



WSSFC 2025

Plenary

Litigation ABC's: P is for Pleadings

Presenters:

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Hon. John R. Remington, Milwaukee Circuit Court, Milwaukee

About the Presenters...

David Blinka is a shareholder and has practiced out of the firm's [Madison office](#) since 2012. In addition to handling claims through trial, he has gained expertise in appellate practice and litigating the complexity of insurance coverage issues. Before joining Habush, David served the public's interest in securing justice and protecting legal rights while learning trial practice as a volunteer prosecutor during law school. David was recognized as a Rising Star from 2014-2022 by Super Lawyers and was distinguished as an Up and Coming lawyer in 2017 by the Wisconsin Law Journal. In 2023, he was selected as a Super Lawyer. David also previously made the Wisconsin Pro Bono Honor Society list by having provided volunteer legal representation to those in need of equal access to justice. David stays active in the legal community through his involvement with the Dane County Bar Association where he presently serves as its Treasurer. He is active with the Wisconsin State Bar as well as the Wisconsin Association for Justice, for which he has published articles on various litigation topics and presented at seminars for continuing legal education.

Kathy L. Nusslock has practiced law for 40 years, primarily in southeast Wisconsin, currently in an Of Counsel role with Amundsen Davis, LLC and as a mediator with Concurrence ADR, LLC. During the last 25 years, Kathy concentrated her practice in complex civil litigation, including employment disputes and trust & estate litigation. Kathy is one of the founding members of Concurrence ADR, LLC and received her mediation training at Northwestern University School of Professional Studies. Kathy is admitted to the state bars of Wisconsin and Florida, the United States Supreme Court, the United States Court of Appeals for the Seventh Circuit and the United States District Courts for the Eastern and Western Districts of Wisconsin, the Northern District of Illinois, Northern District of Ohio, Northern District of Texas, District of Colorado, and Western District of New York. She has been recognized annually as a Wisconsin Super Lawyer (since 2005) and one of the Best Lawyers in America (since 2015). Kathy is a Fellow with the American Bar Foundation and the Wisconsin Law Foundation. Kathy serves on the faculty of the National Trial Advocacy College at the University of Virginia School of Law and is a frequent speaker on litigation topics.

Alexander "Sandie" Pendleton, is a business lawyer and business litigator, and is the founder and owner of Pendleton Legal, S.C. (Milwaukee). He received his undergraduate degree from the University of Wisconsin-Madison in History and Political Science, and his J.D. degree *cum laude* from the University of Minnesota Law School (where he was an editor of the University of Minnesota Law Review). He has been rated AV-Preeminent™ by Martindale-Hubbell since first being eligible to be rated. In his spare time, he is an advocate for better streets, and safer streets, particularly for vulnerable users such as pedestrians and bike riders. He is the president of Greater Shorewood Bikers, Inc., one of the founders of the Shorewood Complete Streets Coalition, and blogs about street issues at shorewoodbikers.blogspot.com. One of the focuses of his practice is advising recreational-opportunity providers, recreational-product manufacturers, and insurers about waiver-of-liability agreements (and many other aspects of legal-liability risk management). He is the author of numerous articles relating to waivers and legal-liability risk management, and is a frequent speaker nationwide on those issues. Sandie is the co-author (with Doyice Cotton) of the forthcoming 11th Edition of *Waivers & Releases of Liability*. Sandie is a prior member of the State Bar Board of Governors, and over the course of his career has served on numerous State Bar committees. He currently serves on the Board of the State Bar's Solo, Small Firm and General Practice Section. Sandie can be reached at pendleton@pendletonlegal.com.

Governor Tony Evers appointed **John R. Remington** to the circuit court in February 2024. Judge Remington took the bench on May 6, 2024 in the Children’s Division, where he presides over juvenile delinquency, CHIPS, and guardianship matters. Before joining the bench, Judge Remington was a partner at Quarles & Brady LLP. He began his legal career at the firm in 2007 as a civil litigator and his practice focused on unfair competition, creditor-debtor law, and healthcare-related litigation. In addition to his civil litigation work, Remington maintained a pro bono practice that included work with the truancy court in Outagamie County and representing incarcerated individuals pursuing section 1983 claims. A native of New Richmond, Wisconsin, Judge Remington is a graduate of the University of Wisconsin–Madison (2002) and Washington University in Saint Louis School of Law (2007), where he was on the executive board of the law review.

Litigation ABCs: P is for Pleadings

Wisconsin Solo & Small Firm Conference 2025
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Presenters:¹ Alexander “Sandie” Pendleton, Kathy L. Nusslock, David S. Blinka²

Rulings by: Hon. John R. Remington, Milwaukee County Circuit Court

Part One: Drafting the Complaint or Petition.

1. Considerations:
 - a. Ethical obligations.
 - b. Utility of including certain allegations.
 - c. Need for heightened allegations or claim definition.
2. General Motion to Dismiss Standards Under the Wisconsin Rules of Civil Procedure.
 - a. Wis. Stat. § 802.02(1)(a).
 - b. Significant Wisconsin cases interpreting Wis. Stat. § 802.02(1)(a).
 - 1) *Strid v. Converse*, 111 Wis. 2d 418, 331 N.W.2d 350 (1983).
 - 2) *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693.
 - 3) *Cattau v. National Ins. Servs. of Wis., Inc.*, 2019 WI 46, 386 Wis. 2d 515, 926 N.W.2d 756, *reconsideration denied*, 2019 WI 84, 931 N.W.2d 538, *aff'ing* No. 2016AP493, 2018 WL 2997574 (Ct. App. Jun. 13, 2018).
3. *Cattau*.
 - a. The unusual procedural history of *Cattau*.
 - 1) The Court of Appeals in an unpublished decision affirmed the circuit court’s granting of a motion to dismiss, based in part on the court’s interpretation of *Data Key Partners*. During its discussion of *Data Key*, the court notes that it “is generally agreed that *Twombly* established a heightened pleading standard

¹ The views expressed in this outline (and during the presentation associated with this outline) are the personal opinions of the speakers and should not be attributed to their law firms or clients.

² The presenters gratefully acknowledge the research and writings of Susan R. Tyndall, partner with Habush & Habush, and Dylan Iadanza, law clerk with Amundsen Davis, LLC.

in federal motion practice” and that “the same approach is now the law in Wisconsin.” *Cattau*, 2018 WL 2997574, ¶ 19.

- 2) On review by the Wisconsin Supreme Court, on the dispositive issue in the case the court was equally divided (with one Justice not participating). As such, the decision of the Court of Appeals was affirmed.

b. Wisconsin Supreme Court’s decision in *Cattau*.

- 1) The Court took pains to explain, in a unanimous writing, what it considers to be the standard through which a motion to dismiss for failure to state a claim must be viewed.
- 2) The Court held that its decision in *Data Key Partners v. Permira*, 356 Wis. 2d 665 (2014) did not change Wisconsin’s pleading standard. That standard, according to the Court, was articulated in *Strid v. Converse*, 111 Wis. 2d 418 (1983).
- 3) The Wisconsin Supreme Court found the U.S. Supreme Court decision in *Twombly* to be consistent with its decision in *Strid*:

The defendants argue that by setting out the pleading standard employed by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), we changed Wisconsin’s pleading standard to a heightened “plausibility” standard. However, as we explained in *Data Key*, **we interpret the Supreme Court’s decision in *Twombly* as being consistent with *Strid*.** *Data Key*, 356 Wis. 2d 665, ¶ 30, 849 N.W.2d 693. Therefore, *Data Key* controls Wisconsin’s pleading standard and it reaffirmed *Strid*.

Cattau, 2019 WI 46, ¶ 7, 386 Wis. 2d 515, 520, 926 N.W.2d 756, 759 (emphasis added).

- 4) The standard requires the following. A court must accept as true all facts well-pleaded in the complaint and any reasonable inferences therefrom. However, Courts cannot add facts to a complaint, and courts do not accept as true legal conclusions stated in the complaint. The sufficiency of a complaint depends on the substantive law underlying the claim. If facts pled in a complaint satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted.

c. Subsequent cases acknowledge *Cattau* and *Data Key* supply the current standard.

- 1) While the discussion is not extensive, *Data Key* is discussed in *Wis. Mfrs. v. Evers*, 2022 WI 38, 977 N.W.2d 374 (a 4-3 decision, arising out of public records request seeking the release of COVID-related records). The majority

indicates it is following *Data Key*, indicating “we take as true all well-pleaded factual allegations, but do not accept legal conclusions as true” (*id.*, 2022 WI 38, ¶7). Based on that standard, the court held that the plaintiffs’ complaint should be dismissed for a failure to state a claim. The dissenting opinion indicated that the court of appeal “erred with respect to the implausibility standard,” and that the majority failed to recognize in its decision (as required by *Data Key*) that “pleadings must be construed liberally such that any reasonable inferences arising from those facts are construed in favor of the non-moving party.” *Id.*, 2022 WI 38, ¶45 (Ziegler, J dissenting).

- 2) Likewise, while again the discussion is not extensive, in *Priorities USA v. Wis. Elections Comm’n* the majority decision briefly indicates it is applying the pleadings standards set forth in *Cattau* and *Data Key*. *Priorities USA*, 2024 WI 32, ¶50, 412 Wis. 2d 594, 8 N.W.3d 429 (a 4-3 decision).

4. Practical tips from the bench regarding motions to dismiss post-*Cattau*.
 - a. In analyzing whether a complaint states a valid cause of action, ensure pleadings meet the standards enunciated in *Cattau* and *Data Key*.
 - b. Focus on factual allegations and not legal conclusions.
 - c. Check the elements of the claims for relief you intend to plead.
 - d. Plead factual allegations (not conclusions of law) regarding every element of claims alleged, specifying nature of defendants’ conduct in issue, but be careful not to plead such detailed facts that defendants can argue for dismissal if they are not proven.

Part Two: Certain Matters Require Special Considerations

1. Averments of fraud must meet heightened pleading standards.
 - a. Wis. Stat. § 802.03(2): “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.”
 - b. The “Five W’s and the One H.”
 - c. See *Hinrichs v. Dow Chem. Co.*, 2020 WI 2, 389 Wis. 2d 669, 937 N.W.2d 37 (“[W]e conclude that the heightened pleading standard set forth by Wis. Stat. § 802.03(2) for claims of fraud does not apply to claims made under Wis. Stat. § 100.18.”); accord *Layher v. Hoffman*, No. 2022AP625, 2024 WL 1069002, ¶30 n.4 (unpublished opinion, Wis. App. March 12, 2024).
 - d. In *Miller Compressing Co. v. Busby*, 2025 WI App 29, 416 Wis. 2d 354, 21 N.W.3d 778 the circuit court dismissed plaintiff’s complaint under the Uniform Fraudulent

Transfer Act because its allegations averring fraudulent transfers were not pleaded with sufficient particularity.

2. Third-party complaints require a plausible theory of liability.
 - a. Under Wis. Stat. § 803.05(1), a defending party may file a summons and complaint to be served on an additional party “who is or may be liable to the defending party for all or part of the [original] claim.”
 - b. In *Nelson v. Loessin*, 2020 WI App 72, ¶10, 394 Wis. 2d 784, 951 N.W.2d 605, the originally named defendants filed a third-party complaint but did not allege the additional parties may be liable in the underlying action, as required under Wis. Stat. § 803.05. Rather, it “demand[ed] . . . judgment in the form of [d]etermination of any claim” against these additional defendants.³
3. Lawsuits requiring notice in advance of suit.
 - a. State court lawsuits against the government.
 - 1) Municipal/local government entities and employees – Wis. Stat. § 893.80(1d)(a): written notice of the circumstances of the claim must be served on the particular governmental entity within 120 days. Failure to give notice will not bar the action if the entity had actual notice of the claim and that failure to give notice was not prejudicial.
 - 2) State government employees – Wis. Stat. § 893.82(3): no claim may be brought against a state officer or employee unless within 120 days of the event causing injuries, the claimant serves written notice upon the attorney general, specifying the time, date, location and circumstances giving rise to the claim, including the name of the state officer, employee or agent involved.
 - b. Federal Tort Claims Act (FTCA)
 - 1) 28 U.S.C. § 2675 – claims against the United States for money damages for personal injury caused by negligence of an employee requires presentation of the claim to the appropriate federal agency.
 - 2) Requires use of Form 95 – Claim for Damages. Failure to execute the form (or to supply requested material) within two years from the date of the claim may render the claim invalid.
 - 3) 28 U.S.C. § 2401 requires the claim to be presented within two years after the claim accrues.

³ Here, the appellate court reversed the circuit court decision rejecting the third-party defendants’ motion to dismiss. The *Nelson* court relied on Wis. Stat. § 803.03(1)(a), which requires necessary parties joined so that complete adjudication of claims can occur.

- 4) A claim is presented when it is received by the appropriate agency, not when it is mailed.
- 5) No lawsuit may be filed against the United States after presentation of the claim until the appropriate federal agency denies the claim. If the agency does not make a final disposition of the claim within 6 months, it shall be deemed a denial of the claim and a lawsuit may then be brought. 28 U.S.C. 2675(a).
- 6) Pleadings should allege exhaustion of administrative remedy and compliance with notice requirements.

c. *Qui tam* lawsuits

- 1) Whistleblower action brought under the federal False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*
- 2) Any individual with information about fraud against the government may become a whistleblower, referred to as a *qui tam* relator, but the person must have an attorney.
- 3) Lawsuit is filed under seal to give the government time to investigate the allegations and determine whether it will join the whistleblower's case.
- 4) Practice note: The basis of the *qui tam* action is fraud, which must be pled with particularity.
- 5) *Wis. Bell, Inc. v. United States ex rel. Heath*, 604 U.S. 140, 145 S. Ct. 498, 221 L.Ed.2d 24 (2025): Judge Lynn Adelman and the Seventh Circuit each dismissed the plaintiff's *qui tam* claim at the motion to dismiss stage, finding that the allegations of wrongdoing made in the complaint failed to allege a "false claim" as that term is defined in the FCA; on appeal, the Supreme Court reversed.

4. Jurisdiction and venue considerations.

a. State court subject matter jurisdiction - examples.

- 1) Small claims court jurisdiction/procedure. *See* Wis. Stat. § 799.01.
 - a) Eviction actions, regardless of the amount of rent claimed.
 - b) Return of earnest money, regardless of the amount claimed.
 - c) Forfeitures (with identified exceptions).

- d) Replevin, where the value of the property claimed does not exceed \$10,000.
 - e) Confirmation, vacation, modification or correction of an arbitration award relating to the purchase of real property.
 - f) Third-party complaints, personal injury claims, and tort claims, where the amount claimed is \$5,000 or less.
 - g) Other civil actions where the amount claimed is \$10,000 or less.
- 2) Probate and trust matters.
 - a) Probate administration. *See* Wis. Stat. chs. 856 – 879.
 - b) Trust administration. *See* Wis. Stat. § 701.0203. The circuit court assigned to exercise probate jurisdiction has exclusive jurisdiction of proceedings concerning the administration of a trust.
- b. Federal court jurisdiction.
 - 1) 28 U.S.C. § 1331 – Federal question. The federal district courts have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.
 - 2) 28 U.S. C. § 1332 – Diversity of citizenship and amount in controversy exceeds \$75,000.
 - 3) Defendant may have the opportunity to remove the case from state court to federal court if the federal court has jurisdiction. *See* 28 U.S.C. § 1441.
 - 4) The “domestic relations” exception to federal court jurisdiction. Historically, family law has been the domain of state legislatures and state courts, but that has begun to erode. *See* Linda Dodd Elrod, *The Federalization of Family Law*, 36:3 Human Rights 6 (2009).
 - 5) Federal district courts now have limited jurisdictional authority to issue nationwide injunctions in cases challenging new statutes or executive actions (*see Trump v. CASA, Inc.*, 606 U.S. 831, 145 S. Ct. 2540 (2025)), but may still be able to do so if the court certifies a class action pursuant to F.R.C.P. 23 (*id.*, 145 S. Ct. at 2567 (Kavanaugh, J. concurring)).
- c. Venue.
 - 1) Wis. Stat. § 801.50 governs venue selection.

- 2) Challenges to improper venue under Wis. Stat. § 801.51, based on noncompliance with the options set forth under Wis. Stat. § 801.50, must be brought at or before the time the party serves his or her first motion or responsive pleading in the action.
- 3) Discretionary change of venue under Wis. Stat. § 801.52, allows a party to move for change of venue based on the interest of justice or for the convenience of the parties or witnesses. A court may also decide to change venue at any time. Such challenges may be made independent of challenges to venue as a matter of right under Wis. Stat. § 801.51.
- 4) *Stelling v. Middlesex*, 2023 WI App 10, 406 Wis.2d 197, 986 N.W.2d 354.
 - a) This is now the leading case in Wisconsin on venue selection and challenges brought thereto. It analyzes the meaning of the phrase “does substantial business” under Wis. Stat. § 801.50(2)(c) and examines various issues involving the venue selection statutes.
 - b) Pursuant to Wis. Stat. § 801.53, a motion to change venue is determined on the basis of proofs submitted by the parties unless the court orders a hearing or oral argument. Nothing bars the circuit court from relying on the movant’s proof or its failure to provide proof. *Stelling*, ¶71.
 - c) A plaintiff is not required to allege in the complaint why the plaintiff believes venue is proper in the county selected. *Id.*, ¶70.

5. Class actions.

- a. Commonality and predominance requirements.
- b. *Freeman v. SL Greenfield LLC*, 2025 WI App 30, 416 Wis. 2d 388, 21 N.W.3d 794.

6. Tort litigation.

- a. General negligence cases.
 - 1) Motions to dismiss are relatively rare.
 - 2) When to use fictitious names. Wis. Stat. § 807.12.
- b. Mass torts and toxic torts (*e.g.*, water contamination; lead paint; asbestos).
- c. Products liability
 - 1) Strict liability against a manufacturer - ensure that elements of Wis. Stat. § 895.047 are properly pleaded.

- a) May include seller or distributor liability under subsection (2); can plead in the alternative (*e.g.*, if alleged manufacturer may be supplier).
- 2) Include common law negligence claim.
- 3) Pleadings require consideration of venue and whether removal to federal court will be an issue.

Part Three: Strategic Considerations

1. Practical tips regarding motions to dismiss.
 - a. Wis. Stat. § 802.05(2)(c) (attorney’s signature on a pleading certifies the attorney made reasonable inquiry and has a reasonable belief there is evidentiary support for the factual allegations made in a complaint).
 - b. *Soderlund v. Zilbolski*, 2016 WI App 6, 366 Wis. 2d 579, 847 N.W.2d 561 (permits the court to consider documents referenced in the complaint, even though not attached to the complaint).
 - c. Duty of candor to the tribunal. SCR 20:3.3.
 - d. Keep the court’s case load in mind when deciding what and how many documents to attach to a motion to dismiss.
 - e. Death of a party – suggestion of death. *See* Wis. Stat. § 803.10(1).
2. AI – helpful or harmful?
 - a. Do not share confidential information concerning your client (including client’s identify) with any chatbots.
 - b. Do not rely on cases generated by AI without reading and key citing each case.
3. Stay resulting from a motion to dismiss.
 - a. 2017 Wisconsin Act 235 made significant changes to civil procedure in Wisconsin State courts. Specific to motions to dismiss, Section 802.06(1)(b) was created and can be summarized as follows. As soon as a party files either a motion to dismiss for failure to state a claim upon which relief can be granted, a motion for judgment on the pleadings, or a motion for a more definite statement, then all discovery, and “other proceedings,” shall be stayed for 180 days after the filing of the motion or until the circuit court rules on the motion, whichever is sooner.
 - i. Stay is automatic.

- ii. There is an exception in that, if a party files a motion while the stay is in place and argues that “particularized discovery is necessary,” and if the circuit judge finds there is “good cause” for that request, then certain discovery may proceed during the stay. However, there is no exception which would allow “other proceedings” to take place during the stay.
 - iii. What constitutes “good cause” for a court to find that “particularized discovery is necessary” under that section?
 - b. Impact on other motions or proceedings.
 - i. Injunctive relief.
 - ii. Harassment orders.
 - iii. Intervenors.
 - iv. Others?
- 4. Other strategic considerations regarding the choice to bring a motion to dismiss:
 - a. By bringing a motion to dismiss, are you educating the plaintiff where there are problems in the plaintiff’s claims?
 - b. Implications of *Strid/Data Key/Cattau* for motions for summary judgment.
 - i. The first consideration in any motion for summary judgment motion is whether the complaint states a claim.
 - ii. Risks associated with a court deciding whether a complaint states a claim early in the case.
 - iii. If the trial judge denies a motion to dismiss filed early in the case, does the denial have any impact/influence on a subsequent motion for summary judgment?
- 5. Motions to Dismiss under the Federal Rules of Civil Procedure.
 - a. F.R.C.P. 12(b).
 - b. In *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), SCOTUS “clarified” notice pleading under Fed. R. Civ. P. 8, counterpart to Wis. Stat. § 802.02. requires that “the threshold requirement of Rule 8(a)(2) [is] that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief;’” thus, plaintiffs must allege “allegations plausibly suggesting (not merely consistent with)” that a cause of action exists. *Id.* at 557.

- c. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) holds that “[s]pecific facts are not necessary.”
 - d. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) explains that ““the plausibility standard is not akin to a probability requirement.”
 - e. Seventh Circuit is viewed as taking a somewhat gentler approach to pleading requirements than other circuits. *See, Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“[t]he Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code...”).
 - f. Seventh Circuit decisions interpreting *Twombly* and *Iqbal*. *See, e.g., McCauley v. City of Chicago*, 671 F.3d 611 (2011).
 - g. *See also* Sybil Dunlop, Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 Hamline L. Rev. 205 (Spring 2010).
6. Motions to dismiss and forum selection. As a general and practical matter, are federal district court judges in Wisconsin more likely to grant a motion to dismiss, or are Wisconsin circuit court judges more likely to grant a motion to dismiss?

Part Four: Materials Considered by Courts at the Motion to Dismiss Stage

1. Materials Considered by State Court Judges.

- a. Wis. Stat. § 802.06(2)(b) and (3).
- b. Wisconsin adopted the “Incorporation by Reference Doctrine” in 2016. *Soderlund v. Zilbolski*, 2016 WI App 6, ¶ 37, 366 Wis. 2d 579, 847 N.W.2d 561 (court considers documents referenced in the complaint, even though not attached to the complaint).
- c. The rule as articulated in *Soderlund*: “Under the [incorporation-by-reference doctrine] a court may consider a document attached to a motion to dismiss or for judgment on the pleadings without converting the motion into one for summary judgment, if the document was referred to in the plaintiff’s complaint, is central to his or her claim, and its authenticity has not been disputed.” *Id.*, 2016 WI App 16 at ¶ 37.
 - 1) The purpose of the doctrine is to prevent “a plaintiff from evad[ing] dismissal ... simply by failing to attach to [the] complaint a document that prove[s] [plaintiff’s] claim has no merit.” *Id.*, ¶ 38; *accord Badgerland Restoration & Remodeling, Inc. v. Federated Mut. Ins. Co.*, 2024 WI App 36, ¶ 13, 412 Wis. 2d 806, 815–16, 8 N.W.3d 877, 882–83 (documents that were referenced in the plaintiff’s complaint—including an insurance contract, an insured’s statement of loss, and a repair contract—all were

properly considered at the motion to dismiss stage, but the trial court erred in considering other documents that were not referenced in the complaint).

- 2) The Wisconsin Supreme Court cites to *Soderlund* and appears, in *dicta*, to approve the incorporation-by-reference doctrine, in *Fleming v. Amateur Athletic Union of United States, Inc.*, 2023 WI 40, ¶ 4 n.3, 407 Wis. 2d 273, 279, 990 N.W.2d 244, 247, *reconsideration denied sub nom.*, 2024 WI 2, 4 N.W.3d 449.

2. Materials Considered by Federal Court Judges.

- a. It is “well-settled in this circuit that documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to his claim.” *Mueller v. Apple Leisure Corp.*, 880 F.3d 890, 895 (7th Cir. 2018); *quoting 188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730 (7th Cir. 2002). “This rule is a liberal one—especially where, as here, the plaintiff does not contest the validity or authenticity of the extraneous materials.” *Mueller*, 880 F.3d at 895; *see also Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009) *abrogated, in part, on other grounds by Hughes v. Northwestern Univ.*, 63 F.4th 615 (7th Cir. 2023).
- b. Beyond the incorporation-by-reference doctrine. Laurence A. Steckman & Rita D. Turner, *Determining When Extrinsic Evidence Not Attached to or Incorporated by Reference in a Pleading May Be Considered on a Rule 12 Dismissal Motion*, 31 Touro L. Rev. No. 1, Art. 10 (2015) (article available online at: <https://tinyurl.com/yybhdzw9>).
- c. *See also Palin v. New York Times*, 940 F.3d 804 (2nd Cir. 2019). May a trial court hold an evidentiary hearing to determine if a complaint meets the plausibility standard and survives a motion to dismiss?

Part Five: “You Make the Call” – Various Motion to Dismiss Scenarios for Audience “Rulings”

1. Scenario One: Complaint alleges plaintiff was an employee with defendant employer, and alleges plaintiff was fired without cause. No written employment contract is attached to the complaint, and there is no express reference in the complaint to a written employment contract. Defendant employer files a motion to dismiss, attaching to the motion what the employer’s counsel says is a copy of an employment contract between the plaintiff and the employer, which expressly says that employee is an at-will employee. No affidavit is submitted authenticating the contract.
 - a. Should the judge consider the contract?
 - b. What if the complaint expressly alleges that the employee could only be fired “for cause”? Must the judge “accept as true” that allegation in the complaint? Or, can the judge ignore the allegation in the complaint, and (based on the purported

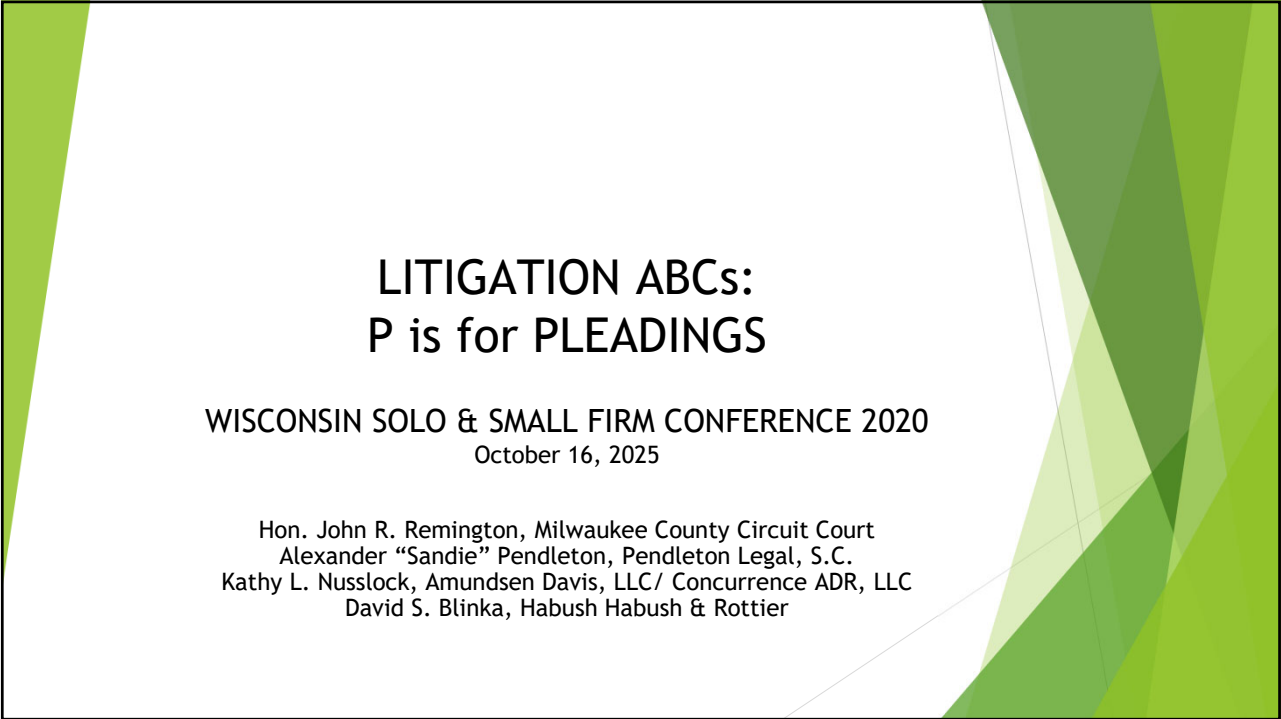
employment contract) accept as undisputed that the employee was an at-will employee?

- c. In the response brief, plaintiff's counsel argues the judge cannot consider the alleged employment contract because:
 - i. The employment contract is neither referenced in, nor attached to the complaint; and/or
 - ii. The defendant has not laid a foundation for the court's consideration of the contract, because there is no affidavit from a person with personal knowledge stating that what purports to be the contract, is a true copy of the contract?

In such a situation, should the judge consider the contract?

- d. What if in a reply brief, the defendant's CEO provides an affidavit authenticating the purported contract? Does the court need to convert the motion to dismiss to a motion for summary judgment?
2. Scenario Two: The City of Milwaukee sues Paintco, alleging claims for negligence and fraud, asserting that Paintco sold the City defective street paint, causing the City millions of dollars in damages when it had to buy replacement paint and repaint its streets. Paintco files a motion to dismiss, arguing that all of the City's tort claims are barred by the economic loss doctrine. Paintco attaches to its motion a 100-page contract between Paintco and the City, and a copy of a "full refund" check. The contract appears to indicate that counsel for the parties negotiated and entered into a detailed contract, by which the City waived all tort claims, and agreed that its sole remedy in the event of breach was a full refund of the purchase price.
- a. Can the trial court consider the contract?
 - b. Can the trial court consider the refund check?
 - c. If yes, can the court dismiss tort claims at the motion to dismiss stage based on the economic loss doctrine?
 - d. What if the City argues that the economic loss doctrine is a defense, which is only properly considered at trial or summary judgment?
3. Scenario Three: Smith sues Jones, alleging that Smith owns Blackacre, and that Jones owns an adjacent property. The complaint further alleges that Jones has installed a new fence, and the fence was not on the boundary line between the two properties, but was instead ten feet onto Blackacre. Jones files a motion to dismiss, and attaches to his motion to dismiss what appears to be a copy of a recorded deed, which appears to indicate that Jones owns Blackacre.

- a. Must the trial court accept as true at this stage- the plain allegation in the complaint that Smith owns Blackacre?
 - b. Can the trial court inquire at the motion to dismiss hearing as to the amount of inquiry or investigation Smith's attorney made before the attorney alleges Smith owned Blackacre?
 - c. If Smith's attorney says he based that allegation solely on what Smith told him (and no other investigation), should that affect whether the court considers the deed?
4. Scenario Four: John sues Bob, and two insurance companies, alleging that because of Bob's negligent driving, John was injured. The complaint alleges that the auto accident occurred "sometime in June of 2017." The complaint further alleges that the insurance companies insured Bob at the time of the accident. The defendants file motions to dismiss. Bob's motion is based on statute of limitations, alleging that more than three years passed before John filed suit, and (to establish the date of the accident), attaches to his motion to dismiss what appears to be a police report regarding an accident that occurred between him and John in June of 2017. The two insurance companies attach to their motions to dismiss what appear to be declaration pages from insurance policies, indicating the coverage that each insurer once provided to Bob was not in effect during June of 2017.
- a. Should the judge rule that the sole issue is whether within "the four corners of the complaint" a claim is stated, and that affirmative defenses (such as statute of limitation defenses, or coverage defenses), are only appropriate at the summary judgment stage?



LITIGATION ABCs: P is for PLEADINGS

WISCONSIN SOLO & SMALL FIRM CONFERENCE 2020
October 16, 2025

Hon. John R. Remington, Milwaukee County Circuit Court
Alexander "Sandie" Pendleton, Pendleton Legal, S.C.
Kathy L. Nusslock, Amundsen Davis, LLC/ Concurrence ADR, LLC
David S. Blinka, Habush Habush & Rottier

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Part One

Drafting the Complaint or Petition

2

Motions to Dismiss - Wis. Stat. § 802.02(1)(a)

Strid v. Converse,
111 Wis. 2d 418, 331 N.W.2d 350 (1983)

“The complaint should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations.”

3

Motions to Dismiss

Data Key Partners v. Permira Advisors, LLC
2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693.

- Plaintiffs must allege facts that plausibly suggest they are entitled to relief.
- Cites to *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

4

A Heightened Pleading Standard?

- ▶ Did *Data Key* create a new, heightened pleading standard as compared to Wisconsin's previous standard?

Wisconsin Supreme Court says "no."

- ▶ *Cattau v. National Ins. Servs. of Wis., Inc.*, 2019 WI 46, 386 Wis. 2d 515, 926 N.W.2d 756.
- ▶ Court was equally divided on merits, but six Justices joined *per curiam* decision on a procedural issue.

5

Cattau

- ▶ *Twombly* is consistent with previous Wisconsin standards on pleadings ("e.g., *Strid* . . . The sufficiency of the facts alleged controls the determination").

6

Where are we now?

1. Wisconsin's pleading standard grounded in 802.02(1)(a): "A short and plain statement of the claim, identifying the transaction or occurrence ... of which the claim arises and showing that the pleader is entitled to relief."
2. Courts accept as true all facts well-pleaded in a complaint and reasonable inferences therefrom.

7

Where are we now?

3. Courts cannot add facts to a complaint and do not accept as true legal conclusions.
4. Formulaic recitation of the elements of a cause of action is not enough.
5. If facts reveal an apparent right to recover under any legal theory, those are sufficient as a cause of action.

8

Where are we now?

6. Sufficiency of a complaint depends on substantive law underlying the claim - substantive law drives what facts must be pled.
7. If well-pleaded facts satisfy each element of a cause of action, the complaint has stated a claim.

9

Wisconsin Manufacturers v. Evers

- ▶ Wis. Mfrs. V. Evers, 2022 WI 38, 977 N.W.2d 374.
- ▶ The court followed *Data Key*, but distinguished factual allegations from legal conclusions, holding it cannot accept legal conclusions as true when construing the complaint.

10

Priorities USA v. Wis. Elections Comm'n

- ▶ *Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.2d 429.
- ▶ The appellate court reversed the dismissal by the circuit court, determining the factual allegations within the complaint stated a plausible claim for relief and consideration of arguments were warranted.

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Tips from the Bench

- ▶ In analyzing whether a complaint states a valid cause of action, ensure pleadings meet the standards enunciated in *Cattau* and *Data Key*.
- ▶ Focus on factual allegations and not legal conclusions.
- ▶ Check the elements of the claims for relief you intend to plead.
- ▶ Plead factual allegations (not conclusions of law) regarding every element of claims alleged.

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Part Two

Matters Requiring Special Consideration

13

Special Consideration Required

- ▶ Averments of fraud must meet heightened pleading standards.
- ▶ Third-party complaints require a plausible theory of liability.

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Special Consideration Required

- ▶ Suits requiring notice in advance of filing a complaint.
 - ▶ State court suits v. government entity.
 - ▶ Federal Tort Claims Act.
 - ▶ *Qui tam* lawsuits.

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Jurisdiction Considerations

- ▶ State court subject matter jurisdiction - examples.
 - ▶ Small claims court jurisdiction/procedure. See Wis. Stat. § 799.01.
 - ▶ Probate and trust matters.
- ▶ Federal court jurisdiction.

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Venue Issues

- ▶ Venue Selection - Wis. Stat. § 801.50.
- ▶ Challenges - noncompliance under Wis. Stat. § 801.51 and discretionary challenge under § 801.52.
- ▶ *Stelling v. Middlesex*, 2023 WI App 10, 406 Wis.2d 197, 986 N.W.2d 354 - Wisconsin's leading case on venue.

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What About...?

- ▶ Class actions.
 - ▶ Commonality and predominance requirements.
 - ▶ *Freeman v. SL Greenfield LLC*, 2025 WI App 30 (filed April 8, 2025; ordered published May 28, 2025).
- ▶ Tort litigation.
 - ▶ General negligence.
 - ▶ Products liability.

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Part Three

Strategic Considerations

19

Practical Tips - Motions to Dismiss

- ▶ Wis. Stat. § 802.05(2)(c) (attorney's signature on a pleading certifies the attorney made reasonable inquiry and has a reasonable belief there is evidentiary support for the factual allegations made in a complaint).
- ▶ *Soderlund v. Zilbolski*, 2016 WI App 6, 366 Wis. 2d 579, 847 N.W.2d 561 (permits the court to consider documents referenced in the complaint, even though not attached to the complaint).
- ▶ Duty of candor to the tribunal. SCR 20:3.3.

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Strategic Considerations

- ▶ Keep the court's case load in mind when deciding what and how many documents to attach to a motion to dismiss.
- ▶ Death of a party - suggestion of death. See Wis. Stat. § 803.10(1).
- ▶ AI - Helpful or harmful?

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Strategic Considerations

Stay resulting from a motion to dismiss.

- ▶ Wis. Stat. § 802.06(1)(b).
- ▶ Discovery stayed for 180 days or a decision on the motion to dismiss.
- ▶ Good cause exception for particularized discovery.

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Impact on Other Motions

- ▶ Injunctive relief
- ▶ Harassment orders
- ▶ Intervenor
- ▶ Others?

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Federal Rules of Civil Procedure

- ▶ F.R.C.P. 12 (b).
- ▶ *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
 - ▶ Fed. R. Civ. P. 8, requires that “the threshold requirement of Rule 8(a)(2) [is] that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief....’”

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Federal Rules of Civil Procedure

- ▶ *Erickson v. Pardus*, 551 U.S. 89, 93 (2007).
 - ▶ Specific facts are not necessary.
- ▶ *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).
 - ▶ The plausibility standard is not akin to a probability requirement.

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Impact on Other Proceedings

- ▶ Forum Selection?
- ▶ Federal v. State Court

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Part Four

Materials Considered by Courts

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Materials Considered - Motion to Dismiss

- ▶ Wis. Stat. § 802.06(2)(b) and (3).
- ▶ Incorporation by reference doctrine: *Soderlund v. Zilbolski*, 2016 WI App. 6, 366 Wis. 2d 579, 847 N.W.2d 561.
- ▶ A court may consider a document attached to a motion to dismiss or for judgment on the pleadings without converting the motion into one for summary judgment, if the document was referred to in the plaintiff's complaint, is central to his or her claim, and its authenticity has not been disputed.

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Federal Courts

- ▶ *Mueller v. Apple Leisure Corp.*, 880 F.3d 890, 895 (7th Cir. 2018).
- ▶ *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009).
- ▶ *Palin v. New York Times*, 940 F.3d 804 (2d Cir. 2019).
- ▶ May a trial court hold an evidentiary hearing to determine if a complaint meets the plausibility standard?

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Part Five

You Make the Call

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Scenario One:

Complaint alleges plaintiff was an employee with defendant employer, and alleges plaintiff was fired without cause. No written employment contract is attached to the Complaint, and there is no express reference in the complaint to a written employment contract. Defendant employer files a motion to dismiss, attaching to the motion what the employer's counsel says is a copy of the employment contract, which expressly says that employee is an at will employee. No affidavit is submitted authenticating the contract.

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Scenario One (con't):

- ▶ Should the judge consider the employment contract?
- ▶ What if the complaint expressly alleges that the employee could only be fired "for cause"? Must the judge "accept as true" that allegation in the complaint? Or, can the judge ignore the allegation in the complaint, and (based on the purported employment contract) accept as undisputed that the employee was an at will employee?

32

Scenario One (con't):

In the response brief, plaintiff's counsel argues the judge cannot consider the alleged employment contract because:

- ▶ The employment contract is neither referenced in, nor attached to the complaint; and/or
- ▶ The defendant has not laid a foundation for the court's consideration of the contract, because there is no affidavit from a person with personal knowledge stating that what purports to be the contract, is a true copy of the contract.

33

Scenario One (con't):

- ▶ What if in a reply brief, the defendant's CEO provides an affidavit authenticating the purported contract?
- ▶ Does the court need to convert the motion to dismiss to a motion for summary judgment?

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Scenario Two:

City of Milwaukee sues Paintco, alleging negligence and fraud, asserting that Paintco sold the City defective street paint, causing the City millions of dollars in damages when it had to buy replacement paint and repaint its streets. Paintco files a motion to dismiss, arguing the City's tort claims are barred by the economic loss doctrine. Paintco attaches to its motion a 100-page contract between Paintco and the City, and a copy of a "full refund" check. The contract appears to indicate the parties negotiated and entered into a detailed contract, by which the City waived all tort claims, and agreed that its sole remedy in the event of breach was a full refund of the purchase price.

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Scenario Two (con't):

- ▶ Can the trial court consider the contract?
- ▶ Can the trial court consider the refund check?
- ▶ If yes, can the court dismiss tort claims at the motion to dismiss stage based on the economic loss doctrine?
- ▶ What if the City argues that the economic loss doctrine is a defense, which is only properly considered at trial or summary judgment?

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Scenario Three:

Smith sues Jones, alleging that Smith owns Blackacre, and that Jones owns an adjacent property. The complaint further alleges that Jones has installed a new fence, and the fence was not on the boundary line between the two properties, but was instead ten feet onto Blackacre. Jones filed a motion to dismiss, and attaches to his motion to dismiss a copy of a recorded deed which appears to indicate that Jones owns Blackacre.

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Scenario Three (con't):

- ▶ Must the trial court accept as true at this stage the plain allegation in the complaint that Smith owns Blackacre?
- ▶ Can the trial court inquire at the motion to dismiss hearing as to the amount of inquiry or investigation Smith's attorney made, before the attorney made the allegation that Smith owned Blackacre?
- ▶ If Smith's attorney says he based that allegation solely on what Smith told him (and no other investigation), should that affect whether the court considers the deed?

38

Scenario Four:

On September 15, 2025, John sues Bob, and two insurance companies, alleging that because of Bob's negligent driving, John was injured. The complaint alleges that the auto accident occurred in September 2022. The defendants file motions to dismiss. Bob's motion is based on the statute of limitations, alleging that more than three years passed before John filed suit, and (to establish the date of the accident), attaches to his motion to dismiss what appears to be a police report of an accident involving Bob and John on September 13, 2022. The two insurance companies attach what appear to be declaration pages from insurance policies, indicating the coverage was not provided during September 2022.

39

Scenario Four (con't):

- ▶ Should the judge rule that the sole issue is whether within "the four corners of the complaint" a claim is stated, and that affirmative defenses (such as statute of limitation defenses, or coverage defenses), are only appropriate at the summary judgment stage?

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Scenario Five:

Trump v New York Times, 8:25-cv-2487-SDM-NHA (M.D. FL September 19, 2025).

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Key Take-Aways

1. Focus on the standards enunciated in *Cattau* and *Data Key*.
2. Don't focus on whether the pleading standard has changed over the last decades - that isn't material.



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Key Take-Aways

3. Consider consequences of a motion to dismiss - possibility of stay for 180 days.
4. Can you rely on materials attached to or referenced in the complaint?



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COMMENTS



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