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September 7, 2012

Honorable Judges of the Court of Appeals of Wisconsin, District II
Wisconsin Court of Appeals
110 East Main Street, Suite 215
P. O. Box 1688
Madison, WI 53701-1688

Re: *State v. Abbott Laboratories et al.*, No. 2010AP 232-AC

Dear Judges Brown, Neubauer, and Reilly:

This letter brief responds to your Order of August 1, 2012. The State (1) will show that the Supreme Court's opinion forecloses Pharmacia's "separation of powers" and "political question" arguments, and (2) will list the issues that in the State's view remain for this Court.

I. The Opinion Forecloses Pharmacia's Justiciability Arguments

A. The Court rejected the premise of these arguments

Although the Supreme Court noted that the separation of powers issue was not certified to it (Op. at ¶1, n.2),[1] Pharmacia's position on that issue and the related political question issue depends entirely on a premise

[1] **Citations.** In this letter brief, "Op." refers to the Supreme Court's opinion. "PB" and "SB" refer respectively to Pharmacia's opening brief and the State's response brief in this Court on Pharmacia's appeal. "SCB" and "PCB" refer respectively to the State's opening brief and Pharmacia's response brief in this Court on the State's cross-appeal. "Order" refers to this Court's Order of August 1, 2012.

the Supreme Court rejected in deciding that the jury did not have to speculate in awarding damages. That premise is that in passing budget bills, the legislature intended to use inflated AWPs to inflate the "estimated acquisition cost" (EAC) component of drug reimbursement rates, and thereby to provide a systematic profit to pharmacies.

Specifically, according to Pharmacia, the State "knew the discount [off AWP] afforded pharmacists a profit of the 7% difference between what they paid to buy drugs from wholesalers and what the State reimbursed them," and hence the State "sought to recover from Pharmacia and other pharmaceutical manufacturers ... the profit the legislature knowingly determined pharmacists would be paid." PB at 3-4. Pharmacia argued that because the legislature had chosen "to apply a discount to AWP that still allowed pharmacies to recoup a profit," the separation of powers forbids a jury to award damages measured by the profits that pharmacies actually reaped from inflated AWPs. *Id.* at 17. Similarly, Pharmacia argued, "when the legislature has determined that pharmacies should be paid a profit," the political question doctrine bars a "determination that they should not be paid a profit." *Id.* at 23.

In deciding the "speculation as to damages" issue, the Supreme Court expressly rejected Pharmacia's premise. Far from finding that the legislature knew it was paying pharmacies a 7% profit, the Court relied on

the State's "compelling account" to the jury that "no one in Wisconsin state government knew the exact degree of inflation" in published AWPs, and that the resulting "uncertainty caused [the State] to overpay for Medicaid drugs." Op. at ¶70. The Court cited "testimony describing a chaotic, confusing process in which decision-makers received dramatically different reports from different sources," and wrote that "Pharmacia's evidence only strengthened that account, because it described even more disagreements among the actors feeding information to the state." *Id.*

Specifically, the Court cited testimony from Amie Goldman, a former analyst with the nonpartisan Legislative Fiscal Bureau (which provided fiscal analyses to the Wisconsin legislature for use in formulating the biennial budget) that with accurate AWPs, there would have been "no need" for her to prepare the report advising the legislature on the ramifications of adopting alternative Medicaid amounts because the legislature would not have become involved in setting the reimbursement formula. *Id.* ¶64. Her testimony "substantially bolstered the State's position that inflated AWPs caused Wisconsin to overpay for Medicaid drugs, and provided a credible foundation for the jury to calculate damages." *Id.* Similarly, the Court cited testimony of Ted Collins, a Department of Health Services consultant, that his job of establishing generic reimbursement "would have been rendered superfluous if

companies like Pharmacia reported actual wholesale prices." *Id.* ¶76. Such evidence supported the inference that if Wisconsin "had been equipped with actual wholesale prices for both brand name and generic drugs, [it] would have paid Pharmacia in those amounts." *Id.* ¶81.[2]

In sum, the Court held the jury was entitled to reject the premise that underlies Pharmacia's justiciability arguments: that overpayments resulted from a political choice and that letting the jury award damages overruled that "choice."

B. No other basis exists for the justiciability argument

Other than the premise that the Supreme Court has now rejected, Pharmacia's briefs to this Court offer no alternative argument that having the jury decide this case interfered with the separation of powers or presented a nonjusticiable political question. *See* PB at 9-14.

No alternative argument is available. First, nothing in the statutory *text* suggests that letting the jury decide this case flouted the intent of the legislature. The relevant statutes—simple line items in budget bills—merely recited dollar amounts appropriated for drug reimbursement. In charts provided to the legislature by the Legislative Research Bureau, those

[2] The Court's citation of evidence was illustrative, not comprehensive. *See* Op. at ¶65, referring to "other witnesses" and citing two by way of "example." In its certification order, this Court cited other such evidence—notably that when Wisconsin received accurate AWPs, it used them to lower reimbursement without involvement from the legislature. *See* Order at 9-10.

amounts corresponded to particular discounts from AWP. Given the rampant uncertainty and controversy noted by the Supreme Court over what pharmacies really were paying for drugs, the legislature's adoption of a particular dollar figure from such charts implies nothing more than an awareness that AWPs were too high and that it wanted them discounted by the percentage it had been told would likely produce total expenditures of the particular amount it appropriated. *See* Op. at ¶¶70, 78; SB at 19-27.

Second, nothing in *federal* Medicaid statutes or regulations, with which Wisconsin must comply, supports an argument that letting the jury decide this case overruled a legislative political "choice" to inflate EAC to give systematic profits to pharmacies. To the contrary, as the Court noted, federal regulations define EAC as the State's "best estimate of the price generally and currently paid by providers" for a drug, and that, except where specific limits are already set, aggregate payment for drugs may not exceed the sum of EACs plus reasonable dispensing fees. Op. at ¶4, *citing* 42 C.F.R. §§447.502 and 447.512(b).[3]

In short, the Supreme Court rejected the premise of Pharmacia's justiciability arguments, and no other argument exists to save them.

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[3] Wisconsin responded to this requirement in its 1996 State Plan, which told the federal government that "the Department's best estimate of the price generally and currently paid by providers for each drug ... will be determined by applying a ten percent (10%) discount to the AWP." Supp.Ap. 149. The legislature that year allocated a dollar amount for Medicaid reimbursement that corresponded to an AWP – 10% formula. *See* SB at 14.

Moreover, even before the Supreme Court rejected the essential premise of those arguments, they were implausible. In enacting § 49.49(4m)(a)2, the legislature explicitly created a judicial remedy for causing false statements to be made for use in determining rights to Medicaid reimbursement. Pharmacia's separation of powers argument depends on the untenable notion that this legislative grant of authority to the judicial branch was impliedly repealed by the legislature's allocations of Medicaid money in biennial budget bills. *See* SB at 27.

The Supreme Court has now rendered this assertion even more implausible—as this Court has suggested. *See* Order at 4 ("In light of the judicial branch cast that the supreme court has placed on the matters discussed in its opinion, how can this court now characterize them as political choices?"). In particular, the Supreme Court's "right to jury trial" discussion found that a cause of action for false statements used to determine Medicaid benefits was an essential counterpart to common-law fraud. Op. at ¶¶45-55. In doing so, it rejected Pharmacia's argument that because the fraud played out in the "specific realm" of Medicaid reimbursement, Medicaid fraud was vitally different than common-law fraud. *Id.* ¶48. The State knows of no case in America that has applied separation-of-powers or political-question doctrines to preclude the judiciary from deciding common-law fraud claims. Deciding such claims is

a judicial function; indeed, it was the judiciary that *created* the common-law remedy for fraud.

In sum, the Supreme Court decision forecloses Pharmacia's separation of powers and political question arguments.

II. The State's Position on the Issues that Remain for Decision

A. Pharmacia's Appeal. The Supreme Court's holding that the jury did not have to speculate in awarding damages subsumes and forecloses Pharmacia's argument that as a matter of law no reasonable jury could find causation of damage. *See* PB 27-30, SB 41-45. Thus, in the State's view, only the following issues remain open:

1. Was there credible evidence to sustain a jury finding that Pharmacia's AWPs were false, deceptive, or misleading? *See* PB at 23-24, 32-33; SB at 34-38, 46.

2. Does §100.18(10)(b), making certain representations about "wholesale" prices *per se* deceptive, govern statements of "average wholesale price"? *See* PB at 25-27, SB at 39-41.

3. Was the State's claim under §100.18 based on nonactionable "failures to disclose" rather than actionable misrepresentations? *See* PB at 30-32, SB at 45.

4. Does §49.49(4m)(a)2 apply to misrepresentations that affect the amount of Medicaid payments? *See* PB at 33-36 and PCB at 21-22; SB at 46-48.

5. Did the circuit court commit reversible error by refusing a mitigation of damages instruction? *See* PB 44-45, SB at 56-58.

6. Should any portion of the jury's $9 million damage award be eliminated as "duplicative?" *See* PB at 47-49, SB at 60-63.

7. Did the court err in any evidentiary ruling, and does any such ruling justify a new trial? *See* PB at 49-55, SB at 63-70.

8. Was the fee award proper? *See* PB at 55-60, SB at 70-76.

B. The State's Cross-Appeal. In the State's view, the following issues remain on Wisconsin's cross-appeal:

1. Is a false statement of AWP "material" only if it actually determined, as opposed to having the potential to determine, reimbursements? *See* SCB at 29-34, PCB at 39-42.

2. Did the circuit court consider improper factors in determining the dollar amount for each forfeiture? *See* SCB at 34-40, PCB at 44-46.

3. Did the circuit court err in limiting injunctive relief to an order to obey the relevant statutes? *See* SCB at 41-49, PCB at 46-54.

Whether the first issue—the standard for "materiality"—remains open requires comment. That issue was not certified to the Supreme Court; it was not briefed by the parties in the Supreme Court; and in oral argument, the Court was told, without objection, that that issue would remain for determination on remand.

In discussing the certified issue of whether the circuit court exceeded its authority in vacating the jury's finding of 1,440,000 false statements, the Court analyzed only three methods of counting violations. First, it considered the State's contention that violations are counted by the number of claims that were reimbursed on the basis of a false AWP—a theory that would have produced 1,440,000 violations. The Court rejected this theory. Op. at ¶¶93-104. Second, the Supreme Court considered Pharmacia's

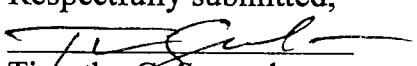
contention that a violation occurred "every time Pharmacia reported an inflated AWP (i.e., every time it transmitted an inflated AWP to FDB which was then conveyed to Medicaid)." Op. at ¶106. The Court rejected that theory as well. *Id.* ¶¶107-108. Third, the Court considered the circuit court's theory that "a violation occurred every time FDB transmitted an inflated AWP to Medicaid and Medicaid then relied on it at least once in the reimbursement of a pharmacy." *Id.* The Court found that approach "the appropriate one" (Op. at ¶106), and later wrote: "We therefore conclude that the number of times FDB transmitted to Medicaid an inflated AWP provided by Pharmacia and used at least once by the state in the Medicaid reimbursement process constituted the best measure of how many violations occurred. Accordingly, the circuit court properly reduced the jury's calculation of violations to 4,578, and we affirm its order." Op. at ¶109.

While this language might seem to endorse the circuit court's holding on materiality, the State does not believe the Court decided this uncertified issue. Rather, the Court is clearly assuming the correctness of the circuit court's holding on all uncertified issues, including its holding that only false statements of AWP that were *actually* used were "material." First, the Court repeatedly says it is not deciding uncertified issues that were not argued to it. *See* Op. at ¶1 n.2, ¶17 n.11, ¶24, ¶54 n.13, ¶58 n.15, ¶62 n.16, ¶81 n.24, ¶106 n.31, ¶110. There is no reason the Court would make

an exception for the "materiality" issue. Second, the Court did not mention or analyze the dispute, not certified to it, over which standard of "materiality" correctly reflects Wisconsin law. Nor did it mention the alternative counting method that would be used if Wisconsin's position on "materiality" were correct—namely, that "a violation occurred every time FDB transmitted an inflated AWP to Medicaid," as endorsed by the Supreme Court (*Id.* ¶¶107-08), but instead of limiting the count to those AWPs that *actually* determined reimbursements, AWPs that had the *potential* to determine reimbursements would be included as "material" statements. *See* SCB at 29-34.

Third, the Court did not and could not have intended to fix 4,578 as the definitive number of violations. Indeed, if this Court on remand accepts certain Pharmacia contentions as to uncertified issues of liability, the final count of forfeitures will be zero, not 4,578. Similarly, if this Court on remand accepts the State's contention that a false statement of AWP was "material" if it had the *potential* to affect a reimbursement, the final count of forfeitures will be higher than 4,578. *See* SCB at 29-34. For these reasons, in the State's view, the "materiality" issue remains for this Court to decide on remand.

Respectfully submitted,



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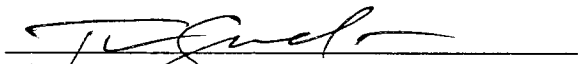
CERTIFICATION

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

Dated this 7th day of September, 2012.



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