

The Impact of Raising Insurance Liability Caps

The Facts about the Commuter Rail Liability Cap

Due to the expiration of both MAP-21 and the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Congressional committees have been working hard on the reauthorization of federal surface transportation programs. In July 2015, the Senate completed action on a comprehensive bill, known as the “DRIVE Act”, which would establish funding levels and policies for highway, bridge, transit, and rail programs. Buried within the 1000-plus pages of the DRIVE Act is a proposal to increase the passenger rail liability cap that has been in place since 1997. This provision would have far-reaching implications for commuter rail agencies and the thousands of riders they serve each day. This paper examines the potential effects of increasing the liability cap, to ensure that the full range of impacts is considered by Congress as the DRIVE Act moves forward.

Background on Commuter Rail

Commuter rail is a specific type of public transportation service that typically connects suburban areas with downtown employment centers, or sometimes connects two nearby employment centers with each other (e.g., the MARC system that connects Baltimore and Washington).¹ Commuter rail differs from subways, light rail, and streetcars in that it runs on the same type of railroad tracks as freight trains and Amtrak. In fact, commuter rail often shares tracks with both freight and Amtrak trains.

Commuter rail is operated by public transit agencies, which may also run buses or other transit services. For example, SEPTA in the Philadelphia area runs commuter rail as well as buses, a subway, and a streetcar. On the other hand, some agencies run only commuter rail, such as the San Joaquin Regional Rail Commission, which runs the Altamont Commuter Express between Stockton and San Jose, CA. Commuter rail operates in many parts of the country. In addition to major metropolitan areas such as Chicago, New York, and Los Angeles,

¹ The American Public Transportation Association defines commuter rail as “a mode of transit service (also called **metropolitan rail**, **regional rail**, or **suburban rail**) characterized by an electric or diesel propelled railway for urban passenger train service consisting of local short distance travel operating between a central city and adjacent suburbs. Service must be operated on a regular basis by or under contract with a transit operator for the purpose of transporting passengers within urbanized areas, or between urbanized areas and outlying areas. Such rail service, using either locomotive hauled or self-propelled railroad passenger cars, is generally characterized by multi-trip tickets, specific station to station fares, railroad employment practices and usually only one or two stations in the central business district. Intercity rail service is excluded, except for that portion of such service that is operated by or under contract with a public transit agency for predominantly commuter services. Most service is provided on routes of current or former freight railroads.” Public Transportation Fact Book, APTA, 2015, <http://www.apta.com/resources/statistics/Pages/glossary.aspx>.

commuter rail serves residents of Nashville, Salt Lake City, Albuquerque, and Denton County, TX, among others.

Commuter rail is regulated by two administrations within the U.S. Department of Transportation. The Federal Transit Administration (FTA) regulates most elements of commuter rail operations, and the Federal Railroad Administration (FRA) regulates its safety. As is true of most other types of transportation, commuter rail is not a profit-making business. Revenue generated by the system (through fares, advertising, and sometimes land development projects) does not cover costs; the remainder of commuter rail agencies' budgets comes from government grants and in some cases local taxes.

Commuter rail is a very safe mode of travel. The risk of a fatality among commuter rail or Amtrak passengers is about 1/20th the risk for people in cars and trucks.² In 2012, 52 people (not all of whom were passengers) died or were injured in commuter rail accidents – a small number considering that more than 466 million trips were taken on commuter rail that year.³ Nonetheless, there are some inherent risks in providing rail service. As mentioned, tracks may be shared with other types of trains. Many tracks cross roadways, raising the potential for interactions with cars or trucks. Pedestrians and bicyclists sometimes walk or ride along tracks, or cross tracks where they should not. Aging infrastructure, weather events, or intentional acts of destruction all have the potential to cause harm. Though these events are rare, commuter rail agencies prepare for them not only by training their employees in emergency preparedness and response, but also by insuring themselves against these possibilities.

Most commuter rail agencies self-insure up to a certain amount, typically between \$1 million and \$10 million in losses.⁴ In other words, for losses up to that amount, the agency will pay out of its existing budget. This is similar to a deductible in a personal insurance policy, in which the policyholder pays out of pocket for medical or car repair costs until those costs reach the level at which insurance kicks in. For losses above the self-insured amount, commuter rail agencies must look to private insurance companies for coverage.

When individuals or even most private companies are looking for insurance, they are able to shop for standardized insurance policies with regulated rates from a multitude of insurers. Railroad liability insurance, however, is considered a specialty product by the insurance industry. Only a handful of insurers offer this coverage, and they are what is known as “surplus lines” providers, which means that they are not regulated by states as closely other insurance companies, and their policy terms and rates are not regulated at all.⁵ A significant percentage of the railroad liability insurance marketplace is provided by foreign companies. Each policy is custom-made for the particular commuter rail agency, with negotiated terms and premiums. Due to the

² “Safer Than You Think: Revising the Transit Safety Narrative,” Victoria Transport Policy Institute, August 2015, <http://www.vtpi.org/safer.pdf>.

³ Table 2-33: Transit Safety Data by Mode for All Reported Accidents, Bureau of Transportation Statistics, http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/index.html#chapter_2. This figure includes only injuries and fatalities that resulted from a commuter rail accident (collisions with vehicles, objects, people, and derailments) and does not include suicides or other personal casualties not related to a train accident. Ridership figure from Quarterly and Annual Ridership Figures by Mode, American Public Transportation Association, available at <http://www.apta.com/resources/statistics/Pages/ridershipreport.aspx>.

⁴ Data drawn from an informal survey of APTA commuter rail members, conducted August 2015.

⁵ For more information on how surplus lines are regulated, see this FAQ by the Illinois Surplus Lines Association: https://www.slai.org/faq/insured_06.html.

fact that only a small number of insurers provide commuter rail insurance, the negotiating power of commuter rail agencies is more limited than it would be in the traditional insurance marketplace. Commuter rail agencies are currently paying premiums that range from \$1 million per year for the smallest agencies to \$8 million or even more for larger, more complex systems.⁶

Consequences of Raising the Liability Cap

In 1997, Congress established a \$200 million⁷ cap on passenger liability claims for passenger railroads, which has been interpreted to apply to both Amtrak and commuter rail agencies.⁸ The cap was put in place as part of the Amtrak Reform and Accountability Act of 1997, so that high insurance premiums and claims would not contribute to Amtrak's financial difficulties.⁹ Without a cap on liability, rail operators either have to absorb the full cost of such events in their limited budgets – potentially bankrupting them - or purchase insurance each year for the most severe losses they can foresee, even if such losses never actually happen. Congress decided to limit liability so that rail operators – which are publicly-funded – would not be subjected to these high costs. As the House Transportation and Infrastructure Committee put it in 1997, “In general, the rationale for imposing limitations on liability in public transportation is to encourage certain activities that yield substantial social benefits that otherwise would not be undertaken due to the exposure to liability, and to protect the taxpayers who ultimately bear the costs of tort liability incurred in providing the public transportation.”¹⁰

The liability cap has provided commuter rail agencies with a predictable exposure limit since 1997, allowing them to keep their insurance needs relatively constant and continue providing service for their communities. If the liability cap is raised, commuter rail operators will face immediate pressure to increase their insurance coverage to the new cap, and will have to pay higher premiums as a result. Given the limited marketplace for railroad liability insurance, the rail operators' ability to negotiate down that high premium would be limited. Preliminary estimates from commuter rail agencies suggest that premiums would increase by 5% to 275% to reach \$295 million of coverage if the proposal in the DRIVE Act were to go into effect, with most premiums increasing between 22% - 56%.¹¹

When costs go up for a private company, that company can choose to absorb the increase by, among other things, cutting dividends for shareholders or reducing profits. Commuter rail agencies do not have those options. When their costs go up, commuter rail agencies must either raise fares, make cuts in their operations, or seek more government contributions. Commuter rail budgets are already constrained. Federal funding for

⁶ Data drawn from an informal survey of APTA commuter rail members, conducted August 2015.

⁷ Some states have enacted lower caps, such as the Pennsylvania Sovereign Immunity Act; see <http://www.wolfbaldwin.com/Commercial-Litigation-Articles/Sovereign-Immunity-in-PA.shtml>.

⁸ The statute provides that “[t]he aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed \$200,000,000,” and defines a claim as “a claim made...against Amtrak, any high-speed railroad authority or operator, any commuter authority or operator, any rail carrier, or any State.” See 49 USC 28103(a)(2) and 49 USC 28103(e)(1). Courts have interpreted this language to apply to commuter railroads; see, e.g., the final order of U.S. District Court Judge George Wu in relation to the 2008 Chatsworth crash, which cites this statute as the reason for creation of a \$200 million compensation fund. Case No. 2:10-cv-06365-GW-JCx, Order Granting Motion for Order Permitting Deposit of Interpleader Funds, U.S. District Court, Central District of California, October 7, 2010.

⁹ See, e.g., Senate Report 105-85 on S. 738, p. 5, at <https://www.congress.gov/105/crpt/srpt85/CRPT-105srpt85.pdf>, and House Report 105-251 on HR 2247, pp. 20-22, <http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt251/pdf/CRPT-105hrpt251.pdf>.

¹⁰ House Report 105-251 on HR 2247, p. 21, <http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt251/pdf/CRPT-105hrpt251.pdf>.

¹¹ Data drawn from an informal survey of APTA commuter rail members, conducted August 2015.

public transportation has been essentially flat for five years, though ridership has continued to increase and transit agencies are facing an \$80 billion backlog of deferred maintenance needs.¹² Yearly rounds of service cuts and fare increases have become common.¹³ A change in federal law requiring more money to be paid to large insurance companies would take funding away from important capital investment and operational needs, and could lead to higher costs and less service for local taxpayers.

Increasing liability for private companies can serve as an incentive for them to make their products or services safer, because the greater liability threatens their profits. Unlike private companies, commuter rail agencies have no profits to protect.¹⁴ Commuter rail has a different set of safety incentives built into its operations. For one thing, commuter rail is heavily regulated. FRA requires numerous safety features, with detailed regulations governing braking systems, train and track structures, and locomotive safety standards, among others.¹⁵ Commuter rail operators are subject to mandatory training requirements and drug and alcohol testing.¹⁶ Commuter rail agencies are also directly overseen by the public officials who serve on their boards of directors, and their budgets are publicly debated each year. These factors provide commuter rail agencies with a strong incentive to provide safe operations, as they must maintain public support if they are to secure more funding each year.

Alternative Approaches

As a matter of public policy, the need to provide transit service must be balanced with the need to provide compensation for victims of these rare but life-changing events. There are ways to ensure that victims are compensated without sending more taxpayer dollars to a handful of big insurance companies. One potential solution is a victim compensation fund, such as the September 11th Victims Compensation Fund or the Crime Victims Fund, both established by the federal government.¹⁷ In the former case, the fund was not established until after the event occurred, whereas the Crime Victims Fund is a standing fund at the Department of Justice.

¹² See Quarterly and Annual Ridership Figures by Mode, American Public Transportation Association, available at <http://www.apta.com/resources/statistics/Pages/ridershipreport.aspx>, and “National State of Good Repair Assessment,” Federal Transit Administration, June 2010, http://www.fta.dot.gov/documents/National_SGR_Study_072010%282%29.pdf. Note that this report includes all types of public transportation, not just commuter rail.

¹³ See, e.g., “FY2015 MBTA Fare Change Adopted,” http://www.mbta.com/about_the_mbta/?id=23567; “N.J. Transit Proposes Fare Increases and Service Cuts,” New York Times, April 20, 2015, http://www.nytimes.com/2015/04/21/nyregion/nj-transit-proposes-fare-increase-and-service-cuts.html?_r=0; “Metrolink to Cut Service on San Bernardino Line,” San Gabriel Valley Tribune, July 14, 2014, <http://www.sgvtribune.com/general-news/20140714/metrolink-to-cut-service-on-san-bernardino-line>.

¹⁴ Case law and academic literature are divided on the question of whether and to what extent public agencies are motivated to change behavior by the threat of liability in the absence of a profit motive. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), in which the U.S. Supreme Court holds that municipalities are not subject to punitive damages because their deterrent effect is unclear and large damage awards could harm taxpayers; *Owen v. City of Independence*, 445 U.S. 622 (1980), in which the U.S. Supreme Court holds that governments are liable for damages in section 1983 cases (violations of constitutional rights) because of the deterrent effect of liability and the importance of protecting constitutional rights; and “A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings,” Lawrence Rosenthal, *Journal of Constitutional Law*, Vol. 9:3, February 2007, <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1251&context=jcl>, in which the author argues that public agencies are motivated by political rather than economic goals. The lack of a conclusive answer to this question makes it even more challenging for the insurance market to price coverage for commuter rail agencies.

¹⁵ See Federal Railroad Administration, Final Rules, at https://www.fra.dot.gov/eLib/Find#p1_z10_ILR.

¹⁶ See <https://www.fra.dot.gov/Page/P0538> and <https://www.fra.dot.gov/Page/P0345>.

¹⁷ For more information, see <http://www.vcf.gov/> and <http://ojp.gov/ovc/pubs/crimevictimsfundfs/intro.html>.

In both cases, the federal government has taken on the responsibility of providing compensation for those who have suffered significant losses, despite the fact that the losses were not directly caused by federal actions.

Another option would be a federal backstop to cover losses above the liability limit. In other contexts where insurance markets were non-competitive and premiums were becoming unaffordable, the government has stepped in to ensure that the underlying activities could continue. Examples include the National Flood Insurance Program¹⁸, the Terrorism Risk Insurance Program¹⁹, the Price-Anderson Act²⁰, and the War Risk Insurance Program²¹. Each of these programs is structured slightly differently; for example the federal government acts as a direct insurer offering subsidized premiums in the National Flood Insurance Program, and serves as a backstop for insurers in the Terrorism Risk Insurance Program. Nonetheless, each has the same aim: to fill a gap in the private insurance market so that a socially and economically beneficial activity could continue.

A fairly straightforward way to construct a federal backstop that could compensate victims above the liability cap in the rare case of a catastrophic rail accident would be to send the funding through an existing program, such as FTA's Emergency Relief Program.²² The Emergency Relief Program was created in MAP-21 to establish a formal structure by which transit agencies could apply to FTA for funds after a natural disaster or other emergency. Funding is provided by Congress through supplemental appropriations on an as-needed basis. Should the \$200 million available from transit agencies and their insurers not be enough to cover victims' needs, Congress could simply provide FTA with additional resources through the Emergency Relief Program to cover those needs.

Any of the options discussed above would have less impact on commuter rail agency budgets than raising the liability cap, and could provide full compensation to future accident victims. By contrast, raising the liability cap would take funding away from commuter rail agencies and their riders today, on the chance that it would be needed to compensate victims in the future. These two groups – today's riders and possible future victims – should not be pitted against each other. Providing a federal backstop or victims fund would balance the needs of both.

¹⁸ A federal program administered by the Federal Emergency Management Agency that provides low-cost flood insurance to property owners. The program was established in 1968 to address a gap in the private insurance market and reduce the likelihood that federal disaster assistance would be required following a flood. http://www.fema.gov/media-library-data/20130726-1438-20490-1905/f084_atq_11aug11.pdf

¹⁹ In this program the federal government acts as a reinsurer (essentially, an insurer for insurance companies), promising to provide funding to insurers if they are called upon to pay extraordinarily high claims after a terrorist attack. The program was enacted in 2002 when most private insurers stopped covering terrorism-related property damage. <http://www.treasury.gov/resource-center/fin-mkts/Pages/program.aspx>

²⁰ This Act creates a liability limit for non-military nuclear power plants. It was passed in 1957 to ensure that the fledgling nuclear power industry would not be bankrupted by insurance costs, but that victims would still be compensated in case of a catastrophic accident. Plants are required to purchase insurance from the private market to the extent such insurance is reasonably available. If claims exceed that coverage, the next layer of coverage is provided by a fund to which the power plants must contribute (though contributions are only required to be made once an accident has occurred). For claims that exceed the amount of the fund, Congress is to determine the source of payments. <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.pdf>

²¹ A temporary program through which the Federal Aviation Administration offered insurance coverage for U.S. air carriers. The program was enacted after the 9/11 terrorist attacks when the private insurance market stopped providing insurance coverage for airlines. https://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_insurance/ext_coverage/

²² 49 USC 5324.

The federal government has a strong interest in the success of commuter rail. Fast, reliable transit service not only benefits its riders, but also helps to achieve economic and environmental goals.²³ Taxpayers and riders provide hundreds of millions of dollars to commuter rail agencies every year. Rather than require more of that funding to be siphoned off to big insurance companies, the federal government should ensure that funding can be put to its most productive use: providing safer, more reliable transit service.

²³ See “Public Transportation Benefits,” American Public Transportation Association, <http://www.apta.com/mediacenter/ptbenefits/Pages/default.aspx>.

Acknowledgements

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