



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Lara A. Sutherlin
Assistant Attorney General
sutherlina@doj.state.wi.us
608/267-7163
FAX 608/267-2778

July 23, 2007

The Honorable Richard G. Niess
Dane County Circuit Court
215 South Hamilton Street
Room 5103
Madison, Wisconsin 53703-3291

Re: State of Wisconsin v. Amgen et al.
Case No. 2004-CV-1709

Dear Judge Niess:

Enclosed for filing is the State of Wisconsin's (Corrected) Brief in Support of Its Claim to a Trial by Jury. I have served the brief and this letter on all counsel of record by posting both on LexisNexis.

Thank you.

Sincerely,

Lara A. Sutherlin
Assistant Attorney General

c: All Counsel of Record by LexisNexis

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

ABBOTT LABORATORIES, et al.,

Defendants.

**THE STATE OF WISCONSIN'S (CORRECTED¹) BRIEF IN SUPPORT OF ITS CLAIM
TO A TRIAL BY JURY**

INTRODUCTION

In its summary judgment opinion of May 20, 2008, this Court raised the issue of whether the parties were entitled to a jury trial in this action given the Court's assumption that the State sought only equitable remedies. (Order on Pl.'s Mots. For Summ. J. at 5 n.3.) The Court requested that the parties submit a brief addressing this issue. The State submits this brief in response to the Court's request, establishing that the State has legal claims in addition to its equitable claims, and thus has a right to a jury trial in this action.

The State prosecutes this action both as the enforcer of Wisconsin's laws and as an injured party (*i.e.*, the payor of Medicaid claims), and as such seeks both legal and equitable

¹ In preparing the original brief, the State relied on an on-line version of Blackstone's *Commentaries on the Laws of England* (1778). At the time of filing, the State learned it could not print out the online version of the Blackstone's *Commentaries* from Google Books and was only able to locate a post-1848 version in hard copy, which differed slightly. The State has now obtained a pre-1848 hard copy of Blackstone's *Commentaries* (1769) and attaches this version. Since the page numbers of the two versions differ, the State submits a corrected brief with page numbers citing to the pre-1848 version.

remedies. The Second Amended Complaint includes legal claims under three chapters of the Wisconsin Statutes—the Deceptive Trade Practices Act (Wis. Stat. § 100.18), the Trusts and Monopolies Act (Wis. Stat. § 133), and the Medicaid Fraud statute (Wis. Stat. § 49.49). The misimpression that the State has only equitable claims may have been the result of the fact that the State moved for partial summary judgment on just its § 100.18 claim and just for the injunctive relief available thereunder. In a footnote to its decision denying the injunction, the Court expressed concern about the parties’ right to a jury trial for purely equitable claims:

The court deliberately uses the term “fact finder” because, although this case had been scheduled for jury trial(s) commencing in February, 2009, it does not appear that plaintiff’s §100.18 enforcement action entitles it to a jury, given its equitable nature under §100.18(11), Stats. *See also State v. Excel Management Services, Inc.*, 111 Wis. 2d 479, 331 N.W.2d 312, (1983). There is no jury trial right in equitable actions. *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667 (1917). The parties’ entitlement to jury trial on this and plaintiff’s other claims for relief [unjust enrichment also sounds in equity, *see General Split Corp. v. P & V Atlas Corp.*, 91 Wis. 2d 119, 124, 280 N.W.2d 765, 768 (1979)] will be addressed at the next status conference.

(Order on Pl.’s Mots. For Summ. J. at 5 n.3.) The Court noted in an earlier footnote that “the remedies sought do not include common-law ‘damages,’ but are purely equitable.”² (Id. at 3 n.2.) However, the State has legal claims under each of the three statutory causes of action, and is entitled to a jury trial on them. The State’s legal claims are set forth below.

Finally, it is not the State’s understanding that the Court questioned whether legal claims brought under the three statutes should be tried by a jury, but simply whether the State *had* legal claims. However, to be complete, the State sets forth the legal basis for its entitlement to a jury

² The Court cited to the injunctive relief available under § 100.18(11)(a), which provides that actions to enjoin violation of this section may be brought by the Department of Agriculture, Trade and Consumer Protection (“DATCP”). In this action, the State seeks injunctive relief under § 100.18(11)(d), which authorizes the DATCP or the Department of Justice to seek injunctive relief.

on its legal claims. *See Village Food & Liquor Mart v. H & S Petroleum, Inc.*, 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177.

I. THIS ACTION CONTAINS BOTH LEGAL AND EQUITABLE CLAIMS, AND THE STATE IS ENTITLED TO A JURY ON THE LEGAL CLAIMS.

Whether an “action be one at law or in equity is material on the question of whether it must be tried to a jury” *Kamke v. Clark*, 268 Wis. 465, 478, 68 N.W.2d 727, 731 (1955). In contrast to actions at law, as this Court noted, there is no jury trial right in purely equitable actions. *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667 (1917).

A. The State Seeks Legal Relief to Be Decided by the Jury Under Each of the Three Statutory Causes of Action.

1. The State Seeks Legal Relief to Collect Damages as an Injured Party.

The State is an injured party in this action. Specifically, as a consequence of defendants’ false and inflated prices, Wisconsin’s Medicaid program has paid more for prescription drugs than it would have if defendants had published their true wholesale prices. (*See, e.g.*, Second Am. Compl. ¶66.) The State seeks legal relief to collect damages as an injured party under each of the three statutory causes of action. “Money damages are a remedy at law.” *Loth v. City of Milwaukee*, 2008 WI App 12, ¶22, 745 N.W.2d 693.

Both the Deceptive Trade Practices Act and the Trusts and Monopolies Act provide that persons³ injured by violations of the respective provisions can recover damages. Specifically, a “person suffering pecuniary loss because of a violation of § 100.18(1) may recover damages under § 100.18(11)(b)2.” *Novell v. Migliaccio*, 2008 WI 44, ¶ 26, 749 N.W.2d 544. Section 100.18(11)(b)2⁴ provides, in part:

³ Under Wisconsin law, the State is a “person.” *See* Wis. Stat. § 990.01(26) (“‘Person’ includes all partnerships, associations and bodies politic or corporate.”)

⁴ Although the State did not specifically plead a damages request under § 100.18(11)(b)2 and § 100.263 in its Second Amended Complaint, the defendants are well aware that the State is

Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees.

Similarly, a person suffering injury because of a violation of the Trusts and Monopolies Act may recover *treble* damages under § 133.18(1)(a):

[A]ny person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees....

Finally, under the Medicaid Fraud statute, the State is entitled to “an amount reasonably necessary to remedy the harmful effects of the violation.” Wis. Stat. § 49.49(6). These claims for damages under each of the three statutes will be tried to a jury.

2. The State Seeks Legal Relief in the Form of Forfeitures.

The State’s requests for forfeitures are legal claims. “[A]n action to recover a forfeiture ... is a statutory action at law.” *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 162, 288 N.W.2d 129, 134 (1980). The State requests forfeitures under each of the three statutes: the Deceptive Trade Practices Act pursuant to §§ 100.26(4) and 100.264(2), the Trusts and Monopolies Act pursuant to § 133.05(4), and the Medicaid Fraud statute pursuant to § 49.49(4m)(b). Under these claims, liability and the number of violations are determined by a jury and the monetary amount of the forfeiture (which is multiplied by the number of violations) is determined by the trial court. *Bylewski*, 94 Wis. 2d at 162 (holding “[a] suit for an injunctive order differs from an action to recover forfeitures in that an action for injunctive relief before a

seeking damages under § 100.18. In fact, the defendants relied upon the fact that the State is seeking damages to oppose the State’s motion for summary judgment under this statute. The defendants argued: “Plaintiff continues to ignore that this is not merely an injunction case; Plaintiff *is* seeking damages. And, as the Supreme Court holds in *Novell*, a claim for damages requires proof of causation.” (Defs.’ Opp’n to Plf.’s Mot. for Recons. at 4.) If the Court believes it is necessary that the State amend its complaint to include these provisions, the State will do so. Given the defendants’ reliance on the State’s claim for damages and the ongoing discovery regarding damages, the defendants will suffer no prejudice from this amendment.

court of competent jurisdiction is an action in equity as opposed to a forfeiture action, which is a statutory action at law.”)

3. The State Seeks Legal Relief to Collect Damages for its Citizens.

The Second Amended Complaint states that “Wisconsin *and its citizens participating in the Medicare Part B* program have been harmed by defendants’ deceptive conduct.” (Second Am. Compl. ¶82) (emphasis added.) The State seeks damages for the injuries of these citizens. The Deceptive Trade Practices Act has a general damages provision not limited to the party bringing the action. Specifically, the Act provides for “an amount reasonably necessary to remedy the harmful effects” of a violation of the act. Wis. Stat. § 100.263. Thus, there is a legal remedy for harm suffered under this Act by the State’s citizens.

B. Simply Having Equitable Claims in the Case Does Not Preclude the Right to a Jury Trial on the Legal Claims.

Simply having equitable claims in this action does not preclude the right to a jury trial on the legal claims. When a “legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.” *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). In sum, the State has a right to a jury trial on liability, damages, and forfeitures under all three chapters of the Wisconsin Statutes.

II. THE STATE IS ENTITLED TO A JURY TRIAL ON ALL OF ITS LEGAL CLAIMS.

Although not the question posed by the Court in its May 22, 2008 Order, the State will briefly articulate why it has a constitutional right to have all its legal claims tried to a jury.

The right to a trial by jury is grounded in Article I, § 5 of the Wisconsin Constitution, which preserves "inviolable" the right to trial by jury:

The right of trial by jury shall remain inviolable, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.

Wis. Const. art. I, § 5.

In *Village Food*, the Wisconsin Supreme Court addressed the issue of when a party has a constitutional right to have a statutory claim tried to a jury pursuant to Article I, § 5. *Village Food*, 254 Wis. 2d 478, ¶ 7. It concluded the right exists when: “(1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848[;] and (2) the action was regarded at law in 1848.” *Id.* ¶ 11. In 2007, the court again applied the “Village Food test,” reiterating that “the modern statute requires more than a passing resemblance to the common law action; it must be ‘essentially a counterpart’ to the common law action.” *State v. Schweda*, 2007 WI 100, ¶ 34, 303 Wis. 2d 353, 736 N.W.2d 49.

Applying this framework to the instant case, it is clear that all of the State’s legal claims are essential counterparts to common law causes of action that both existed at the time of Constitutional Convention in 1848 and provided for a remedy at law at that time. The State therefore has a constitutional right to a jury trial on each.

A. The State Is Entitled To A Trial By Jury On Its Legal Claims Pursuant To Wisconsin’s Deceptive Trade Practices Act, Wis. Stat. § 100.18.

Counts I and II of the State’s Second Amended Complaint allege defendants violated Wisconsin’s Deceptive Trade Practices Act, Wis. Stat. § 100.18, by, *inter alia*, making representations that were untrue, deceptive and misleading. As explained above, among other claims, the State seeks legal damages pursuant to § 100.18(11)(b)2 of this Act. Such claims are routinely tried to a jury. *See, e.g., Torres Enters., Inc. v. Linscott*, 142 Wis. 2d 56, 416 N.W.2d 670 (Ct App. 1987) (jury instructions regarding damages under § 100.18); *K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792 (appeal of jury verdict on claims under the Deceptive Trade Practices Act); *Zeller v. Northrup*

King Co., 125 Wis. 2d 31, 370 N.W.2d 809 (Ct. App. 1985) (appeal of jury verdict on § 100.18 misrepresentation claims); *Radford v. J.J.B. Enters., Ltd.* 163 Wis. 2d 534, 472 N.W.2d 790 (Ct. App. 1991) (appeal of jury verdict on § 100.18 misrepresentation claims). Nothing in the case law warrants a divergence from this longstanding practice.

In *Village Food*, the court analyzed pre-statehood unfair trade practice claims. Its analysis makes clear that Wisconsin’s Deceptive Trade Practices Act has essential counterparts in pre-1848 common law. In *Village Food*, the court examined whether there was a right to jury trial under the Unfair Sales Act,⁵ Wis. Stat. § 100.30. Relying heavily on Blackstone’s *Commentaries on the Laws of England* (1778), which included a chapter on “Offences Against Public Trade,” the court recognized that the public trade offenses of “forestalling the market,” “regrating,” and “engrossing,” “are of the same ‘nature’ as the present cause of action under the Unfair Sales Act.” *Village Food*, 254 Wis. 2d 478, ¶ 27 (citing 4 William Blackstone, *Commentaries on the Laws of England*, ch. 12, at 154-60 (1778)). “These offenses were designed to prevent private citizens from trading outside of England’s regulated mercantile system,” the court explained, and “were enforced to ensure that revenue was generated for the holders of the public market and that dealers and speculators were unable to corner the market.” *Id.* In holding that these unfair trade practices were essential counterparts to the Unfair Sales Act, the court reasoned “[t]hese offenses are clearly forerunners of modern unfair trade practice statutes, as each involves the prohibition of deliberate manipulation of market prices by a market participant in a controlled market.” *Id.*

⁵ The court examined the Unfair Sales Act as a whole and did not confine the analysis to the specific provision pertaining to the sale or purchase of motor fuel at issue in the action. See *Village Food*, 2002 WI 92, ¶¶18-22.

To be sure, the Wisconsin Deceptive Trade Practices Act is part of the “modern unfair trade practice statutes,” whose roots can easily be found in common law unfair trade offenses. Indeed, just as the *Village Food* court found forerunners to the Unfair Sales Act, a forerunner to Deceptive Trade Practices Act can be found in Blackstone’s *Commentaries*⁶—the offense of “cheating.” See 4 Blackstone, *Commentaries*, ch. 12, at 157-58 (1769) (attached). Blackstone defines “cheating,”⁷ in part, as an “offence. . . against public trade,” which “cannot be carried on without a punctilious regard to common honesty, and faith between man and man.” *Id.* Like the modern Deceptive Trade Practices Act, § 100.18, the offense of cheating prohibits the selling of

⁶ The Wisconsin Supreme Court has repeatedly looked to Blackstone's *Commentaries on the Laws of England* to determine whether an action was recognized prior to statehood. See *Dane County v. McGrew*, 2005 WI 130, ¶ 23 n.18, 285 Wis. 2d 519, 699 N.W.2d 890; *State v. Hansford*, 219 Wis. 2d 226, 237, 580 N.W.2d 171 (1998); and *Norval v. Rice*, 2 Wis. 22 (1853).

⁷ Blackstone defined cheating as follows:

CHEATING is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to prevent deceits in particular trades, and which are chiefly of use among the traders themselves. For so cautious has the legislature been, and so thoroughly abhors all indirect practices, that there is hardly a considerable fraud incident to any branch of trade, but what is restrained and punished by some particular statute. The offence also of breaking the affire of bread, or the rules laid down by law, and particularly by statute 31 Geo. II. c. 29. and 3 Geo. III. c. 11. for ascertaining it's price in every given quantity, is reducible to this head of cheating: as is likewise in a peculiar manner the offence of felling by false weights and measures; the standard of which fell under our confederation in a former volume. . . [T]he general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent to the owner, he shall suffer such punishment by imprisonment, fine pillory, transportation, whipping, or other corporal pain, as the court shall direct.

4 Blackstone, *Commentaries*, ch. 12, at 157-158 (citations omitted)

goods or services through deceitful means such as “deceitful practice” and “false pretense.” *Id.* at 158.⁸ While cheating was a criminal offense in 1848 and the Deceptive Trade Practice Act is civil in nature, “[t]he fact that one is undertaken in the civil context, rather than the criminal context, should not deprive the parties of a jury trial in this instance.” *Village Food*, 254 Wis. 2d 478, ¶ 29. As the common law offense of cheating,⁹ which existed at common law prior to 1848, is essentially a counterpart to the Deceptive Trade Practices Act, the first prong of the *Village Food* test is met.

The Deceptive Trade Practices Act also meets the second prong of the two part *Village Food* test, as legal remedies were available for its forerunner common law offense. The

⁸ The appeals court in *State v. Ameritech Corp.*, 185 Wis. 2d 686, 697, 517 N.W.2d 705 held there was no right to a jury trial right under Wis. Stat. § 100.18 in a forfeiture action. This case has no precedential value for two reasons. First, in the instant case, the State seeks damages pursuant to §100.18(11)(b)2, a subsection under which plaintiffs regularly receive a jury trial. *See, e.g., Torres Enters., Inc. v. Linscott*, 142 Wis. 2d 56, 416 N.W.2d 670 (Ct App. 1987) (jury instructions regarding damages under § 100.18). Second, and equally significant, the holding of *Ameritech* was modified by the Court in *Village Food*, which rejected the rigid application of the two prong test by the *Ameritech* court. *Village Food*, 254 Wis. 2d 478, ¶ 11. In so holding, the *Village Food* court stated:

We conclude, however, that this requirement from *Ameritech*—that the statute must specifically “codify” a prior common law cause of action before the right to a jury trial is warranted—interprets our prior case law and the state constitution too narrowly. Instead, consistent with our prior case law, we conclude that a party has a constitutional right to have a statutory claim tried to a jury when: (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and (2) the action was regarded at law in 1848.

Id. Applying the broader, two prong test proscribed by the *Village Food* court, it is plain that the offense of cheating was a forerunner to § 100.18, providing for a remedy at law. *See discussion.*

⁹ Like engrossing, regrating, and forestalling, cheating was a criminal offense under the common law. *Village Food*, 254 Wis.2d 478, ¶29. However, like the Unfair Sales Act, the Deceptive Trade Practices Act also formerly had a criminal provision. *See Gallego v. Wal-Mart Stores, Inc.*, 2005 WI App 244, ¶15, 288 Wis.2d 229, 240, 707 N.W.2d 539, 545. The *Village Food* court found that the “fact that one is undertaken in the civil context, rather than the criminal context, should not deprive the parties of a jury trial in this instance.” *Village Food*, 254 Wis.2d 478, ¶29.

remedies provided at 1848 for the offense of “cheating” were criminal in nature, allowing for fines and forfeitures, among other things. *See* 4 Blackstone, *Commentaries*, ch. 12, at 158. This relief was legal in nature in 1848, thus satisfying the second prong of the *Village Food* test. *Schweda*, 303 Wis. 2d 353, ¶142 (dissent) (stating that pre-1848 criminal actions were actions at law).

In sum, both requirements for jury trial, as outlined by the Wisconsin Supreme Court in *Village Food*, are met. The State therefore has a constitutionally guaranteed right to a jury trial for its legal claims under Wisconsin’s Deceptive Trade Practices Act, § 100.18(1).

B. The State Is Entitled To A Jury Trial On Its Legal Claims Pursuant To The Wisconsin Trust and Monopolies Act.

The State alleges in Count III of its Second Amended Complaint that the defendants have violated the Wisconsin Trust and Monopolies Act, § 133, specifically its prohibition against the secret payment or allowance of rebates, refunds, commissions or unearned discounts that affected competition. Wis. Stats. § 133.05.

Like the Unfair Sales Act and the Deceptive Trade Practices Act, the Wisconsin Trust and Monopolies Act has forerunners in the pre-1848 common-law unfair trade practice offenses. As the Act states, its intent is to “safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory business practices which destroy or hamper competition.” Wis. Stats. § 133.01. In fact, the Trust and Monopolies Act has a particularly similar counterpart in pre-1848 common law—namely, the specific offense of “monopolies,” which is listed in Blackstone’s *Commentaries* in the same chapter as the three common law offenses relied on by the *Village Food* court. *See* 4 Blackstone, *Commentaries*, ch. 12, at 159-60 (citations omitted):

MONOPOLIES are much the same offence in other branches of trade, that engrossing is in provisions: being a licence or privilege allowed by the king for the sole buying and selling, making, working, or using, of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by sir Edward Coke, in the beginning of the reign of king James the first: but were in great measure remedied by st 21 Jac. I. c. 3. which declares such monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions;) and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb.

Thus, there can be no doubt that a cause of action under the Trust and Monopolies Act fulfills the first requirement for a right to a jury trial—that the cause of action created by the statute existed, was known, and was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848.

A cause of action under the Trust and Monopolies Act also fulfills the second requirement—that the action was legal in nature in 1848. *Village Food*, 254 Wis. 2d 478, ¶33. As the *Village Food* court stated, an “action seeking money damages is one at law.” *Id.* According to Blackstone, “monopolists [were] punished with the forfeiture of treble damages and double costs, to those whom they attempt[ed] to disturb.” 4 Blackstone, *Commentaries*, ch. 12 at 159. Since the relief was damages, that action was legal in nature in 1848. Here again, because both requirements for a right to a jury are satisfied, the State has a constitutionally guaranteed right to a jury trial in its cause of action under the Wisconsin Trust and Monopolies Act.¹⁰

¹⁰ It is significant to note that causes of action under the Trust and Monopolies Act are routinely tried before a jury. *See, e.g., Indep. Milk Producers Co-op v. Stoffel*, 102 Wis. 2d 1, 298 N.W.2d 102 (Ct. App. 1980) (milk producer co-op’s case alleging conspiracy in restraint of trade under the Wisconsin Trust and Monopolies Act litigated before a jury); *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 183 Wis. 2d 220, 515 N.W.2d 305 (Ct. App.

C. The State Is Entitled To A Jury Trial For Its Medicaid Fraud Claim.

Finally, the State alleges defendants violated the Medicaid Fraud statute, Wis. Stat. § 49.49(4m)(a)2 in Count IV of its Second Amended Complaint. It, too, is grounded in pre-1848 common law offenses, which provided remedies at law.

As made evident by its name, the Medicaid Fraud statute has a counterpart in common law fraud. The text of § 49.49(4m)2 (“false statements or representations”), confirms the analogy. Black’s Law Dictionary defines “Fraud” to include “false representations.” Black’s Law Dictionary, 584 (5th Ed. 1979). Black’s draws a similar parallel between “false representation” and “misrepresentation.” *Id.* at 903. The essential nature of § 49.49(4m)2 is common law fraud and misrepresentation. There is no question that common law fraud predated statehood at 1848. *See Getty v. Rountree*, 2 Pin. 379 (Wis. 1850).¹¹

Additionally, the Medicaid Fraud statute “differs only slightly” from the common law offense of “concealing a treasure-trove,” found in the Chapter 9 of Blackstone’s *Commentaries*, entitled “Misprisons and Contempts, Affecting the King and Government.” *See* 4 Blackstone, *Commentaries*, ch. 9 at 121-22 (attached); see also *McGrew*, 285 Wis. 2d 519, ¶ 21 (finding a modern statutory action that “differs only slightly” from a common law action satisfies prong one of the *Village Food* test). Prior to 1848, it was a common law offense to conceal a treasure-trove, which belongs to the king. *See* 4 Blackstone’s *Commentaries*, ch. 9 at 121-22. Like the

1994) (jury determined violation of the unfair trade practice provisions of Wis. Stat. §§ 133.05(1) and (2)).

¹¹ The court in *Village Food* rejected the invitation to find that common law fraud as described in *Getty* was an essential counterpart to the Unfair Sales Act. 254 Wis. 2d 478, ¶ 25. However, the Unfair Sales Act dealt with pricing that was more accurately compared to other common law causes of action in 1848. For the reasons discussed above, the Medicaid Fraud statute “differs only slightly” from common law fraud by focusing solely on the injuries to the State. *McGrew*, 285 Wis. 2d 519, ¶ 21.

Medicaid Fraud statute, this common law offense prohibits the taking of money from the government through deception or fraudulent means.

For these reasons, common law fraud and the offense of “concealing a treasure trove” differ only slightly from today’s Medicaid Fraud statute. As such the Medicaid Fraud statute is an essential counterpart to those offenses, and prong one of the *Village Food* test is met.

With respect to prong two of the *Village Food* test, claims for fraud were actions at law, which carried a right to a jury trial at the time of the Wisconsin Constitution. *Bender v. Town of Kronenwetter*, 2002 WI App 284, ¶ 18, 258 Wis. 2d 321, 654 N.W.2d 57 (analyzing the question of whether fraud claims were “known to the common law in 1848” (internal citations omitted)). Likewise, the Supreme Court in *Village Food* recognized that actions for fraud and the like were “at law”. *See Village Food*, 254 Wis. 2d 478, ¶ 33. And the penalty for “concealing a treasure-trove” was punishable by fine or imprisonment, also remedies at law. *Schweda*, 303 Wis. 2d 353, ¶142 (dissent) (stating pre-1848 criminal actions were actions at law). The fact that §§ 49.49(4m) and 49.49(6) offer additional remedies is no matter. Statutes that offer equitable remedies as an additional means of enforcement are not necessarily barred from fulfilling the second prong of the test. *Village Food*, 254 Wis. 2d 478, ¶ 29.¹²

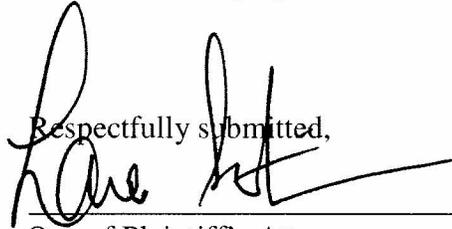
Because both prongs of the *Village Food* test have been met, the State is entitled to a jury trial on its Medicaid Fraud claim.

¹² Current practice in today’s courts corroborates the characterization of fraud being an action “at law.” *See* Wis. JI-Civil 2401 (2004); Wis. JI-Civil 3100 (1998). Further, appellate courts have also reviewed jury verdicts on fraud cases and accepted their findings of fact. *See Rud v. McNamara*, 10 Wis. 2d 41, 102 N.W.2d 248 (1960). The remedies available in § 49.49(4m) are all essentially legal remedies. Similarly, common law fraud relies on monetary damages as relief. *See* Wis. JI-Civil 2401 (2004) (including a question to determine how much money would compensate the plaintiff).

CONCLUSION

For the reasons stated herein, the State is entitled to a jury trial on all of its legal claims.

Dated this 23 day of July, 2008.

Respectfully submitted,


One of Plaintiff's Attorneys

J.B. VAN HOLLEN
Attorney General

FRANK D. REMINGTON
Assistant Attorney General, State Bar #1001131
LARA A. SUTHERLIN
Assistant Attorney General, State Bar #1057096
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3542 (FDR)
(608) 267-7163 (LAS)

CHARLES BARNHILL
State Bar #1015932
ELIZABETH J. EBERLE
State Bar #1037016
ROBERT S. LIBMAN
Admitted Pro Hac Vice
BENJAMIN J. BLUSTEIN
Admitted Pro Hac Vice
Miner, Barnhill & Galland, P.C.
44 East Mifflin Street, Suite 803
Madison, WI 53703
(608) 255-5200

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