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# Commercial Transportation

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## I. INTRODUCTION

Commercial transportation involves all the significant forms of passenger and freight transportation across the United States. This Article surveys significant judicial, regulatory, and legislative developments in commercial-transportation law affecting the federal judicial circuit including Georgia, Alabama, and Florida during the period from January 1, 2020, through December 31, 2020.<sup>1</sup> The first three

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<sup>1</sup> For an analysis of last year's commercial transportation law during the Survey period, see Madeline E. McNeeley, et al., *Commercial Transportation, 2019 Eleventh Circuit Survey*, 71 MERCER L. REV. 951 (2020).

areas discussed here are subject to heavy federal regulation due to their far-reaching effects on interstate commerce: trucking and other commercial motor vehicles, aviation, and railroads. The other two areas discussed in this Article—autonomous-vehicle technology and shareable electric bicycles and scooters—are regulated primarily at the state and local levels at present but interact with federal law in some important ways.

## II. TRUCKING AND OTHER COMMERCIAL MOTOR VEHICLES

### A. Regulation

In May of 2020, the Federal Motor Carrier Safety Administration (FMCSA) issued a long-awaited hours of service final rule.<sup>2</sup> The final rule includes major changes that Transportation Secretary, Elaine Chao, said would give commercial drivers more control and options for planning their days.<sup>3</sup> In effect, the new rule allows commercial truck drivers to travel longer distances, for a longer period of time, and to still be considered a “short haul” driver, therefore not subject to the strict requirements of the FMCSA.<sup>4</sup> The rule change extends the distance limit for short haul drivers from 100 air miles to 150 air miles and increases short haul drivers’ maximum on-duty period from twelve to fourteen hours.<sup>5</sup> The new rules also give drivers more options for how they split their sleeping and driving hours and required thirty-minute breaks after eight hours of driving.<sup>6</sup> Drivers will now be able to split their required ten hours off-duty into two periods: one period of at least seven consecutive hours in the sleeper berth and the other period of not less than two consecutive hours, either off-duty or in the sleeper berth.<sup>7</sup> The final rule does not increase driving time and will continue to prevent commercial truck drivers from driving for more than eight consecutive hours without at least a thirty-minute break.<sup>8</sup>

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<sup>2</sup> 49 C.F.R. §§ 385, 395 (2021).

<sup>3</sup> Eric Miller and Eleanor Lamb, *FMCSA Unveils Proposed Changes to Hours-of-Service Rules*, Transport Topics (last accessed July 17, 2020), <https://www.ttnews.com/articles/fmcsa-unveils-hos>.

<sup>4</sup> Final Rule, Fed. Motor Carrier Safety Admin., Docket No. FMCSA-2018-0248 (2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

*B. Recent Cases*

In *Hardman v. Southeast Permanente Medical Group, Inc.*,<sup>9</sup> the United States District Court for the Northern District of Georgia addressed the question of whether a doctor, who certified a motor carrier driver as fit to drive, could be held liable to the victim of the driver following a trucking accident. In *Hardman*, the plaintiff's wife died after her vehicle was rear-ended by a tractor-trailer in Alabama. The driver of the tractor-trailer, Mr. Hawkins, owned his own trucking company, Hawkins Brothers, LLC. Prior to the collision, which occurred in 2016, the driver had been diagnosed with Type II diabetes mellitus in 2001 and began taking insulin in 2010.<sup>10</sup> Under the Federal Motor Carrier Safety Regulations (FMCSR),<sup>11</sup> a driver diagnosed with Type II diabetes must receive an exemption in order to continue operating as a commercial truck driver.<sup>12</sup> To receive the exemption, the driver must "obtain medical certification from a physician listed on the FMCSAs National Registry of Certified Medical Examiners."<sup>13</sup> Mr. Hawkins did obtain a medical certificate, but the physician who completed Mr. Hawkins's medical certificate was not registered with the FMCSA. The plaintiff filed suit against the physician's medical practice and the physician alleging claims for negligence, wantonness, and negligent supervision.<sup>14</sup>

The crux of the plaintiff's case was that the physician who signed Mr. Hawkins's certificate was negligent in certifying him as fit to operate a commercial motor vehicle and that the plaintiff's wife was killed as result of that negligence.<sup>15</sup> Specifically, the plaintiff's expert contended there was evidence to suggest that Mr. Hawkins fell asleep at the wheel, causing the collision at issue.<sup>16</sup> The defendants filed a motion for summary judgment, arguing that as to the claim of negligence, Mr. Hawkins's physician owed no duty to the plaintiff's wife, a third party.<sup>17</sup> The court, applying Alabama law, disagreed.<sup>18</sup> Rather, the court

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<sup>9</sup> 2020 WL 6135655 (N.D. Ga. 2020).

<sup>10</sup> *Id.* at \*1.

<sup>11</sup> 49 C.F.R. §§ 300–399 (2021).

<sup>12</sup> 49 C.F.R. § 391.46.

<sup>13</sup> 2020 WL 6135655, at \*1.

<sup>14</sup> *Id.* at \*2.

<sup>15</sup> *Id.*

<sup>16</sup> There was also evidence that following the wreck, Mr. Hawkins sought treatment for and was diagnosed with severe sleep apnea by another physician. *Id.* at \*5.

<sup>17</sup> *Id.* at \*7.

<sup>18</sup> *Id.* ("However, for an injury to be foreseeable under Alabama law, 'it is not necessary to anticipate the *specific* [harm] that occurred, but only that some general harm or

reasoned that “the existence of a duty is determined by a number of factors, including, ‘(1) the nature of the defendant's activity; (2) the relationship between the parties; and (3) the type of injury or harm threatened[,]’” and especially “whether the injury was foreseeable by the defendant.”<sup>19</sup> The court found under the facts of the case and

in the light most favorable to the Plaintiff . . . that it was reasonably foreseeable that an automobile accident would follow Dr. Simpson's certification of Mr. Hawkins as medically fit to drive a commercial motor vehicle in the event Mr. Hawkins was not actually fit to operate such a vehicle—due to, for example, untreated and undiagnosed sleep apnea.<sup>20</sup>

Thus, even though the person harmed was not the physician's patient, it was foreseeable that untreated conditions such as those experienced by Mr. Hawkins could cause an automobile accident and injure another motorist, so the physician owed a duty to her and there was a fact question about whether he had breached that duty.<sup>21</sup>

Although the court granted summary judgment in favor of the defendants as to the plaintiff's claims for wantonness and negligent supervision, the court's finding opens the door to potential liability for those in the medical field who are responsible for ensuring the physical fitness of drivers.

### III. AVIATION

Commercial aviation is almost exclusively controlled by federal authority through statutes, courts, and regulations promulgated by the Federal Aviation Administration (FAA). While the Eleventh Circuit did publish a noteworthy opinion regarding the viability of claims pursuant to federal maritime law, this Survey period brought an unprecedented task to rulemaking authorities: the COVID-19 pandemic. In addition to regulations issued in the ordinary course, the FAA worked swiftly to address the role of aviation in this public health emergency. The FAA faces a considerable challenge in having to enact regulations that balance the interests of safety and continuing aviation operations while the COVID-19 pandemic evolves in real time.

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consequence would follow.”) (quoting *Smith v. AmSouth Bank, Inc.*, 892 So. 2d 905, 910 (Ala. 2004)).

<sup>19</sup> *Id.* at \*7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*9.

*A. Regulation*

In February 2020, the FAA amended the requirements of pilot professional development.<sup>22</sup> This final rule provides that new-hire pilots must have an opportunity to observe operations and become familiar with procedures before serving on a flight crew, revises curriculum, and requires leadership and mentoring training to reduce incidents of unprofessional behavior and pilot errors.<sup>23</sup> The National Transportation Safety Board (NTSB) has continuously cited pilot behavior as factors in multiple incidents and accidents.<sup>24</sup> This rule is an acknowledgement of an ongoing problem in the aviation industry with pilots engaging in unprofessional behavior and not adhering to standard operating procedures, which has catastrophic results.<sup>25</sup>

On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic, which required immediate action among numerous industries, including aviation. The FAA issued Special Federal Aviation Regulation No. 118 (SFAR 118),<sup>26</sup> which extended deadlines for certain requirements that were unable to be met because of the COVID-19 pandemic.<sup>27</sup> Many of the FAA's training, testing, recency, and renewal requirements require individuals to be in close proximity where there is an increased risk of COVID-19 transmission.<sup>28</sup> Under the extraordinary circumstances, the FAA determined that extending the certification requirements would not present an additional risk to aviation safety that

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<sup>22</sup> 14 C.F.R. § 121.400 (2021); 14 C.F.R. pt. 121, App. E, F, H (2020); 14 C.F.R. pt. 121, App. F (2020); 14 C.F.R. pt. 121, App. H (2020); 14 C.F.R. § 61.71 (2021); 14 C.F.R. § 91.1063 (2021); 14 C.F.R. § 135.3 (2021).

<sup>23</sup> Pilot Professional Development, 85 Fed. Reg. 10,896 (Feb. 25, 2020).

<sup>24</sup> On Oct. 14, 2004, Northwest Airlink flight 3701 crashed into a residential area in Missouri, killing both pilots and destroying the plane. On Feb. 12, 2009, Continental Connection flight 3407 crashed into a residence in New York, killing two pilots, two flight attendants, all 45 passengers, and one person on the ground. The NTSB cited pilot error as the cause of both crashes. *Id.* at 10,899.

<sup>25</sup> *Id.* at 10,898–99. (The rule was amended in June 2020 and July 2020 to correct several regulations that were improperly identified. Pilot Professional Development; Technical Amendment, Correction, 85 Fed. Reg. 44,692 (Jul. 24, 2020)).

<sup>26</sup> Relief for Certain Persons and Operations During the Coronavirus Disease Outbreak, 85 Fed. Reg. 26,326 (May 4, 2020) (affecting 14 C.F.R. pts. 21, 61, 63, 65, 91, 107, 125 & 141).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 26,329.

could not be mitigated.<sup>29</sup> The FAA amended SFAR 118 three times in 2020 to expand the protections to new populations of airmen.<sup>30</sup>

Another action necessitated by the COVID-19 pandemic paused legal enforcement against any pilot, crewmember, or flight engineer based on noncompliance with medical certificate duration standards.<sup>31</sup> While FAA medical examinations are critical to aviation safety,<sup>32</sup> the physical nature of the examinations increases the risk of transmission of COVID-19. This relief only applied to an eligible class of persons and was limited to medical certificates that expired between March 31, 2020 and June 30, 2020.<sup>33</sup>

The next regulatory update involves an issue known to most air travelers. The Department of Transportation (DOT) defined “service animal” as “a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”<sup>34</sup> Because airlines charge passengers for transporting pets and are prohibited from charging passengers traveling with service animals, passengers previously had an incentive to claim their pets were “emotional support animals” and, thus, service animals.<sup>35</sup> More passengers traveling with animals, many of which were uncrated and untrained, resulted in an increase of animal misbehavior on airplanes and in the airport. Now, airlines can classify emotional support animals as pets and limit the number of service animals that one passenger can bring onboard an aircraft.<sup>36</sup>

Under this rule, airlines can require passengers to submit a form attesting to a service animal’s training, good behavior, and health,<sup>37</sup> and

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<sup>29</sup> *Id.*

<sup>30</sup> Limited Extension of Relief for Certain Persons and Operations During the Coronavirus Disease 2019 Public Health Emergency, 85 Fed. Reg. 38,763 (Jun. 25, 2020); 85 Fed. Reg. 47,295 (Aug. 5, 2020); Second Limited Extension of Relief for Certain Persons and Operations During the Coronavirus Disease 2019 Public Health Emergency, 85 Fed. Reg. 62,951 (Oct. 6, 2020).

<sup>31</sup> Enforcement Policy for Expired Airman Medical Certificates, 85 Fed. Reg. 18,110 (Apr. 1, 2020).

<sup>32</sup> 14 C.F.R. pt. 67.

<sup>33</sup> 85 Fed. Reg. at 18,111.

<sup>34</sup> 14 C.F.R. § 382.3 (2020).

<sup>35</sup> Traveling by Air With Service Animals, 85 Fed. Reg. 79,742, 79,744 (Dec. 10, 2020); 14 C.F.R. § 382, Subpart E (2020).

<sup>36</sup> 14 C.F.R. § 382.74 (2020).

<sup>37</sup> 14 C.F.R. § 382.75 (2020).

can require that service animals are tethered onboard an aircraft.<sup>38</sup> The rule also specifies the circumstances under which a passenger may be charged for damage caused by the animal.<sup>39</sup>

The DOT did not previously regulate the transportation of animals on aircraft, but the FAA Reauthorization Act of 2018<sup>40</sup> requires the DOT to define “service animal” and develop standards for service and emotional support animals.<sup>41</sup> The U.S. Department of Justice (DOJ) also defines “service animal” in the Americans With Disabilities Act (ADA).<sup>42</sup> At Congress’s request, the DOT revised its previous “service animal” definition<sup>43</sup> to align more closely with the ADA’s definition, but the substantive requirements of the DOT’s and DOJ’s rules for service animals differ in several respects.<sup>44</sup> This demonstrates the conflicts that may arise when federal agencies have intersecting authority on an issue.

Two additional rules were enacted by the FAA in December 2020. “Streamlined Launch and Reentry License Requirements” addresses the FAA’s commercial space launch and reentry regulations, governs the licensing of vehicle operators, and removes obsolete requirements.<sup>45</sup> “Removal of the Special Rule for Model Aircraft” eliminates regulations following a change in the law regarding unmanned aircraft systems operating in the National Airspace System.<sup>46</sup>

### *B. Legislation*

No significant aviation legislation was enacted in 2020, though two bills were introduced in Congress. The “Restoring Aviation Accountability Act of 2020” set out to require more accountability in the airline industry.<sup>47</sup> The “Aircraft Safety Improvement Act of 2020” attempted to improve the FAA’s aircraft certification process.<sup>48</sup> Both bills were referred to the Committee on Commerce, Science, and Transportation but neither received a vote.

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<sup>38</sup> 14 C.F.R. § 382.73(b) (2020).

<sup>39</sup> 14 C.F.R. § 382.78 (2020).

<sup>40</sup> 49 U.S.C. §§ 40101–30 (2020).

<sup>41</sup> *Id.*

<sup>42</sup> 28 C.F.R. § 35.104 (2016); 28 C.F.R. § 36.104 (2016).

<sup>43</sup> 14 C.F.R. § 382.117 (2008).

<sup>44</sup> 85 Fed. Reg. at 79,776 (Dec. 10, 2020).

<sup>45</sup> 85 Fed. Reg. 79,566 (Dec. 11, 2020) (codified at 14 C.F.R. pts. 401, 404, 413, 414, 415, 417, 420, 431, 433, 435, 437, 440, 450 & 460).

<sup>46</sup> 85 Fed. Reg. 79,823 (Dec. 11, 2020) (codified at 14 C.F.R. § 61.8; 14 C.F.R. pt. 101 & 14 C.F.R. § 107.1 (2020)).

<sup>47</sup> S.B. 3337 (Feb. 25, 2020).

<sup>48</sup> S.B. 3866 (Jun. 2, 2020).

*C. Recent Cases*

The Eleventh Circuit published an opinion that reveals a seemingly unfair result when controlling precedent conflicts with statutory construction. In *LaCourse v. PAE Worldwide Inc.*,<sup>49</sup> the court analyzed whether and to what extent the Death on the High Seas Act<sup>50</sup> (DOHSA) applied to a wrongful death action in which the plaintiff alleged that a private company failed to properly service and maintain the F-16 that her husband was flying when it crashed into the Gulf of Mexico.<sup>51</sup> The court also evaluated whether the company, which “was operating under a services contract with the [U.S.] Air Force, [was] shielded from liability by the so-called ‘government contractor’ defense.”<sup>52</sup>

On the day of the crash, the plaintiff’s husband—a retired Air Force Lieutenant Colonel employed as a civilian by the Department of Defense—flew an Air Force F-16 fighter jet from Tyndall Air Force Base in Florida over the Gulf of Mexico for a training exercise. The jet crashed more than twelve miles offshore and plaintiff’s husband was killed. PAE Worldwide, Inc. (PAE) was operating under a contract with the Air Force to provide aircraft service and maintenance at Tyndall, including the F-16 that plaintiff’s husband was flying when he crashed. In performing under the contract, PAE was required to follow detailed guidelines and adhere to specific standards prepared by or on behalf of the Air Force.<sup>53</sup>

Lt. Col. LaCourse’s widow filed a wrongful death action in Florida state court alleging state law claims for negligence, breach of warranty, and breach of contract.<sup>54</sup> PAE removed the case to federal court based on jurisdiction under DOHSA, which confers admiralty jurisdiction “[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas.”<sup>55</sup> PAE then moved for partial summary judgment, arguing that DOHSA, which limits a plaintiff’s recovery to pecuniary loss, governed LaCourse’s suit.<sup>56</sup>

The district court granted PAE’s motion “and held that DOHSA applie[d] and ‘[thus provided] the exclusive remedy for death on the high seas, preemp[ting] all other forms of wrongful death claims, and only

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<sup>49</sup> 980 F.3d 1350 (11th Cir. 2020).

<sup>50</sup> 46 U.S.C. §§ 30301–08.

<sup>51</sup> 980 F.3d at 1352.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1353.

<sup>54</sup> *Id.* at 1354.

<sup>55</sup> *Id.* (alteration in the original); 46 U.S.C. § 30302 (2021).

<sup>56</sup> 980 F.3d at 1354.

permit[ting] recovery for pecuniary damages.”<sup>57</sup> LaCourse argued that the district court erred because the negligence asserted—PAE’s maintenance of the F-16—did not occur on the high seas, as the Act’s plain language requires. Rather, she said, the alleged negligence occurred on land when the jet was improperly serviced at Tyndall Air Force Base.<sup>58</sup>

The Eleventh Circuit affirmed, but begrudgingly so. In fact, the opinion states that LaCourse was “exactly right” and the court would agree with her if it had a clean slate upon which to rule, but controlling precedent required a rejection of the statute’s plain-text argument.<sup>59</sup> Relying on two cases interpreting DOHSA to confer jurisdiction over claims arising out of airplane crashes on the high seas even if the alleged negligence occurred on land,<sup>60</sup> the court was constrained to agree with the district court that DOHSA applied even though PAE’s alleged negligence occurred on land at Tyndall Air Force Base.<sup>61</sup>

The court also had to determine whether DOHSA provided LaCourse’s exclusive remedy, thereby preempting all other claims arising from the crash. The court again stated that LaCourse had the plain language of the statute on her side, but that controlling precedent was “squarely against her” and thus DOHSA foreclosed her claims for breach of warranty and breach of contract.<sup>62</sup>

The final issue for the court’s consideration was whether LaCourse’s claim was barred by the so-called “government contractor” defense, a creation of federal common law that allows contractors to escape liability under the shield of the United States’ sovereign immunity when the contractor was following the government’s orders.<sup>63</sup> The court held that while LaCourse did present evidence supporting her DOHSA-based negligence claim, the only relevant question as to the “government contractor” defense was whether PAE violated specific government procedures. Because the evidence showed that it did not, PAE was properly granted summary judgment on “government contractor”

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1355.

<sup>59</sup> *Id.* at 1355–56.

<sup>60</sup> *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218 (1986); *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 272 (5<sup>th</sup> Cir. 1974).

<sup>61</sup> *LaCourse*, 980 F.3d at 1356.

<sup>62</sup> *Id.* at 1358.

<sup>63</sup> *Id.* at 1358–59.

grounds.<sup>64</sup> Joining the opinion, Judge Kevin Newsom delivered a powerful concurrence<sup>65</sup>:

[W]hile I agree that we must follow existing precedent . . . I do so holding my nose, as DOHSA's plain language is squarely to the contrary. LaCourse's logic, it seems to me, is unassailable. Somehow, though, precedent—mounds of it, some of it binding on us—has whistled past the text's unmistakable focus of the location of the alleged negligence as the decisive factor for determining DOHSA's applicability. . . . Bottom line: as in all cases, we should give effect to DOHSA's unambiguous language . . . If it were up to me, I would hold that DOHSA doesn't apply here because the alleged negligence—the failure to properly maintain the F-16 that Lt. Col. LaCourse was piloting when he crashed—occurred on land, not on the high seas.<sup>66</sup>

Judge Newsom's frustration highlights the clash that occurs when courts are bound to follow precedent that defies the plain language of a statute.

In an unpublished opinion from the United States District Court for the Southern District of Florida, a class of four customers sued Spirit Airlines alleging breach of contract related to Spirit's Shortcut Security Program, which provides an expedited security process for purchase.<sup>67</sup> The plaintiffs entered this program and claimed Spirit failed to provide them with the service for which they paid.<sup>68</sup>

“An airline's [c]ontract of [c]arriage is a federally regulated contract that governs the right of the parties.”<sup>69</sup> Contracts of carriage (COCs) are controlled by the Federal Aviation Regulations,<sup>70</sup> which permit airlines to incorporate them into passengers' reservations.<sup>71</sup> Spirit's COC governs all the rights and remedies of its passengers, from the initial ticket purchase to retrieving checked baggage, and everything in between, including the Shortcut Security Program.<sup>72</sup> Spirit's COC contains an explicit class action waiver stating that any lawsuit pursuant to the

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<sup>64</sup> *Id.* at 1358–62.

<sup>65</sup> The concurrence was joined by Judge Charles R. Wilson.

<sup>66</sup> *Id.* at 1362–64.

<sup>67</sup> *Roman, et al. v. Spirit Airlines, Inc.*, No. 19-CIV-61461-RAR (S.D. Fla. Aug. 31, 2020).

<sup>68</sup> *Id.* at \*2.

<sup>69</sup> *Id.* at \*7 (alteration in original) (citing *Pons v. Arubaanse Luchtvaart Maatschappij*, No. 17-cv-22008 at \*3 (S.D. Fla. Mar. 29, 2018)).

<sup>70</sup> *Id.*; 14 C.F.R. § 1.1-1310.20.

<sup>71</sup> *Roman*, No. 19-CIV-61461-RAR at \*8.

<sup>72</sup> *Id.* at \*2.

contract must be brought in a passenger's individual capacity and not as a plaintiff in a class action.<sup>73</sup>

Spirit filed a motion for judgment on the pleadings, arguing that any breach it committed was limited to its COC and that plaintiffs' claims were precluded by the class action waiver because the complaint only invoked federal jurisdiction under the Class Action Fairness Act.<sup>74</sup> Finding that the plaintiffs' claims were governed by Spirit's COC, and thus the plaintiffs were without their class allegations, the district court lacked subject matter jurisdiction over the plaintiffs' individual breach of contract claims.<sup>75</sup> Diversity jurisdiction did not exist, as all parties were citizens of Florida and the amount that each plaintiff paid for the Shortcut Security Program was \$6.00, thus failing to meet the \$75,000 minimum amount in controversy.<sup>76</sup> Without subject matter jurisdiction, plaintiffs' individual claims were dismissed as a matter of law.<sup>77</sup> The plaintiffs filed a Notice of Appeal on September 30, 2020. As of February 2021, the appeal is pending in the Eleventh Circuit.<sup>78</sup>

#### IV. RAILROADS

##### A. Regulation

The Federal Railroad Administration (FRA) was focused on safety during this Survey period with the amendment of existing rules and the codification of several new rules.

The first rule to become effective during this Survey period was the Risk Reduction Program, which was proposed on February 18, 2020<sup>79</sup> and became effective on April 20, 2020.<sup>80</sup> The Risk Reduction Program (RRP) imposes a requirement on all "Class I freight railroad and each freight railroad with inadequate safety performance to develop and implement a Risk Reduction Program (RRP) to improve the safety of its operations."<sup>81</sup> The FRA defines an RRP as a comprehensive, system-oriented approach to improving safety by which an organization formally

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<sup>73</sup> *Id.* at \*5

<sup>74</sup> *Id.* at \*2–3; 28 U.S.C. § 1332(d).

<sup>75</sup> *Roman*, No. 19-CIV-61461-RAR at \*22.

<sup>76</sup> *Id.* at \*23; 28 U.S.C. § 1332(a).

<sup>77</sup> *Roman*, No. 19-CIV-61461-RAR at\*23; FED. R. CIV. P. 12(h)(3).

<sup>78</sup> Docket No. 20-13699.

<sup>79</sup> Risk Reduction Program, 85 Fed. Reg. 9262 (Feb. 18, 2020) (to be codified at 49 C.F.R. pt. 271).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

identifies and analyzes applicable hazards and takes action to mitigate, if not eliminate, the risks associated with those hazards. It provides a railroad with a set of decision-making processes and procedures that can help it plan, organize, direct, and control its railroad operations in a way that enhances safety and promotes compliance with regulatory standards.<sup>82</sup> The rule, first proposed in 2015, requires Class I railroads to submit an RRP plan by August 16, 2021, which must include: “Risk-based hazard management program; safety performance evaluation; safety outreach; technology implementation plan; RRP employee/contractor training; railroad employee involvement; and internal assessment.”<sup>83</sup> However, the requirements of the RRP are purposefully broad to provide for flexibility, as the FRA acknowledges that operating systems and budgets vary from railroad to railroad.<sup>84</sup>

Additionally, the FRA amended its regulations regarding safety operations on commuter and intercity passenger rails.<sup>85</sup> The System Safety Program and Risk Reduction Program<sup>86</sup> requires commuter and intercity passenger rail (IPR) operations to develop and implement a system safety program (SSP)<sup>87</sup> to improve the safety of their operations. This rule became effective May 4, 2020. While recognizing that each passenger rail service involves multiple entities, the FRA stated that it “expects each *passenger rail operation* to have a single SSP and written SSP plan.”<sup>88</sup> Further, the responsibility of developing, filing, and implementing the SSP plan will fall on “the entity conducting the railroad operations.”<sup>89</sup> The rule requires that each passenger rail to which the rule applies should submit its SSP plan to the FRA by March 4, 2021.<sup>90</sup>

The FRA also amended its Rail Integrity and Track Safety Standards.<sup>91</sup> On December 31, 2019, the FRA published a Notice of Proposed Rulemaking (NPRM) in which the FRA proposed to amend subparts A, D, F, and G of the Track Safety Standards (TSS) to:

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 9263.

<sup>84</sup> *Id.* at n.1.

<sup>85</sup> System Safety Program and Risk Reduction Program 85 Fed. Reg. 12,826 (March 4, 2020) (to be codified at 49 C.F.R. pts. 270 and 271).

<sup>86</sup> *Id.*

<sup>87</sup> A System Safety Program plan is defined in 49 C.F.R. 270.103.

<sup>88</sup> 85 Fed. Reg. 12,826, 12,830.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Rail Integrity and Track Safety Standards, 85 Fed. Reg. 63,362 (Oct. 7, 2020) (to be codified at 49 C.F.R. pt. 213).

“(1) [a]llow for continuous rail testing, (2) incorporate longstanding waivers related to track frogs,<sup>92</sup> (3) remove the exception for high-density commuter lines for certain track inspection method requirements, and (4) incorporate several consensus-based, RSAC [Railroad Safety Advisory Committee] recommendations.”<sup>93</sup>

After revisions, the final rule went into effect on October 7, 2020.<sup>94</sup> The FRA anticipates that the amendments will “benefit track owners, railroads, and the public by reducing unnecessary costs and incentivizing innovation, while improving rail safety.”<sup>95</sup>

Continuing with its emphasis on safety, the FRA revised 49 C.F.R. Parts 218, 221, and 232 to clarify existing regulations governing braking inspections, tests, and equipment.<sup>96</sup> The revisions are the result of a petition by the Association of American Railroads (AAR) “requesting [the] FRA relax the requirement to conduct a Class I brake test prior to operation if a train is off-air for a period of more than four hours by extending the off-air period to twenty-four hours.”<sup>97</sup> Following the petition from the AAR, the FRA issued a Notice of Proposed Rulemaking on January 15, 2020, in which the FRA “propos[ed] codification of existing waivers related to brake systems, and making technical amendments to reduce regulatory burdens while maintaining or improving safety.”<sup>98</sup> This rule became effective on December 11, 2020.<sup>99</sup>

Finally, on December 16, 2020, the Metrics and Minimum Standards for Intercity Passenger Rail Service became effective.<sup>100</sup> This rule specifically pertains to Amtrak, and “establishes metrics and minimum standards for measuring the performance and service quality of Amtrak’s intercity passenger train operations.”<sup>101</sup> This rule sets forth four categories by which Amtrak is to be measured: “On-time performance

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<sup>92</sup> As explained by the FRA, “[a] frog is a track component used at the intersection of two running rails to provide support for wheels and passage for their flanges, thus permitting the wheels on either rail to cross the other intersecting rail.” 85 Fed. Reg. 63,362 at fn.1.

<sup>93</sup> 85 Fed. Reg. 63,362.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Miscellaneous Amendments to Brake System Safety Standards and Codification of Waivers, 85 Fed. Reg. 80,544 (Dec. 11, 2020) (to be codified at 49 C.F.R. pts. 218, 221, and 232).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; 85 Fed. Reg. 2494 (Jan. 15, 2020).

<sup>99</sup> 85 Fed. Reg. 80,544.

<sup>100</sup> Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72,971 (Nov. 16, 2020) (to be codified at 49 C.F.R. pt. 273).

<sup>101</sup> *Id.* at 72,972.

(OTP) and train delays, customer service, financial, and public benefits.”<sup>102</sup> However, specific emphasis is placed on OTP and train delays.<sup>103</sup> The FRA anticipates that the rule may lower costs for Amtrak “to the extent it results in improved OTP, which may reduce labor costs, fuel costs, and expenses related to passenger inconvenience, and provide benefits to riders from improved travel times and service quality.”<sup>104</sup>

### *B. Recent Cases*

The United States District Courts within the Eleventh Circuit addressed few notable cases pertaining to railroads during this Survey period, but two decisions address whether a railroad may be held liable under state law claims for nuisance.

In *Reese v. CSX Transportation, Inc.*,<sup>105</sup> the United States District Court for the Southern District of Georgia addressed whether the presence of kudzu on a culvert located in the plaintiffs’ backyard that was owned and operated by CSX Transportation (CSX) contributed to the flooding of the plaintiffs’ homes after significant rain. The plaintiffs filed suit against CSX alleging that it was liable for various state law claims, including nuisance, negligence, negligence per se, and requesting injunctive relief.<sup>106</sup> The crux of the plaintiffs’ claims was that kudzu, which covered the culvert, collected debris and caused the plaintiffs’ home to flood by preventing proper drainage.<sup>107</sup> The court found that the plaintiffs presented enough evidence to overcome the defendant’s motion for summary judgment as to plaintiffs’ negligence claims but granted summary judgment to the defendant as to all of plaintiffs’ remaining claims.<sup>108</sup> Specifically, the court found that the defendant had a duty to maintain the culvert, and that the plaintiffs had presented enough evidence to create an issue of material fact as to whether the defendant was negligent in maintaining the culvert.<sup>109</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> Paragraph (a)(2) of 49 C.F.R. 273 “provides a minimum standard for customer on-time performance of 80 percent for any [two] consecutive calendar quarters.” 85 Fed. Reg. at 72,988.

<sup>104</sup> 85 Fed. Reg. 72,971, 72,972.

<sup>105</sup> 2020 WL 5740253 (S.D. Ga. 2020).

<sup>106</sup> *Id.* at \*25.

<sup>107</sup> *Id.* at \*2.

<sup>108</sup> *Id.* at \*33.

<sup>109</sup> *Id.* at \*28. The court noted that the issues of material fact pertain to the issues of breach and causation.

On the other hand, in *Bankhead v. Norfolk Southern Railway Co.*,<sup>110</sup> the United States District Court for the Northern District of Alabama addressed whether the plaintiffs' state law claims for nuisance, trespass, negligence, wantonness, and conspiracy against the defendant were preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA)<sup>111</sup> thus necessitating dismissal of the plaintiffs' complaint. The plaintiffs' claims arose as a result of the defendant storing approximately 252 railcars within their neighborhood which contained waste materials, including sewage, and omitted an obnoxious stench in addition to causing an infestation of flies.<sup>112</sup> Under the ICCTA, the Surface Transportation Board has exclusive jurisdiction over all claims arising from transportation of rail carriers.<sup>113</sup> The defendant moved to dismiss the plaintiffs' claims, arguing that the claims were preempted under the ICCTA.<sup>114</sup> The plaintiffs argued that because the defendant was merely storing the railcars at the facility, the cars were not in transport and thus not within the jurisdiction of the Surface Transportation Board.<sup>115</sup> However, the court cited to the definition of "transportation" within the ICCTA which specifically includes "storage" related to the movement of passengers and property.<sup>116</sup> Thus, the court found that the plaintiffs' claims were preempted by the ICCTA and granted the defendant's motion to dismiss.<sup>117</sup>

Turning away from nuisance but keeping to the issue of preemption, the United States District Court for the Northern District of Georgia answered the question of whether an employee's claim under the Federal Employers' Liability Act (FELA)<sup>118</sup> was precluded by the Federal Railroad Safety Act (FRSA)<sup>119</sup> in *Guinn v. Norfolk Southern Railway Co.*<sup>120</sup> In *Guinn*, the plaintiff was injured while working for the defendant and filed suit, alleging claims for negligent training, negligent

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<sup>110</sup> 2020 WL 4464443 (N.D. Ala. 2020).

<sup>111</sup> 49 U.S.C. §§ 701–727 (current version at 49 U.S.C.A. §§ 1301–1325 effective December 18, 2015). The ICCTA abolished the Interstate Commerce Commission and created the Surface Transportation Board that has authority over all rail carriers.

<sup>112</sup> *Bankhead*, 2020 WL 4464443 at \*1.

<sup>113</sup> 49 U.S.C. § 10501.

<sup>114</sup> *Bankhead*, 2020 WL 4464443 at \*2.

<sup>115</sup> *Id.* at \*3.

<sup>116</sup> *Id.* at \*4 (quoting 49 U.S.C. § 10102(9)(B)).

<sup>117</sup> *Id.*

<sup>118</sup> 45 U.S.C. §§ 51–60.

<sup>119</sup> 49 U.S.C. §§ 20101–20121.

<sup>120</sup> 441 F. Supp. 3d 1319 (N.D. Ga. 2020).

assignment, and failure to abide by the Safety Appliance Act.<sup>121</sup> The defendant moved for partial summary judgment, arguing that because its training program was approved pursuant to FRA regulations, the plaintiff's FELA claims "premised on an ordinary, 'reasonable care' standard" were precluded by the FRSA.<sup>122</sup> The defendant relied on the FRSA's preemption provision, which states, "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable."<sup>123</sup> The court, however, was not persuaded by the defendant's argument. Rather, the court relied on the reasoning set forth in the Georgia Supreme Court's recent opinion in *Norfolk Southern Railway Co. v. Hartry*.<sup>124</sup> In *Hartry*, the same defendant raised the very same argument, which the supreme court rejected. The Georgia Supreme Court held in *Hartry* that "[p]ermitting safety-related suits under FELA will enhance, rather than impede, the purpose of FRSA in promoting railroad safety and reducing accidents."<sup>125</sup> The District Court in *Guinn* adopted the reasoning of the Georgia Supreme Court and held that "FELA claims based on an ordinary 'reasonableness standard' are not precluded by the FRSA."<sup>126</sup>

#### V. AUTONOMOUS VEHICLES

While no formal rules regarding autonomous vehicles (AVs) were promulgated in 2020, as innovation continues, the groundwork is being laid for the enactment of legislation and regulations by federal entities. In March 2020, the National Highway Traffic Safety Administration (NHTSA) published a Notice of Proposed Rulemaking (NPRM) entitled "Occupant Protection for Automated Driving Systems."<sup>127</sup> This is one of many regulatory actions that NHTSA is considering to address the challenges of testing and verifying that vehicles equipped with Automated Driving Systems (ADS) are in compliance with the Federal Motor Vehicle Safety Standards (FMVSS).<sup>128</sup>

The proposed rule would modify the existing FMVSS to maintain the current occupant protection requirements while also providing

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<sup>121</sup> *Id.* at 1322–23.

<sup>122</sup> *Id.* at 1333.

<sup>123</sup> *Id.* (alteration in original) (quoting 49 U.S.C. § 20106(a)).

<sup>124</sup> 307 Ga. 566, 837 S.E.2d 303 (2019).

<sup>125</sup> *Id.* at 572, 837 S.E.2d at 309.

<sup>126</sup> *Guinn*, 441 F. Supp. 3d at 1333–34.

<sup>127</sup> 85 Fed. Reg. 17,624 (Mar. 30, 2020) (to be codified at 49 C.F.R. pt. 571).

<sup>128</sup> *Id.* at 17,625; 49 C.F.R. pt. 571, Subpart B.

regulatory certainty for manufacturers developing ADS-equipped vehicles.<sup>129</sup> NHTSA intends to achieve this goal by making changes to the FMVSS and 49 C.F.R. § 571.3, which defines the terms contained in the National Traffic and Motor Vehicle Safety Act of 1966.<sup>130</sup> The areas of interest include occupant protection,<sup>131</sup> driver impact protection,<sup>132</sup> steering control displacement,<sup>133</sup> seating systems,<sup>134</sup> side impact and roof protection,<sup>135</sup> child restraint anchoring systems,<sup>136</sup> and ejection mitigation.<sup>137</sup> While this proposal attempts to resolve most of the FMVSS occupant protection barriers, it does not address warnings related to ADS vehicles when there is no requirement for an occupant to be in the driver's seat, which will be the subject of its own future NPRM to engage the stakeholders in discussion.<sup>138</sup>

In a hint of federal rulemaking on the horizon, NHTSA granted its first AV exemption from the established safety standards.<sup>139</sup> A California-based company developing a robotic vehicle smaller than a typical car was exempted from three FMVSSs regarding occupant safety because its vehicle does not have any occupant compartments or manual controls.<sup>140</sup> NHTSA also released two Advanced Notices of Proposed Rulemaking (ANPRMs)<sup>141</sup> and a 248-page report with findings from a research project regarding technical translations of the FMVSS and their application to ADS-equipped vehicles.<sup>142</sup>

Another publication during this Survey period came from the National Science & Technology Council and U.S. Department of Transportation, which issued a joint report developed to unify efforts related to AVs

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<sup>129</sup> 85 Fed. Reg. at 17,626.

<sup>130</sup> *Id.*; 80 Stat. 718 (1966).

<sup>131</sup> 49 C.F.R. § 571.201 (1997).

<sup>132</sup> 49 C.F.R. § 571.203 (2012).

<sup>133</sup> 49 C.F.R. § 571.204 (1998).

<sup>134</sup> 49 C.F.R. § 571.207 (2008).

<sup>135</sup> 49 C.F.R. §§ 571.214, 571.216(a) (2012).

<sup>136</sup> 49 C.F.R. § 571.225 (2012).

<sup>137</sup> 49 C.F.R. § 571.226 (2020).

<sup>138</sup> 85 Fed. Reg. at 17,626.

<sup>139</sup> Nuro, Inc.; Grant of Temporary Exemption for a Low-Speed Vehicle With An Automated Driving System, 85 Fed. Reg. 7,826 (Feb. 11, 2020).

<sup>140</sup> 49 C.F.R. § 571.500 (2016).

<sup>141</sup> Framework for Automated Driving System Safety, 85 Fed. Reg. 78,058 (Dec. 3, 2020); Federal Motor Vehicle Safety Standards: Test Procedures, 85 Fed. Reg. 79,456 (Dec. 10, 2020).

<sup>142</sup> FMVSS Considerations for Vehicles with Automated Driving Systems: Volume 1 (Report No. DOT HS 812 796, Apr. 2020).

across thirty-eight federal departments and independent agencies.<sup>143</sup> The Congressional Research Service released “Issues in Autonomous Vehicle Testing and Deployment,” noting that while Congress remains interested in autonomous vehicles and is considering legislative solutions to some of the regulatory challenges, no legislative proposals have become law.<sup>144</sup>

Vehicles operating on public roads are subject to dual regulation by the federal government and states in which they are registered and driven. Both federal and state agencies are addressing vehicle motorist standards while AV innovation continues. The DOT has announced that it anticipates issuing annual updates to its regulatory guidance. The mainstream use of autonomous vehicles has tremendous implications for highway infrastructure, which will require laws and regulations that we can expect to see as the technology evolves.

#### VI. SHAREABLE DOCKLESS MOBILITY DEVICES

The United States District Court for the Northern District of Georgia recently examined the duty that dockless electric scooter and bicycle companies owe to the general public. In *Robinson v. Bird Rides, Inc.*,<sup>145</sup> the plaintiff was riding his own bike in Atlanta around dusk when he ran over one of the defendant’s scooters, which was lying abandoned in the street. The scooter was painted black and was not equipped with reflectors or lights. The plaintiff lost control of his bicycle, fell, and broke his hip.<sup>146</sup> The plaintiff filed suit against the defendant claiming that the defendant “breached its duty of care by ‘failing to equip its products with warnings lights or reflectors,’” by failing to prevent minors from handling scooters and by failing to prevent individuals from leaving its scooters in roadways.<sup>147</sup>

The defendant filed a Motion to Dismiss, which was granted.<sup>148</sup> The court’s interpretation of Georgia law found that the defendant owed the plaintiff no legal duty and therefore the plaintiff’s negligence action failed as a matter of law.<sup>149</sup> The court’s reasoning goes to the nature of

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<sup>143</sup> Ensuring American Leadership in Automated Vehicle Technologies: Automated Vehicles 4.0 (Jan. 2020); <https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/automated-vehicles/360956/ensuringamericanleadershipav4.pdf>.

<sup>144</sup> Bill Canis, Cong. Rsch. Serv., R45985, Issues in Autonomous Vehicle Testing and Deployment (Feb. 11, 2020).

<sup>145</sup> 2020 WL 2129241, at \*1 (N.D. Ga. May 5, 2020).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at \*3.

<sup>149</sup> *Id.* at \*2.

the shareable vehicle business model. Because the plaintiff's complaint alleged that an unknown third party, as opposed to the defendant themselves, left the scooter in the plaintiff's path, the defendant owed him no duty.<sup>150</sup> The defendant argued that it can place scooters around the city as it pleases, fail to provide docking stations where customers can return scooters after use, not include any lights or reflectors to make scooters more visible when strewn about the roadway by carefree customers, and avoid liability to the plaintiff because it owed him no duty.<sup>151</sup> The court found that Georgia law supported that argument and granted the Motion to Dismiss.<sup>152</sup>

#### VII. CONCLUSION

As this Article illustrates, commercial-transportation law involves an often-complex interaction of state and federal laws and reaches into wide-ranging areas of American life. Staying well informed about the laws and regulations affecting commercial transportation is indispensable for practitioners across legal practice areas.

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<sup>150</sup> *Id.*; See *Shockley v. Zayre of Atlanta, Inc.*, 118 Ga. App. 672, 165 S.E.2d 179, 182 (1968) (finding that the defendant had no duty to protect the plaintiff from the foreseeable and dangerous actions of third parties).

<sup>151</sup> *Robinson*, 2020 WL 2129241, at \*1.

<sup>152</sup> *Id.* at \*3.