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Significant Recent Wisconsin Federal Court Decisions

Federal court interpretations of Wisconsin law are of persuasive value to, but not binding on, Wisconsin courts. Yet they affect how Wisconsin law is argued and develops. Here is a look at eight significant Wisconsin federal court decisions interpreting Wisconsin law in 2024 and 2025.

Each year, the U.S. Court of Appeals for the Seventh Circuit and Wisconsin's two federal district courts issue decisions interpreting Wisconsin statutes and common law or predicting how the Wisconsin Supreme Court would rule on unaddressed questions. Although these decisions are not binding on Wisconsin courts, they influence how Wisconsin law develops.

This article reviews eight recent federal decisions interpreting and applying Wisconsin statutes and common law relating to, among other issues, economic duress in contract cases, public and private nuisances, abnormally dangerous activities, the product liability statute of repose, negligent inspection liability, and the relationship between insurers' duties to defend and indemnify.

Contracts – Economic Duress

Under Wisconsin common law a party may raise economic duress as a defense to a breach of contract claim, arguing that the contract is unenforceable because the party entered the contract out of compulsion, not of its own free will. In *JER Creative Food Concepts, Inc. v. Create A Pack Foods, Inc.*,[1] the Seventh Circuit evaluated whether each of the factors for economic duress was satisfied where a food supplier argued it released claims against its contract manufacturer only because the manufacturer threatened to stop filling orders unless the supplier signed the release.

The relationship between the parties began in 2014 when JER Creative Food Concepts, Inc. d/b/a Golden Select Foods ("Golden") hired Create A Pack Foods, Inc. ("CAP") to produce Golden's kosher food products at CAP's facility in Elmwood, Wisconsin. The parties exchanged drafts of a contract with an eight-year term and, although the contract was never signed, Golden invested over $100,000 to build out CAP's facility to produce Golden's products. CAP produced Golden's products for years afterward but notified Golden in October 2021 that CAP would be closing its Elmwood facility and Golden had until June 1, 2022 (about seven months before the end of the contract term) to remove its equipment.

The parties negotiated a new agreement pursuant to which CAP would continue producing Golden's products until May 27, 2022, and ship all inventory by June 15, but Golden had to have its equipment out by June 15 and had to release all legal claims against CAP that predated the new agreement. Golden's president testified that when he objected to the release, CAP refused to fill any orders unless he signed the agreement with the release.

Golden sued CAP alleging breach of the original agreement and asserted in the complaint that the release in the second agreement was unenforceable because CAP obtained it through economic duress. CAP counterclaimed for breach of the second agreement, alleging Golden received nearly $50,000 of inventory for which it did not pay. The district court entered summary judgment for CAP on both its counterclaim and Golden's claim, finding that no reasonable jury could find that Golden agreed to the release under economic duress.[2]

Analyzing Golden's economic duress argument on appeal, the Seventh Circuit listed the four factors required to prove the defense under Wisconsin law: 1) Golden was the victim of a wrongful or unlawful act or threat; 2) the act or threat deprived Golden of its unfettered will; 3) as a result, Golden was compelled to make a disproportionate exchange of values or give up something – i.e., the release – for nothing; and 4) Golden had no adequate legal remedy.[3]

Addressing the factors in order, the Seventh Circuit first found that there was sufficient evidence to create a genuine dispute regarding whether Golden was the victim of CAP's wrongful or unlawful act or threat. The court explained that economic duress occurs "when one party uses

the threat of breach to get the contract modified in its favor where modification is not in the mutual interest of the parties, and such an act undermines the institution of contract."[4] Assuming without deciding that the unsigned, initial agreement was valid, the court concluded that it was not beyond dispute that CAP had a legal right to cease production when it demanded Golden agree to the release.[5]

The court also found that a jury could find in Golden's favor on the second factor, since it was plausible to conclude that Golden was deprived of its unfettered free will when CAP threatened to stop filling orders. The district court had agreed with CAP that Golden was freely exercising its will by willingly communicating with CAP about the terms of the second agreement, but Golden had no way of producing its products or filling its customers' orders if CAP refused to perform. The Seventh Circuit did not view Golden's negotiation as persuasive because Golden's president claimed to have objected to the release and CAP did not dispute that it would not negotiate the release.[6]

The court further agreed with Golden on the third factor, that a jury could find it received little or nothing in exchange for the release. The district court found that Golden benefitted when CAP resumed production upon execution of the second agreement, but if the first agreement was enforceable, then Golden already had the right to receive that benefit. Thus, "a reasonable jury could find that … Golden received nothing more than the performance CAP had already promised, while relinquishing something of value."[7]

Golden failed to persuade the court that it had no adequate legal remedy, however, leading the court to affirm the district court's summary judgment decision. Golden argued that it had no adequate legal remedy because it could not seek injunctive relief and would not have survived if it sued for damages instead of agreeing to the release. The Seventh Circuit saw no barrier to Golden seeking injunctive relief, though, and cited its potentially imminent demise as the type of irreparable harm that would support such relief.[8] Golden could not establish that going to court was not an alternative to signing the release, so it could not establish the fourth economic duress factor and summary judgment was appropriate.

Torts – Public Nuisance

In the most recent iteration of the Eastern District of Wisconsin's long-running white lead carbonate litigation, the court evaluated the legal sufficiency of the plaintiffs' claim that they were entitled to damages for lead exposure under a public nuisance theory. The defendants in *Gibson v. American Cyanamid Co.*[9] moved to dismiss this and other causes of action in the plaintiffs' amended complaint, which was the first time in the 17-year history of this litigation that public nuisance appeared as a theory of liability.

Before addressing the motion to dismiss, the court recited a brief history of white lead carbonate litigation in the Eastern District of Wisconsin, beginning with the Wisconsin Supreme Court's recognition of a "risk contribution" theory of liability in 2005, which allowed individuals harmed by exposure to white lead carbonate to apportion liability among the pool of defendants who could have caused the injury rather than proving direct causation.[10] This led to numerous suits against manufacturers in the Eastern District, with more than 170 plaintiffs at one point. Those cases were litigated for years in both the Eastern District and the Seventh Circuit, primarily regarding negligent and strict liability failure to warn claims.

The court began its analysis with the plaintiffs' failure to warn claims, which the defendants argued failed because they had no duty to warn. For such a duty to exist, a manufacturer must have had no reason to believe that those for whose use the product is supplied will realize its dangerous condition.[11] This required the court to address two questions: 1) who were the relevant consumers for the inquiry and 2) what did the manufacturers have reason to believe about their knowledge? The Seventh Circuit had previously held that the answer to the first question was those who consumed residential lead paint at the time the plaintiffs and their caregivers had (as opposed to consumers of lead paint in the 1950s and earlier). On the second question, the district court held that public warnings of the dangers of lead paint did not prove as a matter of law that the manufacturers had no duty to warn, but rather suggested that the public was not fully aware of such dangers (hence the need for warnings).

After briefly addressing the plaintiffs' general negligence claim (dismissed on stare decisis grounds), the court turned to the plaintiffs' public nuisance theory. The plaintiffs alleged that the defendants contributed to the creation of a public nuisance by producing, promoting, and marketing lead paint and white lead carbonate for residential use in the city of Milwaukee. The defendants argued that this theory failed for four reasons: 1) the plaintiffs could not prove the defendants engaged in underlying tortious conduct; 2) the plaintiffs lacked standing to remedy harm to non-party members of the community; 3) the plaintiffs did not allege a cognizable "public right"; and 4) the plaintiffs' injuries did not qualify as the kind of "special injury" necessary for private recovery caused by a public nuisance.

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Although the defendants were correct that liability for public nuisance requires proof of tortious conduct, their argument was premised upon the assumption that the plaintiffs' product liability claims failed as a matter of law.[12] Since the court had already denied their motion with respect to the plaintiffs' duty to warn claims, this argument against public nuisance liability was no longer viable.

The defendants' standing argument was based upon the plaintiffs' request for community-wide abatement of white lead carbonate, but the plaintiffs had withdrawn that request so the court did not need to analyze the issue.

The defendants' "public right" argument related to the basic definition of a public nuisance as "a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." They argued that the plaintiffs' injuries were caused by lead paint inside private residences, and therefore not by defendants' interference with a public right. The court rejected this argument, explaining that the alleged right is the public's right to residential housing stock that is not contaminated by lead paint, not merely the right to enjoy a single private residence.[13] The defendants argued that Wisconsin courts would not recognize such a public right, citing cases from other states that rejected or doubted the classification of lead paint contamination as a public nuisance.[14] Counterbalancing those cases was a California lead paint case in which an appellate court recognized a public right to "housing that does not poison children" and, more importantly, a Wisconsin case in which a Wisconsin court had allowed a public nuisance claim to go to a jury and the jury found that the presence of lead-based paint in city of Milwaukee housing was a public nuisance.[15] While stopping short of a formal *Erie* guess,[16] the court was reluctant to rule that the Wisconsin Supreme Court would not recognize a public right to housing stock that is not contaminated by lead paint and accordingly rejected the "public right" argument as a ground to dismiss the public nuisance claim.

Turning to the defendants' fourth argument, the court discussed the rule that private recovery for injuries suffered due to a public nuisance requires such injuries to be "different in kind" than the injuries suffered by the general public from the nuisance. The defendants argued that the plaintiffs could not have suffered such "special injuries" because if the public nuisance is contamination of housing by lead paint, then the plaintiffs' injuries are the same as every member of the public affected by the nuisance. The Restatement (Second) of Torts explains the distinction with the example of a trench dug across a public highway. Detoured plaintiffs cannot maintain actions because everyone who attempted to use the highway would suffer the same injury. If someone fell into the trench and suffered personal injuries, however, it would be considered a special injury and support a private action.[17]

After discussing this example, the court noted that the Restatement recognizes that personal injuries are "normally different in kind" from the injuries suffered by the general public. Further, the Wisconsin Supreme Court held in *Physicians Plus Insurance Corp. v. Midwest Mutual Insurance Co.*[18] that personal injuries from a traffic accident caused by tree branches obstructing the view of a stop sign were sufficient to support a private action. Given that the obstructive branches were only a public nuisance because of the threat of traffic accidents and personal injuries, the Wisconsin Supreme Court "appears to view any personal injury as a special injury."[19] Based on this interpretation of *Physicians Plus* (shared by the U.S. District Court for the Western District of Wisconsin[20]), the court rejected the defendants' final argument against the public nuisance claim and allowed the claim to proceed.

Torts – Proximate Cause, Statute of Repose, Private Nuisance, & Abnormally Dangerous Activity

In a more recent, wide-ranging toxic tort decision, *Rougeau v. Ahlstron Rhinelander, LLC*,[21] the Western District of Wisconsin analyzed landowners' claims against manufacturers of polyfluoroalkyl substances (PFAS) and a paper mill that spread PFAS-containing sludge on farmland, which allegedly leached onto the plaintiffs' properties and into their drinking water. The plaintiffs alleged causes of action for product defect, negligence, private nuisance, trespass, and strict liability for abnormally dangerous activity, all of which the defendants moved to dismiss for failure to state a claim.

One of the manufacturer defendants, 3M Company, argued that every claim against it failed because the paper mill's decision to dispose of PFAS-laden waste on farms was a superseding cause. Under Wisconsin law, superseding cause is subsumed within the proximate cause inquiry, which consists of six public policy factors.[22] Superseding cause is most closely related to the factor that addresses whether the negligence is too remote from the injury to support liability, and generally exists "when it is a cause of independent origin that was not foreseeable."[23] After first noting that Wisconsin courts generally defer consideration of superseding cause and other public policy considerations until after trial, the court found that the plaintiffs had plausibly alleged facts that 3M's conduct was the proximate cause of their injuries. This conclusion was based upon the plaintiffs' allegations that 3M knew or should have known (i.e., it was foreseeable) that the paper mill defendants would likely dispose of PFAS-laden waste on farmland and that such disposal would lead to migration and groundwater contamination.[24]

The court also rejected 3M's argument that there would be no sensible or just stopping point to liability (another

public policy factor) if it were held responsible for its customers' intentional torts involving unforeseeable misuse of 3M's product. The court noted that "denying 3M's motion to dismiss is a far cry from deciding whether plaintiffs' recovery against any defendant is consistent with public policy" and reserved judgment on this argument at least until the parties had a chance to develop the facts in discovery.[25]

3M also asserted an argument based on Wisconsin's product liability statute of repose.[26] The court explained that it could only reach the merits of a statute of repose affirmative defense on a motion to dismiss "if the relevant dates were set forth unambiguously in the complaint," which in this case would mean the date 3M last manufactured PFAS-containing products and the date the plaintiffs' claims allegedly accrued. Because the complaint was vague regarding these two dates, 3M asked the court to take judicial notice of the Federal Register for the date 3M announced phaseout of certain PFAS production and the Wisconsin Department of Natural Resources (DNR's) website for when the DNR began testing wells for PFAS to show when the plaintiffs' claim accrued under Wisconsin's discovery rule.[27]

The court declined to dismiss the plaintiffs' claims on statute of repose grounds for three reasons.[28] First, the plaintiffs alleged that the defendants had represented that their PFAS products had periods of useful life beyond 15 years, potentially triggering a statutory exception. Second, the plaintiffs alleged that 3M continued manufacturing certain PFAS products through the date of filing, so 3M's phaseout of other types of PFAS products may not have been determinative of when the repose period began. And third, the plaintiffs alleged that they "recently" discovered that their wells were contaminated and the DNR's website only stated when the DNR began PFAS testing of certain wells in 2022 without specifying when the plaintiffs discovered PFAS in their wells.[29]

The court next addressed 3M's argument that the plaintiffs' defective design claim failed because PFAS were an inherent part of "PFAS products" and therefore not a design defect. While acknowledging that other courts have dismissed similar, PFAS-related design defect claims for failure to allege a safer alternative design, the court nonetheless declined to dismiss the claim. This was due largely to the plaintiffs' allegations that 3M phased out the production of certain PFAS in 2002 and planned to exit all PFAS manufacturing in 2025, which arguably supports an inference that reasonable, safer alternative products existed without the use of PFAS.[30]

The court concluded its discussion of 3M's product liability arguments by rejecting an argument that the plaintiffs' failure to warn claim failed because the paper mill defendants' knowledge of the danger of their disposal of PFAS-laden sludge made it implausible that any warning from 3M would have changed their behavior. This cause of action required the plaintiffs to allege that "foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe."[31] The court found that the plaintiffs' allegations that 3M knew or should have known of the toxicity and persistence of PFAS since the 1970s (including documentation of increasing levels of one kind of PFAS in its own workers) and failed to warn its customers of the dangers of soil and groundwater contamination plausibly stated a failure-to-warn claim.[32] The court also observed that even if the paper mill defendants did know about the dangers of spreading PFAS-laden sludge, it was still possible a jury would find a warning from the products' manufacturer would have been more effective (potentially because such warnings would be evidence of the paper mills' knowledge).[33]

Moving on to the defendants' arguments to dismiss the plaintiffs' private nuisance and trespass claims, the court first explained that Wisconsin has adopted the Restatement (Second) of Torts' analysis for private nuisance claims. The Restatement provides that private nuisance liability requires a showing that the defendants' conduct "is a legal cause of invasion of another's interest in the private use and enjoyment of land" and the invasion is either 1) intentional and unreasonable, or 2) unintentional but otherwise actionable under the rules for negligence or abnormally dangerous conditions or activities.[34] Wausau Paper argued that the plaintiffs failed to allege it had knowledge of PFAS in its byproduct or that it knew PFAS could travel in groundwater to the plaintiffs' properties, but the court found that the plaintiffs had at least impliedly alleged such knowledge by alleging Wausau Paper did not warn property owners of the dangers of PFAS applied to their or nearby properties. The court viewed 3M's intentional private nuisance argument as a closer question but found that the plaintiffs' allegations allowed a trier of fact to infer that 3M was substantially certain its PFAS products sold to paper mill defendants could contaminate the plaintiffs' properties, satisfying the intent element.

The court addressed the plaintiffs' trespass claims relatively briefly, finding the allegations against Wausau Paper sufficient to state a claim for intentional trespass but dismissing a negligent trespass claim against 3M because "courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers."[35]

Finally, the court addressed the paper mill defendants' argument that the plaintiffs failed to state a claim for strict liability based upon an abnormally dangerous activity. Wisconsin has adopted Sections 519 and 520 of the Restatement (Second) of Torts, which provide the analytical framework for this type of claim.[36] Section 520 lists six factors to be considered when determining if an activity is

abnormally dangerous: 1) existence of a high degree of risk of some harm to the person, land, or chattels of others; 2) likelihood that the harm that results from it will be great; 3) inability to eliminate the risk by the exercise of reasonable care; 4) extent to which the activity is not a matter of common usage; 5) inappropriateness of the activity to the place where it is carried on; and 6) extent to which its value to the community is outweighed by its dangerous attributes.[37]

Before addressing these factors, the court addressed the defendants' argument that the plaintiffs failed to allege that the defendants engaged in an abnormally dangerous *activity*, since their claims hinged on the dangerousness of a *material*. The court disagreed, finding that the plaintiffs' allegations regarding the disposal of PFAS-laden sludge on farmland was sufficient to constitute an actionable activity that could result in strict liability.

Next addressing each of the Restatement factors, the court found that the plaintiffs had plausibly alleged that spreading PFAS-containing waste was "extremely hazardous" and presented a high degree of risk to property and health, those risks could not be mitigated once PFAS entered the groundwater, the practice was uncommon, and the plaintiffs' water supplies continued to be contaminated with PFAS, exposing them to hazardous chemicals and requiring them to incur the costs of remediation.[38] The court noted the paper mill defendants' argument that allegations of disposal of "millions of pounds of waste" and the existence of a DNR plan for land application of PFAS arguably suggested such disposal was common (and therefore not abnormally dangerous), but concluded that a more developed evidentiary record was necessary to address the question.

Economic Loss Doctrine – Other Property Exception

In *Hans Kissle Inc. v. Echo Lake Foods Inc.*,[39] the Eastern District of Wisconsin provided a succinct explanation of the "other property" exception to Wisconsin's economic loss doctrine and evaluated whether that exception prevented application of the doctrine in the context of the sale of contaminated food products between contracting merchants. The case arose when plaintiff Hans Kissle Inc. learned that precooked eggs it purchased from defendant Echo Lake Foods Inc. were contaminated with Listeria, E. coli, and other bacteria. Hans Kissle sued under both tort and contract theories, alleging that the contaminated eggs forced it to dispose of both the breakfast taco filling into which the eggs were to be incorporated and other finished products that had been cross-contaminated by the eggs.

Top 8 Recent Wisconsin Federal Court Decisions

CONTRACT LAW

1. **Economic Duress**

JER Creative Food Concepts Inc. v. Create A Pack Foods Inc.

No. 23-cv-115-wmc, 2025 WL 637440 (7th Cir. Feb. 27, 2025).

Issue: Was each factor for economic duress satisfied when a food supplier argued it released claims against its contract manufacturer only because the manufacturer threatened to stop filling orders unless the supplier signed the release?

Holding: One of the four elements for establishing economic duress was not satisfied, and therefore summary judgment was appropriate.

TORT LAW

2. **Public Nuisance**

Gibson v. American Cyanamid Co.

756 F. Supp. 3d 660 (E.D. Wis. 2024).

Issue: Was the plaintiffs' claim that they were entitled to damages for lead exposure legally sufficient under a public nuisance theory?

Holding: The court denied the defendants' motion to dismiss the public nuisance claim because 1) the plaintiffs' allegations of underlying tortious conduct were legally sufficient, 2) the court could not conclude the Wisconsin Supreme Court would not recognize a public right to housing stock free of lead-based contaminants, and 3) both the Restatement, which recognizes that personal injuries are "normally different in kind" from the injuries suffered by the general public, and the Wisconsin Supreme Court's *Physicians Plus* decision led the court to conclude the plaintiffs' injuries were the type of "special injuries" necessary to state a public nuisance claim.

3. **Proximate Cause, Statute of Repose, Private Nuisance, & Abnormally Dangerous Activity**

Rougeau v. Ahlstron Rhinelander LLC

__ F. Supp. 3d __, No. 23-cv-546-wmc, 2025 WL 1580958 (E.D. Wis. June 4, 2025).

Issue: Were the landowners' causes of action against manufacturers of polyfluoroalkyl substances (PFAS) and a paper mill that spread PFAS-containing sludge on farmland for product defect, negligence, private nuisance, trespass, and strict liability for abnormally dangerous activity sufficiently pled to survive a motion to dismiss for failure to state a claim?

Holding: The court found that the plaintiffs had plausibly alleged that spreading PFAS-containing waste was "extremely hazardous" and presented a high degree of risk to property and health, those risks could not be mitigated once PFAS entered the groundwater, the practice was uncommon, and the plaintiffs' water supplies continued to be contaminated with PFAS, exposing them to hazardous chemicals and requiring them to incur the costs of remediation.

4. **Discovery Rule and Latent Disease Exception**

Nester v. Biomet, Inc.

No. 22-CV-1362-JPS, 2024 WL 4003100 (E.D. Wis. Aug. 30, 2024).

Issue: Were the plaintiff's personal injury claims relating to allegedly defective hip replacement devices barred by Wisconsin's three-year personal injury statute of limitation or 15-year statute of repose?

Holding: The plaintiff knew about his injuries more than three years before filing the complaint, so the claims were barred by the personal injury statute of limitation. The injuries were distinct from those caused by diseases such as asbestosis because they stemmed from the discrete installment of hip implants. Thus, the latent disease exception to the statute of repose did not apply, and the statute of repose applied and barred the claims because the plaintiff's implants were manufactured more than 15 years before he filed suit.

ECONOMIC LOSS DOCTRINE

5. **Other Property Exception**

Hans Kissle Inc. v. Echo Lake Foods Inc.

No. 24-CV-484-SCD, 2024 WL 4186678 (E.D. Wis. Sept. 13, 2024).

Issue: Did the "other property" exception to Wisconsin's economic loss doctrine prevent application of the doctrine in the context of the sale of contaminated food products between contracting merchants?

Holding: The court concluded that the harm caused by the defective products largely affected components in an integrated system and was the foreseeable result of disappointed expectations, which prevented application of the "other property" exception. The court also rejected the plaintiff's argument that the economic loss doctrine did not apply because the contaminated eggs were "unreasonably dangerous and posed a public safety risk"; this argument failed because it was based upon the faulty assumption that there exists a "public safety" exception to the economic loss doctrine, which the Wisconsin Supreme Court has explicitly stated does not exist.

INSURANCE

6. **Bad Faith**

Abegglen v. State Farm Fire & Casualty Co.

24-cv-105-wmc, 2025 WL 1279361 (W.D. Wis. May 2, 2025).

Issue: Was a plaintiff's claim for hail damage to the roof of his house "fairly debatable" such that the insurer's denial of the claim did not constitute bad faith?

Holding: The plaintiff's bad faith claim survived summary judgment because a reasonable jury could conclude that the insurer denied coverage due to an internal policy of denying coverage for any granule loss when granule loss may have satisfied policy requirement for coverage, which was "accidental direct physical loss to the property."

7. **Duty to Indemnify**

Coppe Healthcare Solutions, Inc. v. BrightSky, LLC

No. 24-CV-88, 2024 WL 4252771 (E.D. Wis. Sept. 20, 2024).

Issue: Does a determination on an insurance company's duty to indemnify an insured always first require a final determination as to the insured's liability?

Holding: The Eastern District of Wisconsin held that because the Seventh Circuit acknowledges the possibility of an indemnity determination before liability is established, the insured's argument that such a determination is never permitted failed.

8. **Negligent Inspection Liability**

Camelot Banquet Rooms, Inc. v. Mesa Underwriters Specialty Insurance Co.

No. 25-CV-703, 2025 WL 1807415 (E.D. Wis. July 1, 2025).

Issues: 1) Was a negligent-inspection claim against an insurer, based on a discretionary annual inspection, barred by Wis. Stat. section 895.475, which exempts state actors and insurers from liability associated with "[t]he furnishing of, or failure to furnish, safety inspection or advisory services intended to reduce the likelihood of injury, death or loss"? 2) Did the insurer breach the contract (the insurance policy) by not covering the plaintiff's losses?

Holding: The district court concluded that the plaintiff's negligent-inspection claim fell directly within the scope of Wis. Stat. section 895.475 (rejecting challenges to the statute based on the Wisconsin and U.S. Constitutions) and thus the insurer could not be liable under that theory. After evaluating the policy language, the court found that the exclusion of loss caused by continuous or repeated seepage or leakage of water applied as a matter of law, and thus the plaintiff's breach-of-contract claim failed. **WL**

Echo Lake moved to dismiss Hans Kissle's tort claims as barred by the economic loss doctrine, which "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."[40] Hans Kissle argued that the economic loss doctrine did not apply because the eggs caused damage to property other than themselves and therefore the "other property" exception applied.

Quoting extensively from the Wisconsin Court of Appeals' decision *Foremost Farms USA Cooperative v. Performance Process, Inc.*,[41] the district court explained that Wisconsin courts use two tests to determine whether the "other property" exception applies: the "integrated system" test and the "disappointed expectations" test. First, courts examine whether the allegedly defective product is a component in a larger system, in which case the completed system or product is not "other property." If the product is not part of an integrated system then the court moves on to the disappointed expectations test, which asks whether prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product and whether the damage was "reasonably foreseeable" should the product prove to be defective, such that the purchaser could have obtained protection in contract.[42]

Following this framework, the district court first concluded (without apparent objection from Hans Kissle) that Hans Kissle's breakfast taco filling was an integrated system containing Echo Lake Foods' precooked eggs. Thus, the breakfast taco filling was not "other property" under the integrated system test.

The disappointed expectations test is a two-part inquiry, requiring courts to 1) determine the contractual expectations of the parties, and 2) inquire whether the plaintiff's claim is about disappointment with those expectations.[43] As an example, the court briefly discussed *Grams v. Milk Products, Inc.*,[44] in which calf sellers sued a milk manufacturer for defective milk substitute that harmed their calves. In that case, the Wisconsin Supreme Court applied the disappointed expectations test and concluded that the calf sellers expected the milk substitute to nourish their calves but the product did not work as intended; instead, it weakened some calves' immune system and killed others. Because the tort claims were based on disappointed expectations, the damage to the calves did not fall within the scope of the "other property" exception and the economic loss doctrine applied.[45]

Applying the test to the case at bar, the district court found that the damage to Hans Kissle's raw materials and finished products involved disappointment in the failure of the eggs to live up to their intended purpose. Hans Kissle was in the food production business and required Echo Lake Foods to test for microbial contaminants, so it was within the parties' expectations that provision of contaminated eggs would result in contamination of products incorporating the eggs and cross-contamination. And because the damage caused by the contamination arose from disappointed expectations of a commercial bargain, those damages did not constitute "other property" for purposes of the economic loss doctrine.[46]

Hans Kissle also argued that the economic loss doctrine did not apply because the contaminated eggs were "unreasonably dangerous and posed a public safety risk."[47] The court concluded after examining Hans Kissle's Wisconsin authority that this argument failed because it was based upon the faulty assumption that there exists a "public safety" exception to the economic loss doctrine, which the Wisconsin Supreme Court has explicitly stated does not exist.[48]

Insurance – Bad Faith

The Western District of Wisconsin analyzed whether an insurer's internal hail damage policy could run afoul of Wisconsin bad faith law in *Abegglen v.*

State Farm Fire & Casualty Co.[49] The plaintiff, Abegglen, sued State Farm for breach of contract, bad faith, and statutory interest after State Farm denied his claim for hail damage to the roof of his house. Abegglen's homeowner's policy covered "accidental direct physical loss to the property" or ADPL, which the policy did not define further. A State Farm internal guide to identifying hail damage stated, however, that "granular loss" alone is insufficient to constitute hail damage.[50]

The shingles on Abegglen's roof showed signs of damage to their granular coating after a hailstorm, but several different inspectors hired or employed by State Farm concluded this was not caused by hail. State Farm first denied the claim based upon its third-party inspector's report that although there was granular loss, "[n]o wind or hail damage was found on any slope." Abegglen requested a second inspection, which led a State Farm inspector to examine the roof and report "no ADPL hail damage of bruising, fracturing or puncturing in test squares on all slopes." That inspector later testified that he had been trained by State Farm that for there to be hail damage, "the shingle must exhibit a bruise, fracture or penetration of the mat," and that granular loss caused by hail would not count as hail damage by itself.

The State Farm inspector advised Abegglen after the second inspection that there was hail damage to the soft metals on the roof, but repair costs were below Abegglen's deductible so State Farm would not issue payment. This led Abegglen to retain an engineer, who found roof damage consistent with hail impact, and file suit. State Farm then hired its own engineer, who found "concentrated areas of absent granules" but concluded they were not caused by hail.

State Farm moved for summary judgment on Abegglen's bad faith claim, arguing his claim of hail damage was fairly debatable as a matter of law. The court explained that Wisconsin law requires a showing of two things to prove bad faith: 1) the absence of a reasonable basis for denying benefits and 2) the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.[51] This test includes an objective and a subjective component. The former is "whether the insurer properly investigated the claim and whether the results of the investigation were subject to a reasonable evaluation and review."[52] If after this review is complete the claim is "fairly debatable," the insurer is entitled to debate it, whether the debate is legal or factual.[53] The subjective component asks whether the insurer was aware there was no reasonable basis for denial or displayed "reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured."[54]

While there was a factual dispute over whether the granular loss on Abegglen's shingles was caused by hail damage or "long-term wear and deterioration," the court denied State Farm's summary judgment motion on the bad faith claim because a reasonable jury might conclude that State Farm's policy categorically excluding granule loss from ADPL constituted bad faith.[55] This conclusion was driven in part by the fact that the second inspector had been trained to not treat granular loss as ADPL even if caused by hail, and that the inspector's claims notes and deposition testimony would allow a reasonable jury to conclude he found no ADPL hail damage based on State Farm's training rather than determining that the granular loss was not caused by hail.

State Farm argued that its engineer also found no hail damage, thus making the existence of hail damage fairly debatable, but the court rejected this argument because the engineer inspected the roof only after State Farm twice denied Abegglen's claim. Bad faith is determined with respect to what the insurer knew or should have known at the time it denied the claim,[56] so State Farm's post-denial investigation did not salvage its summary judgment argument.

Insurance – Duty to Indemnify

The Eastern District of Wisconsin's decision in *Coppe Healthcare Solutions, Inc v. BrightSky, LLC*[57] is significant because the court identified an idiosyncrasy in Wisconsin insurance law that may have revealed an inconsistency between Seventh Circuit precedent on Wisconsin law and Wisconsin Supreme Court jurisprudence.

In *Coppe Healthcare*, intervening party Nautilus Insurance Company sought a declaration that it had no duty to defend or indemnify defendant AT&T Enterprises, LLC. AT&T moved to dismiss Nautilus's claim for declaratory judgment on the duty to indemnify, arguing the claim was not ripe because a determination on the duty to indemnify first requires a final determination as to liability.

The court began its analysis by explaining that an insurer's "duty to defend is broader than, and encompasses, the duty to indemnify, in that the duty to defend implicates arguable and not actual coverage," and Wisconsin courts thus routinely state that "if there is no duty to defend there is also no duty to indemnify."[58] The court also noted, however, that the Wisconsin Supreme Court has identified a hypothetical situation in which the pleadings do not allege facts sufficient to give rise to the duty to defend, but facts adduced during litigation ultimately establish a duty to indemnify.[59] This could lead to "isolated instances" in which an insurer has no duty to defend but does have a duty to indemnify.

Turning to AT&T's argument that Nautilus's claim relating to the duty to indemnify was not ripe, the district court found that AT&T did not identify "any authority establishing that, as a matter of Wisconsin law, a finding of liability *must* precede an indemnification determination."[60] The court acknowledged numerous cases in which the Seventh Circuit had said that decisions about indemnity "should be postponed until the underlying liability has been

established," but explained that "the rule is not absolute."[61] The Seventh Circuit has found that an indemnity determination may be appropriate "where indemnification issues did not hinge on remote contingencies and facts."[62]

The district court was compelled to deny AT&T's motion to dismiss in light of *T.H.E. Insurance Company v. Olson*,[63] in which the Seventh Circuit affirmed a district court's decision declaring before any finding of liability that an insurer had no duty to indemnify the insured. The Seventh Circuit held that "where the district court has found there is no duty to defend, the immediate legal consequence is that there is also no duty to indemnify. This consequence is a product of Wisconsin's substantive law, which we are bound to apply in a diversity case like this one."[64] This holding clearly showed that the Seventh Circuit acknowledges the possibility of an indemnity determination before liability is established, so AT&T's argument that such a determination is never permitted failed.

The district court observed that the Seventh Circuit did not mention the Wisconsin Supreme Court's hypothetical scenario in *Olson*, which is an exception to the blanket statement that "the immediate legal consequence" of a finding of no duty to defend is no duty to indemnify. This creates the potential for a situation in which a district court, having found no duty to defend under Wisconsin law, is bound by stare decisis to declare that there is also no duty to indemnify despite knowing the Wisconsin Supreme Court does not consider this conclusion inevitable.

Insurance – Negligent Inspection Liability

Section 895.475 of the Wisconsin Statutes exempts state actors and insurers from liability associated with "[t]he furnishing of, or failure to furnish, safety inspection or advisory services intended to reduce the likelihood of injury, death or loss[.]" In *Camelot Banquet Rooms, Inc. v. Mesa Underwriters Specialty Insurance Co.*,[65] the Eastern District analyzed both the applicability and constitutionality of this statute in the context of annual insurer inspections.

Camelot Banquet Rooms had a commercial property insurance policy with Mesa Underwriters Specialty Insurance Co., pursuant to which Mesa had the right (but not the obligation) to conduct inspections of Camelot's insured property and recommend changes.[66] Mesa conducted inspections of Camelot's property annually and recommended changes, but in August 2023 a contractor discovered water-intrusion damage that Mesa had not identified. The source of the intrusion was likely damaged rubber membranes around scuppers and failed flashings.[67]

The policy excluded losses resulting from continuous or repeated seepage or leakage of water, so Mesa denied Camelot's claim for reimbursement for damage caused by the water intrusion.[68] Camelot then sued Mesa for negligent inspection, breach of contract, and bad faith. Mesa moved to dismiss all three claims, arguing that the negligent inspection claim was barred by Wis. Stat. section 895.475 and the policy language clearly excluded the loss.

Camelot argued that section 895.475 did not bar the general application of section 324A of the Restatement (Second) of Torts, which discusses liability for negligent performance of an undertaking. The district court rejected this argument, explaining that the case upon which Camelot relied predated the effective date of section 895.475 and did not stand for the proposition that the Restatement framework applies to an insurer in the context of a negligent inspection.[69] Rather, the Wisconsin Supreme Court's statement that section 895.475 does not "purport to limit the general application of sec. 324 A, Restatement, (Torts 2d, p.142)" meant that section 324A would continue to generally apply to negligent performance of gratuitous acts.[70] The district court concluded that Camelot's negligent inspection claim fell directly within the scope of section 895.475 and thus Mesa could not be liable under that theory.

Camelot also argued that, if section 895.475 did apply, it was unconstitutional under both article I, section 9 of the Wisconsin Constitution (every person is entitled to a legal remedy for all injuries) and the Seventh Amendment to the U.S. Constitution (right to a jury trial). Regarding the former, the court cited the Wisconsin Supreme Court's statement that "art. 1, § 9 confers no legal rights," but rather applies when someone seeks a remedy for an already existing right.[71] "The right-to-remedy clause thus preserves the right to obtain justice on the basis of the law as it in fact exists."[72] And because the legislature had determined that no right to recovery existed against an insurer for negligent inspection under the circumstances, the application of section 895.475 did not violate the right-to-remedy guarantee of article I, section 9.[73]

The operation of section 895.475 did not violate the Seventh Amendment for much the same reason; the court explained that the Amendment only guarantees the right to a jury where the party has a right to suit.[74] And the Seventh Amendment "is not incorporated against the states and does not apply to the action of the state legislature" anyway, so Camelot's constitutional argument failed.[75]

Having rejected Camelot's challenges to the applicability of section 895.475, the court went on to evaluate the policy language and find that the exclusion of loss caused by continuous or repeated seepage or leakage of water applied as a matter of law, meaning Camelot's breach of contract claim failed.[76] And with the dismissal of its negligent inspection and breach of contract claims, Camelot's bad faith claim was no longer viable and was also dismissed.[77]

Torts – Discovery Rule and Latent Disease Exception

In *Nester v. Biomet, Inc.*,[78] the Eastern District analyzed whether the plaintiff's personal injury claims relating to allegedly defective hip replacement devices were barred by either Wisconsin's 3-year personal injury statute of limitations or 15-year statute of repose. The former required a close examination of Wisconsin's discovery rule and the latter required the court to address whether the "latent disease" exception to the statute of repose applies to injuries caused by an implanted medical device, an issue that has never been addressed by Wisconsin state courts.

In 2002 and 2003, Nester had total replacements of each hip, with Biomet-manufactured devices containing cobalt and chromium used in both surgeries. The prosthetic hip joints were manufactured in 2001 and 2003. Starting in 2016 or 2017, Nester began experiencing bilateral hip pain, which led him to consult with an orthopedic surgeon. Over the next two years, Nester learned that the levels of cobalt and chromium in his blood were unusually high, researched his implanted devices to determine whether they may be defective, and received diagnoses of metallosis and pseudotumors in his hips. Nester's orthopedic surgeon told him on April 19, 2019, that it was "extremely likely that it's the metal-on-metal [devices] and the reaction that it's causing because of the metallosis" and referred Nester to another surgeon to have surgery to replace the Biomet devices "as soon as possible."[79] On Nov. 7, 2019, after consulting with an attorney, Nester reached out to a third surgeon whom the attorney recommended and asked whether he could perform the hip revision surgeries, which he did in 2020 and 2021. Nester filed suit on Nov. 17, 2022, alleging both strict liability and negligence claims for design and manufacturing defects.[80]

The defendants argued that summary judgment was warranted because Nester's claims were time barred under both Wisconsin's personal injury statute of limitations and the statute of repose from Wis. Stat. section 895.047(5). Addressing the statute of limitations argument first, the court explained that accrual was dependent on Wisconsin's "discovery rule," under which a claim accrues when "the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury but also that the injury was probably caused by the defendant's conduct or product."[81] The court further explained that the discovery rule requires the plaintiff to "discover both the nature of his or her injury and its cause so that the relationship between the injury and its cause is more than a layperson's hunch or belief."[82] The relevant inquiry is on the strength *and* the nature of the connection between conduct and injury as reflected in facts known to the claimant, and the plaintiff

must have "an objective basis for determining that the defendant had a role in causing his or her injuries."[83]

Applying this standard, the court found that it was "beyond dispute that Plaintiff was aware of his injuries at the very latest, in April of 2019."[84] Nester had stipulated that he was diagnosed with pseudotumors in April 2019 and the evidence showed his surgeon had told him at that time that both his metallosis and pseudotumors were likely caused by the metal-on-metal articulation of his implants. The court found that Nester knew or should have known that Biomet's products were responsible for his injuries no later than April 2019, noting that Nester had theorized they were the cause long before this time but received confirmation from his orthopedic surgeon when the surgeon unambiguously recommended revision surgery.[85] Thus, Nester's claims accrued no later than April 2019 and the three-year statute of limitations ran in April 2022, long before he filed suit in November 2022.

Moving on to the defendants' statute of repose argument, the court first explained that the statute bars product liability suits filed 15 years or more after the injurious product was manufactured, unless the injury in question qualifies as a "latent disease."[86] Both parties agreed that the question of whether injuries caused by an implanted medical device constitute a latent disease had not been addressed by Wisconsin courts, so the district court looked to federal decisions applying North Carolina state law for guidance. Those authorities have generally held that "symptoms or physical injuries induced by a medical implant are not latent diseases, as they are individual phenomena linked to one cause – the implantation of a medical device – as opposed to a progressive disease lying in wait."[87]

The plaintiff argued that his injuries qualified as a latent disease under Wisconsin law because those injuries were part of a "disease process" and were physical pathologies not immediately obvious at the time they began. The court disagreed, holding that Nester's injuries "were all readily identifiable, discrete physical injuries 'arising from the placement of a single medical device.'"[88] The latent disease exception is typically "limited to diseases that develop over long periods of time after multiple exposures to offending substances which are thought to be causative agents, [and] where it is impossible to identify any particular exposure as the first injury," with the "archetypal example" being asbestosis.[89] Nester's injuries were distinct from those caused by diseases such as asbestosis because they stemmed from the discrete installment of hip implants. Thus, the latent disease exception did not apply and the statute of repose barred Nester's claims because his implants were manufactured over 15 years before he filed suit.[90] **WL**

ENDNOTES

[1]*JER Creative Food Concepts Inc. v. Create A Pack Foods Inc.,* No. 23-cv-115-wmc, 2025 WL 637440 (7th Cir. Feb. 27, 2025) (unpublished).

[2]*Id.* at *2.

[3]*Id.* at *3 (citing *Wurtz v. Fleischman*, 97 Wis. 2d 100, 109-10, 293 N.W.2d 155 (1980)).

[4]*Id.* (quoting *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (discussing Wisconsin law)).

[5]*Id.*

[6]*Id.* at *4. The Seventh Circuit compared this situation to the situation in *Austin Instrument Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971), a case the court has "repeatedly cited as an example of a contract modification made under economic duress." *Austin Instrument* involved a supplier threatening to stop deliveries under a contract unless the purchaser agreed to pay higher prices, which the purchaser ultimately did when it could not find an alternative supplier.

[7]*Id.*

[8]*Id.* at *5.

[9]*Gibson v. American Cyanamid Co.,* 756 F. Supp. 3d 660 (E.D. Wis. 2024).

[10]*Id.* at 664 (citing *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523).

[11]*Id.* at 666 (citing *Strasser v. Transtech Mobile Fleet Serv. Inc.*, 2000 WI 87, 236 Wis. 2d 435, 460-61, 613 N.W.2d 142).

[12]*Id.* at 669 (citing *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 656, 691 N.W.2d 658).

[13]*Id.*

[14]*Id.* at 670 (citing *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1285 (Pa. Commw. Ct. 2023); *State v. Lead Indus. Ass'n Inc.*, 951 A.2d 428, 455 (R.I. 2008); and *Cofield v. Lead Indus. Ass'n Inc.*, No. Civ.A. MJG-99-3277, 2000 WL 34292681, at *7 (D. Md. Aug. 17, 2000) (unpublished)).

[15]*Id.* (citing *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 227 Cal. Rptr. 3d 499, 552 (2017), and *City of Milwaukee v. NL Indus.*, 2008 WI App 181, 315 Wis. 2d 443, 458, 762 N.W.2d 757).

[16]An "*Erie* guess" is a federal court's attempt to predict how a state's high court would rule on a legal issue not yet addressed by that high court, named for the landmark decision *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See* Dolores K. Sloviter, *A Federal Judge Views Jurisdiction through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1679 (1992) (coining phrase "Erie guess"). The district court in *Gibson* reserved its *Erie* guess until the summary judgment stage, "when the record will be more complete." *Gibson*, 756 F. Supp. 3d at 670 (citing *In re Generac Solar Power Sys. Mktg., Sales Pracs. & Prod. Liab. Litig.*, 735 F. Supp. 3d 1047, 1057-58 (E.D. Wis. 2024) (discussing reluctance to make "drive by *Erie* guesses" at the pleading stage)).

[17]*Gibson*, 756 F. Supp. 3d at 670-71 (citing Restatement (Second) of Torts § 821C, cmt. d, illus. 2 (Am Law Inst. 1975)).

[18]2002 WI 80, 254 Wis. 2d 77, 89, 646 N.W.2d 777 (2002).

[19]*Gibson*, 756 F. Supp. 3d at 671.

[20]*See Boyer v. Weyerhaeuser Co.*, No. 14-cv-286-wmc, 2015 WL 3485262, at *3 (W.D. Wis. June 2, 2015) (unpublished) (holding in an asbestos public nuisance case that "[i]f the facts in *Physicians Plus* establish the necessary special injury, so, too, do the facts alleged here").

[21]*Rougeau v. Ahlstrom Rhinelander LLC*, __ F. Supp. 3d __, No. 23-cv-546-wmc, 2025 WL 1580958 (E.D. Wis. June 4, 2025).

[22]*Id.* at *3. The six proximate cause/public policy considerations are: 1) the injury is too remote from the negligence, 2) the injury is too wholly out of proportion to the tortfeasor's culpability, 3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm, 4) allowing recovery would place too unreasonable a burden on the tortfeasor, 5) allowing recovery would be too likely to open the way for fraudulent claims, or 6) allowing recovery would enter a field that has no sensible or just stopping point. *Cefalu v. Cont'l W. Ins. Co.*, 2005 WI App 187, ¶ 12, 285 Wis. 2d 766, 703 N.W.2d 743.

[23]*Rougeau*, 2025 WL 1580958, at *3 (quoting *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 393 (7th Cir. 2018)); *see also Stewart v. Wulf*, 85 Wis. 2d 461, 479, 271 N.W.2d 79 (1978) ("respondent's conduct cannot be considered a superseding cause because it was a foreseeable consequence of the situation the appellant created").

[24]*Id.* at *4.

[25]*Id.* at *5.

[26]Wis. Stat. section 895.047(5) states "a defendant is not liable to a claimant for damages if the product alleged to have caused the damage was manufactured 15 years or more before the claim accrues, unless the manufacturer makes a specific representation that the product will last for a period beyond 15 years."

[27]*See, e.g.*, *Hastings Mut. Ins. Co. v. Omega Flex Inc.*, No. 21-CV-713-JDP, 2022 WL 4103934, at *3 (W.D. Wis. Sept. 8, 2022) (unpublished) (citing *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986)) ("[U]nder Wisconsin law, a tort claim accrues when the plaintiff discovers or, in the exercise of reasonable diligence should have discovered, both its injury and the cause of that injury.").

[28]*Rougeau*, 2025 WL 1580958, at *6. The court expressed doubt as to whether it could take judicial notice of the contents of the DNR website but decided it did not need to resolve that question because it would reject 3M's statute of repose argument even considering the DNR information. *Id.* at *5.

[29]While the court did not spell it out, presumably its conclusion is based upon the idea that the DNR's testing of *some* wells for PFAS was insufficient to show that the plaintiffs discovered, or in the exercise of reasonable diligence should have discovered, the presence of PFAS in *their* wells.

[30]*Id.* at *7.

[31]Wis. Stat. § 895.047(1)(a).

[32]*Rougeau*, 2025 WL 1580958, at *7.

[33]*Id.* at *8 (citing *Ryan v. Greif Inc.*, 708 F. Supp. 3d 148, 170 (D. Mass. 2023)).

[34]*Id.* (citing *Prah v. Maretti*, 108 Wis. 2d 223, 231-32, 321 N.W.2d 182 (1982), and Restatement (Second) of Torts § 822 (A.L.I. 1979)).

[35]*Id.* at *10 (quoting *City of Bloomington Ind. v. Westinghouse Elec. Corp.*, 891 F.2d 611, 615 (7th Cir. 1989) (discussing trespass liability "[i]n accordance with the Restatement [(Second) of Torts] principles")).

[36]*Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 667, 476 N.W.2d 593 (Ct. App. 1991).

[37]Restatement (Second) of Torts § 520 (A.L.I. 1979).

[38]*Rougeau*, 2025 WL 1580958, at *12.

[39]*Hans Kissle Inc. v. Echo Lake Foods Inc.,* No. 24-CV-484-SCD, 2024 WL 4186678 (E.D. Wis. Sept. 13, 2024) (slip copy).

[40]*Id.* at *2 (quoting *Wausau Tile Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 593 N.W.2d 445 (1999)).

[41]2006 WI App 246, 297 Wis. 2d 724, 726 N.W.2d 289.

[42]*Hans Kissle*, 2024 WL 4186678, at *3 (quoting *Foremost Farms*, 2006 WI App 246, ¶¶ 15-19, 297 Wis. 2d 724).

[43]*Id.* at *5 (citing *Grams v. Milk Prods. Inc.*, 2005 WI 112, ¶¶ 50-51, 283 Wis. 2d 511, 699 N.W.2d 167).

[44]2005 WI 112, 283 Wis. 2d 511, 699 N.W.2d 167.

[45]*Grams*, 2005 WI 112, ¶¶ 50-51, 283 Wis. 2d 511.

[46]*Hans Kissle*, 2024 WL 4186678, at *5.

[47]*Id.* at *6.

[48]*Id.* (quoting *Wausau Tile*, 226 Wis. 2d at 264 (stating that the court's decision in *Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 471 N.W.2d 179 (1991), "does not create a broad 'public safety exception' to the economic loss doctrine").)

[49]*Abegglen v. State Farm Fire & Cas. Co.,* 24-cv-105-wmc, 2025 WL 1279361 (W.D. Wis. May 2, 2025).

[50]*Id.* at *1.

[51]*Id.* at *3 (citing *Advance Cable Co. LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 748 (7th Cir. 2015), and *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶ 26, 334 Wis. 2d 23, 798 N.W.2d 467).

[52]*Id.* (citing *Advance Cable*, 788 F.3d at 748, and *Brown v. Labor & Indus. Rev. Comm'n*, 2003 WI 142, 267 Wis. 2d 31, 671 N.W.2d 279, 287-88).

[53]*Id.* (quoting *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978)).

[54]*Id.* (quoting *Advance Cable*, 788 F.3d at 748).

[55]*Id.* at *4.

[56]*Id.* (citing *Kielmar v. Erie Ins. Co.*, No. 20-CV-798, 2021 WL 5505861, at *2 (E.D. Wis. Nov. 24, 2021) (unpublished)).

[57]*Coppe Healthcare Sols. Inc. v. BrightSky LLC,* No. 24-CV-88, 2024 WL 4252771 (E.D. Wis. Sept. 20, 2024) (slip copy).

[58]*Id.* at *1 (citing *Water Well Sols. Serv. Grp. Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 17, 369 Wis. 2d 607, 881 N.W.2d 285, and quoting *Columb v. Cox*, 2022 WI App 32, ¶ 40 n.16, 404 Wis. 2d 50, 978 N.W.2d 481, and *Great Lakes Beverages LLC v. Wochinski*, 2017 WI App 13, ¶ 15, 373 Wis. 2d 649, 892 N.W.2d 333).

[59]*Id.* (citing *Water Well*, 2016 WI 54, ¶ 30 n.17, 369 Wis. 2d 607).

[60]*Id.* at *2. Although the Wisconsin Supreme Court stated in *General Casualty Co. v. Hills*, 209 Wis. 2d 167, 176 n.11, 561 N.W.2d 718 (1997), that "[i]n this case we only consider General Casualty's duty to defend, because the duty to indemnify issue must await resolution of the claim brought by Arrowhead against Hills," this did not mean the duty to indemnify must always await resolution of liability issues. The district court explained: "The court had found that the insurer had a duty to defend. The court's statement reflects only the fact that the duty to defend is broader than the duty to indemnify. Proof of the duty to defend does not prove the duty to indemnify." *Coppe Healthcare*, 2024 WL 4252771, at *2 n.2.

[61]*Id.* at *2 (citing six Seventh Circuit cases and numerous district court cases).

[62]*T.H.E. Ins. Co. v. Olson*, 51 F.4th 264, 270 (7th Cir. 2022) (citing *Amling v. Harrow Indus. LLC*, 943 F.3d 373, 378-79 (7th Cir. 2019), and *Bankers Tr. Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 680-81 (7th Cir. 1992)).

[63]51 F.4th 264.

[64]*Id.* at 270 (citing *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 333 (7th Cir. 1994)).

[65]*Camelot Banquet Rooms Inc. v. Mesa Underwriters Specialty Ins. Co.,* No. 25-CV-703, 2025 WL 1807415 (E.D. Wis. July 1, 2025).

[66]*Id.* at *1-*2.

[67]*Id.*

[68]*Id.* at *2.

[69]*Id.* at *4 (discussing *American Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co.,* 48 Wis. 2d 305, 179 N.W.2d 864 (1970)).

[70]*Id.* (quoting *A.O. Smith Corp. v. Viking Corp.,* 79 F.R.D. 91, 93-94 (E.D. Wis. 1978)).

[71]*Id.* (quoting *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund,* 2000 WI 98, ¶ 43, 237 Wis. 2d 99, 613 N.W.2d 849).

[72]*Aicher*, 2000 WI 98, ¶ 43 (quoting *Mulder v. Acme-Cleveland Corp.,* 95 Wis. 2d 173, 189-90, 290 N.W.2d 276 (1980)).

[73]*Camelot Banquet Rooms,* 2025 WL 1807415, at *5.

[74]*Id.* (citing *Mountain Timber Co. v. Washington,* 243 U.S. 219 (1917)).

[75]*Id.* (citing *McDonald v. City of Chicago,* 561 U.S. 742, 765 n.13 (2010); *Minneapolis & St. L.R. Co. v. Bomboli,* 241 U.S. 211, 217 (1916)).

[76]*Id.* at *5-*7.

[77]*Id.* at *7.

[78]*Nester v. Biomet Inc.,* No. 22-CV-1362-JPS, 2024 WL 4003100 (E.D. Wis. Aug. 30, 2024) (slip copy).

[79]*Id.* at *5-*6.

[80]*Id.* at *1.

[81]*Id.* at *6 (quoting *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986)).

[82]*Id.* at *7 (quoting *S.J.D. v. Mentor Corp.*, 159 Wis. 2d 261, 266, 463 N.W.2d 873 (Ct. App. 1990)).

[83]*Id.* (quoting *Mentor*, 159 Wis. 2d at 269).

[84]*Id.*

[85]*Id.* at *12.

[86]*Id.* at *13 (citing Wis. Stat. § 895.047(5)).

[87]*Id.* at *13 (citing *In re Cook Med. Inc., IVC Filters Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 1:14-ML-02570-RLY-TAB, 2023 WL 7548281, at *3 (S.D. Ind. July 10, 2023) (unpublished) (declining to apply latent disease exception because plaintiff's injuries stemmed from a single, discrete malfunction in her vena cava filter); *Fulmore v. Johnson & Johnson*, 581 F. Supp. 3d 752, 758 (E.D.N.C. 2022) (denying that plaintiff's injuries constituted a latent disease because they were a collection of discrete symptoms from a faulty medical device and not a true disease)).

[88]*Id.* (quoting *Cook*, 2023 WL 7548281, at *3).

[89]*Id.* (quoting *Cook*, 2023 WL 7548281, at *3 and citing *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004, 2016 WL 873854, at *2 (M.D. Ga. Mar. 4, 2016) (unpublished) and *Wilder v. Amatex Corp.*, 336 S.E.2d 66, 73 (N.C. 1985)).

[90]*Id.* **WL**