

drugs required by Medicaid eligible participants at a price no greater than the estimated price these providers paid for these drugs (the estimated acquisition cost or “EAC”) plus a dispensing fee. Because almost all drug manufacturers have chosen to participate in the Medicaid program (doing so is purely voluntary) the number of different drugs that may be prescribed by providers to Medicaid participants numbers well over 50,000. To keep track of the current prices of these drugs for purposes of estimating their acquisition cost for reimbursement purposes, Wisconsin has relied on pricing compendiums which have undertaken to publish what they term are accurate average wholesale prices paid by providers.

J&J has interfered with Wisconsin’s ability to estimate accurately the acquisition cost of the drugs used by its citizens by providing the pricing compendiums, drug wholesalers and directly to Wisconsin, wholesale prices that J&J knows are inflated and unconnected with any real price paid by providers. These phony prices have been incorporated into the pricing compendiums reported prices, which Wisconsin has used in its reimbursement formula.

J&J’s conduct in publishing phony and inflated wholesale prices violates Wisconsin Stat. Sec. 100.18(1) which prohibits any representation with the intent to sell that contains any assertion that is untrue, deceptive or misleading, Sec. 100.18(10)(b) which declares it to be a deceptive act to represent a price as a wholesale price when retailers are paying less, Sec. 133.05(1) which prohibits the “secret payment or allowance of rebates, refunds, commissions or unearned discounts whether in the form of money or otherwise...”, and the Medicaid Fraud Act which prohibits the making of “any false statement or representation of a material fact for use in determining rights to a benefit or payment,” Wis. Stat. Sec. 49.49(4m)(a)(2). 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.

All of 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:

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.”

C. Wis. Stat. 133.05—Count III.

This statute provides in pertinent part: “The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money otherwise,...such payment allowance or extension injuring or tending to injure a competitor or destroying or tending to destroy competition, is an unfair trade practice and is prohibited.”

D. Wis. Stat. 49.49(4m)(a)(2)—Count IV.

This provision states: “No person, in connection with medical assistance, may: 2. Knowingly 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.”

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)¹

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

3. Wisconsin, through its Medicaid Program, purchases hundreds of millions of dollars of drugs for its citizens annually. (See http://dhfs.wisconsin.gov/medicaid4/pharmacy/data_tables/manufacture.asp) For a general description of the program's coverage see Pharmacy Handbook - Claims Submission Section, July 2001 (Exhibit 1 at 3 et. seq.) and see Wisconsin Medicaid Program, 2006 (Exhibit 2 at 2, 6)

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

5. In its simplest form, the Wisconsin Medicaid program works in the following manner. Persons eligible for Medicaid (for eligibility requirements see Ex. 2 at 3) obtain a prescription from a prescriber. They then take this prescription to any Medicaid participating pharmacy and have it filled. The state via the fiscal agent, is then billed for the drug dispensed by the provider.

6. By Federal Regulation Wisconsin is limited in how much it may reimburse pharmacies for drugs prescribed for Wisconsin Medicaid participants. According to 42 C.F.R. sec. 447.331, Wisconsin is required to reimburse pharmacies "the lower of the 1) Estimated acquisition costs plus reasonable dispensing fees established by the agency; or 2) Providers' usual and customary charges to the general public." 42 C.F.R. sec. 447.331.² The "estimated

¹ Plaintiff has filed all relevant depositions and exhibits with the Court and has also prepared an Appendix which contains the excerpted portions of the depositions and exhibits for ease of reference.

² In the case of certain multi-source generic drugs, where the federal government has set a ceiling, a Federal Upper Limit ("FUL"), Wisconsin is to pay the lower of the estimated acquisition cost, the providers' charge or the FUL.

acquisition cost” “means the agency’s best estimate of the price generally and currently paid by providers for a drug marketed or sold by a particular manufacturer or labeler in the package size of drug most frequently purchased by providers.” 42 C.F.R. sec. 447.301.

7. Most of the large drug manufacturers have chosen to participate in Wisconsin’s Medicaid program by signing a federal drug rebate agreement. If a company chooses to participate in the state’s Medicaid Program Wisconsin will reimburse pharmacies for any drug covered by the program. (Pharmacy Handbook – Covered Services and Reimbursement, July 2001, Exhibit 3 at 9) As a consequence, Wisconsin must be able to keep track of the prices of many thousands of drugs on a daily basis. (See Exhibit 4, Manufacturer Table, which lists the participating drug manufacturers.)

8. To enable it to keep track of this huge volume of drugs Wisconsin uses EDS as a fiscal intermediary who, in turn uses First Data Bank to supply it electronically with up-to-date average wholesale prices (“AWPs”) from which Wisconsin estimates the acquisition cost of the drugs purchased by providers by means of the formula described below. (Ex. 2, at 4, 40)

9. From time to time First Data Bank has informed its subscribers that its published AWPs are averages of actual prices paid by retailers. (See Exhibits 5 and 6, excerpted pages of First DataBank’s publications.)

10. Wisconsin uses First DataBank’s AWPs in the following manner. At the time a prescription is presented to a pharmacy, the pharmacy submits a real-time claim to EDS electronically through what is called a Point-of-Sale (POS) claims processing system. Upon receipt, the POS system monitors the reimbursement claim for eligibility, covered drugs, Medicaid cost containment policies, and pricing. EDS then sends a real time response which includes the authorized payment and any patient liability, for example a co-pay. Thereafter EDS

sends Remittance and Status Reports (R&S) to Medicaid certified providers for paid claims. (Ex. 1 at 5-7) First DataBank sends its current average wholesale prices (AWPs) for the thousands of NDC codes listed in its data base to EDS on a weekly basis and this information is entered into the system. These prices become the basis for Wisconsin's reimbursements to providers. (Ex. 3 at 17, and "At-A-Glance" Summary of Most of 2007 Financial Eligibility/Rates in Long Term Support, Ex. 7 at 7.)

11. For the years 1990 to the present Wisconsin estimated the acquisition cost of J&J's drugs using various formulas based on the published AWP ranging from AWP minus 10% to the present AWP minus 13%. (See, e.g. Exhibits 8 and 9 showing the reimbursement formula in different years)

12. 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) (See paragraph 15 below)

13. 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 14 and 15 below)

14. 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)

15. 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)

16. 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)

17. 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. 107-65,³) 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

³ 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.

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)

18. In 2001 First DataBank raised the mark up on J&J’s brand drugs from 20% above the WAC to 25% above the WAC. Prior to this time First DataBank had published the exact AWP’s sent it by J&J. (Parks at 81-83, Ex. 80; Barry at 129; Pearson at 180; Webb at 66-67)

19. J&J was concerned about this change in First DataBank’s conduct (speculating that this change resulted from a Department of Justice investigation) and discussed this change extensively in house. (Ortiz II, Ex. 3)⁴ Initially it was viewed as “a very bad thing. It was a higher price that our payers would have to absorb.” (Ortiz II at 42) Diane Ortiz, a J&J employee, was asked to do a report about this. After research and conversation with managers inside J&J (Ortiz II at 42-49) she concluded, among other things:

With the price action of 1Q 2002, it was discovered that First Data Bank (FDB) published AWP’s higher than what was recommended by the J&J operating companies, moving most products from a 20% spread to a 25% spread (vs. list). Examining AWP prices in Dec 2001 and June 2002 indicate a much greater price increase than the manufacturer intended (a 5% increase in list price would translate into 9.3% increase at the AWP level, including the increase in spread).

For example:

Timeframe:	Dec 2001	June 2002	Result
Spread:	20%	25%	
Price Action:		+5% LP (Q1)	
List Price:	\$100	\$105	+\$5 (+5%)
AWP:	\$120	\$131.25	+\$11.25 (+9.3%)

Since AWP is the basis for reimbursement in many segments, this action will increase the strain on multiple payers. The inflated AWP’s would benefit pharmacies under Medicaid payment procedures and since AWP is the primary

⁴ Ms. Ortiz has been deposed twice, once in this case and once in the MDL. Ortiz II is the deposition taken in this case.

basis of Medicaid reimbursement, the impact to states could be significant. From a Medicare perspective, Congress is actively considering moving away from AWP for payment purposes; J&J has offered assistance in this effort.

Status:

A white paper is being developed by an outside consultant that J&J will provide to key stakeholders (potentially CMS, state Medicaid directors, key managed care organizations, etc.) to alert them to these discrepancies and the lack of control the manufacturer has over the published AWP. The J&J team working on the paper includes: Kathy Schroeder, Kathy Buto, Jerry Holleman, Pat Molino, Bruce Colligen, and Diane Ortiz with input from OC finance and trade relations contacts. The draft paper is currently under review by legal.

Background:

AWPs are not defined in law or regulation and are considered vague, artificial prices established and manipulated at the discretion of the manufacturer but are the cornerstone of a larger pricing infrastructure. AWP is intended to represent the average price at which wholesalers sell drugs to physicians, pharmacies, and other customers. It is considered a flawed pricing mechanism that, although not widely understood, plays a pivotal role in the overall prescription drug pricing and reimbursement systems. (NHPF Issue Brief, June 7, 2002)

(Ortiz II, Ex. 13)

20. Subsequent to Ms. Ortiz' memo and the creation of the white paper group, a J&J employee raised the issue of whether FDB's action was actually a net benefit to J&J and asked that someone find this out. (Ortiz II, Ex. 5)

21. A subsequent e-mail concludes that on balance the rise in J&J's spread is probably "positive" for J&J. (Ortiz II, Ex. 5) Another later e-mail asks whether it was possible for one of J&J's non-branded drugs, Procrit, which, because it was a generic equivalent had not had its spread raised from 20 to 25%, to also have its spread raised. (Ortiz II, Ex. 5)

22. Ultimately no white paper was ever sent to any state authority or to CMS. Indeed, the primary investigator was never informed about what happened to it. (Ortiz II at 179-81) Nor did J&J ever alert Wisconsin to the fact that First Data Bank had raised the AWP of its drugs

from 20% above the wholesale purchase price to 25%. (Parks at 143) Wisconsin continued to use J&J's average wholesale prices as reported by First DataBank in its reimbursement formula thereafter.

23. In 2003, The House Committee on Energy and Commerce expanded Congress' Medicare investigation into pricing practices in the state Medicaid program. On June 26, 2003, Chairman Billy Tauzin (R.-La.) and Oversight and Investigations Subcommittee Chairman James Greenwood (R.-Pa.) wrote as follows:

The Committee on Energy and Commerce is conducting an investigation into pharmaceutical reimbursements and rebates under Medicaid. This inquiry builds upon the earlier work by this Committee on the relationship between the drug pricing practices of certain pharmaceutical companies and reimbursements rates under the Medicare program. In that investigation, the Committee uncovered significant discrepancies between what some pharmaceutical companies charged providers for certain drugs and what Medicare then reimbursed those providers for dispensing those drugs. This price difference resulted in profit incentives for providers to use the drugs of specific companies as well as higher costs to the Medicare system and the patients it serves. For example, we learned that one manufacturer sold a chemotherapy drug to a health care provider for \$7.50, when the reported price for Medicare was \$740. The taxpayer therefore reimbursed the doctor almost \$600 for dispensing the drug and the cancer patient had a \$148 co-payment. Such practices are unacceptable in the view of the Committee, which is why we are in the process of moving legislation to address these abuses.

The Committee has similar concerns regarding drug prices in Medicaid, which has a substantially larger pharmaceutical benefit than Medicare.

House Committee on Energy and Commerce Press Release, Tauzin, Greenwood Expand Medicaid Fraud Investigation (June 26, 2003), available at http://energycommerce.house.gov/108/News/06262003_1003.htm.

24. Notwithstanding this investigation J&J continues to publish, or participate in the publication of, inflated wholesale prices.

ARGUMENT

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

The Medicaid program was well intentioned and well designed. It was intended to help the very neediest citizens obtain basic health care, and it was designed to do so at the lowest cost to the taxpayers by paying providers of drugs no more than their acquisition cost plus a dispensing fee. (PUF 2, 6) The Achilles heel of the program was the fact that the State Medicaid program relied on others to supply the program with the information its employees needed to estimate accurately the acquisition cost of the drugs their citizens needed. (PUF 8-11) Johnson & Johnson (and the other defendants as well) subverted this system by flooding the pricing compendiums Wisconsin used to estimate drug costs with false and inflated prices. (PUF 14 et. seq.) Tautologically, had Johnson & Johnson published its true price in the pricing compendiums it would have been easier to estimate J&J's true wholesale prices. This is an enforcement action brought by the Attorney General of the State of Wisconsin to enjoin defendant J&J's participation in this illicit scheme.

A. Background To Motion.

Medicaid is a voluntary program. Drug manufacturers may elect to participate or not. (PUF 4) 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).

One of the most important Medicaid rules is the rule limiting the amount of money states may pay as reimbursement to providers. The rule says: “The agency payments for brand name drugs...must not exceed in the aggregate, payment levels that the agency has determined by applying the lower of the—(1) Estimated acquisition costs plus reasonable dispensing fees established by the agency; or (2) Providers’ usual and customary charges to the general public.” 42 C.F.R. sec. 447.331(b). (Or in the case of multi-source drugs with upper limits, the lower of the estimated acquisition cost, the usual and customary charge or the FUL.) This rule is designed to maximize the benefits of the program to society’s neediest people while holding down the cost to the taxpayers. There is no exception to this rule and defendant J&J was required to be aware of it. *Heckler v. Community Health Servs.*, 467 U.S. 51, 63 (1984).

Because of the huge volume of drugs eligible for reimbursement, Wisconsin, as most other states, utilizes the services of First DataBank, a pricing service, to provide it with up to date pricing information in electronic form which it can utilize within its payment system. (PUF 8) First DataBank purports to provide Wisconsin with an accurate statement of the average wholesale prices of the drugs it lists. As First DataBank stated to its customers in 1999: “As you know, AWP represents the average wholesale price; the average price a wholesaler would charge a customer for a particular product. The operative word is average. AWP was developed to provide a price which all parties could agree upon for electronic processing to be possible.” (PUF 9) Wisconsin uses these prices on a daily basis. Wisconsin, however, has added a discount to First DataBank’s published prices through the years. For the years 1990 to the present Wisconsin estimated the acquisition cost of J&J’s drugs using various formulas based on the published AWP ranging from AWP minus 10% to the present AWP minus 13%. (PUF 11)

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 14-16)

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 16)

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%. J&J has never disclosed this to Wisconsin. These false prices were plugged into First DataBank's data base which Wisconsin used to estimate the actual acquisition cost of the drugs purchased by providers leading to massive overpayments by Wisconsin. (PUF 8)

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 15)

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 16) This change was requested by the legal group. (PUF 16)

Then, at some point during 2001, First DataBank increased the spread on J&J's brand drugs from 20% to 25% without informing J&J. This was the first time First DataBank had not reported the AWP's sent to it by J&J. Consternation ensued inside J&J. Indeed, the initial reaction within J&J was that this was "a very bad thing. It was a higher price that our payers would obviously have to absorb." (PUF 18) And an employee named Diane Ortiz was requested to look into the matter and report up the chain of command. Here is what she wrote in part:

Status:

A white paper is being developed by an outside consultant that J&J will provide to key stakeholders (potentially CMS, state Medicaid directors, key managed care organizations, etc.) to alert them to these discrepancies and the lack of control the manufacturer has over the published AWP's. The J&J team working on the paper includes: Kathy Schroeder, Kathy Buto, Jerry Holleman, Pat Molino, Bruce Colligen, and Diane Ortiz with input from OC finance and trade relations contacts. The draft paper is currently under review by legal.

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Thus, at least for a brief moment, J&J looked like it would do the right thing and explain to the state Medicaid programs that they were now paying more for J&J drugs and the reason for it. These good intentions slowly eroded. First, after Ms. Ortiz' report one J&J employee questioned whether this price rise might be in J&J's interest. Another suggested that maybe J&J could get First DataBank to raise the spread on J&J's generic drug, Procrit. And a later one

concluded that, on balance, the price rise was favorable to J&J. The white paper to let state Medicaid directors know what was happening to J&J drugs just mysteriously disappeared. And no further word was heard about it by anyone, including Ms. Ortiz who was a pivotal figure in its creation. (PUF 18-22)⁵

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 several 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.⁶

⁵ J&J has asserted a privilege in connection with the white paper. Shortly plaintiff will move to compel this document.

⁶ *See Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253, 257 n.3 (2nd 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. . . ."

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..." *FTC v. Crescent Publ'g Group, Inc.*, 129 F.Supp.2d 311, 321 (S.D.N.Y 2001).⁷ 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

⁷ Wisconsin looks to FTC case law in interpreting its consumer protection statutes. See *Tim Torres, Inc.* supra at 142 Wis.2d 66-67.

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.)

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 (4th 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 (7th 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 unlawful conduct is compounded by its failure to come clean when J&J officials saw that First DataBank was further abusing the opacity of the drug market by extending J&J's own misrepresentations by another five percent. For a couple of months it looked like J&J officials were going to tell the States that First DataBank had increased J&J's already exaggerated 20% markup to 25%. A number of employees and an outside consultant began work on a white paper which was to be publicly released and sent to the states telling them that this increase in the spread was not J&J's doing.

Then on September 22, 2002, Joseph Scodari, World Wide Chairman of the Pharmaceutical Business wrote: "...we need to understand if this is potentially a net benefit to J&J (i.e, Procrit would benefit from this situation if determined to be real) or a net loss, so that we can then take appropriate actions."

In response, on September 27, 2002, Bill Pearson concluded that "net impact on J&J brands is "probably" positive under existing payment mechanisms for Medicare, Medicaid and private party." Following this the White Paper just disappeared with the chief catalyst for the paper, Diane Ortiz, never even being informed of what happened to it. Although it is hard to believe, to this day she says she has no idea of what the final decision was in connection with the

white paper. (PUF 19-23) Thus, J&J simply continued its pattern of publishing false prices knowing that they were even more separated from reality as a result of First DataBank's conduct.

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 14- 16) 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.

3. J&J Has Participated In A Scheme to Provide Pharmacies With Secret Rebates.

Section 133.05(1) prohibits the "secret payment or allowance of rebates, refunds, commission or unearned discounts whether in the form of money or otherwise..." Defendant's scheme violates this provision.

In *Obstetrical & Gynecological Associates of Neenah, S.C. v. Landig*, 129 Wis.2d 362, 384 N.W.2d 719 (Ct. App. 1986), the interior decorator for the plaintiff Obstetrical & Gynecological Associates, obtained discounts from the published price of her suppliers, which she did not report to the plaintiff. Instead, she collected her fee based on the undiscounted price.

The court held that the plaintiff stated a cause of action, rejecting the defense that because the decorator was not a competitor of the plaintiff, the plaintiff could not show the type of direct injury contemplated by the statute:

There is no need to make the direct-indirect distinction under our statute. Section 133.18(1), Stats., explicitly allows any person injured directly *or indirectly* to sue upon this statute. Similar language is not found in the federal law. *See* 15 U.S.C.A. § 15 (1973). This, coupled with the legislature's instruction that we give the most liberal construction to achieve the aim of competition, compels us to the conclusion that an ultimate consumer who pays a higher price for goods and services indirectly due to a secret rebate comes within the ambit of the statute. In addition to the clear wording of the statute, we perceive a valid policy reason for our holding. By encouraging ultimate consumers (tertiary level) to bring lawsuits for violation of this section, the perpetrators will evaluate risk differently. They may decide that it is not worth the risk because of the chance of having to pay treble damages under sec. 133.18(1). OB-GYN, we conclude, has standing.

129 Wis.2d 362, 371-72, 384 N.W.2d 719, 723-24 (Ct.App.1986).

The only difference between this case and the *Landig* case is that here plaintiff is suing the party responsible for the hidden discounts, not the party tendering the bill. For that reason this case is stronger than *Landig*. *Landig* permitted the person reaping the benefit of the secret discount to be sued, but the Act is even more specifically directed at the party providing the secret discounts. The statute says: "The secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise...is an unfair trade practice and is prohibited." Defendant's conduct in providing phony, inflated published prices for its drugs while at the same time either selling these drugs directly to pharmacies, or to wholesalers and through them to pharmacies, at prices which are secretly and substantially discounted from the published prices is exactly what the Act precludes.⁸

This result is consistent with the application of FTC law over multiple decades:

⁸ The Act requires an injury to competition. As this case makes clear secret discounts are the kind of injury the Act prohibits.

Preticketing at fictitious and excessive prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged as well as to the value of the product acquired. 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.

Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition.

Clinton Watch Co. v. Federal Trade Com., 291 F.2d 838, 840 (7th Cir. 1961)

The practice of a drug manufacturer printing false prices for use by the retail pharmacy is especially noxious in the context of the Medicaid program. It robs taxpayers of their tax money, reduces the funds available to help treat society's neediest citizens, and creates an incentive to prefer the drug with the biggest spread instead of the most efficient or inexpensive drug.

4. J&J's Conduct Violates the Medicaid Fraud Act.

The Medicaid Fraud Act is a statutory creation which sets forth the only elements necessary to prove a violation. It states simply: "No person, in connection with medical assistance, may: 2. Knowingly 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." Wis. Stat. 49.49(4m)(a)(2).

As we have already seen, price is a material fact as a matter of law. And it is beyond dispute that the prices J&J has been purveying are false. J&J knows that Medicaid uses these false prices in connection with its Medicaid program—it is a matter of public record. Nothing more is required by statute.

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).

The same analysis applies to Count IV, the Medicaid Fraud count. Section 49.49 under the heading “(1) Fraud. (a) Prohibited conduct”, says: “No person, in connection with a medical assistance program, may:..2. Knowingly and willfully make or cause to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment.” Defendant admits to making false statements about the prices of its drugs—price representations are material as a matter of law—and J&J knew that these prices were being used in determining reimbursement for the state’s pharmacies and providers.

This provision further holds that the making of such statements is, without more, a felony for which penalties may be assessed: “Penalties. Violators of this subsection may be punished as follows:

1. In the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing by that person of items or services for which medical assistance is or may be made, a person violating this subsection is guilty of a Class H felony, except that, notwithstanding the maximum fine specified in s. 939.50(3)(h), the person may be fined not more than \$25,000.

2. In the case of such a statement, representation, concealment, failure, or conversion by any other person, a person convicted of violating this subsection may be fined not more than \$10,000 or imprisoned for not more than one year in the county jail or both.

Section 49.49(1)(b). Thus, the very making of a false statement at odds with this provision renders defendant not only liable for the judgment plaintiff requests now, but liable for penalties as well. [Section 49.49, as 100.18, has a separate section governing damages, 49.49(1)(c).]

A different analysis is required, but the result is the same, in connection with plaintiff's secret discount claim under Wis. Stat. 133.05. That section bars the "allowance of rebates or unearned discounts whether in the form of money or otherwise tending to destroy competition." Unlike the statutes cited above this statute obviously requires a showing beyond the conduct of the defendant—an injury to competition—for Wisconsin to prevail on liability. But this latter element is present as a matter of law according to *Obstetrical & Gynecological Associates of Neenah, S.C. v. Landig*, 129 Wis.2d 362, 384 N.W.2d 719 (Ct.App. 1986). There the court held that concealed discounts, such as those present here, constituted an injury to competition which the Act was intended to cover.

In sum, each of these statutes (with the *Landig* twist) 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 than the federally mandated cap on drug payments 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.⁹

⁹ 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.

V. RELIEF SOUGHT

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

Dated this 23rd day of May, 2007.



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