2022 CIVIL JUSTICE UPDATE

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This paper reviews key civil justice issues and changes in 2022. Part I discusses the landscape for legal reform in 2022 and looks ahead to 2023. Part II discusses federal legislation enacted in 2022. It also discusses changes to the Federal Rules of Civil Procedure that took effect in 2022 and to the Federal Rules of Evidence that are under consideration for 2023. Part III summarizes liability law changes at the state level in 2022. Part IV highlights key cases in 2022 that addressed the constitutionality of state civil justice reforms.

I. LEGAL REFORM TRENDS IN 2022 AND LOOKING AHEAD TO 2023

Redistricting and budget issues received substantial attention in the states in 2022 along with issues that would motivate voters ahead of the November elections. In this environment, civil justice issues were less of a priority in many states. There was also a change in focus. In 2020 and 2021, COVID-19-related liability protections dominated the civil justice landscape. Approximately two-thirds of the states enacted laws to limit COVID-19-related tort claims against health care providers and health care facilities, personal protective equipment manufacturers, or other businesses.[1] Lawmakers are pivoting to other issues now that most states have limited COVID-19-related lawsuits and the pandemic is under better control. COVID-19-related enactments in 2022 largely focused on extending tort liability protections that would have sunset if left alone.

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[*] 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

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[1] Mark A. Behrens, *2021 Civil Justice Update* 4 (Federalist Soc'y Dec. 2021), *available at* https://fedsoccmspublic.s3.amazonaws.com/update/pdf/ZvW7gm9h5bu7Uw3h9T7PyyKZKJfdLxQQB70Mc6x0.pdf.

The plaintiffs' bar flexed its political muscle at the federal level and in a few states with large progressive majorities. Most significantly, a new federal law allows 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. Plaintiffs' attorneys "stand to collect high contingency fees, in addition to expenses and other lawsuit costs billed to claimants, where there is virtually no contingency."[2] At the state level, "blue states" such as California, Colorado, New Jersey, and New York enacted laws that create or expand liability for civil defendants or will increase plaintiff awards. These developments demonstrate that the trial bar's agenda has moved beyond just defending against civil justice legislation advocated by defense interests.

Civil defendants continued to address "over-naming" in asbestos cases.[3] Over-naming describes the indiscriminate naming of asbestos defendants by some plaintiff firms without proof of exposure.[4] Often, these defendants are dismissed without payment, but not before incurring wasteful legal costs that can add up to be substantial for frequently over-named defendants.[5] In 2022, Arizona joined a growing list of states that require asbestos plaintiffs to disclose the factual basis for each claim against each defendant and provide supporting documentation.

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[2] Victor Schwartz, Editorial, *About All Those Camp Lejeune Ads*, N.Y. DAILY NEWS, Oct. 24, 2022, *available at* https://www.nydailynews.com/opinion/ny-oped-about-camp-lejeune-ads-20221024-7jgpwunowjd33p5kghu7iejtwm-story.html; *see also* Alex Swoyer, *Law Firms Spending Millions on Ads Could Rake in Billions in Damages for Vets Ill From Camp Lejeune*, WASH. TIMES, Nov. 28, 2022, *available at* https://www.washingtontimes.com/news/2022/nov/28/law-firms-could-make-billions-ailing-vets-camp-lej/.

[3] Mark Behrens & Christopher Appel, *Over-Naming of Asbestos Defendants: A Pervasive Problem in Need of Reform*, 36 MEALEY'S LITIG. REP.: ASBESTOS, Mar. 24, 2021, *available at* https://www.shb.com/-/media/files/professionals/b/behrensmark/mealeys-commentary-overnaming-of-asbestos-defendan.pdf?la=en.

[4] For example, in 2020, the holding company for the legacy asbestos liabilities of CertainTeed said that over half of the "claims filed against [CertainTeed] after 2001 were dismissed—usually because the plaintiff could provide no evidence of exposure to a [CertainTeed] asbestos containing product." According to ON Marine, another company that filed bankruptcy in 2020, 95% of the over 182,000 asbestos claims filed against it since 1983 were dismissed without payment to a plaintiff. Consulting firm KCIC has said, "many defendants are named frequently with no proof of exposure." Lauren Osterndorf, *Looking at Asbestos Litigation Complaint Naming Patterns*, KCIC, Feb. 26, 2018, *available at* https://www.kcic.com/trending/feed/looking-at-asbestos-litigation-complaint-naming-patterns/.

[5] For example, in Madison County, Illinois, "one company has been sued by the same law firm over 400 times"—incurring more than $720,000 in defense costs—even though there were actual allegations against the company in only four cases. James Lowery, *The Scourge of Over-Naming in Asbestos Litigation: The Costs to Litigants and the Impact on Justice*, 32 MEALEY'S LITIG. REP.: ASBESTOS, Jan. 24. 2018, at 22; Behrens & Appel, *supra* note 3, at 2.

Civil justice groups also supported legislation to regulate legal services advertisements that have the potential to mislead consumers. Plaintiffs' law firms and lead generators spend hundreds of millions of dollars annually on lawsuit advertising. The ads often use flashing words like "medical alert" or "health alert" or include images of government agency logos that make the ads look like public service announcements.[6] Advertisements for lawsuits against prescription drug manufacturers typically do not advise viewers to speak with a doctor before discontinuing use of a medication, which some argue threatens public health.[7] In 2022, Kansas and Louisiana enacted laws to regulate deceptive practices in mass tort lawsuit advertisements. In addition, the Fourth Circuit Court of Appeals upheld a 2020 West Virginia law that regulates advertising by lawyers who seek clients alleging harm from medications or medical devices.

Moving forward, the divided Congress will likely cause most pro-plaintiff legislation to stall in the House of Representatives. Consequently, the trial bar will likely focus on supporting progressive judicial nominees in the Senate and on working with executive branch agencies such as the Consumer Product Safety Commission and Environmental Protection Agency to further the litigation interests of plaintiffs' lawyers.[8] In addition, the trial bar is opposing mass tort defendants' use of bankruptcy laws to resolve various litigations. The plaintiffs' bar views mass tort defendants' exit from the tort system through bankruptcy as "the new face of tort 'reform' and an existential threat."[9] The American Association for Justice (AAJ) says it "is leading efforts to oppose this corporate tactic before it becomes ubiqui-

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[6] Cary Silverman, *Bad for your Health: Lawsuit Advertising Implications and Solutions,* U.S. Chamber Inst. for Legal Reform (Oct. 2017), *available at* https://instituteforlegalreform.com/research/bad-for-your-healthlawsuit-advertising-implications-and-solutions/.

[7] Am. Med. Ass'n, Resolution 222 (2019) (stating that misleading lawsuit advertising targeting medications has become "pervasive" and new research and physician experience indicates that "actual patient harm is occurring"); Mark Behrens & Ashley Garry, *Deceptive Plaintiff Lawyer Advertising is Harmful to Public Health. . .and States Are Taking Action*, HARRISMARTIN'S DRUGS & MEDICAL DEVICES (Nov. 4, 2019), *available at* https://www.iadclaw.org/assets/1/7/Deceptive_Plaintiff_Lawyer_Advertising_is_Harmful_to_Public_Health_-_HarrisMartin_-_Mark_Behrens_and_Ashley_Garry_-_11.4.2019.pdf.

[8] Tad Thomas, *The Righteous Fight*, TRIAL (Nov. 2022) (stating that AAJ staff met with the CPSC's executive director in 2022 "to explore how our members can have a mutual relationship with the commission to better share information about dangerous products."); Am. Ass'n for Justice, *EPA Proposes Ban on Chrysotile Asbestos*, Apr. 5, 2022, *available at* https://www.justice.org/resources/press-center/epa-proposes-ban-of-chrysotile-asbestos; *see generally* Victor E. Schwartz & Cary Silverman, *The Trial Lawyer Underground: Covertly Lobbying the Executive Branch*, U.S. Chamber Inst. for Legal Reform & American Tort Reform Found. (Oct. 2015), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/10/TrialLawyerUndergroundWeb.pdf.

[9] Tad Thomas, *The Righteous Fight*, TRIAL (Nov. 2022).

tous."[10] Business groups may seek to advance civil justice legislation or hold hearings on civil justice issues in the House of Representatives. Senate passage of legislation supported by the trial bar or by business groups will be difficult unless the issue enjoys bipartisan support.

Personal injury lawyers may pursue legislation in states that passed laws they supported in 2022. There also may be opportunities for the trial bar to pursue liability-expanding legislation in Michigan, Minnesota, Maryland, and Massachusetts in the wake of the November elections.[11]

The business community may work to address what some have called "nuclear verdicts." A U.S. Chamber Institute for Legal Reform study of almost 1,400 verdicts of $10 million or more between 2010 and 2019 found that extraordinarily severe verdicts "are increasing in both amount and frequency. The median nuclear verdict increased 27.5% over the ten-year study period, far outpacing inflation, and there was a clear upward trend in the frequency of nuclear verdicts over time."[12]

In addition, civil justice groups will continue to press for third party litigation funding disclosure. Litigation funders front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment. Professor Donald Kochan of the Antonin Scalia Law School at George Mason University recently argued in an editorial that "[t]hird-party litigation funding turns the American justice system into a financial playground by transforming lawsuits into investment vehicles."[13] Investors are attracted by the prospect of hefty returns that are not tied to economic or market conditions. Foreign adversaries also may fund lawsuits in the United States to "weaken critical industries" or "obtain confidential materials through the discovery process."[14]

Finally, there will likely be increased scrutiny of the American Law Institute's (ALI) work. As United States Supreme Court Justice Antonin Scal-

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[10] *Id.*

[11] "Democrats gained trifectas in Massachusetts and Maryland after gubernatorial victories and scored another two trifectas by flipp[ing] the Michigan Legislature and Minnesota Senate." Multistate, *2022 State Elections* 13 (Nov. 16, 2022), *available at* https://s3.amazonaws.com/multistate.us/production/resources/retsDZEk5mMEdApkl/attachment/11-14-22_Post-Election_Deck_%202022%20State%20Elections%20_%20MultiState.pdf.

[12] Cary Silverman, *Nuclear Verdicts,* U.S. Chamber Inst. for Legal Reform (Sept. 2022), *available at* https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf.

[13] Donald J. Kochan, Editorial, *Keep Foreign Cash Out of U.S. Courts*, WALL ST. J., Nov. 25, 2022, at A13, *available at* https://www.wsj.com/articles/keep-foreign-cash-out-of-u-s-courts-litigation-courts-foreign-cash-profit-legal-reform-funder-lawsuit-money-11669227764?mod=opinion_lead_pos9#comments_sector.

[14] *Id.*; *see also* Michael E. Leiter et al., *A New Threat: The National Security Risk of Third Party Litigation Funding*, U.S. Chamber Inst. for Legal Reform (Nov. 2022), *available at* https://instituteforlegalreform.com/research/ilr-briefly-a-new-threat-the-national-security-risk-of-third-party-litigation-funding/.

ia once cautioned, "[I]t cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."[15]

The ALI first began to receive attention from the civil justice community a decade ago in the context of legal duties owed by land possessors to trespassers. Traditionally, land possessors have owed no duty of care to trespassers except in narrow and well-defined circumstances, such as child trespassers injured through artificial conditions known as attractive nuisances.[16] The Restatement Third of Torts: Liability for Physical and Emotional Harm (2012) took the position that land possessors should be required to exercise reasonable care with respect to *all* entrants on their land,[17] except for undefined "flagrant trespassers."[18] The Restatement's approach would dramatically expand the ability of trespassers to sue landowners, crystallizing for defense interests that some ALI Restatement provisions have moved far outside the mainstream. Following that Restatement's publication, almost half of the states enacted laws to preempt courts from adopting the Restatement's approach.

In 2019, the ALI published its Restatement of the Law, Liability Insurance, one of the most controversial restatements in the ALI's nearly 100-year history.[19] Insurers do not believe the publication faithfully restates existing liability insurance law.[20] Many states have enacted laws providing that the Restatement does not constitute the public policy of the state and should not be relied upon by courts, at least to the extent the Restatement is inconsistent with existing law in the state.[21] Other states have passed resolutions to discourage courts from following the Restatement.[22] A Texas law broadly proclaims that ALI Restatements are not controlling.[23]

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[15] Kansas v. Nebraska, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part).

[16] Restatement (Second) of Torts §§ 333-339 (1965).

[17] Restatement Third of Torts: Liability for Physical and Emotional Harm § 51 (2012).

[18] *See id.* at § 52 (2012).

[19] Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PA. J. BUS. L. 718 (2020).

[20] Laura A. Foggan & Rachel Padgett, *Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI's* Restatement of the Law, Liability Insurance, THE BRIEF, at 26 (Fall 2020), *available at* https://m.crowell.com/files/BRF_v050n01_Fall2020-Foggan-Padgett.pdf.

[21] ARK. CODE ANN. § 23-60-112; ARIZ. REV. STAT. § 20-110; MICH. COMP. LAWS § 500.3032; N.C. STAT. § 58-1-2; N.D. CENT. CODE § 26.1-02-34; OKLA. STAT. TIT. 12, § 2411.1; OHIO CODE § 3901.82; UTAH STAT. § 31A-22-205; *cf.* TENN. CODE ANN. § 56-7-102. The National Conference of Insurance Legislators adopted model legislation on the issue. Nat'l Conf. of Ins. Legislators, *NCOIL Adopts Model Act Concerning Interpretation of State Insurance Laws* (July 25, 2019), *available at* http://ncoil.org/2019/07/25/ncoil-adopts-model-act-concerning-interpretation-of-state-insurance-laws/.

[22] Ind. H. Res. 62 (2019); La. Sen. Res. 149 (2019).

[23] TEX. CIV. PRAC. & REM. § 5.001 ("In any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are not controlling.").

At the ALI's 2022 annual meeting, another Restatement was adopted that is even more controversial. The Restatement of the Law, Consumer Contracts may be the most unsound Restatement in the ALI's history.[24] This Restatement purports to restate the law for consumer contracts despite the fact that courts have not articulated rules for consumer contracts that operate apart from the general law of contracts. This Restatement proposes to introduce legal rules that some argue advance a particular policy agenda, namely subjecting agreements between businesses and consumers to heightened judicial scrutiny with respect to the adoption, interpretation, and enforceability of contract terms supplied by businesses.[25]

Against this backdrop, Missouri enacted legislation in 2022 to preclude courts from adopting outlier provisions of ALI Restatements.[26] Additional states may pursue similar laws in 2023.

II. 2022 CIVIL JUSTICE REFORMS – FEDERAL

A. Congress

Barring or restricting the use of pre-dispute arbitration agreements has long been an AAJ priority.[27] It is estimated that more than half of private sector nonunion employees (some sixty million workers) are subject to binding arbitration.[28]

In 2022, the AAJ found success with the enactment of a narrow law that carves out cases of sexual misconduct from the Federal Arbitration Act if a

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[24] Nicholas Malfitano, *ALI Members Question Foundations of Recently Passed Restatement of Consumer Contracts*, PENN RECORD, May 23, 2022, *available at* https://pennrecord.com/stories/626028946-ali-members-question-foundations-of-recently-passed-restatement-of-consumer-contracts; Christopher E. Appel, *The American Law Institute's Unsound Bid to Reinvent Contract Law in the Proposed Restatement of the Law, Consumer Contracts*, 32 LOY. CONSUMER L. REV.339 (2020).

[25] Sherman Joyce, *Trial Lawyers Just Rewrote Centuries-Old Contract Law*, WASH. EXAMINER, June 13, 2022, *available at* https://www.washingtonexaminer.com/opinion/trial-lawyers-just-rewrote-centuries-old-contract-law.

[26] Mo. S.B. 775, 751 & 640 (2022), *available at* https://www.senate.mo.gov/22info/pdf-bill/tat/SB775.pdf.

[27] Am. Ass'n for Justice, *Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities* (June 2021), *available at* https://www.justice.org/resources/research/forced-arbitration-hurts-women-and-minorities; Am. Ass'n for Justice *The Truth About Forced Arbitration* (Sept. 2019), *available at* https://www.justice.org/resources/research/the-truth-about-forced-arbitration. In 2022, the House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act, H.R. 962 (2022), limiting the use of pre-dispute arbitration agreements and class or collective action waivers in employment, consumer, antitrust, or civil rights disputes. The House passed an earlier version of the bill in 2019. H.R. 1423 (2019).

[28] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 1-2 (Sept. 27, 2017).

survivor files a lawsuit.[29] The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act passed out of the Senate in a rare voice vote just days after passing out of the House of Representatives. That law was followed by passage of the Speak Out Act.[30] The Speak Out Act invalidates pre-dispute nondisclosure and nondisparagement (NDA) agreements that block workers from speaking out against sexual harassment and assault in the workplace.[31]

The Camp Lejeune Justice Act of 2022, enacted as part of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, allows anyone to file a lawsuit against the U.S. Government for harm caused by at least thirty days of exposure (including in utero) to water at Marine Corps Base Camp Lejeune from August 1, 1953 to December 31, 1987.[32] The United States District Court for the Eastern District of North Carolina is the exclusive venue for actions brought pursuant to the Act. The Act precludes the government from asserting immunity that otherwise would be available and overrides a North Carolina law that precludes the filing of tort claims after ten years.[33] Punitive damages are not available. Attorney fees are uncapped.[34] Awards will be offset by the amount of any benefit received by a claimant from a program administered by the Secretary of Veterans Affairs or the Medicare or Medicaid programs in connection with health care or a disability claim relating to exposure to water at the base.

The Intimate Imagery and Privacy Protection Act of 2020, included in the Violence Against Women Reauthorization Act of 2022 and signed into law as part of the 2022 Omnibus Appropriations Act, establishes a cause of

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[29] H.R. 4445, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (2022), *available at* https://www.congress.gov/bill/117th-congress/house-bill/4445.

[30] S.4524 (2002), *available at* https://www.congress.gov/bill/117th-congress/senate-bill/4524/text.

[31] An estimated one-third of private sector workers have signed NDAs. Cat Zakrzewski, *NDAs Can Muzzle Sexual Harassment Victims. Congress Could Change That*, WASH. POST, June 27, 2022, *available at* https://www.washingtonpost.com/technology/2022/06/27/congress-ndas-bipartisan-legislation/.

[32] S.3373, Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 or the Honoring our PACT Act of 2022, § 804 (Camp Lejeune Justice Act of 2022) (2022), *available at* https://www.congress.gov/bill/117th-congress/senate-bill/3373/text.

[33] *Id.* at § 804(f) ("The United States may not assert any claim to immunity in an action under this section that would otherwise be available….") and § 804(j)(3) ("Any applicable statute of repose or statute of limitations, other than under [the statute of limitations specified in the Act], shall not apply to a claim under this section.");*see also* N.C. GEN. STAT. ANN. § 1-52(16) ("[N]o cause of action shall accrue more than ten years from the last act or omission of the defendant giving rise to the cause of action.").

[34] Victor Schwartz, Editorial, *Camp Lejeune Lawsuit Ads Reveal an Easy Payday for Trial Lawyers*, WASH. EXAMINER, Sept. 28, 2022, *available at* https://www.washingtonexaminer.com/opinion/op-eds/camp-lejeune-lawsuit-ads-reveal-an-easy-payday-for-trial-lawyers.

action for individuals whose intimate visual images are disclosed without their consent.[35] Victims may bring a civil claim in federal court for up to $150,000 and the cost of the action, including attorneys' fees and court costs, in addition to seeking equitable relief, including a temporary restraining order, a preliminary injunction, or a permanent injunction.

The Hermit's Peak/Calf Canyon Fire Assistance Act, enacted as part of a continuing resolution to fund the federal government, allows recoveries against the federal government for personal injury or death, loss of property, or business loss from the Hermit's Peak/Calf Canyon fire in New Mexico in 2022.[36] The fire stemmed from a prescribed burn on federal land that resulted in the largest wildfire in the state's history. Punitive damages are not available under the Act. Attorneys' fees are capped as set forth in the Federal Tort Claims Act (i.e., fees may not exceed twenty percent of an administrative settlement or twenty-five percent of a judgment or compromise settlement).

Enacted after the November elections, the Respect for Marriage Act provides statutory authority for same-sex and interracial marriages.[37] The Attorney General is authorized to bring a civil action against any person who violates the Act for declaratory and injunctive relief. The Act also allows any person harmed by a violation of the Act to bring a civil action for declaratory and injunctive relief.

B. Department of Justice

Attorney General Merrick Garland issued a memorandum for heads of Department components and United States Attorneys reversing a policy in place since 2017 that generally prohibited Department of Justice components from entering into settlements that direct defendants to make payments to non-governmental third parties.[38] The memorandum permits federal agencies to require defendants to make payments to such organizations, subject to certain guidelines and limitations. The Department of Justice concurrently issued an interim final rule that immediately rescinded the prior policy.[39]

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[35] H.R. 2471 § 1309 (2022), *available at* https://www.congress.gov/117/plaws/publ103/PLAW-117publ103.pdf.

[36] H.R. 6833 (2022), *available at* https://www.congress.gov/bill/117th-congress/house-bill/6833.

[37] H.R. 8404 (2022), *available at* https://www.congress.gov/bill/117th-congress/house-bill/8404/actions.

[38] Memorandum for Heads of Department Components and United States Attorneys from The Attorney General, "Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties," May 5, 2022, *available at* https://www.justice.gov/ag/page/file/1499241/download.

[39] 87 Fed. Reg. 27936 (May 10, 2022), *available at* https://www.govinfo.gov/content/pkg/FR-2022-05-10/pdf/2022-10036.pdf; *see also* Rep. Bob Goodlatte, Opinion, *Slush Funds Open the*

C. Federal Court Rules Amendments

Two changes to the Federal Rules of Civil Procedure took effect on December 1, 2022.[40]

An amendment to Federal Rule of Civil Procedure 7.1(a)(1) provides that a nongovernmental corporation that seeks to intervene must file a statement that identifies any parent corporation and any publicly held corporation owning ten percent or more of its stock or states that there is no such corporation. Amended Rule 7.1(a)(2) reads:

> (2) *Parties or Intervenors in a Diversity Case*. In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:
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> (A) when the action is filed in or removed to federal court, and
>
> (B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

A party, intervenor, or proposed intervenor must file the disclosure statement with its "first appearance, pleading, petition, motion, response, or other request addressed to the court."

New Supplemental Rules for Social Security Decisions Under 42 U.S.C. § 405(g) govern cases in which an individual seeks district court review on the record of a final administrative decision of the Commissioner.

In addition, the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) and Judicial Conference of the United States approved amendments to the Federal Rules of Evidence. If approved by the United States Supreme Court and Congress, the amendments will take effect on December 1, 2023.[41]

Most significantly, the Committee unanimously approved amendments to Rule 702 to clarify that (1) "expert testimony may not be admitted unless

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Door to Beltway Corruption, THE VIRGINIAN-PILOT, Aug. 29, 2022, *available at* https://www.pilotonline.com/opinion/columns/vp-ed-column-goodlatte-0830-20220829-msenbn67f5aidl4mw3y6trxz6u-story.html; Kevin Stocklin, *Biden DOJ Brings Back Obama-era Slush Funds*, THE AM. CONSERVATIVE, May 30, 2022, *available at* https://www.theamericanconservative.com/biden-doj-brings-back-obama-era-slush-funds/.

[40] Letter from Hon. John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States, to Hon. Nancy Pelosi, Speaker of the House, Apr. 11, 2022, *available at* https://www.uscourts.gov/sites/default/files/2022_congressional_package_final_for_website_0.pdf .

[41] Memorandum from Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure, to Scott S. Harris, Clerk, Supreme Court of the United States, Oct. 19, 2022, *available at* https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf.

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,"[42] and (2) "each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology."[43]

Current Rule 702 (which has been in effect since 2000) does not explicitly include a "more likely than not" (preponderance) standard, but the Committee Notes state that "the admissibility of all expert testimony is governed by the principles of Rule 104(a)," under which "the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence."[44] "[M]any courts" incorrectly apply Rules 702 and 104(a) by declaring 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."[45] In addition, "many courts" have declared that "expert testimony is presumed to be admissible."[46] "These statements misstate Rule 702," the Advisory Committee on Evidence Rules explains, "because its admissibility requirements must be established to a court by a preponderance of the evidence."[47]

To resolve this "important conflict among the courts" and address the overstatement issue, the Standing Committee and Judicial Conference approved the following amendments to Rule 702:

> 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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[42] *Id*. at 242 (Committee Note to proposed amendment).

[43] *Id*. at 244. (Committee Note to proposed amendment).

[44] Fed. R. Evid. 702, Committee Notes—2000 Amendment, *available at* https://www.law.cornell.edu/rules/fre/rule_702.

[45] Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Agenda Book (June 7, 2022), at 892, *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf. A 2021 Lawyers for Civil Justice study revealed that, in sixty-one percent of federal judicial districts, courts split over whether to apply the preponderance standard when assessing admissibility. The study also found that district splits exist in every federal appellate circuit. Lawyers for Civil Justice, *Federal Rule of Evidence 702: A One-Year Review and Study of Decisions in 2020,* at 2 (Sept. 30, 2021), *available at* https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_study_of_rule_702_decisions_from_2020_--_sept_30_2021.pdf.

[46] Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Agenda Book (June 7, 2022), at 871, *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf.

[47] *Id*.

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.[48]

The "more likely than not" standard is "substantively identical to 'preponderance of the evidence.'"[49]

The proposed amendment clarifies the existing standard. "This does not change the law at all," according to United States District Judge Patrick Schiltz of Minnesota, who chairs the Advisory Committee on Evidence Rules.[50] "It simply makes it clearer."[51]

The Standing Committee and Judicial Conference also approved changes to Federal Rule of Evidence 106 to allow completion of all statements, including unrecorded, oral statements, and to provide that if the existing fairness standard requires completion, then the completing statement is admissible over a hearsay objection.[52]

An amendment to Federal Rule of Evidence 615 will clarify that, at a party's request, a court may exclude a witness from the courtroom so the witness cannot hear the testimony of others.[53] The amendment will also allow courts to take measures to prevent the disclosure of trial testimony to excluded witnesses and directly prohibit excluded witnesses from trying to access trial testimony. Finally, the amendment will clarify that the exception from exclusion of entity representatives is limited to one designated representative per entity.

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[48] *Id.* at 891-892.

[49] *Id.* at 872.

[50] Brendon Pierson, *Judicial Committee Adopts Controversial Change to Expert Witness Rule*, REUTERS, June 7, 2022, *available at* https://www.reuters.com/legal/government/judicial-committee-adopts-controversial-change-expert-witness-rule-2022-06-07/#:~:text=Register%20now%20for%20FREE%20unlimited%20access%20to%20Reuters.com&text=The%20proposed%20amendment%20to%20Rule,sufficient%20facts%20and%20reliable%20methods (quoting Judge Schiltz).

[51] *Id*.

[52] Memorandum from Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure, to Scott S. Harris, Clerk, Supreme Court of the United States, Oct. 19, 2022, *available at* https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf.

[53] *Id.*

Finally, the Standing Committee approved five proposed changes to the Federal Rules of Evidence.[54] The Committee will hold public hearings on January 20 and January 27, 2023, and receive comments through February 16, 2023. Several of the proposed changes are noteworthy.

A new Rule 611(d) would regulate the use of illustrative aids at trial, clarifying the distinction between illustrative aids (not admitted into evidence, but used solely to assist the jury's understanding of evidence) and demonstrative evidence (admitted into evidence to prove disputed issues at trial). The proposed rule would require an aid to be disclosed in advance to give parties an opportunity to object and allow the court to decide whether the aid's utility outweighs "the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time."[55] Aids are not permitted in the jury room during deliberations unless all parties consent or the court orders otherwise. The Committee Notes explain that if the court allows an illustrative aid to go to the jury room, the court should instruct jurors that the aid is not evidence.

The Committee also approved an amendment to Rule 1006 on the admissibility and proper use of summary evidence. The proposed amendment would clarify that a summary of voluminous materials is admissible whether or not the underlying evidence has been admitted. The proponent must make the underlying materials available for examination or copying.

A proposed amendment to Rule 801(d)(2) would require a hearsay statement to be admissible against successors-in-interest. This situation arises when "a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent" ("most commonly, decedent and estate in a claim brought for damages under 42 U.S.C. § 1983)."[56]

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[54] Memorandum from Hon. John D. Bates, Chair, Committee on Rules of Practice and Procedure, to The Bench, Bar, and Public, Aug. 15, 2022, *available at* https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_to_the_federal_rules_2022_0.pdf.

[55] *Id.* at 288 (proposed amendment to Federal Rule of Evidence 611).

[56] *Id.* at 283.

III. 2022 CIVIL JUSTICE REFORMS – STATES

Arizona

Arizona enacted legislation to address over-naming in asbestos cases.[57] Within forty-five days of filing an asbestos action, a plaintiff must file a sworn statement specifying the facts that provide the basis for each claim against each defendant and include supporting documentation. Plaintiffs have a continuing duty to supplement the required disclosures. The court, on motion by a defendant, shall dismiss a plaintiff's asbestos action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

Arizona also enacted legislation to provide that a secondary source on insurance does not constitute the law or public policy of the state and is not authoritative if the secondary source purports to create, eliminate, expand or restrict a cause of action, right or remedy or if it conflicts with Arizona statutory or common law.[58] The legislation is a response to the ALI's Restatement of the Law, Liability Insurance.

California

Californian amended its landmark Medical Injury Compensation Reform Act of 1975 (MICRA) law to raise the longstanding cap on noneconomic damages in medical malpractice cases.[59] Under the amendments, the previous $250,000 cap on noneconomic damages for wrongful death suits doubles to $500,000 and increases by $50,000 annually until it reaches $1 million. For medical malpractice actions without a wrongful death claim, the noneconomic damages cap is raised from $250,000 to $350,000 and increases by $40,000 annually up to $750,000. After the upper limits are reached, a two percent annual inflationary adjustment will apply beginning January 1, 2034. The amended MICRA law also changes the maximum contingency fee attorneys can charge for medical malpractice claims, depending on the stage of litigation. Previously, contingent fees in medical malpractice cases were based on a tiered system that gradually reduced the attorney's percentage fee as the recovered sum increased. Now, in disputes that settle before a civil complaint or demand for arbitration is filed, an at-

[57]Ariz. S.B. 1157 (2022), *available at* https://www.azleg.gov/legtext/55leg/2R/bills/SB1157S.pdf.

[58]Ariz. H.B. 2272 (2022), *available at* https://legiscan.com/AZ/text/HB2272/id/2562330/Arizona-2022-HB2272-Chaptered.html.

[59]Cal. A.B. 35 (2022), *available at* https://legiscan.com/CA/text/AB35/id/2588431/California-2021-AB35-Chaptered.html.

torney can collect up to twenty-five percent of the total dollar amount. The fee can increase to thirty-three percent after a suit or other action is filed. A plaintiff's attorney can ask the court or arbitrator for a higher rate in cases that are tried or arbitrated, based on the court's discretion and "evidence establishing good cause for the higher contingency fee." In addition, the new law increases the minimum amount required for either party to request periodic payments from $50,000 to $250,000. Lastly, communications or "benevolent gestures" expressing sympathy or acceptance of fault relating to an "adverse patient safety event or unexpected health care outcome" are inadmissible.

Lawmakers also enacted a law that establishes requirements for claimants making "time-limited policy-limit demands" before the filing of a lawsuit or demand for arbitration.[60]

In addition, California established an affirmative obligation for firearm industry members to take reasonable efforts to ensure that their products are not used unlawfully.[61] A person who has suffered harm in California, the Attorney General, or city or county attorneys may bring a civil action for violation of the new standard beginning in July 2023. Firearm industry members are banned from manufacturing, marketing, importing, offering for wholesale sale, or offering for retail sale a firearm-related product that is abnormally dangerous and likely to create an unreasonable risk of harm to public health and safety in California.

A new Sexual Abuse and Cover Up Accountability Act allows previously time-barred claims to be filed by survivors of sexual assault in adulthood.[62] Until December 31, 2026, the Act revives time-barred claims seeking to recover damages resulting from sexual assault against an adult that occurred on or after January 1, 2009. The Act provides a separate one-year reviver for adult sexual assault claims that would otherwise be barred before January 1, 2023. This reviver authorizes claims against private entities alleged to have engaged in a "cover up or attempted cover up of a previous instance or allegations of sexual assault by an alleged perpetrator of such abuse."

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[60] Cal. S.B. 1155 (2022), *available at* https://legiscan.com/CA/text/SB1155/2021. A "time-limited demand" is "an offer prior to the filing of the complaint or demand for arbitration to settle any cause of action or a claim for personal injury, property damage, bodily injury, or wrongful death made by or on behalf of a claimant to a tortfeasor with a liability insurance policy for purposes of settling the claim against the tortfeasor within the insurer's limit of liability insurance, which by its terms must be accepted within a specified period of time." *Id*.

[61] Cal. A.B. 1594 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1594.

[62] Cal. A.B. 2777 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2777.

Another new law declares another state's law authorizing a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion to be contrary to the public policy of California.[63] The law also prohibits application of the other state's law to an action heard in state court, and would prohibit the enforcement or satisfaction of a civil judgment received under that law.

California also passed a law requiring manufacturers or dealers of new passenger vehicles that are equipped with a partial driving automation feature, or that provide a software update or other upgrade that adds a partial driving automation feature, to provide the buyer or owner with a distinct notice that describes the functions and limitations of those features.[64] It is false advertising for a manufacturer or dealer to name or describe a partial driving automation feature "using language that implies or would otherwise lead a reasonable person to believe, that the feature allows the vehicle to function as an autonomous vehicle."

In addition, lawmakers halted state bar working groups that were studying changes to ethics laws to allow non-lawyers to share fees with lawyers or own law firms and allow specially trained non-lawyers to provide limited services in areas such as employment or consumer debt.[65] Both initiatives are on hold to allow the bar to focus on its core mission of "protecting individuals . . . from unscrupulous actors."[66] Beginning January 1, 2025, the bar may resume its study of the use of paraprofessionals, but it must continue to "[e]xclude corporate ownership of law firms and splitting legal fees with nonlawyers" from any regulatory sandbox it explores.[67] By January 23, 2023, the state bar must provide the legislature with a detailed report on the total of all funding spent since 2018 to study the creation of a regulatory sandbox or the licensing of paraprofessionals.

Business and civil justice groups did manage a significant victory in Sacramento. Controversial legislation known as the Public Right to Know

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[63] Cal. A.B. 1666 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1666.

[64] Cal. S.B. 1398 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1398.

[65] Cal. A.B. 2958 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2958.

[66] *Id.; see also* Karen Sloan, *California Lawmakers Pull Plug on Legal Industry Reforms*, REUTERS, Aug. 26, 202, *available at* https://www.reuters.com/legal/legalindustry/california-lawmakers-pull-plug-legal-industry-reforms-2022-08-26/.

[67] *Id.; see also* Mark A. Behrens & Christopher E Appel, *Proposals to Allow Nonlawyer Ownership of Law Firms, Fee Splitting Experience Rejection*, Vol. 37 No. 17 Legal Backgrounder (Wash. Legal Found. Oct. 14, 2022), *available at* https://www.wlf.org/2022/10/13/publishing/proposals-to-allow-nonlawyer-ownership-of-law-firms-fee-splitting-experience-rejection/.

Act of 2022 failed in the Assembly at the end of the session.[68] The legislation would have made most discovery in product liability and environmental cases presumptively public.[69]

Colorado

Colorado's Consumer Protection Act was amended to provide that, in a case certified as a class action, a successful plaintiff may recover actual damages, injunctive relief allowed by law, and reasonable attorney fees and costs.[70] Previously, most Colorado courts held that money damages or injunctive relief were unavailable in private class actions asserting a violation of the Act.[71] Given the Act's breadth, this is a major shift in favor of plaintiffs.

A new Colorado False Claims Act provides that a person is liable to the state or a political subdivision of the state for a civil penalty if the person commits, conspires to commit, or aids and abets the commission of any of a number of listed false claims.[72] The Act allows private whistleblowers (relators) to bring qui tam claims. A private person who brings a false claims action may be awarded up to thirty percent of the proceeds from the action based on how much the person contributed to the investigation and prosecution of the false claim.

Colorado repealed a 2016 law that allowed a defendant to be awarded reasonable attorney fees in a tort action if the case was dismissed on a motion by the defendant prior to trial.[73]

In addition, Colorado enacted legislation to overturn two court decisions, *Rocky Mountain Planned Parenthood, Inc. v. Wagner*[74] and *Wagner v. Planned Parenthood Federation of America, Inc.*,[75] which held that the owner of a property providing controversial goods or services may be held liable as a substantial factor in causing harm to a person at the property without considering whether the criminal action of a third-party was the predominant cause of the harm.[76]

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[68] Cal. S.B. 1149 (2022), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1149.

[69] Patrick Oot & Phil Goldberg, *Calif. Bill on Protective Orders Threatens Privacy Norms*, LAW360, June 6, 2022, *available at* https://www.law360.com/articles/1498292/calif-bill-on-protective-orders-threatens-privacy-norms.

[70] Colo. H.B. 1071 (2022), *available at* https://legiscan.com/CO/text/HB1071/2022.

[71] *See*, *e.g.*, Monson v. Country Preferred Ins. Co., 2018 WL 11016704, at *7 (D. Colo. Sept. 28, 2018) (stating that "language in the CCPA excepts the recovery of actual damages, triple damages, and attorney's fees in class actions.").

[72] Colo. H.B. 1119 (2022), *available at* https://leg.colorado.gov/bills/hb22-1119.

[73] Colo. H.B. 1272 (2022), *available at* https://legiscan.com/CO/text/HB1272/2022.

[74] Rocky Mountain Planned Parenthood, Inc. v. Wagner, 467 P.3d 287 (Colo. 2020).

[75] Wagner v. Planned Parenthood Fed. of Am., Inc., 471 P.3d 1089 (Colo. App. 2019).

[76] Colo. S.B. 15 (2022), *available at* https://legiscan.com/CO/text/SB115/2022.

Delaware

Delaware's General Corporation Law was amended to give senior officers the same liability protection as directors in stockholder actions seeking damages for breaches of the fiduciary duty of care.[77] Officers "may only be exculpated for claims brought directly by stockholders and not for fiduciary duty claims brought by the corporation or derivatively by stockholders."[78]

The Keshall "KeKe" Anderson Safe Firearm Sales Act[79] repeals a Delaware statute that had been interpreted to grant firearm dealers immunity from liability, even if the dealer negligently sold a firearm to a straw purchaser.[80] Public nuisance claims may be filed against firearms industry members that knowingly or recklessly endanger public health through the sale, manufacture, distribution, or marketing of firearm-related products.

Florida

Florida extended the length of time that health care providers receive liability protections from COVID-19-related claims under a 2021 law.[81] The protections were extended to claims accruing before June 1, 2023.[82]

A new subsection of the Florida Evidence Code allows for judicial notice of an "image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool," as long as the image or map "indicates the date on which the information was created."[83] A party intending to offer

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[77] Del. S.B. 273 (2022), *available at* https://legis.delaware.gov/BillDetail?LegislationId=109402.

[78] Pamela L. Millard & Christopher L. Damon, *2022 Amendments to the Delaware General Corporation Law: A Summary*, BUS. L. TODAY, Sept. 18, 2022, *available at* https://www.americanbar.org/groups/business_law/publications/blt/2022/09/2022-amendments-de-corplaw/#:~:text=The%20amendments%20to%20Section%20219%20of%20the%20DGCL%20are%20intended, via%20the%20virtual%20meeting%20format.

[79] Del. S.B. 302 (2022), *available at* https://legis.delaware.gov/BillDetail?LegislationId=129672.

[80] Summers v. Cabela's Wholesale, Inc., 2019 WL 1423095 (Del. Super. Mar. 29, 2019), *aff'd*, 2019 WL 6271569, 223 A.3d 96 (Table), (Del. Nov. 25, 2019).

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

[82] Fla. S.B. 7014 (2022), *available at* https://www.flsenate.gov/Session/Bill/2022/7014.

[83] Fla. S.B. 634 (2022), *available at* https://www.flsenate.gov/Session/Bill/2022/634/BillText/er/PDF; In re: Amendments to the Florida Evidence Code (Fla. Sept. 8, 2022), *available at* https://efactssc-public.flcourts.org/CaseDocuments/2022/1040/2022-1040_Disposition_156509_D29.pdf?Mobile=1&Source=%2F%5Flayouts%2Fmobile%2Fview%2Easpx%3FList%3D72eb6a2d%252D241a%252D43ac%252D8edd%252D23886d179280%26View%3D584f36c4%252D3949%252D4325%252Da18a%252Dfe276307f1cf%26RootFolder%3D%252FCaseDocuments%252F2022%252F1040%26FolderCTID%3D0x0120006E7E4E8421AA8044ADFFCB8FED0D2F4B%26CurrentPage%3D1.

such information in evidence at trial or at a hearing must file a notice that includes a copy of the information and specifies the internet address where the information may be accessed and inspected. There is a rebuttable presumption that the information should be judicially noticed. The rebuttable presumption may be overcome if the court finds by the greater weight of the evidence that the information does not fairly and accurately portray what it is being offered to prove or that it otherwise should not be admitted under the Florida Evidence Code.

In a special session, Florida addressed rising property insurance costs from hurricane-related losses.[84] Among the changes enacted, an insurer may obtain attorney fees and costs associated with securing dismissal for a plaintiff's failure to provide Notice of Intent to Initiate Litigation at least ten days prior to filing a lawsuit arising under a property insurance policy. There is also a "strong presumption" in property insurance cases that statutory attorney fee awards calculated under the Lodestar approach are "sufficient and reasonable." A plaintiff can overcome this presumption and receive a contingency risk multiplier "only in a rare and exceptional circumstance with evidence that competent counsel could not be retained in a reasonable manner."

Florida tackled rising property insurance costs again in a second special session following Hurricane Ian.[85] Among other provisions, the new law will:

> eliminate assignment of benefits for property claims; do away with one-way attorney fees for property claims; reform the first-party bad faith law to require breach of policy to be proven before the claim can be made; reduce the initial claims filing period from two years to one; permit arbitration and other dispute resolution; and permit the use of proposal for settlement for multiple claimants.[86]

The Florida Supreme Court adopted amendments to Rules Regulating the Florida Bar regarding attorney disciplinary procedures and reinstatement

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[84]Fla. S.B. 2-D (2022 spec. sess.), *available at* https://www.flsenate.gov/Session/Bill/2022D/1D/BillText/c1/PDF.

[85]Fla. S.B. 2-A (2022 2d spec. sess.), *available at* https://www.flsenate.gov/Session/Bill/2022A/2A/BillText/er/PDF.

[86] Peter Schorsch, *Insurance Industry Group Applauds Passage of One-Way Attorney Fee Elimination Bill*, FLA. POLITICS, Dec. 14, 2022, *available at* https://floridapolitics.com/archives/576381-insurance-industry-group-applauds-passage-of-one-way-attorney-fee-elimination-bill/; *see also* Leslie Scism & Arian Campo-Flores, *Florida Lawmakers Approve Property-Insurance Overhaul, Sending Bill to DeSantis*, WALL ST. J., Dec. 14, 2022, *available at* https://www.wsj.com/articles/florida-lawmakers-approve-property-insurance-overhaul-sending-bill-to-desantis-11671048780.

and readmission procedures.[87] In addition, the court adopted amendments to Florida Rules of Civil Procedure 1.530 (Motions for New Trial and Rehearing; Amendments of Judgments) and 1.535 (Remittitur and Additur).[88] Rule 1.535 was deleted and Rule 1.530 amended to provide:

> (h) Motion for Remittitur or Additur.
>
> (1) Not later than 15 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-jury action, any party may serve a motion for remittitur or additur. The motion must state the applicable Florida law under which it is being made, the amount the movant contends the verdict should be, and the specific evidence that supports the amount stated or a statement of the improper elements of damages included in the damages award.
>
> (2) If a remittitur or additur is granted, the court must state the specific statutory criteria relied on.
>
> (3) Any party adversely affected by the order granting remittitur or additur may reject the award and elect a new trial on the issue of damages only by filing a written election within 15 days after the order granting remittitur or additur is filed.

The court also amended Florida Rule of Civil Procedure 1.442 (Proposals for Settlement) to exclude nonmonetary terms from a proposal for settlement, with the exceptions of a voluntary dismissal of all claims with prejudice and any other nonmonetary terms permitted by statute.[89]

The Florida Supreme Court rejected proposals to test nonlawyer ownership in law firms, fee splitting with nonlawyers, and broadly expanded paralegal work.[90] The proposals had been included in a 2021 report of a Special Committee to Improve the Delivery of Legal Services[91] and were modeled

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[87] In re: Amendments to Rule Regulating The Florida Bar—Rules 3-7.6 and 3-7.10 (Fla. June 2, 2022), *available at* https://www.floridasupremecourt.org/content/download/839345/opinion/sc22-144.pdf.

[88] In re: Amendments to Florida Rules of Civil Procedure 1.530 and 1.535 (Fla. Aug. 25, 2022), *available at* https://efactssc-public.flcourts.org/casedocuments/2022/115/2022-115_miscdoc_373620_e05.pdf.

[89] In re: Amendments to Florida Rule of Civil Procedure 1.442 (Fla. May 26, 2022), *available at* https://efactssc-public.flcourts.org/casedocuments/2021/277/2021-277_miscdoc_372349_e05.pdf.

[90] Mark D. Killian, *Supreme Court Declines to Adopt Recommendations on Nonlawyer Ownership, Fee Splitting, and Expanded Paralegal Work*, FLA. BAR NEWS, Mar. 8, 2022, *available at* https://www.floridabar.org/the-florida-bar-news/supreme-court-declines-to-adopt-recommendations-on-nonlawyer-ownership-fee-splitting-and-expanded-paralegal-work/.

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

after a regulatory sandbox pilot program approved in Utah in 2020.[92] The Florida Bar's Board of Governors unanimously opposed the Special Committee's proposals to allow nonlawyer ownership in law firms and for lawyers to split fees with nonlawyers.[93] The Florida Supreme Court agreed to permit not-for-profit legal service providers to organize as a corporation and for a nonlawyer to be a member of a not-for-profit legal service provider's boards of directors.[94] The court asked the Bar to file a petition or report by December 30, 2022, providing "alternative proposals to 'improve the delivery of legal services to Florida's consumers and . . . assure Florida lawyers play a proper and prominent role in the provision of these services.'"

The Florida Supreme Court is considering sweeping changes to the Florida Rules of Civil Procedure, including new rules to promote earlier and more active case management by trial courts, among other changes recommended in a 2021 report by a Judicial Management Council Workgroup on Improved Resolution of Civil Cases.[95]

Georgia

Georgia amended the state's apportionment law following a Georgia Supreme Court ruling[96] that only allowed tort damages to be apportioned among liable parties in multi-defendant cases.[97] The new law permits apportionment of damages in single defendant lawsuits and cases with more than one defendant.

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[92] Dan Packel, *Utah Justices Give OK to 'Regulatory Sandbox*,' LAW.COM, Aug. 14, 2020, *available at* https://www.law.com/americanlawyer/2020/08/14/utah-justices-give-ok-to-regulatory-sandbox/?slreturn=20200812113759; *see generally* Utah Work Group on Regulatory Reform, *Narrowing the Access-to-Justice Gap by Reimagining Regulation* (Aug. 2019), *available at* https://utahinnovationoffice.org/wp-content/uploads/2021/08/Narrowing-the-Justice-Gap-Report-August-2019.pdf.

[93] Letter from Michael G. Tanner, President, The Florida Bar, to Hon. Charles T. Canady, Chief Justice, Supreme Court of Florida, Dec. 29, 2021, *available at* https://www.floridabar.org/news/publications/publications002/special-committee-to-improve-the-delivery-of-legal-services/#reports.

[94] In re: Amendments to Rule Regulating The Florida Bar 4-5.4 (Fla. June 2, 2022), *available at* https://www.floridasupremecourt.org/content/download/839346/opinion/sc22-607.pdf; *see also* Letter from John A. Tomasino, Clerk of Court for the Florida Supreme Court, to Joshua E. Doyle, Executive Director of The Florida Bar, Mar. 3, 2022, *available at* https://www.abajournal.com/files/Florida_Supreme_Court_letter.pdf.

[95] Judicial Management Council Workgroup on Improved Resolution of Civil Cases, Final Report (Nov. 2021), *available at* https://efactssc-public.flcourts.org/casedocuments/2022/122/2022-122_petition_79499_e39.pdf.

[96] Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC, 862 S.E.2d 295 (Ga. 2021).

[97] Ga. H.B. 961 (2022), *available at* https://assets.law360news.com/1481000/1481818/house%20bill%20961%20passed.pdf.

Idaho

Idaho's Coronavirus Limited Immunity Act of 2020 was extended to July 1, 2023.[98] The Act provides that a person is immune from civil liability for COVID-19-related damages or injury except for acts or omissions that constitute an intentional tort or willful or reckless misconduct.

Illinois

Illinois enacted a Consumer Legal Funding Act to establish protections for plaintiffs borrowing money to fund their lawsuits.[99] Consumers have fourteen days after the funding date to rescind the contract and refund the disbursed funds. The contract shall contain a written acknowledgment by the plaintiff's attorney stating that the attorney has not received a referral fee from the consumer lending company, among other disclosures. A consumer legal funding company may not pay a referral fee or other consideration to an attorney, law firm, medical provider, chiropractic physician, or physical therapist. In addition, a consumer legal funding company may not advertise materially false or misleading information and many not have a role with respect to the conduct of the underlying legal claim or any settlement or resolution of the claim. The interest rate that consumer legal funding companies may charge is capped at eighteen percent, assessed every six months, for forty-two months after the initial funding date.

Iowa

The Iowa Supreme Court adopted amendments to a number of the Iowa Rules of Evidence to conform to the corresponding federal rules, including Rule 5.408(*a*)(1) (compromise negotiations, impeachment); Rule 5.703 (bases for expert testimony); Rule 5.706(*a*) (expert appointed on court's own motion); Rule 5.801(*d*)(2) (party-opponent statements by authorized and unauthorized employees or agents, or by co-conspirators); Rule 5.803(16) (ancient documents hearsay exception); Rule 5.807 (residual hearsay exception); Rule 5.901(*b*)(8) (ancient documents authentication); Rule 5.902(13) (self-authentication of electronically generated records); and Rule 5.902(14) (self-authentication of data copied from electronic devices).[100] The court

[98]Idaho H.B. 444 (2022), *available at* https://legislature.idaho.gov/sessioninfo/2022/legislation/h0444/; *see also* Idaho H.B. 6 (2020 Spec. Sess.), *available at* https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020spcl/legislation/H0006.pdf.

[99] Ill. S.B. 1099 (2022), *available at* https://www.ilga.gov/legislation/publicacts/102/102-0987.htm.

[100] In the Matter of Adopting Amendments to the Iowa Rules of Evidence in Chapter 5 of the Iowa Court Rules, Order (Iowa Sept. 14, 2022), *available at*

declined to amend Iowa Rule of Evidence 5.702 to codify the additional gatekeeping requirements for expert testimony found in Federal Rule of Evidence 702.

Kansas

Kansas addressed misleading legal services advertisements sponsored by individuals or entities that are not attorneys or law firms, such as lead generating companies.[101] The ads must state "This is a paid advertisement for legal services," and they may not be presented as a "medical alert," "health alert," or "consumer alert." Further, paid advertisements by lead generators 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 by a government agency or through an agreement between a manufacturer and a government agency. Advertisements soliciting claimants for prescription drug lawsuits must warn viewers not to stop taking prescribed medication without consulting with a doctor. Ads focused on recruiting claimants for prescription drug or medical device lawsuits must disclose if the drug or device remains approved by the Food and Drug Administration, unless the product has been recalled or withdrawn. Violations of these provisions constitute unlawful and deceptive trade practices. Lastly, a person may not use, obtain, sell, transfer, or disclose to another person without written authorization protected health information for the purpose of soliciting an individual for legal services. Violations of this provision constitute unlawful and deceptive trade practices and, if done knowingly, are class A nonperson misdemeanors.

The Charitable Privacy Act provides that a public agency shall not require an individual to provide the agency with personal information or compel the release of personal information; require a nonprofit organization to provide the public agency with personal information or compel the release of personal information; publicly disclose personal information in the public agency's possession; or request a contractor or grant recipient to provide the public agency with a list of nonprofits to which the contractor or grantee has provided support.[102] The Act also specifies certain exceptions to the disclosure of public records under the Open Records Act that expire on July 1, 2027. A person alleging a violation of the Charitable Privacy Act

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https://www.iowacourts.gov/collections/754/files/1623/embedDocument/; *see also* Iowa Rules of Evidence Substantive Review Task Force, Final Task Force Report: Proposed Amendments and Task Force Comments (July 2022), *available at* https://www.iowacourts.gov/collections/754/files/1629/embedDocument/.

[101]Kan. S.B. 150 (2022), *available at* http://www.kslegislature.org/li/b2021_22/measures/documents/sb150_enrolled.pdf.

[102]Kan. H.B. 2109 (2022), *available at* http://www.kslegislature.org/li/b2021_22/measures/documents/hb2109_enrolled.pdf.

may bring a civil action for injunctive relief or damages. Damages awarded shall not be less than $7,500 per violation. A court may award reasonable attorney fees and costs to the complainant when the court determines an award is appropriate.

Governor Laura Kelly vetoed legislation to extend the COVID-19 Response and Reopening for Business Liability Protection Act of 2020,[103] with modifications, to January 23, 2023.[104]

Kentucky

The True Origin of Digital Goods and Truth in Musical Advertising Act requires owner or operator websites and online services that distribute commercial recordings and audiovisual works to disclose their name, phone number, physical address, and email address in a readily accessible location on the website or online service.[105] Violation of the Act is an unfair or deceptive act or practice, and subject to a private right of action.

Louisiana

A new Louisiana law prevents legal services advertisements from using certain terms or images that may mislead the public and to require certain disclosures to prevent confusion and protect public health.[106] Legal advertisements presented as a "consumer medical alert," "health alert," "consumer alert," or "public service health announcement" are prohibited along with ads that display the logo of a federal or state government agency in a manner that suggests an affiliation with the sponsorship of that agency. Use of the word "recall" is prohibited when referring to a product that has not been recalled in accordance with an applicable state or federal regulation. Legal services ads that reference a prescription drug or medical device must identify the sponsor and instruct viewers to "Consult your physician before making decisions regarding prescribed medication or medical treatment." The law does not apply to Louisiana licensed attorneys.

A separate enactment regulates advertisements for legal services consistent with the United States Court of Appeals for the Fifth Circuit's 2011 opinion in *Public Citizen v. Louisiana Disciplinary Board*.[107] Advertisements for legal services containing a reference or testimonial to past results must be presented in a truthful, nondeceptive manner and include a dis-

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

[104]Kan. S.B. 286 (2022), *available at* http://www.kslegislature.org/li/b2021_22/measures/sb286/.

[105] Ky. S.B. 272 (2022), *available at* https://apps.legislature.ky.gov/record/22rs/sb272.html.

[106] La. S.B. 378 (2022), *available at* https://legiscan.com/LA/bill/SB378/2022.

[107] La. S.B. 383 (2022), *available at* https://legiscan.com/LA/text/SB383/2022; Public Citizen v. Louisiana Disciplinary Bd., 632 F.3d 212 (5th 2011).

claimer such as "Results May Vary" or "Past Results are not a Guarantee of Future Success."[108] There also must be a disclaimer in ads that include the portrayal of a client by a nonclient or depict an event that is not actual or authentic. Legal services ads that utilize a nickname, moniker, motto, or trade name that states or implies an ability to obtain results or that promises results are prohibited.[109]

Louisiana also chose to limit liability for damages caused by driving a motordrawn float or other vehicle;[110] provide lawsuit immunity for invasion of privacy to a custodian who releases records in response to a public records request;[111] and apply the state's collateral source law to claims brought against the state.[112]

In addition, Louisiana now allows a hearing on any motion or exception to be conducted by any audio-visual means at the discretion of the court.[113] If witness testimony is necessary, a party may request that the hearing be conducted in person. A judge trial may be conducted by any audio-visual means with the consent of all parties and permission of the court.

Another new law provides that an added defendant shall be served with the original and amended or supplemental petitions.[114]

Filings by facsimile transmission shall be deemed complete on the date and time indicated on the clerk of court facsimile transmission receipt.[115] Clerks of court shall not intentionally turn off or disconnect the equipment used to receive facsimile filings. In the event the filing party does not receive a confirmation of receipt and the clerk's office asserts that it never received the facsimile transmission, the filing party may file a contradictory motion if it has electronic or other evidence that the facsimile filing was transmitted to the clerk's office on a particular day and at a specified time.

If a nonresident insurance claims adjuster appears in Louisiana to adjust an insurance claim that is the subject of a lawsuit, the adjuster shall be re-

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[108] Amendments to Louisiana's legal ethics rules in 2021 also provide that legal services advertisements discussing past successes or results obtained must contain a disclaimer such as "Results May Vary" or "Past Results are not a Guarantee of Future Successes." La. Supreme Ct., Order Amending Art. XVI, R. 7 Series of the Articles of Incorporation of the La. State Bar Ass'n (May 6, 2021), *available at* https://www.lasc.org/press_room/press_releases/2021/2021-14-Order_Amending_LA_Professional_Rules_of_Conduct_Attorney_Advertising_Rules.pdf.

[109] Governor John Bel Edwards vetoed other lawsuit advertising legislation in 2021 and 2020. *See* La. S.B. 43 (2021), *available at* https://gov.louisiana.gov/assets/docs/2021session/vetoes/CortezLtr20210701VetoSB43.pdf; La. S.B. 395 (2020), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=1178715.

[110] La. H.B. 923 (2022), *available at* https://legiscan.com/LA/bill/HB923/2022.

[111] La. S.B. 228 (2022), *available at* https://legiscan.com/LA/bill/SB228/2022.

[112] La. H.B. 896 (2022), *available at* https://legiscan.com/LA/text/HB896/2022.

[113] La. H.B. 124 (2022), *available at* https://legiscan.com/LA/text/HB124/id/2591940.

[114] La. H.B. 264 (2022), *available at* https://legiscan.com/LA/text/HB264/2022.

[115] La. H.B. 164 (2022), *available at* https://legiscan.com/LA/text/HB164/2022.

quired to appear in person in the parish or venue where the case is pending and testify at the trial on the merits.[116]

Louisiana also decided to authorize the commissioner of the Office of Financial Institutions to require a mortgage originator or broker of residential mortgages to take up to eight hours of continuing education classes if the commissioner finds that a consumer was negatively impacted by an originator or broker's failure to adhere to reasonable standards of professional conduct in the scope of that person's employment.[117]

A new liability-expanding law creates a private right of action against commercial entities who publish or distribute information harmful to minors on the internet without requiring reasonable age verification methods.[118]

Massachusetts

The Massachusetts Supreme Judicial Court adopted amendments to Rule of Civil Procedure 51(a) to guarantee defendants an opportunity to respond to plaintiff summation anchoring arguments.[119] The amended rule promotes fair trials in the wake of legislation enacted in 2014 to allow plaintiffs to request a specific amount of damages.[120] One commentator has stated, "It is well recognized that a numerical anchor influences jurors' judgment about damages. . . ."[121] Further, because plaintiffs in Massachusetts present closing arguments last, the 2014 statute created the potential that a defendant would be deprived of an opportunity to respond to a plaintiff's request for a specific amount of damages. Amended Rule 51(a) provides:

> Rule 51(a):
>
> (1) Time for Argument.
>
> Counsel for each party shall be allowed thirty minutes for argument; but before the argument commences, the court, on motion or sua sponte, may reasonably reduce or extend the time. When two or more attorneys are to be heard on behalf of the same party, they may divide their time as they elect.
>
> (2) Arguing Damages.
>
> During closing arguments, the parties may suggest a specific monetary amount for damages. If a party suggests a specific monetary amount for damages during closing argument without having provided notice of the intent to suggest the amount to all other parties reasonably in advance of closing arguments, the

[116] La. S.B. 214 (2022), *available at* https://legiscan.com/LA/text/SB214/2022.

[117] La. H.B. 1079 (2022), *available at* https://legiscan.com/LA/bill/HB1079/2022.

[118] La. H.B. 142 (2022), *available at* https://legiscan.com/LA/bill/HB142/2022.

[119] Mass. R. Civ. P. 51(a) (effective Mar. 1, 2022), *available at* https://www.mass.gov/service-details/amendments-to-the-massachusetts-rules-of-civil-procedure-0.

[120] Mass. Gen. Laws. c. 231, §13B.

[121] Patricia Kuehn, *Translating Pain and Suffering Damages*, TRIAL (Nov. 2020).

> court shall allow the opposing party a reasonable opportunity to address the amount to the jury.

The Massachusetts Supreme Judicial Court also adopted amendments to Rule of Civil Procedure 30 (Depositions Upon Oral Examination) and repealed Rule 30A (Audiovisual Depositions and Audiovisual Evidence).[122] Revised Rule 30 covers both stenographic and audiovisual depositions, following the structure of Federal Rule of Civil Procedure 30.[123] The revised rule does not limit the number or duration of depositions, retaining the existing Massachusetts practice in this area.

Massachusetts Rule of Appellate Procedure 19 was amended to reduce the number of copies of each brief and appendix that must be filed and served.[124]

Michigan

Lawmakers enacted laws providing that COVID-19 liability protections and a COVID-19 Employment Rights Act that passed alongside the liability protections in 2020 no longer apply to claims that accrue after July 1, 2022, and they are repealed effective July 1, 2023.[125]

Missouri

Missouri enacted legislation that provides that provisions of ALI Restatements and other secondary sources do not constitute the public policy of the state to the extent their adoption "would create, eliminate, expand, or restrict a cause of action, right, or remedy" or are "inconsistent with, or in conflict with, or otherwise not addressed by, Missouri statutory law or Missouri appellate case law precedent."[126]

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[122] Amendments to Rules 30 and 30A of the Massachusetts Rules of Civil Procedure (effective Sept. 1, 2022), *available at* https://www.mass.gov/doc/amendments-to-rules-30-and-30a-of-the-massachusetts-rules-of-civil-procedure-effective-sept-1-2022/download.

[123] Amendments to Rules 30 and 30A of the Massachusetts Rules of Civil Procedure - Reporter's Notes (effective Sept. 1, 2022), *available at* https://www.mass.gov/doc/amendments-to-rules-30-and-30a-of-the-massachusetts-rules-of-civil-procedure-reporters-notes-sept-1-2022.

[124] Amendments to Rule 19 of the Massachusetts Rules of Appellate Procedure (effective May 1, 2022), *available at* https://www.mass.gov/doc/amendments-to-rule-19-of-the-massachusetts-rules-of-appellate-procedure-effective-may-1-2022/download.

[125] Mich. H.B. 6215 (2022), *available at* https://legiscan.com/MI/text/HB6215/2021; Mich. H.B. 6128 (2022), *available at* https://legiscan.com/MI/text/HB6128/2021; Mich. H.B. 5244 (2022), *available at* https://legiscan.com/MI/text/HB5244/2021.

[126] Mo. S.B. 775, 751 & 640 (2022), *available at* https://www.senate.mo.gov/22info/pdf-bill/tat/SB775.pdf.

New Jersey

The New Jersey Insurance Fair Conduct Act expands policyholders' ability to bring bad faith claims against their automobile insurers.[127] A policyholder who is "unreasonably denied a claim for coverage or payment of benefits, or who experiences an unreasonable delay for coverage or payment of benefits, under an uninsured or underinsured motorist policy" may bring a civil action for "unreasonable delay or unreasonable denial of a claim for payment of benefits" or a violation of N.J.S.A. 17:29B-4 (which lists prohibited insurance trade practices that are enforced by the New Jersey Department of Banking and Insurance). Successful claimants are entitled to actual damages "that shall not exceed three times the applicable coverage amount" as well as "pre- and post-judgment interest, reasonable attorney's fees, and all reasonable litigation expenses." "No rate increase shall be passed on to the consumer or policyholder as a result of compliance" with the new law.

Another new law requires automobile insurance to provide certain minimum amounts of liability, uninsured motorist, and underinsured motorist coverage.[128]

In addition, an insurer who receives a written request from a New Jersey licensed attorney for disclosure of the policy limits under an insurance policy shall provide written disclosure of the information no later than thirty days from receipt of the request.[129] The disclosure shall indicate the limits of all applicable insurance policies and any applicable umbrella or excess liability insurance policies issued by the insurer to the insured. The attorney's request must state that the attorney represents someone who has suffered bodily injury or death allegedly caused by an accident with an insured under an insurance policy issued by the insurer; provide the insured's name and last known address; state the date and approximate time of the accident; attach a copy of the accident report, if available; and in the case of a motor vehicle accident, include a statement from the claimant, or an attorney representing the claimant, providing insurance information. Disclosure of policy limits does not constitute an admission that a loss is subject to the policy. Insurance policy information is inadmissible. Insurers issuing policies in New Jersey must provide the Department of Banking and Insurance with an email address for the Department to publish on its website for the purpose of receiving requests for policy limit disclosures.

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[127] N.J. S.B. 1559 (2022), *available at* https://www.njleg.state.nj.us/Bills/2020/S2000/1559_R3.PDF.

[128] N.J. S.B. 481 (2022), *available at* https://legiscan.com/NJ/bill/S481/2022.

[129] N.J. S.B. 2843 (2022), *available at* https://legiscan.com/NJ/text/S2843/2022.

Another new law provides that calculations of lost or impaired earnings capacity in personal injury or wrongful death actions may not be reduced because of "race, ethnicity, gender identity or expression, or affectional or sexual orientation."[130] Further, damages shall not be based on statistical tables alone unless all parties agree.

Other new legislation allows certain persons who are not yet appointed as administrator of an estate to pursue a wrongful death action on behalf of a deceased's survivors.[131]

In addition, in any action brought by the Attorney General, "any commercial practice that violates State or federal law is conclusively presumed to be an unlawful practice" under the New Jersey Consumer Fraud Act.[132] The new law also updates notice requirements for actions alleging consumer fraud violations and adds indirect purchasers as parties who can receive damages for antitrust violations.[133]

The Attorney General is authorized to bring civil actions against firearms businesses under a new and expansive theory of public nuisance.[134]

The New Jersey Supreme Court adopted an omnibus package of court rule amendments.[135] Among other provisions, the amendments allow a court to permit "testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards" (R. 1:2-1(b)); provide parties with an appeal as of right from an order granting or denying as a final matter class certification (R. 2:2-3(b)); change the Offer of Judgment Rule standard for avoiding the consequences of non-acceptance of a claimant's offer by requiring the offeree to show "undue hardship" or "lack of fairness" (R. 4:58-2); and change the Offer of Judgment Rule to provide for different circumstances governing offers made in litigation with multiple defendants (R. 4:58-4), addressing an ambiguity that was noted by the New Jersey Supreme Court in 2018.[136]

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[130]N.J. S.B. 3594 (2022), *available at* https://www.njleg.state.nj.us/Bills/2020/S4000/3594_R2.PDF.

[131]N.J. A.B. 6133 (2022), *available at* https://www.njleg.state.nj.us/Bills/2020/A9999/6133_I1.PDF.

[132] N.J. A.B. 1556 (2022), *available at* https://legiscan.com/NJ/bill/A1556/2022.

[133] N.J. A.B. 1556 (2022), *available at* https://legiscan.com/NJ/bill/A1556/2022.

[134] N.J. A.B. 1765 (2022), *available at* https://legiscan.com/NJ/text/A1765/2022.

[135]Omnibus Rule Amendment Order (N.J. Aug. 5, 2022), *available at* https://www.njcourts.gov/sites/default/files/notices/2022/08/n220812b.pdf.

[136] *See* Willner v. Vertical Reality, Inc., 192 A.3d 1011 (N.J. 2018).

New York

New York expanded upon existing laws intended to facilitate sexual abuse lawsuits.[137] The Adult Survivors Act revives sexual abuse claims by individuals who were over the age of eighteen when sexually abused and provides a one year window to file revived claims.[138] The law grants trial preference to such actions and authorizes the chief administrator of the courts to promulgate rules for timely adjudication of revived actions.

In addition, public water suppliers may bring previously time-barred claims relating to an "emerging contaminant" in their water supply wells. Such actions are revived and may be commenced within eighteen months of the new provision's effective date of October 5, 2022.[139]

Lawmakers also decided to increase the amount awarded to an individual who initiates a qui tam action if the action includes disclosure of information related to the use of government funds during a state of emergency.[140] Throughout the COVID-19 pandemic, New Yorkers reported seeing potentially fraudulent acts perpetrated on the state. Currently, private citizens can file civil claims on the state's behalf to help recover defrauded money and may be rewarded a percentage of the money recovered. Under the new law, whistleblowers may be eligible to receive additional money if the fraud was perpetrated during a state of emergency.

Most significantly, Governor Kathy Hochul vetoed a bill that would have added grief and anguish, loss of consortium and companionship, pecuniary injuries, including loss of services and loss or diminishment of inheritance, and loss of nurture, guidance, and education to the types of damages recoverable in wrongful death suits.[141] The Grieving Families Act

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[137] In 2019, New York extended the civil statute of limitations for childhood sexual abuse claims to age 55 and initially opened a one year revival period for the filing of previously time-barred claims. N.Y. S.2440/A.2683 (2019), *available at* https://www.nysenate.gov/legislation/bills/2019/S2440. The deadline was later extended by one year because of the COVID pandemic. N.Y. A.9036/S.7082 (2020), *available at* https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S07082&term=2019&Actions=Y&Text=Y. The legislature prospectively extended the civil statute of limitations for certain sexual offenses committed against adults to twenty years. N.Y. S.6574/A.8412 (2019), *available at* https://www.nysenate.gov/legislation/bills/2019/s6574#:~:text=This%20bill%20would%20extend%20the,the%20first%20and%20second%20degrees.

[138] N.Y. A.648/S.66A (2022), *available at* https://www.nysenate.gov/legislation/bills/2021/S66.

[139] N.Y. S.8763/A.9824 (2022), *available at* https://legislation.nysenate.gov/pdf/bills/2021/S8763A.

[140] N.Y. S.1120/A.1431 (2022), *available at* https://www.nysenate.gov/legislation/bills/2021/s1120.

[141] N.Y. S.74A (2022), *available at* https://www.nysenate.gov/legislation/bills/2021/S74; *see also* Mark Behrens & Christopher Appel, *Governor Hochul: Don't Allow Inflation in Wrongful Death Lawsuits*, N.Y.L.J. (Dec. 20. 2022), *available at*

also would have expanded the class of potential claimants to "close family members"—including spouses, domestic partners, children, parents, grandparents, step-parents and siblings—and would have extended the statute of limitations on such claims from two year to three and one-half years. The Governor's veto statement described the bill as "an extraordinary departure from New York's wrongful death jurisprudence" and expressed concern that the bill "would increase already-high insurance burdens on families and small businesses and further strain already-distressed healthcare workers and institutions."[142] The Governor indicated a willingness to sign a narrower law to benefit parents of children killed in accidents unrelated to medical malpractice,[143] but this was rejected by the bill's sponsors.[144]

Oklahoma

Oklahoma enacted a law to regulate legal services contracts between the Office of the Attorney General and private, contingent fee law firms.[145] State agencies and officials are required to use an open request for proposal from at least three qualified private attorneys, when possible, when seeking outside counsel in matters where attorneys' fees and expenses may exceed $1 million. The Attorney General must include a standard clause in every contract for contingent fee attorney services that ensures that government attorneys have control over the litigation and settlement. There is a maximum sliding scale for contingency fees in state contracts with outside counsel ranging from twenty-five percent of amounts below $10 million to five percent of amounts over $25 million. The total fee payable to all private attorneys in any contingent fee contract may not exceed $50 million. Copies of the executed contingent fee contract must be posted on the Attorney General's website for public inspection within five days after the contract is executed. Private contingent fee law firms must maintain detailed time records and documentation for all expenses, and promptly provide such records to the Attorney General upon request. Further, state agencies and officials

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https://www.law.com/newyorklawjournal/2022/12/20/governor-hochul-dont-allow-inflation-in-wrongful-death-lawsuits/.

[142] Governor Kathy Hochul, Veto No. 192, S.74A, Jan. 30, 2023.

[143] 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, *available at* https://www.nydailynews.com/opinion/ny-oped-lets-agree-on-helping-grieving-families-today-before-midnight-deadline-20230130-jim7ltxwofdm3nwurnidmi6mvi-story.html.

[144] Sen. Brad Hoylman-Sigal, Press Release, *Assembly Member Weinstein And Senator Hoylman-Sigal Respond To Governor Hochul's Op-Ed On The Grieving Families Act*, Jan. 30, 2023, *available at* https://www.nysenate.gov/newsroom/press-releases/brad-hoylman-sigal/assembly-member-weinstein-and-senator-hoylman-sigal.

[145] Okla. S.B. 984 (2022), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/SB/SB984%20ENR.PDF.

must disclose to the Attorney General any past or present relationship between the attorney or firm and the state agency, the reason use of a contingency fee arrangement is believed to be in the state's interest, and the justification for hiring the private attorney or firm before entering a contract. Copies of contracts in which fees may be $1 million or more, along with supporting information, must be submitted to the Legislative Oversight Committee overseeing the operations of the Legislative Office of Fiscal Transparency, along with settlement agreements where a private firm or attorney was hired on a contingent fee basis and the settlement was at least $1 million. The Attorney General must submit an annual report to the Governor and legislative leaders describing the use of contracts with private law firms and attorneys over the prior year. The new law exempts agencies not subject to Administrative Procedures Act filing and notification requirements and securities litigation conducted on behalf of state entities.

Oklahoma also enacted legislation to allow service of process to occur at an agreed upon meeting place with someone who resides at the individual's residence.[146] Another new law modifies how a party to a lawsuit can amend a pleading after time restrictions have passed.[147]

Pennsylvania

The Pennsylvania Supreme Court repealed an almost twenty-year old venue rule that required medical malpractice actions to be filed only in a county in which the cause of action arose.[148] Effective January 1, 2023, the change is likely to result in more filings in places such as Philadelphia that are perceived to be plaintiff-friendly.

The court also amended Rule 400(b) of the Pennsylvania Rules of Civil Procedure to "ameliorate 'snap' removal"[149] in response to a Third Circuit decision that upheld the defense litigation tactic.[150] "Snap removal" refers to "the removal of a civil lawsuit brought in state court to the federal district

[146] Okla. H.B. 3381 (2022), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB3381%20ENR.PDF.

[147] Okla. H.B. 3450 (2022), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB3450%20ENR.PDF.

[148] In re Order Amending Rules 1006, 2130, 2156, and 2179 of the Pennsylvania Rules of Civil Procedure (Pa. Aug. 25, 2022), *available at* https://casetext.com/case/in-re-order-amending-rules1006-2130-2156-2179-of-the-pa-rules-of-civil-procedure (Committee Adoption Report).

[149] In re Order Amending Rule 400 of the Pennsylvania Rules of Civil Procedure, No. 727 (Pa. Jan. 18, 2022), *available at* https://www.pacourts.us/assets/opinions/Supreme/out/Order%20-%20105017543157173607.pdf?cb=1 and https://www.pacourts.us/assets/opinions/Supreme/out/Report%20-%20105017543157173653.pdf?cb=1 (Committee Adoption Report).

[150] Encompass Ins. Co. v. Stone Mansion Restaurant, Inc., 902 F.3d 147 (3d Cir. 2018).

court in which the case could have been brought under federal diversity jurisdiction, prior to service on a forum defendant."[151]

Tennessee

Tennessee extended previously enacted COVID-19 liability protections to July 1, 2023.[152]

Virginia

Under a new Virginia law, if a controller or processor of the personal data of Virginians continues to violate the Consumer Data Protection Act following a thirty-day cure period offered by the Attorney General or breaches a written statement provided to the Attorney General, the Attorney General may seek an injunction to restrain any violations and civil penalties of up to $7,500 for each violation. Any civil penalties, expenses, and attorney fees that are collected must be paid into the state treasury.[153]

Vermont

Vermont created a cause of action to allow asymptomatic plaintiffs to obtain the remedy of medical monitoring against an owner or operator of a large facility (i.e., ten or more full-time workers at any time at the facility or 500 employees at any one time across all facilities) that releases a proven toxic substance if the plaintiff was exposed at a rate significantly greater than the general population as a result of the defendant's tortious conduct; as a proximate result of the exposure plaintiffs have suffered an increased risk of contracting a serious disease; the increased risk makes it medically necessary for plaintiffs to undergo periodic medical examination different from that prescribed for the general population in the absence of exposure; and monitoring procedures exist that are reasonable in cost and safe for use.[154] If the cost of medical monitoring is awarded, the defendant shall pay the award to a court-supervised program administered by appropriate health professionals and pay to the plaintiff reasonable attorney's fees and other litigation costs reasonably incurred.

Washington

In 2019, Washington's "Survival of Actions" statute was amended to allow wrongful death cases to proceed for second tier beneficiaries (parents

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[151] Shari Milewski & Donald Kinsley, *What Pa. Procedure Rule Change Means for 'Snap Removals*,' LAW360, Feb. 1, 2022, *available at* https://www.law360.com/articles/1460459.

[152] Tenn. S.B. 2448 (2022), *available at* https://legiscan.com/TN/text/SB2448/id/2502297; *see also* Tenn. S.B. 8002 (2020), *available at* http://www.capitol.tn.gov/Bills/111/Bill/SB8002.pdf.

[153] Va. S.B. 534/H.B. 714 (2022), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+SB534ER.

[154] Vt. S.B. 113 (2022), *available at* https://legislature.vermont.gov/bill/status/2022/S.113.

and siblings) who were not financially dependent on the decedent and no first tier beneficiaries (spouse and children) exist. A 2022 decision by the Washington Supreme Court held that those amendments apply retroactively to permit newly qualified second tier beneficiaries to assert wrongful death claims. Further, the amendments apply regardless of the tortfeasor's prior release with the personal representative.[155]

West Virginia

Governor Jim Justice appointed three justices to serve staggered terms on the new West Virginia Intermediate Court of Appeals. The court was created in 2021 by West Virginia's Appellate Reorganization Act,[156] a significant legal change that was years in the making. Justice Thomas Scarr's term will run two and one-half years, Justice Daniel Greear's term will run four and one-half years, and Justice Donald Nickerson, Jr.'s term will run six and one-half years. Governor Justice described the appointments as "an incredible step for our state that reflects the values of West Virginians and continues to make West Virginia more and more business friendly," noting that he has "always tried to champion judicial reform in West Virginia."[157]

The West Virginia Supreme Court of Appeals is considering amendments that would generally align the West Virginia Rules of Civil Procedure with the Federal Rules of Civil Procedure.[158]

IV. KEY COURT DECISIONS

A. Decisions Upholding Civil Liability Laws

The Fourth Circuit Court of Appeals upheld West Virginia's Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act of 2020.[159] The Act's prohibitions target attorney ads that give the false impression that they reflect medical or government advice. Attorneys that solicit clients in drug or device litigation may not

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[155] Kellogg v. Nat'l R.R. Passenger Corp., 504 P.3d 796 (Wash. 2022).

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

[157] Amy Smith, *West Virginia Governor Announces First Appointees to New Intermediate Court of Appeals*, NAT'L L. REV., Jan. 3, 2022, *available at* https://www.natlawreview.com/article/west-virginia-governor-announces-first-appointees-to-new-intermediate-court-appeals.

[158] West Virginia Supreme Court of Appeals, Request for Public Comment on Proposed Amendments to the West Virginia Rules of Civil Procedure, No. 21-Rules-12 (June 15, 2022), *available at* http://www.courtswv.gov/legal-community/court-rules/Orders/2022/RCP%20Public%20Comment%20Order.pdf.

[159] Recht v. Morrissey, 32 F.4th 398 (4th Cir. 2022), *cert. denied,* 2022 WL 17573477 (U.S. Dec. 12, 2022); W. VA. CODE ANN. §§ 47-28-1 to -5.

present an advertisement as a "medical alert," "health alert," "consumer alert," or the like; display the logo of a government agency in a manner that suggests affiliation; or use the word "recall" unless the recall was ordered by a government agency or was the product of an agreement between the manufacturer and a government agency. Further, legal advertisements must contain certain disclosures that prevent attorney advertisements from confusing or misleading consumers, such as by indicating that an ad is a paid advertisement for legal services and by identifying the sponsor and the attorney or law firm that would represent clients. Other disclosures that were not challenged ensure that attorney advertisements do not give patients the impression that they should suddenly stop using prescription drugs. Such advertisements must include the warning: "Do not stop taking a prescribed medication without first consulting a doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death." Any person who knowingly violates that Act is deemed to have engaged in an unfair or deceptive trade practice in violation of the West Virginia Consumer Credit and Protection Act. The Fourth Circuit concluded,

> Plaintiffs try to transfigure the Act into a sweeping and draconian enactment. But all West Virginia requires is that attorneys truthfully present themselves as attorneys. The Act's prohibitions and disclosures work together to accomplish this end—and to protect the health of West Virginia citizens who may be misled into thinking that attorneys are reliable sources of medical advice. The Act survives constitutional challenge.

Punitive damages caps were upheld by an Ohio appellate court[160] and a Georgia trial court.[161]

A Colorado appellate court upheld a certificate of review requirement for professional negligence actions.[162]

A federal district court upheld a first-of-its-kind New York law that authorizes public nuisance suits against firearm manufacturers and sellers for gun violence.[163] The 2021 law "sidestep[s] the fundamental legal principle that a manufacturer is not liable when a criminal misuses its product to kill or injure someone."[164] Under the statute, a gun industry member is subject

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[160] Gibson Bros., Inc. v. Oberlin College, 187 N.E.3d 629 (Ohio Ct. App. 2022), *appeal not allowed*, 167 Ohio St. 3d 1497 (2022).

[161] Taylor v. The Devereux Found., Inc., 2022 WL 1198660 (Ga. Super. Ct. Cobb County Feb. 8, 2022), *on appeal*, No. S22A1060 (Ga. 2022).

[162] Woo v. Baez*,* 2022 WL 4542404 (Colo. Ct. App. Nov. 3, 2022).

[163] National Shooting Sports Found., Inc. v. James, 2022 WL 1659192 (N.D.N.Y. May 25, 20220), *appeal filed*, No. 22-1374 (2d Cir. 2022).

[164] Victor Schwartz, *N.Y.'s Cheap Shot Against Gun Makers*, N.Y. DAILY NEWS, June 25, 2021, *available at* https://www.nydailynews.com/opinion/ny-oped-a-cheap-shot-against-gun-

to civil liability for public nuisance if it knowingly or recklessly creates or contributes to a condition in New York that "endangers the safety or health of the public" or if the gun industry member fails to "establish and utilize reasonable controls and procedures" to prevent its products "from being possessed, used, marketed or sold unlawfully in New York."[165] The decision came a day after a Texas school shooting that was one of the deadliest in U.S. history.

B. Decisions Striking Down Civil Liability Laws

A divided 4-3 Ohio Supreme Court found the state's cap on noneconomic damages in personal injury cases to be unconstitutional *as applied* to a claim by a victim of childhood sexual assault against the convicted perpetrator.[166] In prior cases, the court held the cap constitutional on its face.[167] Plaintiff interests had hoped the heinous facts in *Brandt v. Pompa* would lead the court to invalidate the cap in its entirety, possibly even with sweeping language that plaintiff lawyers could utilize to try to strike down other civil justice reforms. That did not happen. The court's ruling is much narrower, though the extent of a new court-created exemption to the statutory limit will be clarified in future cases.

Plaintiff was sexually abused at ages eleven and twelve by the defendant, a family friend, who was convicted of multiple felonies involving her and other victims. In the civil suit, plaintiff obtained a verdict including $14 million in compensatory damages for abuse she suffered before the cap took effect, $20 million in noneconomic damages for abuse after the cap took effect, and $100 million in punitive damages. Ohio's noneconomic damages cap exempts specified permanent physical injuries, but does not exempt severe psychological harms. The trial court, following precedent, reduced the capped portion of the noneconomic damage award to $250,000. The Ohio Supreme Court restored the $20 million noneconomic damage award.

The majority opinion, written by Chief Justice Maureen O'Connor, said that allowing full recoveries by individuals with permanent and substantial physical injuries, while capping awards for a plaintiff such as Brandt with "catastrophic *psychological* injury," violates the due-course-of-law guarantee of the Ohio Constitution. In both situations, individuals have experi-

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makers-20210615-2vhluds4irfkzb5oary6e5pyxu-story.html; *see also* N.Y. A.6762/S.7196 (2021), *available at* https://www.nysenate.gov/legislation/bills/2021/s7196.

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

[166] Brandt v. Pompa, 2022 WL 17729469 (Ohio Dec. 16, 2022), *reconsideration denied*, 168 Ohio St. 3d 1489 (2022); OHIO REV. CODE § 2315.18.

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

enced pain and suffering that is "traumatic, extensive, and chronic."[168] The majority opinion concludes, however, with a statement that tightly confines the circumstances under which the cap is unconstitutional as applied. The court held the cap is unconstitutional "as applied to Brandt and similarly situated plaintiffs (i.e., people like Brandt who were child victims of intentional criminal conduct and who bring civil actions to recover damages from the persons who have been found guilty of those intentional criminal acts) *to the extent that it fails to include an exception to its compensatory-damages caps for noneconomic loss for plaintiffs who have suffered permanent and severe psychological injuries*."[169]

Plaintiff interests may argue that the statutory cap can no longer apply to permanent and severe psychological injuries. The court's reasoning and its conclusion, however, suggest that the decision may be confined to "extremely uncommon"[170] circumstances in which: (1) the plaintiff was a *child* at the time of injury; (2) the defendant was *convicted* of an *intentional* criminal act; and (3) the plaintiff experienced a permanent and severe psychological injury as a result of the intentional criminal act.[171]

Strong dissenting opinions argued that the majority invaded the province of the General Assembly by judicially exempting a category of cases from the cap's application.[172] Justices Sharon Kennedy, Patrick Fischer, and R. Patrick DeWine said in their dissent:

> By resolving the merits of this case, the majority opinion improperly involves the judiciary in matters that belong exclusively and fundamentally to the General Assembly. It is this type of result-oriented judicial activism that blurs the line in the public's eye about which branch of government is truly responsible for the policies of this state. It erodes the public's confidence in the judiciary to resolve problems within the confines of the law and places an unrealistic expectation on the members of the Ohio judiciary to resolve all society's problems. Policy-making is not our job. If policy changes are desired, then the members of the majority opinion can take the short walk to Capitol Square to speak with their legislators—the people who are elected to create and set policy for Ohioans. Brandt's situation is certainly sad,

[168] *Brandt*, 2022 WL 17729469, at *6.

[169] *Id*. at *10 (emphasis in original).

[170] *Id*. at *8.

[171] *Id*. at *10; *see also id*. at *7 ("For this limited class of litigants—people like Brandt who were victimized at a very young age and who bring civil actions to recover damages from the persons who have been found guilty of those intentional criminal acts—the constitutional guarantee of due course of law is unjustly withheld."); *id*. at *8 (Brandt was harmed by *intentional*, not negligent behavior.").

[172] *Id*. at *10 (Kennedy, Fischer, and DeWine, JJ., dissenting); *Id*. at *17 (Fischer, J., dissenting).

> but we cannot provide her with compensation simply because it may be our personal policy preference to do so. This activism from the bench needs to stop.[173]

The Ohio Supreme Court has a new look in 2023. Chief Justice O'Connor left the court on December 31, 2022. Age limits blocked her from seeking reelection. In November, Republican Justice Kennedy won her bid to be the next Chief Justice. Governor Mike DeWine appointed Hamilton County (Cincinnati) Prosecuting Attorney Joseph Deters to fill Justice Kennedy's unexpired term.

A Chicago trial court struck down a 2021 law favoring personal injury and wrongful death plaintiffs pertaining to prejudgment interest in tort lawsuits.[174] The court found that "the statute unconstitutionally impeded on juries' role to determine damages and arbitrarily applied to only certain civil litigants."[175]

The Georgia Supreme Court observed that a Georgia law precluding evidence of seat belt non-usage likely violates the due process rights of automobile manufacturers defending crashworthiness cases.[176]

V. CONCLUSION

2022 was a relatively quiet year for civil justice issues as state legislatures were focused on redistricting, budgets, and issues that would motivate voters ahead of the November elections. The AAJ was able to secure enactment of the Camp Lejeune Justice Act and a few other pro-plaintiff laws at the federal level. In addition, liability-expanding laws were enacted in "blue states" with large progressive majorities, such as California, Colorado, New Jersey, and New York. Defense interests successfully defeated protective order legislation in California, extended COVID-19-related liability protections that were set to expire in some states, made progress addressing

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[173] *Id.* at *17 (Kennedy, Fischer, and DeWine, JJ., dissenting).

[174] Hyland v. Advocate Health & Hosp. Corp., 2022 WL 16705676 (Ill. Cir. Ct. Cook County May 27, 2022); Ill. S.B. 72 (2021), *available at* https://ilga.gov/legislation/publicacts/fulltext.asp?name=102-0006&GA=102&SessionId=110&DocTypeId=SB&DocNum=72&GAID=16&SpecSess=&Session=.

[175] Michael Adler, *Navigating Illinois' New Prejudgment Interest Statute*, 110 ILL. B.J. 26 (Sept. 2022).

[176] Domingue v. Ford Motor Co., 875 S.E.2d 720, 729 (Ga. 2022) ("To be sure, some of us have serious concerns about the constitutionality of a statute that strips from a defendant the ability to present evidence that could be critical to its ability to present a defense of a product it designs and manufactures. . . . [W]e believe the constitutional questions are not properly presented to this Court for resolution at this time."); *see also* Lee Mickus, *Georgia Supreme Court's Doubts on Seat Belt Gag Rule's Constitutionality Puts Legislature on Notice*, Vol. 31 No. 9 Legal Opinion Letter (Wash. Legal Found. July 29, 2022), *available at* https://www.wlf.org/wp-content/uploads/2022/07/072922Mickus_LOL.pdf.

over-naming in asbestos lawsuits, and added to the list of states that regulate misleading legal services advertisements. Lawmakers in California and the Florida Supreme Court rejected regulatory sandbox proposals that would allow non-lawyers to share fees with lawyers or own law firms.

In 2023, civil litigants should monitor proposed amendments to Federal Rule of Evidence 702 that will take effect on December 1, 2023 (assuming the amendments are approved by the United States Supreme Court and Congress in 2023). Plaintiff interests will likely pursue liability-expanding proposals in "blue states" such as those that delivered for the trial bar in 2022 as well as states such as Michigan, Minnesota, Maryland, and Massachusetts that have progressive "trifectas" (House, Senate, Governor) after the November elections. Business interests will likely continue to work on asbestos litigation reforms, third party litigation funding disclosure, curbs on misleading legal services advertisements, reforms to address nuclear verdicts, and legislation to address outlier ALI Restatement provisions, among other issues.