BY DANIEL A. MANNA

Significant Recent Wisconsin Federal Court Decisions

This article reviews seven significant Wisconsin federal court decisions from 2023 and 2024 interpreting Wisconsin law. The decisions touch on a variety of subjects: foreign statutes of limitations, minimum markup rules for gasoline, choice of wrongful death laws, intervening and superseding cause, deceptive trade practices, and false advertising.

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 seven recent federal decisions interpreting and applying Wisconsin statutes and common law relating to, among other issues, foreign statutes of limitations, minimum markup rules for gasoline, choice of wrongful death laws, intervening and superseding cause, deceptive trade practices, and false advertising.

Borrowing Statute

Wisconsin's borrowing statute, Wis. Stat. section 893.07, provides that for any "foreign cause of action" brought in Wisconsin, the shorter of Wisconsin's or the foreign jurisdiction's statute of limitations applies. In *RCBA Nutraceuticals LLC v. ProAmpac Holdings Inc.*,[1] the Seventh Circuit analyzed when a breach of contract claim implicating multiple jurisdictions is considered "foreign" under the borrowing statute.

RCBA Nutraceuticals alleged that ProAmpac Holdings sold RCBA defective packaging, which ProAmpac manufactured in Wisconsin and delivered to RCBA's order fulfillment partners in New York and Texas. RCBA sued ProAmpac in the Eastern District of Wisconsin under three contract theories (breach of contract and two implied warranty claims) and three tort theories (negligence, civil conspiracy, and fraudulent misrepresentation). The district court found that all six causes of action were "foreign" causes of action under the borrowing statute and dismissed the contract and negligence claims because the applicable limitations periods had passed.[2] The accrual date for the civil conspiracy and fraudulent misrepresentation claims was unclear, but the district court found that those claims were barred by Wisconsin's economic loss doctrine, meaning the entire complaint failed as a matter of law.[3]

The Seventh Circuit's review focused primarily on the Wisconsin Supreme Court's test for whether a contract cause of action is "foreign." Citing *Abraham v. General Casualty Co. of Wisconsin,*[4] the court explained that a contract claim is foreign under Wisconsin law if "the final significant event giving rise to the cause of action" occurred outside Wisconsin.[5] *Abraham* was the first Wisconsin decision to extend the application of the borrowing statute to contract claims and adopted the "final significant event test" over a "place of injury" test (used for tort claims) or a "significant contacts/center of gravity" test.[6] The *Abraham* court held that the final significant event in a contract claim is the breach, which led it to conclude a claim was not foreign where a Wisconsin insurer refused to pay under an auto policy. The insurer made the decision in Wisconsin, so the alleged breach (and final significant event) occurred in Wisconsin.

Because *Abraham* left open questions regarding the location of a breach in cases with more complicated facts, the Seventh Circuit cited several Wisconsin state and federal cases that followed *Abraham* to show how the law has developed. Most relevant to RCBA's claims, the U.S. District Court for the Western District of Wisconsin held that a "no defect express warranty" for windows was breached where the plaintiffs received defective windows, not where the windows were manufactured.[7] The Seventh Circuit found that "these decisions teach that the final significant event occurs where a contractual duty is breached: for example, where the insurance company improperly rejected coverage … or where the nonconforming goods were delivered."[8]

The Seventh Circuit rejected RCBA's invitation to treat damages as the final significant event for its breach of contract claims, noting the clear

holding in *Abraham*.[9] The Seventh Circuit also rejected RCBA's argument that its connections to New York and Texas were too attenuated for those states' statutes of limitations to apply. This argument was based upon the fact that only RCBA's contract partners were located in those states and noticed the delivery of the defective packaging, while RCBA is a Delaware corporation physically located in Florida. The Seventh Circuit explained that it is irrelevant under the borrowing statute whether a party is "at home" in the jurisdiction whose law applies, and that the correct inquiry is the location of the breach, not the location of notice, discovery, or significant contacts.[10] The court concluded that the breach occurred where the defective packaging was delivered under the contract. This meant that RCBA's contract claims were "foreign" under the borrowing statute and the four-year statute of limitations in New York and Texas applied (as opposed to Wisconsin's six-year statute), barring RCBA's claims.

Unfair Sales Act

In *Pit Row Inc. v. Costco Wholesale Corp.*,[11] the Seventh Circuit was asked to interpret and apply Wisconsin's Unfair Sales Act[12] ("the Act") to determine whether Costco's gasoline pricing practices could give rise to statutory liability. Twelve gas stations in the Green Bay area sued Costco under the Act alleging that Costco's gas pricing at its nearest warehouse (in Bellevue, Wis.) violated the Act's minimum markup requirements and negatively impacted their gasoline sales. The district court granted Costco summary judgment on two bases: 1) Costco's pricing practices comported with the statutory safe harbor for matching competitors' prices on most days in the relevant period, and 2) the plaintiffs failed to establish the causal element of the statutory claim.[13] The plaintiffs appealed the summary judgment decision and an earlier decision by the district court denying the plaintiffs' motion to supplement an expert report on causation.

The Seventh Circuit began its review with a brief recitation of the history and purpose of the Act, quoting the statutory rationale that "[t]he practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce."[14] The court explained that gasoline retailers must set prices at or above a statutory minimum (calculated based on the retailer's cost) and any violation may give rise to liability to "any person who is injured or threatened with injury as a result of" the violation.[15] There are also nine exceptions to liability under the Act, including the "meeting competition" exception, which exempts sales in which the price is "made in good faith to meet an existing price of a competitor."[16] The "existing price of a competitor" is defined as "a price being simultaneously offered to a buyer for merchandise of like quality and quantity by a person who is a direct competitor of the retailer ... and from whom the buyer can practicably purchase the merchandise."[17]

The first issue on appeal was whether Costco's gas pricing satisfied the meeting competition exception with regard to a BP gas station in Kaukauna, Wis., and two Marathon gas stations in the Green Bay area. The plaintiffs argued that the exception did not apply to the Kaukauna BP because it was too distant (24 miles) from the Bellevue Costco and therefore not a direct competitor. Costco responded that its member data showed over 200 members with addresses in Kaukauna who purchased gasoline at the Bellevue warehouse during the relevant timeframe. Citing a Wisconsin Court of Appeals decision, the Seventh Circuit found that "direct competitor" means "one selling or buying goods or services in the same market as another," so whether the Kaukauna BP was a direct competitor of the Bellevue Costco depended on whether they were selling gasoline in the same market.[18]

To determine whether the two retailers sold gasoline in the same market, the Seventh Circuit turned to antitrust law for guidance, consulting the federal *Merger Guidelines* and concluding that markets are defined by "interchangeability of use or the cross-elasticity of demand" between a product and its substitutes.[19] Identifying a relevant market may be done using relevant evidence such as a product's "peculiar characteristics and uses" and "distinct customers."[20] Based on this guidance, the court found the plaintiffs placed "far too much weight on geography in their attempt to define the relevant market," and it was "far from impracticable" for a Costco member living in Kaukauna to purchase gasoline at the Bellevue warehouse.[21] The court concluded that "owing to its membership structure, Costco's direct competitors should be determined not simply based on the location of the stations, but also on the addresses-of-record of its members[,]" and that Costco's membership data established the Kaukauna BP was in the same market and therefore a direct competitor.

The plaintiffs also argued the Marathon stations were not direct competitors of Costco, not because they were in a different market, but because Costco was not entitled to match Marathon's loyalty rewards program discounted price.[22] The plaintiffs argued that Costco was not permitted to match Marathon's loyalty discount because it is not a "price being simultaneously offered to a buyer" under the statute, nor was Costco's gasoline "offered under the same terms and conditions" as Marathon's, which is required by an administrative regulation.[23] The Seventh Circuit rejected both of these positions, noting that the

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statutory language does not restrict a retailer to matching the posted price of its competitors and the terms and conditions offered by Marathon and Costco were sufficiently similar to be consistent with the regulatory requirement.[24]

Following its lengthy "direct competitor" analysis, the court efficiently addressed the two other requirements for the meeting competition exception: 1) that Costco notified the Department of Agriculture, Trade and Consumer Protection (DATCP) when it lowered a price below statutory cost and 2) that Costco lowered its prices in a good faith effort to match a competitor's price. The court found that on the occasions Costco did not strictly comply with the notice requirement, it overcame the rebuttable presumption against application of the meeting competition exception by producing business records showing it matched competitors.[25] And, assuming without deciding that Costco was required to affirmatively prove good faith, the court found that Costco's evidence of daily price monitoring, efforts to notify DATCP of price changes, and business records of price-matching were substantially identical to evidence the Wisconsin Court of Appeals had previously found sufficient to show good faith.[26] Thus, the court concluded that Costco satisfied the meeting competition exception for 238 of the 256 days at issue.

The court concluded by affirming the district court's finding that the plaintiffs had failed to show they were "injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel" for the remaining 18 days at issue. The plaintiffs' experts testified that Costco at least threatened the plaintiffs' sales volume and that Costco entering a market would threaten existing retailers with injury, but due in part to the district court's evidentiary rulings, the experts did not support their opinions with any data. The court held that absent "any rigorous market or economic analysis (or even evidence that at least one customer actually elected to purchase gasoline from Costco rather than from [the plaintiffs] because Costco offered lower prices), the testimony upon which [the plaintiffs] rely amounts to little more than 'sheer speculation,' which the Wisconsin Supreme Court has held is insufficient to establish an element of the Act's private cause of action."[27]

Insurance Coverage – Statutory Limitation on Denial of Benefits

In *Jadair International Inc. v. American National Property & Casualty Co.*,[28] the Seventh Circuit reviewed a relatively straightforward insurance coverage decision with one unusual component: the insured argued that Wisconsin's insurance contracts statute, Wis. Stat. section 631.11, forbade a denial of benefits under the facts of the case and sought certification of the question to the Wisconsin Supreme Court.

The case arose after Jadair's owner and president was killed in the crash of a Cessna airplane he was piloting and the company filed a claim on an aircraft insurance policy covering the Cessna. American National denied coverage based on an exclusion that required the pilot to have certain valid credentials from the Federal Aviation Administration (FAA), including a medical certificate.[29] It was undisputed that the owner did not have a valid FAA medical certificate, but also that the accident was not caused by any health condition of the owner.[30]

The district court granted summary and declaratory judgment to American National based on the medical certificate exclusion, and Jadair appealed. On appeal Jadair argued that an endorsement to the policy exempted the owner from the medical-certificate requirement and, even if it did not, Wisconsin law required American National to prove that the lack of a medical certificate increased its risk of loss or contributed to the accident to deny coverage.

Analyzing the policy language issue first, the court employed the three-step framework described by the Wisconsin Supreme Court in *American Family Mutual Insurance Co. v. American Girl Inc.*[31]: 1) examine the facts to determine if the policy makes an initial grant of coverage; 2) if there is an initial grant of coverage, examine policy exclusions to determine if coverage is precluded; and 3) if an exclusion seems to apply, examine exceptions to see if coverage is reinstated.[32] Following this process, the Seventh Circuit found there was an initial grant of coverage, the medical-certificate exclusion applied, and the endorsement did not reinstate coverage. The court noted that an endorsement cannot modify a policy unless the endorsement either expressly states its provisions are "substituted for those in the body of the policy," or the endorsement and the policy irreconcilably conflict.[33] The court found that neither circumstance was present and the policy unambiguously excluded coverage.

Jadair's second argument was that Wis. Stat. section 631.11(3) prohibited

American National from denying coverage unless it could prove the owner's lack of an FAA medical certificate increased American National's risk at the time of loss or contributed to the loss. The language of section 631.11(3) requires such proof before an insurer may deny coverage based upon a "failure of a condition prior to a loss" or "breach of promissory warranty." Jadair argued the lack of a medical certificate constituted the failure of a condition prior to a loss and that American National could not prove the failure increased its risk or contributed to the loss because mechanical failure was the undisputed cause of the accident.[34] The Seventh Circuit rejected this argument based on the distinction between exclusions (which are not mentioned in the statute) and conditions subsequent. The court explained that "[w]hile conditions subsequent (and warranties) provide for the avoidance of liability for a covered loss if they are breached, exclusions declare that there never was coverage for a particular loss in the first place."[35] And because the medical-certificate exclusion precluded coverage rather than avoided liability for extant coverage, it was not a condition subsequent or warranty covered by Wis. Stat. section 631.11(3).

Finally, the Seventh Circuit rejected Jadair's request to certify to the Wisconsin Supreme Court a question asking whether, under Wis. Stat. section 631.11(3), an insurer must prove a causal connection "under an aircraft insurance policy between the accident and the failure of the insured to comply with federal aviation safety-related regulations."[36] Noting that it will only certify questions to a state supreme court when it is "genuinely uncertain" about the answer to a question, the court refused certification because the Wisconsin Supreme Court had already interpreted the scope of section 631.11(3)'s applicability, albeit in a non-aviation context, and there was no reason to believe that court would interpret the statute differently for different types of insurance.[37]

Choice of Law – Wrongful Death

In *Story v. Marquette University*,[38] the U.S. District Court for the Eastern District of Wisconsin analyzed whether Wisconsin's or Minnesota's wrongful death statute applied to a suicide that occurred in Minnesota and whether that suicide broke the chain of causation and precluded liability.

The plaintiff in *Story* was the next of kin of Andrew Story, a graduate of Marquette University who returned to Marquette's campus a week after graduating and broke into a laboratory during a psychotic episode. After sending a series of cryptic emails to a professor saying what he had done, Story was confronted and taken into custody by two officers of the Marquette University Police Department (MUPD), who allegedly invoked Wisconsin's emergency detention statute, Wis. Stat. section 51.15, to justify the detention. The officers took Story to the emergency department of the Milwaukee County Behavioral Health Division but advised the treating psychiatrist that Story was there voluntarily (despite being handcuffed) and did not mention the emergency detention statute. After a brief evaluation, the psychiatrist and officers permitted Story to leave. Story soon returned to his home in Minnesota, where he murdered a former coworker under the belief that she had telepathically given permission for him to do so. Story fled to Milwaukee after the incident, was arrested, was extradited to Minnesota, made bail, and began psychiatric treatment before dying by suicide in Minnesota.

The plaintiff sued Marquette for wrongful death under the theory that the MUPD officers had a duty to deliver a detailed report of emergency detention to the psychiatrist who evaluated Story when he was in MUPD custody and their failure to satisfy that duty set off the chain of events that led to Story's death.[39] The parties disagreed over which state's wrongful death law applied; the plaintiff argued Minnesota law applied and Marquette argued Wisconsin law applied. The plaintiff first argued that a choice-of-law analysis was unnecessary because the text of the Wisconsin wrongful death statute, Wis. Stat. section 895.03, precluded its application. Section 895.03 applies only to an action "for a death caused in this state," which the plaintiff contended did not describe Story's suicide in Minnesota. The district court rejected this argument, explaining that the plaintiff was confusing the terms "caused" and "occurring," which Wisconsin courts have cautioned against.[40] The statutory causation

language requires only that "some substantial factor contributing to the decedent's death occur within the state."[41]

Given the plaintiff's allegation that the MUPD officers' conduct caused Story's death, Wisconsin's wrongful death statute could apply, but the district court had to perform a choice-of-law analysis to determine whether it should apply. The court addressed Wisconsin's five choice-of-law factors: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law.[42]

The court found that the first and fourth factors favored application of Wisconsin law. For the first factor, predictability of results, the court explained that "[a]t the heart of the plaintiff's allegations is that the defendant did not take steps in the state of Wisconsin pursuant to Wisconsin law" to prevent Story's death, making it foreseeable that the dispute would be resolved under Wisconsin law.[43] For the fourth factor, advancement of the forum's governmental interests, the court found that Wisconsin has an interest in how negligence claims stemming from Wis. Stat. section 51.15 are litigated, and it would be unusual and unpredictable if a party's negligence was judged according to the requirements of a Wisconsin statute but liability was determined according to a different state's law.[44]

The court found that the second factor, maintenance of interstate and international order, was neutral because both states were equally concerned regarding the case. The court also found the third factor, simplification of the judicial task, to be neutral because the court could as easily apply either state's law.

For the fifth factor, the better rule of law, the court found that it "may favor application [of] Minnesota law" because Minnesota's wrongful death statute would allow Story's sister and grandparents to share in the proceeds of a suit, as opposed to Wisconsin's statute, which would only permit Story's parents to recover.[45] The court nonetheless concluded that "in total, the choice-influencing factors as well as the presumption that forum law applies unless non-forum contacts are clearly of greater significance" merited application of Wisconsin law.

Applying Wisconsin law, the court addressed Marquette's argument that Story's suicide was an intervening force that broke the chain of causation, precluding liability. The court began by quoting the Wisconsin Supreme Court for the proposition that it is "practically unanimous" that suicide "is a new and independent agency which does not come within and complete a line of causation from the wrongful act to the death and therefore does not render defendant liable for the suicide."[46] There are two exceptions to this general rule: when the defendant causes an "uncontrollable impulse, a delirium, frenzy or rage" in the deceased that leads to suicide and when there is a special relationship between the defendant and the deceased justifying the creation of a duty to prevent suicide.[47]

The plaintiff conceded the "uncontrollable impulse" exception did not apply and the district court found the "special relationship" exception has only ever been recognized in contexts in which the decedent was in the custody or under the supervision of the defendant.[48] Because Story committed suicide six months after he was in MUPD custody, the district court concluded the special-relationship exception did not apply and therefore Story's suicide constituted an intervening and superseding cause that precluded liability for Marquette.

Insurance – Definition of "Pollutant" & Collateral Source Rule

The Eastern District addressed several insurance coverage issues in *Great American Insurance Co. v. R.J. Schinner Co.*,[49] including the definition of "pollutant" in a policy exclusion under Wisconsin law and a novel argument for application of the collateral source

rule. The subject loss occurred when historic flash flooding toppled a wall at R.J. Schinner Co.'s Nashville warehouse and floodwaters carried away Schinner's inventory of paper, plastic, and Styrofoam products, scattering them in an extensive debris field in and around nearby Mill Creek.[50] Schinner filed claims under a general liability policy written by Zurich American Insurance Co., a second Zurich policy covering property damage including flood damage and debris removal, and an excess policy from Great American Insurance Co. Zurich paid the per-occurrence limit under the general liability policy and agreed to pay under the property policy, but only for costs incurred within 1,000 feet of the warehouse. Great American denied coverage under its excess policy on several bases including an exclusion for any loss arising from or related to the "discharge, dispersal, seepage, migration, release, or escape of 'pollutants,' however caused."[51]

The district court began its analysis with a summary of Wisconsin's approach to interpreting insurance policies, which is to apply the same rules of construction that apply to other contracts.[52] This includes a form of the doctrine of *contra proferentem* pursuant to which courts interpret a policy's terms from the perspective of a "reasonable insured" and resolve ambiguities in favor of coverage.[53]

Applying these principles first to the Great American pollution exclusion, the court set about resolving the parties' disagreement regarding whether the debris field littering the banks of Mill Creek constituted "pollutants" under the language of the policy. The exclusion defined "pollutants" as "any solid, liquid, gaseous, or thermal irritant or contaminant, including, but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste material. Waste material includes materials which are intended to be or have been recycled, reconditioned or reclaimed."[54] The district court found that a reasonable person in Schinner's shoes would consider the debris field to consist of "pollutants" given the inclusion of "solid … contaminant[s]" including "waste material" in the policy definition.

The court further noted that this conclusion was consistent with Wisconsin case law, which holds that a reasonable insured would consider a substance a pollutant if "(1) the substance is largely undesirable and not universally present in the context of the occurrence that the insured seeks coverage for; and (2) a reasonable insured would consider the substance causing the harm involved in the occurrence to be a pollutant."[55] The district court also explained that whether a particular substance is a pollutant is heavily context dependent, since many substances and objects are not considered pollutants in some contexts (for example, lead paint when painted on a house wall, manure in a field, or paper products in a warehouse) but are clearly pollutants in other contexts (for example, lead paint flaking or chipping, manure runoff in a well, or paper products strewn about a waterway).[56] In the context of the instant dispute, the debris field was so clearly pollution that the district court found it "hard to fathom how any reasonable insured would consider [images of the debris field] anything other than a river marred by pollutants."[57]

The district court next addressed Zurich's position that coverage only existed under its property policy for costs incurred within 1,000 feet of the warehouse. Zurich's argument was based on policy language providing coverage for "loss or damage at a 'premises' at which a Limit of Insurance is shown on the Declarations for Flood," and defining "premises" to include "the area associated with that address in which you are legally entitled to conduct your business activities and includes that area extending 1,000 feet beyond the address."[58] The court held the policy language did not support Zurich's position because Zurich had agreed to pay "to remove debris of Covered Property" and there was no dispute that the inventory that ended up on the banks of Mill Creek was "Covered Property" while in the warehouse.[59] Nothing in the policy suggested that covered property that was destroyed or blown off the premises was excluded. The court found that the loss occurred when the inventory was in the warehouse and no reasonable insured would expect that damaged or lost property from a flood that left debris scattered off the premises would not be covered under the debris removal provision.[60]

Top 7 Recent Wisconsin Federal Court Decisions

The decisions touch on a variety of subjects: foreign statutes of limitations, minimum markup rules for gasoline, choice of wrongful death laws, intervening and superseding cause, deceptive trade practices, and false advertising.

Contracts

1. **Borrowing Statute/Foreign Jurisdiction's Statute of Limitations**

RCBA Nutraceuticals LLC v. ProAmpac Holdings Inc.

Issue: When is a breach of contract claim implicating multiple jurisdictions considered to be "foreign" under Wisconsin's borrowing statute?

Holding: The correct inquiry when determining whether a breach of contract claim is "foreign" is the location of the breach. In this case, the court concluded that the breach occurred where defective packaging was delivered under the contract (New York and Texas) and thus the claims were foreign.

Unfair Sales Act

2. **Minimum Markup Rules for Gasoline**

Pit Row Inc. v. Costco Wholesale Corp.

Issue: Do Costco's gasoline pricing practices give rise to statutory liability under Wisconsin's Unfair Sales Act?

Holding: Costco satisfied the meeting competition exception to liability under the Unfair Sales Act and the plaintiffs failed to prove the causation necessary to establish statutory liability.

Insurance Law

3. **Statutory Limitation on Denial of Benefits**

Jadair International Inc. v. American National Property & Casualty Co.

Issue: Did Wisconsin's insurance contracts statute, Wis. Stat. section 631.11, forbid a denial of benefits under the facts of the case?

Holdings: 1) The insurance policy unambiguously excluded coverage. 2) The medical-certificate exclusion in the policy was not a condition subsequent or warranty covered by a statutory provision that would have prohibited the insurer from denying coverage. 3) Certification to the Wisconsin Supreme Court was inappropriate because there was no reason to believe that the court would interpret the statute differently for different types of insurance.

Choice of Law

4. **Choice of Wrongful Death Laws; Intervening and Superseding Cause**

Story v. Marquette University

Issues: Does Wisconsin's or Minnesota's wrongful death statute apply to a suicide that occurred in Minnesota, and did that suicide break the chain of causation and preclude liability?

Holdings: 1) Choice of law factors and the presumption that forum law applies merited application of Wisconsin law. 2) The individual's death by suicide did not fall into either exception to the general rule that suicide is an intervening force that breaks the chain of causation and precludes liability.

Insurance Law

5. **Definition of "Pollutant"; Collateral Source Rule**

Great American Insurance Co. v. R.J. Schinner Co.

Issues: What is the definition of "pollutant" in a policy exclusion under Wisconsin law, and should the collateral source rule apply in this case?

Holdings: 1) A reasonable person in the insured's position would consider an extensive debris field comprised of the insured's property to be a "pollutant." 2) The collateral source rule did not require that the insurance company's payments under a general liability policy reduce the insured's deductible obligation under a separate policy written by the same insurer.

Statute of Repose

6. **Deceptive Trade Practices**

Galveston LFG LLC v. BIOFerm Energy Systems LLC

Issue: Did any statements allegedly made by the defendant fall within exceptions to the statute of repose in Wisconsin's Deceptive Trade Practices Act?

Holding: Statements made by the defendant more than three years before the plaintiff sued did not fall within any statute-of-repose exception and thus were not actionable.

Consumer Law: Unfair Trade Practices Act

7. **False Advertising**

Gomez v. Kohl's Corp.

Issue: Did the plaintiff suffer a pecuniary loss by purchasing merchandise that Kohl's allegedly misrepresented as being on sale?

Holdings: 1) The plaintiff did not suffer a pecuniary loss because she did not allege that the merchandise was worth less than she paid. 2) Without proof of pecuniary loss, the plaintiff could not meet the jurisdictional minimum for federal jurisdiction. **WL**

The final issue on appeal was whether Wisconsin's collateral source rule obligated Zurich to apply proceeds paid to Schinner under the general liability policy toward the required $1 million deductible under the property policy. Schinner argued that under the property policy, Zurich agreed to pay all covered loss, damage, cost, or expense in excess of $1 million, irrespective of who paid the $1 million. Under this reasoning, the amount Zurich paid for debris removal under the general liability policy ($988,111) was akin to Zurich satisfying nearly the entire property policy deductible. Schinner argued that Zurich's reduction of benefits based on its payment of debris cleanup costs under the general liability policy was improper because Zurich's satisfaction of the property policy deductible was a "collateral source," which may not reduce Schinner's recovery.[61]

The collateral source rule provides that an injured plaintiff's recovery may not be reduced by the amount of compensation received from other sources, such as insurance policies.[62] The district court explained that the "rule exists to promote social responsibility, not clever accounting maneuvers. Wisconsin applies the rule as part of a policy seeking to 'deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor.'"[63] The court found that application of the collateral source rule here would not be consistent with the rule's purpose. Zurich was not a tortfeasor and forcing it to pay another million dollars would not deter future misconduct, not least because Zurich was not responsible for the loss in the first place. Rather than deterring future malfeasance, the court posited that, if anything, "[s]queezing an extra million out of its coffers" under such circumstances would dissuade insurers from issuing multiple policies to a single insured. The court held the collateral source rule did not require that Zurich's general liability payments reduce Schinner's deductible obligation under the property policy.

Deceptive Trade Practices Act

In *Galveston LFG LLC v. BIOFerm Energy Systems LLC*,[64] the Western District analyzed potential exceptions to the statute of repose in Wisconsin's Deceptive Trade Practices Act (DTPA), Wis. Stat. section 100.18. The plaintiffs, Pennsylvania-based Montauk Renewables Inc. and its affiliates, contracted with Madison-based BIOFerm for the design and commission of a facility near Galveston, Texas, to convert landfill gas to renewable natural gas. The parties executed the contract on April 17, 2018, and the system was first powered up on Aug. 20, 2019, but Montauk soon discovered performance issues and other problems.[65] Montauk and BIOFirm initially worked together to resolve the problems, but eventually Montauk turned to BIOFirm's German partner in the project to get the system to meet performance requirements, which it finally did in September 2021.[66] Montauk filed suit in September 2022 asserting numerous causes of action including violation of the DTPA. Montauk alleged BIOFerm violated section 100.18 through 12 statements relating to the Galveston project.[67]

A claim under the DTPA requires proof of three elements: 1) a representation to the public with the intent to induce an obligation; 2) the representation was untrue, deceptive, or misleading; and 3) the representation caused a pecuniary loss.[68] Claims under the DTPA may not be made "more than 3 years after the occurrence of the unlawful act or practice," meaning such claims accrue at the time of the offending representation, not at the time of injury or discovery of the injury.[69] BIOFerm moved to dismiss Montauk's DTPA claim on the basis that some of the subject statements occurred more than three years before filing, some were non-public, and alternatively, none satisfied the elements of section 100.18.[70]

There was no dispute that some of BIOFerm's statements occurred more than three years before Montauk sued, but Montauk argued the statements remained actionable because BIOFirm's continuing fraudulent conduct made it impossible for Montauk to know that BIOFirm had violated section 100.18.[71] Montauk argued that BIOFerm created problems that it "fraudulently claimed it had the expertise to resolve," but the district court found the plain language of the statute precluded any tolling of the statute of repose. The court noted that the Wisconsin Court of Appeals had rejected a similar argument in *Kain v. Bluemound East Industrial Park Inc.*, explaining that Wisconsin courts had found limitation statutes to be the result of the legislature's policy considerations and the language of section 100.18 was unambiguous regarding accrual occurring at the time of the false representation.[72] As the *Kain* court noted, Wisconsin courts "have been unwilling to change the legislature's decision on such limitation periods," and a party's remedy "is with the legislature, not with the courts."[73]

The district court also rejected Montauk's argument that representations outside the repose period may be actionable if part of a "continuing fraud." Montauk argued that *Werner v. Pittway Corp.*[74] supported this argument, but the district court distinguished *Werner* on the ground that the hypothetical "continuing fraud" referred to in that decision involved statements to the public upon which the plaintiffs might have relied.[75] Specifically, the *Werner* court suggested in dicta that a misleading public advertisement within the repose period that caused the plaintiffs to keep the defendants' defective smoke alarms in their home may have saved the plaintiffs' claims under a "continuing tort" theory, even though the plaintiffs purchased the alarms outside the repose period.[76] The court explained this did not help Montauk because it was no longer a member of the public after it entered a contractual relationship with BIOFerm on April 17, 2018, so BIOFerm's representations to Montauk after that date were not "to the public."[77]

Montauk argued that the contract alone did not preclude DTPA liability for

such statements because the contract "by design, envisioned further negotiations between the parties as unforeseen issues arose."[78] The district court disagreed, explaining that this argument ignored the "particular relationship" formed by entering a contract, which precludes liability because the "DTPA's intent is to prevent fraudulent inducement causing members of the public to make a purchase or enter into a contract, which logically cannot occur due to statements made by the seller after a person has made a purchase or entered into a contract."[79] The district court thus dismissed the DTPA claim but noted that Montauk was "not without potential recourse through the other counts in the complaint."

Unfair Trade Practices Act

Wisconsin's Unfair Trade Practices Act, Wis. Stat. section 100.20 (not to be confused with the DTPA, Wis. Stat. section 100.18), permits recovery of double damages and costs by "[a]ny person suffering pecuniary loss because of a violation" of an administrative order issued under section 100.20.[80] The question in *Gomez v. Kohl's Corp.*[81] was whether the plaintiff suffered a pecuniary loss by purchasing merchandise that she alleged Kohl's misrepresented as being on sale. Gomez sought to certify a class of similarly situated plaintiffs, but the Western District first had to address Kohl's motion to dismiss.[82] The court found that the issues raised in Kohl's motion overlapped with the question of the jurisdictional amount in controversy, so it analyzed the issues under the rubric of subject matter jurisdiction.

Noting that a plaintiff cannot establish the amount-in-controversy requirement if "it is legally impossible for the plaintiff to recover that much," the district court examined whether Gomez could recover under either section 100.20 or a theory of unjust enrichment. Neither the parties nor the court identified a Wisconsin case determining whether consumers suffer a pecuniary loss when they purchase a product under the false belief the product is on sale, so the court turned to other jurisdictions' law to predict how Wisconsin courts would rule. The court found that the Seventh Circuit had decided the same issue under Illinois law in a case in which a retailer used price tags displaying "suggested prices" and a percentage discount off that amount, allegedly giving the false impression of a discount.[83] The statute at issue required proof of "actual damages," which Illinois courts had interpreted to mean "pecuniary loss."[84] The Seventh Circuit held the plaintiffs had not suffered a pecuniary loss because they "got the benefit of their bargain," that is, they agreed to pay a certain price and did not allege the merchandise was defective or worth less than they paid.[85] In two other cases, the Seventh Circuit held that the same reasoning applies even when the plaintiff alleges she would not have purchased the product had she known about the false advertising.[86]

The district court also identified a case from the Eastern District of Wisconsin in which the court cited the same Seventh Circuit cases and reached a similar conclusion under Wisconsin law, holding that a plaintiff who allegedly purchased almonds falsely implied to be made in a smokehouse did not suffer a pecuniary loss under section 100.20 because he did not show the almonds were worth less than what he paid.[87] Gomez had not alleged that the products she purchased were worth less than she paid, so based on the reasoning in both the Seventh Circuit and Eastern District cases, the district court held that Gomez did not suffer a pecuniary loss under section 100.20 and could not rely on potential damages under section 100.20 to satisfy the jurisdictional minimum.

The court further concluded that Gomez's unjust enrichment claim failed for the same reason: unjust enrichment requires proof that the defendant retained a benefit "without payment of its value," but since Gomez did not allege the products she purchased were worth less than what she paid, Kohl's did not retain a benefit from Gomez without providing her equal value.[88] Accordingly, Gomez could not recover under an unjust enrichment theory and offered no viable alternative theory to meet the jurisdictional minimum, so the court dismissed the case for lack of subject matter jurisdiction.[89] **WL**

ENDNOTES

[1]108 F.4th 997 (7th Cir. 2024).
[2]*Id.* at 1000.
[3]*Id.*
[4]217 Wis. 2d 294, 576 N.W.2d 46 (1998).
[5]*RCBA Nutraceuticals*, 108 F.4th at 1001.
[6]*Id.* at 1001 (citing *Abraham v. General Cas. Co. of Wis.*, 217 Wis. 2d 294, 306-12, 576 N.W.2d 46 (1998)).
[7]*Id.* at 1002 (citing *Haley v. Kolbe & Kolbe Millwork Co.*, No. 14-cv-99, 2015 WL 3774496 (W.D. Wis. June 16, 2015)).
[8]*Id.* (citing *Abraham*, 217 Wis. 2d at 310-11; *Ristow v. Threadneedle Ins. Co.*, 220 Wis. 2d 644, 652, 583 N.W.2d 452 (Wis. Ct. App. 1998); and *Haley*, 2015 WL 3774496, at *7).
[9]*Id.* at 1002-1003
[10]*Id.* at 1003.
[11]101 F.4th 493 (7th Cir. 2024).
[12]Wis. Stat. § 100.30.
[13]*Pit Row*, 101 F.4th at 496.
[14]*Id.* at 497 (quoting Wis. Stat. § 100.30(1)).
[15]*Id.* (quoting Wis. Stat. § 100.30(5m)).
[16]*Id.* (quoting Wis. Stat. § 100.30(2)(cj)).
[17]*Id.* (quoting Wis. Stat. § 100.30(2)(cj)).
[18]*Id.* at 504-05 (citing *Go America L.L.C. v. Kwik Trip Inc.*, 2006 WI App 94, ¶¶ 14-16, 292 Wis. 2d 795, 715 N.W.2d 746).
[19]*Id.* at 505 (quoting U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines* 40 (2023)).
[20]*Id.*
[21]*Id.* at 506.
[22]*Id.*
[23]*Id.* at 506-07 (quoting Wis. Stat. § 100.30(2)(cj) and Wis. Admin. Code § ATCP 105.009).
[24]*Id.* at 507. The Seventh Circuit also noted that under Wisconsin law it need not defer to an agency interpretation of a statute but should "give due weight to the experience, technical competence, and specialized knowledge of an administrative agency." *Id.* (quoting *Tetra Tech EC Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21). The court concluded, however, that it need not determine how much weight to give DATCP's interpretation because Costco's pricing practice was consistent with the regulatory language. *Id.*
[25]*Id.* at 507-08.
[26]*Id.* at 508 (citing *Go America*, 2006 WI App 94, ¶ 28, 292 Wis. 2d 795).
[27]*Id.* at 509 (quoting *Heiden v. Ray's Inc.*, 34 Wis. 2d 632, 638-39, 150 N.W.2d 467 (1967)).
[28]77 F.4th 546 (7th Cir. 2023).
[29]*Id.* at 549-50.
[30]*Id.* at 550.
[31]2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65.
[32]*Jadair Int'l*, 77 F.4th at 552 (citing *American Fam. Mut. Ins. Co. v. American Girl Inc.*, 2004 WI 2, ¶ 23, 268 Wis. 2d 16).
[33]*Id.* at 553 (quoting *Inter-Ins. Exch. of Chi. Motor Club v. Westchester Fire Ins. Co.,* 25 Wis. 2d 100, 104, 130 N.W.2d 185 (1964)).
[34]*Id.* at 556.
[35]*Id.* (citing *Bortz v. Merrimac Mut. Ins. Co.*, 92 Wis. 2d 865, 870-74, 286 N.W.2d 16 (Ct. App. 1979)).
[36]*Id.*
[37]*Id.* at 557 (citing *Fox v. Catholic Knights Ins. Soc.*, 2003 WI 87, ¶¶ 28-30, 263 Wis. 2d 207, 665 N.W.2d 181).
[38]__ F. Supp. 3d __, No. 24-cv-0458, 2024 WL 1340993 (E.D. Wis. Mar. 29, 2024), *appeal filed*, No. 14-1600 (7th Cir. Apr. 15, 2024)
[39]*Id.* at *1.
[40]*Id.* at *3 (citing *Schnabl v. Ford Motor Co.*, 54 Wis. 2d 345, 195 N.W.2d 602 (1972)).
[41]*Id.* (quoting *Tillett v. J.I. Case Co.*, 756 F.2d 591, 594 (7th Cir. 1985)).
[42]*Id.* (citing *Waranka* v. *Wadena Ins. Co.*, 2014 WI 28, ¶ 31, 353 Wis. 2d 619, 847 N.W.2d 324).
[43]*Id.* at *4.
[44]*Id.*
[45]*Id.*
[46]*Id.* at *5 (quoting *Bogust v. Iverson*, 10 Wis. 2d 129, 137, 102 N.W.2d 228 (1960)).
[47]*Id.* (quoting *Bogust*, 10 Wis. 2d at 139, and *Logarta v. Gustafson*, 998 F. Supp. 998, 1004 (E.D. Wis. 1998)).
[48]*Id.* at *6.
[49]__ F. Supp. 3d __, No. 21-cv-1018-bhl, 2023 WL 8356861 (E.D. Wis. Dec. 1, 2023), *appeal filed,* No. 23-3427 (7th Cir. Dec. 28, 2023).
[50]*Id.* at *1.
[51]*Id.* at *3.
[52]*Id.* (citing *Smith v. Atlantic Mut. Ins. Co.*, 155 Wis. 2d 808, 810, 456 N.W.2d 597 (1990)).
[53]*Id.* (quoting *Donaldson v. Urban Land Ints. Inc.*, 211 Wis. 2d 224, 229, 564 N.W.2d 728 (1997)).
[54]*Id.*
[55]*Id.* at *4 (quoting *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, ¶ 38, 360 Wis. 2d 67, 857 N.W.2d 156).
[56]*Id.* *4-*5 (quoting *Wilson Mut. Ins.*, 2014 WI 136, ¶¶ 41-42, 360 Wis. 2d 67).
[57]*Id.* at *4.
[58]*Id.* at *6.
[59]*Id.*
[60]*Id.* at *7.
[61]*Id.* at *8.
[62]*Id.* (citing *Lambert v. Wrensch*, 135 Wis. 2d 105, 110 n.5, 399 N.W.2d 369 (1987) and *W.G. Slugg Seed & Fertilizer Inc. v. Paulsen Lumber Inc.*, 62 Wis. 2d 220, 227-28, 214 N.W.2d 413 (1974)).
[63]*Id.* (quoting *Ellsworth v. Schelbrock*, 2000 WI 63, ¶ 7, 235 Wis. 2d 678, 611 N.W.2d 764).
[64]No. 22-cv-538-wmc, 2023 WL 5353134 (W.D. Wis. Aug. 21, 2023) (slip copy).
[65]*Id.* at *2.
[66]*Id.*
[67]*Id.* at *2-*3.
[68]*Id.* at *3 (citation omitted); Wis. Stat. § 100.18.
[69]*Id.* (citing Wis. Stat. § 100.18(11)(b) and *Kain v. Bluemound E. Indus. Park Inc.*, 2001 WI App 230, ¶ 14, 248 Wis. 2d 172, 635 N.W.2d 640).
[70]*Id.*
[71]*Id.* at *4.
[72]*Id.* (citing *Kain*, 2001 WI App 230, ¶ 18, 248 Wis. 2d 172).
[73]*Kain*, 2001 WI App 230, ¶ 18, 248 Wis. 2d 172.
[74]90 F. Supp. 2d 1018 (W.D. Wis. 2000).
[75]*Galveston LFG*, 2023 WL 5353134, at *5 (citing *Werner v. Pittway Corp.*, 90 F. Supp. 2d 1018, 1033 (W.D. Wis. 2000)).
[76]*Id.*
[77]*Id.*
[78]*Id.* at *5.
[79]*Id.* (quoting *Kailin v. Armstrong*, 2002 WI App 70, ¶ 44, 252 Wis. 2d 676, 643 N.W.2d 132).
[80]Wis. Stat. § 100.20(5).
[81]No. 23-cv-678-jdp, 2024 WL 3363216 (W.D. Wis. July 9, 2024), *appeal filed*, No. 24-2188 (7th Cir. Jul. 11, 2024).
[82]*Id.* at *1.
[83]*Id.* at *2 (citing *Kim v. Carter's Inc.*, 598 F.3d 362 (7th Cir. 2010)).
[84]*Id.* at *3.
[85]*Id.* at *2.
[86]*Id.* at *3 (citing *Camasta v. Jos. A. Bank Clothiers Inc.*, 761 F.3d 732 (7th Cir. 2014), and *Benson v. Fannie May Confections Brands Inc.*, 944 F.3d 639 (7th Cir. 2019)).
[87]*Id.* (citing *Zapadinsky v. Blue Diamond Growers*, No. 23-cv-231, 2023 WL 5116507, at *7-8 (E.D. Wis. Aug. 7, 2023) (slip copy)).
[88]*Id.* at *4 (citing *Buckett v. Jante*, 2009 WI App 55, ¶ 9, 316 Wis. 2d 804, 767 N.W.2d 376).
[89]*Id.* at *4-*5. **WL**