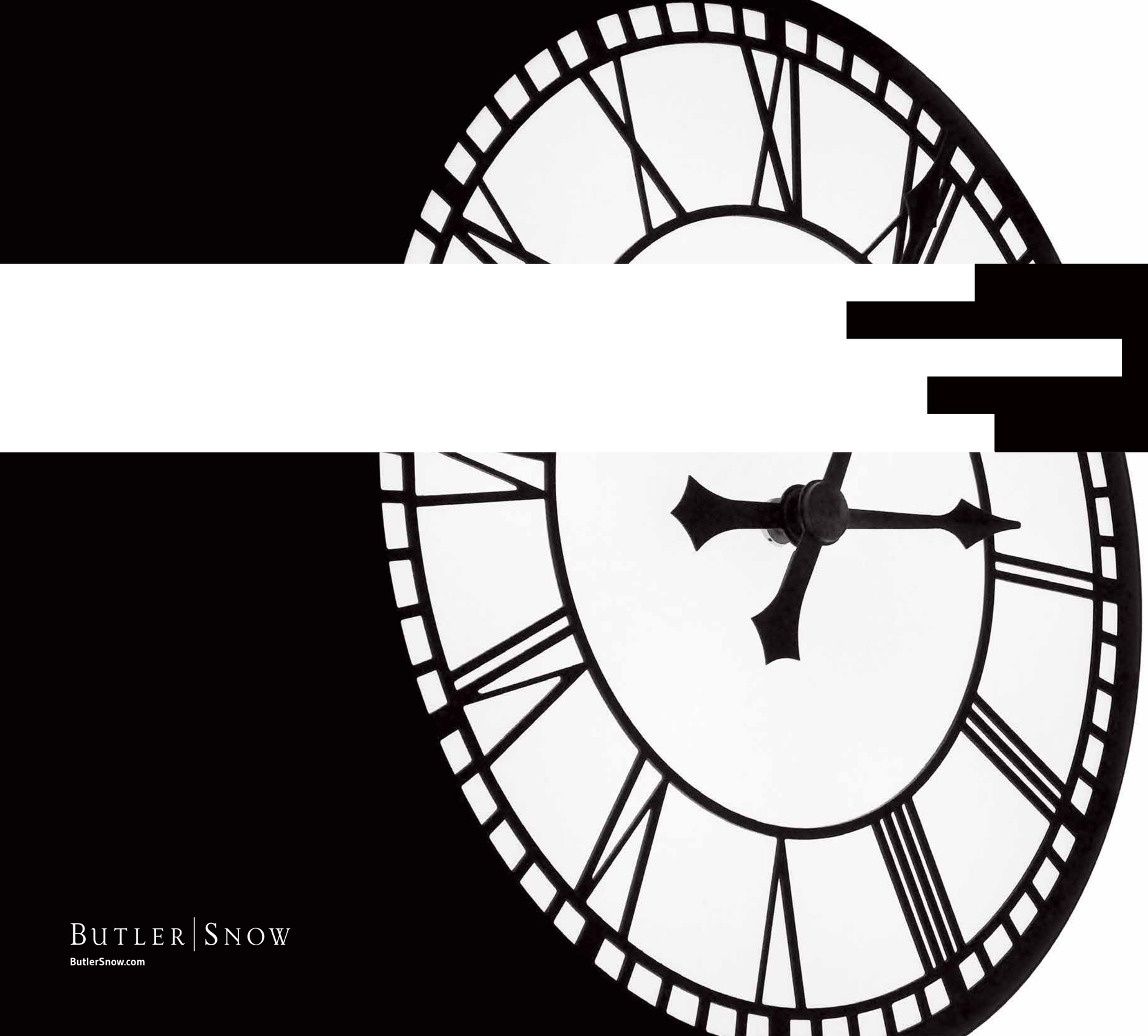

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BRISTOL-MEYERS SQUIBB ONE YEAR LATER

AN ODDITY: APPROVAL AND REGULATORY AUTHORITY OVER COSMETICS

SKY'S THE LIMIT? A 50-STATE SURVEY OF DAMAGES CAPS AND THE COLLATERAL SOURCE RULE

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LAW ELEVATED

DEAR CLIENT,

As summer winds down and litigation ratchets up, we present the newest edition of *Pro Te*. This edition covers three topics that are sure to capture your interest.

The Supreme Court's *Bristol-Meyers Squibb* decision was met with no small amount of (completely justified) joy from the defense bar. In *Bristol-Meyers Squibb One Year Later,* we examine the aftermath of BMS, including how some courts are seeking to stretch the outer-most limits of BMS to find personal jurisdiction.

Cosmetics-based lawsuits are on the rise across the country. In *An Oddity: Approval and Regulatory Authority Over Cosmetics,* we contemplate the sometimes blurry line between cosmetics and drugs, including regulatory and safety considerations.

Caps on damages and the application of the collateral source rule vary wildly from state to state. In *Sky's the Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule,* we analyze those differences to provide a comprehensive overview.

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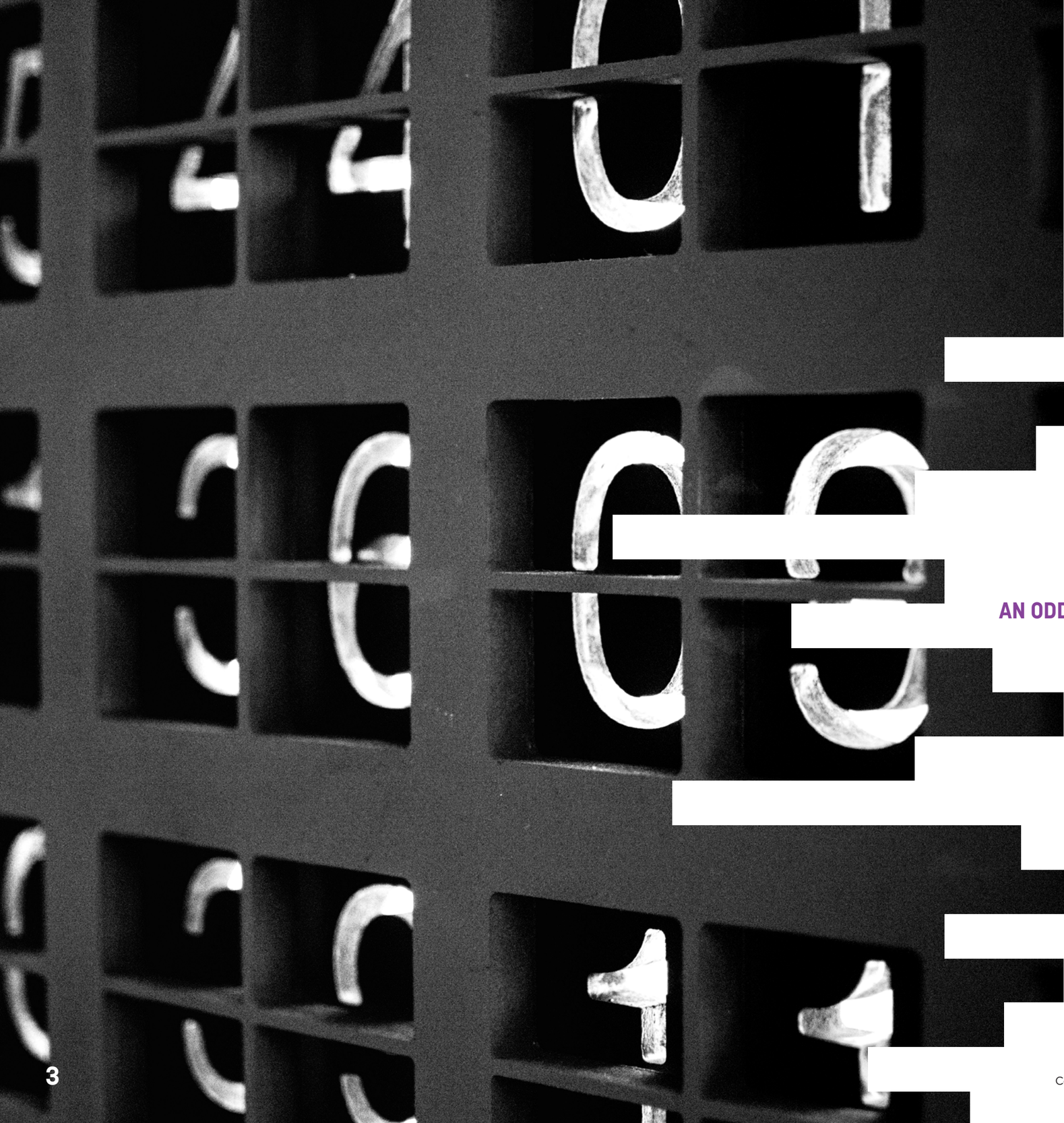

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BRISTOL-MYERS SQUIBB

ONE YEAR LATER

Pursuant to the Fourteenth Amendment, every litigant is entitled to due process of law – a fair and equal adjudication of its dispute. Since 1945 and the United States Supreme Court's decision in *International Shoe,* a key component of such due process and "fair play" is the notion that a defendant will only be haled into court in a state where the defendant has had "minimum contacts." Unfortunately, the fact specific inquiry required to evaluate such contacts has long been fraught with both theoretical and practical problems – how significant must such contacts be before it is fair for a defendant to be sued in a forum?

With the rise of mass tort litigation in the past 50 years, plaintiffs and their lawyers have at times chosen to take advantage of this uncertain jurisprudence (and some judges' reluctance to enforce jurisdictional defenses) to aggregate claims in areas of the country where counsel believe they may have a strategic advantage – either because of perceived friendly state law, receptive judges, or generous juries.

Certain jurisdictions have fallen out of favor with plaintiffs' counsel – Mississippi for instance was one of the largest mass tort venues in the country until the Mississippi Legislature passed significant tort reform legislation 15 years ago.[2] Since then, the number of mass torts filed in Mississippi has dwindled to nearly zero. Undeterred, plaintiffs have looked for and found new hospitable jurisdictions to call home – including certain venues in California, Missouri, and Pennsylvania. Claims have increasingly been filed by plaintiffs from other states who have no connection to these forums.

The United States Supreme Court has taken steps over the last few years to curb flagrant forum shopping by clarifying the jurisdictional due process protections for defendants. Most recently, in *Bristol-Myers Squibb v. Superior Court of Calif.,* the Supreme Court affirmed that "[i]n order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the

A KEY COMPONENT OF DUE PROCESS AND "FAIR PLAY" IS THE NOTION THAT A DEFENDANT WILL ONLY BE HALED INTO COURT IN A STATE WHERE THE DEFENDANT HAS HAD "MINIMUM CONTACTS."

underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'"[3]

A number of questions still remain post-*BMS*. What connections between a defendant and a particular forum are sufficient to convey specific jurisdiction? Does the defendant's forum conduct have to be the "but for" cause of the plaintiff's injury? Do the *BMS* jurisdictional limits extend to class actions?

The past year has seen several federal and state courts evaluate personal jurisdiction in light of *BMS*. While some courts have read *BMS* strictly and dismissed out-of-state plaintiffs with no connection to the forum, other courts continue to stretch, finding even tenuous relationships sufficient to establish personal jurisdiction.

1. THE *BRISTOL-MYERS SQUIBB* DECISION

Bristol-Myers is a pharmaceutical company incorporated in Delaware with its principal place of business in New York.[4] Bristol-Myers manufactured and marketed Plavix, a blood thinning medication.[5] Between 2006 and 2012, Bristol-Myers sold nearly 187 million Plavix pills across the country, including in California.[6] As with all medications, Plavix had potential side-effects – including prolonged bleeding, heart attack, and stroke – and Bristol-Myers faced litigation from patients who allegedly experienced those side effects. In 2013, an MDL was formed by the JPML, consolidating all federal Plavix litigation before Judge Freda Wolfson in New Jersey.[7]

Despite the consolidation of claims in New Jersey, lawyers representing 678 Plavix users sued Bristol-Myers in Superior Court in San Francisco, California.[8] Of the 678 plaintiffs, only 86 were California residents; the remaining 592 traveled to California from 33 other states.[9] The 678 plaintiffs intentionally filed eight separate complaints. If plaintiffs had aggregated their claims into one master complaint, they would have run afoul of the Class Action Fairness Act, which makes any mass action with more than 100 plaintiffs immediately removable to federal court. The plaintiffs sued McKesson, a California distributor of Plavix, in order to defeat diversity.

Bristol-Myers moved to quash service of summons on the claims of the non-California residents for lack of personal jurisdiction.[10] The trial court denied the motion and was affirmed by the California Court of Appeals and the California Supreme Court. Specifically, the California Supreme Court found that Bristol-Myers' sale of Plavix in California was a sufficient enough contact with the forum to justify plaintiffs from all over the country bringing suit against Bristol-Myer in California.[11] The court also noted that Bristol-Myers had not argued that California was an inconvenient or unduly burdensome place to litigate these claims.[12]

Bristol-Myers' petition for certiorari was granted. Interestingly, in its petition for cert, Bristol-Myers did not argue that California was an inconvenient forum, nor could it legitimately take such a position considering its Plavix sales volume, office presence, and the acknowledgement that it would still need to defend against claims brought by the California residents.[13] Instead, Bristol-Myers argued that California's exercise of personal jurisdiction over non-residents claims' violated Bristol-Myers' due process rights because California state courts are a plaintiff-friendly, defendant-hostile venue.[14] Bristol-Myers argued that "Plaintiffs should not be allowed to take their case to the most hospitable forum they can think of" nor should Bristol-Myers alternatively be required to withdraw from the California commercial market to avoid the risk of being sued there by out-of-state plaintiffs.[15]

The Supreme Court agreed and reversed. The mere fact the "*other* plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the non-residents – does not allow the State to assert specific jurisdiction over the nonresidents' claims."[16] Missing was "a connection between the forum and the specific claims at issue."[17] The Supreme Court observed that "[Bristol-Myers Squibb] did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California."[18]

In so holding, the focus of the Supreme Court's analysis was not whether it was overly burdensome to submit *BMS* to jurisdiction in California.[19] The focus of its analysis was that it was unfair to require *BMS* to submit to jurisdiction of a foreign venue with respect to claims having no independent connection to that venue. Interstate sovereignty concerns and accompanying Fourteenth Amendment protections are "decisive" even when a defendant may not face any burden at all in defending in the forum.[20]

POST-BMS EVALUATION OF PERSONAL JURISDICTION

Following *BMS*, defendants' personal jurisdiction defenses were reinvigorated. Across the country and throughout litigation hotspots, defendants have renewed their requests for foreign plaintiff claims to be dismissed.

1. MISSOURI

Missouri state courts domiciled in St. Louis have been reported as the "new hot spot for litigation tourists" because of a reputation for "fast trials, favorable rulings, and big awards."[21] As a result,

numerous out-of-state plaintiffs have flocked to St. Louis to adjudicate their claims. Recent Missouri appellate court rulings suggest, however, that out-of-state plaintiffs may no longer be welcome.

a. Essure Litigation

In *Johnson v. Bayer,* 69 plaintiffs from 27 different states sued Bayer in Missouri state court in St. Louis alleging Bayer's Essure product, a permanent birth control device, caused them harm.[22] Of the 69 plaintiffs, only four alleged that they were citizens of Missouri or had their implant procedure performed in Missouri.[23]

ACROSS THE COUNTRY AND THROUGHOUT LITIGATION HOTSPOTS, DEFENDANTS HAVE RENEWED THEIR REQUESTS FOR FOREIGN PLAINTIFF CLAIMS TO BE DISMISSED.

Bayer removed the cases to the Eastern District of Missouri and sought dismissal of the non-Missouri plaintiffs' claims. Plaintiffs argued that courts sitting in Missouri had specific jurisdiction over Bayer because Missouri was the site of several Essure clinical trials; Bayer worked on regulatory approval for Essure in Missouri; and because St. Louis was one of eight cities targeted as part of a broader marketing plan to increase sales and revenue.[24]

The *Johnson* court rejected these claims as appropriate grounds for establishing personal jurisdiction, finding that the individual plaintiffs' claims were too attenuated from those activities to provide specific, case-linked personal jurisdiction.[25] Specifically, the Johnson court found the fact that Bayer marketed Essure in St. Louis had no bearing on non-residents who did not see that marketing, were not prescribed Essure in Missouri, did not purchase Essure in Missouri, and were not allegedly injured by Essure in Missouri.[26] Similarly, none of the non-resident plaintiffs were participants in any of the Missouri clinical trials and did not allege that they relied on those trials as part of their decision making in deciding to use Essure.[27]

b. Talc Litigation

In *Estate of Fox v. Johnson & Johnson,* 65 plaintiffs sued Johnson & Johnson and Imerys Talc America in a state court in St. Louis alleging that their use of Johnson & Johnson's talc baby powder had led them to develop ovarian cancer.[28] Of the 65 plaintiffs, only two were Missouri residents.[29] Defendants moved to dismiss the claims of the non-Missouri residents for lack of personal jurisdiction. The Missouri state court denied defendants' motion finding that each non-resident need not establish an individual basis for jurisdiction so long as a defendant has sufficient minimum contacts with the state and that defendants' sale of body powders in Missouri "more than adequately" satisfied minimum contacts.[30]

The trial court subsequently selected Ms. Jacqueline Fox, an Alabama resident, to be tried as a single-plaintiff trial.[31] A jury found for Ms. Fox's estate and against J&J, awarding $10 million in compensatory damages and $62 million in punitive damages.[32] J&J appealed the judgment, again asserting a personal jurisdiction defense now bolstered by the *BMS* decision.[33] Plaintiff argued personal jurisdiction was appropriate not only because of J&J's significant commercial contacts with Missouri but plaintiff also sought to reopen the proof to introduce evidence that J&J's body powders were produced, packaged, and distributed by a Missouri company.[34] The Missouri Court of Appeals denied both arguments, finding that under *BMS*, there were no connections between Missouri, J&J and the non-Missouri plaintiffs and that "[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state."[35] The $72 million judgment was vacated and the case dismissed.[36]

Just a few weeks later, in *Slemp v. Johnson & Johnson,* a state court in St. Louis was faced with the same question. Ms. Slemp was from Virginia, she had used baby powder in Virginia, had allegedly developed cancer in Virginia, and had received her medical care in Virginia. Nevertheless, she sued in Missouri. The case was tried for 17 days, and the jury returned a plaintiff verdict of $5.4 million in compensatory damages and $105 million in punitive damages. Defendants filed a post-trial motion, again arguing that the Missouri state court lacked jurisdiction. Plaintiffs argued, as they had unsuccessfully tried in Fox, that Missouri-based PharmaTech, a non-party to the litigation, participated in the labeling, packaging, and distribution of J&J's talc body powders and this "connection" was enough to establish jurisdiction in Missouri. The trial judge agreed and found that it had jurisdiction over the defendants because "Defendants engaged in relevant acts within the State of Missouri, including enlisting a Missouri company…to manufacture, mislabel, and package. . .the very products which caused injury to the Plaintiffs."[37] The decision is currently on appeal to the Missouri Court of Appeals.

Most recently, the Missouri Court of Appeals again reversed a St. Louis state court judge's decision to exercise jurisdiction over a non-Missouri talc plaintiff. In *Ristesund v. Johnson & Johnson,* a South Dakota plaintiff sued Johnson & Johnson for talc related claims in Missouri state court in St. Louis.[38] The defendants filed a motion to dismiss for lack of personal jurisdiction, which was denied.[39] The case went to trial in May 2016 resulting in a verdict for the plaintiff.[40] On appeal, the plaintiff conceded that *BMS* controlled.[41] The plaintiff argued, however, as in *Fox* that she should be permitted to reopen her proof to introduce evidence of a connection between her claims and a Missouri-domiciled contractor of the defendants.[42] The Missouri Court of Appeals again refused, holding that the plaintiff knew of the jurisdictional requirements when she filed her case and "we are not persuaded that the law either warrants or permits us to now return this matter to the trial court for a 'do-over.'"[43]

2. CALIFORNIA

In California state court in San Francisco, plaintiffs have seized upon the "develop…create… manufacture, label, [or] package" language in *BMS* as a blueprint for establishing personal jurisdiction over a nonresident plaintiff's claims.

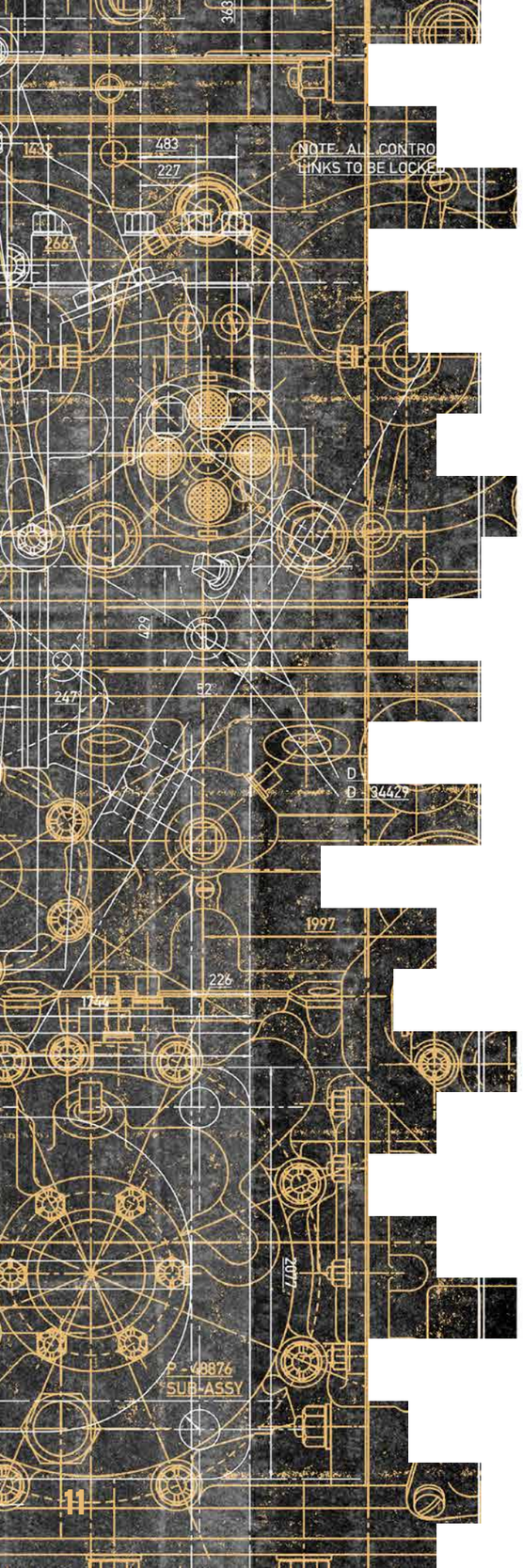
In *DellaCamera v. DePuy Orthopaedics,* the California Superior Court for San Francisco County held that it had specific jurisdiction over the claims of a Connecticut-based plaintiff against several foreign defendants because the defendants had entered into consulting contracts with two California-based surgeons who assisted in the design of defendants' hip implant device.[44] The Connecticut plaintiff had no connection to California – the device was implanted and explanted in Connecticut, and she received all of her related medical care in Connecticut.[45] However, the plaintiffs presented evidence that DePuy and Johnson & Johnson chose to collaborate with Dr. Thomas P. Schmalzried and Dr. Thomas P. Vail, both California residents, regarding the design of defendants' metal hip implant, and service agreements between the defendants and surgeons confirmed that these individuals were designing surgeons.[46] Defendants did not deny their relationship with the two surgeons, but argued that their role in the design was not enough to establish personal jurisdiction in California. The California Superior Court disagreed, finding that "a significant portion of the design work for the DePuy ASR hip implant was either conducted in California or otherwise tied to California, and the alleged defective 'metal-on-metal' design of the ASR implant is a focal point of this lawsuit."[47] Relying on the jurisdictional blueprint language from *BMS*, the court found that this "distinguishe[d] the case from the situation in *BMS*, where the U.S. Supreme Court found that the nonresident defendant did not develop, manufacture, label, package, or create a marketing strategy for the drug in the forum state, and where it was not alleged that the nonresident defendant engaged in relevant acts together with the California resident defendant."[48]

IN CALIFORNIA STATE COURT IN SAN FRANCISCO, PLAINTIFFS HAVE SEIZED UPON THE LANGUAGE IN BMS AS A BLUEPRINT FOR ESTABLISHING PERSONAL JURISDICTION OVER A NONRESIDENT PLAINTIFF'S CLAIMS.

3. PENNSYLVANIA

In 1992, the Philadelphia Court of Common Pleas established its Complex Litigation Center designed exclusively for the administration and adjudication of complex, multi-filed mass torts. When it was first established, the Complex Litigation Center's procedures actively encouraged out-of-state plaintiffs to file claims in the Center's Mass Tort Programs.[49] Changes to the discovery rules in the Mass Tort programs were implemented in 2012 to limit out-of-state filings, but Philadelphia's Mass Tort Program remains a hub for foreign plaintiff litigation.

After *BMS*, several defendants have sought to dismiss cases pending in in the Mass Tort program for lack of jurisdiction over foreign plaintiff's claims. In the Pelvic Mesh Litigation Mass Tort program, Ethicon, Inc. filed a motion asking for dismissal of more than 100 cases involving non-Pennsylvania plaintiffs. Ethicon argued that Pennsylvania did not have general jurisdiction over it, a New Jersey company, and the foreign plaintiffs' claims had no ties to Pennsylvania to establish specific jurisdiction. The court disagreed and found that because Ethicon used a Pennsylvania materials supplier, Pennsylvania had specific jurisdiction over Ethicon and venue was proper.[50] Ethicon has appealed this decision.



The Superior Court of Pennsylvania (the Pennsylvania appellate court) has also recently upheld a pelvic mesh verdict on similar grounds. In *Hammons v. Ethicon,* an Indiana woman sued Ethicon in Philadelphia alleging that its Prolift pelvic mesh product was defective. Following a three-week trial, the jury found in favor of the plaintiff.[52] On appeal, Ethicon argued that under *BMS*, personal jurisdiction did not exist in Pennsylvania.[53] The Pennsylvania appellate court disagreed, finding:

> *The connection between Ethicon and Pennsylvania is considerably stronger than the connection between Bristol–Myers and California. Ethicon supervised the design and manufacturing process of pelvic mesh in Pennsylvania in collaboration with Secant Medical, Inc., a Bucks County company. Ethicon also worked closely with an Allentown, Pennsylvania physician, Vincent Lucente, M.D., in developing Prolift. Both of these factors support the exercise of specific jurisdiction over Ethicon in Pennsylvania.*[54]

The Pennsylvania appellate court's ruling is arguably inconsistent with *BMS* considering that the Supreme Court had rejected a similar argument that Bristol-Myers use of a California distributor was sufficient to establish jurisdiction in California. On July 3, 2018, Ethicon filed a Petition for Reargument and the matter remains pending.

4. ILLINOIS

The District Court of Illinois applied *BMS* to dismiss a foreign plaintiff's claim in *Wilson v. Nouvag.* A Virginia plaintiff sued Nouvag AG, a Swiss company, in the Northern District of Illinois alleging that Nouvag's morcellator product was defectively designed and had contributed to the spread of the plaintiff's deceased wife's cancer.[55] Plaintiff also sued the Illinois-based U.S. distributor of the morcellator. *Id.* Nouvag moved to dismiss for lack of personal jurisdiction.[56]

Decedent's surgery and the use of the morcellator all occurred in Virginia.[57] Nouvag is not registered or licensed to do business in Illinois; it does not itself do business in Illinois; and it does not have a registered agent in Illinois.[58] The Swiss company did not maintain any offices, employees, or a phone listing in Illinois; nor did it advertise in Illinois, own property in Illinois, or enter into any contracts with Illinois companies.[59]

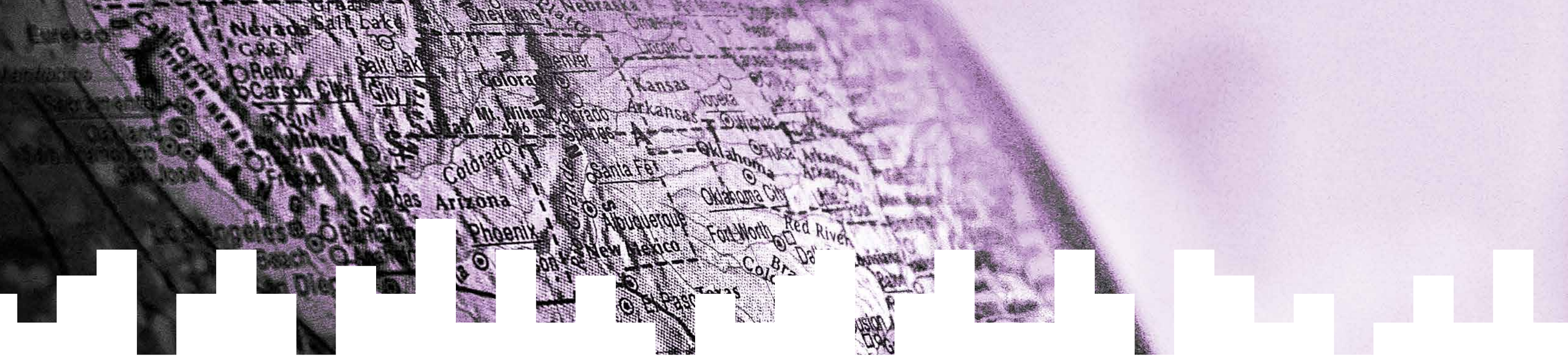
Nouvag did have an Illinois-based distributor that was licensed, thorough a Nouvag subsidiary, to sell the morcellator in question. Wilson argued that the connection between Nouvag and the Illinois-based distributor was sufficient to establish personal jurisdiction over Nouvag in Illinois. Wilson argued that Nouvag intentionally directed distribution of its morcellator into the United States through an Illinois company and knew its product would be sold and distributed through Illinois to customers in the U.S.[60] In addition, Wilson argued that when Nouvag sought FDA clearance to sell the morcellator in the U.S., it specifically noted its intention to distribute the morcellator through its Illinois affiliate.[61] Essentially, Wilson argued that by placing the morcellator in the stream of commerce into the U.S. through Illinois, Nouvag had established sufficient contacts with Illinois to bestow specific jurisdiction in Illinois courts.

In rejecting this stream of commerce argument, the *Wilson* court held that "the fact that Nouvag AG's customer distributed its product through a subsidiary based in Illinois is not enough to indicate that Nouvag AG purposefully availed itself of the privilege of conducting activities within Illinois."[62] Additionally, the *Wilson* court relied heavily on *Bristol-Myers Squib* and found that plaintiff's claims lacked any connection to Illinois. Because Nouvag did not design, manufacture, label, or sell its morcellators in Illinois and the decedent was not injured in Illinois, there was no conduct related to plaintiff's claims sufficient to establish specific personal jurisdiction over Nouvag in Illinois.

APPLICATION OF *BMS* TO CLASS ACTIONS

An unanswered question from *BMS* is whether the same jurisdictional limits apply in class actions. *BMS* was decided in the context of a mass tort, not a class action under Rule 23. A fair reading of *BMS* is that the Supreme Court is concerned with defendants being sued in jurisdictions having no connection with to the plaintiffs' specific claims. The same logic would seem to apply in nationwide class actions in venues where there is no general jurisdiction over the defendants. In her dissent, Justice Sotamayor noted that "the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action."[63] On the other hand, the Supreme Court's concerns may not attach in the same manner to federal class actions – federal courts are assumed, regardless of where they sit, to represent the same federal sovereignty. As such, where a federal court presides over litigation involving a federal question, the interstate sovereignty concerns prevalent in *BMS* may not hold as much sway post-*BMS*. District courts have split on this issue.

For instance, in *Sloan v. General Motors, LLC,* a California district court permitted General Motors to be sued by named plaintiffs from dozens of foreign states in a putative nationwide class action asserting a federal claim under the Magnuson-Moss Warranty Act.[64] The court held that "without those interstate federalism concerns, the due process analysis falls back on whether the maintenance of the suit…offend[s] traditional notions of fair play and substantial justice" focusing on the defendant's more general contacts with the state and the burden placed on the defendant to adjudicate in a particular forum.[65] The court found that General Motors routinely and purposefully availed itself of the privilege of conducting business in California sufficient to establish jurisdiction and that General Motors had failed to adequately articulate why it



would face undue hardship in defending the claims in California.[66] That the nonresident plaintiffs' claims did not arise out of General Motor's suit-related contacts – a fatal flaw under a *BMS* analysis – was not dispositive.[67] Instead, the *Sloan* court found that California could exercise "pendant" jurisdiction over General Motors – essentially because the court clearly had jurisdiction over the California residents' claims and those claims were based on the same set facts and issues as the non-California plaintiffs' claims, then it would be judicially economical for the California court to exercise jurisdiction over all claims against General Motors.[68]

The federal decisions are mixed. Some district courts have similarly held that *BMS* has no application in the class action context.[69] Other district courts have squarely rejected this approach and have concluded that "*Bristol-Myers* applies with equal force in the class action context."[70] In *Chavez v. Church & Dwight Co.,* the defendant, relying on *BMS*, argued that because the defendant was not subject to general jurisdiction in Illinois, it may be sued in Illinois only by consumers whose claims arise out of defendants' contacts with Illinois, i.e., those who purchased or consumed defendant's nutritional supplement in Illinois.[71] The Illinois district court agreed and dismissed all non-Illinois based claims – "Nothing in Bristol-Myers suggests that its basic holding is inapplicable to class actions; rather, the Court announced a general principle – that due process requires a connection between the forum and the specific claims at issue."[72] The District of Arizona, albeit in a footnote, has concluded similarly.[73]

A hybrid approach was taken by the New Jersey District Court in *Chernus v. Logitech.*[74] In *Chernus,* the court found that the *BMS* jurisdictional mandates do apply, but only as it relates to the jurisdictional connections to the named class plaintiffs.[75] The court found that the contacts between the unnamed class members and the forum were irrelevant to the question of specific jurisdiction since they are not actual parties to the litigation absent class certification.[76] The court granted the defendant's motion to dismiss as to a Pennsylvania named-plaintiff because there was no connection between the claims of the Pennsylvania plaintiff, the defendant, and New Jersey.[77] The remaining defendants' motion was denied, however, as to the claims of the New Jersey-based plaintiff. Ruling was reserved on whether the New Jersey plaintiff could maintain a putative nationwide class action for non-residents.[78]

If district courts begin following the *Chavez* approach, where state-specific plaintiffs can only bring class actions on behalf of class members from that particular state, defendants run the risk of facing state-by-state class actions. This result could be more problematic for defendants than helpful. If a defendant obtains dismissal of non-resident plaintiffs based on specific jurisdiction, those plaintiffs could simply return to their home states and file multiple class actions in district courts throughout the country. It appears fairly certain that personal jurisdiction would exist over the defendant in an action brought in the plaintiff's home state in the forum where the underlying controversy arose. Instead of being faced with a single centralized mass tort proceeding, defendants would now be faced with defending dozens across the country. Understandably, defendants wish aggregation of plaintiffs' claims to be limited to jurisdictions where defendants have fairly established a presence sufficient to establish jurisdiction. Defendants may be forced to choose, however, between the dangers of aggregating multiple-state plaintiffs in an unfavorable forum versus the exposure to a dozen separate state class actions and potentially a chaotic and unmanageable mixture of inconsistent schedules and conflicting and irreconcilable legal rulings.

IF DISTRICT COURTS BEGIN FOLLOWING THE *CHAVEZ* APPROACH, WHERE STATE-SPECIFIC PLAINTIFFS CAN ONLY BRING CLASS ACTIONS ON BEHALF OF CLASS MEMBERS FROM THAT PARTICULAR STATE, DEFENDANTS RUN THE RISK OF FACING STATE-BY-STATE CLASS ACTIONS.

CONCLUSION

While *BMS* is a step in the right direction, based on early responses at the trial court level, it is clear that battles remain over whether a defendant's attenuated contacts to a particular forum can support personal jurisdiction.

TRAVIS B. SWEARINGEN

1. Mr. Swearingen is an attorney with Butler Snow LLP. Butler Snow has represented several of the defendants mentioned in this article and was trial counsel in the *Slemp* and *Hammons* cases discussed.
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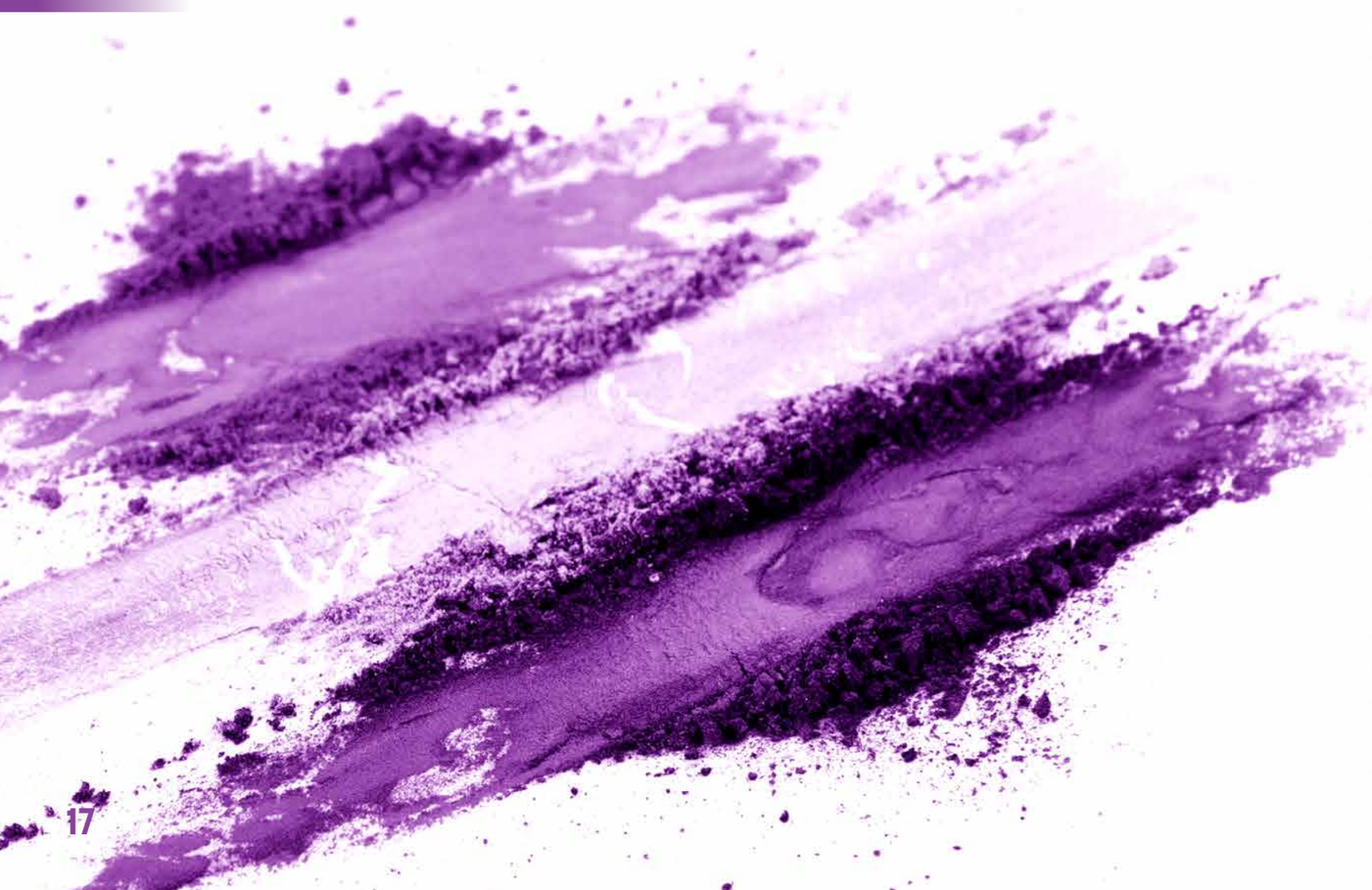
68. *Id.*
69. *See e.g. In re Chinese-Manufactured DryWall Prods.,* Civ. Act. MDL No. 09-2047, 2017 WL 5971622, at *13-16 (E.D. La. Nov. 30, 2017) (finding Bristol-Myers to be inapplicable to class actions, in part, because class actions have due process safeguards under Rule 23 that mass actions lack); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.,* 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) (holding that "Bristol-Myers is meaningfully distinguishable based on that case concerning a mass tort action, in which each plaintiff was a named plaintiff").
70. *Practice Mgmt. Support Servs. v. Cirque Du Soleil, Inc.,* 2018 WL 1255021, at *15 (N.D. Ill. Mar. 12, 2018).
71. *Id.* at *10.
72. *Chavez v. Church & Dwight Co.,* 2018 WL 2238191, at *10–11 (N.D. Ill. May 16, 2018) (internal citations omitted).
73. *Wenokur v. AXA Equitable Life Ins. Co.,* 2017 WL 4357916, at *4 fn. 4 (D. Ariz. Oct. 2, 2017) (*Citing BMS,* the court noted that "it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.").
74. *Chernus v. Logitech, Inc.,* 2018 WL 1981481, at *3 (D.N.J. Apr. 27, 2018).
75. *Id.*
76. *Id.*
77. *Id.* at *6.
78. *Id.* at *7-8.

AN ODDITY: APPROVAL AND REGULATORY AUTHORITY OVER COSMETICS



For various reasons, we are seeing a growth of lawsuits alleging injuries from use of over-the-counter cosmetics sprouting up across the country.[1] Social media reflects the invasion of the "safe beauty products" movement. For example, we are urged to trash the face lotion sitting on our bathroom counters because it is "toxic" to our well-being and to replace it with the promoter's product because it is "better" for us. Cosmetic industry news is all the buzz regarding regulatory authority over cosmetics.[2]

DEFINING COSMETICS AND DRUGS

Fundamental to any discussion regarding cosmetics claims is the significant legal distinction between "cosmetics" and "drugs." In order to differentiate ownership of regulatory authority over cosmetic products, we must first recognize which products qualify as cosmetics and why they are not categorized as drugs. I am not sure about you, but when I see or hear the word "cosmetics," I think of makeup. I think of all of the products found on "that aisle" of my neighborhood supermarket. I do not think of "cosmetics" as drugs. This assumption is fairly accurate, and to the ordinary consumer it means little. But to those of us in the cosmetic or drug industry, the differences between cosmetics and drugs demand a multitude of considerations.

The Food and Drug Administration (FDA) provides that products *intended to cleanse or beautify* are generally regulated as cosmetics.[3] "Articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body…for cleansing, beautifying, promoting attractiveness, or altering the appearance" are cosmetics.[4] Such articles include many items that you would expect to be a cosmetic, like lipsticks, fingernail polishes, eye shadows, and blushes, but also include moisturizing lotions, perfumes, shampoos, hair coloring products, and deodorants, plus "any substance intended for use as a component of a cosmetic product."[5]

THE FOOD AND DRUG ADMINISTRATION PROVIDES THAT PRODUCTS INTENDED TO CLEANSE OR BEAUTIFY ARE GENERALLY REGULATED AS COSMETICS.

By contrast, products such as acne treatments, sunscreens, antiperspirants, and ointments, *intended to treat or prevent disease, or affect the structure or function of the body,* are drugs.[6] Even if these products affected how you look, they are still considered drugs.[7] Manufacturers likely prefer the less cumbersome regulations applicable to cosmetics and do not want their product to be construed as a drug. But cosmetic safety becomes an issue. If the safety of a cosmetic is not adequately substantiated, the product may be considered misbranded and may be subject to regulatory action, unless the label provides the following statement: Warning—The safety of this product has not been determined.[8]

This is where the confusion sets in. Cosmetics and drugs are two separate categories of products and must adhere to different laws and regulations. The difference is in how the law defines their *intended use.*[9] Some products are both cosmetics and drugs.[10] If this occurs, those products must meet the requirements for both cosmetics and drugs.[11] Examples include anti-dandruff shampoos (which cleanse the hair and treat dandruff) and antiperspirant-deodorants, as well as moisturizers and makeup with SPF (sun protection factor) numbers.[12]

CATEGORIZATION OF A PRODUCT AFFECTS AUTHORITATIVE POWER

Intended use is the basis by which a product is defined as either a cosmetic or drug. But how is a product's intended use established? Claims stated on promotional materials (e.g. product

labeling, advertising) may affect the categorization of a product[13] (discussed in detail below). Even if a product is marketed as a cosmetic, certain marketing statements may otherwise characterize the product as a drug.[14] For example, a daily facial moisturizer that promises to decrease the production of pigment in the skin, although marketed as a cosmetic, would be considered a drug.[15]

Consumer perception is another way that intended use is established.[16] The product's reputation may play a role in classification. The reason the consumer is purchasing the product and the use for which it is purchased are factors to be considered.[17] Probably the most relatable example of intended use is the functionality of the ingredients.[18] If there is a well-known therapeutic use for the product, then it would be considered a drug. Examples include fluoride in toothpaste and aromatherapy (sleep aid) in essential oils.[19]

With this better understanding of why certain products are termed cosmetics, we turn to the regulatory implications associated with cosmetics that some love and others appear to hate.

Cosmetic products are regulated by the FDA pursuant to the Federal Food, Drug, and Cosmetic Act (FDCA), which is codified into Title 21 Chapter 9 of the United States Code. "FDA enforces laws enacted by Congress and issues regulations as authorized by Congress to implement its statutory authority. The regulations can create binding obligations and have the force of law."[20] While the FDCA establishes that the FDA has authority over product safety, unlike most drugs, cosmetic products and their ingredients, with the exception of color additives, do not have to undergo pre-market FDA review or approval.[21]

Good Manufacturing Practice (GMP) is a tool to help assure cosmetic products are neither adulterated nor misbranded, and manufacturers are responsible for compliance.[22] While the FDA has provided recommendations for cosmetic GMP, there are no regulations setting forth particular GMP requirements for cosmetics.[23] In contrast, strict adherence to GMP requirements for drugs is mandatory.[24] Selling "adulterated" or "misbranded" cosmetics is prohibited by the FDCA. Penalties can be imposed for doing so.[25] Cosmetics become "adulterated" if the product's composition is compromised with violations involving ingredients, contaminants, processing, packaging, or shipping and handling.[26] Cosmetics are "misbranded" if the violations involve *improper labeling* or deceptively packaged products.[27] If a cosmetic label is false or misleading or fails to provide required information, it is considered misbranded.[28] Even if the label provides the required information, the label can become misbranded if it is improperly displayed.[29]

Registration is another procedure that brings about different legal and regulatory propositions in the cosmetic world. While drug makers are required to register their foreign and domestic establishments with the FDA,[30] "[U]nder the law, manufacturers are not required to register their cosmetic establishments or file their product formulations with FDA, and no registration number is required to import cosmetics into the United States."[31] However, the Voluntary Cosmetic Registration Program (VCRP) for cosmetic establishments and formulations[32] is maintained by the FDA and participation is encouraged.[33]

WHILE THE FDCA ESTABLISHES THAT THE FDA HAS AUTHORITY OVER PRODUCT SAFETY, UNLIKE MOST DRUGS, COSMETIC PRODUCTS AND THEIR INGREDIENTS, WITH THE EXCEPTION OF COLOR ADDITIVES, DO NOT HAVE TO UNDERGO PRE-MARKET FDA REVIEW OR APPROVAL.

LABELING

Labeling and misbranding issues are the impetus for many cosmetics lawsuits. Let us dissect what labeling means before authoritative power is discussed. Any label or other written, printed, or graphic matter on or accompanying a product constitutes labeling.[34] The principal display panel and information panel, which have their own informational requirements, are also considered parts of the label and accommodate label information.[35]

The cosmetics marketed and distributed in the United States, no matter where they are manufactured, must comply with the labeling regulations published by the FDA under the authority of the FDCA and the Fair Packaging and Labeling Act (FPLA).[36] These laws and associated regulations are "intended to protect consumers from health hazards and deceptive practices and to help consumers make informed decisions regarding product purchase."[37] For cosmetics marketed on a retail basis to consumers, FDA requires a declaration of ingredients on the product label.[38] Under the FDCA, cosmetics that fail to comply with the FPLA are considered misbranded.[39] Likewise, if the labeling is "false or misleading in any particular," then it is prohibited.[40] However, the FDA does not have authority to approve cosmetic product labeling *before* it hits the market.

The authority of the Federal Trade Commission (FTC) also comes into play. Pursuant to the Federal Trade Commission Act (FTCA), the FTC is given the authority to prevent unfair or deceptive acts or practices in or affecting commerce. An "unfair or deceptive act or practice" under the FTCA includes "the dissemination or the causing to

be disseminated of any false advertisement."[41] Arguably, to the ordinary consumer it is easy to confuse the responsibilities and governance of the FTC and FDA, because labeling and advertising appear to fall under the same umbrella of "marketing." But authority over labeling and advertising is different, and it is apparent in the FTCA's definition of "false advertisement." A false advertisement is "an advertisement, *other than labeling,* which is misleading in a material respect."[42] Although the FDA and FTC work to eliminate misleading elements associated with cosmetics, each has a specific authority – the FDA regulates labeling and the FTC regulates advertising. Courts have recognized this limitation of the FTCA's reach.[43]

A FALSE ADVERTISEMENT IS "AN ADVERTISEMENT, OTHER THAN LABELING, WHICH IS MISLEADING IN A MATERIAL RESPECT."

In addition, the FTC and FDA entered into a Memorandum of Understanding that makes clear that cosmetic labeling is excluded from the items that fall under the scope of the FTC's regulatory authority. The Memorandum provides that the FTC "has primary responsibility with respect to the regulation of the truth or falsity of all advertising (other than labeling) of foods, drugs, devices and cosmetics."[44] This Memorandum remains in effect today, and it further establishes that cosmetics labeling is a matter for the FDA.

If the FDA does not and cannot pre-approve cosmetic product labeling, it is improper to label cosmetics "FDA Approved." Cosmetic labeling or advertising containing language that suggests that the FDA has approved the product is prohibited. Even if the product is on file with FDA's VCRP,[45] the same restriction applies. As such, a false or misleading statement on labeling renders a cosmetic "misbranded."

SAFETY ASSURANCE WITH NO PRE-MARKET APPROVAL

We have established that cosmetics do not undergo pre-market FDA review or approval. The FDA does not approve cosmetic product labeling, so proper labeling lies in the hands of the cosmetic manufacturer's and/or distributor's hands. Cosmetic manufacturers or companies and individuals who market cosmetics are legally responsible for ensuring that their products are safe. Safety tests for the individual products and/or their ingredients are not required under the law or under FDA regulations.[46]

So, how does the FDA assist in assuring cosmetic safety to the consumer? Although the FDA does not require these companies to test their products' safety, it has consistently encouraged them to do so. Manufacturers and marketers run the risk of having their products deemed adulterated or misbranded if they are not marketed appropriately, which could in turn subject them to regulatory action.[47]

If the FDA has reliable information that a cosmetic is adulterated or misbranded, the FDA can file an action through the Department of Justice in federal court to have the cosmetic removed from the market.[48] Likewise, to ensure that further shipments of that product do not continue, the FDA may request the issuance of a restraining order.[49] Further, if the manufacturer or individual is violating the law, the government may seize the property or the FDA can initiate criminal action.[50]

Cosmetic manufacturing facilities are subject to inspections, and discovery of non-compliance with the FDCA and FPLA can occur through inspections. The FDA can and does inspect and even collects samples for examination and analysis to assure cosmetic safety.[51] The FDA will also inspect in response to cosmetic adverse event

complaints.[52] While the FDA is not authorized to recall adulterated or misbranded cosmetics, it does have the ability to monitor companies that issue recalls on their own initiative. Either that, or the FDA can request a recall if the company is unwilling to remove the product at issue without the FDA's written request.[53]

Another measure of safety assurance implemented by the FDA involves overseeing imports. U.S. Customs and Border Protection works with the FDA to monitor imports. Imported cosmetics are subject to review by FDA at the time of entry through U.S. Customs under section 801(a) of the FDCA.[54] If the products are noncompliant, it is possible they will not be permitted into the United States.[55] If the products are not brought into compliance, they will either be destroyed or sent back.[56] Even if the cosmetics are not inspected upon entry, every shipment of cosmetics that enters the United States is subject to the laws the FDA enforces.[57]

CONCLUSION

For cosmetic manufacturers, it appears at first blush that the less stringent legal and regulatory requirements qualifying a product as a cosmetic would be most appealing. However, as discussed above, there is a unique set of factors that a manufacturer must take into consideration if hoping to market a product as a cosmetic. Ensuring that the product does not cross the faint line that distinguishes it as a drug is of utmost importance. Misbranding of products remains of grave concern amongst the cosmetic and drug industries. The FDA is working within its regulatory authority over cosmetic product labeling, but the fact remains that its limited control in this arena is the talk (and worry) of the town. The "safe beauty product" movement that implicates regulatory and approval authority over cosmetics is the real deal, and it does not appear to be going away anytime soon.

1. See *Morales v. Conopco, Inc.*, No. 2:13-2213 WBS EFB, 2016 WL 3688407 (E.D. Cal. July 12, 2016) (where Plaintiffs filed suit due to alleged misleading nature of certain hair care products being labeled "TRESemme Naturals" despite the products containing synthetic ingredients); *see also Michael v. Honest Company, Inc.*, No. LACV1507059JAKAGRX, 2016 WL 8902574 (C.A. Cal. Dec. 6, 2016) (class-action lawsuit over claims that a number of defendant's "Natural Products" contain non-natural ingredients).
2. Laura Entis, *That Moisturizer You're Slathering on Your Face Isn't Regulated,* Fortune (June 27, 2017), http://fortune.com/2017/06/27/fda-cosmetics-regulations/; Jane Brody, *For Cosmetics, Let the Buyer Beware,* New York Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/well/for-cosmetics-let-the-buyer-beware.html.
3. *Cosmetics Safety Q&A: Personal Care Products,* U.S. Food & Drug Administration (Feb. 22, 2018), https://www.fda.gov/cosmetics/resourcesforyou/consumers/ucm136560.htm.
4. 21 U.S.C.A. § 321(i) (2012).
5. *Is It a Cosmetic, a Drug, or Both? (Or Is It Soap?),* U.S. Food & Drug Administration (Mar. 6, 2018), https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm074201.htm.
6. *Cosmetics Safety Q&A: Personal Care Products, supra* note 3.
7. *Id.*
8. *See* 21 C.F.R. § 740.10 (2018).
9. *Is It a Cosmetic, a Drug, or Both? (Or Is It Soap?), supra* note 5.
10. The FDCA does not recognize any such category as "cosmeceuticals." *See Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Guidance & Regulation*, U.S. Food & Drug Administration (Nov. 3, 2017), https://www.fda.gov/Cosmetics/GuidanceRegulation/default.htm.
21. *Is It a Cosmetic, a Drug, or Both? (Or Is It Soap?), supra* note 5.
22. *Id.*
23. *Id.*
24. *Id.*
25. *See* 21 U.S.C. §§ 331(a), 361-62(a)–(d).
26. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated,* U.S. Food & Drug Administration (Nov. 3, 2017), https://www.fda.gov/cosmetics/guidanceregulation/lawsregulations/ucm074162.htm.
27. *Id.*
28. *Id.*
29. *Id.*
30. *See* 21 C.F.R. § 207 (2018).
31. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated, supra* note 26.
32. *See* 21 C.F.R. §§ 710, 720 (2018).
33. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated, supra* note 26.
34. 21 U.S.C. § 321(m).
35. *Labeling Regulations,* U.S. Food & Drug Administration (Mar. 6, 2018), https://www.fda.gov/Cosmetics/Labeling/Regulations/default.htm.
36. *Id.*
37. *Id.*
38. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated, supra* note 26.
39. See *Id.* (noting that cosmetics distributed solely for professional use, institutional use, or as free samples or hotel amenities are not included).
40. *Id.*
41. *See* 15 U.S.C. § 52.
42. 15 U.S.C. § 55(a)(1).
43. *See, e.g., F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1095* (9th Cir. 1994) (recognizing that the FTCA defines "false advertisement" as an advertisement, other than labeling ...); *see also Miles Labs., Inc.* v. FTC, 50 F. Supp. 434, 437 (D.D.C. 1943) ("The dissemination of a 'false advertisement' by a corporation *otherwise than on the labels* carried by its products is an unfair or deceptive act or practice which is declared unlawful and which the Federal Trade Commission is empowered and directed to prevent.") (emphasis added), *aff'd,* 140 F.2d 683 (D.C. Cir. 1944).
44. Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration, 36 Fed, Reg. 18539-02 (Sept. 16, 1971).
45. *See* 21 C.F.R. §§ 710.8, 720.9 (providing that participation in the VCRP to suggest official approval is prohibited).
46. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated, supra* note 26.
47. *See Estee Lauder, Inc. v. U.S. Food & Drug Admin.,* 727 F. Supp.1 (D.D.C. 1989) (regulatory letter written to cosmetic manufacturer about its anti-aging claims on skin cream labeling that allegedly presented to affect the structure or function of the body and warned that the administration was prepared to invoke sanctions such as seizures and injunctions pursuant to the FDCA); *see also Mollicone v. Universal Handicraft, Inc. et al., No. 216CV07322CASMRWX, 2017 WL 440257,* (C.D. Cal. Jan. 30, 2017) (where Plaintiff alleged violations of the FDCA based on allegations that the products are misbranded - products neither "halt the aging process" nor are they "proven to restore youthful appearance" – and are unlawfully sold as unapproved drugs).

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48. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated, supra* note 26.
49. *Id.*
50. *Id.*
51. *See United States v. Roux Labs., Inc., 456 F. Supp. 973 (M.D. Fla. 1978)* (imposition of sanctions considered where defendant resisted compliance with warrant for FDA to inspect defendant laboratories and collect samples of materials used in hair dye products).
52. *See Statement on FDA Investigation of WEN by Chaz Dean Cleansing Conditioners,* U.S. Food & Drug Administration (Nov. 15. 2017), https://www.fda.gov/cosmetics/productsingredients/products/ucm511626.htm. (reporting that these conditioners resulted in hair loss, hair breakage, balding, itching and rash).
53. *FDA Authority Over Cosmetics: How Cosmetics Are Not FDA-Approved, but Are FDA-Regulated, supra* note 26.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

SKY'S THE LIMIT?

A 50-STATE SURVEY OF DAMAGES CAPS AND THE COLLATERAL SOURCE RULE

Many state legislatures across the country have enacted statutory measures to limit the amount of compensatory and/or punitive damages recoverable by plaintiffs in a civil lawsuit. These limitations and the rationale behind them vary, sometimes widely and sometimes fractionally, from state to state. Similarly, many states have created varying rules regarding the scope and applicability of the collateral source rule, which states generally that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." Restatement (Second) of Torts § 920A. In states where damages caps and/or the collateral source rule apply, early case analysis and even settlement evaluation will necessarily require an examination of these provisions. To assist in this examination, the following is a survey detailing each state's damages cap provisions and the applicability of the collateral source rule.

ALABAMA

In Alabama, state statute limits punitive damages to up to three times compensatory damages or $500,000, whichever is greater. Ala. Code § 6-11-21(a). Punitive damages awards against small businesses (defined as having $2 million or less in net worth at the time of the occurrence) are capped at $50,000, or 10 percent of the business' net worth, whichever is greater. Ala. Code § 6-11-21(b)–(c). In cases involving physical injury, the cap is raised to $1.5 million. Ala. Code § 6-11-21(d). These caps are removed altogether in actions for wrongful death or intentional infliction of physical injury. Ala. Code § 6-11-21(j). There is no corresponding cap on compensatory damages. In product liability actions, when evidence of collateral source payments is admitted, the plaintiff is entitled to introduce evidence of the cost of obtaining those payments, which are considered recoverable as damages. Ala. Code § 6-5-522.

IN STATES WHERE DAMAGES CAPS AND/OR THE COLLATERAL SOURCE RULE APPLY, EARLY CASE ANALYSIS AND EVEN SETTLEMENT EVALUATION WILL NECESSARILY REQUIRE AN EXAMINATION OF THESE PROVISIONS.

ALASKA

Alaska law caps punitive damages at three times compensatory damages or $500,000, whichever is greater. Alaska Stat. § 09.17.020(f). If the conduct is "motivated by financial gain and the adverse consequences of the conduct were actually known by the defendant," the cap is raised to four times compensatory damages, four times the aggregate amount of financial gain received by the defendant as a result of the misconduct, or $7 million, whichever is greater. Alaska Stat. § 09.17.020(g). Fifty percent of all punitive damages awards are deposited into the state's general fund. Alaska Stat. § 09.17.020(j). Non-economic damages are capped at the greater of $400,000 or the injured party's life expectancy in years multiplied by $8,000. Alaska Stat. § 09.17.010(b). This cap is raised to the greater of $1 million or $25,000 multiplied by the plaintiff's life expectancy in the event of "severe permanent physical impairment or severe disfigurement." Alaska Stat. § 09.17.010(c). Alaska allows a post-verdict reduction in damages by the amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract. Alaska Stat. § 09.17.070.

ARIZONA

While there is no stated cap on punitive damages, and the Arizona Constitution prohibits passing a law that would limit the amount of damages in personal injury or wrongful death actions, Arizona case law has interpreted the Due Process Clause to prohibit grossly excessive or arbitrary awards. See Ariz. Const., art. II, § 31; *Security Title Agency, Inc. v. Pope,* 200 P.3d 977, 997–98 (Ariz. Ct. App. 2008). There is no cap on compensatory damages. Arizona generally applies the collateral source rule to allow a plaintiff to recover damages even if they were not actually sustained. See *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 496 (Ariz. 2006).

ARKANSAS

The Arkansas Supreme Court declared unconstitutional a previously enacted statute capping punitive damages. See *Bayer CropScience LP v. Schafer,* 385 S.W.3d 822, 829–32 (Ark. 2011). There is no cap on compensatory damages. The collateral source rule applies in Arkansas. In fact, a statute limiting the recovery of certain medical expenses was declared unconstitutional in contravention of separation of powers, though it was also challenged on collateral source grounds. *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009).

CALIFORNIA

California has no cap on either punitive or compensatory damages, and the collateral source rule applies. See *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011).

COLORADO

In Colorado, punitive damages cannot exceed the amount of compensatory damages awarded. Colo. Rev. Stat. § 13-21-102(1)(a). Though economic damages are not capped, non-economic damages cannot exceed $468,000, which may be increased by the court upon clear and convincing evidence to a maximum of $936,030. Colo. Rev. Stat. § 13-21-102.5(3)(a). Colorado statute also reduces the verdict award by the amount paid by a collateral source; however, no reduction is allowed where the collateral payment arises from contractual obligations intended to benefit the injured party, such as private insurance or social security payments. Colo. Rev. Stat. § 13-21-111.6.

CONNECTICUT

Connecticut does not cap compensatory damages, but in product liability actions, punitive damages cannot exceed two times the amount of compensatory damages awarded and can only be awarded "if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product." Conn. Gen. Stat. 52-240b. Connecticut statutory law reduces the verdict award by the amount paid by a collateral source. Conn. Gen. Stat. § 52-225a(a)–(b).

DELAWARE

There are no caps on either compensatory or punitive damages in Delaware. In terms of collateral source, Delaware law allows for the recovery of the reasonable value of medical expenses, not only the amount actually pa*id. See Mitchell v. Hunter,* 883 A.2d 32 (Del. 2005); *Onusko v. Kerr,* 880 A.2d 1022 (Del. 2005).

DISTRICT OF COLUMBIA

The District of Columbia does not cap either compensatory or punitive damages, and the collateral source rule applies. *See Hardi v. Mezzanotte,* 818 A.2d 974, 984 (D.C. 2003).

FLORIDA

There are no caps on compensatory or punitive damages in Florida. In negligence cases, a court must reduce an award of economic damages by "all amounts that have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources." Fla. Stat. § 768.76(1). However, there is no reduction for collateral source payments for which there is a right of subrogation. *Id.* Any reduction is also offset by any amount paid by the claimant or a family member in order to secure the collateral payment. *Id.*

GEORGIA

Compensatory and punitive damages are not capped in Georgia. The collateral source rule applies to bar admission of any evidence as to payments of medical, hospital, disability income, or other expenses of a tortious injury paid for by a plaintiff, governmental entity, or third party and taking credit towards the defendant's liability in damages for such payments. *Candler Hosp. v. Dent,* 491 S.E.2d 868 (1997).

HAWAII

Hawaii does not place a cap on punitive damages, but non-economic damages are capped at $375,000. Hawaii law also provides for the recovery of the "reasonable value" of medical expenses. *See Bynum v. Magno,* 101 P.3d 1149, 1155–57 (2004). Discounted amounts paid by Medicare/Medicaid are inadmissible pursuant to the collateral source rule. *See Id.* at 1157.

IDAHO

Idaho caps non-economic damages at $250,000, but the cap is subject to increase or decrease in accordance with the average annual wage. Idaho Code Ann. § 6-1603(1). Punitive damages are capped up to three times compensatory damages or $250,000, whichever is greater. Idaho Code Ann. § 6-1604(3). Idaho law prevents double recovery due to collateral source payments. Although the plaintiff is allowed to present evidence of incurred medical expenses, the damages plaintiff is entitled to recover should be reduced by the amount actually paid by sources such as Medicare and Medicaid, and for which plaintiff is not obligated. Collateral sources shall not include: (1) "benefits paid under federal programs which by law must seek subrogation;" (2) "death benefits paid under life insurance contracts;" (3) "benefits paid by a service corporation organized under chapter 34, title 41, Idaho Code;" and (4) "benefits paid which

are recoverable under subrogation rights created under Idaho law or by contract." Idaho Code Ann. § 6-1606; *see also Dyet v. McKinley,* 81 P.3d 1236 (Idaho 2003).

ILLINOIS

Illinois does not have a cap on either compensatory or punitive damages, and the collateral source rule applies. *See Wills v. Foster,* 892 N.E.2d 1018 (Ill. 2008).

INDIANA

While there is no cap on compensatory damages in Indiana (except in the medical malpractice context), punitive damages are capped at the greater of three times compensatory damages or $50,000, whichever is greater. Ind. Code § 34-51-3-4. In terms of collateral source, courts will allow the admission of evidence of collateral source payments except: (1) life insurance payments or death benefits; (2) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; and (3) payments made by the United States or any subdivision thereof. Ind. Code § 34-44-1-2(1). Proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received and proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family are also admissible. Ind. Code § 34-44-1-2(2)–(3).

IOWA

Iowa has no cap on either compensatory or punitive damages. Evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family is admissible under Iowa law. Iowa Code Ann. § 668.14(1). If this evidence is admitted, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment. Iowa Code Ann. § 668.14(2).

KANSAS

Though there is no cap on compensatory damages in Kansas (except in medical malpractice actions), punitive damages are capped at the lesser of either the defendant's annual gross income (or if inadequate, then 50 percent of the defendant's net worth) or $5 million. Kan. Stat. Ann. § 60-3702(e). Kansas follows the Restatement (Second) of Torts § 920A, which provides: "(1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability;" and "(2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."

KENTUCKY

Kentucky does not cap either compensatory or punitive damages, and it applies the collateral source rule without exception and allows for the recovery of all expenses, regardless of payment to the plaintiff by a collateral source. *See O'Bryan v. Hedgespeth,* 892 S.W.2d 571 (Ky. 1995).

LOUISIANA

Though Louisiana does not place a cap on compensatory damages, punitive damages are generally disfavored unless authorized by statute. As of now, punitive damages are allowable only under limited circumstances, such as intoxicated driving, criminal sexual activity with minors, and storage/disposal of toxic waste. *See, e.g.*, La. Civ. Code Ann. Art. 2315.3. The Louisiana choice of law rules also provide that punitive damages may not be awarded except: "(1) [b]y the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or by the law of the place where the person whose conduct caused the injury was domiciled; or (2) [b]y the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled." La. Civ. Code Ann. Art. 3546. The collateral source rule applies in Louisiana. *See Bozeman v. State,* 879 So. 2d 692 (La. 2004).

THOUGH LOUISIANA DOES NOT PLACE A CAP ON COMPENSATORY DAMAGES, PUNITIVE DAMAGES ARE GENERALLY DISFAVORED UNLESS AUTHORIZED BY STATUTE.

MAINE

Proposed legislation in Maine caps non-economic damages at $500,000 and $250,000 in wrongful death cases. *See* 2018 Me. Legis. Serv. Ch. 402 (H.P. 91) (L.D. 123). These caps do not apply in any other context. The collateral source rule applies. *See Werner v. Lane,* 393 A.2d 1329 (Me. 1978).

MARYLAND

In Maryland, there is no cap on economic or punitive damages, but non-economic damages must not exceed $845,000. Per statute, the cap on non-economic damages increases by $15,000 on October 1 of each year. Md. Code Ann., Cts. & Jud. Proc. § 11-108. The collateral source rule applies. *See Corapcioglu v. Roosevelt,* 907 A.2d 885 (Md. App. 2006).

MASSACHUSETTS

There is no cap on compensatory damages in Massachusetts (except in medical malpractice actions), but there is no entitlement to punitive damages except as provided by statute. For example, a defendant "shall be liable in . . . (3) punitive damages in an amount of not less than five thousand dollars in such cases as the decedent's death was caused by the malicious, willful, wanton, or reckless conduct of the defendant or by the gross negligence of the defendant." Mass. Gen. Laws ch. 229 § 2(3). The collateral source rule applies in Massachusetts. *See Law v. Griffith,* 930 N.E.2d 126 (Mass. 2010).

MICHIGAN

Compensatory damages are not capped in Michigan (except in medical malpractice cases), but punitive damages are not available except by statute. However, "exemplary damages" are awardable to compensate a plaintiff for mental anguish, humiliation, outrage, or increased injury to the plaintiff's feelings that he or she suffers due to the defendant's willful, malicious, or wanton conduct or reckless disregard for the plaintiff's rights. *See Peisner v. Detroit Free Press,* 364 N.W.2d 600 (Mich. 1984). The collateral source rule has been abrogated in part by statute, and the procedure for reducing a plaintiff's personal injury award by the amounts paid by a third party is set forth within that statute. See Mich. Comp. Laws Ann. § 600.6303.

MINNESOTA

There is no cap on either compensatory or punitive damages in Minnesota. Minnesota has abrogated the traditional collateral source rule by statute, which allows a reduction (upon motion) in a verdict by the amount of collateral sources paid on behalf of the plaintiff, except where a subrogation right has been asserted, but that reduction is subsequently offset by "amounts that have been paid, contributed, or forfeited by, or on behalf of, the plaintiff or members of the plaintiff's immediate

family for the two-year period immediately before the accrual of the action to secure the right to a collateral source benefit that the plaintiff is receiving as a result of losses." Minn. Stat. § 548.36.

MISSISSIPPI

Mississippi currently has a $1 million cap on non-economic damages for all civil actions except medical malpractice actions, which caps non-economic damages at $500,000. Miss. Code Ann. § 11-1-60. Mississippi has a complicated statutory scheme for capping punitive damages, which centers on the defendant's net worth. Miss. Code Ann. § 11-1-65(3)(a). The collateral source rule is applicable and has no exceptions. *See Busick v. St. John,* 856 So. 2d 304 (Miss. 2003).

MISSOURI

There is no cap on compensatory damages in Missouri (except in medical malpractice cases, Mo. Rev. Stat. § 538.210), and the previous cap on punitive damages (Mo. Rev. Stat. § 510.265) was held to be unconstitutional by the Missouri Supreme Court. *Lewellen v. Franklin,* 441 S.W.3d 136 (Mo. 2014). The collateral source rule applies. *See Porter v. Toys 'R' Us-Delaware, Inc.*, 152 S.W.3d 310 (Mo. Ct. App. 2004).

MONTANA

There is no cap on compensatory damages in Montana. Though Montana statute caps the amount of punitive damages at $10 million or 3 percent of defendant's net worth, whichever is less, the constitutionality of this cap is uncertain. The cap was held unconstitutional by two Montana district court judges in 2014, but the Montana Supreme Court has not ruled. *See Olsen v. Hyundai Motor Co.*, No. DV 11-304, 2014 WL 5040001 (Mont. Dist. Sept. 19, 2014); *Butte Local Dev. Corp. v. Masters Grp. Int'l, Inc.*, No. DV-11-372, 2014 WL 2895577 (Mont. Dist. Mar. 25, 2014). Courts in Montana must reduce the amount of a verdict that was more than $50,000 if the plaintiff will be fully compensated, not including courts costs and attorney fees. There is no right to subrogation except specifically granted by state or federal law. If an insurance policy reduces the award, several factors are considered in the reduction. Mont. Code Ann. § 27-1-308.

NEBRASKA

There is no general cap on compensatory damages (except in medical malpractice cases), but Nebraska has declared punitive damages to be unconstitutional. *See Miller v. Kingsley,* 230 N.W.2d 472 (Neb. 1975). The collateral source rule applies generally, "[b]ut if the tort-feasor contributed in some way to the benefits provided to the injured person, then the tort-feasor might be entitled to mitigation of damages." *Strasburg v. Union Pacific R.R. Co.*, 839 N.W.2d 273, 275 (Neb. 2013).

NEVADA

In Nevada, non-economic damages are capped at $350,000 only in medical malpractice actions. *See* Nev. Rev. Stat. § 41A.035. Otherwise, there is no cap on compensatory damages. Punitive damages are capped at three times compensatory damages if the compensatory damage award was greater than or equal to $100,000 and at $300,000 if the compensatory damage award was less than $100,000. Nev. Rev. Stat. § 42.005. The statute lists the claims where the cap does not apply, which includes actions for defective products. The collateral source rule applies (*see Proctor v. Castelletti,* 911 P.2d 853 (Nev. 1996)), but in medical malpractice actions, the defendant can present evidence of payments from a collateral source. *See* Nev. Rev. Stat. § 42.021.

NEW HAMPSHIRE

There is currently no cap on compensatory damages in New Hampshire after the New Hampshire Supreme Court declared a previous statute capping non-economic damages at $875,000 to be unconstitutional. *See Brannigan v. Usitalo,* 587 A.2d 1232 (N.H. 1991). Punitive damages are unavailable per statute. N.H. Rev. Stat. § 507:16. The collateral source rule applies. *See Cyr v. J.I. Case Co.*, 652 A.2d 685 (N.H. 1994).

NEW JERSEY

There is no cap on compensatory damages in New Jersey. Punitive damages are capped at five times compensatory damages or $350,000, whichever is greater. The cap does not apply in the context of bias crimes, discrimination, AIDS testing disclosure, sexual abuse, or drunk driving. N.J. Stat. Ann. § 2A:15-5.14. This statute also abrogates the collateral source rule. The Third Circuit Court of Appeals has held that the collateral source aspect of this statute is preempted by ERISA. *Levine v. United Healthcare Corp.*, 402 F.3d 156 (3rd Cir. 2005).

NEW MEXICO

There is no cap on either compensatory or punitive damages in New Mexico (except in medical malpractice cases), and the collateral source rule applies. *Sunnyland Farms, Inc. v. Central N.M. Elec. Co-op., Inc.*, 301 P.3d 387 (N.M. 2013).

NEW YORK

New York does not cap either compensatory or punitive damages. Payments from a collateral source are admissible to reduce the award after the verdict (excluding voluntary charitable contributions). N.Y. C.P.L.R. § 4545.

NORTH CAROLINA

There is no cap on compensatory damages in North Carolina (except in medical malpractice cases), but punitive damages are capped at three times compensatory damages or $250,000, whichever is greater. N.C. Gen. Stat. Ann. § 1D-25. The collateral source rule applies. *See Cates v. Wilson,* 361 S.E.2d 734 (N.C. 1987).

NORTH DAKOTA

In North Dakota, non-economic damages are only capped in medical malpractice actions (see N.D.C.C. § 32-42-02) and are generally uncapped otherwise. In terms of collateral source, a court may reduce the verdict based on the introduction of collateral source payments. N.D.C.C. § 32-03.2-06. However, the jury may not be told about the other source. N.D.C.C. § 32-03.2-10.

OHIO

Ohio caps non-economic damages at $250,000 or three times the amount of economic damages, whichever is greater, with a maximum of $350,000 per plaintiff and $500,000 per occurrence. Oh. Rev. Code § 2315.18. Punitive damages are capped at two times compensatory damages. If the defendant is a small employer or an individual, the cap is two times compensatory damages or 10 percent of their net worth, whichever is less, with a maximum of $350,000. Oh. Rev. Code § 2315.21. The statute contemplates certain situations where the caps on punitive damages are not applicable, such as when the injury, death, or loss resulted from the defendant's intentional conduct and the defendant has been convicted of a felony with the element of purposely/knowingly and that felony is the basis of the tort action. In terms of collateral source, a defendant can introduce evidence of any amount of collateral source except if the source has a mandatory self-effectuating federal right of subrogation, a contractual subrogation, or a statutory subrogation, or if the source pays a benefit in the form of a life insurance or disability payment. The defendant can also introduce evidence of a life insurance/disability payment when it was paid by the employer and the employer is the defendant. Oh. Rev. Code § 2315.20.

OKLAHOMA

For bodily injury cases, there is no cap on economic damages, but non-economic damages are capped at $350,000. However, if the conduct is deemed to be reckless, grossly negligent, fraudulent, intentional, or with malice, the cap is removed. 23 Okla. Stat. Ann. § 61.2. Oklahoma statute caps punitive damages at $100,000 or the amount of actual damages, whichever is greater, when the defendant is found to have acted in reckless disregard for the rights of others (Category I). 23 Okla. Stat. Ann. § 9.1(B). Category II punitive damages are capped at $500,000, twice the amount of actual damages, or the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities, whichever is greater, when the defendant is found to have acted intentionally and with malice toward others. 23 Okla. Stat. Ann. § 9.1(C). Finally, Category III punitive damages are not capped and are appropriate only when there has been a showing by clear and convincing evidence that "[t]he defendant has acted intentionally and with malice toward others, *and* when "there is evidence beyond a reasonable doubt that the defendant . . . acted intentionally and with malice and engaged in conduct life-threatening to humans." 23 Okla. Stat. Ann. § 9.1(D). The collateral source rule applies in Oklahoma. *See Mariani v. State ex rel. Okla. State Univ.*, 348 P.3d 194 (2015).

OKLAHOMA STATUTE CAPS PUNITIVE DAMAGES AT $100,000 OR THE AMOUNT OF ACTUAL DAMAGES, WHICHEVER IS GREATER, WHEN THE DEFENDANT IS FOUND TO HAVE ACTED IN RECKLESS DISREGARD FOR THE RIGHTS OF OTHERS.

OREGON

Oregon does not have a cap on compensatory damages (except in medical malpractice cases). There is no cap on punitive damages, but punitive damage awards are divided among the plaintiff (30 percent); the attorney general for deposit into the Criminal Injuries Compensation Account (60 percent); and the attorney general for deposit into the State Court Facilities and Security Account (10 percent). Or. Rev. Stat. § 31.735(1). Punitive damages are not available against healthcare providers acting without malice. Or. Rev. Stat. § 31.740. The collateral source rule has been abrogated by statute and permits a court to reduce the verdict award based on payments from collateral sources (submitted via affidavit prior to a judgment), though the collateral source evidence is not admissible. Or. Rev. Stat. § 31.580.

PENNSYLVANIA

There is no cap on compensatory damages in Pennsylvania. While there is no general cap on punitive damages, multiple statutory provisions (roughly 35) create individualized caps in various contexts such as medical malpractice, abortion notification, bad faith, trade secrets, and agricultural protections, among others. The collateral source rule applies in Pennsylvania to product liability actions, but medical malpractice legislation abrogates the rule to preclude a plaintiff from recovering damages for past medical expenses or past lost earnings that were covered by private or public benefit or gratuity, but this does not apply to life insurance, pension or profit-sharing, social security, benefits subject to repayment to Department of Public Welfare, or public benefits paid under a program under federal statute that provides for right of reimbursement, which supersedes state law. 40 Pa. Cons. Stat. § 1303.508.

RHODE ISLAND

Rhode Island has no cap on compensatory damages, and there is no general cap on punitive damages. Punitive damages are unavailable in wrongful death actions. *See Simeone v. Charron*, 762 A.2d 442, 449 (R.I. 2000). The collateral source rule applies generally, but the rule has been abrogated in the medical malpractice context. *See* R.I. Gen. Laws § 9-19-34.1.

SOUTH CAROLINA

There is no general cap on compensatory damages, except in medical malpractice actions where there are certain limitations on non-economic damages. *See* S.C. Code Ann. § 15-32-220. Punitive damages are capped at three times the amount of compensatory damages to each claimant or $500,000, whichever is greater; however, if the court determines that the wrongful conduct was motivated by unreasonable financial gain and that the unreasonably dangerous nature of the conduct and high likelihood of injury was approved by agent/director/officer or that the defendant's actions could subject them to a felony conviction, the cap is raised to four times compensatory damages or $2 million, whichever greater. If the court determines that the defendant had intent to harm, has pled guilty/been convicted of a felony in relation to the claim, or was under the influence of alcohol/drugs/prescription drugs/glue/aerosol/toxic vapor at the time of the alleged wrongful conduct, the cap is eliminated. S.C. Code Ann. § 15-32-530. The collateral source rule applies in South Carolina. *See Citizens & S. Nat'l Bank of S.C. v. Gregory,* 463 S.E.2d 317 (S.C. 1995).

SOUTH DAKOTA

There is no general cap on compensatory or punitive damages in South Dakota. There are specific caps on compensatory damages in medical malpractice and death or injury of a "voluntary rodeo contestant." S.D. Codified Laws § 21-3-13. The collateral source rule applies with a statutory exception in medical malpractice actions. *See Papke v. Harbert,* 738 N.W.2d 510 (S.D. 2007).

IN SOUTH DAKOTA, THERE ARE SPECIFIC CAPS ON COMPENSATORY DAMAGES IN MEDICAL MALPRACTICE AND DEATH OR INJURY OF A "VOLUNTARY RODEO CONTESTANT."

TENNESSEE

Tennessee caps non-economic damages at $750,000, which is raised to $1 million if the plaintiff suffers catastrophic injury. Tenn. Code Ann. § 29-39-102. The cap is eliminated entirely if the defendant had a specific intent to inflict serious physical injury; intentionally falsified, destroyed, or concealed records of evidence to avoid liability; was under the influence of alcohol, drugs, or any other intoxicant or stimulant; or whose actions result in a felony conviction. *Id.* In general, punitive damages are capped at the greater of two times the amount of compensatory damages or $500,000, and the cap is lifted if there is specific intent to inflict serious physical injury; the defendant intentionally falsified, destroyed, or concealed records of evidence to avoid liability; the defendant was under the influence of alcohol, drugs, or any other intoxicant or stimulant; or the defendant's actions resulted in a felony conviction. Tenn. Code Ann. 29-39-104. Punitive damages are not available in a civil action involving a drug or device if the drug or device conformed to FDA standards or was an over-the-counter drug or device marketed pursuant to federal regulations; was generally recognized as safe and effective and as not being misbranded pursuant to the applicable federal regulations; and satisfied in relevant and material respects each of the conditions contained in the applicable regulations and each of the conditions contained in an applicable monograph. Tenn. Code Ann. § 29-39-104(d)(1). This exemption does not apply if the manufacturer withheld or misrepresented material information relevant to the harm the claimant allegedly suffered. Tenn. Code Ann. § 29-39-104(d)(2). The collateral source rule generally applies but has been abrogated in the medical malpractice context. *See Dedmon v. Steelman*, 535 S.W.3d 431 (Tenn. 2017).

TEXAS

In Texas, there is no general cap on compensatory damages, but there are exceptions for medical malpractice actions. Punitive damages are capped at either two times the amount of compensatory damages plus the amount equal to the amount of non-economic damages found by a jury not to exceed $750,000, or $200,000, whichever is greater. Tex. Civ. Prac. & Remedies Code § 41.008. This cap does not apply in the context of commission of certain crimes. *Id.* The collateral source rule applies, but the plaintiff cannot recover more than the actual expenses. Evidence can be introduced as to what the recoverable expenses actually were, and that evidence is still governed by the collateral source rule. *Haygood v. De Escobedo*, 356 S.W.3d 390 (Tex. 2011).

UTAH

There is no general cap on compensatory damages, but there is a $450,000 cap on non-economic damages in medical malpractice actions (though not in wrongful death actions). Utah Code Ann. § 78B-3-410; *Smith v. U.S.*, 356 P.3d 1249 (Utah 2015). When punitive damages are awarded, the first $50,000 goes to the injured party, and any amount awarded in excess of that amount is split evenly between the injured party and the state. Utah Code Ann. § 78B-2-201(3)(a). The collateral source rule applies generally in Utah, but evidence of collateral source payments is admissible in medical malpractice actions, except where a right of subrogation exists. Utah Code Ann. § 78B-3-405.

VERMONT

Vermont does not have a cap on either compensatory or punitive damages. The collateral source rule applies. *See Windsor School Dist. v. State*, 956 A.2d 528 (Vt. 2008).

VIRGINIA

There is no general cap on compensatory damages in Virginia, though a statutory scheme exists to cap on such damages in medical malpractice actions. *See* Va. Code Ann. § 8.01-581.15. Punitive damages are capped at $350,000. Va. Code Ann. § 8.01-38.1. The collateral source rule applies in Virginia. *Acuar v. Letourneau*, 531 S.E.2d 316 (Va. 2000).

WASHINGTON

The Washington Supreme Court has deemed caps on non-economic damages to be unconstitutional. *See Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). Punitive damages are expressly prohibited unless authorized by statute. *Algaier v. Bank of America, N.A.*, 2015 WL 12867009, *3 (E.D. Wash. July 23, 2015). There is no statutory exception for claims under the Washington Products Liability Act. *Bryant v. Wyeth*, 879 F. Supp. 2d 1214, n. 5 (W.D. Wash. 2012) ("Washington's prohibition on punitive damages applies to the WPLA claims."). The collateral source rule applies. *Johnson v. Weyerhaeuser Co.*, 953 P.2d 800 (Wash. 1998).

WEST VIRGINIA

There is no general cap on compensatory damages, but a cap exists in the medical malpractice context. *See* W. Va. Code § 55-7B-8. There is similarly no cap on punitive damages. In West Virginia, trial courts deduct collateral source payments from the jury's verdict per statute. W. Va. Code § 55-7B-9a.

WISCONSIN

Wisconsin has no general cap on compensatory damages, but as with many other states, the

legislature created a cap in the context of medical malpractice actions. Wis. Stat. Ann. § 893.55. Punitive damages are capped at two times compensatory damages or $200,000, whichever is greater. Wis. Stat. Ann. § 895.043. This cap does not apply in the DUI context. The collateral source rule applies. *See Letinger v. DBart*, Inc., 736 N.W.2d 1 (Wis. 2007).

WYOMING

Wyoming does not have a cap on either compensatory or punitive damages, and the collateral source rule applies, but only in tort cases. *Miller v. Campbell Co.*, 901 P.2d 1107 (Wy. 1995).

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SKY'S THE LIMIT? A 50-STATE SURVEY OF DAMAGES CAPS AND THE COLLATERAL SOURCE RULE

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