



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  
sutherlinla@doj.state.wi.us  
608/267-7163  
FAX 608/267-2778

July 23, 2008

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 Plaintiff State Of Wisconsin's Response 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,

A handwritten signature in black ink, appearing to read 'Lara A. Sutherlin', with a long horizontal flourish extending to the right.

Lara A. Sutherlin  
Assistant Attorney General

LAS:gdt

Enclosure

c: All Counsel of Record by LexisNexis

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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

ABBOTT LABORATORIES, et al.,

Defendants.

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**PLAINTIFF STATE OF WISCONSIN'S RESPONSE BRIEF  
IN SUPPORT OF ITS CLAIM TO A TRIAL BY JURY**

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The issue presently before the Court is whether the State of Wisconsin has a constitutional right to a trial by jury. The parties submitted initial, simultaneous briefs. At the recent status conference of July 9, 2008, the Court granted the parties' request to file simultaneous response briefs. The State submits this response pursuant to the Court's July 9th order.

**INTRODUCTION**

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry* 494 U.S. 558, 565 (1990) (internal quotations and citations omitted). In the instant case, the State brings three causes of action pursuant to which Wisconsin courts have historically provided jury trials—unjust enrichment, the Trusts and Monopolies Act, and the Deceptive Trade Practices Act, Wis. Stat. § 100.18(11)(b)2. Defendants are asking this Court to make a

radical shift in the legal landscape and declare that parties are no longer entitled to jury trials for these causes of action. Additionally, the Defendants are asking the Court to deny a jury trial on a fourth cause of action, Medicaid Fraud, which finds its parentage in common law fraud—a claim that has historically permitted litigants the right to a trial by jury. There is little support for the Defendants’ position; but before turning to the law governing each claim, it is useful to briefly show that the fact that the remedy section of the State’s complaint did not describe two of the State’s claims as damage claims is irrelevant as a matter of law to the issue of whether the State is entitled to a jury trial.

## ARGUMENT

### **I. A PARTY IS NOT REQUIRED TO AMEND ITS COMPLAINT SIMPLY TO ADD AN ADDITIONAL FORM OF RELIEF.**

The State is preparing and will file a motion to amend its complaint (1) to add a request for damages under § 100.18(11)(b)2 and § 100.263; and (2) to amend the monetary relief under unjust enrichment to request damages. The State does so despite the fact that under Wisconsin law, a party is not required to amend its complaint simply to add an additional form of relief.

Wisconsin is a notice pleading state. *See* Wis. Stat. § 802.02. While Section 802.02(1)(b) of the Notice Pleading statute requires that a pleading contain a “demand for judgment for the relief the pleader seeks,” the “prayer for relief is not a substantive part of the complaint.” *John v. John*, 153 Wis.2d 343, 367-68, 450 N.W.2d 795, 805-06 (Wis. App. 1990). The Wisconsin Court of Appeals in *John v. John*, held that, therefore, a party is not required to amend a pleading to seek additional forms of relief when the new relief is based on the same operative facts. *Id.* The *John* court rejected a defendant’s objection that he had no notice in the complaint of an additional form of relief that was awarded against him:

As to the amendment of pleadings and notice, there was no amendment for which notice was required. The only post-trial change consisted of an additional form of relief. The body of the complaint remained unaltered. A prayer for relief is not a substantive part of the complaint. *Hertz Corp. v. Red Rooster Cheese Co.*, 55

Wis.2d 701, 706, 200 N.W.2d 603, 606-07 (1972). The notice to which John was entitled is notice of facts. The complaint set forth facts that were not subject to the amendment motion. *See Wussow v. Commercial Mechanisms, Inc.*, 97 Wis.2d 136, 146, 293 N.W.2d 897, 902 (1980) (“[I]t is the operative facts that determine the unit to be denominated as the cause of action, not the remedy or type of damage sought.”).

153 Wis.2d 343, 367-68, 450 N.W.2d 795, 805-06. Thus, the fact that these remedies were not included in the State’s Second Amended Complaint does not affect the whether the State is entitled to a jury on these claims. (Regardless, the State is moving to amend.)

**II. THE STATE HAS A RIGHT TO A JURY TRIAL ON ITS COMMON LAW CLAIM OF UNJUST ENRICHMENT.**

In Count V of the Second Amended Complaint, the State seeks relief for Defendants’ illegal conduct pursuant to a claim of unjust enrichment. Although the State did not raise this issue in its previous brief, the State has a constitutional right to a jury on this claim.

**A. The State’s Claim Seeking Only Monetary Relief Under Unjust Enrichment Is A Legal Claim.**

Wisconsin courts have been quite consistent in holding that while unjust enrichment claims are governed by equitable principles, they are “legal actions.” *Arjay Inv. Co., v. Kohlmetz*, 9 Wis. 2d 535, 538, 101 N.W.2d 700 (1960); *Clean Soils Wis., Inc. v. Dept. of Transp.*, 229 Wis. 2d 600, 613, 599 N.W.2d 903 (Ct. App. 1999) (citing *Hicks v. Milwaukee County*, 71 Wis. 2d 401, 404, 238 N.W.2d 509 (1974)). In *Boldt v. State*, the Wisconsin Supreme Court explained:

In an action for money had and received on a theory of quasi-contract, recovery is allowed where the defendant has received a benefit from the plaintiff and the retention of such benefit by the defendant would be inequitable. The law implies a promise of repayment when no rule of public policy or good morals has been violated. *The action is one at law, although governed by equitable principles.* ... The focus in unjust enrichment cases is on the benefit received from the plaintiff by the defendant which, in good conscience, should not be retained.

101 Wis.2d 566, 573, 305 N.W.2d 133, 138 (1981) (quoting *Hicks v. Milwaukee County*, 71 Wis.2d 401, 404-05, 238 N.W.2d 509, 512 (1976)) (emphasis added). See also *Dunnebacke Co. v. Pittman*, 216 Wis. 305, 257 N.W. 30, 32 (1934) (quoting Woodward, *The Law of Quasi Contracts*, § (4), p. 8); and *Trempealeau County v. State*, 260 Wis. 602, 605, 51 N.W.2d 499 (1952).

Traditionally parties have received jury trials for unjust enrichment claims in Wisconsin. *Lawlis v. Thompson*, 137 Wis. 2d 490, 405 N.W.2d 317 (1987) (jury trial for unjust enrichment claims); *Watts v. Watts*, 152 Wis. 2d 370, 448 N.W.2d 292 (Ct. App. 1989) (jury trial for unjust enrichment claims). This is underscored by Wisconsin model jury instructions for an unjust enrichment claim. (Defs. Br. at 8-9.); and WIS JI-CIVIL 3028; see also *Dahlke v. Dahlke*, 2002 WI App 282, ¶ 20, 258 Wis. 2d 764, 654 N.W.2d 73.

In attempt to overcome this legal precedent and longstanding practice, Defendants maintain that the remedies sought by the State are “quintessentially equitable in nature,” and thus the State’s unjust enrichment claim is equitable and not legal. (Defs. Br. at 8.) This case is and has always been about the State seeking monetary relief for Defendants’ violations. Because the State seeks monetary relief—and no purely equitable remedies, such as specific performance—under the claim of unjust enrichment, the claim itself is a legal one:

[T]he Trustee seeks a money judgment as the principal remedy in Count VI [for unjust enrichment]. *Granfinanciera [S.A. v. Nordberg]*, 492 U.S. 33 (1989) suggests that this factor alone is determinative and that the claim is legal. 492 U.S. at 49 n. 7 []. The Court explained that, even with “classical equitable remedies” like restitution and avoidance, when a money judgment is sought and no other equitable relief is requested, a complete remedy is available at law because dollars are fungible. *Id.* When a money judgment is sought, “any distinction that might exist between ‘damages’ and monetary relief under a different label is purely semantic, with no relevance to the adjudication of petitioners’ Seventh Amendment claim.” *Id.*

*In re Automotive Professionals, Inc.*, —B.R.—, 2008 WL 2358590, 4 (Bkrctcy. N.D. Ill. 2008) (citing *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989)). See also *Boldt*, 101 Wis. 2d. at 573. To avoid any confusion, the State is amending its unjust enrichment claim to seek damages instead of disgorgement.

**B. The State Is Constitutionally Entitled To A Jury Trial On Its Unjust Enrichment Claim Because Such A Claim Was Heard By A Jury Prior To 1848.**

The Wisconsin Supreme Court has stated that “*non-statutory* causes of action at law, where a jury trial was guaranteed before the passage of the state constitution, would continue to have a guaranteed right to a jury trial attached even after the passage of the constitution.” *Village Food & Liquor Mart v. H & S Petroleum, Inc.*, 254 Wis.2d 478, 483-84, 647 N.W.2d 177, 180 (Wis. 2002). The State is constitutionally entitled to a jury trial on its claim for monetary relief under unjust enrichment because such a claim was heard by a jury prior to 1848.

“[A]ctions for money had and received or for money paid . . . , and which are founded upon the principle of unjust enrichment” are “[q]uasi-contractual claims.” *Seegers v. Sprague*, 70 Wis.2d 997, 1003, 236 N.W.2d 227, 230 (Wis. 1975) (quoting *Goff & Jones, Law of Restitution* 4 (1966)). See also *Black’s Law Dictionary* (8th ed. 2004), contract (“*quasi-contract* [] refers to any money claim for the redress of unjust enrichment.”). Although Wisconsin courts have not addressed this issue, courts in other jurisdictions have established that claims for unjust enrichment were heard by a jury prior to 1848. See, e.g., *In re Automotive Professionals, Inc.*, —B.R.—, 2008 WL 2358590, 5 (Bkrctcy. N.D. Ill. 2008) (“actions for quasi-contract or unjust enrichment were heard in courts of law in 1791”); *Austin v. Shalala*, 994 F.2d 1170, 1176 (5th Cir. 1993) (“A suit in quasi-contract falls under the common law writ of general assumpsit. . . . In England in 1791, this was an action at law and was tried to a jury.”); *Pel-Star Energy, Inc. v.*

*U.S. Dept. of Energy*, 890 F. Supp. 532, 540 (W.D. La. 1995) (same). The Court should permit the State to exercise its right to a jury trial for its unjust enrichment claim.

**II. THE STATE HAS A CONSTITUTIONAL RIGHT TO A JURY FOR ALL OF ITS STATUTORY CLAIMS.**

**A. The State Is Constitutionally Entitled To A Trial By Jury For Its Deceptive Trade Practices Act Claim.**

**1. Contrary to Defendants’ assertion, the *Ameritech* test is not the proper test.**

In determining whether the State is entitled to a jury trial for its claim pursuant to the Deceptive Trade Practices Act, the Defendants maintain that the Court need look no further than the appeals court ruling in *State v. Ameritech Corp.*, 185 Wis. 2d 686, 697, 517 N.W.2d 705 (1994). In *Ameritech*, the appeals court held the State was not entitled to a jury trial for an enforcement action seeking forfeitures pursuant to Wis. Stat. § 100.18(11)(d). This case is not dispositive of whether the State is entitled to a trial by jury for two reasons.

First, *Ameritech* is not controlling law. The holding was altered by *Village Food*, 2002 WI 92, ¶11 (“We conclude [] 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.”). A brief review of the case shows that the *Ameritech* court did not apply the current standard that is set out in *Village Food* and *Schweda*. The bulk of the *Ameritech* opinion is spent deciding on the rule under which to analyze the case. After the court concluded that the two factors to apply were that “(1) the statute codifies an action known to the common law in 1848; and (2) the action was regarded as at law in 1848,” the *Ameritech* court simply concluded that “there is no dispute

that in 1848, the State had no right to commence a civil suit to collect forfeitures for deceptive advertising or violation of the WCA”<sup>1</sup>:

In the case before us, there is no dispute that in 1848, the State had no right to commence a civil suit to collect forfeitures for deceptive advertising or violation of the WCA. Thus, any right to a jury trial would be by legislative grant rather than constitutionally protected. But as the State concedes, neither § 100.18, STATS., nor the WCA specifically provides for a jury trial to determine a party's liability. Nor are there any references to § 100.18 or the WCA in any procedural statutes which permit parties to request a jury. Therefore, we conclude that the trial court correctly granted Ameritech's motion to strike the demand for a jury.

185 Wis.2d at 698. The *Ameritech* court did not consider if there were any “essential counterparts” to § 100.18 at law that existed prior to 1848. It certainly never rejected the position that “cheating,” as defined by Blackstone, is an essential counterpart. *See* 4 William Blackstone, *Commentaries on the Laws of England*, ch. 12, at 158 (1769) (attached to The State of Wisconsin’s (Corrected) Brief in Support of Its Claim to a Trial by Jury).

Second, even if Ameritech *were* controlling law, the holding—“there is no dispute that in 1848, the State had no right to commence a civil suit to *collect forfeitures* for deceptive advertising or violation of the WCA”—is obviously limited to actions for forfeitures.<sup>2</sup> 185 Wis.2d at 517 (emphasis added). The State, however, also has claims for damages under § 100.18(11)(b)2 and § 100.263, and the holding in *Ameritech* does not address such claims.

When applying the broader, two prong test prescribed by the *Village Food* court, it is plain the State is entitled to a jury trial for its Wis. Stat. § 100.18(11)(b)2 claim.<sup>3</sup> As explained

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<sup>1</sup> Wisconsin Consumer Act, Wis. Stats. §§ 421.101-427.105.

<sup>2</sup> While it is the State’s position that it is entitled to a jury trial on the issue of liability in enforcement actions seeking forfeitures, *see e.g. County of Columbia v. Bylewski*, 94 Wis. 2d 153, 162, 288 N.W.2d 129, 134 (1980) (holding “an action to recover a forfeiture . . . is a statutory action at law”), the Court need not reach this issue, given the State seeks damages pursuant to Wis. Stat. § 100.18(11)(b)2 as well.

<sup>3</sup> Defendants suggested at the July 9th status conference that the State of Wisconsin may not be entitled to bring a claim pursuant to Wis. Stat. §100.18(11)(b)2. The State does not have the slightest idea why a private aggrieved consumer would have greater protection than the State to protect its interests, when the State is a marketplace participant. Defendants referenced no authority for this proposition, and certainly never raised the issue in their initial brief. If

in the State's initial filing, the offense of "cheating," defined *Blackstone's Commentaries*, was a forerunner to § 100.18. *See* 4 William Blackstone, *Commentaries on the Laws of England*, ch. 12, at 158 (1769). This satisfies the first prong of the *Village Food* test. *See e.g. Village Food*, 254 Wis. 2d 478, ¶ 29 (holding first prong of test met where common law trade practice actions were forerunners to Unfair Sales Act). The second prong of the *Village Food* test is satisfied because cheating was regarded at law in 1848. *See* 4 William Blackstone, *Commentaries on the Laws of England*, ch. 12, at 158 (1778) (describing criminal penalties for the offense of cheating, which was a legal remedy). Because *Ameritech* is not controlling, and both prongs of the *Village Food* test are satisfied, the State is entitled to a jury trial on its Deceptive Trade Practices claim.

**2. The State has legal as well as equitable claims under § 100.18.**

Defendants also argue against a jury trial on the State's § 100.18 claim by contending that the State is "seeking injunctive relief pursuant to § 100.18(11)(d)," and thus the actions and remedies are not "at law." (*See* Defs. Br. at 5 & n.16.) As this Court has already noted, the Defendants are well aware that the State is seeking both injunctive relief *and* damages under § 100.18:

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) (emphasis in original). Further, the Defendants have relied heavily on case law applicable to Section 100.18(11)(b)2. *See e.g., id.* citing *Novell v. Migliaccio*, 2008 WI 44, ¶26, 749 N.W.2d 544, 549 (damages provision at issue is Section 100.18(11)(b)2); Joint Response at 86-87, citing *K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶¶ 19, 35, and *Werner v. Pittway Corp.*, 90 F.Supp.2d 1018, 1033 (W.D. Wis. 2000).

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Defendants take the position in their latest filing that the State is unable to request relief pursuant to Wis. Stat. § 100.18(11)(b)2, the State respectfully requests the opportunity to respond.

For evidence that the State has allegedly “made abundantly clear” that is seeking injunctive relief and not damages, the Defendants’ rely on the State’s briefing in its summary judgment motion. (Defs. Br. at 5 and n.16.) However, the State moved for summary judgment *solely* on its request for an injunction—not on the pecuniary loss available under § 100.18(11)(d) or for its other requested remedies under §§ 100.18(11)(b)2, 100.26(4), 100.264(2) and § 100.263. In its request for summary judgment on injunctive relief alone, the State asserted it did not need to fulfill the requirements for obtaining damages—obviously not for the litigation as a whole, but for the motion for injunctive relief.

The only thing the State has disclaimed is that it had no claim under § 100.18 (11)(b)2 *for its citizens* with pecuniary losses. (The State brings its claims for monetary relief for private consumers with pecuniary losses under § 100.18(11)(d).) The Court itself had earlier pointed this out in its decision on Defendants’ motion to dismiss. In that motion, the Defendants argued that with regard to “claims under Wis. Stat. § 100.18, the State fails adequately to allege causation and reliance[;] [p]rivate consumers are not alleged to have received AWP data, let alone relied on it.” (Defs. Mem. in Support of Jnt. Mot. to Dismiss (Jan. 20, 2005) at 3.) In its decision, the Court dismissed this objection for several reasons including the fact that the State did not have a claim for private consumers under § 100.18 (11)(b)2, which is correct. (Remainder of the Decision and Order on Defendants’ Motions to Dismiss (May 18, 2006), at 4.)

**B. The State Has A Constitutional Right To A Jury Trial For Its Claim Pursuant To The Trusts And Monopolies Act.**

Defendants admit, as they must, that counterparts to Wisconsin’s antitrust statutes existed prior to 1848. (Defs. Br. 6.) However, they attempt to defeat the State’s right to a jury trial on its trusts and monopoly claim by improperly requiring a counterpart of the specific provision that is at issue, instead of looking for a counterpart to the Trusts and Monopolies Act as a whole.

The *Village Food* court did not focus its analysis on the particular provision that dealt with the price of motor vehicle fuel. Instead, it looked at the purpose of the Unfair Sales Act:

To determine if the right to a jury trial is preserved in this case, we apply the above test to the statute in question—the Unfair Sales Act, Wis. Stat. § 100.30. Under this test, we must determine first if the cause of action created by § 100.30 existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848, and if so, we must then determine whether the action was one that was regarded as at law in 1848. ...

We begin by examining the contours of Wis. Stat. § 100.30. Section 100.30 sets forth a statutory scheme which forbids retailers, distributors, and wholesalers of certain types of goods (namely alcohol, tobacco products, and motor vehicle fuel) from selling their merchandise at an artificially low price in order to attract patronage and thereby cause harm to competing businesses and to consumers of those products. In enacting the statute, the legislature noted that such practices tend to cause commercial dislocations, interfere with free commerce, and mislead consumers.

*Village Food*, 254 Wis.2d 478, ¶¶17-18. The *Village Food* court did not attempt to find a counterpart that regulated the sale of motor vehicle fuel. This is so even though there is a separate cause of action under the Unfair Sales Act for a person injured “a result of a sale or purchase of motor vehicle fuel,” § 100.30 (5m), as opposed to a cause of action for someone injured by other means, such as the sale of tobacco products. § 100.30 (5r).

In *Village Food*, the first part of this test was satisfied by the Unfair Sales Act’s comparison to the common law causes of action of “forestalling the market,” “regrating,” and “engrossing.” *Village Food*, 254 Wis. 2d 478, ¶ 27. The *Village Food* court acknowledged that the common law counterparts are dissimilar to the Act in some ways—*e.g.*, the counterparts are criminal offenses, whereas the Act is a civil; further, the counterparts prohibit acts that result in artificially *high* prices for goods,<sup>4</sup> whereas the Act prohibits the selling of merchandise “at an artificially *low* price.” *Id.* at ¶27 (emphasis added). However, the court found these differences

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<sup>4</sup> Forestalling the market is buying up merchandise, discouraging persons from bringing their goods to market, or encouraging an increase in prices in goods already on sale, “any of which practices make the market dearer to the fair trader”; regrating is buying up provisions in order to sell again at a profit in or near the same market, which “enhances the price of the provisions, as every successive seller must have a successive profit”; and engrossing is buying up large quantities in order to have the power to “raise the price of provisions.” *Village Food*, 254 Wis. 2d 478, ¶27 n.8-10.

“insufficient” to restrict a jury trial, and held that the Act and the common law counterparts were sufficiently similar because both sets of laws “limited the ability of one competitor to manipulate the market with the intent to impair the business of a competitor.” *Id.* at ¶31.

Similarly in *Schweda*, the court looked for, but was unable to find, a counterpart to “modern environmental regulatory laws.” 303 Wis.2d 353, ¶35. Neither the majority nor the dissent examined each claim for a different counterpart—for example, whether common law required a waste treatment facility to “take representative samples of their effluent to assess compliance with their permit limits,” *id.* at ¶38—but simply whether the alleged violations were premised upon a showing of harm, which was required for common-law nuisance. *Schweda*, 303 Wis.2d 353, ¶¶39, 114.

Indeed, the Defendants are proposing exactly what *Village Food* rejected—that the Section 133.05 must specifically “codify” a prior common law cause of action before the right to a jury trial is warranted. *Village Food*, 254 Wis.2d 478, ¶ 11. Instead, it need only be an “essential counterpart.” *Id.* at 493. Section 133.05 of the Trusts and Monopolies Act entitled “Secret rebates; unfair trade practices” simply defines one way to violate the Trusts and Monopolies Act; it is not a separate act itself. Like §§ 100.30(2)(am)1m.c and 100.30(3) of the Unfair Sales Act, Section 133.05 of the Trust and Monopolies Act is simply a mechanism to achieve the goal of the statute: “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. Stat. § 133.01. It is therefore like the rest of the statute, an essential counterpart to the pre-1848 common law offense of monopolies. Since the Trusts and Monopolies Act has an essential counterpart in pre-1848 common law, the State is entitled to a jury trial on this claim.

**C. The State Has A Constitutional Right To A Jury For Its Claim Pursuant To The Medicaid Fraud Act.**

There is no dispute that a claim of fraud was historically tried to a jury. *See Getty v. Rountree*, 2 Pin. 379 (Wis. 1850). Section 49.49 is a codification of common law fraud and misrepresentation as an application to Medical Assistance.

In an attempt to defeat the State's claim to a jury trial, the Defendants assert that the elements of a claim brought pursuant to the Medicaid Fraud statute differ from that of the common law fraud claim, and the statutory claim is therefore not its essential counterpart. Yet, under a proper application of the standard proscribed by the *Village Food* court, it is clear that this difference is simply insufficient to eliminate the State's constitutional right to a jury.

The elements of common law fraud are:

1. The defendant made a factual assertion,
2. The statement is untrue;
3. The defendant knew it was untrue or made it recklessly without regard to the truthfulness of the assertion;
4. The statement was made with intent to defraud and induce another to act on it; and
5. The other party believed the statement to be true and relied upon it to his/her detriment.

*Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 12, 283 Wis. 2d 555, 699 N.W.2d 205.

The elements of a claim under Wis. Stat. § 49.49(4m)2 are:

1. The defendant made or caused to be made a (statement) (representation) of a material fact in an application for (payment) (a benefit) in connection with a medical assistance program.
2. The (statement) (representation) was false when made.
3. The defendant made the (statement) (representation) knowingly.
4. The application for (payment) (benefit) was submitted for payment.

*See also* Wisconsin JI Criminal 1870.

Viewing these elements side by side, it is clear that common law fraud is a forerunner to the Medicaid Fraud statute. To be sure, the fraud proscribed by the Medicaid statute is confined

to the application or payment of a Medicaid benefit, and the elements reflect as much. But as explained in section II. B. *supra*, the causes of action need not be identical for the modern claim to be an essential counterpart to the 1848 claim. As discussed above, the *Village Food* court found the Unfair Sales Act was a counterpart to common law causes of action even though the common law prohibited acts that result in artificially *high* prices for goods, whereas the Act prohibits the selling of merchandise at an artificially *low* price. *Id.* at ¶27. The fact that the elements of the causes of action were the converse of one another was of no matter to the court’s determination that they were counterparts. *Id.*

Defendants incorrectly assert that, “Wisconsin courts have specifically declined to extend the right to a jury trial to statutory claims with fraud-based elements.” (Def. Br. at 7). They cite *Ameritech* and *Village Food* for this proposition. *Id.* In *Ameritech* the appeals court held Wis. Stat. § 100.18 must be a codification of a common law cause of action in 1848, *Ameritech*, 185 Wis. 2d 686, 698, 517 N.W.2d 705. (finding “there is no dispute that in 1848, the State had no right to commence a civil suit to collect forfeitures for deceptive advertising or violation of the WCA”). Again, the exactness required of the *Ameritech* test was rejected by the *Village Food* court, leaving the door open as to whether some modern statutory claims are essential counterparts to fraud. *See Village Food*, 254 Wis.2d 478, ¶ 11.

While it is accurate that the *Village Food* court found the comparison of the Unfair Sales Act to common fraud too tenuous, the Unfair Sales Act is a much different animal than the Medicaid fraud statute. The Unfair Sales Act prohibits the selling of merchandise at artificially low prices in an effort to manipulate the market, an offense significant different than fraud. By contrast, the Medicaid Fraud statute embodies the simplest form of fraud—lying about prices. The State is therefore entitled to a trial by jury for its Medicaid Fraud claim. *See also Austin v.*

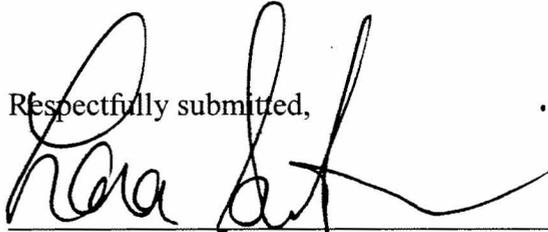
*Shalala*, 994 F.2d 1170 (5th Cir. 1993) (finding government's attempt to recover overpayments of social security benefit to be one for which jury trial was available at common law in England prior to merger of law and equity courts; action was essentially one of restitution, involving suit in quasi-contract under common-law writ of general assumpsit, which was action at law tried to jury.)

### **CONCLUSION**

For these reasons, and those in the State's initial brief, the State is constitutionally entitled to a jury trial for its four causes of action.

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