FLETCHER & SIPPEL LLC

Legal Services for the Transportation Industry

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F&S Granted Summary Judgment in Grade Crossing Case

On May 14, 2012, the Federal Court for the Western District of Wisconsin granted Fletcher & Sippel's motion for summary judgment in a case arising out of a grade crossing accident in Taylor County, Wisconsin. Plaintiff made several claims of negligence against Wisconsin Central Ltd ("WLC"), including: (1) the train was operating at excessive speed, (2) the crew failed to adequately sound the train's horn as it approached the crossing, and (3) the warning devices (cantilevered gates and flashing lights), were not working properly.

Fletcher & Sippel argued that, because the train was operating below the maximum speed prescribed by the FRA for that section of track, the claim of excessive speed was preempted by federal law. F&S also presented evidence that the train's horn began sounding twenty seconds prior to impact, in a pattern of two long blasts, one short blast, and two more long blasts until the train's first locomotive occupied the crossing, as required by 49 C.F.R. § 222.21 and thus the horn claim was also preempted by federal law. Finally, evidence was presented that the warning devices were working properly at the time of the collision. Indeed, the gate event recorder data, which was interpreted by WCL's accident reconstruction expert, showed the flashing lights at the crossing had been activated for thirty-two seconds prior to the accident and the gate was nearly completely horizontal seven seconds later.

(*Continued on page 2)*

IN THIS ISSUE

Bankruptcy Omission Ruins Plaintiff's Day

On August 14, 2012, a Minnesota state court granted Fletcher & Sippel's motion for summary judgment in an FELA case. F&S attorneys James Helenhouse and Jeremy Berman conducted discovery and drafted the successful motion papers. The plaintiff, a switchman, claimed he injured his knee in two separate incidents occurring hours apart. A year and a half after his injury, the plaintiff filed for Chapter 7 bankruptcy. Despite telling his bankruptcy attorney about his alleged injury, plaintiff failed to list his potential FELA claim as an asset in his bankruptcy petition. He then sued the railroad more than a year after his debts were discharged. After learning of plaintiff's bankruptcy omission, the railroad filed for summary judgment on two grounds: (1) that plaintiff lacked

(Continued on Page 4)

Grade Crossing *(Continued from Page 1)*

Fletcher & Sippel further argued that, even if WCL had failed to adequately warn plaintiff of the presence of the train, his claims were barred pursuant to the "occupied crossing rule," which provides that where a train is occupying a crossing, absent special circumstances, the railroad has no duty to provide any additional notice or warning to approaching motorists. The train's presence within the crossing is by itself sufficient warning. Ironically in this case, it was actually the plaintiff's truck that struck the train — he collided with the second locomotive and first rail car. Thus, F&S argued that plaintiff's claims were barred because his own negligent conduct was more than fifty percent of the proximate cause of his injuries.

Plaintiff withdrew his claim that WCL's train was traveling at an excessive rate of speed. He attempted to dispute WCL's evidence that the warning devices at the crossing were properly functioning but was unable to do so because he had no expert witness to refute WCL's accident reconstructionist's interpretation of the data. Finally, plaintiff argued that the "occupied crossing rule" did not apply because the truck and train arrived at the crossing "at nearly the same time," creating questions of fact regarding the relative negligence of the parties.

The Judge disagreed and found that it was not necessary to decide the federal preemption question because, even viewing the facts in a light most favorable to the plaintiff, plaintiff was more negligent that WCL as a matter of law. The Court noted that "the most salient fact is that plaintiff hit the train; the train did not hit him." Regarding Plaintiff's argument that the "occupied crossing rule" did not apply because only the first locomotive had passed through the crossing at the time of impact, the Court noted that other courts, in applying the rule, have not held the train must be in the crossing for any particular amount of time in order for the rule to apply. The Court emphasized that, where the motorist's view of the crossing is blocked, the motorist has a heightened duty to stop, look and listen. The Court found that no reasonable jury could find in favor of the plaintiff on his claims.*

Fletcher & Sippel attorneys Colleen Konicek and Liza Bryant conducted discovery and drafted the successful motion papers. If you would like a copy of the Court's order, please contact Liza Bryant at 312-252-1547 or at ebryant@fletcher-sippel.com

*Note: For those practicing in Wisconsin, the Court's decision provides good guidance regarding the applicability of the "occupied crossing rule" and the duty of a motorist approaching a crossing, findings that do not appear in the more recent Wisconsin case law and should be helpful to railroads defending future claims against motorists who fail to heed the warnings as they approach railroad crossings.

Third Circuit Expands Private Companies' Medicare Recovery Rights

Based on a recent Third Circuit ruling, the Medicare lien process will likely become even more frustrating. In the case of *In re Avandia Marketing*,685 F.3d 353 (3rd Cir. 2012), the Court held that a private provider of Medicare services has a private cause of action to recover claim-related payments under the Medicare Secondary Payer Statute ("MSP").

The MSP provides that Medicare cannot pay expenses where payments have been made or can reasonably be expected to be made, under workers' compensation or other insurance, including a company's settlement with out of pocket funds (42 U.S.C. § 1395y(2)(b)(A)(ii)). Under the MSP, Medicare can pay these expenses if the entity responsible is not yet known or is not expected to make payment in a timely fashion, for instance if a claim is pending in litigation. Medicare's payment is conditional and Medicare must be reimbursed by the responsible entity. Failure to repay Medicare can result in Medicare bringing a direct action for double the amount it paid against any of the parties involved.

Medicare Advantage Organizations ("MAOs") contract with the government to provide Medicare benefits to eligible individuals. Individuals can elect to participate in a Medicare Advantage Plan in lieu of traditional Medicare, and often do so because the plan offers additional benefits not covered by Medicare Part A & B. The MAOs are paid a flat rate per enrollee, administer the plan and assume the risk for insuring those individuals.

But do these MAO's have the same right as Medicare to pursue repayment?

The *Avandia* case involved Humana, who operates several MAO plans. Humana filed a complaint against GlaxoSmithKline ("GSK") to recover payments it made for their enrollees' treatment allegedly resulting from their use of GSK's drug, Avandia. GSK agreed to settle a class action suit involving Avandia for $460 million dollars. Humana sought double damages against GSK under the MSP's private cause of action (42 U.S.C. § 1395y(b)(3)(A)).

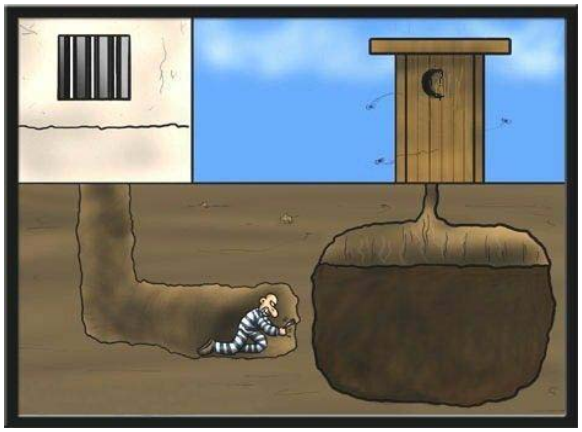
The District Court granted GSK's motion to dismiss, holding that the statute providing for MAO's had its own secondary payer provision, (42 U.S.C. § 1395w-22(a)(4)) which did not create a private cause of action for MAOs and that the statutory language in the MSP was silent on the existence on a private right of action for private non-governmental actors, indicating Congress's intent not to create one.

The Third Circuit disagreed. It held the plain text of the MSP Act established a cause of action for private, non-governmental actors (e.g. MAOs) against "primary payers" for double damages. The Court focused on the fact that, throughout the provisions providing for private causes of action, the MSP statute referenced "payments made under this subchapter." Since the MSP Act did not include any exclusionary language, the Court held that the phrase "payments made under this subchapter" therefore included MAOs; as well as Medicare. The Court also held that if Congress had intended to exclude MAOs from asserting a private cause of action under the MSP, they would have explicitly stated the same. Alternatively, the Court held that, even if it was determined that the statute was ambiguous, the Court should defer to regulations established by the Centers for Medicare and Medicaid Services ("CMS"). Specifically, the Court referenced a December 5, 2011 CMS Memorandum titled "Medicare Secondary Payment Subrogation Rights," which outlined CMS' interpretation of 42 C.F.R. § 422.108. CMS assigns MAOs the right *(Continued on page 4)*

Medicare *(Continued from Page 3)*
and responsibility to collect from primary payers using the same procedures available to traditional Medicare. Therefore the Third Circuit held that the MSP statute provides MAO's the same right to recovery as the Medicare Trust Fund.

Based on the Court's holding in *Avandia*, private providers of Medicare will likely be increasingly proactive in asserting their recovery rights. It is now important to verify not only whether the plaintiff was / is a Medicare beneficiary, but also whether he or she was/is enrolled in any private Medicare plans. If the plaintiff has coverage from such a plan, the responsibility for settling any such lien should be negotiated as part of settlement and the release agreement should properly assign that responsibility. For more information please contact Stephen Rynn at (312) 252-1539 or at srynn@fletcher-sippel.com.

Bad Day *(Continued from page 1)*
standing to bring his claim because his claim belonged to the bankruptcy trustee; and (2) that plaintiff was judicially estopped from pursuing his claim. A month later, plaintiff reopened his bankruptcy case. Plaintiff's FELA attorney was granted permission to pursue the claim on behalf of the trustee. Despite this attempt to rectify the situation, the trial court granted the railroad's motion on both grounds.



The court found plaintiff was judicially estopped from pursuing his claim because he took inconsistent positions. He first omitted his claim in bankruptcy (thus persuading the bankruptcy court that he had no claim) and then he filed a suit to pursue his claim. Plaintiff argued the bankruptcy omission of his claim was an excusable mistake because he relied on his bankruptcy attorney's advice. The court rejected this argument, finding that bad legal advice is no excuse. Plaintiff's remedy for his attorney's advice, if anything, is a malpractice claim.

The court also agreed that plaintiff lacked standing to bring his claim. Plaintiff sought to substitute the trustee as the real party in interest under Minnesota state procedural rules. Again, the court found that bringing suit in his own name was not an understandable mistake that would allow plaintiff to substitute in the trustee. In the end, it was not only plaintiff's failure to disclose his potential claim in bankruptcy but also his sluggishness in attempting to remedy the situation that allowed the court to grant the railroad's motion. If you would like a copy of the motion, please contact F&S attorneys James Helenhouse at (312) 252-1501 or jhelenhouse@fletcher-sippel.com or Jeremy Berman at (312) 252-1510 or jberman@fletcher-sippel.com.

DO YOU USE A THIRD PARTY TO PERFORM BACKGROUND CHECKS? DO YOU USE ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS?

If the answer is yes…here's some things you need to know……

1. When you retain a 3rd party firm to conduct background checks, you are subject to the Fair Credit Reporting Act (FCRA) enforced by the Federal Trade Commission. Background checks are defined as "consumer reports" under the FCRA. They require an applicant or employee's written permission before being conducted. The authorization should be on a separate document from the employment application. It can be a one-time notice that applies for any time during employment.
2. Under the FCRA, if information obtained from a "consumer report" is used for an "adverse action" (denying a job, terminating an employee, rescinding a job offer, denying a promotion, etc), the individual must be given a "pre-adverse action disclosure" and, if adverse action is taken, the individual must be given an "adverse action notice" identifying the screening agency, stating the action was the employer's not the agency's and giving the individual a right to dispute the accuracy of the information in the report.
3. As to arrests and convictions records, EEOC recently issued updated enforcement guidance on consideration of such records in employment decisions. The new guidelines confirm EEOC's position that reliance on arrest and conviction records in hiring or retention of employees may result in illegal discrimination. The EEOC will look at: (1) the nature and seriousness of the offense; (2) time lapsed; and (3) nature of job vs nature of the offense.
4. EEOC's best practices guidelines regarding arrest and conviction include:
   a. A strong discouragement regarding the use of general questions on job applications about conviction records. EEOC suggests any such inquiry should be directed to convictions that relate to the job in question and business necessity.
   b. A recommendation that employers adopt a policy expressly stating that an applicant will not be excluded based on an arrest or conviction record alone.
   c. A strong suggestion that employers not use blanket policies that deny employment to all applicants with conviction records but instead use an evaluative process that looks at factors such as time elapsed and relevance to the job. EEOC recommends employers rely on properly conducted studies that relate the nature of the conduct to likelihood that a person will commit the crime again.
   d. Have in place good processes to protect the confidential nature of any criminal information obtained about applicants or employees and make sure your managers and decision makers are trained about the appropriate use of criminal background records.
   e. A recommendation that employers conduct "individualized assessments" before making decisions based on criminal history, inform the individual of the exclusion or potential exclusion, and give the employee an opportunity to demonstrate that he or she should not be excluded. The "individualized assessment" should be documented and demonstrate consideration of such things as : the facts and circumstances surrounding the criminal offense, employment or character references, and evidence as to whether the person performed the same type of work post-conviction without incident.

Don't forget-- Check the state law where you operate. States have their own rules on these issues, especially use of arrest and conviction records. Some do now allow use of arrest records at all. Contact your lawyer for guidance if the state law conflicts with federal law. For further info, contact Janet Gilbert at (312) 252-1507 or jgilbert@fletcher-sippel.com.

OSHA Updates

- **Interference with Medical Treatment:**

Santiago v. Metro-North Commuter Railroad Company

On July 25, 2012 the Administrative Review Board ("ARB") reversed and remanded the case of *Santiago v. Metro-North Commuter Railroad Company*, ARB Case No. 10-147; ALJ Case No. 2009-FRS-011 (July 25, 2012). The ARB's position is that, 20109(c)(1), which prohibits a railroad from denying, delaying or interfering with the medical treatment of an employee who is injured during the course of employment, applies throughout the entire period of treatment for the injury and is not limited to immediate medical care, as initially held by the Administrative Law Judge. Per the ARB, to succeed on a claim under 20109(c)(1) an employee must prove that: (1) the carrier inserted itself into the medical treatment and (2) such act caused a denial, delay, or interference with medical treatment. "Section 20109 does not require the railroad carrier to affirmatively provide medical insurance, but, if it does, it must not interfere with the insured's decisions." A railroad may argue as an affirmative defense that the result would have been the same with or without the railroad interference.

Delgado v. Union Pacific Railroad Company

Union Pacific challenged a claim of interference with medical treatment in *Delgado v. Union Pacific Railroad Company*, 12-cv-02596, in the Northern District of Illinois. UP argued in a motion to dismiss that "interference" is not a proper right of action and that 20109 provides a right of private action only to employees who have been disciplined or threatened with discipline for requesting medical treatment – not to employees, like Delgado, who allege no disciplinary action. The Court issued an Opinion on October 11, 2012, denying UP's motion and holding that a carrier's efforts to "deny, delay, or interfere" with an injured employee's pursuit of medical treatment can be understood to constitute a form of discrimination, and retaliation, against such an employee.

- **Election of Remedies:**

Norfolk Southern Railway Corp. v. Hilda L. Solis, Secretary of Labor

Last fall, the ARB rejected the arguments of Norfolk Southern Railway Corp. and Union Pacific Railroad in the cases of *Koger v. Norfolk Southern Railway Co.* and *Mercier v. Union Pacific Railroad*. The ARB held that pursuing of a claim under the railway labor act does not constitute an election of remedy by an employee as contemplated in § 20109(f). The ARB held an employee may pursue remedies for discipline both before a Public Law Board under the Railway Labor Act and before OSHA pursuant to the whistleblower provisions of the Federal Railroad Safety Act. Both proceedings were sent back to the Administrative Law Judges for proceedings consistent with the ARB's decision.

NS challenged the ARB's ruling by filing an action against the Secretary of Labor in the District Court of Washington D.C., *Norfolk Southern Railway Co. v. Hilda L. Solis*, 12-cv-00306-RWR. NS argues that in *Koger* the ARB's ruling exceeded the Secretary of Labor's jurisdiction and delegated powers. The Secretary of Labor has filed a motion to dismiss NS's claims. The American Association of Railroads has filed a motion in support of NS and the United Transportation *(Continued on page 7)*

OSHA Updates *(Continued from Page 6)*

Union and the Brotherhood of Locomotive Engineers and Trainmen have filed motions in support of the employee. As of October 19, 2012, a decision on the Motion to Dismiss had not yet been issued.

- **Reinstatement upon Preliminary Decision**

Hilda L. Solis, Secretary of Labor v. Union Pacific Railroad

On August 6, 2012, the Secretary of Labor filed a Complaint followed by a Motion for Preliminary Injunction in the District Court of Idaho to force Union Pacific Railroad to reinstate a worker who was determined by an OSHA investigator to have been dismissed in retaliation for performing a protected activity. UP responded to the Motion by arguing that the Secretary of Labor may not enforce an OSHA decision that is not final such as in this case where UP is appealing the decision to an Administrative Law Judge. UP further raises the argument that the election of remedies provision of §20109(f) precludes the Secretary of Labor's actions. As of October 19, 2012, a decision on the Motion for Preliminary Injunction had not been issued.

For more information, please contact Kristin Bevil at (312) 252-1504 or kbevil@fletcher-sippel.com.

Railroad Retirement Victory

Fletcher and Sippel recently helped RailAmerica, Inc. to overturn an adverse and potentially devastating coverage decision from the Railroad Retirement Board. RA purchased Atlas Railroad Construction, LLC, an independent railroad construction company, in 2010. Prior to the acquisition, Atlas had contracts with several RA railroads for construction and maintenance work. The RRB initially decided that, because of this previously independent work for RA, Atlas became a covered railroad "affiliate" upon acquisition and was subject to Railroad Retirement Taxes. If Atlas were now required to pay hundreds of thousands of dollars in additional employment taxes – while its competitors continued to pay FICA taxes – Atlas would have been completely uncompetitive, and a multimillion dollar deal would have gone south. Ron Lane, working with RailAmerica and Atlas, was able to convince the Board to reconsider its decision and conclude that, in the particular circumstances of this acquisition, this was the wrong result. Today, Atlas Construction still pays FICA taxes and remains a vital competitor in the railroad construction and maintenance market.

Illinois Employers Barred from Snooping on Employees

In July of this year, Illinois Governor Pat Quinn signed a law making Illinois only the second state in the US to prohibit employees from requesting passwords from employees or applicants to their online social media profiles. Coined "the Facebook Bill," the law is designed to protect the privacy of both current employees and prospective hires from the trending practice of employers to request passwords to "check-up" on the employees and applicants. Governor Quinn agreed with civil liberties groups and social media users who have criticized the practice as a fundamental invasion of privacy and cited the importance of privacy laws keeping pace with technology. The Illinois law is strict and leaves no exceptions, not even for job openings that require thorough background checks. Employers, however, should note that the law does not prohibit them from viewing information that is not restricted by privacy settings on a website, nor does it prohibit employers from setting workplace policies on the use of social media. The law goes into effect on January 1, 2013. For more information, please contact Liza Bryant at 312-252-1547, or at **ebryant@fletcher-sippel.com**.

With the holiday season fast approaching us, everyone at Fletcher & Sippel wishes all of you a safe and happy holiday season.

Transaction Tips

[NOTE: This is a new column we're going to try on a regular basis in our upcoming Newsletter. We hope it's helpful but your feedback is welcomed.]

ARBITRATION CLAUSES: ARE THEY ALWAYS THE BEST CHOICE?

There has been a big push in the last decade to include arbitration clauses in all contracts. They have become so common, and the arbitration language so consistent, that we're sure many of you just write them off as the legal "mumbo jumbo" you leave to your lawyers. Arbitration clauses were considered to be more efficient and less costly than the traditional court system but that is not always the case. Below are some of the "pros and cons" of using arbitration clauses for dispute resolution. We suggest you add the arbitration clause to your list of "business decisions" that need to be made when you enter into contracts and weigh whether the clause is appropriate or whether it needs to be tailored to meet the needs of your particular transaction.

PROS:

Tailored to Your Needs: arbitration clauses can be flexible, limited in scope, designed to set forth simplified rules of evidence and procedure, specify the time, place and manner by which disputes will be resolved -- all geared to quick resolution of disputes

Faster than Litigation: this of course depends on the jurisdiction where any lawsuit would be brought and whether the arbitration clause has been drafted in such a way as to eliminate, up front, some of the more contentious and time-consuming aspects of arbitration clauses such as how discovery will take place, how much discovery, what procedural rules will be used, etc.; however, if the clause is clear as to specific response times, etc., arbitration can often be faster than litigation.

Confidential: parties can agree that arbitrations will be private and all proceedings and terms of resolution will remain confidential, which, depending on the circumstances, could be highly beneficial to both parties.

Skilled or Knowledgeable Arbitrators: if your contract involves technical matters or disputes where industry knowledge is a must, the clause can specify the skill set of the arbitrator and assure that both sides will have the matter heard by individuals who understand the issues without the need to spend time to educate them.

CONS:

Binding: most arbitration clauses are designed to either be binding on the parties or have very limited ability to appeal the results. If you have a "bet the business" dispute, there is limited recourse to have the arbitration decision reviewed.

Frequency of Disputes: if your contract has the potential to involve numerous disputes or the parties are contentious, it is possible that the ease of arbitration will actually encourage disputes as opposed to requiring a complaint and court filing.

Procedural Limitations: temporary injunctions, motions to dismiss for frivolous actions or other questionable basis for the dispute, summary judgment motions that resolve a matter on the law alone – these types of procedural means to resolve disputes may very well not be available.

BUT THE JURY IS STILL OUT ON THE MOST COMMON DEBATE ABOUT ARBITRATION: IS IT LESS COSTLY THAN LITIGATION?? The intention of arbitration clauses, and their popularity, was to save litigation costs but all too often the arbitration battles have been as time consuming and as costly in legal fees as litigation PLUS you add on to that the cost of the arbitrator(s), potential arbitration filing fees and space rental!

Future Topics for "Transaction Tips": send your comments and questions to Janet Gilbert at jgilbert@fletcher-sippel.com.

2012 Race Judicata

Fletcher & Sippel employees recently participated in the 19th Annual Race Judicata 5k to raise money for Chicago Volunteer Legal Services (CVLS). CVLS is an organization of almost 3,000 volunteer attorneys who provide free legal services to thousands of low-income Chicagoans annually. F&S attorneys Kristin Bevil, Liza Bryant, Jim Helenhouse, Colleen Konicek, Ron Lane, Stephen Rynn and Myles Tobin and paralegal Melissa Hertel all completed the 5k and had a great time raising money for CVLS. The participants were cheered on by several of their fellow employees.

Upcoming Events

November 27-30, 2012 **General Counsel Symposium and Finance & Administration Seminar**

Intercontinental Kansas City at the Plaza—Kansas City, MO

Ronald Lane—General Counsel Symposium Co-Chair

Kristin Bevil- OSHA Whistleblower Developments: Interference with Medical Treatment, Return to Work, and Safety Incentive Programs

****THIS YEAR CLE WILL BE OFFERED FOR THE GENERAL COUNSEL SYMPOSIUM****

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