

The railroad crossing

Your investigation will lead to a determination as to the adequacy of the barriers or warnings presented to the individual prior to the train wreck

By Nathan L. Karlin

Over the past few decades, the rail industry has seen tragic numbers of rail-crossing, pedestrian, and passenger deaths and injuries. The horrifying images of trains derailing, resulting in catastrophic toxic spills or Amtrak passenger deaths and injuries capture national headlines and happen all too often – in 2015 in Pennsylvania, 2016 in Kansas, 2017 in Washington, 2018 in South Carolina, 2021 in Montana, 2022 in Missouri, and most recently, in 2023 in Ohio. Additionally, no one can forget the single highest train passenger-casualty derailment in American history on September 12, 2008, in Chatsworth, California.

Yet, what is often overlooked in the rapid news cycle are the hundreds of deaths and thousands of injuries that occur every year at railroad crossings and along rail right-of-ways throughout our communities. For example, California has consistently ranked in the top three on a state-by-state basis for rail-related incidents, deaths, and injuries. (See Federal Railroad Administration, Office of Safety Analysis, https://safetydata.fra.dot.gov/OfficeofSafety/default.aspx.) Even though these wrecks don't capture the news cycle like large derailments do, they change the lives of families in our communities forever. The real tragedy is that all these deaths and injuries were preventable.

It's not until a prospective client from a rail-related tragedy walks in the door that these seemingly sporadic rail-related tragedies hit home. But how are all these deaths and injuries preventable? After all, trains are large, trains are loud, and trains run on tracks. Why do these tragedies continue to plague our communities? When people are injured or killed in the rail-related encounter, were they trying to beat the train, or just not paying attention?

Usually, it is none of the above. If humans continue to be human (i.e., imperfect), then it may be time to dive deeper and analyze the root cause of these events to prevent recurrence. Requiring perfection from humans does not work in situations where it is foreseeable that those humans are being placed in situations where they are destined to fail because they did not receive an adequate warning of the train's approach.

In determining the root cause of a rail-related wreck, many general factors should be investigated in all crossings or pedestrian wrecks, while some factors are site-specific and relate only to



the conditions at a particular wreck. There is an interrelationship between all of the factors and each must be addressed to be comprehensive in the evaluation and prosecution of a rail-related case.

Accordingly, the investigation of railroad wrecks involves the collection of facts that will lead to a determination as to the adequacy of the barriers or warnings presented to the individual prior to the wreck. After all, the United States Supreme Court recognized long ago that railroads and individuals have "mutual and reciprocal" duties at crossings and "no greater degree of care is required of one than of the other . . ." (*Cont'l Imp. Co. v. Stead* (1877) 95 U.S. 161, 162, 24 L. Ed. 403.) How you investigate, prepare, and prosecute a rail-related case can often make the difference between a successful and unsuccessful outcome for your client. Below is a brief framework of some considerations that should be made when evaluating and prosecuting a rail-related crossing or pedestrian wreck.

Preemption considerations and the FRSA

From the moment a potential client walks in the door, the role that federal preemption plays in extinguishing some causes of action must be properly considered. Railroad-related federal preemption largely finds itself within the Federal Railroad Safety Act of 1970 (FRSA) 49 U.S.C. Ch. 201 and the related code of

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



federal regulations, title 49, chapter II. A thorough understanding of FRSA preemption and the code of federal regulations, title 49, chapter II is essential before undertaking any railroad-crossing or pedestrian case.

Ironically, the FRSA, which was designed "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents," has been used to shield railroads from liability and has paved the way for railroads to ignore their common-law safety responsibilities. However, with proper investigation and pleadings, the FRSA can be used against railroads as a liability sword.

An important piece to that sword is the 2007 Federal Railroad Safety Action Preemption Clarification Amendment, section 20106 of title 49 of the United States Code. Section 20106 provides that there is no preemption of a state-law cause of action "seeking damages for personal injury, death, or property damages alleging that a party:

> (A) has failed to comply with the Federal standard of care established by regulation or order issued by the Secretary of Transportation . . . or the Secretary of Homeland Security . . . 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).

49 U.S.C. § 20106[b][1]

So, for example, a general claim that the train horn should have been louder or sounded differently at a public crossing may be preempted by 49 C.F.R. Parts 222 and 229. However, when a train horn's pattern, frequency, or intensity is not compliant with these federal regulations, section 20106 provides that a state negligence claim based on a violation of these regulations is not preempted. (*Carter v. Nat'l R.R. Passenger Corp*., 63 F.Supp. 3d 1118, 1157 (N.D. Cal. 2014) [holding no preemption for a claim that train crew failed to sound proper horn sequence in violation of 49 C.F.R. § 221.21].)

Excessive speed vs. failure to timely slow or brake

Similarly, in a case involving a collision at public railroad crossings, a state-law claim that the train was generally traveling at an excessive speed is preempted by 49 C.F.R. § 213.9. (*CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 675; *Jesski v. Dakota, Minnesota & E. R.R. Corp*. (8th Cir. 2022) 43 F.4th 861, 867.) But a specific allegation that the train's speed was in excess of the maximum speed for the class of track set forth in this federal regulation is not preempted. (See e.g., *Zimmerman v. Norfolk S. Corp*. (3d Cir. 2013) 706 F.3d 170, 179 [holding a claimant's excessive speed claim based on violation of § 213.9 is not preempted].) Likewise, a claim that the train's speed was violating a railroad rule created pursuant to these federal regulations, or a state law necessary to eliminate or reduce an essentially local safety hazard is not preempted. (49 U.S.C. § 20106(b)(1)(B) and (C).)

It is critical to distinguish between a claim that the train was generally going too fast and a specific claim that the train failed to timely slow or brake for an individual or vehicle on or near the tracks ahead of the train. The former may be preempted, but the latter is not. (See e.g., *Carter*, 63 F.Supp. 3d at1154 [holding that claim for "failure to slow or stop the train to avoid hitting (claimant) is not preempted by the FRSA"].); *Campbell v. Union Pac. Ry*. (Mo. Ct. App. 2020) 616 S.W.3d 451, 470 [holding that "a claim of failure to slacken speed based on the unwavering approach by a vehicle at a railroad crossing is not preempted."]; *Partenfelder v. Rohde* (Wis. 2014) 356 Wis.2d 492, 510, 850 N.W.2d 896, 905 [holding that claim for "failure to slow or stop a train in response to a 'specific, individual hazard,'" which was a vehicle on the tracks is not preempted] (citing *Easterwood*, 507 U.S. at 673); *Bashir v. Nat'l R.R. Passenger Corp*. (*Amtrak*) (S.D. Fla. 1996) 929 F.Supp. 404, 412, aff'd sub nom. *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997) [holding that claim for failure to slow or stop for a child standing on the tracks is not preempted by 49 C.F.R § 219.9].)

Inadequate warning devices

There are also numerous opinions on the FRSA's preemptive effect of a claim that the warning devices at a vehicle or pedestrian crossing were inadequate if federal funds were spent on the signs posted at the crossing on the day of the wreck. (*Norfolk S. Ry. Co. v. Shanklin* (2000) 529 U.S. 344, 120 S. Ct. 1467, 146 L. Ed. 2d 374; *Rodriguez v. Union Pac. R.R. Co*. (Or. App. 2022) 519 P.3d 148, 151, review denied, (Or. 2023) 523 P.3d 668.)

The requirements for a railroad to obtain FRSA preemption for the signage at a crossing will not be fully discussed here because they are lengthy and could be the subject of the entire article. However, it must be remembered that FRSA preemption is an affirmative defense, meaning the railroad bears the burden of proof to establish compliance with federal regulations or other preemption prerequisites. The Oklahoma Supreme Court put it best when it held that, "[a] railroad cannot avail itself of a regulation's preemptive effect over a state tort claim that the signs, markings and warning devices protecting a crossing were inadequate unless the railroad can first demonstrate that federally funded warning devices were installed and operational before the accident occurred." (*Nye v. BNSF Ry. Co*. (Ok. 2018) 428 P.3d 863, 872.)

The examples above are a non-exhaustive list of claims where FRSA preemption may affect the theories of the case. Regardless of the claim, it is critical to evaluate on a fact-by-fact basis how preemption affects or does not affect a

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



case. For example, if the wreck occurs at a private crossing, any signage placed at a private crossing is not eligible to be paid for with federal funds. So, there is no preemption based on an inadequate-warning-device claim at private crossings and the claim is subject to state law. Put simply, how you evaluate a crossing case, craft the complaint, proceed with discovery, and present the case are all necessarily influenced by preemption.

Malfunctioning active-warning devices

Properly functioning active-warning devices, such as flashing light only or light-and-gate signal systems at highway or pedestrian crossings provide a significant safety benefit and reduce the frequency of collisions at these crossings. We rely on these devices to work properly and provide a reliable warning of an oncoming train. The consequences can be devastating when they malfunction and provide a false warning, short warning, or no warning at all for an unsuspecting motorist or pedestrian. That is why the Federal Railroad Administration (FRA) enacted extensive regulations covering the inspection, maintenance, and operation of these active warning devices. (See 49 C.F.R. Part 234.) A thorough understanding of Part 234 is necessary when handling a wreck that occurred at a crossing equipped with active warning devices.

Non-preempted common-law railroad duties

Not all claims in railroad-crossing or pedestrian collisions are subject to FRSA preemption. There is still a myriad of claims that are not preempted and should be investigated in every case.

Vegetation

Many states have vegetation clearance statutory or regulatory requirements at public highway-railroad crossings. In Illinois, railroads are required to clear their right of way of sight-obstructing vegetation at each crossing for a distance of not less than 500 feet. (625 ILCS 5/18c-7201.) In Washington, the clearance requirement is 100 feet. (Wash. Rev. Code Ann. § 36.86.100.) In Arkansas, the vegetation clearance requirement is 300 feet. (Ark. Code Ann. § 23-12-201.) Still, some other states, such as California, do not have vegetation or other clearance statutes. In those states, obstructed view claims are subject to the common law. (*Spataro v. S. Pac. Co*. (Ct. App. 1967) 254 Cal.App.2d 778 ["Railroad's creation of view obstruction by freight train standing to right of tractor-trailer unit being driven across railroad tracks went to issue of negligence of railroad"].)

Common law or state statutory law claims that vegetation or other objects at a crossing caused a sight obstruction are not preempted. (*Rodriguez* (2023) 519 P.3d at 152, review denied, 370 Or. 714, 523 P.3d 668 [stating that "UP conceded that federal preemption would not apply to a claim based on sight-line obstructions that were not related to the design of the crossing, such as those caused by vegetation or structures."]; *Stonebarger v. Union Pac. R.R. Co*., 76 F. Supp. 3d 1228, 1244 (D. Kan. 2015) [obstructed view claim due to vegetation not preempted]; *Anderson v. Wisconsin Cent. Transp. Co*. (E.D. Wis. 2004) 327 F.Supp. 2d 969, 980 [same]; *Zimmerman v. Norfolk S. Corp*., 706 F.3d 170, 190 (3d Cir. 2013) [claim for obstructed view due to vegetation, as well as "buildings, utility poles and a hedge" is not preempted]; *Gochenour v. CSX Transp., Inc*. (Ind. Ct. App. 2015) 44 N.E.3d 794, 810 [holding federal regulations "not preempt a claim alleging negligence in allowing vegetation to otherwise obscure safe lines of sight at a crossing."].)

Lookout

A claim that should be investigated in every railroad wreck is whether the train crew kept a proper lookout. Almost every state has a statutory or common-law rule that mandates the train crew to keep a proper lookout for motorists and pedestrians approaching a crossing. (See e.g., *Murrell v. Union Pac. R. Co*. (D. Or. 2008) 544 F.Supp. 2d 1138, 1155; *Baker v. Canadian Nat.l/Illinois Cent. Ry. Co*. (S.D. Miss. 2005) 397 F.Supp. 2d 803, 818; *Herrera v. S. Pac. Co*. (1957) 155 Cal.App.2d 781, 785, 318 P.2d 784, 786 ["The train crew cannot assume that a highway crossing in the middle of a city will be clear and they must keep a reasonable lookout for the presence of intersecting traffic."].)

Fencing and other engineering improvements for pedestrians

Many of the same issues that are present in crossing-wreck cases are equally present in pedestrian "trespasser" cases. Lookout, vegetation, failure to slow or brake, and failure to install adequate warning devices are all potential claims that should be investigated in a pedestrian collision. There are, however, unique issues in pedestrian wrecks that are not present in crossing cases. First, premises-liability classifications vary widely from state to state. It is crucial to first determine how that state categorizes your potential client, and therefore, whether the railroad owed a duty of reasonable care, to only refrain from willful and wanton conduct, or something in between.

Second, in some states, a claim for failing to fence or provide other barriers to prevent individuals from traversing the property is a viable claim. In Minnesota, for instance, it has long been established that strict liability applies in cases where the railroad did not erect or maintain fencing and a child is injured, but strict liability only attaches if a fence would have deterred a child (adults are exempt from the protection of the statute altogether). (*Rosse v. St. Paul D. R. Co*. (Minn. 1897) 68 Minn. 216, 218.) In California, in light of the premises liability standards recognized by *Rowland v. Christian* (1968) 69 Cal.2d 108, courts have recognized that railroads owe a duty to use reasonable care to protect individuals on the land from dangerous conditions that could reasonably be expected to harm them, including a duty to install fencing, depending on the specific facts of a case. (*Carter v. Nat'l R.R. Passenger Corp*. N.D. Cal. 2014) 63 F.Supp. 3d 1118, 1147.)

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Go the extra mile

The theories on every case are fact-driven. The above potential claims are not even close to an exhaustive list of meritorious claims that could be asserted in a rail-related wreck. However, a complete understanding of the federal regulatory scheme, state law, rail industry standards, and the railroad's own rules is critical to analyzing potential claims in any rail-related case.

Once you have completed your investigation, you can begin to craft theories as explained above that keep you in court in front of a jury and out of preemption quicksand. Getting to a jury can be a difficult battle. To do so, you must go the extra mile in evaluation, preparation, and prosecution to reveal the root cause of the wreck and obtain justice for your client.


Karlin

Nathan Karlin is a trial attorney with Pottroff & Karlin LLC *based in Manhattan, Kansas. Nathan practices across the nation and concentrates over 90% of his practice on rail-related cases. He can be reached at nathan@pottroff.com or through the firm's website: www.pottroff.com.*

Copyright © 2023 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**