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**SUPREME COURT OF WISCONSIN**  
**Case No. 2010AP000232-AC from District IV/II**

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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.

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**BRIEF OF RESPONDENT  
THE STATE OF WISCONSIN**

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**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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## **STATEMENT OF ISSUES**

1. Did the jury have to speculate to determine damages?

Answered by the trial court: no.

2. Was Wisconsin entitled to a jury trial under Wis. Stat. §§49.49 and 100.18?

Answered by the trial court: yes.

3. If the trial court was correct in vacating, as based on an incorrect counting theory, the jury's finding of the number of false statements Pharmacia caused to be made, did the court have authority to determine the number supported by the record under the theory the court deemed required by §49.49?

Answered by the trial court: yes.

## **STATEMENT ON ARGUMENT AND PUBLICATION**

Argument has already been scheduled. Publication will be appropriate.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

To reimburse a pharmacy for a prescription dispensed to a Medicaid patient, Wisconsin pays no more than the drug's "Estimated Acquisition Cost" (EAC), plus a dispensing fee. Wisconsin must comply with federal

law defining EAC as Wisconsin's best estimate of the *actual* price Wisconsin pharmacies on average are paying to acquire the drug. Because Wisconsin itself lacks the ability to estimate current prices on thousands of different drugs, it buys "Average Wholesale Prices" (AWPs) from a price publisher, First DataBank, and uses them to set EACs. Although First DataBank repeatedly said its AWPs were averages of what pharmacies actually pay, it became apparent over time that they were in fact higher. Wisconsin therefore began discounting from them in the hope of estimating real acquisition costs.

Over time it also became apparent that drug manufacturers were responsible for First DataBank's AWPs. Like other States, Wisconsin sued these manufacturers for causing the publication of false AWPs in violation of Wis. Stat. §§100.18 and 49.49 and thereby causing excessive reimbursements to pharmacies. The first defendant Wisconsin took to trial was Pharmacia. The jury found it liable, awarded \$9 million in damages, and found for purposes of forfeitures that Pharmacia caused 1,440,000 false statements of AWP to be made. The trial court upheld the jury's findings of liability and damages, but vacated its count of false statements after disagreeing with Wisconsin's counting theory. It then determined, under

the counting theory it deemed required by §49.49, that the record supported a finding that Pharmacia caused 4,578 false statements to be made.

Pharmacia appealed. Its most prominent argument was that by passing Medicaid budget resolutions, the Wisconsin legislature had made an intentional “policy choice” to increase pharmacies’ profits by using inflated AWP’s to raise the EAC component of reimbursement above pharmacies’ actual acquisition costs. Pharmacia argued that the suit was a nonjusticiable attempt to overrule that purported “policy choice.” It also argued that given that “choice,” Pharmacia’s AWP’s could not be “false” under §100.18 or §49.49, despite being far higher than real average wholesale prices.

The Court of Appeals discussed but did not accept Pharmacia’s contention about the legislature’s intent as to AWP. Instead, it certified three questions that assume the case *is* justiciable and that the jury could find Pharmacia’s AWP’s false: (1) whether Wisconsin was entitled to a jury trial, (2) whether the jury had to speculate to determine damages, and (3) whether the court was within its authority in vacating the jury’s “false statement” number and determining the number supported by the record under a different counting theory. Accepting the certification, this Court

stated it “will limit its review to the three issues identified in the certification.” Order of June 15, 2011 at 1.

## **II. STATEMENT OF FACTS**

Although the jury’s findings of *liability* under §§100.18 and 49.49(4m) are not before this Court, Pharmacia’s Statement of Facts is designed to suggest that the jury held it liable for innocent conduct. Wisconsin will therefore give the evidence this Court needs to consider the case in its real context as it decides the three certified issues.

### **A. Federal law required Wisconsin to estimate and pay pharmacies’ acquisition costs**

States participating in the federal-state Medicaid program must submit plans for approval by the Center for Medicare and Medicaid Services (CMS). The plans must comply with federal rules limiting drug reimbursement. While a “brand name” drug retains patent protection, it is categorized as “single-source.” Once the patent expires, other manufacturers can make chemically-identical generic drugs. The “brand”

and competing “generics” are then categorized as “multi-source.”

R434/123:10-15; 42 C.F.R. §447.502.<sup>1</sup>

The federal rules depend on the concept of “Estimated Acquisition Cost” (abbreviated EAC, and often called “ingredient cost”). Federal rules 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 (emphasis added). As a CMS official testified, “[t]he ingredient cost should be pegged to the acquisition cost.” Supp.Ap. 154. By law, Wisconsin must submit to CMS a State Plan that “describe[s] comprehensively the agency’s payment methodology” and give “assurances” that its expenditures obey the federal limits. 42 C.F.R. §447.518; Supp.Ap. 140.

Pursuant to federal rules, Wisconsin must also set a “dispensing fee” which becomes part of the reimbursement of each prescription. 42 C.F.R. §447.502. While the fee need not provide a profit for pharmacies,

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<sup>1</sup> **Citations.** Pharmacia’s opening brief is cited “PB,” its Appendix “A.Ap.\_\_\_\_.” Wisconsin’s Supplemental Appendix, filed with the present brief, is cited “Supp.Ap.\_\_\_\_.” Citations to the trial transcript are to the Clerk’s Document Number/Page/Line.

Pharmacia's assertion that it cannot do so (PB 8) is wrong. The dispensing fee "represents the charge for the professional services provided by the pharmacist when dispensing a prescription (including overhead expenses and profit)." HHS Office of Inspector General, *Replacing Average Wholesale Price: Medicaid Drug Payment Policy*, July 18, 2011 (<http://oig.hhs.gov/oei/reports/oei-03-11-00060.asp>) at 3. *See also* Supp.Ap. 322.

During the relevant period, the federal rules limited a State's aggregate reimbursement for *single-source* drugs to the lesser of (1) the drugs' EACs plus dispensing fees, or (2) the providers' "usual and customary charges" (what cash-paying customers are charged). 42 C.F.R. §447.512(a) (2009); R.436/68:18-20. The rules similarly limited a State's aggregate 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 upper limit applies. 42 C.F.R. §447.512(b) (2009). (This exception for FULs proved irrelevant in the trial.)

To comply with these maximum payment limits, the Wisconsin Department of Health and Family Services (now the Department of Health

Services, or DHS) reimbursed each prescription for drugs at the lower of (1) the drug's EAC plus the dispensing fee, or (2) the dispensing pharmacy's "usual and customary" charge for that drug. Supp.Ap. 149. The EAC-plus-dispensing fee figure is usually the lower.

To determine a drug's EAC, DHS used the *lower* of two figures: (1) the EAC produced by a formula, described below, that depended on the reported AWP for the drug; or (2) the drug's "Maximum Allowable Cost" (MAC), if DHS had given it one. R.436/61:11-15. Wisconsin's MAC program, discussed *infra*, sets ceilings on reimbursements for many (but not all) multi-source drugs. In an exception to this system, between 1994 and 2000, Wisconsin set EACs for single-source drugs of four manufacturers who sold directly to pharmacies at a published price called "Direct Price," the manufacturer's price to the pharmacy. Supp.Ap. 149.

**B. Wisconsin depended on First DataBank AWPs to set EACs.**

Wisconsin must set EACs for each of over 35,000 "National Drug Codes" (NDCs) for which it reimburses. Supp.Ap. 233. Each NDC identifies the drug, the manufacturer, the drug format, and the package size. R435/64:19-65:6.

It was not practical for Wisconsin itself to gather the data to set EACs, given the huge number of NDCs, the volume of pharmacy claims (over 50,000 per day), frequently changing drug prices, the fact that manufacturers and wholesalers' contracts keep prices confidential, and other considerations. Supp.Ap. 169-70, 175, 221-29, 233-37, 242, 264-66, 283-84.

Hence, like most States, Wisconsin bought current price information from First DataBank. Manufacturers sell drugs mainly to wholesalers, who then resell to retail pharmacies. Hence, for each NDC, First DataBank publishes a "Wholesale Acquisition Cost" (WAC) and an "Average Wholesale Price" (AWP). WAC is supposed to be the drug manufacturer's price to wholesalers, but because of discounts, wholesalers typically pay *less* than WAC. Supp.Ap. 173.

AWP refers to the average price charged by wholesalers to retailers. Supp.Ap. 33. The jury and trial court rejected Pharmacia's contention that AWP was a mere "benchmark" not intended to carry any relationship to what its name suggested. *See* PB 2. First DataBank, where Pharmacia caused its AWP's to be published, repeatedly and explicitly defined AWP as the average price wholesalers were *actually charging* for a drug. Supp.Ap.

32, 33, 36, 39. In 2002, its attorney told manufacturers that “AWP is the price at which a particular drug is sold by pharmaceutical drug wholesalers to their pharmacy customers,” that it ascertained those prices through surveys, and that it was untrue that AWP amounted to “any price that a manufacturer chooses.” Supp.Ap. 40-43. The National Pharmaceutical Council (of which Pharmacia is a member) and the American Society of Consultant Pharmacists likewise defined AWP (in 1995 and 2007, respectively) as a real average price derived from real market information. Supp.Ap. 27, 29.

Wisconsin originally set drugs’ EAC at the AWP published by First DataBank, because, as Pharmacia acknowledged internally, AWPs originally were accurate. Supp.App. 90, 225-26; PB 14. Over time, as it received indications that pharmacies were obtaining discounts off of AWP, Wisconsin began setting EACs by discounting from First DataBank’s AWPs. Over the damages period (1994-2006), it raised that discount several times, starting at 10% and ending at 14%. R439/184:19-22, 210:4-13, 220:6-13.

**C. Pharmacia was responsible for the AWP's First DataBank published.**

For most of the damage period, Pharmacia's *brand* AWP's were either 120% or 125% higher than the drug's Wholesale Acquisition Cost (WAC). Supp.Ap. 156. First DataBank claimed it researched and reported what wholesalers were charging. Supp.Ap. 36. In reality, First DataBank's AWP's came from data from manufacturers. This "scenario," as a Pharmacia document said, "enable[d] the manufacturer to indicate they did not establish the AWP price in the market." Supp.Ap. 97, 288-91.

For *generics*, Pharmacia set AWP's for each drug and sent them to First DataBank. Upon launching a generic, Pharmacia, regardless of the real market price of the drug to pharmacies, set its initial AWP at the level of generic competitors' AWP's, or, if there was no competitor, at 10.5% below the AWP for the equivalent brand. Supp.Ap. 285-86, 295. First DataBank almost always published the figures Pharmacia sent. Supp.Ap. 160, 163.

Pharmacia "verified" its AWP's for First DataBank before it published them. Supp.Ap. 292-94. Pharmacia produced no evidence that it or anyone else told Wisconsin of the method of setting AWP's, whether for brands or generics.

**D. Pharmacia's AWP's were false, and Pharmacia knew they were.**

The jury found that Pharmacia knowingly caused false AWP's to be made, and the trial court upheld that finding. Supp.Ap. 309-12. The plain meaning of AWP is an average of wholesale prices to providers. *In re Pharm. Indus. AWP Litig.*, 460 F.Supp.2d 277, 287-88 (D.Mass. 2006). As discussed above, First DataBank, where Pharmacia caused its AWP's to be published, defined them by their plain meaning. In reality, however, Pharmacia AWP's were not averages of anything, much less averages of wholesale prices. They were far higher than any pharmacy *ever* paid for the drug. Supp.Ap. 167, 175.

For brands, multiplying WAC by 120% or 125% always produced false AWP's. Because of discounts, wholesalers buy from Pharmacia at less than WAC. And their markups from WAC in reselling to pharmacies are not 20% or 25%, but 1% to 3%. Supp.Ap. 90, 173-74. For example, in one typical period, the AWP of Pharmacia's brand Celebrex was 27% higher than what a major wholesaler was really charging pharmacies. Supp.Ap. 45.

For generics, Pharmacia's method of setting AWP's, described above, produced even greater inflation. Pharmacia (for reasons it never

explained) kept a generic's initial AWP unchanged, while real prices plummeted. Supp.Ap. 287. As a result, generic AWP inflation reached astonishing levels. For example, Alprazolam's AWP was \$534.27, even though Pharmacia knew pharmacies could buy it for \$31.00. Supp.Ap. 92.

Pharmacia internal documents called AWP "fabricated," "nebulous," and "an artifact rather than a number based on reality." Supp.Ap. 48, 58, 90. The president of Pharmacia's generics subsidiary agreed that "the issue of a false and inflated average wholesale price versus the real price, that's an issue in connection with [the] entire industry." Supp. Ap. 296-97.

Pharmacia could have reported accurate AWP's. It knew what wholesalers paid it, and knew that "wholesaler markups are now between 1 and 3 percent, and are sometimes zero or even slightly below cost." Supp.Ap. 90. A Pharmacia expert agreed Pharmacia has "a good idea of the actual wholesale prices of [its] drugs." Supp.Ap. 303; *see also* Supp.Ap. 190.

**E. Pharmacia used inflated AWP's to "market the spread"**

The "spread" is the difference between what pharmacies pay for drugs and what third-party payers reimburse for them. When reimbursement is based on published AWP's, inflating AWP's increases the

spread and increases pharmacy profits, courtesy of payers like Wisconsin Medicaid.

Once a brand's patent expires and generic competition begins, pharmacies usually substitute a generic for a prescribed brand. R439/24:24-25:15. The profit on the spread can motivate a pharmacy's decision whether to carry and substitute a particular generic. Supp.Ap. 191-94. Increasing spreads can therefore serve as a marketing tool for drug manufacturers. At trial, Pharmacia said that "marketing the spread" is unethical and may be fraudulent, and denied doing it. Supp.Ap. 298-99. Wisconsin, however, offered evidence from Pharmacia's own files and executives that it extensively marketed the spread, on both its brands and generics. Supp.Ap. 46, 56, 58, 61-62, 65-68, 69, 70, 74-78, 79-80, 89, 93-96, 163-65, 170-71. One such document said that "[t]hree decades of gaming of the present reimbursement scheme" had "provided a lucrative avenue of profit" for providers. Supp.Ap. 64. Wisconsin's opening brief on its cross-appeal further discusses evidence of Pharmacia's marketing the spread.

**F. DHS and the legislature did not know whether Wisconsin's EAC formula produced systematic profits for pharmacies**

DHS believed it was required to set EACs at actual, not inflated, levels. DHS officials so testified. Supp.Ap. 197-98, 238. Wisconsin's State Medicaid Plan certified to CMS that the AWP-minus formula for EAC represented Wisconsin's "best estimate of the price generally and currently paid by providers for each drug." Supp.Ap. 149.

Carrying out this mandate was difficult, because in the absence of accurate AWP, Wisconsin did not know what real acquisition costs were. Wisconsin knew that published AWP needed discounting, but lacked authoritative information on how big the discount needed to be. At various points over time, Wisconsin received information suggesting that its EAC formula was overpaying. Two federal reports from 1984 and 1989 asserted that ingredient cost reimbursements were higher than pharmacy acquisition costs, and DHS several times recommended that the legislature increase the discount off of AWP. PB 14-15.

However, the assertion that pharmacies were profiting on reimbursement was fiercely contested, not only by the pharmacy lobby but also by other credible sources. Concerns were raised about the accuracy

and methodology of federal reports, including their small samples. Supp.Ap. 187-89, 204-05. CMS published a 1993 academic study reporting that Wisconsin's formula (AWP minus 10%) was within 1% of real average acquisition costs. Supp.Ap. 115; R.439/90:16-92:8, 93:22-94:11. DHS's recommendations to increase the discount off AWP were attacked by the pharmacy industry, which provided information to rebut claims of profit built into EAC, and alleged that further discounts would lead to losses and refusals by pharmacies to participate in Medicaid. Supp.Ap. 199-205. As a former Legislative Fiscal Bureau official testified, the conflicting information made it hard to know definitively what "the right answer to that question was in terms of the estimated acquisition cost." Supp.Ap. 261-63. As late as 2006, a governor's commission was divided on what reimbursement amount would accurately estimate acquisition cost. Supp.Ap. 205-06.

In refusing to overturn the liability verdict, the trial court concluded that "while the State knew that the AWP was not an accurate measure of average wholesale price, it ... did not have definitive information as to what the average wholesale price was." Supp.Ap. 311. Likewise, the Court of Appeals stated that "while the legislature knew that reported AWP

*might* be high, it had no way to know by how much because of conflicting information.” Supp.Ap. 10.

**G. When DHS received AWP’s it believed accurate, it used them to set more accurate EACs**

As stated above, DHS used a formula for EAC which applied a discount to First DataBank’s published AWP’s. The legislature “approved” those formulas in the sense that when it approved a particular budget, it presumed the use of a particular discount from AWP. *See* PB 15-17.

Despite generally using an “AWP minus” formula to discount published AWP’s, DHS had, and used, the power to use accurate AWP’s, if it had them, to determine EACs. As the Court of Appeals wrote, when DHS was informed in 2000 that some 400 drugs (including 47 of Pharmacia’s) had inflated AWP’s, DHS employee Carrie Gray “worked with First DataBank to get the right numbers such that the State was no longer reimbursing at the inflated rate.” Supp.Ap. 9-10, 121-39, 244-45; R.304/DX 908 at 12.

Wisconsin also offered evidence that DHS would have used accurate AWP’s, had it received them, to set “Maximum Allowable Cost” figures (MACs) on those multi-source drugs that were subject to that program. The legislature had no involvement in setting MACs. A consultant to DHS

named Ted Collins set them. He sought to set “the lowest price that’s uniformly available” to pharmacies by marking up the lowest price he could find. Supp.Ap. 219-29. He testified that MACs were not intended to include a “profit” for pharmacies. Supp.Ap. 219A. He believed First DataBank AWP’s were too inflated to use in setting MACs, and instead tried, against great obstacles, to ascertain from other sources what pharmacies paid to acquire these drugs. Collins testified that if the AWP’s Pharmacia reported had been actual acquisition costs, “[he’d] pay those prices.” Supp.Ap. 231-32.

#### **H. Wisconsin’s dispensing fee was more than adequate**

As discussed above, EAC was one part of pharmacy reimbursement; the other part was the dispensing fee. While pharmacy representatives complained about Wisconsin’s dispensing fee, Wisconsin officials disagreed. One official later went to work for a private payer, and testified: “I know what I’m paying pharmacies for dispensing fees, and it’s about a third of [Wisconsin’s dispensing fee].... [T]he Medicaid Program was paying \$4.38, nearly over twice what the market pays today.” Supp.Ap. 274-76, 279-82. Wisconsin officials testified they had little concern about the adequacy of reimbursement to incentivize pharmacies to participate in

Medicaid and knew of no pharmacy that had ever left the program.

Supp.Ap. 209-10, 211-13, 230, 247-49, 267-68.

**I. Wisconsin’s EAC reimbursements exceeded real acquisition costs by over \$9 million**

Wisconsin established real acquisition costs of pharmacies for Pharmacia’s drugs throughout the damages period through subpoenaing wholesaler records on millions of sales. The difference between real costs and what Wisconsin paid exceeded \$9 million during the twelve-year damage period. Supp.Ap. 44, 253-60.

**ARGUMENT**

**I. THE JURY WAS NOT REQUIRED TO “SPECULATE” TO ESTIMATE WISCONSIN’S DAMAGES**

As the Court of Appeals’ certification opinion wrote, “Evidence must demonstrate that the party was injured in some way and establish sufficient data from which a jury could properly estimate amount of damages.” Supp.Ap. 9, *citing Tony Spychatta Farms, Inc. v. Hopkins Agric. Chem. Co.*, 151 Wis. 2d 431, 442, 444 N.W.2d 743 (Ct.App. 1989). As it stated, “uncertainty in damages which prevents recovery is uncertainty as to *fact* of damage and not to its amount.” Supp.Ap. 9, *citing Eden Stone Co., Inc. v. Oakfield Stone Co., Inc.*, 166 Wis. 2d 105, 125, 479

N.W.2d 557 (Ct.App. 1991) (citing *Cutler Cranberry Co., Inc. v. Oakdale Elec. Co-op.*, 78 Wis. 2d 222, 234, 254 N.W.2d 234 (1977)). Like all parts of a jury’s verdict, the damages finding must be upheld unless “considering all credible evidence and reasonable inferences therefrom in the light most favorable to [Wisconsin], there is no credible evidence to sustain a finding in favor of such party.” Wis.Stats. §805.14(1).

Under these principles, the jury’s finding of the *fact* of damage—*i.e.*, that inflated AWP’s caused Wisconsin to pay more than it otherwise would have paid—is unassailable. The jury found Pharmacia’s AWP’s falsely inflated. Lower AWP’s would have produced lower reimbursements as a matter of arithmetic.

Likewise, Wisconsin established “sufficient data from which the jury could properly estimate the *amount* of damages.” *Tony Spsychatta Farms, Inc.*, 151 Wis. 2d at 442. As Section A below will discuss, credible evidence enabled the jury to find, without “speculation,” that (1) accurate rather than false AWP’s would have given Wisconsin the authoritative information it needed to set EACs at a close approximation to real average acquisition costs; (2) DHS had the power to use, and would have used, such information to set accurate EACs, and would have maintained the

dispensing fee it actually paid; and (3) setting accurate EACs while maintaining the dispensing fee would have saved Wisconsin at least \$9 million on Pharmacia drug reimbursement—the amount the jury awarded. As Section B will discuss, it is Pharmacia whose contrary arguments amount to “speculation”—speculation that the legislature would have intervened to keep DHS from using true AWP to set EACs at the real levels that the law required and that DHS believed itself obliged to pay.

**A. Credible evidence enabled the jury to estimate the amount of damages without speculating**

1. The jury was not speculating in finding that Pharmacia could have supplied accurate AWP, but supplied false ones; that although Wisconsin knew reported AWP were too high, it did not know what real acquisition costs were; and that if Pharmacia had told the truth when it reported AWP, Wisconsin would have known how to make EAC approximate actual acquisition costs. Extensive and credible evidence supported all these findings. *Supra* at 10-17. The anecdotal, fragmentary, and contradictory information Wisconsin received about the degree, if any, in inflation of AWP was no substitute for what would have been current, accurate, and electronic AWP. The jury had an ample basis for believing the testimony of Wisconsin officials, including a former Medicaid director

and a former Legislative Fiscal Bureau official, on how accurate AWP's would have filled the information void about real acquisition costs. A.Ap. 232-33, 236-37; Supp.Ap. 269-72.

2. The jury was not speculating in finding it was more likely than not that DHS would have used accurate Pharmacia AWP's to set accurate rather than inflated EAC's. Extensive and credible evidence supported such a finding. It was undisputed that DHS viewed itself as obliged to set EAC's at real levels. *Supra* at 13-14. Moreover, the evidence established that DHS had the *power* to use accurate AWP's to set accurate EAC's. As the Court of Appeals noted, DHS did precisely that in 2000, when the federal government sent it a list of AWP's on 400 important drugs that were represented to be accurate rather than inflated. Supp.Ap. 9-10; *supra* at 15-17. Thus, the jury had undisputed evidence of what DHS viewed itself as obliged to do, and what *it in fact did* with true AWP's in a real-life situation. The jury was not speculating in finding that DHS would have sought to act similarly as a general matter had Pharmacia's AWP's been true rather than false.

3. The jury was not speculating in finding it was more likely than not that DHS would have used accurate AWP's to set lower MAC's on

multi-source drugs subject to the MAC program. The jury heard unrebutted evidence from the person who set those MACs that if he had had accurate AWP, he would have paid exactly those ingredient costs on those drugs. There was no dispute that DHS had the power to set MACs where it deemed appropriate. *Supra* at 16-17.

4. The jury was not speculating in finding that it was more likely than not that DHS, with accurate AWP, would have paid the same dispensing fee it actually paid. There is no evidence DHS ever regarded its dispensing fee as anything other than adequate, if not generous. *Supra* at 17.

5. Pharmacia did not dispute that if Wisconsin had been able to pay real EACs and had maintained the same dispensing fee it had, it would have paid approximately \$9 million less on Pharmacia drugs. *Supra* at 17-18.

**B. Pharmacia's argument speculates that the legislature would have prevented DHS from setting accurate EACs.**

In arguing that the jury's damage verdict was based on speculation, Pharmacia starts from the fact that during the period when AWP were inflated, the legislature approved the discount formulas DHS used to determine EACs. Pharmacia then argues that (1) the legislature approved

these formulas with the intention of paying *inflated* EACs that would increase pharmacy profits; and (2) the legislature, even with accurate AWP, would have required DHS to continue to inflate EACs to pay profits to pharmacies. PB 35-36.

It is Pharmacia's argument that depends on speculation. There is no factual basis for the assertion that the legislature wanted to "pay profits" to pharmacies through inflating EACs. To have knowingly done so would have violated the law. The jury could presume that the legislature would follow the law. It is speculation to assume it would instead have violated it.

1. Pharmacia's inference of the legislature's "intent to pay profit" is illegitimate

Pharmacia's argument rises or falls on the oft-repeated assertion that the Wisconsin legislature "knew that its formulas allowed pharmacists to earn a profit." PB 3; *see also* PB 29, 35, 36, 51. Pharmacia infers this "intent to pay profit" from the legislature's approval of biennial Medicaid budget resolutions. The inference is illegitimate.

To discern the intent of legislation, courts look first to the law's text, 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 simply appropriate amounts for Medicaid. They do not mention AWP, EAC, or the particular AWP formula to be used. *See, e.g.*, 2005 Act 25, § 140; S.App. 345. They do not mention profits to pharmacies, much less declare that the legislature intends to inflate EAC to provide such profits. And no legislative committee report or legislator’s statement on the floor of the legislature indicates such intent.

Pharmacia nonetheless argues that (1) the legislature received reports asserting that pharmacies were making profits on EAC reimbursement with the discount from AWP set as it then was; (2) DHS officials several times asked that the discount be increased; (3) the legislature instead approved Medicaid budgets based on the discount as it then was, or based on a smaller increase than DHS requested; and (4) these events prove the legislature intended to inflate EAC over real levels and thereby to increase pharmacy profits. PB 14-17.

The Court of Appeals stated why this argument is invalid: the legislature received *conflicting information* about whether Wisconsin’s “AWP minus” formula succeeded at setting EAC at real levels.

Accordingly, “while the legislature knew that reported AWP *might* be high, it had no way to know by how much because of conflicting information.” Supp.Ap. 10 (emphasis in original). Hence, the legislature did not know whether a given discount applied to AWP resulted in setting EAC at actual levels. *Supra* at 13-15.

Pharmacia’s method of inferring legislative intent is illegitimate not just in this case, but in general. When legislators get conflicting information, nobody can infer that the legislature supports one side or another unless the text of the law, or an authoritative committee report, reveals that intent. Pharmacia sometimes seems to recognize this fact. After asserting that the legislature intended to inflate EAC to pay profits to pharmacies, Pharmacia contradicts itself by stating that “[n]o trier of fact can say why the legislature did what it did” in basing appropriations bills on particular reimbursement formulas. PB 30. Pharmacia has it right the second time. No legislative intent to inflate EAC to pay profits to pharmacies can be discerned from these appropriation bills.

The above considerations also apply to the Governor’s intent. Pharmacia relies on a 1998 letter from Governor Thompson to pharmacy representatives saying he would not approve a DHS request to reduce the

reimbursement rate. The letter says nothing about *why* the Governor felt that way when he wrote it. He may have believed the pharmacy industry's claims that they were losing money on the current EAC rate. He can no more be presumed to have wanted to inflate EAC over real levels than the legislature can be. Indeed, the 2006 Governor's Commission on Pharmacy Reimbursement said in its Final Report: "Payment to pharmacists should cover the reasonable operational cost of the services they provide, with ingredient costs reimbursed as close to actual costs as can reasonably be determined." A.Ap. 123.

2. It is speculation to assert that the legislature would have required DHS to set EACs at inflated levels contrary to law

States participating in Medicaid must obey federal Medicaid rules.

*State of Louisiana v. HCFA*, 905 F.2d 877, 881 (5th Cir. 1990). As described earlier, those rules limit a State's aggregate expenditure on single-source drugs to the sum of their EACs and dispensing fees, and define EAC as the State's best estimate of the "price generally and currently paid by providers" for drugs. 42 C.F.R §447.502, 447.512(b).

Wisconsin must provide periodic assurances to CMS that its State Medicaid Plan complies with these limits. 42 C.F.R. §447.518(b)(2).<sup>2</sup>

The plain language of these rules is violated by setting a State's EAC reimbursement at levels which deliberately inflate aggregate EAC reimbursement over actual acquisition prices. "If the language of the regulation clearly and unambiguously sets forth its meaning, we apply that meaning to the facts presented by the case at hand." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶87, 308 Wis. 2d 103, 746 N.W.2d 762.

The history of the rule confirms the plain language means what it says. When the present version of the rules was promulgated in 1987, the Health Care Finance Authority (HCFA, as CMS was then called) explained that State Plans must aim to have EAC reimbursements be the total actual acquisition costs for the drugs, so that "any change [in a State plan] in

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<sup>2</sup> As discussed above, there is a separate federal aggregate limit on drugs for which the federal government has assigned a "Federal Upper Limit." 42 CFR §§447.512(a), 447.514(b). This distinction played no role in the trial since Wisconsin sought to reimburse these drugs based on pharmacies' acquisition cost through the MAC program. *Supra* at 16-17. The MACs DHS set were lower than federally-set FULs. Supp.Ap. 217-19.

payments above ... the EAC ... for specific drugs must be balanced with a corresponding reduction ... in payments for other drugs.” Supp.Ap. 328.

In 1990, HCFA stated: “The Secretary [of Health and Human Services] has always interpreted the EAC requirement to require that states approximate as closely as feasible the actual prices paid by pharmacists in light of the best available information concerning these prices.” Brief for Respondent in *State of Louisiana v. HCFA*, No. 89-4566 (5th Cir.), filed Jan. 13, 1990), *reprinted at* 1990 WL 10082245 at \*17. The Fifth Circuit upheld this interpretation and affirmed HCFA’s decision disapproving Louisiana’s use of undiscounted AWP to set EAC since HCFA believed AWP was inflated over Louisiana pharmacies’ real acquisition costs. *State of La.*, 905 F.2d at 881. CMS has not changed its view since then. CMS’s Deirdre Duzor testified at trial, “The ingredient cost should be pegged to the actual acquisition cost.” Supp.Ap. 154.<sup>3</sup>

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<sup>3</sup> Despite the Fifth Circuit’s decision, one administrative decision, *Pennsylvania Dept. of Public Welfare*, DAB No. 1315 (HHS Department Administrative Board 1992), *reprinted at* <http://www.hhs.gov/dab/decisions/dab1315.html>, seems to say that a state could justify an inadequate dispensing fee by documenting that the inadequacy was offset by an excess of EAC payments over actual acquisition cost levels. However, it affirmed the disapproval of Pennsylvania’s plan because it had failed to document such an offset. A follow-up decision held that a State that wanted to engage in this exercise would have

Thus, when Pharmacia argues that the legislature might have interfered with DHS using accurate AWP's to set accurate EACs, it is arguing that the legislature would have violated binding law. This argument is not only sheer speculation, but runs contrary to the "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.* States are similarly presumed to comply with "the binding laws of the United States." *Alden v. Maine*, 527 U.S. 706, 755 (1999). The jury was instructed, without objection from Pharmacia, about this presumption. Supp.Ap. 18.

Pharmacia does not dispute that in calculating damages, the jury could presume that Wisconsin officials follow rather than violate federal law. Pharmacia is thus forced to argue that the federal rules allow the

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to establish and justify such a system *in advance* of applying it, not *ex post facto*. *Penn. Dept. of Pub. Welfare*, DAB No. 1557 (1996) reprinted at <http://www.hhs.gov/dab/decisions/dab1557.html>. Pharmacia mentions (and misdescribes) the first of these decisions (PB 8), but makes no argument based on it since there is no evidence Wisconsin thought its dispensing fee was inadequate, much less sought CMS's permission to offset it by inflating its EAC payments.

deliberate inflation of EAC to provide profits to pharmacies. The arguments are fruitless efforts to escape from the rules' plain language:

(a) 42 U.S.C. §1396a(a)(30)(A) requires State Medicaid plans to “assure that payments are consistent with efficiency, economy, and quality of care and 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 C.F.R. §447.204 essentially repeats the “sufficient to enlist enough providers” language. Eliding the phrase about “efficiency and economy” (PB 7), Pharmacia argues that these two provisions' reference to enlisting “enough providers” renders the rules' specific definition of EAC inoperative and thereby authorizes States to inflate EAC to be utterly inconsistent with that definition. PB 34.

This argument is empty. Neither of the two provisions mentions EAC or uses the word “profit.” The provisions talk of total reimbursement, not of the EAC component. If a State thinks profit is necessary to induce pharmacies to fill Medicaid prescriptions, it can provide that profit through the dispensing fee. All the evidence shows Wisconsin thought its actual

dispensing fee adequate to induce pharmacies to participate in Medicaid.

*Supra* at 17.

(b) Even weaker is Pharmacia's assertion that federal law surely allows inflation of EACs to provide profits for pharmacies, because otherwise CMS would not have approved Wisconsin's Medicaid plans. PB 34. There is no evidence that such approvals endorsed inflated EACs. Like Wisconsin, CMS knew that published *AWPs* were higher than real acquisition cost, but it was no more certain than Wisconsin about whether the *EACs* resulting from Wisconsin's chosen discounts from *AWP* were systematically inflated. This uncertainty is why CMS gave considerable deference to States' EAC formulas as "the best estimate that the state could come up with of acquisition cost." A.Ap. 113.

Pharmacia wrongly claims CMS "would not approve plans that did not afford pharmacists a profit," thereby suggesting that CMS knew that Wisconsin's *AWP*-minus formula provided that profit by inflating EAC and insisted on such inflation as a condition of approval. PB 34. It quotes CMS official Deirdre Duzor's statement that "reimbursement to pharmacies has to be adequate for them to ... make some money." PB 9-10. However, Duzor was the official who testified that "[t]he ingredient cost should be

pegged to the actual acquisition cost.” Supp.Ap. 154. Pharmacia omits her testimony explaining how pharmacies could nonetheless profit on reimbursement through the dispensing fee:

Q. And did CMS have concerns that payment at an actual average [acquisition cost] might impair access?

A. *I would say no*, as long as states could get it [ingredient cost reimbursement] right, because they’re also paying the dispensing fee to the pharmacies.

A.Ap. 112 (emphasis added). All CMS insisted on was that “*combined* ingredient cost and dispensing fees had to be sufficient to ensure access to care.” *Id.* (emphasis added).

Similarly, Pharmacia wrongly states that CMS surveyed Wisconsin pharmacists and found they were obtaining drugs at less than the EACs resulting from Wisconsin’s formula, but did not claim that Wisconsin was thereby violating federal law. PB 8. The survey and recommendation came from a different entity within the Department of Health & Human Services. A.Ap. 174-75. The record does not reveal whether CMS agreed, and contains no CMS statements agreeing that Wisconsin was overpaying on its EAC reimbursement formula, much less that it wanted Wisconsin to do so.

3. Pharmacia's "balancing" argument has no merit

Pharmacia lists eight purported "issues" the legislature had to "balance" in deciding on reimbursement, and says it is impossible to know why it balanced them as it did. PB 31-32. The argument assumes federal law left the legislature free to "balance" these considerations in deciding how much profit to allow in EAC. To the contrary, as discussed above, federal law required Wisconsin to adopt an EAC formula that tried to set EAC at real, not inflated, levels.

Moreover, Pharmacia's list of issues is as inflated as its AWP's were. "Issues" 1 through 5 are all the same assertion: that EACs supposedly had to be inflated to induce pharmacies to stay in the Medicaid program. It is a mystery what Pharmacia means by "Issue" 6 "the different economics of brand and generic drugs." "Issue" 7—the rebates federal law requires Pharmacia to pay Wisconsin as a *quid pro quo* for Wisconsin's reimbursing all Pharmacia drugs—was a non-issue. As the trial court ruled, they were irrelevant to calculating damages, and without objection from Pharmacia, the jury was instructed to ignore them in its damage computations. Supp.Ap. 20, 182-84.

Ultimately, Pharmacia’s “speculation” argument amounts to this: “No one can say whether the legislature and Governor, with reliable information on average wholesale prices, would have bowed to political pressure from pharmacies and deliberately set EAC at inflated levels inconsistent with federal law.” The argument is inconsistent with the respect the judiciary owes co-equal branches of government, and it would allow Pharmacia to pay zero damages even though the jury and trial court found it had violated two important statutes. This Court should reject Pharmacia’s “speculation” arguments.

## **II. WISCONSIN WAS ENTITLED TO A JURY TRIAL**

### **A. This Court’s jury-trial cases have balanced competing constitutional concerns**

The Wisconsin Constitution’s civil jury-trial provision, Article I, §5, provides: “The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy ....” Under this provision, a cause of action that existed at statehood and was recognized as being one at law will continue to carry the right of trial by jury. *Village Food & Liquor Mart v. H & S Petroleum, Inc.*, 2002 WI 92, ¶11, 254 Wis. 2d 478, 647 N.W.2d 177. This test requires courts to

determine whether more recent statutory remedies involve the same “cause of action” as remedies existing at statehood.

In making such determinations, this Court must balance competing concerns. On the one hand, changing times can call for new remedies that differ from causes of action existing at statehood to a degree that no one could reasonably expect them to carry a jury-trial right. On the other hand, this right is a “highly valued attribute of American government” and “was regarded by the founders as ‘an essential bulwark of civil liberty.’” *State v. Schweda*, 2007 WI 100, ¶89, 303 Wis. 2d 353, 736 N.W.2d 49 (Prosser, J., concurring and dissenting) (citation omitted). Requiring too strict a correspondence between a new statutory remedy and one existing at statehood could allow the legislature to circumvent this essential right simply by making the new remedy differ in certain respects from the old. In such a case, where the State can bring suit, it could deprive a defendant of the right of trial by jury simply by suing only under the new statutory remedy. That risk is masked in the present case, where the State wants a jury trial and Pharmacia does not. But often it will be the other way around. *See Dane Cty. v. McGrew*, 2005 WI 130, 285 Wis. 2d 519, 699 N.W.2d 890.

This Court has therefore rejected an “identical elements” test of whether a statutory claim is the same “cause of action” as an older cause of action. The Court of Appeals had used that “codification” test in holding that Wis. Stat. §100.18 did not allow for a jury trial. *State v. Ameritech Corp.*, 185 Wis. 2d 686, 689, 517 N.W.2d 705 (Ct.App. 1994), *aff’d per curiam by an equally divided Court*, 193 Wis. 2d 150, 532 N.W.2d 449 (1995). But *Village Food* rejected *Ameritech*’s “codification” test. 2002 WI 92, ¶11. It held that the Unfair Sales Act’s remedy against retailers who sell certain goods at prices below specified markups was an “essential counterpart” of several common-law claims existing at statehood, despite considerable differences in the form and coverage of the statutory and common-law causes of action. *Id.*, ¶¶26-33.

This Court has repeatedly reaffirmed *Village Food*’s rejection of *Ameritech*’s “codification” test. In *McGrew*, four justices found that the statutory cause of action for forfeitures for speeding carried a jury-trial right because it was the essential counterpart of several “rules of the road” existing at statehood. 2005 WI 130, ¶¶58-63 (Bradley, J.), ¶¶74-76 (Butler, J.). In *Schweda*, the Court reaffirmed the *Village Food* test (2007 WI 100, ¶21), but found several environmental statutes/regulations were not

“essential counterparts” to the common-law cause of action for “nuisance.”  
*Id.*, ¶43.

In *Harvot v. Solo Cup Co.*, 2009 WI 85, 320 Wis. 2d 1, 768 N.W.2d 176, the Court recast the test of *Village Food* by asking whether the statutory claim and the claim existing at statehood “share a similar purpose.” *Id.*, ¶72. *Harvot* found that the Wisconsin Family and Medical Leave Act did not share the same purpose as various older causes of action because the WFMLA “sets forth minimum rights for family and medical leave.” *Id.*, ¶79. It found the analogy between the WFMLA’s guarantee of unpaid leave and older “labor standards of one sort or another” to be “too broad to be meaningful.” *Id.*, ¶81.

**B. §49.49 is an “essential counterpart” to common-law fraud**

The trial court held that common-law fraud, well-established in 1848 as an action “at law,” is an “essential counterpart” 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. 63.

The court was right. Common-law fraud and §49.49 share the “same purpose” under *Harvot*: to deter and punish fraud. And as the trial court held, their elements are very similar. A.Ap. 63. Pharmacia’s arguments to the contrary are both unpersuasive and alarming.

1. Pharmacia claims that *any* difference in the elements of the two claims prevents them from being “counterparts.” PB 38, citing *Schweda*, ¶¶35-36. Nothing in *Schweda* so held. Such a holding would reinstate the “codification” test that *Village Food* and subsequent cases rejected.

As a fallback, Pharmacia argues that “reasonable reliance” is a “vital aspect” of common-law fraud but is not required under §49.49, and under *Schweda*, this difference prevents them from being “essential counterparts.” PB 44. In *Schweda*, the Court held that the “breadth of nuisance is so great that we must narrowly construe the actions that we analogize to nuisance.” 2007 WI 100, ¶40. The Court found “harm” to be a “vital aspect” of common-law nuisance, having noted that the cause of action required a showing of “substantial and unreasonable” harm. *Schweda*, ¶¶35, 42. And logically, “nuisance” *is* “harm.” Because the regulations/statutes at issue

did not require any harm, the Court concluded, pursuant to its narrow construction, that the two causes of action were not counterparts. *Id.*, ¶42.

Pharmacia does not explain why “reasonable reliance” is a “vital aspect” of common-law fraud, and it is not. The “reasonable reliance” requirement of common-law fraud is simply a way of proving causation of harm through deceptive behavior. It is not the *only* method of showing causation, as this Court has made clear in the related context of §100.18 claims. *Novell v. Migliaccio*, 2008 WI 44, ¶3, 309 Wis. 2d 132, 749 N.W.2d 544. Wisconsin’s claim for damages requires harm. Two causes of action that both require proof of harm are not rendered “vitally” different under *Schweda* simply because they tolerate different methods of proving harm. Such a difference does not affect the “common purpose” of the two claims under *Harvot*—detering and punishing fraud. And as explained above, Pharmacia’s argument would allow the legislature, simply by varying the particular ways in which the State can prove such causation, to destroy a private individual or corporation’s right to a jury trial when sued by the State.

Equally concerning is Pharmacia’s assertion that fraud and §49.49 are not counterparts because the latter is restricted to false statements made

to obtain a Medicaid payment. PB 44. This argument implies that the legislature can deny a constitutional jury-trial right for fraudulent behavior simply by restricting a statute to a *subset* of fraudulent statements—again, an unacceptable result.

2. Pharmacia notes that Medicaid did not exist in 1848, and claims that a statutory cause of action will not share the “same purpose” under *Harvot* as a cause of action existing at statehood if the statutory cause of action “regulates a matter the common law did not.” PB 44, *citing Harvot*, ¶80. Nothing in *Harvot* supports this argument, or implies that the “purpose” of a statute is different than the purpose of the older cause of action simply because the statute applies to a *particular practice or program* that did not exist at statehood. Since many current government assistance programs did not exist in 1848, Pharmacia’s reasoning would let the legislature circumvent the jury-trial right by having an antifraud statute cover only selected government programs. The reasoning also implies, absurdly, that the “purpose” of common-law fraud is no longer the same as it was in 1848 because many fraudulent practices of that era have died out and many more modern practices were “unheard of” then.

Moreover, in *Harvot*, the right conferred by the WFMLA—leave for employees, regardless of any employment agreement, and the right to return to their jobs with no reduction in seniority—had no serious counterpart right in 1848; the closest the plaintiff could come to supplying one was a statute preventing cruelty to apprentices. *Harvot*, ¶¶82-83. Section 49.49 entered no such previously “unheard-of” territory. Public assistance, including “medical aid,” existed in Wisconsin as of statehood. *See An Act for the Relief of the Poor, Statutes of the Territory of Wisconsin (1839), §§4-6 (Supp.Ap. 336-37)*. The government had the right in 1848 not to be defrauded, in this or any other program, as it does today.

3. In addition to damages, Wisconsin submitted to the jury the factual question of the *number* of forfeitures, with the court deciding the per-forfeiture dollar amount. After it vacated the jury’s finding on the number, the court subsequently also decided the *number* of forfeitures. Undeterred, Pharmacia argues that Wisconsin had no right to submit its claims for civil forfeitures under to the jury because §49.49 provides for *in personam* forfeitures, which, it claims, were not recognized at Statehood. PB 45-46.

Pharmacia failed to make this argument in the Court of Appeals (*see* Appellant’s Brief in Court of Appeals at 42-44), and has hence waived it in this Court. *Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 455, 480 N.W.2d 16 (1992).

The argument has no merit in any event. First, the argument does not implicate the fact that Wisconsin’s claim for damages under §49.49 is an essential counterpart to common-law fraud and was properly tried to a jury. Second, the question of the number of forfeitures was also triable to a jury. Pharmacia’s historical discussion is mistaken. It deals with classic forfeitures of property. PB 45-46. In Wisconsin, a “forfeiture” is “an action by a governmental unit for the recovery of a money penalty and enforceable in a civil action.” *Columbia Cnty v. Bylewski*, 94 Wis. 2d 153, 161-62, 288 N.W.2d 129 (1980). And a “civil penalty was a type of remedy at common law that could only be enforced in courts of law.” *Tull v. United States*, 481 U.S. 412, 422 (1987). Notably, the remedies at issue in *Schweda* were forfeitures. The Court, however, never suggested that this form of remedy made any difference to the jury-trial right.

4. Pharmacia contends that Wisconsin’s damages claim under §49.49(6) was really a “restitution” claim, that it is therefore equitable, and

that therefore it carries no right to a jury trial. PB 47. Besides having no legal support for any the three conclusions, this argument ignores the plain language of the statute, which provides, in relevant part (emphasis added):

In addition to other remedies available under this section, the court may award the department of justice the reasonable and necessary costs of investigation, *an amount reasonably necessary to remedy the harmful effects of the violation* and the reasonable and necessary expenses of prosecution, including attorney fees, from any person who violates this section.

The italicized phrase is the *definition* of “compensatory damages”—an award “to make whole the damage or injury suffered by the injured party.”

*C&A Investments v. Kelly*, 2010 WI App 151, ¶13, 330 Wis. 2d 223, 792 N.W.2d 644.

Pharmacia’s argument to the contrary is based on Wis. Stat. §20.455(1)(hm), a subsection of an appropriations statute that creates an account from which the Department of Justice pays out “all moneys received by the department to provide restitution to victims *when ordered by the court* as the result of prosecutions under §49.49” (emphasis added). This subsection is necessary for the DOJ to *pay* money to *victims* when “ordered by the court.” Money recovered for Wisconsin Medicaid under §49.49 does not pass through the account created by §20.455(1)(hm).

Moreover, the label of “restitution” in the appropriations statute cannot trump the broad and specific authorization of compensatory damages contained in §49.49(6) itself. The damages sought by Wisconsin against Pharmacia were not “restitution,” a remedy granted because it is “inequitable to allow a defendant to retain a benefit without paying for it.” *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 196 Wis. 2d 578, 599-600, 539 N.W.2d 111 (Ct.App. 1995).

**C. §100.18 is an “essential counterpart” to common-law “cheating.”**

As the trial court held, Wisconsin’s §100.18 claim is an “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. 60-62.

Both “cheating” and §100.18 focus on deceptive trade practices; in Blackstone, “cheating” is listed as one of the “offenses against public trade.” Supp.Ap. 338. As Pharmacia’s *amici* noted in the Court of Appeals, cheating included “the modern tort of misrepresentation.” Non-Pharmacia Brand Defendants’ Amended *Amicus Curiae* Brief at 32. Both “cheating” and §100.18 cover a broad range of deceptive trade practices. Supp.Ap. 341-42. Section 100.18’s text covers any “advertisement,

announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease.” It proscribes misrepresentations in trade in “real estate, merchandise, securities, employment, or service.” It covers not only those who make statements but those who “cause [them], directly or indirectly, to be made.” It covers not only intent to sell, but intent to “distribute, increase the consumption of, or in any wise dispose of ... anything offered ... to the public.”

Pharmacia argues that “cheating” covered a broader range of deceptive practices than §100.18, giving the example of practices that have fallen into disuse today, such as cheating at dice. It analogizes the situation to *Schweda*, which found the vast collection of rules grouped together as “nuisance” was not a counterpart of tightly focused environmental prohibitions. PB 41. The analogy to *Schweda* is unpersuasive.

There was a vast gulf in *Schweda* between “nuisance” and the environmental statutes and regulations whose violation the State alleged. The latter worked by imposing specific regulatory requirements. In distinguishing these provisions from the “nuisance” cause of action, *Schweda* analyzed, claim by claim, the pinpointed nature of these obligations—such as “violations of the limits on concentrations of

pollutants in discharges incorporated into [defendant's] pretreatment permit.” *Schweda*, 2007 WI 100, ¶¶37, 38. In contrast, the common-law cause of action for nuisance is amorphous, contains no specific affirmative requirements, and for that reason “has meant all things to all people.” *Id.*, quoting Prosser and Keeton on the Law of Torts, §86 at 616-617 (5th ed. 1984). No comparable gulf exists between cheating and §100.18. Both are general prohibitions, which operate by generally banning deception over large subject areas of public trade. Moreover, *Schweda* ultimately rested on the fact that the environmental regulations/statutes in question did not require “harm,” which is the essence of a “nuisance.” *Schweda*, ¶42.

Finally, Pharmacia cites *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734 (Ill. 1994), which held that the Illinois consumer protection statute carried no constitutional right to a jury trial. The case carries no weight for Wisconsin purposes. It used the narrow “same elements” test rather than the broader inquiry this Court has used in *Village Foods* and successor cases, and did not analyze “cheating.” See *Martin*, 643 N.E.2d at 754.

The trial court rightly afforded a jury trial on both claims.

### **III. THE TRIAL COURT HAD AUTHORITY TO DETERMINE THE NUMBER OF FALSE STATEMENTS AFTER IT VACATED THE JURY'S NUMBER**

#### **A. The facts of the forfeiture proceedings**

Wis. Stat. §49.49(4m)(b) provides for a forfeiture for each material false statement a defendant causes to be made for use in determining rights to a Medicaid payment. Before trial, Wisconsin formally disclosed—three separate times—its position that under §49.49, the relevant false statements of AWP to be counted were the statements of AWP generated each time a Medicaid claim for Pharmacia's drugs had been paid. Supp.Ap. 17, 179; A.Ap. 465. Pharmacia did not challenge this counting theory on any of these three occasions. Wisconsin then argued that position to the jury, asking it to find 1,440,000 false statements over the damages period. Supp.Ap. 306-07. Pharmacia's closing argument never mentioned the counting issue. R.441/115:4-180:13. Question No. 5 asked the jury, "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?" Agreeing with Wisconsin, the jury answered, "1,440,000." A.Ap. 69.

Pursuant to Wis. Stat. §805.14(5)(c), Pharmacia moved to change that answer to zero, on the ground that Pharmacia had not violated §49.49 at all. In a footnote, it also argued in the alternative that Wisconsin's counting theory had been erroneous, because "the relevant inquiry is on a defendant's separate decisions to publish a statement." Supp.Ap. 177.

On May 15, 2009, 88 days after the verdict, the trial court vacated the jury's "1,440,000" answer, finding Wisconsin's counting theory inconsistent with §49.49. (Wisconsin's cross-appeal challenges this ruling.) But the court refused to change the answer to zero because "there is clearly evidence in this record that would support the imposition of forfeitures." A.Ap. 91. On June 18, 2009, the court ruled it had authority to determine the number of violations supported by the trial evidence. A.Ap. 519-22. The parties then briefed what that number was. On September 30, 2009, the court found that under a proper counting method, the record supported 4,578 material false statements. A.Ap. 93-102; *see* Wisconsin's brief on its cross-appeal at 12-15.

**B. The court acted within its authority**

Wis. Stat. §805.14(5)(c) provides: "Any party may move the court to change an answer in the verdict on the ground of insufficiency of the

evidence to sustain the answer.” Nothing in this language limits the trial court to adopting the answer advocated by the movant, and *Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 582 N.W.2d 480 (Ct. App. 1998), makes clear the court may supply its own answer. In *Reyes*, after ruling that the jury had awarded excessive medical expenses, this Court instructed the trial court to reduce the award to the maximum supported by credible record evidence. 220 Wis. 2d at 301.

Despite the trial court’s reliance on *Reyes*, Pharmacia never mentions it, and offers no valid argument against what the trial court did.

**1. The “90 days” argument.** Wis. Stat. §805.16(3) provides in relevant part: “If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record ... the motion is considered denied and judgment shall be entered on the verdict.” Pharmacia argues that “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.” PB 49, *citing Brandner v. Allstate Ins. Co.*, 181 Wis. 2d 1058, 512 N.W.2d 753 (1994).

The argument violates §805.16(3)’s language. The only relief it authorizes is that the motion, if not decided within 90 days, shall be

“considered denied *and judgment shall be entered upon the verdict.*” The verdict was 1,440,000 violations. Pharmacia tries to use §805.16(3) to produce a judgment *different* than the verdict.

Pharmacia’s argument also violates the rule against construing statutes 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 *protect* jury verdicts by avoiding delays in ruling, but Pharmacia tries to use a delay to *wipe out* a verdict and to give Pharmacia the “zero” finding the court and jury *rejected*.

The only interpretation of §805.16(3) that respects its text and avoids absurd results is that once the trial court vacated the jury’s answer and ordered further proceedings, it had timely “decide[d]” Pharmacia’s motion to change answer (even though it did not grant the number Pharmacia asked for), and that thenceforth, §805.16(3) did not govern the further proceedings the court ordered to determine the correct number of violations.

Nothing in *Brandner* supports Pharmacia. In *Brandner*, the trial court’s original timely decision on post-verdict motions resolved all issues, with disastrous results for one defendant. 181 Wis. 2d at 1064-66. That

defendant moved to reconsider. More than 90 days after the verdict, the court issued a “supplemental decision” reversing the original’s key ruling. *Id.* at 1065-66. On appeal, this Court stated that the “supplemental” corrective decision came too late under §805.16(3). *Id.* at 1071-72. *Brandner* is inapposite. There the first post-trial ruling timely “decided” the motion, and contemplated no further proceedings, while the later decision untimely “decided” the original motion a second time, changing it to a different and opposite result. Here, the original ruling timely “decided” Pharmacia’s motion (although not in the way Pharmacia wanted). It then ordered further proceedings, to which §805.16(3) did not apply, as discussed above, and its resolution of those proceedings did not revisit or change its original post-trial ruling, as the *Brandner* second ruling did.

Despite stating that the trial court’s second decision was a “nullity” under §805.16(3), *Brandner* reviewed and reversed that decision anyway, because this Court was unwilling to tolerate an unjust result. 181 Wis. 2d at 1071. Such would be the case here if §805.16(3), as Pharmacia advocates, were interpreted to produce the opposite of what the trial court intended when it originally vacated the jury’s count of violations.

**2. The “insufficient evidence” argument.** Pharmacia repeatedly argues the evidence was too “scant” to support the court’s redetermined number of forfeitures. PB 48, 50. First, this argument is not properly before this Court, which limited these proceedings to the certified questions. The Court of Appeals never discussed whether the evidence was sufficient to support the trial court’s redetermined number of violations. Second, Pharmacia waived this argument when it told the Court of Appeals that its appeal “*does not raise the sufficiency of the evidence at trial.*” Supp.Ap. 315 (emphasis added). Third, the argument has no merit. Pharmacia does not explain how the evidence was “scant” as applied to the counting theory the court deemed proper. Under *that* theory, the court held that two trial exhibits (P-436M and P-436N) “constitute credible evidence” of the violations and that “tallying up the quarterly AWP’s listed” in those exhibits “yields a reasonable basis for establishing forfeitures under the credible evidence standard.” A.Ap.99.

**3. The “different theory” argument.** Pharmacia argues that “[n]othing 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.” PB 50. The argument is mistaken.

First, as discussed above, §805.14(5)(c) *does* authorize a court to change a jury’s answer. *Reyes* ordered the trial court to change a jury’s answer to the maximum amount supported by credible evidence.

Second, Pharmacia cannot complain that the number of violations was ultimately determined by the court rather than the jury, because Pharmacia objected (and still objects) to a jury trial, and argued that if the court had jurisdiction to decide the number, the record should not be reopened. A.Ap. 519; R.324 at 7.

Third, Pharmacia cannot argue the court acted unfairly. Pharmacia’s argument that §49.49 did not permit Wisconsin’s counting theory was a legal defense it failed to offer before verdict, and the trial court could have treated that argument as waived. *See Rueben v. Koppen*, 2010 WI App 63, ¶28, 324 Wis. 2d 758, 784 N.W.2d 703 (“A defendant cannot use motions after verdict to assert a new defense that he or she regrets foregoing at trial.”); *Vollert v. City of Wis. Rapids*, 27 Wis. 2d 171, 174-75, 133 N.W.2d 786 (1965). Instead, the court allowed the belated objection, concluded that §49.49 required counting false statements at a different level than

Wisconsin had used, and vacated the jury's number. It then decided the number of violations supported by the record only after thorough briefing and argument.

In contrast, had the court refused to conduct further proceedings, it would have been unfair to Wisconsin. As is clear from the Court of Appeals' certification of how to count the false statements, this was *not* a situation where Wisconsin ignored settled law when it argued its counting theory to the jury. It told Pharmacia before the trial of that theory, and when Pharmacia expressed no objection, it designed its trial strategy and argument in accord with that theory.

Fourth, the public interest was at stake. Section 49.49's provision for forfeitures aims to protect the public from Medicaid fraud. Pharmacia had been found liable for such fraud. To have thrown forfeitures out the window would have excused Pharmacia from the full application of the law.

Pharmacia's "changed theory" argument relies on inapposite cases. *Chiarella v. United States*, 445 U.S. 222 (1980), (cited at PB 49) held that "we cannot affirm a criminal conviction on the basis of a theory not argued to the jury." *Id.* at 236. This is not a criminal case, and the trial court did

not affirm the jury's finding; it vacated it. Pharmacia also 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 trial court ordered a new trial on liability, finding no credible evidence that plaintiff's negligence proximately caused her death. This Court found that since no credible evidence supported the comparative negligence defense, the trial court should have simply eliminated the jury's reduction. 86 Wis. 2d at 639. Here, as the trial court found, Wisconsin *did* offer credible evidence supporting a determination of the number of violations. A.Ap. 99.

Pharmacia also seems to suggest that through its treatment of the verdict form, the trial court rejected Wisconsin's counting theory before closing arguments were delivered. PB 47-48. Wisconsin's proposed form asked the jury to state the "total number of claims that were calculated using a price other than a price that would have been used had the defendant reported a truthful price." A.Ap. 465. The form the court used asked, "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?" *Id.*, 69. The court never commented on this change, which on its face reflects

nothing more than a desire to use the general language of §49.49. Had the court intended to rule out Wisconsin's counting theory, it would have said so and would have prevented Wisconsin from arguing that theory to the jury.

**4. The “double jeopardy” discussion.** Pharmacia suggests a “double jeopardy” argument, but backs off from asking this Court to decide it. PB 50-51. Pharmacia was not submitted to a second trial. When the court vacated the jury's finding, it determined the number of violations supported by the trial evidence.

## CONCLUSION

Wisconsin asks this Court to answer the certified questions as follows:

- (1) the jury was not required to “speculate” to determine Wisconsin’s damages;
- (2) Wisconsin properly received a jury trial on its claims; and
- (3) assuming the trial court correctly vacated the jury’s finding of the number of violations, it was within its authority in determining the number supported by credible evidence offered at trial.

Respectfully submitted,

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Dated: September 22, 2011

**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 10,995 words.

Dated September 22, 2011.

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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), Wis. Stats. I further certify that this electronic brief is identical in content to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22d day of September, 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2011, I personally caused three copies of the Brief of Respondent, State of Wisconsin and Supplemental Appendix to be mailed by first-class postage prepaid mail to:

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