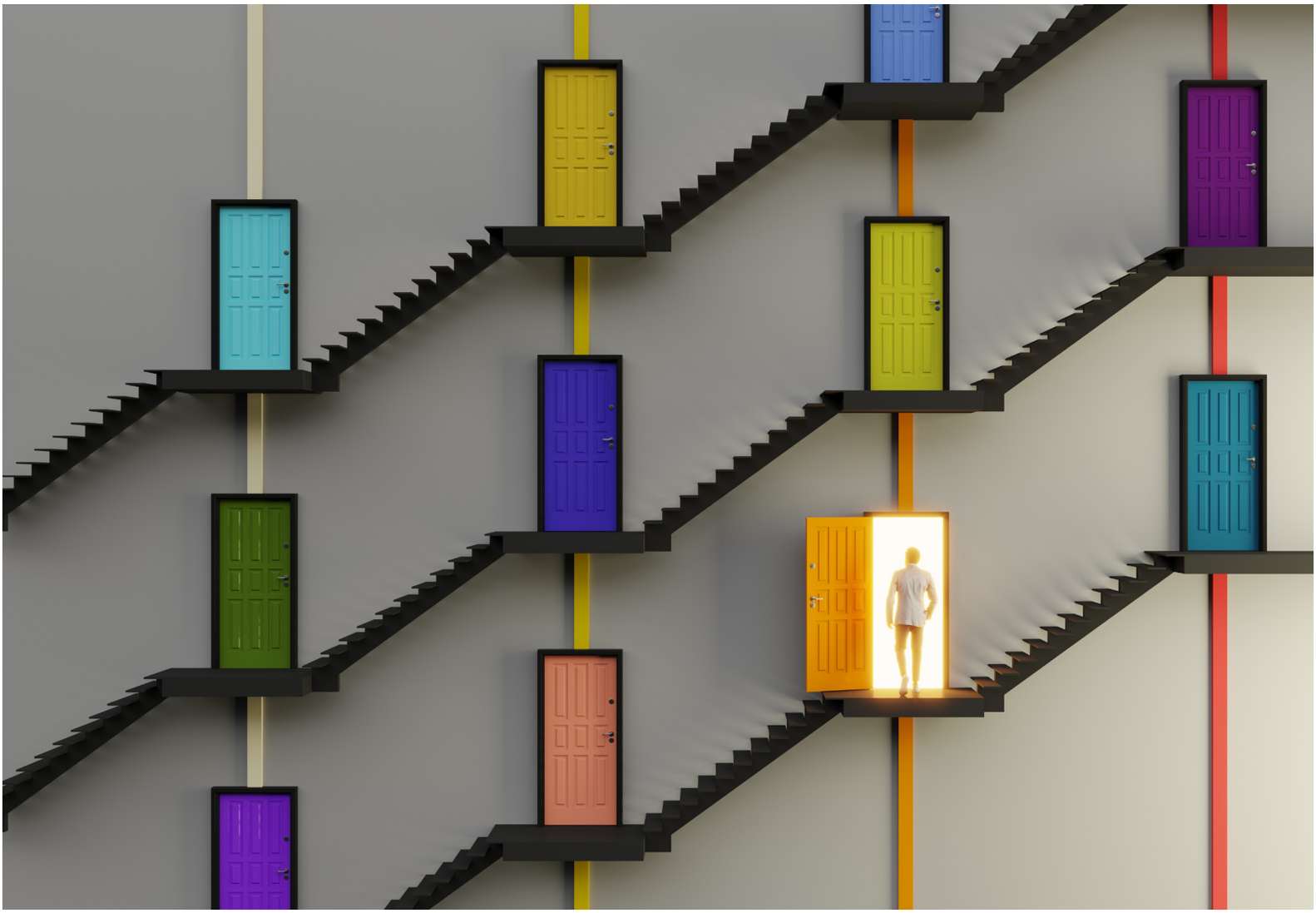
Trending Topics in Business Litigation



The rules may be familiar. But new technology, evolving case law, and familiar doctrines in unfamiliar settings are creating fresh challenges for Wisconsin business litigators.

BY ROBERT B. CORRIS

Business litigators in Wisconsin are confronting a wide range of issues that do not fit neatly into traditional categories. Some of the most important developments are not wholesale changes in the law but shifts at the edges, where unsettled doctrine, technological advances, and litigation strategy meet. The State Bar of Wisconsin PINNACLE® annual *Trending Topics in Business Litigation* seminar,[1] held on Dec. 16, 2025, prompted this overview of several issues that matter to Wisconsin attorneys because they affect how business disputes are pleaded, defended, and proved.

Cybersecurity, Funds-Transfer Fraud, and Digital Privacy Claims

Cybersecurity and privacy claims require businesses and their counsel to consider incident response, common defenses, class action exposure,[2] and standing[3] simultaneously. Zack Willenbrink addressed personal data breach litigation by describing the familiar yet increasingly consequential steps that follow a breach incident: identifying the incident, starting containment efforts, assembling a response team, conducting a forensic investigation and remediation, assessing legal and regulatory obligations, providing notifications, and implementing improvements. He also noted a dramatic increase in class actions and multidistrict litigation in this area, along with common claims and defenses businesses are facing.

Funds-transfer fraud disputes present a related but distinct set of problems, often turning on avoidance and mitigation, claims and defenses, and root-cause analysis. In practice, that means asking who was hacked, how the hacking could have been prevented, whether the counterparty could have avoided the fraud, and what lessons can be learned from the incident. Expert witnesses can play a central role in answering those questions.

Willenbrink and Matt O'Neill also discussed a growing line of digital privacy disputes alleging that companies are disclosing personal and sensitive information to third- and fourth-party advertisers without consumer consent.

Expanded Application of Wisconsin's Economic Loss Doctrine

Wisconsin's economic loss doctrine (ELD) remains a recurring fault line in business litigation, especially when lawyers and courts are trying to sort out where contract ends and tort begins. Benjamin Prinsen and Adam Witkov covered the doctrine's history, purpose, development, and exceptions and then examined recent efforts to expand its application while narrowing those exceptions. Their discussion showed how often the doctrine arises in commercial misrepresentation claims, consumer transactions, commercial and residential real estate transactions, construction agreements, and lending transactions.

Prinsen and Witkov emphasized that the ELD does not displace every claim a litigant may want to pursue. Statutory claims, including those under Wis. Stat. section 100.18, fall outside the doctrine, as do rescission and restitution claims.

Current disputes and splits between courts also focus on the fraud-in-the-inducement exception, contracts for goods and services, the "predominant purpose" test, and whether claims for personal injuries or injury to "other property" should be distinguished. The larger point is that the ELD remains powerful, but its application still

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Presenters

- Moderator and presenter, *Michael J. Cohen*
- Cybersecurity and Privacy Claims Against Businesses, *Matthew W. O'Neill, Zach R. Willenbrink*
- Wisconsin's Economic Loss Doctrine: Where Did You Come From? Where Did You Go? *Benjamin R. Prinsen, Adam E. Witkov*
- Healthy Competition or Illegal Interference? How Contract and Tort Principles Impact Hiring a Competitor's Employees, *Robert S. Driscoll*
- Decoding the DTPA: Uncertainty in Wis. Stat. § 100.18 Claims, *Anthony S. Baish*
- Trending Ethics Topics, *Matthew M. Fernholz, Susan E. Lovern, Ann M. Maher*
- No Contract, No Problem: Alternative Theories to a Traditional Breach of Contract Claim, *David J. Turek*

- Commercial Litigation Trends in Wisconsin's Appellate Courts, *Robert S. Driscoll, Caleb R. Gerbitz*
- Litigating Trade Secret Misappropriation Claims When No Direct Evidence of Misappropriation, *Robert B. Corris*

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demands careful attention to the theory being asserted and the nature of the loss being alleged.

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Hiring a Competitor's Employees Can Trigger Business Tort Claims

When a business hires its competitor's employees, the hiring decision may give rise to claims of unfair competition, aiding and abetting a breach of duty of loyalty, or tortious interference. Robert S. Driscoll explored that territory by examining the possibility of liability for raiding a competitor's employees and the practical difficulty of prevailing on such claims. Citing *Frey Construction & Home Improvement LLC v. Hasheider Roofing & Siding Ltd.*,[4] Driscoll discussed the advice-of-counsel defense, disgorgement of profits, and recovery of attorney fees under the third-party litigation exception to the American Rule.

Lawyers advising businesses on recruitment, departures, and transitions should keep in mind the potential overlap between contract and tort principles when what appears to be ordinary competition for talent becomes something much more consequential.

Decoding the Deceptive Trade Practices Act: Uncertainty in Wis. Stat. § 100.18 Claims

Wis. Stat. section 100.18 remains fertile ground for litigation in part because several basic questions remain unsettled. Anthony Baish focused on pleading standards for alleging a private right of action under Wis. Stat. section 100.18(11)(b), whether the heightened pleading standard for fraud applies, and how the *Erie*[5] doctrine affects the analysis in federal court. He also examined whether reliance is an element of a Wis. Stat. section 100.18 claim and whether reasonable reliance is a factor in answering the causation question.[6]

Baish also addressed the statutory requirement that a statement or misrepresentation be made "to the public." Can a statement to a single person in a private conversation satisfy that requirement? How should courts apply "particular relationship"? Wisconsin case law has taken an expansive view of "the public," but that expansiveness has not gone unquestioned,[7] and some federal courts have shown discomfort with it.[8]

Generative AI is Creating New Ethics Problems Under Familiar Rules

Generative artificial intelligence (GAI) has become an ethics issue, not because the governing duties have changed, but because the technology creates new ways to violate them. A discussion led by Matthew Fernholz, Susan Lovern, and Ann Maher focused on ABA Formal Opinion 512,[9] which addresses the application of various rules of professional conduct[10] to GAI.

Competence. Lawyers must still exercise the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation, including a sufficient understanding of the technologies they use. Lawyers do not need to become experts in GAI; however, they must remain vigilant about the risks and benefits by reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and consulting others who are proficient in GAI technology.

Confidentiality. Confidentiality remains a clear pressure point. Fernholz, Maher, and Lovern emphasized the lawyer's obligation to evaluate the risks of disclosure before entering client information into self-learning GAI tools and, when appropriate, obtain the client's informed consent. They also addressed disclosure to the client, the effect of GAI use on the basis or reasonableness of a lawyer's fee, candor to a tribunal, and supervisory responsibilities. Some courts' local rules now require disclosure of GAI use, including circuit courts in Kenosha and Portage counties, and sanctions decisions involving fake cases, false quotations, and misstatements of authority show the risks are already concrete.

Privilege Disputes Involving Consultants and Client Representatives Remain Fact Specific. Questions about the scope of attorney-client privilege often become more complicated when lawyers work with nonlawyer third parties such as accountants, public relations consultants, and other client representatives. Matthew Fernholz gave an overview of Wisconsin's attorney-client privilege rule[11] and its policy rationales. He then compared Wisconsin's rule to the federal rule and discussed *United States v. Kovel,*[12] which extended the privilege to certain nonlawyer agents assisting attorneys in providing legal advice. The key limitation, however, is that the third party must be necessary or highly useful to facilitate legal communication; the *Kovel* privilege does not protect consultants performing nonlegal functions such as routine public relations or marketing.

Fernholz then turned to *Pulte v. Hakes,*[13] a Waukesha County Circuit Court decision involving communications with a public relations consultant. The dispute centered on whether the consultant's role was sufficiently tied to the facilitation of legal services and whether the privilege applied even when attorneys were not included in the communications. The competing arguments show why these disputes are so fact sensitive: the outcome may depend on whether the consultant is viewed as a true client representative assisting the legal effort or as someone engaged primarily in public relations. For lawyers, the practical lesson is to carefully define the consultant's role and build the rec-ord with privilege arguments in mind from the outset.

Alternative Theories to a Traditional Breach-of-Contract Claim

When a traditional breach-of-contract claim is unavailable or uncertain, alternative theories still carry real weight. These theories may be familiar but can easily blur together unless their elements and remedial limits are kept distinct.

Promissory Estoppel. David Turek outlined the elements of promissory estoppel: a suitable promise, reasonable reliance, and an injustice that can be avoided

only by enforcement of the promise.[14] He also addressed the interaction between promissory estoppel and contract law, as well as the distinction between expectation and reliance damages.[15]

Unjust Enrichment. Turek then turned to unjust enrichment, focusing on the familiar elements: a benefit conferred on the defendant, the defendant's knowledge of the benefit, and acceptance and retention of the benefit under circumstances in which it would be unfair for the defendant to keep the benefit without paying the value conferred. Unlike promissory estoppel, damages for unjust enrichment are measured by the benefit conferred on the defendant, not the plaintiff's loss. Unjust enrichment cannot coexist with a breach-of-contract claim covering the same ground.

Quantum Meruit. Turek contrasted unjust enrichment with quantum meruit. While unjust enrichment is based on the inequity of allowing a defendant to retain a benefit without paying for it, quantum meruit rests on an implied contract to pay reasonable compensation for the services rendered.

Good Faith and Fair Dealing. Turek concluded with the doctrine of good faith and fair dealing, which prevents parties from acting in ways that undermine the purpose of an agreement, even when no explicit provision forbids such conduct. But that doctrine has limits: if a contract expressly allows certain conduct, that conduct cannot violate the duty of good faith and fair dealing.[16] Turek discussed damages and the intersection of the duty of good faith and fair dealing with contract law.[17] In this area, careful pleading and close attention to the underlying contract language are critical.

Commercial Litigation Trends in Wisconsin's Appellate Courts

Recent appellate decisions in Wisconsin and the Seventh Circuit are affecting day-to-day litigation practice in ways that go beyond the facts.

Caleb Gerbitz reviewed a court of appeals decision that business litigators should not overlook simply because it arose in the medical-malpractice context. In *Wren v. Columbia St. Mary's Hospital Milwaukee Inc.*,[18] District I held that a COVID-era civil immunity statute for medical providers, Wis. Stat. section 895.4801, violated the state constitutional right to a jury trial, applying strict scrutiny on the theory that temporarily eliminating a cause of action implicated a fundamental right.[19] That reasoning had potentially broad implications, which could threaten civil immunity statutes well beyond the medical-malpractice setting. Gerbitz noted counterarguments grounded in the Wisconsin Legislature's authority to alter the common law[20] and in earlier cases rejecting the idea that eliminating a cause of action necessarily violates the right to a jury trial.[21]

On review, the Wisconsin Supreme Court reversed and remanded, reasoning that Article XIV, Section 13 of the Wisconsin Constitution authorizes the legislature to alter or suspend certain common-law causes of action. Because Wis. Stat. section 895.4801 suspended causes of action against healthcare providers, the plaintiff had no right to a jury trial.[22]

In *Buddy's Plant Plus Corp. v. Viking Masek Global Packaging Technologies LLC,*[23] a divided court of appeals enforced a contract clause limiting the buyer's recovery to the amount it had paid, even though the machine was never successfully delivered in working order. Gerbitz noted the court's rejection of arguments that the clause did not apply, failed in its essential purpose, or was unconscionable.

Robert Driscoll covered *Radtke v. LIRC*,[24] a decision that underscores the limits of retaliation claims under Wis. Stat. section 113.322(2m). He also noted that *Garrett v. Ocean View Swimming Pool Services LLC*[25] serves as a reminder that limited-liability company status does not shield a sole member from liability for the member's own negligence. Together, these cases reflect the importance of careful attention to statutory text and the distinction between entity liability and personal liability.

Driscoll also highlighted *Gilbert v. Lands' End Inc.,*[26] in which the Seventh Circuit affirmed summary judgment after the district court excluded the plaintiffs' expert on defect and causation. He

concluded with the Wisconsin Court of Appeals decision in *Koble Investments v. Marquardt,* which gave the Wisconsin Consumer Act broad effect in the residential leasing context, including attorney fees and double-damages exposure. The Wisconsin Supreme Court has granted review.[27]

Litigating Trade Secret Misappropriation Claims Without Direct Evidence of Misappropriation

Trade secret litigation often proceeds without the kind of direct evidence a plaintiff would prefer. Robert Corris, framed the issue by positing a common problem: no forensic evidence of copying, emailing, photographing, or videotaping, and no witness with admissible personal knowledge of what happened. In those settings, the case often turns on two questions: how specifically the trade secret must be identified and how misappropriation can be proved indirectly.

Of particular emphasis, under both the Wisconsin Uniform Trade Secrets Act, Wis. Stat. section 134.90, and the Defend Trade Secrets Act of 2016, 34 U.S.C. § 41310, a plaintiff must present evidence of the nature of the trade secret rather than simply gesture toward a broad category of technology or information and ask the court to do the sorting. However, the plaintiff's burden differs by stage: courts may allow more general descriptions at the pleading stage than they will at summary judgment.[28]

Discussion turned to indirect proof, including similarities or derivation in products, processes, or design,[29] along with spoliation and adverse-inference instructions.[30] Corris also emphasized the inevitable-disclosure doctrine as an indirect method of proving misappropriation and jurisdictions that have accepted or rejected it. Wisconsin's position remains unclear.[31] When direct evidence is absent, the plaintiff's case may depend on whether a court is willing to draw persuasive inferences from a collection of circumstantial facts.

Conclusion

If these topics share a common theme, it is that business litigation now turns less on broad legal rules than on how those rules operate under pressure. Whether the question involves emerging technology, an old doctrine in a new setting, or a claim built on circumstantial evidence, the outcome may depend on how precisely the issues are framed, which remedies are on the table, and how quickly counsel identifies the real source of risk. For Wisconsin lawyers, that is the practical value of keeping an eye on these cases and issues as they develop. **WL**

ENDNOTES

[1]Michael J. Cohen, a shareholder at Meissner Tierney Fisher & Nichols S.C., in Milwaukee, organized and chaired the *Trending Topics in Business Litigation* program. Several years ago, the presenters adopted a format featuring shorter lectures followed by a panel discussion that leverages the panel members' combined experience and expertise. As always, Cohen moderated the panel sessions and offered opinions drawn from his own considerable knowledge and experience.

[2]*E.g., Giasson v. MRA - Mgmt. Ass'n Inc.,* 777 F. Supp. 3d 913 (E.D. Wis. 2025).

[3]*See TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021); *Webb v. Injured Workers Pharmacy LLC*, 72 F.4th 365 (1st Cir. 2023).

[4]2025 WI App 4, 414 Wis. 2d 740, 17 N.W.3d 88.

[5]*Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[6]*See K&S Tool & Die v. Perfection Machinery Sales Inc.,* 2007 WI 70, 201 Wis. 2d 109, 732 N.W.2d 792; *Novell v. Migliaccio,* 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544.

[7]See Justice Rebecca Bradley's dissents in *Hinrichs v. Dow Chemical Co.*, 2020 WI 2, 389 Wis. 2d 669, 937 N.W.2d 37, and *Pagoudis v. Keidl*, 2023 WI 27, 406 Wis. 2d 542, 988 N.W. 2d. 606.

[8]*See, e.g., Oregon Potato Co. v. Kerry Inc.,* No. 20-cv-92.2-jdp, 2021 WL 5988423 (W.D. Wis. Feb. 1, 2021) (unpublished).

[9]ABA Formal Op. 512 (2024). Lovern's outline in the seminar course materials includes the full text of the ABA formal opinion.

[10]*E.g.*, SCR 20:1.1, 20:1.6, 20:1.4, 20:3.3, 20:5.3, 20:2.1, and 20:1.5.

[11]Wis. Stat. § 905.03(2).

[12]296 F.2d 918 (2d Cir. 1961).

[13]*Pulte v. Hakes*, No. 2024CV000282 (Waukesha Cnty. Cir. Ct.).

[14]*Hoffman v. Red Owl Stores Inc.*, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965).

[15]Turek contrasted *Skebba v. Kasch,* 2006 WI App 232, 297 Wis. 2d 401, 724 N.W.2d 408 (allowing expectation damages), with *Tynan v. JBVBB, LLC*, 2007 WI App 265, 306 Wis. 2d 522, 743 N.W.2d 730 (distinguishing *Skebba* in a case in which promises made were ambiguous and based on unsatisfied contingencies).

[16]*Reetz v. Advocate Aurora Health Inc.*, 2022 WI App 59, 405 Wis. 2d 298, 983 N.W.2d 669.

[17]*See, e.g., Beidel v. Sideline Software Inc.*, 2013 WI 56, 348 Wis. 2d 360, 842 N.W.2d 240 (recognizing that a violation of the implied promise of good faith may be considered independently of a breach of the underlying contract).

[18]2025 WI App 22, 415 Wis. 2d 758, 19 N.W.3d 614, *rev'd and remanded*, 2026 WI 11, ___ Wis. 2d ___, ___ N.W. 3d ___.

[19]Gerbitz filed an amicus brief on behalf of the organization Wisconsin Defense Counsel, urging the court to reverse the decision.

[20]*See Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 42, 237 Wis. 2d 99, 613 N.W.2d 849.

[21]*See, e.g., Mountain Timber Co. v. Washington*, 243 U.S. 219, 228 (1979); *Oliver v. Travelers Ins. Co.*, 103 Wis. 2d 644, 309 N.W.2d 383 (Ct. App. 1981).

[22]*Wren*, 2026 WI 11, ___ Wis. 2d ___.

[23]*Buddy's Plant Plus Corp. v. Viking Masek Global Packaging Techs. LLC*, 2025 WI App 46, 417 Wis. 2d 723, 25 N.W.3d 613.

[24]2025 WI App 14, 415 Wis. 2d 347, 18 N.W.3d 187.

[25]2025 WI App 12, 415 Wis. 2d 306, 18 N.W.3d 168.

[26]158 F.4th 839 (7th Cir. 2025).

[27]*Koble Invs. v. Marquardt,* 2024 WI App 26, 412 Wis. 2d 1, 7 N.W.3d 915 (review granted).

[28]*See, e.g., Brady Corp. v. Wood,* No. 24-CV-265-JPS 2024 WL 5398591 (E.D. Wis. Dec. 2, 2024) (unpublished) (rejecting heightened pleading standard and details at pleading stage); *Marine Travelift Inc. v. Marine Lift Sys. Inc.,* No. 10-C-1046, 2013 WL 6255689 (E.D. Wis., Dec. 4, 2013) (unpublished) (granting summary judgment in case in which plaintiff failed to identify any specific document or item of information constituting a misappropriated trade secret).

[29]*See, e.g., M. Bryce & Assocs. Inc. v. Gladstone*, 107 Wis. 2d 241, 319 N.W. 2d 907 (Ct. App. 1982); *Sokol Crystal Prods. Inc. v. DSC Comm'n Corp.*, 15 F.3d 1427 (7th Cir. 1994); *Metso Mins. Indus. Inc. v. FL Smidth-Excel LLC*, 733 F. Supp. 2d 965 (E.D. Wis. 2010).

[30]*See 3M v. Pribyl*, 259 F.3d 587, 606 n. 5 (7th Cir. 2001).

[31]*See Clorox. Co. v. S.C. Johnson & Son Inc.*, 627 F. Supp. 2d 954, 967 (E.D. Wis. 2009); *Brady Corp. v. Wood*, No. 24-CV-265-JPS, 2024 WL 5398591 (E.D. Wis. Dec. 2, 2024) (unpublished); *Square D Co. v. Van Handel*, No. 04-C-775, 2005 WL 2076720 (E.D. Wis. Aug. 25, 2005) (unpublished). **WL**