`

STATE BAR OF WISCONSIN
PINNACLE
Your Practice. Our Purpose.

AMC 2025

Session 4

Handling Complex Civil & Commercial Cases: Best Practices for Judges & Lawyers – Session Two

Presented by:

Hon. Valerie Bailey Rihn (Ret.), Val Bailey Legal, Madison
Laura A. Brenner, Reinhart Boerner Van Deuren, S.C., Milwaukee
Hon. Jeffrey O. Davis (Ret.), Concurrence ADR LLC, Milwaukee
Hon. William J. Domina, Waukesha County Circuit Court, Waukesha
Hon. R. Michael Waterman, St. Croix County Circuit Court, Hudson

About the Presenters...

Hon. Val Bailey-Rihn retired from the bench August 1, 2022. She had been the Presiding Judge of Dane County and was one of the judges on the Commercial Court. She practiced law for 25 years for a national firm, where she was a partner in commercial litigation and business law, before being elected in 2016. She now does mediations and arbitrations as well as being a reserve judge and a referee overseeing lawyer discipline cases. She is a two-time Alumna of the UW-Madison, receiving a BBA in Accounting in 1984, and a JD in 1991. She enjoys traveling and running with her husband of 37 years in her spare time.

Laura A. Brenner is a shareholder in Reinhart's Litigation Practice and chair of the firm's Commercial and Competition Law Group. She handles many types of commercial litigation matters in Wisconsin and around the country. She also counsels companies involved in many different industries with a wide range of business matters. Laura is a frequent presenter on topics related to antitrust, dealership and franchise laws (including the Wisconsin Fair Dealership Law), sales representative laws, advertising, pricing, trade regulation, warranties and contract issues. Laura is a former chairperson of Wisconsin's Commercial Court Pilot Program Committee. She is the current president of the Thomas E. Fairchild Inn of Court and member of the State Bar of Wisconsin.

Hon. Jeffrey O. Davis (Ret.) practiced law for 32 years at the firm of Quarles & Brady before accepting a position as a judge on the Wisconsin Court of Appeals, District II, in 2019, where he served until August 2021. During his career at Quarles, Jeff handled a wide range of civil litigation in the areas of unfair competition and trade secrets, construction, property and land use, securities, closely held business, and debtor-creditor and bankruptcy, and he developed a particularly strong specialty in complex insurance matters, which led to handling a number of groundbreaking insurance coverage cases in the Wisconsin Supreme Court and Court of Appeals, forming and chairing the Quarles insurance recovery practice and serving as an adjunct professor of insurance law at Marquette Law School. Following his departure from the bench, Judge Davis co-founded Concurrence ADR, LLC, with one of his former colleagues, the Hon. Paul Reilly, and Milwaukee attorney Kathy Nusslock. Concurrence ADR, LLC provides alternative dispute resolution services and appellate consulting.

Hon. William J. Domina of Waukesha, Wisconsin. **Practice:** *Waukesha County Circuit Court Judge*, (2010-present)(appointed by Gov. James Doyle, elected 2011, re-elected, 2017 and 2023)(assigned to and been the presiding judge over all court divisions during tenure: civil, criminal, family and juvenile): Presiding Judge for Waukesha County (August 2022-October, 2023); *Commercial Docket Judicial Assignment* (2017-2023) (appointed by Chief Justice Patience Roggensack); *Waukesha County Drug Treatment Court*, founding and past-presiding judge (2012-2014); *Milwaukee County Corporation Counsel*, chief legal counsel (2003-2010)(appointed by Scott K. Walker, County Executive); *Waukesha County Corporation Counsel*, Principal Assistant and Assistant Corporation Counsel (1989-2003); *Gibbs, Roper, Loots and Williams, S.C.*, Commercial Litigation Associate (July, 1987-November, 1989); **Education:** *U.W.-Eau Claire*, Bachelor of Business Administration (cum laude graduate); *U.W. Law School, J.D.* (1985); **Professional Activities:** *Marquette University Law School,* Adjunct Professor of Law, (2018-2022); *Wisconsin Criminal Jury Instruction Committee,* Committee Member, (2012-2022), chairperson, (2020-2022); *Judicial Conduct Advisory Committee,* vice-chair (2018-2021), member (2015-2021)(appointed by Chief Justice Patience Roggensack); *American College of Business Court Judges,* member (2017-2023); *Wisconsin Task Force on Opiate Abuse*, member (2016)(appointed by Gov. Scott K. Walker); *Juvenile Corrections Study* Committee, member (2018)(appointed by Gov. Scott K. Walker); State *Bar of Wisconsin*: *2014 Wisconsin Judicial* Conference, co-chairperson; State

Bar of Wisconsin *Board of Governors*, elected member, (2000-10); **Awards:** *Wisconsin Judge of the Year Award*, State Bar of Wisconsin (June, 2015); *Waukesha County Bar Association Distinguished Member Award*, (May, 2016); *University of Wisconsin-Eau Claire Alumni Association President's Award*, (May, 2016); *National Alliance on Mental Illness (NAMI)-Waukesha County Special Recognition Award*, (May, 2017). **Personal:** *Married* to Attorney Julie M. Gay for 39 years and they are *parents* to Attorney Katherine Domina and Joseph Domina and *grandparents* to Miles, Ellis and Cleo.

Judge Waterman was appointed to the St. Croix County Circuit Court in 2015. He received his undergraduate degree from Muhlenberg College in Allentown, Pennsylvania and his law degree from Hamline University School of Law in St. Paul, Minnesota. He chairs the Civil Jury Instruction Committee, and teaches appellate advocacy at Mitchell Hamline School of Law. Prior to joining the bench, Judge Waterman had a civil litigation practice in Hudson, Wisconsin. Contact Information: michael.waterman@wicourts.gov

NAVIGATING THE EVOLVING LINE BETWEEN CONTRACT AND TORT:

WISCONSIN'S ECONOMIC LOSS DOCTRINE

AS PRESENTED BY:

HON. (RET'D) VALERIE L. BAILEY-RIHN
HON. (RET'D) JEFFREY O. DAVIS

2025 STATE BAR ANNUAL MEETING AND CONFERENCE
JUNE 19, 2025

© JEFFREY DAVIS, 2025

TABLE OF CONTENTS

TABLE OF CONTENTS
(cont'd)

TABLE OF CONTENTS
(cont'd)

NAVIGATING THE EVOLVING LINE BETWEEN CONTRACT AND TORT:

WISCONSIN'S ECONOMIC LOSS DOCTRINE

I. Overview Of The Economic Loss Doctrine

A. ***General Rule*. The classic formulation of the economic loss doctrine ("ELD") is as follows:**

> The economic loss doctrine precludes a purchaser of a product from employing negligence or strict liability theories to recover from the product's manufacturer loss which is solely economic.

This is how the doctrine started, and was for a while and occasionally still is articulated by the courts. *Wausau Tile Inc. v. County Concrete Corporation*, *226 Wis. 2d 235, 593 N.W.2d 445, 451 (1999)*. But, as will be seen below, the doctrine is in fact considerably broader than this "classic formulation."

B. ***Policies Behind the Doctrine*.** The Wisconsin Supreme Court has articulated three policies behind the ELD, which it frequently cites as justification for applying the doctrine in any given case. These policies are: (1) it preserves the fundamental distinction between tort law and contract law; (2) application of the doctrine protects the party's freedom to allocate economic risks by contract; (3) the doctrine encourages the purchaser, which is the party best situated to assess the risk of economic loss, to assume, allocate or insure against that risk. *Wausau Tile*, *supra*.

The doctrine is basically designed to prevent a party from making an end run around his or her contract by suing in tort law. As put by Judge Crabb in a frequently cited quote:

> Commercial entities are capable of bargaining to allocate the risk of loss inherent in any commercial transaction. Courts should assume that parties factor risk allocation into their agreements and that the absence of comprehensive warranties is reflected in the price paid. Permitting parties to sue in tort when the deal goes awry rewrites the agreement by allowing a party to recoup a benefit that was not part of the bargain.

Stoughton Trailers, Inc. v. Henkel Corp., 965 F. Supp. 1227, 1230 (W.D. Wis. 1997).

C. Historical Development.

1. **The "Traditional Rule" Allowing Tort Liability.** At common law, Wisconsin has long held that negligent performance of a contract could

give rise to remedies in both tort and contract. *Colton v. Foulks,* 259 Wis. 142, 146-47, 47 N.W.2d 901 (1951). This rule seemingly applied equally to negligence and strict liability actions involving property damage where recovery was sought for damage to the product itself. *City of LaCrosse v. Schubert, Schroeder & Associates*, 72 Wis. 2d 38, 44-5, 240 N.W.2d 124 (1976).

2. **Adoption of the Economic Loss Doctrine.** At least insofar as Wisconsin is concerned, the doctrine has its origins in a relatively recent United States Supreme Court case, *East River S.S. Corp v. TransAmerica Delaval, 476 U.S. 858 (1986)*, an admiralty case where the U.S. Supreme Court held that a manufacturer in a commercial relationship "has no duty under either negligence or strict products liability theory to prevent a product from injuring itself." Just three years later, Wisconsin adopted the same rule, as a matter of common law, in *Sunnyslope Grading Inc. v. Miller, Bradford & Risberg, Inc.* 148 Wis. 2d 910, 437 N.W.2d 213 (1989). In *Sunnyslope*, the court held that "a commercial purchaser of a product cannot recover solely economic losses from the manufacturer under negligence or strict liability theories, particularly, as here, where the warranty given by the manufacturer specifically precludes the recovery of such damages." *Id*. at 921. The Court also suggested, however, that where there was no privity of contract the result would likely be different, noting that *LaCrosse* had been decided "absent any contractual allocation of the risks." *Id*. at 917 (quoting *City of LaCrosse*, *supra* and limiting it to those facts). As will be seen, that suggestion was soon abandoned.

3. **Subsequent Developments.** In the 33 years since *Sunnyslope*, hundreds of published decisions (in Wisconsin alone) have addressed the ELD in ways that might be best described as a continuous struggle to define the scope of the doctrine and its appropriate application. Issues have arisen as to (1) what is economic loss; (2) what types of legal theories are affected by the doctrine and (3) what types of contracts and relationships are encompassed.

II. What Is (And Is Not) "Economic Loss"?

A. ***"Commercial" Loss.*** Judge Posner observed that the term "economic loss" is actually a misnomer, and that a better label for the types of loss encompassed by the doctrine would be "commercial loss" both because personal injuries and property losses may also be economic losses and because "tort law is a superfluous and inapt tool for resolving purely commercial disputes." *Miller v. US Steel Corp.*, 902 F. 2d 573, 574 (7th Cir. 1990). Nonetheless, as a general matter, "economic loss" is generally defined as "damages resulting from inadequate value because the product is inferior and does not work for the general purposes for which it was manufactured and sold." *Daanen & Janssen Inc. v. Cedar Rapids Inc.*, 216 Wis. 2d 395, 400-01, 573 N.W.2d 842 (1998). Economic loss includes both direct economic loss and consequential economic loss. Id. The

former is loss in value of the product itself, the latter all other economic losses attributable to the product defect. *Id.*

B. Personal Injuries.

1. **Effect of personal injury on Economic Loss Doctrine.** Personal injuries are not "economic loss" and a case involving personal injury from a defective product will take a case out of the economic loss doctrine. There has been some suggestion that this will include losses that would otherwise be barred by the doctrine (*e.g.*, repair or replacement of the product and consequential damages). *Wausau Tile, Inc., supra* at ¶ 14 ("claims which allege economic loss in combination with non-economic loss are not barred by the doctrine"). But after *Secura Ins. v. Super Prods. LLC*, 2019 WI App. 47, 388 Wis. 2d 445, 933 N.W. 2d 161, discussed below, this proposition seems highly doubtful.

2. **Third party injury.** Any personal injury must be suffered by the plaintiff and not third parties who may purchase the plaintiff's products in order to take a case out of the economic loss doctrine. Otherwise, third party personal injuries are considered forms of economic loss. *Wausau Tile Inc. supra.* In *Wausau Tile*, the Court reasoned that such injuries merely give rise to third party *claims*, and that the plaintiff in such cases is not the "real party in interest" in asserting a personal injury claim against the defendant manufacturer.

3. **Emotional distress.** Theoretically, allegations of emotional distress might take a case out of the ELD. *Cf. Doyle v. Engelke*, 219 Wis.2d 277, 580 N.W.2d 245 (1998) (emotional distress is form of "bodily injury" for purposes of insurance covering same). However, the Supreme Court has indicated that it is highly questionable if emotional distress damages would ever be available in a property damage case based on negligence. *Kleinke v. Farmers Corp.*, 202 Wis. 2d 138, 549 N.W.2d 714 (1996). And it is certainly hard to imagine how such damages would be available to a purchaser of a defective product not suffering any bodily injury. Consider this potential loophole closed.

C. ***Damage to "Other Property".*** Another category of losses for which tort liability is not barred by the ELD are those that occur when the product causes harm to "other property." The issue as to what constitutes "other property" has been the source of much litigation.

1. **What is the effect of damage to "other property"?** In *Miller, supra* the Seventh Circuit held that "incidental" property damage will not take a commercial dispute outside the economic loss doctrine as "the tail will not be allowed to wag the dog." The Wisconsin Supreme Court has never opined that this is a correct prediction of Wisconsin law; however, the Wisconsin Court of Appeals more recently took a decidedly different

approach, finding that any "other property" damage claims were fully compensable—but did *not* open the door to claims that would otherwise be barred by the ELD, including claims for the value of the product, lost profits, etc. *Secura Ins. v. Super Prods. LLC*, 2019 WI App. 47, 388 Wis. 2d 445, 933 N.W. 2d 161. In adopting this type of divisibility approach, the court characterized prior case law suggesting its viability as "imprecise language in our case law." *Id*. at ¶ 14. As a practical matter, this likely forecloses any need to consider the "de minimis" rule articulated in *Miller*—rather, *Secura* would suggest that any "other property" damage is recoverable regardless of how minimal, but the recovery is limited to *only* that property damage.

2. **Unreasonably or Inherently Dangerous Materials.** In *Northridge Company v. W.R. Grace & Company,* 162 Wis. 2d 918, 471 N.W.2d 179 (1991) the Wisconsin Supreme Court held that property owners could recover in tort against the manufacturer of a fire-proofing material which contained asbestos. The court held that the building was "other property" for purposes of taking the case out of the economic loss doctrine. *Northridge* may be limited to its facts, specifically that it involved an "unreasonably dangerous product," which has since given rise to the so-called *Northridge* "public safety" exception to the ELD. This exception, in turn, has been limited to cases where the materials are "inherently dangerous to the health and safety of humans." *Wausau Tile,* 593 N.W.2d at 458-59*; see also Rich Products Corp. v. Kemutec Inc.,* 66 F. Supp. 2d 937, 976 (E.D. Wis. 1999). Indeed, Judge Griesbach suggested that it was actually based on the "other property" exception rather than any public safety exception, with the inherent dangerousness of asbestos only serving as "an important consideration" pertaining to the applicability of that exception. *Schwabe North America v. Cal-India Foods Int'l, Inc.*, Case No. 14-CV-235 (E.D. Wis. 2014) ("a careful reading of *Northridge* reveals that it did not create a public safety exception at all…*Northridge* was based on the other property exception to the economic loss doctrine"). In any event, it has been further limited to cases where there is more than a "threat" of harm, particularly where the threat is limited in scope. *Rich Products, supra* 66 F.Supp. 2d 937, 976 (E.D. Wis. 1999). In *Rich Products*, strands of frayed metal stemming from a defective conveyor that were found in 29 out of 6 million cases of food product was considered *de minimis* and not sufficient to give rise to the "other property" exception.

3. **Integrated Systems Test for Addressing "Other Property" Damage.** In *Wausau Tile*, the Wisconsin Supreme Court held that component parts causing injury to an integrated system, either to the system as a whole or other system components, does not cause damage to "other property" and, therefore, any tort theories arising out of the defective product are barred by the doctrine. Applying the integrated product rule to building construction, the Wisconsin Court of Appeals in *Bay Breeze Condominium*

Association, Inc. v. Norco Windows, Inc., 2002 WI App 205, 257 Wis. 2d 511, 651 N.W.2d 738, affirmed a dismissal of a condominium association's claim against a window manufacturer, even though the association could prove damage to property other than the windows themselves. The Court concluded that the economic loss doctrine applies to building construction defects when the defective product is a component part of an integrated structure or finished product. "Because of the integral relationship between the windows, the casements and the surrounding walls, the windows are simply a part of a single system or structure, having no function apart from the buildings for which they were manufactured." *Bay Breeze*, 257 Wis. 2d at 527-28.

In *Grams v. Milk Products, Inc.*, 2005 WI 112, Wis. 2d, 699 N.W.2d 167, the Wisconsin Supreme Court stated that the integrated products concept does not, alone, translate well to all situations involving property damage to which the economic loss doctrine logically applies. The *Grams* court then noted that the Court of Appeals had adopted a "disappointed expectations" concept for situations in which a commercial product causes property damage, but the damage was within the scope of the bargaining – that is, the damage could have been the subject of negotiations between the parties. The disappointed expectations concept, so said the Supreme Court in *Grams*, is grounded in contract principles of bargaining and risk allocation, not on a redefinition of "other property."

This concern prompted the *Grams* Court to modify the integrated systems test to also include a "disappointed performance expectations" test as part of the integrated systems analysis:

> In exploring the parameters of the "other property" exception to the economic loss doctrine, we will incorporate this concept of "disappointed expectations" into our analysis, as well as the integrated system concept. . . . [T]he economic loss doctrine will apply when "prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product."

Grams, 2005 WI 112, ¶ 43.

The *Grams* court was clearly concerned that the "other property" exception created an arbitrary line for the application or non-application of the economic loss doctrine. In a significant passage, the *Grams* court stated:

> If a product is expected and intended to interact with other products and property, it naturally follows that the product could adversely affect and even damage that

> property. *A rule that allows a court recovery based on what is damaged, rather than whether the risk of that damage was within the scope of the bargain, would leave little room for contract*.

Id. 47 (emphasis added).

Thus, in *Grams* the Wisconsin Supreme Court essentially adopted in whole the position federal Judge Randa had taken in *Rich Products*, in which he observed that in cases from other jurisdictions, most notably the Eighth Circuit's decision in *Dakota Gasification Co. v. Pascoe Building Systems*, 91 F.3d 1094 (8th Cir. 1996), "other property" claims had turned on whether the damage to the "other property" was a "foreseeable result of a defect at the time the parties contractually determined their respective exposure to risk.. . ." *Rich Prods*., 66 F. Supp. 2d at 972, citing *Dakota*, 91 F.3d at 1099-1101. In that case, the "other property" exception would not apply. Judge Randa went on to caution that the "Dakota exception" should "not be read too broadly" and would apply only where "prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product." *Id*. at 975. That was deemed to be the case with respect to the specialty conveyor at issue in *Rich Products*.

The *Grams* analysis was subsequently applied by the Court of Appeals in *Foremost Farms v. Performance Process, Inc.*, 297 Wis.2d 724, 726 N.W.2d 289, 2006 WI App 246, a case where a dairy company, Foremost had purchased a defoaming agent from the defendant Performance Process. The damage was alleged to be attributable to a chemical known as phenol that was in a single barrel of the defoamer, and that the phenol had reacted with other constituents to create an off odor and taste. Distilling *Grams* to a two part "integrated system" test the court found that neither part was satisfied as a matter of law since (1) there was no evidence that the defoamer remained in the finished product once it had performed its function to reduce foaming in the manufacturing process and (2) the phenol in the finished product was a "contaminant", not a "normal defoamer ingredient." *Foremost* provides helpful guidance in situations where "other property" damage claims are based on "contaminants" or other unintended—and harmful—ingredients make their way into a product that is alleged to have caused "other property" damage claim. Its reasoning comes directly from the language employed by *Grams* and other cases, though in reality it appears to be a distinction not necessarily rooted in the purpose behind the doctrine. After all, "other property" damage caused by a contaminant would seem to be as foreseeable as that caused by a failure to perform due to faulty design, manufacture, etc. In both cases, the fundamental issue is a diminution of the quality of the product.

State Farm & Cas. Co. v. Hague Quality Water Int'l, 2013 WI App 10, 345 Wis. 2d 741, 826 N.W. 2d 412 is another case applying the test,

perhaps in a bit more straightforward fact scenario. In that case, the purchaser was a homeowner who purchased a water softener that allegedly leaked and caused extensive damage to the surrounding property, including drywall, flooring and woodwork. The court of appeals reversed a trial court dismissal, noting in particular that the damage claims did not arise out of the water softener's status as part of an integrated system, *Id*. at ¶ 12 ("the water softener . . . was not integral to the functioning of Krueger's drywall, flooring, and woodwork). Nor did the defect affect the expected performance of the product. *Id*. at 16 (""the alleged failure of Krueger's water softener did not have anything to do with the purpose for which the water softener was purchased."). These facts were sufficient to allow the claim to proceed under both the integrated system and disappointed expectations prongs of the "other property" analysis.

III. What Tort And Other Legal Theories Are Affected By The ELD?

A. ***Background*.** As originally articulated by the Wisconsin Supreme Court, the economic loss doctrine applied only to claims for negligence and products liability. *Sunnyslope*, *supra.* However, the underlying rationale for the doctrine – that it should apply to "preclude recovery in tort of purely economic losses for the failure of a product to live up to contractual expectations", *Vogel v. Russo*, 236 Wis.2d 504, 511, 613 N.W.2d 177 (2000) – always suggested potential applicability wherever tort theories were able to erode the parties' contractual allocation of risk. Consequently, in the years since *Sunnyslope*, much litigation has involved the question as to what other tort theories might be subject to the doctrine, with much more likely to come.

B. Misrepresentation.

1. **Negligence and Strict Liability.** With respect to negligence and strict liability misrepresentation, it has been settled for some time that such claims are barred by the economic loss doctrine. *Van Lare v. Vogt, Inc.*, 274 Wis.2d 631, 683 N.W.2d 46, 2004 WI 110. *See also Badger Pharmacal, Inc. v. Colgate –Palmolive Co.*, 1 F.3d 621, 628 (7th Cir. 1993) and *Prent Corp. v. Martek Holdings, Inc.*, 2000 WI App 194, 238 Wis.2d 777, 618 N.W.2d 201 (Ct. App. 2000).

2. **Intentional Misrepresentation - Background.** Intentional misrepresentation – or fraud – has been a much more confusing story. In *Cooper Power Systems Inc. v. Union Carbide Chemicals & Plastics Co.,* 123 F. 3d 675 (7th Cir. 1997), the Seventh Circuit concluded that there was no reason to treat intentional misrepresentation claims differently than other misrepresentation claims (*i.e.*, they should be barred). Subsequent lower federal court decisions construed *Cooper Power* narrowly, recognizing an exception for fraud in the inducement claims. *See e.g. Budgetel Inns, Inc. v. Microsystem Inc.,* 8 F. Supp. 2d 1137, 1149 (E.D. Wis. 1998). *See also Raytheon Co. v. McGraw Edison Co.,* 979 F. Supp.

858, 870 (E.D. Wis. 1997)*; Icebowl LLC v. Weigel Broadcasting Co.,* 14 F. Supp. 2d 1080 (E.D. Wis. 1998). In doing so, however, some of these courts allowed inducement claims "only where the claims at issue arise independent of the underlying contract" and otherwise applied the doctrine where the inducement related to the subject matter of the contract. *Raytheon Co*., *supra* at 870. This corollary to the doctrine, known as the "*Huron Tool* limitation" after a Michigan case bearing that name, *Huron Tool and Engineering Co. v. Precision Consulting Services, Inc.*, 209 Mich. App. 365, 532 N.W.2d 541 (Mich. App. 1995), was embraced by certain Eastern District courts, most notably Judge Randa in *Raytheon* and *Rich Products*. Other courts rejected this "exception to the exception." *Budgetel*, *supra* at 1146-47.

Then, in *Douglas-Hanson Company, Inc. v. B.F. Goodrich Company,* 229 Wis. 2d 132, 598 N.W.2d 262 (Ct. App. 1999)*,* the Wisconsin Court of Appeals rejected *Cooper Power Systems* to the extent that it held that fraudulent inducement claims were barred by the economic loss doctrine. The Wisconsin Supreme Court took review and affirmed – but only because of a three-to-three split due to Justice Wilcox's recusal in the case. Subsequently, the Seventh Circuit took this split as license to reaffirm its holding in *Cooper Power*, with the prediction that the Wisconsin Supreme Court would overrule *Douglas-Hanson*. *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 964-66 (7th Cir. 2000). The Court of Appeals then reaffirmed *Douglas-Hanson* in *Kailin v. Armstrong*, 252 Wis.2d 676, 643 N.W.2d 132, 2002 WI App. 70. Consequently, there was a split between the Seventh Circuit and the Wisconsin Court of Appeals as to how the Supreme Court would treat intentional misrepresentation claims.

3. ***Digicorp v. Ameritech* – The Supreme Court Tries to Resolve the Split – But the Issue Only Gets More Confusing.** In *Digicorp Inc. v. Ameritech Corp.*, 262 Wis.2d 32 662 N.W.2d 652, 2003 WI 54, the Wisconsin Supreme Court took up the question left unanswered in *Douglas-Hanson* – namely whether Wisconsin recognizes a fraud in the inducement exception to the economic loss doctrine and, if so, what is its scope (i.e., does Wisconsin recognize the *Huron Tool* limitation). Unfortunately, as in *Douglas-Hanson*, the full court was not able to sit on the case. Two justices (Justices Abrahamson and Wilcox) did not participate, and the remaining five were not able to achieve even a three person consensus on the parameters of the doctrine as applied to intentional fraud claims. A three justice majority reversed on the issue before it, finding that the fraud claim was barred. However, the plurality opinion, authored by Justice Crooks and joined by Justice Prosser, did adopt a limited fraud in the inducement exception to the ELD, stating that fraud claims based on representations that were not "interwoven" in the contract would be allowed to proceed. The plurality went on to find however that this exception was inapplicable in the case before it, since

the fraud in *Digicorp* – the defendant's failure to disclose a criminal background of an employee hired by the plaintiff – was "interwoven" with the parties' contractual undertakings concerning employees. Justice Sykes concurred in the result, but opined that there should be no fraud in the inducement exception at all. Finally, Justices Bradley and Bablitch dissented, arguing for a broad fraud in the inducement exception – as had been adopted in *Douglas-Hanson* and *Kailin*.

4. ***Tietsworth v. Harley–Davidson, Inc* – The Court Tries Again.** The fractured decision in *Digicorp*, combined with the fact that two justices did not sit on the panel, left the fraud in the inducement question still up in the air. Then, in *Tietsworth v. Harley-Davidson*, *Inc.*, 270 Wis.2d 146, 677 N.W. 2d 233, 2004 WI 32, the Court took the occasion to consider the fraud question once again. *Tietsworth* was brought as a class action, and involved allegations of a fraudulently concealed defect that caused alleged diminution in value of an entire line of motorcycles, based on an alleged heightened "propensity" to fail. One issue (among several) was whether the fraud claim was barred by the ELD. The Court found that it was. In so doing, the Court recognized that a majority of *Digicorp* had recognized that at least *some* fraud claims – those where the fraud was "interwoven" with the contract – were barred, and that the case before it was such a claim. The Court also recognized however that *Digicorp* could not command a majority on whether the ELD should be limited to such claims, i.e., whether the *Huron Tool* exception should be adopted. Moreover, the Court seemingly declined to address it in *Tietsworth* as well, since "[t]he fraud alleged here plainly pertains to the character and quality of the goods that are the subject matter of the contract." *Id.*, 270 Wis.2d at 167. Once again, whether all fraud claims should be barred was left for another day.

5. ***Kaloti Enterprises, Inc. v. Kellogg Sales* – Resolution at Last?** In *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, 283 Wis.2d 555, 699 N.W.2d 205, the Wisconsin Supreme Court provided a definitive ruling on this subject, establishing a narrow fraud in the inducement exception to the economic loss doctrine, akin to *Huron Tool*, and as carefully explained by the lead opinion in *Digicorp*:

> [W]e hold that a fraud in the inducement claim is not barred by the economic loss doctrine "where the fraud is extraneous to, rather than interwoven with, the contract." [Cites omitted.] To invoke this narrow fraud in the inducement exception where, as here, the failure of a party to a business transaction to disclose a fact serves as the basis for a fraudulent inducement to contract claim, a plaintiff must show that: (1) there was an intentional misrepresentation, the five elements of which are set out above; (2) the misrepresentation

> occurred before the contract was formed, *see Digicorp*, 262 Wis. 2d 32, ¶ 52, 662 N.W.2d 652; and (3) the fraud [was] extraneous to, rather than interwoven with, the contract. *See id*., ¶ 47. Or stated another way, the fraud concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract.

Kaloti, 2005 WI 111, ¶ 42.

Applying the *Huron Tool* rule to the facts of *Kaloti* case, the Court held that the intentional misrepresentation alleged by *Kaloti* was extraneous to and not interwoven with the contract. In *Kaloti*, the defendants, including Kelloggs, were alleged to have known, but failed to disclose, a marketing change whereby Kelloggs would be selling directly into Kaloti's same market, that would largely prevent Kaloti from being able to resell the products being purchased from Kelloggs. This alleged misrepresentation was held by the Court to not concern the defendants' performance of their contract with Kaloti, nor the quality or character of the products being sold to Kaloti, and therefore fell within the fraud exception to the economic loss doctrine. Stated another way, the Court held that applying the *Huron Tool* exception, the plaintiff's claim for intentional misrepresentation by omission was not barred by the economic loss doctrine and could proceed.

Post-*Kaloti*, there have been no significant developments concerning the ELD as it relates to fraud. The Wisconsin Supreme Court applied the exception to allow a fraud in the inducement claim to proceed in *Wickenhauser v. Lehtinen*, 2007 WI 82, 302 Wis. 2d 41, 734 N.W. 2d 855, where the defendant had promised the plaintiffs that he would not record an option to purchase their farm in order to induce the plaintiffs to provide the option as part of a financing arrangement.

In contrast, the Seventh Circuit in *Schreiber Foods, Inc. v. Wang*, 651 F.3d 678 (7th Cir. 2011), declined to allow a fraud claim to proceed against a trading company involved with a sale by the plaintiff to a Chinese buyer though the fraud was seemingly extraneous to the contract—it involved an alleged representation to the seller that the Chinese buyer wanted the goods when, in fact, it did not. In so ruling, the Seventh Circuit appeared to deviate somewhat from a strict "interwoven/extraneous" analysis with a greater emphasis on whether the subject of the representation was one that the parties would have been expected to address in the agreement. The Court ruled that in this case the seller had "acted recklessly" in failing to take steps to protect itself from circumstances that it knew might result in non-payment—including by knowingly shipping, without disclosure, a product that was different than the product ordered, i.e., the plaintiff had

arguably engaged in fraudulent conduct itself. In some ways the case appears to be an outlier, determined by an unusual set of facts.

Finally, yet to be decided is whether the ELD would apply to the tort of "promissory fraud", i.e., a promise made with no intent to perform is a form of fraud and an exception to the rule that fraud cannot be premised on future events or unfulfilled promises. *See, e.g., Hartwig v. Bitter*, 29 Wis. 2d 653, 657, 139 N.W. 2d 644 (1966).

6. **Rescission.** One related point that should not be overlooked is that, whatever the future may hold for the fraud in the inducement exception, only the ability to recover fraud *damages* is affected by the economic loss doctrine. Assuming other elements are met, rescission claims are still potentially viable. This was made clear in *Tietsworth*, in which the Court noted that "a party fraudulently induced to enter a contract may affirm the contract and seek restitutionary damages, including sums necessary to restore the party fraudulently induced to his position prior to the making of the contract." *Id.*, 270 Wis.2d at 167-68. This was made even more explicit by the Seventh Circuit's decision in *Harley Davidson Motor Co. v. Powersports, Inc.*, 319 F.3rd 973 (7th Cir. 2003). Indeed, it may well be that the future of common law fraud in Wisconsin lies in rescission, which allows a defrauded party to "undo the deal" as well as recover various types of restitutionary damages. *Head & Seeman, Inc. v. Gregg*, 107 Wis.2d 126, 318 N.W. 2d 381 (1982); *see also Digicorp, Inc., supra* (Sykes, J., concurring in part and dissenting in part) at ¶ 76. Such "damages 'include any sums that are necessary to restore [the party fraudulently induced] to his position prior to the making of the contract." *Id.* at n. 14. It applies equally to intentional, negligent and strict liability misrepresentation claims. *Whipp v. Iverson*, 43 Wis.2d 166, 168 N.W.2d 201 (1969).

Of course, rescission is subject to its own limitations, including issues concerning election of remedies and waiver and, as an equitable remedy, the lack of a right to a trial by jury. In addition it is not clear if a claim for rescission would be considered simply another form of a contract remedy. There is some suggestion in the case law that it is exactly that. *Compare Digicorp, supra* (Sykes, J., concurring in part and dissenting in part) at ¶ 78 ("the election to either affirm or rescind a fraudulently induced contract is an election between two different contract remedies, one at law for breach and the other in equity for rescission and restitution; it is not an election between tort and contract remedies.") with Wis. Stat. § 402.721 (recognizing "remedies for fraud" as including all remedies available for non-fraudulent breach). Regardless the debate as to whether rescission is a contractual or tort remedy may not matter much—it unquestionably is an *equitable* remedy, and Wisconsin, unlike many states, does not currently permit punitive damages in cases awarding only equitable relief. *Karns v. Allen*, 135 Wis. 48, 59, 115 N.W. 357 (1908); *see also Groshek v. Trewin*,

2009 WI App 56, ¶ 39, 317 Wis. 2d 730, 768 N.W. 2d 62 (authored but unpublished), *aff'd on other grounds*, 2010 WI 51, 325 Wis.2d 250, 784 N.W. 2d 163 (adhering to *Karns*, as controlling supreme court precedent, while noting that a prior court of appeals decision, *White v. Ruditys*, 117 Wis. 2d 130, 343 N.W. 2d 421 (Ct. App. 1983), had "impermissibly declined" to do so).

C. ***Statutory Liability*.** An issue that has been on the table for the last several decades is whether and to what extent the ELD might apply to statutory remedies and in particular whether it would apply to claims under Wis. Stat. § 100.18, which provides a remedy for misrepresentations made in offers or sales to members of the public. In *Kailin v. Armstrong*, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132, the Wisconsin Court of Appeals decided that the ELD did not bar such claims; however, the case was arguably limited to consumer actions, particularly since two federal courts had, prior to *Kailin* found that the ELD did bar 100.18 claims. *MBI Acquisition Partners, L.P. v. Chronicle Publ'g Co.*, 301 F.Supp. 2d 873 (W.D. Wis. 2002); *Weather Shield Mfg., Inc. v. PPG Indus., Inc.*, 1998 WL 469913 (W.D. Wis. 1998). That decision was bolstered by the Supreme Court decision in *Stuart v. Weisflog's Showroom Gallery*, 2008 WI 22, 308 Wis. 2d 103, 746 N.W. 2d 762, in which the court declined to apply the ELD to Home Improvement Protection Act claims because doing so "would defeat the public policies underpinning the HIPA and the remedies it provides." *Id.* at ¶ 35.

More recently, our Supreme Court has settled the 100.18 issue once and for all, deciding that the ELD did not bar 100.18 claims of any sort. *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, 389 Wis. 2d 669, 937 N.W. 2d 37 ("we conclude that the economic loss doctrine does not serve as a bar to claims made under Wis. Stat. § 100.18"). Importantly, the Court went on to reject the notion that the requirement that "the public" to whom a misrepresentation is made cannot be a single member of the public, meaning that the statute is potentially applicable to any type of sales transaction. *Id.* at ¶¶ 57-71.

What is interesting about this line of cases is that the courts have recognized that allowing statutory claims to proceed without an ELD bar is, at least in part, based on the recognition of a legislatively-driven public policy of protecting buyers from misrepresentations in commercial transactions. And yet, despite the fact that the ELD is purely a creature of the judiciary—and originally formulated and consistently applied in the name of public policy—the courts have reached decidedly different results in considering its application to common law tort claims, most notably fraud, that are for all intents and purposes identical to many statutory claims. It would appear that the only way to reconcile these results is with the conclusion that the Supreme Court has a different view of "public policy" than the state legislature when it comes to the viability of fraud claims.

D. ***Other Tort Theories*.** Yet to be decided in Wisconsin is whether the economic loss doctrine will apply to other tort theories frequently litigated in commercial disputes, including tortious interference with contract and prospective contract,

trade libel and breach of fiduciary duty. Judge Crabb did grant dismissal to a defendant who was sued for misrepresentation and tortious interference with contract on the basis of the economic loss doctrine, but did not address why the two were both covered by the doctrine, nor does it appear that any distinction between the two theories was raised as an argument. *Bowen Medical Co. Ltd. v. Nicolet Biomedical Inc.*, 02-CV-170-C (11/14/02). In cases from other jurisdictions the results have been mixed. *See, e.g., Future Tech International, Inc. v. Tae IL Media, Ltd.*, 944 F.Supp. 1538, 1566 (S.D. Fla. 1996) (doctrine did not apply to bar tortious interference, defamation, breach of fiduciary duty or trade secrets claims); *Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 321 (6th Cir. 1999) (dismissing tortious interference claims because they "arise out of the contractual relationship" between the parties), *Craig v. Salamone*, 1999 WL 213368 (E.D. Pa 1999) (allowing claim of tortious interference with prospective contracts to go forward despite existence of contract between parties).

IV. What Types Of Contracts And Relationships Are Affected By The ELD?

A. ***Original Rule*.** Under *Sunnyslope*, the economic loss doctrine applied only to contracts involving the sale of goods in a commercial setting. *Sunnyslope*, *supra*. As with other aspects of the doctrine, this "original" rule has been considerably broadened in the last 16 years.

B. ***Requirement of Privity*.** In Wisconsin, there is no requirement that there be "privity" between the buyer and seller of goods in a case involving defective products in order for the ELD to apply. *Daanen & Janssen, Inc.*, *supra; Digicorp,* ¶ 22. This serves not only to bar tort claims against "remote" sellers or suppliers, but also tort claims by owners against subcontractors with whom the owner is not in privity, *Linden v. Cascade Stone Co., Inc.*, 2005 WI 113, 283 Wis. 2d 606, 699 N.W. 2d 189; *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶¶ 47-52, 349 Wis. 2d 687, 836 N.W. 2d 807 and claims for economic loss between subcontractors on the same project. *Mechanical, Inc. v. Venture Elec. Contractors, Inc.*, 2020 WI App 23, 392 Wis. 2d 319, 944 N.W. 2d 1.

C. ***Consumer Transactions*.** In 1999, the Supreme Court expanded the economic loss doctrine to apply to any type of sale of product, rejecting the notion that it should not apply to claims by consumers. *State Farm Mut. Auto Ins. Co. v. Ford Motor Co.,* 225 Wis.2d 305, 314, 592 N.W.2d 201 (1999). However, the court expressly limited its holding, declining to "reach the issue of the preclusion of a strict liability claim when the parties are of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages." *Id.* at 348.

D. ***Real Estate and Construction Contracts*.**

1. **Real Estate Contracts Generally.** The Supreme Court decided in *Van Lare v. Vogt, Inc.*, 274 Wis.2d 631, 683 N.W.2d 46, 2004 WI 110 that the

economic loss doctrine applies to sales of real estate, agreeing with previous lower court decisions on this point, *see Kailin*, *supra*; *Mose v. Tedco Equities--Petter Road Ltd. Partnership*, 228 Wis. 2d 848, 598 N.W.2d 594 (Ct. App. 1999). In *Below v. Norton*, 2008 WI 77, 310 Wis.2d 713, 751 N.W.2d 351, the Supreme Court expanded the holding in *Van Lare* to include residential real estate, refusing to draw any distinction between the two types of transactions for ELD purposes. In 2009, the legislature subsequently abrogated *Below* as it applied to residential real estate transactions with the passage of Wis. Stat. § 895.10, which expressly allows plaintiffs to bring claims for "fraud committed, or an intentional misrepresentation made, by the transferor" in a residential real estate transaction. And even absent this development, such cases are candidates for claims under Wis. Stat. § 100.18 and other statutory theories.

2. **Sale of contaminated property.** Generally the ELD should apply. *Mose*, *supra*; *Raytheon Co. v. McGraw-Edison Co., Inc*., 979 F. Supp. 858 (E.D. Wis. 1997). But the economic loss doctrine applies only where contaminated property was part of the sale. It does not apply, for example, to unauthorized dumping or pollution claims against an easement owner. *City of West Allis v. Wisconsin Electric Power Co.*, 248 Wis.2d 10, 635 N.W.2d 873, 2001 WI App. 226.

3. **Construction Cases.** The doctrine frequently arises in construction cases, with issues arising in particular concerning "other property". *Bay Breeze*, *supra*; *Linden, supra*; *Mechanical, Inc., supra; Kmart Corp. v. Herzog Roofing, Inc.,* 2018 WI App 71, 384 Wis. 2d 632, 922 N.W. 2d 311 (authored but unpublished). In addition, questions concerning whether construction-related work is for "goods" or "services" is also one that frequently arises, and is addressed in the next section.

E. *Service Contracts*.

1. ***INA v. Cease Electric* – The ELD Does Not Apply to Service Contracts.** For years it was an open question as to whether the economic loss doctrine applied to service contracts. *See*, *e.g. Daanen & Janssen, supra* (expressly declining to decide whether the doctrine applied to service contracts). Case law seemed to suggest that the doctrine applied. *Vogel v. Russo*, 2000 WI 85, 236 Wis.2d 504, 511, 613 N.W.2d 177, (2000) ("The economic loss doctrine precludes recovery in tort of purely economic losses from the failure of a product *or service* to live up to contractual expectations") (emphasis added). *Stoughton Trailers, Inc. v. Henkel Corp*., 965 F. Supp. 1227 (W.D. Wis. 1997), (predicting that Wisconsin would apply the doctrine to service contracts, though *only* where the plaintiff and defendant are in privity). However, in *INA v. Cease Electric, Inc.*, 2004 WI 139, 276 Wis. 2d 361, 688 N.W. 2d 462, the Supreme Court decided that the doctrine does *not* apply to such contracts, reasoning that

the rationale behind the rule – that contract law and contract remedies are better equipped to address problems with the sale of products – is not equally applicable to service contracts. While attempting to create a "bright line" rule in this area, the decision in *Cease Electric* raised a host of new issues, described further below.

2. **When is a contract one for services?** A frequent post-*Cease* question for ELD purposes is whether a contract is one for "goods" or "services" (this has long been a question in other contexts, e.g., for determining application of the Uniform Commercial Code). These issues arise especially in connection with construction cases, the sale of labor-intensive, "customized" products, such as computer systems, and other relationships where the seller provides a mix of goods and services. Where that is the case, our Supreme Court has held that one must look to the "predominant purpose" of the contract to determine whether it is a contract for goods or one for services. *Linden v. Cascade Stone Co.*, 2005 WI 113, ¶ 8, 283 Wis. 2d 606, 699 N.W.2d 189. Application of this test entails examination of a number of factors, both objective and subjective, including "the language of the contract, the nature of the business of the supplier, the intrinsic worth of the materials, the circumstances of the parties, and the primary objective they hoped to achieve by entering into the contract." *Id.* at ¶ 18, 21. As the Court later observed in a similar case, *1325 N. Van Buren, LLC v. T-3 Group, Ltd.*, 2006 WI 94, ¶ 42, n. 11, 293 Wis. 2d 410, 716 N.W. 2d 822, the *Linden* court was focused primarily on two factors—the primary objective the parties hoped to achieve and the fixed contract price—in concluding that the contract at issue was primarily for a product. Between *Linden* and *1325 N. Van Buren*, the answer to questions concerning construction contracts would generally appear to be heavily weighted to a finding that such contracts are predominantly for a product, and subsequent appellant decisions applying the two further bolster that conclusion. *See Kalahari Development, LLC v. Iconica, Inc.*, 2012 WI App 34, 340 Wis. 2d 454, 811 N.W. 2d 825; *TJ Prop, LLC v. Tim Mueller Mason Contractor, LLC*, 2024 WI App 16, 4 N.W.3d 920 (unpublished).

This raises a further issue: what exactly is the contract at issue in assessing the predominant purpose? In *Linden*, the court was, after all, confronted with multiple contracts – the general contract to build the house and the subcontracts between the general contractor and the various defendants. The subcontractor contracts were much more clearly service contracts. In contrast, the owner's contract with the general contractor was predominantly one for delivery of a product, that is, the house. Where a subcontractor mainly provides services that have no independent value or use apart from their function as components of the product into which they are incorporated – in this case, the house being constructed by the general contractor—the Court ruled that it was the general contract between the owners and the general contractor that controlled under the

predominant purpose test—even though the *claims* were against the subcontractors. Notably, this rule has been applied by the court of appeals even where there was no general contractor and an owner simply enters into a series of subcontracts. *TJ Prop, supra* at ¶ 32-35.

3. **Is there a distinction between "services" and "professional services"?** The short answer is no. In *Kalahari Development, supra*, the court of appeals considered an argument that the contract at issue was one for "professional services" and therefore not subject to the "predominant purpose" test but rather was "categorically exempted" from the ELD. The court rejected this argument, noting that it would be contrary to Supreme Court precedent that drew no such distinction. *Id.* at ¶¶ 35-38. While in *Kalahari* that resulted in a potentially broader application of the ELD, is should be noted that, in some states, the service contract exception has been limited to professional services, meaning that the ELD bars tort claims in the context of ordinary service contracts. Wisconsin has not made such a distinction.

4. **When is there a duty in tort?** It is important to note that even though the ELD does not apply to service contracts, a separate line of cases limits tort liability in the context of contractual relationships under the rubric of duty, i.e., the viability of tort claims may still be considered on the basis of whether the defendant owes a common law duty to plaintiff independent of that provided in the contract between the parties. *See, e.g., Colton*, *supra*; *Landwehr v. Citizens Trust Co.*, 110 Wis.2d 716, 723, 329 N.W.2d 411, 414 (1983); *McDonald v. Century 21 Real Estate Corp.*, 132 Wis2d 1, 390 N.W. 2d 68 (Ct. App. 1986); *Nelson v. Motor Tech, Inc.*, 158 Wis.2d 647, 462 N.W. 2d 903(Ct. App. 1990); *Greenberg v. Stewart Title Guar. Co.*, 171 Wis.2d 485, 492 N.W.2d 147 (1992); *Milwaukee Partners v. Collins Engineers, Inc.*, 169 Wis.2d 355, 485 N.W. 2d 274 (Ct. App. 1992); *Madison Newspapers, Inc. v. Pinkerton's Inc.*, 200 Wis.2d 468, 545 N.W. 2d 843 (Ct. App. 1996); *Pagel v. Gaffney*, 230 Wis.2d 747, 604 N.W.2d 34 (Ct. App. 1999); *Recycleworlds Consulting v. Wisconsin Bell*, 224 Wis.2d 586, 592 N.W.2d 637 (Ct. App. 1999). In some of these cases the court found an existing duty – particularly where there were traditional, established duties of care associated with a profession, *Milwaukee Partners*, *supra*, or where there was some type of bodily injury or other property damage, *Colton*, *supra*. In others, no duty could be identified outside of the contractual undertaking, s*ee Nelson*, *supra*; *McDonald*, *supra.*

   For the most part, and despite some arguably incongruous results (*see e.g., Madison Newspapers,* where a security company was absolved of tort liability for its employee's act of setting fire to premises he was supposed to be guarding, a result that seems hard to reconcile with injury/unforeseen property damage cases such as *Colton*, as Judge Dykman noted in dissent), these cases generally seem consistent with the policies underlying the

economic loss doctrine – where there are only disappointed expectations in the provision of a service, it seems as equally valid to conclude that the defendant's liability should arise solely from the parties' contract as it is in the case of goods.

F. Employment Contracts. There has been little law in Wisconsin on whether, or how, the ELD applies in the area of employment relationships and contracts. The court of appeals did, however, recently address the issue in *Reetz v. Advocate Aurora Health, Inc.*, WI App 59, 405 Wis.2d 298, 983 N.W.2d 669, a case involving a class action by current and former employees alleging negligence by their employer in exposing the employees' personal information to a data breach. The court of appeals found that the claim could proceed, overruling the trial court's finding that damages had not been sufficiently alleged. In the course of this ruling, the court rejected the additional argument that the ELD barred the plaintiffs' claims since there were the claims of economic loss did not "derive from a loss in value of any product or a loss attributable to a product defect" and that in fact the claims stemmed from what amounted to a service contract. *Id*. at ¶15.

V. What's at Stake with the Economic Loss Doctrine: What Does the Plaintiff Lose When Tort Claims are Barred?

1. **Statute of Limitations.** The statute of limitations for breach of contract actions in Wisconsin is six years, with no discovery rule. Wis. Stat. §893.43; *CLL Associates v. Arrowhead Pacific*, 174 Wis.2d 604, 497 N.W.2d 115 (1993). Tort claims range from two to six years – but usually have a discovery rule that can extend the life of a tort claim well beyond a contract claim. *See, e.g.*, 893.52-57; 893.93 *Tallmadge v. Skyline Construction, Inc.*, 86 Wis.2d 356, 272 N.W.2d 404 (Ct. App. 1978). Consequently, the economic loss doctrine comes into play in claims involving recently-discovered defects in products sold years ago.

   Moreover, as recently illustrated in *Ripp Distributing Co. v. Ruby Distribution LLC*, 2024 WI App 24, 411 Wis.2d 630, 5 N.W.2d 930, contracts, particularly those involving asset purchases, may well have rep and warranty survival clauses that, depending on the circumstances, may act as a shortened contractual limitations period. Where that is the case an aggrieved buyer who fails to bring a claim for breach of a rep and warranty within the survival period may be without any remedy at all since claims for misrepresentation will be barred by the ELD.

2. **Limitation on Remedies and Recovery.**

a. **Compensatory damages.** Tort remedies can vary considerably from contract remedies. This is particularly true where the contract contains a limited warranty or otherwise expressly limits the seller's liability (which, after all, is the whole point behind the doctrine in the first place).

b. **Punitive Damages.** Obviously, punitive damages are not available once tort claims are barred by the economic loss doctrine. *See, e.g., Shandwick Holdings Ltd. v. Carver Boat Corp.*, 2000 WL 545356 *5 (E.D. Wis. 2000).

c. **Limits Claims Against "Deep Pocket" Defendants.** In cases involving defective products, the actual seller may have little assets, leaving manufacturers, subcontractors, suppliers and others in the chain of distribution as desirable defendants. Contract remedies may not be available due to lack of privity or a limited warranty.

d. **Impact on Insurance Coverage.** Most general liability insurance policies have exclusions for liability arising out of a product's mere failure to perform (the so-called "business risk" exclusions such as the Your Product and Your Work exclusion). Consequently, one practical effect of a claim being barred by the ELD is that sellers will have no coverage in many commercial disputes and buyers lose another potential source of recovery. Indeed, many cases involving the ELD were actually insurance disputes (in whole or in part), with the insurer contesting coverage because the underlying tort claims did not seek damages that were covered by the policy and, relatedly, were also barred by the economic loss doctrine. *Wisconsin Label Corp. v. Northbrook Property & Casualty Ins. Co.*, 233 Wis.2d 314, 607 N.W. 2d 276 (2000); *see also Vogel, supra*; *Wausau Tile, supra*.

In reality, though, the effect of the ELD on coverage issues has been the source of some unfortunate confusion in the case law. Compare *American Family Ins. v. American Girl*, 2004 WI 2, 268 Wis.2d 16, 673 N.W. 2d 65 with *Wisconsin Pharmacal Co. v. Nebraska Cultures of Cal., Inc.*, 2016 WI 14, 367 Wis. 2d 221, 876 N.W. 2d 72.

Attempting to use the ELD to resolve coverage disputes has an irresistible pull, given the superficial similarities between the "other property" exception (and integrated system carve out to that exception) and the very general perception that liability insurance is designed to cover the same damages. But trying to draw a direct correlation between the two has proven fraught with difficulty. The issue typically comes up in the context of the integrated system exception to the rule that the ELD does not apply to "other property." Arguments have been made that in a situation where there is no "other property" damage because the harm was to an "integrated system" there should also be no liability insurance coverage for the buyer of such a product since CGL coverage is typically concerned with injury to property other than the insured's own product.

The logical flaw in this position is that the insurance analysis is driven by an "own product" exclusion, which has very specific language, including exceptions, and cannot be resolved by a general conclusion that a defective product caused harm to property that was part of an integrated system. This was recognized by the Supreme Court in *American Girl, supra*. However, the Court in *Wisconsin Pharmacal Co. v. Nebraska Cultures of Cal., Inc.*, 2016 WI 14, 367 Wis. 2d 221, 876 N.W. 2d 72 later ruled that the ELD analysis could at least be helpful in "evaluating coverage" in such disputes. *Id.*, ¶ 28. In *Pharmacal* the issue was whether a supplier of ingredients had coverage when it supplied the wrong ingredient to the manufacturer of a probiotic pill, which rendered the pill worthless. Relying on an integrated systems analysis, the court found that no coverage existed in that circumstance since the ingredients could not be "separated out" from the now worthless pill.

Subsequently, the Seventh Circuit declined to apply *Pharmacal* to bar insurance coverage to a window manufacturer whose defective windows were alleged to cause leaks and property damage to homes. The court said that to apply *Pharmacal* in such a manner would "stretch *Pharmacal* beyond its intended reach." *Id*. at 829. *Haley* was relied upon by the Wisconsin Court of Appeals in *5 Walworth, LLC v. Engerman Contracting, Inc. et al.*, 963 N.W.2d 779, 2021 WI App. 51, 399 Wis. 2d 240 in reaching the same result where allegedly defective shotcrete had caused cracking to a pool and surrounding pool deck. Distinguishing *Pharmacal* just as the Seventh Circuit had, the court noted that in *Pharmacal* there was no property damage because the incorrect ingredient had rendered the pill worthless rather than actually causing harm to any surrounding property, and that diminution in value was not the same as "property damage" for purposes of CGL coverage.

Recently, the Supreme Court revisited this entire issue by taking up *5 Walworth*—and it not only affirmed the court of appeals decision but in doing so took the rare step of overruling *Pharmacal*, "in order to bring consistency and clarity to this area of the law that is now muddled by *Pharmacal*'s missteps." *5 Walworth v. Engerman Contracting, Inc.*, 2023 WI 51, ¶23, 408 Wis.2d 39, 992 N.W.2d 31. As a result, the law is now clear: the ELD does *not* affect insurance coverage in property damage cases. To be sure, in property damage cases where tort claims are barred by the ELD due to the lack of third party property damage, any contract claims may not be covered by a standard CGL—but that would be because of a policy exclusion, e.g., the Your Work or Your Product exclusion, rather than the ELD and the two require separate analyses.

VI. Procedural Considerations

A. ***Pleading and Motion Practice*.** Typically, ELD issues are decided on a motion to dismiss or summary judgment motion. The ELD is an affirmative defense and should be pleaded as such.

B. ***Discovery and Trial*.** As ELD cases have started to turn on narrower and narrower factual permutations, discovery—and perhaps even trial—would appear to have a more important role. For example, factual development could be important with respect to the "other property" exception (*e.g.*, what is "unreasonably dangerous", what is an "integrated system", when is a product designed to prevent harm to "other property"), goods vs. service contract issues (*e.g.*, what is the predominant purpose of the transaction), and misrepresentation cases (*e.g.*, whether a case falls within the so-called *Huron* limitation).

NAVIGATING THE EVOLVING LINE BETWEEN CONTRACT AND TORT: WISCONSIN'S ECONOMIC LOSS DOCTRINE

PRESENTED BY:

HON. (RET'D) VALERIE BAILEY-RIHN

HON. (RET'D) JEFFREY DAVIS

1

The Basics: What is the ELD?

- A judicially-created, i.e., common law, doctrine the classical formulation of which is:

  The economic loss doctrine precludes a purchaser of a product from employing negligence or strict liability theories to recover from the product's manufacturer loss which is solely economic.

- Numerous permutations have developed that have made this deceptively simple formulation stubbornly difficult to apply and led to a proliferation of case law

2

Some historical perspective

Origin usually traced to a U.S. Supreme Court admiralty case, *East River S.S. Corp. v. TransAmerica Delaval*, 476 U.S. 858 (1986)

Adopted in Wisconsin in *Sunnyslope Grading Inc. v. Miller, Bradford & Risberg, Inc.*, 148 Wis.2d 910 (1989)

Prior to *Sunnyslope*, Wisconsin had recognized potential tort liability in context of contractual relationships

3

So why was the ELD suddenly adopted?

On the particular timing, who knows, though we could speculate that the speed and complexity of modern transactions might have prompted the need for a more contract-based approach to risk allocation

With respect to the broader question, three policy reasons are routinely advanced:

Preserves distinction between contract and tort	Protects freedom of contract	Encourages purchasers who are in best position to assess risk of economic loss to assume, allocate or insure that risk

4

Has public policy always been served?

Some would say no . . . and that a healthy dose of skepticism should accompany an ELD analysis to ensure that its application actually advances the public policy reasons for its creation rather than (as one commentator put it) a "trivial invocation to stem the tide of commercial tort litigation, in an attempt at judicial tort reform."

Or, as Justice Abrahamson memorably put it, to ensure that the ELD does not become . . .

5

"Like the ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*, the economic loss doctrine seems to be a swelling globule on the legal landscape of this state." *Grams v. Milk Products, Inc.*, 2005 WI 112, ¶57 (Abrahamson, CJ, dissent)

6

The Issues: Applying the ELD

- What is and is not "economic loss"?
- What legal theories are affected by the ELD?
- What contracts and relationships are affected by the ELD?

7

What is and is not economic loss?

What it is

- Has been said a more apt label would be "commercial loss"
- "Direct or Consequential"
  - "Direct"—"loss in value of the product itself"
  - "Consequential"—"all other economic loss caused by the product defect, such as lost profits"

What it is *not*

- Damages for personal injury
- Damages for injury to "other property"
- But such injuries do not take a case completely out of the ELD as language from earlier cases had suggested; rather per *Secura Ins. v. Super Prods*, recovery is *only* allowed for the personal injury or damage to "other property"

8

Issues Involving Personal Injury

One common issue concerns liability to the plaintiff for causing the plaintiff to be subject to third party *claims* as opposed to personal injury suffered by the plaintiff. Under *Wausau Tile*, only the latter is an exception to the ELD, although that should not necessarily bar tort contribution claims since in such claims the injured party has been joined in the action

What about emotional distress—can that be personal injury?

9

Damage to "other property"

Tort claims for damage to property other than the product itself are not barred by the ELD

But the exception has become a bit more complicated than that simple formulation might suggest. . .

Two "exceptions to the exception":

- The "other property" is part of an "integrated system" *or*
- The claim is based merely on "disappointed expectations"

10

Damage to "other property" (cont'd)

The integrated system test applies to defective component parts that damage the remaining product—even if the seller of the defective component part is different than the seller of the main product

As for the "disappointed expectations" exception, it is based on foreseeability but not in a "remote or general sense"; rather, it applies where "prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product."

11

What legal theories are affected by ELD?

Negligence and products liability (duh)

But what about . . .

Misrepresentation, including fraud?

Statutory liability, e.g., Wis. Stat. § 100.18?

Other tort theories?

12

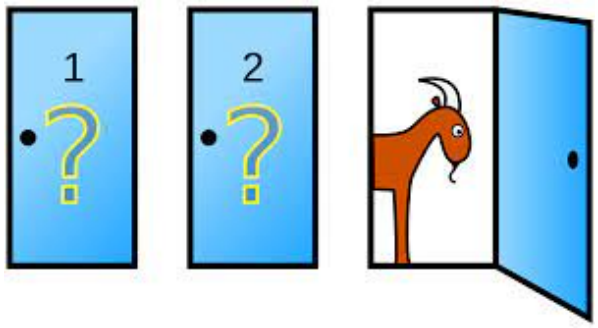
Misrepresentation

- Three types of misrepresentation claims: strict, negligence and intentional
- Seems to be settled that negligence and strict are barred by the ELD
- What about fraud? Three possibilities have consistently been in play
  - Door no. 1—Fraud claims are *always* barred
  - Door no. 2—Fraud claims are *never* barred
  - Door no. 3—It depends on the nature of the fraud and in particular whether the fraud was intertwined with or extraneous to the subject matter of the contract
- After a somewhat tortuous (some would say torturous) path the Wisconsin Supreme Court chose . . .

13

Door Number 3!

Kaloti Enterprises, Inc. v. Kellogg Sales Co., 2005 WI 111 (to avoid application of the ELD to fraud in the inducement claims the plaintiff must show that "the fraud was extraneous to rather than interwoven with, the contract") . . . Meaning what exactly?



14

What about other theories?

- Fraud redux
  - Rescission, including right to recover restitutionary damages, seems to be alive and well
  - Residential real estate—the legislature preserves fraud with passage of Wis. Stat. § 895.07, thereby abrogating *Below v. Norton*
- Statutory claims—is 100.18 a complete end-run around the ELD when it comes to misrep?
- Other torts?

15

What contracts and relationships are affected by ELD?

- Privity of contract not required
  - Vertical privity, claims by end-user against remote sellers
  - Horizontal privity, e.g., claims among subcontractors
- What about consumer contracts?
- Application to service contracts
  - ELD does not apply
  - But when is a contract one for services?

16

What does the plaintiff lose by not being able to sue in tort, or why does all this matter?

- Contract remedies might be limited by contract
  - Limited warranty
  - Disclaimer of consequential damages
  - No punitive damages
- Contract claims often have shorter statute of limitations due to lack of discovery rule or contractual provisions
- Possible impact on insurance coverage where tort claims are barred?

17

Final Thoughts

- ELD issues are not easy and gray areas remain
  - What is an integrated system?
  - What is a foreseeable consequence from failure of defective product?
  - What representations are "extraneous" to the subject of the contract?
  - When is a contract one for "services"?
- While ELD issues are often decided on summary judgment, some of the permutations that have developed would appear to be somewhat fact intensive
- In addressing ELD issues it may help to remember that the ELD was adopted purely as a matter of public policy and that decisions as to its application might best be made by considering the public policy reasons that led to its adoption
- Ultimately the key question would appear to be whether the aggrieved party either negotiated or had the opportunity to negotiate protection for the economic risks of a product failure

18

THANK YOU!

Hon. V.L. Bailey-Rihn (retired)
1508 Capital Ave
Madison, WI 53705
valbaileylegal@gmail.com
608-334-0275

Hon. Jeffrey O. Davis (ret'd)
Concurrence ADR, LLC
1233 N. Mayfair Road, Suite 306
Milwaukee, WI 53226
jdavis@concurrenceadr.com
414-916-0597

19

RECEIVERSHIPS

Hon. Michael Waterman
St. Croix County Circuit Court

I. General principles.[1]

a. Receivership is a remedy that removes control from the individual or company and places it in the hands of a third party – a court-appointed receiver. The receiver takes possession, manages and preserves assets for the benefit of the person or entity determined by the Court to be entitled to it.[2]

b. Receiverships are administered at the Court's directive. The Court defines the scope of the receiver's authority, and the Court oversees the receiver's conduct.

c. Receivers are Court-appointed officers of the court.[3] The receiver must be qualified to carry out the tasks designated by the Court. Persons serving as receivers are usually attorneys or professionals with relevant experience.

   i. Ch. 128 receivers must be residents of Wisconsin.[4]

   ii. A receiver is usually a neutral person with no interest in the outcome of the underlying litigation. A creditor may not be appointed as a receiver of an insolvent corporation unless both parties consent or unless other special circumstances are present.[5]

---

[1] For a more information about receiverships in general, *see* 75 C.J.S. *Receivers* §§ 1, *et seq.*

[2] *Community Nat. Bank v. Medical Benefits Adm'rs, LLC*, 2001 WI App 98, ¶ 7, 242 Wis. 2d 626, 626 N.W.2d 340.

[3] *See Speiser v. Merchants' Exch. Bank*, 110 Wis. 506, 86 N.W. 243, 245 (1901).

[4] Wis. Stat. § 128.02 (2023-24).

[5] *Bartelt v. Smith,* 145 Wis. 31, 36, 129 N.W. 782, 784 (1911); *Community Nat. Bank,* 242 Wis. 2d 626, ¶ 11, 626 N.W.2d 340.

d. In most cases, the receiver serves as a fiduciary to the receivership estate and all parties with an interest in the estate.[6]

    i. Chapter 816 supplemental receivers act in the interest of the judgment creditor only.[7]

    ii. A receiver may not deal with receivership property to benefit itself at the expense of the estate, and a receiver may not profit from its receivership, except through compensation approved by the court.[8]

e. The Court's authority to appoint receiver is established by statute – primarily Chapters 128, 813 and 816. When deciding non-statutory receivership issues, court look for guidance to established usages and customs prevailing in equity.[9]

f. If a receivership is ordered in conformity with legal requirements, the party requesting the appointment of a receiver is not liable for the expenses of the receiver unless there are special circumstances which dictate that, in equity, the expenses ought to be charged against the petitioning party.[10] Special circumstances include:

    i. Agreements to pay the compensation of the receiver, if one is appointed;

    ii. Obligations incurred when appointments are made on condition that the applicant agrees to pay such compensation;

---

[6] *Community Nat. Bank,* 242 Wis. 2d 626, ¶¶ 7-8, 626 N.W.2d 340; *Candee v. Egan*, 84 Wis. 2d 348, 362, 267 N.W.2d 890 (1978).

[7] Wis. Stat. § 816.04; *Candee*, 84 Wis. 2d at 362, 267 N.W.2d at 897.

[8] *Community Nat. Bank*, 242 Wis. 2d 626, ¶ 8, 626 N.W.2d 340.

[9] *See Thomsen v. Cullen*, 196 Wis. 581, 219 N.W. 439, 443 (1928); *Dick & Reuteman Co. v. Jem Realty Co.*, 225 Wis. 428, 274 N.W. 416, 421 (1937); *see also McFarland State Bank v. Sherry*, 2012 WI App 4, ¶32, 338 Wis. 2d 462, 809 N.W.2d 58 (trial court has "authority to grant equitable relief, even in the absence of a statutory right").

[10] *First Nat. Bank of Neenah v. Clark & Lund Boat Co.,* 68 Wis. 2d 738, 742, 229 N.W.2d 221, 223 (1975).

iii. Appointments that were made without authority, irregularly or illegally made;

iv. Appointments made where there was no right to maintain the action; or

v. Cases in which the party procuring the appointment had no interest in or claim upon the property in question.[11]

II. Chapter 128 Receiverships for Businesses.

a. Chapter 128 receivership provides a court-supervised, orderly sale of a financially distressed business as a going concern or liquidation of the business' assets. It is a speedy and cost-effective alternative to Chapter 11 bankruptcy.

b. May be commenced voluntarily or involuntarily.

i. Voluntary process: commenced by debtor by filing a petition and assigning property for the benefit of creditors. Assignee has powers of a receiver.[12]

ii. Involuntary process: commenced by summons and complaint along with a motion to appoint a receiver.[13] Grounds for an involuntary receivership are:

1. When an execution against a judgment debtor is returned unsatisfied in whole or in part;[14] or

2. When a corporation has been dissolved or is insolvent or is in imminent danger of insolvency, or has forfeited its corporate rights.[15]

---

[11] *Cullen v. Landwehr*, 201 Wis. 247, 252, 253, 229 N.W. 68, 70 (1930).

[12] Wis. Stat. § 128.02.

[13] Wis. Stat. § 128.08.

[14] Wis. Stat. § 128.08(1)(a).

[15] Wis. Stat. § 128.(1)(b).

c. Key features to a Chapter 128 Receivership include:

i. An assignment for the benefit of creditors is given. Title to all of debtor's nonexempt assets vests in the receiver.[16]

ii. Debtor must file inventory of assets and list of creditors within ten days.[17]

iii. Creditors are enjoined from collection.[18]

iv. Receiver may void liens obtained by legal proceedings within thirty days of the filing and other liens obtained within four months of the filing of the petition under certain circumstances. The receiver may also set aside fraudulent conveyances. These actions must be brought as separate actions and not within the receivership by motion.[19]

v. Receiver may operate business to wind it down.

vi. Receiver may finish uncompleted contracts of debtor.

vii. Receiver may maintain actions in court. The receiver stands in the shoes of the debtor.[20]

viii. Receiver may liquidate assets by private sale or public auction – all with court approval after motion and approval of the sale proposed procedures.[21] Proceeds distributed according to statute.[22]

---

[16] Wis. Stat. § 128.19; *Admanco v. 700 Stanton Drive*, 2010 WI 76, 326 Wis. 2d 586, 786 N.W.2d 754 (2010).

[17] Wis. Stat. § 128.13.

[18] Wis. Stat. § 128.14.

[19] Wis. Stat. §§ 128.03 and 128.18.

[20] Wis. Stat. § 128.19.

[21] Wis. Stat. § 128.25; *see also BNP Paribas v. Olsen's Mill, Inc.,* 2011 WI 61, 335 Wis. 2d 427, 799 N.W.2d 792.

[22] Wis. Stat. § 128.17.

III. Chapter 813 Receiver – aka receiver pendente lite

a. A receivership under chapter 813 is considered an ancillary remedy. Receivership is not an independent cause of action. A receivership is allowable only in connection with an action pending for some other purpose. While the appointment of a receiver may be part of the prayer for relief, it is not the ultimate relief. It is an ancillary or provisional remedy in aid of the ultimate relief or final judgment.

b. A receiver may be appointed on the application of either party, when the applying party establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired.[23] A sampling of situations that may be suitable for a receiver include:

   i. Foreclosure and other debtor-creditor actions;

   ii. Shareholder / partnership disputes;

   iii. Corporate deadlock;

   iv. Judicial wind-up of a business;

   v. Intellectual property disputes;

   vi. Public nuisances;[24]

   vii. Continuing care contracts;[25]

   viii. Voidable transfers aka fraudulent transfers;[26]

   ix. Actions affecting the family.[27]

c. Less common grounds to appoint a Chapter 813 receiver are:

---

[23] Wis. Stat. § 813.16(1).

[24] Wis. Stat. § 823.23.

[25] Wis. Stat. § 647.06.

[26] Wis. Stat. § 242.07(1)(c)2.

[27] Wis. Stat. § 767.57(5); *see, e.g., Kapalczynski v. Krause-Kapalczynski*, No. 2024AP289, unpublished slip op., ¶ 10 (WI App May 7, 2025).

i. To carry into effect a judgment or to dispose of property according to the judgment.[28]

ii. To preserve property during the pendency of an appeal; or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the judgment debtor's property in satisfaction of the judgment or in an action by a creditor under ch. 816.[29]

iii. When a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights;[30]

iv. In accordance with the practice which obtained when the code of 1856 took effect;[31]

v. When a Wisconsin resident with an interest in property disappears and is absent from the person's place of residence without being heard from after diligent inquiry;[32]

vi. When a member of the armed forces is away from the state, has an interest in property, and has no adequate power of attorney.[33]

IV. Chapter 816 Receiver – aka supplemental receiver; receiver in aid of execution; or selfish receiver.

a. Courts have the authority to appoint a receiver through a supplementary proceeding to help a judgment creditor achieve satisfaction of a judgment.[34] The receivership ends when the judgment is satisfied.

---

[28] Wis. Stat. § 813.16(2).

[29] Wis. Stat. § 813.16(3).

[30] Wis. Stat. § 813.16(4); *see also* Wis. Stat. §§ 180.1431(2), 1432(1).

[31] Wis. Stat. § 813.16(5). This is a statutory acknowledgment of courts' pre-codified, equitable authority to appoint a receiver.

[32] Wis. Stat. § 813.23(1)(a).

[33] Wis. Stat. § 813.23(1)(b).

[34] Wis. Stat. § 816.04.

i. Supplementary proceedings are actions initiated by unsatisfied judgment creditors to identify a judgment debtor's property, other than real property, on which the creditor can execute the judgment. [35]

ii. The supplemental receiver acts as a collection agent for a judgment creditor. The Court may authorize the receiver to take possession of the debtor's assets and apply them toward the satisfaction of the judgment.[36]

iii. The Court may not authorize the supplemental receiver to manage a debtor's property or operate debtor's business.[37]

iv. Receiver's lien.

1. A receiver's lien is an equitable creation governed by the common law, not statute.[38]

2. Service on the judgment debtor of the order to appear at the supplemental examination gives rise to a receiver's lien.[39]

3. A receiver's lien is superior against another creditor on a simple contract.[40]

---

[35] *In re Badger Lines, Inc.,* 224 Wis. 2d 646, 653–54, 590 N.W.2d 270, 273 (1999).

[36] *Dawson v. Goldammer*, 2006 WI App 158, ¶ 34, 295 Wis. 2d 728, 722 N.W.2d 106.

[37] *Candee v. Egan*, 84 Wis. 2d 348, 361, 267 N.W.2d 890 (1978).

[38] *In re Badger Lines, Inc.,* 224 Wis. 2d 646, 654, 590 N.W.2d 270, 273 (1999).

[39] *In re Badger Lines, Inc.,* 224 Wis. 2d 646, 661, 590 N.W.2d 270, 276 (1999).

[40] *In re Badger Lines, Inc.,* 224 Wis. 2d 646, 661, 590 N.W.2d 270, 276 (1999).

Receiverships

Hon. Michael Waterman
St. Croix County Circuit Court

1

Receiverships

Ch.128 receiverships

- Independent action
- Alternative to bankruptcy
- Individual or business
- Voluntary or involuntary

Ch. 816 receiverships

- Supplemental / selfish receiver
- Supplementary proceeding
- Receiver acts as collection agent
- Receiver's lien against assets

2

Chapter 813 Receiverships
or
Receiver pendente lite

3

Chapter 813 receiverships

"On the application of either party, when the applying party establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired."

Wis. Stat. § 813.16(1)

4

Chapter 813 receiverships

Criteria for appointment of receiver:

- Pending lawsuit
- Interest in property affected by the lawsuit
- Property in possession of adverse party
- Property / rents / profits in danger of being lost or materially impaired

Wis. Stat. § 813.16(1)

5

Chapter 813 receiverships

- Foreclosure and other debtor-creditor actions
- Shareholder / partnership disputes
- Corporate deadlock
- Judicial wind-up of a business
- Intellectual property disputes
- Public nuisances
- Continuing care contracts
- Voidable transfers aka fraudulent transfers
- Actions affecting the family

6

Chapter 813 receiverships

Characteristics of Chapter 813 receivers:

- Administered at the Court's directive
- Appointed as officers of the Court
- Take possession of property and rights
- Prioritize unpaid wages, taxes and assessments
- Fiduciary to the receivership estate and all interested parties therein
- Prohibited from self-dealing at expense of the estate
- Compensated from estate or Court-approved alternative

7

Chapter 813 receiverships

Governing Authority for Receiverships:

- Statutory – Wis. Stat. §§ 813.16, et seq.
- Common law
- Equitable principles
- Agreements or governing instruments

8

Thank you

Hon. Michael Waterman
Michael.waterman@wicourts.gov
(715) 377-5825

9

WISCONSIN'S "UNIQUE" COMMERCIAL LAWS

Presented by: Honorable William J. Domina, *Waukesha County Circuit Court*
Attorney Laura A. Brenner, *Reinhart Boerner Van Deuren s.c.*

Wisconsin has many unique laws that pertain to business relationships and cases. This outline describes several examples and provides some resources to learn more about them.

I. WISCONSIN ALLOWS DIRECT ACTION AGAINST INSURERS

A. **Wis. Stat. § 632.24.**

1. Allows parties to bring direct actions against insurance companies, in effect making them parties to a case.

2. Good Resource: For a description of the history and reach of the statute, *see Casper v. Am. Int'l S. Ins.* , 2011 WI 81, ¶¶ 50–80, 336 Wis. 2d 267, 800 N.W.2d 880 (holding that the statute allows direct action against insurance provider irrespective of whether the policy was delivered or issued for delivery in Wisconsin, so long as the accident or injury occurred in Wisconsin); *see also,* 2 Brian D. Anderson et al.*, Anderson on Wisconsin Insurance Law* § 11.111 – 118 (9th ed. 2023).

II. WISCONSIN REQUIRES DISCLOSURE OF LITIGATION FUNDERS

A. **Wis. Stat. § 804.01(2)(bg)** requires that litigation funding agreements be disclosed "without awaiting a discovery request."

1. Text of the statute: *Third party agreements*. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

B. The law does not require disclosure to the court.

C. Litigation Funding is a hot topic now. *See, e.g.,* Justin Boes, *Lawyers, Funds & Money: The Legality of Third-Party Litigation Funding in the United States*, 49 Rutgers L. Rec. 118 (2022).

III. WISCONSIN HAS UNIQUE LAWS ABOUT BUSINESS RELATIONSHIPS

A. Wisconsin has some unique laws that govern how certain business relationships begin and end, including:

1. **Dealerships: The Wisconsin's Fair Dealership Law (a/k/a the "WFDL"), Wis. Stat. Ch. 135.**

(a) A law intended to protect dealers against "unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships." Wis. Stat. § 135.025(2)(b).

(b) Cannot be waived by contract. Wis. Stat. § 135.025(3).

(c) Covers many different types of relationships, even if not called "dealers." Examples have included:

(i) A Girl Scout Council that sells Girl Scout cookies. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S. of Am., Inc.*, 549 F.3d 1079, 1092–1094 (7th Cir. 2008) (quoting *Ziegler Co. v. Rexnord, Inc.*, 139 Wis. 2d 593, 602, 407 N.W.2d 873 (1987)), *abrogated on other grounds by Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S. of Am., Inc.*, 646 F.3d 983, 984 (7th Cir. 2011)

(ii) Golf pros who manage a golf course for a municipality. *Benson v. City of Madison*, 2017 WI 65, ¶ 5, 376 Wis. 2d 35, 897 N.W.2d 16

(iii) A school photographer. *See Bush v. Nat'l Sch. Studios, Inc.*, 139 Wis. 2d 635, 645, 407 N.W.2d 883 (1987)

(d) Whether the dealer shares the required "community of interest" to show a dealership covered by the law is governed by a multi-factor test. Wis. Stat. § 135.02(1); *see Ziegler*, 139 Wis. 2d 593; *Cent. Corp. v. Resch. Prods. Corp.*, 2004 WI 76, 272 Wis. 2d 561, 681 N.W.2d 178

(e) If the WFDL applies, it requires "good cause" for any termination, non-renewal or "substantial change in competitive circumstances" and of relationships between suppliers and dealers and certain prior

written notice/opportunity to cure, even if their contract says otherwise. Wis. Stat. §§ 135.03, 135.04

(f) There are special provisions for dealers of "intoxicating liquor" (not including wine or beer). Wis. Stat. §§ 135.02(3)(b), 135.066

(g) Remedies for violation of the WFDL include damages, injunctive relief, and attorneys' fees. Wis. Stat. §§ 135.06, 135.065.

(h) Many other states now have similar dealer laws, often for particular industries.

(i) Good resources about this law: Brian E. Butler & Jeffrey A. Mandell, *The Wisconsin Fair Dealership Law* (5th ed. 2022).

2. **Franchises: Wisconsin's Franchise Law, Wis. Stat. Ch. 553**

(a) Not all states have franchise laws, but Wisconsin does.

(b) Ch. 553 requires registration with the Wisconsin Securities Commissioner and detailed disclosures to the buyer before sale of a franchise.

(c) Statutory definition of "franchise" must be met, which includes the payment of a "franchise fee." *See* Wis. Stat. § 553.03(4)(a)3., (5m)(a).

(d) Does not regulate termination or non-renewal (the WFDL can apply to franchisees and covers this issue).

(e) Cannot be varied by contract. Wis. Stat. § 553.76.

(f) Remedies include rescission of contract and attorneys' fees, and also criminal penalties for fraud or intentional misrepresentation. Wis. Stat. §§ 553.51, 553.52, 553.54.

(g) Good resource about this law: Laura A. Brenner & Eleanor V. Gerhards, *Wisconsin, in* 2 *Franchise Deskbook: Selected Laws, Commentary, and Annotations* 1567 (Bethany Appleby et al. eds., 3d ed. 2019)

3. **Sales Representatives: Wisconsin's Independent Sales Representative Law, Wis. Stat. § 134.93.**

(a) Wisconsin gives some protection to sales representatives, but not quite as much as dealers and franchises.

(b) Sec. 134.93 governs relationships between principals and independent sales representatives who solicit wholesale orders for products and are compensated via commission. Wis. Stat. § 134.93(1).

(c) In the absence of a written contract specifying otherwise, a principal must provide 90 days' prior written notice of termination. Commissions must be paid upon the effective date of termination. Wis. Stat. § 134.93(5).

(d) Remedies include exemplary damages (2x commissions owed) and attorneys' fees. Wis. Stat. § 134.93(5).

(e) Good resource about this and similar laws: *State Relationship/Termination Laws*, Bus. Franchise Guide (CCH) ¶¶ 4000–4609, VitalLaw (database updated 2025)

4. **Beer Distributors: Wisconsin's Beer Wholesalers Law, Wis. Stat. § 125.33(10).**

(a) Wisconsin has a special law that applies to beer distributors, who are often not covered by the WFDL because they carry many brands from many different suppliers.

(b) Sec. 125.33 applies when beer wholesaler is terminated, cancelled, or non-renewed, and requires "successor" wholesaler to compensate it for the fair market value of the distribution rights (although exceptions apply).

(c) Disputes over the fair market value must be resolved by binding arbitration.

(d) If relationship is a "dealership" covered under the WFDL, these provisions do not apply.

IV. WISCONSIN HAS SOME UNIQUE COMPETITION LAWS

A. Wisconsin has some unique laws that govern competition, including the following:

1. **The Unfair Sales Act (a/k/a the "Minimum Markup Law"): Wis. Stat. § 100.30.**

(a) The subject of a lot of proposed legislation but still around.

(b) Generally precludes sales of merchandise below cost to prevent 'loss leader' sales to prevent unfair competition. *See Orion Flight Servs. v. Basler Flight Serv.*, 2006 WI 51, 290 Wis. 2d 421, 714 N.W.2d 130 (discussing history of the law).

(c) The “unique” part of the law is the requirement of a "minimum mark-up" for certain categories of products: motor vehicle fuel (*i.e.*, gas and diesel), tobacco products, fermented malt beverages, intoxicating liquor and wine.

(d) Cases often involve claims between gas stations or big box retailers that sell fuel. *See, e.g., Gross v. Woodman's Food Mkt., Inc.*, 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718; *Vill. Food & Liquor Mart v. H & S Petroleum, Inc.*, 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177; *Go Am. L.L.C. v. Kwik Trip, Inc.*, 2006 WI App 94, 292 Wis. 2d 795, 715 N.W.2d 746; *PDQ Food Stores, Inc. v. Speedway SuperAmerica, LLC*, No. 99-CV-2756, 2000 WL 33418835 (Wis. Cir. Ct. June 8, 2000); *Pit Row, Inc. v. Costco Wholesale Corp.*, 101 F.4th 493 (7th Cir. 2024).

(e) Enforced by the Department of Agriculture, Trade and Consumer Protection (DATCP); also by private litigants but only for violation of motor vehicle fuel and tobacco provisions.

(f) Penalties for violation of the motor vehicle fuel provisions may be steep: include three times the amount of any monetary loss or an amount equal to $2,000, whichever is greater, multiplied by each day of continued violation, together with costs, including accountants' fees and reasonable attorney fees. *See* Wis. Stat. § 100.30(2).

2. **Wisconsin's Antitrust Act: Wis. Stat. § 133.03 (a/k/a the "Little Sherman Act").**

(a) Based on the federal Sherman Act, 15 U.S.C. § 1-7. *See Eichenseer v. Madison-Dane Cnty. Tavern League, Inc*., 2008 WI 38, ¶ 33, 308 Wis. 2d 684, 748 N.W.2d 154; *Olstad v. Microsoft Corp.*, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139.

(b) Precludes anticompetitive acts involving contracts, combinations, and conspiracies that restrain trade, Wis. Stat. § 133.03(1), and unlawful monopolies, Wis. Stat. § 133.03(2).

(c) Enforcement and Penalties: criminal and civil penalties (including treble (3X) damages and fee awards). Wis. Stat. §§ 133.17, 133.18

(d) Wisconsin Chapter 133 (“Trusts and Monopolies”) includes other sections on anticompetitive conduct similar to federal antitrust laws, including price discrimination (Wis. Stat. § 133.04), secret rebates (Wis. Stat. § 133.05) and interlocking directorates (Wis. Stat. § 133.06).

3. **Wisconsin's "Conspiracy to Injure Business or Reputation" Law: Wis. Stat. § 134.01.**

(a) Makes it unlawful for two or more persons to act together to: maliciously injure another person's reputation, trade, business, or profession, or to maliciously compel another to perform an act against his or her will or to maliciously prevent or hinder another from performing a lawful act.

(b) Requires a conspiracy – the act does not apply to one entity acting alone. The conspirators must act with the same malicious purpose. *See Malecki v. Fine-Lando Clinic Chartered, S.C.*, 162 Wis. 2d 73, 85-86, 88, 469 N.W.2d 629 (1991).

(c) Does not apply to run-of-the-mill competition. "Competition that incidentally harms another when the purpose is to improve one's competitive advantage is not malicious if not done with a malicious motive or purpose." Wis. JI-Civil 2820 cmt at 3 (2008).

(d) Enforcement: while it is a criminal statute, § 134.01 provides the basis for civil tort liability. *Radue v. Dill,* 74 Wis. 2d 239, 245, 246 N.W.2d 507 (1976).

V. WISCONSIN HAS SOME UNIQUE LAWS ABOUT FRAUD AND UNFAIR TRADE PRACTICES

A. Wisconsin has some unique laws intended to prevent fraud and unfair trade practices, including the following:

1. **Fraudulent representations (a/k/a "Wisconsin's Deceptive Trade Practices Act"): Wis. Stat. § 100.18.**

(a) Bars "untrue, deceptive or misleading" statements made in the course of selling goods or services, whether in the form of advertisements or other types of representations, either written or oral. John S. Greene, *Navigating Wisconsin's Consumer Protection System*, 90 Wis. Law., Sept. 2017, at 22; *see also Weaver v. Champion Petfoods USA Inc.*, 3 F.4th 927, 934 (7th Cir. 2021)

(b) Key elements of § 100.18(1): (a) defendant made representation to one or more members of the public with intent to induce obligation; (b) representation was untrue, deceptive or misleading; and (c) representation materially induced a pecuniary loss. *See Hinrichs v. DOW Chem. Co*., 2020 WI 2, ¶ 85, 389 Wis. 2d 669, 937 N.W.2d 37; *see also K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.,* 2001 WI 70, ¶ 19, 301 Wis. 2d 109, 628 N.W.2d 759.

(c) Heightened standard for fraud claims does not apply. *Hinrichs*, 2020 WI 2, ¶¶ 72–84.

(d) Enforcement: Enforced by DATCP; also private cause of action (with award for pecuniary loss, costs, fees, double damages for violation of injunction). *See* Wis. Stat. §§ 100.18(11)(a), 100.18(11)(b)2.

2. **Methods of Competition and Trade Practices: Wis. Stat. § 100.20 (a/k/a Wisconsin's Unfair Trade Practices Act).**

(a) Regulates unfair trade practices and unfair methods of competition in business. *See* Amy Algiers Anderson, *State Deceptive Trade Practices and Consumer Protection Acts: Should Wisconsin Lawyers be Susceptible to Liability under Section 100.20*, 83 Marq. L. Rev. 497, 511-512 (1999).

(b) Patterned after Section 5 of the Federal Trade Commission Act.

(c) Enforced by DATCP; private parties may pursue claims only if alleged conduct violates a specific or general order of DATCP. *See* Greene, *Navigating Wisconsin's Consumer Protection System*, 90 Wis. Law. 22 (Sept. 2017)

(d) *See* Wis. Admin. Code sections for prohibited practices.

VI. WISCONSIN HAS OTHER UNIQUE LAWS

A. Wisconsin has other unique laws about everything from margarine use (not in a restaurant!) to prohibitions on the selling of skunks.

B. Not surprisingly, there are many laws about cheese and consuming alcoholic beverages.

C. *See, e.g.*, Fred McKissack, *Law and Disorder - If You Have Any Designs on Buying or Selling Skunks, You Might Want to Take Our Quiz on Weird Laws First*, Wis. State. J., Feb. 15, 2004, at I1; Gary Johnson, *Now That's Against the Law*, Leader-Telegram (Sept. 21, 2011), https://www.leadertelegram.com/blogs/now-thats-against-the-law/article_e6436b4d-4cfa-5d68-9c3e-edb5c57fb424.html; Beth Dippel, *History Uncovered: Weird Wisconsin Laws*, Sheboygan Sun (Oct. 27, 2021), https://www.sheboygansun.com/history/history-uncovered-weird-wisconsin-laws/article_c2f57de8-3748-11ec-8348-3fa52dd9f562.html; Caroline Simon, *Weirdest Laws Passed in Every State*, USA Today (Oct. 29, 2018), https://web.archive.org/web/20190925085115/https://www.usatoday.com/list/news/nation-now/weirdest-laws-every-state/53ad0541-3518-4432-adc4-0fec193d389e.

Wisconsin's "Unique" Commercial Laws

Presented by:
Honorable William J. Domina
Waukesha County Circuit Court
Attorney Laura A. Brenner
Reinhart Boerner Van Deuren, s.c.

1

1

Check Out Our Outline

2

2

Commercial Cases

3

3

Commercial Cases

- Not all business v. business cases are the same, but they often involve:
  - Both statutory and common law causes of action
  - Massive amounts of data
  - E-discovery issues and disputes
  - Confidentiality and trade secret concerns
  - Timing challenges
  - Complex legal issues
  - Commercial contracts
  - Unique Wisconsin laws

4

4

Bill v. Laura
Wisconsin's Unique Commercial Laws

5

5

Wisconsin Law That Allows Direct Actions Against Insurers

Direct action against insurer, Wis Stat. § 632.24

6

6

Direct action against Insurer Wis Stat. § 632.24

What is unique about it?

- Insurers can be parties to the lawsuit
- Brings a unique dynamic to the case

7

7

Wisconsin Law that Requires Disclosure of Litigation Funding Agreements

8

8

Funding Agreement Disclosure Under Wis. Stat. Sec. 804.01(2)(bg)

- What is unique about it?
  - Requires disclosure to other side as part of discovery, even without a discovery request
  - Wisconsin is one of only states that specifically requires disclosure of third-party funding agreements (although many courts have ordered disclosure)

9

9

Wisconsin Laws That Govern Business Relationships

10

10

Wisconsin's Fair Dealership Law (the "WFDL"): Wis. Stat. Chapter 135

11

11

WFDL: What is Unique About It?

- Among other things:
  - Requires good cause to terminate or non-renew a dealership no matter what contract may say
  - Many terms, like "community of interest" are not defined so see the many cases about them
  - Applies to many people and entities even if not called "dealers"

12

12

The WFDL Can Apply to Many Types of Businesses

13

13

Even Though the WFDL Applies to Franchises, Wisconsin Has a Separate Franchise Law: Ch. 553

14

14

Wisconsin Franchise Law: Wis. Stat. Chapter 553

What is unique about it?

- Requires franchisors to register with state agency
- Requires franchisors to make disclosures to prospective franchisees
- It is a "disclosure" law, not a termination law
- Separate from the WFDL, which may still apply, too

15

15

Wisconsin also has a Law that Protects Beer Wholesalers Wis. Stat. § 125.33(10)

16

16

Beer Wholesalers Law
Wis. Stat. § 125.33(10)

What is unique about this law?:

- Applies only to beer distributors (wholesalers)
- Does not apply if WFDL applies
- Requires "successor" wholesaler to pay fair market value of the distribution rights for the brand to the terminated wholesaler (unless exception applies)
- Disputes over fair market value must be determined in **binding arbitration**

17

17

Wisconsin Also Protects Independent Sales Representatives: Wis. Stat. § 134.93

18

18

Wisconsin's Independent Sales Representative Law: Wis. Stat. § 134.93

What is unique about this law?

- Applies to independent "wholesale" sales representatives
- Unlike WFDL, does not preclude termination or nonrenewal, but if contract doesn't specify otherwise, requires at least 90 days' prior written notice of termination
- Requires payment of commissions upon termination
- Remedies can include "exemplary" damages (up to 200 percent of commissions due)

19

19

Summary: Examples of Wisconsin Laws that Govern Business Relationships

- Dealers (The Wisconsin Fair Dealership Law, Wis. Stat. Chapter 135)
- Franchises (Franchise Disclosure Law, Wis. Stat. Ch. 553)
- Sales Representatives (Wis. Stat. § 134.93)
- Beer Wholesalers (Wis. Stat. § 125.33(10))

20

20

The Unfair Sales Act (a/k/a the "Minimum Markup Law"): Wis. Stat. § 100.30

21

The Unfair Sales Act (a/k/a the "Minimum Markup Law"): Wis. Stat. § 100.30

What is unique about this law?

- Requires sellers to charge a mandatory minimum mark-up for motor vehicle fuel, tobacco products, fermented malt beverages, intoxicating liquor and wine
- Cases often involve competing gas stations and big box retailers
- Fights often involve the exceptions/defenses
- Civil remedies include 3x amount of monetary loss or $2,000, whichever is greater, multiplied by each day of continued violation, plus accountants' and attorney fees

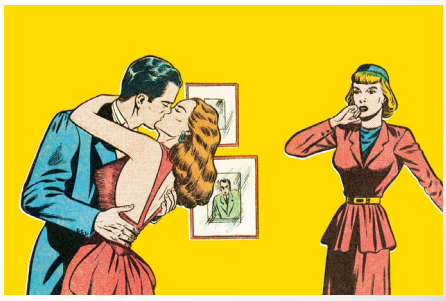
22

Wisconsin Has Many Unique Laws on Unfair Business Practices

- Our own "antitrust" laws: Wis. Ch. 133
- Conspiracy to injure business or reputation: Wis. Stat. Sec. 134.01
- Deceptive trade practices law: Wis. Stat. § 100.18
- Unfair trade practices law: Wis. Stat. § 100.20

23

Wisconsin Has Other "Unique" Laws



24

How Can I Learn About Cases Involving These Unique Laws?

- State bar and other treatises (like the WFDL treatise)
- Articles in trade publications
- Similar laws in other states
- Courts around country who share their experiences
- Ask your colleagues who practiced in these areas

25

Thank You!

- Honorable William J. Domina
  Waukesha County Circuit Court
- Attorney Laura A. Brenner
  Reinhart Boerner Van Deuren, s.c.

26