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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2010AP000232-AC

State of Wisconsin,

Plaintiff-Respondent-Cross-Appellant,

v.

Abbott Laboratories, AstraZeneca LP, AstraZeneca Pharmaceuticals, LP, Aventis Behring, LLC f/k/a ZLB Behring LLC, Aventis Pharmaceuticals, Inc., Ben Venue Laboratories, Inc., Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Roxane, Inc., Bristol-Myers Squibb Co., Dey, Inc., Ivax Corporation, Ivax Pharmaceuticals, Inc., Janssen LP f/k/a Janssen Pharmaceutical Products, LP, Johnson & Johnson, Inc., McNeil-PPC, Inc., Merck & Co. f/k/a Schering-Plough Corporation, Merck Sharp & Dohme Corp. f/k/a Merck & Company, Inc., Mylan Pharmaceuticals, Inc., Mylan, Inc. f/k/a Mylan Laboratories, Inc., Novartis Pharmaceuticals Corp., Ortho Biotech Products, LP, Ortho-McNeil Pharmaceutical, Inc., Pfizer Inc., Roxane Laboratories, Inc., Sandoz, Inc. f/k/a Geneva Pharmaceuticals, Inc., Sicom, Inc. f/k/a Gensia Sicom Pharmaceuticals, Inc., SmithKline Beecham Corp. d/b/a GlaxoSmithKline, Inc., TAP Pharmaceutical Products Inc., Teva Pharmaceuticals USA, Inc., Warrick Pharmaceuticals Corporation, Watson Pharma, Inc. f/k/a Schein Pharmaceuticals, Inc. and Watson Pharmaceuticals, Inc.,

Defendants,

Pharmacia Corporation,

Defendant-Appellant-Cross-Respondent.

**COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT
THE STATE OF WISCONSIN**

ON APPEAL FROM THE
CIRCUIT COURT FOR DANE COUNTY,
JUDGE RICHARD G. NIESS, CIRCUIT JUDGE, PRESIDING
Circuit Court Case No. 04-CV-1709

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE	1
I. NATURE OF THE CASE	1
II. STATEMENT OF FACTS	2
A. Background.....	2
B. The evidence against Pharmacia	6
1. Evidence of causing representations about AWP to be made	7
2. Evidence that AWP's were untrue, misleading, or deceptive	8
3. Evidence that Pharmacia knew the statements of AWP were false when made.....	10
4. Evidence of causation of monetary harm	12
5. Evidence contradicting Pharmacia's defense regarding Wisconsin's supposed knowledge and intent.....	13

ARGUMENT 17

I. PHARMACIA’S ASSERTION OF WHAT THE LEGISLATURE
KNEW AND INTENDED HAS NO MERIT..... 19

II. WISCONSIN'S CLAIMS WERE JUSTICIABLE 28

A. Adjudicating Wisconsin’s claims did
not violate the separation of powers..... 28

B. This is not a “political question” case 32

III. PHARMACIA’S ARGUMENTS AGAINST THE
§100.18 VERDICT LACK MERIT 34

A. The jury’s verdict that AWP’s were “untrue, deceptive or
misleading” must be upheld 34

B. The jury’s finding of causation must be upheld..... 41

C. This was not a “nondisclosure” case 45

IV. PHARMACIA’S ARGUMENTS AGAINST
THE §49.49(4m)(a)2 VERDICT LACK MERIT 45

V. PHARMACIA’S “CHANGING THE ANSWER”
ARGUMENT HAS NO MERIT 48

VI. THE CASE WAS RIGHTLY TRIED TO A JURY 51

A. The §100.18 claim was properly tried to a jury 52

B. The §49.49 claim was properly tried to a jury 53

VII. THE CIRCUIT COURT RIGHTLY
REFUSED A MITIGATION INSTRUCTION 56

VIII. THE JURY’S DAMAGE CALCULATIONS
MUST BE UPHELD..... 59

A. The damage amount was not “speculative” 59

	<u>Page</u>
B. The “duplicative damages” argument lacks merit.....	60
IX. PHARMACIA’S “EVIDENCE” ARGUMENTS ARE WRONG.....	63
A. PX-852.....	64
B. “Unauthenticated documents”	65
C. Testimony of Pharmacia corporate designees	65
D. The “OIG Guidance”	66
E. RedBook evidence.....	67
F. The NAMFCU letter.....	68
X. THE FEE AWARD WAS PROPER.....	70
A. Pharmacia’s lodestar arguments have no merit.....	71
B. The statutory arguments for denying fees have no merit.....	73
CONCLUSION	76

TABLE OF AUTHORITIES

Page

WISCONSIN CASES

<i>A.O. Smith Corp. v. Wisconsin Department of Revenue</i> , 43 Wis.2d 420, 168 N.W.2d 887 (1969)	43
<i>Austin v. Ford Motor Co.</i> , 86 Wis.2d 628, 273 N.W.2d 233 (1979)	51
<i>Bohn v. Sauk County</i> , 268 Wis.2d 13, 67 N.W.2d 288 (1954)	25
<i>Cook v. Public Storage, Inc.</i> , 2008 WI App 155, 314 Wis.2d 426, 761 N.W.2d 645	72
<i>Cormican v. Larrabee</i> , 171 Wis.2d 309, 491 N.W.2d 130 (Ct.App. 1992)	62
<i>Coutts v. Retirement Board</i> , 201 Wis.2d 178, 547 N.W.2d 821 (Ct.App. 1996)	20
<i>Cudahy Junior Chamber of Commerce v. Quirk</i> , 41 Wis.2d 698, 165 N.W.2d 116 (1969).....	32
<i>Cutler Cranberry Co. v. Oakdale Electric Cooperative</i> , 78 Wis.2d 222, 254 N.W.2d 234 (1977)	41, 59-60
<i>DaimlerChrysler v. Labor and Industry Review Commission</i> , 2007 WI 15, 299 Wis.2d 1, 727 N.W.2d 311	48
<i>Eichenseer v. Madison-Dane County Tavern League, Inc.</i> , 2008 WI 38, 308 Wis.3d 684, 748 N.W.2d 154	27, 40
<i>Gorton v. Hostak, Henzl & Bichler, S.C.</i> , 217 Wis.2d 493, 577 N.W.2d 617 (1998)	76
<i>Harvot v. Solo Cup Co.</i> , 2009 WI 85, 320 Wis.2d 1, 768 N.W.2d 176.....	51-55

	<u>Page</u>
<i>Horst v. Deere & Co.</i> , 2009 WI 75, 319 Wis.2d 147, 769 N.W.2d 536.....	57
<i>In re Grady</i> , 118 Wis.2d 762, 348 N.W.2d 559 (1984).....	28
<i>Kolupar v. Wilde Pontiac Cadillac, Inc.</i> , 2004 WI 112, 275 Wis.2d 1, 683 N.W.2d 58.....	70-71
<i>Kolupar v. Wilde Pontiac Cadillac, Inc.</i> , 2007 WI 98, 303 Wis.2d 258, 735 N.W.2d 93.....	76
<i>McQuestion v. Crawford</i> , 2009 WI App 35, 316 Wis.2d 494, 765 N.W.2d 822	50
<i>Nietfeldt v. American Mutual Liability Insurance Co.</i> , 67 Wis.2d 79, 226 N.W.2d 418 (1975)	70
<i>Novell v. Migliaccio</i> , 2008 WI 44, 309 Wis.2d 132, 749 N.W.3d 544.....	38, 41, 44
<i>Reyes v. Greatway Insurance Co.</i> , 220 Wis.2d 285, 582 N.W.2d 480 (Ct. App. 1998)	50
<i>Seider v. O’Connell</i> , 2000 WI 76, 236 Wis.2d 211, 612 N.W.2d 659.....	21
<i>Sinclair v. Department of Health and Social Services</i> , 77 Wis.2d 322, 253 N.W.2d 245 (1977)	39
<i>Spleas v. Milwaukee & Suburban Transport Corp.</i> , 21 Wis.2d 635, 124 N.W.2d 593 (1963)	63
<i>State ex rel. Friedrich v. Circuit Court for Dane County</i> , 192 Wis.2d 1, 531 N.W.2d 532 (1995).....	28
<i>State ex rel. Kalal v. Circuit Court for Dane County</i> , 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110.....	20-21, 39
<i>State v. American TV & Appliance of Madison, Inc.</i> , 146 Wis.2d 292, 430 N.W.2d 709 (1988)	38

	<u>Page</u>
<i>State v. Ameritech Corp.</i> , 185 Wis.2d 686, 517 N.W.2d 705 (Ct. App. 1994), <i>aff'd by an equally divided Court</i> , 193 Wis.2d 150, 532 N.W.2d (1995)	51-53
<i>State v. Chvala</i> , 2004 WI App 53, 271 Wis.2d 115, 678 N.W.2d 880, <i>aff'd per curiam</i> , 2005 WI 30, 279 Wis.2d 216, 693 N.W.2d 747	30
<i>State v. Johnson</i> , 2009 WI 57, 318 Wis.2d 21, 767 N.W.2d 207	19
<i>State v. Kittilstad</i> , 231 Wis.2d 245, 603 N.W.2d 732 (1999)	47
<i>State v. Klein</i> , 25 Wis.2d 394, 130 N.W.2d 816 (1964)	40
<i>State v. Martinez</i> , 150 Wis.2d 47, 441 N.W.2d 690 (1989)	63
<i>State v. Schweda</i> , 2007 WI 100, 303 Wis.2d 353, 736 N.W.2d 40	54-55
<i>State v. Walters</i> , 2004 WI 18, 269 Wis.2d 142, 441 N.W.2d 690	64
<i>Tietsworth v. Harley-Davidson, Inc.</i> , 2004 WI 32, 370 Wis.2d 146, 677 N.W.2d 233	34, 45-47
<i>Village Food & Liquor Mart v. H&S Petroleum, Inc.</i> , 2002 WI 92, 254 Wis.2d 478, 647 N.W.2d 177	51-56
<i>Vincent v. Voight</i> , 2000 WI 93, 236 Wis.2d 88, 614 N.W.2d 388	32
<i>Wausau Underwriters Insurance Co. v. Dane County</i> , 142 Wis.2d 315, 417 N.W.2d 914 (Ct.App. 1987)	70
<i>Zehetner v. Chrysler Finance Co.</i> , 2004 WI App 80, 272 Wis.2d 628, 679 N.W.2d 919	74

OTHER STATE CASES

<i>Abrams v. New York City Transit Authority</i> , 355 N.E.2d 289 (N.Y. 1976)	33
<i>AstraZeneca LP v. State</i> , Case No. 1071439, 2009 WL 3335904 (Ala. Oct. 16, 2009).....	38
<i>Saxton v. Carey</i> , 378 N.E.2d 95 (N.Y. 1978)	33
<i>Shamsian v. Department of Conservation</i> , 136 Cal.App.4th 621 (2006).....	33

FEDERAL CASES

<i>Alden v. Maine</i> , 527 U.S. 706 (1999)	25
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	32
<i>Baughman v. Wilson Freight Forwarding Co.</i> , 583 F.2d 1203 (3d Cir. 1978)	72
<i>Heasley v. Commissioner, Internal Revenue</i> , 967 F.2d 116 (5th Cir. 1992).....	72
<i>Heckler v. Community Health Services of Crawford County, Inc.</i> , 467 U.S. 51 (1984)	37
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983)	71, 72
<i>Hughes v. Repko</i> , 578 F.2d 483 (3rd Cir. 1978).....	72

	<u>Page</u>
<i>In re Pharmaceutical Industry AWP Litigation</i> , 460 F.Supp.2d 277 (D.Mass. 2006).....	22
<i>In re Pharmaceutical Industry AWP Litigation</i> , 254 F.R.D. 35 (D.Mass. 2008)	37
<i>In re Pharmaceutical Industry AWP Litigation</i> , 582 F.3d 156, 170 (1st Cir. 2009)	35
<i>In re Pharmaceutical Industry AWP Litigation</i> , 685 F.Supp.2d 186 (D.Mass. 2010).....	37
<i>Lyons v. Cunningham</i> , 583 F.Supp. 1147 (S.D.N.Y. 1983)	72
<i>Massachusetts v. Mylan Laboratories</i> , 608 F.Supp.2d 127 (D.Mass. 2008).....	30
<i>Pennsylvania Pharmaceutical Association v.</i> <i>Department of Public Welfare</i> , 542 F.Supp. 1349 (W.D.Pa. 1982)	25
<i>Schering-Plough Healthcare Products, Inc. v.</i> <i>Schwarz Pharma, Inc.</i> , 586 F.3d 500 (7th Cir. 2009)	30, 35
<i>Schneidewind v. ANR Pipeline Co.</i> , 285 U.S. 293	22
<i>Spano v. Simendinger</i> , 613 F.Supp. 124 (S.D.N.Y. 1985)	71-72
<i>State of Illinois v. Sangamo Construction Co.</i> , 657 F.2d 855 (7th Cir. 1981)	72-73
<i>Toepleman v. United States</i> , 263 F.2d 697 (4th Cir. 1959)	58
<i>Tennessee Valley Authority v. Hill</i> , 437 U.S. 153 (1978)	40

STATE STATUTES

Wis. Stat. §14.11(2).....	20
Wis. Stat. §20.455(1)(hm).....	74
Wis. Stat. §49.49(1)(a)3	48
Wis. Stat. §49.49(4m)(a)2	<i>passim</i>
Wis. Stat. §49.49(4m)(b).....	48
Wis. Stat. §100.18	<i>passim</i>
Wis. Stat. §100.18(1).....	34
Wis. Stat. §100.18(10)(b)	34, 36, 38-40
Wis. Stat. §100.18(11)(b)2	75, 76
Wis. Stat. §165.25(1m).....	74
Wis. Stat. §804.05(2)(e)	65
Wis. Stat. §805.16(3).....	49, 50
Wis. Stat. §901.01	65

FEDERAL REGULATIONS

42 C.F.R. §447.502.....	4, 12, 15, 26
42 C.F.R. §447.512(a)	4, 15
42 C.F.R. §447.512(b).....	26
42 C.F.R. §447.514(b).....	4, 15
42 C.F.R. §447.518(b)(1) & (2)	14

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> (7th ed. 1999)	47
<i>Prosser on the Law of Torts</i> (5th ed. 1984).....	57
Wis. JI-Civil §173 (2009).....	57
Wis. JI-Civil §2418 (2009).....	41

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wisconsin believes oral argument is necessary given the novelty and complexity of the issues involved. *See* Wis. Stat. §809.22. Furthermore, Wisconsin believes the opinion would likely satisfy the criteria for publication under §809.23.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

To reimburse pharmacies for prescription drugs dispensed to Medicaid patients, and to comply with federal limits on this reimbursement, Wisconsin must estimate the average prices pharmacies pay at any given time to acquire the drugs. To make this estimate, Wisconsin acquires data called “Average Wholesale Prices” (AWPs) on thousands of drugs from a price publisher, First DataBank.

Wisconsin has sued over thirty major drug manufacturers, alleging they have caused First DataBank to publish false and inflated AWPs in violation of Wisconsin Statutes §§100.18 and 49.49(4m)(a)(2) and thereby have caused Wisconsin to overpay pharmacies. The first manufacturer to go to trial was Pharmacia Corporation. It defended mainly by claiming that Wisconsin knew AWPs were inflated and intentionally used them as a way to funnel profits to pharmacies. The jury rejected this defense, found Pharmacia liable, and awarded \$9 million in damages. After upholding the jury’s liability findings and damage award, the circuit court awarded forfeitures, fees, and expenses; enjoined future violations; and entered final judgment from which Pharmacia has appealed.

II. STATEMENT OF FACTS

Pharmacia has represented that its appeal “does not raise the issue of the sufficiency of the evidence at trial.” Opp’n to Wisconsin’s Mot. to Extend Word Limit, 1 (filed June 18, 2010). Nonetheless, its Statement of Facts omits the evidence through which Wisconsin proved its claims and fails to give the facts needed for consideration of Pharmacia’s arguments for reversal. The following statement is therefore required.

A. **Background**

Pharmacia. In this brief, “Pharmacia” includes Pharmacia Corporation (now a subsidiary of Pfizer), its corporate predecessors, and its subsidiary Greenstone Corporation. Pharmacia sells drugs to wholesalers, who resell to pharmacies and other “providers” who dispense the drugs to patients. Pharmacia also sells drugs directly to providers. R434/211:24-212:2; R439/17:15-18.¹

Drug categories and price terms. Pharmacia makes both “brand” and “generic” drugs. “Brands” typically begin with patent protection. While they enjoy that protection, they are considered “single-source” drugs

¹ **Citations.** Citations to the trial transcript are to the Clerk’s Document Number/Page/Line. For example, R439/27:10-28:2 means Clerk’s Document No. 439, page 27, line 10 through page 28, line 2. Pharmacia’s Appendix is cited “A.Ap. ___.” Wisconsin’s Supplemental Appendix is cited “S.App. ___.” Pharmacia’s opening brief is cited “PB.”

for purposes of reimbursement. Once the patent expires, other manufacturers can make identical drugs, known as “generics,” which compete with the brand. The brand and competing generics are then known as “multi-source” drugs for purposes of reimbursement. R434/123:10-15; 42 C.F.R. §502 (definitions of “brand name,” “multiple source,” “single source”).

“Wholesale Acquisition Cost” (WAC) purports to be the drug manufacturer’s price to wholesalers. Because of discounts, wholesalers typically pay Pharmacia *less* than WAC. R439/31:2-18; S.App. 24 (lines 258:5-262:9). “Average Wholesale Price” (AWP), the focus of this case, refers to the average price charged by wholesalers to retailers. S.App. 42.

Federal reimbursement limits. To receive federal Medicaid funds, States must submit Medicaid plans for approval by the federal Center for Medicare and Medicaid Services (CMS). A.Ap. 280. The plans must meet federal limits on drug expenditures. These limits incorporate the concepts of “Estimated Acquisition Cost” (EAC) and “reasonable dispensing fee.” R.438/32:15-22.

Federal regulations define EAC as a State Medicaid agency’s “best estimate of the price generally and currently paid by providers for a drug

marketed or sold by a particular manufacturer or labeler in the package size of drug most frequently purchased by providers.” 42 C.F.R §447.502.

Wisconsin sets EACs for all drugs for which it reimburses. The “dispensing fee” reimburses the pharmacy for operational costs associated with dispensing a drug; it is the same fee regardless of the drug dispensed. 42 C.F.R. §447.502.

Federal regulations limit a State’s aggregate Medicaid reimbursement to drug providers (including retail pharmacies) for *single-source* drugs to the lesser of (1) the drugs’ EACs plus dispensing fees, or (2) or the providers’ “usual and customary charges” (what cash-paying customers would be charged for the drugs). 42 C.F.R §447.512(a); R.436/68:18-20. The regulations similarly limit a State’s aggregate Medicaid expenditure on *multi-source* drugs to the drugs’ EACs plus the dispensing fees, except that for multi-source drugs to which CMS has assigned special maximums called “Federal Upper Limits” (FULs), a different limit applies. 42 CFR §§447.512(a), 447.514(b). (FULs played no role in the trial.)

Wisconsin complies with the federal expenditure limit by reimbursing any prescription at the lower of (1) the EAC of the drug

involved plus the dispensing fee, or (2) the pharmacy's "usual and customary" charge for the drug involved. R439/234:14-235:2. The EAC-plus-dispensing fee figure is usually the lower one. For single-source drugs, Wisconsin sets EAC through a formula using First DataBank's AWP, discussed below.² For multi-source drugs, Wisconsin sets EAC by the lower of the AWP-based formula or the drug's "Maximum Allowable Cost" (MAC), if the drug has one. R.436/61:11-15. The Wisconsin MAC program sets ceilings on many (but not all) multi-source drugs. Wisconsin's goal was to set a MAC at the lowest acquisition price uniformly available to pharmacies. R436/32:22-25, 37:2-24, 60:5-21 (S.App. 270, 271, 282).

Wisconsin's use of First DataBank AWP. Under the above system, Wisconsin must set tens of thousands of current EACs, and apply them instantly via computer to reimburse claims. It is not practical for Wisconsin itself to gather the cost data to set EACs because of the number of drugs involved (there over 36,000 active "National Drug Codes," one for each drug in each format in each package size in which it is sold), the volume of pharmacy claims (Wisconsin Medicaid reimburses 50,000 to

² For part of the relevant period, Wisconsin used a metric called "direct price" to reimburse single-source drugs of three manufacturers who sold directly to pharmacies. See PB 9.

75,000 claims per day), the constant changing of drug prices, the non-transparency of the drug market, and the impracticality of relying on pharmacies to submit cost data with their claims. R436/41:21-49:17, 156:14-21, 157:3-16, 159:17-20, 160:1-161:16,178:6-7 (S.App. 272-280, 296-300, 304); R437/133:19-135:23 (S.App. 327-329); R438/83:1-84:6 (S.App. 346-347); S.App. 20-21 (lines 77:14-83:11), 26 (lines 270:12-274:15).

Hence, like most States, Wisconsin uses current market price information purchased from a price publisher named First DataBank. Wisconsin originally set a drug's EAC at the undiscounted AWP supplied by First DataBank. Over time, as it received indications that these AWPs were high, Wisconsin began setting EAC at a discount from them. Wisconsin set that discount at 10% (1990-2001), 11.25% (2001-2002), 12% (2002-2004), 13% (2004-2005), and 14% thereafter. R439/184:19-22, 210:4-13, 220:6-13.

B. The evidence against Pharmacia

Under agreed jury instructions, the elements of Wisconsin's two claims were similar. Under Wisconsin Statutes §100.18, Wisconsin had to show that Pharmacia (1) caused representations to be made (2) that were

untrue, deceptive or misleading and (3) that caused monetary loss to Wisconsin. The instruction on §49.49(4m)(a)2 required essentially the same elements and also that Pharmacia knew the representations were false when made. R.441/204:13-208:23. Wisconsin offered the following evidence to prove these claims.

1. Evidence of causing representations about AWP to be made

Wisconsin offered extensive evidence that Pharmacia determined the AWPs First DataBank published. While Pharmacia claimed First DataBank independently set AWPs, Wisconsin offered evidence that this assertion of independence was a sham scenario that “enables the manufacturer to indicate that they did not establish the AWP price in the market,” as an internal Pharmacia email put it. S.App. 132; R438/129:19-132:12 (S.App. 351-354).

For generics, Pharmacia set AWPs for each drug and sent them to First DataBank. Around 2003, Pharmacia began calling these prices “suggested” AWPs (SWPs) rather than simply AWPs. S.App. 10. First DataBank almost always published the exact figures from Pharmacia as “Bluebook AWPs,” the AWPs Wisconsin used. Pharmacia executives admitted that the First DataBank AWPs and Pharmacia’s generic SWPs

were “basically interchangeable.” S.App. 8, 10. A Pharmacia executive admitted that Pharmacia verified the AWP’s First DataBank published. R438/133:18-135:2 (S.App. 355-357).

For brands, Pharmacia likewise set AWP’s and sent them to First DataBank, which published them. Pharmacia set a brand drug’s AWP by marking up by either 20% or 25% the drug’s “Wholesale Acquisition Cost” (WAC), a figure Pharmacia also set. S.App. 3. At some point around 2003, on advice of counsel, Pharmacia stopped sending brands’ AWP’s to First DataBank and thereafter sent only the drugs’ WAC’s. But this decision changed nothing of substance, because First DataBank thereafter did what Pharmacia had done: It took Pharmacia’s WAC’s, applied the 20% or 25% markup, and published the resulting numbers as the drugs’ purported AWP’s. S.App. 5-6.

2. Evidence that AWP’s were untrue, misleading or deceptive

The plain meaning of the term “AWP” refers to an average of wholesale prices to providers. Pharmacia executives admitted that *all* published Pharmacia AWP’s were far higher than any pharmacy *ever* paid for the drug. S.App. 17, 26.

For brands, the 20/25% markup over WAC always produced false

AWP figures. Wholesalers never pay AWP; in fact, they pay Pharmacia *less than WAC*, and their markups to pharmacies are very small, as discussed below. S.App. 24-25 (lines 263:12-264:6); S.App. 125. For example, in one typical period, the AWP of Pharmacia's popular Celebrex was 27% higher than wholesalers were charging. S.App. 54. Pharmacia produced no evidence that it or anyone else told Wisconsin of its "20%/25% markup" method for setting brands' AWPs at inflated levels.

For generics, Pharmacia's method of setting AWPs produced even greater inflation. Upon launching a generic, Pharmacia set its initial AWP at the level of competitors' AWPs, or, if there was no competitor, at 10.5% below the AWP for the equivalent brand. R.438/96:20-97:2, 138:5-22 (S.App. 348-349, 358). Pharmacia thereafter kept the AWP at that level, while actual prices to pharmacies plummeted because of price competition. R438/105:6-8 (S.App. 350). The result was astonishing inflation in AWP. The jury heard many examples, such as Alprazolam, whose AWP was \$534.27, even though Pharmacia knew pharmacies could buy it for \$31.00. S.App. 127.

Pharmacia contended at trial and contends on appeal that its AWPs were not "untrue, deceptive or misleading," because the drug industry

purportedly construes AWP as a “benchmark” price that is not intended to convey the plain meaning of its name. To rebut this contention, Wisconsin offered extensive evidence that key players in the industry defined AWP to mean exactly what the name says. First DataBank, which published the AWPs, repeatedly defined AWP between 1991 and 2003 as the average price wholesalers were *actually being paid* for the drug. S.App. 40, 42, 45, 48. In 2002, a First DataBank attorney informed two manufacturers of this definition and denied that AWP could amount to “any price that a manufacturer chooses.” S.App. 49-52. The National Pharmaceutical Council (of which Pharmacia is a member) and the American Society of Consultant Pharmacists gave similar definitions in 1995 and 2007 respectively. S.App. 35, 37.

Although Wisconsin Medicaid officials knew First DataBank’s reported AWPs needed discounting, no official testified to understanding AWP as a figure the manufacturer could set at whatever level it chose.

3. Evidence that Pharmacia knew the statements of AWP were false when made

Pharmacia knew that AWPs were far greater than real average acquisition costs and that payers like Wisconsin relied on them for reimbursement. Pharmacia internal documents called AWP “fabricated,”

“nebulous,” and “an artifact rather than a number based on reality.” S.App. 57, 89, 125.

Wisconsin offered evidence that Pharmacia could have reported reasonably accurate AWP. A Pharmacia expert agreed it has “a good idea of the actual wholesale prices of [its] drugs.” R440/109:19-22 (S.App. 378); *see also* R434/132:8-23 (S.App. 239). Pharmacia knew what wholesalers paid it for its drugs, and knew that “wholesaler markups are now between 1 and 3%, and are sometimes zero or even slightly below cost.” R304/PX-641 (S.App. 125).

Wisconsin offered evidence of an improper purpose in inflating AWP: Pharmacia used them to “market the spread” on its drugs. The “spread” is the difference between what pharmacies pay for drugs and what third-party payers reimburse them. Inflating AWP causes third parties to overpay on AWP-based reimbursements, creating profits for pharmacies. That fact can motivate pharmacies to carry and dispense the drug with the greatest spread. Hence, as a Pharmacia analysis noted, “the pressure is for the AWP to be high.” S.App. 90. The evidence of “marketing the spread” was important to Wisconsin’s request for forfeitures and injunctive relief, and is detailed in Wisconsin’s Cross-Appeal Brief, which addresses those

issues.

4. Evidence of causation of monetary harm

Wisconsin offered extensive evidence that it paid more for Pharmacia's drugs than it would have if accurate AWP's had been reported. As stated above, its reimbursements for single-source drugs, and for multi-source drugs for which no MAC had been established, were based on AWP. Even for multi-source drugs with MACs, Wisconsin offered evidence that if a drug's true AWP had been lower than MAC, a pharmacy would have been reimbursed for the drug based on the AWP formula, and that true Pharmacia AWP's would in fact have rendered the MAC program unnecessary for Pharmacia's drugs. R436/60:22-61:15 (S.App. 282-283), 185:4-10 (S.App. 310).

Wisconsin's damages expert calculated what Wisconsin would have paid had accurate AWP's resulted in EACs being (as defined by the federal regulation) the "price generally and currently paid by providers." 42 CFR §447.502. He used real pharmacy acquisition costs shown by records subpoenaed from drug wholesalers. R437/11:3-13:22. He calculated overpayment figures exceeding \$9 million. S.App. 53; R437/28:25-31:17 (S.App. 319-322).

5. Evidence contradicting Pharmacia's defense regarding Wisconsin's supposed knowledge and intent.

Pharmacia contended at trial that Wisconsin knew what retail pharmacies paid for Pharmacia's drugs and thus knew how much the AWP's were inflated, and that Wisconsin intentionally overstated its estimate of acquisition costs to give retail pharmacies a profit through drug cost reimbursements. As discussed in the Argument, Pharmacia did not distinguish clearly at trial between what the *legislature* supposedly knew and intended (which has become the basis of its argument on appeal) and what *Medicaid employees* in the Department of Health and Family Services (DHFS) supposedly knew and intended. Wisconsin offered evidence as to both the legislature and Medicaid officials, including the following.

DHFS officials. Pharmacia offered evidence (discussed in Pharmacia's brief) of what DHFS officials responsible for administering the Medicaid program knew and intended. To rebut those assertions, the State presented the following evidence:

1. The primary Medicaid official with day-to-day responsibility for administration of the program testified that until this lawsuit began, she had believed that AWP was the "gold standard" for Medicaid departments to use in estimating what pharmacists were actually paying for their drugs.

R436/156:7-11, 167:4-22 (S.App. 296, 301A). A former Medicaid director testified that although he understood AWP's were inflated, he believed Wisconsin's discounted formula reasonably approximated the actual cost retail providers paid to acquire drugs. R435/113:25-114:24 (S.App. 248-249). No state official testified to understanding AWP as Pharmacia portrays it, namely, a price set at whatever level a manufacturer pleased.

2. State officials testified that they all understood federal regulations (summarized above) to require Wisconsin to set the EAC based on its best estimate of real acquisition cost. R435/113:25-114:24 (S.App. 248-249); R436/166:16-21, 169:5-8, 182:17-25 (S.App. 301, 303, 307A). Medicaid officials were required to certify that the methods Wisconsin used to determine EAC, including its AWP-based formula, conformed to federal law. 42 C.F.R. §447.518(b)(2); A.Ap. 280.

3. Wisconsin submitted evidence that when DHFS officials received information demonstrating what retail pharmacies actually paid on average, they used that information to lower reimbursement. For example, when Wisconsin received market-based information from the U.S. Department of Justice about average wholesale prices for 47 of Pharmacia's drug products, Wisconsin calculated AWP's based on that information

instead of inflated figures from First DataBank. S.App. 156-173, 198; R436/180:1-181:10 (S.App. 306-307).

The legislature. Over Wisconsin’s objection (overruled *in limine*, R431/17:20-18:13, 109:9-110:5), Pharmacia also offered evidence on which it constructed an argument about the supposed knowledge and intent of the *legislature*. To rebut Pharmacia’s argument, Wisconsin presented the following evidence.

1. As discussed above, Wisconsin showed that federal regulations require setting the reimbursement level for most drugs no higher than Wisconsin’s “best estimate of the price generally and currently paid by providers” (42 C.F.R. §§447.502, 447.512(a)), and for the other drugs, no higher than a “federal upper limit” for reimbursement (42 C.F.R. §447.514(b)).

2. The information cited by Pharmacia for the assertion that ingredient reimbursements exceeded actual pharmacy acquisition costs was vigorously contested, not only by the pharmacy lobby but also by other credible sources. Concerns were raised about the accuracy and methodology of federal Office of Inspector General (“OIG”) reports, including their small samples. R434/52:22-54:10 (S.App. 236-238)

R435/122:5-123:11 (S.App. 254A-255). As opposed to such OIG reports, a 1993 report by the federal predecessor to CMS found Wisconsin's formula at the time (AWP minus 10%) within 1% of real average acquisition costs. S.App. 150; R.439/90:16-92:8, 93:22-94:11.

Furthermore, reports suggesting an increase to the discount off AWP were attacked by the pharmacy industry, which alleged that further discounts would lead to losses and refusals by pharmacies to participate in Medicaid. R435/117:5-121:13 (S.App. 250-254); S.App. 174-182. The Pharmacy Society of Wisconsin provided information about members' acquisition costs to rebut claims of profit built into EAC. R435/123:1-124:2 (S.App. 255-256). An official with the Legislative Fiscal Bureau, on whose occasional reports to the legislature Pharmacia relies heavily, testified that it was her understanding that drug cost reimbursement was not meant to pay pharmacists a profit, R437/94:2-25 (S.App. 323), and that the conflicting information created a situation where "it was hard ... to know definitively what sort of the right answer to that question was in terms of the estimated acquisition cost." R.437/102:13-104:17 (S.App. 324-326). She also testified that if accurate AWP's had been provided, her work of analyzing the limited pricing information available for reporting to the

legislature would not have been necessary. R437/142:12-145:2 (S.App. 332-335). As late as 2005, a governor's commission was divided on what reimbursement amount would accurately reflect EAC. R435/123:1-124:2 (S.App. 255-256).

3. In response to Pharmacia's argument that Wisconsin kept an inflated reimbursement rate because it feared that otherwise pharmacies would leave Medicaid and harm the access of recipients to drugs, Wisconsin offered evidence that such concerns played no significant role and that access had never been a problem under any reimbursement formula Wisconsin had adopted. R435/134:12-135:20, 180:6-182:6 (S.App. 259-260, 261-263); R436/57:6-16 (S.App. 281), 183:16-185:3 (S.App. 308-310); R437/140:8-141:21 (S.App. 330-331).

ARGUMENT

The jury heard extensive and credible evidence that Pharmacia knowingly made or caused to be made false, deceptive, or misleading statements about its drugs' average wholesale prices; that Wisconsin used these false and inflated AWP's in determining reimbursement for Pharmacia's drugs; and that as a result Wisconsin over-reimbursed retail pharmacies by millions of dollars. The jury also heard Pharmacia's

unprecedented defense. Over Wisconsin's objection, Pharmacia tried to convince the jury that the legislature knew the amount of inflation in AWP and intended to use that inflation to pay profits to pharmacies through drug cost reimbursements. The jury rejected this defense, found Pharmacia liable for violation §§100.18 and 49.49(4m)(a)2, and awarded damages.

In attacking this verdict, Pharmacia does *not* challenge the jury instructions, and has stated emphatically that its appeal “does not raise the issue of the sufficiency of the evidence at trial.” Opposition to Wisconsin's Motion to Extend Word Limit (filed June 18, 2010) (underscoring in original). Instead, Pharmacia mainly offers arguments that the case should never have been heard. These arguments all rest on renewing the same assertion about legislative knowledge and intent: that the legislature knew by how much AWPs were inflated and intended to use the resulting inflated ingredient reimbursements to pay profits to pharmacies. Building on that assertion, Pharmacia argues that the case is nonjusticiable on separation of powers or political question grounds; that biennial budget bills superseded and impliedly repealed §§100.18's and 49.49(4m)(a)2's application to the false drug pricing claims of this case; that Wisconsin failed to prove causation of damage; and that the damage award was “speculative.”

Since Pharmacia's assertion underpins so many of its arguments, Section I will show it has no merit. Sections II through X will then address Pharmacia's "issues for appeal" in order and show that this judgment (other than as specified in Wisconsin's cross-appeal) must be affirmed.

I. PHARMACIA'S ASSERTION OF WHAT THE LEGISLATURE KNEW AND INTENDED HAS NO MERIT

Pharmacia repeatedly asserts that by passing biennial budget appropriation resolutions, the legislature intended the "AWP minus" formulas to afford pharmacies a systematic profit, rather than to approximate real acquisition cost. *See, e.g.*, PB 17 (asserting that the legislature chose "to apply a discount to AWP that still allowed pharmacies to recoup a profit"); *id.*, 22 (asserting that "[t]he legislature knew it was affording pharmacists a profit on Medicaid reimbursement").

Pharmacia's assertion about the knowledge or intent of the legislature is an argument of statutory construction, because legislatures act only through statutes. Thus, that argument is reviewed *de novo* by this Court. *State v. Johnson*, 2009 WI 57, ¶57, 318 Wis.2d 21, 767 N.W.2d 207. (Pharmacia's brief consistently fails to inform this Court of the relevant standard of review governing the various issues it raises.)

Pharmacia offers no basis recognized in law for its argument about legislative intent.

Courts must look first to the text to determine legislative intent, because “[i]t is the enacted law, not the unenacted intent, that is binding on the public.” *State ex rel. Kalal v. Cir. Ct. of Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. *See also Coutts v. Retirement Bd.*, 201 Wis.2d 178, 195, 547 N.W.2d 821 (Ct.App. 1996) (“We are governed by laws, not by the intentions of legislators”) (internal quotation marks omitted). The budget resolutions in question (which Pharmacia never quotes or cites to) simply appropriate amounts for Medicaid. Their text does not mention AWP or EAC or the particular AWP formula on which amounts requested for the budget were calculated. *See, e.g.*, 2009 Wisconsin Act 28. They do not mention profits to pharmacies, much less declare that the legislature intends Wisconsin’s EAC formula to provide such profits. They do not mention the two statutes that Wisconsin sued under, §§100.18 and 49.49(4m)(a)2, much less declare that the legislature intends the budget resolutions to supersede those statutes’ applicability to Medicaid drug reimbursement.

Since the statutory text provides no support for the sweeping legislative intent that Pharmacia infers, there is no reason to search legislative history for that intent. “If a statute is unambiguous on its face, this court does not look to extrinsic evidence, such as legislative history, to ascertain meaning.” *Seider v. O’Connell*, 2000 WI 76, ¶50, 236 Wis.2d 211, 612 N.W.2d 659; *see also Kalal*, 2004 WI 58, ¶50. In any case, Pharmacia cites no committee report or statement indicating that the legislature intended any appropriations bill to provide profit to pharmacies through drug cost reimbursements, or to suspend §§100.18’s and 49.49(4m)(a)2’s applicability to false statements of AWP.

Lacking support in the text or in committee reports, Pharmacia treats the legislature’s intent as a question to be answered by the evidence adduced at trial. According to Pharmacia, (1) the legislature was given reports asserting that pharmacies were making profits on drug cost with the discount from AWP set as it then was; (2) Wisconsin Medicaid officials suggested the discount be increased; (3) the legislature approved Medicaid budgets based on the discount as it then was, or based on an increase in the discount smaller than Medicaid officials requested; and (4) the evidence of this chain of events shows a legislative intent to use the AWP-minus

formula *to pay profits to pharmacies* (PB 17), and an intent to suspend “pharmacy reimbursement” from the coverage of §§100.18’s and 49.49(4m)(a)2 (PB 27).

This argument is invalid.

First, there is no precedent for determining legislative intent from conflicting trial evidence. It is a question of law to be decided based on the text and, if necessary, the legislative record.

Second, the inference drawn by Pharmacia depends on what the legislature failed to do when requested. It is settled that inferences should not be drawn from a government’s failure to act. *See In re Pharm. Indus. AWP Litig.*, 263 F.Supp.2d 172, 180-181 (D.Mass. 2003), *citing Schneidewind v. ANR Pipeline Co.*, 285 U.S. 293, 306 (1988).

Third, and most importantly, the legislature received *conflicting* information regarding pharmacies’ actual acquisition costs, and therefore the legislature could not have known what the impact would be of a particular reimbursement formula. The reports cited by Pharmacia were just one side of the story the legislature heard, as Pharmacia concedes. Pharmacy industry representatives criticized those same studies and provided their own information to the effect that increasing the discount

would have made some pharmacies lose money, leave Medicaid, and jeopardize recipients' access to drugs. R435/117:5-124:2 (S.App. 250-256); A.Ap. 349, ¶6. In this situation, the failure of the legislature on several occasions to agree with proposed increases in the discount from AWP reveals nothing about whether it intended to provide profits to pharmacies. All that can be said is that the legislature several times appropriated money based on discounts different than the ones agency officials suggested.

Fourth, even ignoring conflicting information the legislature received from other sources, the documents most heavily relied on by Pharmacia for its version of what the legislature must have believed – four memoranda from the Legislative Fiscal Bureau (LFB) to a legislative committee – are equivocal at best. These memos reflect that the LFB's staff understood that the legislature wanted to set reimbursement at levels that would “adequately compensate pharmacies for their *costs*, rather than provide a profit.” A.Ap.349, ¶7. The LRB informed the committee that it was “difficult to assess pharmacies' actual costs of providing drugs” to Medicaid beneficiaries because AWPs were not generally accurate, and that like a “sticker price” of a car, “it was very difficult to assess true costs in

relation to the list price.” A.Ap.335, ¶6. “As a result,” the memo went on, “most [Medicaid] programs use AWP minus a percentage-based discount.” *Id.* To allow the legislature to determine the proper discount, the memos reported the results of numerous studies, all with different approximations of the appropriate discount off of AWP – ranging from a 7% or 9% discount to over 20%. A.Ap. 349, 373. The memos also reported the Pharmacy Society of Wisconsin’s position that any increase in the percentage-discount would “threaten a pharmacy’s ability to service [Medicaid] recipients.” A.Ap. 349, ¶6.

Pharmacia cites to two passages, which it contends establish as a matter of law that the legislature intended to use AWP to pay profits to pharmacies. PB 10, 22, 25, 29. In the first cited passage, the LFB reported two studies that found that average acquisition cost was AWP-18% and stated that “[*b*ased on these studies, it appears that a reimbursement rate of AWP-15% would provide an average margin of 3% ... compared with approximately 8% of AWP under current reimbursement rates.” A.Ap. 373-74, ¶¶11-12 (emphasis added). Similarly, the LFB reported the results of a study that found average acquisition cost was AWP-17% and stated that “[*b*ased on this finding and the current reimbursement rate of AWP-

11.25%, it is estimated that pharmacies' margin on acquisition costs is an average of 6.25%." A.Ap. 359, ¶15 (emphasis added). Pharmacia cannot establish that the legislature as a body concurred with these particular studies or that the legislature rejected the results of other studies that showed, consistent with the Pharmacy Society's position, that Wisconsin's percentage-discount reasonably estimated actual acquisition cost.

There is thus no acceptable support for the legislative intent Pharmacia wants to infer from these budget appropriation acts. In contrast, two settled legal presumptions argue heavily *against* that intent.

First, there is a "presumption that public officers in performing their official duties have complied with all statutory requirements." *Bohn v. Sauk County*, 268 Wis. 213, 219, 67 N.W.2d 288 (1954). This presumption applies to "legislative bodies." *Id.* The presumption also assumes that States comply with "the binding laws of the United States." *Alden v. Maine*, 527 U.S. 706, 755 (1999).

Wisconsin would have violated federal law if it had deliberately set EAC at a level to funnel systematic profits to pharmacies. Having elected to participate in Medicaid, Wisconsin must obey federal Medicaid law. *Penn. Pharm. Assn. v. Dept. of Pub. Welfare*, 542 F.Supp. 1349, 1350

(W.D.Pa. 1982). The federal Medicaid regulations *define* EAC as a “best estimate of the price *generally and currently paid* by providers for a drug marketed or sold by a particular manufacturer or labeler in the package size of drug most frequently purchased by providers.” 42 C.F.R §447.502 (emphasis added). Once EACs are set, a State may not pay more for single-source drugs in the aggregate—*i.e.*, across all drugs—than EACs. R.436/35:4-7; 42 C.F.R §447.512(b). The plain language of these regulations does not countenance a systematic inflation of EAC in violation of its definition to give profits to pharmacies.

Pharmacia essentially shrugs off these regulations. It does not argue that they allow Wisconsin to inflate EAC to allow systematic profits to providers. It merely says that, “[d]espite these regulations, CMS routinely approved reimbursement rates exceeding the amounts pharmacists paid for prescription drugs because CMS recognized such rates were the result of political compromise.” PB 8. The testimony Pharmacia cites established only that CMS was willing to accept results of negotiations between pharmacies and States as a “reasonable proxy” for the “best estimate the state could come up with of acquisition cost.” A.Ap. 580. That CMS was willing to do this shows nothing about the intentions of the Wisconsin

legislature.

Second, there is a “strong presumption” against implied repeal of a statute by a later enactment. Such implied repeal “can only occur where two utterly repugnant conflicting statutes cannot be reconciled.”

Eichenseer v. Madison-Dade County Tavern League, Inc., 2008 WI 38.

¶118, 308 Wis.2d 684, 748 N.W.2d 154. Pharmacia argues that the legislature intended in its appropriations bills to suspend the applicability of §§100.18 and 49.49(4m)(a)2 to cases based on false statements dealing with “pharmaceutical reimbursement.” PB 17. The strong presumption against such an implied repeal renders this argument, and the inference about legislative intent that underlies it, implausible.

In sum, there is no basis in law to interpret these appropriations bills as reflecting either that (1) the legislature intended to set EAC at an inflated level, inconsistent with federal regulations, which would pay systematic profits to pharmacies, or that (2) the legislature intended to suspend the application of §§100.18 and 49.49(4m)(a)2 to “pharmaceutical reimbursement.”

II. WISCONSIN'S CLAIMS WERE JUSTICIABLE

In deciding this case, the circuit court did what courts are supposed to do. It decided a claim by Wisconsin under statutes which authorize civil suits for damages caused by untrue statements.

Pharmacia's argument that the case is nonjusticiable – that Pharmacia is exempt from having its conduct even *examined* under §§100.18 and 49.49(4m)(a)2 – depends on its invalid assertion that the legislature intended to use drug cost reimbursement to pay pharmacies a profit. Hence, says Pharmacia, in persuading the jury to award damages, “DHFS got from the judiciary what it could not achieve through the political process.” PB 23. Putting aside the fact that this case is brought by the State of Wisconsin, not by DHFS, Pharmacia's nonjusticiability arguments have no merit.

A. Adjudicating Wisconsin's claims did not violate the separation of powers

The starting point for separation-of-powers analysis is whether the action challenged falls within the “core zones of exclusive authority” of a governmental branch, or within an area where the authority of multiple branches overlaps and thus involves “shared powers.” *State ex rel.*

Friedrich v. Cir. Ct. for Dane County, 192 Wis.2d 1, 14, 531 N.W.2d 532

(1995). When a power is exclusive, “any exercise of authority by another branch of government is unconstitutional.” *In re Grady*, 118 Wis.2d 762, 776, 348 N.W.2d 559 (1984). Where a power is shared, an action by one branch of government is constitutional if it does not “unduly burden[] or substantially interfer[e]” with the other branches’ exercise of power. *Id.*

Pharmacia’s argument fails at both steps of this analysis. First, the power the court exercised was, if anything, a “core” *judicial*, not legislative, power: the power to decide whether a private entity’s conduct violated remedial statutes, and if so, to decide damages and other forms of relief as authorized by statute. Second, deciding this case did not burden or interfere with, much less “unduly” burden or “substantially “ interfere with, any legislative exercise of power.

Pharmacia nonetheless asserts that the jury intruded on the “core” legislative area of determining reimbursement rates for Medicaid as part of determining the budget. PB 17. The argument is unacceptable. First, it depends on the untenable assertion that holding Pharmacia liable amounted to rejecting the legislative intention to pay a profit through the EAC formula. Without that assertion, there is no basis for asserting that the circuit court or jury set “reimbursement rates” for Medicaid, much less that

they told the legislature to change “reimbursement rates.” The court and jury merely held a private defendant liable for causing false numbers to be fed into the reimbursement mechanism.

Second, Pharmacia fudges on what it means by “reimbursement rates.” What it really means is that the legislature, by approving a particular EAC formula, intended to allow drug manufacturers to feed *any numbers they pleased* into that formula, and that the resulting *dollar expenditure* for any drug was the amount the legislature intended for that drug. As the federal judge hearing consolidated AWP cases in the “Multidistrict Litigation” proceedings observed, to attribute such intent to a legislature would be “absurd,” because it implies that the legislature intended drug reimbursements to be determined by “a metric that is wholly dictated by the pharmaceutical industry” and “to give the pharmaceutical industry free reign over drug pricing.” *Massachusetts v. Mylan Labs.*, 608 F.Supp.2d 127, 144 (D.Mass. 2008) (internal quotation marks omitted).

It is irrelevant that the budget acts and reimbursement formulas are part of the backdrop to Pharmacia’s unlawful conduct. Many justiciable cases play out against a similar backdrop involving sensitive legislative prerogatives. For example, the court in *State v. Chvala*, 2004 WI App 53,

¶¶47-49, 271 Wis.2d 115, 678 N.W.2d 880, *aff'd per curiam*, 2005 WI 30, 279 Wis.2d 216, 693 N.W.2d 747, held that the separation-of-powers doctrine did not prevent a felony-misconduct-in-office prosecution, even though the duty supposedly violated arose from the Wisconsin Senate's own rules and even though the legislature has never invited courts to interpret those rules. Here, the legislature *has* told courts to decide civil cases alleging violation of §§100.18 and 49.49(4m)(a)2.

Finally, Pharmacia argues that Wisconsin violated the separation of powers by asking the jury “to evaluate why the legislature did what it did.” PB 19. To the contrary, as shown above, it was *Pharmacia* who injected into the trial, over Wisconsin's objection, the legislature's supposed intent as a defense to Wisconsin's claims. For similar reasons, there is no merit to the argument that the jury had to “divine what [the legislature] would have done under different circumstances” in order to determine how much money Wisconsin would have paid if accurate AWP's had been reported. This is not a justiciability argument, but an argument that Wisconsin failed to prove damage, and as will be shown in Sections III(A) and VIII(A) below, it is a meritless argument, because it is Pharmacia whose main

defense ultimately rested on assertions about what the legislature “would have done” if Pharmacia had told the truth.

B. This is not a “political question” case

In Wisconsin, “the doctrine of political question nonjusticiability is rarely invoked.” *Vincent v. Voight*, 2000 WI 93, ¶194, 236 Wis.2d 88, 614 N.W.2d 388 (Sykes, J., concurring in part and dissenting in part). In *Vincent*, the majority found justiciable a constitutional attack Wisconsin public school financing – a political process that makes setting Medicaid drug reimbursement look like child’s play. Pharmacia cites only one Wisconsin case in its political-question argument: *Cudahy Junior Chamber of Commerce v. Quirk*, 41 Wis.2d 698, 704, 165 N.W.2d 116 (1969), which relied mainly on standard contract law in refusing to let the Jaycees use the judiciary to decide the merits of a \$1,000 bet with an anti-fluoridation activist.

Pharmacia invokes the “political question” doctrine as formulated in *Baker v. Carr*, 369 U.S. 186 (1962). Even assuming Wisconsin follows *Baker*’s framework, nothing in that framework prevents a court from considering whether a private corporation has made untrue or deceptive statements within the meaning of two remedial statutes and if so, whether

the conduct caused damage. Pharmacia's *Baker* arguments recycle its invalid assertion about the legislature's "intent to pay profit." That assertion underlies Pharmacia's arguments that deciding this case violates a "textually demonstrable commitment" to leave the issues in this case to the legislature, or involves "an initial policy determination not intended for judicial discretion," or that deciding this case would express "a lack of respect due coordinate branches of the government" or would involve "potential embarrassment from multifarious pronouncements by various departments on one question." PB 21-23.

As for whether courts have "judicially discoverable and manageable tools" to decide this case (PB 20), determining the falsity of statements in trade or commerce and calculating damages from such statements are standard judicial tasks. Lacking Wisconsin authority on the "judicial tools" factor, Pharmacia cites California and New York cases that are remote from this case. PB 21. These cases involved quixotic claims asking courts to do things such as order California to "provide convenient, economical, and efficient beverage container redemption opportunities for California consumers," (*Shamsian v. Dep't of Conservation*, 136 Cal.App.4th 621, 626, 641-642 (2006)), keep New York's Governor and legislature from

enacting a budget (*Saxton v. Carey*, 378 N.E.2d 95, 96 (N.Y. 1978)), and make New York’s subways less noisy (*Abrams v. N.Y.C. Transit Auth.*, 355 N.E.2d 289, 290 (N.Y. 1976)). Those cases have no bearing on the circumstances presented here.

III. PHARMACIA’S ARGUMENTS AGAINST THE §100.18 VERDICT LACK MERIT

A. The jury’s verdict that AWP’s were “untrue, deceptive or misleading” must be upheld

The jury answered Question 1 in the affirmative, finding that Pharmacia’s AWP’s were “untrue, deceptive and misleading” under §100.18. A.Ap. 144. As the jury was instructed, a statement is untrue under §100.18(1) “if it is false, erroneous, or does not state or represent things as they are.” Wis. JI-Civil § 2418 (2009), *cited with approval in Tietzworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶85, 370 Wis.2d 146, 677 N.W.2d 233. Pharmacia’s AWP’s represented things as they were not. No Pharmacia “Average Wholesale Price” came close to being an average wholesale price. Moreover, §100.18(10)(b) makes it deceptive *per se* to represent a price as a wholesale price if it is “more than the price which retailers regularly pay for the merchandise.” It was undisputed that no retail pharmacy ever bought its products at AWP.

Pharmacia offers two meritless arguments against the jury’s “untrue, deceptive and misleading” finding.

1. The “context” argument. Pharmacia argues that as a matter of law, its AWP’s were not untrue, deceptive, or misleading, because statements must be “considered in context and with reference to the audience to which [they are] addressed.” PB 24-25, *quoting Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 512-513 (7th Cir. 2009). According to Pharmacia, the “context” is that Wisconsin Medicaid and the legislature knew that AWP had nothing to do with real acquisition costs and knew the amounts by which AWP was inflated. According to Pharmacia, such knowledge as a matter of law negates the untruth of these prices. PB 9-12, 24-25. The argument has no merit.³

First, the only undisputed fact about Wisconsin’s knowledge was that it believed AWP’s as published by First DataBank tended to be

³ Pharmacia does not renew an argument it and other defendants made and lost below: that AWP has become a “term of art” – a term no reasonable person would interpret as having its ordinary meaning. Wisconsin offered extensive evidence (such as the definitions of AWP from First DataBank) refuting this argument, and as noted earlier, Pharmacia does not challenge the verdict on grounds of the sufficiency of the evidence. Courts in other AWP cases have declined to find AWP a “term of art.” *In re Pharm. Indus. AWP Litig.*, 582 F.3d 156, 170 (1st Cir. 2009).

overstated and needed discounting. As discussed above, extensive and credible evidence showed that (1) neither Wisconsin Medicaid nor the legislature knew what real average acquisition prices were, (2) Pharmacia could have provided true AWP, and (3) Pharmacia chose instead to provide false ones. Likewise, there is no evidence the legislature knew the role of Pharmacia and other manufacturers in causing false AWP, or the wildly varying markups that were used to fabricate them.

Second, whatever Wisconsin believed, Pharmacia's argument confuses the "truth" of statements with the particulars of what Wisconsin believed about them. A suspect who gives a false name to a policeman is lying, even if the policeman knows his real one. Wisconsin law reflects this fact. The jury instruction quoted above defines an "untrue" statement without reference to the knowledge of the person to whom the statement is directed. Likewise, §100.18(10)(b) makes certain statements about "wholesale" prices *per se* deceptive, regardless of what the listener may believe.

Third, when claims of misleading the *government* are at issue, courts impose a high threshold on defenses that the "government" knew about the alleged deceptive practice. As Justice Holmes wrote, "[m]en must turn

square corners when they deal with the Government.” *Rock Island, A.&L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). Justice Holmes’s “observation has its greatest force when a private party seeks to spend the Government’s money [T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.” *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). Consistent with this rule, decisions in AWP cases under the federal False Claims Act hold “that the relevant government officials know of the falsity is not in itself a defense,” and to use government knowledge to negate the element of falsity, courts “have required that the government possess knowledge of the actual true facts of the claim, not simply knowledge that the claim is generally false; some have further required that the government actually *approve* of those true facts.” *In re Pharm. Industry AWP Litig.*, 254 F.R.D. 35, 41-42 (D.Mass. 2008) (emphasis added).

Thus, the judge presiding over dozens of AWP cases consolidated in the federal “Multidistrict Litigation” proceedings held that “[t]o prevail on a government knowledge defense, Defendants must produce admissible evidence that [the State] or its agencies knew the actual true facts, and that

they ordered, asked for, approved, or decided as a matter of policy to acquiesce in the Defendants' reporting of false prices.” *In re Pharm. Indus. AWP Litig.*, 685 F.Supp.2d 186, 205 (D.Mass. 2010). Pharmacia offered no evidence to show, much less as a matter of law, that Wisconsin “ordered, asked for, approved, or decided as a matter of policy to acquiesce in the Defendants’ reporting of false prices.”

Fourth, the cases cited by Pharmacia (PB 24-25), only one of which is from Wisconsin, do not help it. *Schering-Plough* held that because the federal Lanaham Act requires proof that a statement is *both* false and deceptive, a “literally false” statement is not actionable if “no one is or could be fooled” by it. 586 F.3d at 512. *State v. Am. TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 300-02, 430 N.W.2d 709 (1988) is a “puffery” case. Whatever else Pharmacia was doing with AWP’s, it was not puffing. *AstraZeneca LP v. State*, Case No. 1071439, 2009 WL 3335904 (Ala. Oct. 16, 2009), held only that Alabama could not prove the “reasonable reliance” requirement of common-law fraud, the only claim Alabama brought in its AWP case. *Id.* at *11. Reasonable reliance is not an element under Wis. Stat. §100.18. *Novell v. Migliaccio*, 2008 WI 44, ¶3, 309 Wis. 2d 132, 749 N.W.2d 544.

2. Arguments to avoid §100.18(10)(b). Pharmacia does not contest that under the plain language of §100.18(10)(b), its statements about AWP were *per se* “deceptive,” nor does it argue that the statute is ambiguous. “If the meaning of the statute is plain, [courts] ordinarily stop the inquiry” there. *Kalal*, 271 Wis. 2d 633, ¶45 (citation omitted).

Pharmacia nonetheless argues against applying §100.18(1)(b) as written. It argues that “[a]llowing a plaintiff that was not deceived to recover” violates §100.18’s purpose of protecting Wisconsin residents from deceptive representations. PB 26. This argument confuses proving falsity with proving causation of damages, which Wisconsin discusses in the next section.

Pharmacia also argues that §100.18(10)(b) must be considered *in pari materia* with budget resolutions, and that to consider AWP to “represent the price of [drugs] as a . . . wholesaler’s price” within the meaning of §100.18(10)(b) to AWP would “conflict” with such resolutions, because they “set reimbursement formulas” and “recognized that AWP is not ‘the price which retailers regularly pay for the merchandise.’” PB 27. The argument has no merit.

First, no case suggests that a budget resolution for an entire

department is *in pari materia* with a remedial statute designed to prohibit deceptive conduct in trade. In any event, the tool of *in pari materia* applies only to resolve ambiguous text, and cannot create an ambiguity where there is none. *Sinclair v. DHSS*, 77 Wis.2d 322, 332, 253 N.W.2d 245 (1977).

Second, Pharmacia's argument is an *implied repeal* argument – that appropriations bills that budget on the basis of AWP-based formulas have repealed the applicability of §100.18(10)(b) to cases involving pharmaceutical reimbursement. However, as discussed in Section I, implied repeal of a statute by a later enactment “can only occur where two utterly repugnant conflicting statutes cannot be reconciled.” *Eichenseer v. Madison-Dade County Tavern League, Inc.*, 2008 WI 38 at ¶118. *See also State v. Klein*, 25 Wis.2d 394, 404, 130 N.W.2d 816 (1964). Moreover, the presumption against implied repeal applies “with full vigor when . . . the subsequent legislation is an appropriations measure.” *TVA v. Hill*, 437 U.S. 153 (1978) (citation omitted).

Pharmacia cannot show “utter repugnance” between the budget resolutions and §100(10)(b) as applied to statements about Pharmacia's AWPs. Far from being “repugnant” to the language of §100(10)(b), the language of the budget resolutions merely appropriates money, never

mentioning AWP. As Section I showed, the sweeping intent that Pharmacia tries to distill from these budget resolutions cannot be justified. That the legislature may have recognized that AWP's needed discounting in no way establishes that the legislature immunized unlawful and deceptive conduct that caused the inflation in AWP.

B. The jury's finding of causation must be upheld

The legal principles governing causation are settled. First, as the jury was instructed, "the test is whether the State of Wisconsin would have acted in the same way in its absence." R.441/206:5-10. Second, as the jury was also instructed, "the representation need not be the sole or only motivation for the State of Wisconsin's decision to reimburse the amount that it did for prescription drugs," but must have been "a significant factor contributing to the State of Wisconsin's decision." R.441/206:10-16; *see Novell*, 309 Wis.2d 132, ¶49. Third, uncertainty surrounding the *amount* of damages is not a sufficient basis to deny recovery. *Cutler Cranberry Co. v. Oakdale Elec. Co-op.*, 78 Wis. 2d 222, 233, 254 N.W.2d 234 (1977).

Answering Question 2, the jury found that Pharmacia's representations caused monetary harm to Wisconsin. A.Ap. 145. Extensive credible evidence showed that Wisconsin reimbursed more for

Pharmacia's drugs than if Pharmacia had not caused false and inflated AWP's to be published. *See, e.g.*, R436/185:4-10 (S.App. 310). At the simplest level, it was a matter of arithmetic that for Pharmacia drugs reimbursed under the AWP formula, reimbursement would have been lower if Pharmacia's reported AWP's had been true. Even with respect to generic drugs for which MAC limits had been set, Wisconsin offered evidence that it would have not have used MACs at all if it had been able to determine acquisition cost using AWP's. R436/60:22-61:15 (S.App. 282-283).

As discussed in Section I, in the trial court, Pharmacia responded to this causation evidence by trying to convince the jury that Medicaid officials and/or the legislature intended to pay systematic profits to pharmacies on drug cost reimbursements rather than to pay actual drug costs. Pharmacia's implicit argument was that the legislature would have nullified any net decrease in reimbursements that would have resulted from true AWP's being reported. The jury necessarily rejected this argument when it found causation and awarded damages.

On appeal, Pharmacia does not dispute that credible evidence supports the causation finding, but offers three arguments to overturn the finding as a matter of law.

1. Pharmacia argues that to show causation from its false AWP, Wisconsin had to prove that the legislature was “induced” by those AWPs to do something differently than it would have done had the AWPs been truthful. Pharmacia then claims that Wisconsin has “conceded” that it cannot show this. Pharmacia cites a statement Wisconsin made in a brief on an unsuccessful motion to quash depositions of several analysts from the Legislative Fiscal Bureau: “There is no person who can testify why the ‘State of Wisconsin’ did what it did regarding pharmacy reimbursement.” PB 28, *quoting* A.Ap. 15.

The argument has no merit. Wisconsin proved to a jury that Pharmacia’s false prices caused the Medicaid agency, as the designated agent of the State, to reimburse at a higher level than it would have if Pharmacia’s AWPs had been true. As discussed above, it was Pharmacia who *defended* on the ground that the legislature intended to use drug cost reimbursement to pay profits to pharmacies. Ironically, in the brief from which Pharmacia quotes, Wisconsin unsuccessfully opposed that effort, arguing (correctly) that a party cannot establish legislative intent through after-the-fact testimony of legislative aides. A.Ap. 15-16; *see A.O. Smith Corp. v. Wis. Dep’t of Revenue*, 43 Wis.2d 420, 427, 168 N.W.2d 887

(1969), which held that “legislative acts must be construed from their own language, uninfluenced by what the persons introducing or preparing the bill actually intended to accomplish by it.”

2. Pharmacia argues that because Wisconsin believed that published AWP’s were too high, it cannot prove “reliance” on the AWP’s, because “the State . . . was never deceived.” PB 29, *citing Novell*. This argument misuses *Novell*, which conspicuously held that “reasonable reliance” on the truth of the representations in question not an element of §100.18. 309 Wis.2d 132, ¶53. Instead, *Novell* held only that reasonable reliance “may be relevant” to proving causation. 309 Wis.2d 132, ¶3.

This case involved an institutionalized *system* in which Wisconsin, for practical reasons, was required to rely on reported AWP’s for reimbursement, despite their flaws. Pharmacia knew this fact. It knew that reporting inflated AWP’s would cause higher reimbursements, tens of thousands of times a day. While the Wisconsin legislature knew that reported AWP’s needed discounting, it did not know what real average acquisition costs *were*. In this situation, with Wisconsin relying on AWP and lacking a practical alternative, untrue AWP’s caused immediate harm by increasing reimbursements. It was Pharmacia who failed to persuade the

jury that Medicaid drug reimbursements would have been the same if accurate AWP's had been reported.

3. Pharmacia argues that reimbursement of generics for which MACS had been set was not tied to AWP, so there could have been no causation with respect to generics from false AWP's. However, as stated above, Wisconsin offered evidence that if EAC as determined by true AWP's had been lower than a MAC limit, a generic would have been reimbursed based on the AWP, not at MAC. R436/60:22-61:15 (S.App. 282-283).

C. This was not a “nondisclosure” case

Pharmacia argues that this case is really about “nondisclosure” of real AWP prices, and that because it had no duty to report accurate AWP's, Wisconsin's claims must fail. PB 31-33, *citing Tietsworth*, 270 Wis.2d 146, ¶40. The circuit court succinctly rejected this meritless theory, because “once it undertook to speak, Pharmacia had to speak truthfully.” A.App. 139 n.1. This was not a case of “silence.” As the jury found, it was a case of publishing false prices or causing them to be published.

IV. PHARMACIA'S ARGUMENTS AGAINST THE §49.49(4m)(a)2 VERDICT LACK MERIT

Section 49.49(4m)(a)2 provides: “No person, in connection with

medical assistance, may . . . [k]nowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.” As reflected in the agreed jury instructions on liability, the elements of a §49.49(4m)(a)2 violation are essentially those of §100.18, plus a *scienter* element. There was ample credible evidence that Pharmacia knew it was making, or causing to be made, false statements about AWP. *Supra* at 8-11.

In attacking the §49.49(4m)(a)2 verdict, Pharmacia, with one exception, repeats its contentions under §100.18. PB 32-33, 35-36. Wisconsin has answered these arguments above. Pharmacia’s only separate argument under §49.49(4m)(a)2 is that the AWPs it caused to be published were not “for use in determining rights to a [Medicaid] payment or benefit.” Pharmacia argues that this phrase must be restricted to mean “for use in determining the right to be paid at all” and that the “rights” referred to cannot refer to the *amount* a provider has the right to be paid. Since no case holds such a thing, Pharmacia invokes the principle that statutes imposing forfeitures are construed strictly. PB 33-34.

The circuit court rejected this argument as “strained and ultimately unsustainable.” A.Ap. 142. This is an understatement. “[T]he rule of strict

construction of penal statutes does not apply unless the statute is ambiguous, and it cannot be used to circumvent the purpose of the statute. Moreover, the rule ‘is not violated by taking the commonsense view of the statute as a whole and giving effect to the object of the legislature, if a reasonable construction of the words permits it.’” *State v. Kittilstad*, 231 Wis. 2d 245, ¶45, 603 N.W.2d 732 (1999) (citation omitted).

These principles shred Pharmacia’s argument. First, there is nothing ambiguous about “rights to a payment or benefit.” The term’s plain English meaning includes the *amount* of payment the provider has a right to receive. So does its ordinary legal meaning. Black’s Law Dictionary (7th ed. 1999) defines “right” as, among other things, “[t]he interest, claim or ownership that one has in tangible or intangible property.” *Id.* at 1322. Second, the statute uses “rights” in the plural, showing intent to include *all* rights associated with a payment, including the amount the recipient has the right to receive. Third, it offends common sense that the legislature, in outlawing Medicaid fraud, would wish to exclude fraud affecting the *amount* of payment or benefit.

Moreover, “[i]t is a basic rule of construction that we attribute the same definition to a word both times it is used in the same statute or

administrative rule.” *DaimlerChrysler v. Labor and Indus. Review Comm’n*, 2007 WI 15, ¶29, 299 Wis.2d 1, 727 N.W.2d 311. Another subsection of §49.49, subsection (1)(a)3, uses the term “right to a payment or benefit” in the course of outlawing concealment of events that, if disclosed, would *lower* the amount of Medicaid payment due. Since the “right to a payment or benefit” in §49.49(1)(a)3 includes the amount one has the right to receive, so does the “right to a benefit or payment” as used in §49.49(4m)(a)2, the section Wisconsin relied on in this case.

V. PHARMACIA’S “CHANGING THE ANSWER” ARGUMENT HAS NO MERIT

To calculate forfeitures under §49.49(4m)(b), the circuit court had to determine how many material false statements Pharmacia caused to be made for use in determining rights to a Medicaid payment. Wisconsin argued that Pharmacia caused a false statement of AWP to be made each time it processed a pharmacy claim for reimbursement. The jury agreed, finding 1,440,000 false statements as Wisconsin had requested. A.Ap. 146. Pharmacia moved to change the jury’s answer to zero. On May 15, 2009, 88 days after the verdict, the circuit court refused to do so, because “there is clearly evidence in this record that would support the imposition of forfeitures . . .” A.Ap. 152. However, the court disagreed with Wisconsin’s

method of counting material misstatements, vacated the jury's "1,440,000" answer, and ordered further proceedings to determine the correct number. A.Ap. 152-153. On September 30, 2009, the court issued an opinion finding that under a proper counting method, Pharmacia had caused 4,578 material false statements to be made. A.Ap. 162-168.

Pharmacia does not address the method the court used to count violations or the evidence used by the court to do so. Instead, Pharmacia argues the court should not have conducted further proceedings at all. It argues that under Wisconsin Statutes §805.16(3), the court's finding of 4,578 violations was a "nullity" since it was made more than 90 days after the verdict. PB 36-38.

If accepted, this argument would produce the reverse of what Pharmacia wants. Its motion was a "motion to change answer" (PB 38), and the court failed to complete proceedings on that motion within 90 days. Under §805.16(3), the motion would then be "considered denied and judgment shall be entered on the verdict" – the verdict finding 1,440,000 false statements.

In reality, however, the court complied with §805.16(3). Pharmacia's motion sought to vacate the jury's answer, and the court did

that within 90 days. But when it refused to enter the zero number Pharmacia wanted, and ordered further proceedings, §805.16(3), properly interpreted, did not govern those further proceedings. Statutes are not to be construed to produce absurd results. *McQuestion v. Crawford*, 2009 WI App 35, ¶8, 316 Wis.2d 494, 765 N.W.2d 822. Section 805.16(3) is intended to keep jury verdicts from being *changed* by delays in ruling, but Pharmacia's argument tries to use a delay to *wipe out* a verdict. Equally absurdly, the argument would give Pharmacia the "zero" finding the court *rejected*.

Pharmacia also argues the court erroneously gave Wisconsin a "second opportunity" to prove the number of violations. PB 38-40. As the circuit court ruled, the case law defeats this contention. The court cited *Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 301, 582 N.W.2d 480 (Ct. App. 1998), where the jury awarded nearly four times the medical expenses supported by credible evidence. *Reyes* ruled that the circuit court should reduce the award to the maximum supported by credible record evidence. Similarly, the court here found it should "determine an award that is supported by credible evidence." A.Ap. 163.

Pharmacia never mentions this reasoning, much less refutes it.

Pharmacia wrongly relies on *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 273 N.W.2d 233 (1979), where the jury reduced its wrongful death verdict by finding comparative negligence. The circuit court ordered a new trial on liability, finding no credible evidence that plaintiff's negligence proximately caused her death. The Supreme Court found that since Ford had offered no credible evidence to support the proximate-cause element of its comparative negligence defense, the circuit court should have simply eliminated the jury's reduction. 86 Wis.2d at 639. *Austin* is inapposite. As the circuit court found, Wisconsin *did* offer credible evidence supporting a determination of the number of violations. A.Ap. 152.

VI. THE CASE WAS RIGHTLY TRIED TO A JURY

In *State v. Ameritech Corp.*, 185 Wis. 2d 686, 690, 517 N.W.2d 705 (Ct.App. 1994), *aff'd by an equally divided Court*, 193 Wis.2d 150, 532 N.W.2d (1995), the Court of Appeals ruled that §100.18 carried no constitutional jury-trial right because it had not "codified" a common-law cause of action existing in 1848. But in *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, ¶11, 254 Wis.2d 478, 647 N.W.2d 177, the Supreme Court ruled that *Ameritech's* "codification" test was too narrow, and that a statutory claim is triable as of right to a jury if "(1) the

cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and (2) the action was regarded at law in 1848.”

Applying *Village Food*, the circuit court found both of Wisconsin’s claims triable to a jury. Review of this ruling is *de novo*. The circuit court was correct as to both claims.

A. The §100.18 claim was properly tried to a jury

The court found this claim the “essential counterpart” under *Village Foods* of the common-law cause of action for “cheating,” which, like §100.18, was “aimed at protecting the public from the misrepresentations of merchants engaged in trade.” A.Ap. 132-133. Pharmacia does not discuss this cause of action, much less contend that it fails the *Village Food* test for being an “essential counterpart” of §100.18. Instead, it argues that *Harvot v. Solo Cup Co.*, 2009 WI 85, 320 Wis.2d 1, 768 N.W.2d 176 (2009), decided after the Pharmacia trial, “cited *Ameritech* with approval” and hence *Ameritech* is still “controlling.” PB 41-42.

Pharmacia is mistaken. *Harvot* resolved whether, in a claim under the Wisconsin Family or Medical Leave Act, (1) the statute impliedly requires a jury trial, and (2) if not, whether the Constitution requires it. On

the first issue, *Harvot* held that when a statute fails expressly to provide the right, “no jury trial is required unless the right is preserved by [the Constitution].” 320 Wis.2d 1, ¶47. It quoted from *Ameritech* only to support that principle. *Id.*, ¶49. *Harvot* did not cite *Ameritech* for its constitutional holding on §100.18, a statute not at issue in *Harvot*. Far from rejecting *Village Food*’s holding that *Ameritech*’s “codification” test was too narrow, *Harvot* reaffirmed *Village Food*’s broader test.

B. The §49.49 claim was properly tried to a jury

The circuit court held that common-law fraud, well-established as of 1848 as a “legal” cause of action, is a “counterpart” within *Village Food* of Wisconsin’s §49.49 claim: “§49.49 identifies itself as a ‘fraud’ statute in its opening paragraph, and can best be characterized as a statutory sub-species of common-law fraud, with the medical assistance benefit program serving as merely the stage for its performance.” A.Ap. 134. Pharmacia does address the court’s §49.49 analysis (unlike its §100.18 analysis), but unpersuasively.

1. In denying a constitutional jury right under the WFMLA, *Harvot* called the statute “modern social legislation” that was “quite unheard of in 1848.” 320 Wis.2d 1, ¶80. Pharmacia says that §49.49 is

similar “modern social legislation.” PB 42. This has no merit. *Harvot* meant that the WFMLA imposed affirmative rights to family and medical leave that were unheard of in 1848. 320 Wis.2d 1, ¶79. Section 49.49 creates no affirmative new rights. It prohibits fraud in connection with one program. Thus, what Pharmacia really asserts is that §49.49 cannot be the “counterpart” of common law fraud because it covers a *subset* of situations covered by common law fraud, or because the program it addresses did not exist in 1848. Nothing in *Harvot* or any other case supports this theory.

2. Pharmacia argues that to be “counterparts,” the statute and the common-law doctrine must have “the same elements.” PB 41, *citing Harvot* and *State v. Schweda*, 2007 WI 100, 303 Wis.2d 353, 736 N.W.2d 49. Pharmacia then asserts differences between §49.49 and common-law fraud. *Id.* 43-44.

Pharmacia is wrong that the elements of the statutory and common law claims must be the same. *Village Food* rejected that assertion by disapproving *Ameritech*’s “codification” test. *Schweda* stated only that “where such a vital aspect of a common law nuisance cause of action, i.e., harm, is not part of a contemporary cause of action [under environmental regulations] . . . the two are not sufficiently analogous to pass the first

prong of the *Village Food* test.” 303 Wis.2d 353, ¶42. *Harvot* repeated this language from *Schweda*. 320 Wis.2d 1, ¶72. This holding does not distinguish common-law fraud from a §49.49(4m)(a)2 violation, since, as the circuit court instructed the jury, Wisconsin was required to prove harm under the latter.

The two variations argued by Pharmacia in the elements of common-law fraud and of a damages claim under §49.49 are not “vital.” First, the fact that § 49.49(4m) requires a statement “for use in determining rights to a benefit or payment” (*see* PB 43) merely means that the statute covers a subset of common law claims, as discussed above. Second, the fact that Wisconsin need not prove harm to obtain the particular remedy of forfeiture under §49.49 does not make this case analogous to *Schweda*, as Pharmacia argues (PB 43). *Village Food* analyzed whether the Unfair Sales Act itself had a counterpart in common law, not whether the party’s *remedy for damages* under the Act had a counterpart. The Court found such counterparts in certain common-law crimes. 254 Wis.2d 478, ¶¶ 27, 28. The Court acknowledged that those crimes carried no civil remedy, but held that the fact that enforcement “is undertaken in the civil context, rather than the criminal context, should not deprive the parties of a jury trial.” *Id.*, ¶29.

Thus the absolute dissimilarity in remedies between statute and common law in *Village Food* made no difference, and here both common-law fraud and §49.49 share the remedy of damages. Moreover, even if there were no right to a jury trial on Wisconsin's claim for *forfeitures*, it would make no difference. The circuit court, not the jury, eventually decided that claim.

Finally, there is no merit to Pharmacia's unexplained argument (PB 43-44), which it never articulated below, that §49.49(6)'s remedy is for "restitution" since Wis. Stat. §20.455(1)(hm) (eff. until 2010), a 2009 appropriations act, mentions a victim's fund for "restitution." How a budget act chooses to label an unrelated fund cannot determine the nature of a remedy provided by a remedial statute.

VII. THE CIRCUIT COURT RIGHTLY REFUSED A MITIGATION INSTRUCTION

Pharmacia's mitigation argument was that Wisconsin knew enough about inflated AWP that it should have changed its reimbursement method. The circuit court rejected Pharmacia's mitigation instruction for two reasons, the first of which Pharmacia never mentions. First, it held that "[T]he defense case isn't that it's a mitigation case. It's that once you learned of the fraud and continue to overpay, it is a noncausal and no liability situation." A.Ap. 831. Second, it held in any event that a court

could not tell the legislature how to mitigate harm. *Id.*

To get a new trial because of this ruling, Pharmacia must show not only that it was wrong but that there is a “reasonable probability the outcome would have been different but for the error.” *Horst v. Deere & Co.*, 2009 WI 75, ¶18, 319 Wis.2d 147, 769 N.W.2d 536. Pharmacia can show neither thing.

First, Pharmacia ignores, and cannot refute, the circuit court’s holding that the “mitigation” argument was really a liability argument. “The rule of avoidable consequences comes into play *after* a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages.” Prosser on the Law of Torts §65 (5th ed. 1984). Wisconsin’s mitigation instruction reflects this rule: “A person *who has been damaged* may not recover for losses that he knows or should have known could have been reduced by reasonable efforts.” Wis. JI-Civil §173 (2009) (emphasis added). In contrast, when Pharmacia argued that Wisconsin knew enough about false AWP’s that it should have changed its reimbursement method, Pharmacia was arguing that Wisconsin did not meet the statutory requirements to hold it liable. *See* Pharmacia’s closing argument, R441/141:11-142:8, 157:20-159:21 (S.App. 382-383, 384-385).

A mitigation instruction would have unfairly let Pharmacia make the same liability argument in a second guise.

Second, there is no “reasonable probability” the result would have been different if the instruction had been given. If the jury rejected this argument in finding liability, there is no reason to think it would have accepted the same argument in “mitigation” guise.

The refusal can further be upheld on the ground that no Wisconsin case has subjected a government making claims on behalf of the public under remedial statutes to a “duty to mitigate.” The circuit court recognized as much in its alternative holding – that it could not tell the legislature how it should have mitigated damages. Under the federal False Claims Act, courts have held there is no such duty. *See Toepelman v. United States*, 263 F.2d 697, 700 (4th Cir. 1959) (“Having by his fraud thrust this burden on the United States, the appellant cannot be exonerated by the failure of the Government to cast it off at the most propitious time.”). As the evidence in this case shows, Governments cannot be expected to react to deceptive or unfair conduct in the same way as private parties.

VIII. THE JURY’S DAMAGE CALCULATIONS MUST BE UPHOLD

A. The damage amount was not “speculative”

In calculating overpayments, Wisconsin’s damage expert assumed that had Pharmacia’s AWP’s been true, the Medicaid program would have used those prices to reimburse drug cost at actual rather than inflated levels. The jury had a solid basis to accept calculations built on that assumption. The evidence showed that Wisconsin lowered reimbursement when it received better AWP data on 400 drug products. R436/180:1-181:10 (S.App. 306-307); S.App. 156-173. The head of the MAC program testified that if Pharmacia’s published AWP’s had been accurate, Medicaid would have set MACs at that level or that a MAC would not have been necessary, since Wisconsin would have reimbursed based on the lower AWP’s. R436/60:22-61:15 (S.App. 282-283).

Moreover, as discussed in Section I above, the jury could presume that the legislature, receiving conflicting and contested information about actual acquisition costs, intended to fix the EAC formula in accordance with, not in conflict with, the binding federal regulation defining it. And in any event, as discussed in Section III(B) above, uncertainty surrounding the *amount* of damages is not a sufficient basis to deny recovery. *Cutler*

Cranberry Co., 78 Wis. 2d at 233.

Pharmacia nonetheless asks this Court to overturn this damage award. It asserts that Wisconsin’s trial theory required the jury “to determine what reimbursement level would have been set by the legislature if DHFS had different information with which to counter the political pressure from pharmacy lobbyists” and that such a determination was “utter speculation.” PB 46. For reasons already discussed, this has no merit. Wisconsin proved to the jury’s satisfaction that DHFS would have used true Pharmacia AWP’s to reimburse at actual acquisition cost, not that the legislature would have changed the reimbursement rate. It was *Pharmacia* that tried to prove that if it had reported accurate AWP’s, the legislature would have reacted by increasing the reimbursement rate to at least AWP + 7%. That defense *did* depend on speculation, and nothing in the legislative record of the budget resolutions supported it.

B. The “duplicative damages” argument lacks merit

Because of differing statutes of limitation, Pharmacia knew the jury would be considering damages under §49.49(4m)(a)2 (which reached back to 1994) and §100.18 (which reached back to 2001) during different but overlapping periods. Pharmacia could have proposed an instruction to

guard against duplicative damages, but did not. Instead, it endorsed the language of the special verdict form.

During deliberations, the jury sent a note asking, “Are the dollar requests in [Question No. 3, the §100.18 damage question] and [Question No. 7, the §49.49 damage question] separate amounts so the amounts would be the total of the two figures added? Or is \$9,146,000 the total amount being requested? Are we awarding two dollar amounts or just one?”

R441/230:3-8. With the parties’ agreement, the court replied that “it is one amount being requested and the total amount being requested is

\$9,146,000.” R.441/230:15-25. The jury then sent a second note asking,

“If the \$9,146,000 (No. 7) amount is the total requested, where does No. 3 figure come from, \$7,440,000? How is it calculated?” Wisconsin asked

the court to reply that “the \$9 million figure is the total amount and the \$7 million is a subtotal for a limited period of time. In other words, the June

3rd, 2001 through the present.” When Pharmacia opposed this reply, the

court merely told the jury to “rely on their collective memories of the

evidence to decide the damage questions.” R441/231:15-232:23. The jury

entered \$2 million in damages on Question 3 and \$7 million on Question 7.

A.Ap. 145, 147.

Pharmacia contends that these findings as a matter of law contain \$2 million of the same damages over the overlapping time period of the two claims and asks this Court to reduce the total to \$7 million. PB 47-49. The circuit court rightly rejected this argument. Wisconsin law required the court to determine whether duplication occurred based on all the circumstances leading to the verdict. *See Cormican v. Larrabee*, 171 Wis.2d 309, 323-25, 491 N.W.2d 130 (Ct.App. 1992). In *Cormican*, where the court was “satisfied that the jury did not award duplicate damages,” reduction of the verdict was not necessary even though “duplication was possible.” *Id.* at 324.

Heeding this rule, the circuit court saw there was strong reason to conclude that the jury did what it did to protect *Pharmacia*. The two notes strongly suggested the jury believed that including amounts from the same time periods in both answers would have led to the numbers being *added*, thereby requiring *Pharmacia* to pay more than the jury wanted to award. As the circuit court wrote, “plaintiffs’ proof contained expert testimony supporting over \$9 million in damages caused by *Pharmacia*’s fraudulent representations. The jury broke these damages down between the two claims for relief it found were proven by Wisconsin. This was its

prerogative on this factual record.” A.Ap. 186. The court continued: “Both the \$2 million awarded for §100.18 damages and the \$7 million awarded for §49.49(4m)(a)2 damages are supported by ample credible evidence, and there is no basis to conclude that the damages awards overlap. If anything, the jury's questions to the court during deliberations demonstrate its intention not to duplicate awards.” *Id.*

Where, as here, there is sufficient evidence to support the award, a court “should not attempt to weigh the parties’ conflicting theories as to the meaning of the jury’s decisions.” *State v. Martinez*, 150 Wis.2d 47, 56, 441 N.W.2d 690 (1989). This is particularly true here, where Pharmacia successfully opposed giving the jury a helpful answer to its second question. Pharmacia cites *Spleas v. Milwaukee & Suburban Transport Corp.*, 21 Wis.2d 635, 641, 124 N.W.2d 593 (1963), but *Spleas* rejected the defendant’s speculation that the award represented double damages and held that “in the absence of proof that the jury's answer is erroneous, it will not be disturbed.” *Id.*

IX. PHARMACIA’S “EVIDENCE” ARGUMENTS ARE WRONG

The circuit court considered and rejected Pharmacia’s evidentiary arguments not only before and during the trial, but again in denying its

post-verdict motions. An appellate court “will uphold an evidentiary ruling if it concludes that the [trial] court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.” *State v. Walters*, 2004 WI 18, ¶14, 269 Wis.2d 142, 675 N.W.2d 778. Even an erroneous evidentiary ruling justifies a new trial only if there is a “reasonable possibility that the error contributed to the outcome of the case.” *Id.* ¶152. Under these rules, Pharmacia’s evidentiary arguments are hopeless.

A. PX-852

This document (A.Ap. 524) was an email to Pharmacia executives from a consultant, summarizing how First DataBank set AWP’s at the numbers the manufacturers wanted, through a method that enabled manufacturers to deny responsibility. Pharmacia moved *in limine* to exclude the email as hearsay, asserting that the consultant was not its agent. The circuit court denied the motion, ruling the email had non-hearsay uses and might be an admission as well. A.Ap. 654. Pharmacia renews the hearsay objection (PB 49-50), but that objection became moot at trial when one of the Pharmacia recipients of the email was shown it and *agreed* with

the key statements Pharmacia wanted excluded. R438/130:8-132:12 (S.App. 352-354).

B. “Unauthenticated documents”

Pharmacia claims the circuit court erroneously admitted unauthenticated exhibits. PB 50. It apparently means PX-457 (S.App. 55-65), which showed Pharmacia used inflated AWP’s to “market the spread” on generics. The objection has no merit. Pharmacia admitted that the author shown on PX-457 was a Pharmacia employee as of its date, that at another deposition he had admitted writing it, and that it came from Pharmacia’s files. A.Ap. 613-619. As the court ruled, those concessions satisfied §901.01’s requirement of “evidence sufficient to support a finding that the matter in question is what its proponent claims.” A.Ap. 620. Anyway, many other documents showed “marketing the spread,” as detailed in Wisconsin’s Cross-Appeal Brief. Thus the court was within its discretion in deciding there was no “reasonable possibility” this particular document affected the outcome.

C. Testimony of Pharmacia corporate designees

Wisconsin offered deposition testimony from Pharmacia §804.05(2)(e) “corporate designees.” Several of them were asked to read

aloud what certain exhibits said. Pharmacia says this was reversible error as to any exhibit the designee denied having seen. PB 51. The circuit court rightly overruled this objection. A.Ap. 662-669. Pharmacia does not dispute that the *documents themselves* were relevant and authentic. There is nothing objectionable about presenting such documents to the jury through asking corporate designees about them. As the court said, these were the people Pharmacia “put up to be questioned on these particular areas of inquiry” (*id.* 667). Anyway, the mere reading aloud of portions of documents that would have been admitted anyway had no “reasonable possibility” of changing the trial outcome.

D. The “OIG Guidance”

Pharmacia claims the court erred in admitting a redacted version of a 2003 “Guidance” document (PX-828, A.Ap. 534-546) from the Office of Inspector General of the federal Department of Health and Human Services. Wisconsin used PX-828 to show Pharmacia was on notice of information the Guidance conveyed to manufacturers, including a description of the “spread” and how manufacturers can influence the spread (A.Ap. 539); how state programs’ drug reimbursement rates use “price and sales data directly or indirectly furnished by pharmaceutical manufacturers,” and do so in the

“expectation that the data provided are complete and accurate” (*id.* 536); and how the federal government expects manufacturers to ensure “the integrity of data they generate that is used for government reimbursement purposes” (*id.* 537). The court allowed this redacted exhibit after carefully balancing its probative value against any potential for prejudice.

R431/176:17-179:23, 184:7-24 (S.App. 212-216); R432/15:15-29:16 (S.App. 219-233).

Rather than argue the irrelevance of the Guidance, Pharmacia complains only that it should have been excluded because it does not have the “force of law.” PB 52. The document was admitted to show what Pharmacia knew, not to argue what the law was. Wisconsin’s expert described it merely as “guidance that people pay attention to.” R434/144:23-145:1 (S.App. 244-245). Wisconsin’s closing argument called it “guidance,” without objection from Pharmacia. A.Ap. 842.

E. RedBook evidence

The circuit court admitted evidence that Pharmacia provided false AWP’s not only to First DataBank but also to another pricing service called RedBook, and that Pharmacia verified in advance the purported accuracy of the manifestly inflated AWP’s RedBook would publish. Pharmacia argues

this evidence was irrelevant because Wisconsin did not use RedBook for reimbursement. PB 52-53. However, as the court ruled, Wisconsin was entitled to assert that publishing false AWP's in any compendium was unlawful under §100.18, regardless of whether Wisconsin itself used that compendium for reimbursement. The court suggested that Pharmacia was entitled to an instruction not to consider RedBook evidence in computing damages (A.Ap. 595-596), but Pharmacia never requested one.

Moreover, the RedBook evidence was relevant to Wisconsin's First DataBank based claims. Pharmacia reported the same AWP's to RedBook as it reported to First DataBank. S.App. 4. That Pharmacia verified the "accuracy" of these absurd numbers to *anybody* supported a finding that Pharmacia's AWP's were knowingly false. Moreover, contrary to Pharmacia's assertion (PB 53), there *was* evidence – a deposition admission by a top Pharmacia executive – that Pharmacia conducted the same "verification" process with First DataBank as with RedBook. R438/133:18-135:16 (S.App. 355-357). The RedBook evidence was admissible to show how such verification worked.

F. The NAMFCU letter

In 2002, the National Association of Medicaid Fraud Control Units

sent Wisconsin a letter saying that a current national investigation had found AWP's significantly inflated on 400 drugs, including 47 Pharmacia drugs, that First DataBank had agreed to report accurate AWP's henceforth on these drugs, and that the States should take appropriate actions in response. R304/PX-1282 (S.App. 156-172). As discussed above, Wisconsin then worked with First DataBank to get these accurate AWP's into its system. This episode was an important part of Wisconsin's proof that if it had had accurate AWP's, it would have used them to lower its reimbursements. *Supra* at 12.

When Wisconsin offered this letter, the circuit court required that all references to fraud be redacted. R436/17:16-20:13, 85:6-90:23. The parties then agreed on redactions, with one minor dispute the court resolved in Wisconsin's favor. R436:135:25-138:16. Carrie Gray of Wisconsin Medicaid then testified to the 2000 episode. Following her testimony, Wisconsin offered the redacted PX-1282. Pharmacia replied, "No objection." R436/207:7-9 (S.App. 311). That was its last word on this exhibit during trial.

Pharmacia's resuscitated objection to admitting PX-1282 (PB 53-54) has no merit. The letter was admissible as part of the evidence that

Wisconsin used true AWP's when it got them. Ms. Gray's oblique reference to the letter stayed within the limits the circuit court had set; Pharmacia does not argue otherwise. R436/178:22-181:10 (S.App. 304-307). The exhibit itself after redactions said nothing about any governmental findings of fraud or other legal violations.

Similarly meritless is the complaint about counsel's comment in closing argument on this exhibit. PB 54; *see* R441/192:16-193:19. Not only did Pharmacia not object, but its failure to move for a mistrial waives this argument. *Nietfeldt v. American Mut. Liability Ins. Co.* 67 Wis.2d 79, 89, 226 N.W.2d 418 (1975). In any case, to obtain a new trial because of improper argument, Pharmacia must convince this Court that the verdict "in all probability would have been more favorable to appellants but for the improper conduct." *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis.2d 315, 329, 417 N.W.2d 914 (Ct.App.1987). Pharmacia never mentions this burden, much less shows it can meet it.

X. THE FEE AWARD WAS PROPER

The circuit court's fee award is reviewed for erroneous exercise of discretion. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis.2d 1, 683 N.W.2d 58 ("*Kolupar I*").

A. Pharmacia's lodestar arguments have no merit

Pharmacia “vetted plaintiff’s [original] submissions virtually line by line,” and Wisconsin agreed to make most of the reductions Pharmacia demanded. A.Ap. 181. The court found the fees, “as whittled down previously by Pharmacia and further by the court here, were reasonably and necessarily incurred in the case against Pharmacia under the lodestar method [of *Kolupar I*].” A.Ap. 184.

Pharmacia identifies no additional hours the court should have cut. Instead, it argues the court should have reduced the lodestar for “limited success,” because the work “was performed in connection with claims against 30 defendants but there was success against only one.” PB 60, citing *Hensley v. Eckerhart*, 461 U.S.424 (1983). This has no merit. Wisconsin provided evidence that its submission was “shorn of fees incurred litigating cases against other defendants except to the extent that the work was reasonably necessary to advance the case against Pharmacia.” A.Ap. 181. Pharmacia provided no contrary evidence. Courts compensate hours reasonably spent pursuing a successful claim even if some of those hours also relate to claims against other defendants plaintiff has not prevailed against. *Spano v. Simendinger*, 613 F.Supp. 124, 125-26

(S.D.N.Y. 1985); *Hughes v. Repko*, 578 F.2d 483, 486 (3rd Cir. 1978);
Lyons v. Cunningham, 583 F.Supp. 1147, 1152 (S.D.N.Y. 1983);
Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1215 (3d
Cir. 1978). *Hensley* merely holds that a fee award against a defendant may
be reduced for limited success as against *that defendant*. Even then, hours
reasonable and necessary to both the successful and unsuccessful claims are
compensable. *Cook v. Public Storage, Inc.*, 2008 WI App 155 ¶¶97, 314
Wis.2d 426, 761 N.W.2d 645.

Pharmacia also argues the court lacked discretion to award fees for
work by two DOJ lawyers who had to reconstruct their hours. PB 59.
However, reconstructed records may serve as the basis for a fee award as
long as the applicant produces sufficient evidence to support the request.
See Heasley v. C.I.R., 967 F.2d 116, 123 (5th Cir. 1992) (“Failure to
provide contemporaneous billing records . . . does not preclude recovery”).
The attorneys explained how they reconstructed their time by reviewing
correspondence, emails, and pleadings. They compensated for any
imprecision in hours by requesting hourly rates based on the hourly cost to
Wisconsin of their salary and benefits, rather than the higher market rate the
law allows government lawyers to claim. *See, e.g., State of Illinois v.*

Sangamo Const. Co., 657 F.2d 855, 861 (7th Cir. 1981).

B. The statutory arguments for denying fees have no merit

The circuit court rightly found Pharmacia's arguments for denying fees would violate the fee statutes' plain wording, punish counsel who had provided "outstanding service to the State of Wisconsin," and "reward the wrongdoer Pharmacia." A.Ap. 178.

1. The Attorney General retained Miner, Barnhill & Galland ("MBG") in a written 2004 agreement requiring the firm to look only to court-ordered fees and expenses. R365, Ex. D (S.App. 208-209). A member of the Governor's staff (not the Governor, as Pharmacia claims) wrote a letter approving employment of the firm to represent Wisconsin. R360, Ex. A (S.App. 207), then a week later wrote another letter asserting that the firm was approved only to represent "private citizens" (A.Ap. 108). Despite this second staff letter, the Governor took no action to stop MBG from representing Wisconsin, and for the next three years MBG represented Wisconsin, the only plaintiff, in court with no objection by the Governor or his staff. In 2007, the Governor entered into a "Special Counsel Agreement" with MBG which stated that he had approved the 2004 filing of suit, that MBG had been assisting the Attorney General since its filing,

and that on successful resolution MBG could petition for fees based on “the total number of hours worked in the case from its onset in 2004.” R365, Ex. B (S.App. 200-206).

Pharmacia argues that Wis. Stat. §14.11(2), which allows the Governor to employ private counsel to assist the Attorney General under a written fee contract, bars Wisconsin from recovering for MBG work performed before the 2007 Special Counsel Agreement. PB 57. Pharmacia offers no reason why the statute was not satisfied by that Agreement’s approval of MBG being compensated for all work from the case’s inception. Moreover, Pharmacia lacks standing to allege a violation of §14.11(2). It was not “injured in fact” by delay in executing the Agreement, and is outside the “zone of interests” §14.11(2) protects. *Zehetner v. Chrysler Fin. Co. LLC*, 2004 WI App 80, ¶12, 272 Wis.2d 628, 679 N.W.2d 919. Section 14.11(2) protects taxpayers, not wrongdoing defendants.

2. For the same reason, Pharmacia lacks standing to invoke Wis. Stat. §165.25(1m), another taxpayer-protection provision that requires all expenses of DOJ proceedings in representing the State to be based on budget appropriations. PB 58. In any case, this law does not forbid the

Governor from agreeing, as he did here, that Special Counsel will advance all expenses and look only to defendants to recover them. Otherwise, as the court said, the statute would prevent retainer agreements such as the one in this case, which, he noted, “wildly favor[s] Wisconsin’s taxpayers.” A.Ap. 178.

3. Pharmacia seeks to disallow roughly \$48,000 in time incurred before the case was filed. It argues that in §49.49(6)’s authorization of “the costs of investigation and the expenses of prosecution, including attorney’s fees,” “attorney’s fees” applies only to “expenses of prosecution.” PB 58. No case supports this parsing. In any case, prosecutions can and always do begin before formal filing of the case.

4. As the court wrote, the attorney-client contract has “no bearing on the issue of whether reasonable attorney's fees may be recovered under a fee shifting statute,” and Wisconsin courts have approved fees “even where the client has no actual obligation to pay an attorney, and where the negotiated fee is purely contingent.” A.Ap. 177, *citing Richland School District v. DILHR*, 174 Wis. 2d 878, 912, 498 N.W.2d 826 (1993). Nonetheless, Pharmacia argues that §§100.18(11)(b)2 and 49.49(6) are not “ordinary” fee-shifting statutes, but allow awards only to the extent the

client contractually must pay the lawyer. Since MBG agreed to look solely to the fee award for payment, Pharmacia says Wisconsin is entitled to no fees. PB 58-59.

Nothing in either statute's text mentions such a limitation.

Pharmacia bizarrely reads *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, 303 Wis.2d 258, 735 N.W.2d 93 ("*Kolupar II*") and *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis.2d 493, 577 N.W.2d 617 (1998), to hold that the only permissible purpose of §100.18(11)(b)2's fee-shifting is to make the plaintiff "whole," and hence the statute only allows awards that reimburse a client's contractual obligation. PB 58-59. *Kolupar II* held only that "costs" in §100.18(11)(b) can include litigation expenses beyond the items listed in the general costs statute. 303 Wis.2d 258, ¶3. *Gorton* held that a contract providing a fee of 40% of the "gross amount recovered" meant 40% of the damage award, not 40% of the sum of the damages award and the additional court-ordered fee. 217 Wis.2d 493, ¶28.

CONCLUSION

Other than as specified in Wisconsin's cross-appeal, the judgment against Pharmacia should be affirmed.

CERTIFICATION

I hereby certify that the foregoing brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 14,891 words.

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CERTIFICATION

In accordance with §809.19(12)(f), Wis. Stats., I hereby certify that the text of the electronic copy of the Respondent's Brief is identical to the text of the paper copy of the Respondent's Brief.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2010AP000232-AC

State of Wisconsin,

Plaintiff-Respondent-Cross-Appellant,

v.

Abbott Laboratories, AstraZeneca LP, AstraZeneca Pharmaceuticals, LP, Aventis Behring, LLC f/k/a ZLB Behring LLC, Aventis Pharmaceuticals, Inc., Ben Venue Laboratories, Inc., Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Roxane, Inc., Bristol-Myers Squibb Co., Dey, Inc., Ivax Corporation, Ivax Pharmaceuticals, Inc., Janssen LP f/k/a Janssen Pharmaceutical Products, LP, Johnson & Johnson, Inc., McNeil-PPC, Inc., Merck & Co. f/k/a Schering-Plough Corporation, Merck Sharp & Dohme Corp. f/k/a Merck & Company, Inc., Mylan Pharmaceuticals, Inc., Mylan, Inc. f/k/a Mylan Laboratories, Inc., Novartis Pharmaceuticals Corp., Ortho Biotech Products, LP, Ortho-McNeil Pharmaceutical, Inc., Pfizer Inc., Roxane Laboratories, Inc., Sandoz, Inc. f/k/a Geneva Pharmaceuticals, Inc., Sisor, Inc. f/k/a Gensia Sisor Pharmaceuticals, Inc., SmithKline Beecham Corp. d/b/a GlaxoSmithKline, Inc., TAP Pharmaceutical Products Inc., Teva Pharmaceuticals USA, Inc., Warrick Pharmaceuticals Corporation, Watson Pharma, Inc. f/k/a Schein Pharmaceuticals, Inc. and Watson Pharmaceuticals, Inc.,

Defendants,

Pharmacia Corporation,

Defendant-Appellant-Cross-Respondent.

BRIEF OF CROSS-APPELLANT THE STATE OF WISCONSIN

ON APPEAL FROM THE
CIRCUIT COURT FOR DANE COUNTY,
JUDGE RICHARD G. NIESS, CIRCUIT JUDGE, PRESIDING
Circuit Court Case No. 04-CV-1709

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES ON CROSS APPEAL	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE FOR THE CROSS-APPEAL	2
I. NATURE OF THE CASE	2
II. STATEMENT OF FACTS FOR THE CROSS APPEAL.....	3
A. Evidence of false AWP's that Pharmacia caused First DataBank to send Wisconsin.....	3
B. Evidence of causing false statements of AWP to be made each time claims were paid	4
C. Evidence of Pharmacia's "marketing the spread"	6
D. Circuit court proceedings on forfeitures.....	13
E. Circuit court proceedings on injunctive relief	19
ARGUMENT	20
I. THE COURT ERRED IN STRIKING THE JURY'S FINDING OF THE NUMBER OF FALSE STATEMENTS	20
A. Under a correct interpretation of the statute, credible evidence supported the jury's finding of 1,440,000 false statements	21

B. The circuit court’s legal reasons for overturning the jury’s findings are unpersuasive.....	25
II. THE CIRCUIT COURT ALSO ERRED BY MISINTERPRETING THE “MATERIALITY” REQUIREMENT	29
III. THE CIRCUIT COURT CONSIDERED TWO IMPROPER FACTORS IN FIXING THE AMOUNT PER VIOLATION	34
A. The circuit court erred in considering Pharmacia’s supposed ability to “pass on” forfeitures as a mitigating factor	36
B. Wisconsin’s “government knowledge” is irrelevant in setting forfeitures.....	39
IV. THE CIRCUIT COURT ERRED IN FAILING TO ENTER EFFECTIVE INJUNCTIVE RELIEF	41
A. Wisconsin had strong reasons for its requested injunction	42
B. The circuit court’s reasons for rejecting the requested injunction have no basis in law or the record	44
CONCLUSION AND REQUEST FOR RELIEF	49

TABLE OF AUTHORITIES

WISCONSIN CASES

	<u>Page</u>
<i>Bachowski v. Salamone</i> , 139 Wis.2d 397, 407 N.W.2d 533 (1987)	49
<i>Columbia County v. Bylewski</i> , 94 Wis.2d 153, 288 N.W.2d 129 (1980)	45
<i>Radford v. J.J.B. Enterprises, Ltd.</i> , 163 Wis.2d 534, 472 N.W.2d 790 (Ct.App. 1991)	31
<i>School District of Slinger v. Wisconsin Interscholastic Athletic Association</i> , 210 Wis.2d 365, 563 N.W.2d 585 (Ct.App. 1997).....	42
<i>State v. C. Spielvogel & Sons Excavating</i> , 193 Wis.2d 464, 535 N.W.2d 28 (Ct.App. 1995)	36
<i>State v. Fonk's Mobile Home Park & Sales, Inc.</i> , 117 Wis.2d 94, 343 N.W.2d 820 (Ct.App. 1983)	41, 45
<i>State v. Menard, Inc.</i> , 121 Wis.2d 199, 358 N.W.2d 813 (Ct.App. 1984)	26-28
<i>State v. Munz</i> , 198 Wis.2d 379, 541 N.W.2d 821 (Ct.App. 1995)	31
<i>State v. Schmitt</i> , 145 Wis.2d 724, 429 N.W.2d 518 (Ct.App. 1988)	35,36
<i>State v. Seigel</i> , 163 Wis.2d 871, 472 N.W.2d 584 (Ct.App. 1991)	49

State v. Tappa,
127 Wis.2d 155, 378 N.W.2d 883 (1985) 21

State v. Williams,
179 Wis.2d 80, 505 N.W.2d 468 (Ct.App. 1993) 32-33

State v. Wolske,
143 Wis.2d 175, 420 N.W.2d 60 (Ct.App. 1988) 21

Tammi v. Porsche Cars North America, Inc.,
2009 WI 83, 320 Wis.2d 45, 768 N.W.2d 783 20

Weiss v. United Fire & Casualty Co.,
197 Wis.2d 365, 541 N.W.2d 753 (1995) 21

FEDERAL CASES

*National Association of Home Builders v. Occupational
Safety & Health Administration*, 602 F.3d 464 (D.C. Cir. 2010)..... 21

Neder v. United States, 527 U.S. 1 (1999) 31

WISCONSIN STATUTES AND REGULATIONS

Wis. Stat. §49.49(4m)(a)2 *passim*

Wis. Stat §49.49(4m)(b) *passim*

Wis. Stat. §100.18 2, 20

Wis. Stat. §100.18(10)(b) 47

Wis. Stat. §100.18(11)(d) 41

Wis. Stat. §100.20 27

OTHER AUTHORITIES

Areeda and Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (3d ed. 2000)..... 38

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STATEMENT OF THE ISSUES ON CROSS APPEAL

I. Did the circuit court err in striking the jury’s finding of the number of false statements of material fact Pharmacia made or caused to be made in violation of Wis. Stat. § 49.49(4m)(a)2?

Answered by the circuit court: No.

II. Alternatively, did the circuit court, in counting “false statements,” err in holding that an AWP transmitted to Wisconsin by First DataBank was “material” only if it actually determined the amount of at least one specific reimbursement?

Answered by the circuit court: No.

III. Did the circuit court consider improper factors in determining the proper amount of forfeiture to impose for each violation?

Answered by the circuit court: No.

IV. Upon upholding the jury’s liability and damage awards, did the circuit court err in limiting injunctive relief to an order to obey the text of the relevant statutes?

Answered by the circuit court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wisconsin believes oral argument is necessary, given the novelty and complexity of the issues involved. *See* Wis. Stat. §809.22.

Furthermore, Wisconsin believes the opinion would likely satisfy the criteria for publication under §809.23.

STATEMENT OF THE CASE FOR THE CROSS-APPEAL

I. NATURE OF THE CASE

Among other relief, Wisconsin sought forfeitures under Wisconsin Statutes §49.49(4m)(b), which provides that a person “may be required to forfeit not less than \$100 nor more than \$15,000 for each statement, representation, concealment or failure” that violates §49.49(4m)(a)2. The circuit court therefore instructed the jury to determine the number of false statements that Pharmacia made or caused to be made for use in determining rights to Wisconsin Medicaid payments. The jury found 1,440,000 such false statements. The circuit court struck the jury’s answer and conducted further proceedings to determine the proper count. In those proceedings, the court rejected a theory, advanced by Wisconsin in the alternative, that would have resulted in counting at least 26,319 false statements. Instead, the circuit court concluded that credible evidence supported a finding of 4,578 false statements. The circuit court imposed forfeitures of \$1,000 per violation, resulting in a total of \$4,578,000.

After the jury found Pharmacia liable for damages under §§49.49(4m)(a)2 and 100.18, Wisconsin sought to enjoin Pharmacia from continuing to cause false AWP’s to be reported on generic drugs, and related

specific relief. Instead, the circuit court entered an injunction that merely directed Pharmacia to obey the statutes as written.

In this cross-appeal, Wisconsin asserts that the circuit court either should have accepted the jury's finding of 1,440,000 false statements, or should have calculated the number by the alternative theory advanced by Wisconsin. Wisconsin also asserts that the circuit court considered impermissible factors in determining the amount per violation. It seeks remand for recalculation of forfeitures. Wisconsin further seeks remand for entry of the specific injunction it requested.

II. STATEMENT OF FACTS FOR THE CROSS-APPEAL

The following Statement of Facts supplements (and assumes familiarity with) the underlying facts of the case set forth in Wisconsin's Response Brief.

A. Evidence of false AWP's that Pharmacia caused First DataBank to send Wisconsin

Wisconsin's Response Brief has described the evidence showing the process by which Pharmacia sent price information during the relevant period to First DataBank, and how that process caused First DataBank to publish AWP's for Pharmacia drugs. The Response Brief likewise has

described the evidence supporting the finding that all Pharmacia AWP's thus supplied were false. *See* Response Brief at 7-11.

During the relevant time period (which, for Wisconsin's claim under §49.49(4m)(a)2, began on June 3, 1994), First DataBank sent AWP's to Wisconsin monthly through the end of 1995, and at least semi-monthly thereafter. R304/DX-492.¹ Based on data from Wisconsin's damages expert regarding each Pharmacia drug product, Wisconsin provided evidence that no less than 26,319 false statements of Pharmacia AWP's were sent to Wisconsin during the relevant damages period. R304/PX-436M, PX-436N; R348, Ex. C.

B. Evidence of causing false statements of AWP to be made each time claims were paid

A pharmacy submits a claim for reimbursement to Wisconsin when it dispenses a drug to a Medicaid beneficiary. R435/138:10-18. In filling the prescription, the pharmacy transmits to Wisconsin via computer the beneficiary's Medicaid information, the "national drug code" associated

¹ Citations in this brief follow the format of Wisconsin's Response Brief. *See* Response Brief at 2, fn. 1. Certain admitted exhibits that are not included in the Supplemental Appendix are cited by their Record citation, *e.g.*, "R304/DX-492" (for Defendant's Exhibit 492) or "R304/PX-436M" (for Plaintiff's Exhibit 436M).

with the drug dispensed, the prescribing doctor, and the pharmacy's "usual and customary" price for the drug (the price that a cash-paying customer would be charged). R436/68:18-69:1, 158:14-25.

In response, Wisconsin's computer system fills three fields with pricing information: (1) the "usual and customary" price provided by the pharmacy with the claim, (2) the AWP for the drug code in question (and Wisconsin's discount rate), and (3) the current Maximum Acquisition Cost (MAC) for the drug code, if Wisconsin has calculated a MAC for it.

R.436/61:6-15, 160:13-19, 185:4-10; R.435/137:22-138:6,

The amount eligible for reimbursement on any claim is the lowest of the three fields (after adding a dispensing fee to the last two fields).

R436/61:6-15. The computer applies this algorithm and transmits to the pharmacy Wisconsin's approval of the claim, the reimbursement calculated according to the algorithm, and the co-pay for which the beneficiary is liable. The transaction is then completed. R436/159:1-8.

The relevant time period under Wisconsin's §49.49(4m)(a)2 claim began June 3, 1994. Between this date and the end of 2006, more than 2.2 million Medicaid claims for reimbursement for Pharmacia drugs were processed by Wisconsin. R437/14:8-9, 14:16-15:9. In each of those

claims, Wisconsin's data system stated a specific AWP for the claim through the above process in order to apply the reimbursement algorithm. R436/61:6-15; 137:22-138:6, 160:13-19, 185:4-10. (In over 1.5 million of these claims, not only was a statement of false AWP made, but the AWP-determined price was the lowest of the three prices examined in the algorithm and thus controlled the reimbursement. R437/14:16-15:9.)

C. Evidence of Pharmacia's "marketing the spread"

An important category of the evidence considered by the circuit court in deciding the amount of forfeitures per false statement and in deciding the scope of injunctive relief was evidence that Pharmacia knew that Wisconsin based its reimbursement on Pharmacia's published AWP's and that Pharmacia marketed its drugs based on the inflation of the AWP. The "spread" is the difference between the amount a provider is reimbursed for dispensing a drug and the provider's cost to acquire it. R434/133:4-114; R.Ap.56. Such a spread provides profit to the provider on the "ingredient cost" component of reimbursement. Where third-party payers reimburse providers on the basis of formulas that utilize AWP, an inflated AWP creates a spread, and thus a profit for providers. *See, e.g., R.Ap. 55, 128.*

“Marketing the spread” refers to a manufacturer’s use of the “spread” on drugs to induce providers to purchase and dispense its drugs. At trial, Pharmacia denied marketing the spread, saying that doing so would be “unethical” and possibly fraudulent. R438/195:11-196:14 (R.Ap. 361-362). However, Wisconsin offered extensive evidence from Pharmacia’s own records showing that Pharmacia indeed marketed the spread as to both its brands and its generics. Evidence that Pharmacia marketed the spread not only demonstrated liability but was also important to support Wisconsin’s requested forfeitures and injunctive relief. The following is a brief summary of that evidence.

1. Wisconsin offered evidence that even before a patent expired on a Pharmacia brand drug, Pharmacia’s inflation of AWP could be used to make spreads on its brands “competitive” with the spreads on competitor drugs that also might be prescribed for the problem a patient had. As described in Wisconsin’s Response Brief, AWPs on Pharmacia’s brands were calculated by marking up the Wholesale Acquisition Cost (WAC, the ostensible price at which wholesalers purchased drugs) by either 20% or 25%. In an internal memo, Pharmacia noted that with its “AWP 25% greater than catalog in most cases there is [] ‘hidden’ profit in our [brand]

products.” R.Ap. 100. When Pharmacia was considering launching an anti-depressant brand under the name Prolift, it had an internal debate whether its AWP should be marked up over the Pharmacia WAC price by 20% versus 25%. The essence of this debate was that competitors’ antidepressants, such as Prozac and Wellbutrin, were marked up by 25% over those drugs’ WACs, and that suggesting an AWP inflated by only 20% over WAC would produce resistance from providers who would be making less profit through the spread on Prolift. R.Ap. 105-109.

2. As described in Wisconsin’s Response Brief, once a brand drug’s patent expires, other companies can begin selling a chemically identical drug if the drug is considered a multi-source brand. That drug then experiences greater price competition, and the prices inevitably begin to fall. Pharmacies generally may (and sometimes by law *must*) substitute a generic drug for the multi-source brand the physician has prescribed.

R439/24:24-25:15. In this situation, the profit that a pharmacy can earn on the spread becomes a prime motivator of its decision whether to carry and substitute a particular generic. R434/133:15-136:12 (R.Ap. 240-243).

Wisconsin offered evidence that following the introduction of generic competition with its brand drugs, Pharmacia marketed its brand

drugs based on the spread created by false AWP. In a 1995 internal memo, Pharmacia told its sales force to market its brand antidepressant Xanax to pharmacies by showing them that dispensing Xanax “leads to a greater dollar margin as compared to the generics” than dispensing cheaper generic substitutes, because Xanax’s AWP resulted in bigger gross profits from Medicaid reimbursement payments. R.Ap. 55. Pharmacia noted that these profits are realized from the “spread,” and pointed out that dollar reimbursement by Wisconsin Medicaid was, at the time, calculated at AWP minus 10%. The memo provided a table for marketing to Wisconsin pharmacies:

	Generic	Brand
<u>Wisconsin</u>		
Reimburse	9.23	66.60*
Disp. Fee	4.69	-4.69
Drug Cost	-4.00	-59.20
Net Margin *AWP-10%	9.92	12.09

R.Ap. 65. Thus, because of Pharmacia's inflated AWP, the pharmacy could reap a profit of \$12.09 for the Xanax brand versus \$9.92 for a generic substitute.

3. Pharmacia sells generic as well as brand drugs, and sets AWPs on generics at highly inflated levels. *See* Wisconsin's Response Brief at 9. Wisconsin provided extensive evidence that Pharmacia used these inflated AWPs to market the resulting spreads to providers. In the "Pricing and Contracts" section of the Policies and Procedures Manual for Pharmacia's generics subsidiary, Pharmacia acknowledged:

The major chains, mail orders, and to a less[er] extent independents consider two factors in the buying decision. The first is acquisition cost and then, what they are reimbursed at. AWP is the basis for determining third party reimbursement. It is this spread between acquisition cost and reimbursement that is used to make the purchasing decision. All things being equal, the generic offering the greatest spread will be awarded the business.

R.Ap. 89. In another policy document, Pharmacia recognized the importance of an inflated AWP for marketing generics:

[D]istributors of pharmaceuticals stand to make more money dispensing generics because of artificial pricing and reimbursement schemes based on average wholesale price (AWP).

R.Ap. 118.

The margin that can be made on generics is enhanced by the difference between an inflated AWP set by the generic manufacturer

and the actual acquisition cost which is lowered by a series of “unpublished” discounts.

R.Ap. 124.

One Pharmacia document acknowledged that “[t]hree decades of gaming of the present reimbursement scheme” had “provided a lucrative avenue of profit” for providers. R.Ap. 95. Pharmacia’s generic subsidiary, Greenstone, produced slides entitled “Greenstone Profit Opportunity, Fluconazole Tablets” that spelled out a “lost profit per day” of \$11,150.61 for pharmacies if they did not take advantage of Pharmacia’s inflated AWP for Fluconazole of \$100 compared to the actual price of \$2.66. R.Ap. 111; R.Ap. 11-13 (lines 155:7-162:2).

On June 1, 2004, Greenstone approved a strategy of “hold[ing the] line on SWP [the “suggested” AWP]s that Greenstone sent to First DataBank], creat[ing] spreads at more competitive level vs. Teva [a competing generics manufacturer].” R.Ap. 114.

In a letter to American Oncology Resources (AOR) regarding its purchase of oncology drugs, Pharmacia promoted the fact that “spread from acquisition cost to reimbursement on the multi-source products offered on the contract give[s] AOR a wide margin for profit.” R.Ap. 101. Pharmacia also marketed the fact that “[s]ome of the drugs on the multi-source list

offer AOR margins of over 75% versus acquisition cost of the drug,” and that for a “drug like Adriamycin, the reduced pricing offers AOR a profit of over \$7,000,000 when reimbursed at AWP.” *Id.*

4. Wisconsin offered evidence that in contract proposals to customers purchasing its drugs, Pharmacia marketed the spread by listing the inflated AWP and the much lower actual acquisition price (and sometimes the difference between the two). In one such proposal, Pharmacia set forth the “List Price” (which Pharmacia equates with the WAC) and the AWP, which was 20% or 25% above the List Price for brands. The prices at which Pharmacia was proposing to sell the drugs, however, were far lower than the List Prices. For example, Pharmacia proposed to offer Toposar for \$60, and informed the provider that the AWP, on which the provider would be reimbursed, was \$698.65, a markup of 1,164%. Pharmacia also calculated and set forth the “profit” for the provider – \$638.65. R.Ap. 128; R.Ap. 21-22 (lines 103:14-105:8). For other proposals or contracts calling attention to huge spreads, see R.Ap. 66-87, 92-93, 96-99, 129-131.

D. Circuit court proceedings on forfeitures

One of the two claims Wisconsin took to trial was brought under Wis. Stat. §49.49(4m)(a)2, which provides: “No person, in connection with medical assistance, may . . . knowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.” In addition to damages and injunctive relief, Wisconsin sought forfeitures under §49.49(4m)(b), which provides that a person who violates subsection 4m “may be required to forfeit not less than \$100 nor more than \$15,000 for each statement, representation, concealment or failure.” Since the number of such false statements or representations was a disputed issue of fact, the circuit court submitted Question No. 5 to the jury, asking: “How many such false statements or representations of material fact for use in determining rights to a Wisconsin Medicaid payment did Pharmacia Corporation knowingly make or cause to be made?” R441/235:10-15.

As described above, every claim from a pharmacy generated a statement about the relevant drug’s AWP as part of the algorithm that determined the amount of reimbursement. During the relevant period, over 1.5 million claims were processed. Wisconsin reduced this number by

approximately 4% for technical reasons to 1,440,000. R441/108:23-109:15. Since §49.49(4m)(a)2 made Pharmacia liable for causing a false statement or representation “for use in determining rights to a benefit or payment,” Wisconsin asked the jury to find that Pharmacia had caused 1,440,000 such false statements. *Id.*

This was the only input the jury received on how to count false statements. Although Wisconsin set out its method of counting the number of false statements in its trial brief (R284, at 15), Pharmacia raised no objection to that method *in limine* or while the evidence was being offered at trial. Nor did Pharmacia object during Wisconsin’s closing argument when Wisconsin asked the jury to answer Jury Question No. 5 with the number of false statements made in processing claims. R441/108:23-109:15. Pharmacia’s closing argument did not mention Jury Question No. 5 or the issue of counting false statements. R441/115:4-180:13. After finding liability under §49.49(4m)(a)2, the jury agreed with Wisconsin on the number of false statements, answering “1,440,000” on Question No. 5. A.Ap. 146.

Although Pharmacia had ignored the “number of false statements” issue in the trial, after the verdict it moved to change the jury’s answer to

Question No. 5 to zero. R310 at 28 n.5. On May 15, 2009, the circuit court held that as a matter of law Wisconsin's method of counting false statements was invalid. The court asserted that that method was "not directed at the actual culpable conduct of Pharmacia, but at the consequences of that conduct." A.Ap. 151. But the court refused to change the jury's answer to zero, because there was "clearly evidence in this record that would support the imposition of forfeitures under §49.49(4m)" and that number "cannot be determined without a full analysis of the factual record, and further argument from counsel." *Id.*, 152.

On June 18, 2009, the circuit court rejected Pharmacia's argument that the time had expired for conducting further proceedings to determine the number of forfeitures. A.Ap. 158-161. (Pharmacia renews this argument on its appeal; Wisconsin has answered it in Section V of its Response Brief.) The parties had earlier agreed that any further proceedings on forfeitures should be conducted on the basis of the existing trial record. A.Ap. 158. On September 30, 2009, the circuit court found that Pharmacia had caused 4,578 false statements to be made and imposed a forfeiture of \$1,000 per violation. A.Ap. 168.

In coming to this conclusion, the circuit court held that credible evidence in the record supported the conclusion that:

- (1) all of Pharmacia's published AWP's were false;
- (2) Wisconsin reimbursed pharmacies for dispensing certain Pharmacia drugs based on these published AWP's;
- (3) Wisconsin received all of its false Pharmacia AWP pricing information from compendia published by First DataBank which, in return, obtained it from Pharmacia; and
- (4) Pharmacia knew that Wisconsin would and did rely on the false AWP's published in First DataBank in determining the amount to reimburse the participating pharmacies for dispensing certain Pharmacia products.

A.Ap. 163. The court added: "Indeed, the jury's verdict determined the evidence on these points to be largely clear and convincing." *Id.*

Wisconsin argued that no less than 26,319 false statements of Pharmacia's AWP were sent by First DataBank to Wisconsin during the relevant damages period. It based that number on the frequency with which AWP updates were sent to Wisconsin Medicaid and data regarding each Pharmacia drug product. R304/DX-492; R304/PX-436M, PX-436N; R348 & Ex. C.

Pharmacia objected to the 26,319 count based on, among other grounds, the fact that First DataBank's monthly (and then semi-monthly)

transmittals of AWP to Wisconsin contained only AWP that differed from those previously transmitted. Pharmacia argued that only those AWP that had changed since the previous transmittal should be counted. The circuit court rejected this argument, holding that once a false AWP was transmitted to Wisconsin about a drug, a subsequent transmittal to Wisconsin was an implied representation that the AWP of any drug not included in the update remained at its previously reported level, and was hence “a new misrepresentation caused to be made by Pharmacia which, again, knew that Wisconsin Medicaid was relying on its pricing through First DataBank.” A.Ap. 165. Hence the court held that “to underpin its forfeitures claim, plaintiff can certainly rely on the credible evidence establishing the number of times First DataBank published Pharmacia’s AWP, either initially at the time of the particular drug’s rollout or on update. *Id.* Pharmacia’s appeal has not challenged this holding.

In applying this holding, however, the court imposed a further limitation. Interpreting the requirement in §49.49(4m)(a)2 that the false statement be “material,” the circuit court held that the transmission of a particular false AWP would be deemed to involve a “material” fact only if a claim was actually paid on the basis of that AWP between the time it was

transmitted and the time the next set of AWP's was transmitted. *See* A.Ap. 165-168. The circuit court found record evidence of 4,578 AWP's transmitted after June 3, 1994 that had been used to determine reimbursement, and adopted that number as a "reasonable basis for establishing forfeitures under the credible evidence standard." A.Ap. 168.

The court then turned to the amount per false statement to impose. It found the "magnitude and duration of Pharmacia's fraud" to be "aggravating factors which must be accorded substantial weight, consistent with the respect owed to the jury's verdict." A.Ap. 169. It found another aggravating factor in the fact that "almost all of the misrepresentations resulted in multiple overpayments by Wisconsin Medicaid." *Id.* The court acknowledged that the damages found by the jury did not go "directly into Pharmacia's pockets," but found this mitigating factor "minimal at best," since "it is no stretch to conclude that Pharmacia indirectly benefited from these overpayments in that Wisconsin pharmacies were incented to sell Pharmacia products." *Id.*

However, the court found two significant mitigating factors. First, it cited evidence that Pharmacia had submitted in support of its unsuccessful "government knowledge" defense – the defense that Wisconsin had been

aware of inflation in AWP – and asserted that there was “plenty of blame to go around.” *Id.* at 169-170. Second, the court also declared it to be “largely wishful thinking to believe that imposing forfeitures on a corporation of Pharmacia’s magnitude actually punishes it” and that a large forfeiture “would be simply passed on to Pharmacia’s consumers in the form of price increases, just like a windfall tax.” *Id.* at 170. On the other hand, the court said, more than a *de minimis* award was required, since \$100 per violation “would not register so much as a blip on Pharmacia’s multi-billion dollar annual fiscal radar screen.” *Id.* Weighing these factors, the court imposed a \$1,000 forfeiture for each of the 4,578 violations it had found. *Id.*

E. Circuit court proceedings on injunctive relief

After the verdict, Wisconsin requested injunctive relief. It narrowed an original proposal that would have covered both generics and brands, and ultimately requested three measures, described in detail in Section IV of the Argument, designed (a) to assure accurate reporting by Pharmacia to the price reporting services of prices on generic drugs, (b) to require efforts by Pharmacia to correct false prices in the reporting services if they came to Pharmacia’s attention; and (c) periodic certification by Pharmacia to the

Wisconsin Attorney General of the generic prices that Pharmacia has chosen to report. R330 (Brief with proposed order).

In an oral ruling, the circuit court refused to issue the injunction requested by Wisconsin, and merely entered an injunction that recited the language of §§100.18 and 49.49(4m)(a)2 and ordered Pharmacia not to violate the statutes as written. A.Ap. 172-173, 867-878. The court's reasons are discussed in Section IV of the Argument below.

ARGUMENT

Although the circuit court otherwise handled this complex case commendably, it erred in ruling on forfeitures and in failing to impose effective injunctive relief.

I. THE COURT ERRED IN STRIKING THE JURY'S FINDING OF THE NUMBER OF FALSE STATEMENTS

Review of the jury's determination of the number of false statements involves two questions with different standards of appellate review. In deciding how to count the false statements or representations that Pharmacia caused to be made "for use in determining rights to a benefit or payment" under §49.49(4m)(a)2, the circuit court relied on its interpretation of the statute. This Court reviews that interpretation *de novo*. *Tammi v.*

Porsche Cars N. Am., Inc., 2009 WI 83, ¶ 25, 320 Wis.2d 45, 768 N.W.2d 783. If Wisconsin’s method of counting correctly interpreted the statute, the circuit court could reject the jury’s determination only if it was unsupported by “any credible evidence.” *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388-389, 541 N.W.2d 753 (1995).

A. Under a correct interpretation of the statute, credible evidence supported the jury’s finding of 1,440,000 false statements

It is for the legislature to define forbidden conduct. *State v. Wolske*, 143 Wis.2d 175, 187, 420 N.W.2d 60 (Ct.App. 1988). An integral aspect of deciding what is unlawful is determining whether an unlawful act involves one or several distinct offenses. In other words, “to define the violation is to define the unit of prosecution.” *Nat’l Ass’n of Home Builders v. Occupational Safety & Health Admin.*, 602 F.3d 464, 467 (D.C. Cir. 2010); *State v. Tappa*, 127 Wis.2d 155, 164-65, 378 N.W.2d 883 (1985) (examining legislative intent to determine “allowable unit of prosecution”).

Under the plain language of §49.49(4m)(a)2, any time a person knowingly causes a false statement to be “made . . . for use in determining rights to a benefit or payment,” there is a violation. Under this

unambiguous language, *any* statement that is “made for use” in determining rights to a benefit qualifies. It does not need to be the *first* such false statement in the causal chain, or the *only* one. Moreover, while the statement in question may be actually used to determine a benefit, this is not required by the statute. If it is made for anticipated use in determining a benefit, that statement qualifies under the statute’s unambiguous language.

It is incontestable that a “statement or representation” of a drug’s AWP was generated *each time a claim was submitted for reimbursement for a Pharmacia drug*. Wisconsin’s claim processing procedure asked, as to each such claim, “What is this drug’s Average Wholesale Price?” The answer came back: “This drug’s AWP is X.” That false statement or representation of the AWP was then used to determine how much to pay the pharmacy. The jury found that Pharmacia had caused that false representation. And the representation was “for use” in determining how much of a benefit the pharmacy had the right to receive; indeed, that was the purpose of generating the representation.

It is irrelevant that these “statements or representations” of AWP were made electronically within Wisconsin’s data processing system. *All* price statements in this case occurred electronically. Pharmacia transmitted

its price data to First DataBank electronically. First DataBank then electronically transmitted AWP's to Wisconsin. R.305 (Deposition Testimony of Marilyn Davis), lines 47:12-48:18, 102:7-12, 115:2-15. And Wisconsin's system generated an electronic representation of each AWP each time it processed a claim from a pharmacy. The statements or representations of AWP in each case were no less "statements" or "representations" within the meaning of the statute simply because they were in electronic form.

It is likewise irrelevant that Pharmacia did not directly make the particular statement or representation of AWP that occurred at the time of a claim's processing. Section 49.49(4m)(a)2 does not merely outlaw *making* false statements or representations. It also outlaws *causing* false statements or representations *to be made*. Pharmacia knew that Wisconsin's processing system has to generate a representation about a drug's AWP in order to pay any particular pharmacy claim. And Pharmacia caused each such representation about its drugs to be a false one.

Under the plain language of the statute, therefore, Pharmacia committed a violation each time a claim was processed, because each such processing entailed the making of a false statement about the drug's AWP

that was used to determine a benefit or payment. The circuit court erred in declining to apply the statute as written.

Under the correct interpretation of the statute, the jury's finding must be reinstated. It was supported not only by "credible" evidence, but by un rebutted evidence. As discussed above, the undisputed evidence showed that during the claims period, over 2.2 million claims were processed. Although a false statement of AWP was generated in the course of considering every claim, Wisconsin conservatively limited the number of false statements it argued to the jury to the 1,440,00 statements associated with claims that were *paid* on the basis of the AWP, and excluded false statements generated in connection with claims that were ultimately reimbursed on the basis of one of the other two numbers (MAC or "Usual & Customary") that were considered by the reimbursement algorithm.²

² Wisconsin limited its number of statements in order to be conservative, not because any concept of "materiality" required that limitation. Ironically, it is likely that this decision influenced the circuit court in its erroneous decision, discussed in Section II below, to interpret the "materiality" requirement in a restrictive fashion once it decided to count violations according to the number of transmissions of AWP by First DataBank.

B. The circuit court’s legal reasons for overturning the jury’s finding are unpersuasive

1. The circuit court asserted that Wisconsin’s method of counting false statements “cannot be a correct interpretation or application of the statute because it is not directed at the actual culpable conduct of Pharmacia, but at the consequences of that conduct.” A.Ap. 151. This was a meaningless distinction, because the statute takes “consequences” into account in defining the violation. Pharmacia is not simply liable for *making its own* false statement, but also for *causing a false statement to be made* for use in determining rights to a Medicaid payment. Where, as here, Pharmacia causes *multiple* such false statements to be made for such use, then each such statement is a violation. Here, for example, once Pharmacia caused First Databank to provide a false AWP to Wisconsin for a particular Pharmacia drug, that action was certain to generate a separate false statement about the drug’s AWP for use in determining a payment each time Wisconsin received a claim for reimbursement for that drug. The text of the statute gives Pharmacia no protection against liability for causing multiple false statements to be made simply because Pharmacia may only have sent false data on one occasion to First DataBank.

This interpretation fits not only the text of the statute but its purpose. It is a more serious matter to cause multiple false statements to be made than to cause a single one to be made. It is a more serious matter to affect tens of thousands of pharmacy reimbursements than to affect just one.

To illustrate this point, suppose Wisconsin had contacted Pharmacia directly to verify the AWP for each of the 1,440,000 claims submitted for Pharmacia's drugs. There can be no doubt that Pharmacia would be liable for falsely representing its AWP under that scenario, and Pharmacia would therefore be subject to 1,440,000 forfeitures. The fact that Wisconsin's processing did not request such claim-by-claim verification of AWPs directly from Pharmacia cannot alter this result. In both scenarios, Pharmacia knew that a statement of AWP would be generated in connection with every claim a pharmacy made for a Pharmacia drug, and it knew Wisconsin would rely on those AWPs. It is therefore responsible for those statements and must face the legal consequences for each such statement.

2. The circuit court's reliance on *State v. Menard, Inc.*, 121 Wis.2d 199, 358 N.W.2d 813 (Ct.App. 1984), for its interpretation of the statute is also unpersuasive. A.Ap. 151.

Menard involved a claim of misleading price comparison advertising. Wis. Stat. §100.20(1) bans unfair methods of competition. Section 100.20(2) authorizes the Department of Agriculture, Trade and Consumer Protection to issue general orders forbidding methods determined by the department to be unfair. Pursuant to §100.20(2), that Department issued an order, Wisconsin Administrative Code §ATCP 124.01, which made “the use of arbitrary or inflated price comparisons” to induce sales an unfair trade practice under §100.20.

Menard submitted for publication eight distinct advertisements making price comparisons with its competitors’ product. Wisconsin sued for violation of the Department’s order under §100.26(6), which authorizes a forfeiture of “not less than \$100 nor more than \$10,000 for each violation of an order issued under §100.20.” The circuit court found the advertising violated the order and imposed forfeitures. The circuit court held that *Menard* committed only eight violations, based on the number of distinct advertisements that were created, disregarding the number of editions in which those ads were published. This Court reversed. It agreed with Wisconsin that “a violation occurs each time an improper advertisement is

published. Each newspaper edition constitutes a separate publication.”

Menard, 121 Wis.2d at 202.

The circuit court found *Menard* significant because “a forfeiture was not imposed for each time the publication was read or relied upon by the reader (which would have been the analogous situation to the State’s case here).” A.Ap. 151. This reasoning is invalid. First, in *Menard*, Wisconsin never *argued* that there should be a violation each time “the publication was read or relied upon by the reader.” Thus, the circuit court here read *Menard* to decide an issue the case never addressed.

Second, *Menard* and the present case are not parallel in how the violation was defined. In *Menard*, the departmental order at issue banned “the use of arbitrary or inflated price comparisons.” This language makes the defendant’s “use” of a false price comparison the violation itself. In the statute at issue here, the concept of “use” plays a different role. Section 49.49(4m)(a)2 makes it unlawful to “cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.” The violation is not *using* a statement, but causing a statement to be made for use by someone else – in this case, Wisconsin.

There is thus no reason to assume that violations defined so differently will be counted according to the same system.

In sum, the circuit court erred in overturning the jury's finding that Pharmacia caused 1,440,000 false statements to be made. Since the circuit court's calculation of the amount of forfeiture per false statement was based on a much smaller number (4,578), remand is appropriate to have the court redetermine the proper amount per violation.

II. THE CIRCUIT COURT ALSO ERRED BY MISINTERPRETING THE "MATERIALITY" REQUIREMENT

As discussed above, the circuit court's method of counting false statements had three components. First, the only false statements the court counted were false statements contained in First DataBank transmissions to Wisconsin. While Wisconsin disagrees with that holding (as discussed in Section I), Pharmacia has not challenged it.

Second, the court held that if First DataBank initially reported a false AWP to Wisconsin, any subsequent update by First DataBank to Wisconsin that did not report a change in a previously reported AWP was deemed to be an implied representation that that AWP remained unchanged, and hence a new false statement of AWP. Wisconsin agrees that if the court's first

holding is correct, so is this second one, and Pharmacia has likewise not challenged it. A.Ap. 164-65.

Third, the court held a statement of AWP, whether explicit or implicit, transmitted in any First DataBank update to Wisconsin would be deemed “material” only if Wisconsin *actually paid a claim* by using that AWP between the time of that update and the time of the next update. While Pharmacia has not challenged this holding, Wisconsin respectfully submits that it was erroneous.³ A.Ap. 165-68.

First, the statute outlaws causing false statements of material fact to be made “*for use* in determining the right to a benefit or payment.” The term “for use” plainly includes statements made whose purpose is for future use in determining benefits. If the legislature had wanted to require that the statement actually be used in order to be “material,” it would have outlawed a false statement “*used* in determining a benefit or payment.”

³ If all three of the circuit court’s principles for counting false statements are correct – and Pharmacia’s appeal does not attack or address any of them – then Pharmacia does not dispute that credible evidence supported the circuit court’s number of 4,578. Indeed, that number was conservative, since the circuit court included, in the updates it counted, only those updates received by Wisconsin every *quarter*, despite evidence that updates were sent far more frequently than that.

Second, the court's holding is contrary to case law construing the "materiality" of false statements. Materiality does not require *actual* impact on transactions, but only requires *potential* for having an impact on transactions. A "representation is material if a reasonable person would attach importance to the existence of the matter or if the maker knows or has reason to know that the recipient regards it as important." *Radford v. J.J.B. Enters., Ltd.*, 163 Wis.2d 534, 544, 472 N.W.2d 790 (Ct.App. 1991) (citing Restatement (Second) of Torts §538 (1977)). *See also State v. Munz*, 198 Wis.2d 379, 385, 541 N.W.2d 821 (Ct.App. 1995) ("Because the court *could have* relied upon these statements in rendering a [perjury] verdict even though it apparently did not, we conclude that they were material.") (emphasis added). As the United States Supreme Court has said, "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing,' a decision of the decisionmaking body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999) (citations omitted).

Third, the court's construction of the "materiality" requirement has unacceptable implications. Suppose a Medicaid recipient provides knowingly false information on an application for a benefit, and Wisconsin

catches the fraud before the payment is made. Under the circuit court's reasoning, no violation of §49.49(4m)(a)2 has occurred because Wisconsin did not actually use the information in making the payment. This cannot be what the legislature intended.

In holding that a statement was not material unless Wisconsin actually relied on it in paying a claim, the circuit court relied on *State v. Williams*, 179 Wis.2d 80, 505 N.W.2d 468 (Ct.App. 1993). In *Williams*, two defendants were prosecuted for causing false statements to be made on claims their employer (a home healthcare provider) made to Wisconsin for Medicaid reimbursement on account of services defendants had provided to their own children. They had filled out time charts for their employer with the dates and number of hours they had worked. 179 Wis.2d at 90. The employer used the dates and hours in claiming reimbursement. *Id.* The State asserted the charts were false and had caused false statements of material fact to be made.

At trial, the court barred defendants from offering evidence that they had actually worked the total number of hours they had submitted to their employer, and that their only false statements were the dates on which the hours were worked. They wanted to show that their employer's policy was

that even if they worked twenty-four consecutive hours, they were to mark down eight hours for each of three different days. *Id.* at 86. Because Medicaid reimbursement was based on hours worked and not the dates on which those hours were worked, defendants argued that the false statements about the dates on which they worked were not material to the amount of medical assistance benefits received. *Id.*

The Court of Appeals reversed defendants' conviction and held that the evidence should have been received. The Court wrote that "[i]f the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised," and went on to state that if "the statements had no legal effect, the court could determine as a matter of law that the false statements were not material." *Id.* at 87-88.

The circuit court read this statement to mean that a false statement that did not result in an improper payment is not material. This reading cannot be reconciled with *Williams*' holding, in discussing another issue, that "the statute does not require the state to prove that anyone actually received a medical assistance benefit or payment." *Id.* at 89. Thus, the real import of the court's holding in *Williams* is that if defendants' evidence had been admitted and believed, the court or jury could have concluded that the

only misstatements they made were about the *dates* on which they provided services. In that case, these misstatements would not have been material, since the dates on which they worked those hours could not affect the employer's entitlement to payment for the hours they worked. The court did not hold that the misstatement was immaterial because it *did* not affect a payment, but because it *could* not.

In sum, even if the only false statements or representations to be counted are the statements transmitted by First DataBank, then each of those statements was "material" within the meaning of §49.49(4m)(a)2, because each had the potential to affect a payment. If this Court declines to reinstate the jury's finding, then Wisconsin respectfully requests in the alternative that this Court remand with instructions to conduct further proceedings to calculate forfeitures without the incorrect limitation on "materiality" that the circuit court used.

III. THE CIRCUIT COURT CONSIDERED TWO IMPROPER FACTORS IN FIXING THE AMOUNT PER VIOLATION

Wisconsin made a strong case for imposing a substantial per-violation forfeiture amount. The jury found Pharmacia knowingly caused false statements to be made over a thirteen-year period and found those

violations caused millions of dollars of damage. Pharmacia continued unabated the practices the jury found unlawful even after Wisconsin filed this lawsuit in 2004. Wisconsin offered extensive evidence from Pharmacia's own files of using inflated AWP's to "market the spread," yet Pharmacia executives under oath defiantly denied doing so. See *supra*, at. 7-13.

While the circuit court imposed a significant amount per violation (\$1,000) in forfeitures, that amount was toward the low end of the statutory range of \$100 to \$15,000. The figure plainly would have been higher but for two factors the circuit court found "mitigating": its belief that Pharmacia would pass a larger forfeiture amount on to purchasers of its drugs in the marketplace, and its view that Wisconsin's knowledge of the inflation in AWP mitigated Pharmacia's conduct.

Section 49.49(4m)(b) does not identify the factors the court must consider in fixing the amount of forfeiture per false statement. Thus, the standard of review is whether the circuit erroneously exercised its discretion within the statutory range of \$100 to 15,000. See *State v. Schmitt*, 145 Wis.2d 724, 730, 429 N.W.2d 518 (Ct.App. 1988). In exercising that discretion, the court was required to "examine[] the relevant

facts, appl[y] a proper view of the law, and, using a demonstrated rational process, reach[] a conclusion that a reasonable judge could reach.” *Id.*, 145 Wis. 2d at 729. A failure to abide by these requirements constitutes an erroneous exercise of its discretion. *State v. C. Spielvogel & Sons Excavating*, 193 Wis.2d 464, 479, 535 N.W.2d 28 (Ct.App. 1995). As will now be shown, the two factors the circuit court treated as “mitigating” cannot be defended, providing an additional reason to remand for recalculation of the forfeitures.

A. The circuit court erred in considering Pharmacia’s supposed ability to “pass on” forfeitures as a mitigating factor

As the circuit court noted, the purpose of imposing forfeitures is not to compensate the victims of wrongdoing but to punish and deter conduct that the legislature has declared unlawful. A.Ap. 170. The court appears to have been pessimistic about succeeding in those purposes, because it believed Pharmacia would respond to a significant forfeiture by raising its prices, ultimately harming “those dependent upon Pharmacia’s products for their health, well-being, and even their very existence.” A.Ap. 170.

The court cited no authority for considering the ability of a defendant to “pass on” penalties to the buying public as a “mitigating”

factor in considering penalties, and Wisconsin knows of no such authority. The logic of this rationale would argue against imposing any penalty in any situation where defendant supposedly can “pass on” a cost by raising prices. The rationale would therefore afford special protection to monopolists, who have more ability to raise prices than those who compete in competitive marketplaces. Providing special protection for monopolists from forfeitures cannot be what the legislature intended.

Worse, Pharmacia never *argued* for a lower amount per false statement on this ground, and no evidence was received on whether Pharmacia could pass on forfeitures to the public through higher prices. Had Pharmacia made such an argument, Wisconsin would have had strong grounds for refuting it. In particular, the court assumed that Pharmacia faced no competition on brand drugs: “Unlike generics, branded drugs on patent have no competitive alternative that would serve to neutralize the impact on the consumer of any price increases.” A.Ap. 170 n.9. To the contrary, therapeutic substitutes are available for most brands, and this can lead to substantial price competition between brands. *See, e.g.*, Patricia M. Danzon, *The Pharmaceutical Industry*, in Bouckaert and de Geest, *Encyclopedia of Law and Economics*, at 1069 (2000) (“For therapeutic

substitutes, the use of formularies, physician monitoring and other strategies enables PBMs [Pharmacy Benefit Managers] to shift market share between therapeutically similar, single source drugs, thereby increasing the demand elasticity facing manufacturers of on-patent drugs.”). *See also* J. L. Lu & W. S. Comanor, *Strategic Pricing of New Pharmaceuticals*, 80 *Review of Economics & Statistics*, 108, 112-116 (1998) (finding that most new drugs have an existing substitute at the time they are introduced, and that the availability of substitutes affects pricing strategy).

Furthermore, the circuit court’s assumption that a monopolist has the incentive and ability to raise prices in response to a substantial penalty is contrary to standard economic theory. Under that theory, a monopolist, like any other seller, seeks to maximize its profit by setting prices at a level where its marginal revenue equals its marginal cost. Changes in *fixed* costs – meaning costs that do not vary by output – do not affect the profit-maximizing price. *See, e.g.*, Png and Lehman, *Managerial Economics* at 206-07 (3d ed. 2007); Areeda and Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application*, at 156 (3d ed. 2000). A one-time forfeiture is a fixed cost under this classification. While it may affect

the profitability of a firm, it will not predictably affect the price that a monopolist sets for its product. *See also* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 509 (1961) (noting that where tort liability is fixed, it would not likely affect the defendant's price or output under the theory of marginal pricing).

In short, the ability of Pharmacia to “pass on” forfeitures was not a proper mitigating factor. And in any event, the circuit court should not have waded into a complicated area of economic theory without briefing, argument, or evidence from the parties.

B. Wisconsin’s “government knowledge” is irrelevant in setting forfeitures

The circuit court held that Wisconsin’s role in setting the reimbursement formulas “[s]ubstantially complicat[es] and mitigat[es]” the forfeiture analysis. A.Ap. 169. But the court failed to explain why that is a legally relevant factor. It was not.

No evidence justified the circuit court in holding Wisconsin partially responsible for the submission of false and inflated AWP. While Wisconsin has known for many years that published AWP needed discounting, Pharmacia offered no evidence that Wisconsin ever encouraged or approved of the publication of inflated AWP. Indeed,

Pharmacia offered no evidence that Wisconsin knew, until it decided to file this lawsuit, that *Pharmacia's* activities lay behind AWP's that First DataBank published. In the absence of evidence that Wisconsin encouraged Pharmacia to do what it did, or approved of its activities, taking Wisconsin's supposed "government knowledge" into account on forfeitures focuses on the wrong party.

Pharmacia invoked Wisconsin's supposed "government knowledge" of the inflated nature of AWP to defend both liability and damages. That defense failed. Bringing this defense back as a "mitigation" factor on forfeitures was therefore inconsistent with the jury's verdict, which the circuit court was otherwise careful to respect.

Because of the court's reliance on these two improper factors, this Court should vacate the forfeiture decision and remand with instructions to analyze only those factors relevant to the purposes of punishment and deterrence.

IV. THE CIRCUIT COURT ERRED IN FAILING TO ENTER EFFECTIVE INJUNCTIVE RELIEF

Section 100.18(11)(d) makes an injunction the presumptive remedy in a suit by the Department of Justice under §100.18:⁴

The . . . department of justice . . . may commence an action . . . to restrain by . . . permanent injunction any violation of this section. The court may in its discretion . . . make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved in the action

In *State v. Fonk's Mobile Home Park & Sales, Inc.*, 117 Wis.2d 94, 343 N.W.2d 820 (Ct.App. 1983), involving a statute whose injunctive authorization was identical to that of § 100.18(11)(d), this Court held that the “threat of future harm . . . is not necessary where the authority for the injunction is found in a statute which does not make threat of future harm a prerequisite to relief.” 117 Wis.2d at 96. The Court reasoned that “basing an injunction on past violations of consumer protection statutes furthers the policy supporting the statute.” *Id.* at 103.

⁴ While §49.49 does not specifically refer to injunctive relief, the circuit court found it had authority to issue an injunction under that statute as well. A.Ap.871. Pharmacia has not challenged that holding in its appeal.

Having prevailed before the jury on liability and damages, Wisconsin requested specific injunctive relief focused on generic drugs. The circuit court refused it, and limited its injunction to an order to obey the two statutes as written.

The standard of review in an appeal from the scope of injunctive relief is erroneous exercise of discretion. “An erroneous exercise of discretion in the context of an injunction occurs when the circuit court (1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant or improper factors; or (3) clearly gives too much weight to one factor.” *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass’n*, 210 Wis.2d 365, 370, 563 N.W.2d 585 (Ct.App. 1997). Under this standard, the circuit court’s refusal to enter the injunction requested by Wisconsin should be reversed.

A. Wisconsin had strong reasons for its requested injunction

All three parts of Wisconsin’s requested injunction were tailored to the violations proven.

First, Wisconsin requested that Pharmacia and its subsidiaries be enjoined from reporting or transmitting prices for certain generic products to a reporting service except (1) WACs that accurately and truthfully

reflected the final transaction prices paid by wholesaler, and (2) AWP's that accurately and truthfully reflected the final transaction prices paid by retailers – with both prices being net of any rebates, discounts, or other adjustment made to the final price of Pharmacia's products. R.330 & attached proposed order. As discussed in Wisconsin's Response Brief, WACs on generic drugs as reported by Pharmacia to First DataBank had no predictable relationship to the real prices that were paid by wholesalers and others to acquire generics, because there is intense price competition. The suggested AWP's that Pharmacia continues to report to First DataBank for generics likewise have no relation to real acquisition costs. A fundamental reason why Wisconsin brought this suit was to end the reporting of these meaningless AWP's. Yet the circuit court denied this relief.

Second, in the event that a pricing compendium published a price for its generic products that did not accurately reflect the price paid for Pharmacia's pharmaceutical products by retailers or by wholesalers, Wisconsin requested that Pharmacia be ordered to notify the reporting service and request that the price reporting service cease publication of that price. *Id.* This provision was prompted by Pharmacia's claim at trial that

First DataBank had occasionally acted against Pharmacia's wishes in the Pharmacia prices it published – a claim that had failed to impress the jury.

Third, Wisconsin requested that Pharmacia be required to appoint a corporate representative to certify to the Wisconsin Attorney General, not less than quarterly, that every price Pharmacia has reported for any of its generic products accurately and truthfully reflects the final transaction price paid net of any rebates, discounts or other adjustment made to the final price of Pharmacia's products. *Id.* This was a typical reporting requirement imposed on defendants who have been found to have engaged in deceptive behavior over a prolonged period, and was carefully tailored to the particular practices that had been found unlawful by the jury. It was particularly necessary in light of the extensive evidence, discussed above, that Pharmacia used inflated AWP's on generics to "market the spread."

B. The circuit court's reasons for rejecting the requested injunction have no basis in law or the record

The circuit court gave invalid reasons for refusing to enter the specific injunction Wisconsin requested.

First, the court inexplicably stated: "I do not believe this case was tried on a sufficient record of consumers other than Medicaid having paid

excessive money or any money on the basis of fraudulent pricing.” A.Ap. 872. However, after establishing a violation, Wisconsin had no burden to offer evidence that others were similarly hurt. *State v. Fonk’s Mobile Home Park & Sales, Inc.*, 117 Wis.2d at 96.

Second, the court was “not satisfied there’s not an adequate legal remedy available to consumers” and suggested that “the class action and other litigation strategies” can be developed as an adequate remedy at law. A.Ap. 872. This reason, too, is difficult to understand. A class action by “consumers” offers *Wisconsin*, the plaintiff in this case, no protection against the harm that the lack of true price information has created for its Medicaid program. Wisconsin went through a massive lawsuit facing tooth-and-nail opposition and proved its case. Yet the circuit court concluded that effective relief for the future must await further class actions from private plaintiffs, presumably against similar opposition.

In any event, as discussed above, the threat of future harm is not required for injunctive relief under the language of §100.18. 117 Wis.2d at 96. *See also Columbia County v. Bylewski*, 94 Wis.2d 153, 163, 288 N.W.2d 129 (1980) (holding that common law requirements to obtain injunctive relief, such an “injury [that] is irreparable, i.e. not adequately

compensable in damages,” can be modified by statutory authorization of injunctive relief).

Third, the court said it was not “convinced that there is a sufficient proof of continuing violation, at least insofar as Medicaid is concerned.” A.Ap. 874. This is again inexplicable. Even if the threat of future harm were necessary, Pharmacia has made clear that it is not going to change its price reporting practices. First DataBank continues to use pricing data from Pharmacia to publish generic AWP’s that are wildly inflated and that are useless to determine real acquisition costs. At the first post-trial hearing on injunctive relief, Pharmacia maintained that it was *legally permissible* to continue the practice that the jury had just found unlawful: “We’re doing what I said we were doing which is for branded products, providing our list price, which is a list price. And for generics, providing a suggested AWP. [I]f that’s all that we’re doing, how are we making any misrepresentations? How is there any wrongful conduct? How is there any violation of the law that Your Honor would enjoin?” R.443/183:15-184:4.

Fourth, the court expressed concern that it does not have “enough information” to insert itself “in affirmatively tailoring how information regarding drug pricing should be communicated to the public.” A.Ap. 875.

The legislature, however, has already determined how information regarding Pharmacia's drug pricing should be reported – a company “shall not represent the price of any of its products as a . . . wholesaler's price unless such price is not more than the price which retailers regularly pay.” Wis. Stat. §100.18(10)(b).

Fifth, the court expressed concern that if Pharmacia *obeys* the law, there is “a large chance that [it] could completely muck up the pricing system in the interstate commerce of drugs.” A.Ap. 875. With due respect, this is a fear of the tail wagging the dog. No evidence was presented by Pharmacia that requiring this one defendant to tell the truth about its generic drugs' prices would “muck up” the system of Medicaid reimbursement.

Sixth, in a variation on the same theme, the circuit court noted that it had severed the cases against defendants for separate trials, and it expressed concern that if some defendants in this multi-defendant litigation are found *not* to have violated the law, “we're going to have a hodgepodge of injunctions which . . . has the potential to skew the marketplace tremendously based upon inconsistent verdicts.” A.Ap. 877. This, too, is unpersuasive. It was *defendants* who, over Wisconsin's objection, sought

and obtained severance. R.91. They have no legitimate objection to a regime in which those who are found to have violated the law are restrained by an injunction, whereas those who are found to have followed the law are not.

Moreover, the circuit court offered no persuasive basis for its fear that telling Pharmacia to report real, rather than wildly inflated, average wholesale prices for its generic drugs, will “skew the marketplace.” A.Ap. 877. It is not even clear what “marketplace” the court was referring to. Markets are rightly thought to work best on truthful, not false, price information. Vague concerns of “skewing the marketplace” cannot be permitted to overrule the legislative judgment that it is deceptive and unlawful to report prices as “wholesale prices” when no wholesale transactions ever occur at that price.

In short, the circuit court’s reasons for refusing to enter the carefully tailored injunction proposed by Wisconsin were invalid. Moreover, the alternative injunction the court did enter is all but useless. It orders Pharmacia not to violate the text of the two statutes. Such “obey the law” injunctions, devoid of specifics on what actions Pharmacia must or must not do, are rightly disfavored. On the one hand, they cut too broadly. As

the Court said in *Bachowski v. Salamone*, 139 Wis.2d 397, 414, 407 N.W.2d 533 (1987), “Only the acts or conduct which are proven at trial and form the basis of the judge’s finding of harassment or substantially similar conduct should be enjoined.” On the other hand, they provide no useful check on an aggressive defendant. As the Court noted in *State v. Seigel*, 163 Wis.2d 871, 893, 472 N.W.2d 584 (Ct.App. 1991), there are situations in which “the statutory language alone [is] insufficient to exact the [defendant’s] compliance” with law. Thus, “in order to obtain and assure such compliance, the trial court was obliged to prescribe further reasonable conditions.” *Id.* at 383.

Wisconsin respectfully requests this Court to find that the circuit court abused its discretion and should direct the circuit court to enter the injunction requested by Wisconsin.

CONCLUSION AND REQUEST FOR RELIEF

Wisconsin respectfully requests:

- (1) that this Court reinstate the jury’s verdict finding of 1,440,000 false statements;
- (2) that alternatively, this Court remand for further proceedings to determine the number of false statements in First DataBank’s transmissions

to Wisconsin, without the limitation that the court imposed for judging the “materiality” of false statements;

(3) that in either case, this Court direct the circuit court to reconsider the amount of forfeiture per violation without taking into account the two erroneous mitigating factors discussed in this brief;

(4) that this Court remand with instructions to enter the injunction previously requested by Wisconsin; and

(5) that this Court affirm the circuit court’s judgment in all other respects.

Respectfully submitted,

Dated: July 28, 2010

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CERTIFICATION

I hereby certify that the foregoing Brief of Cross-Appellant conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 9,567 words.

Dated this 28th day of July, 2010.

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CERTIFICATION

In accordance with §809.19(12)(f), Wis. Stats., I hereby certify that the text of the electronic copy of the Brief of Cross-Appellant is identical to the text of the paper copy of the Brief of Cross-Appellant.

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