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Derailed: The Locomotive Inspection Act and the Need to Extend the Field Preemption

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Comments

Derailed: The Locomotive Inspection Act and the Need to Extend the Field Preemption

Rebecca Diel*

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I. INTRODUCTION

On January 23, 1990, Michael McGinn was working as a brakeman for Burlington Northern Railroad Company when he fell down the stairs of a moving locomotive, injuring his back and ribs.¹ He had tripped over the luggage strap of his own suitcase, which he had placed on the floor of the locomotive in the absence of available luggage racks.² In his lawsuit against his railroad employer,

* J.D., University of Pacific, McGeorge School of Law, to be conferred May 2014. I would like to thank Union Pacific attorneys Michael Johnson, Brian Plummer, and David Pickett for their guidance and support throughout the writing process.

1. McGinn v. Burlington N. R.R. Co., 102 F.3d 295, 297 (7th Cir. 1996).

2. *Id.*

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McGinn alleged, among other things, that Burlington Northern had violated the Boiler Inspection Act (BIA),³ a federal act that dictates safety standards for locomotives used by interstate railroads.⁴ The employee claimed that the locomotive should have had a luggage rack where he could place his suitcase, so that the tripping hazard would not have been in the middle of the cab of the locomotive.⁵ This complaint amounts to a design defect negligence claim directed to the interior of the locomotive, yet the suit was filed against the railroad, rather than the manufacturer of the locomotive.⁶

Railroad employees injured on the job engage in a compensation process that is unique to the railroad industry.⁷ As opposed to the typical no-fault workers' compensation system, the Federal Employer's Liability Act (FELA) allows for a more generous recovery, but only if the injured employee can prove negligence on the part of the railroad.⁸ Shortly after Congress enacted the FELA in 1908,⁹ the federal government enacted the Boiler Inspection Act in 1911 (later renamed the Locomotive Inspection Act),¹⁰ which created the Federal Railroad Administration (FRA), and empowered the newly created commission to regulate and enact standards to which all locomotives must conform.¹¹

In 1926, the Supreme Court of the United States ruled that the intent of Congress in enacting the Locomotive Inspection Act was to occupy the entire field of locomotives and their parts used by interstate railroads.¹² This decision established that any state law that concerns locomotives will be preempted by the federal statutes and will not be recognized.¹³ The decision explicitly states that the Court believed Congress intended a field preemption; the field was defined as "the field of regulating locomotive equipment."¹⁴ The Supreme Court has not yet

3. *Id.* The Boiler Inspection Act was expanded and renamed to the Locomotion Inspection Act in 1915. *Infra* note 10.

4. 49 U.S.C. § 20701 (2006).

5. *McGinn*, 102 F.3d at 298.

6. *Id.* at 297–98.

7. The FELA only applies to railroad workers and seamen, as a special development to address the particular dangers of these specific industries. Melissa Sandoval Greenidge, *Getting the Train on the Right Track: A Modern Proposal for Changes to the Federal Employer's Liability Act*, 41 MCGEORGE L. REV. 407, 408–09 (2010).

8. *See id.* at 410 (citing Thomas E. Baker, *Why Congress Should Repeal the Federal Employer's Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 81 (1992), and explaining how Congress drafted the FELA based on the negligence principles of the time).

9. Federal Employer's Liability Act of 1908, Pub. L. No. 100, §§ 1–8 (amended 1939) (current version at 45 U.S.C. §§ 51–60 (West 2006)).

10. The original act was called the Boiler Inspection Act and applied only to the boiler of the locomotive, but in 1915 the act was extended to cover all locomotives and their parts, and renamed as the Locomotive Inspection Act (LIA). *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 608 (1926).

11. *Id.* at 608–09.

12. *Id.* at 613.

13. *Id.*

14. *Id.* at 607, 613.

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extended this reasoning to prevent claims against the railroads, and, as it stands, the decision only applies to protect the railcar and equipment manufacturers from products liability suits.¹⁵ Therefore, because employee plaintiffs are currently barred from bringing products liability claims against the manufacturers of locomotives and parts, their lawyers have taken advantage of recent case law suggesting that FELA plaintiffs can bring these claims against the railroads themselves.¹⁶ Yet, the railroad's only role in producing locomotives is that of purchasing the locomotive and its parts.¹⁷

Because employee plaintiffs continue to bring products liability cases claiming defective design of a locomotive against employers, the railroads are forced to litigate these claims—which are based on no fault of their own.¹⁸ In this way, employees are eliminating the requirement of fault on the part of the railroads by suing them under FELA for the design defects created by the manufacturers.¹⁹ Plaintiffs are able to recover larger damages (as compared to employees who receive payments under the typical, no-fault worker's compensations system) without proving negligence on the part of the railroad.²⁰ This trend of generous awards without a showing of any negligence goes against the Congressional intent, and very cornerstone, of the FELA statutory scheme, which allows for larger damages only in the case of railroad negligence.²¹ The current state of the law, which allows for this inequitable result, has caused uncertainty for the attorneys for both FELA plaintiffs and railroad defendants, creating an atmosphere in which the outcome of a case is unknown and unpredictable.

This Comment proposes that the field preemption enjoyed by the manufacturers should be extended to products liability claims brought against the railroad, and that any plaintiffs who are truly in need of compensation for their injuries will largely be able to recover under traditional FELA principles.²² For the small minority of cases in which a plaintiff has no recourse from the courts or from his employer, this Comment proposes an appeals system by which this

15. *Gilmore v. Union Pac. R.R. Co.*, No. 2:09-cv-02180-KMJ-DAD, at 16 (defendant's motion for summary judgment denied) (on file with the *McGeorge Law Review*).

16. *Infra* Part III.C.

17. *See McGinn v. Burlington N. R.R. Co.*, 102 F.3d 295, 297 (7th Cir. 1996) (plaintiff sued railroad claiming there should have been luggage racks in the locomotive cab); *Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180 -KMJ-DAD, 2012 WL 3205233, at *9 (E.D.Cal. Aug. 2012) (alleging that "air brake compartment door that caused injury should have been made of fiberglass or have additional latches"); *Woods v. Union Pac. R.R. Co.*, No. NC035695, at *7 (Cal. Ct. App., April 15, 2008) (plaintiff sued railroad alleging that handholds on outside of railcar should have been horizontal, instead of vertical); *infra* Part III.D.

18. *See, e.g., Grogg v. CSX Transp., Inc.*, 659 F. Supp. 2d 998, 1000 (2009) (Grogg sued his railroad employer for the alleged defective design of the engines of the locomotives he had been riding in for over twenty years as a conductor).

19. *See id.* at 1006-07.

20. Greenidge, *supra* note 7, at 412.

21. *Infra* Part III.D.

22. *Infra* Part IV.

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plaintiff may file a grievance directly with the FRA, the federal agency that approves locomotive designs.²³ Part II discusses the historical backdrop of the pertinent federal statutes. Part III details the two main Supreme Court decisions that created this issue. Finally, Part IV proposes a solution to operator liability for manufacturing defect and explores the arguments for and impact of expanding the LIA field preemption to cover railroad employees. Part IV also explores the option of establishing a system in which a plaintiff may present his case to the FRA itself.

II. HISTORICAL BACKGROUND

FELA and the LIA were both enacted at the turn of the twentieth century, when injuries of railroad employees were numerous, severe, and largely uncompensated.²⁴ In response to an epidemic of debilitating and traumatic injuries, the federal government intervened and created a series of statutes that brought uniformity and increased safety across the industry.²⁵ While each set of laws was enacted and passed separately, the Supreme Court of the United States has noted that the LIA and its sister statute, the Safety Appliance Act (SAA),²⁶ “are substantively if not in form amendments to the Federal Employer’s Liability Act.”²⁷ Because the LIA did not create a private right of action within its provisions,²⁸ the interaction between the LIA and FELA has been somewhat unpredictable, and the standards of each can be somewhat convoluted.²⁹ This Part discusses the implementation of each set of regulations, the extent to which courts have interpreted their scope, and the ways in which they relate to each other.

A. The Enactment of the Federal Employer’s Liability Act

Congress enacted the Federal Employer’s Liability Act (FELA) in 1908 as an affirmative measure to protect railroad employees from injuries suffered on the job.³⁰ The understood purpose of the statutory scheme was to afford a predictable

23. *Infra* Part IV.B.2.

24. See Greenidge, *supra* note 7, at 409–10 (describing the dangers associated with railroad work and that there was no comprehensive federal liability system to compensate workers for their injuries).

25. Brief for Respondent at 4–5, *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261 (2012) (No. 10-879), 2011 WL 4590847 (citing *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486 (1943)).

26. The Safety Appliance Act is the sister act to the Locomotive Inspection Act. While the LIA pertains to locomotives, the SAA focuses on safety rules for the entirety of the train and its parts. See *Urie v. Thompson*, 337 U.S. 163, 189 (1949) (discussing the nature of the SAA and the LIA to each other, and to the FELA in general).

27. *Id.*

28. See 49 U.S.C. § 20701 (2006) (failing to provide a private right).

29. *Infra* Part II.A.

30. Greenidge, *supra* note 7, at 410.

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and generous recovery for those who suffer workplace injuries while acting in their capacity as railroad employees.³¹ The FELA was enacted prior to the development of any workers' compensation system and, in fact, differs substantially from workers' compensation systems.³² While most workers' compensation programs offer a no-fault scheme where a worker will recover modest damages without having to show employer fault,³³ the FELA requires that the employee prove negligence on the part of the railroad in order to recover.³⁴ Once a plaintiff proves negligence, however, the available recovery is much larger, and the railroad employer is liable for all damages resulting from the injury.³⁵ This includes, but is not limited to, costs of medical care, lost future earnings, and pain and suffering—rather than simply compensating lost wages as other workers' compensation systems do.³⁶

The text of the FELA reads that the railroads will be liable “for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.”³⁷ As the Supreme Court noted in *CSX Transp., Inc. v. McBride*, FELA liability is only limited in two respects: railroad liability under the FELA extends only to employees, and employees may only recover if they were injured while acting within the scope of their employment.³⁸ Outside of these two limitations, the language of the FELA is framed as broadly as possible.³⁹

To prove negligence in a FELA case, plaintiffs must show the same elements as in a common law tort case for negligence: duty, breach, causation, and damages.⁴⁰ However, a private cause of action under the FELA has a much lower standard of causation than a common law negligence claim.⁴¹ Because of the broad language used in drafting the FELA, the Supreme Court has held that if a plaintiff can show even a *de minimis* level of causation between the railroad's

31. *Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *9 (E.D.Cal. Aug. 2012) (“It makes little sense to find that a statute that serves as an amendment to the FELA, making it easier in some cases for injured workers to pursue their claims, also restricts the kind of claims workers can bring, particularly in light of the ‘humanitarian’ purpose of both statutes.”) (citing *Urie*, 337 U.S. at 188) (defendant's motion for summary judgment denied) (on file with the *McGeorge Law Review*).

32. *Greenidge*, *supra* note 7, at 409–10.

33. GOVERNOR'S OFFICE OF BUSINESS AND ECONOMIC DEVELOPMENT, OBTAINING WORKER'S COMPENSATION INSURANCE (2012), <http://business.ca.gov/StartaBusiness/AdministeringEmployees/WorkersCompensation.aspx> (on file with the *McGeorge Law Review*).

34. 45 U.S.C. § 51 (2006).

35. *Greenidge*, *supra* note 7, at 430.

36. *Id.*; *see also* 45 U.S.C. § 51 (2006) (stating that railroad employers will be liable in damages to injured employees, rather than just for lost wages).

37. *Id.*

38. *CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630, 2636 (2011).

39. *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

40. *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (2010).

41. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957); *see also Hiltgen v. Sumrall*, 47 F.3d 695, 700 (5th Cir. 1995) (showing the common law negligence standard).

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negligence and his injury then the causation element will be satisfied.⁴² This is in contrast to the typical standard for a tort claim of negligence, which requires that the defendant's conduct be the "but for" cause of or a substantial factor in the injury.⁴³ If an injured plaintiff can show all of the elements of negligence with the lowered standard of causation, he will be able to recover for all proven damages that resulted from his injury.⁴⁴ These damages are usually substantially more generous than those awarded under a no-fault workers' compensation system.⁴⁵

B. History of the Locomotive Inspection Act

The Boiler Inspection Act (BIA) was passed in 1911, just three years after FELA went into effect.⁴⁶ Initially, the BIA statutory scheme applied only to the boiler of the locomotives used by interstate railroads, but by 1915 it was renamed the Locomotive Inspection Act (LIA) and "extended . . . to include the entire locomotive and tender and all parts and appurtenances thereof."⁴⁷ The BIA has two principal parts, which act together to achieve its dual goals of increasing locomotive safety⁴⁸ and federal uniformity of safety regulations throughout the railroad industry.⁴⁹ The main benefit of the Act was to create a uniform set of locomotive safety standards, as there were numerous state safety standards throughout the country.⁵⁰ As will be noted below, the Supreme Court has consistently held that states may not enact statutes requiring locomotives to carry devices that conflict with, or are not required under, the LIA statutes.⁵¹

The first principal part of the Act is the imposition of an absolute duty of care on the railroads to ensure that all locomotives be inspected and maintained in

42. *Id.* In one case, an employee plaintiff sued his employer, alleging that the railroad was legally responsible for a hand injury that resulted from controlling the switch for a locomotive whose engine was different than the regular set up. In finding the standard of causation to be satisfied, the court reaffirmed the *Rogers* decision and stated that "[t]o discard or restrict the Rogers instruction now would ill serve the goals of 'stability' and 'predictability' . . ." of the FELA and stare decisis. *CSX Transp., Inc.*, 131 S. Ct. at 2641 (relying heavily on *Rogers*, 352 U.S. at 506).

43. *Hiltgen*, 47 F.3d at 700 (5th Cir. 1995).

44. 45 U.S.C. § 51 (2006).

45. GOVERNOR'S OFFICE OF BUSINESS AND ECONOMIC DEVELOPMENT, *supra* note 33; Greenidge, *supra* note 7, at 430.

46. Brief for Respondent at 4, *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261 (2012) (No. 10-879), 2011 WL 4590847.

47. *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 608-09 (1926).

48. *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 486 (1943).

49. The LIA was necessary to avoid "the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them." *Swift & Co. v. Wickham*, 230 F. Supp. 398, 407-08 (S.D.N.Y. 1964).

50. *See generally Napier*, 272 U.S. at 605 (offering examples of the differing state regulations by which railroads had to attempt to abide by to avoid legal action).

51. *Infra* Part III.A; *see generally id.* (the issue arose for the defendants when they chose to follow the federal regulations issued by the FRA under the LIA, and in doing so violated conflicting state statutes).

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accordance with federal safety regulations.⁵² A violation of this duty would give rise to a cause of action against the railroad under negligence principles, while nonemployees would have to bring a claim under common law negligence.⁵³

Secondly, the LIA called for the creation of the Federal Railroad Administration (FRA), which was empowered to issue safety regulations under the LIA and to approve or deny design proposals submitted by locomotive manufacturers.⁵⁴ Because the LIA did not include a provision authorizing a private right of action, the Supreme Court has opined that the LIA is, practically speaking, an amendment to the FELA.⁵⁵ Consequently, courts cannot discuss or apply the LIA without acknowledging that its origins are inextricably tied to the FELA.⁵⁶ As a result, when read together the FELA and the LIA create a second cause of action.

The LIA has imposed another standard on the railroads by which they must abide.⁵⁷ Because the LIA sets a standard of care for the railroads, the plaintiff will win his case if he proves that the railroad has violated the LIA.⁵⁸ This is because a violation of the LIA constitutes negligence per se.⁵⁹

The LIA imposes liability for railroad carriers in two instances. The first way a plaintiff may allege an LIA violation is to claim that the railroad has violated one of the specific regulations issued by the FRA.⁶⁰ For example, if the FRA has issued a regulation that all brake levers must be on the conductor's left side, but the railroad alters the design and moves them to the conductor's right side, then the railroad will have violated a specific FRA regulation. The second way a plaintiff may prove a violation of the LIA is to show that the railroad has violated its "broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without necessary peril to life or limb."⁶¹ A violation of this kind would consist of a general failure to maintain or care for the locomotives.⁶² This Article deals primarily with this second type of violation, which can only be brought by a railroad employee (as defined in the FELA

52. 49 U.S.C. § 20701 (2006).

53. *McGinn*, 102 F.3d at 299 (a nonemployee must bring the claim under common law, while the employee may bring the claim under either common law or the FELA—which is more generous than the common law because of the lowered causation standard).

54. *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 608 (1926).

55. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

56. *Id.*

57. 49 U.S.C. § 20702 (2006).

58. *Id.*; *McGinn*, 102 F.3d at 299.

59. *Urie*, 337 U.S. at 189. It is clear that the LIA "dispense[s], for the purposes of employee's suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Id.*

60. *McGinn*, 102 F.3d at 299.

61. *Id.*

62. 49 U.S.C. § 20702 (2006).

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provisions⁶³). It is this type of violation that allows an employee to recover extensive damages without proving railroad negligence.⁶⁴

First, an employee plaintiff files a claim under the FELA, alleging an LIA violation. To meet his burden, the plaintiff must prove there was a violation of an FRA regulation. If the plaintiff successfully demonstrates such a violation, he can recover proven damages.⁶⁵ The railroad does not have the option of offering a defense to the statutory violation; once the violation is proven, the only step left is to calculate damages.⁶⁶ Taken together, the FELA and the LIA seek to ensure that railroad workers who are injured or killed on the job are fully compensated—without forcing railroad employers to completely insure their employees.⁶⁷

III. SUPREME COURT CASE LAW: THE *NAPIER* AND *KURNS* DECISIONS AND THEIR IMPLICATIONS

Prior to 1926, although the LIA had been enacted, there was no uniform case law on how the federal railroad workers' compensation scheme was supposed to interact with the various state statutes and regulations that existed across the country.⁶⁸ Two key decisions from the Supreme Court have created the national climate in which railroad employees who allege a defective design of locomotives are suing railroad employers.⁶⁹ The first case, *Napier v. Atlantic Coast Line Railroad Company*, which was decided in 1926, dealt with state laws that conflicted with LIA regulations.⁷⁰ After eighty-six years of silence, the Supreme Court spoke on the issue again in 2012 when it decided *Kurns v. Railroad Friction Products Corporation*. This time the Court dealt with a state common law claim that was alleged to be outside the reach of the LIA.⁷¹ The discussion will begin with a brief overview of preemption concepts, so as to better understand the preemption implications in the *Napier* and *Kurns* cases.

63. 45 U.S.C. § 51 (2006).

64. Greenidge, *supra* note 7, at 430.

65. *Urie*, 337 U.S. at 189.

66. *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 485 (1943).

67. *See Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) (finding for the defendant, the court emphasized that the FELA was to be liberal, but was not to be a no-fault system—plaintiffs must always prove negligence on the part of the railroad).

68. *See generally* *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926) (analyzing the scope of the LIA, and interpreting its reach and intent for the first time).

69. Interview with Michael Johnson, Senior Trial Counsel, Union Pacific Railroad Company, in Roseville, CA (Sept. 5, 2012) [hereinafter Johnson Interview] (notes on file with the *McGeorge Law Review*).

70. *Napier*, 272 U.S. at 606–07.

71. *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261, 1261 (2012).

*McGeorge Law Review / Vol. 45**A. Field Preemption: The Basics*

The Supremacy Clause of the United States Constitution states that federal laws “shall be the supreme Law of the Land.”⁷² This clause is universally accepted to mean that in the event of a conflict between federal and state law, the federal law will be controlling and the state law will be rendered invalid to the extent that it conflicts.⁷³ Generally, preemption analyses are primarily questions of Congressional intent, and a court will look to see that Congress intended for a federal law to override state laws.⁷⁴

Further, if Congress shows intent to regulate the entire field, but there is no express preemption language, the courts may find that implied field preemption applies.⁷⁵ Field preemption can often be found where the “federal interest [in a field] is so dominant, that the federal system will be assumed to preclude enforcement of the state laws on the same subject.”⁷⁶ In the following discussion of the *Napier* case, it is clear that the Supreme Court set out to analyze the scope of the LIA in the absence of any express preemption language to determine if there was a place for any state statutes in the field of locomotive safety standards.⁷⁷

B. Napier v. Atlantic Coast Line Railroad Company

The first case in which the Supreme Court analyzed the scope and reach of the LIA was a consolidation of three cases that asked the same basic question: “whether the [LIA] has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation.”⁷⁸ Each of the three cases involved a state statute, of which there was an alleged violation.⁷⁹ The defendant railroad companies in all three cases wanted to “enjoin state officials from enforcing” the state statutes, claiming that they were invalid and in conflict with the newly established LIA.⁸⁰

In *Napier*, the railroads challenged state laws that allowed locomotives to cross into the specified state only if they were outfitted with certain prescribed devices.⁸¹ Specifically, a statute enacted in Georgia required a particular type of

72. U.S. CONST. art. VI, cl. 2.

73. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

74. *Id.*

75. *Id.*

76. *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

77. *Napier*, 272 U.S. at 607.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261,1266 (2012) (discussing the *Napier* case as prior precedence).

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automatic fire box door,⁸² while a statute from Wisconsin required each locomotive to be equipped with a cab curtain, which would protect engineers and firemen from seasonal weather.⁸³ Neither of these devices was required under the LIA. The railroads challenged the states' power to enact laws relating to locomotive safety.⁸⁴

Ultimately, the Supreme Court found that field preemption applied by implication over the entire field of locomotive safety regulations and requirements.⁸⁵ It was irrelevant that the FRA had not issued any particular regulations on these specific devices; what mattered was that the FRA had the sole power to do so.⁸⁶ The Supreme Court stated that “[t]he fact that the Commission [FRA] has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power.”⁸⁷

As the law stands today, no state may regulate locomotive equipment, whether or not the FRA has spoken on the issue.⁸⁸ The policy behind this decision is a strong need for federal uniformity in laws so that interstate railroads do not have to abide by different laws in each state they pass through.⁸⁹ Requiring a business to change the devices and safety equipment on a locomotive at each state line would have a severe impact on economic efficiency and interstate commerce.⁹⁰ The Supreme Court's decision in *Napier* was limited to the holding that states may not pass independent laws governing the design, construction, and safety equipment of locomotives,⁹¹ and did not even mention the area of products liability. Nevertheless, this case was instrumental in laying the foundation for a much later case in which the Supreme Court would clarify the scope of the LIA field preemption in the area of products liability.⁹²

82. A fire box door is a door that covers the area where the fuel is burned on a locomotive, the purpose of which is to protect the firemen from the heat and flames. *Napier*, 272 U.S. at 609.

83. *Id.* at 609–10.

84. *Id.* at 609.

85. *Id.* at 612–13.

86. *Id.* at 613.

87. *Id.*

88. *Id.*

89. *See generally* *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (focusing on the Dormant Commerce Clause and effects on interstate commerce, the Supreme Court held that requiring an interstate carrier to abide by different safety regulations in different states places an unreasonable burden on interstate commerce).

90. *Id.*

91. *Napier*, 272 U.S. at 613.

92. *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261, 1266 (2012).

C. *Kurns v. Railroad Friction Products Corporation*

George Corson was diagnosed with malignant mesothelioma⁹³ in 2005, after working for the Chicago, Milwaukee, St. Paul & Pacific Railroad for almost thirty years.⁹⁴ Following his diagnosis, he and his wife, Freida E. Jung Corson, filed a lawsuit in 2007 against several manufacturers of locomotive parts.⁹⁵ After Corson succumbed to the cancerous tumor, Gloria Kurns, the executrix of his estate, was substituted as a party.⁹⁶ The complaint alleged state common law claims of defective design and inadequate warnings, directed at Railroad Friction Products Corporation (RFPC) (a manufacturer of locomotive brakeshoes) and Viad Corporation (a manufacturer of locomotives and locomotive engine valves).⁹⁷ The plaintiffs primarily alleged that the products contained asbestos, and that the manufacturers should be held liable for defectively designing the products and marketing them to consumers without adequate warnings of the possibility of asbestos.⁹⁸

The *Kurns* case presented a novel question because, in contrast to *Napier*, the cause of action was a state common law claim, rather than a private right of action arising from a statute violation.⁹⁹ Despite the plaintiffs' efforts to distinguish this case from *Napier*, the Court did not see a distinction and reinforced the field preemption held by the Supreme Court in 1926.¹⁰⁰ The Court went on to extend the scope of the field regulated by the LIA, holding that in addition to preempting state statutes, the act would preempt claims of state common law, including a design defect cause of action.¹⁰¹

Of interest is the fact that four of the nine Supreme Court justices concurred with the majority opinion and agreed that the *Napier* field preemption blocked petitioners' claims, but stated that they believed the Court would decide the *Napier* case differently today.¹⁰² Under the Court's more recent decisions regarding field preemption, the Court held that "Congress must do much more to oust all of state law from a field,"¹⁰³ such as expressly state that field preemption exists or state the congressional intent behind the act with such strength and

93. This diagnosis is defined as "an uncommon cancerous tumor of the lining of the lung and chest cavity (pleura) or lining of the abdomen (peritoneum) that is typically due to long-term asbestos exposure." A.D.A.M. Medical Encyclopedia, U.S. NATIONAL LIBRARY OF MEDICINE (June 5, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001174/> (on file with the *McGeorge Law Review*).

94. *Kurns*, 132 S. Ct. at 1264.

95. *Id.*

96. *Id.* at 1265.

97. *Id.* at 1264.

98. *Id.*

99. *Id.* at 1270.

100. *Id.*

101. *Id.*

102. *Id.* at 1270–72 (Kagan, J. concurring).

103. *Id.* at 1270 (Kagan, J. concurring).

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clarity that it becomes obvious field preemption was intended.¹⁰⁴ However, because Congress had not exhibited any desire to remove or lessen the impact of the *Napier* decision, the Court ultimately applied *stare decisis* and agreed the application of *Napier* would preclude plaintiffs' claims.¹⁰⁵

The *Kurns* decision has caused some turmoil in the railroad industry.¹⁰⁶ Because of the eighty-six-year hiatus between Supreme Court decisions ruling on the LIA field preemption, many of the immediate consequences of the *Napier* decision had become settled.¹⁰⁷ The *Kurns* decision disturbed this settled area of law, leaving FELA plaintiffs and railroad employers equally unsure of what the law actually is.¹⁰⁸

D. The Practical Effect of Napier and Kurns

Although not expressly limited to manufacturers, the practical effect of both the *Napier* and *Kurns* cases has been that the manufacturers of locomotives and locomotive parts cannot be sued for a design the FRA approved.¹⁰⁹ The combined holdings mean a plaintiff cannot sue the manufacturer under state codified law that includes a private right of action (*Napier*)¹¹⁰ or under state common law (*Kurns*).¹¹¹ Because these are the only two ways to bring a case, if a manufacturer's design of a locomotive or its parts receives approval from the FRA, then a plaintiff cannot file a lawsuit challenging that design.¹¹² As long as manufacturers design their products in accordance with the regulations issued by the FRA, a plaintiff who is injured by a locomotive or its parts will not be able to bring a suit alleging that the design was defective in any way.¹¹³ Because plaintiffs cannot sue the manufacturers, many are now suing the railroads instead.¹¹⁴

104. *See id.* at 1270 (Kagan, J. concurring) (citing *N. Y. State Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 415 (1973), in which the Supreme Court rejected field preemption, even though the regulatory scheme passed by Congress was "detailed" and "comprehensive," much like the LIA).

105. *Id.* at 1269–70.

106. Johnson Interview, *supra* note 69.

107. *Id.*

108. *Id.* Senior Trial Counsel for Union Pacific Railroad, Michael Johnson, explains the impact of this decision on attorneys: railroad lawyers for both plaintiffs and defendants felt that their legal world was predictable and manageable. With the *Kurns* decision extending the field preemption to block state common law claims, a level of uncertainty has emerged among the attorneys who litigate these types of lawsuits as to whether or not a court will allow them to proceed or find them to be preempted by the *Napier* field preemption. *Id.*

109. *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926); *Kurns*, 132 S. Ct. at 1269–70.

110. *Napier*, 272 U.S. at 613.

111. *Kurns*, 132 S. Ct. at 1269–70.

112. *See generally id.* (holding that in addition to state statutes and regulations, all state common law claims that conflict with the provisions of the LIA are preempted by the *Napier* decision).

113. *Napier*, 272 U.S. at 613; *Kurns*, 132 S. Ct. at 1269–70.

114. *See, e.g., Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *9

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The limitations outlined in *Kurns* apply to the railroads as well, so that nonemployees cannot sue the railroads for a supposed defective design.¹¹⁵ However, *Kurns* does not apply to employees.¹¹⁶ Because of the FELA, employees have an extremely protective and liberal set of statutes under which they can sue their railroad employers for an injury sustained on the job.¹¹⁷

E. Recovery for Injury

For an employee bringing a claim against a railroad, there are three primary ways to frame a case. The first way is to bring a typical claim of negligence under the FELA.¹¹⁸ The element of duty is always going to be satisfied, unless there is a question of whether or not the claimant is a hired contractor rather than an actual employee.¹¹⁹ Because the standard of causation is lowered, and the smallest link will satisfy it,¹²⁰ the plaintiff's biggest challenge will be proving a breach of the standard of care.¹²¹

The second way plaintiffs can recover for an injury suffered on the job is by claiming a violation of the SAA¹²² or the LIA.¹²³ If an employee can prove that either a railcar or locomotive, or any of its parts, were not maintained according to the federal standards, then the plaintiff's burden will be satisfied.¹²⁴ A proven violation is negligence per se, and the railroad has no opportunity to offer a

(E.D.Cal. Aug. 2012) (plaintiff sued railroad, claiming that air brake compartment doors should be made of fiberglass, or have additional latches, where the LIA did not require such devices or materials) (on file with the *McGeorge Law Review*).

115. See *Napier*, 272 U.S. at 613; *Kurns*, 132 S. Ct. at 1269–70 (court did not limit these decisions to just manufacturers, the opinions are general and applicable to all defendants).

116. *Kurns*, 132 S. Ct. at 1269–70.

117. See *Greenidge*, *supra* note 7, at 408 (discussing that the purpose of the FELA was to put employees on equal footing with their employers, and to facilitate recovery for workplace injuries).

118. See *id.* at 410 (citing Thomas E. Baker, *Why Congress Should Repeal the Federal Employer's Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 82 (1992) and explaining that the FELA was enacted based on negligence principles at the time) (on file with the *McGeorge Law Review*).

119. The special relationship of employer-employee is enough to prove that the defendant owed a duty to the plaintiff. See 45 U.S.C. § 51 (2012) (describing what an employee is for purposes of the FELA).

120. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957); *Vaillancourt v. Illinois Cent. R.R. Co.*, 791 F. Supp. 734, 738 (1992).

121. *Rogers*, 352 U.S. at 506.

122. The SAA is another regulatory scheme that preceded the FELA and the LIA, was passed by Congress in 1893, and outlined general safety requirements for the entire train. It was the first time that Congress codified the duty of safety that railroads had to abide by. *Shields v. Atl. Coast Line R.R. Co.*, 350 U.S. 318, 320 (1956). The legal problems discussed in this Article are equally applicable to problems arising under the SAA and will be discussed throughout.

123. *McGinn v. Burlington N. R.R. Co.*, 102 F.3d 295, 299 (7th Cir. 1996).

124. *Urie v. Thompson*, 337 U.S. 163, 189 (1949).

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defense.¹²⁵ Once a FELA plaintiff proves a violation of the federal statute, the only remaining step is to calculate the damages owed to the plaintiff.¹²⁶

These first two options require proving fault on the part of the railroad; the first requires proving all of the elements of negligence, while the second requires showing a violation of safety regulations that the railroad is required to abide by. These types of suits require the plaintiff to prove negligence on the part of the railroad, as negligence is the fundamental element required by the FELA.¹²⁷ This is in contrast to the third way that a plaintiff may bring a case, where the complaint does not allege 1) negligence on the part of the railroad employer or 2) legally unsafe modifications to the locomotive made by the railroad.¹²⁸

The third way a plaintiff may bring a claim is in the form of a products liability claim under the FELA, alleging a defective design of the locomotive.¹²⁹ This type of claim is brought when the cause of the injury is not due to negligence on the part of the railroad or failure to maintain equipment up to federal standards.¹³⁰ This strategy does not allege fault directly on the part of the railroad, but constitutes a products liability suit alleging that the locomotive or rail car itself is defectively designed.¹³¹ Because, as noted in previous sections, the manufacturers are exempt from these types of claims,¹³² the employees are filing them against the railroads.¹³³ These suits are being brought against the railroads despite the fact that the railroads are typically not involved in the chain of production.¹³⁴

In typical products liability cases, a plaintiff can sue all members in the chain of production, including the manufacturer and retailer.¹³⁵ The railroads are generally outside of the recognized chain of production because in these types of cases the railroad did not design or sell the locomotive. The railroad's only role was that of consumer—which is the party that would normally bring the products liability claim rather than defend against it. By bringing these suits, injured

125. *Id.*

126. *Lilly v. Grand Trunk W. R.R. Co.*, 317 U.S. 481, 485 (1943) (a violation of the regulations set out by the FRA gives right to a suit for damages).

127. 45 U.S.C. § 51 (2006).

128. *See, e.g., McGinn*, 102 F.3d at 297 (plaintiff brought a claim alleging only that the design of the locomotive was defective, not that there was any negligence on the part of the railroad).

129. *Id.*

130. *See id.* (plaintiffs sole claim was that the manufacturers should have installed luggage racks in the cab of the locomotive, which was contrary to the FRA regulations).

131. *See McGinn*, 102 F.3d at 297 (plaintiff brought a claim alleging only that the design of the locomotive was defective, not that there was any negligence on the part of the railroad).

132. *Supra* Part II.A; *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261, 1270 (2012).

133. *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926); *Kurns*, 132 S.Ct. at 1270 (both cases holding that the LIA constituted field preemption against conflicting state common law and regulations).

134. *Napier*, 272 U.S. at 613; *Kurns*, 132 S.Ct. at 1270.

135. *See generally Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 212 (7th Cir. 1994) (noting that sellers as well as manufacturers can be liable for a defect in a product, based on a theory that the seller should have detected the theory and should share in the blame if an injury results).

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employees are seeking to recover from the railroad for an injury that is not due to fault on the part of the railroad.¹³⁶ As a result, FELA plaintiffs find themselves better situated than injured employees of other industries: they are able to recover the larger damages that are available without showing fault on the part of their employers.¹³⁷

FELA plaintiffs may rely on a theory of agency law in order to overcome the argument that railroad employers are not in the chain of production and should not be able to be sued for products liability.¹³⁸ Under agency theories, the principal has a duty to furnish the agent with information regarding potential dangers or harm that is within the scope of the agency relationship.¹³⁹ The determination of whether something has a level of danger sufficient to trigger this duty is a fact specific inquiry.¹⁴⁰ It is likely that this will be enough to allow a court to find a triable issue of fact to overcome summary judgment. From there, the decision of liability would be in the hands of the jury,¹⁴¹ a group which is generally very unsympathetic to railroad corporations.¹⁴²

Because a plaintiff must be an employee under the FELA,¹⁴³ and an employer-employee relationship is generally understood to constitute a principal-agent relationship,¹⁴⁴ agency law would apply to a FELA plaintiff. Using these laws, FELA plaintiffs would be able to show that, as agents of the railroad, they must be furnished with equipment that is safe and warned of potential dangers.¹⁴⁵ While it has not yet become apparent that plaintiffs are using these theories in order to forward their claims, this type of argument would likely be enough to allow a case to proceed on a products liability theory. The existence of these agency principles also makes it clear that a railroad will not be able to dispense of these lawsuits merely by comparing itself to consumers in other products liability cases.

136. *Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *9 (E.D.Cal. Aug. 2012) (plaintiff sued railroad, claiming that air brake compartment doors should be made of fiberglass, or have additional latches, where the LIA did not require such devices or materials) (on file with the *McGeorge Law Review*).

137. *See Gilmore*, 2012 WL 3205233, at *9; *Woods v. Union Pac. R.R. Co.*, No. NC035695, at *7 (Cal. Ct. App., Apr. 15, 2008) (plaintiffs filed lawsuits that did not allege railroad negligence and yet they sought the larger damages that are available to FELA plaintiffs) (on file with the *McGeorge Law Review*).

138. *Supra* Part II.A.

139. RESTATEMENT (THIRD) OF AGENCY § 8.15 (2006).

140. *Id.*

141. Or judge, in the case of a bench trial.

142. Johnson Interview, *supra* note 69.

143. 45 U.S.C. § 51 (2006).

144. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01, comm G (2006) (the Restatement assumes that all employees are agents by stating that “[a]s agents, all employees owe duties of loyalty to their employers”).

145. RESTATEMENT (THIRD) OF AGENCY § 8.15 (2006).

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IV. EXTENDING *NAPIER*'S FIELD PREEMPTION TO RAILROAD CARRIERS

Courts are conflicted as to whether the field preemption established in *Napier* should be extended to protect the railroad carriers themselves.¹⁴⁶ While courts may make the logical extension and disallow an employee lawsuit alleging design defects against a railroad,¹⁴⁷ a minority will allow these suits to survive a motion to dismiss and go to trial.¹⁴⁸ This lack of consistency has caused uncertainty among lawyers attempting to bring or defend against these types of products liability claims.¹⁴⁹ While some courts are dismissing lawsuits at the summary judgment stage¹⁵⁰ and some are allowing the cases to continue to trial,¹⁵¹ all parties involved in this type of litigation proceed with caution, unsure of how the case will unfold.¹⁵² With such an unpredictable future, attorneys cannot even determine the value of a case or agree on a settlement.¹⁵³ Additionally, to survive summary judgment, some plaintiffs' attorneys attempt to create a triable issue of fact over whether the device in question is covered by the LIA.¹⁵⁴

In a profession that values predictability in order to be most effective, this uncertainty leads attorneys and clients to settle cases more quickly out of fear of the unknown.¹⁵⁵ In order to create a level of certainty in the industry and bring a

146. *Garza v. Norfolk S. Ry. Co.*, No. 3:09-cv-2045, 2012 WL 3758632 (N.D. Ohio, July 23, 2012) (extending preemption); *Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *9 (E.D.Cal. Aug. 2012) (refusing to extend preemption).

147. *See, e.g., Garza*, No. 3:09-cv-2045, 2012 WL 3758632 (N.D. Ohio, July 23, 2012) (holding that, in the absence of any evidence showing a violation of FRA regulations or negligent maintenance of the locomotive, the plaintiff's defective design claims were preempted by *Napier*).

148. "[D]espite many cases in many districts and circuits throughout the country, the degree to which [LIA] preclusion applies to FELA claims remains a developing part of the law and there is clearly no bright line test for applying preclusion. Preclusion analysis must still be done on a case by case, claim by claim basis." *Grogg v. CSX Transp., Inc.*, 659 F.Supp.2d 998, 1011 (2009); *see also Gilmore*, 2012 WL 3205233, at *9 (holding "that preemption of state laws d[oes] not necessarily mean that an action based on another federal statute [is] necessarily precluded"); *Woods v. Union Pac. R.R. Co.*, No. NC035695, at *7 (Cal. Ct. App., Apr. 15, 2008) (court denied motion for summary judgment and allowed case to go to trial, where the judge directed a verdict for the railroad, citing plaintiff's failure to meet its burden of proof).

149. Johnson Interview, *supra* note 69.

150. *Garza*, No. 3:09-cv-2045, 2012 WL 3758632 (N.D. Ohio, July 23, 2012).

151. *Woods*, No. NC035695 (Cal. Ct. App., April 15, 2008) (case was heard in the California Court of Appeal for the Second District after a jury trial); *Grogg*, 659 F.Supp.2d at 1014 ("[T]his court refuses to extend the preclusion doctrine . . . to the present case as CSX urges it to do . . . the court concludes that the LIA does not preclude *Grogg*'s claims under the FELA and CSX's motion for summary judgment . . . is denied.").

152. Johnson Interview, *supra* note 69.

153. *Id.*

154. There is a small line of case law that suggests that the LIA does not encompass all parts on a locomotive, but only those that are deemed "essential" are covered. Therefore, the theory is that showing that a device was not integral part of a locomotive will relieve the plaintiff of the burden of the LIA field preemption. *Grogg*, 659 F.Supp.2d at 1013 (2009) (citing *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936)).

155. *See, e.g., Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, , 2012 WL 3205233, at *9 (E. Dist. Aug. 2012) (case settled after defendant's motion for summary judgment was denied) (on file with the *McGeorge Law Review*).

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level of fairness to FELA plaintiffs and railroad employers, as compared to the workers' compensation systems of other industries, Congress should clarify its intent and enact a final rule of law that makes it clear to all parties that the *Napier* field preemption extends to railroads. Consequently, plaintiffs will not be able to bring a case alleging defective design without any evidence of an actual violation of the LIA, despite plaintiffs' argument that this would violate the liberal and humanitarian nature of the FELA and the LIA.¹⁵⁶

A. *Plaintiffs' Objections to the Expansion of Field Preemption*

Railroad employees and their attorneys have advocated that field preemption should not be extended to protect the railroads from these types of lawsuits.¹⁵⁷ While attorneys are not arguing that a regular civilian should be able to bring suit against the railroad, plaintiffs argue that the FELA creates a special set of circumstances under which an injured employee can sue the railroad employer alleging only that the locomotive where the injury occurred was defectively designed, without needing to show an actual violation of FRA regulations or negligent maintenance.¹⁵⁸

The strongest argument in support of allowing these types of lawsuits rests with Congress' intent for enacting the FELA. The need for the FELA arose in response to a growing number of devastating railroad accidents, in which more and more employees were being killed or maimed.¹⁵⁹ At the time it was passed, the Act was exceedingly progressive as compared to statutes pertaining to employees of other industries; and it was to be liberally construed so as to align with Congressional intent and to allow employees to be on equal footing with their employers in a lawsuit resulting from injury.¹⁶⁰

Although based on negligence principles,¹⁶¹ the FELA abolished the common law doctrines of assumption of the risk¹⁶² and contributory negligence,¹⁶³ so that

156. *Infra* Part IV.A; *Atchinson, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987) (citing *Urie v. Thompson*, 337 U.S. 163, 180 (1949)).

157. Brief for Petitioners at 2, *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261 (2012) (No. 10-879), 2011 WL 5126230.

158. *See, e.g.*, *Garza v. Norfolk S. Ry. Co.*, No. 3:09-cv-2045, 2012 WL 3758632 (N.D. Ohio, July 23, 2012) (plaintiff alleged that the cab design was defective and prevented him from slowing the train effectively and sued his railroad employer for his resulting injury).

159. *Greenidge*, *supra* note 7, at 410.

160. *Bluell*, 480 U.S. at 562 (citing *Urie*, 337 U.S. at 180).

161. *Greenidge*, *supra* note 7, at 410.

162. Assumption of the risk is an affirmative defense in which a defendant will attempt to show that a plaintiff assumed the risk of a particular activity. In the FELA context, it is used to say that an injured party assumed the risks of the job by accepting a position. *Greenidge*, *supra* note 7, at 406 (citing *Thomas Tidd & Daniel Saphire, The Case for Repeal of the Federal Employer's Liability Act*, (Washington Legal Foundation, Critical Legal Issues, Working Papers Series, Paper No. 23, 1988)).

163. Contributory negligence is also an affirmative defense, and is defined as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection." At the time the

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railroads could not avoid paying damages by claiming the employee contributed to the accident or agreed to assume the risk merely by accepting a job at the railroad.¹⁶⁴ In addition to removing two of the railroad's affirmative defenses, courts have interpreted the FELA as requiring a relaxed standard of causation, so that a plaintiff needs only show "that employer negligence played *any part, even the slightest*, in producing the injury."¹⁶⁵ By creating these relaxed causation principles, Congress has shown a preference for and has helped facilitate employee recovery, as it is now "well established that the quantum of evidence required to establish liability in a FELA case is much less than in an ordinary negligence action."¹⁶⁶ While it does not approach the level of strict liability, the standard of care can be described as one of easy negligence.¹⁶⁷

Because of the FELA's plaintiff-friendly provisions and the clear congressional intent to help injured employees recover from their employers, advocates of allowing these lawsuits argue that it would be fundamentally unfair and counterintuitive to protect the railroads.¹⁶⁸ The intent of the Act was clearly to protect workers engaged in a dangerous industry; thus, allowing railroads to hide behind the *Napier* field preemption would frustrate that purpose by denying plaintiffs one avenue of recovery.¹⁶⁹ Additionally, proponents point out that the FELA and the LIA are meant to be "'remedial and humanitarian' statutes that impose two separate types of liability to protect the safety of railroad employees."¹⁷⁰ It would be nonsensical to extend the *Napier* field preemption to cover railroads, when doing so would make it more difficult for an employee to recover.¹⁷¹

An additional argument utilized by plaintiffs is that the LIA has been interpreted so that the term "parts and appurtenances" does not include all parts

FELA was enacted, proving of contributory negligence would eliminate a plaintiff's ability to recover damages. *Murray v. N.Y. New Haven & Hartford R.R. Co.*, 255 F.2d 42, 44 (2nd Cir. 1958).

164. Greenidge, *supra* note 7, at 410 (citing Thomas Tidd & Daniel Saphire, *The Case for Repeal of the Federal Employer's Liability Act*, (Washington Legal Foundation, Critical Legal Issues, Working Papers Series, Paper No. 23, 1988)).

165. *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990) (quoting *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957) (emphasis in original)).

166. *Id.*

167. *See Rogers*, 352 U.S. at 506 (emphasizing the lowered standard of causation for FELA cases, and discussing the intent that plaintiffs recover more easily than they would under ordinary negligence).

168. *See generally* Thomas O. McGarity, *Preempted Worker Protection*, Supreme Court Review 48-JUL Trial 52 (July 2012) (expressing disapproval at the *Kurns* decision, and arguing that injured employees and their families should be able to sue and recover for injuries from defectively designed locomotives and parts) (on file with the *McGeorge Law Review*).

169. *Id.*

170. *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001) (citing *King v. Pac. Transp. Co.*, 855 F.2d 1485, 1488 n.1 (10th Cir. 1988)).

171. *See Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *10 (E.D. Cal. Aug. 2, 2012) ("[R]ejecting the argument . . . that the preemption of state laws did not necessarily mean that an action based on another federal statute was necessarily precluded. . . .") (motion for summary judgment denied).

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that could conceivably be attached to a locomotive.¹⁷² The Supreme Court has stated that “mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not [within the LIA].”¹⁷³ The Court went on to define “parts and appurtenances” as “[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order”¹⁷⁴ Because of this decision, plaintiffs’ attorneys can attempt to expand the category of a nonessential device, so that the LIA will not apply to the case. If the LIA does not apply, then neither will the field preemption, and an employee plaintiff will be able to bring a design defect claim and recover the larger damages. For the same reasons identified below, expansion of this definition is not a viable option for courts to take because it will result in lack of uniformity among statutes regarding locomotive parts.¹⁷⁵

FELA plaintiffs argue that limiting what types of claims an injured employee can bring against his employer is in stark contrast to the purpose of the FELA and the LIA,¹⁷⁶ which is to be humanitarian and liberally construed to the benefit of the employee.¹⁷⁷ Therefore, plaintiffs and their attorneys argue that it is unjust to limit the rights of FELA claimants. That is, in order to further the progressive nature of federal railroad legislation, plaintiffs should be able to sue railroads for defectively designed locomotives or locomotive parts.¹⁷⁸ Although these arguments may seem to carry some weight, they are outweighed by the overwhelming arguments opposing these kinds of lawsuits.

B. Derailing the Arguments Against Field Preemption Expansion

Despite the congressional goals of the FELA and the LIA, it is illogical to hold the railroads legally responsible for the actions of an entirely different entity. In most cases, the railroad carrier is a wholly independent company from the entity that designed and manufactured the locomotive,¹⁷⁹ and because of the *Napier* and *Kurns* decisions, these manufacturers cannot be held liable for a

172. *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936).

173. *See id.* (“With reason, it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability.”).

174. *Id.*

175. *Infra* Part IV.B.

176. *Gilmore*, 2012 WL 3205233, at *10 (motion for summary judgment denied).

177. *Urie v. Thompson*, 337 U.S. 163, 188 (1949).

178. *See McGarity*, *supra* note 168 (lamenting that in one case, “the families of railroad employees who contracted mesothelioma from defectively designed locomotive parts . . . will never get their day in court” under restrictive laws).

179. *See Woods v. Union Pac. R.R. Co.*, No. NC035695 (2d Dist. Cal. Ct. App. Apr. 15, 2008) (including claims against the railroad for plaintiff’s injury due to handhold placement even though the locomotive was designed and manufactured by a different company).

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design that the FRA approved as being appropriately safe for use.¹⁸⁰ It is a fundamental cornerstone of the American tort system that, generally, a person is only liable for his or her own actions.¹⁸¹ Following this concept, it would be a legal anomaly to hold the railroads liable for the actions and decisions of manufacturers of locomotives and their parts.¹⁸²

In addition to holding railroads legally responsible for the actions of others, allowing these design defect FELA lawsuits undermines the entire existence of the LIA. As mentioned, the LIA was enacted in order to create uniform standards of safety across the railroad industry.¹⁸³ The FRA was created under the LIA to impose safety standards and set a starting point for railroads around which to base their maintenance practices.¹⁸⁴ If each state and its courts were permitted to hear design defect cases, and if each court could issue holdings that only bind the state in which the court sits, the LIA regulations would become irrelevant. With each defective design claim would come a “reasonable alternative design,”¹⁸⁵ where the plaintiff would offer his view of how the locomotive or part should have been designed.¹⁸⁶ If the jury finds for the plaintiff, the court is essentially dictating what type of safety equipment and devices a railroad must use in order to escape liability. Luckily, this has not yet occurred, as the vast majority of these cases settle before trial in an attempt to avoid this uncertainty.¹⁸⁷

1. Prohibiting Defective Design Lawsuits Against Railroads

With strong arguments on both sides of the issue, the most logical solution is to extend the field preemption to railroads. Although many railroads would argue that the field preemption should not apply to manufacturers and should only apply to railroads, this argument is not feasible for the same reason mentioned above: doing so would invalidate the purpose of the LIA. Even though removing the field preemption protection from the manufacturers would offer plaintiffs a

180. *Kurns v. R.R. Friction Prod. Corp.*, 132 S. Ct. 1261, 1269–70 (2012).

181. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1964) (listing the elements of a negligence claim, which are generally based on a defendant’s own actions).

182. *Id.*

183. Brief for Respondent at 4, *Kurns v. R.R. Friction Prod. Corp.*, 132 S. Ct. 1261 (2012) (No. 10-879), 2011 WL 4590847.

184. *Id.*

185. In making a prima facie case of defective design, a plaintiff must offer a “reasonable alternative design” to show that alternatives were feasible and would have prevented the harm that occurred. RESTATEMENT (THIRD) OF TORTS: Products Liability § 2(b) (1998).

186. *See, e.g., Woods v. Union Pac. R.R. Co.*, No. NC035695, slip op. at 2 (2d Dist. Cal. Ct. App. Apr. 15, 2008) (describing plaintiff’s argument that that hand-holds on side of railcar should have been horizontal, instead of vertical, despite the fact that the FRA approved the design with horizontal hand-holds) (on file with the *McGeorge Law Review*).

187. Johnson Interview, *supra* note 69; *see, e.g., Gilmore v. Union Pac. R.R. Co.*, No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *10 (E.D. Aug. 2012) (case settled after defendant lost motion for summary judgment but before trial).

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more appropriate party against whom to bring their claims, it would impermissibly impinge on the power and effectiveness that Congress intended the LIA to have. The Act must occupy the entire field of locomotive safety, regardless of who the defendant is, so that railroads can continue to operate efficiently on an interstate basis.

In light of these concerns, no plaintiff should be able to successfully bring a defective design claim based on a locomotive or locomotive part that was reviewed and approved by the FRA. Since the FRA approves all locomotives in use by a railroad,¹⁸⁸ an injured employee cannot bring a suit under the FELA and the LIA alleging a defective design. A definitive statement from Congress establishing that products liability suits against manufacturers or railroad carriers are prohibited would eliminate the trend occurring in the industry. A ruling from the US Supreme Court would accomplish the same goal, but it is unlikely that the opportunity will present itself, as most of these cases do not even make it to trial, much less to the Supreme Court.¹⁸⁹

The implications of removing defective design claims under the FELA would not be as far reaching as most plaintiffs' attorneys suggest. The only claims that would be completely barred from being brought would be claims that rest solely on a theory of defective design.¹⁹⁰ Complaints that allege negligent maintenance or an actual violation of the LIA would remain valid.¹⁹¹

Since the Supreme Court has held that state lawmakers are not qualified to substitute their judgment on safety for that of the federal government and its experts,¹⁹² it follows that individual employees and their counsel are similarly unqualified. FELA plaintiffs would not be losing anything or having their rights infringed upon. In reality, setting this legal standard will not eliminate recovery for most plaintiffs, as there would still be recovery for statutory violations for unsafe modification to the locomotive.¹⁹³

2. Appeals to the FRA Directly

Typically a design defect claim is accompanied by negligence claims.¹⁹⁴ In the usual case, if the products liability claim is stripped away, the case can still

188. If an active locomotive was not approved by the FRA, that would constitute an LIA violation and would be negligent per se. 49 U.S.C. § 20701 (2006). The plaintiff would have a prima facie case of negligence necessary to satisfy the requirements of the FELA.

189. Johnson Interview, *supra* note 69.

190. *See supra* Part III.E (discussing the ways an employee bringing an injury claim against a railroad could frame a case).

191. *See supra* Part II.B (discussing the legislative history of the LIA).

192. *Id.*

193. *See supra* Part II.B (discussing the legislative history of the LIA).

194. *See, e.g.*, Gilmore v. Union Pac. R.R. Co., No. S-09-2180-KMJ-DAD, 2012 WL 3205233, at *1 (E.D. Aug. 2012) (including claims for general negligence, along with claims of defective design).

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proceed on the other stated causes of action.¹⁹⁵ If a case does not have other claims, usually the merits of the case are weak and the plaintiff does not meet the qualifications for recovery.¹⁹⁶

In the rare case in which a plaintiff has a claim that alleges defective design of a locomotive and there are no other means of recovery and no other claims being alleged, and it would be inequitable to deny any recovery, Congress should enact a system in which a plaintiff can file an appeal with the FRA directly. As previously mentioned, it goes against basic legal principles to allow these lawsuits against the railroads, but it would not violate these same principles to bring a complaint to the FRA. Because the FRA is the governing body of railroad safety, and it is the entity that approves the challenged design, deserving plaintiffs should have a process in which they can challenge the design to the board that determined it was safe for use.

The best way to allow for complaints directly to the FRA would be to establish an administrative judicial board, much like the Workers' Compensation Appeals Board, where a plaintiff can appeal his award amount or denial of workers' compensation.¹⁹⁷ Similarly, an appeals board for the FRA would hear cases from plaintiffs who allege that a design was wrongfully approved and have the power to award damages to compensate a deserving plaintiff. Additionally, because deserving plaintiffs of this kind would be rare, the board may also hear suggestions or challenges to FRA-issued regulations that may have had adverse consequences. To ensure that the board is not biased, it should be staffed with disinterested members who were not involved in the enactment of new regulations or the approval of submitted designs, but who have some expertise in the field of railroad engineering. A fresh eye and a motivated advocate may act as a check on the FRA and make sure that it continues to consider all aspects of safety when approving requested designs.

By having plaintiffs focus their grievances towards the FRA directly, the purpose of the LIA will not be undermined, as a court of law will not be determining what constitutes adequately safe locomotive parts. While it may be doubtful that the FRA will be swayed to change its long-established safety regulations, giving plaintiffs the chance to make their cases will maintain the humanitarian and liberal goals of the FELA and the LIA.

V. CONCLUSION

Despite the pressing need to interpret the FELA and the LIA liberally to facilitate employee recovery, the case law makes it clear that courts are not

195. Johnson Interview, *supra* note 69.

196. *Id.*

197. *See, e.g.*, Cal. Labor Code §§ 110–138.2 (West 2011) (the statutory scheme establishing the existence of the California Worker's Compensation Appeals Board).

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willing to stretch it so far so as to make the railroads a complete insurer of their employee's wellbeing.¹⁹⁸ While employee protection is a strong interest, especially in light of the power the railroads command, ultimately, this interest must be balanced against the need for national uniformity across the railroad industry.

Since it was clearly not Congress' intent to create legislation that would serve no purpose and accomplish no goal, it is apparent that the *Napier* field preemption must extend to the railroads. Failure to do so would render the entirety of the LIA obsolete.

If plaintiffs were able to bring defective design claims against the railroad, then each lawsuit would effectively question the FRA and federal government's ability to determine sufficient safety limits. Allowing each court to make the determination as to what constitutes acceptable safety regulations would create varied results and would put the country back where it was before the LIA was enacted: railroad carriers having to abide by numerous sets of laws, depending on which state a train is traveling through.¹⁹⁹ If a railroad opted not to respect a state court's decision on what it considered to be acceptable safety equipment, it would incur liability for any employee injured in that state, which would be a huge risk for any carrier.²⁰⁰ Ultimately, allowing an employee plaintiff to sue his railroad employer under the LIA alleging a defective design claim places liability on the railroads that is both inequitable and contrary to the underlying principles of the FELA, and should not be allowed.

198. *See* *Urie v. Thompson*, 337 U.S. 163, 188 (1949) (stating the purpose of the statute is to "facilitate[e] employee recovery"). *But see* *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (stating that the FELA "does not. . . require[] us to interpret every uncertainty in the act in favor of the employees"). Courts have been careful to avoid turning the FELA into a no-fault system of compensation and to maintain its intent as a tort-based system. *Greendige*, *supra* note 7, at 418.

199. *See generally* *Napier v. Atl. Coast R. Co. et al.*, 272 U.S. 605 (1926) (offering examples of the differing state regulations by which railroads had to attempt to abide by to avoid legal action).

200. *See* *Napier*, 272 U.S. at 607 (stating that the railroads filed the suit to enjoin state officials from enforcing the laws and avoid raising their cost of business).