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Articles

*1 PREEMPTION IS NOT DEAD: THE CONTINUED VITALITY OF PREEMPTION UNDER THE FEDERAL RAILROAD SAFETY ACT FOLLOWING THE 2007 AMENDMENT TO 49 U.S.C. § 20106

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***2** I. Introduction

"Safety first!" is a slogan attributed to a railroader of a bygone era. [FN1] Throughout the history of rail transportation, safety always has been a concern for the industry, as well as the government. [FN2] However, it was not until 1970, more than 140 years after the nation's first railroad was chartered, [FN3] that Congress passed the first comprehensive railroad safety law. [FN4] The Federal Railroad Safety Act ("FRSA") [FN5] establishes uniform national safety standards for railroads to abide by. [FN6] In order to achieve uniformity, this federal law displaces state law, including common law, whenever there is federal law covering the subject matter of the parallel state law. [FN7] This federal preemption of state law has led to increased railroad safety, [FN8] but simultaneously, has left some victims of railroad accidents***3** without a remedy. [FN9]

In 2007, Congress amended the preemption provision of the FRSA in response to two federal court decisions foreclosing relief to plaintiffs who suffered injuries in a major train derailment in North Dakota. [FN10] In each case, the court held that the FRSA preempted the plaintiffs' state law negligence claims irrespective of whether the railroad was in compliance with applicable federal regulations at the time of the derailment. [FN11] Congress subsequently "clarified" the preemptive effect of Section 20106 of the FRSA to legislatively overrule these decisions, [FN12] but how far did Congress scale back preemption under the statute?

This article examines the state of federal preemption under the FRSA following the 2007 amendment. Section II reviews the history of the FRSA and the preemption provision at issue. Section III discusses the North Dakota derailment and the subsequent court decisions that triggered the amendment to Section 20106. Section IV focuses on the legislative history of the amendment to Section 20106 while Section V compares the amendment to former law. Finally, Section VI discusses judicial and agency reactions to the new law.

II. History of the FRSA and § 20106

A. Purpose of the Act

The FRSA was enacted in 1970 to promote safety in all areas of railroad***4** operations, to reduce railroad-related accidents and incidents of death, and prevent bodily injury to persons. [FN13] The legislation aimed to reduce the number of rail accidents, which had steadily increased for more than a decade prior to the enactment of the FRSA. [FN14] The rising accident rate, coupled with the tremendous growth in the transportation of hazardous materials by rail in the 1960's, raised the prospect of future accidents with more catastrophic results. [FN15] These circumstances troubled Congress, which sought to remedy the situation by enacting the most comprehensive rail safety legislation in our nation's history. [FN16]

Given the interstate nature of rail transportation, Congress recognized their goal of increased safety could not be achieved "by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." [FN17] So, Congress assumed "broad federal regulatory authority over all areas of railroad safety" in order to establish ***5** national rail safety standards. [FN18] To implement this national scheme, Congress granted the Secretary of Transportation broad authority to "prescribe regulations and issue orders for every area of railroad safety." [FN19] The Secretary delegated his authority under the FRSA to the Federal Railroad Administration ('FRA"), [FN20] who promulgated a comprehensive scheme of safety regulations. [FN21] The enforcement of these regulations, with limited exception, is vested in the Secretary of Transportation and by extension, the FRA. [FN22]

Meanwhile, states may regulate a given area of railroad safety only until the Secretary prescribes a uniform national standard in that area. [FN23] Once a federal regulation has been issued, state regulation of the same area must cease. [FN24] States, however, are permitted to regulate an "essentially local" safety hazard - one that is so unique that it is "not capable of being adequately encompassed within uniform national standards." [FN25] Otherwise, the role of states is limited to "investigation and surveillance activities," subject to oversight and certification by the Secretary of ***6** Transportation. [FN26]

B. Preemptive Effect of § 20106

Federal preemption has a deep history in our nation's railroad laws. [FN27] Prior to the passage of the FRSA, the federal government regulated only discreet aspects of railroad safety, such as locomotives and signal systems. [FN28] However, fields in which federal regulation was present, state laws were preempted. [FN29] In drafting the FRSA, Congress did not disturb these existing railroad safety laws, but rather, built upon them a "broadscale federal legislation . . . to assure a much higher degree of railroad safety." [FN30] Like the earlier railroad legislation, the FRSA preempts state law in order to promote national uniformity of safety regulation. [FN31] In this way, the FRSA embodies the historical approach to railroad regulation, i.e. "that railroads should be regulated primarily on a national ***7** level through an integrated network of federal law." [FN32]

Section 20106 of the FRSA contains an express preemption provision. [FN33] Essentially, state regulation of railroad safety and security is prohibited unless: (1) the Secretary of Transportation (or his designate) has not yet regulated the subject matter of the state regulation; or (2) the state regulation is: (a) necessary to eliminate an essentially local safety or security hazard, (b) is not incompatible with federal law, and (c) does not unreasonably burden interstate commerce. [FN34] The Secretary will be deemed to have regulated in an area wherever the federal regulation "covers," or

"substantially subsumes" the underlying safety concerns the state regulation addresses. [FN35]

C. Important Supreme Court FRSA Preemption Cases

Two cases involving interpretations of the FRSA have reached the Supreme Court: CSX Transp., Inc. v. Easterwood [FN36] and Norfolk So. Ry. Co. v. Shanklin. [FN37] In each case, the Supreme Court held that the FRSA preempted common law tort duties. [FN38] In Easterwood, a truck driver was killed when his truck collided with a CSX train at a grade crossing in Cartersville, Georgia. [FN39] The driver's widow subsequently brought an action against CSX alleging that the railroad was negligent under Georgia law for operating the train at an excessive speed and failing to maintain adequate warning devices at the crossing. [FN40] The Supreme Court held the ***8** excessive speed claim was preempted, but that the negligence claim based on the absence of warning devices was not. [FN41]

At issue in Easterwood were the FRSA regulations setting the maximum allowable operating speed for freight and passenger trains on various classifications of track. [FN42] These regulations established a maximum train speed of 60 miles per hour for the stretch of track, including the grade crossing where the accident occurred. [FN43] The Court concluded that the regulations "covered the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." [FN44]

Shanklin also involved a grade crossing accident. [FN45] Unlike Easterwood, however, the Supreme Court found the plaintiff's claim of inadequate warning devices to be preempted because reflecting cross buck signs [FN46] at the crossing had been installed using federal funds. These funds were made available through a federal program that provided signs for all railway-highway crossings. [FN47] As a result, "the federal standard for adequacy" set forth in the applicable regulations displaced state statutory and common law addressing the same subject matter resulting in preemption of the claim. [FN48]

III. The Minot Derailment and its Aftermath

A. The Derailment of Canadian Pacific Train 292-16

In the early morning of January 18, 2002, about one-half mile west of ***9** the city limits of Minot, North Dakota, [FN49] an eastbound Canadian Pacific Railway freight train traveling at roughly 41 miles per hour derailed 31 of its 112 cars, including 15 tank cars carrying anhydrous ammonia. [FN50] Five of the tank cars suffered catastrophic ruptures causing the instantaneous release and vaporization of 146,700 gallons of anhydrous ammonia. [FN51] The resulting vapor plume rose an estimated 300 feet in the air and gradually expanded five miles downwind of the accident site over a population of approximately 11,600 people, roughly one-third of Minot. [FN52]

One person died due to prolonged exposure to anhydrous ammonia while trying to flee the area in his pickup truck shortly after the derailment occurred. [FN53] Eleven others suffered serious injuries resulting from exposure to the toxic gas and 322 others were treated for minor injuries. [FN54] The accident caused nearly $2.5 million in property damage, and required Canadian Pacific to spend more than $8.3 million in environmental remediation. [FN55]

The National Transportation Safety Board ("NTSB") later determined that the joint bars fastening a section of "plug rail" [FN56] to the continuous welded track fractured under a prior train or as the accident train passed over the joint. [FN57] After the joint bars fractured, the plug rail, which itself was weakened by small fatigue cracks, also fractured and

broke away from the joint, ultimately causing the train to derail. [FN58]

***10** B. The Eighth Circuit's Decision in Lundeen

Shortly after the NTSB released its findings, Tom and Nanette Lundeen filed suit against Canadian Pacific in Minnesota state court. [FN59] The Lundeen suit was one of 31 lawsuits filed against Canadian Pacific in Minnesota state court seeking damages for personal injury and property damage suffered as a result of the derailment. [FN60] Canadian Pacific removed the cases to federal court based on the common allegation that the railroad had violated "United States law" by negligently failing to inspect the track in accordance with FRA regulations. [FN61] Plaintiffs sought a remand, but were denied. [FN62]

The plaintiffs then sought leave to amend their complaint to delete the reference to federal law, and to file another motion to remand. [FN63] The district court granted the motion for leave, allowed the amendment, then remanded the case to state court for lack of a federal question. [FN64] Canadian Pacific appealed to the Eighth Circuit, which reversed. [FN65] The Eighth Circuit concluded that the FRA track inspection regulations, which enumerated how, when and by whom track inspections must be conducted, were intended to prevent negligent track inspections. [FN66] Therefore, plaintiff's state law negligent track inspection claim was preempted. [FN67] Moreover, because the track inspection regulations completely occupied the field of track inspection, federal question jurisdiction existed under the "complete preemption" doctrine. [FN68]

***11** Upon remand, the district court dismissed all of the plaintiff's negligence claims as preempted by the FRSA. [FN69] In addition to the negligent inspection claim, the district court found that related claims for negligent track construction and maintenance, negligent train operation, and negligent hiring and supervision were covered by applicable FRA regulations and also preempted, regardless of whether the railroad was in compliance with the regulations at the time of the derailment. [FN70]

C. The District of North Dakota's Ruling in Mehl

While defending the Lundeen action in Minnesota, Canadian Pacific also was battling a separate class action lawsuit in federal court in North Dakota arising out of the Minot derailment. [FN71] As in the Lundeen case, the plaintiffs in Mehl pled a variety of state law causes of action, [FN72] including claims for negligent track inspection, negligent track construction and maintenance, negligent train operations, and negligent training of track inspectors and maintenance of way employees. [FN73]

While the Lundeen appeal was sub curia in the Eighth Circuit, the District of North Dakota dismissed the complaint in Mehl, finding that the plaintiffs' state law negligence claims were covered by applicable FRA regulations and, therefore, preempted as a matter of law. [FN74] The court also held that the plaintiffs' common law claims of nuisance, trespass, and intentional infliction of emotional distress were likewise preempted***12** because they were based on the same allegations underlying the preempted negligence claims. [FN75]

The ruling in Mehl, however, is likely to be remembered not for its holding, but for its dicta, particularly Judge Daniel L. Hovland's expression of frustration with the "harsh result" he felt compelled to reach in light of the then-current state of the law. [FN76] Since the FRSA does not provide a civil cause of action for a party injured by a railroad's failure to abide by FRA regulations, the plaintiffs in Mehl and Lundeen were left without a remedy - a result Judge Hovland urged to be corrected through legislative action. [FN77] The outcomes in Mehl and Lundeen became catalysts for

the subsequent amendment to § 20106 of the FRSA. [FN78]

IV. The 2007 "Clarification" Amendment to § 20106

To say that Congress acted quickly in response to these decisions would be an understatement. Just 53 days after the Minnesota district court's decision dismissing the plaintiff's claims in Lundeen upon remand from the Eighth Circuit, the House of Representatives passed legislation ***13** amending § 20106. [FN79]

On March 27, 2007, less than four hours before a vote on H.R. 1401 (the Rail and Public Transportation Security Act of 2007), Rep. Bennie G. Thompson (D-Miss.) introduced a manager's amendment proposing to radically reshape the preemptive effect of the FRSA. [FN80] The Thompson Amendment inserted into the bill a new section titled "No Preemption of State Law" which rewrote § 20106 to eliminate federal preemption unless compliance with both state and federal law was impossible. [FN81] In addition to switching the type of preemption from field to conflict preemption, [FN82] the Thompson Amendment exempted common law causes of action from preemption by limited preemption under § 20106 to conflicting "positive laws, regulations, or orders." [FN83] Lastly, the Thompson Amendment provided that § 20106 did not confer federal question jurisdiction over a state law cause of action. [FN84] The Thompson Amendment passed with scant debate on the proposed change to § 20106. [FN85] After passage in the House, [FN86] ***14** the bill stalled in the Senate and the Thompson Amendment never was enacted. [FN87]

During a House conference to reconcile differing versions of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("the "9/11 Act" ") that had passed each chamber of Congress, the House appended the text of H.R. 1401 to the 9/11 Act. [FN88] The conference, however, rewrote § 20106 in Section 1528 of the 9/11 Act by adopting compromise language modeled after a suggestion by the railroad lobby allowing for an exception to preemption when the railroad was not in compliance with a regulation. [FN89] The 9/11 Act was signed into law on August 2, 2007, barely six months after the final ruling in Lundeen. [FN90]

V. Comparison of the Amended § 20106 to Former Law

Section 20106 of the FRSA now reads:

> § 20106. Preemption
>
> (a) National Uniformity of Regulation. --
>
> (1) Laws, regulations, and orders related to railroad safety and laws, ***15** regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order --
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.
>
> (b) Clarification Regarding State Law Causes of Action. --
>
> (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party --

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.--Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action. [FN91]

The amendment creates a new title for 49 U.S.C. § 20106 ("Preemption") and moves the former title ("National Uniformity of Regulation") to subhead (a). [FN92] The text of subsection (a) contains the exact text of § 20106, as it existed prior to the amendment. [FN93] This restructuring was done solely for clarification and was "not intended to indicate any substantive change in the meaning of the provision." [FN94] Subsection (a) retains the express preemption language and remains the operative portion of ***16** the statute. [FN95]

Subsection (b) is a clarification of subsection (a). [FN96] It clarifies the exceptions to the general rule of preemption by stating what is not preempted. [FN97] Subsections (b)(1)(A) and (b)(1)(B) directly address the rulings in the Minot litigation that Congress perceived to be at odds with the statute. [FN98] Subpart (A) legislatively overrules the Mehl court's ruling that noncompliance with a federal regulation is immaterial to the preemption inquiry. [FN99] Subpart (B) overrules the decision in Lundeen finding preemption notwithstanding that the railroad was alleged to have failed to comply with its own internal rules regarding continuous welded rail, which it was required to have under federal regulations. [FN100] Subsection (b)(2) completes the legislative overruling of the Minot decisions by making the clarification retroactive to the date of the Minot derailment. [FN101]

Subsection (b)(1)(C) completes the list of what is not preempted by incorporating the exception for essentially local safety hazards contained in subsection (a)(2). [FN102] Thus, subpart (C) links together the two subsections of the new statute. Subpart (C) is a catchall provision that completes the realm of non-preempted claims in subsection (b) by referring the reader back to the traditional categories of claims that were not preempted under the original statute. [FN103]

Subsection (c), meanwhile, expressly disavows federal question jurisdiction of state law causes of action for removal purposes. [FN104] It is the only ***17** provision from the failed Thompson Amendment that made its way into the amended § 20106. [FN105]

VI. Post-Amendment Preemption Developments

A. Judicial Decisions Rejecting the Proposition that Preemption is Dead

Shortly after the amendment to § 20106 was enacted, some commentators and members of the Plaintiffs' bar proclaimed that federal preemption under the FRSA no longer existed or had been significantly eroded. [FN106] Courts, however, have taken a different view. In fact, every court that has considered the question has reaffirmed the vitality of preemption under the FRSA and held that the 2007 amendment did not overrule the prior precedent of Easterwood and Shanklin. [FN107]

The Tenth Circuit, in Henning v. Union Pacific Railroad, [FN108] was the first federal appellate court to rule on the issue. [FN109] The Tenth Circuit rejected the plaintiff's argument that her claim of inadequate signalization of a railroad crossing was permitted under the clarification amendment***18** to § 20106. [FN110] In reaching its conclusion, the Tenth Circuit observed that in amending § 20106 "Congress did not overrule Shanklin, but instead provided clarification for courts interpreting Shanklin, establishing [that] FRSA preemption does not apply when a railroad violates a federal safety standard of care," [FN111] and concluded that "[h]ad Congress sought to overrule Shanklin and Easterwood, it would have done so in express terms." [FN112] The court also noted that because subsection (b) was labeled a "clarification," it indicated that Congress sought to resolve an ambiguity in the law's application rather than to effect a substantive change. [FN113]

The District of Oregon, in Murrell v. Union Pac. Ry. Co., [FN114] became the first federal court to squarely address the argument that "common state law tort claims are no longer preempted" by the FRSA and that the Easterwood and Shanklin decisions had been overruled by the amendment to § 20106. [FN115] The plaintiff in Murrell pursued a variety of state law negligence claims, including excessive speed and inadequate warning devices, against Amtrak and Union Pacific arising out of a grade crossing accident. [FN116] He argued that the language in subsection (b)(1)(C) allowed state law torts claims for two reasons: (1) to find that subsection (b)(1)(C) was a restatement of subsection (a)(2) would render it superfluous; and (2) that the term "state law" as used in (b)(1)(C) did not include state common law claims. [FN117] For the latter proposition, the plaintiff acknowledged that the Easterwood and Shanklin decisions held that the word "law" as used in the statute included state common law causes of action, but contended that those decisions had been overruled. [FN118]

***19** The district court disagreed. [FN119] It held that subsection (b)(1)(C) "reaffirmed" the long-standing principle that state law is preempted whenever a federal regulation covers the subject matter of the state law unless one of the exceptions in subsection (a)(2) applies. [FN120] The court further held that the amendment "did not explicitly overrule . . . Shanklin and Easterwood," but rather, modified the analysis of whether preemption applies by adding the railroad's compliance with the standard of care established by federal safety regulations and rules as a factor to consider. [FN121]

Other courts considering the issue have reached the same conclusion. [FN122] Indeed, it is difficult to see how the amendment to § 20106 could be said to have erected a total ban on preemption of state law tort claims. The existing text of § 20106, including the express preemption language upon which Easterwood and Shanklin were decided, was preserved in its entirety without any change. [FN123] Subsection (b) was added, according to ***20** its subhead, as a "clarification regarding state law causes of action." [FN124] As a "clarification," it does not effect a substantive change in the law but rather, resolves an ambiguity and/or corrects a mistaken interpretation of the law. [FN125] In this instance, "Congress enacted a very precise cure for the problem presented by Lundeen and Mehl" by amending § 20106 to "clarif[y] that causes of action under State tort law may be available to injured parties if they are based on the violation of the Federal standard of care created by a Federal regulation or order, or violation of a plan required to be created by Federal regulation or order." [FN126]

Furthermore, one would have expected a more definite statement from Congress if it had intended the amendment to effect a landmark change in the law, [FN127] and overrule Supreme Court precedent in Easterwood and Shanklin. [FN128] The fact that Congress also ultimately chose ***21** not to enact the far-reaching Thompson Amendment (and its "no preemption of state law" language) militates against finding that § 20106 now permits all state law tort actions to continue. [FN129]

B. The Inability to Remove an Action under the Complete Preemption Doctrine

Courts have been uniform in ruling that the amended § 20106 does not permit railroads to remove state court actions to federal court based on the complete preemption doctrine. [FN130] This should not come as a surprise given the clear language of subsection (c). [FN131] The inability to remove a case under the complete preemption doctrine, however, does not preclude a railroad from raising preemption as an affirmative defense. [FN132]

The Eighth Circuit squarely confronted the issue in Bates v. Missouri ***22** & N. Arkansas R.R. Co.. [FN133] In Bates, the plaintiff was injured when his vehicle collided with a train at a crossing in Barton County, Missouri. [FN134] After the plaintiff commenced an action in state court, the railroad removed the case to federal court on grounds that the plaintiff's claims were completely preempted by the FRSA. [FN135] The plaintiff then dropped the sole federal claim that the district court determined was completely preempted. [FN136] As a result, the district court ordered a remand, declining to exercise supplemental jurisdiction over the remaining state law claims, and the railroad appealed. [FN137]

While the appeal was pending, the amendment to § 20106 took effect. [FN138] An Eighth Circuit panel, in a 2-1 decision, subsequently affirmed the remand. [FN139] The majority rejected the railroad's argument that the retroactivity provision of subsection (b)(2) did not apply to subsection (c), thereby allowing for federal question jurisdiction over claims filed before § 20106 was amended. [FN140] The dissent, meanwhile, interpreted the retroactivity imposed under subsection (b)(2) as applying only to causes of action authorized under subsection (b)(1), i.e., claims alleging that a railroad failed to comply with a federal standard of care. [FN141] Since the plaintiff's amended complaint alleged negligent train operation without identifying a specific violation of a federal standard of care, such as excessive speed, the dissent concluded that the claim did not fall under subsection (b)(1). [FN142] Thus, subsection (c) did not apply and federal question jurisdiction would lie because the claim was completely preempted under the FRSA. [FN143]

The difficulty with the dissent's reasoning is that even if subsection (c) is construed to apply only to causes of action provided by subsection (b)(1), it does not necessarily follow that the complete preemption doctrine***23** would justify federal question jurisdiction over other causes of action. The complete preemption doctrine flows from the concept of field preemption. [FN144] Given that the amended statute carves out limited areas where the states may regulate railroad safety, [FN145] it hardly can be said that federal law so thoroughly occupies the field of railroad safety that there is “no room” for the states to supplement law. [FN146] Thus, the complete preemption doctrine would not apply even absent the new language in subsection (c).

C. The Federal Railroad Administration's Interpretation of the Clarification Amendment

When Congress was considering the 9/11 Act and the amendment to § 20106, the FRA issued a Notice of Proposed Rulemaking (“NPRM”) regarding enhanced requirements for the structural strength of cab cars and multiple unit locomotives used in passenger transportation. [FN147] On January 8, 2010, the FRA issued a Proposed Final Rule (“PFR”) that is scheduled to take effect on March 9, 2010. [FN148] In connection with its PFR, the FRA issued detailed comments regarding federal preemption, including its interpretation of the 2007 amendment to § 20106. [FN149]

According to the FRA, “the key concept of Section 20106(b) is permitting actions under State law seeking damages . . . to proceed using a Federal standard of care.” [FN150] In amending the statute, Congress has clarified that “the Federal railroad safety regulations preempt the standard of care, not the underlying causes of action in tort.” [FN151] The clarification allows plaintiffs to pursue causes of action against non-compliant railroads ***24** while preserving the national uniformity of railroad safety regulation. [FN152]

Additionally, the FRA interpreted subpart (b)(1)(B) to be inapplicable to plans, rules or standards created by a railroad that exceed FRA minimum requirements. [FN153] The FRA offered two reasons for its conclusion: (1) that a rail-

road-created plan establishing a higher standard than required by federal law "does not fit the paradigm of a Federal standard of care;" [FN154] and (2) such a rule, in its view, would not improve railroad safety. [FN155] The latter concern voiced by the FRA is valid - there is no incentive for a railroad to adopt a more stringent internal standard if, as a result, it will be subject to liability for failing to achieve that which exceeds what is required by federal law. [FN156] Thus, as long as a railroad meets ***25** minimum federal safety standards, it will not be penalized for failing to meet a self-imposed higher standard of care.

VII. Conclusion

Two conclusions are readily apparent in light of the clarification amendment to § 20106 of the FRSA and its aftermath: removal based on the doctrine of "complete preemption" no longer is possible, but preemption as an affirmative defense is not dead. [FN157]

The express disavowal of federal question jurisdiction in § 20106(c), as amended, has eliminated the strategic option of removal for railroad defendants. With more cases being litigated in state courts as a result, state court judges will find themselves confronting the affirmative defense of preemption with greater frequency. Thus, a larger body of state law decisions regarding preemption under § 20106 is likely to develop.

Nevertheless, it is clear that preemption continues to exist under § 20106(a). The statute will continue to assure that federal regulations regarding particular areas of railroad safety will supersede state laws covering the same subject matter as the federal regulations. Although a federal standard of care is imposed by § 20106(a), injured plaintiffs are no longer without recourse if a railroad fails to abide by the required federal standard of care. In such instances, plaintiffs are permitted to pursue state law causes of action based on the railroad's failure to meet the federal standard of care. This exception to preemption under § 20106(b) does not undermine the FRSA's goal of uniformity of regulation and should not compromise rail safety. In fact, the amendment may lead railroads to have a heightened focus on regulatory compliance given that injury resulting from non-compliance is now actionable under state tort law. If so, one would anticipate that increased attention to regulatory compliance would lead to increased rail safety.

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[FN1]. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4105. The "Safety First" slogan and resulting movement was launched in 1910 by Ralph C. Richards, a general claim agent for the Chicago & North Western Railroad. See Mark Aldrich, Safety First: Technology, Labor, and Business in the Building of American Work Safety, 188-90 (Johns Hopkins Univ. Press 1997). Richards had collected data on employee injuries and concluded that most injuries were not caused by equipment failure or derailment, but by worker carelessness. By making employees more aware of the occupational hazards of railroading and teaching them how to avoid most injuries, Richards believed deaths and injuries could be greatly reduced; see also Ralph C. Richards, The Safety First Movement on American Railways, Proceedings of the Second Pan-American Scientific Congress, Vol. XI, 326-50 (Gov't Printing Office 1917).

[FN2]. See Bhd. of R.R. Trainmen v. Va. State Bar, 377 U.S. 1, 2-3 (1964) (The Brotherhood of Railroad Trainmen was formed in 1883 founded as a fraternal and mutual benefit society to promote the welfare of the trainmen. The case observed that railroad work in the late 19th Century was quite dangerous; the odds in 1888 against a brakeman dying a nat-

ural death were almost 4-1 while the average life expectancy of a switchman in 1893 was seven years). In 1908, Congress enacted the Federal Employers' Liability Act, 45 U.S.C. § 1(1908), in response to the "tremendous loss of life and limb on the railroads." See Melvyn L. Griffith, The Vindication of a National Public Policy Under the Federal Employers' Liability Act, 18 Law & Contemp. Probs. 160, 163 (1953)) (quoting from 45 Cong. Rec. 4041 (1910)). For a comprehensive survey of the history of the FELA, see id. For a greater understanding of railroad injuries and accidents during the early part of the 20th Century, see Ralph C. Richards, The Safety First Movement on American Railways, Proceedings of the Second Pan-American Scientific Congress, Vol. XI, 326-50 (Gov't Printing Office 1917).

[FN3]. The Baltimore & Ohio Railroad Co., the nation's first commercial railroad, was chartered by the Maryland Legislature in 1826. See 1826 Md. Laws Ch. 123; Baltimore & Ohio Railroad Museum, About the Museum, http://www.borail.org/history-of-museum.shtml (visited Feb. 5, 2010).

[FN4]. Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970).

[FN5]. 49 U.S.C. § 20101 (1994).

[FN6]. 49 U.S.C. § 20106(a) (2007).

[FN7]. Id.

[FN8]. Between 1978 and 2006, the total number of rail-related accidents and incidents saw a dramatic decrease from 90,653 to an all-time low of 13,139. Written Statement of Joseph H. Boardman, Administrator, Federal Railroad Admin., U.S. Dep't of Transp., before the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security, Committee on Commerce, Science, and Transportation, U.S. Senate (July 26, 2007) at Appendix A. During the same time period, total rail-related fatalities declined by 45 percent, from 1,646 to 912 while total rail employee deaths plummeted 87 percent from 122 to 16. Id. Total employee cases (fatal and nonfatal) declined by 92 percent, from 65,193 in 1978 to a record low of 5,165 in 2006. Id. Train accidents declined by 74 percent from 1978 to 2006 even though rail traffic has increased by nearly 8 percent. Id. For additional rail safety data, see Federal Railroad Administration, Office of Safety Analysis, Home http://safetydata.fra.dot.gov/officeofsafety/ (last visited Feb. 8, 2010).

[FN9]. See, e.g., Mehl v. Canadian Pac. Ry. Co., 417 F. Supp. 2d 1104, 1120-21 (D.N.D. 2006) (observing that the FRSA "fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies."); Sharon L. Van Dyck, A Clear Path for Railroad Negligence Cases, Trial, Feb. 2008, at 50 ("court have perverted th[e] purpose [of the FRSA] by applying the doctrine of preemption to deprive Americans grievously injured in railroad accidents of any remedy").

[FN10]. Pub. L. No. 110-53, Title XV, § 1521, 121 Stat. 444 (Aug. 3, 2007); see also discussion infra § IV.

[FN11]. See discussion infra §§ III.B-C.

[FN12]. See H.R. Rep. No. 110-259, at 351 (2007) (Conf. Rep.); 153 Cong. Rec. H8546, H8590 (daily ed. July 25, 2007); see also discussion infra § V.

[FN13]. 49 U.S.C. § 20101 (1970); Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970).

[FN14]. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4105-06. Prior to the passage of the FRSA, the number of rail accidents in the Untied States had increased for 12 consecutive years. Id. at 4106. In 1969,

there were 8,543 such accidents, which represented a six percent increase over the previous year and a 60 percent jump over the total from five years earlier. Id. Train accidents claimed 2,299 lives in 1969 and injured 23,356 persons. Id.

[FN15]. The House Committee received evidence of several contemporary National Transportation Safety Board investigations of rail accidents involving the release of hazardous materials. Id. at 4107. The Committee's Report highlighted several derailments, including a Jan. 1, 1968 derailment and collision of two Pennsylvania Railroad trains in Dunreith, Ind. Id.; see also NTSB Railroad Accident Report, Pennsylvania Railroad Train PR-11A, Extra 2210West and Train SW-6, Extra 2217 East, Derailment and Collision, Dunreith, Indiana, January 1, 1968 (NTSB/RAR-68/03) (adopted Dec. 18, 1968). A broken rail caused a car on the westbound train to derail and strike several cars on the eastbound train, including one filled with hydrogen cyanide. William J. Watt, The Pennsylvania Railroad in Indiana 169 (Indiana Univ. Press 1999). A total of twenty-six cars derailed and a tank car carrying anhydrous ammonia exploded. Id. The resulting fire destroyed a local cannery, which was the town's major industry, and caused extensive property damage to nearby homes and businesses. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4107. Local residents were evacuated for two days and returned to find that the local water supply had been polluted as a result of the accident. Id. The Committee also focused on a Jan. 25, 1969 accident in Laurel, Miss. where 15 tank cars carrying liquefied propane gas derailed from a Southern Railway-owned train. Id.; see also NTSB Railroad Accident Report, Southern Railway Company Train 154, Derailment with Fire and Explosion, Laurel, Mississippi, January 25, 1969 (NTSB/RAR-69/01) (adopted Oct. 6, 1969); Alabama Great So. R.R. Co. v. Allied Chem. Corp., 501 F.2d 94 (5th Cir. 1974). The resulting explosion and fire fatally injured two residents, hospitalized 33 others and caused widespread property damage. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4107.

[FN16]. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4106.

[FN17]. Id. at 4109. “The railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. Unlike the gas pipelines, the vast bulk of railroad mileage, and operations there over, are by companies whose operations extend over many state lines...To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.” Id. at 4110-11.

[FN18]. Id. at 4108. The FRSA declares as federal policy that “all laws, regulations and orders” related to railroad safety “shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1); see also H.R. Rep. No. 91-1194, reprinted in 1970 U.S.C.C.A.N. 4104, at 4116.

[FN19]. 49 U.S.C. § 20103(a) (1994); H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4114.

[FN20]. 49 C.F.R. § 1.49(m) (1998).

[FN21]. See, e.g., 49 C.F.R. Parts 213-238 (2010).

[FN22]. 49 U.S.C. § 20111(a) (1993); see also H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4109 (“all enforcement [is] federal in nature. The secretary will have exclusive authority to assess and compromise penalties and to recommend court action for the recovery of such penalties”). Only when the Secretary fails to act, may a State pursue enforcement. 49 U.S.C. § 20113(1994). Thus, for example, if the Secretary fails to bring an enforcement action within 15 days after being notified of a safety violation by a State authority, the State authority may commence an action for injunction relief in a federal district court. 49 U.S.C. § 20113(a) (1994). Similarly, a State authority may commence an action in a federal district court to impose and collect a civil penalty for a safety violation when the Secretary fails to impose a penalty with 60 days after receiving notice of a safety violation by a State authority. 49 U.S.C. §

20113(b) (1994). Congress initially considered a larger enforcement role for the States, see H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4117 ("As originally considered by the Committee, this section [State Participation] allowed for certifying states to adopt all federal standards and... enforce them at the state level"), but ultimately decided to centralize enforcement, presumably in an effort to foster national uniformity. See id. ("The committee believes, however, that such a vital part of our interstate commerce as railroads should not be subject to this multiplicity of enforcement by various certifying states as well as the federal government.").

[FN23]. 49 U.S.C. § 20106(a)(2) (2007); H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4116-17.

[FN24]. H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4116-17.

[FN25]. 49 U.S.C. § 20106(a)(2) (2007); see also H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4117. Congress did not believe that allowing States the leeway to regulate "essentially local" hazards was inconsistent with its goal of uniformity. Id. ("Since these local hazards would not be statewide in character, there is no intent to permit a state to establish statewide standards superimposed on national standards covering the same subject matter.").

[FN26]. 49 U.S.C. § 20105 (1994). States also participate in the rulemaking process through the FRA's Railroad Safety Advisory Committee (RSAC). See Federal Railroad Administration, Railroad Safety Advisory Committee (RSAC), RSAC History (visited Jan. 28, 2010) http://rsac.fra.dot.gov/about.php. Currently, the American Association of State Highway & Transportation Officials (AASHTO), the American Public Transportation Association (APTA), and the Association of State Rail Safety Managers hold membership in RSAC. See Federal Railroad Administration, Railroad Safety Advisory Committee (RSAC), RSAC Members, http://rsac.fra.dot.gov/organizations (last visited Jan. 28.2010).

[FN27]. See infra notes 28-29; U.S. CONST. art. VI, cl. 2 (titled "The Supremacy Clause"); see, e.g., CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993); Gade v. Nat'l Solid Wastes Mgt. Ass'n, 505 U.S. 88, 98 (1992); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990); Schneidewind v. ANR Pipeline Co., 485 U.S. 295, 300 (1988); ., Fla. Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Md v. La, 451 U.S. 725, 746 (1981) (explaining that there are three kinds of preemption: express, which exists where a federal statute says that it supersedes state law; field, which occurs whenever federal regulation of a particular field is so pervasive that it is reasonable to infer that Congress intended federal regulation to be exclusive; Conflict, which is present when it is impossible to comply with both federal and state regulations and the presence of preemption requires the offending state to yield to federal law.).

[FN28]. See H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4105-06; 49 U.S.C. §§ 20301-20306 (the Safety Appliance Act 1893); 49 U.S.C. §§ 21101-21108 (the Hours of Service Act 1907); 49 U.S.C. §§ 20501-20505 (the Signal Inspection Act 1910); 49 U.S.C. §§ 20901-20903(the Accident Reports Act 1910); and 49 U.S.C. §§ 20701-20703 (the Locomotive Inspection Act 1911, formerly known as the Boiler Inspection Act).

[FN29]. See H.R. REP. NO. 91-1194, reprinted in 1970 U.S.C.C.A.N. 4104, 4108 ("At the present time where the federal government has authority, with respect to rail safety, it preempts the field.").

[FN30]. Id. at 4105 ("These particular laws have served well. In fact the committee chose to continue them without change.").

[FN31]. See Burlington N. and Santa Fe Ry. v. Doyle, 186 F.3d 790, 794 (7th Cir. 1999) ("The FRSA also advanced the goal of national uniformity of regulation because one of its provisions expressly preempts state laws regulating rail safety"); Ouelette v. Union Tank Car Co., 902 F. Supp. 5, 10 (D. Mass. 1995) ("By pervasively legislating the field of

railroad safety, Congress demonstrated its intent to create uniform national standards and to preempt state regulation of railroads").

[FN32]. R.J. Corman R.R. Co. v. Palmore, 999 F.2d 149, 152 (6th Cir. 1993) (stating uniformity of railroad regulation is desired, if not essential, for the safe and practical operation of railroads. Railroads operate across many state and jurisdictional boundaries. Train equipment and crews regularly move between states to transport freight and passengers. Freight and commuter railroads share track with one another. The structural interdependence and interoperability of railroads are fostered through uniformity in operating procedures and rules).

[FN33]. See 49 U.S.C. § 20106(a)(2) (1994); 49 C.F.R. § 240.5(a) (2007) ("Under 49 U.S.C. § 20106, issuance of the regulations in this part preempts any State law, regulation, or order...).

[FN34]. 49 U.S.C. § 20106(a)(2) (1994); 49 U.S.C. §20105(g)(1) (1994); 49 C.F.R. § 240.5(a) (2005).

[FN35]. Norfolk So. Ry. Co. v. Shanklin, 529 U.S. 344, 352 (2000). ("For preemption to take effect, the federal regulation must cover the same subject matter and not merely touch upon or relate to that the subject matter"); Easterwood, 507 U.S. at 662 (federal regulation setting maximum train speeds preempted state common law duty to operate train at a safe speed); Burlington N. R.R. Co. v. Mont., 880 F.2d 1104, 1106 (9th Cir. 1989) (holding that FRSA "preempts all state regulations aimed at the same safety concerns addressed by FRA regulations").

[FN36]. Easterwood, 507 U.S. at 658.

[FN37]. Shanklin, 529 U.S. 344 (2000).

[FN38]. Easterwood, 507 U.S. at 662, 664 (quoting former 45 U.S.C. § 434); Shanklin, 529 U.S. at 358-59.

[FN39]. Easterwood, 507 U.S. at 661. For more information about Cartersville, Georgia, see About the City of Cartersville, http:// www.cityofcartersville.org/index.aspx?NID=29 (last visited on Feb. 1, 2010).

[FN40]. See Easterwood, 507 U.S. at 661; Easterwood v. CSX Transp., Inc., 742 F. Supp. 676, 678 (N.D. Ga. 1990) (granting summary judgment in favor of CSX, holding that both claims were preempted) Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1553-56 (11th Cir. 1991) (holding only the excessive speed claim was preempted by the FRSA).

[FN41]. Easterwood, 507 U.S. at 661, 673, 675-76 (holding that the excessive speed claim was preempted).

[FN42]. Id. at 673, (track is classified on a numerical system from 1-5 based on, inter alia, gage, alignment, curvature, surface, and number of crossties per length of track); see also 49 C.F.R. §§ 213.9(a), 213.51-213.63, 213.109 (2005).

[FN43]. Easterwood, 507 U.S. at 673; see also 49 C.F.R. § 213.9(a) (2005).

[FN44]. Easterwood, 507 U.S. at 674-75 (irrelevant is the contention that these regulations were adopted to prevent derailments rather than to ensure safety at grade crossings because the FRSA "does not... call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter" at issue).

[FN45]. Shanklin, 529 U.S. at 347, 350 (motorist was killed when his truck was struck by a Norfolk Southern train at a grade crossing in western Tennessee and driver's widow sued the railroad alleging that the signs posted at the crossing provided insufficient warning to drivers).

[FN46]. Id. at 350 (cross buck signs are black and white X-shaped signs reading “RAILROAD CROSSING”).

[FN47]. Id. at 347-48, 350; see generally 23 U.S.C. § 130 (2006); 49 U.S.C. § 20134(a) (1994); 23 C.F.R. §§ 646.214(b)(3), 646.214(b)(4) (2005) (cross buck signs were partially paid by federal funds in accordance with regulations, also cross buck signs met standards set forth by statutes); see also Easterwood, 507 U.S. at 671-73.

[FN48]. Shanklin, 529 U.S. at 359.

[FN49]. For more information about Minot, South Dakota, see City of Minot, ND, Community Data Profile, http://minotnd.org/community_data.htm (last visited Feb. 2, 2010).

[FN50]. NTSB Railroad Accident Report, Derailment of Canadian Pacific Railway Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, North Dakota January 18, 2002 (NTSB/RAR-04/01) at 1, 3, 33 (March 9, 2004), available at http://www.ntsb.gov/publictn/2004/RAR0401.pdf.

[FN51]. Id. at 5.

[FN52]. Id.; see also Lundeen v. Can. Pac. Ry. Co., 507 F. Supp. 2d 1006, 1008-09 (D. Minn. 2007).

[FN53]. NTSB Railroad Accident Report, Derailment of Canadian Pacific Railway Freight Train 292-16 at 10.

[FN54]. Id. at 10-11. The serious injuries included chemical burns to the face and feet, respiratory failure, and erythema, an abnormal redness of the skin caused by capillary constriction. Id. at 10-11 & 10 n.13. The minor injuries included eye irritation, respiratory distress, chest discomfort, and headaches. Id. at 10.

[FN55]. Id. at 11-12. Thirty railcars, having an aggregate replacement value of $1,966,000 were completely destroyed in the accident. The value of the damaged or destroyed lading was estimated to be $340,000. Nearly 475 feet of track was replaced at a cost of $180,000. Id. at 11. Additionally, two houses in a nearby neighborhood suffered property damage. Id. at 12.

[FN56]. When continuous welded rail (CWR) is repaired, the damaged section is cut out and removed. A section of “plug rail” is then fitted into the CWR. The plug rail is secured to the CWR by joint bars inside and outside the rail that are fastened with bolts through both joint bars. Later, the joint bars can be removed and the plug rail joints can be welded to the CWR. Id. at 16.

[FN57]. Id. at 54.

[FN58]. Id.

[FN59]. Lundeen v. Canadian Pac. Ry. Co., 342 F. Supp. 2d 826, 827 (D. Minn. 2004).

[FN60]. Id. at 827.

[FN61]. Id. at 828.

[FN62]. Id. at 829-31.

[FN63]. Lundeen v. Canadian Pac. Ry. Co., No. Civ.04-3220(RHK/AJB), 2005 WL 563111, at *1 (D. Minn. Mar. 9, 2005), rev'd, 447 F.3d 606 (8th Cir. 2006), vacated, 532 F.3d 682 (8th Cir. 2008).

[FN64]. Id. at *1-2.

[FN65]. Lundeen v. Canadian Pac. Ry. Co., 447 F.3d 606, 611 (8th Cir. 2006), vacated, 532 F.3d 682 (8th Cir. 2008). Although appeals of remand orders ordinarily are not allowed, see 28 U.S.C. § 1447(d) (2006), the appeal in this case was properly taken because district court had subject matter jurisdiction upon removal of the case (hence the denial of the initial motion to remand) but declined to exercise supplemental jurisdiction over the plaintiff's remaining state law claims pursuant to 28 U.S.C. § 1367 once the complaint was amended to delete reference to federal law, see Lundeen, 447 F.3d at 611.

[FN66]. Lundeen, 447 F.3d at 614; see also 49 C.F.R. §§ 212.203, 213.7, 213.233, 213.237 (2009).

[FN67]. Lundeen, 447 F.3d at 614.

[FN68]. Id. at 614-15. Federal question jurisdiction exists when "...federal law creates the cause of action or [when] the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law." Id. at 611 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983) (alteration to original)). The "complete preemption" doctrine is a corollary to the "...'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S.386, 392 (1987). Under the complete preemption doctrine, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Id. at 393. Prior to the 2007 Amendment to the FRSA, there was a split of authority as towhether theAct "completely preempted" state-law claims giving rise to federal question removal. Compare, e.g., Peters v. Union Pac. R.R., 80 F.3d 257, 262 (8th Cir. 1996); Holem v. Eagle, 482 F. Supp. 2d 1101, 1102(S.D. Iowa 2007); Hodge v. Burlington N. & Santa Fe Ry. Co., 461 F. Supp. 2d 1044, 1053(E.D. Mo. 2006); and Kutilek v. Union Pac. R.R., 454 F. Supp. 2d 876, 883-84(E.D. Mo. 2006) (finding complete preemption), with Colbert v. Union Pac. R.R., 485 F. Supp. 2d 1236, 1243(D. Kan. 2007); Kuntz v. Illinois Cent. R.R., 469 F. Supp. 2d 586, 591-92(S.D. Ill. 2007); Fuller v. BNSF Ry. Co., 472 F. Supp. 2d 1088, 1092-93(S.D. Ill. 2007); and Sullivan v. BNSF Ry. Co., 447 F. Supp. 2d 1092, 1099(D. Ariz. 2006) (rejecting complete preemption due to the lack of a private cause of action in the FRSA). The 2007 Amendment has foreclosed the possibility of removal jurisdiction. See discussion infra Part VI.B.

[FN69]. Lundeen, 507 F. Supp. 2d at 1011, 1017, vacated, 532 F.3d 682 (8th Cir. 2008).

[FN70]. Id. at 1013-15; see also Shanklin, 529 U.S. 344, 357-58 (2000); Oullette, 902 F. Supp. at 5, 10, (holding that FRSA's preemption language does not differentiate between instances of compliance and non-compliance).

[FN71]. See Mehl v. Canadian Pac. Ry. Ltd., 417 F. Supp. 2d 1104, 1106 (D.N.D. 2006). The Mehl case was brought in federal court based on the existence of diversity jurisdiction. See Mehl v. Canadian Pac. Ry. Ltd., No. 14-02-09, 2004 WL 2554589 at *1 (D.N.D. Nov. 8, 2004) (order affirming diversity jurisdiction). Thus, unlike in Lundeen, the district court did not need to concern itself with whether federal question existed by virtue of the "complete preemption" doctrine.

[FN72]. Mehl, 417 F. Supp. 2d at 1107.

[FN73]. Id. at 1115.

[FN74]. Id. at 1116-18. In the same vein as the Lundeen court, the Mehl court observed that "...compliance is not a part

of the preemption analysis." Id. at 1116.

[FN75]. Id. at 1118-19. The court also dismissed the plaintiffs' remaining state law claims of negligence per se and strict liability on grounds that North Dakota did not recognize such causes of action. Id. at 1118.

[FN76]. Mehl, 417 F. Supp. 2d at 1120-21.

[FN77]. Id. Judge Hovland wrote:

While the Federal Railroad Safety Act does provide for civil penalties to be imposed on non-compliant railroads, the legislation fails to provide any method to make injured parties whole and, in fact, closes every available door and remedy for injured parties. As a result, the judicial system is left with a law that is inherently unfair to innocent bystanders and property owners who may be injured by the negligent actions of railroad companies.

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Other federal district courts throughout the country have struggled with the harshness of decisions such as this. However, it is the province of Congress, not the judicial branch, to address this inequity. Common sense and fundamental concepts of fairness and justice demand that there should be a remedy for the wrong, but there is none under the current state of federal law. Such an unfair and inequitable result should be addressed through legislative action.

Id. Judge James M. Rosenbaum echoed these sentiments when dismissing the claims by the Lundeen plaintiffs upon remand from the Eighth Circuit. Lundeen v., 507 F. Supp. at 1016 ("the FRSA has 'absolved railroads from any common law liability for failure to comply with the safety regulations.' This is the regulatory scheme that Congress has imposed. And when Congress has clearly spoken, any relief from its regime must come from Congress rather than the Courts." (quoting Mehl, 417 F. Supp. 2d at 1120)). The concern that preemption left injured plaintiffs without Justice Ginsburg voiced a remedy in her dissenting opinion in Shanklin. Shanklin, 529 U.S. at 360. (Ginsburg, J., dissenting) ("The upshot of the Court's decision is that state negligence law is displaced with no substantive federal standard of conduct to fill the void. That outcome defies common sense and sound policy.").

[FN78]. See H.R. Rep. No. 110-259, at 326 (2007) (Conf. Rep.), reprinted in 153 Cong. Rec. H8496-01 at H8589 (daily ed. July 25, 2007) (explaining that proposed amendment to 49 U.S.C. § 20106 would "...rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent").

[FN79]. See H.R. 1401, 110th Cong. § 3 (2007); 153 Cong. Rec. H3141-45 (daily ed. Mar. 27, 2007).

[FN80]. 153 Cong. Rec. H3123-26 (daily ed. Mar. 27, 2007); see also H.R. Conf. Rep. 110-74 (discussing Rep. Bennie G. Thompson's amendment to H.R. 1401).

[FN81]. H.R. 1401, 110th Cong. § 3(a) (2007); 153 Cong. Rec. H3123 (daily ed. Mar. 2007). The text of the proposed amendment provided:

Sec. 3. NO PREEMPTION OF STATE LAW.

(a) No Preemption of State Law. - Nothing in section 20106 of title 49, United States Code, preempts a State cause of action, or any damages recoverable in such an action, including negligence, recklessness, and intentional misconduct claims, unless compliance with State law would make compliance with Federal requirements impossible. Nothing in section 20106 of title 49, United States Code, confers Federal jurisdiction of a question for such a cause of action.

(b) Secretarial Power. - Section 20106 of title 49, United States Code, preempts only positive laws, regulations or orders by executive or legislative branch officials that expressly address railroad safety or security. The Secretary and the Secretary of Transportation have the power to preempt such positive enactments by substantially subsuming the same subject matter, pursuant to proper administrative procedures.

H.R. 1401, 110th Cong. § 3(a)-(b) (2007).

[FN82]. H.R. 1401, 110th Cong. § 3(a)-(b) (2007).

[FN83]. H.R. 1401, 110th Cong. § 3(b) (2007); 153 Cong. Rec. H3123 (daily ed. Mar. 27, 2007).

[FN84]. H.R. 1401, 110th Cong. § 3(a) (2007); 153 Cong. Rec. H3123 (daily ed. Mar. 27, 2007).

[FN85]. 153 Cong. Rec. H3138-39 (daily ed. Mar. 27, 2007) (the amendment passed by a vote of 224-199); 153 Cong. Rec. H3128 (daily ed. Mar. 27, 2007) (Reps. Oberstar and Thompson supported the amendment with the latter urging that "Congress must act now before more Americans lose their right to a remedy, and that is why we have chosen to add technical language to the Rail Security bill to alleviate this problem on a timely basis...The language would clarify that the purpose of the FRSA was and is to set uniform minimum safety standards, and that an expansive application of preemption to deprive accident victims' access to state remedies is a misapplication of the law."); 153 Cong. Rec. H3128 (daily ed. Mar. 27, 2007) (only Rep. LaTourette spoke out against the Amendment); 153 Cong. Rec. H3128 (daily ed. Mar. 27, 2007) ("section 3 undoes decades of Federal preemption when safety matters are concerned on the Nation's railroads [sic], and the situation that we are going to find ourselves in is the one that Mr. Shuster described: States will be free to pass 50 different sets of safety regulations, and trains are going to have to stop at the border and comply with this, that or the other thing...It is going to undo the fabric of our Nation's rail system...This, in my opinion, is a ham-handed approach that should be defeated.").

[FN86]. 153 Cong. Rec. H3149 (daily ed. Mar. 27, 2007) (the House passed H.R. 1401 by a 299-124 vote).

[FN87]. The Senate received the bill the day following its passage in the House and referred it to the Committee on Commerce, Science, and Transportation. The Library of Congress, THOMAS, H.R. 1401, Major Actions, http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1:./temp/~bdFALK:@@CC@R--/ bss/d110query.html (last visited Feb. 13, 2010). The bill never made it out of committee.

[FN88]. H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8496-605 (daily ed. July 25, 2007).

[FN89]. See H.R. 1, 110th Cong. § 1528 (2007); H.R. Conf. Rep. 110-259. The American Association of Railroads (AAR) proposed to add the following language to 49 U.S.C. § 20106:

> Nothing in this section shall be construed to preclude an action under state law seeking damages for personal injury or property damage alleging that a party has violated a specific requirement set forth in a regulation or order issued by the Secretary. This provision shall apply to all causes of action which accrue on or after the effective date of this Act. Nothing in this provision shall otherwise affect the scope of application of this section as interpreted by the U.S. Supreme Court in CSX Transportation, Inc. v. Easterwood and Norfolk Southern Railroad v. Shanklin.

Frank J. Mastro, Congress Clarifies the Preemptive Effect of the Federal Railroad Safety Act, The Transportation Lawyer 40, 42 (Oct. 2007) (citing AAR Amendment to Address Minot Litigation (Apr. 4, 2007)).

[FN90]. The Senate passed the 9/11 Act by an 85-8 vote. 153 Cong. Rec. S10115-17 (daily ed. July 26, 2007). A day later, the House passed the bill by a 371-40 margin. 153 Cong. Rec. H8791-812 (daily ed. July 27, 2007). The bill was forwarded to President George W. Bush on Aug. 1, 2007. See The Library of Congress, THOMAS, H.R. 1401, Major Actions, http:// thomas.loc.gov/cgi-bin/bdquery/D?d110:1:./temp/~bdFALK:@@CC@R--/ bss/d110query.html (last visited Feb. 13, 2010). The bill was signed into law on Aug. 3, 2007. Pub. L. No. 110-53, Title XV, § 1521, 121 Stat. 444 (Aug. 3, 2007).

[FN91]. 49 U.S.C. § 20106.

[FN92]. H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8546, H8589 (daily ed. July 25, 2007).

[FN93]. H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8546, H8589 (daily ed. July 25, 2007).

[FN94]. 153 Cong. Rec. H8546, H8589 (daily ed. July 25, 2007); see also H.R. Conf. Rep. 110-259.

[FN95]. 49 U.S.C. § 20106(a) ("A State may adopt or continue in force a law...until the Secretary...prescribes a regulation...").

[FN96]. Id.; see also H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8546, H8589-90 (daily ed. July 25, 2007).

[FN97]. H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8546, H8590 (daily ed. July 25, 2007).

[FN98]. 153 Cong. Rec. H8589 (daily ed. July 25, 2007) (stating that one of the purposes of § 1528 is "to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent").

[FN99]. See Mehl, 417 F. Supp. 2d at 1116 (rejecting argument that railroads must "prove compliance with federal regulations before allowing preemption of state law claims" for negligent inspection).

[FN100]. See Lundeen, 507 F. Supp. 2d at 1012-13 (citing 49 C.F.R. § 213.119) (rejecting the argument that the preemption did not apply where railroad did not submit its internal procedures for maintenance and inspection of CWR to the FRA for approval as required by regulation because "[c]ourts deem coverage, rather than compliance, to be preemption's touchstone").

[FN101]. See H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8546 (daily ed. July 25, 2007).

[FN102]. 49 U.S.C. § 20106(b)(1)(C); see, e.g., Van Buren v. Burlington No. Santa Fe Ry. Co., 544 F. Supp. 2d 867, 876 (D. Neb. 2008) (observing that subpart (C) "merely restates the general presumption rule and the exception found within section 20106(a)(2)"); Murrell v. Union Pac. R.R. Co., 544 F. Supp. 2d 1138, 1147 (D. Or. 2008) (holding that subsection (b)(1)(C) reaffirms state law preemption unless one of the exceptions in subsection (a)(2) apply).

[FN103]. See S. Calif. Reg. Rail Auth. v. Super. Ct., 77 Cal. Rptr. 3d 765, 784 (Cal. Ct. App. 2008) ("in order for a state claim to proceed, it cannot be one that is preempted under subdivision (a)(2)").

[FN104]. H.R. Conf. Rep. 110-259; 153 Cong. Rec. H8546 (daily ed. July 25, 2007).

[FN105]. Compare H.R. 1401, 110th Cong. § 3(a) (2007) with 49 U.S.C. § 20106(c).

[FN106]. See, e.g., Stuart Scott, Victims of Dangerous Railroad Crossing Can Once Again Sue Negligent Railroads, Injuryboard.com, Feb. 26, 2008 ("... the 2007 amendment expressly limit[s] federal preemption under the FRSA...."), http://cleveland.injuryboard.com/miscellaneous/victims-of-dangerous-railroad-crossing-can-once-again-sue-negligent-railroads.aspx?googleid=232248; Rick Shapiro, New Legislation Enacted Preserves State Injury and Death Actions-- Congress Clarifies That Federal Rail Safety Act Does Not Preempt State Law Suits, Injuryboard.com, Aug. 10, 2007 ("So, one might ask what is still preempted, if anything? The answer will be divined by the courts in the future but it seems to this author that there is not much - the act virtually wipes out preemption...."), http://virginiabeach.injuryboard.com/mass-transit-accidents/new-legislation-enacted-preserves-state-injury-and-death-actions-congress-clarifies-that-federal-rail-safety-act-does-not-preempt-state-law-suits.aspx?googleid=222194; Sharon L. Van Dyck, A Clear Path for Railroad Negligence Cases, Trial, Feb. 2008, 50, 51 ("... Congress decided to amend the FRSA's

preemption provision to clarify that its scope is limited.... The new standard expressly preserves state law causes of action from dismissal on the basis of preemption."); See also Comment of American Association for Justice, Passenger Equipment Safety Standards Notice of Proposed Rulemaking, Dkt. No. FRA-2006-25268 (Oct. 1, 2007) at 2 ("Section 1528 [of the 9/11 Act] sends a loud and clear message that 49 U.S.C. § 20106 in no way preempts state common law claims....").

[FN107]. See Henning v. Union Pac. R.R. Co., 530 F.3d 1206, 1215 (10th Cir. 2008); Gauthier v. Union Pac. R.R. Co., 644 F. Supp. 2d 824, 835-36 (E.D. Tex. 2009); Murrell, 544 F. Supp. 2d at 1147-48; Southern Calif. Reg. Rail Auth. v. Superior Court, 77 Cal. Rptr. 3d 765, 782, 784 (Cal. Ct. App. 2008); Smith v. Burlington No. & Santa Fe Ry. Co., 187 P.3d 639, 646 (Mont. 2008); Kill v. CSX Transp., Inc., 2009 WL 5067182, P 19 (Ohio Ct. App. Dec. 28, 2009).

[FN108]. Henning, 530 F.3d at 1215-16.

[FN109]. The Eighth Circuit considered the amended § 20106 a month later in Lundeen v. Canadian Pac. Ry. Co., 532 F.3d 682 (8th Cir. 2008). The Sixth Circuit applied post-amendment § 20106 last year in Nickels v. Grand Trunk Western R.R., Inc., 560 F.3d 426 (6th Cir. 2009). These are the only circuit court decisions, along with the Tenth Circuit in Henning, to have interpreted post-amendment § 20106.

[FN110]. Henning, 530 F.2d at 1214-16.

[FN111]. Id. at 1216. Since the regulations at issue in Henning, 23 C.F.R. § 646.214(b)(3) and (4), did not establish a federal standard of care, the court held that the railroad could not, as a matter of law, fail to comply with the regulations and, therefore, the claims were preempted. Id. at 1215-16.

[FN112]. Id. at 1216 (citing Midlantic Nat'l Bank v. N.J. Dep't of Environmental Protection, 474 U.S. 494, 501 (1986) ("'[I]f Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"')).

[FN113]. Id. (citing Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. 2004) ("explaining that Congress often amends laws to 'clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases"')).

[FN114]. Murrell, 544 F. Supp. 2d at 1138.

[FN115]. Id. at 1144-48. Prior to Murrell, the post-amendment § 20106 had come up in only three federal district court decisions, none of which considered the arguments advanced by the plaintiff in Murrell. Id. at 1145-46; See Crabbe v. Consolidated Rail Corp., 2007 WL 3227584 (E.D. Mich. Nov. 1, 2007); Hunter v. Canadian Pac. Ry. Ltd., 2007 WL 4118936 (E.D. Minn. Nov. 16, 2007); Plasser Am. Corp. v. Burlington No. & Santa Fe Ry. Co., 2007 WL 4410682 (E.D. Ark. Dec. 14, 2007).

[FN116]. Id. at 1142-43, 1148-56. Plaintiff's other negligence claims consisted of: failure to issue a slow order, failure to warn, inadequate visibility, failure to eliminate a dangerous condition, and failure to keep a proper lookout. Id. at 1151-56.

[FN117]. Id. at 1147.

[FN118]. Id.; see Easterwood, 507 U.S. at 664 (legal duties imposed on the railroad by common law fall within the scope of FRSA preemption); Shanklin, 529 U.S. at 358 (acknowledging preemption of state tort law); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 522 (1992) ("At least since Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), we have recognized

the phrase ‘state law’ to include common law as well as statutes and regulations.”).

[FN119]. Murrell, 544 F. Supp. 2d at 1147.

[FN120]. Id. (“Subsection (b)(1)(C) was presumably added to be consistent with subpart (a).”).

[FN121]. Id. at 1148 (“Therefore, the Court's decision in Shanklin which held that common law negligence claims are preempted continues to stand today as long as the defendant complies with the requirements listed in section 20106(b)(1).”).

[FN122]. See supra Note 107; Nickels v. Grand Trunk Western R.R., Inc., 560 F.3d 426, 432 (6th Cir. 2009) (rejecting argument that subsection (b)(1)(C) added incompatibility of state and federal law as an additional prerequisite to preemption). In Gauthier, the court rejected plaintiff's argument that the 2007 amendment “changed federal preemption law... by carving out state law claims seeking damages for personal injury, death or property damage from the preemption scheme of the FRSA” by recognizing that § 20106 “was not amended to eliminate preemption of federal claims but... to rectify a situation” in which two federal courts concluded that compliance with federal standards of care was not relevant to the preemption analysis. Gauthier, 644 F. Supp. 2d at 831, 835. In Southern Calif. Reg. Rail Auth., the appellate court found it “difficult to read the amendment as permitting state claims as long as they are not incompatible with federal regulations. Such a reading would amount to a significant substantive change in the law of FRSA preemption and there is no indication Congress intended such a change.” S. Calif. Reg. Rail Auth, 77 Cal. Rptr. 3d at 784-85. In Smith, the plaintiff attempted to characterize § 20106(b) as an “‘anti-preemption clause”’ and advanced the familiar refrain that the amendment “‘sends a loud and clear message that 49 U.S.C. § 20106 in no way preempts state common law claims.”’ Smith, 187 P.3d at 644. After reviewing the legislative history of the amendment, the Supreme Court of Montana concluded that the proposition that § 20106(b) was enacted to overrule Shanklin and its progeny had “scant support” and was “contrary to settled law.” Id. at 646. In Kill, the court dismissed a similar argument that “the 2007 amendment to the FRSA substantially eroded the precedential value of [Easterwood and Shanklin] such that it now has little application....” Kill, 2009 WL 5067182 at *7. Rather, the court concluded that “in analyzing the 2007 amendment to the FRSA, we find that it does little to alter the preemption analysis... under Easterwood and Shanklin, other than to provide additional exceptions to preemption.” Id. at *7.

[FN123]. H.R. Rep. No. 110-259 at 351.

[FN124]. See 49 U.S.C. § 20106(b).

[FN125]. United States v. Sepulveda, 115 F.3d 882, 885 n. 5 (11th Cir. 1997) (observing that Congress may “‘amend a statute... to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite.”’) (quoting Hawkins v. United States, 30 F.3d 1077, 1082 (9th Cir. 1994), cert. denied, 515 U.S. 1141 (1995)); see also, e.g., Brown, 374 F.3d at 259 & n.2, (finding that Congress intended the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 to be “a clarifying amendment, not a substantive change”); Motorola, Inc. v. Federal Express Corp., 308 F.3d 995, 1000 (9th Cir. 2002) (holding that Hague Protocol “only clarified, and certainly did not expand, carrier liability with respect to the affected weight standard.”); Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1290 (11th Cir. 1999) (concluding that Montreal Protocol No. 4 “clarifies the definition of willful misconduct under Article 25 [of the Warsaw Convention], rather than effecting a substantive change in the law”); Liquilux Gas Corp. v. Martin Gas Sales, Inc., 979 F.2d 887, 890 (1st Cir. 1992) (holding that amendment to Puerto Rico's antitrust statute was “a clarification that did not alter the law [but] merely explicated it.”).

[FN126]. Passenger Equipment Safety Standards, 75 Fed. Reg. 1180, 1208, 1209 (Jan. 8, 2010). In its recently released Final Rule regarding enhanced requirements for the structural strength of cab cars and multiple unit locomotives used in passenger transportation, the FRA reaffirmed the application and preemptive effect of § 20106 in light of the 2007 amendment. See discussion at § VI.C., infra. The agency's view on such matters is typically entitled to deference. See California State Legislative Bd. v. Department of Transp., 400 F.3d 760, 765 (9th Cir. 2005); see also H.R. Rep. No. 110-259 at 351 (noting that "the restructuring is not intended to indicate any substantive change in the meaning" of § 20106 as it existed prior to the amendment but, rather, "to explain what State law causes of action for personal injury, death or property damage are not preempted" and thereby "rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent").

[FN127]. See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 52 (2004) (observing that if 1995 amendment to Truth-in-Lending Act had intended to repeal the damages limitations applicable to consumer loan, "Congress likely would have flagged that substantial change"); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 176 (1993) (rejecting argument that § 243(h) of the Immigration and Naturalization Act gained extraterritorial effect upon 1980 amendment deleting the words "'within the United States"' from statute noting that "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect.").

[FN128]. When Congress intends to overrule Supreme Court precedent, an expression of that intention may appear in the statute itself or in its legislative history. See, e.g., 42 U.S.C. § 2000bb(a)(4) (2000) (indicating that Congress disapproved of decision in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) and sought to restore prior Supreme Court precedent); S. Conf. Rep. 93-1200, reprinted in 1974 U.S.C.C.A.N. 6285-93 (noting that amendment to Freedom of Information Act sought to correct Supreme Court interpretation of § 552(b) of the law in Environmental Protection Agency v. Mink, 410 U.S. 73 (1973)). For additional examples, See William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, Appendix I (1991).

[FN129]. H.R. 1401, 110th Cong. § 3(a) (2007), supra note 81; see, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 579-80 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation."); Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."); Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt, 194 F.3d 176, 185 (1st Cir. 1999) ("[T]he conference committee eliminated this language. Congress sometimes can speak as clearly by opting not to enact proffered language as by enacting it.").

[FN130]. See Bates v. Missouri & N. Arkansas R.R. Co., 548 F.3d 634, 637 (8th Cir. 2008); Lundeen, 532 F.3d at 688, 690; G.R. ex rel. Joyce v. Union Pac. R.R. Co., 2009 WL 3248213, *4-5 (E.D. Mo. Oct. 6, 2009); Ruiz v. Union Pac. R.R. Co., 2009 WL 650621, *2 (E.D. Cal. Mar. 10, 2009); Hunter, 2007 WL 4118936 at * 4-5.

[FN131]. See 49 U.S.C. § 20106(c) ("Nothing in this section...confers Federal question jurisdiction for such State law causes of action.").

[FN132]. See, e.g., Bates, 548 F.3d at 637 ("Absent diversity, therefore, a state court is the proper forum for litigating [the railroad's] preemption defense"); Joyce, 2009 WL 3248213 at *4 ("Defendants, however, can raise the affirmative defense of preemption to the State trial court that has jurisdiction over this matter"); Hunter, 2007 WL 4118936 at *4 ("the railroad can still raise the affirmative defense of preemption to the trial court that has jurisdiction over the case"). Hunter, 2007 WL 4118936 at *2 "This jurisdictional issue of whether 'complete preemption' exists is very different from

the substantive inquiry of whether a 'preemption defense' may be established." (quoting Whitman v. Raley's Inc., 886 F.2d 1177, 1181 (9th Cir. 1989)). Id. "Complete preemption has jurisdictional consequences that distinguish it from preemption asserted only as a defense. The defense of preemption can prevent a claim from proceeding, but in contrast to complete preemption it does not convert a state claim into a federal claim." (quoting Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543 (8th Cir. 1996)).

[FN133]. Bates, 548 F.3d at 634.

[FN134]. Bates, 548 F.3d at 636; see also Bates v. Missouri & N. Arkansas R.R. Co., 2007 WL 2409606, *1 (W.D. Mo. Aug. 20, 2007). Barton County is located in southwestern Missouri, along the Missouri-Kansas border, about 120 miles south of Kansas City. See Barton County Chamber of Commerce, http:// www.bartoncounty.com (last visited Feb. 5, 2010). Lamar, the county seat of Barton, is best known as the birthplace of Harry S. Truman, the 33rd President of the United States. See Harry S. Truman Birthplace State Historic Site, http://www.mostateparks.com/trumansite.htm (last visited Feb. 5, 2010).

[FN135]. Bates, 548 F.3d at 636.

[FN136]. Id.

[FN137]. Id.

[FN138]. Id. at 637.

[FN139]. Id.

[FN140]. Id.

[FN141]. Id. at 638 (Beam, J., concurring and dissenting) (citing Lundeen, 532 F.3d at 696-702, (Beam, J., dissenting).

[FN142]. Id. (Beam, J., concurring and dissenting); see also Lundeen, 532 F.3d at 698-700 (Beam, J., dissenting).

[FN143]. Lundeen, 532 F.3d at 698-700.

[FN144]. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984) "Enforcement of state regulation may be preempted...when...Congress has intended, by legislating comprehensively, to occupy an entire field of regulation, and has thereby 'left no room for the States to supplement' federal law." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); see also Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983, 986 (7th Cir. 2000) ("in some instances, Congress has so completely preempted a particular area that no room remains for any state regulation") (citing Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987)); supra Note 68 for discussion.

[FN145]. See 49 U.S.C. §§ 20106(a), 20106(b)(1).

[FN146]. See supra note 144; see also Cipollone, 505 U.S. at 516.

[FN147]. Passenger Equipment Safety Standards, 75 Fed. Reg. 1180, 1207-08 (Jan. 8, 2010) (to be codified at 49 C.F.R. pt. 238).

[FN148]. Id. at 1180.

[FN149]. Id. at 1206-16.

[FN150]. Id. at 1209.

[FN151]. Id. Since the federal regulations establish the standard of care, there can be no liability, for example, under a common law theory of negligence where the railroad has complied with the applicable standard of care. Consequently, state law causes of action are permitted only where the railroad has breached its duty of care by failing to comply with the standard established by the federal regulation. See, e.g., id. ("under Section 20106(b)(1)(A), a private plaintiff may bring a tort action for damages alleging injury as a result of violation of the Track Safety Standards, such as for train speed exceeding the maximum speed permitted under 49 C.F.R. 213.9 over the class of track being traversed").

[FN152]. Id. at 1210. The FRA rejected the interpretation advanced by one commenter, a railroad union that would allow for a compliant railroad to be held negligent "for the very behavior required by federal law." Such an interpretation would "make a nullity of Federal railroad safety laws" according to the FRA and, if such a view were adopted, "the effective railroad safety standard would be set by the most recent jury verdict in each State and national uniformity of safety regulation would no longer exist."

[FN153]. Id. at 1209.

[FN154]. Id. ("Federal law does not require [a plan with a higher standard] and, past the point at which requirements of Federal law are satisfied, [federal law] says nothing about [the] adequacy [of a such a plan]").

[FN155]. Id. ("The basic purpose of the statute - improving railroad safety - is best served by encouraging regulated entities that do more than the law requires and would be disserved by increasing potential tort liability of regulated entities that choose to exceed Federal standards, which would discourage them from ever exceeding Federal standards again."): see also id. at 1210 ("FRA believes that Congress has encouraged railroads to exceed Federal safety standards and that Section 20106 does not increase the potential tort liability of railroads that choose to do so.").

[FN156]. See Passenger Equipment Safety Standards, supra Note 155 at 1210. Another commenter "maintained that Federal regulations are minimum standards and are not intended to provide maximum protection, asserting that the justice system offers a deterrent against railroad companies' violations of Federal, State and local regulations." Id. at 1201-11. The FRA acknowledged that this view reflects a difference of opinion as to "whether safety standards are better set by twelve jurors good and true, most of whom probably do not know anything about railroad safety, or by experts in railroad safety to whom Congress has assigned the task," id., but concluded that the latter approach was more sound. The FRA believed that the logic expressed by Justice Scalia in his opinion in the recent case of Riegel v. Medtronic, Inc., 552 U.S. 312 (2008), which involved federal preemption under a Food and Drug Administration regulation, was equally applicable to preemption under the FRSA. Id. at 1201-11.

A state statute, or regulation adopted by a state agency, could at least be expected to apply a cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court... It is implausible that the [Medical Device Amendment] was meant to grant greater power (to state standards different from, or in addition to, federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.

Id. at 1211 (quoting Riegel, 552 U.S. 312, 128 S. Ct. at 1008 (internal citations omitted)).

[FN157]. Accord Brent M. Timberlake, Railroad Law, 43 U. Rich. L. Rev. 337, 357 (Nov. 2008).

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