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SUPREME COURT OF WISCONSIN

08-15-2011

STATE OF WISCONSIN,

**CLERK OF SUPREME COURT
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 PHARMACEUTICA
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.,
SICOR, INC. F/K/A GENSLIA SICOR 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.

**COURT OF APPEALS, DISTRICT II
APPEAL NO. 2010AP000232-AC
TRIAL COURT NO. 2004CV001709**

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STATEMENT OF ISSUES

1. CAN THE STATE PURSUE A DAMAGES CLAIM BASED ON SPECULATION THAT THE LEGISLATURE WOULD HAVE MADE DIFFERENT POLICY AND BUDGETARY DECISIONS IF THE LEGISLATURE HAD KNOWN CERTAIN FACTS?

Answered by the trial court: Yes.

2. DOES THE STATE HAVE A CONSTITUTIONAL RIGHT TO A JURY TRIAL FOR STATUTORY LAW ENFORCEMENT CLAIMS OVER THE OBJECTION OF A DEFENDANT?

Answered by the trial court: Yes.

3. WHEN THE STATE INSISTS ON TRYING A CLAIM TO A JURY, RATHER THAN THE COURT, AND THEN FAILS TO OBTAIN A SUSTAINABLE VERDICT FROM THE JURY ON THAT CLAIM, CAN THE TRIAL COURT DECIDE THE CLAIM MORE THAN 90 DAYS AFTER VERDICT ON A THEORY THE STATE NEVER ARGUED TO THE JURY?

Answered by the trial court: Yes.

STATEMENT ON ARGUMENT AND PUBLICATION

As in any case important enough to merit this Court's review, both argument and publication are appropriate.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Wisconsin Medicaid ("Medicaid") reimburses pharmacists for prescription drugs dispensed to Medicaid beneficiaries using formulas established by the legislature and approved by the Governor in the

biennial budget process. The federal government approved each formula, thereby affirming that each of the legislature's decisions complied with federal law.

One component of the legislatively-set reimbursement formula for brand drugs is called "AWP," an acronym that nominally stands for "average wholesale price." AWP's are not actual prices. Rather, they are a pricing benchmark used by various payors in the marketplace as a starting point for reimbursement calculations to providers. The legislature, Governor, Medicaid employees, and the federal government all understood that AWP's did not represent actual wholesale prices. For that reason, the legislature set reimbursement formulas for brand drugs at significant percentage discounts from AWP, knowing that pharmacists still made a profit. The legislature did so to meet the federal requirement that it ensure enough pharmacists would participate in the Medicaid program so that low-income Wisconsin citizens would have access to prescription drugs equal to that of the general population.

The State's claims in this case are premised on the theory that published AWP's should have been actual prices and that had Wisconsin's Medicaid program had "true AWP's," it would have paid less money to pharmacists. However, the notion that "true AWP's"

should reflect actual average prices is contrary to the way that the legislature, Medicaid, the federal government, and drug manufacturers understood and used the term.

The State claims it is entitled to recover as “damages” the profit that the legislature built into the reimbursement formulas, notwithstanding that the legislature knew that its formulas allowed pharmacists to earn a profit. The State never credibly explains why Wisconsin pharmacists would choose to participate in a voluntary program requiring them to dispense drugs to Medicaid patients if they merely broke even or lost money. Nor does the State explain how Medicaid could serve the needs of the low-income population if pharmacists refused to participate in the program. The State does not answer these questions for the obvious reason that no rational business would participate in a complex government program if the business would merely break even or lose money from that operation.

The State sued virtually every manufacturer in the pharmaceutical industry, including Pharmacia Corporation (“Pharmacia”). This Court has accepted review on whether: (a) the State has asserted non-speculative damages claims; (b) the State had a constitutional right to a jury trial for claims under Wis. Stat. §§ 100.18 and 49.49; and (c)(i) the trial court was within its authority to supply

an answer to a verdict question that was the basis for forfeitures and, if so, (ii) the appropriate manner for determining the number of statutory violations of Wis. Stat. § 49.49(4m). Questions (a), (b) and (c)(i) are raised by Pharmacia and are issues of law, subject to *de novo* review. The last issue is raised by the State in its Cross-Appeal.

The answers to questions (a), (b), and (c)(i) are all “no.” First, no reasonable trier of fact is entitled to speculate that the legislature would have made different reimbursement decisions with more or different information, much less characterize the legislature’s budgetary choices as “damages.” Second, the State has no constitutional right to a jury trial because its claims are not counterparts to ones recognized at statehood as at law. Finally, when the State presents a case to a jury and fails to prove a claim, a trial court may not then decide the issue on its own, much less (a) on a theory never presented to the jury and (b) when the trial court acknowledges that the applicable burden of proof was not satisfied. The judgment in favor of the State should be vacated.

II. PROCEDURAL STATUS AND DISPOSITION IN THE TRIAL COURT

The State filed this action on June 3, 2004 against numerous pharmaceutical manufacturers, including Pharmacia. It alleged that

each defendant violated Wis. Stat. §§ 49.49(4m)(a)2, 100.18, and 133.05. It also claimed unjust enrichment. (A.Ap. at 1-22; *see also* A.Ap. at 23-58.) The trial court granted Pharmacia's summary judgment motion on the § 133.05 claim (R.272), and the State withdrew its unjust enrichment claim (R.233 at 56-57).

The trial court overruled defendants' objections to a jury trial. (A.Ap. at 59-66.) On February 16, 2009, a jury found for the State, awarding \$2,000,000 on the § 100.18 claim and \$7,000,000 on the § 49.49(4m) claim. (A.Ap. at 67-70.) Although the Special Verdict had two damages questions covering overlapping time periods for the same conduct, the trial court awarded both amounts. (R.388.)

On May 12, 2009, the trial court denied the majority of Pharmacia's post-verdict motions (A.Ap. at 86), but, on May 15, 2009, it vacated the jury's answer to Special Verdict Question No. 5, which was the basis for forfeitures under § 49.49(4m) (A.Ap. at 89). On September 30, 2009, the trial court supplied its own answer to Question No. 5, reducing the number of alleged violations from 1,440,000 to 4,578, and imposed forfeitures totaling \$4,578,000. (A.Ap. at 93-102.) The trial court also entered a permanent injunction. (R.377.) On October 26, 2009, the trial court awarded attorneys' fees of \$6,503,035.09 and costs of \$314,108.44. (R.382.) Judgment was entered

November 30, 2009 (A.Ap. at 103-04) and Pharmacia timely filed its notice of appeal on January 21, 2010 (R.404).

III. STATEMENT OF FACTS

A. MEDICAID REIMBURSEMENT FOR PRESCRIPTION DRUGS

Medicaid is a joint federal-state program that pays for health care provided to low income citizens. 42 U.S.C. § 1396 (2011).

Medicaid was created in 1965, when Congress added Title XIX to the Social Security Act. *Id.* Medicaid is administered at the federal level by the Centers for Medicare and Medicaid Services (“CMS”).¹ At the State level, it is administered by the Department of Health Services (“W-DHS”). Wis. Stat. §§ 49.43(3e) (2011), 49.45 (2011).² The purpose of Wisconsin’s Medicaid laws is to “provide appropriate health care for eligible persons and obtain the most benefits available under Title XIX. . . .” Wis. Stat. § 49.45(1) (2011).

States that choose to participate in the Medicaid program are required to submit a “state plan” to the federal government. 42 U.S.C. § 1396a (2011). CMS reviews each state plan to ensure it complies with federal law. (R.305 at 137). If CMS approves the state plan, the

¹ CMS is an agency of the Department of Health and Human Services. For convenience, both CMS and the Department are referred to herein as “CMS.”

² W-DHS formerly was known as the Department of Health and Family Services (“DHFS”).

federal government will fund a portion of the State's payments to Medicaid providers. 42 U.S.C. § 1396b(a) (2011).

State plans must “assure that payments are . . . sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area. . . .” 42 U.S.C. § 1396a(a)(30)(A) (2011); 42 C.F.R. § 447.204 (2011). In the context of pharmacy reimbursement, this means that the State must pay pharmacists enough money to ensure they are willing to accept Medicaid patients. (A.Ap. at 112.)

State plans are required to describe “comprehensively” the methodology for reimbursement of prescription drugs. 42 C.F.R. § 447.518 (2011).

For brand drugs, reimbursement may not exceed, in the aggregate, the lesser of (1) the Estimated Acquisition Cost (“EAC”) of the drug plus a reasonable dispensing fee; or (2) the pharmacist's usual and customary charges to the general public. 42 C.F.R. § 447.512(b) (2011). EAC is defined as a state's “best estimate of the price generally and currently paid by providers for a drug. . . .” 42 C.F.R. § 447.502 (2011).

The “dispensing fee” “pays for the pharmacists’ costs in excess of the ingredient cost of a . . . drug. . . .” *Id.* It does not include profit for the pharmacist. *Id.*³ However, a state may pay a low dispensing fee so long as the dispensing fee and ingredient cost reimbursement “in the aggregate” are reasonable. 42 C.F.R. § 447.512(b) (2011); *see also Pa. Dept. of Public Welfare*, DAB No. 1315 (1992), *available at* <http://www.hhs.gov/dab/decisions/dab1315.html>.

Federal law does not require states to use actual drug prices in estimating EAC for brand drugs. Rather, CMS recognizes that some states’ determinations are based on a political negotiation, and accepts that process may result in EACs that exceed actual prices. (A.Ap. at 108-09, A.Ap. at 113-16.) Accordingly, CMS has never required state Medicaid agencies to reimburse pharmacists at their actual cost. (A.Ap. at 108-13.) For example, in 2002, CMS surveyed Wisconsin pharmacists and found they paid roughly 20.52% less than AWP for brand drugs and 67.28% less than AWP for generic drugs. (A.Ap. at 174-75.) CMS did not claim that Wisconsin was violating federal law by reimbursing at AWP minus 11.25%, but merely recommended that

³ For example, in Wisconsin in 2006, the average cost for a pharmacist to dispense a drug was \$9.50, but the dispensing fee paid by W-DHS was \$4.38. (A.Ap. at 120.)

Wisconsin “consider the results of our review as a factor in any future changes to pharmacy reimbursement. . . .” (*Id.*)

Deirdre Duzor, the director of CMS’ division of pharmacy, explained:

Q: Your opportunity to enforce [federal regulations] is through the approval of state plan amendments?

A: Yes. Because we agree to the reimbursement formula in those plans.

(A.Ap. at 107.)

Q: Did CMS want to see states reimbursing at an actual average of acquisition cost for providers—yes or no?

A: I just don’t know that it’s quite that simple as a yes or no.

Q: Why is it not that simple?

A: Because you have to make sure that pharmacies are willing to serve Medicaid beneficiaries at that rate of payment.

...

Q: [F]air to say that CMS would have concerns that payment at an actual average of ingredient cost would not provide incentives to ensure adequate access?

...

A: That—yes, that potentially that could cause an access problem.

...

Q: Ms. Duzor, we were just talking about the fact that CMS had concerns that payment at an actual average acquisition cost might present issues of access. Is that fair to say?

A: That reimbursement—what I was trying to say was that reimbursement to pharmacies has to be adequate for them

to—it has to be adequate, they have to make some money or they won't serve Medicaid clients.

(A.Ap. at 111-12.)

Generic and multi-source drugs are subject to different regulations with respect to reimbursement. 42 C.F.R. § 447.512 (2011).

B. FEDERAL DISCLOSURE REQUIREMENTS AND REBATES

A Rebate Agreement between manufacturers and CMS, acting on behalf of all states, specifies manufacturers' responsibilities under Medicaid. (A.Ap. at 197-210.)

Under the Rebate Agreement, drug manufacturers of brand drugs must pay each state Medicaid agency rebates equal to (a) the difference between the "average manufacturer's price" ("AMP") and the "Best Price" of their drugs, or (b) 15.1% of the AMP. 42 U.S.C. § 1396r-8(c) (2011).⁴ The AMP is the average price that wholesalers pay to the manufacturer for drugs distributed to retail pharmacists or by retail pharmacists that purchase directly from the manufacturer. *Id.*

§ 1396r-8(k). The Best Price is the lowest price available from the manufacturer net of rebates, discounts, and other price concessions. 42 C.F.R. § 447.505 (2011).

⁴ Drug manufacturers of non-innovator multi-source drugs pay Medicaid programs rebates based on AMP. 42 U.S.C. § 1396r-8(c)(3) (2011).

Manufacturers are required to report AMPs and Best Prices to the federal government. The federal government views information about drug manufacturers' prices as proprietary and, therefore, does not share that information with the states. 42 U.S.C. § 1396r-8(b)(3)(D) (2011).

Manufacturers make quarterly rebate payments to each state (A.Ap. at 197-210), which provide millions of dollars in revenue to Wisconsin (A.Ap. at 213). In addition, Wisconsin requires manufacturers participating in Medicaid to make supplemental rebate payments to the State for certain drugs. Wis. Stat. § 49.45(49m)(c)2 (2011).

C. AWPs, WACS, AND MACS

In 1969, a California Medicaid official created a methodology to reimburse for prescription drugs. (A.Ap. at 224-25.) He created a figure called "Average Wholesale Price" or "AWP," which was a mark-up of 25% over the manufacturer's list price to the wholesaler. (*Id.*) AWP "was designed to provide a reference price for adjudicating claims" at the retail level. (R.304:P194.)

Wisconsin obtains AWPs from First DataBank, a subsidiary of the Hearst Corporation. (A.Ap. at 244; A.Ap. at 258.) More particularly, it purchases what are called "Blue Book AWPs." (A.Ap.

at 261-63; R.434 at 219:17-219:23, 226-27.) First DataBank also sells wholesale acquisition costs (“WAC”), the list price at which branded manufacturers sell products to wholesalers (A.Ap. at 262), and Direct Prices, the price at which some manufacturers sell directly to retailers (*id.*). Until 2000, Wisconsin purchased Direct Prices for eight drug manufacturers, including the predecessor to Pharmacia, and reimbursed for those drugs at Direct Prices. (A.Ap. at 264-70; A.Ap. at 272-74.)

Medicaid uses First DataBank’s published AWP’s in its drug reimbursement formulas. (A.Ap. at 264-70.) These “Blue Book” AWP’s are not supplied by drug manufacturers, but instead are determined by First DataBank. (A.Ap. at 258-59; R.438 at 212:24-213:12.)

Wisconsin’s fiscal agent, Electronic Data Systems Corporation (“EDS”) receives the pricing data from First DataBank and loads it into EDS’s computer system. (A.Ap. at 234-35; R.435 at 137:7-138:18.)

Pharmacists, who submit their claims to EDS (A.Ap. at 235), submit neither AWP’s nor their acquisition costs in their claims; instead, they supply their “usual and customary” charges (A.Ap. at 298-99; R.436 at 68:15-69:7). The “usual and customary” charge is the pharmacist’s charge for providing the same service to the cash-paying public. WIS. ADMIN. CODE DHS § 101.03(181) (2011).

From the outset of trial, the State admitted that the legislature and W-DHS employees knew that AWP's did not represent actual prices (A.Ap. at 306-07; R.433 at 57:23-58:8) and offered no evidence that Pharmacia (or any other drug manufacturer) ever represented that AWP's were actual prices.⁵ The only evidence the State has offered of anyone stating that AWP's were actual prices were scattered documents almost exclusively from First DataBank or its lawyers, none of which were made to, or shown to be seen by, anyone in Wisconsin or at Pharmacia. (R.304:P367; R.304:P373; R.304:P378; R.304:P386; R.304:P197.)

In about 1978, Wisconsin established a maximum allowable cost ("MAC") program for generic drugs (A.Ap. at 290.) Wisconsin sets MACs without regard to published prices (R.228 at 104-05, 107-08), because it has known since the 1980s that AWP's bear no relationship to the prices pharmacies pay for generic drugs. (A.Ap. at 291-95; R.436 at 44-45, 63:15-65:2.) Instead, Ted Collins, a W-DHS consultant, set the MAC based on actual market prices, which he marks up by 15-25%. (A.Ap. at 297-98; R.436 at 67:16-68:7.) Mr. Collins knows that this

⁵ In fact, First DataBank expressly disclaims any warranties or representations as to the accuracy of AWP's or their fitness for any particular use. (R.304:DX490.)

markup over actual prices enables pharmacists to earn a profit, but does this in order to ensure patient access to generics. (*Id.*)

Wisconsin's MAC program for generic drugs has some of the lowest reimbursement rates and is considered one of the most aggressive in the country. (A.Ap. at 300.) The low reimbursement rates plus an inadequate dispensing fee mean that Wisconsin pharmacists often actually lose money dispensing generic drugs. (A.Ap. at 322-24.)

D. THE EVOLUTION OF DRUG REIMBURSEMENT IN WISCONSIN

In the 1970s and most of the 1980s, Medicaid reimbursed drugs on the basis of an undiscounted AWP plus a dispensing fee. (A.Ap. at 330; A.Ap. at 268.)

In 1984, CMS advised state Medicaid programs that 99.6% of pharmacy purchases were made at an average of approximately 16% less than published AWPs. (A.Ap. at 347.) CMS noted that certain states were adopting cost-containment measures, in lieu of relying exclusively on AWPs, one of which was setting EAC levels at Direct Prices from the major manufacturers. (A.Ap. at 338.) Wisconsin was one such state, reimbursing at Direct Prices for the large manufacturers and at an undiscounted AWP for other manufacturers' drugs. (A.Ap. at 268.)

In 1989, CMS took the position that, absent valid documentation to the contrary, states needed to set EAC at a “significant discount” from AWP. (R.304:DX177 at 1.) Wisconsin considered basing reimbursement on actual cost, but rejected that alternative because it would be “unacceptable to providers.” (*Id.* at 3.) Wisconsin, therefore, began to reimburse at AWP minus 10% for most manufacturers’ brand drugs. (A.Ap. at 385.) For certain manufacturers, it continued to reimburse at Direct Prices. (A.Ap. at 381.) CMS approved that plan. (A.Ap. at 383-88; A.Ap. at 275-77.)

Over the next ten years, reimbursement for most brand drugs remained at either Direct Prices or AWP minus 10%, with the approval of the federal government. (*See, e.g.*, A.Ap. at 378-82.)

During the 1999-2001 budget cycle, W-DHS recommended to the legislature that it reduce reimbursement for brand drugs to AWP minus 15%, based, in part, on the Office of Inspector General’s (“OIG”) conclusion that AWP minus 18.3% approximated what pharmacists actually paid. (A.Ap. at 389-92; A.Ap. at 278-80.) The pharmacists’ lobby responded that a reduction of this magnitude “[would] threaten a pharmacy’s ability to service [Medicaid] recipients.” (A.Ap. at 396.) Both the pharmacists and W-DHS proposed that the legislature consider a number of alternatives to reducing reimbursement (A.Ap.

at 393-401), yet the legislature decided to keep reimbursement at AWP minus 10% (A.Ap. at 278-79). The State also stopped reimbursing at Direct Prices (A.Ap. at 402; A.Ap. at 281-82), even though these published prices were usually lower than AWP minus 10% (for Pharmacia, Direct Prices were approximately equivalent to AWP minus 20%) (R.227, Ex.12 at sealed deposition pages 43:13-44:16), and even though the federal government had endorsed the use of Direct Prices as a cost-saving measure (A.Ap. at 335).

During the 2001-2003 budget cycle, W-DHS proposed reducing drug reimbursement to AWP minus 15% to “bring Wisconsin [Medicaid] payments more in line with the actual acquisition cost of the provider.” (A.Ap. at 404.) The Wisconsin legislature rejected this proposal. It chose instead to set reimbursement at AWP minus 11.25%. (A.Ap. at 283-85.)

During the 2003-2005 budget cycle, W-DHS again pressed for reduced reimbursement at AWP minus 15%. (A.Ap. at 417-18.) The Secretary of W-DHS informed the legislature’s Joint Committee on Finance that AWP minus 15% was “supportable” because studies indicated that pharmacists actually paid between 17.2 and 17.5% less than AWP for brand drugs. (A.Ap. at 419.) She also told the Committee that the average per prescription dispensing cost was \$6.60

and that the Medicaid dispensing fee was \$4.88. (A.Ap. at 420.) The legislature decided to set reimbursement at AWP minus 12% in 2003, and AWP minus 13% in 2004. (A.Ap. at 286-87; R.439 at 209:11-210:12.)

The State continues to reimburse for brand drugs based on published AWP. (A.Ap. at 288; R.439 at 220:6-18.)

E. THE POLITICS OF SETTING REIMBURSEMENT IN WISCONSIN

As shown above, Medicaid reimbursement is set through a political process, in which W-DHS advocates for lower reimbursement and pharmacists oppose reductions. (A.Ap. at 393-401; A.Ap. at 402-05; A.Ap. at 406-16; A.Ap. at 211-12; A.Ap. at 100-01.) The pharmacy lobby has argued that the profit they earn on drug reimbursement “is necessary to cover the costs of dispensing medications to [Medicaid] recipients. . . .” (A.Ap. at 214.) They claim that, if reimbursement is reduced, pharmacists may stop participating in the Medicaid program. (A.Ap. at 396; A.Ap. at 409.)

Pharmacists in Wisconsin are politically engaged and their lobbying has an influence on Medicaid reimbursement. For example, during the 1999-2001 budget cycle, even though W-DHS proposed

reducing EAC by 5% (A.Ap. at 392), Governor Tommy Thompson assured the Executive Director of the pharmacists' lobby:

I understand your concern regarding the 1999-2001 biennial budget request from [W-DHS] to reduce the Medicaid reimbursement rate to pharmacies. **Rest assured I remain committed to protecting the interests of pharmacies throughout the state of Wisconsin and will not approve this request to reduce the Medicaid pharmacist reimbursement in the 1999-2001 biennial budget.**

(A.Ap. at 422 (emphasis supplied); *see also* A.Ap. at 423; A.Ap. at 424-27.)

As the trial court observed, “raw politics . . . drove (and continues to drive) this issue at the State Capitol, in which both the legislative and executive branches fully participated and in which compromises (unrelated to Pharmacia) were made that **knowingly sacrificed more accurate reimbursement formulas. . . .**” (A.Ap. at 101 (emphasis supplied).)

F. THE LEGISLATURE’S KNOWLEDGE ABOUT AWP’S AND PHARMACISTS’ PROFIT

During the 1999-2001, 2001-2003, and 2003-2005 budget cycles, W-DHS and the Legislative Fiscal Bureau (“LFB”) informed the legislature that:

- “The AWP [was] the manufacturer’s suggested wholesale price of a drug and is analogous to the ‘sticker price’ of a car. It does not reflect the actual cost of acquiring the drug.” (A.Ap. at 395);
- “[P]harmacies generally obtain brand drug products from their wholesaler at an average price of AWP minus 18.3%. . . . Wisconsin [Medicaid’s] policy of reimbursing for brand name drugs at AWP minus 10% overcompensates providers for the cost of drugs.” (A.Ap. at 390);
- Each percentage increase in the discount rate to AWP would generate millions of dollars of savings. (A.Ap. at 397; A.Ap. at 404; A.Ap. at 410); and
- “Wisconsin [Medicaid’s] current drug payment methodology over-compensates pharmacy providers for their cost of drugs.” (A.Ap. at 389.)

The legislature was also advised that pharmacists were making a profit on drug reimbursement, but that the dispensing fee was inadequate:

- “[A] reimbursement rate of AWP-15% would provide an average margin of 3% of the AWP price for drugs purchased under [Medicaid], compared with approximately 8% of AWP under current reimbursement rates.” (A.Ap. at 409);
- “[I]t is estimated that pharmacies’ margin on acquisition costs is an average of 6.25% of AWP, or approximately \$5.54 per prescription. . . .” (A.Ap. at 215); and
- “The Pharmacy Society of Wisconsin argues that pharmacies’ margins on the product reimbursement is necessary to cover the costs of dispensing medications to [Medicaid] recipients, since the current [Medicaid] dispensing fee is not sufficient to cover such costs.” (A.Ap. at 214.)

In fact, against this backdrop, W-DHS employees joked that AWP stood for “[A]in’t [W]hat’s [P]aid” (A.Ap. at 428), and lamented the legislature’s approach to reimbursement. (*See, e.g.*, A.Ap. at 430.) With respect to one report, estimating pharmacists actually paid 21.84% below AWP, a W-DHS employee noted, “[g]uess we should send this over to Legislative staff. Not that it will matter.” (*Id.*)

The Governor also knew pharmacists were making a profit. In 2005, Governor Doyle appointed a Pharmacy Reimbursement Commission to recommend ways to reduce pharmacy payments, directing the Commission to “find savings while compensating pharmacies fairly and protecting benefits to Wisconsin’s most vulnerable residents.” (A.Ap. at 119; *see also* A.Ap. at 431.) The Commission’s report noted:

- It was in the pharmacists’ interest to be provided with sufficient reimbursement to cover the costs of doing business, including “some profit margin.” (A.Ap. at 123);
- Reducing reimbursement could cause pharmacies, particularly rural ones, to leave the Medicaid program, reduce the quality of care, and result in increased costs to the State, including for travel expenses and visits to emergency rooms and urgent care facilities for patients without reasonable access to a pharmacy. (A.Ap. at 126-27); and
- Pharmacists made insufficient margin on generic drugs to make up the difference between the \$4.38 dispensing fee and the \$9.50 cost of dispensing. (A.Ap. at 120.)

G. PHARMACIA

Pharmacia manufactures both brand and generic drugs. (A.Ap. at 105-06.) It sets two prices for its brand drugs: (a) WAC, at which it sells to wholesalers (R.227, Ex.11 at sealed deposition page 78:11-14); and (b) Direct Price, at which it sells to retailers (*id.* at 76:14-78:16). WACs and Direct Prices were almost always the same. (R.235 at 8.) Purchasers can receive a 2% “prompt pay” discount for paying Pharmacia within a specified time period, which is common in the industry. (R.227 at 261.) These prices and terms of sale were published in Pharmacia’s product catalogs. (A.Ap. at 432-36; A.Ap. at 437-42.)

Pharmacia’s subsidiary, Greenstone, manufactures and sells generic versions of Pharmacia’s brand drugs after those drugs lose patent protection and other generic competitors enter the market. (A.Ap. at 250-51; R.438 at 70:21-71:4.) Roughly 5% of Greenstone’s drugs are dispensed by pharmacies that are reimbursed by Medicaid programs. (A.Ap. at 252; R.438 at 88:13-15.) The vast majority of Greenstone’s products are reimbursed based on MACs, which typically are set, including by Wisconsin, within days of a product’s launch and are based on actual market prices. (A.Ap. at 253-54; R.438 at 93:11-94:19; A.Ap. at 297-98; R.436 at 67:16-68:7.) Greenstone has to suggest

AWPs in order to ensure that a drug will be classified by First DataBank as a generic, rather than a branded product. (A.Ap. at 256-57; R.438 at 96:7-97:17.) Greenstone tries to duplicate the AWP that is already in the marketplace for a competitor's generic, but if it does not have that information, it proposes an AWP that is 10.5% below the equivalent brand drug's AWP. (A.Ap. at 256-57; R.438 at 96:7-97:2.)

H. THE TRIAL

1. The State Relied on Political Debate and Legislative Decisions to Try to Prove Damages.

Pharmacia had nothing to do with setting the Medicaid reimbursement rate. However, the State's case was premised on the theory that Pharmacia should be held accountable for the fact that the Wisconsin legislature required W-DHS to reimburse pharmacies more than what pharmacies paid to purchase drugs from wholesalers. From its opening statement, the State conceded that pharmacists were reimbursed as a result of the legislature's decisions through the political process. (A.Ap. at 303-05; R.433 at 48:23-50:7.) Nevertheless, the State's liability expert testified that the political "tug of war" by which the legislature set reimbursement in Wisconsin would have been

resolved differently if the State had actual drug prices because, in his opinion, “facts trump politics.” (A.Ap. at 226-31; R.435 at 71:15-76:2.)

The State’s fact witnesses offered similar testimony. The former Director of Medicaid speculated that, despite the multiple reports about the drug prices pharmacies actually paid that *were* provided to the Wisconsin legislature, if drug manufacturers had reported actual prices, it “would have made a difference” to the legislature’s decision-making process. (A.Ap. at 232-33; R.435 at 125:11-126:13; A.Ap. at 236-37; R.435 at 180:20-181:20.) A former LFB analyst opined that the political “tug of war” would not have occurred if the State had actual drug prices. (A.Ap. at 447-51; R.437 at 101:6-105:13.) She also testified that, with actual drug prices from manufacturers, the legislature would not have had to “guess” what providers should be paid, and that the Joint Committee on Finance would not have needed to consider pharmacy reimbursement. (A.Ap. at 452-55; R.437 at 142:12-145:2.)

Finally, in closing argument, the State told the jury that, with actual prices, the legislature would have been able to “spend their time on other kind[s] of more substantive policy questions” than pharmacy reimbursement (A.Ap. at 458-59; R.441 at 98:17-99:2 (internal quotation marks omitted)) and that “[t]here would have been no

arguing with the Pharmacy Society of Wisconsin. It just wouldn't have happened." (A.Ap. at 459; R.441 at 99:9-11.)

2. The State's Damages Claim.

The State's damages expert, Dr. DeBrock, testified that his damages calculations were based on the difference between what pharmacists were reimbursed for drugs and what they actually paid for drugs. (A.Ap. at 444-45; R.437 at 10:20-11:2.) That is, the State's damages theory was premised on the view that pharmacists should have made no profit at all. (*Id.*) Under this view, the State's expert calculated damages of roughly 7.2% (A.Ap. at 446; R.437 at 33:6-10) an approximate profit figure of which the legislature had been informed (*see, e.g.*, A.Ap. at 409; A.Ap. at 417-18), which amounted to approximately \$650 per pharmacist per year (A.Ap. at 308).

Dr. DeBrock made clear that he was simply performing an accounting calculation that the State's counsel had directed him to perform: "You asked me to compute the amount by which Wisconsin overpaid on reimbursement claims for Medicaid and SeniorCare based on a state's theory they should only pay what the pharmacies' acquisition costs were." (A.Ap. at 444-45; R.437 at 10:24-11:2.)

3. The State Asked the Jury to Answer a Special Verdict Question that the Trial Court Had Rejected.

In its requested verdict form, the State wanted the jury to be asked how many times Medicaid had reimbursed for Pharmacia's drugs. (A.Ap. at 465.) However, the trial court submitted its own verdict form that asked, in Question No. 5, for the number of "false statements" that Pharmacia had made or caused to be made. (A.Ap. at 69.) The State did not object to the trial court's decision to count violations of Wis. Stat. § 49.49(4m) in that fashion. The State also conceded that it had failed to show the number of statements that had been made to Wisconsin and, therefore, withdrew its forfeiture claim under Wis. Stat. § 100.18. (A.Ap. at 457.)

Yet, in closing argument, the State asked the jury to answer Question No. 5 with the number of times Medicaid had reimbursed for drugs at more than actual acquisition cost. (A.Ap. at 460-61; R.441 at 108:23-109:15.) The jury answered Question No. 5 as the State had requested. (A.Ap. at 69.)

I. THE POST VERDICT MOTION CONCERNING FORFEITURES

Pharmacia moved for post-verdict relief, including to change the answer to Question No. 5 to "zero." (R.309; R.310.) At the May 2009 hearing on post-verdict motions, the trial court asked:

[W]hy didn't the State bring in the evidence of how often First DataBank or any of these other compendia published these misrepresentations or how often Pharmacia made these false statements or misrepresentations?

(A.Ap. at 73; R.443 at 45:3-8.) When asked by the trial court if it had put in evidence of the number of "false statements" (as opposed to the number of claims that Medicaid had reimbursed), the State first answered "I don't believe so, Your Honor" and then stated there were a "scattering of them." (A.Ap. at 75-76; R.443 at 98:12-99:20.) The trial court observed that "[t]he forfeiture case here was almost a throw-away in terms of the way it was presented, and the jury was left with very little." (A.Ap. at 81; R.443 at 109:1-4.)

The trial court vacated the jury's answer to Special Verdict Question No. 5 on May 15, 2009. (A.Ap. at 89.) The 90-day period from verdict lapsed on May 18, 2009. On September 30, 2009, the trial court determined the answer to Question No. 5 should be 4,578 (A.Ap. at 99), and characterized the credible evidence on the number of statements as "scant at best, widely scattered, and none too clear," due to the State "adopting an unsustainable theory of recovery (equating claims paid with misrepresentations made), thereby largely eschewing the presentation of evidence that would have been right on point." (A.Ap. at 94.)

The trial court set each forfeiture at \$1,000, or ten times the statutory minimum, for a total forfeiture award of \$4,578,000. (A.Ap. at 101.)

ARGUMENT

I. THE STATE’S DAMAGES CLAIM IS IMPERMISSIBLY SPECULATIVE.

The State pursued monetary relief under Wis. Stat.

§§ 100.18(11)(b) and 49.49(6) (2011). Under § 100.18(11)(b), “any person suffering pecuniary loss **because of** a violation” may bring a damages claim. Wis. Stat. § 100.18(11)(b) (emphasis supplied). This requires a plaintiff actually to have been induced by a false, deceptive, or misleading statement to enter into an obligation the plaintiff otherwise would not have entered into to purchase a product. *Novell v. Migliaccio*, 2008 WI 44, ¶ 49, 309 Wis. 2d 132, 749 N.W.2d 544.

Wisconsin Statute Section 49.49(6) does not speak of damages at all, but merely provides that a trial court can award to the Department of Justice “an amount reasonably necessary to remedy the harmful effects of the violation. . . .” Wis. Stat. § 49.49(6).

Under Wisconsin law, an injured party can only recover damages when the fact and amount of damages are proven with reasonable certainty. *Wis. Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*,

96 Wis. 2d 314, 334, 291 N.W.2d 825 (1980); *Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.*, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977); *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 432-33, 265 N.W.2d 513 (1978) (“Damages may not be awarded on speculation or conjecture alone.”). While damages are not evaluated against a standard of “absolute certainty,” inherently conjectural claims are insufficient. *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 20, 270 Wis. 2d 146, 677 N.W.2d 233 (explaining that there can be no claim for damages based on event or circumstance that might or might not occur in future).

The damages claimed in this case are impermissible for the following reasons:

1. The State’s assumption that federal law prohibited a profit for pharmacists is incorrect;
2. The State’s theory that with more actual pharmacy pricing information the legislature would have made different reimbursement decisions is inherently speculative and ignores that there is no duty for manufacturers to try to calculate and provide such information; and
3. The State’s contention that “lower AWP’s would mean lower reimbursement” is based on a characterization of AWP’s that differs from the legislature’s understanding and is an inherently conjectural “if/then” construct.

The State’s damages claim is based on the assumption that pharmacists were legally barred from making any profit on drug

reimbursement, an assumption contradicted by (a) the manner in which CMS applied federal law to Medicaid reimbursement, and (b) the legislative history for the budget bills, which showed that the legislature was aware that it was providing a profit by consistently setting reimbursement at levels higher than the reports it received showed pharmacies were actually paying. It also is contradicted by common sense and basic economics: businesses exist to make a profit and do not continue unprofitable operations. Because it is clear that pharmacists were entitled to make some level of profit, the State's theory fails as contrary to federal and Wisconsin law.

Nor could the State show that pharmacists should have made less of a profit than the legislature authorized, let alone provide a basis on which a trier of fact could determine that amount. The reimbursement formulas set by the legislature were hammered out through the budgetary process, after considering various reports concerning actual prices and after weighing alternatives to reducing reimbursement and considering the advocacy of the pharmacy lobby. The Governor chose to approve or veto those decisions and he too weighed various economic options and political considerations. No trier of fact could conclude how the legislature and Governor would have resolved the competing pressures and interests if more or different

information about what pharmacies actually paid for drugs had been available. The State never attempted to show that a particular amount of profit would have satisfied the legislature, been endorsed by the Governor, and then been approved by the federal government. This is not a question of the sufficiency of the proof at trial—there was and could be no proof at all.

A. BECAUSE THE LEGISLATURE SET REIMBURSEMENT, THE STATE CANNOT PROVE DAMAGES.

The claimed “damages” in this case are, in fact, nothing more than the economic consequences of the legislature’s decisions in the biennial budget process. No trier of fact can say why the legislature did what it did when it directed W-DHS to reimburse for brand drugs at a particular discount from AWP and to reimburse for generics at MAC. *City of Appleton v. Bachman*, 197 Wis. 4, 11, 220 N.W. 393 (1928) (stating that “a court cannot inquire into the character of the intent with which a co-ordinate branch of the government exercises its powers”); *Christie v. Lueth*, 265 Wis. 326, 332, 61 N.W.2d 338 (1953) (“It is axiomatic that the courts may not investigate the motives of those who enact legislation.”).

The State’s theory is that the legislature would have set the reimbursement formulas differently, if the legislature had been

provided with more information about actual prices. This theory is untenable for at least two reasons. First, because no statute or regulation requires drug manufacturers to calculate or publish actual prices paid by pharmacies (even assuming wholesalers would share such data with manufacturers), the State's theory is premised on speculation as to what would have happened if there had been a duty to disclose. Moreover, the federal government does not require states to obtain or base reimbursement on actual prices. The Wisconsin legislature has enacted no statute requiring manufacturers to try to calculate what pharmacies actually pay; nor is there any regulatory requirement to do so. Absent a legally cognizable duty of disclosure, there is no factual predicate for a damages claim against any manufacturer based on the State's alleged lack of actual pharmacy prices.

Second, as the State concedes, “[t]here is no person who can testify about why ‘the State of Wisconsin’ did what it did regarding pharmacy reimbursement.” (A.Ap. at 476 (emphasis omitted).) Indeed, the State admitted at trial that it was “**pure speculation.**” (A.Ap. at 491; R.431 at 46:19-23 (emphasis supplied).) The State was correct, and there is no way to determine why the legislature balanced various issues as it did, including the following:

1. The need to provide Medicaid recipients with sufficient access to services (A.Ap. at 493-505; A.Ap. at 393-401; A.Ap. at 406-16);
2. The need to compensate pharmacists at a level that would encourage them to participate in the Medicaid program (42 C.F.R. § 447.204 (2011));
3. The unlikelihood that pharmacists would choose to participate in a program that would not afford them an adequate profit (A.Ap. at 110-11);
4. The fact that the dispensing fee was insufficient to provide any profit and that pharmacists claimed, as a result, that they needed some margin on drug reimbursement (A.Ap. at 319-27; A.Ap. at 126-27);
5. The costs to the State if it had to pay beneficiaries' transportation costs to pharmacies or for increased emergency room or urgent care visits (*id.*);
6. The different economics of brand and generic drugs (A.Ap. at 319-27; A.Ap. at 117-70);
7. The rebates that drug companies paid to the State in order to have their drugs included in the Medicaid program (Wis. Stat. § 49.45(49m) (2011)); and
8. The interests of economy (A.Ap. at 493-505; A.Ap. at 393-401; A.Ap. at 211-22; A.Ap. at 402-05; A.Ap. at 406-16).

Equally unknowable are the reasons for the Governor's decisions to approve or veto particular Medicaid expenditures, including why in 1999, Governor Tommy Thompson reassured the pharmacists that he would not approve a proposed reduction in drug reimbursement. (A.Ap. at 422.) No trier of fact can conclude that Governor Thompson or, after

him, Governor Doyle, would have made any different choices in making the decisions reflected in the State budget.

B. THE STATE CANNOT SHOW DAMAGES WITH REASONABLE CERTAINTY BY CLAIMING THAT FEDERAL LAW REQUIRED IT TO REIMBURSE AT ACTUAL COST.

The State claims it must be presumed that the legislature would have followed federal law in setting reimbursement. (Respondent's Brief of 7/28/10, at 15, 25-26.) The State further claims that the legislature would have been required by federal law to set reimbursement at actual cost if the legislature had known actual cost. This argument fails because federal law does not require states to reimburse either at or based on actual costs.⁶

The State's argument about federal law is premised on 42 C.F.R. § 447.502, which defines EAC as a state's "best estimate" of what pharmacists are paying in the aggregate, and § 447.512, which sets aggregate limits on payments for brand drugs. Those regulations cannot be considered in isolation without regard to other laws governing reimbursement, *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110, and those other laws refute the State's theory.

⁶ Presumptions must be based on proof of actual existing facts, not conjecture. See *Home Sav. Bank v. Gertenbach*, 270 Wis. 386, 403-04, 71 N.W.2d 347 (1955).

Federal law requires states to balance two competing policies when they set reimbursement: (a) setting reimbursement at a level that will encourage pharmacists to participate in the Medicaid program, 42 C.F.R. § 447.204 (2011), and (b) estimating actual cost, 42 C.F.R. § 447.512 (2011). Section 447.512 cannot be construed without regard to § 447.204, or in a way that conflicts with the statutory objective of the statute it implements. *Sec’y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990). Reimbursement must be set at levels that will incentivize pharmacists to participate in the Medicaid program. 42 U.S.C. § 1396a(a)(30)(A) (2011). The State’s theory that pharmacists were prohibited by federal law from earning a profit on drugs dispensed to Medicaid patients is directly contrary to the statutory and regulatory scheme as a whole.⁷

The federal government’s actions further refute the State’s characterization of federal law. CMS approved every single Medicaid plan used during the period covered by the State’s claims in this case (*see, e.g.*, A.Ap. at 506-13; A.Ap. at 378-82), and would not approve plans that did not afford pharmacists a profit (A.Ap. at 110-12). CMS’

⁷ The State cannot credibly claim that 42 C.F.R. § 447.512 stands alone as a requirement when OIG reported in 1997 that “[w]e have determined that there is a significant difference between pharmacy acquisition cost and AWP” but “[w]e recognize that these calculations do not incorporate all the complexities of pharmacy reimbursement and that acquisition cost is just one factor in pharmacy reimbursement policy.” (R.304:DX202; *see also* A.Ap. at 171-92.)

approval of Medicaid plans as complying with federal law is accorded substantial deference. *Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 532, 105 S. Ct. 2210, 85 L. Ed. 2d 577 (1985); *Iowa Dep't of Human Servs. v. Centers for Medicare & Medicaid Servs.*, 576 F.3d 885, 888 (8th Cir. 2009). It, therefore, must be presumed that the legislature complied with federal law when it set reimbursement rates that knowingly afforded pharmacists a profit.

The fact that the State's damages claim is based on pure speculation was underscored by the State's closing argument to the jury that complete price transparency is necessary because then: "[t]he pharmacy lobby has to lobby to the legislators to violate federal law **if there's complete transparency.**" (A.Ap. at 463; R.441 at 187:4-5 (emphasis supplied).) However, there is no transparency of the sort the State advocates, and neither the federal government nor the Wisconsin legislature has determined that there should be. Accordingly, the notion that **with** transparency the legislature would have made different decisions is speculation: there simply is no way to know.

C. THE STATE CANNOT SHOW DAMAGES WITH REASONABLE CERTAINTY BY ITS THEORY THAT AWPs SHOULD HAVE BEEN ACTUAL PRICES.

The State further contends that **if** AWPs had been what the State calls "true" actual average prices, **then** the formulas approved by

the legislature would have resulted in lower payments. Because the legislature knew when it enacted the formulas that AWP's were not actual average prices (A.Ap. at 493-505; A.Ap. at 393-401; A.Ap. at 211-12; A.Ap. at 402-05; A.Ap. at 406-16), the State's theory is really that the formulas would have resulted in lower payments if the formulas had been based on different assumptions. Again, that is pure conjecture.

The State never attempted to answer the question of "how much lower" with any answer except "all of the profit." (A.Ap. at 444-45; R.437 at 10:23-11:13.) Because the federal government would not have approved a plan that afforded no profit (A.Ap. at 110-12) and because the legislature was aware that pharmacists were making a profit (A.Ap. at 493-505; A.Ap. at 393-401; A.Ap. at 211-12; A.Ap. at 402-05; A.Ap. at 406-16), the State's theory is refuted by the uncontested facts. The State offered no evidence to support a claim that some lesser amount of profit would have been enacted by the legislature, endorsed by the Governor, and approved by CMS.

II. THE STATE WAS NOT ENTITLED TO A JURY.

A. STATUTORY CLAIMS CARRY THE CONSTITUTIONAL RIGHT TO A JURY ONLY UNDER SPECIFIED, NARROW CIRCUMSTANCES.

Neither Wis. Stat. § 100.18 nor § 49.49 provide for a trial by jury.

The trial court concluded that Article I, § 5 of the Wisconsin Constitution afforded the State the right to a jury trial. (A.App. at 59-66.)⁸

Article I, § 5 provides that “[t]he right of trial by jury shall remain inviolate. . . .” This means that “the right is preserved to the extent that it existed at the time of the adoption of the state constitution in 1848.” *State v. Schweda*, 2007 WI 100, ¶ 18, 303 Wis. 2d 353, 736 N.W.2d 49. This Court has addressed when a statutory cause of action will carry the constitutional right to a jury. *State v. Ameritech Corp.*, 185 Wis. 2d 686, 517 N.W.2d 705 (Ct. App. 1994), *aff’d* 193 Wis. 2d 150, 532 N.W.2d 449 (1995); *Vill. Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177; *Dane County v. McGrew*, 2005 WI 130, 285 Wis. 2d 519, 699 N.W.2d 890; *Schweda*, 303 Wis. 2d 353; *Harvot v. Solo Cup Co.*, 2009 WI 85, 320 Wis. 2d 1, 768 N.W.2d 176.

⁸ This Court has never suggested that Article I, § 5 affords the State a right to a jury trial. This is unsurprising because § 5 is contained in Article I of the Constitution, which is the Declaration of Rights afforded against the government.

In *Ameritech*, 185 Wis. 2d at 698, the Court of Appeals held that the State has no right to a jury trial for an enforcement action brought under § 100.18. This Court affirmed. *State v. Ameritech Corp.*, 193 Wis. 2d 150, 532 N.W.2d 449 (1995). The Court of Appeals held that there is a constitutional right to a jury trial in civil cases where “(1) the statute codifies an action known to the common law in 1848; and (2) the action was regarded as at law in 1848.” *Ameritech*, 185 Wis. 2d at 690 (emphasis in original). In *Village Food*, this Court addressed the first part of the test and concluded that, while the action need not be the codification of common law, it must have “existed, [been] known, or [been] recognized at common law . . . in 1848” and “regarded as at law in 1848.” *Vill. Food*, 254 Wis. 2d 478, ¶ 16.

In *Schweda*, the Court refused to find an Article I, § 5 right to a jury in a case involving the State’s enforcement of environmental statutes. *Schweda*, 303 Wis. 2d 353, ¶ 14. Although modern environmental law is based on the common law of nuisance, the Court noted that it “had been univocal in rejecting the temptation to carve out a constitutional right to a jury trial based on broad analogies between modern causes of action and causes of action at statehood.” *Id.* ¶ 21. Further, according to the Court, a statutory claim would not be a

counterpart if its elements differed from the arguable common law origin. *Id.* ¶¶ 35-36.

Finally, in *Harvot*, this Court declined to find a constitutional right to a jury in a damages claim under Wisconsin’s Family or Medical Leave Act (“WFMLA”). *Harvot*, 320 Wis. 2d 1, ¶ 45. The Court concluded that *Schweda* had narrowed *Village Food’s* test for a “counterpart,” and concluded that a statutory claim will not be a counterpart to a common law claim if their purposes differ. *Id.* ¶¶ 77-87. As the Court explained, “it would be hard to imagine that *Harvot’s* civil action for damages under the WFMLA ‘existed, was known, or was recognized at common law . . . in 1848’ when we consider that the creation of the WFMLA was a response to the change in composition of the modern-day work force.” *Id.* ¶ 87.

B. WISCONSIN STATUTE SECTION 100.18 IS NOT A “COUNTERPART” TO A CLAIM AT COMMON LAW.

There is no right to a jury for an enforcement action under Wis. Stat. § 100.18. *Ameritech*, 185 Wis. 2d 686, *aff’d* 193 Wis. 2d 150; *Harvot*, 320 Wis. 2d 1, ¶ 49 (“There is no dispute that in 1848, the State had no right to commence a civil suit to collect forfeitures for deceptive advertising or violation of the Wisconsin Consumer Act. Thus, *any right to a jury trial would be by legislative grant rather than*

constitutionally protected.”) (quoting *Ameritech*, 185 Wis. 2d at 689) (brackets omitted).⁹

While *Ameritech* was decided in the context of an enforcement action, the fact that the State in this case also sought monetary relief under § 100.18(11)(b) is without consequence. No common law claim existed at statehood that was a counterpart to § 100.18. The State contends that a claim under § 100.18 carries the right to a jury because it is the “essential counterpart” to the common law offense of “cheating.” (Respondent Brief of 7/28/10, at 52.) The State is wrong as a matter of law.

At common law the elements of cheating were: (1) deception; (2) that affects the public; and (3) that common prudence cannot guard against. *See, e.g., People v. Stone*, 9 Wend. 182, 188 (N.Y. Sup. Ct. 1832); *State v. Stroll*, 30 S.C.L. (1 Rich.) 244 (S.C. Ct. App. 1845); *see also State v. Cunningham*, 99 N.W.2d 908, 912 (Minn. 1959). The “common illustrations of the meaning of the common law in such cases” included “cheating by means of false measures,” a “false seal affixed to cloth, in order to enhance the price,” “[c]heating by false dice,” “false certificates or vouchers by an officer,” and “false copies or certificates of

⁹ Because the State’s damages claim is impossible to prove, (*see supra*, pp. 27-33), the enforcement action is the only claim available to the State. The State waived any right to forfeitures under § 100.18 (R.441, 6:16-23), leaving only its equitable claim for injunctive relief.

judicial records.” *Stroll*, 30 S.C.L. (1 Rich.) 244. Similarly, Blackstone spoke of cheating as including, in addition to those sorts of offenses, “selling by false weights and measures,” and misrepresenting the weight and quality of bread and beer. 2 WILLIAM BLACKSTONE, COMMENTARIES *116-17.

Cheating is not § 100.18’s common-law counterpart. The elements of a claim under § 100.18 are: (1) the defendant made a representation to the public with the intent to induce an obligation; (2) the representation was “untrue, deceptive, or misleading;” and (3) the representation materially induced a pecuniary loss to the plaintiff. *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶ 19, 301 Wis. 2d 109, 732 N.W.2d 792. Section 100.18 bears no relation to the practices associated with common law cheating, such as using false weights, playing with loaded dice, and buying goods with counterfeit money, *see Stone*, 9 Wend. 182; *Stroll*, 30 S.C.L. (1 Rich.) 244, and it is wholly unlike the other examples cited by Blackstone. For the State to claim that § 100.18 is the counterpart of the common law of cheating is to engage in precisely the sort of broad analogizing that this Court has “univocal[ly]” rejected. *Schweda*, 303 Wis. 2d 353, ¶ 21.

Nor can the State analogize a § 100.18 claim to common law claims for fraud. This Court has made clear that a statutory claim is not a counterpart to a common law claim if a “vital aspect” of the two differs. *Id.* ¶ 42. The elements of common law fraud include reasonable reliance on the representation by a plaintiff who believed it to be true. *See Household Fin. Corp. v. Christian*, 8 Wis. 2d 53, 55-56, 98 N.W.2d 390 (1959). In this case, the State repeatedly emphasized to the trial court that § 100.18 does not require reasonable reliance. (*See, e.g., R.233* at 40-41; *R.147* at 8-12.) Further, common law fraud can, in appropriate circumstances, be based on a failure to disclose, *Estate of Lecic v. Lane Co.*, 104 Wis. 2d 592, 609-11, 312 N.W.2d 773 (1981), and a § 100.18 claim can only be based on affirmative misrepresentations of fact. *Tietsworth*, 270 Wis. 2d 146, ¶¶ 39-40.

Illinois, which has a constitutional provision similar to Wisconsin’s Article I, § 5, affords no right to a jury under its consumer protection statute. *See, e.g., Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 754 (Ill. 1994). As in Wisconsin, Illinois courts interpret the state’s constitutional right to a jury as protecting “the right of trial by jury as it existed at common law.” *Heinold*, 643 N.E.2d at 753 (quoting *George v. People*, 47 N.E. 741 (Ill. 1897)).

The Illinois Supreme Court has rejected the argument that a claim under the state's Consumer Fraud Act is analogous to a common law action. *Id.* at 754-55. Instead, the court concluded that the Consumer Fraud Act "created a new cause of action different from the traditional common law tort of fraud." *Id.* at 754 (quoting *Richard / Allen / Winter, Ltd. v. Waldorf*, 509 N.E.2d 1078 (Ill. 1987)).

C. WISCONSIN STATUTE SECTION 49.49(4M) IS NOT SUFFICIENTLY ANALOGOUS TO A CLAIM AT COMMON LAW TO CARRY A CONSTITUTIONAL RIGHT TO A JURY.

A claim under Wis. Stat. § 49.49 is not a counterpart to a common law claim at statehood for four reasons. First, the elements of § 49.49 are different from any common law claim recognized at statehood. Second, the purpose of § 49.49 is different from any such common law claim. Third, § 49.49(4m) is a claim for *in personam* forfeitures, which were not recognized at common law at the time of the signing of the Wisconsin Constitution. Finally, § 49.49(6) provides for the equitable remedy of restitution, not the remedy at law of damages. Each of these reasons, independently, warrants the conclusion that there is no right to a jury under § 49.49(4m) or (6).

1. The Elements of § 49.49(4m)(a)2 Differ from a Claim at Common Law.

The State asserts that a claim under § 49.49(4m) is “sufficiently analogous” to common law fraud to carry the right to a jury. (Respondent’s Brief of 7/28/10, at 53-56.) However, claims for common law fraud require reasonable detrimental reliance. *Household Fin. Corp.*, 8 Wis. 2d at 55-56. A claim under § 49.49(4m) contains no requirement of reasonable reliance. Finally, § 49.49(4m)2 requires that a statement be “for use in determining rights to a benefit or payment” under Wisconsin Medicaid, and common law fraud contains no such limitation. Where, as here, “vital aspects” of a common law cause of action are not part of a contemporary statutory claim, “the two are not sufficiently analogous” to give rise to a constitutional right to a jury. *Schweda*, 303 Wis. 2d 353, ¶ 42.

2. The Purpose of § 49.49(4m) is Different from Common Law Fraud.

A statutory claim will not be a counterpart to a claim at common law if it regulates a matter the common law did not. *Harvot*, 320 Wis. 2d 1, ¶ 80. As this Court held in *Harvot*, because the WFMLA is modern social legislation that did not have an essential counterpart in 1848, a claim for damages under the WFMLA does not carry the right to a jury. *Id.* Similarly, the “medical assistance” on which the State’s

§ 49.49(4m) claim is based did not exist until more than a century after statehood. *See* Wis. Stat. § 49.49 (eff. July 1, 1966). Like the WFMLA, § 49.49 is precisely the sort of “modern social legislation” that was “quite unheard of in 1848.” *Harvot*, 320 Wis. 2d 1, ¶ 80.

3. Section 49.49(4m) Provides for *In Personam* Forfeitures, Which were not Recognized at Common Law at Statehood.

There are two species of forfeitures: *in rem* and *in personam*. *In rem* forfeitures are for the seizure of property actually used in the commission of an offense. *State v. Konrath*, 218 Wis. 2d 290, 307, 577 N.W.2d 601 (Wis. 1998). *In personam* forfeitures are punitive and not limited to the property used in the commission of an offense. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965). Section 49.49(4m) provides for *in personam* forfeitures, because it does not seize property used in the commission of an offense and is intended to punish. (A.Ap. at 78; A.Ap. at 84.)

At common law, three kinds of forfeitures existed. First, there was deodand, which was the forfeiture to the king of an object causing the death of a person. *Austin v. United States*, 509 U.S. 602, 611-12, 113 S. Ct. 2801, 125 L. Ed. 2d 448 (1993). Second, there were forfeitures resulting from felony or treason, known as forfeiture of estate. *Id.* Finally, there were *in rem* statutory forfeitures for customs

violations. *Id.* While statutory forfeitures were *in rem*, deodands and forfeiture of estate were *in personam*. *Id.* at 612; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974); Paul S. Grossman, *Appellate Jurisdiction for Civil Forfeiture: The Case for the Continuation of Jurisdiction Beyond the Release of the Res*, 59 Fordham L. Rev. 679, 682 (1991).

The two types of *in personam* forfeitures at common law—deodands and forfeiture of estate—did not survive to the time of the Wisconsin Constitution. Deodand was abolished in England by 1846, two years before the Wisconsin Constitution was adopted in 1848. *Calero-Toledo*, 416 U.S. at 682. Forfeitures of estate are unconstitutional. *Id.* at 682-83; U.S. Constitution, Article III, § 3. *In personam* forfeitures, therefore, were not recognized at common law at statehood and, thus, there was no constitutional right to submit the § 49.49(4m) claim to a jury.

4. Wisconsin Statute Section 49.49(6) is an Equitable Claim for Restitution, Not a Legal Claim for Damages.

Section 49.49(6) is not a damages provision at all; instead, it provides for restitution. The legislature clearly indicates when it is enacting a provision for damages; indeed, in 2007, it enacted § 49.485, which expressly provides for damages caused by false claims. Further,

the legislature enacted § 49.49(6) together with §§ 100.263 and 133.16—three statutes intended to provide for awards to the Wisconsin Department of Justice (“DOJ”). In the same bill, the legislature enacted Wis. Stat. § 20.455(1)(hm), which provided that all money received by DOJ under these statutes other than fines, forfeitures, and penalty assessments would be credited to DOJ’s appropriation account in order to provide for restitution. Wis. Stat. § 20.455(1)(hm) (eff. until 2010); ANALYSIS OF THE LEGISLATIVE REFERENCE BUREAU, 1995-96 Legislative Sess. (1995), A.Ap. at 514-18. Rather than being at law, restitution is an equitable claim. *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶ 79, 262 Wis. 2d 32, 662 N.W.2d 652. Accordingly, there was no right to present it to a jury.

III. WHEN THE STATE FAILS TO PROVE A CLAIM AT TRIAL, THE TRIAL COURT MAY NOT ITSELF DETERMINE THE CLAIM FOR THE STATE.

Even if a claim under § 49.49(4m) could be pursued against a drug manufacturer based on the legislature’s decision to use AWP’s, the State could not obtain a judgment against Pharmacia for forfeitures when the State failed to prove that claim to the jury. The State had submitted to the trial court a proposed Special Verdict that asked the jury how many claims Medicaid had reimbursed based on AWP’s. (A.Ap. at 465.) The trial court rejected that question and submitted a

question asking the jury how many false statements Pharmacia had made or caused to be made. (A.Ap. at 69.) The State did not object, waiving any ability to claim that violations are measured by the number of claims reimbursed. Wis. Stat. § 805.11 (2011) (“Any party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error.”).

The trial court correctly rejected the State’s argument that it could prove violations of § 49.49(4m) by the number of claims reimbursed by the State. (A.Ap. at 87-92.) However, the trial court decided to review the entire trial record and determine what it believed was the number of statements, based on a theory never argued to the jury. (A.Ap. at 94; A.Ap. at 521.) More than seven months after verdict, the trial court supplied its own answer: 4,578 statements. (A.Ap. at 99.) It then based the forfeitures award on that number. (A.Ap. at 101.) However, the trial court’s own description of the evidence supporting that number as “scant at best, widely scattered, and none too clear” refutes any notion that the State met its burden to prove that number by clear and convincing evidence. *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985); *Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 242, 170 N.W.2d 807 (1969).

As a matter of law, the trial court could not supply an answer to the verdict form. First, it did so more than 90 days after verdict, in violation of Wis. Stat. § 805.16(3). Although the trial court correctly vacated the answer to Question No. 5 within 90 days of verdict, it then lost competence to provide a new answer. *Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058, 1070-71, 512 N.W.2d 753 (1994). The only thing the trial court could do with the verdict question, because the jury would have had to find at least one violation to answer the previous questions, would be to answer Question No. 5 with “one.” To do more exceeded its statutory authority, and this Court should make clear that trial judges are bound to the deadlines set by the legislature, regardless of their view that an appellate court might find their reasoning “helpful.” (A.Ap. at 521.)

The State never argued to the jury that the number of “statements” violative of § 49.49(4m) was anything other than the number of times Medicaid reimbursed pharmacists using a discounted AWP. For the trial court to decide a factual issue based on a different theory was impermissible. *Chiarella v. United States*, 445 U.S. 222, 236, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980) (refusing to permit government to support conviction with alternative theory and noting that “[w]e need not decide whether this theory has merit for it was not

submitted to the jury”). The trial court correctly concluded that the State failed to prove its forfeiture claim, but as a matter of law, could do nothing more.

Wisconsin law does not permit the State to do what it did here: ask the jury to decide a substantive claim based on a faulty legal theory and then have the trial court save the State from the consequences of its own trial strategy. As this Court has noted, “no rule of law . . . permits a party to have a second opportunity to prove a crucial element of its case” when it was afforded that opportunity and “the element on which it failed to discharge its burden was clearly and unequivocally an issue at trial.” *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 639, 273 N.W.2d 233 (1979). Nothing in Wisconsin law permits a trial court to supply an answer to a verdict question when the case was submitted to a jury, much less on a different theory than was presented to the jury. Certainly, nothing permits a trial court to supply an answer based on evidence that the trial court itself describes as “scant at best, widely scattered, and none too clear” (A.Ap. at 94), when the applicable burden of proof required evidence to be clear and convincing. *Lundin*, 124 Wis. 2d at 184; *Williams*, 44 Wis. 2d at 242.

Supplying an answer to a verdict question was particularly improper here because the forfeiture claim was a punitive one. A

punitive proceeding is subject to the prohibition of double jeopardy, regardless of whether denominated as civil, *State v. McMaster*, 206 Wis. 2d 30, 42-43, 556 N.W.2d 673 (1996), and the government is not permitted to treat a trial as a “dress rehearsal” for its presentation of proof. *State v. Lawton*, 167 Wis. 2d 461, 464, 482 N.W.2d 142 (Ct. App. 1992). While the Court need not reach the constitutional issue of double jeopardy to reject what was done in this case, it can and should consider the ramifications of permitting the government to put on a flawed trial against a defendant and then be rescued by the trial court.

CONCLUSION

Every two years, the Wisconsin legislature wrestles with choices about a system “characterized by ambivalence and ambiguity, by a confusing mix of means-tested programs and entitlements, and by uneasy compromises among different and often conflicting policies.” *Tannler v. Wis. Dep’t of Health & Human Servs.*, 211 Wis. 2d, 179, 191, 564 N.W.2d 735 (Wis. 1997) (Abrahamson, C.J., concurring). One such choice has been to reimburse pharmacies for drugs based on certain discounts from First DataBank’s AWP, knowing that the AWP were not actual prices paid by pharmacies and that the reimbursement levels chosen would result in some profits for Wisconsin pharmacies. The legislature has had to balance how much profit to pay pharmacists,

how best to conserve State resources, and how to make certain that indigent citizens who needed medicines were able to obtain them.

This lawsuit improperly substituted litigation for legislation. There was no “fraud” here; to the contrary, the legislature knew that AWP’s were not actual prices and set Medicaid reimbursement accordingly. In the context of the “different and often conflicting policies” at issue, the legislature’s decisions as to the appropriate balance of economy and access make a great deal of sense. But, even if the legislature’s decisions did not make sense, they cannot be upended through a lawsuit.

The case was flawed from the outset and the State’s claim of “damages” impermissibly rests on budgetary choices made by the legislative branch of the government. No trier of fact could properly conclude that the State was harmed, much less quantify that harm as a damages award. In fact, the State was not entitled to a jury in the first place. Finally, the trial court disregarded the express statutes that governed its role, and gave the State a second opportunity to prove the forfeiture claim that the State wholly failed to prove at trial. The judgment in this case is contrary to law and should be vacated.

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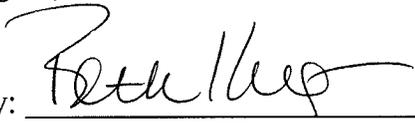
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CERTIFICATION

I hereby certify that this 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 9,950 words.

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CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12)

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I personally caused three copies of the Appellant's Brief and Appendix to be sent by e-mail and mailed by first-class postage prepaid mail to:

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