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Commercial Transportation

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I. INTRODUCTION

Commercial transportation involves all of the significant forms of passenger and property transportation across the United States. This Article covers four major areas: (1) trucking and commercial transit; (2) aviation; (3) limousines, taxis, and rideshare services; and (4) railroads.[1] Most of these areas are subject to heavy federal regulation due to their involvement in and effect on interstate commerce. This Article surveys

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1. A fifth major issue in commercial transportation, the development of autonomous vehicles (or self-driving cars), is being regulated primarily at the state level at present, to the extent it is regulated at all. Therefore, there are no significant developments to report in this survey of Eleventh Circuit law. The reader should be aware that as autonomous vehicles come ever closer to reality, they are expected to have important effects across all ground-based commercial transportation. For more on how the state of Georgia is beginning to regulate autonomous vehicles *see* Stephen G. Lowry, Madeline E. McNeeley, Kristy S. Davies & Yvonne S. Godfrey, *Commercial Transportation, Annual Survey of Georgia Law*, 69 MERCER L. REV. 41, 56–57 (2017).

significant judicial, regulatory, and legislative developments in Eleventh Circuit commercial transportation law during the period from January 1, 2016 through December 31, 2017.[2]

II. TRUCKING AND COMMERCIAL TRANSIT

The United States Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) was established on January 1, 2000,[3] to regulate commercial motor vehicles by "consider[ing] the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation."[4] More specifically, the FMCSA is charged with enforcing federal laws and regulations, particularly the Federal Motor Carrier Safety Regulations (FMCSR).[5] The FMSCR is "applicable to all employers, employees, and commercial motor vehicles that transport property or passengers in interstate commerce."[6] However, the FMSCR does not apply to the following: (1) school bus operations; (2) "[t]ransportation performed by the Federal government, a State, or any political subdivision of a State, or an agency established under a compact between States that has been approved by the Congress of the United States";[7] (3) transportation of personal property not for compensation; (4) transportation of corpses or sick and injured persons; (5) fire trucks and other rescue vehicles while operating in an emergency circumstance; (6) "[t]he operation of commercial motor vehicles designed or used to transport between 9 and 15 persons (including the driver)";[8] and (7) propane transporters if the FMCSR would prevent them from responding to an emergency requiring immediate response.[9]

In addition to complying with the FMSCR, commercial motor vehicle operators must comply with state and local laws and regulations, including obtaining and maintaining a commercial driver's license

2. The sixty-ninth volume of the *Mercer Law Review* marks the first survey of commercial transportation law in the United States Court of Appeals for the Eleventh Circuit. For that reason, this Article covers an expanded survey period.

3. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (1999) (codified as amended at 49 U.S.C. § 113 (1999)).

4. 49 U.S.C. § 113 (2017).

5. 49 C.F.R. §§ 350–99 (2017).

6. 49 C.F.R. § 390.3(a)(1) (2017).

7. 49 C.F.R. § 390.3(f)(2) (2017).

8. 49 C.F.R. § 390.3(f)(6) (2017).

9. 49 C.F.R. § 390.3(f) (2017).

(CDL).[10] Although issued by individual states, the Motor Carrier Safety Improvement Act of 1999[11] authorizes the FMCSA to regulate CDLs nationwide.[12] Typically, there are three classes of CDLs: Class A, for "[a]ny combination of vehicles with a gross combination weight rating (GCWR) of 11,794 kilograms or more (26,001 pounds or more) provided the GVWR of the vehicle(s) being towed is in excess of 4,536 kilograms (10,000 pounds);"[13] Class B, for "[a]ny single vehicle with a GVWR of 11,794 kilograms or more (26,001 pounds or more), or any such vehicle towing a vehicle not in excess of 4,536 kilograms (10,000 pounds) GVWR;"[14] and Class C, for "[a]ny single vehicle, or combination of vehicles, that meets neither the definition of Group A nor that of Group B as contained in this section, but that either is designed to transport 16 or more passengers including the driver, or is used in the transportation of hazardous materials."[15]

A. Regulatory Developments

Since the inception of the Motor Carrier Safety Improvement Act of 1999, commercial motor vehicle drivers regulated by the FMCSA have been required to maintain hours of service (HOS) logbooks recording the driver's duty status for each twenty-four-hour period.[16] In the past, commercial motor vehicle drivers had the option to record their HOS manually using a specific handwritten grid.[17] As of December 18, 2017, however, motor carriers "operating commercial motor vehicles must install and require each of its drivers to use an [electronic logging device (ELD)] to record the driver's duty status."[18] Although the overall implications of this new regulation are unclear, there are two particular areas of the law that will undoubtedly be affected by the FMCSA's new ELD mandate. First, the requirement of using ELDs to log HOS should improve the integrity of recording a driver's on-duty and off-duty hours. Better tracking, in turn, should improve motor carriers' and law enforcement's ability to spot HOS violations. Second, ELDs should help prevent spoliation of evidence in litigation involving commercial motor vehicles by eliminating a driver's or motor carrier's ability to destroy the

10. 49 C.F.R. §§ 383.3(a), 390.3(b) (2017).
11. 49 U.S.C. § 113 (2017).
12. *Id.*
13. 49 C.F.R. § 383.91(a)(1) (2017).
14. 49 C.F.R. § 383.91(a)(2) (2017).
15. 49 C.F.R. § 383.91(a)(3) (2017).
16. 49 C.F.R. § 395.8(a)(1) (2017).
17. 49 C.F.R. § 395.8(a)(1)(iv)(C) (2017).
18. 49 C.F.R. § 395.8(a)(1)(i) (2017).

paper logs before they can be saved in an electronic filing system. Hopefully, this will reduce the number of issues arising in trucking litigation and make for a more efficient litigation process.

In addition to the ELD mandate, the FMCSA has issued a final rule heightening the minimum training requirements of new commercial motor vehicle operators.[19] These new regulations for training standards apply to "individuals applying for their commercial driver's license (CDL) for the first time; an upgrade of their CDL . . . or a hazardous materials (H), passenger (P), or school bus (S) endorsement for the first time."[20] The rule primarily revises the FMCSR's special training requirements[21] to require that entry-level drivers receive mandatory training.[22] The regulation went into effect on June 5, 2017.[23]

Next, the FMCSA promulgated a final rule revising the medical examination report that medical examiners of commercial motor vehicle drivers must complete before issuing a medical examiner's certificate to the drivers.[24] This final rule was issued on April 23, 2015, and went into effect on April 20, 2016.[25] The new forms required by the FMCSA do not change the physical qualifications to be applied by a medical examiner, but the new forms do seek more information from the medical examiner and require more information to support their qualifying decisions, especially where medical conditions exist.[26] The new forms will likely lead to higher scrutiny of medical examiners that could result in more failed medical examinations and more out-of-service drivers.

Finally, the National Highway Traffic Safety Administration (NHTSA) is currently teaming with the FMCSA to make additions to regulations affecting motor carriers and drivers. Most notably, the NHTSA and the FMCSA proposed a new regulation to be added to the FMCSR that would limit the speed of certain commercial motor

19. Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators, 81 Fed. Reg. 88732 (Dec. 8, 2016) (codified at 49 C.F.R. pts. 380, 383 & 384).

20. *Id.*

21. 49 C.F.R. pt. 380.

22. 81 Fed. Reg. 88732.

23. Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators, 82 Fed. Reg. 23516 (May 23, 2017).

24. Medical Examiner's Certification Integration, 80 Fed. Reg. 22790 (Apr. 23, 2015) (codified at 49 C.F.R. pts. 383, 384 & 391); *see also* Guidance on Medical Examiner's Certification Integration Final Rule Regarding Use of Driver, 80 Fed. Reg. 79273 (Dec. 21, 2015).

25. 80 Fed. Reg. 79273.

26. *Id.*

vehicles.[27] The proposed regulation "would require vehicles with a gross vehicle weight rating of more than 11,793.4 kilograms (26,000 pounds) to be equipped with a speed limiting device initially set to a speed no greater than a speed to be specified in a final rule."[28] This rule proposal has not become final and is still under deliberation.[29] If instituted, the rule would no doubt slow down tractor-trailer drivers and prevent many dangerous, and often fatal, vehicle collisions.

B. Judicial Developments

Pursuant to 49 U.S.C. § 31139,[30] motor carriers transporting property must have a minimum of $750,000 in insurance coverage for automobile wrecks involving commercial motor vehicles.[31] In *National Specialty Insurance Co. v. Martin-Vegue*,[32] the United States Court of Appeals for the Eleventh Circuit examined whether an MCS-90 endorsement, which guarantees the minimum level of coverage, applied in a case where the at-fault tractor-trailer driver was excluded from coverage under the motor carrier's insurance policy.[33] The case involved two motor carriers—Freight and Transport—that allegedly were both the motor carriers "for-hire" at the time of the wreck.[34] Evidence suggested that Freight had a contract to carry the cargo contained in the trailer involved in the collision and that Transport leased the tractor, trailer, and driver from Freight.[35] Freight's insurance policy specifically excluded any driver who was using one of Freight's covered vehicles under a "written lease or trailer interchange agreement," such as the driver in this action.[36]

The individual who brought the underlying personal injury action argued here the MCS-90 endorsement applied to her claims and Freight

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27. Federal Motor Vehicle Safety Standards; Federal Motor Carrier Safety Regulations; Parts and Accessories Necessary for Safe Operation; Speed Limiting Devices, 81 Fed. Reg. 61942 (proposed Sept. 7, 2016) (to be codified at 49 C.F.R. pts. 393, 571).

28. *Id.*

29. *Id.*

30. 49 U.S.C. § 31139 (2017).

31. 49 U.S.C. § 31139(b)(2) (2017). For commercial motor vehicles transporting hazardous materials, the minimum insurance required by this Code section is $5 million. 49 U.S.C. § 31139(d)(2)(i) (2017).

32. 644 F. App'x 900 (11th Cir. 2016). This case was a declaratory judgment action related to an underlying personal injury claim for the damages incurred due to a motor vehicle collision. The defendant in this action was the plaintiff in the underlying personal injury lawsuit.

33. *Id.* at 904.

34. *Id.* at 903–04.

35. *Id.* at 902, 906.

36. *Id.* at 904.

was obligated to provide the minimum insurance limits despite the exclusion in its insurance policy. The court disagreed, holding the MCS-90 endorsement did not apply because Freight was not the "for-hire" motor carrier.[37] The Eleventh Circuit reasoned that "[f]ederal regulations define a for-hire motor carrier as a carrier in 'the business of transporting, for compensation, the goods or property of another.'"[38] The court determined that the driver of the tractor and trailer was hauling the cargo on behalf of Transport, not Freight.[39] Consequently, Transport was the only motor carrier that could be considered the "for-hire" motor carrier, and only Transport's—not Freight's—MCS-90 applied to the collision.[40]

The United States District Court for the Northern District of Alabama denied a defendant's motion for summary judgment in a hit-and-run involving a tractor-trailer where there was an eyewitness who could identify the owner of the tractor-trailer from the company's display of its logo on the side of the tractor-trailer.[41] In *Howze v. Western Express, Inc.*,[42] the plaintiff was run off the road and injured by an unknown tractor-trailer.[43] Fortunately for the injured motorcyclist, an eyewitness to the incident testified that the at-fault tractor-trailer bore the words "Western Express"—the same name as the defendant in the action.[44] The court determined that the eyewitness account was sufficient evidence for a jury to determine that Western Express, Inc. "owned and operated" the tractor-trailer.[45] This ruling is important because it provides a potential avenue of recovery for plaintiffs in cases involving hit-and-runs by tractor-trailer operators. Given the dangerous nature of tractor-trailers and numerous injuries incurred across the country at the hands of their operators, this decision may help ensure justice for victims of trucking negligence regardless of whether the driver sticks around at the scene of the incident.

Spoliation of drivers' logs created as part of a commercial motor vehicle operator's duty-status requirement under the FMCSR is evolving in the Eleventh Circuit. The United States District Court for the Middle

37. *Id.* at 907–08.

38. *Id.* (quoting 49 C.F.R. § 387.5).

39. *Id.*

40. *Id.*

41. Howze v. W. Express, Inc., No. 7:14-CV-01407-RDP, 2016 U.S. Dist. LEXIS 103935, at *5, *28 (N.D. Ala. Aug. 8, 2016).

42. 2016 U.S. Dist. LEXIS 103935.

43. *Id.* at *3.

44. *Id.* at *6.

45. *Id.* at *23–24.

District of Georgia recently sanctioned the defendants in a personal injury case involving a tractor-trailer collision for failing to preserve the tractor-trailer driver's HOS logs.[46] In *O'Berry v. Turner*,[47] the commercial motor carrier received a spoliation letter and notice of claims for the personal injury of the plaintiffs just two months after the wreck. Despite the spoliation letter, the motor carrier allegedly lost the driver's logs when the company later moved its operations to a different building. Although the motor carrier claimed an excuse for accidentally "losing" the driver's logs after receiving notice of the claims,[48] the court concluded that the destruction of evidence was "intentional" and awarded sanctions in the form of an adverse inference.[49] In other words, the court decided that it would "instruct the jury that it must presume that the lost information, including the driver's log and all other data that was collected . . . was unfavorable to" the motor carrier.[50] This ruling demonstrates that a motor carrier must take the utmost care in preserving relevant information regarding claims for personal injury, especially the driver's logs that show a driver's hours of service.

III. AVIATION

Aviation law is an area highly regulated and determined by federal regulations,[51] and in some cases, international treaties.[52] As a result, federal courts determine much of the case law regulating commercial aviation.[53] Moreover, recent updates and amendments to federal aviation

46. O'Berry v. Turner, 7:15-CV-00064-HL, 7:15-CV-00075-HL, 2016 U.S. Dist. LEXIS 55714, at *10 (M.D. Ga. Apr. 27, 2016).

47. 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016).

48. *Id.* at *6–7.

49. *Id.* at *12.

50. *Id.* at *14.

51. ROBIN C. LARNER, 15 GA. JUR. PERSONAL INJURY AND TORTS § 29:25 (2017) ("Federal aviation regulations have been promulgated to regulate virtually every aspect of aviation in the United States; these regulations are duly published in accordance with law in the Code of Federal Regulations, and they have the force of law.").

52. The United Nations treaty regarding international carriage by air, the Montreal Convention (which replaced its predecessor, the Warsaw Convention, *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1354, 1360 (S.D. Fla. 2008)), 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." (citation omitted)); *Ugaz*, 576 F. Supp. 2d at 1360 ("The Montreal Convention entered into force in the United States on November 4, 2003 and superseded the Warsaw Convention.").

53. Indeed, state courts frequently look to federal aviation regulations when addressing aviation-related issues under state law. *See, e.g.*, Eagles Jets, LLC v. Atlanta

statutes demonstrate the extent to which federal legislation and regulation impact the landscape of commercial aviation law.[54]

A. Recent Cases

In the past two years, few cases have been decided that directly impact commercial aviation, in large part due to the already extensive federal regulation in that area. In *Zamber v. American Airlines, Inc.*,[55] the United States District Court for the Southern District of Florida had the opportunity to address the interplay between Florida consumer protection law and federal preemption of state attempts to regulate air transportation.[56] Specifically, in *Zamber*, the district court addressed a motion to dismiss a purported class action brought under Florida state laws for alleged deception and unjust enrichment regarding the language appearing on an airline's website when a customer purchases optional trip insurance.[57] The case presented a threshold issue of whether the federal Airline Deregulation Act (ADA)[58] foreclosed or preempted the plaintiff's claims.[59]

The plaintiff in *Zamber* alleged that, while the trip insurance was being provided by a third-party insurer, defendant American Airlines, Inc. (American) was receiving an undisclosed "kickback" on every trip insurance policy sold to American's customers.[60] The plaintiff alleged this practice violated Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) and constituted unjust enrichment. American moved to dismiss, arguing, *inter alia*, that the plaintiff's claims were preempted by the ADA.[61]

The ADA preempts state laws that are "related to a price, route, or service of an air carrier that may provide air transportation."[62] A state

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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) constitutes 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).

54. *See* FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, 130 Stat. 615 (discussed in text accompanying *infra* notes 80–83).

55. No. 16-23901, 2017 U.S. Dist. LEXIS 49299 (S.D. Fla. Oct. 17, 2017).

56. *Id.* at *1–2.

57. *Id.* at *1.

58. 49 U.S.C. § 41713(b)(1) (2017).

59. *Zamber*, 2017 U.S. Dist. LEXIS 49299, at *2.

60. *Id.* at *4.

61. *Id.* at *6–7.

62. 49 U.S.C. § 41713(b)(1).

law is considered "related to a price, route, or service of an air carrier"[63] when it has "a connection with, or reference to, airline 'rates, routes, or services.'"[64] "The Eleventh Circuit has explained that [the] ADA does not 'result in the preemption of virtually everything an airline does,' but rather, the ADA's preemptive effect is 'limited to the bargained-for aspects of airline operations over which carriers compete.'"[65]

The district court noted in *Zamber* that the case appeared to present an issue of first impression as to whether the ADA preemption would apply in the context of trip insurance sold by a third party.[66] Ultimately, the district court elected to postpone ruling on the ADA preemption issue at the motion-to-dismiss phase, finding that discovery of additional necessary facts was required.[67]

While *Zamber* involved facts directly affecting the commercial aviation industry, cases involving private, non-commercial aviation may nevertheless shed light on how federal courts will analyze the interplay between state law and federal regulations in the commercial context. In *Knous v. United States*,[68] the Eleventh Circuit considered a wrongful death action in which the plaintiffs alleged the Federal Aviation Administration (FAA) breached its duty of care in providing air traffic control services to a pilot of a private aircraft, resulting in a plane crash that killed the pilot and his wife.[69] The plaintiffs brought their claims under the Federal Tort Claims Act.[70] Following a bench trial, the United States District Court for the Northern District of Georgia concluded an air traffic controller had no duty to report observed weather or provide vectoring services to the pilot, and that he acted reasonably under the circumstances. The district court also found that the weather did not cause the in-flight breakup of the plane.[71]

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63. *Id.*

64. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

65. *Zamber*, 2017 U.S. Dist. LEXIS 49299, at *20 (quoting Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1256, 1258 (11th Cir. 2003) (emphasis in original)); *see also* Amerijet Int'l, Inc. v. Miami–Dade Cty., 627 F. App'x 744, 749 (11th Cir. 2015) (holding that a "service" under the ADA "must fit within the limited range of services over which airlines compete" and must be provided as part of a "bargained-for exchange . . . between an air carrier and its consumers").

66. *Zamber*, 2017 U.S. Dist. LEXIS 49299, at *19.

67. *Id.* at *19–20.

68. 683 F. App'x 859 (11th Cir. 2017).

69. *Id.* at 860.

70. 28 U.S.C. ch. 171 (2018).

71. *Id.*

On appeal, the Eleventh Circuit affirmed the district court's findings.[72] In analyzing the duty of air traffic controllers, the Eleventh Circuit noted that the duty may "rest either upon the requirements of procedures manuals spelling out the functions of its air traffic controllers or upon general pilot reliance on the government for a given service."[73] Referencing the FAA Air Traffic Control Manual (ATCM), the Eleventh Circuit agreed with the district court that:

> [T]he primary purpose of the air traffic controller system is to prevent collision between aircraft and organize and expedite the flow of traffic[;] [c]ontrollers are required to stay aware of current, pertinent weather information and provide additional services, like weather reporting, 'to the extent possible, contingent only upon higher priority duties and other factors . . . ; [and controllers are required] to provide pilots with pertinent information on observed/reported weather.[74]

The district court concluded that the controller in *Knous* satisfied this duty by communicating three "PIREPs" (pilot reports of actual weather conditions encountered by a plane in flight) to the pilot prior to the subject incident. The court determined that because the controller subsequently prioritized separating planes and directing an FAA flight check in his sector, rather than providing updated weather information to the pilot, his conduct before was consistent with the controller's duty of care.[75] The Eleventh Circuit agreed.[76] It also rejected the plaintiffs' assertion that a 2006 FAA memorandum required the controller to relay weather data depicted on his radar to pilots in the area, in addition to PIREPs.[77]

Of particular relevance to future aviation cases involving alleged negligence of air traffic controllers, the Eleventh Circuit rejected the argument that the ATCM established a "floor" on conduct, and that the duty of reasonable care required additional acts by the controller.[78] Finally, the Eleventh Circuit noted that, even if the controller had breached a duty of care, it would nevertheless affirm the district court's finding that the plaintiff failed to demonstrate the weather proximately caused the plane to break apart in flight.[79]

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72. *Id.* at 861.
73. *Id.* at 863 (quoting Gill v. United States, 429 F.2d 1072, 1075 (5th Cir. 1970)).
74. *Id.*
75. *Id.*
76. *Id.* at 863–64.
77. *Id.* at 864.
78. *Id.* at 864–65.
79. *Id.* at 866–67.

B. Legislation

Finally, on the legislative front, federal statutes pertaining to commercial aviation were amended pursuant to the FAA Extension, Safety, and Security Act of 2016,[80] which was enacted on July 15, 2016.[81] The stated purpose of the Act was to extend authorizations for the airport improvement program, to amend the tax code to extend funding and expenditure authority of the Airport and Airway Trust Fund, and for other purposes.[82] The Act encompassed everything from mental health screening for pilots, "laser pointer incidents," and aviation cybersecurity, to extensive provisions related to "unmanned aircraft" (drones) and refunds for delayed baggage.[83] Even a cursory review of the legislation and affected statutes demonstrates the extensive influence federal statutory law and the FAA exercise over legal developments in commercial aviation.

IV. VEHICLES FOR HIRE: TAXICABS, LIMOUSINES, AND RIDESHARE SERVICES

Regulation of taxicabs, limousines, and rideshare services (also known as transportation network entities or transportation network companies), such as Uber and Lyft, primarily occurs at the state and local level. The federal courts primarily have been called upon to adjudicate two issues: Whether service providers violated the Fair Labor Standards Act (FLSA)[84] by classifying drivers as independent contractors and whether new regulations distinguishing between rideshare services and traditional taxicab and limousine services are constitutional.

A. Fair Labor Standards Act Litigation

Litigation over labor disputes between drivers and their employers often arises in the context of traditional taxicab and limousine services. For example, in *Francois v. Gulf Coast Transportation, Inc.*,[85] two Florida taxicab drivers filed suit against their former employer, alleging they and their coworkers had been misclassified as independent contractors. Drivers for Gulf Coast Transportation entered into twelve-month "Agreement[s] for Independent Vehicle-For-Hire Operators," which

80. Pub. L. No. 114-190, 130 Stat. 615.

81. *Id.*; 49 U.S.C. §§ 40101–40130 (1994).

82. Pub. L. No. 114-190, 130 Stat. 615.

83. *Id.*

84. 29 U.S.C. §§ 201–219 (1938).

85. No. 8:16-cv-1061-T24 TBM, slip op. 2017 U.S. Dist. LEXIS 77181 (M.D. Fla. May 22, 2017).

allowed them to lease a taxicab for a set fee. The cabs came with a certificate permitting operation in Hillsborough County, Florida, as well as a radio dispatch system, a fare meter, and a computer for accepting credit card payments. The agreements provided the drivers would keep all the money they generated, but they were not paid any wages. The agreements stated they were independent contractors; however, the plaintiffs alleged they were actually employees, so failure to pay them a wage violated the FLSA.[86]

In particular, the plaintiffs argued Gulf Coast Transportation exercised significant control over their manner of work and gave them no opportunity to make a profit because it suspended or reprimanded drivers who refused to take fares from the dispatch system; it conducted performance reviews and evaluations; it required drivers to take airport passengers at the flat fees it negotiated rather than at the usual rate; it fined or reprimanded drivers for failing to comply with policies and procedures; it reserved the right to terminate unilaterally or to refuse to renew a driver's agreement; it required drivers to accept fares only through the dispatch system or when hailed on the street rather than building their own client lists; and it mandated that drivers "could not refuse transportation to unruly or troublesome passengers after picking them up."[87] Although the company disputed many of these assertions, the United States District Court for the Middle District of Florida found the allegations and supporting evidence sufficient to survive summary judgment and to create a need for a jury trial.[88]

FLSA disputes in the context of transportation network entities are complicated by the inclusion of arbitration agreements in the various contracts those drivers accept through their mobile devices. In *Richemond v. Uber Technologies, Inc.*,[89] the plaintiff argued that Uber had misclassified him and other employees as independent contractors and did not properly pay him for overtime hours, thus, violating the FLSA. Uber argued Richemond was required to submit his claim to arbitration, but Richemond argued in turn that the arbitration provisions in the contracts violated the National Labor Relations Act (NLRA) and were unenforceable.[90] The United States District Court for the Middle District of Florida granted Uber's motion to compel arbitration.[91]

86. *Id.* at *2–4.

87. *Id.* at *6–7.

88. *Id.* at *8. The parties settled on the morning of trial. No. 8:16-cv-01061-SCB-TBM, Clerk's Minutes–General, Aug. 28, 2017.

89. 263 F. Supp. 3d 1312 (S.D. Fla. 2017).

90. *Id.* at 1314.

91. *Id.* at 1318.

Importantly, the court noted that the arbitration agreement included a "delegation provision" making even disputes over the enforceability of the arbitration provision subject to arbitration.[92] Here, the question of whether Richemond was an employee or an independent contractor was not only the basis for Richemond's substantive claim, it also would determine the threshold matter of whether the NLRA, which applies only to "employees," rendered the arbitration agreement unenforceable.[93] While acknowledging that courts are not to "assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so,"[94] the court found Richemond clearly acceded to the arbitration provisions because they were prominently marked, he had time to review them, and they included opt-out clauses of which he did not avail himself.[95] Accordingly, the court determined that an arbitrator would be responsible for determining the threshold question of whether the arbitration clause was enforceable, including "whether Richemond's relationship with Uber [wa]s that of an employee or an independent contractor."[96]

Another Florida Uber driver brought a similar claim in *Lamour v. Uber Technologies, Inc.*[97] As in *Francois*, the plaintiff contended that Uber misclassified him and other drivers as independent contractors rather than employees, and he argued that several aspects of the drivers' contracts were unenforceable, particularly the arbitration agreement and the collective-action waiver it included. Uber again moved to compel arbitration. Lamour argued that because he was really an employee, not an independent contractor, the arbitration provision violated the NLRA, and the delegation provision directing this threshold issue to arbitration was not clear and unmistakable.[98] Citing *Richemond* alongside cases from other circuits, the magistrate judge determined that the delegation clause was clear and unmistakable and that it required the parties to submit the threshold issues to an arbitrator.[99] Moreover, even where the NLRA applies, the Eleventh Circuit has found collective-action waivers to be procedural rights that may be subjected to arbitration.[100] The magistrate judge found the arbitration provision's opt-out clause

92. *Id.* at 1316.
93. *Id.* at 1317.
94. *Id.* at 1316.
95. *Id.* at 1316–17.
96. *Id.* at 1317–18.
97. No. 1:16-cv-21449, slip op., 2017 U.S. Dist. LEXIS 29706 (S.D. Fla. Mar. 1, 2017).
98. *Id.* *9–11.
99. *Id.* at *32–33.
100. *Id.* at *27.

especially significant.[101] Some drivers took advantage of the opt-out clause, and it did not appear to be "a ruse or . . . purposely ineffective."[102] The magistrate judge recommended granting the motion to compel arbitration, and the district court subsequently adopted the magistrate judge's Report and Recommendations.[103]

Thus, at least where Uber drivers in this circuit fail to exercise their right to opt out of the arbitration provisions in their contracts, it appears that challenges to Uber's labor practices will continue to be decided in secret arbitration proceedings rather than in open court.

B. Constitutionality of Separate Regulatory Schemes for Rideshare Services and Traditional Vehicle-for-Hire Services

As rideshare services have entered local markets in Georgia, Florida, and Alabama over the past several years, legislators have been faced with how or whether to regulate this new spin on vehicles-for-hire. Existing taxi and limousine drivers have not always been pleased with the results. Two cases from the United States District Court for the Southern District of Florida illustrate the (largely unsuccessful) court challenges that traditional vehicle-for-hire companies have raised to what they see as unfairly lenient treatment of the new transportation network entities and a dilution of the market for taxi and limousine services.[104]

In *VTS Transportation, Inc. v. Palm Beach County*,[105] three limousine services sued over a Temporary Operating Agreement (TOA) between the County and a subsidiary of Uber Technologies, Inc. This agreement allowed Uber "to operate in Palm Beach County without complying with the ordinance governing vehicle-for-hire services." The plaintiffs argued that allowing Uber to operate subject only to the TOA's less onerous requirements violated their rights under the Equal Protection Clause of the U.S. Constitution[106] because the plaintiffs remained subject to all the requirements of the original ordinance.[107] To succeed on their claim, the limousine services had to show there was no rational basis for the County to enact the TOA treating Uber differently from other vehicle-for-hire

101. *Id.* at *34.

102. *Id.* at *4.

103. *Id.* at *7; order dated Aug. 28, 2017.

104. For more on legislation enacted by the Georgia General Assembly to regulate rideshare networks and the Georgia Supreme Court case deciding the constitutionality of this legislation, *see* Lowry et al., *Commercial Transportation*, *supra* note 1.

105. 239 F. Supp. 3d 1350 (S.D. Fla. 2017).

106. U.S. CONST. amend. XIV.

107. *VTS Transp., Inc.*, 239 F. Supp. 3d at 1352.

services; that is, the TOA was not rationally related to some legitimate government purpose.[108]

The district court found two rational bases for the differences between Uber's treatment under the TOA and limousine companies' treatment under the original ordinance.[109] First, the ordinance did not account for new technological developments that were key to Uber's operations.[110] The ordinance specified that non-taxi rides had to be reserved at least thirty minutes in advance by a writing, email, fax, or telephone, which would thwart the Uber subsidiary's goal of offering rides within five to fifteen minutes of a request made via Uber's digital platform.[111] The TOA did not contain any prearrangement requirement, and the court found it "reads as a stop-gap measure meant to allow [the subsidiary] to continue operating while [the County] 'reviewed its [vehicle for hire] regulations as they pertain specifically to [transportation network companies].'"[112] In fact, the County later amended the vehicle-for-hire ordinance to remove the thirty-minute requirement and to redefine "prearranged" as including requests made via a digital platform.[113] As to other requirements omitted from the TOA, such as insurance, background checks, knowledge of local geography and the English language, driver IDs, limitations on hours spent driving, and vehicle inspections, the court found these rationally related to differences between the two services, and thus, to the government's interest in facilitating competition.[114] Accordingly, the plaintiffs failed to state a claim for an Equal Protection violation, and the TOA stood.[115]

Traditional taxicab operators likewise challenged the constitutionality of an ordinance regulating transportation network entities in *Miadeco Corp. v. Miami-Dade County*.[116] Miami-Dade County required anyone operating a for-hire vehicle to obtain a for-hire license, or "medallion," which was considered the driver's intangible property. The County limited the total quantity of medallions, though it also occasionally auctioned off new ones, and the medallions were eligible to be resold. In May 2016, however, the County passed a new ordinance regulating only transportation network entities, which did not require those drivers to

108. *Id.* at 1354.
109. *Id.* at 1355.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1355–56.
114. *See id.* at 1356–62.
115. *Id.* at 1362.
116. 249 F. Supp. 3d 1296, 1299 (S.D. Fla. 2017), *appeal filed* (Apr. 28, 2017).

obtain medallions. Instead, the transportation network entity was required to obtain a "preliminary transportation network entity license or a transportation network entity for-hire license." There was no limitation on the number of such licenses that could be issued. This regulation also allegedly imposed looser requirements on rideshare drivers with respect to insurance, vehicle inspections, fare charges, and background checks than those imposed on taxicab drivers. The plaintiffs alleged that the application of less onerous regulations to rideshare networks violated taxi drivers' Equal Protection Rights and that allowing rideshare drivers to operate without medallions, devalued the taxi drivers' medallions, which violated the Fifth Amendment[117] so as to constitute a taking.[118]

As in *VTS Transportation*, the district court found several "important differences" between taxis and rideshare services that created a rational basis for the separate regulatory system, including the manner in which rides are hailed, the formation of a contract between rideshare drivers and their customers through the smartphone app, and rideshare services' variation in pricing versus taxi drivers' set fare rates.[119] As to the inverse-condemnation claim, the court pointed out that taxi drivers' property rights are in the medallions themselves, not in the overall for-hire-transportation market.[120] Indeed, while the law did create a property interest in the taxi medallions, a takings claim cannot arise in an area that is subject to such pervasive government control and into which the individual entered voluntarily.[121] "'Property' does not include a right to be free from competition,"[122] the County did not confiscate or negate the medallions, there still existed a market for taxis, and the medallions retained value, even if their secondary market value decreased.[123] Thus, the taxi drivers failed to state a claim for either an Equal Protection violation or a taking.[124]

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117. U.S. CONST. amend. V.

118. *Miadeco Corp.*, 249 F. Supp. 3d at 1300–01. The plaintiffs also alleged (and subsequently abandoned) a claim for a Commerce Clause violation, but the court noted that all of the activity at issue here was entirely intrastate. *Id.* at 1301, 1306–07.

119. *Id.* at 1304.

120. *Id.*

121. *Id.* at 1305.

122. *Id.* (quotation marks omitted).

123. *Id.* at 1305–06.

124. *Id.* at 1304, 1306.

V. RAILROADS

"Railroads are among the most heavily regulated American industries."[125] Several railroad-related regulations and judicial decisions were issued during this survey period, mostly pertaining to railroad safety.

A. Regulatory Developments

The Federal Railroad Administration (FRA) amended several regulations in 49 C.F.R. Part 236[126] in response to the Positive Train Control Enforcement and Implementation Act of 2015,[127] which extended the deadline for the railroad industry to implement Positive Train Control (PTC) systems on locomotives.[128] The new deadline for implementation is December 31, 2018, with the opportunity for another extension to December 31, 2020, and an additional three years for small railroads.[129] When fully implemented, all "Class I railroad main lines handling poisonous-inhalation-hazard materials and any railroad main lines with regularly scheduled intercity and commuter rail passenger service"[130] will have PTC systems, which use "communication-based/processor-based train control technology [to prevent] train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a main line switch in the wrong position."[131] Full implementation of PTC will be a significant step forward in passenger and freight-rail safety.

The FRA enacted new regulations at 49 C.F.R. part 270[132] on August 12, 2016, which finally went into effect on December 4, 2017.[133] These regulations require certain commuter and intercity passenger railroads to develop and implement a System Safety Program (SSP), a program of "processes and procedures [that] will identify then mitigate or eliminate hazards and the resulting risks on the railroad's system."[134] "These procedures, processes, and programs include, but are not limited to, the

125. Zimmerman v. Norfolk S. Corp., 706 F.3d 170, 174 (3d Cir. 2013).

126. 49 C.F.R. pt. 236 (2017).

127. H.R. 3651, 114th Cong. (1st Sess. 2015).

128. Positive Train Control Systems, 81 Fed. Reg. 10126-27 (Feb. 29, 2016).

129. 81 Fed. Reg. 10126.

130. FEDERAL RAILROAD ADMINISTRATION, POSITIVE TRAIN CONTROL, https://www.fra.dot.gov/ptc.

131. *Id.*

132. 49 C.F.R. pt. 270 (2017).

133. *See* System Safety Program, 81 Fed. Reg. 53850 (Aug. 12, 2016); System Safety Program, 82 Fed. Reg. 26359 (June 7, 2017).

134. 81 Fed. Reg. 53850; *see* 49 C.F.R. § 270.101.

following: A maintenance, inspection, and repair program; rules compliance and procedures review(s); SSP employee/contractor training; and a public safety outreach program."[135] Of particular importance to lawyers, these regulations restrict the ability of litigants and the public to obtain some information about the SSPs:

> [I]nformation that is generated solely for the purpose of developing, implementing, or evaluating a[n] SSP is protected from (1) discovery, or admissibility into evidence, or use for other purposes in a proceeding for damages involving personal injury, wrongful death, or property damage, and (2) State discovery rules and sunshine laws which could be used to require the disclosure of such information. Information that is compiled or collected for a purpose unrelated to the railroad's SSP is not protected.[136]

The FRA also opined that risk reduction records in the Administration's possession generally will be exempt from mandatory disclosure under the Freedom of Information Act (FOIA)[137] due to the interest in protecting the confidentiality of the SSP development and implementation process.[138]

Finally, for matters within the jurisdiction of the Surface Transportation Board, that agency enacted several amendments to its arbitration provisions in 49 C.F.R. part 1108.[139]

B. Recent Cases

The Federal Railroad Safety Act (FRSA)[140] expressly preempts most state and local laws.[141] In this survey period, this fact was illustrated in *Phillips v. OmniTRAX, Inc.*[142] The plaintiff brought various state law claims against Georgia Florida Railway, LLC, alleging it had not properly maintained and inspected the automatic warning gates at a particular rail crossing, causing the gates to strike the plaintiff's truck.[143] The United States District Court for the Middle District of Georgia noted

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135. 81 Fed. Reg. 53851; *see* 49 C.F.R. § 270.103.

136. 81 Fed. Reg. 53851; *see* 49 C.F.R. § 270.105.

137. 5 U.S.C. §§ 551–59 (2017).

138. 81 Fed. Reg. 53851.

139. 49 C.F.R. pt. 1108 (2017); Revisions to Arbitration Procedures, 81 Fed. Reg. 69410 (Oct. 6, 2016).

140. 49 U.S.C. §§ 20101-20121 (2017).

141. 49 U.S.C. § 20106(a)(2).

142. No. 1:14-cv-135, 2016 U.S. Dist. LEXIS 135329 (M.D. Ga. 2016).

143. *Id.* at *1. The first-named defendant, OmniTRAX, Inc., was dismissed without objection from the plaintiff upon a determination that it was not a proper party to the suit. *Id.* at *2.

that the FRSA gives the U.S. Secretary of Transportation authority to regulate "every area of railroad safety" and that the express preemption clause prohibits state governments from making their own regulations if the Department of Transportation has issued a regulation covering the same subject matter.[144] In this case, the court found both Georgia's common law regarding the duty to maintain active warning devices and the relevant statutes, O.C.G.A. §§ 32-6-190[145] and 32-6-200,[146] had been subsumed by the set of federal regulations governing the maintenance and safety of highway-rail grade crossing warning systems.[147] The plaintiff could only avoid federal preemption and pursue his state law claims if he could show that the state law "'(1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a [federal] law, regulation, or order . . . and (3) does not unreasonably burden interstate commerce.'"[148] As the plaintiff could not show the conditions at that particular crossing were unique and incapable of being adequately addressed by national standards, his claims against the railway were barred.[149]

In *Johns v. CSX Transportation, Inc.*,[150] on the other hand, the United States District Court for the Middle District of Georgia reviewed claims under O.C.G.A. § 32-6-190 on the merits, as well as considering other claims under the Georgia Code of Public Transportation (GCPT) and federal law claims.[151] Johns was catastrophically injured when he was traveling north on Anderson Memorial Church Road in Fitzgerald, Georgia and a train collided with his truck as he crossed the railroad tracks.[152] Johns's wife brought various state and federal claims on his behalf.[153] As to her claims under O.C.G.A. § 32-6-190 and the common law for failure to install active warning devices and failure to widen the road, the court did not mention possible preemption by federal regulations.[154] Instead, it found no common law duties existed, and the respective statutory duties fell on the Georgia Department of Transportation and the county.[155] The court likewise found no duty under

144. *Id.* at *9.
145. O.C.G.A. § 32-6-190 (2017).
146. O.C.G.A. § 32-6-200 (2017).
147. U.S. Dist. LEXIS 135329, at *9–10.
148. *Id.* at *11 (quoting 49 C.F.R. § 20106).
149. *Id.*
150. 210 F. Supp. 3d 1357 (M.D. Ga. 2016).
151. *Id.* at 1369, 1378.
152. *Id.* at 1363–64.
153. *Id.* at 1367.
154. *Id.* at 1369–71.
155. *Id.* at 1370 n.6, 1371.

the GCPT to install a crossbuck on the same post as the existing stop sign or to notify any governmental entity of the allegedly dangerous conditions evidenced by the past history of collisions at the subject location.[156]

The district court did address federal preemption with respect to train speeds.[157] The plaintiff alleged the operator negligently drove the train at a speed in excess of the fifteen miles per hour specified in its internal rule, but the court noted the FRSA preempted common law claims for operating at excessive speeds unless the speed violated an internal rule that was created pursuant to a federal regulation or order.[158] Here, the applicable federal regulation allowed speeds up to sixty miles per hour, and the internal rule specifying a lower speed was not created pursuant to a federal regulation or order.[159] Thus, the claim was preempted.[160]

The most consequential case pertaining to railroads in this survey period, however, has nothing to do with preemption or safety. *BNSF Railway Co. v. Tyrrell*[161] addressed the state courts' jurisdiction over railroads under the Federal Employers' Liability Act (FELA).[162] Two suits were brought against BNSF under FELA, which makes railroads liable to their employees for money damages for on-the-job injuries. Both suits were brought in Montana, although neither worker resided nor was injured in Montana.[163] The Montana Supreme Court first held the state courts could exercise personal jurisdiction over BNSF under 45 U.S.C. § 56,[164] which the Supreme Court of the United States determined was not a personal jurisdiction provision; rather, it addressed venue and subject matter jurisdiction.[165]

The Montana Supreme Court held in the alternative that personal jurisdiction could be based on Montana's long-arm statute, which applied to all "persons found within Montana." BNSF did not contest that it was

156. *Id.* at 1372–73.

157. *Id.* at 1373.

158. *Id.*

159. *Id.* at 1373–74. The train operator was traveling at thirty-nine miles per hour at the time of the collision. *Id.* at 1373.

160. *Id.* at 1374. The plaintiff also alleged failure to keep a proper lookout, failure to control excess vegetation at the crossing, and failure to comply with federal horn regulations. *Id.* at 1374, 1377–78. The court ultimately disposed of each of these claims by finding the alleged conduct was not a proximate cause of Johns's injuries and his contributory negligence was the sole proximate cause. *See id.* at 1380.

161. 137 S. Ct. 1549 (2017).

162. 45 U.S.C. §§ 51–60; *BNSF Ry. Co.*, 137 S. Ct. at 1551.

163. *BNSF Ry. Co.*, 137 S. Ct. at 1551.

164. 45 U.S.C. § 56 (2017).

165. *BNSF Ry. Co.*, 137 S. Ct. at 1551–52.

"found within" Montana within the meaning of the state law. It was not incorporated in Montana and did not maintain its principal place of business there, but it did maintain over 2,000 miles of railroad track in Montana and have more than 2,000 employees there.[166] The issue before the Supreme Court of the United States, then, was whether Montana's long-arm statute comported with due process.[167] The Court held no specific jurisdiction existed because neither worker was injured from work in or related to Montana.[168] As to general jurisdiction, which requires such continuous and systematic contacts in the forum as to render the company "at home" there, the Court held the "magnitude" of BNSF's activities in Montana was not sufficient to confer jurisdiction.[169] The general jurisdiction inquiry "calls for an appraisal of a corporation's activities in their entirety, [and] a corporation that operates in many places can scarcely be deemed at home in all of them."[170] Here, the Court determined that BNSF's contacts with Montana were sufficient to confer jurisdiction only over claims related to the business it conducts there.[171]

Although *BNSF* arose in the context of railroad operations and FELA, its holding is not limited to rail cases. *BNSF* and another recent personal jurisdiction case, *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*,[172] already are having ripple effects throughout the country on existing jury verdicts and on plaintiffs' ability to bring their claims in their choice of forum.[173]

Finally, readers with an interest in taxation should note the recent decision *CSX Transportation, Inc. v. Alabama Department of Revenue*,[174] which found that Alabama's scheme did not discriminate against railroads in violation of the Railroad Revitalization and Regulatory Reform Act of 1976[175] by exempting motor carriers and water carriers from a diesel fuel sales tax imposed on railroads.[176]

166. *Id.* at 1558–59.

167. *Id.* at 1555.

168. *Id.* at 1558.

169. *Id.* at 1559.

170. *Id.* (quotation marks omitted).

171. *Id.*

172. 137 S. Ct. 1773 (2017).

173. *See, e.g.*, Amanda Bronstad, *Missouri Appeals Court Reverses $72M Talc Verdict*, NAT'L L.J. (Oct. 17, 2017), https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/10/17/missouri-appeals-court-reverses-72m-talc-verdict/.

174. 247 F. Supp. 3d 1240 (N.D. Ala. 2017), *appeal filed* (Apr. 14, 2017).

175. Pub. L. No. 94-210, 90 Stat. 31 (1976).

176. *CSX Transp. Inc.*, 247 F. Supp. 3d at 1242.

VI. CONCLUSION

As this Article illustrates, commercial transportation law involves an often-complex interaction of state and federal law, even in areas that are primarily regulated at the federal level. Efforts to adapt the law to the fast-changing business and technological landscape further complicate this picture. Successfully navigating issues in commercial transportation requires a thorough understanding of laws and regulations at both the federal and state level and how they interact with each other.