**Case Law Update**
**Jonathan M. Hoffman & Contributors**

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## Speaker Information

Jonathan 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 United States Attorney, before joining Martin Bischoff. He is licensed to practice in Oregon and Alaska. He is also a singer-songwriter, recording artist, and is currently working on his fourth CD, and pledges not to sing any of his songs during his presentation except, perhaps, those relating to CAFA or *Kumho Tire*.

## 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 at page ---, 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.

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## 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 Pain 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 [ying] 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 CNOGF 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 (3rd) 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.