

2020 Civil Justice Update

by Mark A. Behrens

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This paper reviews key civil justice issues and changes in 2020. Part I focuses on broad trends. Part II discusses 2020 federal legislation and amendments to federal court rules that take effect on December 1, 2020. Part III summarizes liability law changes at the state level in 2020. Part IV highlights key cases in 2020 that addressed the constitutionality of civil justice reforms.

The COVID-19 pandemic was the dominant worldwide issue in 2020. Thus, legislation to address COVID-19-related lawsuits against health care providers and health care facilities, personal protective equipment (PPE) manufacturers, and already-struggling businesses dominated the civil justice landscape. This legislation crowded out other civil justice issues at the federal level and in the majority of states. State lawmakers also had less opportunity to work on other issues where legislative sessions were shortened in an effort to keep people safe and slow the spread of the novel coronavirus.

I. LEGAL REFORM TRENDS IN 2020

A. Defense-Oriented Issues

1. COVID-19 Liability Reform

As the COVID-19 pandemic hit, healthcare providers struggled to address a surge of patients. PPE, hand sanitizer, and disinfectants were difficult to find. Many employers were required to temporarily close, while essential businesses continued to operate. As states looked toward reopening, businesses, schools, and others looked to public health guidance for clarity on how to operate in a reasonably safe manner.

Governors in many states responded in the early months of the pandemic by issuing executive orders to limit COVID-19-related medical liability claims.¹ These governors generally relied on their emergency powers to expand existing Good Samaritan or other laws that limit liability to gross negligence to a broader range of healthcare providers during the pandemic.

As the pandemic continued, almost half the states enacted laws addressing COVID-19-related tort claims.² These laws

generally address three areas of liability: medical liability, exposure claims / premises liability, and product liability.

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

Over a dozen states enacted legislation to address claims of COVID-19 infection from exposure at a premises.³ States have generally taken three approaches. Some states require a showing that a business, school, or other entity recklessly disregarded a known risk that a person would be exposed to COVID-19 or was grossly negligent. Other states provide a safe harbor from liability when a business or other entity operates in compliance with executive orders and public health guidance. Several states have adopted a hybrid of both approaches.

Some of these laws include unique provisions. For example, Iowa COVID-19 tort plaintiffs must have a “minimum medical condition,” which is defined as “a diagnosis of COVID-19 that requires inpatient hospitalization or results in death.”⁴ Louisiana enacted a law specifically for restaurants that follow COVID-19 proclamations and procedures⁵ and a separate law addressing the liability of schools for claims alleging COVID-19 exposure.⁶ A North Carolina law shields volunteer organizations that offer their facilities in support of the state’s response to the pandemic.⁷ In Georgia, there is a presumption that a person assumed the risk of exposure when a ticket, receipt, wristband, or a sign at the entrance of an event or other public gathering warns of this inherent risk.⁸

Almost a dozen states limited the risk of liability for manufacturers, sellers, or donors of PPE or other products in response to the pandemic.⁹ Some of these laws include significant limitations on their application. For example, the Wisconsin law provides liability protection only when goods are donated

1 The Governors of Alabama, Arizona, Arkansas, Connecticut, Georgia, Hawaii, Illinois, Kansas, Michigan, Mississippi, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, and Virginia issued executive orders addressing medical liability during the pandemic. The Iowa Department of Health also issued such an order. Some executive orders covered other issues, such as an Alabama Proclamation (May 8, 2020) that addresses premises liability and the liability of PPE makers, an Arkansas executive order (No. 20-33, June 15, 2020) that addresses premises liability, and an Iowa Department of Health order (Apr. 9, 2020) that also addresses the liability of PPE makers.

2 Jurisdictions that enacted COVID-19 liability legislation include Alaska, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Virginia, Wisconsin, Wyoming, and the District of Columbia.

3 These states include Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming.

4 See Iowa S.F. 2338 (2020), available at <https://legiscan.com/IA/text/SF2338/2019>.

5 See La. S.B. 508 (2020), available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1182332>.

6 See La. H.B. 59 (2020 Spec. Sess.), available at <https://legiscan.com/LA/text/HB59/2020/X1>.

7 See N.C. S.B. 704 (2020), available at <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v5.pdf>.

8 See Ga. S.B. 359 (2020 Spec. Sess.), available at <http://www.legis.ga.gov/Legislation/20192020/195211.pdf>.

9 These states include Alaska, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Wisconsin.

or sold at cost.¹⁰ Oklahoma’s limitation on liability applies only when the product is sold outside the ordinary course of business, such as a brewer or distiller that produces hand sanitizer.¹¹ Kansas’ liability shield applies only after the governor issues an order or directive finding a public need for the product.¹² Some of the laws are limited to PPE, while others apply to a range of products that aid in a state’s response to the pandemic, such as medications, medical devices, and disinfectants.

2. Civil Discovery Reform

States continue to take steps to better align their state court discovery rules with changes to the Federal Rules of Civil Procedure that took effect in December 2015.¹³ The federal judiciary spent years developing the 2015 amendments with a goal of improving early case management and addressing abuse of the discovery process. Surveys had found that litigation “takes too long and costs too much.”¹⁴ One survey found that “[i] nefficient and expensive discovery does not aid the fact finder. The ratio of pages discovered to pages entered as exhibits is as high as 1000/1.”¹⁵ The amendments sought to address these issues by redefining the scope of discovery to be “proportional to the needs of the case”;¹⁶ authorizing court-issued protective orders to shift the costs of overly burdensome discovery;¹⁷ and establishing a uniform standard for sanctions and curative measures where electronically stored information (ESI) has not been properly preserved,¹⁸ among other changes.

At least 15 states and the District of Columbia have brought their state court civil discovery rules into closer conformity with the amended federal rules, including Ohio by court rule in 2020.¹⁹ The federal proportionality concept is well on its way to

becoming the majority rule in the states,²⁰ as are the authority of courts to enter protective orders to shift the cost of overly burdensome discovery to requesters²¹ and limits on discovery that is “cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.”²² States are limiting production of ESI that is not reasonably accessible²³ and clarifying the standard for imposing sanctions after a party fails to preserve ESI.²⁴ Momentum

Legal Opinion Letter (Wash. Legal Found. July 17, 2020), *available at* <https://www.wlf.org/2020/07/16/publishing/states-are-embracing-proportional-discovery-moving-into-alignment-with-federal-rules/>.

10 See Wis. A.B. 1038 (2019 Wis. Act 185), *available at* <https://docs.legis.wisconsin.gov/2019/related/acts/185>.

11 See Okla. S.B. 1947 (2020), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/SB/SB1947%20ENR.PDF.

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

13 See generally Thomson Reuters Prac. L. Litig., *Overview of December 2015 Amendments to the Federal Rules of Civil Procedure*, *available at* [https://content.next.westlaw.com/Document/I60de982874de11e598dc8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)](https://content.next.westlaw.com/Document/I60de982874de11e598dc8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=(sc.Default)).

14 See, e.g., Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System 2 (revised Apr. 15, 2009), *available at* https://iaals.du.edu/sites/default/files/documents/publications/actl-iaals_final_report_rev_8-4-10.pdf.

15 See Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies for Presentation to Committee on Rules of Practice and Procedure*, Judicial Conference of the United States, May 10-11, 2010, at 3, *available at* https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf.

16 Fed. R. Civ. P. 26(b)(1).

17 See Fed. R. Civ. P. 26(c)(1)(B).

18 See Fed. R. Civ. P. Rule 37(e).

19 See Mark A. Behrens & Christopher E. Appel, *States Are Embracing Proportional Discovery, Moving Into Alignment with Federal Rules*, 29:5

20 See Ala. R. Civ. P. 26(b)(1); Ariz. R. Civ. P. 26(b)(1); Colo. R. Civ. P. 26(b)(1); Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. R. Civ. P. 26(b)(1); D.C. Super. Ct. R. Civ. P. 26(b)(1); Ind. Commercial Ct. R. 6(A); Kan. Stat. § 60-226(b)(1); Mich. Ct. R. 2.302(B)(1); Minn. R. Civ. P. 26.02(b); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(b)(1); Ohio R. Civ. P. 26(B)(1); Okla. Sta. tit. 12

§ 3226(B)(1); Utah R. Civ. P. 26(b); Vt. R. Civ. P. 26(b)(1); Wis. Code § 804.01(2)(a); Wyo. R. Civ. P. 26(b)(1); see generally National Center for State Courts, *Call to Action: Achieving Justice for All* 24 (2016) (“proportionality must be a guiding standard in discovery and the entire pretrial process”), *available at* <https://iaals.du.edu/sites/default/files/documents/publications/cji-report.pdf>.

21 See Ala. R. Civ. P. 26(c); Colo. R. Civ. P. 26(c); Del. Ch. Ct. R. 26(c); Del. Super. Ct. R. Civ. P. 26(c); D.C. Super. Ct. R. Civ. P. 26(c); Iowa R. Civ. P. 1.504(1)(a)(2); Kan. Stat. § 60-226(c); Md. R. Civ. P., Cir. Ct. 2-403(a); Mass. R. Civ. P. 26(c)(2); Minn. R. Civ. P. 26.03(a); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(c); Ohio R. Civ. P. 26(C); Okla. Stat. tit. 12 § 3226(C)(1)(b); Vt. R. Civ. P. 26(c); Wis. Code § 804.01(3)(A)(2); Wyo. R. Civ. P. 26(c).

22 See Ala. R. Civ. P. 26(b)(2)(B); Ariz. R. Civ. P. 26(b)(2)(C); Ark. R. Civ. P. 26(b)(2); Cal. Civ. Proc. Code § 2019.030(a); Colo. R. Civ. P. 26(b)(2)(F); Del. Ch. Ct. R. 26(b)(1); Del. Super. Ct. R. Civ. P. 26(b)(1); D.C. Super. Ct. R. Civ. P. 26(b)(2)(C); Haw. R. Civ. P. 26(b)(2); Idaho R. Civ. P. 26(b)(1)(C); Ind. R. Trial P. 26(B)(1); Iowa R. Civ. P. 1.503(8); Kan. Stat. § 60-226(b)(2); Md. R. Civ. P., Cir. Ct. 2-402(b)(1); Mass. R. Civ. P. 26(c); Minn. R. Civ. P. 26.02(b)(3); Miss. R. Civ. P. 26(d)(2); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(b)(2)(C); N.M. R. Civ. P., Dist. Ct. 1-026(B)(2); N.C. R. Civ. P. 26(b)(1a); N.D. R. Civ. P. 26(b)(1)(B)(i); Mont. R. Civ. P. 26(b)(2)(C); Ohio R. Civ. P. 26(B)(6); Ohio R. Civ. P. 26(B)(6)(b); Okla. Sta. tit. 12 § 3226(B)(2); R.I. Dist. Ct. R. 26(b); S.C. R. Civ. P. 26(a); Tenn. R. Civ. P. 26.02(1); Va. Sup. Ct. R. 4:1(b)(1); S.D. Codified Laws § 15-6-26(b)(1); Vt. R. Civ. P. 26(b)(2)(B); Wash. Super. Ct. R. 26(b)(1); W.Va. R. Civ. P. 26(b)(1); Wis. Code § 804.01(2)(am); Wyo. R. Civ. P. 26(b)(2)(C); see also Fed. R. Civ. P. (b)(2)(C).

23 See Ala. R. Civ. P. 26(b)(2); Ariz. R. Civ. P. 26(b)(2)(B); Ark. R. Civ. P. 26.1(h); Cal. Civ. Proc. Code § 1985.8(i); D.C. Super. Ct. R. Civ. P. 26(b)(2)(B); Fla. R. Civ. P. 26(d); Idaho R. Civ. P. 26(b)(1)(B); Iowa R. Civ. P. 1.504(2); Kan. Stat. § 60-226(b)(2)(B); Md. R. Civ. P., Cir. Ct. 2-402(b)(2); Md. R. Civ. P., Cir. Ct. 2-402(b)(2); Mass. R. Civ. P. 26(f); Mich. Ct. R. 2.302(B)(6); Minn. R. Civ. P. 26.02(b)(2); Miss. R. Civ. P. 26(b)(5); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 56.01); Nev. R. Civ. P. 26(b)(2)(B); Mont. R. Civ. P. 26(b)(2)(B); Nev. R. Civ. P. 26(b)(2)(B); N.C. R. Civ. P. 26(b)(1b); N.D. R. Civ. P. 26(b)(1)(B)(ii); Ohio R. Civ. P. 26(B)(5); Okla. Sta. tit. 12 § 3226(B)(2)(b); R.I. Super. Ct. R. 26(b)(6)(D); Tenn. R. Civ. P. 26.02(1); Va. Sup. Ct. R. 4:1(b)(7); Vt. R. Civ. P. 26(b)(2)(A); Wis. Code § 804.01(2)(e)(1g); Wyo. R. Civ. P. 26(b)(2)(B); see also Fed. R. Civ. P. (b)(2)(B).

24 See Ala. R. Civ. P. 37(g); Del. Ch. Ct. R. 37(e); Del. Super. Ct. R. Civ. P. 37(b)(2)(F); D.C. Super. Ct. R. Civ. P. 37(e); Fla. R. Civ. P. 1.380(e); Ind. Commercial Ct. R. 6(E); Kan. Stat. § 60-237(e); Mich. Ct. R.

also exists for presumptive limits on interrogatories²⁵ and depositions²⁶ as in the federal civil rules. In addition to these changes, states are setting presumptive limits on requests for admission,²⁷ and some require disclosure of third-party litigation funding agreements.²⁸

B. Plaintiff-Oriented Issues

1. Statutes of Limitations for Childhood Sexual Abuse Claims

Victims' advocates and plaintiffs' lawyers continue to seek longer statutes of limitations for childhood sexual abuse claims with momentum from several high-profile scandals. There was less activity on this issue compared to 2019 because of lawmakers' focus on COVID-19 and abbreviated legislative sessions. New York, however, extended a 2019 "look-back" window for childhood sexual abuse plaintiffs to file claims.²⁹ West Virginia extended the statute of limitations for childhood sexual abuse claims against a perpetrator.³⁰

The trend of extending statutes of limitation for childhood sexual abuse claims is likely to continue and may expand to cover abuse of adults. In 2020, Virginia established a 10-year statute of limitations for sexual abuse claims involving an adult—a substantially longer period than the 2-year statute of limitations period that applies to most other personal injury claims in the Commonwealth.³¹

II. 2020 CIVIL JUSTICE REFORMS – FEDERAL

A. Congress

In response to the COVID-19 pandemic, Congress extended tort protections under the 2005 Public Readiness and Emergency Preparedness (PREP) Act to manufacturers of respiratory protective devices approved by the National Institute for Occupational Safety and Health (NIOSH). Under the PREP Act, the federal government assumes liability for harm caused by use of a covered product during a public health emergency except for "death or serious physical injury proximately caused by willful misconduct."³² The 2020 laws fixed "a past legislative oversight which omitted NIOSH-certified respirators from the liability protections afforded to drugs, biological products, and other FDA-approved devices" under the PREP Act.³³

The Families First Coronavirus Response Act,³⁴ enacted in March 2020, initially extended the PREP Act to manufacturers of NIOSH-approved personal respirators that are authorized by the Secretary of Health & Human Services for emergency use pursuant to the Federal Food, Drug, and Cosmetic Act and are used between January 27, 2020, and October 1, 2024.³⁵ The protection was subsequently modified and extended in the Coronavirus Aid, Relief, and Economic Security (CARES) Act³⁶ to remove the sunset date and cover NIOSH-approved respiratory protective devices that the Secretary determines to be a "priority for use during a declared public health emergency."³⁷

In the CARES Act, Congress also provided immunity to volunteer health care professionals who treat COVID-19 patients if the services performed are within the scope of the volunteer's license, registration, or certification and rendered in a good faith belief that the individual being treated is in need of health care services.³⁸ The protections do not apply to willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the

2.313(D); Minn. R. Civ. P. 37.05; Nev. R. Civ. P. 37(e); Vt. R. Civ. P. 37(f); Wyo. R. Civ. P. 37(e); *see also* Fed. R. Civ. P. 37(e).

25 *See* Ariz. R. Civ. P. 26.2; Colo. R. Civ. P. 26(b)(2); D.C. Super. Ct. R. Civ. P. 33(a)(1); Fla. R. Civ. P. 1.340(a); Ill. S. Ct. R. 213(c); Ind. Commercial Ct. R. 6(D)(1); Iowa R. Civ. P. 1.509(1)(e); Ky. R. Civ. P. 33.01; Maine R. Civ. P. 33(a); Mass. R. Civ. P. 33(a)(2); Mich. Ct. R. 2.309(A)(2); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 57.01); N.Y. Ct. R. § 202.70, Rule 11-a; Nev. R. Civ. P. 33(a)(1); Wis. Code § 804.08(1)(am); Wyo. R. Civ. P. 33(a); *see also* Fed. R. Civ. P. 33(a)(1).

26 *See* Alaska R. Civ. P. 30(a), (d); Ariz. R. Civ. P. 30(d); Ariz. R. Civ. P. 26.2; Colo. R. Civ. P. 26(b)(2); D.C. Super. Ct. R. Civ. P. 30(a), (d); Ind. Commercial Ct. R. 6(D)(2); Haw. R. Civ. P. 30(a)(2); Ill. Sup. Ct. R. 206(d); Me. R. Civ. P. 30; Mich. Ct. R. 2.306(A)(3); Minn. R. Civ. P. 30.04(b); 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 57.03); Mont. R. Civ. P. 30(a)(2); N.H. Dist. Ct. R. 26(a); N.H. Super. Ct. R. 3.26(a); N.C. Bus. Ct. Rule 10; N.Y. Ct. R. § 202.70, Rule 11-d; Nev. R. Civ. P. 30(a), (d); Okla. Stat. tit. 12 § 3230(A); S.D. Codified Laws § 15-6-30(d)(2); Utah R. Civ. P. 30(d); Vt. R. Civ. P. 80.11(e)(4); Wis. Code § 804.045; Wyo. R. Civ. P. 30(a), (d); *see also* Fed. R. Civ. P. 30(a), (d).

27 *See* Ariz. R. Civ. P. 26.2; Colo. R. Civ. P. 26(b)(2)(E); Ky. R. Civ. P. 33.01; 2019 Mo. S.B. 224 (amending Mo. Sup. Ct. R. 59.01); Nev. R. Civ. P. 36(a)(7).

28 *See* Wis. Code § 804.01(2)(bg); W. Va. Code Ann. § 46A-6N-6 (consumer litigation financing).

29 *See* 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.

30 *See* W.Va. H.B. 4559 (2020), available at https://legiscan.com/WV/text/HB4559/id/2159958/West_Virginia-2020-HB4559-Enrolled.html.

31 *See* Va. H.B. 870 (2020), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB870ER>.

32 *See* Public Readiness and Emergency Preparedness Act, Pub. L. 109-148, § 319F-3(d), available at https://www.hrsa.gov/sites/default/files/gethealthcare/conditions/countermeasurescomp/covered_countermeasures_and_prep_act.pdf.

33 Reps. Paul Tonko & Don Bacon and Sens. Deb Fischer & Kyrsten Sinema, Editorial, *As We Face Coronavirus Battle, We Must Ensure Critical Supplies of Respirators for Health Care Workers*, THE HILL, Mar. 13, 2020, available at <https://thehill.com/blogs/congress-blog/healthcare/487497-as-we-face-coronavirus-battle-we-must-ensure-critical-supplies>.

34 *See* Families First Coronavirus Response Act, Pub. L. 116-127, available at <https://www.congress.gov/116/plaws/publ127/PLAW-116publ127.pdf>.

35 *See id.* at § 6005.

36 *See* Coronavirus Aid, Relief, and Economic Security Act or the CARES Act, Pub. L. 116-136, available at <https://www.congress.gov/bill/116th-congress/house-bill/748/text>.

37 *Id.* at § 3103; *see also* Dept of Health and Human Servs., Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, .85 Fed. Reg. 21012 (Apr. 15, 2020), available at <https://www.federalregister.gov/documents/2020/04/15/2020-08040/amendment-to-declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical>.

38 *See* CARES Act, *supra* note 36, at § 3215.

individual harmed by the health care professional, or to a health care professional who renders services while under the influence of alcohol or an intoxicating drug. The immunity sunsets at the expiration of the COVID-19 public health emergency.

B. Federal Courts

On December 1, 2020, amendments to Federal Rules of Appellate Procedure 35 and 40; Federal Rules of Bankruptcy Procedure 2002, 2004, 8012, 8013, 8015, and 8021; Federal Rule of Civil Procedure 30; and Federal Rule of Evidence 404 took effect.³⁹ During the comment period and public hearings, changes to Federal Rule of Civil Procedure 30(b)(6) generated the most attention. Significantly, the amendment to Rule 30(b)(6) does not include language that would require parties to confer about “the identity of each person the organization will designate to testify” or require organizations to identify their designees a specified number of days in advance of a deposition.⁴⁰ Amended Rule 30(b)(6) states:

Rule 30. Depositions by Oral Examination

(b) Notice of the Deposition; Other Formal Requirements.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.⁴¹

39 See Letters from United States Supreme Court Chief Justice John G. Roberts, Jr. to Hon. Michael R. Pence, President, United States Senate, and to Hon. Nancy Pelosi, Speaker of the House of Representatives, Apr. 27, 2020, available at https://www.uscourts.gov/sites/default/files/congressional_package_final_0.pdf.

40 In a letter to the federal courts’ Committee on Rules of Practice and Procedure (Standing Committee), 138 companies objected to a requirement that parties confer about the identity of Rule 30(b)(6) witnesses. See Letter from Companies Opposing the Proposed Amendment to Rule 30(b)(6) to Advisory Committee on Civil Rules Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 5, 2019), available at <https://www2.acc.com/advocacy/upload/138-Companies-Letter-to-Civil-Rules-Committee-on-Rule-30-b-6.pdf?ga=2.222998363.1309647380.1561396382-14131942.1561396382>.

41 See Letters from United States Supreme Court Chief Justice John G. Roberts, Jr., *supra* note 39.

III. 2020 CIVIL JUSTICE REFORMS – STATES

Alabama

Governor Kay Ivey issued an executive order providing that individuals, businesses, health care providers, or agencies of the state, including universities, are not liable for COVID-19 transmission or a covered COVID-19 response activity (i.e., testing, health care services or treatment negatively impacted by resource shortages due to COVID-19, or PPE design, manufacture, or distribution) unless a claimant shows by clear and convincing evidence that the loss was caused by wanton, reckless, willful, or intentional misconduct.⁴² Plaintiffs without serious injuries are limited to actual economic damages and may not recover noneconomic or punitive damages.⁴³ For causes of action that accrued before the order was issued, covered defendants are not liable for “negligence, premises liability, or a non-wanton, non-willful, or non-intentional civil cause of action” related to COVID-19 transmission or a covered COVID-19 response activity unless the claimant proves by “clear and convincing evidence” that the defendant “did not reasonably attempt to comply with the then applicable public health guidance.”⁴⁴ The order applies to acts or omissions occurring from March 13, 2020, until the state’s COVID-19 emergency terminates.⁴⁵

Alaska

Alaska enacted legislation providing that a public health agent or health care provider, including a hospital or medical laboratory, shall not be liable for damages resulting from implementation of a standing order issued by the chief medical officer in the State’s Department of Health and Social Services related to essential public health services and in response to the COVID-19 pandemic.⁴⁶ The immunity, which took effect on April 10, 2020, does not apply to gross negligence, recklessness, or intentional misconduct.

In addition, the new law provides that an employee who contracts COVID-19 is conclusively presumed to have contracted an occupational disease if, during the COVID-19 emergency, the person is employed as a firefighter, emergency

42 See Ala. Proclamation, May 8, 2020, available at <https://governor.alabama.gov/assets/2020/05/2020-05-08-8th-Supplemental-SOE-COVID-19.pdf>.

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

44 See Ala. Proclamation, May 8, 2020, *supra* note 42.

45 Healthcare providers also received legal protections in a March 2020 executive order. See Ala. Proclamation, Mar. 13, 2020, available at <https://governor.alabama.gov/assets/2020/03/2020-03-13-Initial-COVID-19-SOE.pdf>. This order continues to apply if the May 2020 order is adjudged not to cover a healthcare provider for any reason. The March order declares health care professionals and assisting personnel executing alternative-standards-of-care plans in good faith to be “Emergency Management Workers,” entitling them to immunity except for willful misconduct, gross negligence, or bad faith. See Ala. Code § 31-9-16.

46 See Alaska S.B. 241 (2020), available at <http://www.akleg.gov/PDF/31/Bills/SB0241Z.PDF>.

medical technician, paramedic, peace officer, or health care provider; the person is occupationally exposed to COVID-19; and the person receives a COVID-19 diagnosis by a physician, presumptive positive COVID-19 test result, or laboratory-confirmed COVID-19 diagnosis.

The new law also makes it an unfair or deceptive trade practice for stores to charge more than 10% over the normal pre-pandemic price for food, medicine, medical equipment, fuel, sanitation products, hygiene products, essential household supplies, or other essential goods unless the charge is caused by an increased cost for the seller to purchase the supplies or, for a person in the business of selling fuel, caused by normal fluctuations in the market for fuel.

Lastly, the statute provides that during the COVID-19 emergency, a health care provider or manufacturer of PPE is immune from civil damages connected to PPE that was issued, provided, or manufactured in good faith to respond to the emergency. The liability protection does not apply to gross negligence, recklessness, or intentional misconduct. Also, users of the PPE must be notified that it may not meet established federal standards and requirements.

Arizona

Governor Douglas Ducey issued an executive order limiting the liability of health care institutions and health care providers for acts taken in response to COVID-19 from April 9 to June 30, 2020.⁴⁷ Health care professionals who are licensed in Arizona, volunteer health professionals registered and recruited through the Arizona Emergency System for the Advance Registration of Volunteer Health Professionals, and Arizona Emergency Care Technicians who provided services in support of the State's COVID-19 response are presumed to have acted in good faith and are immune from civil liability. Health care professionals, emergency care technicians, health care institutions, and entities operating modular field treatment facilities or other temporary sites also receive tort immunity for triage decisions that were made in the course of providing medical services based on good faith reliance on state-approved protocols for COVID-19. Tort immunity is waived for gross negligence or willful misconduct.

Separately, Arizona became the first state to eliminate Rule 5.4 of the Rules of Professional Conduct—the rule that bars nonlawyers from sharing in legal fees or having an economic interest in a law firm.⁴⁸ Beginning on January 1, 2021, “[s]pecially licensed alternative business structures may now allow nonlawyers to share an economic interest in a law firm.”⁴⁹ The Arizona Supreme Court's order allows nonlawyers

to inject capital into law firms and allows law firms to “recruit nonlawyer managers by giving them an equity interest in the firm's profits.”⁵⁰ The Arizona Supreme Court also instituted “a new licensure process that will allow nonlawyers, called ‘legal paraprofessionals,’ to begin providing limited legal services, including being able to go into court with clients.”⁵¹

Arkansas

Governor Asa Hutchinson issued a number of executive orders in response to the COVID-19 outbreak. One of the orders provides tort immunity to physicians, physician assistants, specialist assistants, nurse practitioners, licensed registered nurses, and licensed practical nurses for services provided in support of the state's COVID-19 response or as a result of implementing measures to control the causes of the pandemic.⁵² The immunity does not apply to a person acting outside the scope of his or her practice (unless the person has been redeployed to the extent necessary to respond to the outbreak) or to gross negligence, willful misconduct, or bad faith.

Another executive order designates all health care providers as emergency responders and confers immunity for harms allegedly sustained as a result of an act or omission by a health care provider in the course of providing COVID-19-related emergency management functions if the act or omission occurs as the result of a good faith effort by the health care provider and was the direct result of treating a patient for COVID-19 or the symptoms of COVID-19 during the public health emergency.⁵³ The immunity does not apply to willful, reckless, or intentional misconduct.

Health care providers are also immune from liability for using a prescription drug or device to treat a known or suspected COVID-19 infection provided that the prescription is within the scope of the health care provider's license, the drug or device is prescribed in accordance with the most recent recommendations of a federal agency, and the health care provider informs the patient of the known positive and negative outcomes of the drug or device and documents the patient's informed consent to the treatment in the patient's medical record.

[articles/1306717/ariz-law-firm-ownership-rule-change-is-a-win-for-clients.](https://www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034LPABS.pdf?ver=2020-08-27-153342-037)

50 *Id.*

51 Sam Skolnik, *Ariz. First State to OK Nonlawyer Ownership of Law Firms*, BLOOMBERG L., Aug. 28, 2020, <https://news.bloomberglaw.com/business-and-practice/arizona-first-state-to-allow-nonlawyer-co-ownership-of-law-firms>.

52 See Ark. Exec. Order 20-18, Regarding the Public Health Emergency Concerning COVID-19 For the Purpose of Equipping Health Care Professionals With the Tools Necessary to Combat the COVID-19 Emergency, Apr. 13, 2020, [available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-18_.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-18_.pdf).

53 See Ark. Exec. Order 20-34, Executive Order Pursuant to the Public Health Emergency Concerning COVID-19, as Declared in Executive Order 20-03 and Extended by Executive Order 20-25, for the Purpose of Ensuring Access to Healthcare Resources to Treat COVID-19, June 15, 2020, [available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-34.pdf](https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-34.pdf).

47 See Ariz. Exec. Order 2020-27, The “Good Samaritan” Order: Protecting Frontline Healthcare Workers Responding to the COVID-19 Outbreak, Apr. 9, 2020, [available at https://azgovernor.gov/sites/default/files/ao_2020-27_the_good_samaritan_order.pdf](https://azgovernor.gov/sites/default/files/ao_2020-27_the_good_samaritan_order.pdf).

48 See In the Matter of Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs From 1.0 to 5.7), 46-51, 54-58, 60 and 75-76) (Ariz. Aug. 27, 2020) (effective Jan. 1, 2021), [available at https://www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034LPABS.pdf?ver=2020-08-27-153342-037](https://www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034LPABS.pdf?ver=2020-08-27-153342-037).

49 William Marra, *Ariz. Law Firm Ownership Rule Change is a Win for Clients*, LAW360, Sept. 3, 2020, <https://www.law360.com/delaware/>

A third executive order protects businesses from suits related to infections from COVID-19 exposures on their premises during the COVID-19 public health emergency.⁵⁴ The immunity does not apply to willful, reckless, or intentional misconduct. It is presumed that a business acted appropriately if it substantially complied with or acted in good faith while attempting to comply with health and safety directives or guidelines issued by the Governor or Secretary of the Department of Health.

Other executive orders address employees' eligibility to obtain workers' compensation for COVID-19 infections. One executive order allows first responders and front-line health care workers who test positive for COVID-19 to be eligible for workers' compensation if they can demonstrate a causal connection between their diagnosis and occupational exposure to COVID-19.⁵⁵ Another order allows first responders, Arkansas National Guard active duty personnel, and front-line health care workers with confirmed COVID-19 diagnoses to obtain workers' compensation benefits if they can show a causal connection between their COVID-19 diagnosis and occupational exposure to COVID-19.⁵⁶ Yet another order provides that COVID-19 qualifies as an occupational disease for workers' compensation purposes and is not considered an ordinary disease of life to which the general public is exposed.⁵⁷ An employee asserting a workers' compensation claim must meet all requirements of proof for an occupational disease, including a causal connection between employment and the disease. An employer that requires an employee to work when the employer knows it is possible or likely that the employee will be exposed to COVID-19 has not committed intentional conduct that permits a civil action outside the exclusivity of the workers' compensation law.

54 See Ark. Exec. Order 20-33, Executive Order Pursuant to the Public Health Emergency Concerning COVID-19, as Declared in Executive Order 20-03 and Extended by Executive Order 20-25, for the Purpose of Protecting Arkansas Businesses from Liability Related to COVID-19, June 15, 2020, available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-33.pdf.

55 See Ark. Exec. Order 20-19, Executive Order to Amend Executive Order 20-03 for the Purpose of Suspending Provisions Regarding Workers' Compensation Qualifications in the State of Arkansas for First Responders and Front-Line Health Care Workers, Apr. 13, 2020, available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-19_.pdf.

56 See Ark. Exec. Order 20-22, Executive Order to Amend Executive Order 20-03 for the Purpose of Suspending Provisions Regarding Workers Compensation Qualifications in the State of Arkansas for First Responders, Arkansas National Guard Soldiers and Airmen on State Active Duty, and Front-Line Health Care Workers, Apr. 21, 2020, available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-22_.pdf.

57 See Ark. Exec. Order 20-35, Executive Order Pursuant to the Public Health Emergency Concerning COVID-19, as Declared in Executive Order 20-03 and Extended by Executive Order 20-25, for the Purpose of Clarifying Workers' Compensation Law, June 15, 2020, available at https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-35.pdf.

California

Governor Gavin Newsom signed an executive order creating a rebuttable presumption that an employee's COVID-19-related illness arises out of the course of employment if the employee tests positive within 14 days of performing work or is diagnosed by a California-licensed physician within 14 days after performing work and the diagnosis is confirmed by further testing.⁵⁸ The work must have been performed between March 20 and July 5, 2020.

California subsequently enacted legislation that creates a disputable presumption that COVID-19-related illnesses or deaths to first responders, health care workers, and employees who test positive during a workplace outbreak are work-related and thus eligible for workers' compensation after an employee exhausts paid sick leave benefits and meets specified certification requirements.⁵⁹ The law is retroactive to July 2020 and remains in effect until January 1, 2023.

Another new California law provides that, beginning on January 1, 2026, civil litigants are prohibited from using peremptory challenges to remove prospective jurors on the basis of race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of a prospective juror in any of those groups.⁶⁰ A party (or the trial court on its own motion) may object to the use of a peremptory challenge based on these criteria. Upon objection, the party exercising the challenge must state the reason for the peremptory challenge. The court will evaluate the reason given and, if the court grants the objection, may take actions that include starting jury selection anew, declaring a mistrial if the motion is granted after the jury has been impaneled, or seating the challenged juror. The denial of an objection is subject to de novo review by an appellate court. A new trial will be granted if the appellate court finds that the objection was erroneously denied.

In November, California voters approved a ballot initiative to strengthen the state's landmark consumer privacy law. The ballot initiative "builds on the existing California Consumer Privacy Act in several ways, including by creating a new agency dedicated to data privacy and providing consumers with substantial new data control mechanisms that companies now need to implement" before January 1, 2023.⁶¹

A consumer advocacy group that was planning to use a ballot initiative to increase California's cap on noneconomic damages in medical malpractice cases postponed the initiative

58 See Cal. Exec. Order N-62-20, May 6, 2020, available at <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>.

59 See Cal. S.B. 1159 (2020), available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB1159.

60 See Cal. A.B. 3070 (2020), available at https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB3070. The new law applies to criminal cases in which jury selection begins on or after January 1, 2022.

61 Allison Grande, *California Voters Back Bid to Toughen Consumer Privacy Law*, Law360, Nov. 4, 2020, <https://www.law360.com/articles/1324594/calif-voters-back-bid-to-toughen-consumer-privacy-law>.

until 2022.⁶² The group reportedly had the signatures needed to put the issue on the ballot but realized the timing was not optimal while health care workers enjoy widespread public support for placing themselves at risk to treat COVID-19 patients.

Colorado

Governor Jared Polis issued an executive order that provides civil immunity to hospitals, health care providers, health insurers or managed health care organizations, and emergency service providers that in good faith comply with an order from the Department of Public Health to transfer or cease the admission of patients to respond to the COVID-19 pandemic in Colorado.⁶³ The order took effect on November 23, 2020, and expires in 30 days unless extended further by executive order.

Connecticut

Governor Ned Lamont issued executive orders providing liability relief to health care institutions and health care providers in response to COVID-19.⁶⁴ The orders became effective in April 2020 and provide civil immunity for “acts or omissions undertaken in good faith while providing health care services in support of the State’s COVID-19 response,” including acts or omissions undertaken because of “a lack of resources . . . that renders the health care professional or facility unable to provide the level or manner of care that otherwise would have been required in the absence of the COVID-19 pandemic.”⁶⁵ The immunity does not apply to acts that constitute a crime, fraud, malice, gross negligence, willful misconduct, or false claims.

62 See Y. Peter Yang, *Law360’s Tort Report: Calif. Med Mal Cap Challenge Delayed*, LAW360, May 4, 2020, <https://www.law360.com/publicpolicy/articles/1270123/law360-s-tort-report-calif-med-mal-cap-challenge-delayed>.

63 See Colo. Exec. Order D 2020 260, Authorizing the Colorado Department of Public Health and Environment to Order Hospitals and Freestanding Emergency Departments to Transfer or Cease the Admission of Patients to Respond to the Current COVID-19 Disaster Emergency in Colorado, Nov. 23, 2020, available at <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20260%20Hospital%20Transfer.pdf>.

64 See Conn. Exec. Order 7U, Protection of Public Health and Safety During COVID-19 Pandemic and Response – Protections From Civil Liability For Healthcare Providers and Billing Protections for Patients, Apr. 5, 2020, available at <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7U.pdf>, superseded by Conn. Exec. Order 7V, Protection of Public Health and Safety During COVID-19 Pandemic and Response – Safe Workplaces, Emergency Expansion of the Healthcare Workforce, Apr. 7, 2020, available at <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7V.pdf>.

65 See Conn. Exec. Order 7V, Protection of Public Health and Safety During COVID-19 Pandemic and Response – Safe Workplaces, Emergency Expansion of the Healthcare Workforce, Apr. 7, 2020, available at <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7V.pdf>.

Delaware

Governor John Carney issued an executive order providing liability protection to health care volunteers who have held an active license or certification in any state that is now inactive, expired, or lapsed, and who register with the Medical Reserve Corps and work in a hospital that activates a Public Health Authority-approved crisis standard of care for COVID-19.⁶⁶ Covered volunteers are considered “qualified medical personnel” with immunity for any loss resulting from relief activities, unless the harm was intentional or caused by the willful or wanton disregard of the rights of others.⁶⁷

District of Columbia

The District of Columbia’s COVID-19 Supplemental Corrections Emergency Amendment Act of 2020 authorizes the mayor to issue a public health emergency executive order that exempts licensed health care providers from civil liability for acts taken to implement the District’s COVID-19 emergency response.⁶⁸ The law also authorizes the mayor to exempt from civil liability health care providers, first responders, or volunteers who render care to COVID-19 patients during a declared public health emergency. In addition, the mayor is authorized to exempt from civil liability a donor of professional services, equipment, or supplies for the benefit of persons or entities providing care or treatment to COVID-19 patients, or care for the family members of such individuals, during a declared public health emergency. Further, the mayor is authorized to exempt from civil liability a contractor or subcontractor on a District government contract that provides health care services or human care services related to the District’s COVID-19 emergency response. The limitations on liability do not apply to acts or omissions that constitute a crime, actual fraud, actual malice, recklessness, breach of contract, gross negligence, or willful misconduct, or that are unrelated to direct patient care, provided that a contractor or subcontractor shall not be liable for damages for an act or omission alleged to have caused an individual to contract COVID-19.

Florida

Florida’s Chief Financial Officer and State Fire Marshal directed the state’s Division of Risk Management to provide workers’ compensation coverage to frontline state employees who test positive for COVID-19 contracted at work. This includes first responders, corrections officers, state employees working in the health care field around people being tested for COVID-19 or known to be infected with COVID-19, child safety investigators, and members of the National Guard who

66 See Del. Exec. Order, Twelfth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, Apr. 23, 2020, available at <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/04/Twelfth-Modification-to-State-of-Emergency-04232020.pdf>.

67 See 20 Del. C. § 3129.

68 See D.C. Act 23-299 (2020) (amending D.C. Code § 7-2304.01), at <https://code.dccouncil.us/dc/council/acts/23-299.html>; see also D.C. Act 23-283 (2020), available at <https://code.dccouncil.us/dc/council/acts/23-283.html>.

are called to active duty for service in Florida in response to COVID-19.⁶⁹

Georgia

Governor Brian Kemp issued executive orders designating various workers as “auxiliary emergency management workers,” bringing them within Georgia’s emergency management statute during the COVID-19 public health emergency.⁷⁰ Under the emergency management statute, “auxiliary emergency management workers” are immune from civil liability for personal injury or death resulting from emergency management activities except for willful misconduct, gross negligence, or bad faith. The orders cover employees, staff, and contractors of health care institutions and medical facilities, along with cardiac technicians, emergency medical technicians, paramedics, paramedic clinical preceptors, officers and directors, employees, staff, and contractors of air ambulance services, ambulance providers, emergency services systems, Emergency Medical Services for Children programs, local coordinating entities, and dialysis technicians at health care facilities responding to COVID-19.⁷¹

Georgia subsequently enacted the COVID-19 Pandemic Business Safety Act to protect businesses against liability for certain COVID-19-related claims.⁷² Health care facilities or health care providers shall not be liable for damages in a COVID-19 liability claim unless there was gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm. There is a rebuttable presumption of assumption of risk by a COVID-19 claimant alleging exposure at a premises when any receipt for entry, including an e-ticket or wristband, states the following in at least 10-point font:

Any person entering the premises waives all civil liability against the premises owner and operator for any injuries caused by the inherent risk associated with contracting COVID-19 at public gatherings, except for gross negligence, willful and wanton misconduct, reckless infliction of harm,

or intentional infliction of harm, by the individual or entity of the premises.⁷³

The rebuttable presumption is also available to individuals or entities, including health care facilities or health care providers, that post the following warning at a point of entry in at least one-inch Arial font: “Warning: Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.”⁷⁴

Hawaii

Governor David Ige issued an executive order providing immunity to health care facilities, health care professionals, and health care volunteers that comply with all state and federal COVID-19 orders while providing health care services in response to the public health emergency.⁷⁵ The order took effect on April 16, 2020, and runs until the end of the public health state of emergency. The immunity does not apply to willful misconduct, gross negligence, or recklessness.

In a series of FAQs on Hawaii’s Department of Labor and Industrial Relations website, the Disability and Compensation Division states that, under certain circumstances, COVID-19 is considered a compensable work-related injury if the employee was exposed to or contracted COVID-19 in the course of work.⁷⁶

Idaho

Idaho’s Coronavirus Limited Immunity 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.⁷⁷ The law sunsets on July 1, 2021.

Idaho also enacted legislation providing that architects, engineers, and contractors may not be held liable for loss related to professional services provided by the architect or engineer voluntarily or by the contractor at the request of a public official in response to a declared emergency, disaster, or catastrophic event.⁷⁸ The immunity does not apply to “unreasonable acts, gross negligence, or willful or wanton misconduct or if the architect, engineer, or contractor did not act as a reasonable architect, engineer, or contractor would have under the same or similar circumstances.”⁷⁹

69 See Fla. Chief Fin. Officer Directive 2020-05, Mar. 30, 2020, available at <https://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=5515>.

70 See Ga. Exec. Order 04.14.20.01, Designation of Auxiliary Emergency Management Workers and Emergency Management Activities, Apr. 14, 2020, available at <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders>; Ga. Exec. Order 04.20.20.01, Providing Flexibility for Healthcare Practices, Moving Certain Businesses to Minimum Operations, and Providing for Emergency Response, Apr. 20, 2020, available at <https://gov.georgia.gov/document/2020-executive-order/04202001/download>; Ga. Exec. Order 05.12.20.02, Reviving a Healthy Georgia, May 12, 2020, available at <https://gov.georgia.gov/document/2020-executive-order/05122002/download>; see also O.C.G.A. § 38-3-35.

71 See Ga. Exec. Order 04.14.20.01, Designation of Auxiliary Emergency Management Workers and Emergency Management Activities, Apr. 14, 2020, available at <https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders>.

72 See Ga. S.B. 359 (2020 Spec. Sess.), available at <http://www.legis.ga.gov/Legislation/20192020/195211.pdf>.

73 *Id.*

74 *Id.*

75 See Haw. Exec. Order 20-05, Apr. 16, 2020, available at https://governor.hawaii.gov/wp-content/uploads/2020/04/2004090-ATG_Executive-Order-No.-20-05-distribution-signed-1.pdf.

76 See Haw. Dept. of Labor & Indus. Relations, Disability & Compensation Div., COVID-19 Information, available at <https://labor.hawaii.gov/covid-19-employer-workers-compensation-faqs/>.

77 See Idaho H.B. 6 (2020 Spec. Sess.), available at <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020spl/legislation/H0006.pdf>.

78 See Idaho H.B. 529 (2020), available at <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0529.pdf>.

79 *Id.*

Governor J.B. Pritzker issued executive orders providing COVID-19 liability relief to health care facilities and health care providers for acts or omissions in support of the state's COVID-19 response between April 1, 2020, and June 27, 2020.⁸⁰ The executive orders evolved during the pandemic. For instance, the earliest version covered “not just the treatment of pandemic cases, but every service offered during the pandemic, as long as the institutions [were] involved in the response.”⁸¹ The last order provided health care facilities and health care professionals with immunity from liability relating to the diagnosis, transmission, or treatment of COVID-19 alleged to have occurred when the facility or person rendered assistance to the State by providing health care services consistent with guidance issued by the Illinois Department of Public Health.⁸² The immunities do not apply to gross negligence or willful misconduct by a health care facility or health care professional or willful misconduct by a health care volunteer.⁸³

Illinois enacted legislation providing that first responders and front-line workers that contract COVID-19 are presumed to have contracted the virus at work if they were exposed to and contracted COVID-19 between March 9 and December 31, 2020.⁸⁴ The rebuttable presumption applies to police and fire personnel, corrections officers, emergency medical technicians and paramedics, health care providers, and essential workers that were required to interact with the public or work with more than 15 employees. The law also requires workers to demonstrate they received a positive laboratory test for COVID-19 antibodies or a confirmed diagnosis of COVID-19 from a licensed medical

professional. An employer can rebut the presumption if it applied to the fullest extent possible or to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices or was using a combination of administrative controls and PPE to reduce the transmission of COVID-19 to all employees for at least 14 days before the worker's injury from COVID-19 exposure.

Indiana

The Indiana State Department of Health issued guidance confirming that, pursuant to existing law,⁸⁵ facilities and individuals providing health care services in response to a declared disaster emergency may not be held liable for care provided in response to the emergency except for gross negligence or willful misconduct.⁸⁶

Iowa

Iowa enacted the COVID-19 Response and Back-to-Business Limited Liability Act, one of the strongest and broadest COVID-19 liability relief laws in the nation.⁸⁷ Under the Act, a person may not bring a COVID-19-related tort claim unless the person has a “minimum medical condition” or the civil action involves an act that was intended to cause harm or constitutes actual malice.

Premises owners are not liable for infections from COVID-19-related exposures unless the premises owner recklessly disregards a substantial and unnecessary risk that the entrant would be exposed to COVID-19, intentionally exposes the entrant to COVID-19, or exposes the entrant to COVID-19 through an act that constitutes actual malice.

The Act also provides a safe harbor for compliance with regulations, executive orders, or public health guidance. No person shall be liable for injuries sustained from actual or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care was in substantial compliance with or was consistent with any federal or state statute, regulation, order, or public health guidance related to COVID-19 that was applicable to the person or activity at the time of the alleged exposure.

Health care providers are protected from liability for acts or omissions while providing or arranging health care in support of the state's response to COVID-19, except for acts or omissions constituting recklessness or willful misconduct. The immunity extends to injury or death resulting from screening, assessing, diagnosing, caring for, or treating COVID-19 patients; prescribing, administering, or dispensing a pharmaceutical for off-label use to treat a COVID-19 patient; delaying or cancelling non-urgent or elective dental, medical, or surgical procedures, or altering the diagnosing or treatment of any person in response to a federal or state statute, regulation, order, or public health

80 See Ill. Exec. Order 2020-19, Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 17), Apr. 1, 2020 (effective April 1 through April 30, 2020), available at <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-19.aspx>; Ill. Exec. Order 2020-33, Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 31), Apr. 30 2020 (re-issuing prior order and extending it through May 29, 2020), available at <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-33.aspx>; Ill. Exec. Order 2020-37, Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 37), May 13, 2020 (superseding Executive Order 2020-19 as of May 13, 2020), available at <https://www.muchshelist.com/sites/default/files/Executive%20Order%202020-37.pdf>; Ill. Exec. Order 2020-39, Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 35), May 29, 2020 (re-issuing prior order and extending it through June 27, 2020), available at <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-39.pdf>.

81 Rich Miller, *Gov. Pritzker Shields Healthcare Workers From Lawsuits During Coronavirus Pandemic*, CHICAGO SUN TIMES, Apr. 3, 2020, <https://chicago.suntimes.com/columnists/2020/4/3/21207614/coronavirus-covid-19-j-b-pritzker-health-care-workers-illinois-emergency-management-agency>.

82 See Ill. Exec. Order 2020-37, Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 35), May 13, 30 2020, available at <https://www.muchshelist.com/sites/default/files/Executive%20Order%202020-37.pdf>.

83 See *id.*

84 See Ill. H.B. 2455 (2020 Spec. Sess.), available at <http://ilga.gov/legislation/fulltext.asp?DocName=10100HB2455&nr&SessionID=109&GA=101&DocTypeID=HB&DocNum=2455&print=true>.

85 See Ind. Code § 34-30-13.5.

86 See Ind. Dept. of Health, Guidance Concerning Liability for Healthcare Providers and Facilities, Apr. 22, 2020, available at <https://www.coronavirus.in.gov/files/Liability%20Guidance%204.3.20.pdf>.

87 See Iowa S.F. 2338 (2020), available at <https://legiscan.com/IA/text/SF2338/2019>.

guidance; diagnosing or treating patients outside the normal scope of the health care professional's license or practice; using medical devices, equipment, or supplies outside of the product's normal use for the provision of health care; conducting tests or providing treatment to a person outside of the premises of a health care facility; or acts or omissions undertaken by a health care professional or health care facility because of a lack of staffing, facilities, equipment, supplies, or other resources attributable to COVID-19 that renders the health care provider unable to provide the level or manner of care that otherwise would have been required in the absence of COVID-19.

The COVID-19 Response and Back-to-Business Limited Liability Act also provides tort immunity to any person that designs, manufactures, labels, sells, distributes, or donates household disinfecting or cleaning supplies; PPE used to protect the wearer from COVID-19; medical devices, equipment, and supplies used to treat COVID-19, including when those products are used or modified for an unapproved use or used outside their normal use to treat COVID-19 or prevent its spread; medications used to treat COVID-19, including off-label uses; and COVID-19 test kits, unless the person recklessly disregards a substantial and unnecessary risk that the products would cause serious personal injury, death, or serious property damage or the person acted with actual malice. The COVID-19 Response and Back-to-Business Limited Liability Act applies retroactively to January 1, 2020.

Earlier, the Iowa Department of Public Health provided tort immunity to health care providers, health care facilities, and other persons or corporations that act in good faith to support the state's effort to optimize supplies of PPE to combat COVID-19.⁸⁸ Iowa law already provided immunity to persons who, during a public health emergency, have been requested by the Department of Health or Department of Public Defense to render emergency care or assistance (unless such acts constitute recklessness).⁸⁹ The 2020 order directed health care providers, health care facilities, and others to take measures to optimize PPE supplies, such as by using eye protection and facemasks beyond the manufacturer-designated shelf life during patient care activities, and stated that persons complying with the order would be acting at the Department's request for purposes of the statute granting immunity for emergency aid.

In addition to COVID-19 tort legislation, Iowa enacted "phantom damages" reform legislation to limit evidence of medical expenses and recoverable damages for medical expenses to amounts actually paid to health care providers and amounts actually necessary to satisfy the medical care charges that have been incurred but not yet satisfied.⁹⁰

In addition, Iowa enacted first-of-its-kind legislation to address over-naming in asbestos lawsuits.⁹¹ This relates to some asbestos plaintiff attorneys' practice of naming defendants in asbestos cases that do not belong in the case and are eventually dismissed, typically after the businesses has incurred defense costs that can be substantial in the aggregate. The new law requires asbestos plaintiffs (and silica plaintiffs) to provide a sworn information form with the initial complaint disclosing the evidence that provides the basis for each claim against each defendant. The sworn information form must include detailed information as to the plaintiff's exposures and their connection to each defendant. The court must dismiss the action without prejudice as to any defendant whose product or premises is not identified in the required disclosures.

Kansas

Governor Laura Kelly issued an executive order providing liability relief to health care providers responding to COVID-19.⁹² Beginning on April 22, 2020, until the later of May 31, 2020, or the expiration of the statewide COVID-19 State of Disaster Emergency, health care providers making clinical triage decisions and rendering assistance, testing, care, or advice in the care of COVID-19 patients are immune from suit except for injuries caused by willful misconduct, gross negligence, recklessness, or bad faith. The order does not extend to medical treatment or procedures performed in the ordinary or customary course of practice.

Kansas also enacted the COVID-19 Response and Reopening for Business Liability Protection Act.⁹³ The legislation passed in a special session following the Governor's veto of a bill at the end of the regular session.⁹⁴ The Act provides liability protections for health care providers acting in direct response to the COVID-19 public health emergency except for decisions involving gross negligence or willful, wanton or reckless conduct. The immunity applies retroactively to any cause of action accruing on or after March 12, 2020, and prior to the termination of the COVID-19 public health emergency. The Act also provides tort liability immunity to businesses that substantially comply with applicable public health directives. The provision applies retroactively to any cause of action accruing on or after March 12, 2020, and expires on January 26, 2021.

The Act also provides tort immunity to persons who design, manufacturer, label, sell, distribute, provide, or donate certain products in response to COVID-19 (e.g., PPE, medical devices including those that are used or modified for an unapproved use to treat COVID-19 patients, medications including off-label uses to treat COVID-19, test kits, and clinical laboratory

88 See Iowa Dept of Pub. Health, PPE Shortage Order, Apr. 9, 2020, at https://medicalboard.iowa.gov/sites/default/files/documents/2020/04/signed_ppe_shortage_order_final.pdf.

89 See Iowa Code § 135.147.

90 See Iowa S.F. 2338 (2020), available at <https://legiscan.com/IA/text/SF2338/2019>.

91 See Iowa S.F. 2337 (2020), available at <https://www.legis.iowa.gov/docs/publications/LGE/88/SF2337.pdf>.

92 See Kan. Exec. Order 20-26, Apr. 26, 2020, available at <https://governor.kansas.gov/wp-content/uploads/2020/04/EO-20-26-Executed.pdf>.

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

94 See Kan. H.B. 2054 (2020), available at http://www.kslegislature.org/li/b2019_20/measures/documents/hb2054_enrolled.pdf.

services) at the specific request of or in response to a written order or other directive finding a public need issued by the governor, adjutant general, or the division of emergency management, and the damages were not occasioned by willful, wanton, or reckless disregard of a known, substantial, and unnecessary risk that the product would cause serious injury to others. This provision applies retroactively to any cause of action accruing on or after March 12, 2020.

Adult care facilities have an affirmative defense to COVID-19 liability claims if 1) the facility was caused, by the facility's compliance with a statute or rule and regulation, to reaccept a resident who had been removed from the facility for treatment of COVID-19, or 2) the facility treats a resident with confirmed COVID-19 in compliance with a statute or rule and regulation and the facility is acting in substantial compliance with public health directives. The provision applies retroactively to any cause of action accruing on or after March 12, 2020, and prior to the termination of the COVID-19 public health emergency.

Kentucky

Kentucky enacted legislation providing that a health care provider who in good faith renders care to a COVID-19 patient during the state of emergency shall not be liable if the health care provider acts as an "ordinary, reasonable, and prudent health care provider would have acted under the same or similar circumstances."⁹⁵ The defense applies to health care providers that prescribe or dispense medicines for off-label use to attempt to combat the COVID-19 virus in accordance with the federal and Kentucky Right to Try Acts; provide health care services upon the request of health care facilities or public health entities that are outside of the provider's professional scope of practice; or use equipment or supplies outside of the product's normal use for medical practice and the provision of health care services. Kentucky business that make or provide PPE or personal hygiene supplies relative to COVID-19 and that do not make or provide such products in the normal course of business have a defense to claims of ordinary negligence and product liability "so long as the business has acted in good faith and in an ordinary, reasonable, and prudent manner. . . ."⁹⁶

By executive order from Kentucky Governor Andy Beshear, it is presumed that removal of the following employees from work by a physician is due to occupational exposure to COVID-19: first responders, health care workers, military and National Guard, domestic violence shelter workers, child advocacy workers, rape crisis center staff, grocery store workers, postal workers, and child care workers.⁹⁷ In order for the exposure to be considered occupational, there must be a causal

connection between the conditions under which the work is performed and COVID-19.

Louisiana

Louisiana enacted legislation providing that no person or entity, state or local government, or political subdivision shall be liable for injury or death related to exposure to COVID-19 unless the person or entity, state or local government, or political subdivision failed to substantially comply with applicable COVID-19 procedures and the injury or death was caused by gross negligence or wanton or reckless misconduct.⁹⁸ When two or more sources of COVID-19 procedures apply, the responsible party shall substantially comply with any one applicable set of procedures.

Corporate or association meeting or event planners, trade show organizations, and other event hosts or promoters are immune from COVID-19-related personal injury or death claims except for damages caused by gross negligence or willful or wanton misconduct.

In addition, employees who contract COVID-19 shall have no tort remedy against their employers except for exposures caused by intentional acts.

Designers, manufacturers, labelers, and distributors of PPE in response to the COVID-19 public health emergency are immune from tort liability unless they are grossly negligent or engage in willful or wanton misconduct.

During the COVID-19 public health emergency, no person or business who uses, dispenses, or administers PPE is liable for damages resulting from such products unless the person or business failed to substantially comply with applicable procedures and the injury was caused by gross negligence or wanton or reckless misconduct. The law is retroactive to March 11, 2020.

Louisiana also enacted legislation to provide that during a declared state of emergency, entities that render disaster relief, recovery services, or products outside of the typical course and scope of their operations in coordination with the federal government, the state, or its political subdivisions shall not be liable for injury or death or damage to property resulting therefrom, except in the event of gross negligence or willful misconduct.⁹⁹ The law is retroactive to March 11, 2020.

Restaurants that operate in substantial compliance with applicable COVID-19 procedures are not liable for injury or death due to infection transmitted through the preparation and serving of food and beverage products during the COVID-19 public health emergency unless the injury or death was caused by gross negligence or willful and wanton misconduct.¹⁰⁰ The law is retroactive to March 11, 2020.

In a special session, Louisiana enacted legislation to provide immunity to schools and school personnel for civil

95 See Ky. S.B. 150 (2020), available at <https://apps.legislature.ky.gov/recorddocuments/bill/20RS/sb150/bill.pdf>.

96 *Id.*

97 See Ky. Exec. Order 2020-277, State of Emergency Relating to Workers' Compensation, Apr. 9, 2020, available at https://governor.ky.gov/attachments/20200409_Executive-Order_2020-277_Workers-Compensation.pdf.

98 See La. H.B. 826 (2020), available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1182532>.

99 See La. S.B. 491 (2020), available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1182329>.

100 See La. S.B. 508 (2020), available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1182332>.

damages from exposure to COVID-19 or acts taken in the effort to respond or adapt to the public health emergency.¹⁰¹ The immunity does not apply if the act or failure to act was in violation of applicable procedure and is determined to be grossly negligent or wanton or reckless misconduct. The law is retroactive to March 11, 2020.

In addition to COVID-19-related liability reforms, Louisiana enacted legislation to address legal advertisements that have the potential to mislead consumers.¹⁰² The new law requires legal services advertisements that contain a reference to a monetary settlement or jury award to disclose all fees paid to the advertising attorney that are associated with the settlement agreement or jury verdict.

Louisiana also enacted the Civil Justice Reform Act of 2020 to lower the jury trial threshold for civil actions from \$50,000 to \$10,000, limit evidence of the existence of insurance coverage, provide that an insurer's identity shall not be disclosed to the jury unless it is to attack a witness's credibility, address phantom damages, and repeal a prohibition on admission of evidence of a plaintiff's failure to wear a seat belt to mitigate damages in motor vehicle tort actions.¹⁰³ The law becomes effective on January 1, 2021.

Maryland

Governor Larry Hogan issued a catastrophic health emergency proclamation for COVID-19 which triggered application of a Maryland law that provides civil immunity to a health care provider that acts in good faith under such a proclamation.¹⁰⁴

Maryland's highest court adopted the federal *Daubert* standard for the admission of expert evidence, following the supermajority of states.¹⁰⁵

Massachusetts

Governor Charles Baker issued a directive providing health care professionals and facilities with civil immunity "to the fullest extent provided in the [federal] PREP Act" in their efforts to respond to COVID-19.¹⁰⁶ The directive provides that health care professionals are immune from civil liability for harms resulting from the prescription, administration, delivery, distribution, or

dispensing of PREP Act "Covered Countermeasures" to treat, diagnose, prevent, or mitigate COVID-19. Health care facilities are likewise immune from civil liability for harms resulting from the prescription, administration, delivery, distribution, or dispensing of PREP Act "Covered Countermeasures" as part of any program administered by such facilities to treat, diagnose, prevent, or mitigate COVID-19 or as part of the Commonwealth's response to the COVID-19 outbreak. Immunity does not apply to willful misconduct.

Soon thereafter, Massachusetts enacted legislation providing that health care professionals and health care facilities are immune from suit for damages allegedly sustained by acts or omissions in the course of providing health care services during the COVID-19 state of emergency if the health care professional or health care facility acted in good faith pursuant to a COVID-19 emergency rule and the treatment was impacted by the health care facility's or health care professional's actions in response to treatment conditions resulting from the COVID-19 outbreak or COVID-19 emergency rules.¹⁰⁷ The immunity does not apply to gross negligence, recklessness, or conduct with an intent to harm or to discriminate based on race, ethnicity, national origin, religion, disability, sexual orientation, or gender identity; consumer protection actions brought by the attorney general; or false claims actions brought by or on behalf of the Commonwealth. The legislation further provides that volunteer organizations are immune from suit for damages occurring in or at the organization's facility where the damage arises from use of the facility for the Commonwealth's response and activities related to the COVID-19 emergency, unless it is established that the damages were caused by the volunteer organization's gross negligence, recklessness, or conduct with an intent to harm.

Michigan

Governor Gretchen Whitmer issued executive orders stating that, consistent with the state's existing civil immunity for health care facilities and health care professionals that provide medical services during a state of disaster, any licensed health care professional or designated health care facility that provides medical services in support of Michigan's response to the COVID-19 pandemic is not liable for an injury sustained by a person from those services unless the injury or death was caused by gross negligence.¹⁰⁸ Other executive orders replaced

101 See La. H.B. 59 (2020 Spec. Sess.), available at <https://legiscan.com/LA/text/HB59/2020/X1>.

102 See La. S.B. 115 (2020), available at <https://legiscan.com/LA/text/SB115/id/2193520/Louisiana-2020-SB115-Chaptered.pdf>.

103 See La. H.B. 57 (2020 Spec. Sess.), available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1185162>. This law contains measures that were included in an earlier bill, the Omnibus Premium Reduction Act of 2020, that Governor John Bel Edwards vetoed in the regular session. See La. S.B. 418 (2020), available at <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1179197>.

104 See Md. Declaration of State of Emergency and Existence of Catastrophic Health Emergency, Mar. 5, 2020, available at <https://governor.maryland.gov/wp-content/uploads/2020/03/Proclamation-COVID-19.pdf>; Md. Code Ann. Pub. Safety § 14-3A-06.

105 See *Rochkind v. Stevenson*, 236 A.3d 630 (Md. 2020).

106 See Mass. Apr. 8, 2020 PREP Act Directive, available at <https://www.mass.gov/doc/april-8-2020-prep-act-directive>.

107 See Mass. S.B. 2640 (2020), available at <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter64>.

108 See Mich. Exec. Order 2020-30 (COVID-19), Temporary Relief from Certain Restrictions and Requirements Governing the Provision of Medical Services, Mar. 29, 2020, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523481--,00.html; rescinded and replaced with Mich. Exec. Order 2020-61 (COVID-19), Temporary Relief from Certain Restrictions and Requirements Governing the Provision of Medical Services, Rescission of Executive Order 2020-30, Apr. 26, 2020, available at https://content.govdelivery.com/attachments/MIEOG/2020/04/26/file_attachments/1436219/EO%202020-61%20Emerg%20order%20-%20scope%20of%20practice%20-%20re-issue.pdf, extended by Mich. Exec. Order 2020-100, Amending Certain Previously Issued Executive Orders to Clarify Their Duration, May 22, 2020, available at https://content.govdelivery.com/attachments/MIEOG/2020/05/22/file_attachments/1458387/EO%202020-100%20Emerg%20order%20-%20amendments.pdf.

emergency rules issued by the Workers' Disability Compensation Agency of the Department of Labor & Economic Opportunity,¹⁰⁹ declaring that first responders and certain frontline workers that are confirmed as COVID-19 positive on or after March 18, 2020, are considered to have suffered a work-related injury.¹¹⁰

In October, the Michigan Supreme Court held that Governor Whitmer did not have authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 pandemic.¹¹¹ Soon thereafter, the legislature enacted a number of civil justice reforms to address COVID-19-related lawsuits.

The COVID-19 Response and Reopening Liability Assurance Act provides tort immunity to persons that comply with all federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the conduct that allegedly caused harm.¹¹² An isolated, de minimis deviation from strict compliance with applicable statutes, rules, regulations, executive orders, and agency orders unrelated to the plaintiff's injuries does not result in denial of the immunity. The law applies to any claim or cause of action that accrues after March 1, 2020.

Further, employers are not liable for employees' COVID-19 exposure if they operate in compliance with all federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the exposure.¹¹³ An isolated, de minimis deviation from strict compliance unrelated to the employee's exposure to

COVID-19 does not deny an employer the immunity provided by the Act. The law applies to COVID-19 exposures that occur after March 1, 2020.

Employers are prohibited from discharging, disciplining, or otherwise retaliating against employees who display the principal symptoms of COVID-19 and do not report to work but later test negative for COVID-19.¹¹⁴ Employees who test positive for COVID-19 or display the principal symptoms of COVID-19 are prohibited from reporting to work until certain conditions are met to prevent the spread of the virus. A worker who has close contact with an individual who tests positive for COVID-19 or with an individual who displays the principal symptoms of COVID-19 is also prohibited from reporting to work until certain conditions are met to prevent the spread of the virus. The prohibition against reporting to work for those in close contact with persons exhibiting COVID-19 symptoms does not apply to health care workers, first responders, child protective service employees, workers at child caring institutions, workers at adult foster care facilities, or workers at correctional facilities. An employee aggrieved by a violation of this new law may bring a civil action for injunctive relief, damages, or both, in the circuit court for the county where the alleged violation occurred or for the county where the employer against whom the action is filed is located or has its principal place of business. A court shall award to a plaintiff who prevails in such an action damages of not less than \$5,000. The Act is effective retroactive to March 1, 2020.

Minnesota

Minnesota amended its workers' compensation law to provide a presumption that an employee who contracts COVID-19 is presumed to have a compensable occupational disease if the employee was a licensed peace officer, firefighter, nurse or health care worker, correctional officer, security counselor, emergency medical technician, health care provider, nurse, assistive employee in a health care, home care, or long-term care setting with direct COVID-19 patient care or ancillary work in COVID-19 patient units, or required to provide child care to first responders and health care workers under specified executive orders.¹¹⁵ In addition, the contraction of COVID-19 must be confirmed by a laboratory test or documented by a licensed health care provider. The presumption applies to employees who contract COVID-19 on or after April 8, 2020, until May 1, 2021.

Mississippi

Governor Tate Reeves issued an executive order providing liability relief to health care facilities and health care providers in response to COVID-19.¹¹⁶ The order immunized health care

rescinded by Mich. Exec. Order 2020-150 (COVID-19), Temporary and Limited Relief from Certain Licensing and Certification Requirements Applicable to COVID-19 Response, Rescission of Executive Order 2020-61, July 13, 2020, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-534173--,00.html; see also Mich. Comp. L. Ann. § 30.411(4). Governor Whitmer vetoed legislation that would have amended the state's Emergency Management Act to immunize licensed health care professionals and hospitals rendering aid in support of the state's response to a state of disaster or state of emergency declared by the governor except for acts constituting willful misconduct, gross negligence, intentional and willful or criminal misconduct, or intentional infliction of harm. See Mich. S.B. 899 (2020), available at <https://www.legislature.mi.gov/documents/2019-2020/billenrolled/Senate/pdf/2020-SNB-0899.pdf>.

109 See Mich. Dept. of Labor & Econ. Opportunity Workers' Disability Comp. Agency, Emergency Rules, Mar. 30, 2020, available at https://www.michigan.gov/documents/lara/Workers_Disability_Compensation_Agency_COVID-19_First_Responder_ER_684245_7.pdf.

110 See Mich. Exec. Order 2020-128, Clarifying WDC Eligibility for Workplace Exposure to COVID-19, June 18, 2020, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-532413--,00.html (rescinding Mich. Exec. Order 2020-125, Clarifying WDC Eligibility for Workplace Exposure to COVID-19, June 17, 2020, available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-532255--,00.html).

111 See *In re Certified Questions from the U.S. Dist. Ct., W. Dist. of Mich., S. Div. (Midwest Inst. of Health, PLLC v. Gov. of Mich.)*, 2020 WL 5877599 (Mich. Oct. 2, 2020).

112 See Mich. H.B. 6030 (2020), available at <http://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0236.pdf>.

113 See Mich. H.B. 6031 (2020), available at <http://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0237.pdf>.

114 See Mich. H.B. 6032 (2020), available at <http://www.legislature.mi.gov/documents/2019-2020/publicact/pdf/2020-PA-0238.pdf>; Mich. H.B. 6101 (2020), available at <http://www.legislature.mi.gov/documents/2019-2020/billenrolled/House/pdf/2020-HNB-6101.pdf>.

115 See Minn. H.F. 4537 (2020), available at <https://www.revisor.mn.gov/laws/2020/0/Session+Law/Chapter/72/>.

116 See Miss. Exec. Order 1471, Apr. 10, 2020, available at <https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1471.pdf>.

facilities and health care professionals from liability for acts or omissions while providing health care services to COVID-19 patients or otherwise acting in support of the state's COVID-19 response. The immunity does not apply to acts that constitute a crime, fraud, malice, reckless disregard, willful misconduct, or that would otherwise constitute a false claim under the federal False Claims Act.

Mississippi subsequently enacted the Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act.¹¹⁷ The Act provides that any person who attempts in good faith to follow applicable public health guidance is immune from suit for injuries or death related to COVID-19. An owner, lessee, occupant, or other person in control of a premises who attempts in good faith to follow applicable public health guidance and invites or permits a person onto the premises is immune from suit for COVID-19-related personal injury or death claims.

The Act also provides immunity to health care professionals and health care facilities for COVID-19-related personal injury or death claims because of the health care professional's or health care facility's acts or omissions while providing health care services related to the COVID-19 state of emergency. The immunity applies to any health care services performed during the state of emergency and includes claims resulting from screening, assessing, diagnosing, or treating persons in relation to the state of emergency. It also applies to acts or omissions while providing health care services to persons unrelated to COVID-19 but intended to support the state's response to the COVID-19 state of emergency, including delaying or cancelling non-urgent or elective procedures; altering the diagnosing or treatment of any person in response to an order, directive, or guideline issued by the federal, state, or a local government; diagnosing or treating patients outside the normal scope of the health care professional's license or practice; using equipment or supplies outside of the product's normal use for medical practice and the provision of health care services; prescribing, administering, or dispensing a pharmaceutical for off-label use to treat a COVID-19 patient; conducting tests or providing treatment to any person outside of the premises of standard health care facilities; or acts or omissions undertaken because of a lack of staffing, facilities, equipment, supplies, or other resources attributable to the COVID-19 emergency that make it impractical for the health care professional or health care facility to provide the level or manner of care to any person that otherwise would have been required in the absence of the COVID-19 state of emergency.

A designer, manufacturer, labeler, seller, distributor, or donor of the following shall be immune from suit for civil damages for injuries related to COVID-19 exposure: PPE used to protect wearers from COVID-19; medical devices, equipment, and supplies used to treat COVID-19 patients, including products that are used or modified for unapproved uses or utilized outside of the product's normal use to treat COVID-19; medications used to treat COVID-19, including

medications prescribed or dispensed for off-label use to attempt to combat COVID-19; or FDA-approved tests to diagnose or determine immunity to COVID-19. In addition, a designer, manufacturer, labeler, seller, distributor, or donor of disinfecting or cleaning supplies or PPE in response to COVID-19 outside the ordinary course of the person's business shall be immune from suit for civil damages for injuries related to COVID-19 exposure.

The various immunities do not apply where the plaintiff shows by clear and convincing evidence that a defendant acted with actual malice or willful, intentional misconduct. The Act also creates a two-year statute of limitations for COVID-19 personal injury claims. The Act is retroactive to March 14, 2020, and ends 1 year after the expiration of the COVID-19 state of emergency.

Missouri

Missouri enacted sweeping changes to the state's punitive damages law and consumer protection statute, the Missouri Merchandising Practices Act ("MMPA").¹¹⁸ The law applies to all cases filed on or after August 28, 2020.

Missouri lawmakers have been concerned about extreme and unpredictable punitive damages since the state's supreme court struck down a cap on punitive damages for tort actions that existed at common law.¹¹⁹ The legislature enacted the cap after years of state court decisions blurring the line between ordinary negligence and the type of conduct that should be required for punitive damages.¹²⁰

Under the new law, punitive damages are limited to cases where a "defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others." The standard returns punitive damages to their intentional tort roots.¹²¹ A separate but similar standard is provided for personal injury claims against health care providers. The new law also codifies the "clear and convincing evidence" burden of proof standard for punitive damages that has been applied by Missouri courts.¹²²

In addition, the new law changes the procedure for pleading punitive damages claims to expedite the weeding out of meritless claims and prevent unjustified, speculative claims from driving media attention and settlement discussions. Missouri had previously required punitive damages claims to be included in the initial petition, which allowed some plaintiffs to make claims for punitive damages without evidentiary support. Under the new law, a claim for punitive damages may be filed only with leave of court after a written motion by the claimant, filed 120

118 See Mo. S.B. 591 (2020), available at <https://www.senate.mo.gov/20info/pdf-bill/tat/SB591.pdf>.

119 See *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014).

120 See, e.g., *Burnett v. Griffith*, 769 S.W.2d 780, 787 (Mo. banc 1989) (punitive damages may be awarded "for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others").

121 See *Klingman v. Holmes*, 54 Mo. 304, 308 (1873) (punitive damages allowed "where an evil intent has manifested itself").

122 See *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

117 See Miss. S.B. 3049 (2020 Spec. Sess.), available at <http://billstatus.ls.state.ms.us/documents/2020/pdf/SB/3000-3099/SB3049SG.pdf>.

days prior to the final pretrial conference or trial. The claimant must present admissible evidence establishing a reasonable basis for recovery of punitive damages. Other parties may oppose the motion. If the court concludes that a trier of fact could reasonably conclude that the burden of proof and standard for punitive damages liability have been met, the court will allow the pleading seeking punitive damages.

Employers receive protection from punitive damages for acts by rogue employees. Punitive damages may be awarded against an employer or other principal for an agent's acts only if a managerial agent authorized, participated in, or ratified the outrageous conduct, or the agent was "unfit" for the job, making it "reckless" for the principal to employ the person.

Finally, the new law requires more than nominal damages to support punitive damages and states that the amount of punitive damages cannot be based on harm to nonparties, as the United States Supreme Court held in 2007.¹²³

The amendments to the MMPA¹²⁴ are also significant. The MMPA was intended to provide a way for consumers harmed by unlawful business practices to recover damages, but its broad language had been exploited, turning the MMPA into a vehicle for lawsuit abuse. Between 2000 and 2009, there was a 678% increase in reported MMPA decisions.¹²⁵ The growth of consumer litigation in Missouri outpaced virtually every other state.

The MMPA now requires a claimant to show that he or she acted as a "reasonable consumer . . . in light of all circumstances." Previously, claimants could seek out and challenge business practices that might mislead the most unsophisticated consumer. The new law also requires claimants to show that the allegedly unfair business practice would "cause a reasonable person to enter into the transaction" that resulted in damages. In class actions, the class representatives must establish both reasonableness and reliance under the reasonable person standard.

In addition, MMPA claimants are required to prove damages with "sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty." This standard applies to class action representatives, while class members "shall establish individual damages in a manner determined by the court."

The new law also provides that an MMPA cause of action accrues on the date of the purchase or lease that forms the basis of the MMPA claim, or when the plaintiff first receives notice of the allegedly unfair business practice. Attorneys' fees awarded in MMPA class actions must bear a "reasonable relationship" to the amount of the judgment (for equitable relief, they must be based on the time expended).

123 See Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (due process forbids use of punitive damages "to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent").

124 See Mo. Rev. Stat. § 407.025, et seq.

125 See Joanna Shepherd, *The Expanding Missouri Merchandizing Practices Act 13* (Am. Tort Reform Found. 2014), available at http://www.judicialhellholes.org/wp-content/uploads/2017/02/103114_MMPAreport.pdf.

Separately, an emergency rule by the Department of Labor & Industrial Relations creates a presumption that first responders with confirmed COVID-19 are considered to have suffered a work-related injury.¹²⁶

A late November special session to address COVID-19 lawsuits was postponed due to positive cases of COVID-19 among policymakers and staff.

Nevada

Governor Steve Sisolak issued an executive order stating that providers of medical services related to COVID-19 are considered agents of the state for tort liability and immunity purposes, subject to exceptions for willful misconduct, gross negligence, or bad faith as provided in the state's emergency management statute.¹²⁷ The order took effect on April 1, 2020.

Nevada enacted legislation to provide that businesses, governmental entities, and nonprofits are immune from civil liability resulting from a person's exposure to COVID-19 on the premises if the entity substantially complied with controlling health standards.¹²⁸ The court must, as a matter of law, determine whether the entity was in substantial compliance with controlling health standards at the time of the alleged COVID-19 exposure. The liability protection does not apply if the entity was not in substantial compliance with controlling health standards or was grossly negligent. A complaint in any COVID-19-related personal injury or death action shall be pled with particularity.

New Hampshire

Governor Christopher Sununu's declared state of emergency for COVID-19 generally orders assisted living facilities, long term care facilities, nursing facilities, residential care facilities, or similar facilities providing residential care to elderly or infirm patients to prohibit visitor access to reduce the spread of COVID-19.¹²⁹ Pursuant to an existing state law that provides immunity to corporations complying with the state's emergency orders, facilities providing residential care to elderly or infirm patients are immune from liability for injury caused

126 See Mo. Dept. of Labor & Indus. Relations, Div. of Workers' Comp., Emergency Rule 8 CSR50-5.005, Apr. 8, 2020, available at https://labor.mo.gov/sites/labor/files/8_CSR_50-5.005_Emergency_Final.pdf.

127 See Nev. Directive 011, Apr. 1, 2020, available at http://gov.nv.gov/News/Emergency_Orders/2020/2020-04-01_-_COVID-19_Declaration_of_Emergency_Directive_011/; Nev. Rev. Stat. § 414.110.

128 See Nev. S.B. 4 (2020 Spec. Sess.), available at <https://www.leg.state.nv.us/App/NELIS/REL/32nd2020Special/Bill/7156/Text>.

129 See N.H. Exec. Order 2020-04, An Order Declaring a State of Emergency Due to Novel Coronavirus (COVID-19), Mar. 13, 2020, available at <https://www.governor.nh.gov/news-media/orders/2020/documents/2020-04.pdf>, extended by N.H. Exec. Order 2020-05, Apr. 3, 2020, available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-05.pdf>. The prohibition does not apply to medically necessary personnel, visitors for residents receiving end of life care, or visitors necessary to provide for a residents psychosocial needs as determined by a licensed medical care provider.

by denying access to visitors who are not permitted access under the order.¹³⁰

Another order issued by the Governor provides that a first responder with confirmed COVID-19 that is reported to the Department of Health and Human Services is presumed to have an occupationally-related infection.¹³¹

Governor Sununu vetoed legislation that would have allowed asymptomatic individuals who have been exposed to a toxic or hazardous substance to bring a claim for medical monitoring damages.¹³² Medical monitoring damages would have been permitted regardless of the plaintiff's present or past health status and without proof that illness "is certain or likely as a result of the exposure."¹³³ In addition, there was no ban on lump-sum awards that could be used to fund other purchases. Governor Sununu said the proposal "would subject businesses to increased liability by creating a pathway for almost anyone exposed to hazardous or toxic substances to prove a claim for medical monitoring damages, regardless of the level, risk or consequences of exposure."¹³⁴ He added, "By not requiring proof of injury or symptoms and excluding plaintiffs' past or present health status from being considered, this bill would open the floodgates to new, less severe claims which would divert resources from those who truly need them."¹³⁵

New Jersey

Governor Philip Murphy issued an executive order providing liability relief to health care facilities and health care providers in response to COVID-19.¹³⁶ The order became effective on April 1, 2020, and applies to acts or omissions occurring during the COVID-19 public health emergency, including acts or omissions occurring prior to issuance of the order. The order provides civil immunity to any individual granted a temporary license, certificate, registration, or certification to practice a health care profession in connection with New Jersey's COVID-19 response; any individual holding a license, certificate, registration, or certification to practice a health care profession in New Jersey; and any health care facility, modular treatment facility, or other site designated by the Commissioner of Public Health for temporary use for the provision of essential services in support of New Jersey's

COVID-19 response, including hotels and student dormitories, for acts by any of these individuals or facilities undertaken in good faith in the course of supporting the state's COVID-19 response. The immunity does not extend to acts or omissions that constitute a crime, actual fraud, actual malice, gross negligence, or willful misconduct.

Soon thereafter, the legislature enacted legislation that applies retroactively to March 9, when Governor Murphy declared a public health emergency in connection with the novel coronavirus, and remains in effect during the public health emergency.¹³⁷ The law grants civil immunity for acts or omissions undertaken in good faith by a health care professional, facility, or system to support efforts to treat COVID-19 patients and prevent the spread of COVID-19. The immunity does not apply to acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct.

New Jersey also enacted legislation to create a presumption that COVID-19 infections contracted by essential employees are work-related for the purpose of obtaining workers' compensation benefits.¹³⁸ Additionally, an essential employee's absence from work due to contracting or being exposed to COVID-19 will be considered on-duty time. The law is retroactive to March 9, 2020.

New Mexico

Governor Michelle Lujan Grisham issued an executive order providing that all state agency employees and eligible volunteers, including emergency medical technicians and other first responders, volunteer and paid medical personnel, administrative and custodial staff at COVID-19-specific care centers, and law enforcement officers, who contract COVID-19 within 2 weeks of providing direct assistance or care to COVID-19 patients, or within 2 weeks of working inside a facility that provides direct assistance, care, or housing to COVID-19 patients, are presumed to have suffered a compensable occupational disease if they contract COVID-19.¹³⁹

New York

Governor Andrew Cuomo issued an executive order extending by 5 months the 1-year window for victims of childhood sexual assault to bring a civil action under the 2019 New York Child Victims Act.¹⁴⁰ That Act, which went into effect

130 See N.H. Rev. Stat. Ann. § 21-P:41.

131 See N.H. Emergency Order #36 Pursuant to Executive Order 2020-04 as Extended by Executive Order 2020-05, Ensuring Worker's Compensation Coverage for New Hampshire First Responders Exposed to COVID-19, Apr. 24, 2020, available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-36.pdf>.

132 Hon. Christopher Sununu, Governor's Veto Message Regarding House Bill 1375, Aug. 7, 2020, available at <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/hb1375-veto-message.pdf>.

133 N.H. H.B. 1375 (2020), available at https://legiscan.com/NH/text/HB1375/id/2197744/New_Hampshire-2020-HB1375-Amended.html.

134 Hon. Christopher Sununu, Governor's Veto Message Regarding House Bill 1375, *supra* note 132.

135 *Id.*

136 See N.J. Exec. Order 112, Apr. 1, 2020, available at <https://nj.gov/infobank/eo/056murphy/pdf/EO-112.pdf>.

137 See N.J. S.B. 2333 (2020), available at https://www.njleg.state.nj.us/2020/Bills/S2500/2333_R1.PDF.

138 See N.J. S.B. 2380 (2020), available at https://legiscan.com/NJ/text/S2380/id/2181793/New_Jersey-2020-S2380-Introduced.html.

139 See N.M. Exec. Order 2020-25, Directing All Executive Agencies to Afford a Presumption of a Compensable Occupational Disease and to Award Service Credit to Certain Qualifying State Employees and Volunteers, Apr. 23, 2020, available at <https://www.iaff.org/wp-content/uploads/NM-Executive-Order-2020-025.pdf>.

140 See N.Y. Exec. Order 202.29, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, May 8, 2020 (modifying N.Y. Civ. Prac. L. & Rules § 214-g), available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.29.pdf.

on August 14, 2019, gave survivors of childhood sexual abuse 1 year to bring a civil action to recover money damages, regardless of when the alleged abuse occurred. The order responded to a temporary halt in court filings due to COVID-19, which had effectively narrowed the previous look-back window available to claimants. New York subsequently enacted legislation extending the initial look-back window by 1 year.¹⁴¹

Governor Cuomo also issued an executive order providing liability relief to health care providers responding to the COVID-19 crisis.¹⁴² The order modified existing Good Samaritan laws to provide immunity to physicians, physician assistants, special assistants, nurse practitioners, licensed registered professional nurses, and licensed practical nurses that provide medical services in response to COVID-19, except for gross negligence.

Soon thereafter, New York's FY2021 final budget included an Emergency Disaster Treatment Protection Act, known as "30-D," that granted civil immunity to health care facilities and health care professionals for harms resulting from health care services performed in good faith from the start of Governor Cuomo's March 7 COVID-19 emergency declaration through its expiration.¹⁴³ The law covers liability stemming from the care of individuals with and without COVID-19 and covers decisions resulting from a resource or staffing shortage. The immunity does not apply to willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional providing health care services.

The legislature subsequently pared back the future legal immunity under 30-D for nursing homes and hospitals with regard to virus prevention work, arranging virus care, and non-COVID-19 treatment.¹⁴⁴

New York enacted other legislation to strengthen the state's anti-SLAPP law by providing defendants with new tools to challenge frivolous lawsuits.¹⁴⁵ The new law addresses so-called "strategic lawsuits against public participation" lawsuits by making losing plaintiffs pay a defendant's costs and legal fees if a court determines that the lawsuit was "commenced or continued without a substantial basis in fact and law and could

not be supported by a substantial argument for the extension, modification or reversal of existing law."¹⁴⁶

North Carolina

Governor Roy Cooper issued an executive order extending statutory immunity for emergency management workers to licensed health care professionals providing emergency services in response to COVID-19, except in cases of willful misconduct, gross negligence, or recklessness.¹⁴⁷ Other executive orders work in conjunction with recently enacted COVID-19 statutory immunities to provide lawsuit protections to essential businesses.¹⁴⁸ For instance, the Governor's March 27, 2020, Stay at Home Order¹⁴⁹ lists essential businesses spanning "numerous fields and industries including health care, critical infrastructure, law enforcement, government operations, grocery and hardware stores, pharmacies, banking, eateries for takeout and even lawyers, among many others."¹⁵⁰ A subsequent order extended "essential business" immunity to restaurants.¹⁵¹

North Carolina's Emergency or Disaster Treatment Protection Act of 2020 provides tort liability protection to health care providers and health care facilities during the COVID-19 public health emergency under conditions resulting from circumstances associated with the emergency.¹⁵² The law provides immunity to health care facilities, health care providers, and entities that have legal responsibility for the acts or omissions of health care providers when they act in good faith and the arrangement or provision of health care services has been impacted by a decision or activity flowing from the COVID-19 pandemic. The immunity does not apply to acts or omissions that constitute gross negligence, reckless misconduct, or intentional infliction of harm.¹⁵³ The law also affords liability protections to volunteer organizations that have volunteered their facilities to support the state's COVID-19 response unless

¹⁴⁶ *Id.*

¹⁴⁷ See N.C. Exec. Order 130, Meeting North Carolina's Health and Human Services Needs, Apr. 8, 2020, available at <https://files.nc.gov/governor/documents/files/EO130-Meeting-North-Carolinas-Health-and-Human-Services-Needs.pdf>; see also N.C. Gen. Stat. § 166A-19.60.

¹⁴⁸ See N.C. S.B. 704 (2020), available at <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v5.pdf>.

¹⁴⁹ See N.C. Exec. Order 121, Stay at Home Order and Strategic Directions for North Carolina in Response to Increasing COVID-19 Cases, Mar. 27, 2020, available at <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-text.pdf>.

¹⁵⁰ Jeffrey P. MacHarg, *North Carolina Law Provides Limited Immunity to Certain Businesses Against COVID-19 Contraction Claims*, Fox Rothschild LLP, May 20, 2020, <https://www.foxrothschild.com/publications/north-carolina-law-provides-limited-immunity-to-certain-businesses-against-covid-19-contraction-claims/>.

¹⁵¹ See N.C. Exec. Order 141, Easing Restrictions on Travel, Business Operations, and Mass Gatherings: Phase 2, May 20, 2020, available at <https://files.nc.gov/governor/documents/files/EO141-Phase-2.pdf>.

¹⁵² See N.C. S.B. 704 (2020), available at <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v5.pdf>.

¹⁵³ Under the new law, acts, omissions, or decisions resulting from a resource or staffing shortage are not considered to be gross negligence, reckless misconduct, or intentional infliction of harm.

¹⁴¹ See N.Y. A.9036/S.7082 (2020), available at https://nysassembly.gov/leg/?default_fd=&leg_video=&bn=S07082&term=2019&Actions=Y&T_ext=Y.

¹⁴² See N.Y. Exec. Order 202.10, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, Mar. 23, 2020 (modifying N.Y. Educ. L. §§ 6527(2), 6545, 6909(1)), available at <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁴³ See N.Y. S.7506-B/A.9506-B (2020) (Part GGG), available at <https://legislation.nysenate.gov/pdf/bills/2019/S7506>.

¹⁴⁴ See N.Y. A.10840/S.8835 (2020), available at <https://legislation.nysenate.gov/pdf/bills/2019/A10840>; see also Frank G. Runyeon, *NY Nursing Home Virus Immunity Shrinks as First Suits Filed*, LAW360, Aug. 4, 2020, <https://www.law360.com/newyork/articles/1298194/ny-nursing-home-virus-immunity-shrinks-as-first-suits-filed>.

¹⁴⁵ See N.Y. A.52A/S.5991 (2020), available at <https://legislation.nysenate.gov/pdf/bills/2019/S52A>.

the harm is caused by gross negligence, reckless misconduct, or intentional infliction of harm.

A separate part of the same legislation provides that essential businesses are not subject to liability for harms to customers or employees who contract COVID-19. Likewise, an emergency response entity is not subject to liability with respect to claims from a customer, user, or consumer for injuries or death resulting from COVID-19 or while doing business with the emergency response entity. The immunities do not apply to injuries or death caused by an act or omission of the essential business or emergency response entity that constitutes gross negligence, reckless misconduct, or intentional infliction of harm.

North Carolina also enacted legislation to provide statutory immunity for any act or omission alleged to have resulted in the contraction of COVID-19, except for conduct constituting gross negligence, willful or wanton misconduct, or intentional wrongdoing.¹⁵⁴

North Dakota

Governor Doug Burgum issued an executive order providing that beginning March 13, 2020, and for the duration of the declared COVID-19 public health emergency, first responders and health care workers who test positive for COVID-19 and can demonstrate that the infection resulted from a work-related exposure are eligible for workers' compensation benefits.¹⁵⁵

Ohio

The Ohio Supreme Court adopted amendments to the Ohio Rules of Civil Procedure that took effect on July 1, 2020. The amendments incorporate a number of discovery rule changes based on 2015 amendments to the Federal Rules of Civil Procedure. The changes in Ohio include redefining the scope of discovery to be "proportional to the needs of the case"; limiting the frequency or extent of discovery that is cumulative or duplicative or can be obtained from another source that is more convenient, less burdensome, or less expensive; allowing for the allocation of expenses to the requesting party; and placing specific limits on the production of ESI.¹⁵⁶ Ohio's civil rule reforms also include changes regarding required initial party disclosures, expert witness disclosure requirements, and pre-trial discovery conferences. The discovery rule changes are part of a broader package of amendments to Ohio's rules of practice and procedure.

154 See N.C. H.B. 118 (2020), available at <https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H118v7.pdf>.

155 See N.D. Exec. Order 2020-12, Mar. 25, 2020, available at <https://www.governor.nd.gov/sites/www/files/documents/executive-orders/Executive%20Order%202020-12%20WSI%20extension%20for%201st%20responders.pdf>.

156 See Amendment to the Ohio Rules of Practice and Procedure, effective July 1, 2020, available at <http://www.supremecourtsohio.gov/ruleamendments/documents/4.22.20%20Posting.pdf>; see also Victor E. Schwartz, *Ohio's Civil Discovery Rules Need to be Improved*, CLEVELAND.COM, Mar. 13, 2020, <https://www.cleveland.com/opinion/2020/03/ohios-civil-discovery-rules-need-to-be-improved-victor-e-schwartz.html>.

Ohio enacted legislation to temporarily provide qualified civil immunity for health care and emergency services providers during a government-declared disaster or emergency and for exposure to certain coronaviruses including COVID-19.¹⁵⁷ Providers of health care services or emergency professional care in response to a disaster or emergency are not subject to professional disciplinary action or tort liability for harms that result from the provision, withholding, or withdrawal of those services, or as a result of compliance with an executive order or director's order unless the health care provider's acts demonstrate a reckless disregard for the consequences so as to affect the life or health of the patient or intentional misconduct or willful or wanton misconduct. A health care provider is not subject to disciplinary action or tort liability that arises because the provider is unable to treat a person due to an executive or director's order or a local health order issued in relation to a public health emergency. The new law also provides that no civil tort action shall be brought in relation to exposure to, or the transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, except for alleged reckless conduct or intentional misconduct or willful or wanton misconduct on the part of the person against whom the action is brought. The law applies from the date of the Governor's March 9, 2020, COVID-19 emergency declaration through September 30, 2021.

Oklahoma

Governor J. Kevin Stitt issued an executive order providing that for the period of time the legislature concurs with his declaration of a health emergency related to COVID-19, a health care provider, health care facility, or alternative care location designated by the state shall be treated as covered by the state's statutory immunity for liability for emergency assistance provided during natural disasters or catastrophic events.¹⁵⁸ The immunity does not apply to gross negligence or willful or wanton misconduct.

Thereafter, the legislature enacted the COVID-19 Public Health Emergency Limited Liability Act.¹⁵⁹ The new law provides health care providers with immunity from civil liability for any loss or harm to a person with suspected or confirmed COVID-19 caused by an act or omission by the facility or provider during the COVID-19 public health emergency, except for gross negligence or willful or wanton misconduct. The law remains in effect until the Governor concludes the emergency declaration.

Oklahoma also enacted legislation to protect businesses from civil liability for claims relating to exposure or potential exposure to COVID-19 if the act or omission alleged to have violated a duty of care complied with or was consistent with

157 See Ohio Am. Sub. H.B. 606 (2020), available at <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-606>.

158 See Okla. Third Amended Exec. Order 2020-13, Apr. 20, 2020, available at <https://www.sos.ok.gov/documents/Executive/1935.pdf>; see also 76 Okla. Stat. § 5.9.

159 See Okla. S.B. 300 (2020), available at http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/SB/SB300%20ENR.PDF.

federal or state regulations, a presidential or gubernatorial executive order, or guidance applicable at the time of the alleged exposure.¹⁶⁰ “Guidance” is defined as written guidelines related to COVID-19 issued by the Centers for Disease Control and Prevention, Occupational Safety and Health Administration, Oklahoma State Department of Health, Oklahoma Department of Commerce, or any other state agency, board, or commission.

Another new law, the COVID-19 Product Protection Act,¹⁶¹ provides that any person who designs, manufactures, labels, sells, distributes, or donates disinfecting and cleaning supplies or PPE in response to the COVID-19 public health emergency that does not make such products in the ordinary course of business shall not be liable for injury, death, or property damage caused by or resulting from the product’s manufacturing or design, or a failure to provide proper instructions or sufficient warnings. Further, a government entity, health care facility, health care provider, first responder, or business that uses such products is not liable for injuries resulting from their selection, distribution, or use. The immunity does not apply if a person had actual knowledge that a product was defective when put to the use for which the product was manufactured, sold, distributed, or donated, and acted with deliberate indifference to or conscious disregard of a substantial and unnecessary risk that the product would cause serious injury to others, or if the person deliberately intended to cause harm.

Pennsylvania

Governor Tom Wolf signed a narrow executive order providing limited civil immunity to health care providers and property owners who donate the use of their property to support the Commonwealth’s COVID-19 response.¹⁶² The order designates licensed, certified, or otherwise authorized health care professionals providing coronavirus care as “agents of the commonwealth,” entitling them to tort immunity except in cases of willful misconduct or gross negligence. The order also provides civil immunity to premises owners who donate use of their premises for COVID-19 emergency services when a person suffers an injury while on the property for that purpose. The immunity runs from May 6, 2020, through the duration of the COVID-19 emergency.¹⁶³ Business and civil justice groups such as the Pennsylvania Coalition for Civil Justice Reform criticized

the order for being “one of the weakest in the nation,” arguing that protections should extend to health care facilities.¹⁶⁴

Another executive order provides limited civil immunity to business (including not-for-profit) and restaurant owners and employees, state employees and authorized agents, local health department personnel, state and local law enforcement, and personnel of other authorized government agencies with respect to the enforcement of a November 2020 state order requiring universal face coverings.¹⁶⁵ The immunity does not apply to willful misconduct, gross negligence, recklessness or bad faith.

Governor Wolf vetoed legislation that would have provided COVID-19-related liability relief to schools (including institutions of higher learning) or child care facilities, PPE manufacturers or distributors, providers of business or government services, and covered health care providers absent clear and convincing evidence of gross negligence, recklessness, willful misconduct, or intentional infliction of harm.¹⁶⁶ The vetoed bill also included liability protections for agritourism activity providers.

Rhode Island

Governor Gina Raimondo issued executive orders providing that the state’s civil immunity for disaster response workers applies to medical services in support of the state’s response to COVID-19, including health care entities, health care professionals, and health care workers providing community-based health care, long term care, congregate care, services at alternative hospitals, and services in existing hospitals, nursing facilities, assisted living residences, home health care, hospice, adult day care, and PACE organization, as well as landlords that make alternative hospital sites available to the state.¹⁶⁷ The immunity is temporary and does not apply to cases of willful misconduct, gross negligence, or bad faith.

Tennessee

Governor Bill Lee’s declaration of a public emergency for COVID-19 triggered application of a Tennessee law that

160 See Okla. S.B. 1946 (2020), available at <https://legiscan.com/OK/text/SB1946/id/2185680/Oklahoma-2020-SB1946-Enrolled.pdf>. If two or more sources of guidance are applicable to the conduct or risk at the time of the alleged exposure, the person or agent shall not be liable if the conduct is consistent with any applicable guidance.

161 See Okla. S.B. 1947 (2020), available at http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20ENR/SB/SB1947%20ENR.PDF.

162 See Pa. Exec. Order 20200506, Order of the Governor of the Commonwealth of Pennsylvania to Enhance Protections for Health Care Professionals, May 6, 2020, available at <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200506-GOV-health-care-professionals-protection-order-COVID-19.pdf>.

163 Corporations and individuals “engaged in disaster services activities” receive tort claims immunity except for willful misconduct or gross negligence.

164 Matthew Santoni, *Pa. Gives Civil Immunity to COVID-19 Health Care Providers*, LAW360, May 6, 2020, <https://www.law360.com/health/articles/1271198/pa-gives-civil-immunity-to-covid-19-health-care-providers>.

165 See Pa. Exec. Order 20201123, Order of the Governor of the Commonwealth of Pennsylvania For Mitigation, Enforcement, and Immunity Protections, Nov. 23 2020, available at <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201123-TWW-mitigation-enforcement-immunity-order.pdf>.

166 See Pa. H.B. 1737 (2020), available at <https://legiscan.com/PA/text/HB1737/2019>. For Governor Wolf’s November 30, 2020, veto statement, see <https://www.governor.pa.gov/wp-content/uploads/2020/11/20201130-Veto-Message-HB-1737.pdf>.

167 See R.I. Exec. Order 20-70, Sixty-Fifth Supplemental Emergency Declaration – Hospital and Community-Based Health Care, Sept. 2, 2020, available at <https://governor.ri.gov/documents/orders/Executive-Order-20-70.pdf>; R.I. Exec. Order 20-33, Thirtieth Supplemental Emergency Declaration – Hospital and Community-Based Health Care, May 8, 2020, available at <https://governor.ri.gov/documents/orders/Executive-Order-20-33.pdf>; see also R.I. Exec. Order 20-21, Eighteenth Supplemental Emergency Declaration – Increasing Hospital and Nursing Facility Capacity, Extending Statutory Immunity, Apr. 10,

provides civil immunity to voluntary health care providers that participate in the Emergency Management Assistance Compact or Southern Regional Emergency Management Assistance Compact as long as the services are provided within the limits of the provider's license, certification, or authorization.¹⁶⁸ The immunity does not apply to gross negligence or willful misconduct.

A subsequent executive order that was in effect in July 2020 provided that licensed or certified health care providers are not liable for personal injury or death claims related to COVID-19 alleged to have been caused by acts or omissions within the limits of the provider's license, certification, registration, or authorization. This includes acts or omissions resulting from lack of resources attributable to or arising out of the provider's COVID-19 response that renders the health care provider unable to provide the level or manner of care or services that would otherwise be required in the absence of the COVID-19 pandemic.¹⁶⁹ The protection did not apply to gross negligence or willful misconduct.

Soon thereafter, Tennessee enacted the COVID-19 Recovery Act.¹⁷⁰ The law bars personal injury or wrongful death claims arising from COVID-19 unless the claimant proves by clear and convincing evidence that the defendant caused the harm due to gross negligence or willful misconduct. Further, the claimant must file a verified complaint pleading specific facts with particularity from which a finder of fact could reasonably conclude that the alleged injury or death was caused by the defendant's gross negligence or willful misconduct. The claimant also must file a certificate of good faith stating that the claimant has obtained a signed, written expert medical opinion by a physician licensed in Tennessee or a bordering state stating that the claimant's injury was caused by the defendant's alleged act or omission. A claimant's failure to comply with the Act's pleading requirements will, upon motion, make the claim subject to dismissal with prejudice.

The Act also extends immunity under the Tennessee Governmental Tort Liability Act to government entities in connection with any injury arising from COVID-19, unless the claimant proves by clear and convincing evidence that the injury was caused by an act or omission of the governmental entity or its employees constituting gross negligence.

The Act prohibits claims against an employee of a governmental entity for an injury arising from COVID-19

and proximately caused by an act or omission of the employee within the employee's scope of employment for which the governmental entity is immune, unless the claimant proves by clear and convincing evidence that the injury was caused by an act or omission that was willful, malicious, criminal, or performed for personal financial gain.

The Act further specifies that the state does not waive sovereign immunity for injuries arising from COVID-19, unless the claimant proves by clear and convincing evidence that the injury was caused by an act or omission of the state or an employee or agent of the state constituting gross negligence.

There is no cause of action against a public institution of higher education for any injury arising from COVID-19 unless the claimant proves by clear and convincing evidence that the injury was caused by an act or omission of the institution or its employee or agent constituting gross negligence or willful misconduct.

The Act sunsets on July 1, 2022.

Utah

Utah enacted limited immunity for health care providers that treat patients during a major public health emergency.¹⁷¹ The Act is not COVID-19 specific. The statute gives health care providers immunity from civil liability for an act or omission in the course of providing health care during a declared major public health emergency if the services are provided in good faith to treat a patient for a condition that resulted in the declared major public health emergency, or if the act or omission was the direct result of providing health care to a patient for the condition that resulted in the declared major public health emergency. The immunity does not apply to acts or omissions by a health care provider that constitute gross negligence or intentional or malicious misconduct.

During a declared major public health emergency, it is not a breach of the applicable standard of care for a health care provider to provide care that is not within the provider's education, training, or experience if the health care is within the applicable scope of practice for the type of license issued to the health care provider, the health care is provided in good faith to treat a patient for the condition that resulted in the declared major public health emergency, or there is an urgent shortage of health care providers as a direct result of the declared major public health emergency. The standard of care is breached if the care that is provided is grossly negligent or intentional or malicious misconduct.

The new law also provides that a health care provider is not subject to civil or criminal liability or sanctions against the provider's license if the provider uses a prescription drug for an off-label use if written recommendations have been issued by a federal government agency regarding the product's use for the condition that resulted in the declared major public health emergency, the provider follows that guidance, and the provider explains the possible positive and negative outcomes to the patient and documents the informed consent on the patient's

2020, available at <https://governor.ri.gov/documents/orders/Executive-Order-20-21.pdf>; R.I. Gen. Laws § 30-15-15(b).

168 See Tenn. Exec. Order 14, An Order Suspending Provisions of Certain Statutes and Rules in Order to Facilitate the Treatment and Containment of COVID-19, Mar. 12, 2020, available at <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee14.pdf>; Tenn. Govt. Code § 58-2-107.

169 See Tenn. Exec. Order 53, An Order Regarding Limited Liability Protection for Health Care Providers in Response to COVID-19, July 1, 2020, available at <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee53.pdf>; Tenn. Govt. Code § 58-2-107(l).

170 See Tenn. S.B. 8002 (2020), available at <http://www.capitol.tn.gov/Bills/111/Bill/SB8002.pdf>.

171 See Utah S.B. 3002 (Spec Sess. 2020), available at <https://le.utah.gov/-2020S3/bills/sbillenr/SB3002.pdf>.

medical record. If two or more written recommendations are issued by federal government agencies, a health care provider qualifies for immunity by satisfying the most current written recommendations of any one agency. Again, the protection does not apply to gross negligence or intentional or malicious misconduct.

Finally, a health care provider is not subject to civil liability or sanctions against the provider's license for any harm resulting from the provider's treatment of a patient with an investigational drug or device during a major public health emergency for a condition that resulted from that emergency.

Utah enacted other legislation to provide civil immunity for injuries from COVID-19 exposures on a "premises owned or operated by the person, or during an activity managed by the person," except for willful misconduct, reckless infliction of harm, or intentional infliction of harm.¹⁷²

In addition, Utah's workers' compensation law was amended to establish a rebuttable presumption that a first responder with confirmed COVID-19 between March 21 and June 1, 2021, is entitled to benefits unless the person refuses to be tested.¹⁷³

Separately, Utah's Supreme Court approved a two-year pilot of a regulatory sandbox called the Office of Legal Innovation to license new forms of legal services providers.¹⁷⁴

Vermont

Governor Phil Scott issued an executive order providing that the state's civil immunity for emergency management activities applies to health care facilities, health care providers, and health care volunteers who provide COVID-19-related emergency management services or response activities, except in the case of willful misconduct or gross negligence.¹⁷⁵ The order was effective from April 10 through May 15, 2020.

In addition, Vermont established a rebuttable presumption that certain frontline workers are entitled to workers' compensation coverage for illness or death resulting from COVID-19 that is diagnosed between March 1, 2020, and January 15, 2021.¹⁷⁶ Other workers are entitled to workers' compensation coverage for illness or death resulting from

COVID-19 that is diagnosed during the same period where the worker had a documented occupational exposure to COVID-19.

Virginia

Governor Ralph Northam issued an executive order providing that the state's civil immunity for health care providers who respond to a disaster applies to medical services in support of the state's response to COVID-19 during the declared emergency.¹⁷⁷ The immunity does not apply to gross negligence or willful misconduct. The order took effect on April 28, 2020, and sunsets when the state's COVID-19 emergency terminates. An earlier executive order declaring a state of emergency related to COVID-19 triggered application of a Virginia law providing liability protections for harms caused by health care providers' abandonment of persons for whom they owe a duty of care or for causes of action arising out of hospital credentialing or granting of practice privileges.¹⁷⁸

Virginia enacted legislation to provide that in the absence of gross negligence or willful misconduct, a licensed hospice, licensed home care organization, private provider licensed by the Department of Behavioral Health and Developmental Services, licensed assisted living facility, or licensed adult day care center that delivers care to or withholds care from a patient, resident, or person receiving services who is diagnosed with COVID-19 or is believed to be infected with COVID-19 is not liable for an injury or death to the person when the emergency and subsequent conditions caused by the emergency result in a lack of resources, attributable to the disaster, that render the entity unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and that resulted in the injury or wrongful death at issue.¹⁷⁹ The immunity applies to causes of action arising between March 12, 2020, and the expiration of the state of emergency related to the COVID-19.

In addition, Virginia enacted legislation to assist asbestos plaintiffs by providing that the diagnosis of a nonmalignant asbestos-related condition (e.g., asbestosis) and a subsequent diagnosis of a malignant asbestos-related injury (e.g., mesothelioma) shall constitute separate injuries for statute of limitations purposes. Under the new law, the statute of limitations for the malignant condition will begin to run when that diagnosis is first communicated to the plaintiff by

172 See Utah S.B. 3007 (Spec Sess. 2020), available at <https://le.utah.gov/-/2020S3/bills/sbillenr/SB3007.pdf>.

173 See Utah H.B. 5006 (Spec Sess. 2020), available at <https://le.utah.gov/-/2020S5/bills/static/HB5006.html>.

174 See Dan Packel, *Utah Justices Give OK to 'Regulatory Sandbox'*, LAW.COM, Aug. 14, 2020, <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://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf#page=8>.

175 See Vt. Addendum 9 to Exec. Order 01-20, Apr. 10, 2020, available at <https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%209%20TO%20EXECUTIVE%20ORDER%2001-20.pdf>; 20 Vt. Stat. § 20.

176 See Vt. S.342 (2020), available at <https://legislature.vermont.gov/Documents/2020/Docs/ACTS/ACT150/ACT150%20As%20Enacted.pdf>.

177 See Va. Exec. Order 60, Clarification of Certain Immunity from Liability for Healthcare Providers in Response to Novel Coronavirus (COVID-19), Apr. 28, 2020, available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-60-Clarification-of-Certain-Immunity-From-Liability-For-Healthcare-Providers-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-60-Clarification-of-Certain-Immunity-From-Liability-For-Healthcare-Providers-in-Response-to-Novel-Coronavirus-(COVID-19).pdf); Va. Code §§ 8.01-225.01, 8.01-225.02.

178 See Va. Exec. Order 51, Declaration of a State of Emergency Due to Novel Coronavirus (COVID-19), Mar. 12, 2020, available at [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf); Va. Code § 8.01-225.01.

179 See Va. S.B. 5082 (2020 Spec. Sess.), available at <https://legiscan.com/VA/text/SB5082/id/2206444>.

to a state of emergency unless the harm is caused by willful or wanton acts or omissions.¹⁸⁸

The law also creates a rebuttable presumption that COVID-19 was caused by the person's employment if the person is a first responder who develops COVID-19 during the public health emergency declared by the governor or within 30 days after the order ends, and was exposed to persons with confirmed cases of COVID-19 in the course of employment.

Wyoming

Wyoming enacted legislation to protect health care providers and businesses from tort liability when responding to a public health emergency.¹⁸⁹ The new law provides that "any health care provider or other person, including a business entity, who in good faith follows the instructions of a state, city, town or county health officer or who acts in good faith in responding to the public health emergency is immune from any liability arising from complying with those instructions or acting in good faith."¹⁹⁰ The immunity does not apply to gross negligence or willful or wanton misconduct.

IV. KEY COURT DECISIONS

A. Decisions Upholding Civil Justice Laws

The Tennessee Supreme Court held that the state's \$750,000 cap on noneconomic damages in personal injury cases (\$1 million for certain "catastrophic loss or injury") satisfies the Tennessee Constitution's right to jury trial, separation of powers, and equal protection provisions.¹⁹¹ The court said that the right to jury trial is satisfied "when an unbiased and impartial jury makes a factual determination regarding the amount of noneconomic damages, if any, sustained by the plaintiff" and the "judge then applies, as a matter of law, the statutory cap on noneconomic damages."¹⁹² The court also found that the cap was a "substantive change in the law that was within the General Assembly's legislative authority to enact."¹⁹³ The court rejected plaintiffs' claim of an equal protection violation based on the cap's alleged disparate impact on women. The court found no evidence of discriminatory purpose regarding the statute.¹⁹⁴

In a significant footnote, the court repudiated a 2019 decision by the federal Sixth Circuit predicting that the

Tennessee Supreme Court would find the state's *punitive* damages cap to violate the right to jury trial.¹⁹⁵ The court found the Sixth Circuit's reasoning "unpersuasive" and criticized the Sixth Circuit's failure to certify that question of state law, while noting that the punitive damages cap was not at issue in the instant case.¹⁹⁶ The court's statement should clear up uncertainty as to the viability of the punitive damages cap in the wake of the federal court's decision.

A Maryland appellate court upheld the state's cap on noneconomic damages in personal injury cases,¹⁹⁷ following a consistent line of decisions from Maryland's highest court that have rejected constitutional challenges to the cap.¹⁹⁸

A North Dakota federal magistrate judge upheld that state's Asbestos Bankruptcy Trust Transparency Act against a separation of powers challenge.¹⁹⁹ The Act requires plaintiffs to file and disclose their asbestos bankruptcy trust claims before trial.²⁰⁰

B. Decisions Striking Down Civil Justice Laws

The Utah Supreme Court struck down a 2016 law that revived time-barred claims for childhood sex abuse.²⁰¹ The court held that the legislature cannot retroactively revive a time-barred claim in a manner that deprives a defendant of a vested statute of limitations defense. The court agreed with the legislature regarding the reasonableness of its policy judgment, but said the "original meaning of the constitution binds us as a matter of the rule of law."²⁰² The court added that its "commitment to originalism would be no commitment at all" if its application of constitutional principles depended on the court's agreement with legislative policy decisions: "It would be a smokescreen for the outcomes that we prefer."²⁰³

188 See Wis. Code §§ 895.51.

189 See Wyo. S.F. 1002 (2020 Spec. Sess.), available at <https://wyoleg.gov/2020Sp1/Enroll/SF1002.pdf>.

190 *Id.*

191 See *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686 (Tenn. 2020). See also Mark A. Behrens, *State Court Docket Watch: McClay v. Airport Management Services, LLC* (Federalist Soc'y Nov. 3, 2020), available at <https://fedsoc.org/commentary/publications/state-court-docket-watch-mcclay-v-airport-management-services-llc>. A Tennessee appellate court subsequently upheld the cap against similar challenges and a takings doctrine challenge. See *Yeboah v. Center for Urological Treatment*, 2020 WL 2781586 (Tenn. Ct. App. May 28, 2020).

192 *McClay*, 596 S.W.3d at 693.

193 *Id.* at 695.

194 See *id.* at 696.

195 See *Lindenberg v. Jackson Nat'l Life Ins.*, 912 F.3d 348 (6th Cir. 2019), *reh'g en banc denied*, 919 F.3d 992 (6th Cir. 2019), *cert. denied sub nom. Tennessee v. Lindenberg*, 140 S. Ct. 635 (2019).

196 See *McClay*, 596 S.W.3d at 693 n.6.

197 See *Crouell v. Turner*, 2020 WL 1303621 (Md. Ct. Spec. App. Mar. 18, 2020), *cert. denied*, 232 A.3d 260 (Md. 2020) (rejecting equal protection, right to jury trial, and separation of powers challenges to the cap).

198 See *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010) (\$500,000 limit on noneconomic damages in personal injury or wrongful death actions did not violate right to jury trial or right to remedy provisions of Maryland Constitution or equal protection provisions of Maryland or U.S. Constitutions); *Oaks v. Connors*, 660 A.2d 423 (Md. 1995) (prior \$350,000 limit on noneconomic damages in personal injury actions did not violate equal protection or right to jury trial provisions of Maryland Constitution); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Green v. N.B.S., Inc.*, 976 A.2d 279 (Md. 2009) (statute not a prohibited special law).

199 See *Kotalik v. A.W. Chesterton Co.*, 2020 WL 4381606 (D.N.D. July 8, 2020) (unpublished).

200 See N.D. Cent. Code §§ 32-46.1-01 to -06.

201 See *Mitchell v. Roberts*, 469 P.3d 901 (Utah 2020).

202 *Id.* at 904.

203 *Id.*

The Oregon Supreme Court held that a \$500,000 statutory limit on noneconomic damages in personal injury cases violated the Oregon Constitution's remedy clause.²⁰⁴ The court said that while the legislature can limit common law remedies without a "quid pro quo" in exchange for the limitation, the failure to "counterbalance a plaintiff's right to a remedy . . . strikes a real blow to the defense" of the statute.²⁰⁵ Further, the statutory limit did not "advance the state's interest in sovereign immunity or any other interest with constitutional underpinnings."²⁰⁶ And the cap was not set at a level "capable of restoring the right that had been injured in many, if not all, instances, and would remain capable of doing so over time," particularly since the statute (enacted in 1987) had not been adjusted for inflation over time.²⁰⁷ The court distinguished rulings permitting limits on damages under the Oregon Tort Claims Act and in statutory wrongful death actions.²⁰⁸

The Oklahoma Supreme Court struck down a provision of the state's workers' compensation law that limited recovery for wrongful death to a spouse, child, or legal guardian dependent on the worker, precluding recovery by a parent as the next of kin when the decedent is an adult, unmarried, and childless.²⁰⁹ The court held that the provision violated the Oklahoma Constitution's anti-abrogation clause for damages for injuries resulting in death.²¹⁰ The court said that fixing the defect would be "easy . . . for the Legislature" and would take an amendment to the workers' compensation statute to include statutory heirs (just as it did before 2014 amendments).²¹¹

A Texas appellate court held that application of a statutory settlement credit to reduce a health care liability plaintiff's award of economic damages by the amount of a settlement between the plaintiff's daughter and a hospital violated the Open Courts Clause of the Texas Constitution.²¹²

A Pennsylvania appellate court struck down a federal law known as the Protection of Lawful Commerce in Arms Act that provides liability protections to firearms manufacturers.²¹³ In

this outlier decision,²¹⁴ the court held that "[a]ny impact that litigation might have upon interstate commerce, constitutionally speaking, is too remote to displace State sovereignty" over local torts.²¹⁵

V. CONCLUSION

Legislation to address the effects of the COVID-19 pandemic were a focus of policymakers at the federal and state levels. Many states adopted COVID-19-related liability reforms. In addition, many governors signed executive orders to limit COVID-19 tort claims against health care liability defendants. Legislation to address COVID-19-related tort claims will continue to be active into 2021.

In addition, issues that were trending before the pandemic—such as civil discovery reform, legislation to require transparency in asbestos lawsuits, and extending statutes of limitations for childhood sexual abuse—will continue to be active at the state level.

204 *Busch v. McInnis Waste Sys., Inc.*, 468 P.3d 419 (Or. 2020).

205 *See id.* at 433.

206 *Id.*

207 *Id.*

208 *See id.*; *see also* *Horton v. Oregon Health & Science Univ.*, 376 P.3d 998 (Or. 2016) (upholding \$3 million aggregate limit on damages under Oregon Tort Claims Act); *Greist v. Phillips*, 906 P.2d 789 (Or. 1995) (upholding \$500,000 limit on noneconomic damages in statutory personal injury and wrongful death actions without common law underpinnings).

209 *See Whipple v. Phillips & Sons Trucking, LLC*, 2020 WL 5639993 (Okla. Sept. 22, 2020).

210 *Id.* at *2 (citing Okla. Const. art 23, § 7).

211 *Id.* at *7.

212 *See Virlar v. Puente*, 2020 WL 6049652 (Tex. Ct. App. Oct. 14, 2020).

213 *See Gustafson v. Springfield, Inc.*, 2020 WL 5755493 (Pa. Super. Sept. 28, 2020).

214 For scholarship on the constitutionality of federal tort reform legislation, see Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEG. 269 (1999); Paul Taylor, *The Federalist Papers, The Commerce Clause, and Federal Tort Reform*, 45 SUFFOLK U. L. REV. 357 (2012); Paul D. Clement, *Federalism, The Framers, and Federal Legal Reform: Setting the Record Straight* (U.S. Chamber Inst. for Legal Reform Oct. 2012), available at <https://i2i.org/wp-content/uploads/2012/11/Clement-Federalism.pdf>.

215 *Gustafson*, 2020 WL 5755493, at *24.

