

# Case Law Update

**Jonathan M. Hoffman**

*Martin Bischoff LLP*

888 S.W. Fifth Ave., Suite 900

Portland, OR 97204

(503) 224-3113

[jhoffman@martinbischoff.com](mailto:jhoffman@martinbischoff.com)

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JONATHAN M. HOFFMAN is a senior partner in the firm Martin Bischoff LLP, where he has practiced for over 30 years. He specializes in civil litigation, primarily the defense of product liability and aviation defendants. He received an A.B. magna cum laude from Harvard and his J.D. from the University of Oregon. He was an honor law graduate, joining the Civil Division, Torts Section at the U.S. Department of Justice and subsequently, as an assistant U.S. attorney, before joining Martin Bischoff. He is licensed to practice in Oregon and Alaska. He is also a singer-songwriter, recording artist, currently working on his fourth CD, and he pledges not to sing any of his songs during his presentation except, perhaps, those relating to CAFA or to Kumho Tire.

The speaker owes thanks to the many other attorneys throughout the country who provided tremendous assistance in conducting the vast majority of the research and in most of the drafting of this paper. They are listed beginning on page 144–147. And the speaker owes special thanks to attorney Angela Allen of Ragsdale Liggett PLLC, Raleigh, NC, for her work arranging and coordinating all of the work of so many contributors.

# Case Law Update

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# Case Law Update

## I. How to Use This Paper

We asked contributors to identify and summarize the most important cases affecting product liability litigation in the state and federal courts within their respective circuits. Accordingly, the paper is organized by **Federal Circuits** (plus Canada), to make it easier for readers to have easy access to recent cases in the jurisdiction(s) where they practice. In addition, to facilitate access to cases by **topic**, we have also included an index, which follows the paper, listing the leading cases by topic, cross-referencing page numbers to facilitate access. The format and writing style varies somewhat from circuit to circuit because of the number of contributors and our desire to try to provide the most recent decisions possible.

## U.S. Supreme Court

The U.S. Supreme Court decided four cases in the past year that are likely to have an effect on product liability litigation.

*Walden v. Fiore*, 571 U.S. —, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014) (Specific Personal Jurisdiction)

*Walden* is the Court's first attempt to address specific personal jurisdiction since the Court's 4-2-3 plurality decision in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). Although the decision does not involve product liability, it was a unanimous decision. The case was argued on the same day as another important general jurisdiction case, *Daimler AG v. Bauman*, 571 U.S. —, —, 134 S.Ct. 746, 753, 187 L.Ed.2d 624 (2014), but the decision was not rendered until over a month after *Bauman*. Plaintiffs, professional gamblers and residents of Nevada, were returning home from a gambling trip. They departed Puerto Rico, carrying \$97,000 in their luggage. They were stopped at the gate in Atlanta by a deputized DEA agent, who had been alerted by authorities in Puerto Rico. He seized the money, and filed a probable cause affidavit in Georgia. Plaintiffs later got the money back, but filed a *Bivens* claim in federal court in Nevada, alleging that the DEA agent filed a false affidavit in Georgia, knowing it would adversely affect Plaintiffs in Nevada. The Nevada court dismissed for lack of personal jurisdiction, but the Ninth Circuit reversed. The U.S. Supreme Court unanimously reversed the Ninth Circuit. It held that the court must focus on *Defendant's contacts* with the forum State itself. The inquiry is not the defendant's contacts with persons who reside there. "...[T]he plaintiff "cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." The relationship must arise out of contacts that the "defendant himself " creates with the forum State. What matters is liberty of defendant, not the convenience of Plaintiff or third parties.

*Daimler AG v. Bauman*, 571 U.S. —, —, 134 S.Ct. 746, 753, 187 L.Ed.2d 624 (2014) (General Personal Jurisdiction)

*Daimler* was brought by 22 Argentine plaintiffs who sued Daimler—a German corporation—in the Northern District of California for alleged war crimes involving Daimler's Argentine subsidiary. Plaintiffs alleged that Daimler's subsidiary was complicit in abuses that occurred during the "Dirty War" in Argentina in the 1970s. Plaintiffs brought claims under the Alien Tort Statute, the Torture Victim Protection Act and California state law. Plaintiffs contended that Daimler was subject to general personal jurisdiction in California based on an "agency" theory in which the contacts of another Daimler subsidiary—Mercedes-Benz USA—could be imputed to Daimler. As in *Walden*, the District Court

dismissed, but the Ninth Circuit reversed, after first affirming on a 2-1 vote. Here, too, the Supreme Court unanimously reversed the Ninth Circuit, albeit with a concurrence from Justice Sotomayor. The Court rejected the Ninth Circuit’s “agency” test, saying that such a test “stacks the deck, for it will always yield a pro-jurisdiction answer.” It held that a foreign corporation is not subject to general jurisdiction wherever it has an in-state subsidiary or affiliate. It fortified its recent holding in *Goodyear*, that general jurisdiction over a corporation only exists in its state of incorporation and principal place of business. It acknowledged the possibility that “exceptional” cases may justify going beyond these two locations, but no such exception existed here.

*Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568 (2013).

Although decided in 2013, *Atlantic Marine* is an important decision for corporate defendants. It concerned the effect of a contractual forum selection clause on a motion to change venue. The Court held that such a clause is *not* a basis for dismissal under 28 USC §1406(a). Proper venue determined solely by 28 U.S.C. § 1391(b), not the agreements of the parties. However, such a clause IS enforceable under 28 U.S.C. § 1404(a) if transfer to another federal court and a forum non conveniens dismissal if to another state or foreign forum. Section 1404(a) merely codifies FNC within federal court system. “[f]or the convenience of parties and witnesses, in the interest of justice. . .”.

The Court held that a valid forum-selection clause, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. The effects of a valid forum selection clause is as follows: a) The deference ordinarily given to Plaintiff’s choice of forum merits no weight if contrary to the forum selection agreed to by the parties; b) The burden to establish a forum other than that agreed upon in advance is on party violating forum-selection clause; c) The Court should not consider arguments about the parties’ private interests—only public interests; d) perhaps most importantly, a § 1404(a) venue transfer “will not carry with it the original venue’s choice-of-law rules” if transfer is based on a forum-selection clause. This aspect of the decision narrows the long-standing *Van Dusen* rule, that traditionally provided that a § 1404(a) venue transfer required the transferee court to apply the whole law of the transferor court. When a valid forum selection clause has been agreed to by the parties, a district court should transfer the case “unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.”

*Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014)

The Mississippi Attorney General sued on behalf of state residents, seeking to redress injuries arising from price-fixing. The Attorney General’s lawsuit sought to certify a securities fraud class action against Halliburton. The

lower court certified the class, invoking *Basic v. Levinson*'s presumption of class-wide reliance based on the fraud-on-the-market theory. The Supreme Court granted certiorari to decide whether *Basic* should be overruled or modified. The Court held that the Mississippi Attorney General's lawsuit was not a "mass action" under CAFA.

The statute requires that there be 100 or more plaintiffs. Although there were more than 100 real parties in interest, there was only one plaintiff in this case.



## First Circuit

### Medical Monitoring

*Genereux v. Raytheon Co.*, 754 F.3d 51 (1st Cir. 2014)

Plaintiffs in this putative class action alleged they were negligently exposed to beryllium by Raytheon. No named plaintiff or class member had as yet developed Chronic Beryllium Disease (CBD), a very serious lung malady, but Plaintiff alleged that some might. Plaintiffs sought to compel Raytheon to establish a trust fund to finance appropriate medical monitoring.

Plaintiffs based their claim on Massachusetts tort law and, specifically, *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215, 914 N.E.2d 891 (2009). The class in *Donovan* shared a history of at least twenty pack-years of smoking, but none had as yet developed lung cancer. They sought to compel Defendant cigarette manufacturer to provide a court-supervised medical surveillance program for early cancer detection. In that case, the Massachusetts Supreme Judicial Court ruled that the cost of medical monitoring may be recoverable in a tort suit under Massachusetts law under certain specific conditions, the most significant of which is that the traditional tort requirement of injury must be met. Plaintiffs in *Donovan* met this standard by alleging that each class member had some subcellular or physiological injury that put him or her at an increased risk of developing cancer. The SJC expressly did not decide and left “for another day” whether, if a manufacturer exposes a person to a dangerous carcinogen, a cause of action for medical monitoring would lie even though no subcellular or other physiological change had yet occurred.

Raytheon moved for summary judgment in the *Genereux* case, and the motion was allowed. The primary argument of the Plaintiffs in *Genereux* in opposition to summary judgment and on appeal was that they fit within *Donovan*.

The pathogenesis of CBD begins with beryllium sensitization (BeS). Although BeS is regarded as an abnormal medical finding, it can be asymptomatic and is typically not treated. Nevertheless, persons with BeS should receive periodic clinical screenings because they have a high risk of developing CBD. Plaintiffs’ expert testified that BeS is the first manifestation of subcellular change resulting from beryllium exposure and opined that if the entire membership of the plaintiff class were tested, somewhere between one and twenty percent would be found to have BeS. This one to twenty percent likelihood put the entire class at an appreciably higher risk of contracting CBD than a randomly selected baseline population.

The First Circuit noted a large hole in the expert’s testimony which distinguished this case from *Donovan*. Plaintiffs’ expert could not say that any of the named Plaintiffs had actually developed BeS, nor could he identify any member of the class as being known to have BeS. . While the expert could opine

that Plaintiffs and the class members were at an increased risk, he could not say any had as yet suffered any harm. Under the cause of action recognized in *Donovan*, increased epidemiological risk of illness caused by exposure unaccompanied by some subcellular or other physiological change is not enough to permit recovery in tort. Thus, Plaintiffs' primary argument was unavailing.

Alternatively, Plaintiffs asked the First Circuit to rule on the issue the SJC had left "for another day," namely, whether an action for medical monitoring might lie without a showing of subcellular or other physiological change. The First Circuit refused to consider the issue. The Court catalogued the many instances in which Plaintiffs had assured the district court that they were not pursuing this theory. Having not raised the issue below, they could not raise it for the first time on appeal.

The last issue on appeal was the district court's order striking an expert's affidavit filed thirteen months after the deadline for expert disclosures. The First Circuit noted that a district court's choice of sanction for late submissions is reviewed under a deferential abuse of discretion standard. The court upheld the lower court's ruling striking the late filed affidavit: "Given the totality of the circumstances, it beggars credulity for the Plaintiffs to argue that the district court abused its discretion in striking the egregiously late [expert affidavit]."

### **Drug and Medical Device Litigation Safe Harbor Provision of State Consumer Protection Statutes**

*Marcus v. Forest Lab. Inc.*, No. 14-1290, pending before 1st Cir. as of Oct. 29, 2014

Case Status: Pending before the First Circuit; oral argument took place on November 5, 2014

This case concerns the anti-depressant drug Lexapro marketed and sold by the Defendants, Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc. (collectively, "Forest"). Plaintiffs alleged that Defendants violated California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law by misrepresenting and concealing material information about the efficacy of Lexapro in treating major depressive disorder (MDD) in pediatric patients. The district court granted Forest's motion to dismiss. Plaintiffs appealed, but the First Circuit has not yet decided the case. What follows is a summary of the district court's decision.

The action was originally filed in California, where the Plaintiffs resided and purchased Lexapro. As noted above, the complaint alleged violations of several California consumer protection statutes. At bottom, however, Plaintiffs claimed that Lexapro is ineffective for treatment of MDD in adolescents and that Defendants misrepresented and concealed material information about the efficacy

of Lexapro in such treatment. The case was transferred to the District of Massachusetts to become part of the Lexapro/Celexa MDL.

Forest moved to dismiss the case based on federal preemption and California's safe harbor rule. Concluding that the action was barred by the California safe harbor rule, the district court found that it need not reach the federal preemption issue.

The California safe harbor rule bars claims brought under California's unfair competition laws when another law clearly permits the allegedly actionable conduct. The rationale is that courts may not use the unfair competition laws to condemn actions the legislature permits. The district court ruled that Congress had charged the FDA with determining a drug's efficacy for a particular indication, and with approving the warning label. Forest obtained the approval of the FDA to market Lexapro for depression in adults in 2002, and in 2009 for MDD in adolescents, and approved the label for each indication. The FDA's actions, particularly, its action in approving the label for Lexapro, triggered the safe harbor provision and barred a claim that the label was false or misleading. Plaintiffs argued that two potential exceptions to the safe harbor rule applied, but the district court rejected those arguments. First, said the court, this case was distinguishable from those involving FDA regulation of food and homeopathic remedies, in which courts have found the safe harbor provision inapplicable. Second, this case was distinguishable from cases in which Plaintiffs argued that the practice in question violated federal law. Finally, Plaintiffs provided no justification for extending the holding of the Supreme Court in *Wyeth v. Levine*, 555 U.S. 555 (2009), namely, that FDA approval of a drug label does not necessarily preempt state-law failure to warn claims, to preclude state safe harbor defenses to claims arising under state consumer protection law and the court had found no authority permitting it to do so.

### **Manufacturer's Failure to Warn**

*Geshke v. CROCS, Inc.*, 740 F.3d 74 (1st Cir. 2014)

We begin with the First Circuit's succinct introduction to the case:

CROCS are odd looking shoes, known for their comfort. Plaintiff alleges that this reputation for comfort masks a hidden peril: the shoes present a heightened risk to the safety of wearers using escalators, and the manufacturer has failed to warn of this risk. The district court found these allegations unsupported and entered summary judgment accordingly.

The First Circuit affirmed. Plaintiff alleged that her 9-year old daughter was wearing CROCS when her right foot became caught in the side of a descending escalator, causing injury. In this suit against the manufacturer, she alleged negligent design, failure to warn, and breach of a implied warranty of merchantability. She alleged that CROCS are prone to being entrapped in

escalators; that the manufacturer knew of this risk; and that the manufacturer nonetheless failed to redesign the product or to provide adequate warnings.

She appealed the District Court's grant of summary judgment on her failure to warn and implied warranty claims. The First Circuit noted that under Massachusetts law claims for breach of an implied warranty of merchantability arising out of a supposed failure to warn were analogous to failure-to-warn claims grounded in negligence. Thus, the Court needed to examine only the failure to warn claim.

The court held that a manufacturer had a duty to warn foreseeable users of the risks inherent in the use of its product. Here the manufacturer did not have a duty to warn "unless the plaintiff can at least make a tenable showing that CROCS pose a heightened risk of escalator entrapment." In attempting to make this showing, Plaintiff pointed to four items of evidence, each of which the First Circuit rejected as inadequate proof of an increased risk of escalator entrapment. First, Plaintiff pointed to a dozen complaints between 2006 and 2009 by consumers who claimed to have caught a foot in an escalator while wearing CROCS. The First Circuit concluded that these brief anecdotal reports were so lacking in probative value that they could not support an inference that CROCS presented an increased risk of escalator entrapment. Second, Plaintiff pointed to a report by Japan's National Institute of Technology and Evaluation which concluded, after various tests, that resin sandals (CROCS are resin sandals) have "a tendency to become entrapped in escalators." But the First Circuit disposed of this second item because the district court had ruled this report inadmissible and Plaintiff had not appealed that ruling. The third item was the manufacturer's response to the Japanese report. It designed a new model of sandals for the Japanese market, and in an email the general manager of CROCS Japan said this was done because of the escalator issue and the Ministry's request that CROC sell new products which could reduce accidents. The First Circuit rejected this evidence because when "unmoored from the inadmissible report [it] is highly ambiguous" and would not support a "reasonable inference that CROCS sandals present a heightened risk of danger on escalators." The fourth item was "defendant's decision to include a generalized escalator safety warning on the hangtag of its sandals. The label exhorts purchasers to adhere to safe escalator-riding practices...." Plaintiff argued that the adoption of this warning shows that the manufacturer believed CROCS present an escalator safety issue. The court concluded the hangtag contained no admissions and was not sufficient evidence of an enhanced escalator risk. The Court observed in a footnote that neither party had briefed the issue of the admissibility of a post-accident warning to prove negligence, so it did not consider that issue.

We end with the First Circuit's succinct conclusion:

To sum up, the plaintiff's case hinges on demonstrating that the defendant's product was particularly dangerous on escalators. Yet even after full discovery, the plaintiff failed to adduce significantly probative evidence on this point sufficient to allow a reasonable jury to find in her

favor. Thus, she has not made the required showing of each and every element essential to her case.

### **District of Maine**

#### **Breach of Contract, Breach of Warranties Under the UCC, Economic Loss Doctrine, Punitive Damages**

*American Aerial Servs., Inc. v. Terex USA, LLC*, No. 2:12-CV-00361-JDL, 2014 WL 4060241 (D. Me. Aug. 15, 2014)

Plaintiff American Aerial Services, Inc. is in the equipment rental business. It owns a fleet of cranes that it rents out; it does not itself otherwise use the cranes. Defendant Terex USA, LLC, is a manufacturer of large equipment, including cranes. Empire Crane Company is an authorized dealer of Terex for the northeast United States. American Aerial approached Empire about the purchase of a particular Terex crane. Empire said it knew that such a crane was at the Terex factory, having just come off the line. Terex bought the crane for \$615,000. It turned out that the crane had not been at Terex, nor had it just come off the line. In fact, Terex had built the crane five months earlier and had sold it to Cropac Equipment, Inc., a Terex distributor, and the crane was sitting on Cropac's lot.

Shortly after American Aerial took delivery of the crane in Maine, a technician from the dealer, Empire, went to Maine to perform a delivery inspection. He determined that the crane was 22 quarts low on coolant and had likely been driven from Iowa to Maine in that condition. The crane also had a shredded serpentine belt in the engine. That very day, American Aerial wrote to Empire "revoking the acceptance" of the crane. There followed 10 months of numerous complaints from American Aerial to Empire about a laundry list of problems with the crane, inspections by the parties or their consultants, exchanges of emails, some repairs, and ultimately a lack of a resolution of the problems to the satisfaction of American Aerial. This suit followed. Both the manufacturer and the dealer moved for summary judgment. After a tour de force of legal analysis of any number of issues, the district court granted Defendants' motions for summary judgment with regard to the claims for breach of contract, breach of the implied warranty of fitness for a particular purpose, fraud, and punitive damages. The court denied in part Defendants' motion with regard to the claim of breach of the warranty of merchantability.

To resolve the breach of contract claim, the court had to determine what constituted a "new" crane. It determined that it is one which has not yet been put into use. Because both the distributor, Cropac, and the dealer, Empire, had purchased the crane to resell it, it had not yet been put into use, and thus there was no breach of contract. To resolve the claim for breach of the implied warranty of merchantability, the court had to address several distinct issues. First, the court found that the facts did not support Terex's claim that it had had been deprived of an opportunity to repair. Terex also claims it had not received adequate notice of

the breach of warranty. The court disagreed and concluded that American Aerial had given notice within a reasonable time as required by the UCC. Terex asserted that it excluded implied warranties when it sold the crane to Cropac and those sales terms also applied to the sale to American Aerial. The court ruled that, under Maine law, a limitation or disclaimer of warranty is ineffective unless it has been received by the buyer against whom the provisions are sought to be imposed (here, American Aerial). There was no evidence that American Aerial received or agreed to the terms of the contract between Terex and Cropac.

For the same reasons, the court rejected Terex's argument that its Limited Product Warranty applied. The court also rejected arguments that the implied warranty of merchantability had been excluded, concluding that the language Defendants pointed to was not "conspicuous" as required by the § 2-316(2) of the UCC, and did not fit within terms like "as is," "with all faults," or "other language which in common understanding calls the buyer's attention to the exclusion of warranties," under § 2-316(3)(a). The court dismissed the claim for breach of warranty of fitness for a particular purpose because American Aerial had not shown that the use of a crane in an equipment rental business was outside the ordinary use of such equipment. The fraud claims were barred by the economic loss doctrine. The punitive damages claims were dismissed because they require a showing that Defendants engaged in tortious conduct with malice. Given the dismissal of the fraud claim, there was no tortious conduct on which such damages could be based.

### **Asbestos Litigation**

*Soucy v. Briggs & Stratton Corp.*, No. 1:13-CV-00068-NT, 2014 WL 794570, at \*1 (D. Me. Feb. 27, 2014)

Decedent, a small engine mechanic, was exposed to asbestos in the course of his work and ultimately died of mesothelioma. Plaintiff, filing suit individually and on behalf of decedent's estate, alleged that the eight defendant manufacturers of products used on the job by the decedent failed to adequately warn of the dangers of asbestos exposure from their asbestos-containing components. Defendant Toro moved to dismiss Plaintiff's complaint for failure to state a claim. The district court denied the motion.

Toro argued that the complaint should be dismissed for want of specificity as to the products at issue, the nature of decedent's exposure, causation as to his illness and eventual death, how the training materials were lacking, and what warning would have sufficed. The court distinguished three cases, involving implantable pain pumps, in which dismissals were granted. The plaintiffs in those cases could not identify the pump's manufacturer, so they sued several manufacturers. The district court distinguished these cases because Plaintiff's decedent was actually exposed to each of the Defendants' products.

The court held that Plaintiff need not “isolate” this defendant’s products as the source of the harm. Further, it noted that Plaintiff may have to point to specific Toro products later, but need not do so to survive a 12(b)(6) motion. Finally, the court observed that a plaintiff need not allege adequate alternative warnings to state a claim for failure to warn in Maine, and denied the motion to dismiss.

**Partial Summary Judgment Based on Failure to Read Warning  
District Judge’s Decision Affirming the Recommended Decision of the  
Magistrate Judge**

*Veilleux v. Genie Indus.*, No. 1:13-CV-00029-NT, 2014 WL 3548983, at \*1 (D. Me. July 17, 2014)

Plaintiffs brought suit alleging inadequate warnings on an elevated work platform or personnel lift manufactured by the Defendant, Genie. The manufacturer moved for partial summary judgment asserting that Plaintiffs cannot recover on their failure to warn claim because Mr. Veilleux testified that he did not read the warnings that were provided, and had not read warnings on other products. The magistrate judge recommended denial of the motion. He concluded that, given the testimony of Plaintiffs’ expert about the adequacy, prominence and conspicuity of the warnings, and the testimony of Mr. Veillux, a reasonable fact-finder could conclude that, had the warnings satisfied the applicable standard as to size, color, and content, Mr. Veillux likely would have read the warnings and acted in accordance with their instructions. Moreover, although Mr. Veillux testified he had not read other warnings, one cannot conclude as a matter of law that Mr. Veillux would not have read a warning as prominent as the warning Plaintiffs’ experts maintained was required.

The magistrate judge denied Defendant’s motion to strike the affidavit of Plaintiffs’ expert. The request to strike the affidavit asserted that the affidavit (1) is conclusory, self-serving, and unsupported; (2) contradicts prior testimony; and (3) was not served in timely fashion. The magistrate judge addressed each of these contentions and denied the motion to strike.

**District of Puerto Rico**

*(While we have included the following case from the District of Puerto Rico, decisions from Puerto Rico pose unique circumstances given the mix of civil and common law applicable in cases from this jurisdiction.)*

## **Automobiles**

### **Third Restatement of Torts**

*Quilez-Velar v. Ox Bodies, Inc.*, No. CIV. 12-1780 SCC, 2014 WL 2003813 (D.P.R. May 16, 2014)

This case stems from a car accident involving a truck manufactured by the Defendant in which the victim died after crashing into said truck. Decedent's survivors sued the manufacturer, alleging that the truck was defective. The victim hit the truck while descending a hill in her own vehicle. The hood of the victim's vehicle underrode the truck and the truck's bumper penetrated the victim's driver's side roof and windshield. Defendants moved for summary judgment on Plaintiffs' strict liability and negligence claims.

In their motion, Defendant argued that the *Larsen* crashworthiness doctrine, which arose from the 1968 seminal case, *Larsen v. Gen. Motors Corp.*, 391 F. 2d 495, 503 (8th Cir. 1968) did not exist under Puerto Rico law. In *Larsen*, the Eighth Circuit, applying Minnesota law, held that automobile manufacturers have a duty to design their products to be safe in the event of foreseeable accidents, including collisions. The District Court found that although the Puerto Rico Supreme Court never explicitly adopted *Larsen*, Puerto Rico looks to California Supreme Court precedent and California has unambiguously followed *Larsen*, thereby concluding that the crashworthiness doctrine exists under Puerto Rico law.

Defendant also argued that Puerto Rico does not recognize a duty of a manufacturer to manufacture or design a vehicle that was safe *to crash into*. However, the District Court held that despite interpretations of *Larsen* only applying to manufacturers' duty to protect against reasonably foreseeable harms to "users" of their products, the better rule – and one favored by the Restatement Third of Torts – holds that the manufacturer has a duty that is coextensive with the foreseeability of the harm. The Court concluded by stating, "[w]e perceive of no sound reason . . . why the manufacturer should not be held to a reasonable duty of care in the design of its rear bumpers so as to 'minimize the effects of accidents' to those who collide with its vehicles."

Similarly, the court denied Defendant's motion for summary judgment on Plaintiffs' negligence claim because the court believed the Puerto Rico Supreme Court would not rely on a rule that found no duty for manufacturers to make their vehicles safe for third parties to strike from the outside. Instead, under Puerto Rico law, the plaintiff must prove a breach of duty on the part of Defendant and this duty is breached when a person's actions "create reasonable foreseeable risks" – thus making foreseeability the linchpin for determining the duty of an actor. Therefore, the court denied Defendant's motion for summary judgment as to both strict liability and negligent design.



## Second Circuit

### Tort Reform/Third Restatement of Torts

#### Connecticut

*Theodore v. Lifeline Sys. Co.*, HHDCV 126029978S, 2014 Conn. Super. LEXIS 2069 (Conn. Super. Ct. Aug. 19, 2014)

Plaintiff brought suit amongst, *inter alia*, the manufacturer of a home emergency monitoring system and its corporate relatives alleging that a design defect in the monitoring system was the proximate cause of Plaintiff's death after a fall in her home when help failed to arrive. The trial court granted Defendants' motion for summary judgment on Plaintiff's common-law negligence and recklessness claims, holding these were precluded by the Connecticut Products Liability Act, Conn. General Statutes §52-572m *et seq.*, and also granted summary judgment in favor of the corporate parent Defendants, concluding that these parties were not "manufacturers" or "sellers" as defined in the CPLA. Plaintiffs' CPLA claims against the manufacturer itself were permitted to go forward, as there were genuine issues of fact as to causation.

*Beyer v. Anchor Insulation Co.*, No. 13-cv-1576, 2014 U.S. Dist. LEXIS 152578 (D. Conn. Oct. 28, 2014)

Plaintiffs brought claims under Connecticut Products Liability Act and Connecticut Unfair Trade Practices Act alleging that Defendants failed to warn of the risks of noxious fumes associated with their spray insulation products. After initially dismissing Plaintiffs' CUTPA claims as duplicative of the CPLA failure to warn claims, and thus barred by CPLA's exclusivity provision, Plaintiffs amended their complaint to allege a separate and distinct financial injury associated with Defendants' alleged efforts to extract higher prices for their products by disseminating misrepresentations about their safety. Because these claims were based on "new facts" known to Plaintiffs at the time they initially filed suit, the trial court held that Fed. R. Civ. P. 15's relation-back doctrine was inapplicable and the re-pled CPLA claims were barred by the statute's three-year limitations period.

## Preemption

### New York

*Bertini v. Smith & Nephew, Inc.*, 8 F. Supp. 3d 246 (E.D.N.Y. 2014)

Defendant manufacturer of an artificial hip system successfully moved to dismiss failure to warn and design defect claims based on preemption. The device was originally approved through a 510(k) premarket clearance process, but the metal liner primarily at issue in the case received premarket approval for use in a different hip system. The liner was subject to a recall by Defendant the year after Plaintiff's surgery.

The court concluded that because the portion of the device primarily at issue, the metal liner, had received premarket approval, the preemption analysis would apply to the whole device and not just to claims relating to the component, and rejected Plaintiffs' argument that preemption should not apply because the metal liner was not approved for use in the particular hip system at issue. The court reasoned that the preemption analysis should focus on the federal requirements applicable to the device itself and not to its use and that the analysis does not change just because the device is being used off-label.

*Tansey v. Cochlear Ltd.*, No. 13-CV-4628, 2014 U.S. Dist. LEXIS 138250 (E.D.N.Y. Sept. 26, 2014)

Defendants, manufacturers and sellers of Class III cochlear implants, moved to dismiss the complaint on multiple grounds, including federal preemption of Plaintiffs' state tort claims. Relying on *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), the court did not find preemption as to Plaintiff's manufacturing defect claim because the complaint sufficiently alleged that the device deviated from the FDA-approved plan. However, the court did find that Plaintiff's design defect claim was preempted because the complaint alleged that the device as designed posed a substantial likelihood of harm, directly challenging the FDA's approval.

*Cordova v. Smith & Nephew, Inc.*, No 14-CV-351, 2014 U.S. Dist. LEXIS 104956 (E.D.N.Y. July 30, 2014), CCH Prod. Liab. Rep. P19, 442

Defendant artificial hip manufacturer successfully moved to dismiss Plaintiff's allegations regarding a Class III artificial hip device on the basis of preemption. The FDA issued a warning letter to Defendant that the devices manufactured at a plant in Germany were adulterated because they were not being produced in conformity with the Current Good Manufacturing Practice requirements set forth in regulation, leading Defendant to issue a recall. Defendant did not move to dismiss the manufacturing defect claims against it.

The court found the design defect claims and warning claims to be preempted because there was no allegation that the design of the device or the

warnings differed from what was approved by the FDA. The court also found it significant that the failure to warn claim was not based on any violation of a federal requirement. The court found that the express warranty claim was not preempted to the extent that it was based on a manufacturing defect. The court nevertheless dismissed the claim without prejudice because it was not pled in a way to allow the court to determine whether it was based on a manufacturing defect. The remaining claims for breach of implied warranty, negligence, and consortium were all dismissed as preempted to the extent that they were based on a design defect or failure to warn claims.

*Franzese v. St. Jude Med., Inc.*, 13-CV-3203, 2014 U.S. Dist. LEXIS 85449 (E.D.N.Y. June 23, 2014), CCH Prod. Liab. Rep. P19, 412

Defendant manufacturer of a Class III implantable defibrillator successfully moved to dismiss manufacturing, design defect, and implied warranty claims on preemption grounds. FDA issued a warning letter following Plaintiff's surgery based on various Current Good Manufacturing Practice ("CGMP") violations.

The court found the manufacturing claim to be preempted because the complaint alleged only that the devices were not manufactured in conformity with the CGMP requirements, but did not also reference other federal regulations or the premarket approval requirements. The court concluded that a violation of the CGMP's alone was insufficient to avoid preemption because the CGMP's do not identify a federal law that is specific to the medical device at issue. The design defect and implied warranty claims were dismissed for failure to plead how the devices deviated from federal law after their premarket approval. The court also held that the express warranty claim was preempted to the extent that it rested on FDA approved packaging materials. The court dismissed the warning claim for failure to state a claim since the FDA warning letter regarding manufacturing violations was issued following his surgery.

*Amos v. Biogen Idec Inc.*, No. 13-CV-6375T, 2014 U.S. Dist. LEXIS 87178 (W.D.N.Y. June 25, 2014)

Defendant prescription drug manufacturer successfully moved to dismiss design defect claims as preempted. The court concluded that *Mutual Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013) required a finding of preemption with regard to the design defect claims (sounding both in strict liability and negligence), on the basis that "because a drug manufacturer [can] not simultaneously comply with FDA requirements mandating the specific design of an approved drug and state law requirements mandating that the design be altered, the state-law requirements [are] preempted by federal law."

*Burkett v. Smith & Nephew GmbH*, No. CV 12-4895, 2014 U.S. Dist. LEXIS 43995 (E.D.N.Y. Mar. 31, 2014)

Defendant artificial hip manufacturer successfully moved to dismiss Plaintiff's allegations regarding a Class III artificial hip device, primarily on the basis of preemption. FDA issued a warning letter to Defendant manufacturer that the devices manufactured at one of its plants in Germany were adulterated because they were not being produced in conformity with the CGMP requirements set forth in the regulation. Defendant manufacturer, in turn, issued a recall.

In concluding that Plaintiff's claims were preempted or failed to state a claim the court observed that while Plaintiff argued that her design defect claims were based on failures to comply with federal law enacted following the premarket approval, she cited nothing beyond the warning letter, which dealt only with manufacturing issues. The court also found the manufacturing claim to be deficient for failure to allege a violation of specific federal requirements applicable to the device. Her fraudulent misrepresentation and her GBL § 349 deceptive practices claim failed for similar reasons. Plaintiff's express warranty claims were also preempted to the extent that they relied on FDA-approved material, and failed to identify any other marketing materials. Implied warranty, negligence, and unjust enrichment claims were dismissed for the same reasons. The court observed that Plaintiff arguably could have stated a failure to warn claim based on unapproved alterations to the device that were made following FDA approval, but failed to do so sufficiently in her complaint.

### Connecticut

*McConologue v. Smith & Nephew, Inc.*, 8 F. Supp. 3d 93 (D. Conn. 2014).

Defendant manufacturer of hip replacement system using a ceramic liner moved to dismiss based on preemption. The court rejected the argument that premarket approval of the device warranted wholesale dismissal of all claims under *Riegel*. The court ultimately concluded that Plaintiff pled a plausible claim for manufacturing defect based on violation of federal standards, but rejected Plaintiff's argument that the manufacturing defect nullified FDA approval for the purposes of his design defect and warning claims. The court did, however, accept Plaintiff's argument that the manufacturing defect supported a negligent misrepresentation claim because the FDA-approved warnings were intended for use only with conforming devices.

*Simoneau v. Stryker Corp.*, No. 13-CV-1200, 2014 U.S. Dist. LEXIS 43137 (D. Conn. Mar. 31, 2014), CCH Prod. Liab. Rep. P19,373

Defendant hip implant manufacturer was partially successful in arguing preemption on a motion to dismiss. The hip implant device is a Class III device that received premarket approval. The FDA later issued two warning letters regarding manufacturing issues and concluded the device was adulterated, causing Defendant to issue multiple recalls.

The court held that Plaintiff's manufacturing defect theory was not preempted because Plaintiffs based their claims on the FDA's warning letter, subsequent finding of adulteration, and Defendant's recalls. The court rejected Defendants' argument that Plaintiff needed to cite specific federal regulations and that the CGMP's were insufficient to defeat preemption. The court further reasoned that premarket approval materials are largely kept confidential and so are unavailable prior to discovery. The court found that Plaintiff's remaining product liability theories were preempted or inadequately plead to the extent that they did not involve the manufacturing defect.

### **Market Share or Other New Theories of Liability**

#### **New York**

*Sahu v. Union Carbide Corp.*, No. 07-cv-2156, 2014 U.S. Dist. LEXIS 105019 (S.D.N.Y. July 30, 2014)

Plaintiffs alleged that Defendants caused massive contamination of the soil and drinking water supply in the vicinity of a former chemical plant. Plaintiffs alleged that toxic and carcinogenic chemicals emanated and spread through a common groundwater aquifer from the land and premises of the former plant operated from 1969 to 1984 by UCIL, of which Defendant UCC was then a majority owner.

The court rejected the argument that the Second Circuit's decision in *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013), 77 ERC (BNA) 1254, 43 ELR 20171, cert. denied, 134 S. Ct. 1877, 188 L. Ed. 2d 948 (2014) "compels a new, more generous legal standard that is different than the one used by this Court and the Second Circuit in *Sahu I*." The court reasoned that *Sahu I* can be "squared with" the legal test in *In re MTBE* because "no reasonable juror could find that UCC participated in the creation of" the alleged nuisance. Specifically, the court rejected the theory that UCC could be found liable because UCC's MIC process design was a substantial factor in creating pollution. The court concluded that although the MIC process was designed by UCC, the task of designing and providing facilities for the disposal of waste was reserved to its former affiliate UCIL. The court concluded that absent participation in the design of facilities for the disposal of waste, UCC could not have been a "substantial factor" in creating the injury alleged by the *Sahu I* plaintiffs.

#### **Tobacco**

#### **New York**

*Caronia v. Philip Morris USA, Inc.*, 748 F.3d 454 (2d Cir. 2014)

Plaintiffs, healthy smokers or former smokers, brought claims against cigarette manufacturer under traditional tort and breach-of-warranty theories, as well as independent equitable claims for medical monitoring with respect to increased risk of future disease. In the Second Circuit opinion reported at 715 F.3d 417 (2013), CCH Prod. Liab. Rep. P19,096, the dismissal of Plaintiffs' traditional claims was affirmed, and questions as to the existence of an independent equitable cause of action under New York law for medical monitoring were certified to the New York Court of Appeals. Based on that Court's response that New York does not recognize such a cause of action, *see Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 982 N.Y.S.2d 40 (2013), 5 N.E.3d 11, CCH Prod. Liab. Rep. P19,295 the Second Circuit affirmed the dismissal of Plaintiffs' medical monitoring claims.

### Connecticut

*Bifolck v. Philip Morris, Inc.*, No. 06-cv-1768, 2014 U.S. Dist. LEXIS 18797 (D. Conn. Feb. 14, 2014), CCH Prod. Liab. Rep. P19,327

Plaintiff brought suit under the Connecticut Products Liability Act (CPLA) alleging the death of his wife was caused by, *inter alia*, Philip Morris's cigarettes being defectively designed (in that they contained carcinogenic materials in addition to nicotine), and negligently designed (in that Philip Morris failed to exercise ordinary care in designing cigarettes that contained addictive toxins). After noting that the issue of whether § 402A of the Restatement (Second) of Torts would bar the design defect claim was already before the Connecticut Supreme Court on certification from the Second Circuit, *see Izzarelli v. R.J. Reynolds Tobacco Co.*, 731 F.3d 164, 169 (2d Cir. 2013), CCH Prod. Liab. Rep. P19,221, the district court certified two additional questions to the Connecticut Supreme Court: (1) "Does section 402A of the Restatement (Second) of Torts (and Comment i to that provision) apply to a product liability claim for negligence under the CPLA"; and (2) "Does Connecticut's common law rule of punitive damages, as articulated in *Waterbury Petroleum Prods., Inc. v. Canaan Oil & Fuel Co.*, 477 A.2d 988 (1984), 193 Conn. 208 (1984) apply to an award of statutory punitive damages pursuant to Conn. Gen. Stat. § 52-240b, the punitive damages provision of the CPLA?"

## Connecticut

*White v. Mazda Motor of Am., Inc.*, 313 Conn. 610, 99 A.3d 1079 (2014)

This case arose from a fire in an almost-new Mazda 3 automobile. While driving home from work, Plaintiff smelled gasoline, pulled over, and shut off the car, but it caught fire. Then incident occurred approximately one month after the Plaintiff purchased the vehicle as new and had driven it about 2,800 miles. Plaintiff claimed personal injury and property damage. He alleged a specific defect in the design of the vehicle's fuel system. He retained one expert, a fire cause and origin expert, who opined that the fire was caused a poorly designed fuel clip or gasket in or on the vehicle fuel line failed and caused the fire. When deposed, however, the expert declined to offer an opinion that the vehicle was defective, because that issue was beyond his area of expertise. Mazda moved for summary judgment. The trial judge determined that Plaintiff did not present competent evidence to create a genuine issue of material fact and granted Defendants' motion for summary judgment. Plaintiff belatedly attempted to save his case by arguing that the evidence created an issue of fact over whether the car suffered from an indeterminate defect. He was unsuccessful in the trial court, and he appealed. In a 2011 decision, Connecticut's intermediate court affirmed the trial court based on Plaintiff's failure to raise the issue properly in the trial court.

The Connecticut Supreme Court accepted review on two questions: 1) whether the Appellate Court properly conclude that the Plaintiff had failed to raise the malfunction theory claim at trial; and 2) if not, did Plaintiff present a prima facie case under the 'malfunction theory' of products liability. The Court affirmed in a 4-2 decision.

The Court affirmed based on the first issue: Plaintiff's failure to plead or raise the malfunction claim in a timely fashion. However, in so doing, the majority opinion advanced three propositions of considerable benefit to product manufacturers.

First, it made clear that a malfunction claim must be pled, and that it was not sufficient to use a malfunction claim as a fallback for a failed claim of a specific defect. "To put the defendants on notice that the plaintiff intended to pursue an alternative theory of liability under the malfunction theory, the plaintiff needed to plead this theory in his amended complaint." A product liability claim under the malfunction theory "is distinct from an ordinary product liability claim. . . . A plaintiff must allege facts to put the trial court and the defendant on notice that the plaintiff intends to pursue his claim under this alternative burden of proof."

Second, it reiterated that it is the plaintiff's burden to exclude other plausible theories the might explain the incident. Plaintiff's failure to plead a malfunction claim prejudiced Mazda by making it harder for Mazda to investigate and conduct discovery to identify other plausible explanations for the fire.

Third, in a footnote, the court reiterated the analysis in a 2011 decision that the malfunction theory is "not an alternative to expert testimony, nor is it proven simply by the expectations of the consumer." The court added, "The plaintiff therefore did not raise a malfunction theory argument merely by asserting that he did not need to present expert testimony to prove proximate cause." The majority opinion also rejected an assertion from the dissenting opinion, that "plaintiff could prove a design defect through the malfunction theory." This assertion, the majority stated:

further demonstrates the dissent's misunderstanding of the malfunction theory. A design defect theory typically is based on a claim that a product harbored a specific problem due to its design, and such a claim is proven through a review of the plans of a product and its exemplars. The malfunction theory, however, does not involve a claim of a specific defect, whether the result of faulty design or manufacturing.

## **Drug and Medical Device Litigation**

### **New York**

*Bee v. Novartis Pharms. Corp.*, No 12-CV-1421, 2014 U.S. Dist. LEXIS 64309 (E.D.N.Y. May 9, 2014)

Married Plaintiffs brought suit against prescription drug manufacturer alleging various product liability claims, including failure to warn. Plaintiff's physician prescribed him the drug for an off-label use.

In denying summary judgment, the court held that, with regard to duty to warn, under New York law, an off-label user may still be a reasonably foreseeable user, such that the drug manufacturer has a duty to warn of known risks. The court distinguished off-label use, which is not prohibited by law, from situations where a label restricts use of the drug to only the intended uses listed. The court then concluded that there were issues of fact both as to whether the harm Plaintiff suffered was a reasonably foreseeable risk of using the drugs, and when Defendant became aware of the risk. As to causation, the court concluded that there was an issue of fact as to the treating physician's independent knowledge of the drugs' risk or whether the physician or Plaintiff would have heeded warnings. The court reasoned that the fact that the prescribing physician continues to use the medication at issue is not dispositive because it does not conclusively show that the physician would not have changed Plaintiff's treatment or altered the drug regimen in some way. The court also accepted, for the purposes of the motion,



that the learned intermediary doctrine applied to other physicians who were treating Plaintiff as well, even though they were not the prescribing physician, meaning that Defendant had a duty to warn them of foreseeable risks as well.

*Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis US LLP*, No. 08-CV-179, 20 F. Supp. 2d 305 (E.D.N.Y. 2014)

Plaintiff health benefit providers brought a class action based on RICO, New York's General Business Law §349 "deceptive practices," statute, and unjust enrichment against Defendant drug manufacturer for misrepresenting the safety and efficacy of a prescription antibiotic it marketed. Plaintiffs alleged that Defendant concealed problems with a clinical study of the drug, and then falsely represented that the study had been conducted appropriately, and that the drug's safety and efficacy was similar to other antibiotics. FDA approved three indications for the drug based on a review of the allegedly false study. FDA eventually withdrew approval for two of the indications following adverse reactions in patients.

The court dismissed the RICO claims, reasoning that the prescribing physicians' decisions to use the drug were based on multiple factors—not all of them safety related—and that without individualized proof of physician prescribing decisions, the causal chain between the allegedly fraudulent study and the decision to prescribe the medication is too attenuated to support a RICO claim. The court did allow that there might be some instances where the health risks of a drug are so severe that safety considerations might be the sole determinant of a physician's decision to use the drug. Here, the evidence showed that doctors continued to prescribe the antibiotic even after the FDA issued a public health advisory.

As to the GBL claim, the court held that the conduct was consumer-orientated on two grounds: 1) the alleged wrongdoing was a marketing scheme aimed at the consuming public; and 2) the alleged misrepresentations were "calculated to infect the [FDA]'s decision-making processes" to the detriment of consumers. However, as with the RICO claims, the court found that Plaintiffs could not show that the fraud caused them actual injury. The court also dismissed the unjust enrichment claim because there was no evidence that any patient actually suffered harm or found the drug ineffective, and in any event, if there were, such compensation would be more appropriately awarded to the patients themselves.

### **Connecticut**

*Provost-Daar v. Merz N. Am., Inc.*, No. CV136037872S, 2014 Conn. Super. LEXIS 411 (Conn. Super. Ct. Feb. 24, 2014)

Defendant cosmetic gel manufacturer successfully moved to strike Plaintiff's Connecticut Unfair Trade Practices Act ("CUTPA") claim. The

holding analyzes the interplay between the Connecticut Product Liability Act (“CPLA”) and CUTPA. Defendant argued that the CUTPA claim was barred by an exclusivity provision in CPLA, which makes that statute the exclusive remedy for injury caused by a defective product. Here, the court found Plaintiff’s CUTPA claim insufficient where it incorporated her CPLA claim and was based on misrepresentations about the safety of the product. The court further held that Plaintiff failed to plead sufficient facts to show that any misrepresentation resulted in a financial loss to her separate from her CPLA claims.

### **Vermont**

*Drake v. Allergan, Inc.*, No. 13-cv-234, 2014 U.S. Dist. LEXIS 154979 (D. Vt. Oct. 31, 2014)

In a case involving off-label use of Botox to treat pediatric spasticity in the legs, the court denied Defendant drug manufacturer’s motion for partial summary judgment on failure to warn, negligence, and violations of the Vermont Consumer Fraud Act. Plaintiffs alleged that Defendant failed to adequately warn about dosages in children in excess of 8 units/kg of body weight, despite having internally concluded that dosages should not generally exceed that amount in children.

Defendant argued that Plaintiffs failed to show causation because the evidence showed the treating physician had been using Botox to treat pediatric spasticity for years and routinely used dosages between 10 and 15 u/kg based on his own experience. Defendant sought to rely on the learned intermediary doctrine, which has not been either accepted or rejected by the Vermont Supreme Court. The court concluded that it was unnecessary to address the issue of whether the doctrine applies, because issues of fact remained about whether the treating physician would have acted differently with a warning that doses above 8 u/kg are unsafe. Although Vermont law presumes that a warning will be read and heeded, and the court concluded that the evidence demonstrated factual ambiguity as to both the physician’s and Plaintiffs’ reaction had the warnings been passed on to them. The court also concluded that there were issues of fact regarding the adequacy of the warnings and whether Defendant targeted the physician to promote off-label use.

### **Class Action Fairness Act**

#### **New York**

*Cutrone v. Mortg. Elec. Registration Sys.*, 749 F.3d 137, 148 (2d Cir. 2014)

Defendant-appellant electronic mortgage registration company, appealed from the district court’s order to remand the case to state court on the ground that notice of removal was untimely. The Second Circuit held that, in CAFA cases, the 30-day removal periods of 28 U.S.C. §§ 1446(b)(1) and (b)(3) are not triggered until the Plaintiff serves the defendant with an initial pleading or other

document that explicitly specifies the amount of monetary damages sought or sets forth facts from which an amount in controversy in excess of \$5,000,000 could be ascertained. They also held that, where the documents fail to trigger the removal periods of 28 U.S.C. §§ 1446(b)(1) and (b)(3), a defendant may remove a case when, upon its own independent investigation, it determines that the case is removable; thus, the 30-day removal periods of 28 U.S.C. §§ 1446(b)(1) and (b)(3) are not the exclusive authorizations of removal in CAFA cases. Here, Plaintiffs never served MERS with a complaint or subsequent document explicitly stating the amount in controversy or providing MERS with sufficient information to conclude the threshold amount in controversy was satisfied. Therefore, the removal clocks of 28 U.S.C. §§ 1446(b)(1) and (b)(3) did not commence. After MERS determined upon its independent investigation that 28 U.S.C. § 1332(d) conveyed CAFA federal jurisdiction, it properly removed the case by alleging facts adequate to establish the amount in controversy in its notice of removal.

*In re Standard & Poor's Rating Agency Litig.*, No. 13-MD-2446, 2014 U.S. Dist. LEXIS 76163, 60-61 (S.D.N.Y. June 3, 2014)

In a multidistrict litigation proceeding, comprised of nineteen cases, between States and the District of Columbia and three a national credit-rating agencies, the court remanded the cases back to state court for a lack of federal jurisdiction. The court found a lack of complete diversity and reasoned that arguments regarding the propriety of the removal as a “mass action” under CAFA, had been mooted by the Supreme Court’s decision in *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014) (“Hood”). The court explained that in that case, the Supreme Court held that a “mass action” under CAFA “must involve monetary claims brought by 100 or more persons who propose to try those claims jointly as *named* plaintiffs...” Relying on the Supreme Court’s ruling that CAFA’s mass action provision does not “include[] suits brought by fewer than 100 named plaintiffs on the theory that there may be 100 or more unnamed persons who are real parties in interest as beneficiaries to any of the plaintiffs’ claims” the court determined removal would be invalid in the instant action.

### **New York**

*Koch v. Greenberg*, No. 07-cv-9600, 2014 U.S. Dist. LEXIS 44581 (S.D.N.Y. Mar. 31, 2014)

Defendant wine merchant sold 24 bottles of counterfeit wine. After discovery of the deception, Plaintiff brought suit alleging common law fraud and claims under N.Y. GBL §§ 349 and 350. The trial was bifurcated into two phases, with the first encompassing liability and the second addressing the claim for punitive damages associated with the fraud allegations. The jury found in favor of Plaintiff on all claims, and awarded compensatory damages of \$355,811—representing the purchase price for the 24 bottles—and an additional \$24,000 in statutory damages under GBL § 349, which authorizes “treble damages” up to

\$1000 per violation. At the punitive damages phase, the jury awarded \$12 million in punitive damages. Finding the award to be excessive and a violation of defendant's due process rights, after an analysis of the "Gore guideposts" and relevant factors under New York law, the court determined the award should be reduced to \$711,622.

### Connecticut

*R.I. Pools, Inc. v. Paramount Concrete, Inc.*, 89 A.3d 993 (2014), 149 Conn. App. 839, 877 (Conn. App. Ct. 2014)

Plaintiff, a pool installer, brought a claim under the Connecticut Products Liability Act (CPLA) alleging that it suffered property damage arising from Defendant's sale of defective concrete. The jury found in favor of Plaintiff and awarded both compensatory and punitive damages. Defendant appealed, arguing, *inter alia*, that punitive damages under the CPLA were not available in property damage cases. The appellate court disagreed, holding that the CPLA unambiguously allows for punitive damages in property damage cases, and reiterated that punitive damages under the CPLA should be calculated in accordance with Connecticut's common-law rule that punitive damages should amount to Plaintiff's litigation expenses less taxable costs.

*Fraser v. Wyeth, Inc.*, 992 F. Supp. 2d 68 (D. Conn. 2014)

After the jury awarded Plaintiff over \$1.75M in punitive damages for her CPLA suit against Wyeth related to its design, marketing, and sale of the hormone therapy drug Prempro, Defendant moved for judgment as a matter of law. The district court denied Defendant's motion, finding that punitive damages were authorized under the CPLA, that the jury had ample evidence before it from which to conclude that punitive damages were appropriate, and that the damages were appropriately calculated under Connecticut law.

### New York

*Aquila v. Fleetwood, R.V., Inc.*, No. 12-CV-3281, 2014 U.S. Dist. LEXIS 52858 (E.D.N.Y. Mar. 27, 2014)

The District Court adopted a magistrate's Report and Recommendation that Fed. R. Civ. P. 12(b)(3) dismissal was inappropriate where Plaintiff had sued the manufacturer, distributor, and retailer of a recreational vehicle for product defect and the retailer—citing a forum selection clause in the sales contract—sought to have its dispute with the Plaintiff transferred to Florida. Applying the Supreme Court's decision in *Atl. Marine Constr. Co. v. United States Dist. Ct. for the W. Dist. of Texas*, 134 S. Ct. 568 (2013), 187 L. Ed. 2d 487, 82 USLW 4021, the Magistrate reasoned that because venue in New York federal court was not "wrong" or "improper," under the traditional *forum non conveniens* analysis, the strong public interest in litigating Plaintiff's suit against an entire supply chain in

a single forum outweighed the retailer-defendant's interest in transferring only the claims against it to its home state under a forum selection clause.

*Boyce v. Cycle Spectrum, Inc.*, No. 14-cv-1163, 2014 U.S. Dist. LEXIS 96545, 6-7 (E.D.N.Y. July 14, 2014)

Purchaser of a bicycle from a website operated outside New York, sustained injuries when the bicycle's handlebar broke. The bicycle had been shipped to purchaser/Plaintiff's residence in New York from a place outside of New York.

The court reasoned that, although foreign and out-of-state manufacturers have been held amenable to product liability suits after their products were distributed to New York through third parties and caused injury within the State, in those cases, Defendants had distribution or sales agreements with its customers that gave rise to the reasonable expectation that its product would be used in New York. In the instant case, HL did not enter into any distribution or sales agreements with its customers leading to an expectation that its product would be sold to or used by a person in New York. Further, Plaintiff failed to allege facts sufficient to establish minimum contacts because there were no arrangements with companies incorporated or doing business in New York to sell bicycle parts or bicycles containing their parts in New York and there was no evidence that HL targeted the New York market.

*Darrow v Hetronic Deutschland*, 119 A.D.3d 1142, 1144, 990 N.Y.S.2d 150 (3d Dep't 2014)

German manufacturer of radio remote controls sued for negligent design and manufacture and strict products liability after Plaintiff boom operator was injured when boom inadvertently engaged crushing Plaintiff against the ground and resulting in serious injuries. The court found long-arm jurisdiction under CPLR 302 (a)(3)(ii).

The court held that the record reflected that Defendant maintained an exclusive agreement with H-USA to distribute its products to various locations in New York. Unchallenged evidence submitted by Plaintiffs demonstrated that H-USA affected distribution to certain states in this country through a network of regional distributors, one of which was designated to serve the New York market. Additionally, the website for Defendant and other Hetronic companies, along with the interrelationship of the entities involved, demonstrated Defendant's awareness of this network. The court found that evidence of "such purposeful distribution arrangement," showed that Defendant sought to indirectly market its product in New York and, should have reasonably expected a manufacturing defect to have consequences in New York.

## Connecticut

*Pina v. Metalcraft of Mayville, Inc.*, CV116024842S, 2014 Conn. Super. LEXIS 246 (Conn. Super. Ct. Feb. 3, 2014)

Plaintiff commenced suit in November 2011 under the Connecticut Products Liability Act (CPLA) against the manufacturer of a lawnmower alleging injuries arising from a defective safety switch that failed to disengage the mower blades. In May 2013, Defendant sought to implead the manufacturer of the safety switch. The switch manufacturer moved to dismiss on the grounds that the mower manufacturer failed to implead the switch manufacturer within the one-year period proscribed by the CPLA. After concluding that the switch manufacturer's motion to dismiss was a proper procedural vehicle because the CPLA's limitations period is jurisdictional, not procedural, the trial court denied the switch manufacturer's motion to dismiss, finding that the CPLA's one-year limitations period could be equitably tolled because the mower manufacturer could not have discovered that the switch manufacturer was a proper party until 2013, and because a separate contractual indemnity action would have been timely if brought in 2013, judicial economy favored allowing that same claim to be brought as a impleader action under the CPLA.

### **New York**

*Pichardo v. C.R. Bard, Inc.*, 563 Fed. Appx. 58 (2d Cir. 2014)

In an action involving an inferior vena cava filter, Plaintiff attempted to avoid summary judgment by relying on expert reports filed in a similar action involving a different plaintiff. The Second Circuit agreed with the trial court that Plaintiff could not proffer the evidence contained in four of the five reports, noting the experts were not retained by Plaintiff and could not be made to appear absent their agreement to testify because un-retained expert witnesses are not generally subject to a subpoena. However, in the instance of the one expert who did agree to testify, the Second Circuit reversed the decision of the trial court.

The Second Circuit rejected the holding that the experts' reports were invalid because they had not examined Plaintiff or the product at issue. "While it is undoubtedly true in many cases that, in order to give relevant evidence, an expert must have examined facts relating specifically to the plaintiff, this is not invariably so." Here, the court found that because the expert's report addressed an identical product to conclude that the manufacturer had not employed a process which was known at the time to improve resistance to fracture, the report did have pertinence to the Plaintiff's case.

*Neve v. City of New York*, 117 A.D.3d 1006, 986 N.Y.S.2d 606 (2d Dep't 2014)

In a personal injury action allegedly caused by the collapse a street sweeper seat, the Defendant, City of New York, disposed of the street sweeper in the usual course of business. The plaintiff moved for spoliation sanctions striking Defendant's answer and awarding summary judgment. The motion court granted

Plaintiff's motion to the extent of precluding Defendant from establishing at trial that it lacked constructive notice of the defective nature of the seat, but declined to strike Defendant's answer.

The Appellate Division affirmed noting that while a court has broad discretion in determining the appropriate sanction for spoliation, and under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence, the drastic remedy of striking the "answer was unwarranted because there was no suggestion that its disposal was "due to willful or contumacious behavior." The Appellate Division concluded that the lesser sanction granted by the Supreme Court was appropriate because the negligent disposal of the street sweeper prejudiced all parties, including Defendant, and there was other evidence of the sweeper's condition including photographs and the possibility of expert depositions.

*Hawley v. Mphasis Corp.*, No. 12-cv-592, 2014 U.S. Dist. LEXIS 100145 (S.D.N.Y. July 22, 2014)

In an employment discrimination case, Plaintiff moved for sanctions pursuant to Fed. R. Civ. P. 37 for Defendant's alleged discovery violations, seeking an adverse inference instruction, preclusion of his former supervisor's testimony, striking Defendant's answer, and entry of a default judgment. Plaintiff claimed that Defendant failed to perform a good faith search for documents; failed to produce critical information in discovery; failed to preserve certain evidence and destroyed significant evidence related to Plaintiff's claims, including that Defendant intentionally erased all data from company-issued laptops.

Relying on *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002), as the controlling case in the Second Circuit regarding adverse inference instructions, the court found that the first prong of *Residential Funding* test was met because Defendant's obligation to preserve company laptops arose over two years before the action was filed when the Plaintiff made an EEOC complaint. The court found that the second factor was also met, rejecting Defendant's argument that it did not have the requisite culpability because the laptops were not destroyed in bad faith: "Defendants' position reflects a fundamental misunderstanding of the culpability that supports an adverse inference under Second Circuit law," under which ordinary negligence is sufficient to merit sanctions and "once the duty to preserve attaches, any destruction [of relevant evidence] is, at a minimum, negligent." The court granted an adverse inference with respect to the destruction of evidence on the supervisor's computer, holding that the destruction was so egregious that it created a presumption of relevance which Defendant failed to rebut.

*Freedman v. Weatherford Int'l*, No. 12-cv-2121, 2014 U.S. Dist. LEXIS 133950 (S.D.N.Y. Sept. 12, 2014)

In a securities fraud case, Plaintiff argued that Defendants' document production was deficient and sought search term hit reports that would enable it to compare search results from discovery in the instant action to the results from prior searches in a related audit. In support, Plaintiffs pointed to Defendants' failure to produce eighteen emails that were produced by a third party. Relying on the proportionality clause of Fed. R. Civ. P. 26, the court denied Plaintiff's motion, finding that the "suggested remedy is not suited to the task." The court found that only three of the eighteen emails produced by the third party would have been identified by the search terms in the investigation. The court also noted that although some documents may have "fallen through the cracks," the remedy sought was unlikely to remedy any alleged discovery defects.

### Connecticut

*White v. Mazda Motor of Am., Inc.*, 313 Conn. 610, 99 A.3d 1079 (2014) [see supra at automobiles]

*Fraser v. Wyeth, Inc.*, 992 F. Supp. 2d 68 (D. Conn. 2014)

In an action under the Connecticut Products Liability Act (CPLA) against a manufacturer of a hormone therapy medication, the manufacturer moved for a new trial and remittitur, arguing that the court's conduct during the trial displayed a clear bias in favor of Plaintiff and improperly influenced the jury's verdict by, *inter alia*, converting Plaintiffs' counsel's objection to an expert's testimony into an untimely *Daubert* motion.

The court found that in its role as gatekeeper, it had the authority to raise *Daubert* concerns *sua sponte* to prohibit testimony that does not pass muster. The court further reasoned that its jury instruction was sufficient to avoid any potential prejudice: the jury was instructed that the court's rulings, statements, and questions should not be taken as expressing any opinion as to what the verdict should be, and that the court's "analysis of the merits of objections and rulings on evidentiary disputes have nothing to do with the ultimate merits of the case, and are not to be considered as points scored for one side or the other."



## Third Circuit

### Tort Reform/ Third Restatement of Torts

While New Jersey and Delaware have adopted pertinent portions of the Third Restatement of Torts with respect to Product Liability claims, Pennsylvania law remains in flux on the issue. Currently there is a split of authority in Pennsylvania, whereby Pennsylvania state courts apply the Restatement Second of Torts to product liability claims, while *some* Pennsylvania Federal Courts apply the Restatement Third.

The confusion stems from the Third Circuit's decision in *Covell v. Bell Sports, Inc.*, 651 F.3d 357 (3d Cir. 2011), in which the Third Circuit "predicted" that Pennsylvania would adopt the Restatement Third. The Pennsylvania Supreme Court responded with an opinion in *Beard v. Johnson & Johnson*, 41 A.3d 823 (Pa. 2012) which held that the Restatement Second should be applied in all strict products liability cases in Pennsylvania. Because of this, some federal court judges in Pennsylvania have chosen to follow the Pennsylvania Supreme Court's holding in *Beard* and have applied the Restatement Second § 402A. However, some federal court judges believe that they are bound to follow the Third Circuit's prediction in *Covell* as binding precedent until a contrary decision is handed down by a Pennsylvania appellate court. Therefore, in Pennsylvania federal court, the substantive law being applied may vary not only from court to court, but judge to judge.

Subsequently the Pennsylvania Supreme Court, in *Tincher v. Omega Flex, Inc.*, No. 17 MAP 2013, 2014 WL 6474923 (Pa. Nov. 19, 2014), overruled its long-standing decision in *Azzarello v. Black Brothers Company*, 480 Pa. 547, 391 A.2d 1020 (1978), and held that a plaintiff pursuing a cause upon a theory of strict liability in tort must prove that the product is in a "defective condition." The plaintiff may prove defective condition by showing either that (1) the danger is unknowable and unacceptable to the average or ordinary consumer, or that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The court declined to adopt the Restatement (Third) but expressed "appreciation of certain principles contained in that Restatement" as informing its application of § 402A. It recognized that certain negligence principles may apply in design cases—a proposition that had long been precluded under *Azzarello*. It recognized the distinction articulated in *Soule v. Gen. Motors Corp.*, 8 Cal.4th 548, 34 Cal.Rptr.2d 607, 882 P.2d 298, 308 (1994), that drew a distinction between simple product failures and complex product design issues as to which the ordinary consumer may not have any expectations about how a product should perform. Rather than adopt or reject the Third Restatement altogether, the court chose an "incremental approach," and stated that "the Second Restatement already adopted, and properly calibrated, permits the plaintiffs to tailor their factual allegations and

legal argumentation to the circumstances as they present themselves in the real-world crucible of litigation, rather than relying upon an evidence-bound standard of proof.” *Tincher*, at \*62.

### **Preemption**

The Third Circuit addressed whether state law claims against generic drug manufacturers were preempted by federal law in *In Re: Fosamax*, 751 F.3d 150, 2014 WL 116288 (3d Cir. 2014). Ninety-one plaintiffs from twenty-eight states sued Merck Sharp & Dohme Corporation, along with several generic drug makers, claiming that Defendants failed to warn them or their doctors that Fosamax or its generic version could cause bone fractures. After removal, the generic Defendants were granted summary judgment in the U.S. District Court for the District of New Jersey. Plaintiffs appealed the decision that their design defect claims were preempted to the Third Circuit. The Third Circuit affirmed, holding that Plaintiff’s strict-products liability design defect claims were preempted by federal law under the doctrine of impossibility preemption. The Court reasoned that it was impossible for generic manufacturers to comply with both requirements of federal law and state law simultaneously.

In *Smith v. Depuy Orthopaedics Inc.*, 552 F. App’x 192, 192-193 (3d Cir. 2014), Plaintiff, a knee surgery patient, brought a product liability action against the manufacturer of knee replacement components of the LCS Total Knee System. The manufacturer moved for summary judgment based on preemption, because the product at issue and its components were approved under the FDA’s PMA process, per the United States Supreme Court’s ruling in *Riegel. Id.* at 195. The Third Circuit affirmed the district court, and noted that “no discovery was necessary to determine that these components were also subject to PMA preemption.” *Id.* at 196.

### **Market Share/New Theories of Liability**

As posited by the dissent in *Lance v. Wyeth*, 85 A.3d 434 (Pa. 2014), the Court recognized a new cause of action—negligent design defect—against pharmaceutical companies. (*Wyeth* is discussed below.)

### **Automobiles**

In *Parr v. Ford Motor Company*, 2014 Pa. Super 8, 2014 Pa. Super. LEXIS 8 (Pa. Super. Ct. 2014) the Pennsylvania Superior Court affirmed an order of the Philadelphia County Court of Common Pleas, which was later withdrawn because it is the opinion of a single judge on a split two judge panel. Nonetheless, the case presents an interesting issue which will likely be addressed in Pennsylvania.

Plaintiffs were involved in a motor vehicle accident in their 2001 Ford Excursion, which rolled over and severely injured two minor children. Plaintiffs brought suit against Ford alleging defective design. The trial court made several rulings regarding statistical studies involved in a variety of accidents, injuries and vehicles. Plaintiffs argued that the court should have deferred to the National Highway Traffic Safety Administration's 2009 conclusion that in vehicle rollovers, "roof crush" was the cause of head and neck injuries that were suffered by the minor children. Defendant Ford set forth a theory of "diving/torso augmentation and sought to exclude the statistical information offered by Plaintiffs, and did so successfully at the trial court level. The Pennsylvania Superior Court, in an opinion that has since been withdrawn, held that because the statistical studies involved a wide variety of accidents, injuries, and vehicles, they were not substantially similar to the accident in question and were therefore not relevant under Pa. R.E. 401.

### **Drug and Medical Device**

In *A.S. v. SmithKline Beechman Corp.*, (2014 U.S. App. LEXIS 19267) the Third Circuit decided whether a defendant could remove a case a second time based on diversity jurisdiction more than one year after the commencement of the case. Plaintiffs filed suit in Pennsylvania state court against Defendant claiming that the drug Paxil caused birth defects. The case was removed to the United States District Court for the Eastern District of Pennsylvania. The District Court remanded the case, finding that Defendant was a citizen of Pennsylvania, thus destroying diversity. However, in *Johnson v. SmithKline Beechman Corp.*, 724 F.3d 337 (3d Cir. 2013), the Third Circuit held that Defendant was a citizen of Delaware and *not* Pennsylvania, as the Eastern District held. Based on this ruling, Defendant attempted removal once again. Plaintiffs filed a Motion to Remand, which was denied but certified for interlocutory review pursuant to 1292(b) so allow the Third Circuit to decide this issue.

The Third Circuit remanded the case to state court, holding that Defendant's second removal occurred more than 30 days after the initial pleading, and that the Court's holding in *Johnson* did not trigger a new time period for removal. Furthermore, the second removal was time-barred under the one year limit under 1446(b). The Third Circuit held that the decision in *Johnson* could not be considered an equitable tolling because the original erroneous demand was not an extraordinary circumstance.

In *Lance v. Wyeth*, 2014 Pa. LEXIS 205 (Pa. 2014), the Pennsylvania Supreme Court held that drug companies were not immune to product liability claims in Pennsylvania for defective drugs. The Court rendered a 56-page opinion some three years after oral argument.

Plaintiff alleged that Defendant negligently placed a diet drug on the market, failed to withdraw it, and breached the standard of care in designing,

developing, inspecting, testing and preparing the drug. *Lance* comes from two weight-loss drugs that were widely prescribed and used in the 1990's, which Wyeth stopped selling following reports that they were linked to heart disease. Plaintiff's daughter died from pulmonary hypertension roughly seven years after taking the drug. Plaintiff claimed that the drug was "unreasonably dangerous" and that Wyeth acted negligently in marketing the drug or failing to remove it from the market sooner.

Wyeth defended the claim on the basis that Pennsylvania had refused to extend strict liability to prescription drug manufacturers under Restatement 2<sup>nd</sup> 402A comment *k*, which describes unavoidably safe products. Wyeth's argued that while prescription drugs are in fact unavoidably safe, they are not unreasonably dangerous or defective when accompanied by proper warnings and directions. Wyeth's defense was based on the long-standing notion that under Pennsylvania law, a negligent design claim against drug manufacturers was precluded because a Plaintiff could never prove a reasonable alternative design. Additionally, Wyeth argued that allowing the Plaintiffs to only bring failure-to-warn and manufacturing defect claims met a public policy need of compensating injured consumers but at the same time not discouraging the continued development of beneficial drugs. Wyeth also argued that the FDA had approved its product as evidence of the product not being unreasonably dangerous.

The trial court granted summary judgment, and the Superior Court affirmed on Plaintiff's strict liability claim but held that the lower court erred by applying the strict liability rule to her claims in negligence. It held that, under Pennsylvania law, a negligent design defect claim was considered to be distinct from a strict liability design defect claim. Defendant appealed the decision to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court held that Plaintiffs may assert negligence claims against pharmaceutical companies relating to the design, testing, marketing and distribution of drugs regulated by the FDA. The Court rejected Wyeth's attempts to "protect" pharmaceutical companies from negligence claims. The Court specifically addressed comment *k* as well, holding it inapplicable because it presumed that a medicine has some net benefit and therefore does not apply to a claim that a drug is too dangerous to be used by anyone. Essentially, the Court held that comment *k* was rooted in a strict liability analysis and did not readily translate into a negligence action. In justifying its decision, the Court partook in a discussion detailing the conceptual differences between strict liability claims, which focus on the product itself, and negligence-based product claims, which focus on the conduct of the manufacturer.

In addressing Wyeth's FDA argument, the Court stated that the FDA was a government agency of limited resources. Accordingly, Pennsylvania would not give absolute discretion to a drug company based upon FDA approval, stating that while it is admissible evidence, it is not dispositive of a negligence claim. The

Pennsylvania Supreme Court remanded the case to the trial court for a determination of whether Wyeth acted negligently under the facts and circumstances presented.

### **Class Action Fairness Act**

In *Dewey v. Volkswagen Aktiengesellschaft*, 558 F. App'x 191, 194 (3d Cir. 2014), *cert. denied sub nom. Braverman v. Dewey*, 135 S.Ct. 231(2014), the Third Circuit approved a class action settlement regarding a number of Volkswagen and Audi cars that allegedly had defective sunroofs that leaked. In approving the settlement, the Court held that both federal law and New Jersey law permit courts to apply the percentage-of-recovery method in class actions when attorney's fees flow from a "common fund" shared by plaintiffs. Thus, in a class-action products liability suit concerning defects in cars manufactured by defendant automobile manufacturer, the district court did not abuse its discretion by performing a percentage-of-recovery analysis in calculating attorney's fees as to a settlement of the action.

In *re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 564 F. App'x 672 (3d Cir. 2014) ("*Avandia I*"), the Third Circuit affirmed the dismissal of a former Type 2 diabetes medication user's complaint for failure to state a claim upon which relief can be granted. The *Avandia I* Court upheld the ruling for "substantially the same reasons set forth by the District Court." *Id.* at 673. Specifically, the Plaintiff did not allege that his health was impaired by the use of the drug, nor did he identify what he would have paid for some other alternative, and also failed to allege what advertising materials or information he or his prescribing physician read or relied upon. *Id.*

In *In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 2014 WL 2011597, (E.D. Pa. May 15, 2014) ("*Avandia II*"), the Court considered Motions to Remand 53 cases to California state courts and granted eight of those motions that named Delaware plaintiffs. The *Avandia II* Court specifically noted that Plaintiffs' counsel was attempting to circumvent applicability of the Class Action Fairness Act ("CAFA") by filing individual complaints in California state court. *Id.* at \*7. However, the Court noted that the "CAFA gives federal courts jurisdiction over plaintiffs in a mass action only where more than 100 plaintiffs are proposed—by those plaintiffs—to be tried jointly." *Id.* at \*8.

### **Punitive Damages**

In *Mendez v. Shah*, 2014 WL 2921023 (D.N.J. June 27, 2014), a patient with chronic back pain brought a diversity action against her doctor and the manufacturer of a lumbar fusion device implanted in her back. As part of her claim, Plaintiff alleged that she was entitled to punitive damages for her injuries. *Id.* at 15-17. However, the district court held that Plaintiff's claims for those damages were preempted by the Medical Device Amendments to the Food, Drug,

and Cosmetic Act, as any punitive measures would have encroached upon “the federal statutory scheme [to] empower the FDA to punish and deter fraud against the Administration. . .” *Id.* at 17; citing *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 344 (2001).

In *IMO Indus. Inc. v. Transamerica Corp.*, 2014 WL 4810047 (N.J. Super. Ct. App. 2014), an asbestos products manufacturer, IMO Industries Inc., brought a declaratory judgment action against a predecessor's former parent corporation and primary and excess liability insurers to recover compensatory and punitive damages for breach of contract and bad faith. The Superior Court of New Jersey held that the defendants were obligated to pay for coverage in underlying asbestos-related injury suits up to the policies’ limits of \$1.85 billion. In so holding, the appeals court rejected the insurance companies’ argument that IMO should have to re-examine thousands of old claims that had been settled and paid by primary carriers. Specifically, the Court noted that, “[a]llowing excess insurers to contest coverage is not feasible for long-tail, multi-claim coverage cases and would compromise the allocation methodology mandated by the Supreme Court.” The Court also held that the excess insurers were liable for costs arising out of suits IMO defended against and prevailed previously. They reasoned that the policies at issue provided coverage for costs arising from an “occurrence,” and, given that the relevant occurrence was selling asbestos-containing products, the excess insurers had to pay for defense costs in those cases.

### **Personal Jurisdiction/ Forum Non Conveniens**

In *Bratic v. Rubendall*, 99 A.3d 1 (Pa. 2014), the Pennsylvania Supreme Court clarified the standard a defendant must meet to raise a successful *forum non conveniens* challenge. Reversing the *en banc* Superior Court, the Supreme Court reinstated the Philadelphia Court of Common Pleas’ decision to transfer a case to another county in Pennsylvania based upon the “proper consideration of the totality of the evidence” supporting the transfer. The Supreme Court held that seven witness affidavits, containing identical language about the hardships suffered by those witnesses, submitted by Defendant in the case were sufficient to meet Defendant’s burden set forth in *Cheesman v. Lethal Exterminator, Inc.*, requiring proof that the venue was “oppressive or vexatious.”

In reaching that determination, the Supreme Court stated that “distance alone is not dispositive, but is inherently part of the equation.” 99 A.3d at 9. The Court elaborated that “one needs no detailed affidavit to understand the difference in logistics necessitated by a separation of 100 miles,” and in a case involving witnesses from a distant county noted, “it may be presumed without fear of contradiction that to each of these people, time indeed is money, and days participating in trial in Philadelphia would impact their ‘duties/operations.’” *Id.*

In *Patel v. Karnavati America, LLC*, 437 N.J. Super. 415, 99 A.3d 836 (2014), the Superior Court of New Jersey addressed issues of personal jurisdiction over a product manufacturer located in India. Plaintiff claimed that Defendant defectively designed and manufactured a pharmaceutical machine which injured him while working in New Jersey. The trial court rejected Defendant's claim that the case should be dismissed because of lack of jurisdiction.

The Superior Court reversed, finding only a negligible relationship with the state of New Jersey. While the minimum contacts test was applied, the Court put sufficient weight on the purposeful conduct of the foreign defendant to avail itself of New Jersey's laws. The Court held that Defendant did not take advantage of the privilege of conducting activities within the state, and thus did not invoke the benefits and privileges of the law.

### Discovery/Evidence

In *Varner v. MHS, LTD.*, 2 F.Supp.3d 584 (M.D. Pa. 2014), the Court decided a case involving the alleged failure of a nylon strap and subsequent injury. Plaintiff was injured while using a nylon strap manufactured by Defendant to lift plates. Defendant moved for summary judgment, arguing that the nylon strap was not an unreasonably dangerous product and that an adequate warning was given. Defendant argued that Plaintiff's misuse of the product was the cause of Plaintiff's injury.

In addressing the alleged defect, Plaintiff proceeded under the malfunction theory of liability, which allows Plaintiff to use circumstantial evidence rather than direct evidence to show that the product was defective in manufacture. Under the Restatement (Third) approach, a Plaintiff can support an inference of a manufacturing defect if the incident that harmed the plaintiff 1) was of a kind that ordinarily occurs as a result of a product defect; and 2) was not solely the result of causes other than product defect existing at the time of sale or distribution. (*Restatement Third of Torts* §3). The Court held that the strap malfunctioned because it was not supposed to break, and based on the evidence presented, the timing of the malfunction was a factual issue for the jury to determine. Thus, summary judgment was denied on the manufacturing defect.

The Plaintiff also alleged that the strap was defectively designed. The Restatement (Third) of Torts uses a reasonableness-based, risk-utility balancing test as the standard for adjudging the defectiveness of product designs. Plaintiff's expert set forth a "reasonable alternative design" for the strap, stating that the strap was unreasonably dangerous because a warning tag was sewn to the strap on only **one** of its four sides. Additionally, this tag was easily removable purposefully and accidentally. Plaintiff's expert's reasonable alternative design included a warning tag being sewn onto **all four** sides. Evidence was also offered that another strap manufacturer followed the same procedure regarding the sewing on all four corners. The Court accepted this as a reasonable and cost-effective

alternative design. However, the Court granted Defendant's summary judgment on design defect because Plaintiff did not show that the straps were *not* reasonably safe with the current design. While Plaintiff's expert did state that the straps would be safer with additional warning tags, he did not show that the absence of those tags rendered the straps *not* reasonably safe. The Court held that such evidence was insufficient to prevent summary judgment.

The Court also granted summary judgment on Plaintiff's failure to warn claim. Under the Restatement (Third) of Torts §2(c), a product is defective because of inadequate warnings when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, and the omission of the instructions or warnings renders the product not reasonably safe." Plaintiff argued that there was no evidence of any warnings regarding the strap, besides the leather tag, which was not attached to the strap when Plaintiff's expert inspected it. However, Plaintiff did not establish that the warning tag was not shipped with the strap when purchased. Because Plaintiff could not show that the strap is *not* reasonably safe because the warning tags on the straps are not sewn in on all four sides, his failure to warn claim could not survive summary judgment.

In *Cherilus v. Federal Express*, 435 N.J. Super. 172, 87 A.3d 269 (N.J. Super. 2014), Plaintiff sustained a serious leg injury in February of 2006 while working on a "torklift", a mechanical lift designed by American Lifts for use in warehouses. The Court held that defective materials and manufactured equipment installed permanently in a construction project are improvements to property. The "torklift" was a specially manufactured product that became an improvement to the property when it was installed in the Federal Express facility at Newark Airport in 1995. The lawsuit was not filed until 2008. Thus, the claim was barred under New Jersey's ten year statute of repose for construction defect claims. The court noted that the manufacturer did *not* install the specially manufactured product, and indicated that the outcome would have been different if it had done so.

### Venue: Forum Selection Clauses

The Third Circuit has only mentioned *Atlantic Marine Constr. Co. v. US District Court*, 134 S.Ct. 568 (2013), in a single unpublished opinion: *Dawes v. Publish America LLLP*, 563 Fed. Appx. 117 (3rd Cir. 2014). *Dawes* involved a fraudulent inducement claim between an author and publisher, which the district court dismissed per a forum selection which provided that, "Author and Publisher irrevocably submit to the jurisdiction of any Maryland State or Federal court sitting in the City of Frederick over any suit related to this agreement." *Id.* at 118. The Third Circuit held that this was error, "because the forum selection clause—which did not make jurisdiction in Maryland exclusive—was permissive, not mandatory." *Id.* In a footnote, the Court noted that, per *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), "[i]f the forum selection clause was



mandatory, it would be entitled to a presumption of enforceability.” The Third Circuit then noted, under *Atlantic Marine*, “that presumption can be overcome when, as here, ‘extraordinary circumstances unrelated to the convenience of the parties’ clearly disfavor a transfer,” citing 134 S.Ct. at 581. The Court went on to hold that the Plaintiff’s claims were barred on other grounds and noted that transfer under the forum selection clause would be useless. However, several District Court opinions by courts situated in the Third Circuit provide further guidance.

Of those District Court opinions interpreting *Atlantic Marine*, several opinions from the District of New Jersey are of particular note. The District Court followed *Atlantic Marine* and granted a Defendant’s Motion to Transfer in *Dillon v. Ski Shawnee, Inc.*, 2014 WL 3900877 (D.N.J. August 11, 2014), yet denied similar Motions to Transfer and distinguished *Atlantic Marine* in *Networld Communications, Corp. v. Croatia Airlines, D.D.*, 2014 WL 4724625 (D.N.J. September 23, 2014) and *Lieberman v. Carnival Cruise Lines*, 2014 WL 3906066 (D.N.J. August 7, 2014).

## Fourth Circuit Cases

### Preemption

*Drager v. PLIVA USA, Inc.*, 741 F.3d 470 (4th Cir. 2014)

The United States District Court for the District of Maryland denied a plaintiff's motion to amend her complaint against a generic drug manufacturer and dismissed her case after finding that under the reasoning of the Supreme Court's decision in *PLIVA, Inc. v. Mensing*, all of her state law tort claims were preempted by federal requirements applicable to generic drug manufacturers.

The Fourth Circuit affirmed. The court first dispensed with Drager's contention that the district court erred in denying leave to amend to allege a cause of action under Maryland law based on the manufacturer's alleged failure to update its warnings, pointing out that the Plaintiff had never filed a motion to amend her complaint with the district court. *Id.* at 474. The court then held that because all of the Plaintiff's causes of action logically required the manufacturer either to change its labeling, change its design or formulation, exit the market, or accept tort liability, the district court did not err in finding that the underlying applicable Maryland laws were preempted. *Id.* at 475-76.

The Court of Appeals rejected Plaintiff's argument that because Maryland applies the consumer-expectations test in assessing the unreasonableness of a danger, the Supreme Court's decision in *Mutual Pharmaceutical Co. v. Bartlett* was inapplicable to Plaintiff's design defect claims. *Id.* at 478. The Court in *Bartlett* held that a plaintiff's design defect claims under New Hampshire law, which applies a risk-utility analysis, were preempted under *Mensing*. *Bartlett*, 133 S. Ct. 2466 (2013). After explaining that the *Bartlett* Court "concluded that there was no action that the defendant could take under [the risk-utility] approach to increase the safety of its product without violating the restrictions of the FDCA," the appellate court found that "the same is true under . . . the consumer-expectations approach in Maryland." *Id.* Thus, like the rest of her claims, the Plaintiff's design defect claims were preempted. *Id.*

### Discovery/Evidence

*Wilkins v. Montgomery*, 751 F.3d 214 (4th Cir. 2014)

Plaintiff sued the director of a state hospital after another hospital patient murdered her son. On the day of Plaintiff's expert disclosure deadline, she provided her expert's name and curriculum vitae, but no written report. Two weeks after the deadline, Plaintiff disclosed a one-page "preliminary report" from her expert, which included only a list of materials the expert had reviewed and two sentences of his opinion. After Defendant moved to exclude the expert witness and moved for summary judgment, Plaintiff filed an additional nine-page expert report. The trial court struck the mother's expert witness for untimely disclosure. Plaintiff appealed, but the Fourth Circuit affirmed.

The Court of Appeals found that the trial court had not abused its discretion in excluding the plaintiff's expert as an appropriate sanction under Rule 37(c)(1). Rule 37(c)(1) provides that if a party fails to identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that witness unless the failure was substantially justified or harmless. *Id.* at 221. The court reiterated that because a party's failure to provide expert disclosures, which "are often the centerpiece of discovery," impairs an opponent's ability to defend itself and "undermines the district court's management of the case," the court gives "particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." *Id.* (quoting *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 278-79 (4th Cir. 2005)).

The court rejected Plaintiff's argument that the district court was required to weigh all of the factors laid out in *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003), for determining whether nondisclosure was substantially justified or harmless for purposes of Rule 37(c)(1) exclusion. 751 F.3d at 222. Nevertheless, the court conducted its own analysis of the *Southern States* factors and found that the Plaintiff's untimely disclosure was not harmless because it disrupted the district court's pre-trial scheduling order, would not have been helpful to the jury because it only contained legal conclusions, and failed to provide Defendant with any concrete explanation of the expert's testimony. *Id.* at 223.

## **Maryland**

### **District of Maryland**

#### **Automobiles**

*Ruark v. BMW of North America, LLC*, Civ. A. No. ELH-09-2738, 2014 WL 1668917 (D. Md. April 24, 2014)

After he was injured in a rollover accident, Plaintiff sued the vehicle manufacturer, alleging that the vehicle's roof was defective in design. Plaintiff argued that the consumer expectation test should apply to his strict liability design defect claim, while the manufacturer argued for the risk-utility test.

Analyzing Maryland law, the district court concluded that the risk-utility test applies only when the product malfunctions in some manner; otherwise, the consumer expectations test applies. *Id.* at \*10. Finding that Plaintiff's claim was not that the roof of the vehicle malfunctioned, the court explained that "if the roof crushed inward because the accident imposed a greater amount of force than the roof was designed to absorb, that is not a malfunction." *Id.* at \*9. Since Plaintiff's allegations did not involve a malfunction, the court instructed the jury in accordance with the consumer expectation test. *Id.* at \*10.

## **Punitive Damages**

*Harper v. Anchor Packing Co.*, C.A. No. GLR-12-460, 2014 WL 1807935 (D. Md. May 5, 2014).

Defendant moved for summary judgment on Plaintiffs' claim for punitive damages in an asbestos case.

The court granted the motion, recognizing that in non-intentional tort cases, a plaintiff must establish actual malice under Maryland law. *Id.* at \*3 (citing *Owens-Illinois v. Zenobia*, 601 A.2d 633, 652 (Md. 1992)). Since the plaintiffs had proffered no evidence to support the required elements to prove malice in a product liability case—(1) actual knowledge of the defect at issue and (2) conscious or deliberate disregard of foreseeable harm—plaintiffs were not entitled to punitive damages. *Id.* (citing *Zenobia*, 601 A.2d at 653).

## **Personal Jurisdiction/Forum Non Conveniens**

*Lloyd v. Frontera Produce, Ltd.*, No. WDQ-13-2232, 2014 WL 4825641 (D. Md. Sept. 24, 2014).

Plaintiff alleged that an equipment manufacturer contributed to a Listeria infection suffered by decedent. The manufacturer was based in Colorado and sold equipment to a cantaloupe packer in Colorado. Plaintiff claimed that exercise of personal jurisdiction was proper because the manufacturer knew or should have known that cantaloupes packaged with its equipment would be sold nationwide, including in Maryland.

Applying a purposeful availment standard, the court held that personal jurisdiction was not proper, as there was no indication that the manufacturer itself derived substantial revenue from sales of equipment or produce in Maryland and, in fact, the manufacturer had not sold its equipment in Maryland. *Id.* at \*13. The fact that Defendant placed information about its product on the Internet via its website did not subject it to personal jurisdiction because it did not direct electronic activity into the forum state. Additionally, the court explained that even though it may have been foreseeable that its equipment would be used to process produce eventually sold in Maryland, the Supreme Court has rejected foreseeability as the standard for personal jurisdiction. *Id.* at \*14 (citing *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632, 638 (D. Md. 2011) (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2783 (2011))).

## **Personal Jurisdiction**

*Ricks v. Armstrong Int'l., Inc.*, No. 4:14-cv-BO, 2014 WL 2873189 (E.D.N.C. June 24, 2014).

Plaintiff filed suit against numerous defendants, including a Massachusetts manufacturer of gasket paper, which another defendant used as a component part of the gaskets that led to Plaintiff's exposure to asbestos. The gasket paper manufacturer moved to dismiss based on lack of personal jurisdiction.

The court agreed with the manufacturer and dismissed it from the suit. The court found the fact that the manufacturer had "entered its paper products into the stream of commerce with the knowledge that they would be incorporated into products later sold in North Carolina," was insufficient to satisfy the purposeful availment requirement of due process. *Id.* at \*2 (citing *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 946 (4th Cir. 1994)).

### **Discovery/Evidence**

*Beal v. Air & Liquid Sys. Corp.*, Civ. No. 1:12-cv-00172, 2014 WL 1092080 (W.D.N.C. March 18, 2014)

Plaintiff moved to strike a defense expert jointly retained by three defendants. The expert's report was not specific to any defendant. Although two of the defendants timely designated the expert and provided his report, one defendant failed to designate the expert in its expert disclosure, claiming the omission was inadvertent.

Analyzing the factors laid out in *Southern States Rack and Fixture, Inc. v. Sherwin-Williams, Co.*, the district court found Defendant's failure to disclose to be harmless. The court explained that since the other defendants designated the expert and provided his report, the expert's opinions would not have been a surprise to the Plaintiff. *Id.* at \*2. Additionally, since the matter was scheduled to go to trial a year after the expert disclosure deadline, Plaintiff had ample opportunity to depose this witness prior to the trial and allowing the expert to testify would not affect or disrupt the trial proceedings. *Id.* Moreover, given that the omission was obviously inadvertent, the court found that there was sufficient justification for the failure to disclose. *Id.*

## **South Carolina**

### **Preemption**

*Wells v. Allergen, Inc.*, Civ. A. No. 6:12-3509-TMC, 2014 WL 117773 (D.S.C. Jan. 13, 2014)

Defendants manufactured injectable gel dermal fillers, Restylane and Juvederm, which are Class III medical devices, approved by the FDA through the premarket approval process. Plaintiff brought a product liability action against

the manufacturers after allegedly suffering injuries as a result of an immune reaction to the fillers. The manufacturers moved to dismiss on the grounds that plaintiff's claims were preempted.

Recognizing that courts have overwhelmingly found that the express preemption clause of the Medical Device Amendments of 1976 bars common-law tort claims against Class III device manufacturers, the court dismissed Plaintiff's complaint with prejudice "as to any claim premised on standards different from or in addition to the standards imposed by federal law." *Id.* at \*2-3.

The court also rejected Plaintiff's argument that her complaint should not be dismissed because her state law claims paralleled federal law. Finding that Plaintiff's amended complaint contained "only barebones, conclusory allegations," and failed to allege specific facts as to how the defendants violated federal requirements, the court held that Plaintiff had not adequately stated a parallel claim. *Id.* at \*3. The court also rejected Plaintiff's argument that she should be allowed to proceed with discovery in order to state her parallel claim. *Id.* The court dismissed Plaintiff's complaint without prejudice as "to the plaintiff's right to potentially pursue relief based on a properly pled and sufficiently supported parallel claim." *Id.*

## Virginia

### Discovery/Evidence

*Zaklit v. Global Linguist Solutions, LLC*, No. 1:14cv314 (JCC/JFA), 2014 WL 4925780 (E.D. Va. Sept. 30, 2014).

Plaintiffs sued for false imprisonment. Defendants moved to exclude Plaintiff's only expert, a psychologist, on the grounds that his expert disclosure did not comply with the requirements of Rule 26(a)(2).

The court granted the defendant's motion, finding that the expert's disclosure "wholly deficient." The report "fails to satisfy the most basic requirement of Rule 26(a)(2)(B): that he express an opinion. Dr. Reading's written report reads less like expected expert testimony at trial and more like a brief introduction to a scholarly article about the general psychological and psychiatric effects of false imprisonment." *Supra*, at \*3.

It contained only general statements about the psychological effects of false imprisonment without any opinions on the matters at issue in the litigation or explanations why the statements were specifically applicable to the case. *Id.* at \*3.

## Personal Jurisdiction/Forum Non Conveniens

*Collier v. Land & Sea Rest. Co., LLC*, No. 7:13-cv-00104, 2014 WL 5254916 (W.D. Va. Oct. 15, 2014)

An oyster harvester challenged personal jurisdiction on the basis that it was a Connecticut company that harvested oyster solely in the waters of Connecticut, did not have any offices in Virginia, had no employees in Virginia, had no direct contact with the restaurant that sold the allegedly hazardous oysters, had a general website which was not directed to Virginia customers, and sold the oysters at issue to a Massachusetts company which, without its knowledge, resold the oysters to a distributor that in turn sold the oyster to the Virginia restaurant.

The district court found that it had personal jurisdiction over the defendant.

The court found that the harvester knowingly placed oysters into the stream of commerce, and that it did not matter whether the specific oysters at issue were in Virginia by virtue of the defendant's contacts with Virginia. *Id.* \*6-7. The court concluded that the harvester had purposely availed itself of Virginia by selling other oysters to a Virginia corporation and directly to Virginia residents. *Id.* at \*7. The court also reasoned that even though the harvester's website may not have been directed at Virginia residents, the harvester was aware that Virginia residents were placing orders on the website, and thus there were sufficient minimum contacts to justify personal jurisdiction. *Id.* at \*8.

## West Virginia

### Drug and Medical Device Litigation

*Tyree v. Boston Scientific Corp.*, Civ. A. No. 2:12-cv-08633, 2014 WL 5431993 (S.D. W. Va. Oct. 23, 2014)

Four plaintiffs alleged injuries as a result of surgical mesh implants. Defendant manufacturer moved to preclude evidence that it owed or breached a duty to directly warn Plaintiffs about the risks associated with the implant. Among other things, Defendant argued that, although the West Virginia Supreme Court in *State ex rel. Johnson & Johnson v. Karl* rejected the learned intermediary doctrine for prescription drug manufacturers that engage in direct-to-consumer ("DTC") advertising, West Virginia courts have not eliminated the doctrine for medical device manufacturers.

After a lengthy discussion of the *Karl* decision, the *Tyree* court agreed with Defendants, finding that *Karl* rejected the learned intermediary doctrine only for drug manufactures engaging in DTC advertising. *Id.* at \*2-5. The court then

concluded that the learned intermediary doctrine should be applied in *Tyree* because: (1) Defendant did not directly advertise the product to consumers; and (2) the product at issue was a medical device. *Id.* at \*5. In making that determination, the court pointed out that, unlike Defendants who engaged in DTC advertising in *Karl*, the *Tyree* Defendants “lacking an advertising forum . . . cannot easily communicate with end-consumers.” *Id.* Unable to rely on advertisements to make medical decisions, explained the court, patients “must again depend on their treating physicians as a ‘learned intermediary’ to help them determine the appropriate treatment.” *Id.* Distinguishing prescription medical devices from drugs, the court recognized that “because the patient is under anesthesia during the surgery, the patient and her physician must thoroughly discuss the potential risks and benefits prior to the implantation . . . factors [ ] not present when a physician prescribes a routine drug.” *Id.* Thus, the court held, Defendants only had a duty to warn Plaintiffs’ treating physicians of the risks involved with the transvaginal mesh implant. *Id.*

*Palkovic v. Countrywide Home Loans, Inc.*, Civ. A. No. 5:14-cv-102, 2014 WL 5449687 (N.D. W. Va. Oct. 24, 2014)

Three named plaintiffs brought a class action on behalf of themselves and West Virginia consumers who obtained mortgage loans that were closed by persons not under the supervision of a West Virginia lawyer. Defendants removed the case based on CAFA jurisdiction. To support removal under CAFA and the requirement that the class include 100 or more members, Defendants attached an affidavit identifying 4,264 loans obtained through Defendants for property in West Virginia during the relevant time frame. In opposing the Plaintiffs’ motion to remand, Defendants argued that the language of the complaint, which alleged that Defendants “issued thousands of mortgage loans” in West Virginia, implicated all 4,264 loans originated by Defendants.

The district court rejected Defendants’ argument and remanded the case. Because the class definition in the complaint was “clearly and unambiguously limited to those loans closed by persons not authorized to practice law in West Virginia,” the court found it could not “speculate as to the number of loans which may have been closed in such a manner.” *Id.* at \*3. The court reasoned that because Defendants did not identify any loans closed by persons not under the supervision of a West Virginia lawyer, Defendants failed to meet their burden of demonstrating CAFA’s requirements that the putative class consist of 100 or more members and that the matter in controversy exceed \$5 million. *Id.*

**Cases of Note Citing:** *Atl. Marine Const. Co. v. United States Dist. Ct. for W. Dist. of Tx*

*Creative Commc’ns, LLC v. Iberiabank*, Civ. A. No. 5:14-cv-36, 2014 WL 2111208 (N.D. W. Va. May 7, 2014)



Plaintiffs sued Century Bank's successor-in-interest based on a commercial loan agreement they entered into with a Century Bank. The loan agreement included a forum-selection clause that provided that the venue for any lawsuit brought with respect to the loan should be in Sarasota County Florida. Defendants moved to transfer venue based on the forum-selection clause. Plaintiffs argued that because Defendant was not a party to the loan contract at issue, the Supreme Court's holding in *Atlantic Marine* should not apply and that the court should conduct a typical 28 U.S.C. § 1404(a) analysis.

The district court rejected Plaintiffs' arguments and granted the motion to transfer. The court explained that "[t]he fact that [Defendant] is a successor-in-interest does not invalidate the forum selection clause in the loan agreement; both [the defendant] and plaintiffs remain bound by the clause." *Id.* at \*3 (citations omitted). Thus, the court analyzed the motion to transfer based on the § 1404(a) analysis articulated in *Atlantic Marine*. *Id.* Applying that analysis, the court held that Plaintiffs failed to meet their burden of establishing that their case was "one of the exceptional cases in which enforcement of a valid forum-selection clause is unwarranted." *Id.* at \*4.

## Fifth Circuit

### Drug & Medical Device Cases and Preemption

*Johnson v. TEVA Pharmaceuticals USA, Inc., et. al.*, 758 F.3d 605 (5th Cir. 2014)

Plaintiff brought a product liability action against the manufacturers of both the generic and brand name version of the medicine metoclopramide. Plaintiff alleged that her long-term use of the generic medicine caused her to develop a neurological disorder and that the manufacturers provided misleading and/or inadequate warnings in the product labeling. It was not disputed that Plaintiff had only ingested the generic version of the medicine and that she had not ingested the branded version. Plaintiff alleged claims against the generic manufacturer under the Louisiana Products Liability Act (LPLA), and against the branded manufacturers for breach of warranty, misrepresentation, fraud, and violation of the Louisiana Unfair Trade Practices Act (LUPTA).

The court determined that all variants of Plaintiffs' inadequate warning claims under the LPLA were preempted pursuant to the Supreme Court's ruling in *PLIVA, Inc. v. Mensing*, --- U.S. ---, 131 S. Ct. 2567, 180 L.Ed.2d 580 (2011). This included Plaintiffs' attempt to amend the complaint to allege that the generic Defendants should have sent "Dear Doctor" letters after a labeling change. The court noted that the generic Defendants could not send such letters because, under federal law, they must only communicate the same information as that provided by the brand-name manufacturers, and the brand-name manufacturers had not disseminated such a warning during the relevant time period.

The court next found that the LPLA-design-defect claim against the generic manufacturers was preempted per *Mut. Pharm. Co. Inc. v. Bartlett*, because generic manufacturers cannot develop an alternative design and yet still comply with the federal requirement that their generic medicines have the same chemical composition as the brand-name version of the medicine. *See* --- U.S. ---, 133 S.Ct. 2466, 186 L.Ed.2d 607 (2013). The court also rejected the argument that the generic Defendants should have stopped selling the medicine to avoid a preemption conflict.

Concerning the Plaintiffs' express warranty claim under the LPLA, the court agreed with the district court that any changes or modifications to the product warranties by the generic Defendants would run afoul of the "duty of sameness" identified in *Mensing*. Thus, such claims are not viable for the same reasons as the inadequate warnings claims.

Finally, with respect to the brand-name manufacturers, the court concluded that the LPLA provided the exclusive remedy for Plaintiffs against product manufacturers in the state of Louisiana. And because Plaintiff had not ingested the brand-name medicine, there was no viable claim against the brand-

name manufacturers under the LPLA. The court was not persuaded by Plaintiffs' arguments that viable claims existed outside the LPLA under the unique circumstances of the case. And the court also noted that even if the LPLA did not apply, Plaintiff had not established "that Brand Defendants owed Johnson a duty of care." *Id.* at 616 (internal citations omitted).

*Eckhardt v. Qualitest Pharmaceuticals, Inc., et. al.*, 751 F.3d 674 (5th Cir. 2014)

This case also involved claims against the brand-name and generic manufacturers of the medicine metoclopramide. Its reasoning is virtually identical to that of the Fifth Circuit in *Johnson v. TEVA Pharmaceuticals*, summarized above. 758 F.3d 605 (5th Cir. 2014). The case is noteworthy nonetheless because, while it arrives at the same outcome as *Johnson*, it does so surrounding claims made under Texas law (products liability, strict liability design defect, failure-to-warn, breach of warranty, consumer protection, fraud, negligence, negligent misrepresentation), rather than claims made under Louisiana law.

*Lashley v. Pfizer, Inc., et. al.*, 750 F.3d 470 (5th Cir. 2014)

Like *Johnson* and *Eckhardt* above, this case, too, involves the medicine metoclopramide and claims asserted against the brand-name and generic manufacturers. On appeal, two matters were consolidated, one asserting claims under Texas law and the other asserting claims under Mississippi law. This case confirms that the preemption outcomes of *Eckhardt* and *Johnson* also hold true under Mississippi law. Specifically, after rejecting Plaintiffs' efforts to avoid *Mensing* preemption decision as to the generic Defendants, the court then addressed the product liability claims made against the brand-name manufacturers. The court explained, "[Plaintiffs'] claims against brand manufacturers are foreclosed by [their] respective states' products liability laws . . . , which shield companies from liability for products they did not create." *Id.* at 466 (citing Miss. Code Ann § 11-1-63; Tex. Civ. Prac. & Rem. Code Ann. § 82.001(2) (West 2012)). Then considering any non-products-liability claims, the court concluded that "because Appellants did not ingest the brand manufacturers' products, these defendants have no common-law duty to them." *Id.*

### **Automobiles**

*Casey v. Toyota Motor Eng'g & Mfg. N. Am., Inc.*, 770 F.3d 322 (5th Cir. 2014)

Plaintiffs' decedent was involved in a single-vehicle accident, during which she was partially ejected through a side window and sustained a fatal head injury. The vehicle, a 2010 Toyota Highlander, was equipped with side curtain airbags that inflated, but during the accident sequence, they allegedly tore and remained inflated "for approximately two seconds or less." Plaintiffs alleged that Casey would not have been fatally injured had the airbags remained inflated.

After Plaintiffs presented their case, the district court granted a stipulated judgment as a matter of law in favor of Toyota as to Plaintiffs' manufacturing and design defect claims relating to the failure of the side curtain airbags.

The Fifth Circuit affirmed. Relying upon Texas law, the Court noted that, “[t]he Supreme Court of Texas has made clear that a showing that the product deviated in its construction or quality from *specifications or planned output* is essential to maintaining a strict liability manufacturing defect claim.” Here, Plaintiffs failed to present any evidence of the cause or nature of the defect “beyond the fact that the airbag did not remain inflated during the rollover.” Such unsubstantiated proof, the Court reasoned, would impermissibly force the jury to “speculate that a defect existed on the basis of product failure alone.” Similarly, they failed to show that the subject airbag performed differently from other airbags in the same product line – that is to say, that other airbags would have remained inflated longer. Plaintiffs did show that the airbags were designed to remain inflated for approximately six seconds, but the Court referred to such a benchmark as a performance standard, not a design standard, reasoning that “Texas does not permit proof of a manufacturing defect by showing a deviation from performance standards alone.”

Plaintiffs' design defect claim likewise failed for lack of evidence of a safer alternative design. Plaintiffs' expert, relying upon a single patent application, opined that airbags made with elastomer would have been more puncture-resistant than the subject nylon material. On cross, the expert admitted that he had not tested the alternative material, could not explain why it would have performed differently under the conditions of Casey's accident, had not performed a risk-utility analysis, and could not speak to the feasibility of the alternative airbag for use in Casey's vehicle.

### **Personal Jurisdiction**

*In re Chinese Manufactured Drywall Products Liab. Litig.*, 742 F.3d 576 (5th Cir. 2014)

Taishan Gypsum (“TG”), a drywall manufacturer, entered into a distribution agreement with Venture Supply, Inc., a Virginia company that distributes drywall and other building materials to customers in multiple states, including Virginia. Pursuant to the agreements between the parties, TG manufactured and sold over 200,000 sheets of drywall to Venture. In 2009, a group of Virginia homeowners initiated a class action suit against TG, claiming that they suffered property damage and health issues as a result of exposure to allegedly defective drywall.

After TG failed to appear in the action, the federal district court issued a default judgment against TG and certified a nationwide plaintiff class. TG moved to have the default order vacated, contending that the court lacked personal

jurisdiction and that service was defective because it was never served with a second amended complaint. The federal court rejected TG's jurisdictional argument, holding that exercising jurisdiction was fair, that TG knowingly placed its drywall into the stream of commerce to be used in Virginia, and that the claims against TG arose from TG's contacts with Virginia.

TG argued on appeal that the district court should have used the more stringent personal jurisdiction evaluation of the Fourth Circuit. The Fifth Circuit affirmed, however, holding that U.S. Courts have jurisdiction over defective Chinese drywall claims filed by Virginia homeowners against TG. The Court agreed with the district court's opinion that, whether analyzed under the Fourth Circuit's stream-of-commerce test or the Fifth Circuit's stream-of-commerce-plus test, the outcome would be the same: TG had sufficient contact with the forum state of Virginia to establish personal jurisdiction. Here, TG had identified its product with a Virginia distributor and imprinted its product with the contact information for that distributor, clearing any additional hurdles created by the higher bar of the Fourth Circuit's would-be analysis. The Court also noted as a practical matter that, were it not for the agreement with a Virginia distributor, TG's products would not have ended up in Virginia homes.

The Court dispensed with TG's deficient service argument because, under the Federal Rules of Civil Procedure, a party in default – as TG was by the time a second amended complaint was filed – need not be served with a subsequent pleading “unless that pleading asserts a *new claim* for relief.” Because the claims of the amended complaints were identical, there could be no deficiency. Finally, the Court disagreed with TG's suggestion that the lower court abused its discretion by not vacating the default judgment. TG argued under FRCP 60(b) that, as a Chinese company, it was unfamiliar with the litigation system of the United States and therefore any mishandling of its defense was attributable to excusable neglect.” The Court admonished TG for waiting “nearly a year after it was served” to seek legal advice and make its appearance, particularly if TG did not understand the implications of the complaint.

*In re Chinese-Manufactured Drywall Products Liab. Litig.*, 753 F.3d 521 (5th Cir. 2014)

In a separate decision arising out of several multidistrict litigation cases against Taishan Gypsum (“TG”), the Fifth Circuit affirmed the federal district court's decision that personal jurisdiction lies over TG and Tai'an Taishan Plasterboard Company, Limited (“TTP”). TG is a Chinese corporation with its principal place of business in Ta'in City, Shandong Province, China, and is one of the largest drywall manufacturers in China. TTP was its wholly owned subsidiary. Following Hurricanes Katrina and Rita, the Gulf States experienced a housing boom. TG sold gypsum drywall used in this home construction, but the drywall was prone to structural, plumbing, and mechanical problems. The

affected homeowners filed products liability claims against a number of responsible parties and, due to the volume of cases filed, the litigation was transferred to MDL in the Eastern District of Louisiana. This particular holding addressed several homeowners in both Florida and Louisiana.

With regard to the lower court's finding that it had specific jurisdiction over TG in Florida, TG argued first that the court erred in imputing TTP's contacts with Florida to TG for purposes of personal jurisdiction. TG contended that Chinese law, rather than Florida law, should have been used in assessing whether the court had personal jurisdiction; however, TG acknowledged that Chinese and Florida law are not materially different on the issue. The Court upheld the application of Florida law, reasoning simply that "if the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them." Turning to the same question as to whether Louisiana law or Chinese law should apply to the Louisiana litigations, the Court again found no material distinction between the two laws and reach the same conclusion.

With regard to the imputation of TTP's contacts with Florida, the Court found that TG's "parental control" over TTP was such that TTP's Florida contacts were rightly imputed under agency principles to TG for purposes of specific jurisdiction. Under Florida's long-arm statute, where a foreign corporation uses a subsidiary to do business in a particular jurisdiction, the parent is likewise considered to be doing business there as well for purposes of establishing personal jurisdiction. Further, over the course of TTP's operations, the Court noted that TG created TTP, has its own employees on the board of TTP, staffs TTP, TTP held itself out as the same entity as TG, and TG wound down TTP. Lastly, the Court observed that TG itself had sold a meaningful amount of drywall and conducted business negotiations in Florida, without using TTP as intermediary, to establish personal jurisdiction in Florida.

And again, the Court reached the same decision as to the Louisiana homeowners due to TG's independent and relevant business contacts in Louisiana. Based upon this finding, as well as the determination that "there is evidence showing that TG absolutely knew that the drywall was going to New Orleans," the Court affirmed personal jurisdiction as against TG in Louisiana. "[T]he record reflects an intimate relationship between TG and TTP," the Court observed, and "as their dealings demonstrate, TG and TTP availed themselves of Florida and Louisiana."

## **Class Action Fairness Act (CAFA)**

*Perritt v. Westlake Vinyls Co., L.P.*, 562 Fed. Appx. 228 (5th Cir. 2014).

Plaintiffs filed a class action against the owner of a chemical facility that exploded and released various chemicals. Following removal, the District Court granted the class members' motion to remand. On appeal, the Fifth Circuit held that Defendant did not meet its burden to prove that the amount in controversy required for federal jurisdiction under the CAFA was facially apparent. Nor did the owner's affidavit did not establish the amount in controversy required by the CAFA. Instead, the affidavit merely recapitulated the census numbers of the areas impacted by the release of chemicals and failed to provide an estimate of claims the owner expected to pay. Accordingly, the Fifth Circuit concluded that the district court did not have jurisdiction over the class action, and affirmed the District Court's remand order.

## **Eastern District of Texas**

### **Forum Non Conveniens**

*Dominguez v. Gulf Coast Marine & Associates, Inc.*, No. 9:08-CV-200, 2014 WL 1998052 (E.D. Tex. May 14, 2014).

In an action arising from a fatal maritime accident off the coast of Mexico, the Court dismissed the suit pursuant to the doctrine of *forum non conveniens*. Giving rise to the suit, a mobile drilling rig collided with an oil production platform. The workers onboard were forced to evacuate the platform, and their lifeboats capsized in the rough waters, resulting in the death of twenty-two offshore workers. The workers killed in the accident were either employed by Pemex, Mexico's state-owned oil company, or Perforadora, a Mexican company that assisted Pemex in oil exploration. At the time of the incident, Pemex owned the oil production platform and was leasing the drilling rig from Perforadora. As a condition of dismissal, the court required Defendants to tender a written statement in which they agreed to submit themselves to the jurisdiction of a Mexican court, waiving any jurisdictional defenses they might normally possess. Additionally, the court's dismissal was subject to a return-jurisdiction clause. When the Mexican courts dismissed the cases, stating that they could not assert jurisdiction over Defendants, Plaintiffs filed a motion to reinstate the case pursuant to the return-jurisdiction clause. The court denied the motion, finding that Plaintiffs did not comply with Mexican procedural law and did not prosecute their cases in good faith. Because Plaintiffs failed to satisfy the conditions set forth in the return-jurisdiction clause, the court held that reinstatement was not warranted.

**Cases Arising from *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013)**

*Stewart v. American Van Lines, et al*, 2014 WL 243509 (E.D. Tex. January 21, 2014)

Barbara Stewart contracted with United States Van Line (“US Van Line”) to move Stewart’s personal property from Texas to Mississippi. Stewart alleged that the movers failed to pick up all of her items, failed to provide the required notice prior to delivery in Mississippi, required payment of a delivery surcharge before delivering the items in Mississippi, and refused to accept payment for the surcharge. US Van Line, claiming that it was not paid the surcharge, took the items to Florida, placed them in storage, and refused to release the goods until Stewart paid the storage and additional moving costs.

Stewart sued the moving company Defendants, who *inter alia* sought to transfer the suit under 28 U.S.C. §§ 1404(a) and 1406(b) for improper venue. These Defendants contended that, pursuant to forum-selection clauses in a bill of lading and other contract documents, the matter should be transferred from Texas to Florida.

The Eastern District of Texas reviewed the enforceability of the forum-selection clause. Noting that historically in the Fifth Circuit, forum-selection clauses have been enforced absent a showing by the resisting party that the clause is unreasonable (a “heavy burden”), the Court reviewed the four circumstances where a forum-selection clause may be found unreasonable: (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching, (2) the party seeking to escape enforcement will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum, (3) the fundamental unfairness of the chosen law will deprive Plaintiff of a remedy, or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

The Court went on, however, to review the recent clarification from the U.S. Supreme Court regarding forum-selection clauses in *Atlantic Marine Construction Company, Inc. v. U.S. District for the Western District of Texas*. 134 S.Ct. 568, --- U.S. --- (2013). In *Atlantic Marine*, the Court held that “valid forum-selection clauses are to be given controlling weight in all but the most exceptional cases.” When parties have agreed to a valid clause, “a district court should ordinarily transfer the case to the specified forum.” The burden is on the Plaintiff to show why the transfer should not be made, and district courts are only to consider public-interest factors – which, again “will rarely prevent transfer and only in the most exceptional cases.”



Accordingly, the *Stewart* Court noted that it “is limited in its analysis to whether the four factors noted above are such exceptional factors which would warrant the Court’s denial of a motion to transfer.” Reviewing the four factors and finding that none are met here, the Court upheld the venue transfer as proper and as required under *Atlantic Marine*.

## **Northern District of Texas**

### ***Daubert* and Punitive Damages**

*In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liab. Litig.*, No. 3:11-MD-2244-K, 2014 WL 3557345 (N.D. Tex. July 18, 2014).

In the DePuy Pinnacle multidistrict litigation involving DePuy's design, development, manufacture, and distribution of the Pinnacle hip implant, Plaintiffs offered a designated expert to provide financial information and expertise about Defendant DePuy. DePuy argued that the expert’s testimony was inadmissible because the expert’s opinions invaded the province of the jury to determine the amount of punitive damages. DePuy also argued that such opinions were not based on reliable methodology for calculating punitive damages. The court found that the expert was not being offered as an expert on punitive damages, but rather as an expert in evaluating the financial condition of businesses. The court further concluded that the expert report provided the jury with figures for Defendants' ability to pay – one of the statutory mandated factors to be considered in determining an amount of punitive damages. Additionally, the court concluded that the financial expert's calculation of Defendant’s net worth for purposes of awarding punitive damages – based on sources and methods generally accepted in the economic community – was reliable.

### **Personal Jurisdiction**

*Allstate Ins. Co. v. Interline Brands, Inc.*, 997 F. Supp. 2d 501, 504 (N.D. Tex. 2014).

Insurers brought a subrogation action – removed from state court – against a Chinese manufacturer, alleging it manufactured defective toilet supply lines that caused water-related damage in a number of insured individuals' homes. Defendant-manufacturer moved to dismiss for lack of personal jurisdiction. The Court found the evidence insufficient to show Defendant delivered its product into the stream of commerce with the expectation that the product would be purchased or used by consumers in Texas, as required to establish a prima facie case of specific personal jurisdiction. The court further held that Defendant’s 54 shipments of its product to Texas over an eight-year period – equating to less than seven annual shipments – did not qualify as “continuous and systematic” forum contacts, as required to establish a prima facie case of general personal

jurisdiction over the manufacturer. The court reasoned that Defendant's limited and discrete business did not render Defendant "essentially at home" in Texas.

## Western District of Texas

### Discovery/Evidence – Discoverability of Communications with Experts and/or Non-Attorneys

*Whole Woman's Health, et. al. v. David Lakey, M.D.*, 301 F.R.D. 266 (W.D. Tex. 2014)

While not a product liability case, the Court addressed an issue often implicated in product liability matters, namely: the extent to which communications between testifying experts, attorneys, and non-attorneys are shielded from discovery. At issue was whether written communications between Vincent Rue, Ph.D. and certain testifying experts were protected by the work-product doctrine as outlined in the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 26(b)(4). The court noted that Rue was involved in the preparation of at least some of the experts reports submitted by certain testifying experts and communicated with those same experts on multiple occasions. The court had previously ruled in a telephonic hearing that Plaintiffs were entitled to ask Defendants' testifying experts at a deposition about their oral communications with Rue. In its reasoning, the court noted that the Fifth Circuit had not yet decided whether communications between a party's testifying expert and a non-attorney representative were discoverable, but several other circuits had been faced with the subject. *See Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185 (11th Cir. 2013); *Republic of Ecuador v. Bjorkman*, 735 F.3d 1179 (10th Cir. 2013). After analyzing these other decisions, and the Advisory Committee Notes to Fed.R.Civ.P. 26, the Court concluded that communications between Rue and the testifying experts were discoverable, except as provided in Rule 26(b)(4)(B)-(C). Any communications related to draft expert reports and/or relating to communications between counsel and testifying experts were also found to be protected. In so ruling, the Court noted that "a major obstacle" to shielding the communications in question was that Rue's role in the litigation was never precisely explained to the Court, but "is [was] clear that Rue is not an attorney." The Court also distinguished its ruling in this case from its ruling in *Nat'l W. Life Ins. Co. v. W. Nat. Life Ins. Co.*, No. A-09-CA-711, 2011 WL 840976 (W.D. Tex. Mar. 3, 2011), which had held the communications between testifying experts and retained, non-testifying experts were not discoverable.

**Cases Arising From *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013)**

*Trevino v. Cooley Constructors, Inc.*, 2014 WL 2611823 (W.D. Tex. June 9, 2014)

Cooley Constructors (“Cooley”) was the general contractor for a construction project at Laughlin Air Force Base in Val Verde County, Texas. Cooley requested a bid for electrical work from Joe Trevino, and the two entered into a Subcontract Agreement in May 2010. On July 31, 2010, Trevino submitted his first request for payment, and pursuant to the Agreement was entitled to payment within 30 days of request. Cooley did not issue payment until nearly 60 days later, and even then only made partial payment. Trevino filed suit for breach of contract and quantum merit, claiming to be owed over \$100,000 for work performed.

Shortly thereafter, Cooley filed a Motion to Transfer Venue under the mandatory forum-selection clause of the Agreement. Noting that “such clauses are ‘prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances,’” the Court quickly determined that the contractual validity factors for such clauses – including (1) whether incorporation of the forum-selection clause was the product of fraud or overreaching, (2) whether Plaintiff will be deprived of his day in court by the grave inconvenience or unfairness of the chosen forum, (3) whether Plaintiff will be deprived an adequate remedy due to the fundamental unfairness of the chosen law, and (4) whether enforcement would contravene Texas public policy – weighed in favor of enforcement.

The Court then analyzed enforcement under 28 U.S.C. § 1404(a) in light of the recent holding in *Atlantic Marine v. Western District of Texas*, 134 S.Ct. 568, 187 L.Ed.2d 487 (2013). In that opinion, the Supreme Court held that:

The “enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interest of the justice system.” For that reason, and because the overarching consideration under § 1404(a) is whether a transfer would promote “the interest of justice,” “a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.”

Having found the subject forum-selection clause to be valid, the Court observed that the § 1404(a) analysis must be modified as follows: (1) the Plaintiff’s choice of forum merits no weight, (2) the court is not to consider arguments about the parties’ private interests, and (3) when a party files suit in a different forum despite a valid forum-selection clause, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules. The purpose

of this modification, the Court noted, is to “not unnecessarily disrupt the parties’ settled expectations.”

The effect of this modification, and of *Atlantic Marine* therefore, is that only certain public policy factors may be considered with regard to a valid forum-selection clause, including: (1) the administrative difficulties flowing from court congestion, (2) the local interest in having localized interests decided at home, (3) the familiarity of the forum with the law that will govern the case, and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law. Because Plaintiff failed to argue any of these public policy considerations, and because none appeared to be present, the Court held that there were no extraordinary circumstances sufficient to deny Cooley’s requested transfer of venue, and that such transfer was proper under the circumstances.

### **Southern District of Texas**

#### **Medical Device Preemption and Off-Label Use**

*Schouest v. Medtronic, Inc.*, --- F.Supp.2d ----, 2014 WL 1213243 (S.D. Tex. 2014)

Plaintiff brought a product liability action against the manufacturer of the Infuse medical device, which included claims of negligence, strict liability, breach of express and implied warranties, and fraud. Plaintiff alleged that the manufacturer fraudulently promoted an off-label use of the device and/or failed to warn physicians of the risks associated with the off-label use of the device. The court first noted that Plaintiffs asserting product claims against medical-device manufacturers “must navigate a narrow path between two federal preemption doctrines.” *Id.* at \*1 (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) and *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001)). The court continued that “the key dividing line is between claims alleging affirmative misrepresentations and those alleging that Medtronic should have done more.” *Id.* at \*5. Claims based upon affirmative misrepresentations may survive preemption if properly pleaded; claims premised upon omissions, however, are generally preempted under existing precedent. The court next engaged in a claim-by-claim analysis and ultimately concluded as follows:

To the extent that Plaintiff’s negligence claims were predicated on a failure-to-warn theory, the claims were preempted. However, Plaintiff’s negligence claims could survive preemption to the extent that Plaintiff could point to a state law duty to report adverse events and an FDA regulation that Medtronic violated surrounding the reporting of such events. Plaintiff was allowed an opportunity to amend the complaint to assert such a claim. *Id.* at \*10

Plaintiff's fraud and constructive fraud claims that Medtronic knowingly and intentionally misrepresented materials facts about the safety and effectiveness of the Infuse device in an off-label manner were "paradigmatic" of the sorts of claims that survive preemption. *Id.*

Plaintiff's strict liability claim alleging that Medtronic failed to provide warnings describing the risks of off-label uses was preempted because the FDA had reviewed and approved of the device's warnings and indications for use. Likewise, Plaintiff's design defect claims were preempted for the same reason. *Id.* at \*10-11.

Plaintiff's implied warranty claim was preempted because "[f]ederal law governs all statements that Medtronic is obligated to make concerning the Infuse device." *Id.* at \*11.

Plaintiff's express warranty claims could survive preemption to the extent they were premised on false warranties that Medtronic voluntarily made beyond the federally approved warning. The court allowed Plaintiff an opportunity to re-plead this claim. *Id.*

Plaintiff's claims under Texas Consumer Protection Laws were insufficiently plead but could conceivably survive preemption. Again, the court allowed Plaintiff an opportunity to re-plead. *Id.* at 12.

## **Eastern District of Louisiana**

### **Electronic Discovery**

*XL Specialty Insurance Co. v. Bollinger Shipyards, Inc., et. al.*, No. 12-2071, 2014 WL 295053 (E.D. La. 1/27/2014).

The consolidated cases involved a dispute between Bollinger, the alleged insured, and XL Specialty Insurance Company, an insurer. Among other matters, the case involved a discovery dispute concerning the manner in which electronically stored information (ESI) was produced. While Bollinger had produced more than 800,000 documents consisting of more than 4 million pages, XL complained that Bollinger failed to provide an explanation of the document naming and number system, as well as that "[m]any of the documents in the [production] database had been entered as scanned documents and/or lacked elements of metadata that usually accompany native files, significantly hampering review." *Id.* at \*4. Bollinger replied that the documents produced were OCR recognized (optical character recognition) and therefore could be searched electronically. *Id.* The court first observed that discovering parties are not necessarily entitled to receive electronic documents in any particular form and that if XL desired the produced documents to be in a particular form, XL was required to specify that form, as indicated in Fed.R.Civ.P. 34(b)(2)(B). The court

then noted, however, that even if such a specified request had been made, “the question of whether production of some particular electronic form or format, including native format with useable metadata, would have been open to debate. *Id.* at \*4 (citing Fed.R.Civ.P. 26(b)(2)(C)(iii); *Wyeth v. Impax Laboratories, Inc.*, 2006 U.S. Dist. LEXIS 79761 (D. Del. 2006)). Because XL did not make such a particularized request concerning the production format, the court ultimately concluded that Bollinger merely was required to produce the ESI in form or forms in which it [was] ordinarily maintained or in a reasonably usable form. *Id.* at \*6 (citing Fed.R.Civ.P. 34(b)(2)(E)(i) and (ii)). The court believed that an OCR-readable disc produced by XL satisfied that requirement. The court did, however, require that Bollinger provide a written explanation as to the naming and numbering system that it used to label the documents, to the extent that it had not already done so.

### **Preemption Arguments Involving Non-Prescription Medicines**

*Hunt v. McNeil Consumer Healthcare, et. al.*, 6 F.Supp.3d 694 (E.D. La. 2014).

The Plaintiff, Keisha Hunt, suffered an injury after ingesting Children’s Motrin, a non-prescription medicine manufactured by Defendant McNeil Consumer Healthcare and Johnson and Johnson. It was alleged that Plaintiff contracted Stevens-Johnson Syndrome and/or Toxic Epidermal Necrolysis (SJS/TEN). Plaintiff filed suit pursuant to the Louisiana Products Liability Act (LPLA) alleging Children’s Motrin to be defectively designed and/or to be accompanied by inadequate warnings. Defendants claimed that Plaintiffs claims were preempted under the doctrine of impossibility preemption, as described in *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). More specifically, Defendants alleged that it was not possible to comply with both the LPLA and the Federal Food, Drug, and Cosmetic Act (FDCA) and, therefore, that Plaintiff’s LPLA claims were preempted. The court disagreed, however, explaining, “There is a crucial difference between *Wyeth* and the case at bar: whereas *Wyeth* involved a prescription drug, Children’s Motrin is available over the counter.” *Id.* at 699. The court continued that non-prescription drugs are regulated by a special statute, which includes not only a preemption clause but also a savings clause that “expressly preserve[s] product liability actions.” *Id.* (citing 21 U.S.C. § 379r(a); *Wyeth, supra*, 555 U.S. at 575 n.8). Ultimately, therefore, the court concluded that Plaintiff’s inadequate-warning claim was not preempted. It also found that Defendants had not demonstrated “clear evidence” that the FDA would have rejected a change to the drug’s labeling that would have been required to comply with state law. *Id.* And finally, after acknowledging that no court had yet addressed the issue, the court concluded that Plaintiff’s design defect claim was not preempted because the United States Supreme Court’s decision in *Bartlett* did not apply to non-prescription drugs. *Id.* at 702 (citing *Mutual Pharmaceuticals Co. v. Bartlett*, --- U.S. ----, 133 S.Ct. 2466, 186 L.Ed.2d 607 (2013)).

### **Class Action Fairness Act (CAFA)**

*Moll v. Intuitive Surgical, Inc.*, No. CIV.A. 13-6086, 2014 WL 1389652, (E.D. La. Apr. 1, 2014).

A class-action suit filed in state court arose from injuries sustained as a result of a robot-assisted laparoscopic hysterectomy. The complaint asserted negligence and strict liability claims against Intuitive, the manufacturer of the da Vinci device, and Ochsner, the medical facility where the procedure was performed. Defendants removed the suit to federal court, asserting that the complaint satisfied the requirements of the Class Action Fairness Act and federal diversity-of-citizenship jurisdiction. Defendants argued that Ochsner was improperly joined to defeat diversity jurisdiction as both the company and Plaintiff were Louisiana citizens. Judge Fallon agreed, finding the proposed class action met the threshold requirements for federal jurisdiction under CAFA because the action: (1) involved product liability allegations about a device used nationwide, not just in Louisiana; (2) likely would involve more than 100 class members; and (3) likely would seek to recover more than \$5 million. The court further concluded that the claims against Ochsner sounded in medical malpractice and were thus premature because Plaintiff had not complied with the Louisiana Medical Malpractice Act. Consequently, the court found that the hospital was improperly joined to avoid federal diversity jurisdiction and held that complete diversity existed in the suit.

### **Personal Jurisdiction**

*Istre v. Montco Offshore, Inc.*, No. CIV.A. 12-2054, 2014 WL 790872 (E.D. La. Feb. 26, 2014).

Plaintiff allegedly sustained injuries during the course and scope of his employment while serving as a seaman aboard a vessel. Plaintiff initially sued his employer, alleging that he and other crew members were attempting to hoist a rescue board up to the main deck of the vessel when the line on the winch system snapped, causing the boat to fall on top of Plaintiff in the water. In an amended complaint, Plaintiff asserted a product liability claim against Schat-Harding – the company that contracted with Plaintiff’s employer to install the winch system. In turn, Schat-Harding filed a third-party complaint against SESA, a French corporation, alleging that the winch system failed because of a defective switch manufactured by SESA. SESA moved to dismiss, contending that the Court lacked personal jurisdiction over it. The court granted SESA’s motion and held the evidence was insufficient to show either: (1) that SESA placed the product at issue into the stream of commerce; or (2) the product reached the forum state while it was in the stream of commerce. The court reasoned that the record was devoid of evidence that SESA manufactured any product – much less the switch at issue. Instead, the evidence showed that SESA was the ultimate parent of a group of companies, one of which actually manufactured the switch at issue. The

court rejected the argument that the winch system traveled through the forum state en-route to Alabama, noting the lack of jurisprudence relying on the shipping chain of a product in order to justify the exercise of personal jurisdiction over a corporation.

*Ford v. Mentor Worldwide, LLC*, No. CIV.A. 13-6317, 2014 WL 693926 (E.D. La. Feb. 21, 2014).

A patient brought a state court action against her physician, the healthcare association, and the manufacturer of breast implants, seeking to recover damages for her injuries allegedly suffered after a failed breast augmentation procedure. Defendants removed the case and subsequently moved to dismiss based, in part, on lack of personal jurisdiction. The Eastern District of Louisiana held: (1) the nonresident physician's maintenance of a website did not constitute purposeful availment, so as to support the exercise of specific jurisdiction; (2) the nonresident physician's email exchange and contract with the patient concerning her breast augmentation surgery while she was located in Louisiana did not constitute purposeful availment, so as to support the exercise of specific jurisdiction; and (3) the nonresident physician's contacts with Louisiana were not sufficiently substantial so as to support the exercise of general jurisdiction.

**Cases of Note Citing *Mississippi ex. rel. v. AU Optronics*, 134 S.Ct. 736, 187 L.Ed.2d 654 (2014) and Class Action Fairness Act**

*Louisiana v. Zealandia Holding Company, Inc.*, 2014 WL 1378874 (E.D. La. April 8, 2014)

This litigation arose out of the sales and marketing of memberships in a points-based vacation club. Defendant Festiva Development Group, LLC ("Festiva") marketed club memberships to Louisiana consumers, who were invited to attend sales presentations and then given the opportunity to purchase club memberships. Over a hundred Louisiana residents who purchased club memberships then brought suit against Festiva, alleging violations of the Louisiana Unfair Trade Practices Act and seeking recovery of membership fees. Under the *parens patriae* authority, Louisiana assumed the prosecution of the claims, seeking injunctive relief and civil penalties related to alleged violations of the LUTPA.

Festiva and other Defendants removed the litigation as "either a class action or, in the alternative, a mass action," pursuant to the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d). Louisiana moved to remand on the basis that the CAFA does not provide class or mass action jurisdiction for *parens patriae* actions. In support of its motion, Louisiana cited the recent holding in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736 (2014).



Festiva disagreed, arguing that the *Hood* holding was distinguishable because its *parens patriae* action was brought pursuant to a Mississippi statute; the Louisiana statute, Defendants argued, not only allowed Louisiana to assert a class, but required such assertion.

The Eastern District of Louisiana determined first that the subject action was not a “mass action.” The Court relied heavily upon the holding in *Hood*, noting that in that case, the Supreme Court made clear that “mass action jurisdiction could not exist over a *parens patriae* action.” Extending the analysis to the present case, the court reasoned that because the State of Louisiana was the only Plaintiff, “it is uncontested that mass action jurisdiction does not exist.”

With regard to the class action allegation by Defendants, the Court again relied upon the *Hood* decision, noting that “if Congress had wanted representative actions brought by States as sole Plaintiffs to be removable under CAFA on the theory that they are in substance no different from class actions, it would have done so through the class action provision, not the one governing mass actions.” Because a class must be asserted for an action to be removable under CAFA, the question becomes whether a *parens patriae* action seeking an injunction and restitution is, by its very nature, a class action. In the instant proceedings, the attorney general had the option under the Code of Civil Procedure to prosecute its claims as “a class action ... for the procedural safeguards [that choice] offers.” However, the attorney general did not do so. By choosing not to proceed as a class action, especially in light of the language of both CAFA and the *Hood* decision, the Court held that “it would be inappropriate to allow the Defendants to alter that choice. Accordingly, a basis for jurisdiction does not exist under either CAFA’s mass action or class action provision.”

## **Western District of Louisiana**

### ***Daubert* and Punitive Damages**

*In re Actos (Pioglitazone) Products Liab. Litig.*, No. 6:11-MD-2299, 2013 WL 6383104 (W.D. La. Dec. 4, 2013).

In the multidistrict litigation arising from product liability claims against the manufacturers and marketers of Actos and other drugs containing pioglitazone, Defendants moved to exclude expert testimony recommending a methodology for calculating Defendants' ability to pay punitive damages. Defendants' challenges were based on: (1) the alleged lack of a foundation to permit any opinion regarding punitive damages; and (2) the admissibility of testimony about the recommended methodology. The US District Court for the Western District of Louisiana denied Defendants' motion, finding that the testimony offered the jury assistance with its process of considering punitive damages but did not offer an opinion as to the proper outcome or end result of its deliberations. As to the admissibility challenge, the court found that Plaintiffs'

expert used reliable principles and methods in reaching her opinion that her recommended methodology used by financial institutions could provide useful assistance for the jury to use in determining a proper amount of punitive damages.

### **Discovery Sanctions and Spoliation**

*In re Actos (Pioglitazone) Products Liab. Litig.*, No. 6:11-MD-2299, 2014 WL 2872299 (W.D. La. June 23, 2014).

In the same litigation described above, the Plaintiffs Steering Committee (PSC) filed a motion arguing that Defendant Takeda destroyed relevant and beneficial evidence for the PSC case after a duty to preserve that evidence had arisen. The PSC also argued that the destruction of evidence had been in bad faith and therefore Plaintiffs were entitled to a default judgment, or alternatively an adverse inference instruction for the jury, as well as a variety of cost-shifting measures, a fine, and an award of attorneys' fees and costs. The dispute centered on missing electronic and paper files from a variety of employees and sales representatives who left Takeda's employment between 2001 and 2011; some of the missing files had been obtained via third-party discovery and were purported to demonstrate safety concerns associated with the medicine in question. The court noted that a party can only be sanctioned for destroying evidence that it has a duty to preserve, which would be triggered when a party became aware of ongoing or potential litigation. *Id.* at \*5. Takeda acknowledged that some documents could not be located, accessed, and/or produced and that a general Actos product liability litigation hold had been issued throughout the company in 2002, well before the institution of the current bladder cancer litigation. Moreover, this 2002 litigation hold also had been "refreshed" or reissued several times between 2003 and 2011. As for the allegation of bad faith, the PSC cited the fact that Takeda's 30(b)(6) deposition representative on the topic of document retention was an IT consultant, who had no independent knowledge of any of the Takeda entities or policies, and who had never worked with any of the Takeda entities in any capacity before being retained in the litigation. *Id.* at \*8. The court seemed persuaded by this argument, noting "after review of the 30(b)(6) deposition, [this Court] cannot say that the deposition does not support that argument [that the representative was a hired gun brought in to buffer and obfuscate]." *Id.* The court ultimately found that it had power to impose sanctions for conduct before the commencement of the MDL via its inherent powers. *Id.* at \*14. It then deferred its decision on many of the requested forms of relief (including sanctions and cost shifting, among others) but concluded that it was "wholly reasonable to allow the jury to hear all evidence and argument establishing and bearing on the good faith or bad faith of Takeda's conduct." *Id.* at \*38. Accordingly, the court ruled that it would "allow all evidence of and relating to Takeda's conduct as to documents and electronic data destruction to go before the jury and will, after having heard all evidence, determine what instruction to give the jury." *Id.* at \*39.

## Punitive Damages

*Hayes v. Asbestos, Corp., Ltd*, No. 2:13-2392, 2014 WL 1270011 (W.D. La. Mar. 27, 2014).

After suffering from malignant mesothelioma, Plaintiff filed suit against Ford Motor Company and other manufacturers that allegedly exposed Plaintiff to their products containing asbestos. In the amended complaint, Plaintiff's two surviving sons asserted survival and wrongful death claims, as well as a product liability claim pursuant to the Louisiana Products Liability Act. Defendant Ford moved to dismiss Plaintiffs' punitive damages claim, arguing that Plaintiffs failed to state a cause of action entitling them to relief under the applicable civil code article because they failed to allege that Ford's conduct "occurred in the storage, handling or transportation of hazardous or toxic substances." The court agreed with Ford, finding the complaint failed to allege facts that would entitle Plaintiffs to punitive damages under Louisiana law.

*McLaughlin v. GlaxoSmithKline, LLC*, No. CIV.A. 12-2946, 2014 WL 669349 (W.D. La. Jan. 6, 2014).

In a case arising from alleged injuries suffered by Plaintiff from the ingestion of Paxil and Paxil CR, a prescription medication manufactured by Defendant, Plaintiff alleged ten causes of action including, inter alia, product liability claims and a punitive damages claim. The Western District of Louisiana determined that Louisiana law applied, and consequently, the Louisiana Product Liability Act (LPLA) provided the sole theories of recovery for Plaintiff's claims arising out of her use of Defendant's product. Accordingly, the court dismissed all of Plaintiff's claims pled beyond the scope of her exclusive remedy under the LPLA, including her punitive damages claim.

## Other Cases of Interest

*Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)

No negative treatment in the Fifth Circuit in 2013.

Cited once for the proposition that "Loss causation need not be proven at the class certification stage." *In re BP plc. Sec. Litig.*, No. 10-MD-2185, 2014 WL 2112823, at \*7 (S.D. Tex. May 20, 2014) (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2185–86 (2011))

Cited once as authority for the elements of a private securities fraud claim based on violations of 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b–5. *Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676, 683 (5th Cir. 2014) (citing *Erica P.*

*John Fund, Inc. v. Halliburton Co.*, — U.S. —, 131 S.Ct. 2179, 2184, 180 L.Ed.2d 24 (2011)

## Sixth Circuit

### Preemption

*In re: Darvocet, Darvon, and Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917 (6th Cir. 2014)

In *Darvocet*, the Sixth Circuit upheld the dismissal of most claims in 68 cases assigned to multidistrict litigation in the United States District Court for the Eastern District of Kentucky. Plaintiffs sought to hold both generic and brand-name pharmaceutical drug makers liable for injuries allegedly caused by the use of a generic prescription painkiller called propoxyphene (brand names of Darvon and Darvocet). The drug was pulled from the market in the United States in 2010 when the FDA became aware of a study suggesting it might be linked to heart rhythm abnormalities. Plaintiffs alleged that manufacturers continued marketing propoxyphene products after they knew the risks of the drug exceeded its benefits without any warnings.

Plaintiffs alleged three sets of claims against generic manufacturers: (1) wrongful marketing, (2) failure-to-warn claims, and (3) various remaining state law claims including breach of warranties, fraud, and misrepresentation. Most of the Plaintiffs also sought to hold the brand-name manufacturers liable, alleging that they made misrepresentations about propoxyphene, which led Plaintiffs' physicians to prescribe the generic equivalent. The Sixth Circuit affirmed dismissal of 67 of 68 cases, agreeing that Plaintiffs either failed to plead their claims adequately or that their claims were preempted.

The Sixth Circuit was the first to test the so-called Footnote 4 exception – the “parallel misbranding” theory originating from the recent United States Supreme Court case *Mutual Pharmacy Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013). Under *Bartlett*, plaintiffs “cannot sue a generic manufacturer on a failure to warn claim or a state law design defect claim that turns on the adequacy of a drug’s warning.” But in Footnote 4 in *Bartlett* stated that it did not address “state design-defect claims that parallel the federal misbranding statute.” In *Darvocet*, the Sixth Circuit reasoned that “even if such a claim does exist under federal and state law, Plaintiff’s claims fail for a simpler reason: Plaintiffs failed to plead such a claim.” And according to the Sixth Circuit, Plaintiffs did not point to any “new or scientifically significant information” that the generic manufacturers possessed that was not presented to the FDA.

The court in *Darvocet* further reasoned that, under current regulations, generic manufacturers are subject to the requirement that their labeling match that of the “reference listed drug” (Darvon and Darvocet, in this case). Thus, “while a brand-name manufacturer is responsible for the accuracy and adequacy of its label, a generic manufacturer is responsible for ensuring that its warning label is the same as the brand-name’s.” This is commonly referred to as the “duty of sameness.”

Plaintiffs argued that their failure-to-warn claims against the generic manufacturer, Mylan, were not preempted because the FDA designated Mylan's product as the "reference listed drug" for certain propoxyphene products after the brand-name manufacturer left the market. As a result, Plaintiffs asserted that Mylan was subject to liability under the standard for brand-name manufacturers rather than generic manufacturers. But the Sixth Circuit disagreed, and stated that "merely becoming [a reference listed drug] holder does not empower a generic manufacturer to independently change the drug's warning label." Therefore, the claims were preempted.

Finally, the Sixth Circuit agreed with the District Court and "an overwhelming majority of courts" that brand-name drug manufacturers cannot be liable for harm caused by generic versions of their drugs. After an analysis of 22 state courts, the Sixth Circuit found that no high courts would recognize the claims against brand-name manufacturers.

*Strayhorn v. Wyeth Pharm., Inc.*, 737 F.3d 378, 408 (6th Cir. 2013)

In *Strayhorn*, the Sixth Circuit applied federal conflict preemption principles to Plaintiffs' state-law failure-to-warn claims. The appeal stemmed from the consolidation of seven separate cases filed against manufacturers of the prescription drug Reglan and its generic equivalent, metocopramide. Plaintiffs filed product liability claims against the brand-name and generic drug manufacturers, alleging that they developed a serious neurological disorder from ingesting the generic drug. The brand-name manufacturers moved for summary judgment because none of the Plaintiffs ingested Reglan; that motion was granted by the district court and affirmed by the Sixth Circuit.

The generic manufacturers moved to dismiss, arguing that Plaintiffs' claims were preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA") and the recent Supreme Court decisions of *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (holding that state-law failure-to-warn claims against generic manufacturers of metocopramide are preempted by federal law), and *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013) (applying the holding of *Mensing* to state-law design-defect claims against generic manufacturers). The district court granted the motion to dismiss; the Sixth Circuit affirmed.

Plaintiffs desired to read *Mensing* and *Bartlett* very narrowly, arguing that "only claims 'based on the adequacy of the information contained in the drug's label' are preempted, not claims based on a 'manufacturer's duty to provide a warning' beyond the label." The Court of Appeals reviewed the opinions of other circuits and ultimately disagreed with Plaintiffs. Disregarding Plaintiffs' efforts to "dress up" their claims as anything other than failure-to-warn claims (such as design defect and breach of warranty), the court interpreted *Mensing* and *Bartlett* broadly, holding that any failure to warn claims are preempted by the FDCA "because labeling is limited by federal law to the information contained in the brand-name drug's labeling."

Judge Stranch’s dissent concurred with the majority holding as to the generic manufacturers, but only because she was “bound to apply Supreme Court law.” However Judge Stranch expressed serious dismay that the holding “strips generic-drug consumers of compensation when they are injured by inadequate warnings.” Judge Stranch’s dissent mirrors the dissent in *Mensing*, and may signal that a shift on this issue may come at some point down the road.

### Immunity

*Miller v. Mylan, Inc.*, 741 F.3d 674 (6th Cir. 2014)

In *Miller*, Plaintiff’s decedent died after receiving a fatal dose of fentanyl through a transdermal patch. Defendant argued in the district court that the fentanyl patch was a “drug,” rather than a “device,” and that the manufacturer was therefore immune from liability pursuant to MICH. COMP. LAWS § 600.2946(5), which grants immunity to drug manufacturers. The district court agreed, and dismissed the complaint. Plaintiff appealed. *Id.* at 675.

The Sixth Circuit reversed. Under Michigan law, a “drug” is defined as that term is used in federal law, which defines a drug as:

(A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).

*Id.* at 676. The Sixth Circuit criticized the district court’s analysis of whether the transdermal patch constituted a drug for being incomplete. The court stated that, under the federal statutory scheme for defining, identifying, and regulating drugs, drugs are no longer simply broken down into the two categories of drug or device. *Id.* at 677. Rather, in 1990, Congress amended the federal scheme to add a third category, known as “combination products.” *Id.* As such, “if a product is better defined as a ‘combination product’ than a ‘drug’ under federal law, then its manufacturer is not immune from suit in Michigan.” *Id.* Because the district court did not apply the “tripartite” scheme employed by federal law, the Sixth Circuit reversed and remanded the case to the district court to “determine whether the fentanyl patch should be designated as only a ‘drug’ for purposes of the Michigan statute.” *Id.* at 678.

## Expert Witness Qualification

*Burgett v. Troy-Bilt LLC*, No. 13-6327, 2014 WL 4290109 (6th Cir. Sept. 2, 2014)

Plaintiff was injured when a riding lawnmower permanently disfigured his foot, part of which was amputated. He and his wife filed suit against the manufacturer (alleging strict liability design manufacturing defect) and against the retailer (alleging negligent assembly). Plaintiffs offered the testimony of a purported expert, who opined as to various potential causes, biomechanical issues, human factors, and his own experience as an accident reconstructionist. The manufacturer moved to exclude the expert's testimony and for summary judgment. The district court granted both, holding that the expert was unqualified in electrical, biomechanical, and human issues. Plaintiff appealed.

The Court of Appeals affirmed the exclusion of the expert as to the biomechanical issues and human factors because the expert himself had admitted he was not an expert in either of these two elements. As to the electrical issues, the court found it a "close call," holding that Plaintiff "only needed a witness who met the 'minimum qualifications' requirement—not one who could teach a graduate seminar on the subject. If [Plaintiff] had put forward a lawnmower man, that person would likely have been qualified to opine on a manufacturing defect, even if her educational background was lacking." Nevertheless, even though the expert had a degree in mechanical engineering, was a forensic engineer and accident reconstructionist, and had 30 years experience with various machinery, he had no training in electrical engineering and not much practical experience. The court affirmed the district court's ruling that the expert did not meet Rule 702's basic qualifications requirements. Because the expert testimony was excluded, Plaintiff's claim ultimately failed due to insufficient evidence to prove proximate cause.

## Ohio

### Ohio Products Liability Act

*Butts v. OMG, Inc.*, Case No. 1:11-CV-918, 2014 U.S. Dist. LEXIS 127380 (S.D. Ohio Sept. 11, 2014)

In *Butts*, Plaintiff was injured while using a caulking gun designed for commercial roofing applications. A coworker asked Plaintiff to help retrieve additional roofing boards. *Id.* at \*6. Plaintiff retracted the caulking gun's drive pistons, and set the gun down with its nozzle facing at an upward angle. *Id.* Plaintiff returned five minutes later, and prepared the caulking gun for use again. *Id.* at \*7. According to Plaintiff, however, the gun had "frozen" – meaning it would not dispense any adhesive. *Id.* To remedy the situation, Plaintiff placed the gun on his leg, and pressed the gun's release button to retract the drive pistons. *Id.* Plaintiff testified that when he did this, the gun's cross-bar blew



back, injuring his fingers. *Id.* Plaintiff brought a design defect claim and a defective warning claim under the Ohio Products Liability Act, alleging that the “blowback” event resulted from excessive pressure that had built up in the gun’s adhesive cartridge. *Id.* at \*8. Defendants moved to exclude Plaintiff’s experts and for summary judgment on all claims.

The Court granted summary judgment for Defendants on all claims. In rejecting Plaintiff’s design defect claim, the Court noted that although the consumer expectations test seemed to favor Plaintiff, Ohio’s statutory product liability scheme requires additional factors be considered. *Id.* at \*29. First, the evidence demonstrated “that an explosive blowback was not a reasonably foreseeable risk of using the [caulking gun and cartridge].” *Id.* Second, Plaintiff’s proposed alternative design greatly impaired the usefulness of the gun. *Id.* at \*32. As such, Plaintiff’s design defect claim was dismissed. *Id.* at \*35.

Plaintiff’s defective warning claim was also dismissed. Again, the Court relied on the lack of a reasonably foreseeable risk that a “blowback” event would occur. *Id.* at \*36-37. Because the risk giving rise to the injury was not reasonably foreseeable, no warning was required. *Id.* at \*37. Moreover, Plaintiff’s argument that Defendants could have become aware of the risk complained of through pre-marketing testing failed because the expert witnesses in the case demonstrated through testing that a “blowback” occurs “only in extreme situations that are unlikely to exist when the products are used under normal conditions.” *Id.* Accordingly, Plaintiff’s defective warning claim was also dismissed. *Id.*

Because Plaintiff’s claims were substantively lacking, the Court did not assess whether the experts passed muster under *Daubert* and its progeny.

### **Price Premium Theory**

*In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 08-wp-65000 (N.D. Ohio Oct. 30, 2014)

In *Whirlpool*, a class of approximately 150,000 Ohioans brought design defect and breach of warranty claims against Whirlpool alleging that washing machines they had purchased from Whirlpool were defective due to the washers’ tendency to gather mold. Plaintiffs contended that they paid a “premium price” for the washers, not knowing about the alleged mold problem. Had they known about the alleged problem, Plaintiffs claimed they would have paid less.

On October 30th, 2014, Whirlpool scored a major victory when the Ohio jury rejected the so-called “price premium” theory. After a three week trial, the jury deliberated for less than 24 hours to reach this conclusion. Class counsel has indicated that it plans to appeal to the Sixth Circuit. Kat Laskowski & Emily Kokoll, *Whirlpool Leaves ‘Price Premium’ Theory Down, But Not Out*, Law360 (Oct. 30, 2014, 8:04 PM), <http://www.law360.com/articles/591986/whirlpool-leaves-price-premium-theory-down-but-not-out>.

## Tennessee

### Class Certification (Applying *Halliburton*)

*Schuh v. HCA Holdings, Inc.*, No. 3:11-01033, 2014 WL 4716231, at \*3 (M.D. Tenn. Sept. 22, 2014)

This case is a consolidation of three securities actions brought on behalf of all persons who acquired common stock of HCA “traceable to” an allegedly false and misleading Registration Statement issued in connection with an initial public offering (“IPO”). Plaintiff alleged that the Registration Statement was false and misleading because it had omitted certain material facts. Plaintiff moved to certify a class under Rule 23(b)(3), which allows a court to certify a class if common questions of law or fact predominate over individual ones.

The court cited to the recent Supreme Court rulings in *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, 131 S. Ct. 2179, 2184, 180 L. Ed. 2d 24 (2011) (“Considering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.”) and *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2411, 189 L. Ed. 2d 339 (2014) (“In securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3).”). Following those two cases, the court’s analysis began with the essential elements of the underlying claim, finding that Plaintiff “has established that there are key questions, common to the entire class, which are best answered in the class context.” However, on the question of “knowledge” (whether Plaintiff knew of the untruth or omission at the time of his acquisition of the security) as an affirmative defense, the court held that the question would not predominate over the other common issues in the case. Therefore, the court granted the motion for class certification, but placed temporal limits on the class period by creating a cut-off date for the class as of the time of filing.

## Kentucky

### Preemption

*Waltenburg v. St. Jude Med., Inc.*, No. 3:13-CV-01106-TBR, 2014 WL 3586471 (W.D. Ky. July 21, 2014)

Plaintiff was a hospital patient who was implanted with an ‘implantable cardioverter defibrillator’ (“ICD”) designed to detect and treat irregular heart rhythms. Plaintiff alleged that, shortly after implantation, he began to experience recurring unexplained electric shocks, leading to both physical and emotional injuries. Plaintiff and his wife filed suit against the hospital and the manufacturer of the ICD on theories of strict liability (manufacturing defect), negligent

manufacture, negligence *per se*, and negligent failure to warn. Following removal, the manufacturer moved to dismiss on express preemption grounds and for failure to state a claim.

On the preemption issue, the court found that the Medical Device Amendments (the “MDA”) contains an express preemption clause. However, despite three Supreme Court decisions, “courts have struggled to discern the precise scope of MDA preemption.” Specifically, “lower courts have struggled to resolve one of the major preemption questions . . . . In the context of a Rule 12(b)(6) motion to dismiss, what degree of particularity is required to establish a parallel claim and avoid preemption?” The court noted that the Sixth Circuit has yet to weigh in on this issue, and looked instead to other circuits to determine the “required pleading specificity in the context of MDA preemption.” Siding with a line of cases that requires less rigorous specificity, the court ultimately was “satisfied that the claims . . . are pleaded with sufficient particularity.”

The court then turned to the individual claims to determine if they were preempted by the MDA. The court found that the strict liability manufacturing defect, negligent manufacture, and negligent failure to warn claims were all predicated on violations of federal questions, but the plaintiffs “successfully alleged a parallel [state law] claim sufficient to survive” express and implied preemption. The court left open the possibility that if Plaintiffs could not maintain their parallel state-based claims after further discovery, the manufacturer could move for summary judgment. The court dismissed the negligence *per se* claim because there was no state law basis for it, but allowed the derivative (loss of consortium and punitive damages) claims to proceed.

## **Personal Jurisdiction**

### **Michigan**

*Allianz Global Corporate & Specialty v. Advantage Aviation Technologies, Inc.*, 2014 WL 3586556 (E.D. Mich. 2014)

Plaintiffs sued over the allegedly improper repair of an airplane, allegedly causing the aircraft to veer suddenly off a runway in Michigan. Plaintiffs’ subrogors were Michigan-based companies who sought bids for the work on the aircraft. Defendant, a Texas company, submitted bids via email to the Michigan owners. Defendant also fashioned parts for the customers as a part of the repair, shipped those parts back to the customers, and provided a five-year warranty on its repairs, knowing that Michigan would be the primary place the repaired parts would be used at least once during the repair process, Defendant also attempted to solicit its Michigan customers for further business repairing other airplane parts. Not surprisingly, the court found that Defendant conducted business in Michigan and was therefore subject to jurisdiction. In reaching this conclusion, however, the court cited *Walden v. Fiore*, but the court found that it was distinguishable

because the defendant in *Walden* “did not purposefully target [the forum] or any [forum] citizen, nor did he intend for any action taken at the Atlanta airport to have consequences in [the forum].

## Seventh Circuit

### Res Ipsa Loquitur – Indiana

*Piltch v. Ford Motor Co.*, 11 F.Supp.3d 884 (N.D. Ind. 2014)

In *Piltch*, Plaintiffs brought suit after their Mercury Mountaineer skidded on ice and collided with a wall and then a tree. *Id.* at 886. Plaintiffs claimed “that their injuries were more severe than they would have otherwise been had the air bags in the vehicle not failed to deploy.” *Id.* Ford moved for summary judgment on the grounds that Plaintiffs could not prove their product defect claim without the use of expert testimony. *Id.* at 886-87. It was undisputed that Plaintiffs had not disclosed any expert witness who would testify “regarding the particular circumstances of the accident, whether the air bags would have been expected to deploy in the accident, or any findings based on the condition of the vehicle after the accident suggesting a reason for their failure to deploy.” *Id.* at 889.

Under Indiana law, the crashworthiness doctrine imposes liability for “enhanced” injuries, “recognizing that ‘in light of the statistical inevitability of collisions, a vehicle manufacturer must use reasonable care in designing a vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.’” *Id.* at 889 (citing *Green v. Ford Motor Co.*, 942 N.E.2d 791, 793 (Ind. 2011)). Plaintiffs’ response argued that they did not have to present any expert testimony to establish their claim. *Id.* at 890. Instead, Plaintiffs asserted that they could establish proximate cause by utilizing circumstantial evidence. *Id.*

The Northern District of Indiana recognized the principle, established by the Court of Appeals for the Seventh Circuit in *Whitted*, that there are some circumstances where product liability can be established using the doctrine of *res ipsa loquitur*. *Id.* at 892 (“In *Whitted* the court stated that it ‘glean[ed] from the doctrine of *res ipsa loquitur* the principle that, in certain rare instances, circumstantial evidence may produce reasonable inferences upon which a jury may reasonably find that a defendant manufactured a product containing a defect.’”). However, because the only circumstantial evidence was Plaintiffs’ description of the accident, the court determined that Plaintiffs’ evidence did not qualify as “one of the ‘rare instances’ where it is enough to negate all possible causes other than a product defect for the air bags’ failure to deflate.” *Id.* at 893.

### Medical Device Preemption – Indiana

*Ossim v. Anulex Technologies, Inc.*, No. 1:14-CV-00254-TWP, 2014 WL 4908574, (S.D. Ind. Sept. 30, 2014)

Defendant Anulex Technologies, Inc. (“Anulex”) designed, manufactured, sold, and distributed a surgical prosthetic device known as Xclose Tissue Repair System (“Xclose”). *Id.* at \*1. According to Plaintiff, Anulex did not complete the

approval process through the Federal Drug Administration (“FDA”) because Anulex needed to obtain regulatory approval for marketing Xclose. *Id.* Plaintiff alleged that he suffered “severe and permanent injuries to his lower back and spinal cord following the implantation of the Xclose device.” *Id.* Plaintiff alleged strict product liability, negligence, breach of implied warranties, breach of express warranty, and negligent misrepresentation. *Id.*

Anulex claimed that Plaintiff’s claims were impliedly preempted by federal law, pursuant to *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001). *Id.* at \*2. In *Buckman*, the Supreme Court held that “fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by federal law.” *Id.* (citing *Buckman*, 531 U.S. at 348) (internal quotations omitted). Citing the Seventh Circuit’s decision in *Bausch v. Stryker Corporation*, 630 F.3d 546 (7th Cir. 2010), Plaintiff argued instead that his allegations against Anulex were not based on “fraud-on-the-agency” claims, but claims based on permissible state tort law principles. *Id.* at \*3.

Finding that the Supreme Court in *Buckman* “was concerned with balancing the regulatory structure dealing specifically with issues of fraud and misrepresentations to the FDA,” the Southern District of Indiana ultimately sided with Plaintiff, holding that “state law tort theories based on a medical device manufacturer’s violation of federal law can be brought without preemption.” *Id.*

### **Statute of Repose – Indiana**

*Hartman v. EBSCO Indus., Inc.*, 758 F.3d 810 (7th Cir. 2014)

Plaintiff owned a muzzle-loading rifle that he installed with a modified muzzle loader, which came in a kit sold by KR Warranty. *Id.* at 813. When Plaintiff utilized the upgraded muzzle loader, the weapon unexpectedly discharged, inflicting serious injury. *Id.* Plaintiff sued KR Warranty on theories of negligence and strict liability. *Id.* at 813-14.

KR Warranty moved for summary judgment on the theory that Plaintiff’s claim was barred by the Indiana ten-year statute of repose. *Id.* at 813. Plaintiff was injured fourteen (14) years after the purchase of the weapon, but “there are two exceptions to the statute: (1) where a manufacturer refurbishes a product to extend its useful life, or (2) where a defective new component is incorporated into the old product.” *Id.* The court examined each exception in turn before ultimately concluding that Indiana’s statute of repose barred Plaintiff’s claim. *Id.* at 819.

On the issue of whether the muzzleloader extended the useful life of the weapon, the court found that the kit Plaintiff used to install the muzzle loader made the weapon into an entirely new rifle, but had no effect on how long the gun would be usable. *Id.* at 815. Even if the muzzle loader had extended the useful life

of the weapon, the product was not retrofitted by the manufacturer of the original product. *Id.* The court found that there was no case law holding a manufacturer responsible “for selling a *non-defective* new component” where “the consumer or another party install[ed] the component incorrectly.” *Id.* at 816 (emphasis in original).

The court also found inapplicable the second exception to the statute of repose. In order to make the necessary showing for the second exception, the court found that Plaintiff needed to “show that the conversion kit *increased* the risk of latent embers or unexpected discharge beyond what already existed” in the gun. *Id.* at 817 (emphasis in original). Unless the installation of the conversion kit actually increased the existing risk of the gun accidentally firing, KR Warranty’s duty to warn actually arose when the gun was originally manufactured. *Id.* In such a scenario, the statute of repose would rightly bar Plaintiff’s action, because the conversion kit introduced no new defect that would reset the ten-year clock. *Id.*

### **Personal Jurisdiction – Wisconsin**

*Krones, Inc. v. Botmatic, Inc.*, No. 13-C-935, 2014 U.S. Dist. LEXIS 122111 (E.D. Wis. Aug. 29, 2014)

This case examined whether a Wisconsin federal court had specific personal jurisdiction over a California company. Krones filed a declaratory judgment action against Botmatic seeking a declaration that Krones had no obligation to sell Botmatic a molding machine. Botmatic moved to dismiss the action based on a lack of specific personal jurisdiction. Botmatic also argued that the arbitration clause in the purported sales contract between Krones and Botmatic, which set venue in Milwaukee, Wisconsin, did not confer personal jurisdiction over Botmatic. The United States District Court for the Eastern District of Wisconsin agreed with Botmatic and dismissed Krones action against Botmatic for lack of personal jurisdiction.

Krones’ lawsuit against Botmatic stemmed from Krones’ attempt to sell a molding machine to Botmatic. Krones is Wisconsin corporation that sells bottling, filling, and packaging and brewing equipment. Botmatic is a California company that manufactures and distributes plastic containers. Krones initiated the business relationship with Botmatic in late 2010 by calling Botmatic. Shortly thereafter a Krones representative traveled to California to discuss Krones’ products. From the initial meeting through 2012 the parties exchanged phone calls and emails and met in person in Nevada and California. In early 2012 the parties negotiated the sale and purchase of a machine, but Krones sold the machine to a different customer before Botmatic could secure financing. In mid-2013, counsel for Botmatic prepared a draft complaint and threatened legal action against Krones. The parties unsuccessfully mediated in August 2013, and Krones filed the declaratory judgment action in Wisconsin within thirty minutes of the failed mediation.

In reaching its decision, the district court explained that an exercise of specific personal jurisdiction is only supported if Defendant's contacts "directly relate to the challenged conduct or transaction." The district court also explained that merely contracting with another party is insufficient to establish specific personal jurisdiction in the other party's home forum. The court also rejected the notion that sending documents into Wisconsin and placing calls into Wisconsin could establish specific personal jurisdiction. Overall, the purported contract would have required Kronos to ship the molding machine into California, to install the machine in California, and provide training in Wisconsin, but such training never occurred and was only optional.

The court also rejected Kronos' argument that the arbitration clause in the purported contract established Botmatic's implied consent to personal jurisdiction. The district court noted that the Seventh Circuit had not specifically addressed the issue of whether an arbitration clause that sets an arbitration venue can be construed as impliedly consenting to personal jurisdiction.

### **Experts – Wisconsin**

*Nationwide Agribusiness Ins. Co. v. August Winter & Sons, Inc.*, No. 2013AP488, 2014 Wisc. App. LEXIS 804, 2014 WL 4920799 (Wisc. App. Oct. 2, 2014)

Nationwide brought a subrogation action against Winter & Sons to recover damages after a boiler that Winter & Sons was installing exploded. Prior to trial, Winter & Sons moved to exclude Nationwide's causation expert. The trial court excluded the expert and Nationwide appealed. The Wisconsin Court of Appeals affirmed.

Nationwide's expert opined that a Winter & Sons technician failed to tighten sufficiently a set screw, which became loose between the 97<sup>th</sup> and 98<sup>th</sup> boiler cycle, which permitted excessive gas build-up in the combustion chamber that resulted in an explosion during the 98<sup>th</sup> boiler cycle. Nationwide's expert further opined that scratch marks on the linkage that controls gas into the combustion chamber were evidence of an excessively loose set screw. Winter & Sons argued that Nationwide's expert's opinion hinged on "the factual assumption that the scratch marks showed that the set screw was too loose, a factual assumption without support."

In reaching its decision to affirm, the appellate court first explained that expert testimony is admissible pursuant to Wisconsin Statute § 907.02(1) if:

1. Scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;



2. The witness is qualified as an expert by knowledge, skill, experience, training, or education;
3. The testimony is based upon sufficient facts or data;
4. The testimony is the product of reliable principles and methods; and
5. The witness has applied the principles and methods reliably to the facts of the case.

*August Winter & Sons, Inc.*, 2014 Wisc. App. LEXIS at \*5-6.

The appellate court accepted Winter & Son's argument that a court can bar an expert for not meeting the third factor alone. *Id.* at \*7-8. The appellate court then affirmed the trial court's decision to bar the expert because there was no evidence in the record to explain that the existence of scratch marks on the linkage was evidence of an excessively loose set screw. *Id.* at \*12-13.

### **Pharmaceuticals/Preemption – Wisconsin**

*Estate of Cassel v. ALZA Corp.*, No. 12-cv-771-wme, 2014 U.S. Dist. LEXIS 27924, 2014 WL 856023 (W.D. Wisc. Mar. 5, 2014)

Plaintiffs sued for damages for a fentanyl overdose death, allegedly caused by defects associated with recently FDA-approved Duragesic brand patches containing fentanyl. ALZA moved for partial summary judgment on the design defect claims and argued that those claims were preempted by "impossibility preemption." The district court denied ALZA's motion.

The district court first defined "impossibility preemption" as the preemption of state law where "it is impossible for a party to comply with both state and federal law . . . ." *Id.* at \*5. The district court next summarized the United States Supreme Court's decisions in *Wyeth v. Levine*, 555 U.S. 555 (2009) and *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) as standing for the following three part impossibility preemption test:

First, the court must identify the steps a defendant should have taken to avoid liability under state tort law. Next, the court must determine as a matter of law whether federal law expressly *prohibited* the defendant from taking these steps. If the answer to this second question is 'No,' the court must determine whether the defendant has presented 'clear evidence' that the regulatory agency would have stepped in and exercised its discretionary authority to prohibit the defendant from taking the necessary steps under state law.

*Id.* at \*9.

The district court next analyzed the United States Supreme Court's decision in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013), which applied *Wyeth* and *Mensing* to a design defect case. In *Bartlett*, the United States Supreme Court held that Plaintiff's claims were preempted because it was not possible for the generic drug manufacturer defendant to change its label and because the generic drug was incapable of being redesigned.

In this case, ALZA argued that under *Bartlett*, "federal preemption bars any state-law claim, including design-defect claims, premised on a manufacturer's failure to market a drug with a new design feature that would constitute a 'major change' or render it a new drug, either of which requires FDA approval." *Id.* at \*13. The district court disagreed because ALZA was not a generic drug manufacturer and because ALZA's patch was capable of multiple designs unlike the generic drug in *Bartlett*. The district court also explained that ALZA misconstrued Plaintiff's theory: that ALZA "had a duty to employ an alternate design . . . from the beginning, *before* FDA approval." *Id.* at \*14. The trial court explained that ALZA's "emphasis on altering [its] patches *after* FDA approval is misplaced and does not entitle [it] to summary judgment." *Id.*

### **Preemption: Name Brand Drug Manufacturer Could Be Liable for Injuries from Generic Drug – Illinois**

*Dolin v. Smithkline Beecham Corporation, et. al.*, 2014 U.S. Dist. LEXIS 26219 (N.D. Ill. 2014)

Plaintiff's decedent was prescribed Paxil, an antidepressant, manufactured by GSK. Dolin committed suicide after ingesting the generic version of Paxil, manufactured by Mylan. Plaintiff sued GSK and Mylan for failing to warn of the increased risk of suicidal behavior associated with the drug. The warning label at the time of death did not contain a warning of the increased risk of suicidal behavior in adults. The Court granted Mylan's motion to dismiss, finding that the claims against Mylan, as the generic manufacturer, were preempted under *Mensing* and *Bartlett*. The Court also granted GSK's summary judgment as to the strict liability claim, but denied GSK's motion for the negligence count. Judge Zagel reasoned that generic drug manufacturers are required to use the warning label created by the name-brand manufacturer under Hatch-Waxman Act. *Id.* at 20-21. Therefore, any alleged wrongdoing as to the warning can only be attributed to GSK, as the name-brand manufacturer. *Id.* As such, although it did not manufacture the drug ingested, GSK could be held liable under the negligent failure to warn claim.

## Class Action Settlements Denied: Facta – Illinois

*Pearson v. NBTY, Inc.*, No. 12-1245, 2014 WL 6466128 (7th Cir. Nov. 19, 2014)

The Seventh Circuit, per Judge Posner, disapproved the attorney's fees award in a class action settlement. This case arose from claims that Defendants violated several states' consumer protection statutes by making false claims about the effectiveness of the product. As approved by the District Court, the settlement required Rexall to "cough up" (Seventh Circuit's terminology) "approximately \$5.63 million—\$1.93 million in fees to class counsel, plus an additional \$179,676 in attorney expenses (attorneys' fees cover billable time and overhead expenses such as office space and secretaries, but clients typically are charged extra for such expenses as expert-consultant and expert-witness fees, PACER access, photocopies, and Westlaw research), \$1.5 million in notice and administration costs, \$1.13 million to the Orthopedic Research and Education Foundation, \$865,284 to the 30,245 class members who submitted claims, and \$30,000 to the six named plaintiffs (\$5,000 apiece) as compensation for their role as the class representatives. The version of the settlement that had received preliminary approval had provided for even higher attorneys' fees—up to \$4.5 million—with Rexall stipulating that it wouldn't challenge any attorney-fee requests by class counsel up to that amount. Such a stipulation is called a "clear-sailing" agreement. The Seventh Circuit rejected the settlement, noting that the attorneys' fees approved by the court were erroneously based on a vastly inflated prediction of what the class members would receive, and that the ratio between the fees and what class members actually received was "an outlandish 69 percent, and would have been 84 percent had the trial court accepted Plaintiffs' proposed fee award. The court suggested the possible use of an independent auditor under Rule 706 to estimate the reasonableness of class counsel's billing rates. "Class counsel could have done much better by the class had they been willing to accept lower fees in their negotiation with Rexall. But realism requires recognition that probably all that class counsel *really* care about *is* their fees—for \$865,284 spread over 12 million class members is only 7 cents apiece."

The court also rejected the proposed \$1.13 million *cy pres* award included in the settlement. "The Orthopedic Research and Education Foundation seems perfectly reputable, but it is entitled to receive money intended to compensate victims of consumer fraud only if it's infeasible to provide that compensation to the victims—which has not been demonstrated."

The court noted "with disapproval" a quote by Plaintiffs' class counsel, taken from a 1980 decision, that "because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." Times have changed, and courts are far more experienced to judge

such settlements than they were 35 years ago. The court now recognizes “an acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class. Defendants are interested only in the total costs of the settlement to them, and not in the division of the costs between attorneys' fees and payment to class members.” Judges must therefore be “vigilant” in reviewing such settlements.

*Redman v. RadioShack Corp.*, 768 F.3d 622 (7<sup>TH</sup> Cir. 2014)

Plaintiffs' class claimed that RadioShack violated the Fair and Accurate Credit Transactions Act (“FACTA”) by improperly printing credit card expiration dates on customers' receipts. The proposed settlement included class members receiving a \$10 coupon, and attorneys' fees of approximately \$1 million. Following approval of the settlement by the district court, certain class members appealed.

Judge Posner authored the appellate opinion finding that the coupon settlement likely accounted for no more than \$500,000. As such, the resulting attorneys' fees accounted for a sixty-seven percent contingency fee. Judge Posner noted that expert testimony to support the actual value of the coupons may have assisted in determining whether the attorneys' fee was reasonable. Alternatively, the parties could have utilized a staggered payment structure whereby an initial payment to the class and attorneys was made, followed by a final payment to both after the settlement was completed. The court reasoned such alternatives would help determine the reasonableness of the fee in light of the actual value received by the class members.

### **Scathing Opinion Reverses Class Settlement – Illinois**

*Eubank v. Pella Corp.*, 753 F.3d 718 (7<sup>th</sup> Cir. 2014)

Saltzman was one of five class representatives in a class action suit against Pella for alleged design defects in Pella's windows. Saltzman's son-in-law, Paul Weiss, was the lead counsel for Plaintiffs.

A settlement was approved by the district court, although four of the five named class members objected to the settlement. Saltzman was the only named class member to support the settlement; Plaintiffs' counsel removed the other four and replaced them with four supporters of the settlement. The settlement purported to be worth \$90 million, with Pella to pay \$11 million in attorneys' fees to class counsel.

In a sharply-worded opinion, Judge Posner cited several grounds to deny the settlement, and remanded the case to the district court. First, the court noted the relationship between lead counsel, Weiss, and his son-in-law, Saltzman, was

improper. *Id.* at 723-24. Second, Posner believed that Weiss may have had a financial incentive to settle the case quickly because he was under investigation by the attorney disciplinary commission, and was embroiled in a legal battle with his previous law firm, Freed & Weiss – also a class counsel, coincidentally. *Id.* at 724. Third, Posner found the claimed settlement value of \$90 million to be greatly inflated. In turn, the \$11 million in attorneys’ fees, including an attorney fee advance of \$2 million, was not reasonable. In addition to rejecting the settlement agreement and remanding the case, Judge Posner removed Weiss and his firm as class counsel, and Saltzman as the class representative.

### **Expert Barred As Sanction for Failure to Comply With Subpoena; Attorney Sanctioned for Frivolous Appeal – Illinois**

*Fraser v. Jackson*, 382 Ill.Dec. 62, 12 N.E.3d 62 (Ill. App. 2014)

The Illinois Court of Appeals upheld a trial court’s ruling barring Defendant’s medical expert from testifying at trial after the Defendant refused to produce the expert’s correspondence and reports. This matter involved a vehicular collision in which Plaintiff claimed various physical injuries. Defendant retained Dr. Skaletsky, a neurosurgeon, as an expert witness pursuant to Illinois Supreme Court Rule 213(f)(3). Following Defendant’s failure to comply with Plaintiff’s subpoena for various items, including all correspondence and reports, Plaintiff filed a motion to compel. The court granted the motion and ordered the production of the requested materials. When Defendant did not comply, the trial court granted Plaintiff’s motion *in limine*, barring Dr. Skaletsky from testifying. The Court of Appeals upheld the ruling, and sanctioned Defendant’s counsel for filing the “frivolous” appeal. *Id.* at 74.

### **Personal Jurisdiction in Product Liability Suit Barred Based on Lack of Contacts – Illinois**

*Tile Unlimited v. Blanke Corp. et. al.*, 2014 U.S. Dist. LEXIS 78414, 2014 WL 2609189 (N.D. Ill., June 9, 2014)

Plaintiffs filed a class action and product liability lawsuit alleging a certain floor tile product was defective. German-based Defendants, Blanke Germany and Interplast, moved to dismiss the action due to a lack of minimum contacts with Illinois. In granting Defendants’ motion, the district court found that although its product reached Illinois, Defendants did not target Illinois as a market. The court also found that although Defendant’s officer attended a trade show in Illinois, the harm alleged in the complaint did not arise out of his contact in Illinois. *Id.* at 31. Moreover, Defendants’ interactive website, although available in Illinois, was not a sufficient contact for purposes of personal jurisdiction.

## **Eighth Circuit**

### **Daubert—Differential Diagnosis**

*Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557 (8th Cir. 2014).

The Court of Appeals held that the district court abused its discretion in excluding expert witnesses. Plaintiff brought an action against manufacturer and seller of powdered infant formula. The infant, H.T.P. was fed said formula when he was less than 28 days old, at a time when gastrointestinal systems have not yet fully developed. Plaintiff alleged that administration of the formula to the infant caused a *C. sak* infection that resulted in severe permanent brain damage to H.T.P.

On a Motion for Summary Judgment, the formula manufacturer sought to exclude testimony of Plaintiff's experts. The manufacturer based its argument on the fact that the experts used by Plaintiff did not complete an adequate differential diagnosis in their work, and that they did not adequately rule out other possible sources of infection. The district court excluded the expert testimony and granted Summary Judgment.

The Court of Appeals reversed, based on its reasoning that expert testimony should be admitted if it "advances the trier of fact's understanding to any degree." *Id.* at 562. Further, exclusion of expert testimony is only appropriate when that testimony "is so fundamentally unsupported that it can offer no assistance to the jury." *Id.* In interpreting those general rules, the Eighth Circuit found that the district court improperly resolved doubts in favor of keeping the testimony out, rather than keeping it in. Further, the Court specifically ruled that experts are not required to rule out all other possible causes when performing a differential diagnosis. *Id.* at 564.

### **Personal Jurisdiction**

*Everett v. Bombardier-Rotax*, 2014 WL 3809199 (W.D. Mo. Aug. 1, 2014)

Plaintiff, a Missouri resident, was seriously injured in a plane crash. He sued the engine manufacturers, who moved to dismiss for lack of personal jurisdiction. The court granted the motion because none of the Defendants conducted business in Missouri, and none of Defendants' few contracts with Missouri had any relationship to the case. Plaintiff purchased it at an airshow in Oshkosh, Wisconsin, took possession of it there, brought it to Missouri and installed it on the aircraft himself in Missouri. In reaching this conclusion, the court cited *Walden v. Fiore*, 134 S.Ct. 1115 (2014), for the proposition that, "for specific personal jurisdiction to be exercised in accord with the Due Process Clause, 'the defendant's suit-related conduct must create a substantial connection

with the forum State,’ and this “relationship must arise out of contacts that the defendant himself creates with the forum State.”

### **Preemption – Warnings Labels**

*Huck v. Wyeth, Inc.*, 850 N.W.2d 353 (Iowa 2014).

This case is one of many litigated in state and federal courts nationwide alleging severe side effects from prolonged use of metoclopramide, sold under the brand name Reglan and as a competing generic formulation. Plaintiff used only the generic product. She was prescribed and began taking the product in February 2004 and continued doing so regularly until March 2006. After being diagnosed with tardive dyskinesia in June 2006, she sued the manufacturer of the generic drug as well as the manufacturers of the branded formulation.

The trial court granted Summary Judgment on all of Plaintiff’s claims. That court found that the claims against the generic manufacturers were preempted by *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), and its holding that federal law requires that the label of a generic drug conform with the brand manufacturers’ warning label as approved by the FDA. The trial court granted Summary Judgment for the brand manufacturers based on *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986), which requires proof Defendant manufactured or supplied the product that caused Plaintiff’s injury.

On appeal to the Supreme Court of Iowa, Plaintiff argued that *Mensing* preempts only claims that require the generic manufacturer to vary its labeling from that of the branded drug. *Id.* at 362. Here, at the time she was prescribed metoclopramide, the label indicated that “Therapy longer than 12 weeks has not been evaluated and cannot be amended.” In July 2004, approximately five months after Plaintiff began taking metoclopramide, the brand manufacturer changed its label to read “Therapy should not exceed 12 weeks in duration.” *Id.* at 359. Citing *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 584 (6th Cir. 2013), the Supreme Court of Iowa reversed, finding that Plaintiff’s product liability claims, including claims for negligent testing and post-market surveillance, and claims for breach of warranty, fraud, and misrepresentation survived preemption to the extent they were based on the generic manufacturer’s failure to adopt the additional warnings language added in July 2004. *Id.* at 362.

### **Personal Jurisdiction**

*Butler v. JLA Industrial Equipment, Inc., et al.*, 845 N.W.2d 834 (Minn. 2014).

Plaintiff was utilizing a pressure washer to wash his truck when hose of pressure washer burst, burning his hand, thigh, and shoulder. The injured party and his wife sued numerous defendants, including Schieffer-Magam Industries,

Ltd. (“SMI”), a corporation with its principal place of business in Israel. *Id.* at 837-838.

SMI moved to dismiss, arguing that Minnesota courts lacked personal jurisdiction over it. Throughout the course of discovery, the following facts were established. SMI manufactures hydraulic hoses. Both SMI and another defendant, Schieffer Co. International, LC (“Schieffer”) are subsidiaries of a German parent. Between 2000 and 2011, SMI sold hydraulic hoses in bulk to Schieffer, which is based in Iowa. Schieffer did the finishing manufacture work on the hydraulic hoses and distributed them nationwide, including to another Defendant, Hotsy Equipment of Minnesota (“Hotsy”). *Id.* at 838.

The parties, and the court, agreed that SMI lacked direct and indirect contacts with Minnesota to sufficiently support a finding of general personal jurisdiction. On the other hand, in examining specific personal jurisdiction, the court looked to the flow of the manufacturer’s products into the forum, or the “stream of commerce” theory to determine if such jurisdiction could be established. *Id.* at 840. In interpreting the U.S. Supreme Court’s application of the “stream of commerce” theory, the court came to the following conclusions based on the facts:

- SMI sold, through Schieffer, a substantial amount of SMI hoses and so the quantity of contacts factor weighed in favor of exercising personal jurisdiction;
- The substantial flow of commerce by SMI to customers in Minnesota indicated to the court that SMI targeted Minnesota and purposefully availed itself of the benefits and protections of the state, and so the quality of contacts factor weighed in favor of exercising personal jurisdiction;
- The coordination of SMI and Schieffer to develop the U.S. market was more than a unilateral activity and Schieffer, in effect, was SMI’s distributor in Minnesota, so the connection of the cause of action with the contacts favor weighed in favor of exercising personal jurisdiction;
- Although other Defendants exist, it could not be established by SMI that the Plaintiff could undoubtedly recover fully from one of the other Defendants, and so the interest in Minnesota in providing a forum factor weighed in favor of exercising personal jurisdiction; and
- In light of the fact that multiple Defendants existed in this case, the court reasoned that convenience of the parties was not a relevant factor, because at least one party would have to travel wherever the case was filed.



*Id.* at 846-850. Accordingly, the court affirmed the district court's decision to deny SMI's Motion for Summary Judgment because SMI had sufficient minimum contacts to exercise personal jurisdiction over it.

*Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 S.D. 70, No. 26956, 2014 WL 4925837 (S.D. 2014)

Plaintiff brought a subrogation action against Barton Solvents, Inc. ("Barton"), a supplier, and CITGO Petroleum Corporation ("CITGO"), the manufacturer, of heptane, which caused an explosion of a honey and beeswax processing plant. The heptane at issue was being used as a part of the rendering process of the beeswax.

Plaintiff attempted to establish the causation element of its failure to warn claim merely by pointing to the fact that the explosion occurred. The court, however, disagreed and stated that this was "not one of those cases in which it is patently obvious that the accident would not have happened but for an inadequate warning." *Id.* at 4.

Plaintiff also sought to impose liability under its implied warranty of fitness for a particular purpose claim, based solely on the explosion itself. Again, the court rejected Plaintiff's argument, stating that the theory of implied warranty of fitness for a particular purpose does not impose on the manufacturer a requirement for a "perfect" product, but rather simply one that is fit for the purpose for which it is intended. *Id.* at 7. Here, the owners of the beeswax plant, A.H. Meyers had installed a ventilation system that caused the fumes of heptane to circulate more than they otherwise would, which ultimately contributed to the explosion. This, the court said, did not render the heptane unfit. *Id.*

### **Limitations of Actions**

*Block v. Toyota Motor Company*, 5 F. Supp. 3d 1047 (D. Minn. 2014).

A Toyota vehicle allegedly lost braking power and struck Plaintiff's vehicle, pushing it into traffic and killing two of its occupants. Toyota moved for summary judgment, inter alia, based on the wrongful death statute of limitations.

On appeal, the court addressed a conflict between the length of the wrongful death statute of limitations and the strict product liability's statute of limitations. It noted that wrongful death actions in Minnesota are purely statutory and "in derogation of the common law[.]" *Id.* at 1056. As such, the statute of limitations of the wrongful death action must be strictly construed with the statutory requirements. Unlike other causes of actions which base their statutes of limitations on the underlying cause of action, such as product liability, wrongful death statutes state an unambiguous limitation, and so the court concluded that the

wrongful death statute of limitations should supersede the statute of limitations for the underlying tort claims.

## Ninth Circuit Cases

### Personal Jurisdiction

*Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014)

Cervantes was a passenger on an airplane that crashed in Cuba, killing everyone aboard. ATR, a French company, designed and manufactured the airplane. Plaintiffs sued ATR in the Northern District of California, alleging that ATR's defective design and construction of the plane caused the crash.

Plaintiffs served ATR's vice president of marketing with the summons and complaint while he was in California attending a conference on ATR's behalf. Plaintiffs argued that this service was sufficient, under *Burnham v. Superior Court*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990), to confer general jurisdiction over the French manufacturer. The Ninth Circuit disagreed and held that so called "Tag Jurisdiction" exists only over natural persons and does not apply to corporations.

Plaintiffs also served ATR at its headquarters in France. Plaintiffs argued, alternatively, that ATR's contacts with California were extensive enough to create general jurisdiction there. These contacts included: (1) ATR's contracts, worth between \$225 and \$450 million, to sell airplanes to Air Lease Corp., a California corporation; (2) ATR's contracts with eleven California component suppliers; (3) ATR's sending of representatives to California to attend industry conferences, promote ATR products, and meet with suppliers; (4) Empire Airlines' use of ATR airplanes in its California route; and (5) ATR's advertising in trade publications with distribution in California. The Ninth Circuit held that these contacts are "plainly insufficient" to subject ATR to general jurisdiction in California. "The Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), makes clear the demanding nature of the standard for general personal jurisdiction over a corporation." Absent exceptional circumstances, general jurisdiction exists only at corporation's place of incorporation and principal place of business.

### *Daubert*

*City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036 (9th Cir. 2014)

The City of Pomona sued SQM, an importer, alleging that SQM was liable for perchlorate contamination of Pomona's water supply. Although perchlorate exists naturally throughout the world, and synthetic perchlorate has been widely used in the United States for decades, the City singled out Chilean fertilizers that SQM distributed in the United States several decades ago as the chief cause of its current perchlorate problem. Pomona's case relied upon one expert's application of a method known as stable isotope analysis, which measures the relative

weights of atoms of same chemical element within a substance to determine its origin. The district court held a *Daubert* hearing and excluded the expert under Evidence Rule 702.

The Ninth Circuit reversed, holding that the district court ignored the controlling rule of law for *Daubert* challenges: “[O]nly a faulty methodology or theory, as opposed to imperfect execution of laboratory techniques, is a valid basis to exclude expert testimony.” Applying this rule, the court held that errors that Pomona’s expert made in following protocol did not warrant exclusion, so long as the general methodology that he was attempting to follow was consistent with the scientific method. “The rationale of this approach is that ‘[a] minor flaw in an expert’s reasoning or a slight modification of an otherwise reliable method’ does not render expert testimony inadmissible.”

SQM petitioned for a *writ of certiorari* on September 8, 2014, arguing that, contrary to the Ninth Circuit’s holding, Evidence Rule 702 expressly provides that a trial court may exclude expert testimony as unreliable for reasons other than the expert’s use of a faulty principle or methodology. That is, Rule 702 gives two other factors of equal prominence in the reliability determination—whether “the expert has reliably applied” his or her chosen “principles and methods to the facts of the case,” and whether “the testimony is based upon sufficient facts or data.” SQM’s petition was pending as of the time of the drafting of this summary.

## CAFA

*Corber v. Xanodyne Pharm., Inc.*, No. 13-56306, 2014 WL 6436154 (9th Cir. Nov. 18, 2014) (en banc)

The Ninth Circuit upheld the removal of several actions as “mass actions” under CAFA. The Court determined that the petitions filed in this case, “seeking coordination of the California propoxyphene actions, were in legal effect proposals for those actions to be tried jointly,” and therefore rendered them mass actions within the meaning of CAFA. The court acknowledged the general rule that Plaintiffs are the “masters of their complaints,” but “they are also the masters of their petitions for coordination. Stated another way, when we assess whether there has been a proposal for joint trial, we hold plaintiffs responsible for what they have said and done.” The court rejected Plaintiffs’ contention that a petition to evoke CAFA must expressly request a “joint trial” in order to be a proposal to try the cases jointly. “Although such a rule would be easy to administer, it would ignore the real substance of Plaintiffs’ petitions.”

*Hawaii v. HSBC Bank Nev., N.A.*, 761 F.3d 1027 (9th Cir. 2014)

The Hawaii Attorney General filed suit in state court against six credit card providers, alleging that each violated state law by deceptively marketing and improperly enrolling cardholders in add-on credit card products. The card providers removed the cases to federal court, and the Attorney General moved to remand. The district court concluded that the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), did not afford a basis for federal jurisdiction.

The Ninth Circuit affirmed. The court observed that because the complaints were not filed under Federal Rule 23, the issue was whether the Attorney General filed them under a “similar” state rule or statute. In this case, the Attorney General filed suit in accordance with Hawaii’s statutory *parens patriae* authority to bring an action based upon unfair or deceptive acts. Applying *Mississippi v. AU Optronics Corp.*, 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014), the court held that a common law *parens patriae* suit is not a procedural device similar to Rule 23, and nor is it a CAFA mass action.

The court further rejected Defendants’ argument that any action brought by the Attorney General on behalf of consumers under Hawaii law is perforce a class action. The pertinent statute provides: “The attorney general . . . may bring a class action on behalf of consumers based on unfair or deceptive acts or practices declared unlawful by section 480-2. Actions brought under this subsection shall be brought as *parens patriae* . . . .” The court held that this argument might have justified CAFA jurisdiction had the complaints not “specifically disclaim[ed]” class status. Failure to request class status or its equivalent is fatal to CAFA jurisdiction.

## **District Court Cases – Arizona**

### **Medical Device/Preemption**

*Arvizu v. Medtronic Inc.*, No. CV-14-00792-PHX-DGC, 2014 WL 4204933 (D. Ariz. Aug. 25, 2014)

Plaintiff sued Medtronic, which manufactures the INFUSE® Bone Graft device, which is a Class III medical device. INFUSE® is used in spinal fusion surgeries to stimulate bone growth. Plaintiff’s doctor used the device in an off-label use that was not approved by the FDA. Specifically, Plaintiff was implanted with INFUSE® without the use of the LT-Cage. Plaintiffs alleged that, despite the limited purpose for which the Infuse Device was approved, Defendants “engaged in a multi-faceted campaign to promote off-label uses of [the Infuse Device].” Medtronic moved to dismiss based upon preemption.

The Arizona District Court held that section 360k of the Medical Devices Amendments to the Federal Food, Drug and Cosmetics Act applies when the FDA imposes requirements on a “device,” not specific uses of the device, and off-label uses remain subject to federal regulation and therefore to preemption. (*citing*

*Houston v. Medtronic, Inc.*, No. 2:13-cv-01679-SVW-SHx, 2014 WL 1364455, at \*5-6 (C.D. Cal. Apr. 2, 2014). The court dismissed Plaintiff's design defect, design defect and negligence claims, but permitted Plaintiff's fraud claims to proceed.

## **District Court Cases – California**

### **Central District of California**

#### ***Daubert* and Punitive Damages**

*Stanley v. Novartis Pharmaceuticals Corp.*, 11 F. Supp. 3d 987 (C.D. Cal. 2014)

Plaintiff, a cancer patient, brought a product liability action against Novartis Pharmaceuticals, the manufacturer of intravenous bisphosphonate drugs which were prescribed for Plaintiff. She later developed osteonecrosis of the jaw and alleged it was caused by the drugs manufactured by Novartis Pharmaceuticals.

Novartis moved for a *Daubert* hearing and to exclude testimony from some of Plaintiff's experts. Specifically, Novartis moved to preclude causation testimony from Plaintiff's treating physicians, which the Court granted, and to preclude causation testimony from Plaintiff's retained expert on the basis that he performed a differential diagnosis in reaching his opinion, which the Court denied. The Court granted Novartis' motion to exclude the retained expert's testimony that the cumulative dose or duration of treatment Plaintiff received strengthened the causation argument. The Court found that testimony unreliable; the expert provided no data to support the reliability of those opinions, and instead offered only vague references to potential sources of information.

The Court also found that California's punitive damages law applied to Plaintiff's claims, and therefore denied Novartis' motion for summary judgment, which relied on New Jersey law. In doing so, the Court found a "true conflict" between the two state's laws, because California has an interest in applying its punitive damages law to punish and deter misconduct, while New Jersey, where Defendant's principal place of business resided, has an interest in limiting the liability of businesses that operate within its borders. Ultimately, the Court held that California's interest would be significantly impaired if New Jersey law was to apply because Defendant marketed and distributed its drug in California and California has an interest in regulation the conduct of manufacturers who have placed their product in the stream of commerce with actual knowledge of a defect.

*Sclafani v. Air & Liquid Systems Corp.*, No. CV 12-3013 SVW, 2014 WL 1613912 (C.D. Cal. April 17, 2014) (*Daubert*)

This wrongful death asbestos action arose from decedent's mesothelioma. Decedent allegedly came into contact with asbestos during his four years of Navy service, where he worked as a boiler technician from 1960-1963. Multiple parties were dismissed or settled and the remaining four Defendants, Air and Liquids Systems, Goodyear Tire and Rubber Co., Foster Wheeler LLC and Crane Co., filed a joint motion for summary judgment on the issue of causation. An Amended Complaint was filed and three Defendants re-filed their summary judgment motions.

The Court held that it was Plaintiff's burden to establish causation, and that here they had to show that the defective products were a substantial factor in bringing about the decedent's injury. The Court applied California law, under which plaintiffs may prove causation in asbestos-related cases by demonstrating that plaintiff's exposure to Defendant's product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the decedent inhaled and hence had the risk of developing asbestos related diseases without the need to demonstrate that fibers from Defendant's particular product were the ones or among the ones that produced a malignant growth. The primary evidence Plaintiffs offered in this regard was the testimony of their expert, Dr. Arnold Brody. His Rule 26 disclosure asserted that "[e]ach and every exposure to asbestos that an individual with mesothelioma experienced in excess of a background level contributes to the development of the disease." However, Dr. Brody did not offer an opinion on whether decedent's exposure to a particular defendant's asbestos-containing product was a "substantial factor" in contributing to his disease. His opinion was only that "every exposure" contributes to the development of the disease.

The Court found Dr. Brody's opinion inadmissible under Federal Rule of Evidence 702 and *Daubert*. It held that, even by Dr. Brody's own admission, his "every exposure" theory could not be tested and had not been published in any peer-reviewed literature, both of which would lend support for the reliability of those opinions.

### **Medical Device/Preemption**

#### **Eastern District of California**

*Hawkins v. Medtronic, Inc.*, No. 1:13-CV-00499 AWI SKO, 2014 U.S. Dist. LEXIS 11779, 2014 WL 346622 (E.D. Cal. Jan. 30, 2014)

Plaintiff sued Medtronic, which manufactures the INFUSE® Bone Graft device, which is a Class III medical device. INFUSE® is used in spinal fusion surgeries to stimulate bone growth. Plaintiff's doctor used the device in an off-label use that was not approved by the FDA. Specifically, Plaintiff was implanted

with INFUSE® without the use of the LT-Cage and using a posterior approach. Medtronic moved to dismiss based upon preemption.

To escape preemption, a plaintiff's claims must be based on conduct that violates the Medical Device Amendments to the Food, Drug, and Cosmetics Act ("FDCA"), and the conduct that is alleged to violate the FDCA must also violate some state law duty. The court held that some but not all of the Plaintiff's claims were preempted; however, the court allowed Plaintiff leave to amend the complaint. Notably, the court applied *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1228 (9th Cir. 2013), *cert denied*, 134 S. Ct. 2839, 189 L. Ed. 2d 805 (2014), and held that state law claims based upon the alleged failure to report risks of promoted off-label use to the FDA parallels federal law and are not preempted.

### **Northern District of California**

*Eidson v. Medtronic, Inc.*, 2014 WL 1996024, No. 13-CV-02049, 13-CV-01502, (N.D. Cal. May 13, 2014) (Medical Device/Preemption)

Plaintiffs in two combined cases sued Medtronic for side effects suffered after their off-label use of the INFUSE Bone Graft device, a Class III medical device. Medtronic moved to dismiss both cases based on preemption and failure to state a claim.

Medtronic asked the Court to reconsider its previous finding that Plaintiffs' claims were not expressly preempted, arguing that *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1228 (9th Cir. 2013), *cert denied*, 134 S. Ct. 2839, 189 L. Ed. 2d 805 (2014), is distinguishable because its reasoning was based on Arizona's state law duty to warn third parties while California law does not impose a similar duty to warn third parties rather than direct consumers.

The Court found, however, that California law—like the Arizona law at issue in *Stengel*—requires a manufacturer to discharge its duty to warn consumers by communicating warnings to a third party in circumstances where such a warning is necessary to put consumers on notice of the danger. (citing *Persons v. Salomon N. Am., Inc.*, 217 Cal.App.3d 168, 178, 265 Cal.Rptr. 773 (1990)). Therefore, like the claims in *Stengel*, Plaintiffs' failure to warn claims paralleled federal requirements because they demand the same conduct as federal law—to notify the third party FDA of adverse events, where such notification could suffice to put doctors and patients on notice of the product's dangers.

### **Venue: Forum-Selection Clause—*Atlantic Marine***

*Harold E Nutter & Son Inc. v. Tetra Tech Tesoro Inc.*, No. 14-cv-02060-JCS, 2014 U.S. Dist. LEXIS 103068 (N.D. Cal. July 28, 2014)



Plaintiff sued a construction contractor and its surety in federal court in California under the Miller Act, 40 U.S.C. § 3131 *et seq.*, as well as state law for breach of contract, open book account and *quantum meruit*.

The parties' contract contained a forum-selection clause that provided that all claims be brought in the Circuit Court of the City of Virginia Beach, Virginia, or in the United States District Court for the Eastern District of Virginia, Norfolk Division. Citing the forum selection clause, Defendant moved to dismiss the action or, alternatively, to transfer venue. Plaintiff argued that venue was proper in California federal court under the Miller Act's venue provision, which requires venue in the district in which the public contract is to be performed and executed.

Applying *Atlantic Marine Constr. Co. v. US District Court*, 134 S.Ct. 568, 87 L. Ed. 2d 487 (2013), the court observed that a valid forum-selection clause should be given controlling weight in all but the most exceptional cases. The court also observed, however, that the Miller Act's venue provision promoted public interest by ensuring that local contractors are guaranteed a local forum and the opportunity to bid on local federal construction projects. This is a "public-interest" factor that may be considered in a motion to transfer venue under 28 U.S.C. § 1404(a).

The district court found that although the Ninth Circuit has not addressed this issue, at least four other circuits have held that a valid forum-selection clause in a subcontract supersedes the Miller Act's venue provision. These circuits have relied on *dicta* from the Supreme Court that § 3133(b)(3) of the Miller Act "is merely a venue requirement," and under conventional venue statutes, venue provisions have long been subject to contractual waiver through a valid forum selection agreement.

The court found that this was not one of the "unusual cases" in which the "interest of justice" is best served by overriding the parties' agreement. Because the parties had previously agreed to litigate in the Eastern District of Virginia; the Court declined to disrupt their settled expectations.

### **Expert Disclosure Sanctions**

*Mariscal v. Graco, Inc.*, No. 13-cv-02548-THE, 2014 WL 2919520 (N.D. Cal. June 26, 2014)

Plaintiff alleged he was injured while attempting to clean and repair a used Graco Magnum X7 Airless Paint Sprayer which belonged to his brother-in-law. The filter was full of dried paint, so Plaintiff tried installing a new filter but the sprayer wouldn't work. He also cleaned parts of the intake hoses. It still wouldn't spray. Contrary to warnings he "probably" read, Plaintiff wore no protective gear while he tried to clear this clog, and at some point an "explosion"

occurred, sending debris into his eye and causing permanent damage. Plaintiff filed suit for product liability, breach of implied warranty and negligence.

Defendant objected to Plaintiff's submission of expert opinions after the deadline had passed. Plaintiff argued they weren't new opinions, but merely restated opinions previously disclosed. The Court ruled they were new, untimely, opinions, and that Plaintiff had not demonstrated that the lateness was either substantially justified or harmless to Defendant. The expert opinions were therefore excluded.

### **Consumer Class Action**

*Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873 (N.D. Cal. 2014).

Plaintiffs brought a consumer class action against Dole, alleging that Dole falsely advertised some of its products as "natural" despite containing "artificial ingredients and flavorings, artificial coloring and chemical preservatives." Plaintiffs further contended that products Dole described as "All Natural Fruit" contained ascorbic acid (commonly known as Vitamin C) and citric acid, both allegedly synthetic ingredients. The court granted class certification in part, to a Damages Class premised on a regression model that purportedly "provide[d] a means of showing damages on a class-wide basis through common proof," thus "satisf[y]ing the Rule 23(b)(3) requirement that common issues predominate over individual ones." Dole later moved to decertify the Damages Class, arguing that the expert's Regression Model is fundamentally flawed, rendering it incapable of measuring only those damages attributable to Dole's alleged misbranding. The Court agreed in part, concluding that the expert's Regression Model "does not sufficiently isolate the price impact of Dole's use of the 'All Natural Fruit' labeling statements. The model 'has not satisfied the Rule 23(b)(3) requirement that common issues predominate over individual ones.'" The Court concluded that the model failed under *Comcast* to adequately tie damages to Dole's supposed misconduct, and decertified the Damages Class, although it denied Dole's motion to decertify the Injunction Class.

### **Southern District of California**

#### **Forum Non Conveniens**

*Kryzanowski v. Wyndham Hotels and Resorts, LLC*, No. 13-cv-1077-L(MDD), 2014 WL895449 (S.D. Cal. March 6, 2014)

Plaintiff, a Canadian citizen, and her cousin, went scuba diving during a vacation to Cabo, Mexico. Plaintiff claimed that the air tanks provided by the diving company were filled with toxic gas or some other toxic substance, causing the death of Plaintiff's cousin and personal injuries and severe emotional distress to Plaintiff. Plaintiff brought claims against the dive company, the company that

filled the air tanks, and the Wyndham Hotel and Resorts for negligence and strict liability. Defendants moved to dismiss on the basis of *forum non conveniens*, arguing the case should be tried in Mexico.

The Court denied Defendants' motion to dismiss, finding that Mexico was an inadequate forum because Mexico's system only imposes liability for damages on the wrongdoer itself, and since plaintiff was bringing claims under vicarious liability theories, she would essentially have no meaningful remedy if the case were brought in Mexico.

### **District Court Cases – Hawaii**

*In re Herbert*, No. CIV. 13-00452 DKW, 2014 WL 1464837 (D. Haw. Apr. 14, 2014)

Plaintiff worked as a chemistry teacher in schools around the world, including schools in London, Switzerland, Greece and Indonesia, during the late 1970s-1980s. While in Indonesia, Plaintiff was allegedly exposed to asbestos-containing products supplied by the Defendants, including gloves, squares, mats, wire gauze and asbestos wool and fibers in bottles. He was later diagnosed with malignant mesothelioma in 2012. He and his wife brought suit in Hawaii, their current home, against two distributors of the scientific equipment he used. Defendant Fisher Scientific Company moved to dismiss on the basis that Indonesia was a more convenient forum.

In granting the motion to dismiss, the Court found that the following factors favored dismissal of the case so it could be brought in Indonesia: (1) that Indonesia was an adequate forum because it provided Plaintiffs with "some remedy" and (2) that private interest factors weighed in favor of dismissal – the majority of product ID witnesses, who could not be compelled to testify in the US, were located in Indonesia, including former co-workers, school witnesses with knowledge about the purchase of the products, and witnesses to potential alternative asbestos exposures, all of whom were "material" to the case, and physical evidence and other potential sources of proof were also located in Indonesia and could not be compelled to be produced in the United States. The Court also found that Indonesia has a greater interest in the outcome of the litigation, Indonesian law might apply to the case, and that the case would be resolved more expeditiously in Indonesia, where civil cases must be resolved within a period of six months.

### **Preemption—Medical Device**

*Beavers-Gabriel v. Medtronic, Inc.*, No. 13-00686 JMS-RLP, 2014 WL 1396582 (D. Haw. Apr. 10, 2014)

Plaintiff Karla Beavers–Gabriel filed suit against Medtronic, Inc. and another Medtronic entity, asserting state law claims for injuries she allegedly sustained after undergoing spinal surgery in which her surgeon used Defendants’ Infuse® Bone Graft, a Class III prescription medical device, in an off-label manner not approved by the FDA.

The Medtronic Defendants filed a Motion to Dismiss, arguing preemption and failure to state a claim. The Court found that most of Plaintiff’s claims were preempted. However, it held that her claim for breach of express warranty was neither expressly nor impliedly preempted (although the count was nevertheless dismissed for failure to state a claim). The Court found that Medtronic expressly warranted to physicians and other members of the general public that off-label uses for the Infuse product were safe and effective, and explained that preemption did not apply because federal law prohibits false or misleading off-label promotion. Thus, Plaintiff was not imposing any requirement different from or additional to what federal law already required. The Court also found no implied preemption because the liability for breach of warranty existed in Hawaii independently of federal law; in other words, Plaintiff’s breach would exist even if the federal law was not in place.

## District Court Cases – Oregon

### Personal Jurisdiction

*Bates v. Bankers Life & Cas. Co.*, 993 F. Supp. 2d 1318 (D. Or. 2014)

Plaintiffs, Oregon residents, purchased long-term health care insurance policies from Bankers Life and Casualty Company. Bankers is a Delaware corporation with its principal place of business in Illinois. Bankers is a wholly-owned subsidiary of Defendant CNOFG.

CNOFG is incorporated and principally located in Delaware. Plaintiffs alleged that CNOFG oversaw Bankers' activities in marketing long-term healthcare policies to Oregonians and played a direct role in reviewing and processing claims filed under such policies. Plaintiffs further alleged that CNOFG exercised "day-to-day management and control over Bankers," including providing all human resources, public relations, legal affairs, product development, and employee training services and functionality to Bankers. Moreover, Plaintiffs alleged that CNOFG's CEO was the architect of the policies and procedures complained of in the lawsuit, and who specifically and expressly required Bankers to begin denying legitimate claims under Bankers' long-term health care policies and to create obstacles intentionally calculated to make filing such claims more burdensome for Bankers' insureds.

The district court granted CNOFG's motion to dismiss for lack of personal jurisdiction. Regarding general jurisdiction, the district court applied *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), and held that CNOFG's contacts with Oregon were not so continuous and systematic "as to render it essentially at home" in Oregon.

In addition, the court held that Bankers' contacts with Oregon were insufficient to create specific jurisdiction over CNOFG on an agency theory. Plaintiffs argued that Bankers was CNOFG's agent because Bankers carried out directives issued by its parent entity and acted in some sense on authority delegated by CNOFG. The court rejected this argument because, otherwise, it would mean that virtually all corporate parents could be hauled into court in any jurisdiction in which they had subsidiaries on the ground that virtually all subsidiaries serve as their parents' agents for some purposes. However, such garden-variety forms of agency are insufficient to satisfy the jurisdictional agency standard, which requires that but for the subsidiary's presence in the jurisdiction, the parent would necessarily be present performing all of the same functions actually performed by its subsidiary. "At an irreducible minimum, the general agency test requires that the agent perform some service or engage in some meaningful activity in the forum state on behalf of its principal such that its presence substitutes for presence of the principal."

## District Court Cases – Washington

### Venue: Forum Selection Clause—*Atlantic Marine*

*Taylor v. Goodwin & Assocs. Hospitality Servs., LLC*, No. C14-5098 KLS, 2014 U.S. Dist. LEXIS 112410, 2014 WL 3965012 (W.D. Wash. Aug. 13, 2014)

Defendant moved to dismiss or, in the alternative, to transfer venue from the Western District of Washington to state court in New Hampshire pursuant to a contract between the parties, which contained the following clause: “Compliance with laws: the parties shall perform all respective actions under the jurisdiction of the state of New Hampshire.”

In granting the motion to dismiss, the court found that the clause qualified as a binding forum selection clause. Applying *Atlantic Marine Constr. Co. v. US District Court*, 134 S.Ct. 568, 87 L. Ed. 2d 487 (2013), the court then held that transfer under 28 U.S.C. § 1404(a) is not applicable where a forum selection clause provides for suit in state court. Instead, the court must analyze the motion under a forum *non conveniens* analysis, which if granted, would require dismissal as opposed to transfer to another jurisdiction.

The court noted that, under the analysis set forth in *Atlantic Marine*, a district court may consider public-interest factors only, and that because those factors will rarely defeat a motion to dismiss, the practical result is that forum-selection clauses should control except in unusual cases. The court found that none of the public-interest factors outweighed the court’s obligation to enforce a valid forum selection clause.

## State Court Cases – Arizona

### Restatement (3<sup>rd</sup>) of Torts

*Jamerson v. Quintero*, 233 Ariz. 389, 313 P.3d 532 (Az. App. 2013)

Jamerson brought a negligence claim in a slip-and-fall case against janitor Quintero, his employer American Floor, and the store owner, Walgreen Arizona Drug Co. After mediation, Jamerson settled with Walgreen, and the claim against Walgreen was dismissed with prejudice by the court. American then moved for summary judgment, arguing that this dismissal constituted adjudication on the merits and barred the claims against Quintero and American (the agents for the principal, Walgreen).

The Arizona Court of Appeals determined that, under A.R.S. § 12-2504, a consent judgment in favor of a principal does not bar a claim against the tortfeasor agent. Instead, it simply reduces the possible judgment Jamerson could obtain against American by the amount Walgreen paid in settlement. American also cited Restatement (Third) of Torts § 7, comment j, to show that when one party is liable only because of another's tortious conduct, they are treated as a single unit for the assignment of responsibility. As a result, a settlement with one of the party ends the liability of the other. Restatement (Third) of Torts § 16 cmt. *d* (2000). The court, however, determined that comment *d* applied only where the fault of the defendants linked by vicarious liability was compared to that of the non-settling Defendants. Additionally, A.R.S. § 12-2504 precluded any application of the Restatement rule, as "Arizona courts do not follow the Restatement in the face of 'legislative enactment' to the contrary." *Id.* at 393, 535 (citing *In re Krohn*, 203 Ariz. 205, 210, 52 P.3d 774, 779 (2002)).

## **State Court Cases – California**

### **Consumer Expectation Test**

*Romine v. Johnson Controls, Inc.*, 224 Cal. App.4th 990, 169 Cal.Rptr.3d 208 (2014)

Plaintiff's pickup truck was rear-ended in a multiple-car accident. The force of the collision caused Plaintiff's seatback to collapse, allowing her head to hit the truck's back seat and causing sever spinal injuries that left Plaintiff a quadriplegic. He sued the seat designers and manufacturers under strict product liability and won, using a consumer expectation design defect theory.

Defendants appealed, arguing that the consumer expectation test cannot be used to evaluate the performance of a single car part in a multi-vehicle crash, as it requires the assessment of multiple factors and the ordinary consumer is not clear on how a car part should perform in all foreseeable situations. The California Court of Appeal ruled that consumers do have expectations about whether a car seat would collapse rearward in a rear-end collision. Additionally, the crash was not as complex as Defendants claimed, because it was just one single collision that caused the injuries. The use of expert testimony to prove injury causation did not mean ordinary consumers could not make assumptions about a product's safety. As a result, the consumer expectations design defect test was appropriate to present to the jury.

### **Punitive Damages**

*Scott v. Ford Motor Co.*, 224 Cal.App.4th 1492, 169 Cal.Rptr.3d 823 (2014), *rev. denied* (Jul 09, 2014)

Plaintiff owned and operated vehicle service stations for 40 years. During this time, he was exposed to asbestos from brake and clutch repairs, eventually developing mesothelioma. He sued multiple corporate Defendants for negligence and product liability, ultimately proceeding to trial against just Ford. The trial court struck down Scott's request for punitive damages because Michigan law applied to the issue, and Michigan does not permit punitive damages unless authorized by statute.

On appeal, the California Court of Appeal decided that while the conflict, and punitive damages were not available under Michigan law, the trial court's analysis to bar punitive damages was incorrect. The trial court had ruled, "[u]sing the government interest analysis, the court concludes that Michigan's interest as embodied in its prohibition of punitive damages would be more impaired if its law were not applied under the circumstances of this case than would California's interest" in allowing a claim for punitive damages. *Id.* at 1498, 169 Cal.Rptr.3d at 828. However, the Court of Appeal did not see how Michigan could have a strong interest in ensuring its policy against punitive damages as a tort remedy was implemented by California courts. Ford argued that the court should use Michigan's policy because the conduct at issue in the claims occurred in Michigan at a corporation domiciled there. However, this would have created a "nationwide shield from punitive damage liability" for Ford, simply by maintaining its headquarters in a state that felt punitive damages were poor public policy. *Id.* at 1506, 169 Cal.Rptr.3d at 834. Based on this analysis, the court determined that there was no real conflict of law, as Michigan had no true interest in the implementation of its policies in California. The court therefore remanded the case for trial on punitive damages.

### **Punitive Damages/Other Incidents**

*Colombo v. BRP US Inc.*, 230 Cal. App. 4th 1442, 179 Cal. Rptr. 3d 580 (2014)

Plaintiffs were two female passengers on a personal watercraft (PWC) manufactured by Defendants. They were thrown off the PWC as a result of maneuvers of the operator, who had provided no safety instructions to his passengers. Plaintiffs sustained vaginal and rectal injuries from the jet thrust of the watercraft. BRP provided a warning label located under the handlebars in front of the pilot, which warned of this very hazard, and advised that "[n]ormal swimwear does not adequately protect against forceful water entry into lower body opening(s) of males or females," and, thus, "[a]ll riders *must* wear a wet suit bottom or clothing that provides equivalent protection." The jury found no design defect but also found that the subject PWC was defective "because of inadequate warnings" and that this defect was a "substantial factor in causing harm" to both Plaintiffs. The jury awarded Colombo about \$3.385 million in damages, which included past and future medical expenses and past and future noneconomic losses, and awarded Slagel about \$1.063 million in similar damages. The jury also awarded each Plaintiff \$1.5 million in punitive damages.



BRP argued on appeal that the trial court erred in admitting 18 other incidents over its objection that the only criterion used by the trial court to determine that the other incidents were substantially similar was that they all caused the same or similar injuries. The trial court nevertheless admitted the incidents to show notice, and the plaintiffs also used them to support their claim for punitive damages. It also excluded evidence proffered by BRP to show that some of the incidents were dissimilar (at least six of them involved incidents on older PWCs that provided no warning at all), and evidence that the Coast Guard had approved the warnings BRP used.

The Court of Appeal affirmed. It rejected BRP's argument that the trial court erred in admitting evidence of other incidents because such evidence "was relevant to show BRP, before the injury to Plaintiffs, knew of a potential defect to its PWC's. . . ." It also affirmed the trial court's decision to exclude BRP's exculpatory evidence as within the trial court's discretion. BRP has filed a petition for review in the California Supreme Court, based on the admission of the other incidents, the exclusion of exculpatory evidence, and the use of such evidence in support of Plaintiffs' claim for punitive damages.

## **State Court Cases – Nevada**

### **Punitive Damages**

*D.R. Horton, Inc. v. Betsinger*, 335 P.3d 1230 (Nev. 2014)

In the original case, Steven Betsinger contracted to buy a house from D.R. Horton, Inc., and applied for a loan to fund the purchase from Horton's financing division. The financing division refused to fund the loan, so Betsinger canceled the contract, but Horton would not return his earnest money deposit. Betsinger sued Horton, alleging fraud and deceptive trade practices. At trial, the jury found in favor of Betsinger and awarded him, among other damages, punitive damages against the financing division. All parties appealed, and the Nevada Court of Appeals reduced the compensatory damages award. However, the court could not determine what the jury would have awarded in punitive damages based on the reduced compensatory award, so the court remanded the issue of punitive damages for further proceedings.

At the second trial, it was unclear whether the jury could simply decide the amount of punitive damages, or if it had to reconsider whether punitive damages were even warranted. The trial court instructed the jury to decide what amount, if any, Betsinger was entitled to for punitive damages, and the jury returned a verdict awarding Betsinger \$675,000 in punitive damages. Horton and its financing division appealed this new verdict.

The Nevada Supreme Court ruled that the plain language of NRS 42.005 indicated the same trier of fact must both determine the appropriateness of punitive damages and the amount to be awarded. The trial court's instruction was insufficient, as even though it could have led the jury to award \$0 in punitive damages, it still did not require the jury to make the threshold determination that punitive damages could be awarded. As a result, the same jury must answer both questions (appropriateness and amount) for punitive damage awards.

### **Personal Jurisdiction**

*Viega GmbH v. Eighth Jud. Dist. Ct.*, 328 P.3d 1152 (Nev. 2014)

Two German limited-liability corporations operated several subsidiaries across the United States. One of the subsidiaries owned a distribution center in Nevada and regularly conducted business in the state. A local homeowner's association sued the parent companies and the subsidiaries, alleging the companies' plumbing parts were faulty.

Both German companies argued the state trial court did not have personal jurisdiction over them, as they had no direct connection to Nevada nor did they control the American subsidiaries in such a way that the subsidiaries' Nevada contacts could be imputed to the parent companies. The court found that the separate entities essentially operated as one company, so all were subject to Nevada jurisdiction.

On appeal to the Nevada Supreme Court, both sides agreed that the German companies were not directly engaged in business in Nevada. The court ruled that an agency relationship is formed when one person has the right to control another's performance. In order for an agency relationship to exist between a parent company and its subsidiary, control requires more than mere ownership, but something more akin to day-to-day management. The Court ruled that there was no evidence of such control by the parent companies, particularly in regards to the sale and distribution of the plumbing products. In order for the state to have personal jurisdiction over a foreign parent corporation through the "minimum contacts" of its subsidiary, the companies need more entanglement than a traditional parent-subsidiary relationship.

## State Court Cases – Oregon

### Damages Caps

*Rains v. Stayton Builders Mart, Inc.*, 264 Or. App. 636, 336 P.3d 483 (2014)

Plaintiff filed a negligence and product liability action against several parties seeking damages for injuries sustained when a board on which he was standing broke, causing him to fall 16 feet.

Weyerhaeuser, the company that provided the board, challenged the trial court's denial of its motion to reduce the Plaintiff's noneconomic damages under ORS 31.710(1), which caps noneconomic damages at \$500,000 in most civil actions "arising out of bodily injury." The trial court denied Weyerhaeuser's motion and held that application of the cap in this case would violate Article I, section 17, of the Oregon Constitution, which provides, "[i]n all civil cases the right of Trial by Jury shall remain inviolate."

The Oregon Court of Appeals observed that Article I, section 17, guarantees a jury trial in civil actions for which the common law provided a jury trial when the Oregon Constitution was adopted in 1857 and in cases of like nature. In any such case, the legislature may not interfere with the full effect of a jury's assessment of noneconomic damages, at least as to civil cases in which the right to jury trial was customary in 1857."

The court held that the damages cap was not unconstitutional because a strict product liability claim has very little in common with the type of product liability negligence claim that existed in 1857, even if the "origins" of a strict product liability claim ORS 30.920 is arguably found in the common law.

## Tenth Circuit

### Tort Reform/Third Restatement of Torts

#### Duty and Foreseeability

*Rodriguez v. Del Sol Shopping Ctr. Assocs.*, 326 P.3d 465 (N.M. 2014)

Reaffirms that New Mexico follows the Third Restatement § 7 comment *j* (2010). Foreseeability is not a factor for courts to consider when determining the existence of a duty, or when deciding to limit or eliminate an existing duty in a particular class of cases. Instead, courts are required to articulate specific policy reasons, unrelated to foreseeability considerations, if deciding that a defendant does not have a duty or that an existing duty should be limited.

*State Farm Fire & Cas. Co. v. Bell*, Case No. 12-2456-DDC-KGG, 2014 U.S. Dist. LEXIS 92067, 2014 WL 3341124 (D. Kan. July 8, 2014)

In Kansas, the duty of care is intertwined with the foreseeability of harm. Kansas has not specifically adopted the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7. Risk-utility v. consumer expectations test

*Smith v. Cent. Mine Equip. Co.*, 559 Fed.Appx. 679, 689 n.6 (10th Cir. 2014)

There is no sign that Oklahoma has backed away from the consumer expectations test since the release of the Third Restatement in 1998. Successor liability.

*Kingsbury v. Westlake Mgmt. Co.*, Case No. CIV-14-468-M, 2014 U.S. Dist. LEXIS 104599, 2014 WL 3778908 (D. Okla. July 31, 2014)

As a general rule, when one company sells or otherwise transfers all its assets to another company, the successor is not liable for the debts and liabilities of the seller. The four exceptions to this rule are when:

- 1) there is an agreement to assume such debts or liabilities;
- 2) there is a consolidation or merger of the corporations;
- 3) the transaction was fraudulent in fact; or
- 4) the purchasing corporation is a mere continuation of the selling company.

The mere continuation exception covers a re-organization of a corporation. For this exception, the test is not whether there is a continuation of business operations, but whether there is a continuation of the corporate entity. To make this determination, we have looked to whether there is a common identity of directors, officers, and stockholders before and after the sale, whether there was good consideration for the sale, and whether the seller corporation continues to exist in fact. The bare de jure existence of the seller corporation after the sale is

insufficient alone to establish that the successor corporation is not a mere continuation of the seller company.

### **Comparative Fault**

*McQuivey v. Fulmer Helmets*, 335 P.3d 361 335 P.3d 361 (Utah App. 2014).

The doctrine of strict product liability exists in tension with Utah’s system of comparative fault. Utah courts have resolved that tension by holding that a passive retailer of a product is not subject to a strict liability claim when the manufacturer of the product is a named party in the action. A passive retailer is one that does not participate in the design, manufacture, engineering, testing, or assembly of a product.

*United Tort Claimants v. Quorum Health Resources, LLC*, Case No. 11-11-13686 JL, 2014 Bankr. LEXIS 2690, 2014 WL 2615009 (Bankr. D.N.M. June 11, 2014)

Although comparative fault is the general rule in New Mexico, joint and several liability applies in certain limited circumstances. In situations involving concurrent tortfeasors (i.e. two or more parties who cause a single, indivisible injury), exceptions are made for [1] intentional torts, [2] vicarious liability, [3] product liability cases, and [4] other situations having a sound basis in public policy. Joint and several liability also applies in situations involving successive tortfeasors.

### **Preemption**

*Gilles v. Ford Motor Co.*, No. 13-CV-00357-RBJ, 2014 WL 544990 (D. Colo. Feb. 12, 2014)

Putative class action in which Plaintiff alleged that Ford violated Colorado common law and the Colorado Consumer Protection Act by advertising that the Ford Escape SE achieved the EPA-estimated fuel economy.

The court held that the Energy Policy and Conservation Act of 1975, 49 U.S.C. § 32901–32919 did not preempt Plaintiff’s state law claims, even though Ford complied with the statute by posting the EPA-estimated fuel economy on the “window sticker.” The court agreed with the (minority) of “federal and state jurisdictions that have held that state law claims akin to those asserted here are not preempted by this body of federal law.” *Id.* at \*3 (citing *True v. American Honda Motor Co., Inc.*, 520 F.Supp.2d 1175, 1180–81 (C.D.Cal.2007); *Paduano v. American Motors Co., Inc.*, 169 Cal.App.4th 1453, 1473–85, 88 Cal.Rptr.3d 90 (Cal. Ct. App. 2009)).

In so doing, the court observed that Plaintiff was not “alleging that his 2013 Ford Escape SE was not properly posted with a compliant fuel economy

label,” “not alleging that the Monroney Sticker on his Escape did not indicate that 30 miles per gallon on the highway is an estimate based upon EPA methods, or that it failed to note that his actual results would vary according to driving and maintenance factors,” or that “Ford provided false or misleading fuel economy data to the EPA.” *Id.* at \*3. Thus, the court concluded that Plaintiff “alleges no violation by Ford of the Energy Policy and Conservation Act of 1975.” *Id.* The court then observed that the Plaintiff, “apparently aware of the problems such claims would create for him, . . . takes a different road” and the “substance of his case is that while Ford might have complied fully with those obligations, Ford simultaneously was representing in print and video advertisements that the vehicle achieves 30 miles per gallon on the highway without mentioning that this number is an EPA estimate or that actual mileage will vary.” *Id.* “His complaint is that the numbers were not identified as such, and that he was not cautioned in those advertisements that actual mileage will vary; and therefore he purchased the Escape in reliance on the representation that the vehicle would achieve 30 miles per gallon.” *Id.* The court held that these narrow claims survive preemption.

The court agreed, however, that Plaintiff’s claim for failure to include a disclaimer that actual results may vary is preempted by Federal Trade Commission regulations “because those regulations do not require such a disclaimer.” *Id.* at \*5.

*Sanchez v. Ford Motor Co.*, No. 13-CV-01924-RBJ, 2014 WL 2218278, at \*3-5 (D. Colo. May 29, 2014)

Putative class action in which Plaintiff alleged that Ford violated Colorado common law and the Colorado Consumer Protection Act by advertising that the Ford MKZ Hybrid achieved the EPA-estimated fuel economy.

The Court held that Plaintiff’s claims based on a 45 MPG COMBINED graphic and accompanying disclosure were preempted by FTC regulations governing the form of disclosures relating to the fuel economy. “Although the EPA did not undertake regulation of automobile manufacturers’ advertising beyond the Monroney Sticker and the booklet, the Federal Trade Commission (FTC) did.” *Id.* at \*3. Because the FTC regulation did not require Ford to disclose that “actual results may vary,” any claim that Ford deceived Plaintiff by not including that language is preempted. *Id.* at \*4.

The Court concluded that “[i]nsofar Mr. Sanchez is claiming that the EPA estimates in the 45 MPG COMBINED graphic were inherently deceptive, failed to comply with federal regulations, or that the disclosure was too small, difficult to read, confusing, those claims are preempted by the FTC regulations. . . . The advertisement complied with the regulations, and any alternative requirement that Mr. Sanchez could seek to impose would conflict with the detailed guidelines in the FTC regulations.” *Id.* at \*4.

*Catheter Connections, Inc. v. Ivera Med. Corp.*, No. 2:14-CV-70-TC, 2014 WL 3536573 (D. Utah July 17, 2014)

Plaintiff Catheter Connections, Inc. and Defendant Ivera Medical Corporation are competitors in the medical device market for infection-control devices. Catheter Connections sued Ivera bringing claims for false advertising and unfair competition under the federal Lanham Act as well as Utah and California statutes and common law.

Catheter connections asserted that Ivera did not receive a Food and Drug Administration 510(k) clearance letter for its device, and thus Ivera's statements that the device is approved under the FDCA is false. Catheter Connections further claimed that Ivera's representation—that a new 510(k) clearance letter is not needed “falsely implied to customers that the [device] is safe and effective.” *Id.* at \*3. The court held that “Catheter Connections’ claim about FDA 510(k) clearance is precluded and preempted by the FDCA.” *Id.* at \*8.

Catheter Connections remaining claims were not preempted. The Lanham Act claims focused “on the substance of Ivera's representations in the context of the medical device market and what drives buyers' purchasing decisions.” *Id.* at \*6. Although “the claims involve a medical device regulated under the FDCA,” “the simple fact that a matter touches upon an area dealt with by the FDA is not a bar to proceedings with a claim under the Lanham Act.” *Id.* Likewise, the state law claims were not preempted because none of the “state laws are regulating medical devices.” *Id.* at \*7.

### **Class Action Fairness Act**

*Parson v. Johnson and Johnson*, 749 F.3d 879 (10th Cir. 2014)

702 Plaintiffs from 26 different states and the Commonwealth of Puerto Rico filed twelve nearly identical product liability actions against Defendants in the District Court of Pottawatomie County, Oklahoma. All twelve actions were assigned to the same state court judge.

Plaintiffs were women who were implanted with the devices and their husbands, who asserted loss-of-consortium claims. Each of the actions included at least one New Jersey resident plaintiff.

Defendants (the manufacturers of transvaginal mesh medical devices) were corporate residents of New Jersey.

None of the individual actions contained 100 or more plaintiffs.

Each complaint specifically disclaimed federal question and federal diversity jurisdiction, and included provisions that admitted the claims had been joined for the purpose of pretrial discovery and proceedings but disclaimed joinder for trial purposes.

Defendants removed the actions to the United States District Court for the Western District of Oklahoma, relying on both diversity jurisdiction and CAFA removal jurisdiction. They argued that complete diversity existed between the parties because in each action, the New Jersey citizen plaintiff had been fraudulently joined and should therefore be disregarded for diversity purposes. They further contended that jurisdiction was available under CAFA's "mass action" provision because, by filing all of the suits in the same court before the same judge, Plaintiffs had proposed a joint trial of claims involving more than 100 Plaintiffs.

Plaintiffs moved to remand eleven of the actions, involving 650 Plaintiffs, to state court.

The district court granted their motion. It declined to adopt the procedural misjoinder doctrine advocated by Defendants, and concluded that Plaintiffs had not in fact proposed a joint trial of their claims, as required for CAFA removal jurisdiction. Tenth Circuit affirmed.

*Jeter v. Wild West Gas, LLC*, Case No. 12-CV-411-TCK-PJC, 2014 U.S. Dist. LEXIS 108894, 2014 WL 3890308 (N.D. Okla. Aug. 7, 2014)

Plaintiffs filed suit in federal court under CAFA, alleging that (1) the two named Plaintiffs, Larry Smith and Janice Sue Parker, are citizens of states other than Oklahoma, (2) all five Defendants are citizens of Oklahoma, and (3) the amount in controversy exceeds \$5 million. Plaintiffs alleged that they and members of the putative class "have owned or currently own oil, gas, and mineral interests in lands and producing wells that have been drilled on land that is located" in the Northern District of Oklahoma and that such interests are subject to leases owned or controlled by Defendants. Plaintiffs alleged that Defendants underpaid royalties due and owing to them and asserted causes of action under Oklahoma law for breach of implied covenant and lease, breach of fiduciary duty, fraud by concealment, and an accounting.

Defendants asked the court to decline jurisdiction and dismiss based on the CAFA exceptions, asserting that the controversy is truly local in nature.

The court noted that although the CAFA exceptions are most commonly litigated in the context of a motion to remand following removal to federal court, it is permissible for a defendant to seek dismissal under the exceptions:

1) Home state exception – Section 1332(d)(4)(B), the home state exception, provides that a district court "shall decline to exercise jurisdiction"



over a class action if “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary Defendants, are citizens of the State in which the action was originally filed.”

In order to successfully invoke the home state exception, Defendants must: (1) establish that at least 66% of the putative class are Oklahoma citizens; (2) identify the primary Defendants; and (3) demonstrate that the primary Defendants are also Oklahoma citizens.

2) Interest of justice exception – The interest of justice exception set forth in § 1332(d)(3) "provides a discretionary vehicle for district courts to ferret out the 'controversy [13] that uniquely affects a particular locality to the exclusion of all others.'"

This exception provides six factors to consider. In order to successfully invoke the interest of justice exception, Defendants must (1) establish that greater than 33% but less than 66% of the putative class are Oklahoma citizens, (2) identify the primary Defendants; and (3) demonstrate that the primary Defendants are also Oklahoma citizens.

The element common to both exceptions is the class citizenship test, i.e., the requirement of a showing that at least 66% of the putative class were Oklahoma citizens. The court concluded that Defendants failed to present reliable evidence permitting the court to make a reasonable estimate of the percentage of putative class members that are Oklahoma citizens. The motion to dismiss was denied.

*Dutcher v. Matheson*, Case No. 2:11-CV-666 TS, 2014 U.S. Dist. LEXIS 58155, 2014 WL 1660585 (D. Utah Apr. 25, 2014)

Plaintiffs were Utah residents whose homes had been subject to foreclosure sales performed by Defendants in Utah.

Plaintiffs claimed that Defendant ReconTrust did not have authority to conduct a trustee sale in Utah because it was not an authorized trustee under Utah law.

Plaintiffs brought their claims on behalf of all persons subject to the allegedly unlawful foreclosure actions of Defendants. Plaintiffs alleged that the proposed class exceeded 10,000 members. Plaintiffs also alleged, on information and belief, that more than 75% of the proposed class members are citizens of Utah.

Defendants removed then case, and Plaintiffs filed a motion to remand based on the exceptions to CAFA: (1) local controversy exception, (2) home state exception, and (3) discretionary exception.

1) Local controversy exception – The local controversy exception was created to exempt from CAFA jurisdiction "those cases consisting of primarily local, intrastate matters."

The court found that the exception was inapplicable because it requires a showing by the party seeking remand that, *inter alia*, "no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" during the three years prior to the filing of suit. The court concluded that such a prior case had been filed.

2) Home state exception – The court concluded that Plaintiffs had not met their burden to demonstrate that two-thirds or more of the members of the proposed class in aggregate were citizens of Utah.

The court noted that "most courts have construed the term 'primary Defendants' to mean all primary defendants." The court concluded that ReconTrust and Bank of America are primary Defendants and it was undisputed that neither ReconTrust nor Bank of America were citizens of Utah.

3) Discretionary exception – There are six factors for the court to consider to determine whether to remand the case; here the court declined to use its discretion to remand. Having denied the three asserted exceptions to CAFA, the court denied Plaintiffs' motion to remand to state court.

### **Personal Jurisdiction, Forum Non Conveniens**

*Eaves v. Pirelli Tire, LLC*, Case No. 13-1271-SAC, 2014 U.S. Dist. LEXIS 64866 (D. Kan. May 12, 2014)

In a product liability action by motorcycle riders who were injured due to a tire blow-out, there was no personal jurisdiction over the foreign manufacturing entities because the riders failed to establish sufficient contacts by an alter ego or agency theory with the tire distributor.

The entities lacked affiliations with Kansas that were continuous and systematic, such that they were not rendered "essentially at home" in Kansas for purposes of jurisdiction.

The stream of commerce approach did not support jurisdiction because the minimum contacts and purposeful availment factors were not satisfied for purposes of due process under U.S. Const. amend. XIV and defendant-focused fairness.

## Daubert/Kumho

*StorageCraft Tech. Corp. v. Kirby*, 744 F.3d 1183 (10th Cir. 2014)

The Tenth Circuit stated that it has “yet to identify some unifying theory or principle for discerning the precise point at which a district court's gate-keeping findings prove sufficient. But several lessons emerge from a review of our existing decisions.”

First, it is not sufficient for a district court simply to say on the record that it has decided to admit the expert testimony after due consideration. Instead, the district court must furnish enough of a record to permit a reviewing court to say with confidence that it “properly applied the relevant law.”

Second, the district court must reply in some meaningful way to the *Daubert* concerns the objector has raised. So, for example, if the reliability of an expert's methodology is at issue, it's not good enough for the district court to stress the expert's qualifications. At the same time, a district court doesn't have to discuss in every case all of the reliability factors that the Supreme Court identified in *Daubert* and *Kumho*. A district court's gate-keeping function is more flexible than that, requiring the court to focus its attention on the specific factors implicated by the circumstances at hand. And, other things equal, more complicated challenges demand lengthier discussions while less complicated challenges require less discussion.

Third, a district court's insufficient gate-keeping findings may not warrant reversal if the appellee can persuade us the error was harmless. If, for example, if it is readily apparent from the record that the expert testimony was admissible, it would be pointless to require a new trial at which the very same evidence can and will be presented again. Even if this court concludes the expert's testimony was wrongly admitted, the presentation of that evidence might still qualify as harmless error “if other competent evidence is ‘sufficiently strong’ to permit the conclusion that the improper evidence had no effect on the decision.” Either way, we will not demand a new trial when the existing one reached the right result.

*Smith v. Cent. Mine Equip. Co.*, 559 Fed.Appx. 679 (10th Cir. 2014)  
(Qualifications)

The judge limited Munsell's testimony because his device had not been tested on any truck-mounted rig nor did Munsell have any personal experience with the operation of a truck-mounted drilling rig.

There is nothing in this record which would support the notion that Munsell had sufficient experience (he had none) to opine on how the device he created for this litigation would perform as a part of the rig's operation in the field. There was no abuse of discretion.

*Freeland v. Ameristep, Inc.*, 2014 U.S. Dist. LEXIS 57160, 2014 WL 1646948 (E.D. Okla. Apr. 24, 2014)

The Court has carefully considered Mr. Powell's credentials, expert report, and deposition testimony. At the outset, the Court finds that Mr. Powell's expertise with regard to design of ratchet straps manufactured using polymer polypropylene webbing insufficient to qualify him as an expert on the design and manufacture of the 2008 Ratchet Straps. Although Mr. Powell is an accomplished engineer, his expertise appears to be strongly concentrated in the area of metallurgy. Significantly, Mr. Powell has very limited experience with UV inhibitors to polymer materials—the very materials that are the subject of this case. As such, the Court finds that Mr. Powell's general engineering knowledge is insufficient to qualify him as an expert with regard to the 2008 Ratchet Straps at issue in this case. Therefore, the Court finds that Mr. Powell is not qualified to opine as to the design and manufacture of the 2008 Ratchet Straps.

The Court also finds that Mr. Powell's testimony must be excluded for failing to satisfy the reliability requirements mandated by *Daubert* and its progeny. Mr. Powell opined that the 2008 Ratchet Straps were defective because they lacked a UV additive, explaining that the webbing for the 2008 Ratchet Straps "should contain antioxidants and be UV stabilized for typical weather exposure for a tree stand for 5 to 10 years." In reaching this opinion, Mr. Powell conducted a FTIR analysis, the results of which identified webbing material in the 2008 Ratchet Straps "as the polymer polypropylene." However, Mr. Powell's expert report plainly states, "[The FTIR] analysis can only identify the base polymer and not any additives such as antioxidants or UV light inhibitors that could be added to the base polymer to protect the [polymer polypropylene] from exposure degradation [10] and weakening that PP is susceptible to." [Id. (emphasis added)].<sup>1</sup> Furthermore, Mr. Powell's report explains that "[t]he design drawing and documents produced to date by [Defendants] are inadequate to determine if the [2008 Ratchet Straps] contain design defects as well as manufacturing defects. No documents identifying the specific polymer chemistry for the webbing has been produced." Without more, there is simply no basis for Mr. Powell's conclusion that the 2008 Ratchet Straps failed to contain a UV additive. Furthermore, Mr. Powell admits that he cannot determine whether the design of the 2008 Ratchet Straps was defective because he did not review the design specifications in order to determine if the 2008 Ratchet Straps were manufactured according to the product intended specifications or were simply aberrant units. Consequently, the Court is left to wonder how Mr. Powell could logically conclude that the ratchet straps contained no UV additives, either by

design or as the result of a manufacturing defect. Without knowing whether the ratchet straps contained UV additives, Mr. Powell's opinion that the ratchet straps were defective due to the absence of UV additives cannot be supported.

The Court also finds that Mr. Powell's report did not offer an opinion regarding the specific cause of the 2008 Ratchet Straps failure. Instead, Mr. Powell's report merely states that exposure to the elements, or weathering, caused the 2008 Ratchet Straps to degrade. Given Mr. Powell's opinion that the 2008 Ratchet Straps were defective due to the Defendants' failure to incorporate a UV additive into their design, the relevant inquiry is whether the UV additive would have prevented Mr. Freeland's injuries. Mr. Powell testified that he did not do any tests on the 2008 Ratchet Straps or any exemplar ratchet straps to determine the amount of degradation and resulting tensile strength reduction caused by exposure to the elements. Mr. Powell also testified that he did not identify what element (i.e., sunlight, wind, rain, extreme temperatures) caused the breakdown of the ratchet straps. Furthermore, Mr. Powell did not attempt to quantify how much longer the ratchet straps would have lasted if Defendants incorporated a UV additive into the polymer webbing used to manufacture the ratchet straps. Consequently, Mr. Powell's opinion that the ratchet straps were defective because they failed to contain UV additives does not satisfy the requirements of *Daubert*, and Defendants' Motion in Limine must be GRANTED.

*Howard v. Ferrellgas Partners, L.P.*, 2014 U.S. Dist. LEXIS 129193 (D. Kan. Sept. 16, 2014)

While Defendant is correct that an expert witness is generally prohibited from providing legal opinions, “courts are more concerned about an expert who presents legal conclusions to a jury rather than to a judge.” Indeed, “the Tenth Circuit has suggested that a district court conducting a bench trial may, in drawing its own conclusions, consider the legal conclusions of an expert.” Here, because there is no jury to instruct, the danger of allowing Dr. Murray to “stray out of bounds and into the rightful territory of the Court” is greatly diminished.

That having been said, however, Defendant is also correct that certain portions of Dr. Murray's report read like a legal opinion.

Therefore, the court will not consider the legal opinions and conclusions contained in Dr. Murray's report. Nor will it permit Dr. Murray to testify, in the event that Defendant seeks to depose him, to the governing legal standard or whether the parties' actions and behavior satisfy that standard. The court will, however, permit Dr. Murray, should Defendant choose to depose him, to opine as to what certain actions in contractual relationships mean through the form of responses to hypothetical questions. This, of course, is in addition to the general explanatory provisions of Dr. Murray's report, especially with regard to rolling contract theory, and any testimony that Dr. Murray may offer generally on contracts, contractual relationships, and rolling contract theory.

*Am. Family Mut. Ins. Co. v. Techtronic Indus. N. Am.*, 2014 U.S. Dist. LEXIS 71758 (D. Kan. May 27, 2014)

Upon careful review, the Court finds that [Plaintiff's expert] Wollack's proposed testimony will not aid the jury in determining the facts and understanding the evidence in this case. The Power Stroke operator manual and on-product warnings were written for average consumers, i.e. individuals similar to those who will sit on the jury. Thus, the jurors will be fully capable to assess Plaintiffs' claims that the on-product warnings and operator manual do not adequately convey a fair indication of the nature and extent of the danger, i.e. that storing a hot pressure washer can ignite nearby combustible materials. Because the issues are within the realm of common understanding and knowledge of the average juror, the Court will exclude Wogalter's proposed expert testimony.

Similar to Wogalter's opinions, the Court finds that [defense expert] Dorris' opinions will not aid the jury in determining the facts and understanding the evidence in this case. As discussed, the Power Stroke operator manual and on-product warnings were written for consumers similar to individuals who will sit on the jury. Thus, the jurors will be fully capable to assess whether the Power Stroke warnings are adequate, i.e. whether they reasonably convey to the average user a fair indication of the nature and extent of the danger. Because the fact issues are within the realm of common understanding and knowledge of the average juror, the Court will exclude Dorris' testimony.

### **Sanctions for Failing to Comply with Expert Disclosure/Report Issues**

*Carroll v. Allstate Fire & Cas. Ins. Co.*, No. 12-CV-00007-WJM-KLM, 2014 WL 859238 (D. Colo. Mar. 4, 2014)

Excluding expert as sanction for his failure to provide a complete statement of all opinions he will express and the basis and reasons for them and the facts or data considered by him in forming them, as required by Federal Rule of Civil Procedure 26(a)(2)(B). The court rejected Plaintiff's argument that the expert relied on the documents listed in an exhibit to his report because that production and the related index do "not clarify the rationale or thought process involved reaching his proffered opinions." *Id.* at \*5.

*Carbaugh v. Home Depot U.S.A., Inc.*, No. 13-CV-02848-REB-MEH, 2014 WL 3543714 (D. Colo. July 16, 2014)

Analyzed when an expert is properly characterized as retained, and obligated to provide a report under Federal Rule of Civil Procedure 26(a)(2)(b), or non-retained.

“Although a witness’ records as a treating physician may, in some instances, obviate the need for a report, ‘[i]t is the substance of the expert’s testimony, not the status of the expert, which will dictate whether a Rule 26(a)(2)(B) report will be required.’” *Id.* at \*3 (citation omitted).

“When a witness’ testimony is limited to his observations, diagnosis and treatment of a patient, the physician ‘is testifying about what he saw and did and why he did it, even though the physician’s treatment and his testimony about that treatment are based on his specialized knowledge and training.’” *Id.* (citation omitted). “Under these circumstances, no Rule 26(a)(2)(B) report is necessary.” *Id.*

“However, when a witness forms an opinion because there is a lawsuit, such as when he or she is asked to review the records of another health care provider in order to formulate his or her own opinion on the appropriateness of care, the witness is considered ‘retained or employed’ under Rule 26(a)(2)(B) and must file a written report accordingly.” *Id.* (citation omitted)

Thus, “findings and opinions” of a treating physician, “to the extent they rely (even in part) on the findings of other physicians, trigger the requirements of Rule 26(a)(2)(B).” *Id.* at \*4.

**Venue: Cases of Note Citing *Atlantic Marine Constr. Co. v. US District Court* 134 S.Ct. 568**

*Deeba v. First Specialty Ins. Corp.*, Case No. CIV-14-00038-M, 2014 U.S. Dist. LEXIS 136828 (W.D. Okla. Sept. 29, 2014)

The Court finds that Plaintiff has not demonstrated that litigating this matter in New York is unreasonable or unwarranted. The Court specifically finds that the factors Plaintiff asserts weigh against enforcing the forum selection clause are all factors the Atlantic Marine Court instructed should not be considered.

Further the Court finds that it was foreseeable that an apartment complex could be potentially damaged by a tornado in Oklahoma, so this is not the type of unusual case the Atlantic Marine Court mentioned would defeat a motion to dismiss for forum non conveniens. Lastly, the Court finds that the parties are already engaged in active litigation surrounding this dispute in New York. Accordingly, the Court finds the forum selection clause should be enforced and this case should be dismissed pursuant to the doctrine of forum non conveniens.

*Crisler v. Matthews Richards Healthcare Mgmt., LLC*, Case No. 14-1061-CM, 2014 U.S. Dist. LEXIS 120091 (D. Kan. Aug. 28, 2014)

A transfer of venue is proper because the forum-selection clause mandates venue exclusively in Missouri courts. Considerations of justice and fairness dictate that a transfer is appropriate. The court therefore grants defendant's request to transfer the case to the United States District Court for the Western District of Missouri.

*Legacy Separators, LLC v. Halliburton Energy Servs., Inc.*, NO. CIV-14-0267-HE, 2014 U.S. Dist. LEXIS 98361, 2014 WL 3587804 (W.D. Okla. July 21, 2014)

The court found that Plaintiff failed to establish exceptional circumstances sufficient to warrant overriding the forum selection clause. While some of the public-interest factors arguably weighed in favor of keeping the case, they were insufficient to meet the exacting standard articulated in *Atlantic Marine*.

*Cardoni v. Prosperity Bank*, Case No. 14-CV-0319-CVE-PJC, 2014 U.S. Dist. LEXIS 93068, 2014 WL 3369334 (N.D. Okla. July 9, 2014)

The court found that the forum selection clause was valid and enforceable. Because Plaintiffs failed to show that the public interest factors weighed heavily against application of the parties' forum selection clause, the court found that the forum selection clause should be enforced.

*Goodwin v. Bruggeman-Hatch*, 2014 U.S. Dist. LEXIS 91812 (D. Colo. May 28, 2014)

Plaintiff asserted seven claims against Twitter. Twitter filed a motion to dismiss, arguing that a forum-selection clause in its Terms of Use rendered venue in the district improper. The court enforced the forum-selection clause, which required suit to be filed in California state court.

*Burke v. Sterling Trust Co.*, 2014 U.S. Dist. LEXIS 50359, 2014 WL 1409423 (D. Colo. Apr. 11, 2014)

The court found that the forum selection clause was valid and enforceable. Therefore, the case should have been filed in the forum designed in the contract. The court dismissed the case without prejudice.

*Liquid Magnetix Corp. v. Therma-Stor LLC*, Civil Action No. 13-cv-3151-WJM-KMT, 2014 U.S. Dist. LEXIS 49016, 2014 WL 1389984 (D. Colo. Apr. 9, 2014)

The court's analysis was driven by whether there was a valid forum selection clause. The court ruled that there was. The court also ruled that Plaintiff failed to show how keeping the case in the District of Colorado was in the public interest. As such, transfer of the action pursuant to the forum-selection clause was warranted.



*Lagerstrom v. Enter. Bank & Trust*, Case No. 13-2531-JTM, 2014 U.S. Dist. LEXIS 34931 (D. Kan. Mar. 18, 2014)

Under *Atlantic Marine*, when there is a valid forum selection clause, district courts adjust their usual § 1404(a) analysis in three ways. First, the Plaintiff's choice of forum merits no weight. Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests; a district court may consider arguments about public-interest factors only. Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations. In other words, there is no potential conflict of laws issue for the court to consider because the transferee court will apply its own laws. The sole dispute in the case was whether the alleged forum selection clause was a mandatory clause. The court concluded that it was and ordered transfer of the case.

*Enriquez v. Seaton, LLC*, Case No. 13-1474-RDR2014 U.S. Dist. LEXIS 24902 (D. Kan. Feb. 26, 2014)

*Atlantic Marine* held that motions to dismiss for improper venue based on a forum selection clause should be treated as a motion to transfer. Under *Atlantic Marine*, only where a case does not involve a forum selection clause should the court weigh and balance convenience of the parties and various public interest considerations and determine whether a transfer would serve the convenience of parties and witnesses and otherwise promote the interest of justice. Where a case does involve a forum selection clause, the clause should be given controlling weight in all but the most exceptional cases. The court found nothing unusual or extraordinary about the case and transferred venue.

### **Cases of Note Citing *Mississippi ex rel. Hood v. AU Optronics* 134 S.Ct. 736**

*Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014)

702 plaintiffs from 26 different states and the Commonwealth of Puerto Rico filed twelve nearly identical product liability actions against Defendants in the District Court of Pottawatomie County, Oklahoma. All twelve actions were assigned to the same state court judge.

Plaintiffs were women who were implanted with the devices and their husbands, who asserted loss-of-consortium claims. Each of the actions included at least one New Jersey resident plaintiff. Defendants (the manufacturers of transvaginal mesh medical devices) were corporate residents of New Jersey. None of the individual actions contained 100 or more plaintiffs. Each complaint specifically disclaimed federal question and federal diversity jurisdiction, and

included provisions that admitted the claims had been joined for the purpose of pretrial discovery and proceedings but disclaimed joinder for trial purposes.

Defendants removed the actions to the United States District Court for the Western District of Oklahoma, relying on both diversity jurisdiction and CAFA removal jurisdiction. They argued that complete diversity existed between the parties because in each action, the New Jersey citizen Plaintiff had been fraudulently joined and should therefore be disregarded for diversity purposes. They further contended that jurisdiction was available under CAFA's "mass action" provision because, by filing all of the suits in the same court before the same judge, Plaintiffs had proposed a joint trial of claims involving more than 100 plaintiffs.

Plaintiffs moved to remand eleven of the actions, involving 650 plaintiffs, to state court. The district court granted their motion. It declined to adopt the procedural misjoinder doctrine advocated by Defendants, and concluded that Plaintiffs had not in fact proposed a joint trial of their claims, as required for CAFA removal jurisdiction. Tenth Circuit affirmed.

Most significantly for the issues in this case, the [Hood] Court then went on to discuss the Court of Appeals' reliance on "background principles" of CAFA. The Fifth Circuit had claimed to be looking to the substance of the action rather than the labels the parties had attached to it. The Supreme Court concluded that Congress did not intend that courts engage in such a background inquiry when deciding whether a suit is a mass action. *Id.* at 745-46. The Court found significant CAFA's express provision that a mass action would not include "any civil action in which . . . the claims are joined upon motion of a defendant." *Id.* at 746 (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(II)). With this language, "Congress demonstrated its focus on the persons who are actually proposing to join together as named plaintiffs in the suit." *Hood*, 134 S. Ct. at 746. The Supreme Court's reasoning here suggests a narrow focus on the statutory language, and on the plaintiffs actually named in the suit.

#### **Cases of Note Citing *Halliburton v. Erica P. John Fund* 131 S.Ct. 2179**

*Maxwell v. United Servs. Auto. Ass'n*, \_\_\_ P.3d \_\_\_, 2014 COA 2 (Colo. App. Jan. 2, 2014)

The Colorado Court of Appeals cited *Halliburton* for the proposition that to "be certified as a class under C.R.C.P. 23(b)(3), plaintiffs must establish that common questions of law or fact predominate over individual questions. This inquiry begins with the elements of the underlying cause of action."

*Bennett v. Sprint Nextel Corp.*, 298 F.R.D. 498, 506 (D. Kan. 2014)

Citing *Halliburton* for the standard to satisfy predominance: “Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action.”

## Eleventh Circuit

### Evidence

*Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063 (11th Cir. 2014)

The Eleventh Circuit held the trial court erred in excluding evidence of Decedent's alcohol use from an action against a tobacco company by the widow of a deceased smoker finding such evidence was relevant to Decedent's cause of death, the jury's determination of comparative fault, and non-economic damages. The Court noted Decedent's history of alcoholism was relevant to the jury's determination of comparative fault because, among other reasons, it contributed to the smoking itself, citing Plaintiff's expert, Dr. David Burns, and the Surgeon General that "alcohol consumption has a negative effect on smoking cessation." Further, the Court noted non-economic damages rest squarely on the quality of the relationship between the Plaintiff and Decedent, and by excluding evidence of how alcohol abuse affected that relationship, the trial court prevented Defendant from presenting an accurate picture of the Plaintiff and Decedent's family life, which was a critical consideration in determining the damages awarded.

*Adams v. Laboratory Corporation of America*, 760 F.3d 1322 (11<sup>th</sup> Cir. 2014)

The Eleventh Circuit reversed the district court for excluding the testimony of Plaintiff's expert in a negligence case based on the failure of Defendant's cytotechnologists to identify abnormalities in Plaintiff's Pap smears. Despite purporting to apply the abuse of discretion standard of review, the court found that the trial judge's exclusion of the expert's opinions manifestly erroneous. It faulted the lower court for rejecting the Plaintiff's expert's failure to do a “blinded” review of the slides, even though the defense expert also failed to do a blinded review (In the *Kumho Tire* case, the Eleventh Circuit, later reversed, used the same analysis: “We note that both Carlson's and Samyang's experts rely on the same markings on the Carmichaels' tire for their analyses; the existence and relevance of these signs has not been questioned by either party before this court. *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1436 (11th Cir. 1997) *rev'd sub nom. Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The court also faulted the District Court for concluding that a “blinded review was the standard set by the profession based on the litigation guidelines created by the CAP and ASC,” characterizing those standards as “policy proposals to limit how the courts can find the members of the organizations liable for professional negligence when they are sued.” Such standards, the court concluded, “skew the evidentiary rules against plaintiffs is by imposing a one-sided standard for reliability.” The Court criticized this criterion,

asserting that the general acceptance criterion has value only “when the science is being applied outside of the litigation context, not the scientific community’s opinion about the standard or type of proof that should be required in litigation.”

## **Alabama**

### **Northern District of Alabama**

**Cases of Note Citing *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568, 581-82 (2013)**

*U.S. ex rel. MDI Servs., LLC v. Fed. Ins. Co.*, No. 5:13-CV-2355-AKK, 2014 WL 1576975, at \*2-3 (N.D. Ala. Apr. 17, 2014).

The Court held the considerations relevant to altering the § 1404(a) analysis for mandatory forum-selection clauses, as discussed in the Supreme Court's holding in *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568, 581-82 (2013), do not apply if the forum-selection clause is permissive, and not mandatory.

### **Personal Jurisdiction**

*Johnson v. Chrysler Canada Inc.*, No. 1:13-CV-1712-VEH, 2014 WL 2526967 (N.D. Ala. June 5, 2014)

The issue was whether or not the Court had personal jurisdiction over foreign manufacturer Chrysler Canada. The Court held that while the parameters of the “stream of commerce” basis for specific personal jurisdiction, as described by the Supreme Court of the United States in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011), are not yet clearly defined, the Court did have specific personal jurisdiction over Chrysler Canada. In so deciding, the Court found that: 1) the exercise of personal jurisdiction over the nonresident vehicle manufacturer would not offend traditional notions of fair play and substantial justice, as required to comport with due process; 2) litigating the action in Alabama district court would not be burdensome on the manufacturer, and 3) Alabama had a substantial interest in protecting drivers in its state from unreasonably dangerous vehicles.

## **Florida**

### **Middle District of Florida**

#### **Preemption/Removal**

*Wier v. Depuy Orthopaedics, Inc.*, No. 8:14-CV-2166-T-30AEP, 2014 WL 5178950, at \*3 (M.D. Fla. Oct. 14, 2014);

*Fronczak v. Depuy Orthopaedics, Inc.*, No. 8:14-CV-2162-T-30MAP, 2014 WL 5175857, at \*2 (M.D. Fla. Oct. 14, 2014).

Defendants, the manufacturer and distributor of medical devices, removed these cases to federal court. They contended that the non-diverse distributor was fraudulently joined because the claim against the distributor—as well as the manufacturer—was preempted. The Court held that, while there is precedent that federal preemption applies to generic drug manufacturers, the cases do not address whether or not it also applies to medical device distributors. Thus, the Court declined to exercise federal jurisdiction and remanded the cases to state court.

### **Southern District of Florida**

**Cases of Note Citing *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568 (2013)**

*Vernon v. Stabach*, No. 13-62378-CIV, 2014 WL 1806861, at \*2 (S.D. Fla. May 7, 2014).

The Court held that where a forum-selection clause designates a state forum, and not a federal one, a motion to dismiss for *forum non conveniens* is the appropriate enforcement mechanism. Distinguishing *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568 (2013), which requires transfer of the case, not dismissal, if the forum-selection clause designates another federal district court as the forum choice.

*Echols v. RJ Reynolds Tobacco Co.*, No. 2:13-CV-14215, 2014 WL 5305633, at \*3 (S.D. Fla. Oct. 15, 2014).

The Court held that, to satisfy the federal pleading standards, Plaintiff must, at a bare minimum, state the years during which Plaintiff smoked each Defendant's brands generally. Plaintiff alleged that he smoked a certain brand for a certain number of years then switched to another brand for a certain number of years but also smoked other brands. The Court held these allegations were insufficient to satisfy federal pleading standards and dismissed Plaintiff's personal injury claims without prejudice.

### **Malfunction/Indeterminate Defect**

*O'Bryan v. Ford Motor Co.*, No. 12-CV-10052-JLK, 2014 WL 1745074 (S.D. Fla. May 1, 2014).

Plaintiff sued Ford, alleging that a defective speed control deactivation switch caused their residential fire. The issue was whether or not Plaintiff was

entitled to a legal inference that the vehicle was defective to survive summary judgment. The Court held Plaintiff was precluded from relying on an inference of defect where the cause of the fire was undetermined, Plaintiff's own expert was unable to rule out other causes, there was no indication the fire began in the vehicle, and there was no evidence of an existing defect in the vehicle.

### **Drug and Medical Device Litigation**

*Cline v. Advanced Neuromodulation Sys., Inc.*, No. 1:11-CV-4064-AT, 2014 WL 1624084 (N.D. Ga. March 31, 2014)

Patient brought an action in state court against the manufacturer of implantable pulse generator (IPG) alleging breach of warranty, negligent manufacture and failure to warn, strict liability, breach of implied warranty, material misrepresentation, and violation of Georgia's Uniform Deceptive Trade Practices Act. After removal, the manufacturer moved to dismiss. The District Court held that the fact that manufacturer timely replaced patient's IPG for free did not bar patient's claim for breach of express warranty; patient's strict product liability claim was preempted by Medical Device Amendments; patient's negligent manufacture claim was preempted; the manufacturer's alleged violation of device design verification regulation could not serve as foundation of permissible parallel claim under state law; patient's negligence claim based on manufacturer's alleged violation of current good manufacturing practice requirements incorporated into premarket approval supplement was not preempted; manufacturer's failure to timely file medical device reports and adverse events reports was not the proximate cause of patient's injury; the patient failed to plead fraud with requisite particularity; and the patient did not justifiably rely on manufacturer's representative's alleged oral statement.

### **Protective Orders**

*Tillman v. C.R. Bard, Inc.*, 297 F.R.D. 660 (M.D. Fla. 2014)

In a product liability action arising out of the implantation and performance of the manufacturer's inferior vena cava filter medical device, the manufacturer moved for a protective order to prevent Plaintiff from disclosing to the public and the Food and Drug Administration documents it produced in discovery. The District Court held that good cause existed to issue the protective order where such documents contained proprietary and trade secret information, the disclosure of which would unfairly advantage manufacturer's competitors, and granted the motion.

### **Class Action Fairness Act**

*In re Engle Cases*, 767 F.3d 1082 (11th Cir. 2014)

A lawyer filed personal injury cases in diversity on behalf of purportedly living cigarette smokers who were dead at the time of filing, loss of consortium cases on behalf of spouses and children of those predeceased Plaintiffs, and wrongful death cases more than two years after decedent-smoker's death. The United States District Court for the Middle District of Florida dismissed the cases and the Eleventh Circuit affirmed holding that: the Federal Rule of Civil Procedure that allowed for substitution of parties did not allow lawyer to file placeholder actions or "protective filings" to keep limitations period open while proper parties were tracked down and claims were investigated; years of unjustified delay and obfuscation stripped counsel for Plaintiffs who had died before filing of whatever rights to amendment to add survivors as Plaintiffs that they might have had, due to related stay order, if they had brought defects to court's attention in timely fashion; years of unjustified delay and obfuscation stripped counsel for Plaintiffs who were alive at filing, but subsequently died, of whatever rights to amendment to add survivors as Plaintiffs that they might have had, due to related stay order, if they had brought defects to court's attention in timely fashion; Plaintiffs' counsel was not entitled to leave to file motion for relief from judgment after "inadvertent" dismissal of consortium cases on basis that counsel later thought of argument as to why those cases should not have been dismissed; years of unjustified delay and obfuscation stripped counsel for Plaintiffs of whatever rights to amendment that they might have had, due to related stay order, to convert consortium cases into wrongful death or survival cases, if they had brought defects to court's attention in timely fashion; and counsel for Plaintiffs were not entitled to leave to amend to add new allegations that supposedly would establish equitable tolling of limitations period.

### **Punitive Damages**

*Taylor v. MillerCoors, LLC*, No. 1:14-CV-94 (WLS), 2014 WL 4179918 (M.D. Ga. Aug. 20, 2014)

The Court granted Defendant's motion to dismiss Plaintiff's claim for punitive damages where, as to punitive damages, complaint only contained a threadbare recital of the elements for such a claim and failed to plead facts that demonstrated willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences, as required under Georgia law.

*Sutor v. Intex Recreation Corp.*, No. 2:12-cv-600-FtM-38DNF, 2014 WL 5439302 (M.D. Fla. October 24, 2014)

The Court denied Plaintiff's motion to amend complaint to add a claim for punitive damages where proposed amended complaint failed to allege specific facts that supported such a claim.

*In re ConAgra Peanut Butter Products Liability Litigation*, No: 1:13-DV-34-TWT, 2014 WL 3767793 (N.D. Ga. July 30, 2014)

The Court granted Defendant's motion for summary judgment on Plaintiff's claim for punitive damages where the evidence was insufficient for such a claim under Georgia or District of Columbia law.

**Cases of Note Citing *Mississippi ex rel. Hood v. AU Optonics*, 134 S. Ct. 736 (2014)**

**Removal**

*Melton v. Gen. Motors LLC*, No. 1:14-CV-1815-TWT, 2014 WL 3565682 (N.D. Ga. July 18, 2014)

In a product liability case arising out of an allegedly defective ignition switch, the court granted Plaintiff's motion to remand because a sufficient connection existed between the claims asserted against GM and the negligence claim asserted against the resident Defendant.

**Alabama Supreme Court**

**Good Samaritan Doctrine**

*Yanmar America Corp. v. Nichols*, 2014 WL 4851514 (Ala. 2014).

Plaintiff sustained serious injuries when a tractor he was operating rolled over and crushed him. The tractor had been manufactured and sold in Japan. And was designed specifically for use in the rice paddies in Japan. It was not equipped with a ROPS system (roll-over protection). The Japanese company manufactured other tractors, differently designed, for use in the U.S. Later, a U.S. company decided to purchase Japanese tractors and re-sell them in the U.S. as gray-market tractors. Defendant, the manufacturer's U.S. Distributor, informed the Japanese manufacturer, expressing concern because the tractors lacked ROPS, and took steps to discourage the use of the gray-market tractors by refusing to sell replacement parts, and asking the manufacturer to try to stop the unauthorized sale of these tractors. It implemented a computer parts-blocking program to stop the sale of replacement parts and issued a safety notice on its website, explaining its safety concerns with these tractors. Because the U.S. distributor was not in the chain of sale or distribution of the subject tractor, Plaintiff sued it on a "good Samaritan" theory of liability, based on its voluntary assumption of the duty to warn users. Nevertheless, the jury awarded a large verdict against Defendant, but the Alabama Supreme Court reversed. It held that liability for breach of a voluntary undertaking was governed by Restatement, Torts 2d, § 324A. Under that rule, a Defendant can only be held liable if it "affirmatively either made, or



caused to be made, a change in the conditions which change created or increased the risk of harm.” Comment *c* to §324A makes clear that ‘increased risk’ means some physical change to the environment or some other material alteration of the circumstances.” In this case, it was undisputed that none of the Defendant’s warnings ever reached Plaintiff

## D.C. Circuit

### District Court

*Gamson v. British Airways*, 2014 WL 2527487 (D.D.C. 2014)

British Airways removed claims of negligence and breach of contract for a pre-flight booking error to federal court, alleging that at least one of Plaintiffs' claims arose out of the Montreal Convention, a treaty that governs international air travel and provides federal subject-matter jurisdiction. *Id.* at \*1. British Airways also moved to dismiss the allegations asserting that Plaintiffs could not state a claim under the Montreal Convention and that the U.S. Airline Deregulation Act preempted any remaining claims. *Id.*

The District Court broadly recognized that, “[A]s a general proposition, federal preemption of state law is a *defense* that does not justify removal under the rule of [*Louisville & N.R. Co. v. Mottley*, 211 U.S. 149 (1908) (*citing Caterpillar v. Williams*, 482 U.S. 386, 392-93 (1987))],” unless “Congress intended [the federal statute at issue] to provide the exclusive cause of action . . .” *Id.* at \*2 (*quoting Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8-9 (2003) (emphasis supplied in original)).

The Court ultimately held that removal was not proper under either the Convention or the Act finding the specific language of the Convention precluded preemption and that the Act did not provide complete preemption. Thus, preemption under the ADA was a *defense*, not a basis for jurisdiction. *Id.* at \*3-4. The Court also denied sanctions, finding no bad faith or purposeful delay. *Id.*

## Market Share/New Theories of Liability

### Court of Appeals of Federal Circuit

*Prime Time Int’l Co. v. U.S. Dep’t of Agric.*, 753 F.3d 1339 (D.C. Cir. 2014)  
Plaintiff, a Cigar manufacturer, challenged USDA’s “method for calculating assessments for cigars” (“the Rule”), alleging that the Rule violated the Fair and Equitable Tobacco Reform Act. *Id.* at 1340. The District Court upheld the Rule as a reasonable interpretation of an ambiguous statute and Prime Time appealed. *Id.* at 1341.

Applying a *Chevron* Step 2 analysis, the Court of Appeals affirmed. *See, e.g., Prime Time* at 1341-43; *see also Chevron v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984). Importantly, the Court of Appeals recognized that Judge Lamberth “invok[ed] a fundamental principle of *Chevron* review” when he explained that “[a]s long as the agency’s interpretation of . . . ambiguous language is reasonable, it does not matter whether [the Plaintiff’s] interpretation is

‘more’ reasonable.’” *Id.* at 1342-43 (citing *Prime Time Int’l Co. v. Vilsack*, 930 F. Supp. 2d 240, 259 (D.D.C. 2013) (citing *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005))).

## **Personal Jurisdiction**

### **Court of Appeals**

*Williams v. Romarm*, 756 F.3d 777 (D.C. Cir. 2014)

A Romanian government-owned firearms manufacturer, Romarm, was sued for wrongful death related to a March 2010 drive-by shooting murder in D.C. *Id.* at 780-81. Although it was located in Romania, Romarm sold its products to an American distributor that imported them for sale in America. *Id.* The District Court agreed with Romarm’s argument that the Court lacked personal jurisdiction over Romarm. *Id.* at 781.

On appeal, Plaintiffs argued that the court had personal jurisdiction through D.C.’s long-arm statute and raised three primary arguments challenging the district court’s dismissal, in part, for lack of personal jurisdiction. In particular, one of Plaintiffs’ contentions was that “Romarm’s sales to the United States through a distributor establish sufficient contact with the District to comply with due process. *Id.* at 781.

Citing Justice Breyer’s “narrow” concurrence in *J. McIntyre Machinery v. Nicastro*, 131 S.Ct. 2780 (2011), the Court of Appeals affirmed the district court’s dismissal. *Id.* Specifically, the Court relied upon the conclusion that “a foreign corporation’s sale to a distributor, without more, is insufficient to establish the minimum contacts necessary for a court to exert personal jurisdiction over the corporation, even if [the corporation’s] product ultimately causes injury in the forum state. *Id.* at 780.

### **District Court**

*Song fi v. Google*, 2014 WL 5472794 (D.D.C.)

Plaintiffs sued Google and YouTube alleging that the Defendants “improperly removed Plaintiffs’ video from the YouTube website.” *Id.* at \*1. Defendants argued that the only proper venue for the action was in Santa Clara County, California, pursuant to the forum selection clause set forth in YouTube’s Terms of Service. *Id.* The District Court transferred the case to the U. S. District Court for the Northern District of California. *Id.*

Pertinent to the Court’s analysis was the fact that one of the Plaintiffs, Song Fi, agreed to the YouTube Terms of Service, which contained two pertinent provisions: (1) disavowed personal jurisdiction over YouTube in any jurisdiction

other than California; and (2) selected Santa Clara County, California, as the exclusive jurisdictional venue for any claim or dispute. *Id.*

The District Court found the forum-selection clause to be enforceable. *Id.* at \*4. First, the Court rejected Plaintiffs' argument that only Song Fi was subject to the forum-selection clause in the Terms of Service finding that "non-parties and non-signatories to an agreement may be bound by that agreement's forum selection clause if their conduct is 'closely related to the contractual relationship' so that it is 'foreseeable that they would be bound by such clause.'" *Id.* (quoting *Sabre Int'l Sec. v. Torres Advanced Enter. Solutions*, 2014 WL 3859164 at \*8-9 (D.D.C. 2014).

Second, the Court rejected Plaintiffs' argument that YouTube's action of removing the video invalidated the forum-selection clause because YouTube was no longer a "passive" website. *Id.* at \*5. The District Court held that YouTube's personal jurisdiction provision in the Terms of Service was "clearly designed to preempt assertions of jurisdiction based on contacts with a specific forum." *Id.* (citing *Sweetgreen v. Sweet Leaf*, 882 F. Supp. 2d 1, 5 (D.D.C. 2012).

Finally, the Court found that neither the Terms of Service, nor the forum-selection clause, were unconscionable based on a factual analysis of the circumstances surrounding the removal of the video. *Id.* at \*5.

**Cases of Note Citing *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. Of Texas*, 134 S.C. 568 (2013)**

**Court of Appeals**

*Wu v. Stomber*, 750 F.3d 944 (D.C. Cir. 2014)

The D.C. federal Court of Appeals affirmed district court dismissal of putative class action in D.C. and one transferred from New York to D.C. Plaintiffs alleged that Defendants made material misstatements and omissions in offering memorandum for sale of securities in violation of federal securities laws. *Id.* at 946-47. Defendants contended that Dutch law, rather than D.C. or New York law, applied to the fraud and misrepresentation claims. *Id.* at 949.

With respect to the dismissal of the New York action, the Court of Appeals cited to *Atlantic Marine* for the proposition that "[A] diversity case transferred from one federal forum to another generally retains the state choice-of-law rules of the original forum." *Id.* at 949 (citing *Atl. Marine*, 134 S.Ct. at 582).

Applying New York choice of law principles, the Court of Appeals found that either New York or D.C. law would apply to the fraud and misrepresentation claims given Plaintiffs' domiciles. *Id.* at 950. The Court further held that the

elements of these claims were essentially the same in either jurisdiction. *Id.* (citations omitted). Thus, Plaintiffs' claims failed in either jurisdiction.

### District Court

*One on One Basketball v. Global Payments Direct*, 2014 WL 1617707 (D.D.C. 2014)

Plaintiff brought breach of contract and negligence claims in the D.C. District Court. *Id.* at \*1. Global Payments moved to transfer based on a forum selection clause and to dismiss for failure to state a claim upon which relief could be granted. *Id.* at \*1-2. The District Court transferred the action to the Northern District of Georgia and did not address the motion to dismiss. *Id.*

At issue with respect to transfer was a forum-selection clause contained in the Card Services Terms & Conditions mentioned in the Merchant Application that was signed, in part, by One on One's President. *Id.* at \*2. Although the Court noted the general analysis that must be undertaken for a 28 U.S.C. § 1404(a) transfer, the District Court also stated that "the presence of a valid forum-selection clause substantially changes the analysis . . ." *Id.* at \*3.

Quoting extensively from *Atlantic Marine*, the Court further recognized that § 1404(a) "provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district" and that "[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Id.* (quoting *Atl. Marine*, 134 S.Ct. at 581) (internal quotations omitted). Finally, the Court held that "when a valid forum-selection clause is present, [o]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." *Id.* (quoting *Atl. Marine*, 134 S.Ct. at 581) (internal quotations omitted).

*Renchard v. Prince William Marine Sales*, 2014 WL 30968 (D.D.C. 2014)

Plaintiff alleged breach of contract and tort claims as a result of the repossession of Plaintiff's yacht. *Id.* at \*1-4. Defendants moved to dismiss and, alternatively, to transfer pursuant to 28 U.S.C. § 1404(a), contending that a valid forum-selection clause required the case to be litigated in the Eastern District of Virginia. *Id.* at \*1.

The District Court denied the motion to transfer based on a factual finding that the forum-selection clause, while "valid," did not apply to the Plaintiff's suit. *Id.* at \*5. The parties had entered into a series of contracts, only one of which specified the Virginias forum, and the Court found that the actions giving rise to the suit were not part of the transaction referenced by the contract containing the choice-of-forum clause. However, quoting *Atlantic Marine*, the District Court recognized that "[w]hen the parties have agreed to a valid forum-selection clause,

a district court should ordinarily transfer the case to the forum specified in that clause and [o]nly under extraordinary circumstances unrelated to the convenience of the parties' may such a motion be denied. *Id.* (quoting *Atl. Marine*, 134 S.Ct. at 574).

### Cases of Note Citing *Hood v. AU Optronics Corp.*, 134 S.Ct. 736 (2014)

#### District Court

*Nat'l Consumers League v. Flowers Bakeries*, 2014 WL 1372642 (D.D.C. 2014)

A public interest organization, acting as a private attorney general, filed suit in the D. C. Superior Court alleging that Defendant engaged in a "pervasive pattern of fraudulent, deceptive, and otherwise improper marketing practices . . . regarding the sale of Nature's Own Honey Wheat Bread and Whitewheat Bread" in violation of the D. C. Consumer Protection Procedures Act ("DCCPPA"). *Id.* at \*1. Flowers removed the case and asserted three independent grounds for removal: (1) diversity jurisdiction; (2) the class action provision of CAFA; and (3) the mass action provision of CAFA. *Id.* The District Court granted Plaintiff's motion to remand. *Id.*

The Court cited *Hood* twice in its analysis. First, the Court declined "to aggregate the damages to which a single individual would be entitled when calculating the amount in controversy," finding that before it could do so, the needed to also be a party to the lawsuit for diversity jurisdiction. *Id.* at \*4 (citing *Hood*, 134 S.Ct. at 744 (holding that the term "Plaintiff" should be interpreted "in accordance with its usual meaning – to refer to the actual named parties who bring an action") (additional citations omitted)).

*Second*, the District Court declined to exercise original jurisdiction under CAFA's "mass action" provision adopting the Supreme Court's ruling in *Hood* that "actions brought on behalf of the public . . . do not satisfy the '100 or more persons' requirement of CAFA." *Id.* at \*7 (citing *Hood*, 134 S.Ct. at 744).

*Nat'l Consumers League v. Bimbo Bakeries*, 2014 WL 2536795 (D.D.C. 2014)

Analogous facts and identical allegations to *Nat'l Consumers League v. Flowers Bakeries*, 2014 WL 1372642 (D.D.C. 2014). In fact, the District Court relied primarily on *Flowers* opinion for its holding. *Id.*

However, the Court rejected Defendant Bimbo's attempt to distinguish its case from *Flowers* by arguing that Plaintiff NCL "asked in its Complaint that damages be payable to only one entity – NCL." *Id.* at \*5. Because of this, Bimbo argued that the rule against aggregation was inapplicable and irrelevant. *Id.* The District Court noted that the issue had not been addressed by *Flowers* or any other court in the D.C. Circuit. *Id.*

Nevertheless, the *Bimbo* Court recognized that the prayers for relief in both *Flowers* and *Bimbo* were “exactly verbatim”. *Id.* Thus, the District Court held that there was “no reason for these undistinguishable cases to come out differently on the issue of potential statutory damages.” *Id.*

## Federal Circuit

### Vaccines

*M.R. v. Sec’y of HHS*, 2014 U.S. Claims LEXIS 1122 (Sept. 24, 2014).

Petitioner filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program, alleging that the diphtheria tetanus acellular pertussis, hemophilus influenza-type b, measles mumps rubella, and varicella vaccinations received by her son caused him to suffer from a seizure disorder. The Court held that petitioner was entitled to compensation under the Vaccine Act because she satisfied her burden of proof causally connecting the Prevnar vaccine and her son’s seizure disorder by a preponderance of the evidence. The court found that she had offered a medical theory, a logical sequence of cause and effect, and a showing of a proximate temporal relationship between the vaccine and her son’s injury.

### Vaccines and *Daubert*

*Jacunski v. Sec’y of HHS*, 2014 U.S. Claims LEXIS 1097 (Sept. 23, 2014).

Petitioner filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program, alleging that her chronic inflammatory demyelinating polyneuropathy was aggravated by the influenza vaccines that she received. The Court held that petitioner was not entitled to an award under the Act because her expert based his causation opinion that petitioner experienced two separate exacerbations, one immediately after each vaccination. However, the medical records refuted that, demonstrating that petitioner experienced only one exacerbation, long after the petitioner’s first vaccination and prior to petitioner’s second vaccination.

The Federal Circuit ruled previously that it is appropriate for special masters to utilize *Daubert’s* factors as a framework for evaluating the reliability of causation-in-fact theories presented in National Vaccine Injury Compensation Program cases. *Terran v. HHS*, 195 F.3d 1302, 1316 (Fed. Cir. 1999). In this case, petitioner’s expert failed to provide any significant support for his theory that an influenza vaccine could cause an aggravation of chronic inflammatory demyelinating polyneuropathy.



## Forum Non Conveniens

*In re Apple, Inc.*, 2014 U.S. App. LEXIS 17664 (Sept. 11, 2014).

This patent infringement case contains a good discussion concerning *forum non conveniens* analysis by the United States Court of Appeals for the Federal Circuit. The Court applied regional circuit law (in this case law from the Fifth Circuit) to procedural issues and issues that do not involve substantive patent law. See *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008). Consequently, in analyzing this case, the Court notes that the Fifth Circuit considers the public and private factors used in *forum non conveniens* analysis.

## Vaccines

*Russell v. Sec'y of the HHS*, 2014 U.S. Claims LEXIS 1040 (Sept. 9, 2014).

Petitioner filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program, alleging that a Hepatitis A vaccine caused her daughter's seizure disorder. The Court held that petitioner was not entitled to compensation under the Act because she failed to present any expert opinion or any opinion from a treating physician that the vaccine caused her daughter's seizure disorder, thereby failing to satisfy any of the *Althen* factors. The *Althen* factors originate from *Althen v. Sec'y of HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005), wherein the Federal Circuit set forth three factors that a petitioner must establish by a preponderance of the evidence to prove causation in fact in off-Vaccine Injury Table cases: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of proximate temporal relationship between the vaccination and the injury.

## Punitive Damages

*Hicks v. United States*, 2014 U.S. Claims LEXIS 883 (Aug. 29, 2014).

While not a product liability case, this case includes a good discussion of tort claims in the United States Court of Federal Claims and punitive damages. The case involved a pro se Plaintiff who sought damages (including punitive damages) for injuries allegedly sustained in an altercation with a South Carolina police detective. The government moved to dismiss the Complaint for lack of jurisdiction and failure to state claims under Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims. The Court found that Plaintiff's tort claims failed as a matter of law because the Tucker Act excludes tort claims from the court's jurisdiction. 28 U.S.C. § 1491(a)(1). Moreover, the Court found that Plaintiff's assertion of punitive damages failed as a matter of law because the court has no authority to award punitive damages. *Garner v. United States*, 230 Ct. Cl., 941, 941 (1982). In addition, punitive damages are not

available in Federal Tort Claims Act suits against the United States. 28 U.S.C. § 2674 (2012).

### ***Kumho***

*Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Apr. 25, 2014).

This is a patent infringement action, but contains a discussion regarding the applicability of *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) with respect to all expert testimony. The decision notes the revision of Rule 702 of the Federal Rules of Civil Procedure in response to the United State Supreme Court's decisions in *Daubert* and *Kumho*, and the application of the same in patent infringement actions.

### **Vaccines**

*D'Anglioni v. Sec'y of HHS*, 2014 U.S. Claims LEXIS 286 (Mar. 27, 2014).

Petitioner filed a petition for compensation pursuant to National Childhood Vaccine Injury Compensation Program, 42 U.S.C. §§ 3300aa-10 through 34 (2012). He alleged that he experienced an adverse, and possibly allergic, reaction to the Hepatitis B vaccine, causing him to develop chronic fatigue syndrome, systemic lupus erythematosus, and autoimmune syndrome by adjuvants. While the court found that he had established most of the elements set forth in 42 U.S.C. § 300aa-11(c), including that he received a vaccine listed on the Vaccine Table, he failed to establish persuasively that he experienced an adverse and possibly allergic reaction to the Hepatitis B vaccine that caused him to develop an allergy, chronic fatigue syndrome, systemic lupus erythematosus, and autoimmune syndrome by adjuvants. Therefore, his petition was denied.

*Tompkins v. United States*, 117 Fed. Cl. 713 (Mar. 11, 2014).

Petitioner filed, on behalf of his son, a petition for review of the Chief Special Master's Decision denying compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 through 34). Petitioner had alleged that two sets of vaccines administered to his son caused his son to develop Guillain-Barré syndrome. The Chief Special Master had denied compensation on the grounds that petitioner did not establish by a preponderance of the evidence that the vaccines caused petitioner's son's Guillain-Barré syndrome. The Chief Special Master's decision was affirmed because her conclusion that the responsive expert was more persuasive than petitioner's expert was not improper, her findings were based on a thorough review of the records and logical inferences that were both well-reasoned and rational, and her decision set forth several reasons supporting her decision of no acute illness.

*Simanski v. Sec’y of HHS*, 115 Fed. Cl. 407 (Feb. 18, 2014).

Petitioners filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10, et seq., on behalf of their minor daughter. Petitioners alleged that the minor developed Guillain-Barré syndrome and Chronic Inflammatory Demyelinating Polyneuropathy. The Court found that petitioners were properly denied compensation because the records evidence did not support a finding of either Guillain-Barré syndrome or Chronic Inflammatory Demyelinating Polyneuropathy, but rather a preponderance of the evidence established that the child suffered from a spinal muscular atrophy with respiratory distress, which was caused by a genetic mutation. The Court noted that the alleged medical conditions did not meet the requirements of a presumptively “on [Vaccine Injury] Table” vaccine-related condition. Therefore, in order to prove entitlement for an off-Table injury, they were required to prove causation in fact. To do this, pursuant to the Restatement (Second) of Torts, a vaccine is a cause in fact when it is a substantial factor in bringing about the harm.

*Spooner v. Sec’y of HHS*, 2014 U.S. Claims LEXIS 73 (Jan. 16, 2014).

Petitioner filed a petition for Vaccine Compensation under the National Vaccine Injury Compensation Program, 41 U.S.C. §§ 300aa-10, et seq., alleging that the Hepatitis A vaccine, which is contained in the Vaccine Injury Table, that her minor child received caused her to suffer Guillain-Barré syndrome. The Court granted respondent’s motion to dismiss, finding that the lumbar puncture and intravenous immunoglobulin therapy did not qualify as “surgical interventions” pursuant to 42 U.S.C. § 300aa-11(c)(1)(D)(iii), that petitioner failed to establish that the child suffered residual effects of a vaccine injury for more than 6 months, and that petitioner failed to present factual allegations that the child suffered an injury that satisfied the National Vaccine Injury Compensation Program’s severity requirement.

### **Restatement (Third) of Torts**

*Raymo v. Sec’y of HHS*, 2014 U.S. Claims LEXIS 162 (Feb. 24, 2014).

Petitioners filed a petition for compensation pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-10, et seq., on behalf of their minor daughter. Petitioners alleged that the minor developed acute transverse myelitis as the result of the human papillomavirus, meningococcal, hepatitis A, and diphtheria, tetanus and pertussis vaccinations that she received. The Court found that petitioners were entitled to compensation under the Vaccine Act because they met their burden of showing by a preponderance of evidence that a component of the minor’s vaccination caused her to develop acute transverse myelitis within a medically appropriate time period. While the Court noted that the Restatement (Third) eliminates the “substantial factor” element in

the factual causation analysis, it notes that the Federal Circuit has held that the causation analysis in Restatement (Second) of Torts applies to Off Table Vaccine Act cases. See *Walther v. Sec’y, HHS*, 485 F.3d 1146, 1151 (Fed. Cir. 2007); *Shyface v. Sec’y, HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999). Consequently, whether the vaccination was a “substantial factor” is still a consideration in determining whether it was the legal cause of an injury.

## Canadian Case Law Update

### **Tort Reform – Public Policy Justifies Non-Recognition of Tort**

*Vijay Arora, et al v Whirlpool Canada LP, et al*, 2014 CanLII 11047 (SCC)

In *Whirlpool Canada LP*, the Supreme Court of Canada dismissed the motion for leave to appeal the Ontario Court of Appeal's decision. The Court of Appeal upheld the lower Court's decision to dismiss a motion to certify a class action against Whirlpool, which alleged that their front-loading washing machines were poorly designed and prone to developing an unpleasant smell. Specifically, it was alleged that the washing machines were shoddy and released a noxious odour that permeated clothes being washed, the washing machine itself, and the room the washing machine was located in.

Plaintiffs sued for negligence, waiver of tort, breach of express and implied warranties, and breach of the *Competition Act*, R.S.C. 1985, c. C.34. The Plaintiffs claimed damages for repair costs, diminution of value of the washing machines, and the costs of cleaning the washing machines. The most significant was their claim in negligence for pure economic loss for negligent design against a manufacturer of a non-dangerous, but shoddy consumer product.

The Court of Appeal upheld the lower Court's decision, which found that policy reasons negated recognizing a cause of action in negligence for diminution in value for a defective non-dangerous consumer product. The Court of Appeal was concerned that recognizing such a cause of action would result in the Courts being required to analyze a substantial number of consumer transactions to determine if the consumer received value for his or her money. Further, the Court of Appeal held that there was insufficient wrongful conduct to ground a claim for waiver in tort. Further, there was not a tenable contractual claim for breach of warranty because of the lack of privity.

### **New Theories of Liability – Tort Based Solely Upon Alleged Breach of Statute Not Recognized**

*Wakelam v Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*, 2014 BCCA

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In *Wakelam*, the British Columbia Court of Appeal overruled a decision of the lower Court certifying a class action involving the sale of cough and cold medicines for use by children. In 2008, the federal regulator, Health Canada, reversed a policy permitting the sale of certain non-prescription cough and cold medicines for use by children. While manufacturers had already withdrawn the products from the market for use by children under age two, Health Canada required relabeling to instruct against use in children under age six.

The Plaintiff commenced an action claiming that, prior to 2008, the Defendants had engaged in “deceptive acts or practices” under the *Business Practices and Consumer Protection Act*, S.B.C. 2004 c.2 and had made misleading representations to the public contrary to the *Competition Act*, R.S.C. 1985, c. C.34, in relation to the sale of cough and cold medicines for children. These statutes provide private rights of action for persons who suffer loss or damage due to breach of the statutes. Plaintiff sought to marry the alleged statute breaches with restitutionary remedies.

The Court of Appeal followed the Court’s earlier decision in *Koubi v Mazda Canada Inc*, 2012 BCCA 310 to hold that the *Business Practices and Consumer Protection Act*, S.B.C. 2004 c.2 is an exhaustive code. The Court of Appeal stated that no cause of action based in waiver of tort, unjust enrichment or constructive trust is available at law for an alleged breach of a statute. Further, the Court of Appeal held that there was nothing in the *Competition Act* to indicate that the legislature intended that the statutory right of action should be augmented by a general right for consumers to sue in tort or to seek restitutionary remedies on the basis of a breach of the *Competition Act*.

### **Product Liability, Evidence, and Aggravated Damages**

*Stilwell v World Kitchen Inc*, 2014 ONCA 770

Plaintiff was injured when a Visions Dutch Oven he was washing, manufactured by World Kitchen Inc., shattered resulting in a severe laceration on his wrist. Plaintiff claimed Defendants were negligent and breached a warranty. A central issue in the case was the determination of the issue of spoliation. Spoliation is the intentional destruction of relevant evidence where litigation was existing or pending. Courts remedy spoliation by imposing a rebuttable presumption that the missing evidence, had it been preserved, would have been unfavourable to the party who destroyed it. Following the incident giving rise to the injury, Plaintiff’s wife discarded the pieces of the glassware. The Judge found that Plaintiff did not deliberately destroy relevant evidence for the purpose of gaining an advantage in future litigation. This finding was not appealed.

Ultimately, a jury found that Defendants were liable in negligence for “failure to adequately warn”. The Court of Appeal upheld the jury’s findings, and found that the standard of review of a jury verdict was “exceptionally high” and a jury’s verdict should only be set aside where it was so plainly unreasonable and unjust that no jury reviewing the evidence as a whole and acting judicially could have arrived at the verdict.

The jury found Defendant 75% at fault and Plaintiff 25% responsible. The jury awarded damages at \$1,132,850 including \$25,000 in aggravated damages. The Court of Appeal upheld the general damages award. The Court of Appeal set aside the aggravated damages award as the Judge failed to advise the jury that, in

order to award such damages, they had to be satisfied that any increased injury to the Plaintiff had to be a result of particularly reprehensible conduct by the Defendant.

### **Medical Products**

*Player v Janssen-Ortho Inc*, 2014 BCSC 1122

In *Player*, the Supreme Court of British Columbia dismissed an action, on a summary trial prior to a certification hearing, alleging that transdermal fentanyl patches (a form of prescription painkiller where fentanyl is delivered by a patch) were defectively designed. As a result, they caused serious harm in ordinary use. Plaintiffs alleged negligence, negligent misrepresentation, breach of warranty, breach of fiduciary duty, in marketing the defective product. Plaintiffs also claimed breach of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, the *Competition Act*, R.S.C. 1985, c. C-34, the *Sale of Goods Act*, R.S.B.C. 1996, c. 410, and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

The Court held that Defendants satisfied the legal requirements of the law in Canada in the manufacturing of the patches and did not breach the duty of care to Plaintiffs. Further, there was no satisfactory evidence that a safer alternative design was available. The Court found that the product monographs distributed to physicians, pharmacists, and on packaging contained clear, accurate and understandable warnings. Thus, Defendants were not liable on the ground of failure to warn of the risks of using fentanyl. Finally, the Court dismissed the claims of misrepresentation, breach of fiduciary duty, and breach of the *Competition Act* stating that there was no evidence to ground such claims.

### **New Theories of Liability – Video Lottery Terminals and Establishing Liability for Gambling Addictions**

*Babstock v Atlantic Lottery Corporation Inc-Société de Loteries de l'Atlantique*, 2014 CanLII 56981 (NL SCTD)

In *Babstock*, an intended class proceeding, Defendant brought an application to strike the Statement of Claim as disclosing no cause of action. Plaintiffs alleged that in providing Video Lottery Terminals (VLTs) for gambling purposes, Defendant had either deliberately or negligently placed defective machines at various locations throughout the Province. Those defects, it was alleged, had an adverse impact on a significant portion of the public who used these machines. Plaintiffs alleged negligence on the part of Defendant in two areas: first, by its failure to ensure, in the design and presentation of the games on the VLTs, that they were safe for use by the public; and second, by its failure to warn of the inherent dangers of addiction by use of the machines. Plaintiffs alleged that Defendant had a special duty towards the public as regulator and monopolist which was breached by its failure to ensure safe games, and its failure to warn.

On the application, the Court found that Defendant failed to prove that it was plain and obvious that Plaintiffs could not succeed. The matter is proceeding to a certification motion.

### **New Theories of Liability – Privacy and Mobile Communication Devices**

*Ladas v Apple Inc*, 2014 BCSC 1821

In *Ladas*, Plaintiff sought certification of a national class action alleging that Apple designed and produced an operating system (iOS4) to record and store locational data on Apple devices in unencrypted form, for long periods of time, and to copy the unencrypted data onto computers when Apple devices were being synchronized. Plaintiff alleged that, as a result, her privacy, and the privacy of proposed class members, had been breached. Further, Plaintiff claimed that Apple's conduct constituted a deceptive act or practice under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2.

The Court held that Plaintiff pleaded a reasonable claim under the *Privacy Act*, R.S.B.C. 1996, c. 373, and a common law claim for intentional breach of privacy on behalf of non-British Columbia residents. However, the Court found that Plaintiff failed to plead any reasonable claim sufficient to establish that the *Business Practices and Consumer Protection Act* applied. Specifically, the Court found that Plaintiff's failure to plead that Apple was a "supplier" and that the material transaction was a "consumer transaction" as defined in the Act, barred her from pursuing claims under the Act. Plaintiff also failed to plead that Apple's conduct caused her to do something (which was a prerequisite for a successful deceptive act or practice claim).

### **Product Liability and Forum Non Conveniens**

*Newfoundland and Labrador (Attorney General) v Rothmans Inc*, 2013 CanLII 83643 (NL SCTD)

The *Rothmans* decision was reported at the end of 2013. In *Rothmans*, the Government of Newfoundland and Labrador commenced a statute-based action against various tobacco manufacturers seeking to recover health care costs incurred by the province in treating tobacco-related diseases. A number of Defendants challenged the jurisdiction of the Court to hear the action.

Before hearing the substantive applications challenging the jurisdiction, the Court determined the legal framework which would later be applied to decide the related evidentiary and procedural issues. As of the date of this article, the Court has not released a decision determining the actual substantive jurisdictional issues.

The Court posed five questions of law designed to establish the legal framework in which the challenges would be heard. The questions addressed the applicable test or tests for the assumption of jurisdiction, the role of pleadings,



issues relating to jurisdictional facts and issues relating to the merits of the Plaintiff's claim. The five questions posed and the Court's answers were as follows:

***1. What is the test to be applied when a challenge is raised to the Court's jurisdiction to assume carriage of a proceeding involving one or more foreign Defendants?***

With respect to the Defendants individually, jurisdiction may be assumed on the basis of their consent or presence in the jurisdiction of any particular Defendant. Jurisdiction can also be assumed when the Court is satisfied that there is a real and substantial connection between the forum and either the subject matter of the litigation or the Defendant.

***2. Is a properly pleaded cause of action against a particular foreign Defendant a necessary condition to an assumption of jurisdiction over the proceeding?***

No. Subject to any specific rule of the Court, jurisdiction over a proceeding involving a foreign Defendant, assuming no consent or presence or no real and substantial connection to the Defendant, can be assumed when the characterization of the nature of the claim(s) alleged in the pleadings, without distinction between Defendants, allows a Court to satisfy itself that there is a real and substantial connection between the claim(s) and the forum.

***3. Is a real and substantial connection between the cause of action as pleaded against a particular foreign Defendant and the jurisdiction a necessary condition to an assumption of jurisdiction over the proceeding?***

No. Subject to any specific rule of the Court, and other than a case of jurisdiction founded on presence or consent or on a real and substantial connection to a Defendant, jurisdiction is not determined by reference to either the circumstances of or the claim against any particular Defendant. If jurisdiction is asserted based on a real and substantial connection between the forum and the subject matter of the claim, the only necessary condition for the presumptive assumption of jurisdiction is a real and substantial connection between the subject matter of the litigation and the forum.

***4. Is a good and arguable case on the asserted jurisdictional fact or facts a necessary condition to assuming jurisdiction over the proceeding?***

Where the Plaintiff, in order to establish an asserted presumptive connecting factor, relies on a jurisdictional fact and such fact is credibly placed in issue by the Defendant(s), it is a necessary condition for the assumption of jurisdiction (assuming that no other real and substantial

connection has been established) that the Court be satisfied that the presumptive connecting factor has been established on a *prima facie* basis. Once the Court is so satisfied, and subject only to appellate review, the issue is closed for the purposes of the ensuing litigation.

***5. Is a good and arguable case on the merits a necessary condition to the assumption of jurisdiction to adjudicate the claim against a particular foreign defendant?***

No. Subject to any specific rule of the Court, the merits of the claim against any Defendant(s) are not relevant to a determination of the territorial competence of the Court to assume jurisdiction.

### **Motor Vehicles – Pending Cases**

*Sue Brown et al v General Motors of Canada Limited et al*, Proceedings under the *Class Proceedings Act*, SNS 2007, c 28, Court File No 427140, filed May 9, 2014.

A class action was commenced against GM in Canada alleging that approximately 236,000 GM vehicles suffer from a defect which puts drivers at risk when the ignition switch moves from the “ON” position to the “OFF” position while driving. When this occurs, the risks to drivers includes: loss of electrical power; loss of power-steering function; loss of electrical brake-assisting; and loss of air-bag function.

### **Medical Products – Pending Cases**

*Hunt et al v Mezentco Solutions Inc et al*, Proceedings under the *Class Proceedings Act*, 1992, SO c 6, Court File No CV-13-19436, filed April 3, 2013

A class action proceeding was commenced against Mezentco Inc., a chemotherapy medical products producer regarding improperly mixed chemotherapy drugs supplied to hospitals in Ontario and New Brunswick. It is alleged that the premixed bags prepared by Mezentco Inc. contained too much saline solution, resulting in patients receiving less than the prescribed amounts of certain chemotherapy drugs. Approximately 1,200 patients received the defective drugs.

### **Preemption - Federal Government Changes Product Liability Legislation**

This past year, the Federal Government made changes to legislation effecting product liability in Canada. The amended legislation includes: *Hazardous Products Act*, R.S.C. 1985, c. H.3, the *Motor Vehicle Safety Act*, S.C. 1993, c. 16, and the *Safe Food for Canadians Act*, S.C. 2012 c.24. The amendments are outlined below.

### **Hazardous Products Act**

The amendments to the *Hazardous Products Act* add definitions for “suppliers” and “hazardous products”. “Supplier” means a person who, in the course of business, sells or imports a hazardous product. A “hazardous product” is now defined as any product, mixture, material or substance that is classified in accordance with the Act’s regulations in a category or subcategory of a hazard class listed in Schedule 2 of the Act. The amendments expand the categories of substances that are subject to the Act to include: explosives within the meaning of the *Explosives Act*; cosmetics, devices, drugs or food within the meaning of the *Food and Drugs Act*; pest control products as defined in subsection 2(1) of the *Pest Control Products Act*; consumer products as defined in section 2 of the *Canada Consumer Product Safety Act*; and wood or products made of wood.

The amendments empower the Minister of Health to make orders to prevent and remediate non-compliance with the Act. Further, the Minister of Health is also permitted to order testing of products that may be dangerous. These amendments also require product labels to transition from Canada’s Workplace Hazardous Materials Information System (WHMIS) to the UN’s Globally Harmonized System of Classification and Labeling of Chemicals (GHS). Finally, the changes increase the penalties for non-compliance with the Act.

### **Motor Vehicle Safety Act**

The *Motor Vehicle Safety Act* has been amended to require companies to report a non-compliance with a prescribed motor vehicle safety standard in the same manner that safety defects are currently being reported. The amendments also empower the Minister of Transportation to order that public notice of a defect be given in appropriate circumstances. A failure to comply with such an Order would be an offence.

Other amendments include the elimination of the government’s obligation to provide interested persons with an opportunity to make representations to the Minister of Transportation with respect to proposed regulations. Further, the penalties for non-compliance have been increased. Finally, the amendments empower the Minister of Transportation to collect information related to vehicles or equipment that is considered to be in the public interest.

### **Safe Food for Canadians Act**

This Act received Royal Assent in 2012, but has not yet come into force. The Act consolidates the authorities of the *Fish Inspection Act*, the *Canada Agricultural Products Act*, the *Meat Inspection Act*, and the food provisions of the *Consumer Packaging and Labelling Act*. The Act addresses food safety, protects consumers, implements tougher penalties for activities that put health and safety at risk, controls imports, and regulates inspection of food commodities.

## Contributors:

### 1st Circuit

Shagha Tousi  
Nutter McClennen & Fish LLP  
Seaport West  
155 Seaport Boulevard  
Boston, MA 02210  
617.439.2872  
stousi@nutter.com

Rebecca H. Gallup  
Nutter McClennen & Fish LLP  
Seaport West  
155 Seaport Boulevard  
Boston, MA 02210  
617.439.2872  
rgallup@nutter.com

### 2nd Circuit

Jim Murdica  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, New York 10036  
212.336.2000  
jfmurdica@pbwt.com

Susan Lawless  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, New York 10036  
212.336.2000  
slawless@pbwt.com

Matthew Funk  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, New York 10036  
212.336.2000  
mfunk@pbwt.com

Tom Kurland  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, New York 10036  
212.336.2000  
tkurland@pbwt.com

Jenya Moshkovich  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, New York 10036  
212.336.2000  
Jmoshkovich@pbwt.com

### 3d Circuit

Stephanie S. Solomon  
Burns White Law Firm  
Four Northshore Center  
106 Isabella Street  
Pittsburgh, Pennsylvania 15212  
412-995-3000  
ssolomon@burnswhite.com

Robert M. Palumbi  
Babst Calland  
Two Gateway Center  
Pittsburg, PA 15222  
(412) 394-6553  
rpalumbi@bapstcalland.com

#### **4th Circuit**

Eden M. Darrell  
Bowman and Brooke LLP  
402 West Broadway Suite 1270  
San Diego, California 92101  
619.376.2506  
eden.darrell@bowmanandbrooke.com

Dannel C. Duddy  
Harman, Claytor, Corrigan & Wellman  
P. O. Box 70280  
Richmond, Virginia 23255  
(804) 622-1107  
dduddy@hccw.com

#### **5th Circuit**

Stephen G.A. Myers  
Irwin Fritchie Urquhart & Moore LLC  
400 Poydras St, Suite 2700  
New Orleans, Louisiana 70130  
smyers@irwinllc.com

Derek T. Rollins  
Colvin, Chaney, Saenz & Rodriguez,  
LLP  
1201 E. Van Buren St.  
Brownsville, TX 78520  
dt.rollins@rcclaw.com

Claire A. Noonan  
Irwin Fritchie Urquhart & Moore LLC  
400 Poydras St, Suite 2700  
New Orleans, Louisiana 70130  
cnoonan@irwinllc.com

#### **6th Circuit**

Gregory A. Thompson  
Thompson Hine LLP  
3900 Key Center  
127 Public Square  
Cleveland, OH 44141  
(216) 566-5500  
gregory.thompson@thompsonhine.com

Liam E. Felsen, Ph.D.  
Frost Brown Todd  
400 West Market Street  
Suite 3200  
Louisville, Kentucky 40202-3363  
(502) 779-8119  
lfelsen@fbtlaw.com

Ryan T. Winkler  
Thompson Hine LLP  
3900 Key Center  
127 Public Square  
Cleveland, OH 44141  
(216) 566-5500  
ryan.winkler@thompsonhine.com

#### **7th Circuit**

Patrick P. Clyder  
Swanson, Martin, & Bell LLP

Jessica Williams Schnelker  
Frost Brown Todd LLC

330 North Wabash Avenue  
Suite 3300  
Chicago, Illinois 60611  
(312) 923-8277

Michael A. McCaskey  
SWANSON, MARTIN & BELL, LLP  
330 North Wabash Ave., Suite 3300  
Chicago, Illinois 60611  
(312) 321-8464  
mmccaskey@smtrials.com

201 N. Illinois Street  
Suite 1900  
Indianapolis, Indiana  
(317) 237-3800  
jschnelker@fbtlaw.com

### **8th Circuit**

Courtney Presthus  
Ebeltoft Sickler  
2272 8th Street West  
Dickinson, North Dakota  
(701) 225-5297  
cpresthus@ndlaw.com

Baxter Drennon  
Wright, Lindsey & Jennings LLP  
200 West Capitol Avenue, Suite 2300  
Little Rock, Arkansas 72201  
(501) 212-1299  
bdrennon@wlj.com

### **9th Circuit**

John Fetters  
Mills Meyers Swartling, P.S.  
1000 Second Avenue Third Floor  
Seattle WA 98104  
(206) 812-7467  
jfetters@millsmyers.com

Amanda C. Sheridan  
Snell & Wilmer  
400 E Van Buren St  
Phoenix, AZ 85004  
(602) 382-6000  
asheridan@sw.law.com

Sarah Delaney  
Snell & Wilmer  
400 E Van Buren St  
Phoenix, AZ 85004  
(602) 382-6000  
sdelaney@sw.law.com

### **10th Circuit**

Theresa R. Wardon  
Wheeler Trigg O'Donnell, LLL  
370 Seventeenth Street, Suite 4500  
Denver, CO 80202  
(303) 244-1800  
wardon@wtotrial.com

Tyler V. Snow  
Christensen & Jensen, P.C.  
15 W. South Temple, Ste. 800  
Salt Lake City, UT 84101  
(801) 323-5000  
tyler.snow@chrisjen.com

### **11th Circuit**

Christa E. Burger  
Womble Carlyle Sandridge & Rice  
LLP  
1 W 4th St #100,  
Winston-Salem, NC 27101  
(336) 728-7029  
cburger@wcsr.com

Summer Austin Davis  
Bradley Arant Boulton Cummings LLP  
One Federal Place  
1819 Fifth Avenue North  
Birmingham, AL 35203  
(205) 521-8916  
sdavis@babco.com

### **D. C. Circuit**

John Isaac Southerland  
Huie, Fernambucq & Stewart  
2801 Highway 280 South  
Suite 200  
Birmingham, AL 35223  
(205) 251-1193  
jsoutherland@huielaw.com

Vishal H. Shah  
Huie, Fernambucq & Stewart  
2801 Highway 280 South  
Suite 200  
Birmingham, AL 35223  
(205) 251-1193  
vshaw@huielaw.com

### **Federal Circuit**

Bernard S. Vallejos  
Farrell, White & Legg PLLC  
914 5th Ave, Huntington, WV 25701  
(304) 522-9100

### **Canada**

Tina Georgieva  
Bowman and Brooke LLP  
41000 Woodward Avenue Suite 200 East  
Bloomfield Hills, Michigan 48304  
(248) 205-3372  
tina.georgieva@bowmanandbrooke.com

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