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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2010-AP-000232

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

Case No. 10-AP-232

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., SICOR,
INC. F/K/A GENZIA SICOR PHARMACEUTICALS, INC., SMITHKLINE
BEECHAM CORP. D/B/A GLAXOSMITHKLINE, INC., TAP
PHARMACEUTICAL PRODUCTS, INC., TEVA PHARMACEUTICALS USA,
INC., WARRICK PHARMACEUTICALS CORPORATION, WATSON
PHARMA, INC. F/K/A SCHEIN PHARMACEUTICALS, INC. AND WATSON
PHARMACEUTICALS, INC.,

Defendants,

PHARMACIA CORPORATION,

Defendant-Appellant-Cross-Respondent.

COMBINED BRIEF OF APPELLANT AND CROSS-RESPONDENT

On Appeal From The Circuit Court For Dane County,
The Honorable Richard G. Niess, Presiding
Dane County Circuit Court Case No. 04-CV-1709

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APPELLANT PHARMACIA CORPORATION'S REPLY BRIEF

TABLE OF CONTENTS

	<u>Page</u>
I. THE COURT SHOULD REJECT THE STATE’S IMPROPER STATEMENT OF FACTS.	1
II. THE LEGISLATURE’S ROLE IN SETTING MEDICAID REIMBURSEMENT DEFEATS ITS CLAIMS.	1
A. The State Cannot Avoid the Legislature’s Knowledge That AWP’s Did Not Represent Actual Prices.....	1
B. The State Cannot Avoid the Legislature’s Knowledge by Claiming that the Legislature Did Not Know Actual Acquisition Costs.....	4
C. The State Cannot Avoid the Legislature’s Role By Its Incorrect Argument That Federal Law Does Not Allow Pharmacists to Make a Profit.....	5
D. The State’s Claims Violate the Separation of Powers.	9
E. The State’s Claims Are Not Justiciable.	12
F. Because the Legislature Set Reimbursement Rates, the State’s Damages Claims Were Wholly Speculative.	14
III. THE STATE COULD NOT PURSUE A CLAIM UNDER § 100.18.	15
A. AWP’s Are Not, as a Matter of Law, False or Deceptive.....	16
B. Because The State Was Not Induced To Set Reimbursement Rates By The Supposed “Falsity” of AWP’s, It Had No § 100.18 Damages Claim.	19

IV. THE STATE HAD NO CLAIM UNDER WIS. STAT. §49.49(4m)(a)2.	20
V. THE STATE HAD NO RIGHT TO A JURY.	22
VI. THE TRIAL COURT ERRED IN SUPPLYING AN ANSWER TO SPECIAL VERDICT QUESTION NO. 5.	26
VII. THE COURT’S FAILURE TO SUBMIT A MITIGATION INSTRUCTION AND THE COURT’S DUPLICATIVE DAMAGES CALCULATION WERE REVERSIBLE ERRORS.	27
VIII. EVIDENTIARY ERRORS WARRANT REVERSAL.	28
IX. THE AWARD OF ATTORNEYS’ FEES AND COSTS IS ERRONEOUS.	29
CONCLUSION	31
CERTIFICATION	33
CERTIFICATION	34
CERTIFICATE OF SERVICE	35

I. THE COURT SHOULD REJECT THE STATE'S IMPROPER STATEMENT OF FACTS.

The State's Response Brief ("SRB") relies on factual assertions that do not relate to the issues on appeal, that the State previously conceded were irrelevant to this case, or that are unsupported or inaccurately portrayed. Because the State relies on such assertions for both Pharmacia's appeal and its Cross-Appeal, Pharmacia addresses the factual deficiencies in responding to the Cross-Appeal. (Pharmacia Cross-Respondent Brief 15-22.) Such facts should be disregarded by this Court.

II. THE LEGISLATURE'S ROLE IN SETTING MEDICAID REIMBURSEMENT DEFEATS ITS CLAIMS.

A. The State Cannot Avoid the Legislature's Knowledge That AWP's Did Not Represent Actual Prices. (SRB 19-27.)

The State concedes that the legislature knew AWP's were not actual prices (SRB 10, 14, 44), but urges this Court to ignore that knowledge.

First, the State argues that the legislature's knowledge is a question of law for the Court, not a question of evidence to be decided by the jury. (SRB 21-22.) Because the legislature's knowledge was a question of law, Pharmacia asked the trial court to dismiss the case before trial. (R.135, 226.) Once the case went to trial, the legislature's role could not be avoided; indeed, the State raised it in its opening statement, through its

expert and lay witnesses, and in closing argument. (Pharmacia's Brief ("PB") 16.)

Second, the State argues that the budget resolutions setting Medicaid's appropriation do not mention AWP, Wis. Stat. § 100.18 or § 49.49(4m)(a)2. (SRB 20-21.) The State's assertion is both incorrect (*see* R.304 at DX-399; C.Resp.Ap. 152) and counter to the State's position at trial, where it argued: "the only way that the State communicated here was through its statute. And it said . . . here's what our reimbursement rate is. It's AWP minus 10, minus 11, minus 12 percent." (R. 431 at 46:5-46:10; C.Resp.Ap. 268.)

It is irrelevant that the budget bills do not mention § 49.49 or § 100.18 because the legislature is presumed to have set reimbursement rates with knowledge of those statutes. *See Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 40, 316 Wis.2d 47, 762 N.W.2d 652. Knowing that Wisconsin had consumer protection and Medicaid fraud statutes, the legislature employed the term "AWP" with the understanding that it does not represent actual prices. (*E.g.*, R.304 at DX-292; A.Ap. 367-70.) The State cannot premise its case on the theory that AWP's are false or deceptive in the face of that knowledge. (PB 17-19, 26-27, 34-35.)

Third, the State claims the legislature's understanding of AWP should be ignored because the legislature "fail[ed] to act" on the Department of Health and Family Service's ("DHFS's") recommendations that reimbursement rates be lowered to better reflect acquisition costs. (SRB 22.) The Wisconsin legislature did act — each biennium, it enacted reimbursement rates knowing that AWP did not represent wholesale prices and knowing that its reimbursement formula resulted in reimbursement that exceeded acquisition costs.

Finally, the State argues that the legislature's knowledge should be ignored because the legislature was presented with "conflicting evidence" regarding what pharmacists paid to acquire drugs. (SRB 22-24.) Whether the legislature knew the degree to which AWP differed from pharmacists' acquisition costs does not negate the legislature's knowledge that AWP did not represent actual acquisition costs. The State's claims are not justiciable because, in making policy decisions, the legislature considered the very conflicting evidence and divergent positions cited by the State. (PB 15-23).

B. The State Cannot Avoid the Legislature's Knowledge by Claiming that the Legislature Did Not Know Actual Acquisition Costs. (SRB 8, 10, 16-17, 22-24.)

Although the legislature knew AWP's did not represent pharmacists' acquisition costs, the State claims it can still pursue claims under § 100.18 and § 49.49(4m) because the legislature did not know what those actual costs were. (SRB 22-25.) The legislature's lack of knowledge cannot be the basis for a claim unless there was a duty to disclose actual prices to the State, and there is no such duty.

No statute or regulation provides that drug manufacturers must disclose their prices to the State. Section 100.18 is not the source of such a duty. *Goudy v. Yamaha Motor Corp.*, 2010 WI App 55, ¶ 25, 324 Wis.2d 441, 782 N.W.2d 114. Because § 49.49(4m) contains the same language as § 100.18 concerning affirmative misrepresentations of fact, it similarly imposes no duty. *See Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶¶ 39-40, 270 Wis.2d 146, 677 N.W.2d 233 (distinguishing misrepresentations of facts from failures to disclose facts, and refusing to extend statute proscribing affirmative misrepresentations to failures to disclose).

The legislature was fully aware that it did not know pharmacists' actual acquisition costs. (SRB 23-24.) The legislature is always free to

enact laws that require disclosure of certain information, and it has done so when it believes the State needs information. *See, e.g.*, Wis. Stat. § 103.05.

The State claims that “once it undertook to speak, Pharmacia had to speak truthfully.” (SRB 45.) The State’s proposition is a common law concept, which does not apply to statutory claims. *See Goudy*, 324 Wis.2d 441, ¶ 25. Even when the concept applies, it merely requires the speaker to say enough to keep the recipient from being misled. *See Estate of Lecic v. Lane Co.*, 104 Wis.2d 592, 610, 312 N.W.2d 773 (1981). The State was not misled. It knew AWP’s did not represent pharmacists’ actual acquisition costs—for this very reason, it set reimbursement at a substantial discount below AWP. (SRB 10, 14, 44.)

Moreover, the State does not claim that Pharmacia represented that AWP’s were actual acquisition costs. (PB 14-15.) Despite years of litigation, the State’s only evidence of anyone representing that AWP’s were actual prices are documents that were neither authored by Pharmacia nor published to anyone in Wisconsin. (SRB 10.)

C. The State Cannot Avoid the Legislature’s Role By Its Incorrect Argument That Federal Law Does Not Allow Pharmacists to Make a Profit. (SRB 15, 25-27.)

No trier of fact could say what the legislature intended to pay pharmacists as a profit, much less quantify that intention as a damages

award. (PB 46-47.) The State tries to avoid this problem by contending that federal law required the legislature to set reimbursement rates at a level that would afford no profit. (SRB 15, 25-27.)

The State's premise is incorrect as a matter of law. It considers a single regulation, 42 C.F.R. § 447.502, in isolation, without regard to other laws governing reimbursement. *See Williams v. Integrated Cmty. Servs., Inc.*, 2007 WI App. 159, ¶ 12, 303 Wis.2d 697, 736 N.W.2d 226 ("As with statutory interpretation, we interpret the language of a regulation in the context in which it is used, 'not in isolation but as part of a whole[.]'" (quoting *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110)).

Federal law requires that Wisconsin ensure Medicaid beneficiaries have the same access to services as the general population. *See* 42 U.S.C. § 1396a(a)(30)(A). Pharmacists' participation in Medicaid is voluntary, and reimbursement levels must be sufficient to "encourage participation of health care providers." *Moody Emergency Med. Servs., Inc., v. City of Millbrook*, 967 F. Supp. 488, 493 (M.D. Ala. 1997) (emphasis supplied). In setting reimbursement rates, the legislature was required to balance economy with patient access. (PB 7-8, 10-12.) The legislature and Governor were concerned with, and considered the impact of,

reimbursement rates on pharmacists' willingness to participate in Medicaid. (E.g., A.Ap. 337, 349, 358-59, 523.)

The legislature could not encourage providers to participate in a program in which they made zero profit. Indeed, pharmacists consistently told the legislature that they required a profit to participate in the Medicaid program. (A.Ap. 337, 349, 358-59, 374-75.)

The State's position is refuted by statements made by the federal government on this issue. The federal government would not approve plans that set reimbursement at pharmacists' actual cost, (A.Ap. 576-80), and expressly advised states that acquisition cost is "just one factor in pharmacy reimbursement policy." (A.Ap. 327, 332.) For example, in 2002, the federal Department of Health and Human Services ("DHHS") surveyed Wisconsin pharmacists (A.Ap. 300-16) and found they paid 20.52% less than AWP for branded drugs and 67.28% less than AWP for generic drugs (A.Ap. 300). DHHS did not claim Wisconsin was violating the law, but merely recommended that Wisconsin "consider the results of our review as a factor in any future changes to pharmacy reimbursement." (A.Ap. 301 (emphasis supplied).) The Centers for Medicare and Medicaid Services ("CMS"), the federal agency that evaluates state plans for compliance with

federal law, was aware of DHHS' findings and continued to approve Wisconsin's reimbursement rates. (PB 8; A.Ap. 575-76, 580-81, 583.)

The State's only counter to these facts is the argument that Medicaid employees and a Legislative Fiscal Bureau ("LFB") analyst were unaware of pharmacists leaving the Medicaid program due to insufficient reimbursement. (SRB 17.) Yet, the State conceded at trial that what Medicaid employees knew or believed was "irrelevant," (R.431 at 45:5-45:11, 46:10-46:12; C.Resp.Ap. 267-68) and it may not avoid its prior positions in this litigation. *See State v. White*, 2000 WI App 147, ¶ 3 n.4, 237 Wis.2d 699, 615 N.W.2d 667. Similarly, an LFB analyst's understanding is meaningless, because the LFB makes no decisions. Wis. Stat. § 13.95. What is relevant is that pharmacists threatened to leave Medicaid if reimbursement was lowered and that the legislature, tasked with balancing access and budgetary constraints, allowed pharmacists a profit. (A.Ap. 337, 349, 358-59, 523; *see also* R.304 at DX-543; C.Resp.Ap. 248-49.)

Finally, the State's own actions with respect to generic drugs refute its argument about federal law. Wisconsin Medicaid reimbursed pharmacists for generics based on Maximum Allowable Costs ("MACs"), rather than published prices, and set MACs at the lowest price pharmacies

actually paid, marked up by 15-25%. (R.436 at 67:17-68:7; C.Resp.Ap. 289-90.) Thus, it knowingly allowed pharmacists to make a profit, in order to ensure patients access (*id.*)—precisely as federal law, when considered as a whole, required (PB 7-8).

**D. The State’s Claims Violate the Separation of Powers.
(SRB 29-30.)**

The State argues that this case did not violate separation of powers principles because it was a lawsuit, and courts have the power to adjudicate lawsuits. This argument renders the principle of separation of powers meaningless. It is the nature of the decision to be made in the lawsuit, not the fact of the lawsuit itself, that governs the separation of powers analysis. Here, a trial was held to decide whether and how the legislature would have set Medicaid reimbursement rates differently if the legislature had different information. (PB 16-19.) The determination of Medicaid reimbursement rates via the biennial budget process is a core zone of exclusive legislative authority. *See Flynn v. Dep’t of Admin.*, 216 Wis.2d 521, 540, 576 N.W.2d 245 (1998).

The State’s alternative argument, that this case involves overlapping powers (SRB 29), ignores the Supreme Court’s analysis in *Flynn*, 216 Wis.2d 521. Budget appropriations are exclusively committed to the legislature (PB 17), and the Supreme Court has found only two limited

exceptions to this rule. In *Flynn*, the Court concluded that the budgetary appropriations at issue involved overlapping powers because they were appropriations for court operations. *Id.* at 529, 547, ¶¶ 2, 42-50. The other equally inapplicable exception is a constitutional challenge to a particular budgetary decision. See *Wis. Medicaid Society, Inc. v. Morgan*, 2010 WI 94, ___ Wis.2d ___, 787 N.W.2d 22.

Even in situations of overlapping constitutional powers, one branch cannot intrude on another's "core zone of exclusive authority." *Flynn*, 216 Wis.2d 546, ¶¶ 39-40. The conflict between the legislature's choices and the claims in this case is manifest. (PB 11-12, 16-19, 21-23.) At its heart, this case asked whether the legislature would have chosen differently. Absent a statutory requirement, it is not for the judiciary to decide that the legislature should have had different information, or that the balance the legislature reached between economy and patient access was not the correct one. This case impermissibly substituted litigation for legislation.

State v. Chvala, 2004 WI App 53, 271 Wis.2d 115, 678 N.W.2d 880, *aff'd per curiam*, 2005 WI 30, 279 Wis.2d 216, 693 N.W.2d 747, does not help the State. (SRB 30-31.) *Chvala* involved the criminal prosecution of a state senator for misconduct in office. *Chvala*, 2004 WI App 53, ¶ 1. Enforcement of a criminal statute enacted by the legislature to punish

misconduct by public officials was consistent with the legislature's power to regulate its members and, therefore, did not interfere with a uniquely legislative function. *Id.* at ¶¶ 43, 48-49. In contrast, this case intrudes directly on the legislature's "core function" of balancing patient access and fiscal economy in Medicaid reimbursement. (PB 19.)

The State cites *Massachusetts v. Mylan Laboratories*, 608 F. Supp. 2d 127 (D. Mass. 2008), for the proposition that this case is not barred by the separation of powers. (SRB 30.) *Mylan* was neither a separation-of-powers decision, nor involved a system in which Medicaid reimbursement was set by the legislature as part of the political process. Further, the State mischaracterizes Pharmacia's argument. Pharmacia never argued that the legislature intended drug manufacturers to "feed any numbers they pleased" into Wisconsin's reimbursement formula. (SRB 30.) There was no evidence of this ever happening, and the State cites none. Rather, the undisputed evidence was that the legislature knew that AWP exceeded actual drugs costs, and consequently set reimbursement rates at a discount off of AWP that would allow pharmacies a profit. (PB 8-12.)

In an effort to avoid this issue, the State claims the legislature's role was "injected into the trial" by Pharmacia. (SRB 31.) However, the State raised the legislature's role and lobbying by various interest groups in its

opening statement, before Pharmacia even addressed the jury. (R.433 at 48:23-50:9; C.Resp.Ap. 459-61.) Moreover, the trial court recognized, “raw politics . . . drove (and continues to drive) this issue at the State Capitol, in which both the legislative and executive branches fully participated and in which compromises (unrelated to Pharmacia) were made that knowingly sacrificed more accurate reimbursement formulas even up through the current budget.” (A.Ap. at 170.) The State cannot avoid the legislature’s role by ignoring that role.

E. The State’s Claims Are Not Justiciable. (SRB 32-34.)

The State cites one sentence in a minority opinion that the political question doctrine is “rarely invoked” in Wisconsin and suggests *Baker v. Carr*, 369 U.S. 186 (1962), may not be the law of Wisconsin. (SRB 32.) This Court has made clear that it is. *Chvala*, 271 Wis.2d 115, ¶¶ 50-58, 64. If just one *Baker* factor is enmeshed in a case, the case is not justiciable. (PB 19-23.) The State addresses only one factor—whether there are “judicially discoverable and manageable tools” to decide the case—and asserts there are such tools, but never explains what they might be. (SRB 33.)

The State argues that, because school financing is part of the State budget and Wisconsin courts have considered the constitutionality of

school financing statutes, this case is justiciable. (SRB 32.) This case did not question the constitutionality of the legislature's decisions about Medicaid reimbursement. It questioned the accuracy of the legislature's policy decisions. It asserted law enforcement and damages claims on the theory that, had the legislature known pharmacists' acquisition costs for drugs, it would have reimbursed pharmacists at cost. The legislature's decisions on how and where to set reimbursement rates—including the information needed to make those decisions—are political decisions reached after balancing the competing interests of different constituents.

The way the State tried this case refutes the State's claim that it does not challenge the legislature's decisions. (PB 16.) Even after trial, the trial court imposed forfeitures at least in part to “spur on the process of reform.” (A.Ap. 170.) It is up to the legislature to decide whether to reform Medicaid and, if so, how to do it. *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 60, 281 Wis.2d 300, 697 N.W.2d 417 (legislature, not judiciary, is to settle and declare public policy).

Courts interpret the law. “Sometimes, however, the law is that the judicial department has no business entertaining [a] claim of unlawfulness—because the question is entrusted to one of the political branches[.]” *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004); *Payday Loan*

Store of Wis., Inc., v. City of Madison, 339 F. Supp. 2d 1058, 1061 (W.D. Wis. 2004). That is the case here.

F. Because the Legislature Set Reimbursement Rates, the State's Damages Claims Were Wholly Speculative. (SRB 59-60.)

The State's argument that its damages claim was not speculative is contrary to both its admissions at trial and the law. (PB 46-47.) At trial, the State conceded that the knowledge of Medicaid employees was irrelevant because "[t]hey didn't have the power to change [reimbursement]. At most all they could do was make recommendations like everybody else to the legislature and the governor." (R.431 at 46:12-46:16; C.Resp.Ap. 268.) The State went further, admitting that "as to what the legislature or the governor knew or believed when it—when they enacted the statutes, it's pure speculation." (*Id.* at 46:19-46:23; C.Resp.Ap. 268 (emphasis added).)

Contrary to its express admissions, the State now argues the jury had a "solid basis" to accept that, if AWP's had reflected actual averages of acquisition prices, Medicaid would have reimbursed pharmacists at what they paid and that the jury could "presume" the legislature intended to set reimbursement rates in accordance with the State's characterization of federal law. (SRB 59-60.) Because Medicaid did not set reimbursement

rates but instead (unsuccessfully) lobbied the legislature to lower them, Medicaid employees cannot say what the legislature intended to do or would have done if AWP's were acquisition prices. *See City of Appleton v. Outagamie County*, 197 Wis. 4, 220 N.W. 393, 397 (1928).¹

Lacking competent evidence, the State's argument rests on the flawed presumption that federal law required the legislature to reimburse pharmacists at what pharmacists actually paid for drugs and ignores the statutory mandate to provide access. (*See, supra*, 5-9.) Courts cannot evaluate what the legislature would do, by presumption or otherwise. *Christie v. Lueth*, 265 Wis. 326, 332, 61 N.W.2d 338 (1953). The economic consequences of legislative budgetary decisions cannot be quantified as a damages award.

III. THE STATE COULD NOT PURSUE A CLAIM UNDER § 100.18. (SRB 34-45.)

The legislature's knowledge that AWP's did not represent actual wholesale prices is fatal to the State's § 100.18 claim. Because the State was not induced to take any action it otherwise would not have taken in reliance on AWP's representing actual average wholesale prices, the § 100.18 damages award cannot stand.

¹ Nor can an LFB analyst's opinion have any weight, because the LFB makes no decisions. Wis. Stat. § 13.95.

A. AWP's Are Not, as a Matter of Law, False or Deceptive.

The purpose of § 100.18 is to prevent purchasers of products from being deceived. (PB 26-27.) According to the State, it is irrelevant that the legislature was not deceived because (a) the legislature did not know what Pharmacia's wholesale prices actually were (SRB 36); (b) the legislature's understanding of AWP is irrelevant to whether AWP is "false" (*id.*); (c) there is a "higher standard" of truth when dealing with the government (*id.* at 36-38); and (d) AWP's were *per se* deceptive under § 100.18(10)(b) (*id.* at 39-41).

The State's first argument confuses "falsity" with "non-disclosure." Nondisclosure is not actionable under § 100.18 or § 49.49(4m). (PB 30-32.) The State's second argument is neither explained nor supported by legal authority. The State does not claim that Pharmacia represented that AWP's were averages of pharmacists' acquisition costs. (*See, supra*, 5.) If merely using the term "AWP" constitutes falsity or deception, then the legislature, Governor, Wisconsin agencies, and federal government in its communications with Medicaid have been violating § 100.18 and § 49.49(4m) for years. (*E.g.*, A.Ap. 191-94, 221, 224, 272-73, 289, 300.) The idea is absurd, and statutes will not be interpreted or applied so as to lead to unreasonable results. (PB 26-27.)

The State's example of giving a false name to a policeman (SRB 36) is inapposite because the legislature did not use the term "name" with the understanding it meant something other than one's appellation. Similarly, it is irrelevant that a jury instruction for § 100.18² does not require that a listener have believed a statement. (SRB 36.) The falsity of a statement can be determined as a matter of law. *See State v. Am. TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 300-02, 430 N.W.2d 709 (1988).

The State dismisses *American TV* as a "puffery" case. (SRB 38.) The allegedly false statements in *American TV* were determined to be "puffery" precisely because they were considered in context. 146 Wis.2d at 300-01. Context is a fundamental principle of determining falsity. *See, e.g., Heinz W. Kirchner t/a Universe Co.*, 63 F.T.C. 1282, 1289-90) (1963) (ad referring to "invisible" swim aid was not deceptive because would not be understood as literally true).³ The State is flatly wrong that Pharmacia "knew the statements of AWP were false when made." (SRB 10-12.) Pharmacia understood AWP in precisely the manner that the State did: as a benchmark for reimbursement that did not represent pharmacists' actual costs. (*See, supra*, 5.)

² There is no constitutional right to a jury. (PB 40-42.)

³ Wisconsin courts are guided by federal cases interpreting analogous consumer protection statutes. *See American TV*, 146 Wis.2d at 301.

The State's third argument, that there is a "higher standard" of truth when dealing with the government, is also meritless. The meaning of a term does not change because one of the parties is the government, and none of the U.S. Supreme Court cases cited by the State so holds. (SRB 36-37.) Moreover, the court in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 254 F.R.D. 35, 41-43 (D. Mass. 2008) and 685 F. Supp. 2d 186 (D. Mass. 2010) (SRB 35-37), concluded government knowledge would provide a defense when the government was aware of the actual facts claimed to constitute the alleged fraud. The Wisconsin legislature was fully aware of the actual facts on which the alleged fraud in this case is based—the damages award here was precisely the amount of profit the legislature had been advised it was paying to pharmacists. (PB 15.)

Finally, the State's fourth argument—that AWP's are deceptive *per se* under § 100.18(10)(b)—rests on an inaccurate characterization of Pharmacia's arguments. (SRB 39-41.) AWP's were not understood to be representations of wholesaler prices. (PB 24-25.) Indeed, no evidence was introduced at trial that anyone may have been deceived. Applying § 100.18(10)(b) to statements that did not deceive anyone is contrary to the purpose of § 100.18. (PB 26.)

B. Because The State Was Not Induced To Set Reimbursement Rates By The Supposed “Falsity” of AWP’s, It Had No § 100.18 Damages Claim. (SRB 41-45.)

Causation under § 100.18 requires proof of an actual decision, induced by a particular representation. (PB 27-28.) The misrepresentation must have materially induced the plaintiff to act. *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶ 37, 301 Wis.2d 109, 732 N.W.2d 792. In this case, the State could not prove that any decision that the legislature made was induced by any particular representation. (PB 28-29.)

There is a fatal disconnect between the alleged “fraud” in this case (AWPs were not actual averages of wholesale prices) and any decision by the State that could constitute causation under § 100.18. The State portrayed its damages claim as “a matter of arithmetic”—that reimbursement was higher than it would have been had AWP’s been actual averages of wholesale prices. (SRB 42.) However, the State never urged that the legislature made any decision, much less decided to reimburse based on AWP’s, because Pharmacia (or anyone else) told the legislature that AWP’s were actual averages of wholesale prices. The legislature’s reimbursement formulas—which pay pharmacists a discount off of AWP—demonstrate it understood AWP’s were not actual averages of wholesale

prices. Thus, as a matter of law, there is no causation. *Novell v. Migliaccio*, 2008 WI 44, ¶¶ 41-53, 309 Wis.2d 132, 749 N.W.2d 544 (“The circuit court may determine that the representation did not induce the plaintiff’s decision to act and that plaintiff would have acted in the absence of the representation.”).

For this reason, the State argues the legislature “relied” on AWP’s because it did not know what actual prices were. (SRB 44.) The State’s argument confuses “relying” on the accuracy of particular information (which § 100.18 causation requires) with “using” that information (which is insufficient). *See Novell*, 309 Wis.2d 132, ¶¶ 51-53, 61 (assuming in discussion of causation that plaintiff must have believed representation). While the State claims it did not have a “practical alternative” (SRB 44), no case suggests that merely using information is a sufficient basis for a § 100.18 claim. *Novell* makes clear that, to state a § 100.18 claim, one must both believe a representation and have taken action one otherwise would not have taken. 309 Wis.2d 132, ¶¶ 32, 51-52.

IV. THE STATE HAD NO CLAIM UNDER WIS. STAT. § 49.49(4m)(a)2. (SRB 45-48.)

The State argues that, because the term “right to any such benefit or payment” appears in § 49.49(1)(a)(3), the Court should read into § 49.49(4m)(a)2 the language “amount of a payment.” (SRB 47-48.) To

the contrary, because § 49.49(4m)(a)2 does not contain language concerning the amount of a payment, the Court will not expand the existing language to include that concept. *Brauneis v. Labor & Indus. Review Comm'n*, 2000 WI 69, ¶ 27, 236 Wis.2d 27, 612 N.W.2d 635 (“We should not read into the statute language that the legislature did not put in.”).

The State also argues that § 49.49(4m) need not be strictly construed because it is not ambiguous. (SRB 47.) The State has conceded in this case that § 49.49(4m) is ambiguous. (R.443 at 137:18-138:3; C.Resp.Ap. 337-38.) The phrase “rights to a benefit or payment” is not defined and is subject to more than one reasonable interpretation. *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 12, 302 Wis.2d 564, 734 N.W.2d 394 (terms subject to more than one reasonable meaning are ambiguous). Thus the statute must be strictly construed against the State. (PB 33.)

The State concedes the Court will consider the legislature’s intent in enacting § 49.49(4m). (SRB 47.) The purpose of § 49.49(4m) was to “creat[e] and, in some cases, redefin[e] penalties for violations of existing statutes which address prohibited provider or facility charges and prohibited conduct by any person involved with the Wisconsin Medical Assistance Program” (ANALYSIS OF THE LEGISLATIVE REFERENCE BUREAU OF 1983 A.B. 665, Legislative Reference Bureau, Madison, Wis.) (emphasis

supplied). Comparing the statutes that existed when § 49.49(4m) was enacted refutes the State’s position that § 49.49(4m) applies to drug manufacturers.

The relevant “existing statute” was § 49.49(1)(a), because it proscribes the same conduct as § 49.49(4m) (*compare* §49.49(1)(a) *with* § 49.49(4m)(a)). Under § 49.49(1)(a)1, a prohibited false statement must be “in any application for any benefit or payment” (emphasis supplied). Section 49.49(1)(a)2 proscribes false statements or representations of material fact for use in determining rights to “such” benefit or payment, referring to a benefit or payment for which application had been made. Section 49.49(1)(a)3 similarly speaks of conduct in connection with “such” benefit or payment. Section 49.49(1) only reaches conduct by those who deal directly with Medicaid as providers or beneficiaries. Because the purpose of § 49.49(4m) was to create or redefine penalties for violation of § 49.49(1), § 49.49(4m) does not apply to Pharmacia.

V. THE STATE HAD NO RIGHT TO A JURY. (SRB 51-56.)

The State argues it was entitled to a jury because: (a) *State v. Ameritech Corp.*, 185 Wis.2d 686, 690, 517 N.W.2d 705 (Ct. App. 1994), *aff’d*, 193 Wis.2d 150, 532 N.W.2d 449 (1995), was somehow changed by *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, ¶ 11,

254 Wis.2d 478, 647 N.W.2d 177 (SRB 51-53), and (b) Medicaid, enacted in 1965, is not the sort of “modern social legislation” to which the constitutional right to a jury is inapplicable (*id.* at 56). The State is wrong.

Established precedent is binding unless expressly overruled. See *Moe v. Benelli U.S.A. Corp.*, 2007 WI App 254, ¶ 8 n.5, 306 Wis.2d 812, 743 N.W.2d 691 (“We believe that, had the supreme court intended to overrule these cases, it would have done so expressly.”) (citing *State v. Vogelsberg*, 2006 WI App 228, ¶ 14, 297 Wis.2d 519, 724 N.W.2d 649; *Vollmer v. Luety*, 150 Wis.2d 891, 902, 443 N.W.2d 32 (Ct.App. 1989)). *Village Food* did not purport to overrule *Ameritech* and, as a result, *Ameritech* remains the law with respect to claims under § 100.18: there is no constitutional right to a jury trial under that statute.

In *State v. Schweda*, 2007 WI 100, ¶ 42, 303 Wis.2d 353, 736 N.W.2d 49, the Supreme Court held that a statutory claim is not a counterpart to a common law claim if a “vital aspect” of the claims differs. In *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶¶ 77-83, 320 Wis.2d 1, 768 N.W.2d 176, the Supreme Court added that claims are not counterparts if their purposes differ. It is the most wishful of thinking for the State to claim that *Solo Cup* “reaffirmed *Village Food*’s broader test” (SRB 53), when the Supreme Court stated in *Solo Cup* that “we think [our] decision in

Schweda represents a narrowed application of the test in *Village Food*” and that *Schweda* “amounted to a narrower interpretation of the *Village Food* test and the term ‘counterpart.’” *Solo Cup*, 320 Wis.2d 1, ¶¶ 74, 77.

The essential elements of common law fraud are: (a) a misrepresentation of fact; (b) that was untrue; (c) made by the defendant knowing the representation was untrue or recklessly without caring whether it was true or false; (d) with intent to deceive and induce the plaintiff to act upon it to the plaintiff’s pecuniary damage; and (e) that was believed and justifiably relied on by the plaintiff to its pecuniary damage. WIS JI-CIVIL 2401.

A § 100.18 violation does not require intent to deceive. *Kailin v. Armstrong*, 2002 WI App 70, ¶ 37 n.22, 252 Wis.2d 676, 643 N.W.2d 132. Moreover, as the State previously admitted, neither of its enforcement claims required it to prove harm. (R.284 at 13; C.Resp.Ap. 13.) While the State argues, without citation to the record, that the trial court instructed the jury that Wisconsin was required to prove harm to show a violation of § 49.49(4m)(a)2 (SRB 55), the instruction refutes that contention (R.303; C.Resp.Ap. 18). The only element a common law fraud claim shares with the statutory enforcement claims in this case is a false statement.

Nor was the State entitled to a jury for its damages claims. Among other things, damages under § 100.18 do not require knowledge of falsity or intent to deceive. *Kailin*, 252 Wis.2d 676, ¶ 37 n.22. Thus, under *Schweda*'s "same elements" test, the statutory claims are not counterparts to common law fraud. (PB 41.) As for monetary relief under § 49.49, the legislature has made clear that the claim is for the equitable remedy of restitution, rather than for damages. (PB 43.) The State cannot credibly dispute the legislature's express statement as to the nature of the remedy. (SRB 56.)

With respect to the second aspect of the counterpart test, the Supreme Court does not apply the "right vs. remedy" analysis suggested by the State (SRB 53-56), and instead states, "[w]e believe it would be hard to show that a modern statutory cause of action is essentially the counterpart of a cause of action existing in 1848 if the two causes of action do not share a similar purpose." *Solo Cup*, 320 Wis.2d 1, ¶ 72. The only statement of purpose in Wisconsin's Medical Assistance law is "[t]o provide appropriate health care for eligible persons and obtain the most benefits available under Title XIX of the federal social security act." Wis. Stat. § 49.45(1). Because neither government health care nor Title XIX existed in 1848, § 49.49(4m) does not share the same purpose as a common law fraud claim.

The State is wrong that the § 49.49(4m) claim could be submitted to the jury because the trial court “eventually decided that claim.” (SRB 56.) The trial court viewed itself as bound by the jury’s finding that § 49.49(4m) had been violated. (A.Ap. 148-71.) The State is also wrong that Pharmacia did not previously raise its argument that § 49.49(6) monetary relief was not properly tried to a jury. (SRB 55-56.) Pharmacia preserved that objection. (R.441 at 36:20-36:21; C.Resp.Ap. 463; *see also* R.310 at 30, 32.)

VI. THE TRIAL COURT ERRED IN SUPPLYING AN ANSWER TO SPECIAL VERDICT QUESTION NO. 5. (SRB 48-51.)

The trial court correctly concluded that the answer to Question No. 5 was unsupportable, and vacated it within 90 days of verdict. (A.Ap. 144-53.) After 90 days, the trial court lost competence to take further action and supply an answer. (PB 36-38.) The State has no authority to support its argument that the trial court could not have done the former if it did not also do the latter. (SRB 49-50).

The State can hardly refute that the trial court gave the State a second opportunity to prove a claim it failed to prove at trial when it admits the “circuit court, not the jury, eventually decided that claim.” (SRB 56.) While it cites *Reyes v. Greatway Ins. Co.*, 220 Wis.2d 285, 582 N.W.2d 480 (Ct. App. 1998), for the proposition that trial courts can reduce a jury

award to what the credible evidence supports (SRB 50-51), the trial court's own description of the evidence as "scant at best, widely scattered, and none too clear" establishes it was insufficient under the clear and convincing burden of proof (A.Ap. at 163).

VII. THE COURT'S FAILURE TO SUBMIT A MITIGATION INSTRUCTION AND THE COURT'S DUPLICATIVE DAMAGES CALCULATION WERE REVERSIBLE ERRORS. (SRB 56-63.)

The State's primary argument equates mitigation with liability. (SRB 57.) Mitigation is not the same as liability. *See, e.g., Peterson v. Gauger*, 148 Wis.2d 231, 237-38, 434 N.W.2d 819 (Ct. App. 1988) (recognizing distinction between proof admitted for liability and proof admitted for mitigation). The State claims a mitigation instruction would not have made a difference (SRB 58), but never explains why.

Next, the State argues that mitigation cannot be applied against the government, citing *Toepleman v. United States*, 263 F.2d 697, 700 (4th Cir. 1959) (SRB 58). However, *Toepleman* was not a mitigation case. While Wisconsin courts have not considered mitigation in the context of claims by the government, there is no reason the State is different from other plaintiffs seeking damages (PB 45.)

As to duplicative damages, the jury's questions while deliberating (SRB 61-62) prove only that it was wrestling with the issue, not that it

decided the State was harmed in a particular amount by violations of one legal theory and a different amount by violations of another legal theory. The jury could not have done so, because the two questions covered the same time period (2001 forward), the same injury (Medicaid “overpayments”), based on the same conduct (“causing” the publication of AWP’s). (PB 47-49.) The State’s citation to *Cormican v. Larrabee*, 171 Wis.2d 309, 323-25, 491 N.W.2d 130 (Ct. App. 1992) (SRB 62), is misplaced, because *Cormican* involved different types of damages, physical and psychiatric. This case involved one type of damages — alleged overpayments by Medicaid.

VIII. EVIDENTIARY ERRORS WARRANT REVERSAL. (SRB 63-70.)

The State cites no authority for its arguments that (a) the trial court could admit hearsay in a document because a witness who was shown an inadmissible document agreed with portions of it (SRB 64-65); (b) any document produced from Pharmacia files was automatically authenticated (*id.* at 65); (c) unauthenticated documents were admissible because they “would have been admitted anyway” (with no explanation of how or through whom) (*id.* at 65-66); (d) documents from a data publisher that were never shown to have been published in Wisconsin and that Wisconsin Medicaid did not use were relevant (*id.* at 67-68); and (e) a letter about

investigations not relevant to this case was properly before the jury (*id.* at 68-70).

The State claims there is no reasonable possibility the outcome would have been different. (SRB 65.) Yet, the State highlighted these very documents as “key” in its closing statement. (R.441 at 71:14-72:10; A.Ap. 847-48.) *Cf. Martindale v. Ripp*, 2001 WI 113, ¶¶ 72-73, 246 Wis.2d 67, 629 N.W.2d 698 (“reasonable possibility” of different outcome where absence of excluded evidence was emphasized in closing argument). Moreover, the State’s argument is contradicted by its reliance on these documents to support its cross-appeal. (S.App. 11-14, 16-17, 21-22, 110-117, 128-133, 156-173.) Finally, the State suggests Pharmacia did not properly preserve all of its evidentiary objections. (SRB 69-70.) The State is mistaken: objections raised in motions *in limine* are fully preserved. *State v. Bergron*, 162 Wis.2d 521, 528, 470 N.W.2d 322 (Ct. App. 1991); Wis. Stat. § 805.11.

IX. THE AWARD OF ATTORNEYS’ FEES AND COSTS IS ERRONEOUS. (SRB 70-76.)

While the State claims the Attorney General hired outside counsel in 2004 (SRB 73), the Attorney General is prohibited by law from hiring outside counsel “until such employment has been approved by the governor.” Wis. Stat. § 20.930. Neither the Governor nor the Attorney

General may violate this law or the laws that prohibit outside lawyers from representing Wisconsin without following certain specific procedures. (PB 56-57.) Those procedures apply regardless of whether the Attorney General thinks it would be expedient (SRB 73), the Governor is following a case (*id.*), or the Governor ultimately decides he does not care if the private lawyers ask for compensation for efforts before they were retained (*id.* at 74). Similarly, when a statute requires the Attorney General to pay the costs of litigation, the Attorney General is not free to “finance” those expenses through private lawyers. (SRB 74-75.) As the party directed to pay those millions of dollars, Pharmacia has standing to object. *Mast v. Olsen*, 89 Wis.2d 12, 16, 278 N.W.2d 205 (1979).

Wisconsin law requires attorneys to support fee applications with contemporaneous time records (PB 59), and the State cannot avoid that law by citing decisions in other jurisdictions (SRB 72-73). Likewise, Wisconsin law requires the trial court to independently analyze a fee petition (PB 59-60), and the trial court cannot accept the representation of lawyers that they “had to” spend \$7,000,000 worth of time to prepare and try two claims against one defendant. *See Bettendorf v. Microsoft Corp.*, 2010 WI App 13, ¶ 43-53, 323 Wis.2d 137, 779 N.W.2d 34 (circuit court must critically apply lodestar factors).

Finally, the State mischaracterizes Pharmacia's argument concerning fees recoverable under either § 49.49 or § 100.18. (SRB 75-76.) Neither statute permits "farming out" the State's prosecutorial role to private lawyers with a for-profit motive. (PB 58.) The only statutory authority for awarding fees would be under and consistent with the "special prosecutor" statutes, a fact the State does not dispute. It is not surprising that there is no statutory authority for payment of "special prosecutors" on a contingency basis because it is well-settled that when the government acts in a prosecutorial function, it is acting as "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *State v. Harris*, 2008 WI 15, ¶ 37 & n.13, 307 Wis.2d 555, 745 N.W.2d 297 (internal citation omitted); *see also County of Santa Clara v. Superior Court*, 235 P.3d 21, 31-40 (Cal. 2010) (explaining that general prohibition against prosecutors (or private lawyers hired as such) working on a contingency basis in criminal context applies in the civil context to cases that implicate "interests akin to those inherent in a criminal prosecution").

CONCLUSION

For the foregoing reasons, and the reasons stated in Pharmacia's opening Brief, the Judgment should be reversed and the State's claims

dismissed with prejudice. To the extent that any of the State's substantive claims are determined to have merit, the Court should remand for a bench trial.

Dated this 18th day of October, 2010.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), WIS. STATS., for a brief and appendix produced with a proportional serif font. The length of this brief is 5,884 words.

Dated this 18th day of October, 2010.

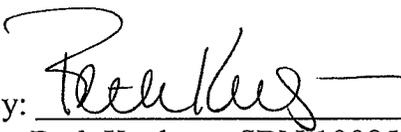
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In accordance with § 809.19(12)(f), WIS. STATS., I hereby certify that the text of the electronic copy of Appellant Pharmacia Corporation's Reply Brief is identical to the text of the paper copy of Appellant Pharmacia Corporation's Reply Brief.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2010-AP-000232

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

Case No. 10-AP-232

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.
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PHARMACEUTICAL, INC., PFIZER INC., ROXANE LABORATORIES,
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SICOR, INC. F/K/A GENSLIA SICOR PHARMACEUTICALS, INC.,
SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE, INC., TAP
PHARMACEUTICAL PRODUCTS, INC., TEVA PHARMACEUTICALS USA,
INC., WARRICK PHARMACEUTICALS CORPORATION, WATSON PHARMA,
INC. F/K/A SCHEIN PHARMACEUTICALS, INC. AND WATSON
PHARMACEUTICALS, INC.,

Defendants,

PHARMACIA CORPORATION,

Defendant-Appellant-Cross-Respondent.

CROSS-RESPONDENT'S BRIEF

On Appeal From The Circuit Court For Dane County,
The Honorable Richard G. Niess, Presiding
Dane County Circuit Court Case No. 04-CV-1709

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

I. NATURE OF THE CASE 1

II. STATEMENT OF FACTS 2

 A. Wisconsin Medicaid’s Drug Reimbursement System 2

 1. *Reimbursement Methodology* 2

 2. *Claims Processing* 5

 3. *Pharmacists* 6

 B. Pharmacia and the Rebate Agreement 7

 C. The Lawsuit 9

 D. Post Trial Proceedings 10

 1. *Forfeitures*..... 10

 2. *Injunctive Relief* 13

ARGUMENT 15

I. THE COURT WILL DISREGARD MISSTATED, UNSUPPORTED, AND IRRELEVANT FACTS IN THE STATE’S BRIEF, AND WILL NOT PERMIT THE STATE TO AVOID ITS PRIOR ADMISSIONS IN THIS CASE..... 15

 A. Factual Misrepresentations Regarding Wholesale Acquisition Cost..... 16

 B. Factual Misrepresentations Regarding Pharmacia’s Relationship With First DataBank 17

 C. Factual Misrepresentations Regarding AWP’s For Generic Drugs 18

 D. Factual Misrepresentations Regarding Department Of Health And Family Services (“DHFS”) Officials Lowering Reimbursement..... 18

 E. Factual Misrepresentations Regarding Medicaid’s Electronic Claims Processing System..... 19

F.	<u>Factual Misrepresentations Regarding Pharmacia’s Marketing Practices</u>	20
G.	<u>The Court Should Not Permit The State To Avoid Its Prior Admissions In This Case Or To Make Arguments It Did Not Make To The Trial Court</u>	21
II.	THE TRIAL COURT PROPERLY REJECTED THE STATE’S ATTEMPT TO EQUATE THE NUMBER OF VIOLATIONS OF § 49.49(4m) WITH THE NUMBER OF PHARMACISTS’ CLAIMS PROCESSED BY THE STATE.....	23
A.	<u>Use Of The State’s Computer System Does Not Constitute A “Statement Of Fact” That Pharmacia “Knowingly Caused” To Be Made</u>	26
1.	<i>Running a Computer Program is not a “Statement of Fact” Within the Scope of § 49.49(4m)</i>	26
2.	<i>Pharmacia Did Not “Knowingly Cause” the State to Make Statements to Itself</i>	28
B.	<u>The State’s “Number Of Claims Processed” Theory Does Not Measure Conduct That Violates Wis. Stat. § 49.49(4m)</u>	33
C.	<u>The Trial Court Had Discretion To Limit Forfeitures To Only Those Statements For Which It Believed Pharmacia Was Responsible</u>	36
III.	THERE IS NO BASIS TO REMAND FOR YET ANOTHER DETERMINATION OF THE NUMBER OF FORFEITURES.....	38
A.	<u>The State’s Argument That The Trial Court Misinterpreted § 49.49(4m)(a)2’s Materiality Requirement Was Waived And Is Wrong</u>	39
B.	<u>The State Is Not Entitled To Yet Another Opportunity To Prove Its Forfeiture Claims</u>	43
IV.	THE STATE’S ARGUMENTS THAT THE TRIAL COURT MISUSED ITS DISCRETION IN SETTING THE AMOUNT OF FORFEITURES WERE WAIVED AND ARE MERITLESS	44

V.	THE TRIAL COURT DID NOT MISUSE ITS DISCRETION IN DECLINING TO ENTER THE INJUNCTION REQUESTED BY THE STATE.....	46
A.	<u>The State Has Failed To Show A Misuse Of Discretion By The Trial Court.....</u>	49
B.	<u>The Injunction That The State Requested Would Be Unconstitutional And Contrary To Federal Law</u>	53
	<u>CONCLUSION.....</u>	54
	<u>CERTIFICATION</u>	56
	<u>CERTIFICATION</u>	57
	<u>CERTIFICATE OF SERVICE.....</u>	58

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Edgar v. MITE Corp.</i> , 457 U.S. 624 (1982).....	53
<i>Hays v. Hoffman</i> , 325 F.3d 982 (8th Cir. 2003).....	35
<i>Hyatt Corp. v. Hyatt Legal Services</i> , 610 F. Supp. 381 (N.D. Ill. 1985)	53
<i>U.S. ex rel. Longhi v. Lithium Power Techs., Inc.</i> , 530 F. Supp. 2d 888 (S.D. Tex. 2008).....	36
<i>United States v. Bornstein</i> , 423 U.S. 303 (1976)	35, 36, 38
<i>United States v. Krizek</i> , 111 F.3d 934 (D.C. Cir. 1997)	35, 36

STATE CASES

<i>Arents v. ANR Pipeline Co.</i> , 2005 WI App. 61, 281 Wis. 2d 173, 696 N.W.2d 194	15
<i>Austin v. Ford Motor Co.</i> , 86 Wis. 2d 628, 273 N.W.2d 233 (1979)	43
<i>Brauneis v. Labor & Industrial Review Commission</i> , 2000 WI 69, 236 Wis. 2d 27, 612 N.W.2d 635.....	26, 32
<i>City of Milwaukee v. Stanki</i> , 262 Wis. 607, 55 N.W.2d 916 (1952).....	44
<i>Forest County v. Goode</i> , 219 Wis. 2d 654, 579 N.W.2d 715 (1998) ...	50, 51
<i>Hess v. Fernandez</i> , 2005 WI 19, 278 Wis. 2d 283, 692 N.W.2d 655.....	46
<i>Hoffman v. Wis. Electric Power Co.</i> , 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55	49

<i>Independent Milk Producers Co-op. v. Stoffel</i> , 102 Wis. 2d 1, 298 N.W.2d 102 (Ct. App. 1980).....	35
<i>Industrial Risk Insurance v. America Engineering Testing</i> , 2009 WI App. 62, 318 Wis. 2d 148, 769 N.W.2d 82.....	27
<i>Matter of Kersten's Estate</i> , 71 Wis. 2d 757, 239 N.W.2d 86 (1976).....	35
<i>Kocken v. Wis. Council 40, AFSCME, AFL-CIO</i> , 2007 WI 72, 301 Wis. 2d 266, 732 N.W.2d 828.....	48
<i>La Crosse Lutheran Hospital v. La Crosse County</i> , 133 Wis. 2d 335, 395 N.W.2d 612 (Ct. App. 1986).....	42
<i>Meriter Hospital, Inc. v. Dane County</i> , 2004 WI 145, 277 Wis. 2d 1, 689 N.W.2d 627	42, 50
<i>Nw. Wholesale Lumber, Inc. v. Anderson</i> , 191 Wis. 2d 278, 528 N.W.2d 502 (Ct. App. 1995).....	16
<i>Rutherford v. Labor & Industrial Review Commission</i> , 309 Wis. 2d 498, 752 N.W.2d 897 (Ct. App. 2008).....	37
<i>Sch. District of Slinger v. Wis. Interscholastic Athletic Association</i> , 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997).....	49
<i>Schwigel v. Kohlmann</i> , 2005 WI App. 44, 280 Wis. 2d 193, 694 N.W.2d 467	34
<i>State v. Baye</i> , 191 Wis. 2d 334, 528 N.W.2d 81 (Ct. App. 1995)	25, 28
<i>State v. Chrysler Outboard Corp.</i> , 219 Wis. 2d 130, 580 N.W.2d 203 (1998).....	27, 29, 30, 31
<i>State v. Fonk's Mobile Home Park & Sales, Inc.</i> , 117 Wis. 2d 94, 343 N.W.2d 820 (Ct. App. 1983).....	51
<i>State v. James</i> , 47 Wis. 2d 600, 177 N.W.2d 864 (1970)	25, 28

<i>State v. Lawton</i> , 167 Wis. 2d 461, 482 N.W.2d 142 (Ct. App. 1992)	44
<i>State v. Magnuson</i> , 220 Wis. 2d 468, 583 N.W.2d 843 (Ct. App. 1998)	41
<i>State v. McKenzie</i> , 139 Wis. 2d 171, 407 N.W.2d 274 (Ct. App. 1987)	37
<i>State v. McMaster</i> , 206 Wis. 2d 30, 556 N.W.2d 673 (1996).....	44
<i>State v. Menard, Inc.</i> , 121 Wis. 2d 199, 358 N.W.2d 813 (Ct. App. 1984)	25, 33, 34
<i>State v. Mendez</i> , 157 Wis. 2d 289, 459 N.W.2d 578 (Ct. App. 1990).....	41
<i>State v. Phillips</i> , 218 Wis. 2d 180, 577 N.W.2d 794 (1998).....	16
<i>State v. Seigel</i> , 163 Wis. 2d 871, 472 N.W.2d 584 (Ct. App. 1991).....	52
<i>State v. Shaffer</i> , 96 Wis. 2d 531, 292 N.W.2d 370 (Ct. App. 1980).....	31
<i>State v. White</i> , 2000 WI App. 147, 237 Wis. 2d 699, 615 N.W.2d 667.....	34
<i>State v. Williams</i> , 179 Wis. 2d 80, 505 N.W.2d 468 (Ct. App. 1993)	39, 40, 41
<i>State v. Williams</i> , 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733	21
<i>Swatek v. County of Dane</i> , 192 Wis. 2d 47, 531 N.W.2d 45 (1995)	37
<i>Tatera v. FMC Corp.</i> , 2010 WI 90, ____ Wis. 2d ____, 786 N.W.2d 810.....	40
<i>Techworks, LLC v. Wille</i> , 2009 WI App. 101, 318 Wis. 2d 488, 770 N.W.2d 727	27

<i>Tietsworth v. Harley- Davidson, Inc.</i> , 2007 WI 97, 303 Wis. 2d 94, 735 N.W.2d 418 (2007)	43
<i>Vanstone v. Town of Delafield</i> , 191 Wis. 2d 586, 530 N.W.2d 16 (Ct. App. 1995)	24, 37
<i>Young v. Young</i> , 124 Wis. 2d 306, 369 N.W.2d 178 (Ct. App. 1985)	45

FEDERAL STATUTES

31 U.S.C. § 3729(a).....	35
42 U.S.C. § 1395w-3a(c)(6)(B).....	16, 54

STATE STATUTES AND REGULATIONS

Wis. Stat. § 12.08	32
Wis. Stat. § 49.485	37
Wis. Stat. § 49.49(4m)	<i>passim</i>
Wis. Stat. § 100.18	<i>passim</i>
Wis. Stat. § 144.76	29, 30
Wis. Stat. § 551.502	32
Wis. Stat. § 778.02	24
Wis. Stat. § 806.07	45
Wis. Stat. § 905.13	17
Wis. Stat. § 939.32	42
Wis. Admin. Code § DHS 101.03(181).....	6

Wis. Admin. Code §§ DHS 105-107 6
Wis. Admin. Code § DHS 106.02(9)(e)1 7
Wis. Admin. Code § DHS 106.03 30

OTHER MATERIALS

WIS JI-CRIM 1870 23

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Although the legislature, the Governor, and the Wisconsin Medicaid (“Medicaid”) agency all knew AWP’s did not represent wholesale prices, the State obtained a jury verdict that Pharmacia violated Wis. Stat. §§ 100.18 and 49.49(4m) because AWP’s were not averages of wholesale prices.

The State then asked the trial court to award it almost \$212,000,000 in forfeitures pursuant to § 49.49(4m). The State further petitioned the court for a sweeping injunction with nationwide impact, requiring Pharmacia to disclose pricing information that the legislature has never required, in order to “reform” Medicaid in a manner the legislature has never deemed necessary.

While the State now cross-appeals the trial court’s discretionary decisions concerning forfeitures and injunctions, it fails to show a misuse of discretion. The State’s appeal of the forfeiture award is further barred by its strategic decisions before, during, and after trial. Finally, the requested injunction was improper because it would have irreparably damaged Pharmacia’s business, affected businesses that are not parties to this

litigation, violated federal law, and been unconstitutional. The trial court correctly rejected the State's efforts.

II. STATEMENT OF FACTS

This Statement of Facts supplements the underlying facts of the case set forth in Pharmacia's Appellant's Brief ("PB").

A. Wisconsin Medicaid's Drug Reimbursement System.

1. *Reimbursement Methodology.*

The Wisconsin legislature has determined that Medicaid will use a discount from AWP to calculate the "Estimated Acquisition Cost" ("EAC") for branded drugs dispensed to Medicaid patients. (A.Ap. 10.) The legislature applied a discount because it knew that AWP exceed the price pharmacists pay to acquire a drug. (A.Ap. 348.) The legislature sets the discount as part of the biennial budget. (A.Ap. 8, 18.) During the majority of the relevant time period, that discount was between 10-12%. (PB 9-12.)

The legislature knew that pharmacists—including in Wisconsin—were able to buy prescription drugs for far less than AWP (A.Ap. 348-49, 368-69, 803-05, 818-20; *see also* R.304 at DX-68; C.Resp.Ap. 111-13.) Although the State claimed in this case that pharmacists were not "supposed" to make a profit on reimbursement (SRB 12, 14-16, 19, 25-27,

41-43), the State knew there was a difference between what pharmacists paid for drugs and what they were reimbursed by Medicaid, and that the difference between what pharmacists paid and were reimbursed “is profit for the pharmacist.” (R.304 at DX-54; C.Resp.Ap. 108.) The federal government and Wisconsin also knew that AWP were a “list price”—by a drug wholesaler to its customers—that did not reflect discounts available to pharmacists. (*Id.* at DX-10; C.Resp.Ap. 109.)

The State chose to purchase the AWP it used to calculate reimbursement from one of several industry data providers, First DataBank. (A.Ap. 777-778.) First DataBank sells different types of pricing information, in addition to what it calls “Blue Book” AWP. (A.Ap. 693, 695-96.) Blue Book AWP are 20% or 25% above wholesale acquisition cost or “WAC,” the list price at which manufacturers sell products to wholesalers. As set forth in Pharmacia’s product catalogs, wholesalers can receive a 2% discount from WAC for meeting certain payment terms. For Pharmacia’s branded drugs, virtually all of its sales were within 2% of WAC. (R.437 at 36:22-37:7; A.Ap. at 763-64.) Thus, for branded drugs, Blue Book AWP were generally 15-20% higher than pharmacists’

acquisition costs, depending on what price the pharmacy could obtain from its wholesaler.

First DataBank also sells “Suggested Wholesale Prices” (“SWPs”). (A.Ap. 699-700, 777-80.) Unlike “Blue Book” AWP, which First DataBank calculates independently, SWPs are typically supplied by manufacturers. (*Id.*) Wisconsin chose not to purchase SWPs. (A.Ap. 38.)

For generics, Wisconsin reimburses based on maximum allowable cost (“MAC”), which it determines without reference to published prices. (A.Ap. 51, 52, 54, 55, 730, 736.) Wisconsin establishes MACs for generics because it has known since the 1980s that AWP for generics bear no relationship to actual prices. (R.436 at 63:15-65:2; C.Resp.Ap. 285-87.) The purpose of AWP for generic products is to enable the generic product to be classified as such. (R.438 at 96:7-97:17, 100:9-102:14; C.Resp.Ap. 315-16, 319-21.) Thus, Medicaid investigates pharmacies’ actual acquisition costs for generics and sets MACs at the lowest acquisition cost generally available, plus an additional 15-25% markup. (R.436 at 67:17-68:7; C.Resp.Ap. 289-90.)

2. *Claims Processing.*

Wisconsin Medicaid does not process claims for reimbursement submitted by pharmacists but, rather, contracts with Electronic Data Service (“EDS”) to act as the State’s fiscal agent claims processor. (R.435 at 137:11-138:6; C.Resp.Ap. 280-81.) First DataBank does not send AWP’s directly to Medicaid (A.Ap. 39); instead, AWP’s go to EDS (R.435 at 137:15-137:17; C.Resp.Ap. 280).

The Agreement between First DataBank and EDS is a license for “drug pricing fixed in computer data bases,” and the National Drug Data File (“NDDF”) is a “comprehensive drug product information data base” that includes “Blue Book” AWP’s. (R.304 at DX-490; C.Resp.Ap. 155, 168.) Information in the NDDF is “confidential, proprietary material owned and copyrighted by First DataBank.” (*Id.*; C.Resp.Ap. 168.) First DataBank expressly disclaims any warranties or representations as to the accuracy of the data from which the NDDF is compiled, or its fitness for any particular use. (*Id.*; C.Resp.Ap. 170.)

The data file containing “Blue Book” AWP’s updates automatically, and the frequency of the updates varied during the relevant time period for this case. (R.304 at DX-490, DX-492; R.436 at 142:24-143:5; C.Resp.Ap.

297-98; *see also* R.305 at 124.) Updates reflected changes to existing prices, and did not constitute completely new replacement files. (R.304 at P-376; C.Resp.Ap. 442.)

3. *Pharmacists.*

The responsibilities of pharmacists who choose to participate in Wisconsin's Medicaid program are set forth in provider handbooks and other communications from the Department of Health Services ("DHS"). (*E.g.*, R.304 at DX-946; C.Resp.Ap. 253-56.) They are also contained in detailed regulations. Wis. Admin. Code §§ DHS 105-107. Pharmacists do not submit reimbursement claims directly to Medicaid but, instead, submit the claims to EDS. (R.435 at 137:11-138:6; C.Resp.Ap. 280-81.)

Pharmacists do not enter AWP's on their claim forms when submitting claims for reimbursement. (R.436 at 68:21-69:16; C.Resp.Ap. 290-91.) Rather, when submitting claims, pharmacists identify the patient, the drug being dispensed, and the pharmacist's "usual and customary charge" for the drug. (*Id.*) The "usual and customary" charge is the pharmacist's charge for providing the same service to the cash-paying public. Wis. Admin. Code § DHS 101.03(181). Pharmacists are solely

responsible for the truthfulness and accuracy of their claims. Wis. Admin. Code § DHS 106.02(9)(e)1.

The State's claim processing system was automated in September 1999 (A.Ap. 351); prior to that date, pharmacists could submit claims either electronically or by paper (*see* R.304 at DX-946; C.Resp.Ap. 254-56).

B. Pharmacia and the Rebate Agreement.

Pharmacia manufactures both brand and generic drugs. (R.226 at 4.) It sets two prices for its brand drugs: (a) Wholesale Acquisition Cost, or WAC, at which it sells to wholesalers; and (b) Direct Price, at which it sells to retailers. (*Id.* at 5.) Those prices are provided to pricing compendia, including First DataBank. (*Id.* at 6.) Pharmacia's subsidiary, Greenstone, manufactures and sells generic versions of Pharmacia's branded drugs when those products lose patent protection and other generic competitors enter the market. (R.438 at 70:21-71:4; A.Ap. 774-75.)

Roughly 5% of Greenstone's business is dispensed by pharmacies that are reimbursed by Medicaid programs. (R.438 at 88:13-88:15; C.Resp.Ap. 307.) The vast majority of Greenstone's products are reimbursed based on MACs, which are typically set by third-party payors, including Wisconsin Medicaid, within days of a product's launch and are

based on market prices. (*Id.* at 93:11-94:19; C.Resp.Ap. 312-13.)

However, Greenstone has to set AWP's in order to ensure that a drug will be classified and reimbursed as a generic, rather than a branded product. (*Id.* at 96:7-97:17, 100:9-102:14; C.Resp.Ap. 315-16, 319-21.) Greenstone tries to duplicate the AWP that is already in the marketplace for a generic, but, if it does not have that information, sets the AWP 10% below the branded drug's AWP. (*Id.* at 96:7-97:2; C.Resp.Ap. 315-16.)

A Rebate Agreement between manufacturers and the federal Department of Health and Human Services ("DHHS"), acting on behalf of all states, dictates Pharmacia's responsibilities under Medicaid. (R.304 at DX-305; C.Resp.Ap. 427-28.) The Rebate Agreement defines various pricing terms, and requires that manufacturers report those prices to the federal government. These include the Average Manufacturer Price ("AMP") and the "Best Price" for the Company's products. (*Id.*) There is no definition of AWP and no obligation to report prices other than AMPs and Best Prices. The manufacturer must make quarterly rebate payments to each state (*id.*), which provides millions of dollars in revenue to Wisconsin. (A.Ap. 356-57.)

C. The Lawsuit.

The State filed its Complaint in June 2004. (R.2.) In its § 49.49(4m) claim, the State asked for “[f]orfeitures in the amount of not less than \$100 and not more than \$15,000 for each AWP reported by each defendant for the last ten years.” (A.Ap. 94 (emphasis supplied).) It never sought to amend this demand.

In late 2008 and early 2009, the State dismissed three defendants in exchange for financial settlements. (R.312 at 28-51; C.Resp.Ap. 32-55.) The State did not require that any of those defendants change their price-reporting practices, nor did it require those defendants to provide any pricing information to the State. (*Id.*)

The claims against Pharmacia were tried to a jury, over Pharmacia’s objection, in February 2009. The State submitted a proposed Special Verdict that asked the jury to determine the number of claims the State had reimbursed on the basis of AWP. (R.265; C.Resp.Ap. 15.) The trial court rejected that question and, instead, submitted a question that asked for the number of false statements Pharmacia made or caused to be made for use in determining rights to a Wisconsin Medicaid payment. (A.Ap. 146.) The State did not object. Nor did the State object when the trial court instructed

the jury that for a statement to violate Wis. Stat. § 49.49(4m), a statement must be material and that “[a] ‘material fact’ is one that affects the amount of a payment.” (R.303; C.Resp.Ap. 18.)

Immediately before the case was submitted to the jury, the State conceded it had failed to prove the number of “false statements,” and therefore withdrew its claim for forfeitures under § 100.18, (A.Ap. 828A.) but chose to proceed with its § 49.49(4m) claim. Although Special Verdict Question No. 5 asked for the number of “false statements or representations of material fact” that Pharmacia had made or caused to be made, the State asked the jury to answer Question No. 5 with 1,440,000—the number of times the State reimbursed on the basis of AWP. (R.441 at 108:23-109:15; C.Resp.Ap. 326-27.) The jury returned a verdict for the State, and answered the Special Verdict Question No. 5 as the State requested. (A.Ap.146.)

D. Post Trial Proceedings.

1. *Forfeitures.*

After verdict, the State filed a request that the trial court find over 1.4 million violations and award approximately \$212,000,000 in forfeitures. (R.307.) Pharmacia timely moved for judgment notwithstanding the

verdict, for a directed verdict, to change the answers in the verdict, and for a new trial. (R.309, 310, 314.)

At the hearing on Pharmacia's post-verdict motions, the trial court noted that "[t]he forfeiture case here was almost a throw-away in terms of the way it was presented, and the jury was left with very little." (R. 443 at 109:1-109:4; C.Resp.Ap. 333.) The trial court asked whether there was evidence in the record to support the number of statements under § 49.49(4m), to which the State first answered "I don't believe so, Your Honor" and then stated there were a "scattering of them." (*Id.* at 99:3-99:20; C.Resp.Ap. 331.) The State argued that § 49.49(4m) was ambiguous with respect to the conduct that constituted a violation. (*Id.* at 137:18-141:11; C.Resp.Ap. 337-41.)

The trial court vacated the jury's answer to Question No. 5 on May 15, 2009 (A.Ap. 148-53). The 90 day period from verdict lapsed on May 18, 2009. On September 30, 2009, the trial court determined the answer to Question No. 5 should be 4,578 (A.Ap. 168).¹ The court characterized the credible evidence on the number of statements as "scant at best, widely scattered, and none too clear," due to the State "adopting an unsustainable

¹ The trial court's authority to make this finding is a subject of Pharmacia's appeal. (PB 36-38.)

theory of recovery (equating claims paid with misrepresentations made), thereby largely eschewing the presentation of evidence that would have been right on point.” (A.Ap. 163.)

In considering the dollar amount for each forfeiture, the trial court believed it was required to take the jury’s finding of fraud as a given, and stated it would also take into consideration that almost all of the “misrepresentations” resulted in “multiple overpayments by Wisconsin Medicaid.” (A.Ap. 169.) The court noted that Pharmacia had received none of the “overpayments” but concluded Pharmacia may have reaped indirect benefits. (*Id.*) The trial court then explained:

Substantially complicating and mitigating the forfeitures issues is the role of the plaintiff, through its legislative and executive branches, in setting the formulas for reimbursing pharmacies dispensing Pharmacia products within the Wisconsin Medicaid system. The evidence is compelling that a political tug-of-war between various interest groups spanning a number of successive biennial budget sessions resulted in the adoption of reimbursement formulas that were known to overcompensate participating Wisconsin pharmacies. In this respect, plaintiff’s case has a Captain Renault quality to it, insofar as the plaintiff professes to be ‘shocked—shocked!’ that the AWP system has resulted in overpayments to pharmacies. The jury’s finding of fraud on the part of Pharmacia does not in any way exonerate the State of Wisconsin’s own role in causing the damages since, as the jury was properly instructed, there may be more than one cause for their losses. Considered in the context of evidence detailing the raw politics that drove (and continues to drive) this issue at the State Capital, in which both the legislative and executive branches fully participated and in which compromises (unrelated to Pharmacia) were made that knowingly sacrificed more accurate reimbursement formulas even up through the current budget, it is more than a little unsavory to think of rewarding the State with a substantial forfeitures windfall here. In short, there is plenty of blame to go around.

(A.Ap. 169-70 (footnote omitted) (emphasis added).)

The trial court set each forfeiture at \$1,000, or ten times the statutory minimum, for a total forfeiture award of \$4,578,000. (*Id.* at 170.)

The State never suggested that the trial court had considered any inappropriate factors in its determination of forfeitures. It never asked for reconsideration or the opportunity to present evidence rebutting the court's stated reasons for setting the forfeiture amount at \$1,000 per violation.

2. *Injunctive Relief.*

The State asked the trial court to (1) order Pharmacia to report the "actual" average wholesale prices and wholesale acquisition costs of its drugs directly to Wisconsin Medicaid "as often as necessary to reflect real prices in a manner suitable for integration into the State's electronic databases[;]" (2) order Pharmacia to report those same prices to all pricing compendia; (3) order Pharmacia to instruct all pricing compendia not to publish any other prices for Pharmacia; and (4) prohibit Pharmacia from causing to be published or reported in Wisconsin any wholesale price for Pharmacia's drugs "unless the price is not more than the price which retailers regularly pay for its drugs." (R.307; C.Resp.Ap. 418.)² It made

² Subsequently, the State submitted a proposed modified injunction. (R.330.) Its only change was to limit the proposed injunction to generic drugs.

these requests despite having taken the position that this case was about Pharmacia's AWP's, not its wholesale acquisition costs or WACs. (R.233 at 36, 39; C.Resp.Ap. 6, 8.)³

At the first hearing on the State's post-verdict requests, the trial court noted that the State had not required defendants with which it settled to change their price reporting practices. (R.443 at 148:6-148:16; C.Resp.Ap. 343.) The court questioned how Pharmacia would know what pharmacists paid wholesalers for drugs (*id.* at 149:13-149:14; C.Resp.Ap. 344) and expressed concern about the ramifications of the State's proposed injunction on the "overall delivery of pharmaceuticals" (*id.* at 187:7-187:10; C.Resp.Ap. 347). The State took the position that the court should enter an injunction and that the parties could then "sit down [and] negotiate." (*Id.* at 151:3-151:6; C.Resp.Ap. 346.)

At a second hearing on the State's request for an injunction, the trial court declined to grant the State's request. (R.445 at 3:21-3:22; C.Resp.Ap. 372.) The court was concerned about the potential impact of the injunction outside the State of Wisconsin (R.444 at 26:19-26:21; C.Resp.Ap. 352), the rights of potentially affected parties that were not before the court (*id.* at

³ At trial, the State's expert conceded that Pharmacia's branded WACs were accurate. (R.437 at 36:22-37:7; A.Ap. 763-64.)

42:18-43:6; C.Resp.Ap. 354-55), and the fact that no court in the country had approved the sort of injunction that the State was seeking (*id.* at 46:11-47:18; C.Resp.Ap. 358-59). The trial court addressed the feasibility of enforcing the sort of injunction the State requested (*id.* at 61:18-61:24; C.Resp.Ap. 360), the language of the statutes at issue (*id.* at 77:3-80:2; C.Resp.Ap. 361-64), and the current price reporting practices of both Pharmacia and First DataBank (*id.* at 83:17-86:14; C.Resp.Ap. 365-68).

The trial court concluded that there were “many compelling reasons not to go the route that the State has suggested.” (R.445 at 8:21-8:23; C.Resp.Ap. 377.) Accordingly, it entered a limited injunction, which was confined in its geographical scope to Wisconsin. (A.Ap. 172-73.)

ARGUMENT

I. THE COURT WILL DISREGARD MISSTATED, UNSUPPORTED, AND IRRELEVANT FACTS IN THE STATE’S BRIEF, AND WILL NOT PERMIT THE STATE TO AVOID ITS PRIOR ADMISSIONS IN THIS CASE.

On appeal, a party may not insert “legal argument and ‘spin’ into what should have been an objective recitation of the factual occurrences of [a] case. [F]acts must be stated with absolute, uncompromising accuracy. They should never be overstated — or understated, or ‘fudged’ in — any manner.” *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶¶ 4-5, n.2, 281

Wis.2d 173. 696 N.W.2d 194 (internal quotation marks omitted) (second alteration in original). Further, factual statements in an appellate brief must be supported by citation to the record. *Nw. Wholesale Lumber, Inc. v. Anderson*, 191 Wis.2d 278, 284, 528 N.W.2d 502 (Ct. App. 1995). Finally, the issues on appeal will determine the facts that are relevant to that appeal, and the Court will not consider facts that are not relevant. *State v. Phillips*, 218 Wis.2d 180, 208, n.12, 577 N.W.2d 794 (1998).

The State's Statements of Facts for both its Cross-Appeal Brief ("SCB") and Response Brief ("SRB") contain argument, characterize rather than objectively state facts, inaccurately represent documents and testimony, and include lengthy discussions of facts not relevant to any issue on appeal.⁴ They should not be considered by the Court.

A. Factual Misrepresentations Regarding Wholesale Acquisition Cost. (SRB 3.)

The State's assertions concerning the accuracy of Pharmacia's WACs are misleading. First, federal law defines WAC as "the manufacturer's list price for the drug or biological to wholesalers or direct purchasers in the United States, not including prompt pay or other discounts, rebates or reductions in price." 42 U.S.C. § 1395w-3a(c)(6)(B)

⁴ The State's Cross Appeal incorporates the Statement of Facts in its Response Brief. (SCB 3.)

(emphasis added). Second, the testimony on which the State relies did not purport to concern Pharmacia. (S.App. 24.) The only testimony specific to Pharmacia was that Pharmacia sold its brand drugs to wholesalers at WAC (R.226 at 4-6) and offered a 2% “prompt pay” discount, which was common in the industry (R.227 at 261). The State’s damages expert acknowledged that all of Pharmacia’s brand drugs at issue in this case were sold within 2% of WAC. (R.437 at 36:22-37:7; A.Ap. 763-64.)

B. Factual Misrepresentations Regarding Pharmacia’s Relationship With First DataBank. (SRB 7-9.)

The State similarly mischaracterizes the relationship between Pharmacia and First DataBank. The evidence showed that First DataBank set AWP’s on its own. (S.App. 5; *see also* R.438 at 213:6-213:8; C.Resp.Ap. 324.) The State failed to cite support for its assertion that Pharmacia stopped sending AWP’s to First DataBank on the “advice of counsel,” and its intimation that counsel’s advice is significant is contrary to Wis. Stat. § 905.13. (SRB 8.) The testimony was that Pharmacia stopped submitting suggested AWP’s “because First DataBank never took our suggestions anyway.” (S.App. 5.) The State’s assertion that Pharmacia “verified” AWP’s for First DataBank (SRB 8) is untrue—the testimony was that Pharmacia at times “verified” prices reported by RedBook, an entirely

different data publisher (S.App. 355-57), which Wisconsin never used for reimbursement (A.Ap. 77-78).

C. Factual Misrepresentations Regarding AWP For Generic Drugs. (SRB 9.)

The State's brief emphasizes the difference between AWP and acquisition cost for generic drugs. For example, the State asserts: "The jury heard many examples [of generic AWP inflation], such as Alprazolam, whose AWP was \$534.27, even though Pharmacia knew pharmacies could buy it for \$31.00." (SRB 9.) Wisconsin knew AWPs for generic drugs were not tied to pharmacy acquisition prices, and as a result, did not reimburse for generics based on AWP. (R.436 at 63:15-65:2; C.Resp.Ap. 285-87.) Alprazolam, for instance, was reimbursed based on MAC, which was at—and sometimes below—acquisition cost. (R.304 at DX-947; C.Resp.Ap. 432.)

D. Factual Misrepresentations Regarding Department Of Health And Family Services ("DHFS") Officials Lowering Reimbursement. (SRB 14.)

The State claims that "when DHFS officials received information demonstrating what retail pharmacies actually paid on average, they used that information to lower reimbursement." (SRB 14.) The State does not, and cannot, offer any record support for this assertion; DHFS could not

“lower reimbursement”—only the legislature could. (R.431 at 46:10-46:16; C.Resp.Ap. 268.) In fact, the State admitted precisely this to the trial court. (A.Ap. 15-16; *see also* R.431 at 46:10-46:16; C.Resp.Ap. 268.) The State’s assertion is also belied by the fact that every budget cycle, DHFS used evidence showing what retail pharmacies actually paid to try to convince the legislature to lower reimbursement rates; and every budget cycle, the legislature declined to approve the lower rates DHFS proposed. (PB 8-12.)

E. Factual Misrepresentations Regarding Medicaid’s Electronic Claims Processing System. (SCB 5-6.)

The State’s assertions regarding its claims processing system are seriously inaccurate. First, the automated claims process to which the State refers was not operational until September 1999. (A.Ap. 351.) Second, the State’s contention that its automated system “filled in” AWP is unsupported by the testimony it cites.⁵ Third, the witness who, according to the State, testified how, “[i]n over 1.5 million of these claims, not only was a statement of false AWP made, but the AWP-determined price was the lowest of three prices examined in the algorithm and thus controlled the reimbursement” (SCB 6) said nothing about falsity, but merely stated that

⁵ For example, one cited excerpt was the trial court’s discussion of redacting a document. (R.436 at 137:22-138:6; C.Resp.Ap. 292-93.)

over 1.5 million claims “were reimbursed at a discounted AWP.” (R.437 at 15:6-15:9; C.Resp.Ap. 302.)

F. Factual Misrepresentations Regarding Pharmacia’s Marketing Practices. (SCB 6-12; SRB 11.)

The State devotes seven pages to Pharmacia’s supposed marketing practices in its Cross-Appeal Brief and Response Briefs (SCB 6-12, SRB 11), claiming that those practices were evidence of an “improper purpose” (SRB 11), “important to Wisconsin’s request for forfeitures and injunctive relief” (SRB 11), an “important category of the evidence considered by the circuit court” (SCB 6), and constituted evidence that “demonstrated liability” (SCB 7). These “facts” are both unsupported and irrelevant to the issues on cross-appeal, namely, whether the trial court misused its discretion in ordering forfeitures and injunctive relief.

The State’s assertion of an “improper purpose” directly contradicts the State’s concession that “marketing the spread” did not violate either of the statutes at issue. (R.313 at 9; C.Resp.Ap. 58.) Moreover, the State admitted it had no evidence that a Wisconsin pharmacist ever chose a Pharmacia drug due to its “spread” and no evidence that Pharmacia ever marketed the “spread” to Wisconsin pharmacies at all. (R.250 at 111-112; C.Resp.Ap. 405-06; *see also* R.430 at 61:8-64:5; C.Resp.Ap. 448-51.)

Finally, the trial court never stated in either its decision on the amount of forfeitures or its oral ruling on injunctive relief that such evidence was “important” or even mentioned how Pharmacia marketed its drugs.

G. The Court Should Not Permit The State To Avoid Its Prior Admissions In This Case Or To Make Arguments It Did Not Make To The Trial Court.

The State claims it is enforcing the laws of Wisconsin in this case. (R.284 at 2-3.) When the State acts in a prosecutorial capacity, it is not merely a litigant seeking to win a case. Instead, as the Supreme Court has made clear, it “holds a ‘quasi-judicial’ office. A prosecutor’s interest is not to win a case but to see that justice shall be done.” *State v. Williams*, 2002 WI 1, ¶ 43, n.38, 249 Wis.2d 492, 637 N.W. 2d 733.

The State’s positions in this case have been inconsistent with this role. Both at the trial court and in this appeal, the State has sought to disregard its prior admissions in this case:

- In order to avoid summary judgment, the State represented to the trial court that WACs were “irrelevant” to this case. (R.235 at 37, 39; C.Resp.Ap. 7-8.) The State now claims that the trial court erred by not entering an injunction relating to Pharmacia’s WACs. (SCB 42-43.)
- The State argued to the trial court that no witness could say why Wisconsin made its decisions concerning Medicaid reimbursement (A.Ap. 15-18) and, in particular, that Medicaid employees could not testify because reimbursement decisions were made by the

legislature (R.431 at 45:5-45:13, 46:4-46:16; C.Resp.Ap. 267-68). It now argues that Medicaid employees could provide such testimony. (SRB 13-15.)

- The State argued that Medicaid reimbursement formulas were “part of the legislative process” and that, “what ‘AWP’ means rests in the mind of each legislator and the Governor as a result of their vote on a particular State Budget Bill.” (A.Ap. 10-11.) It now argues that the legislature’s understanding of AWP should be ignored. (SRB 19-27.)
- In order to avoid a new trial, the State told the trial court it never claimed that “marketing the spread” violated either § 100.18 or § 49.49. (R.313 at 9; C.Resp.Ap. 58.) It now argues that this same evidence showed “an improper purpose” (SRB 11) and was an “important category of the evidence” that “demonstrated liability.” (SCB 6, 7.)
- In arguing that the § 49.49 case was properly tried to a jury, the State contends that it was required to prove actual harm to show violation. (SRB 55.) In arguing that the trial court erred in its award of forfeitures, it contends that actual harm is unnecessary. (SCB 31-34.)
- The State argued to the trial court that particular language in § 49.49 was ambiguous. (R.443 at 137:18-141:11; C.Resp.Ap. 337-41.) It argues to this Court that precisely that same language is not ambiguous. (SCB 21-22.)

In addition to taking conflicting positions that are inconsistent with its quasi-judicial role, the State also tries on appeal to raise issues and arguments it never made to the trial court. *See, infra*, 25-26, 39-42, 44-45. The Court should not permit the State to disregard its required role of neutrality and respect for justice.

II. THE TRIAL COURT PROPERLY REJECTED THE STATE’S ATTEMPT TO EQUATE THE NUMBER OF VIOLATIONS OF § 49.49(4m) WITH THE NUMBER OF PHARMACISTS’ CLAIMS PROCESSED BY THE STATE.

Wisconsin Statute § 49.49(4m)(a)2 provides that “[n]o person, in connection with medical assistance, may . . . [k]nowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.” Thus, a violation of § 49.49(4m)(a)2 requires four things: (1) a representation of material fact in connection with Medicaid; (2) that was false when made; (3) that was knowingly made or caused to be made; and (4) that was used in determining a provider’s right to payment. WIS JI-CRIM 1870.⁶ Section 49.49(4m)(b) provides that a person who violates the statute “may be required to forfeit not less than \$100 nor more than \$15,000 for each statement [or] representation.”

The State’s theory of what constitutes a “statement” in violation of § 49.49(4m)(a)2 has been a moving target. In its Complaint, the State demanded a forfeiture for “each AWP reported by [Pharmacia] for the last

⁶ There is no pattern instruction for a civil claim under § 49.49.

ten years.”⁷ (A.Ap. 94.) Prior to trial, the State’s forfeitures theory shifted, and it claimed that “each time Pharmacia reported a false price, it caused a false statement of fact to be made in a provider’s application for reimbursement.” (R.250 at 105; C.Resp.Ap. 399 (emphasis added).) At trial, a State witness admitted that pharmacists did not put AWP’s in applications for reimbursement. (R.436 at 68:15-69:7; C.Resp.Ap. 290-91.) Rather, the State applied an AWP, less the legislatively determined discount, when it processed a pharmacist’s claim for a branded drug. (*Id.* at 69:14-69:16; C.Resp.Ap. 291.) The State then simply asked the jury to find as the number of statements the number of times the State had reimbursed based on a discounted AWP. (R.441 at 108:23-109:15; C.Resp.Ap. 326-27.) The State now asks this Court to find that each time after June 3, 1994 that EDS processed a claim by a pharmacist for reimbursement at a discount from AWP, the State’s computer program made a statement to itself. (SCB 21-24.)

⁷ Under Wis. Stat. § 778.02, the State was required, in its Complaint, to “specify the particular offense or delinquency for which the action is brought.” The State’s Complaint was for a forfeiture “for each AWP reported by each defendant for the last ten years” (A.Ap. 94), and it never amended that demand to seek a forfeiture for each time the State reimbursed a pharmacist. The requirement of § 778.02 is mandatory and defeats the State’s attempt to recover forfeitures on a different theory. While the trial court did not consider this issue, it may properly be considered by this Court. *Vanstone v. Town of Delafield*, 191 Wis.2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (court of appeals may affirm on grounds different than those relied on by trial court).

The State's "number of claims processed" theory is unsupportable by the law and the facts. Forfeitures are disfavored in the law, and will be construed strictly against the State. *State v. James*, 47 Wis.2d 600, 602, 177 N.W.2d 864 (1970); *State v. Baye*, 191 Wis.2d 334, 339-40, 528 N.W.2d 81 (Ct. App. 1995). This is particularly so because the State has conceded that § 49.49(4m) is ambiguous. (R.443 at 137:18-141:11; C.Resp.Ap. 337-41.) Strictly construing § 49.49(4m) precludes stretching the language "false statement or representation of a material fact for use in determining rights to a . . . payment" to reach a computer program, operated by the State's fiscal agent, that electronically populated pricing information according to the State's specifications. Even if the electronic population of pricing data by the State's computer system could constitute a "statement" under § 49.49(4m)(a)2, that "statement" was not "knowingly caused" to be made by Pharmacia.

Moreover, the State's "number of claims processed" theory does not measure, or even purport to measure, Pharmacia's conduct. Although the State now argues that the trial court's reliance on *State v. Menard, Inc.*, 121 Wis.2d 199, 358 N.W.2d 813 (Ct.App. 1984), was "unpersuasive," (SCB 26), the State itself relied on *Menard* to support its own argument for

imposing forfeitures. (R.443 at 46:4-46:21, 112:15-114:15; C.Resp.Ap. 329, 334-36.) Finally, even if Pharmacia's conduct was not the correct measure of the number of violations, the trial court had the discretion to limit forfeitures to only those statements for which it believed Pharmacia might be culpable.

A. **Use Of The State's Computer System Does Not Constitute A "Statement Of Fact" That Pharmacia "Knowingly Caused" To Be Made.**

1. *Running a Computer Program is not a "Statement of Fact" Within the Scope of § 49.49(4m).*

Section 49.49(4m)(b) does not say a forfeiture may be imposed each time the State "uses" a statement. It says that a forfeiture may be imposed for "each statement." If the legislature had wanted to base forfeitures on the number of times the State "used" a single statement, it could have done so. *Brauneis v. Labor & Indus. Review Comm'n*, 2000 WI 69, ¶ 27, 236 Wis.2d 27, 612 N.W.2d 635 (court will not read into statute what is not there). The State's claim of 1.4 million "statements" rests on two sentences of testimony by its damages expert, Lawrence DeBrock. (SCB 6.)

Critically, Dr. DeBrock was never asked how many statements were made to the State. Rather, he was asked how many times the State reimbursed a pharmacist's claim at a discounted AWP. (R.437 at 15:6-15:9; C.Resp.Ap.

302.) Dr. DeBrock testified only to the number of reimbursements, not the number of statements.

The State does not explain how each use of a computer program constituted a separate “statement of fact,” and merely asks the Court to accept that the proposition is “incontestable.” (SCB 22.) The Court may reject the State’s argument on that basis alone. *Indus. Risk Ins. v. Am. Eng’g. Testing*, 2009 WI App 62, ¶ 25, 318 Wis.2d 148, 769 N.W.2d 82 (“Arguments unsupported by legal authority will not be considered[.]”); *Techworks, LLC v. Wille*, 2009 WI App 101, ¶ 24, 318 Wis.2d 488, 770 N.W.2d 727 (court will not consider undeveloped arguments).

Moreover, the State’s argument is wrong. While “statement of fact” is not defined in § 49.49(4m), *Black’s Law Dictionary* defines a “statement of fact” as “[a] form of conduct that asserts or implies the existence or nonexistence of a fact.” *Cf. State v. Chrysler Outboard Corp.*, 219 Wis.2d 130, 168, 580 N.W.2d 203 (1998) (consulting *Black’s* to determine meaning of undefined term in forfeiture statute). The use of discounted AWP’s in the State’s reimbursement formulas neither asserted nor implied that actual wholesale prices were being used; in fact, as the State admits,

the State used a discount from AWP precisely because AWP did not represent actual wholesale prices. (SRB 5-6, 12, 44.)

Further, the State's interpretation of § 49.49(4m) is inconsistent with the rule that forfeitures are disfavored in the law, and will be construed strictly against the State. *State v. James*, 47 Wis.2d 600, 602 177 N.W.2d 864 (1970); *State v. Baye*, 191 Wis.2d 334, 339-40, 528 N.W.2d 81 (Ct. App. 1995). The State has conceded that § 49.49(4m) is ambiguous. (R.443 at 137:18-141:11; C.Resp.Ap. 337-41.) Accordingly, this Court should reject the State's expansive reading of the statute.

Finally, the State argues that, if Pharmacia had told the State 1.4 million times what the AWP for a drug was, Pharmacia would have made 1.4 million statements to the State. (SCB 26.) The number of statutory violations is not measured by what did not happen.

2. *Pharmacia Did Not "Knowingly Cause" the State to Make Statements to Itself.*

The trial court concluded that Pharmacia "caused" First DataBank to provide AWP to Medicaid and found a violation of § 49.49(4m) each time First DataBank provided an AWP that Medicaid used at least once for reimbursement purposes. (A.Ap. 164-68.) The State's Cross-Appeal asks this Court to take several more logical leaps and conclude that Pharmacia

“caused” Medicaid’s computer system to make statements to itself. (SCB 4-6, 22-24.) This argument is untenable. In support of this argument, the State cites a case that stands for the unremarkable proposition that defining a violation will define “the unit of prosecution.” (SCB 21.) The State also cites a case that states legislative history may be relevant to determining the issue, but then fails to direct the Court to any legislative history for § 49.49(4m). (SCB 21.)

The State never explains how Pharmacia “caused” Medicaid to make 1.4 million statements to itself. Because § 49.49(4m) does not define what it means to “cause” a statement to be made, this Court will apply normal principles of statutory construction to determine its meaning for purposes of the statute. *Chrysler*, 219 Wis.2d at 168-69. In *Chrysler*, the Supreme Court considered the language of Wis. Stat. § 144.76, which imposed liability on persons who “cause a hazardous discharge.” *Chrysler*, 219 Wis.2d at 141. The Court noted that the term “cause” could be reasonably understood in more than one way, considered the legal dictionary definitions of “cause,” and ultimately concluded, after analyzing the legislative history of the environmental statute at issue, that Chrysler “caused” a spill when it failed to remediate. Crucial to the *Chrysler* Court’s

analysis was the fact that § 144.76 did not require the hazard to have been “knowingly” caused. 219 Wis.2d at 171.

In contrast, § 49.49(4m) contains the express requirement that a defendant have “knowingly” caused a particular statement to be made. Here, there was no evidence that Pharmacia had any knowledge of pharmacists’ submission of claims or the State’s reimbursement processes. It was the State that “caused” the providers to submit claims in order to be reimbursed and “caused” EDS, the State’s fiscal agent, to compute reimbursement for branded drugs based on a discount from AWP. (R.304 at DX-490; C.Resp.Ap. 153-73; *see also* Wis. Admin. Code § DHS 106.03.) The State argues, without record support, that “Pharmacia knew that Wisconsin’s processing system has to generate a representation about a drug’s AWP in order to pay any particular pharmacy claim” (SCB 23) and “Pharmacia knew that a statement of AWP would be generated in connection with every claim a pharmacy made for a Pharmacia drug” (SCB 26). The only evidence as to Pharmacia’s knowledge about Wisconsin is that it knew what the State’s reimbursement rate and dispensing fee were in 1995. (S.App. 55, 65.) This shows nothing about Pharmacia’s knowledge of the State’s “processing system.” (SCB 23, 26.) Moreover, that system

was not even operating until four years later. (A.Ap. 351.) *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (appellate court will not consider unsupported assertions).

With respect to the statute's legislative history, there is no statement of purpose in § 49.49(4m), much less one that suggests an intent to hold drug manufacturers liable for "causing" individual reimbursement claims by pharmacists. To the contrary, the legislative history for § 49.49(4m) demonstrates that the statute was intended to address statements made by providers—here pharmacists—who submit claims to Medicaid, not statements made by the State to itself. ANALYSIS OF THE LEGISLATIVE REFERENCE BUREAU OF 1983 A.B. 665, Legislative Reference Bureau, Madison, Wis. Thus, under the *Chrysler* analysis, Pharmacia neither "knowingly cause[d]" pharmacists to make individual reimbursement claims, nor "knowingly cause[d]" the State to process data in a particular way with respect to individual claims for reimbursement. *Chrysler*, 219 Wis.2d at 171.

The State's argument also fails because § 49.49(4m) does not prohibit indirectly causing a statement to be made. When it wishes to do so, the legislature enacts statutes that govern "indirect" conduct. *See, e.g.*,

Wis. Stat. § 12.08 (“[n]o person may, directly or indirectly, cause any person” to make contribution); Wis. Stat. § 551.502 (prohibiting providing fraudulent investment advice “directly or indirectly or through publications or writings”); Wis. Stat. § 100.18(1) (no person may “cause, directly or indirectly”). The legislature knows how to regulate conduct that is one or more steps removed from the original actor. It has not done so in § 49.49(4m). The Court cannot read into § 49.49(4m) what is not there. *Brauneis*, 236 Wis.2d 27, ¶ 27.

Even assuming *arguendo* that, by providing First DataBank with WACs and Direct Prices, Pharmacia “caused” First DataBank to publish AWP, Pharmacia did not “cause” the State to use AWP in reimbursement formulas, “cause” pharmacists to submit claims for reimbursement, or “cause” the computer program selected by the State to determine the amount of any particular claim. The State’s theory far exceeds the scope of § 49.49(4m), impermissibly seeking to punish conduct several steps removed from any action by Pharmacia.

B. The State’s “Number Of Claims Processed” Theory Does Not Measure Conduct That Violates Wis. Stat. § 49.49(4m).

Section 49.49(4m) provides the Court with the discretion to impose a forfeiture on a defendant “for each statement, representation, concealment or failure.” Significantly, it does *not* say “for each subsequent use of the statement, representation, concealment or failure.” *Id.* (emphasis added). Thus, the plain language of the statute requires that the focus of the forfeiture analysis be on the acts of the defendant, not on subsequent acts by others.

Wisconsin case law confirms this principle. In *Menard*, 121 Wis.2d 199, a company published eight false newspaper advertisements. *Id.* at 202-03. The State sought forfeitures under a statute providing for such relief. *Id.* at 201. The State sought a forfeiture for each of the ads, for a total of eight forfeitures. The Court of Appeals held that each of the eight false ads constituted a violation and awarded eight forfeitures. *Id.* at 202-03. The State apparently did not seek, and the Court certainly did not order, forfeitures based on the number of newspapers sold that contained the false advertisement. Instead the Court focused solely on the defendant’s conduct in seeking eight advertisements, rather than the

newspaper's conduct in publishing however many newspapers it published.

This case, like *Menard*, involves consideration of allegedly false statements. As in *Menard*, the statute at issue does not explicitly define what constitutes a separate violation. As in *Menard*, the trial court related the number of forfeitures to Pharmacia's conduct.

While the State claims the trial court erred in relying on *Menard* (SCB 26-29), the State had asked the trial court to do exactly that. (R.443 at 46:4-46:21, 112:15-114:15; C.Resp.Ap. 329, 334-36.) *See State v. White*, 2000 WI App 147, ¶ 3, n.4, 237 Wis.2d 699, 615 N.W.2d 667 (party may not take position on appeal that contradicts argument to trial court). Further, the trial court did not base its decision on *Menard*, but merely stated that, to the extent the case had any applicability, it would support the court's conclusion that forfeitures should not be measured as the State argued. (A.Ap.151.) Thus, any arguable error was harmless. *Schwigel v. Kohlmann*, 2005 WI App 44, ¶¶ 11, 17, 280 Wis.2d 193, 694 N.W.2d 467.

The State's "number of claims processed" theory is not only inconsistent with Wisconsin law but also federal case law governing the imposition of penalties in similar contexts. Federal cases hold that only the conduct of the defendant may be considered in determining the number of

violations under the federal False Claims Act.⁸ Wisconsin Statute § 49.49 is similar to the federal False Claims Act (“FCA”), 31 U.S.C. § 3729(a). Both statutes prohibit knowingly making or causing to be made false statements that will be used to obtain a payment from the government, 31 U.S.C. § 3729(a)(2); Wis. Stat. § 49.49(4m)(a)2, and both statutes have been used to prosecute alleged Medicaid fraud. *See, e.g., Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003); *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997). Although the remaining subparts of the statutes address different issues, both statutes allow for forfeitures based on the number of violations. 31 U.S.C. § 3729(a); Wis. Stat. § 49.49(4m)(b).

The seminal FCA case, *United States v. Bornstein*, 423 U.S. 303 (1976), held that the conduct of the actor being punished should be the focus of determining the number of forfeitures to award. In *Bornstein*, a general contractor incorporated three separately invoiced shipments of falsely labeled radio kit components from a subcontractor into products shipped to the federal government. *Id.* at 307-08. The general contractor

⁸ It is appropriate for the Court to consider federal case law because there is very little Wisconsin law regarding the proper method for calculating the number of forfeitures. *Indep. Milk Producers Co-op. v. Stoffel*, 102 Wis.2d 1, 6-7, 298 N.W.2d 102 (Ct. App. 1980) (directing Wisconsin state courts to consider federal case law where Wisconsin law is scarce); *Matter of Kersten’s Estate*, 71 Wis.2d 757, 763, 239 N.W.2d 86 (1976) (stating that construction by federal courts of parallel federal provision ought to be given considerable weight by the state court in construing the state provision).

billed the government for the falsely labeled kits in 35 separate invoices. *Id.* In a suit against the subcontractor, the government sought a forfeiture for each of the 35 false invoices from the general contractor. *Id.* Although the three fraudulent acts of the subcontractor caused the general contractor to submit 35 false claims, the United States Supreme Court held that the government could recover only for the *three* subcontractor invoices to the general contractor, not the 35 invoices from the general contractor to the government. *Id.* at 311-13. Specifically, the Court held that “the focus in each case [must] be upon the specific conduct of the person from whom the Government seeks to collect the [civil penalties]” and “[the act] . . . penalizes a person for his own acts, not for the acts of someone else.” *Id.* at 312-13.⁹

C. The Trial Court Had Discretion To Limit Forfeitures To Only Those Statements For Which It Believed Pharmacia Was Responsible.

Even if the State’s claim for 1.4 million forfeitures was not contrary to a correct interpretation of § 49.49(4m), Wisconsin law, the trial court could simply have chosen not to impose forfeitures for any more violations

⁹ Other courts applying *Bornstein* have found that the only acts appropriate for consideration are those of the defendant, not third parties. *See, e.g., Krizek*, 111 F.3d at 939-40; *U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 530 F. Supp. 2d 888, 900-01 (S.D. Tex. 2008).

than it ultimately found. *Vanstone*, 191 Wis.2d at 595 (appellate court can affirm trial court for different reason than trial court gave). Section 49.49(4m)(b) states that “[a] person who violates this subsection may be required to forfeit not less than \$100 nor more than \$15,000 for each statement, representation, concealment or failure” (emphasis supplied.) Under Wisconsin law, the use of “may” means the imposition of forfeitures is permissive. *Rutherford v. Labor & Indus. Review Comm’n*, 309 Wis.2d 498, 509, 752 N.W.2d 897 (Ct. App. 2008); *Swatek v. County of Dane*, 192 Wis.2d 47, 59, 531 N.W.2d 45 (1995); *State v. McKenzie*, 139 Wis.2d 171, 177, 407 N.W.2d 274 (Ct. App. 1987). Thus, to the extent the trial court had competency (*see* PB 36-38), the number of forfeitures was within the trial court’s discretion.

The legislature has enacted statutes that provide that forfeitures or fines “shall” be imposed upon a violation; in fact, it has done so in a different statute relating to Medical assistance. *See* Wis. Stat. § 49.485 (stating that anyone who knowingly presents or causes a false claim for medical assistance to be submitted “shall forfeit not less than \$5,000 nor more than \$10,000, plus 3 times the amount of the damages that were sustained by the state or would have been sustained by the state, whichever

is greater, as a result of the false claim.” (emphasis supplied)). With respect to § 49.49(4m), the legislature did not choose to make forfeitures mandatory.

Because forfeitures under § 49.49 are permissive, the trial court could have chosen to only impose them for the statements that it believed satisfied the test of *Bornstein*, which measured the number of violations based on the “specific conduct of the person from whom the government seeks to collect the statutory forfeitures.” (A.Ap. 151.)

III. THERE IS NO BASIS TO REMAND FOR YET ANOTHER DETERMINATION OF THE NUMBER OF FORFEITURES.

Over Pharmacia’s objections, the State submitted the issue of the number of violations of § 49.49(4m) to the jury. (A.Ap. 30.) The trial court, after vacating the jury’s answer, reviewed the trial record and supplied an answer to Verdict Question No. 5 seven months after verdict. (R.376; A.Ap. 162-71.) The State now claims that, if this Court does not agree that Pharmacia violated § 49.49(4m) every time the State processed a pharmacist’s claim, the Court should remand for a new determination of the number of violations. (SCB 34.) First, the State waived the argument that the trial court misinterpreted § 49.49(4m)(a)2’s materiality requirement,

and the State's argument is meritless in any event. The State is not entitled to yet another opportunity to support its forfeitures claim.

A. The State's Argument That The Trial Court Misinterpreted § 49.49(4m)(a)2's Materiality Requirement Was Waived And Is Wrong.

A violation of § 49.49(4m)(a)2 requires that a misrepresentation have been of a "material fact." The State agreed with the trial court that materiality for purposes of § 49.49(4m) was determined by whether a statement actually affected the amount of a payment (R.284 at 10), and therefore did not object to the trial court instructing the jury that "a 'material fact' is one that affects the amount of a payment" (C.Resp.Ap. 18). In its briefing after verdict, the State again agreed that statements of fact must be material under *State v. Williams*, 179 Wis.2d 80, 87, 505 N.W.2d 468 (Ct. App. 1993), and argued that, had Pharmacia reported "true" prices, "the State would have reimbursed a lesser amount given the reimbursement system that existed at the time." (R.313 at 18; C.Resp.Ap. 60.) On another occasion, the State argued that "materiality" was satisfied because "AWPs even for drugs that were reimbursed on something other than AWP's 'affected' reimbursement amounts and thus were 'material.'" (R.343 at 7; C.Resp.Ap. 421.)

The State now argues—for the first time—that “materiality does not require *actual* impact on transactions, but only requires *potential* for having an impact on transactions” (SCB 31) and claims the trial court misread *Williams* (SCB 32-34). Because the State raises this argument for the first time on appeal, it is waived. *Tatera v. FMC Corp.*, 2010 WI 90, ¶ 19, n.16, ___ Wis.2d ___, 786 N.W.2d 810.

The argument is also wrong. In *Williams*, the defendants were home health aides that billed Medicaid for their services on days that they did not work. 179 Wis.2d at 85-86. The trial court did not allow the defendants to put on evidence that they had, in fact, billed for the correct number of hours, just on the wrong days. *Id.* at 86. This Court reversed explaining that “[m]ateriality is an element of medical assistance fraud. . . . If the false statements did not affect the amount of benefits or payments made, an issue of materiality is raised.” *Id.* at 87-88 (emphasis supplied).

The State argues the trial court’s interpretation “cannot be reconciled” with a different conclusion of the *Williams* court that the defendants themselves need not have directly received payment from Medicaid to have had the requisite intent to violate the statute. (SCB 33-34.) The State’s argument confuses the elements of intent and

materiality. The language from *Williams* on which the State relies does not concern materiality. The *Williams* Court made clear that “[a]n assertion that no medical assistance payment or benefit resulted from the false statement goes to the materiality of the fact falsely asserted and not the party’s state of mind.” *Williams*, 179 Wis.2d at 89 (emphasis supplied).

The State also argues—for the first time—that “materiality” should be measured by the tests applied to cases involving common law fraud and federal mail fraud. (SCB 31.) The State never explains why these tests are more germane than the test in *Williams*, which the State urged the trial court to use, and which considered the specific statute at issue in this case. *See State v. Magnuson*, 220 Wis.2d 468, 470-71, 583 N.W.2d 843 (Ct. App. 1998) (appellate court may decline to consider party’s argument on appeal that directly contradicts that party’s argument in the trial court); *cf. State v. Mendez*, 157 Wis.2d 289, 294, 459 N.W.2d 578 (Ct. App. 1990) (“A party will not be allowed to maintain inconsistent positions in judicial actions and proceedings.”). Further, the State asks the Court to consider “materiality” from the standpoint of the decision-making body to which the statement is addressed. (SCB 31.) However, the State has conceded that the decision-maker with respect to Medicaid reimbursement was the legislature. (PB

11-12, 16.) If the State’s argument now is that the materiality of AWP’s is to be measured by the legislature’s understanding, it has conceded that its claims are barred on separation of powers and political question grounds. (PB 16-23; Pharmacia’ Reply Brief 9-14.)

Finally, the State argues—again for the first time—that the trial court’s construction of materiality “has unacceptable implications” because it would foreclose prosecution of those who attempt to violate § 49.49 but are not successful. (SCB 31-32.) The State offers no legal authority for its argument. Moreover, while an attempted violation of § 49.49(1)(a)2 could be criminally prosecuted under Wis. Stat. § 939.32, there is no comparable civil statute that permits forfeitures for an attempted violation. It is up to the legislature to enact such a statute if it believes it appropriate. *Meriter Hosp., Inc. v. Dane County*, 2004 WI 145, ¶ 35, 277 Wis.2d 1, 689 N.W.2d 627 (if a “statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts” (quoting *La Crosse Lutheran Hosp. v. La Crosse County*, 133 Wis.2d 335, 338, 395 N.W.2d 612 (Ct. App. 1986)).

B. The State Is Not Entitled To Yet Another Opportunity To Prove Its Forfeiture Claims.

Not only is there no reason to remand for further proceedings, remand would be contrary to law. “[N]o rule of law . . . permits a party . . . a second opportunity to prove a crucial element of its case when” it was afforded that opportunity and “the element on which it failed to discharge its burden was clearly and unequivocally an issue at trial.” *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 639, 273 N.W.2d 233 (1979). Here, the State is urging this Court to give it a third opportunity. The State argued for and received a jury determination of the number of violations of § 49.49(4m), and urged the jury to equate the number of violations of the statute with the number of claims processed by the State. When that theory proved unsustainable, the State argued for and received a second chance to prove its forfeitures claim before the trial court, which sat as a second trier of fact and performed a second, independent evaluation of the evidence on forfeitures. (R.376; A.Ap. 162-71.) This Court should reject the State’s request for still another chance. *See Austin*, 86 Wis.2d at 639; *Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶ 51, 303 Wis.2d 94, 122-23, 735 N.W.2d 418 (2007) (parties are responsible for consequences of litigation decisions).

Remand for yet another forfeitures hearing would be particularly inappropriate in this case, where the State purported to act in its “law enforcement” capacity. (R.284 at 2-3.) When the government pursues punishment, including by a forfeiture claim, the proceeding is subject to the prohibition of double jeopardy. *State v. McMaster*, 206 Wis.2d 30, 43-50, 556 N.W.2d 673 (1996). The government is not permitted to treat a trial as a “dress rehearsal” for its presentation of proof, *see State v. Lawton*, 167 Wis.2d 461, 464, 482 N.W.2d 142 (Ct. App. 1992), and a forfeiture claim is not a piñata at which the State may swing until it finally connects. The State had every opportunity to prove the number of violations of § 49.49(4m); it failed to do so consistent with the law under which it was proceeding, and it may not have yet another run at the issue now.

IV. THE STATE’S ARGUMENTS THAT THE TRIAL COURT MISUSED ITS DISCRETION IN SETTING THE AMOUNT OF FORFEITURES WERE WAIVED AND ARE MERITLESS.

Setting the amount of forfeitures within a statutory range is committed to the discretion of the trial court. *City of Milwaukee v. Stanki*, 262 Wis. 607, 610, 55 N.W.2d 916 (1952). The State argues that the trial court should not have considered Pharmacia’s ability to pass on the cost of a judgment to its consumers or the “compelling” evidence of the State’s

role in setting reimbursement rates. (SCB 34-40; A.Ap. 169-70.) The State waived both arguments, and neither has merit.

The State complains the trial court “waded into a complicated area of economic theory without briefing, argument, or evidence from the parties.” (SCB 39.) The State’s only basis for this argument is the trial court’s three sentence observation that Pharmacia could pass the cost of forfeitures on to its customers. (A.Ap. 170.) No reported decision suggests that, in deciding what factors are relevant to a discretionary decision, a trial court is limited to those raised by the parties. (SCB 37.)

The State claims that it could have “rebutted” the trial court’s observation through various publications about economics and the pharmaceutical industry. (SCB 37-39.) If the State had a meritorious response to the trial court’s observation, it should have been brought to the trial court’s attention via a motion for reconsideration. *See* Wis. Stat. § 806.07. There is no basis for this Court to permit the State to present arguments it did not previously choose to raise. *Young v. Young*, 124 Wis.2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985).

The State next asserts that the trial court erroneously considered the State’s knowledge that AWP’s did not reflect actual averages of wholesale

prices, and its informed decision to nevertheless use AWP's to reimburse providers for dispensing branded drugs. (SCB 39-40.) Pharmacia expressly asked the trial court to consider the State's role in setting the reimbursement formulas (R.311), and State never suggested the issue was irrelevant (R.315). Moreover, the legislature's knowledge and its subsequent decisions are not only relevant, they are dispositive. (PB 15-23.) The trial court's consideration of a factor that was central to this case was not a misuse of discretion. *Hess v. Fernandez*, 2005 WI 19, ¶ 12, 278 Wis.2d 283, 692 N.W.2d 655 (trial court misuses discretion if it does not exercise discretion, the facts do not support the decision, or the court applies an incorrect legal standard).

V. THE TRIAL COURT DID NOT MISUSE ITS DISCRETION IN DECLINING TO ENTER THE INJUNCTION REQUESTED BY THE STATE.

In determining injunctive relief, the trial court considered arguments in seven briefs (R.307, 311, 315, 330, 337, 349, 352) and held two separate lengthy hearings (R.443, 444, 445). It rigorously questioned counsel for both the State and Pharmacia (*id.*), and considered arguments made by other pharmaceutical manufacturers (R.444 at 3:15-4:1; C.Resp.Ap. 350-51). It considered many factors, including:

- the State’s settlement with other defendants, which did not require the defendants to either provide prices to the State or stop reporting AWP’s (R.443 at 148:6-148:16; C.Resp.Ap. 343);
- Pharmacia’s and First DataBank’s public statements that AWP’s did not represent actual prices (R.444 at 83:17-86:14; C.Resp.Ap. 365-68);
- the fact that First DataBank was stopping publication of AWP’s in 2011 (R.444 at 44:24-45:2; C.Resp.Ap. 356-57);
- the burden on Pharmacia’s business (R.444 at 34:7-34:17; C.Resp.Ap. 353);
- the impact on the interstate commerce in pharmaceuticals (R.443 at 187:7-187:10; C.Resp.Ap. 347);
- Pharmacia’s lack of knowledge as to what pharmacists paid to purchase its drugs from wholesalers (R.443 at 149:13-149:14; C.Resp.Ap. 344);
- the potential impact on Wisconsin consumers (R.445 at 11:9-11:19; C.Resp.Ap. 380); and
- the fact that no court, anywhere in the country, had issued an injunction of the sort which was being requested (R.444 at 46:11-47:18; C.Resp.Ap. 358-59).

The State had presented the trial court with a series of vague, conflicting, and overbroad requests for injunctive relief. (R.307, 315, 330.) It argued that, if the trial court would just enter an injunction, the State would “sit down” with Pharmacia and “negotiate” any problems. (R.443 at 151:3-151:7; C.Resp.Ap. 346.) And the State conceded that it was permitting other defendants (so long as they settled with the State) to

continue to report the AWP's that the State alleged were fraudulent. (R.443 at 148:6-148:16; C.Resp.Ap. 343.) The trial court properly rejected the State's arguments and instead identified the legal standards for an injunction and applied those standards to the facts before it. (R.445 at 7:21-12:14; C.Resp.Ap. 376-81.) The court ultimately concluded that what it could and should do was enter an injunction prohibiting Pharmacia from violating the two statutes at issue. (R.445 at 12:5-12:14; C.Resp.Ap. 381.)

After the trial court announced its decision, the State's counsel asked the court to appoint a corporate officer with "the responsibility of certifying to the attorney general of the State of Wisconsin on a periodic basis but not less than quarterly . . . that any wholesale price that Pharmacia has reported for any of its generic products is not more than the price which retailers regularly pay for that product." (R.445 at 14:14-14:23; C.Resp.Ap. 383.) The State offered no legal authority in support of its request and said only that it was common in contracts. (*Id.* at 17:20-18:4; C.Resp.Ap. 386-87.) The trial court viewed the unsupported request as unnecessary and denied it. (*Id.* at 18:24-19:4, 22:8-22:9; C.Resp.Ap. 387-88, 391.)

Injunctions are committed to the discretion of the trial court. *Kocken v. Wis. Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 24, 301 Wis.2d

266, 732 N.W.2d 828. Both the scope and form of the injunction are discretionary. *Hoffman v. Wis. Elec. Power Co.*, 2003 WI 64, ¶ 23, 262 Wis.2d 264, 664 N.W.2d 55. The State correctly notes there will be a misuse of discretion if the trial court “(1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant or improper factors; or (3) clearly gives too much weight to one factor.” *Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass’n*, 210 Wis.2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997) (SCB 42). However, the State does not suggest that the trial court failed to consider or make a record of the factors behind its decision, does not identify any irrelevant or improper factors that the court considered, and does not point to any factor to which the trial court clearly gave “too much weight.” Thus, the State has failed to show a misuse of discretion by the trial court. Moreover, the injunction that the State requested would be unconstitutional and contrary to federal law, leaving Pharmacia to choose between violating the injunction or violating federal law.

A. The State Has Failed To Show A Misuse Of Discretion By The Trial Court.

The State claims it brought this lawsuit to “end the reporting of these meaningless AWP’s.” (SCB 43.) Putting aside that AWP’s were precisely

what the legislature knew they were (PB 24-25), neither § 100.18 nor § 49.49(4m) imposes reporting requirements on drug manufacturers, wholesalers, or anyone else. It is up to the legislature to decide whether to require that information, *Meriter Hosp.*, 277 Wis.2d 201, ¶ 35, and an injunction is not a substitute for legislation. Further, because the State had previously represented to the trial court that “WACs” were “irrelevant” and that “this case is not about the accuracy of Pharmacia’s WACs” (R.235 at 37, 39; C.Resp.Ap. 7-8), it can hardly complain that the trial court did not issue an injunction that related to WACs (SCB 42-43).

The State claims one reason the trial court gave—that there was insufficient proof of harm to consumers to issue the State’s requested injunction—had “no basis in law or the record.” (SCB 44-46.) However, the State does not suggest that it presented the trial court with any proof of possible harm to consumers. Indeed, there was no evidence that a single Wisconsin consumer had ever seen an AWP, much less was misled by one. The trial court was to determine whether injunctive relief was appropriate at all, as well as the form of any such relief, based on the evidence presented. *Forest County v. Goode*, 219 Wis.2d 654, 670, 579 N.W.2d 715 (1998). While the trial court will consider the evidence presented to it, *id.*

at 683-84, no case suggests that a party that presents no evidence can complain that the trial court failed to consider evidence. (SCB 44-46.)

While the State cites *State v. Fonk's Mobile Home Park & Sales, Inc.*, 117 Wis.2d 94, 343 N.W.2d 820 (Ct. App. 1983), in support of its argument that it need not prove a “threat of future harm,” but only a statutory violation, to obtain its requested injunction (SCB 45), the Wisconsin Supreme Court rejected a previous argument by the State that *Fonk's* restricts the trial court’s discretion to conclude an injunction is not warranted. *Goode*, 219 Wis.2d at 676-77.

Similarly unavailing is the State’s argument that the trial court erred because it did not agree with the State’s view of “continuing violations.” (SCB 46-47.) Pharmacia and First DataBank¹⁰ were and are making clear that AWP’s are not representations of actual wholesale prices. (R.444 at 83:17-86:14; C.Resp.Ap. 365-68.) The State argues that § 100.18(10)(b) prohibits representing a price as a wholesaler’s price unless it is not more than retailers regularly pay (SCB 47), but never explains how this is happening when Pharmacia and First DataBank disclaim any such representation (R.338 at 3-6; C.Resp.Ap. 92-95).

¹⁰ First DataBank is an independent third party unrelated to Pharmacia. (R.434 at 206:17-206:20; C.Resp.Ap. 277.) The State never explained how Pharmacia could control First DataBank’s actions.

The State is mistaken that Pharmacia “presented no evidence” as to the impact of the requested injunction. Pharmacia—and the other defendants in this case—provided substantial evidence of precisely that. (R.312, 338, 350.)

It was entirely appropriate for the trial court to reject the State’s effort to have a panoply of different reporting requirements for drug manufacturers—some reporting AWP (if they paid to settle these cases (R.443 at 148:6-148:16; C.Resp.Ap. 343)) and others having to report prices after discounts (if they chose to defend these claims). This was not a situation in which those defendants “found to have followed the law” would be free from having to report their confidential prices. (SCB 48.) It was a situation in which the State was improperly putting drug manufacturers at a competitive disadvantage *vis-a-vis* each other unless they agreed to settle with the State.

Finally, *State v. Seigel*, 163 Wis.2d 871, 472 N.W.2d 584 (Ct. App. 1991) does not help the State. (SCB 49.) *Seigel* merely confirmed that the scope of an injunction is committed to the sound discretion of the trial court. 163 Wis.2d at 892-93. In this case, because both Pharmacia and First DataBank were making clear that AWP were not actual prices, there

was nothing more to do to ensure compliance with the statutes on which the State's claims were based.

B. The Injunction That The State Requested Would Be Unconstitutional And Contrary To Federal Law.

The State's requested injunction would have been unconstitutional because it would have affected reimbursement in all fifty states. (R.330.) Article I, § 8 of the United States Constitution reserves to the United States Congress the power to regulate interstate commerce. States are not permitted to regulate interstate commerce directly, and incidental regulation of interstate commerce cannot be "excessive" in light of the interests served by the state's regulation. *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982). Injunctions such as that sought by the State, which prescribe standards for publication of advertisements and other statements nationwide, violate the Commerce Clause. *See, e.g., Hyatt Corp. v. Hyatt Legal Servs.*, 610 F. Supp. 381, 383-84 (N.D. Ill. 1985). The trial court correctly rejected this effort.

Further, the State's proposed injunction with respect to WACs (which it previously conceded were not even part of this case (R.235 at 36-39; C.Resp.Ap. 6-8)), would have required Pharmacia to report them as including all rebates, chargebacks and other discounts (R.307 at 11;

C.Resp.Ap. 417.) This would conflict with federal law, which defines WACs as “the manufacturer’s list price for the drug . . . not including prompt pay or other discounts, rebates or reductions in price.” 42 U.S.C. § 1395w-3a(c)(6)(B). Wisconsin Statute § 100.18(11)(b) prohibited the trial court from entering an injunction that would conflict with federal law.

The impediments to the State’s request were obvious and it had no meaningful response to them. The Commerce Clause and the requirements of federal law provide additional reasons to reject the State’s cross-appeal.

CONCLUSION

Pharmacia respectfully requests that the State’s cross-appeal be rejected.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,183 words.

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CERTIFICATION

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

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I personally caused copies of the Combined Brief of Appellant and Cross-Respondent and Cross-Respondent's Appendix to be mailed by first-class postage prepaid mail to:

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