2023 CIVIL JUSTICE UPDATE*

MARK A. BEHRENS**

This paper reviews key civil justice issues and changes in 2023. Part I discusses legal reform trends in 2023. Part II discusses changes to the Federal Rules of Evidence that took effect in December as well as key amendments to the Federal Rules of Evidence and Federal Rules of Civil Procedure that are under consideration. Part III summarizes key developments regarding American Law Institute restatement projects. Part IV summarizes liability law changes at the state level in 2023. Part V highlights cases that addressed the constitutionality of state civil justice reforms.

I. LEGAL REFORM TRENDS IN 2023

In recent years the plaintiffs' bar was able to leverage progressive majorities in Congress to notch some narrow but significant victories, such as a law allowing anyone who had at least thirty days of exposure to water at Marine Corps Base Camp Lejeune from August 1, 1953, to December 31, 1987, to sue the federal government for harm caused by exposure to contaminants in the water. Total payouts in Camp Lejeune cases are estimated to be in the billions of dollars. The trial bar's progress has stalled under Republican control of the House of Representatives, but business interests lack sufficient support in the Senate to achieve pro-defendant legal reforms. The trial bar is now trying to use federal agencies to support its agenda. The trial bar is also continuing a recent trend of working in states with progressive majorities to pursue legislation expanding liability or damages to benefit plaintiffs. The trial bar's agenda has found additional support in the states from some populist Republican legislators.

In particular, the plaintiffs' bar is making a strong push to increase awards in wrongful death cases.[1] At least eleven states considered legislation

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

in 2023 that would have allowed a broader range of people to sue, expanded recoverable damages, raised or eliminated existing caps on damages, authorized punitive damages, or lengthened the statute of limitations for bringing such claims. Legislation was enacted in five states.[2] In New York, however, Governor Kathy Hochul vetoed a bill that would have "fundamentally alter[ed] the legal framework for wrongful death claims in New York by expanding the types of damages that may be recovered, expanding the class of persons who may recover such damages and extending the statute of limitations."[3]

Consumer data privacy laws are also attracting significant attention in the states. In 2023, seven states enacted comprehensive consumer data privacy legislation—Delaware,[4] Florida,[5] Indiana,[6] Iowa,[7] Montana,[8] Oregon,[9] Tennessee,[10] and Texas.[11] Over a dozen states have now enacted consumer data privacy laws.[12] In addition, Washington enacted the "My Health My Data Act,"[13] the "first privacy-focused law in the country to

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** Mark Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group and is a member of the Federalist Society's Litigation Practice Group Executive Committee. He is active in civil justice issues on behalf of business and civil justice organizations, defendants in litigation, and insurers.

[1] Cary Silverman, *Nuclear Risk Grows as States Expand Wrongful Death Liability*, Legal Opinion Letter, Vol. 32 No. 10, WASH. LEGAL FOUND. (Dec. 1, 2023), https://www.wlf.org/wp-content/uploads/2023/11/120123Silverman_LOL.pdf.

[2] L.D. 934, 131st Leg., Reg. Sess. (Me. 2023), https://legiscan.com/ME/bill/LD934/2023; S.81, 152d Gen. Assemb., Reg. Sess. (Del. 2023), https://legiscan.com/DE/bill/SB81/2023; H.B. 219, 103d Gen. Assemb., Reg. Sess. (Ill. 2023), https://legiscan.com/IL/bill/HB0219/2023; S.F. 2909, 93d Leg. (Minn. 2023), https://legiscan.com/MN/drafts/SF2909/2023; H.B. 5513, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023), https://legiscan.com/RI/bill/H5513/2023.

[3] N.Y. Governor Kathy Hochul, Veto No. 151, A.6698, Dec. 29, 2023.

[4] H.B. 154, 152d Gen. Assemb., Reg. Sess. (Del. 2023), https://legiscan.com/DE/bill/HB154/2023.

[5] S.262, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/S0262/2023.

[6] S.5, 123d Gen. Assemb., Reg. Sess. (Ind. 2023), https://legiscan.com/IN/text/SB0005/id/2772732.

[7] S.F. 262, 90th Gen. Assemb., Reg. Sess. (Iowa 2023), https://legiscan.com/IA/text/SF262/2023.

[8] S.384, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/text/SB384/2023.

[9] S.619, 81st Leg., Reg. Sess. (Or. 2023), https://legiscan.com/OR/text/SB619/id/2830293.

[10] H.B. 1181, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023), https://legiscan.com/TN/bill/HB1181/2023.

[11] H.B. 4, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/text/HB4/2023.

[12] California, Colorado, Connecticut, Utah, and Virginia enacted data privacy laws before 2023. *Which States Have Consumer Data Privacy Laws?*, BLOOMBERG L. (Nov. 27, 2023), https://pro.bloomberglaw.com/brief/state-privacy-legislation-tracker/.

[13] H.B. 1155, 2023 Leg., Reg. Sess. (Wash. 2023), https://legiscan.com/WA/bill/HB1155/2023.

protect personal health data that falls outside the ambit of the Health Insurance Portability and Accountability Act, or HIPAA."[14]

State legislatures, often with the support of the state judiciary, are embracing increases in juror compensation, which may reduce the need for summoned jurors to request financial hardship exemptions and permit a wider range of individuals to serve. Six states increased juror compensation in 2023;[15] some of these states had not raised their juror per diem in decades.[16]

II. 2023 CIVIL JUSTICE REFORMS – FEDERAL

A. Congress

There were no tort liability enactments of significance at the federal level in 2023

B. Federal Court Rules Amendments

1. Amendments to Federal Rules of Evidence Effective December 1, 2023

i. Rule 702

The modern iteration of Federal Rule of Evidence 702 developed from United States Supreme Court cases determining the standards for admitting scientific and other expert testimony: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[17] *Kumho Tire Co., Ltd. v. Carmichael*,[18] and *General Electric Co. v. Joiner*.[19] In 2000, Rule 702 was amended to codify these holdings and add further safeguards to ensure the reliability of expert testimony.

Many courts, however, "resist[ed] the judiciary's proper gatekeeping role, either by ignoring Rule 702's mandate altogether or by aggressively

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[14] Washington Attorney General Bob Ferguson, *Protecting Washingtonian's Personal Health Data and Privacy* (2023), https://www.atg.wa.gov/protecting-washingtonians-personal-health-data-and-privacy.

[15] H.B. 1466, 123d Gen. Assemb., Reg. Sess. (Ind. 2023), https://legiscan.com/IN/bill/HB1466/2023; S.222, 82d Leg., Reg. Sess. (Nev. 2023)https://legiscan.com/NV/bill/SB222/2023; H.B. 1002, 68th Leg. Assemb., Reg. Sess. (N.D. 2023), https://legiscan.com/ND/text/HB1002/2023; H.B. 1024, 2023 Leg., 1st Spec. Sess. (Okla. 2023), https://legiscan.com/OK/bill/HB1024/2023/X1; H.B. 3474, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/text/HB3474/2023;S.789, 2023 Gen. Assemb., Reg. Sess. (Va. 2023), https://legiscan.com/VA/bill/SB789/2023.

[16] Cary Silverman, *Higher Juror Compensation Trend Is Good for Justice System*, LAW360 (Dec. 15, 2023), https://www.law360.com/access-to-justice/articles/1771720/higher-juror-compensation-trend-is-good-for-justice-system.

[17] 509 U.S. 579 (1993).

[18] 526 U.S. 137 (1999).

[19] 522 U.S. 136 (1997)

reinterpreting the Rule's provisions."[20] In a landmark 2015 article, Professor David Bernstein (co-author of *The New Wigmore: Expert Evidence* treatise) and co-author Eric Lasker demonstrated that many federal courts had not been applying Rule 702 as intended, or even as written.[21] Additional reviews of case opinions back up this observation.[22]

The federal judiciary's Advisory Committee on Evidence Rules independently studied the issue and confirmed that many courts had failed to correctly apply the rule. For example, "many courts" incorrectly applied 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,"[23] "and more broadly that expert testimony is presumed to be admissible."[24]

To address these issues and prevent over-statements by experts, Rule 702 was amended.[25] The amendments are intended to (1) "clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule," and (2) "emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[26] The amended rule states:

> Rule 702. Testimony by Expert Witnesses
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> 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 demonstrates to the court that it is more likely than not that:

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[20] David E. Bernstein & Eric G. Lasker, *Defending* Daubert*: It's Time to Amend Federal Rules of Evidence 702*, 57 WM. & MARY L. REV. 1, 1 (2015).

[21] *See id.*

[22] *See, e.g.,* Kateland R. Jackson & Andrew J. Trask, *Federal Rules of Evidence 702: A One-Year Review & Study of Decisions in 2020*, LAWS. FOR CIVIL JUST. (Sept. 30, 2021), https://www.lfcj.com/document-directory/federal-rule-of-evidence-702a-one-year-review-and-study-of-decisions-in-2020; *see also* Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039 (2020).

[23] Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

[24] Memorandum from Hon. Patrick J., Schiltz, Chair, Advisory Committee on Evidence Rules, to Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure, Report of the Advisory Committee on Evidence Rules, at 6 (May 15, 2022), in Committee on Rules of Practice and Procedure, Jud. Conf. of the U.S., Agenda Book, at 871 (June 7, 2022), https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf.

[25] Lee Mickus & Alex Dahl, *Attorneys and Courts Should Immediately Rely on the Forthcoming Rule 702 Amendment*, Legal Backgrounder, Vol. 38 No. 3, WASH. LEGAL FOUND. (Feb. 24, 2023), https://www.wlf.org/wp-content/uploads/2023/02/022423MickusDahl_LB.pdf.

[26] *Supra* note 23.

> (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;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[27]

ii. Rule 106

Federal Rule of Evidence 106 was amended to cover all statements, including unrecorded, oral statements, and to provide that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection.[28] Previously, courts "had been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection."[29]

iii. Rule 615

Federal Rule of Evidence 615 was amended to clarify that, when entering an order to exclude a witness from trial to prevent that person from hearing the testimony of other witnesses, the court may also prohibit the excluded witness from learning about, obtaining, or being provided with trial testimony.[30] In addition, the amendment clarifies that the exception from exclusion of entity representatives is limited to one designated representative per entity.

2. Proposed Amendments to Evidence Rules Approved by Judicial Conference

The federal judiciary's Committee on Rules of Practice and Procedure (Standing Committee) and Judicial Conference approved changes to several Rules of Evidence. If adopted by the United States Supreme Court and transmitted to Congress by May 1, 2024, absent congressional action, the amended and new rules will take effect on December 1, 2024.[31]

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[27] Fed. R. Evid. 702; *see also* Mark A. Behrens, *A Brief Guide to the 2023 Amendments to the Federal Rules of Evidence*, FEDSOC BLOG (Jan. 30, 2024), https://fedsoc.org/commentary/fedsoc-blog/a-brief-guide-to-the-2023-amendments-to-the-federal-rules-of-evidence-1.

[28] Fed. R. Evid. 106.

[29] Fed. R. Evid. 106 advisory committee's note to 2023 amendment.

[30] Fed. R. Evid. 615.

[31] Letter from Hon. John D. Bates Chair, Committee on Rules of Practice and Procedure, to Scott S. Harris, Clerk, Supreme Court of the United States, Summary of Proposed New and Amended Federal Rules of Procedure, Oct. 23, 2023,

A new Rule 107 "provides standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay."[32]

Amended Rule 613 "provides that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule gives the court the discretion to dispense with the requirement."[33]

An amendment to Rule 801(d)(2) "resolves a dispute among the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest."[34]

An amendment to Rule 1006 will "clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted."[35] The amendment will help courts distinguish a summary of voluminous evidence (which summary is evidence and governed by Rule 1006) from a summary intended to help the trier of fact understand admissible evidence (which summary is not evidence and would be governed by new Rule 107).

3. Proposed Civil Rules Amendments Published for Public Comment

The Standing Committee published for public comment the first proposed rule for multidistrict litigation and amendments to privilege log rules.[36] Stakeholders may engage by submitting a written comment to the Advisory Committee on Civil Rules on or before February 16.[37]

Proposed Federal Rule of Civil Procedure 16.1 "is designed to provide a framework for the initial management of MDL proceedings."[38] Data from the Judicial Panel on Multidistrict Litigation (JPML) and the U.S. Courts, analyzed by Lawyers for Civil Justice, shows that seventy-three percent of federal civil cases reside in MDL proceedings. In the last decade, the

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https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf [hereinafter Bates Letter].

[32] *Id.* at 3.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Memorandum from Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, to The Bench, Bar, and Public, Request for Comments on Proposed Amendments to Federal Rules and Forms, Aug. 15, 2023, https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf [hereinafter Bates Memo].

[37] Written comments may be submitted at https://www.regulations.gov/docket/USC-RULES-CV-2023-0003/document. There were public hearings on October 16, 2023, and on January 16 and February 6, 2024. For a list of witnesses, transcripts, and testimony, see https://www.uscourts.gov/rules-policies/records-rules-committees/transcripts-and-testimony.

[38] Bates Memo, *supra* note 36, at 128 (proposed Fed. R. Civ. P. 16.1 Comm. Note).

percentage of civil cases in MDLs has more than doubled, underscoring the need for rules to address the unique management challenges of MDLs.[39]

Proposed Rule 16.1(a) states that transferee courts "should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings."[40] Rule 16.1(b) provides that coordinating counsel may be designated to assist the court with the initial MDL management conference. Rule 16.1(c) states that the transferee court "should order the parties to meet and prepare a report to be submitted to the court" prior to the initial MDL management conference.[41] The Committee Notes explain that this "should be a single report, but it may reflect the parties' divergent views . . . ."[42] Rule 16.1(c)(1) identifies a number of issues that transferee courts may require the parties to address in the report, including "whether leadership counsel should be appointed;" identification of "the principal factual and legal issues likely to be presented in the MDL proceedings;" "how and when the parties will exchange information about the factual bases for their claims and defenses;" a "proposed plan for discovery;" any "likely pretrial motions and a plan for addressing them;" and "whether matters should be referred to a magistrate judge or a master."[43] The report also may address "whether the court should consider measures to facilitate settlement of some of all actions before the court,"[44] but "the question whether the parties choose to settle a claim is just that—a decision to be made by the parties."[45] Rule 16.1(d) states that, after the initial MDL management conference, the court should enter an initial MDL management order that "controls the MDL proceedings until the court modifies it."[46]

The Advisory Committee on Civil Rules is also considering changes to privilege log rules. A proposed amendment to Rule 26(f)(3)(D) would require parties to address in their discovery plan "the timing and method for complying with Rule 26(b)(5)(A)."[47] A proposed amendment to Rule 16(b)(3) provides that the court may address "the timing and method" of such compliance in its scheduling order.[48]

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[39] Lawyers for Civil Justice, *70% of Federal Civil Cases Are in MDLs as of Year End, FY21*, RULES4MDLS (Apr. 13, 2022), https://www.rules4mdls.com/copy-of-mdl-cases-surge-to-majorty-of.

[40] Bates Memo, *supra* note 36, at 123 (proposed Fed. R. Civ. P. 16.1).

[41] *Id.* at 124 (proposed Fed. R. Civ. P. 16.1).

[42] *Id.*at 129 (proposed Fed. R. Civ. P. 16.1 Committee Note).

[43] *Id.* at 124-126 (proposed Fed. R. Civ. P. 16.1).

[44] *Id.* at 126 (proposed Fed. R. Civ. P. 16.1).

[45] *Id.*at 131 (proposed Fed. R. Civ. P. 16.1 Committee Note).

[46] *Id.* at 127 (proposed Fed. R. Civ. P. 16.1).

[47] *Id.* at 137 (proposed Fed. R. Civ. P. 26(f)(3)(D)).

[48] *Id.* at 120 (proposed Fed. R. Civ. P. 16(b)(3)).

III. AMERICAN LAW INSTITUTE

The membership of the American Law Institute (ALI) considered several pending restatements of the law at the ALI's annual meeting in May.

A. Restatement of Torts, Third: Miscellaneous Provisions

This Restatement is a "catch all" of various topics not covered in other parts of the Restatement of Torts, Third. The ALI membership was scheduled to consider a 600+ page draft containing dozens of miscellaneous provisions, in addition to a nearly 100-page draft of the recently spun off Medical Malpractice Restatement. Hardly any of this material was considered, however, because the topic of no-injury medical monitoring exhausted almost the entire discussion session.[49]

Nine motions were filed in advance of the meeting seeking various changes to a proposed rule endorsing a medical monitoring remedy for unimpaired claimants. ALI Council member John Beisner presented the "lead" motion for the defense bar. His motion sought to replace the proposed rule with a statement that medical monitoring is an inappropriate topic for restatement treatment. Most of the discussion session centered on debating this motion, which ultimately failed. A few other motions by defense practitioners to amend the medical monitoring proposal (including one by this author) were also defeated.

Time ran out before consideration of a motion to have the ALI take a neutral position on the topic of medical monitoring by restating separate "yes" and "no" medical monitoring approaches without endorsing either approach. The ALI membership's failure to complete discussion of the proposed medical monitoring provision means it will need to be revisited at the ALI's 2024 annual meeting in San Francisco in May.

The time spent debating the ALI's treatment of medical monitoring also precluded consideration of several other controversial provisions that propose to enhance the liability of civil defendants, such as a novel negligent misrepresentation rule that would support innovator liability theory claims against branded drug manufacturers and a novel tort for aiding and abetting negligence.[50]

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[49] James M. Beck, *Always Liability Increases (ALI)? Not Yet With Medical Monitoring*, DRUG & DEVICE L. (May 25, 2023), https://www.druganddevicelawblog.com/2023/05/always-liability-increases-ali-not-yet-with-medical-monitoring.html. The ALI's proposed medical monitoring rule is discussed in Victor E. Schwartz & Christopher E. Appel, *The Restatement of Torts, Third Proposes Abandoning Tort Law's Present Injury Requirement to Allow Medical Monitoring Claims: Should Courts Follow?*, – SW. U. L. REV. – (forthcoming).

[50] The ALI's proposed negligent misrepresentation rule is discussed in Mark A. Behrens & Christopher E. Appel, *Why Courts Should Continue to Reject Innovator Liability Theories that Seek to Hold Branded Drug Manufacturers Liable for Generic Drug Injuries*, – SW. U. L. REV. – (forthcoming).

B. Restatement of Torts, Third: Remedies

The ALI membership approved virtually all of a 600+ page draft of disparate tort remedies provisions.

C. Restatement, Third: Conflict of Laws

The ALI membership approved a draft that included choice of law rules specific to products liability cases, certain other tort cases, and cases involving punitive damages. Each of these provisions sets forth rules that produce choice of law outcomes that are consistent with most judicial decisions.

D. Other

The ALI membership voted to approve portions of other projects, including the Restatement of the Law, Copyright and the Restatement Fourth, Property.

IV. 2023 CIVIL JUSTICE REFORMS – STATES

Alabama

The Alabama Supreme Court approved Alabama Rule of Civil Procedure 55(b)(2) to require a hearing on an application or motion for a default judgment if the opposing party has appeared and to require notice of both the application or motion to be served on the opposing party.[51] The court also approved amendments to Alabama Rules of Appellate Procedure 8(d)(1),[52] 34(f),[53] 45A,[54] 39(d)(5), 40(e), 53, and 54,[55] and Alabama Rule of Judicial Administration 32.[56]

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[51] Ala. R. Civ. P. 55 (2023), https://judicial.alabama.gov/docs/rules/OrderAmendingRule55b_2_Ala_R_Civ_P.pdf.

[52] Ala. R. App. P. 8 (2023), https://judicial.alabama.gov/docs/rules/Rule_8(d)(1),Ala.R.App.P.Order.pdf.

[53] Ala. R. App. P. 34 (2023), https://judicial.alabama.gov/docs/rules/Rule_34(f),Ala.R.App.P.Order.pdf.

[54] Ala. R. App. P. 45A (2023), https://judicial.alabama.gov/docs/rules/Rule_45A,Ala.R.App.P.Order.pdf.

[55] Ala. R. App. P. 39, 40, 53, and 54 (2023), https://judicial.alabama.gov/docs/rules/Rule_45A,Ala.R.App.P.Order.pdf.

[56] Ala. R. Jud. Admin. 32 (2023), https://judicial.alabama.gov/docs/rules/OrderonRule32AlabamaRulesofJudicialAdministration.pdf.

Arkansas

Arkansas made it easier to sue providers of gender-affirming care for children.[57] A person who received a gender transition procedure as a minor has fifteen years after the age of eighteen to file a malpractice action against the healthcare professional who performed the procedure if the minor suffers physical, psychological, emotional, or physiological injury by the procedure or the after effects of the procedure or related treatment.

Arizona

The Arizona Supreme Court adopted amendments to several Arizona Rules of Evidence, effective January 1, 2024. Arizona Rule of Evidence 106 was amended to conform to the 2023 amendments to Federal Rule of Evidence 106.[58] Arizona Rule of Evidence 615 was amended to partly conform to the 2023 amendments to Federal Rule of Evidence 615.[59] Arizona Rule of Evidence 702 was amended to conform to the 2023 amendments to Federal Rule of Evidence 702 and to add a new comment.[60]

California

California enacted legislation[61] to overturn a 2022 appellate court decision which "join[ed] state and federal courts from across the country" in holding that the requirement of proving causation to a "reasonable medical probability" in a personal injury action applies "only to the party bearing the burden of proof on the issue which is the subject of the opinion."[62] Now, in a case in which an expert testifying about medical causation for the party bearing the burden of proof is required to opine that causation exists to a reasonable probability, the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that (1) "the proffered alternative cause or causes each exists to a reasonable medical probability," or (2) "a matter cannot meet a reasonable degree of probability in the applicable field, and providing the basis for that opinion."[63]

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[57] S. 199, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) https://legiscan.com/AR/text/SB199/2023.

[58] In the Matter of Rule 106, Rules of Evidence, No. R-23-0002 (Ariz. Aug. 24, 2023), https://www.azcourts.gov/Portals/20/2023%20Rules/R-23-0002%20Final%20Rules%20Order.PDF?ver=_0y045CisxzkA_bME2zbcQ%3d%3d.

[59] In the Matter of Rule 615, Rules of Evidence, No. R-23-0003 (Ariz. Aug. 24, 2023), https://www.azcourts.gov/Portals/20/2023%20Rules/R-23-0003%20Final%20Rules%20Order.PDF?ver=_hRSLOZSGs56iStL_3lIgA%3d%3d.

[60] In the Matter of Rule 702, Rules of Evidence, No. R-23-0004 (Ariz. Aug. 24, 2023), https://www.azcourts.gov/Portals/20/2023%20Rules/R-23-0004%20Final%20Rules%20Order.PDF?ver=2O1ka9lxUlVfpxOpMckvTg%3d%3d.

[61] S.652, 2023 Leg., Reg. Sess. (Cal. 2023), https://legiscan.com/CA/text/SB652/2023.

[62] Kline v. Zimmer, Inc., 79 Cal. App. 5th 123, 132-33 (Cal. Ct. App. 2022).

[63] S.652, 2023 Leg., Reg. Sess. (Cal. 2023), https://legiscan.com/CA/text/SB652/2023.

California also instituted a procedure for initial disclosure of information similar to Federal Rule of Civil Procedure 26(a) for most civil cases filed on or after January 1, 2024 until January 1, 2027.[64] Within sixty days of a demand by any party, each party in the action, "including the party that made the demand," shall provide to the other parties significant details about relevant fact witnesses (except those to be used solely for impeachment); a copy or a description by category and location of relevant documents (except those to be used solely for impeachment); and any contractual agreements or insurance policies under which an insurance company or person, as defined in Section 175 of the Evidence Code, may be liable to satisfy, in whole or in part, a judgment entered in the action or to indemnify or reimburse payments made to satisfy the judgment.

A party shall make its initial disclosures "based on the information then reasonably available to it" and is "not excused from making its initial disclosures because it has not fully investigated the case, because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures."

A party that has made, or responded to, a demand for an initial disclosure may propound a supplemental demand on any other party to elicit any later-acquired information bearing on all disclosures previously made by any party. A party generally may propound a supplemental demand twice before the initial setting of a trial date, and potentially once after the initial setting of a trial date.

A party's disclosures shall be verified in a written declaration by the party, or the party's authorized representative, or signed by the party's counsel. A court shall impose a $1,000 fine in specified situations where a party's disclosures are deemed unresponsive or lacking.

Colorado

Colorado's Antitrust Act of 2023 expands standing, gives the attorney general more leeway to sue violators, quadruples the maximum civil penalty courts can award for violations (from $250,000 to $1 million), increases the maximum criminal penalty from $1 million to $5 million, and empowers judges to issue orders to prevent unjust enrichment through a company's anticompetitive behavior.[65]

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[64] S.235, 2023 Leg., Reg. Sess. (Cal. 2023), https://legiscan.com/CA/text/SB235/2023. The new law does not apply to small claims cases, *pro se* plaintiffs, cases under the Family Code or Probate Code, unlawful detainer actions, or actions in which a party has been granted preference pursuant to California Code of Civil Procedure § 36.

[65] H.B. 1192, 74th Gen. Assemb., Reg. Sess. (Colo. 2023), https://legiscan.com/CO/text/HB1192/2023.

Colorado rolled back liability protections for manufacturers of firearms.[66] The Jessi Redfield Ghawi Act for Gun Violence Victims' Access to Justice and Firearms Industry Accountability repealed a prior law that limited product liability actions against manufacturers of firearms and ammunition to manufacturing and design defect claims. In addition, the law creates a cause of action for a person or entity that suffers harm as a result of a firearm industry member's violation of firearm industry standards of responsible conduct, or for the attorney general or the attorney general's designee, for enforcement and remedy of any harms caused as a result of an industry member's violation. An intervening act by a third party, including unlawful misuse of an industry product, does not prevent an industry member from being held liable. A cause of action may be brought within five years after the date of a violation or harm.

Colorado authorized the Administrator of the Uniform Consumer Credit Code to adopt rules regarding creditor-imposed "deferral charges" for consumer lawsuit lending transactions that are secured by a consumer's potential proceeds from a settlement or judgment obtained in an associated legal claim.[67] A deferral charge is a fee for an extension of an installment payment on a loan beyond when it is due and may be assessed on a daily basis. The new law allows the attorney general to permit consumer lawsuit lenders to impose an additional fee on top of the maximum interest rates allowed by statute.

Colorado amended its law relating to civil remedies for civil rights violations of persons with disabilities.[68] Claims asserting discrimination in places of public accommodation or discriminatory housing practices are no longer required to exhaust the proceedings and remedies available to them before filing an action in district court. An individual with a disability cannot be excluded from participation in or be denied the benefits of services, programs, or activities provided by a place of public accommodation. In certain civil suits, an individual with a disability is entitled to a court order requiring compliance with applicable provisions along with monetary damages or a statutory fine.

Lawmakers also passed a law requiring a patient's informed consent to the practice of using patients under anesthesia to train medical professionals on how to perform pelvic exams.[69]

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[66] H.B. 168, 74th Gen. Assemb., Reg. Sess. (Colo. 2023), https://legiscan.com/CO/text/SB168/2023.

[67] H.B. 1162, 74th Gen. Assemb., Reg. Sess. (Colo. 2023), https://legiscan.com/CO/text/HB1162/2023.

[68] H.B. 1032, 74th Gen. Assemb., Reg. Sess. (Colo. 2023), https://legiscan.com/CO/text/HB1032/2023.

[69] H.B. 1077, 74th Gen. Assemb., Reg. Sess. (Colo. 2023), https://legiscan.com/CO/text/HB1077/2023.

The Colorado Supreme Court adopted a rule allowing Licensed Legal Paraprofessionals to perform certain services to make legal representation more affordable and more widely available in certain domestic relations matters.[70]

Delaware

Delaware's Wrongful Death Act was amended to allow the spouse, parents, children, and siblings of a deceased person to recover punitive damages "if it is found that the death was maliciously intended or was the result of reckless, willful or wanton misconduct by the tortfeasor."[71] The factfinder must make a separate finding that punitive damages are warranted and state the amounts being awarded for compensatory and punitive damages. The new law also clarifies the definitions of "child" (i.e., "any natural born child or adopted child") and "parent" (the mother and father "or adopted mother and father" of a deceased child) in the Act.

A new Delaware Personal Data Privacy Act delineates various data privacy rights held by consumers and provides that Delaware residents have the right to know what information is being collected about them, see the information, correct any inaccuracies, or request deletion of personal data.[72] The Act generally applies to companies conducting business in Delaware or producing products or services that are targeted to Delaware residents and that control or process the personal data of at least 35,000 consumers or control or process the personal data of at least 10,000 consumers and derive more than twenty percent of their gross revenue from the sale of personal data. The Act requires consent prior to the processing of sensitive data and provides for recognition of universal opt-out mechanisms. The Act will be enforced exclusively by the Delaware Department of Justice (DDOJ), subject to a cure period for violations that lasts until December 31, 2025.

The Delaware Supreme Court held that "an increased risk of illness without present manifestation of a physical harm is not a cognizable injury under Delaware law."[73]

Florida

Florida enacted a comprehensive package of legal reforms,[74] curbs on misleading legal services advertisements,[75] and legislation impacting construction defect litigation,[76] among other issues.

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[70] Colo. R. Civ. P. 207 (20230), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(06).pdf.

[71] H.B. 81, 152d Gen. Assemb., Reg. Sess. (Del. 2023), https://legis.delaware.gov/BillDetail/130197.

[72] H.B. 154, 152d Gen. Assemb., Reg. Sess. (Del. 2023), https://legiscan.com/DE/bill/HB154/2023.

[73] Baker v. Croda, 304 A.3d 191, 192 (Del. 2023).

The tort package shortened the statute of limitations from four years to two years for general negligence claims that accrue after March 24, 2023. It also changed Florida's comparative negligence standard from "pure" to "modified" comparative fault, except for medical negligence cases. Previously, plaintiffs could recover damages even if they were primarily at fault. Now, a party found to be greater than fifty percent at fault for his or her own harm may not recover damages.

The tort package also addressed so-called "phantom damages" by changing the evidence juries hear to decide medical expenses. Previously, plaintiffs were able to board the full amount of "billed" medical expenses, even though health care providers routinely accept amounts that are far less as full payment. Now, evidence offered to prove the amount of damages for past medical services that have been satisfied is limited to the amount "actually paid, regardless of the source of the payment." Plaintiffs may recover amounts necessary to satisfy charges not yet satisfied and amounts necessary to provide for reasonable and necessary medical services the plaintiff will receive in the future.

In actions for medical expenses where treatment was rendered under a letter of protection, the claimant must disclose (1) a copy of the letter of protection; (2) itemized and medically coded bills; (3) whether the plaintiff had, but did not use, health care insurance coverage; (4) the identity of any factoring company that has purchased a health care provider's accounts; and (5) the referral source. If a plaintiff's attorney refers a client for treatment under a letter of protection, disclosure of the referral is permitted. This provision overturns a 2017 Florida Supreme Court decision prohibiting discovery into a plaintiff counsel's referral relationship with treating physicians.[77] As the *Wall Street Journal* explains, "Collusive agreements between physicians and lawyers to inflate charges will no longer be protected by attorney-client privilege."[78]

The new law allows for apportionment of liability between negligent and intentional tortfeasors for criminal acts committed on the property in negligent security cases. Before the change, juries could apportion liability only among negligent actors and could not consider the conduct of the person who committed the crime. The law creates a rebuttable presumption

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[74] H.B. 837, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/text/H0837/2023. For a detailed staff analysis, see FLA. HOUSE OF REPRESENTATIVES, STAFF ANALYSIS OF H.B. 837, Reg. Sess. (2023), https://www.flsenate.gov/Session/Bill/2023/837/Analyses/h0837c.JDC.PDF.

[75] H.B. 1205, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/H1205/2023.

[76] S.360, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/S0360/2023.

[77] Worley v. Central Fla. Young Men's Christian Ass'n, 228 So. 3d 18 (Fla. 2017).

[78] Editorial, *DeSantis Defeats Trump on Lawsuit Abuse*, WALL ST. J. (Mar. 31, 2023), https://www.wsj.com/articles/ron-desantis-tort-reform-law-donald-trump-trial-bar-attorneys-d4e840?cx_testId=3&cx_testVariant=cx_170&cx_artPos=3&mod=WTRN#cxrecs_s.

against liability for owners of multifamily residential properties if certain security measures are in place.

In addition, the legislation changes Florida's "bad faith" framework. No bad faith action is permitted if an insurer tenders the policy limits or the amount of the plaintiff's demand, whichever is less, within ninety days of receiving notice of the claim and sufficient evidence supporting the amount of the claim. Negligence alone on the part of an insurer is insufficient to constitute bad faith denial of insurance coverage. Insureds, claimants, and representatives of insureds or claimants have a duty to act in good faith in furnishing information regarding the claim, in making demands of an insurer, in setting deadlines, and in attempting to settle claims.

Florida's "one-way attorney fees" provisions for insurance cases were limited. According to the *Wall Street Journal*, "[o]ne-way fees encourage plaintiff attorneys to file more lawsuits and defendants to settle cases to avoid paying even larger legal bills."[79] Attorney fees are now available only if an insured prevails in a declaratory judgment action to determine insurance coverage after total denial of coverage of a claim. A defense offered by an insurer pursuant to a reservation of rights does not constitute denial of a claim.

In any action in which attorney fees are determined or awarded by the court, the new law changes the ability of plaintiffs' counsel to obtain a contingency fee multiplier by creating a "strong presumption" that a "lodestar" fee is "sufficient and reasonable." The presumption may be overcome "only in a rare and exceptional circumstance with evidence that competent counsel could not otherwise be retained."

Another new law revises the date on which the four-year statute of limitations for construction defect claims begins to run. The enactment also shortens the previous ten-year statute of repose for claims involving improvements to real property to seven years and revises the date on which the statute of repose begins to run.[80]

Florida also addressed misleading legal services advertisements.[81] Under the new law, advertisements for legal services may not be presented as a "medical alert," "health alert," "drug alert," or public service announcement and may not display the logo of a government agency in a manner that suggests affiliation with the agency or use the word "recall" when referring to a product that has not been recalled in accordance with state or federal government regulations. Advertisements soliciting claimants for prescription drug or medical device lawsuits must state "[t]his is a paid advertisement for legal services" and disclose the identity of the advertisement's sponsor. In addition, ads soliciting claimants for

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[79] *Id.*

[80] S.360, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/S0360/2023.

[81] H.B. 1205, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/H1205/2023.

prescription drug or medical device lawsuits must identify the attorney or law firm that will be primarily responsible for providing the solicited legal services or explain how a responding consumer's case will be referred to an attorney. Ads targeting manufacturers of prescription drugs or medical devices must warn consumers to "Consult your physician before making any decision regarding prescription medication or medical treatment" and disclose if the drug or device remains approved by the Food and Drug Administration, unless the product has been recalled. The legislation does not apply to ads that have been reviewed and approved by an ethics or disciplinary committee of The Florida Bar. Lastly, it is an unlawful and deceptive trade practice for a person or entity to use, obtain, sell, transfer, or disclose to another person or entity a consumer's protected health information for the purpose of soliciting the consumer for legal services without the consumer's written authorization.

In addition, Florida enacted legislation to address motor vehicle glass claims.[82] Motor vehicle repair shops and their employees are prohibited from offering anything of value to a customer in exchange for making an insurance claim for motor vehicle glass replacement or repair. Further, a policyholder may not enter into an assignment agreement of post-loss benefits for motor vehicle glass replacement or repair.

A new Digital Bill of Rights[83] is in some ways narrower than other state data privacy laws, defining a "controller" as an entity that conducts business in Florida and, among other things, generates over $1 billion in annual global revenues and either derives fifty percent or more of its global annual revenues from the sale of advertisements online, operates a consumer smart speaker and voice command component service that uses hands-free verbal activation, or operates an app store or digital distribution platform with at least 250,000 different software applications for consumers to download and install. Consumers have the right to confirm whether a controller is processing their personal data and to access the personal information. Consumers also have the right to correct inaccuracies in their personal information, delete personal data, obtain a copy of personal data, and opt out of the sale of personal data, targeted advertising, or profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer.

Controllers and processors may not use electronic, visual, thermal, or olfactory features on a device, such as voice or facial recognition features, to collect data when such features are not in active use by the consumer unless expressly authorized. Data controllers must limit the collection of personal data to data that is reasonably necessary in relation to the purposes

[82] S.1002, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/S1002/2023.
[83] S.262, 2023 Leg., Reg. Sess. (Fla. 2023), https://legiscan.com/FL/bill/S0262/2023.

for which it is processed, as disclosed to the consumer. Further, controllers may not process the sensitive data of a consumer without obtaining the consumer's consent. (This part applies to any for-profit entity in Florida that collects data). Data controllers must provide consumers with a privacy notice that includes the categories of personal information processed, the purposes for which it is processed, how consumers may exercise their data rights, the categories of personal data shared with third parties, the categories of third parties with whom the controller shares such information, and the methods for consumers to exercise their rights.

Controllers that sell personal data must provide consumers with the following notice: "NOTICE: This website may sell your sensitive personal data." Controllers that sell biometric personal information must provide consumers with the following notice: "NOTICE: This website may sell your biometric personal data." Controllers must conduct and document data protection assessments for the processing of personal information for purposes of targeted advertising, the sale of personal data, the processing of personal data for profiling if certain foreseeable risk factors are present, the processing of sensitive data, and any processing activities involving personal information that present a heightened risk of harm to consumers.

The Department of Legal Affairs has exclusive authority to enforce the Digital Bill of Rights law. Violations are deemed unfair and deceptive trade practices. The department may collect a civil penalty of up to $50,000 per violation, with treble damages available in some situations. The department may grant a forty-five-day cure period and issue a letter of guidance. The statute also prohibits government-directed content moderation of social media platforms and imposes various protections for children in online spaces.

The Florida Supreme Court decided that no further amendments are warranted with respect to Florida Rule of Civil Procedure 1.280(h), which the court adopted in 2021 to extend the "apex doctrine" to the private sector and provide discovery protections to top-level corporate decision makers.[84]

The Florida Bar's Board of Governors scrapped a proposed advisory opinion that would have allowed Florida attorneys to passively invest in out-of-state law firms using alternative business structures.[85]

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[84] *In re* Amendment to Florida Rule of Civil Procedure 1.280, No. SC2021-0929 (Fla. Nov. 2, 2023); *see also In re* Amendment to Florida Rule of Civil Procedure 1.280, 324 So. 3d 459 (Fla. 2021).

[85] Madison Arnold, *Florida Bar Passes on Attorney Investments in Non-Attorney-Owned Firms*, LAW360 (Dec. 6, 2023), https://www.law360.com/legalethics/articles/1773488/fla-bar-passes-on-atty-investments-in-non-atty-owned-firms.

Georgia

Georgia codified the "apex doctrine," allowing a court to grant a protective order prohibiting the deposition of current or former high-ranking corporate officers or government officials who lack unique personal knowledge of matters relevant to a lawsuit.[86] The legislation also prohibits persons who are ineligible to provide legal services from holding themselves out as attorneys and provides liability for misrepresentation of the practice of law, such as falsely portraying actors as clients or making statements likely to lead a person to have an unjustified expectation of future success based on past performance. Additionally, a chief executive officer of a state government entity must name a designee or designees for service of process for civil actions and publish the information conspicuously on the entity's webpage.

Georgia also enacted legislation to allow a chiropractic practice to file a lien on a cause of action in the same way a hospital can file a lien under similar circumstances. Bills must be submitted to health insurers before a medical lien can be filed.[87]

Another new law doubled the amount of damages that must be at issue for a party in a civil action to demand a twelve-person jury.[88] Any party in which the claim for damages is greater than $50,000 may demand in writing prior to trial that the case be tried by a twelve-person jury. Previously, a twelve-person jury was available in civil cases in which the damages at issue exceeded $25,000.

The Georgia Supreme Court published comprehensive revisions to the Rules of the Supreme Court of Georgia.[89] Among the more substantial changes to the rules, which took effect on January 1, 2024, are:

- Rules 16-22: Revises formatting and typography requirements for briefs and shifts from page limitations for briefs to word counts;
- Rule 26.1: Requires a Certificate of Interested Persons at the time of the initial filing;
- Rules 40-41: Clarifies the standard for granting certiorari and requires petitioners to include the questions presented by the case in the petition for certiorari;

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[86] S. 74, 2023 Gen. Assemb., Reg. Sess. (Ga. 2023), https://legiscan.com/GA/bill/SB74/2023; *see also* General Motors, L.L.C. v. Buchanan, 874 S.E.2d 52 (Ga. 2022).

[87] S.168, 2023 Gen. Assemb., Reg. Sess. (Ga. 2023), https://legiscan.com/GA/bill/SB168/2023.

[88] H.B. 543, 2023 Gen. Assemb., Reg. Sess. (Ga. 2023), https://legiscan.com/GA/bill/HB543/2023.

[89] *In re* Amendments to the Rules of the Supreme Court of Georgia (Ga. Aug. 24, 2023), https://www.gasupreme.us/rules/.

- Rules 46-48: Clarifies the process of and requirements for other state and federal courts presenting certified questions to the Supreme Court of Georgia

Illinois

Illinois enacted legislation to permit punitive damages to be awarded in wrongful death cases, except in cases against the state or a unit of local government, against an employee of the state or an employee of a unit of local government acting in the person's official capacity, or in actions for healing art or legal malpractice.[90]

Indiana

Indiana enacted consumer lawsuit lending legislation.[91] In any civil action in which the plaintiff has entered into a civil proceeding advance payment (CPAP) transaction—i.e., a nonrecourse loan to a consumer where the consumer assigns to the lender a contingent right to receive a portion of the consumer's recovery in a civil action—the plaintiff or that person's attorney must provide to the parties and any insurer that has a duty to defend a party in the action written notice that the plaintiff has entered into a CPAP contract with a CPAP provider. The existence and contents of the contract are subject to discovery. The written notice concerning a CPAP contract is inadmissible in a court proceeding.

Indiana also enacted consumer data privacy legislation that generally applies to companies conducting business in Indiana or producing products or services that are targeted to Indiana residents and that control or process personal data of at least 100,000 Indiana residents or control or process the personal data of at least 25,000 Indiana residents and derive more than fifty percent of their gross revenue from the sale of personal data.[92] Consumers have the right to confirm whether a controller is processing the consumer's personal data and to access the data. Consumers also have the right to correct inaccuracies, delete personal data, obtain a copy or summary of personal data previously provided to the controller, and opt out of the processing of personal data for purposes of targeted advertising, the sale of personal data, or profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer.

Controllers of personal data must inform consumers of the categories of personal data processed by the controller, the purposes for processing

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[90] H.B. 219, 103d Gen. Assemb., Reg. Sess. (Ill. 2023), https://legiscan.com/IL/bill/HB0219/2023.

[91] H.B. 1124, 123d Gen. Assemb., Reg. Sess. (Ind. 2023), https://legiscan.com/IN/text/HB1124/id/2763105.

[92] S.5, 123d Gen. Assemb., Reg. Sess. (Ind. 2023), https://legiscan.com/IN/text/SB0005/id/2772732.

personal data, how to exercise their consumer rights, the categories of personal data that are shared with third parties, and the categories of third parties that will receive such information. Indiana's attorney general has the exclusive authority to enforce the law and may seek civil penalties of up to $7,500 per violation after providing the controller or processor with a thirty-day cure period. The law takes effect on January 1, 2026.

Indiana doubled juror compensation from $15 to $30 per day prior to a jury being impaneled and from $40 to $80 per day for subsequent days, with an increase to $90 on the sixth day.[93] The jury fee collected from a defendant who has committed a crime or committed certain violations was increased from $2 to $6. The clerk shall collect a jury fee of $75 from a party filing a civil tort or plenary action.

Iowa

Iowa enacted a $250,000 cap on noneconomic damages in medical liability actions that applies unless the jury determines "there is a substantial or permanent loss or impairment of a bodily function, substantial disfigurement, loss of pregnancy, or death, which warrants a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained," in which case the amount recoverable shall not exceed $1 million (or $2 million if the action includes a hospital).[94] The limitations on damages increase by two and one-tenth percent on January 1, 2028, and each January 1 thereafter. Punitive damages awarded in a claim against a physician and surgeon, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, nurse, or hospital are not subject to Iowa's punitive damages split-recovery statute, which provides that seventy-five percent of any punitive damages award shall be paid into a civil reparations trust fund administered by the state court administrator.

Iowa also enacted legislation providing that commercial trucking companies are not subject to liability for negligent hiring of a driver if the employer stipulates that the driver whose negligence is alleged to have caused damages to another was an employee acting within the course and scope of employment.[95] If an employer makes those stipulations, and the employee's negligence is found to have caused or contributed to causing the plaintiff's damages, the employer's liability shall be adjudged solely on the basis of respondeat superior.

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[93] H.B. 1466, 123d Gen. Assemb., Reg. Sess. (Ind. 2023), https://legiscan.com/IN/bill/HB1466/2023.

[94] H.F. 161, 90th Gen. Assemb., Reg. Sess. (Iowa 2023), https://www.legis.iowa.gov/legislation/BillBook?ga=90&ba=hf%20161.

[95] S.F. 228, 90th Gen. Assemb., Reg. Sess. (Iowa 2023), https://legiscan.com/IA/bill/SF228/2023.

Noneconomic damages in personal injury or death actions against commercial trucking companies are capped at $5 million per plaintiff. The cap does not apply if the driver lacked a commercial driver's license or commercial learner's permit for the vehicle, was intoxicated or under the influence of a drug, engaged in reckless driving or excessive speeding, was using an electronic communication device, or was violating a state or local distracted driving law or ordinance at the time of the negligent act leading to the plaintiff's harm. In addition, the cap does not apply to commercial motor vehicles serving as a common carrier of passengers or that are primarily engaged in transporting passengers. The cap will be adjusted for inflation on January 1, 2028, and every even-numbered year thereafter.

In addition, Iowa enacted consumer data privacy legislation that generally applies to companies conducting business in Iowa or producing products or services that are targeted to Iowa residents and that control or process the personal data of at least 100,000 Iowa residents or control or process the personal data of at least 25,000 Iowa residents and derive more than fifty percent of their gross revenue from the sale of personal data.[96] Consumers have the right to confirm whether a controller is processing their personal data and to access the data, to delete personal data, to obtain a copy of personal data, and opt out of the sale of personal data. Data controllers must not process sensitive data collected from a consumer without presenting the consumer with clear notice and an opportunity to opt out of the processing of the data. A controller that sells a consumer's personal data or engages in targeted advertising must "clearly and conspicuously disclose such activity" and the manner in which the consumer may opt out of the activity. Iowa's attorney general has the sole authority to enforce the law and may seek injunctive relief and civil penalties of up to $7,500 per violation after providing the controller or processor with a ninety-day cure period. The law takes effect on January 1, 2025.

Kansas

Kansas changed the rate on prejudgment interest in civil actions from a fixed rate of ten percent per annum to a new rate that reflects the federal discount rate (the charge on loans to depository institutions by the New York federal reserve bank as reported in the money rates column of the *Wall Street Journal*) plus two percent.[97]

[96] S.F. 262, 90th Gen. Assemb., Reg. Sess. (Iowa 2023), https://legiscan.com/IA/text/SF262/2023.

[97] S.75, 2023 Leg., Reg. Sess. (Kan. 2023), https://legiscan.com/KS/bill/SB75/2023.

Louisiana

Governor John Bel Edwards vetoed a Litigation Financing Disclosure and Security Protection Act that would have required mandatory disclosures relating to commercial litigation funding.[98]

Maine

Maine increased the amount that damages recoverable in wrongful death actions for loss of comfort, society, and companionship from $750,000 to "$1 million adjusted for inflation."[99] The amount of punitive damages recoverable in wrongful death actions was raised from $250,000 to $500,000.[100] The statute of limitations for wrongful death actions was extended from two years to three years after the decedent's death.

Maryland

Maryland abolished the statute of limitations for civil lawsuits alleging child sex abuse against public and private entities and retroactively revived previously time-barred actions.[101] Under the Child Victims Act of 2023, actions for damages arising out of alleged incidents of sexual abuse against minors may be filed at any time. The new law would not allow actions on behalf of alleged child sex abuse victims who are deceased if such claims would have been time-barred before October 1, 2023. For claims against private entities that would have been time-barred before October 1, noneconomic damages are capped at $1.5 million. For public entities, such as school boards and local governments, damages are capped at $890,000.

Michigan

Michigan repealed a longstanding law precluding product liability actions against manufacturers of FDA-approved drugs unless the drug was sold after a recall or withdrawal of approval, the manufacturer intentionally withheld information from or misrepresented information to the FDA that would have led the FDA to not approve or withdraw approval of the drug, or approval was obtained through an illegal payment to an agency official.[102]

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[98] S.196, 2023 Leg., Reg. Sess. (La. 2023), https://legiscan.com/LA/bill/SB196/2023; Emily R. Siegel, *Litigation Finance Disclosure Legislation Vetoed in Louisiana*, BLOOMBERG L., June 16, 2023, https://news.bloomberglaw.com/business-and-practice/litigation-finance-disclosure-legislation-vetoed-in-louisiana.

[99] L.D. 934, 131st Leg., Reg. Sess. (Me. 2023), https://legiscan.com/ME/text/LD934/2023.

[100] L.D. 934, 131st Leg., Reg. Sess. (Me. 2023), https://legiscan.com/ME/text/LD934/2023.

[101] S.686, 2023 Gen. Assemb., Reg. Sess. (Md. 2023), https://mgaleg.maryland.gov/2023RS/bills/sb/sb0686T.pdf.

[102] S.410, 102d Leg., Reg. Sess. (Mich. 2023), https://legiscan.com/MI/text/SB0410/2023.

The Michigan Supreme Court restyled the Michigan Rules of Evidence to bring the rules into closer alignment with the Federal Rules of Evidence. The updated Michigan rules took effect on January 1, 2024.[103]

The Michigan Supreme Court is considering additional amendments to Michigan Rules of Evidence 702 and 804.[104] The proposed amendment to Michigan Rule of Evidence 702 reflects the 2023 amendments to Federal Rule of Evidence 702. The proposed amendment to Michigan Rule of Evidence 804 "would require corroborating circumstances of trustworthiness for any statement against interest that exposes a declarant to criminal liability."[105]

Minnesota

Minnesota's survivorship law was amended to provide that a cause of action for personal injury survives a person's death.[106] Previously, Minnesota did not recognize survival actions; only wrongful death actions could be brought in the event of someone's death.

A new Family Protection Act requires insurance coverage for all occupants in a boat.[107] The law prohibits boating insurance, personal excess liability policies, and personal umbrella insurance policies from excluding coverage for personal injuries because the injured person is a relative or member of the insured's household.

Missouri

Missouri enacted a Consumer Legal Funding Act to provide certain requirements for consumer lawsuit lending transactions.[108] Consumers must give non-revocable written direction to their attorney requiring the attorney to notify the consumer legal funding company when a legal claim has been resolved. Once the consumer legal funding company confirms in writing the amount due under the contract, the consumer's attorney must pay, from the proceeds of the resolution of the legal claim, the amount due within ten business days. Consumer legal funding companies may not pay or offer to

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[103] Michigan Supreme Court, Amendments of the Michigan Rules of Evidence, ADM File No. 2021-10 (Sept. 20, 2023) (Order), https://www.courts.michigan.gov/4a96cc/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2021-10_2023-09-20_formor_amdmre.pdf.

[104] Michigan Supreme Court, Proposed Amendments of Rules 702 and 804 of the Michigan Rules of Evidence, ADM File No. 2022-30 (Oct. 25, 2023) (Order), https://www.courts.michigan.gov/4aa645/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/proposed-orders/2022-30_2023-10-25_formor_propamdmre702-804.pdf.

[105] *Id.* (staff comment).

[106] S.F. 2909, 93d Leg., Reg. Sess. (Minn. 2023), https://www.revisor.mn.gov/laws/2023/0/52/laws.19.32.0#laws.19.32.0.

[107] S.F. 2744, 93d Leg., Reg. Sess. (Minn. 2023), https://legiscan.com/MN/bill/SF2744/2023.

[108] S.103, 2023 Leg., Reg. Sess. (Mo. 2023), https://legiscan.com/MO/text/SB103/2023.

pay commissions or other forms of consideration to attorneys, medical providers, chiropractors, or physical therapists (or their employees) for referring a consumer to the company. Further, consumer legal funding companies may not make decisions with respect to the conduct or resolution of the underlying legal claim. The amount to be paid to a consumer legal funding company shall be set as a predetermined amount based upon intervals of time from the funding date to the resolution date and shall not be determined as a percentage of the recovery from the legal claim. No consumer legal funding contract may exceed a period of forty-eight months. Consumer legal funding contracts may not be automatically renewed. No communication between a consumer's attorney and a consumer legal funding company regarding the status of a legal claim or a legal claim's expected value shall be discoverable by a defendant in a civil action claim brought by the consumer. A consumer legal funding contract is subject to the usual rules of discovery.

Montana

Significant changes were made to Montana's product liability law.[109] Defendants in negligence, strict liability, and breach of warranty cases may assert as a defense that the claimant's damages were caused in full or in part by a person with whom the claimant has settled or whom the claimant has released from liability. Previously, the fault of settling or released parties could only be considered in negligence cases. In addition, contributory negligence is allowed as a defense to a product liability claim. Previously, contributory negligence was not permitted as a defense to a strict product liability action.

Defendants in actions alleging that a product was defectively designed may assert as an affirmative defense that the product "could not have been made safer by the adoption of a reasonable alternative that was available at the time the product was first sold to a user or consumer."

The legislation also includes a ten-year statute of repose for product liability claims. The law has several exceptions to permit product liability claims more than ten years after a product was first sold, leased, or otherwise placed into the stream of commerce if: (1) the seller knowingly concealed a defective or unsafe condition that resulted in the claimant's harm; (2) the product is subject to a government-mandated recall related to consumer safety; (3) the claim is brought with respect to a product that is real property or an improvement to real property; (4) the product causes a respiratory or malignant disease with a latency of more than ten years, and the defendant seller is also the manufacturer of the product claimed to be

[109] S.216, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/bill/SB216/2023.

defective; or (5) the seller made an express warranty or advertised that the product had an expected useful safe life greater than ten years.

In addition, there is a rebuttable presumption in product liability actions that the subject product was not defective and that the product's manufacturer or seller was not negligent. The jury must be told of this presumption if at the time the product was first sold, leased, or otherwise placed in the stream of commerce, the product complied with mandatory safety standards adopted by a federal or state government or agency, the product was subject to premarket licensing or approval by a federal or state government or agency, or the product was an FDA-approved drug or medical device that complied with FDA approval at the time of sale and was not sold after any order by the FDA to remove the product from the market or withdraw its approval.

A product liability action may not be brought against a seller that is not also a manufacturer unless the claimant proves that the seller modified the product after it left the manufacturer's possession in an unauthorized manner or in a manner that was not performed in compliance with the manufacturer's directions or specifications, the seller made an express factual representation about the product independent of any express warranty made by the manufacturer, the manufacturer cannot be identified, despite a good faith exercise of due diligence to identify the manufacturer, personal jurisdiction over the manufacturer cannot be obtained in the state, the manufacturer has been adjudicated bankrupt and a judgment is not otherwise recoverable from the assets of the manufacturer's bankruptcy estate, or the seller knew that the product was defective at the time of sale and the known defect proximately caused the plaintiff's harm.

Montana also enacted punitive damages legislation.[110] A claim for punitive damages may not be contained within an initial pleading. After the initial pleading is filed and discovery has commenced in a lawsuit, a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages. The party making the motion may submit affidavits and documentation supporting the claim for punitive damages. A party opposing the motion may submit opposing affidavits and documentation. The court may not allow a party to assert a claim for punitive damages unless the affidavits and supporting documentation submitted by the party seeking punitive damages set forth specific facts supported by admissible evidence adequate to establish the existence of a triable issue on all elements of a punitive damages claim.

Any punitive damages award above $200,000 shall be divided equally between the prevailing party and the state. Reasonable attorney fees related to the award of punitive damages may be deducted from the full award of

[110] S.169, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/bill/SB169/2023.

punitive damages after costs, but attorney fees deducted from the state's share may not exceed twenty percent of the state's share of the award of punitive damages after costs.

A new Litigation Financing Transparency and Consumer Protection Act requires the registration of litigation financers with the Secretary of State, the disclosure of litigation financers and the financing contract in any civil action, and disclosure of the officers of the company engaging in litigation financing.[111] Litigation funders are jointly liable for any award or order imposing costs. There is a twenty-five percent cap on the amount that a funder may recover from any award, settlement, or other monetary relief from the lawsuit.

Montana also established a duty of cooperation for insureds and third-party claimants toward insurers.[112] Breach of that duty may be asserted by an insurer as an affirmative defense to a claim by an insured or third-party claimant alleging breach of contract or breach of the implied covenant of good faith and fair dealing by the insurer. An insurer may introduce evidence concerning an insured's or third-party claimant's conduct in cases alleging the insurer's breach of contract or breach of the covenant of good faith and fair dealing. In addition, the state's bad faith insurance claim statute was amended to provide that a third-party claimant who has suffered damages as a result of the handling of an insurance claim may bring an action against the insurer for fraud, but no other cause of action. A third-party claimant may not bring an action for bad faith in connection with the handling of an insurance claim.

Another new law establishes requirements for time-limited demands from claimants to insurers to settle claims, including the need for the claimant to provide all available information and supporting documents so the insurer has an opportunity to investigate and evaluate the claims presented without the risk of having an unfair claim settlement practices or insurance bad faith claim alleged against it.[113]

Montana also enacted a Consumer Data Privacy Act that generally applies to companies conducting business in Montana or producing products or services that are targeted to Montana residents and that control or process the personal data of at least 50,000 Montana residents (excluding personal data processed for the purpose of payments) or control or process the personal data of at least 25,000 Montana residents and derive more than twenty-five percent of their gross revenue from the sale of personal data.[114] Consumers have the right to confirm whether a controller is processing the consumer's personal data and to access the data, to correct inaccuracies and

[111] S.269, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/bill/SB269/2023.
[112] S.165, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/bill/SB165/2023.
[113] S.236, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/bill/SB236/2023.
[114] S.384, 68th Leg., Reg. Sess. (Mont. 2023), https://legiscan.com/MT/text/SB384/2023.

delete personal data, obtain a copy of personal data, and opt out of the processing of personal data for targeted advertising, sale of personal data, and profiling in furtherance of solely automated decisions that produce legal or similarly significant effects concerning the consumer. Data controllers must comply with requests to opt out of targeted advertising or the sale of personal data made through opt out preference signals by January 1, 2025. Data controllers cannot process sensitive data collected concerning a consumer without the consumer's permission. The legislation also imposes various requirements on processors and requires controllers to conduct data protection assessments for processing activities that present a heightened risk of harm to consumers. The state's attorney general has sole authority to enforce violations, subject to a sixty-day cure period that sunsets on April 1, 2026.

Nevada

Nevada's statutory cap on noneconomic damages in medical malpractice claims was increased from $350,000 to $750,000 over five years with step increases of $80,000 each year beginning January 1, 2024, and ending on January 1, 2028.[115] Beginning January 1, 2029, the cap will increase two and one-tenth percent each year. For actions filed on or after October 1, 2023, the statute of limitations increases from one year to two years after the plaintiff discovers or should have discovered the injury. The legislation maintains the maximum time limit (statute of repose) to file a medical malpractice action (three years from the date of injury). The prior sliding scale limits on contingency fees in medical liability cases were replaced with a thirty-five percent cap.

Nevada boosted payments for expert witnesses where courts are required or authorized to award certain costs to prevailing parties in certain civil actions.[116] Previously, such costs could include the reasonable fees of not more than five experts in an amount of not more than $1,500 for each witness, unless the court allowed a larger fee after determining that the circumstance surrounding the expert's testimony required the larger fee. The new law raises the amount to $15,000 for each expert witness.

In addition, the state raised its juror per diem from $40 to $65 for persons who are summoned as a juror or serving as a grand juror.[117]

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[115] A.B. 404, 82d Leg., Reg. Sess. (Nev. 2023), https://legiscan.com/NV/text/AB404/id/2823106.

[116] A.B. 76, 82d Leg., Reg. Sess. (Nev. 2023), https://www.leg.state.nv.us/Session/82nd2023/Bills/AB/AB76.pdf.

[117] S.222, 82d Leg., Reg. Sess. (Nev. 2023), https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10022/.

New Hampshire

The New Hampshire Supreme Court held that New Hampshire does not recognize a remedy or cause of action for the costs of medical monitoring absent a present physical injury.[118]

New York

New York enacted legislation requiring all New York drivers to be automatically enrolled in pricier automobile insurance that allows one spouse to sue another for injuries arising from negligent driving,[119] "even though the coverage will be of no use to roughly half the population."[120] The law took effect on August 1, 2023 and sunsets on July 31, 2027. Drivers may opt out of the supplemental spousal liability insurance coverage if they contact their insurer and refuse it in writing.

Governor Kathy Hochul vetoed a bill that would have required foreign companies that register to do business or are designated to do business in New York to automatically consent to the jurisdiction of the courts of the state.[121] She explained that she vetoed similar legislation in 2021 "due to concerns that the proposal would represent a massive expansion of New York's laws governing general jurisdiction, likely deterring out-of-state companies from doing business in New York because it would require them to be subject to lawsuits in the State regardless of any connection to New York."[122]

Governor Hochul also vetoed a bill that would have banned noncompete agreements in New York.[123] The Governor could not agree with policymakers on "how to calculate an income threshold that would have kept the ban for low-wage workers but would have allowed the

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[118] Brown v. Saint-Gobain Performance Plastics Corp., 300 A.3d 949 (N.H. 2023).

[119] S.883, 2023 State Assemb., Reg. Sess. (N.Y. 2023), https://legiscan.com/NY/text/S00833/2023; *see also* A.1029, 2022 State Assemb., Reg. Sess. (N.Y. 2022), https://legiscan.com/NY/text/A01029/2021.

[120] Times Union Editorial Board, *Pay More, Get Zilch—Thanks, New York*, TIMES UNION (Aug. 17, 2023) https://www.timesunion.com/opinion/article/editorial-wants-pay-auto-insurance-anybody-18297122.php.

[121] N.Y. Governor Kathy Hochul, Veto No. 147, S.7476 (Dec. 22, 2023); S.7476, 2023 State Assemb., Reg. Sess. (N.Y. 2023), https://www.nysenate.gov/legislation/bills/2023/S7476; *see also* Mark Behrens, *Gov. Hochul Must Protect New York's Courts from Forum Shopping and Nuclear Verdicts,* N.Y.L.J. (Dec. 20, 2023), https://www.law.com/newyorklawjournal/2023/12/20/gov-hochul-must-protect-new-yorks-courts-from-forum-shopping-and-nuclear-verdicts/.

[122] N.Y. Governor Kathy Hochul, Veto No. 147, S.7476 (Dec. 22, 2023); *see also* N.Y. Governor Kathy Hochul, Veto No. 76, A.7729 (Dec. 31, 2021).

[123] S.3100A, 2023 State Assemb., Reg. Sess. (N.Y. 2023), https://www.nysenate.gov/legislation/bills/2023/S3100/amendment/A.

agreements to persist for well-paid workers like those in the financial services industry."[124]

Another bill Governor Hochul vetoed would have authorized much larger awards in wrongful death cases by expanding recoverable damages to include noneconomic damages.[125] Today, surviving family members may recover economic or pecuniary losses resulting from a loved one's wrongful death, such as medical and funeral costs related to the death, wages the decedent would have earned, and the value of lost services provided by the decedent such as childcare. In addition to these awards, the so-called Grieving Families Act would have permitted uncapped recoveries for "grief or anguish," "loss of love, society, protection, comfort, companionship, and consortium," and "loss of nurture, guidance, counsel, advice, training and education resulting from the decedent's death." Further, the bill would have allowed such lawsuits to be filed by a "decedent's spouse or domestic partner, issue, foster-children, step-children, and step-grandchildren, parents, grandparents, step-parents, step-grandparents, siblings or any other person standing in loco parentis to the decedent." The current two-year statute of limitations for wrongful death cases would have been extended by a year. Governor Hochul explained that she vetoed the bill because it "represented a foundational shift in New York's wrongful death jurisprudence and would have likely resulted in significant unintended consequences."[126] In 2022, Governor Hochul vetoed substantially similar legislation, expressing concern that it "would increase already-high insurance burdens on families and small businesses and further strain already-distressed healthcare workers and institutions."[127]

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[124] Luis Ferré-Sadurní, *Hochul Vetoes Ban on Noncompete Agreements in New York*, N.Y. TIMES (Dec. 24, 2023), https://www.nytimes.com/2023/12/22/nyregion/kathy-hochul-veto-noncompete.html.

[125] N.Y. Governor Kathy Hochul, Veto No. 151, A.6698 (Dec. 29, 2023); A.6698, 2023 State Assemb., Reg. Sess. (N.Y. 2023), https://www.nysenate.gov/legislation/bills/2023/A6698; *see also* Behrens, *supra* note 121; Mark Behrens & Christopher Appel, *Governor Hochul: Don't Allow Inflation in Wrongful Death Lawsuits*, N.Y.L.J. (Dec. 20. 2022), https://www.law.com/newyorklawjournal/2022/12/20/governor-hochul-dont-allow-inflation-in-wrongful-death-lawsuits/.

[126] N.Y. Governor Kathy Hochul, Veto No. 151, A.6698 (Dec. 29, 2023).

[127] N.Y. Governor Kathy Hochul, Veto No. 192, S.74A (Jan. 30, 2023). The Governor indicated a willingness to sign a narrower law to benefit parents of children killed in accidents unrelated to medical malpractice, but this was rejected by the bill's sponsors. N.Y. Governor Kathy Hochul, *Hochul to Legislature: Let's Agree on Helping Grieving Families Before Tuesday's Midnight Deadline*, N.Y. DAILY NEWS, Jan. 30, 2023, https://www.nydailynews.com/opinion/ny-oped-lets-agree-on-helping-grieving-families-today-before-midnight-deadline-20230130-jim7ltxwofdm3nwurnidmi6mvi-story.html; Press Release, Sen. Brad Hoylman-Sigal, Assembly Member Weinstein And Senator Hoylman-Sigal Respond To Governor Hochul's Op-Ed On The Grieving Families Act (Jan. 30, 2023), https://www.nysenate.gov/newsroom/press-releases/brad-hoylman-sigal/assembly-member-weinstein-and-senator-hoylman-sigal.

North Dakota

North Dakota doubled its juror per diem from $25 to $50 for the first half-day and from $50 to $100 for each full day of jury service.[128]

Ohio

The Ohio Supreme Court is considering an amendment to Ohio Rule of Evidence 702 to mirror the 2023 amendments to Federal Rule of Evidence 702.[129]

Oklahoma

Oklahoma increased juror pay from $20 to $50 for each day's attendance before any court of record.[130] Local courts are able to reimburse jurors for mileage and, beginning on the 11th day of jury service, pay jurors up to $200 daily through a lengthy trial fund. A prospective juror who has a mental or physical condition that causes him or her to be incapable of performing jury service may be excused by presenting documentation from a physician, physician assistant, or advanced practice registered nurse licensed to practice medicine verifying that a mental or physical condition renders the person unfit for jury service for a period of up to twenty-four months.[131] Previously, the note had to come from a physician.

Oregon

Oregon enacted a Consumer Privacy Act to give consumers enhanced rights to access, delete, correct and stop the sale and sharing of their personal information.[132] The law also "requires companies to obtain opt-in consent before processing certain 'sensitive' data and for serving targeted advertising or selling personal information belonging to thirteen to fifteen year-olds."[133] The state's attorney general has the exclusive authority to investigate violations and bring enforcement actions with civil penalties of up to $7,500 per violation."[134] A right to cure provision requires the

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[128] H.B. 1002, 68th Leg. Assemb., Reg. Sess. (N.D. 2023), https://legiscan.com/ND/text/HB1002/2023.

[129] Ohio Supreme Court, Proposed Amendments to the Ohio Rules of Practice and Procedure (Dec. 21, 2023), https://www.supremecourt.ohio.gov/ruleamendments/documents/2024%20Practice%20&%20Procedure%20Proposals.pdf.

[130] H.B. 1024, 2023 Leg., 1st Spec. Sess. (Okla. 2023), https://legiscan.com/OK/bill/HB1024/2023/X1.

[131] H.B. 1005, 2023 Leg., Reg. Sess. (Okla. 2023), https://legiscan.com/OK/text/HB1005/2023.

[132] S.619, 81st Leg., Reg. Sess. (Or. 2023), https://legiscan.com/OR/text/SB619/id/2830293.

[133] Allison Grande, *Oregon Becomes Latest State to Join Data Privacy Law Surge*, LAW360 (July 18, 2023), https://www.law360.com/articles/1701184/print?section=compliance.

[134] *Id.*

attorney general to give companies thirty days to remedy alleged violations if the attorney general determines an infraction can be fixed.

Rhode Island

Rhode Island raised the minimum recovery for successful plaintiffs in wrongful death actions from $250,000 to $350,000.[135]

Tennessee

Tennessee enacted consumer data privacy legislation that generally applies to companies conducting business in Tennessee or producing products or services that are targeted to Tennessee residents, exceeding $25 million in revenue, and either controlling or processing personal data of at least 175,000 Tennessee residents or control or process the personal data of at least 25,000 Tennessee residents and deriving more than fifty percent of their gross revenue from the sale of personal information.[136] Under the Tennessee Information Act, consumers have the right to confirm whether a controller is processing the consumer's personal data and to access the personal information. Consumers also have the right to correct inaccuracies in their personal information, to delete personal data, obtain a copy of personal data, and to opt out of the sale of personal data, targeted advertising, or profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer.

Data controllers must not process sensitive data concerning a consumer without the consumer's consent. Data controllers also must provide consumers with a privacy notice that includes the categories of personal information processed, the purpose for processing personal information, how consumers may exercise their rights, the categories of personal data sold to third parties, and the categories of third parties to whom the controller sells personal information. Controllers must conduct and document data protection assessments for the processing of personal information for purposes of targeted advertising, the sale of personal information, the processing of data for purposes of profiling if certain foreseeable risk factors are present, the processing of sensitive data, and any processing activities involving personal information that present a heightened risk of harm to consumers.

The state's attorney general has exclusive authority to enforce the Act and may seek injunctive relief and civil penalties of up to $7,500 per violation with treble damages available for willful violations of the Act, subject to a sixty-day cure period. An affirmative defense exists to a cause

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[135] H.B. 5513, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023), https://legiscan.com/RI/text/H5513/2023.

[136] H.B. 1181, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023), https://legiscan.com/TN/bill/HB1181/2023.

of action for a violation if the data controller or processor creates, maintains, or complies with a written privacy program that reasonably conforms to the National Institute of Standards and Technology privacy framework. The Act takes effect on July 1, 2025.

Texas

Texas created a business court.[137] The legislation took effect on September 1, but will apply only to actions commenced on or after September 1, 2024, to allow for preliminary steps to be completed such as the appointment and confirmation of judges and adoption of court rules. The business court judicial district is composed of all Texas counties. There are eleven business court Divisions (which are geographically aligned with the eleven administrative judicial regions in the state). Five divisions containing the major urban areas in and around Austin (Third Division), Dallas (First Division), Fort Worth (Eighth Division), Houston (Eleventh Division), and San Antonio (Fourth Division) will be created as of September 1, 2024. The remaining divisions will only be created if funded during the 2025 legislative session; otherwise, these divisions will be abolished on September 1, 2026, unless reauthorized and funded through additional legislative appropriations.

The business court will be served by up to sixteen judges appointed by the governor with the advice and consent of the senate. The governor must appoint two judges to each of the First, Third, Fourth, Eighth, and Eleventh Divisions and one judge to each of the other divisions (depending on how many of these divisions are created in the 2025 legislative session). Judges will serve two-year terms, beginning on September 1 of every even-numbered year, and may be reappointed. The statute sets forth age and other qualifications for appointments to the business court bench.

The business court will have civil jurisdiction concurrent with district courts for cases involving over $5 million in controversy that concern corporate governance disputes, certain claims under a securities or trade regulation law, an action alleging an act or omission by an owner, controlling person, or managerial official of an organization, an action alleging that an owner, controlling person, or managerial official breached a duty owed to the organization or an owner, an action seeking to hold an owner or governing person liable for an obligation of the organization, and an action arising out of the Business Organizations Code. The business court will have civil jurisdiction concurrent with district courts in these actions, regardless of the amount in controversy, if a party to the action is a publicly traded company.

[137] H.B. 19, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/text/HB19/2023.

In addition, the business court will have civil jurisdiction concurrent with district courts for cases involving over $10 million in controversy that concern a qualified transaction, a contract (except an insurance contract), or a violation of the Finance Code or Business & Commerce Code by an officer acting on behalf of an organization other than a bank, credit union, or savings and loan association.

In any of these disputes, the business court will have civil jurisdiction concurrent with district courts over cases seeking declaratory judgment or injunctive relief under Chapter 37 of the Civil Practice and Remedies Code.

Subject to certain objections, the business court has supplemental jurisdiction over any other claim related to a case or controversy within the court's jurisdiction, but only if agreed to by all parties and the judge.

The business court will not have jurisdiction over personal injury or wrongful death claims, actions brought by or against a governmental entity, claims arising out of the sale of farm products, consumer transactions, or claims relating to the duties or obligations under an insurance policy, among others.

An action may be originally filed in a business court or removed from the court in which it was originally filed. Business court cases may be tried before a jury subject to certain venue provisions.

Business court decisions will be appealed to a newly-created Fifteenth Court of Appeals in Austin.[138]

Texas also enacted legislation providing that a transportation network company may not be held vicariously liable for damages in an action or arbitration proceeding under certain circumstances, including if the claimant does not prove by clear and convincing evidence that the company was grossly negligent.[139]

In addition, Texas increased the amount of money for civil penalties the attorney general may collect for violations of the Texas Free Enterprise and Antitrust Act of 1983.[140] Previously, fines could not exceed $1 million for a corporation or $100,000 for any other person. Fines under the new law may not exceed $300,000 for an individual and may not exceed $3 million for corporations with less than $100 million in assets or market capitalization, $20 million for corporations with assets or market capitalization that is at least $100 million but less than $500 million, and $30 million for corporations with $500 million or more in assets or market capitalization.

Texas joined several other states in enacting consumer data protection legislation.[141] The new law generally applies to companies conducting business in Texas or producing products or services consumed by Texas

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[138] S.1045, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/bill/SB1045/2023.
[139] H.B. 1745, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/text/HB1745/2023.
[140] H.B. 5232, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/bill/HB5232/2023.
[141] H.B. 4, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/text/HB4/2023.

residents that process or engage in the sale of personal data and are not small businesses (though small businesses are prohibited from selling sensitive personal data without a consumer's consent). Consumers have the right to confirm whether a controller is processing the consumer's personal data and to access the personal information. Consumers also have the right to correct inaccuracies in their personal data, delete personal data, obtain a copy of personal data, and opt out of the sale of personal data, targeted advertising, or profiling in furtherance of a decision that produces a legal or similarly significant effect concerning the consumer.

Controllers must set up a process for consumers to appeal a controller's potential refusal to act on a consumer's data rights request. Data controllers must not process sensitive data concerning a consumer without consent. Data controllers also must provide consumers with a privacy notice that includes the categories of personal information processed, the purpose for processing personal data, how consumers may exercise their data rights, the categories of personal data sold to third parties, the categories of third parties to whom the controller sells such information, and the methods for consumers to submit requests to exercise their rights.

A controller that sells personal data must provide consumers with the following notice: "NOTICE: We may sell your sensitive personal data." If a data controller sells biometric personal information, the following disclosure is required: "NOTICE: We may sell your biometric personal data." Controllers must conduct and document data protection assessments for the processing of personal information for purposes of targeted advertising, the sale of personal information, the processing of personal data for purposes of profiling if certain foreseeable risk factors are present, the processing of sensitive data, and any processing activities involving personal information that present a heightened risk of harm to consumers. The state's attorney general has exclusive authority to enforce the law and may seek injunctive relief and civil penalties of up to $7,500 per violation, subject to a thirty-day cure period.

Texas also increased the reimbursement for jurors for the first day or fraction of the day from $6 to $20 and from $40 to $58 for subsequent days.[142] The state also increased the amount it reimburses counties for payments made to persons who report to jury duty from $34 after the first day or fraction of the day to $14 for the first day or fraction of the day and $52 for subsequent days per juror. This was the first pay raise for Texas jurors in almost twenty years.[143]

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[142] H.B. 3474, 88th Leg., Reg. Sess. (Tex. 2023), https://legiscan.com/TX/text/HB3474/2023.

[143] Tommy Witherspoon, *Texas Residents Summoned for Jury Duty to Get Pay Raise for First Time in 20 Years*, KWTX (July 7, 2023), https://www.kwtx.com/2023/07/07/texas-residents-summoned-jury-duty-get-pay-raise-first-time-20-years/. H.B. 5232, 88th Leg., 1st C. Sess. (Tex. 2023), https://legiscan.com/TX/bill/HB5232/2023.

Utah

Utah enacted legislation to address over-naming in asbestos cases and to require plaintiffs with nonmalignant conditions to demonstrate impairment pursuant to objective medical criteria.[144] Within twenty-one days after the day on which the first answer is filed in response to the plaintiff's complaint, the plaintiff must provide the parties with a sworn declaration stating the evidence providing the basis for each claim against each defendant and include supporting documentation. 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. The court may not dismiss a plaintiff's asbestos claim upon a showing of good cause by the plaintiff. In addition, within ninety days after the day on which the plaintiff files a complaint alleging an asbestos-related nonmalignant condition, the plaintiff shall file a detailed narrative medical report and diagnosis, signed under oath by a qualified physician and accompanied by supporting test results, constituting prima facie evidence that the exposed individual has a physical impairment for which exposure to asbestos was a substantial contributing factor.

Vermont

Vermont's Fiscal Year 2024 Appropriations Act included a provision stating, "The State may recover from a manufacturer of PCBs monies expended or awarded by the State for PCB investigation, testing, assessment, remediation, or removal of PCBs in a school above the relevant action level."[145]

Virginia

Virginia increased the jury duty allowance from $30 to $50 per day.[146]

Washington

Washington's new Firearm Industry Responsibility and Gun Violence Victims' Access to Justice Act provides that firearm manufacturers may be held liable for contributing to a public nuisance if they market or sell firearms to children or individuals who are legally prohibited from purchasing or possessing firearms or promote conversion of a legal firearm into an illegal firearm.[147] If the attorney general has reason to believe a firearm industry member has violated these duties, the attorney general may

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[144] H.B. 328, 2023 Gen. Sess., Reg. Sess. (Utah 2023), https://legiscan.com/UT/text/HB0328/2023.

[145] H.494, 2023 Leg., Reg. Sess. (Vt. 2023) https://legiscan.com/VT/text/H0494/2023.

[146] S.789, 2023 Gen. Assemb., Reg. Sess. (Va. 2023), https://legiscan.com/VA/bill/SB789/2023.

[147] S.5078, 2023 Leg., Reg. Sess. (Wash. 2023), https://legiscan.com/WA/text/SB5078/2023.

commence a claim under the consumer protection act for relief, including punitive damages up to three times the actual damages sustained by the state, reasonable attorneys' fees, and costs of the action.

The "Washington My Health My Data Act" supplements HIPAA's protections for health data.[148] Regulated entities must publish consumer health privacy policies that disclose the categories of health data collected and the purpose for collecting the information, the categories of sources from which the health data is collected, the categories of consumer health data that is shared, the categories of third parties and affiliates with whom the health data is shared, and how consumers may exercise their data rights. Regulated entities may not collect or share a consumer's health data without the consumer's affirmative, opt-in consent, unless the collection or sharing is needed to provide a product or service requested by the consumer. Separate consent must be obtained from consumers for collection and sharing of health data. Consumers have the right to confirm whether a regulated entity is collecting, sharing or selling the consumer's health data and to access such data, the right to withdraw consent for the collection and sharing of health data, and the right to delete consumer health data. Regulated industries must restrict access to consumer health data and adopt data security practices that satisfy a "reasonable standard of care" within their industry. Consumer health data cannot be sold without a consumer's authorization. Geofences are prohibited around health care facilities when used to identify or track consumers seeking health care services, collect consumer health data, or send messages or advertisements to consumers about health data or health care services. Consumers injured through violations of the law may bring a private cause of action under the Washington Consumer Protection Act. The state's attorney general also may enforce violations under the Washington Consumer Protection Act.

West Virginia

West Virginia capped noneconomic damages at the greater or $500,000 or two times a plaintiff's economic damages in cases where an employer acted with a "deliberate intent" to injure an employee in the workplace.[149] An employee initiating a cause of action for deliberate intent involving occupational pneumoconiosis must prove that the employer "fraudulently concealed or manipulated dust samples or air quality samples." Employees are not permitted to recover for workplace injuries that are self-inflicted or caused by the employee being intoxicated.

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[148] H.B. 1155, 2023 Leg., Reg. Sess. (Wash. 2023), https://legiscan.com/WA/bill/HB1155/2023.

[149] H.B. 3270, 86th Leg., 2d Sess. (W. Va. 2023), https://legiscan.com/WV/bill/HB3270/2023.

V. KEY COURT DECISIONS

A. Decisions Upholding Civil Liability Laws

The Georgia Supreme Court upheld the state's $250,000 cap on punitive damages in tort actions.[150] In *Taylor v. Devereux Foundation, Inc.*,[151] an action involving the sexual assault of a minor patient at a mental health facility by an employee, the court rejected claims that the cap violated the right to trial by jury, separation of powers, or equal protection guarantees in the Georgia Constitution. The court explained that the Georgia Constitution preserved the right to trial by jury "as it was used in the state prior to the Constitution of 1798."[152] The court found that parties were entitled to a jury determination of punitive damages in 1798, but the plaintiff "could not show that a Georgia jury in 1798 would have been authorized to award . . . punitive damages . . . based on a defendant acting with an 'entire want of care.'"[153] Punitive damages in pre-1776 English cases involved claims alleging that the defendant "engaged in intentional misconduct."[154] Thus, the plaintiff "failed to show that the kind of punitive damages she seeks were within the scope of the jury-trial right in Georgia in 1798."[155] The court further held the cap did not violate the guarantee of the separation of powers because the legislature has the power to define the parameters of punitive damages like those Taylor was awarded and because the cap does not infringe on the judicial remittitur power. Finally, the court held the cap did not violate equal protection because the statute satisfied rational basis review and does not treat similarly situated plaintiffs differently. As the court explained, "the General Assembly could have concluded that choosing a flat-sum cap . . . was an appropriate way to address the need to punish and deter defendants while limiting economic uncertainty."[156]

The Georgia Supreme Court also held that a defendant had a vested, substantive right to be free from liability after the running of an eight-year statute of repose for claims involving improvement to real property, "join[ing] the majority of jurisdictions that have reached that conclusion."[157] Under the Due Process Clause, a subsequent amendment to exclude contract-based claims from the statute of repose could not be applied retroactively. The court overruled several contrary appellate court decisions

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[150] Taylor v. Devereux Found., Inc., 885 S.E.2d 671, 676-77 (Ga. 2023).
[151] 885 S.E.2d 671 (Ga. 2023).
[152] *Id.* at 684.
[153] *Id.* at 686.
[154] *Id.*
[155] *Id.* at 697.
[156] *Id.* at 703.
[157] Southern States Chem. v. Tampa Tank & Welding, Inc., 888 S.E.2d 553, 563-64 (Ga. 2023).

to the extent that they held that repose statutes only implicate procedural rights and that changes to them may be applied retroactively.[158]

The Colorado Supreme Court upheld the state's $25 million supersedeas bond cap, holding that the statute does not unconstitutionally infringe on the court's rulemaking authority or violate equal protection principles.[159]

A federal court in Kansas predicted the Kansas Supreme Court would find the state's $250,000 cap on nonpecuniary losses in wrongful death cases to be constitutional, rejecting claims that the statute violates the right to a jury trial or right to remedy provisions of the Kansas Constitution.[160]

The Arizona Supreme Court reaffirmed that the anti-abrogation clause of the Arizona Constitution, which guarantees "[t]he right of action to recover damages for injuries,"[161] "only prohibits abrogation of rights of action that existed at statehood or that are based in rights of action existing at statehood."[162] The court held that because dram-shop actions are not based on a right of action that was recognized by pre-statehood common law, the legislature was free to enact a standard that was stricter than common law precedent for dram-shop liability. In its decision, the court not only overturned a prior appellate court decision to the contrary,[163] but took the opportunity to specifically reject two prior Arizona Supreme Court cases containing "dicta implying that the anti-abrogation clause extends to all rights of action regardless of when those rights were recognized."[164] The court said it was rejecting that dicta "because it undermines the legislature's role in developing and restricting tort causes of action that are unprotected by the anti-abrogation clause."[165]

The Texas Supreme Court upheld the application of the state's proportionate-responsibility statute to require a medical malpractice plaintiff's award to be reduced by the amount of a family member's settlement with one of the defendants.[166]

The Oklahoma Supreme Court held that a $10 filing fee for the state's Lengthy Trial Fund that provides full or partial wage replacement or wage

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[158] *Id.* at 564 (overruling Bagnell v. Ford Motor Co., 678 S.E.2d 489 (Ga. App. 2009); overruling Bieling v. Battle, 434 S.E.2d 719 (Ga. App. 1993); overruling LFE Corp. v. Edenfield, 371 S.E.2d 435 (Ga. App. 1988)).

[159] Antero Treatment, L.L.C. v. Veolia Water Techs., Inc., 2023 WL 8361332, at *1-*7 (Colo. 2023).

[160] Yaple v. Jakel Trucking, L.L.C., 2023 WL 4824858, at *4-*6 (D. Kan. 2023), *vacated in part on other grounds*, 2023 WL 5854370 (D. Kan. 2023).

[161] ARIZ. CONST. art. 18, § 6.

[162] Torres v. JAI Dining Servs., Inc., 536 P.3d 790, 794 (Ariz. 2023) (overruling Young v. D.F.W Corp., 908 P.2d 1 (Ariz. App. 1995); quoting Dickey *ex rel.* Dickey v. City of Flagstaff, 66 P.3d 44, 46 (Ariz. 2003)).

[163] *Torres*, 536 P.3d at 795.

[164] *Id.* (disapproving Boswell v. Phoenix Newspapers, Inc., 730 P.2d 186 (Ariz. 1986); disapproving Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993)).

[165] *Torres*, 536 P.3d at 795.

[166] Virlar v. Puente, 664 S.W.3d 53, 59-62 (Tex. 2023).

supplementation to petit jurors who serve for more than ten days was not unconstitutional.[167]

The Idaho Supreme Court upheld a statute holding abortion providers civilly liable to immediate and extended family members and providing for statutory minimum damages of $20,000.[168]

The Colorado Court of Appeals held that the state's general statutory limit on noneconomic damages does not run afoul of the Seventh Amendment to the United States Constitution because longstanding precedent instructs that the amendment does not apply to the states.[169]

Pennsylvania's Commonwealth Court upheld at $250,000 cap on damages for vehicular accident claims against local political subdivisions.[170]

The U.S. Court of Appeals for the District of Columbia Circuit upheld the Sudan Claims Resolution Act, which effectively restored Sudan's sovereign immunity for most terrorism-related claims.[171]

In a decision supported by tort plaintiffs, the Massachusetts Supreme Judicial Court upheld the Commonwealth's twelve percent rate for pre- and post-judgment interest.[172] The court acknowledged that the rate provides an "arguable windfall . . . in a low-interest economy," but said "the interest amount is comparable to stock market returns over the same period; the money at issue, whether in the hands of plaintiffs or defendants, may very well have been so invested, despite the risk."[173]

Illinois appellate courts upheld a 2021 law providing for six percent prejudgment interest in personal injury and wrongful death actions.[174]

B. Decisions Striking Down Civil Liability Laws

The Colorado Supreme Court struck down retrospective application of the Child Sexual Abuse Accountability Act of 2021, which created a statutory cause of action for victims of sexual misconduct who were abused while minors in a youth-related activity or program.[175] Under the statute, a victim may bring a civil claim for damages against both the actor who committed the abuse and the organization that operated or managed the youth-related activity or program if the organization knew or should have known about the risk of sexual misconduct. The Act includes a three-year

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[167] Berkson v. State ex rel. Askins, 532 P.3d 36, 56 (Okla. 2023).

[168] Planned Parenthood Great Nw. v. Idaho, 522 P.3d 1132, 1210-14 (Idaho 2023).

[169] Gebert v. Sears, Roebuck & Co., 2023 WL 7392967, at *1 (Colo. App. Nov. 9, 2023).

[170] Freilich v. v. Southeastern Pa. Transp. Auth., 302 A.3d 1261 (Table), 2023 WL 4370703, at *10-*11 (Pa. Commw. Ct. 2023).

[171] Mark v. Republic of the Sudan, 77 F.4th 892, 896-99 (D.C. Cir. 2023).

[172] Greene v. Philip Morris USA Inc., 208 N.E.3d 676, 692-93 (Mass. 2023).

[173] *Id.* at 692.

[174] Cotton v. Coccaro, 2023 WL 3910582, at *8-*14 (Ill. Ct. App. 2023); First Midwest Bank v. Rossi, 2023 WL 4540776, at *22 (Ill. Ct. App.2023).

[175] Aurora Pub. Sch. v. A.S. & B.S., 531 P.3d 1036, 1039 (Colo. 2023).

window to bring claims for child sexual abuse that occurred between January 1, 1960, and January 1, 2022, regardless of whether previously available causes of action were time-barred. The court held that the Colorado Constitution's Retrospectivity Clause prohibits the legislature from creating a new cause of action for conduct that predates the Act and for which any previously available claims would be time-barred.

An Arizona appellate court held that a law shielding health care providers from ordinary negligence claims relating to their provision of pandemic-related medical treatment violated the anti-abrogation provision of the Arizona Constitution.[176]

The Washington Supreme Court struck down an eight-year statute of repose for medical malpractice actions, holding that the statute violated the state constitution's privileges and immunities clause.[177]

VI. CONCLUSION

Liability-expanding laws were enacted in "blue states" with progressive majorities, continuing a recent trend. There was a strong focus on expanding liability and increasing damages in wrongful death cases. Two "red states" enacted significant pro-business tort liability laws: Florida and Montana. Bipartisan laws were enacted in a half dozen states to boost juror pay and allow more people to serve without seeking to be excused for financial hardship.

A significant amendment went into effect in December with respect to Federal Rule of Evidence 702 governing expert witness testimony. The rule clarifies how the rule is to be applied to correct rulings by many courts that had incorrectly applied the prior version adopted in 2000. Courts and practitioners must now take care to avoid citing flawed case law and rely on the text of the new rule for deciding Rule 702 motions.

States are beginning to update their state court rules of evidence to reflect the amended federal rule. For example, the Arizona Supreme Court adopted amendments to several Arizona Rules of Evidence, including Arizona Rule of Evidence 702. Similar proposals are under consideration by the Ohio and Michigan Supreme Courts.

The federal judiciary's Advisory Committee on Civil Rules is considering changes to multidistrict litigation and privilege log practices. The public comment period closes on February 16, 2024.

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[176] Roebuck v. Mayo Clinic, 536 P.3d 289, 294-97 (Ariz. Ct. App. 2023).
[177] Bennett v. United States, 539 P.3d 361, 364-65 (Wash. 2023).