

See § 100.18(11)(d).¹ To arm Wisconsin in this task, the Act provides special injunctive provisions available to the State alone, *see* § 100.18(11)(a) and (d), and only requires the State to prove two elements to prevail in connection with such a judgment, neither of which relates to reliance:

We first address the legal sufficiency of the claim based upon sec. 100.18(1), Stats. There are two elements to this offense: There must be an advertisement or announcement, and that advertisement must contain a statement which is ‘untrue, deceptive or misleading.’

State v. American TV & Appliance of Madison, 146 Wis.2d 292, 300, 430 N.W.2d 709 (Sup. Ct. 1988). Both of the necessary elements have been established by Wisconsin.

In its decision on summary judgment the Court found that Wisconsin had tendered significant evidence showing that defendants had falsely reported average wholesale prices for their products:

While varying in the particulars against each of the four target defendants, plaintiff presents evidence broadly supporting its contention that defendants, in marketing their drugs, falsely reported both wholesale acquisition costs (“WACs”) and average wholesale prices (“AWPs”) to third parties, such as First DataBank and Red Book, knowing that these third parties would publish pharmaceutical pricing information relied upon by the state in paying or reimbursing retail providers of the drugs through the Wisconsin Medicaid program. The misrepresented WACs and AWPs caused the third parties to publish artificially high drug prices which, in turn, caused, and still causes, the Wisconsin Medicaid program to overpay for defendants’ drugs. A *prima facie* case for partial summary judgment in liability under § 100.18, Stats., is thus presented. Decision at 4.

This evidence was never refuted by any of the defendants.

Moreover, as plaintiff showed in its Reply Brief in support of its motion for summary judgment (at 19), defendants’ prices are a public problem, not simply an issue for Wisconsin’s

¹ “... the department of justice ... may commence an action in circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section.”

Medicaid program. As the witness from Shopko testified, defendants' inflated average wholesale prices are the only prices Shopko sends to its third party payers.

Q. When a drug goes from a brand to generic and the price drops precipitously, you continue to bill at the AWP and you don't tell, for example, the State of Wisconsin that the price now, the acquisition price has dropped precipitously. You wait for Wisconsin to figure that out itself, is that correct? * * *

A. What we send, regardless of brand or generic or at any given point, we send AWP of that drug. Has nothing to do with the cost that we pay for it. So that we're paid on a formula based on AWP. We submit AWP to our third parties and that's what we're paid off of... We send 100 percent of AWP to our third-party payers, to anybody. That's how we bill for a drug, yes.

Deposition of Lorie L. Neumann, October 31, 2007, p. 274.

The publication of wholesale prices that are greater than retailers are actually paying is deceptive as a matter of Wisconsin law. Wis. Stat. § 100.18(10)(b).

It is deceptive to represent the price of any merchandise as a manufacturer's or wholesaler's price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for the merchandise. The effective date of this subsection shall be January 1, 1962.

Thus, Wisconsin has clearly proved that defendants published advertisements that were deceptive as a matter of law—all that it is required to prove to obtain an injunction.

The *Novell* case broadly supports Wisconsin's position in two ways. First, it makes clear that the major focus of § 100.18(1) is deterrence. As the Wisconsin Supreme Court stated:

¶30 In addition, the purpose of § 100.18 does not support the proposition that reasonable reliance is an element of a § 100.18 claim. This court and the court of appeals have made clear that the purpose of § 100.18 is to deter sellers from making false and misleading representations in order to protect the public. In State v. Automatic Merchandisers of America, Inc., this court determined that the statute applied to face-to-face communications in addition to media advertisements because the statute was 'intended to protect the residents of Wisconsin from any untrue, deceptive or misleading representations made to promote the sale of a product.' 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974). (Emphasis supplied.)

* * * * *

¶32 Deterrence does not depend on reasonable reliance. Requiring that plaintiffs demonstrate reasonable reliance as a statutory element of a § 100.18 claim therefore would not fulfill the statutory purpose.

Novell, supra, ¶¶ 30, 32.

Holding the injunctive relief hostage to a damage award thus ignores the central focus of the statute and adds a layer of proof not required by Wisconsin law.

Second, *Novell* makes clear that, to the extent reliance has any role to play (but see below), it only applies to the damage prong of § 100.18 and does not impact the only two elements of § 100.18(1) Wisconsin must prove to prevail on its injunctive relief. Thus, *Novell* states at paragraph 47:

¶47 Nonetheless, we stated that even though a plaintiff need not prove reasonable reliance in a § 100.18 claim, ‘the reasonableness of a plaintiff’s reliance may be relevant in considering whether the representations materially induced the plaintiff’s pecuniary loss....’ *Id.* In support of this proposition, we cited Malzewski.

Thus, proof of reliance is unrelated to the State’s entitlement to an injunction. The Supreme Court’s holding in *State v. American TV & Appliance of Madison, Inc.*, that Wisconsin only need prove that defendants published false prices to prevail is dispositive on this point.

Moreover, the holding of *Novell* removes the Court’s concern that ruling for Wisconsin in its enforcement capacity would be nothing more than an advisory opinion, reversible if Wisconsin failed to show damages. Wisconsin’s enforcement claim is based on the undisputed evidence that defendant’s misrepresented their prices to the public and a decision on this claim will be a final judgment in its own right. This judgment will be unaffected by any later damage proceeding, whatever the outcome.

Wisconsin, therefore, requests that the Court enter summary judgment against these four defendants.

II. THE *NOVELL* DECISION INVALIDATES DEFENDANTS' NO CAUSATION ARGUMENT IN CONNECTION WITH PLAINTIFF'S CLAIM FOR DAMAGES.

The *Novell* decision also destroys defendants' no causation argument in connection with Wisconsin's claim for damages.

From the inception of this case, defendants have argued that reliance was an element of plaintiff's *prima facie* case. This argument took many forms but the one most often repeated was that Wisconsin could not prove "that the representation caused the plaintiff a pecuniary loss" unless it showed that it reasonably relied on defendants' false prices.

That argument, which was wrong from the start, has been permanently put to rest by *Novell*. The court stated unequivocally at paragraph 48 that:

¶48 As with Malzewski, we were explicit that plaintiffs in § 100.18 actions do not have to demonstrate reasonable reliance as an element of the statutory claim. K&S Tool & Die, 301 Wis. 2d 109, ¶ 36. Thus, neither the language of the statute, the purpose of the statute, nor the case law supports the Migliaccios' argument that reasonable reliance is an element of a § 100.18 cause of action.

Reliance is only available as an affirmative defense and the burden of proof is, hence, on the defendants, not the plaintiff. The court made this clear in paragraph 49:

¶49 The Migliaccios' maintain that even if reasonable reliance is not an element of a §100.18 claim, the reasonableness of a person's actions in relying on representations is a defense and may be considered by a jury in determining cause. We agree. As set forth above, there are three elements in a § 100.18 cause of action: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was 'untrue, deceptive or misleading,' and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff. K&S Tool and Die, ¶19; see also Wis. JI-Civil 2418. Reliance is an aspect of the third element, whether a representation caused the plaintiff's pecuniary loss. Tim Torres, 142 Wis. 2d at 70; Valente, 48 F.Supp.2d at 874.² (Emphasis added.)

Thus, the only element that plaintiff must prove beyond the falsity of defendants' prices in order to prevail on its damage claim is that these misrepresentations caused Wisconsin harm.

² The court in *Novell* also made clear in its opinion that the term "materially induced" is simply another term for "caused," not some different legal standard. See paragraphs 49 and 53.

Proof of causation requires only that defendants' misrepresentations be a significant factor in causing plaintiff's harm. *See K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶ 37, 301 Wis. 2d 109, 130, ¶ 37, 732 N.W.2d 792, ¶ 37. Causation is a given in this case. The vast majority of the drugs which Wisconsin paid for were reimbursed on the basis of a formula that relied on defendants' inflated average wholesale prices. Had defendants published their true lower prices, Wisconsin would have paid less. A similar analysis applies to Wisconsin's MAC program. Had defendants published their true, lower prices, pharmacists would have been reimbursed at these prices since they were always lower than the price at which they were MAC'd by Wisconsin.

III. REASONABLE RELIANCE IS NOT A VIABLE DEFENSE TO WISCONSIN'S DAMAGE CLAIM.

Characterizing reasonable reliance as a defense, instead of an element of plaintiff's liability case, has the added consequence of erasing it as a factor in this case altogether.

As *Novell* explains, in the ordinary case if defendant proves that a plaintiff's reliance on its false promises was unreasonable, a jury may choose to deny damages despite plaintiff's proof of unlawful conduct. This is not the case, however, where the State is the plaintiff. As long-standing precedent on the estoppel doctrine makes clear, the "unreasonableness," foolishness, or even impropriety of a government employee's actions cannot estop the government from obtaining relief from a defendant's misconduct. None of the various spins that defendants from time to time have attempted to put on the conduct of Wisconsin employees—that they acted negligently in relying on defendants' prices, that they used defendants' false prices to evade federal regulations requiring that the state only pay the estimated acquisition cost of the drugs being purchased, or that they reached an agreement with the defendants to permit them to publish

wholesale prices greater than retailers were actually paying in the face of a statutory provision banning such conduct—afford a valid defense as a matter of law.

As the Court is well aware from the enormous briefs already filed in this case, the State of Wisconsin has a protected role as a consumer and litigant. Defendants, in their business dealings with the State, cannot bend the rules. *Caveat emptor* is not the governing rule. Instead, parties seeking public funds have a special obligation of honesty. The Supreme 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.

Additionally, public funds are protected by a series of decisions dating back to the Republic's infancy, which boil down to the notion that acts of state agents cannot exculpate a defendant who has violated the law and caused damage to the public treasury. Thus, a wrongdoer cannot get off the hook by asserting it was misled by a state employee, or that a state employee acted unreasonably, or that state employees signaled approval of the conduct, or that the a state employee was in cahoots with the defendant. "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 also United States v. Kirkpatrick*, 22 U.S. 720 (1824). *n Nevada v. US*, 463 U.S. 110 (1983) (relying on *Utah Power & Light Co. v. US*, 243 U.S. 389, 409 (1917)), the Supreme Court rejected the argument that certain officials of the United States had impliedly acquiesced in granting the defendant an 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.

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

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 also U.S. v. Socony-Vacuum Oil Co., 310 U.S. 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.”

Wisconsin adopted these principles in the seminal case of *State v. City of Green Bay*, 96 Wis. 2d 195, 291 N.W.2d 508 (Wis. 1980). There the Wisconsin Supreme 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,” and hence, estoppel is unavailable to the defendant.

In *Westgate Hotel, Inc. v. E.R. Krumbiegel*, 39 Wis. 2d 108, 113, 158 N.W.2d 362, 364 (Wis. 1968), the Court rejected the argument that the City had lulled the defendant into thinking it was in full compliance with an ordinance by its failure to enforce it for nine years. Similarly, in *Wisconsin Employment Relations Commission v. Teamsters Local 563*, 75 Wis.2d 602, 612-13, 250 N.W.2d 696 (Sup. Ct. 1977), the Court held that is unlawful for a state agency to contract away a statute's prohibition.

This line of authority bars any defense that State employees acted unreasonably, negligently or unlawfully in relying on defendants' false prices. Thus, unlike in the ordinary case, the issue of the "reasonableness" of the State's reliance on defendants' false misrepresentations and any related affirmative defenses, is irrelevant.

CONCLUSION

Plaintiff requests that the Court revise its decision on summary judgment and grant Plaintiff's motion.

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Respectfully submitted,



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