2009 Litigation and Regulatory Highlights

Litigation Update:
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Regulatory and Legislative Update:
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APTA Legal Affairs Conference
Orlando, Florida
February 22, 2010
Federal Regulatory and Legislative Update: Major Transit Developments in 2009/2010

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APTA Legal Affairs Conference
Orlando - February 22, 2010
High Speed Rail Initiative

Passenger Rail Investment & Improvement Act (“PRIIA”)

- Enacted on October 16, 2008
- Authorized (but did not fund) three competitive grant programs for funding high-speed intercity passenger rail improvements

American Recovery & Reinvestment Act (“ARRA”)

- Enacted on February 17, 2009
- Provided $8 billion in funding for the three FRA grant programs authorized by PRIIA
High Speed Rail Initiative

FRA High Speed and Intercity Passenger Rail Program (January 2010)

- Implements the grant programs authorized by PRIIA and funded by ARRA and annual appropriations
- First Round: $57 billion requested, only $8 billion to distribute among 79 applications from 31 states
- California, Florida and the Midwest got largest share of the funding, although most is for “incremental” projects
High Speed Rail Initiative – Open Issues

Was the selection process transparent enough for a merit-based competitive grant program?

Was the money spread too thinly?

What does this mean for public transit systems?

How will public transit systems interface with high-speed passenger rail projects?
Positive Train Control ("PTC")

- PTC had been recommended by NTSB and evaluated by FRA for decades
- Sept. 12, 2008: Metrolink Chatsworth Crash
- Oct. 16, 2008: Rail Safety Improvement Act of 2008 ("RSIA") mandated PTC on:
  - “Main lines” of Class I railroads over which hazardous materials are shipped
  - Any railroad lines over which intercity or commuter rail passenger transportation is provided
  - Does not apply to LRT (except at diamond crossings with PTC routes)
Positive Train Control

- **Tight Deadlines**
  - Covered railroads must file a PTC Implementation Plan and other relevant documents by April 16, 2010.

- **Cost/Benefit Analysis**
  - FRA estimates costs of PTC implementation from $9.5 billion to $13.2 billion, railroad accident reduction benefits only $440 million to $674 million
Positive Train Control – Open Issues

Who will pay for significant implementation costs?
  - FRA rule silent on allocation
  - Commuter Railroads must look at underlying contracts and circumstances
  - Transit formula and ARRA funds can be used

When will capacity and other benefits be realized?
  - Technical limitations
  - Current focus on interoperability
  - House Rail Subcommittee plans Spring hearing on implementation challenges
The “Stimulus Bill”

- American Recovery & Reinvestment Act ("ARRA"), enacted on February 17, 2009
- Total of $48 billion invested in transportation infrastructure, $8.4 billion for transit capital improvements through FTA programs
- As of Feb. 19, 2010, FTA has:
  - Awarded 713 grants totaling $7.24 billion.
  - 208 grants totaling $1.07 billion under review and pending award (collectively, 99.67% of appropriated ARRA funds)
- Unprecedented focus on transparency and accountability
TIGER Grant Program

DOT discretionary grant program funded by ARRA

- Focus on national and regional projects

February 17, 2010: Award of $1.5 billion in TIGER grants to 51 projects across the U.S.

- Received more than 1,400 applications for $57 billion

- Rail projects received more than half of funding
  - Top 3: NS Crescent Corridor, CSX National Gateway and CREATE
  - Other Notable: NYC Moynihan Station, Tucson and New Orleans Streetcar Projects
FTA Rulemaking Since Last Meeting

March 2009: FHWA/FTA Environmental Guidance
  - Modifies FHWA-FTA joint NEPA procedures
  - Creates new Categorical Exclusions (CEs)

June 2009: Buy America Rulemaking
  - Bi-metallic aluminum rail reclassified as “traction power equipment” (instead of running rail) to allow 60/40 content and US final assembly
FTA Rulemaking Since Last Meeting

June 2009: School Bus NPRM Withdrawn
- Proposal would have clarified requirements for distinguishing permissible and prohibited services to school students and personnel

Sept 2009: Additional Guidance Issued on New Starts and Small Starts Program

Sept 2009: Project Management Oversight ANPRM
- Proposed changes to PMOC program
- Comment period extended through early January
FTA Rulemaking Since Last Meeting

October 2009: Bus Testing Rulemaking

- Modification of Part 665 to incorporate phased-in testing for brake performance and emissions
- Updates and clarifies other parts of Part 665
- Effective January 1, 2010

Other Pending Activities

- New Starts and Transit Safety
- Refer to Chief Counsel’s Presentation
Transit Safety Oversight Proposal

- Currently, FTA’s State Safety Oversight Program mandates that States establish State Oversight Agencies that implement safety oversight and audit programs for light rail and subway systems.

- Obama Administration has proposed legislation requiring the FTA to establish and enforce minimum Federal safety standards for rail transit systems that receive Federal funding.
  - Allows States to “opt in” and enforce the Federal safety standards, or “opt out” and allow FTA to directly enforce the standards.
  - States may impose additional or more stringent safety standards.
Other FRA Rulemakings Since Last Meeting

- Front-End Strength of Cab Cars and Multiple-Unit Locomotives
  - Final Rule published Jan. 8, 2010 (75 FR 1180)
- Track Safety Standards/Continuous Welded Rail
  - Final Rule published Aug. 25, 2009
- Hours of Service Recordkeeping and Reporting
  - Final Rule published May 27, 2009 (74 FR 25330)
- Railroad Bridge Safety Management Program
  - Final Rule being prepared, March 2010 target
- Roadway Worker Protection – Adjacent Track Protection
  - NPRM published, awaiting Final Rule
Other FRA Rulemakings Since Last Meeting

- Locomotive Safety Standards (49 CFR Part 229)
  - NPRM being prepared, March 2010 target
- Passenger Train Emergency Systems
  - NPRM in preparation addressing low location emergency exit path marking, emergency lighting, emergency signage
- Track Safety Standards/Concrete Ties
  - NPRM being prepared, March 2010 target
- Vehicle/Track Interaction
  - NPRM being prepared to address high-speed passenger service issues, March 2010 target
Liveable and Sustainable Communities

Partnership among DOT, HUD, and EPA. Has the following goals:

- **Provide more transportation choices.** Decrease transportation costs, reduce dependence on foreign oil, improve air quality.
- **Promote equitable, affordable housing.** Expand housing choices for people of all ages, incomes, races and ethnicities to lower combined cost of housing and transportation.
- **Enhance economic competitiveness.** Access to services by workers as well as expanded business access to markets.
- **Support existing communities.** Target federal funding toward existing communities to increase community revitalization, improve energy efficiency, and safeguard rural landscapes.
- **Coordinate policies and leverage investment.** Remove barriers to collaboration, leverage funding and increase accountability and effectiveness of government to plan for future growth.
- **Value communities and neighborhoods.** Invest in safe and walkable neighborhoods – rural, urban or suburban.
Outlook for Federal Transportation Legislation

Bipartisan Gridlock Creates Political Impasse
- Unless “trigger events” like Chatsworth occur

Political Agenda Consumed by Ambitious Goals
- Health Care, Climate Change, Deficit Reduction

Focus on Creating Jobs Will Benefit Infrastructure
- There is still a perception of “slack” in the construction industry due to low ARRA bids

Surface Transportation Reauthorization Caught in Political Crossfire With Transit/Highway Trust Fund Bankruptcy Again Imminent
Transportation Reauthorization Bill

- SAFETEA-LU authorizes federal highway, transit, highway safety and motor carrier safety programs through FY2009.
- The House passed a Jobs Bill in Dec. 2009 that contained another short-term extension through FY2010, but the Senate has not yet passed their version.
- Obama Administration wants an 18-month extension to buy time on drafting a more comprehensive bill.
- Chairman Oberstar wants to enact a long-term solution in 2010, but the legislative schedule is clogged for the foreseeable future and a long-term reauthorization may be postponed until 2011.
Transportation Reauthorization Bill

Consensus Objectives include the following:

- Maintaining State of Good Repair
- Improving Metropolitan and Freight Mobility
- Increasing Overall Investment
- Reforming Federal Programs

Funding Challenges Are Enormous

- $450 billion bill
- No political will to raise gas tax
- Other mechanisms appear insufficient
- Congress working on $19.5 billion transfer from General Fund to Trust Fund (“interest” capture)
Other Infrastructure Funding Proposals

National Infrastructure Bank

- Senate Banking may introduce legislation establishing competitive loan and credit program to supplement core highway/transit programs
- Core objective would be to fund large, complex projects (multi-modal, multi-jurisdictional) of national and regional significance that cannot be funded through existing mechanisms
- Would seek to leverage state/local/private funding sources
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2009 LITIGATION HIGHLIGHTS
Extent of ADA Compliance Obligation:
George v. Bay Area Rapid Transit, 577 F.3d 1005 (9th Cir. Aug. 13, 2009)

Two sight impaired transit riders asserted a claim against BART alleging violations of the ADA, the Rehabilitation Act of 1973, and California civil rights laws. The riders alleged BART stations were not equipped to meet the needs of visually disabled individuals. The riders conceded, however, that BART’s facilities complied with DOT’s accessibility regulations. The district court found the DOT’s regulations to be arbitrary and capricious to the extent they failed to address the needs of passengers with visual impairments. On appeal, the Ninth Circuit reversed, finding that (a) DOT’s regulations to be neither arbitrary nor capricious, and (b) BART’s compliance with them protected it from liability under federal law. The court left open the potential that state law could impose greater obligations on BART.
“BART notes that those who find the ADAAG guidelines or DOT regulations unreasonable may challenge them under the Administrative Procedure Act . . . . The transit riders, BART argues, ‘should not be permitted to use the courts . . . to enact regulations they failed to convince the . . . Board or the DOT to implement and did not thereafter challenge under the APA.’ We agree.”
“There is no evidence that DOT considered impermissible factors. The regulations demonstrate that DOD did not entirely fail to consider the needs of those with visual disabilities. Nor is there any reason to think that the overall set of regulations runs counter to the evidence or is implausible.”

“It may well be sensible to require accessible handrails, contrast striping on stairs, and other such measures to promote accessibility. However, it is not up to this court to decide what is reasonable or sensible in this regard; instead, our task is to ascertain BART’s legal obligations. Unless DOT regulations are arbitrary and capricious, BART is required to do no more than follow them.”
Paratransit service obligations:  
Boose v. Tri–County Metro. Trans. Dist. of Oregon, 587 F.3d 997 (9th Cir. Nov. 23, 2009)

Paratransit rider who suffered from a balance disorder brought an action against Tri–Met alleging that it violated the ADA by refusing to schedule her rides in only sedans or taxis. The rider justified her initial request for accommodation by claiming that she experienced less dizziness and nausea when riding in sedans or taxis, as opposed to the paratransit buses. The district court granted Tri–Met's motion for summary judgment. On appeal, the Ninth Circuit affirmed, finding that Tri–Met was not subject to a DOJ regulation requiring public entities to make reasonable modifications in policies to avoid discrimination on the basis of disability.
Boose v. Tri-County Metro. Trans. Dist. of Oregon, 587 F.3d 997 (9th Cir. Nov. 23, 2009) (cont’d)

ADA Title II, Part A, “specifically prohibits the DOJ from making rules that ‘include any matter within the scope of the authority of the Secretary of Transportation under section 12143.’”

Plaintiff “concedes that ‘[t]he DOJ cannot promulgate regulations regarding transportation . . . services. Only the DOT can do that.’ We agree. Only the Secretary of Transportation can make rules ‘determining the level of services to be required’ for paratransit. . . . If the Attorney General cannot make rules about scheduling paratransit trips by vehicle type, then neither can he make rules that effectively require paratransit systems to schedule trips by vehicle type. Application of the DOJ’s reasonable modification regulation to TriMet in this instance would do just that, in violation of the regulation’s enabling statute.”
Injured bus passengers brought action against bus manufacturer and chassis producer, asserting claims for negligence arising from an accident caused when a bus driver fell asleep at the wheel while driving on a highway at approximately 60 miles per hour. Plaintiffs claimed, in part, that the manufacturer was negligent because it failed to install seatbelts for passengers. The appellate division held that plaintiffs' seatbelt claim was preempted by the DOT regulations issued under authority of the National Traffic and Motor Vehicle Safety Act of 1966.
“The National Traffic and Motor Vehicle Safety Act of 1966 prescribes uniform national standards. When read together with the regulatory scheme prescribed by the Secretary of Transportation . . . this standard requires manufacturers to equip vehicles with certain restraints, depending on the type, weight and age of the vehicle. This bus was governed by [a standard] pursuant to which only the driver’s seat was required to be fitted with a seatbelt.”

“The state tort law rule for which plaintiffs argue – one that effectively would require seatbelts at passenger seating positions for all buses governed by FMVSS 208 – is preempted because it conflicts with the federal goal of establishing uniform standards . . ..”
Indemnity Agreements with Amtrak:

Plaintiff, being advised that the SEPTA train he wanted to board would arrive at the platform on the other side of a track, decided not to use the stairs available to safely cross the track, but instead jumped down from the platform and started to walk across the tracks. In the process, an Amtrak train struck and injured him. He filed a claim in state court against Amtrak, SEPTA, Pennsylvania. The action was removed to federal court, the state was dismissed as a party, and Amtrak and SEPTA settled with the plaintiff for $100,000 each. The settlement left unresolved an indemnity claim which Amtrak had asserted against SEPTA. SEPTA argued that its sovereign immunity invalidated two indemnification agreements it had with Amtrak. The Third Circuit disagreed, finding that Amtrak’s enabling statute preempted SEPTA’s sovereign immunity defense.
The legislative history of the Amtrak Reform and Accountability Act of 1997 “reveals that giving Amtrak the freedom to negotiate agreements with other carriers to allocate the financial consequences of liability was a key component of the Reform Act, and § 28103(b) was specifically needed to eliminate ‘the possibility that state laws can nullify [Amtrak’s] indemnification contracts.’ . . . The Pennsylvania sovereign immunity statute, to the extent it could nullify the NEC Agreement, stands as a direct obstacle to that goal, and, as such, is preempted.”
Plaintiff filed suit against the driver of a bus that struck her vehicle, and against First Transit, the contractor operating the bus route on behalf of the Regional Transportation District ("RTD"). Both the trial court and the appellate court found: (1) that the bus driver was, as a matter of law, also considered an employee of RTD and that, as a result, his liability was capped at $150,000 under the Colorado Governmental Immunity Act; and (2) in accordance with the doctrine of respondeat superior, First Transit's liability was also capped at $150,000. The appellate court's decision is currently on appeal to the Supreme Court of Colorado.
“The fact that a person is an employee of one employer does not preclude a determination that he is also an employee of another employer for purposes of the [Colorado Government Immunity Act]. ‘[A] worker can simultaneously be the employee of two persons . . . .’”

Although the contract between RTD and First Transit stated that “[t]he personnel performing services under the contract shall at all times be under [First Transit’s] exclusive direction and control and shall be employees of [Firstst Transit] and not employees of RTD,” the court found that a long list of specific facts relating to the contract and contract performance demonstrated that the bus driver was an employee of RTD.

Query: Are these agency “employees” entitled to claim benefits owed to agency employees?
Carrier’s Heightened Duty of Care:  

Metro passenger sustained personal injuries when she tripped on a plastic newspaper band outside a Metro station. The passenger brought an action in Maryland state court. WMATA removed to federal court and moved for summary judgment. The district court granted WMATA's motion for summary judgment based on the lack of evidence showing that WMATA had caused, knew of, or had reason to know of the dangerous condition created by the plastic band.
• Carrier’s **heightened duty of care** arises “when a passenger, having paid or with the intent to pay a fare, enters a station, platform, or other premises to wait to board the vehicle.”

• Carrier has a duty “to all persons coming to its station, to exercise **ordinary care** to keep the station and the approaches thereto in a reasonably safe condition.”

• Here, no negligence established under either standard because passenger failed to demonstrate that an employee of WMATA knew or should have known of the dangerous condition.
 Carrier’s heightened duty of care:  

After exiting a city bus and desiring to get to the side of the road opposite the bus stop, the plaintiff started crossing and was struck by a truck and killed. Plaintiff’s daughter instituted a wrongful death action against the city (and its transit agency and insurer). The trial court granted summary judgment in favor of the defendants and the plaintiff appealed. On appeal, the court affirmed, finding that: (1) once a passenger exits a bus, they become a former passenger to whom the city owes only a duty of ordinary care; and (2) the location of the bus stop in question was not inherently dangerous.
“While common carriers are not insurers of their passengers, they are required to exercise the highest degree of vigilance, care, and precaution for the safety of those whom they transport. ... Once a passenger freely disembarks at his chosen destination free from harm, his status as a passenger, and the public carrier’s contract to transport for hire, ceases. ... At that point the public carrier only owes such person the duty of ordinary care. It is under no duty to warn the former passenger of ‘a danger which is apparent, obvious, and known to every person in good mind and sense ...’”
In the 30 years that this bus stop has been in existence, the plaintiff was the first and only individual to assert that the bus stop at issue is unreasonably dangerous because of its location. ... It is the unsafe actions of the passengers after they leave the bust stop that are unreasonably dangerous. It is clear that Mrs. Ricks’s conduct is the cause of her injury, not the placement of the bus stop.
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