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## CaseWatch: Railroad Litigation

Railroad Litigation

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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:

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### **District Court Holds That FELA Choice Of Forum Is Not A “Right” And Grants Railroad’s Transfer Of Venue Motion**

In *Potrykus v. CSX Transp., Inc.*, 2009 WL 466573 (E.D.Pa. Feb. 25, 2009), plaintiff brought a repetitive stress claim under the FELA. Plaintiff alleged that he had worked in Walbridge, Ohio and was exposed to harmful cumulative trauma as a result of ballast, even though plaintiff filed his lawsuit in Pennsylvania. CSXT filed a motion to have the case transferred to the Northern District of Ohio.

CSXT argued that since plaintiff worked primarily in the Northern District of Ohio and that the known witnesses reside in or near the Northern District of Ohio, the transfer of the case to the Northern District was appropriate. Plaintiff argued that because the case was brought under the FELA, plaintiff’s choice of forum was entitled to special deference despite his lack of ties to the Eastern District of Pennsylvania.

The court agreed with CSXT. The court rejected plaintiff’s assertion that under the FELA, plaintiff’s choice of venue is entitled to great deference. In reaching its decision, the court cited plaintiff’s complete lack of ties to the Eastern District of Pennsylvania and witnesses in Ohio being beyond the subpoena power of the district court located in Pennsylvania.

## Release Round Up

In the context of railroad litigation, the issues regarding releases, such as their applicability and the language contained within them are of great interest to both the courts and the litigating parties. Two cases, *Babbitt v. Norfolk & Western Railway Co.*, 104 F.3d 89 (6th Cir. 1997) and *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3d Cir. 1998) are often cited by courts when determining whether a plaintiff's claim is barred by a release previously executed with a railroad employer. A discussion of *Wicker* and *Babbitt* was published previously in our December 2006 newsletter. In short, *Babbitt* stands for the rule that the FELA bars a release as void unless the release was intended to resolve a claim of liability for the “**specific injuries**” in controversy. *Wicker* on the other hand stands for the rule that the FELA permits a release that covers a “**known risk**”, even if the specific injury was not known at the time the release was executed. Below are two recent cases applying and distinguishing the *Babbitt* and *Wicker* decisions.

In *Daniels v. Union Pacific R. Co.*, 2009 WL 605372 (Ill.App. 1 Dist. Mar. 9, 2009), plaintiff brought an FELA action against Union Pacific alleging multiple injuries. Plaintiff alleged a traumatic injury to his back in 2007 and also a repetitive occupational injury to his back. Plaintiff settled a 1995 back injury claim and signed a release in 1997. Plaintiff released all claims and liabilities of every kind, “including claims for injuries which are unknown... at the present time, arising out of an accident on or about the 4th day of August, 1995.” The trial court granted defendant's motion to dismiss plaintiff's complaint based upon a prior release. Plaintiff appealed the judgment stating the language of the release does not bar the claims on the current action.

The appellate court applied the standard in the *Wicker* case and held that the FELA permits the release of known risks of future injuries or conditions, and held that plaintiff's 2007 trauma claim and post-release occupational injuries were not barred by the release. The court did hold, however, that the pre-release occupational injury claim was barred. The court held that a release to bar a subsequent FELA claim must be related to a specific instance of disputed liability and as such, a release drafted in 1997 could not have addressed plaintiff's 2007 injuries. In addition, the court stated that *Wicker's* holding, which permits releases of **known risks**, was not applicable because intent of the parties is an essential element and there was no way the parties in 1997 could have contemplated a new traumatic injury in 2007.

The court stated that plaintiff's second cause of action, an occupational injury claim spanning from 1973 to 2007 could be partially barred. Specifically, the time period from 1973 to 1997 was barred since the alleged injuries during that time period were known at the time of the signing of the release.

In *Ratliff v. Norfolk Southern Ry. Co.*, 2009 WL 649268 (W.Va. Mar. 12, 2009), plaintiff as executrix, brought a claim under the FELA for the death of her husband by mesothelioma. Previously, the lower court granted summary judgment for Norfolk Southern on the basis of a release executed by decedent in connection with a voluntary separation program. Plaintiff appealed stating that the release violated the FELA since the statute prohibits employers from exempting themselves from FELA liability. The court held that decedent's release was executed in the context of a voluntary separation program as opposed to being executed in compromise of a claimed liability. In other words, the agreement must have reflected a specific bargained for

settlement for mesothelioma in order to be valid. As a result, the court reversed the lower court's finding of summary judgment.

The court analyzed both *Babbitt* and *Wicker*. The court interpreted *Babbitt* for the proposition that a release is valid under the FELA, if the release settles a specific injury and was not an attempt by the railroad to simply escape liability. The court interpreted *Wicker* as holding that a release does not violate the FELA, provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed. Therefore, claims relating to unknown risks do not constitute controversies and could not be waived under the FELA.

The *Ratliff* court interpreted yet another distinction between the *Babbitt* and *Wicker* decisions, beyond "specific injury" (*Babbitt*) and "known risk" (*Wicker*). The court held that *Babbitt* applies to general releases signed in connection with a voluntary separation, while *Wicker* applies to general releases signed in the context of settling an FELA claim.

The court held that a *Wicker* type employee is negotiating an FELA claim and, therefore, a release does not violate the FELA so long as the risk released was one known to the parties and was a risk the employee intended to release. On the other hand, a *Babbitt* type employee is not negotiating the settlement of a claim, and is not engaged in a controversy as to liability.

Thus, the court held that the lower court mistakenly placed the decedent in the *Wicker* category. Since the court believed that this decedent fell into the *Babbitt* category (separation release), and there was no evidence that the release was executed as a part of a settlement for a specific injury, i.e. mesothelioma, the release was void under the FELA.

### **Georgia Appellate Court Allows Plaintiff To Lie About Bankruptcy And Avoid Dismissal Of His FELA Claim**

In *CSX Transp., Inc. v. Howell*, 2009 WL 619584 (Ga.App. Mar. 12, 2009), plaintiff brought an FELA action against CSXT for injuries he allegedly suffered during the course of his employment with CSXT in November of 2001. Plaintiff filed for bankruptcy in October 2002. In his bankruptcy filing, he failed to identify his FELA claim. Plaintiff received a "no asset" discharge through bankruptcy on January 2003, resulting in his creditors receiving nothing.

After CSXT learned of plaintiff's bankruptcy, it filed a motion for summary judgment, arguing that under Georgia law plaintiff was judicially estopped from pursuing his FELA claim because he did not disclose the claim in his bankruptcy proceeding.

In response, plaintiff successfully petitioned the bankruptcy court to reopen his case to amend his filings to reflect his pending FELA lawsuit. The lower court denied CSXT's motion for summary judgment based on state law.

CSXT moved for reconsideration. CSXT argued that federal, not state law governed the issue of whether plaintiff was judicially estopped from pursuing his FELA claim. The trial court denied CSXT's motion for reconsideration.

On appeal, the appellate court held that generally FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal. Since the doctrine of judicial estoppel, however, is a hybrid between substance and process, the appellate court agreed with the trial court and held that judicial estoppel is procedural in nature and thus applied the law of the forum, i.e. Georgia state law. As a result, the trial court's rulings denying summary judgment were affirmed.

### **ICCTA Preemption Update: Second Circuit Reverses "Bad" ICCTA Ruling**

Opinions relating to preemption involving the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et. seq.* ("ICCTA") are rare and challenging. For example, after *Island Park, LLC v. CSX Transp.*, 2007 WL 1851784 N.D.N.Y. Jun. 26, 2007, we reported that "the district court failed to follow the [proper] analysis and simply mis-analyzed the issues. *See Case Watch: Railroad Litigation Jun/Sep 2007*, pp. 5-6. The Second Circuit has reversed this prior bad ruling by the district court. 559 F.3d 96 (2nd Cir. 2009).

In 2007, the district court in *Island Park, LLC v. CSX Transp.*, 2007 WL 1851784 (N.D.N.Y. Jun. 26, 2007) had grossly misapplied ICCTA preemption to rule in favor of a sympathetic plaintiff. The case involved a farm/nursery that had property on both sides of railroad tracks. The farm/nursery used a private crossing, wholly situated on its property to cross the tracks to access 400 acres of land. The public did not use the crossing. The crossing has no automated grade crossing warnings. In 1978, Conrail made improvements to the tracks at the private crossing. Island Park sued to have its private crossing restored.

In early 2005, the New York State Department of Transportation ("NYSDOT") advised Island Park that it was closing the crossing. The NYSDOT commenced an administrative proceeding to determine if the crossing should be closed. A judge held four days of public hearings and recommended that the crossing be closed. Among many factors considered, the judge noted that other points of access existed and were safer for crossing the tracks to access the fields on the other side.

Island Park argued that New York's railroad law (used by the NYSDOT to close the crossing) was preempted by the ICCTA. The railroad defendants responded that: 1) plaintiff lacked standing and was unable to invoke preemption; 2) railroad crossings are not expressly governed by ICCTA; 3) the purpose of the ICCTA does not implicate the closure of crossings and, therefore, New York's applicable railroad law is not preempted; and 4) there is a strong policy against preemption of local laws regulating public health and welfare. The district court analyzed the preemption issue, concluding that the linchpin was whether the local law involved predictable, generally applicable regulations and cited to *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (holding that Vermont's post construction enforcement of permits voluntarily obtained by the railroad were preempted). The district court also held that invoking the police power was insufficient to defeat ICCTA preemption.

The Second Circuit has corrected the district court's ruling by reversing the district court and directing summary judgment in favor of the railroad, holding that: 1) the state's decision to

terminate the owner's use of the crossing was not preempted by federal law; 2) the state did not violate the owner's due process rights; and 3) the owner's federal takings claim was not ripe.

The appellate court held that term rail "transportation" did not encompass the closure of this private rail crossing. The court held that rail transportation did include property related to the movement of passengers or property by rail and a rail crossing did constitute an improvement of railroad tracks that allows vehicles, equipment, and persons to traverse the tracks. However, the court held that it could not conclude that all state actions related to a railroad crossing are preempted. The court held that the questions which must be answered are: what does the state seek to regulate and does the proposed regulation burden rail transportation?

The court held that if it adopted a definition of rail transportation for preemption purposes that includes the movement of people and property across railroad tracks, then any entity – an automobile, bicycle or even a pedestrian – passing over the crossing would arguably be beyond the reach of state regulatory authority.

It was found that Island Park could not show that the state regulation at issue interferes with or burden rail operations. In distinguishing *Green Mountain R.R. Corp.*, the appellate court held that in *Green Mountain R.R. Corp.*, the proposed trans-loading and storage facilities were integral to the railroad's operation, and thus the permit process necessarily interfered with Green Mountain's ability to construct facilities and conduct economic activities. In the instant case no such operational inference existed.

### **Railroad's Third-Party Claim Against Seat Manufacturer Is Preempted By LIA**

In *Stevenson v. Union Pacific R. Co.*, 2009 WL 129916 (E.D. Ark. Jan. 20, 2009), plaintiff brought an FELA action and an LIA action against Union Pacific alleging that while riding in a locomotive, his seat broke and dropped, causing him serious injuries.

Union Pacific filed a third-party complaint against Seats Incorporated ("Seats Inc."), the manufacturer that sold the seat to Union Pacific. Union Pacific sought contribution and indemnification from Seats Inc., based on theories of breach of warranty, negligence and strict liability in the event that Union Pacific was found liable to plaintiff.

Seats Inc., filed a motion to dismiss on the grounds that Union Pacific's claims were preempted by the LIA. Seats Inc., relied upon *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926), in which the Supreme Court held that Congress in passing the Locomotive Boiler Inspection Act intended that the Act occupy the entire field of regulating locomotive equipment, so as to preclude state legislation. Seats Inc., argued that the preemption was broad, extending "to the design, the construction, and the material of every part of the locomotive... and of all appurtenances." *Id.*

The court held that the seat was an appurtenance and that placement of the seat was governed by federal regulation. Union Pacific countered that it was not seeking to impose a state law standard or to require different or additional equipment on the locomotive. The court held that the FELA does not apply to manufacturers, and thus plaintiff could not bring an action against Seats Inc., under the LIA or the FELA. The court further held that Union Pacific's contribution and

indemnification claims were based upon plaintiff's underlying claim. Therefore, Union Pacific could only recover from Seats Inc., if plaintiff could have recovered from Seats Inc. Since plaintiff can not recover from Seats Inc., neither could Union Pacific. As a result, Seats Inc.'s motion to dismiss was granted.

### **Preemption Of Ballast Claim Affirmed By Sixth Circuit With Dissenting Opinion**

In *Nickels v. Grand Trunk Western R.R., Inc.*, 560 F.3d 426 (6th Cir. 2009), plaintiff brought an action under the FELA for alleged injuries sustained while walking on oversized track ballast. The lower court held that the Federal Railway Safety Act ("FRSA") regulations covered the issues of track construction, and thus precluded plaintiff's negligence claim. The Sixth Circuit court agreed and affirmed the railroad's summary judgment motion.

Plaintiff claimed that the railroad had failed to provide him with a safe place to work by using large mainline ballast instead of smaller yard ballast. The railroad moved for summary judgment arguing that the FRSA precluded the plaintiff's FELA claims. The lower court granted the railroad's summary judgment motion on the basis that allowing plaintiff to continue with his FELA claim would undermine the FRSA's express intent to achieve national uniformity in railroad safety regulations. Upon appeal, the Sixth Circuit held that that an FELA claim was precluded if the same claim would be preempted by the FRSA in a state law negligence action.

The circuit court held that uniformity required by the FRSA could only be achieved if the federal safety regulations were applied similarly to an FELA negligence claim and a non-railroad employee's state law negligence claim. The court added that dissimilar treatment of such claims would make the regulations under the FRSA virtually meaningless.

It must be noted that the dissent argued that plaintiff's FELA claims were not categorically precluded by the FRSA. The dissent believed that under the Supreme Court's FRSA preemption analysis, the FRSA regulations that require adequate physical support for rail lines do not sufficiently imply that a railroad may use any grade of ballast, no matter the risk to the employee who must walk on the ballast.

The dissent stated that the Supreme Court in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) did not imply that physically supporting a rail line may be obtained without regard to harm to an employee. The dissent interpreted 49 C.F.R. § 213.103 as regulations generally requiring adequate support for the trains, and not covering the nature of a walking surface. The dissent further believed that nothing in the ballast supporting regulations contemplated stripping away any negligence with respect to a railroad's construction or maintenance of ballast. Finally, the dissent stated that the FRSA regulation was a floor that guaranteed a minimum level of safety and that while compliance with the FRSA regulation may be evidence of due care, it did not preclude the finding of negligence if a reasonable railroad could have taken additional precautions to prevent injury to its employees.

## **Attempt To Remove Jitney Driver's Claims To Federal Court Fails Based On FELA's Non-Removal Provision**

In *Fritchman v. Norfolk Southern Railway Co.*, 2009 WL 722301 (E.D.Pa. Mar. 17, 2009), plaintiff, a jitney driver who drove Norfolk Southern employees around the Morrisville Rail Yard, was injured when plaintiff's van collided with a parked trailer. Plaintiff was not directly employed by the railroad, but nevertheless argued he was a defacto employee subject to the FELA. Defendant moved to remove the case to federal court on the basis that there was a complete diversity of citizenship and the amount in controversy exceeded \$75,000.

The court held that there was no basis in fact or in law for defendant's removal. The court cited the statute and stated that "[a] civil action in any State court against a railroad ..., arising under [the FELA], may not be removed to any district court of the United States." 28 U.S.C. § 1445(a). The court also rejected defendant's request for an exception from the statute. Defendant argued that plaintiff's claim under the FELA will ultimately fail. The court framed defendant's request as "assume jurisdiction now and justify it later, once discovery shows that plaintiff's FELA claim fails." The court rejected this argument, denying removal.

## **District Of Columbia's Exclusive Jurisdiction To Determine Successor Liability Restrictions Of The Rail Reorganization Act Of 1973 Recognized After Motion For Reconsideration**

In *Consolidated Rail Corp. v. Ritter*, 593 F.Supp.2d 107 (D.D.C. 2009), Conrail brought a suit against former employees of a predecessor company, Erie Lackawanna, who had been exposed to asbestos, seeking a declaratory judgment that the Regional Rail Reorganization Act proscribed successor liability for personal injury claims stemming from conduct prior to Conrail's formation. The court initially granted defendants' motion to dismiss for lack of jurisdiction. However, the district court granted Conrail's motion for reconsideration, and reversed its prior decision.

The court held that the Rail Act provided that original and exclusive jurisdiction of the District Court for the District of Columbia shall include any action to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 743 of the Rail Act. The court added that the task of interpreting section 743(b)(2)'s lien and encumbrance language could not be swallowed or dismissed by an inquiry into the court's jurisdiction. Therefore, the court held that it did have jurisdiction and granted Conrail's motion after reconsideration.

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