



Kathleen Papa v. DHS

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In *Kathleen Papa and Professional Homecare Providers, Inc. v. Wisconsin Department of Health Services*, 2020 WI 66, the Wisconsin Supreme Court addressed the authority of the Department of Health Services (DHS) to recoup payments made to Medicaid service providers. The Court determined DHS's policy allowed recoupment even in cases when it could verify that services were actually provided and claims were appropriate and accurate. This policy exceeded DHS's recoupment authority, according to the Court, because it was not "explicitly permitted by a statute or by a [properly promulgated] rule" as required by [s. 227.10 \(2m\), Stats.](#) This issue brief provides an overview of the Court's [decision](#).

BACKGROUND

Federal law [requires](#) the state to audit records of Medicaid service providers to ensure that proper payments are made under the program. Accordingly, state statutes [direct](#) providers to maintain records to verify claims for reimbursement. With regard to recoupments, state statutes [authorize](#) departmental audits "to verify the actual provision of services ... and the appropriateness and accuracy of claims for reimbursement" and [require](#) DHS to "recover money improperly or erroneously paid or overpayments to a provider" using procedures set forth in the [administrative rules](#).

In 2015, Kathleen Papa and other members of Professional Homecare Providers, Inc. (PHP) challenged DHS's recoupment practices and policies in Waukesha County Circuit Court. The plaintiffs are [nurses in independent practice](#) who provide in-home nursing services to Medicaid patients. The nurses did not question DHS's authority to recoup payments in certain cases, such as when providers had failed to maintain records to verify claims for reimbursement. However, PHP alleged that DHS had further extended its policy by creating, in effect, a "perfection" standard that authorized recoupment of funds whenever the supporting records were less than perfect.

In the case, the circuit court sided with PHP, saying the department lacked authority to recoup certain payments; however, the court of appeals overturned the decision and instructed the lower court to enter a judgment for DHS. Ultimately, the Wisconsin Supreme Court reversed the decision of the appeals court in part, and affirmed it in part, as described below.

WAUKESHA COUNTY CIRCUIT COURT ORDER

At the circuit court, PHP alleged that DHS repeatedly sought funds "based on a finding of alleged minor noncompliance" with documentation requirements. For example, DHS recouped payments from a nurse who had not countersigned an attachment before she provided the services that had been ordered. The department said this violated Topic # 66 of its [Provider Handbook](#), in which DHS informs Medicaid service providers that:

[f]or a covered service to meet program requirements... the service must meet all applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

The plaintiffs argued this standard was insufficient to allow DHS to recoup funds simply because of imperfect documentation. The circuit court agreed. It held that that Topic # 66 was a "statement of general policy" that according to [precedent](#) constituted a rule required to be promulgated by DHS. Because DHS had not promulgated the "perfection" standard as a rule, the court enjoined DHS from using it to recoup payments "based solely on findings of the provider's noncompliance with Medicaid policies or guidance" such as Topic # 66 of the Provider Handbook.

WISCONSIN COURT OF APPEALS DECISION

The case was reviewed by a three-judge panel in the Wisconsin Court of Appeals, District II, which issued a decision on July 31, 2019. The [opinion](#), written by then-Judge Hagedorn with Judge Reilly dissenting, acknowledged the case raised “potential issues” relating to DHS’s authority to impose documentation requirements on providers. However, the majority believed that the issue in the case was narrower than had been acknowledged, and that the case should be reversed.

The majority held that Topic # 66 does not constitute a rule, because it merely “synthesizes and summarizes the existing law, whose authority is found in other statutes or administrative rules.” Therefore, the court of appeals held that PHP lacked a basis for its requested relief. The court of appeals overturned the circuit court’s decision and ordered it to enter a judgment in favor of DHS. In addition, the court of appeals vacated an order for supplemental relief, which had required DHS to pay PHP’s costs and attorneys’ fees.

WISCONSIN SUPREME COURT DECISION

The Wisconsin Supreme Court granted PHP’s petition to review the decision of the court of appeals and issued a decision on July 9, 2020. The [opinion](#) by Justice Ziegler was unanimous as to the main holding. With regard to the denial of costs, Justices Kelly and Grassl Bradley dissented from the majority. Due to his prior involvement at the court of appeals, Justice Hagedorn did not participate in the decision.

The Court began by clarifying the scope of the challenge. Both the court of appeals and DHS had framed the case as a challenge to Topic # 66 exclusively. However, Justice Ziegler noted that “Topic # 66 is just an example of DHS’s recoupment policy” that imposes a “perfection” standard on the documentation requirements for Medicaid providers. The Court determined that the plaintiffs’ challenge was broader than the single statement in Topic # 66, and that it extended to DHS’s recoupment policy as a whole.

With regard to the inquiry, PHP had argued that the policy was either an unpromulgated administrative rule or an invalid guidance document, and that it exceeded DHS’s statutory authority. Ziegler noted “[i]t makes no difference in this case” whether the policy is a rule or a guidance document. Ziegler concluded that, if DHS’s policy exceeded its authority, as had been alleged in the complaint, then the policy should be invalidated no matter what. Against this backdrop, the Court determined that the proper inquiry was whether DHS’s policy exceeded its authority, and that the matter was ripe for adjudication.

Having resolved the initial questions relating to the scope of the challenge and proper inquiry, the Court deduced that DHS’s recoupment policy had, indeed, exceeded its recoupment authority. The Court rested its conclusion on [s. 227.10 \(2m\), Stats.](#), which prohibits the implementation or enforcement of a standard, requirement, or threshold not “explicitly required or explicitly permitted by statute or by a rule that has been promulgated” in accordance with [subch. II, ch. 227, Stats.](#) “Nowhere,” wrote Ziegler, does state law “say that DHS may recoup payments from service providers based on any particular documentation shortcomings or imperfections.” Instead, the [statutes](#) authorize DHS to recoup Medicaid payments from service providers only in cases where DHS cannot verify one of the following: (1) the actual provision of covered services; (2) that the reimbursement claim is appropriate; and (3) that the reimbursement claim is accurate. The Court unanimously held that DHS may recoup payments only when one of these cannot be verified. This holding implies that even if DHS were to promulgate an administrative rule, it could not push the recoupment standard beyond its statutory limit.

In addition, a four-justice majority held that the award of costs and attorneys’ fees should be denied. They disagreed with the reasoning of the court of appeals on that issue, but ultimately agreed that the obligation to pay costs and attorneys’ fees should not have been placed upon the state.