Opinions for the week of December 9 – December 13, 2019

Fabick, Inc. v. JFTCO, Inc. Nos. 19-1760 & 19-1872
Argued November 5, 2019 — Decided December 9, 2019
Case Type: Civil
Western District of Wisconsin. No. 16-cv-00172 — **William M. Conley**, *Judge*.
Before FLAUM, ROVNER, and HAMILTON, *Circuit Judges*.

FLAUM, *Circuit Judge*. Two non-competing Midwestern companies operated by brothers used marks containing the family name, Fabick. The owner of the registered mark (or "senior user") (Fabick, Inc., or "FI"), a small manufacturer of sealants, sued the "junior user" (JFTCO, Inc.), a larger distributor of Caterpillar equipment, for trademark infringement. In a mixed verdict, a jury found that JFTCO had violated the Lanham Act but had not committed common law infringement. FI sought an order permanently enjoining JFTCO from using the name "Fabick," but the district court entered limited injunctive relief requiring that JFTCO issue, for five years, disclaimers clarifying that it is not associated with FI. Both parties appealed. FI complains that the district court erred in setting remedies: it should have entered a broad permanent injunction against JFTCO, and further should have allowed FI to recover JFTCO's profits. JFTCO, in its counter-appeal, seeks reversal of the jury's finding that it violated the Lanham Act based on an allegedly erroneous jury instruction and the district court's refusal to overturn the jury's verdict as a matter of law. We now affirm on each issue.

Clarisha Benson v. Fannie May Confections Brands, Inc. No. 19-1032
Argued September 4, 2019 — Decided December 9, 2019
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 17 C 3519 — **Sara L. Ellis**, *Judge*.
Before WOOD, *Chief Judge*, and BAUER and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. Proving that almost anything can give rise to litigation, this case concerns chocolates that Clarisha Benson and Lorenzo Smith purchased at their local Fannie May stores in Chicago. Upon opening their boxes of candy, Benson and Smith were dismayed to find that the boxes were not brimming with goodies. Far from it: the boxes appeared to be only about half full. Believing that they had been duped, they sued Fannie May on behalf of themselves and a putative class, alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1– 505/12, and asserting claims for unjust enrichment and breach of implied contract. The plaintiffs contend that Fannie May's boxes of chocolate contain needless empty space, and that this practice misleads consumers. After allowing Benson and Smith to amend their complaint, the district court granted Fannie May's motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint with prejudice. The court found that the plaintiffs had not adequately pleaded a violation of the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C.
§§ 301–399, and that the FDCA preempted their state-law claims. We affirm the judgment, though on other grounds.

Jason Grant v. John Doe No. 18-2680
Submitted November 21, 2019 — Decided December 9, 2019
Case Type: Prisoner
Eastern District of Wisconsin. No. 18-cv-379-pp **— Pamela Pepper,** *Chief Judge*.
Before DIANE P. WOOD, *Chief Judge;* FRANK H. EASTERBROOK, *Circuit Judge;* DANIEL A. MANION, *Circuit Judge.*

ORDER

One week after his release from prison, Jason Grant experienced a psychotic episode during which he strangled and attempted to kill a woman. He entered a plea of not guilty by reason of mental defect to the resulting charges, and a state-court judge committed him to the custody of the Wisconsin Department of Health Services. Grant then sued a prison psychologist and other prison officials for deliberately failing to treat his serious mental illness. *See* 42 U.S.C. § 1983. The district court screened the complaint, 18 U.S.C. § 1915A(b), and dismissed it with prejudice for failure to state a claim. Because Grant cannot plausibly allege that committing a new crime after his release was a foreseeable consequence of his lack of treatment, we affirm.

Jeffrey Malkan v. American Bar Association No. 19-1958
Argued November 13, 2019 — Decided December 10, 2019
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 18 CV 7810 — **John Robert Blakey**, *Judge*.
Before WILLIAM J. BAUER, *Circuit Judge;* MICHAEL B. BRENNAN, *Circuit Judge;* MICHAEL Y. SCUDDER, *Circuit Judge.*

ORDER
After his contract as a clinical law professor was not renewed, Jeffrey Malkan brought, and lost, a federal suit for wrongful termination against the law school dean who fired him. Malkan then brought this suit against the American Bar Association, arguing the ABA had failed to enforce its own accreditation standards, which amounted to fraud and negligent misrepresentation against him. The district court concluded that Malkan lacked standing to sue under Article III of the U.S. Constitution because he did not allege an injury traceable to an action of the ABA. We agree and affirm the judgment, with one minor modification.

Louis Phillips v. Richard Spencer No. 18-3347
Argued November 14, 2019 — Decided December 10, 2019
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 15-cv-05721 — **Andrea R. Wood**, *Judge*.
Before DANIEL A. MANION, *Circuit Judge;* MICHAEL S. KANNE, *Circuit Judge;* DIANE S. SYKES, *Circuit Judge.*

ORDER
Louis Phillips, a former Navy police officer, sued the United States Navy for race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. He now appeals the district judge’s entry of summary judgment for the Navy. Because no reasonable jury could find that Phillips was fired because of his race or as retaliation for opposing race discrimination, we affirm.

CSI Worldwide, LLC v. Trumpf, Inc. No. 19-2189
Argued December 9, 2019 — Decided December 11, 2019
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 2018 CV 05900 — **Charles R. Norgle**, *Judge*.
Before EASTERBROOK, ROVNER, and SCUDDER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge*. TRUMPF Inc., the U.S. subsidiary of an international business, makes specialty tools such as precision laser cutters. Trade shows are among its selling venues, and it hired Lynch Exhibits to handle its appearance at the 2017 PABTECH show in Chicago. Lynch subcontracted with CSI Worldwide to provide some of the necessary services. CSI contends that it told TRUMPF that it was unsure of Lynch's reliability and would do the work only if TRUMPF paid it directly or guaranteed Lynch's payment. According to CSI, TRUMPF assented-though it did not sign any undertaking to that

effect. CSI did the work and billed Lynch, which did not pay. CSI filed an involuntary bankruptcy petition against Lynch, which soon filed a voluntary bankruptcy petition. CSI claimed approximately $530,000 as a creditor. It also filed this suit against TRUMPF under the diversity jurisdiction, seeking $530,000 on theories including unjust enrichment and promissory estoppel. The district court dismissed the suit on the pleadings, ruling that, by making a claim in Lynch's bankruptcy, CSI necessarily represented that Lynch is the sole debtor. The district court called its approach judicial estoppel… CSI may or may not have a good claim on the merits-and TRUMPF may or may not have a defense that it has paid what it owes. These matters must be resolved on remand. REVERSED AND REMANDED

Sauk Prairie Conservation Alli v. DOI No. 18-2213
Argued May 17, 2019 — Decided December 12, 2019
Case Type: Civil
Western District of Wisconsin. No. 17-cv-35 — **James D. Peterson**, *Chief Judge*.
Before RIPPLE, MANION, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. The National Park Service donated more than 3,000 acres in central Wisconsin to the state's Department of Natural Resources. The goal was to turn the site of a Cold War munitions plant into a state park designed for a variety of recreational uses. That land now makes up the Sauk Prairie Recreation Area ("Sauk Prairie Park"). The Sauk Prairie Conservation Alliance ("the Alliance"), an environmentalist group, sued to halt three activities now permitted at the park: dog training for hunting, off-road motorcycle riding, and helicopter drills conducted by the Wisconsin National Guard. The defendants include the Department of the Interior, the National Park Service, and several federal officers. The State of Wisconsin intervened. The Alliance invokes two federal statutes. The first is the Property and Administrative Services Act ("the Property Act"), which, among other things, controls the terms of deeds issued through the Federal Land to Parks Program, 40 U.S.C. § 550, the program that led to the creation of Sauk Prairie Park. The statute requires the federal government to enforce the terms of any deed it issues. And here, the relevant deeds provide that Wisconsin must use Sauk Prairie Park for its originally intended purposes. The Alliance argues that dog training and motorcycle riding are inconsistent with the park's original purposes because neither was mentioned in Wisconsin's initial application. So, the argument goes, the statute requires the National Park Service to enforce the deeds by taking action to end those uses. The Property Act also requires, with some important qualifications, that any land conveyed through the program must be conveyed for recreational purposes. The Alliance argues that this provision precludes military helicopter training. The second statute at issue is the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*. The Alliance claims that the federal defendants violated NEPA by failing to prepare an environmental-impact statement prior to approving these three uses. The district court entered summary judgment for the defendants on all claims, and we affirm.

George Burciaga v. Alex Moglia No. 19-2246
Argued December 2, 2019 — Decided December 13, 2019
Case Type: Bankruptcy from District Court
Northern District of Illinois, Eastern Division. No. 18 CV 5293 — **Manish S. Shah**, *Judge*.
Before BAUER, EASTERBROOK, and SYKES, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. George Burciaga lost his job in May 2018 and filed for bankruptcy a week later. On the date the bankruptcy proceeding began, Burciaga's former employer owed him approximately $24,000 for unused vacation time. Illinois, where Burciaga lives, treats vacation pay as a form of wages. 735 ILCS 5/12-801 (final paragraph, defining "wages" to include all compensation that an employer owes to an employee). Exemptions for debtors in Illinois rest on state law, for it has exercised its right under 11 U.S.C. §522(b)(2) to make local exemptions exclusive. See 735 ILCS 5/12-1201. Burciaga asked the district court to treat 85% of the vacation pay as exempt from creditors' claims. (Illinois permits creditors to reach 15% of unpaid wages but forbids debt collection from the rest. 735 ILCS 5/12-803.) Alex Moglia, the Chapter 7 Trustee, objected to this request. Both a bankruptcy judge and a

district judge sided with the Trustee. 602 B.R. 675 (N.D. Ill. 2019). The district judge concluded that unpaid wages are not exempt in bankruptcy… Because 85% of unpaid wages are exempt from creditors' claims in Illinois, and vacation pay is a form of wages, the decision of the district court is REVERSED.
