2021 Civil Justice Update

by Mark A. Behrens

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The Federalist Society

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This paper reviews key civil justice issues and changes in 2021. Part I focuses on broad trends. Part II discusses federal legislation proposed in 2021. Part III summarizes liability law changes at the state level in 2021. Part IV highlights key cases in 2021 that addressed the constitutionality of civil justice reforms.

I. Legal Reform Trends in 2021

A. Defense-Oriented Issues

1. COVID-19 Liability Reform

Legislation to address COVID-19-related lawsuits against health care providers and health care facilities, personal protective equipment (PPE) manufacturers, and other businesses dominated the civil justice landscape in 2021, as it did in 2020.

Now, approximately two-thirds of the states have limited COVID-19-related tort claims.[1] Eighteen states took action in 2021: Alabama, Alaska, Arizona, Arkansas, Florida, Indiana, Kentucky, Missouri, Montana, Nebraska, New Jersey, North Dakota, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin.

Nearly every state that enacted COVID-19-related tort legislation raised the standard for medical liability cases above ordinary negligence. State legislation varies in how it defines eligibility for liability protection (health care professionals, facilities, or both), the scope of conduct covered (directly treating COVID-19 patients or other care impacted by a lack of resources due to the pandemic), exceptions for coverage (such as whether nursing homes are included), and the conduct subject to liability (such as gross negligence).

Almost half of the states have limited the risk of liability for manufacturers, sellers, and donors of PPE and other products in response to the pandemic.[2] These laws vary significantly from state to state and may extend to products or parties beyond those covered by the already-robust liability protections of the federal Public Readiness and Emergency Preparedness (PREP) Act.[3]

A majority of states that have enacted COVID-19-related liability reforms have also limited liability for transmission-related claims.[4] States have generally taken three approaches. Some states require a showing that a business or other entity recklessly disregarded a known risk that a person would be exposed to COVID-19, that the entity was grossly negligent, or, in four states, that the exposure resulted from an intentional or malicious act, or willful misconduct.[5] Other states provide a safe harbor from liability when a business or other entity operates in compliance with executive orders and public health guidance. Several states have adopted a hybrid approach. Some of these laws include heightened evidentiary requirements, such as in Florida and Texas. A 2021 Missouri law—similar to legislation enacted last year in Georgia[6]—creates a rebuttable presumption that a business is not liable for transmission-related claims if it posts a sign warning entrants of the inherent risk of COVID-19 exposure.[7]

State laws vary as to whether they apply retroactively to the beginning of the pandemic and whether they sunset, and, if so, whether the protections expire on a particular date or at the end of the state's emergency declaration.

2. Asbestos Over-Naming Reform

State laws seeking to limit "over-naming" in asbestos cases are gaining traction. Following a bankruptcy wave in the early 2000s that removed virtually the entire asbestos industry from the tort system, asbestos litigation became an "endless search for a solvent bystander."[8] Asbestos plaintiffs name over sixty defendants in an average complaint, and as many as 300 defendants in some cases.[9] The pursuit of solvent defendants by plaintiffs' lawyers nets many innocent companies in the process. Consulting firm KCIC has said, "many defendants are named frequently with no proof of exposure."[10]

High dismissal rates confirm the over-naming problem. For example, a sample of fifty Missouri asbestos cases filed from 2016-2020 revealed that 201 defendants were dismissed from *every* case in which they were named.[11] A 2021 report discussing asbestos litigation in West Virginia revealed that upwards of seventy percent of the defendants named in

1 The American Tort Reform Association tracks enacted state COVID-19 liability reform laws at https://www.atra.org/covid-19-resources/; *see also* Kate Miceli, *Workers' Waning Chances*, TRIAL, Sept. 2021, at 44.

2 Alabama, Indiana, Missouri, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Texas, and West Virginia enacted product liability protections in 2021, joining Alaska, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Wisconsin.

3 42 U.S.C. 247d-6d.

4 States that enacted liability protection for COVID-19 exposure claims in 2021 include Alabama, Alaska, Arizona, Arkansas, Florida, Indiana, Kentucky, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. They joined Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. Arkansas provided premises liability protection in 2020 through an executive order.

5 Mississippi, North Dakota, South Dakota, and West Virginia require evidence of intentional or malicious conduct in COVID-19 exposure claims. *See* Miss. S.B. 3049 (2020); N.D. H.B. 1175 (2021); S.D. H.B. 1046 (2021); W. Va. S.B. 277 (2021).

6 Ga. S.B. 359 (2020), *available at* http://www.legis.ga.gov/legislation/en-US/Display/20192020/SB/359.

7 Mo. S.B. 51 and S.B. 42 (2021), *available at* https://www.senate.mo.gov/21info/pdf-bill/tat/SB51.pdf.

8 Richard Scruggs & Victor Schwartz, *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 1, 5.

9 Mark Behrens & Christopher Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform*, 36 Mealey's Litig. Rep.: Asbestos, Mar. 24, 2021, at 1.

10 Lauren Osterndorf, *Looking at Asbestos Litigation Complaint Naming Patterns*, KCIC, Feb. 26, 2018, *available at* https://www.kcic.com/trending/feed/looking-at-asbestos-litigation-complaint-naming-patterns/.

11 Behrens & Appel, *supra* note 9, at 2.

some asbestos lawsuits were dismissed without payment or a finding of liability.[12] A 2020 Ohio study found that as many as twenty percent of the asbestos defendants in a recent year "were voluntarily dismissed after enduring at least two years of expensive litigation."[13]

Litigation costs start on day one for defendants that are sued without proof of exposure, and may continue for years, costing thousands of dollars, until dismissal is obtained. For example, in Madison County, Illinois, "one company has been sued by the same law firm over 400 times"—incurring more than $720,000 in defense costs—even though there were actual allegations against the company in only four cases.[14] Improper naming of asbestos defendants has also contributed to recent bankruptcies.[15]

Iowa passed a first-of-its-kind law in 2020 to help ensure that there is an evidentiary basis for each claim against each defendant named in an asbestos action.[16] The Iowa law requires asbestos plaintiffs to provide a sworn information form with the complaint that includes detailed information and supporting documentation as to the plaintiff's exposures and their connection to each defendant. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures. In 2021, West Virginia, North Dakota, and Tennessee enacted legislation based on the Iowa law.

B. Plaintiff-Oriented Issues

1. Statutes of Limitations for Childhood Sexual Abuse Claims

Victims' advocates and plaintiffs' lawyers continue to seek legislation that extends or eliminates statutes of limitations for childhood sexual abuse claims and revives time-barred claims. After a lull in activity in 2020 due to lawmakers' focus on COVID-19 and abbreviated legislative sessions, several states enacted legislation in 2021: Arkansas, Colorado, Kentucky, Louisiana, Maine, Nevada, and North Carolina. This trend is likely to continue and may expand to claims of sexual abuse against an adult or *physical* (nonsexual) child abuse. For example, Vermont retroactively eliminated the statute of limitations for civil claims alleging injuries from childhood physical abuse, extending legislation enacted in 2019 for childhood sexual abuse claims.[17]

II. 2020 Civil Justice Reforms – Federal

A. Congress

1. Pre-Dispute Arbitration Agreements

Barring or restricting the use of pre-dispute arbitration agreements has long been a top priority for the American Association for Justice (AAJ).[18] A progressive think tank has estimated that more than half of the country's private sector nonunion employees (some sixty million workers) are subject to binding arbitration procedures, with nearly twenty-five million American workers (twenty-three percent of the private sector nonunion workforce) subject to class action waivers.[19] The AAJ-supported Forced Arbitration Injustice Repeal (FAIR) Act would "prohibit mandatory pre-dispute arbitration agreements and class action waivers in employment, consumer, antitrust, and civil rights disputes."[20] The FAIR Act's failure to gain traction has led the AAJ to simultaneously pursue issue-specific bills to abolish pre-dispute arbitration agreements "in cases involving service-members, sexual assault and harassment, and nursing homes."[21]

B. Federal Court Rules Amendments

The federal judiciary's Advisory Committee on Evidence Rules has published proposed amendments to several of the Federal Rules of Evidence. Proposed changes to Rule 702, which concerns expert testimony, will attract the most attention. One amendment clarifies that satisfaction of the rule's admissibility requirement must be established by a preponderance of the evidence.[22] Another amendment addresses "overstatement" by experts.

Current Rule 702 (which has been in effect since 2000) does not explicitly include a preponderance standard, but the

12 *Id.* at 3.

13 Laura Hong & Mary Margaret Gay, *Over-naming in Ohio Asbestos Litigation: A Legislative Solution is Needed*, IADC Civil Justice Response and Toxic and Hazardous Substances Litigation Joint Committee Newsletter, Dec. 2020, at 5.

14 James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, 32 Mealey's Litig. Rep.: Asbestos, Jan. 24. 2018, at 22; Behrens & Appel, *supra* note 9, at 2.

15 For example, in 2020, the holding company for the legacy asbestos liabilities of CertainTeed said that over half of the "claims filed against [CertainTeed] after 2001 were dismissed—usually because the plaintiff could provide no evidence of exposure to a [CertainTeed] asbestos containing product." According to ON Marine, another company that filed bankruptcy in 2020, 95% of the over 182,000 asbestos claims filed against it since 1983 were dismissed without payment to a plaintiff. Behrens & Appel, *supra* note 9, at 4.

16 *See* Iowa S.F. 2337 (2020) (codified at Iowa Code § 686B.3).

17 Vt. S. 99 (2021), *available at* https://legislature.vermont.gov/bill/status/2022/S.99.

18 *See* Am. Ass'n for Justice, *Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities* (June 2021), *available at* https://www.justice.org/resources/research/forced-arbitration-hurts-women-and-minorities; Am. Ass'n for Justice *The Truth About Forced Arbitration* (Sept. 2019), *available at* https://www.justice.org/sites/default/files/file-uploads/Forced%20Arbitration%20Report%202019_final.pdf.

19 *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. 1-2 (Sept. 27, 2017).

20 Benjamin Goldstein, *Congress Considers Ban on Mandatory Predispute Arbitration and Class Action Waiver*, ABA Labor & Employment L. Newsletter, June 2, 2021, *available at* https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/winter-spring-2021-issue/congress-considers-ban/. *See* H.R. 963, 117th Cong. (2021), *available at* https://www.congress.gov/bill/117th-congress/house-bill/963; S.505, 117th Cong. (2021), *available at* https://www.congress.gov/bill/117th-congress/senate-bill/505/text. The FAIR Act passed out of the U.S. House of Representatives in 2019.

21 Navan Ward, Jr., *President's Page*, TRIAL, Sept. 2021, at 6.

22 Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendment to Federal Rule of

Committee Notes accompanying the 2000 amendment state that "the admissibility of all expert testimony is governed by the principles of Rule 104(a)," under which "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[23] According to the Advisory Committee, "many courts" incorrectly apply Rules 702 and 104(a) by holding that "the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility."[24] To fix this problem and address the "overstatement" issue, the proposed amendments to Rule 702 state:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent has demonstrated by a preponderance of the evidence that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[25]

A proposed change to Federal Rule of Evidence 106 would "make unrecorded statements subject to the completing statement rule (requiring that a person's entire statement be admissible—not just the part that a particular party finds helpful), and it would make completing statements admissible over a hearsay objection."[26] A proposed change to Federal Rule of Evidence 615 would clarify that, at a party's request, a court may exclude a witness from the courtroom so the witness cannot hear the testimony of others. The amendment would also allow courts to take measures to prevent the disclosure of trial testimony to excluded witnesses and directly prohibit excluded witnesses from trying to access trial testimony.[27]

The Advisory Committee on Civil Rules has proposed a new Rule 87 to the Federal Rules of Civil Procedure to revise requirements for service of process and extend deadlines to file certain motions and appeals if the Judicial Conference declares a Civil Rules emergency based on a determination that "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."[28]

Comments on the proposed amendments must be submitted electronically not later than February 16, 2022.[29] The Advisory Committee on Evidence Rules will hold a public hearing conducted virtually on January 21, 2022. The Advisory Committee on Civil Rules will hold public hearings conducted virtually on January 6, 2022, and February 4, 2022. Individuals wishing to present testimony must notify the office of Rules Committee Staff at least thirty days before the scheduled hearing.[30]

A Discovery Subcommittee of the Advisory Committee on Civil Rules received comments on whether to amend Federal Rule of Civil Procedure 26(b)(5)(A) regarding privilege logs.[31] The Advisory Committee asked for comments in response to a suggestion for rule changes to address difficulties in complying with the rule in some cases. According to the Advisory Committee, "No decision has been made about whether any rule change should be formally considered, and the eventual conclusion may be that no rule change is needed."[32]

III. 2021 Civil Justice Reforms – States

Alabama

Alabama enacted COVID-19 liability legislation.[33] The law provides that a covered entity (business, health care provider, educational entity, church, government entity, cultural institution, or its agent) is not liable in a COVID-19-related "health emergency claim" unless the plaintiff proves by clear and convincing evidence that the entity acted with wanton, reckless,

Evidence 702, Committee Note (Aug. 6, 2021), *available at* https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

23 Fed. R. Evid. 702, Committee Notes—2000 Amendment.

24 Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendment to Federal Rule of Evidence 702, Committee Note (Aug. 6, 2021).

25 *Id.*

26 Susan Steinman, *On the Hill: Rules Changes Ahead*, TRIAL, Sept. 2021, at 64; *see also* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendment to Federal Rule of Evidence, Rule 106 (Aug. 6, 2021), *available at* https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

27 Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendment to Federal Rule of Evidence 615 (Aug. 6, 2021).

28 Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Amendment to Federal Rule of Civil Procedure 87 (Aug. 6, 2021), *available at* https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

29 Instructions for submitting comments are posted at http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

30 Notice shall be sent to the office of Rules Committee Staff by email addressed to RulesCommittee_Secretary@ao.uscourts.gov.

31 Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Invitation for Comment on Privilege Log Practice (2021), *available at* https://www.uscourts.gov/sites/default/files/invitation_for_comment_on_privilege_log_practice_0.pdf.

32 *Id.* at 1.

33 Ala. S.B. 30 (2021), *available at* https://legiscan.com/AL/text/SB30/2021.

willful, or intentional misconduct. Prevailing plaintiffs without serious injuries are limited to economic damages and may not recover noneconomic or punitive damages.[34] In addition, a health care provider is not liable for an injury caused by an act that resulted from or was in response to the pandemic. Further, a covered entity is not liable for negligence, premises liability, or any non-wanton, non-willful, or non-intentional cause of action unless the plaintiff shows by clear and convincing evidence that the entity did not reasonably attempt to comply with the public health guidance in effect at the time of the exposure. The law sunsets on December 31, 2021, or one year after a declared health emergency relating to COVID-19 expires, whichever is later.

Alaska

Alaska enacted COVID-19 liability legislation.[35] Businesses and their employees are immune from COVID-19 transmission-related actions if the business operates in substantial compliance with federal, state, and municipal laws and health mandates in effect at the time of the exposure and the exposure does not result from gross negligence, recklessness, or intentional misconduct.

Arizona

Arizona enacted liability legislation related to COVID-19 and other declared public health emergencies.[36] In a public health state of emergency, a health care professional or health care institution that acts in good faith is not liable for an injury that is caused by the health care professional's or health care institution's acts in support of the state's response to a state of emergency unless it is proven by clear and convincing evidence that the professional or institution engaged in willful misconduct or gross negligence. The liability protection applies to delaying or canceling a non-urgent or elective procedure, providing nursing care, altering a patient's treatment in response to a governmental directive or guideline, and actions due to lack of staffing, facilities, equipment, supplies, or other resources that are attributable to the state of emergency. A health care professional or health care institution is presumed to have acted in good faith if the professional or institution relied on or reasonably attempted to comply with published guidance by a federal or state agency related to the pandemic.

Arizona also passed a version of the federal Protection of Lawful Commerce in Arms Act to bar lawsuits against manufacturers or sellers of firearms or ammunition or a related trade association for damages resulting from the criminal or unlawful misuse of a firearm or ammunition.[37]

Arkansas

Arkansas codified COVID-19 liability protections provided by a 2020 Executive Order with a sunset date of May 1, 2023.[38] Businesses are immune from COVID-19 transmission-related actions except for willful, reckless, or intentional misconduct. It is presumed that a business has not engaged in such conduct if it substantially complied with health and safety directives or guidelines issued by the Governor, the Secretary of the Department of Health, the Centers for Disease Control and Prevention, and the Centers for Medicare & Medicaid Services concerning COVID-19, or if it acted in good faith while attempting to comply with health and safety directives or guidelines issued by the Governor or the Secretary concerning COVID-19.

Another new law provides that health care providers are considered "emergency responders" when providing health care services that are directed at the prevention, treatment, mitigation, or cure of COVID-19 or when performing other emergency management functions related to COVID-19 within the scope of the person's licensure.[39] As emergency responders, only health care providers that engage in willful misconduct, gross negligence, or bad faith are subject to liability. In addition, a health care provider is immune from liability for a good faith effort regarding the diagnosis, treatment, cure, mitigation, or prevention of COVID-19. The immunity does not apply to willful, reckless, or intentional misconduct. Finally, a health care provider is immune from liability for using any prescription drug or device to treat a COVID-19 patient if the prescription is within the scope of the health care provider's license, the patient is informed of the known positive and negative outcomes of the prescription drug or device, and the provider documents the patient's informed consent.

In addition, Arkansas adopted a statute of limitations for civil childhood sexual abuse claims.[40] Previously, the claims were subject to the general three-year statute of limitations for tort claims. Now, childhood sexual abuse claims may be filed until the plaintiff reaches age fifty-five. Plaintiffs are authorized to file previously time-barred claims during a two-year window that began six months after enactment.

California

California dramatically expanded damages in survival cases by permitting damages for a decedent's pain, suffering, or disfigurement to be recovered by a decedent's personal representative or successor in interest if the action was granted a specified preference before January 1, 2022, or is filed on or after

34 Punitive damages are allowed for COVID-19-related wrongful death claims, reflecting Alabama's unique wrongful death law.

35 Alaska H.B. 76 (2021), *available at* http://www.akleg.gov/PDF/32/Bills/HB0076Z.PDF.

36 Ariz. S.B. 1377 (2021), *available at* https://legiscan.com/AZ/text/SB1377/id/2359519/Arizona-2021-SB1377-Chaptered.html.

37 Ariz. S.B. 1382 (2021), *available at* https://legiscan.com/AZ/bill/SB1382/2021.

38 Ark. H.B. 1521 (2021), *available at* https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FHB1521.pdf (codifying Ark. Exec. Order 20-34 (June 15, 2020), *available at* https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-34.pdf).

39 Ark. H.B. 1487 (2021), *available at* https://www.arkleg.state.ar.us/Acts/FTPDocument?%20path=%2FACTS%2F2021R%2FPublic%2F&file=559.pdf&ddBienniumSession=2021%2F2021R.

40 Ark. S.B. 676 (2021), *available at* https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills%2F2021R%2FPublic%2FSB676.pdf.

January 1, 2022, and before January 1, 2026.[41] A plaintiff who recovers damages for pain, suffering, or disfigurement between the specified dates must provide the Judicial Council with a copy of the judgment, consent judgment, or court-approved settlement agreement entitling the plaintiff to the damages and a cover sheet detailing the date the action was filed, the date of the final disposition of the action, and the amount and type of damages awarded, including economic damages and damages for pain, suffering, or disfigurement. On or before January 1, 2025, the Judicial Council must submit a report to the legislature detailing the information received for all judgments, consent judgments, or court-approved settlement agreements rendered from January 1, 2022, to July 31, 2024.

Colorado

Colorado enacted legislation to overturn a recent Colorado Supreme Court decision holding that when an employer admits liability for the tortious actions of its employee, the plaintiff cannot assert direct negligence claims against the employer arising out of the same incident.[42] Now, a plaintiff may bring such claims against an employer or other principal that admits liability for the acts of its agent.[43]

Colorado also enacted legislation to prevent disclosure of a personal injury plaintiff's use of medical funding known as a medical lien.[44] A Colorado-based national medical lien company lobbied for the law "after judges increasingly were allowing insurers and their defense teams to present evidence of the difference between what the lien company was trying to collect and what was paid to the patient's medical providers."[45] The new law prevents medical lien companies from collecting from a plaintiff who is unsuccessful in a lawsuit, and bars the companies from sending the bill to a debt collector.

The Colorado Privacy Act, which takes effect on July 31, 2023, requires businesses to give consumers the ability to access, correct, delete, and opt out of the sale of their personal information or processing of the data for targeting advertising and profiling purposes.[46] The Privacy Act also requires companies to obtain consumer consent before processing their sensitive personal data. The state attorney general and district attorneys will enforce the law; there is no private right of action to allow consumers to sue for alleged violations.

Colorado also addressed the statute of limitations for childhood sexual abuse claims. One law establishes a cause of action that may be filed at any time against a person who committed sexual misconduct or an organization that knew or should have known that a person or youth-related activity or program posed a risk of sexual misconduct against a minor.[47] The statutory action is in addition to other actions available by statute or common law before or after January 1, 2022. The law includes a three-year window allowing time-barred claims that opens on January 1, 2022, but does not apply to conduct prior to 1960. Damages for revived claims are limited to $350,000 against public entities and are capped at either $500,000 or $1 million against private entities, depending on whether (1) there is clear and convincing evidence that the defendant failed to take remedial action against a person the defendant knew or should have known posed a risk of sexual misconduct to a minor and (2) the application of the $500,000 limit would be unfair. Another law eliminates the statute of limitations on child sexual abuse claims prospectively, applying to actions that accrue on or after January 1, 2022.[48]

Florida

Florida enacted COVID-19 liability legislation.[49] Civil actions alleging a COVID-19-related claim must be pled with particularity and include an affidavit signed by a Florida-licensed physician attesting to the physician's belief, within a reasonable degree of medical certainty, that the plaintiff's COVID-19-related damages resulted from the defendant's acts or omissions. Businesses are immune from liability if they made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued. If a court determines that the defendant did not make a good faith effort, the plaintiff may proceed with the action, but absent at least gross negligence proven by clear and convincing evidence, the defendant is not liable in the COVID-19-related claim. The law sets a one-year statute of limitations for COVID-19-related civil actions. A plaintiff whose COVID-19-related cause of action accrued before the law's effective date must commence the action within one year of the effective date.

Florida's Right to Farm law was updated to provide that a farm is not liable for nuisance unless the plaintiff proves by clear and convincing evidence that the farm failed to comply with state or federal environmental laws, regulations, or best management practices, and that the property allegedly affected by the nuisance is located within one half-mile of the source of

41 Cal. S.B. 447 (2021), *available at* https://legiscan.com/CA/text/SB447/id/2430276; *see generally* Mark Behrens & Mayela Montenegro-Urch, *Calif. Survival Damages Bill Would Cost Cos., Consumers*, Law360, June 7, 2021, *available at* https://www.law360.com/articles/1391780/calif-survival-damages-bill-would-cost-cos-consumers.

42 Ferrer v. Okbamicael, 390 P.3d 836 (Colo. 2017).

43 Colo. H.B. 1188 (2021), *available at* https://leg.colorado.gov/bills/hb21-1188.

44 Colo. H.B. 1300 (2021), *available at* https://leg.colorado.gov/sites/default/files/2021a_1300_signed.pdf.

45 Diana Novak Jones, *Personal Injury Financiers Get Boost With New Colorado Law*, Reuters, Oct. 22, 2021, *available at* https://www.reuters.com/legal/litigation/personal-injury-financiers-get-boost-with-new-colorado-law-2021-10-22/.

46 Colo. S.B. 190 (2021), *available at* https://leg.colorado.gov/sites/default/files/2021a_190_signed.pdf.

47 Colo. S.B. 88 (2021), *available at* https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_088_rer.pdf.

48 Colo. S.B. 73 (2021), *available at* https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_073_01.pdf.

49 Fla. S.B. 72 (2021), *available at* https://www.flsenate.gov/Session/Bill/2021/72/BillText/er/PDF.

the alleged nuisance.[50] Damages for a nuisance emanating from a farm operation are limited to the reduction in the fair market value of the plaintiff's property caused by the nuisance. Punitive damages may not be awarded unless the alleged nuisance is based on substantially the same conduct that was subject to a civil enforcement judgment or criminal conviction that occurred within three years of the first action forming the basis of the nuisance action. A plaintiff who loses a nuisance action against a farm operation that has been in existence for at least one year before the date the action was filed and that conforms with generally accepted agricultural and management practices or state and federal environmental laws is liable to the farm for all costs, fees, and expenses incurred in defense of the action.

In addition, Florida now forbids roofing contractors from soliciting homeowners to file insurance claims, such as after a hurricane, and the time for homeowners to file roofing claims has been shortened from three years to two.[51] The law also requires pre-suit notice prior to the filing of a suit under a property insurance policy.

The Florida Supreme Court finalized an amendment to largely replace the text of Florida Rule of Civil Procedure 1.510—the state's summary judgment rule—with the text of Federal Rule of Civil Procedure 56.[52] However, while federal Rule 56(a) says that the court *should* state on the record its reasons for granting or denying a summary judgment motion, Florida's new rule 1.510(a) says that the court *shall* do so. The new Florida rule, also unlike its federal counterpart, requires the movant to file its summary judgment motion at least forty days before the hearing. The new rule applies to all summary judgment motions decided after May 1, 2021.

The Florida Supreme Court, on its own motion, also finalized an amendment to Florida Rule of Civil Procedure 1.280(h) to codify the "apex doctrine" and protect current and former corporate officers from abusive discovery.[53] The change was effective immediately and applies to pending cases. Previously, the apex doctrine was clearly established in Florida for high-ranking government officials. New Rule 1.280(h) extends the doctrine to the private sphere. The Florida Supreme Court explained, "We see no good reason to withhold from private officers the same protection that Florida courts have long afforded government officers."[54]

A special committee created by the Florida Supreme Court released a lengthy report recommending that the state adopt a regulatory sandbox similar to the one adopted in Utah in 2020 to relax some restrictions on non-lawyer ownership and the delivery of legal services.[55] A law practice innovation laboratory program would permit non-lawyers to have a non-controlling equity interest in law firms with restrictions and eliminate prohibitions on fee-sharing between lawyers and other entities. A pilot program would allow registered paralegals to provide added assistance in areas including document filing.

Georgia

The State Bar of Georgia issued a formal advisory opinion stating that a lawyer may communicate with a former employee of an organization that is represented by counsel without obtaining the consent of the organization's counsel, provided that the lawyer fully discloses to the former employee before initiating the communication (1) the identity of the lawyer's client and the nature of that client's interest in relation to the organization (i.e., the former employer), and (2) the reason for the communication and the essence of the information sought. After making these disclosures, the lawyer must obtain the former employee's consent to the communication.[56] In communicating with the former employee, the lawyer must not utilize methods of obtaining information that would violate the legal rights of the former employee or the represented organization, such as inquiring into information that may be protected by attorney-client privilege or other evidentiary privilege. Finally, if the lawyer determines that the former employee is individually represented by counsel in the matter, the lawyer may not communicate with the former employee, unless authorized to do so, without obtaining the former employee's counsel's consent.

Hawaii

Effective January 1, 2022, the Hawaii Supreme Court made significant amendments to the Hawaii Rules of Civil Procedure governing pretrial conferences, disclosures in discovery, and expert litigation practice.[57]

Idaho

Idaho's Coronavirus Limited Immunity Act of 2020, which was set to expire on July 1, 2021, was extended to July 1, 2022.[58] The law provides that a person is immune from civil

50 Fla. S.B. 88 (2021), *available at* https://www.flsenate.gov/Session/Bill/2021/88/BillText/er/PDF.

51 Fla. S.B. 76 (2021), *available at* http://laws.flrules.org/2021/77.

52 *In re* Amendments to Florida Civil Rule of Procedure 1.510, 317 So. 3d 72 (Fla. 2021).

53 *In re* Amendment to Florida Civil Rule of Procedure 1.280, 324 So. 3d 459 (Fla. 2021).

54 *Id.* at *3.

55 John Stewart et al., Final Report of the Special Committee to Improve the Delivery of Legal Services (June 28, 2021), *available at* https://www-media.floridabar.org/uploads/2021/06/FINAL-REPORT-OF-THE-SPECIAL-COMMITTEE-TO-IMPROVE-THE-DELIVERY-OF-LEGAL-SERVICES.pdf.

56 Ga. State Bar, Formal Advisory Opinion No. 20-1 (Redrafted Version of Formal Advisory Opinion No. 94-3) (Mar. 25, 2021), *available at* https://www.gabar.org/newsandpublications/announcement/upload/FAO-No-20-1.pdf.

57 In the Matter of the Hawai'i Rules of Civil Procedure, SCRU-11-0000051 (Haw. Oct. 8, 2020), *available at* https://www.txcourts.gov/media/1450176/209153.pdf; In the Matter of the Hawai'i Rules of Civil Procedure, SCRU-11-0000051 (Haw. Mar. 30, 2021), *available at* https://www.courts.state.hi.us/wp-content/uploads/2021/03/2021_hrcp16_16.1_26_29am_ada.pdf.

58 Idaho H.B. 149 (2021), *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0149.pdf; *see also* Idaho H.B. 6 (2020 Spec. Sess.), *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020spcl/legislation/H0006.pdf.

liability for COVID-19-related damages or injury except for acts or omissions that constitute an intentional tort or willful or reckless misconduct.

Iowa

Iowa enacted a version of the federal Protection of Lawful Commerce in Arms Act to bar lawsuits against manufacturers or sellers of firearms, firearm accessories, or ammunition or related trade associations for damages resulting from the criminal or unlawful misuse of a firearm, firearm accessory, or ammunition by a third party.[59]

Illinois

Illinois set prejudgment interest at six percent with interest accruing from the date an action is filed.[60] Prejudgment interest does not apply to punitive damages, sanctions, statutory attorney fees, or statutory costs. If a judgment is greater than the amount of the highest written offer made by the defendant within twelve months after the law's effective date or the filing of action, whichever is later, and not accepted by the plaintiff within ninety days from the date of the offer or rejected by the plaintiff, interest only applies to the difference between the judgment and the highest written settlement. If the judgment is equal to or less than the amount of the highest written offer within twelve months after the law's effective date or the action was filed, and not accepted by the plaintiff within ninety days from the date of the offer or rejected by the plaintiff, then no prejudgment interest shall be added to the judgment. Prejudgment interest shall accrue for no more than five years. Prejudgment interest will apply to injuries or deaths that occurred before the effective date of the legislation with interest accruing when the action is filed or the effective date of the legislation, whichever is later.

Illinois also broke up the 20th Judicial Circuit Court—a circuit comprised of five counties east of St. Louis.[61] Proponents claim that the move will help address the heavy caseload within the circuit's St. Clair County Courthouse. Opponents assert that the end of session change preserves St. Clair County as a friendly forum for plaintiffs' lawyers given that the rest of the circuit surrounding St. Clair County has been trending more conservative and business friendly.[62]

Indiana

Indiana addressed deceptive lead generation practices targeting medical devices and pharmaceutical products.[63] The new law prohibits "commercial communications" for legal services from opening with "sensationalized warnings or alerts" that lead consumers to believe they are watching a government-sanctioned medical alert, health alert, consumer alert, or public service announcement. It also prohibits advertising that is likely to cause consumers to fail to use or to discontinue medications or remove a medical device without appropriate independent medical advice. Advertisements must disclose the identity of the sponsor, whether a case will be referred to another attorney or law firm, and who will represent consumers responding to the ad. It is now a deceptive act to misrepresent the risks associated with a drug or medical device, leave consumers with the false impression that the risks of the device or drug exceed its benefits, or to leave consumers with the false impression that the FDA has recalled the product. Lead generation claims shall be substantiated by competent and reliable scientific or medical evidence or backed by a final adjudication on the merits, including appeals. The law, which took effect on July 1, may be enforced by the state attorney general, by a manufacturer or seller of the medical device or drug, or by a consumer who views the advertisement. An action may be brought against any combination of persons that authorize, finance, sponsor, participate in, or otherwise benefit from a deceptive act, except attorneys licensed to practice in Indiana. In such an action, a court may impose an injunction, order a person engaged in deceptive lead generation practices to reimburse or provide other restitution to aggrieved consumers, and require a violator to pay court costs and reasonable litigation fees.

Indiana also enacted COVID-19 liability legislation.[64] An owner or operator of a premises is immune from COVID-19 tort liability while providing services to another person, or during an activity managed, organized, or sponsored by the person, except for gross negligence or willful or wanton misconduct proven by clear and convincing evidence.[65] Designers, manufacturers, distributors, sellers, or donors of a statutorily-defined COVID-19 protective product are immune from COVID-19 tort claims except for gross negligence or willful or wanton misconduct proven by clear and convincing evidence. Class actions are banned for tort damages and contract

59 Iowa H.F. 621 (2021), *available at* https://www.legis.iowa.gov/legislation/BillBook?ba=HF+621&ga=89&utm_medium=email&utm_source=govdelivery.

60 Ill. S.B. 72 (2021), *available at* https://ilga.gov/legislation/publicacts/fulltext.asp?name=102-0006&GA=102&SessionId=110&DocTypeId=SB&DocNum=72&GAID=16&SpecSess=&Session=. *See generally* Jonathan Bilyk, *Pritzker Signs Law Allowing Prejudgment Interest in Personal Injury Cases; Biz Groups Warn of Big Costs*, Cook County Record, May 28, 2021, *available at* https://cookcountyrecord.com/stories/601178318-pritzker-signs-law-allowing-prejudgment-interest-in-personal-injury-cases-biz-groups-warn-of-big-costs. Earlier, Governor J.B. Prizker vetoed other prejudgment interest legislation that passed in the early morning hours of a lame duck session without a public hearing and was strongly opposed by business groups. Ill. H.B. 3360 (2021), *available at* https://www.ilga.gov/legislation/fulltext.asp?DocName=10100HB3360enr&GA=101&SessionId=108&DocTypeId=HB&LegID=119866&DocNum=3360&GAID=15&SpecSess=&Session=; Letter from Gov. JB Pritzker, to Members of the Ill. House of Reps., re Veto of H.B. 3360, Mar. 25, 2021, *available at* https://www2.illinois.gov/IISNews/23009-Veto_Message_-_HB3360.pdf; *see also* Letter from Sherman Joyce, American Tort Reform Ass'n, and John Pastuovic, Ill. Civil Justice League, to Gov. JB Pritzker, Jan, 14, 2021.

61 Ill. S.B. 2406 (2021), *available at* https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=102-0380.

62 Dan McConchie, *New Illinois Law Perpetuates Frivolous Courts*, Crain's Chicago Bus., Aug. 25, 2021.

63 Ind. H.B. 1125, *available at* http://iga.in.gov/legislative/2021/bills/house/1125/.

64 Ind. S.B. 1 (2021), *available at* https://legiscan.com/IN/text/SB0001/2021; Ind. H.B. 1002 (2021), *available at* https:// legiscan.com/IN/text/HB1002/2021.

65 Ind. S.B. 1 (2021), *available at* https://legiscan.com/IN/text/SB0001/2021.

actions arising from COVID-19.[66] In addition, a governmental entity or employee is not liable if a loss results from an act or omission arising from COVID-19 except for gross negligence, willful or wanton misconduct, or intentional misrepresentation. Health care providers are protected from COVID-19 tort claims and professional discipline during periods of disaster emergency after February 29, 2020, and before April 1, 2022, except for gross negligence, willful or wanton misconduct, fraud, or intentional misrepresentation. The law also provides that effective July 1, 2021, a certified emergency medical responder, a certified emergency medical technician, a certified advanced emergency medical technician, or a licensed paramedic who provides emergency medical services is not liable for an act or omission absent gross negligence or willful misconduct.

Kansas

Kansas extended the COVID-19 Response and Reopening for Business Liability Protection Act of 2020[67] to March 31, 2022.[68] The new law also provides that the Act's immunity for health care providers applies to claims arising between March 12, 2020, and March 31, 2022.

Kentucky

Kentucky enacted COVID-19 liability legislation.[69] A premises owner or possessor who follows an executive action to prevent the spread of COVID-19 and invites or permits another person to enter the owner's premises during the declared emergency is not liable in a COVID-19 claim, unless the owner is grossly negligent or engages in wanton, willful, malicious, or intentional misconduct. In addition, essential service providers are not liable for COVID-19 claims during the declared emergency absent gross negligence, or wanton, willful, malicious, or intentional misconduct. There is a one-year statute of limitations for any COVID-19 personal injury claim against a premises owner or possessor or essential service provider.

The new law also reduces the current liability protection provided to state and local emergency management staff from requiring "malice or bad faith" to allowing liability in cases of gross negligence, or wanton, willful, malicious, or intentional misconduct.

The law extends a liability protection from negligence claims available to those who repurpose property for use in sheltering people during an emergency to apply regardless of whether property is used without compensation. Licensed professional engineers receive similar liability protection if an engineer, at the request of a government official, assists at the scene of a declared emergency, disaster, or catastrophe, regardless of whether the person is compensated.

The new law applies retroactively to March 6, 2020. The liability protections for premises owners and essential service providers sunset on December 31, 2023.

Kentucky also extended a ten-year statute of limitations for childhood sexual assault or abuse claims enacted in 2017 to entities that owed a duty of care.[70] Court decisions applied the earlier law only to claims against perpetrators. The amendment applies retroactively to actions accruing before June 29, 2017. Revived claims must be filed within five years of the date on which the applicable statute of limitations expired.

Louisiana

Louisiana eliminated the statute of limitations for civil actions involving sexual abuse of a minor, physical abuse of a minor resulting in permanent impairment or permanent physical injury or scarring, and actions against a person convicted of a crime against a child.[71] The law includes a three-year reviver window to file previously time-barred actions.

The Louisiana Supreme Court amended the state's legal ethics rules governing attorney advertising.[72] The amendments include the creation of a publicly searchable database containing all advertisements and unsolicited written communications filed with the Louisiana State Bar Association. Any legal advertisement discussing past successes must contain a disclaimer such as "Results May Vary." Lawyers may not state or imply that an advertisement has approval from the Louisiana State Bar Association. Governor John Bel Edwards vetoed legislation that sought to provide more robust regulation of legal services advertisements.[73]

Maine

Governor Janet Mills vetoed legislation that would have dramatically increased pre- and post-judgment interest rates in civil cases other than those for small claims and on contracts and notes.[74] Governor Mills also vetoed legislation that would have

66 Ind. H.B. 1002 (2021), *available at* https://legiscan.com/IN/text/HB1002/2021.

67 Kan. H.B. 2016 (2020 Spec. Sess.), *available at* http://kslegislature.net/li_2020s/b2020s/measures/documents/hb2016_01_0000.pdf.

68 Kan. S.B. 283 (2021), *available at* http://kslegislature.net/li_2020s/b2020s/measures/documents/hb2016_01_0000.pdf.

69 Ky. S.B. 5 (2021), *available at* https://legiscan.com/KY/text/SB5/2021.

70 Ky. H.B. 472 (2021), *available at* https://apps.legislature.ky.gov/law/acts/21RS/documents/0089.pdf.

71 La. H.B. 492 (2021), *available at* https://legiscan.com/LA/text/HB492/2021.

72 La. Supreme Ct., Order Amending Art. XVI, R. 7 Series of the Articles of Incorporation of the La. State Bar Ass'n (May 6, 2021), *available at* https://www.lasc.org/press_room/press_releases/2021/2021-14-Order_Amending_LA_Professional_Rules_of_Conduct_Attorney_Advertising_Rules.pdf.

73 La. S.B. 43 (2021), *available at* https://gov.louisiana.gov/assets/docs/2021session/vetoes/CortezLtr20210701VetoSB43.pdf. *See generally* Cary Silverman, *Governor Should Protect Public Health by Signing Misleading Attorney Ad Legislation,* La. Record, June 14, 2021, *available at* https://louisianarecord.com/stories/603360120-governor-should-protect-public-health-by-signing-misleading-attorney-ad-legislation.

74 Me. L.D. 1160 (2021), *available at* http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0838&item=1&snum=130; Letter from Hon. Janet T. Mills to Members of the 130th Legislature re L.D. 1160 (June 25, 2021), *available at* https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/2021-06/LD%201160%20Veto%20Letter.pdf. The vetoed legislation would have provided for prejudgment

allowed "private attorneys general" to bring enforcement actions in the name of the state for violations of certain labor laws.[75] Maine amended a 1999 law that prospectively eliminated the statute of limitations for childhood sexual abuse actions to apply retroactively regardless of whether the previously applicable statute of limitations had expired.[76]

Missouri

Missouri enacted tort relief for businesses facing COVID-19 exposure claims, health care providers in COVID-19-related medical liability actions, and certain COVID-19 product liability defendants.[77] The act's provisions provide a statutory remedy that replaces the common law until the act sunsets after four years.

Businesses and individuals are not liable in COVID-19-related exposure actions unless the plaintiff proves by clear and convincing evidence that the exposure was caused by recklessness or willful misconduct and the exposure caused the plaintiff's injury. Intentional misconduct must be proven in COVID-19 exposure actions against religious organizations. There is a rebuttable presumption of an assumption of risk by a plaintiff in a COVID-19 exposure action when the individual or business posts a clearly visible warning notice advising anyone who enters or engages the services of the business that they are assuming the inherent risks associated with COVID-19 exposure, except for recklessness or willful misconduct. No individual or business shall be liable in a COVID-19 exposure action for the acts of a third party unless the individual or business has an obligation under general common law principles to control the third party or the third party was an agent of the individual or entity. A two-year statute of limitations applies to COVID-19 exposure actions.

Health care providers are not liable in COVID-19-related medical liability actions except for recklessness or willful misconduct. An elective procedure that is delayed for good cause is not considered recklessness or willful misconduct. A one-year statute of limitations applies to COVID-19 medical liability actions absent fraud, intentional concealment, or the presence of a foreign body which has no therapeutic or diagnostic purpose or effect.

Defendants in cases involving products used to combat COVID-19, excluding a vaccine or gene therapy, are not liable in a COVID-19 product liability action if the business does not make the product in its ordinary course of business, the emergency requires the product to be made in a modified manufacturing process that is outside the ordinary course of business, or the use of the product is different from its recommended purpose. A COVID-19 product liability plaintiff must prove by clear and convincing evidence that the injury was caused by recklessness or willful misconduct. A two-year statute of limitations applies to COVID-19 product liability actions absent fraud or intentional concealment. Punitive damages in COVID-19-related actions may not exceed nine times the amount of compensatory damages awarded to a plaintiff.

Missouri also enacted legislation to modify certain arbitration arrangements known as "065 agreements" in reference to a section of the Missouri Code.[78] Arbitration awards for personal injury or death are now unenforceable against an insurer that has not agreed in writing to the arbitration proceeding or agreement. The new law closes "a loophole that allowed the plaintiff's attorneys to skip trial and enter arbitration, shutting insurers out of the conversation entirely while making them liable for the award."[79]

Montana

Montana enacted COVID-19 liability legislation.[80] A premises owner who invites or permits an individual onto a premises is not liable for that person's exposure to COVID-19 unless the premises owner was grossly negligent, engaged in willful and wanton misconduct, or committed an intentional tort. Health care providers are not liable for harm in support of the response to COVID-19 unless the provider acted with gross negligence, engaged in willful and wanton misconduct, or committed an intentional tort. The provision applies to injury or death resulting from diagnosing or treating individuals with a suspected or confirmed case of COVID-19; administering a pharmaceutical for off-label use to treat a patient with a suspected or confirmed case of COVID-19; using medical devices, equipment, or supplies outside of their normal use for the provision of health care; or acts while providing health care to individuals with a condition unrelated to COVID-19 when those acts support the response to COVID-19, such as delaying or canceling non-urgent or elective procedures, providing testing or treatment outside a health care facility, or acts taken because of staffing or equipment shortages due to COVID-19 that render the health care provider unable to deliver the level or manner of care that otherwise would be required in the absence

interest rates of 12% per annum from the date of service of the notice of claim or service of the complaint, whichever is earlier. The bill also would have provided for post-judgment interest at 12% per annum from the date of judgment. Current pre- and post-judgment interest rates are tied to U.S. Treasury bill rates. In addition, the bill would have amended the law governing unfair claims settlement practices by allowing direct claims against third-party liability insurers and treble damages against insurers for violations.

75 Me. L.D. 1711 (2021), *available at* http://www.mainelegislature.org/legis/bills/display_ps.asp?ld=1711&PID=1456&snum=130; Letter from Hon. Janet T. Mills to Members of the 130th Legislature re L.D. 1711 (July 12, 2021), *available at* https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/2021-07/LD%201711%20Veto%20Letter%20Scan.pdf.

76 Me. L.D. 589 (2021), *available at* https://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280078977.

77 Mo. Sen. Sub. No. 2 for Sen. Comm. Sub. for SB. 51 & 42 (2021), *available at* https://www.senate.mo.gov/21info/pdf-bill/perf/SB51.pdf.

78 Mo. H.B. 345 (2021), *available at* https://house.mo.gov/billtracking/bills211/hlrbillspdf/1228S.02T.pdf.

79 Cameron Gerber, *What to Know About 065 Agreements*, Mo. Times, Jan. 18, 2021 (quoting Mo. Rep. Bruce DeGroot), *available at* https://themissouritimes.com/what-to-know-about-065-agreements/.

80 Mont. S.B. 65 (2021), *available at* https://leg.mt.gov/bills/2021/billpdf/SB0065.pdf.

of COVID-19. Manufacturers, distributors, sellers, or donors of household cleaning supplies, PPE, and other qualified products used in response to COVID-19 enjoy liability relief except for gross negligence, willful and wanton misconduct, or an intentional tort. There is also an affirmative defense for anyone who takes reasonable measures consistent with any federal or state statute, regulation, order, or public health guidance related to COVID-19 that was applicable to the person or activity at issue at the time of the alleged harm.

In addition, Montana enacted "phantom damages" reform legislation to prevent compensatory damages awards for medical expenses from including amounts that the plaintiff has not and will not pay for medical care or treatment.[81]

Montana also enacted legislation to provide that landowners owe trespassers no duty of care, except to refrain from willful or wanton misconduct.[82]

Nebraska

Nebraska's COVID-19 Liability Act provides that a person may not bring an action for exposure to COVID-19 if the act alleged to violate a duty of care was in substantial compliance with any federal public health guidance that was applicable to the person, place, or activity at the time of the alleged exposure.[83]

New Jersey

New Jersey barred lawsuits over the spread of COVID-19 at planned real estate developments through the end of 2021 if a warning sign is prominently displayed at the entrances of pools, gyms, clubhouses, or other communal spaces stating:

> ANY PERSON ENTERING THE PREMISES WAIVES ALL CIVIL LIABILITY AGAINST THE PLANNED REAL ESTATE DEVELOPMENT FOR DAMAGES ARISING FROM, OR RELATED TO, AN EXPOSURE TO, OR TRANSMISSION OF, COVID-19 ON THE PREMISES, EXCEPT FOR ACTS OR OMISSIONS CONSTITUTING A CRIME, ACTUAL FRAUD, ACTUAL MALICE, GROSS NEGLIGENCE, RECKLESSNESS, OR WILLFUL MISCONDUCT.[84]

The United States District Court for the District of New Jersey adopted a local civil rule requiring disclosure of third-party litigation funding.[85]

Nevada

Nevada retroactively eliminated the statute of limitations for civil actions against a perpetrator or person convicted of child sexual abuse or sexual exploitation of a child.[86] In addition, a right of action is established against a person or entity that knowingly benefits from participation in a venture involving sexual abuse or sexual exploitation of another person. This provision exempts hotels, motels, or other establishments with more than 175 rooms. Treble damages may be awarded against a person who knowingly participates in, gains a benefit from, or covers up sexual abuse or sexual exploitation.

New Mexico

Following a 2021 New Mexico Supreme Court decision upholding a $600,000 aggregate limit on nonmedical and punitive damages awards in medical malpractice actions,[87] the legislature raised the cap.[88] The new cap is $750,000 for individual physicians and four million for hospitals, which will increase by $500,000 annually to $6 million in 2026, then adjust annually to account for inflation.

New York

New York repealed the Emergency Disaster Treatment Protection Act of 2020, known as "30-D," which provided civil immunity to health care facilities and health care professionals for harms resulting from health care services performed in good faith from the start of Governor Andrew Cuomo's March 7, 2020, COVID-19 emergency declaration through its expiration.[89] The new law does not apply retroactively.

The New York Health and Essential Rights Act (HERO Act) mandates extensive workplace health and safety protections in the event of an airborne infectious disease.[90] In September, Governor Kathy Hochul announced the designation of COVID-19 as an airborne infectious disease under the HERO Act.[91] Among other provisions, the HERO Act provides that, after a thirty-day cure period, workers may sue employers for violations of safety standards, up to $20,000 per violation.

In addition, New York enacted a "first-of-its-kind law that would attempt to sidestep the fundamental legal principle that a manufacturer is not liable when a criminal misuses its product to kill or injure someone."[92] Gun companies must

81 Mont. S.B. 251 (2021), *available at* https://legiscan.com/MT/text/SB251/id/2378687/Montana-2021-SB251-Enrolled.pdf.

82 Mont. S.B. 338 (2021), *available at* https://legiscan.com/MT/text/SB338/2021.

83 N.D. L.B. 139 (2021), *available at* https://nebraskalegislature.gov/FloorDocs/107/PDF/Slip/LB139.pdf.

84 N.J. S.B. 3584 (2021), *available at* https://legiscan.com/NJ/text/S3584/2020.

85 D. N.J. Civ. R. 7.1.1, Disclosure of Third-Party Litigation Funding (adopted June 21, 2021), *available at* https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf.

86 Nev. S.B. 203 (2021), *available at* https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7650/Text.

87 Siebert v. Okun, 485 P.3d 1265 (N.M. 2021). *See infra* nn. 123-127 and accompanying text for discussion of case.

88 N.M. H.B. 75 (2021), *available at* https://legiscan.com/NM/text/HB75/2021.

89 N.Y. A.3397/S.5177 (2021), *available at* https://www.nysenate.gov/legislation/bills/2021/a3397; *see also* N.Y. S.7506-B/A.9506-B (2020) (Part GGG), *available at* https://legislation.nysenate.gov/pdf/bills/2019/S7506.

90 N.Y. 7477/S.6768 (2021), *available at* https://legislation.nysenate.gov/pdf/bills/2021/A7477.

91 N.Y. State Dep't of Labor, *NYS HERO Act* (2021), *available at* https://dol.ny.gov/ny-hero-act.

92 Victor Schwartz, *N.Y.'s Cheap Shot Against Gun Makers*, N.Y. Daily News, June 25, 2021, *available at* https://www.nydailynews.com/

establish "reasonable controls and procedures" to prevent their guns from being possessed, used, marketed, or sold unlawfully in New York.[93] Failure to do so can subject a company to a public nuisance lawsuit by the state attorney general or city corporation counsel. Individuals harmed by a gun industry member's practices in violation of the statue also may sue to recover damages.

In November, New York voters overwhelmingly approved an amendment to the New York State Constitution that states, "Each person shall have the right to clean air and water, and a healthful environment."[94]

As this article went to print, the legislature had completed work on a comprehensive insurance disclosure law for civil defendants in lawsuits.[95] The version completed by the legislature at the time of publication provides that, within sixty days of filing an answer to a lawsuit, a defendant must provide the plaintiff with any insurance agreement that is available to satisfy all or part of the judgment along with a sworn affidavit stating that the information is accurate and complete. The information also must include the contact information, including telephone number and e-mail address, of any person responsible for adjusting the claim; the amounts available under any policy to satisfy the judgment; any lawsuits that have reduced or eroded or may reduce or erode the amounts available under the policy along with the date the lawsuit was filed and the identity and contact information of the attorneys for all represented parties; and the amount of any attorney's fees that have eroded or reduced the face value of the policy, and the name and address of any attorney who received such payments. A defendant has a continuing duty to update the disclosures within thirty days after receiving information that renders a prior disclosure inaccurate or incomplete. The obligation shall run through the pendency of the case and for sixty days after any settlement or entry of judgment inclusive or all appeals.

Finally, New York's Chief Administrative Judge incorporated certain rules of the Commercial Division of the New York State Supreme Court into the Uniform Rules for the Supreme Court and the County Court.[96] The changes, which were issued on December 29, 2020, and took effect on February 1, 2021, encourage parties "to use the most efficient means to review documents, including electronically stored information ('ESI'), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case."[97] The order also establishes presumptive limits on oral depositions (ten—each limited to seven hours) and interrogatories (twenty-five) in line with the Federal Rules of Civil Procedure.

North Carolina

North Carolina extended a 2019 law that provided a window for plaintiffs to bring time-barred actions alleging injuries from childhood sexual abuse from two to three years.[98] The window closes on December 31, 2022.

North Dakota

North Dakota enacted COVID-19 liability legislation.[99] Civil actions alleging exposure or potential exposure to COVID-19 must involve an act intended to cause harm or that constitutes actual malice. Further, a possessor of real property that invites an individual onto the property is immune from civil liability for COVID-19 exposure unless the possessor acts with actual malice or intentionally exposes the individual to COVID-19 with the intent to cause harm. There is a safe harbor from liability for acts or omissions resulting in COVID-19 exposure that are in substantial compliance or consistent with a federal or state statute, regulation, or order related to COVID-19 which was applicable to the person or activity at issue at the time of the alleged exposure. Health care providers or health care facilities are immune from civil liability for actions taken in response to COVID-19 except for willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm. Further, designers, manufacturers, sellers, distributors, or donors of disinfecting or cleaning supplies, PPE, or certain pharmaceuticals, medical devices, or tests used in response to COVID-19 are immune from liability for personal injury, death, or property damage caused by the product unless the person acts with actual malice or has actual knowledge of a defect in the product and recklessly disregards a substantial and unnecessary risk that the product would cause serious personal injury, death, or serious property damage.

North Dakota also enacted asbestos litigation reform legislation.[100] Asbestos claimants have to support their claims with a medical report signed by a treating physician demonstrating that the claimant has asbestos-related impairment according to objective medical criteria. For claims involving a malignant condition, the trial court must hold a hearing to determine if the exposed person's cancer is asbestos-related. The law also helps to ensure that plaintiffs with asbestos-related impairment are suing defendants with an actual connection to the plaintiff. Within forty-five days of filing an asbestos action, a plaintiff must file a sworn information form that specifies the evidence

opinion/ny-oped-a-cheap-shot-against-gun-makers-20210615-2vhluds4irfkzb5oary6e5pyxu-story.html.

93 N.Y. A.6762/S.7196 (2021), *available at* https://www.nysenate.gov/legislation/bills/2021/s7196.

94 N.Y. Proposal 2, Environmental Rights Amendment (2021), *available at* https://www.elections.ny.gov/2021BallotProposals.html.

95 N.Y. A.8041/S.7052 (2021), *available at* https://www.nysenate.gov/legislation/bills/2021/a8041; *see also* Alan Smith & Mark Behrens, *Hochul Must Veto Burdensome Insurance Disclosure Bill*, Crain's N.Y. Bus., Sept. 9, 2021.

96 Administrative Order of the Chief Administrative Judge of the State of N.Y., AO/270/2020, Dec. 29, 2020, *available at* https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO%20Commercial%20Division%20rules%20in%20civil%20courts.pdf.

97 *Id.* (N.Y. R. Unif. Trial Cts. § 202.20-c(e)).

98 N.C. H.B. 196 (2021), *available at* https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H196v3.pdf.

99 N.D. H.B. 1175 (2021), *available at* https://www.legis.nd.gov/assembly/67-2021/documents/21-0247-06000.pdf.

100 N.D. H.B. 1207 (2021), *available at* https://www.legis.nd.gov/assembly/67-2021/documents/21-0434-05000.pdf.

that provides the basis for each claim against each defendant and includes supporting documentation. In addition, absent consent of all parties, asbestos cases may be joined for trial only if the cases relate to the exposed person and members of the person's household. The new law also provides that a manufacturer or seller of a product, such as a pump, is not liable for later-added external thermal insulation or replacement internal components, such as gaskets, made or sold by a third party. North Dakota's innocent seller liability reform statute was amended to permit a seller to obtain dismissal when the seller has simply been part of the chain of distribution of a product that is alleged to have caused a harm. The law applies to all asbestos claims filed on or after August 1, 2021.

Ohio

Ohio reduced the statute of limitations from eight to six years for actions on a contract in writing, and from six to four years for actions on a contract not in writing.[101] The reduction applies to claims accruing on or after June 14, 2021. Written contract claims that accrue prior to June 14, 2021, must be brought within the time remaining under the prior eight-year limitations period or by June 14, 2027, whichever is earlier. Oral contract claims that accrue prior to June 14, 2021, must be brought within the time remaining under the prior four-year limitations period or by June 14, 2025, whichever is earlier.

The Ohio Supreme Court amended Rule 37 of the Ohio Rules of Civil Procedure to match Federal Rule of Civil Procedure 37(e) regarding sanctions for failure to preserve electronically stored information.[102]

Oklahoma

Oklahoma blocked nuisance lawsuits against critical infrastructure sectors identified by the Cybersecurity and Infrastructure Security Agency when the applicable industry complies with or acts consistently with government rules, guidelines, laws and municipal ordinances, or laws applicable to the sector.[103]

Oregon

Oregon enacted legislation to permit claims against insurance assets of dissolved businesses notwithstanding certain time limitations that would otherwise bar claims.[104]

Pennsylvania

Secretary of State Kathy Boockvar resigned after the Pennsylvania Department of State failed to advertise a constitutional amendment to provide child sexual abuse survivors with a two-year window to file previously time-barred actions. The legislature passed the constitutional amendment in November 2019. The Department of State was constitutionally required to advertise it in at least two newspapers in every county during each of the three months before the November 2020 election. The department's press release said, "While the department will take every step possible to expedite efforts to move this initiative forward, the failure to advertise the proposed constitutional amendment means the process to amend the constitution must now start from the beginning."[105]

South Carolina

South Carolina's COVID-19 Liability Immunity Act provides that businesses, governmental agencies, and their workers that reasonably adhere to public health guidance are immune from COVID-19-related tort liability unless the plaintiff can show by clear and convincing evidence that the entity or person caused the harm by grossly negligent, reckless, willful, or intentional misconduct, or failed to attempt to adhere to public health guidance.[106] Health care providers and facilities are also covered by the Act, but a preponderance of the evidence standard of proof applies to certain acts or omissions in the health care setting. The reforms cover civil actions that arise between March 13, 2020, and June 30, 2021, or 180 days after the final COVID-19 state of emergency is lifted in South Carolina.

South Dakota

South Dakota enacted COVID-19 liability legislation.[107] A person may not bring an action for exposure or potential exposure to COVID-19 unless it results in a COVID-19 diagnosis and the exposure is the result of intentional exposure with the intent to transmit COVID-19. In addition, a premises owner who invites or permits an individual onto a premises is not liable for that person's exposure to COVID-19 unless the premises owner intentionally exposes the individual to COVID-19 with the intent to transmit COVID-19. In alleging intentional exposure with the intent to transmit COVID-19, a party shall state with particularity the circumstances constituting intentional exposure with the intent to transmit COVID-19—including all duty, breach, and intent elements—and establish all elements by clear and convincing evidence. Health care providers are not liable for harm resulting from acts or omissions in response to COVID-19 unless the provider is grossly negligent, reckless, or engaged in willful misconduct. The provision applies to injury or death resulting from diagnosing or treating individuals with a suspected or confirmed case of COVID-19; administering a pharmaceutical for off-label use to treat a patient with a suspected or confirmed case of COVID-19; and acts or omissions while providing health care to individuals with a condition unrelated to

101 Ohio S.B. 13 (2021), *available at* https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb13/EN/05?format=pdf.

102 Ohio R. Civ. P. 37(E) (effective July 1, 2021), *available at* https://www.supremecourt.ohio.gov/ruleamendments/documents/Online%20Posting%20-%20Final%20Rules%20(7.1.21).pdf.

103 Okla. S.B. 939 (2021), *available at* https://legiscan.com/OK/text/SB939/2021.

104 Or. H.B. 2377 (2021), *available at* https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB2377.

105 Pennsylvania Secretary of State, *Department of State Apologizes for its Failure to Properly Advertise Proposed Constitutional Amendment, HB 963*, Feb. 1, 2021, *available at* https://www.media.pa.gov/Pages/State-details.aspx?newsid=450.

106 S.C. S.B. 147 (2021), *available at* https://legiscan.com/SC/text/S0147/id/2378565/South_Carolina-2021-S0147-Comm_Sub.html.

107 S.D. H.B. 1046 (2021), *available at* https://sdlegislature.gov/Session/Bill/21916/216992.

COVID-19 when those acts support the response to COVID-19, such as delaying or canceling non-urgent or elective procedures, using medical devices, equipment, or supplies outside of their normal use for the provision of health care, providing testing or treatment outside the health care facility, or acts taken because of staffing or equipment shortages due to COVID-19 that render the health care provider unable to deliver the level or manner of care that otherwise would be required in the absence of COVID-19. Manufacturers, distributors, sellers, or donors of cleaning supplies or PPE and other qualified products used in response to COVID-19 receive liability protection except for gross negligence, recklessness, or willful misconduct.

Tennessee

Tennessee enacted disclosure legislation to address over-naming in asbestos cases.[108] A plaintiff filing an asbestos action after July 1, 2021, shall file, within thirty days of any complaint, an information form attested by plaintiff stating the evidence that provides the basis for each claim against each defendant and include supporting documentation. Plaintiffs have a continuing duty to supplement the required disclosures. The court, on motion by a defendant, shall dismiss a plaintiff's asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures. In addition, absent consent of all parties, asbestos cases may be joined for trial only if the cases relate to the exposed person and members of the person's household.

Texas

Texas enacted COVID-19 liability legislation.[109] Physicians, health care providers, and first responders are not liable for harms arising from care relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic disease absent reckless conduct or intentional, willful, or wanton misconduct. The provision applies to screening, diagnosing, or treating a person who is infected or suspected of being infected with a pandemic disease; administering a pharmaceutical for off-label use to treat a patient who is infected or suspected of being infected with a pandemic disease; diagnosing or treating someone who is infected or suspected of being infected with a pandemic disease outside the normal area of the physician's or provider's specialty; delaying or canceling nonurgent or elective procedures; delaying or canceling in-person appointments for conditions not related to a pandemic disease; using medical devices, equipment, or supplies outside of their normal use to treat someone who is infected or suspected of being infected with a pandemic disease; providing testing or treatment outside the health care facility on an individual who is infected or suspected of being infected with a pandemic disease; acts taken because staffing or equipment shortages due to a pandemic disease that render the physician, health care provider, or first responder unable to deliver the level or manner of care that otherwise would be required in the absence of the pandemic; and acts arising from the use or nonuse of PPE.

The new law also addresses products liability actions for PPE, medical devices and drugs used during a pandemic emergency, testing kits, and commercial cleaning products related to pandemic emergencies. Manufacturers, designers, sellers, or donors of covered products are not liable for harms caused by the product absent actual malice or the company has actual knowledge of a defect in the product and the product presents an unreasonable risk of substantial harm to a person using or exposed to the product.

In addition, a person is not liable for exposing an individual to a pandemic disease unless the person who exposed the individual knowingly failed to warn of or remediate a condition that the person knew was likely to result in the exposure, provided that the person had control over the condition, knew that the individual was likely to come into contact with the condition, and had a reasonable opportunity and ability to remediate the condition or warn the individual of the condition before the individual came into contact with the condition; or knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols intended to lower the likelihood of exposure, provided that the person has a reasonable opportunity to implement or comply with the standards, guidance or protocols, the person refused to implement or comply with or acted with flagrant disregard of the standards, guidance, or protocols, and the standards, guidance, or protocols the person failed to follow did not conflict with other standards, guidance or protocols in effect on the date of exposure, and reliable scientific evidence shows that the failure to warn the individual of the condition, remediate the condition, or implement or comply with government-promulgated standards, guidance, or protocols was the cause of the individual contracting the disease.

Not later than 120 days after a defendant files an answer in a claim alleging liability for causing exposure to a pandemic disease, the claimant shall serve an expert report that provides a factual and scientific basis for the assertion that the defendant's failure to act caused the individual to contract a pandemic disease. A defendant may challenge the sufficiency of the report. If the court determines that the report does not represent an objective, good faith effort to provide a factual and scientific basis for the assertion that the defendant's failure to act caused the injured individual to contract a pandemic disease, the court may grant a one-time opportunity for the claimant to cure the deficiency. If a sufficient report is not timely served, the court, on the defendant's motion, shall dismiss the case with prejudice and award reasonable attorney's fees and costs to the defendant. Claimants may not take more than two depositions before the expert report is served.

Educational institutions are not liable for damages or equitable monetary relief arising from cancellation or modification of a course or activity caused in whole or in part by a pandemic emergency.

The new pandemic emergency liability protection law is retroactive and applies to lawsuits filed since the Governor

108 Tenn. S.B. 873 (2021), *available at* https://www.capitol.tn.gov/Bills/112/Amend/SA0177.pdf.

109 Tex. S.B. 6 (2021), *available at* https://legiscan.com/TX/text/SB6/id/2407683/Texas-2021-SB6-Enrolled.html.

declared the COVID-19 pandemic a state disaster on March 13, 2020.

Texas also enacted legislation to facilitate the recovery of workers' compensation benefits for detention officers, custodial officers, firefighters, peace officers, or emergency medical technicians that suffer disability from SARS or COVID-19.[110]

In addition, Texas enacted legislation to establish bifurcated trials, on motion by a defendant, in negligence cases against commercial motor vehicle operators.[111] In phase one, a claimant must prove that the driver of a commercial vehicle was negligent in operating the vehicle before the claimant may proceed against the driver's employer in phase two and seek exemplary damages. A court may not require expert testimony for admission of properly authenticated photo and video evidence of the accident at trial.

Other legislation enacted in Texas changes the timing of expert reports in health care liability actions so that trial judges can first determine whether a claim constitutes a health care liability claim.[112]

Effective January 1, 2021, the Texas Supreme Court made significant amendments to the Texas Rules of Civil Procedure governing disclosures in discovery and expert litigation practice.[113]

Vermont

Vermont retroactively eliminated the statute of limitations for claims alleging injuries from childhood physical abuse.[114] Lawsuits against entities require a showing of gross negligence. The law extends 2019 legislation that applied to childhood sexual abuse claims.

Virginia

The Virginia Consumer Data Protection Act, which takes effect on January 1, 2023, provides consumers the ability to access, correct, and delete their personal information and to opt out of the processing of this data for targeted advertising purposes.[115] The state's attorney general has exclusive authority to enforce the law.

Washington

Washington enacted COVID-19 liability legislation.[116] To establish that a health care provider failed to follow the accepted standard of care in responding to the COVID-19 state of emergency, a plaintiff must show that his or her injury was proximately caused by the health care provider's failure to act like a reasonably prudent health care provider at that time in the state of Washington in the same or similar circumstances, taking into account whether the act or omission was in good faith based upon applicable guidance published by federal, state, or local government agencies in response to COVID-19 or was due to a lack of resources directly attributable to the pandemic. This liability protection is retroactive to February 29, 2020, and concludes upon termination of the state of emergency.

Washington substantially increased the penalties for violations of the state's Consumer Protection Act.[117]

West Virginia

West Virginia's Appellate Reorganization Act created an intermediate court of appeals—a significant legal change that was years in the making.[118] West Virginia has been one of only a few states without an intermediate court of appeals. Rulings from the state's trial courts have avoided review in some cases because the state's high court is unable to hear every appeal that is filed. The Court of Appeals will consist of a single three-judge panel that is to be operable on or before July 1, 2022.

The COVID-19 Jobs Protection Act bars claims against "any person, essential business, business, entity, health care facility, health care provider, first responder, or volunteer for loss, damage, physical injury, or death arising from COVID-19, from COVID-19 care, or from impacted care."[119] The new law also contains liability protections for manufacturers, distributors, sellers, or donors of certain qualified products, such as PPE, unless the entity acted with actual malice or had actual knowledge of a defect in the product and acted with conscious, reckless, and outrageous indifference to a substantial and unnecessary risk that the product would cause serious injury. Finally, workers' compensation is the exclusive remedy for COVID-19-related injuries or conditions from employment unless the employer engaged in intentional conduct with actual malice. The law applies to any cause of action accruing on or after January 1, 2020.

West Virginia also passed disclosure legislation to address over-naming in asbestos cases.[120] Within sixty days of filing an

110 Tex. S.B. 22 (2021), *available at* https://legiscan.com/TX/text/SB22/id/2408465/Texas-2021-SB22-Enrolled.html.

111 Tex. H.B. 19 (2021), *available at* https://legiscan.com/TX/text/HB19/2021.

112 Tex. S.B. 232 (2021), *available at* https://legiscan.com/TX/text/SB232/id/2398877/Texas-2021-SB232-Enrolled.html.

113 Final Approval of Amendment to Texas Rules of Civil Procedure 47, 99, 169, 190, 192, 193, 194, 195, 196, 197 and 198, Misc Docket No. 20-9153 (Tex. Dec. 23, 2020), *available at* https://www.txcourts.gov/media/1450176/209153.pdf; *see generally New Year, New Rules: Amendments to the Texas Rules of Civil Procedure Effective as of January 1,* JD Supra (Jan. 7, 2021), *available at* https://www.jdsupra.com/legalnews/new-year-new-rules-amendments-to-the-8752875/.

114 Vt. S. 99 (2021), *available at* https://legislature.vermont.gov/bill/status/2022/S.99.

115 Va. H.B. 2307 (2021), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0035.

116 Wash. S.B. 5271 (2021), *available at* http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Passed%20Legislature/5271-S.PL.pdf?q=20210511124327.

117 Wash. S.B. 5025 (2021), *available at* http://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5025-S.SL.pdf.

118 W. Va. 275 (2021), *available at* https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=SB275%20SUB2%20ENR.htm&yr=2021&sesstype=RS&i=275.

119 W. Va. 277 (2021), *available at* https://www.wvlegislature.gov/Bill_Text_HTML/2021_SESSIONS/RS/bills/SB277%20SUB1%20ENR.pdf.

120 W. Va. 2495 (2021), *available at* https://www.wvlegislature.gov/Bill_Text_HTML/2021_SESSIONS/RS/bills/HB2495%20SUB%20ENR.

asbestos action, a plaintiff must file a sworn information form that specifies the evidence that provides the basis for each claim against each defendant and includes supporting documentation. Plaintiffs have a continuing duty to supplement the required disclosures. The court, on motion by a defendant, shall dismiss a plaintiff's asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

In addition, West Virginia enacted legislation to allow civil juries to hear evidence regarding a passenger vehicle occupant's failure to use a seat belt.[121]

Wisconsin

Wisconsin enacted broad COVID-19-related tort protections as part of a new law addressing the state's unemployment insurance program.[122] Beginning March 1, 2020, long-term care providers and other businesses and entities are immune from civil liability for the death of or injury to any individual or damages caused by COVID-19 exposure in the course of the entity's functions or services. The protection does not apply to reckless or wanton conduct or intentional misconduct.

IV. Key Court Decisions

A. Decisions Upholding Civil Justice Laws

The Missouri Supreme Court upheld a statute limiting noneconomic damages in medical malpractice cases to $400,000 for non-catastrophic and $700,000 for catastrophic personal injuries.[123] The 2015 statute was a response to a 2012 Missouri Supreme Court decision, *Watts v. Lester E. Cox Medical Centers*,[124] which overruled twenty years of precedent[125] and held that a cap on noneconomic damages in common law medical malpractice cases violated the Missouri Constitution's jury trial right. The 2015 law abolished common law medical malpractice and replaced it with a statutory cause of action. In upholding the newer caps, the Missouri Supreme Court explained, "It is undisputed that the General Assembly possesses the authority to abolish common law causes of action," as the legislature did years ago when it abolished common law negligence claims against employers and created a statutory workers' compensation scheme.[126] "Because a medical negligence action is a statutorily created cause of action," the court added, "the General Assembly had the legislative authority to enact statutory non-economic damage caps."[127]

The New Mexico Supreme Court upheld a $600,000 aggregate limit on nonmedical and punitive damages awards in medical malpractice actions.[128] The court found no violation of the New Mexico Constitution's right to a jury trial because the statute does not interfere with the jury's fact finding role. Rather, the damage limit addresses the legal consequences of a verdict, which is a matter of law that the legislature has authority to shape. In reaching its decision, the court considered the "great weight of persuasive authority" in other states finding that caps on tort damages do not violate the right to jury trial.[129] The court noted that twenty-four of thirty jurisdictions have held that statutory caps do not violate the right to trial by jury, including sixteen states in which the right to jury trial is "inviolate."[130]

The Kansas Supreme Court upheld a statute abolishing a medical malpractice claim known as a "wrongful birth" action.[131]

A Cleveland appellate court followed Ohio Supreme Court precedent[132] and reaffirmed the constitutionality of Ohio's statutory cap on noneconomic damages awards.[133] The case is pending before the Ohio Supreme Court.

B. Decisions Striking Down Civil Justice Laws

A federal district court blocked West Virginia from enforcing provisions of a 2020 law restricting advertising by lawyers seeking clients harmed by medications.[134] The provisions prohibit attorneys that advertise with regard to pharmaceuticals from presenting an advertisement as a "medical alert," "health alert," "consumer alert," or the like; displaying the logo of a government agency in a manner that suggests affiliation;

pdf; *see also* Mary Margaret Gay, *The Name Game: Over-Naming in West Virginia Asbestos Litigation*, W. Va. Record, Mar. 15, 2021, *available at* https://wvrecord.com/stories/578828061-the-name-game-over-naming-in-west-virginia-asbestos-litigation.

121 W. Va. S.B. 439 (2021), *available at* https://www.wvlegislature.gov/Bill_Text_HTML/2021_SESSIONS/RS/bills/SB439%20SUB1%20ENR.pdf.

122 Wis. S.B. 1 (2021 spec. sess.), *available at* https://docs.legis.wisconsin.gov/2021/related/enrolled/jr1_sb1.pdf. Earlier in 2021, Governor Tony Evers vetoed a bill that included COVID-19 tort liability protections. The veto was a response to several contentious provisions in the bill that did not relate to liability protection. Wis. A.B. 1 (2021), *available at* https://www.billtrack50.com/BillDetail/1257188.

123 Ordinola v. Univ. Physician Assocs., 625 S.W.3d 445 (Mo. banc 2021).

124 Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. banc 2012), *superseded by statute*.

125 Adams By and Through Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. banc 1992), *overruled in part by Watts*, 376 S.W.3d 633.

126 *Ordinola*, 625 S.W.3d at 450; *see also* Sanders v. Ahmed, 364 S.W.3d 195 (Mo. banc 2012) (limit on noneconomic damages in medical malpractice actions involving wrongful death did not violate right to jury trial or separation of powers); Dodson v. Ferrara, 491 S.W.3d 542 (Mo. banc 2016) (statute did not violate right to jury trial, equal protection, or separation of powers).

127 *Ordinola*, 625 S.W.3d at 450; *see generally* Phil Goldberg, *The Legislature's Check on Runaway Verdicts*, St. Louis Record, Aug. 11, 2021, *available at* https://stlrecord.com/stories/606535409-the-missouri-legislature-s-check-on-runaway-verdicts.

128 *Siebert,* 485 P.3d 1265. *See supra* nn. 87-88 and accompanying text (describing legislation passed in response to this decision).

129 *Id*. at 1277.

130 *Id*. at 1277 n.3.

131 Tillman v. Goodpasture, 485 P.3D 656 (Kan. 2021).

132 Simpkins v. Grace Brethren Church of Del., 75 N.E.3d 122 (Ohio 2016); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007).

133 Brandt v. Pompa, 169 N.E.3d 285 (Ohio Ct. App.), *appeal allowed*, 170 N.E.3d 891 (Ohio 2021).

134 Recht v. Morrissey, No. 5:20-cv-00090 (N.D. W. Va. May 7, 2021), *available at* https://www.bloomberglaw.com/public/

or using the word "recall" unless the recall was ordered by a government agency or was the product of an agreement between the manufacturer and a government agency.[1] Further, legal advertisements must contain certain disclosures, such as indicating that the ad is a paid advertisement for legal services and the identity of the sponsor, and shall warn viewers not to stop taking a prescribed medication without consulting with a doctor. The district court held that these parts of the Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act violate the First Amendment to the United States Constitution. The court also raised concern that the West Virginia law's prohibition against the use of the word "recall" in ads unless the recall was ordered by a government agency or was the product of an agreement between a manufacturer and agency might not be sufficiently broad to include voluntarily undertaken recalls. The ruling is on appeal to the Fourth Circuit.[2]

V. Conclusion

Many states adopted COVID-19-related liability reforms, continuing a trend from last year. A number of states extended statutes of limitations for childhood sexual abuse claims, continuing a trend that began before the pandemic. Legislation to address over-naming in asbestos personal injury lawsuits is a newer issue that has gained traction. Statutory limits on noneconomic damages were upheld by the Supreme Courts of Missouri and New Mexico and an Ohio appellate court.

135 *See* W. Va. Code Ann. §§ 47-28-1 to -5.

136 Recht v. Morrissey, No. 21-1684 (4th Cir. docketed June 16, 2021).