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As with other firm publications, we continue to provide concise summaries of significant court decisions and issues. *CaseWatch: Railroad Litigation* focuses on cases and issues unique to the defense of railroads in all areas of civil litigation in New York, New Jersey, Pennsylvania and Connecticut. It is our goal to make this publication useful and informative. To discuss the cases and issues highlighted below or to make suggestions for future editions please contact:

John J. Jablonski, Esq.

716.566.5469

jjablonski@goldbergsegalla.com

Supreme Court Of Virginia Holds That Another State’s Duty Statutes Are Inadmissible As Proof Of Negligence

In *Norfolk and Portsmouth Belt Line R. Co. v. Wilson*, 667 S.E.2d 735 (Sup. Ct. Va. 2008), plaintiff brought an FELA action based upon injuries suffered as a result of his upper arm hitting a fence post that was bent inward toward the track. Specifically, plaintiff’s claim was based upon Belt Line’s alleged failure to inspect and maintain its track and its failure to eliminate dangerous “close clearances” (i.e., the bent fence post) along its track.

At trial, plaintiff’s expert’s testimony was based upon the close clearance statutes enacted by other states. Plaintiff’s expert could not cite, however, any Virginia laws regarding clearance, because none existed. Belt Line moved to strike the expert’s testimony on the basis that the laws of other states have no relevance to the law of Virginia and such references are likely to mislead the jury into thinking that those foreign laws govern the safety and standards prevailing in Virginia. The court denied Belt Line’s motion. The jury found in favor of plaintiff and Belt Line appealed.

The Supreme Court of Virginia held that the trial court erred. The Court held that inapplicable statutes are irrelevant to the proof of the standard of care in a negligence case. Since the laws of other states are inapplicable in Virginia, testimony regarding the laws enacted by other states was inadmissible.

The court further stated that even if the statutes of another state had been admitted as evidence of industry standards, the admission of inapplicable statutes was still reversible error.

North Carolina Court Of Appeals Reverses Tier II Offset Granted By Trial Court

In *Wilkins v. CSX Transp., Inc.*, 2008 WL 5212727 (N.C.App. Dec. 16, 2008), plaintiff brought an action under the FELA for alleged back injuries sustained while working as a maintenance of way worker for CSX Transportation (“CSXT”). Plaintiff was awarded \$62,500 by a jury and the judge awarded an offset against the verdict for \$7,437.90, an amount equal to what CSXT had paid in the form of “Tier II” Railroad Retirement Board disability payments. Plaintiff appealed the offset as against his award. The Court of Appeals held that the trial court had erred.

Plaintiff argued that the collateral source rule prohibited the trial court’s offset of plaintiff’s award. CSXT argued that the Railroad Retirement Act benefits consist of two Tiers and that unlike Tier I benefits, Tier II benefits are distinct, and are not a collateral source as described in *Eichel v. New York Cent. R. Co.*

The court held that while the funding of Tier II benefits had changed, with an employer being responsible for a greater percentage of the cost, the purpose and availability of the Tier II benefits had not changed in any significant manner. The court further held that the “purpose and availability” were the more important factors when determining if Tier II benefits are a collateral source. As a result, the court held that the nature and manner of Tier II benefits were not significantly changed by the 1974 amendments to the Act. Therefore, the payments were a collateral source and should not have been offset.

Supreme Court Of Montana Refuses To Give Full Faith And Credit To An Illinois Court’s *Forum Non Conveniens* Order

In *Cook v. Soo Line R. Co.*, 2008 WL 5227971 (Sup. Ct. Mont. Dec. 16, 2008), the Montana Supreme Court held that the Montana District Court erred by affording full faith and credit to an Illinois Order. The Illinois Order dismissed plaintiff’s FELA claims for *forum non conveniens* and ordered plaintiff to re-file his suit in Indiana.

Plaintiff had originally filed his FELA claim in Illinois. Soo Line moved to dismiss the claim on the basis of *forum non conveniens*. The Illinois court granted Soo’s motion and also ordered plaintiff to re-file his claim in Indiana. The Illinois court mostly based its decision on the fact that plaintiff and most of the witnesses resided in Indiana and that plaintiff had worked the majority of his career in Indiana.

Consequently, although plaintiff did not live or work for Soo Line in Montana, he filed his claim in Montana on the basis that Soo Line owned railroad tracks in Montana. Soo Line moved to dismiss plaintiff’s claims on the basis that the Illinois judgment was “entitled to *res judicata* effect” in Montana and that the Illinois court had already determined that the proper forum was Indiana. The District Court agreed with Soo Line and dismissed plaintiff’s claim.

The Supreme Court of Montana reversed. The court held that *res judicata* (also known as claim preclusion) presumes that a judgment was rendered on the merits of the case. The court held that a dismissal for *forum non conveniens* is not an adjudication on the merits and thus cannot have preclusive effect in Montana. In addition, the court held that the Full Faith and Credit Clause did not require the District Court in Montana to afford preclusive effect to plaintiff's claim. The court held that under the FELA, plaintiff is not limited to one forum, i.e., Indiana. The court reasoned that the Illinois order did not preclude plaintiff from filing his FELA in claim in Montana as long as Montana had appropriate jurisdiction under the FELA.

ICCTA Preemption Update

Opinions relating to preemption involving the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et. seq.* ("ICCTA") can be rare. The broad preemption granted by the statute has received detailed treatment in some recent decisions.

In *Kiser v. CSX Real Property, Inc.*, 2008 WL 4866024 (M.D.Fla. Nov. 7, 2008), residents opposed the development of an intermodal railway facility as a nuisance or threatened nuisance. The residents sued the local town as well as the developers, seeking injunctive relief to prevent defendants from issuing or applying for development permits for the proposed railway facility. Defendants moved for summary judgment on the grounds that federal law preempts state-based actions that would have the effect of regulating the acquisition, construction, or use of a railroad facility. The court dismissed plaintiff's action, holding that "[s]tate law nuisance actions are not excepted from ICCTA preemption, *citing Suchon v. Wis. Cent. Ltd.*, 2005 WL 568057 at *3-4 (W.D.Wis. Feb. 23, 2005) (holding that the ICCTA preempted a nuisance action brought against the railroad for the vibrations and fumes that affected neighboring businesses because the action would have had the effect of regulating railroad routes or practices); *Maynard v. CSX Transp.*, 360 F.Supp.2d 836, 843-44 (E.D.Ky. 2004) (holding that the ICCTA preempted a nuisance claim against a railroad where a side track regularly blocked access to plaintiffs' houses for hours and diminished their property values); and *Guckenberg v. Wis. Cent. Ltd.*, 178 F.Supp.2d 954, 958 (E.D.Wis. 2001) (holding that the ICCTA preempted a state nuisance action brought by neighboring property owners, because such claims would amount to "regulation" of rail transportation). As a result the court held that "[a]ll state-born attacks aimed at the target, no matter the weapon used, are rebuffed by the shield of federal supremacy."

In *Adrian & Blissfield R. Co. v. Village of Blissfield*, 2008 WL 5245679 (6th Cir. Dec. 18, 2008), a local municipality sought to charge a short-line railroad for the installation of sidewalks and pedestrian bridges. The railroad sought a declaratory judgment pursuant to ICCTA preemption saying that it was not obligated to pay for the village's pedestrian track crossings or sidewalk repairs that were situated partly on the railroad's land. The district court agreed and entered judgment for the railroad after a bench trial and the village appealed. The Sixth Circuit agreed with the Fifth Circuit's recent holding that "[r]outine crossing disputes, despite the fact that they touch the tracks in some literal sense, are not typically preempted." 2008 WL 5245679 at * 5, *quoting, New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332-33 (5th Cir. 2008) (internal quotations and citations omitted). The Sixth Circuit went on to hold that "a state regulation must address state concerns generally, without targeting the railroad industry. States retain their police powers, allowing them to create health and safety measures, but those rules

must be clear enough that the rail carrier can follow them and... the state cannot easily use them as a pretext for interfering with or curtailing rail service.” *Id.* at * 6, quoting *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007) (internal quotations and citations omitted). Analyzing the Michigan statute the court held that the statute “dictates that ‘a railroad shall first be given the right to construct in the same manner as that right is given to individuals’ before the locality may begin construction [and therefore] the interference with railroad operations is negligible.” The Court held that the burden on the railroad is not unreasonable and therefore, the ICCTA did not preempt the Michigan sidewalk statute. The Sixth Circuit reversed the grant of summary judgment for the railroad and remanded the case for further proceedings.

In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 2008 WL 5421787 (D.D.C. Dec. 31, 2008), freight customers of four Class I railroads filed antitrust class actions alleging that these railroads controlled nearly 90% of all rail freight traffic. Plaintiffs claimed violations of the Sherman and Clayton acts, and state antitrust, consumer protection and unjust enrichment laws due to the impropriety of allegedly excessive fuel surcharges. The railroads moved to dismiss the freight customers’ claims based largely on ICCTA preemption. The opinion provides a detailed overview of ICCTA preemption. Notably, the court held:

The preemption language in ICCTA is plain and explicit: The remedies provided “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.... The language of the statute could not be more precise.... The most natural reading of section 10501(b)(2) is that the federal remedies provided by the [ICCTA] are the only remedies available as to the regulation of rail transportation, and that the federal remedies are exclusive of state remedies except where the [ICCTA] has expressly provided otherwise.... Indeed, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over rail-road operations.”

2008 WL 5421787 at *5 (citations omitted). The court went on to hold that the state law remedies sought by plaintiffs were no different than the patch work of state regulations that were specifically preempted by the ICCTA. Accordingly, the court held that the state antitrust, consumer protection and unjust enrichment claims were preempted by the ICCTA. The court also held, however, that the injunctive relief sought by plaintiffs pursuant to federal statutes was not preempted based on the averments contained in the complaints. As a result the court held that it would be premature to dismiss these federally based claims at this time, allowing plaintiffs to continue to pursue injunctive relief.

District Court Of North Dakota Causally Links Injuries During An Investigation Of A Broken Coupler To That Of A Federal Safety Appliance Act Violation

In *Magelky v. BNSF Ry. Co.*, 579 F.Supp.2d 1299 (D.N.D. 2008), plaintiff brought an FELA action claiming a violation of the Federal Safety Appliance Act (FSAA) by BNSF Railway Company. Plaintiff was injured while working as a conductor on a BNSF train. Specifically, she was injured when she fell down a slope while investigating why her train had lost air pressure and had come to an emergency stop.

Plaintiff attempted to causally link the injuries she suffered when she fell down a slope during her investigation to the fact that there was a broken coupler on one of her train cars. Thus, plaintiff's position was that the cause of her injury was the broken coupler, and hence BNSF was strictly liable under an FSAA violation. BNSF on the other hand moved for summary judgment on the basis that the broken coupler that allegedly stopped her train was not the cause of her injuries. Therefore, plaintiff's injuries were not caused by any alleged violation of the FSAA.

The court held that under the FELA, the proper test of causation is "in whole or in part" and not proximate causation. The evidence presented during trial showed that a broken coupler had caused the train to stop causing plaintiff to disembark the train to investigate the problem. The court held that this provided a sufficient causal link between the alleged FSAA violation and plaintiff's injuries.

Court Of Appeals Of North Carolina Allows Equitable Tolling Of The Statute Of Limitations Under The FELA

In *Carlisle v. CSX Transp., Inc.*, 668 S.E.2d 98 (N.C.App. 2008), plaintiff sued under the FELA for alleged knee injuries as a result of walking on ballast. Plaintiff filed his complaint in Virginia in 2002. In 2005, on the eve of trial, defendant moved to dismiss for improper venue. The Virginia court granted this motion without prejudice on the condition that if plaintiff re-filed by December 15, 2005, defendant would not assert a statute of limitations defense (since the statute of limitations period is three years under the FELA).

On November 29, 2005, plaintiff re-filed his complaint in North Carolina. On the eve of trial, defendant moved for summary judgment stating that plaintiff's injuries had accrued in the 1980s and 1990s and that the statute of limitations had expired before plaintiff filed his original complaint in 2002.

Plaintiff then asked that the North Carolina court to voluntarily dismiss his claim based upon North Carolina Rule 41(a). Rule 41(a) would toll the statute of limitations from the period in which plaintiff first filed suit in 2002 in Virginia and would give plaintiff a year in which to re-file. The court granted plaintiff's voluntary dismissal. Defendants appealed this order.

The Court of Appeals held that although the lower court could not use Rule 41(a) to toll the statute of limitations under federal law, the FELA statute of limitations could be equitably tolled. The court specifically held that the time period from 2002 to 2005 was tolled (when the suit was first filed and dismissed for improper venue in Virginia). In addition, the court held that the time from when the case was dismissed for improper venue and re-filed in North Carolina was also tolled. The court also held that the FELA statute of limitations was equitably tolled while the plaintiff's action was pending in North Carolina.

The court based its decision on *Burnett v. New York Central R. Co.* In *Burnett* the court held that the FELA statute of limitations period may be extended beyond three years under appropriate circumstances. The court focused on the fact that 1) the order dismissing for improper venue was based upon defendant not raising a statute of limitation defense for the period between the dismissal and plaintiff re-filing the case; 2) that plaintiff had not sat on his rights, pointing out that

plaintiff's diagnosis of osteoarthritis was in 2001 and that plaintiff filed his claim in 2002; 3) defendant had delayed the resolution of this matter by filing its motions on the eve of trial; and 4) the deposition testimony relied upon by defendant to establish that plaintiff's injuries had accrued in the 1980s was based upon deposition testimony taken in Virginia and Virginia rules state that deposition testimony cannot be used to support a summary judgment motion or used to attack the lawsuit itself.

The U.S. District Court In New Jersey Preserves The Possibility Of Impeachment Regarding RRB Benefits And Testimony

In *Doyle v. New Jersey Transit Rail Operations, Inc.*, 2008 WL 4755735 (D.N.J. Oct. 29, 2008), plaintiff brought an FELA action against New Jersey Transit Rail Operations Inc., ("NJ Transit") based upon injuries she suffered from an alleged assault by a passenger. Plaintiff had alleged that NJ Transit had acted negligently in failing to provide adequate equipment, training and warning on how to handle a disgruntled passenger.

Plaintiff moved to preclude defendant from introducing evidence that plaintiff had received benefits from the Railroad Retirement Board. Plaintiff stated that testimony regarding the receipt of collateral source insurance benefits involved a substantial likelihood of prejudicial impact.

The court stated, however, that defendant may introduce testimony of a collateral source when offered to directly contradict a statement made by plaintiff. The court added that the federal courts have permitted inquiry into collateral source benefits when plaintiff makes specific references to collateral source payments on direct examination on matters affecting the credibility of the witness. For example, if plaintiff testified that she was inclined to return to work early as a result of financial difficulties, defendant had the right to ask plaintiff on cross examination whether she had received financial assistance in order to challenge the credibility of his assertion.

[Goldberg Segalla LLP](#) is a Best Practices law firm¹ with offices in Pennsylvania (Philadelphia); New York (Buffalo, Syracuse, Albany, Manhattan, Rochester, White Plains, and Long Island); New Jersey (Princeton); and Connecticut (Hartford).

Newsletter Editor

John J. Jablonski

Contributing Authors

**Toni L. Frain
John J. Jablonski
JooHong Park
Richard T. Saraf
Thomas F. Segalla
Joseph J. Welter**

PHILADELPHIA

1700 Market Street / Suite 1418, Philadelphia, Pennsylvania 19103-3907
Telephone: 267.519.6800 Fax: 267.519.6801

PRINCETON

301 Carnegie Center Drive / Suite 101, Princeton, New Jersey 08540-6227
Telephone: 609.986.1300 Fax: 609.986.1301

HARTFORD

Blue Back Square, 65 Memorial Road / Suite 340
West Hartford, Connecticut 06107-2434
Telephone: 860.760.8400 Fax: 860.760.8401

LONG ISLAND

200 Old Country Road / Suite 210, Mineola, New York 11501-4293
Telephone: 516.281.9800 Fax: 516.281.9801

BUFFALO

665 Main Street / Suite 400, Buffalo, New York 14203-1425
Telephone: 716.566.5400 Fax: 716.566.5401

NEW YORK

111 John Street / Suite 800, New York, New York 10038-3002
Telephone: 646.253.5400 Fax: 646.253.5500

ALBANY

8 Southwoods Blvd. / Suite 300, Albany, New York 12211-2364
Telephone: 518.463.5400 Fax: 518.463.5420

WHITE PLAINS

170 Hamilton Avenue / Suite 203, White Plains, New York 10601-1717
Telephone: 914.798.5400 Fax: 914.798.5401

ROCHESTER

2 State Street / Suite 805, Rochester, New York 14614-1342
Telephone: 585.295.5400 Fax: 585.295.8300

SYRACUSE

5789 Widewaters Parkway, Syracuse, New York 13214-1855
Telephone: 315.413.5400 Fax: 315.413.5401

EUROPE

We are affiliated with:

Studio Legale Casini, C.so di Porta Romana, 63 20121 Milano, Italy
Telephone: 011-39-02-54113609 Fax: 011-39-02-54116314

Via M. Coppino, 273, 55049 Viareggio, Italy
Telephone: 011-39-05-84388797 Fax: 011-39-05-84388798

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