminating her Medical Assistance based on the application of BWI Operations memo 99-19 pending a final decision in this matter.

Dated this 8th day of June, 1999.



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Attorney for Plaintiff

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