

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

AMGEN INC., et al.

Defendants.

DECISION AND ORDER ON PLAINTIFF'S RIGHT TO JURY TRIAL

INTRODUCTION

Article I, Section 5 of the Wisconsin Constitution governs a civil litigant's right to a jury trial in this court:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy;..."

In *Village Food & Liquor Mart v. H & S , Petroleum, Inc.*, 254 Wis. 478, 647 N.W.2d 177 (2002), our Supreme Court observed:

"This section clearly indicates that *non-statutory* causes of action at law, where a jury trial was guaranteed before the passage of the state constitution, would continue to have a guaranteed right to a jury trial attached even after the passage of the constitution.

¶ 11. It certainly follows then that, as the *Ameritech* [185 Wis. 2d 686, 532 N.W.2d 705 (Ct. App. 1994), *aff'd* 193 Wis. 2d 150, 532 N.W.2d 449 (1995)] court concluded, a cause of action created *by statute* after 1848 will have a constitutionally guaranteed right to a jury trial attached if that statute *codifies* a claim that existed in the common law before the adoption of the Constitution. We conclude, however, that this requirement from *Ameritech* -- that the statute must specifically "codify" a prior common law cause of action before the right to a jury trial is

warranted -- interprets our prior case law and the state constitution too narrowly. Instead, consistent with our prior case law, we conclude that a party has a constitutional right to have a statutory claim tried to a jury when: (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and (2) the action was regarded at law in 1848."

254 Wis. 2d at 484 (emphasis in original).

Stating the test is a breeze compared to applying it, as the very narrowly but sharply divided Supreme Court decisions in *Ameritech*, *Village Food*, *State v. Schweda*, 303 Wis. 2d 353 736 N.W.2d 49 (2007) and *Dane County v. McGrew*, 285 Wis. 2d 519, 699 N.W.2d 890 (2005) bear witness. Nonetheless, to this task we now turn with a focus on plaintiff's Second Amended Complaint, analyzing each of plaintiff's five claims for relief under the *Village Food* test, as further discussed but only occasionally clarified in *Schweda* and *McGrew*.

COUNT I- Violation of Wis. Stat. §100.18 (1)

In this claim, plaintiff alleges that defendants' conduct, set forth at length in the previous 29 pages of the Second Amended Complaint, violates §100.18 (1), Stats., prohibiting untrue, deceptive, or misleading representations of fact with intent to sell or distribute their products. Particular victims allegedly include the elderly and disabled, and participants in the Medicare Part B program. As remedies, plaintiff seeks an injunction, restitution to restore pecuniary losses pursuant to §100.18 (11) (d), Stats., forfeitures under §§100.26(4) and 100.264 (2), Stats., and "appropriate penalty assessments".

A. PRONG 1—SIMILARITY OF STATUTORY CLAIM TO PRE-1848 CAUSE OF ACTION

The initial question in applying the first prong of the two-part *Village Food* test is, what does it mean?¹ *Village Food* found that a post-1848 statutory cause of action existed, was known, or was recognized at common law because the causes of action were of the same "nature", and the pre-1848 offenses were "clearly forerunners" of, only "slightly" different from, and "counterpart[s]" to the statutory claims. 254 Wis. 2d at 492-93. Subsequent cases, particularly *Schweda* and *McGrew*, apply the same considerations but, like *Village Food*, demonstrate a wide divergence of opinion on the Supreme Court concerning how these considerations apply to the facts of each particular case.

¹ But for *Village Food* and its spawn, *Ameritech*, *supra*, would control, denying plaintiff a jury trial on its deceptive trade practices claim under §100.18, Stats. However, our Supreme Court has substantially relaxed the rule of law underpinning *Ameritech*'s holding, throwing into considerable doubt its value as precedent on this issue.

Be that as it may, in *Village Food*, the Supreme Court majority was persuaded that defendant was entitled to a jury trial in a lawsuit alleging that defendant committed a series of violations of the minimum mark-up laws governing the sale of motor vehicle fuel under the Unfair Sales Act, §100.30, Stats. In particular, it found that the statutory cause of action was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 in the form of "Offenses Against Public Trade", specifically "business fraud" and "business torts" identified in 4 William Blackstone *Commentaries on the Law of England*, ch.12, at 154 -- 60 (1778). These included common law crimes of forestalling the market, regrating, engrossing and unfair competition, including price competition. 254 Wis. 2d at 492-94. The majority found these pre-1848 common law causes of action only slightly different but otherwise essentially counterparts and forerunners of a similar nature to the statutory minimum gas mark-up claims, because they all involve unfair trade practices manipulating prices in a controlled market. *Id.* The dissent essentially argued that the majority had so loosely applied the test it adopted as to render it "a nullity" 254 Wis. 2d had 500 (Wilcox,J.).

Based solely on *Village Food*, there is little doubt that prong one is satisfied by plaintiff's §100.18 (1) claim for relief. Plaintiff chronicles a number of common-law actions identified in Blackstone's *Commentaries* that are no more dissimilar to its statutory claim than was the case in *Village Food*. The defense argument that these pre--statehood claims differ fundamentally in their nature from a §100.18 (1) claim-- an argument not without merit-- is the same one lost by Justice Wilcox in *Village Food*, 254 Wis. 2d at 499.

Do *McGrew* and *Schweda* alter the analysis? This court finds it impossible to say. While both ostensibly apply the same prong-one test, a slender majority in each appears to retrench on the issue of how narrowly the test should be applied. Justice Wilcox joined in the narrow application adopted by the controlling decision in *McGrew* which rejected a constitutional jury right on a speeding ticket, but the majority of that court still found a constitutional jury trial right based upon a broader application of prong one. In *Schweda*, the majority found no jury trial right in an environmental regulatory case, applying prong one more narrowly than the dissent, which included Justice Wilcox, and certainly more narrowly than *Village Food*. So what are we left with? As Justice Prosser noted, at least with respect to environmental regulatory cases, circuit judges are essentially cast adrift by the analyses. *Schweda, supra*, at 424. Emerging from this line of decisions is an essentially case-by-case, policy-driven inquiry yielding no right answers, simply differences of opinion. Predicting how the Supreme Court would apply prong one to the case at bar is thus a hazardous task at best, but one no less necessary to resolve the issue.

This court finds that *Village Food* is the most closely analogous decision, and that plaintiff's §100.18 (1), Stats., claim satisfies the first prong of the test. As in *Village Food*, Blackstone provides an analogous forerunner to a §100.18 claim

in the offense of "cheating", which is similar inasmuch as both are aimed at protecting the public from the misrepresentations of merchants engaged in trade.

B. PRONG 2 -- WHETHER THE CLAIM IS "AT LAW".

Although §100.18 (11) (a), Stats., speaks of "equity jurisdiction", this action has not been filed by the Department of Agriculture, Trade and Consumer Protection, but proceeds instead under §100.18 (11) (d) at the behest of the Department of Justice. And while injunction is sought as a remedy, which is indisputably equitable, Count I also seeks forfeitures, which are legal remedies. See, e.g., *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 162, 288 N.W.2d 129 (1980). More to the point, prong two focuses on whether the pre-1848 action, which is the analog to the statutory claim, was "at law". Blackstone appears to place cheating in that category. See 4 Blackstone, *Commentaries on the Laws of England*, ch.12, at 158 (1778).

Accordingly, a constitutional jury right attaches to plaintiff's statutory claim in Count I of the Second Amended Complaint. This conclusion is not without some doubt, insofar as premised upon the satisfaction of prong two. For *State v. Excel Management Services*, 111 Wis. 2d 479, 490 et seq., 331 N.W.2d 312 (1983) strongly identifies an enforcement action under §100.18 (11) (d) as purely equitable. And, in *Ameritech*, *supra*, at 697, the court of appeals stated:

"Therefore, if a statutory action is equitable in nature, there can be no constitutional right to a jury trial, regardless of the existence of a counterpart at common-law."

But, as previously noted, *Ameritech* has been subsequently discredited to a degree in *Village Food*.

COUNT III -- Violation of the Wisconsin Trust and Monopolies Act

This is the easy one.

Again, Blackstone's *Commentaries*- here describing "monopolies"- provides the analogous pre-statehood forerunners to plaintiff's statutory claim under the Wisconsin Trust and Monopolies Act, Chapter 133, Stats., under the *Village Food* test. See 4 Blackstone, *Commentaries on the Laws of England*, ch.12, 1558 *et seq.* Even the legal remedies described in Blackstone mirror those provided under Chapter 133, including forfeitures and treble damages. The pre-1848 action for monopolies was clearly "at law". Additionally, the injunction sought by plaintiff here is incidental to the monetary remedies, and thus does not trump the claim's "at law" status. *Schweda*, *supra*, at 423 (Prosser, J., concurring/dissenting).

Plaintiff's Chapter 133 claim thus satisfies both prongs under *Village Food*, triggering a constitutional jury trial right.

COUNT IV—VIOLATION OF WIS. STAT. §49.49(4m)(a)(2)
MEDICAL ASSISTANCE FRAUD

A. PRONG 1—SIMILARITY OF STATUTORY CLAIM TO PRE-1848
CAUSE OF ACTION

For reasons stated by the defense, plaintiff's attempt to analogize its medical assistance fraud claim to the ancient common-law action for concealing a king's "treasure-trove" is too attenuated to satisfy *Village Food's* first prong, whether one accepts the majority or minority positions in that case, or in either of the subsequent decisions in *McGrew* or *Schweda*. Accordingly, to satisfy prong one, plaintiffs must turn to pre-statehood common-law fraud. In doing so, it runs into a potential roadblock created by the *Schweda* majority, which warned against very broad analogies to a cause of action at statehood. 303 Wis. 2d at 364 *et seq.* *Schweda* specifically rejected the analogy between statutory environmental regulatory laws and common-law nuisance, finding that

"[t]he breadth of nuisance is so great that we must narrowly construe the actions that we analogize to nuisance, lest we render the *Village Food* test a nullity because 'present causes of action of all sorts assessed under this test will only have to be compared generally... in order to invoke the constitutional protection to a trial by jury.'"

303 Wis. 2d at 373 [citing *Village Food*, 254 Wis. 2d at 500 (Wilcox, J., concurring and dissenting)].

Common-law fraud is no less broad than common-law nuisance. However, a material distinction exists between the application of prong one in *Schweda* and its application here. In *Schweda*, the court rejected the analogy between environmental regulatory claims and pre-statehood nuisance because the latter requires actual harm as an element of the claim, while the former does not. In plaintiff's §49.49 claim, the elements of medical assistance fraud differ only slightly from common-law fraud. Both require a representation, scienter, intent to induce reliance and (where monetary remedies are sought) actual harm. In fact, §49.49 identifies itself as a "fraud" statute in its opening paragraph, and can best be characterized as a statutory sub-species of common-law fraud, with the medical assistance benefit program serving as merely the stage for its performance. While the defense is correct that a §49.49 claim viewed thus largely duplicates remedies already provided by common-law fraud², and to that extent may be viewed as unnecessary and redundant, §49.49 also provides remedies for fraud in the medical assistance arena that common-law fraud does

² This argument supports the conclusion that a jury trial right attaches because the two actions are quite similar.

not, such as forfeitures under subsection (4m) and reasonable and necessary expenses for prosecution under subsection (6).

The analogy to common-law fraud is certainly sufficient under *Village Food* and, for the above reasons, survives the more narrow view of prong one urged in *Schweda*.

B. PRONG 2 -- WHETHER THE CLAIM IS "AT LAW".

Pre-statehood common-law fraud claims were actions "at law" that bore the constitutional right to a jury. *Bender v. Town of Kronenwetter*, 258 Wis. 2d 321, 331 (Ct. App.2002). Moreover, the remedies plaintiff seeks include legal ones such as forfeitures (*County of Columbia v. Bylewski*, 94 Wis. 2d 153, 162, 288 N.W. 2d 129) and money damages (*Farr v. Spain*, 67 Wis. 631, 632, 31 N.W. 21 (1887)).

Plaintiff is entitled to a jury trial on its medical assistance fraud claims.

COUNT V- Unjust Enrichment

Plaintiff is not entitled to a jury trial on its claim for unjust enrichment.

To say that an unjust enrichment action sounds in equity³ is an oversimplification and a bit misleading. The claim today is a mongrelization of various common law actions -- some at law (quasi-contract claim for "money had and received"⁴) that preexisted 1848, and some in equity ("accounting for profits" and "constructive trust").

Identifying which breed of unjust enrichment claim is stated in the Second Amended Complaint is the starting point, but not the ultimate determining factor, in deciding plaintiff's entitlement to jury resolution *vel non*. Not surprisingly, the parties differ on the nature of the claim alleged. Plaintiff asserts it is suing on quasi-contract for money had and received, which entitles it to a jury trial. See *e.g. Gavahan v. Village of Shorewood*, 200 Wis. 429, 228 N.W.497, 498 (1930). Defendants argue that plaintiff's claim, which is based upon defendants' alleged increased market share and inflated payments from third-party providers who allegedly received excessive reimbursements from plaintiff due to defendants' wrongful conduct, is more akin to equitable, non-jury "accounting for profits" and "constructive trust" claims.

³Stated by the Court of Appeals in the unpublished decision *Edgewater Associates of Racine, Inc. v. Racine County*, 1990 WL 262051 citing *General Split Corp. v. P & V Atlas Corp.*, 91 Wis. 2d 119,124 (1979).

⁴Complicating the analysis is the Supreme Court's observation in *Hicks v. Milwaukee County*, 71 Wis. 2d. 401, 404 (1976) that, although "money had and received" is an action at law, it is governed by equitable principles.

Because the claim is not statutory, *Schweda* and *Village Food*, while instructive, are not entirely on point, although they begin the analysis.

In *Village Food*, 254 Wis. 2d at 495 (2002), our Supreme Court interpreted *Gavahan, supra*, as an "action seeking money damages" and therefore "one at law". In doing so, it appears to continue the long-standing line of cases that look to the remedy sought as largely defining the nature of the action. See, for example, Justice Prosser's excellent discussion in his *Village Food* dissent/concurrence, 303 Wis. 2d at 419 *et seq.*

In *McLennan v. Church*, 163 Wis. 411, 158 N.W. 73, 75 (1916), our Supreme Court observed:

"Under our judicial system, there are no distinctions between actions at law and suits in equity. We have only the civil action of the code as an instrumentality to redress or prevent wrongs, **triable with or without a jury according to whether the nature of the relief demanded is legal or equitable.**"

See also *Fraedrich v. Fliette*, 64 Wis. 184, 25 N.W. 28, 29 (1885) and *Stilwell v. Kellogg*, 14 Wis. for 99, 1861 W L 1607.

Bender v. Town of Kronenwetter, 258 Wis. 2d 321, 331-32, 654 N.W.2d 57 (Ct. App. 2002) denied a jury trial in circumstances closely analogous to ours. In that case, plaintiff pursued fraud and breach of contract claims, which the court of appeals expressly acknowledged were actions at law. However, because the relief sought was purely equitable (voiding a special assessment), the court affirmed the trial court's holding that plaintiff was not entitled to a jury trial.

In the Second Amended Complaint here, plaintiff seeks solely equitable remedies for the unjust enrichment claimed in Count V, i.e. injunction and disgorgement of profits. Therefore, regardless of whether the unjust enrichment claim falls in the legal or equitable category, no jury right attaches.

CONCLUSION

The plaintiff is entitled to jury trials on its statutory claims (Counts I, III, and IV in the Second Amended Complaint) but not on its unjust enrichment claim (Count V).

Dated this ____ day of _____, 2007.

BY THE COURT:

Richard G. Niess
Circuit Judge

CC: Attorney William M. Conley
(for immediate service on all parties per
usual practice in this case)