Perilous crossings

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Dangerous railway crossings kill hundreds of motorists each year, but federal preemption often bars recovery. Defend your clients' rights by identifying viable state law causes of action and using federal regulations to your advantage.

In 1877, the U.S. Supreme Court recognized that people and railroads had "mutual and reciprocal" duties at railroad crossings.[1] The concept is simple. We allow railroads the right-of-way to operate their trains across the country without stopping for motorists, pedestrians, or anybody else. In return, we ask only that railroads give us a safe place to cross their tracks and let us know when a train is coming.

Under the common law, this standard seemed to work well. A motorist injured in a collision with a train at a crossing could argue that the train was going unreasonably fast through a busy community when the collision occurred and that he or she was unaware of the train's approach because there were no lights and gates at the crossing.

But over the years, Congress has enacted legislation that preempts many common law claims. States are no longer free to protect their citizens at grade crossings by applying the common law concept that the motorist and railroad should each be held to a standard of reasonable care.

Ironically, the Federal Railroad Safety Act of 1970 (FRSA)[2]—designed "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents"—has resulted in the most devastating form of federal preemption. It is strange that an act with such a noble intent has been used to shield railroads from liability and has paved the way for railroads to ignore their common law safety responsibilities at crossings.

The Supreme Court addressed the extent to which the FRSA preempts state common law claims against railroads in two pivotal cases: *CSX Transportation, Inc. v. Easterwood*[3] and *Norfolk Southern Railway Co. v. Shanklin*.[4] A complete understanding of *Easterwood*, *Shanklin*, the FRSA, and the history of preemption in the railroad industry is a fundamental requirement for handling any crossing case.

From the moment a prospective client walks in the door, you must consider the role preemption may play in his or her case. How you evaluate a crossing case, craft the complaint, proceed with discovery, and present the case are all necessarily influenced or controlled by preemption.

Many well-established state claims may be preempted by the FRSA and other federal laws. For example, a Federal Railroad Administration (FRA) rule finalized in May 2005 may preempt a claim that a train's horn was not blown in the correct pattern for a set period of time.[5] Claims that the horn

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was not loud enough to provide an audible warning have long been preempted.[6] A railroad complies with federal law if the horn produced 92 decibels of sound 100 feet in front of the locomotive, regardless of whether a motorist could hear the horn.

A claim that the duration of a horn's blast was not long enough is also subject to preemption.[7] The 2005 rule requires a minimum of 15 seconds of horn for slower trains, but ironically it provides a lower standard for faster trains (those traveling over 45 mph).[8] The new rule may not preempt claims that an emergency horn sequence should have been used before impact. The emergency horn sequence is a broken horn pattern intended to alert motorists, much like the irregular siren on emergency vehicles.

Another new regulation preempts claims of improper railcar "reflectorization."[9] The common law provided a basis for claims that railcars should be adequately equipped with reflectors so they could be seen at night while blocking unguarded crossings.[10] Courts recognized that a black tanker car (for example) across an unlighted highway at night created an unreasonably dangerous condition. The new regulation appears to shield defendants from liability for this dangerous conduct.

Finally, you will almost certainly hear arguments for preemption of claims that the railroad failed to provide employees proper training in crossing safety.[11] The railroads' arguments on this issue are often vague and misguided, but you must be aware that inadequate-training allegations can be obliterated by preemption if you have not pleaded and developed them correctly.[12]

Steering clear

The easiest way to avoid preemption is to present claims that fall outside its scope. Review each case thoroughly to identify viable state law claims and develop a factual basis for them.

Vegetation. Vegetation or other objects on the railroad right-of-way that block a motorist's view may support a claim based on the common law duty to provide reasonably safe visibility. Many states regulate visibility at crossings by statute or regulation,[13] and violation of these laws can form the basis of a claim that falls outside the bounds of federal preemption. It is relatively well settled that states can protect the public by regulating visibility at crossings. Nevertheless, railroads continue to assert that claims based on sight obstructions near a crossing are preempted.[14]

Crossing surface and design. The construction, design, and maintenance of crossing surfaces, approaches, and the surrounding area are still subjects that

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Documents and document sets

Ahlgrim v. Burlington Northern Railroad. The plaintiffs' memorandum regarding negligence per se and their brief supporting motions to amend the complaints in a case alleging lack of automatic gates at a crossing. (No. LR2294)

Anderson v. Burlington Northern Railroad. The plaintiffs' amended petition, trial brief on preemption, response to a motion for a new trial, and the court's charge and judgment in a case alleging improper maintenance of a crossing. (No. LR3045)

Boomsma v. Dakota, Minnesota & Eastern Railroad Corp. The plaintiffs' complaint and briefs supporting motions in limine and punitive damages, briefs opposing the defendant's trial motions, and brief in response to a motion for reconsideration, among other documents, in a case alleging failure to properly warn of the presence of a flatbed car at a railroad crossing. (No. LR3765)

Erickson v. Burlington Northern Railroad. The plaintiff's trial brief in a case alleging that a railroad's crossing signal was defective because it failed to operate until two seconds before the collision. (No. LR2167)

Hamlin v. Norfolk Southern Railway. The plaintiffs' appellate brief and the parties' and amicus curiae briefs to the U.S. Supreme Court on whether to grant certiorari in a case holding that federal regulations do not preempt state claims alleging negligent maintenance of crossing warnings. (No. LR2871)

Isbell v. State. The plaintiffs' responses to the defendants' posttrial motions in a case alleging failure to install automatic crossing gates and larger flashing lights. (No. LR3184)

Powell v. Norfolk Southern Railway. The plaintiffs' complaints, the defendant's motion for new trial and supporting brief, the plaintiffs' response and supporting brief, and the court's order, among other documents, in a case alleging failure to sound a horn at an open crossing and poor design of the crossing. (No. LR3538)

Ventress v. Union Pacific Railroad. The plaintiffs' memorandum opposing a motion for judgment notwithstanding the verdict or for a new trial, jury interrogatories, and the judgment in a case alleging that flashing lights at a crossing were misaligned. (No. LR2292)

Abstract set

Railroad Grade Crossing Collisions. A collection of verdicts, settlements, and opinions that have appeared in the *Law Reporter* since 1993 involving grade-crossing collisions. (No. AS022)

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have managed to evade federal preemption. Some examples of unsafe conditions in a crossing area include

- incompatibility of the materials used in the surface of the crossing with those used in the surrounding roadway surface
- a rough and unstable crossing surface
- horizontal misalignment (skew/curves) of the track and roadway
- vertical misalignment (hump/dip) of the crossing approach
- inadequate crossing width
- the presence of nearby roadways or railroad operations that may distract a driver's attention.

Crossings must be constructed in a reasonably safe manner. They should not have a rough surface or be built at a level above or below the plane of the intersecting roadway. Ideally, the track and the roadway should intersect at or near a 90-degree angle, with no visibility obstructions or distractions. Crossings should not be constructed in or near curves in the roadway or track.

Most of these conditions violate recognized guidelines or standards,[15] and claims relating to them will generally survive preemption under common law theories.[16]

Maintenance of signs and signals. Generally, claims involving the maintenance of grade-crossing signs, signals, and equipment are not preempted by federal law.

The Eleventh Circuit ruled that claims alleging negligent maintenance of warning devices or failure to warn the public of defective devices were not preempted.[17] Consequently, an allegation of malfunctioning lights and gates is usually not preempted.[18]

Lookout operations. The claim that a train crew failed to maintain a proper lookout should be available in most states if there is proximate cause.[19] Proximate cause can be based on whether an alert crew could have sounded additional warnings or engaged a train's emergency brakes.

Although in certain situations a proper lookout would not necessarily have prevented an accident, the failure to maintain one may have contributed to the crash. For example, if the crew could have taken emergency measures to slow the train and thereby change the point of impact, these actions might have decreased the car occupants' risk of death or injury.

We allow railroads the right-of-way to operate their trains without stopping for motorists or pedestrians. In return, we ask that railroads give us a safe place to cross their tracks.

Private crossings. Crossings on private property are free from most federal regulation, and common law principles apply. For example, the new horn rule does not apply to private crossings, and common law recognizes in most states the duty to sound a train horn at these crossings.[20]

Private crossings typically do not receive federal funds for sign installation, so they are open to claims that they should have been equipped with lights and gates or other adequate warning devices.[21] These crossings may also be subject to contractual obligations between the landowner and the railroad.[22]

Minimizing preemption's effect

There is a presumption against federal preemption of state law.[23] This presumption is even stronger where preemption would displace the historic power of the states to protect the health and safety of their citizens.[24] When preemption of common law claims would leave injured people without any state or federal remedy, a court may find preemption only in the most compelling circumstances.[25]

The *Easterwood* Court recognized that the FRSA and state laws and standards "relating to railroad safety" could coexist "to promote safety in all areas of railroad operations."[26] Thus, states are permitted to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety" until a federal counterpart covering the same subject matter is adopted.[27] Even after federal standards have been promulgated, states may adopt more stringent safety requirements if there is a local safety hazard unless the requirements are incompatible with federal laws or are an undue burden on interstate commerce.[28]

Even if a preemption defense cannot be defeated, you may be able to lessen its impact and persuade the court to admit your evidence by asserting certain theories of liability.

Excessive speed. Although train-speed claims are generally preempted, the facts of a case may support a common law exception for local hazards. The factual basis for these kinds of claims must be well developed early in the case.[29]

The preemption of excessive-speed claims is based on the presumption that the FRA has evaluated track conditions, including those at grade crossings, and considered those factors in setting speed limits. This rationale ignores the fact that certain train cars must be operated at speeds lower than the track speed limit.

In fact, the agency has established regulations requiring lower speeds for particular trains. For example, trains without an "in-service" data event recorder on the locomotive may not exceed 30 mph.[30] On some occasions, a train must be slowed because it includes a "restricted car." Restricted cars are defined by federal regulation and are allowed to operate only by approval of the FRA on a car-by-car basis. Exceeding the restricted speed would violate this regulation.[31]

Even in a case where a train-speed claim is preempted, evidence of speed may be relevant to the adequacy of the warning and the dangerous nature of the crossing, and to whether the opera-

tors of both the train and the automobile acted reasonably.[32]

Inadequate warning devices. Railroad defendants always argue that claims alleging inadequate warning devices are preempted. However, railroads often use incomplete, conclusory affidavits to support their claim that federal safety funds were spent on the crossbuck signs at a crossing. Courts are reluctant to find preemption when the testimony supporting a summary judgment motion is not clear and uncontroverted.[33] You will need to conduct discovery to expose unfounded preemption defenses in virtually every crossing case.

Taking the offensive

In certain cases, you can use federal law as a sword: State claims can be based on violation of federal regulations. Federal law also may be used to strengthen a crossing case.[34]

Training and internal rules. Claims of negligent training of engineers to operate a locomotive are, as a general rule, preempted.[35] You may be able to keep a claim alive, however, if the railroad failed to satisfy all requirements for issuing a certificate to its engineers.[36]

Railroads are required to file a copy of their code of operating rules, timetables, and timetable special instructions with the FRA before they may operate in the United States.[37] They also must instruct employees about operating practices and rules[38] and must periodically conduct operational tests and inspections.[39] A valid claim for negligence may be based on a violation of these regulations.[40]

Track standards. The FRA has adopted specific track standards that provide for inspection frequency.[41] Railroads must designate qualified people to inspect the track for defects.[42]

Federal regulations prescribe minimum safety requirements for specific track conditions. And a "combination of track conditions, none of which individually amounts to a deviation from the requirements in [the regulations], may require remedial action to provide for safe operations over that track."[43]

Railroads that have notice that the

track does not comply with safety standards must bring it into compliance or halt operations over that section of track.[14] Railroads must also keep a record of each inspection, prepared and signed on the day it occurs. Any person who knowingly and willfully falsifies these records may be subject to criminal penalties.[15]

Track inspectors sometimes control the speed of trains by ordering them to slow down. These "slow orders" may be required by track safety standards, and violation of an order as well as failure to issue one may be actionable.[16]

As federal preemption expands in the area of railroad crossing litigation, so does the challenge for trial lawyers. You must identify viable causes of action under state law and battle unfounded preemption defenses, avoiding their harsh effect by artfully pleading and proving your case. Finally, when possible, use federal regulation of the railroad industry to show the defendant's misconduct and protect your client's rights. ■

Vegetation or other objects on the railroad right-of-way that block a motorist's view may support a claim based on the common law duty to provide reasonably safe visibility.

Notes

1. Cont'l Improvement Co. v. Stead, 95 U.S. 161, 165 (1877).
2. 49 U.S.C. §§20101-20155 (2000).
3. 507 U.S. 658 (1993).
4. 529 U.S. 344 (2000).
5. 49 C.F.R. §§222.1-222.30 & 229.129 (2005).
6. 49 C.F.R. §§222.7 & 229.129 (2005).
7. 49 C.F.R. §§222.7 & 222.21 (2005).
8. 49 C.F.R. §222.21(b) (2005).
9. 49 C.F.R. §224.13 (2005).
10. *See, e.g.*, Nye v. CSX Transp., Inc., 300 F. Supp. 2d 529, 538 (N.D. Ohio 2004); Libel v. Union Pac. R.R., 109 P.3d 730, 732-33 (Kan. Ct. App. 2005); Pearson v. Columbus & Greenville Ry. Co., 737 So. 2d 390 (Miss. Ct. App. 1998).
11. *See* Burlington N. & Santa Fe Ry. Co. v. Doyle, 186 F.3d 790, 802 (7th Cir. 1999).
12. Dowe v. Nat'l R.R. Passenger Corp., No. 01 C 5808, 2004 WL 887410, at *2-*5 (N.D. Ill. Apr. 26, 2004).
13. *See* U.S. DEP'T OF TRANSP., COMPILATION OF STATE LAWS AND REGULATIONS AFFECTING HIGHWAY-RAIL GRADE CROSSINGS (3d ed. 2003), *available at* www.fra.dot.gov/us/content/806 (last visited Feb. 22, 2006).
14. *See, e.g.*, 49 U.S.C. §§20102-20114 (2000); 49 C.F.R. §213.37 (2005); *see also* Shanklin v. Norfolk So. Ry. Co., 369 F.3d 978 (6th Cir. 2004); Mo. Pac. R.R. Co. v. R.R. Comm'n, 833 F.2d 570, 577 (5th Cir. 1987); O'Bannon v. Union Pac. R.R. Co., 960 F. Supp. 1411, 1422-23 (W.D. Mo. 1997).
15. *See* AM. RY. ENG'G & MAINT. OF WAY ASS'N, PRACTICAL GUIDE TO RAILWAY ENGINEERING (2003); *see also* American Association of State Highway and Transportation Officials standards, standards of individual railroads, and numerous highway-design treatises, *at* www.aashto.org (last visited Feb. 22, 2006).
16. *See, e.g.*, Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1557 n.8 (11th Cir. 1991), *aff'd*, 507 U.S. 658; *see also* Cox v. Norfolk & W. Ry. Co., 998 F. Supp. 679, 689 (S.D. W. Va. 1998).
17. Michael v. Norfolk S. Ry. Co., 74 F.3d 271, 273 (11th Cir. 1996). For post-*Shanklin* decisions, see Anderson v. Wis. Cent. Transp. Co., 327 F. Supp. 2d 969 (E.D. Wis. 2004); Myers v. Mo. Pac. R.R. Co., 52 P.3d 1014, 1028 n.50 (Okla. 2002).
18. *See, e.g.*, Hamlin v. Norfolk S. Ry. Co., 686 So. 2d 1115 (Ala. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Myers*, 52 P.3d 1014, 1028 n.50; *see also* Stone v. CSX Transp., Inc., 37 F. Supp. 2d 789, 797 (S.D. W. Va. 1999).
19. *See, e.g.*, *Pearson*, 737 So. 2d 390, 398.
20. *See, e.g.*, Roach v. St. Joseph & I.R. Co., 41 P. 964, 965 (Kan. 1895).
21. *See* Wood v. Minn. Mining & Mfg. Co., 112 F.3d 306, 310-11 (8th Cir. 1997).
22. *See, e.g.*, Fritzsche v. Union Pac. R.R. Co., 707 N.E.2d 721, 725 (Ill. App. Ct. 1999).
23. *See* Bates v. Dow AgroSciences L.L.C., 125 S. Ct. 1788 (2005); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992); Rogers v. Consol. Rail Corp., 948 F.2d 858, 859 (2d Cir. 1991).
24. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), *rev'd on other grounds*, Rice v. Bd. of Trade, 331 U.S. 247 (1947).
25. *See* English v. Gen. Elec. Corp., 496 U.S. 72 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984).
26. 507 U.S. 658, 661-62.
27. *Id.* at 662.
28. 49 U.S.C. §20106 (2000).
29. *See Stone*, 37 F. Supp. 2d 789; Bakhuyzen v. Nat'l Rail Passenger Corp., 20 F. Supp. 2d 1113, 1118-19 (W.D. Mich. 1996); Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226 (Mo. 2001).
30. 49 C.F.R. §229.135(a) (2005).
31. 49 C.F.R. §215.203 (2005).
32. *See, e.g.*, *Easterwood*, 933 F.2d 1548, 1558 n.9; Earwood v. Norfolk So. Ry. Co., 845 F. Supp. 880, 888 (N.D. Ga. 1993); Watson v. Rail Link, Inc., 826 F. Supp. 487, 490 n.1 (S.D. Ga. 1993); W. Co. of No. Am. v. Dynasty Transp., Inc., 696 So. 2d 1 (La. Ct. App. 1997); Carter v. CSX Transp., Inc., No. 1:93CV589GR, 1994 WL 836291, at *3 (S.D. Miss. Nov. 8, 1994).
33. *See, e.g.*, Duncan v. Kansas City S. Ry. Co., 773 So. 2d 670, 680 (La. 2000), *cert. dismissed*, 532 U.S. 992 (2001); Largo v. Atchison, Topeka & Santa Fe Ry. Co., 41 P.3d 347, 351 (N.M. Ct. App. 2001); Bonacorsi v. Wheeling & Lake Erie Ry. Co., 767 N.E.2d 707, 713-14 (Ohio), *cert. denied*, 537 U.S. 1025 (2002).
34. *See, e.g.*, *Michael*, 74 F.3d 271, 273-74.
35. *See, e.g.*, Sheppard v. Union Pac. R.R. Co., 357 F. Supp. 2d 1180, 1188-89 (E.D. Mo. 2005).
36. *See* 49 C.F.R. §240.213 (2005); *see also* 49 C.F.R. §§240.101-240.129 (2005) (requiring documentation of railroad's locomotive engineer qualifications).
37. 49 C.F.R. §217.7 (2005).
38. 49 C.F.R. §217.11 (2005).
39. 49 C.F.R. §217.9 (2005).
40. *See, e.g.*, Union Pac. R.R. Co. v. Barber, 149 S.W.3d 325, 344 (Ark.), *cert. denied*, 543 U.S. 940 (2004).
41. 49 C.F.R. §213 (2005).
42. 49 C.F.R. §213.7(b) (2005).
43. 49 C.F.R. §213.1(a) (2005).
44. 49 C.F.R. §213.5 (2005).
45. 49 C.F.R. §213.15(b) (2005).
46. *See, e.g.*, *Stone*, 37 F. Supp. 2d 789, 797; Fla. E. Coast Ry. Co. v. Griffin, 566 So. 2d 1321, 1324 (Fla. Dist. Ct. App. 1990).