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Wisconsin Supreme Court Reins in Agency Authorities

The Court Recognizes Agencies Have Only Those Powers Explicitly Delegated by the Legislature

Madison, Wisconsin — On July 9, the Wisconsin Supreme Court unanimously held the Department of Health Services (DHS) Medicaid auditing and claw-back policies exceeded DHS's explicit recoupment authority. This decision in *Kathleen Papa v. DHS* (2017AP634) was a resounding victory for Wisconsin's regulated community.

On behalf of the Wisconsin Manufacturers and Commerce, Midwest Food Products Association, Wisconsin Farm Bureau Federation, Wisconsin Dairy Alliance, Outdoor Advertising Association of Wisconsin, and Wisconsin Paper Council, the Great Lakes Legal Foundation (GLLF) filed an amicus brief arguing DHS lacked explicit statutory authority to enforce its recoupment policies. As we stated in our brief,

2011 Wis. Act 21 directs the courts to look for explicit authorities in the context of legislative delegated powers to administrative agencies. No one disputes that Wis. Stat. § 49.45(3)(f) sets forth the explicit boundaries of DHS recoupment authority... DHS's recoupment practices wander well outside these clearly defined boundaries.

The Supreme Court agreed with our analysis, with Justice Ziegler writing for the majority:

¶32 The crux of this case is the scope of DHS's recoupment authority. "No agency may implement or enforce any standard, requirement, or threshold, . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a [promulgated] rule..." Wis. Stat. § 227.10(2m).

...

¶34 The plain language of Wis. Stat. § 49.45(3)(f)1.-2. does not explicitly require or permit DHS to enforce a Perfection Policy."

"This case isn't just about DHS's authority," says Bob Fassbender, GLLF President. "Our clients and their members have fought for years, at the legislature and now the courts, to rein in the reach of agencies. Our proposition was simple: Agencies have only those authorities explicitly delegated to them by the legislature. Today, a unanimous Supreme Court agrees."

Under Act 21, any analysis of agency's action must begin with the agency's explicit statutory authority analysis. The court began, and ended, its analysis with this test, concluding:

¶42 "No statute or promulgated rule explicitly requires or permits recoupment based on mere imperfection. Wis. Stat. § 227.10(2m)."

The Great Lakes Legal Foundation is a non-profit legal foundation providing legal and policy support to advance regulatory reform and the rule of law within state agencies. We fight to assure people are regulated fairly by agencies, consistent with clear statutory authority and through administrative law rulemaking procedures.