



assertion that is untrue, deceptive or misleading, and Sec. 100.18(10)(b)<sup>1</sup> which declares it to be a deceptive act to represent a price as a wholesale price when retailers are paying less. Indeed, for over 40 years it has been the law everywhere and in every context that it is unlawful to publish a price of any kind, no matter what it is called—manufacturer’s list, suggested list, regular or wholesale—where that price does not truly represent a price at which significant sales are made.

As the Court will see, J&J has freely admitted circulating false wholesale prices. J&J seeks to excuse this facially unlawful conduct by arguing that Wisconsin is estopped from enforcing its laws because Wisconsin employees knew that discounts were being given to providers beyond the published wholesale prices in the compendiums and that, as a result, Wisconsin had a duty to change its Medicaid program to account for this fact. As plaintiff will show, this defense is unavailable to J&J as a matter of law for two reasons. First, under the statutes relied upon here, liability attaches upon the publication of a false price, nothing more is required, and a state employee cannot change this result even if he or she wanted to. Second, as a matter of law, the state may not be estopped from enforcing its laws whatever its employees knew or did not know.

## **II. THE STATUTORY BASIS FOR WISCONSIN’S CLAIMS.**

Wisconsin’s claims at issue here are purely creatures of statute, the language of each of which outlines the elements which plaintiff must prove.

### **A. Wis. Stat. 100.18(1)—Count I.**

This statute provides:

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<sup>1</sup> No statute of limitations issue is raised in this motion because it is unnecessary for the motion’s resolution and because Judge Krueger has already identified the statute of limitations for the consumer protection statute as three years.

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

**B. Wis. Stat. 100.18(10) (b)—Count II.**

This statute states: “It is deceptive to represent the price of any merchandise as a manufacturers or wholesalers price, or price equal thereto, unless the price is not more than the price which retailers regularly pay for the merchandise.”

**III. THE INDISPUTABLE FACTS SUPPORTING WISCONSIN’S MOTION.**

1. Defendant Johnson & Johnson (J&J) is a holding company which operates through a number of different subsidiaries including the additional defendants Janssen Pharmaceutical Products, LP, Ortho Biotech Products, LP, Ortho-McNeil Pharmaceutical, Inc. and McNeil-PPC, Inc. All of these subsidiaries manufacture drugs which are purchased by Wisconsin’s Medicaid program. (Parks at 12-17)<sup>2</sup>

2. The purpose of Wisconsin’s Medicaid program is to provide medical assistance to the state’s neediest citizens. (Parks at 17-19)

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<sup>2</sup> On May 23, 2007 Plaintiff prepared and filed an Appendix which contained the excerpted portions of the depositions and exhibits for ease of reference. Plaintiff has also filed all relevant depositions and exhibits with the Court.

3. Participation in Wisconsin's Medicaid Program is purely voluntary for drug manufacturers. J&J has chosen to participate. (Parks at 20)

4. Historically through the year 2000, J&J and its subsidiaries, sent to pricing compendiums including First DataBank and Red Book, wholesalers reselling their drugs, and the State of Wisconsin, documents stating average wholesale prices for their drugs. (See Parks at 54-61; Webb at 65-67) (Various letters sent to Wisconsin by J&J, Exhibits 10, 11) Through 2000 the pricing compendiums published these prices as their average wholesale prices for J&J's drugs and J&J so knew. (Parks at 32-33; Webb at 65-67)

5. During this period of time J&J knew that the average wholesale prices that it was sending to these various entities were not true average wholesale prices for its drugs. (See paragraphs 6 *et seq.* below)

6. J&J sells its drugs to wholesalers who, in turn, sell them to retail pharmacies including retail pharmacies who participate in Wisconsin's Medicaid program. During this period of time it was common knowledge among pharmaceutical manufacturers—and J&J so knew—that wholesalers did not mark up the drugs they purchased from J&J and other manufacturers for resale to providers by more than 2% to 3%, of what the industry terms "WAC"—Wholesale Acquisition Cost—(and often less than this). (Parks at 37-47, 51-55, 76-77)

7. J&J created the prices it represented to be its average wholesale prices by marking up the WAC by 20%. (Webb at 59-60, 65; Ortiz II, Ex. 8) Thus, J&J knew that the average wholesale price it reported for its drugs was generally 17% to 18% higher than the retailers were actually paying for its drugs during this period (since the actual markup was no more than 3%). (Parks at 46-49, 53-55, 75-78) J&J is not able to provide any business reason for marking up the average wholesale price it circulated by such a large amount. (Parks at 38; Webb at 59-60)

8. J&J has filed briefs in this case admitting that it establishes its AWP by marking up its selling price to wholesalers by 20%, that it knows that wholesalers have very thin margins—not in excess of 2% or 3%—and that “it is reasonable to believe (and the J&J Defendants do believe) that the prices paid by retail pharmacies are close to the prices at which the J&J Defendants sell to wholesalers.” (J&J’s Reply Memorandum in Support of Their Motion for a Protective Order, Exhibit 12)

9. In 2001, after Congress’ began its investigation into the drug companies pricing practices in connection with the Medicare program, (See Joint Hearing Before the Subcommittee On Health and the Subcommittee on Oversight and Investigations, Sept. 21, 2001, Serial No. 107-65,<sup>3</sup>) J&J modified the pricing materials it sent to the pricing compendiums, wholesalers and the state of Wisconsin by adding the phrase “suggested” to their average wholesale price quotations. (Parks at 59-62) (See Exhibit 9) Thus, in 2001 and thereafter, J&J’s pricing documents reported a “suggested average wholesale price”, not simply an average wholesale price. Different subsidiaries phased this phrase in at different times. (Parks at 187-89) J&J knew at the time that it made this linguistic change that the price it called a “suggested average wholesale price” was, in reality, generally 17% to 18% higher than wholesalers were actually charging retailers. The change in language was requested by the legal group. (Parks at 61-62, 188)

10. J&J is well aware that the “AWP is intended to represent the average price at which wholesalers sell drugs,” that the AWP is important to the underlying drug pricing structure, and that it has devolved into an artificial, manipulated number “that is not widely understood.” (Ortiz II at 42-49, Ex. 13)

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<sup>3</sup> The transcript of this hearing with exhibits is hundreds of page long and since plaintiff’s only point in citing to it is to show that a public investigation of industry pricing practices had begun plaintiff has not submitted the transcript. If the Court wishes the plaintiff to supplement the record in this regard plaintiff would be happy to do so.

## ARGUMENT

### IV. SUMMARY JUDGMENT ON LIABILITY SHOULD BE GRANTED FOR THE STATE OF WISCONSIN.

#### A. Background To Motion.

Medicaid is a voluntary program. Drug manufacturers may elect to participate or not.

(PUF 3) As a participant a manufacturer must follow certain rules. The first of these is the general rule applicable to all businesses benefiting from public expenditures:

Justice Holmes wrote: ‘Men must turn square corners when they deal with the government.’ *Rock Island, A. & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government’s money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.

*Heckler v. Community Health Servs.*, 467 U.S. 51, 63 (1984).

All during the period covered by Wisconsin’s complaint J&J has lied about what its average wholesale prices are. J&J reports an average wholesale price, more recently a “suggested average wholesale price,” that is far higher than the actual price pharmacies are generally paying for its drugs. J&J calculates the average wholesale price it sends to Wisconsin, the price reporting services, and wholesalers by multiplying J&J’s WAC to wholesalers by 20%. J&J does this even though it knows, and it is common knowledge in the pharmaceutical industry, that wholesalers are marking up these drugs by 2% at most as one of J&J’s corporate designees admitted.

Q. Prior to 2002 and backwards, how did Janssen determine what the average wholesale price of its drugs was?

A. Just a mechanical calculation. We multiplied it by 120 percent, and that’s what was put onto the form.

(Deposition of Parks, 09/15/06, 37:8-13)

Q. Why did Johnson & Johnson or Janssen determine the average wholesale price or suggest an average wholesale price by marking up the WAC 20 percent?

MR. MANGI: Object to the form.

THE WITNESS: I don't know that either. It had been done before me. I just continued it.

Q. Now were all of Janssen and Ortho-McNeil's drugs marked up 20 percent?

A. To the best of my knowledge, yes.

(Parks, 39:1-11)

Q. My question to you is were you aware when you were forwarding these average wholesale prices to First Databank on behalf of Janssen that wholesalers were actually selling Janssen's products at prices significantly lower than the average wholesale price you were sending to First Databank?

MR. MANGI: Objection to the form.

THE WITNESS: Yes, yes, they were selling at below that suggested AWP price to retailers, yes.

(Parks, 47:7-17)

Q. In fact, it was your understanding at the time that you were sending these average wholesale prices to First Databank that wholesalers often charged their customers less than they paid Janssen for these drugs, is that correct?

MR. MANGI: Object to the form, lack of foundation.

THE WITNESS: There are certain customers that the wholesalers sold the Janssen products for for less than the acquisition cost.

(Parks, 48:6-16) (PUF 6-8)

This testimony has been confirmed by J&J's lawyers who admit that "[t]he MDL record establishes, beyond question, that the J&J Defendants sell their medicines to wholesalers at or about the WAC price (not AWP), that the AWP figures submitted by the J&J Defendants to First Data Bank and the Red Book were 120% of the WAC price, and that AWP, as used by the J&J

Defendants and other manufacturers, does not represent, or purport to represent, an actual selling price. (Ex. 12 at 4, 5; PUF 8)

Thus, J&J sent to all state Medicaid programs, pricing services and wholesalers, average wholesale prices which it knew were false by some 17-18%. (PUF 7)

J&J's corporate designee could not articulate a business reason for marking up the true wholesale price of J&J's drugs by 20% and publishing this marked up figure as an average wholesale price. (PUF 7)

In 2001, J&J, during the pendency of the first Congressional hearings into pricing abuses in the Medicare system, began to send to all the recipients of its pricing information "suggested average wholesale prices." These were determined in the same manner as the average wholesale prices had been determined, and were just as unrelated to any real wholesale price of J&J's drugs. (PUF 9) This change was requested by the legal group. (PUF 9)

**B. Defendant's Conduct Violates Wisconsin Statutory Law**

J&J's practice of distributing prices it knows have no basis in fact is unlawful under Wisconsin laws.

1. J&J's Conduct Violates Wis. Stat. sec. 100.18(1).

a. J&J's Publication of False and Inflated Prices is Unlawful.

Wis. Stat. sec. 100.18(1) prohibits any representation with the intent to sell, distribute, or increase the consumption of merchandise when the representation contains any assertion, representation, or statement of fact that is untrue, deceptive or misleading. Defendant J&J's made up prices are all of these things.

There is no question what the term average wholesale price means. Judge Saris, in the MDL, turned to her dictionary and determined that it meant exactly what it says: the average

price paid for goods for resale. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 460 F.Supp.2d 277, 287-88 (D. Mass. 2006). Where a statute does not define a term Wisconsin courts also turn to the dictionary. *Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.*, 164 Wis.2d 689, 698, 476 N.W.2d 305, 308 (Ct. App. 1991). Any dictionary the Court chooses confirms Judge Saris' reading of the meaning of average wholesale price.<sup>4</sup>

Defendant's conduct in publishing average wholesale prices that are admittedly not average wholesale prices violates 100.18(1)'s prohibition against untrue statements. "[A] statement is untrue which does not express things exactly as they are." See *Tim Torres Enterprises, Inc. v. Linscott*, 142 Wis.2d 56, 65 n.3, 416 N.W.2d 670, 673 n.3 (Ct. App. 1987). See Wis. J.I. – Civil Sec. 2418 (1998). A statement is untrue "if it is false, erroneous, or does not state or represent things as they are."

Adding the term "suggested" to its reported average wholesale prices after Congress began its investigation of the drug industry does not get J&J off the hook. Whatever a "suggested average wholesale price" is—the prices J&J sends out are not that. J&J knows that no one is selling its product to retailers at those prices, far from it, and J&J is not seriously suggesting anyone should. Thus, the term "suggested" average wholesale prices do not "express things exactly as they are." Moreover, it has been the law for a couple of generations that it is improper to publish a price—suggested or otherwise—unless substantial sales are made at that price.

Pricing information is material as a matter of law. "The materiality of such information cannot be denied. Information concerning prices or charges for goods or services is material..."

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<sup>4</sup> See *Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253, 257 n.3 (2<sup>nd</sup> Cir. 1968) where the Court says "[t]he term 'wholesale price' is generally defined as the price which a retailer pays to its source of supply when purchasing goods for resale. . . ."

*FTC v. Crescent Publ'g Group, Inc.*, 129 F.Supp.2d 311, 321 (S.D.N.Y 2001).<sup>5</sup> As a consequence, it has been the law for over 40 years that it is unlawful to publish a price of any kind, no matter what it is called—manufacturers list, suggested list, regular or wholesale—where that price does not truly represent a price at which significant sales are made. *See Giant Food, Inc. v. FTC*, 322 F.2d 977, 981-82 (D.C.Cir. 1963):

The Commission here has determined that the use of the term 'manufacturer's list price' represents to the public that that was the price at which the product was usually and customarily sold by other stores in the area. This determination was within its power, unless it was 'arbitrary or clearly wrong.' \* \* \* If a manufacturer can be prevented from placing a deceptive price on its product, we see no reason to permit a retailer to make reference to a deceptive *suggested price*.

*Giant Food, Inc. v. FTC*, 322 F.2d 977, 982 (D.C. Cir. 1963)(emphasis added)(The case also describes why automobile manufacturers can attach suggested retail prices to their cars irrespective of whether substantial sales are made at that price—they are permitted to do so by a specific statute.)

In *Regina I*, 61 F.T.C. Lexis 92, at 34-36, the FTC issued a cease and desist order holding that:

In this case, Regina disseminated its *suggested list prices* to resellers rather than directly to the purchasing public. Regina was fully aware that these *suggested list prices* were not the usual and customary retail prices at which Regina products were sold in the trading areas involved. In so furnishing fictitious retail prices to resellers, Regina placed in hands of retailers and others the means and instrumentalities by which they could mislead and deceive the purchasing public. Such practice is a violation of the Federal Trade Commission Act. (Emphasis supplied)

*Regina I*, 1962 F.T.C. Lexis 92, at \*34-35 (citations omitted). *See Regina Corp. v. FTC*, 322 F.2d 765 (3rd Cir. 1963); *In re Matter of George's Radio and Television Company, Inc.* 62 F.T.C. 179, 1962 WL 75744 (F.T.C.)

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<sup>5</sup> Wisconsin looks to FTC case law in interpreting its consumer protection statutes. *See Tim Torres, Inc. supra* at 142 Wis.2d 66-67.

Subsequent to this decision the FTC revised its pricing guidelines to provide that use of the term list prices is impermissible unless “substantial (that is, not isolated or insignificant) sales are made in the advertiser’s trade area (the area in which he does business).” FTC Guides Against Deceptive Pricing, 16 C.F.R. sec. 233.3(d). In *Helbros Watch Co. v. FTC.*, 319 F.2d 868, 870 n.4 (D.C. Cir. 1962), the FTC took the position, and the D.C. Circuit agreed, that where 40% of all sales were made at prices substantially less than the preticketed price sales at the announced price were not substantial.

In sum, defendant J&J’s publication of false and inflated average wholesale prices is a violation of Wis. Stat. 100.18(1).

- b. J&J cannot escape liability by blaming the pricing compendiums who publish inflated prices for J&J’s drugs.

J&J cannot escape liability by blaming the pricing compendiums who publish J&J’s phony prices. J&J substantially participates in the publication of false pricing information of its drugs by supplying false prices to every link in the purchasing chain from the wholesalers to the pricing compendiums to the actual purchaser, the State of Wisconsin. Indeed, J&J’s conduct is nothing more than an inflated pre-ticketing scheme, something that has long been banned.

It is, and has been for a couple of generations, unlawful for a manufacturer to publish inflated suggested retail prices which it knows will be used in the market place by others in connection with the sale of its products. The case of *Baltimore Luggage Company v. FTC*, 296 F.2d 608 (4<sup>th</sup> Cir. 1961) illustrates this principal. There the Baltimore Luggage Company preticketed its luggage pieces with prices which the retailers could either leave on the luggage or remove which were some \$2.00 higher than the luggage was actually being sold at. As the court explained what happened:

Although Baltimore's pretickets were sometimes removed by the retailers who sold the luggage at less than the preticketed price when the luggage was put on sale, generally the retailers left Baltimore's tickets on the luggage. Some stores also exhibited cards furnished by Baltimore showing the same price as that printed on Baltimore's tickets. The hearing examiner found, and the Commissioner adopted his findings, that by preticketing its luggage, and in some instances also by furnishing customers with display cards showing retail prices, Baltimore represented that the prices on the tickets and cards were the usual and regular retail prices, for its luggage, and that this representation was false in those trade areas where the luggage was usually and regularly sold at retail at approximately \$2.00 less.

*Id.* at 609.

The court had no difficulty agreeing with the Federal Trade Commission that this conduct was unlawful. Indeed, the defendant agreed that manufacturers who preticket their products with fictitious prices "are guilty of engaging in an unfair trade practice in violation of the Act."

*Baltimore Luggage Company*, supra, 296 F.2d at 610. Instead, the defendant argued that the market from which the FTC secured evidence that its goods were being sold below the advertised price was too narrow.

The *Baltimore Luggage* case is just one in a long line of decisions holding that it is unlawful for a manufacturer to publish a fictitious price which it knows will be used in the market place in connection with the sale of its product. See, e.g., *Clinton Watch Co. v. FTC*, 291 F.2d 838, 840 (7<sup>th</sup> Cir. 1961) where the court described the vice of preticketing: "Petitioners' practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. Notwithstanding the prevalence of these practices and the familiarity therewith among members of the trade, these activities are proscribed to protect the interest of the public."

J&J's conduct in putting false wholesale prices in the hands of the compendiums, the industry's voice to the public, (as well as wholesalers and purchasers) is no different in kind than the preticketing schemes described in the preceding cases.

The holding of those preticketing cases are just one application of the broader rule that consumer protection law prohibits participation in any manner in connection with commercial schemes which bilk the public. As the court stated in *FTC v. Windward Marketing, Ltd.*, 1997 WL 33642380 at 13 (N.D. Ga. 1997), “direct participation in the fraudulent practices is not a requirement for liability. Awareness of fraudulent practices and failure to act within one’s authority to control such practices is sufficient to establish liability.” In that case a check factoring business was held liable because it neither “ceased doing business with the selling Defendants, or even questioned their practices.” *Id.* See also, Section 876(b) of the Restatement of Torts. The *Windward* case is consistent with a long line of FTC precedent.

In *Regina Corporation v. FTC*, 322 F.2d 765 (3rd Cir. 1963) the defendant supplied its retailers and distributors with “list prices” or “suggested list prices” which were higher than the usual and customary price charged by other retailers. The defendant argued that it was not liable because, in some instances, while it supplied the inflated list prices, it had not paid for the advertising which contained its misleading pricing reports, only the retailers had. The court rejected defendant’s argument holding: “With respect to those instances where petitioner did not contribute to the cost of misleading advertising, it is settled that ‘One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act. [citations omitted] Proof of petitioner’s intention to deceive is not a prerequisite to a finding of a violation [citation omitted]; it is sufficient that deception is possible.’” 322 F.2d at 768.

“That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.” *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

“It is settled law that ‘one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act. . .’ *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).” *In the Matter of Coro, Inc.*, 63 F.T.C. 1164 (1963). *See, Coca Cola Co. v. Gay-Ola Co.*, 200 F. 720 (1912); *Von Mumm v. Frash*, 56 F. 830 (2nd Cir. 1893); *Idaho v. Master Distributors, Inc.*, 101 Idaho 447, 458 (1980).

The principles set forth in this case law have special resonance here. As Justice Holmes long ago made clear, J&J, in its multi-million dollar dealings with Wisconsin’s taxpayers, accepted a greater standard of care than if it were operating in the private market place. “Men must turn square corners when they deal with the Government.” *Rock Island, A & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920). No matter how J&J’s conduct is spun, supplying pricing data to a business that J&J knew was publishing false prices for its drugs is not turning square corners.

J&J’s conduct in dealing with Wisconsin’s Medicaid program has been a refutation of its obligations to behave with scrupulous honesty toward Wisconsin and its taxpayers.

2. J&J’s Conduct Violates Wis. Stat. 100.18(10)(b).

Defendant’s false prices even more clearly violate 100.18(10)(b). That statute specifically declares it to be a deceptive act to represent a price as a wholesale price when retailers are paying less. Here defendant concedes that the average wholesale prices it sent to Wisconsin, the pricing publications and wholesalers, were substantially greater—17% to 18%—than the prices retailers were actually paying for J&J’s product. (PUF 6-8) Wisconsin need prove nothing more.

Wisconsin's section 100.18(10)(b) is consistent with FTC law. In *Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253 (2nd Cir. 1968) the court defined wholesale price as follows: "The term 'wholesale price' is generally defined as the price which a retailer pays to its source of supply when purchasing goods for resale to the ultimate consumer." *Id.* at 256, n.3. The opinion then held that it was unlawful to call a price a wholesale price when retailers are paying less for it: "The evidence clearly shows that the prices charged by the petitioners for items in the Spalding 'regular' line are uniformly higher, although by modest amounts, than the prices paid by retailers to Spalding. Their representations of 'wholesale prices,' therefore, are deceptive..." *Id.* at 257.

The *Federated* case was not new law. In *L. & C. Mayers Co. v. FTC*, 97 F.2d 365 (2d Cir. 1938) the court held that it was deceptive for a jeweler to call itself a wholesaler and identify its prices as wholesale when they were selling retail at prices in excess of normal wholesale prices. As the opinion states:

The groups to whom the petitioner is directed not to sell representing itself as a 'wholesaler' are consumers. There is evidence to justify the finding that the prices at which the petitioner sold were higher than normal wholesale prices.

\* \* \*

Petitioner contends that there is no public interest involved and therefore the order should not be approved. It is in the interest of the public to prevent the sale of commodities by the use of false and misleading statements and representations. *Federal Trade Comm. v. Winsted Hosiery Co.*, 258 U.S. 483, 494, 42 S.Ct. 384, 385, 66 L.Ed. 729; *Federal Trade Comm. v. Balme Co.*, 2 Cir., 23 F.2d 615, 620. Indeed, a representation may be unlawful under section 5 although the trader makes it innocently. *Federal Trade Comm. v. Algoma Lumber Co.*, 291 U.S. 67, 81, 54 S.Ct. 315, 321, 78 L.Ed. 655. It is not necessary that the product so misrepresented be inferior or harmful to the public; it is sufficient that the sale of the product be other than as represented. *Federal Trade Comm. v. Royal Milling Co.*, *supra*.

*Id.* at 367.

Defendants' practice of publishing or circulating wholesale prices which are greater than retailers are actually paying clearly violates Wis. Stat. 100.18(10)(b) and FTC case law to which Wisconsin looks for guidance.

**C. J&J Has No Defense As A Matter Of Law To Plaintiff's Motion.**

J&J's defense to this clear case of unlawful conduct is to argue that certain Wisconsin employees connected with the Medicaid program believed that First DataBank's published wholesale prices for at least some drugs were being discounted to pharmacies and doctors. Notwithstanding their belief, J&J argues, these employees failed adequately to revise the Medicaid program to account fully for such discounting thereby permitting, through negligence, inadvertence or design, pharmacies to be reimbursed at rates higher than the federally authorized estimated acquisition cost. (Plaintiff does not believe that J&J will argue that Wisconsin knew that J&J was deliberately creating and sending false prices to the pricing compendiums. Even if J&J took that position, however, it would not make its argument against a liability judgment any stronger.)

What makes this case ripe for summary judgment on liability is that for two reasons this defense is no defense at all. First, the statutes upon which Wisconsin relies leave no room for such a defense. As these statutes make clear, for liability purposes the only conduct that is important is defendants' unlawful conduct, nothing else. And, second, even assuming that state employees either negligently or purposely looked the other way as defendant violated the law, case law is clear that such conduct cannot estop Wisconsin from seeking a judgment in favor of the taxpayers against defendant for its wrongful acts.

First, in connection with three of the statutes which defendant is accused of violating, liability is established by virtue of defendant's admissions that it published average wholesale

prices that were false. No more needs to be proven—and nothing else is relevant for a liability determination. Thus, Wis. Stat. Sec. 100.18(1) makes it unlawful to publish an untrue representation—period. Similarly, 100.18(10)(b) simply says that as a matter of law “it is deceptive” to publish wholesale prices where retailers are actually paying less. These provisions require proof of no other elements, and they do not contain any language which would excuse defendant’s conduct. (Thus, there is no requirement that the false statements be knowingly made or that anyone rely on them. Contrast these provisions with 100.18(12)(b) where the legislature shielded real estate brokers from liability unless they had “knowledge that the assertion. . . is untrue, deceptive or misleading.”)

Wisconsin case law does require what is termed a “causal connection” between the untrue statements and a plaintiff’s loss—but only in connection with Section 100.18(11)(b)2, the statutory provision authorizing pecuniary damages. *See Tim Torres Enterprises, Inc. v. Linscott*, 142 Wis.2d 56, 70, 416 N.W.2d 670, 675 (Ct. App. 1987).

In sum, each of these statutes base liability solely on whether the defendant did or did not make a false statement—nothing more needs to be proved. Thus, such things as defendant’s belief about its conduct, whether anyone relied on defendant’s lies, or whether the conduct of state employees was appropriate are irrelevant to a finding on liability.

Second, defendant’s claim that Wisconsin is estopped from enforcing its laws because state employees permitted the state to pay more is defeated by a line of cases that date back to the Supreme Court’s earliest days holding that a defendant who breaks the law cannot excuse its conduct by pointing to negligent, misleading or intentional misconduct on the part of state employees.<sup>6</sup>

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<sup>6</sup> The determination of whether estoppel is available as a defense against a governmental entity is a question of law to be decided by the Court. *Mowers v. St. Francis*, 108 Wis.2d 630, 633, 323 N.W.2d 157, 158 (Ct. App. 1982).

As the Court stated this principle in *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984):

Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.”

The *Heckler* opinion is consistent with an unbroken line of authority holding that a defendant may not excuse its unlawful conduct by blaming a government employee when a public right is involved: “As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest.” *FTC v. Crescent Publ’g Group, Inc.*, 129 F.Supp.2d 311, 324 (S.D.N.Y. 2001). See *United States v. Kirkpatrick*, 22 U.S. 720 (1824). See *Nevada v. US*, 463 U.S. 110 (1983), relying on *Utah Power & Light Co. v. US*, 243 U.S. 389, 409 (1917) where the Court rejected the argument that certain officials of the United States had granted a power company the unfettered right to utilize federal lands holding:

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.

Or as the Court said in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947):

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

*See US v. Socony-Vacuum Oil Co.*, 310 US 150, 226 (1940): “Though employees of the government may have known of those (unlawful) programs and winked at them or tacitly approved them, no immunity would have thereby been obtained.”

This doctrine dates back to the infancy of the Supreme Court. *See US v. Kirkpatrick*, 22 U.S. 720, 735 (1824). *See US v. Insley*, 130 U.S. 263, 266 (1889): “The principle that the United States are not bound by any statute of limitations nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest, is established past all controversy or doubt.”

Wisconsin adopted these principles in the seminal case of *State v. City of Green Bay*, 96 Wis.2d 195, 291 N.W.2d 508 (1980). There the Court held:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. *State of Chippewa Cable Co.*, 21 Wis.2d 598, 608, 609, 124 N.W.2d 616 (1963); *Park Bldg. Corp. v. Ind. Comm.*, 9 Wis.2d 78, 87, 88, 100 N.W.2d 571 (1960); *Town of Richmond v. Murdock*, 70 Wis.2d 642, 653, 654, 235 N.W.2d 497 (1975); *McKenna v. State Highway Comm.*, 28 Wis.2d 179, 186, 135 N.W.2d 827 (1965); *Milwaukee v. Milwaukee Amusement, Inc.*, 22 Wis.2d 240, 252-53, 125 N.W.2d 625 (1964).

*City of Green Bay*, 96 Wis.2d at 201-202, 291 N.W.2d at 511. In this case Wisconsin’s Attorney General is acting for the “public health, safety (and) general welfare,” hence, estoppel is unavailable to the defendant. *And see Westgate Hotel, Inc. v. E.R. Krumbiegel*, 39 Wis.2d 108, 113, 158 N.W.2d 362, 364 (1968) where the Court rejected the argument that because the City had not enforced an ordinance for nine years the defendant had been lulled into thinking that it was in full compliance with the ordinance.

**D. J&J's Argument Misplaces the Duties of the Parties.**

Finally, J&J's argument misplaces the burdens and duties of the parties. J&J has a duty to be honest and truthful with the State where, as here, it knows that the AWP's it sets, controls, reports, and causes First DataBank to publish will determine the amount of taxpayer dollars spent by the Wisconsin Medicaid program on J&J's drugs. *Heckler*, 467 U.S. at 63. In contrast, the State had no duty to sue J&J earlier or to modify its Medicaid program to account for J&J's misconduct. Rather, the reverse is true. Wisconsin is permitted to sue to enforce its laws at any time to recover public funds that were lost due to J&J's misconduct. *Aging Care Home Health, Inc.*, 2006 WL 2915674 at \*1 (defendants' argument that the government was at fault in not discovering defendants' wrongdoing earlier was irrelevant); *see also Westgate Hotel*, 39 Wis.2d at 114, 158 N.W.2d at 365 (where government failed to enforce ordinance for nine years, "the most that can be said for the plaintiff's position is that he had been violating the law for a number of years and had got away with it"); *id.* ("It, however, is axiomatic that a law-enforcing body, when faced with the practical difficulties of enforcing all of its regulations at once, is not thereby barred from future enforcement of the law.").

**V. RELIEF SOUGHT**

Wisconsin requests the Court grant its Motion for Summary Judgment on liability against these Defendants on each of the two counts for which such relief is sought.

Dated this 29 day of June, 2007.

  
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One of Plaintiff's Attorneys

CHARLES BARNHILL  
State Bar #1015932

ELIZABETH J. EBERLE

State Bar #1037016

ROBERT S. LIBMAN

Admitted Pro Hac Vice

Miner, Barnhill & Galland, P.C.

44 East Mifflin Street, Suite 803

Madison, WI 53703

(608) 255-5200

FRANK D. REMINGTON

Assistant Attorney General, State Bar #1001131

CYNTHIA R. HIRSCH

Assistant Attorney General, State Bar #1012870

Wisconsin Department of Justice

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 266-3542 (FDR)

(608) 266-3861 (CRH)

P. Jeffrey Archibald

State Bar # 1006299

Archibald Consumer Law Office

1914 Monroe St.

Madison, Wisconsin 53711

(608) 661-8855

Attorneys for Plaintiff,

State of Wisconsin