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Articles

FAA Approves IATA’s Operational Safety Audit (IOSA) Program: A Historical Review and Future Implications for the Airline Industry

Lindsey Sabec*

I. Introduction

With the globalization of the airline industry, everyday thousands of Americans board planes as ticketed passengers for a U.S. airline when the actual travel for all or a portion of the trip may be with a foreign carrier’s aircraft and crew. Following September 11, 2001, the Federal Aviation Administration ("FAA") undertook to implement stringent new safety and security measures to protect the airline industry and their passengers. Accordingly, the burgeoning practice of sharing flights, known as "code-sharing," took center stage. On July 2, 2004, the FAA announced U.S. airlines may use the universal safety audit program developed by the International Air Transport Association ("IATA") when auditing current and prospective foreign code-share partners. The IATA

* JD Candidate 2006, Sturm College of Law, Denver, Colorado.
3. Phillips, supra note 1, at A01.
4. Press Release, Department of Transportation, FAA Approves of IATA Safety Audit
Operational Safety Audit ("IOSA") program is the only globally accepted airline audit process providing internationally recognized audit standards.\(^{5}\)

For years, the Department of Transportation ("DOT"), through the FAA and the Office of the Secretary of Transportation ("OST"), has required U.S. airlines to audit current and prospective foreign code-share partners themselves.\(^{6}\) However, committed to strengthening the air safety standards of U.S. airlines, the FAA’s recognition of the IOSA program no longer requires U.S. airlines to perform audits on code-share partners themselves,\(^{7}\) nor do U.S. airlines have to obtain separate audits of foreign code-share partners who have been audited by the IOSA program.\(^{8}\) Now, the FAA will accept audits performed by IOSA-accredited organizations as another method for U.S. airlines to fulfill their responsibility of ensuring their code-share partners satisfy international safety standards.\(^{9}\)

Although the FAA will still recognize audits performed by non-IOSA accredited organizations as long as they satisfy FAA standards,\(^{10}\) the FAA’s approval of the IOSA program provides several new benefits to the airline industry, as well as passengers worldwide. In addition to providing uniform international audit standards to ensure airline safety compliance throughout the world,\(^{11}\) the IOSA program reinforces the FAA’s commitment to ensuring "a safe, secure, and efficient global aerospace system that contributes to national security and the promotion of U.S. aerospace safety."\(^{12}\) Additionally, U.S. airlines will benefit by decreasing costs, saving time, and reducing the manpower necessary to perform multiple audits on every prospective foreign code-share partner as previously mandated.\(^{13}\) IATA, as an independent international body with more than 270 member airlines, international credibility, and access to worldwide resources, is well positioned to exert globally recognized audit
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standards. Through the IOSA program “the [airline] industry will be in a position to achieve the benefits of cost-efficiency through a significant reduction in audit redundancy.”

Accordingly, the FAA’s approval of the IOSA program is one of the most important steps toward strengthening the air safety standards of a U.S. air carrier’s foreign code-share partners. As Marion Blakey, FAA Administrator, stated, “[t]he United States and its aviation partners around the world share a commitment to improving global aviation safety. This new audit accreditation programme is an important step toward achieving a single international set of audit standards that will make flying safer.”

This article examines the history surrounding the need for individual airline safety audits, the FAA code-share safety guidelines, the need for standardized audits, the infrastructure and procedure of the IOSA program, and future implications of the airline industry.

II. The Airline Safety Audit Problem: Pre-IOSA

A. The Rise of Code-Share Agreements and Pre-Existing Safety Standards

In 1999, the U.S. airlines market contained 149 large U.S. airlines providing scheduled domestic service. However, international markets were still virtually untapped, accounting for 21% of the total passenger revenues for the major U.S. airlines. However, with the globalization of the airline industry, the emergence of code-share agreements is inevitable to the viability of the airline industry. Accordingly, the practice of code sharing has become necessary for international travel in order to create

18. Executive Summary, supra note 1, para. 1, at 1.
19. Id.
seamless travel for passengers around the world.21

Code sharing is a market alliance in which one airline issues tickets in its own name for travel to a particular city, but another airline and crew provide some or all of the transportation.22 Accordingly, under a code-share alliance an airline buys a block of tickets from another airline and places its designator code on the flight operated by the other airline.24 Therefore, when the airline issues a ticket using a code-share partner, the passenger's ticket reads as if the passenger was flying on the U.S. airline for the whole trip even though the passenger transfers to a plane flown by another airline.25 For example, a person flying from Denver to Frankfurt may read their ticket that says they will depart on United flight 264 to Philadelphia and transfer in Philadelphia to United flight 9199, which will take them to Frankfurt. However, the United flight 9199 is really Lufthansa flight 418 operated by Lufthansa airlines and crew.26

Code-share agreements offer substantial benefits to airlines. Not only does code-sharing provide passengers with seamless travel service throughout the world, it is also profitable for the airlines.27 "In addition to enhancing international trade and commerce, air carriers may receive substantial profits from code share agreements and market the agreements as a 'seamless,' efficient way for passengers to engage in international travel in an increasingly global air service environment."28

Between 1994 and 1999, code-share agreements nearly tripled.29 "One and a half billion passengers have been carried by the world's airlines up to 1999 and this is expected to double in the first decade of this century."30 However, as of 1999, U.S. airlines were primarily collaborating with airlines in Western Europe and other countries with well-established safety records similar to those of the United States.31 With the

21. See Phillips, supra note 1, at A01.
23. Phillips, supra note 1, at A01.
25. See Phillips, supra note 1, at A01.
26. Id.
27. EXECUTIVE SUMMARY, supra note 1, at i.
28. Id.
29. Id. at iii; see also Press Release, House of Representatives Transportation and Infrastructure Committee, Oberstar Commends DOT on Code-Sharing Safety Guidelines But Plan Lacks Mandatory Requirements in Oberstar Bill (Feb. 29, 2000) (stating the number of international code-share agreements has more than doubled in the last five years).
31. EXECUTIVE SUMMARY, supra note 1, at iii.
growth of international travel, U.S. airlines are now partnering with airlines from other, less-established, regions of the world where aviation safety accident records are not as strong as those of the United States. Accordingly, "[t]his variability in safety [accident] records shows that economics and seamless travel ought not to be the sole consideration in approving and overseeing code share agreements." Accident reports are good indicators of safety problems but alone do not necessarily mean an aircraft is unsafe.

As of 1999, data from an Executive Summary audit, assessing the safety of international aviation code-share agreements, indicated airlines from less-established regions had significantly more accidents resulting in fatalities. In the 1944 Chicago Convention, consisting of fifty-two states, aviation safety was allocated to individual countries. However, the Executive Summary audit indicated the DOT’s code-share approval process did not adequately address safety implications. In the United States, safety was not treated as a major factor in the code-share approval process. Instead, in determining whether to approve a foreign code-share agreement, the DOT assessed whether such an agreement would be in the public interest by considering: reciprocal agreements, impact on competition, the financial strength of the foreign carrier, and finally safety.

Additionally, as of September 1999, "the FAA had not taken an active role in the approval or oversight of international code share agreements." Although the principal measure of safety of foreign code-share partners was through the FAA’s International Aviation Safety Assessment ("IASA") Program developed in 1992, the FAA evaluated the safety oversight system of each country, not the safety of its individual airlines. "The Programme assesses[d] whether a foreign civil aviation authority ("CAA") [in each country] complie[d] with the minimum international standards for aviation safety oversight established by the International Civil Aviation Organisation (ICAO)."

ICAO, a specialized United Nations agency, was created at the 1944
Chicago Convention for the purpose of regulating and promoting international civil aviation, specifically establishing standards for security and safety issues. The 1944 Chicago Convention charged the ICAO with the authority to act as an arbiter between code-share partners, investigate any situation that presents obstacles to the development of international air navigation, and take all steps necessary to maintain safety and regularity of international air industry. Furthermore, the 1944 Chicago Convention established ICAO Standards and Recommended Practices ("SARPs") designed to ensure a "minimum international standards for [civil] aviation safety." 

Accordingly, the FAA evaluated the safety of each country using three categories: Category 1, Category 2, or Category 3. A Category 1 rating meant the foreign carrier's safety oversight met or exceeded the minimum ICAO international standards for safety. A foreign code-share agreement was only approved if the foreign air carrier:

1. [was] from a country that maintains a Category 1 rating under the FAA's IASA program; or
2. [was] from a country that either holds an IASA Category 2 or 3 rating or has not been assessed by the FAA, and the foreign air carrier [was] using aircraft wet leased and operated by a duly authorized and properly supervised U.S. carrier or foreign carrier from a Category 1 country.

When a country slipped from a Category 1 rating to a Category 2 or 3 rating, the code-share arrangement was considered on a case-by-case basis. If an existing foreign code-share partner fails to meet ICAO standards the FAA formally freezes that foreign code-share partner's operations into the United States and the FAA may heighten surveillance inspections on these carriers while they are in the United States. If deficiencies were uncorrectable within a reasonable time, the FAA would notify the DOT and recommend they revoke or suspend the foreign airlines operating authority. Today, the FAA still uses the IASA program retaining authority to reassess a CAA at anytime if it believes the minimum

43. See generally ICAO Preamble, supra note 36.
44. Id.
45. See generally ICAO Preamble, supra note 36; see also European Community Contribution, supra note 30, at annex 2, at 14.
46. Office of the Secretary & Federal Aviation Administration, Department of Transportation, Code-Share Safety Program Guidelines, at 1 (Feb. 29, 2000) [hereinafter Guideline Details].
47. Id.
48. Id.
50. Id.
ICAO international standards are not being met. Yet, in May 2000, the FAA eliminated Category 3 deciding only to use Category 1 and Category 2 rankings.

B. THE FIRST DEMAND FOR SAFETY REGULATIONS OF INDIVIDUAL CARRIERS IN THE UNITED STATES

In 1999, there were 196 foreign code-share agreements in existence. In a 1999 report, results from the IASA program indicated seventy out of ninety-four foreign carriers received a Category 1 rating. As of 2001, results from the IASA program indicated 40% of countries evaluated by the FAA lacked sufficient oversight to ensure the ICAO minimum international standards were met. Accordingly, although foreign CAA's were directly responsible for overseeing the safety of foreign air transportation by their foreign airlines, assessments by the ICAO have revealed that many States are facing serious difficulties in fulfilling their safety obligations.

In 1998, the ICAO attempted to reconcile these deficiencies by launching its own audit program called the Universal Safety Oversight Assessment Programme ("USOAP"). The USOAP was designed to audit the level of compliance of States with ICAO SARPs and to ensure compliance with the ICAO's minimum international safety standards. Although the USOAP provided a baseline level of compliance, the U.S. as well as some other countries, established higher standards.

In September 1999, the DOT was alerted to the need for safety regulations of individual airlines amongst foreign code-share partners by the devastating crash of SwissAir Flight 111. At the time of this tragedy, Switzerland had a Category 1 ranking by the IASA. Furthermore, SwissAir was considered one of the world's safest airlines. Flying on this fatal SwissAir flight, through a code-share agreement with Delta Airlines, were fifty-three U.S. passengers who had purchased tickets from Delta.

52. Id.
55. Guideline Details, supra note 46, at 1 n.1. See also European Community Contribution, supra note 30, para. 2.2.4.
56. European Community Contribution, supra note 30, para. 2.2.6, at 4.
57. Id. annex 4, at 16.
58. Id.
59. Id.
60. Phillips, supra note 1, at A01; see also Executive Summary, supra note 1, at 1.
61. FAA Flight Standards Service, supra note 53.
62. Phillips, supra note 1; see also Executive Summary, supra note 1, at iv-v.
Airlines.63 This tragedy signified that "the odds of dying on some foreign airlines are many times higher than on U.S. carriers, in part because crew training and government oversight can vary widely from country to country."64 Recognizing the American traveler's right to expect the highest standards of safety whether flying on a U.S. airline or its foreign code-share partner, the United States government accepted that "there appears to be little correlation between FAA's assessment of the foreign regulatory system and the actual safety performance of a carrier."65 Accordingly, the U.S Transportation Secretary, Rodney E. Slater, directed the DOT to develop a code-share safety plan to ensure foreign code-share partners meet international safety standards.66

C. FAA Code-Share Safety Audit Mandate and Guidelines

In 2000, aviation safety became top priority in the United States. In addition the FAA's assessment and approval of CAAs through the IASA program, the DOT recognized the need to develop a method for U.S. airlines to assess individual67 foreign code-share partner's levels of safety to ensure Americans knew such foreign airlines were complying with ICAO safety standards.68 On February 29, 2000, the U.S. government mandated that all U.S. airlines must audit current and prospective foreign code-share partners to determine if the code-share service is in the public interest.69

This mandate only applied to "authorized U.S. air carriers certifi-

64. Phillips, supra note 1, at A01; see also EXECUTIVE SUMMARY, supra note 1, at ii, iv-v.
66. Press Release, Department of Transportation, Secretary Slater Outlines Steps to Assure Safety of Code-Share Flights (Dec. 6, 1999) (on file with author) [hereinafter Slater Press Release]; see also 145 CONG. REC. E1138 (daily ed. June 7, 1999) (statement of Rep. Oberstar); see also AIR PASSENGER RIGHTS, supra note 20 (recognizing code-share alliances necessitate common standards to ensure safety for all Americans).
67. The DOT recognized the need to develop a method for U.S. airlines to assess individual airlines because foreign CAA's had the burden of regulating aviation safety of which many had serious difficulty fulfilling these regulations. Although the FAA regulated code-share partnerships in the United States through the IASA program and approved only those airlines with a Category I rating, the FAA had no personal knowledge as to whether the foreign airlines were in fact complying with ICAO safety standards. Accordingly, the only way to ensure foreign code-share partners were complying with ICAO minimum safety standards was to conduct safety audits individually. See Guidelines Press Release, supra note 22; see also Slater Press Release, supra note 66 (outlining guidelines to ensure safety of code-share flights).
Located under 14 CFR Part 121. This regulation specifies operating requirements for certain passenger airlines, which includes most major airlines, and establishes the operating requirements of U.S. airlines in compliance with ICAO’s SARP requirements. As a result of this mandate, all U.S. airlines certified under 14 CFR Part 121 seeking or utilizing a foreign code-share partner were required to develop an approved code-share safety audit program providing for periodic on-site safety audits of foreign code-share carriers and in compliance with applicable ICAO safety standards. Not only were U.S. airlines required to audit foreign code-share partners themselves, but also each U.S. airline’s code-share safety audit program required the FAA’s and OST’s authorization. The FAA and the OST were required to review each audit program to ensure U.S. airlines were conducting these audits correctly. Accordingly, if an airline refused to conduct an audit, the FAA would deny such airline’s code-share application until such airline complied. This mandate only required U.S. airlines audit foreign code-share partners, not domestic code-share partners.

Once an airline developed a code-share safety audit program, the FAA and OST reviewed each airline’s audit program to ensure the program provided an acceptable means of determining the levels of safety maintained by the foreign carrier. In February 2000, the DOT issued “Code-share Safety Audit Program Guidelines” (“Guidelines”), devel-

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70. Guideline Details, supra note 46, at 2.
72. Title 14 CFR Part 121 established regulations for domestic and international commercial air transport. Specifically, the aircraft certification is available to all airlines; however, such airline in order to conduct operations in the U.S. must be authorized by the Administrator and issued an Air Carrier Certificate. Furthermore, part 121.1 prescribes rules governing airlines holding an Air Carrier Certificate or Operating Certificate under Part 119. Accordingly, part 119 provides the certifications, authorizations, and prohibitions applicable to airlines. Part 119.33 establishes general requirements providing that “[a] person may not operate as a direct air carrier unless that person—(1) Is a citizen of the United States; (2) Obtains an Air Carrier Certificate; and (3) Obtains operations specifications that prescribe the authorizations, limitations, and procedures under which each kind of operation must be conducted.” See Operating Requirements: Domestic, Flag & Supplemental Operations, 14 C.F.R. § 121 (2005); Certification: Air Carriers and Commercial Operators, 14 C.F.R. § 119 (2005).
73. See Guideline Details, supra note 46, at 2; Guidelines Press Release, supra note 22 (stating only airlines from countries with Category 1 ratings from the FAA satisfy ICAO standards for safety oversight). See generally ICAO Preamble, supra note 36 (discussing ICAO standards).
74. Guideline Details, supra note 46, at 2.
75. Id.
77. Id.
78. See id.
oped by the FAA and OST, to provide a method for U.S. airlines to assess the safety of their foreign code-share partners.\textsuperscript{79}

The Guidelines established the minimum necessary elements for U.S. airlines to incorporate in their code-share safety audit programs as well as the content of the Audit Report and the content of the Compliance Statement.\textsuperscript{80} The Guidelines provided that, at a minimum, a U.S. airline's code-share safety audit program should address:


The Guidelines provided a detailed description of the applicable review standards for each element.\textsuperscript{82}

If the FAA and OST approved a U.S. airline's code-share safety audit program, the DOT issued a letter of acceptance to the U.S. airline.\textsuperscript{83} Upon receipt of the letter of acceptance, the Principal Operations Inspector ("POI") of each U.S. airline was required to incorporate the accepted safety audit program into its operating manual\textsuperscript{84} and record such date of incorporation in the Program Tracking and Reporting Subsystem ("PTRS") as provided by 14 CFR part 121, section 121.133.\textsuperscript{85} The POI was required to review the currency of the accepted U.S. airline's code-share safety audit program at least once a year and record this date in the PTRS.\textsuperscript{86} If the POI deemed the program not current during this review, then the POI was required to "provide the necessary follow-up actions to ensure currency and enter the date of the revision in the manual required by section 121.133 making it current."\textsuperscript{87} However, if the FAA and OST deemed a safety audit program unacceptable, then the FAA and OST would return the program to the U.S. airline with specific reasons for their findings in writing and the U.S. airline had to take corrective

\textsuperscript{79} See Guideline Details, supra note 46, at 2-4; see also Guidelines Press Release, supra note 22.

\textsuperscript{80} See Guideline Details, supra note 46, at 2.

\textsuperscript{81} See id. at 3 (detailing the standards for U.S. carrier review of its U.S. code-share service on the foreign code-share carrier).

\textsuperscript{82} Id. at 3-8.

\textsuperscript{83} Guideline Details, supra note 46, at 3; see also Handbook Bulletin for Air Transportation Code-share Audit Programs, Doc. No. HBAT 00-12, para. 2.B, at 1, July 7, 2000, at http://www.faa.gov/avr.afs.hbat/hbat.htm.

\textsuperscript{84} Id.

\textsuperscript{85} Id. para. 3.A, at 2 (providing detailed instructions to the POI as to which activity codes to use in the PTRS input).

\textsuperscript{86} Id. para. 3.B, at 2.

\textsuperscript{87} Id.
action.88

Once a U.S. airline established an approved code-share safety audit program, the U.S. airline was thereafter required by the DOT to conduct initial and periodic audits of both current and prospective foreign code-share partners.89 U.S. airlines were only permitted to conduct audits and submit code-share applications for foreign airlines from countries with a Category 1 rating from the FAA.90

U.S. airlines were required to conduct audits on one-fourth of their pre-existing foreign code-share partners during each quarter of the year and provide an Audit Report detailing the results of the audit to the FAA and OST within forty-five days of each audit.91 For existing code-share partners not certificated under 14 CFR Part 129,92 "the U.S. air carrier should perform an audit of the foreign air carrier within 90-days following DOT's code-share program implementation. Thereafter, the U.S. air carriers would conduct a follow-up audit of each foreign code-share partner at least once every 24-months. . ."93 Additionally, the U.S. airline should provide the findings of such an audit to the foreign carrier no "later than 24 hours following such a determination."94

The content of the U.S. airline's safety audit report was confidential and required to adhere to the requirements established in the "Code-share Safety Program Guidelines."95

As before, to obtain authority for a U.S. code-share service, the DOT had to make a public interest determination about the safety of the foreign code-share partner.96 Accordingly, as part of their application, each airline was required to submit a signed and dated Compliance Statement with their Audit Report to the FAA and OST, demonstrating an on-site safety audit was conducted on the foreign code-share carrier and the foreign code-share carrier complied with the applicable ICAO interna-

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88. GUIDELINE DETAILS, supra note 46, at 3.
89. Id. at 2.
91. GUIDELINE DETAILS, supra note 46, at 9; see also Guidelines Press Release, supra note 22.
92. Title 14 CFR part 129 provides in pertinent part that "no foreign air carrier may operate any aircraft within the United State unless that aircraft carries current registration and airworthiness certificates issued or validated by the country of registry and displays the nationality and registration markings of that country." 14 C.F.R. § 129.13(a) (2005).
93. GUIDELINE DETAILS, supra note 46, at 7; see also Guidelines Press Release, supra note 22.
94. GUIDELINE DETAILS, supra note 46, at 8.
95. Id.
96. Id. at 1-2 (considering reciprocal agreements, impact on competition, the financial strength of the foreign carrier, and finally safety to determine if a code-share partnership is in the public interest).
tional safety standards within forty-five days of completion of the audit.97 The content of the Compliance Statement was required to adhere to the minimum standards provided in the Guidelines.98 Prior to approval of the application, "[t]he FAA will review whether the U.S. airline applicant is carrying out audits in accordance with the U.S. carrier’s [audit] program, will review the audit report and will consult other relevant safety-related information"99 and report its position to OST.100 The OST will consider approving an application based on economic and policy grounds but only after approval by the FAA.101 Assuming no issues remain, OST will then issue a decision to the U.S. air carrier on the proposed code-share application.102

D. THE SECOND DEMAND FOR SAFETY REGULATIONS OF INDIVIDUAL CARRIERS IN THE UNITED STATES

In 2001, only a year after the DOT’s mandate, the airline industry began calling for global standards, complaining the volume of safety audits conducted by individual operators was unmanageable.103 Unfortunately, the demand for airline safety around the world resulted in a mushrooming of audits, costing the airline industry millions.104 The Flight Safety Foundation ("FSF")105 estimated more than 10,000 airline audits were conducted each year.106 Other estimates suggest the number of annual airline audits was far greater.107 In 2001, the IATA estimated the number of annual airline audits was as high as 70,000 a year and still growing.108 Moreover, the IATA estimated safety audits cost about $3.6 billion a year.109

In addition to an airline’s own safety audits and thorough checks by their own government’s civil aviation regulator, several other groups con-

97. Guideline Details, supra note 46, at 2, 9; see also Guidelines Press Release, supra note 22.
100. Guideline Details, supra note 46, at 10.
101. Id.
102. Id. at 11.
105. FSF is an independent, non-profit international organization providing a neutral forum for the aviation industry to meet and discuss safety concerns. See Flight Safety Foundation, Welcome, at http://www.flightsafety.org/home.html.
107. IATA Ambitious Timetable, supra note 104.
108. Id.
109. Id.
ducted reviews. For example, the ICAO conducted safety audits at a state level, the IATA conducted safety audits for prospective new members, and eventually all its members, global airline alliance members conducted their own audits, and prospective code-share partners conducted safety audits on each other. Moreover, as Leroy Keith, Association of Asian Pacific Airlines' ("AAPA") technical director, said, "[e]very audit by these people basically has the same parameters and the same outcome in mind. Our [member] airlines have expressed concern about the number of audits required. . . ." As such, it was not long before many in the airline industry were concerned about the proliferation of airline safety audits. Although "[t]he credibility of [the] industry and its continued high degree of acceptability" necessitates safety audits, airlines began complaining that the volume of audits was growing too large, thus, diverting attention from critical daily tasks and resulting in significant cost expenditures, the airline industry simply could not afford. "After three years of crisis, the need for fundamental change [became] critical." Although prior attempts by individual governments (i.e., DOT's guidelines and mandatory audits) and the ICAO, through the USOAP, to implement safety standards created new concerns, the airline industry still dreamed of developing worldwide standards for airline safety audits. As the chairman and president of the FSF, Stuart Mathews, stated "[w]e would like to see carriers evaluated, once a year or every two years, by a competent and qualified auditing team working to a standard everyone could accept." Discussions amongst several prominent airlines and airline associations, including United as well as other U.S. airlines and European Airlines Association members, suggested the best path to achieving global standards for safety audits would have to be through IATA and ICAO because these organizations "have the clout to bring together airlines and states to design an internationally acceptable model." Little did the airline industry know that a worldwide standard for airline safety audits was in the midst of development by IATA.

11. Id.
13. IATA Ambitious Timetable, supra note 104; see also Ballantyne, supra note 69, at 1.
16. See generally Ballantyne, supra note 69.
17. Id. at 2.
18. Id.
19. Id.
III. BIRTH OF A NEW SAFETY AUDIT PROGRAM

As airlines were calling for internationally recognized standards for airline safety audits, IATA was already collaborating with the FSF as well as other key players positioned to shape new policy in an attempt to develop worldwide standards for airline safety audits.\textsuperscript{120} Even prior to the DOT's launch of the Guidelines, IATA and its member airlines were diligently working to improve safety in the airline industry.\textsuperscript{121}

A. IATA: WHO ARE THEY AND WHAT DO THEY DO

For years, IATA has influenced the airline industry worldwide "to meet airline requirements for safety, efficiency, and functionality."\textsuperscript{122} Unlike the ICAO and other prominent aviation agencies that are government-owned, the IATA is an independent international body.\textsuperscript{123} Founded in 1945, the IATA currently consists of more than 270 member airlines from approximately 140 nations,\textsuperscript{124} charged with the goal and ambition to improve the level of safety worldwide.\textsuperscript{125} IATA receives most of its funding by marketing its products and services to its member airlines.\textsuperscript{126} Since 1945, IATA's reputation in the airline industry has grown as IATA pioneered the global aviation industry by cooperating with the ICAO, providing the ICAO with airline input as it drafted its SARPs, and serving the stated policies of most of the world's governments.\textsuperscript{127} IATA, through its global influence, credibility, and access to worldwide technical resources, is well positioned to implement global audit standards and reduce costs industry-wide.\textsuperscript{128}

Although industry shocks, such as the terrorist attacks, awakened uncertainty in the airline industry and left the airline industry drowning in one of the most difficult business environments of recent times, IATA has undertaken many initiatives to promote regulatory change within the air-

\textsuperscript{120} Ballantyne, supra note 69, at 2; see also International Air Transportation Association, 2004 Annual Report 8-11 (2004) (discussing IATA's collaboration in order to modernize the industry's safety and regulatory framework).

\textsuperscript{121} See generally Air Passenger Rights, supra note 20.

\textsuperscript{122} IATA Annual Report, supra note 120, at 26.

\textsuperscript{123} See generally IATA Ambitious Timetable, supra note 104.

\textsuperscript{124} International Air Transportation Association, IATA History: Introduction [hereinafter IATA History], at http://www.iata.org/about/history.htm (last visited Nov. 12, 2004).

\textsuperscript{125} Trigger Points: Interview with Guenther Matschnigg, Senior Vice President, IATA Safety, Operations & Infrastructure, Air Safety Week (Aug. 23, 2004), available at http://www.findarticles.com/p/articles/mi_m0UBT/is_33_18/ai_n6270156/print (last visited Nov. 12, 2004).

\textsuperscript{126} IATA History, supra note 124.

\textsuperscript{127} Id.

\textsuperscript{128} IATA Ambitious Timetable, supra note 104.
line industry. For example, the sense of urgency for new security measures following September 11, 2001 precluded the development of "international harmonisation." As such, IATA, recognizing safety is essential to the vitality of the airline industry and believing fundamental reform must continue, has committed to improving global aviation safety through efficiency, reducing costs, focusing on best practices, and promoting the exchange of information.

In 2003, IATA launched a six-point integrated global safety program, which included the IOSA program. The IOSA program allows IATA to be involved directly in establishing and managing improvements in safety and efficiency within the aviation industry while also reducing industry costs. In 2001, IATA began developing the IOSA program in order to meet two aviation industry needs: cost-effectiveness and safety.

Following two years of intense development and collaborating with key policy makers, airlines, and international aviation experts, IOSA introduced to the airline industry a single, common airline audit standard. After collaboration with organizations such as the ICAO, the FAA, the FSF, and Europe’s Joint Aviation Authority ("JAA"), the IATA was finally able to launch the IOSA program to provide a standardized audit program with internationally recognized standards for the purpose of improving worldwide operations while streamlining operational audits. Although the FAA and the ICAO have been involved in the development of the IOSA program from the beginning, only after extensive investigation did the FAA fully accept the IOSA program. Accordingly, as Giovanni Bisignani, IATA Director General and CEO, stated, "IOSA is the world’s only airline safety audit program incorporating globally recognised standards and best practices." Furthermore, IOSA provides several benefits for the airline industry. Not only does IOSA provide internationally recognized operational audit standards, but it also provides a quality audit program, accredited training organizations,

129. IATA Annual Report, supra note 120, at 1-5, 18http:////.
130. Id. at 13.
131. Id. at 11, 13.
132. Id. at 10http:////.
133. Idhttp:////.
137. IATA Press Release, supra note 17.
138. Id.
139. Id.; see also IATA Annual Report, supra note 120, at 10.
structured audit methodology, and elimination of audit redundancy resulting in cost reduction.\textsuperscript{140} Accordingly, IATA claims, "[a]n airline that has been audited to full conformity with IOSA standards makes a clear positive statement about the integrity of its operations and its ability to manage associated risks."\textsuperscript{141} To get the IOSA program off to a positive start, IATA will also absorb all 2004 program costs.\textsuperscript{142}

B. IOSA Program: Internal Structure

The IOSA program is designed to assess the operational, management, and control systems of an airline by auditing the following operational areas: (1) Corporate Organisation & Management; (2) Flight Operations; (3) Operational Control/Flight Dispatch; (4) Aircraft Engineering & Maintenance; (5) Cabin Operations; (6) Aircraft Ground Handling; (7) Cargo Operations; and (8) Operational Security.\textsuperscript{143} IATA structured the IOSA program "[t]o ensure integrity, quality, and oversight" of the IOSA program.\textsuperscript{144} Accordingly, IOSA's internal structure consists of multiple entities, including IATA, Audit Organizations, Endorsed Training Organizations, and the IOSA Oversight Committee.\textsuperscript{145}

IATA's main role is to provide ongoing quality oversight of the IOSA program. Specifically, "IATA oversees the accreditation of Audit Organizations and Endorsed Training Organizations, ensures continuous development of the IOSA Standards and Recommended Practices and manages the central database of IOSA Audit Reports."\textsuperscript{146} Additionally, IATA maintains the IOSA Registry,\textsuperscript{147} which is a list of current airlines that have been successfully audited under IOSA.\textsuperscript{148} Any airline can access the IOSA Registry.\textsuperscript{149}

Under the IOSA program, accredited Audit Organizations\textsuperscript{150}

\begin{itemize}
\item \textsuperscript{140} IATA Press Release, supra note 17.
\item \textsuperscript{141} Id. It is still unclear who will pay after 2004.
\item \textsuperscript{142} IATA \textit{Annual Report}, supra note 120, at 11http:///.
\item \textsuperscript{143} IATA Press Release, supra note 17; see also IOSA \textit{Commonly Asked Questions}, supra note 134, at 3.
\item \textsuperscript{144} IATA Press Release, supra note 17.
\item \textsuperscript{145} IOSA \textit{Commonly Asked Questions}, supra note 134, at 4.
\item \textsuperscript{146} \textit{International Air Transportation Association, What We Do: IOSA Role}, at http://www.iata.org/whatwedoinauditing; see also IATA Press Release, supra note 17 (stating IATA is the "[d]eveloper of the Standards, keeper of the IOSA Registry, Accreditation of Audit Organisations and Endorsed Training Organisations, and ongoing Quality oversight of the IOSA Programme").
\item \textsuperscript{147} IATA Press Release, supra note 17.
\item \textsuperscript{148} \textit{IOSA – The IATA Operational Safety Audit Programme}, para. 3.1, at 2, ICAO Executive Committee Working Paper, A35-WP/73 (July 7, 2004) [hereinafter \textit{IATA Safety Audit}]
\item \textsuperscript{149} Id.
\item \textsuperscript{150} A list of Audit Organizations approved by IATA is available on IATA's website. See http://www.iata.org.
throughout the world conduct operational safety audits of U.S. and non-U.S. carriers, as well as U.S. carrier’s foreign code-share partners. IOSA is designed to conduct audits in a standardized and consistent manner. Therefore, when an Audit Organization seeks IOSA accreditation, IATA uses standards published in the IOSA Program Manual to accredit Audit Organizations. Currently, the IOSA program consists of six accredited Audit Organizations, housing more than 120 experienced aviation auditors who conduct the reviews. IOSA auditors only receive approval if they successfully complete an intense training and qualification process by Endorsed Training Organizations. Individual airlines are encouraged to select an Audit Organization they feel most comfortable using. IATA provides no pricing guideline to its Audit Organizations but, rather, allows them to set their own pricing based on, inter alia, geographical location, airline size, and facilities. To ensure auditors adhere to IOSA standards when conducting audits, the IOSA auditors are required to follow detailed guidance provided in an operations manual called the IOSA Auditor Handbook.

Finally, the IOSA Oversight Committee (“IOC”) functions to ensure the IOSA program maintains a “high level of quality and standardization.” Reporting indirectly to the IATA Board of Governors, the IOC is comprised of representatives from twenty-five member airlines as well as ten regulatory authorities. IOC current members include “representatives for the regulatory authorities of Australia (CASA), Canada (Transport Canada), China, European Union, France (DGAC), Scandinavia, and the United States (FAA).”

C. IOSA Program: Procedure Structure

An airline does not have to be an IATA member in order to seek an IOSA audit and there is no indication this will change in the future.

152. BUSINESS SOLUTIONS: IOSA, supra note 15.
153. IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 5.
154. IATA ANNUAL REPORT, supra note 120, at 10.
155. IATA Press Release, supra note 17; see also IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 5.
156. IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 6.
157. Id. at 8.
158. Id. at 3.
159. IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 5.
160. Id.
161. ETF, supra note 16.
162. IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 2.
The IOSA program is available to all airlines,\(^{163}\) thus preventing the inefficient need for multiple airline audits. However, beginning in 2005, for those new airlines interested in joining IATA, submission to an audit by the IOSA program will be required.\(^{164}\) At that time, new airlines will be required to submit to an IOSA standardized “New Member Entry Audit,” which is not a full-audit as described above.\(^{165}\) Once a new airline successfully completes this, it may become an IATA member.\(^{166}\) Because the “New Member Entry Audit” is not a full IOSA audit, the airline is thereafter required to seek a full IOSA audit within a two-year period.\(^{167}\) An airline applicant may initially submit to a full IOSA audit to satisfy IATA new Member Entry requirements.\(^{168}\) Furthermore, the IOSA program requires the airline’s subsidiaries holding an air operator certificate must also submit to an IOSA audit.\(^{169}\)

Before submitting to an audit, the airline and the Audit Organization enter into an Audit Agreement.\(^{170}\) Upon completion of an IOSA audit, a closing meeting is held on site at the audited airline’s premises at which time the audited airline is given an interim audit report by the Audit Organization.\(^{171}\) Thereafter, the Audit Organization is required to submit an IOSA Audit Report to the audited airline within fifteen business days from the completion of the audit.\(^{172}\) If an airline does not satisfy all the IOSA standards, the airline must develop a corrective action plan and has twelve months to clear all the audit findings.\(^{173}\) Only after an audited airline fully clears all the findings and conforms to the IOSA standards is the airline registered as an IOSA Operator and entered into the IATA Registry.\(^{174}\) At this point, IATA issues a formal dated certificate of registration to the airline.\(^{175}\) An airline’s registration is only valid for twenty-four months from the date of the completion of the audit at which time IATA provides renewal notification to the airline operator.\(^{176}\)

\(^{163}\) IATA Press Release, supra note 17; see also IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 2.

\(^{164}\) IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 2-3.

\(^{165}\) Id. at 3.

\(^{166}\) Id.

\(^{167}\) IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 3.

\(^{168}\) Id.

\(^{169}\) Id. at 6.

\(^{170}\) Id.

\(^{171}\) IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 6.

\(^{172}\) Id. at 8.

\(^{173}\) Id. at 6.

\(^{174}\) Id. at 3; see also IATA Press Release, supra note 17.

\(^{175}\) IOSA COMMONLY ASKED QUESTIONS, supra note 134, at 8.

\(^{176}\) IATA Press Release, supra note 17.
D. Future Implications

As of September 2003, twenty IOSA airline audits had been conducted.177 By January 1, 2006, all IATA Member Airlines will be audited to IOSA standards.178 IOSA will replace most code-share audits today by providing a system of audit sharing.179 Prior to the IOSA program, when a code-share agreement was contemplated an operational audit had to be conducted by one or both carriers to ensure operational integrity.180 Now, when a code-share agreement is contemplated with an existing IOSA Operator, no additional audit is necessary of prospective code-share partners if that carrier has already been audited and demonstrated they are in compliance with IOSA standards.181 Accordingly, a registered IOSA airline has the opportunity for a range of shared commercial opportunities.182 Moreover, through the IOSA program, “the industry will be in a position to achieve the benefits of cost-efficiency through a significant reduction in audit redundancy.”183

Given the IOSA program has proven to compliment the ICAO USOAP’s effort to optimize aviation safety,184 IOSA is gaining vital industry support as an acceptable evaluation system for conducting audits by applying worldwide standards.185 For IOSA, the benefits are clear and the future is very promising.186 However, while the FAA is trying to ensure the safety and security of American passengers, the question of liability and monetary ramifications remain unanswered with American travelers and in the law community.

IV. Conclusion

Today, roughly fifty million international passengers a year are paying for their ticket through a particular airline, but are using at least two, sometimes five or more, airlines to complete some, or all, of their journey.187 Moreover, nearly 300 airlines have formed code-share alliances accepting each other’s tickets on a reciprocal basis.188 Furthermore, more than 70,000 audits are conducted yearly to ensure global aviation safety. Even with the staggering number of audits, the IOSA program is esti-
mated to save billions of dollars by reducing the number of audits conducted by airlines each year as well as save lives by providing globally recognized safety standards.\textsuperscript{189}

In these difficult times, it cannot be overlooked that the fear of traveling still exists. Yet, the FAA's recent acceptance of the IOSA program attempts to offer assurance to American passengers of the organization's commitment to improving global international safety.\textsuperscript{190} Although liability and monetary concerns remain amongst American travelers and in the minds of lawyers, the FAA through the IOSA program has provided yet another method for ensuring an even safer, more secure, and more efficient global aerospace system that contributes to national security and the promotion of the U.S. aerospace safety.\textsuperscript{191}

\begin{flushleft}
\textsuperscript{189}. IATA Ambitious Timetable, supra note 104.
\textsuperscript{190}. IATA Annual Report, supra note 120, at 11http://.
\textsuperscript{191}. ETF, supra note 16.
\end{flushleft}
You Are Not a Lawyer: Does Representation of Carriers by Non-Lawyers in Federal Motor Carrier Safety Administration Enforcement Cases Constitute the Unauthorized Practice of Law?

Osman E. Nawaz*

I. INTRODUCTION

Seven years, four years of undergraduate education and three years of graduate schooling can potentially lead to a Juris Doctor ("JD") or law degree.¹ Obtaining the JD typically comprises the most important prerequisite for aspiring lawyers in the United States.² In order to gain admission to most states’ Bars, a candidate must receive his or her JD from an ABA approved law school.³ Additionally, a candidate must pass the state’s Bar exam and convince the Bar that the applicant is of good moral character.⁴ If a candidate can successfully accomplish these three things, the individual will likely obtain a Bar card allowing the candidate to prac-

* JD Candidate 2005, Sturm College of Law, Denver, Colorado.


³. AMERICAN BAR ASSOCIATION, supra note 1.

⁴. Id.; see also Leef, supra note 2.
tice law in a particular state. If someone attempts to practice law without a license, such person faces criminal penalties ranging from monetary fines to potential jail time.\textsuperscript{5}

On the whole, most states prohibit the practice of law by those who do not meet requirements set by the state Bar.\textsuperscript{6} This prohibition, referred to as the "unauthorized practice of law," makes it illegal for anyone who does not comport with state Bar requirements to render legal advice or assistance.\textsuperscript{7} But, what actually constitutes the practice of law? The answer to that question remains unclear and with an increasing number of rights determined in federal and state agencies, where the line is drawn for unauthorized practice of law issues within the various federal and state agencies poses an even more uncertain inquiry.

Administrative adjudication and agency proceedings of various types have evolved to become critical pieces of the United States system of government.\textsuperscript{8} The evolution and importance of agencies arose, in part, from overcrowded court dockets, increased litigation costs, and an overworked U.S. government system.\textsuperscript{9} The paramount importance of administrative agencies in the year 2005 is without question – agencies have very real power and control over important rights of both businesses and individuals.\textsuperscript{10}

In contrast to earlier attitudes that there was a de minimis risk of harm from unauthorized practice in front of administrative agencies, serious concerns now surround agency practice because of the powers today’s agencies possess.\textsuperscript{11} So, where does an agency’s power come from? Agencies are delegated their power by Congress, or in the case of a state agency, by the state legislature, to act as agents for the executive branch of government.\textsuperscript{12} The delegation of power comes from an enabling stat-


\textsuperscript{6} See Leef, supra note 2; but see Rees M. Hawkins, Not "If," But "When" and "How": A Look at Existing De Facto Multidisciplinary Practices and What They Can Teach Us About the Ongoing Debate, 83 N.C. L. REV. 481, 482 (2005) (all states except Arizona have unauthorized practice of law statutes; Arizona chose not to renew its statute after it expired several years ago).

\textsuperscript{7} Leef, supra note 2.

\textsuperscript{8} See JOHN H. REESE & RICHARD H. SEAMON, ADMINISTRATIVE LAW PRINCIPLES AND PRACTICE 8-10 (2d ed. 2003).


\textsuperscript{10} See Stevens, supra note 9, at 273-74.

\textsuperscript{11} JOHN H. REESE & RICHARD H. SEAMON, ADMINISTRATIVE LAW PRINCIPLES AND PRACTICE 7-10 (2d ed. 2003) (agencies can determine many significant rights of individuals and businesses alike, such as drivers’ licenses, operating licenses for businesses, and health certification for restaurants).

\textsuperscript{12} LEGAL INFORMATION INSTITUTE, ADMINISTRATIVE AGENCIES: AN OVERVIEW, at http://www.law.cornell.edu/topics/administrative.html (last visited May 24, 2005).
ute. Enabling statutes govern, *inter alia*, what authority an agency has, for example, with respect to adjudication and rulemaking. In regard to representation in agency proceedings, ideally, an agency's enabling statute will prescribe the proper scope of both lawyer and non-lawyer representation of clients in front of an agency. Representation by non-lawyers is acceptable and in some of the larger agencies non-lawyer representation occurs with great frequency. However, other agencies limit non-lawyer representation more narrowly. In any event, when non-lawyers acting without permission, permission which is not granted through an enabling statute, attempt to perform acts that are dubiously tasks usually performed by a lawyer, questions of the unauthorized practice of law arise. Many agencies' enabling statutes fail to define with specificity what a non-lawyer can and cannot do within the agency, thereby causing this issue to arise. As such, this results in a nebulous, gray area of how to precisely define the practice of law or identify the unauthorized practice of law.

This Note attempts to answer the elusive question of what constitutes the unauthorized practice of law within an agency, but, more specifically analyzes the unauthorized practice of law issue within the context of one particular case before the United States Department of Transportation Federal Motor Carrier Safety Administration ("FMCSA"): *In the Matter Of Boomerang Transportation, Inc.* Briefly, the Boomerang matter involved a truck company that violated FMCSA regulations; Boomerang retained a non-lawyer safety consultant who assumed responsibilities of representation against the alleged violations. The safety consultant sent a "Reply" to the agency thereby precipitating the FMCSA Field Administrator for the Midwestern Service Center to raise the unauthorized practice of law question.

A definitive answer as to whether or not the representation was in fact the unauthorized practice of law never came to fruition because Boomerang ultimately engaged legal counsel and eventually settled the

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14. Id.

15. Id. at 229-30 (for example, the Internal Revenue Service allows qualified C.P.A.’s to appear as ‘enrolled agents’).

16. Id.

17. The *Boomerang Transportation, Inc.* matter raises this exact situation – the Federal Motor Carrier Safety Administration’s ("FMCSA") enabling statute does not clearly delineate, or for that matter address, non-lawyer representation – and as such has been the catalyst for this Note.


20. Id.
case. But, prior to the case’s settlement, the issue in the Boomerang matter went for consideration before the FMCSA Office of Hearings. This leads to speculation and thoughts about what if, what if the issue was carried through to a decision by the Office of Hearings. Where would the Office of Hearings draw the line between acceptable and unacceptable non-lawyer representation in FMCSA proceedings? Despite the issue rendering itself moot due to Boomerang’s retention of a licensed attorney, the question remains one of significant value and is the crux of this Note.

Prior to analyzing the Boomerang Transportation, Inc. circumstances, this Note reviews and discusses unauthorized practice of law issues in general, beginning with an attempt to define the “practice of law” and following with a description of the agency in which the Boomerang matter took place.

II. DEFINING THE PRACTICE OF LAW

Generally, the practice of law involves the giving of legal advice and instruction to clients in order to inform them of their rights and obligations; the preparation and drafting of legal documents requiring knowledge of legal principles not possessed by ordinary laymen; and the appearance or representation on behalf of clients in court proceedings such as lawsuits or in legal negotiations before public tribunals which possess power and authority to determine rights.

According to some courts and scholars, the crucial factor in determining if an action constitutes the unauthorized practice of law is whether performance of the action involves an application of legal knowledge, skill, and expertise. The Fifth Circuit Court of Appeals defined the practice of law as “any service requiring the use of legal skill or knowledge.” The state of Illinois followed the same line of reasoning but expanded upon this determination and held that an attorney need not necessarily appear in court to engage in the practice of law; the court went on to say that acts such as giving advice or rendering services requiring use of any degree of legal knowledge or skill may implicate the rule

21. Id.
22. Id.
against the unauthorized practice of law.\textsuperscript{27} A cursory review of various state definitions of the practice of law echoes the same general notion; taking Texas for example, the Lone Star State defines the practice of law as the giving of advice or the rendering of any services requiring the use of legal skill or knowledge.\textsuperscript{28} In Colorado, per the Colorado Constitution, the Supreme Court has exclusive authority to regulate and define the practice of law\textsuperscript{29} and has stated in the Colorado Supreme Court case of Denver Bar Association \textit{v.} Public Utilities Commission that generally one acting in a “representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law.”\textsuperscript{30}

Once again, the question remains what exactly constitutes the practice of law. Other side issues frame the question in a different light. For instance, there is some amount of overlap between the practice of law and various other professions where clients are represented by agents.\textsuperscript{31} This causes question about what truly is and is not the practice of law. The professions where non-lawyers are assuming greater roles that delve somewhat into legal tasks include real estate, banking, accounting, and insurance – these are also typically areas where unauthorized practice of law claims arise with some regularity.\textsuperscript{32}

Moreover, a growing number of tasks once considered purely “legal” are now performed by paralegals,\textsuperscript{33} and many documents may now be drafted by computer assisted drafting libraries where the clients are asked a series of questions by software in order to construct legal documents\textsuperscript{34} – is this the practice of law? Issues also arise with the use of forms; does


\textsuperscript{28} \textit{See e.g.}, \textit{Tex. Gov't Code Ann.} § 81.101(a) (Vernon 1998 & Supp. 2001).

\textsuperscript{29} \textit{Colo. Const.} art. III.

\textsuperscript{30} Denver Bar Ass’n \textit{v.} Public Utilities Commission, 391 P.2d 467, 471 (Colo. 1964).


\textsuperscript{33} Zitter, supra note 5.

\textsuperscript{34} William A. Scott, \textit{Filling in the Blanks: How Computerized Forms are Affecting the Legal Profession}, 13 A.B. L.J. Sci. & Tech. 835, 837 (2003); Melissa Blades & Sarah Vermyn, \textit{Virtual Ethics for a New Age: The Internet and the Ethical Lawyer}, 17 Geo. J. Legal Ethics 637
filling in blanks on a form qualify as the practice of law? Technology and
the internet modify the way in which the practice of law plays out and
causes greater confusion on what exactly constitutes the practice of law.

While attempting to define this imprecise and ambiguous concept, it
is without question that the United States conditions the practice of law
upon admission to the Bar of a particular state or other territorial jurisdic-
tion.\textsuperscript{35} The unauthorized practice of law is prohibited by statute or
court rules in every state but Arizona.\textsuperscript{36} Definitions of the legal term “un-
authorized practice of law” seem to vary across jurisdictions. For ex-
ample, California tolerates the use of independent paralegals to a high
degree, while the state of New York fails to tolerate some of the very
same paralegal activities California allows.\textsuperscript{37} The practice of law is taken
seriously by state Bars, but there are few reported cases of individuals
actually arrested for the unauthorized practice of law, absent fraud or
other violations of consumer protection.\textsuperscript{38} Commonly, the penalties sim-
ply consist of fines.\textsuperscript{39}

Why do statutes prohibiting those without a law license from practic-
ing exist? Most lawyers seem to strongly support unauthorized practice of
law statutes for different reasons. Some argue unauthorized practice of
law statutes further the public interest because of consumer welfare.\textsuperscript{40}
Lawyers and advocates of the statutes contend that licensure protects
consumers from unqualified or unscrupulous practitioners.\textsuperscript{41} Supporters
of unauthorized practice of law statutes further opine the statutes help
the public assess the competence of service providers.\textsuperscript{42} In theory, in a
free market, consumers of legal services generally would be unable to
judge the quality of prospective unlicensed practitioners, but the licen-
sure guarantees a baseline of competency in order to protect the public.\textsuperscript{43}
It is difficult for consumers to obtain information on the quality and reli-
bility of one-time purchases of certain goods and services, of which legal
services qualify. Licenses ameliorate the dilemma. Moreover, licenses of-

\textsuperscript{35} American Bar Association, supra note 1.
\textsuperscript{36} Hawkins, supra note 6, at 482.
\textsuperscript{37} Zitter, supra note 5.
\textsuperscript{38} See Thomas D. Morgan & Ronald D. Rotunda, Professional Responsibility,
\textsuperscript{39} Id.
\textsuperscript{40} Center for Professional Responsibility, American Bar Association, Written
Remarks of James C. Turner submitted to the Commission on Multidisciplinary Practice (Feb. 5,
\textsuperscript{41} Deborah J. Cantrell, The Obligation of the Legal Aid Lawyers to Champion Practice by
\textsuperscript{42} Lee, supra note 2.
\textsuperscript{43} Id.
fer a remedy or incentive for lawyers to do their job – if a lawyer does a poor or unethical job, consumers have potential malpractice claims in order to police lawyers. If someone does not have a license, where is the incentive or police for the consumer? Sure the non-lawyer without the license will face possible sanctions, but what real remedy does the actual end user have in this situation – seemingly none.

On the flip side, many people oppose these statutes and point to lawyer greed as the real reason for lawyers supporting the unauthorized practice of law rules. In short, lawyers have a monopoly on legal services and, according to some, set prices that discriminate against the poor and at times even those with money. The price set by lawyers does not reflect value of services but reflects what a lawyer believes the value of the services to be. Also, to rebut the contention of law licenses protecting consumer welfare, the counterargument is simple, licensure does not protect consumers but protects lawyers from competition by non-lawyers. Whether in support or opposition, it seems that unauthorized practice of law statutes will exist so long as those with law licenses are profitable in their ventures.

Whichever side of the fence one falls, the unauthorized practice of law issue affects a widespread group, especially with the increases in agency practice. Before detailing the facts of Boomerang Transportation, Inc., this Note next reviews the Federal Motor Carrier Safety Administration ("FMCSA").

III. THE FMCSA – HISTORY, PURPOSE

The Motor Carrier Safety Improvement Act of 1999 established the Federal Motor Carrier Safety Administration ("FMCSA") as a division of the United States Department of Transportation ("DOT"). Before the creation of the FMCSA within DOT, the Federal Highway Administration ("FHA") regulated trucking safety. The new agency, FMCSA, was created because the trucking industry, safety advocates, and eventually Congress, questioned the expertise of the FHA to oversee safety since the FHA primarily built and maintained highways, not protected and promoted safety. Although public interest advocates lobbied to move the

44. Id.
45. Lee, supra note 2.
46. Id.
47. Id.
50. Id.
safety program to the National Highway Traffic Safety Administration ("NHTSA"), they agreed with both the industry and the DOT’s inspector general the safety program should at least be removed from FHA.\textsuperscript{51}

Congress believed the rate, number, and severity of crashes involving motor carriers in the United States was unacceptable.\textsuperscript{52} Congress further opined that the DOT failed to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety, and too few motor carriers underwent compliance reviews to ensure safety.\textsuperscript{53} As a result, the FMCSA’s creation took place on January 1, 2000.\textsuperscript{54} The young agency’s principal headquarters are located in Washington, D.C.; however, operations run in all fifty states employing more than 1,000 workers nationwide.\textsuperscript{55}

The FMCSA develops and enforces data-driven regulations that balance motor carrier, truck and bus companies, safety with industry efficiency.\textsuperscript{56} The FMCSA gathers safety information systems to focus on higher risk carriers in enforcing the safety regulations; focuses on educational messages to commercial drivers, carriers, and the public; and works with stakeholders including Federal, State, and local enforcement agencies, safety groups, the motor carrier industry, and organized labor on efforts to reduce bus and truck-related crashes.\textsuperscript{57}

Fundamentally, the FMCSA functions to reduce crashes, injuries, and fatalities involving large trucks and buses.\textsuperscript{58} In carrying out this mission, safety serves as the guiding star for this subdivision of DOT. As an example, one specific goal of the FMCSA is to reduce the large truck fatality rate by forty-one percent from 1996 to 2008.\textsuperscript{59} Achieving this goal will reduce the annual number of truck-related fatalities down to 4,330 by the year 2008.\textsuperscript{60} The FMCSA revolves around safety.\textsuperscript{61} To carry out its mission, Congress conferred rulemaking power to the FMCSA through the Motor Carrier Safety Improvement Act.\textsuperscript{62}

To achieve safety, many of the regulated truck and bus companies utilize outside safety consultants in order to properly align themselves

\textsuperscript{51} Id. at 61-62.
\textsuperscript{52} Motor Carrier Safety Improvement Act of 1999 § 3.
\textsuperscript{53} § 3.
\textsuperscript{54} § 113(e).
\textsuperscript{55} Motor Carrier Safety Administration, supra note 48.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} See Motor Carrier Safety Administration, Sharing the Road Safely, at http://www.sharethe-roadsafety.org/ (last visited May 24, 2005).
\textsuperscript{60} Id.
\textsuperscript{61} Motor Carrier Safety Administration, supra note 48.
with FMCSA regulations. Safety consultants work closely with truck and bus companies to ensure their clients understand how to comply as well as how to achieve safety. Safety consultants further offer suggestions for increased safety performance. Safety consultants may advise carriers on methods to improve safety programs to avoid any violation or continued violation of FMCSA regulations. Ideally, safety consultants possess years of experience along with special knowledge which aids carriers. Safety consultants serve as an integral piece in regulating carriers.

IV. FMCSA ENFORCEMENT

In enforcing FMCSA regulations, the agency uses Statutory Authority. Section 222 of the Motor Carrier Safety Improvement Act of 1999 directed the Secretary of Transportation to:

(a) [E]nsure that motor carriers operate safely by imposing civil penalties at a level calculated to ensure prompt and sustained compliance with Federal motor carrier safety and commercial driver’s license laws.

(b) Establish and assess minimum civil penalties for each violation of laws referred to [under (a) above]; and . . . assess the maximum civil penalty for each violation . . . by any person who is found to have committed a pattern of violations of critical or acute regulations . . . or to have previously committed the same or a related violation of critical or acute regulations . . .

(c) If the Secretary determines and documents that extraordinary circumstances exist which merit the assessment of any civil penalty lower than any level established [above], the Secretary may assess such lower penalty. In cases where a person has been found to have previously committed the same or a related violation of critical or acute regulations . . . extraordinary circumstances may be found to exist when the Secretary determines that repetition of such violation does not demonstrate a failure to take appropriate remedial action.

Section 222 of the Motor Carrier Safety Improvement Act of 1999 provides statutory authority for the FMCSA to fine carriers that violate regulations. The typical FMCSA enforcement process against those who violate the rules begins with a Notice of Claim. The Notice of Claim resembles the beginning of a legal proceeding, except the proceed-

63. See Motor Carrier Safety Administration, supra note 48.
64. See id.
65. See id.
66. See id.
67. See id.
68. Motor Carrier Safety Improvement Act of 1999 § 222(a)-(c).
69. § 222(b)(1).
ing is an administrative one in which the FMCSA assesses a civil penalty against the party in violation, pursuant to statutory authority. The enforcement process takes place through Enforcement Cases, with key players such as Field Administrators, Chief Safety Officers, and other Enforcement personnel. An enforcement case is the backdrop for Boomerang’s retention of a safety consultant in response to a Notice of Claim, resulting in the flag being raised on the unauthorized practice of law question.

V. In The Matter of Boomerang Transportation, Inc.

FMCSA Safety Specialist, Eric Teel, performed a compliance review on Boomerang Transportation, Inc. in July of 2003. The compliance review yielded numerous violations; as a result, the FMCSA issued a Notice of Claim to Boomerang on July 29, 2003. A Notice of Claim essentially amounts to a complaint against Boomerang for the alleged violations and typically contains a series of fines assessed against the party. The Notice of Claim against Boomerang included seven counts charging them of violating 49 C.F.R. 395.8(e), false reports of records of duty status. Roughly one month after the Notice of Claim against Boomerang, Boomerang submitted a Reply to the Notice of Claim. The hitch was who submitted the Reply – non-lawyer Eric J. Arnold, doing business as Arnold Safety Consulting, mailed the Reply to the FMCSA Field Administrator (FMCSA Enforcement counsel)

Mr. Arnold’s Reply reviewed the counts charged against Boomerang in the Notice of Claim, demanded discovery, challenged “material facts in dispute,” argued the penalty imposed by the FMCSA was excessive, and offered justifying circumstances in Boomerang’s case. In response, the FMCSA Field Administrator filed a Motion to Strike the Reply and also requested an advisory opinion – as to the issue the Field Administrator raised was that of the unauthorized practice of law by Eric Arnold. Basically, the FMCSA Field Administrator avers Eric Arnold was practicing law through his Reply and to respond to the Reply would be to further this breach. The Field Administrator claimed Mr. Arnold was a non-

71. Id.
72. Id.
74. Id. at 2.
75. Id. at 3.
76. Id.
78. Id.
79. Id.
80. Id.
party to the litigation lacking standing to file a Reply and was not a licensed attorney qualified to practice law in any state within the United States, as such unauthorized to practice law. The Field Administrator requested Boomerang obtain appropriate counsel within fifteen days and for the Court to strike the Reply. The Field Administrator also sought an advisory opinion. As previously stated, Boomerang eventually retained counsel, Andrew C. White, to represent them, thereby mooting the unauthorized practice of law issue unsettled by the Office of Hearings. The Notice of Entry of Appearance by Mr. White was filed on May 19, 2004 and the case settled soon thereafter. But, what would the Office of Hearings done had they decided the issue?

The recurring theme of this Note is how we define the practice of law or how we identify the unauthorized practice of law. Eric Arnold responded to the Notice of Claim similar to how an attorney responds to a complaint. Eric Arnold stated he had been retained to act on behalf of Boomerang; Arnold requested an oral hearing on the Notice of Claim, demanded discovery, challenged “material facts in dispute,” argued the penalty imposed by the FMCSA was excessive, and offered justifying circumstances in Boomerang’s case. All of these acts are typically handled by lawyers in the analogous lawsuit context. Was the Boomerang matter the unauthorized practice of law? The issue was to be decided by the Office of Hearings, but no answer was reached due to settlement. We are only left to speculate how the issue would have been decided.

VI. Unauthorized Practice of Law?

Representation by non-lawyers in agencies is acceptable, but when a non-lawyer attempts to perform tasks that are usually performed by a lawyer, questions of the unauthorized practice of law arise. Applying the earlier definition of the practice of law, performance of an action involving an application of legal knowledge, skill, and expertise, seemingly engaged in the practice of law. Mr. Arnold stated he was retained to act on behalf of Boomerang, requested an oral hearing, demanded discovery, challenged “material facts in dispute,” and argued how the fines facing Boomerang were excessive. These are all acts that an attorney would do when answering a complaint. For example, in re-

82. Id.
84. Id.
86. Attorneys at Law, supra note 24, § 118; see e.g., Keller, 114 N.W.2d at 802.
response to a complaint in the traditional judicial system, an attorney reviews the complaint and responds with affirmative defenses, denials, counter-arguments, and sometimes crafty legal wrangling.88 Eric Arnold, arguably, was denying (he challenged material facts in dispute), offering affirmative defenses (he advanced mitigating or justifying circumstances for Boomerang’s alleged violations), and wrangled for position (he argued how the fines were excessive and even demanded discovery).89 But does that mean the acts involved the application of legal knowledge, skill, and expertise? This question is not easy to answer.

It seems Mr. Arnold was performing legal wrangling and jockeying for his client’s best interests by advocating. The role of advocate usually belongs to an attorney and this, in turn, pushes the scales more towards the unauthorized practice of law versus the permissible actions of a non-lawyer. But, the real problem in this matter results because the FMCSA enabling statute fails to clearly define the role of a non-lawyer within agency proceedings; and fails to clarify whether or not a non-lawyer is even allowed in agency proceedings.90 Eric Arnold’s job title and company name, Arnold Safety Consulting, revolve around consulting. A Delaware Supreme Court case stated “counsel have inherent and presumptive representational ability and authority, while . . . consultants do not.”91

The preceding statement came in a Delaware case involving an unauthorized practice of law claim before a state administrative agency; the case resulted in a finding that the unauthorized practice of law indeed took place.92 The non-lawyers representing the party possessed special knowledge and training but no law license.93 Ultimately, the court viewed the manner in which the hearing proceeded and its adversarial nature as a factor holding that the unauthorized practice of law took place.94

The nature of an FMCSA Enforcement Case seemingly would be adversarial if the alleged violator contested the Notice of Claim. Dispute over whether or not a violation occurred would inherently assume an adversarial nature. Based on the facts, Eric Arnold disputed material facts and seemingly had something to argue against the Field Administrator, otherwise a check for the fines assessed would have been returned to the FMCSA in lieu of Eric Arnold’s reply.

Applying the earlier definition of the practice of law to the facts of

91. In re Arons, 756 A.2d 867, 870 (Del. 2000).
92. Id. at 874.
93. Id.
94. Id.
Boomerang, it seems that Eric Arnold in fact crossed over into the practice of law. But, we will never know what the FMCSA Office of Hearings believes on the issue.

VII. POTENTIAL SOLUTIONS

Reformers of unauthorized practice of law statutes call for refinements to current laws and regulations; a commonly advanced solution includes the creation of a licensing scheme so that paraprofessionals and non-lawyer professionals can qualify to perform certain tasks currently handled solely by lawyers.95 An exam could be administered for non-lawyers to ensure they possess necessary skills or competency to represent, whether it be in an agency or courtroom proceeding.96 The problem here centers on the resources and time necessary for an exam for every non-lawyer desiring these representation or practice rights. Other suggestions ask that restrictions on who may provide legal services should be abandoned and replaced with a system where all may provide services, with only licensed lawyers being able to hold themselves out as such.97

In the case of Boomerang, the answer would be relatively clearer if the enabling statute offered guidance. Additionally, precedent within the agency might also be helpful. But, as Boomerang illustrates, how should the unauthorized practice of law issue be handled when an enabling statute fails to guide and how should the issue be handled when there is no precedent? Solutions such as tests for non-lawyers or eliminating restrictions on who can provide legal services do not answer the current question posed. The matter seemingly should be analyzed according to what has taken place in other similar situations. The aforementioned Delaware case seems to help generate a plausible answer. “Counsel have inherent and presumptive representational ability and authority, while . . . consultants do not.”98 Taking this statement alone would place Eric Arnold in the consultant role and outside the possession of inherent representational ability and authority, thereby qualifying what he has done as the unauthorized practice of law.

VIII. CONCLUSION

Eric Arnold's principal occupation consisted of safety consulting. The value of a safety consultant to those regulated by the FMCSA is not

95. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 79-102 (2004).
96. Id.
98. In re Arons, 756 A.2d at 870.
easily measured. The mission of the FMCSA is safety, as such, Eric Arnold's job runs tantamount to the mission of the FMCSA. The Wisconsin Supreme Court recognized that a non-lawyer with familiarity of a particular industry, such as the trucking industry, may possess or acquire knowledge of value to a client and may be in a position to give technical non-legal advice for such matters that does not constitute the practice of law.99 This seems to guide us on the inquiry of the proper role of a safety consultant in this instance. Eric Arnold should consult and help his clients achieve safety, but whether or not Eric Arnold can take on the role of someone with specialized knowledge and legal skill is another story.

It seems we come full circle to seven years. In those seven years it takes to become a lawyer and, presumably, receive a law license, the lawyer may not actually possess superior legal skill or knowledge then that of laymen like Eric Arnold. But, rules are rules and the way the definition for the practice of law has been crafted, it does take seven years before someone can offer legal advice in a permissible fashion.

99. Keller, 114 N.W.2d at 802.
Protecting Design-Build Owners Through Design Liability Coverage, Independent Construction Managers, and Quality Control Procedures

Stephen Wichern*

The domestic economic downturn of the late 1990s led to budget cuts and downsizing efforts that restricted the ability of state transportation agencies ("STAs") to provide much-needed highway infrastructure improvements. STAs were forced to improve the cost-efficiency of their highway construction programs in order to accomplish their goals. They sought to exploit the state-of-the-art construction knowledge and technology held by specialty contractors in order to run more efficient programs. They looked for ways to avoid the pre-construction costs, delays and litigation commonly associated with the traditional design-bid-build construction method. Additionally, STAs searched for a building method with greater cost certainty and the potential for larger time-savings. Of the many alternative procurement techniques available, one of the most promising that STAs began to explore is "design-build," a project delivery system in which a project owner contracts directly with a single entity.

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* JD Candidate 2006, Sturm College of Law, Denver, Colorado.


3. Id.
that assumes complete responsibility for both project design and construction. This paper explains the design-build system and some of the inherent advantages that make it an attractive option to project owners, especially STAs. A central issue of the design-build method, namely that the design professional’s allegiance is modified from the owner to the contractor, is discussed, along with several concerns associated with this relationship shift. Specifically, potential design-build project owners may be concerned of design insurance coverage gaps, project quality, and unfair change orders due to an inability to effectively monitor contractor performance. Three ways in which potential design-build owners can guard against these problems are then highlighted. By selecting an appropriate design liability coverage option, securing an independent construction manager, and establishing quality control programs, project owners can fully enjoy the many benefits of the design-build procurement model while effectively responding to the design professional’s redefined commitment.

I. ADVANTAGES OF THE DESIGN-BUILD MODEL

Design-build is a method of construction whereby a project owner, having defined its initial expectations to a certain extent, executes a single contract for both the architectural/engineering design services and construction of a project. In contrast, design-bid-build, the traditional project delivery method, requires separate procurement processes for the distinct and sequential phases of design and construction. The design-builder may be a single company with in-house design and construction departments, a consortium, or a partnership of separate companies called a “joint venture.” Contractors most often lead design-build projects because of the large capital required for the integrated design-build approach. Design services are then rendered either by in-house design professionals or by an independent design professional firm acting as a sub-consultant to the contractor. Whether the leading entity is a general contractor or an engineer/architect, the fundamental feature of design-build delivery remains that a single entity assumes responsibility for both project design and construction.

6. SIAC Consulting, supra note 4.
7. Friedlander, supra note 5, at 29.
8. Sweet & Schineier, supra note 2, ¶ 17.04, at 353.
10. American Association of State Highway and Transportation Officials
Design-build is one of the fastest growing methods of project delivery in the country today, growing by more than 100 percent a year in a wide range of construction projects.\textsuperscript{11} Design-build is a popular procurement technique for several reasons.

First, design-build enables owners to more fully exploit the state-of-the-art construction knowledge and technology held exclusively by specialty contractors, leading to more efficient projects.\textsuperscript{12} The design-build method allows the contractor to make valuable contributions at the design stage, whereas the traditional design-bid-build method relies heavily on the expertise of the design professional and is far less disposed to incorporation of contractor innovations. Second, design-build has the potential to lower costs by avoiding pre-construction costs and delays associated with the multiple procurement phases of design-bid-build.\textsuperscript{13} Third, because design-build is generally bid on a lump-sum basis, it provides owners with greater cost certainty.\textsuperscript{14} Fourth, design-build delivery provides owners with a single-point of responsibility for project development. Single-point responsibility can eliminate the need for the owner to coordinate or mediate disagreements between separate design and construction entities, reducing the owner's administrative burdens.\textsuperscript{15} Finally, the design-build system has the potential for significant time savings because contractors have early access to design information, allowing all phases of the project—planning, design, and construction—to occur simultaneously.\textsuperscript{16}

In the early 1990s, based on the success of design-build techniques in the private sector, the Federal Highway Administration Agency ("FHWA") encouraged state transportation agencies that administer federal-aid highway projects to use the design-build method on a limited basis in order to test the technique's usefulness.\textsuperscript{17} In 1997, the Transportation Equity Act for the Twenty-First Century ("TEA-21"),

\begin{footnotesize}
\begin{enumerate}
\item Friedlander, supra note 5, at 29. In large civil projects specifically, the growth rate is between 80 and 150 percent a year, depending on the category of construction. \textit{Id}.
\item \textit{Sweet \& Schineier, supra} note 2, § 17.04, at 352.
\item \textit{Id}.
\item \textit{AASHTO JOINT TASK FORCE ON DESIGN-BUILD, supra} note 10, at para. 1.2.
\item Jay A. Felli, \textit{Comments: The Elements of Ohio's Liability Provisions for Contemporary Design-Build Architects an Unwillingness to Expand the Plan, 17 Dayton L. Rev. 109, 149 n.63} (1991). In contrast, in the traditional design-bid-build model, construction cannot begin until the design phase is completed, which itself cannot begin until the programming phase has been completed, and so on; time and cost problems are thus serious drawbacks. \textit{Id.} at 149 n.62.
\item SIAC CONSULTING, \textit{supra} note 4.
\end{enumerate}
\end{footnotesize}
which became the new funding legislation for the nation's surface transportation programs, included provisions requiring that a comprehensive national study be conducted to evaluate the effectiveness of design-build contracting in the federal-aid highway program.\textsuperscript{18} And in 2002, the Intermodal Surface Transportation Efficiency Act ("ISTEA") implemented FHWA regulations allowing design-build contracting, listing the criteria and procedures by which FHWA will approve the use of design-build contracting by state transportation agencies ("STAs").\textsuperscript{19}

As STAs are increasingly interested in the use of design-build procurement, it has become a hot topic in state legislatures across the country. As of 2002, thirty-one states had passed design-build legislation of some kind, with by far the largest group of design-build bills introduced relating to highway and road construction.\textsuperscript{20} Outside of the realm of public transportation projects, design-build is now easily the fastest growing method of project delivery in the country, with over $53 billion in total revenue in 2003.\textsuperscript{21} Overall, design-build projects are growing by more than 100 percent a year.\textsuperscript{22} In large civil projects specifically, the growth rate is between 80 and 150 percent a year, depending on the category of construction.\textsuperscript{23}

A recent successful example of a design-build public transportation project is Colorado's Transportation Reconstruction and Expansion Project, or T-REX. Started in 2001, T-REX is a seven-year, $1.67 billion design-build project that includes complete reconstruction of seventeen miles of interstate and the construction of nineteen miles of new light rail transit.\textsuperscript{24} T-REX is an unprecedented multi-modal project featuring the collaborative efforts of the Colorado Department of Transportation ("CDOT"), the Regional Transportation District ("RTD"), FHWA, and the Federal Transit Administration ("FTA"), to combine light rail, highway and other transit options in one massive construction effort.\textsuperscript{25} The agencies involved felt that an innovative construction approach would be re-

\textsuperscript{18} \textit{Id.} The ultimate report, prepared by Science Application International Corporation (SAIC) and AECOM Consult, Inc., and based on literature review, interviews, surveys and the results of FHWA studies, is currently under review. \textit{Id.}


\textsuperscript{21} Rosta, \textit{supra} note 14.

\textsuperscript{22} Friedlander, \textit{supra} note 5, at 29.

\textsuperscript{23} \textit{Id.}


\textsuperscript{25} \textit{Id.}
required for this ambitious undertaking. They focused on the design-build method.26

T-REX is not C-DOT's first experience with the design-build approach. C-DOT contracted for several smaller design-build projects on interstate rehabilitation projects in the late 1990's.27 C-DOT then obtained authorization to use a best value procurement process for design-build contracts in 1999, a specialized form of procurement based on the highest overall quality, of which low price is merely one of several important factors considered.28 The best value procurement process allowed C-DOT to select a design-build team that would most effectively meet its stated goals of minimizing inconvenience to the public, staying under budget, designing and constructing a quality project, and completing the project before June of 2008.29 The winning proposal was submitted by the Southeast Corridor Constructors ("SECC"), a joint venture design-build team led by Kiewit Construction and Parsons Engineering.30

The Colorado Department of Transportation ("C-DOT") notes that the design-build method gave SECC considerable flexibility and creativity, enabling project construction to begin while completing design.31 This was necessary for SECC to meet the project's aggressive schedule while minimizing inconvenience to the public.32 Also, the design-build method saved the state both time and money.33 C-DOT compared the current seven year completion goal to the twenty or more years that the project would have taken using the traditional design-bid-build system, noting that an additional thirteen years of construction time would have entailed an enormously higher cost.34 In addition, the contractual completion deadline is now almost two years ahead of schedule, reducing the construction duration from seven to five years, an incredible accomplishment for a project of significant magnitude and complexity.35 Lower project costs are also anticipated in a number of areas including inflation, administrative costs, and user costs.36 Based on the success of the T-REX transportation project, as well as other positive experiences, the Colorado

26. Id.
27. "Smaller" projects are those that cost less than $50 million. AASHTO JOINT TASK FORCE ON DESIGN-BUILD, supra note 10, at para. 2.1.
28. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. AASHTO JOINT TASK FORCE ON DESIGN-BUILD, supra note 10, at para. 2.1.
Department of Transportation anticipates using design-build in the future.37

II. THE ALTERED ROLE OF THE DESIGN PROFESSIONAL IN THE DESIGN-BUILD SYSTEM

Despite the many advantages of the design-build system over the traditional approach, the union of the design professional and contractor into a single entity may cause potential owners some apprehension. Owners may be concerned that they are losing any advantages they may have had through separate relationships with the two primary construction parties. Specifically, owners may fear the ramifications of the fact that the role of the design professional is changed from that of the owner’s consultant to that of the contractor’s “teammate.”38

In a traditional relationship, the design professional who contracts directly with the owner is the owner’s representative during construction.39 The design professional has an ethical and contractual duty to report to the owner any contractor work that does not comply with the plans and specifications for a project.40 The design professional becomes the ‘eyes and ears’ of the owner, policing the construction project and protecting the interests of the owner by evaluating and criticizing the performance of the general contractor.41 Thus, owners benefit from the services of an independent and knowledgeable party to monitor construction and ensure full conformance with the contract specifications. As the Georgia Supreme Court concisely stated in Wise v. State Board for Examination, Qualifications & Registration of Architects:42

[Traditionally] [t]he job of [a design professional] is to ensure that his plans are followed precisely, irrespective of the additional cost to the contractor. In many respects, the [design professional] is seen as an antagonist to the contractor, as the contractor is seeking the maximum profit, while the [design professional] is seeking the best final product possible.43

However, this traditional “watchdog” role of design professionals is greatly restricted in the design-build model.44 Design professionals in design-build projects are typically subcontractors and are therefore prima-

37. Id.
39. Id.
40. Id.
41. Bech, supra note 9, at 44.
43. Id.
44. Bech, supra note 9, at 44.
rily responsible to the design-builder, not the owner. They are placed in the professionally-difficult position of attempting to satisfy both their contractual allegiance with the design-builder and their traditional role of representing the owner. Because design professionals have a stake in the financial results of the project, the owner’s desires, such as high quality and conformance with project specifications, may not take priority over the considerations of the contractor, such as lowering total cost and improving constructability. Contrary to the expectations of the owner, it may prove very difficult for the design professional to exercise any independent control at all over the actual construction of a design-build project.

III. THREE SPECIFIC OWNER CONCERNS OF DESIGN-BUILD PROCUREMENT

The altered role of the design professional in design-build projects raises several important concerns for potential owners. A primary issue, created by the lack of a direct contractual relationship between the owner and the design professional, is how best to adequately guard against the significant difference in design insurance coverage between the traditional and the design-build systems. A second concern is how design-build owners can ensure high quality and the production of a satisfactory final product without the services of an independent design professional. A third issue, closely related to quality concerns, is how design-build owners, if not represented on-site by the design-professional, can monitor the contractor’s performance to guard against unfair change orders.

A. DESIGN INSURANCE COVERAGE GAPS

Design insurance coverage in design-build is significantly different than in the traditional system because owners no longer have a direct contractual relationship with the design professional. In design-bid-build construction, the contractor and the design professional have different

45. SWEET & SCHNEIER, supra note 2, § 17.04, at 354. The vague and undefined belief that a registered architect or engineer will take the interests of the owner and the public into account, even though engaged and paid by the builder, is demonstrated by successful owner claims against design professionals with whom they had no contract. See id.


47. Robinson, supra note 38, at 53.

48. Bech, supra note 9, at 44. Despite indirectly receiving payment from the owner, design professionals in the design-build method are primarily responsible to the design-builder, over and above their duties to the owner and obligations to protect the public. See also SWEET & SCHNEIER, supra note 2, § 17.04, at 354.
liabilities that are covered under separate insurance policies.\textsuperscript{49} The contractor’s performance is covered under performance bonds, which do not underwrite the design of the project.\textsuperscript{50} A construction contractor’s general liability policy will also exclude coverage for the services of design professionals.\textsuperscript{51} Conversely, design professionals are covered by errors and omissions insurance policies that do not include coverage for construction services.\textsuperscript{52}

However, the redefined relationships of the design-build model modifies each party’s traditional rights and liabilities.\textsuperscript{53} Specifically, in the common situation where a contractor leads a design-build team, the contractor is explicitly responsible for the design of a project.\textsuperscript{54} However, the contractor’s liability insurance policy generally will not provide coverage for redesign and reconstruction required by negligent design.\textsuperscript{55} Further, the professional liability policy of the project’s design firm would not provide any coverage if the owner had an additional claim based on the contractor’s own negligent acts, errors or omissions in relation to the design component.\textsuperscript{56}

Without supplemental design insurance coverage, the owner would then be left with two options to secure compensation for damages based on design errors. First, the owner could sue the contractor for breach of contract, relying on the design-builder’s financial capacity to pay for remedial design and construction.\textsuperscript{57} Second, the owner could sue the surety and attempt to force coverage of design error under the construction performance bond.\textsuperscript{58} While it is possible that a design-build owner may prevail on such a claim, it is not in the owner’s best interests to rely on litigation for protection against design errors. Such an approach could have a negative effect on the attitude with which contractors respond to the design-build model, eroding the spirit of mutually beneficial cooperation upon which the model is based. It is therefore important that design-build owners specifically address the issue of design risk to ensure that comprehensive coverage is obtained.

\textsuperscript{49} Robinson, \textit{supra} note 38, at 55.
\textsuperscript{50} \textit{Id}.
\textsuperscript{51} \textit{Id}.
\textsuperscript{52} \textit{Id}.
\textsuperscript{53} \textit{Id.} at 54.
\textsuperscript{55} \textit{Id}.
\textsuperscript{56} \textit{Id}.
\textsuperscript{57} \textit{Id}.
\textsuperscript{58} \textit{Id}.
B. Project Quality

Another concern that potential design-build owners may have is how best to ensure high project quality. Many owners are accustomed to performing their own quality control processes in design-bid-build projects to make certain that the final product meets or exceeds expectations. This may be particularly true of owners who typically pursue large and complex developments, such as state transportation agencies ("STAs") that build and modernize transportation infrastructure systems. While STAs must select the most efficient alternative available that adequately addresses a specified need, they must also protect public health and safety by ensuring design integrity.59 STAs are thus accustomed to performing their own quality control measures at both the design and construction stages.60

However, the design-build system's single-point responsibility requires that owners release a significant level of control to the design-builder, who is solely responsible for both design and construction.61 In fact, to most fully realize the benefits of single-point responsibility, owners should merely provide the design-builder with detailed performance specifications and otherwise leave the design and construction entirely up to the design-builder.62

Moreover, the design-build system restricts owners from implementing their own quality control measures in both the design and construction phases. In the design phase, potential design-build owners should be aware that increased control over project design might not only reduce potential design-build benefits but might also carry with it the risk of liability for the entire project.63 Furthermore, a design-build owner's active involvement in the design process may even constitute interference with the proper rendition of design services.64 In the construction phase, it is simply not practical for owners, even relatively sophisticated and experienced state transportation agencies, to perform their own quality control

60. AASHTO Joint Task Force on Design-Build, supra note 10, at para. 6.3.
62. Id. at 95.
63. AASHTO Joint Task Force on Design-Build, supra note 10, at para. 6.3. Owners that involve themselves in the design process to a significant degree, placing considerable constraints on the design-builder, could be held liable for the entire project design. Id. For instance, an owner may be liable for project design when providing a relatively high level of design, allowing a limited time to proposers to review that design, and retaining a high degree of control over the post-award design. See also id.
measures. The design-builder has complete control over the project site, construction scheduling and method of construction. Also, owners should consider that one of the advantages of design-build is that construction and design can often be performed simultaneously. Thus, one project area could be constructed before the design of another is even completed. Therefore, project owners will most likely have difficulty following the design-builder's schedule in order to effectively implement quality control measures as they would in traditional design-bid-build projects. The construction in such traditional projects is much more predictable because it can only occur after the design has been completed and reviewed. Additionally, owners in traditional projects have the luxury of reviewing and modifying the project design before choosing a contractor. This allows the owner to gain familiarity with the design and plan quality control measures. The design-build method does not afford the owner such luxury.

Therefore, along with losing the design-professional watchdog, owners may also fear the fact that the design-build method forces a shift from ensuring quality for themselves to assigning responsibility for the production of a quality product to the design-builder.\textsuperscript{65} The issue of how to effectively ensure quality of both design and construction in a design-build project therefore may be very important to potential design-build owners.

C. UNFAIR CHANGE ORDERS AND MONITORING CONTRACTOR PERFORMANCE

Finally, along with ensuring quality, design-build owners may also be concerned with how to monitor design-build contractor performance in order to verify the validity of change order requests. Change orders are of special concern to design-build owners because the point at which the scope of work is increased, meriting compensation, is more difficult to define than in traditional design-bid-build projects. Generally, change orders are required where the owner makes an additional request in quality or quantity that affects the project price.\textsuperscript{66} In the traditional model, any additional work that must be performed outside of the design plans, but not due to the contractor's own negligence, is an additional request, or "change in scope," for which the contractor may make a claim.\textsuperscript{67} This distinction between performance under the contract and work that constitutes a change in scope is relatively clear because the owner alone is responsible for the design.\textsuperscript{68}

\textsuperscript{65} AASHTO Joint Task Force on Design-Build, supra note 10, at para. 6.3.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
However, the question of what constitutes a change in scope in a design-build project is not as clear. While the design-build owner provides a basic configuration concept to define its expectations, the design-build team’s design professional, not the owner, produces design plans. Hence, change orders based on design errors and omissions are eliminated because the owner does not act as an intermediary to warrant the accuracy of the drawings. Nevertheless, a contractor could potentially claim additional compensation for a large volume of work by charging that deficiencies in the owner’s basic configuration expanded the scope of work. While there certainly may be occasions where such a claim would be valid, the concern for design-build owners is how to verify that the additional work was not actually caused by an element for which the design-builder was responsible, such as the project design. Thus, without the supervision provided by a watchdog design professional, STAs may feel vulnerable to unfair change orders.

IV. Addressing Owner Concerns of Design Risk Coverage, Project Quality and Unfair Change Orders in the Design-Build Model Through Design Liability Coverage Options, Independent Construction Managers and Quality Control Programs

Three topics should be discussed when addressing the specific concerns, discussed above, that owners may have regarding the design-build model. First, there are several options available to design-build owners through which comprehensive design insurance coverage can be ensured. These include minimum errors and omissions (“E&O”) insurance specifications, standalone professional liability policies for contractors, and owner controlled insurance programs (“OCIPs”). Second, retaining the services of an independent construction manager is an important step towards monitoring the quality of performance and guarding against unfair change orders. Finally, incorporating specific quality control procedures in design-build contracts is an essential tool to ensuring that the owner’s quality expectations are met while also assisting the owner in monitoring contractor performance. When owners incorporate all three of these areas in their approach to design-build projects, they can be more certain of attaining the full range of benefits that the design-build model can offer.

69. Design-build owners provide this basic configuration concept in the bid package both to communicate their expectations and for the purpose of constraining the design-builder’s ability to deviate from a particular design concept. See AASHTO Joint Task Force on Design-Build, supra note 10, at para. 5.1.
70. Change Orders, supra note 66.
71. Sweet & Schneier, supra note 2, § 17.04, at 356.
while avoiding the harms of a design insurance gap, an inadequate final product or unacceptable contractor performance.

A. Three Approaches to Providing Design Risk Coverage for Design-build Owners

As discussed, an important issue that potential design-build owners should address is the need to secure comprehensive design insurance coverage in the design-build method. Design insurance is an important issue because the convolution of design and construction responsibilities creates new liabilities that may not be adequately addressed under the traditional insurance arrangement. There are several options available to design-build owners seeking to address this issue, including minimum errors and omissions ("E&O") insurance specifications, contractor controlled professional liability policies, and owner controlled insurance programs ("OCIPs").

The promulgation of appropriate minimum standards in E&O insurance coverage for design build projects is one approach to addressing the issue of design risk. By demanding minimum standards in the design professional’s E&O insurance, owners can protect themselves from design negligence, errors, and omissions while also securing their traditional surety guarantees under the contractor's performance bond. Owners can also obtain long-term protection through stipulating appropriate insurance minimums. For instance, owners can require that design professionals obtain prepaid coverage tails to assure coverage for long-term exposure. Conversely, owners could specify retroactive coverage extending back to the beginning of pre-bid design activities. Additionally, owners could protect themselves against low liability limits through requesting excess E&O coverage. In general, because there are no standard errors and omissions insurance policies, design-build owners can examine each policy's exclusions, definitions, limits and conditions and make revisions as required to adequately address the additional exposures assumed by the design-builder for each project.

Owners should consider both the advantages and disadvantages of this approach. A suggested advantage to pursing coverage under the design professional's E&O policy, instead of, for example, forcing coverage through the contractor's surety, is that irresponsible risk management

73. Robinson, supra note 38, at 54.
74. Niemeyer, supra note 72.
75. Id.
76. Id.
77. Id.
among design-builders will be discouraged, developing a more qualified and responsible contracting group with greater support from their sureties. A disadvantage to this option is that stipulating minimum errors and omissions specifications may not completely cover the owner for claims against the contractor for negligent supervision of the design component of the project. The policy will usually only provide coverage to the design members of the design-build team and thus exclude the contractor.

A second approach to securing comprehensive coverage in design-build projects is for owners to require that the contractor obtain a standalone professional liability policy to cover the project’s design exposure. If the contractor provides its own design professional liability policy, the owner is assured of an insurance policy that will respond on the contractor’s behalf if the owner has the need to pursue a claim for a design error or negligent supervision of the design component. This approach reinforces the benefits of the design-build model’s single point of responsibility because it simplifies the owner’s insurance claims process. The contractor’s design professional policy can resolve any design-related claim by the owner, leaving the contractor to pursue apportionment of liability among the design-build team members. And the market for such professional liability insurance has grown in recent years along with the popularity of design-build procurement, with insurance companies offering contractors annual policies to provide coverage for the vicarious liability of a project’s design component. However, potential design-build owners should expect an increase in bid prices under this approach. In traditional construction, there is no need for a contractor to secure such an additional liability policy that is separate from the design professional’s insurance. And this additional contractor cost would be passed directly to the owner.

A third viable option that design-build owners can pursue to properly address design risk coverage is an owner controlled insurance programs ("OCIP"). OCIPs are a type of "wrap-up" insurance procurement that allows the owner to establish and administer coverage for all project participants by “wrapping up,” or bundling, multiple par-

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78. Id.
79. Tennant, supra note 54.
80. Id.
81. Id.
82. Id.
83. Tennant, supra note 54.
84. Id.
85. Id.
86. Id.
87. Robinson, supra note 38, at 56.
ties into a single consolidated program. OCIPs are typically employed on large, multi-disciplinary construction projects involving numerous parties. Also, the integrated risk management and financing that such programs require make them a popular approach among owners seeking to augment the benefits of the design-build method. Owner controlled insurance programs may thus be particularly appealing to state transportation agencies considering design-build procurement for large transportation infrastructure projects.

A primary aspect of an OCIP is, as the name implies, increased owner control. Under owner controlled insurance programs, an owner takes total responsibility for insurance coverage and so has direct control over the selection of an insurer, allowing the owner to monitor the insurer's performance and insolvency. This leads to several significant advantages. First, by combining the cost for all of the contractors' and subcontractors' insurance coverage into a single policy, an owner creates substantial leverage in the insurance market. An owner can capitalize on this leverage to realize volume discounts from the economies of scale, buying broader coverage at lower rates than available to individual contractors. "An owner can realize cost savings of as much as 10-15% due to the volume purchasing of the OCIP coverages." The owner then can require the project participants to reduce their bid offers by eliminating all of their insurance costs in exchange for owner-provided coverage. Compared to traditional, fragmented insurance programs, this could potentially reduce an owner's overall project costs by up to two percent.

Second, an owner controlled insurance program allows the owner to define the scope of coverage. Owners using OCIPs have the ability to obtain broader insurance coverage with higher dedicated limits. Specific to the issue of design risk coverage in design-build projects, owners administering OCIPs can include a professional liability insurance policy that will provide coverage for all of the design professionals on the pro-

89. Id.
90. David L. Grenier, Owner Controlled Insurance Programs - Part Two, CFMA BUILDING PROFITS (Jan./Feb. 2001)
91. Grenier, Part One, supra note 88.
92. Id.
93. Id.
94. Id.
95. Id.
97. Id.
ject, even without a direct contract with the design professionals.\textsuperscript{98} Such an approach will provide comprehensive protection for the owner regardless of the coverage that the individual professionals may or may not have. Additionally, “an owner can purchase broader and more uniform coverage for the OCIP than each design professional could purchase individually in a stand-alone policy.”\textsuperscript{99} By directly establishing and administering owner controlled insurance programs, a design-build owner eliminates the apprehension that the specific endorsements and limitations of the particular policies of the parties involved will result in an insurance gap.\textsuperscript{100} The owner is assuring itself uniform and comprehensive design insurance coverage and can then more fully take advantage of the potential benefits that the design-build method has to offer.

Whether through ensuring adequate minimum standards in professional errors and omissions insurance policies, requiring the contractor to purchase a design professional liability policy or establishing a broad owner controlled insurance program, design-build owners should invest the time and planning necessary to address the issue of design insurance for design-build projects. With sufficient insurance coverage for project design secured, owners can move on to the important issues of obtaining the services of an independent construction manager and establishing a quality control program.

B. INDEPENDENT CONSTRUCTION MANAGERS AS THE OWNER’S REPRESENTATIVE IN DESIGN-BUILD PROJECTS

Potential design-build owners who are concerned about how to monitor contractor performance and also ensure project quality should consider the services of an independent construction manager. While not a panacea, hiring a separate design professional to take the role of construction manager can greatly assist the owner by evaluating project design, overseeing construction, and communicating important project developments.\textsuperscript{101}

Construction managers are specialized professionals, unconnected with design creation, that perform many services typically expected of the design professional.\textsuperscript{102} A construction manager should provide construction experience and skill at all phases of the construction process.\textsuperscript{103} Cost estimating and budgetary controls, scheduling, organizational management, quality assurance, and a commitment to meeting the expectations

\textsuperscript{98} Grenier, \textit{Part One}, supra note 88.
\textsuperscript{99} Id.
\textsuperscript{100} Nilsson, supra note 96.
\textsuperscript{101} Robinson, supra note 38, at 54.
\textsuperscript{102} See \textit{SWEET & SCHNEIDER, supra note 2, § 12.08, at 201}.
\textsuperscript{103} Id.
of the owner are various components of professional construction management services.104

In the traditional method, a construction manager works with both the owner and the design professional. As the owner’s agent, the design professional furnishes a design and interprets the contract documents with the owner’s best interests at heart. The construction manager further advises both the owner and the design professional to increase project efficiency and constructability.105 The construction manager also assists both parties by taking over many site services usually performed by the design professional.106

Even though construction managers are common in traditional design-bid-build projects, the concept is particularly applicable to the design-build method.107 As discussed, design-build substantially limits the traditional watchdog role of the design professional, creating a significant quality concern. This could result in not only substandard work but also in such inequitable transactions as excessive payments being made early in the project.108 The potential for misrepresentation and poor construction is thus more apparent than in design-bid-build where the design professional provides the owner with an initial level of security. And many potential design-build owners, even experienced state transportation agencies, lack the skill and sophistication to adequately monitor a design-build contractor’s performance on their own.109

A construction manager can thus provide a valuable service as the owner’s representative in design-build projects. A construction manager hired directly by the owner has the authority to intervene on the owner’s behalf and to make recommendations regarding major decisions.110 The construction manager’s importance is accentuated by the fact that he or she works exclusively for the design-build owner, not in conjunction with the design professional as in the traditional system.111 This relationship of trust and confidence between the owner and construction manager can take the place of the watchdog role assumed by the design professional in the traditional method.112

An independent construction manager has a unique role in design-build projects in various phases of the construction process. In the pre-

105. SWEET & SCHNEIER, supra note 2, § 17.04, at 349.
106. Id.
107. PREREQUISITES, supra note 46.
108. See generally Id.
109. Id.
111. Id. at 60.
112. Id. at 60-61.
design phase, a construction manager is critically important in assisting the owner prepare contract specifications and select the design-build entity. In the traditional model, the owner selects and collaborates with a design professional long before preparing bid documents and choosing a contractor. The owner can rely on the design professional to help develop its project concept and to evaluate potential contractors after the project design has been completed. In design-build however, these two steps must be taken at the same time and without the guidance of the design professional. Also, the owner must provide sufficiently technical detail in the initial basic configuration so as to avoid costly change orders later in construction. This may be especially difficult in individual, tailored projects, such as complex transportation projects, where owners may not be sufficiently familiar with the design and construction elements required to bring the initial concept into reality.

A construction manager is thus extremely helpful in the pre-design phase of a design-build project. The construction manager can provide the technical and management expertise necessary to properly prepare the basic configuration concept in the contract documents. Additionally, the construction manager can help the owner assess not only the capabilities of the designer but also those of the potential contractor, increasing the owner’s chances of finding the best design-build team available. The services of a professional construction manager are thus vital to the owner facing these otherwise daunting pre-design phase tasks.

The services of a construction manager are also uniquely important in the design phase. In a traditional project, the design professional is the owner’s representative and will perform the most cost-effective design that can meet the owner’s needs. However, as discussed, the design professional’s allegiance, and control of project design, is shifted to the design-build entity in a design-build project. Thus the owner must still rely on the expertise of the contractor in proposing alternative design concepts. For example, if a contractor who specializes in the construction of steel-framed structures leads the design-build, it would be natural for the engineer to design a steel support system without even considering an alternative, such as a combination of concrete walls and wooden joists. Even if the owner will ultimately receive a quality design, it may not be able to make a fully informed decision regarding the full range of available design options. The owner may thus be deprived of the widest op-

113. Id. at 60.
114. Id.
115. Chiarelli & Chiarelli, supra note 104, at 60.
116. Id.
117. Id.
118. Id. at 61.
portunity for selecting the most effective design. However, an independent construction manager could intervene in such a situation and provide the owner with information on options of which the owner would otherwise be unaware. The construction manager in design-build then serves a critical role as the owner's agent, providing an objective evaluation of all design alternatives, even those not considered by the contracting entity.\textsuperscript{119}

Finally, a construction manager can be an essential representative for the owner during the construction phase. As discussed below, a comprehensive quality control program is essential to monitoring a contractor's performance during a design-build project. And a key element of an effective quality control program is periodic progress reports. But without the design professional acting as the owner's representative, a design-build owner would have no option but to rely on the contractor's assessments of its own performance. Such transmissions may very well be reliable but, due to the obvious conflict of interest, would nonetheless cause most owners concern. Thus, an integral part of a construction manager's services includes the independent documentation of the exchange of information between the owner and the design-builder.\textsuperscript{120} The construction manager can assess the validity of contractor reports, reassuring the owner that such communications are truthful and accurate. Additionally, the construction manager can routinely assess the contractor's performance and advise the owner of important project developments. For example, the construction manager could report to the owner when portions of the project are completed and evaluate whether or not the work performed and materials utilized met or exceeded the standards of quality established in the contract documents.\textsuperscript{121}

Other matters in which the reports of a construction manager would be very beneficial to a design-build owner include whether or not work is progressing according to schedule, evaluating the validity of contractor requests for extensions, alerting the owner when the contractor has a potential claim for additional compensation, and verifying the veracity of such change order claims.\textsuperscript{122} Independent reports from a construction manager can provide the owner much needed assurance that change order claims are not the result of the contractor's own errors in either design or construction. In the event that disputes escalate, the construction manager provides the owner with a personal insight into the construction project that would otherwise be unavailable. The owner has independent

\textsuperscript{119} Chiarelli & Chiarelli, supra note 104, at 61.
\textsuperscript{120} Id. at 60.
\textsuperscript{121} Id. at 61-62.
\textsuperscript{122} Id. at 62.
third voice, a role held by the design professional in the traditional system, to counteract the contractor’s claims.

While the retention of an independent construction manager is certainly beneficial to a design-build owner, it does not completely guarantee the integrity of a design-build contractor. The construction manager’s liability will be generally limited to a good faith effort and the exercise of reasonable skill and judgment in its duties. Thus, the situation can arise where an owner’s construction manager will not be liable to the owner for construction errors. For example, this may occur in situations where the construction manager justifiably relied on the design misrepresentations of the design-build contractor. This may hold true despite the fact that the public owner took the precaution of hiring the construction manager expressly for the purpose of checking the design and monitoring construction for compliance with the plans and specifications.

Even though the retention of a construction manager is not a fail-safe, it does reintroduce into the design-build model the checks and balances of the traditional project delivery system to some extent. Potential design-build owners should especially consider this option where they do not have experienced in-house engineering staff or staff availability is limited by other obligations. However, because construction managers have a limited liability scope, their services will be most effective when used in conjunction with a quality control program, as described below.

C. QUALITY CONTROL SPECIFICATIONS FOR DESIGN-BUILD PROJECTS

Design-build projects generally operate on a much faster pace and broader scale than design-bid-build projects. Design-builders, determined to stay on schedule, may be inclined to avoid time-consuming quality measures, such as inspecting completed work for deficiencies, in order to meet production requirements. This leaves quality enforcement entirely in the hands of the owner, who must take the initiative to perform inspections and demand corrections before making final approval for completed work items. This may be an unacceptable situation for owners. One

123. See Robinson, supra note 38, at 53.
124. Id.
126. Id. at 1347.
127. Whitney, supra note 61, at 93.
128. Prerequisites, supra note 46.
method by which owners can place some quality responsibility back on the design-builder is to require a quality control plan that clearly demonstrates a thorough review of project design, frequency of testing and sampling, qualification of the testing personnel, and reporting procedures. While a quality control plan may be important for any construction project, it is particularly applicable to the design-build model where the design professional does not offer security for the owner's quality concerns. It forces the contractor to commit to a formal list of quality measures, providing the owner some assurance that completed work has at least been reviewed before the request for approval is made. And a quality control plan does not completely eliminate the owner's quality responsibilities. The owner should still retain responsibility for quality assurance and verify the contractor's adherence to the quality control plan by making random inspections. Such quality assurance oversight can be accomplished through small on-site monitoring staffs performing audits and independent testing of the contractor's quality control efforts. Three important elements of an effective quality control plan are discussed below.

First, design-build owners should require the design-build entity to establish design review procedures as part of its quality control plan. Design review procedures should clearly demonstrate, through physical records collected according to a document control process, that an appropriate authority has competently reviewed each design element. Design professionals might be required to submit copies of their work, showing proof of revisions and corrections, to quality control personnel before work is approved for construction. Design professionals may be required to follow this process at various stages of the project design development. Proper design review may also require evaluation by several different levels of supervisors, from design professional managers through to project leads, depending on the complexity of the project and the size of the design team. Design-build owners should thus assess their design review expectations early on and direct the contractor to establish quality control procedures accordingly.

Second, the quality of personnel dedicated to quality control efforts should be addressed. Owners should require that contractors dedicate personnel that are independent of the construction team. Additionally, such personnel should be experienced quality control professionals, not simply construction employees that happen to be available. An outside

130. Id at 11.
131. Id. at 29.
132. AASHTO Joint Task Force on Design-Build, supra note 10, at para. 6.5.
133. See Graham, supra note 129, at 25.
134. Id. at 26.
and neutral manager who may communicate with, but not report to, the project superintendent should lead this quality control team. Furthermore, the quality control manager should be based at the project site but prohibited from performing production-related duties to avoid the compromise of the quality control program. Correspondingly, all other quality control personnel should be independent of the project superintendent and be responsible to the quality control manager or some other outside leader. While the contractor’s construction team may also perform inspections, quality control personnel should be responsible for directly inspecting all project work, regardless of any additional quality efforts made by the construction team. Also, the quality manager should be free to reject any portion of the contractor’s work that does not meet specifications. The owner should specify what process the quality manager and contractor should follow to verify the correction of any unacceptable performance. An independent quality control staff will thus allow for an honest evaluation of all project work and a reintroduction, to a small degree, of the tension between the design professional and contractor in the design-bid-build method.

Third, a quality control plan should require contractors to submit project reports on a periodic basis. Conflicts may arise between a design-builder and an owner over whether or not completed work meets specifications. Without a program addressing how completed items are to be approved by the owner on a regular basis, the contractor will have no clear acceptance process and work will always be “ongoing.” And the owner’s input would then be limited to reviewing the final request for approval at the end of the project. At that point, conflicts may be very difficult to resolve because changes or corrections might require costly demolition. A good quality control plan should therefore require contractors to submit reports on an intermediate basis, instead of only at the end of a project. The quality control manager should submit reports and evaluations to both the owner (or the owner’s representative, such as a construction manager) and the contractor, providing immediate verification of the contractor’s performance. Also, the owner’s concurrence should be obtained before the contractor’s independent quality manager gives the stamp of final approval, and this progression should be documented.

135. Id.
136. Id. at 25.
137. Id. at 26.
138. See generally Friedlander, supra note 5.
139. Graham, supra note 130, at 20.
140. Id.
141. Id.
142. Id.
V. CONCLUSION

The design-build procurement method is a popular and effective alternative to the traditional design-bid-build model. The design-build system has many advantages, including allowing the design-builder considerable flexibility to incorporate creative and innovative construction methods, which results in more cost-efficient construction and the potential for greatly accelerated project schedules. In particular, state transportation agencies can benefit from design-build when creating and expanding transportation infrastructure systems because the model affords the state greater freedom in specifying its primary construction goals, such as minimizing inconvenience to the public, and selecting a contractor who will effectively meet that goal.

Although the altered role of the design professional creates several significant concerns to potential design-build owners, three steps may be taken to alleviate these pressures. First, design-build owners should address the issue of design risk to ensure that comprehensive coverage is obtained. Three options available to owners in this area are minimum errors and omissions insurance specifications, standalone professional liability policies for contractors, and owner controlled insurance programs. Second, retaining the services of an independent construction manager is an important step towards monitoring performance and guarding against unfair change orders. Finally, owners can ensure that their quality expectations are met by incorporating specific quality control procedures in design-build contracts. Through investing the time and effort necessary to properly address these issues in advance, design-build owners can be more certain of attaining the many benefits of the design-build system while avoiding the possible limitations of this new procurement technique.
The Preempt Bill: On Track Toward Addressing Rail-related Terrorism?

R. Michael Pimentel*

INTRODUCTION

On March 11, 2004, during the morning rush hour, terrorists attacked a commuter train in Madrid, Spain. It is unfortunate that nations turn to the question of what can be done to enhance their own transportation security only after such tragedies occur; the United States is no exception. Following the terrorist attacks in Madrid, legislative activity regarding rail security has increased. Among the proposed bills is the Protecting against Enemy Efforts through Modernization, Planning and Technology Act ("PREEMPT"). In general, PREEMPT would enhance security for passenger and freight rail systems against terrorist attacks such as the one in Madrid and provide contingency plans for keeping

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* JD Candidate 2006, Sturm College of Law, Denver, Colorado.
them operational following a terrorist attack.\textsuperscript{5}

The passage of PREEMPT is imperative because rail transportation is an ideal terrorist target for several reasons. First, due to the high concentration of passengers, rail passenger transportation provides terrorists with opportunities to kill in quantity. Second, public rail transportation allows terrorists to blend into the high concentration of people, which, in turn, provides them an easy escape. Third, a terrorist attack on public rail transportation could cause disruption and alarm because it is the circulatory system of urban environments. Fourth, the freight rail system transports over half the nation’s hazardous materials. Finally, because aviation received the majority of federal anti-terrorism funding to date, the rail transportation system has not been able to sustain nor improve on its current security measures. In sum, rail transportation has become an attractive target for terrorists.

Part I of this article will detail past attacks on rail transportation in the United States. Part II will give further consideration to why terrorists target rail passenger and freight transportation. Part III will discuss the current status of U.S. rail security following the September 11 attacks. Part IV will describe the United Kingdom’s experience with the IRA’s bombing campaign and its subsequent actions regarding rail transportation. Part V will summarize PREEMPT and Part VI will discuss the potential impact of PREEMPT on the safety of rail transportation.

\textbf{PART I: ATTACKS ON U.S. RAIL TRANSPORTATION}

Beginning in the early 1990s, attacks on rail transportation in the United States have increased. In 1992, an individual left a hand grenade on a railroad station platform in Chicago.\textsuperscript{6} In 1993, terrorists bombed the World Trade Center in New York including the train stations below them.\textsuperscript{7} “In December 1994, six days apart, two bombs went off on the New York City subway” system.\textsuperscript{8} In 1995, “the ‘Sons of the Gestapo’ derailed Amtrak’s Sunset Limited in the Arizona desert, killing one passenger and injuring 65 people.”\textsuperscript{9} Additionally in 1995, a token-sales booth on

\textsuperscript{7} NEW YORK CITY SUBWAY, PATH/HUDSON & MANHATTAN RR (2004) (“The renovation of the [World Trade Center] station due to the damage from the 1993 bombing was still not complete on September 11, 2001 when the station was totally destroyed.”), at http://www.nycsubway.org/nyc/path/ (last visited Jan. 31, 2005).
\textsuperscript{8} Dunham, supra note 6.
[S]abotage was indicated by the removal of a rail joint bar supporting a section of the
a New York City subway line was set on fire and the person occupying the booth was severely burned.\textsuperscript{10} In 1997, police authorities raided a Brooklyn apartment where they found a cache of explosives intended for a New York City subway station.\textsuperscript{11} The September 11, 2001 attack completely destroyed the New York Transport Authority and Port Authority Trans-Hudson train stations at the World Trade Center.\textsuperscript{12} These attacks prove that rail transportation is a vulnerable target—for attacks that could result in high casualties, public alarm, and economic disruption. The following section will discuss why terrorists view the rail transportation system as an ideal target.

\textbf{PART II: WHY TERRORISTS TARGET TRANSPORTATION}

\textbf{A. KILLING IN QUANTITY}

Since World War II, the beginning of the modern era of terrorist violence, how to secure mass transit systems against attacks has been a growing concern.\textsuperscript{13} For decades, civilian rail passengers were fortunate because terrorists rarely targeted large numbers of people.\textsuperscript{14} However, over the last decades, terrorists have become less reluctant to kill large numbers of people, and public transportation systems (particularly passenger rail) have been targeted.\textsuperscript{15} Between 1998 and 2003, there were approximately 181 attacks on trains and related rail targets such as depots, and rail bridges worldwide.\textsuperscript{16} These attacks resulted in approxi-

\hspace*{1cm} track leading to the trestle over the 30-foot ravine. The movement of the rail should have triggered an alarm, but the saboteur wired the track in such a way that the signal remained green and the crew had no warning of any problem ahead. \ldots

\textit{Id.}

\textsuperscript{10} Dunham, \textit{supra} note 6.

\textsuperscript{11} \textit{New York Was ‘Close to a Disaster’ From Suicide Bomb Plot}, CNN News, Aug. 1, 1997 (The police authorities found an address book on the suspects, which contained the name of a “known terrorist organization.” The suspects admitted that their target was the New York City subway station.), \textit{available} at \url{http://www.cnn.com/US/9708/01/brooklyn.bomb.pm/index.html}.


\textsuperscript{14} \textit{Id.} at 307.

\textsuperscript{15} \textit{Id.}

\textit{Id.}

India leads the world in attacks on public transportation and in facilities from those attacks, with countries in Asia and Africa close behind. Terrorists, however, have been targeting mass transit in more industrialized countries as well. The United Kingdom and Germany each experienced six threats or attacks from mid-1997 through the end of 2000; Japan, seven; Israel, eight. Australia and Belgium suffered attacks as well.

\textit{Dunham, \textit{supra} note 6.}

\textsuperscript{16} \textsc{Jack} R\textsc{iley}, R\textsc{and} C\textsc{orporation}, \textit{Terrorism and Rail Security} 2 (Mar. 2003) (testimony presented to the Senate Commerce, Science, and Transportation Comm. on Mar. 23, 2004), \textit{available} at \url{http://www.rand.org/publications/CT/CT224/CT224.pdf}.
mately 431 deaths and thousands of injuries.\textsuperscript{17}

Public transportation is an ideal target for terrorists because it allows them to kill in quantity.\textsuperscript{18} Passenger rail is used by millions of people on a daily basis.\textsuperscript{19} For example, the MTA Long Island Rail Road is the most busy passenger rail system in North America, averaging 274,000 passengers each weekday.\textsuperscript{20} In addition, the logistics of a passenger rail attack are comparatively simple. Given the concentration of people in a passenger rail station, substantial casualties can be inflicted with a backpack-sized bomb.

Although conventional explosives have been the most frequently used weapon in rail attacks up to now, security officials cannot overlook the potential use of unconventional weapons such as chemical or biological weapons.\textsuperscript{21} The use of biological or chemical weapons in rail systems is real and not a theoretical threat.\textsuperscript{22} In 1995, Japan’s Aum Shinrikyo sect members released nerve gas on Tokyo’s subways, killing twelve people and causing 5,500 people to seek medical treatment.\textsuperscript{23} Moreover, recent arrests of extremists connected with Al Qaeda who manufactured ricin and the discovery of ricin in a Paris train station further proves that chemical or biological weapons are a potential threat to rail systems.\textsuperscript{24}

Although a large-scale attack involving chemical or biological weapons would be difficult to execute, a small-scale attack could produce widespread panic. As demonstrated by the anthrax attacks on postal facilities in the United States in 2001, such an attack could deny the use of transportation facilities for a lengthy period and result in expensive cleanups.\textsuperscript{25}

B. KILLING INDISCRIMINATELY

Terrorists target public transportation because it allows them to kill indiscriminately. Public transportation depots have “little security with no

\begin{enumerate}
\item\textsuperscript{17} Id.
\item\textsuperscript{18} Dunham, \textit{supra} note 6.
\item\textsuperscript{21} Jenkins, \textit{supra} note 12, at 3.
\item\textsuperscript{22} \textit{Id.}
\item\textsuperscript{23} \textit{Id.}
\item\textsuperscript{24} \textit{Id.}
\item\textsuperscript{25} \textit{Id.}
\end{enumerate}
obvious checkpoints," as compared to airports where passengers and parcels are inspected.\textsuperscript{26} Generally, rail passengers do not know each other, which allows terrorists to attack in anonymity and provides an easier escape.\textsuperscript{27} In addition, rail passenger facilities are readily accessible, making them all the more vulnerable to a terrorist attack. For example, a typical rail passenger facility relies on open architecture and the rapid and easy movement of passengers in and out of facilities and on and off trains. Furthermore, passenger rail systems pass through dense urban landscapes that may offer multiple attack points and easy escape, as well as vast rural stretches that are difficult to patrol and secure.

C. Public Transportation as a Circulatory System

"Transportation systems are the nervous systems of large cities."\textsuperscript{28} Attacks on these systems produce significant psychological effects and economic disruption.\textsuperscript{29} "As such, the potential loss of service, not to mention the loss of life, that might accompany an [attack] can severely disrupt the social and economic life of communities and even regions."\textsuperscript{30} A terrorist attack is likely to result in a decrease of commuter travel on passenger rail systems, thus increasing highway congestion. Moreover, tourists in metropolitan areas would also become reluctant to travel on passenger rail systems. Furthermore, transit-related businesses would most likely be adversely affected by the decrease in passenger and tourist travel.\textsuperscript{31} Thus, "the potential economic impact of infrastructure damage alone may encourage terrorists to target transit systems."\textsuperscript{32}

In addition, "[t]errorists thrive on the psychological effects their actions have upon others. Whenever a government overreacts to a hostage

\textsuperscript{26} Dunham, supra note 6.
\textsuperscript{27} Id.
\textsuperscript{28} Jenkins, supra note 12, at 1.
\textsuperscript{29} Light railways (typically one- or two-car electric trains operating on street trackage or other surface right-of-way and sometimes in tunnels) carry more passengers than buses do and hence have a higher potential for casualties in an attack; also, they are more vulnerable to disruption, as a disabled vehicle can block operations on a line. At least 20 U.S. cities have light rail lines; more are planned or under construction. . . Just as vulnerable to terrorist attacks is the subway ("heavy rail" as it is known in the industry. . .) Eleven U.S. metropolitan areas have heavy rail rapid transit systems, with electric trains typically four or more cars long running on their own right-of-way, often in tunnels.
\textsuperscript{30} Jenkins, supra note 12, at 1.
\textsuperscript{31} Waugh, supra note 13, at 307.
\textsuperscript{32} Id.
\textsuperscript{33} Waugh, supra note 13, at 307. See also Adam Eventov, FBI; U.S. Rail Lines Among Terror Targets: Trains: A Study Say an Attack on Corridors in the Area Would Cost $414 Million a Day, The Press-Enterprise, Sept. 12, 2003 ("If service on either the Union Pacific or Burlington Northern Santa Fe Railroad . . . were cut, the disruption would have an economic impact of $414 million a day. . .").
incident or the public becomes engulfed in fear over potential terrorist attacks, the terrorists achieve an important victory.” 33 Consider a report conducted by the American Psychological Association which performed a random survey of 1,900 Americans nationwide in the four months after the September 11 attacks; “[f]indings indicated that about one quarter of Americans reported ‘feeling more depressed than at any other time in their lives.’” 34 Rail transportation, like air travel, can rise or fall with the willingness of passengers to put their personal safety in the hands of others. 35

D. Passenger Rail Vulnerabilities

Attacks on passenger rail systems are likely to occur more frequently, and to become more deadly than those on airports and airplanes, because the security measures on the rail network have not kept pace with those in aviation. 36 For instance, airports extensively use passenger profiling, passenger screening, metal detectors, X-ray machines, explosives sniffers, hand searchers, and armed guards. 37 The employment of such security measures would conflict with the expectations of the average American rail passenger. The American rail passenger expects rail transportation to be inexpensive and fast. 38 These security measures would cause an increase in fares and longer travel times, which would likely lead to a substantial loss in ridership. 39

Unlike airports, passenger rail facilities rely on open architecture because it allows passengers more physical space and easier accessibility. 40 However, due to the recent growth of passenger rail ridership, 41 it is

38. Id. at 4-5.
39. Id. at 5.
40. GAO TESTIMONY, supra note 19, at 8.
questionable whether passenger rail facilities should continue to rely on open architecture. For two major reasons, open architecture makes passenger rail facilities more vulnerable to terrorist attacks. First, terrorists benefit by anonymity and easy escape. Second, open architecture prevents passenger rail facilities from employing certain security measures, such as the creation of “safe zones” through separation between check-in counters and departure gates at airports.42

The above factors weigh unfavorably against rail passenger transportation and create a potential target for terrorists to exploit. To summarize: (i) the high concentration of passengers provides terrorists with the opportunity to kill in quantity and indiscriminately; (ii) a terrorist attack on public transportation would result in profound psychological effects and economic disruption; and (iii) the impracticality of employing some aviation-style security measures makes rail transportation more vulnerable, thus affording terrorists another avenue to exploit.

E. Freight Rail Vulnerabilities

Unlike passenger rail systems, freight rail does not have a high concentration of passengers; however, “it does provide terrorists with some opportunities that passenger rail does not afford.”43 In particular, freight rail is used to transport large quantities of hazardous materials and dangerous cargoes.44 Nearly half of the hazardous materials shipped in the U.S. move by rail.45 Sometimes these freight trains travel through densely populated urban areas, which creates the potential for a very serious accident.46 For instance, the New York City area had two million tons of hazardous materials travel through it on freight cars in 2004.47 Tank cars of chlorine have routinely passed within four blocks of the Capitol.48 The breadth of the problem was highlighted in June of 2002, when the state of Nevada filed a federal civil action against the Department of Energy for failing to “address the environmental impacts and terrorism risks from tens of thousands of . . . rail . . . shipments of high-level radioactive waste through 44 states, 109 major cities and 703 counties with a combined pop-
ulation of 123 million.”

In July 2001, a railcar carrying noxious chemicals caught fire in the Howard Street Tunnel under downtown Baltimore. The fire disrupted freight rail movements throughout the East Coast, and damaged the underground infrastructure of downtown Baltimore. In January 2002, a freight train derailed outside Minot, North Dakota. The derailment caused five tanker cars to leak anhydrous ammonia; one man was killed and sixty-one people sought emergency care. Recently, in January 2005, a train derailment in Graniteville, South Carolina, caused chlorine gas to leak killing nine people, sending more than 500 to hospitals, and evacuating nearly 5,500 residents.

More than twenty-eight million freight car shipments haul everything from coal to children’s food. Tracks travel through every major city and within yards of the most important symbols of our country and tourist attractions. Although terrorists have not attacked a U.S. freight rail system, this could change. With terrorism a threat, railroads will face increasing pressure to divert hazardous cargoes from heavily populated areas.

PART III: STATUS OF U.S. RAIL TRANSPORTATION SECURITY EFFORTS

Before September 11, 2001, the United States focused its security


50. Tim Doulin, Rails Bring Danger to Town, But Threat Hard to Quantify, COLUMBUS DISPATCH, Jan. 20, 2005, at 1A.


52. Id.


54. Id. Anhydrous ammonia is particularly noxious. “It sucks the water right of your system . . . If your skin comes in contact, it causes a chemical burn. It freezes clothing to the body and sucks the moisture right out of your eyes, breathing system, bronchial tubes, anything that’s moist. It goes directly to those areas.” said Lt. Douglas Lockrem of Minot police. Id.

55. Gregory Richards, CSX To Reduce Train Movements in Jacksonville, Fla., During Super Bowl Week, FLORIDA TIMES-UNION, Jan. 20, 2005.


57. Id.
efforts almost exclusively on aircraft and airport facility protection. Since September 11th, the focus of America’s security efforts has continued to center on aviation. This has been true at the U.S. Department of Transportation ("DOT"), at the new Department of Homeland Security ("DHS"), and at the Transportation Security Administration ("TSA"), which has been transferred from DOT to DHS. This focus on aviation is somewhat understandable given the nature of the September 11 attacks.

Since September 11, however, passenger rail systems have conducted further drills, testing, and preparation for emergency situations. Railroad employees have been trained to look for unusual or suspicious activity and report it on toll-free hotlines. The Washington, D.C. subway system recently initiated a program for identifying suspicious packages. Some transportation systems are experimenting with chemical and biological detection systems, having been reminded by the sarin attacks in Tokyo that the next attack may not involve conventional weapons.

The March 2004 bombings of four commuter trains in Madrid were followed by the discoveries of bombs under railroad tracks in Spain and France, and by the recent intelligence reports that terrorists might try to bomb rail lines and buses in major U.S. cities. These developments suggest that the measures taken thus far to protect rail systems are insufficient, and that a greater degree of planning, preparation, and coordination between government and the rail industry in dealing with terrorism is imperative.

PART IV: THE IRA & THE UNITED KINGDOM

Only a few rail systems have been confronted with sustained terror campaigns; as a result, it has been difficult to evaluate the effects of rail

58. GAO Testimony, supra note 19, at I.
60. Waugh, supra note 13, at 307.
61. Id.
64. Riley, supra note 16, at 6.
65. Id.
66. Id.
67. In fact, a rough sketch of Grand Central Terminal was found on a laptop of a suspect in the Madrid Bombings. Robert Polner, Rocco Parascandola, & Wil Cruz, Sketchy Information; Kelly Says a 'Crude' Drawing of Grand Central Found in Spain was Withheld From the Public to Avoid a Scare, Newsday, Mar. 3, 2005, at A3.
security measures. The terrorist attacks of the Irish Republican Army (the “IRA”) on the United Kingdom’s rail facilities provide a good example of terrorist behavior and the value of security measures.

The IRA waged a twenty-five year terrorist campaign against London’s Underground and British railroads. Between 1991 and 1999, British transportation authorities had to deal with more than 6,000 bomb threats and had to inspect more than 9,000 suspicious objects. During the same period, the IRA planted eighty-one explosive devices.

The IRA terrorist campaign exploited simple security gaps of the United Kingdom’s rail facilities. For example, the IRA successfully exploited breaks in fences, poor lighting, and trash containers allowing the hiding of packages. These incidents led the United Kingdom to develop a broad security strategy. The security elements included:

- Repairing gaps in fencing to provide more control around the perimeter of rail facilities.
- Improving lighting, both to deter terrorists and to improve facility observation.
- Installing blast resistant trash containers to reduce the utility of placing bombs in trash containers.
- Installing close-circuit television to provide stationmasters and security personnel with better visibility throughout the facilities during emergencies.
- Training of personnel and passengers to have a role in security by reporting suspicious behavior, identifying suspicious packages and luggage, and improving readiness for evacuation and emergency actions.

Other methods used in the United Kingdom included covert testing of security measures, increased presence of armed security officers, and the use of public communication strategies to advise on threats, service disruptions and the availability of alternate routes and transportation methods.

No security measures will be perfect and completely end a terrorist

69. RILEY, supra note 16, at 7.
70. Paula Zahn Now, Defending America; America’s Railways Vulnerable? (CNN television broadcast, Jan. 17, 2005).
73. Id.
74. RILEY, supra note 16, at 7.
75. Id.
76. Id. at 8.
77. Id.
78. Id.
campaign. However, improved security measures can limit the effects of such a campaign. The security measures implemented by the United Kingdom forced terrorists to retreat to more remote targets. Moreover, improved training for rail employees resulted in prompt and well-planned responses, which avoided needless casualties. Overall, the United Kingdom's security measures resulted in very low casualties and disruptions were at a tolerable minimum. One lesson taken from the United Kingdom's experience with the IRA's bombing campaign is that we need to be more proactive to stop terrorism on rail transportation rather than reactive, waiting for an attack to occur. One such proactive approach is reflected in PREEMPT, which will be discussed in detail below.

PART V: SUMMARY OF PREEMPT

On June 17, 2004, U.S. Representatives Don Young, Jack Quinn, and Jon Porter introduced PREEMPT as a legislative vehicle for expanding and improving anti-terrorist security programs for passenger railroad and freight rail systems. PREEMPT would provide the resources both to harden our nation's rail system against the possibility of terrorist attack and to improve our ability to recover from such an incident.

PREEMPT would provide in excess of $1 billion in new money, including more than $600 million to improve the safety of critical rail tunnels used by commuter railroads and Amtrak. PREEMPT would also require the development of a coordinated comprehensive security plan between the DOT and Homeland Security. Other provisions for the enhancement of railroad security address the following areas:

- Automated security inspection;
- Emergency bridge repair and replacement technology and testing;
- Establishment of a unified railroad emergency operations center;
- Security and redundancy for critical communications, electric power (in-
eluding traction power), computer, and train control systems essential for secure railroad operations or to continue railroad operations after an attack impacting railroad operations;

- The security of hazardous material transportation by railroad;
- Secure passenger railroad stations, trains, and infrastructure;
- Public security awareness campaigns for passenger train operations;
- The sharing of intelligence and information about railroad security threats;
- Additional police and security officers, including canine unity.90

The most important feature of the bill is that the rail industry played a large role in writing PREEMPT.91 As Representative Porter stated, “What you find in this bill, the bulk of it, is written by the industry who understands the needs.”92

PART VI: POTENTIAL IMPACT OF THE BILL

The September 11th attacks have proven that terrorists have learned to attack areas of particular vulnerability while avoiding those that are more protected and predictable.93 Therefore, because aviation is now more protected and predictable, it is more likely that terrorists will target the vulnerable rail transportation system. Lack of funding is the primary reason for the vulnerabilities of the rail transportation system.94 PREEMPT would provide the rail transportation system with funding to better identify terrorist attacks at the earliest stages, and also would require creation of a coordinated federal policy on rail security.

A. IDENTIFYING AN ATTACK

Identifying an attack in its early stages can be pivotal to limiting casualties and contamination. The same techniques can also assist in recognizing hoaxes, thereby reducing unnecessary shutdowns and

90. Id.
92. Id.

Every day, more than 14 million people use mass transit compared with 1.8 million daily air passengers and 63,000 Amtrak passengers. However, in fiscal 2002 and 2003, mass transit received only $115 million for transit security grants compared to the $11 billion in federal money spent on aviation security, according to the [Transportation] committee.

Id.
disruptions. PREEMPT would provide rail facilities with the necessary funding to install chemical or biological detectors. Chemical and biological detectors can alert public health authorities to the release of dangerous pathogens that otherwise might not become apparent for days (i.e., until symptoms developed and medical diagnosis was confirmed). The Washington, D.C., Metro recently installed chemical and biological detectors. Moreover, the TSA has conducted test programs at passenger train stations, such as New Carrollton Maryland, to screen passengers for explosive residue. Overall, these detectors are useful for detecting potential terrorist attacks and natural outbreaks of disease, and could be implemented more broadly through PREEMPT.

As noted earlier, Amtrak and other major commuter rail carriers have implemented several new measures to ensure passengers' safety and security. "Most of [these measures have] been accomplished without any direct financial assistance from the federal government." Representative Quinn has stated. "This effort is commendable, but we have to do more."

Among other things, PREEMPT would provide the necessary funding for rail security authorities to develop simulation exercises for administrative and response personnel. For example, The Metropolitan Atlanta Rapid Transit Authority ("MARTA") is one rail transit agency that had an extensive security program before September 11; this was due to its hosting of the 1996 Olympic games. MARTA conducted numerous simulation exercises prior to the Olympics, including a simulation held at the civic center that focused on a takeover of a train with hostages. Such simulations of terrorist attacks will help refine the rail transportation response time, and will keep skills and response plans sharp and up-

95. Jenkins, supra note 12, at 3.
96. Id. But see Eric A. Posner, Fear and the Regulatory Model of Counterterrorism, 25 Harv. J.L. & Pub. Pol'y 681, 689 (2002) ("Some authors argue that governments aggravate the risks of panic by taking visible or unusual steps to combat the underlying risks of harm. Individuals are more likely to panic if they see government agents wearing protective suits, or chemical weapons detectors in subway stations.").
97. Jenkins, supra note 12, at 3.
98. Goo, supra note 63, at A5 ("The passenger screening program at New Carrollton was completed . . . and TSA officials say they plan to use explosive detection machines at rail stations only during major public events, such as the inauguration earlier this month.").
101. Id.
102. Id.
103. Dunham, supra note 6.
104. Id.
Moreover, they will help security authorities assess preparedness and identify the most vulnerable areas for attack.

PREEMPT also would provide the rail transportation the funding to install better surveillance technology. Improved surveillance can alert security of suspicious activities or abandoned bags. For instance, in a test, it took more than thirty minutes for security personnel to notice an abandoned bag left in clear view in a New York train station. Likewise, improved surveillance can alert authorities to a vehicle parked on a rail tracks. In addition, PREEMPT could help equip all rail transit facilities with closed-circuit television monitors, which would improve a facility's visibility and, thus, its security. Finally, PREEMPT would increase funding for security officers, including canine units, to patrol train facilities and trains. An increase in security presence would help identify suspicious activity and abandoned parcels and ultimately, deter terrorists from attacking vulnerable areas.

As in the United Kingdom's response to the IRA bombings, rail transportation needs to perform active maintenance facility security. Many of the existing rail facilities are old and lack the necessary components of adequate security. PREEMPT would permit funding to repair fencing and force terrorists to more remote areas. Moreover, improved lighting would deter terrorists and improve rail facility observation.

PREEMPT would identify security weaknesses for freight rail as well. As noted earlier, freight rail is a concern because it is used to transport hazardous materials and dangerous cargoes. An estimated forty percent of inter-city freight, including half of the nation's hazardous materials moves by rail. PREEMPT would fund technologies such as automated freight car inspection, and surveillance. In addition, with increased funding, freight rail transportation could invest in improved railcar design, which could reduce the release of hazardous materials following a terrorist attack.

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106. Id.
107. Paula Zahn Now, supra note 70. But see Terrorism: Q & A, supra note 105. ("[I]n the United Kingdom . . . police are confident that unattended packages will be reported within minutes, giving authorities early warning to thwart possible attacks.").
108. Goo, supra note 63, at A5. ("[A] suicidal man who parked his vehicle on the tracks in California, caused a multi-train accident, killing 11 and injuring 200.").
109. PREEMPT, supra note 4.
110. Keane, supra note 91.
111. GAO Testimony, supra note 19, at 1.
112. Mosquera, supra note 5.
B. NEED FOR COORDINATED FEDERAL POLICY

Coordinated federal policy on security is necessary for protection of America's rail systems, including freight, passenger and commuter services.\textsuperscript{113} Compared to other sectors in transportation, decision-making for rail systems appears decentralized among a number of federal, state, local, and private stakeholders.\textsuperscript{114} As it stands, the roles and responsibilities of DHS and DOT could create the potential for duplicating or conflicting efforts as both entities work to enhance security.\textsuperscript{115}

PREEMPT would require DHS and DOT to delineate each department's railroad security roles and responsibilities.\textsuperscript{116} In particular, DHS and DOT would be required to enter into a memorandum of understanding within 180 days after the date of enactment to clearly establish their respective rail transportation security roles.\textsuperscript{117} Furthermore, a coordinated rail security plan would be required to identify the vulnerabilities of rail assets and infrastructure.\textsuperscript{118} In addition, PREEMPT would require DHS and DOT to develop a contingency plan to keep the rail system operational after a terrorist attack.\textsuperscript{119} Finally, a coordinated approach would allow the two agencies to share intelligence and information about railroad security threats.\textsuperscript{120} This could be accomplished through PREEMPT's provision for a unified railroad emergency operations center.\textsuperscript{121}

PART VII: CONCLUSION

Americans have been told to expect the worst: a terrorist attack is probably coming; it may be terrible.\textsuperscript{122} Since September 11, the federal government has focused on aviation security.\textsuperscript{123} However, terrorist attacks around the world, such as the recent terrorist attack in Spain, have shown that rail systems, like all modes of transportation, are potential targets of attack.\textsuperscript{124} No security system for passenger and freight rail will be perfect.\textsuperscript{125} Nonetheless, as the United Kingdom's experience with the

\textsuperscript{113} Riley, supra note 16, at 10.
\textsuperscript{114} Id.
\textsuperscript{115} GAO Testimony, supra note 19, at 2-3.
\textsuperscript{116} Keane, supra note 91.
\textsuperscript{117} PREEMPT, supra note 4.
\textsuperscript{118} Keane, supra note 91.
\textsuperscript{119} Id.
\textsuperscript{120} PREEMPT, supra note 4.
\textsuperscript{121} Id.
\textsuperscript{123} GAO Testimony, supra note 19, at 1.
\textsuperscript{124} Id.
\textsuperscript{125} Riley, supra note 16, at 10.
IRA demonstrates, we can and should take proactive steps to secure our rail transportation system.

Even without major direct federal assistance, Amtrak and other large commuter rail carriers have acted to enhance security. However, more work is needed and more work requires more money. The passage of PREEMPT would provide the rail system with $1 billion in new money for security purposes. This financial commitment would be accompanied by a much-needed coordinated security plan between DHS and DOT. In addition, PREEMPT would provide funding to develop better methods for detecting and identifying a potential attack, such as improved surveillance and better-trained personnel. Moreover, simulation exercises could help identify vulnerabilities to attack and keep rail systems operational after an attack.

126. GAO Testimony, supra note 19, at 6.
127. T&I Leaders Introduce PREEMPT, supra note 86.
Doomed to Repeat the Past: How the TSA Is Picking Up Where the FAA Left Off

Gregory Robert Schroer*

I. Introduction

From the Federal Aviation Administration ("FAA") to the current Transportation Security Administration ("TSA"), aviation security has been riddled with problems.¹ This paper will focus on the similarities of the issues that plagued the FAA and are plaguing the TSA.² By taking note of the mishandling of security in years past and avoiding the hard lessons the FAA had to learn, the TSA can provide the much needed security, within budgetary constraints, in a manner that strengthens our nation's economy.

September 11th was not the dawn of terrorism. Hijackings have been a factor in airline security since the 1960s.³ The FAA tried many times to repair aviation security to avoid these tragic events.⁴ But the overreaching problem with the FAA was its implementation of security programs.⁵

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* J.D. Candidate 2005, University of Denver, Sturm College of Law.
2. Id.
3. See United States v. Fannon, 556 F.2d 961 (9th Cir. 1977).
Another serious problem with the FAA was its budgetary policy. There was a lack of funds, overspending, and an over reliance on airlines.

By the 1990s President George H. Bush formed a Commission to investigate the inner workings of the FAA. The report card came back as a solid "F." The Commission found research and development was not properly used and that there was a severe lack of coordination and organization. Within the FAA, employees were discontent and aviation security was in jeopardy.

After September 11th, the TSA picked up where the FAA left off. Due to the rush in which the TSA was established, many of the FAA's problems were not addressed and are therefore being repeated. The overspending continues and even more money is being proposed. Airlines and passengers are still picking up the shortage to the extreme detriment of our economy. The lack of budgetary restraint and an unorganized research and development ("R&D") department still exists so research and development projects can't take off. And finally, employees are still as discontent as they were many years ago.

The good news is that there is a solution. After analyzing the major issues that hamper aviation security, this paper will address solutions that can give the TSA a solid foundation, fiscal responsibility, and an eager

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12. See Murphy, supra note 1, at 916-17.
13. Id. at 924-25.
14. DOT IG Cites Lack of TSA Cost Controls for $3 Billion Overrun, 45 GOVT CONTRACTOR 60 (Feb. 12, 2003) [hereinafter Lack of TSA Cost Controls].
16. TSA and DHS Need to Improve R&D Management, 46 GOVT CONTRACTOR 418 (Oct. 27, 2004) [hereinafter TSA to Improve R&D].
and loyal workforce. By remembering the past the TSA can avoid repeating it . . . anymore.

II. FEDERAL AVIATION ADMINISTRATION

In 1958, Congress enacted the Federal Aviation Act.18 Under this legislation the FAA was established and given the power to take action and proscribe regulations to ensure the safety of air passengers and cargo.19 This power also includes the responsibility of protecting passengers and guarding against violence and piracy.20 Airline violence, hijacking, and terrorism are not 21st century inventions.21 Many may look at the horrifying events of September 11, 2001 and conclude that our government had never considered the possibility of an airline hijacking. Furthermore, many may also conclude that the current Bush administration is giving the first wholehearted effort to protect us as we travel through the air.22 The truth is Congress addressed “terrorism” over 40 years ago.23 And along the same lines, airline violence and terrorism has a history that dates back to the beginning of commercial aviation.24 This section will explore how the FAA dealt with airline security breaches and how these reactions have laid the foundation for the current TSA.

A. THE EARLY HISTORY OF THE FAA

Soon after the passage of the Federal Aviation Act security breaches and airline hijackings were on the rise.25 Airline hijackings were extremely high from 1968-1969.26 Following these numerous hijackings, the FAA responded by forming a special task force.27 “The FAA Task Force [“Task Force”] proposed the initial anti-hijacking system which involved notices to the public, the use of hijacker detection system magnetome-
ters,\textsuperscript{28} and searches of any individual activating the magnetometer.\textsuperscript{29} The problem with this new system was not the system itself, but its implementation.\textsuperscript{30} The Task Force left the system in the hands of the individual airlines.\textsuperscript{31} This attempt at curbing hijackings turned out to be dreadfully unsuccessful.\textsuperscript{32}

At this point, in the early 1970s, Congress stepped in and put some more muscle behind the Federal Aviation Act.\textsuperscript{33} This strengthening came in the form of the Anti-hijacking Act of 1974.\textsuperscript{34} This Anti-hijacking Act imposed penalties on skyjackers and "empower[ed] the President to suspend air service to any nation that permits the use of its territory as a base of operation or refuge for a terrorist organization. . ."\textsuperscript{35} These new and improved hijacking laws helped to reduce the number of hijackings in the 1970s.\textsuperscript{36} But, hijacking still continued in many areas of the world.\textsuperscript{37}

\section*{B. The 1980s -- Pan Am Flight 103}

Although the 1970s may have shown a relative slowing of hijackings, the early 1980s was certainly a decade where hijackings were back on the

\begin{thebibliography}{99}
\bibitem{28} A magnetometer is an instrument used to measure the strength and sometimes the direction of magnetic fields . . . Magnetometers are also used to calibrate electromagnets and permanent magnets and to determine the magnetization of materials. \textit{Encyclopædia Britannica Online}, Magnetometer (2005), \textit{available at} \url{http://www.britannica.com/eb/article?tocId=9050040&query=magnetometer&ct= last visited May 29, 2005}.

\bibitem{29} Rogers, \textit{supra} note 5, at 506 (citing U.S. v. Davis, 482 F.2d 893, 898 (1973)). Under the old system, passengers who fit the profile and activated the magnetometer were subject to questioning. Under the new anti-hijacking system, passengers who fit the profile and activated the magnetometer were asked to empty their pockets and go through the machine again. If the machine was set off again, the passenger could be searched for weapons and have their carry-on bags searched. Rogers, \textit{supra} note 5, at 898 n.29.

\bibitem{30} \textit{Id.} at 506-07.

\bibitem{31} \textit{Id.}

\bibitem{32} Choi, \textit{supra} note 27, at 24. In 1969, there were forty attempted hijackings. From 1970 to 1971 there were twenty-seven hijacking attempts. In 1972, there were thirty-one hijacking attempts.

\bibitem{33} Krause, \textit{supra} note 21, at 234 n.13.


\bibitem{36} Krause, \textit{supra} note 21, at 237-38. Hijacking is the "forcible seizure of any vehicle while in transit in order to commit robbery, extort money, kidnap passengers, or carry out other crimes." \textit{Encyclopædia Britannica Online}, Hijacking (2005), \textit{available at} \url{http://encarta.msn.com/encyclopedia_7-61578496/Hijacking.html}.

\bibitem{37} For example, in 1976, an Air France plane was forced into Uganda. Once in Uganda, Israeli commandos freed the passengers. In 1977 a Lufthansa plane was hijacked and forced into Somalia. The pilot was killed and eighty-six hostages were released. Krause, \textit{supra} note 21, at 237.
\end{thebibliography}
rise.\textsuperscript{38} One of the reasons these “terrorist” were becoming more effective during the 1980s is because there was a shift in the way they chose to threaten aviation.\textsuperscript{39} The culprits in these hijacking schemes were unable to bring metallic weapons on the airplanes.\textsuperscript{40} Therefore, the “hijackers began to utilize small quantities of gasoline or explosives which were undetectable to traditional magnetometers.”\textsuperscript{41} Throughout aviation history, terrorist have always found new ways of causing terror.\textsuperscript{42} The FAA was unable to keep up with these changes, technologically or financially.

The FAA was not given adequate resources to deal with these hijackings, so the misappropriation of funds was the chosen solution.\textsuperscript{43} Since the early 1970’s fuel taxes, cargo taxes, and an 8% surcharge on passenger tickets have been used to finance capital improvement projects.\textsuperscript{44} The Airport and Airway Improvement Act of 1982 dictated how these funds would be allocated.\textsuperscript{45} By amending section 506 of this act, the Airport Technology and Research Act (“ATRA”) wanted to increase the FAA budget by $8 million for research and engineering.\textsuperscript{46} The total budget had proposed to give the FAA $16 million for “research on, and evaluation of aviation and airport security projects . . . not all of them capital improvement projects.”\textsuperscript{47} The effect of these efforts was that the trust fund money was used to fund security projects and not capital improvement as designed.\textsuperscript{48} It is these types of antics that caused problems in passing the Aviation Security Act.\textsuperscript{49}

C. The President’s Commission on Aviation Security and Terrorism

In 1988, the unforgettable explosion of Pan Am flight 103 took the
lives of over 250 passengers and flight crew members. This tragic event spurred the family members of the deceased to form a group ("Victims of Pan Am Flight 103") that would put pressure on the Bush Administration to tighten airport security to ensure these catastrophes would never happen again. The President heard the cries of the victim's group and formed a Commission to look into aviation security.

The report that the Commission brought back to the President was nothing less than detailed analysis of the FAA's shortcomings. The Commission quickly pointed out how the bombing of flight 103 could and should "have been prevented." The Commission stated that the FAA had insufficiencies in practically every area they oversaw. Sixty-four recommendations were proposed to improve the FAA's system of aviation security. One of the main recommendations dealt with the lack of priority the FAA gives to aviation security.

The FAA's handling of research and development also fell under severe scrutiny. The Commission believed there was too much effort being pumped into thermal neutron analysis ("TNA"). TNA technology is capable of finding baggage that contains plastic explosives. One the one

50. Id. at 413. Pan Am Flight 103 was headed to Kennedy Airport in New York from Heathrow Airport in London. Once over Lockerbie, Scotland the plane exploded. Investigations were done by West German, British, Scottish, and American authorities. They determined the bomb was made near Damascus or by the Popular Front for the Liberation of Palestine-General Command (PFLP-GC). Id. at 414-15.
51. Id. at 420.
52. Executive Order, supra note 8, at 32,629.
54. Id.
55. Id. For example some of the shortcomings the Commission noted: "[t]he gathering, assessment, and dissemination of intelligence; the Federal Government's oversight of airline and airport activities; counterterrorism research and development; our Government's response to tragedies; and in the area of negotiations and agreements with foreign governments. . . ."
56. Id.
57. Id. The Commission noted that the security functions were "buried deep within the FAA" and the Secretary of Transportation and Administrator were isolated from these functions.
58. Id.
59. Id.
60. Presidential Commission Report, supra note 9. The commission was hesitant to endorse TNA technology because of its operating problems and the fact that TNA technology "cannot detect plastic explosives in small quantities; quantities that are still large enough to destroy and airliner."
hand, the Commission found that the presence of TNA will give the traveling public the impression of increased security, but on the other, "the level of assurance is slim, at best." 61

Another key issue that the Commission addressed was the "lack of coordination and communication between the State department, the FAA, and the American intelligence gathering community." 62 The Commission proposed many changes to improve the organizational structure of the FAA. 63 The lack of organization in the FAA could be characterized as its greatest problem. 64 Everyone involved with the airline industry seems to have a hand involved in aviation security. 65 With this discombobulated security system there are numerous airline employees with no stake in security and numerous accesses to secure areas that are "shot through with loopholes." 66

With the lack of coordination came the lack of agreement on who would fund the ever increasing cost of aviation security. 67 The FAA itself had no proposals for funding changes even though the cost of aviation security was at $3 billion. 68 Passenger charges and other user fees seemed to be the scapegoat for anyone funding security. 69

Finally, the discontentment of security personnel was a major issue that plagued the FAA. 70 A GAO report in 2000 noted the FAA was unhappy with the performance of security forces and characterized the personnel as "unsatisfactory." 71 Furthermore, performance tests by screeners were declining at an alarming rate when the tests accurately depicted "how a terrorist might seek to enter a checkpoint." 72 The reasons the FAA screeners were performing poorly are the same reasons the TSA screeners are performing poorly - "monotonous and repetitive

61. Id.
62. Strantz, supra note 6, at 464. Within the FAA, efforts were being duplicated and the system was holding no one accountable. Id.
63. Id. at 465. Two of the more prominent recommendations were that an Assistant Secretary for Aviation Security and Intelligence should be appointed by the Transportation Secretary and that "the executive heading the FAA aviation security operational function report directly to the FAA Administrator." Id. Furthermore, the Commission wanted the FAA's Office of Civil Aviation Security moved to the Department of Transportation. Id.
64. Poole, supra note 10.
65. Id. The FAA, airport operators, and the airlines themselves all hold joint responsibility for airport and airline security.
66. Id. The airlines control the passenger security checkpoints themselves. The contractors they hire do relatively boring and repetitive work and often get paid only minimum wage. The turnover rate for employees in these positions is over 100% a year. Id.
68. Id.
69. Id.
70. Wilde, supra note 11, at 19.
71. Id.
72. Id.
work, heaped onto a poor salary and lame benefits. . . .”73 And just like our modern TSA, the results are the same. There was a high turnover rate, unnecessary screening mistakes, and greater risks to travelers.74 The solution was the same then as it is now; better coordination, better training, and listening to employees who know the job and why the system is ineffective; working together to improve aviation security.75

D. Security in a Post-9/11 World

As we move into a post 9/11 world, it is helpful to analyze the issues that plagued the FAA throughout its forty-year life. As we examine these issues we will see the similarities in the problems that the FAA and the Transportation Security Administration have had and will have to face. In the 1960s a task force was created to combat terrorism.76 This task force was unsuccessful.77 With the passage of the Anti-hijacking Act of 1974, there was some curtailing of hijacking for the remainder of the decade.78 But a real in-depth view of the FAA was provided in the late 1980s by the President’s Commission on Aviation Security and Terrorism.79 In the Commission report we see how the problems with the FAA are similar to the problems facing the TSA.80 Some similarities include research and development, organization, working with other agencies, and budgetary constraints. Hopefully the TSA can use these lessons of the past to shed light on our current state of aviation security and provide meaningful solutions to very important issues.

III. Transportation Security Administration “TSA”

A. The TSA, Picking Up Where the FAA Left Off

After the tragic events of September 11th there was a deafening public outcry for aviation security.81 In haste, the TSA was established and given extremely broad powers over all aspects of airline security.82 To the onlooker, the TSA was seen as a new start, a clean slate after the failings of the FAA.83 Yes, the FAA did have many problems, but due to the rush

73. Wilde, supra note 11, at 19.
74. Id.
76. See Rogers, supra note 5, at 506.
77. Id.
78. Krause, supra note 21, at 237-38.
79. Executive Order, supra note 8, at 32,629.
80. Id.
81. See Krause, supra note 21, at 243-44.
82. Id. at 244.
83. Wilde, supra note 11, at 19.
to get a new agency in place, the TSA has inherited many of the same troublng issues.\textsuperscript{84} With that in mind, maybe the TSA can learn a few lessons from the mistakes of the past.

The FAA subsidized their spending by taxing passengers and airlines.\textsuperscript{85} The newly formed TSA has done the same. Both agencies have seen the ramifications this policy has on our economy. Secondly, both agencies were given the opportunity to pursue research and development projects which could greatly increase the likelihood of preventing terrorist activity.\textsuperscript{86} But, without a structured organization and without putting resources in the proper areas of development, the benefits of these technologies cannot be realized in the near future, and maybe not at all.\textsuperscript{87} Finally, the rush in hiring thousands of TSA employees has created employee discontent the FAA knows all too much about. Turnover rates are high and employee morale is low.\textsuperscript{88} Addressing these employee concerns is imperative to aviation security.\textsuperscript{89}

B. The Enactment of the TSA

In the pre-9/11 aviation world, passengers were mainly concerned with on-time flights, getting their baggage, and hoping their hotel reservations were correct.\textsuperscript{90} After the attacks of 9/11 the mood in all areas of the aviation process was changed and passengers had new concerns with respect to flying.\textsuperscript{91} This “change in atmosphere” echoed the cries for the federal government to take a more active role in aviation security.\textsuperscript{92}

President George W. Bush signed the Aviation and Transportation Security Act (“ATSA”) into law on November 19, 2001.\textsuperscript{93} Under this new Act, the Transportation Security Administration was established “within the Department of Transportation.”\textsuperscript{94} The TSA was formed to secure passengers and “ensur[e] the freedom of movement for people.”\textsuperscript{95}

\textsuperscript{84} Murphy, \textit{supra} note 1, at 924-25.
\textsuperscript{85} See GAO \textit{Aviation Security Report}, \textit{supra} note 7, at 5.
\textsuperscript{86} \textit{TSA to Improve R&D}, \textit{supra} note 16.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} Wilde, \textit{supra} note 11, at 19.
\textsuperscript{89} See Krause, \textit{supra} note 21, at 247.
\textsuperscript{90} \textit{Id.} at 243. Many airlines did not spend time searching the checked baggage. Passengers were allowed to pass through security with weapons and forged identification with relative ease. While on the plane passengers rarely questioned anyone who was sitting around them. \textit{Id.}
\textsuperscript{91} \textit{Id.} For an extended period after September 11th armed personnel with saturating airports. Everyone was scrutinized by passengers, guards, and the flight crews. \textit{Id.}
\textsuperscript{92} \textit{Id.} at 244.
\textsuperscript{94} Aviation and Transportation Security Act § 114(a).
\textsuperscript{95} Transportation Security Administration, \textit{supra} note 93.
The TSA was given broad powers to ensure aviation security.\textsuperscript{96} The Under Secretary was responsible for all aspects of security personnel.\textsuperscript{97} Additional duties and responsibilities include gathering intelligence information, accessing threats, consulting with other governmental agencies, and research and development.\textsuperscript{98} Another area where the TSA is given powerful authority is in the event of a national emergency.\textsuperscript{99} In the event of a national emergency the Under Secretary is to coordinate all aspects of transportation and provide notice to the other governmental agencies.\textsuperscript{100}

Why was the TSA given such huge duties and responsibilities? Why was the FAA practically stripped of all meaningful purpose? The answer is clear. The FAA was slow in putting security measures to work and the measures were ineffective when they were finally implemented.\textsuperscript{101} Avia-

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\textsuperscript{97} § 114(d). See also
\textsuperscript{98} Screening operations.—The Under Secretary shall—
\textsuperscript{99} (1) be responsible for day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation under sections 44901 and 44935.
\textsuperscript{100} (2) develop standards for the hiring and retention of security screening personnel;
\textsuperscript{101} (3) train and test security personnel; and
\textsuperscript{102} (4) be responsible for hiring and training personnel to provide security screening at all airports in the United States where screening is required under section 44901, in consultation with the Secretary of Transportation and the heads of other appropriate Federal agencies and departments.
\textsuperscript{96} § 114(e).
\textsuperscript{97} § 114(f).
\textsuperscript{98} § 114(g).
\textsuperscript{99} § 114(g)(1)(C)
\textsuperscript{100} (g) National emergency responsibilities.—
\textsuperscript{101} (1) In general.—Subject to the direction and control of the Secretary, the Under Secretary, during a national emergency, shall have the following responsibilities:
\textsuperscript{102} (A) To coordinate domestic transportation, including aviation, rail, and other surface transportation, and maritime transportation (including port security).
\textsuperscript{103} (B) To coordinate and oversee the transportation-related responsibilities of other departments and agencies of the Federal Government other than the Department of Defense and the military departments.
\textsuperscript{104} (C) To coordinate and provide notice to other departments and agencies of the Federal Government, and appropriate agencies of State and local governments, including departments and agencies for transportation, law enforcement, and border control, about threats to transportation.
\textsuperscript{96} § 114(g)(1).
\textsuperscript{97} Dempsey, supra note 35, at 714.
\textsuperscript{98} The FAA had also missed congressionally-imposed deadlines for: installing explosive-detection equipment; certifying screening companies; promulgating regulatory requirements on standards for testing and training screeners; and implementing airport security technology. The FAA was criticized in various quarters as having a culture that was: “in a time warp”; “resistant to change, defensive and turf-conscious”; “secretive rather that open; self-interested rather than public spirited and highly resistant to change”; “characterized by dysfunctional management”; and “a self-perpetuating bureaucratic
tion security, again, had brought itself to the forefront, the FAA was viewed as more untrustworthy than ever, and drastic measures had to be taken.\textsuperscript{102}

C. Budgetary Concerns

In a perfect world the TSA would be able to provide increased security at a reasonable price. Our world of course is not a perfect one. For the past 40 years the FAA has been unable to provide adequate security within its budgetary constraints.\textsuperscript{103} Now, the newly formed TSA is experiencing the same problems.\textsuperscript{104} And, just like the FAA, the TSA is trying to subsidize the burden by taxing an already struggling airline industry.\textsuperscript{105}

The airline industry as a whole, in its entire history, has never turned a profit.\textsuperscript{106} Logic would dictate that taxing the airlines more would not turn this unfortunate state of affairs around. The new aviation security administration is not concerned.\textsuperscript{107} The TSA is already more “costly and intrusive” than the FAA ever was.\textsuperscript{108} On top of that, the airlines and the airline consumer are being forced to pitch in to cover the shortage.\textsuperscript{109} Aside from the failing airline industry, the TSA is being pushed by the public at large and elementary economic principles to “oversupply” security services.\textsuperscript{110} These factors are driving the airline industry further

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{102} See id. at 714.
\item\textsuperscript{103} See GAO Aviation Security Report, supra note 7, at 5.
\item\textsuperscript{104} Lack of TSA Cost Controls, supra note 14.
\item\textsuperscript{105} See generally Jet Blue, supra note 17.
\item\textsuperscript{106} Taken from Professor Robert Hardaway, Transportation Law Class, University of Denver, Sturm College of Law (Jan. 24, 2005).
\item\textsuperscript{107} See Dempsey, supra note 35, at 722.
\item\textsuperscript{109} 49 U.S.C. § 44940(2).
\begin{enumerate}
\item Air carrier fees.—
\begin{quote}
Authority.—[O]nly to the extent that the Under Secretary estimates that such fee will be insufficient to pay for the costs of providing civil aviation security services, . . . , the Under Secretary may impose a fee on air carriers and foreign air carriers engaged in air transportation and intrastate air transportation to pay for the difference between any such costs and the amount collected from such fee. . .
\end{quote}
“Various fees and taxes now consume $44 of a $100 airline ticket.” Dempsey, supra note 35, at 722.
\end{enumerate}
\item\textsuperscript{110} Coughlin, Cohen, & Khan, supra note 108, at 27-29. Considering the recent memories of September 11th the public will opt for too much security as opposed to too little. The TSA is operating in a monopolistic manner. It is argued that private firms could provide the same ser-
\end{enumerate}
\end{footnotesize}
down.111 Immediately after the September 11th attacks there were fewer passengers in the air.112 In the past two years passengers have become relatively more comfortable with aviation and demand for flights is rising.113 This may sound like good news for airlines, but the fact is with more planes in the air, the more the airlines are taxed, and the more other areas of aviation go unattended.114

When you bear down on the airline industry and require them to shoulder a high tax burden, the consequences are seemingly endless.115 The airline industry is one of the hardest hit sectors.116 Smaller airports cannot continue to provide services under this tax scheme.117 The fact of the matter is that the aviation industry is one of the backbones to our nation’s economy.118 When you put a hamper on airline travel: businesspeople, their businesses, consumers traveling for pleasure, and the services that are dependent upon them all suffer greatly.119 To continue this trend could have lasting, detrimental effects on all aspects of our nation’s economy.

In February of 2002, Congress stripped the FAA of civil aviation security responsibility.120 Once the TSA took over this task the wasteful overspending continued. In its first year the TSA was caught over spending the budget by over $3 million.121 The shortfall is attributed to the lack of revenues from the airline and passenger taxes.122 To compensate for

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111. See Dempsey, supra note 35, at 722.
112. See Jet Blue, supra note 17.
113. Id.
114. Id. The aviation infrastructure is seeing no improvements. Air traffic control, runways, and airport slots are basically in the same condition as they were in the pre-9/11 era.
116. Id. For the year 2005, the ATA has predicted the industry will lose $5 billion. The tax increase would raise this loss to $6.5 billion. Id.
117. Id. “Regional airlines provide the only air service for 72 percent of U.S. cities. The propose tax increases will make it even harder to continue to fly to many of these small- and medium-sized communities.” Id. (quoting Deborah McElroy, President of the Regional Airline Association).
118. See generally id.
119. Id. Industries that will be directly hit will be “hotels, attractions, resorts, car rental firms and other travel industry companies...” Id. (quoting Roger Dow, president and CEO of Travel Industry Association of America (TIA)).
120. Wilde, supra note 11, at 19.
121. Lack of TSA Cost Controls, supra note 14.
122. Id.
these shortages, the TSA had to over rely on contractors. With no stable infrastructure and a lack of control, the TSA had no way to monitor the $8 billion worth of contracts that were spiraling out of control. Once a proper infrastructure is established these contracts can be monitored and the TSA can begin to appreciate economies of scale in the consolidation of personnel and facilities.

The Department of Homeland Security, the overseer of the TSA, requested over $40 billion for the fiscal year 2005. This increase marks a 10% budget increase from 2004 and a substantial increase from the department’s inception in 2003. Under the “2006 budget proposal” the TSA itself could go through new hardships. If the new cuts are implemented by the administration, the TSA could be left with nothing to do but supervise security screeners. The Bush Administration is hoping to consolidate some of the programs and divisions of the TSA into a “Screening Coordination and Operations” office. The question is whether these consolidations will really bring the needed organization or will it cause more problems than we started with. Serious concerns are being raised with respect to privacy. Concerned lobbyists and citizens alike have noted this type of database would create a “national surveillance system.” These changes also bring back the old concern that the

123. Id.
124. Id. Department of Transportation Inspector General Kenneth M. Mead testified before the Senate Committee on Commerce, Science, and Transportation’s Aviation Subcommittee. General Mead gave as an example that a “contract with an initial cost estimate of $104 million” ballooned to about $700 million due to improper oversight. Id.
125. Id. Mead further testified “that economies of scale could be realized through: (1) centralized administration services, (2) consolidation of airport space, and (3) conservative use of law enforcement personnel.” Centralization would enable the TSA to provide cost controls and cut unnecessary staff. Most airports already have break rooms, offices, and other spaces used by INS and Customs which could be utilized for this purpose. Id.
127. Id.
129. Id.
130. Id. “The office would oversee records on millions of Americans and foreigners in vast databases that contain digital fingerprints and photographs, eye scans and personal information from travelers and transportation workers. The move is meant to prevent overlap among the various programs now scattered across the department and improve efficiency.” Id.
131. Id.
132. Id. “This confirms our worst fears that DHS will become a one-stop shop for background checks on a wide variety of Americans, ranging from airline passengers to train travelers to workers in a variety of industries.” (Id. (quoting Barry Steinhardt, Director of the Technology and Liberty Program at the American Civil Liberties Union)).
TSA will become diluted and eventually swallowed up by other divisions of the Department of Homeland Security ("DHS").

The TSA’s financial plan can be described as a lose-lose situation. The TSA gets it’s funding from two places: Congress and airlines. As we have seen the airline industry is not turning a profit and being hit hard by economic forces. At the rate we are going, security fees will make it too expensive for anyone to travel. Depending on Congress is not a stable choice either. With economic hard times like we were in, and which we will be in again, government programs get cut due to a decrease in tax revenues.

D. RESEARCH AND DEVELOPMENT

When the TSA was established it was given the authority to review, examine, and implement technologies that would better secure the aviation industry. This new power included taking a hard look at existing procedures and the further research and development of new technologies. The TSA was appropriated $50 million, for 2002-2006, to carry out this venture. Because of the new threats experienced by the attacks of September 11th, a variety of new technologies had to be considered to prevent these tragic events from happening again. Along with these, another $20 million was given to the form of grants "in conjunction with the Defense Advanced Research Projects Agency." One area these

133. Id.
134. ATA Press Release, supra note 115.
136. Id.
137. Id.
139. § 44903(j)(1).
(A) review the effectiveness of biometrics systems currently in use at several United States airports, including San Francisco International;
(B) review the effectiveness of increased surveillance at access points;
(C) review the effectiveness of card- or keypad-based access systems;
(D) review the effectiveness of airport emergency exit systems and determine whether those that lead to secure areas of the airport should be monitored or how breaches can be swiftly responded to; and
(E) specifically target the elimination of the “piggy-backing” phenomenon, where another person follows an authorized person through the access point.
141. § 112(2) Review of Threats (b)(a):
(i) the destruction, commandeering, or diversion of civil aircraft or the use of civil aircraft as a weapon; and
(ii) the disruption of civil aviation service, including by cyber attack;
142. § 137(d).
grants can be used is biometrics.143

Many experts are pushing hard for the use of new biometric technology.144 Unique characteristics about an individual can be used to verify identity, for example voice patterns, retinas, and fingerprints.145 Biometric technology can also store this information on databases which would be able to detect individuals on a watch list in seconds.146 This technology could be utilized to permit the pilot in the cockpit, permit personnel in secure areas, and scan passengers for terrorists.147

Although biometric technology can provide increased security at a reasonable cost to the consumer there are concerns that need addressing; the two major concerns over biometric technology are health concerns and privacy issues. Some passengers could be adversely affected by biometric technology because of the radiation the machines to emit.148 Passengers may also feel some of the machines which employ biometrics are intrusive, which raise issues of a passenger's right of unreasonable searches.149 Furthermore, if the biometric technology is found to be a legal search, passengers may be unhappy with their personal information now becoming public.150 The greatest concern, at this stage of biometrics, is misidentification.151 For example, if the passenger is standing at an odd angle or the passenger is standing in bad lighting the biometric technology may misidentify the person.152

Despite these valid concerns, biometrics can be a great step in aviation security.153 The challenge facing the TSA will be to work further with biometrics technology and ensure the public of the accuracy and safety the technology will provide.154

One specific program in which biometric technology could be used is the “trusted traveler” program.155 Proper use of the trusted traveler card

143. § 137(d)(3).
144. Coughlin, Cohen, & Khan, supra note 108, at 12. ("Biometric technology uses unique biological data to identify and authenticate an individual almost instantaneously.").
145. Id.
146. Id.
147. Coughlin, Cohen, & Khan, supra note 108, at 12.
148. Id. Even if the machines were entirely safe, the impression of radiation issues could cause damaging economic ramifications on the airline industry.
149. Id.
150. Id. This again raises the argument of the impression of air travel and economic consequences.
152. Id. at 633.
153. See id at 632.
154. Id. at 671-73.
155. John M. Moloney, Known Travelers vs. Unknown Threats: Balancing Security With a Sound Aviation System, 17 SUM AIR & SPACE LAW. 1, 23 (2002). Passenger who fly frequently can pay a fee and obtain a “trusted traveler” card. The passenger will then provide a background
could be verified through fingerprint or iris checks. The first benefit of this program is fairly obvious. This type of security is less intrusive and more efficient at getting people boarded quickly. By implementing the "trusted traveler" program the government is showing the traveling public that it is serious about safety and also serious about economic factors by not making one wait unnecessarily. Another positive for this program is the fact that security personnel can focus their efforts on a smaller pool of individuals when hunting down wrong-doers. In time, this program could encompass a large group of travelers, leaving only a select few who would need to be thoroughly checked. This would cut down on the redundant checking and re-checking; and would cut down on the inefficient process of pulling half of the boarding passengers out of line for another security check.

The Trusted Traveler program would provide an efficient way to reduce costs. The TSA needs to implement this program as soon as possible. Once this program is established, many travelers can quickly proceed through security and the fees from the cards can be used to subsidize other aspects of security. Furthermore, this subsidization of security will provide tax relief to the nation as a whole.

As the "trusted traveler program" continues in development, there appear to be two negative issues which need addressing. First, many passengers feel this program would be an unwelcome hindrance to travel and would keep a skeptical eye on how the information would be used. Before widespread use of the program, tight security would have to be in place to ensure the safety of the information. Secondly, the fees collected for the cards would have to be reasonable and used reasonably. With-

156. Id.
157. Id.
158. Id.
159. Id.
160. See generally id. at 23-24.
161. Id. at 23-24. "On an almost-daily basis we continue to hear of lawmakers, grandmothers, children, medal-of-honor recipients, and airline pilots being subjected to redundant hand searches at screening checkpoints and gates, confiscating every potential 'weapon' from disposable razors to nail files. Law enforcement is not going to find terrorists in this manner." Id.
162. Id.
164. Id.
165. See generally id.
167. Moloney, supra note 155, at 23.
out reasonable use an elite group of travelers would form, hindering the travel of the "lower class." 168

The TSA has access to numerous new technologies and a healthy research and development budget to work with. For the time being these new technologies are not going to get implemented because there is no strategic plan in place. 169

The TSA appears to be needlessly investing a lot of energy and money in to near term technologies. 170 A better strategy would include seriously funding basic level research. 171 Another problem is the fact that the TSA has no real systems in place that will manage and monitor the funds appropriated. 172 As the DHS and TSA work together for national security accurate, current, and accessible information must be available to monitor and manage research and development projects. 173 Finally, there needs to be clarification of roles between the Department of Transportation ("DOT") and the DHS. 174 The ATSA gave the TSA this extremely broad task of security transportation, but did not extinguish the DOT's responsibility of securing transportation as well. 175

E. TRAINING AND EMPLOYMENT ISSUES

The TSA was also given the very broad power of hiring and training all security personnel. 176 By May of 2002 the TSA was off and running appointing "its first federal security directors, to oversee TSA operations at several American airports." 177 Due to the quickness in which the TSA was formed, there were several problems in training that presented themselves early on. 178 For example, the TSA was obliged to find help from "local law enforcement" and the National Guard to man security check-

168. Id.
169. TSA to Improve R&D, supra note 16. In 2003 and 2004 the TSA and The Department of Homeland Security ("DHS") were funding over 200 research and development projects. In 2003 the TSA was allotted $21 million for its R&D budget and $126 million for 2004.
170. Id.
172. TSA to Improve R&D, supra note 16.
173. Id. In commenting on the "coordination between TSA and DHS, GAO found it was 'limited,' and 'does not provide assurance that R&D resources are being leveraged, research gaps are being identified and addressed, and duplication is being avoided.'" Id.
174. Id.
175. Id.
177. Wilde, supra note 11, at 20.
178. Id.
points while the agency was still getting their bearings.\textsuperscript{179}

One of the reasons it was difficult for the TSA to get off the ground was the lengthy process of hiring employees.\textsuperscript{180} The pre-employment requirements included an extensive background check and drug/alcohol testing.\textsuperscript{181} Along with the strict requirements, it was estimated that thousands-upon-thousands of employees were going to be needed.\textsuperscript{182} If this mission were to be accomplished in less than a year it would be the largest "federal organizational buildup of its kind since World War II."\textsuperscript{183} By 2003, some 100,000 employees had been hired, but around 40,000 were temporary contractors.\textsuperscript{184} But the concerns over funding, training requirements, and unrealistic deadlines remained.\textsuperscript{185}

In the rush to get all these screeners in, one of the biggest employee problems emerged: low morale.\textsuperscript{186} TSA employees nationwide have brought forth numerous instances of why the workplace is unsatisfactory including: inadequate training, inadequate equipment, scheduling problems, not getting paid, sexual harassment, and favoritism.\textsuperscript{187} The TSA has been unable to adequately deal with these problems.\textsuperscript{188} As a result the "screener turnover rate was between 30\% and 35\% at airports where TSA had assumed staffing responsibilities."\textsuperscript{189}

Another huge employment issue is the debate over collective bargaining. The TSA has published guidelines for a program called Screen-
ing Partnership Program ("SPP"). The SPP "permit[s] commercial airports to opt out of federal screener services and instead use private passenger and baggage screeners." The main purpose of this program is to provide greater flexibility in security services. The problems have arisen due to the fact that "federal screeners are prohibited from engaging in collective bargaining under the ATSA, [but] private contract employees may organize and engage in collective bargaining."

Once there is organization in the TSA employees will work more efficiently. Many employees complain that they don't know what their job is or even what is going on. Other complaints include being overworked and not being heard. It is important to national security that the TSA listen and take serious the concerns of their employees. When employees feel their being listened to, productivity and job performance increase.

The best way to solve all of the major issues concerning TSA employees is to listen to the employees and give them a voice in the process. TSA spokesmen Nico Melendez said it best "that the screener workforce is 'probably our most important asset' and that 'it's in TSA's best interest to work with screeners.'" Because of the infancy of the TSA, no one would know better than the employees themselves what schedules work, what the safety/training issues are, and how the rules are being applied. By giving employees a voice in the security process, there are incentives for "employees to work with employers" and will improve the morale and quality of work.

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190. *TSA Begins Airport Screening Re-Privatization*, 46 GOVT CONTRACTOR 257 (June 30, 2004) [hereinafter *TSA Begins Screening*].

191. *Id.*

192. *Id.*

The SPP is designed, as outlined in the guidelines, (1) to meet ATA standards; (2) to ensure security; (3) to seek to establish a strong public/private partnership; (4) to provide significant opportunity for innovation, efficiency, and cost saving to the taxpayer; (5) to provide decentralized management; (6) to incorporate best practices and lessons learned from recent studies of the Pilot program, and to continue to evaluate and learn on an on-going basis; (7) to be performance based; (8) to respect federal and private sector workforces; and (9) not to restrict airport participation.

193. *Id.*

194. Krause, supra note 21, at 244.


196. *Id.*

197. *Id.* at 343-44.

198. *Id.*

199. *Id.* at 344.


201. *Id.*
IV. Conclusion

As this paper has shown, the FAA and TSA have faced the same issues with regard to aviation security. The paper has addressed how neither agency has been able to provide adequate aviation security within budgetary constraints or provide a suitable work environment for their employees. At the same time neither agency has found a way to effectively and efficiently provide an organized, cost efficient program of security. Many solutions were raised in the FAA era but could never take root because there was no organization within the FAA. So to improve the TSA we must start with its efficiency.

A realistic and unbiased review of the TSA is imperative to finding excess spending and realizing inefficiencies. If you travel through any of our nation’s airports you are constantly reminded of the chaotic and unsupervised “circus” that is aviation security. No one seems to be in control, most employees are indifferent (at best) about their duties, and the selection of passengers for inspection is ridiculous and intrusive. A complete and total review of all aspects of the TSA could provide useful insight into how to better structure aviation security. Instead of dumping more money on the problem, the Bush administration should invest in an unbiased review of a failing agency.

An essential ingredient in this review would have to be input from the security screeners themselves. By analyzing the security issues with those who perform the task day in and day out, the TSA would find what problems exist at security checkpoints and would show appreciation for employees. By including employees in this vital review process employees would begin to have a sense of pride in their work and aviation security as a whole would benefit.

Aviation security is of national concern and should be paid for as such. Transportation is the backbone of our economy. When transportation is in trouble, we are all in trouble. The same is true in the realm

202. Murphy, supra note 1, at 924-25.
203. See Slater, supra note 17, at 343.
204. Poole, supra note 10.
205. TSA Begins Screening, supra note 190.
206. Abels, supra note 163.
207. Id.
208. Id.
209. Abels, supra note 163.
210. Id.
212. Slater, supra note 17, at 244.
213. Ables, supra note 163.
214. ATA Press Release, supra note 115.
of terrorism and national security. Taxing airlines leads to decrease in travel, increased shipping costs and other areas of transportation go unattended.\textsuperscript{215}

As we look ahead to the budget of 2006, the Bush Administration has seriously considered putting the TSA on the chopping block.\textsuperscript{216} Before any drastic decisions are made the administration should consider how long we have waited for an efficient and organized program of aviation administration.\textsuperscript{217} Once a review of the TSA is done, it will show ways to cut costs.\textsuperscript{218} Then we as a nation can support a lean and efficient program of aviation security.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{215} Jet Blue, supra note 17.
\item \textsuperscript{216} Goo, supra note 128.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Ables, supra note 163.
\item \textsuperscript{219} Id.
\end{itemize}
UNCITRAL’s Proposed Instrument on the
International Marine Carriage of Goods

Nicholas de la Garza*

I. Introduction

“Ships are but boards, sailors but men: there be land-rats and water-rats, water-thieves and land-thieves,” said William Shakespeare in The Merchant of Venice. But no, ships and the seas upon which they travel are far more than that. Indeed, our world turns on them. Homer forced Odysseus to spend years afloat, while Noah had a short drift. Hemingway found it interesting, while a seagull named Jonathan Livingston knew no better. The reality is, humanity has always written, sung, and dreamed about the sea. Whether it is the unknown horizon or the setting fog, its deep mystery has forever appealed to our romanticist imagination. Yet that mystery is also enlightenment. Before the internet, before the Wright Brothers, before transatlantic cables and satellites, it was boats that connected us from afar and brought us to new places.

From the time of Athens and before, till today and henceforth, we have and do rely on ships. From the hallowed history of Magellan to the British Empire of yore, such water-faring craft have changed our world in every way. That is, be it the Santa Maria or the Peerless, the world we

* J.D. Candidate, 2006, University of Denver, Sturm College of Law.

know is a creation of boats. Cars, chairs, the mythical widget and Smith’s “silent hand” all conspire to force nations out, and let others in. Ships bring about the wealth of nations; ships are elemental to commerce. Every sea voyage, however, is fraught with danger, be it Poseidon or kamikaze winds. To maintain the commerce – and save merchants pounds of flesh – a doctrine has developed over time to deal with Cassandra’s prophecies. With increased globalization and the rise of liberal economic theory, countries have increasingly found themselves needing to interact with their trading partners overseas. For such reasons, the global community has chosen to develop standards and protocols for such carriages of goods.

II. History

The modern United States statutory maritime carriage law, Carriage of Goods by Sea Act, is currently based on the Hague Rules, and was developed at a 1924 meeting in the Netherlands. In 1969, the international community amended the Hague Rules, now the Hague-Visby Rules, to increase liability limits. The United States, however, never adopted the Hague-Visby Rules. In 1978, the international political community adopted a new set of rules, the Hamburg Rules. The Hamburg Rules abolished the defense of “nautical-fault,” and again increased liability. Again, however, the United States never adopted the Hamburg Rules. In short, no convention on the marine carriage of goods has been widely accepted, particularly by key nations. The general consensus has

3. Id.
4. Id.
5. Edmonson, supra note 2, at 16.
6. Id.
7. Id.
8. The Adoption of the Various International Conventions
1. Hague 1924:
a) The United States adopted COGSA 1936 on April 16, 1936, and the Hague Rules were approved by the United States Senate on May 6, 1937, signed by President Franklin Roosevelt, and ratified by the United States Senate on June 29, 1937.
b) A few colonies and small entities are still party to the Hague Rules.
2. Hague-Visby 1968/1979: Over seventy nations, including almost all of the world’s major shipping nations (with the exception of the United States), are party to or have Hague-Visby in their national laws or have ratified it.
3. Hamburg 1978: Adopted by twenty-nine nations (only a few major shipping nations).
4. Multimodal Convention, 1980: Ratified by ten nations. However, thirty ratifications are required to bring it into force.

been that “[w]ith the development of shipping industry, the mandatory regimes adopted by the Hague Rules are somewhat out of date, and the Hamburg Rules are not advisable either.”9 In 1996, the United Nations Commission on International Trade Law (“UNCITRAL”) deliberated over a proposal to review the current practices in the arena of international trade law, particularly the international carriage of goods by sea.10 Specifically, the proposal intended to form “uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than [had] so far been achieved.”11 Commission members appeared to be specifically concerned regarding an absence of law relating to bills of lading and seamay bills.12 However, many were concerned about the limits of UNCITRAL’s time.13 Others argued that adding another document to the already existing documents was likely to concern existed as to the limits of UNCITRAL’s time, the issue was not put on the agenda.14 Clearly, however, these concerns were substantial – UNCITRAL did direct its Secretariat to gather “information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems.”15

By 1998, UNCITRAL had become more receptive to the idea. UNCITRAL was informed that the Secretariat and the Committee Maritime International (“CMI”) had begun to work together to pursue the Secretariat’s mandate from 1996.16 In 1997 it became clear that the concerned industries were very interested in the proposal.17 The UNCITRAL members responded, showing strong interest themselves.18 By 2000, the CMI and UNCITRAL Secretariat had organized a transport law colloquium,
to "gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea," looking towards concerns that might be remedied. The colloquium confirmed what had been argued before: "with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts."20

The surveying and analysis performed by CMI culminated in a report, "Possible Future Work on Transport Law," from the Secretary-General to UNCITRAL.21 This report ("SG Report") categorized and identified problems with the then current state of international maritime transport law. This comment first looks to the most major problems identified by the Secretary-General, and then looks to the most recent complete version of the proposed document: "The Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]" ("Draft Instrument").22 By considering each item side-by-side, the effectiveness and curative powers of the Draft Instrument are easily considered. This Comment will then move on to look at a specific provision of the Draft Instrument: the port-to-port regime.

III. CURATIVE ACTIONS

The largest problem facing companies whose business concerned with the carriage of maritime involved a simple, but esoteric, requirement: knowledge. In order for companies to calculate the cost of doing business, to understand the meaning and requirements of contracts into which they are considering, companies must be able to predict the legal environment around them.

The United States is not the only country that is either reluctant or otherwise unable to amend their rules – the Hamburg Rules were never generally accepted by the international community.23 United States companies, and others, have thus been not only unable to predict the outcome of disputes, but even what law would control any dispute.24 The

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20. Id. at para 334.


recent history of international maritime carriage law, particularly the interspersed acceptance of the various treaties, prohibited companies from operating in a transparent environment.\textsuperscript{25}

The developers of the Draft Instrument have recognized this issue. The very beginning proposal, the first impetus, stated that review should be undertaken "with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws."\textsuperscript{26}

The potential power, then, of the Draft Instrument, to clean this muddled sea of treaties and laws is clear. With one uniform, well-drafted, code, at least the sources of authority will be known to all transacting business. The Draft Instrument, in this regard, does not fully complete its purpose, however. The so-called "network exception" may reduce its efficiency in this matter, discussed \textit{infra}.

Essential today in any type of commercial agreement, of course, is the written instrument. The Secretary-General found in his report to UNCITRAL that several problems existed with the requirements of written documents, or bills of lading, as the former laws applied to it. The Secretary-General pointed out that the document requirements of the various conventions were incomplete: while some requirements were listed and spelled out accurately (for example, a requirement of description of goods), other logical and practical necessities were not mandated (for example, dates).\textsuperscript{27} This particular issue, dates, the Draft Instrument has done well and explicitly cured, in Article 34(1)(f).\textsuperscript{28} Stepping back, not to miss the ocean for the waves, Articles 34 and 35 efficiently and effectively address the normal contractual requirements. Description, identification, weight, quantity, dates, condition, and signatures are among the statutory requirements to be.\textsuperscript{29} Of course, merchants are expected to occasionally overlook some requirements. Article 36 serves to save the document from itself, providing instructions to resolve ambiguities.\textsuperscript{30}

"Most troublesome," the Secretary-General noted, "[is] the carrier's ability to limit its liability for descriptions in the transport document that it has failed to verify."\textsuperscript{31} The authors of the Draft Instrument seem to have directly followed the Secretary-General's concerns: Article 37 addresses this scenario. Article 37 gives a procedure whereby a carrier, act-

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{51st Session of UNCITRAL General Assembly, supra} note 10, at para. 210.
  \item \textsuperscript{27} \textit{Secretary-General Report, supra} note 21, at para. 34.
  \item \textsuperscript{28} \textit{Draft Instrument, supra} note 1, at 39-40, art. 34.
  \item \textsuperscript{29} \textit{Id.} at 39-41, arts. 34, 35.
  \item \textsuperscript{30} \textit{Id.} at 41-42, art. 36.
  \item \textsuperscript{31} \textit{Secretary-General Report, supra} note 21, at para. 37.
\end{itemize}
ing in good faith, may limit its liability.\textsuperscript{32} Clearly, in this regard, the Draft Instrument achieves what it originally intended to do.

Also missing, notes the Secretary-General, is any articulation of obligations of the shipper.\textsuperscript{33} In keeping with tradition, the Draft Instrument rectifies this oversight. Indeed, the chapter has been entitled “Obligations of the shipper.”\textsuperscript{34} Articles 25 – 32, the articles which Chapter 7 encompasses, clearly and without question describe the duties that the shipper statutorily undertakes.\textsuperscript{35}

This analysis can continue, but the pattern is clear. The Draft Instrument takes on and satisfies the elements that the Secretary-General found lacking.

In some ways the Draft Instrument did better than it had to, when judged by the Secretary-General’s “what’s missing” criteria. The most insightful section is Chapter 8, entitled “Transport Document and Electronic Records.”\textsuperscript{36} Article 33, in particular, shows forethought and proactive intent not only to rectify an issue that has been noted but also a desire to create an instrument that justifies its 21st-Century inception.\textsuperscript{37}

\section*{IV. Port-to-Port Analysis}

Perhaps the most interesting and potentially important element of the Draft Instrument is found in its definitions. Article 1(a) states that “contract of carriage” means “a contract under which a carrier, against payment of freight, undertakes to carry goods \textit{wholly or partly} by sea from one place to another.”\textsuperscript{38}

Initially, observers expected the Draft Instrument to use the “port-to-port” criteria rather than the “tackle-to-tackle” tradition, meaning that the “carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge,” rather than simply “starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom.”\textsuperscript{39} It was quickly decided, though, to consider going beyond “port-to-port” coverage in favor of “door-to-door” coverage.\textsuperscript{40} Ultimately, this decision manifested in the definition of “contract of carriage.” As the writers understood, the words “wholly or partly” re-

\begin{itemize}
  \item \textsuperscript{32} \textit{Draft Instrument}, supra note 1, at 42-43, art. 37.
  \item \textit{Id.} at para. 33.
  \item \textit{Draft Instrument}, supra note 1, at 35, ch. 7.
  \item See \textit{id.} at 35-38.
  \item \textit{Id.} at 39, ch. 8 (emphasis added).
  \item See \textit{id.} at 39, art. 33.
  \item \textit{Draft Instrument}, supra note 1, at 8, art. 1.
\end{itemize}
sults in the application of the Draft Instrument to overland portions of a shipment that at some point experiences international maritime transport. That is, if a shipment of Hondas from Japan arrived in Seattle, was then transported by truck to Boise, but experienced delay or damage along the way, the Draft Instrument would govern any subsequent legal processes.

A door-to-door regime was preferred for several reasons. First, a door-to-door regime would provide a ‘smooth and seamless’ movement of containers from one place to another.\(^\text{41}\) Simply put, companies prefer to do business with one company rather than many companies, when all other factors are equal.\(^\text{42}\) Dealing with only one other company is easier for companies because there are fewer people with whom that company must maintain communication. Furthermore, a door-to-door system also promotes efficiency and predictability in cost, if for no other reason than the development of one contractual relationship rather than many.\(^\text{43}\) At other points, a door-to-door arrangement would act to ‘plug the holes’ in previous multimodal and unimodal agreements.\(^\text{44}\)

Because “[t]he principal difficulty in achieving door-to-door coverage with a new international convention is the prior existence of potentially conflicting national laws and international conventions that already govern various segments of the door-to-door carriage,” an exception was needed to give way to those pre-existent rules.\(^\text{45}\) The “network exception” permits parties who are subject to another binding international treaty, i.e. a regional agreement, to subject themselves to that agreement rather than the Draft Instrument.\(^\text{46}\) One proposed formulation of the network exception provides for both binding international treaties and national laws to permit exceptions from the otherwise multimodal nature of the Draft Instrument.\(^\text{47}\)

This, of course, destroys uniformity. There are states that have these systems in force, usually economic unions. Whether this limited destruction is warranted – and it probably is – is another issue. Nevertheless, the law affecting parties will be clearer, though extensive research may be necessary at times to determine how the law affects any given state.


\(^\text{42}\) Id.

\(^\text{43}\) Id.

\(^\text{44}\) Id. at 28, para. 112.

\(^\text{45}\) General Remarks on the Draft Instrument, supra note 41, at 14, para. 43.

\(^\text{46}\) Draft Instrument, supra note 1, at art. 8(1).

\(^\text{47}\) Id.
The door-to-door provision interacts in an interesting way with the network exception clause. If shipment were to have a sea leg from State A to State B, and then the goods were transported over land to State C (possibly a landlocked country, or one that lacks access to an appropriate coast), and a binding agreement exists between States A and B regarding the overland transportation of goods, the treaty would come into force because of the land leg and would immediately be nullified because of the network exception. Countries like the Democratic Republic of the Congo, the Czech Republic, and Mongolia might be able to sign the treaty without any effect. At the same time, however, these states might greatly benefit from the door-to-door provision of the Draft Instrument. If the Czech Republic were to buy more goods from Britain and fewer goods from Germany, then the Czech Republic could force Germany (et. al) to treat its imports in a specific manner. This would be a great advantage to any country that is presented with a Hobson’s Choice, regarding another country with biased transportation laws.

Professor Tetley has pointed out that the predecessor to the current door-to-door clause in a previous version of the Draft Instrument might have allowed a nation to defeat the door-to-door provision using domestic law. Even now, the door-to-door clause presently includes a new bracketed provision (neither adopted nor rejected) expanding the limited network exception from simply binding international conventions to binding national laws. Such a provision would allow a country wishing to avoid any or all pre-carriage or on-carriage Draft Instrument clauses effectively modify the Draft Instrument into a port-to-port convention simply by enacting a binding national law. Such is not the theory of international agreements. Footnote 42 of the current Draft Instrument explains that the Draft Instrument’s “[or national law]” rider was placed in the section for “further reflection in the future.” The same footnote points out that the “[or national law]” proposal had strong support.

Another problem with the network system is that the various networks have varying liability limits. This problem seems to be particularly noteworthy when it is considered that the greatest disparities exist between modes. For non-maritime conventions, the limits are significantly greater – at one point nearly nine times that of the maritime liability limits: “the CMR limit is 8.33 SDRs per kilogramme, the COTIF-CIM

48. Tetley, supra note 8, at 10 (Professor Tetley was analyzing the previous version of the Draft Instrument, A/CN.9/WG.111/WP.21. The current version is A/CN.9/WG.111/WP.32).
49. Draft Instrument, supra note 1, at art. 8(1)(b).
50. Draft Instrument, supra note 1, at n.42.
51. Id.
53. Id.
limit is 17 SDRs per kilogramme, [like] the Montreal and Warsaw Conventions . . . the Hague-Visby limit is . . . 2 SDRs per kilogramme or 666.67 SDRs per package, and the Hamburg limit is 2.5 SDRs per kilogramme or 835 SDRs per package.”54 This problem leads into another: the application of a maritime convention to non-maritime activities.55 Some of the clauses built into the Draft Instrument simply do not make sense in non-maritime modes.56 For example, the Draft Instrument’s “perils of the sea” defense is clearly illogical on a truck.57

Other modal differences are elemental to their respective regimes.

The Draft Instrument requires due diligence to make the ship seaworthy . . . barely one level higher than that of reasonable care. In contrast, the CMR level of duty with respect to the vehicle is one of the utmost diligence, while the Montreal Convention holds the air carrier to a strict duty . . . .58

Therefore, if the Draft Instrument were to be applied to non-maritime problems, it might apply a different duty of care other than that to which the road, rail, or air carrier would otherwise be subject. The network exception might not apply here because Article 8(1)(b)(ii) limits the importation of other conventions’ doctrines to “provisions for carrier’s liability, limitation of liability, or time for suit.”59 It seems, therefore, that if “provisions for carrier’s liability” is read to include the carrier’s duty of care, then this issue might be moot. On the other hand, if “provisions for carrier’s liability” is read so as not to include duty, then it will become much more difficult for plaintiffs to prove their case. Plaintiffs would be injured because the duty of care of any of their shippers will drop, at times from strict liability to due diligence.60

Many nations, intergovernmental organizations and non-governmental organizations have given input regarding their position on the port-to-port/door-to-door debate. “The United States,” for example, “supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception.”61 The United States, though supporting the network exception, desires to keep the network exception “as narrow as possible” to “provide the maximum degree

54. Id.
55. Id. at 30, para. 119.
56. Id. at 30, para. 121.
57. Id.
58. Id. at 30, para. 122.
59. Draft Instrument, supra note 1, at art. 8(1)(b)(ii).
of uniformity possible." The United States is not, however, being as multilateral as it might initially seem. The United States stated that, while it has no problem with the Draft Instrument applying to pre-carriage or on-carriage situations, it did object to the Draft Instrument applying to pre-carriage or on-carriage actors. Hence, the only pre-carriage or on-carriage activity covered by the Draft Instrument would be that activity undertaken by an already "performing party" or shipper. The United States, therefore, while supporting subject-matter jurisdiction over pre-carriage and on-carriage activities, opposes personal jurisdiction over the most typical pre-carriage and on-carriage actors.

The Netherlands, conversely, embraces door-to-door coverage. The Netherlands first notes that most modern contracts of maritime carriage are door-to-door rather than port-to-port. Hence, the Netherlands reasons, a port-to-port instrument would "just add another maritime convention to the existing ones." In order to have some meaningful purpose, therefore, only a door-to-door instrument would be useful. Problematically, however, a door-to-door instrument would violate other international conventions dealing with unimodal forms of transport. For that reason, the network exceptions embodied in Article 8 are necessary. Furthermore, the Netherlands expressly endorsed the "regardless of national law" provision of Article 8(3), stating that "Article 8 applies regardless of the national law otherwise applicable to the contract of carriage."

The Italian comments echo the first of the Netherlands' comments that a port-to-port instrument would be of little value in a contractual door-to-door world. Italy argued that

certain sections of the industry (e.g. shipowners . . . insurers) might be prepared to leave the safe grounds of a well tested, albeit old fashioned, sys-

62. Id.
63. Id. at 7, para. 23.
64. See id.
65. See id.
67. Id. at annex 1, para. 1(a).
68. Id.
69. Id. at annex 1, para.1(c).
70. Id. at annex 1, para. 1(d).
71. Draft Instrument, supra note 1, at 19, art. 8(3).
tem... only if the new instrument would really constitute an answer to the reality of modern transportation. And the reality is door-to-door container transportation.73

Italy is correct: in the United States, for example, at least 75 – 80% of container trade is conducted on door-to-door contracts.74 Moreover, in the absence of an international agreement that provides for and articulates rules for dealing with door-to-door arrangements, "it is not surprising that the transport industry has developed its own pragmatic solutions."75

Canada has come forth with three potential solutions to these problems. Canada's first option has the committee continuing to work on the document, but permits a reservation that "would enable contracting States to decide whether or not to implement this Article and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea."76 It is unclear how a state would do this outside of reservations, as articulated in Canada's Option 3.

Canada's second option appears to have been the option chosen by the drafters. Canada suggests that the drafters insert "or national law" after "international convention," allowing a country to legislate its way out of the agreement; the country would vote for the Draft Instrument before it votes against it.77 This, however, significantly increases the difficulty of determining the state of the law in any given country.78 Whereas signatory reservations are nearly always included with the list of signatories of any document, each country's opposition to the "door" elements would be found in their own code. Signatory reservations are easily obtainable; many country's codes are not. Other difficulties, like language, legal system, and precedent would undoubtedly increase such difficulties.

Canada's third option splits the truly operative parts of the instrument into half: a door-to-door scheme is articulated in the first half while a port-to-port scheme is created in the second half.79 Countries would be permitted to add reservations, either opposing the first or second half.80 When a country opposes the second half, it implicitly endorses the port-

73. Id.
75. Id. at 13, para. 41.
77. Id. at annex, para. 9.
78. Id. at annex, para. 9(a).
79. Id. at annex, para. 10.
80. Id.
to-port clause. Conversely, if a country files a reservation against the second half, it signs onto the Draft Article’s door— to-door provision. This option is the standard diplomatic method for obtaining signatures and ratifications on and of treaties without offending the sovereignty of a signatory or party state. The reservation simply allows countries to state that they agree to the document, except section X.

Both Peru and Malaysia have expressed concern that the Draft Instrument’s door-to-door provision may be too ambitious, thereby precluding its acceptance. In Peru’s words, “a consensus is almost an utopia.” These observations are likely what everyone knows, but nobody says. This issue has not been decided upon, and it is sure to be a point of extensive discussion. Given various governments’ concern in the past few years over the potentially binding nature of treaties and their impacts on sovereignty, this might dissuade some of the world’s largest economic powers from signing or ratifying any final instrument. That is not to say, however, that the door-to-door coverage should be eliminated. Though it is important to, and, with some supereconomic powers, vital, to gain their approval and acquiescence, the argument can easily be made to show the door-to-door coverage as a good thing – if for no other reason than the uniformity.

V. Conclusion

The Draft Instrument is well on its way to becoming a controlling and useful operator of maritime commerce. The Draft Instrument fulfills several deficiencies in the current regulatory scheme, creates uniformity, and pushes the nations towards a generally consistent theory and method of resolving disputes. The Draft Instrument has several hurdles to jump, however, before it can come to fruition. Most importantly, the scope of the Draft Instrument must be determined – will it be port-to-port or door-to-door? This determination should either enlarge or restrict the remaining requirements of the Draft Instrument. If the drafters choose to continue with a door-to-door regime, the instrument should be expanded to deal with the separate necessities of the additional modalities. If the drafters, however, choose to do away with the door-to-door regime in

81. Id.
82. Id.
84. Id.
85. Draft Instrument, supra note 1, at n.3.
86. Yet one must bear in mind the “network exceptions.”
favor of a port-to-port, tackle-to-tackle, or depot-to-depot regime, then the instrument needs to articulate how it will interact with its corollaries.

Whatever form it takes, the Draft Instrument will find use. The current muddle of regimes and doctrines in use today make it more difficult than it need be to transact business overseas over seas. With any simplification, transaction costs should decrease. When transaction costs decrease, more trade will likely occur, leading to an increase in the Wealth of Nations.87 Though we no longer rely on ships for news of Europe and spices from the East, we now rely on them for national defense, economic security, and, ultimately, political stability. Every effort made to create a regime like the Draft Instrument is a step forward onto steady ground.

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I. INTRODUCTION

With the increasing local and state government's interest in acquiring right-of-way designations under Revised Statute 2477 ("R.S. 2477"),¹ several debates concerning the authority of the Federal Government to intervene and regulate conduct on such R.S. 2477 roads have resulted in much litigation. In 1866, federal statute R.S. 2477 was a gift from the Federal Government to state and local governments granting them the right-of-way to "roads" created by frontiersmen traveling from one state to another.² Several counties have mistakenly initiated the process of obtaining a R.S. 2477 right-of-way believing that doing so would eliminate involvement by federal agencies in the maintenance and construction of current rights-of-way. For example, San Bernardino County, California ("San Bernardino") applied for a "recordable disclaimer"³ under R.S.

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¹ Rights-of-Way and Other Easements in Public Lands, ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976).
³ A recordable disclaimer is an alternative to litigation in which the DOI issues a record.
2477. San Bernardino admits that it chose Camp Rock Road as the first recordable disclaimer request primarily to eliminate Bureau of Land Management ("BLM") involvement in county maintained roads. Although BLM may not be the agency regulating activities on Camp Rock Road, the Federal Government, through the Fish and Wildlife Service, remains the regulating authority concerning activities on the road.

The purpose of this article is to define the law concerning the regulatory authority over R.S. 2477 rights-of-way. However, it is necessary to begin with a history of R.S. 2477, which will describe some of the confusion surrounding the poorly defined statute and subsequent revisions. In addition, to understand why the Federal Government may be involved in R.S. 2477 rights-of-way maintenance and construction, a brief synopsis of the Endangered Species Act follows. An examination of several cases demonstrates the misunderstanding of county governments over who has the say as to how an R.S. 2477 may be maintained. Finally, the article will include other cases where courts have determined that Federal Governments had the regulatory authority to mandate actions on R.S. 2477 rights-of-way.

II. THE HISTORY OF REVISED STATUTE 2477

To facilitate the development of our nation's western territories, the federal government passed R.S. 2477 in 1866. The statute, in its entirety, simply reads, "[T]he right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Congress passed the statute to give states the discretion to develop roads created by America's frontiersmen over federal government lands. Although no legislative history exists on the intent of the statute, it is commonly understood that R.S. 2477 was a federal government offer to the states to legitimize miners' and homesteaders' access routes that had developed across

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5. Id.
8. Much of the debate over R.S. 2477 involves the different interpretations of the meaning of "construction" and "highways." The debate over this issue is beyond the scope of this article. However, for comprehensive discussion of this confusion see Michael J. Wolter, Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?, 5 Dick. J. Env'tl. L. & Pol'y 315 (1996).
10. Resolving R. S. 2477, supra note 2, at 486.
federal lands during the expansion of the western frontier. The simple language of the statute provided no guidelines for determining the process though which a state accepts the federal government's offer nor the criteria for determining the scope of the granted easement. The controversies still exist because persons constructing a right-of-way were not required to file any application or record a R.S. 2477 right-of-way. Additionally, Congress failed to formally record the R.S. 2477 rights-of-way granted, causing uncertainty as to the number of rights-of-way that exist.

Congress repealed R.S. 2477 in 1976 by enacting the Federal Land Policy and Management Act ("FLPMA") as a way of rectifying the above issues. However, in doing so, Congress preserved the validity of preexisting R.S. 2477 rights-of-way. Under FLPMA, the Secretary of the Interior could only expand existing R.S. 2477 rights-of-way through grants. Since FLPMA's passage, the approach to R.S. 2477 claims have changed with each presidential administration. In 1988, the Department of the Interior ("DOI") issued the Hodel Policy allowing any dirt road, cow path, or footpath to qualify as an R.S. 2477 right-of-way. Eight years later, the DOI placed a moratorium on the consideration of R.S. 2477 claims under the Hodel Policy and eventually rescinded the policy. In spite of the changing policies, FLPMA remains the governing authority over issuance of disclaimers of interest in federal land.

FLPMA required the DOI to establish "comprehensive rules and regulations after considering the views of the general public" relating to the issuance of disclaimers to R.S. 2477 rights-of-way. State or local governments wanting to claim title to federal land may file an application with BLM requesting that a disclaimer of interest be issued when the applicant has reason to believe that a cloud exists on the title to the land.

11. Id. at 486-87.
13. Freeman & Ro, supra note 3, at 106.
14. Id.
18. Freeman & Ro, supra note 3, at 106.
19. Id. See also Memorandum from Assistant Secretary for Fish and Wildlife and Parks & Secretary for Land and Minerals Management, to the Secretary of the Interior 1 (Dec. 7, 1988), available at http://www.highway-robbery.org/resources/documents.htm. The Hodel Policy was a 1988 memorandum approved by Donald Hodel, the Secretary of the Interior.
20. Freeman & Ro, supra note 3, at 106.
due to a pre-existing claim by the United States.\textsuperscript{22} The Secretary of the Interior, authorized by FLPMA, delegates authority to BLM to issue a document of disclaimer of interest in any lands, thereby removing any cloud on the title of the land.\textsuperscript{23} This document is issued after BLM determines whether "a record of interest of the United States in lands has terminated by operation of law or is otherwise invalid."\textsuperscript{24} The disclaimer has the same effect as a quitclaim deed of the land from the United States to the applicant.\textsuperscript{25}

The current regulations for obtaining a recordable disclaimer require each applicant to submit a legal description of the lands for which a disclaimer is sought.\textsuperscript{26} The applicant must also complete a statement concerning the nature and extent of the cloud on the title and the reason the applicant believes the United States' interest in the land has terminated.\textsuperscript{27} The disclaimer cannot be issued until a notice of the application, including the grounds supporting the application, has been published in the Federal Register for at least ninety days and the applicant has paid the administrative costs of issuing the disclaimer to the Secretary of DOI.\textsuperscript{28} Upon receipt of the payment, and after the ninety-day waiting period, the DOI makes a decision about the application and if the application is allowed, issues the applicant a recordable disclaimer, thereby granting the land to the applicant.\textsuperscript{29}

III. Endangered Species Act

Local and state entities should understand the legal obligations that attach to ownership of a R.S. 2477 right-of-way. Many R.S. 2477 roads are located in areas where endangered species habitats exist.\textsuperscript{30} The Endangered Species Act ("ESA") prohibits persons from jeopardizing the lives and habitats of endangered species.\textsuperscript{31} When an endangered species attempts to navigate across or around a R.S. 2477 right-of-way, many lose their lives either by collisions with vehicles, over exhaustion, or confisca-

\textsuperscript{22} Recordable Disclaimers of Interest in Land, 43 C.F.R. § 1864.1-1(a) (2004).
\textsuperscript{24} § 1745(a).
\textsuperscript{25} § 1745(c).
\textsuperscript{26} 43 C.F.R. § 1864.1-2(c)(1).
\textsuperscript{27} § 1864.1-2(4)(i-ii).
\textsuperscript{28} § 1864.2.
\textsuperscript{29} § 1864.3.
\textsuperscript{30} Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004). There remains much confusion concerning what roads are R.S. 2477 rights-of-way because of the many interpretations of the statute.
tion by those using the rights-of-way.32 Local and state entities possessing R.S. 2477 rights-of-way risk legal liability for the prohibited “taking” of endangered species under the ESA.33 “Taking” means harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting, or attempting to engage in such conduct.34 The “taking” may occur through a direct taking for example, shooting or squashing, or through the destruction or “harming” of endangered species habitat.35 “Harm,” as used in ESA’s definition of taking, includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”36

Entities may “harm” endangered species when performing regular maintenance on the rights-of-way that run through endangered species habitat. Thus, the ESA requires the federal agency on whose land the rights-of-way cross to conduct studies and prescribe a course of action counties must take to ensure the survival of endangered species.37 Once entities obtain ownership of R.S. 2477 rights-of-way, the burden of enforcing the ESA provisions falls to the federal agencies such as the Fish and Wildlife Service, the United States Forest Service, or the National Parks Service.38 However, the right-of-way owner is ultimately responsible for complying with the ESA.39

To avoid criminal and civil penalties, state and local governments may apply for an incidental take permit under Section 10 of the ESA.40 “Incidental taking” results when an otherwise lawful activity causes a “take,” for example, running over an endangered species while lawfully using a right-of-way.41 The Secretary of the DOI may issue permits for

32. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004).
33. Id.
36. 50 C.F.R. § 17.3. It is important to point out that “harm” may occur on any endangered species habitat. However, the Secretary of the Interior, concurrently with determining that a species is an endangered species or a threatened species, designates any habitat of such species that is considered to be “critical habitat.” “Critical habitat” is defined as the specific areas within the geographical area occupied by an endangered species on which are found physical or biological features essential to the conservation of the species and which may require special management considerations or protection. 16 U.S.C. at § 1532(5)(A)(I-II) (2004).
38. § 1536(g)(5)(A).
39. See generally Loggerhead Turtle v. County Council of Volusia, 896 F. Supp. 1170, 1182 (M.D. Fla. 1995). This concept will be discussed infra in section E.
41. See Loggerhead Turtle v. County Council of Volusia, 148 F.3d 1231, 1258-59 (11th Cir. 1998).
incidental “takes” of endangered species otherwise prohibited by the ESA.\textsuperscript{42} However, the permit applicant must submit a habitat conservation plan to the Secretary.\textsuperscript{43} The plan must specify:

1. the impact which will likely result from such taking;
2. what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
3. what alternative actions to such taking the applicant considered and the reason why such alternatives are not being utilized; and
4. such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.\textsuperscript{44}

The Secretary may issue a permit if the habitat conservation plan indicates that

1. the taking will be incidental [to and not the primary purpose of the action];
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
3. the applicant will ensure that adequate funding for the plan will be provided;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. the measures, if any, required . . . will be met. . . .\textsuperscript{45}

Without an incidental take permit, the person causing the taking of endangered species is subject to civil as well as criminal penalties.\textsuperscript{46} The ESA states that any person who knowingly violates the “take” provision of the Act may be assessed civil penalties up to $12,000 per violation.\textsuperscript{47} Each violation constitutes a separate offense.\textsuperscript{48} In addition, any person who knowingly violates the “take” provision of the Act is subject to a criminal suit.\textsuperscript{49} Upon conviction, a violator may be fined up to $50,000 or imprisoned for not more than one year, or both.\textsuperscript{50}

The term “person” means an “individual, corporation, partnership, trust association, or any other private entity; or any officer, employee, agent, department . . . of any State, municipality, or political subdivision of a State; . . . any State, municipality, or political subdivision of a State. . . .”\textsuperscript{51} Thus, any state or local government official, as well as the

\textsuperscript{42} 16 U.S.C. § 1539(a)(1)(B).
\textsuperscript{43} § 1539(a)(2)(A).
\textsuperscript{44} § 1539(a)(2)(A)(i)-(iv).
\textsuperscript{45} § 1539(a)(2)(B)(i)-(v).
\textsuperscript{46} 16 U.S.C. § 1540(a)(1), (b) (2002).
\textsuperscript{47} § 1540(a)(1).
\textsuperscript{48} § 1540(a)(1).
\textsuperscript{49} § 1540(b)(1).
\textsuperscript{50} § 1540(b)(1).
state or local government itself, is subject to both civil and criminal penalties pursuant to the ESA.

IV. Jarbridge South Canyon Road

San Bernardino County should consider the litigation concerning Elko County, Nevada to realize that R.S. 2477 right-of-way grants do not eliminate the Federal government’s involvement in such roads. Elko County mistakenly assumed that by making a claim to a R.S. 2477 right-of-way it would be entitled to reconstruct South Canyon Road without Forest Service involvement.52

The problems with South Canyon Road began with a significant flood event in June 1995 that washed out and damaged sections of South Canyon road.53 Following the flood, motorized passenger vehicles could no longer use the road.54 The United States Forest Service (“USFS”) obtained emergency funding to reconstruct portions of the road through funds provided by the Federal Highway Administration Emergency Relief for Federally Owned Roads Program by the Western Federal Lands Highway Division.55 FHWA funds engineering services in order to restore access to public lands damaged by natural disasters.56 However, before reconstruction of the road began, the USFS prepared an environmental assessment (“EA”) finding no significant impact on the environment.57 Trout Unlimited appealed that finding claiming “reconstruction of the road and subsequent actions proposed will impact bull trout individuals or habitat...”58 The EA was remanded back to the Forest Service for further study.59 Eventually, the USFS repaired the road but only to the extent that protected bull trout.60 The road remained unusable by motorized passenger vehicles.61

52. U.S. v. Carpenter, CV-N-990547-DWH(RAM) (D. Nev. 2004). In the court order in this case, the judge noted in a footnote that “the parties may be under the mistaken impression that recognition of an R.S. 2477 right of way in the County would deprive the United States of all regulatory authority over the road. This is not the case under controlling Ninth Circuit law.” Id. (referring to Adams v. U.S., 3 F.3d. 1254, 1258 n.1 (9th Cir. 1993) (R.S. 2477 easement, if it existed, “would still be subject to reasonable Forest Service regulations”)).
54. Id.
55. Id. at S-4.
56. Id.
57. Id.
59. Id.
60. Id.
61. Id.
Elko County, anxious for access to the road to be available for public use as well as emergency medical and fire protection, directed the County Road department to begin reconstruction of South Canyon Road.62 The County, however, encountered a series of obstacles precluding the restoration of the road. In June 1998, the first hurdle to reconstructing the road occurred when the Nevada Division of Environmental Protection ("NDEP") halted the work Elko County Road Department had begun in reconstructing the road.63 NDEP's acted in response to USFWS announcement of a proposed 240-day emergency listing of the Bull Trout as an endangered species.64 USFWS attempted to protect a population of the Bull Trout that lived in the Jarbridge River, which is adjacent to South Canyon Road.65 To protect the Bull Trout, the USFS began its own river restoration work where Elko County had begun reconstructing the road.66 The U.S. Attorney's office then sent Elko County a letter requesting negotiations for repayment from Elko County for the cost of repairing the damage caused by the heavy equipment used by Elko County workers during its attempt to reconstruct the road.67 The U.S. then filed a suit against Elko County to recover the costs of repairing the road.68

At that point, U.S. District Judge Hagen issued an order and required the parties to enter into mediation.69 During the mediation, Elko County asserted that it had the authority to reestablish the road without federal approval by "virtue of its claimed ownership interest in the road under . . . R.S. 2477."70 The United States contended that the road may only be restored in compliance with federal laws and regulations, including NEPA and ESA, regardless of who owned the road.71 However, rather than continuing to litigate the matter, the parties agreed to resolve the suit under an agreement.72

Under the agreement, the United States agreed not to contest that Elko County had an R.S. 2477 right-of-way for South Canyon Road.73 The U.S. did not concede to any limit on its authority to manage the federally owned land in accordance with federal laws, including NEPA,
NFMA and the ESA.\(^{74}\) The parties agreed that the current law required Elko County to obtain USFS authorization prior to reconstructing South Canyon Road.\(^{75}\) Therefore, Elko County agreed to submit proposals to USFS for any work planned for the reconstruction of the road.\(^{76}\) Nevertheless, Elko County believed that authorization of the proposed work would not require a NEPA analysis.\(^{77}\) The United States maintained that it may not authorize any work without a NEPA analysis and a determination that the work would comply with the federal laws.\(^{78}\) Elko County agreed not to contest a determination by USFS that a submitted proposal required an analysis under NEPA.\(^{79}\) In addition, Elko County agreed to submit any required permit applications and to comply with federal laws.\(^{80}\) The USFS agreed to work cooperatively with Elko County to analyze plans with reasonable alternatives and to complete NEPA analysis and consultations as required under applicable federal law.\(^{81}\)

Elko County agreed to perform any work in accordance with the

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\(^{74}\) Id. The wording of the agreement became the source for another lawsuit. The agreement states It is not the intent of this agreement to alter or modify the rights of the parties under law except as expressly provided herein. If the South Canyon Road is reestablished pursuant to the terms of this Agreement, and all other obligations of the parties created by this Agreement have been performed, the rights and obligations of the parties shall be no different from those existing in all other cases in which a political subdivision of a state owns an R.S. 2477 right of way crossing National Forest System lands. Id. Elko County filed a motion for clarification of the Order claiming its belief that the settlement agreement recognized the existence of an R.S. 2477 right of way over the South Canyon Road but the order possibly “converted” that right-of-way into an easement granted under FLPMA. The county warned that its decision to adopt the agreement would have to be reconsidered if that was the case. The court pointed out, and the US had conceded, that an R.S. 2477 right of way may not be granted affirmatively by settlement; either the right of way exists by operation of the statute, or it does not. The court declared that if Elko County had perfected an R.S. 2477 right of way as of the date of FLPMA’s passage in 1976, that right of way would have been valid at the time of the agreement. But the mere existence of the road at FLPMA’s passage may not be depositive. Elko County would have to establish an R.S. 2477 claim by proving that the road was “constructed” over “public lands.” The court finds that Elko County did not present facts supporting the existence of an R.S. 2477 claim. U. S. v. Carpenter, 298 F.3d 1122, 1124-25 (9th Cir. 2002).

\(^{75}\) Draft EIS, supra note 52, at app. A-2.

\(^{76}\) Id.

\(^{77}\) Id. at app. A-2 to A-3.

\(^{78}\) Id. at app. A-3.

\(^{79}\) Id.

\(^{80}\) Id.

\(^{81}\) Id. In a statement before the House Committee on Resources, the Forest Supervisor of Humboldt-Taoiyabe National Forest praised its effort and Elko County’s effort to follow the law. As required by law (the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act, and others) and regulations, the Forest Service will consult with the Fish and Wildlife Service to guarantee that any action in the South Jarbidge Canyon will not jeopardize the continued existence of the listed bull trout. The Forest Service asked the Fish and Wildlife Service to be a cooperating agency during the environmental analysis process. The Service agreed. Working closely in this
terms and conditions provided in any authorization from USFS.\textsuperscript{82} Elko County also agreed to perform work at its own expense, including the reconstruction, repair, and/or maintenance of the road.\textsuperscript{83}

V. \textbf{FEDERAL GOVERNMENT INVOLVEMENT IN R.S. 2477 ROADS CONCERNING MATTERS OTHER THAN THE ESA}

Courts in several jurisdictions have concluded that the recognition of an R.S. 2477 right-of-way does not deprive the United States of all regulatory authority over the road.\textsuperscript{84} In \textit{U.S. v. Vogler},\textsuperscript{85} the Ninth Circuit Court of Appeals held that Congress clearly gave the Secretary of the Interior broad power to regulate and manage national parks.\textsuperscript{86} "The Secretary's power to regulate within a national park to 'conserve the scenery and the nature and historic objects and wildlife therein. . . .' applies with equal force to regulating an established right of way within the park."\textsuperscript{87} The court relies on a Colorado District Court case which upheld the National Park Service's authority to regulate commercial access on an R.S. 2477 right-of-way within the Colorado National Monument.\textsuperscript{88} In that case, the court held that a local resident's claim that use of the road could not be regulated was invalid.\textsuperscript{89} The Ninth Circuit also referred to the Mining in the Parks Act to support its position.\textsuperscript{90} The Act provides that:

\begin{quote}
[All] activities resulting from the exercise of valid existing mineral rights on patented or unpatented mining claims within any area of the National Park System shall be subject to such regulations prescribed by the Secretary of the Interior as he deems necessary or desirable for the preservation and management of those areas.\textsuperscript{91}
\end{quote}

Because the regulations on the R.S. 2477 right-of-way were necessary to conserve the beauty of the Preserve, the regulations were within the government's power to regulate roads in national parks.\textsuperscript{92}

The U.S. District Court for the District of Utah also held that the

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\begin{itemize}
\item \textsuperscript{82} \textit{Id.} at app. A-2.
\item \textsuperscript{83} \textit{Id.} at app. A-4.
\item \textsuperscript{84} \textit{Carpentier}, 298 F.3d at 1124.
\item \textsuperscript{85} \textit{U. S. v. Vogler}, 859 F.2d 638 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).
\item \textsuperscript{86} \textit{Id.} at 642.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} (citing Wilkinson v. Dep't of Interior, 634 F. Supp. 1265, 1279 (Colo. 1986)).
\item \textsuperscript{89} \textit{Vogler}, 859 F.2d at 642.
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.} (citing 16 U.S.C. § 1902 (2005)).
\item \textsuperscript{92} \textit{Vogler}, 859 F.2d at 642.
\end{itemize}
federal government had the power to regulate roads and recover damages caused by others on those roads. In U.S. v. Garfield County,\textsuperscript{93} the court ordered the county to pay over $6,000 for damage caused to the vegetation of a hillside, which the county partially excavated with a bulldozer.\textsuperscript{94} The U.S. contended that Garfield County workers had engaged in road \textit{construction} work by “bulldoz[ing] two hillsides and [digging] a four-foot trench . . . excavating more than forty dump trucks worth of material.”\textsuperscript{95} The U.S. alleged that the construction activities “widened and realigned the road, destroyed vegetation, disturbed dirt that had been in place for millennia and changed the experience of the visitor entering the Park at that location.”\textsuperscript{96} By undertaking such activities, the U.S. contended that the County engaged in unauthorized road construction that was outside of its statutory right-of-way.\textsuperscript{97} The U.S. accused the County of committing an unlawful trespass upon federal lands and damaging park resources.\textsuperscript{98}

Garfield County confronted this accusation and maintained that the work was “reasonable and necessary to meet applicable safety standards,” and was not road construction but rather \textit{maintenance}.\textsuperscript{99} The County argued that there was no trespass because the County believed that it had not exceeded the scope of the right-of-way and that the county’s actions had not caused an impact to the values for which the Park was created.\textsuperscript{100} The County contended that within the scope of the right-of-way, it did not need prior consultation or approval of the Park Service to maintain and improve the road as it saw fit and was “free from Park Service regulation and control.”\textsuperscript{101} The County submitted “R.S. 2477 grants no regulatory authority to any federal agency . . . but rather offers the right-of-way . . . with the reacquisition of the interests it received under the R.S. § 2477 grant. . . .”\textsuperscript{102}


\textsuperscript{94} Id. at 1265. At the time of the excavation, Garfield County had been performing work on the segment of the Burr Trail road that traverses Capitol Reef National Park since the Park opened. Id. at 1205. The county maintained the road so that it could be used by motor vehicles. Id. “For a brief period, maintenance was performed under a ‘Cooperative Agreement’ between the Park Service and the County, dated January 15, 1979, but the Park Service sought to terminate this agreement in 1981 because it could not compensate the County for the work as had been agreed.” Id.

\textsuperscript{95} Id. at 1214.

\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

\textsuperscript{99} Id. The court found that Garfield County had failed to establish that the bulldozing was “reasonable and necessary” and thus, trespassed upon U. S. Land. Id. at 1256.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 1222.

\textsuperscript{102} Id. at 1222-23.
The court explained in its opinion that “[a]t the same time that Congress protects the County’s ‘valid existing rights,’ Congress also seeks to protect the natural scenic value of the Park lands.”\textsuperscript{103} Congress vested the Secretary of the Interior with the authority to “make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service. . . .”\textsuperscript{104} Congress imposed a duty on the Park Service to “conserve the scenery and the natural and historic objects and the wild life therein,” and “provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”\textsuperscript{105} The court points out that the Park Service has also been charged with the affirmative duty to “administer, protect, and develop the park” as directed by the Secretary.\textsuperscript{106} The Secretary’s rule concerning roads through national parks reads,

\textit{Constructing or attempting to construct} a building or other structure, boat dock, \textit{road}, trail, path, or other way, telephone line, telegraph line, power line, or any other private or public utility, \textit{upon, across, over, through}, or under any \textit{park areas}, except in accordance with the provisions of a valid permit, contract, or other written agreement with the United States, \textit{is prohibited}.\textsuperscript{107}

The court concludes that both parties have limited authority as to the management and maintenance of the R.S. 2477 right-of-way. However, the initial determination of whether the activity falls within an established right-of-way must be made by the federal agency having authority over the land.\textsuperscript{108} The court evoked Congress’ intent that the parties should communicate and adjust the right-of-way if necessary so long as the park’s resources do not suffer.\textsuperscript{109} The court reminds the parties that for the agency to make the determination Garfield County must communicate its plan for the road and in turn, the Park Service must evaluate those plans in a timely manner.\textsuperscript{110} Nevertheless, in the end, the Park Service had the regulatory authority over the road requiring Garfield County to consult with the Park Service before taking any action on the road.

\begin{thebibliography}{99}
\bibitem{103} Id. at 1235.
\bibitem{106} Garfield County, 122 F. Supp. 2d at 1241 (citing 16 U.S.C. § 273(a)).
\bibitem{107} 36 C.F.R. § 5.7 (2000) (emphasis added).
\bibitem{108} Garfield County, 122 F. Supp. 2d at 1243 (citing Sierra Club v. Hodel, 848 F.2d 1068, 1085 (10th Cir. 1988)).
\bibitem{109} Id.
\bibitem{110} Id. at 1243-44.
\end{thebibliography}
VI. The Camp Rock Road Case Involving R.S. 2477 Right-of-Way

In April 2003, the San Bernardino County Board of Supervisors approved a motion to apply for ownership of Camp Rock Road, a 42-mile stretch of federal land in the Mojave Desert.\textsuperscript{111} County officials chose Camp Rock Road for the first R.S. 2477 right-of-way application because it was a perfect example of a federal “right-of-way that should be granted [to state entities] and would make future cases easier to win.”\textsuperscript{112} The San Bernardino County Board of Supervisors chose Camp Rock Road as its first recordable disclaimer, or quitclaim deed, request because of the history and evidence of San Bernardino County money used for federally owned road maintenance.\textsuperscript{113} The Board wanted to ensure that there would be no question about county funds being used only for county owned roads.\textsuperscript{114}

This is an interesting case because the Board wanted to eliminate the BLM’s involvement in the plans for county road maintenance. The Board stated, “[a]ccording to the Public Works Department, the BLM will not prescribe any terms, conditions or maintenance that will be required to maintain a right-of-way once a recordable disclaimer is issued.”\textsuperscript{115} The desire to eliminate the BLM’s involvement in county road maintenance arose in response to maintenance protocols the BLM set forth for San Bernardino in 2001. The California Desert District of the BLM notified San Bernardino’s Transportation Department that the county maintained road\textsuperscript{116} ran through critical habitat for desert tortoises.\textsuperscript{117} The manner in which the county maintained Camp Rock Road created berms\textsuperscript{118} alongside the road.\textsuperscript{119} The berms pose a threat to the tortoise’s safe movement


\textsuperscript{113} Press Release, supra note 111.

\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} San Bernardino County had a permit to maintain and use the right-of-way at the time. However, the Federal Government retained ownership of the right-of-way. See Letter from Tim Salt, District Manager, United States Department of the Interior Bureau of Land Management, to Ken A Miller, Director of County of San Bernardino, Transportation Department (May 11, 2001) (on file at U.S. DOI BLM California Desert District) [hereinafter Tim Salt Letter].

\textsuperscript{117} Id.

\textsuperscript{118} A berm is a mound or wall of earth. Berms are created when the grading of the roads cause the excess dirt to collect and build along side of the road. MERRIAM-WEBSTER ONLINE DICTIONARY, available at http://www.webster.com/cgi-bin/dictionary?book=dictionary&v=berm (last visited May 25, 2005).

\textsuperscript{119} Tim Salt Letter, supra note 116.
within their habitat. The tortoises navigate along and down the berms slope eventually ending up on the roadway. The steep slope of the berms prevents the tortoise's ability to navigate a return to safety because the tortoises are unable to climb back up the slope. The tortoises either die from dehydration, starvation, or impacts from passing vehicles.

The desert tortoise listing on the ESA's threatened wildlife species list requires the right-of-way permit holder to prevent the "takings" of desert tortoises. The BLM, in explaining to the county that the ESA's unauthorized "takings" provision applies within the county's right of way authorization, emphasized the likelihood that the county would be identified as the "responsible party" in any future incident of unauthorized "takes" of desert tortoise. The district manager of the BLM also stated that an individual's involvement in any unauthorized "take" may result in a variety of sanctions and legal liability, including the "cancellation of an existing federal authorization, such as a right-of-way."

Pursuant to a right-of-way permit held by the county, BLM set out road maintenance protocols to reduce the unnecessary risks to desert tortoises. BLM's protocol instructed the county to reduce the slopes of all berms and ditches to less than thirty percent in desert tortoise habitat. In addition, the protocol required "breaks" in the existing berms that would allow the desert tortoises to exit the roadway. To circumvent the probability of desert tortoise deaths during their most vulnerable youth, the BLM placed non-emergency pipeline maintenance restrictions between June 16th and September 6th or November 8th and February 28th of each year, the periods when the young tortoises are actively roaming onto the roads.

When the BLM handed the county this mandate, San Bernardino County claimed no responsibility for the "takings" because it was not the owner of the road. It merely had a right-of-way permit. However, the BLM may revoke the county's right-of-way permit for not complying

120. Id.
121. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004).
122. Id.
123. Id.
125. Id.
126. Id.
129. Id.
130. Interview with Jay Tutchton, Professor of Law, University of Denver, Sturm College of Law, in Denver, Colo. (Sept. 15, 2004).
with the protocol. The county then decided to request a recordable disclaimer from the BLM for ownership of the road believing that the BLM's involvement in the plans for road maintenance on Camp Rock Road would terminate.

The BLM may be restricted from mandating day-to-day operations on most R.S. 2477 rights-of-way, but accepting ownership of the right-of-way will not preclude the county from ESA enforcements either by private citizen suits or Federal government involvement.

The ESA allows the Secretary of the Interior to utilize, by agreement, the personnel, services, and facilities of any other Federal or State agency for purposes of enforcing the act. Ownership of a R.S. 2477 right-of-way will not eliminate the federal government's involvement with maintenance protocols. In any case, San Bernardino County's maintenance of Camp Rock Road will still be subject to the regulations provided in the Endangered Species Act that governed the protocols issued by BLM. At most, enforcement of the protocols will simply shift from BLM to another federal agency, the Fish and Wildlife Service. In the end, San Bernadino County, as owner of the road, increased its liability for the unlawful “taking” of endangered species by applying for a recordable disclaimer for Camp Rock Road even if third parties cause a “take” to occur.

As the owner of the road, the county's liability increased because it could be liable for “taking” endangered species either directly or indirectly. The manner in which “taking” occurs is of little consequence. If a county worker or administrator causes a “take”, the county would be directly liable for the “take.” The county would also be liable for “take” if the activities which it allows to occur on the road results in a third party causing a “take.” In the first instance, the Endangered Species Act provides that it is unlawful for any person to take any endangered species. The ESA defines a “person” to include any “State, municipality, or political subdivisions of a State, or any other entity subject to the jurisdiction of the United States.” Therefore, if a county worker or administrator causes a take, the county would be subject to civil and criminal punishment under the ESA.

In the second instance, although third parties may commit the “tak-
ing” of endangered species on county roads, the local government bears the liability for such takings for allowing public use of the rights-of-way. In *Loggerhead Turtle v. Volusia County*, the court held the county liable for the “taking” of federally protected sea turtles committed by third parties on Volusia County owned land. Volusia County permitted vehicles upon beaches at night, which resulted in the death of many sea turtles. The light from the vehicles confused turtle hatchlings and caused their deaths. Once sea turtles hatch on the beach, they instinctively gravitate toward the ocean guided by the moon’s reflection upon the water. The turtles mistake the vehicles headlights as the moon’s reflection and proceed in the opposite direction of the ocean. Additionally, the vehicles frequently run over the turtles during their misguided trek. The *Loggerhead Turtle* court held that the county permitted the “taking” of protected sea turtles by allowing private vehicles nighttime access to the beaches. Consequently, the county was enjoined from permitting private vehicles nighttime access to its beaches.

As the court in *Loggerhead Turtle* established, the county’s liability remains intact although technically third party’s actions caused the unauthorized “take.” The county is derivately liable for the unauthorized “takes” of the desert tortoises because it maintains Camp Rock Road and allows private vehicles to travel upon the road.

**VII. CONCLUSION**

The granting of R.S. 2477 rights-of-way from the Federal Government to state and local governments does not eliminate federal agency involvement in the maintenance and regulation of activities on such roads. When Congress created the National Park Service and passed the Endangered Species Act, it delegated power to the Secretary of the Interior to protect national parks and endangered species and their habitats. When counties assert a claim to an R.S. 2477 right-of-way designation, nothing prevents a federal agency from enforcing the provisions of the National Park Service or the Endangered Species Act. The only thing that might change is the agency that regulates the activities on the roads. Instead of the Bureau for Land Management enforcing provisions, other agencies such as the Fish and Wildlife Service, the Forest Service, or the National Park Service enforce the provisions using the same criteria set

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140. *Id.* at 1182.
141. *Id.*
142. *Id.*
143. *Loggerhead Turtle, 896 F. Supp. at 1182.*
144. *Id.*
145. *Id.*
out by the relevant Acts. Counties asserting a right-of-way claim under R.S. 2477 will not be free to maintain and regulate activities on the road as they see fit as several counties have stated. Counties will remain responsible for maintaining the road and limiting access to the roads in a way that will protect parks and endangered species and their habitats.
Articles

Prologue: Federal Motor Carrier Leasing and Interchange Regulations and OOIDA Litigation

James C. Hardman*

The Transportation Law Journal has a history of publishing symposium issues devoted to significant aspects of transportation law. The Journal also focuses on how underlying historical events have influenced our current laws and practices. Some of the issues covered include:

Aviation Safety and Security
Aviation and Airport Infrastructure
International and Intermodal Transportation
Urban Mass Transit
Transportation Regulations: Past, Present and Future
Transportation Deregulation
Intrastate Regulation
Interstate Commerce Commission Anniversary Proceedings
Hazardous Materials Transportation
Railroad Industry

* James C. Hardman has specialized in transportation law over his forty-four year legal career. He has argued before the United States Supreme Court and courts and administrative agencies across the country. He has written three books and numerous business and law review articles on business and law subjects and has been named to Marquis' "Who's Who in America." He has also been active in professional and industry organizations, receiving Life Time Achievement Awards from the Transportation Lawyers Association, the Truckload Carriers Association, and the Minnesota Trucking Association. He received both an MBA and a JD from Northwestern University and is currently engaged in private law practice in Little Canada, Minnesota.
The history of motor carrier transportation is replete with significant regulatory changes emanating from landmark judicial decisions and legislative activities.

One example is the Interstate Commerce Commission's ("ICC") handling of application under former section 212(c) of the Interstate Commerce Act, 49 U.S.C § 312(c), which involved involuntary conversions of motor contract carriers to common carries if the carriers' operations did not conform to the newly enacted definition of contract carriage. Extensive litigation occurred as to whether the common carrier authority issued allowed the transportation of "the same commodities between the same points or within the same territory as authorized in the permit" issued to reflect contract carriage.1

Another excellent example occurred in 1986 when the ICC diverted from the "filed rate" doctrine2 and, in particular circumstances, gave equitable relief from the doctrine.

Despite the fact that over one hundred cases involving an estimated $10 million in undercharges were before the ICC based on its new "reasonable practice jurisdiction," the United States Supreme Court, in Maislin Industries, Inc. v. Primary Steel, Inc.,3 upheld the propriety and applicability of the "filed rate" doctrine leading to subsequent special legislation to resolve the handling of the outstanding undercharge claims.4

In Lease and Interchange of Vehicles, the ICC adopted regulations covering a significant part of the legal and economic relationship between motor carriers and owner-operators.5

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2. Under then existing law, a motor common carrier of property was not allowed to charge or receive any different compensation for transportation services than the rate set forth in the applicable tariff. 49 U.S.C. § 10761(a). See James C. Hardman, Motor Common Carriage and the Filed Rate Doctrine, 51 TRANSF. PRAC. J. 404 (1990).


5. See Lease and Interchange of Vehicles, 129 M.C.C. 700 (1978); Lease and Interchange of Vehicles 131 M.C.C. 141 (1979). Earlier in Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951), the ICC adopted regulations governing the responsibility of motor carriers, who are utilizing another party's equipment, to shippers, the public and to the agency in respect to public liability claims, cargo loss and/or damages and compliance to administrative rules and regulations. Owner-operators are individuals or entities which lease their vehicles to regulated motor carriers with driver service and which operate pursuant to registration authority held by the motor carrier. See 49 C.F.R. pt. 376.
The enforcement of the regulations involved exclusive administrative remedies and the ICC was quite active in enforcement activity. However, with the passage of the ICC Termination Act,6 the Federal Highway Administration inherited the dispute programs administered by the ICC7 and enforcement activities thereafter virtually ceased.

The new legislation, however, expanded remedies for violation from complaints before the agency to private actions in courts for enforcement.8

The allowance for injunctive relief, monetary damages, and the availability of class actions and attorney fees provided significant impetus for private party enforcement and, in a relatively short time period, lawsuits under the statute were filed generally by the Owner-Operator Independent Drivers Association, Inc. (“OOIDA”), on behalf of its members.9

The lawsuits, which currently number in excess of twenty, involve substantial monetary damages and have been vigorously defended by the motor carrier defendants.

The litigation has raised numerous and significant legal issues important in the context of transportation law. Such issues involve a review of the intent and reasonable interpretation of the Regulations; private versus regulatory dispute resolution; class action damages and other relief; and, finally, the legality and propriety of compulsory arbitration in the resolution of disputes.

Courts, to date, have reached different conclusions on the various issues, leaving the motor carrier industry participants and their legal counsel in “limbo.”

Authors of the symposium articles have attempted to identify and impart a thorough and meaningful understanding of the issues involved, provide their sage appraisal of the status of current litigation quagmire, and suggest possible resolution of the problems.

The Staff of the Transportation Law Journal and its advisor, Professor Robert Hardaway, are to be commended for bringing this study of OOIDA litigation to readers while it is still unfolding. This collection of articles allows readers to review the subject, appraise it, and contribute

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8. A significant number of truckload motor carriers conduct their operations utilizing owner-operators. The issues arising in the litigation are critical to the parties’ future relationships, if not continued usage of such operators.
9. OOIDA is a business association of persons and entities who own and operate motor carrier vehicles with driver services typically under lease to private and regulated motor carriers. Founded in 1973, it allegedly has over 127,000 members residing in the United States and Canada. Its membership has presumably grown approximately four-fold during the period it has engaged in Leasing Regulation litigation.
their views as to meaningful steps that might resolve the problems which have arisen in this critical area of transportation law.

James C. Hardman
Editorial Advisory Board Chairman
Transportation Law Journal
University of Denver Sturm College of Law
The Lease and Interchange of Vehicles in the Motor Carrier Industry

Jessica Goldstein*

I. In General

The regulation of the lease and interchange of vehicles is necessary for the efficient management of the motor carrier industry.¹ The Lease and Interchange of Vehicles governs the use of equipment by authorized motor carriers when the equipment is not owned by the authorized carrier but, instead, is leased from the owner-operator or obtained by interchange with another authorized carrier.² Generally, "interchange" means "the physical exchange of equipment, usually trailers, between authorized common carriers, at some common point, and generally in the furtherance of a through movement of freight over the lines of such carriers."³ Furthermore, the Lease and Interchange of Vehicles promotes the full disclosure between authorized carriers and owner-operators of the equipment.⁴ Specifically, it provides the detailed requirements necessary to form a valid contract between owner-operators and authorized carriers in the motor carrier industry.⁵

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¹ See Lease and Interchange of Vehicles, 131 M.C.C. 141, 142 (1979) [hereinafter 1979 Lease and Interchange of Vehicles].
³ Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675, 678 (1951).
⁴ 1979 Lease and Interchange of Vehicles, 131 M.C.C. at 142.
⁵ Id. at 141.
Regulation of the motor carrier industry began in 1935 and has since presented difficult problems in establishing fair practices for owner-operators and authorized carriers under the “grandfather” clauses of this act. During World War II ("the War"), many practices were sanctioned only because the Government was required to maximize motor-vehicle capacity and conserve fuel and tires. Consequently, “leasing among authorized carriers became more prevalent and widespread.” When the War was over, veterans returned to enter into business for themselves. Veterans were able to obtain financial aid to buy equipment and, as a result, the motor carrier industry grew.

As the industry grew, so did complaints regarding practices of authorized carriers. It was found that motor carriers “were augmenting equipment in times of heavy traffic with vehicles of other [authorized] carriers, exempt haulers, or private carriers, without a lease of any kind.” The problem with this type of practice was, “[i]n instances where an authorized regular-route carrier permits another to operate over its certificated route under an ostensible vehicle lease, it is difficult at present to determine whether . . . an unauthorized and illegal operation is being conducted.”

An example of such abuse occurred by an authorized carrier “possessing operating authority between Chicago, Illinois, and Louisville, Kentucky, but not beyond” Kentucky. The authorized carrier received a job, which required the cargo to be taken to points beyond Louisville. The authorized carrier purportedly arranged to have another carrier, with authority to perform the service, take the cargo beyond Louisville.

The [authorized] carrier serving Chicago, however, performed all the transportation in its vehicles, using shipping documents of the local carrier, and retained all the revenue. It appeared that the local carrier permitted this in order to keep the good will of a shipper, and to prevent the Chicago carrier from obtaining operating authority beyond Louisville.

Unlawful practices within the motor carrier industry could also be seen in situations where owner-operators employed under trip leases, “af-
ter the completion of [their] one-way haul [were] 'on their own.'”18 In most instances, the lessee made “no effort to obtain a return load for the operator.”19

Most of the carriers, including those which are substantial users of owner-operator equipment and oppose restrictions on trip leasing, concede that upon the completion of a trip they assume no responsibility for the owner-operator, and, as some of the owner-operators either do not carry public-liability and property-damage insurance or are unable to obtain it, protection for the public may be lacking . . . . In such instances, the opportunity is presented [to] the owner-operator to engage in unlawful transportation, if he can obtain a shipment.20

In 1947, all members of the motor carrier industry were in agreement that some action should be taken to correct and eliminate the abuses within the industry, but they were unable to agree as to what measures should be taken.21

There were four main points of the proposed rules in the 1951 Lease and Interchange of Vehicles by Motor Carriers.22 These main points were:

[1.] All leases, except those leases between authorized carriers or in an emergency, must apply for not less than thirty days.
[2.] Exclusive possession of a leased vehicle for the period of the lease, must be vested in the lessee . . . .
[3.] Compensation for the rental of a vehicle obtained under [a] lease based upon a division or percentage of the revenue earned thereby, is prohibited.
[4.] Except in the case of equipment (1) leased from another authorized carrier and operated over routes or within territory which the lessor and lessee are authorized to serve, or (2) utilized in the transportation of railway express shipments or in substituted motor-for-rail transportation, the driver of a leased vehicle must be an employee of the lessee.23

In 1978, the Surface Transportation Board (“STB”) established four main objectives in the current Lease and Interchange of Vehicles.24 The four objectives are:

(1) to simplify existing and new leasing regulations and to write them in more understandable language;
(2) to promote truth-in-leasing . . . ;
(3) to eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and

18. Id. at 690.
19. Id.
20. Id.
21. Id. at 683.
22. Id. at 722.
23. Id.
(4) to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry.25

The purpose of the 1978 objectives is to expand the previous regulations governing the leasing of equipment in order to promote the principle of truth-in-leasing. The basic definition of truth-in-leasing is, "a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties."26

The current rules and guidelines set forth in the 1978 Lease and Interchange of Vehicles are based upon the findings of:

(1) a Bureau of Operations (BOP) Report on Motor Carrier Leasing Practices, August 1977; (2) a Bureau of Economics (BOE) Preliminary Report on the Independent Trucker, November 1977; (3) evidence gathered during congressional testimony before a special Subcommittee on the House Committee on Small Business; and (4) testimony presented during Commission field hearings around the country.27

All the reports indicated a number of problem areas between authorized motor carriers and owner-operators.28 These problems prompted the revision of the leasing rules to ensure that motor carriers measure up to their statutory responsibilities, to reduce the opportunity for abuses, and to guarantee that the transportation system functions smoothly.29

The Interstate Commerce Commission ("ICC"), replaced on December 29, 1995 by the STB, maintains the authority to regulate the motor carrier industry.30 However, many parties affected by the 1978 Lease and Interchange of Vehicles claimed that the ICC lacked sufficient authority to issue regulations.31 In American Trucking Associations v. United States,32 the United States Supreme Court recognized that the Motor Carrier Act33 ("the Act") does not explicitly grant authority to the ICC to regulate "the leasing of vehicles for the transportation of passengers or property by motor carriers in interstate or foreign commerce."34 However, the

25. Id.
26. Id.
27. Id.
28. Id.
29. See id.
34. 1978 Lease and Interchange of Vehicles, 129 M.C.C. at 702-03 (citing Am. Trucking Ass'ns v. United States, 344 U.S. 298, 311-12 (1953)).
United States Supreme Court in *American Trucking* found that the ICC "holds implied power under section 204(a)(6) of the [Motor Carrier Act]."\(^{35}\)

\[T\]he ICC's implied authority to issue leasing regulations may be related to a host of economic regulatory functions including: (1) requiring the filing of just and reasonable rates by common carriers and preventing the violation of these rates and the demoralization of rate structures generally under sections 216(b) and 218(a) of the act, (2) requiring continuous and adequate service under section 204(a)(1) of the act, (3) requiring the observance of authorized routes and termini under sections 208(a) and 209(b) of the act, (4) prohibiting unlawful rebates under sections 216(d), 217(b), 218(a), and 222(c) of the act, and (5) imposing safety regulations for vehicles and drivers (authority now vested in the Department of Transportation).\(^{36}\)

However, the ICC's power to issue regulations is not unlimited.\(^{37}\) Not only must regulations be in line with the enabling statute, but they must also be reasonable.\(^{38}\)

Many motor carriers consider the matters regulated by the ICC "to be of a purely private contractual nature."\(^{39}\) Some motor carriers argued that under sections 204(e) and (f) of the Act, the ICC was not authorized to "set a level or a method of compensation" for the authorized carriers.\(^{40}\) The ICC was only entitled to require that the lease "specify the compensation."\(^{41}\)

The authorized carriers also argued that if the ICC "injects itself into such 'private contractual matters,'" it will intrude upon the powers of the Department of Labor or the National Labor Relations Board.\(^{42}\) Furthermore, it was argued that sections 204(e) and (f) of the Act show a congressional intent not to allow the ICC the power to issue such regulations.\(^{43}\) Lastly, a number of authorized carriers argued that the enactment of sections 204(e) and (f) of the Act preclude the holding in *American Trucking*.\(^{44}\)

Contrary to the arguments presented by the motor carriers, section 204(e) of the Act represents a specific congressional intent to impart the ICC's authority to regulate such matters.\(^{45}\) In fact, "[t]he congressional

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35. *Id.* at 703 (citing Am. Trucking Ass'ns v. United States, 344 U.S. 298, 310 (1953)).
36. *Id.* (citing Am. Trucking Ass'ns v. United States, 344 U.S. 298, 310 (1953)).
37. *Id.*
38. *Id.* (citing Int'l Ry. Co. v. Davidson, 257 U.S. 506, 514 (1922)).
39. *Id.*
40. *Id.* at 703-04.
41. *Id.* at 704.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
purpose in enacting section 204(e) was to confirm the ICC’s authority in this area, not to set fixed limits on the [ICC’s] authority.”\textsuperscript{46} Moreover, [S]ection 204(e) confirms the [ICC’s] implied authority to prescribe: [s]uch other regulations as may be reasonably necessary to assure that motor carriers will have full direction and control of vehicles while they are being used under such leases, and will be fully responsible for the operation thereof in accordance with applicable law and regulation, as if they were the owners of the vehicles.\textsuperscript{47}

Additionally, as provided in the Senate Report,

The bill would enact into law powers that are intended to strengthen the authority of the Interstate Commerce Commission in dealing with safety in motor transportation. While it is true that the courts have held that some of this authority already rests with the [ICC] still it is believed advisable to make them law by enactment rather than by court decision.\textsuperscript{48}

Furthermore, “section 204(f) [of the Act] establishe[d] certain limitations on that authority with respect to leases that involved exempt authorized carriers.”\textsuperscript{49}

The argument that the ICC may not constitutionally alter the terms of contracts is not valid.\textsuperscript{50} The ICC’s authority to issue regulations is based upon a statutory, not constitutional, basis.\textsuperscript{51} “The prohibition against impairing the obligation of contracts, found in article 1, section 10, clause 1 of the United States Constitution, runs only to the actions of the State[,]” not to federal actions.\textsuperscript{52} Additionally, the United States Supreme Court held that the due process clause of the Fifth Amendment does not prohibit the ICC from adopting lease and interchange rules.\textsuperscript{53} The United States Supreme Court recognized that “[t]he rule making power is rooted in and supplements Congress’ regulatory scheme, which in turn derives from the commerce power.”\textsuperscript{54}

Currently, the adopted lease and interchange regulations “promote full disclosure between [authorized] carriers and owner-operators.”\textsuperscript{55} The final leasing rules issued by what is now known as the STB, attain the four main objectives of the 1979 Lease and Interchange of Vehicles, partic-

\begin{itemize}
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id. at 704-05 (citing H.R. Rep. No. 84-2425 (1956)).
  \item \textsuperscript{48} Id. at 705 n.6 (citing S. Rep. No. 84-1271 (1955)).
  \item \textsuperscript{49} Id. at 704.
  \item \textsuperscript{50} Id. at 705.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id. (citing Am. Trucking Ass’ns v. United States, 344 U.S. 298, 322 (1953)).
  \item \textsuperscript{54} Am. Trucking, 344 U.S. at 322.
  \item \textsuperscript{55} 1979 Lease and Interchange of Vehicles, 131 M.C.C. at 141.
\end{itemize}
ularly the truth-in-leasing principle.\textsuperscript{56} "Proposals for a uniform lease agreement have been rejected in order to allow the various types of carriers using owner-operators, and owner-operators themselves, the greatest latitude in establishing leases."\textsuperscript{57} However some portions of the lease must be uniform.\textsuperscript{58} For example, the lease must disclose "[t]he cost of various operating expenses such as fuel, permits, tolls, and licenses . . . ."\textsuperscript{59} Moreover, the lease must identify the following:

\begin{quote}
[A]ll items that may be charged-back to the [owner-operator], clearly state the insurance costs and responsibilities of each party, and specify the terms of any equipment purchase plan or rental contract that gives the [authorized] carrier the right to make deductions from the [owner-operator's] compensation. The level of compensation to the owner[-operator] must be stated on the lease, the owner-operators must receive a copy of the freight bill, and payment of compensation must be made within 15 days of the submission of paperwork to the [authorized] carrier.\textsuperscript{60}
\end{quote}

The majority of commissioners accept the basic truth-in-leasing concept.\textsuperscript{61} However, three of the commissioners would go further to protect the interests of owner-operators by setting minimum standards for the following items: "fuel, fuel taxes, empty mileage, permits, tolls, ferries, detention and accessorial services, base plates, licenses, and insurance."\textsuperscript{62}

These Commissioners believe that owner-operators have assumed an increasingly important role in the national transportation system; that, despite their importance, they have little chance of individually bargaining any changes in any contract; and that some carriers will continue, wholly consistent with the truth-in-leasing rules, to pass the bulk of their transportation burdens on to the independent driver. These Commissioners believe that the independent should not have to assume all of the carrier's business risks without having some access to the returns of the business.\textsuperscript{63}

Despite the commissioners' beliefs mentioned above, three other commissioners "recognize[d] the vital role played by owner-operators, but believe that specific standards in these areas may tend to interfere with the independent status of the owner-operator and with the parties' rights to contract."\textsuperscript{64} Additionally, the commissioners believe that, "any gains made by the independent in these areas could be offset by a corre-

\begin{thebibliography}{99}
\bibitem{56} Id. at 142.
\bibitem{57} Id.
\bibitem{58} See id. at 141.
\bibitem{59} Id.
\bibitem{60} Id.
\bibitem{61} Id. at 144.
\bibitem{62} Id.
\bibitem{63} Id.
\bibitem{64} Id.
\end{thebibliography}
sponding reduction in the rate of compensation specified in the lease.\textsuperscript{65}

II. Scope of Regulations

The general scope of the lease and interchange regulations applies to all authorized property carriers under 49 U.S.C. §§ 13901 and 13902.\textsuperscript{66} More specifically, 49 C.F.R. § 376.1 regulates the actions of motor carriers who transport property and who are registered with the Secretary.\textsuperscript{67} Pursuant to 49 C.F.R. § 376.1:

The regulations in this part apply to the following actions by motor carriers registered with the Secretary to transport property:
(a) The leasing of equipment with which to perform transportation regulated by the Secretary.
(b) The leasing of equipment to motor private carrier or shippers.
(c) The interchange of equipment between motor common carriers in the performance of transportation regulated by the Secretary.\textsuperscript{68}

III. General Requirements

Only under certain conditions may a motor carrier perform authorized transportation in equipment that it does not own.\textsuperscript{69} There must be a written lease “granting the use of the equipment and meeting the requirements contained in 49 C.F.R. § 376.12.”\textsuperscript{70} For example, a lease under 49 C.F.R. 376.11(a) must: (1) be made between the authorized carrier and the owner-operator of the equipment; (2) be signed by the parties or by their authorized representatives; (3) specify the duration; and (4) clearly specify the compensation to be given.\textsuperscript{71}

A motor carrier must provide receipts for the equipment, which identify the equipment leased as well as specify the date and time transfer of possession is to occur.\textsuperscript{72} The authorized carrier is required to give the owner-operator of the equipment a receipt once the authorized carrier takes possession of the equipment, which may be given “by mail, telegraph, or by other similar means of communication.”\textsuperscript{73} Conversely, if so required by the lease, a receipt must be given when the authorized carrier’s possession of the equipment ends.\textsuperscript{74} Similarly, “[a]uthorized repre-

\textsuperscript{65} Id.
\textsuperscript{66} 49 U.S.C. §§ 13901, 13902.
\textsuperscript{67} 49 C.F.R. § 376.1 (2005).
\textsuperscript{68} Id.
\textsuperscript{69} Id. § 376.11.
\textsuperscript{70} Id. § 376.11(a).
\textsuperscript{71} Id. § 376.12(a), (b), (d).
\textsuperscript{72} Id. § 376.11(b).
\textsuperscript{73} Id. § 376.11(b)(1).
\textsuperscript{74} Id. § 376.11(b)(2).
sentatives of the [authorized] carrier and the owner-operator may take possession of the leased equipment and give and receive the receipts required under this subsection.\textsuperscript{75}

Moreover, the owner-operator's equipment must be identified with both the authorized carrier's name and Department of Transportation ("DOT") numbers.\textsuperscript{76} Additionally, the authorized carrier must keep a statement with the equipment certifying that the authorized carrier is operating the equipment during the length of the lease, unless a copy of the lease is carried on the actual equipment.\textsuperscript{77} The statement must include: "[1] the name of the owner, [2] the date and length of the lease, [3] any restrictions in the lease relative to the commodities to be transported, and [4] the address at which the original lease is kept by the authorized carrier."\textsuperscript{78}

Furthermore, 49 C.F.R § 376.11(d) requires that the authorized carrier using the equipment keep certain records of the equipment.\textsuperscript{79} The authorized carrier must "prepare and keep documents covering each trip for which the equipment is used in its service."\textsuperscript{80} The documents must include "the name and address of the owner of the equipment, the point of origin, time and date of departure, and the point of final destination."\textsuperscript{81} Also, papers identifying the lading and indicating that the transportation is under the authorized carrier's responsibility are to be kept with the equipment.\textsuperscript{82} A lease containing the above-mentioned information may be used instead of documents and papers.\textsuperscript{83} In regards to lease agreements negotiated under a master lease, a copy of the master lease must be kept with the equipment and any extra information required, needs to be included in the freight documents prepared for the specific trip.\textsuperscript{84}

\section*{IV. WRITTEN LEASE REQUIREMENTS}

Certain provisions must be adhered to in order to make a written lease valid under the regulations.\textsuperscript{85} As previously stated, the lease must be made between the authorized carrier and the owner-operator of the

\textsuperscript{75} Id. § 376.11(b)(3).
\textsuperscript{76} Id. § 390.21(b)(1), (2).
\textsuperscript{77} Id. § 376.11(c)(2).
\textsuperscript{78} Id.
\textsuperscript{79} Id. § 376.11(d).
\textsuperscript{80} Id. § 376.11(d)(1).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. § 376.12.
equipment.\textsuperscript{86} Also, the lease must to be signed by the authorized carrier and the owner-operator or their authorized representative.\textsuperscript{87} The lease must state the date and time when the lease begins and ends, and those dates and times must coincide with the receipt times.\textsuperscript{88} Additionally, the lease has to state that the authorized carrier has exclusive possession, control, and use of the equipment for the duration of the lease.” The lease must also provide that the authorized carrier has “assume[d] complete responsibility for operation of the equipment for the duration of the lease.”\textsuperscript{89}

Section 204(e)(1) of the Act permits the STB “to require that the lease specify the compensation to be paid” to the owner-operator.\textsuperscript{90} The amount of compensation to be paid by the authorized carrier for the equipment and driver’s services “shall be clearly stated on the face of the lease or in an addendum which is attached to the lease.”\textsuperscript{91} Such lease or addendum needs to be provided to the owner-operator of the equipment or its authorized representative before the commencement of any trip in the service of the authorized carrier.\textsuperscript{92} “The amount to be paid may be expressed as a percentage of the gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease.”\textsuperscript{93}

V. Specific Items in Lease

The lease must clearly specify the responsible party for removing the authorized carrier’s identification from the equipment at the end of the lease and how the devices will be returned to the authorized carrier.\textsuperscript{94} If the lease requires any receipts, the lease must specify how the receipts will be issued upon termination of the lease.\textsuperscript{95} Additionally, the lease must identify whether the owner-operator or the authorized carrier is responsible for the “cost of fuel, fuel taxes, empty mileage, permits . . . , tolls, ferries, detention and accessorial charges, base plates and licenses, and any unused portions of such items.”\textsuperscript{96} The party responsible for the loading and unloading of freight and any compensation for this service

\textsuperscript{86} Id. § 376.12(a).
\textsuperscript{87} Id.
\textsuperscript{88} Id. § 376.12(b).
\textsuperscript{89} Id. § 376.12(e)(1).
\textsuperscript{90} 1978 Lease and Interchange of Vehicles, 129 M.C.C. at 706.
\textsuperscript{91} 49 C.F.R. § 376.12(d).
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. § 376.12(e).
\textsuperscript{95} Id.
\textsuperscript{96} Id.
must also be determined in the lease.97

The lease shall specify the authorized carrier’s responsibility to assume any liability for fines incurred from overweight or oversize loads where the trailers are pre-loaded, sealed, containerized or otherwise outside of the owner-operator’s control.98 Furthermore, it must be stated that the authorized carrier is responsible for improperly permitted shipments, unless the fine results from an owner-operator’s acts or omissions.99 If the owner-operator pays any fines incurred by the authorized carrier, the authorized carrier must reimburse the owner-operator for the fines paid.100

VI. Compensation and Settlement

The STB’s authority to require motor carriers to pay owner-operators within a specified time is “premised on the [Board’s] duty under the national transportation policy to promote a smoothly functioning transportation system . . . .”101 It is also based upon he Board’s authority under section 204(a)(1) of the Act “to establish reasonable requirements regarding continuous and adequate service.”102 The authorized carrier must make payment to the vehicle owner-operator within fifteen days “after submission of the necessary delivery documents and other paperwork regarding a trip . . . .”103 The theory behind the prompt payment is, if owner-operators are not compensated in a timely manner, they may experience a cash shortage.104 The lack of cash could ultimately end in the business closing or in transportation service disruptions.105 In order for the owner-operator to receive payment, the authorized carrier is required to submit logbooks to the DOT as well as “documents necessary for the authorized carrier to secure payment from the shipper.”106 The authorized carrier may require the owner-operator of the equipment to submit additional documents, but not as a condition of payment.107 Furthermore, payment to the owner-operator cannot be “contingent upon submission of a bill of lading to which no exception has been taken.”108 The authorized carrier may withhold final settlement until the owner-operator has

97. Id.
98. Id.
99. Id.
100. Id.
102. Id.
103. 49 C.F.R. § 376.12(f).
104. 1978 Lease and Interchange of Vehicles, 129 M.C.C. at 706.
105. Id.
106. 49 C.F.R. § 376.12(f).
107. Id.
108. Id.
returned the authorized carrier’s identification devices, except for those painted directly onto the equipment.109 If the identification device has been lost or stolen, the owner-operator may provide a letter certifying its removal.110

When the owner-operator of the equipment is paid a percentage of the revenue, the lease must state that the owner-operator will be provided with a copy of the rated freight bill or computer-generated summary, before or at the time of settlement.111 The owner-operator is permitted to examine copies of the authorized carrier’s tariffs or other documents necessary to verify rates and charges, but “the authorized carrier may delete the names of the shippers and consignees shown on the freight bill or other form of documentation.”112

The lease must “specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the [owner-operator’s]” final compensation.113 Also, the lease must state how charge-back items will be computed and that the owner-operator will be provided with copies of all the documents necessary to verify the validity of the charges.114

VII. PRODUCTS, EQUIPMENT AND SERVICES

The lease must state that the owner-operator “is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement.”115 The terms of any equipment purchase or rental contract, which gives the authorized carrier the right to make deductions from the owner-operator’s compensation for purchase or rental payments, must be clearly specified in the lease.116

VIII. INSURANCE OBLIGATIONS

The lease must state that the authorized carrier has the legal obligation to maintain insurance coverage for the protection of the public.117 The lease must also specify who is responsible for providing all other types of insurance coverage for the equipment, such as bobtail insurance.118 If the authorized carrier will make a charge-back to the owner-

109. Id.
110. Id.
111. Id. § 376.12(g).
112. Id.
113. Id. § 376.12(h).
114. Id.
115. Id. § 376.12(i).
116. Id.
117. Id. § 376.12(j)(1).
118. Id.
operator of the equipment for any of the insurance, the lease must specify the amount that will be charged back.\textsuperscript{119} If the owner-operator purchases any insurance coverage from or through the authorized carrier, the lease must specify that the authorized carrier will provide a copy of the policy upon the owner-operator's request.\textsuperscript{120} When the insurance is purchased in this manner, the lease must further specify that the authorized carrier will provide the owner-operator with a certificate of insurance which states the following: (1) the name of the insurer; (2) the policy number; (3) the effective dates of the policy; (4) the amounts and types of coverage; (5) the cost to the owner-operator for each type of coverage; and (6) the deductible amount.\textsuperscript{121} The lease must clearly identify the "conditions under which deductions for cargo or property damage" will be made.\textsuperscript{122} Additionally, the lease must state that the authorized carrier is required to provide the owner-operator with a written explanation and itemization of any cargo or property damage deductions before the deduction is made.\textsuperscript{123}

\section*{IX. Escrow Funds}

If the owner-operator and authorized carrier determine that escrow funds are required, the lease must specify three things. First, that the owner-operator of the equipment must pay the amount of any escrow fund or performance bond to the authorized carrier or to an authorized third party.\textsuperscript{124} Second, the specific items to which the authorized carrier can apply the escrow fund.\textsuperscript{125} Lastly, "that while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the [owner-operator] of any transactions involving" the fund.\textsuperscript{126}

The accounting can be done in one of two ways.\textsuperscript{127} The authorized carrier can provide individual statement sheets or a separate accounting given monthly to the owner-operator.\textsuperscript{128} The lease must state the owner-operator's right at any time to have a separate accounting for any transactions involving the escrow fund.\textsuperscript{129}

While the authorized carrier is in control of the escrow fund, the

\begin{footnotesize}

\begin{enumerate}
\item Id.
\item Id. § 376.12(j)(2).
\item Id.
\item Id. § 376.12(j)(3).
\item Id.
\item Id. § 376.12(k)(1).
\item Id. § 376.12(k)(2).
\item Id. § 376.12(k)(3).
\item Id.
\item Id. § 376.12(k)(3)(i), (ii).
\item Id. § 376.12(k)(4).
\end{enumerate}

\end{footnotesize}
authorized carrier will pay interest on the fund.\textsuperscript{130} The interest must be paid on at least a quarterly basis based upon the "average yield or equivalent coupon issue yield for a [ninety-one-day, thirteen-week] Treasury bill . . . ."\textsuperscript{131} The lease may specify that escrow will not be paid on the amount of the escrow fund equal to the average advance made to the owner-operator during the period of time for which interest is paid.\textsuperscript{132}

Also, the lease must state the conditions the owner-operator must fulfill in order to have the escrow funds returned.\textsuperscript{133} When the escrow fund is returned, the authorized carrier may deduct any amount owed for obligations incurred by the owner-operator as previously specified in the lease, and "shall provide [the owner-operator with] a final accounting" of the deduction amount.\textsuperscript{134} Furthermore, the lease must state that the escrow funds will be returned no later than forty-five days from the date of the termination of the lease.\textsuperscript{135}

\section*{X. Permissive Items}

The lease must provide for the receipt of the equipment at the lease's end.\textsuperscript{136} The lease must also provide for the authorized carrier to be considered as the owner-operator of the equipment for the purpose of subleasing the equipment to other authorized carriers.\textsuperscript{137} "The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount."\textsuperscript{138} The owner-operator may require additional documents, other than logs and documents necessary for freight billing, but not as a prerequisite to a settlement within fifteen days.\textsuperscript{139}

\section*{XI. Action Items}

The lease or the addendum regarding compensations shall be delivered before or at the trip's commencement.\textsuperscript{140} The owner-operator shall receive a refund or credit for base plates purchased by the owner-operator from the authorized carrier as a prorated portion of the proceeds from the subsequent sale.\textsuperscript{141} "The authorized carrier shall not set time

\begin{thebibliography}{11}
\bibitem{130} Id. § 376.12(k)(5).
\bibitem{131} Id.
\bibitem{132} Id.
\bibitem{133} Id. § 376.12(k)(6).
\bibitem{134} Id.
\bibitem{135} Id.
\bibitem{136} Id. § 376.12(e).
\bibitem{137} Id. § 376.12(c)(2).
\bibitem{138} Id. § 376.12(d).
\bibitem{139} Id. § 376.12(f).
\bibitem{140} Id. § 376.12(d).
\bibitem{141} Id. § 376.12(e).
\end{thebibliography}
limits for the [owner-operator's] submission . . . of required delivery documents and other paperwork."\textsuperscript{142} The owner-operator must be given copies of the documents necessary to determine the validity of charge-back items.\textsuperscript{143} A written explanation and itemization of deductions for cargo or property damages must be delivered to the owner-operator before any deductions can be made.\textsuperscript{144} “At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the [owner-operator] which have been previously specified in the lease, and shall provide [the owner-operator with] a final accounting” of any deductions taken.\textsuperscript{145} The parties to the lease must sign an original and two copies of the lease.\textsuperscript{146} The authorized carrier will keep the original copy of the lease.\textsuperscript{147} Unless a copy of the lease is carried on the equipment itself, the authorized carrier shall keep a certificate asserting the validity of the authorized carrier’s operation of the equipment on the equipment.\textsuperscript{148}

\section*{XII. Household Goods Carriers}

“When an authorized carrier of household goods leases equipment for the transportation of household goods, . . . the parties may provide in the lease that the [authorized carrier will have exclusive possession, control, and use of the equipment] only during the time the equipment is operated by or for the authorized carrier,” rather than for the duration of the lease.\textsuperscript{149} Some instances of leasing equipment involve owner-operators whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of the authorized carrier, rather than the authorized carrier itself.\textsuperscript{150} “In this situation, the authorized carrier is obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d) – (k) of [49 C.F.R. 376.12].”\textsuperscript{151}

\section*{XIII. Conclusion}

The regulation of the motor carrier industry is a detailed, in-depth process which attempts to ensure the smooth functioning of the lease and

\begin{flushleft}
\textsuperscript{142} Id. § 376.12(f). \\
\textsuperscript{143} Id. § 376.12(h). \\
\textsuperscript{144} Id. § 376.12(j)(3). \\
\textsuperscript{145} Id. § 376.12(k)(6). \\
\textsuperscript{146} Id. § 376.12(l). \\
\textsuperscript{147} Id. \\
\textsuperscript{148} Id. \\
\textsuperscript{149} Id. § 376.12(c)(3). \\
\textsuperscript{150} Id. § 376.12(m). \\
\textsuperscript{151} Id.
interchange of vehicles. Not only does the management of the motor carrier industry prevent abuses against both owner-operators and authorized carriers, but it also ensures the reliable movement of goods throughout the United States. The management and regulation of the motor carrier industry has long been an imperative necessity to the transportation community, and it will continue to be of great importance in the industry's future growth.
An Overview of OOIDA Litigation

James C. Hardman*

I. INTRODUCTION

The passage of the ICC Termination Act of 1995\(^1\) and the demise of the Interstate Commerce Commission ("ICC") over motor carrier regulatory functions has had a profound effect on the resolution of disputes.\(^2\) The Report of the House Transportation and Infrastructure Committee highlights this development and explained:

In addition to overseeing the background commercial rules of the motor carrier industry, the ICC currently resolves disputes that arise in such areas. There is no explicit statutory requirement to do so . . .. The ICC dispute resolution programs include household goods and auto driveaway carriers, brokers, owner-operator leasing, loss and damage claims, duplicate payments and overcharges, and lumping.

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* James C. Hardman has specialized in transportation law over his forty-four year legal career. He has argued before the United States Supreme Court and courts and administrative agencies across the country. He has written three books and numerous business and law review articles on business and law subjects and has been named to Marquis' "Who's Who in America." He has also been active in professional and industry organizations, receiving Life Time Achievement Awards from the Transportation Lawyers Association, the Truckload Carriers Association, and the Minnesota Trucking Association. He received both an MBA and a JD from Northwestern University and is currently engaged in private law practice in Little Canada, Minnesota.


2. The Termination Act was intended to substantially deregulate rail and motor carrier transportation.
The bill transfers responsibility for all the areas in which the ICC resolves disputes to the Secretary (except passenger intercarrier disputes). The Committee does not believe that DOT should allocate scarce resources to resolving these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution function in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act. This change will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved—by the parties.  

To facilitate the private resolution of disputes in court, the legislature expanded the applicable law, which at that time only permitted complaints to be brought before the ICC.

The provisions adopted read as follows:

49 U.S.C. § 14701. General Authority
   (a) INVESTIGATIONS. If the Secretary or Board, as applicable, finds that a carrier . . . is violating this part, the Secretary or Board, as applicable, shall take appropriate action to compel compliance with this part.  
   (b) COMPLAINTS. A person, including a governmental authority, may file with the Secretary or Board, as applicable, a complaint about a violation of this part by a carrier . . . .

§ 14702. Enforcement by the regulatory authority
   (a) IN GENERAL. The Secretary or the Board, as applicable, may bring a civil action—
      (2) to enforce this part, or a regulation or order of the Secretary or Board, as applicable, when violated by a carrier . . . .

§ 14703. Enforcement by the Attorney General
   The Attorney General may, and on request of either the Secretary or Board shall bring court proceedings—
      (1) to enforce this part of a regulation or order of the Secretary or Board or terms of registration under this part . . . .

§ 14704. Rights and remedies of person injured by carriers [or brokers]
   (a) IN GENERAL.
      (1) ENFORCEMENT OF ORDER. — A person injured because a carrier . . . does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this

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5. Id. § 14701(b).
6. Id. § 14702(a)(2).
7. Id. § 14703(1).
subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 [the statute authorizing at least some of the motor carrier leasing regulations] and 14103.8

(2) DAMAGES FOR VIOLATIONS. - A carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.9

(b) LIABILITY AND DAMAGES FOR EXCEEDING TARIFF RATE. A carrier . . . is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702.10

(c) ELECTION.

(1) COMPLAINT TO DOT OR BOARD, CIVIL ACTION. A person may file a complaint with the Board or the Secretary, as applicable, under section 14701(b) or bring a civil action under subsection (b) to enforce liability against a carrier . . . .11

(2) ORDER OF DOT OR BOARD.

(B) ENFORCEMENT BY CIVIL ACTION. - The person for whose benefit an order of the Board or Secretary requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if a carrier . . . does not pay the amount awarded by the date payment was ordered to be made.12

This statutory change has led to a rash of private lawsuits seeking injunctive and monetary damages by individual owner-operators13 and the Owner-Operator Independent Drivers Association ("OOIDA"), representing the interests of its member owner-operators.14 No less than thirty lawsuits have been filed by OOIDA or others.15

8. Id. § 14704(a)(1).
9. Id. § 14704(a)(2).
10. Id. § 14704(b).
11. Id. § 14704(c)(1).
12. Id. § 14704(c)(2)(B).
13. Under the Leasing Regulations, a “lease” constitutes “[a] contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier [as defined by section 376.2(a)] for use in the regulated transportation of property, in exchange for compensation.” 49 C.F.R. § 376.2(e). An owner-operator is considered an owner who contracts the vehicle with driver services being performed by himself or herself. Id. § 376.2(d). The Leasing Regulations are applicable, however, to the use of a vehicle whether without a driver as well as drivers engaged by the owner.
14. OOIDA is a business association comprised of individuals and entities that own and operate equipment under the Leasing Regulations or transport commodities exempt from the Leasing Regulations. It claims a membership exceeding 125,000 owner-operators which represent a growth of approximately 300% since it initiated litigation under 49 U.S.C. § 14704. The organization has been in the forefront of the judicial activity although other similar lawsuits have been filed by other organizations and independent individuals. See OOIDA, Homepage, http://www.ooida.com (last visited Nov. 6, 2005).
II. Jurisdiction

The question of jurisdiction was a crux issue in the initial cases filed, first appearing in Owner-Operator Independent Drivers Association, Inc. v. New Prime, Inc. Broadly speaking, the owner-operators argued that the provision of 49 U.S.C. § 14704(a)(1) and (a)(2) authorized "direct actions against carriers in federal court," while the carrier argued the "remedies were secondary to Federal Highway Administration's ("FHWA") administrative remedies in [49 U.S.C.] § 14701."17

While the district court dismissed the suit, deferring to the primary jurisdiction of FHWA, FHWA declined to exercise that jurisdiction.18 The Court of Appeals was then faced with complex issues of statutory construction creating both administrative and judicial enforcement of remedies.

In a concise decision, the court, relying on the legislative history while noting the linguistic imperfections and inconsistencies in the applicable sections, felt the most logical reading of the statute allowed private actions and.19 The court, thus, found that FHWA's remedial jurisdiction was not exclusive.20

Since the New Prime case, the jurisdictional issue has been raised in

17. Id. at 781.
18. Id. FHWA responded with a Notice of Denial, declining to exercise primary jurisdiction because the Leasing Regulations and the issues raised by the Owner-Operators "are fairly straightforward matters clearly within the competence of a court to resolve" and because the ICC had addressed similar issues in OPA Information Bulletin No. 93-103, No. MC-C-30192, Dart Transit Co.-Petition for Declaratory Order, 9 I.C.C.2d 701 (June 28, 1993)." Id. New Prime appealed FHWA's refusal to exercise its administrative jurisdiction. OOIDA also commenced an action in the Southern District of Ohio, alleging that the lease agreements used by Arctic Express, Inc. and its affiliate, D & A Associates, Ltd. (collectively, 'Arctic Express'), violate[d] the same provisions of the Leasing Regulations. Arctic Express appealed FHWA's Notice of Denial to the Sixth Circuit, which transferred the appeal to [the Court of Appeals in the Eighth Circuit]. The American Trucking Associations filed amicus briefs in support of the [New Prime and Arctic Express appeals, urging [the Court] to reverse the agency's refusal to exercise jurisdiction over the carriers' disputes with the Owner-Operators. Id.
19. Id. at 785.
20. Id. The court also rejected the argument that the FHWA be compelled to exercise its jurisdiction as such action was not reviewable under the Administrative Procedure Act. Id. at 786.
other similar cases without success.\textsuperscript{21}

III. The Truth-in-Leasing Regulations

The federal Leasing Regulations were originally adopted to eliminate “provider plans” which were prevalent in the mid to late 1940s. Carriers, which held authority from the ICC to operate, were essentially leasing such authority to individuals or entities without such authority for single or multiple transportation movements. The authorized carrier did not exercise any control of such operation and, thus, did not have any responsibility for the operations.\textsuperscript{22} This practice led to problems of assuring that the public and cargo were covered by the operator’s insurance and that operations were performed in adherence to regulations.

As a result, the ICC promulgated regulations that required leased vehicles to be operated under the direction and control of authorized carriers.\textsuperscript{23} Furthermore, the regulations made authorized carriers responsible to shippers, the public, and the agency for public liability claims, cargo loss and/or damages, and compliance with the rules and regulations.\textsuperscript{24} Although this action solved the problems indicated, it did not address the relationship between the lessor and lessee of the equipment used in the transportation to any greater degree.

Later, complaints by owner-operators about the practices of motor carrier lessees led to government studies and ultimately to hearings leading to additional regulatory provisions. These provisions were designed

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\item to simplify existing and new regulations and to write them in understandable English;
\item to promote . . . disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties;
\item to . . . reduce opportunities for skimming and other illegal or inequitable practices; and
\item to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry.\textsuperscript{25}
\end{enumerate}

\textsuperscript{21} See, e.g., Mayflower Trans., 161 F. Supp. 2d at 957 (denying Mayflower's motion to dismiss or stay pending resolution by the DOT while adopting the Eighth Circuit's holding in New Prime); Swift Transp., 288 F. Supp. 2d at 1033. Decided prior to the New Prime case, the district court in Renteria v. K & R Transp., Inc., found that no private cause of action existed for damages without first obtaining an agency order. Renteria, 1999 WL 33268638, at *6.

\textsuperscript{22} E.g., Performance of Motor Common Carrier Service by Riss & Company, 48 M.C.C. 327, 358 (1948).

\textsuperscript{23} See generally Lease and Interchange of Vehicles By Motor Carriers, 51 M.C.C. 461 (1950).

\textsuperscript{24} See id. at 515, 547.

\textsuperscript{25} Lease and Interchange of Vehicles, 131 M.C.C. 141, 142 (1979) [hereinafter 1979 Lease and Interchange of Vehicles]. The main purpose of the renewed Regulation was to ensure truth-in-leasing by fostering disclosure. See Tousley v. N. Am. Van Lines, Inc., 752 F.2d 96, 101 (4th Cir. 1985) (citing Lease and Interchange of Vehicles, 129 M.C.C. 700, 706-08 (1978)).
The regulations adopted were broad in application and covered an extensive range of subjects including the specific items required to be included in the lease, compensation and settlements tracking, products, equipment and service transactions, insurance obligations, and escrow funds plus other general requirements.

During the time the ICC had jurisdiction, issues over the regulations governing equipment leases normally arose during the periodic audits made by FHWA of carrier operations. However, such issues were, presumably, informally resolved as few reported proceedings involving the issue exist.

While no statistics are available, it appears that the FHWA, and now the Federal Motor Carrier Safety Administration ("FMCSA"), have not made periodic audits of carriers in respect to compliance with the Truth-in-Leasing Regulations ("Leasing Regulations"). Thus, few administrative directives or precedence exist.

IV. OOIDA Allegations

In the numerous federal cases filed by OOIDA, common allegations of violations have been made. A fairly exhaustive list would include:

1. Failure of carrier to assume full and complete responsibility for the operations of and exclusive possession and control of the equipment.
2. Failure to clearly state compensation.
3. Failure to specify that carrier shall assume the risk and costs of fines and

27. Id. § 376.12(e).
28. Id. § 376.12(d), (f).
29. Id. § 376.12(i).
30. Id. § 376.12(j).
31. Id. § 376.12(k).
32. See id. §§ 376.11, 376.12(a), (b), (c).
33. In the numerous cases litigated in court, two administrative cases have been cited. See Arctic Express, 287 F. Supp. 2d at 820; Dart Transit Company - Petition for Declaratory Order - Leasing Regulations, 9 I.C.C.2d 701 (1993). In Dart Transit, the issue involved was whether a leasing company with some affiliation with the carrier was subject to the Leasing Regulations. Id. Although finding that the affiliate was subject to the Leasing Regulations, and the carrier had not attached a copy of the lease agreement between that company and the owner-operator to its lease, that there was substantial compliance with the Leasing Regulations because a written authorization exists which allowed the motor carrier to deduct lease payments from the owner-operator's settlement and remit them directly to the leasing company. Id. A similar situation existed in Central Transport, Inc., Petition for Declaratory Order, No. MC-C-30050, 1988 WL 225559 (June 29, 1998), decided by the ICC, and a similar finding has also been cited in OOIDA litigation. The issue of what constitutes "affiliation" has not been firmly established as it is, essentially, fact specific and thus it is possible this issue will be a continuing one in OOIDA litigation.
34. 49 C.F.R. § 376.12(c)(1).
35. Id. § 376.12(d).
overweight and oversized trailers or improperly permitted over-dimensions and overweight loads in the absence of the violation arising from an act or omission of the owner-operator.  

4. Failure to specify and pay owner-operators within 15 days of submittal of logs and documents necessary to secure payment from shipper.  

5. Failure to specify and give a copy of the rated freight bill before or at time of settlement if payment is based on a percentage of revenue.  

6. Failure to specify access to tariffs or contracts.  

7. Failure to specify all charge-back items and how to amounts are to be computed and affording copies of documents which are necessary to determine validity of charges.  

8. Failure to specify that the owner-operator is not required to purchase or rent any products, equipment or services from the carrier as a condition of leasing.  

9. Failure to specify that the carrier has a legal obligation to maintain insurance coverage for the public.  

10. Failure to specify who is responsible for other insurance.  

11. Charging back more to the owner-operator than cost of insurance to the carrier.  

12. Failure to issue a certificate of insurance and to provide a copy of policy upon request.  

13. Failure to provide written explanation and itemization of deductions for cargo and property damage before any chargeback is made.  

14. Failure to specify items to which escrow funds can be applied and failure to pay specified interest.  

15. Failure to give accounting to transaction regarding the escrow or specifying right to demand accounting at any time.  

16. Failure to specify conditions for the return of escrow funds.  

17. Failure to return escrow funds within 45 days.  

18. Failure to specify the terms of any equipment purchase or rental contract which give the authorized carrier the right to make deductions from the lessee's compensation for purchase or rental payments.  

Other miscellaneous charges have been made in specific cases:
1. Selling insurance without a license.
2. Failure to provide full tax credits.
3. State law conversion relating to chargebacks, interest on escrow, and fuel tax credits.
4. Common law fraud for insurance chargebacks exceeding cost to carrier.
5. Unconscionable lease terms in violation of state law.
6. Involuntary servitude in violation of Thirteenth Amendment to U.S. Constitution.

These miscellaneous charges have generally been abandoned in litigation or disappeared because of settlements.

In respect to the other listed charges, OOIDA has adopted a "laundry list" approach to litigation. While this approach has worked to its advantage in at least one case, litigation has focused on issues where monetary damages, rather than drafting efforts or oversights, have been involved. Thus, the main issues focus on the handling of escrow funds, insurance premiums, chargeback items and handling, and the failure to clearly state compensation.

Escrow, under the Leasing Regulations, requires (a) authorization of the lessor-owner-operator, (b) payment of interest, (c) deductions which are allowed, and (d) return of funds. Escrows are liberally defined and, yet, some motor carriers have excluded monies designated as "security deposits" as well as failed to pay any of the specified interest on the funds. Other troublesome issues involving escrows can be attributed to a lack of clarity in establishing what deductions can be made against escrow funds and the time period in which escrow funds must be returned to the owner-operator. Courts have uniformly and strictly required compliance with the escrow regulatory provision.

In respect to insurance premiums, the issue is still open. OOIDA has taken the position that the motor carrier cannot charge any amount over

53. 49 C.F.R. § 376.12(k)(1).
54. Id. § 376.12(k)(5).
55. Id. § 376.12(k)(3)(i).
56. Id. § 376.12(k)(6).
57. Escrow funds are defined as "[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and lessee." Id. § 376.2(l).
60. 49 C.F.R. § 376.12(k)(6); see 1978 Lease and Interchange of Vehicles, 129 M.C.C. at 725.
61. See, e.g., Arctic Express, 159 F. Supp. 2d at 1078.
the premium charged by the insurer, while motor carriers, in some instances, have added an amount to cover its administrative and management costs in negotiating, establishing, and administering an insurance program in which the owner-operators may secure insurance.

When the ICC enacted the regulations in 1979, the issue arose as to what insurance costs could be quoted to the owner-operator and was disposed of as follows:

We believe that a prime concern of lessors in choosing insurance coverage is knowing exactly how much they will be charged. With this information they are better equipped to obtain the best insurance coverage possible. . . . Therefore, at this time we will not require that carriers [disclose] to the owner-operator the total cost of insurance that the carrier pays but will require the lease to specify the amount for insurance provided by or through the carrier.62

A similar issue has arisen regarding fuel discounts. Motor carriers frequently provide owner-operators with "credit cards" which allow the owner-operators to make purchases at pump price and also secure "cash" withdrawals so as to avoid the need to carry considerable amounts of cash on the road. The carriers ultimately deduct the charges against the owner-operator's contract settlement.

In some instances, motor carriers and fuel suppliers negotiate volume discounts predicated upon the volume of purchases made during a prescribed period of time. The discount is determined on the overall purchases made by the carrier, including the owner-operators.

OOIDA has argued that, under the Leasing Regulations, the owner-operators should receive the discount since they purchased the fuel.63 Some motor carriers voluntarily distribute the discount to the owner-operators, some motor carriers remit a portion of the discount, and some motor carriers retain the discount.

Those motor carriers who retain the discounts or a portion of them assert that the practice is not only allowable under the Leasing Regulations, but is warranted equitably because the motor carrier extends its credit and availability of funds while the credit of the owner-operator is outstanding.64 Further, the motor carrier incurs credit losses65 computer time and accounting expenses, administrative costs in issuing the card and securing the card's return, and expenses in promoting the program.

62. 1979 LEASE AND INTERCHANGE OF VEHICLES, 131 M.C.C. at 141.
64. Normally, the motor carrier must pay the suppliers on a daily basis; whereas, reimbursement from the owner-operator through contract settlements usually lags from 7 to 14 days.
65. If an owner-operator cancelled his or her contract with the motor carrier it is not infrequent that they do so when a balance due for fuel or cash advances under the fuel card exists.
It would seem that the ICC's reasoning regarding insurance premiums would be applicable to fuel card discounts; however, it does not appear that any court has yet ruled on this issue.

OOIDA's position in respect to "charge back items" under the Leasing Regulations has been that detailed information must be set forth in the contract or no chargeback of an unlisted item can be made.66 While OOIDA has never advanced a bright line test, it has been successful in requiring many motor carriers to amend their contracts to cover every possible chargeback and how they were to be determined. As a result, many contracts between owner-operators and motor carriers have been expanded to the point where they appear to be documents evidencing a merger agreement between major corporations.67

The final major contention arising in OOIDA litigation has been that compensation terms were not clearly stated. While this has been true in many instances, in practice, the parties usually have agreed to such terms by their practices. The typical deficiency, for example, involved payment by miles driven in handling of the freight. The contract would specify "X" cents per mile as determined by a specifically named computer program or other determinative schedule. The named program, however, frequently provides two different methods of determining mileage, either over the shortest routes between any origin and destination or over the most practical routes.

In many, if not most, instances, the motor carriers paid owner-operators on the basis of mileage using the shortest mileage scale because they were paid by the shipper on that basis. This was readily understood and accepted by the parties without any discussion. However, OOIDA litigation has necessitated that the parties address the possible alternatives and clearly specify the standard to be used.

Similarly, in some instances, shippers would pay the motor carrier a set rate which would include, for example, an amount for washing or cleaning out the trailer before the pickup of their freight. The motor carrier would subtract the costs of cleaning the trailer as the carrier paid for the washing before computing what the owner-operator would be paid if his or her contract called for payment on the basis of a percentage of "revenue." OOIDA has asserted that the percentage paid should be

66. 49 C.F.R. § 376.12(h).
67. The author was sent a revised contract which was approximately 70 pages in length and which was not clearly understandable to the author's feasible legal mind without extensive study which would probably not occur by the typical owner-operator. In another revised contract the drafter lists approximately 50 possible chargeback items and the list might actually not have been exhaustive as unforeseen or unpredictable charges or advances might arise. It is difficult to understand why it would not suffice to list recurring charges and merely include a catch-all provision, "any and all other money due the carrier by the owner-operator" with a single provision that the owner-operator will receive notice of the chargeback and the details supporting it.
based on the amount the shipper paid the carrier, without any deduction, regardless of whether a portion of the payment was for the carrier’s services independent of the owner-operator’s expense or participation.

While these types of drafting errors occurred, and rightfully should and could be corrected or avoided, it would seem that litigation of the scope and cost of OOIDA litigation might have been avoided by voluntary contract clarification, negotiations, and/or alternative dispute resolution techniques.

V. OTHER ISSUES

OOIDA litigation has also involved many other issues, including the applicability of class actions, limitation periods, injunctive relief, determination of monetary damages, and bankruptcy protection. In litigation to date, class actions have been authorized in most, but not all, cases, as has the issuance of injunctions. While costs and reasonable attorney fees are provided by the statute and have been awarded to the prevailing party, punitive damages have not been awarded and would probably never be awarded unless a state or common law claim allowed them. A major issue has also arisen as to whether claims must be arbitrated under contract clauses. In most instances, arbitration has not been allowed because of the application of the Federal Arbitration Act’s exclusion involving transportation employees or on the basis of equity.

VI. CONCLUSIONS

Courts have differed on the issue of whether the Leasing Regulations should be enforced on a literal basis or whether substantial compliance applies. Resolution of this basic issue may determine the direction of outstanding and future litigation.

Very few cases have reached a final determination and many have

68. E.g., Mayflower Transit, 161 F. Supp. 2d at 955.
70. See, e.g., Ledar Transport, 2000 WL 33711271, at *11.
71. 49 U.S.C. § 14704(e).
73. Id.
concluded based on a voluntary settlement or bankruptcy. It is therefore
difficult to predict the future direction OOIDA litigation.

It is clear, however, that OOIDA litigation has confirmed the high
cost and time expense of litigation. It also raises the issue as to whether
court resolution was an effective medium to resolve leasing disputes in
this instance, when the possibility of a single, or a minimal number of,
administrative decisions might have more economically and effectively
resolved common issues raised for both the parties and the industry.
Apart from the expense, it is also clear that confusing results have and
will continue to arise because of OOIDA lawsuits filed in diverse jurisdic-
tions, leading to different results and engendering continued litigation.76

OOIDA litigation has caused industry participants to review their
practices, procedures, and lease documents. In due time, it may assure
compliance with the Leasing Regulations. It should also raise the ques-
tion as to whether the Leasing Regulations should be modified or clari-
fied to resolve some of the issues which have arisen due to the numerous
and significant changes which have occurred in the motor carrier industry
since their last promulgation.

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76. A U.S. Supreme Court decision or decisions might be needed to resolve the diverse
lower court decisions, but these cases are not the type of cases the U.S. Supreme Court would
normally address. A more-feasible route to resolve the problem of diverse views would appear
to be for the FMCSA to reverse the position FHWA has taken and accept jurisdiction of a
significant case and/or rewrite the Leasing Regulations to resolve the confusion which now
exists.
Private Rights of Action to Enforce the Truth-in-Leasing Regulations in Court

James C. Sullivan*

I. INTRODUCTION

Since the enactment of the Interstate Commerce Commission Termination Action of 1995 ("ICCTA"), 49 U.S.C. § 10101 et seq., owner-operators have sought to enforce alleged violations of the Truth-in-Leasing regulations, title 49, part 376 of the Code of Federal Regulations, in court, asserting private rights of action under 49 U.S.C. § 14704(a)(1) and (2).¹ In Owner-Operator Independent Drivers Association v. New Prime, Inc., the Eighth Circuit ruled that 49 U.S.C. § 14704(a)(1) and (2) create a private right of action for owner-operators to seek injunctive relief and damages.² Several district courts have since adopted the reasoning of

* James C. Sullivan is a shareholder/director of Shughart Thomson & Kilroy, P.C. in Kansas City, Missouri, and practices in the areas of transportation law, labor and employment litigation, and business/commercial litigation. Mr. Sullivan has extensive experience in handling class action litigation in the areas of transportation and labor/employment law. He has successfully represented trucking companies throughout the country in federal and state courts in matters ranging from single injury auto liability claims to complex class action litigation. He earned his bachelor's degree in business administration from the University of Kansas in 1987 and his law degree from the University of Missouri-Kansas City in 1990, where he was a member of the American Bar Association, the Lawyers Association of Kansas City and the Kansas City Metropolitan Bar Association, where he served on the executive committee of the Young Lawyers Section.

¹ See, e.g., Owner Operator Indep. Drivers Ass'n v. New Prime, 192 F.3d 778 (8th Cir. 1999).
² Id. at 784-85.
*New Prime*, rejecting the carriers’ arguments that actions to enforce the Truth-in-Leasing regulations must first be filed with the Federal Motor Carrier Safety Administration (“FMCSA”).

This article examines the statutory language on which the federal courts have relied in finding that 49 U.S.C. § 14704 creates a private right of action for owner-operators to seek injunctive relief and damages absent action by the FMCSA in the first instance. Moreover, this article examines the language of 49 U.S.C. § 14705, wherein Congress enacted the statute of limitations for the various private rights of action created by 49 U.S.C. § 14704, and the application of section 14705 to owner-operator suits to enforce the Truth-in-Leasing regulations.

II. PRIVATE RIGHTS OF ACTION TO ENFORCE THE TRUTH-IN-LEASING REGULATIONS

A. CONGRESSIONAL INTENT

Owner-operators have relied upon 49 U.S.C. § 14704(a)(1) and (2) to support their private actions to enforce the Truth-in-Leasing regulations. These provisions provide as follows:

Rights and remedies of persons injured by carriers or brokers
(a) In general.—

(1) Enforcement of order.—A person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.

(2) Damages for violations.—A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.4

The plain language of this provision alone does not indicate that Congress intended to create a private right of action, but rather that it intended that the Secretary or the FMCSA have exclusive jurisdiction to review alleged violations of the Truth-in-Leasing regulations. First, sub-

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section (a)(1) by its plain terms is limited to enforcement of an "order" of
the Secretary or the FMCSA, which is supported by its title, "Enforce-
ment of Order."5 Further, subsection (a)(1) provides for a private right of
action only when a defendant refuses to "obey an order of the Secretary or . . . Board" and further provides that the civil action is only "to enforce that order."6

The question then becomes whether Congress intended that the leasing regulations should somehow be considered an order. If Congress intended to create a private right to sue for violations of both orders and regulations, it could have done so, as it did in section 14702(a)(2), where it specifically empowered the Secretary (or the FMCSA) to bring a civil action "to enforce this part, or a regulation or order of the Secretary."7 Many cases have recognized that a regulation is not to be considered an order where a statute specifically provides for a private right of action to enforce only an order. For example, in Mallenbaum v. Adelphia Communications Corp., plaintiffs attempted to bring an action under the Federal Communications Act, 47 U.S.C. § 401(b), a provision similar to section 14704(a), for alleged violations of a regulation promulgated by the Federal Communications Commission ("FCC").8 In relevant part, section 401(b) provides that, "[i]f any person fails or neglects to obey any order of the Commission other than for the payment of money, . . . any party injured thereby . . . may apply to the appropriate district court of the United States for the enforcement of such order."9 The Third Circuit affirmed the dismissal of the action for failure to state a claim because a regulation is not an order under section 401(b).10

The second sentence of section 14704 (a)(1) clearly creates a private right of action to seek injunctive relief, but again, the language of the statute when read as a whole limits such actions.11 The entire subsection (a)(1) is titled "Enforcement of Order," and, thus, the second sentence should be construed to simply grant a right to seek injunctive relief


7. Id. § 14704(a)(2) (emphasis added).
10. Mallenbaum, 74 F.3d at 467; see also New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n, 742 F.2d 1, 9 (1st Cir. 1984) (holding that "private parties could not use § 401(b) of the Communications Act to enforce an FCC rule because the word 'order' in that section does not include agency rules . . ."); PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 730 (3d Cir. 1973) (rejecting the contention that "a clearly quasi-legislative exercise of power should be subjected to review under the provisions set up exclusively for review of adjudicatory orders of the FCC.").
from a court in conjunction with the private party's complaint seeking enforcement of the FMCSA's order when the carrier has violated 49 U.S.C. §§ 14102 to 14103, the provisions empowering the Secretary to regulate the contractual relationships between owner-operators and motor carriers.\textsuperscript{12}

By its express wording, 49 U.S.C. § 14704(a)(2) also does not provide for a private right of action. Subsection (a)(2) states that a carrier or broker "is liable for damages" if the carrier or broker violates "this part."\textsuperscript{13} Reading subsections (a)(1) and (2) together, the statutory language alone creates a private right of action for damages only after the carrier violates an order issued by the FMCSA.\textsuperscript{14} Subsection (a)(1) provides for the right of action in such an instance and subsection (a)(2) allows for the recovery of damages.\textsuperscript{15}

In seeking this interpretation, the carriers have sought the same interpretation of section 14704, which governs actions against motor carriers, as that given to 49 U.S.C. § 11704, which uses nearly identical language to set forth actions against rail carriers. In DeBruce Grain, Inc. v. Union Pacific Railroad Company, the Eighth Circuit discussed this parallel provision of the ICCTA.\textsuperscript{16} In its discussion of section 11704, the court in DeBruce did not discuss any private right of action to enforce agency regulations.\textsuperscript{17} Instead, it limited its discussion of remedies to the enforcement of agency orders and excess tariff claims:

In 1995 Congress passed the Interstate Commerce Commission Termination Act under which the STB replaced the Interstate Commerce Commission (ICC) as the regulatory agency for rail transportation. Application can be made to the STB by disappointed shippers for emergency orders similar to injunctions, 49 U.S.C. § 721(b)(4), and for damages, 49 U.S.C. § 11704. \ldots Federal court jurisdiction exists over claims for violations of STB orders and for charges that are in excess of the applicable rate.\textsuperscript{18}

The district court in DeBruce had reached the same conclusion. It held, in a part of its opinion not reached or discussed by the Eighth Circuit, that 49 U.S.C. § 11704, the parallel rail provision of the ICCTA, did not authorize private actions to enforce agency regulations.\textsuperscript{19}

\textsuperscript{12} See Almendarez-Torres, 523 U.S. at 234 (quoting Bhd. of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528-29 (1947)) ("[T]he title of a statute and the heading of a section are 'tools available for the resolution of a doubt' about the meaning of a statute.").

\textsuperscript{13} 49 U.S.C. § 14704(a)(2).

\textsuperscript{14} Id. § 14704(a)(1), (2).

\textsuperscript{15} Id.

\textsuperscript{16} DeBruce Grain, Inc., v. Union Pac. R.R. Co., 149 F.3d 787, 788 (8th Cir. 1998).

\textsuperscript{17} Id. at 788.

\textsuperscript{18} Id. (citing 49 U.S.C. §§ 702, 11704) (emphasis added).

\textsuperscript{19} DeBruce Grain, Inc., v. Union Pac. R.R., 983 F. Supp. 1280, 1284 (W.D. Mo. 1997), aff'd on other grounds, 149 F.3d 787 (8th Cir. 1998). The Eighth Circuit's opinion in DeBruce did not
In *New Prime*, the Eighth Circuit largely rejected the statutory interpretation discussed above and found that 49 U.S.C. § 14704(a)(1) and (2) create a private right of action for injunctive relief and damages even if the claimant does not first go to the agency for relief.\(^{20}\) In reaching its conclusions, the court went beyond the statutory language itself and relied heavily upon the statute’s legislative history.\(^{21}\) In so doing, the court noted various “linguistic imperfections and inconsistencies” in section 14704 and acknowledged “to being rather mystified by the inconsistent language used in the [ICCTA’s] various enforcement provisions.”\(^{22}\)

While the Eighth Circuit agreed that the first sentence of section 14704(a)(1) does not create a private right of action, the court found that the second sentence, which provides that a party “may bring a civil action for injunctive relief for violations of section 14102[,]”\(^{23}\) does create such a right.\(^{24}\) The court found that, by referring to section 14102, Congress must have intended that claimants can pursue injunctive relief to enforce the leasing regulations because section 14102 itself “contains no


\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) 49 U.S.C. § 14704(a)(1). 49 U.S.C. § 14102, at least in part, was the basis on which the Interstate Commerce Commission promulgated the Truth-in-Leasing regulations. In relevant part, section 14102 provides as follows:

(a) General Authority of Secretary. The Secretary may require a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 35 of title 49 that uses motor vehicles not owned by it to transport property under an arrangement with another party to—

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

\(^{24}\) Id.
mandates or prohibitions." The court also rejected that this provision be limited to injunctive relief to enforce agency orders, relying on legislative history that provides “that private actions brought to enforce the ‘leasing . . . rules may also seek injunctive relief.’”

The Eighth Circuit also found that section 14704(a)(2) creates a private action for damages. Again, the court relied heavily upon the statute’s legislative history. The court referenced the Conference Report, which states that section 14704(a)(2) “provides for private enforcement of the provisions of the Motor Carrier Act in court . . . . The ability to seek injunctive relief for motor carrier leasing . . . violations is in addition to and does not in any way preclude the right to bring civil actions for damages for such violations.” Ultimately, the court concluded that section 14704(a) “authorizes private actions for damages and injunctive relief to remedy at least some violations of the Motor Carrier Act and its implementing regulations.”

Notably, the court in New Prime refused to pass upon the carriers’ argument that “the leasing regulations on which the Owner-Operators rely, 49 C.F.R. §§ 376.12(i) & (k), go beyond the scope of § 14102(a) and therefore may not be enforced by a private action for injunctive relief under § 14704(a)(1).” In response to this argument, the court stated, “[[t]here is a simple answer to this contention – it is not part of the jurisdictional issues before us.” Thus, whether all of the Truth-in-Leasing regulations fall within the private right of action created by section 14704 remains to be further litigated.

Jurisdiction in federal court to hear claims of alleged violations of the Truth-in-Leasing regulations appears to have taken hold. Since the decision in New Prime, several district courts that have reviewed jurisdiction to hear claims of alleged violations of the Truth-in-Leasing regulations have found that section 14704(a) creates a private right of action. New Prime, however, is the only circuit court of appeals decision to decide the issue.

25. Id. at 784.
27. Id. at 785.
28. Id.
30. Id.
31. Id. at 784.
32. Id.
B. Application of the Truth-in-Leasing Regulations by District Courts

Since the enactment of the ICCTA, numerous class action cases have been filed against motor carriers under section 14704(a), challenging their compliance with the Truth-in-Leasing regulations.34 The charges raised in many instances seek over-reaching interpretations of the leasing regulations never passed upon by either the Interstate Commerce Commission ("ICC") prior to its demise or by the Department of Transportation ("DOT") or FMCSA since.35 For instance, owner-operators have challenged the carriers' practice of marking up products and services sold to owner-operators even if the mark-up is fully disclosed and the price charged to the owner-operators is below the market price for such items. Litigating these issues on a case-by-case basis in district courts not only creates a significant risk of inconsistent application of the regulations on motor carriers, but also imposes an undue burden upon the courts in deciding complex issues unique to the trucking industry. Such issues have traditionally been resolved by agencies with specialized knowledge in such matters.

Motor carriers have requested that the courts apply the doctrine of primary jurisdiction to refer the matter to the agency charged with enforcing the regulations.36 Referral to an administrative body under this doctrine is appropriate when it is "better equipped than courts by specialization [and] by insight gained through experience . . . ."37 "Uniformity and consistency in the regulation of business entrusted to a particular agency" is one of the key factors when deciding whether an agency is better suited to decide a particular question.38

In New Prime, the district court had dismissed the owner-operators' claims based upon the doctrine of primary jurisdiction.39 During the pendency of the appeal of that issue, the owner-operators filed an ex parte petition with the Federal Highway Administration ("FHWA"), seeking a review of the carrier's compliance with the leasing regulations.40 The FHWA denied the owner-operators' petition, stating that the issues presented in the petition were within the competence of the district court

34. See, e.g., Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F.3d 1108, 1109-10 (9th Cir. 2004); Mayflower Transit, 161 F. Supp. 2d at 953-55.
35. See id.
36. New Prime, 192 F.3d at 785; Mayflower Transit, 161 F. Supp. 2d at 956.
38. Id.; see also Hawaiian Tel. Co. v. Pub. Util. Comm'n, 827 F.2d 1264, 1272 (9th Cir. 1987) (applying the doctrine of primary jurisdiction helps "to prevent substantially inconsistent application of FCC rules and serious judicial encroachment on FCC responsibilities."); In re Long Distance Telecomms. Litig., 831 F.2d 627, 629-30 (6th Cir. 1987).
40. Id. at 780-781.
and had previously been addressed by the agency charged with enforcing the regulations.\textsuperscript{41} The FHWA also stated that it "will generally decline to exercise its primary jurisdiction with regard to court referrals involving violations of part 376."\textsuperscript{42} In \textit{New Prime}, the Eighth Circuit refused to review the findings of the FHWA, stating that "[w]hen the agency declines to provide guidance or to commence a proceeding that might obviate the need for judicial action, '[t]he court [can] then proceed according to its own light.'\textsuperscript{43}

Despite the FHWA's stated position, the current environment of owner-operator litigation poses vastly different issues than those presented to it in its prior ruling. The FHWA's prior decision was motivated in large part on its determination that the issues presented had previously been decided by the ICC.\textsuperscript{44} As mentioned above, the owner-operators are seeking interpretations of the leasing regulations never considered by the agency.\textsuperscript{45} The FMCSA should undertake review of allegations that attempt to expand the breadth of the leasing regulations in order to ensure consistency of application.

\section{III. Statute of Limitations for Private Rights of Action to Enforce the Truth-in-Leasing Regulations}

In conjunction with the motor carrier enforcement provisions of section 14704, Congress enacted section 14705 to establish statutes of limitation on those rights of action.\textsuperscript{46} However, upon close examination, section 14705 appears to contain no statute of limitations for private

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{42} Id. at 31828-29.
\item \textsuperscript{43} \textit{New Prime}, 192 F.3d at 785-86 (quoting Atchison, Topeka and Santa Fe Ry. v. Aircoach Transp. Ass'n, 253 F.2d 877, 886 (D.C. Cir. 1958)). The court in \textit{New Prime} further found the carrier was not adversely affected by the FHWA's "notice ruling" because it did not constitute an "adjudication." \textit{Id.} at 786.
\item \textsuperscript{44} \textit{Id.} at 781.
\item \textsuperscript{45} \textit{See, e.g., Swift Transp.}, 367 F.3d at 1109-10; \textit{Mayflower Transit}, 161 F. Supp. 2d at 953-55.
\item \textsuperscript{46} 49 U.S.C. § 14705, limitations on actions by and against carriers, provides in relevant part:
\begin{itemize}
\item (a) In general.-A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.
\item (b) Overcharges.-A person must begin a civil action to recover overcharges within 18 months after the claim accrues. If the claim is against a carrier providing transportation subject to jurisdiction under chapter 135 and an election to file a complaint with the Board or Secretary, as applicable, is made under section 14704(c)(1), the complaint must be filed within 3 years after the claim accrues.
\item (c) Damages.-A person must file a complaint with the Board or Secretary, as applicable, to recover damages under section 14704(b) within 2 years after the claim accrues.
\end{itemize}
\end{itemize}
\end{footnotesize}
rights of action to enforce the leasing regulations. There is only one limitations period for damages actions under section 14704, and that period is two years.

Damages.—A person must file a complaint with the [Surface Transportation] Board or Secretary, as applicable, to recover damages under section 14704(b) within 2 years after the claim accrues.47

Although this subsection appears on its face to provide for a two-year limitations period for plaintiffs' claims, the question is somewhat more complicated. As discussed above, claims for damages for alleged violations of the leasing regulations are authorized, not by section 14704(b), but by section 14704(a)(2).48 There is thus an ambiguity in the statute. The question becomes whether "claims for damages" under section 14704(a), the only section authorizing such damages claims, are governed by the two-year statute, or whether there is no limitation statute governing plaintiffs' claims.

As acknowledged by both the agency enforcing the statute and the original sponsor of the legislation, the statute contains a scrivener's error.49 The provision authorizing owner-operators claims was originally intended to be codified in subsection (b) of section 14704, not subsection (a), where it was mistakenly placed when the statute was enacted.50

A. STATUTE OF LIMITATIONS: CONGRESSIONAL INTENT

The limitations period in section 14705(c) applies only to recovery of "damages" in cases brought under "section 14704(b)."51 But, as currently codified, section 14704(b) pertains only to overcharges, not damages,52 and an eighteen-month limitations period for overcharge claims already exists at 49 U.S.C. § 14705(b).53 Therefore, under a literal reading of the statute, there are two conflicting statutes of limitations for overcharge claims, and no limitation period for damage claims not related to overcharges.54

47. 49 U.S.C. § 14705(c) (emphasis added).
48. Id. § 14704(a)(2), (b).
50. See id.; see also 49 U.S.C. § 11705(c) (1994) ("A person must file a complaint with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues." (emphasis added)); id. § 15905(c) ("A person must file a complaint with the Board to recover damages under section 15904(b)(2) within 2 years after the claim accrues." (emphasis added)).
51. Id. § 14705(c).
52. Id. § 14704(b).
53. Id. § 14705(b).
54. See id. §§ 14704(b), 14705(b), (c).
In short, section 14704 contains a drafting error. The language contained in section 14704(a)(2), pertaining to damages actions, was originally intended to be codified at section 14704(b).\textsuperscript{55} The legislative history of the Act confirms that the language contained in § 14704(a)(2) should properly have been codified as section 14704(b)(2). The ICCTA Conference Report succinctly describes the purpose of section 14705: "This section preserves the current relevant statutes of limitation for bringing court suits by or against carriers and makes the time limits uniform for all types of traffic."\textsuperscript{56} Because the then "current" limitations statute for damages actions against rail and water carriers was two years, Congress plainly intended for the same two-year limitations statute to apply in actions against motor carriers.\textsuperscript{57}

Under the Act, similar actions for damages against other types of traffic were preserved, and are subject to a two-year statute of limitations.\textsuperscript{58} The Conference Report's statement that the Act was intended to make limitations periods "uniform for all types of traffic" compels the conclusion that a two-year statute was meant to apply to damage claims against motor carriers as well.\textsuperscript{59}

Moreover, the structure of the Act suggests the same result. Both the rail carrier and pipeline carrier provisions of the Act contain language authorizing damages actions in subsections marked (b) rather than (a).\textsuperscript{60} The action for damages against motor carriers is the statutory anomaly in that the action is provided for under subsection (a), at section 14704(a)(2), rather than under subsection (b), as it is with rail and pipeline carriers.\textsuperscript{61} In all other material respects, the sister statutes to the motor carrier statute are identical.\textsuperscript{62} Significantly, these sister statutes contain two-year limitations periods for actions for damages.\textsuperscript{63} The doctrine of in pari materia thus also supports the conclusion that actions for damages against motor carriers are subject to a two-year limitations pe-


\textsuperscript{56} H.R. Rep. No. 104-311, at 121.

\textsuperscript{57} See id.; see also 49 U.S.C. § 11705(c) (1994) (codifying a two-year statute of limitations to actions for damages against rail carriers); 49 U.S.C. § 15905(c) (1994) (codifying a two-year statute of limitations to actions for damages against pipe line carriers).

\textsuperscript{58} See 49 U.S.C. §§ 11705(c); 15905(c).

\textsuperscript{59} H.R. Rep. No. 104-311, at 121.

\textsuperscript{60} Compare 49 U.S.C. § 15904(b)(2) (authorizing damages actions) and 49 U.S.C. § 11704(b) (authorizing damages actions) with 49 U.S.C. § 14704(b) (authorizing liability and damages for overcharges only.).


\textsuperscript{63} Id. §§ 11705(c), 15905(c).
When a statute is a part of a larger Act . . . , the starting point for ascertaining legislative intent is to look to other sections of the Act in pari materia with the statute under review.”65 There can be no other conclusion but that section 14704 contains a drafting error, and that the action for damages belongs in section 14704(b) rather than in section 14704(a)(2). Thus, the two-year limitations statute of section 14705(c) must apply in the present case.

The Act’s legislative history tells the same story and confirms that a drafting error occurred. On November 6, 1995, when House Bill 2539 was reported to the House of Representatives from the Committee on Transportation and Infrastructure, the action for non-overcharge damages was found where it was obviously intended to be, in section 14704(b)(2).66 In fact, as reported to the House on that date, section 14704 did not even contain an (a)(2).67

But somewhere between November 6 and November 14, just eight calendar days after the bill was reported to the House, the measure with the drafting error was called up for consideration by special rule in the House.68 The measure was considered and passed.69 No reference is made in the legislative history of the statute concerning this significant change, which moved the action for damages from subsection (b)(2) to subsection (a)(2), nor was this change made by any amendment.70 Given the havoc this change plays with the statutory scheme of section 14705 and given that the original bill reported to the House did not have this change, this change can only be ascribed to a drafting or scrivener’s error. Thus, the two-year limitations statute of section 14705(c) must apply to actions for damages.71

The fact that House Bill 2539 as passed contains a drafting error is confirmed by a review of Senate Bill 1396. When Senate Bill 1396 was

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64. See United States v. Morison, 844 F.2d 1057, 1064 (4th Cir. 1988) (citing Erlenbaugh v. United States, 409 U.S. 239, 244-47 (1972)).
65. Id.
67. Id. § 14704.
68. See H.R. 2539, Bill Summary & Status for the 104th Congress, http://thomas.loc.gov (follow “Search Bills and Resolutions;” then select “Summary and Status Information about Bills and Resolutions;” then select “Bill Number;” then enter “H.R. 2539” into the “Enter Search” field; then select the “104th Congress;” then select “Search;” then select “CRS Summary.”).
69. Id.
70. Id.
introduced in the Senate, the action for damages was found in section 14704(b)(2).\textsuperscript{72} In fact, as reported to the Senate, section 14704 did not contain an (a)(2).\textsuperscript{73} Later, when the Senate adopted the House version of the Bill in lieu of Senate Bill 1396, no reference was made to the change in placement of the section 14704 damage action.\textsuperscript{74}

The district court in \textit{Fitzpatrick v. Morgan Southern, Inc.}, recognized the above problems, stating it “would not invoke a rule recognizing a scrivener’s error to modify enacted statutory text absent an extraordinarily convincing justification. In this case, the Court believes such a justification exists.”\textsuperscript{75} The court recognized that “the legislative history of the ICCTA shows that the structure of [sections] 14704 and 14705 is at odds with the purpose of the statute for several reasons.”\textsuperscript{76} The court carefully analyzed the legislative history of the scrivener’s error, and ruled that the two-year statute of limitations applied because: (1) the legislative history showed that Congress intended to preserve the statute of limitations of the ICCTA’s predecessor statute; (2) parallel limitation provisions applying to rail and pipeline carriers is two years; (3) section 14705 was not amended to reflect the change in section 14704; and (4) Congress acted hastily in passing the provisions involved.\textsuperscript{77}

\section*{B. The Surface Transportation Board’s Recognition of the Drafting Error}

The agency charged with enforcing the statute, the Surface Transportation Board (“STB”), has already found a reasonable solution to the statute’s ambiguity. The STB is an agency charged with enforcing the ICCTA.\textsuperscript{78} In \textit{National Association of Freight Transportation Consultants, Inc. – Petition for Declaratory Order}, the STB specifically recognized that the language contained in section 14704(a)(2) of the statute was misplaced.\textsuperscript{79} In interpreting the statute, the STB noted an “apparent technical error” in the statute and determined that the right to recover damages

\begin{footnotesize}
\begin{itemize}
\item 73. Id. § 14704.
\item 74. See S. 1396, \textit{Bill Summary \\ & Status for the 104th Congress}, http://thomas.loc.gov (follow “Search Bills and Resolutions;” then select “Summary and Status Information about Bills and Resolutions;” then select “Bill Number;” then enter “S. 1396” into the “Enter Search” field; then select the “104th Congress;” then select “Search;” then select “CRS Summary;” then select “other summaries;” then select “Indefinitely postponed in Senate.”).
\item 75. \textit{Fitzpatrick}, 261 F. Supp. 2d at 982.
\item 76. Id.
\item 77. Id. at 983-85.
\item 78. See, e.g., 49 U.S.C. § 14704 (referring to the STB).
\end{itemize}
\end{footnotesize}
under section 14704(a)(2) should have been codified under section 14704(b).

Section 14704(c)(1) authorizes a person to “bring a civil action under subsection (b) [of section 14704] to enforce liability against a carrier or broker providing transportation [. . .] subject to jurisdiction under chapter 135.” As codified, subsection (b) refers only to tariff overcharges, while the provision allowing recovery of damages from carriers is contained in section 14704(a)(2) (as to which the statute does not expressly authorize a civil action). Both the House and Senate bills (H.R. 2539 and S. 1396) that became the ICC Termination Act of 1995, however, placed the damages provision in subsection (b)(2), as to which the statute does authorize a civil action. Subsection (b)(2), as passed by both Houses, reads as follows: A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part. Thus, as enacted by Congress, section 14704(c)(1) authorized civil actions both for damages and for charges exceeding the tariff rate. Notwithstanding the fact that section 14704(b)(2) was misplaced having been codified as section 14704(a)(2), in our opinion, section 14704(c)(1) was intended to authorize a person to bring a civil action against a carrier or broker for damages sustained by that person as a result of any act or omission of the carrier in violation of Part B, Subchapter IV, of Title 49.80

Thus, according to the STB’s interpretation, the cause of action for damages stated in section 14704(a)(2) belongs in section 14704(b), to which the two-year limitations statute of section 14705(c) unquestionably applies.81 Under Chevron v. Natural Resources Defense Council, Inc., the STB’s reasonable interpretation of this statute is entitled to deference.82 In Fitzpatrick, the Western District of Tennessee also noted that the STB’s opinion about the two-year statute of limitations “carries significant weight with the Court as the opinion of the agency charged with enforcement and regulatory authority under the ICCTA.”83

C. THE COURTS’ RELUCTANCE TO CURE THE DRAFTING ERROR

Despite the clear ambiguity in sections 14704 and 14705, courts have been reluctant to correct the defect. As of this writing, two district courts have recognized the statutory absurdity in sections 14704 and 14705 and

80. Id. (emphasis added).
81. See id.
82. See generally Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 841-44 (1984); see also Love v. Tippy, 133 F.3d 1066, 1069 (8th Cir. 1998) (“It is well-settled that ‘if a statute is unambiguous the statute governs; if, however, Congress’ silence or ambiguity has ‘left a gap for the agency to fill,’ courts must defer to the agency’s interpretation so long as it is ‘a permissible construction of the statute.’”)(quoting Stinson v. United States, 508 U.S. 36, 44 (1993)).
have found that Congress could only have intended that actions under section 14704(a) were intended to be governed by a two year statute of limitations.\textsuperscript{84} Several district courts, however, have found that the ICCTA did not contain a statute of limitations for actions to enforce the Truth-in-Leasing regulations, and have instead applied the catch-all four year statute of limitations contained in 28 U.S.C. § 1658(a).\textsuperscript{85} The issue has not yet been addressed by any circuit court of appeals.

A district court's determination of the statute of limitations, either two or four years, has a dramatic impact on the course and ultimate outcome of the litigation. All but one of the cases cited above has been filed as a class action.\textsuperscript{86} As such, the statute of limitations governs not only the claims of the named plaintiffs, but the decision will ultimately govern the breadth of a class if certified. The breadth of the class will determine what claims can be included and what damages can be claimed. Thus, the statute of limitations that governs the action may impact the damages recoverable twofold.

\section{D. Legislative Actions to Correct the Drafting Error}

The conflicting statutory language of sections 14704 and 14705 and the conflicts among the courts that have addressed the issue call out for legislative action to correct the problem. Indeed, the current administration, with the full support of the DOT, has submitted legislation to do just that.

On May 15, 2003, a bill to correct this scrivener's error was introduced to both houses of Congress. The Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 ("SAFETEA"), the Bush Administration's transportation bill, includes sections 7201(f)(1) and (2) that change the ICCTA to make clear that a two-year statute of limitations applies.\textsuperscript{87} The bill notes that the change in the ICCTA is a "technical correction."\textsuperscript{88} The DOT issued comments about this technical correction, stating that SAFETEA's section 7201.

would move subsection (a)(2) of section 14704 . . . to subsection (b) of that

\textsuperscript{84} Fitzpatrick, 261 F. Supp. 2d at 986; see also Mayflower Transit, 161 F. Supp. 2d at 955 ("[W]e agree with the FHWA and with the Eighth Circuit that 49 U.S.C. § 14704(a) appears on its face to provide for a private right of action for damages and injunctive relief by parties injured by a carrier." (emphasis added)).


\textsuperscript{86} See id.


\textsuperscript{88} Id. at Subtitle B ("Miscellaneous Technical Corrections to Title 49").
section . . . [because what is now (a)(2)] appeared as subsection (b)(2) in both the House and Senate bills that became the ICCTA]. . . . There is no indication in the Conference Report of any intent to substantively alter this provision. . . . Furthermore, the change in placement to subsection (a) made certain cross-references invalid.89

SAFETEA has been stalled in the legislative process apparently due to controversial funding provisions unrelated to the correction of the scrivener’s error. The motor carrier industry should encourage Congress to correct this error so that the original intent of actions under section 14704 is recognized.

IV. Conclusion

The enforcement of the Truth-in-Leasing regulations in the federal courts has and will continue to place a heavy burden on the trucking industry. Motor carriers are faced with court enforcement of regulations that are outdated under current industry practices. Moreover, the regulations themselves are in many respects vague and confusing. Motor carriers have been left to guess as to the meaning of numerous provisions in the regulations and are faced with inconsistent enforcement by federal courts that have been given little, if any, guidance by the enforcing agency. The current position of the FMCSA (previously the FHWA) of refusing to hear Truth-in-Leasing claims only exacerbates the problem. The FMCSA should revisit certain provisions of the Truth-in-Leasing regulations in light of current industry practices and cure ambiguities, or at the very least, exercise its jurisdiction over certain claims in order to provide proper interpretative guidance.

I. INTRODUCTION

As a general rule, it makes sense to avoid the quagmire of litigation. Litigation is costly, time consuming, and diverts attention from business and creative pursuits.

Business disputes frequently arise between parties who intend to or have had continuing relations. The outcome of a single dispute rarely, if ever, has any true significance on the business relationship unless it is blown out of proportion. This is a result frequently arising from adversarial confrontation. Despite the logic of settling disputes voluntarily, Americans are the most litigious people in the world and we turn any problem into the familiar pattern of a two-party adversarial trial and take it to court.

While many reasons underlie resorting to courts, the basic problem is that parties mainly focus on the legal issues when, in most instances, they

* James C. Hardman has specialized in transportation law over his forty-four year legal career. He has argued before the United States Supreme Court and courts and administrative agencies across the country. He has written three books and numerous business and law review articles on business and law subjects and has been named to Marquis' "Who's Who in America." He has also been active in professional and industry organizations, receiving Life Time Achievement Awards from the Transportation Lawyers Association, the Truckload Carriers Association, and the Minnesota Trucking Association. He received both an MBA and a JD from Northwestern University and is currently engaged in private law practice in Little Canada, Minnesota.
should be concerned with addressing the reconciliation of their interests. In some instances, a negotiated settlement of respective interests cannot be successfully concluded and it would then behoove parties to seek resolution through alternative dispute resolution ("ADR") techniques, rather than formal litigation. This is true in respect to those disputes that arise between the motor carrier and the owner-operators\(^1\) it engages under written contract to lease equipment with driver services\(^2\) to transport freight tendered to the motor carrier for movement in commerce.

The relationship between the motor carrier and the owner-operator is one in which "interests" are significantly intertwined. The ability of the owner-operator to succeed economically under the lease is, to a degree, dependent upon the amount and type of traffic the motor carrier generates and can tender under the lease. The traffic which is offered to the motor carriers by shippers, on the other hand, is frequently, if not always, predicated on the ability of the owner-operator to handle loads on a timely and safe basis without loss or damage to the freight tendered and to deal with consignor\(^3\) and consignee\(^4\) personnel in a civil manner.

Further, there is considerable intercourse between the motor carrier's employees and the owner-operator related to important and common business functions including scheduling, dispatching,\(^5\) permitting,\(^6\)

\(^1\) Owner-Operators are individuals or entities. The lessor of the lease equipment is considered the "owner" under the federal Leasing and Interchange Regulations, 49 C.F.R. pt. 376 [hereinafter Leasing Regulations].

A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any state in the name of that person. 49 C.F.R. § 376.2(d) (2004). Owner-Operators are independent businesspersons and the lessor is considered by the lessee to be an independent contractor and even if the lessor actually drives the vehicle under the lease, the lessor is not to be considered an employee of the lessee-carrier. See James C. Hardman, Administrative Bulls in the Delicate China Shop of Motor Carrier Operations – Revisited, 18 Transp. L.J. 115 (1989).

\(^2\) The Leasing Regulations do not specify the person or persons who must operate the equipment while utilized under lease. In fact, equipment may be leased "with or without [a] driver." 49 C.F.R. § 376.2(e). Typically, the owner-operator/lessor with one unit leased will drive the vehicle, while lessors of multiple units under lease will employ drivers to operate the equipment in addition to driving a unit himself or herself. See James C. Hardman, Workers’ Compensation and the Use of Owner-Operators in Interstate Motor Carriage: A Need for Sensible Uniformity, 20 Transp. L.J. 255, 261-64 (1992).

\(^3\) A consignor is the person or entity who consigns or tenders freight at an origin point. Black’s Law Dictionary 327 (8th ed. 2004).

\(^4\) A consignee is the person or entity to whom the freight is shipped. Id.


\(^6\) Depending upon the size and weight of the equipment and/or the freight or its nature, states may require a special permit to move the load. Because of the business practicality involved, motor carriers will apply for the permits as needed and see that the operators receive
and resolving of problems which occur in the movement of freight. The climate between motor carrier personnel and owner-operators is one which involves significant challenges to maintaining good personal and contract relationships particularly in a market where the number of competent, industrious, and safe owner-operators is limited on the one hand, and on the other, the number of motor carriers who compete among themselves for such operators.\textsuperscript{7}

The avoidance of litigation is clearly a sensible goal in the above-referenced circumstances.

II. Arbitration as a Viable Alternative to Litigation

While various ADR techniques exist and each has advantages and disadvantages, in the context of motor carrier - owner-operator disputes, which cannot be settled by negotiation, arbitration appears to be the most feasible alternative. While arbitration can involve a binding or non-binding decision handed down by a third-party arbitrator, the cost and time of the respective parties can rarely, if ever, justify a non-binding decision necessitating the need for further proceedings if either party is discontent with the non-binding award.

The benefits of arbitration in the context of disputes between motor carriers and owner-operators include:\textsuperscript{8}

(a) Costs. Generally, less overall legal costs are involved and less personal time is necessary than in litigation. Discovery and motion practice, the greatest expenses in litigation, frequently can be eliminated or confined.

The fact that all possible evidence has not been accumulated or discovered is not a legitimate reason to avoid ADR processes. In reality, most all cases settle before trial and on the proverbial "courthouse steps." So why go through the motions and expense of extensive trial preparation if it can be avoided? The outcome of litigation is never certain and the uncertainty of a party’s position may promote a settlement.

A quick and modest payment in a case in which neither party has expended a great deal of time or money is frequently attractive to a mo-

\textsuperscript{7} Motor carriers consider driver capacity as their single most pressing problem. \textit{See generally} \textit{Global Insight Inc., The U.S. Truck Driver Shortage: Analysis and Forecasts} 4 (May 2005), \texttt{http://www.truckline.com/NR/rdonlyres/E2E789CF-F308-463F-8831-0F7E283A0218/0/ATAODriverShortageStudy05.pdf}.

tor carrier or an owner-operator who wants to get on to more profitable pursuits.

(b) **Expertise.** Complicated facts can be sifted through and considered by knowledgeable arbitrators rather than by non-expert lay juries or judges with limited knowledge of the specific law involved. This is particularly important where a defined body of law exists or the dispute is basically factually orientated.

Private organizations, such as the American Arbitration Association, the Transportation ADR Council, Inc. and similar organizations, have set qualifications for arbitrators with expertise in transportation disputes.

These professionals are familiar with controlling statutes, administrative rules, case law, and, maybe most important, industry practices to help achieve a more positive result.

(c) **Fair.** While arbitration is an adversarial type of dispute resolution, it is most frequently consensual and the parties can establish their own boundaries as to the procedures and limits of the process. Also, the issues presented to the arbitrator may be limited, discovery and evidentiary considerations agreed to by the parties, and the arbitrator may be bound by existing law as well as to the remedy or remedies which may be awarded. Coupled with the fact that the parties generally select the arbitrator leads to the realization that arbitration is also a fair mode of dispute resolution.

(d) **Prompt Disposition.** Routine disputes can be disposed of efficiently and rapidly. In most instances, if not most, arbitration can be completed in one day or within a minimal number of days while judicial litigation can linger for years.

The ability to resolve a business dispute in the current business climate cannot be overstated. An arbitration award can be based on current conditions. A final court judgment, however, arises after a possible appeal, some years after the controversy. Considering the value of the claim at the later date, the disruption to all parties’ business, the change in the business climate and the cost of litigation, the question is raised: who has really won?

(e) **Convenience.** Arbitration can be scheduled as promptly as agreed to by the parties and for a date or dates certain. The parties are not subject to the whims of a court calendar with the frequent possibilities of cancellation or delay.

It is also advantageous to be able to select a convenient place for the process rather than being bound to the selected forum of the party initiating a lawsuit.

(f) **Confidentiality.** If disputes involve highly sensitive information of
the motor carrier, the owner-operator and their mutual customers, confidentiality can be basically assured.

Typically, business litigation not only exposes the facts of the dispute to the opposition, but also the parties’ business practices, philosophy, and style of doing business, all of which may be of interest and economic value to third parties.

In arbitration, the parties and arbitrator may agree to the proceeding being closed to third parties and the award is kept confidential except to the extent it is necessary to enforce the award in a court or competent jurisdiction.

Arbitration has some drawbacks and may not be speedy and cost effective in some complex cases although the process has been successful in such cases. In addition, parties are not always assured that they will be able to secure critical information for use at the hearing. The exchange of information, documents, and attendance of witnesses is dependent upon the arbitration rules or agreement of the parties.

Some parties feel that the lack of application of the rules of evidence may also hinder a predictable and fair hearing and that an award not constrained by precedent may not be just and be contrary to law.

Unless the parties request a reasoned decision, many arbitration awards merely express a simple finding and decision. The parties will not know why a decision was made and how the result was reached and thus no basis exists for precedents and is void of expressed educational value. The limited appealability of awards is also of concern as one party may be obligated to pay an award and yet feel aggrieved without the opportunity for further review.

III. Arbitration of Transportation Disputes

While arbitration has been extensively utilized and proven successful in various industries, it has not been widely used in the motor carrier transportation industry despite the advantages of cost containment, fairness, prompt disposition, convenience, and confidentiality. Based on the efforts of certain trade and professional groups to educate industry members of the availability and advantages of arbitration and other ADR techniques in recent years, it appears that there has been some increase in ADR occurring, including arbitration between motor carriers and owner-operators.

10. The Transportation Lawyers Association ("TLA") has presented many papers on the subject at conferences it has sponsored. This is also true of the American Trucking Associations and state bar and trucking associations.
The emergence of litigation involving the Owner-Operator Independent Driver Association ("OOIDA") and its members against specified motor carriers related to the federal Leasing and Interchange Regulations has increased awareness of arbitration and raised significant issues concerning consensual final and binding contractual arbitra
tion. In a minimum of four of the major cases, the motor carriers defendants have attempted to compel arbitration in lieu of judicial proceedings based on contract clauses between them and owner operators. In only one instance has the motor carrier been successful in compelling arbitration and the issues raised in these cases and their resolution could have far-reaching consequences in determining the future use of arbitration within the industry.

IV. THE FAA AND THE TRANSPORTATION WORKER EXCLUSION

The most important issue arising in the OOIDA litigation is whether owner-operators are excluded from the coverage of the Federal Arbitration Act ("FAA"). This issue is arises on the basis that the contract between the motor carrier and the owner-operator is a "contract of employment" involving a "class of workers engaged in foreign or interstate commerce" which are excluded under the FAA.

11. This trade association for owner-operators boasts a membership in excess of 128,000 members. It publishes educational materials for its members, monitors legislative and administrative transportation matters and actively participates in advocating or opposing such governmental endeavors, and engages in litigation on behalf of individual members. See generally OOIDA, Owner-Operator Independent Drivers Association, http://www.ooida.com.

12. In the past nine years there has been at least twenty civil lawsuits filed by OOIDA members and the organization under 49 U.S.C. § 104704(a)(1) and (2) complaining that the motor carrier defendants have violated various provisions of the Leasing Regulations resulting in the need for injunctive relief and monetary damages. While many cases have been settled, other cases are still being litigated or have been judicially resolved with mixed results. In some instances, such as Gagnon v. Service Trucking, Inc., OOIDA was not a participating party, but the litigation was predicated on the same statutory provisions and based on the same principles. 266 F. Supp. 2d 1361, 1362 n.2 (M.D. Fla. 2003) [hereinafter Gagnon I]. The parties in Gagnon I settled the case and, pursuant to the Settlement Agreement, the court vacated its Order entered May 1, 2003. Gagnon v. Service Trucking, Inc., No. 5:02-CV-342-OC-10GRJ, 2004 WL 290743, at *1 (M.D. Fla. Feb. 3, 2004) [hereinafter Gagnon II].


16. See id. § 1 (providing that the FAA does not apply to "contracts of employment of seamen, railroad employees and any other class of workers engaged in interstate commerce.") [hereinafter "Transportation Worker" exclusion]. The Supreme Court has clarified the exemp-
The FAA was signed on February 12, 1925 by President Calvin Coolidge, in part, to overcome the hostility of the judiciary to arbitration and to address the increase in business disputes stemming from industrialization in the 1920s.\textsuperscript{17} The FAA declared “a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”\textsuperscript{18}

However, in enacting the FAA, Congress specifically provided that, “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”\textsuperscript{19} This provision, which has little legislative history, was seemingly based on Congress’ concern to assure that the transportation industry and the necessary role of the companies in the free flow of goods in interstate commerce was critical to the country.\textsuperscript{20}

Congress had previously enacted federal legislation specifically providing for arbitration of disputes involving seamen.\textsuperscript{21} The same was true in respect to railroad employees under the Interstate Commerce Act.\textsuperscript{22} Thus, it is reasonable to conclude that Congress excluded seamen and railroad workers for the “simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.”\textsuperscript{23}

While motor carriage existed in the 1920s, it was in its infancy and, thus, was not regulated, and was not precluded under common law from the use of arbitration. Further, there is no specific evidence that motor carriers or their employees were specifically considered in the context of section 1 of the FAA.\textsuperscript{24} The same was true of airlines and employees of airlines.\textsuperscript{25}


\textsuperscript{19} 9 U.S.C. § 1.

\textsuperscript{20} Adams, 532 U.S. at 121.


\textsuperscript{22} See Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920); Railway Labor Act, ch. 347, 44 Stat. 577 (1926).

\textsuperscript{23} Adams, 532 U.S. at 121.

\textsuperscript{24} See 9 U.S.C. § 1.

\textsuperscript{25} The airline employees were being considered for inclusion in the Railway Labor Act being drafted at the same time that the FAA was being considered. However, airlines and employees of airlines were not included under the Railway Labor Act until 1936. See 29 C.F.R. § 1202.13.
If Congress had some concern about including motor carrier workers and delayed inclusion under the FAA because of their significant involvement in the movement of interstate commerce, which might necessitate legislation similar to that in the seamen, rail, and airline industry, it must be recognized that no such need has arisen in over 100 years. This should, in and of itself, indicate that there is no justification to exclude personnel in the motor carrier industry, and particularly owner-operators, from voluntary arbitration and its attendant benefits.26

Further, if ever necessary, legislation could be passed providing for legislative specified handling of dispute and at the same time remove coverage under the FAA. In the meantime, it is felt that society, as well as motor carrier transportation workers, including owner-operator, should be able to enjoy the benefits of arbitration in resolving disputes.

The Transportation Workers exclusion, as related to owner-operators, was first raised in OOIDA-type litigation in Gagnon I when the motor carrier defendant filed a Motion to Compel Arbitration under a contract clause reading, “To the extent any dispute arises under this agreement or its interpretation, we both agree to submit such dispute to final and binding arbitration.”27 This agreement between the motor carriers also provided that the “entire agreement and understanding between us and is to be interpreted under the laws of the State of Florida.”28 However, the defendant did not advance its claim on the state’s arbitration statute, but rather under the FAA because the case concerned interstate commerce.29

In Gagnon I, plaintiff opposed the Motion, in part, on the fact that the FAA was inapplicable because plaintiff and potential class members were within a “‘class of workers engaged in foreign or interstate commerce’” and, therefore, excluded under 9 U.S.C. § 1.30 The United States Magistrate to whom the Motion was referred recommended that the Motion be denied on the basis that the FAA exempts from its provisions the claims under employment contracts of truck drivers involved in interstate

26. It should be noted that when specific legislation was passed for seamen and rail and airline workers, it was clear only railroad employees fell within the legislation and the limitation to rail employees is a strong indication that the statutory provision did not apply to independent contractors. It should also be noted that the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) covers employees in the motor carrier industry and presumably such employees could be covered by a collective bargaining agreement calling for arbitration. See, e.g., Mason-Dixon Lines, Inv. v. Local Union No. 560, Int'l Bhd. of Teamsters, 443 F.2d 807, 809 (3d Cir. 1971) (enforcing such an arbitration clause under a collective bargaining agreement covering a driver and a motor carrier despite FAA section 1).

27. Gagnon I, 266 F. Supp. 2d at 1363.


30. Id. at 1364 (quoting 9 U.S.C. § 1).
commerce. The Magistrate framed the relevant issue as two-fold, "whether the owner-operators, like Plaintiff, are workers engaged in interstate commerce" and, if so, "whether the Lease Agreement in this case is a ‘contract of employment.’" Citing various cases finding truck drivers to be workers engaged in interstate commerce, the Magistrate addressed the issue whether a “contract of employment” existed under the FAA.

Specifically noting that the FAA and its history was “not particularly helpful in defining the term ‘contract of employment’ nor [was] there any case law that expressly [dealt] with the issue of whether a Lease Agreement, like the one in the instant case, constitutes an employment contract for purposes of the FAA[,]” the Magistrate resorted to cases where the employment classification arose in other areas of law.

Relying on the decision of Judy v. Tri-State Motor Transit Co. and other cases which were based on finding employment relationships in connection with tort liability of carriers for personal injuries sustained as a result of driver negligence while under the a lease contract, the Magistrate found a “statutory employer-employee relationship between the [truck driver] and the [motor carrier].” Furthermore, the Magistrate noted that his finding was premised on 49 U.S.C. § 14102, “which requires motor carriers to assume control and responsibility of operating leased motor vehicles.” The Magistrate, recognizing the concept of a statutory employer-employee relationship arose in the context of tort claims, stated the same rationale applied to the Gagnon I situation because “the responsibility and the duty to control the vehicle” was a “key ingredient in determining” the employment classification issue.

The Magistrate also resorted to agency principles under federal law to buttress the decision and found their application supported his conclusion. Key provisions leading to an employment finding included “control over and responsibility” for the operation of the vehicle, the lease

31. Id. at 1367.
32. Id. at 1364.
34. Id. at 1364.
35. Id. at 1365 (citing Judy v. Tri-State Motor Transit Co., 844 F.2d 1496, 1500-01 (11th Cir. 1988); Price v. Westmoreland, 727 F.2d 494, 496-97 (5th Cir. 1984); Heaton v. Home Transp. Co., 659 F. Supp. 27, 31 (N.D. Ga. 1986)).
36. Id.
37. Id.
agreement was renewable on a year-to-year basis, the work performed by
the driver was the main focus of the carrier’s regular business, and the
carrier secured and distributed to the drivers “permits for road use, mile-
age and fuel taxes.”\textsuperscript{39} The Magistrate concluded the Lease Agreement
constituted a contract of employment of a class of workers engaged in
interstate commerce.\textsuperscript{40}

In \textit{Owner-Operator Independent Drivers Association. v. Landstar
Systems, Inc.}, the same issue arose when Plaintiff submitted the \textit{Gagnon I}
decision as authority in response to the motor carrier’s Motion to Compel
Arbitration.\textsuperscript{41} The court followed the analysis made in \textit{Gagnon I}, finding
that truck drivers fell within the exclusion of workers engaged in foreign
or interstate commerce and then determined the carrier-owner-operator
agreement was an employment contract thereby removing them from the
dictates of the FAA.\textsuperscript{42} The court merely reviewed the \textit{Judy} and \textit{Gagnon I}
decisions and found the Defendant’s leases with the owner-operators set
out the terms of the employer-employee relationship under 49 U.S.C.
\textsection{} 14102.\textsuperscript{43}

In a third case, \textit{Swift Transportation}, the issue also arose.\textsuperscript{44} While the
parties did not address the arbitration issue to any extent in their plead-
ings, the court ruled that the Plaintiff did not meet its burden of establish-
ing that the drivers should be considered “employees” under the Lease
Agreement or in the circumstances of their working relationship.\textsuperscript{45} In
effect, the court ruled the exclusion of section 1 of the FAA only applied
to an employee relationship and not an independent contractor relation-
ship.\textsuperscript{46} Arbitration was compelled.\textsuperscript{47}

At the same time that the arbitration issue was before the \textit{Swift
Transportation} Court, it arose in \textit{Owner-Operator Independent Drivers
Association v. C.R. England, Inc.}\textsuperscript{48} While the Defendant asserted that
arbitration should be compelled under the Utah State Arbitration Act,\textsuperscript{49}
the Plaintiffs argued the owner-operators were exempt from arbitration
under the FAA.\textsuperscript{50} The court, in deciding the issue, declared that despite

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1366.
\item \textit{Id.} at 1365-66.
\item \textit{Landstar}, 2003 WL 23941713, at *2.
\item \textit{Id.} at *8.
\item \textit{Id.} at *7-8.
\item \textit{Swift Transp.}, 288 F. Supp. 2d at 1035.
\item \textit{Id.}
\item \textit{See id.}
\item \textit{Id.}
\item \textit{Owner-Operator Indep. Drivers Ass’n v. C.R. Eng., Inc.}, 325 F. Supp. 2d 1252, 1255-56
(D. Utah 2004).
[hereinafter “UAA”]).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
the split of authority, it was “clear” that the Plaintiffs were a “class of workers engaged in interstate commerce, or [were] transportation workers,” within the exception of the FAA.\(^\text{51}\) The court rested its decision on the language of the agreement between the motor carrier and owner-operator which existed because the owner-operators were to perform personally or through other drivers certain functions related to the operation of the equipment for C.R. England’s business, namely to operate the equipment together with all necessary drivers and labor to transport freight on the company’s behalf, which it felt clearly established the agreement was a contract of employment of transportation workers and was excluded from arbitration under the FAA.\(^\text{52}\)

The diversity of opinions rose primarily because the Gagnon I Court was not presented with the most critical issue and the administrative provision upon which it relied in reaching the decision had been substantially modified by a prior amendment to the regulation, which clearly indicated an opposite intent than that adopted by the court.

Because many courts in other areas of law involving the “employment classification” issue interpreted the Leasing Regulations as creating a per se employment status,\(^\text{53}\) the administrative agency felt it necessary to clarify this misinterpretation of its intent. It modified the applicable section of the Leasing Regulations by adding a new subsection reading:

> Nothing in the provision required by paragraph (c)(1) of this section in intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.\(^\text{54}\)

Courts, subsequent to the adoption of 49 C.F.R. § 376.12(c)(4), have generally accepted the position that an independent contractor relationship can exist in a lease arrangement under the Leasing Regulations.\(^\text{55}\) Despite the fact that this “oversight” in the Gagnon I case was brought to

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\(^\text{51}\) Id. at 1257.

\(^\text{52}\) Id. at 1257-58 (rejecting Gagnon I's reliance on the statutory employer-employee theory and the motor carrier safety regulations at 49 C.F.R. Parts 200 through 399, asserting that such reliance was not applicable because the cited cases relied upon as authority involved liability for personal injuries, whereas the applicable regulation in the present case was 49 C.F.R. § 376.12(c)(4)).


\(^\text{54}\) 49 C.F.R. § 376.12(c)(4) (2005).

the attention of the *Landstar* Court, the court made no recognition or discussion of it in ruling against the motor carrier’s Motion to Compel Arbitration. 56

The Court in *C.R. England* did recognize that *Gagnon I*’s reliance on the statutory employer-employee theory and reference to the federal Motor Carrier Safety Regulations was misplaced, finding that such reliance was not applicable because the cases relied upon involved personal injuries, whereas the applicable regulation before it was 49 C.F.R. § 376.12(c)(4). 57

In the circumstances, and particularly in light of the apparent evidence and arguments not raised, it is difficult to accept the decisions of the *Gagnon I* and *Landstar* Courts as sound precedent. OOIDA litigation, to date, has essentially created a proverbial “mess” in the segment of the motor carrier industry using owner-operators. Carriers are faced with the issues of: (1) whether independent owners, who also drive their leased vehicles under contract to the motor carrier, are excluded from FAA coverage whether employees and/or independent contractors; (2) whether all drivers will or should be considered statutory employees for purposes of section 1 of the FAA; and (3) what tests or criteria should the employment classification issue, to the extent relevant, be decided?

V. **Coverage of Independent Contractors: The Employment Classification Issue**

The cursory treatment of the issue of owner-operators being employees or independent contractors in OOIDA-type litigation presents a significant problem for motor carriers using such personnel. The issue is also frequently raised in many other areas of law. The proper determination of the issue is important in terms of federal and state employment taxes, labor management relations, workers’ compensation, unemployment compensation, and in respect to tort and contract law.

The resolution of the employment classification issue in the context of OOIDA type litigation can and will have significant implications in motor carrier operations as a decision of “misapplication” of the issue in one area of the law frequently has consequences in other areas of law. For example, a finding of misapplication of the issues resulting in an IRS proceeding regarding employment taxes will invariably raise the issue by state revenue departments. A finding that any owner-operator is an “employee” for purposes of workers’ compensation will result in inquiries or audits of the particular state’s department of labor regarding unemployment compensation coverage.

While each agency or court interpreting the employment classification issue under various statutory or administrative standards and the decision reached may seem to make sense, it must be realized that to a business attempting to determine business *modus operandi*, the plethora of tests utilized does not make sense and has led to explosive litigation obscuring the simple conclusion that there has to be a reasonably usable test to determine whether a person is an independent contractor or an employee.

In the *Landstar* case, an appeal was filed regarding the denial of the Motion to Compel Arbitration but subsequently withdrawn. As such, one can only speculate whether such action was driven, in part, by the fact that they may not have wanted this type of threat since Landstar is one of the largest motor carriers solely using owner-operators. Thus, they did not want the employment classification issue decided as a peripheral issue where an adverse decision could have significant, if not critical, affects on its operations.

While the United States Supreme Court in *Circuit City Stores, Inc. v. Adams* has limited the exclusion provision under the FAA to the “employment” of transportation workers, and characterized the relationship of those individuals as in an “employee” status, the specific issue of independent contractor coverage was not decided.58 Likewise, in *Roadway Package Systems, Inc. v. Kayser*, a district court specifically found that the FAA exclusion only applied to driver-employees and did not include arbitration of owner-operator disputes.59

In the *Adams* case, Justice Kennedy stated the residual exclusion is linked to the two specific enumerated types of workers identified in the preceding portion of the sentence, that is seamen and rail employees and their employers.60 Justice Kennedy also noted that air carriers and “their employees” were included under the Railway Labor Act in 1936.61 Again, this decision indicates that only “employees” in transportation are excluded from FAA coverage.

This is the only logical conclusion to reach. To take the position that independent contractors in transportation are included would ignore the relationship existing between the statutory term “contract of employment” and “class of worker.” It appears clear that a person in a “class of worker” must have a contract of employment such as seamen and railroad employees. The term “contract of employment” and “employee” should not be utilized improperly to extend the term “worker” to include

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58. *Adams*, 532 U.S. at 119.
60. *Adams*, 532 U.S. at 121.
independent contractors. If Congress, in fact, wanted to cover independent contractors, it would have been logical to word the exclusion to read, "nothing contained herein shall apply to seamen or any other class of transportation workers engaged in interstate commerce."

It is also significant that in the OOIDA litigation to date, it appears that the courts have not specifically considered the fact that agreements between motor carriers and independent businesspersons are not personal service contracts. This critical point would seemingly preclude any effective argument that an individual independent contractor is an employee or worker of the motor carrier for purposes of the FAA.

The Leasing Regulations, which are the predicate of the OOIDA suits, merely regulate the leasing of equipment and the terms of the agreement between the lessor and the lessee of the equipment.\textsuperscript{62} The typical agreement does not require the lessor of the equipment to drive the vehicle nor is there any breakdown between the payment for the lease of the equipment and the driving of it, related service such as loading and unloading freight, maintenance of equipment, licensing it, and operational expenses.

The disputes that might arise under the Leasing Regulations, as they did in the OOIDA litigation, were not predicated on "wages and salary," "fringe benefits," or any real "employment" issue. Instead, the issues arose over items such as voluntary insurance purchases, use of voluntary fuel cards, business-based security deposits, and escrow funds.\textsuperscript{63} These issues do not involve typical employer-employee provisions having a direct bearing on "wages or salary."

There is really no basis to argue that they relate to a "worker" dispute as opposed to two independent businesses disputing over a contract to accomplish a business purpose. The fact that OOIDA litigation involves transportation service under contract as opposed to a general contractor in the construction industry in a dispute with a plumbing subcontractor over a contract term, or a retailer in a dispute with a business person leasing floor space to sell cosmetics, does not change a business dispute into an employment dispute. Until the employment classification issue is reasonably defined and resolved, it will be a continuing issue in disputes under the FAA.

\textsuperscript{62} 49 C.F.R. § 376.12 (2005). Leases of equipment can include driver service or not. \textit{Id.} § 376.2(h).

VI. FEDERAL – STATE LAW RELATIONSHIP

A second major issue in the use of arbitration between motor carrier and owner operators, arises when a state arbitration act exists and “transportation workers” are not excluded from coverage. Although this potential issue was recognized in Gagnon I, the defendant motor carrier appeared to have limited its argument that the FAA applied because the dispute concerned interstate commerce. The parties agree as did the Magistrate holding the FAA controlled.

In the Landstar case, however, the carrier defendants took a strong but different position on the issue arguing that the FAA was not controlling since arbitration could also be compelled under the Tennessee Uniform Arbitration Act. Similarly, in C.R. England, the motor carrier although arguing the applicability of the FAA to some extent seemingly relied more strongly on the applicability of the Utah Arbitration Act, which did not include an exclusion provision similar to section 1 of the FAA. However, the court in C.R. England rejected application of the Utah Arbitration Act on the basis of the decision in Palcko v. Airborne Express, Inc., which held that a state statutory provision similar to the Utah Arbitration Act would frustrate the congressional intent to exclude transportation workers’ claims from arbitration.

In the Swift Transportation case, the defendant motor carrier raised the arbitration issue relying upon the FAA and the Tennessee Uniform Arbitration Act. Plaintiffs raised the exclusionary provision of Section 1 of the FAA and argued that the state Act was inappropriate because the FAA governed the issue. The court, while not directly addressing the State arbitration issue, found that the FAA applied and discussed other issues such as “unconscionability” in denying application of the

64. Gagnon I, 266 F. Supp. 2d at 1363 n.3.
65. Id.
68. C.R. Eng., 325 F. Supp. 2d at 1258 (citing Palcko v. Airborne Express, Inc., No. Civ.A. 02-2990, 2003 WL 21077048 (E.D. Pa. 2003), rev’d 372 F.3d 588 (3d Cir. 2004)); Mason-Dixon Lines, 443 F.2d at 809 (recognizing that the effect of Section 1 is merely to leave the arbitrator of disputes in the excluded category as if the FAA has never been enacted).
70. Swift Transp., 288 F. Supp. 2d at 1034.
71. Id. at 1035.
72. Id. at 1035-36.
state laws referred to in the motor carrier owner operator agreement.\textsuperscript{73} Thus, motor carriers and owner operators are faced with the propriety of consensual arbitration clauses under state statutes if the FAA, in fact, excludes arbitration.

In attempting to resolve this issue based on the OOIDA cases, it must initially be noted that the federal district court decision in \textit{Palcko}, which was relied upon in the \textit{C.R. England} case and, presumably, considered in other cases, was reversed by the Third Circuit Court of Appeals subsequent to the OOIDA decisions.\textsuperscript{74} In \textit{Palcko}, the plaintiff conceded to being an employee of the motor carrier and agreed by contract to arbitrate her claim under the federal Civil Rights Act and the Pennsylvania Human Relations Act under the FAA and Washington state law.\textsuperscript{75} The district court noted that the plaintiff, as a transportation worker, engaged in interstate commerce was excluded from FAA coverage and that the FAA exclusion preempted the enforcement of the Washington state statute.\textsuperscript{76} While concurring with the district court that the plaintiff’s employment contract was excluded from coverage under the FAA, the Court of Appeals overruled the lower court, holding that the enforcement of the arbitration agreement, under Washington state law, was precluded by the FAA.\textsuperscript{77}

The Court predicated its decision, in part, on the following basis: (1) “Congress enacted the FAA ‘to ensure judicial enforcement of privately made agreements to arbitrate,’ rather than restrict the force of arbitration agreements[.]” (2) in \textit{Rodriguez de Quijas v. Shearson/American Express Inc.},\textsuperscript{78} seeking to fulfill the FAA’s purpose, the U.S. Supreme Court “enforced an agreement to arbitrate claims under the Securities Act of 1933, even though prior case law stated that the Securities Act’s language prohibit[ed] the arbitration of such claims[.]”\textsuperscript{79} (3) the U.S. Supreme Court, in \textit{Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.},\textsuperscript{80} “also stated that parties to an arbitration agreement ‘[h]aving made the bargain to arbitrate . . . should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory right at issue[:]’”\textsuperscript{81} and (4) “[t]here is no language in the FAA that explicitly

\textsuperscript{73} Id. at 1038-40.
\textsuperscript{74} See \textit{Palcko} v. Airborne Express, Inc., 372 F.3d 588, 597 (3d Cir. 2004).
\textsuperscript{75} Id. at 590.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 596.
\textsuperscript{78} \textit{Rodriguez de Quijas v. Shearson/American Express Inc.}, 490 U.S. 477 (1989).
\textsuperscript{79} \textit{Palcko}, 372 F. 3d at 595 (citing \textit{Rodriguez de Quijas v. Shearson/American Express, Inc.}, 490 U.S. 477 (1989)).
\textsuperscript{80} \textit{Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 628 (1985).
\textsuperscript{81} \textit{Palcko}, 372 F.3d at 595 (citing \textit{Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.}, 473 U.S. 614, 628 (1985)).
preempts the enforcement of State arbitration statutes," nor does the FAA "reflect a congressional intent to occupy the entire field of arbitration."\(^{82}\)

The court further indicated that "‘[i]n our view, the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted.’"\(^{83}\) Based on the above, the court ruled that enforcement of the arbitration agreement under Washington state law was appropriate and did not contradict any of the statutory language, but, in contrast, furthered the general policy goals of the FAA favoring arbitration.\(^{84}\) The Third Circuit Court of Appeal's decision in the *Palcko* case is well-reasoned and reflects the majority view.\(^{85}\)

The U.S. Supreme Court in *Valdes v. Swift Transportation Company*, for example, stated that "[s]ection 1 does not, however, in any way address the enforceability of employment contracts exempt from the FAA. It simply excludes these contracts from FAA coverage entirely."\(^{86}\) In opposition to the district courts' reasoning in the *Palcko* case, the court stated:

\[
\text{[t]he conclusion flouts the principle that 'questions of arbitrability must be addressed with a healthy regard for the federal law favoring arbitration'... [a]nd most importantly, it essentially re-writes what is merely an exemption providing that the FAA does not apply into a substantive pronouncement that such clauses in transportation workers' contracts are unenforceable.}\]

In light of this precedent and in view of the decision and direction taken by the courts in OOIDA-type litigation, it would appear that a clarifying amendment to Section 1 of FAA may be warranted.

A provision could be added to Section 1 reading:

\[
\text{... Nothing herein shall preclude seamen and railroad, airline, or other employees engaged in foreign or interstate commerce in the transportation industry from participating in consensual arbitration under applicable state law covering disputes unless federal legislation imposes a specific prohibition or has established a conflicting means or procedures of resolving such disputes.}
\]

The adoption of such a statutory provision would clearly resolve the

\(^{82}\) *Id.* at 595.

\(^{83}\) *Id.* at 596 (citing Mason-Dixon Lines, Inc. v. Local Union No. 560, Int'l Bhd. of Teamsters, 443 F.2d 807, 809 (3d Cir. 1971)).

\(^{84}\) *Id.* at 597.


\(^{86}\) *Valdes*, 292 F. Supp. 2d at 529.

\(^{87}\) *Id.*
issues motor carriers and owner-operators now face as a result of the OOIDA-type litigation. In fact, by merely making the proposed amendment applicable to employees generally would help avoid any confusion in the area of federal-state arbitrability issues.

VII. THE ARBITRABILITY ISSUE

Apart from the exclusionary issue and the preemption issue, OOIDA litigation has also raised significant issues involving the determination of a specific claim’s arbitrability. Under the FAA, an arbitration clause is valid, irrevocable, and enforceable in the absence of any grounds that would exist at law or in equity for the revocation of any contract.\(^88\) By enacting the above provision, Congress desired to place arbitration agreements “upon the same footing as other contracts, where [they] belong.”\(^89\)

In the OOIDA litigation, various general contract issues have been raised including financial hardship of arbitrating, unconscionability and significantly these arguments have led to denial of various Motions to Compel Arbitration.

A. FINANCIAL HARDSHIP

Courts such as \textit{C.R. England}, in OOIDA litigation have relied heavily on the “hardship” issue to deny arbitration.\(^90\) The court in \textit{C.R. England} noted the decision in \textit{Morrison v. Circuit City Stores, Inc.}\(^91\) as fleshing out the test to determine whether arbitration was a conscionable forum.\(^92\) “Potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from seeking to vindicate their federal statutory rights in the arbitral forum.”\(^93\) The \textit{Morrison} court acknowledged that a reviewing court should define the class of such similarly potential litigants by job description and socioeconomic background and indicated it should take the actual plaintiff’s income and resources as representative of the larger class’ ability to shoulder the cost of arbitration.\(^94\)

The \textit{C.R. England} court, however, noted that in the \textit{Morrison} case it was not mandated that a searching inquiry be made into the employee’s bills and expenses.\(^95\) The \textit{C.R. England} court held that the uncontested


\(^{90}\) See \textit{C.R. Eng.}, 325 F. Supp. 2d at 1263.

\(^{91}\) Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).

\(^{92}\) \textit{C.R. Eng.}, 325 F. Supp. 2d at 1262.

\(^{93}\) \textit{Id.} (citing \textit{Morrison v. Circuit City Stores, Inc.}, 317 F.3d 646 (6th Cir. 2003)).

\(^{94}\) \textit{See Morrison}, 317 F.3d at 663.

\(^{95}\) \textit{C.R. Eng.}, 325 F. Supp. 2d at 1262.
information provided by plaintiffs showed that the plaintiff’s work as truck drivers necessarily takes them all over the country, that their incomes were modest, that their claims are generally small, usually around or under $3,000, that the company withheld funds pending resolution, and the cost of arbitration, the difficulty of coming to Utah, and the relatively small amount of the claims would deter their use of the arbitration to vindicate their statutory rights.96

The court in Swift Transportation, presumably with the same or substantially the same evidence, found plaintiffs failed to meet their burden as the evidence merely established “some evidence of what arbitration costs might be incurred in general through an AAA arbitration, their position [was] in effect based on speculation since arbitration costs depend upon various factors. . .” the specifics of which the plaintiffs failed to submit.97

The C.R. England court discussed the U.S. Supreme Court decision in Green Tree Financial Corp. v. Randolph98 but indicated the court did not detail what evidence of prohibitive cost was required.99 In Green Tree, the Plaintiff was purchasing a mobile home through Green Tree Financial, whose contract required that Randolph purchase insurance to protect the vendor or lien holder against the cost of repossession in the event of default.100 The contract also stipulated that all disputes would be resolved by binding arbitration.101 Randolph argued that the arbitration agreement’s failure to disclose related costs and fees created a risk that she would have to bear in pursuing her claims in an arbitral forum left her unable to vindicate her statutory rights in arbitration.102 Finding that the alleged prohibitive costs identified by Randolph were too speculative to justify the invalidation of the arbitration, the court stated that Randolph and others who would raise the prohibitively expense argument, had the burden of showing the likelihood of its cost being incurred.103

It would appear that the burden imposed upon the party resisting arbitration on the basis of prohibitive costs should be a fairly stringent one because it flies in the face of commonly accepted evidence and observers’ conclusions that, in general, the cost of judicial resolution is more costly and time consuming than arbitration.104 By not imposing a strict

96. Id. at 1261.
100. Green Tree, 531 U.S. at 82.
101. Id. at 83.
102. Id. at 89.
103. Id. at 91-92.
104. See, e.g., Weaver v. State Farm Ins. Co., 609 N.W.2d 878, 884 (Minn. 2000); see generally
burden of proof upon the person raising the unconscionability argument, facts such as the AAA by rule provides for fees to be deferred or relieved in the extent of extreme hardship, which apparently was not considered in the C.R. England case. 105

In many instances, it is common in arbitration awards to include hardship adjustment and allocation adjustment in final awards. 106 Hardship occurs in many circumstances whether it involved court rooms or arbitration hearing rooms. In C.R. England, for example, the lawsuit was initially filed in California and moved to Salt Lake City on the basis of legitimate venue considerations, for example, most of the witnesses necessary to testify about Plaintiff's claim resided in Utah. 107 Thus, it is difficult to understand that "travel costs" to arbitrate in Salt Lake City, Utah was a factor against arbitration as noted by the court. Further, while C.R. England is one of the largest motor carriers in the country, the position taken by the court in their OOIDA case is potentially dangerous in the transportation community.

As a whole, motor carriers are small businesses and the smaller the carrier, the more likely it utilizes owner-operators. Presumably, with owner-operators residing in various points in the United States, any one or all of them could file an OOIDA-type lawsuit at multiple points and justify it on the basis that arbitration would be too costly for the same reasons asserted in the C.R. England case. 108 But one should consider the cost of the small motor carrier who would be forced to litigate at points around the country and the cost of doing so based on local rules, schedules, attorney fees, and so on and then be subject to multiple judicial appeals.

Arbitration allows the parties to decide and agree that a dispute if it is reasonable to resort to adjudication, will generally be handled with less discovery, at a date definite, before an arbitrator of choice, if possible, and at a point agreed upon and has some reasonable relationship to the contractual relationship. One can also rightfully ask whether a party who feels aggrieved should be excused from a contractual obligation because a worst-case scenario would mean not only losing a substantive claim, but also the possible imposition of the cost of arbitration. This should be a factor all litigants face in entertaining the issue of filing or defending a lawsuit. Defendant motor carriers are frequently faced with the reverse

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108. See generally id. at 1252-62.
side of the coin when an owner-operator files a small contractual money claim in a small home-town local court distant from the carrier's headquarters, necessitating local counsel, travel expenses, etc. As such, it becomes necessary to consider the practicality of litigation and a common sense economic settlement.

However, to remove the possibility of losing with attendant costs may encourage frivolous lawsuits or arbitrations as well as discourage the prosecution of claims when the costs of litigation suggest a reasonable settlement. At best, where an arbitration clause exists, it should be left to the arbitrator to decide arbitrability. The parties, in conjunction with the arbitrator should decide "cost cutting" and "sensible" procedures, including: (1) class or consolidated arbitrations;  

109  (2) use of written affidavits;  

110  (3) the assessment of costs and arbitrator fees; and (4) other factors that may make arbitration less costly and less time-consuming than a court proceeding.  

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B. CLASS ACTIONS

Because of the cost of arbitration and the small amounts of damages suffered by individuals, in deciding whether arbitration should be denied on the basis of "unconscionability" courts will note that requiring arbitration of each individual's claim is not appropriate.  

112  This argument has arisen in pre-OOIDA litigation and rejected by a majority of the courts.

In Champ v. Siegel Trading Company, the Seventh Circuit held that the FAA does not permit a court to order class action arbitration where the arbitration did not expressly provide for such a procedure.  

113  The Champ decision was predicated on the basis that it was necessary to "rigorously enforce the parties' agreement as they wrote it 'even if the result

109. Class action arbitrations are relatively new, but OOIDA type litigation may encourage their usage. In Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638-39 (4th Cir. 2002), cert. denied, 537 U.S. 1087 (2002), the Court rejected the need for a class action because of the small amount of damages suffered by prospective class members, where the statute, like that involved in the OOIDA litigation, provided for recovery of attorney fees to the prevailing party.

110. The use of written affidavit is allowed under the Arbitration Rules of Transportation ADR Council, Inc. and such usage is not uncommon in arbitration.

111. If one studies the OOIDA cases, it is clear that proceedings have been extremely costly to all parties because of motions, briefings, discovery, appeals, and time, thus, clearly exceeding the cost of reasonable arbitration.


is piece-meal litigation."114 The court explained that for the court to "substitute our own notion of fairness in place of the explicit terms of [the parties] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate."115

Similar positions have been taken by the Court of Appeals in the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits116 and similar decisions have been made in state courts.117 The majority approach has been readily taken by California courts as well as other state courts. For example, in Keating v. Superior Court, the California Supreme Court held that state law permitted a court to order class arbitration even where an arbitration clause did not provide for it.118 The test to be applied was not solely the intent of the parties, but rather, included an analysis of which procedure offers "a better, more efficient, and fairer solution."119

The diversity of positions led to the U.S. Supreme Court in Green Tree Financial Corp v. Bazzle.120 This decision shed some light on this

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115. Id. at 275 (citing Universal Reinsurance Corp. v. Allstate Ins. Co., 16 F.3d 125, 130 (7th Cir. 1993).
116. Id. at 274; see, e.g., Gov't of U.K. v. Boeing Co., 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation."); Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation."); Baessler v. Cont'l Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings."); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) (quoting Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145, 150 (5th Cir. 1987) in holding that "the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration."); Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984) (holding that the court "can only determine whether a written arbitration agreement exists . . ."); contra New Eng. Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 3 (1st Cir. 1988) (holding that consolidation is proper if allowed by state law).
117. See, e.g., Stein v. Geonerco, Inc., 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) (enforcing the arbitration agreement as written where the agreement was silent as to class action); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (recognizing that the arbitration agreement prevented class litigation); Med. Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) (concluding that requiring "class-wide arbitration would alter the agreement of the parties . . .").
120. Green Tree, 539 U.S. at 444.
issue, but left many issues unresolved. In one of the most fragmented decisions in recent years, the Court held that the issue of whether a contract prohibited class-wide arbitration was for the arbitrator, not the Court, to decide. Eight of the nine Justices wrote or concurred in opinions that supported the use of arbitration and all stressed the importance of the choice of the parties in their arbitration agreements. The majority also endorsed arbitration agreement provisions barring class actions, but until the Court actually decides the issue, differences will occur in the courts.

In the meantime, however, courts should recognize that the benefits of class arbitration may, in fact, be available through the arbitrators’ ruling on the issue of whether the agreement of the parties in a specific case warrants the use of class arbitration consolidation or collective action. It should also be recognized that the American Arbitration Association (“AAA”) has changed its policy concerning class arbitration and has adopted rules providing for class arbitration if “(1) the underlying arbitration agreement specifies that disputes arising out of the parties’ agreement shall be resolved by arbitration in accordance with any of the Association’s rules, and (2) the agreement is silent with respect to class claims, consolidation, or joinder of claims.”

In OOIDA litigation, there have also been some interesting developments in respect to class action arbitration. OOIDA had universally opposed arbitration until mid-2004 when it was announced that the organization was supporting one of its members in a demand for class action against FFE Transportation Services, Inc. for alleged violation of

121. The Court voted 4-3-1-1 to remand the case for further finding by the arbitrator concerning the parties’ intention as to class actions as expressed in their arbitration agreement. The plurality opinion was authored by Justice Breyer and joined in by Justices Souter, Ginsburg, and Scalia. Justice Stevens concurred in the judgment of the majority. Justices Rehnquist, O’Connor, and Kennedy dissented and voted to reverse the judgment, but for different reasons. Justice Thomas wrote a separate dissent. Id. at 454-60.

122. Id. at 451.

123. See id. at 451-53.

124. See id. at 450-51.


126. American Arbitration Association, American Arbitration Association Policy on Class Arbitrations (2005), http://www.adr.org/classarbitrationpolicy (last visited Oct. 15, 2005); see generally Justin Scheck, New ADR Policy Torched, CORP. COUNS., May 2005, at 115 (discussing the decision of one of the country’s largest private arbitration services, JAMS, which announced in November 2004 that it adopted a policy not to enforce clauses prohibiting class arbitrations, but in March, 2005, reversed this policy because of arguments that the process involved “agreement” between the parties which should be respected).
the truth-in-leasing regulations. No further information has been found about the disposition of that request. There is no evidence that a lawsuit has been filed and the parties involved have not released any further information which would tend to indicate the dispute may have settled or that it is progressing in the ADR process and receiving one of the benefits of arbitration? “confidentially.” Subsequent to the FFE Transportation action, OOIDA, in the Swift Transportation case, filed a class-wide arbitration demand with the AAA relative to the claims in that case, which demand is currently unresolved.

Assuming class arbitration is allowed in some instances at the discretion of an arbitrator or courts, the availability of such arbitration would seemingly eliminate all or a good portion of “hardship” and unconscionability arguments while still affording many of the other benefits associated with arbitration.

VIII. Conclusion

There are no reasons why motor carriers and owner-operators should be precluded from consensual arbitration of disputes under the exclusionary provisions of Section 1 of the FAA or under any state statute which allows such arbitration. This should be assured on a federal basis by statutory amendment of the FAA previously suggested and which appears to be consistent with the apparent statutory intent policy of Congress as expressed in the FAA. It is equally clear the FAA, at best, was only intended to address arbitration as relevant in the context of motor carrier operations between employers and employees and not independent contractors.

While “unconscionability” issues are important, it is equally important that decisions be based on more than speculation and that a strict burden of proof should be imposed upon the moving party to preclude the general policy favoring arbitration from being undermined. Consensual arbitration affords too many advantages to the parties involved, to the public, and as a meaningful alternative to the burdened judicial system to be denied to motor carriers in their relationship to owner-operators who are, in fact and by law, independent contractors and not employees.

129. This should also be true with respect to employees of motor carriers because they, unlike seamen, railroad, and airline employees who have legislative alternative dispute resolution procedures, are precluded from arbitration under federal law except possibly under a collective bargaining agreement or under state law coverage.
OOIDA Class-Action Damages and Other Relief

Daniel D. Doyle* and Jennifer A. Fletcher**

I. INTRODUCTION

The Owner-Operator Independent Drivers Association (OOIDA)1 is comprised of truck drivers who own and operate their power units ("owner-operators"). OOIDA has aggressively filed lawsuits against carriers alleging violations of the so-called "Truth-in-Leasing" regulations.2 In addition, at least five comparable lawsuits have been filed by other parties. OOIDA has claimed that motor carriers violated Federal Leasing & Interchange Regulations and has sought unique relief for recovery of unreturned maintenance account balances alleged due from motor carri-

* Daniel D. Doyle, a partner of Spencer Fane Britt & Browne LLP, has been involved in a range of commercial and bankruptcy litigation and is national transportation counsel for two Fortune 500 companies. He graduated in 1989 from Washington University School of Law, where he was Executive Articles Editor of the Journal of Urban and Contemporary Law and a W.L.H. Griffin scholar. He has served as bankruptcy counsel for Dick Simon Trucking, Inc., Rocor International, Arctic Express Inc., and other motor carriers.

** Jennifer A. Fletcher is an associate in Robbins, Schwartz, Nicholas, Liffon, Taylor, LTD. Jennifer received her juris doctor, with distinction, from the University of Iowa College of Law, where she was Managing Editor of the Journal of Corporation Law.

1. The Owner-Operator Independent Drivers Association is an international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect truckers. OOIDA represents more than 113,000 members in all 50 states and Canada who collectively own and/or operate more than 156,000 individual heavy-duty trucks and small truck fleets. See OOIDA.com, What is OOIDA, http://www.ooida.com/about_us/about_us.html (last visited Aug. 23, 2005).

ers. The damages and equitable relief sought in these lawsuits pose substantial risks to all motor carriers, and potential liability for motor carrier lenders.

Owner-operators are independent contractors and often enter into lease agreements with motor carriers possessing authority from the U.S. Department of Transportation ("DOT") to transport property. The leases are regulated by DOT through the Federal Highway Administration ("FHWA").

In conjunction with the lease of the driver and power units, owner-operators frequently obtain their trucks by entering into equipment lease-purchase agreements with motor-carriers, in which the owner-operator is the lessee and the motor carrier is the lessor. This article deals exclusively with the latter and related class-action lawsuits arising under DOT Regulations.

This article will analyze the damages and remedies that OOIDA may seek in class-action lawsuits against motor carriers and review strategies to limit motor carriers' exposure in such litigation. Section II discusses the legal basis for the claims made against motor carriers. Section III describes injunctive relief that has been sought against motor carriers and Section IV discusses the damages available under leasing laws. Section V provides strategies for minimizing such damages. Section VI discusses two lawsuits that OOIDA brought in the Chapter 11 bankruptcy cases of Rocor International and Arctic Express. Although OOIDA's claims were similar in both cases, the litigation arose in different procedural contexts and required the development and implementation of specialized strategies to reach favorable outcomes. In summary, Section VI suggests practical strategies to blunt OOIDA damage claims at each stage of litigation.

II. CLAIMS MADE AGAINST CARRIERS

OOIDA and owner-operators base their claims for unreturned maintenance funds on the Truth-in-Leasing regulations promulgated under the Interstate Commerce Act, particularly 49 U.S.C. § 14102, which provides


5. See 49 C.F.R. § 376.2 (f), (g).


the Secretary of Transportation with authority to regulate vehicle leases.\textsuperscript{8} The leasing regulations, title 49 sections 376.1 to 376.42,\textsuperscript{9} specifically section 376.12(k), provide that “if escrow funds are required, the lease shall specify [that] . . . the carrier shall pay interest on the escrow fund[s] . . .. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of [lease] termination.”\textsuperscript{10} OOIDA asserts that maintenance funds may qualify as escrow funds and, accordingly, motor carriers must follow the requirements imposed on escrow funds. The regulations define an “escrow fund” as “[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and lessee.”\textsuperscript{11}

Note that OOIDA lawsuits based on violations of these leasing regulations have the potential of being catastrophic to motor carriers. \textit{Owner-Operator Independent Drivers Association v. Ledar Transport} illustrates how poorly litigation can go for motor carriers.\textsuperscript{12} Section III discusses \textit{Ledar Transport} as a case study of the legal and practical challenges confronting motor carriers.

\section*{III. INJUNCTIVE RELIEF SOUGHT FROM CARRIERS}

The OOIDA class-action lawsuits usually seek a permanent injunction against the motor carrier to restrain future violations of the leasing regulations, essentially by shutting down the carrier’s operations.\textsuperscript{13} Courts have found that a private right of action for injunctive relief exists under 49 U.S.C. § 14704(a)(1) only for those regulations promulgated under 49 U.S.C. § 14102.\textsuperscript{14} In \textit{New Prime II}, the court found that title 49, section 376.12 of the Code of Federal Regulations was enacted under 49 U.S.C. § 14102(a) authority, meaning that OOIDA may seek injunctive relief when claiming a violation of title 49, section 376.12 of the Code of Federal Regulations.\textsuperscript{15}

The party seeking injunctive relief typically has the burden of showing it meets the “traditional equitable principles,” which include: “[1]...
threat of irreparable harm, [2] likelihood of success on the merits, [3] the balance of hardships [favors granting the injunction], and [4] public interest [favors the relief].”16 The traditional test, however, has not always been applied. In Ledar Transport, the court applied the reasonable cause standard.17

A. Reasonable Cause Standard

In Ledar Transport, OOIDA argued that the reasonable cause standard is appropriate in litigation involving federal leasing regulations.18 According to Ledar Transport, the reasonable cause standard is appropriate where (1) Congress has previously balanced the hardships, (2) the purpose of the regulations is served by an injunction, and (3) the regulations contain flat bans.19 Based on the legislative history, the court found that Congress had balanced the equities when authorizing the promulgation of the Truth-in-Leasing regulations.20 The court next analyzed whether the purpose of the leasing provisions would be served through issuance of a preliminary injunction.21 The court quoted the old Interstate Commerce Commission (“ICC”), which stated that the purposes of the Truth-in-Leasing provisions are promoting truth-in-leasing, full disclosure between the carrier and the owner-operator regarding contracts, elimination of illegal practices, and promotion of economic welfare of the independent trucker segment of the industry.22 The court found that these purposes would be served by issuing a preliminary injunction.23

The court then applied the third factor: “whether the statute places a flat ban on the prohibited conduct.”24 The court determined that the leasing regulations’ mandated contents of a lease are effectively a flat ban on entering into noncompliant leases.25 Under the reasonable cause standard, the court issued a preliminary injunction.26

B. Traditional Standard

Finding the Ledar Transport decision wrongly decided, the court in Owner-Operator Independent Drivers Association, Inc. v. Swift Transportation Co., Inc. found that the district court did not err in applying the

17. Id. at *11.
18. Id. at *2.
19. Id. (citing Burlington N. R.R. Co. v. Bair, 957 F.2d 599 (8th Cir. 1992)).
20. Id.
21. Id. at *3.
22. Id.
23. Id.
24. Id.
25. Id. at *4.
26. Id. at *11.
“traditional equitable principles” test in granting or denying preliminary injunctions for federal leasing violations.\textsuperscript{27} The \textit{Swift Transportation} court reasoned that the traditional test is the appropriate test, unless Congress restricts the courts’ equitable discretion.\textsuperscript{28} In other words, the relevant inquiry is whether Congress expressed an intent to restrict judicial discretion through 49 U.S.C. §14704(a)(1).\textsuperscript{29}

The \textit{Swift Transportation} court found that “Congress has not clearly indicated an intent to restrict the courts’ equitable discretion” in the text of the statute.\textsuperscript{30} Further, the \textit{Swift Transportation} court found that the factors applied by the \textit{Ledar Transport} court do not relate to the question of ascertaining Congress’s intent and, therefore, found that \textit{Ledar Transport} was wrongly decided.\textsuperscript{31} Applying the traditional test, the court denied OOIDA’s request for preliminary injunctive relief.\textsuperscript{32}

\textbf{C. Court Approved Injunctive Relief}

In \textit{Ledar Transport}, the court entered a preliminary injunction requiring court-approved lease agreements.\textsuperscript{33} This injunction, in essence, required the carrier to shut down business until it returned to court with new leases that complied with DOT regulations.\textsuperscript{34} The \textit{Ledar Transport} court also entered an injunction requiring the carrier to allow owner-operators to rescind their lease-purchase contracts with the motor carrier with no penalty.\textsuperscript{35} Furthermore, the \textit{Ledar Transport} court entered an injunction prohibiting retaliation against owner-operators.\textsuperscript{36} Such injunc-

\begin{footnotesize}
28. \textit{id.} at 1111-12.
29. \textit{id.} at 1109-10.
30. \textit{id.} at 1114.
31. \textit{id.} at 1115.
32. \textit{id.} at 1115-16.
33. \textit{Ledar Transp.}, 2000 WL 37711271, at *11. The court issued the following injunction: Defendant Ledar Transport, Inc. is hereby enjoined, pursuant to 49 U.S.C. § 14704(a)(1) and 49 C.F.R. § 376.11(a), from performing any transportation requiring U.S. Department of Transportation authorization in equipment it does not own until it executes written lease agreements for such equipment, approved by this Court as conforming to the requirements contained in 49 C.F.R. § 376.12, with each person leasing such equipment to Defendant. \textit{id.}
34. \textit{id.}
35. \textit{id.} The court issued the following injunction:
   For each equipment lessor to Defendant who is subject to any other lease, lease-purchase, or sales agreement between such lessor and Defendant, its officers, directors, shareholders, owners, employees, agents, corporate subsidiaries, corporate parents and/or corporate affiliates, such other agreement may be rescinded in its entirety at the option of such lessor, free of any penalty or further obligation upon such lessor. Defendant shall notify all such lessors of this provision in writing upon the issuance of this injunction. \textit{id.}
36. \textit{id.} The court prohibited retaliation with the following order:
   Defendant is enjoined from all acts of retaliation, harassment, and intimidation against
\end{footnotesize}
tions can paralyze a motor carrier. OOIDA achieved its goal by claiming that the defendants in *Ledar Transport* retaliated against owner-operators by failing to repay them the outstanding lease escrow amounts after termination of their leases.\(^{37}\) OOIDA argued that, by withholding compensation owed to lessors, the carrier erected an obstacle to lessors paying off their trucks and forfeiting drivers’ rights under the lease-purchase agreements.\(^{38}\)

IV. **Statutory Trusts**

OOIDA lawsuits have also sought to trump the priority of payment of secured lenders. OOIDA has aggressively sought to reorderr payment priorities in bankruptcy proceedings. To recover ahead of other creditors in Chapter 11 bankruptcy cases, OOIDA has asserted that owner-operators benefit from a federal statutory trust for the amount of unreturned escrow accounts. OOIDA and the owner-operators would then have a superior claim to the subject assets because property subject to a statutory trust would not be part of a bankruptcy estate and would be outside the bankruptcy court’s jurisdiction.\(^{39}\) Such claims are superior even to the perfected and enforceable security interest held by asset-based lenders.

A. **Trust Funds Excluded from Chapter 11 Bankruptcy**

When a motor carrier enters bankruptcy, the debtor’s estate broadly encompasses nearly every legal or equitable interest.\(^{40}\) Nevertheless, property of others held by the debtor in trust is excluded from the bankruptcy estate.\(^{41}\) An unsecured creditor can remove itself from an express bankruptcy statutory scheme by showing that the debtor is holding property in trust for the benefit of the unsecured creditor.\(^{42}\)

Bankruptcy courts apply non-bankruptcy law to determine whether a

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Plaintiffs, all other members of the potential class in this action, and others who may assist and/or participate in this action. *Id.*


38. *Id.*


40. *See id.* § 541.

41. *Id.* § 541(b)(1) (providing that estate property does not include power held for the sole benefit of another); United States v. Whiting Pools, Inc., 462 U.S. 198, 205 n.10 (1983) (“Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition.”); see also Daly v. Carrozella & Richardson (*In re Carrozella & Richardson*), 255 B.R. 267, 274 (Bankr. D. Conn. 2000) (“It is axiomatic that funds held in trust by one entity . . . do not constitute the beneficial property of the former.”).

trust exists.\textsuperscript{43} A statute may create a trust if the statute "define[s] the trust res, spell[s] out trustee's fiduciary duties, and impose[s] a trust prior to and without reference to the wrong which created the debt."\textsuperscript{44} Furthermore, under common law, strict tracing of the trust res is required.\textsuperscript{45}

OOIDA has claimed that motor carriers, including those restructuring under Chapter 11 of the United States Bankruptcy Code, hold owner-operator funds in trust and, therefore, the funds are not subject to bankruptcy.\textsuperscript{46} OOIDA has based its statutory trust argument on the use of the term "escrow" in the regulation and its reading of the Supreme Court's decision in \textit{Begier v. IRS}.\textsuperscript{47} OOIDA has succeeded with this argument in one case, \textit{In re Intrenet, Inc.},\textsuperscript{48} despite the fact that the leasing regulations do not expressly establish a trust and that OOIDA can hardly be analogized to the U.S. Internal Revenue Service.

1. \textit{The Begier Case}

At issue in \textit{Begier} was whether tax payments made to the IRS could be avoided as preferential transfers.\textsuperscript{49} Before the \textit{Begier} decision, courts required the IRS to trace payments that debtors made to the IRS ninety days before filing for bankruptcy in order to claim the IRS payment from a trust account was not an avoidable transfer of bankruptcy estate property.\textsuperscript{50} In \textit{Begier}, the Court required only that there be some nexus between the alleged trust fund and the "trust fund taxes" withheld and paid by the debtor.\textsuperscript{51} The Court held that the Internal Revenue Code, 26 U.S.C. § 7501, created a trust comprised of amounts withheld or collected as taxes, and those payments were, therefore, not avoidable transfers of property of the debtor's bankruptcy estate under the Bankruptcy Code,

\textsuperscript{43} See Butner v. United States, 440 U.S. 48, 54-55 (1979) (recognizing that state law generally determines contract rights absent a compelling federal interest).

\textsuperscript{44} Stephens v. Bigelow (\textit{In re Bigelow}), 271 B.R. 178, 187 (B.A.P. 9th Cir. 2001) (citing Woodworking Enter., Inc. v. Baird (\textit{In re Baird}), 114 B.R. 198, 202 (B.A.P. 9th Cir. 1990)); see generally 11 U.S.C. § 523(a)(4) ("(a) A discharge . . . does not discharge an individual debtor from any debt . . . (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.").

\textsuperscript{45} See Sender v. Nancy Elizabeth R. Heggland Family Trust (\textit{In re Hedged-Inv. Assocs.}), 48 F.3d 470, 474 (10th Cir. 1995) (quoting 4 Collier on Bankruptcy, ¶541.13 at 541-76, 79 (15th ed. 1994)).

\textsuperscript{46} 11 U.S.C. §§ 101-1330.

\textsuperscript{47} Begier v. IRS, 496 U.S. 53 (1990).

\textsuperscript{48} See Owner-Operator Indep. Drivers Ass'n v. Huntington Nat'l Bank (\textit{In re Intrenet, Inc.}), 273 B.R. 153, 157 (Bankr. S.D. Ohio 2002) (holding that "the funds are subject to a statutory trust created by the federal Truth-In-Leasing regulations for the benefit of the Owner-Operators").

\textsuperscript{49} Begier, 496 U.S. at 55; see also 11 U.S.C. § 547 (providing for recovery of preferential payments).

\textsuperscript{50} See id. at 57 n.1.

\textsuperscript{51} Id. at 65-67.
11 U.S.C. § 547.52

Like Begier, the vast majority of statutory trusts are found in tax codes.53 The Third Circuit has imposed trusts on natural gas customer refunds54 and on interline freight payments between railroads,55 but other circuits have not endorsed this expansion of the statutory trust doctrine to frustrate the fundamental bankruptcy policy of pro rata distribution on unsecured claims. However, extending Begier to truck lease-purchase agreements would radically expand that decision beyond the unique statutory tax scheme upon which it relies.56 As such, the Begier holding should not be expanded more broadly than is “necessary to accomplish its purposes when doing so would undermine the policy of equality of distribution among creditors, a fundamental policy of the Bankruptcy Code, especially when the IRS would not be affected by a failure to expand the Begier holding.”57

The Supreme Court based the trust in Begier on statutory language, which expressly provides that “the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States.”58 There is no similar language in either the Interstate Commerce Act or regulations to create a statutory trust for owner-operators.59 Moreover, relevant statutory and regulatory provisions never mention the word “trust.”60 Therefore, where Congress was previously explicit in its intention to create a statutory trust, the Interstate Commerce Commission Termination Act (“ICCTA”)61 was silent. The courts should not imply an intention that was not expressed. To decide otherwise would transform every regulated

52. Id. at 66-67.
53. See Tex. Comptroller v. Megafood Stores, Inc. (In re Megafood Stores, Inc.), 163 F.3d 1063, 1066 (9th Cir. 1998) (stating that a statutory tax trust arose by operation of the Texas Tax Code); City of Farrell v. Sharon Steel Corp., 41 F.3d 92, 93-94 (3d Cir. 1994) (involving a municipal income tax); In re Al Copeland Enter., Inc., 133 B.R. 837 (Bankr. W.D. Tex. 1991) (recognizing collected sales tax were trust funds pursuant to section 111.016 of the Texas Tax Code).
56. See generally Begier, 496 U.S. at 66 (holding that 26 U.S.C. § 7501 created a trust comprised of amounts withheld or collected as taxes, and those payments were, therefore, not avoidable transfers of property of the debtor’s bankruptcy estate under 11 U.S.C. § 547).
60. See, e.g., 49 C.F.R. §§ 376.1-376.42.
“fund” into a statutory trust that is not subject to pro rata distribution and undermine the strong public policy supporting the bankruptcy system.62

Owner-operators are not similarly situated to U.S. taxpayers and the OOIDA is not the IRS. Where a party has no specific obligation of his own for which he writes a check to an agent, then no trust exists over the funds.63 The taxpayers in Begier were paying their own tax obligation. The owner-operators’ payments to motor carriers are made based on lease agreements to fund the motor carriers’ lease obligations, such as future maintenance expenses charged to the carrier and to be reimbursed by the driver.64 If the lease obligations are not paid, the motor carriers, not the owner-operators, accumulate the debt.65 The lease funds withheld from owner-operators are held by the carrier primarily for its own benefit (its future reimbursement owed by the driver), rather than for a third party or the driver.66

Furthermore, the policy in favor of payment of taxes is not implicated in OOIDA cases.67 There is no strong public policy that favors owner-operators over fundamental bankruptcy principles. Nonetheless, in Intrenet, the bankruptcy court found a statutory trust created by the lease regulations.68 Even in that instance, the funds were in a segregated bank account and the secured lender had been paid in full from its collateral.69

2. **Tracing Property Subject To the Statutory Trust**

Trust law generally requires the beneficiary to trace its trust property in order to recover it. As stated in Hedged-Investments:

Once the trust relationship has been established, one claiming as a cestui que trust thereunder must identify the trust fund or property in the estate, and, if such fund or property has been mingled with the general property of the debtor, sufficiently trace the trust property. If the trust fund or property cannot be identified in its original or substituted form, the cestui becomes merely a general creditor of the estate . . . .70

62. Although the regulations refer to holding funds in “escrow,” the regulations allow the carrier to receive the payments and do not require segregation of the funds from the carrier’s operating account. A true escrow requires the funds be held by a third party depository under an express escrow agreement. See Mid-Island Hosp., Inc. v. Empire Blue Cross & Blue Shield (In re Mid-Island Hosp., Inc.), 276 F.3d 123, 130 (2d Cir. 2002) (applying New York state law).
63. See Morin v. Frontier Bus. Tech., 288 B.R. 663, 673 (W.D.N.Y. 2003) (finding that where a party has no tax obligation of its own, then no trust existed over its own funds).
64. See In re Intrenet, 273 B.R. at 155-56.
65. See id.
66. See id. at 157.
67. Morin, 288 B.R. at 673 (citing the implication of the public policy in favor of paying taxes as a reason not to apply the Begier holding).
69. See id.
70. In re Hedged-Inv. Assocs., 48 F.3d at 474.
OOIDA argues, based on Begier, that tracing is not required for federal statutory trusts. Begier holds only that common law "rules are of limited utility in the context of the trust created by § 7501." That is not to say that common law cannot answer questions pertaining to non-7501 trusts. If courts were to imply a statutory trust to lease funds, then common law rules logically should apply and OOIDA should be prepared to identify the trust property through tracing.

Moreover, the long period between an owner-operators' maintenance reserve contributions and litigation to collect those amounts, coupled with the fact that the regulation does not require those funds to be segregated, probably makes it impossible for OOIDA to trace the driver funds to specific, current assets of the debtor. If, however, OOIDA wins on this point, all of the carrier's property would belong to OOIDA members to the extent its reserve judgment on account escrows has been satisfied. OOIDA could liquidate the carrier for the benefit of owner-operators and itself, despite bargained-for secured credit facilities.

3. The Creation of an OOIDA Statutory Trust Threatens All Carriers

Statutory trust claims pose a substantial threat to the availability of credit and borrowing costs for all motor carriers because such claims threaten availability on existing lines of credit. New lenders may be unwilling to risk collateral which will be subject to a superior claim by the OOIDA. The cost of obtaining new financing in the trucking industry may be increased because potential lenders could require owner-operator audits to ensure compliance with the leasing regulations and to rule out possible trust claims by OOIDA. The higher cost of capital will compress already small operating margins and could push carriers with neutral or marginally positive cash flows into negative profitability.

Although to date OOIDA has only asserted the statutory trust argument in bankruptcy cases, nothing prevents it from making the same argument outside bankruptcy to satisfy claims ahead of a carrier's other creditors. Not only does the argument frustrate the legitimate expectations of a carrier's trade creditors, but also, on at least two occasions, OOIDA has used the argument seeking to recover payments made to a carrier's principal lender.

As such, the risk to a carrier's survival is obvious if payments made to its lender must be disgorged to OOIDA as part of a statutory trust res. The lender would be forced to demand payment again from the carrier and may foreclose on assets (also subject to OOIDA's statutory trust) or seek payment directly from any guarantors. Statutory trusts violate the

71. Begier, 496 U.S. at 62.
72. New Prime IV, 339 F.3d at 1007.
expectations of lenders that believe they have an unassailable mortgage or security interest after checking real estate and UCC filings covering the motor carrier’s collateral. The imposition of statutory trusts could destabilize established lending practices and even harm motor carriers who are not parties to an OOIDA lawsuit. As OOIDA’s statutory trust theory faces fewer obstacles outside of bankruptcy, where equality of distribution among creditors is not a consideration, carriers can expect OOIDA to extend its statutory trust allegations more aggressively in non-bankruptcy litigation.

4. Damages Sought from Carriers

The hearing regulations do not contain an express private cause of action against motor carriers. Nevertheless, courts have implied a private right of action for damages arising under the Interstate Commerce Act.\footnote{See 49 U.S.C. § 14704(a)(2) (providing that “a carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier.”); see, e.g., Owner-Operator Indep. Drivers Ass’n v. Comerica, Inc., No. 2:05-CV-00056 (S.D. Ohio Jan. 19, 2005).}

B. "Disgorgement" of Escrow Funds

Courts have interpreted OOIDA’s requests for disgorgement of escrow funds as requests for money damages under 49 U.S.C. § 14704(a)(2).\footnote{See, e.g., Owner-Operator Indep. Drivers Ass’n v. Arctic Express, Inc., 270 F. Supp. 2d 990, 995 (S.D. Ohio 2003) [hereinafter Arctic Express III] (recognizing that the court labeled remedy of damages as opposed to the remedy sought by the plaintiffs, the equitable remedy of the return of the escrow funds with interest are the same and do not alter the substantive rights of the parties), recons. denied, 288 F. Supp. 2d 895 (S.D. Ohio 2003); see generally 49 U.S.C. § 14704(a)(2).} OOIDA has claimed that it is entitled to recover damages of the full amount contributed into escrow funds.\footnote{Owner-Operator Indep. Drivers Ass’n v. Arctic Express, Inc., 288 F. Supp. 2d 895, 899, 905 (S.D. Ohio 2003) [hereinafter Arctic Express IV].} OOIDA claimed that only deductions reported to drivers within 45 days of contract termination should be subtracted from the amounts contributed to the funds. The courts have not adopted this harsh measure. Instead, the courts have looked to what damages are necessary to make the plaintiffs whole.\footnote{Id. at 905.} In Arctic Express III, the court found that, if the carrier had complied with the leasing regulations, the owner-operators would have recovered the net balance of the escrow accounts, not the total contributed funds.\footnote{Id. at 906 (citing DAN B. DOBBS, DOBBS LAW OF REMEDIES § 3.1 (2d ed. 1993)).} Accordingly, the court found that the measure of damages is "the unrecovered amounts remaining in the maintenance escrows" at the time of each owner-operator’s termination.\footnote{Id.}
C. SETOFFS AGAINST ESCROW BALANCES

Determination of owner-operator damages does not end at the amount in the escrow accounts at the time of termination.\textsuperscript{80} Pursuant to 49 C.F.R § 376.12(k)(6), all amounts due from the driver to the carrier are to be deducted from the escrow accounts if specified in the lease.\textsuperscript{81} Under many owner-operator lease agreements, the escrow payments may pay such debts as the costs of “Qualcomm unit, maintenance and repairs, licenses, permits, taxes, insurance, loss or damage to the tractor, missing or damaged equipment, and costs associated with [recovering] possession of the tractor unit” after default.\textsuperscript{82} Based on these countervailing lease provisions, some courts have not imposed liability on motor carriers that did not return funds if those funds were offset by amounts owed or if the escrow account did not have a positive balance.\textsuperscript{83}

Notwithstanding this provision, OOIDA has persuaded some courts that the regulations prohibit any reduction in the amounts due to owner-operators or that permissible deductions are limited to the purpose of the escrow (e.g., cost of tires deducted from tire reserve account). The effect of courts’ acceptance of this argument is that carriers are required to return the full amount of the escrows to owner-operators, but are prevented from collecting amounts owed to the carrier by the owner-operator for items such as advances, past due lease payments and breach of lease damages. A carrier, therefore, faces a large damage claim from owner-operators and OOIDA, but is left with no effective way to recover amounts owed to it by those same owner-operators.

D. ATTORNEY FEES

OOIDA routinely seeks attorneys fees under 49 U.S.C. §14704(e), which states that the “district court shall award a reasonable attorney’s fee under this section.”\textsuperscript{84} As a result, defendants should include an estimate of OOIDA’s attorney fees in calculating potential exposure.

E. JOINER OF COMPANY OWNERS, DIRECTORS, AND OFFICERS

OOIDA has joined motor carriers’ presidents, agents, and employees for “engaging in a course of conduct, and in concert, whereby these parties have acted as part of a single common enterprise to violate federal

\textsuperscript{80} See generally 49 C.F.R. § 376.12(k)(6) (providing that “the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease.”).
\textsuperscript{81} Id.
\textsuperscript{82} New Prime IV, 339 F.3d at 1011.
\textsuperscript{84} 49 U.S.C. § 14704(e).
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law."85 OOIDA claimed in LEDAR TRANSPORT that the facts justify piercing the corporate veil under Missouri law.86 Piercing the corporate veil is an extraordinary form of relief that courts employ in very limited circumstances.87 It is unlikely that OOIDA will be able to establish the extraordinary evidence required to prove such a claim. Nonetheless, OOIDA continues to make such claims as part of an aggressive litigation strategy.

V. STRATEGIES FOR REDUCING RISK OF DAMAGE AWARDS

According to its website, "OOIDA continues to file more lawsuits against motor carriers and several states in order to fight unfair and illegal treatment of drivers, violation of lumping laws, and private right of action, as well as double taxation."88 Under this rubric, the OOIDA has filed class action lawsuits across the United States claiming to represent the interests of all owner-operators.

A. SETOFFS AND COUNTERCLAIMS CAN BAR CLASS CERTIFICATION

Carriers' claims against owner-operators for unpaid advances, lease breaches and other amounts due may provide a setoff against positive escrow balances that have not been refunded to a former owner-operator. If the carrier's claims exceed the amount of the escrow balance, the carrier has a counterclaim against the owner-operator in litigation. As such, these setoff and counterclaim rights may provide a basis to prevent class certification by OOIDA.89

Opposing class certification is crucial. OOIDA initiates litigation naming only a few owner-operators as plaintiffs with escrow claims, totaling only a few thousand dollars. But class certification could allow it to sue a carrier on behalf of all owner-operators owed escrow funds for a long period as well as recover attorney fees, increasing potential damage awards to millions of dollars.

However, OOIDA must establish several factors to obtain certifica-

85. See, e.g., LEDAR TRANSPORT, 2000 WL 33711271, at *11.
89. Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc., No. 2:97-CV-750, 2001 WL 3436624, at *10 (S.D. Ohio Sept. 4, 2001) [hereinafter ARCTIC EXPRESS II] (determining that "the primary issue to be reached by this Court in deciding the Plaintiffs' Motion for Class Certification is whether, under Rule 24(b)(3), the Defendants' counterclaims can destroy an otherwise cognizable class.").
tion of a class. The existence of setoffs and counterclaims is most relevant to the requirement that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." 

The courts in *New Prime IV* recognized that, if New Prime had violated the leasing regulations, the escrow amount and the amount of New Prime's setoff and counterclaim rights would have to be determined separately for each class member. Because "questions affecting individual class members would predominate over common questions of law or fact," the Eighth Circuit Court of Appeals upheld the denial of OOIDA's request for certification of a class.

In contrast, the trial court in *Arctic Express II* decided that the question common to all defendants, whether the leasing regulations had been violated, warranted class certification. By only asserting its counterclaims against the few named plaintiffs, Arctic Express left open the possibility of a simple alternative to denying class certification. If counterclaims and setoffs became unwieldy, the court would create a subclass of owner-operators that were subject to those claims or sever those owner-operators from the action entirely. When it later faced setoffs and counterclaims against virtually all of the thousands of class members,

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90. *Fed. R. Civ.* P. 23. The prerequisites to a Class Action pursuant to subsection (a) include:

1. the class is so numerous that joinder of all members is impracticable, 2. there are questions of law or fact common to the class, 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class, and 4. the representative parties will fairly and adequately protect the interest of the class.

*Id.* A court must also find pursuant to subsection (b) that:

1. the prosecution of separate actions by or against individual members of the class would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . . *Id.*


92. *New Prime IV*, 339 F.3d at 1012.

93. *Id.* at 1008, 1012.

94. *Arctic Express II*, 2001 WL 34366624, at *6. Oddly, the District Court had already decided that issue on summary judgment and, therefore, based class certification on an issue no longer before it.

95. *Id.* at *10.

96. *Id.* at *11.
the district court dismissed Arctic Express' counterclaims based on a lack of independent subject-matter jurisdiction instead of adjudicating Arctic Express' rights against the class members. 97 That dismissal left Arctic Express subject to liability for the full amount of the escrow balances without the ability to reduce that liability or otherwise collect the amounts it was owed by former owner-operators, except by bringing collection actions against thousands of former drivers, if they could be located. 98 The court's decision made a Chapter 11 bankruptcy case, in which setoffs are specifically preserved by the U.S. Bankruptcy Code, inevitable. 99

Defeating class certification limits potential damages to those suffered by the named plaintiffs. Prevailing on the issue of commonality of claims would limit potential damages to a small fraction of that sought in a class action and removes OOIDA's motivations for pursuing the litigation.

B. RETROACTIVE APPLICATION OF THE REGULATION

The effective date of the ICCTA was January 1, 1996. 100 A federal statute that expands the class of plaintiffs that can bring an action cannot be applied retroactively. 101 Since no private right of action existed before the ICCTA, 102 most courts have held that the ICCTA expanded the class of plaintiffs and, therefore, cannot apply to owner-operators entering into leases before its January 1, 1996 effective date. 103 However, a minority of courts have held that the ICCTA and its regulations can be applied retroactively to allow pre-1996 owner-operators to sue carriers for alleged violations. 104

C. SHORTENED STATUTE OF LIMITATIONS

Courts recognizing a private right of action for owner-operators


98. See generally id. at 965 (assuming it could find those former owner-operators, Arctic Express faced the impossible task of commencing thousands of individual lawsuits all around the country, obtaining service on each former owner-operator and then collecting the judgments it obtained).


100. New Prime IV, 339 F.3d at 1006.


103. See, e.g., New Prime IV, 339 F.3d at 1007 (relying on Hughes Aircraft Co. v. United States, 520 U.S. 939, 950 (1997)).

104. Arctic Express IV, 288 F. Supp. 2d at 900-01 (distinguishing Hughes Aircraft Co. v. United States, 520 U.S. 939, 950 (1997)).
agree that it is based on 49 U.S.C. § 14704(a)(2). However, that statute does not provide a statute of limitations for recovery of money damages. Therefore, the general four-year statute of limitation would seem to apply. Yet, at least one court has found that because of a drafting error, the private right of action for owner-operators was included in section 14704(a) instead of section 14705(c), which has a two-year statute of limitation. Accordingly, the court held that owner-operators must bring their claims within a two-year period, significantly limiting the number of claims that could be asserted.

D. OOIDA MAY LACK STANDING TO ACT ON BEHALF OF OWNER-OPERATORS

Standing has been described as possibly the most important jurisdictional doctrine. Because it raises a question of jurisdiction, the issue can be raised at any stage of the litigation or for the first time on appeal. The party asserting standing, such as OOIDA, bears the burden of proof.

Because OOIDA has not incurred damages, it usually asserts “associational standing” to represent its members in court. “Associational standing,” sometimes called organizational standing, was born from three decisions of the United States Supreme Court: Warth v. Seldin, Hunt v. Washington State Apple Advertising Comm’n, and Automobile Workers v. Brock. An association can be granted standing to represent its members by satisfying a three-factor test: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim as-

106. Id.; Renteria, 1999 WL 33268638, at *5 (finding that no provision governs the filing of a civil action for any other types of damages and concluding that the lack of a limitations period provided persuasive evidence that no private right of action was intended by Congress).
109. Id. at 986.
112. In re Integra Realty, 262 F.3d at 1101-02.
113. E.g., Arctic Express II, 2001 WL 34366624, at *7 (holding that OOIDA had associational standing without considering its preclusion when monetary damages are sought, even though the parties did not raise the issue directly).
asserted nor the relief requested requires the participation of individual members in the lawsuit.”

OOIDA fails at least the third factor of the test for associational standing when monetary damages are sought. In Warth, the United States Supreme Court indicated that the participation of individual members would be required in an action for damages and the organization would consequently not have standing. These and later precedents have been understood to preclude associational standing when an organization seeks damages on behalf of its members.

The denial of associational standing when monetary damages are sought promotes “adversarial intensity,” protects against “the hazard of litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity,” and hedges “against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed.”

E. Defending Against Statutory Trust Claims

Statutory trusts are generally incompatible with federal bankruptcy law and should be used to extract property from the bankruptcy estate. “[R]atable distribution among all creditors is one of the strongest policies behind the bankruptcy laws.”

Further, neither the ICCTA nor underlying regulations provide for the creation of a statutory trust. The regulation defining the terms of a lease between a carrier and owner-operator makes no reference to an “escrow.” However, even the escrow referred to in the regulation is optional and can be held by the carrier rather than the third-party trustee required by trust law.

VI. Case Studies: Rocor Transportation and Arctic Express

The two following examples of OOIDA litigation and their resolution through very different Chapter 11 strategies demonstrate the need for experienced advocacy and strategic planning in this type of litigation.

117. Hunt, 432 U.S. at 343.
118. Warth, 422 U.S. at 515-16.
120. Id. at 556.
121. Wisconsin v. Reese (In re Kennedy & Cohen, Inc.), 612 F.2d 963, 966 (5th Cir. 1980).
123. See 49 C.F.R. § 376.12(k).
A. The Rocor Transportation Case

OOIDA repeatedly failed to obtain class certification against Rocor International from the Oklahoma district court.\textsuperscript{124} Other factors required the company to file its Chapter 11 case in August 2002.\textsuperscript{125} Shortly after the Chapter 11 filing, OOIDA and the individual plaintiffs filed an adversary proceeding in the bankruptcy court seeking the imposition of a statutory or constructive trust on all of Rocor's assets on behalf of a putative class.\textsuperscript{126} Although unsuccessful, OOIDA used its allegation of a trust to oppose every action by the debtor to spend money or transfer an asset, including a more than $17 million asset sale for the benefit of creditors, on the theory that all of Rocor's assets were held in trust for the former owner-operators.\textsuperscript{127}

Spencer Fane Britt & Browne LLP ("Spencer Fane") represented Rocor International in its Chapter 11 case and obtained a dismissal of OOIDA's claim for a constructive trust. Confirmation of a plan of liquidation transferred Rocor International's assets into a liquidation trust (1) free and clear of liens and claims and (2) beyond the reach of OOIDA and the former owner-operators.\textsuperscript{128} Although OOIDA appealed the confirmation and pursued its claims against the liquidation trust, Spencer Fane successfully opposed the two motions for stays pending appeal and a third motion for a preliminary injunction. It also obtained the dismissal of the individual owner-operators, leaving OOIDA as the only party to the appeal and putting its qualification for "associational standing" directly at issue.\textsuperscript{129}

Following the denial of their motions, OOIDA and the other owner-operators agreed to dismiss the litigation and waive their claims against Rocor for a $100,000 administrative claim in the Chapter 11 case which is expected to receive only partial payment.

B. The Arctic Express Case

The district court certified a class of former owner-operators\textsuperscript{130} and entered partial summary judgment against Arctic Express on liability for

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\textsuperscript{124} See Order by Honorable Tim Leonard, Owner-Operator Indep. Drivers Ass'n v. Rocor Int'l, No. 00-CV-00640 (W.D. Okla. Sept. 25, 2001) (denying the plaintiff's motion for class certification because the proof offered by plaintiffs in support of their motion for class certification was deficient).

\textsuperscript{125} In re Rocor Int'l, Inc., No. 02-17658-TRC (Bankr. W.D. Okla. Aug. 5, 2002).

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Order Confirming First Amended Plan of Liquidation at 5, In re Rocor Int'l, No. 02-17658-TRC (Bankr. W.D. Okla. Aug. 5, 2002).

\textsuperscript{129} See supra text accompanying notes 112-22.

\textsuperscript{130} Arctic Express II, 2001 WL 34366624, at *1.
\end{flushleft}
violations of the leasing regulation.\textsuperscript{131} OOIDA sought damages exceeding $16 million and the district court had dismissed all of Arctic Express' setoffs as well as counterclaims against class members, which would have significantly reduced that damage amount.\textsuperscript{132} The potential liability and large legal fees required Arctic Express to file a Chapter 11 case and it retained Spencer Fane as its reorganization counsel.\textsuperscript{133}

Most of the major battles, such as class certification, liability, and setoffs and counterclaims, have been fought and lost in the district court prior to the Chapter 11 case. Because of the potential size of the liability, OOIDA and the class most probably held a "veto" vote, which could stop any plan of reorganization proposed by the carrier. As in \textit{Rocor}, OOIDA filed an adversary proceeding seeking a determination that Arctic Express' assets were held in statutory trust for the former owner-operators to secure repayment of the gross escrow amounts, which put the continued existence of Arctic Express in jeopardy.\textsuperscript{134} Any reorganization strategy had to bring the damages to a manageable level by reducing the owner-operators' gross escrow amounts by the amounts those owner-operators owed Arctic Express. In many cases, matching the escrow amounts with the carrier's counterclaims and setoffs actually resulted in a net amount owed to Arctic Express.

The judgment OOIDA and the owner-operators received in the district court would be paid through the Chapter 11 case. OOIDA filed a $11.5 million proof of claim in the Chapter 11 case based on that expected judgment. However, the Bankruptcy Code requires parties to pay amounts they owe to the debtor and bars them from having a claim in bankruptcy until that debt is repaid.\textsuperscript{135} Arctic Express used those provisions to obtain bankruptcy court approval of an alternative dispute resolution ("ADR") procedure that reduced the escrow amount owed to an owner-operator by the amount each owner-operator owed to Arctic Express, and informally resolved disputes regarding the accounts without further litigation.\textsuperscript{136} The bankruptcy court's adoption of the ADR proce-

\textsuperscript{131} Owner Operator Indep. Drivers Ass'n v. Arctic Express, Inc., 159 F. Supp. 2d 1067, 1080 (S.D. Ohio 2001) [hereinafter \textit{Arctic Express I}] (granting plaintiff's motion for partial summary judgment as to count II with the only remaining issue being damages).

\textsuperscript{132} See \textit{Arctic Express II}, 2001 WL 34366624 at *1; \textit{Arctic Express V}, 238 F. Supp. 2d at 969-70.

\textsuperscript{133} See \textit{In re Arctic Express, Inc.}, Ch. 11 Case No. 03-66797-DEC (Bankr. S.D. Ohio Oct. 31, 2003).

\textsuperscript{134} Owner-Operator Indep. Drivers Ass'n v. Arctic Express, Inc. (\textit{In re Arctic Express, Inc.}), Ch. 11 Case No. 03-66797-DEC, Adv. No. 2:04-ap-02022 (Bankr. S.D. Ohio Jan. 16, 2004).

\textsuperscript{135} 11 U.S.C. §§ 502(d), 542(b).

\textsuperscript{136} Although the district court had ruled that it did not have subject matter jurisdiction over Arctic Express' setoffs and counterclaims against the former owner-operators, filing the Chapter 11 case gave the bankruptcy court original jurisdiction over those claims. See 28 U.S.C. § 1334(b).
dure had three important effects. First, it provided a mechanism to match the owner-operators’ claims against Arctic Express with the carrier’s claims against the owner-operators, and to net those claims against each other. This procedure, which the district court refused to allow, reduced Arctic Express’ potential liability by millions of dollars. Second, by administering the claims between Arctic Express and the former owner-operators through an informal ADR procedure, Arctic Express would receive significant relief from the legal expenses that would be incurred in collecting its claims against owner-operators through traditional litigation. Finally, the ADR procedure would minimize OOIDA’s role in the process and allow the adjustment of claims by Arctic Express and the owner-operators.

The approval of its ADR procedure and Arctic Express’ opposition to certification of an owner-operator class in the bankruptcy court prompted OOIDA’s settlement of its seven-year dispute with Arctic Express. OOIDA and the owner-operators have waived all claims against Arctic Express, including their allegation of a statutory trust on the carrier’s assets, in return for a structured payment of $900,000 without interest over four years.137

VII. CONCLUSION: PRACTICAL STRATEGIES FOR REDUCING THE POTENTIAL DAMAGES

Carriers have options available to reduce the risk of an OOIDA claim based on the leasing regulations and the imposition of a statutory trust on the carrier’s assets. A thorough review of owner-operator agreements and escrow management procedures by qualified counsel or the elimination of owner-operator lease programs can be preventative first steps, but will not cure past violations of the regulations. Carriers must also retain legal counsel with specific experience with owner-operator claims immediately upon receiving a demand or legal action from OOIDA or another owner-operator representative. OOIDA claims constitute complex litigation which requires special knowledge from the beginning in order to effectively defend against a large recovery. Trade group lobbying efforts to amend the statute and regulations so as to exclude a private right of action, reduce the term of the statute of limitations, prevent class actions, and to clarify the escrow provisions to exclude a statutory trust, could bring an end to this type of litigation. In the meantime, carriers finding themselves in OOIDA litigation should retain counsel experienced in these matters and solicit amicus curiae

137. The settlement was approved by the district court on July 16, 2004 and has been submitted for bankruptcy court approval as part of Arctic Express’ plan of reorganization
("friend of the court") support from industry trade groups and other carriers.
Articles


Jennifer L. Andrews*

I. Introduction

In the case of Geier v. American Honda Motor Co. (Geier II),¹ the United States Supreme Court decided that a no airbag lawsuit conflicted with the objectives of Federal Motor Vehicle Safety Standard 208² ("Standard 208"), and was consequently preempted by the National Traffic and Motor Vehicle Safety Act of 1966³ ("Safety Act").⁴ The case was

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*Ms. Andrews is an attorney at Kutak Rock, LLP, conducting a practice in complex civil litigation, with an emphasis on business, insurance coverage, product liability defense and commercial litigation. Ms. Andrews has extensive experience in product liability defense litigation for the automotive and tire industries. In her practice, she represents governmental entities in matters involving contracts, inverse condemnation, tort liability, zoning issues and general tort liability. Ms. Andrews earned a J.D., cum laude, from Creighton University School of Law in 2002, and a B.A. in Humanities from Loyola Marymount University in 1996. She was a judicial clerk for the judges of the Fourth Judicial District of Iowa.

3. Geier II, 529 U.S. at 865 (indicating that the court refers to the pre-1994 version of the statute as codified at 15 U.S.C. § 1381 et seq., but recognizing that the current version of the statute is codified at 49 U.S.C. § 30101 et seq. (2000)).
4. Id. at 867.
based on a complaint by a driver who contended that an automobile manufacturer, American Honda Motor Company ("American Honda"), was liable for damages arising from the allegedly defective design of the vehicle she was injured in because the company had failed to install airbags.\(^5\) American Honda countered by claiming that its compliance with the Safety Act and Standard 208 preempted the *no airbag* lawsuit.\(^6\)

The Court agreed with the manufacturer, declaring that the lawsuit conflicted with the objectives of Standard 208 and was preempted by the Safety Act.\(^7\) The Court made three major findings in reaching this conclusion. The first finding was that the preemption provision did not expressly preempt the lawsuit. The Court determined that the preemption provision of the Safety Act should be read narrowly to preempt *only* state statutes and regulations, excluding common law tort actions.\(^8\)

Second, ordinary preemption applied. While the Safety Act’s saving clause did not expressly *save* Geier’s action, the Court concluded, based partially on its inclination not to construe saving clauses broadly, that the clause did not “bar the ordinary working of conflict-pre-emption principles.”\(^9\) The Court stated that it was Congress’ intent to apply ordinary pre-emption principles where an actual conflict with a federal objective existed; without such application, states could impose laws directly conflicting with federal regulatory mandates.\(^10\)

Third, the Court held that Geier’s suit was exactly such a case because it actually conflicted with the Safety Act due to its inconsistency with the Department of Transportation’s objectives in enacting the standard.\(^11\) To allow Geier’s suit to proceed would have imposed a state-created duty compelling car manufacturers to install airbags in their vehicles. Such a result would constitute “an obstacle to the variety and mix of devices that the federal regulation sought.”\(^12\)

This Article will first review the facts and holding of *Geier II*. It will then examine the evolution of the doctrine of federal conflict preemption, including the National Motor Vehicle Safety Act, Standard 208, judicial interpretation of this doctrine, the court split, and decisions subsequent to *Geier II* that have used it as precedent. Next, this Article will contend that the Court in *Geier II* properly held that state common law *no airbag* suits were preempted by Standard 208 and implicitly resolved the court

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5. *Id.* at 865.
7. *Geier II*, 529 U.S. at 874.
8. *Id.* at 868.
9. *Id.* at 869.
10. *Id.* at 871.
11. *Id.* at 867.
12. *Id.* at 881.
split on the preemption doctrine, correctly enforcing the circumstances in which ordinary preemption applies. Finally, this Article will exhibit the precedent Geier II has set in enforcing ordinary preemption principles, as discussed in subsequent appellate decisions.

II. Facts and Holding

In 1992, Alexis Geier sustained serious injuries when she drove her 1987 Honda Accord, which lacked passive restraints, into a tree in the District of Columbia.\textsuperscript{13} While driving, Ms. Geier, who was wearing her manual shoulder harness and lap belt, rounded a curve and lost control.\textsuperscript{14} Ms. Geier, and her parents ("Geier"), sued American Honda seeking $20,500,000 in compensatory and punitive damages.\textsuperscript{15} Geier sued under the tort law of the District of Columbia, claiming American Honda negligently and defectively designed the vehicle based on the lack of a driver’s side airbag.\textsuperscript{16} American Honda filed a motion for summary judgment, asserting that their compliance with the Safety Act and Standard 208 preempted the defective design lawsuit.\textsuperscript{17}

The District Court for the District of Columbia granted American Honda’s motion for summary judgment.\textsuperscript{18} The court noted that Standard 208, which obliged auto manufacturers to install passive restraints in 1987 model vehicles, expressly preempted the petitioners’ claims.\textsuperscript{19} The court concluded that because the lawsuit sought to create a different safety standard, one requiring airbag installation, it was expressly preempted by the Safety Act.\textsuperscript{20} Geier appealed to the United States Court of Appeals for the District of Columbia Circuit.\textsuperscript{21}

The Court of Appeals for the District of Columbia affirmed the District Court’s grant of summary judgment based on slightly different reasons, holding that a verdict in Geier’s favor would present an obstacle to the government’s method of achieving the Safety Act’s objectives.\textsuperscript{22} According to the Court of Appeals, it was not necessary to resolve the issue of express preemption as the Safety Act impliedly preempted Geier’s suit.\textsuperscript{23} Appellants’ claims conflicted with Standard 208 and, based on or-

\textsuperscript{13} Id. at 865.
\textsuperscript{14} Id.
\textsuperscript{15} Brief for Respondents, supra note 6, at 6.
\textsuperscript{16} Geier II, 529 U.S. at 865.
\textsuperscript{17} Brief for Petitioners at 12-13, Geier II, 529 U.S. 861 (No. 98-1811).
\textsuperscript{18} Geier v. Am. Honda Motor Co. (Geier I), 166 F.3d 1236, 1237 (D.C. Cir. 1999).
\textsuperscript{19} Geier II, 529 U.S. at 865.
\textsuperscript{20} Id.
\textsuperscript{21} Geier I, 166 F.3d at 1236.
\textsuperscript{22} Geier II, 529 U.S. at 865-66.
\textsuperscript{23} Geier I, 166 F.3d at 1243; Geier II, 529 U.S. at 866.
dinary preemption principles, the Safety Act preempted the lawsuit.\textsuperscript{24} The United States Supreme Court granted certiorari to resolve the differences between state courts that have held against preemption and federal circuit courts that have held for it.\textsuperscript{25}

In a 5 to 4 decision, the United States Supreme Court held that petitioners' \textit{no airbag} lawsuit conflicted with the objectives of Standard 208 and was consequently preempted by the Safety Act.\textsuperscript{26} Delivered by Justice Stephen G. Breyer, the Court made three determinations in its decision.\textsuperscript{27} First, the preemption provision did not expressly preempt the lawsuit.\textsuperscript{28} Second, ordinary preemption applied.\textsuperscript{29} Finally, the lawsuit actually conflicted with the Safety Act.\textsuperscript{30}

The Safety Act contains an express preemption provision which provides that "[w]hensoever a Federal motor vehicle safety standard . . . is in effect, no State . . . shall have any authority . . . to establish . . . any safety standard applicable to the same aspect of performance of such vehicle . . . which is not identical to the Federal standard."\textsuperscript{31} The Court determined that this preemption provision should be read narrowly to preempt only state statutes and regulations, excluding common law tort actions.\textsuperscript{32} A broad reading would not be appropriate as it would allow little, if any, common law liability. Further, there was no indication that Congress intended to preempt common law tort actions in addition to state statutes and regulations.\textsuperscript{33}

In addition to its preemption provision, the Safety Act also contains a "saving clause," which states that "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"\textsuperscript{34} The saving clause indicates that the express preemption clause does not preempt tort actions.\textsuperscript{35} Although the saving clause did not expressly save Geier's tort action, the Court concluded that it did not bar the "ordinary working of conflict pre-emption principles."\textsuperscript{36} However, the Court has repeatedly refused to give a broad effect to a saving clause where it would disturb an established federal regulatory scheme.\textsuperscript{37}

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\item \textsuperscript{24} \textit{Geier I}, 166 F.3d at 1243; \textit{Geier II}, 529 U.S. at 866.
\item \textsuperscript{25} \textit{Geier II}, 529 U.S. at 866.
\item \textsuperscript{26} Id. at 886.
\item \textsuperscript{27} Id. at 864.
\item \textsuperscript{28} Id. at 867-70.
\item \textsuperscript{29} Id. at 870-74.
\item \textsuperscript{30} Id. at 874-86.
\item \textsuperscript{31} Id. at 867 (quoting 15 U.S.C. \textsection 1392(d) (1988)).
\item \textsuperscript{32} Id. at 868.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Id. (quoting 15 U.S.C. \textsection 1397(k) (1988)).
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. at 869.
\item \textsuperscript{37} Id. at 870 (quoting United States v. Locke, 529 U.S. 89, 106 (2000); citing Am. Tel. &
\end{itemize}
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Court questioned whether Congress would have wanted to apply ordinary preemption principles where an actual conflict with a federal objective is present. In the absence of such application, states could impose laws that would directly conflict with federal regulation.

The Court held that petitioners’ lawsuit actually conflicted with Standard 208 and the Safety Act. Although petitioners claimed Standard 208 created a minimum safety standard, the Court stated that the Department of Transportation created Standard 208 not as a minimum, but as a way to introduce car manufacturers to various passive restraint devices that would be gradually integrated into the market. Through this introduction, the costs of passive restraints would be lowered, technological development encouraged, technical safety problems overcome, and widespread consumer acceptance won.

The history of Standard 208 explains why the Department of Transportation promoted these objectives. While the Department of Transportation mandated manual seatbelt installation in all automobiles in 1967, it became obvious that most vehicle occupants would not buckle up, prompting the Department of Transportation to investigate the feasibility of passive restraints. Standard 208 was amended multiple times as the Department of Transportation attempted to deal with the lack of popular acceptance of the passive restraint requirement.

The 1984 version of Standard 208 reflected several significant considerations regarding the effectiveness of seatbelts and the likelihood that passengers would leave their seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public’s resistance to the installation or use of passive restraint safety devices that were available at

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38. Id. at 871.
39. Id.
40. Id. at 874.
41. Id. at 875.
42. Id.
44. Id. (citing 32 Fed. Reg. 2408, 2415 (1969)).
45. Id. (citing 34 Fed. Reg. 11148 (1969)).
46. See id. at 875-76.
the time.\textsuperscript{50} Most importantly, the Department of Transportation deliberately rejected an “all airbag” standard because real or perceived safety concerns threatened a negative public response more easily overcome with a combination of several different devices.\textsuperscript{51}

The 1984 Standard 208 also sought to gradually phase in passive restraints.\textsuperscript{52} It required ten percent of manufacturers’ car fleets to be equipped with passive restraints in 1987, followed by an increasing percentage in three annual phases, up to one hundred percent after September 1, 1989.\textsuperscript{53} In addition to providing time for compliance, this progressive approach would also help establish data on comparative effectiveness, permit manufacturers to overcome safety problems and high production costs, and advance the development of alternative passive restraint systems, ultimately building necessary public confidence.\textsuperscript{54}

In \textit{Geier II}, Petitioners claimed that American Honda, as a manufacturer, had an obligation to install an airbag in the 1987 Accord driven by the plaintiff.\textsuperscript{55} The Court explained that plaintiff’s rationale would impose an airbag installation mandate upon manufacturers of similar cars based on state law.\textsuperscript{56} To impose a rule of state tort law compelling a duty to install airbags in cars such as the Honda in question “would have presented an obstacle to the variety and mix of devices that the federal regulation sought.”\textsuperscript{57} The Court recognized the importance of the Department of Transportation’s understanding of its own regulation and deferred to the Department’s position that state tort suits would impinge on Standard 208’s objectives.\textsuperscript{58}

While preemption is generally an issue of congressional intent, courts have traditionally made distinctions between express and implied preemption.\textsuperscript{59} \textit{Geier II} was a case of “conflict” preemption and, therefore, hinged on the issue of Congress’ “implied” intent.\textsuperscript{60} The Court believed that Congress would not have intended such a significant conflict to be

\textsuperscript{50} Id. (citing 49 Fed. Reg. 28962, 28990, 28987-89, 29001 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
\textsuperscript{51} Id. at 879 (citing 49 Fed. Reg. 28962, 29001 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
\textsuperscript{52} Id. (citing 49 Fed. Reg. 28962, 28999-29000 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
\textsuperscript{53} Id. (citing 49 Fed. Reg. 28962, 28999 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
\textsuperscript{54} Id. (citing 49 Fed. Reg. 28962, 29000-01 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
\textsuperscript{55} Id. at 881.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 883.
\textsuperscript{59} Id. at 884.
permitted. 61

Justice John Paul Stevens, writing for the dissent, argued against pre-emption “[b]ecause neither the text of the statute nor the text of the regu-lation contains any indication of an intent to pre-empt petitioners’ cause of action . . . .” 62 Before discussing the issue of preemption, the dissent observed that good faith compliance with Standard 208 would not pro-
vide a complete defense for Honda, but “such compliance would be ad-
missible evidence tending to negate charges of negligent and defective de-
design.” 63

Justice Stevens noted that federal statutes are not presumed to pre-
empt state laws, especially those within the scope of historic police pow-
ers, unless Congress has a “clear and manifest purpose . . . .” 64 Express preemption clauses are evidence of preemptive intent. 65 Although the Court has interpreted such clauses broadly in prior cases, the dissent distin-
tinguished statutes in those cases from the preemption provision of the Safety Act. 66 The former contained preemption clause language that was significantly broader than the provision of the Safety Act and also did not preserve common law remedies through a saving clause. 67 The dissent contended that the express preemption and saving provisions of the Safety Act created a “special burden” which a court must impose on a party who claims conflict preemption. 68

The dissent asserted three reasons to reject the majority’s opinion that common law claims presented liability risks that would have frustr-
ated the Secretary of Transportation’s policy decisions in enacting Standard 208. 69 First, that the majority’s contention was based on “an unrealistic factual predicate” because, at that time, the risk of common law liability was not great enough to compel manufacturers to install airbags; if there had been a high likelihood of liability, Standard 208 would have been unnecessary. 70 Second, the purposes of the Standard would not actually have been frustrated because even without preemp-

61. Id. at 885.
62. Id. at 912-13 (Stevens, J., dissenting).
63. Id. at 892-93 (Stevens, J., dissenting).
64. Id. at 894 (Stevens, J., dissenting) (citing Medtronic, Inc. v. Lohr (Medtronic II), 518 U.S. 470, 485 (1996) and Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 116-17 (1992) (Souter, J., dissenting)).
65. Id. at 895 (Stevens, J., dissenting) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).
66. Id. at 896-97 (Stevens, J., dissenting).
67. Id. at 897 (Stevens, J., dissenting).
68. Id. at 898-99 (Stevens, J., dissenting); see id. at 895 (Stevens, J., dissenting) (defining 15 U.S.C. § 1392(d) as the express preemption provision of the Safety Act and defining 15 U.S.C. § 1397(k) as the saving clause).
69. Id. at 901 (Stevens, J., dissenting).
70. Id. (Stevens, J., dissenting).
tion the manufacturers would have modified their designs to avoid liability in the future.\textsuperscript{71} Third, that the majority ignored the definition of standards established under the Safety Act, which indicated an imposition of minimum requirements as opposed to fixed requirements.\textsuperscript{72} The possibility that manufacturers might be exposed to potential tort liability would have accelerated the rate of airbag installation, promoting the sole goal expressed in Standard 208 itself, reducing deaths and injuries.\textsuperscript{73} Justice Stevens further argued that there is generally a "presumption against preemption" rooted in federalism.\textsuperscript{74} He contended that Honda had not overcome this presumption, as Standard 208 contained no "indication of intent to preempt common law no-airbag suits."\textsuperscript{75}

### III. Background

#### A. Federal Court Preemption Doctrine

Article VI of the United States Constitution provides that the laws of the United States, "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\textsuperscript{76} "From this simple mandate springs the doctrine of preemption ... ."\textsuperscript{77} This clause "gives federal law precedence over conflicting state law."\textsuperscript{78} When a state law conflicts with a federal law, the state law is without effect.\textsuperscript{79} The United States Supreme Court provides that pre-emption exists in three situations: (1) where Congress expressly defines the extent of preemption;\textsuperscript{80} (2) where preemption may be "inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;"\textsuperscript{81} and (3) where it "actually conflicts" with federal and state requirements.\textsuperscript{82} The second and third types are instances of implied

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\textsuperscript{71} Id. at 901-02 (Stevens, J., dissenting).
\textsuperscript{72} Id. at 903 (Stevens, J., dissenting) (citing Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 358 (2000) (Breyer, J., concurring) and Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 721 (1985)).
\textsuperscript{73} Id. at 903-04 (Stevens, J., dissenting).
\textsuperscript{74} Id. at 906-07 (Stevens, J., dissenting) (citing Rice v. Santa Fe Elevator Corp., 331 U.S., 218, 230 (1947) and Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).
\textsuperscript{75} Id. at 910 (Stevens, J., dissenting).
\textsuperscript{76} U.S. CONSTR. art. VI, cl. 2.
\textsuperscript{78} Viet D. Dinh, Regulatory Compliance as a Defense to Products Liability: Reassessing the Law of Preemption, 88 GEO. L.J. 2085, 2088 (2000).
\textsuperscript{81} Id. at 79 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
\textsuperscript{82} Id.
preemption.\textsuperscript{83}

However, as the States are recognized as autonomous sovereigns, there is a presumption that “Congress does not cavalierly pre-empt state-law causes of action.”\textsuperscript{84} Generally, there is an assumption that a federal act is not to supersede the States’ historic police powers unless it is “the clear and manifest purpose of Congress” to do so.\textsuperscript{85} Nevertheless, courts struggle with determining whether “federal law preempts state action”\textsuperscript{86} because determining Congress’ “manifest purpose” does not traditionally require express statutory text.\textsuperscript{87} The United States Supreme Court noted that where express preemption is absent, one may imply preemption.\textsuperscript{88}

B. **The National Traffic and Motor Vehicle Safety Act of 1966**

The first legislative drive toward the development of uniform safety standards regarding automobiles was the enactment of the National Traffic and Motor Vehicle Safety Act of 1966.\textsuperscript{89} Congress enacted the Safety Act with the purpose of, “[r]educing [traffic] accidents and deaths and injuries to persons resulting from traffic accidents . . . .”\textsuperscript{90} The Safety Act made the federal government responsible to insure that vehicles “prove crashworthy enough to enable their occupants to survive with minimal injuries.”\textsuperscript{91}

Section 1381 of the Safety Act authorized the Secretary of Transportation to promulgate Federal Motor Vehicle Safety Standards.\textsuperscript{92} The Safety Act provides that a safety standard is a “minimum standard for motor vehicle performance, . . . which is practicable, [and] which meets


\textsuperscript{84} Medtronic, Inc. v. Lohr (Medtronic II), 518 U.S. 470, 485 (1996).

\textsuperscript{85} *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); citing Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715-16 (1985) and Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987)).

\textsuperscript{86} Cipollone I, 593 F. Supp. at 1150.

\textsuperscript{87} Cipollone VI, 505 U.S. at 545 (Scalia, J., concurring in part and dissenting in part).


\textsuperscript{92} Motor Vehicle Mfrs., 463 U.S. at 33 (citing 15 U.S.C. § 1392(a) (1976)).
the need for motor vehicle safety . . . .”93 The Secretary of Transportation has delegated the authority to enact safety standards to the Administrator of the National Highway Traffic Safety Administration (“NHTSA”).94 The express preemption clause of the 1984 Safety Act provided:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle . . . safety standard applicable to the same aspect of performance of such vehicle or item of equipment[,] which is not identical to the Federal standard.95

The saving clause in effect in 1984 stated that compliance with a federal safety standard issued “does not exempt any person from any liability under common law.”96

C. Standard 208

The Department of Transportation first issued Standard 208 in 1967, requiring that seatbelts be installed in all cars.97 Based on a low use of seatbelts, the Department sought to consider the development of possible passive restraint systems.98 Two types of passive restraint devices emerged, airbags and automatic seatbelts.99 In the early 1970’s, after an extensive rulemaking proceeding on such systems, the Department of Transportation amended Standard 208 to include passive restraint devices.100 Vehicles manufactured between 1973 and 1975 were to contain passive restraints or a system involving lap and shoulder belts, in conjunction with an ignition interlock system which prevented a vehicle from starting when the seatbelts were not connected.101 Based on considerable

94. Motor Vehicle Mfrs., 463 U.S. at 34 n.3 (citing 49 C.F.R. § 1.50(a) (1982)).
96. Id. at 868 (quoting 15 U.S.C. § 1397(k) (1988)).
98. Id. at 209-10 (defining passive restraint systems as “protective systems” requiring “no action by vehicle occupants.” (citing 34 Fed. Reg. 11, 148 (1969) and 36 Fed. Reg. 8296 (1971)).
100. Id. (citing 35 Fed. Reg. 16927 (1970)).
101. Id. The ignition interlock system proved undesirable, leading Congress to amend Standard 208 “to prohibit a motor vehicle safety standard from requiring or permitting compliance
resistance from the automotive community, including manufacturers, the NHTSA postponed the effective date of the Standard.\textsuperscript{102} In 1976, the Secretary of Transportation, William T. Coleman, Jr., prolonged the alternatives indefinitely and suspended passive restraint requirements.\textsuperscript{103} He established that passive restraints were feasible, both economically and technologically, but based his conclusion on the expectation of extensive public resistance to passive restraint systems.\textsuperscript{104}

In 1977, Coleman’s successor, Brock Adams, issued a new compulsory passive restraint regulation, Modified Standard 208.\textsuperscript{105} The modification “mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars in model year 1984.”\textsuperscript{106} In 1981, Secretary Andrew Lewis totally rescinded the passive restraint mandate.\textsuperscript{107} The reasoning was based on the manufacturers’ intentions to install automatic seatbelts in 99\% of cars, the fact that these passive belts were easily detachable, and, once detached, the passive belts would provide no superior protection than the use of manual belts.\textsuperscript{108}

The United States Supreme Court reviewed the rescission of Modified Standard 208 in \textit{Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.}\textsuperscript{109} In \textit{Motor Vehicle Manufacturers}, the Court concluded that the rescission was arbitrary and capricious, and that further consideration was required.\textsuperscript{110} It determined that the NHTSA’s acquiescence to the manufacturers’ decision to adopt automatic belts instead of installing airbags was inappropriate.\textsuperscript{111} Subsequently, the NHTSA reviewed the passive restraint matter thoroughly.\textsuperscript{112}

On July 17, 1984, NHTSA reinstated Standard 208, directing a phase in of passive restraints beginning with cars manufactured after September 1986.\textsuperscript{113} Secretary Elizabeth Dole focused on the traditional three-point

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{102} Chadwell, \textit{supra} note 83, at 146. Some experts contended that “further testing and development was necessary before a functional airbag system would be available.” \textit{Id.} at 145.
\item \textsuperscript{103} \textit{Motor Vehicle Mfrs.}, 463 U.S. at 36 (citing 41 Fed. Reg. 24070 (1976)).
\item \textsuperscript{104} \textit{Id.} at 36-37. Instead, Coleman proposed a project involving approximately 500,000 vehicles, containing passive restraints, to introduce the systems to the public, and “smooth the way” for future mandatory installation. \textit{Id.} at 37.
\item \textsuperscript{105} \textit{Id.} (citing 42 Fed. Reg. 34289 (1977) and 49 C.F.R. § 571.208 (1978)).
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} \textit{Id.} at 38.
\item \textsuperscript{108} \textit{Id.} at 38-39.
\item \textsuperscript{109} \textit{Id.} at 32.
\item \textsuperscript{110} \textit{Id.} at 46, 57.
\item \textsuperscript{111} \textit{Id.} at 49-50.
\item \textsuperscript{112} Chadwell, \textit{supra} note 83, at 149.
\item \textsuperscript{113} \textit{Id.} (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. § 571.208)).
\end{itemize}
\end{footnotesize}
belts.114 Due to the fact that most vehicles contained three-point belts, compulsory belt use laws would produce more instantaneous safety benefits than passive restraint requirements, which would take time to implement.115 The NHTSA lacked the power to enact compulsory belt use laws itself, so it decided to instate the phase-in requirement.116 The phase-in requirement eventually mandated installation of passive restraints in all cars manufactured after September 1, 1989.117

D. No-Airbag Cases and Preemption of Common Law Claims

The controversy surrounding preemption in airbag cases arises from “conflict between the Safety Act’s [p]reemption [c]lause and its [s]aving [c]lause.”118 It is clear that Congress intended to federalize the approach to automobile safety regulation.119 “The conflict centers around the [p]reemption [c]lause’s applicability to common law actions.”120 The clause itself did not mention preemption of common law claims.121 This omission led to a split amongst courts.122 Some courts held that the language of the preemption clause did indeed extend to common law actions in addition to actions by state regulatory bodies.123 Accordingly, a jury is foreclosed from imposing liability as a common law standard which contradicts a federal standard, just as a regulatory agency of a state is preempted from creating a standard dissimilar to Standard 208.124

Another area of conflict in airbag litigation was the question of whether common law should be preempted as conflicting with federal law.125 Conflict preemption arises when a state law conflicts directly with federal law or presents an obstacle to federal law or federal objectives.126 The majority of courts found that common law claims were impliedly preempted by the Safety Act.127 Some courts have held no airbag claims

114. Id. A “three point” belt is one with a shoulder and lap combination which is attached to the vehicle at three points. Id. at 149 n.57.
115. Id. (citing 49 Fed. Reg. 28962, 28997-98 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
117. Id. (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
118. Babb, supra note 89, at 1687.
120. Id. at 1687-88.
121. Id. at 1688.
122. Chadwell, supra note 83, at 156-57.
124. Id. at 157.
125. Id. at 161.
126. Id. at 162; English, 496 U.S. at 78-79.
expressly preempted.\textsuperscript{128} A minority of courts found the Safety Act did not preempt airbag claims whatsoever.\textsuperscript{129}

E. \textbf{Cipollone: State Common Law Preemption Precedent}

In \textit{Cipollone v. Liggett Group, Inc.} (\textit{Cipollone VI}), the United States Supreme Court determined that only the express language of the 1965 Federal Cigarette and Advertising Act and the 1969 Public Health Cigarette Smoking Act, governed their preemption.\textsuperscript{130} In \textit{Cipollone VI}, a lung cancer patient named Rose Cipollone filed an action in the United States District Court for the District of New Jersey against three cigarette companies, the Liggett Group, Inc., Philip Morris, Inc., and Loew's Theatres, Inc., bringing a fourteen count complaint based in part on strict liability and negligence.\textsuperscript{131} Cipollone alleged that the defendants produced unsafe and defective products, of which the risk outweighed the utility, and that they did not adequately warn consumers of smoking hazards.\textsuperscript{132} Defendant manufacturers asserted a defense that the Federal Cigarette Labeling Act ("FCLA") of 1965, as amended by the Public Health Cigarette Smoking Act of 1969, preempted the plaintiff's claims.\textsuperscript{133}

The district court granted a motion to strike, ruling that the FCLA did not preempt the plaintiff's common law actions, but that the FCLA was intended to create a national uniform warning system that would protect manufacturers from being subjected to a variety of state laws.\textsuperscript{134} The court provided that an individual is not prevented from claiming that inadequate warnings existed regardless of the existence of federally man-

\textsuperscript{128} \textit{Id.} (citations omitted).
\textsuperscript{129} \textit{Id.} (citations omitted).
\textsuperscript{130} \textit{Cipollone VI}, 505 U.S. at 517.
\textsuperscript{131} \textit{Cipollone I}, 593 F. Supp. at 1149.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}; \textit{Cipollone VI}, 505 U.S. at 510. The express preemption provision, section 5 of the 1965 Act, provides in part:
(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package. (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.
\textsuperscript{134} \textit{Id.} at 510 (citing Cipollone v. Liggett Group, Inc. (\textit{Cipollone I}), 593 F. Supp. 1146, 1148, 1153-70 (D. N.J. 1984)).
dated warnings. While the court also recognized that it would be very difficult to prove such a claim, it added that “the difficulty of proof cannot preclude the opportunity to be heard . . .”

The Third Circuit Court of Appeals accepted interlocutory appeal and reversed, rejecting defendant manufacturers’ express preemption contention, but accepting their assertion that plaintiff’s common law actions would conflict with federal law. Congress’ purposes in the FCL A included establishing a balance between public warning of smoking hazards and protection of national economic interests. These purposes would be upset by state common law actions. Therefore, the court held that the FCLA preempted common law damages actions relating to smoking that challenged either cigarette package warnings or the propriety of a party’s advertising actions. The court further held that damages claims were preempted where success depended upon a party’s duty of providing a consumer warning, in addition to the congressionally mandated warnings on cigarette packages. The Court of Appeals did not identify with specificity which of the plaintiff’s claims the FCLA preempted. The United States Supreme Court denied certiorari and returned the case to the District Court for the District of New Jersey for trial.

The district court, in compliance with the mandate by the Court of Appeals, held that Cipollone’s “failure-to-warn, express-warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims” were preempted as they relied on defendant manufacturers’ advertising activities after the effective date of the enactment of the FCLA of 1965. It also found that the design defect claims were barred, but were not preempted by federal law. Following a four month trial, a jury awarded $400,000

136. Id.
137. Cipollone VI, 505 U.S. at 511 (citing Cipollone v. Liggett Group, Inc. (Cipollone II), 789 F.2d 181 (3d Cir. 1986)).
138. Cipollone v. Liggett Group, Inc. (Cipollone II), 789 F.2d 181, 187 (3d Cir. 1986) (citing Banzhaf v. FCC, 405 F.2d 1082, 1090 (D.C. Cir. 1968)).
140. Id.
141. Id.
142. Cipollone VI, 505 U.S. at 512.
144. Cipollone VI, 505 U.S. at 512.
145. Id. (citing Cipollone v. Liggett Group, Inc. (Cipollone III), 649 F. Supp. 664, 669, 673-75 (D. N.J. 1986)).
146. Id. (citing Cipollone v. Liggett Group, Inc. (Cipollone III), 649 F. Supp. 664, 669, 673-75 (D. N.J. 1986)).
of damages to the plaintiff.\textsuperscript{147} The jury found that Liggett Group, Inc., had breached a duty to warn as well as express warranties prior to 1966.\textsuperscript{148} Attributing 80\% of Cipollone's injuries to her own voluntary smoking of cigarettes, a known danger, the jury awarded no damages to her estate.\textsuperscript{149} However, damages were awarded to her husband in compensation for losses incurred due to the defendant manufacturers' breach of express warranty.\textsuperscript{150} Both parties "appealed, raising a plethora of issues," but mainly based on alleged errors in the district court's charge to the jury and errors in jury findings.\textsuperscript{151} Specifically, Cipollone contended that the district court erred in interpreting the Third Circuit's prior decision by holding that the FCLA preempted plaintiff's misrepresentation, intentional tort and fraud claims.\textsuperscript{152}

The Third Circuit Court of Appeals partially affirmed the decision, upholding the district court's preemption ruling, and partially reversed and remanded.\textsuperscript{153} The court disagreed with Cipollone's contentions and reasserted its prior holding that the FCLA "preempts those state law damage actions relating to smoking and health that challenge . . . the propriety of a party's actions with respect to the advertising and promotion of cigarettes."\textsuperscript{154} Cipollone's intentional tort claim was based on allegations that defendant manufacturers "intentionally, wil[l]fully, and wantonly, through their advertising, attempted to neutralize the [federally mandated] warnings that were given regarding the adverse effects of cigarette smoking."\textsuperscript{155} This claim specifically challenged the defendants' advertising and promotions actions regarding cigarettes;\textsuperscript{156} therefore, the court concluded that the lower court did not err in interpreting the Court of Appeals prior preemption decision.\textsuperscript{157} The United States Supreme Court "granted the petition for certiorari to consider the pre-emptive effect of the federal statutes."\textsuperscript{158}

\textsuperscript{147} Id. (citing Cipollone v. Liggett Group, Inc. (Cipollone I), 893 F.2d 541, 554 (3d Cir. 1990)). Rose Cipollone died in 1984 and her husband filed an amended complaint. After trial, he also died and their son maintained the action. Id. at 509.

\textsuperscript{148} Id. at 512 (citing Cipollone v. Liggett Group, Inc. (Cipollone I), 893 F.2d 541, 554 (3d Cir. 1990)).

\textsuperscript{149} Id. (citing Cipollone v. Liggett Group, Inc. (Cipollone I), 893 F.2d 541, 554 (3d Cir. 1990)).

\textsuperscript{150} Id.

\textsuperscript{151} Cipollone v. Liggett Group, Inc. (Cipollone I), 893 F.2d 541, 546 (3d Cir. 1990).

\textsuperscript{152} Id. at 581.

\textsuperscript{153} Id. at 583.

\textsuperscript{154} Id. at 582 (quoting Cipollone v. Liggett Group, Inc. (Cipollone II), 789 F.2d 181, 187 (3d Cir. 1986)).


\textsuperscript{156} Cipollone I, 893 F.2d at 582 (citing Cipollone v. Liggett Group, Inc. (Cipollone II), 789 F.2d 181, 187 (3d Cir. 1986)).

\textsuperscript{157} Id.

\textsuperscript{158} Cipollone VI, 505 U.S. at 512.
The United States Supreme Court affirmed in part and reversed in part, holding that the FCLA of 1965 did not preempt common law damages claims and the 1969 Act did not preempt plaintiff’s intentional fraud and misrepresentation, express warranty, or conspiracy claims. Justice John Paul Stevens, speaking for the majority, reasoned that the preemption clause of the FCLA provided a reliable expression of congressional intent concerning state authority. Consequently, an implied preemption analysis was unnecessary in determining the Act’s preemptive reach. When looking at the provisions of an act, a court must construe them “in light of the presumption against the pre-emption of state police power regulations.”

1. The Judgment of the Court

Justice John Paul Stevens announced the judgment of the Court in parts I-IV for a 7 to 2 majority. In part IV of the opinion, Justice Stevens provided that the 1965 Act included a preemption provision in which “Congress spoke precisely and narrowly.” The preemption provision language merely prohibited federal and state rulemaking bodies from requiring specific cautionary statements in advertising or on labels. Justice Stevens concluded that the preemption provision of the 1965 Act “only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state-law damages actions.”

2. Justice Stevens’ Plurality Opinion

In part V of the opinion, Justice Stevens, joined by three other members of the Court, provided that the 1969 Act’s preemption provision was much broader than the 1965 Act which it amended. This amendment prohibited not merely, “‘statements’ but rather ‘requirements or prohibitions . . . imposed under State law.” Justice Stevens provided that the 1969 Act extended the reach of the 1965 Act’s preemption clause. Although the 1969 Act suggested that Congress’ concern was to preempt

159. Id. at 530-31.
160. Id. at 517.
161. See id.
162. Id. at 518.
163. Id. at 507.
164. Id. at 518.
165. Id.
166. Id. at 519-20.
167. Id. at 515.
169. Id. at 522-23.
state and local enactments, here, “it is difficult to say that such actions do not impose ‘requirements or prohibitions.’”\textsuperscript{170}

The preemption provision of the 1969 Act was not to be read as pre-empting all common law claims.\textsuperscript{171} Justice Stevens stated the Court had to narrowly construe the language of the preemption clause and look at each of Cipollone’s common law claims with a “presumption against pre-emption,” to determine which actions were indeed preempted.\textsuperscript{172} In analyzing each of the plaintiff’s claims, the Court considered whether the claim imposed a “requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.”\textsuperscript{173}

Cipollone’s failure-to-warn claims against the cigarette manufacturers were preempted insofar as “they rely on a state-law ‘requirement or prohibition . . . with respect to . . . advertising or promotion.’”\textsuperscript{174} The 1969 Act therefore preempted claims regarding advertising or promotions containing additional or stronger warnings. However, it did not preempt claims that relied on actions unrelated to promotion or advertising. The Court found that Cipollone’s breach of express warranty claims were not based on a state-imposed requirement and, therefore, were not preempted by the 1969 Act.\textsuperscript{175} “A manufacturer’s liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the ‘requirements’ imposed by an express warranty claim are ‘not imposed under State law,’ but rather imposed by the warrantor.”\textsuperscript{176} Such common law actions for contractual commitments by manufacturers were not considered a “requirement . . . imposed under State law” as set forth in the preemption provision of the 1969 Act.\textsuperscript{177}

Cipollone maintained two fraudulent misrepresentation claims.\textsuperscript{178} The first alleged that the manufacturers, through advertising and promotion, had neutralized the effects of the mandatory warning labels.\textsuperscript{179} Justice Stevens stated that the 1969 Act preempted this claim as “it seems quite clear that petitioner’s first theory of fraudulent misrepresentation is

\textsuperscript{170} Id. at 521-22 (citing W. Prosser, Law of Torts 4 (4th ed. 1971) and Black's Law Dictionary 1489 (6th ed. 1990)).
\textsuperscript{171} Id. at 523.
\textsuperscript{172} Id.
\textsuperscript{175} Id. at 526-27.
\textsuperscript{176} Id. at 525 (alteration in original).
\textsuperscript{178} Id. at 527.
\textsuperscript{179} Id.
inextricably related to petitioner’s first failure-to-warn theory, a theory that we have already concluded is largely pre-empted” by the Act.\textsuperscript{180} Cipollone’s second theory, based on the tobacco companies’ alleged “false representation of a material fact” and “concealment of a material fact[,]” was determined not to be pre-empted by the Act as it was “predicated not on a duty ‘based on smoking and health[,]’ but rather on a more general obligation – the duty not to deceive.”\textsuperscript{181} Finally, Cipollone alleged a conspiracy existed among the cigarette manufacturers “to misrepresent or conceal material facts concerning the health hazards of smoking.”\textsuperscript{182} Justice Stevens stated this claim was not predicated on a “prohibition ‘based on smoking and health[,]’” but on “a duty not to conspire to commit fraud.”\textsuperscript{183} Accordingly, the 1969 Act did not preempt the claim.\textsuperscript{184}

3. \textit{The Blackmun Opinion}

Justice Harry A. Blackmun, joined by Justice David H. Souter and Justice Anthony M. Kennedy, concurred and dissented in part.\textsuperscript{185} Justice Blackmun agreed with the Court in its exposition of preemption law, its unwillingness to find preemption of state common law claims as being “pre-empted by federal law in the absence of clear and unambiguous evidence that Congress intended that result,” and in its finding that the 1965 Act did not preempt any of Cipollone’s common law damages claims.\textsuperscript{186} Justice Blackmun dissented, finding the plurality’s determination that the 1969 Act preempted “some common-law damages claims [to be] little short of baffling.”\textsuperscript{187} In his opinion, the substitution of the words “requirement or prohibition” in the 1969 Act for the word “statement” did not clearly evidence a congressional intent to preempt common law damages actions.\textsuperscript{188} Instead, the 1969 Act’s plain language “simply cannot

\begin{itemize}
  \item \textsuperscript{180} \textit{Id.} at 528.
  \item \textsuperscript{182} \textit{Id.} at 530.
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} \textit{Id.} at 531 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
  \item \textsuperscript{186} \textit{Id.} at 531-34 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing Cipollone v. Ligget Group, Inc. (\textit{Cipollone VI}), 505 U.S. 504, 516 (1992)).
  \item \textsuperscript{187} \textit{Id.} at 534 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
  \item \textsuperscript{188} \textit{Id.} at 534, 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
\end{itemize}
bear the broad interpretation the plurality would impart to it.” ¹⁸⁹ The changes to the preemption provision are “generally non-substantive in nature[,]” and show Congress meant to clarify the clause, not to dramatically expand its reach.¹⁹⁰

4. The Scalia Opinion

Justice Antonin Scalia, joined by Justice Clarence Thomas, concurred and dissented in part, reasoning that there was no merit to the majority’s newly crafted narrow construction doctrine.¹⁹¹ Justice Scalia would have found complete preemption of Cipollone’s claims.¹⁹² He provided that the Supreme Court’s “job is to interpret Congress’ decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.” ¹⁹³ Express preemption cases have applied ordinary statutory construction to determine the scope of the preemption.¹⁹⁴ If ordinary statutory construction principles were applied, Justice Scalia believed Cipollone’s failure-to-warn claims would be preempted by the 1965 FCLA and all Cipollone’s common law claims preempted by the 1969 Act.¹⁹⁵

Since the preemption provision of the 1965 Act enjoins only laws requiring statements in cigarette advertising, claims based on voluntary statements by the manufacturers should not be preempted.¹⁹⁶ Justice Scalia provided that promotion and advertising are normal means by which a manufacturer communicates warnings to customers.¹⁹⁷ He stated, “It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still.” ¹⁹⁸

F. POST CIPOLLINE IMPLIED PREEMPTION CASES

The United States Supreme Court, in Freightliner Corp. v. Myrick (Freightliner II), revisited federal preemption of common law actions and held that the Safety Act did not preempt state common law claims against

¹⁸⁹. Id. at 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
¹⁹¹. Id. at 544 (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹². Id. (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹³. Id. (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹⁴. Id. at 545-46 (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹⁵. Id. at 548 (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹⁶. Id. at 550 (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹⁷. Id. at 555 (Scalia, J., concurring in the judgment in part and dissenting in part).
¹⁹⁸. Id. (Scalia, J., concurring in the judgment in part and dissenting in part).
manufacturers of tractor-trailers.\textsuperscript{199} \textit{Freightliner II} arose from two actions in the District Court for the Northern District of Georgia in which plaintiffs contended the manufacturer had negligently designed tractor-trailers by omitting antilock brake system ("ABS") installation.\textsuperscript{200} The two accidents involved eighteen-wheel tractor-trailers, neither with an ABS installed, that jackknifed when the drivers attempted to brake suddenly.\textsuperscript{201} In the first action, a tractor-trailer manufactured by Freightliner hit plaintiff, Ben Myrick, head on, giving him brain damage and permanent paraplegia.\textsuperscript{202} The second action dealt with an automobile driver, Grace Lindsay, who died when a tractor-trailer manufactured by Navistar collided with her.\textsuperscript{203} The plaintiffs separately filed common law actions against the manufacturers under Georgia tort law.\textsuperscript{204} They independently alleged that the vehicles were negligently designed based on the absence of ABS installation.\textsuperscript{205} The defendant manufacturers removed the actions to the United States District Court for the Northern District of Georgia based on diversity of citizenship.\textsuperscript{206} Freightliner and Navistar moved for summary judgment claiming the Safety Act preempted the plaintiffs' common law actions.\textsuperscript{207}

The District Court for the Northern District of Georgia separately granted summary judgment for defendant manufacturers, holding that the Safety Act preempted both plaintiffs' common law actions.\textsuperscript{208} In the \textit{Myrick} action, the court granted summary judgment in favor of Freightliner because the Safety Act, and the regulations implemented under it, impliedly preempted the action.\textsuperscript{209} Immediately following the \textit{Myrick} decision, a different judge in the district court decided the \textit{Lindsay} action, adopting the reasoning of the first action, finding the cause of action to be similarly preempted.\textsuperscript{210}

The Eleventh Circuit Court of Appeals consolidated the two actions and reversed, holding that the plaintiffs' claims were not expressly or impliedly preempted based on a conflict between federal regulation and state law.\textsuperscript{211} The court found that they were bound by their decision in

\begin{itemize}
\item \textsuperscript{199} \textit{Freightliner II}, 514 U.S. at 282.
\item \textsuperscript{200} \textit{Id.} at 282-83.
\item \textsuperscript{201} \textit{Id.} at 282.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{Id.} at 283.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.} (citing Myrick v. Freuhauf Corp. (\textit{Myrick I}), 795 F. Supp. 1139, 1140, 1143 (N.D. Ga. 1992))
\item \textsuperscript{209} Myrick v. Freuhauf Corp. (\textit{Myrick II}), 13 F.3d 1516, 1518-19 (11th Cir. 1994).
\item \textsuperscript{210} \textit{Id.} at 1519.
\item \textsuperscript{211} \textit{Id.} at 1519, 1528.
\end{itemize}
Taylor v. General Motors Corp.,\footnote{Taylor v. Gen. Motors Corp., 875 F.2d 816 (11th Cir. 1989).} which the court determined remained unchanged by the United States Supreme Court's holding in Cipollone VI.\footnote{Myrick II, 13 F.3d at 1521. In Myrick II, the court discussed the Taylor decision wherein the court held that state common law actions based on a defect addressed by a safety standard created under the Safety Act were not expressly preempted. The court did find that the claims were impliedly preempted, however, as a common law claim. A common law tort claim "based on a failure to install air bags [are] impliedly pre-empted by the Safety Act because they would interfere with and frustrate the methods by which the federal regulations sought to accomplish their goals." The Safety Act safety standard at issue in Taylor granted manufacturers an option for manual seat belt or airbag installation. Id. at 1520-21 (citing Taylor v. Gen. Motors Corp., 875 F.2d 816, 822-27 (11th Cir. 1989)).} Based on Taylor, the plaintiffs' common law actions were not preempted by the express language of the Safety Act.\footnote{Id. at 1521.} In both instances, the plaintiffs' claimed that the manufacturers were strictly liable and negligent in failing to equip a safety device in their manufactured vehicle.\footnote{Id.} Additionally, a safety standard existed under the Safety Act that gave manufacturers the option not to install the device.\footnote{Id.}

The preemption and saving clauses were the same for both cases, thereby binding the Court of Appeals to conclude in favor of express preemption consistent with Taylor.\footnote{Id.} The court's decision "primarily involve[d] laying the Cipollone [VI] decision over the Taylor decision[,]" thereby mandating a holding that the Safety Act did not preempt Myrick's and Lindsay's common law claims.\footnote{Id. at 1528.} Judge James C. Hill dissented, stating that the effect of a common law claim for negligent failure to install ABS would be identical to Georgia enacting a statute providing a manufacturer could not sell any truck lacking ABS.\footnote{Id. at 1531 (Hill, J., dissenting).} Therefore, he stated, "If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict."\footnote{Id. (Hill, J., dissenting).} The United States Supreme Court granted certiorari.\footnote{Freightliner Corp. v. Myrick (Freightliner I), 513 U.S. 922, 115 S. Ct. 306 (1994), aff'd by Freightliner Corp. v. Myrick (Freightliner II), 514 U.S. 280 (1995).}

The United States Supreme Court affirmed the decision of the Eleventh Circuit Court of Appeals, reasoning that no express preemption existed for plaintiffs' claims, but making clear that Cipollone VI did not establish "a categorical rule precluding the coexistence of express and implied preemption . . . ."\footnote{Freightliner II, 514 U.S. at 286, 288, 290.} Rather, the Court indicated that the implied
preemption analysis remained a viable option.\textsuperscript{223} Justice Thomas, writing for the Court, stated that "Cipollone [VI] supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule."\textsuperscript{224} The Court concluded, however, that defendant manufacturers' preemption argument was futile as plaintiffs' common law actions and federal law did not conflict.\textsuperscript{225} First, compliance with both state and federal law was not impossible as the Safety Act contained no regulations regarding ABS use.\textsuperscript{226} Second, the Court could not conclude that the common law claims conflicted with the objectives of Congress.\textsuperscript{227}

In 1996, the United States Supreme Court, in Medtronic, Inc. \textit{v.} Lohr (\textit{Medtronic II}), directed that state common law claims were not preempted by a provision of the Federal Food, Drug and Cosmetic Act ("FDCA").\textsuperscript{228} Lora Lohr had a Medtronic pacemaker implanted in 1987.\textsuperscript{229} In 1990, the pacemaker failed because of an alleged defect, requiring Ms. Lohr to undergo emergency surgery.\textsuperscript{230} In 1993, Ms. Lohr and her husband filed an action against Medtronic in Florida state court alleging both negligence and strict liability.\textsuperscript{231} The complaint alleged that Medtronic failed to act reasonably in designing, manufacturing, assembling, and selling the subject pacemaker and that "the device was in a defective condition and unreasonably dangerous to foreseeable users at the time of its sale."\textsuperscript{232} Medtronic removed the action to the federal district court and filed a summary judgment motion, arguing that the Medical Device Amendments ("MDA") of the FDCA preempted both of Ms. Lohr's claims.\textsuperscript{233} Section 360(k) of the MDA provides that no state may establish a medical device requirement relating to safety or effectiveness of a device which is "different from, or in addition to, any requirement" applicable to the device.\textsuperscript{234}

The District Court for the Middle District of Florida initially denied Medtronic's motion for summary judgment.\textsuperscript{235} The district court found nothing in the MDA that entirely exempted a manufacturer who "allegedly violated the FDA's regulations."\textsuperscript{236} However, in an earlier case, the

\begin{itemize}
  \item\textsuperscript{223} \textit{Id.} at 288.
  \item\textsuperscript{224} \textit{Id.} at 282, 289.
  \item\textsuperscript{225} \textit{Id.} at 289.
  \item\textsuperscript{226} \textit{Id.}
  \item\textsuperscript{227} \textit{Id.} (quoting Hines \textit{v.} Davidowitz, 312 U.S. 52, 67 (1941)).
  \item\textsuperscript{228} \textit{Medtronic II}, 518 U.S. at 503.
  \item\textsuperscript{229} \textit{Id.} at 480.
  \item\textsuperscript{230} \textit{Id.} at 480-81.
  \item\textsuperscript{231} \textit{Id.} at 481.
  \item\textsuperscript{232} \textit{Id.}
  \item\textsuperscript{233} \textit{Id.} at 481-82 (quoting 21 U.S.C. \S 360k(a)).
  \item\textsuperscript{234} Lohr \textit{v.} Medtronic, Inc. (\textit{Medtronic I}), 56 F.3d 1335, 1341 (11th Cir. 1995).
  \item\textsuperscript{235} \textit{Medtronic II}, 518 U.S. at 482.
\end{itemize}
United States Court of Appeals for the Eleventh Circuit had concluded that the same MDA provision required preemption of some common law claims, which prompted the district court to reconsider and dismiss the Lohrs' complaint.\textsuperscript{237}

The Lohrs appealed the district court's decision to the Eleventh Circuit Court of Appeals, claiming error in the district court's finding that common law tort actions against the manufacturer of Ms. Lohr's pacemaker were preempted by the MDA.\textsuperscript{238} The Court of Appeals, reversing and affirming in part, ruled that the claims based on negligent design were not preempted, and the claims based on negligent manufacturing and failure to warn were preempted.\textsuperscript{239} In reaching this holding, the court decided "common law actions are state requirements within the meaning of [section] 360k(a)."\textsuperscript{240} In discussing Food and Drug Administration ("FDA") regulations, the court concluded that a state requirement is preempted if the FDA has established "specific requirements applicable to a particular device . . . ."\textsuperscript{241} The FDA established that these requirements existed for the failure to warn and negligent manufacturing claims, consequently preempting them.\textsuperscript{242} Alternatively, FDA did not establish a requirement regarding negligent design claims; therefore, the court concluded the claims were not preempted.\textsuperscript{243} Medtronic petitioned for writ of certiorari with the United States Supreme Court to consider the affirmation of the district court's decision and the Lohrs cross petitioned for review of the judgment upholding the preemption defense.\textsuperscript{244} The Court granted both petitions based on the divergent decisions regarding preemption and state common law claims.\textsuperscript{245}

The United States Supreme Court reversed the decision of the Eleventh Circuit Court of Appeals, holding that none of Ms. Lohr's state common law claims alleging negligent design and negligent manufacture were preempted.\textsuperscript{246} The Court, in an opinion by Justice John Paul Stevens, provided that their task was to interpret the scope of the express preemption provision of section 360(k), similar to its undertaking in \textit{Cipollone VI}.\textsuperscript{247} The Court expressed two presumptions concerning preemption.\textsuperscript{248}

\textsuperscript{237} \textit{Id.} at 482-83. (citing Duncan v. Iolab Corp., 12 F.3d 194 (1994), abrogated by Goodlin v. Medtronic, Inc., 167 F.3d 1367 (11th Cir. 1999)).

\textsuperscript{238} \textit{Medtronic I}, 56 F.3d at 1338, 1340-41.

\textsuperscript{239} \textit{Id.} at 1347-50.

\textsuperscript{240} \textit{Id.} at 1342.

\textsuperscript{241} \textit{Id.} at 1344 (quoting 21 C.F.R. § 808.1(d)) (alteration in original).

\textsuperscript{242} \textit{Medtronic II}, 518 U.S. at 483.

\textsuperscript{243} \textit{Id.} (citing Lohr v. Medtronic, Inc. (\textit{Medtronic I}), 56 F.3d 1335, 1347-49 (11th Cir. 1995)).

\textsuperscript{244} \textit{Id.} at 484.

\textsuperscript{245} \textit{Id.} (citing Medtronic, Inc. v. Lohr, 516 U.S. 1087 (1996)).

\textsuperscript{246} \textit{Id.} at 503.

\textsuperscript{247} \textit{Id.} at 474, 484.
First, there is a presumption against preemption of state common law actions.\textsuperscript{249} Second, in every preemption case the "ultimate touchstone" is Congress' purpose.\textsuperscript{250}

Medtronic claimed that the Eleventh Circuit Court of Appeals erred in deciding against preemption regarding the negligent design claims.\textsuperscript{251} Medtronic suggested that all common law actions are requirements which impose "duties 'different from, or in addition to,' ... federal standards that the FDA has promulgated in response to mandates under the MDA."\textsuperscript{252} The Court disagreed with this contention as such an interpretation would mean Congress precluded state courts from allowing consumers protection from defective medical devices.\textsuperscript{253} In fact, such a reading of section 360(k) would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that ... needed more stringent regulation ... ."\textsuperscript{254}

The Court noted that Congress has used the word "requirement" in preemption state actions.\textsuperscript{255} By using the word "requirement," there was an apparent presumption that specific duties were imposed on manufacturers by the State.\textsuperscript{256} Although the Court found, in \textit{Cipollone VI}, that a statute preempting "requirements" preempted certain common-law claims, that statute is distinguished as preempting a very limited set of claims.\textsuperscript{257} Medtronic's interpretation of section 360(k) was not as limiting and would produce "a serious intrusion into state sovereignty[;]" therefore, the Court did not accept such a contention.\textsuperscript{258}

An examination of the basic purpose of the MDA supported the Court's rejection of certain preemption claims.\textsuperscript{259} The purpose of the MDA is "to provide for the safety and effectiveness of medical devices intended for human use."\textsuperscript{260} The legislative history contains nothing that

\begin{footnotesize}
\bibliography{\textit{Transportation Law Journal} (Vol. 32:221)}
\end{footnotesize}
suggested “a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices.”

Had Congress intended such preemption, there would have been some indication. In the absence of such indication, the Court noted that some common law causes of action could be maintained.

Specifically, the Court evaluated the Lohrs’ action regarding three issues. First, it provided that the Court of Appeals held correctly against preemption of the negligent design claims, as the purpose of Congress should prevail. Second, although the Lohrs argued that the “state requirements [were] not pre-empted unless [the state requirements were] ‘different from, or in addition to,’ the federal requirement, the Court stated that the MDA did not preempt state requirements that are the same as the federal requirements. Finally, the State’s rules regarding manufacturing and labeling were not preempted because they did not impose requirements “with respect to a device[.]”

The Lohrs’ cross petition claimed common-law duties could never be requirements in reference to section 360(k) and that the MDA did not preempt common law actions. The Court did not resolve this argument because none of the plaintiffs’ claims were preempted; such discussion would merely be hypothetical and, due to the specificity of section 360(k), few common law claims would ever be preempted.

Justice David Breyer concurred in part in the judgment, providing that while the MDA would preempt a common law tort suit on some occasions, the Lohrs’ claims were not preempted. Insofar as section 360(k) preempted a state requirement in the form of a state rule, statute, or regulation, section 360(k) would preempt a similar requirement embodied as a standard of care imposed by common law tort action. Justice Breyer concluded that the claims at hand, however, were not preempted, as the ambiguous preemption provision of the MDA did not force the federal requirements to preempt state requirements. Justice Breyer further concluded that the ordinary conflict preemption principles

261. Id. at 491.
262. Id.
263. Id.
264. Id. at 492.
265. Id. at 494.
266. Id. at 494-97 (quoting 21 U.S.C. § 360k(a)).
267. Id. at 502 (quoting 21 U.S.C. § 360k(a)).
268. Id.
269. Id. at 502-03. The Court further stated, “[e]ven then, the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis . . . .” Id. at 503 (citing Freightliner Corp. v. Myrick (Freightliner II), 514 U.S. 280, 287 (1995)).
270. Id. at 503-05 (Breyer, J., concurring in part and concurring in judgment).
271. Id. at 504-05 (Breyer, J., concurring in part and concurring in judgment).
272. Id. at 505-06 (Breyer, J., concurring in part and concurring in judgment).
are consistent with the holding against preemption.\textsuperscript{273}

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas, concurred and dissented in part.\textsuperscript{274} Justice O'Connor concluded that state common law actions for damages impose requirements and are consequently preempted where the requirements are in conflict with those of the FDCA.\textsuperscript{275} The determination by a majority of the Court in \textit{Cipollone VI} determined that common law damage actions impose requirements.\textsuperscript{276} Whether cigarettes or pacemakers, Justice O'Connor agreed that common law damages actions require manufacturers' compliance with common law duties.\textsuperscript{277} Justice O'Connor determined that the Court's interpretation was incorrect because, where the express statutory language is clear, deference to an agency's construction is improper.\textsuperscript{278} Justice O'Connor concluded that the MDA did not preempt the Lohrs' design claim, but did preempt the claims based on failure to warn and negligent manufacture.\textsuperscript{279}

G. The Court Split

1. Decisions Holding Against Preemption

In \textit{Wilson v. Pleasant} (\textit{Wilson II}), the Indiana Supreme Court held that the Safety Act, and its subsequent regulations, did not preempt state common law negligence claims based on a manufacturer's failure to install airbags.\textsuperscript{280} \textit{Wilson II} involved a suit by the decedent's estate against Mr. Pleasant, the driver of the automobile that struck the decedent, and General Motors ("GM"), who negligently designed, manufactured and sold a vehicle which lacked an airbag passive restraint system.\textsuperscript{281} Mr. Wilson was operating a 1986 Chevrolet manufactured by GM and was not wearing his seat belt when Mr. Pleasant struck him.\textsuperscript{282} GM filed a summary judgment motion, asserting that Wilson's common law claims were

\textsuperscript{273} \textit{Id.} at 507-08 (Breyer, J., concurring in part and concurring in judgment).
\textsuperscript{274} \textit{Id.} at 509 (O'Connor, J., concurring in part and dissenting in part).
\textsuperscript{275} \textit{Id.} (O'Connor, J., concurring in part and dissenting in part).
\textsuperscript{276} \textit{Id.} at 510 (O'Connor, J., concurring in part and dissenting in part) (citing \textit{Cipollone v. Liggett Group, Inc. (Cipollone VI)}, 505 U.S. 504, 521-22 (1992) (plurality opinion) and \textit{Cipollone v. Liggett Group, Inc. (Cipollone VI)}, 505 U.S. 504, 548-49 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).
\textsuperscript{277} \textit{Id.} (O'Connor, J., concurring in part and dissenting in part).
\textsuperscript{279} \textit{Id.} at 514 (O'Connor, J., concurring in part and dissenting in part).
\textsuperscript{280} Wilson v. Pleasant (\textit{Wilson II}), 660 N.E.2d 327, 328 (Ind. 1995).
\textsuperscript{281} \textit{Id.} at 329.
\textsuperscript{282} \textit{Id.}.
preempted by the Safety Act and safety regulations created under it.283 GM's motion was granted by the trial court, and the court of appeals subsequently affirmed the decision finding "that although the Safety Act did not expressly pre-empt a common law claim such as the one asserted in this case, it impliedly did so."284 The court of appeals held that the Safety Act impliedly preempted the claims as they conflicted with federal regulation.285

The Indiana Supreme Court vacated the court of appeals decision and reversed the trial court's grant of summary judgment, concluding that it was improper to imply preemption of Wilson's claims.286 Justice Patrick Sullivan, writing for the majority, held that the preemption clause of the Safety Act "entirely forecloses implied pre-emption . . . . And even if we appl[ied] the principles of implied pre-emption analysis as re-stated in [Freightliner II] . . . . it would be improper to imply pre-emption here."287 The court agreed with the court of appeals, finding that the Safety Act did not expressly preempt Wilson's state common law claim.288 In addition, through an examination of the Safety Act's purposes and policies, the court found no basis for applying the implied preemption doctrine.289 The court held that through the Safety Act's saving clause, "Congress made an explicit statement that the kind of state common law claim made by [Wilson] in this case [was] not pre-empted . . . ."290 The court also held that the "pre-emption clause entirely forecloses any possibility of implied pre-emption in this case."291

Similarly, in Minton v. Honda of America Manufacturing, Inc. (Minton II), the Ohio Supreme Court held that the Safety Act did not expressly or impliedly preempt state common law tort claims based on an automobile manufacturer's failure to install airbags.292 In Minton II, Mary Ann Minton, executrix of the Estate of Jeffrey L. Minton, sued Honda of America Manufacturing, Inc., Honda R & D Co., Ltd., and Honda Motor Co., Ltd. ("Honda") in the Montgomery County Court of Common Pleas, seeking damages based on negligence and strict product

283. Id.
284. Id. (citing Wilson v. Pleasant (Wilson I), 645 N.E.2d 638, 642 (Ind. Ct. App. 1994)).
286. Id. at 339.
287. Id. at 328, 339.
288. Id. at 330 (citing Wilson v. Pleasant (Wilson I), 645 N.E.2d 638, 641 (Ind. Ct. App. 1994)).
289. Id. at 339.
290. Id. at 336.
291. Id.
liability. In 1991, Jeffrey Minton was killed while driving a 1990 Honda Accord. Mr. Minton was wearing a "motorized shoulder belt and manual lap belt" when another vehicle hit the Accord practically head on. As executrix of Jeffrey Minton's estate, Mary Ann Minton, brought suit under Ohio's state product liability laws. Minton claimed that the Honda Accord her husband operated was defective in its manufacture and design, specifically, that the shoulder belt was defective. As agreed to by both parties, the design defect strict liability claim was the only issue at trial. Honda submitted a motion in limine seeking the exclusion of testimony and evidence regarding the lack of a driver's side airbag in the Honda Accord. The Montgomery County Court of Common Pleas sustained the motion and excluded any airbag references. Minton appealed the trial court's judgment, claiming it erred in disallowing the introduction of evidence relating to the absence of airbags.

The Ohio Court of Appeals, Second Appellate District, Montgomery County, affirmed the trial court's ruling, as the Safety Act preempted Minton's no airbag claim. Minton was precluded from presenting evidence of design alterations made to Honda Accords. The court first noted that the claim was not expressly preempted based upon the language of the Safety Act's preemption clause and federal appeals court precedent. Federal appeals courts had unanimously held that the Safety Act did not expressly preempt common law liability. Additionally, if Congress wanted to preempt such claims, it could have expressly included the phrase "common law" in the federal statute.

However, the court concluded that Minton's claim was impliedly preempted based on federal appeals court precedent and the notion that an award of damages would in effect be the same as a regulation requir-

294. Id.
295. Id.
296. Id.
297. Id.
298. Id.
299. Id. The motion was premised on Honda's lack of notice concerning the no airbag claim, and federal law would preempt the claim. Id.
300. Id.
301. Id. at *2.
302. Id. at *7.
303. Id. at *1.
304. Id. at *5.
305. Id. (citing Wood v. Gen. Motors Corp., 865 F.2d 395, 401 (1st Cir. 1988) and Taylor v. Gen. Motors Corp., 875 F.2d 816, 825 (11th Cir. 1989)).
306. Id. (citations omitted).
ing airbags. In no airbag cases, federal appeals courts had unanimously found implied preemption. The court also agreed with Honda's contentions that a holding against preemption "would create a conflict with the Safety Act . . . by subverting the federal purpose of providing manufacturers with alternative methods of providing passive restraint system[s]." Minton appealed from the verdict and judgment favoring Honda, claiming error in the trial court's failure to allow her introduction of airbag evidence.

The Ohio Supreme Court reversed the court of appeals' judgment holding that a state common law tort claim founded on the manufacturer's failure to install airbags was not preempted, either expressly or impliedly, by the Safety Act. Justice Andrew Douglas, writing for the majority, determined that the plaintiff should have been permitted to present evidence to the trial court showing that their 1990 Honda Accord did not contain airbags while the 1992 Accords did. The court agreed with the court of appeals insofar as Minton's products liability claim was not expressly preempted by the Safety Act. This conclusion complied with federal circuit court decisions. In addition, the court also noted the lack of express mention of common law actions in the preemption clause. Additionally, in examining the Safety Act's history, the court could not construe any intent of Congress to expressly preempt a no airbag claim.

Justice Douglas disagreed with Honda's contentions that implied preemption should apply. He contested Honda's arguments, finding that "Congress did not intend for the Safety Act to occupy the entire field of auto safety . . . [and] appellant's claim does not prevent compliance with [S]tandard 208, nor does it thwart the accomplishment of the full purposes of Congress." In holding that Minton's state claim against Honda for its failure to install airbags was not preempted impliedly or expressly, the court reversed and remanded the action to the trial court.

307. Id. at *6 to *7.
308. Id. at *6.
309. Id. at *6 to *7.
310. Id. at *1.
312. Id. at 651-52.
313. Id. at 655.
314. Id. (citations omitted).
315. Id. at 655-56.
316. Id. at 657.
317. Id. at 660.
318. Id. at 661 (citing Freightliner Corp. v. Myrick (Freightliner II), 514 U.S. 280, 287 (1995)).
319. Id. at 662.
Justice Deborah Cook dissented, claiming the Safety Act impliedly preempted no airbag claims in tort.\textsuperscript{320} Justice Cook emphasized the United States Supreme Court's statement that preemption exists "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"\textsuperscript{321} She disagreed with the majority's implied preemption analysis and, instead, agreed with the First Circuit Court of Appeals decision in \textit{Wood v. General Motors Corp.}, finding that a product liability no airbag claim was impliedly preempted.\textsuperscript{322} If a common law action were allowed holding a manufacturer liable for the absence of airbags, it would be equal "to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area."\textsuperscript{323}

Likewise, in \textit{Drattel v. Toyota Motor Corp. (Drattel II)}, the New York Court of Appeals determined that the Safety Act of 1966 did not preclude plaintiffs' state common law claims.\textsuperscript{324} In \textit{Drattel II}, the plaintiff, Caryn Drattel, sued Toyota Motor Corporation and the distributors of her 1991 Toyota Tercel ("Toyota"), alleging defective design based on the absence of a driver's side airbag.\textsuperscript{325} Drattel, who was wearing her seatbelt, received injuries in an automobile collision while driving her Tercel.\textsuperscript{326} Drattel alleged that installation of a driver's side airbag would make for a safer alternative design.\textsuperscript{327} Toyota moved for partial summary judgment seeking dismissal of the plaintiff's claim based on preemption by the Safety Act and Standard 208.\textsuperscript{328}

The trial court granted Toyota's motion for summary judgment.\textsuperscript{329} It concluded that the "claims, insofar as they were based on the absence of an airbag, were preempted by [f]ederal law . . . ."\textsuperscript{330} The court reasoned that allowing state common law claims would impose a standard not identical to federal regulation because Standard 208 gave manufacturers a

\begin{footnotesize}
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\item\textsuperscript{320} \textit{Id. at 662} (Cook, J., dissenting).
\item\textsuperscript{321} \textit{Id. at 663} (Cook, J., dissenting) (quoting \textit{English v. Gen. Elec. Co.}, 496 U.S. 72, 79 (1990)) (alteration in original).
\item\textsuperscript{322} \textit{Id. at 666} (Cook, J., dissenting) (citing \textit{Wood v. Gen. Motors Corp.}, 865 F.2d 395, 402 (1st Cir. 1988)).
\item\textsuperscript{323} \textit{Id. (Cook, J., dissenting)} (quoting \textit{Wood v. Gen. Motors Corp.}, 865 F.2d 395, 402 (1st Cir. 1988)).
\item\textsuperscript{324} \textit{Drattel v. Toyota Motor Corp. (Drattel II)}, 699 N.E.2d 376, 377 (N.Y. 1998).
\item\textsuperscript{325} \textit{Id. at 377}.
\item\textsuperscript{326} \textit{Id}.
\item\textsuperscript{327} \textit{Drattel v. Toyota Motor Corp. (Drattel I)}, 662 N.Y.S.2d 535, 536 (N.Y. App. Div. 1997).
\item\textsuperscript{328} \textit{Id}.
\item\textsuperscript{329} \textit{Drattel II}, 699 N.E.2d at 377.
\end{enumerate}
\end{footnotesize}
choice of installing airbags or another passive restraint system. The New York Supreme Court, Appellate Division, Second Department, reversed the trial court, finding that Drattel's suit was not preempted as Congress did not intend the preemption of state common law claims. This determination was based upon legislative history and the purpose and language of the Safety Act.

The New York Court of Appeals affirmed the Appellate Division's decision, finding that the Safety Act did not preclude Drattel's state common law claims. Judge Joseph Bellacosa, writing for the court, found that neither express nor implied preemption applied. The court determined that express preemption did not apply as the preemption provision did not mention common law claims, and the savings clause negated "any lingering notion of express preemption of State common-law claims." Additionally, the court found that the Safety Act's legislative history confirmed that Congress intended to preserve common law claims against manufacturers of defective automobiles. Judge Bellacosa provided that implied preemption analysis was not warranted. The combination of the Safety Act's express preemption clause, the saving clause, as well as legislative history, combined to prove "a reliable indicium of congressional intent" to preserve common law claims. The court stated that implied conflict preemption was not available as recognition of Drattel's common law claims would neither make compliance with federal regulation impossible nor prevent the execution and accomplishment of the Safety Act's congressional objectives.

Judge Howard Levine dissented, reasoning that the implied preemption doctrine should apply to the plaintiff's claims to the extent they were premised on the omission of driver's side airbags. To impose common law liability for a manufacturer's failure to install airbags "would inevitably undermine the regulatory, interest-weighing cost/benefit determination by Congress . . . ." Additionally, Judge Levine argued that the majority's position, relying on the saving clause to overcome implied pre-

331. Id.
333. Id. at 378.
334. Id. at 385-86.
335. Id. at 377, 381, 383.
336. Id. at 381-82.
337. Id. at 382 (citing Minton v. Honda of Am. Mfg., Inc. (Minton II), 684 N.E.2d 648, 656-57 (Ohio 1997)).
338. Id. at 383.
339. Id. (citing Cipollone v. Liggett Group, Inc. (Cipollone VI), 505 U.S. 504, 517 (1992)).
340. Id. at 385 (citing Freightliner Corp. v. Myrick (Freightliner II), 514 U.S. 287 (1995)).
341. Id. at 386 (Levine, J., dissenting).
342. Id. at 391 (Levine, J., dissenting).
emption, was inconsistent with United States Supreme Court precedent.\textsuperscript{343} Based on this, Judge Levine would have reversed and granted Toyota’s motion for partial summary judgment, dismissing the complaint to the extent it relied upon the omission of airbag installation.\textsuperscript{344}

2. Decisions Holding for Preemption

a. The Ninth Circuit

In \textit{Harris ex rel Harris v. Ford Motor Co.}, the Ninth Circuit Court of Appeals decided that the Safety Act expressly preempted no airbag claims.\textsuperscript{345} In \textit{Harris}, Jennifer Harris was driving a 1992 Mercury Topaz when she “lost control of the vehicle, smashed into a tree, and was seriously injured.”\textsuperscript{346} Harris sued Ford in a California trial court, alleging Ford’s negligence in defectively designing the vehicle due to the failure to equip the vehicle with a driver’s side airbag.\textsuperscript{347} The action was subsequently removed to the United States District Court for the Central District of California and Ford filed a motion for partial summary judgment claiming the Safety Act and Standard 208 preempted Harris’ claims.\textsuperscript{348}

The district court denied Ford’s motion for partial summary judgment and certified its order for appeal.\textsuperscript{349} Subsequently, Ford petitioned the Ninth Circuit Court of Appeals, which granted leave to file an interlocutory appeal regarding the preemption issue.\textsuperscript{350} The Court of Appeals reversed the district court’s denial of summary judgment, concluding that section 1392(d), the express preemption clause in the Safety Act, “expressly pre-empt[ed] state law causes of action, including Harris’, for failure to install airbags.”\textsuperscript{351} Section 1392(d) precluded states from creating or continuing in effect standards not identical to federal standards.\textsuperscript{352} The court noted, contrary to Harris’ contentions, that section 1392(d) contemplated safety standards not solely created by regulators and legislators.\textsuperscript{353} The court further noted that analysis from United States Supreme Court decisions applied to Harris’ claims, and supported a finding of preemption.\textsuperscript{354} Using the Supreme Court’s analysis, the court stated

\textsuperscript{343} \textit{Id.} at 394 (Levine, J., dissenting).
\textsuperscript{344} \textit{Id.} (Levine, J., dissenting).
\textsuperscript{345} Harris ex rel. Harris v. Ford Motor Co., 110 F.3d 1410, 1416 (9th Cir. 1997).
\textsuperscript{346} \textit{Id.} at 1411.
\textsuperscript{347} \textit{Id.}
\textsuperscript{348} \textit{Id.} at 1411-12.
\textsuperscript{349} \textit{Id.} at 1412.
\textsuperscript{350} \textit{Id.}
\textsuperscript{351} \textit{Id.} at 1415-16.
\textsuperscript{352} \textit{Id.} at 1413.
\textsuperscript{353} \textit{Id.}
\textsuperscript{354} \textit{Id.} at 1413 (discussing Cipollone v. Liggett Group, Inc. (\textit{Cipollone VI}), 505 U.S. 504 (1992) and Medtronic, Inc. v. Lohr (\textit{Medtronic II}), 518 U.S. 470 (1996)).
that Congress, the Department of Transportation, and the National Highway Transportation and Safety Administration weighed the benefits and burdens of airbags and determined that manufacturers should be given the choice of installing passive restraint systems. The court found that other circuits had found implied preemption of no airbag claims.

Additionally, the court did not agree with Harris that section 1397(k), the saving clause, vitiated preemption. The court noted that section 1397(k), which provided that compliance with a standard promulgated under the Safety Act "does not exempt any person from any liability under common law," was not to be construed in isolation. Instead, section 1397(k), which must be read with section 1392(d), "clearly preempt[ed] common law claims . . . ." The court determined that observance of federal standards did not excuse anyone from state imposed liability. The saving clause still imposed liability for a multitude of claims pertaining to automobile safety, including areas where no safety standard existed.

Judge Bruce Van Sickle dissented, reasoning that neither the Safety Act nor Standard 208 preempted state common law tort claims. Judge Van Sickle noted that there was no indication that the Safety Act was designed to achieve uniform national safety standards, especially where doing so would conflict with the purpose of the Act. Instead, he believed that the Safety Act was designed to improve safety by creating minimum safety standards. Judge Van Sickle concluded that the ability of the states to set higher standards, along with the preservation of common law actions, constituted exceptions to national uniformity. Additionally, Judge Van Sickle stated that the majority ignored the saving clause, or convoluted its meaning, thereby supplanting Congress' intentions.

b. The Majority of Courts Have Found Implied Preemption

In Wood, the First Circuit Court of Appeals did not find express pre-

355. Id. at 1414 n.7.
356. Id. at 1413 n.4, 1414 n.7 (citations omitted).
357. Id. at 1415-16.
358. Id. at 1415 (quoting 15 U.S.C. § 1397(k) (repealed 1994)).
359. Id.
360. Id.
361. Id. (citing Freightliner Corp. v. Myrick (Freightliner II), 514 U.S. 280, 280 (1995)).
362. Id. at 1416 (Van Sickle, J., dissenting).
363. Id. (Van Sickle, J., dissenting).
364. Id. (Van Sickle, J., dissenting).
365. Id. (Van Sickle, J., dissenting).
366. Id. at 1418 (Van Sickle, J., dissenting).
emption in a *no airbag* suit, but found that “Congress’ purposes, as revealed in the Safety Act and legislative history, plainly *imply* a preemptive intent.”³⁶⁷ In *Wood*, Patricia Wood sued General Motors (“GM”) in the United States District Court for the District of Massachusetts alleging negligent design and manufacture as well as breach of express and implied warranties.³⁶⁸ Wood was injured and rendered quadriplegic when she was involved in a collision while riding as a passenger in a 1976 Chevrolet Blazer.³⁶⁹ She brought the action under Massachusetts law, asserting that GM was negligent in failing to provide reasonable and adequate safety devices, including airbags.³⁷⁰ GM filed a motion for summary judgment, arguing that the claim was invalid under Massachusetts’ products liability laws and that federal safety regulations preempted it.³⁷¹

The district court denied summary judgment, disagreeing with GM’s express and implied preemption arguments.³⁷² The district court reasoned that the express preemption theory did not apply for the following reasons: (1) the preemption clause appeared to be applicable to state regulation; (2) Congress did not explicitly mention the preemption of defective design claims; (3) the savings clause countered any express legislative intent to preempt such actions; and (4) there is a presumption against preemption.³⁷³ The court also determined that Wood’s action was not in conflict with Standard 208 and would not frustrate the goals of the Safety Act.³⁷⁴ GM moved for interlocutory appeal to the First Circuit Court of Appeals.³⁷⁵ The court granted the motion, in part, for review of the question “whether federal law preempts a state law product liability claim against a motor vehicle manufacturer based on its installing seat belts, rather than airbags, in a motor vehicle.”³⁷⁶

The Court of Appeals remanded the action to the district court, holding that federal law preempted Wood’s products liability action insofar as it was based on GM’s installation of seat belts instead of airbags.³⁷⁷ Justice Levin H. Campbell, writing for the majority, stated, “[p]reemption is a matter of congressional intent.”³⁷⁸ Justice Campbell noted that there

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³⁶⁸. *Id.* at 396.
³⁶⁹. *Id.*
³⁷⁰. *Id.*
³⁷¹. *Id.*
³⁷². *Id.* at 400.
³⁷³. *Id.*
³⁷⁴. *Id.*
³⁷⁵. *Id.* at 397.
³⁷⁶. *Id.*
³⁷⁷. *Id.* at 419.
³⁷⁸. *Id.* at 401.
were two possible methods of analyzing this issue. First, the preemption and savings clauses may be read together, showing Congress intended preemption of contradictory state safety regulations or standards, but not of standards in common law suits or, second, the legislative history of the Safety Act may be examined. The court preferred the second method, and examined the Safety Act in terms of express and implied preemption.

While Congress' lack of inclusion of product liability claims in the preemption provision precluded a finding of express preemption, the court was "convinced that Congress' purposes, as revealed in the Safety Act and in the legislative history, plainly imply a preemptive intent." This is due to the notion that, if upheld, such a product liability claim would be an obstacle to the Safety Act's regulatory scheme. A defective design common law action would create a safety standard related to, but not identical to, Standard 208. Allowing such an action, holding an automobile manufacturer liable for the failure to install airbags in automobiles, "would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area."

Judge Bruce Selya dissented, reasoning that he could not discern a clear expression of preemption intent, nor reasons to imply preemption. Judge Selya agreed that preemption is primarily the subject of congressional intent. However, he could not agree with the majority because he believed the savings clause should be read with great breadth and a search of the legislative history failed to reveal an "implicit exception for design defects ..." In Pokorny v. Ford Motor Co. (Pokorny II), the Third Circuit Court of Appeals stated that, to the extent a common law suit was based on the absence of airbags or automatic belts, it was preempted by Standard 208 and the Safety Act, but was not preempted if based on the absence of a protective window netting as it would then lack an actual conflict with federal regulation. In Pokorny II, Anne Duffy Pokorny, as administrator of John Duffy's estate, sued Ford Motor Company in Pennsylvania

379. Id.
380. Id. at 401-02.
381. Id. at 402.
382. Id. (alteration in original).
383. Id.
384. Id.
385. Id.
386. Id. at 419-20 (Selya, J., dissenting).
387. Id. at 421 (Selya, J., dissenting).
388. Id. at 420, 421 (Selya, J., dissenting).
state court alleging negligence, breach of implied warranty and strict liability.\textsuperscript{390} Mr. Duffy was killed in an automobile collision in which he was not wearing his seatbelt.\textsuperscript{391} Ford removed the action to federal court on the basis of diversity between the parties.\textsuperscript{392} In the United States District Court for the Eastern District of Pennsylvania, Ford filed a motion for summary judgment, alleging that the Safety Act and Standard 208 expressly and impliedly preempted the claims.\textsuperscript{393} Ford contended that the van complied with one of the enumerated passive restraint options of Standard 208.\textsuperscript{394} Additionally, Ford argued that an allowance of claims such as Pokorny's "created an actual conflict with the federal regulatory requirements that clearly gave automobile manufacturers the choice to install either manual safety belts or passive restraints."\textsuperscript{395} Therefore, Ford alleged that the action was impliedly preempted.\textsuperscript{396}

The District Court for the Eastern District of Pennsylvania concluded that the action constituted a conflict with the Safety Act and Standard 208, and it consequently granted Ford's summary judgment motion.\textsuperscript{397} The court observed that Standard 208 gave automobile manufacturers a choice in passive restraint system installation.\textsuperscript{398} To allow a suit like Pokorny's would expose Ford to liability for failure to install a certain passive restraint system, thereby eliminating the flexibility and choice the regulations were designed to offer manufacturers.\textsuperscript{399}

Pokorny appealed the district court's grant of summary judgment to the Third Circuit Court of Appeals.\textsuperscript{400} The Court of Appeals partially affirmed and partially reversed the district court's decision, determining that Pokorny's claims asserting the absence of airbag or automatic belts were preempted by Standard 208 and the Safety Act.\textsuperscript{401} However, the court noted that the portion of Pokorny's claim based on the absence of a protective window netting was not preempted as it did not conflict with federal regulation.\textsuperscript{402} In contrast, common law liability stemming from failure to install the airbags and automatic belts would create an actual

\textsuperscript{390} Id. at 1117-18.
\textsuperscript{391} Id. at 1118.
\textsuperscript{392} Id.
\textsuperscript{393} Id.
\textsuperscript{394} Id. at 1119.
\textsuperscript{395} Id. (alteration in original).
\textsuperscript{396} Id.
\textsuperscript{397} Id. at 1118 (citing Pokorny v. Ford Motor Co. (Pokorny I), 714 F. Supp. 739, 742 (E.D. Pa. 1989)).
\textsuperscript{398} Id. at 1119.
\textsuperscript{399} Id.
\textsuperscript{400} Id.
\textsuperscript{401} Id. at 1126.
\textsuperscript{402} Id. at 1123.
conflict with federal regulations and statutes.\textsuperscript{403} However, the court noted that not all design defects that arise from the absence of certain passive restraints posed an actual conflict with federal regulations and statutes.\textsuperscript{404}

The court first examined Ford's assertion of express preemption.\textsuperscript{405} The court stated that Ford's argument was unconvincing as it focused on only one clause of the Safety Act, the preemption clause, and did not consider the saving clause.\textsuperscript{406} When the court analyzed the preemption and saving clauses together, they concluded that Congress did not intend for regulations such as Standard 208 to expressly preempt all design defect common law actions.\textsuperscript{407} Since the judiciary must abide by Congress' designed framework in enacting the Safety Act, Pokorný's action was not expressly preempted.\textsuperscript{408}

Alternatively, Ford argued that the Safety Act and Standard 208 impliedly preempted Pokorný's action because common law liability would present an obstacle to the accomplishment of the purposes that Congress and the Department of Transportation articulated.\textsuperscript{409} The court provided that a state law must actually present a conflict with federal regulation before it becomes impliedly preempted.\textsuperscript{410} In regards to Pokorný's airbag and seat belt claim, the court stated that potential common law liability interfered with federal regulatory methods which were created to achieve the stated goals of the Safety Act.\textsuperscript{411} Section 1410(b) of the Motor Vehicle and Schoolbus Safety Amendments of 1974 ("MVSSA") clarified the conflict theory.\textsuperscript{412} The MVSSA was enacted to address motorists' concern about the possibility of passive restraint systems becoming mandatory.\textsuperscript{413} The court stated that, as exhibited by the MVSSA, Congress desired manual belts to remain as one of the federal restraint system options.\textsuperscript{414} The options promulgated by the Department of Transportation in Standard 208 manifested congressional intent as they allowed manufacturers to comply with federal regulations by selecting one of the

\textsuperscript{403} Id. (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).

\textsuperscript{404} Id. at 1118.

\textsuperscript{405} Id. at 1120.

\textsuperscript{406} Id.

\textsuperscript{407} Id. at 1121.

\textsuperscript{408} Id.

\textsuperscript{409} Id. at 1121-22.

\textsuperscript{410} Id. at 1122.

\textsuperscript{411} Id. at 1123 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).


\textsuperscript{414} Id. at 1123-24 & nn.8 & 9.
options.\textsuperscript{415} Allowing Pokorny’s allegations of common law liability for a manufacturer’s failure to install automatic belts or airbags “would directly undermine the regulatory framework suggested by Congress . . . in Standard 208.”\textsuperscript{416}

Finally, Pokorny’s action was not preempted because it asserted Ford’s liability for its failure to provide window netting.\textsuperscript{417} Possible liability for the window netting system was distinguished from the failure to provide automatic belts or airbags since the netting system presented no actual conflict with Standard 208.\textsuperscript{418} The court stated that potential liability for the window netting system did not remove the flexibility that was established by the federal regulatory scheme and did not prohibit an option that Congress or the Department of Transportation had granted.\textsuperscript{419} Instead, common law liability would encourage manufacturers to install safety devices in addition to those mentioned in Standard 208.\textsuperscript{420}

Subsequently, in\textit{ Cellucci v. General Motors Corp. (Cellucci II)}, the Supreme Court of Pennsylvania also held that that the Safety Act impliedly preempted state tort no airbag actions, consistent with the majority of case precedent.\textsuperscript{421} In\textit{ Cellucci II}, Daniel Cellucci sued automobile manufacturer General Motors (“GM”) contending he wore his seatbelt during an accident and alleging defective design based on lack of airbag installation.\textsuperscript{422} GM filed a motion seeking partial summary judgment claiming that federal law preempted Cellucci’s defective vehicle claim based on the absence of airbags.\textsuperscript{423}

The trial court denied the motion, and GM appealed to the Pennsylvania Superior Court.\textsuperscript{424} The Superior Court reversed the denial of partial summary judgment, holding that Cellucci’s no airbag claim was impliedly preempted by federal law.\textsuperscript{425} The Superior Court first determined that the Safety Act did not expressly preempt the no airbag claim because the court found an ambiguity when the preemption clause was read in conjunction with the savings clause.\textsuperscript{426} Instead, the court found implied preemption because the allowance of such claims against manufacturers based on the absence of airbags “would create an actual conflict

\textsuperscript{415} \textit{Id.} at 1124.
\textsuperscript{416} \textit{Id.}
\textsuperscript{417} \textit{Id.} at 1125-26.
\textsuperscript{418} \textit{Id.} at 1126.
\textsuperscript{419} \textit{Id.} (citing Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 154-56 (1982)).
\textsuperscript{420} \textit{Id.}
\textsuperscript{421} \textit{Cellucci II}, 706 A.2d at 811-12 & n.4.
\textsuperscript{422} \textit{Id.} at 807.
\textsuperscript{423} \textit{Id.}
\textsuperscript{424} \textit{Id.}
\textsuperscript{426} \textit{Id.} at 258.
between the federal and state law . . . .” Cellucci petitioned the Pennsylvania Supreme Court for allowance of appeal and the petition was granted.

The Pennsylvania Supreme Court affirmed the decision of the Superior Court, similarly holding that Cellucci's claims were impliedly pre-empted, consistent with the majority of courts' rulings on the issue. The court noted that the regulations under the Safety Act gave automobile manufacturers the choice of seat belt promoting schemes. The court reasoned, "Allowing a state common law standard that imposes liability on a manufacturer for choosing a federally-imposed option takes away that federally-imposed option from the manufacturer, which clearly goes against Congress' intent." Therefore, liability in common law arising from a manufacturer's failure to install passive restraint systems, including airbags, actually conflicts with federal law.

H. POST-GEIER DECISIONS

One week following the issue of the Court's decision in Geier II, the United States District Court for the Northern District of Illinois granted summary judgment in a no airbag action. In Davis v. Nissan Motor Corp. in U.S.A., the plaintiff sued Nissan Motor Corporation in U.S.A. ("Nissan"), asserting her deceased husband's vehicle was unreasonably dangerous based on the lack of an installed airbag. Her husband was driving his 1994 Nissan Sentra when he was struck by another vehicle. The injuries sustained by the plaintiff's husband were fatal. Nissan moved for partial summary judgment alleging the plaintiff's no airbag claim was preempted by the Safety Act and Standard 208.

The District Court for the Northern District of Illinois granted Nissan's summary judgment motion based on the United States Supreme Court's decision in Geier II. The district court first acknowledged the Supreme Court's decision that no airbag claims were not expressly pre-

427. Id. at 259 (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).
428. Cellucci II, 706 A.2d at 807.
429. Id. at 811-13 & n.4.
430. Id. at 811.
431. Id.
432. Id.
433. Geier II, 529 U.S. at 861.
435. Id. at *1.
436. Id.
437. Id.
438. Id.
439. Id. at *1 to *2.
emptied by the Safety Act or Standard 208.\textsuperscript{440} However, consistent with \textit{Geier II}, the district court held that ordinary preemption principles applied.\textsuperscript{441} The district court reasoned that the Court in \textit{Geier II} held \textit{no airbag} claims impliedly preempted as they actually conflicted with Standard 208.\textsuperscript{442} To allow such an action "to proceed would have the effect of requiring all manufacturers to install airbags to avoid suits and would eliminate the choices given by the federal standards."\textsuperscript{443}

In \textit{Lady v. Neal Glaser Marine, Inc.}, the Fifth Circuit Court of Appeals held that, where there is a significant federal interest, implied preemption precluded an injured plaintiff's state tort actions against a boat manufacturer.\textsuperscript{444} Steven Lady sued Neal Glaser Marine, Inc. and Outboard Marine Corporation ("OMC") in Mississippi state court, seeking damages for losses he received in a boating accident.\textsuperscript{445} Lady's jet ski collided with a friend's motor boat, Lady was thrown from the jet ski, and sustained injuries from the boat's propeller.\textsuperscript{446} Lady sought recovery under Mississippi state tort law, alleging OMC's negligence, gross negligence, breach of warranty, and design defect for failure to install a propeller guard.\textsuperscript{447} OMC removed Lady's action to federal court based on diversity.\textsuperscript{448} OMC filed a motion for summary judgment claiming that Lady's claims were preempted by federal law, including the Federal Boat Safety Act ("FBSA") and Coast Guard regulations.\textsuperscript{449} Subsequently, Lady and OMC agreed to a magistrate judge's authority over the proceedings, including final judgment entry.\textsuperscript{450} The magistrate judge concluded that the FBSA as well as the Coast Guard regulations preempted Lady's claims and granted OMC's motion for summary judgment.\textsuperscript{451}

Lady appealed the magistrate judge's decision to the Fifth Circuit Court of Appeals, arguing that, despite the express preemption clause of the FBSA and the existence of Coast Guard regulatory decisions, the acc-

\begin{footnotesize}
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\item Id. at *1 (citing Geier v. Am. Honda Motor Co. (\textit{Geier II}), 529 U.S. 861, 868 (2000)).
\item Id. at *2 (citing Geier v. Am. Honda Motor Co. (\textit{Geier II}), 529 U.S. 861, 874 (2000)).
\item Id. (citing Geier v. Am. Honda Motor Co. (\textit{Geier II}), 529 U.S. 861, 886 (2000)).
\item Id.
\item Id. (citing Geier v. Am. Honda Motor Co. (\textit{Geier II}), 529 U.S. 861, 886 (2000)).
\item Id. at 600.
\item Id.
\item Id.
\item Id.
\item Id. at 601.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
tion was not precluded because it was preserved by the saving clause.\textsuperscript{452} The Fifth Circuit affirmed the magistrate's opinion, concluding that implied preemption applied and precluded Lady's common law actions against OMC.\textsuperscript{453} The court first noted that Lady's claims were not expressly preempted by the express preemption clause in the FBSA.\textsuperscript{454} While the preemption clause of the FBSA did not specifically preempt common law actions, the court noted that the United States Supreme Court had interpreted similar clauses to include state common law actions.\textsuperscript{455} The court reasoned that, in light of the recent decision in \textit{Geier II}, the presence of a saving clause in the FBSA "precludes a broad reading of the express preemption provision . . ."\textsuperscript{456} Accordingly, the Fifth Circuit was unable to hold Lady's claims expressly preempted.\textsuperscript{457}

Additionally, relying in part on the \textit{Geier II} decision, the court concluded that Lady's action was impliedly preempted by the FBSA.\textsuperscript{458} A common law rule mandating a propeller guard would disturb the Coast Guard's objectives of the FBSA.\textsuperscript{459} The Coast Guard had studied the issue and affirmatively determined against imposing such a requirement.\textsuperscript{460} An objective of the FBSA was to maintain national uniformity, which requires state law to be consistent with the Coast Guard's regulation.\textsuperscript{461} The court stated that this goal and the regulations of the Coast Guard must be weighed with Congress' intentions as evidenced by the FBSA's saving clause.\textsuperscript{462} Lady's claims were in the realm in which the Coast Guard had affirmatively decided that such a requirement was inappropriate, and were thus preempted.\textsuperscript{463}

In \textit{Choate v. Champion Home Builders Co.}, the Tenth Circuit Court of Appeals held, partially based on the reasoning in \textit{Geier II}, that the preemption clause of the National Manufactured Housing Construction and Safety Standards Act of 1974 ("MHA") did not preempt a tort action against the manufacturer of a manufactured home.\textsuperscript{464} Plaintiffs sued a manufactured home builder in the United States District Court for the Eastern District of Oklahoma, alleging failure to provide a smoke detec-

\textsuperscript{452} \textit{Id.} at 600, 602.
\textsuperscript{453} \textit{Id.} at 615.
\textsuperscript{454} \textit{Id.} at 602.
\textsuperscript{455} \textit{Id.} at 609 (citations omitted).
\textsuperscript{456} \textit{Id.} at 610.
\textsuperscript{457} \textit{Id.} at 611.
\textsuperscript{458} \textit{Id.} at 615 & n.23.
\textsuperscript{459} \textit{Id.} at 614.
\textsuperscript{460} \textit{Id.}
\textsuperscript{461} \textit{Id.} at 615.
\textsuperscript{462} \textit{Id.}
\textsuperscript{463} \textit{Id.}
\textsuperscript{464} \textit{Choate v. Champion Home Builders Co.}, 222 F.3d 788, 790, 793-94 (10th Cir. 2000).
tor with battery powered backup and failure to warn that smoke detection would be inactive with a power loss. The plaintiffs bought the manufactured home in 1997 and approximately one and a half months later it caught fire, injuring one and killing another. The home was manufactured with a smoke detector that was not outfitted with a battery powered back-up; consequently, it did not function during the fire because the fire had caused a power loss. The fact that the detector lacked battery backup and a warning was undisputed. The defendant filed a motion for summary judgment, asserting that the MHA and the Housing and Urban Development regulations promulgated beneath it preempted the plaintiffs’ claims both expressly and impliedly. The plaintiffs responded that the saving clause preserved their common law claim from preemption. The District Court for the Eastern District of Oklahoma granted the manufacturers’ motion for summary judgment, holding that “[p]laintiffs’ state law claim based on [manufacturers’] failure to install battery powered smoke detectors is preempted by federal law.” Plaintiffs appealed, asserting their claim was not impliedly or expressly preempted by the MHA.

The United States Court of Appeals for the Tenth Circuit reversed the district court holding that plaintiffs’ claim was not preempted, expressly or impliedly, by the MHA or any regulations promulgated under it. The court first examined the possibility of express preemption. The preemption clause of the MHA provided that a state could not create a manufactured home safety standard different from federal safety standards. The court noted that the United States Supreme Court reasoned that common law rules might be expressly preempted by language such as that in the MHA. The existence of the saving clause in the MHA led to a discussion of the United States Supreme Court’s decision in Geier II. The court noted that, in Geier II, the preemption and sav-

465. Id. at 790.
466. Id. "‘Manufactured’ homes are often referred to as ‘mobile’ homes.” Id. at 790 n.2.
467. Id. at 790.
468. Id.
469. Id. at 791.
470. Id.
472. Id.
473. Id. at 790.
474. Id. at 792.
475. Id. (quoting Manufactured Housing Act, 42 U.S.C. § 5403(d) (1992)).
476. Id. (citing Medtronic, Inc. v. Lohr (Medtronic II, 518 U.S. 470, 481, 502-03 (1996) and Cipollone v. Liggett Group, Inc. (Cipollone VI), 505 U.S. 504, 521 (1992)).
477. Id. at 793.
ing clause provisions were nearly identical to those of the MHA. In Geier II, the Supreme Court concluded against express preemption, relying on the saving clause. Given the almost identical preemption and saving clauses in both the Safety Act and MHA, the Tenth Circuit held that “in light of Geier [II], . . . [plaintiffs’] claim is not expressly preempted.”

The Tenth Circuit determined that the existence of an express preemption clause and the presence of a saving clause did not preclude the possibility of implied preemption. The court stated that implied preemption exists where a state law regulates an area Congress intended to be governed exclusively by federal law and where there is an actual conflict between the state and federal law. The home manufacturer did not argue the first situation, field preemption, but instead asserted that a finding of conflict preemption was appropriate as state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The court found that the law presented no such obstacle. The MHA’s implementing regulations contain a provision stating that the determination of whether such an obstacle exists can be discovered by questioning “whether the [s]tate rule can be enforced or the action taken without impairing the [f]ederal superintendence of the manufactured home industry as established by the Act.” A state standard that required a battery-powered backup would not be contrary to a federal standard that required at least one smoke detector. Additionally, the court stated that allowing claims such as the plaintiffs’ was consistent with the MHA’s purposes because it was enacted to reduce deaths and injuries, insurance costs, and increase the quality of manufactured homes.

IV. Analysis

In Geier II, the United States Supreme Court held, in a 5 to 4 decision, that petitioners’ no airbag lawsuit conflicted with the objectives of

478. Id.
479. Geier II, 529 U.S. at 868.
480. Choate, 222 F.3d at 793-94.
481. Id. at 794 (citing Geier v. Am. Honda Motor Co. (Geier II), 529 U.S. 861, 869 (2000)).
482. Id. at 795 (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).
484. Id.
485. Id. (quoting 24 C.F.R. § 3282.11(d)).
486. Id. (noting that “the HUD standard, 24 C.F.R. § 3280.208(d), only requires ‘at least one smoke detector [which is hard wired to the general electrical circuit].’” (alteration in original)).
487. Id. at 796 (quoting 42 U.S.C. § 5401(b)(5)).
Standard 208 and was consequently preempted by the Safety Act. Alexis Geier ("Geier") contended that American Honda Motor Co. ("American Honda") was liable for damages arising from its alleged defective design of the 1987 Honda in which she was injured by failing to install airbags or another passive restraint device. American Honda claimed that its compliance with the Safety Act and Standard 208 preempted the no airbag lawsuit. The Court declared that the lawsuit conflicted with the objectives of Standard 208 and was preempted by the Safety Act. The Court made three findings in its decision; first, the preemption provision did not expressly preempt the lawsuit; second, ordinary preemption applied; and finally, the lawsuit actually conflicted with the Safety Act. The Court determined the preemption provision of the Safety Act should be read narrowly to preempt only state regulations and statutes, excluding common law tort actions. The Safety Act's saving clause did not expressly save Geier's action and the Court concluded, based partially on its inclination not to construe preemption clauses broadly, that it did "not bar the ordinary working of conflict pre-emption principles." The Court stated that it would be Congress' intent to apply ordinary preemption principles where there is "an actual conflict with a federal objective . . . [;]" without such application, states could impose laws "that would conflict directly with federal regulatory mandates . . . ." Finally, the Court concluded that Geier's suit actually conflicted with the Department of Transportation's objectives in enacting the Standard. An imposition of a rule of state tort law compelling a duty to install airbags in cars such as petitioners' "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."

The Court, faced with a split of decisions involving state and circuit courts, properly concluded in favor of implied preemption and preserved the objectives of the Safety Act. The correctness of the Court's holding in Geier II can be demonstrated by considering three aspects of the Court's opinion. First, the Court examined the possibility of express preemption and decided the issue in a manner consistent with its prece-

488. Geier II, 529 U.S. at 863, 865.
489. Id. at 865.
490. Brief for Respondents, supra note 6, at 7.
491. Geier II, 529 U.S. at 866.
492. Id. at 867.
493. Id. at 868.
494. Id. at 869 (alteration in original).
495. Id. at 871.
496. Id. at 874.
497. Id. at 881.
Second, the Court properly upheld the application of ordinary preemption principles to Geier’s actions, resolved an unanswered question from Cipollone VI, and further defined the workings of the Safety Act’s saving clause. Third, the Court applied ordinary preemption by looking beyond the express language of, and examining the intent behind, the Safety Act and Standard 208. Consistent with the doctrine of implied preemption, the Court held that an actual conflict existed between Geier’s action and Standard 208. The Court’s holding in Geier II resolved the split among the various courts, preventing future state and appellate courts from holding against preemption in no airbag cases. The Court affirmed the Freightliner Corp. v. Myrick (Freightliner II) decision by determining that the existence of a preemption clause does not foreclose the workings of ordinary preemption. Subsequent to the Court’s decision in Geier II, state and appellate courts have relied on Geier II to apply ordinary preemption principles when reasoning both for and against the preemption of common law actions.

A. Ordinary Preemption Analysis

1. The Preemption Clause and Express Preemption

The United States Supreme Court’s holding in Geier II, namely that the petitioners’ no airbag suit was not expressly preempted, was sup-

498. See Geier II, 529 U.S. at 867-68 (holding that the Safety Act’s savings clause removed the claim from the scope of the express preemption clause).

499. See id. at 874.

500. Id. at 869 (“We recognize that, when this Court previously considered the pre-emptive effect of the statute’s language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act.”).

501. Id. at 869-70.

502. Id. at 874-86.

503. See id. at 886 (holding that the no airbag claim was preempted).

504. Id. at 869 (citing Freightliner II in support of its holding that the saving clause, like the preemption provision, did “not bar the ordinary working of conflict pre-emption principles.” (alteration in original)).

505. E.g., Choate, 222 F.3d at 793-94 (holding, in light of Geier II, that “given the nearly identical nature of the preemption and saving clause provisions in the National Traffic and Motor Vehicle Safety Act and the Manufactured Housing Act[,]” that common law actions were not expressly preempted, thus, applying ordinary preemption principles and ultimately determining that the common law claim at issue was not impliedly preempted); Lady, 228 F.3d at 611-12 (holding that, because the saving clause in the FBPA is similar to the saving clause in the Motor Vehicle Safety Act, the common law tort action at issue was not expressly preempted and, thus, applying ordinary preemption principles and ultimately determining that the claim was not impliedly preempted; however the court’s implied preemption holding was abrogated by Spreitksma v. Mercury Marine, 537 U.S. 51, 68 (2002)); Davis, 2000 WL 1459027, at *1 to *2 (holding in accordance with Geier II).
ported by its established precedent. Although the Court had not, prior to Geier, explicitly decided the preemption issue as it relates to airbags, it had previously discussed factors that courts should weigh when considering preemption. Court precedent dictates that when the term “common law actions” is omitted from an act’s preemption clause, that omission must be interpreted to mean that Congress intended such actions to survive preemption. For example, in Cipollone VI, the Supreme Court determined that only the express language of certain statutes governed their preemption. The preemption clause at issue provided that “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes . . . .” The Court determined that several common law claims were not expressly preempted by the statutory language in question because the actions did not impose requirements or prohibitions “based on smoking and health” In Geier II, the preemption clause of the Safety Act provided, in part, that states shall not “have any authority either to establish, or to continue in effect . . . any motor vehicle . . . safety standard . . . not identical to the Federal standard.” Much like “requirements or prohibitions,” the term “standards” was not held to include the plaintiff’s common law actions. Therefore, consistent with Cipollone VI, the Court in Geier II concluded that the plaintiff’s claims were not expressly preempted.

Similarly, in Freightliner II, the Court declined to declare similar state common law actions expressly preempted. In Freightliner II, as in Geier II, the Court faced the preemption clause of the Safety Act. Like the plaintiff in Freightliner II, Geier asserted a negligent and de-

506. See Geier II, 529 U.S. at 867-68 (holding that the Safety Act’s saving clause removed the claim from scope of the express preemption clause).


508. Cipollone VI, 505 U.S. at 517.


510. Id. at 526, 528-29 (quoting 15 U.S.C. § 1334(b)).


512. Compare Cipollone VI, 505 U.S. at 523 ("That the pre-emptive scope of [the Public Health Cigarette Smoking Act’s preemption clause] cannot be limited to positive enactments does not mean that that section pre-empts all common-law claims."). with Geier II, 529 U.S. at 867-68 (determining Geier’s claims were not expressly preempted by the statutory language).

513. Freightliner II, 514 U.S. at 286.

514. Id. at 286-87.

515. Id. at 282.
fective design claim.\textsuperscript{516} As in \textit{Geier II}, the Court in \textit{Freightliner II} found plaintiff's negligent design actions were not expressly preempted by the Safety Act's preemption clause.\textsuperscript{517} Thus, the Court's holding in \textit{Geier II} was consistent with its previous findings regarding substantially similar issues.

The Court's reasoning in \textit{Medtronic II} also parallels that of the \textit{Geier II} decision.\textsuperscript{518} The preemption clause at issue in \textit{Medtronic II} explicitly preempted "requirements," and the Court declined to establish that the term "requirement" explicitly included state common law actions.\textsuperscript{519} In \textit{Geier II}, the Safety Act's preemption clause did not mention the preemption of state common law tort actions, but explicitly preempted certain state "standards."\textsuperscript{520} The Court in \textit{Geier II} stated that it "need not determine the precise significance of the use of the word 'standard' . . . ."\textsuperscript{521} The Court did not thoroughly explore the possibility of an explicit or express preemption finding of state common law actions in either case because a different analysis was more appropriate.\textsuperscript{522} The Court's holding in \textit{Geier II} was consistent with its decision in \textit{Medtronic II} when it declined a thorough discussion of a similar preemption clause.

2. Upholding Ordinary Preemption

In \textit{Geier II}, the United States Supreme Court upheld the application of ordinary preemption principles.\textsuperscript{523} The Court also resolved a previously undetermined question from \textit{Cipollone VI} in a manner that was consistent with precedent.\textsuperscript{524} Additionally, the Court further defined the workings of the Safety Act's saving clause.\textsuperscript{525}

The decision in \textit{Geier II}, holding that implied preemption principles apply, is consistent with the Court's decision in \textit{Freightliner II}. In \textit{Freightliner II}, the Court determined that the Safety Act did not expressly pre-

\begin{enumerate}
\item \textit{Geier II}, 529 U.S. at 865.
\item \textit{Freightliner II}, 514 U.S. at 286.
\item \textit{Medtronic II}, 518 U.S. at 470.
\item \textit{Id.} at 502-03.
\item \textit{Geier II}, 529 U.S. at 867-68.
\item \textit{Id.} at 867.
\item \textit{Id.} at 867-68 (declining to determine the significance of the word "standard" as opposed to "requirement" when the savings clause resolved the issue); \textit{Medtronic}, 518 U.S. at 501-03 (plurality opinion) (declining to determine whether common law actions were explicitly preempted by the preemption clause and deferring possible evaluation to conflict preemption analysis).
\item \textit{Geier II}, 529 U.S. at 874.
\item \textit{See id.} at 869 ("We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act.").
\item \textit{Id.} at 869-70.
\end{enumerate}
empt plaintiff's claims. Instead, the Court analyzed the possibility that
the suit might be impliedly preempted. The Court in *Geier II* also
determined that the existence of a preemption clause does not preclude
"any possibility of implied [conflict] preemption." The Court in *Geier II*
followed the precedent set in *Freightliner II* and conducted an analysis
of the implied preemption scope of the Safety Act.

While *Cipollone VI* questioned the application of express or implied
preemption, it did not resolve when a court should apply ordinary pre-
emption principles. The Court addressed the scope of express preemp-
tion without exploring implied preemption. The Court stated, "the pre-
emptive scope of the 1965 Act and the 1969 Act is governed entirely by
the express language in [section] 5 of each Act." *Cipollone VI* cast
doubt on the application of implied preemption in *no airbag* cases, as
"[m]any courts interpreted [Cipollone VI] as abandoning an implied pre-
emption analysis when an express preemption clause exists." The *Cipollone VI* decision "led to many inconsistent results." The plaintiff in
*Freightliner II* argued that the Court in *Cipollone VI* "held that implied
pre-emption cannot exist when Congress has chosen to include an express
pre-emption clause in a statute." Despite the plaintiff's arguments, the
Court in *Freightliner II* held that *Cipollone VI* did not create a categorical
rule precluding the existence of implied preemption when an express pre-
emption clause exists.

Consistent with *Freightliner II*, the Court in *Geier II* conducted im-
plied preemption analysis. Whereas *Cipollone VI* led to inconsistent
results, *Geier II* resolved the issue by providing that the existence of the
Safety Act's preemption clause did not preclude the prospect of implied
preemption. The decision to analyze possible implied preemption of

527. *Id.* at 288-90.
529. *Id.* (providing, consistent with *Freightliner II*, that a preemption provision alone does not necessarily preclude implied preemption).
530. *Cipollone VI*, 505 U.S. at 517.
531. *Id.*
532. *Id.*
534. *Id.*
536. *Id.* at 288.
537. *Geier II*, 529 U.S. at 869 ("Petitioners concede, as they must in light of [*Freightliner II*], that the pre-emption provision, by itself, does not foreclose . . . 'any possibility of implied [conflict] pre-emption' . . . " (quoting Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 288 (1995)) (second alteration in original)).
538. *Id.*
Geier’s claims even withstood the existence of the saving clause of the Safety Act. The Court in Geier II decided to apply ordinary preemption principles notwithstanding Geier’s contention that the existence of the saving clause foreclosed the workings of ordinary preemption.

Although the Court in Freightliner II considered the statute’s preemptive effect, it did not determine the extent to which the saving clause saved state common law actions. The Geier II decision further defined the Safety Act’s saving clause by concluding that its existence did “not bar the ordinary working of conflict pre-emption principles.” This conclusion was consistent with the Court’s past treatment of saving clauses. Geier II’s allowance for the application of ordinary preemption principles was not only consistent with precedent, but also simultaneously resolved uncertainty regarding the appropriateness of implied preemptive analysis in light of express preemptive clauses.

3. No Airbag Suits Actually Conflict With the Safety Act

The United States Supreme Court in Geier II correctly applied preemption consistent with the doctrine of implied preemption. The Court looked beyond express language, examined the intent behind the enactment of Standard 208, and held that an actual conflict existed. The preemption doctrine stems from the Supremacy Clause of the United States Constitution. Article VI of the Constitution provides that the laws of “the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Supremacy Clause “gives federal law precedence over conflicting state law.” When state law and federal law conflict, the state law is “without effect.”

539. Id. (“We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles.” (alteration in original)).
540. Id. at 869.
541. Freightliner II, 514 U.S. at 287 n.3.
542. Geier II, 529 U.S. at 869 (alteration in original).
543. Id. at 870 (“This Court has repeatedly ‘declined’ to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”’ (quoting United States v. Locke, 529 U.S. 89, 106-07 (2000) (second alteration in original))).
544. See id. at 874-86.
545. See id. at 884 (“Conflict pre-emption is different in that it turns on the identification of ‘actual conflict,’ and not on an express statement of pre-emptive intent.”) (citing English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990)).
546. Id. at 874-84, 886.
547. Id. at 874.
549. U.S. Const. art VI, cl. 2.
550. Dinh, supra note 78, at 2088.
551. Cipollone VI, 505 U.S. at 516 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).
act does not supersede the states’ historic police powers, “unless that was the clear and manifest purpose of Congress.” The Supreme Court provides three situations in which preemption exists.

First, Congress can define explicitly the extent to which its enactments pre-empt state law . . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively . . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law.

The second and third types of preemption are implied. The third type of preemption, conflict preemption, includes situations where compliance with both federal and state law is impossible, and instances where “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” In Geier II, the Court rested its holding on conflict preemption. The Court determined that Geier’s claims actually conflicted with the Safety Act because it found that the rule of law Geier’s claim would impose presented an obstacle to the Standard’s objectives.

The Court reached its decision in Geier II by following established implied preemption doctrine and remaining consistent with past decisions involving conflict preemption. The Court’s analysis of conflict preemption also properly considered the history of Standard 208. The Department of Transportation first issued Standard 208 in 1967, providing a

554. Chadwell, supra note 83, at 151.
556. Geier II, 529 U.S. at 867.
557. Id. at 886.
558. Id. at 884 (“The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre-emption. And conflict pre-emption is different in that it turns on the identification of ‘actual conflict,’ and not on an express statement of pre-emptive intent. While [p]re-emption fundamentally is a question of congressional intent, this Court traditionally distinguishes between ‘express’ and ‘implied’ pre-emptive intent, and treats ‘conflict’ pre-emption as an instance of the latter. And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere volume and complexity of agency regulations demonstrate an implicit intent to displace all state law in a particular area - so-called ‘field pre-emption’- the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.” (alteration in original) (internal quotations and citations omitted)).
559. See id. at 886 (determining that Standard 208 “sought a gradually developing mix of alternative passive restraint devices for safety-related reasons” and, thus, holding that “the rule of state tort law for which petitioners argue would stand as an ‘obstacle’ to the accomplishment of that objective.”).
requirement that seatbelts be installed in all cars. In the early 1970's, after an extensive rulemaking proceeding on such systems, the Department of Transportation amended Standard 208 to include passive restraint devices. Based on considerable resistance from the automotive community, including manufacturers, the NHTSA postponed the effective date of Standard 208.

In 1976, the Secretary of Transportation "extended the optional alternatives indefinitely and suspended the passive restraint requirement." In 1981, the passive restraint mandate was completely rescinded. In 1984, NHTSA reinstated Standard 208, directing a phase-in of passive restraints, beginning with cars manufactured after September 1986. The NHTSA lacked the power to enact compulsory belt use laws itself, so it opted for a phase-in requirement. The phase-in requirement eventually mandated installation of passive restraints in all cars manufactured after September 1, 1989. Geier II maintained these objectives by holding Geier's claims impliedly preempted because an opposite holding would have frustrated the regulatory scheme and discouraged the Department's objective of "a gradually developing mix of alternative passive restraint devices for safety-related reasons."

Further, the Court stated that the analysis conducted in Freightliner II was entirely consistent with the Court's determination of implied preemption in Geier II because no implied preemption existed in the former. In Freightliner II, the plaintiffs brought common law claims against truck manufacturers, asserting a design defect in failure to install antilock brakes. The Court concluded that no express preemption existed, and subsequently conducted an implied preemption analysis. In deciding the claims were not expressly preempted by the Safety Act, the Court stated that "there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and

560. State Farm, 680 F.2d at 209 (citing 32 Fed. Reg. 2408, 2415 (1967)).
562. Chadwell, supra note 83, at 145-146 (citations omitted).
564. Id. at 38.
566. Id.
567. Id. (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
568. See Geier II, 529 U.S. at 886 ("[Standard] 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an 'obstacle' to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.").
569. Freightliner II, 514 U.S. at 283.
570. Id. at 286-90.
vehicle stability."\textsuperscript{571} Instead, in the absence of regulation, states remained free to "‘establish, or to continue in effect,’ their own safety standards concerning those ‘aspect[s] of performance.’"\textsuperscript{572} Therefore, the Court decided that the plaintiff’s claims were not impliedly preempted as finding Freightliner liable would not present an obstacle to federal purposes or objectives.\textsuperscript{573}

\textit{Geier II} involved the Safety Act and a defective design claim based on a failure to install airbags.\textsuperscript{574} The Court determined in \textit{Geier II} that if the tort claims were allowed, they "would have presented an obstacle to the variety and mix of devices that the federal regulation sought . . . [and] also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed."\textsuperscript{575} The uncertainty surrounding Standard 208 did not involve the absence of regulation; rather, Standard 208 was a specific regulation requiring a phase-in of passive restraints, beginning with 1987 model cars.\textsuperscript{576} As opposed to \textit{Freightliner II}, where federal objectives were nonexistent,\textsuperscript{577} the Court in \textit{Geier II} was faced with a specific regulation and a multitude of federal objectives.\textsuperscript{578} Therefore, Court precedent did not preclude the finding of implied preemption where \textit{Geier II} presented a possibility of enacting a common law regulation which would have conflicted with federal law.

\section*{B. Resolving the Split of Authority}

A variety of courts subsequent to \textit{Cipollone VI} and \textit{Freightliner II} "have interpreted the preemption issues inconsistently under Standard 208."\textsuperscript{579} In fact, the Court in \textit{Geier II} "granted certiorari to resolve these differences."\textsuperscript{580} Several state courts had held that neither the Safety Act’s express preemption nor Standard 208 preempted a \textit{no airbag} claim.\textsuperscript{581} In

\begin{itemize}
\item \textsuperscript{571} \textit{Id.} at 286.
\item \textsuperscript{572} \textit{Id.} (quoting 15 U.S.C. § 1392(d) (1966)) (alteration in original).
\item \textsuperscript{573} \textit{Id.} at 287, 289-90.
\item \textsuperscript{574} \textit{Geier II}, 529 U.S. at 864-65.
\item \textsuperscript{575} \textit{Id.} at 881.
\item \textsuperscript{576} See Norton, supra note 507, at 663.
\item \textsuperscript{577} \textit{Freightliner II}, 514 U.S. at 289 ("[T]here is simply no federal standard for a private party to comply with.").
\item \textsuperscript{578} \textit{Geier II}, 529 U.S. at 874-75 ("DOT’s comments, which accompanied the promulgation of [Standard] 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and [Standard] 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance - all of which would promote [Standard] 208’s safety objectives." (citing 49 Fed. Reg. 28962, 28962 (1984) (codified at 49 C.F.R. pt. 571)).
\item \textsuperscript{579} Babb, supra note 89, at 1695 (citations omitted).
\item \textsuperscript{580} \textit{Geier II}, 529 U.S. at 866.
\item \textsuperscript{581} \textit{Id.} (citations omitted).
\end{itemize}
contrast, the federal circuit courts, which had considered the issue, found preemption in no airbag cases. The Ninth Circuit concluded in favor of preemption resting on the express preemption clause of the Safety Act. All of the other decisions, however, found “pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to [Standard 208’s] objectives, and thus to the Act itself.” The United States Supreme Court in Geier II invalidated the Ninth Circuit’s finding of express preemption in no airbag suits. Geier II thus established precedent incompatible with various decisions on the state level and reaffirmed the application of ordinary preemption principles set forth in Cipollone VI. Finally, Geier II resolved the differences in no airbag decisions, and set precedent by concluding that no airbag claims are impliedly preempted by the Safety Act.

1. The Ninth Circuit

In Harris, the Ninth Circuit Court of Appeals determined that the Safety Act expressly preempted claims based on the manufacturer’s failure to install an airbag. This holding is inconsistent with and currently superseded by the Court’s recent holding in Geier II. The Ninth Circuit stated, contrary to Harris’ contentions, that the preemption provision of the Safety Act contemplated safety standards not solely created by regulators and legislators. The Geier II decision also dealt with the preemption clause of the Safety Act and a claim for failure to install an airbag. However, in Geier II, the Court held against an express preemption finding due to the existence of the Safety Act’s saving clause. Consequently, the Court determined that the existence of the Safety Act’s saving clause precludes a finding of express preemption of no airbag claims, contrary to the Ninth Circuit’s determination that no

582. Id.
583. Id. (citing Harris ex rel. Harris v. Ford Motor Co., 110 F.3d 1410, 1413-15 (9th Cir. 1997)).
584. Id. at 868-69.
585. See id. at 866 (“We now hold that this kind of ‘no airbag’ lawsuit conflicts with the objectives of [Standard 208], a standard authorized by the Act, and is therefore, pre-empted by the Act.”).
586. See id.
587. See id.
588. Harris, 110 F.3d at 1415.
589. Id. at 1413.
590. Geier II, 529 U.S. at 865.
591. Id. at 868-69.
592. Id. at 869-70 (concluding that due to the existence of the savings clause the preemption provision must be narrowly read to preclude expressly preempts common law claims).
airbag claims were expressly preempted by the Safety Act. 593

2. Implied Preemption Application

Geier II resolved the split among state and federal courts by holding that there is no categorical rule precluding implied preemption when an express preemption clause exists in no airbag cases. 594 While Cipollone VI led to inconsistent results, 595 Geier II established precedent incompatible with various decisions on the state level, reaffirming the application of ordinary preemption principles set forth in Cipollone VI. 596 For example, in Minton v. Honda of America Manufacturing, Inc. (Minton II), the Ohio Supreme Court held that the Safety Act did not expressly or impliedly preempt state common law tort claims based on an automobile manufacturer’s failure to install airbags. 597 The court relied on Cipollone VI and “concluded that if the federal legislation at issue contains an express pre-emption clause, there is no need to look beyond the text of that clause to determine the preemptive intent of Congress.” 598

The United States Supreme Court, in Freightliner II, reasoned that no express preemption existed for the plaintiff’s claims under the Safety Act, but made clear that Cipollone VI did not establish “a categorical rule precluding the coexistence of express and implied pre-emption . . . .” 599 Rather, the Court indicated that implied preemption analysis remained a viable option for interpretation. 600 Although the Ohio Supreme Court, in Minton II, recognized the Freightliner II opinion, the court opted not to follow it. 601 In so holding, the Minton II court determined that Freightliner II did not overrule Cipollone VI, but instead, “sought merely to disapprove of decisions interpreting Cipollone [VI] to mean that implied preemption can never exist when Congress has included an express preemption clause in the legislation in question.” 602

The Geier II decision affirmed the analysis in Freightliner II, stating

593. Harris, 110 F.3d at 1416 (concluding that the preemption provisions expressly preempted plaintiff’s claim).
594. Geier II, 529 U.S. at 869.
595. Babb, supra note 89, at 1694 (citations omitted).
596. See Geier II, 529 U.S. at 869 (referencing Freightliner II, but recognizing that the Freightliner II Court discussed Cipollone VI).
598. Id. at 658 (citations omitted).
600. Id. at 288.
601. Minton II, 684 N.E.2d at 658 (acknowledging that the Supreme Court in Freightliner II “noted that an explicit statement limiting Congress’ preemptive intent does not always obviate the need to consider the implied preemption[,]” but determining that because the Freightliner II Court “did not overrule Cipollone [VI] . . . an implied preemption analysis is not required . . . .” (citations omitted)).
602. Id. at 658 (citing Wilson v. Pleasant (Wilson II), 660 N.E.2d 327, 334 (Ind. 1995)).
that the petitioners conceded, “as they must in light of *Freightliner II* . . .
that the pre-emption provision, by itself, does not foreclose . . . ‘any possi-
bility of implied [conflict] pre-emption[.]’”\textsuperscript{603} The *Geier II*
decision, holding that ordinary preemption principles apply to *no airbag* suits,\textsuperscript{604} supersedes *Minton* because the *Minton II* court declined to conduct an
implied preemption analysis.\textsuperscript{605}

Similarly, in *Wilson II*, the Indiana Supreme Court held that the
Safety Act and its subsequent regulations did not preempt state common
law negligence claims based on a manufacturer’s failure to install
airbags.\textsuperscript{606} The court concluded that it was improper to imply pre-
emption of Wilson’s claims.\textsuperscript{607} Justice Patrick Sullivan, writing for the ma-
jority, reasoned that the preemption clause of the Safety Act, “entirely
forecloses implied preemption . . . [a]nd even if we apply the principles of
implied pre-emption analysis as re-stated in [*Freightliner II*] . . . it would
be improper to imply pre-emption here.”\textsuperscript{608} The court’s finding in *Wilson
II* is also superseded by *Geier II* as ordinary preemption principles apply
to *no airbag* suits,\textsuperscript{609} and *Wilson II* declined to conduct an implied pre-
emption analysis.\textsuperscript{610}

In *Drettel II*, the New York Court of Appeals determined that the
Safety Act of 1966 did not preclude plaintiffs’ state common law
claims.\textsuperscript{611} The court discussed *Cipollone VI*, and provided that implied
preemption analysis was not warranted.\textsuperscript{612} The combination of the Safety
Act’s express preemption clause, the saving clause and the legislative his-
tory demonstrated congressional intent to protect common law claims.\textsuperscript{613}
The court noted that implied conflict preemption was unavailable, as the
plaintiff’s common law claims would neither make compliance with the
federal regulation impossible nor prevent the execution and accomplish-

\textsuperscript{603} *Geier II*, 529 U.S. at 867, 869 (quoting Freightliner Corp. v. Myrick (*Freightliner II*), 514
U.S. 280, 288 (1995)).

\textsuperscript{604} *Id.* at 869 (determining that the existence of a preemption provision does not preclude
the possibility of implied preemption).

\textsuperscript{605} *Minton II*, 684 N.E.2d at 658 (determining that an implied preemption analysis was not
required).

\textsuperscript{606} *Wilson II*, 660 N.E.2d at 330, 334.

\textsuperscript{607} *Id.* at 339.

\textsuperscript{608} *Id.* at 328, 339.

\textsuperscript{609} *Geier II*, 529 U.S. at 867 (determining that the existence of a preemption provision does
not preclude the possibility of implied preemption).

\textsuperscript{610} *Wilson II*, 660 N.E.2d at 339 (concluding that the pre-emption clause entirely foreclosed
implied pre-emption).

\textsuperscript{611} *Drettel II*, 699 N.E.2d at 382-83.

\textsuperscript{612} *Id.* (determining that, when read together, *Cipollone VI* and *Freightliner II*, “do not
favor, support or mandate an implied preemption analysis of common-law claims in the present
case framework.”).

\textsuperscript{613} *Id.* at 383.
ment of the Safety Act’s congressional objectives. Geier II affirms the opposite; where a preemption provision exists, the possibility of implied preemption is not foreclosed. The dissent’s discussion in Drattel II was consistent with the United States Supreme Court’s holding in Geier II, reasoning that the implied preemption doctrine should apply to the plaintiff’s claims to the extent their claims were premised on the omission of driver’s side airbags. The dissent argued that imposition of common law liability for a manufacturer’s failure to install airbags “would inevitably undermine the regulatory, interest-weighing cost/benefit determination by Congress . . . .”

3. **Implied Preemption of No Airbag Claims**

In Geier II, the United States Supreme Court granted certiorari to resolve differences in decisions made by state and federal courts regarding preemption in no airbag cases. Geier II resolved the differences and set precedent establishing that the Safety Act impliedly preempts no airbag claims. Contrary to Geier II, the Ohio Supreme Court, in Minton II, held that no airbag claims were not impliedly preempted. The court stated that “Congress did not intend for the Safety Act to occupy the entire field of auto safety . . . [and] appellant’s claim does not prevent compliance with [S]tandard 208, nor does it thwart the accomplishment of the full purposes of Congress.” Geier II, however, established that a conflict with federal law does exist as no airbag claims present an obstacle to the objectives of Congress.

Similarly, in Drattel II, the New York Court of Appeals found that no airbag claims were not impliedly preempted. The court stated that implied conflict preemption was not available as permitting Drattel’s common law claims would neither make compliance with federal regulation impossible nor prevent the execution and accomplishment of the Safety Act’s congressional objectives. The United States Supreme Court, in Geier II, rejected this contention and established that a conflict

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614. Id. at 385.
615. Geier II, 529 U.S. at 869.
617. Id. at 391 (Levine, J., dissenting).
618. Geier II, 529 U.S. at 867.
619. Id. at 866 (“We granted certiorari to resolve these differences. We now hold that this kind of ‘no airbag’ lawsuit conflicts with the objectives of [Standard 208] . . . and is therefore preempted by the [Safety] Act.”).
621. Id. at 661 (citing Freightliner Corp. v. Myrick (Freightliner II), 514 U.S. 280, 287 (1995)).
622. Geier II, 529 U.S. at 867.
624. Id. at 383-85.
with federal law exists because no airbag claims pose an obstacle to Congress’ objectives.625

Over a decade before the Geier II decision, the First Circuit reached a similar conclusion to that of Geier II. In 1989, the First Circuit conducted the first appellate review of preemption of no airbag claims.626 In Wood, the First Circuit Court of Appeals did not find express preemption in a no airbag suit, but found that Congress’ aims, as demonstrated by the Safety Act and legislative history, “plainly imply a preemptive intent.”627 While the lack of mention of products liability claims in the preemption provision precluded a finding of express preemption, the court inferred preemptive intent.628 The court noted that if such a product liability claim were upheld, it would be an obstacle to the Safety Act’s regulatory scheme.629 A defective design common law action would create a safety standard related, but not identical, to Standard 208.630 Allowing such an action holding automobile manufacturers liable for the failure to install airbags in automobiles “would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area.”631 This decision is akin to that of Geier II, where the United States Supreme Court found implied preemption based on the same reasoning,632 namely conflict preemption based on the presentation of an obstacle to federal objectives.633

Subsequently, the Pennsylvania Supreme Court held, in Cellucci II,

625. Geier II, 529 U.S. at 881.
626. Babb, supra note 89, at 1689.
627. Wood, 865 F.2d at 402 (alteration in original).
628. Id. (“At the time [the Safety Act was drafted], the only kind of legal claim which could give rise to the present dilemma – a cause of action based upon alleged automobile design defects – had yet to take its place in the arsenal of the plaintiff’s bar. We infer from this, as well as from the total silence of the legislative record concerning the present dilemma, that Congress simply did not anticipate the situation that now confronts us. While Congress intended that federal safety standards would not interfere with ongoing state litigation as then understood, it did not foresee the possibility of litigation that could, in practical effect, impose a new and conflicting state safety standard on national automobile manufacturers... [G]iven Congress’ failure to oversee this problem, we are not persuaded that section 1392(d) can be construed to manifest an express intention to preempt state design lawsuits having the present effect... While we, therefore, do not find express preemption, we are convinced that Congress’ purposes, as revealed in the Safety Act and in the legislative history, plainly imply a preemptive intent.” (footnote omitted) (alteration in original)).
629. Id.
630. Id.
631. Id.
632. Geier II, 529 U.S. at 881 (“In effect, petitioner’s tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law... by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems... It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.”).
633. Id. at 886.
that the Safety Act impliedly preempted state tort no airbag actions. In Cellucci II, the Pennsylvania Supreme Court noted that the regulations under the Safety Act gave automobile manufacturers an option of various passive restraint devices. To allow a common law standard imposing "liability on a manufacturer for choosing a federally-imposed option takes away that federally-imposed option from the manufacturer, which clearly goes against Congress' intent." Therefore, liability in common law, arising from a manufacturer's failure to install passive restraint systems, including airbags, actually conflicted with federal law. Similarly, the Geier II decision found that no airbag claims actually conflicted with federal law and held those claims impliedly preempted.

The United States Supreme Court's decision in Geier II also accords with the Third Circuit's holding that no airbag claims are impliedly preempted. In Pokorny II, the Third Circuit Court of Appeals held that a common law claim based on the absence of airbags or automatic belts was impliedly preempted by Standard 208 and the Safety Act. The court stated that common law liability developing from failure to install airbags and automatic belts would create an actual conflict with federal regulations and statutes. Potential common law liability arising from Pokorny's airbag and seat belt claims interfered with federal regulatory methods created to achieve the stated goals of the Safety Act. The court noted that section 1410(b) of the Motor Vehicle and Schoolbus Safety Amendments of 1974 ("MVSSA") clarified the conflict theory. Congress enacted the MVSSA to address motorists' concern about the possibility of passive restraint safety systems becoming mandatory. The court stated that, as exhibited by the MVSSA, Congress desired manual belts to remain as one of the federal restraint system options. The options promulgated by the Department of Transportation in Standard 208 manifest congressional intent, as they allow manufacturers to be compliant with federal regulations by selecting one of the options.

634. Cellucci II, 706 A.2d at 811-12.
635. Id. at 811.
636. Id.
637. Id. at 811-12.
638. Geier II, 529 U.S. at 886.
639. Pokorny II, 902 F.2d at 1126.
640. Id. at 1118.
641. Id. at 1123 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).
642. Id. at 1123-24 (footnote omitted) (citations omitted).
644. Id. at 1123-24 (citing Taylor v. Gen. Motors Corp., 875 F.2d 816, 826-27 (11th Cir. 1989)).
645. Id. at 1124.
ollowing Pokorny’s allegations of common law liability for a manufacturer’s failure to install automatic belts or airbags “would directly undermine the regulatory framework suggested by Congress . . . in Standard 208.”646 The Geier II decision accords with the Third Circuit’s reasoning, as the Supreme Court in Geier II similarly held that no airbag claims actually conflicted with federal law and were impliedly preempted.647

Unlike the Ninth Circuit in Harris, the Supreme Court in Geier II correctly rejected a holding of no airbag claims in light of the Safety Act’s saving clause. Further, the Court reaffirmed the principle that there is no categorical rule precluding implied preemption when an express preemption clause exists in no airbag cases, resolving the split of decisions among the various courts.648

C. SETTING PRECEDENT

The Geier II decision immediately set precedent in holding no airbag claims impliedly preempted. Just one week following the issuance of the United States Supreme Court’s decision in Geier II, the United States District Court for the Northern District of Illinois granted summary judgment in a no airbag action.649 In Davis, the plaintiff sued Nissan Motor Corporation in U.S.A (“Nissan”) asserting her deceased husband’s vehicle was unreasonably dangerous based on the lack of an installed airbag.650 The District Court for the Northern District of Illinois granted Nissan’s summary judgment motion based on the Court’s decision in Geier II.651 The district court recognized the Court’s decision that no airbag claims were not expressly preempted by the Safety Act or Standard 208.652 Additionally, the district court stated, consistent with Geier II, that ordinary preemption principles apply.653 “The court reasoned that the Court in Geier II held an actual conflict with Standard 208 existed, thereby preempting no airbag claims.654 The court in Davis applied the precedent Geier II established, and both courts agree that allowing such

646. Id.
647. Geier II, 529 U.S. at 886.
648. Id. at 866-69.
650. Id. at *1.
651. Id. at *1 to *2.
652. Id. at *2.
653. Id. (“Plaintiff argues that the presence of an express pre-emption provision in the Act creates an inference that there is no implied pre-emption precluding her from bringing her ‘no-air bag’ claim. The Supreme Court, however, determined that nothing in the saving clause suggests an intent to save common law actions that actually conflict with federal regulations and, thus, ordinary pre-emption principles apply.” (citing Geier v. Am. Honda Motor Co. (Geier II), 529 U.S. 861, 974 (2000)) (internal citation omitted)).
654. Id.
an action “to proceed would have the effect of requiring all manufacturers to install airbags to avoid suits and would eliminate the choices given by the federal standards.”

Furthermore, Geier II established an ordinary preemption analysis which now provides a basis for courts considering preemption of common law claims by any federal act. The Tenth Circuit followed Geier II in its analysis of preemption of common law claims by the National Manufactured Housing Construction and Safety Act of 1974 (“MHA”). In Choate, the United States Court of Appeals for the Tenth Circuit held that the preemption clause of the MHA did not preempt a tort action against the manufacturer of a manufactured home. By applying the reasoning of Geier II, the Tenth Circuit found that no express preemption existed, but that ordinary preemption principles applied. The preemption clause of the MHA provided that a state could not create a manufactured home safety standard different from a federal safety standard.

The Tenth Circuit noted that the word “standard” and the word “requirement” may be similarly interpreted, recognizing that common law rules could be preempted by the express language. The existence of the saving clause, however, led to a discussion of the precedent set in Geier II. The preemption and saving clause provisions of the Safety Act were nearly identical to those of the MHA. Given the almost identical preemption and saving clauses in both the Safety Act and MHA, the Tenth Circuit held, “in light of Geier II, that [plaintiffs’] claim is not expressly preempted.” Geier II established that the exact significance of the term “standard” need not be ascertained in light of the existence of the saving clause. Choate followed the precedent and found, in the

655. Id.
656. See Geier II, 529 U.S. at 874-86 (examining the history of Standard 208 and the Department of Transportation’s primary goals in determining whether the no airbag claim actually conflicted with Standard 208 and indicating that a formal agency statement of pre-emptive intent is not a prerequisite to concluding that a conflict exists).
657. Choate, 222 F.3d at 793-94 (holding, based on the similarities between the preemption and savings clauses of the MHA and the Safety Act, that the plaintiffs’ claims were not expressly preempted, but, in contrast to the Geier II decision, holding that the plaintiffs’ claims were not impliedly preempted based on the history of the MHA and the stated purpose of the Act).
658. Id. at 797.
659. Id. at 793-94.
660. Id. at 792 (quoting 42 U.S.C. § 5403(d)).
661. Id. (citing Medtronic Inc. v. Lohr (Medtronic II), 518 U.S. 470, 481, 502-04, 509 (1996) (plurality opinion) (Breyer, J., concurring in part and concurring in judgment) (O’Connor, J., concurring in part and dissenting in part) and Cipollone v. Liggett Group, Inc. (Cipollone VI), 505 U.S. 504, 521 (1992)).
662. Id. at 793-94.
663. Id.
664. Id.
665. Geier II, 529 U.S. at 867-68.
presence of a preemption clause and saving clause nearly identical to those of the Safety Act, that an express preemption finding would be improper.\textsuperscript{666}

Additionally, in accordance with the United States Supreme Court’s precedent in \textit{Geier II}, the Tenth Circuit applied ordinary preemption principles.\textsuperscript{667} Although the Tenth Circuit found the plaintiff’s claims were not preempted, the analysis conducted by the court accords with \textit{Geier II}.\textsuperscript{668} In discussing conflict preemption, the court concluded against a finding of implied preemption, as the claims did not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{669}

Similar to the United States Supreme Court’s decision in \textit{Geier II}, the Tenth Circuit conducted an analysis to determine the objectives and purposes of Congress in order to decide whether a conflict existed.\textsuperscript{670} The Tenth Circuit found no such obstacle.\textsuperscript{671} The MHA’s implementing regulations contain a provision stating that determination of whether such an obstacle exists can be discovered by questioning, “whether the [s]tate rule can be enforced or the action taken without impairing the [f]ederal superintendence of the manufactured home industry as established by the Act.”\textsuperscript{672} A rule that required a battery-powered backup would not be contrary to a federal standard that required at least one smoke detector.\textsuperscript{673} However, a rule that required an airbag mandate, where Congress and the Department of Transportation intended for manufacturers to have a choice of passive restraint systems, was an obstacle to a federal objective.\textsuperscript{674} Therefore, the Tenth Circuit followed the precedent set in \textit{Geier II} and applied ordinary preemption analysis in accordance with the Supreme Court’s discussion.\textsuperscript{675}

The Fifth Circuit looked, in part, to \textit{Geier II} in evaluating preemption of common law claims by the Federal Boat Safety Act (“FBSA”).\textsuperscript{676} In \textit{Lady}, the United States Court of Appeals for the Fifth Circuit held

\begin{itemize}
  \item \textsuperscript{666} \textit{Choate}, 222 F.3d at 793-94.
  \item \textsuperscript{667} \textit{Id}. at 794-95.
  \item \textsuperscript{668} \textit{Id}. at 795-97.
  \item \textsuperscript{669} \textit{Id}. at 796-97 (quoting English v. Gen. Elec. Co. 496 U.S. 72, 79 (1990)).
  \item \textsuperscript{670} \textit{Id}. at 795-96.
  \item \textsuperscript{671} \textit{Id}. at 796-97.
  \item \textsuperscript{672} \textit{Id}. at 795 (quoting 24 C.F.R. § 3282.11(d)).
  \item \textsuperscript{673} \textit{Id}. at 795-96 (determining that the plaintiffs’ claim that state products liability law “pertaining to defective and unreasonably dangerous products require[d] that the hard-wired smoke detector also have either a battery-powered backup or a warning that it would not work if there was a loss of power . . . would not eliminate the chosen federal method of providing smoke detection in manufactured homes. It would simply increase the effectiveness of that method.”).
  \item \textsuperscript{674} \textit{Id}. at 796 (citing Geier v. Am. Honda Motor Co. (\textit{Geier II}), 529 U.S. 861, 875 (2000)).
  \item \textsuperscript{675} \textit{Id}. at 795-96.
  \item \textsuperscript{676} \textit{Lady}, 228 F.3d at 598.
\end{itemize}
that implied preemption precluded an injured plaintiff’s state tort actions against a boat manufacturer.\textsuperscript{677} The court determined that Lady’s claims requiring a propeller guard on a recreational boat “would frustrate the Coast Guard’s decision that recreational boats should not be required to be equipped with propeller guards.”\textsuperscript{678} The Fifth Circuit, like the \textit{Geier II} Court, concluded that frustration of the Coast Guard’s decision and an obstacle to congressional objectives of a federal act both amounted to a conflict with federal law.\textsuperscript{679}

Through the \textit{Geier II} decision, the United States Supreme Court set precedent mandating a holding of implied preemption of \textit{no airbag} claims. Moreover, \textit{Geier II} established an ordinary preemption analysis which now provides a basis for courts considering preemption of common law claims by any federal act. The Fifth and Tenth Circuits have recog-

\textsuperscript{677} \textit{Id.} at 600, 615 (“[W]e conclude that, at least in the instant maritime context where the federal interest and presence has traditionally been so significant and there is no presumption against preemption, implied preemption precludes [the] action . . . .”), \textit{abrogated by Spreitma v. Mercury Marine}, 537 U.S. 51, 68 (2002) (“[W]e think it clear that the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies.”).

\textsuperscript{678} \textit{Id.} at 602.

\textsuperscript{679} \textit{Compare Lady}, 228 F.3d at 602 (discussing the frustration of the Coast Guard regulation), \textit{with Geier II}, 529 U.S. at 886 (stating the tort action was preempted because it posed an obstacle to federal objectives). It should be noted, however, that the \textit{Lady} court relied heavily on \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151 (1978) in determining that Lady’s claims were impliedly preempted. The court stated,

[U]nlike the situation in \textit{Geier II}, the manufacturer’s contention does not rest upon a prescribed safety standard, but rather a decision not to prescribe a standard, in which the Coast Guard, after considering whether to require propeller guards, decided that [t]he U.S. Coast Guard should take no regulatory action to require propeller guards. An agency decision not to regulate does not always, or perhaps even usually, carry a preemptive effect. Yet, a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate. This is so where the failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, [s]tates are not permitted to use their police power to enact such a legislation.

\textit{Id.} at 613 (internal quotations and citations omitted) (alterations in original). Thus, the court determined that,

where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA’s objective of national uniformity mandates that state law not provide a result different than the Coast Guard’s.

\textit{Id.} at 615. The court’s holding rested on the conclusion that, “at least in the instant maritime context where the federal interest and presence has traditionally been so significant and there is no presumption against preemption, implied preemption precludes Lady’s action against [the manufacturer].” \textit{Id.} Therefore, in contrast to the holding in \textit{Geier II}, the court ultimately found implied preemption based on federal occupation of the field, not solely based on an actual conflict. \textit{Id.}
nized the Geier II reasoning in holdings for and against a finding of implied preemption.

V. Conclusion

In Geier II, the United States Supreme Court decided that a no airbag lawsuit conflicted with the objectives of the Safety Act and Standard 208. An injured driver contended American Honda was liable for damages arising from its alleged defective design of a vehicle based on a failure to install airbags. American Honda asserted its compliance with the Safety Act and that Standard 208 preempted the no airbag lawsuit. The Court held that the lawsuit conflicted with the objectives of Standard 208 and was consequently preempted by the Safety Act. The Court made three major findings in its decision; first, the Act's preemption provision did not expressly preempt the lawsuit; second, ordinary preemption applied; and finally, the lawsuit actually conflicted with the Safety Act.

The Court determined the preemption provision of the Safety Act should be read narrowly to preempt "only state statutes and regulations," excluding common law tort actions. However, the Safety Act's saving clause did not expressly save Geier's action. The Court concluded, based partially on its inclination not to construe saving clauses broadly, that the clause did not "bar the ordinary working of conflict pre-emption principles." The Court stated that it was Congress' intent to apply ordinary preemption principles where there is "an actual conflict with a federal objective[;]" without such application, states could impose laws "that would conflict directly with federal regulatory mandates." Finally, the Court concluded that Geier's suit actually conflicted with the Department of Transportation's objectives in enacting the standard. An imposition of a rule of state tort law compelling a duty to install airbags in cars such as petitioners' "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."

First, the Court in Geier II properly held that state common law no

680. Geier II, 529 U.S. at 886.
681. Id. at 865.
682. Brief for Respondents, supra note 6, at 7.
683. Geier II, 529 U.S. at 886.
684. Id. at 867.
685. Id. at 868.
686. Id. at 868-69 (alteration in original).
687. Id. at 871.
688. Id. at 874.
689. Id. at 881.
airbag suits were preempted by Standard 208 and the Safety Act.\textsuperscript{690} Second, the Court resolved the court split on the preemption doctrine, clarifying the circumstances in which ordinary preemption applies, and reaffirming decisions holding no airbag suits impliedly preempted.\textsuperscript{691} Finally, \textit{Geier} has set precedent which enforces ordinary preemption principles, demonstrated by the decisions of courts that have subsequently relied on its law.\textsuperscript{692}

\textit{Geier v. American Honda Motors Co.} is a case of obvious importance to automobile manufacturers. The preemption issues analyzed have significant implications not only for manufacturers faced with no airbag suits, but any businesses subject to significant federal regulation. Many federal statutes contain preemption clauses similar to that of the Safety Act. \textit{Geier II} presents a broad question relating to whether the existence of an express preemption clause forecloses the operation of ordinary preemption principles, an argument the Court rejected.

The United States Supreme Court also answered the question that its holding in \textit{Cipollone VI}\textsuperscript{693} left unresolved.\textsuperscript{694} By holding that the Safety Act preempted no airbag suits, the Court followed precedent and reaffirmed ordinary preemption principles. If the Court had held in favor of Geier, manufacturers would have been subjected to an increased range of products liability suits. Courts would have begun to question the language of the preemption provisions of other federal acts, resulting in inconsistent holdings and an onslaught of litigation in areas Congress may have intended to preempt. Instead, in \textit{Geier II}, the Court recognized that the objectives of Congress are of the utmost importance and any claim which presents an obstacle to that goal must not be permitted. \textit{Geier II} offers protection to not only automobile companies but to all types of product manufacturers who may face product liability suits despite compliance with regulations embodying federal objectives in a given area.

\textsuperscript{690} See \textit{id.} at 865-86 (examining both express and implied preemption and looking to legislative history and the Department of Transportation's intent in making its determination).

\textsuperscript{691} \textit{id.} at 866 ("We granted certiorari to resolve these differences. We now hold that this kind of 'no airbag' lawsuit conflicts with the objectives of [Standard 208], a standard authorized by the Act, and is therefore pre-empted by the Act.").

\textsuperscript{692} \textit{E.g., Choate, 222 F.3d at 793-97.}

\textsuperscript{693} \textit{Cipollone VI}, 505 U.S. at 504.

\textsuperscript{694} \textit{Geier II}, 529 U.S. at 869 ("We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles." (citing Freighliner Corp. v. Myrick (Freighliner II), 514 U.S. 280, 287 (1995) which discusses Cipollone v. Liggett Group, Inc. (Cipollone VI), 505 U.S. 504, 517-18 (1992) (internal citations omitted) (alteration in original)).
State Supreme Courts and American Transportation Policy in the Jacksonian Decade

Professor Ronald L. Nelson*

I. "Transportation is Civilization"¹

Postcolonial Americans experienced dramatic change in all aspects of societal life. In particular, crucial developments in the means of transportation were materializing at a rapid pace. America was, after all, a new nation characterized by a large sparsely populated land mass. Transportation developments were essential to the very success of the enterprise known as the United States.² The future of trade and general economic

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* Dr. Ronald L. Nelson is an assistant professor in the Department of Political Science and Criminal Justice, University of South Alabama, Mobile, Alabama. Dr. Nelson is a member of the Florida Bar and formerly served for a number of years in the U.S. Department of Transportation as a Coast Guard Legal Officer. He holds a B.S. from Texas A & M University; a M.A. from The New School in NYC; a Ph.D. from The University of Texas at Austin; and a J.D. from The University of Miami in Coral Gables. While in law school, Dr. Nelson served as an associate editor and a comments and articles editor for the Lawyer of the Americas (University of Miami Inter-American Law Review). The views expressed in this article are solely those of the author. Dr. Nelson can be reached at rnelson@usouthal.edu.


growth of the country were closely tied to advances in technology and the formulation of a transportation policy for the new country. A significant and well-studied aspect of the formulation of policy in this area centers around the debate over private versus public development of technological advances.\textsuperscript{3} In fact, the real progress in transportation policy in the first half century after the ratification of the Constitution came through private as well as governmental efforts. Both private companies and, in particular, state and local governments acted to move beyond the “somewhat haphazard system of wagon roads, canals, and ferries [used] to move people and goods from place to place” in the early part of the nineteenth century.\textsuperscript{4} These efforts ushered in the American Transportation Revolution—a period of amazing developments in transportation from approximately 1815 to 1860.\textsuperscript{5}

Certainly, the new national government was also involved in early transportation efforts. Federal subsides were involved in such projects as Zane’s Trace (1796),\textsuperscript{6} the Natchez Trace (1803),\textsuperscript{7} and the Cumberland Road (1806).\textsuperscript{8} However, as noted by Robert Dilger, a scholar of American transportation policy, “[M]ost bills authorizing the expenditure of national government funds for transportation projects were vetoed by presidents convinced that the bills were unconstitutional infringements on states’ rights.”\textsuperscript{9} The presidents that Professor Dilger refers to are Presidents Madison, Monroe, and, in particular, Jackson.\textsuperscript{10} With regard to Jackson, Dilger argues that “President Andrew Jackson’s (D, 1829-1837) election and the ascendancy of the Democratic Party and its advocacy of states’ rights slowed the national government’s increased involvement in transportation policy for nearly a generation.”\textsuperscript{11}

Two specific events occurred during the Jacksonian decade that played a significant role in the federal government’s departure from the transportation policy business. First, President Jackson vetoed the Maysville Road project in 1830.\textsuperscript{12} Second, the National Road project was

\textsuperscript{4} Id. at 5.
\textsuperscript{6} Dilger, supra note 3, at 6.
\textsuperscript{7} Id.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id. at 6-7.
\textsuperscript{11} Id. at 7. President Madison vetoed a Bill authorizing the use of dividends from National Bank stock to fund road construction. In Madison’s view, the plan went beyond the constitutional powers of the national government. Similarly, President Monroe vetoed legislation that provided for the collection of tolls on the National Road. Monroe believed that collection of national tolls on state land would be a violation of state sovereignty. Id. at 6-7.
\textsuperscript{12} Id. at 7. The Maysville Road project was a sixty-four-mile extension of what was eventu-
turned over to the states in 1834.\textsuperscript{13}

In the end, the early role of the national government in transportation policy can be characterized as limited and indirect.\textsuperscript{14} Therefore, the utilization of new technologies and the development of transportation policy was largely left to the state and local governments and private enterprise. This mix of public and private policy concerns at the state and local level was the primary source of development in American transportation in the antebellum period.\textsuperscript{15}

The conventional approach to the study of these advances in transportation has been to examine the actions of private enterprise as well as the initiatives of the legislative and executive branches at the state level.\textsuperscript{16} Indeed, the actions of industry and these governmental institutions did much to affect changes in the means and policies of transportation in the early history of the United States. On the other hand, formulation of transportation policy issues was not only the province of state legislatures and executives. State courts also faced issues tied to the development of new transportation technologies and policies. A look at the role of the state courts in addressing transportation related issues offers a means to better understand the changes that occurred in transportation during this early developmental period. The transportation issues of the times came under review in the everyday, routine disputes brought before the courts of the American states. An evaluation of these early cases is thus crucial to understanding this development.

The research project presented in this Article was based on a keen interest in the role of law and the courts as institutions within society. The research performed was aimed at gaining insight into how courts interact within a society undergoing significant change and how these institutions act in the process of policy formulation. More specifically, this

\textsuperscript{13} See id. Of course, this national versus state authority issue had been a constant source of debate stemming back to the Federalists and Anti-Federalists writings in the early days of the nation and the struggle over the ratification of the Constitution. Jackson's views of state sovereignty accompanied by his veto action stymied efforts for a national transportation policy and put state and local policy makers in charge of the transportation policy for years to come.

\textsuperscript{14} Id. at 8.

\textsuperscript{15} See id. at 10.

\textsuperscript{16} See generally Taylor, supra note 5; Seymour Dunbar, A History of Travel in America (1915); Caroline E. MacGill under the direction of Balthasar Henry Meyer, History of Transportation in the United States Before 1860 (1948); J. L. Ringwalt, Development of Transportation Systems in the United States (William N. Parker ed., reprint 1966) (1888).
relationship was examined through the review of all decisions reached by six American state supreme courts during the period of 1828 through 1837, a period commonly referred to as the Jacksonian decade. The six target states were: Missouri, Ohio, North Carolina, Massachusetts, Pennsylvania, and Louisiana.\textsuperscript{17} The focus of this particular article is the interaction between society and the state supreme courts of the six states listed with respect to matters of transportation policy, an interaction which offers a view of everyday transportation issues faced by Jacksonian society. It also reveals the role of the state supreme courts in addressing transportation changes and forming transportation policy through judicial decisions.

\textbf{II. Research Design}

The research upon which this article is based was centered on the idea that the study of events in extraordinary times provide valuable insight into how institutions and societies relate.\textsuperscript{18} With respect to extraordinary times, the Jacksonian decade spans a period of considerable and well documented change in American society. The period of the Jackson Presidency was at the center of an era of far reaching changes of real importance for the United States. As described by two well-known historians, Jackson’s “election of 1828 was like an earthquake” on the American scene.\textsuperscript{19} This shaking of the foundations that surrounded the 1828 election was accompanied by significant economic, political, and social change.\textsuperscript{20} These important economic and social changes accompanied the virtual revolutions in transportation, industry, and demographics of the period.\textsuperscript{21} Given such significance, it is no small wonder that the

\textsuperscript{17} The six states—Missouri, Ohio, North Carolina, Massachusetts, Pennsylvania, and Louisiana—were non-randomly selected to offer a cross-section of states (e.g. old-new, north-south, east-west, rural-commercial) of the antebellum period. Additionally, the states offer a cross-section of various transportation contexts (e.g. coastal, river, mountainous and plain).

\textsuperscript{18} See Peter Gourevitch, Politics in Hard Times: Comparative Responses to International Economic Crises (Peter J. Katzenstein ed., University of Michigan Press 1996) (1986). Gourevitch’s research approach uses comparative national policy within the historical context of economic crisis. Gourevitch’s method presents an analytical framework for better understanding the politics and societal relationships as well as other variables involved in national and international political economies. A basic tenet of this approach is the assumption that hard times produce stress and that this stress can expose the inner workings of the policy decision institutions. Stress is what makes such a period “extraordinary.” Id. See also Rogers M. Smith, Science, Non-Science, and Politics, in The Historic Turn in the Human Sciences 119, 147 (Terence J. McDonald ed., 1996). Smith notes, in a discussion of historical analysis and the new institutionalism school of thought, that periods of revolutions and new foundings may be especially important times for research. He calls these periods “extraordinary.” Id.


\textsuperscript{20} See id. at 169-74.

Jacksonian Era has been a continuing subject of study since Alexis de Tocqueville and others of that period recorded contemporaneous observations of antebellum America and the societal changes of the times. It is just such a period that presents a society and its courts with issues resulting from the stress of change—change like the development of transportation policy that is responsive to the needs of a new nation. This is why the Jacksonian decade was selected. It was a period located in roughly the middle third of the 1815-1860 Transportation Revolution. The method of study employed in this research is essentially a close examination of the relevant court decisions of the times.

State supreme court case decisions offer a valuable lens for the study of law in American society. The central role of courts and law in American society has been the subject of considerable scholarly discussion, especially from the institutional perspective. For example, J. P. Nettl, in his classic essay "The State as a Conceptual Variable," argues that law in America acts as the functional equivalent of the European state. With regard to development in the early American republic, including the Jacksonian Era, the courts and the law have been regarded as having particular significance. Stephen Skowronek's classic 1982 study of the development of the American state considers the state courts and parties of the early American republic as the primary institutions of the early American state. Also, Tocqueville noted the importance of judge-made law in America in his oft quoted observation: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." A study of court decisions, especially decisions from the highest state courts, can shed light on policy development in American society, in general, and American transportation policy, in particular.

In addition to selecting a timeframe for study (the Jacksonian decade) and a unit of analysis (state supreme court decisions), a framework of analysis was also selected. A framework offers a means of evaluating

22. Chevalier, supra note 21, at 17. In commenting on the observations of Frenchman, Michael Chevalier and his travels in antebellum America, historian Douglas Miller notes that the transportation revolution was "[c]entral to the restless optimism of the Jacksonian Americans." Id.

23. See id.


the role of court decisions in the policy making process. One such framework can be found in a paper written by Dr. Harry N. Scheiber, the Riesenfeld Professor of Law and History at the Boalt Hall School of Law, University of California at Berkeley. In the paper, Professor Scheiber makes the point that the issues debated during the Transportation Revolution were not the same at the federal and state levels. The national debate centered primarily on issues of federalism. Controversies over transportation policy that arose at the state level involved practical issues stemming from the new developments in transportation itself. Scheiber outlines five major categories or topics of concern regarding transportation policy issues that were of particular significance at the state level. Scheiber's categories have been adopted as framework issues for this article's research. Given that these issues were the key transportation policy concerns for the states during the revolution, state supreme court decisions addressing these framework issues are evidence of the courts' participation in the formation of transportation policy. Based on Scheiber's work, the categories of framework issues examined in this study of state supreme court decisions of the period include:

**Category 1** Allocation: the allocation of authority and responsibility for transportation improvements among the national, state and local governments.

**Category 2** Prioritization: the prioritizing of planning goals, particularly balancing rationality and fairness concerns.

**Category 3** Financing: the means of financing transportation improvements.

**Category 4** Privileges, Immunities, and Responsibilities: the application of privileges, immunities, and responsibilities between various entities involved in transportation matters.

**Category 5** Legal Matters: the consideration of specific public and common law causes of action and procedures in light of the new developments in transportation.

These five categories provide a shorthand to capture the essential issues surrounding the development of an American transportation policy as the new nation faced growth and expansion. The policy that resulted from addressing these issues during the antebellum period, including the

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27. See generally Harry N. Scheiber, *The Transportation Revolution and American Law: Constitutionalism and Public Policy, in Transportation and the Early Nation* 1 (1982) (providing an overview and appraisal of the Transportation Revolution in American law by examining the National Arena, the Supreme Court and Formal Law, and then the State Arena).

28. *Id.* at 18.

29. *See id.* at 1, 18-22.

30. *Id.* at 18.

31. *See id.* While patterned after Scheiber's categories, my categories are somewhat broader than the originals.
Jacksonian decade, deeply affected the overall development of the United States. To the extent that these framework issues were addressed and shaped by the states through their courts, the study of state supreme court decisions with respect to transportation policy can offer a means to better understand the overall development of the states and the nation. These categories serve as a starting point for this analysis. While a court's decisions may address only one or, on the other hand, several of the categories, close examination of how these particular issues are addressed will help explain the courts' role in the development of American transportation during the early years after independence.

This paper is based on a database created from a review of all of the reported decisions of the supreme courts from each of the six target states issued during the Jacksonian decade. The source for the court decisions were the official state reporters. The research database consists of categories or data points of information observed in each of the reported decisions. After each decision was reviewed, the resultant information was recorded in a specially formulated relational database using data point entries. The data points described the courts' decisions from various perspectives. Additionally, the database has a section for recording the rationales used in each decision. Using this database, it was possible to isolate those decisions that addressed transportation in the new nation.

III. FINDINGS

The basic findings regarding state supreme courts and transportation related case decisions can be expressed in a simple tabular format. First, the number of case decisions in each of the original six target states differed during the Jacksonian decade. As Table 1 indicates, the number of overall case decisions reported in my target states for the Jacksonian decade varied from 428 decisions in Missouri to 2007 in Louisiana. The total number of Jacksonian decade decisions for the six target states is 7200.

<table>
<thead>
<tr>
<th>Total Decisions</th>
<th>MO</th>
<th>OH</th>
<th>NC</th>
<th>MA</th>
<th>PA</th>
<th>LA</th>
</tr>
</thead>
<tbody>
<tr>
<td>7200</td>
<td>428</td>
<td>488</td>
<td>989</td>
<td>1593</td>
<td>1695</td>
<td>2007</td>
</tr>
</tbody>
</table>

Tables 2, 3, 4, 5, and 6 provide more specific details regarding the

number of transportation related cases decided by the target state supreme courts during the decade. Supreme court decisions that addressed canal issues, railroad issues, and highway (including turnpikes, streets, and roads) issues were used as a means to identify transportation related cases for the period.

**Table 2** Transportation Related Decisions During the Jacksonian Decade - Canals

<table>
<thead>
<tr>
<th>Target States</th>
<th>MO</th>
<th>OH</th>
<th>NC</th>
<th>MA</th>
<th>PA</th>
<th>LA</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canals/All Decisions</td>
<td>00/428</td>
<td>06/488</td>
<td>00/989</td>
<td>02/1593</td>
<td>06/1695</td>
<td>01/2007</td>
<td>15/7200</td>
</tr>
<tr>
<td>Percentages</td>
<td>00%</td>
<td>01.23%</td>
<td>00%</td>
<td>00.13%</td>
<td>00.35%</td>
<td>00.05%</td>
<td>00.21%</td>
</tr>
</tbody>
</table>

**Table 3** Transportation Related Decisions During the Jacksonian Decade - Railroads

<table>
<thead>
<tr>
<th>Target States</th>
<th>MO</th>
<th>OH</th>
<th>NC</th>
<th>MA</th>
<th>PA</th>
<th>LA</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Railroads/All Decisions</td>
<td>00/428</td>
<td>01/488</td>
<td>00/989</td>
<td>01/1593</td>
<td>02/1695</td>
<td>02/2007</td>
<td>06/7200</td>
</tr>
<tr>
<td>Percentages</td>
<td>00%</td>
<td>00.2%</td>
<td>00%</td>
<td>00.06%</td>
<td>00.12%</td>
<td>00.10%</td>
<td>00.08%</td>
</tr>
</tbody>
</table>

**Table 4** Transportation Related Decisions During the Jacksonian Decade - Highways

<table>
<thead>
<tr>
<th>Target States</th>
<th>MO</th>
<th>OH</th>
<th>NC</th>
<th>MA</th>
<th>PA</th>
<th>LA</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highways/All Decisions</td>
<td>02/428</td>
<td>04/488</td>
<td>06/989</td>
<td>77/1593</td>
<td>36/1695</td>
<td>10/2007</td>
<td>135/7200</td>
</tr>
<tr>
<td>Percentages</td>
<td>00.47%</td>
<td>00.82%</td>
<td>00.61%</td>
<td>04.83%</td>
<td>02.12%</td>
<td>00.50%</td>
<td>01.88%</td>
</tr>
</tbody>
</table>

**Table 5** Transportation Related Decisions During the Jacksonian Decade - All

<table>
<thead>
<tr>
<th>Target States</th>
<th>MO</th>
<th>OH</th>
<th>NC</th>
<th>MA</th>
<th>PA</th>
<th>LA</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transportation/All Decisions</td>
<td>02/428</td>
<td>11/488</td>
<td>06/989</td>
<td>80/1593</td>
<td>44/1695</td>
<td>13/2007</td>
<td>156/7200</td>
</tr>
<tr>
<td>Percentages</td>
<td>00.47%</td>
<td>02.25%</td>
<td>00.61%</td>
<td>05.02%</td>
<td>02.60%</td>
<td>00.65%</td>
<td>02.17%</td>
</tr>
</tbody>
</table>
IV. Case Decisions

As noted in the findings section, the six target state supreme courts reported 7200 total decisions for the Jacksonian decade. Of these, only 156, or slightly over two percent, were transportation related. Certainly, the number of transportation case decisions is small. This is not surprising, however, when the dramatic changes of the Transportation Revolution are considered. Debates regarding transportation policy took place in all branches of government and at all levels, and were not always resolved in the courts. This small number of decisions suggests that, while the state supreme courts of the period did address transportation issues, parties were not litigating every transportation dispute they experienced at this early stage. However, an examination of the decisions in these cases does reveal the type of transportation issues brought to these supreme courts during the stress of the Jacksonian decade, as well as the reasoning of the deciding courts. This Article focuses on a selection of approximately ten percent of these transportation related decisions, at least one from each target state. These case decisions are presented as a means of exploring how the judiciary can shed light on the transportation changes in the period, as well as the relation between American society and the institution of the state supreme courts. The courts’ written opinions are quoted extensively in an effort to present, in the judges own words, a better picture of the transportation policy questions of this period as well as the resolutions reached.33 Additionally, using the five issue categories suggested by Harry Scheiber’s work as a framework for analysis, the decisions can show just how these state supreme courts participated in the development of transportation policy during this critical period. In fact, these decisions demonstrate that the state supreme courts did indeed address the core issues of the Transportation Revolution.

A. Missouri

The Missouri Supreme Court addressed transportation matters in just 2 of 428, or 0.47%, of its decisions during the Jacksonian decade.34 These decisions in general address policy issues involving the building and protecting of public highways. Perhaps the most significant case, with respect to transportation policy, is the 1831 case of Pearce v. Myers.35 The Pearce case involved an action for recovery of the statutory penalty for placing obstructions in a public road.36 The defendant lost the case

33. These quotes offer direct evidence of the courts’ view of the transportation issues raised by Jacksonian society and the rationale of the courts in resolving these issues.
34. See supra Table 5.
35. Pearce v. Myers, 3 Mo. 31, 31 (1831).
36. Id.
before a justice of the peace and appealed to the circuit court. The circuit court ruled that there was no avenue of appeal in such cases. On appeal of the circuit court’s decision, the Missouri Supreme Court first explained the penalty statute and its private citizen prosecution provision. The court then ruled that, while the case was in fact appealable, it should have been set aside for want of proper procedures, stating:

The law clearly intends that some [private] person shall prosecute for the penalty, to the half of which he will be entitled. In this case the process of the justice was utterly void for want of parties, and the Circuit Court instead of dismissing the appeal, should have entertained jurisdiction, and set aside the proceedings before the justice.

In this decision, the Missouri Supreme Court affirmed an enforcement scheme for protecting roadways that relied on citizen prosecutors rewarded with part of any resultant fine. The Pearce case highlights a method of private enforcement of transportation related public law penalties. This enforcement scheme reflects the limited availability of Missouri governmental resources for enforcement action regarding transportation matters. The case decision demonstrates that the court considered the legal procedures of the day that allowed for citizen enforcement regarding transportation related penalties, a legal matters (Category 5) framework issue. Here, the court’s decision offers support for a transportation policy that relies on a penalty-reward system.

B. Ohio

The Ohio Supreme Court reviewed transportation matters in 11 of 488, or 2.25%, of its Jacksonian decade decisions. A review of these cases reveals public versus private policy issues dealing with the operation and maintenance of canals, railroads, and highways. For example, in the case of Arnold v. Flattery, the Ohio Supreme Court reviewed a dispute over whether a public rather than a private highway existed over the land of the plaintiff. In this action for trespass, the court determined that evidence of long-term use supported the claim that the property was public and not private:

Where a road has been laid out in the manner prescribed by law, opened and used many years, it can not be allowed that it shall be suddenly closed by any

37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. See text accompanying note 31.
43. See supra Table 5.
44. Arnold v. Flattery, 5 Ohio 271, 273 (1831).
individual through whose land it passes, on the hypothesis that the road used does not exactly follow the courses and distances of the recorded survey. Nor can it be required, after the lapse of many years, that to sustain a public road every preliminary step directed to be taken in establishing it must be proven by existing papers or records.  

Here, the Ohio Supreme Court afforded public road status to a road that had become public in practice even if some of the formalities were not followed. In so ruling, the court keeps the road open to the public and not subject to private closure. This decision addresses issues regarding prioritizing interests (Category 2), allocating privileges (Category 4), as well as matters related to legal evidence (Category 5). In particular, the *Arnold* decision appears to lean toward giving fairness to the public a high priority (Category 2). The court’s decision demonstrates that, with respect to the issue of what has priority in transportation policy, the public interest ranks high on the list. This type of decision supported, and perhaps even fostered, a transportation policy emphasizing increased roadway mileage for the developing State of Ohio, as well as the nation.

In the case of *Bates v. Cooper*, the owner of the reversion in certain property brought an action against a superintendent of the Miami Canal for unlawful entry and digging up soil on the property. The soil was taken for the purpose of repairing parts of the canal pursuant to an Ohio statute. The plaintiff challenged the constitutionality of the takings statute. In its decision, the Ohio Supreme Court reviewed the statute and considered both private rights and public interests within the context of transportation policy issues, stating:

The constitution must receive a construction that will leave it possessed of practical utility. The public interest is to be promoted while private rights are secured – but can it be for a moment supposed that a road or canal of general importance to the community should be interrupted or suspended at the capricious will of an individual? . . . The statute must receive such a construction as looks to the accomplishment of the great objects the legislature had in view, and not such a one as would make it powerless to attain to that end. The object was the structure and maintenance for use of navigable canals . . . . If the authority to take the materials for the prosecution of the improvements intended by the act does not embrace cases of causal sinking of the banks and repairing breaches, we are at a loss to discover its practical

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45. *Id.*
46. *See id.* (refusing to convert the public road to a private road simply because it does not “follow the courses and distances of the recorded survey.”).
47. *See id.*
49. *See supra* text accompanying note 31.
51. *Id.* at 116.
52. *Id.* at 117-18.
benefit. Such a construction would be altogether too narrow for the liberal policy of the act, and would warrant the setting up of a petty private interest in opposition to the great interests of the whole people of the state.\textsuperscript{53}

Here, the Ohio Supreme Court found ample protection for private landowners in provisions of the state’s takings statute and supported a policy favoring the canal building enterprise as a part of the public interest.\textsuperscript{54} The \textit{Bates} decision examined the legislature’s support of the canal and considered issues of prioritizing the interests involved in the project (Category 2) and the applicability of privilege (Category 4).\textsuperscript{55} The court also considered the question of the legal liability of the canal builder (Category 5).\textsuperscript{56} The court was keenly aware of the benefit to the community that comes from a supportive transportation policy.\textsuperscript{57} The \textit{Bates} decision suggests that the public interest in developing modes of transportation was viewed as a high priority in deciding transportation related disputes.\textsuperscript{58} The decision demonstrates the court’s view that this high priority status is part of the intent of the Ohio legislature that should be supported by the courts.

C. NORTH CAROLINA

The North Carolina Supreme Court decided transportation related issues in 6 of 989, or 0.60\%, of its decisions during the Jacksonian decade.\textsuperscript{59} These decisions address various policy issues, including the operation and maintenance of the highways. For example, in 1834, the North Carolina Supreme Court reviewed a case that raised the question of whether a carriage used for the transportation of the mail as well as passengers was subject to the toll on a corporate turnpike. In its decision in \textit{Buncombe Turnpike Co. v. Newland}, the North Carolina Supreme Court examined the boundary between the public and the private within the scope of transportation policy, providing:

\begin{quote}
As the record speaks, the single question is, whether by the terms of the charter, the plaintiffs can recover in this action a toll on a carriage belonging to the defendant which is called a \textit{mail stage} . . . . We have found no act of Congress exempting persons or carriages engaged in the business of the post office, from the payment of tolls for passing ferries, bridges or roads. As
\end{quote}

\begin{footnotes}
\item 53. \textit{Id.} at 118-20.
\item 54. \textit{See id.} at 120.
\item 55. \textit{Id.} at 118; \textit{see also supra} text accompanying note 31.
\item 56. \textit{Bates}, 5 Ohio at 118-20.
\item 57. \textit{See id.} at 119-20 (determining that the purpose of the statute was structure and maintenance for use of navigable canals and recognizing that the superintendent of the Miami canal was “engaged in the construction of a great public improvement, for the sole benefit of the state.”).
\item 58. \textit{See id.}
\item 59. \textit{See supra} Table 5.
\end{footnotes}
such tolls are granted as the price of constructing and repairing those public accommodations, and are necessary for those purposes, and to no establishment are such facilities more indispensable than to the post office itself, it is probable that no such act ever has been, or ever will be passed . . . . It is true the road is a highway, but not a common and free highway. It was constructed by the plaintiffs at their own expense, and is to be kept in repair by them for a long period under heavy penalties. As compensation for their services, and as reimbursement of their expenditures, the tolls are granted . . . . It is not to be presumed, that passage to any person or thing was intended to be toll free, unless either there be a special exception, or they cannot reasonably be brought within the meaning of general terms descriptive of the subjects made liable to tolls . . . . The owners of the road have a fair right to remuneration from all who derive a benefit from their labour.60

In this decision, the court discussed several issues that fit into the five category issue framework. For example, it addressed allocation of authority issues related to federal law and the required payment of tolls (Category 1) and the prioritizing of the interests of the landowner and road builder (Category 2).61 The decision also specifically addressed a Category 3 financing question—a key aspect of transportation policy.62 In the end, the court was supportive of the costs incurred by the turnpike company and held that a fair remuneration was required.63 Obviously, consideration of the costs of building a completely new transportation system, often from scratch in a wilderness setting, was an important aspect of the transportation policy of the Jacksonian decade. In Buncombe Turnpike, the court discussed the framework issues of federalism and concerns regarding the balancing of interests.64 However, in the end, the court’s decision was particularly supportive of the effort to build the transportation infrastructure necessary for the growing State of North Carolina and the nation.

D. Massachusetts

The Massachusetts Supreme Court of the Jacksonian decade addressed transportation matters in 80 of 1593, or 5.02%, of its reported decisions.65 This is compared to an overall average of 2.17% for all of the six target states.66 These transportation related decisions provide insight into some of Massachusetts’ transportation policies regarding the mainte-

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61. See id.; see also supra text accompanying note 31.
62. Buncombe Tpk., 15 N.C. at 463-64; see also supra text accompanying note 31.
64. See id. at 463-464.
65. See supra Table 5.
66. Id.
nance and operation of the canals, railroads, and highways of the Jacksonian decade. For example, one case from 1829 involved issues of the extent of authorized activities for a turnpike corporation. In the case of *Tucker v. Tower*, a plaintiff landowner brought a trespass action against a turnpike company for digging pits, cutting down trees, and erecting a house for a toll collector on his property. The plaintiff, who had consented to the use of his land by the company for all legal purposes, claimed that the company only had an easement on the property and that their activities went beyond what was legally authorized. The Massachusetts Supreme Court's decision considered the needs of the public and took a broad view regarding the activities necessary to support a turnpike:

It is too clear to require any discussion, that the proprietor of land over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any corporation by authority derived constitutionally from the legislature. The right was given to appropriate the land of the plaintiff for the purposes mentioned in the act, and he having been indemnified for this use of his property, the corporation had a right to erect their gate across the *locus in quo*, and to demand toll at that gate. The ground taken by the plaintiff is founded upon a supposed limitation of the right of the corporation to use the surface of the land only for the purpose of travel; but we do not understand their right to be so limited, but that they may make such use of the land below the surface as may be necessary to secure and maintain the proper enjoyment of their franchise.

In this case, the toll road construction received support from the Massachusetts Supreme Court. Despite the objection of the private landowner, the court broadly interpreted the extent of required construction activities. The *Tucker* decision prioritized interests in favor of the corporation—a prioritization consideration (Category 2). The decision also provided for legal protection of the developers (Category 5) in broadly interpreting the legal definition of an easement. While the court discussed the dispute in terms of the opposing interests of the landowner and the corporation and ruled in favor of the corporation's enjoyment of the franchise, the net result was an enhancement of a

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68. *Id.* at 111-12.
69. *Id.*
70. *Id.* at 113.
71. *See id.* at 112.
72. *See id.; see also supra* text accompanying note 31.
74. *See id.* at 110.
transportation policy climate that encouraged the development of transportation within Massachusetts and the nation.

Also decided in 1829, the case of *Parks v. Mayor of Boston* involved the authority to lay out and alter streets in Boston.\(^75\) A store owner challenged the decision of the officials of Boston to widen certain streets, taking away part of the petitioner's store in the process.\(^76\) The immediate issue before the Massachusetts Supreme Court was whether the store owner's petition for a writ of certiorari was the appropriate legal means to challenge the local decision making process regarding the streets of Boston.\(^77\) In its decision, the Massachusetts Supreme Court addressed the nature of the official street modification process after finding that the question is judicial and, thus, the resultant policies are reviewable by the court.\(^78\) The court stated:

> We cannot doubt that the power thus conferred is judicial . . . . The error assigned is, that the petitioner's land was taken for the accommodation of private individuals, and not for public uses, in violation of the 10th article of the declaration of rights. But this we think has not been made to appear. The record shows that the mayor and aldermen have adjudicated on the subject, and that they expressly resolved that the public safety and convenience required that the street in question should be widened . . . . If the public necessity and convenience required the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit. A street or highway is not the less public, because it accommodates some individuals more than others, for this is the case in regard to all streets and ways . . . .\(^79\)

In this case, the Massachusetts Supreme Court rejected claims by private landowners that special interests had influenced the city's road widening project.\(^80\) The court found that, if public interest is served, funding sources are irrelevant.\(^81\) The *Parks* decision reflects issues from a number of Schreiber's framework categories. For example, the question of the authority of the local officials to widen streets is an allocation matter (Category 1), while the question of whose interests are to be served involves prioritization (Category 2).\(^82\) The court also addressed a legal matters issue (Category 5) when it ruled that the question was judicial.

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76. *Id.*
77. *Id.*
78. *Id.* at 233.
79. *Id.* at 231-33.
80. *Id.* at 233.
81. *Id.*
82. See supra text accompanying note 31.
and, therefore, reviewable by the court. The decision in this case is strongly supportive of local control of transportation matters in Massachusetts. While declaring that transportation policy issues are indeed reviewable by the judiciary, the court largely defers to the policy decisions of the local government.

In 1834, the Massachusetts Supreme Court decided a case stemming from an indictment for continuance of a nuisance on a highway. In Commonwealth v. Wilkinson, the defendant maintained certain buildings within the limits of a turnpike road. These buildings were the subject of the nuisance case. In its decision, the court addressed the question of whether a turnpike is a public road protected by nuisance law, stating:

But the principal question, and one which goes to the foundation of this proceeding is, whether a turnpike road in this Commonwealth, is a highway, and whether an indictment will lie against any person, for an obstruction thereon as a public nuisance. We think, that a turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance; and the cost of construction and maintenance, is reimbursed by a toll, levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway.

Here, the Massachusetts Supreme Court essentially removed the distinction between toll roads and public highways, thus extending state protections of public highways to toll roads. In so doing, the court specifically addressed issues of privileges, immunities, and responsibilities (Category 4), as well as the law of nuisance, a legal matter (Category 5). This decision offers a significant grant of protection to turnpike owners in Massachusetts. Extending the privileges and immunities enjoyed by public roads to the non-public developers of highways was a significant benefit for those engaged in private development of roads at that time.

In the following year, 1835, the Massachusetts Supreme Court decided another case that dealt with the nature of turnpikes. The case of Hartford & Dedham Turnpike Corp. v. Baker was a debt action brought

84. Id.
86. Id. at 176.
87. Id. at 176-77.
88. Id. at 177.
89. See supra text accompanying note 31.
by a turnpike company to collect tolls for use of their turnpike road.\textsuperscript{90} The defendant claimed that the tolls were not due because the toll-gate had been moved from its originally authorized location.\textsuperscript{91} In its decision, the court discussed the authority of a turnpike company:

\begin{quote}
[T]he plaintiffs have removed the gate to suit their own convenience or interest, without complying with the terms which the legislature have clearly and wisely pointed out. And as the plaintiffs had no legal right to remove the gate from the place where it was first put, to the place where it stood when the claim of the plaintiffs arose for tolls, we are all of opinion, that they could not there rightfully stop the defendant with his horses and wagon, and could not lawfully demand and recover toll from him at that place.\textsuperscript{92}
\end{quote}

This decision demonstrates that the Massachusetts Supreme Court found some limits to its support of the actions of toll road companies. The court held that, once established, it would limit a company's discretion to modify its turnpike operation.\textsuperscript{93} The Hartford & Dedham decision presents considerations regarding a number of Schreiber's framework issues. The decision considers the allocation of the authority of the legislature to set limits on transportation corporations (Category 1), the priority of the fairness of the situation (Category 2), as well as the extent of the privileges, immunities and responsibilities of a turnpike company (Category 4).\textsuperscript{94} The decision also addressed the legal applicability of the terms of the company's charter (Category 5).\textsuperscript{95} While many of the state court decisions of the Jacksonian decade appear to be supportive of the development of the transportation infrastructure—both public and private—there were limits. Here, the court did not support the corporation's action to collect more revenue than originally authorized.\textsuperscript{96} The limits placed on the corporation, however, were not so severe as to inhibit the fostering of transportation development in the state.

Land speculation and canal building were at issue in the 1836 decision, Cobb v. Hampshire & Hampden Canal Co.\textsuperscript{97} In this case, a landowner brought suit to recover land used by a canal company to build a canal that never went into full operation.\textsuperscript{98} The canal company resisted the landowner's recovery, claiming that they had a grant of an easement under a contract between the land owner and four private individuals.\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{90} Hartford & Dedham Tpk. Corp. v. Baker, 34 Mass. (17 Pick.) 432, 433 (1835).
\item \textsuperscript{91} See id. at 433-34.
\item \textsuperscript{92} Id. at 434.
\item \textsuperscript{93} See id. at 432.
\item \textsuperscript{94} See id. at 433-34; see also supra text accompanying note 31.
\item \textsuperscript{95} See Baker, 34 Mass. (17 Pick.) at 433; see also supra text accompanying note 31.
\item \textsuperscript{96} Baker, 34 Mass. (17 Pick.) at 434.
\item \textsuperscript{97} Cobb v. Hampshire & Hampden Canal Co., 35 Mass. (18 Pick.) 340, 340 (1836).
\item \textsuperscript{98} Id. at 343-44.
\item \textsuperscript{99} Id. at 343.
\end{itemize}
The decision of the Massachusetts Supreme Court considered the realities of the speculative nature of the canal building enterprise, providing:

The question submitted for the consideration of the court is, whether the evidence set forth in the report is sufficient to support the plea of grant . . . . The plea alleges a grant of a perpetual easement by the plaintiff to the defendants, embracing not only an authority to enter and excavate the canal and raise the embankments, but a perpetual right to use and improve the same, for all the purposes of a public navigable canal . . . a use so entirely incompatible with any beneficial use to be made of the land by the owner, that it is in effect equivalent to a claim of the fee . . . . But this contract, so far as it affected the rights of the company, was inchoate, executory and prospective, and a contract inter alios [between other persons], under which no actual rights vested in this company . . . . Under these circumstances the Court are of opinion, that this instrument cannot be relied on, as proof of a grant to the company, and that the plea is not supported.\(^{100}\)

This is another instance in which the activities of a transportation enterprise were limited by a decision of a state supreme court. Here, the company's claim of a grant from the plaintiff to use his land for canal building was rejected by the court.\(^{101}\) The court recognized the claim as part of a land speculation scheme and refused to support it. The Cobb decision demonstrates how the Massachusetts Supreme Court looked to the realities of the case in addressing fairness issues (Category 2) and contract legalities (Category 5) in transportation related disputes.\(^{102}\) This decision reflects the court's awareness of the nature of the times and the Transportation Revolution in Massachusetts. While the court may have been generally supportive of a development-oriented transportation policy, it did not turn a blind eye to the realities of speculation in the complicated financing schemes of the day.

The case of Yale v. Hampden & Berkshire Turnpike Corp. involved a hole in the surface of a turnpike and the fall of a horse.\(^{103}\) In response to the damage suit brought by the owner of the lamed horse, the turnpike company claimed that they were without fault or negligence.\(^{104}\) The 1836 decision by the Massachusetts Supreme Court addressed the liability standard for turnpike companies:

It is proper, in the outset, to distinguish between the legal liability of turnpike corporations and that of towns . . . . The Court are of opinion, that by this act it was intended to provide, that whenever the [traveler] himself is not chargeable with negligence or rashness, but where from an unforeseen cause the road is actually defective and in want of repair, and an accident occurs

\(^{100}\) **Id.** at 343, 346.

\(^{101}\) **Id.** at 346.

\(^{102}\) See supra text accompanying note 31.


\(^{104}\) See id. at 358-59.
without the default of either party, the company should be held liable. It is
founded on the consideration, that the toll is an adequate compensation for
the risk assumed, and that by throwing the risk upon those who have the
best means of taking precautions against it, the public will have the greatest
security against actual damage and loss . . . . This construction of the statute
is not likely to expose turnpike corporations to any extraordinary burden,
because if there be a bridge broken down or a chasm made by floods, or
other open and visible obstruction, and the [traveler] through his own neglig-
ence or rashness should fall in and suffer damage, such damage would be
attributable to himself, and could not be said to arise from want of repair in
the road.105

The Yale court held the company liable for damage suffered by non-
negligent turnpike customers, reasoning that the tolls collected by the
company ensured it sufficient compensation to pay for such damage.106
This case presented the court with a number of the transportation frame-
work issues. In reaching its decision, the court considered priority of in-
terests issues (Category 2), cost issues (Category 3), responsibility issues
(Category 4), and assumption of risk issues (Category 5).107 The decision
in this case addressed an important transportation policy issue, other than
the obvious questions of who regulates, who finances, and who profits
from transportation development. Here, the question was: who is liable?
The Yale court declared that the public in Massachusetts was to be af-
forded some protection from injury even if the transportation corporation
was not negligent.108

E. PENNSYLVANIA

The Pennsylvania Supreme Court addressed transportation-related
issues in 44 of 1695, or 2.60%, of its decisions during the Jacksonian de-
 cade.109 These cases addressed policies involving the operation and main-
tenance of canals, railroads, and highways. For example, in 1830 the
Pennsylvania Supreme Court decided a case involving a dispute over who
had authority to set specific requirements for a turnpike running through
a newly incorporated town. In Kensington District Division, an existing
turnpike company challenged the town’s authority to change widths and
raise road levels.110

In its decision regarding public rights and private property, the Penn-
sylvania Supreme Court viewed the turnpike corporation as an individ-
ual—with no less and no more protection than the individual from

105. Id. at 359.
106. Id.
107. Id.; see also supra text accompanying note 31.
109. See supra Table 5.
governmental taking. At the same time, the court held that local governments had the authority to plan and lay out communities including the local roadways:

The intention of the legislator was, to give all the authority necessary to the commissioners, to lay out the town in the manner most convenient and useful to the inhabitants of the district; and in furtherance of this object, so highly beneficial to the citizens, they have vested in the surveyors full and plenary authority, liable to be reviewed and corrected in the manner therein prescribed. It is a fundamental principle of all government, that the rights of individuals must yield to the general welfare, and the only security of the citizen (and in most cases it is an ample one) consists in the constitutional provision: "That no man's property shall be taken or applied to public use, ... without a just compensation being made." And in conformity to this article of the constitution, the legislature have guarded the interests of all concerned, by declaring, "That no street, road, lane, court, or alley, shall be opened and appropriated to public use, until the owner of the ground shall be compensated for the damages he may have sustained." ... We think it right to give the [compensation] act such a construction as to secure to the inhabitants of the district the object they had in view, and at the same time, to guard the rights of the company from violation, and secure to them such compensation as they may be justly entitled to under all the circumstances. If, as has been suggested, the property of the company has been taken in contradiction to the directions of the act, it is such an injury as may be compensated in damages in the usual manner.

In this decision, the Pennsylvania Supreme Court expressed its view regarding governmental authority and private compensation. The local government, as the representative of the local citizens, was afforded broad support. The company's recourse, as with any private interest, was limited to its pursuit of compensation. In the Kensington case, the Pennsylvania Supreme Court explored a number of Schreiber's framework issues. In some respects, the court's decision might be viewed as primarily examining an allocation of authority issue (Category 1). However, the court also clearly considered priority of interests issues (Category 2), financing issues (Category 3) and privileges, immunities, and responsibilities issues (Category 4). In this decision, the Pennsylvania Supreme Court strongly supported local authority in formulating transportation policy. With respect to limiting the transportation re-

111. See id. at 447.
112. Id. at 447-49 (referring to the United States Constitution and state legislation).
113. See id.
114. See id. at 447.
115. See id. at 448-49.
116. Id. at 447; see also supra text accompanying note 31.
117. In re Kensington, 2 Rawle at 448; see also supra text accompanying note 31.
118. See In re Kensington, 2 Rawle at 447.
lated actions of local government, the court viewed the compensation schemes existing at the time as an adequate means of reimbursement.\textsuperscript{119}

In 1833, the Pennsylvania Supreme Court heard an appeal stemming from a stage coach and wagon accident on the turnpike from Harrisburg to Lebanon, Pennsylvania. In \textit{Bolton v. Colder}, a dearborn wagon was struck and upset by an overtaking mail coach.\textsuperscript{120} The jury found for the plaintiff, the injured wagon driver.\textsuperscript{121} In its decision, the Pennsylvania Supreme Court discussed the state of the law with respect to traffic regulation on the state’s highways, holding:

The movement of carriages passing on our turnpike roads in opposite directions, is regulated by special enactment; but there is no positive law to regulate the passing of those who are [traveling] in the same direction. The defendants gave evidence of its being a custom in the latter case for the leading carriage to incline to the right, the other making the transit at the same time by the left; whence it was attempted to be shown that the injury suffered by the plaintiff had been occasioned by his own neglect of this custom . . . . It was not pretended that the mail coaches are entitled to precedence, or the enjoyment of any particular privileges. They are, indeed, protected by an Act of congress from being willfully and wantonly obstructed or delayed; but in every other respect they are on a equal footing with all other carriages; and it is right, perhaps, that it should be so. Experience proves that the drivers of them are not the most eligible depositories of power; and there are few who have not to do with them either as passengers or [travelers]. The public, consequently, has an important interest in having them, in common with the drivers of other carriages, held strictly to the measure of their rights; and this can be done only by making their employers sureties for their good conduct, as far as the law permits, and liable for their acts . . . . [T]he verdict was properly rendered for such damages as will probably induce the proprietors of mail coaches to take care that their drivers be more attentive to the rights of others for the future.\textsuperscript{122}

The decision offers a view of how the early “rules of the road” developed. In the \textit{Bolton} decision, the court considered the role of state and federal legislators (Category 1), as well as the privileges and immunities of the litigants (Category 4) in determining what the law should be in the relatively new area of transportation litigation (Category 5).\textsuperscript{123} This decision demonstrates the early involvement of the Pennsylvania Supreme Court in the “nitty-gritty” area of traffic rules. Beyond the obvious need for definitive, well-publicized rules, the \textit{Bolton} court recognized the power of the damage award as an inducement for proper behavior within

\textsuperscript{119} See id. at 448-49.
\textsuperscript{120} Bolton v. Colder, 1 Watts 360 (Pa. 1833) (providing background information prior to the court’s opinion).
\textsuperscript{121} Id. (providing background information prior to the court’s opinion).
\textsuperscript{122} Id. at 362-64.
\textsuperscript{123} Id. at 362-63; see also supra text accompanying note 31.
American transportation policy.  

In the 1834 case of Commonwealth v. M'Allister, the Pennsylvania Supreme Court reviewed a damage assessment stemming from the construction of the Pennsylvania Canal. In its decision upholding the damages, the Pennsylvania Supreme Court explained the basis for the reimbursement policy:

And again, I think it cannot be fairly questioned, but that it was the intention as well as the duty of the legislature, in framing the act, to provide for the state’s making adequate reparation to the party injured, as soon as the extent of the damage could be fully ascertained with reasonable precision . . . . The intention of the legislature is very clearly manifested by the acts passed on this subject; and it is, that the state shall pay for every foot of land taken by her from the owner, so far as he has not been compensated for it by the advantages which may reasonably be expected to accrue to him by the canal’s enhancing the value of the residue of his land.

This decision explained and affirmed the Pennsylvania compensation process for damages incurred in a canal building in the state. In its decision, the court considered the responsibility of the state legislature in addressing damage laws and procedures within its transportation policy (Category 1 and Category 5), as well as the fairness of the compensation scheme (Category 2). The court followed the policy established by the state legislature with respect to compensation and transportation development. As interpreted by the court, the policy in Pennsylvania, while providing property owners with reparation, was designed to facilitate the construction of canals – an important part of the transportation infrastructure of the period.

Again in 1834, the Pennsylvania Supreme Court addressed the issue of compensation for damages claimed to be caused by canal activity in the case of Union Canal Co. v. O’Brien. In this case, the plaintiffs brought suit for alleged damages that arose from the erection of a dam across the Schuylkill River by the defendant, a canal company. The plaintiffs argued that the canal company went beyond its authority in erecting the dam and that the claims process set up by the statute did not apply. The Pennsylvania Supreme Court held that the applicable stat-

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124. See Bolton, 1 Watts at 363-64.
126. Id. at 193, 197.
127. See id.
128. See id.; see also supra text accompanying note 31.
129. See M'Allister, 2 Watts at 197, 200.
130. See id. at 191.
132. Id.
133. Id. at 359-60.
utes, when read together, authorized the construction of the dam and established a damage redress process.\textsuperscript{134} However, the court also required specificity in such complaints and held that the plaintiffs in this case failed to provide sufficient information to allow their complaint to move forward:

And these acts being \textit{in pari materia}, must be construed as one act, and the remedy therefore provided by the first, may, as it appears to me, be well applied to obtain redress for such injuries as the erection of the dam shall produce immediately to the lands of the complainants, or shall in all cases of the like kind be the inevitable consequences of its erection, under the authority contained in the act of 1826 . . . . Hence it may be that the complainants in this case have sustained a damage as an inevitable consequence from the erection of the dam by the company, in having their messuage, distillery, and lot of ground constantly inundated with the water of the river, although situate at some distance from the canal, and above the dam upon the river. But it is impossible to say from anything that is stated in their petition, or that is reported on the subject by the jury, that they have sustained any damage from such a cause. The nature of the injury, and the particular ground of their complaint, are not set forth in this petition. This ought to have been done . . . .\textsuperscript{135}

In this decision, the Pennsylvania court affirmed the damage compensation process, but required that claims be pled with specificity.\textsuperscript{136} The court's ruling with regard to the authority to build the dam considered the allocation of responsibility (Category 1) framework issue.\textsuperscript{137} Fairness issues (Category 2) were also raised by the court.\textsuperscript{138} The ruling with regard to the pleadings issues was based on the existing legal procedural requirements of the times (Category 5).\textsuperscript{139} As a result of this decision, the Pennsylvania transportation policy regarding dam building for the purpose of canal maintenance was upheld as a valid transportation related enterprise. While compensation was authorized for damages, damage was not cause for prohibition.\textsuperscript{140}

\textbf{F. Louisiana}

The Louisiana Supreme Court addressed transportation related matters in 13 of 2007, or 0.65\%, of its reported decisions.\textsuperscript{141} These decisions generally addressed policies involving the maintenance and operation of

\begin{itemize}
  \item \textsuperscript{134} \textit{Id.} at 360.
  \item \textsuperscript{135} \textit{Id.} at 360-61.
  \item \textsuperscript{136} \textit{Id.} at 361.
  \item \textsuperscript{137} \textit{Id.} at 360; see also \textit{supra} text accompanying note 31.
  \item \textsuperscript{138} \textit{O'Brien}, 4 Rawle at 360; see also \textit{supra} text accompanying note 31.
  \item \textsuperscript{139} \textit{O'Brien}, 4 Rawle at 361; see also \textit{supra} text accompanying note 31.
  \item \textsuperscript{140} See \textit{O'Brien}, 4 Rawle at 360-61.
  \item \textsuperscript{141} See \textit{supra} Table 5.
\end{itemize}
canals, railroads, and highways. For example, in *Carrollton Rail Road Co. v. Avart*, a railroad company brought a condemnation action to acquire the use of a strip of land for their operations. The owner of the land claimed damages for trespass because the railroad company had taken possession of the land prior to any proceedings in condemnation. The Louisiana Supreme Court’s decision in this case examined the applicable legislation and ruled that the condemnation action was not to be denied because of the means taken by the railroad to obtain possession of the private property:

The evidence of the case does not show the manner in which they [the railroad] obtained possession, whether forcibly or by consent of the defendants. But it must be presumed from the present pursuit to obtain title, that the possession which the plaintiffs now hold is not based on any title. How this naked possession can preclude them from taking steps [authorized] and prescribed by the act to obtain titles, we cannot conceive. There is no penalty of this kind denounced in the law itself as a consequence of taking property, nor are we acquainted with any provisions of the general laws now in force in this state from which such a penalty or prohibition may be deduced.

The Louisiana Supreme Court decision in this case supported the canal building process by not requiring strict compliance with established acquisition procedures. The decision gave priority to the railroad company over the landowner (Category 2) in its refusal to authorize damages or interfere with the condemnation process (Category 5). The court refused to allow a procedural imperfection to impede the development of transportation in the state.

In the 1837 case of *Mabire v. Canal Bank*, a land owner brought suit against a canal company for damage to his property that was adjacent to the construction of a new canal. The canal company appealed an adverse verdict, claiming that their legislative charter of incorporation protected them from liability for the damage. The Louisiana Supreme Court examined both the provisions of the charter in question and the issue of compensation for the expropriation of private property for a transportation related project authorized by the legislature, stating:

The question then occurs, has the legislature assumed to exempt the defendants from the usual responsibility imposed by law, and authorized them to obstruct the natural drains of water, so as to cause damage to the adjacent

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143. *See id.*
144. *Id.* at 207.
145. *See id.*
146. *See id.; see also supra* text accompanying note 31.
148. *Id.* at 84-85.
proprietors, without regard to their rights . . . . Nothing but the most clear and unequivocal language could induce us to suppose, that the legislature intended at the same time to authorize the corporation to lay those same lands under water, over which they could not pass without compensation, by shutting up the natural or artificial channels by which they were previously drained, and that without paying for the damages thus occasioned. No such language is to be found in the act . . . . We cannot entertain the idea that the legislature will ever sanction the expropriation of, or injury to private property, without a just indemnity.149

The court refused to support the canal company's claim of immunity from damages, finding that private property owners were due proper indemnity.150 The decision demonstrates concern with legislative authority and intent (Category 1), fairness (Category 2), and privileges, immunities, and responsibilities, (Category 4).151 The Louisiana Supreme Court thus established a limit to the policy of offering protection to those developing modes of transportation in the state.152 The court recognized the importance of transportation, but did not believe it should override the rights of property owners.153

V. CONCLUSIONS

This review of various state supreme court decisions from the Jacksonian decade offers a revealing picture of the condition of state transportation policy within society and judicial institutions of the early years of the American republic. While the six state supreme courts were presented with relatively few transportation related cases during this period, their decisions, as demonstrated by the cases discussed, address a variety of policy issues regarding the operation and maintenance of the transportation systems of the day. These case decisions describe the issues, the resolutions reached by the courts and the rationales used to explain the results. As a consequence, these decisions, often notably mundane in basic subject matter, offer a unique picture of Jacksonian society as well as the everyday transportation disputes of the times. Further, they are indicative of the role of state supreme courts in the development of transportation policy. Most of the cases deal with highways. However, canal and railroad issues were also considered. The decisions reveal that the state supreme courts were generally supportive of the transportation boom of the period. Nonetheless, the courts also set limits on the business of

149. Id. at 86-87.
150. Id. at 87-88.
151. See id. at 86-87; see also supra text accompanying note 31.
152. See Maire, 11 La. at 86-87.
153. See id. at 86-87.
transportation—particularly in situations where the public and private interests were at odds.

Supportive transportation rulings are found in a number of the decisions cited previously. For example, in Bates, the Ohio Supreme Court recognized the important public interest value of road construction. In Buncombe Turnpike, the North Carolina Supreme Court recognized that an expectation of compensation is part of the road making process at the private turnpike level. The Massachusetts Supreme Court offered broad support for turnpikes. For instance, in Tucker, the court found authority for extensive turnpike activities. In Wilkinson, the court afforded a turnpike the same nuisance protection of a public highway project, equating the construction effort to that of a public highway. Similarly, in Parks, the Massachusetts Supreme Court held that a street that serves the public is public, regardless of its funding source.

On the other hand, the supreme court decisions of the Jacksonian decade also set some limitations on the transportation activities. For example, in Baker, the Massachusetts Supreme Court limited a turnpike company's right to collect tolls from a relocated toll-gate. In Cobb, the same court applied privity requirements strictly and denied a turnpike company's claim that it had a grant to use certain property. In Yale, the Massachusetts Supreme Court again found against a turnpike company, holding that turnpikes are liable for damages even if they are not at fault or negligent. The Louisiana Supreme Court also held a transportation company liable in Mabire, a case in which a canal company attempted to avoid damage payments. The court insisted on clear legislative authority for such a limitation on citizen protections. Finally, the Pennsylvania Supreme Court upheld a limit to turnpike authority with regard to local planning for the public good in In re Kensington.

With respect to the larger transportation related issues of the day, the actual decisions of the courts clearly show that these courts encouraged the Transportation Revolution. As can be seen by the state supreme courts' open recognition of the five framework categories, the

162. Mabire, 11 La. at 85.
163. Id. at 87.
164. In re Kensington, 2 Rawle at 448-49.
disputes in the cases raised the central questions that accompanied the development of a modern transportation civilization. The courts’ decisions demonstrate a day to day familiarity with the core transportation framework issues identified by Harry Scheiber: allocation of responsibilities; prioritizing the goals of practicality versus fairness; financing; privileges, immunities and responsibilities; and legal considerations. The state supreme courts that raised these issues were, in fact, a significant part of the development of a national transportation policy. This was a policy that supported the Transportation Revolution – a revolution of vital importance to the new nation.

These case decisions suggest that, while the state supreme courts of the Jacksonian decade were presented with a limited number of transportation related cases, they played a role in shaping the transportation policies of the times. In particular, the courts were supportive of transportation companies. However, this support appears to have been based on a concern for the public interest in transportation rather than a concern for the private business interests of the companies. The decisions of these courts offered benefits to the transportation companies while at the same time limiting some of their actions, upholding their liability for most damage situations, and remaining mindful of just compensation claims from private landowners. It is noteworthy that almost all of these cases from the six different state supreme courts involved an effort by the courts to square the needs of society with existing legislative transportation policy. These decisions reveal a developing policy that was the product of the courts as well as legislators, executives and business entrepreneurs.

As indicated by this study, Scheiber’s five framework categories were often key aspects to transportation related litigation in the states’ courts. These general categories of issues, as presented in the specific disputes brought to the state supreme courts in litigation, highlight the state level transportation policy development of the Jacksonian decade. In addressing the often routine disputes between landowner and transportation entrepreneur, the courts necessarily faced the core transportation policy issues of the times: who has the authority to regulate transportation (Category 1); what is fair (Category 2); who pays (Category 3); who is responsible for what (Category 4); and what is the law (Category 5). The framework issues provide a means to examine the re-

165. Scheiber, supra note 27, at 18.

sponses as revealed in the words of the decisions of the state supreme courts of the period.

Hopefully, this brief examination of transportation related state supreme court decisions from the Jacksonian decade offers some insight into what issues were brought to the courts as well as how those issues were addressed. The disputes were generated by a society caught up in rapidly changing times. They were based on clashes grounded in the transition towards new modes of transportation and the regulatory policies needed to ensure the public’s welfare. The courts responded by reaching decisions that attempted to resolve the conflicting tensions of the times. In addition to dispute resolution, the courts’ decisions also reflected society at large. Study of the written records of the resolutions and rationales of the judges in these cases serves as a useful framework for understanding the judiciary as well as changes within American society in general at that time. As this study shows, the state supreme courts of the Jacksonian decade were players in the phenomenon of change known as the American Transportation Revolution.
The I-70 Mountain Corridor Expansion Project: Does the Department of Transportation Act of 1966 Apply?

Megan A. Yahr*

I. INTRODUCTION

The Colorado Department of Transportation ("C-DOT") intends to widen the Interstate 70 ("I-70") mountain corridor both in Dowd Canyon and from the Eisenhower-Johnson Memorial Tunnels to Floyd Hill.1 The proposed project will take fifteen years to complete, from 2010 to 2025,2 and involves widening thirty-seven miles of highway from four to six lanes.3 Improvements will also be made to parts of I-70 that are located outside of the expansion area.4 The project’s purpose is to increase the

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* J.D. Candidate, May 2006, University of Denver Sturm College of Law.


2. Id. at ES-41.

3. See id. at ES-3 ("Termini of Project Alternatives" figure and index shows that the project will expand I-70 from mileposts 169 to 172 and from 214 to 248).

4. See, e.g., COLO. DEP’T OF TRANSP., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL. IMPACT STATEMENT (PEIS), 3.16 SECTION 4(f) EVALUATION, at 3.16-3 (2004) [hereinafter DRAFT PEIS SECTION 4(f) EVALUATION], available at http://www.i70mtncorridor.com/Webready/PEIS/3.16_Section_4f_Evaluation.pdf (last visited Jan. 14, 2006) ("Upgrades to the Glenwood Springs westbound off-ramp are required due to traffic congestion onto I-70. Upgrade requirements include lengthening and widening the ramp.")
capacity of the corridor, improve accessibility, increase mobility, and decrease congestion.\(^5\)

Naturally, a project of this magnitude will have many repercussions. The expansion will undoubtedly affect travelers, residents along the I-70 corridor, business activities, nearby properties, the natural environment, and wildlife. Additionally, some of these impacts implicate protective statutes including section 4(f) of the Department of Transportation Act of 1966.\(^6\)

In Part I, this Article will discuss the history and policy behind section 4(f). Part II summarizes the Act’s statutory requirements, while Part III examines the case law and regulatory interpretations of use, the primary determinant of whether section 4(f) applies to a project. Part IV of this Article provides a cursory list of the protected resources located in the vicinity of the I-70 corridor. Part V discusses the projected adverse impacts that C-DOT recognizes in its preliminary study of the effects of the proposed, six-lane highway facility. Finally, in Part VI, this Article asserts that the I-70 expansion project will use protected resources under the statute. As a consequence, section 4(f) applies, forcing the consideration of route and means-of-transportation alternatives.\(^7\) Furthermore, if one or more of the alternatives satisfies section 4(f)’s qualifications, C-DOT must facilitate construction of a qualifying alternative in lieu of the proposed project.\(^8\)

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5. **Draft PEIS Executive Summary, supra** note 1, at ES-1.


   (a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. (b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities. (c) ... The Secretary may approve a transportation program or project ... requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

*Id.*

7. See 49 U.S.C. § 303(c) (providing that “[t]he Secretary may approve a transportation program or project ... only if: (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . .” (emphasis added)).

8. See *id.* (providing that “[t]he Secretary may approve a transportation program or pro-
II. BACKGROUND

Two competing policies pervade federally funded roadway construction: (1) encouraging the development and improvement of interstate and state roadway systems and (2) protecting parklands and historic resources.9 Naturally, the establishment of the federal highway aid program in 1916 and subsequent statutes aimed at creating a strong national highway system favored roadway construction.10 These early laws had little or no consideration of the environment and historic properties.11 As a result, the unbridled construction of thousands of miles of paved roadways led to massive destruction of public resources that can never be replaced.12

Preserving parklands and historic resources first became a consideration in the routing and funding of roadway projects in the 1960s with the following federal legislation:13 section 4(f),14 the National Historic Preservation Act of 1966,15 the Federal Aid Highway Act of 1968,16 and the National Environmental Policy Act of 1969 ("NEPA").17 These landmark statutes responded to increasing public concern for the preservation of the country's natural splendor and historic legacy.18

Section 4(f) declares as national policy the making of a "special effort" to preserve the nation's remaining parklands and historic resources.19 This policy applies to proposed roadway construction and improvement projects that are funded by federal money distributed by the Federal Highway Administration ("FHWA"), pursuant to the Federal Aid Highway Act of 1968.20 While NEPA dictates the procedure for federally construction projects affecting public resources,21 section

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10. Id. at 633-35 (citing and discussing the Act of July 11, 1916, ch. 241, 39 Stat. 355 (1916), the 1944 Congressional chartering of the Interstate Highway System, and subsequent statutes that were established to enable highway projects).
11. Id. at 634 (citations omitted).
12. Id. at 634-35.
13. Id. at 635-36 (citations omitted).
18. Miller, supra note 9, at 638-39.
19. Id. at 639; 39 AM. JUR. 2d Highways, Streets, and Bridges § 57 (2004).
21. See 42 U.S.C. § 4332 (setting forth the procedural requirements federal agencies must follow in order to promote the national policy of protecting the human and natural environments).
4(f) is substantive. It provides the Secretary of Transportation with explicit instruction of what considerations to make when the projected impacts use certain public resources.\textsuperscript{22} If a project fails to meet section 4(f)'s requirements, it is ineligible to receive federal funding.\textsuperscript{23}

Section 4(f)'s purpose, as interpreted by the Supreme Court of the United States in \textit{Citizens to Preserve Overton Park v. Volpe}, is to protect certain types of public lands from destruction caused by federally funded roadway projects except in very unusual circumstances.\textsuperscript{24} Because the statute's legislative history is ambiguous,\textsuperscript{25} the Court determined that the underlying intent of the statute is ascertainable through an analysis of its language.\textsuperscript{26} The preservation of public lands is of "paramount importance" when considered against projected cost and community disruption caused by the construction of a project's alternatives.\textsuperscript{27} Therefore, cost and community disruption must reach "extraordinary magnitudes" in order to prevail over the preservation of public lands.\textsuperscript{28}

\section*{III. Statutory Overview of Section 4(f)}

Before inquiring into whether a proposed project satisfies the requirements of section 4(f), three threshold criteria must be met in order for the statute to apply. First, the project must directly or indirectly use\textsuperscript{29} certain types of land.\textsuperscript{30} Second, the land used must be public land that is utilized for at least one of the following purposes: park, recreation, wildlife or waterfowl refuge, or historic site.\textsuperscript{31} Third, the public land must

\begin{thebibliography}{9}
\item 22. \textit{See} 49 U.S.C. § 303(c)(1), (2) (mandating that if a project uses protected lands, the Secretary must consider feasible and prudent alternatives to the use of such lands and must ensure that the project seeks to minimize harm to such lands).
\item 24. \textit{Overton Park}, 401 U.S. at 411-13 & n.29 (citations omitted).
\item 25. \textit{Id.} at 413 n.29 (citing the disagreement between the Legislative Committee's view of the statute as merely a "general directive" to the Secretary, allowing for broad discretion, and the view of the Senate Committee emphasizing the Secretary's limited authority) (citations omitted).
\item 26. \textit{Id.} ("Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.").
\item 27. \textit{Id.} at 412-13 ("Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance.").
\item 28. \textit{Id.} at 413 ("The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.").
\item 29. 49 U.S.C. § 303.
\item 30. \textit{La. Envtl. Soc'y v. Coleman}, 537 F.2d 79, 84-85 (5th Cir. 1976) (holding that section 4(f) applied to the project but there were no feasible or prudent alternatives to the use of parkland) (citations omitted).
\item 31. 49 U.S.C. § 303; Michael J. Kaplan, Annotation, \textit{Construction and Application of § 4(f) of Department of Transportation Act of 1966} (49 U.S.C.A. § 1653(f)), as Amended, and § 18(a) of
\end{thebibliography}
have national, state, or local significance.\textsuperscript{32} If these criteria are met, the Secretary of Transportation must conduct a section 4(f) evaluation of the proposed roadway project, which requires a study of alternatives and strategies to minimize harm to protected land.\textsuperscript{33} Section 4(f) requires that the Secretary of Transportation disapprove funding to a proposed project unless: (1) "no prudent and feasible alternatives" to the use of the protected land exist and (2) all possible designing and planning has been conducted in an effort to minimize harm to the protected land.\textsuperscript{34} Summaries of these requirements and the applicable standard of review for section 4(f) claims follow.

A. "Feasible and Prudent Alternatives"

Once it has been determined that a project will use a protected resource, section 4(f) requires the FHWA to determine whether there are feasible and prudent alternatives to the use of the land; if there are, the project must adopt one of the alternatives.\textsuperscript{35} Since enactment of section 4(f), the FHWA promulgated 23 C.F.R. § 771.135 to address application of the statute.\textsuperscript{36} However, section 771.135 provides little guidance concerning the meanings of the terms "feasible" and "prudent."\textsuperscript{37} Therefore, case law constitutes the vast majority of this body of jurisprudence.

1. "Feasible"

"An alternative is infeasible only if a proposed project cannot be constructed as a matter of sound engineering."\textsuperscript{38} This definition was adopted by the United States Supreme Court in \textit{Overton Park},\textsuperscript{39} and has become the universal method of determining feasibility.\textsuperscript{40} Because few designs are technically infeasible, the majority of section 4(f) disputes focus on whether an alternative is prudent.\textsuperscript{41}

\footnotesize
\textit{Federal Aid Highway Act of 1968} (23 U.S.C.A. § 138) Requiring Secretary of Transportation to Determine that All Possible Planning for Highways has been Done to Minimize Harm to Public Park and Recreation Lands, 19 A.L.R. Fed. 90 (2004).

\begin{itemize}
  \item 32. 49 U.S.C. § 303.
  \item 33. 23 C.F.R. § 771.135(i) (2005); Kaplan, \textit{supra} note 31, § 2(a).
  \item 34. 49 U.S.C. § 303(c).
  \item 36. 23 C.F.R. § 771.135.
  \item 37. \textit{See id.}, § 771.135(a)(1)(i) (requiring that protected lands may not be used unless there are no prudent or feasible alternatives, but failing to explain the definitions of "feasible" and "prudent").
  \item 39. \textit{Overton Park}, 401 U.S. at 411.
  \item 41. Ferster & Merritt, \textit{supra} note 35, at 39.
\end{itemize}
2. "Prudent"

Section 771.135 does little to explain the meaning of the term "prudent." The regulation does, however, adopt language from the Supreme Court's opinion in Overton Park. The case involved a proposed segment of interstate highway that would have been constructed through a city park in Memphis, Tennessee, destroying a portion of the land. The Secretary of Transportation asserted that the determination of whether an alternative is prudent involved a "wide-ranging balancing of competing interests," weighing the detriment caused against the cost of alternative routes, community disruption, safety considerations, and other factors.

However, the Supreme Court rejected this approach, stating that if the Secretary's balancing test was what Congress had intended, the test would always significantly weigh in favor of using public lands, making the statute meaningless. Public lands are generally the cheapest lands to acquire, and use of public lands allows for minimal community disruptions. Rather, section 4(f) contemplates that while cost, safety, and community disruptions are not negligible factors, they should not be on an "equal footing" with the preservation of protected resources. The Court emphasized that protection of parkland is of "paramount importance," and section 4(f) imposes a "plain and explicit bar" on the construction of roadways that use protected resources. Therefore, exceptions to this bar should only be made in truly unusual situations.

Overton Park, thus, affirmed an overriding concern for the preservation of protected lands, which is the foundation of section 4(f), in stating that "[s]upporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid

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42. See 23 C.F.R. § 771.135(a)(1)(i) (providing that protected lands may not be used unless there are no prudent or feasible alternatives, but failing to explain the definitions of "feasi-1" and "prudent").
43. Overton Park, 401 U.S. at 413. The Court states, The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.
44. Id. at 406.
45. Id. at 411.
46. Id. at 412.
47. Id.
48. Id.
49. Id. at 412-13.
50. Id. at 411.
51. Id.
[protected] properties or that the cost, social, economic, and environmental impacts, or the community disruption resulting from such alternatives reach *extraordinary magnitudes*. This weighted balancing test, allowing protected resources considerable deference, is the standard that must be implemented to determine whether an alternative is prudent.

Since the *Overton Park* case, many of the lower federal courts have failed to follow the Supreme Court's stringent directives. Post-*Overton Park* cases appear to employ a more forgiving approach concerning the alleged imprudence of alternatives. For example, courts have found "unique problems" extant in common highway conditions, such as traffic and congestion, whether existing or merely predicted.

**B. “All Possible Planning to Minimize Harm”**

Even if no feasible and prudent alternatives exist, a roadway construction or improvement project can still violate section 4(f). Under section 4(f), the FHWA must undertake "all possible planning to minimize harm" to protected resources before the Secretary of Transportation can approve a project. This inquiry, which strengthens protection of section 4(f) resources, is triggered when a project and its proposed alternatives use a protected resource. Section 771.135 does not provide guidance of

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52. 23 C.F.R. § 771.135(a)(2) (emphasis added).
53. Miller, *supra* note 9, at 643.
55. *Id.; see e.g.,* Comm. to Pres. Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1548-53 (10th Cir. 1993) (upholding the district court's grant of summary judgment and determination that alternatives were imprudent because they failed to accommodate the project's purposes of eliminating congestion, accommodating projected traffic needs, increasing safety, and decreasing fire department response times. Alternatives also presented "unique problems" because of higher road user costs and higher construction costs.); Druid Hills Civic Ass'n v. Fed. Highway Admin., 772 F.2d 700, 715-16 (11th Cir. 1985) (holding that a no-build alternative's failure to fulfill a project's purpose provided reasonable grounds to conclude that the alternative was imprudent (emphasis added)); Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1455-58 (9th Cir. 1984) (citing Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 411-13 (1971) in holding that a no-build alternative is not imprudent due to the mere fact that it failed to satisfy projected traffic needs); *see also* *La. Envtl. Soc'y*, 537 F.2d at 85 (holding that a ten-year delay resulting from the rejection of a project did not present a "unique problem"). The Ninth Circuit in *Stop H-3*, citing *Overton Park* as authority, stated,

The mere fact that a "need" for a highway has been "established" does not prove that not to build the highway would be "imprudent" under *Overton Park*. To the contrary, it must be shown that the implications of not building the highway pose an "unusual situation," are "truly unusual factors," or represent cost or community disruption reaching "extraordinary magnitudes."

*Stop H-3*, 740 F.2d at 1455 n.21.
57. 49 U.S.C. § 303(c)(2).
58. Miller, *supra* note 9, at 643-44; *see e.g.,* Citizens to Pres. Wilderness Park, Inc. v. Adams, 543 F. Supp. 21, 28-29 (D. Neb. 1981) (failing to demonstrate that the Secretary's action in
the requirements of this second course of examination.\textsuperscript{59}

The lower federal courts have discussed what it means to undertake all possible planning to minimize harm.\textsuperscript{60} Minimizing harm requires a weighing of total harm created by each alternative and choosing the one alternative that creates the least harm.\textsuperscript{61} If an alternative does not minimize harm to a protected resource, the Secretary of Transportation does not have to accept it in lieu of the proposed project and is free to choose from “equal damage alternatives.”\textsuperscript{62}

What makes an alternative imprudent is not relevant to determining whether an alternative would minimize harm to the value of protected land.\textsuperscript{63} However, if an alternative that does minimizes harm is also imprudent, the Secretary is not required to consider it as a viable alternative to the project.\textsuperscript{64} Therefore, if one alternative minimizes harm above all others, the Secretary can only reject that alternative if it is infeasible, imprudent, or presents truly unusual factors.\textsuperscript{65} In addition, this line of evaluation considers the mitigation measures of the project and its alternatives that reduce adverse impacts.\textsuperscript{66}

The “all possible planning to minimize harm” line of questioning was clearly intended to provide an additional safeguard for protected resources.\textsuperscript{67} However, in practice, most of the lower federal courts have been reluctant to overturn the Secretary of Transportation’s finding that all possible planning to minimize harm has occurred.\textsuperscript{68} On the one hand, this may indicate a trend toward deference to the Secretary’s choice among alternatives that use a protected resource.\textsuperscript{69} On the other hand, the trend may indicate the Department of Transportation’s improved sophistication in planning methodology, ensuring that every alternative uses the protected resource in question, therefore, enabling the Secretary to select the proposed project.\textsuperscript{70}

\textsuperscript{59} See 23 C.F.R. § 771.135(a)(1)(ii) (providing the requirement of undergoing “all possible planning to minimize harm,” but not explaining what this entails).

\textsuperscript{60} See, e.g., La. Envtl. Soc’y, 537 F.2d at 86.

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Miller, supra note 9, at 644.

\textsuperscript{67} Id. at 643.


\textsuperscript{69} Id.

\textsuperscript{70} Id.
C. Standard of Review

The United States Supreme Court in Overton Park determined that judicial review is available for alleged violations of section 4(f) and set forth the applicable standard of review. The Court stated that because the language of section 4(f) provides "clear and specific directives," the Secretary of Transportation's decision is subject to judicial review. The Secretary's decision is not an action "committed to agency discretion." Having established judicial review, the Overton Park Court looked to the Administrative Procedure Act ("APA") to determine the applicable standard of review. According to section 706(2)(A) of the APA, a reviewing court must set aside an agency's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the action failed to satisfy statutory, procedural, or constitutional mandates.

The Court further stated that although the Secretary's decision is entitled to a "presumption of regularity," the presumption should not "shield his action from a thorough, probing, in-depth review." Such a review consists of three basic inquiries. First, a reviewing court must determine "whether the Secretary acted within the scope of his authority." The Court noted that section 4(f)'s "clear and specific directives" only permit the Secretary to make a small range of choices. A reviewing court must decide whether the Secretary's decision is reasonably within this limited range, considering specific facts of the case. Second, a reviewing court must establish whether the Secretary's actual decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as required by the APA section 706(2).

72. Id. at 410-11.
73. Id at 410.
74. Id. at 413 (citing 5 U.S.C. § 706 (1964)).
75. Id. at 414 (citing 5 U.S.C. § 706(2)(A) (1964)).
76. Id. at 415.
77. Id. (citing Schilling v. Rogers 363 U.S. 666, 676-77, 680 (1960)).
78. Id. at 411.
79. Id. at 416.
80. Id. The Court in Overton Park noted two sub-issues within the first inquiry: "whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems[,]" and whether "the Secretary could have reasonably believed that in this case there are no feasible [or prudent] alternatives or that alternatives do involve unique problems." Id. Further, in La. Envtl. Soc'y, the Fifth Circuit interpreted this line of inquiry to include a determination of whether the Secretary could have reasonably believed there was no use of Section 4(f) protected land. 537 F.2d at 83.
81. Overton Park, 401 U.S. at 416 (quoting 5 U.S.C. § 706(2)(A)). In addition, the Overton
IV. USE: CASE LAW AND REGULATORY INTERPRETATIONS

The mandates in section 4(f) that direct the FHWA to consider feasible and prudent alternatives and planning to minimize harm only come into play upon the determination that a proposed project will use protected resources. Thus, use of protected resources is the principal issue and the single determinant of whether section 4(f) applies to a project. Perhaps it is because this issue is of such primary importance, together with the ambiguity of the term use, that the Department of Transportation promulgated section 771.135. The regulation facilitates a better understanding of the term use under section 4(f).

Section 771.135(p) provides that use occurs when land is directly or constructively impacted, permanently or temporarily. The Supreme Court has never addressed which scenarios constitute use of protected resources. However, the lower federal courts have created a rich precedent, providing considerable guidance to the nebulous term. For example, the Ninth Circuit Court of Appeals in Adler v. Lewis recognized that “[a] site is considered ‘used’ whenever land from or buildings on the site are taken by the proposed project, or whenever the proposed project has significant adverse air, water, noise, land, accessibility, esthetic, or other environmental impacts on or around the site, . . . .”

A. DIRECT USE

Direct use of protected land and resources is not an issue in section 4(f) arguments because it involves the actual taking of land, which is indisputable. Simply, direct use arises when a program physically encroaches into a boundary of protected land and permanently incorporates

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*Park Court stated that in making the second inquiry, a reviewing court “must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Id. (citations omitted).

82. Id.
83. Id. at 417.
85. See 23 C.F.R. § 771.135(p) (providing examples of when use occurs).
86. See id.
87. Adler v. Lewis, 675 F.2d 1085, 1092 (9th Cir. 1982) (relying on Stop H-3 Ass’n v. Coleman, 740 F.2d 1442 (9th Cir. 1984)).
that land into a transportation facility.\textsuperscript{88} Regardless of how small or insignificant the encroachment, if it is permanent, section 4(f) protection applies.\textsuperscript{89}

B. **Constructive Use**

Section 4(f) also applies to constructive use. Constructive use occurs when a program indirectly impacts a protected resource.\textsuperscript{90} The concept of constructive use was a product of the federal courts' attempt to consider the text of section 4(f) in conjunction with the spirit of *Overton Park*.\textsuperscript{91} Relying on *Overton Park*’s decision, which provides that the word use should be broadly construed, together with section 4(f)’s policy to protect certain lands and a presumption in favor of violation when use has occurred, a majority of courts have held that section 4(f) applies to constructive use.\textsuperscript{92} Promulgation of section 771.135 confirmed the majority opinion.\textsuperscript{93}

Section 771.135(p)(2) provides that constructive use arises when a “project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired.”\textsuperscript{94} Section 771.135(p)(2) further provides that “[s]ubstantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.”\textsuperscript{95} Thus, a key disparity between direct and constructive use is in the level of impact required to trigger section 4(f).\textsuperscript{96} Harm can be *de minimis* if it is the result of direct use; conversely, harm must be substantial if it results from constructive use.\textsuperscript{97} Section 771.135(p)(4) and (5) provide a non-exclusive list of what constitutes constructive use.\textsuperscript{98} The regulation recog-

\textsuperscript{88} See 23 C.F.R. § 771.135(p) (using the language “permanent incorporation” which means direct use); Ferster & Merritt, *supra* note 35, at 39.

\textsuperscript{89} *La. Envtl. Soc’y*, 537 F.2d at 84 (recognizing that “[a]ny park use, regardless of the degree, invokes [section] 4(f).”).


\textsuperscript{91} *See La. Envtl. Soc’y*, 537 F.2d at 84 (discussing Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402 (1971) and section 4(f)).

\textsuperscript{92} Miller, *supra* note 9, at 637; *see e.g., La. Envtl. Soc’y*, 537 F.2d at 84; Brooks v. Volpe, 460 F.2d 1193, 1194 (9th Cir. 1972) (holding that plaintiffs successfully demonstrated that the project would use parkland, despite the fact that no land would actually be taken).

\textsuperscript{93} See 23 C.F.R. § 771.135(p) (providing that use occurs “(iii) [w]hen there is a constructive use of land.”).

\textsuperscript{94} *Id.* § 771.135(p)(2).

\textsuperscript{95} *Id.*


\textsuperscript{97} *Id.* (holding that the noise level was not “significant enough to constitute a constructive taking.”).

\textsuperscript{98} See 23 C.F.R. § 771.135(p)(4)-(5).
nizes five proximity effects as constructive: noise, adverse esthetic impacts, vibration, restricting access to protected land, and ecological intrusions in wildlife or waterfowl refuges. However, the regulation applies to all potential impacts of federally funded construction projects, specified and unspecified.

Case law illustrates the various scenarios falling within and outside of the regulatory boundaries. Courts have enunciated two basic standards to determine whether protected land or resources have been constructively used: (1) proximity of the harm to the protected area and (2) impairment of a resource’s value, significance, or utility. Yet, even when individual impacts are not enough to constitute constructive use by these standards, a court may still conclude that a protected resource has been used if the cumulative effects of adverse impacts substantially impair the resource’s utility.

For example, in Coalition Against a Raised Expressway, Inc. v. Dole, the Eleventh Circuit Court of Appeals held that a project’s anticipated air pollution, noise, and adverse esthetics constructively used neighboring historic landmarks. In Coalition Against a Raised Expressway, the court examined a proposed raised freeway that would run in-between downtown Mobile, Alabama and the Mobile River. The facility would stand adjacent to several visual and historic landmarks. Referring to the nearness of the freeway to the landmarks, the court determined that the project’s proximity effects constituted constructive use. The freeway would add to the number of vehicles passing alongside the protected properties, causing an increase in air pollution and noise levels substantially in excess of the Environmental Protection Agency’s (“EPA”) guidelines. The freeway would also impair the view between downtown and the Mobile River, and debris from the freeway “would lessen the beauty of the architecture itself.” The court noted that although, individually, the impacts may not rise to the level of use, the cumulative effect would significantly impair the utility of the protected sites.

99. Id. § 771.135(p)(4)(i)-(v).
100. See id. § 771.135(p)(4)-(5).
101. Miller, supra note 9, at 647 (citations omitted).
102. See id. at 648.
104. Id. at 805.
105. Id.
106. Id. at 811.
107. Id. at 811-12 (“The final EIS predicts that the noise level for these properties would rise to between seventy-five and eighty decibels. This is substantially greater than the Environmental Protection Agency’s goal of fifty-five decibels.”) (citations omitted).
108. Id. at 812.
109. Id.
Alternatively, in *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, the Fifth Circuit Court of Appeals held that esthetic impacts, alone, constituted constructive use.\(^{110}\) The proposed project would widen an existing highway running adjacent to an urban park and a historic building in Fort Worth, Texas.\(^{111}\) The project would expand the highway within five to twenty feet of the protected resources, and would create an “awning-like effect” upon the historic building, shading it and obstructing the view of its façade.\(^{112}\) The court held that the program constructively used the protected sites, imposing an “uninviting” and “inhumane quality” upon the urban park.\(^{113}\) The nearness of the highway would also “detract from [the] carefully conceived design” of the historic building.\(^{114}\)

In *Brooks v. Volpe*, the Ninth Circuit Court of Appeals established the constructive use doctrine.\(^{115}\) The *Brooks* court determined that the proposed highway, which would encircle a public camping site in Washington’s Cascade Mountain Range, would use the site.\(^{116}\) The court stated, “The word ‘use’ is to be construed broadly in favor of environmental statements in cases in which environmental impact appears to be a substantial question.”\(^{117}\) Years later, in *Stop H-3 Ass’n v. Dole*, the Ninth Circuit impliedly held that constructive use resulted from a project’s noise, pollution, and esthetic impacts.\(^{118}\) The proposed highway construction project in Oahu, which would pass within 100 to 200 feet of an archeological landmark, would constitute a constructive use.\(^{119}\) The court observed that it was irrelevant that the archeological landmark (a petroglyph rock) had been moved a few feet from its original location as it still formed the “basis of a historic site.”\(^{120}\)

In *Sierra Club v. United States Department of Transportation*, the dis-

\(^{110}\) See *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 436, 441-42 (5th Cir. 1985) (stating that the highway would give the park an “uninviting” and “inhumane quality” as well as create an “awning-like effect” to an adjacent building).

\(^{111}\) Id. at 426-27.

\(^{112}\) Id. at 427.

\(^{113}\) Id. at 435, 441-42.

\(^{114}\) Id. at 435-36.

\(^{115}\) See *Brooks*, 460 F.2d at 1194 (relying on *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971) in determining that the term use is to be broadly construed); *Miller, supra* note 9, at 647 (providing that “the Ninth Circuit first established the constructive use doctrine in *Brooks v. Volpe.*”).

\(^{116}\) *Brooks*, 460 F.2d at 1194.

\(^{117}\) Id. (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971)).

\(^{118}\) See *Stop H-3*, 533 F.2d at 445 (holding that the archeological site, and “its immediate environs, qualify for protection under section 4(f)” and citing *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) in concluding that the proposed highway would use land from the nearby archeological site).

\(^{119}\) Id. at 439, 445.

\(^{120}\) Id. at 445.
district court held that esthetic impacts, alone, and impacts on recreation, wildlife, vegetation, and hydrology constituted constructive use. The court examined a highway construction project located in close proximity to Mcnee Ranch State Park, a recreation and wilderness area in California. The cuts and fills of a nearby mountain would be visible to park visitors from certain locations within the park, and re-vegetation efforts to hide these impacts were not expected to be successful. In addition, the project's adverse impacts on recreation and wildlife would rise to the level of use. The hiking trails would have to be rerouted, and the unspoiled wilderness would be interrupted by the highway. The proposed highway would also cause noise levels to increase and would negatively affect the vegetation and hydrology within the protected area.

Conversely, the district court in Falls Road Impact Committee, Inc. v. Dole held that a project's noise and esthetic impacts did not constitute constructive use of a neighboring park. The proposed highway improvement project would run adjacent to Lime Kiln Park in Grafton, Wisconsin. Although area residents testified that they believed the aesthetics of Lime Kiln Park would be adversely affected, the court stated that increased traffic, alone, was not a serious enough impact. The court observed that the projected noise increase would be below the design noise level (the upper level of acceptable noise), and the program would not widen the existing highway into the park. The court noted that the project would improve access to Lime Kiln Park and increase safety by building sidewalks, mitigating any increased danger to park visitors.

In Concerned Citizens Coalition v. FHWA, the district court concluded that a project's noise impacts did not rise to the level of constructive use. The construction of the proposed highway improvement project on an existing right-of-way, in Lafayette, Louisiana, would not substantially impair the value of the surrounding park. The court de-

122. Id. at 1328.
123. Id. at 1330-31.
124. Id. at 1331.
125. Id.
126. Id.
128. Id. at 689.
129. Id. at 694.
130. Id. at 693.
131. Id.
133. See id.
termed that the noise increase attributable to the improved facility did not constitute a constructive use of the park because the highway’s existing noise levels were already above the FHWA’s upper limit.134

1. The Tenth Circuit

Because the I-70 mountain corridor is located in Colorado, courts in the Tenth Circuit will address any claims that the proposed expansion project violates section 4(f). Therefore, understanding the Tenth’s Circuit’s approach to use is essential. The Tenth Circuit tends to interpret use broadly, as exemplified by the following discussion of cases.

In Davis v. Mineta, the Tenth Circuit Court of Appeals held that esthetic and noise impacts constituted constructive use.135 The court evaluated a plaintiff’s motion to enjoin the construction of a highway that would bisect a public park located on the Jordan River in Utah.136 The court granted the motion, concluding that the project would adversely affect the esthetic attributes of the park by disrupting “the natural setting and feeling of the park.”137 In addition, “noise levels [were] expected to increase at least ten decibels” in some areas and as much as twenty decibels in other areas, nearly tripling the noise levels in some areas of the park.138

Similarly, in National Parks and Conservation Ass’n v. FAA, the Tenth Circuit held that noise impacts constituted constructive use of a park.139 The project would construct a new airport adjacent to the Glen Canyon National Recreation Area in Utah.140 Although the FAA claimed that the project would not significantly impact the recreational utility of the park, the court concluded otherwise, recognizing that park visitors would have to experience double the amount of audible aircraft noise.141 The court noted that a visitor would hear an additional fifteen to twenty-five minutes of traffic on some days.142

C. Temporary Use

Having addressed which permanent impacts constitute use under section 4(f), this Article will next discuss temporary impacts. Pursuant to

134. Id. The highway’s pre-improvement noise level was 71 dBA, four decibels higher than 67 dBA, the upper limit for noise in park areas established by the FHWA. The improved facility would have an anticipated noise level of 75 dBA. Id.
135. See Davis v. Mineta, 302 F.3d 1104, 1109, 1115-16 (10th Cir. 2002).
136. Id. at 1109, 1112.
137. Id. at 1115-16.
138. Id. at 1112, 1115, 1124-25.
139. See Nat’l Parks & Conservation Ass’n v. FAA, 998 F.2d 1523, 1532-33 (10th Cir. 1993).
140. Id. at 1525.
141. Id. at 1532-33.
142. Id. at 1532.
section 771.135(p)(7), temporary impacts resulting from a transportation project do "not constitute a 'use' within the meaning of section 4(f)" when: (i) duration of the impact is less than the time needed for construction; (ii) both the nature and magnitude of the work impacting the resource are minor; (iii) there is no interference with the purposes of the resource; (iv) the resource is fully restored; and (v) each condition is documented by the appropriate authorities.\textsuperscript{143} Therefore, if any of the named conditions are not satisfied, a temporary impact may qualify as a use within the meaning of section 4(f).\textsuperscript{144} To a small degree, case law supports this principle.

\textit{Coalition on Sensible Transportation v. Dole} addressed the concept that temporary actual impacts can constitute uses of protected lands.\textsuperscript{145} The proposed program, expected to last for only five years, would widen a strip of interstate highway that bordered four parks in Montgomery County, Maryland.\textsuperscript{146} Although recognizing that none of the parks had popular facilities in the area of the highway, the Court of Appeals for the District of Columbia held that the project's temporary construction easements constituted use of the parks.\textsuperscript{147} The court noted that the project would grade the topography of the easements, leaving permanent slopes along the edges of the highway.\textsuperscript{148} The project would kill and remove vegetation, including the removal of fifty-year-old oak trees in order to facilitate construction.\textsuperscript{149} Even though the project would re-vegetate and re-landscape the easements prior to return to their government owners, the court stated that these mitigation measures would not change the fact that the project used the park.\textsuperscript{150} In addition, the fifty-year-old oaks would take two generations to replace.\textsuperscript{151} The court noted that this replacement period would seem permanent to most individuals.\textsuperscript{152}

The concept of temporary constructive use has an even more tenuous relationship with section 771.135 and case law. However, support, albeit negative, does exist. Section 771.135(p)(7) does not distinguish between actual and constructive use in the context of temporary impacts.\textsuperscript{153}

\textsuperscript{143} 23 C.F.R. § 771.135(p)(7)(i)-(v).
\textsuperscript{144} See id. (using the connector term "and" not "or").
\textsuperscript{145} See Coal. on Sensible Transp., Inc. v. Dole, 826 F.2d. 60, 63 (D.C. Cir. 1987) (emphasis added).
\textsuperscript{146} Id. at 62.
\textsuperscript{147} Id. at 63.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} See 23 C.F.R. § 771.135(p)(7) (providing that when specific conditions are fulfilled a temporary use does not constitute a use within the meaning of section 4(f), but does not provide physical use of the land as one of the conditions).
Furthermore, the regulation’s inventory of scenarios that cannot constitute constructive use does not list temporary conditions.\textsuperscript{154} Thus, section 771.135 allows a temporary constructive impact to rise to the level of use, though the very nature of constructive use poses a significant hurdle for those seeking to invoke the doctrine for temporary impacts. For constructive use, proximity impacts of a program must substantially impair a protected resource’s activities, features, or attributes that qualified the resource for section 4(f) protection in the first place.\textsuperscript{155} Therefore, a temporary constructive use must satisfy this strict standard and fulfill section 771.135(p)(7)’s requirements for temporary use.\textsuperscript{156}

\textit{Falls Road Impact Committee v. Dole}\textsuperscript{157} provides a cautionary tale of a failed invocation of temporary constructive use. Nevertheless, the case guides what could result in a successful assertion of the doctrine. As previously mentioned, in \textit{Falls Road}, the program at issue would improve a highway running adjacent to a city park in Grafton, Wisconsin.\textsuperscript{158} The court denied that restricted access to the park during construction amounted to use, acknowledging that construction would only limit the direction of approach to the park and would only last 80 to 100 days.\textsuperscript{159} Further, the public could still use the park during construction.\textsuperscript{160}

The Tenth Circuit case \textit{Valley Community Preservation Commission v. Mineta}\textsuperscript{161} also addresses temporary constructive use. The project at issue involved widening a portion of highway located in close proximity to historical structures located in the Hondo River Valley in New Mexico.\textsuperscript{162} In its opinion, the court distinguished between impacts resulting from construction and permanent impacts from the operation of the facility.\textsuperscript{163} Relying on section 771.135, the court opined that temporary vibration impacts from construction were not considered use, so long as the impacts were mitigated, “through advance planning and monitoring of activities,” to ensure that the value of the historical structures were not substantially impaired.\textsuperscript{164} Acknowledging that the FHWA had in fact adopted a monitoring and repair program, the court held that the project

\begin{itemize}
\item \textsuperscript{154} See id. § 771.135(p)(5) (listing situations that would prevent constructive impacts from rising to the level of use) (emphasis added).
\item \textsuperscript{155} Id. § 771.135(p)(5)(vi).
\item \textsuperscript{156} See id. § 771.135(p)(5)(vi), (7) (examining both sections 771.135(p)(5) and 771.135(p)(7) provides support for this conclusion).
\item \textsuperscript{157} Falls Rd., 581 F. Supp. 678.
\item \textsuperscript{158} Id. at 689.
\item \textsuperscript{159} Id. at 694.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Valley Cmtv. Pres. Comm’n v. Mineta, 373 F.3d 1078 (10th Cir. 2004).
\item \textsuperscript{162} Id. at 1081-82.
\item \textsuperscript{163} Id. at 1092.
\item \textsuperscript{164} Id. (quoting 23 C.F.R § 771.135(p)(5)(ix)).
\end{itemize}
did not use the protected resources.\textsuperscript{165}

V. **Protected Properties Along the I-70 Corridor**

Section 4(f) limits its application to historic sites, wildlife and waterfowl refuges, recreation areas, and parks that have local, state, or national significance.\textsuperscript{166} Furthermore, section 771.135 provides, "The Administration may not approve the use of land from a significant publicly owned park, recreation area, or wildlife and waterfowl refuge, or any significant historic site . . . ."\textsuperscript{167} Significance, therefore, is an essential requirement for the protection of all four of the enumerated resources in section 4(f).\textsuperscript{168} Significance is presumed in the absence of a determination of insignificance of a particular wildlife or waterfowl refuge, park, or recreation area.\textsuperscript{169} Conversely, historic resources require an official determination of significance, meaning that the property is either on or eligible for the National Register of Historic Places.\textsuperscript{170} Historic resources are evidently presumed insignificant until an official determination is made otherwise.

Another restraint imposed by section 771.135 applies only to multiple-use public lands: "section 4(f) applies only to those portions of such lands which function for, or are designated in the plans of the administering agency as being for, significant park, recreation, or wildlife and waterfowl purposes."\textsuperscript{171} Therefore, entire state and national forests are generally not eligible for section (4)(f) protection if they are used for multiple purposes; only the portions that are used or designated for the purposes enumerated in the statute are entitled to protection.\textsuperscript{172} The following discussion gives a non-exhaustive inventory of resources located in the vicinity of the I-70 mountain corridor expansion project that may be entitled to section 4(f) protection.

A. **Properties that have Historic and Cultural Significance**

The proposed project will widen a portion of I-70 that passes

\textsuperscript{165} Id. at 1092.
\textsuperscript{166} 49 U.S.C. § 303(a).
\textsuperscript{167} 23 C.F.R. § 771.135(a)(1).
\textsuperscript{168} See id. (providing that the use of land from a "significant publicly owned public park, recreation area, or wildlife and waterfowl refuge." (emphasis added)).
\textsuperscript{169} Id. § 771.135(c) (providing that section 4(f) permits either federal, state, or local authorities to determine whether a resource is significant and in the absence of such determination, section 4(f) land is presumed to be significant).
\textsuperscript{170} Id. § 771.135(c).
\textsuperscript{171} Id. § 771.135(d) (emphasis added).
\textsuperscript{172} See id. (providing that section 4(f) "only" applies to those portions of land that function as, or have been designated in the administrating agency's plans as significant park, recreation, or wildlife and waterfowl purposes).
through, or is in the vicinity of, a number of historic mining towns.\textsuperscript{173} There are at least 741 public, historic sites within one mile of the corridor,\textsuperscript{174} and of those, 184 sites are either on or eligible for the National Register of Historic Properties.\textsuperscript{175} I-70 operates directly through two districts on the register: the Georgetown-Silver Plume National Historic Landmark ("NHL") District, a five-mile stretch along I-70, and the Hot Springs National Historic District, located in Glenwood Springs.\textsuperscript{176} A much larger district, the state designated "Silver Heritage Area," surrounds the Georgetown-Silver Plume NHL District and extends fifteen miles along I-70.\textsuperscript{177}

\section*{B. Areas Used for Recreation}

There are 224 recreation sites within six miles of the mountain corridor.\textsuperscript{178} Of these recreation sites, there are six ski resorts, two congressionally designated wilderness areas, eighteen river access points, nine public campgrounds, and eighty-six trails.\textsuperscript{179}

The proposed project will widen the I-70 mountain corridor segment operating through the Arapaho National Forest.\textsuperscript{180} The project is also in close proximity to the White River National Forest.\textsuperscript{181} These forests have been designated, at least partially, as recreation resources, where visitors engage in a variety of activities, including snowboarding and skiing, camping, hiking, fishing, and hunting.\textsuperscript{182} In fact, the Forest Service has identified 110 section 4(f) public recreation areas of local, regional, and national significance located in the White River and Arapaho National


\textsuperscript{174} Id. at 2-1.

\textsuperscript{175} Id.

\textsuperscript{176} Draft PEIS Section 4(f) Evaluation, supra note 4, at 3.16-3, -4.

\textsuperscript{177} Id.


\textsuperscript{179} Id.

\textsuperscript{180} Draft PEIS Executive Summary, supra note 1, at ES-7, -8 (indicating in Figure ES-3 the relationship of the national forests to the I-70 mountain corridor).

\textsuperscript{181} Id.

Forests. Of these recreation areas, eighty-six recreation resources are located within six miles of the project area.

Flowing through the Arapaho National Forest and the towns of Idaho Springs and Georgetown, Clear Creek runs adjacent to and crosses under I-70 at various points in the project area. People visit the river to go trout fishing and white water rafting. In addition, Georgetown Lake Recreation Area is also located adjacent to the expansion area. Recreation activities on and around the lake include ice fishing and racing, fishing, hiking, picnicking, and wildlife viewing. Located in the center of the expansion area, Clear Creek County has identified twenty-one public recreation resources within the vicinity of I-70. These areas facilitate numerous recreation activities, such as biking, skiing, soccer, tennis, and fishing.

A total of sixteen National Wilderness Preservation Areas are located in the Arapaho and White River National Forests. Designated wilderness areas under this system are intended not only to maintain a close-to-pristine environment for wildlife, but also to provide many recreational, educational, and scientific opportunities. These opportunities include star gazing, mountain climbing, camping, and studying animals in their natural habitat. People also visit the wilderness areas for scenic and esthetic opportunities, such as experiencing the natural dark and

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184. See Draft PEIS 3.14 Recreation Resources, supra note 178, at 3.14-3 (providing in "Table 3.14-1 Recreation Resources in the Inventory Area" that the Whiteriver National Forest has seventy-three recreation resources within six miles of the corridor, and the Arapaho National Forest has thirteen recreation resources).

185. See generally Revised Reconnaissance Survey, supra note 173, at Figures 4-5, 4-6.


187. Draft PEIS Appendix O, supra note 185, at O-48 (identifying such uses in a copy of a letter from Cynthia Neely, Planning Coordinator, Town of Georgetown, to Teresa O'Neil, Environmental Planner, J.F.Sato & Assocs. (Aug. 9, 2001)).

188. Id. at O-41 (identifying the twenty-one public lands in a letter from Carol Wise, Planning Director, Clear Creek County, to Teresa O'Neil, J.F. Sato & Assocs. (Dec. 5, 2001)).

189. See id.

190. See U.S. Department of Agriculture, Forest Service, White River National Forest, supra note 182 (providing that eight wilderness areas are located in the forest); Wildernet, Colorado National Forests, Arapaho and Roosevelt National Forests, http://areas.wildernet.com/pages/area.cfm?areaID=0210&CU_ID=1 (last visited Mar. 22, 2006) (stating that eight wilderness areas are located in the forest).


192. Id.
quiet of wilderness, and the natural beauty and grandeur of the landscape.\textsuperscript{193}

C. WILDLIFE AND WATERFOWL REFUGES

Currently, no national- or state-designated wildlife and waterfowl refuges are located along the I-70 mountain corridor.\textsuperscript{194} However, the Arapaho and White River National Forests are home for mule deer, coyote, elk, black bear, mountain lion, mountain goat, various species of trout, songbird, boreal toad, and big horn sheep.\textsuperscript{195} In addition, the forests are critical habitat for endangered and threatened species, such as gray wolf, greenback cutthroat trout, and Canadian lynx.\textsuperscript{196}

D. PARKS

Sixty-four parks are located within six miles of the I-70 mountain corridor.\textsuperscript{197} In particular, Clear Creek and Jefferson counties have a total of nineteen public parks within the six-mile zone.\textsuperscript{198} There are no Colorado State Parks or National Parks proximately located to the project area.\textsuperscript{199}


\textsuperscript{196} See supra note 178, at 3.14-3 (indicating in Table 3.14-1the recreation resources located in the project area).

\textsuperscript{197} See id.

VI. PROJECTED IMPACTS FROM THE PROPOSED SIX-LANE INTERSTATE HIGHWAY

By 2025, the anticipated end of the I-70 mountain corridor expansion project, C-DOT anticipates that the human populations in the Front Range and mountain corridor communities will increase by 46% and 101%, respectively.\textsuperscript{200} C-DOT also projects a 65% increase in person trips through the corridor.\textsuperscript{201} These increased trips will generate increased vehicle traffic along the corridor, which, in turn, will result in increased adverse impacts on the land surrounding the project area. Because the project is currently in the Tier 1 phase of investigation,\textsuperscript{202} there is inadequate information addressing projected adverse impacts. C-DOT will not define specific effects until the end stages of Tier 1, when C-DOT has published its final programmatic environmental impact statement, and the FHWA has issued its record of decision.\textsuperscript{203}

Following is a non-exhaustive overview of the project’s impacts recognized in the draft programmatic environmental impact statement (Draft PEIS), its appendices, and the Reconnaissance Survey. This examination generally involves comparisons between the proposed six-lane highway facility and the no-build alternative. Discussion of the proposed six-lane highway facility amalgamates the impacts of the fifty-five and sixty-five miles per hour alternatives. This overview does not consider cumulative effects or induced growth and travel demand resulting from the project.\textsuperscript{204}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{201} Id. at 7.
\item \textsuperscript{202} I-70 Mountain Corridor, Draft PEIS, Draft PEIS - Comment Period has Ended, http://www.i70mtncorridor.com/I70_Deadline.asp (last visited Jan. 26, 2006).
\item \textsuperscript{203} See id.
\item \textsuperscript{204} See generally 40 C.F.R. § 1508.7 (2005) (defining “cumulative impact as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”); Robert B. Noland & Lewison L. Lem, A Review of the Evidence for Induced Travel and Changes in Transportation and Environmental Policy in the United States and the United Kingdom (CENTRE FOR TRANSPORT STUDIES, London, Eng.), Feb. 6, 2001, at 2, available at http://www.cts.cv.imperial.ac.uk/documents/publications/icts00244.pdf (last visited Jan. 26, 2006) (providing that “[a]ny increase in highway capacity (supply) reduces the generalized cost of travel, especially on congested highways, by reducing the time cost of travel. Travel time is the major component of variable costs experienced by those using private vehicles for travel. When any good (in this case travel) is reduced in cost, the quantity demanded of that good increases.”).
\end{itemize}
\end{footnotesize}
A. Noise

Existing noise levels in parts of the I-70 mountain corridor already exceed FHWA and C-DOT noise abatement criteria. The Draft PEIS indicates that the proposed facility will increase the corridor’s noise levels two to three decibels during peak travel times. The project’s impacts are expected to be great in the Idaho Springs area due to the elevated nature of I-70 through the town and the close proximity of steep rock cliffs.

B. Air Quality

In the mountain corridor, particulate matter and carbon monoxide emissions are the air-pollutants of most concern. Particulate matter emissions come in the form of re-entrained road dust, dust and sand on the highway, and hazardous air pollutants, all of which are “resuspended in the air” by motor vehicle travel. While these pollutants are harmful to one’s health, they also impair visibility in the corridor.

The Draft PEIS anticipates that the widened, six-lane transportation facility will adversely affect air quality in the vicinity of I-70. C-DOT projects that in 2025, the use of the widened highway facility will result in carbon monoxide emissions 13% higher than those from the no-build alternative. Particulate matter emissions will be 8% to 15% higher than if the project were not built. In addition, visibility impacts from pollution will be approximately 11% higher than those of the no-build alternative.

206. Id. at 3.12-5.
207. Id. at 3.12-9.
208. Draft PEIS Executive Summary, supra note 1, at ES-25.
209. Id.
210. Id.
211. See id.
213. Id. at 3.1-7.
214. See Draft PEIS Executive Summary, supra note 1, at ES-25 (indicating in Chart ES-25 that the total gross emissions of the six-lane highway alternatives will be about fifty-nine units, as opposed to approximately fifty-three units from the no-build alternative).
C. Visual Blight

By its very nature, esthetic judgment concerning visual resources is subjective. However, according to C-DOT, federal agencies have developed tools to assess esthetic qualities in objective terms. Using these tools, the Draft PEIS indicates that impacts on visibility are expected to be significant. In addition, the Revised Reconnaissance Survey also mentions possible visual impacts as a possible impact on historic properties.

C-DOT anticipates that the project’s landform changes and structural elements will disfigure the landscape in the project area. The potential landform changes involve cuts and fills, retaining walls, and changing open medians to paved, closed medians. The project’s potential structural elements include bridges, piers, columns, elevated platforms, barriers, and fencing. According to C-DOT, the project’s anticipated landform changes will have “strong contrasts” with the existing landscape. Further, some structural elements could have “very strong contrasts” with the land and its resources. While these descriptions of the project’s impacts may appear awkward, they are the method used to explain the potential “degree of dominance or discontinuity anticipated to occur within the landscape setting.” In other words, “contrast” is a method that measures the level of visual disruption the project will likely impose on the landscape.

D. Water Quality

Roadways generally contribute to water pollution, and the I-70 mountain corridor is not an exception. Because the I-70 segment in ques-

216. Id.
217. See PUBLIC HEARING, supra note 200, at 33.
218. REVISED RECONNAISSANCE SURVEY, supra note 173, at 2-2.
219. See DRAFT PEIS APPENDIX L, supra note 215, at L-15 (assessing in Table L-2 the anticipated landform changes and structural elements associated with the project alternatives).
220. See id. (providing in Table L-2 the landform changes).
221. See id. (providing in Table L-2 the structural elements).
222. See id. (providing that “[a] key tool in assessing the change associated with activities in a landscape is the concept of visual contrast. Contrast ratings compare project alternatives with existing conditions element by element, according to the degree of dominance or discontinuity anticipated to occur within the landscape setting[,]” and describing in Table L-2 the strong contrasts associated with the landform changes).
223. See id. (providing in Table L-2 the very strong contrasts associated with the structural elements).
224. Id.
tion runs through river and stream valleys, the highway is located in very close proximity to a number of waterways. Pollution of these waterways results from a mixture of storm-water runoff and contaminants caused by normal highway use and maintenance activities. Surface and structural erosion, re-surfacing and improvements, vehicle and tire wear, and oil and grease deposits represent typical highway runoff pollutant-inducing conditions. The pollutants of concern in the I-70 mountain corridor are suspended solids, chloride, phosphorus, copper, and zinc. C-DOT projects that each of these pollutants will increase at least 17% as a result of the proposed six-lane highway facility.

The fact that the mountain corridor is subject to winter ice and snow conditions exacerbates the pollution problem. In order to maintain safe driving conditions on I-70 during the winter months, C-DOT applies sand and deicers, containing sodium and manganese chloride, to roadway surfaces. Naturally, these applications contribute to highway runoff pollution as sand, sodium and magnesium chloride gradually make their way into nearby rivers, lakes, and streams. It seems intuitive that the project’s goal of adding extra roadway surface to the mountain corridor would increase such contaminants. In fact, C-DOT acknowledges that increased sand and deicer application to accommodate a six-lane traffic facility will impact the Eagle River, Blue River, Clear Creek, and Upper South Platte River watersheds. Depending on the watershed, application is anticipated to increase 7% to 62%. C-DOT states that the most severe of these projected impacts of the six-lane highway alternatives will

226. Id. at 3.4-2.
227. See id. (indicating in Table 3.4-2 the source of highway runoff pollutants of concern in the corridor).
228. See id. (indicating in Table 3.4-2 and Table 3.4-19 the type of pollutants).
229. See id. at 3.4-20 (summarizing in Table 3.4-19 the percent increase from existing conditions in stormwater runoff over three years that correspond to the project alternatives). The graph shows the following pollutant increases: total suspended solids will increase 17-19%; phosphorus will increase 18-20%; chloride will increase 19-20%; dissolved copper will increase 18-19%; and dissolved zinc will increase 18-20%. Id.
230. See id. at 3.4-1. “C-DOT winter maintenance crews apply sand and deicers to I-70 when necessary to maintain road traction and a safe ice- and snow-free road surface. Snow accumulates at higher elevations in the Corridor throughout the winter and must be removed from the highway to maintain mobility.” Id. at 3.4-2.
231. Id. at 3.4-2.
232. Id.
233. See id. at 3.4-19 (summarizing in Table 3.4-18 the percent increase of winter maintenance impacts from project alternatives).
234. See id. (summarizing in Table 3.4-18 the percent increase of winter maintenance impacts from project alternatives).
be in the Clear Creek watershed, with projected sand and deicer applications increasing between 41% and 62%.235

E. V E G E T A T I O N A N D W I L D L I F E

C-DOT projects that the I-70 mountain corridor project and its resulting six-lane facility will impose various adverse impacts on area vegetation and wildlife.236 Among these potential impacts are loss of plant communities and animal habitat, barriers to wildlife movement, and impacts on fisheries.237

C-DOT anticipates that the proposed project will “permanently displace” fifty-eight to seventy-six acres of vegetation in the mountain corridor.238 Direct impacts from construction will affect an additional fifty-six to sixty-one acres of vegetation.239 These new disturbances will adversely impact various vegetation habitats identified in the project area: spruce-fir forest, sagebrush shrubland, ponderosa pine forest, pinion-juniper, mountain shrubland, lodgepole pine forest, grass/forb meadows, douglas-fir forest, and aspen forest.240 Among these effects, the project will impact approximately ten to twenty-five acres of vegetation in the White River National Forest.241 However, C-DOT anticipates that the project will only affect approximately one acre in the Arapaho and Roosevelt National Forests.242

In assessing wildlife impacts, C-DOT identified a number of potential direct and indirect impacts. However, it states that “the primary issue affecting wildlife in the corridor is the interference of I-70 with wildlife movement and animal-vehicle collisions (AVCs).”243 C-DOT refers to this impact as the “barrier effect.”244 Such barriers result from the structure and operation of the transportation facility,245 combined with certain

235. Id. at 3.4-26.
237. Id. at 3.2-1; Draft PEIS Executive Summary, supra note 1, at ES-30.
238. Draft PEIS 3.2 Biological Resources, supra note 236, at 3.2-9.
239. Id.
240. See id. (indicating in Chart 3.2-2 the vegetation types impacted).
241. See id. at 3.2-10 (indicating in Chart 3.2-3 the estimated number of acres affected by the six-lane highway (55 and 65 mph) alternatives in White River National Forest)
242. See id. at 3.2-10 (indicating in Chart 3.2-4 the estimated number of acres affected by the six-lane highway (55 and 65 mph) alternatives in Arapaho and Roosevelt National Forests).
243. Id. at 3.2-11.
244. Id.
245. See id. (“Barriers to wildlife movement include structural, operational, and behavioral impediments to wildlife trying to cross I-70.”).
animal behavior regarding territory, roaming, and migration.246 While no
method exists to accurately measure the relationship between barrier ef-
fect and the design of a transportation facility, C-DOT recognizes that “it
is reasonable to assume that barrier effects would increase for all species
with increased width and the addition of retaining walls, fences, raised
medians, guardrails, and increases in volume and/or speed of traffic.”247
Because the proposed six-lane facility will involve the construction of
“two additional 12-foot-wide traffic lanes,” guardrails, and barriers, C-
DOT projects an augmented barrier effect resulting from the project.248

Essential habitat loss poses a threat to wildlife in the project area.249
C-DOT projects that the new, six-lane highway will permanently affect
ninety-three to ninety-seven acres of key wildlife habitat.250 Construction
will affect an additional seventy-eight acres.251 Even though the con-
struction zone may be reclaimed, C-DOT impliedly recognizes that the
temporary impacts of construction may have lasting effects because re-
claimed habitat may be “altered” permanently.252 Of the affected habi-
tats, the proposed project will most greatly impact that of bighorn sheep.253

Further, C-DOT anticipates that the project will adversely impact
Colorado Division of Wildlife's designated “high-value” fisheries, Gold
Medal fisheries, and fish “species of special concern.”254 According to C-
DOT, the proposed six-lane highway will impact “high value’ fisheries
within the Eagle River, Blue River, and Clear Creek sub-basins.”255 The
project may also impact Gold Medal fisheries in the Eagle River and
Blue River sub-basins.256 Seven species of fish live in these fisheries,

246. See id. at 3.2-5 (stating that “I-70, human population centers, increasing development,
and human intrusion act as barriers to wildlife that historically crossed the Corridor in their
migration.”).

247. Id. at 3.2-11.

248. Id. at 3.2-17.

249. Id.

250. Id. at 3.2-18.

251. Id.

252. See id. at 3.2-17, -18 (recognizing that “the construction disturbance zone . . . would be
reclaimed, although habitat in this area would be altered.”).

253. Id. at 3.2-18.

254. DRAFT PEIS EXECUTIVE SUMMARY, supra note 1, at ES-30; see also COLO. DEP’T OF
TRANS., FED. HIGHWAY ADMIN., I-70 MOUNTAIN CORRIDOR DRAFT PROGRAMMATIC ENVTL.
IMPACT STATEMENT (PEIS), 3.5 FISHERIES, at 3.5-1 (2004) [hereinafter DRAFT PEIS 3.5 FISHER-
IES], available at http://www.i70mtncorridor.com/Webready/PEIS/3.05_Fisheries.pdf (last visited
Jan. 27, 2006) (providing that the Colorado Division of Wildlife determines “high value” fisher-
ies “based on general observations of the quantity/quality of fish populations and recreational
value[,] and Gold Medal fisheries “based on more formal studies of fish population and fish
weight and on ‘exceptional’ recreation value.”).

255. DRAFT PEIS 3.5 FISHERIES, supra note 254, at 3.5-8.

256. Id. at 3.5-7.
which include fish that are indicator species, endangered species, or "species of special concern." 257

VI. DO THE PROJECT'S PROXIMITY IMPACTS RISE TO THE LEVEL OF USE?

Determining whether the I-70 mountain corridor expansion project's proximity impacts constitute use as contemplated by section 4(f), requires a preliminary examination of whether the lands affected are protected resources. As discussed above, in order to qualify as protected, a resource must have these three characteristics: (1) public, (2) significant, and (3) used as a park, recreation area, wildlife or waterfowl refuge, or historic property. 258 An analysis of the nature of the lands adjacent to and in the vicinity of the project demonstrates that many of the lands are likely protected by the statute.

The segment of highway passing through the Georgetown-Silver Plume NHL District is protected under section 4(f). This is because section 4(f) applies to significant historic sites. 259 Section 771.135(e) explains that the significance of a historic site is determined by that site's listing, or eligibility for listing, on the National Register of Historic Properties. 260 As a consequence, all of the structures within the Georgetown-Silver Plume NHL District are significant historic sites under section 771.135 and, therefore, protected under section 4(f). It also follows that section 4(f) protects all other sites in the project area that are listed on or eligible for the National Register. 261

The question remains, however, whether the state-designated "Silver Heritage Area," which is located in Clear Creek County and is much larger than the NHL district, is significant under section 771.135. While many individual historic properties within this area are listed on or eligible for listing on the National Register, the entire area has not been recognized as such. 262 Therefore, the entire Silver Heritage Area is probably not a protected resource at the present time. However, according to section 771.135(e), if the Colorado State Historic Preservation Officer has yet to consult with Clear Creek officials and the administration, the area's inclusion on the National Register (or a determination that the

257. See id. at 3.5-1 (indicating in Table 3.5-1 the types of fish species that inhabit the rivers, streams, and lakes of the corridor).
258. See 49 U.S.C. § 303(c).
259. See id.
260. 23 C.F.R. § 771.135(e).
261. Id.
262. See REVISED RECONNAISSANCE SURVEY, supra note 173, at 4-35 to -56 (listing the historic sites in Clear Creek County that have been or will be considered for National Register of Historic Properties eligibility status).
area is at least eligible for inclusion) may still occur.\textsuperscript{263} This would estab-
lish the Silver Heritage Area as a protected property.

In addition, section 4(f) applies to the recreation areas within the
Arapahoe and White River National Forests because significant recreation
areas are a classification of protected properties listed in the statute.\textsuperscript{264} Therefore, the National Wilderness Preservation Areas within these na-
tional forests are also protected resources, as are all of the mountain cor-
dor’s public recreation areas. In the absence of an explicit
determination that these areas are insignificant, there is a presumption of
significance of all of the public lands that serve recreational purposes.\textsuperscript{265}

Unfortunately, the areas of the Arapahoe and White River National
Forests that serve as wildlife habitat will probably not qualify, in their
entirety, as protected resources because “wildlife habitat” is not enumer-
ated in section 4(f).\textsuperscript{266} Furthermore, neither the State of Colorado nor
the federal government has designated these lands as wildlife or water-
fowl refuges, which would trigger the statute’s protection.\textsuperscript{267} However,
section 4(f) applies to significant recreation areas or parks within the na-
tional forests\textsuperscript{268} that happen to serve as wildlife habitat. Section 4(f)’s
application to significant parks also necessitates the protection of all of
the public parks in the I-70 mountain corridor.\textsuperscript{269}

A. Use of Protected Resources

The I-70 mountain corridor expansion project will directly use only a
handful of the protected resources in the corridor area. Unless the pro-
ject actually takes land from the corridor’s protected parks, recreation
areas, or historical sites, and permanently incorporates it into the I-70
facility, the project will not directly use these resources.\textsuperscript{270}

The Draft PEIS Section 4(f) Evaluation indicates that the project
will directly use eleven protected resources, including the Hot Springs
Historic District, Hot Springs Lodge and Pool, Glenwood Springs Vi-a-
duct, Georgetown-Silver Plume NHL District, Mendota Mine, Dunderberg Mine, Toll House, Darragh Placer, Big Five Mines, Loveland

\textsuperscript{263} See 23 C.F.R. § 771.135(e) (providing, “In determining the application of section 4(f) to
historic sites, the Administration, in cooperation with the applicant, will consult with the State
Historic Preservation Officer (SHPO) and appropriate local officials to identify all properties on
or eligible for the National Register of Historic Places (National Register).”).
\textsuperscript{264} See 49 U.S.C. § 303(c).
\textsuperscript{265} See 23 C.F.R. § 771.135(c).
\textsuperscript{266} See 49 U.S.C. § 303(c) (not mentioning “wildlife habitat,” or its equivalent, as a pro-
tected use for public lands).
\textsuperscript{267} See id.
\textsuperscript{268} See id.
\textsuperscript{269} See id.
\textsuperscript{270} See 23 C.F.R. § 771.135(p)(i).
Ski Area, USFS Visitor Center Parking Lot and Trailhead, and Charlie Tayler Water Wheel Park. However, at this point in time, C-DOT has not addressed constructive use of these or other properties in its section 4(f) evaluation. The following discussion will examine potential constructive use resulting from construction and operation of the proposed six-lane highway.

Concerning other protected resources located in the project’s vicinity, the small amount of available data shows that the anticipated proximity impacts will probably constitute constructive use. This is due to the strong possibility that the project’s indirect impacts will substantially impair protected resources. An even stronger case for constructive use is made when one considers the broad interpretation of use applied by courts, including those in the Tenth Circuit, and the cumulative effect of multiple impacts.

1. Air Quality

While section 771.135 does not provide specific examples or guidance addressing air quality impacts, it does not expressly reject the notion that increased air pollution can constitute constructive use. Coalition Against a Raised Expressway determined that a project’s projected air pollution increases, considered with other factors, constituted a use of adjacent historic buildings. The court observed that the anticipated amounts of pollution would substantially exceed the EPA’s goal.

Constructive use may be possible as a result of the I-70 project’s increased air pollution if considered in conjunction with other impacts. The Draft PEIS states that C-DOT projects increases in carbon monoxide and particulate matter emissions. However, C-DOT anticipates that increased carbon monoxide emissions and particulate matter emissions will not exceed state and federal EPA standards. Further, because an increase in air pollution may be less perceptible than other types of adverse proximity impacts, it may be difficult to demonstrate that the pollution substantially impairs the value of protected resources.

271. See Draft PEIS Section 4(f) Evaluation, supra note 4, at 3.16-13 (listing in Table 3.16-1 the 4(f) properties that the project will directly use).
272. Id. at 3.16-1 (stating, “This Tier 1 analysis of potential 4(f) use has focused on direct footprint uses and has not addressed the potential for constructive uses.”).
274. See discussion supra Part III.B.
275. See 23 C.F.R. § 771.135(p)(2)-(5).
276. Coal. Against a Raised Expressway, 835 F.2d at 811-12.
277. Id. at 812.
278. Draft PEIS 3.1 CLIMATE & AIR QUALITY, supra note 212, at 3.1-6 to -7.
279. Id. (providing that “no exceedances of federal CO standards would occur in the Corridor for any of the alternatives . . . ”).
Air pollution from the project will probably impact forest recreation areas along I-70 more than other protected resources. Generally, those who engage in recreation activities in the Arapaho and White River National Forests enjoy the wilderness and seclusion from the urban world. A significant increase in air pollution may prevent this type of enjoyment, substantially impacting the value of the recreation area. However, for the reasons discussed above, air pollution, alone, does not constitute a strong basis for a section 4(f) violation claim. A consideration of air pollution combined with other impacts makes a much stronger case.

2. Visual Blight

Turning to potential visual impacts, section 771.135(p)(4)(ii) provides that constructive use occurs when

[t]he proximity of the proposed project substantially impairs esthetic features or attributes . . . , where such features or attributes are considered important contributing elements to the value of the resource. Examples of substantial impairment to . . . esthetic qualities would be the location of a . . . facility in such proximity that it obstructs . . . the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historical site which derives its value in substantial part due to its setting.\(^{280}\)

The courts in *Coalition Against a Raised Expressway, I-CARE*, and *Sierra Club* considered visual blight (adverse esthetic impacts) as a decisive factor in determining that the projects in question constructively used protected resources. In *Coalition Against a Raised Expressway*, constructive use resulted from a proposed highway that would impair the view from historic sites to a nearby river, and vice-versa, and debris from the highway would detract from the beauty of the historical buildings’ architecture.\(^{281}\) The *I-CARE* court held that constructive use occurred when a highway expansion project would impose an “uninviting” and “inhumane quality” upon an urban park and would “detract from the carefully conceived design” of a historic building.\(^{282}\) Further, the *Sierra Club* court held that the esthetic impacts of a proposed highway, alone, constituted constructive use of a recreation area and wilderness park because the project’s cuts and fills into a mountain would be visible to park visitors.\(^{283}\)

The Draft PEIS anticipates both “strong” and “very strong” contrasts between the natural scenery surrounding I-70 and the project’s

\(^{280}\) 23 C.F.R. § 771.135(p)(4)(ii).

\(^{281}\) *Coal. Against a Raised Expressway*, 835 F.2d at 811.

\(^{282}\) *I-CARE*, 770 F.2d at 435, 441-42.

\(^{283}\) *Sierra Club*, 664 F. Supp. at 1330-31.
landform changes and structural elements. In addition, the potential increases in entrained dust and pollution will impact visibility in the mountain corridor. Considering the combined effect of these impacts, C-DOT indicates that visual blight may substantially impact protected resources. Because many significant historic resources are located adjacent to the highway, expansion of the highway will more than likely “detract from the carefully conceived design” and architectural beauty of these sites. Constructive use may also result from impairing the view of the historic sites from the surrounding areas, and vice-versa. Likewise, the project’s landform changes and structural elements will potentially interfere with the spectacular mountain and valley views along the corridor, as will decreases in visibility resulting from air pollution.

Expanding the highway will likely substantially impair fishing and white-water rafting activities in Clear Creek, which flows immediately adjacent to I-70 and the project area. The proximity impacts of the widened highway could conceivably impose an “uninviting” and “inhumane” quality upon the natural resource. In this way, the project may also impair the visual attributes of other public parks located adjacent to the highway.

Visual blight could also substantially impair the value of the National Wilderness Preservation Areas and other recreation areas within the Arapaho and White River National Forests. Depending on the location and severity of cuts and other alterations to the landscape resulting from construction, the proposed facility could severely impact the ability to surround oneself in a truly natural setting. Further, increases in pollution resulting from the project may also be visible to visitors to the recreation areas within the National Forests.

3. Noise

Addressing potential noise impacts, section 771.135(p)(4)(i) provides that constructive use occurs when

[t]he projected noise level increase . . . substantially interferes with the use and enjoyment of a noise sensitive facility . . . , such as . . . sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet

284. Draft PEIS Appendix L, supra note 215, at L-15 (listing in Table L-2 the types of anticipated landform changes and structural elements associated with the alternatives as well as their degree of visual contrast).
286. I-CARE, 770 F.2d at 442.
287. See, e.g., Coal. Against a Raised Expressway, 835 F.2d at 812 (determining that the project would also impair the view between downtown and the Mobile River and, thus, constituted constructive use).
288. I-CARE, 770 F.2d at 435, 441-42 (holding that the project constructively used the protected sites where the project imposed an “uninviting” and “inhumane quality” upon the park).
setting is a generally recognized feature or attributable to the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes.\textsuperscript{289}

However, section 771.135(p)(5)(ii) and (iii) moderates the impact of this statement by maintaining that a noise level increase from a transportation facility is not a constructive use if it does not exceed FHWA guidelines, or if noise levels exceed the guidelines, but the increase in noise is "barely perceptible."\textsuperscript{290}

The holdings in \textit{Coalition Against a Raised Expressway} and \textit{Sierra Club} support the position that the projected noise impacts of the I-70 expansion project would likely constitute constructive use of nearby protected resources. In \textit{Coalition Against a Raised Expressway}, the court cited projected noise levels in excess of the EPA's guidelines as one of the reasons why a proposed freeway would use nearby historic resources.\textsuperscript{291} Similarly, the \textit{Sierra Club} court stated that projected noise level increases from a proposed highway would adversely impact a nearby recreation and wilderness park.\textsuperscript{292} It should be noted, however, that both courts relied on additional adverse impacts in order to arrive at their conclusions.\textsuperscript{293}

Conversely, in \textit{Falls Road}, the court determined that the projected noise impacts of increased traffic on an improved highway would not rise to the level of constructive use.\textsuperscript{294} The court's ruling was tempered by the fact that the facility's projected noise increase would not exceed the design noise level.\textsuperscript{295} In addition, the noise effects were only coupled with an unconvincing assertion of esthetic impact.\textsuperscript{296}

Neither section 771.135 nor the cases surveyed in furtherance of this Article indicate that additional negative impacts to those created by noise are required for there to be a constructive use due to adverse noise levels. Nevertheless, a determination of constructive use based solely on noise impacts in the mountain corridor is improbable because the Draft PEIS indicates that the proposed six-lane facility will only increase noise levels by two to three decibels.\textsuperscript{297} A reviewing court would more than likely

\begin{itemize}
\item \textsuperscript{289} 23 C.F.R. § 771.135(p)(4)(i).
\item \textsuperscript{290} \textit{Id.} § 771.135(p)(5)(ii) to (iii).
\item \textsuperscript{291} \textit{Coal. Against a Raised Expressway}, 835 F.2d at 811-12 (determining that "[t]he final EIS predicts that the noise level for these properties would rise to between seventy-five and eighty decibels. This is substantially greater than the Environmental Protection Agency's goal of fifty-five decibels.").
\item \textsuperscript{292} \textit{Sierra Club}, 664 F. Supp. at 1330-31.
\item \textsuperscript{293} \textit{See supra} text accompanying note 103-09, 121-26.
\item \textsuperscript{294} \textit{Falls Rd.}, 581 F. Supp. at 692-94.
\item \textsuperscript{295} \textit{Id.} at 693.
\item \textsuperscript{296} \textit{See id.} at 693-94.
\item \textsuperscript{297} \textit{Draft PEIS} 3.12 NOISE, \textit{supra} note 205, at 3.12-5.
\end{itemize}
consider the potential increase in noise as "barely perceptible" and, therefore, not a constructive use.\textsuperscript{298}

Moreover, considering that I-70's existing noise levels are already above FHWA and C-DOT noise guidelines,\textsuperscript{299} the court's opinion in \textit{Concerned Citizens Coalition} is instructive.\textsuperscript{300} The court held that the improved facility's projected noise increases did not constitute constructive use because the existing noise levels were already above FHWA guidelines.\textsuperscript{301} This precedent illustrates another obstacle to a noise-based determination of constructive use.

Yet, increased traffic noise in the Idaho Springs area may prove to be the one exception in this situation. Idaho Springs' elevated highway and steep rock cliffs amplify the sound of the highway. These exacerbating circumstances may justify the finding of constructive use based solely on noise.

Even if noise level increases alone do not trigger protection in this case, noise level increases may be combined with other adverse impacts to constitute constructive use of protected properties.\textsuperscript{302} As \textit{Coalition Against a Raised Expressway} illustrates, the cumulative effect of the adverse impacts can significantly impair the utility of protected resources.\textsuperscript{303} Therefore, the combination of the proposed project's air pollution, visual blight, and noise impacts will more than likely constitute constructive use of the I-70 mountain corridor's protected resources.

4. Water, Vegetation, and Wildlife Resources

Section 771.135 does not specifically address constructive impacts on water, vegetation, and wildlife that do not occur in refuges.\textsuperscript{304} As such, the regulation leaves open the possibility for these types of impacts to constitute uses under section 4(f). A constructive use claim based on water, vegetation, and wildlife impacts would find its strongest support in section 771.135(p)(2)'s general directive concerning constructive use.\textsuperscript{305} The regulation makes clear that constructive use only occurs when a "project's proximity impacts are so severe that the protected activities,

\textsuperscript{298} See 23 C.F.R. § 771.135(p)(5)(iii).
\textsuperscript{299} Draft PEIS 3.12 Noise, supra note 205, at 3.12-1.
\textsuperscript{300} Concerned Citizens Coal., 330 F. Supp. 2d at 787.
\textsuperscript{301} Id. at 793-94.
\textsuperscript{302} See 23 C.F.R. § 771.135(p)(2) to (4).
\textsuperscript{303} Coal. Against a Raised Expressway, 835 F.2d at 812.
\textsuperscript{304} See id. § 771.135(p)(2) (not specifically addressing ecological impacts in areas other than refuges).
\textsuperscript{305} See id. § 771.135(p)(2) ("Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired.").
features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired.” Substantial impairment, in turn, only occurs when a resource’s “activities, features, or attributes” are “substantially diminished.” \textit{Sierra Club} lends further support to the notion that constructive use can result from impacts on wildlife and vegetation.

Considering section 771.135(p)(2)'s instruction and \textit{Sierra Club}, the impacts acknowledged in the Draft PEIS make a decent case for a constructive use claim based on impacts on water, wildlife, and vegetation resources. As previously discussed, the White River and Arapaho National Forests, Clear Creek, Blue River, Eagle River, and Georgetown Lake are fishing resources. C-DOT estimates that harmful chemicals and substances resulting from the six-lane highway's increased runoff and winter maintenance activities will pollute the water resources in these areas. In fact, C-DOT acknowledges impacts on “high value” and Gold Medal fisheries in the Eagle River, Blue River and Clear Creek sub-basins.

However, the question remains whether a court would determine that the value of the resources would be “substantially diminished” as required by section 771.135(p)(2). Arguably, one of the attributes of a fishing resource, particularly a “high value” or Gold Medal fishery, is that there are plenty of healthy, native fish to catch. Another important attribute, especially to fly-fishermen, is that the fishing area is quiet, beautiful, and has clear water (in order to locate the “honey holes”). If the project’s pollution and other impacts substantially diminish these attributes, the impacts would likely constitute constructive use.

This line of reasoning can also apply to impacts on other species of wildlife and vegetation. Georgetown Lake is a recreation area in which wildlife viewing, including the viewing of bighorn sheep, is a significant attribute. Because the lake is almost immediately adjacent to the project, constructive impacts from the six-lane facility are a strong possibility. As mentioned above, C-DOT estimates that the project will particularly impact bighorn sheep habitat, among those of other species. Further, the barrier effect of the six-lane highway may also impair the survival of

\begin{itemize}
\item \textit{Id.} (emphasis added).
\item \textit{Id.}
\item \textit{Sierra Club}, 664 F. Supp. at 1330-31.
\item \textit{See }\textit{Draft PEIS 3.5 Fisheries, supra note 254, at 3.5-1.}
\item \textit{Draft PEIS 3.4 Water Resources, supra note 225, at 3.4-19 (summarizing in Table 3.4-18 the percent increase of winter maintenance impacts from project alternatives).}
\item \textit{Draft PEIS 3.5 Fisheries, supra note 254, at 3.5-7 to -8.}
\item 23 C.F.R. § 771.135(p)(2).
\item \textit{See Draft PEIS 3.2 Biological Resources, supra note 236, at 3.2-20 (providing that the key habitat of bighorn sheep would be most extensively affected near Georgetown).}
\item \textit{Id.}
\end{itemize}
wildlife species that roam and migrate in search of cover, food, water, and mates.315 If these impacts substantially diminish the ability to view big-horn sheep or other wildlife from Georgetown Lake, a court may determine that the project has constructively used this recreation area.

In addition, a total of sixteen National Wilderness Preservation Areas are located in the White River and Arapaho National Forests.316 The ability to view wildlife in its natural habitat and to experience the unaffected, natural beauty of wilderness are important attributes of these areas. Thus, if impacts on vegetation and wildlife, such as barrier effect, community and habitat loss, and noise substantially diminish a visitor’s ability to engage in these activities, constructive use may occur.

C. Temporary Use

This Article establishes that constructive use resulting from permanent impacts will likely occur in the project area. This is especially clear when one considers the cumulative effect of proximity impacts and the courts’ broad interpretation of use and the cumulative effect of proximity impacts. Additionally, temporary use of protected resources in the mountain corridor may also occur from the project’s construction impacts. Section 771.135(p)(7) confirms that temporary use may occur when: the use’s duration is as long as or longer than the duration of the construction project; the “nature and magnitude” of the use is not minor; there are permanent impacts; the project temporarily or permanently interferes with a protected resource’s attributes; or the land used is not fully restored.317 The holdings in Valley Community Preservation, Coalition on Sensible Transportation, and Falls Road guide for claims based on temporary impacts.318

The I-70 expansion project may temporarily use protected resources in the mountain corridor due to the project’s extended fifteen-year duration, large scope, and location. Because temporary impacts generally re-

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315. See id. at 3.2-5 (stating that “I-70, human population centers, increasing development, and human intrusion act as barriers to wildlife that historically crossed the Corridor in their migration.”).

316. See U.S. Department of Agriculture, Forest Service, White River National Forest, supra note 182 (providing that eight wilderness areas are located in the forest); Wilderness, Arapaho and Roosevelt National Forests, supra note 190 (stating that eight wilderness areas are located in the forest).

317. 23 C.F.R. § 771.135(p)(7).

318. See Valley Cnty. Pres., 373 F.3d at 1092 (citing section 771.135(p)(5)(ix) in holding that temporary vibration impacts did not constitute constructive use because the impacts were mitigated “through advance planning and monitoring activities.”); Falls Rd., 581 F. Supp. 678 (providing a cautionary example of failed invocation of temporary constructive use); but see Coal. on Sensible Transp., 826 F.2d at 63 (determining that the project’s temporary construction easements constituted use of the parks even though none of the parks had popular facilities in the area of the highway).
result from construction activities, the project will probably use historic sites, parks, and recreation areas located adjacent to and within the construction zone. C-DOT acknowledges that the project’s construction will “displace” fifty-six to sixty-one acres of vegetation along the I-70 mountain corridor.\(^{319}\) If any of the displaced vegetation is located within the boundaries of protected resources, the impact may constitute constructive use if the area is not fully restored or if the use lasts at least as long as the project’s fifteen-year duration.\(^{320}\) This analysis applies to all of the project’s construction activities that actually occupy or take protected land.

Curiously, constructive temporary use may occur more often than direct temporary use. This is because most of the protected resources adjacent to I-70 are not so close that expanding the highway would actually encroach into the resources’ lands. Because a large portion of the proposed expansion area is located in the valley, pollution, noise, and esthetic impacts from construction may be more noticeable and pronounced. If such temporary impacts do not satisfy the conditions provided in section 771.135(p)(7), then construction of the project may substantially impair nearby protected resources, even though the harm is only temporary.\(^{321}\)

VII. CONCLUSION

This Article establishes that section 4(f) of the Department of Transportation Act applies to the I-70 mountain corridor expansion project. Not only has C-DOT recognized that the proposed six-lane highway will directly use eleven section 4(f) resources, but this Article concludes that the project will likely constructively use protected parks, historic sites, and recreation areas located in the I-70 mountain corridor. Temporary impacts resulting from the proposed project’s construction may also occur. This Article bases its conclusion on anticipated noise, air quality, water, esthetic, and ecological impacts, and the broad interpretation of use employed by the federal courts, including those in the Tenth Circuit. Further, even if the project’s anticipated impacts, alone, cannot constitute constructive use of protected resources, the impacts’ cumulative effect will more than likely significantly impair the value of protected resources. Therefore, because section 4(f) applies to the project, C-DOT and the

\(^{319}\) Draft PEIS 3.2 Biological Resources, supra note 236, at 3.2-9 (providing that the proposed project will permanently displace fifty-eight to seventy-five acres of vegetation as well as directly impact an additional fifty-six to sixty-one acres of vegetation within the construction zone).

\(^{320}\) See 23 C.F.R. § 771.135(p)(7)(i) (indicating that temporary use may constitute use within the meaning of section 4(f) if its duration is equal to or greater than the time needed for construction of the project).

\(^{321}\) See id.
FHWA are mandated to consider feasible and prudent alternatives in lieu of the proposed six-lane highway facility and undergo all possible planning to minimize harm to the protected resources located in the I-70 mountain corridor.
TxDOT Dispute Resolution Process for Construction Contract Claims Settlements

Yetkin Yildirim, Ph.D., P.E.*

I. INTRODUCTION

The Federal Highway Administration reports that state claims procedures must be designed to address issues of governmental immunity from construction claims, the authority of administrative review, and administrative settlement appeal.¹ In an effort to reduce the expenditure of human and economic resources on claims settlement, the 78th Texas Legislature adopted language endorsing the use of alternative dispute resolution regarding state agencies.² The 78th Legislature was the first to include alternative dispute resolution provisions in state agencies’ Sunset

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* Dr. Yetkin Yildirim completed his Masters in 1999 and Ph.D. in 2000 in the Civil Engineering Department at the University of Texas at Austin. Dr. Yildirim completed his Doctoral Graduate Portfolio in Dispute Resolution at the University of Texas at Austin in 2004. He is the project manager of the Superpave and Asphalt Research Program at the Center for Transportation Research, the University of Texas at Austin. Dr. Yildirim has been the main researcher on a number of TxDOT’s major research projects in a wide variety of transportation related research. Dr. Yildirim has taught courses in the transportation engineering area both at the undergraduate and graduate levels at the University of Texas at Austin since 1999. He is involved in developing a series of training videos aimed at construction workers and engineers.

The University of Texas at Austin, Center for Transportation Research, 3208 Red River, Austin, TX 78705, USA, Tel: (512) 232-1845, yetkin@mail.utexas.edu.


2. Cent. for Dispute Resolution, 2003 Texas ADR Legislative Report 2 (2003),
bills, and in November 2002, the Sunset Advisory Commission officially enacted an across-the-board recommendation for state agencies to develop and implement alternative dispute resolution practices. This recommendation is in accord with Texas policy on alternative dispute resolution by government agencies, as stated in the Governmental Dispute Resolution Act, chapter 2009 of the Government Code. Further, Senate Bill 1147 incorporated alternative dispute resolution processes into the operations of the State Office of Administrative Hearings ("SOAH"), a key player in the settlement of disputes related to Texas Department of Transportation ("TxDOT") construction.

An established hierarchy of agency-level resolution processes are now in place that not only grant authorization for suits against the State but also provide guidelines for claims filed at various levels of administration. TxDOT aims to resolve as many disputes as possible at the lower project-level before suits escalate to the district or agency levels. Once a dispute surpasses the project level, it is termed a claim. Numerous preventative measures, including partnering and project, district, and agency-level dispute resolution procedures, have been developed to address disputes early before they mature into claims. TxDOT recognizes that the resolution of disputes at the time they occur results in the least expenditure of time and economic resources.

3. Id. The Sunset Advisory Commission is a Texas oversight committee, which assesses the need for state agencies to exist and serves to enact fundamental changes to an agency’s mission or operations if needed. The Sunset process sets a date by which a state agency is abolished unless legislation is passed to continue its operation. This allows the Legislature to examine closely each agency and make changes to the agency’s mission or operations if necessary. Approximately twenty to thirty state agencies go through the Sunset process each legislative session.
4. Id.
5. Id.
8. Id. (defining a claim as “a dispute that is not resolved and requires formal action by the TxDOT Contract Claims Committee.”).
9. Id. at 3-10 to 3-12, 8-3 to 8-5.
10. Id.
II. PROJECT LEVEL DISPUTE RESOLUTION: CRITICAL PATH MANAGEMENT, PROJECT PARTNERING AND DISPUTE RESOLUTION TRAINING

TexDOT's first line of defense against claim escalation is a proactive approach towards addressing claims at the project level. This approach is manifested through critical path management, the development of project-level partnering, and training to increase the competence of both area engineers and other district level staff in dispute resolution.

A. CRITICAL PATH MANAGEMENT

The concept of Critical Path Management ("CPM") was developed in the late 1950s to address different construction planning and control problems in the United States.\textsuperscript{11} For example, in one case, the U.S. Navy needed to control contracts for its Polaris program.\textsuperscript{12} The contracts in question dealt with the research, development, and manufacturing of new component parts. As these parts were being made for the first time, their manufacturing cost and time could not be estimated accurately.\textsuperscript{13} In this case, three separate time estimates were projected: "optimistic, pessimistic, and most likely."\textsuperscript{14} These three estimates were then used in a mathematical model called the Program Evaluation and Review Technique ("PERT").\textsuperscript{15} This technique, similar to the CPM method developed later, projected realistic time estimates despite the existence of major uncertainties.\textsuperscript{16}

A second case instrumental in the development of CPM involved the E.I. du Pont de Nemours Company, which was constructing several chemical plants in the United States.\textsuperscript{17} These large-scale projects required that both construction time and cost be estimated accurately.\textsuperscript{18} The method of Project Planning and Scheduling ("PPS"), was implemented in this case to project realistic estimates for cost and time.\textsuperscript{19} The PPS technique was the direct predecessor of the CPM method.\textsuperscript{20}

\begin{thebibliography}{9}
\bibitem{12} Id.
\bibitem{13} Id.
\bibitem{14} Id.
\bibitem{15} Id. The PERT method "was developed by a research team consisting of the U.S. Navy Special Projects Office and the Booz, Allen, and Hamilton" consulting firm. F.H. (Bud) Griffis & John V. Farr, Construction Planning for Engineers 92 (M.D. Morris ed., 2000).
\bibitem{16} Antill & Woodhead, supra note 11, at 2.
\bibitem{17} Id.
\bibitem{18} Id.
\bibitem{19} Id.
\bibitem{20} Id. CPM was developed by Morgan Walker of E. I. Du Pont, and James E. Kelly, then with Remington Rand Univac Corporation. Griffis & Farr, supra note 15, at 92.
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The CPM method assumes that a construction project’s activities form a network, defined as a “diagram of activities joined in interconnected links that reflect relationships among complex interrelated tasks.” Further, it assumes that one pathway through the network can be used to determine the duration of a construction project. This one pathway is referred to as the “critical path,” and “the [minimum] duration of the project is computed by the sum of the ‘expected’ durations of each activity on the critical path.” With CPM, project tasks are diagrammed in detail. Calculations are utilized to estimate activity durations and resource expenditures in each network. Once CPM calculations have been performed, an accurate project scheduling bar chart can be created. A delay in the completion of individual activities anywhere along this critical path—such as a temporary stoppage caused by a dispute—will lead to a delay in the completion of the overall project. However, it is important to note that the network of activities is itself not a schedule, but is rather used in a series of mathematical calculations to produce scheduling data.

The development of CPM networks can assist in the management of project design, scheduling, and control. Districts often utilize CPM methods to assist in the design and execution of construction projects. The critical path may be used to substantiate activity relationships when claims arise. It is also a beneficial scheduling tool to avoid project delay in dispute situations. The CPM tool provides engineers and contractors with a better estimate of a dispute’s impact on project development.

The process of agency-wide CPM policy implementation at TxDOT began in 1992. By 1995, formal training was introduced to educate engineers about the potential of claims clarification through critical path scheduling. Compared to the previous system of project-level dispute risk management, the TxDOT CPM system provides a more uniform arrangement by which the agency can address contractor claims.

22. Id.
25. Id. at 92, 103.
26. Id. at 102.
27. Id. at 103.
31. Antill & Woodhead, supra note 11, at 1, 4-5.
32. Interview with Shirley Macik, Administrative Assistant to the Contract Claim Committee (July 20, 2004).
33. Id.
34. Id.
B. Project Partnering

TXDOT currently employs project partnering as a proactive approach to construction claims prevention on the project level. Partnering is defined as

a long-term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources . . . . The relationship is based on trust, dedication to common goals and . . . understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost effectiveness, increased opportunity for innovation, and . . . continuous improvement of quality products and services.

Partnering develops stronger relationships among members of a project team and promotes "trust and commitment, a common mission statement, shared goals, interdependence, [and] accountability . . . ." "It is a concept that is intended to accentuate the positive and overcome the weaknesses that thrive in an adversarial milieu." The desired result of the application of these ends is primarily cost reduction through project efficacy and claims reduction.

It is important to observe that many of the goals installed by partnering initiatives reflect basic principles utilized in the execution of dispute resolution. Shared goals and interdependence are each fundamental objectives in the resolution of interpersonal and inter-organizational conflict. In relation to organizational communication, the perception of interdependent goals can lead to shared ideas, open-minded consideration and improved productivity. The application of partnering ideals to multi-organizational projects encourages productivity while instilling basic conflict resolution principles.

The concept of partnering is particularly applicable to contractor complaints stemming from the competitive bidding process. The rules and guidelines of competitive bidding cannot fully protect the public sector

35. See Kenneth M. Grajek, et al., Partnered Project Performance in Texas Department of Transportation, 6 J. Infrastructure Sys. 73, 73 (2000).
40. See id. at 24.
41. See id. at 24-26.
from the negative effects of litigation.\textsuperscript{42} In response, TxDOT and associated general contractors have incorporated the partnering system to meet the needs of public sector construction projects.\textsuperscript{43} "In a ‘best-bid’ environment, litigation . . . by the contractor would be counterproductive and destructive [to the] mutually beneficial relationship."\textsuperscript{44} This is known as "project partnering,"\textsuperscript{45} and in addition to offering the regular benefits of partnering, project partnering also provides training methods and project facilitators during a project's early stages for the purpose of improving communication among construction project team members.\textsuperscript{46}

TxDOT initiated its official partnering program in April 1992.\textsuperscript{47} The positive results included better work environments, faster project completion, and fewer contract disputes.\textsuperscript{48} With the implementation of the Partnering Plus Program in December 1996, partnering was required for all TxDOT construction projects and TxDOT employees and contractors received project partnering training.\textsuperscript{49} This training included single-project, team-building seminars that instructed employees and contractors on how to maximize project schedules and cost benefits.\textsuperscript{50}

The comparison of partnered TxDOT construction projects to non-partnered projects demonstrates that partnering positively influences "completion times, dispute resolution and project team relations."\textsuperscript{51} Participants have reported the most beneficial elements of partnering preparation as "identification of problem-solving techniques and issue escalation tactics."\textsuperscript{52} Indeed, according to a 1997 Texas Performance Review, TxDOT saved $7 million over five years after implementing project partnering in 1992.

Texas agencies' use of ADR has reduced construction costs and time and the number of contractor claims. TxDOT reported that during the last five

\textsuperscript{42} See Grajek, supra note 35, at 73-75.
\textsuperscript{43} See id.
\textsuperscript{45} See Grajek, supra note 35, at 74 (providing that the term project partnering is used "to describe the voluntary partnering activities conducted by a project-by-project basis within a continuous framework.").
\textsuperscript{47} Grajek, supra note 35, at 75.
\textsuperscript{48} See id.
\textsuperscript{49} See GRANBERG, supra note 46, at 1.
\textsuperscript{50} See id. at 2.
\textsuperscript{51} Grajek, supra note 35, at 73 (language provided in the Abstract).
\textsuperscript{52} Id. at 79.
years, after implementing an ADR process that included partnering, only a few projects had major disputes. According to a report on partnering at TxDOT, "partnering is having a positive impact on schedule duration and claims costs." According to the study, partnered projects had a higher on-schedule percentage than non-partnered projects, resulting in an estimated savings of $7 million.53

C. AREA ENGINEERS AND OTHER DISTRICT LEVEL STAFF

TxDOT policy also attempts to address disputes at the project level by equipping various personnel with necessary conflict resolution skills through dispute resolution training.54 It is often the area engineer, defined as the "engineer in charge of a series of construction projects in a specified geographical area . . . [such as] districts or regions[,]"55 who is first in line to resolve project-level disputes. Project-level dispute resolution procedure is outlined in the Guide Specifications for Highway Construction, developed in 1962 by the American Association of State Highway and Transportation Officials ("AASHTO") to promote uniformity among states' contract administration procedures.56 The 1962 AASHTO Guide Specifications provide:

The [e]ngineer will decide all questions which may arise as to the quality and acceptability of materials furnished and work performed and as to the rate of progress of the work; all questions which may arise as to the interpretation of the plans and specifications; all questions as to the acceptable fulfillment of the contract on the part of the Contractor.57

Additionally, in 1987 and 1988, the State Department of Highways and Public Transportation enacted a dispute resolution policy and contract claim procedure for the resolution of disputes and claims between the department and contractors.58 The purpose of Administrative Circular No. 10-87 ("AC-10-87") was the promotion of a more cooperative attitude between area engineers and contractors and the establishment of procedure for the resolution of disputes at the district level.59 AC-10-87 provides:

54. See generally GRANSBERG, supra note 46, at 1-33.
56. See id. at 18.
57. Id
59. Id. at 1-2.
When the contractor appeals the District's final decision, the District is to request the Construction Division to review the dispute and the District's final decision. The Construction Division will then review the information presented by the contractor and the information presented by the District and make a recommendation to the District for disposition of the matter in compliance with the contract provisions. That recommendation shall be founded on fairness to the contractor and to the State. It will be the District's responsibility to notify the contractor in writing of their final decision on his appeal.  

In his analysis of contract claims, Netherton states that the AASHTO Guide Specifications, although a separate document, is considered to be part of the official contract between engineers and contractors "in the same way that private construction contracts treat the general conditions as an integral part of the agreement between owner and contractor." The area engineer and district staff should work together to resolve disputes with the project contractor. In addition to the area engineer, the district construction engineer and district engineer should be available to address the contractor's concerns.

Section 104.02 of the 1962 AASHTO Guide Specifications gave contracting agencies the authority to make necessary changes at any time during the progress of work as long as any changes made are within the scope of the contract. The power to adjust the course of the work as necessary and adjust time and compensation for performance after the contract has been established serves a practical need. Work site conditions may require that changes be made immediately and this authority helps agencies sidestep potential disputes between contractors and engineers.

D. CLAIM RESOLUTION AT THE PROJECT LEVEL

The State Department of Highways and Public Transportation and TxDOT strongly encourage the resolution of disputes at the project level during the time period of contract. Netherton notes, however, that dispute resolution at the project level is generally "informal, and concentrates on establishing the facts." Furthermore, Netherton states:

In many instances, once the factual situation producing a claim is clarified, the parties can agree on the technical measures that solve the problem, and

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60. *Id.* at 2 (emphasis added).
61. NETHERTON, supra note 55, at 18 (alteration in original).
62. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, supra note 7, at 8-3.
63. STATE DEP'T OF HIGHWAYS & PUB. TRANSP., supra note 58, at 2-3.
64. See NETHERTON, supra note 55, at 18.
65. *Id.*
66. STATE DEP'T OF HIGHWAYS & PUB. TRANSP., supra note 58, at 2.
67. See NETHERTON, supra note 55, at 18.
on an appropriate change order, including additional compensation, when warranted. In such cases, the result is likely to be a negotiated settlement, implemented voluntarily by the field engineer's action under the authority to order changes within the scope of the contract. The field engineer's position in these situations has been compared to that of a tightrope walker; they must exercise extreme care to avoid, on one hand, being overly generous with the claimant, and, on the other, denying a claim that is justified.68

III. DISTRICT LEVEL DISPUTE RESOLUTION

Disputes that remain unsettled by project-level management require district-level dispute resolution. According to AC-10-87, the Construction Division is responsible for creating and staffing an internal claims section.69 The Project Management Branch of the Construction Division directs dispute management at the district level.70 This section works with District personnel and meets with contractors to obtain any additional information since the filing of the dispute claim.71

Critical path method is used to determine the scope and validity of the contractor's claim.72 It is important to note that contractors often have little experience with the development of a claim. In these situations, the Project Management Branch of the Construction Division may provide the contractor with claim development assistance to expedite the claims process. TxDOT and the claimant contractor work to develop an accurate representation of the claims' critical path disruption.73 Appropriate claims development utilizing critical path illustration has led directly to resolution at the district level for some disputes. Critical path representation elucidates agency requirements for certain claims settlement. Figure 2 illustrates the dispute resolution process at the district level.

IV. AGENCY AND STATE LEVEL DISPUTE RESOLUTION

A. CONTRACT CLAIM COMMITTEE

The original contract claim procedure stipulated by AC-10-87 was adopted by the state of Texas on June 10, 1988, and revised on January 10,

68. Id.
69. STATE DEP'T OF HIGHWAYS & PUB. TRANSP., supra note 58, at 3. In the case of Texas, this is the Project Management Branch. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, supra note 7, at 8-5.
70. CONSTRUCTION CONTRACT ADMINISTRATION MANUAL, supra note 7, at 8-3, 8-5.
71. Id.
72. O'BRIEN, supra note 30, at 367.
1999 as reflected in title 43, section 9.2 of the Texas Administrative Code.74 TxDOT established the policy outlined by section 9.2 in accordance with section 201.112 of the Transportation Code, which outlines the procedure for the Contract Claim Committee ("CCC").75 CCC is composed of a chairperson and three members and was developed to address claims that transcend resolution at the district level.76 CCC members are appointed by the State Engineer-Director for the State Department of Highways and Public Transportation.77 The contractor initiates the dispute claim procedure by filing a detailed report with the district engineer, the director of the Construction Division, or the CCC.78 If the report is filed with the district engineer or director of the Construction Division, the claim will be forwarded to the CCC that will administer the contract claim procedure.79 This report includes contractor and project reference information, a summary of the claim and requested amount of time or compensation, a detailed explanation of the issues involved in the claim, justification for TxDOT responsibility for compensation related to claim issues, and a specific summary of the calculation of damages resulting in the claim.80 Figure 3 shows the dispute resolution process at the agency level.

The Committee also receives claim reports from the district including critical path representation of the district's position.81 CCC regularly consults with the Construction Division's Project Management Branch, the district, and related administration in their investigation of dispute claims.82 Following consultation, the CCC schedules an initial meeting with the contractor to confer on issues related to the claim.83 This meeting between the CCC and contractor, however, is strictly informal. As subsection (5) provides:

The committee will then afford the contractor an opportunity for a meeting

79. Id.; see also State Dep't of Highways & Pub. Transp., supra note 58, at 3 (providing that "[c]ontractor disputes that cannot be resolved under the contract provisions may be submitted to the Contractors Review Committee through the District and the Construction Division.").
80. See Letter from Arnadeo Saenz, J.R., Chairman, Contract Claim Committee, to the Contractors (Apr. 11, 2002) (on file with the author) (providing as an attachment a suggested format for filing claims).
81. Synder, supra note 77.
83. Id. § 9.2(b)(4), (5).
to informally discuss the disputed matters and to provide the contractor an
opportunity to present relevant information and respond to information the
committee has received from the department office.\textsuperscript{84}

CCC meeting attendants typically include the Committee, CCC
chairman, and representatives for the claimant contractor and the district
involved in the claim.\textsuperscript{85} The contractor presents the claim, the Commit-
tee clarifies the details of the claim where necessary, and the district re-
fu tes the claim from their position.\textsuperscript{86} This presentation is succeeded by a
series of CCC clarification and rebuttals.\textsuperscript{87} At the close of the meeting,
committee members collectively deliberate a decision regarding the
presented claim and rebuttals privately.\textsuperscript{88} In accordance with section
201.112 (b) of the Transportation Code, decisions by the CCC are bind-
ing. A dissatisfied contractor may appeal the CCC’s resolution by for-
ma lly requesting an administrative hearing with the Texas SOAH to
resolve the claim under section 2001.057 of the Government Code.\textsuperscript{89}

The contract claim process is a modified arbitration process, it is in-
formal, and as Lehmann states, “attendance of attorneys is discouraged
as the presence of legal counsel often restricts the free flow of conversa-
tion.”\textsuperscript{90} This arbitration process is modified within TxDOT as “rights”
arbitration, whereby the arbiter (CCC) presents a resolution based on the
interpretation and application of a project’s contract terms.\textsuperscript{91} Three
methods exist for the selection of arbitrators: (1) they may be selected by
the parties involved in the dispute; (2) they may be selected by the Na-
tional Panel of Construction Arbitrators as maintained by the American
Arbitration Association (“AAA”); or (3) each individual party may se-
lect arbitrators who, in turn, choose a neutral arbitrator to settle the dis-
pute or to form a panel.\textsuperscript{92} Thus, it should be noted that the Contract
Claim Procedure, as outlined by title 43, section 9.2 of the Texas Admi-
Nistrative Code, adheres to most of the construction industry dispute resolution
standards of the AAA. Excluding procedures specific to AAA
improvement, these standards include: “[1] express arbitrator authority to

\textsuperscript{84} Id. § 9.2(b)(5) (emphasis added).
\textsuperscript{85} See id. § 9.2(b)(1), (5) (providing in subsection (1) that the executive director will name
the members and chairman of the contract claim committee and in subsection (5) that the primes
contractor will be afforded an opportunity to meet informally to discuss the disputed matters,
present relevant information, and respond to the information the committee has received).
\textsuperscript{86} Lehmann, supra note 73, at 43-44.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 44.
\textsuperscript{89} TEX. TRANSP. CODE ANN. § 201.112(b) (2005).
\textsuperscript{90} Lehmann, supra note 73, at 43.
\textsuperscript{91} See John S. Murray, Alan Scott Rau & Edward F. Sherman, Arbitration 17
(1996) (discussing the difference between “rights” and “interest” arbitration).
\textsuperscript{92} Lehmann, supra note 73, at 19.
control the discovery process; [2] broad arbitrator authority to control the hearing; and [3] a concise written breakdown of the award . . . ."93

Two main exceptions, however, eliminate CCC proceedings from the legal interpretation of arbitration. First, the discovery process is essentially contractor summary and Committee investigation.94 Counsel is also replaced by representative presentations. Second, while two of the Committee members who preside over a meeting originate from districts disinterested in the outcome of the claim, the employment of CCC members by an agency party to the dispute is inconsistent with arbitration.95 "Contractors perceive these [types of] proceedings as subject to bias in favor of the agency’s staff, and have recommended that disputed claims be submitted to outside mediation panels."96

Many highway agencies, including those in Alabama, Arkansas, West Virginia, Texas and Maine, do not believe that outside mediation would improve settlement results, instead relying on CCC member proficiency and the ability to issue a well-informed, professional decision.97 Netherton subcategorizes this group of highway agencies in his 1983 report, “Construction Contract Claims: Causes and Methods of Settlement,” for the National Cooperative Highway Research Program.98 Netherton groups Alabama, Arkansas and West Virginia into one group, which “declares that the doctrine bars suits against the state in its regular courts and directs that in the absence of that remedy claimants may request recovery in a special tribunal—Alabama’s Board of Adjustment, Arkansas’ State Claims Commission, and West Virginia’s Court of Claims."99

Texas, a state which denies claimants access to the courts, falls into Netherton’s second subcategory. This subgroup denies “claimants access to the courts and refers [claimants] to procedures established as part of the legislative process.”100 The Texas state constitution contains no provision relating to suits against the State or its agencies; neither has the Legislature enacted a general waiver of sovereign immunity. Disputes between the contractor and TxDOT must be handled according to administrative procedures, in accordance with the Supplementary Conditions for State of Texas Building Construction Contracts of the Texas Depart-

94. See 43 TEX. ADMIN. CODE § 9.2(b)(1), (4).
95. See Lehmann, supra note 73, at 23.
96. NETHERTON, supra note 55, at 1.
97. See id. at 17-18.
98. Id.
99. Id.
100. Id.
In the case of Texas, some of these procedures have already been stated, such as the screening of dispute claims by a review committee (including the district engineer, Construction Division, and CCC).

B. Administrative Hearing

If a contractor is dissatisfied with the resolution of the CCC, the contractor may request a formal administrative hearing to resolve the dispute claim in accordance with section 2001.057 of the Government Code. Conducted by SOAH, the formal administrative hearing is the final stage in the Texas public construction claims alternative dispute resolution process. The TxDOT engineer-director selects the hearing officers for the administrative hearing; one of these officers is typically a high-ranking TxDOT employee who is not personally involved with the dispute claim. The other member should be a neutral party not associated with TxDOT, usually a lawyer familiar with legal issues related to the construction industry. The engineer-director then assigns one of the hearing members as a presiding officer. An administrative hearing is a legal proceeding presided over by an appointed administrative law judge. Netherton remarks that because contracting agencies’ top administrative officers often do not have direct knowledge of the situations that produced the dispute claims, the proceedings “seldom produce any entirely new evidence, but they provide opportunities for claimants to explain their version of the causal events and resulting damages, and give their interpretation of the contract’s provisions governing liability.” It should be noted that the average settlement time for claims that go to administrative hearing is thirty months. Cronin-Harris notes that large, complex cases may take several months to arbitrate, especially if they are not administered properly; she cites the following reasons for the lengthy process: “lack of cooperation between the parties; the assertion of legal challenges to arbitrability; the quality of administration by a sponsoring organization, if any; the difficulty of finding suitable arbitrators; and the extent to which discovery is allowed.” Evidently, the most important factor in the length of the proceedings for an administrative hearing is the expertise of the arbitrator(s). Clearly, an administrative hearing is by far

101. Synder, supra note 77.
104. See Lehmman, supra note 73, at 44.
105. Id. at 44-45.
108. Lehmman, supra note 73, at 41.
the most time-consuming form of claims settlement available in current TxDOT practice. Figure 4 shows the path of disputes through the state level.

C. Litigation

Only after all the steps in Texas’ alternative dispute resolution process have been followed can a contractor take the ultimate legal measure of petitioning the State Legislature to file suit against TxDOT.110 For all state highway agencies, including TxDOT, the drawback of litigation against the state agency is the increased cost of time and money.111 Cronin-Harris reports:

In many jurisdictions the trial of a litigated case does not occur until many years after the case is filed. This poses a serious problem to many litigants, particularly plaintiffs who may not be entitled to prejudgment interest. Litigation costs tend to be time oriented; extension of the dispute commonly increases the cost substantially.112

According to Lehmann, however, “only three out of the 60 claims filed against the State from 1984 to 1990 have gone entirely through the departmental process and into litigation.”113

D. The TxDOT Claims Log

A dispute is recorded by the TxDOT Construction Division once it requires a formal review by the Project Management Branch, and an inventory of these disputes is kept as the Construction Claims Log.114 According to the log, the Division filed a total of 187 construction contract claims in the state of Texas between April 1993 and July 2004—an average of approximately seventeen claims per year.115 Of these claims, 162 have been settled.116

The claims represent advanced disputes in twenty-four districts and three specialized divisions within TxDOT.117 Table 1 shows the number of filed claims for each TxDOT sector from April 1993 to July 2004, as reported by the Construction Division.

The claims include contractor disputes regarding building, mainte-

110. Lehmann, supra note 73, at 15.
111. CPR INST. FOR DISP. RESOL., supra note 38, pt. I, at I-137 to 138.
112. Id. at I-137.
113. Lehmann, supra note 73, at 45.
115. Id.
116. Id. at R4 – R197.
117. Id. at 15 – 1197.
nance, and construction provisions to contracts. The Claims Log substantiates the cost of claims to TxDOT. Forty-six of the 162 settled claims were settled at the district level. Eighty-four claims were settled by the CCC, and twenty-three claims were settled by administrative hearing, which included two claims that were appealed through the SOAH. The level of settlement was not reported for eight claims that were resolved by the General Services Division.

Of the forty-six claims settled at the district level, fourteen were directly settled by a Change Order, eleven of which were resolved within the area engineer's authority. District-level settlement amounts range from $0 to $503,214.58 with a total amount of $2,522,089.56. Only four of the forty-six settlements made at the district level resulted in zero-dollar settlements. The average time for zero-dollar settlements at the district level was 9.82 months.

The eighty-four settled claims by the CCC figures as 51.8% of the total number of settled claims in the last eleven years, including the two claims that were settled by administrative hearing. The CCC settled claims ranged from zero dollars to $23,500,000. Twenty CCC claims were settled for zero dollars, but the average time to settle the twenty, zero-dollar settlements at the agency level was 14.72 months—almost five months longer than the time it took for the zero-dollar settlements at the district level.

Of the twenty-three claims that required administrative hearings, two decisions proceeded to appellate court. Eight of the cases that extended beyond the agency level resulted in zero-dollar settlements. An average of 24.6 months was required to complete these claims. Clearly, administrative hearing is by far the most time-consuming form of claims settlement available in TxDOT practice.

118. See id. at K5 – K197.
119. Id. at AC5 – AC197.
120. Id. at U5 – U197.
121. Id.
122. Id.
123. Id. at S5 – S197.
124. Id.
125. See id. at AC5 – AC197, N5 – N197, S5 – S197, T5 – T197.
126. See id. at AC5 – AC197.
127. Id. at S5 – S197, T5 – T197, AC5 – AC197.
128. Id. at S5 – S197, AC5 – AC197.
129. Id. at N5 – N197, S5 – S197, T5 – T197, AC5 – AC197.
130. Id. at U5 – U197.
131. Id. at S5 – S197, AC5 – AC197.
132. Id. at N5 – N197, S5 – S197, T5 – T197, U5 – U197.
V. Conclusions and Recommendations

Despite the existing alternate dispute resolution procedures and tactics employed by TxDOT, specific protocols for personnel and administration are still lacking. The agency’s first line of defense against claim escalation is a proactive approach to addressing claims through the development of project-level partnering and competence in dispute resolution. Although area engineers carry enormous responsibility within TxDOT to resolve project and district-level disputes, CPM and other dispute resolution training is neither mandatory nor readily available. Increased and mandatory training in CPM and mediation-arbitration for area engineers could significantly reduce the number of claims that pass on to the CCC.

Zero-dollar settlements occur at the district, agency, and state levels. While this particular settlement amount is favorable to TxDOT, the expenditure of resources beyond the district level is inefficient. Further research is necessary to determine appropriate methods to identify and manage these disputes before they develop into claims, perhaps including a root cause analysis.

Although the decision by the CCC is considered fairly binding, close to one-third of all dispute claims are appealed through administrative hearing. SOAH issues the same decision as the CCC in a significant portion of the cases, which are zero-dollar settlements. This suggests that contractor satisfaction with the CCC process is lacking.

Arbitration and mediation are effective alternatives to litigation. Giving claimants the option to request outside arbitration or mediation could increase overall satisfaction with the process. The potential for overwhelming inter-agency arbitration can be avoided by specifying arbitrator options. For example, the AAA and Center for Public Resources Legal Program offer free construction industry arbiters, mediators and guidelines.

While there is room for improvement in the TxDOT claims settlement process, claims occur on less than 2% of TxDOT construction contracts. Other state departments of transportation could certainly benefit from comparison with the TxDOT system.

133. See id. at S5 – S197, AC5 – AC197.
134. See id. at U5 – U197.
135. See id. at S5 – S197, AC5 – AC197.
Table 1. Distribution of Construction Claims among Districts

<table>
<thead>
<tr>
<th>District</th>
<th>Number of Claims 1993-2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abilene</td>
<td>8</td>
</tr>
<tr>
<td>Amarillo</td>
<td>4</td>
</tr>
<tr>
<td>Atlanta</td>
<td>13</td>
</tr>
<tr>
<td>Austin</td>
<td>16</td>
</tr>
<tr>
<td>Beaumont</td>
<td>11</td>
</tr>
<tr>
<td>Brownwood</td>
<td>0</td>
</tr>
<tr>
<td>Bryan</td>
<td>7</td>
</tr>
<tr>
<td>Childress</td>
<td>2</td>
</tr>
<tr>
<td>Corpus Christi</td>
<td>10</td>
</tr>
<tr>
<td>Dallas</td>
<td>16</td>
</tr>
<tr>
<td>El Paso</td>
<td>12</td>
</tr>
<tr>
<td>Fort Worth</td>
<td>8</td>
</tr>
<tr>
<td>Houston</td>
<td>17</td>
</tr>
<tr>
<td>Laredo</td>
<td>4</td>
</tr>
<tr>
<td>Lubbock</td>
<td>3</td>
</tr>
<tr>
<td>Lufkin</td>
<td>4</td>
</tr>
<tr>
<td>Odessa</td>
<td>2</td>
</tr>
<tr>
<td>Paris</td>
<td>2</td>
</tr>
<tr>
<td>Pharr</td>
<td>2</td>
</tr>
<tr>
<td>San Angelo</td>
<td>8</td>
</tr>
<tr>
<td>San Antonio</td>
<td>9</td>
</tr>
<tr>
<td>Tyler</td>
<td>8</td>
</tr>
<tr>
<td>Waco</td>
<td>6</td>
</tr>
<tr>
<td>Wichita Falls</td>
<td>5</td>
</tr>
<tr>
<td>Yoakum</td>
<td>7</td>
</tr>
<tr>
<td>Aviation Department</td>
<td>1</td>
</tr>
<tr>
<td>Construction Division</td>
<td>1</td>
</tr>
<tr>
<td>General Services Division</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>187</strong></td>
</tr>
</tbody>
</table>
Figure 1. Project-Level Dispute Resolution Process

Figure 2. District-Level Dispute Resolution Process
Figure 3. Agency-Level Dispute Resolution Process

Figure 4. State-Level Dispute Resolution Process
Figure 5. TxDOT Dispute Resolution Process