In support of its motion for summary judgment, Airbus Americas, Inc. argued that while its parent company Airbus S.A.S. (which had already been dismissed from the litigation) designed and built the accident aircraft, it had no involvement with the aircraft's design, manufacture, marketing or sale, and could not be held liable. Assessing the evidence in the record, the court agreed. As a predicate to its decision, the court applied the "location" and "nexus" test set forth in Jerome Grubart, Inc. v. Great Lakes Dredge & Dock Co.[5] to determine that the case fell within admiralty jurisdiction and was governed by general maritime law. Under maritime law, a defendant "cannot be liable for a manufacturing defect in a product that it did not make or supply," and Airbus Americas, Inc. could not be liable.[6]

With these three decisions, a major portion of the U.S. litigation arising from one of the deadliest air crashes in Indonesian history has been dismissed.

HAZ MAT

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Federal Judge Enjoins California's Fee on Rail Cars Carrying Hazardous Materials

On October 28, 2016, U.S. District Judge for the Northern District of California Richard Seeborg issued a preliminary injunction prohibiting the California State Board of Equalization from implementing S.B. 84, a state law that would have imposed a fee on rail cars carrying certain hazardous materials (HazMat) through the state. See Cal. Gov't Code § 8574.32(a)(1). The state tax board planned to start assessing the $45 per car fee in November; it would have applied to rail cars carrying diesel fuel, ethanol, gasoline, chlorine, crude oil, and certain other HazMat. The fees would have been deposited in the newly-created Regional Railroad Accident Preparedness and Immediate Response Fund, to support HazMat emergency preparedness and response in California.

BNSF Railway Company and Union Pacific Railroad Company filed a lawsuit against the state tax board, arguing that the fee is anti-competitive and interferes with federally-protected interstate commerce. Specifically, they contend that S.B. 84 is preempted by the Interstate Commerce Commission Termination Act of 1995 (ICCTA; Pub. L. No, 104-88, 109 Stat. 803). The railroads assert that the structure of S.B. 84 is problematic under ICCTA because it would require carriers to collect the fees

[5] 513 U.S. 527 (1995).

[6] Siswanto v. Airbus Americas, Inc., No. 15-CV-5486, 2016 WL 7178458, at *5 (N.D. Ill. Dec. 9, 2016) (memorandum opinion and order granting summary judgment as against Airbus Americas, Inc.).

from shippers and then remit the proceeds to the state, and as a result the $45 per car fee would be considered part of the rate that the railways charge to their shippers, which is subject to Surface Transportation Board oversight. The railroads also argue that S.B. 54 violates the Hazardous Materials Transportation Act (HMTA; U.S. Code §§ 5101, et seq.), because the fee would be assessed on rail cars only, yet the proceeds would be used to fund emergency response for both rail and truck accidents. Finally, the railroads contend that the charge is properly construed as a tax and that as such it is forbidden by the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act; Pub. L. No. 94-210, 90 Stat. 31).

The state, in contrast, argues that California is exercising its police powers to protect its residents from the health and safety consequences of HazMat releases from train accidents. In particular, the state cites the increasing frequency of oil train derailments and the associated damages and response and mitigation costs.

In granting the preliminary injunction, Judge Seeborg ruled that the railroads have shown a likelihood of success on the merits with respect to the ICCTA and HMTA claims. By contrast, he found that the railroads did not establish a likelihood of success on the 4-R claim.

The case citation is: BNSF Railway Co., et al. v. California State Board of Equalization, et al., case number 3:16-cv-04311, in the U.S. District Court for the Northern District of California.

Dispute Continues Regarding Requirement for Electronically Controlled Pneumatic Brakes on Certain Trains Carrying HazMat

On October 12, 2016, the U.S. Government Accountability Office (GAO) published a study evaluating the costs and benefits of a recent U.S. Department of Transportation (DOT) Final Rule requiring certain trains carrying HazMat to be equipped with electronically controlled pneumatic (ECP) brakes. GAO conducted this study in response to a provision in the Fixing America's Surface Transportation Act that directs GAO to review the potential costs and the business and safety benefits of ECP brakes (FAST Act; Pub. L. No. 114-94, § 7311(a), 129 Stat. 1312, 1601 (Dec. 4, 2015)).

There is a general consensus that ECP brakes can stop a train faster than traditional air brakes because they instantly apply to all cars, whereas traditional brakes can take several seconds to engage as the signal travels down the length of the train. The dispute centers on whether this enhanced braking yields any appreciable safety benefit. Rail industry groups argue that ECP brakes lead to only minimal safety enhancements at a large financial cost; DOT maintains that the ECP brakes significantly reduce the likelihood of tank car puncture and product release during a derailment. Another area of dispute is whether ECP brakes reduce train fuel consumption and improve rail operational efficiency under typical conditions.

The GAO study concluded that DOT likely overestimated the business and safety benefits of ECP brakes in its Regulatory Impact Analysis supporting the Final Rule, and as such, GAO suggested that the Final Rule requiring ECP brakes may not be well-supported by evidence. The GAO study criticized DOT for a lack of transparency regarding its analysis and for relying on a small dataset in its computer modelling, which may not represent rail operations generally. The GAO study recommended that DOT: (i) publish information such as data inputs, formulas, and simulations that DOT relied on in developing the ECP brake requirement, so that third parties can assess and replicate the analysis, (ii) publicly identify the key assumptions and the ranges of possible scenarios DOT considered in its computer modelling, and (iii) consider data regarding railroads' ongoing operational experiences with ECP brakes. DOT has stated that it disagrees with the recommendations of the GAO study on the basis that GAO did not provide sufficient and appropriate evidence to justify its findings and conclusions.

The future of the ECP brake requirement is uncertain. In addition to ordering the GAO study, the FAST Act also directs the National Academy of Sciences (NAS) to physically test ECP brakes (as

opposed to the computer-based testing as performed by DOT), including their effect on stopping distance, car derailment, and car puncture. The FAST Act requires that DOT perform an updated Regulatory Impact Analysis for the ECP brake requirement that takes into account the GAO and NAS findings (See Pub. L. No. 114-94, § 7311(c), 129 Stat. 1312, 1603). DOT may be hard-pressed to justify upholding the ECP brake requirement in the face of these FAST Act mandates and litigation from industry groups.

The GAO study is available at: http://www.gao.gov/products/GAO-17-122

PHMSA and OSHA Issue Joint Guidance Memorandum Regarding HazMat Labeling Requirements

On September 19, 2016, the DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) and the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) issued a Joint Guidance Memorandum (Memorandum) discussing the relationship between the agencies' HazMat labeling requirements.

It explains that PHMSA's rules regarding labeling, marking, and placarding shipments are contained in the Hazardous Materials Regulations (HMR; 49 C.F.R. pts. 100-180). PHMSA's regulations are intended to communicate key information to emergency personnel and to the general public regarding the potential dangers of handling the shipment or responding to an uncontrolled release. OSHA's rules regarding labeling are found in the Hazard Communication Standard (HCS 2012; 29 C.F.R. § 1910.1200). HCS 2012 is intended to inform workers about hazards in the workplace. The Memorandum states that HCS 2012 requirements for apply in the workplace irrespective of whether the same material is subject to HMR labeling requirements during transportation.

With respect to bulk packages HazMat, questions may arise as to how to reconcile the PHMSA and OSHA labeling requirements, given that the HMR prohibits the transportation of HazMat in a package that bears a label that may be confused with a label prescribed by the HMR (see 49 C.F.R. § 172.401(b)). The Memorandum clarifies that a package bearing an HCS 2012-compliant OSHA label and a PHMSA HMR label or marking does not violate the HMR's rule against confusing labeling.

The Joint Guidance Memorandum is located at: http://www.phmsa.dot.gov/hazmat/phmsa-and-osha-clarify-requirements-for-labeling-hazardous-chemicals-for-bulk-shipments

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This is part 2 of an article that addresses the closest subject to tax law employment lawyers handle – the ways in which leave laws (and employees expectations in relation to them) affect decision making in the workplace. Part 1 appeared in the last edition of Highlights.