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Commercial Transportation: A Two-Year Survey

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I. INTRODUCTION

Commercial transportation involves all of the significant forms of passenger and freight transportation across the United States. This Article surveys significant judicial and legislative developments in Georgia commercial-transportation law during the period from June 1, 2017 through May 31, 2019.¹

Three of the areas discussed here—commercial motor vehicles, aviation, and rail—are subject to heavy federal regulation due to their

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1. This Article covers an expanded survey period because no survey on this topic appeared in the seventieth volume of the Mercer Law Review. For an analysis of commercial-transportation law from the previous survey period, see Stephen G. Lowry et al., *Commercial Transportation, Annual Survey of Georgia Law*, 69 MERCER L. REV. 41 (2017).

large effects on interstate commerce. Accordingly, motor-carrier and railroad law primarily saw developments pertaining to state procedure and in the interactions between state and federal law, while state aviation law primarily focused on Georgia's efforts both to regulate and facilitate the development of unmanned aircraft and commercial space flight. This Article also discusses the nascent industry in "last mile" rentals of shareable dockless electric scooters and electric bicycles. These businesses have exploded onto the scene just in the last two or three years and have sent local and state lawmakers rushing to address the issues they present. Finally, this Article concludes with a brief section on two more areas being "disrupted" by Silicon Valley entrepreneurs: passenger transportation for hire, which saw a useful appellate opinion on when an individual's automobile insurance may stop applying to trips with paying passengers, and autonomous-vehicle technology.

II. TRUCKING AND COMMERCIAL MOTOR VEHICLES

A. Venue for Motor Carrier Litigation

In *Blakemore v. Dirt Movers, Inc.*,² the Georgia Court of Appeals considered the competing venue provisions under the Georgia Business Corporation Code, O.C.G.A. § 14-2-510(b),³ and the Georgia Motor Carrier Act, O.C.G.A. § 40-1-117(b).⁴ In an action against a motor-carrier defendant, the Georgia Motor Carrier Act makes venue proper in the county where the tort occurred.⁵ Pursuant to the Georgia Business Corporation Code, venue in a tort action against a domestic corporate defendant likewise is proper where the tort occurred, but if the defendant does not have an office in that county, it has the right to remove the action to the county where it maintains its principal place of business.⁶

In *Blakemore*, the plaintiff filed a wrongful death action against Dirt Movers, Dirt Movers's driver, and Dirt Movers's liability insurance carrier in Bibb County State Court following the death of the plaintiff's daughter in a motor vehicle accident that occurred in Bibb County. All parties agreed that Dirt Movers was a Georgia corporation registered with the Federal Motor Carrier Safety Administration that maintained its principal place of business and registered agent in Jeff Davis

2. 344 Ga. App. 238, 809 S.E.2d 827 (2018).

3. O.C.G.A. § 14-2-510(b) (2019).

4. O.C.G.A. § 40-1-117(b) (2019).

5. *Id.*

6. O.C.G.A. § 14-2-510(b)(4) (2019).

County. The plaintiff's complaint asserted that because the accident happened in Bibb County, venue was proper in Bibb County under the Georgia Motor Carrier Act. Dirt Movers filed a notice of removal to Jeff Davis County based on the Georgia Business Corporation Code. The trial court denied the plaintiff's motion to remand the case back to Bibb County, but granted the plaintiff a certificate of immediate review.⁷

On review, the Georgia Court of Appeals noted that the Georgia Business Corporation Code's venue provision limits a corporate defendant's right of removal to those cases where venue is based solely on O.C.G.A. § 14-2-510(b)(4), which provides:

In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business.⁸

"Therefore, under the plain language of O.C.G.A. § 14-2-510(b)(4), a corporation cannot remove an action to the county where its principal place of business is located if there is any basis for venue other than O.C.G.A. § 14-2-510(b)(4)."⁹ Here, although the plaintiff filed the action in the county where the cause of action arose, she based venue on the provisions of O.C.G.A. § 40-1-117(b), not solely on the similar grounds in O.C.G.A. § 14-2-510(b)(4).¹⁰ Because O.C.G.A. § 40-1-117(b) provided an independent basis for venue in Bibb County, the court held that venue was proper in Bibb County and the defendant could not remove the case to Jeff Davis County.¹¹

B. Direct Actions Against Motor Carriers' Insurers

The appellate courts rendered two important decisions in this survey period interpreting Georgia's direct-action statutes, O.C.G.A. §§ 40-1-112¹² and 40-2-140,¹³ which permit the plaintiff to name a motor carrier's insurance provider as a defendant in an action against the motor carrier.¹⁴

7. *Blakemore*, 344 Ga. App. at 238–39, 809 S.E.2d at 828–29.

8. *Id.* at 240, 809 S.E.2d at 829 (emphasis omitted).

9. *Id.* at 241–42, 809 S.E.2d at 830.

10. *Id.* at 242, 809 S.E.2d at 830–31.

11. *Id.* at 243, 809 S.E.2d at 831.

12. O.C.G.A. § 40-1-112 (2019).

13. O.C.G.A. § 40-2-140 (2019).

14. *See* RLI Ins. Co. v. Duncan, 345 Ga. App. 876, 815 S.E.2d 558 (2018); *see also* Reis v. OOIDA Risk Retention Grp., Inc., 303 Ga. 659, 814 S.E.2d 338 (2018).

In *RLI Insurance Company v. Duncan*,¹⁵ the Georgia Court of Appeals considered whether a motor carrier's excess insurance carrier could be named as a defendant under the direct-action statutes. Following a motor vehicle accident involving a tractor-trailer, the plaintiff sued the truck driver, the trucking company, and the trucking company's insurer, RLI Insurance Company. The defendant trucking company was self-insured up to \$750,000 but failed to register as self-insured. RLI Insurance filed a motion to dismiss, claiming it was an excess carrier and, therefore, should be dismissed. The trial court denied RLI's motion to dismiss because the defendant trucking company failed to register itself as self-insured and because, having issued the trucking company a surety bond, RLI was the company's primary insurer.¹⁶ The Georgia Court of Appeals reversed on interlocutory appeal.¹⁷

The court of appeals noted the existence of a long line of cases holding that the direct-action statutes do not authorize actions against an insured's excess insurer.¹⁸ Because statutes permitting a direct action against an insurance carrier are in derogation of the common law, the terms of those statutes are strictly construed.¹⁹ Also, O.C.G.A. § 40-1-112(b) allows a motor carrier to self-insure in lieu of obtaining an indemnity policy when the financial ability of the motor carrier warrants.²⁰ Even though the trucking company failed to register as self-insured, the court determined that the terms of the RLI insurance policy still only required RLI to pay for damages in excess of the trucking company's self-insured limits, so RLI only provided excess insurance and could not be added as a named defendant to the lawsuit.²¹

Finally, the Georgia Supreme Court considered whether provisions of the federal Liability Risk Retention Act (LRRRA)²² preempted Georgia's direct-action statutes so as to prevent risk retention groups from being named as parties in actions against their insureds.²³ The defendant motor carrier in *Reis v. OOIDA Risk Retention Group, Inc.* was insured through OOIDA, a foreign liability risk retention group created

15. 345 Ga. App. 876, 815 S.E.2d 558 (2018).

16. *Id.* at 876–77, 815 S.E.2d at 559–60.

17. *Id.*

18. *Id.* at 878, 815 S.E.2d at 560.

19. *Id.*

20. *Id.* at 879, 815 S.E.2d at 561.

21. *Id.*

22. 15 U.S.C. §§ 3901–3906 (2019).

23. *Reis*, 303 Ga. 659, 814 S.E.2d 338.

pursuant to the guidelines of the LRRRA. The plaintiffs filed their lawsuit against the defendant driver, the corporate motor carrier, and OOIDA as the motor carrier's insurer. OOIDA filed a motion for summary judgment arguing the direct-action statutes did not apply for two reasons. First, OOIDA argued the direct-action statutes did not contemplate suits against risk retention groups. Second, OOIDA argued the LRRRA preempted Georgia's direct-action statutes.²⁴

The trial court concluded that the LRRRA preempted the direct-action statutes and, therefore, OOIDA could not be named as a defendant.²⁵ The Georgia Supreme Court agreed.²⁶ The court explained that the federal legislation authorizing the creation of risk retention groups, 15 U.S.C. § 3902(a)(1), specifically states that "a risk retention group is exempt from any State law . . . to the extent that such law . . . would make unlawful, or regulate, directly or indirectly, the operation of a risk retention group . . ."²⁷ Essentially, the LRRRA provides that risk retention groups are exempt from state laws relating to the operation of the risk retention groups.²⁸ States are specifically allowed to enforce their own financial-responsibility laws on out-of-state risk retention groups to demand financial soundness or solvency, and the plaintiffs urged that the direct-action statutes are essentially financial-responsibility laws.²⁹ The supreme court, however, determined that, because the direct-action statutes would subject foreign risk retention groups to lawsuits, liability, and damages, they would directly and indirectly regulate the groups' operations.³⁰ Therefore, the direct-action statutes are preempted by the LRRRA, and risk retention groups organized through the LRRRA cannot be named as direct-action defendants pursuant to the Georgia Motor Carrier Act.³¹

III. AVIATION

The general landscape of aviation law is, for the most part, shaped and determined by federal regulations³² and, in some cases,

24. *Id.* at 660, 814 S.E.2d at 339–40.

25. *Id.* at 660, 814 S.E.2d at 340.

26. *Id.* at 659, 814 S.E.2d at 339.

27. *Id.* at 662, 814 S.E.2d at 341 (quoting 15 U.S.C. § 3902(a)(1) (2019)).

28. *Id.* at 662–63, 814 S.E.2d at 341.

29. *Id.* at 663–64, 814 S.E.2d at 341–42.

30. *Id.* at 666, 814 S.E.2d at 343.

31. *Id.*

32. ROBIN C. LARNER, 15 GA. JUR. § 29:25 (2019) ("Federal aviation regulations have been promulgated to regulate virtually every aspect of aviation in the United States;

international treaties.³³ In fact, the stated intention of Georgia's aviation statutes is "to coincide with the policies, principles, and practices established by the Federal Aviation Act of 1958 and all amendments thereto."³⁴ As a result, federal courts determine much of the case law regulating commercial aviation,³⁵ as further reflected by the recent Georgia cases discussed below. However, developments in legislation have begun to shape the legal aviation landscape in Georgia.

A. Case Law

In *Avery v. Paulding County Airport Authority*,³⁶ the Georgia Court of Appeals addressed four appeals from three related declaratory-judgment actions concerning commercial aviation.³⁷ The appeals all pertained to the Paulding County Airport Authority (PCAA) and its actions related to applying for a commercial "Airport Operating Certificate," one of the many requirements for commercial aviation imposed by the Federal Aviation Administration (FAA). Each of the underlying declaratory-judgment actions sought clarification as to whether the PCAA was authorized to submit the application to the FAA and whether consent from Paulding County was required to submit that application. The actions also challenged whether the PCAA had

these regulations are duly published in accordance with law in the Code of Federal Regulations, and they have the force of law.").

33. A United Nations treaty, the Montreal Convention, sets forth uniform rules for claims that arise out of incidents that occur during international air transportation. *See Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255, 1259 (11th Cir. 2002) ("[T]he Warsaw Convention is the exclusive mechanism of recovery for personal injuries suffered on board an aircraft or in the course of embarking or disembarking from an airplane."); *Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1360 (S.D. Fla. 2008) ("The Montreal Convention entered into force in the United States on November 4, 2003 and superseded [*sic*] the Warsaw Convention.").

34. O.C.G.A. § 6-2-1 (2019).

35. Georgia courts do, however, routinely analyze and consider federal aviation regulations when addressing aviation-related issues under state law. *See, e.g., Eagle Jets, LLC v. Atlanta Jet, Inc.*, 321 Ga. App. 386, 740 S.E.2d 439 (2013) (discussing whether the Certificate of Aircraft Registration required by the Federal Aviation Administration (FAA) constituted ownership of the aircraft for purposes of a contract dispute); *Sky King 101, LLC v. Thurmond*, 314 Ga. App. 377, 724 S.E.2d 412 (2012) (addressing FAA flight procedures and regulations followed by pilots when analyzing whether defendant air transportation company had "control" over a co-pilot sufficient to be considered his employer).

36. 343 Ga. App. 832, 808 S.E.2d 15 (2017).

37. *Id.* at 832, 808 S.E.2d at 17.

complied with the Georgia Open Meetings Act³⁸ in taking steps to obtain the certification.³⁹

The issues raised by the cases below significantly touched on commercial aviation, as both taxpayers and Paulding County argued that the PCAA's application to the FAA would "obligate the County in numerous respects to the funding and operation of a commercial airport."⁴⁰ Paulding County argued, *inter alia*, that it had "final decision-making authority on whether to seek a change in the scope of aviation services offered" and that PCAA lacked authority to seek the operating certificate from the FAA without approval and support from the county.⁴¹ However, all four appeals resulted from a dismissal by the trial court for failure to state a claim, rather than a decision directly analyzing the parties' obligations related to the FAA certification.⁴²

Specifically, the Georgia Court of Appeals held that the taxpayers' action alleging the PCAA violated the Open Meetings Act when making decisions related to the FAA application was not time-barred under O.C.G.A. § 50-14-1(b)(2),⁴³ and that the trial court erred in dismissing their claim on this basis.⁴⁴ However, the court of appeals held that the trial court properly dismissed the taxpayers' action seeking a declaratory judgment that the PCAA was not authorized to submit an application to the FAA on behalf of Paulding County, as they failed to "allege any uncertainty or insecurity as to their rights, status, or legal relations" in order to establish an "actual controversy" entitling them to declaratory relief.⁴⁵

Contrastingly, as to Paulding County's action seeking a similar declaration, that the PCAA lacked the authority to submit an application to the FAA to change the nature and scope of services at the airport, the appellate court held that the county's allegations sufficiently demonstrated an actual controversy for which declaratory relief is appropriate.⁴⁶ Essentially, the court of appeals held that Paulding County was in a different position than the taxpayers in that there was a dispute between Paulding County and the PCAA relating to

38. O.C.G.A. § 50-14-1 (2019).

39. *Avery*, 343 Ga. App. at 832, 834, 808 S.E.2d at 17–18.

40. *Id.* at 834, 808 S.E.2d at 19.

41. *Id.* at 837–38, 808 S.E.2d at 21.

42. *Id.* at 832, 808 S.E.2d at 18.

43. O.C.G.A. § 50-14-1(b)(2) (2019).

44. *Avery*, 343 Ga. App. at 841, 808 S.E.2d at 23.

45. *Id.* at 844–45, 808 S.E.2d at 24–25.

46. *Id.* at 845–46, 808 S.E.2d at 25–26.

their rights to submit and approve the FAA application.⁴⁷ Finally, the court of appeals determined that a private operator that had entered an agreement to be responsible for the commercial aviation and related development at the airport, like the taxpayers, had failed to establish a case or controversy sufficient to support a declaratory judgment action, in part because the private operator was not party to the dispute between Paulding County and the PCAA and the related authority to deal with the FAA regarding the airport's application.⁴⁸ While the court of appeals' opinion ultimately dealt with the issues raised by the trial court's dismissal for failure to state a claim and did not significantly affect commercial aviation law, it nevertheless is a useful illustration of the complexities of the aviation legal landscape.

B. Legislation

As referenced in the 2017 edition of this survey,⁴⁹ the Georgia General Assembly amended Georgia's statutory tort law to facilitate space flight activity and to limit the liability of space flight entities for injuries sustained by participants.⁵⁰ Effective July 1, 2017, the new statutory provisions define related terms⁵¹ and provide that any litigation or proceeding against a space flight entity pertaining to space flight activities will be governed by Georgia law.⁵² The statutory language defines "space flight entity" expansively and includes the following: persons conducting space flight activities and licensed as necessary by the FAA and the state of Georgia; manufacturers or suppliers of component parts of vehicles used in space flight activities; employees, officers, directors, owners, stockholders, members, managers, advisors, or partners of the entity, manufacturer, or supplier; owners or lessors of the real property on which space flight activities are conducted; and any state agency or local governmental unit having a contractual relationship with these entities or having jurisdiction in the territory in which space flight activities are conducted.⁵³ Space flight entities will not be civilly or criminally liable for a participant's injury arising out of the "inherent risks associated with any space flight activities," provided that the participant

47. *Id.* at 847, 808 S.E.2d at 27.

48. *Id.* at 848, 850, 808 S.E.2d at 27–28.

49. Lowry et al., *supra* note 1, at 50–51.

50. Ga. H.R. Bill 1, Reg. Sess., 2017 Ga. Laws 172 (codified at O.C.G.A. §§ 51-3-41–51-3-44 (2019)).

51. O.C.G.A. § 51-3-41 (2019).

52. O.C.G.A. § 51-3-44 (2019).

53. O.C.G.A. § 51-3-41(a)(12) (2019).

previously signed a statutorily specified “warning and agreement.”⁵⁴ The liability limitation does not apply to intentional acts or acts of gross negligence that proximately caused the injury, nor does it apply to breaches of contracts related to the use of real property or enforcement actions brought by the state or federal government.⁵⁵

The General Assembly’s legislation pertaining to unmanned aircraft systems, or drones, also went into effect as of July 1, 2017.⁵⁶ Pursuant to O.C.G.A. § 6-1-4(a), an “unmanned aircraft system” is defined as a “powered, aerial vehicle” that does not carry a human operator, does not require operation by a human from within or on the aircraft, can fly autonomously or be piloted remotely, and can be expendable or recoverable.⁵⁷ The new code section permits state agencies, counties, municipalities, and other political subdivisions to adopt an ordinance that authorizes or prohibits the launch or intentional landing of an unmanned aircraft system from or on their public property.⁵⁸ Counties, municipalities, and other political subdivisions of the state are not authorized, however, to adopt ordinances to provide or prohibit the launch or landing of drones on their property “with respect to the operation of an unmanned aircraft system for commercial purposes.”⁵⁹ The new code section also prevents counties, municipalities, and other political subdivisions from regulating the testing or operation of drones, except to the extent the regulations enforce ordinances in effect before April 1, 2017, or adopt FAA restrictions.⁶⁰

Finally, while not having the force of statutory or case law, Georgia Senate Resolution No. 296, filed March 5, 2019, recognized and commended the Georgia aerospace industry for “its significant beneficial impact to the people and economy of the State of Georgia,” noting that the aerospace industry comprises 800 companies employing 108,000 Georgians and has an economic impact of \$57.5 billion.⁶¹ The resolution demonstrates commercial aviation’s significant presence in Georgia and how that presence may continue to affect Georgia law and legislation.

54. O.C.G.A. § 51-3-42(a) (2019) (providing for limitations of liability of space flight entities); O.C.G.A. § 51-3-43 (2019) (specifying the language required for a valid warning and agreement sufficient to limit a space flight entity’s liability).

55. O.C.G.A. § 51-3-42(b) (2019).

56. Ga. H.R. Bill 481, Reg. Sess., 2017 Ga. Laws 268 (codified at O.C.G.A. § 6-1-4 (2017)); *see* Lowry et al., *supra* note 1, at 51–52.

57. O.C.G.A. § 6-1-4(a) (2019).

58. O.C.G.A. § 6-1-4(b)–(c) (2019).

59. O.C.G.A. § 6-1-4(b).

60. *Id.*

61. Ga. S. Res. 296, Reg. Sess. (2019).

IV. RAILROADS

As noted by the Georgia Court of Appeals, “Railroads are among the most heavily regulated American industries.”⁶² Federal legislation, such as the Federal Railroad Safety Act (FRSA),⁶³ comprises the vast majority of this regulation.⁶⁴ Moreover, any additional or more stringent state or local law or regulation related to railroad safety or security will typically be preempted by federal law.⁶⁵ Accordingly, the General Assembly has not enacted recent legislation that regulates commercial rail transportation. However, a recent Georgia case that touches upon railroads and the commercial-rail industry demonstrates the interplay between federal regulations and preemption, while highlighting those areas still decided by state law.

In *Fox v. Norfolk Southern Corp.*,⁶⁶ a landowner (Fox) asserted claims against Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively referred to herein as Norfolk Southern) for inverse condemnation and trespass related to a 100-foot wide right-of-way owned by Norfolk Southern. Specifically, Fox owned 160 acres in Gordon County that were bisected by active railroad tracks operated by Norfolk Southern. To access portions of his land, Fox had to travel over the tracks via a private railroad crossing.⁶⁷

In 2007, Norfolk Southern developed plans to construct a new passing side track, which would necessitate an additional forty feet of width to the existing right-of-way. Fox declined to sell the additional portions of his land unless Norfolk Southern would guarantee that it would not block his private railroad crossing for more than thirty minutes at a time. Rather than make the guarantee and purchase additional land, Norfolk Southern altered its plans to fit the passing track within the existing, 100-foot wide right-of-way. Following the construction, Fox alleged that trains now blocked his private crossing for up to twenty-four hours at a time, preventing him from using a portion of his land. Fox also alleged the original deed and the pattern of use of the right-of-way was for only forty-five feet and, therefore, the

62. *Midville River Tract, LLC v. Cent. of Ga. R.R. Co.*, 339 Ga. App. 546, 548, 794 S.E.2d 192, 194 (2016) (quoting *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 174 (3d Cir. 2013)).

63. 49 U.S.C. §§ 20101–168 (2019).

64. *See Midville River Tract*, 339 Ga. App. at 548, 794 S.E.2d at 194.

65. *Id.* (citing FRSA, 49 U.S.C. § 20106(a)(2) (2019)).

66. 342 Ga. App. 38, 802 S.E.2d 319 (2017).

67. *Id.* at 38–40, 802 S.E.2d at 322–23.

new construction of passing track that extended past this distance amounted to inverse condemnation of his land.⁶⁸

Demonstrating the interplay between federal regulations and state-level commercial railroad disputes, Norfolk Southern asserted that Fox's claims were preempted by federal law under the Interstate Commerce Commission Termination Act of 1995 (ICCTA)⁶⁹ and removed the case to federal court.⁷⁰ ICCTA provides that the Surface Transportation Board (STB) has exclusive jurisdiction over legal remedies related to "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks . . ."⁷¹ However, the federal district court determined that Fox's claims for the taking of his property and required compensation were not preempted because "the issue of whether [the Railroad] wrongfully took [Fox's] property does not relate to the regulation of the Railroad or affect the operation and use of the Railroad."⁷² Noting that Norfolk Southern could still operate the side track, and would only have to compensate Fox, the federal court remanded Fox's claims to state court.⁷³ After remand, the state court determined that Fox could not prevail on his claims because Norfolk Southern's construction remained within the 100-foot right-of-way and because his claims were preempted by ICCTA.⁷⁴ Fox appealed from the grant of summary judgment to Norfolk Southern.⁷⁵

As to the parties' dispute as to the width of the original right-of-way, the court of appeals held that Fox's claims were foreclosed by O.C.G.A. § 46-8-100,⁷⁶ a statute enacted in 2008 which provided that any disputes related to the acquisition by a railroad company of property that occurred prior to 1913 would be conclusively determined on the official maps the railroad filed with the Interstate Commerce Commission pursuant to the Railroad Valuation Act of March 1, 1913.⁷⁷ As the map clearly reflected a 100-foot right-of-way, the court of appeals rejected Fox's claims for taking related to his property falling within

68. *Id.* at 40–41, 802 S.E.2d at 324.

69. 49 U.S.C. § 10101–62 (2019).

70. *Fox*, 342 Ga. App. at 41, 802 S.E.2d at 324.

71. 49 U.S.C. § 10501(b)(2) (2019).

72. *Fox*, 342 Ga. App. at 42, 802 S.E.2d at 324.

73. *Id.*

74. *Id.* at 42, 802 S.E.2d at 324–25.

75. *Id.* at 42–43, 802 S.E.2d at 325.

76. O.C.G.A. § 46-8-100 (2019).

77. *Fox*, 342 Ga. App. at 46–47, 802 S.E.2d at 327–28.

that area.⁷⁸ The court also rejected Fox's claims that Norfolk Southern had admitted it only had a 45-foot right-of-way in discovery and that, in any case, he had adversely possessed the remainder of the 100-foot right-of-way.⁷⁹

However, the Georgia Court of Appeals disagreed with the trial court's determination that Fox's claims as to the portion of his land on the other side of the tracks were preempted by ICCTA.⁸⁰ First, the court noted that whether the STB has exclusive jurisdiction by operation of ICCTA is informed by STB decisions regarding preemption.⁸¹ Specifically, the STB set forth a framework for analyzing potential preemption issues by state and local laws or claims, depending on whether the preemption was categorical or as applied.⁸² Noting, *inter alia*, that Fox's claims involved a "traditional state law cause of action . . . not directed . . . at railroads or their property," the court of appeals determined that the dispute fell within the "as applied" analysis.⁸³ Accordingly, the court analyzed whether Fox's claims "would have the effect of unreasonably burdening or interfering with rail transportation."⁸⁴

Determining that Norfolk Southern had not offered any argument or evidence that Fox's claims would burden rail transportation, the court of appeals determined that Fox's claims were not preempted by ICCTA.⁸⁵ Accordingly, the court reversed the grant of summary judgment as to Fox's inverse condemnation claims for the portion of his land on the other side of the tracks.⁸⁶

The *Fox* decision demonstrates, once again, that litigation against a railroad company, and evaluation of federal preemption issues, will typically be highly fact-specific and turn on the specific issue addressed by a federal regulation and the specific allegations made in the state action.

78. *Id.* at 48, 802 S.E.2d at 328.

79. *Id.* at 48–50, 802 S.E.2d at 329.

80. *Id.* at 52, 802 S.E.2d at 331.

81. *Id.* at 55, 802 S.E.2d at 333.

82. *See* CSX Transp., Inc.—Pet. for Decl. Order, S.T.B. Finance Docket No. 34662, 2005 STB LEXIS 675, at *2–3 (S.T.B. May 3, 2005); *see also* *Wedemeyer v. CSX Transp.*, 850 F.3d 889, 894–95 (7th Cir. 2017) (describing the STB's preemption analysis).

83. *Fox*, 342 Ga. App. at 56–57, 802 S.E.2d at 334.

84. *Id.* at 57, 802 S.E.2d at 334.

85. *Id.* at 57–58, 60, 802 S.E.2d at 334–36.

86. *Id.* at 60, 802 S.E.2d at 836.

V. SHAREABLE, DOCKLESS MOBILITY-DEVICE RENTALS

The sight of electric bicycles and electric scooters cruising through large cities and college towns has become increasingly common in the past few years, as Silicon Valley companies such as Bird, Lime, and Spin have moved quickly to “disrupt” the industry of bicycle and mobility-device rentals.⁸⁷ As these bikeshare and scooter-share services grow in popularity, lawmakers are struggling to keep up.

These companies operate by leaving shareable, dockless electric bicycles and scooters unattended on the street and connecting them to the internet.⁸⁸ A customer who comes across one of the devices can rent it via a smartphone app, then leave it wherever the customer finishes using it.⁸⁹ The companies engage individuals in the various towns to collect and charge the devices, and some companies engage other local individuals to perform inspections, maintenance, and repairs.⁹⁰ The sudden profusion of these devices on city streets and sidewalks raises a number of safety concerns. For example, users may not know whether to drive scooters on sidewalks, in bike lanes, or in travel lanes; they likely do not have helmets or other protective equipment with them; and the companies may vary in how thoroughly the bikes and scooters are inspected and maintained.⁹¹ These and other emerging safety

87. See, e.g., Megan Rose Dickey, *Ford-Owned Spin Will Bring Electric Scooters to 100 New Cities and College Campuses This Year*, TECHCRUNCH (Mar. 19, 2019), <https://techcrunch.com/2019/03/19/ford-owned-spin-will-launch-electric-scooters-in-100-new-cities-this-year/>; Lora Kolodny, *LimeBike Raises \$12 Million to Roll Out Bike Sharing Without Kiosks in the US*, TECHCRUNCH (Mar. 15, 2017), <https://techcrunch.com/2017/03/15/limebike-raises-12-million-to-roll-out-bike-sharing-without-kiosks-in-the-us/>; Press Release, *Bird Marks One Year Anniversary With 10 Millionth Environmentally-Friendly Ride*, BIRD (Sept. 20, 2018), <https://www.bird.co/press/bird-marks-one-year-anniversary-with-10-millionth-environmentally-friendly-ride/>.

88. Umair Irfan, *Electric Scooters’ Sudden Invasion of American Cities, Explained*, VOX (Sept. 7, 2018), <https://www.vox.com/2018/8/27/17676670/electric-scooter-rental-bird-lime-skip-spin-cities>.

89. *Id.*

90. Thomas Wheatley, *Bird Invasion: Atlanta’s Electric Scooters Are Fun, Dangerous, Exciting, Annoying, and Unstoppable*, ATLANTA MAGAZINE (Aug. 7, 2018), <https://www.atlantamagazine.com/news-culture-articles/bird-invasion-atlantas-electric-scooters-are-fun-dangerous-exciting-annoying-and-unstoppable/>; Harry Campbell, *Bird Mechanic Review: What It’s Like to Fix Bird Scooters*, THE RIDESHARE GUY (July 20, 2018), <https://therideshareguy.com/how-to-become-bird-mechanic>.

91. For more on potential hazards associated with rentals of shareable dockless mobility devices, questions about applicability of insurance policies, and other concerns for tort litigators, see Madeline E. McNeeley, *Electric Bicycle and Scooter Rental Litigation*, VERDICT: J. GA. TRIAL LAW. ASS’N (forthcoming Fall 2019).

concerns are likely to be the source of new legislation, personal-injury lawsuits, or both in the coming months and years.

At the state level, the Georgia General Assembly took a first step toward addressing some of these issues during the 2019 legislative session with the passage of House Bill 454.⁹² The bill was signed by the governor on April 26, 2019, and was slated to go into effect on July 1, 2019.⁹³ HB 454 speaks to the use of electric bicycles and electric personal assistive mobility devices (EPAMDs),⁹⁴ such as electric scooters and Segway PTs, on bike paths, but otherwise addresses only a selection of safety issues surrounding electric bicycles.⁹⁵

Pursuant to HB 454, the Georgia Code now groups electric bicycles into three classes according to their top speeds and the manner in which their motors operate,⁹⁶ and it requires that each electric bicycle have its class, top speed, and motor wattage prominently displayed.⁹⁷ Electric bicycles must have the same equipment as ordinary bicycles, as well as the capability of disengaging the motor when the operator stops pedaling or applies the brakes and, in the case of Class III devices (those with top speeds of twenty-eight miles per hour), a speedometer.⁹⁸

The new law also clarifies that persons operating electric-assisted bicycles are subject to all the same rights and duties as operators of ordinary bicycles.⁹⁹ Class I and II electric-assisted bicycles, as well as EPAMDs, may operate on bicycle paths, but Class III electric-assisted bicycles may not.¹⁰⁰ Local authorities and state agencies are authorized to make exceptions regarding electric bicycles within their

92. Ga. H.R. Bill 454, Reg. Sess., 2019 Ga. Laws 56 (codified at O.C.G.A. § 12-3-114 (2019) and in scattered sections of tit. 40).

93. *Id.*

94. The statute provides:

“Electric personal assistive mobility device” or “EPAMD” means a self-balancing, two nontandem wheeled device designed to transport only one person and having an electric propulsion system with average power of 750 watts (1 horsepower) and a maximum speed of less than 20 miles per hour on a paved level surface when powered solely by such propulsion system and ridden by an operator who weighs 170 pounds.

O.C.G.A. § 40-1-1(15.4) (2019).

95. *Id.*

96. O.C.G.A. § 40-6-300 (2019); *see* O.C.G.A. § 40-1-1(15.3), (30), (33) (2019) (refining the definition of electric assisted bicycle).

97. O.C.G.A. § 40-6-302(a) (2019).

98. O.C.G.A. § 40-6-302(c)–(d) (2019).

99. O.C.G.A. § 40-6-301 (2019).

100. O.C.G.A. § 40-6-303(a)(1)–(2) (2019); *see* O.C.G.A. § 12-3-114(1)(B), (G) (2019) (providing that only motorized transportation capable of traveling over 20 miles per hour is excluded from urban bike trails); O.C.G.A. § 40-1-1(6.1)–(6.2) (2019).

jurisdictions.¹⁰¹ The law regarding use of bike paths does not apply to natural-surface bike trails, which remain regulated solely by the authorities or agencies with jurisdiction over them.¹⁰²

Persons under age 15 are prohibited from operating Class III electric bicycles, and no one of any age may operate or be a passenger on a Class III bicycle without wearing a helmet.¹⁰³ Importantly for the bikeshare industry, O.C.G.A. § 40-6-303(c)(2)¹⁰⁴ provides that Class III electric-assisted bicycles may not be rented or leased to any person without an accompanying helmet unless the customer is already in possession of a helmet.¹⁰⁵ The helmet provisions do not apply to Class I and II electric bicycles.¹⁰⁶ Tort lawyers should note that “[v]iolation of any provision of th[e] subsection” on helmets, § 40-6-303(c), expressly “shall not constitute negligence per se nor contributory negligence per se or be considered evidence of negligence or liability.”¹⁰⁷

As of this writing, whether and how to address other safety concerns around electric bicycle and, especially, electric scooter rentals, what permitting requirements to put into place, and how to manage sidewalk and road usage is largely a matter for local governments. Some Georgia communities, such as Athens and Savannah, joined cities like San Francisco and Nashville in banning the rentals altogether, either permanently or until they could enact satisfactory ordinances.¹⁰⁸ Other cities, including Atlanta, allowed the devices to proliferate while they deliberated and enacted new regulatory schemes.¹⁰⁹ A comprehensive look at municipal ordinances is beyond the scope of this Survey, but tort

101. O.C.G.A. § 40-6-303(a)(1)–(2).

102. O.C.G.A. § 40-6-303(a)(3) (2019).

103. O.C.G.A. § 40-6-303(b)–(c)(1) (2019).

104. O.C.G.A. § 40-6-303(c)(2) (2019).

105. *Id.*

106. *Id.*

107. O.C.G.A. § 40-6-303(c)(5) (2019).

108. Wheatley, *supra* note 90; Lee Shearer, *Athens-Clarke Commission Grounds Bird Scooters*, ATHENS BANNER-HERALD (Dec. 5, 2018), <https://www.onlineathens.com/news/20181205/athens-clarke-commission-grounds-bird-scooters>; Lee Shearer, *Athens-Clarke County Weighs Options to Deal With Bird Scooters*, ATHENS BANNER-HERALD (Oct. 19, 2018), <https://www.onlineathens.com/news/20181019/athens-clarke-county-weighs-options-to-deal-with-bird-scooters>.

109. Wheatley, *supra* note 90. The Atlanta City Council adopted Ordinance 18-O-1322 on January 7, 2019. Atlanta City Council Ordinance No. 18-O-1322, *available at* <https://www.atlantaga.gov/home/showdocument?id=39601>; *Shareable Dockless Mobility Devices*, CITY OF ATLANTA, GA, <https://www.atlantaga.gov/government/departments/shareable-dockless-mobility-devices> (last visited July 21, 2019).

lawyers and others with an interest in this area should be sure to review local laws and regulations closely if they encounter an issue involving an electric bicycle or EPAMD.

VI. TRANSPORTATION FOR HIRE—TAXICABS, LIMOUSINES, AND RIDESHARE SERVICES

No legal developments occurred during this survey period that bear directly on the provision of taxi, limousine, or other livery services. A case from the Georgia Court of Appeals, however, did consider for the first time the definition of the term “public or livery conveyance” that often appears in coverage exclusions in individual automobile-insurance policies.¹¹⁰

The plaintiff in *Haulers Insurance Co. v. Davenport*¹¹¹ was in a wreck while giving his neighbor a ride into town.¹¹² He sued the at-fault driver and served his own uninsured-motorist (UM) carrier, but the UM carrier denied coverage, claiming that his policy excluded coverage for damages and injuries incurred when the vehicle was “being used as a public or livery conveyance.”¹¹³ The evidence showed that the plaintiff sometimes drove this neighbor three miles into town, for which she would pay him about seven dollars. On the day in question, the plaintiff saw his neighbor walking into town and gratuitously offered her a ride, which she accepted. She never paid him for that ride, although she later testified that she had expected to do so. He did not offer paid rides to the general public.¹¹⁴

The court of appeals noted that because the term “public or livery conveyance” was not defined in the policy, it must be given its common and ordinary meaning.¹¹⁵ “Public” refers to something that affects all people or is accessible by all members of the community, and “livery” refers to a “business that rents vehicles.”¹¹⁶ Dicta in a prior Georgia Supreme Court case had suggested that “public livery conveyance” indicates a taxicab, and a Georgia Court of Appeals case from the 1950s held an agreement to pay for gasoline did not convert the loan of a personal vehicle into a livery conveyance.¹¹⁷ Moreover, several other states’ courts held that a vehicle must be held out indiscriminately to

110. *Haulers Ins. Co. v. Davenport*, 344 Ga. 444, 810 S.E.2d 617 (2018).

111. 344 Ga. 444, 810 S.E.2d 617 (2018).

112. *Id.* at 444, 810 S.E.2d at 618.

113. *Id.*

114. *Id.*

115. *Id.* at 446, 810 S.E.2d at 619.

116. *Id.*

117. *Id.*

the general public for hire in order to qualify as a “public or livery conveyance.”¹¹⁸ In light of these precedents, the court in *Davenport* adopted the other states’ definition and held that this plaintiff’s occasional transport of a specific neighbor for a fee did not rise to the level of either holding his services out indiscriminately to the public or operating a business for hire.¹¹⁹ Therefore, the coverage exclusion did not apply.¹²⁰ While the *Davenport* case does not change the scope of insurance coverage for those who actually are engaged in providing transportation for hire, it offers useful clarification in this time of increasing pervasiveness of ridesharing services that some boundaries still exist, and individuals can still carpool or offer a ride in exchange for gas money without being deemed livery drivers and losing the benefit of their insurance coverage.

VII. AUTONOMOUS VEHICLE TECHNOLOGY

The Georgia General Assembly enacted a regime in 2017 to allow for testing and operating autonomous vehicles (or “self-driving cars”) on public roads.¹²¹ In particular, as readers of the 2017 Georgia Survey will recall, O.C.G.A. § 40-8-11¹²² sets forth certain minimum safety and insurance standards for an automated vehicle to be allowed to operate on the roads without a human driver.¹²³ During the 2018 legislative session, O.C.G.A. § 40-8-11 was amended to state that none of those minimum standards “shall be construed to limit the applicability of state consumer protection laws,”¹²⁴ such as the Fair Business Practices Act of 1975,¹²⁵ the Georgia Motor Vehicle Franchise Practices Act,¹²⁶ and the Georgia Lemon Law.¹²⁷ This brief but important clarification confirms that these new technologies must adhere to existing consumer-protection laws as they develop and that Georgians’ rights and protections are not to be sacrificed in the name of progress.

118. *Id.* at 446, 810 S.E.2d at 619–20.

119. *Id.* at 447–48, 810 S.E.2d at 620.

120. *Id.* at 448, 810 S.E.2d at 620.

121. Ga. S. Bill 219, Reg. Sess., 2017 Ga. Laws 214 (codified as amended in scattered sections of tit. 40); Lowry et al., *supra* note 1, at 56.

122. O.C.G.A. § 40-8-11 (2019).

123. Lowry et al., *supra* note 1, at 56–57.

124. Ga. H.R. Bill 717, 2018 Ga. Laws 331 (codified at O.C.G.A. § 40-8-11(d) (2019)).

125. O.C.G.A. §§ 10-1-390–10-1-407 (2019).

126. O.C.G.A. §§ 10-1-620–10-1-670 (2019).

127. O.C.G.A. §§ 10-1-780–10-1-798 (2019).

VIII. CONCLUSION

As this Article illustrates, commercial transportation law involves an often complex interaction of state and federal law, despite that each major area tends to be regulated primarily at one level or the other. Efforts to adapt the law to the fast-changing business and technological landscape further complicate this picture. Successfully navigating these issues requires a thorough understanding of laws and regulations at the federal, state, and even local levels and how they all interact with each other.