

PLANES, TRAINS AND AUTOMOBILES — AND OTHER TRANSPORTATION HAZARDS

A REPORT ABOUT DANGERS FOR COMMUTERS AND BUSINESS TRAVELERS
AND THEIR SHRINKING LEGAL RIGHTS



Written by Emily Gottlieb, Deputy Director for Law & Policy
Edited by Joanne Doroshov, Executive Director

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Center for Justice & Democracy at New York Law School
185 West Broadway, New York, NY 10013; centerjd@centerjd.org

Center for Justice & Democracy at New York Law School
185 West Broadway
New York, NY 10013
centerjd@centerjd.org
<http://centerjd.org>

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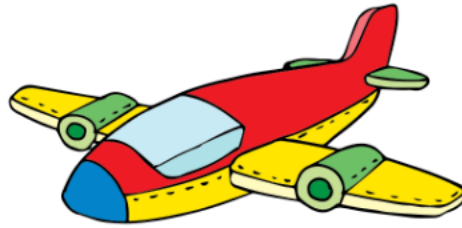
INTRODUCTION

However you get to work these days, chances are that you are spending more time doing it. According to the U.S. Census Bureau, commuting time reached a record high in 2018, with an average of 27 minutes each way to work. That's an average of 225 hours, or nine full days, per person spent commuting last year.¹ While research shows that this trend is "bad for workers, their families, their employers and the economy as a whole," things may only get worse as the search for affordable housing is taking more and more people farther outside metropolitan areas.²

Similarly, if you must travel for business, chances are that you would rather be doing almost anything else. According to recent surveys, "64% of all travelers say traveling for business increases their stress, and people in the U.S. are among the most stressed on Earth.... Despite high levels of stress, only 57% of North American travelers feel their travel policy takes their health and wellness into consideration; the lowest among all regions."³

Yet as bad as those problems are, consider this. Whether driving, flying, taking trains or ferries, or even walking, Americans must largely rely on private companies to ensure their safety – companies that are subject to ever-weakening federal regulations and public protections. The result is that far too many transportation injuries and deaths are occurring. At the same time the legal rights of all Americans are being reduced or, in some cases, eliminated altogether through state or federal tort limits, contractual restrictions like forced arbitration, and federal preemption.

This report presents an overview of some of the most common yet dangerous methods of transportation today.⁴ Divided into five sections – air, rails, highways, water and sidewalks – it examines some of the most common safety dangers associated with each transportation mode. And it explores the ever-shrinking legal options that are available to harmed individuals who seek compensation and accountability in court.



AIR

COMMERCIAL AIRPLANES

SAFETY

In 1996, after two major U.S. commercial airplane disasters killed 375 people, the Clinton administration created an aviation safety and security commission with a goal to drastically reduce fatal accidents. It was led by Vice President Al Gore. In 1997, after “an intensive inquiry into civil aviation safety, security and air traffic control modernization,” the commission issued a number of recommendations to improve airline safety.”⁵ They seemed to work. Ten years after those recommendations were implemented, the U.S. accident rate had dropped a striking 65 percent, and even the international accident rate improved. Said the FAA Administrator at the time, “This is the golden age of safety, the safest period, in the safest mode, in the history of the world.”⁶

Perhaps no longer, however. The October 29, 2018 Lion Air crash killing all 189 people and the March 10, 2019 Ethiopian Airlines crash killing 157 passengers both involved one type of plane: Boeing’s new-model airliner, the 737 MAX 8. While the public’s understanding of what caused these tragedies grows daily as a result of investigative news reports, congressional hearings and litigation, the underlying problem is indisputable: namely, the FAA delegated safety decisions to a company more concerned about profit and market share than safety, and as a result it rushed to put a plane into operation knowing it was unsafe.⁷

The horrific death of Southwest passenger Jennifer Riordan is another recent case in point.⁸ About twenty minutes into an April 2018 New York to Dallas flight, a plane engine exploded in midair, violently firing shrapnel through a window, creating an opening that sucked Riordan’s head, torso and arm out of the plane. The 43-year-old Wells Fargo executive, wife and mother of two died from blunt impact trauma to her body. Less than two years prior, a fan blade similarly broke during a Southwest flight with the same

model engine. Fortunately no one was hurt in that incident. However, the FAA knew inspections were urgently needed but it failed to order them, downplaying the risks by “citing information from the engine’s manufacturer.”⁹ As reported by the *Washington Post*, “The FAA’s halting response troubled some inside the agency who say it fit a pattern of giving too much deference to industry – including airplane manufacturers and their suppliers, airlines and others.”¹⁰

The problem of FAA delegation of safety responsibilities to profit-motivated companies it should be regulating is not the only disturbing airline safety trend, however. There are many problems that are longstanding. Some are improving but not all. These include:

Near misses and runway incidents. As the *New York Times* reported on the 10-year anniversary of the Gore Commission report,

Despite the safety improvements since then, not all the trends are positive. Airports have lately recorded a disturbing number of what they call “proximity events,” in which a plane lands on a runway already occupied by another because someone made a wrong turn or a controller made an error.¹¹

These issues have seen some improvements but remain a challenge.¹² In 2011, a consortium of journalists reviewed NASA’s Aviation Safety Reporting System, which it maintains on behalf of the FAA.¹³ They found “more than 130 near-mishaps and lapses reported on an average day, most happening unbeknownst to the flying public or those living near the airports. And that’s just what’s publicly revealed; the actual number of reports is about five times as much.”¹⁴ The FAA contracted with NASA to create the database but has been criticized for not paying enough attention to it.¹⁵

Commuter/regional airlines.¹⁶ In 2009, a Colgan Air/Continental Connection flight crashed, killing 50. While pilot error was the principal cause, investigations into the crash exposed “widespread safety problems linked to lax regulation.”¹⁷ These problems included “long hours and low pay at regional carriers, where some pilots become captains with less than a year of experience.”¹⁸ Like the 1996 crashes, this tragedy led to a number of safety improvements led by the FAA. Whether this record will continue given the FAA’s recent history of safety negligence is an open question.¹⁹

Cheap flights. An April 2018 *60 Minutes* report exposed ultra-low-cost carrier Allegiant Air’s “persistent problems since at least the summer of 2015 when it experienced a rash of mid-air breakdowns, including five on a single day.”²⁰ What’s responsible for most of these life-threatening hazards: Allegiant’s “aggressive business model” that relies on flying “the oldest fleet in the business,” where “nearly 30 percent of its planes are antiquated, gas-guzzling McDonnell-

Douglas MD-80s, almost all of them purchased second-hand from foreign airlines,” and, as such, “require a lot of maintenance and reliable parts are hard to come by.”²¹

Systemic maintenance problems. Maintenance problems ranging from the outsourcing of maintenance to unreliable foreign countries, to failures to maintain reliable paperwork to verify that repairs are done,²² to the silencing of workers who complain about safety problems, are well-known within the industry. For example, an eight-month-long *CBS News* investigation²³ revealed how American and Southwest Airlines mechanics “feel pressured by management to look the other way when they see potential safety problems on airplanes” and fear retaliation if they speak out. Clearly, airlines should be listening to workers. Just weeks before Jennifer Riordan’s death, the head of the Southwest Airlines mechanics union warned of an “ostrich-like head-in-the-sand approach” regarding problems with the company’s aircraft maintenance program, warning that there was too much outsourcing of maintenance work.²⁴ Members of Congress have complained about this too,²⁵ introducing legislation that would require airlines to disclose the maintenance history of their fleets to the public and FAA (although not proposing to halt outsourcing practices).²⁶

Falling baggage. While perhaps not as life-threatening as other airline risks, being hit by carry-ons falling from overhead bins is among the more frequent ways that passengers suffer injuries on airplanes.²⁷

LIMITS ON VICTIMS’ RIGHTS

TORT, CONTRACT AND COMPENSATION LIMITS

Domestic airlines/U.S. manufacturers

When passengers are hurt or killed in airline accidents or incidents, their legal rights (and those of surviving family members) are generally similar to those of any other injury victim injured by a defective product or by negligence. However, it is important to note that when there is a crash, the airline’s liability may be clearer than that of other types of businesses that cause harm. That’s because commercial airlines are “common carriers,” engaged in the business of transporting paying passengers and, as such, are required under common law to exercise the highest degree of care and diligence in the safety of their passengers.

Depending on what and who caused the accident, a case is usually brought in state court under state products liability tort law (*e.g.*, for plane defects) or other state negligence law (*e.g.*, for poor pilot

training). A plane's owners/operators and manufacturer are not the only possible defendants, and these cases can be complex.²⁸ Compensation may be available for injuries or wrongful death. Punitive damages are also possible. Damages laws vary from state to state. For example, some states cap damages in negligence cases or in products liability cases, or both.²⁹ Other state tort restrictions can limit victims' rights in varying ways. It all depends on the state where the case is filed.³⁰

If the crash involves a small aircraft (carrying fewer than 20 passengers), the federal General Aviation Revitalization Act (GARA) also can limit victims' rights.³¹ That law immunizes manufacturers for crash deaths and injuries when the aircraft is older than 18 years.³²

When crashes occur outside the United States, U.S. manufacturers like Boeing have also tried to use *forum non conveniens* as a way to avoid the full legal and financial accountability that can be achieved through the American civil justice system.³³ Boeing is currently using this tactic in the Lion Air crash cases, a move that "would most likely save Boeing many millions of dollars in damages and limit how much information about the crash the company has to make public."³⁴

And there's another potential barrier to justice, namely the terms of an airline's "Contract of Carriage" (COC). When consumers purchase an airline ticket, they unwittingly enter into a COC with the carrier. Companies are increasingly using these take-it-or-leave-it contracts to try to impose various restrictions on victims' access to the courts.³⁵ For example, some carriers, like Spirit³⁶ and Southwest,³⁷ have inserted narrow time windows for filing suit. Certain airlines' COCs – American,³⁸ Delta³⁹ and Spirit,⁴⁰ to name three – contain choice of law clauses that allow carriers to dictate what state tort law (*i.e.*, state limits) will govern any future legal actions that end up in civil court. Other carriers, such as Alaska Airlines, deny victims any compensation if they are even one percent at fault, regardless of whether the airline's misconduct is negligent or willful.⁴¹ In addition, Alaska and Delta's COCs bar "any punitive, consequential or special damages arising out of or in connection with carriage or other services performed by [the airline], whether or not [it] had knowledge that such damage might be incurred."⁴² And by buying a ticket on Spirit Airlines, customers waive their right to jury trial as well as their right to bring class actions.⁴³

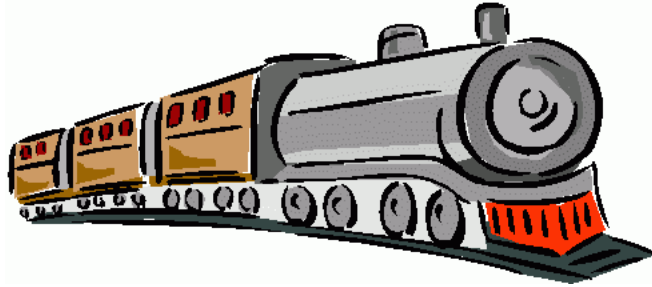
International flights

Under the Montreal Convention, an international treaty ratified by the U.S. Senate in 2003, victims on international flights have two years from the date of the accident to file suit against airlines and can only file in certain locations.⁴⁴ In other words, only passengers who purchased tickets in the United States, permanent U.S. residents or those whose final destination was the United States can seek compensation from an international carrier in U.S. courts. Regarding damages, the carrier is only responsible for about \$170,000 per injured passenger; that amount applies whether the passenger suffered death or physical injury. If a victim seeks more, the burden is on the airline to show that it wasn't negligent or that a third

party was 100 percent at fault. The Convention also bars punitive damages and noneconomic damages cannot be pursued unless they're accompanied by physical injury.

FEDERAL PREEMPTION

Congress gave the federal government exclusive authority to regulate the design and manufacture of commercial aircraft, which is done through the FAA. So far, the courts have been clear, with extremely limited exceptions, that Congress did not intend federal preemption of this field to extend to state lawsuits for compensation. The courts have protected victims' rights despite legal arguments to eliminate them that are consistently made by the industry and the FAA.⁴⁵ State litigation over crashes has always co-existed with federal regulatory authority. However, the U.S. Supreme Court may soon consider a case called *Sikkelee v. Precision Airmotive Corporation*.⁴⁶ In that case, the 3rd Circuit Court of Appeals had held that injured victims can sue the manufacturer of a defectively designed aircraft. As of publication, the Supreme Court is still considering whether to take the case. If it does, the implications for airline crash victims could be enormous.



RAILS

PASSENGER TRAINS

SAFETY

Amtrak is our nation's only high-speed intercity passenger rail provider, operating in 46 states and the District of Columbia. Moving at speeds of up to 150 miles an hour, Amtrak trains certainly can be deadly for any person or motor vehicle that comes in contact with them.⁴⁷ According to the National Safety Council, 841 people were killed by trains in 2018 (although most, 540, were people trespassing on rails).⁴⁸ However, when it comes to motorist and passenger deaths, news about highway-rail grade crossing accidents⁴⁹ and mass casualty collisions raise real concerns about whether railroad companies are appropriately focused on safety. The same goes for the federal agency in charge of rail safety, the Federal Railroad Administration (FRA).

According to the FRA, there are more than 2,000 highway-rail grade crossing accidents per year in the United States, most of which involve train and motor vehicle collisions, which kill over 250 people annually.⁵⁰ Any motorist who must cross the over 200,000 highway-rail grade crossings that operate in the United States knows how terrifying and potentially deadly it can be to traverse an unsafe crossing. And when it comes to derailments or train collisions, the results are far more lethal. In those types of accidents, train passengers are, of course, the vast majority of victims.

Congress has taken some steps to try to stop derailments and collisions. In 2008, it passed the Rail Safety Improvement Act (RSIA), setting a deadline of December 31, 2015 for the implementation of positive train control technology (PTC) on 30 commuter lines, Amtrak and other railroads.⁵¹ The National Transportation Safety Board (NTSB) had been recommending PTC since 1990.⁵² (Notably, “more than 1,400 miles of freight railroad-owned track on which Amtrak operates, some of which is in dark (non-signalized) territory,”⁵³ are exempted.) Congress took this step following the tragic September 12, 2008 Chatsworth, California Metrolink train crash, which killed 24 passengers and injured 135 others, some catastrophically.⁵⁴ The engineer had been texting with a teenage rail enthusiast when he ran a red light on the tracks. The accident might have been completely avoided had the train been equipped with PTC.

Even so, the rail industry “bridled” at Congress’ mandate to implement PTC,⁵⁵ has failed to act quickly and, as a result, preventable crashes have continued. For example, PTC might have prevented a December 1, 2013 New York Metro-North train derailment and crash, killing four and injuring at least 61 people.⁵⁶ A May 12, 2015 Amtrak train derailment that killed eight passengers and injured hundreds more⁵⁷ could also have been avoided with PTC.⁵⁸ Yet as the end of 2015 neared, passenger rail lines were nowhere close to PTC compliance. As a result, they were granted a new deadline of December 31, 2018.⁵⁹ The crashes continued.

On December 18, 2017, an Amtrak train with 77 passengers derailed from a bridge near DuPont, WA, where several passenger cars “fell onto Interstate 5 and hit multiple highway vehicles.”⁶⁰ Three passengers were killed and 57 passengers and crewmembers were injured, plus eight people in highway vehicles were also hurt. PTC controls would have prevented the crash.⁶¹ Less than two months later, an Amtrak passenger train traveling at 57 mph unexpectedly entered a siding and collided with a stationary CSX freight train near Cayce, SC, killing the engineer and conductor and injuring at least 92 passengers and crew.⁶²

By September 2018, railroads were still far from meeting the December PTC deadline. NTSB Chair Robert S. Sumwalt warned Congress yet again that passengers continued to face unnecessary dangers on the nation’s rails.⁶³ U.S. Rep. Michael E. Capuano (D-Mass.) echoed this frustration, stating “I have zero sympathy for the railroads that have done nothing. It’s only a matter of time before the next accident happens and someone dies. How much is a life worth?”⁶⁴

Beyond PTC-noncompliance, there are other troubling safety issues that risk train passenger safety today, including:⁶⁵ lack of speed limit action plans by intercity and passenger railroads;⁶⁶ poor safety culture and management;⁶⁷ ineffective training of crewmembers;⁶⁸ an aging fleet and unsafe repairs;⁶⁹ continued use of passenger rail cars that fail to meet new crashworthiness standards;⁷⁰ and a lack of audio and image recorders.⁷¹

LIMITS ON VICTIMS' RIGHTS

TORT, CONTRACT AND COMPENSATION LIMITS

When passengers are hurt or killed in train crashes, their legal rights (and those of surviving family members) are generally similar to those of any other injury victim injured by negligence. However, it is important to note that when there is a train crash, the rail company's liability may be clearer than that of other types of businesses that cause harm. That's because railroads, like airplanes, are "common carriers," engaged in the business of transporting paying passengers. As such, they are required under common law to exercise the highest degree of care and diligence in the safety of their passengers.

Depending on what and who caused an accident, a case can be brought, for example, against the company operating the train (*e.g.*, Amtrak), a negligent engineer and/or a company that may have maintained unsafe rails. However, victims of mass casualty train crashes face something that other negligence victims do not: a \$295 million overall compensation cap. This is a "per incident" cap. In other words, it applies no matter how many are killed or injured, the seriousness of their harms, the degree of railroad malfeasance or how many entities are responsible.⁷²

This cap was first enacted in 1997, when it was made part of Congress' Amtrak Reform and Accountability Act,⁷³ which helped bail out the financially-troubled company. The cap was originally set at \$200 million, and although it was part of an Amtrak bill, the cap operates in any passenger rail crash. The 2008 Chatsworth, California Metrolink commuter train disaster, mentioned earlier, is an example.⁷⁴ That head-on collision with a Union Pacific freight train ended 24 lives and injured 135 others, many catastrophically.⁷⁵ Though the judge in the case agreed with victims' attorneys that the total value of the collisions would have been between \$320-\$350 million or more "if each of the cases were tried separately to a jury" and had also determined that \$264 million would be a reasonable award given his tentative calculations, he was bound by the \$200 million cap. This forced him to employ a kind of "judicial triage" to allocate damages.⁷⁶ He said,

[I]mpossible decisions had to be made. What was given to one victim had to be taken from another. Essentially a Sophie's Choice had to be made on a daily basis. One Sophie's Choice is enough for a lifetime, but over 120 of them defies description.

It took another massive passenger train disaster – namely the May 12, 2015 Philadelphia Amtrak train derailment that killed eight and injured over 200 others – for Congress to raise the cap to \$295 million in December 2015.⁷⁷ The increase applied retroactively to the roughly 125 passengers and family members

who filed lawsuits after the Philadelphia tragedy.⁷⁸ The victims ultimately settled for \$265 million, with a court-supervised trust run by special masters to determine individual compensation.⁷⁹

Forced Arbitration

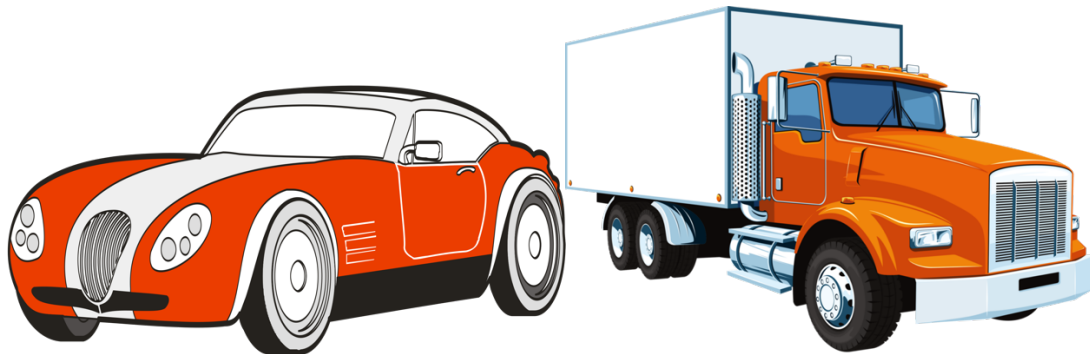
In January 2019, Amtrak “quietly added to its ticket purchases” a new provision that forces passengers in any kind of dispute with Amtrak – even mass casualty victims – into arbitration “with no right to go before a judge or jury”⁸⁰ or band together with similarly injured passengers to pursue claims as a class. With this provision, Amtrak is trying to save money on the backs of their own injured passengers, who are already subject to a compensation cap.

Writes *Politico*, “The change is bringing objections from consumer advocates, who note that it covers scenarios ranging from ordinary ticketing complaints up to wrongful death, and even includes minors who had the tickets purchased for them.”⁸¹ Similarly, travel columnist Ed Perkins wrote in the *Chicago Tribune*, “Say you’ve been hurt in a serious train accident and you want to sue Amtrak for damages. You go to a lawyer, and the lawyer tells you, ‘Sorry, I can’t take the case. You signed away your rights to sue when you bought your ticket.’”⁸²

On December 10, 2019, more than 30 organizations urged Amtrak to end this practice, as did 18 individuals and family members who were able to obtain compensation following the tragic 2015 Philadelphia Amtrak derailment.⁸³ They wrote,

We strongly believe that the only reason we received some measure of justice – since nothing can bring back our loved ones or make up for the devastating impacts to our lives – is because we had the right to hold Amtrak accountable in a court of law. ...Forced arbitration will take away any incentive for Amtrak to remedy their wrongs, knowing that the secrecy of forced arbitration acts as a shield from accountability and public scrutiny.

Several lawmakers have objected to this policy as well.⁸⁴ Among them, 14 U.S. senators, who demanded in a November 26, 2019 letter to Amtrak President & CEO Richard Anderson that “Amtrak immediately eliminate this anti-consumer arbitration and class action policy.”⁸⁵ And at a November 2019 U.S. House subcommittee hearing on Amtrak’s reauthorization,⁸⁶ U.S. Rep. Stephen Lynch (D-Mass.) observed that the rail line’s broad arbitration provision even blocks claims when someone is grossly disfigured in a crash or killed. He also noted that forcing cases into secret arbitration following crashes creates disincentives for safety. Jack Dinsdale of the Transportation Communications Union agreed, telling the subcommittee that forcing people to resolve cases in company-controlled secret systems will “make passengers question whether they want to board the train.” It is “telling me right away you don’t have my safety as a concern.”



HIGHWAYS

PASSENGER VEHICLES

SAFETY

In 2018, over 16 million people were involved in motor vehicle crashes on U.S. roadways; 2.7 million were injured and 36,560 people were killed.⁸⁷ The good news is that this represents a 2.4 percent decrease in fatalities from 2017. The bad news is that pedestrian and cycling deaths are up. And perhaps most troubling, no other mode of transportation comes close to causing this number of deaths or injuries than vehicles on roads.⁸⁸

Yet crashes are hardly the only safety problem involving vehicles.⁸⁹ For example, according to a database compiled by *KidsandCars.org*, in 2018 at least 132 children died from non-traffic, non-crash-related incidents, which include being backed over by vehicles, inadvertently left in hot vehicles, strangled by power windows and setting cars in motion when left unattended in a vehicle.⁹⁰

In 1966, when car accidents had become the leading cause of death of Americans under age 44,⁹¹ Congress enacted the National Traffic and Motor Vehicle Safety Act,⁹² creating the National Highway Transportation [now Traffic] Safety Administration (NHTSA) to develop safety requirements for automobiles.⁹³ In 1974, Congress gave the agency even more safety powers.⁹⁴ But even as this new

regulatory scheme emerged, the auto industry's practice of cutting safety corners and getting away with it did not stop. To put it bluntly, NHTSA has never been able to adequately protect the public from unsafe vehicles. NHTSA has long been "woefully under-funded, understaffed and outgunned by the industry it regulates"⁹⁵; it fails to issue new mandatory safety standards and is slow in upgrading safety standards based on investigations and testing; it often fails to do investigation at all; and the "revolving door" between NHTSA and automakers creates numerous other problems.⁹⁶

As bad as the situation has always been in past, today it is only getting worse. NHTSA is now conducting "fewer defect investigations last year than at any time in its history."⁹⁷ Wrote *Consumer Reports*,

The decline comes just a few years after a series of major scandals rocked the industry, including the General Motors ignition switch and Takata airbag scandals, which are blamed for scores of deaths and injuries and the recall of tens of millions of vehicles, many more than a decade old.

"The American public is relying on this agency to be a cop on the beat," says Cathy Chase, president of Advocates for Highway and Auto Safety, a Washington watchdog group. "People expect the federal government to protect them. ...Absent that, there's going to be a tremendous void in motorist safety."

Meanwhile, auto manufacturers are also refusing to invest in safety, "even when it's available at a reasonable price" and "can mitigate or eliminate potential tragedy and does not interfere with the utility of the vehicle," as Center for Auto Safety Executive Director Jason Levine told a congressional committee in May 2019.⁹⁸ Among the examples of changes Levine cited that would save lives: automatic emergency braking, lane departure warnings, adaptive headlights, rear seat design changes and inflatable curtains.

And when it comes to the latest development in automotive transportation – driverless cars – NHTSA's hands-off regulatory approach and deference to industry raises serious safety concerns. In a recent NTSB report on a 2018 Uber autonomous vehicle crash that killed a pedestrian, the agency severely criticized NHTSA for failing to adequately oversee the safety of these cars. NTSB board member and Trump appointee Jennifer Homendy called NHTSA's approach to safety "laughable" and one that puts "technology advancements before saving lives," while mocking voluntary federal autonomous-vehicles guidance, once dubbed "a vision for safety," as "a vision for lax safety."⁹⁹

Recall statistics also speak to the problem of safety failures. Specifically, "[i]n the last 10 years, over 280 million vehicles have been recalled. With recall completion rates in the 70-75% level that leaves over 70 million vehicles on the road with open recalls."¹⁰⁰ What's especially problematic, however, is the extent to which these numbers reflect alarming behavior by the auto industry, which has taken advantage of

perfunctory federal oversight. It has repeatedly put hundreds of millions of dangerous and defective cars, pickup trucks and SUVs in the stream of commerce, only stepping in months or sometimes years after drivers, passengers and others on the road have been hurt by or exposed to risk from their products.¹⁰¹ This is reflected in many of the top recalls of 2018.¹⁰² 2019 is on track to be an equally hazardous year, with the biggest recalls from January through November already involving a total of over 20 million passenger cars, SUVs and pickup trucks.¹⁰³

Greatly compounding all these problems is the fact that used cars, which represent roughly 75 percent of vehicle sales, are allowed under federal law to be sold to customers with open safety recalls and known, fixable safety defects.¹⁰⁴ A 2019 U.S. Public Interest Research Group and Consumers for Auto Reliability and Safety Foundation investigation of 2,400 used vehicles at 28 AutoNation dealerships nationwide found that one in nine had unrepaired safety recall issues, including problems linked to deaths and injuries, like Takata exploding airbags and faulty GM ignition switches.¹⁰⁵ In 2015, the company had said it would stop selling used cars with open safety recalls, “[b]ut a little over a year later, AutoNation reversed course and resumed selling vehicles with active recalls,”¹⁰⁶ with the company CEO telling *Automotive News* that “with the Trump administration there’s no way that that issue is going to be addressed from a regulatory point of view.”¹⁰⁷ Similarly, a 2017 study of CarMax, the nation’s biggest seller of used vehicles, uncovered the same deadly business practices, with one in four vehicles (27 percent) of nearly 1,700 for sale at eight CarMax locations having unrepaired safety defects.¹⁰⁸

Warranties and Lemon Laws

One way states have stepped in to help ensure that new vehicles with safety defects do not make it on the roads – as well as to protect the purchasers of new cars – is state “lemon laws.” As described by the Center for Auto Safety, “Lemon laws are state-level consumer protection statutes that allow consumers to receive a full refund or a replacement vehicle if their new car has a defect that cannot be fixed after a specified number of repair attempts.”¹⁰⁹ Notably, even before the first state lemon law was enacted in 1982, Congress had provided new product purchasers with firmer warranty rights under the Magnuson-Moss Warranty Act (MMWA), which prevents manufacturers “from drafting unfair warranties” and makes it “easier for consumers to file warranty suits.”¹¹⁰

While all 50 states plus the District of Columbia have lemon laws and many “provide comprehensive rights for consumers,” other laws are weak, providing “protection in name only.”¹¹¹ Another problem is that some car companies are able to completely defeat the purpose of lemon laws by engaging in lemon law laundering. This is where automakers repurchase “lemons” and then resell them without telling the new buyer of the vehicle’s history.¹¹² Unfortunately, the Federal Trade Commission has let manufacturers get away with this dangerous and anti-consumer practice.¹¹³

LIMITS ON VICTIMS' RIGHTS

TORT, CONTRACT AND COMPENSATION LIMITS

When someone is injured or killed in a car accident, the crash is sometimes due to a defectively designed, manufactured or sold vehicle, or an unsafe component such as a dangerous tire or engine part. In these cases, the car manufacturer may be responsible for – in fact may be strictly liable for – causing harm under state products liability law. A supplier or car dealer may also be responsible. Personal injury cases are brought under a state tort law, and compensation may be available for injuries or wrongful death. Punitive damages are also possible.¹¹⁴ Damages laws vary from state to state. For example, some states cap damages in negligence cases or in products liability cases, or both.¹¹⁵ State tort restrictions, especially caps on damages,¹¹⁶ stymie negligence, manufacturing defect and design defect claims against culpable automakers and parts manufacturers.¹¹⁷

Forced Arbitration

Warranty claims made under the MMWA are supposed to follow the Federal Trade Commission's rules implementing the Act, particularly Rule 703.¹¹⁸ This Rule allows for an initial informal dispute settlement mechanism (ISDM) and it specifies how such systems should operate, but rights to go to court are not eliminated.¹¹⁹ The same is generally true under state lemon laws. That said, the lemon law claims process still can be unfair to customers. In some states, like Alabama,¹²⁰ Arizona,¹²¹ Colorado,¹²² Illinois,¹²³ Kansas,¹²⁴ Kentucky,¹²⁵ Louisiana,¹²⁶ Mississippi,¹²⁷ Missouri,¹²⁸ New Mexico,¹²⁹ North Carolina¹³⁰ North Dakota,¹³¹ Oregon,¹³² Pennsylvania,¹³³ South Carolina,¹³⁴ South Dakota,¹³⁵ Tennessee,¹³⁶ Utah¹³⁷ and Wyoming,¹³⁸ consumers must have their complaints go through a manufacturer's alternative dispute resolution mechanism before they can go to court. These systems sometimes do not comply with FTC Rule 703 and can be a difficult and sometimes rigged process for the consumer.¹³⁹

Although manufacturers may not use forced arbitration against their customers, manufacturers that sell vehicles through franchised dealers can – and do – put such clauses in vehicle sales agreements. In fact, forced arbitration clauses are in nearly all vehicle sales and lease agreements today.¹⁴⁰ However, there is one car maker that is using forced arbitration clauses: Tesla. Tesla is claiming that because it sells vehicles directly to consumers, it can insert these clauses in its sales agreement.¹⁴¹ This illustrates why it is so critical that in any upcoming driverless car legislation, Congress preserve state tort law and civil remedies by expressly banning such clauses in autonomous car disputes, particularly when those disputes involve injuries or deaths.¹⁴²

FEDERAL PREEMPTION

In 2000, the U.S. Supreme Court issued a troubling and unprecedented ruling that a NHTSA regulation preempted a state tort lawsuit even though Congress had expressly made it clear that “compliance with a motor vehicle safety standard...does not exempt a person from liability at common law.”¹⁴³ The Court reasoned that “the savings clause ensures the continued viability of state common law claims only to the extent that they do not conflict with a particular federal standard” and that this “lawsuit would conflict” with the federal standard, thus providing no recourse for the injured victim.¹⁴⁴ As with forced arbitration, Supreme Court precedent in this case illustrates why it is so critical that in any upcoming driverless car legislation, Congress preserve state tort law and civil remedies by including more than a savings clause, clarifying throughout that tort lawsuits, which compensate victims, do not conflict with federal law.¹⁴⁵

LARGE TRUCKS AND BUSES

SAFETY

There are about 12.5 million commercial large trucks and buses on the roads.¹⁴⁶ For motorists, there’s nothing scarier than seeing a massive 80,000-pound semi or a speeding motorcoach suddenly appear in the rearview mirror.¹⁴⁷ There’s good reason to be concerned. Of the nearly 5,000 people killed in large truck crashes each year, 82 percent of those victims are *not* large-truck occupants.¹⁴⁸ Equally troubling is the safety record of motorcoaches, where students (age 18 and younger) and seniors (age 55 and older) account for nearly 50 percent of nearly 1.2 million people traveling by commercial bus each year.¹⁴⁹

In 1999, the U.S. Department of Transportation Inspector General (DOT IG) told Congress there were so many large truck- and bus-related injuries and fatalities on U.S. roads that motor carrier safety had become “the number one public safety issue in the Department of Transportation.”¹⁵⁰ In response, Congress passed legislation that established a new DOT subagency to oversee and improve big rig and bus safety; the Federal Motor Carrier Safety Administration (FMCSA) came into being.

The FMCSA is charged with regulating some 500,000 commercial trucking companies, more than 4,000 interstate bus companies and more than four million commercial driver’s license (CDL) holders.¹⁵¹ Its mission is “to reduce crashes, injuries and fatalities involving large trucks and buses.” Unfortunately, the FMCSA has fallen down on the job – badly. As of June 2019, fatalities in crashes involving large trucks or buses have grown from 4,455 in 2013 to 4,949 in 2018, an 11-percent increase.¹⁵² As for trucks specifically, in 2017, there were 102,000 injury crashes involving large trucks, a 5 percent increase from

the previous year and a 59 percent increase from a decade earlier.¹⁵³ Moreover, 2018 marked the highest number of large-truck occupant fatalities since 1988.¹⁵⁴

As for buses, a few recent grim news headlines say it all: “21-year-old bus passenger killed, 20 others injured after crash in New Jersey,”¹⁵⁵ “17 injured in Cincinnati-bound Greyhound bus crash on I-75 in central Kentucky,”¹⁵⁶ “Peter Pan bus crashes into Granby home, two injured,”¹⁵⁷ “Greyhound bus crashes on Highway 99 in Fresno.”¹⁵⁸ The list goes on. Yet today’s FMCSA has repeatedly rejected opportunities to promulgate, institute and enforce rules that safeguard the public from potential motorcoach accidents.¹⁵⁹ For example, in May 2017, the agency stopped working on a rule that would require states to inspect commercial buses annually.¹⁶⁰

On September 25, 2019, the DOT IG released audit results showing that the FMCSA failed to make actionable: 1) needed improvements to the agency’s Safety Measurement System, which collects public motor carrier safety data “to identify carriers that pose the greatest risk to safety for interventions”¹⁶¹; and 2) needed improvements in its assessment of carrier safety rankings.¹⁶² In response, the then-FMCSA Administrator stated that the agency “has no immediate plans to collect data on carrier exposure and additional crash data, after reaching out to the industry and determining that much of the data doesn’t exist.”¹⁶³ Similarly, two years earlier, the agency under President Trump abandoned Obama-era rulemaking efforts to raise motor carriers’ minimum liability limits from 1985 levels, an increase that would not only ensure the availability of compensation to motorcoach and big rig crash victims but also force carriers to make public safety a higher priority.¹⁶⁴

Some of the most dangerous large truck and bus practices include:

Speeding and poor braking. In 2015, 2016 and 2017 (the most recent years for which federal data are available), “Speeding of Any Kind” was cited as the top reason truck drivers were involved in fatal crashes.¹⁶⁵ Moreover, “[g]oing too fast and not allowing for a safe stopping distance are primary causes of rear end collisions.”¹⁶⁶ As for adequate braking, an unannounced May 2019 brake safety inspection initiative caused U.S. law enforcement to place 16.6 percent of large trucks (roughly 1,450 big rigs) out of service for brake violations.¹⁶⁷

A 2016 agency proposal would have required new heavy trucks to be equipped with speed-limiting devices set to a specific maximum speed.¹⁶⁸ In his October 23, 2017 annual address, American Trucking Associations (ATA) President and CEO Chris Spear credited the trade group for stalling the speed-limiter rule, citing it as one of ATA’s “significant triumphs for the industry that were the result of the federation’s elevated profile.”¹⁶⁹

Drowsy driving. Driver fatigue remains a significant factor in many large truck and bus crashes.¹⁷⁰ A well-known recent example was the crash that critically injured comedian Tracy Morgan and killed his friend after their vehicle was hit from behind by a Wal-Mart truck driver who had not slept for more than 24 hours.¹⁷¹ In 2017, 60 truckers involved in fatal crashes were “asleep or fatigued,” a number that the NTSB says is likely underreported on police crash forms.¹⁷²

The consequences for passenger-carrying motorcoaches are even more stark. Forty-two Greyhound passengers were injured and one was killed after their overnight bus slammed into the back of a tractor-trailer on I-80 in Pennsylvania.¹⁷³ The bus driver had fallen asleep at the wheel. At trial, evidence revealed that Greyhound had a rest break rule but never enforced it.

Similarly, on August 2, 2016, a motorcoach with 24 passengers crashed in California, killing four and injuring 19. The driver “had only about five hours of opportunity for sleep in the 40 hours preceding the crash.”¹⁷⁴

“Here’s yet another fatal crash involving both a motorcoach carrier with a starkly evident history of safety problems and a severely fatigued driver,” said NTSB Chairman Robert L. Sumwalt. “It’s time that the Federal Motor Carrier Safety Administration move more aggressively to keep these unsafe carriers off American roadways.”¹⁷⁵

Yet under the current Administration, the FMCSA is doing the opposite. For example, over 20 states, including California, have meal and rest break employment laws that apply to commercial drivers.¹⁷⁶ Over the years and under prior Administrations, the FMCSA had repeatedly rejected efforts by the trucking industry to preempt these employment laws.¹⁷⁷ In 2008, the agency rejected a petition to preempt California’s law, noting that “[Federal Motor Carrier Safety Regulations] have for decades required carriers and drivers to comply with all of the laws, ordinances, and regulations of the jurisdiction where they operate.” Later, the Department of Transportation filed an *amicus* brief at the invitation of the 9th Circuit, arguing strongly that state meal and rest break laws like California’s exist pursuant to “traditional state police power” and should not be preempted.¹⁷⁸

But in 2018, the trucking and bus industries began a new campaign for agency action after Congress expressly refused to accede to their lobbying demands.¹⁷⁹ And on December 21, 2018, violating its own precedent, the FMCSA granted the California trucking industry petition. This alarmed both the truckers’ union (*i.e.*, the International Brotherhood of Teamsters) and highway safety advocates,¹⁸⁰ and promised a new surge of fatigued truckers on the road.¹⁸¹

Yet industry groups have not stopped there. As of publication, Washington State’s trucking industry has also petitioned the FMCSA for a similar result.¹⁸² And the bus industry is also attempting to preempt California’s rule as applied to passenger-carrying motorcoaches,¹⁸³ again generating strong opposition.¹⁸⁴

The Teamsters called FMCSA’s preemption decision a “bail out” for trucking “after it failed to achieve a legislative fix and numerous court rejections” and a “giveaway to the trucking industry at the expense of driver safety.”¹⁸⁵ California’s Attorney General and Labor Commissioner, among others, have challenged the legality of the FMCSA’s truck determination before the 9th Circuit Court of Appeals.¹⁸⁶ In the meantime, however, California state and federal courts have started dismissing truck drivers’ meal and rest break claims, pointing to the FMCSA’s preemption as leaving them no choice.¹⁸⁷

Underride crashes. Truck underride crashes “are collisions in which a car slides under the body of a truck – such as a tractor-trailer or single-unit truck – due to the height difference between the vehicles.”¹⁸⁸ According to a 2019 U.S. Government Accountability Office (GAO) report, every year an average of 219 people are killed by such accidents, a calculation the agency deems an undercount “due to variability in state and local data collection.”¹⁸⁹

Though big rigs are legally required to have rear guards to prevent underride crashes, existing federal regulations are woefully out of date plus there’s no requirement that guards be inspected.¹⁹⁰ When state commercial motor vehicle inspectors examined more than 10,000 trailers over a five-day period in August 2018, they found “about 900 [rear guard] violations (about 28 percent of all violations identified),”¹⁹¹ including “almost 500 instances where the rear guard was cracked or broken, or missing altogether.”¹⁹²

LIMITS ON VICTIMS’ RIGHTS

TORT, CONTRACT AND COMPENSATION LIMITS

As noted throughout this report, state tort restrictions can impede victims’ abilities to bring negligence, wrongful death and product liability actions against wrongdoers. In addition, in the case of truck and motorcoach accidents, federally-mandated insurance minimums may also have a profound impact on a victim’s ability to recover.

Under FMCSA regulations, big rigs transporting non-hazardous cargo must carry a minimum of only \$750,000 per accident in insurance liability coverage, a number that has stayed constant since the 1980s.¹⁹³ Similarly, under FMCSA minimums unchanged since 1985, buses carrying 16 or more passengers across state lines must carry at least \$5 million in liability insurance coverage.¹⁹⁴ These insurance limits not only fail to take into account inflation and substantial medical costs but also function as a cap, providing a single fund of woefully inadequate available compensation that is indifferent to the number of victims hurt or killed. In addition, these liability limits fail to incentivize insurers to make safer practices a condition of coverage, thereby allowing trucking and motorcoach companies to treat deaths and catastrophic injuries as part of the cost of doing business.

When it comes to bus passengers specifically, many motorcoach companies now hide tort limits in the fine print of ticket purchases. For example, discount operator Megabus's "Terms and conditions" give the company the option of denying victims a jury trial, forcing victims into private, company-controlled arbitration to resolve claims, and banning class actions against them.¹⁹⁵ Under Greyhound and its low-cost subsidiary BoltBus's "Terms and Service," class actions are banned and individuals have a mere one-year window to file suit.¹⁹⁶

FEDERAL PREEMPTION

As discussed earlier, the FMCSA without authority has attempted to invalidate California's longstanding meal and rest break employment laws. Until this action is overturned either by a court or a subsequent administration, California state and federal courts in the meantime have been forced to dismiss truck drivers' meal and rest break claims, pointing to the FMCSA's preemption as leaving them no choice.¹⁹⁷ The FMCSA may also be trying to eliminate claims by injury victims when harm results from violations of California's meal and rest employment statutes.¹⁹⁸ However, it is also clear that compliance with an FMCSA standard does not exempt companies from liability at common law.¹⁹⁹



WATER

PASSENGER FERRIES

SAFETY

A passenger ferry is a vessel that transports people across a body of water on a regular, frequent basis. Such vessels include boats, ships and water taxi operations that serve the general public.²⁰⁰ Ferries are used for a variety of reasons including commuting to work in coastal cities or traveling to towns not connected by bridges.²⁰¹ According to the most up-to-date federal statistics available, a reported total of 118.9 million passengers were transported by ferry in 2015, with New York and Washington being the top two states.²⁰²

The U.S. Coast Guard (USCG) is responsible for overseeing passenger ferry safety,²⁰³ but it is one of the agency's *eleven* statutorily-mandated missions.²⁰⁴ This has left passenger ferry safety as an under-resourced priority. Explained a September 2019 Congressional Research Service report,²⁰⁵

For at least four decades, Congress has been concerned about the Coast Guard's ability to maintain an adequate staff of experienced marine safety personnel to ensure that vessels meet federal safety standards.

...Congress's concern about the Coast Guard's inspection staff comes at a time when the agency's vessel inspection workload is increasing by about 50% because towing vessels have been added to its responsibilities. Additionally, Congress has been increasing the agency's role in fishing vessel safety. Adding to the Coast Guard's safety responsibilities is the construction of several liquefied natural gas (LNG) export terminals as well as the increasing use of LNG as ship fuel.... It is unclear what the agency has accomplished over the last decade regarding its inspection workforce. Government audits dating to 1979 have been consistently critical of the proficiency level of Coast Guard inspectors and accident investigators.

Lack of resources seems to be compounded by a lack of institutional will to make needed safety improvements. More specifically, the NTSB investigates ferry crashes and makes recommendations to improve safety but the Coast Guard sometimes simply ignores the NTSB. For example, it has failed to heed repeated NTSB warnings that USCG mandate all passenger vessels have standard and clear procedures for routine and emergency operations to enhance safety.²⁰⁶ That is just one of many safety issues.

Sometimes unsafe vessels are taken out of service in time to avoid large numbers of serious injuries or deaths, although this is typically only after vessels have been operating unsafely for some time and may have even crashed. For example,

- In November 2019, 23 of 32 New York Waterway ferries – which operate 32,000 passenger trips every weekday²⁰⁷ – were taken out of service after inspections flagged them as “operationally unfit.”²⁰⁸
- On November 24, 2018, the MS San Francisco crashed into the San Francisco Ferry terminal. Fifty-three passengers were aboard.²⁰⁹ Passengers “had no official warning of the impending crash.”²¹⁰ Fortunately, the injuries in this crash were minor.
- On December 28, 2017, a Hornblower ferry boat slammed into a sandbar off the Rockaways in New York City and became stuck. Twenty-seven people were stranded on board for nearly six hours – with temperatures in the low 20s – because the water was too shallow for a rescue.²¹¹ Notably, New York City had already decommissioned six of 16 Hornblower passenger ferries after a *New York Post* investigation revealed that at least five boats “had already begun springing potentially disastrous leaks” in their hulls after only seven months of being in service.²¹²

Sometimes far more serious crashes occur and the injuries are catastrophic.

- On July 28, 2017, a New York Water Taxi – owned by Circle Line Sightseeing Cruises and carrying 125 people – slammed into a dock at a ferry terminal on the west side of Manhattan, hurting at least 30 passengers, the majority of whom suffered head and back injuries. According to the FDNY Manhattan Borough Commander, “The people who were getting ready to disembark, a lot of them were thrown forward.”²¹³
- On June 16, 2017, a high-speed Steamship Authority passenger ferry struck the Hyannisport rock jetty, injuring 15 passengers.²¹⁴ According to one passenger, “There were people outside who fell over, injured their head pretty bad and were bleeding. It was chaos at that point.”²¹⁵ Another passenger said a number of passengers got “knocked around. It was pretty violent. like I said there were people on stairwells that got tossed and fell on their face.”²¹⁶
- On December 17, 2013, a private ferry carrying 53 passengers ran aground near Battery Island, North Carolina, injuring 14 people.²¹⁷ “One passenger was flown to a hospital, and 12 others were taken to regional hospitals.”²¹⁸ According to a complaint filed by one victim who suffered traumatic brain injury and vision damage in the crash, Bald Head Island Transportation had “employed a chronically inattentive captain who had a documented history of failing to maintain situational awareness, not keeping his eyes on the road and not keeping a proper lookout.”²¹⁹
- “More than 80 people were injured on Jan. 9, 2013 when the Wall Street-bound Seastreak crashed into a dock near [NY’s] South Street Seaport, sending people tumbling down stairs and into walls.”²²⁰ Some passengers were critically injured, others suffered serious wounds. An NTSB report faulted the ferry captain and Seastreak for “‘ineffective oversight’ and said [the captain] was hampered by a lack of training and a lack of use and familiarity with the backup system.”²²¹ A news investigation “also found the ferry boat was involved in several crashes and one maintenance overhaul in prior years.”²²²

LIMITS ON VICTIMS’ RIGHTS

TORT, CONTRACT AND COMPENSATION LIMITS

Victims of ferry crashes, like anyone harmed in a boating accident, have opportunities to sue those responsible (*e.g.*, the owner, the captain and even the vessel itself). But unlike land-based claims, ferry passengers must sue under federal maritime law.²²³ State law may supplement federal maritime law where necessary.²²⁴ But generally, maritime tort law is its own separate body of common law developed largely by federal courts and the U.S. Supreme Court.²²⁵

The typical commuter ferry crash occurs within one marine league (a.k.a. three nautical miles) of the United States (“territorial waters”). This is important because laws are more restrictive when deaths occur on the high seas.²²⁶

Proving negligence under maritime law is generally the same as proving it under state law with some differences, both good and bad. Because typical personal injury cases are brought under federal maritime law, they would not be subject to the same kind of state tort limits to which land-based victims may be subject, such as caps on non-economic damages. On the other hand, the federal Limitation of Liability Act²²⁷ (LOLA), an anachronistic law on the books since 1851, provides an avenue for ferry owners to try to drastically limit their liability in mass casualty cases.²²⁸

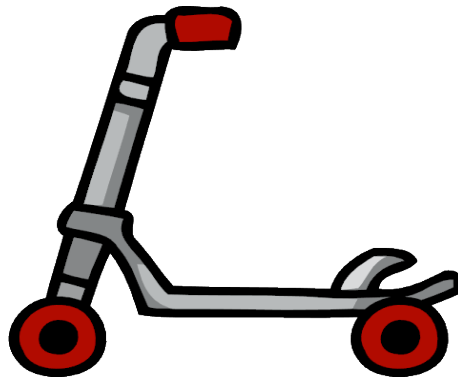
After a crash, LOLA allows a ferry owner to sue preemptively, “without waiting for the injured parties to sue him, or he may file the limitation action [up to six months] after being sued by claimants in various courts.”²²⁹ Victims then must prove that the owner had privity or knowledge of the negligent or unseaworthy conditions of the vessel when it left the dock. If they cannot, liability for an entire mass casualty accident could be limited to the *value of the ferry*. Indeed, ferry owners attempted to invoke LOLA in many recent ferry accidents discussed above, including the January 9, 2013 Seastreak crash,²³⁰ the December 17, 2013 Adventure Ferry accident²³¹ and the June 16, 2017 Hyannisport rock jetty crash.²³²

While victims can usually show negligence and quash the law’s use in most ferry accidents, “[t]he immediate effect of the filing of a limitation action is to stay all actions currently pending against the boat owner and to cause a notice to issue, forcing all claimants to file their claims in the boat owner’s limitation action”²³³ or possibly lose their claims entirely. As one attorney recently testified in Congress:²³⁴

...Moreover, because of draconian limitation periods built into the law, ship owners attempt to misuse the statute to deprive victims of remedies by defaulting them, without appropriate due process. If victims do not file claims within a short time period (ranging from 60 to 120 days), they could forever be barred from seeking any compensation – even if the LOLA action is frivolous and the owners have no factual basis to achieve limitation or exoneration. Often federal courts allow notice to victims, which is intended to inform victims of their rights and requirements to file a claim, to be posted in classified sections of obscure local newspapers. In instances of tragedies where families have lost loved ones to a maritime disaster...families often are in a state of shock and just beginning the mourning process in these early days. Yet, under the current law, they may lose all their rights and remedies if they do not take the necessary legal steps within a short period of time.

Finally, some vessel owners are inserting forced arbitration clauses in the fine print in certain maritime contracts, which passengers must sign as a condition of boarding a vessel.²³⁵ Such clauses do not appear

to be in widespread use by commuter ferries, at least not yet. Other restrictions are being imposed, however. For example, the “Terms and Conditions” for New York City Ferry, Seastreak and some other companies require written notice of claims provided within 6 months and a personal injury or wrongful death lawsuit filed within one year from the date of a crash,²³⁶ which is shorter than the three-year time period allowed by federal statute.²³⁷



SIDEWALKS

ELECTRIC SCOOTERS (E-SCOOTERS)

SAFETY

Walking down a sidewalk to work or a meeting would probably not be on anyone’s list of top commuting dangers. It is true that the advent of cell phone use and distracted walking-while-texting have caused a recent rise in emergency room visits for face and head injuries.²³⁸ However, the explosion of injuries caused by e-scooters have lifted sidewalk dangers to an entirely new level.²³⁹

E-scooters can go up to 15 mph, cost roughly \$1 to unlock and about 15 cents per minute to ride, can be dropped off pretty much anywhere when the user’s finished with it and make companies large profits.²⁴⁰ In 2018 alone, “e-scooters zoomed past station-based rental bikes as the most popular form of shared ‘micro-mobility’ transportation, with rental companies like Lime and Bird renting 85,000 e-scooters”²⁴¹ and riders taking 38.5 million trips in more than 100 cities in the U.S.²⁴²

However, e-scooters “did not arrive without disruption; companies Bird and Lime began operations in 43 markets without government permits or consent. Several cities responded with cease and desist orders, fines, or both.”²⁴³ And as one writer put it, “Indeed, the overall scooter industry’s approach to safety has generally seemed somewhat more in the ‘move fast and break things’ spirit.” Between 2008 and 2017, “emergency departments recorded 990 head or facial injuries sustained from electric scooter use – or

32,000 estimated injuries nationwide. The incidences tripled annually from an estimated 2,325 nationwide in 2008 to an estimated 6,947 in 2017.”²⁴⁴ *Consumer Reports* tabulated injuries from 110 hospitals in 47 U.S. cities between late 2017 through early 2019 and found that at least 1,500 riders had been injured and four had died while using a rentable e-scooter.²⁴⁵ In June 2019, the number of deaths linked to e-scooters rose to eight.²⁴⁶

When *CBS’s 60 Minutes* covered “The Great Electric Scooter Backlash” in September 2019, California attorney Catherine Lerer spoke of the kinds of cases she sees:²⁴⁷

“The calls that I get from riders who are injured, they are injured when the scooter malfunctions,” she said.

“Do you get the impression that they malfunction much?” asked [correspondent David] Pogue.

“Very much, all the time,” Lerer said. “The scooters die mid-ride. The brakes lock up. The handlebar post collapses. The handlebars detach. They were never intended to be like rental cars, commercial fleet usage, you know, use after use after use every day. And that’s why they have a lifespan of only 30 to 45 days!”

In November 2018, Lime pulled one of its models off the market because the baseboards were breaking in two. That was only after multiple earlier warnings Lime had ignored, including emails from an independent contractor who alerted the company that scooters were splitting, attaching photo documentation and ID codes for scooters with “cracks on the underside of the deck.”²⁴⁸ Similarly, despite earlier employee concerns, it took questions from the *Washington Post*²⁴⁹ for Lime to issue an October 30, 2018 public statement that its August recall of roughly 2,000 Segway Ninebot scooters was due to “a manufacturing defect” that “could result in the battery smoldering or, in some cases, catching fire.”²⁵⁰ Battery fires aren’t unique to Lime scooters, of course.²⁵¹ And other safety hazard include sticking accelerators,²⁵² dangerously poor performance in certain weather conditions²⁵³ and untrained or poorly-trained mechanics. For example, Bird uses freelance mechanics, trained via YouTube, who “have to figure out for themselves what needs fixing” and “get a bounty for each fixed ride,” which incentivizes them to repair e-scooters “fast, and by any means necessary,” including taking parts off another Bird scooter.²⁵⁴

Though the Consumer Product Safety Commission (CPSC) could be doing more, the agency lacks the resources or political will to do much, relying on companies to police themselves.²⁵⁵ In the absence of federal oversight, the e-scooter industry continues to operate without much accountability,²⁵⁶ with only the “rules of the road” (*i.e.*, how e-scooter users should ride in cities) – not product safety – “hammered out in local transportation agencies, mayors’ offices and city councils.”²⁵⁷

LIMITS ON VICTIMS' RIGHTS

TORT, CONTRACT AND COMPENSATION LIMITS

Normally when someone relies on a mode of transportation to be safe and it isn't, an injured victim has rights to seek compensation from the culpable company under the tort system. Available damages vary from state to state as a result of tort restrictions passed by state lawmakers, but at least the right to go to court exists.²⁵⁸ Not so with the e-scooter industry.

That is because e-scooter companies force riders to agree to standard boilerplate contracts in order to use their product, all of which contain unfair provisions buried in fine print and legalese that most people cannot possibly understand. Among those provisions is the complete elimination of an injured rider's tort rights. In fact, the e-scooter industry's liability scheme accepts none of the responsibility for rider injuries even if a company's gross negligence is to blame, and forces riders to agree to assume all the risk.

More specifically, e-scooter rental agreements force riders to, as in Lime's agreement, "waive any and all claims, including those in contract, tort (including negligence), statutory and/or any other grounds."²⁵⁹ Bird puts it this way: "users are barred from asserting general negligence, breach of contract, and/or breach of express or implied warranty claims; and...personal injury, wrongful death, punitive damages and all other compensation is denied."²⁶⁰ Skip's agreement says that it's "not responsible for any injury, damage, harm or cost that you cause that is related to or arises out of your use of a Skip Scooter" and this is "regardless of whether the injury or damage is caused to Yourself or to others."²⁶¹

Forced Arbitration

All these companies also require that all disputes be resolved in private, secret forced arbitration systems, and they prevent riders from joining with others in class actions.²⁶² In other words, riders have no right to have their disputes resolved by judges or juries, and must instead submit to a company-controlled system, rigged in the company's favor, with no meaningful right to appeal.²⁶³

Whether companies can escape all liability particularly when *non*-riders (who are not parties to a rental contract) suffer e-scooter-related injuries is certainly an open question. For example, one California class action is proceeding in court as of publication. In the case *Borgia v. Bird Rides, Inc.*,²⁶⁴ injury victims are suing Lime, Bird and scooter manufacturer Segway for gross negligence and aided and abetted assaults by "dumping" thousands of scooters onto CA streets and into public areas.²⁶⁵ They say the companies are

endangering the health, safety and welfare of riders, pedestrians and the general public.²⁶⁶ Other cases are proceeding specifically under the Americans with Disabilities Act (ADA) for making sidewalks inaccessible and creating a public nuisance.²⁶⁷

NOTES

¹ Christopher Ingraham, “Nine days on the road. Average commute time reached a new record last year,” *Washington Post*, October 7, 2019, <https://www.washingtonpost.com/business/2019/10/07/nine-days-road-average-commute-time-reached-new-record-last-year/>

² Ibid.

³ Peggy Studer, “The World Of Travel: Making Business Travelers Happier In Each Region,” *Hospitality Net*, August 19, 2019, <https://www.hospitalitynet.org/opinion/4094683.html>

⁴ As public transit is generally considered among the safest ways of commuting, city buses and city rail systems are not part of this report. For example, a 2018 analysis showed that “using public transit is 10 times safer than traveling by vehicle, while using commuter/intercity railroads is 18 times safer.” See National Safety Council, “Public transportation is 10 times safer, analysis shows,” *Safety + Health*, December 27, 2018, <https://www.safetyandhealthmagazine.com/articles/17905-public-transportation-is-10-times-safer-for-commuters-analysis-shows>. In addition, this report does not focus on active commuting, such as walking or cycling, except where a mode of sidewalk transportation presents unique safety risks, such as e-scooters.

⁵ White House Commission on Aviation Safety and Security, *Final Report to President Clinton*, February 12, 1997, <https://fas.org/irp/threat/212fin~1.html>

⁶ Matthew L. Wald, “Fatal Airplane Crashes Drop 65%,” *New York Times*, October 1, 2007, <https://www.nytimes.com/2007/10/01/business/01safety.html>

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airline industry is their use of low paid mechanics in foreign countries to maintain passenger aircraft,' said John Samuelsen, president of the national Transport Workers Union. 'It is a fact that Southwest and many other United States' airlines have overhaul work done overseas by mechanics who are not required to meet the stringent standards and requirements adhered to inside the United States. It's the ultimate example of a 'profits before people' business plan and it has created a clear and present danger to America's air travelers.'")

²⁵ Letter to Doug Parker, CEO, American Airlines Group, dated October 9, 2019, <https://chuygarcia.house.gov/sites/chuygarcia.house.gov/files/FINAL%20American%20Airlines%20Signed%20Letter.pdf>

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³¹ According to the latest statistics released by the National Transportation Safety Board (NTSB), "Most aviation deaths in 2018 took place during general aviation operations, when 381 were killed, compared to 331 the year before. The fatal accident rate in general aviation was 1.029 accidents per 100,000 flight hours, compared to 2017's rate of 0.935." Said NTSB Chairman Robert L. Sumwalt in a November 14, 2019 news release, "Aviators in both the general aviation and [commuter and on-demand] communities need to renew their emphasis on building and sustaining a safety culture, and recipients of our safety recommendations in this area need to implement those life-saving recommendations." National Transportation Safety Board, "U.S. Aviation Fatalities Increased in 2018," November 14, 2019, <https://www.nts.gov/news/press-releases/Pages/NR20191114.aspx>

³² General Aviation Revitalization Act, P.L. 103-298 (1994), <https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg1552.pdf#page=1>

³³ Gabriele Steinhäuser and Sara Randazzo, "An Early Question in the Boeing Crash Lawsuits: Where Should the Claims Be Heard?" *Wall Street Journal*, April 11, 2019, <https://www.wsj.com/articles/an-early-question-in-the-boeing-crash-lawsuits-where-should-the-claims-be-heard-11555013294>. See also, Abdi Latif Dahir, "The battle over the future of Boeing's 737 Max is heading to US courts," *Quartz Africa*, April 2, 2019, <https://qz.com/africa/1584662/boeing-and-ethiopian-airlines-face-lawsuits-over-737-max-crash/>

³⁴ David Gelles, "Boeing Aims to Move Victim Lawsuits Abroad, but C.E.O. Says He Is Unaware," *New York Times*, November 10, 2019, <https://www.nytimes.com/2019/11/10/business/boeing-lion-air-lawsuits-indonesia.html>

³⁵ See Richard Ritorto and Stephan A. Fisher, “Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261) – A Bumpy But Navigable Ride,” 82 *J. Air L. & Com.* 561 (2017), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=4063&context=jalc>

³⁶ “Time Limit – No legal action may be brought by a passenger against Spirit or its directors, officers, employees or agents unless commenced within six (6) months from the date of the alleged incident.” Spirit Airlines, “Contract of Carriage,” updated as of October 3, 2019, https://content.spirit.com/Shared/en-us/Documents/Contract_of_Carriage.pdf

³⁷ “(1) No claim for personal injury or death of a Passenger will be entertained by Carrier unless written notice of such claim is received by Carrier within 21 days after the occurrence of the event giving rise to the claim. (2) No legal action on any claim described above may be maintained against Carrier unless commenced within one year of the Carrier’s written denial of a claim, in whole or in part.” Southwest Airlines, “Southwest Airlines Co. Contract of Carriage - Passenger,” effective October 8, 2019, <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>

³⁸ “Texas law applies to this contract.” American Airlines, “Conditions of Carriage: Contract details,” updated August 22, 2019, <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp>

³⁹ “Any and all matters arising out of or relating to this Contract of Carriage and/or the subject matter hereof shall be governed by and enforced in accordance with the laws of the United States of America and, to the extent not preempted by Federal law, the laws of the State of Georgia without regard to conflict of law principles, regardless of the legal theory upon which such matter is asserted.” Delta Airlines, “Contract of Carriage: U.S.” last modified June 18, 2019, <https://www.delta.com/us/en/legal/contract-of-carriage-dgr>

⁴⁰ “This Contract of Carriage will be governed by and construed in accordance with the laws of the United States of America and the State of Florida without regard to conflict of law principles or law.” Spirit Airlines, “Contract of Carriage,” updated as of October 3, 2019, https://content.spirit.com/Shared/en-us/Documents/Contract_of_Carriage.pdf

⁴¹ “Alaska shall not be liable for any death, injury, delay, loss or other damage of whatsoever nature (hereafter referred to collectively as ‘damage’) arising out of or in connection with Carriage or other services performed by Alaska, unless such damage is proven to have been caused by the sole negligence or willful misconduct of Alaska and there has been no contributory negligence on the part of the Passenger.” Alaska Airlines, “Alaska Airline, Inc. Contract of Carriage,” revised September 3, 2019, <https://www.alaskaair.com/content/legal/contract-of-carriage/english-COC>

⁴² Alaska Airlines, “Alaska Airline, Inc. Contract of Carriage,” revised September 3, 2019, <https://www.alaskaair.com/content/legal/contract-of-carriage/english-COC>; Delta Airlines, “Contract of Carriage: U.S.” last modified June 18, 2019, <https://www.delta.com/us/en/legal/contract-of-carriage-dgr>

⁴³ “All right to trial by jury in any action, proceeding or counterclaim arising out of or in connection with this Contract of Carriage is irrevocably waived. No Class Action – Any case brought pursuant to this Contract of Carriage, Spirit’s Tarmac Delay Plan, or Spirit’s Guest Service Plan must be brought in a party’s individual capacity and not as a plaintiff or class member in any purported class or representative proceeding.” Spirit Airlines, “Contract of Carriage,” updated as of October 3, 2019, https://content.spirit.com/Shared/en-us/Documents/Contract_of_Carriage.pdf

⁴⁴ Specifically, 1) where the airline is incorporated; 2) where it has its principal place of business; 3) where the flight ticket was purchased; 4) in the passenger’s home country; or 5) the site of their trip’s ultimate destination.

⁴⁵ See Thomas McGarity, Nina Mendelson and Sidney Shapiro, “The Truth About Torts; Regulatory Preemption at the Federal Aviation Administration,” Center for Progressive Reform (November 2016) http://progressivereform.org/articles/FAA_Preemption_1608.pdf

⁴⁶ *Avco Corp. v. Sikkelee*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/avco-corp-v-sikkelee/> (viewed November 1, 2019).

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⁵⁰ Federal Railroad Administration, *In-Depth Data Analysis Of Grade-Crossing Accidents Resulting in Injuries and Fatalities* (May 2017), <https://www.fra.dot.gov/Elib/Document/17066>

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⁶⁴ Ashley Halsey III, “Untangling the train wrecks: Congress holds yet another hearing on its mandate to end what’s causing most of them,” *Washington Post*, September 13, 2018, <https://www.washingtonpost.com/transportation/2018/09/13/untangling-train-wrecks-congress-holds-yet-another-hearing-its-mandate-end-whats-causing-most-them/>

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⁶⁶ Ibid. (Intercity and passenger railroads don’t: 1) “periodically review and update their speed limit action plans to reflect any operational or territorial operating changes requiring additional safety mitigations”; 2) “continually monitor the effectiveness of their speed limit action plan mitigations”; or 3) “apply their existing speed limit action plan criteria for overspeed risk mitigation to all current and future projects in the planning, design, and construction phases, including projects where operations are provided under contract.”)

⁶⁷ Ibid. (Each railroad has failed to “develop and implement a railroad safety risk reduction program that systematically evaluates railroad safety risks on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.” In addition, Amtrak should “develop a comprehensive [safety management system] that vitalizes safety goals and programs with executive management accountability; incorporates risk management controls for all operations affecting employees, contractors, and the traveling public; improves continually through safety data monitoring and feedback; and is promoted at all levels of the company.”)

⁶⁸ Ibid. (Amtrak needs to “improve training for crewmembers to ensure proficiency on the physical characteristics of a territory and operating characteristics of locomotives, including through the use of simulators” and “conduct training that specifies and reinforces how each crewmember, including those who have not received their certifications or qualifications, may be used as a resource to assist in establishing and maintaining safe train operations.”)

⁶⁹ Testimony of Jim Mathews, President and Chief Executive Officer, Rail Passengers Association before U.S. House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines and Hazardous Materials hearing on “Amtrak: Now and Into the Future,” November 13, 2019, <https://transportation.house.gov/imo/media/doc/Mathews%20Testimony1.pdf> (“Amtrak’s fleet averages nearly 33 years of age and its diesel locomotives average nearly 21 years of age. The picture on the National Network is even more stark: as of last year, the railroad’s 461 Amfleet I’s ranged from 41 to 44 years old, with the 145 Amfleet II’s averaging 38 years of age. What does that mean in practice? ...[An] experience as akin to traveling on a rolling museum,” where “citizens of the richest nation on earth are forced to bring shims and duct tape to jury-rig repairs to their interstate transportation systems.”)

⁷⁰ Testimony of Jennifer Homendy, National Transportation Safety Board Member before U.S. Senate Committee on Commerce, Science and Transportation hearing on “Amtrak: Next Steps for Passenger Rail,” June 26, 2019, <https://www.nts.gov/news/speeches/JHomendy/Pages/homendy-20190626.aspx> (Amtrak has passenger rail cars in service that it knows don’t meet new, stronger equipment safety standards. The result: a disaster like the DuPont, WA derailment, where the rail cars “did not provide adequate occupant protection, resulting in complex uncontrolled movements and secondary collisions with the surrounding environment which led to damage so severe to the railcar body structure, that it caused passenger ejections. The failure of the railcars directly resulted in three fatalities and two partially ejected passengers.”)

⁷¹ Ibid. (Not all intercity and commuter rail passenger trains carry crash- and fire-protected inward- and outward-facing audio and image recorders, which “improve the quality of accident investigations and provide the opportunity for proactive steps by railroad management and the FRA to improve operational safety.”)

⁷² Andrew Cohen. “The Real Victims of ‘Tort Reform,’” *Atlantic*, July 18, 2011, <https://www.theatlantic.com/national/archive/2011/07/the-real-victims-of-tort-reform/242030/>

⁷³ P.L. 105–134, December 2, 1997, <https://www.congress.gov/105/plaws/publ134/PLAW-105publ134.pdf>; 49 U.S.C §28103, <https://www.law.cornell.edu/uscode/text/49/28103>; Pub. L. 114-94, div. A, title XI, §11415, <https://www.govinfo.gov/content/pkg/PLAW-114publ94/html/PLAW-114publ94.htm>

⁷⁴ National Transportation Safety Board, *Collision of Metrolink Train 111 With Union Pacific Train LOF65-12 Chatsworth, California September 12, 2008*, January 21, 2010, <https://www.nts.gov/investigations/AccidentReports/Reports/RAR1001.pdf>

⁷⁵ *Chatsworth Metrolink Collision Cases*, Case No. PC043703 (L.A. Super. Ct., Cal.) (final judgment re: allocation of interpled funds filed July 13, 2011), <http://www.justiceandrailroadsafety.com/files/FINAL-JUDGMENT.pdf>

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<https://www.cars.com/articles/recall-recap-the-5-biggest-recalls-in-june-2019-405306/> (1,868,900 vehicles); Patrick Masterson, "Recall Recap: The 5 Biggest Recalls in May 2019," *Cars.com*, June 3, 2019, <https://www.cars.com/articles/recall-recap-the-5-biggest-recalls-in-may-2019-403264/> (1,309,800 vehicles); Patrick Masterson, "Recall Recap: The 5 Biggest Recalls in April 2019," *Cars.com*, May 1, 2019, <https://www.cars.com/articles/recall-recap-the-5-biggest-recalls-in-april-2019-401405/> (1,011,500 vehicles); Patrick Masterson, "Recall Recap: The Biggest Recalls in March 2019," *Cars.com*, April 1, 2019, <https://www.cars.com/articles/recall-recap-the-5-biggest-recalls-in-march-2019-1420757741308/> (2,340,100 vehicles); Patrick Masterson, "Recall Recap: The Biggest Recalls in February 2019," *Cars.com*, March 4, 2019, <https://www.cars.com/articles/recall-recap-the-5-biggest-recalls-in-february-2019-1420757491315/> (1,062,000 vehicles); Patrick Masterson, "Recall Recap: The Biggest Recalls in January 2019," *Cars.com*, February 4, 2019, <https://www.cars.com/articles/recall-recap-the-biggest-recalls-in-january-2019-1420757218779/> (102,300 vehicles).

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Transportation and Infrastructure, Coast Guard and Maritime Transportation Subcommittee hearing on “Commercial and Passenger Vessel Safety: Challenges and Opportunities,” November 14, 2019, <https://transportation.house.gov/imo/media/doc/Sterbcow%20Testimony.pdf>

²²⁸ See, e.g., “Dive Boat Owners Seek Legal Protection Under 1851 Maritime Law,” *Associated Press*, September 6, 2019, <https://sanfrancisco.cbslocal.com/2019/09/06/dive-boat-owners-1851-maritime-law-conception-victims/>; Andy Newman, “New York Can’t Limit Damages in Ferry Crash,” *New York Times*, February 26, 2007, <https://www.nytimes.com/2007/02/26/nyregion/26cnd-ferry.html>

²²⁹ Stephen F. White, “Understanding the limitations of shipowners’ liability,” *PropertyCasualty360*, February 6, 2019, <https://www.propertycasualty360.com/2019/02/06/understanding-limitation-of-shipowners-liability/>

²³⁰ David Voreacos, “Wall Street Commuter Ferry Operator Settles Crash Claims,” *Bloomberg*, October 31, 2013, <https://www.insurancejournal.com/news/east/2013/10/31/309912.htm>; Lisa Barron, “Passengers in Wall Street ferry crash file 37 lawsuits,” *Reuters*, May 17, 2013, <https://www.reuters.com/article/us-usa-newyork-ferry/passengers-in-wall-street-ferry-crash-file-37-lawsuits-idUSBRE94G0VD20130517>; Ted Sherman, “Lawsuit seeking \$45 million in damages filed against Seastreak in ferry crash,” *NJ Advance Media*, January 22, 2013,” https://www.nj.com/news/2013/01/lawsuit_seeking_45_million_in.html, discussing *In Re: Seastreak, LLC*, Case No. 2:13-cv-00315 (D.N.J.) (complaint for exoneration from or limitation of liability filed January 16, 2013).

²³¹ *In the Matter of: Bald Head Island Transportation, Inc.*, 124 F.Supp.3d 658 (2015); *In the Matter of: Bald Head Island Transportation, Inc.*, Case No. 7:14-cv-00077-F (Adm.S.Div. E.D.N.C. (verified complaint for exoneration from or limitation of liability by vessel owners filed April 23, 2014).

²³² *In re: Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority*, Case No. 1:17-cv-12473 (D.Mass.) (complaint of Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority for exoneration from and/or limitation of liability, civil and maritime filed December 15, 2017).

²³³ *Ibid.*

²³⁴ Testimony of Paul M. Sterbcow, Lewis, Kullman, Sterbcow & Abramson, LLC, before U.S. House Committee on Transportation and Infrastructure, Coast Guard and Maritime Transportation Subcommittee hearing on “Commercial and Passenger Vessel Safety: Challenges and Opportunities,” November 14, 2019, <https://transportation.house.gov/imo/media/doc/Sterbcow%20Testimony.pdf>

²³⁵ Testimony of Paul M. Sterbcow, Lewis, Kullman, Sterbcow & Abramson, LLC, before U.S. House Committee on Transportation and Infrastructure, Coast Guard and Maritime Transportation Subcommittee hearing on “Commercial and Passenger Vessel Safety: Challenges and Opportunities,” November 14, 2019, <https://transportation.house.gov/imo/media/doc/Sterbcow%20Testimony.pdf>

²³⁶ See NYC Ferry, “NYC Ferry Tickets Terms and Conditions,” <https://images.ferry.nyc/wp-content/uploads/2018/04/13143740/NYC-Ferry-Terms-and-conditions.pdf> (viewed December 14, 2019); Seastreak, “Terms of Service,” <https://seastreak.com/terms-of-service/> (viewed December 14, 2019). See also, Hornblower, “Terms & Conditions,” <https://www.hornblower.com/terms-conditions/> (viewed December 14, 2019); Washington State Department of Transportation, “FAQ – Terms and Conditions,” <https://www.wsdot.wa.gov/Ferries/infodesk/fag/terms/> (viewed December 14, 2019).

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the sidewalk right in front of the exit of a coffee shop she was visiting”; a man who “has a torn bicep distal tendon, which required surgery,” because of a Bird rider that “crashed into him from behind”; and a woman with a degenerative disease and arthritis in her knees “unable to park her car in handicapped parking spaces due to Bird and/or Lime Scooters blocking the handicapped parking spaces.”

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