

2014

## For Every Wrong, a Remedy: A Narrow Interpretation of the Locomotive Inspection Act's Preemptive Scope in Asbestos Cases

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### Recommended Citation

Malzahn, Andrew (2014) "For Every Wrong, a Remedy: A Narrow Interpretation of the Locomotive Inspection Act's Preemptive Scope in Asbestos Cases," *Hamline Law Review*: Vol. 37: Iss. 2, Article 9.  
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**FOR EVERY WRONG, A REMEDY: A NARROW  
INTERPRETATION OF THE LOCOMOTIVE INSPECTION  
ACT’S PREEMPTIVE SCOPE IN ASBESTOS CASES**

*Andrew Malzahn\**

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\* Juris Doctor expected May 2015, Hamline University School of Law. I wish to thank my parents, Mark and Barb, and siblings Anna and Joe, each of whom inspire me in different ways and are always supportive. I also wish to thank *Hamline Law Review*, Volume 37 staff for their guidance, contributions, and support throughout the article process.

## I. INTRODUCTION

By 2015, the number of asbestos-injury claims in America is projected to exceed 250,000.<sup>1</sup> Long-term exposure to asbestos, often occupationally, has been linked to a number of debilitating diseases.<sup>2</sup> Asbestos-related diseases often have prolonged latency periods, which can leave afflicted individuals without opportunity to effectively treat these painful, and often fatal, ailments.<sup>3</sup> Although many asbestos-related disease victims may seek a legal remedy, a narrow class of these individuals may be left without recourse.<sup>4</sup>

During the twentieth century, a large number of railroad workers were exposed to asbestos-containing products.<sup>5</sup> Consequently, thousands of railroad workers afflicted with asbestos-related diseases have brought claims against rail carriers and locomotive equipment manufacturers responsible for their exposure to asbestos-containing products.<sup>6</sup> The ensuing litigation has raised legal questions including federal preemption, which ultimately results in the preclusion of state law tort claims.<sup>7</sup>

State laws have historically provided redress for persons injured by defective products, failure to warn, and consumer rights violations.<sup>8</sup> However, in its 2012 decision in *Kurns v. R.R. Friction Prods. Corp.*, the United States Supreme Court declared that federal legislation in the field of locomotives and locomotive equipment preempts state law tort claims.<sup>9</sup> *Kurns* relied on the Court's decision in *Napier v. Atl. Coast Line R. Co.*,

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<sup>1</sup> See *infra* text accompanying note 44 (referencing a comprehensive study of asbestos injury litigation).

<sup>2</sup> See *infra* text accompanying note 37 (citing diseases such as mesothelioma, asbestosis, pleural changes, and lung cancer).

<sup>3</sup> See *infra* text accompanying notes 38, 41 (explaining that a latency period ranging from ten to forty years may result in incurable disease).

<sup>4</sup> See *infra* text accompanying note 30 (noting that nonemployees must use state courts because nonemployees cannot pursue FELA claims); see also *infra* text accompanying note 152 (leaving nonemployees exposed to asbestos-containing products from locomotive "parts and appurtenances" without a remedy because state law tort claims are preempted).

<sup>5</sup> See *infra* note 35 and accompanying text (explaining that railroad employees worked with or around asbestos-containing products).

<sup>6</sup> See, e.g., *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012) (railroad employee suing multiple defendants for the distribution and manufacture of locomotive brake shoes and locomotive engine valves that contained asbestos with which he came into contact); *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003) (class-action suit by railroad workers against manufacturers of locomotive brakes and engines); *Ransford v. Griffin Wheel Co.*, No. A121620, 2009 WL 1994740 (Cal. Ct. App. July 9, 2009) (railroad employee suing manufacturer of asbestos-laden brake pads on locomotives and rolling stock).

<sup>7</sup> See, e.g., *Kurns*, 132 S. Ct. at 1270 (holding that the LIA preempts state law tort claims); *Ransford*, 2009 WL 1994740, at \*1 (holding that the LIA preempts state law tort claims).

<sup>8</sup> See *infra* note 52 and accompanying text (citing that state law usually provides redress for tort claims).

<sup>9</sup> *Kurns*, 132 S. Ct. at 1270 (providing the Court's holding in *Kurns*).

where it held that the Locomotive Inspection Act (LIA), promulgated in 1911, “occupies the field” of locomotive equipment and thereby precludes state law regulating the same.<sup>10</sup> However, the concurring and dissenting Justices in *Kurns* stated that it is “doubtful” *Napier* would be decided the same way today because the Court’s recent cases have required that Congress do much more to displace state law from an entire field.<sup>11</sup> Nevertheless, the Justices felt compelled by *stare decisis* to agree with the majority that the LIA occupies the field of locomotive equipment.<sup>12</sup>

Notwithstanding the LIA’s field preemption, a reviewing court ultimately determines whether the LIA preempts state law based on the facts before it and its interpretation of what the LIA field covers.<sup>13</sup> While eighty-five years of *stare decisis* holds that state laws directed at “locomotive equipment” or locomotive “parts and appurtenances” are preempted by the LIA, what constitutes a part or appurtenance of a locomotive has only been defined in abstract terms and, therefore, remains open for interpretation by the courts.<sup>14</sup> For instance, courts have been called on to decide whether a two-way telemetry system is an appurtenance of a locomotive or whether a formerly attached pin cushion unit is an appurtenance of the locomotive and thereby falls within the LIA’s preemptive scope.<sup>15</sup>

This comment addresses whether brake shoes on and in a line of railcars are an appurtenance of the locomotive. Despite the Court’s recent decision in *Kurns*, reviewing courts should limit the scope and effect of the LIA’s field in light of the doctrinal shift to reluctance on field preemption and find that brake shoes on railcars are not a part or appurtenance of a locomotive.<sup>16</sup> That assertion is supported by a presumption against

<sup>10</sup> *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 613 (1926).

<sup>11</sup> See *Kurns*, 132 S. Ct. at 1270 (Kagan, J., concurring) (opining that, “[v]iewed through the lens of modern preemption law, *Napier* is an anachronism,” and citing *N.Y. State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973), which rejected field preemption despite a “detailed” and “comprehensive regulatory scheme”); *Kurns*, 132 S. Ct. at 1271 (Sotomayor, J., concurring in part, dissenting in part) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997)) (stating that “recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it”).

<sup>12</sup> *Kurns*, 132 S. Ct. at 1271 (discussing the Court’s reasoning).

<sup>13</sup> See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486–92 (1996) (conducting a preemption analysis based on its interpretation of the preempted field).

<sup>14</sup> See *Kurns*, 132 S. Ct. at 1271 (Sotomayor, J., concurring in part, dissenting in part) (stating that the eighty-five year old decision in *Napier*, which held that state laws directed at locomotive equipment were preempted by the LIA, remains the law); *S. Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936); see, e.g., *infra* Part II.E (providing case illustrations of courts interpreting the extent of parts or appurtenances).

<sup>15</sup> See *Burlington N. R.R. Co. v. State of Mont.*, 805 F. Supp. 1522, 1529 (D. Mont. 1992) (holding two-way telemetry system was not a locomotive part or appurtenance); *Milescu v. Norfolk S. Corp.*, 807 F. Supp. 2d 214, 221 (M.D. Pa. 2011) (holding that a cushion unit was not a locomotive part or appurtenance).

<sup>16</sup> *Kurns*, 132 S. Ct. at 1270 (holding that “state-law design-defect and failure-to-warn claims fall within the field of locomotive equipment regulation pre-empted by the LIA,

preemption, a detailed analysis of the on-point case law, the incongruent intent of the LIA, and the unjust consequences—specifically that asbestos-related disease victims may be left without a remedy—that result from field preemption.<sup>17</sup>

## II. BACKGROUND

This section provides a comprehensive overview of the considerations a court must take into account when deciding whether the LIA preempts state law tort claims against the manufacturer of asbestos-containing products not located on the locomotive itself. Additionally, this section discusses the LIA, asbestos litigation generally, the preemption doctrine, the scope of LIA's preemption, judicial interpretations of the LIA's phrase "locomotive . . . parts or appurtenances," and judicial interpretations of the LIA's preemptive coverage with regard to brake shoes on railcars.<sup>18</sup>

### A. *The Locomotive Inspection Act*

In 1911, Congress enacted the Boiler Inspection Act (BIA) in the midst of the Progressive Era movement towards regulation of health and safety.<sup>19</sup> The BIA was the result of successful lobbying efforts by a railroad employee union.<sup>20</sup> The union cited the currently ineffective safety procedures of small carriers that failed to use due care and the rush of traffic that led to shortcuts.<sup>21</sup> The BIA's purpose was humanitarian, as it sought to address the dangers from boilers, namely boiler explosions, often caused by low water levels.<sup>22</sup> After implementation, the increased inspection of boilers eventually

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as that field was defined in *Napier*"). "The LIA lacks an express preemption clause and our recent cases have frequently rejected field pre-emption in absence of statutory language expressly requiring it." *Id.* (Sotomayor, J., concurring in part, dissenting in part) (citing *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 617) (internal quotation marks omitted).

<sup>17</sup> See *infra* Parts III.E–F (arguing that the preemptive scope of the LIA does not include every part or component on a train, specifically the LIA does not reach brake shoes on freight cars); *infra* text accompanying note 30 (noting that nonemployees must use state courts because nonemployees cannot pursue FELA claims); *infra* text accompanying note 152 (nonemployees exposed to asbestos-containing products from locomotive parts or appurtenances are left without a remedy because state law tort claims are preempted).

<sup>18</sup> See *infra* Parts II.A–F (providing background that a court must take into account when considering whether the LIA precludes state law tort claims against manufacturers of asbestos-containing products not located on the locomotive itself).

<sup>19</sup> Mark Aldrich, *Running Out of Steam: Federal Inspection and Locomotive Safety*, 67 J. ECON. HIST. 884, 884 (2007) (recounting the historical underpinnings of the LIA). The BIA is the predecessor of the LIA. See also *Napier*, 272 U.S. at 608 (explaining the historical context in which the LIA was passed).

<sup>20</sup> Aldrich, *supra* note 19, at 888 (discussing the motives behind the LIA).

<sup>21</sup> *Id.* (discussing the union's interest in promoting the passage of the LIA).

<sup>22</sup> *Id.* at 885–86 (noting that locomotives were a source of risk for a "significant fraction of the labor force"); see also *Garcia v. Burlington N. R.R. Co.*, 818 F.2d 713, 714–15 (10th Cir. 1987) ("The BIA was enacted in 1911, when railroads used steam locomotives. The

led to reporting defects unrelated to the boilers, such as leaky steam valves on the locomotive.<sup>23</sup> Congress amended the BIA four years later, providing coverage to “the entire locomotive and tender and all parts and appurtenances thereof.”<sup>24</sup> Thereafter, the BIA became known as the Locomotive Inspection Act (LIA).<sup>25</sup> Currently, the LIA states:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

- (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
- (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
- (3) can withstand every test prescribed by the Secretary under this chapter.<sup>26</sup>

The LIA establishes that rail carriers owe an absolute duty to safely maintain its locomotives and their parts and appurtenances.<sup>27</sup> The Supreme Court has also recognized the LIA’s primary purpose is to “protect[] . . . railroad employees and perhaps also . . . passengers and the public at large . . . from injury due to industrial accident.”<sup>28</sup> However, the LIA does not confer a right of action for an injured employee.<sup>29</sup> Instead, a LIA violation establishes negligence *per se* under the Federal Employee Liability Act

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boilers in steam locomotives could explode violently and cause serious damages to persons and property.”).

<sup>23</sup> Aldrich, *supra* note 19, at 890–91 (discussing the expansion of the LIA).

<sup>24</sup> *Kurns*, 132 S. Ct. at 1265 (citing the Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192). Near the time of the amendment, a locomotive was commonly known as the propelling engine at the front of the train. See WEBSTER’S REVISED UNABRIDGED DICTIONARY (1913) (defining a locomotive as an “engine; self-propelling wheel carriage, especially one which bears a steam boiler and one or more steam engines which communicate motion to the wheels and thus propel the carriage, [] used to convey goods or passengers, or draw wagons, railroad cars . . .”).

<sup>25</sup> *Kurns*, 132 S. Ct. at 1265. “The BIA as amended became commonly known as the Locomotive Inspection Act.” *Id.*

<sup>26</sup> 49 U.S.C. § 20701 (2012) (noting the Supreme Court also stated that “[a] ‘tender’ is a [a] car attached to a locomotive, for carrying a supply of fuel and water.” *Kurns*, 132 S. Ct. at 1272 n.1 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2126 (1917))).

<sup>27</sup> *Lunsford*, 297 U.S. at 401 (stating that the LIA imposes an “absolute and continuing duty to maintain the locomotive and all their parts and appurtenances thereof, in proper condition and safe to operate in active service without unnecessary peril to life or limb”).

<sup>28</sup> *Urie v. Thompson*, 337 U.S. 163, 191 (1949).

<sup>29</sup> *Elston v. Union Pac. R.R. Co.*, 74 P.3d 478, 483 (Colo. Ct. App. 2003) (discussing the purpose of the LIA and the consequences for violations).

(FELA), which provides a cause of action for injured railroad employees only.<sup>30</sup>

While FELA provides a remedy for railroad employees injured on the job due to a railroad carrier's negligence, it does not expressly provide a remedy for nonemployees.<sup>31</sup> Courts have established that nonemployee claims must be addressed by state law tort claims.<sup>32</sup> However, if state law tort claims alleged by nonemployees arising out of LIA violations are preempted, those injured nonemployees are left without a remedy.<sup>33</sup>

### *B. Asbestos Litigation*

Asbestos was widely used during the twentieth century.<sup>34</sup> Asbestos's resistance to heat, fire, and corrosion, and its versatility and availability led to its widespread use in numerous industries.<sup>35</sup> Consequently, tens of millions of Americans have been exposed to asbestos in their occupations.<sup>36</sup> Asbestos exposure has been linked to a number of debilitating diseases, such as mesothelioma, asbestosis, pleural changes, lung cancer, and other various cancers.<sup>37</sup> Asbestos-related diseases have a long latency period, lasting anywhere from ten to forty years.<sup>38</sup> This latency period explains medicine's lag in understanding and contribution to the unrestricted use of asbestos-

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<sup>30</sup> *Id.* at 483–84 (noting that while the LIA does not confer a right of action on an injured employee, “a railroad employee who is injured as a result of an LIA violation may sue under FELA alleging an LIA claim”).

<sup>31</sup> *See* 45 U.S.C. § 51 (2012) (providing no express remedy for nonemployees); “[I]t has been held consistently that the Boiler Inspection Act supplements the Federal Employers’ Liability Act by imposing on interstate railroads ‘an absolute and continuing duty’ to provide safe equipment.” *Urie*, 337 U.S. at 188.

<sup>32</sup> *See, e.g.*, 45 U.S.C. § 51. “[T]he nonemployee must look for his remedy to a common law action in tort, which is to say that he must sue in a state court, in the absence of diversity, to implement a state cause of action.” *Crane v. Cedar Rapids & I. C. Ry. Co.*, 395 U.S. 164, 166 (1969).

<sup>33</sup> *See, e.g.*, *Beimert v. Am. Cyanamid Co.*, No. 62-CV-12-9393, at \*7 (Minn. Dist. Ct. Aug. 2, 2013) (recognizing the unjust consequences that may result from preemption in this context).

<sup>34</sup> *Overview of Asbestos Claims and Trends*, AM. ACAD. OF ACTUARIES’ MASS TORTS SUBCOMM. 1 (Aug. 2007), [http://www.actuary.org/pdf/casualty/asbestos\\_aug07.pdf](http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf) [hereinafter *Overview of Asbestos*].

<sup>35</sup> *Id.* (noting that asbestos was used in “building materials such as cement siding, insulation, roofing, flooring, and wire insulation; brake and boiler linings; gaskets; and ship building materials—especially during World War II”); *see also* 60 AM. JUR. TRIALS 73 § 14 [hereinafter AM. JUR. TRIALS] (listing “[r]ailroad workers (including locomotive mechanics, car mechanics and rebuilders, and maintenance personnel)” as a known occupation in which workers worked with or around asbestos-containing products).

<sup>36</sup> *Overview of Asbestos*, *supra* note 34, at 1 (providing a general discussion on asbestos and asbestos disease).

<sup>37</sup> *Id.* at 2 (providing a general discussion on asbestos and asbestos disease).

<sup>38</sup> AM. JUR. TRIALS, *supra* note 35, § 26 (discussing the long-term course of asbestos-related diseases).

containing products during the twentieth century.<sup>39</sup> Due in part to the prolonged latency period, curative treatment is often unavailable at the time of diagnosis.<sup>40</sup> Thus, certain afflicted individuals face an unstoppable, slow and painful death.<sup>41</sup>

The asbestos-related litigation that ensued has had a profound effect on America's civil justice system.<sup>42</sup> A 2005 comprehensive study concluded that at least 730,000 asbestos claimants filed lawsuits through 2002.<sup>43</sup> Another study predicted that by the year 2015 there will be as many as 265,000 pending asbestos-injury cases.<sup>44</sup> Frequently, manufacturers of asbestos-containing products are named as defendants.<sup>45</sup> In asbestos cases, defendants faced with state law tort claims often argue that the LIA preempts the plaintiff's claims.<sup>46</sup>

### C. Preemption

Preemption is a judicial response to a conflict that arises out of the United States Constitution's formulation of dual sovereignty.<sup>47</sup> Dual sovereignty creates discrete powers in the federal government and reserves all other powers to the states.<sup>48</sup> To resolve this conflict, courts have relied on the Supremacy Clause, which states that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State contrary notwithstanding."<sup>49</sup> Thus, Congress, through its enumerated powers,

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<sup>39</sup> *Overview of Asbestos*, *supra* note 34, §§ 1, 13 (noting the widespread use of asbestos until 1973 when the government began to regulate and ultimately ban the use of asbestos).

<sup>40</sup> AM. JUR. TRIALS, *supra* note 35, § 1 (explaining the late onset of symptomology of asbestos-related diseases).

<sup>41</sup> *See Roberts v. Owens-Corning Fiberglas Corp.*, 878 So. 2d 631, 644 (La. Ct. App. 2004) (exploring a doctor's testimony that the mesothelioma afflicted patient suffered "incredible pain caused by mesothelioma and stated that, '[e]very breath becomes painful'").

<sup>42</sup> *Overview of Asbestos*, *supra* note 34, at 3 (discussing asbestos-related litigation).

<sup>43</sup> *Id.* (citing a 2005 RAND report regarding asbestos related litigation).

<sup>44</sup> *See* AM. JUR. TRIALS, *supra* note 35, § 4 (citing Stephen Labaton, *Judge's Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. TIMES, July 30, 1991, at A1, available at <http://www.nytimes.com/1991/07/30/business/judges-panel-seeing-court-crisis-combines-26000-asbestos-cases.html>).

<sup>45</sup> AM. JUR. TRIALS, *supra* note 35 (discussing asbestos related litigation).

<sup>46</sup> *See, e.g., Kurns*, 132 S. Ct. at 1265 (raising preemption defense on behalf of defendant manufacturer of asbestos product); *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 821 (raising preemption defense on behalf of defendant manufacturer of asbestos product facing class action lawsuit).

<sup>47</sup> MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 509 (Carolina Acad. Press, 3d ed. 2011).

<sup>48</sup> *Printz v. United States*, 521 U.S. 898, 918–28 (1997) (discussing dual sovereignty and preemption in general).

<sup>49</sup> U.S. CONST. art. VI, cl. 2.



may enact federal legislation that forces states to yield in areas it otherwise may control.<sup>50</sup>

While “[p]reemption is fundamentally an inquiry into congressional intent,” courts have established a bias against preemption.<sup>51</sup> Preemption inquiries are guided by a general presumption that the state’s historic police powers were not intended to be superseded by federal law absent a clear and manifest purpose from Congress to do so.<sup>52</sup> Consequently, the presumption against preemption promotes a narrow interpretation of federal law.<sup>53</sup>

It is well established that state law is preempted by federal statute either expressly or by implication.<sup>54</sup> Express preemption occurs when Congress explicitly defines the extent that the enactment displaces state law.<sup>55</sup> Explicit preemption of state law makes preemption interpretation a less daunting task because “[t]he purpose of Congress is the ‘ultimate touchstone’ of pre-emption analysis.”<sup>56</sup>

A more difficult task for a court arises while considering preemption in absence of explicit displacement of state law, otherwise known as implied

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<sup>50</sup> CURTIS, *supra* note 47, at 509 (noting that “Congress may use its Commerce Clause powers (or other powers) to prevent states from regulating activities that the states would otherwise be free to reach”).

<sup>51</sup> *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990); *Medtronic, Inc.*, 518 U.S. at 485 (stating that courts have “long presumed that Congress does not cavalierly preempt state-law causes of action”) ; *see also* *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 316 (2008) (Ginsburg, J., dissenting) (noting “[t]he presumption against preemption is heightened where federal law is said to bar state actions in fields of traditional state regulation”).

<sup>52</sup> *Medtronic, Inc.*, 518 U.S. at 485; *see also* *FMC Corp. v. Holiday*, 498 U.S. 52, 53 (1990) (noting that there exists a “presumption that Congress does not intend to pre-empt areas of traditional state regulation”); CURTIS, *supra* note 47, at 535 (stating “state laws typically provide redress . . . for those by injured defective products, injured by failure to warn, injured by fraud, or injured by consumers’ rights violations”).

<sup>53</sup> *Medtronic, Inc.*, 518 U.S. at 485 (endorsing a narrow interpretation of federal law to avoid preemption).

<sup>54</sup> *See, e.g., Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (discussing various ways in which courts find preemption).

<sup>55</sup> *English*, 496 U.S. at 78 (exploring preemption generally); *see, e.g.,* 29 U.S.C. § 1132(a) (2012) (stating that the Employee Retirement Income Security Act (ERISA) expressly preempts state law “insofar as they may now or hereafter relate to any employee benefit plan . . . .”); *Riegel*, 552 U.S. at 316 (noting that the Medical Device Amendments (MDA) of 1976 contains an express preemption clause). For example, the MDA states:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k (2012).

<sup>56</sup> *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

preemption.<sup>57</sup> Implied preemption occurs in two ways: (1) implied conflict preemption and (2) implied field preemption.<sup>58</sup> In the first instance, implied conflict preemption occurs where the coexistence of state and federal law is a “physical impossibility” or where “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>59</sup>

Second, implied field preemption occurs by declaration of a court if Congress intended the Federal Government to “occupy a field” of activity exclusively.<sup>60</sup> The Supreme Court has aptly stated the basis for field preemption:

Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.<sup>61</sup>

With that bias in mind, a reviewing court ultimately “defines the scope of . . . field preemption” when faced with a preemption inquiry.<sup>62</sup>

Historically, field preemption was implied on a basis of mere delegation of authority, without reference to Congress’s intent to displace state law.<sup>63</sup> However, the Court’s modern approach to field preemption has required Congress to “do much more to oust all of state law from a field.”<sup>64</sup>

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<sup>57</sup> CURTIS, *supra* note 47, at 535 (stating that preemption decisions can be problematic because Congress could have resolved such issues by drafting a more precise statute).

<sup>58</sup> CURTIS, *supra* note 47, at 537 (noting the various types of implied preemption).

<sup>59</sup> *Gade*, 505 U.S. at 98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>60</sup> *English*, 496 U.S. at 79 (discussing implied preemption).

<sup>61</sup> *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>62</sup> *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (noting “[t]he scope of preemption under the Boiler Inspection Act is determined by the interpretation of the words ‘parts and appurtenances.’”); *see also Medtronic, Inc.*, 518 U.S. at 486 (discussing the different methods in which a reviewing court determines the scope of a statute’s preemption). It is also worth mentioning that, according to the West Virginia Supreme Court, state courts “have the authority to decide whether a state provision is indeed preempted by federal law.” *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 821. The West Virginia Supreme Court held their “state courts have the subject matter jurisdiction over federal preemption defenses.” *Id.* (citing *State ex rel. Orlofske v. City of Wheeling*, 575 S.E.2d 532, 538 (W. Va. 2002)).

<sup>63</sup> *Kurns*, 132 S. Ct. at 1271 (Sotomayor, J., concurring in part, dissenting in part) (discussing the preemption doctrine’s history).

<sup>64</sup> *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 617 (Thomas, J., dissenting) (explaining the Court’s modern approach to preemption).

#### ***D. The LIA's Preemptive Effect***

The notion that the LIA occupies the field of locomotive equipment has snowballed through *stare decisis*.<sup>65</sup> In *Napier*, the Supreme Court considered the preemptive scope and effect of the LIA.<sup>66</sup> The Court declared that the LIA “occupies the field” and extends to the “design, construction and the material of every part of the locomotive and tender and of all appurtenances.”<sup>67</sup> In that consolidated case, the Court considered a Georgia statute that required locomotives to have an automatic fire door and a Wisconsin statute that required locomotives to have a cab curtain.<sup>68</sup> The Court grounded its decision on the broad scope of authority that the Interstate Commerce Commission (ICC) possessed to carry out the LIA, describing the ICC’s authority as a “general one.”<sup>69</sup> The Court found it dispositive that the state statutes were directed at the “equipment of locomotives,” which consequently conflicted with the BIA.<sup>70</sup> In sum, the Court “defined the preempted field as the physical composition of the locomotive equipment.”<sup>71</sup>

More recently, in *In re W. Va. Asbestos Litig.*, the West Virginia Supreme Court of Appeals considered the scope of LIA preemption in the context of mass litigation involving several thousand railroad employees alleging injuries from exposure to asbestos-containing products.<sup>72</sup> The court addressed whether the LIA preempted state law tort claims against manufacturers of parts or components of locomotives.<sup>73</sup> The court relied on a Ninth Circuit case in order to declare a broad preemptive sweep across train parts and components.<sup>74</sup> The court recognized the presumption against preemption, but ultimately felt compelled to follow “an avalanche of adverse authority from other jurisdictions” and held that the LIA preempted state law

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<sup>65</sup> See, e.g., *Napier*, 272 U.S. 605 at 612 (providing the Supreme Court’s first decision that the LIA preempts state law); *Kurns*, 132 S. Ct. 1261 (relying on the decision in *Napier* nearly eighty-five years later).

<sup>66</sup> *Napier*, 272 U.S. at 607 (discussing whether the BIA preempted state statutes in Georgia and Wisconsin).

<sup>67</sup> *Id.* at 611.

<sup>68</sup> *Id.* at 607.

<sup>69</sup> *Id.* at 611.

<sup>70</sup> *Id.* at 612–13.

<sup>71</sup> *Kurns*, 132 S. Ct. at 1272 (Sotomayor, J., concurring in part, dissenting in part) (analyzing the *Napier* decision).

<sup>72</sup> See *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818.

<sup>73</sup> *Id.* at 820.

<sup>74</sup> *Id.* at 823–24 (citing *Law v. Gen. Motors Corp.* 114 F.3d 908, 910 (9th Cir. 1997) (“This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce.”)). It should also be noted that the court in *Law* addressed whether the manufacturers of “locomotive brakes and engines” were liable, as opposed to manufacturers of “train parts and components.” *Law*, 114 F.3d at 910. However, the court in *In re W. Va. Asbestos Litig.* did not make the distinction between “locomotive brakes and engines” and “train parts and components.” *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 823–24.

tort claims against railroads and manufacturers of “various products used by the railroads.”<sup>75</sup>

In *In re W. Va. Litig.*, the court noted the plaintiff’s argument that innocent plaintiffs should not be left without a remedy.<sup>76</sup> The court recognized the merit of the argument, noting that “for every wrong there is a remedy.”<sup>77</sup> However, the court stated that the defendant’s arguments led the court to believe there were no such instances in the case before it.<sup>78</sup>

In 2012, the Supreme Court’s decision in *Kurns* addressed the same issue as in *In re W. Va. Asbestos Litig.*—whether the LIA preempts state law tort claims for design defect and failure to warn.<sup>79</sup> The plaintiff, George Corson, installed brake shoes on locomotives and stripped insulation from locomotive boilers by occupation in locomotive repair and maintenance facilities.<sup>80</sup> After a thirty-plus year latency, Corson was diagnosed with malignant mesothelioma.<sup>81</sup> Thereafter, Corson filed state law tort claims against multiple defendants for the distribution and manufacture of locomotive brake shoes and locomotive engine valves containing asbestos that caused his injuries.<sup>82</sup>

The manufacturers and distributors of the asbestos-containing products moved for summary judgment, arguing that the state law tort claims were preempted by the LIA.<sup>83</sup> Corson argued: (1) that the LIA did not cover repair and maintenance of locomotives; (2) that failure to warn claims were not preempted because “the basis of liability for failure to warn . . . is not the ‘design’ or ‘manufacture’ of a product, but instead the failure to provide adequate warnings regarding the product’s risks;” (3) that the state law tort claims fell outside the LIA because the “manufacturers were not regulated under the LIA at the time the plaintiff was allegedly exposed to asbestos;” and (4) that the LIA “does not extend to state common law claims, as opposed to state legislation or regulation.”<sup>84</sup> The Court rejected all of Corson’s arguments.<sup>85</sup> Relying exclusively on *Napier*, the Court reiterated

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<sup>75</sup> *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 820, 822 (noting the overwhelming presence of authority in other jurisdictions holding that the LIA preempted state law tort claims).

<sup>76</sup> *Id.* at 822 n.2.

<sup>77</sup> *Id.* (quoting *Sanders v. Meredith*, 89 S.E. 733, 736 (W. Va. 1916)).

<sup>78</sup> *Id.* (stating that the defendant’s arguments persuaded the court that no innocent plaintiffs existed, among thousands).

<sup>79</sup> *Kurns*, 132 S. Ct. at 1270 (discussing for the first time at the Supreme Court whether the LIA preempted state law tort claims).

<sup>80</sup> *Id.* at 1264.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 1262, 1264 (noting the plaintiff’s claims of defective design and failure to warn of the dangers posed by asbestos).

<sup>83</sup> *Id.* at 1265.

<sup>84</sup> *Id.* at 1265–69 (providing plaintiff’s arguments regarding the LIA’s preemption of his claims).

<sup>85</sup> *Kurns*, 132 S. Ct. at 1268–69 (discussing the *Napier* decision and its continued vitality).

that field preemption focused on the “physical elements regulated—the equipment of locomotives”—and that the LIA “occup[ied] the entire field of regulating locomotive equipment.”<sup>86</sup> The Court conclusively stated, without inquiry into whether the defective products were locomotive parts or appurtenances, that the claims of defective locomotive brake shoes and insulation on locomotive boilers were the equipment of locomotives.<sup>87</sup> Thus, the distinctions suggested by Corson were unpersuasive because they all related to the equipment of locomotives and “*Napier* dictate[d] that they [fell] within the preempted field [of the LIA].”<sup>88</sup> In sum, the Supreme Court held that the LIA preempted state law tort claims.<sup>89</sup>

Justice Kagan’s concurring and Justice Sotomayor’s dissenting opinions agreed with the majority that Corson’s defective design claims were preempted, despite their disapproval of *Napier*’s declaration of the LIA’s field preemption.<sup>90</sup> In her concurrence, Justice Kagan wrote, “[l]ike Justice Sotomayor, I doubt this Court would decide *Napier* . . . in the same way today.”<sup>91</sup> Justice Kagan criticized *Napier* for declaring field preemption “based on nothing more than a statute granting regulatory authority over that subject matter to a federal agency.”<sup>92</sup> Justice Sotomayor noted that “[t]he LIA lacks an express pre-emption clause, and our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it.”<sup>93</sup> Justice Sotomayor’s reluctant adherence to *Napier*’s declaration of field preemption was premised on eighty-five years of *stare decisis*.<sup>94</sup>

### *E. Judicial Interpretation of Locomotive “Parts and Appurtenances”*

For the better part of the twentieth century, courts have endeavored to interpret the phrase “part and appurtenance” contained within the LIA.<sup>95</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1269.

<sup>88</sup> *Id.* at 1268.

<sup>89</sup> *Id.* at 1270.

<sup>90</sup> *Id.* at 1270–71 (Kagan, J., concurring); *see also id.* at 1271–75 (Sotomayor, J., concurring in part, dissenting in part).

<sup>91</sup> *Kurns*, 132 S. Ct. at 1271 (Kagan, J., concurring) (opining that, “[v]iewed through the lens of modern preemption law, *Napier* is an anachronism[.]” and citing *Dublino*, 413 U.S. at 415, which rejected field preemption despite a detailed and “comprehensive statutory scheme”).

<sup>92</sup> *Id.* at 1271 (Kagan, J., concurring).

<sup>93</sup> *Id.* (Sotomayor, J., concurring in part, dissenting in part) (citing Justice Thomas’s dissenting opinion in *Camps Newfoundland/Owatonna, Inc.*, 520 U.S. at 617).

<sup>94</sup> *See id.* (Sotomayor, J., concurring in part, dissenting in part).

<sup>95</sup> *See, e.g., Lunsford*, 297 U.S. at 399–402 (deciding whether an experimental emergency braking device was a locomotive part or appurtenance); *Grogg v. CSX Transp., Inc.*, 659 F. Supp. 2d 998, 1012 (N.D. Ind. 2009) (discussing the limits of locomotive parts or appurtenances); *Garcia*, 818 F.2d at 714–15 (deciding whether a two-way telemetry device was a locomotive part or appurtenance).

The interpretation of locomotive parts and appurtenances is crucial because it determines the scope of the LIA.<sup>96</sup> Consequently, preemption limits a plaintiff's available recourse to FELA claims.<sup>97</sup> Because the LIA only preempts state law if the state law regulates "locomotives and tender and all parts and appurtenances thereof," the interpretation thereby expands or contracts the preemptive scope and effect of the LIA.<sup>98</sup>

In 1936, the Supreme Court construed the phrase "part and appurtenance."<sup>99</sup> The discussion arose in the context of whether an experimental device fastened beneath the locomotive frame intended to help apply the brakes in the event of a derailment was a part or appurtenance of the locomotive.<sup>100</sup> The Court held that the device was not a locomotive part or appurtenance thereof.<sup>101</sup> The Court reasoned that it excluded the device from the LIA because inclusion "of every gadget placed upon a locomotive by a carrier [would] . . . hinder commendable efforts to better conditions and tend to defeat the [LIA's] evident purpose—avoidance of unnecessary peril to life or limb."<sup>102</sup> The Court found it convincing that the device did not increase the peril to life or limb; rather, it could only prove helpful in the event of an emergency.<sup>103</sup> In its discussion, the Court abstractly defined a part and appurtenance as "[w]hatever in fact is an integral or essential part of a completed locomotive."<sup>104</sup>

In *Burlington N. R.R. Co. v. State*, the United States District Court for the District of Montana considered what constituted a part or appurtenance under the LIA.<sup>105</sup> In 1991, Montana passed a bill that required a two-way telemetry system capable of initiating an emergency brake application on certain trains.<sup>106</sup> A railroad company challenged the bill, arguing that the LIA preempted all state regulation beyond what the LIA expressly authorized.<sup>107</sup> The court relied on the Ninth Circuit's interpretation of the phrase "all parts and appurtenances," which the court defined as "any part or attachment of a locomotive that is within the scope of authority

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<sup>96</sup> *Marshall*, 720 F.2d at 1152 (noting "[t]he scope of preemption under the Boiler Inspection Act is determined by the interpretation of the words 'parts and appurtenances.'").

<sup>97</sup> See *supra* text accompanying notes 29–32 (explaining that courts have established that nonemployee claims must be addressed with state laws).

<sup>98</sup> *Napier*, 272 U.S. at 608; *Marshall*, 720 F.2d at 1152 (noting that the scope of preemption is determined by the reviewing court's interpretation of the LIA's locomotive parts and appurtenances).

<sup>99</sup> *Lunsford*, 297 U.S. at 399–402.

<sup>100</sup> *Id.* at 399–400.

<sup>101</sup> *Id.* at 402.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (stating "mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not [within the statute]").

<sup>104</sup> *Lunsford*, 297 U.S. at 402.

<sup>105</sup> *Burlington N. R.R. Co.*, 805 F. Supp. at 1529.

<sup>106</sup> *Id.* at 1526.

<sup>107</sup> *Id.* at 1527.

delegated to the [Secretary] to prescribe the same part or attachment.”<sup>108</sup> The court held that the Secretary of Transportation had the authority to prescribe a telemetry system based on the location of the system’s parts.<sup>109</sup> Specifically, the two-way system required a telemetry device in the cab of the locomotive.<sup>110</sup> Thus, the LIA preempted the state’s bill because a portion of the device was located on the locomotive.<sup>111</sup>

In *Milesco v. Norfolk S. Corp.*, the United States District Court in the Middle District of Pennsylvania considered whether a gas return cushion unit was a locomotive part or appurtenance.<sup>112</sup> The cushion unit in question was removed from a railcar to be scrapped, but expelled gas on a worker and exploded while decommissioned.<sup>113</sup> The court concluded the cushion unit was not a locomotive part or appurtenance and denied the defendant’s motion for summary judgment.<sup>114</sup> While the court found that the cushion unit was at one time a part or appurtenance, it refused to find that a discarded cushion unit whose only purpose was scrap should be considered an appurtenance.<sup>115</sup> Thus, the injured employee’s state law negligence claims were not preempted by the LIA.<sup>116</sup>

In *Grogg v. CSX Transp., Inc.*, the United States District Court for the District of Indiana discussed the LIA’s “part and appurtenance” phrase.<sup>117</sup> In *Grogg*, a former railroad employee brought a FELA claim against a railroad, alleging injuries caused by his repetitive task of riding on defective locomotive and defective tracks.<sup>118</sup> The plaintiff made a general allegation against the railroad—that the “defective locomotive design and defective

<sup>108</sup> *Id.* at 1529 (citing *Marshall*, 720 F.2d at 1152 (relying on the scope of authority delegated to the Interstate Commerce Commission)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Burlington N. R.R. Co.*, 805 F. Supp. at 1529.

<sup>112</sup> *Milesco*, 807 F. Supp. 2d at 217–18 (considering the “parts and appurtenances” phrase of the LIA to determine whether the LIA preempted the plaintiff’s state common law claims).

<sup>113</sup> *Id.* at 221.

<sup>114</sup> *Id.* at 223.

<sup>115</sup> *Id.* at 221, 223 (noting the court stated in dicta that the LIA “would clearly preempt state law claims challenging the design and construction of the railcar to which the unit was attached, as well as the selection and installation of the cushion unit,” but finding that the plaintiff’s claims did not arise from “the design or construction of railcars”). The court based the commentary on *Kurns*, stating that *Kurns* was distinguishable because the plaintiff’s common law claims were directed at a decommissioned cushion unit and did “not implicate the design, materials, construction or installation of a cushion unit . . .”.

<sup>116</sup> *Id.* at 223 (stating that “we do not find Plaintiff’s claims to be preempted by the BIA”).

<sup>117</sup> *Grogg*, 659 F. Supp. 2d at 1006–12 (noting that, in *Grogg*, the defendant argued that the LIA precluded the plaintiff’s FELA claim). The discussion regarding locomotive parts or appurtenances arose because the court had to decide whether the locomotive “design and equipment” fell within the LIA before deciding whether the LIA precluded the FELA claim. *Id.* The court ultimately found the LIA violation did not preclude the FELA claim and that the LIA supplemented FELA claims. *Id.*

<sup>118</sup> *Id.* at 1008.

locomotive seating caused or contributed to his back injury.”<sup>119</sup> The former employee also sued the railroad for his work on a large, oversized ballast that failed to meet the railroad’s size specifications.<sup>120</sup> In its discussion of the LIA’s preemptive effect, the court cited *Lunsford* for the proposition that “parts or appurtenances do not include every item of equipment that conceivably could be installed on a locomotive.”<sup>121</sup> Therefore, the court concluded that the language defining the preemptive scope of the LIA is not “anything and everything that could possibly touch the train or anything and everything involving train safety.”<sup>122</sup> Based on the foregoing, the court held that the LIA did not preclude the FELA claim.<sup>123</sup>

### F. Brake Shoes on Railcars

Courts across the country consistently cite to the preceding case law when considering whether railcars, specifically brake shoes on railcars, fall within the preemptive scope of the LIA.<sup>124</sup> However, courts have reached different results under inconsistent lines of reasoning.<sup>125</sup> Some courts recognize, while others do not, a distinction between the parts and appurtenances of the *locomotive* and the parts and appurtenances of *railcars*; the latter resulting in an expansion of the LIA’s preemptive effect.<sup>126</sup>

Several cases have held that brake shoes on freight cars are a locomotive part or appurtenance.<sup>127</sup> In the case of *Ransford v. Griffin Wheel Co.*, the plaintiff, Ransford, brought a lawsuit against a manufacturer of asbestos-laden brake pads on locomotives and rolling stock.<sup>128</sup> Ransford alleged that he contracted mesothelioma during his fifteen-year exposure to asbestos while replacing brake pads.<sup>129</sup> The California Court of Appeals affirmed the trial court’s summary judgment order in favor of the defendants,

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1000.

<sup>121</sup> *Id.* at 1012.

<sup>122</sup> *Id.* at 1013.

<sup>123</sup> *Grogg*, 659 F. Supp. 2d at 1014.

<sup>124</sup> See *infra* Part II.E (providing case illustrations of frequently cited cases).

<sup>125</sup> See *infra* Part II.D (illustrating the inconsistencies in reasoning among courts deciding whether train or railcar parts are locomotive parts or appurtenances and therefore within the scope of the LIA).

<sup>126</sup> Compare *Ransford*, 2009 WL 1994740 (finding no distinction between parts and appurtenances of the locomotive and the parts and appurtenances of railcars), with *Beimert*, No. 62-CV-12-9393 (finding a distinction between parts and appurtenances of the locomotive and the parts and appurtenances of railcars).

<sup>127</sup> See, e.g., *Ransford*, 2009 WL 1994740; *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818.

<sup>128</sup> *Ransford*, 2009 WL 1994740, at \*1. “Rolling stock” generally means freight cars or locomotives. See 49 C.F.R. § 224.5 (2013) (“Freight rolling stock means: (1) Any locomotive subject to Part 229 of this chapter used to haul or switch freight cars (whether in revenue or work train service); and (2) Any railroad freight car (whether used in revenue or work train service).”).

<sup>129</sup> *Ransford*, 2009 WL 1994740, at \*1.



holding that the plaintiff's state law claims were preempted by the LIA and the Safety Appliances Act (SAA).<sup>130</sup> The court noted that the California Supreme Court held that "brakes on railroad cars clearly qualify under the BIA as an 'appurtenant' to those cars."<sup>131</sup> To support its decision, the court relied on a California Supreme Court decision holding that the BIA precluded state common law suits by a former railroad worker against a locomotive manufacturer.<sup>132</sup> Further, the court discussed a California Appellate Court case, *Frastaci v. Vapor Corp.*, which held that a railroad repairman's state common law tort claims against a locomotive manufacturer were preempted by the LIA.<sup>133</sup> In *Frastaci*, the railroad repairman alleged exposure to asbestos in locomotives during repair and maintenance.<sup>134</sup> In sum, the court held that brake shoes on railcars were clearly an appurtenance to the railcars.<sup>135</sup> Thus, the claims directed at railcars fell within the scope of the LIA and thereby preempted.<sup>136</sup>

In *In re W. Va. Asbestos Litig.*, the West Virginia Supreme Court of Appeals held that state tort law claims against manufacturers of train parts or components of railroad locomotives are preempted by the LIA.<sup>137</sup> The court relied primarily on a Ninth Circuit case, *Law v. Gen. Motors Corp.*, and its progeny in its decision to preempt state law tort claims.<sup>138</sup> However, in *Law*

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at \*2 (emphasis added).

<sup>132</sup> *Id.* at \*2 (discussing *Scheidung v. Gen. Motors Corp.*, 993 P.2d 996, 997 (Cal. 2000)).

<sup>133</sup> *Ransford*, 2009 WL 1994740, at \*2 (discussing *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007)).

<sup>134</sup> *Frastaci*, 70 Cal. Rptr. 3d at 404.

<sup>135</sup> *Ransford*, 2009 WL 1994740, at \*2.

<sup>136</sup> *Id.* It should also be noted that the California Appellate Court invoked the SAA to conclude that brake shoes on railcars were preempted because the brake shoes on railcars were deemed safety equipment. *Id.*

<sup>137</sup> *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 824 (placing emphasis on train parts or components, as opposed to locomotive parts or appurtenances).

<sup>138</sup> *Id.* at 822–23 (examining *Law*, 114 F.3d 908). As the Supreme Court of West Virginia stated:

Since the decision in *Law v. General Motors Corp.*, many other jurisdictions have adopted a similar view . . . . We note the following authority is in accord: *Scheidung v. General Motors Corp.*, 993 P.2d 996 (Cal. 2000) (Boiler Inspection Act preempts employees' product-liability actions against a manufacturer of locomotives containing asbestos materials); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299 (Sup. Ct. 2000) (Boiler Inspection Act preempts claims made by employees against manufacturers of train components containing asbestos); *Key v. Norfolk Southern Ry. Co.*, 491 S.E.2d 511 (Ga. Ct. App. 1997) (Boiler Inspection Act preempts common law claims against railroad by employee injured in fall from locomotive steps); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (Boiler Inspection Act preempts state-law negligence claims for inadequate warning devices on locomotive in action brought by motorist struck by train); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (Boiler Inspection Act preempts employee

*v. Gen. Motors Corp.*, the court considered claims by railroad workers against manufacturers of *locomotive* brakes and engines, and not *train* parts or components.<sup>139</sup> Consequently, the West Virginia Supreme Court equated locomotive brakes and engines with train parts and components.<sup>140</sup>

In *Cunitz-Robinson*, the plaintiff, as executrix of her late husband's estate, alleged her husband contracted lung cancer due to long-term asbestos exposure specifically related to brake products and other products appended to tank cars designed and manufactured by the defendants.<sup>141</sup> The defendants moved for summary judgment, citing the LIA and the decision in *Kurns* as a basis for preemption, and the court considered whether the LIA and *Kurns* preempted state tort claims on brake shoes on tank cars.<sup>142</sup> Despite the plaintiff's arguments that brake shoes on tank cars were not parts or appurtenances of a locomotive, unlike the locomotive brake shoes and locomotive engine valves in *Kurns*, the court held that the brake shoes "cannot reasonably be considered anything but locomotive equipment, or in other words, locomotives and parts and appurtenances thereof."<sup>143</sup> Further, the court held that the plaintiff failed to provide any factual basis that the "products were not involved with the locomotive at all."<sup>144</sup> The court likened the plaintiff's claims with those in *Kurns*, stating that the claims were directed at the "equipment of locomotives."<sup>145</sup>

Recently, a Minnesota trial court recognized a distinction between brake shoes on a *locomotive* and brake shoes on a *railcar* in its decision on

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common law claims against locomotive seat manufacturer); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (Boiler Inspection Act preempts non-employee product-liability actions against a manufacturer of locomotive cranes); *In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (Boiler Inspection Act preempts passenger and employee common-law negligence and design-defect claims against Amtrak); *Roth v. I & M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (Boiler Inspection Act preempts state common-law tort claims against manufacturer of locomotive cab in action brought by widow of employee crushed in collision); *Bell v. Illinois Central R.R.*, 236 F. Supp. 2d 882 (N.D. Ill. 2001) (Boiler Inspection Act preempts passengers' state law claims against locomotive manufacturer); *but c.f.*, *Engvall v. Soo Line Railroad Co.*, 632 N.W.2d 560 (Minn. 2001) (Boiler Inspection Act does *not* preempt state common law actions based upon a violation of the Act, thus a railroad may bring a state law contribution claim against a manufacturer of a railroad locomotive).

*Id.* at 823–24.

<sup>139</sup> *Law*, 114 F.3d at 908–11.

<sup>140</sup> *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 823–24.

<sup>141</sup> *Cunitz-Robinson v. GATX*, No. 0954, at \*2 (C.P. Phila. Cnty. Apr. 25, 2013).

<sup>142</sup> *Id.* (emphasis on brake shoes on tank cars as opposed to brake shoes on locomotives).

<sup>143</sup> *Id.* at \*6.

<sup>144</sup> *Id.* The court also rejected plaintiff's argument that the asbestos dust that caused her husband's disease was not a part or appurtenance but did not elaborate. *Id.* at \*7.

<sup>145</sup> *Id.* at \*6.

summary judgment.<sup>146</sup> In that case, a railroad employee's sibling brought state law tort claims against the manufacturers of railcar brake shoes, alleging that continuous exposure to asbestos while washing her relative's clothes over a number of years caused her mesothelioma.<sup>147</sup> Faced with arguments proposing and opposing summary judgment based on federal preemption by the LIA and *Kurns*, the court concluded the claims were not preempted.<sup>148</sup> The court had four bases for its reasoning. First, the court noted the strong presumption against preemption.<sup>149</sup> Second, the court discussed the objective of the LIA, holding that it did not reach the situation before the court.<sup>150</sup> Third, the court distinguished *Kurns* based on the facts, and held that the brake system in locomotives was independent of the locomotive itself.<sup>151</sup> Finally, the court noted the grave consequences of summary judgment—that if the LIA preempted the plaintiff's state law tort claim, the plaintiff had no remedy because FELA provides the exclusive remedy for LIA violations and nonemployees cannot assert FELA claims.<sup>152</sup>

<sup>146</sup> *Beimert*, No. 62-CV-1293-92, at \*5–10 (emphasis added).

<sup>147</sup> *Id.* at \*3 (describing that the plaintiff's relative changed asbestos-laden brake shoes on railcars throughout his career).

<sup>148</sup> *Id.* at \*5 (holding that the LIA did not preempt the plaintiff's state law tort claims under the facts of that case).

<sup>149</sup> *Id.* at \*6 (citing the Supreme Court in *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), for the proposition that “[p]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained”).

<sup>150</sup> *Id.* at \*7–8 (explaining that the BIA initially sought to prevent boiler explosions on steam locomotives that caused serious damage to persons or property). The court further noted that objective of the successor to the BIA, the LIA, “was to allow safe operation of locomotives.” *Id.* (emphasizing the LIA's concentration on locomotives as opposed to the entire train).

<sup>151</sup> *Id.* at \*6–7. The court found that brake shoes in the instant case were distinguishable from *Kurns* based on their location on the railcar, not the locomotive. *Id.* at \*6. Further, the court found reliance on case law, such as *Ransford* and *Cunitz-Robinson*, inapposite. *Id.* at \*8–9. The court also noted that statutory interpretation principles were relevant because the LIA was ambiguous with regard to its coverage. *Id.* at \*8. Regarding independent brake lines, the court cited a Massachusetts Superior Court case of Middlesex County, *Manser v. Metro. Life Ins. Co.*, which wrote:

. . . railroad car brakes on the cars in this case were part of an integrated air brake system designed for the safe operation of the entire train, not just the locomotive. Although the brake controls for a multi-vehicle train are on the locomotive, the brake system is an integrated train system, not an integrated locomotive system. The car brakes are appurtenant to a train brake system, but they are not an appurtenant to a locomotive. For this reason, state law tort liability is not preempted by the Locomotive Boiler Inspection Act.

*Id.* at \*10 (quoting *Manser*, No. CA11-4609 (Mass. Super. Ct. Sept. 26, 2012)).

<sup>152</sup> *Beimert*, No. 62-CV-1293-92, at \*8. In *Beimert*, the court considered the consequences of the alternative interpretations of the LIA. *Id.* Considering the consequences of alternative interpretations to discern congressional intent is well-founded in case law. *See, e.g.*, *State v. Hayes*, 681 N.W.2d 203, 207 (Wis. 2004) (noting “[a]dditional sources of

### III. ANALYSIS

This comment suggests that the Minnesota District Court's meticulous consideration of the LIA's preemptive scope in *Beimert* provides the correct framework for courts addressing the same or similar LIA preemption arguments.<sup>153</sup> The LIA does not reach every part or component on a train; specifically, it does not reach brake shoes on freight cars.<sup>154</sup> A detailed consideration of the LIA and its preemptive scope leads to the conclusion that brake shoes on freight cars do not fall within the scope of the LIA due to logical, legal, and pragmatic considerations.<sup>155</sup> Consequently, under this model, plaintiffs afflicted with asbestos-related diseases and without access to FELA claims are not left without legal recourse.<sup>156</sup>

#### *A. The Presumption Against Preemption Calls for a Narrow Interpretation of the LIA's Field Preemption*

At the outset, preemption generally faces the presumption that federal laws do not trump state laws absent a clear and manifest intention from Congress.<sup>157</sup> While the Supreme Court declared in *Napier* that the LIA occupies the field of locomotive equipment, the presumption against preemption should persuade courts to avoid a haphazard expansion of the

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legislative intent such as the context, history, scope, and objective of the statute, including the consequences of alternative interpretations, illuminate the intent of the legislature.”); *Griffith v. State*, 116 S.W.3d 782, 785 (Tex. Crim. App. 2003) (providing, “if a statute may be interpreted reasonably in two different ways, a court may consider the consequences of differing interpretations in deciding which interpretation to adopt”); *Five Corners Family Farmers v. State*, 268 P.3d 892, 900 (Wash. 2011) (observing “[i]t is true that we ‘will avoid [a] literal reading of a statute which would result in unlikely, absurd, or strained consequences.’”).

<sup>153</sup> See *supra* text accompanying notes 146–152 (illustrating the Minnesota District Court's denial of summary judgment, reasoning the LIA does not preempt claims for defective products on railcars, as opposed to locomotives or their appurtenances).

<sup>154</sup> See *infra* Parts III.A–F (providing arguments that support narrowing the scope of the LIA and its preemptive effect).

<sup>155</sup> See *infra* Parts III.A–F (arguing the LIA's field preemption is grounded on a preemption theory that has significantly changed since its decision and the inclusion of defective products into the LIA expands an outmoded theory of preemption). An expansive reading of what constitutes locomotive equipment or locomotive parts and appurtenances result in unjust consequences because it leaves an innocent class of individuals without a legal remedy. Those unjust consequences are incongruent with original intent of the LIA.

<sup>156</sup> See, e.g., *supra* text accompanying note 152 (noting the Minnesota District Court's acknowledgment that preemption results in no remedy for an innocent plaintiff, which influenced the court's ultimate decision to rule against preemption and thereby provide the plaintiff with a legal remedy).

<sup>157</sup> See *supra* text accompanying note 52 (explaining the general bias against preemption).

field.<sup>158</sup> Additionally, courts should not presume that all parts or components on a train are locomotive equipment.<sup>159</sup>

The presumption against preemption is apposite for cases interpreting whether brake shoes on railcars fall within the scope of the LIA for a number of reasons.<sup>160</sup> First, the LIA does not clearly and manifestly extend to brake shoes on railcars attached to the locomotive.<sup>161</sup> Second, the field preemption doctrine is more constrictive today than in 1936, when the Supreme Court declared that the LIA occupies the field of locomotive equipment.<sup>162</sup> Third, states have historically regulated the health and safety of their citizens by operation of state laws.<sup>163</sup>

Notwithstanding the Court's declaration that the LIA occupies the field of locomotive equipment, it is far from clear that Congress intended the LIA to reach brake shoes on railcars—objects that do not touch and are not located on locomotives.<sup>164</sup> First, Congress did not provide an express preemption clause in the LIA indicating its intent to preempt state laws.<sup>165</sup> It is an even further stretch to hold that the LIA preempts state laws from addressing brake shoes on railcars, especially noting that the LIA explicitly mentions “tender” but fails to explicitly include railcars.<sup>166</sup> Nevertheless, in 1936, the Court construed the LIA to occupy the field, inferring manifest congressional intent based on the Interstate Commerce Commission's broad scope of authority.<sup>167</sup> Recently, in *Kurns*, the Court confirmed *Napier*'s declaration of field preemption and held that the LIA preempted state law

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<sup>158</sup> See *supra* text accompanying note 67 (describing the Court's holding in *Napier*); *supra* text accompanying note 52 (noting the presumption against preemption).

<sup>159</sup> See *supra* text accompanying note 67 (discussing the *Napier* decision and its holding that the LIA “occupies the field” of locomotives or tender and its parts and appurtenances).

<sup>160</sup> See generally *supra* text accompanying notes 26, 52, 55, 64, 93 (noting that the LIA lacks an express preemption clause, the modern and restrictive view of preemption, and the state's historic powers over the health and safety of their citizens).

<sup>161</sup> Compare *supra* text accompanying note 26 (illustrating that the LIA lacks any express preemption clause), with *supra* note 55 and accompanying text (illustrating that ERISA and the MDA explicitly displace state law).

<sup>162</sup> See *supra* text accompanying notes 90–94 (explaining two Supreme Court Justices' doubt that *Napier* would be decided the same under the modern view of preemption).

<sup>163</sup> See *supra* note 52 (explaining that state laws historically provide redress for defective products, failure to warn, fraud, and consumer rights violations).

<sup>164</sup> See *supra* text accompanying note 67 (illustrating the *Napier* decision and its holding that the LIA occupies the field of locomotives or tender and its parts and appurtenances).

<sup>165</sup> See *supra* text accompanying note 26 (showing that the LIA lacks any express preemption clause); *contra supra* note 55 and accompanying text (noting that ERISA and the MDA explicitly displace state law).

<sup>166</sup> *Supra* text accompanying note 26 (providing the complete LIA, which does not reference or mention a railcar but explicitly includes “tender”).

<sup>167</sup> See *supra* text accompanying note 67 (analyzing the *Napier* decision and the Court's reliance on the Interstate Commerce Commission's broad scope of authority).

tort claims.<sup>168</sup> However, neither decision found a clear and manifest intent that the LIA reaches brake shoes on railcars because neither case addressed brake shoes on *railcars*.<sup>169</sup> More broadly, neither *Napier* nor *Kurns* addressed train components or parts not located on the locomotive or coming into contact with the locomotive.<sup>170</sup>

Second, the modern field preemption doctrine is considerably more restrictive than it was at the time the Supreme Court declared that the LIA “occup[ie]d the entire field regulating locomotive equipment.”<sup>171</sup> Justice Kagan and Sotomayor recognized the shift in the doctrine in their respective opinions in *Kurns*.<sup>172</sup> The inclusion of railcar brake shoes into the scope of the LIA only perpetuates or expands the outdated doctrine of preemption, referred to by Supreme Court Justice Kagan as an anachronism.<sup>173</sup> Thus, a restrictive reading of the LIA’s scope can cauterize the LIA and stop furtherance of an outmoded version of field preemption.<sup>174</sup>

Third, states have historically invoked their police powers to regulate the health and safety of their citizens by operation of state laws.<sup>175</sup> Despite that notion, the LIA supersedes historic police powers due to the Supreme Court’s decisions in *Napier* and *Kurns*.<sup>176</sup> Thus, a court deciding whether a train part or component is within the scope of the LIA should keep in mind that inclusion will permit the preemption of a historic police power, which is generally disfavored.<sup>177</sup>

While *Napier* and *Kurns* overcame the presumption against preemption and held that the LIA preempts state law directed at the

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<sup>168</sup> See *supra* text accompanying note 86 (analyzing the *Kurns* decision and the Court’s reliance on *Napier*).

<sup>169</sup> See *supra* text accompanying note 68 (illustrating the facts of *Napier*, which contain no reference to railcars); *supra* text accompanying note 80 (illustrating the facts of *Kurns*, which contain no reference to railcars).

<sup>170</sup> See *supra* text accompanying notes 68, 80.

<sup>171</sup> See *supra* text accompanying notes 90–94 (explaining two Supreme Court Justices’ doubt that *Napier* would be decided the same under the modern view of preemption); see also *supra* note 91 (quoting Justice Kagan that, “[v]iewed through the lens of modern preemption law, *Napier* is an anachronism”).

<sup>172</sup> See *supra* text accompanying notes 90–94.

<sup>173</sup> See *supra* text accompanying note 98 (noting that the interpretation of the LIA either expands or contracts the scope and effect of the LIA).

<sup>174</sup> See *supra* text accompanying note 98 (providing that a court’s analysis of the LIA determines the scope and effect of the statute).

<sup>175</sup> See *supra* note 52 and accompanying text (explaining that state laws historically provide redress for defective products, failure to warn, fraud, and consumer rights violations).

<sup>176</sup> See *supra* text accompanying notes 67–68 (illustrating the *Napier* holding that state laws enacted for the health and safety of its citizens were preempted by the LIA); *supra* text accompanying note 79 (analyzing the *Kurns* holding that state law claims for design defect and failure to warn, which protect the health and safety of its citizens, were preempted by the LIA).

<sup>177</sup> See *supra* text accompanying note 52 (noting that preemption inquiries are guided by a general presumption that state historic police powers were not intended to be displaced absent an explicit purpose of Congress to do so).

equipment of locomotives, the presumption against preemption should guide courts deciding whether train parts or components are the equipment of locomotives.<sup>178</sup> Based on the foregoing, the presumption against preemption is well suited for cases deciding whether brake shoes on railcars fall within the scope of the LIA.<sup>179</sup> Therefore, the presumption against preemption promotes a narrow interpretation of the LIA.<sup>180</sup>

***B. Brake Shoes on Railcars Do Not Fall Within the Court's Interpretation of Locomotive "Parts and Appurtenances"***

Brake shoes on railcars do not fall within the court's interpretation of locomotive equipment or "locomotive or tender and its parts and appurtenances."<sup>181</sup> In *Lunsford*, the Court correctly excluded anything that is not integral or essential to a completed locomotive from what constitutes locomotive parts and appurtenances.<sup>182</sup> Although brake shoes on railcars are not experimental emergency brake devices as in *Lunsford*, the similarities are apparent.<sup>183</sup> Both products involve stopping the entire train, as opposed to only the locomotive.<sup>184</sup> The brake shoes on railcars are not essential to the operation of the locomotive because they are located on railcars and not the

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<sup>178</sup> See *supra* text accompanying notes 67–68 (analyzing the *Napier* holding); *supra* text accompanying note 79 (illustrating the *Kurns* holding that state law tort claims were preempted by the LIA).

<sup>179</sup> See, e.g., *supra* text accompanying note 149 (illustrating the Minnesota District Court decision that took into account the presumption against preemption in its consideration of whether the LIA preempted claims against the manufacturers of asbestos-laden brake shoes attached to railcars).

<sup>180</sup> See *supra* text accompanying notes 51–53 (explaining that the presumption against preemption promotes a narrow interpretation of the federal statute in question).

<sup>181</sup> See, e.g., *supra* text accompanying notes 146–152 (noting that the Minnesota District Court decision provides a detailed consideration of why brake shoes on locomotive are not within the scope of the LIA).

<sup>182</sup> See *supra* text accompanying note 104 (illustrating the main takeaway of *Lunsford*—that locomotive appurtenances are “[w]hatever in fact is an integral or essential part of a completed locomotive”). The Court held that an experimental device fastened beneath the locomotive was not a locomotive part or appurtenance. See *supra* text accompanying note 99 (providing the facts of *Lunsford*).

<sup>183</sup> See *supra* note 151 (explaining the Minnesota District Court's rationale, which is partly based on a Massachusetts Superior Court case that found brake systems were independent of the locomotive, therefore the brake shoes were appurtenant to the brake system, not the locomotive). Note that the locomotive is not the entire train, but rather only the front engine of the train. See *supra* note 24 and accompanying text (providing the definition of locomotive near the time the LIA was amended to include the locomotive).

<sup>184</sup> See *supra* note 151 (noting that the Minnesota District Court's finding that the brake system operated independently from the locomotive and operated to stop the entire train).

locomotive; rather, the brake system and its brake shoes are independent of the train, as the court noted in its *Beimert* analysis.<sup>185</sup>

Further, the location of asbestos-containing products, such as brake shoes on railcars and not the locomotive, supports the conclusion that brake shoes on railcars are not a locomotive part or appurtenance within the meaning of the LIA.<sup>186</sup> Brake shoes on railcars are distinguishable from the device that the district court held fell within the scope of the LIA in *Burlington N. R.R. Co.*<sup>187</sup> The court relied primarily on the location of one part of the two-way telemetry system, which was in the locomotive cab.<sup>188</sup> Similarly, in *Lunsford*, the brake device was fastened beneath the locomotive and in proximity to the locomotive, but the Court found that it was not within the meaning of the LIA.<sup>189</sup> Given the concentration on the location of the asbestos-containing product, brake shoes on railcars that do not touch locomotives and can be located hundreds of yards away from the locomotive should not be considered a locomotive part or appurtenance.<sup>190</sup>

The district court's decision in *Milesco* is inapposite for a court considering brake shoes on railcars but is nevertheless meaningful because of the court's discussion in its dicta.<sup>191</sup> When the court held that the cushion unit removed from the *railcar* was at one time a part or appurtenance of the locomotive, the court failed to recognize the subtle distinction between the hypothetical cushion unit it spoke of and the locomotive brake pads and engine valves in *Kurns*.<sup>192</sup> Namely, the court equated parts on railcars with parts on locomotives.<sup>193</sup> Under *Milesco*'s dicta, the LIA would preempt state

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<sup>185</sup> See *supra* note 151 (noting the Minnesota District Court's finding that the brake system was similar to the brake system in the Massachusetts Superior Court Case, which held that the brake system was independent of the locomotive).

<sup>186</sup> See, e.g., *supra* text accompanying note 152 (illustrating the Minnesota District Court's finding that the brake shoes on railcars are factually distinguishable from *Kurns* based on location).

<sup>187</sup> See *supra* text accompanying note 109 (analyzing the district court decision that relied on the fact that the device was in part located on the locomotive, as opposed to railcar brake shoes which operate independent of the locomotive).

<sup>188</sup> See *supra* text accompanying note 109 (noting the district court decision that relied on the location of the device on the locomotive, distinguishable from railcar brake shoes); *supra* note 151 (explaining the Minnesota District Court's finding that the brake shoes were appurtenant to the brake system).

<sup>189</sup> See *supra* text accompanying note 100 (illustrating that the braking device in *Lunsford* was fastened on or near the locomotive).

<sup>190</sup> See *supra* text accompanying note 151 (explaining the Minnesota District Court's rationale).

<sup>191</sup> See *supra* text accompanying notes 114–115 (analyzing the *Milesco* opinion, which stated that a decommissioned cushion unit attached to a railcar was at one time a locomotive appurtenance).

<sup>192</sup> See *supra* note 115 (illustrating the court's reliance on *Kurns* despite the factual difference between the locomotive brake shoes and locomotive engine valves in *Kurns* and the railcar cushion unit in *Milesco*).

<sup>193</sup> See *supra* note 115 (analyzing the court's dicta in *Milesco* that seemingly jumped to the conclusion that the cushion unit attached to the railcar was at one time a locomotive part or appurtenance).



law claims directed at any devices, parts, or components on any railcar in addition to the devices, parts, or components on the locomotive.<sup>194</sup>

Finally, in *Grogg*, a district court correctly recognized limitations on the LIA's preemptive effect on state laws.<sup>195</sup> Brake shoes on railcars should fall outside the preemptive effect of the LIA based on the court's language that "not anything and everything that could possibly touch the train or anything and everything involving train safety" is preempted by the LIA.<sup>196</sup> *Grogg* serves to remind a reviewing court that, while brake shoes involve train safety, they are not *per se* within the LIA's scope.<sup>197</sup>

***C. The Supreme Court's Recent Decision Does Not Apply to Cases  
Deciding Whether Train or Railcar Parts or Components Are Within the  
LIA***

The Supreme Court's decision in *Kurns* does not bind courts considering whether the LIA preempts claims directed at manufacturers of brake shoes on railcars.<sup>198</sup> A cursory review of the facts in *Kurns* may lead to an inferential, yet illogical leap to preemption—that state law tort claims against manufacturers of *railcar* brake shoes are preempted because *Kurns* held that state tort law claims against manufacturers of *locomotive* brake shoes are preempted.<sup>199</sup> However, as the preceding sentence illustrates, *Kurns* is distinguishable for a court considering whether brake shoes on railcars fall within the preemptive scope of the LIA.<sup>200</sup>

Foremost, the Court held that brake shoes on *locomotives* and insulation on *locomotive* boilers fell within the scope of the LIA and therefore the state law tort claims were preempted because the defective parts were locomotive equipment.<sup>201</sup> The plaintiff, Corson, did not dispute that the asbestos-containing products were attached to the locomotive.<sup>202</sup> Therefore,

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<sup>194</sup> See *supra* note 115 (noting the difference between the locomotive parts or appurtenances and railcar parts or appurtenances).

<sup>195</sup> See *supra* text accompanying notes 121–122 (noting the court's recognition that the LIA does not reach the entire train)

<sup>196</sup> See *supra* text accompanying notes 121–122.

<sup>197</sup> See *supra* text accompanying notes 121–122 (concluding that brake shoes on railcars are not *per se* within the statute).

<sup>198</sup> See *supra* note 151 and accompanying text (explaining the Minnesota District Court's finding that *Kurns* is not binding to a court considering whether brake shoes on railcars fall within the scope of the LIA).

<sup>199</sup> Compare *supra* text accompanying notes 143–144 (analyzing *Cunitz-Robinson*, which failed to distinguish between locomotive brake shoes and railcar brake shoes), with *supra* text accompanying notes 148–152 (illustrating the Minnesota District Court case, which distinguished between locomotive brake shoes and railcar brake shoes).

<sup>200</sup> Compare *supra* text accompanying note 80 (providing the facts of *Kurns* in which the plaintiff's exposure to asbestos derived from locomotive brake shoes and locomotive engine valve insulation), with *supra* note 147 (noting that the asbestos exposure derived from railcar brake shoes).

<sup>201</sup> See *supra* text accompanying note 80 (providing the Court's holding in *Kurns*).

<sup>202</sup> See *supra* text accompanying note 84 (outlining the plaintiff's arguments).

the Court did not discuss the boundaries of what constitutes locomotive equipment or locomotive parts and appurtenances.<sup>203</sup> Thus, *Kurns* is inapplicable to a claim against the manufacturer of brake shoes on railcars unless the reviewing court first decides the brake shoe on the railcar is locomotive equipment or a locomotive part or appurtenance on other grounds.<sup>204</sup>

***D. Courts Must Distinguish Between Train or Railcar Parts or Components and Locomotive “Parts and Appurtenances”***

Certain courts have been called upon to determine whether train or railcar parts or components are locomotive parts and appurtenances and therefore within the scope of the LIA.<sup>205</sup> A number of courts have equated railcars with locomotives or brakes on railcars with brakes on locomotives.<sup>206</sup> Reliance on these cases is inappropriate.<sup>207</sup> An illustration of these cases illuminates these courts’ errors and also the distinction between railcar parts or components and locomotive parts or appurtenances that courts must make.

The California Appellate Court’s reasoning in *Ransford* is flawed because it relied on cases that addressed different and inapplicable factual scenarios.<sup>208</sup> In effect, the court read railcar parts or appurtenances, as opposed to locomotive parts or appurtenances, into the LIA.<sup>209</sup> The inclusion of the entire train and train parts or appurtenances has the effect of expanding the scope of the LIA based on a misrepresentation of the LIA.<sup>210</sup> The court relied on cases where the plaintiffs’ alleged state law tort claims were against locomotive manufacturers, which ultimately led to preemption under the LIA.<sup>211</sup> In *Ransford*, the court incorrectly focused on whether brake shoes were an appurtenance to the railcar, and not whether the brake shoes on a

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<sup>203</sup> See *supra* text accompanying note 87 (explaining that the Supreme Court did not discuss locomotive parts or appurtenances in *Kurns*).

<sup>204</sup> See, e.g., *supra* text accompanying note 151 (illustrating that claims against manufacturers of brake shoes attached to railcars presents a distinguishable factual scenario from *Kurns*).

<sup>205</sup> See *supra* Part II.F (illustrating several cases considering whether brake shoes railcars are within the LIA’s regulatory boundaries).

<sup>206</sup> See, e.g., *supra* text accompanying notes 131, 135–136, 137–139, 144 (illustrating several cases in which reviewing courts found no distinction between locomotive parts and railcar parts).

<sup>207</sup> See, e.g., *supra* note 151 (explaining that the Minnesota District Court found *Ransford* and *Cunitz-Robinson* inapposite).

<sup>208</sup> See *supra* text accompanying notes 128–136 (providing a case illustration of *Ransford*).

<sup>209</sup> See *supra* text accompanying notes 135–136 (explaining that the *Ransford* court held that brake shoes were appurtenant to the railcar, not to the locomotive).

<sup>210</sup> See *supra* text accompanying note 98 (explaining that the interpretation of the LIA can expand the scope and effect of the LIA).

<sup>211</sup> See *supra* text accompanying notes 132–134 (discussing the facts of the California Appellate and Supreme Court cases in which *Ransford* relied on in its opinion).

railcar are an appurtenance to the locomotive.<sup>212</sup> The court's misstep reflects a misapprehension of the LIA's language.<sup>213</sup>

Similarly, the West Virginia Supreme Court incorrectly held that state law tort claims against "manufacturers of various products used by the railroads" were preempted by the LIA without inquiring into whether the various products were *locomotive* parts or appurtenances.<sup>214</sup> The court's reasoning was based in large part on *Law v. Gen. Motors Corp.* and its progeny.<sup>215</sup> However, the court broadly characterized the facts of *Law*, which resulted in a crucial mischaracterization: "In the more modern case of *Law*, the Ninth Circuit considered the claims made by railroad workers against the manufacturers of *train parts and components*."<sup>216</sup> In fact, *Law* considered whether *locomotive brakes and engines* were within the scope of the LIA.<sup>217</sup> Moreover, the court's so-called "avalanche of adverse authority" consisted primarily of cases holding that the LIA preempts state law claims against manufacturers of *locomotive* parts or appurtenances.<sup>218</sup> Thus, the court preempted thousands of state law tort claims due to its mischaracterization of precedent, regardless of whether the claims were directed at the equipment of locomotives or at train or railcar equipment in general.<sup>219</sup> This decision, like *Ransford*, mistakenly expanded the scope and effect of the LIA to read railcar parts or appurtenances, as opposed to locomotive parts or appurtenances.<sup>220</sup>

In *Cunitz-Robinson*, the court relied on *Kurns* to reject the plaintiff's argument that the defective brake shoes on tank cars were not locomotives or locomotive parts and appurtenances.<sup>221</sup> The court declared that the claims were directed at the equipment of locomotives, thereby holding that brake shoes on railcars are a part or appurtenance to the locomotive.<sup>222</sup> The court provided little reasoning for its decision, making conclusory statements

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<sup>212</sup> See *supra* text accompanying notes 135–136 (illustrating that the court held that brakes shoes on rolling stock were clearly an appurtenance to railcars).

<sup>213</sup> See *supra* text accompanying notes 135–136 (explaining that the *Ransford* court held that brake shoes were appurtenant to the railcar, not to the locomotive).

<sup>214</sup> See *supra* text accompanying note 75 (providing the West Virginia Supreme Court's holding in *In re W. Va. Asbestos Litig.*).

<sup>215</sup> See *supra* text accompanying note 138 (explaining *Law*, the Ninth Circuit case that the West Virginia Supreme Court found persuasive).

<sup>216</sup> See *supra* text accompanying note 139 (stating the plaintiff's claims).

<sup>217</sup> See *supra* text accompanying note 139 (providing the facts from the Ninth Circuit case that the West Virginia Supreme Court found distinguishable).

<sup>218</sup> See *supra* note 138 (quoting the cases that the West Virginia Supreme Court found persuasive due to their reliance on *Law*).

<sup>219</sup> See *supra* text accompanying note 75 (providing the West Virginia Supreme Court's holding).

<sup>220</sup> See *supra* text accompanying note 98 (explaining that the interpretation of the LIA can expand the scope and effect of the LIA).

<sup>221</sup> See *supra* text accompanying note 144 (explaining the plaintiff's argument that *Kurns* did not apply because the brake shoes were located on the railcar).

<sup>222</sup> See *supra* text accompanying note 144–145 (providing the court's holding based on *Kurns*).

without conducting a meaningful interpretation.<sup>223</sup> Without an interpretative analysis, the court made a common error, as illustrated in *Ransford* and *In re W. Va. Asbestos Litig.*; the court made an inferential leap, declaring that the appendages to railcars are necessarily the equipment of locomotives.<sup>224</sup>

***E. The Intent or Objective of the LIA Is Not to Preclude Plaintiffs from State Law Claims Related to Asbestos Exposure from Brake Shoes on Railcars***

The LIA's intent is far removed from precluding state law tort claims brought against manufacturers of defective products placed on railcars.<sup>225</sup> The common law provides adequate protection for citizens and their safety.<sup>226</sup> Therefore, the historic need for the LIA to protect railroad employees from dangerous working conditions is no longer necessary.<sup>227</sup> In fact, the adequacy and powerful effect of state laws is brought to light by the abundance of plaintiffs that prefer state laws as a means of recourse for their injuries.<sup>228</sup> Thus, the LIA is no longer the exclusive means of adequate protection for railroad employees because state laws effectively provide redress.<sup>229</sup>

Moreover, the LIA sought to prevent an entirely different evil than exposure to asbestos-laden brake shoes on railcars that cause debilitating

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<sup>223</sup> See *supra* text accompanying note 143 (stating that the brake shoes on tank cars “cannot reasonably be considered anything but locomotive equipment, or in other words, locomotives and parts and appurtenances”).

<sup>224</sup> See *supra* text accompanying notes 135–136 (explaining that the *Ransford* court held that brake shoes were appurtenant to the railcar, not to the locomotive); *supra* text accompanying notes 138–139 (noting that the court relied on broadly stated facts in *Law*, not necessarily accurate, and thereby included train parts and components into the LIA); *supra* text accompanying note 143 (stating that the brake shoes on tank cars “cannot reasonably be considered anything but locomotive equipment, or in other words, locomotives and parts and appurtenances”).

<sup>225</sup> See generally *supra* Part II.A (noting that the LIA arose during a progressive movement over a century ago when a railroad union successfully lobbied to protect railroad employees from dangerous working condition because state laws were ineffective).

<sup>226</sup> See *supra* note 52 (explaining that state laws historically provide redress for defective products, failure to warn, fraud, and consumer rights violations).

<sup>227</sup> See *supra* note 52.

<sup>228</sup> See, e.g., *supra* text accompanying note 73 (thousands of current and former railroad employees alleging state law tort claims against manufacturers); *supra* text accompanying note 82 (railroad employee alleging state law tort claims); *supra* text accompanying notes 113, 116 (plaintiff alleging state law tort claims against the manufacturer of a cushion unit that caused injuries to the plaintiff); *supra* text accompanying note 130 (plaintiff alleging state law tort claims against manufacturer of asbestos-laden brake shoes); *supra* text accompanying note 142 (plaintiff alleged state law torts claims for long-term exposure to asbestos-laden brake shoes); *supra* text accompanying note 147 (plaintiff alleging state law tort claims for relief due to exposure to asbestos-laden brake shoes).

<sup>229</sup> See *supra* note 52.

diseases.<sup>230</sup> Congress originally enacted the BIA to protect rail workers from immediate injuries such as those from large explosions, as opposed to toxins from a product not even in widespread use at the time of the enactment.<sup>231</sup> Although the amendment expanded the BIA beyond the boiler, the language still constrained itself to the “locomotive or tender and its parts and appurtenances.”<sup>232</sup> In fact, it appears the impetus for the amendment came from an ongoing practice of non-compulsory reports of additional defects on the locomotive itself, not from reports of defects down the line of the train.<sup>233</sup> As such, the LIA was intended to allow safe operation of *locomotives*.<sup>234</sup>

A juxtaposition of the LIA’s intent with the effect demonstrates the point:

Intent: Railroad employee union lobbies for legislation to ensure safe operation of locomotives because state laws were ineffective, resulting in injuries due to boiler explosions. The original enactment was amended to include the “locomotive or tender and its parts and appurtenances” because it was common to report additional defects on the *locomotive*.<sup>235</sup>

Effect: One hundred years later, state law tort claims against manufacturers of asbestos-laden products on railcars are barred by the statute.<sup>236</sup>

As such, preclusion of state law tort claims against manufacturers of asbestos-laden products attached to railcars does not embody the intent or objective of the LIA.<sup>237</sup>

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<sup>230</sup> See *supra* text accompanying note 22 (noting that the BIA sought to prevent immediate dangers on locomotive boilers, specifically boiler explosions caused by low water levels).

<sup>231</sup> See *supra* text accompanying note 22 (explaining the original intent of the BIA).

<sup>232</sup> See *supra* text accompanying note 24 (noting the language added to the BIA).

<sup>233</sup> See *supra* text accompanying note 23 (noting that the amendment to the BIA was an adoption of a current practice of reporting defects on the locomotive beyond the boiler itself, such as leaky steam valves on the locomotive).

<sup>234</sup> See *supra* note 150 (discussing a Minnesota District Court case that declared the objective of the LIA “was to allow safe operation of locomotives”).

<sup>235</sup> See *supra* text accompanying notes 19–24 (noting that the LIA arose during a progressive movement over a century ago when a railroad union successfully lobbied to protect railroad employees from dangerous working condition because state laws were ineffective).

<sup>236</sup> See *supra* text accompanying note 22 (explaining that, in some instances, preemption bars state law tort claims altogether, which is far removed from the LIA’s humanitarian purpose).

<sup>237</sup> See *supra* note 150.

### *F. Preemption Results in Unjust Consequences*

Declaring that asbestos-laden brake shoes fall within the preempted field of the LIA results in unjust consequences for nonemployees suffering from asbestos-related diseases.<sup>238</sup> The preemptive effect of the LIA leaves nonemployees without any legal recourse.<sup>239</sup>

Courts must narrowly interpret the scope of LIA's preemption to ensure that certain innocent plaintiffs such as the plaintiff in *Beimert* are afforded a legal remedy.<sup>240</sup> Courts should reject the *Ransford* and *Cunitz-Robinson* analyses because they fail to consider the consequences of alternate interpretations of the statute and may preclude innocent plaintiffs from any remedy.<sup>241</sup> The Supreme Court of West Virginia acknowledged that "for every wrong there is supposed to be a remedy somewhere."<sup>242</sup> To provide a remedy, courts must draw a line where locomotive parts or appurtenances end and train parts or components begin, as opposed to haphazardly concluding that all train parts or components on a railcar are within the scope of the LIA.<sup>243</sup>

The grounds for a restricted interpretation based on alternative consequences of interpretation can be illustrated in two hypothetical scenarios in which a nonemployee is afflicted with an asbestos-related disease:

Plaintiff A is a nonemployee afflicted with mesothelioma contracted from long-term exposure to asbestos while washing the clothes of his or her spouse over a twenty-year period. The spouse whose clothes are laundered by the other was routinely exposed to asbestos while changing brake shoes on *locomotives*.

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<sup>238</sup> See *supra* text accompanying note 33 (explaining that nonemployees whose state law tort claims are preempted are without a remedy).

<sup>239</sup> See *supra* text accompanying note 32 (explaining that nonemployees cannot pursue FELA claims).

<sup>240</sup> See, e.g., *supra* text accompanying note 152 (providing an alternative interpretation would leave a nonemployee afflicted with mesothelioma without a legal remedy).

<sup>241</sup> See *supra* note 152 and accompanying text (citing multiple states that consider the consequences of alternative interpretations of statutes and illustrating *Beimert*, in which the court held that the brake shoes on railcars did not fall within the scope of the LIA, partly because it would leave a nonemployee without legal recourse against a manufacturer that allegedly caused her mesothelioma).

<sup>242</sup> See *supra* text accompanying note 78 (noting that the West Virginia Supreme Court's reasoning with regard to innocent plaintiffs left without a remedy).

<sup>243</sup> See, e.g., *supra* text accompanying notes 146, 152 (discussing *Beimert*, in which the court distinguished brake shoes attached to locomotives from brake shoes attached to railcars so as to prevent the LIA from moving beyond its original intent).

Plaintiff B is a nonemployee afflicted with mesothelioma contracted from long-term exposure to asbestos while washing the clothes of his or her spouse over a twenty-year period. The spouse whose clothes are laundered by the other was routinely exposed to asbestos while changing brake shoes on railcars.<sup>244</sup>

In both scenarios, the Supreme Court's decision in *Kurns* is binding.<sup>245</sup> Thus, Plaintiff A's state law tort claims are precluded because the facts are indistinguishable from *Kurns*—brake shoes on locomotives are the equipment of locomotives, and the claim is directed against the equipment.<sup>246</sup> Further, neither plaintiff has a FELA remedy because both are nonemployees.<sup>247</sup> However, because the brake shoes are located on the railcar, a court may provide innocent Plaintiff B a legal remedy under a restrictive interpretation of the LIA.<sup>248</sup> Under *In re W. Va. Asbestos Litig.*, *Ransford*, and *Cunitz-Robinson*, Plaintiff B is subject to the same fate as Plaintiff A because those cases made no distinction between brake shoes or train parts and components on railcars and brake shoes or train parts and components on locomotives.<sup>249</sup> Under *Beimert*,<sup>250</sup> Plaintiff B's claims are not precluded by the LIA, and the innocent party may bring forth state law claims.<sup>251</sup> Based on the foregoing, courts should consider the effect of a broad interpretation of the LIA, which in certain circumstances leaves innocent plaintiffs without a remedy.<sup>252</sup> Thus, the alternative interpretation—brake shoes on railcars do not constitute a locomotive part or appurtenance—is best.

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<sup>244</sup> See, e.g., *supra* text accompanying note 147 (noting the plaintiff, a nonemployee, and her claim against the manufacturer of railcar brake shoes).

<sup>245</sup> See *supra* text accompanying notes 88–89 (explaining that the Supreme Court held that state law tort claims directed at the equipment of locomotives are preempted by the LIA).

<sup>246</sup> See *supra* text accompanying note 82 (illustrating that the plaintiff in *Kurns* brought claims for defective locomotive products).

<sup>247</sup> See *supra* text accompanying note 32 (explaining that nonemployees must use state courts because nonemployees cannot pursue FELA claims).

<sup>248</sup> See, e.g., *supra* text accompanying notes 146–152 (illustrating *Beimert* in which the court distinguished between brake shoes attached to locomotives from brake shoes attached to railcars and held that the LIA did not preempt the state law tort claim).

<sup>249</sup> Compare *supra* Part II.F (providing cases that equated railcar brake shoes with locomotive brake shoes), with *supra* text accompanying notes 146–152 (distinguishing between brake shoes attached to locomotives and brake shoes attached to railcars).

<sup>250</sup> See *supra* note 152 (explaining the reasoning in a Massachusetts District Court of Middlesex County that made a distinction between railcars and locomotives, holding that a brake system is independent of a locomotive).

<sup>251</sup> See *supra* text accompanying notes 146–152 (holding that the LIA did not preempt the state law tort claim).

<sup>252</sup> See *supra* note 152 and accompanying text (illustrating that, in *Beimert*, the broad alternative interpretation of the LIA precludes innocent plaintiffs from a remedy).

#### IV. CONCLUSION

In 1936, the Supreme Court declared that the LIA occupies the field of locomotive equipment and preempts state law.<sup>253</sup> Today, the century-old LIA remains in full effect, precluding state law tort claims.<sup>254</sup> As reviewing courts ultimately determine how far the LIA casts its net, courts should limit the effect of the LIA for a number of reasons.<sup>255</sup>

First, the LIA's field preemption is grounded on a preemption theory that has significantly changed since its decision, and the inclusion of defective products into the LIA expands an outmoded theory of preemption.<sup>256</sup> Rather, a restrictive interpretation of what constitutes locomotive equipment or locomotive parts and appurtenances will limit a probable unforeseen consequence of the LIA.<sup>257</sup> Moreover, an expansive reading of what constitutes locomotive equipment or locomotive parts and appurtenances results in unjust consequences because it leaves a class of innocent individuals without a legal remedy.<sup>258</sup> Those unjust consequences are incongruent with the original intent of the LIA.<sup>259</sup> Finally, an analysis of on-point case law reveals that a number of courts have failed to make a logical distinction between parts attached to locomotives and parts attached to railcars, which results in an overly broad and incorrect reading of the

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<sup>253</sup> See *supra* text accompanying note 67 (holding that the LIA occupies the field and extends to the “design, construction and the material of every part of the locomotive and tender and of all appurtenances”).

<sup>254</sup> See *supra* text accompanying note 89 (holding that the LIA preempts state law tort claims).

<sup>255</sup> See *supra* text accompanying note 98 (explaining that courts determine whether the LIA preempts state laws based on whether the defective product is a locomotive part or appurtenance and thereby expands or contracts the scope of the LIA); *supra* Parts III.A–F (arguing that the LIA's field preemption is grounded on a preemption theory that has significantly changed since its decision and the inclusion of defective products into the LIA expands an outmoded theory of preemption). An expansive reading of what constitutes locomotive equipment or locomotive parts and appurtenances results in unjust consequences because it leaves an innocent class of individuals without a legal remedy. Those unjust consequences are inconsistent with original intent of the LIA.

<sup>256</sup> See *supra* text accompanying notes 172–174 (arguing that the modern field preemption doctrine should persuade a court to narrowly interpret the LIA, which is based on the outmoded version of field preemption).

<sup>257</sup> See *supra* text accompanying note 174 (contending that a restrictive reading of the LIA's scope can limit the LIA to its intended scope and stop furtherance of an outmoded version of field preemption).

<sup>258</sup> See *supra* Part III.F (arguing that declaring asbestos-laden brake shoes fall within the preempted field of the LIA results in unjust consequences for nonemployees suffering from asbestos-related diseases).

<sup>259</sup> See *supra* Part III.E (arguing that state laws now effectively address railroad employees' concerns, whereas state laws was ineffective at the time the BIA was enacted, and that the evil sought to be remedied by the LIA was immediate injury due to locomotive boiler explosions).



LIA.<sup>260</sup> Based on the foregoing, reviewing courts should cauterize the reach of the LIA and find that brake shoes on railcars are not a locomotive part or appurtenance.

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<sup>260</sup> *See supra* Part III.D (asserting that reliance on cases equating locomotive brake shoes with railcar brake shoes is incorrect and inappropriate).