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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 federal commercial transportation law affecting Georgia, Florida, and Alabama during the period from January 1, 2021, through December 31, 2021.¹ The first three areas discussed here are

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1. For an analysis of commercial transportation law during the prior Survey period, see Madeline E. McNeeley et al., *Commercial Transportation, Eleventh Circuit*, 72 MERCER L. REV. 1073 (2021).

subject to heavy federal regulation due to their far-reaching effects on interstate commerce: aviation, trucking and other commercial motor vehicles, and railroads. The remaining subjects covered in this Article—autonomous-vehicle technology, shareable electric bicycles, and shareable scooters—remain regulated primarily at the state and local levels but are discussed here to the extent they interact with the federal arena.

II. AVIATION

The federal government has almost exclusive control over commercial aviation, which plays a critical role in the welfare of the United States' citizens and economy. Since it began in early 2020, the COVID-19 pandemic has had a significant impact across all industries, including aviation. This public health crisis has involved the action and coordination of numerous federal entities, particularly air travel. While there are non-pandemic-related updates from this Survey period, the pressing need to address a moving target in real time remained at the forefront.

A. Regulation

Multiple federal agencies, including the United States Department of Transportation (USDOT), Federal Aviation Administration (FAA), Transportation Security Administration (TSA), and Centers for Disease Control and Prevention (CDC) have enacted rules and regulations in response to the COVID-19 pandemic. Face masks, testing, and vaccine requirements for air travel were put into place and changed with the tide of data and necessary public health measures related to COVID-19.

On January 21, 2021, President Biden issued Executive Order (E.O.) 13,998² in response to the CDC, the Surgeon General, and the National Institutes of Health's (NIH) conclusion that mask-wearing could mitigate the spread of COVID-19. With this finding and the lack of unified, controlling authority, public health measures on modes of transportation and entry points into the United States were necessary "to save lives and allow all Americans, including the millions of people employed in the transportation industry, to travel and work safely[.]"³

E.O. 13,998 went into effect immediately and required masks to be worn in compliance with CDC guidelines in airports and on commercial aircrafts.⁴ Given this novel task, the departments enacting regulations

2. Exec. Order No. 13,998, 86 Fed. Reg. 7205 (Jan. 26, 2021).

3. *Id.*

4. *Id.*

were ordered to report to the COVID-19 Response Coordinator regarding additional measures that may be taken to protect public transportation users.⁵ E.O. 13,998 also announced an executive policy that international travelers entering the United States must provide proof of a recent negative COVID-19 test prior to entry and comply with other CDC guidelines, including periods of isolation or quarantine after entry.⁶ The FAA and TSA were tasked with coordinating with the CDC to determine the requirements and procedure to execute this policy, such as the timing and types of tests that would provide reliable safeguards.⁷

Following E.O. 13,998, the CDC promulgated an Emergency Action requiring all persons, with limited exceptions, to wear a mask covering “the mouth and nose when traveling on any conveyance” or while inside any transportation hub within the United States.⁸ Airline and airport operators were responsible for using “best efforts” to ensure compliance with the Order, including denying entry to or removing persons not properly wearing masks.⁹ CDC deemed this Order necessary for the protection of the public’s health as well as the country’s economy, given the increased risk of spreading COVID-19 during air travel due to close contact with others.¹⁰ The travel mask mandate was to remain in effect “unless modified or rescinded based on specific public health or other considerations, or until the Secretary of Health and Human Services rescinds the determination under section 319 of the Public Health Service Act (42 U.S.C. 247d) that a public health emergency exists.”¹¹

The chain of command moved swiftly. On January 27, 2021, the Acting Secretary of Homeland Security declared the existence of a national emergency requiring TSA to implement the Orders put forth by the President and the CDC.¹² Accordingly, TSA issued emergency security directives to airport operators,¹³ aircraft operators,¹⁴ and

5. *Id.* at 7206.

6. *Id.*

7. *Id.* at 7206–07.

8. Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021).

9. *Id.* at 8026–27.

10. *Id.* at 8029.

11. *Id.* at 8030 (citing 42 U.S.C. § 247d (2019)).

12. Determination of a National Emergency Requiring Actions to Protect the Safety of Americans Using and Employed by the Transportation System (Jan. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_0130_as1_determination-national-emergency.pdf.

13. Security Directive, Security Measures—Mask Requirements, SD 1542-21-01 (Feb. 1, 2021), <https://www.tsa.gov/sites/default/files/sd-1542-21-01.pdf>.

foreign air carriers¹⁵ requiring mask wearing at airports and on commercial aircraft on all flights to, from, or within the United States. In April 2021, the Department of Homeland Security (DHS) published an official notification that TSA aviation security directives requiring mask wearing were applicable to all airport and aircraft carriers “to protect the safety and security of the traveling public, transportation workers, and the transportation system from the threat of COVID-19.”¹⁶ The travel mask mandate was extended several times throughout this Survey period as the pandemic continued.¹⁷

While COVID-19 tests were not required for domestic air travel, TSA did enact testing regulations for travelers entering the United States due to the numerous COVID-19 variants that emerged worldwide. In January 2021, the CDC issued an Order requiring “negative pre-departure COVID-19 test results or documentation of recovery from COVID-19 for all airline or other aircraft passengers arriving into the United States from any foreign country.”¹⁸ Passengers were required to present a viral test conducted on a specimen collected within three days of the flight’s departure from a foreign country or approved documentation of previous COVID-19 infection, recovery, and clearance for travel.¹⁹ A “limited humanitarian exemption category” was created for passengers demonstrating exigent circumstances and the inability to access or complete predeparture testing.²⁰

As the COVID-19 pandemic evolved, so did the air travel testing requirements. In December 2021, the CDC amended its previous Order to require all air travelers aged two and older, regardless of nationality or vaccination status, to show documentation of a negative viral test result taken within one day of the flight’s departure to the United

14. *Id.*

15. Emergency Amendment, Security Measures—Mask Requirements, EA 1546-21-01 (Feb. 1, 2021), <https://www.tsa.gov/sites/default/files/ea-1546-21-01.pdf>.

16. Ratification of Security Directives and Emergency Amendment, 86 Fed. Reg. 26,825 (May 18, 2021).

17. Security Directive, Security Measures—Mask Requirements, SD 1542-21-01A; EA 1546-21-01A (May 12, 2021); SD 1542-21-01B; EA 1546-21-01B (Sept. 14, 2021) available at <https://www.tsa.gov/sd-and-ea>.

18. Requirement for Negative Pre-Departure COVID-19 Test Result or Documentation of Recovery From COVID-19 for all Airline or Other Aircraft Passengers Arriving Into the United States From Any Foreign Country, 86 Fed. Reg. 7387 (Jan. 28, 2021).

19. *Id.* at 7388.

20. *Id.* at 7387.

States before boarding.²¹ If the traveler recently recovered from COVID-19, he or she could instead provide documentation of a positive viral test result on a sample taken no more than 90 days before the flight's departure from a foreign country and a letter from a healthcare provider or public health official confirming clearance to travel.²² These stricter measures were implemented in response to the Omicron variant of COVID-19, which was “particularly concerning and of critical significance” due to its rapid spread.²³ This rule was effective “until more information becomes available that may alter or improve the public health outlook[,]”²⁴ highlighting the ever-changing data related to COVID-19 and the government's need to take swift action to address new issues.

As they became more widely available in 2021, COVID-19 vaccines were another instrument in regulating air travel. In October 2021, President Biden issued a Proclamation “to adopt an air travel policy that relies primarily on vaccination [as an added tool to the current multi-layered strategy] to advance the safe resumption of international air travel to the United States.”²⁵ Relying on the CDC's science-based determination that vaccination slowed the spread of COVID-19, President Biden suspended and limited air travel entry into the United States for non-citizen nonimmigrants not fully vaccinated against COVID-19.²⁶ These restrictions did not apply to U.S. citizens, nationals, permanent residents, immigrants, or some air crew members.²⁷

The same day, the CDC issued an Order implementing the Proclamation and amended it to provide further instructions.²⁸ What constituted a COVID-19 vaccine and what it meant to be fully vaccinated were clearly defined to avoid confusion or dispute.²⁹ On November 8, 2021, TSA enacted a security directive—effective immediately and for one year—following the CDC's Order, that required non-citizen, nonimmigrant international travelers coming to

21. Requirements for Pre-Covid-19 Test Result or Documentation of Recovery From Covid-19 For All Airline or Other Aircraft Passengers Arriving Into the United States From Any Foreign Country, 86 Fed. Reg. 69,256 (Dec. 7, 2021).

22. *Id.* at 69,256–57.

23. *Id.* at 69,259.

24. *Id.*

25. Proclamation No. 10294, 86 Fed. Reg. 59,603 (Oct. 25, 2021).

26. *Id.*

27. *Id.*

28. Amended Order Implementing Presidential Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic, 86 Fed. Reg. 61,224 (Nov. 5, 2021).

29. *Id.* at 61,224–25.

the U.S. by air to be fully vaccinated against COVID-19 or to provide proof that they fall within an exception to the vaccination requirements according to the CDC.³⁰

Aviation regulations during this Survey period were heavily focused on COVID-19 due to the ongoing crisis, but other issues were also addressed. In January 2021, the FAA enacted a rule permitting the routine operation of small, unmanned aircraft systems (UAS) at night or over people under certain conditions.³¹ This was “the next step in the FAA’s incremental approach to integrating UAS into the national airspace system (NAS), based on demands for increased operational flexibility and the experience the FAA has gained since it initially published [14 C.F.R.] part 107.”³² The prior rule limited small UAS operations to those over people directly participating in the operation, located under a covered structure or inside a stationary vehicle, but the update expanded the ability to conduct operations over people, as long as certain operational requirements were met.³³ This rule was updated with minor corrections in November 2021.³⁴

The FAA also adopted final regulations to implement a Pilot Records Database (PRD) for pilots’ records to be shared with air carriers and other operators in an electronic data system managed by the FAA.³⁵ Information collected included pilot performance related to aircraft operations, both technically and pertaining to other safety issues such as crew resource management.³⁶ The modernization of pilot record-sharing was “intended to help ensure that no records about a pilot’s performance with previous employers that could influence a future employer’s decision go unidentified.”³⁷ The FAA extended a long runway for the PRD’s completion, but the wheels are in motion to build the database.

30. Security Directive, Requirements for Proof of Being Fully Vaccinated Against COVID-19, SD 1544-21-03 (Nov. 8, 2021), https://www.tsa.gov/sites/default/files/tsa-211104-1_6-2final_sd1544-20-03_signed.pdf.

31. Operation of Small Unmanned Aircraft Systems Over People, 86 Fed. Reg. 4314 (Jan. 15, 2021) (amending 14 C.F.R. pt. 107).

32. *Id.* at 4314.

33. *Id.* at 4314–15.

34. Operation of Small Unmanned Aircraft Systems Over People; Technical Amendments, 86 Fed. Reg. 62,472 (Nov. 10, 2021) (codified at 14 C.F.R. pt. 107).

35. Pilot Records Database, 86 Fed. Reg. 31,006 (June 10, 2021) (amending 14 C.F.R. pts. 11 & 91; codified at 14 C.F.R. pt. 111).

36. *Id.* at 31,021.

37. *Id.* at 31,006.

B. Legislation

No significant aviation legislation was enacted in 2021, though bills were introduced in Congress, including several related to the COVID-19 pandemic. The Fly Safe and Healthy Act proposed that TSA establish a temperature check policy and program at airports and airport security screening locations through the end of the COVID-19 public health emergency.³⁸ The Healthy Flights Act of 2021 set out to provide the FAA with authority to impose requirements on passenger and cargo air travel during public health emergencies, including the use of masks and other measures to reduce the spread of infectious diseases.³⁹ It also suggested the development of a national aviation plan to ensure preparedness for infectious disease epidemics or pandemics and to establish a Center of Excellence for Infectious Disease Response and Prevention in Aviation within the FAA.⁴⁰

Conversely, in April 2021, a bill was introduced that urged the FAA to prohibit air carriers from denying air travel to individuals who had not been vaccinated against COVID-19.⁴¹ The bill also suggested a prohibition on the obligation or expenditure of federal funds:

(1) to create . . . a database of individuals who have been vaccinated against COVID-19; and (2) by any Federal agency . . . to develop, implement, or enforce any Federal law, rule, regulation, guidance, or policy denying any individual access to transportation or . . . preventing any individual from traveling solely because such individual has not been vaccinated against COVID-19.⁴²

A similar bill was introduced in the House seeking to prohibit several federal agencies, including USDOT and TSA, from requiring proof of COVID-19 vaccination in order to engage in interstate commerce.⁴³ While none of these bills were passed into law, they may predict future legislative responses to lessons learned from the COVID-19 pandemic.

38. H.R. 2387, 117th Cong. (2021).

39. H.R. 2770, 117th Cong. (2021).

40. *Id.* at §§ 50204, 50206.

41. To prohibit airlines and Amtrak from conditioning the provision of transportation services to any individual on such individual having been vaccinated against COVID-19, and for other purposes. H.R. 2323, 117th Cong. (Apr. 1, 2021).

42. *Id.* at § (c).

43. To prohibit the Department of Transportation and other agencies from promulgating rules requiring a person to provide proof of a COVID-19 vaccination in order to engage in interstate commerce, and for other purposes. H.R. 5418, 117th Cong. (Sept. 29, 2021).

C. Recent Cases

As this Survey period brought regulations in response to the COVID-19 pandemic, the courts were used as a vehicle to oppose those rules. In June 2021, Lucas Wall filed a 206-page complaint in the United States District Court for the Middle District of Florida containing twenty-three different causes of action against several federal agencies (CDC, Department of Health and Human Services, TSA, DHS, and USDOT) and President Biden.⁴⁴ Wall challenged the Federal Transportation Mask Mandate (FTMM) requiring persons using public conveyances to wear a mask to prevent the transmission of COVID-19, claiming he had been “stranded” in Florida when he was denied entry to a commercial flight for failure to comply with the FTMM and wear a mask on the plane.⁴⁵ Wall sought a temporary restraining order (TRO) enjoining the enforcement of the FTMM, claiming he would suffer harm by not being able to utilize upcoming plane tickets for which he had already paid.⁴⁶ The court denied Wall’s request, noting that he had received clear notice that he would not be able to fly without a mask and that he had not attempted to avoid financial harm by requesting a refund for his pending flights.⁴⁷ The court also rejected Wall’s argument that his constitutional right to travel would be violated, as he could still fly in compliance with the FTMM. Making clear that spurious challenges to the travel mask mandate would not succeed, the court noted that “flying may be Plaintiff’s preferred mode of transportation, but it is by no means the *only* reasonable mode of transportation available to him.”⁴⁸

Wall was not alone in his resistance of the travel mask mandate. In July 2021, two individuals and a non-profit organization, the Health Freedom Defense Fund, sought a declaratory judgment that E.O. 13,998 and the CDC’s travel mask mandate were unlawful.⁴⁹ The individual

44. *Wall v. Centers for Disease Control & Prevention*, 543 F. Supp. 3d 1290 (M.D. Fla. 2021). Wall later amended his complaint to include the Greater Orlando Aviation Authority and Central Florida Regional Transportation Authority as defendants. Brief for Wall at 2, *Wall*, 543 F. Supp. 3d 1290 (No. 6:21-CV-975-PGB-DCI).

45. Brief for Wall at 2, *Wall*, 543 F. Supp. 3d 1290 (No. 6:21-CV-975-PGB-DCI).

46. *Wall*, 543 F. Supp. 3d at 1291.

47. *Id.*

48. *Id.* at 1293 (emphasis in original). Wall remained undeterred. He continued to utilize the courts to challenge the FTMM, including filing motions with the Eleventh Circuit Court of Appeals and the Supreme Court of the United States. As of the date of this publication, the case docket remains active, showing Wall’s persistent efforts to establish a violation of his “right” to travel by air without a mask.

49. Complaint for Declaratory Relief at 1, *Health Freedom Def. Fund, Inc. v. Biden*, No. 8:21-CV-016393-KKM-AEP, 2021 U.S. Dist. LEXIS 224099 (M.D. Fla. Nov. 19, 2021).

plaintiffs did not qualify for a medical exception to the mask mandate but objected to wearing masks during air travel due to concerns of anxiety and the fear of becoming short-of-breath.⁵⁰ The plaintiffs claimed that prolonged mask use during air travel carried “potential adverse health effects” and challenged the CDC’s guidelines for mask usage.⁵¹ The trial court issued an order on a procedural issue in November 2021,⁵² and as of the date of this publication, there is a pending motion for summary judgment for which briefing has not been completed. While the plaintiffs’ position may be dubious, judicial resources continue to be spent opposing COVID-19 public health measures.

Airline personnel were also involved in litigation challenging pandemic-related rules. In August 2021, United Airlines announced a policy requiring all employees to receive a COVID-19 vaccine no later than five weeks after FDA vaccine approval, stating that failure to comply would lead to termination.⁵³ A group of eighteen pilots initiated a lawsuit by filing a motion for the issuance of an emergency TRO “for the ‘immediate cessation’ of United’s vaccine mandate and to enjoin other airline companies from issuing vaccine mandates until ‘the science/medicine is more fully developed and better understood.’”⁵⁴ The court dismissed the pilots’ motion on procedural grounds, as it was not an emergency under the local rules and a formal complaint had not been filed to establish the claims.⁵⁵ The pilots did not file a complaint, causing the court to administratively dismiss the case without prejudice. Although this litigation was short-lived, COVID-19 pandemic orders continue to be enacted, and future challenges should be expected.

In addition to COVID-19-related litigation, this Survey period included a handful of cases out of the Eleventh Circuit regarding insurance coverage for damage to planes involved in crashes. A case out of the United States District Court for the Southern District of Alabama arose following an aircraft crash that killed the pilot and his passenger.⁵⁶ The aircraft was owned by Gulf Coast Aerial and insured under a policy with American National Property and Casualty

50. *Id.*

51. *Id.*

52. Order, *Health Freedom Defense Fund*, 2021 U.S. Dist. LEXIS 224099 (No. 8:21-CV-016393-KKM-AEP).

53. *Hencey, v. United Airlines, Inc.*, No. 21-61702, 2021 U.S. Dist. LEXIS 154513, at *1 (S.D. Fla. Aug. 17, 2021).

54. *Id.* at *2.

55. *Id.* at *4.

56. *Am. Nat’l Prop., & Cas. Co. v. Gulf Coast Aerial, LLC*, 533 F. Supp. 3d 1110, 1113 (S.D. Ala. 2021).

Company (ANPAC).⁵⁷ After the passenger's estate filed a lawsuit, ANPAC filed a declaratory judgment seeking instruction on its duty to defend Gulf Coast Aerial in the wrongful death action.⁵⁸

As the lawsuit was based on diversity jurisdiction, the court applied Alabama's substantive law that "[i]f the allegations of the injured party's complaint show an accident or an occurrence within the coverage of the policy, then the insurer is obligated to defend, regardless of the ultimate liability of the insured."⁵⁹ ANPAC's policy required that the aircraft be used for three specified purposes for coverage to apply.⁶⁰ The court analyzed the parties' arguments regarding whether the flight at issue qualified under any of the covered purposes, paying close attention to the policy's language.⁶¹ Ultimately, the court found that the fatal flight was not within the coverage of the policy and, thus, ANPAC had no duty to defend Gulf Coast Aerial in the wrongful death lawsuit.⁶² This demonstrates the importance of an insured being familiar with all terms of its coverage policy, particularly given the significant damages that can occur when aircrafts are involved.

Relatedly, a contractual dispute arose in the United States District Court for the Middle District of Florida that highlighted the tension when parties agree to terms that are stricter than those required by law. Timothy Neubert, President of Neubert Aero Corporation, was flying a Cessna aircraft that sustained damage during an off-field emergency landing.⁶³ The insurance policy that covered the aircraft included special conditions regarding Neubert's pilot qualifications, requiring him to obtain certain training and credentials to be covered under the policy.⁶⁴ The insurer denied coverage for the plane's damage, claiming that Neubert failed to meet the special conditions of the policy. Neubert Aero Corporation filed a lawsuit against the insurer, and the parties filed cross-motions for summary judgment regarding coverage.⁶⁵

57. *Id.* at 1113.

58. *Id.*

59. *Id.* at 1115.

60. *Id.* at 1116.

61. *Id.* at 1116–18.

62. *Id.* at 1119–20.

63. *Neubert Aero Corp. v. StarStone Nat'l Ins. Co.*, No. 5:20-CV-45, 2021 U.S. Dist. LEXIS 203375, at *1–2 (M.D. Fla. Oct. 21, 2021).

64. *Id.* at *2.

65. *Id.* at *1.

The trial court agreed with the insurer that Neubert did not satisfy the special conditions required by the express language of the policy.⁶⁶ The court noted that Neubert would have been qualified to operate the aircraft at issue under federal aviation regulations, but the requirements of the insurance policy were stricter.⁶⁷ “The Court cannot rewrite the unambiguous terms of the Special Conditions upon which the parties agreed, simply because Neubert engaged in solo training that was permissible under the regulations, but not under the Policy.”⁶⁸ This case presents yet another warning to parties entering insurance agreements, as the law favors contract enforcement even when the terms require more than the federal standards.

III. TRUCKING AND OTHER COMMERCIAL MOTOR VEHICLES

A. Regulations

The U.S. Environmental Protection Agency (EPA) and the USDOT National Highway Traffic Safety Administration (NHTSA) jointly finalized standards for medium-and heavy-duty vehicles in 2016 in an effort to improve fuel efficiency and cut carbon pollution to reduce the impacts of climate change.⁶⁹ The new regulations began to impact medium and heavy-duty vehicles manufactured in 2021. Two other stages of the regulations are set to go into effect for vehicles manufactured in 2024 and 2027. The rules call for reductions in carbon dioxide emissions and fuel consumption of about 16% and largely leave manufacturers to determine how to accomplish this aim.⁷⁰ The effects of this new regulation have been seen in the rising cost of medium-and heavy-duty vehicles with combustible engines and the explosion in use of battery electric vehicles across the industry.⁷¹

In November of 2021, President Joe Biden signed the Infrastructure Investment and Jobs Act⁷² into law. While this law has no direct effect on existing Federal Motor Carrier Safety Regulations (FMCSRs), a number of components of the new law are of particular interest to the

66. *Id.* at *5-7.

67. *Id.* at *5-6.

68. *Id.* at *15.

69. Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium-and Heavy-Duty Engines and Vehicles—Phase 2, 81 Fed. Reg. 734,478 (Oct. 25, 2016).

70. *Id.*

71. Jim Park, *Medium-Duty Truck Emissions in 2021 and Beyond*, TRUCKING INFO (2019), <https://www.truckinginfo.com/329662/medium-duty-truck-emissions-in-2021-and-beyond>.

72. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429.

transportation industry. The law provides for \$110 billion of new funds for roads and bridges with a focus on improving safety; \$66 billion for passenger and freight rail improvements; \$7.5 billion to build a national network of electric vehicle chargers; and \$42 billion for improvements to airports and seaports in an effort to ease congestion issues.⁷³

The Federal Motor Carrier Safety Administration (FMCSA) issued a final rule, effective December 9, 2021, requiring rear impact guards on each trailer and semitrailer with a gross vehicle weight rating of 10,000 pounds or more that was manufactured on or after January 26, 1998.⁷⁴ The changes to the regulation require these vehicles to be equipped with a rear impact guard that meets the requirements of Federal Motor Vehicle Safety Standard (FMVSS) No. 223⁷⁵ in effect at the time the vehicle was manufactured.⁷⁶ When the rear impact guard is installed on the trailer or semitrailer, the vehicle must, at a minimum, meet the requirements of FMVSS No. 224⁷⁷ in effect at the time the vehicle was manufactured.⁷⁸ The new regulation further provides for inspection of these vehicles for compliance and maximum penalties of \$15,876 for motor carriers and \$3,969 for drivers operating vehicles that are not sufficiently equipped with rear impact guards.⁷⁹

B. Recent Cases

In *Moorehead v. Ryder Truck Rental, Inc.*,⁸⁰ the United States District Court for the Northern District of Georgia was tasked with determining whether a company that leased trucks and trailers to a food-delivery business owed a duty to a driver employed by that food-delivery business. The plaintiff was employed as a truck driver by McLane Company. McLane Company leased trucks and trailers from defendant Ryder Truck Rental, Inc. (Ryder) pursuant to a written agreement. While plaintiff was working, an “e-track,” a strap used to secure cargo inside the trailer, came loose, causing cargo to fall and injure him. The plaintiff filed suit against Ryder, alleging it was responsible for maintaining the e-track and was therefore liable for his

73. *Id.*; see also Fact Sheet: Historic Bipartisan Infrastructure Deal, THE WHITE HOUSE (July 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-historic-bipartisan-infrastructure-deal/>.

74. 49 C.F.R. § 393.86 (2021).

75. 49 C.F.R. § 571.223 (2004).

76. *Id.*

77. 49 C.F.R. § 571.224 (2006).

78. *Id.*

79. 49 C.F.R. § 396 Appendix A (2022).

80. No. 1:19-CV-5155, 2021 U.S. Dist. LEXIS 237340 (N.D. Ga. Dec. 13, 2021).

injuries. The defendant moved for summary judgment, arguing it owed no duty to the plaintiff, in part because he was not a third-party beneficiary to the contract between it and McLane Company.⁸¹

In response, the plaintiff relied on the FMCSRs, citing 49 C.F.R. § 393.1(c),⁸² which sets minimum requirements for motor carriers pertaining to parts and accessories needed for safe operation.⁸³ The defendant argued it was not a motor carrier, and, as such, the regulations did provide a basis for liability.⁸⁴ The court agreed, reasoning, “[t]he Federal Motor Carrier Safety Regulations, which contain the cargo securement provisions, apply to motor carriers and their employees who operate commercial motor vehicles, not companies that lease trailers to motor carriers.”⁸⁵ The court additionally agreed with the defendant’s argument that the plaintiff was not a third party beneficiary to the contract.⁸⁶ Thus, Ryder owed no duty to the plaintiff based upon either the FMCSRs or the lease agreement, and the court granted summary judgment.⁸⁷

IV. RAILROADS

A. *Statutes and Regulations*

During 2021, infrastructure was a focal point of the Biden administration, the United States Congress, and the United States House of Representatives. As a result, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA) on November 15, 2021.⁸⁸ The purpose of the IIJA, in part, is to “rebuild America’s roads, bridges and rails”⁸⁹ Consequently, the IIJA includes funding for states for the improvement and expansion of railroads and includes many new regulations pertaining to rail transportation that will take effect in 2022. However, even before the IIJA was signed into law, the Federal Railroad Administration (FRA) both promulgated and amended regulations during this Survey period.

81. *Id.* at *3.

82. 49 C.F.R. § 393.1(c) (2016).

83. *Moorehead*, 2021 U.S. Dist. LEXIS 237340, at *16.

84. *Id.* at *16–17.

85. *Id.* at *18.

86. *Id.* at *19.

87. *Id.*

88. *See supra* note 72.

89. *Fact Sheet: The Bipartisan Infrastructure Deal*, THE WHITE HOUSE (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/>.

On January 13, 2021, a final rule by the FRA in response to the Fixing America's Surface Transportation (FAST) Act⁹⁰ became effective.⁹¹ It revised 49 C.F.R. § 234.11,⁹² which pertains to state highway-rail grade crossing plans, or action plans. The revision requires forty states and the District of Columbia (DC) to develop and implement FRA-approved action plans. Additionally, ten states, which previously were required to develop action plans by the Rail Safety Improvement Act of 2008 (RSIA)⁹³ and 49 C.F.R. § 234.11, are required under the revised rule to update their plans and submit reports describing the implementation actions they have taken. In RSIA, Congress directed the Secretary of Transportation to identify the ten states that had the most highway-rail grade crossing (GX) collisions, on average, over the previous three years, and required those States to develop action plans for the Secretary's approval.⁹⁴

RSIA required the action plans to "identify specific solutions for improving" grade crossing safety and to "focus on crossings that have experienced multiple accidents or are at high risk" for accidents; Alabama, Florida, and Georgia are among the ten states required to submit action plans.⁹⁵ The action plans submitted by these states shall:

- (1) identify [GXs] . . . that: (i) Have experienced at least one accident/incident within the previous 3 years; (ii) [h]ave experienced more than one accident/incident within the previous 5 years; or (iii) [a]re at high-risk for accidents/incidents as defined in the Action Plan. Each State or the District of Columbia that identifies highway-rail and pathway grade crossings that are at high-risk for accidents/incidents in its Action Plan shall provide a list of the factors that were considered when making this determination.⁹⁶

Although a tedious task, this regulation embodies the FRA's focus on safety, the prevailing risks associated with accidents and injuries at railroad crossings, and the need for each of the states to address those risks in a coherent, organized manner that can be realistically implemented.

90. Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, 129 Stat. 1312.

91. *Id.*

92. 49 C.F.R. § 234.11 (2021).

93. Pub. L. 110-432, 122 Stat. 4848.

94. Rail Safety Improvement Act of 2008, 49 U.S.C. § 202 (2008).

95. *Id.*

96. 49 C.F.R. § 234.11.

The FRA further amended regulations pertaining to positive train control (PTC) systems, which took effect on August 26, 2021.⁹⁷ The purpose of the rule is to streamline the process under 49 C.F.R. § 236.1021 for requests for amendment (RFA) to positive train control safety plans for FRA-certified systems.⁹⁸ This revised RFA process requires host railroads to provide certain documentation, analysis, and safety assurances in a concise RFA and establishes a forty-five-day deadline for FRA to review and approve or deny railroads' RFAs to their FRA-approved PTCSPs or FRA-certified PTC systems.⁹⁹ In addition, this final rule permits host railroads utilizing the same type of PTC system to submit joint RFAs to their PTCSPs and PTC Development Plans (PTCDPs).¹⁰⁰

Further, the FRA is expanding an existing reporting requirement—49 C.F.R. § 236.1029(h),¹⁰¹ PTC System Use and Failures—by increasing the frequency of the reporting requirement from annual to biannual and broadening the reporting requirement to encompass positive performance-related information, not just failure-related information, and requiring host railroads to utilize a new, standardized Biannual Report of PTC System Performance to enable more effective FRA oversight.¹⁰²

Finally, 49 C.F.R. § 240.309,¹⁰³ which pertains to railroad oversight responsibilities, was amended to reflect a change in reporting poor safety conduct.¹⁰⁴ The most significant change occurred to 49 C.F.R. § 240.309(f),¹⁰⁵ which now requires that instances of poor safety conduct involving an individual who is certified as both a conductor and locomotive engineer be reported only once, and the location of the report will be determined by the work the individual was performing at the time the conduct occurred.¹⁰⁶

V. AUTONOMOUS VEHICLE TECHNOLOGY

As autonomous vehicle (AV) technology advances, the government must move toward a legal and regulatory framework to manage the

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. 49 C.F.R. § 236.1029(h) (2021).

102. *Id.*

103. 49 C.F.R. § 240.309 (2022).

104. *Id.*

105. 49 C.F.R. § 240.309(f) (2022).

106. *Id.*

wide web of entities and issues involved. Lawmakers must follow industry developments to identify regulatory and legislative needs. Like that for non-automated and partially automated vehicles, AV authority will be enacted at the state level, but federal regulation will play a critical role in allowing AV use to become more widespread.

A. Regulation

AV regulation involves numerous federal agencies, including NHTSA, EPA, FMCSA, and the National Transportation Safety Board (NTSB). In January 2021, USDOT announced its “Automated Vehicles Comprehensive Plan,” acknowledging the enormity of the mission and defining three goals toward its vision for automatic driving systems (ADS):

1. **Promote Collaboration and Transparency**—USDOT will promote access to clear and reliable information to its partners and stakeholders, including the public, regarding the capabilities and limitations of ADS.
2. **Modernize the Regulatory Environment**—USDOT will modernize regulations to remove unintended and unnecessary barriers to innovative vehicle designs, features, and operational models, and will develop safety focused frameworks and tools to assess the safe performance of ADS technologies.
3. **Prepare the Transportation System**—USDOT will conduct, in partnership with stakeholders, the foundational research and demonstration activities needed to safely evaluate and integrate ADS, while working to improve the safety, efficiency, and accessibility of the transportation system.¹⁰⁷

Balancing the interests of safety and innovation, the Plan demonstrates USDOT’s “fundamental focus on safety, transportation system efficiency, and mobility for people and goods[]” while having to respond to the challenges and opportunities presented by AV technology.¹⁰⁸

The general outline of the Plan is that it should (1) build on previous voluntary guidance regarding AV technology; (2) explain departmental goals related to AVs; (3) identify actions being taken to meet those goals; and (4) provide real-world examples of how these departmental

107. *Automated Vehicles Comprehensive Plan*, DEPARTMENT OF TRANSPORTATION (Jan. 21, 2021), <https://www.transportation.gov/av/avcp>.

108. *Id.*

actions relate to emerging AV applications.¹⁰⁹ The Plan was made publicly available and comments were sought through March 22, 2021.¹¹⁰ While being transparent about the amount of work still to be done before ADS-equipped vehicles take to the roads, this Comprehensive Plan “addresses clear, near-term needs while laying the groundwork for longer-term changes” related to AV technology.¹¹¹

NHTSA is the arm of USDOT responsible for safety on the country’s roadways. NHTSA’s statutory mandate includes the exercise of its authority to proactively ensure that motor vehicles and motor vehicle equipment, including those with novel technologies, perform in ways that “protect[] the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident[.]”¹¹² In furtherance of its mission to reduce traffic accidents, in June 2021, NHTSA issued a General Standing Order requiring manufacturers and operators of ADS and Level 2 Advanced Driver Assistance Systems (ADAS)¹¹³ to report specified information about safety-related incident involving vehicles operating on publicly available roads.¹¹⁴ Collecting data to evaluate possible safety defects in equipment or with certain manufacturers while the technology is developing is a preventative measure to avoid injuries and deaths related to AV use. This Order was amended in August 2021 and will remain effective through June 29, 2024.¹¹⁵

109. *AV Comprehensive Plan Briefing Slides*, DEPARTMENT OF TRANSPORTATION (Jan. 11, 2021), <https://www.transportation.gov/policy-initiatives/automated-vehicles/av-comprehensive-plan-briefing-slides>.

110. *USDOT Automated Vehicles Comprehensive Plan*, DEPARTMENT OF TRANSPORTATION (Jan. 2021), https://www.transportation.gov/sites/dot.gov/files/2021-01/USDOT_AVCP.pdf; *Automated Vehicles Comprehensive Plan; Request for Comments*, 86 Fed. Reg. 6410 (Jan. 21, 2021).

111. *USDOT Automated Vehicles Comprehensive Plan*, *supra* note 110, at *2.

112. Standing General Order, USDOT National Highway Traffic Safety Administration, Incident Reporting for Automated Driving Systems (ADS) and Level 2 Advanced Driver Assistance Systems (ADAS), Order No. 2021-01 (June 29, 2021), https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-06/Standing_General_Order_2021_01-digital-06292021.pdf (citing 49 C.F.R. §§ 1.95, 501.8(d)(3); 49 U.S.C. § 30102(9)).

113. There are five levels of automation in vehicles. Level 2 ADAS is defined as “partially automated,” where the vehicle has combined automated functions such as acceleration and steering but the driver must remain engaged with the task of driving. Society of Automotive Engineers (SAE) Automation Levels, *Automated Vehicle Safety*, USDOT, <https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety>.

114. Standing General Order 2021-01, *supra* note 112.

115. The substantive crash reporting requirements were not altered; NHTSA issued the amendment to transition the reporting process to an updated electronic system. Standing General Order, USDOT National Highway Traffic Safety Administration, First

In May 2021, NHTSA posted a notice and sought comments on its request to extend the collection of information for a policy outlining an approach to enable the safe deployment of ADS.¹¹⁶ NHTSA asked for a three-year extension to gather information that would “assist States and the public in understanding how safety is being considered by manufacturers and other entities developing and testing ADSs,” including safety self-assessments done by ADS vehicle manufacturers.¹¹⁷ These assessments were designed not only to provide NHTSA with information, but also to build the public’s confidence in ADS development through the acknowledgement of safety norms and collaboration with the USDOT.¹¹⁸

B. Legislation

While no federal legislation governing AV technology was enacted during this Survey period, lawmakers are attentive to the growing need for authority. In June 2021, a member of the House Energy and Commerce Subcommittee on Communications and Technology introduced a revised version of a bill that had previously circulated but was never passed into law.¹¹⁹ The Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act (SELF DRIVE Act) set out to establish the federal role in ensuring the safety of AVs, including preemption of state laws regarding the design, construction, or performance of AVs that do not mirror the federal standards.¹²⁰ Under this bill, USDOT would require safety assessment certifications for ADS development and vehicle manufacturers would develop written cybersecurity and privacy plans before offering AVs for sale.¹²¹ While this most recent version of the SELF DRIVE Act did not make it past the House of Representatives, it demonstrates the concern about potential conflicts between federal and state regulation and the need for a cohesive approach as AV technology continues to evolve.

Amended Standing General Order, 2021-01 (Aug. 5, 2021), https://www.nhtsa.gov/sites/nhtsa.gov/files/2021-08/First_Amended_SGO_2021_01_Final.pdf.

116. Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Automated Driving Systems 2.0 A Vision for Safety, 86 Fed. Reg. 28,436 (May 26, 2021).

117. *Id.*

118. *Id.*

119. H.R. 3711, 117th Cong. (2021).

120. *Id.*

121. *Id.*

VI. SHAREABLE DOCKLESS MOBILITY DEVICE RENTALS

Recent years have seen several instances of litigation over the arbitration clauses buried in rideshare apps' browse-wrap and click-wrap user agreements.¹²² This year saw the phenomenon spread to the world of electric scooter rentals, as the United States District Court for the Northern District of Georgia examined the enforceability of the arbitration clause included in the User Agreement & Terms of Service (User Agreement) of the Lime scooter mobile app.¹²³ The defendant, Neutron Holdings, Inc., or "Lime," provides electric scooters to the general public which can be rented through Lime's mobile application. Upon registering for an account with Lime, users are confronted with a screen reading, "By signing up, I confirm that I am at least 18 years old, and that I have read and agreed to Lime's User Agreement & Terms of Service."¹²⁴ The bold section of this language is hyperlinked to the Agreement itself, which contains a binding arbitration clause. The plaintiff argued the User Agreement was insufficiently conspicuous to put him on notice of the arbitration agreement and the defendant waived its right to arbitrate.¹²⁵

As a preliminary issue, the court examined whether the questions concerning arbitrability were for the court or the arbitrator to decide.¹²⁶ The court recognized it may find "clear and unmistakable intent to arbitrate gateway issues" based upon "the wording of the delegation provision itself."¹²⁷ After an examination of the language of the Lime User Agreement, the court held that, under the Eleventh Circuit's interpretation of the "clear and unmistakable intent" standard, the parties intended for the arbitrator to decide issues of arbitrability.¹²⁸

The court further held that Lime had not waived its right to arbitrate.¹²⁹ The plaintiff argued Georgia law governed the formation of the User Agreement while the User Agreement contained a California choice-of-law provision, but the court found this did not rise to the level

122. See McNeeley et al., *Commercial Transportation, Annual Survey of Georgia Law*, 73 MERCER L. REV. 47, 53–56 (2021); McNeeley et al., *Commercial Transportation, Eleventh Circuit Survey*, 69 MERCER L. REV. 1087, 1098–1100 (2018).

123. Walker v. Neutron Holdings, Inc., No. 1:20-CV-4805-LMM, 2021 U.S. Dist. LEXIS 94525, at *1–2 (N.D. Ga. Jan. 22, 2021).

124. *Id.* at *3.

125. *Id.* at *4.

126. *Id.* at *5.

127. *Id.* at *6.

128. *Id.*

129. *Id.* at *7–8.

of an arbitration waiver and noted federal policy strongly favors arbitration.¹³⁰

VII. CONCLUSION

As in so many other areas of American life, the COVID-19 pandemic continued to affect the commercial transportation world during 2021, most notably in the vigorous regulation of aviation travel and related litigation. More broadly, the varied developments in the law during this period demonstrate how extensively the world of commercial transportation reaches into many 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.

130. *Id.* at *8.