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STATE OF WISCONSIN
SUPREME COURT

Case No. 2010AP000232-AC from District IV/II

State of Wisconsin,

Plaintiff–Respondent–Cross-Appellant,

v.

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

Defendants,

Pharmacia Corporation,

Defendant–Appellant–Cross-Respondent.

**REPLY IN SUPPORT OF
BRIEF OF CROSS-APPELLANT
THE STATE OF WISCONSIN**

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

J.B. Van Hollen
Attorney General

Frank D. Remington
Assistant Attorney General
WISCONSIN DEPARTMENT OF JUSTICE
P.O. Box 7857
Madison, WI 53707
(608) 266-3542

George F. Galland, Jr.
Charles Barnhill, Jr.
Betty Eberle
Barry J. Blonien
MINER, BARNHILL & GALLAND, P.C.
44 E Mifflin Street, Suite 803
Madison, WI 53703
(608) 255-5200

*Counsel for the
State of Wisconsin*

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ARGUMENT

I. THE JURY’S COUNT OF VIOLATIONS WAS CONSISTENT WITH THE MEDICAID FRAUD STATUTE.

A. The Plain Meaning of the Statute Supports Wisconsin’s Method of Counting Violations.

Wisconsin’s opening cross-appeal brief (“WCAB”) showed that under a plain and ordinary understanding of §49.49(4m)(a)2’s text, Pharmacia violated the statute each time it caused Wisconsin’s data system to state false average wholesale prices while processing Medicaid claims for Pharmacia’s drugs. WCAB 21-24. Wisconsin also showed that giving the statute its plain meaning is consistent with the legislative history and purpose of the provision. WCAB 24-25.

Pharmacia’s contrary arguments are unpersuasive.

1. Pharmacia argues that §49.49(4m)(b) allows forfeitures for each “statement,” not each “use” of a statement to determine a Medicaid payment. CRB 17-19. Wisconsin agrees. The jury did not determine the number of forfeitures by counting how many times each false statement was *used*. It correctly counted the number of false *statements* that Pharmacia caused to be made.

2. Pharmacia's next argument has nothing to do with counting violations. Instead, Pharmacia argues that it is not *liable* at all based on its interpretation of the phrase "for use in determining *rights* to payment." Pharmacia argues that "rights to a payment" includes only whether *any* payment is owing, not the *amount* of payment, and Pharmacia only affected the *amount* of the payment. CRB 21-22. The Court did not accept this liability issue for review, and by raising it, Pharmacia goes beyond the scope of the appeal.

In any event, Pharmacia's proposed construction is "strained and ultimately unsustainable," as the trial court held in denying Pharmacia's motion for summary judgment. R.272 at 5. Under a plain reading, the phrase "rights to a benefit or payment" includes the amount of money a provider has a right to receive. *See* Black's Law Dictionary (9th ed. 2009) (defining "right" as, among other things, "[t]he interest, claim or ownership that one has in tangible or intangible property"). The legislature used the plural "rights," which includes *all* rights associated with a benefit or payment. If accepted, Pharmacia's argument would mean no liability under §49.49(4m)(a)(2) for those who knowingly falsify information that is

material only to the amount due. Such intent, in a Medicaid fraud statute, would have been bizarre.

Pharmacia also invokes §49.49(1)(a)3, which prohibits persons with knowledge regarding a change in someone's "right to a payment or benefit" from "conceal[ing]" their knowledge "with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized." Pharmacia argues if the legislature had intended §49.49(4m)(a)2 to prohibit statements used to inflate the payment amount, it would have included similar verbiage in it. CRB 22.

This comparison of the statutes, however, supports Wisconsin, not Pharmacia. Since the "right to a payment or benefit" in §49.49(1)(a)3 includes the "amount," so does "rights to a benefit or payment" as used in §49.49(4m)(a)2. *DaimlerChrysler v. Labor and Indus. Review Comm'n*, 2007 WI 15, ¶29, 299 Wis. 2d 1, 727 N.W.2d 311.

3. Pharmacia invokes the rule of strict construction of penal statutes. CRB 16-17. As this Court explained in *State v. Kittilstad*, 231 Wis. 2d 245, 603 N.W.2d 732 (1999), that rule "does not apply when the legislature's intent is unambiguous, or when strict construction goes against

the legislature’s purpose.” 231 Wis. 2d at 262. *See e.g., State v. Schmitt*, 145 Wis. 2d 724, 738, 429 N.W.2d 518, 523-24 (Ct.App. 1988) (rejecting a construction of a forfeiture statute that limited violations to only one per day because “expos[ing] persons who violate more than one ... law on any given day to liability for more than one violation per day” “would be more consistent with the purposes” of the statute).

4. Pharmacia disputes Wisconsin’s description of legislative history, arguing that forfeitures were not the sole remedy for conduct prohibited under §49.49(4m) because §49.49(1) “provided criminal penalties for the identical conduct.” CRB 20. But the two provisions are not the same. Section 49.49(1) requires proof that the defendant acted “knowingly *and willfully*.” §49.49(1)(a)(2) (emphasis added). The legislature broadened the scope of unlawful conduct when it enacted §49.49(4m), but provided a less serious sanction than a criminal conviction. Until 1995, forfeitures were the only tool Wisconsin had to punish individuals who knowingly—but not willfully—caused false statements to be made.

B. The Caselaw Supports the Jury’s Special Verdict Finding.

Menard. As Wisconsin showed, *State v. Menard*, 121 Wis. 2d 199, 358 N.W.2d 813 (Ct.App. 1984), does not support vacating the jury’s count, as it expanded—rather than restricted—the forfeiture count.

WCAB 28-30. Pharmacia acknowledges that “*Menard* does not deal with the specific issue before the court.” CRB 23. It asserts, however, that “the State is essentially asking that a forfeiture be imposed not for each [statement], but for each time the [statement] was read or relied upon,” and that such counting results in multiple forfeitures for the same conduct because each violation does not involve “separate choices.” CRB 24.

But as stated above, Wisconsin did not ask the jury to count the number of times each false statement was “read or relied upon,” (*i.e.*, used). Wisconsin asked it to count the number of false statements Pharmacia caused to be made. Hence Wisconsin’s approach does not result in double-counting, as Pharmacia argues. CRB 25.

Moreover, Pharmacia fails to recognize the different “units of prosecution” covered by the two statutes. *Menard* involved a rule that counted the number of times a seller chose to have a false price-comparison advertisement published. Wis. Admin. Code ATCP 124.03 (“no price

comparison may be made by a seller”). The advertising regulation is much narrower than the Medicaid Fraud statute because the regulation does not explicitly prohibit *causing others* to publish a sellers’ advertisement (other than the implicit assumption that a newspaper, not a seller, does the actual publishing).

By contrast, one “independent act” of Pharmacia can “cause to be made” multiple statements, each of which, as *Menard* states with respect to the publication of advertisements, “must be considered separately for compliance” with the law, as to whether the statement was true “within a specified period of time” and within the trade area the statement was made. 121 Wis. 2d at 202. As *Menard* concluded, “a violation occurs each time an improper advertisement is published” because each publication “must be considered separately for compliance.” *Id.*

The appropriate analogy to *Menard*, then, would involve the publication of misleading advertisements in 1.44 million newspaper editions over a twelve year period. It is Pharmacia’s construction that contradicts the intent of the statute by significantly *undercounting* violations and reducing its deterrent value. *Menard* similarly rejected a

narrow construction of a violation that would have deprived the statute of serious deterrent effect.

Bornstein and Ehrlich. Pharmacia asserts that *United States v. Bornstein*, 423 U.S. 303 (1976), “expressly rejected the precise foreseeability analysis the State advocates” and held that forfeitures may only be imposed on Pharmacia for its own conduct. CRB 28. Pharmacia is mistaken. *Bornstein* refused to count each claim submitted as a violation because the evidence did not show that the defendant “cause[d] [the subcontractor] to submit any particular number of false claims.” 423 U.S. at 312. The number of claims submitted was “wholly irrelevant completely fortuitous and beyond [the defendant’s] knowledge or control.” *Id.* Thus, the Court did not reject foreseeability—it rejected strict liability for the unforeseeable and uncontrollable acts of others.

Pharmacia is likewise unpersuasive in dealing with *United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981), which held the defendant liable not only for his own conduct but also for the 76 false claims a subcontractor submitted, because the defendant “knew a false claim would be submitted each month” and “could have prevented the filing of additional claims,” but instead “did nothing and gained a continuing benefit.” 643 F.2d at 638.

Pharmacia reads *Ehrlich* to require a defendant to have “actual knowledge that a particular number of claims would be filed, the ability to *stop* a particular claim from being filed, and received a benefit from each claim that was filed.” CRB 29. Pharmacia’s application of *Ehrlich*, however, is flawed.

As Wisconsin explained, it makes no sense to require that a defendant know in advance the *exact number* of false statements its conduct will cause to be made. WCAB 36. Credible evidence supports the finding that Pharmacia knew its conduct would cause false statements to be generated with each paid claim, that the number of such claims would be very large, and that its prohibited actions would *increase* that number. Under *Ehrlich*, that knowledge suffices to hold Pharmacia liable for each such false statement. WCAB 31-37.

And exactly like the defendant in *Ehrlich*, Pharmacia could have stopped additional false statements by reporting true prices, but did not. Finally, Pharmacia benefited from the continuation in the scheme by selling more drugs. *Id.*

C. AWP's Generated by Wisconsin's Data System Are "Statements" Within the Meaning of §49.49(4m).

Pharmacia makes several arguments attempting to establish that the jury's finding—that the AWP's generated for each claim were "statements or representations"—was wrong as a matter of law. Despite that the statute uses broad, disjunctive language, Pharmacia argues that AWP's generated during claims processing are different than a "defendant making a statement of fact" and are simply old statements that Wisconsin reviewed more than once. CRB 31-32. According to Pharmacia, the AWP's generated by the computer system are no different than Wisconsin "repeatedly looking in a book for that same number." CRB 32.

The "re-reading a book" analogy is unpersuasive. Statements of AWP made during the original dissemination of AWP's to Wisconsin had a different effect than the statements of AWP generated in the payment of claims. The earlier statements had no immediate impact. It was the AWP statements that were generated for each claim that determined whether the AWP-based amount or some other amount would be paid.

Suppose that this issue had arisen in a less technologically-advanced context, in which Medicaid claim processors had to call Pharmacia for each claim and ask what the current AWP was for the drug. Pharmacia's answer

would often have been the same from one claim to the next, but each time it stated the current AWP, it would have made a separate false statement of fact subjecting the company to liability and forfeitures. The substance is no different now that statements of current AWP are generated electronically for each claim.

Pharmacia also argues that “statements” are made only by one live person to another, and that AWP’s generated by a computer cannot be a “statement of fact.” CRB 33. This view has nothing to recommend it. Electronic statements can be as consequential as statements coming from live persons.

Pharmacia also offers two arguments that have nothing to do with counting violations. Instead, Pharmacia argues that it is not *liable* under the statute because: (1) Wisconsin could not have believed AWP’s reflected actual prices—because it discounted from AWP in its reimbursement formula and First DataBank disclaimed responsibility for the accuracy of the data (CRB 34)—and (2) an AWP generated in connection with Wisconsin’s processing of claims “neither asserts nor implies the use of an actual wholesale price” (CRB 33). The Court did not accept this liability

issue for review, and by raising it, Pharmacia goes beyond the scope of the appeal.

Here it suffices to say what Wisconsin argued at length in the court of appeals: (1) discounting from AWP shows only that Wisconsin learned that AWPs were inflated and needed to be discounted; and (2) such knowledge did not negate that Pharmacia's AWPs were *supposed to be* true. As for First DataBank's disclaimer of responsibility (an argument made by Pharmacia for the first time in this litigation), First DataBank *defined* the AWPs it published as meaning *real* average wholesale prices. *See* Wisconsin's Response Brief on Pharmacia's appeal at 8-9.

D. Pharmacia's "Directly or Indirectly Caused" Argument Has No Merit.

Pharmacia makes several arguments attempting to establish that the jury's finding—that Pharmacia “caused to be made” the AWPs generated for each claim—was wrong as a matter of law. Pharmacia argues that it cannot be liable under §49.49(4m) for statements more than one step down the causal chain between its own conduct and the false statement, because the statute does not explicitly say “make or cause to be made, *directly or indirectly*.” CRB 36-37. Pharmacia's restricted concept of causation finds no support in the dictionary definition of “cause,” which is “[t]o bring

about or effect.” Black’s Law Dictionary (9th ed. 2009). And Pharmacia’s construction is inconsistent with the statute’s objective to prevent and deter false statements in medical assistance programs. It is irrelevant that the legislature occasionally uses the words “directly or indirectly” in connection with causation but did not do so here. Anyway, there was nothing “indirect” here about Pharmacia’s causation of false statements. First DataBank was merely a pipeline between Pharmacia and the generation of AWP’s to pay claims.

Pharmacia’s long discussion of *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130 (1998), (CRB 35-37) is unhelpful. *Chrysler* focused on a question irrelevant to this case: whether “cause” should be read to include both the commission and omission of an act. 219 Wis. 2d at 168-71. The federal cases Pharmacia cites (CRB 37-38) also shed no light on the forfeiture issue certified for review. As Pharmacia admits (*id.* at 38), their factual situations were different than the one presented here. If those cases show anything, it is that causation is a fact-specific inquiry.

Pharmacia also asserts that the “State’s theory impermissibly reads out of §49.49(4m) the requirement of scienter.” CRB 39. According to Pharmacia, “under Wisconsin principles of statutory construction,

‘knowingly’ modifies ‘caused,’” and therefore, Pharmacia could not have “knowingly caused” Wisconsin’s data systems to generate a false statement unless it “actually knew it caused that particular statement to be made.” CRB 40. This argument cannot be reconciled with *State v. Williams*, 179 Wis. 2d 80, 505 N.W.2d 468 (Ct.App. 1993), where the court of appeals held that the “knowing and willful” language of §49.49(1) modified “false.” 179 Wis. 2d at 89. “The statute’s additional requirements ... do not concern the requisite state of mind.” *Id.*

II. PHARMACIA’S ARGUMENTS AS TO SUFFICIENCY OF THE EVIDENCE ARE IMPROPER.

Pharmacia argues that Wisconsin failed to prove that it “knowingly caused even one claim to be processed using AWP, let alone 1.4 million of them.” CRB 50-51. However, the jury *did* find that Pharmacia knowingly caused its false AWP’s to be generated in processing claims when the jury found Pharmacia liable and that it caused millions of dollars of overpayments under §49.49(4m)(a)2. Pharmacia waived its evidentiary argument to the contrary when it told the court of appeals that its appeal “does not raise the sufficiency of the evidence at trial.” *See* Wisconsin’s Supplemental Appendix on Pharmacia’s appeal, at 315. In addition to

waiving this argument, the Court did not accept this issue for review, and by raising it, Pharmacia goes beyond the scope of the appeal.

In any event, credible evidence supported the jury's verdict on §49.49(4m)(a)2 liability and damages. Wisconsin sketched some of that evidence (for purposes of context only) in its response brief on Pharmacia's appeal, and at WCAB 6-9.

Pharmacia also complains of Wisconsin's discussion of the massive evidence that Pharmacia unethically "marketed the spread." It calls such evidence irrelevant and insists that "marketing the spread" does not in itself violate §49.49(4m)(a)2. CRB 43-47. However, as Wisconsin explained, the evidence of "marketing the spread" bears on the *Bornstein-Ehrlich* foreseeability issue. By marketing the spread created by inflated AWP's, Pharmacia aimed to use third party payers' money to increase sales. Such behavior makes it all the more unjust for Pharmacia to escape forfeiture liability because it did not know the exact number of false statements that would be generated. WCAP at 35-37; *supra* at 7.

III. WISCONSIN PRESERVED THE ISSUE PRESENTED BY ITS CROSS-APPEAL.

Citing actions by Wisconsin prior to the jury verdict, Pharmacia argues that these actions taken together precluded Wisconsin from requesting in closing argument, as it did, that the jury find 1,440,000 violations, and from cross-appealing from the trial court's later ruling vacating that finding. CRB 40-43.

This argument is unintentionally ironic because it is far too late for Pharmacia to make it. Wisconsin described its theory for determining liability and counting forfeitures in its trial brief and in *motions in limine*. WCAB 10-11; *see also* Wisconsin's Response Brief on Pharmacia's appeal, at 47. If Pharmacia wanted to bar Wisconsin from arguing this theory of counting forfeitures, it had to seek that bar before the jury rendered its verdict. Instead, it waited until after the jury's verdict to assert its challenge.

Pharmacia's arguments would have had no merit even if made prior to verdict. First, Pharmacia argues that Wisconsin's complaint failed to "specify the particular offense or delinquency for which the action is brought," as provided in Wis. Stat. §778.02. CRB 41. Wisconsin's 35-page complaint, in fact, details at length the actions that violated

Wisconsin's laws and laws that were violated. R.296. In any case, §778.02 requires specificity only if "the statute imposes a forfeiture for several offenses or delinquencies." And Wis. Stat. §806.01(1)(c) provides "[e]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings."

Second, Pharmacia argues that Wisconsin waived its right to raise these issues on appeal because it did not object when the trial court changed a proposed Wisconsin jury instruction on counting violations by inserting the general language of the statute. Wisconsin has answered this meritless argument at 55-56 of its Response Brief on Pharmacia's appeal.

CONCLUSION AND REQUEST FOR RELIEF

Wisconsin respectfully requests that this Court answer the certified question relevant to forfeitures by holding that the trial court erred in vacating the jury's finding of 1,440,000 false statements.

Dated: October 6, 2011

Respectfully submitted,

Frank D. Remington
Assistant Attorney General

J.B. Van Hollen
ATTORNEY GENERAL

Frank D. Remington
Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707
(608) 266-3542

George F. Galland, Jr.
Charles Barnhill, Jr.
Betty Eberle
Barry J. Blonien
Miner, Barnhill & Galland, P.C
44 E Mifflin Street, Suite 803
Madison, WI 53703
(608) 255-5200

Counsel for the State of Wisconsin

CERTIFICATION

I hereby certify that the foregoing Reply Brief in Support of Cross-Appellant the State of Wisconsin 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 2,989 words.

Dated this 6th day of October, 2011.

By: _____
Elizabeth Eberle, SBN 1037016
Miner, Barnhill & Galland, P.C.
44 E. Mifflin St., Suite 803
Madison, WI 53703
Tel. (608) 255-5200

CERTIFICATION

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

Dated this 6th day of October, 2011.

Elizabeth Eberle, SBN 1037016
Miner, Barnhill & Galland, P.C.
44 E. Mifflin St., Suite 803
Madison, WI 53703
Tel. (608) 255-5200