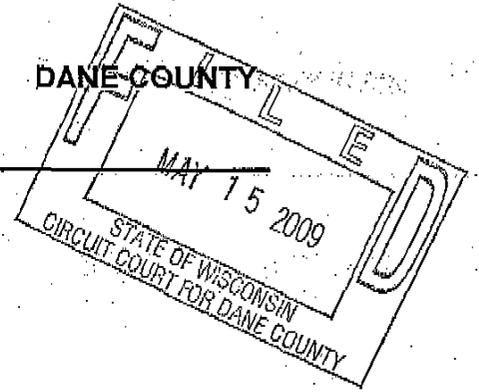


STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY



STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

PHARMACIA CORPORATION,

Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTIONS AFTER VERDICT ON FORFEITURES

In its Third Amended Complaint, plaintiff State of Wisconsin requested, *inter alia*, the following relief on its Medicaid fraud claim against defendant Pharmacia Corporation :

"B. Forfeitures in the amount of not less than \$100 and not more than \$15,000 for each AWP reported by [Pharmacia] for the last 10 years."

(Third Amended Complaint, p. 34).

Section 49.49 (4m) (a) (2) and (b), Stats., provide the basis for the State's civil forfeiture claim:

"(4m) **Prohibited conduct; forfeitures.** (a) 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.

...

(b) A person who violates this subsection may be required to forfeit not less than \$100 nor more than \$15,000 for each statement, representation, concealment or failure."

Throughout the jury trial, the State presented evidence that, over the years at issue in this lawsuit, Pharmacia repeatedly misrepresented prices for its drugs. Additionally, by knowingly allowing various companies such as First Databank and Redbook to further publish these false prices in drug pricing compendia relied upon by the State and others in calculating payments for these drugs, Pharmacia caused these false statements and representations "to be made" by others. Accordingly, and because the evidence was disputed by Pharmacia, the following special verdict questions were submitted to the jury¹:

"Question No. 4: After June 3, 1994, did defendant Pharmacia Corporation knowingly make, or knowingly cause to be made, any false statement or representation of material fact for use in determining rights to a Wisconsin Medicaid payment?

Answer: _____
(Yes or No)

Question No. 5: **If you answered Question No.4 "yes", then answer this question. Otherwise do not answer it.** How many such false statements or representations of material fact for use in determining rights to a Wisconsin Medicaid payment did Pharmacia Corporation knowingly make or cause to be made?

Answer: _____"

However, rather than requesting the jury to calculate the number of the false statements or representations made or cause to be made by Pharmacia for purposes of imposing forfeitures, the State urged the jury in closing argument to equate the number of violations subject to forfeitures with the number of reimbursement claims made by pharmacies which were overpaid by the State based upon the false statements, as calculated by the State's expert witness. In other words, rather than focus on the **culpable conduct** of the defendant, the State argued that the jury should fill in a number that, in fact, measured something different, i.e. the **consequences** of the culpable conduct:

"If you answered question No. 4 yes, then answer this question. Otherwise do not answer it. How many such false statements or representations of material fact for use in determining rights to a Wisconsin Medicaid payment did Pharmacia Corporation knowingly make or cause to be made? Doctor DeBrock told you there were 1,000,500 of these claims that if the true price

¹ The court had previously ruled that plaintiff was entitled to a jury trial on its Medicaid fraud claim. See "Decision and Order on Plaintiff's Right to Jury Trial", pages 4 *et seq.*

had been given, we would have paid less on. 1,500,000. But because of the statute of limitation, 4% of those are out and you have to subtract 60,000. This is from the time period January 3rd of 1993 to June 3rd of 1994. There's a year and a half roughly there at the very beginning that the statute of limitations precludes us from seeking damages on. And that was 60,000 claims, so you have to subtract that. And the number of claims was 1,440,000. And that's the number that you should put as an answer to question No. 5."

(Transcript, Jury Trial-Day 9, pages 108 -- 109.)

Following a "yes" answer to Question No. 4, the jury's answer to Question No. 5 was 1,440,000. As a matter of law, this number does not measure the number of violations subject to forfeitures under §49.49 (4m) (b), Stats., and accordingly cannot stand. It is vacated.

Forfeitures in state enforcement actions are not designed to compensate the victims of wrongdoing. Rather, as the Attorney General himself eloquently articulated at oral argument on the motions after verdict, their purpose is to punish and deter. Indeed, the jury's verdict in this case, which has been affirmed in all other respects, fully compensates the State for Medicaid overpayments caused by Pharmacia's misrepresentations before we even get to the issue of forfeitures.

Thus, forfeitures are penal in nature, aimed at eliminating illegal conduct or behavior. Here, §49.49 (4m) (b) specifically targets illegal conduct in the form of false statements or representations of material fact made or cause to be made for use in determining rights to Medicaid benefits or payments. But rather than address Pharmacia's illegal conduct, the jury's answer to Question No. 5 focuses, at the State's urging, on the effects of Pharmacia's illegal conduct in terms of the number of claims overpaid by Wisconsin Medicaid in reliance on the false statements/representations made or cause to be made by Pharmacia.

Forfeiture statutes are to be strictly construed. The State's expansive theory of the forfeiture case here, as reflected in its arguments on motions after verdict and in the jury's answer to Question No. 5, is anything but a strict construction of §49.49 (4m)(2). Essentially, the State posits that, having entered one of Pharmacia's published false average wholesale prices ("AWP's") into its computer database², every time the State's computer references that downloaded price in determining payment on a pharmacy's Medicaid reimbursement claim, Pharmacia itself has committed a new, discrete violation of §49.49(4m)(a) 2, sanctionable by forfeiture. That is, each time the State pays a claim, Pharmacia has made or caused to be made a new false statement or representation because the State has consulted the price it downloaded into its own computer reimbursement algorithm, regardless of the number of times

² Actually, the computer of the State's contract agent EDS.

Pharmacia and the various pricing compendia have published the false price. So, for example, hypothetically if (1) Pharmacia announced a false price for one of its drugs only one time [i.e. knowingly made a false statement], (2) First Data Bank and Redbook each, in turn, published the false price only one time [i.e. Pharmacia caused it to be made two more times] and (3) the State downloaded the price from one of these compendia one time, yet subsequently consulted it on 100,000 reimbursement claims submitted by retail pharmacies, none of which included the false price in its claim paperwork. Pharmacia has nonetheless violated §49.49(4m)(a) 2 100,000 times and is subject to 100,000 forfeitures under §49.49 (4m)(b). This cannot be a correct interpretation or application of the statute because it is not directed at the actual culpable conduct of Pharmacia, but at the consequences of that conduct.

Pharmacia is subject to forfeiture for each false material statement or representation it made or caused to be made, not each time someone looked at it, or even relied on it. *State v. Menard, Inc.*, 121 Wis. 2d 199 (Ct. App. 1984) while not precisely on point, is the closest Wisconsin authority and is cited by both parties for opposite conclusions. In fact, to the extent it has any applicability, it supports this court's holding here. In *Menard*, the appellate court held that each publication of a single misleading advertisement is to be separately considered as a violation subject to forfeiture under §100.26(6), Stats. Significantly, a forfeiture was not imposed for each time the publication was read or relied upon by the reader (which would have been the analogous situation to the State's case here).

Nor can the plaintiff find solace in the case it cites under the federal False Claims Act, *United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981). The federal False Claims Act, unlike Wisconsin's §49.49 (4m), expressly ties imposition of forfeitures to false "claims" filed or caused to be filed.³ Equally important, the *Ehrlich* court specifically acknowledges the U. S. Supreme Court's admonition in *United States v. Bornstein*, 423 U.S. 303 313 (1976) "that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." 643 F.2d at 638.

This is not to say that the consequences of the false statement or representation are completely irrelevant to the issue of forfeitures. Continuing the above hypothetical, whether the State overpaid 10 pharmacy reimbursement claims in reliance on the one downloaded price, or 100,000 such claims, is a factor— one of many identified in the case law—to be considered in determining the amount of the forfeiture for each of the three misrepresentations made or

³ Indeed, it is not even clear that the jury's answer to Question No. 5 could stand if §49.49 (4m) were identical, in all relevant respects, to the forfeiture provisions in the federal False Claims Act, since none of the 1,440,000 claims submitted for reimbursement by the pharmacies appear to have been, in any way, false. But that is neither here nor there on the issues before this court.

caused to be made by Pharmacia. Section 49.49(4m)(b) provides a range of potential forfeiture amounts from \$100 per violation to \$15,000. Certainly, a false statement that wreaks substantial damage would argue for a forfeiture at a higher end of the range than might be appropriate for one that causes little or no damage.

Three other arguments raised by plaintiff deserve comment.

First, plaintiff argues that by failing to object to the form of the verdict, the content of the Medicaid fraud jury instruction, and plaintiff's forfeiture closing argument, Pharmacia waived its right to challenge the jury's answer to Question No. 5. The argument manifestly lacks merit; there was no waiver. The problem with the jury's answer to Question No. 5 lies not in the form of the verdict nor in the jury instruction, neither of which is erroneous. And failing to object to a closing argument does not signify acquiescence to the validity of that argument, let alone to a subsequent jury verdict in accordance with the argument. Closing arguments always involve parties urging positions abhorrent to the other side. For reasons one hopes are obvious, defendant had no reason, let alone occasion, to object to the jury's verdict before it was rendered. This is especially true given that the jury still could have rendered an answer to Question No. 5 actually countenanced by §49.49(4m), in spite of the erroneous argument by plaintiff's counsel.

Secondly, near the end of the arguments on forfeitures at the hearing on motions after verdict, plaintiff's counsel argued for the first time--surprisingly--that the forfeiture statute §49.49(4m) is ambiguous. I disagree. However, even if this were true, it is difficult to see how statutory ambiguity would rescue the jury's answer to Question No. 5, or otherwise assist plaintiff's cause on forfeitures, given the strict construction required of forfeiture statutes due to their penal nature.

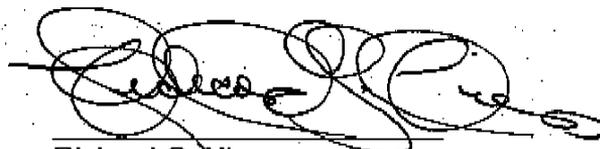
Thirdly, in the unlikely event the Court of Appeals reviews this decision on an interlocutory basis, any guidance on whether §49.49(4m)(b) is permissive or mandatory would be appreciated, since this court is not convinced that "may" means "shall" given the clear wording of the statute.

So where do we go from here? By striking the jury's answer to Question No. 5, the court is not holding that the answer should be changed to "0". As discussed at the motion hearing, there is clearly evidence in this record that would support the imposition of forfeitures under §49.49(4m). However, their number cannot be determined without a full analysis of the factual record, and further argument from counsel. Accordingly, counsel are directed to submit briefs, by no later than June 5, 2009 and no longer than 10 pages each, setting forth the parties' respective positions on the procedure that should be followed by the court from this point forward to address the remaining issues on forfeitures, consistent with the court's opinion here. In particular, at oral argument, both

parties agreed that a further forfeiture hearing would be required, but disagreed on whether the evidence should be reopened. Obviously, this issue should be addressed in the briefing. The parties may have until no later than June 15, 2009 to reply to the opposing party's brief. In response, the court will then schedule further proceedings as necessary and appropriate, likely to include a forfeiture hearing of some sort or another.

Dated this 15th day of May, 2009.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Richard G. Niess", written over a horizontal line.

Richard G. Niess
Circuit Judge

CC: Attorney Charles J. Barnhill (by facsimile transmission)
Attorney John C. Dodds (by facsimile transmission)
Mr. Xavier A. Santistevan, Legal Assistant at Quarles & Brady LLP
(for immediate service on all parties via Lexis/Nexis per
usual practice in this case)