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SIGNING IT ALL AWAY: THE PERMISSIBLE SCOPE OF WAIVERS AND RELEASES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

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INTRODUCTION

The American railroad is sometimes described as a rural lifeline, connecting disparate hamlets to one another.[1] While railroads do connect rural areas, railways can also facilitate connection between major urban spaces and provide a vital link between cities and their suburban counterparts.[2] In fact, commuter railways are an essential part of life for many denizens of densely packed cities in the northeast United States, who rely on them for transportation between work and home.[3] These railroad connections present employment opportunities for thousands of Americans, many of whom also live and work in urban

1. *See* JEFFERY E. WARNER & MANUEL S. TERRA, IMPORTANCE OF SHORT LINE RAILROADS TO TEXAS 2 (2006).

2. *See* TIMOTHY J. BROCK & REGINALD R. SOULEYRETTE, AN OVERVIEW OF U.S. COMMUTER RAIL 2 (2013).

3. *See* NE. CORRIDOR COMM'N, NORTHEAST CORRIDOR ANNUAL REPORT: INFRASTRUCTURE AND OPERATIONS FISCAL YEAR 2021 6 (2022) ("There were over 800,000 daily trips on the [Northeast Corridor] in 2019 — 775,000 on commuter rail and 45,000 on Amtrak's intercity services.").

areas.[4] This Note aims to help tell the story of those employees, who have worked tirelessly, often at great physical expense, to keep America moving.

Railroad employment and physical injury often go hand-in-hand. While safety standards have increased over the last century, railroad employment remains one of the most dangerous occupations in America.[5] With the inherent danger of the railroad industry in mind, Congress passed the Federal Employers' Liability Act (FELA or the "Act") in the early twentieth century to shift the burden of those injuries from the employee to the employer and prevent railroads from relieving themselves of liability when accidents occur.[6] Today, FELA permits railroad employees to recover for injuries caused by their employer's negligence.[7] However, such controversies typically result in a settlement agreement negotiated without the aid of counsel.[8] These agreements sometimes contain provisions designed to waive or release an employee's right to bring future claims under FELA arising from their employment.[9]

Today's courts are caught in broad disagreement about the validity of waivers and releases under FELA. Section 5 of FELA invalidates some but not all such waivers, and the courts have yet to determine the extent of section 5's reach. As the law currently stands, three federal Circuit Courts of Appeals have produced inconsistent interpretations of section 5, yielding unpredictable results for railroad companies and their employees alike. This Note provides a comprehensive overview of the conflict and presents a synthesis of the best aspects of the two leading approaches. The "ripeness-plus-preclusion" approach, as this Note calls it, enjoys the advantages of the Sixth Circuit's bright-line

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4. For example, Long Island Rail Road, the busiest commuter railroad in the United States, employs more than 7,000 people in the New York City metropolitan area. *See* AM. PUB.TRANSP. ASS'N, PUBLIC TRANSPORTATION RIDERSHIP REPORT: THIRD QUARTER 2022 5–6 (2022) (showing that the Long Island Rail Road has the highest daily average ridership of any commuter railroad in the U.S.); *see also* METRO. TRANSP. AUTH., EEO REPORT — 2ND QUARTER 2022 2 (2022) ("As of June 30, 2022 [Long Island Rail Road]'s workforce consisted of 7,126 employees . . . .").

5. *See* MARK ALDRICH, SAFETY FIRST: TECHNOLOGY, LABOR, AND BUSINESS IN THE BUILDING OF AMERICAN WORK SAFETY 1870–1939 xvii (1997); *see also* Jerome Pollack, *Workmen's Compensation for Railroad Injuries and Diseases*, 36 CORNELL L. REV. 236, 236 (1951) (noting the continued danger of railroad employment despite the passage of federal legislation designed to ensure employee safety).

6. *See infra* Section I.A–B.

7. *See generally* Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (2022) [hereinafter FELA].

8. *See* Pollack, *supra* note 5, at 241–42.

9. *See, e.g.*, Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998).

approach while accommodating some of the justifiable concerns of the Third Circuit. Rooted in FELA's text, the ripeness-plus-preclusion approach respects both the history of the statute and the interpretive norms of the U.S. Supreme Court.

Part I of this Note sets forth the legislative history of FELA and discusses early twentieth century Supreme Court interpretations of section 5.[10] Part II identifies where the Court's early precedents failed to provide clarity and explains two interpretive approaches to section 5 that emerged in decisions published by the Sixth and Third Circuits in the late 1990s.[11] After surveying lower court decisions that have grappled with which standard to apply, it examines the Fifth Circuit's recent foray into this unsettled area of law. Part III analyzes the decisions of the Third, Fifth, and Sixth Circuits, with a particular emphasis on: (a) dispelling the myth that the Circuit split is a function of the power struggle between contract and tort law, and (b) clarifying what is required to establish a settleable claim for the purposes of a FELA action.[12] In Part IV, this Note articulates a new approach that better reflects the text and legislative history of FELA, as well as the remedial purpose it was enacted to effectuate.[13]

I. HISTORICAL, LEGISLATIVE, AND LEGAL CONTEXT OF FELA

Part I of this Note addresses the hazardous nature of railway employment in the nineteenth and twentieth centuries, contending that brutal working conditions constituted the major impetus for passage of FELA. Then, it presents an overview of FELA's legislative history, subsequent legal challenges to FELA's legitimacy, and congressional responses to these challenges. Finally, this Part surveys the Supreme Court's early interpretations of FELA section 5 to identify which issues have been decided and where ground remains unsettled.

A. Historical Context

Westward expansion in the United States, propelled by the industrial revolution, exacted a heavy toll on the laborers who made this development possible.[14] The age of manifest destiny was facilitated by nascent technologies, the most important of which was

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[10] *See infra* Part I.
[11] *See infra* Part II.
[12] *See infra* Part III.
[13] *See infra* Part IV.
14. *See* Michael D. Green, *The Federal Employers' Liability Act: Sense and Nonsense about Causation*, 61 DEPAUL L. REV. 503, 505–07 (2012).

the railroad.[15] For much of the nineteenth and twentieth centuries railroads dominated American transportation, transforming daily life and capturing the popular imagination along the way.[16] However, increasing reliance on this new machinery was accompanied by brutal working conditions on the rails.[17] In the late nineteenth century, a railroad brakeman had an almost 80% chance of dying prematurely.[18] Switchmen in 1893 had an average life expectancy of seven years.[19]

These conditions were exacerbated by widespread acceptance of *laissez faire* economic theory, which discouraged government interference in matters concerning labor.[20] That callous philosophy, which regards the laborer as mere chattel, dominated business practices during the epoch of railroad transportation in America.[21] The practical effect of this doctrine was most devastating when railway men became casualties of their hazardous employment.[22]

At the time, railroad companies had little incentive to adequately compensate injured employees.[23] An employee might have been prevented from bringing suit in court based on "some contract or device by which the employer had successfully exempted itself from liability."[24] Even if an employee were to sue, tort law was generally unsympathetic to injured employees.[25] Employers regularly asserted a trio of judge-made defenses with great success.[26]

Still, as early as 1889, government officials recognized the urgent need for federal legislation to protect these essential employees

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15. *See generally* MARK ALDRICH, DEATH RODE THE RAILS: AMERICAN RAILROAD ACCIDENTS AND SAFETY, 1828–1965 (2006).

16. *See id.*

17. *See* Green, *supra* note 14, at 505; *see also* S. REP. NO. 60-460, at 3 (1908) ("Everybody understands that our railway workmen do their work in the constant presence of danger, where a single misstep is often fatal.").

18. *See* INTERSTATE COM. COMM'N, THIRD ANNUAL REPORT 702 (1889) ("It appears also that a brakemen has only 31 chances in 145 or I in 4.7 of being allowed to die a natural death.").

19. Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 L. & CONTEMP. PROBS. 160, 163 (1953).

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *Id.*

25. *See id.*; *see also* Green, *supra* note 14, at 505–06.

26. *See* Green, *supra* note 14, at 506 n.12 ("These defenses included contributory negligence and assumption of risk, which applied to all tort actions of the era, as well as the fellow-servant rule, which was specific to workplace-related actions and relieved the employer of vicarious liability if the plaintiff was an employee.") (internal citations omitted).

through direct federal regulation.[27] President Harrison, who noted the plight of these workers in his message to Congress in 1889, forecast the public policy rationales that would underpin subsequent legislation: "It is a reproach to our civilization that any class of American workmen should in the pursuit of a necessary and useful vocation be subjected to a peril of life and limb as great as that of a soldier in time of war."[28] Against this historical backdrop, and in response to growing public concern, Congress subsequently turned its attention to the safety of those who worked on the rails.

B. Legislative Action, Subsequent Legal Challenges, and the 1939 Amendment

Congress began to regulate railway safety just before the turn of the twentieth century. The Railroad Safety Appliance Act was enacted in 1893, requiring an array of safety devices on all railroad cars.[29] Two years later, FELA was introduced in Congress.[30] After languishing without enough political capital for nearly a decade, the bill eventually garnered the support of President Theodore Roosevelt, whose efforts drove it through the 59th Congress in 1906.[31]

FELA was enacted as a response to the aforementioned dangerous working conditions, as well as the common law barriers preventing railroad employees from receiving compensation for injuries resulting from their employer's negligence.[32] Moreover, Congress noted that some railroads "insist[ed] on a contract with their employees, discharging the company from liability for personal injuries."[33] Congress has consistently stated that FELA was intended to specifically remedy these problems.[34] As a Senate Subcommittee report later recounted:

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27. *See* INTERSTATE COM. COMM'N, *supra* note 18, at 703.

28. President Benjamin Harrison, State of the Union Address (Dec. 3, 1889) (transcript available at the University of Virginia Miller Center).

29. *See* Railway Safety Appliance Act, 27 Stat. 531, 531–32 (1893) (requiring that railroad locomotives and cars be equipped with automatic couplers and sufficient brake capacity to ensure trains can be safely stopped); *see also* Lilly v. Grant Trunk W. R.R. Co., 317 U.S. 481, 486 (1943) (holding that the Railway Safety Appliance Act "is to be liberally construed in the light of its prime purpose, the protection of employees and other by requiring the use of safe equipment").

30. *See* Griffith, *supra* note 19, at 166.

31. *See id.*; *see also* FELA (1906), Pub. L. No. 59-219, 34 Stat. 232.

32. *See generally* S. REP. NO. 60-460 (1908) (discussing the purpose and intent of the fifty-ninth Congress in passing the 1906 FELA).

33. H.R. REP. NO. 60-1386, at 6 (1908).

34. *See, e.g.*, *id.*; S. REP. NO. 60-460 (1908); S. REP. NO. 61-432 (1910).

> The passage of the law was urged upon the strongest and highest considerations of justice and promotion of the public welfare. It was largely influenced by the strong message of President Roosevelt to the Sixtieth Congress in December, 1907, in which the basis of the legislation was clearly and strongly placed upon the ground of justice to the railroad workmen of this country and in which legislation was urged to the limit of congressional power upon this subject.[35]

However, the Supreme Court promptly struck down the original Act in January 1908, holding that Congress lacked the authority to enact such legislation because its coverage of the railroad workers violated the Interstate Commerce Clause.[36] Congress quickly corrected the problem, and a second, constitutionally-sound version of FELA was enacted three months later on April 22, 1908.[37] The Senate Committee on Education and Labor considered reenactment of FELA "a wise step toward the establishment of justice and fair-dealing among men."[38]

After antiquated venue statutes stymied the new rights granted under FELA, Congress passed an amendment in 1910 to provide a more liberal venue provision for actions brought under the Act.[39] In doing so, Congress reaffirmed its initial aim, that railway workers be compensated for occupational injuries, by further elaborating that:

> It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress to shift the burden of the loss resulting from these casualties from "those least able to bear it," and place it upon those who can . . . "measurably control their causes."[40]

Thus, Congress explicitly declared that its purpose in the passage of FELA "was to extend further protection to employees."[41]

Though grounded in tort law, some contend that FELA was, in effect, the first workers' compensation statute in American history.[42] FELA addressed the "unholy trinity" of employer defenses by replacing contributory negligence with comparative fault, abolishing

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35. S. REP. NO. 61-432, at 2 (1910).

36. *See* The Employers' Liability Cases, 207 U.S. 463, 504 (1908).

37. *See* FELA of 1908, Pub. L. 60-100, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51–60 (2022)); *see also* Griffith, *supra* note 19, at 166; Green, *supra* note 14, at 507.

38. S. REP. NO. 60-460, at 4 (1908).

39. *See* FELA of 1908 Amendment, Pub. L. 61-117, §§ 1–2, 36 Stat. 291, 291 (codified as amended at 45 U.S.C. §§ 56, 59 (2022)).

40. S. REP. NO. 61-432, at 2 (1910) (quoting St. Louis Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 296 (1908)).

41. *Id.* at 12 (1910).

42. *See, e.g.*, Green, *supra* note 14, at 507 (arguing that the FELA "was the product of the same societal concerns that produced workers' compensation").

the fellow-servant rule, and limiting the doctrine of assumption of risk.[43] Within a decade after enactment, the Supreme Court held that, like workers' compensation, FELA is the sole remedy available to railroad employees seeking to recover from their employer due to an occupational injury.[44] Nevertheless, FELA does not establish a workers' compensation scheme, as an injured employee must prove that the railroad was, to some extent, negligent to recover under the Act.[45]

The expressed purpose of Congress, and the regulatory policy that accompanied FELA's enactment, was met with disdain by the courts.[46] In the ensuing years, FELA "ran the rapids of streams of restrictive interpretations and of constructions placed upon its provisions by the courts which reimposed many of the old common-law defenses that, in the original Act, it was the intention of Congress to abolish."[47] Courts regularly restricted FELA's applicability by interpreting the Act's statutory language to limit recovery to injuries where the employee was actually engaged in interstate commerce.[48] These rulings, of which there are more than 40 between 1908 and 1939, resulted in the re-erection of judge-made barriers to recovery — in direct opposition to Congress' original intent in enacting FELA.[49]

FELA was so ravaged at the hands of the courts that, by 1939, Congress recognized that rehabilitation and repair were needed. The legislature's solution to this problem was to amend the law, adding a single sentence to the original section 1 of FELA.[50] Today, the amended statute declares that the benefits of FELA are available to "[a]ny employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in

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43. Initially, the elimination of assumption of risk was restricted to situations in which the railroad violated a safety statute. *See* FELA of 1908, Pub. L. No. 60-100, § 4, 35 Stat. 65, 66. In 1939, the doctrine was eliminated. *See* FELA Amendment of 1939, Pub. L. No. 76-382, §1, 53 Stat. 1404, 1404 (codified as amended at 45 U.S.C. § 54 (2022)).

44. *See* N.Y. Cent. R.R. v. Winfield, 244 U.S. 147, 151–52 (1917).

45. *See* T.J. Lewis, *Federal Employers' Liability Act*, 14 S.C. L. REV. 447, 448 (1962).

46. *See* Griffith, *supra* note 19, at 168.

47. *Id.*

48. *See* Samuel P. Delisi, *Scope of the Federal Employers' Liability Act*, 18 MISS. L.J. 206, 207–12 (1947).

49. *See id.* For an extremely detailed, contemporaneous discussion of the Supreme Court's rulings on FELA in the years between the Act's enactment and the 1939 Amendment, see Lester P. Schoene & Frank Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389, 399–406 (1934).

50. *See* FELA Amendment of 1939, Pub. L. No. 76-382, §1, 53 Stat. 1404, 1404.

any way directly or closely and substantially, affect such commerce."[51] A Senate Report from 1939 confirms that the inclusion of this language was intended to correct the judicial malfeasance of the previous 31 years:

> [The amendment] broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce . . . . The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic.[52]

The language of the 1939 Amendment not only clarified previously ambiguous language, but also supplied "language with teeth in it."[53] The Supreme Court, whose composition also drastically shifted in the intervening years between FELA's enactment and its amendment in 1939, moved to protect FELA and interpret it in line with Congressional intent. For instance, in *Urie v. Thompson*,[54] the Court declared that the Railway Safety Appliance Act[55] covered the same subject matter as the FELA, and was, in effect, supplemental to it.[56] Moreover, the Court boldly defended FELA's validity on several occasions. In perhaps the most eloquent and vivid defense of the purpose of FELA as it relates to railway workers, Justice Douglas stated in *Wilkerson v. McCarthy*:[57]

> The purpose of the Act was to change that strict rule of liability, to lift from employees the "prodigious burden" of personal injuries which that system had placed upon them, and to relieve men "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work."[58]

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51. 45 U.S.C. § 51 (2022).

52. S. REP. NO. 76-661, at 2–3 (1939).

53. *See* James A. Dooley, *The Scope of the 1939 Amendment to the Federal Employers' Liability Act*, 4 DEPAUL L. REV. 17, 18 (1954) (arguing that the phrases "any employee," "any part of whose duties," or "in any way" spread the base of the Act to cover virtually all aspects of railroad operations).

54. Urie v. Thompson, 337 U.S. 163, 163 (1949).

55. *See* Railway Safety Appliance Act, 27 Stat. 53 (1893).

56. *See Urie*, 337 U.S. at 188–89.

57. 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

58. *Id.* (quoting H.R. REP. NO. 60-1386, at 2 (1908)).

Thus, this dramatic shift in Supreme Court jurisprudence brought the courts in line with the national public policy forecast by President Harrison in 1889 and legislated by Congress in 1906.

C. Curated Survey of Supreme Court Interpretations of Section 5

While the purpose and intent of FELA — to provide railroad workers with adequate remedies when they are injured or killed — was well settled by the late 1940s, certain sections of the Act remained vague and required interpretation. In particular, courts struggled to interpret section 5 of FELA which states, in relevant part: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."[59]

As early as 1912, section 5 of FELA was challenged on the basis that it violated the Fifth Amendment to the Constitution as an unjustified interference with both employee and employer freedom of contract.[60] Despite the temporally proximate ruling in *Lochner v. New York*,[61] the Supreme Court dismissed such objections, instead declaring that Congress' power to prohibit contracts that evade liability flows directly from its power to impose such liability.[62]

That same year, in *Philadelphia, Baltimore, & Washington Railroad Company v. Schubert*, the Court examined section 5 in the context of a relief fund agreement signed prior to injury wherein acceptance of benefits constituted a release of all claims against the employer.[63] There, an injured employee accepted such benefits as payment for his injuries, and brought suit against his employer under FELA.[64] The railroad pleaded the release as a defense.[65] Concluding that this agreement was simply a way for the railroad to avoid liability through the law of contracts, and that it fell within the purview of section 5, the Court held that "the conclusion cannot be escaped that such an

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59. 45 U.S.C. § 55 (2022).

60. This rationale was popular at the time and flows directly from the *laissez faire* economic theories discussed above. *See supra* notes 20–22 and accompanying text; *see also* Lochner v. N.Y., 198 U.S. 45, 64 (1905) (holding that New York state law setting maximum working hours for bakers violated the bakers' right to freedom of contract under the Fourteenth Amendment to the Constitution).

61. 198 U.S. at 53.

62. *See* Second Employers' Liability Cases, 221 U.S. 1, 52 (1912).

63. Phila., Balt., & Washington R.R. Co. v. Schubert, 224 U.S. 603, 606–07 (1912).

64. *See id.*

65. *See id.* at 612–13.

agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute."[66]

While *Schubert* addressed only agreements signed prior to injury, the Court later extended section 5's prohibition to releases signed after injury as well. In *Duncan v. Thompson*,[67] an employee accepted a sum certain to pay for living expenses after he was injured on the job.[68] In exchange, he agreed to return the money before bringing suit against his employer.[69] When he subsequently sued without returning the money, the employer raised the contract as a defense.[70] After examining the legislative history of section 5, the court held that "Congress wanted [s]ection 5 to have the full effect that its comprehensive phraseology implies."[71]

The Court focused its analysis on whether the purpose and intent of the release was to enable the employer to exempt itself from liability under FELA, noting that the employee's fiscal position rendered the condition to return the sum certain before filing suit equivalent to depriving him of his right to sue.[72] The Court failed to reach the issue of whether a release signed as part of a bona fide settlement is valid under FELA because the agreement did not mention the employee's claim, finding instead that the "very language of the agreement indicates it is not a compromise and settlement."[73]

In 1948, the Court considered whether section 5 is offended by bona fide settlement agreements in *Callen v. Pennsylvania Railway Corporation*.[74] *Callen* revolved around a FELA action brought by an employee after he injured his back in a workplace accident.[75] The railroad argued that a general release signed by the employee in exchange for $250 discharged the railroad of "all claims and demands which [the employee] can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained."[76] In addressing whether such releases violate section 5 of FELA, the Court stated:

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66. *Id.* at 612.
67. 315 U.S. 1 (1942).
68. *See id.* at 2–3.
69. *See id.* at 3.
70. *See id.*
71. *Id.* at 6.
72. *See id.* at 7.
73. *Duncan*, 315 U.S. at 7–8.
74. Callen v. Pa. Ry. Corp., 332 U.S. 625, 626 (1948).
75. *See id.*
76. *Id.*

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.[77]

Still, it is worth noting that the Court's ruling rested, at least in part, on a determination that it is not within the purview of the courts to alter the plain language of FELA as enacted by Congress.[78] Though the Court seemingly approved of the policy rationales advanced as part of a concurring opinion in Court of Appeals for the Second Circuit,[79] the Court nevertheless dismissed the argument because "an amendment of this character is for the Congress to consider rather than for the courts to introduce."[80]

The precedents discussed above, along with two subsequent clarifying opinions published in 1949 and 1953, demonstrate that FELA is not violated when a release constitutes a compromise of a claimed liability that arises out of a single controversy.[81] Moreover, these rulings reveal the Court's belief that such waivers do not expressly contravene the public policy goals enshrined in the legislative history of FELA.[82]

II. THE CIRCUIT SPLIT

Despite the Court's early precedents on this issue, there remains unsettled ground with respect to the scope of section 5's limitations. While the Supreme Court has ruled that section 5 does not prevent railroad employers from settling claims with an employee that arise out of a single controversy, the Court has yet to consider how far that controversy extends and whether section 5 permits using detailed boilerplate agreements to waive unrelated claims that have yet to

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77. *Id.* at 631.

78. *See id.* at 629–30.

79. *See* Ricketts v. Pa. R.R. Co., 153 F.2d 757, 760 (1946) (Frank, J., concurring) (arguing that the inequality of bargaining power in an employee–employer relationship in the context of railroad employment justifies altering FELA to deprive settlements of their *prima facie* validity because doing so could ensure injured employees are always compensated and make settlement awards less speculative).

80. *See Callen*, 332 U.S. at 630.

81. *See* Phila., Balt., & Washington R.R. Co. v. Schubert, 224 U.S. 603, 612 (1912); Duncan v. Thompson, 315 U.S. 1, 7 (1942); *Callen*, 332 U.S. at 630–31; *see also* Boyd v. Grand Trunk W. R.R. Co., 338 U.S. 263, 266 (1949) (a "full compromise enabling the parties to settle their dispute without litigation" does not violate FELA); S. Buffalo Ry. Co. v. Ahern, 344 U.S. 367, 372 (1953) (holding that "full and fair compromises of FELA claims do not clash with the policy of the Act").

82. *Compare supra* Sections I.A–B, *with S. Buffalo Ry.*, 344 U.S. at 373.

accrue. Part II of this Note surveys the decisions of lower courts that have considered this issue.

First, this Part reviews two interpretive approaches that emerged in decisions published by the Sixth and Third Circuit Courts of Appeals in the late 1990s. Then, it discusses cases that followed the decisions of the Sixth and Third Circuits to illustrate how subsequent lower courts have dealt with this issue and identify which approach most courts utilize. Finally, it examines how the Fifth Circuit's recent ruling in *Mendoza-Gomez v. Union Pacific Railroad Company* reinvigorated the Circuit split and forged a new interpretive approach.

A. Setting the Standard(s): The *Babbitt* and *Wicker* Frameworks

In the late 1990s, two competing approaches for evaluating waiver validity under section 5 emerged in decisions by the Courts of Appeals for the Sixth and Third Circuits. The Sixth Circuit was the first to rule on how far the scope of a controversy may permissibly extend, determining that a bright-line rule is necessary to preclude railroad employers from relieving themselves of liability.[83] Nearly a year later the Third Circuit rejected the Sixth Circuit's reasoning, instead holding that a waiver's validity under section 5 depends on the intent of the parties at the time it was signed.[84]

1. The Sixth Circuit's Decision in Babbitt v. Norfolk & Western Railway

In 1997, the Sixth Circuit became the first federal Court of Appeals to articulate an approach for evaluating the validity of releases under section 5 of FELA.[85] In *Babbitt v. Norfolk & Western Railway*, the plaintiffs were former employees of Norfolk & Western Railway Company ("Norfolk Western") who filed claims under FELA alleging hearing loss due to their employment.[86] Specifically, the plaintiffs claimed that their hearing loss was caused by Norfolk Western's negligence in exposing its workers to excessive noise levels in the course of their duties.[87]

The plaintiffs signed a Resignation and Release Agreement ("RRA") as part of a voluntary separation plan, which offered employees early retirement, a lump sum payment, and a continuation

83. *See* Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 93 (6th Cir. 1997).
84. *See* Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998).
85. *See Babbitt*, 104 F.3d at 93.
86. *See id.* at 90.
87. *See id.*

of health and other benefits.[88] In consideration, the plaintiffs waived their right to pursue claims arising out of their employment with Norfolk Western.[89] However, the plaintiffs asserted that they were unaware of their hearing loss injuries until after they signed the RRA due to the gradual onset of symptoms.[90]

The district court accepted Norfolk Western's argument, that the RRA constituted a bar to the plaintiffs' hearing loss claims, and granted the railroad's motion for summary judgment.[91] On appeal, the *Babbitt* court surveyed Supreme Court precedent, ultimately noting that while compromises of claims of liability that settle a specific injury sustained by an employee do not offend FELA, releases that are not executed as part of a specific settlement of FELA claims, and that attempt to bar potential future claims, are void under section 5.[92]

The Sixth Circuit determined that "to be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him."[93] Applying that standard to the facts before it, the Sixth Circuit reversed and remanded the case for a determination of "whether the Release was executed as part of a settlement for damages sustained for the Plaintiffs' specific injuries."[94]

2. The Third Circuit's Decision in Wicker v. Consolidated Rail Corporation

One year after the Sixth Circuit's ruling in *Babbitt*, the Third Circuit became the next Court of Appeals to put forth an approach for determining whether a waiver or release is valid under section 5, rejecting the Sixth Circuit's bright-line approach in the process.[95] The Third Circuit's approach is fact-intensive, requiring courts to analyze the intent of the parties at the time the release was signed.[96]

In *Wicker v. Consolidated Rail Corporation*, five employees brought suit against their former employer, Consolidated Rail Corporation ("Conrail"), for injuries sustained on the job ranging from back

88. *See id.*
89. *See id.*
90. *See id.*
91. *See Babbitt*, 104 F.3d at 91.
92. *See id.* at 92.
93. *Id.* at 93.
94. *Id.*
95. *See Wicker*, 142 F.3d at 701.
96. *See id.*

problems to asbestos exposure.[97] Each plaintiff settled their claim and signed a waiver that released Conrail from all liability stemming from the specifically claimed injuries.[98] The release also purported to waive claims based on potential injuries the plaintiffs may have sustained as a result of their employment.[99] Exposure to asbestos was explicitly noted in the release, but references to other chemical substances were not included.[100]

Years later, the plaintiffs began to experience a variety of symptoms, including blackouts, seizures, respiratory difficulties, skin rashes, and headaches.[101] They subsequently brought new claims alleging injury from exposure to a toxic chemical — trichloroethylene — at one of the railroad's properties.[102] They all claimed that they did not know at the time of signing the releases that they had been exposed to any other dangerous substances besides asbestos, and that they did not intend to waive their right to sue for injuries resulting from chemical exposure other than asbestos.[103]

As in *Babbitt*, the district court accepted the railroad's argument that the plaintiffs signed releases that barred any subsequent claims for workplace injuries and granted Conrail's motion for summary judgment.[104] On appeal, the Third Circuit declined to endorse the Sixth Circuit's reasoning in *Babbitt*.[105] The court explained that *Babbitt*'s holding rested, in part, on the fact that the releases signed by the railroad workers in that case were part of a separation agreement and "not the product of negotiations settling a claim."[106]

After surveying Supreme Court precedent, the court suggested that the lack of a clearly defined standard is partly the result of the nature of the Court's decisions on this issue.[107] Even still, the Third Circuit determined that the Court's precedent "provides us with some rough guidelines."[108] For instance, the *Wicker* court explained that "*Schubert* and *Duncan* hold that a release of FELA claims given as a condition of employment, or signed without negotiation, is void under [section]

97. *See id.* at 692.
98. *See id.*
99. *See id.*
100. *See id.* at 692.
101. *See Wicker*, 142 F.3d at 692–93.
102. *See id.*
103. *See id.*
104. *See id.* at 694.
105. *See id.* at 700–01.
106. *Id.* at 700.
107. *See Wicker*, 142 F.3d at 698.
108. *See id.*

5."[109] Equally clear, the court opined, was that "*Schubert* [also] invalidates those release whose only purpose is to deprive employees of their FELA rights."[110] Nevertheless, the Third Circuit reasoned that "*Callen* permits an employer and an employee to negotiate a release of existing claims."[111]

Acknowledging that the Supreme Court's decisions concerning section 5 are inherently "fact-driven, and consequently do not provide a generally applicable rule of law,"[112] the Third Circuit determined that "the evaluation of the parties' intent at the time the agreement was made is an essential element of this inquiry."[113] Nevertheless, the *Wicker* court recognized that using the parties' intent to resolve the section 5 dispute "raises the troublesome question whether a general release in FELA cases is merely an engine by which an employer can evade liability, or represents a rational and considered way to resolve claims and liabilities."[114]

To resolve this question, the *Wicker* court weighed FELA's underlying goal of providing liberal recovery for employees against the Supreme Court's interpretation of section 5 in *Callen*, which permits releases that "compromis[e] a claimed liability and to that extent recogniz[e] its possibility."[115] The Third Circuit held that "a release does not violate [section] 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to *those risks which are known* to the parties at the time the release is signed."[116] The court also clarified that "claims relating to *unknown risks* do not constitute 'controversies'"[117] under the standard set by *Callen*. The *Wicker* court determined that:

> For this reason, a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed — for example toxic exposure — allowing the employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate [section] 5 of FELA.[118]

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109. *Id.* at 700.
110. *Id.*
111. *Id.*
112. *Id.* at 698
113. *Wicker*, 142 F.3d at 700.
114. *Id.*
115. *Id.* (internal quotations and references omitted).
116. *Id.* at 701 (emphasis added).
117. *Id.* (emphasis added).
118. *Id.*

This position represents the *Wicker* court's attempt to reconcile the statutory rights of employees with both parties' inherent right to settle claims by contract.[119]

The court also proffered a public policy rationale to support its decision, contending that permanent settlement and release may be mutually beneficial to both the railroad company and the railroad employee.[120] Specifically, the court reasoned that both the employee and employer may wish to settle all claims, both present and potential, at the same time, as opposed to delaying additional settlements until a time when, or if, future injuries present themselves.[121]

However, recognizing the danger that detailed boilerplate agreements pose,[122] the *Wicker* court refused to make the validity of the release turn on the language of the agreement alone, convinced that trial courts have the competency to make nuanced evaluations after gathering all legally determinative facts.[123] "While the elusiveness of any such determination might counsel in favor of a bright-line rule such as the Sixth Circuit adopted in *Babbitt*," the Third Circuit concluded, "we decline to adopt one here."[124]

B. Subsequent Developments: Where Do Today's Courts Stand?

After the release of the *Wicker* decision in 1998, lower courts quickly began to diverge on which was the proper approach to apply. Most courts to consider this issue opt for the Third Circuit's fact-intensive standard. A minority of courts, primarily located in Ohio and California, elect to follow the bright-line rule articulated by the Sixth Circuit. Adding complexity, some courts have declined to choose one approach over the other. Within this group, there are two sub-sets: (a) courts that attempt to reconcile both *Babbitt* and *Wicker*, and (b) courts that decide that the particular releases at issue in the case at hand would be void under either approach, and therefore no choice is necessary.

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119. *Wicker*, 142 F.3d at 700.

120. *See id.* at 700–01.

121. *See id.*

122. *See id.* at 701 ("[D]raft releases might well include an extensive catalog of every chemical and hazard known to railroad employment.").

123. *See id.*

124. *See id.*

1. The Majority of Courts Follow the Third Circuit's Fact-Intensive Standard

The Georgia Court of Appeals, the intermediate-level appellate court for the U.S. State of Georgia, was one of the first courts to consider which of the competing standards should apply in *Loyal v. Norfolk Southern Corporation*.[125] Decided only five months after the *Wicker* decision came down, the facts of *Loyal* are substantially similar to *Babbitt*, yet the outcome is different.[126] As in *Babbitt*, the named plaintiff in *Loyal* and two other retired employees sued their former employer for hearing loss allegedly sustained while they were employed as switchmen and engineers by Norfolk Southern Corporation.[127] However, years earlier, Loyal accepted an early retirement compensation package due to a medical condition unrelated to his employment.[128] As part of that retirement package, he signed a general release as to all known and unknown occupational diseases and risks.[129] Nine years later, in the spring of 1996, Loyal attended a free health screening for former railroad employees, sponsored by the law firm he would later retain, where he sat for an audiogram hearing test.[130] The results showed that he had sustained hearing loss, even though job-related mandatory hearing tests failed to indicate any similar injury.[131] So, he sued under FELA, alleging that Norfolk Southern's negligence caused his hearing loss.[132]

Norfolk Southern moved for summary judgment, asserting that Loyal's claim was barred by the release signed at the time he accepted the retirement package.[133] The trial court agreed, and granted summary judgment to Norfolk Southern.[134] The Georgia Court of

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125. The *Loyal* decision was published on October 2, 1998, shortly after *Wicker* was released on April 29, 1998. *See id.* at 690; *see also* Loyal v. Norfolk S. Corp., 507 S.E.2d 499, 500 (Ga. Ct. App. 1998).

126. *Compare supra* notes 86–90 and accompanying text, *with Loyal*, 507 S.E.2d at 500–02.

127. *See Loyal*, 507 S.E.2d at 500–502. *Compare supra* notes 86–90 and accompanying text, *with Loyal*, 507 S.E.2d at 500–02.

128. *See Loyal*, S.E.2d at 500.

129. The specific language contained in the release stated that Loyal would release "any claim (with the exception of vested pension rights), demand, action, or cause of action, of any kind whatsoever, known or unknown, which I have or could have on account of, or in any manner arising out of or connected with, my employment." *Id.*

130. *See id.* at 500–01.

131. *See id.* at 501.

132. *See id.*

133. *See id.*

134. *See Loyal*, S.E.2d at 501.

Appeals affirmed the trial court's judgment.[135] In doing so, the court found guidance in the *Wicker* court's analysis, holding that:

> The correctness of an analysis that turns on the known *risk* of injury, as opposed to a known actual injury, is completely supported by the Supreme Court's decision in *Callen*, where the Court held, "It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent *recognizing its possibility*." [136]

The Court of Appeals reiterated the *Wicker* court's policy rationale, that the ability to settle potential claims in addition to known claims is a freedom that both parties derive value from.[137] The court stated: "Clearly, in an industry, such as the railroad industry, that has a number of known occupational risks and diseases, it is important to both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery."[138] Moreover, the Georgia Court of Appeals found that allowing the settlement of known risks helps "avoid the set aside of successive settlements of known occupational diseases and repeated litigation when subsequent injuries from such occupational diseases manifest themselves over time."[139]

The public policy positions articulated in *Wicker* and *Loyal* are echoed by courts across the country that choose to apply the *Wicker* fact-intensive standard over *Babbitt*'s bright line rule.[140] For instance, in *Oliverio v. Consolidated Rail Corporation*, a New York trial court held that the *Wicker* standard is the better approach after surveying relevant caselaw, stating:

> [T]he *Babbitt* approach requires an unrealistic view on how parties compromise claims. And while it may appear that the approach may enable an easier resolution of the manner in which a release is enforced, the result may be either more complicated inquiry into the exact nature and scope of the injury compromised, or a chilling effect on the resolution by compromise of any claims. This is particularly

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135. *See id.* at 504.

136. *Id.* at 502 (quoting Callen v. Pa. Ry. Corp., 332 U.S. 625, 631 (1948)) (emphasis in original).

137. *See id.*

138. *Id.*

139. *Id.*

140. *See, e.g.*, Oliverio v. Consol. Rail Corp., 822 N.Y.S.2d 699, 702–03 (Sup. Ct. 2006) (adopting the *Wicker* standard based on public policy encouraging parties to settle claims outside of court); Jaqua v. Canadian Nat'l R.R., Inc., 734 N.W.2d 228, 236 (Mich. Ct. App. 2007) (same); Cole v. Norfolk S. Ry. Co., 803 S.E.2d 346, 352 (Va. 2017) (same).

> true with respect to claims based upon exposure to asbestos, where effects of the exposure may be latent for a considerable period of time. If a new claim were permitted for each and every new manifestation of the asbestos exposure, regardless of the extent of the parties' awareness of such risks, there would be no incentive on the part of the railroad defendant to ever compromise such claims. This result would not further the public policy of encouraging settlement of claims.[141]

State courts in Georgia,[142] New York,[143] Pennsylvania,[144] Delaware,[145] Virginia,[146] Maryland,[147] Illinois,[148] Montana,[149] Michigan,[150] Mississippi,[151] and Arkansas[152] ruled similarly in the past. Moreover, the Eleventh Circuit,[153] and federal district courts in Pennsylvania,[154] Georgia,[155] and Louisiana,[156] opt for *Wicker*'s fact-intensive approach. These courts agree that the inquiry into a waiver's validity under section 5 is dependent on the intent of the parties at the time it was signed, and that public policy favoring easy settlement of present and potential claims should be encouraged by the judicial system.

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141. *Oliverio*, 822 N.Y.S.2d at 702–03.

142. *See, e.g.*, *Loyal*, S.E.2d at 502.

143. *See, e.g.*, *Oliverio*, 822 N.Y.S.2d at 702–03.

144. *See, e.g.*, Jarrett v. Consol. Rail Corp., 185 A.3d 374, 378 (Pa. Super. Ct. 2018).

145. *See, e.g.*, Reed v. Burlington N. & Santa Fe Ry. Co., No. N17C-10-366 EMD, 2020 WL 6392866, at *6 (Del. Super. Ct. Nov. 2, 2020).

146. *See, e.g.*, Cole v. Norfolk S. Ry. Co., 803 S.E.2d 346, 352 (Va. 2017).

147. *See, e.g.*, Blackwell v. CSX Transp., Inc., 102 A.3d 864, 871 (Md. Ct. Spec. App. 2014).

148. *See, e.g.*, Daniels v. Union Pac. R.R. Co., 904 N.E.2d 1003, 1012 (Ill. App. Ct. 2009).

149. *See, e.g.*, Sinclair v. Burlington N. & Santa Fe Ry. Co., 200 P.3d 46, 56 (Mont. 2008).

150. *See, e.g.*, Jacqua v. Canadian Nat'l R.R., Inc., 734 N.W.2d 228 (Mich. 2007).

151. *See, e.g.*, Ill. Cent. R.R. Co. v. Acuff, 950 So.2d 947, 960 (Miss. 2006).

152. *See, e.g.*, Murphy v. Union Pac. R.R. Co., 574 S.W.3d 676, 682 (Ark. Ct. App. 2019).

153. *See* Sea-Land Serv., Inc. v. Sellan, 231 F.3d 848, 851–52 (11th Cir. 2000) (adopting the *Wicker* standard for evaluating releases under the Jones Act).

154. *See, e.g.*, Nethken v. CSX Transp. Inc., No. 2:13-01544-ER, 2014 WL 7647789, at *1, *4 (E.D. Pa., Nov. 12, 2014); Bludworth v. Ill. Cent. R.R. Co., No. Civ.A 2:10-68527, 2011 WL 4916913, at *1 (E.D. Pa. Feb. 10, 2011).

155. Eason v. CSX Transp., Inc., No. 5:04-CV-112, 2005 WL 8157066, at *1, *3 (S.D. Ga. Oct. 26, 2005).

156. Hartman v. Ill. Cent. R.R. Co., No. 20-1633, 2022 WL 912102, at *1, *2 (E.D. La. Mar. 29, 2022).

2. A Minority of Courts Apply the Sixth Circuit's Bright-Line Rule

In contrast, a minority of courts primarily located in Ohio[157] and California[158] have adopted the bright-line rule set forth in *Babbitt*. These courts offer distinct rationales for concluding that the bright-line rule is more consistent with section 5 of FELA and the Supreme Court decisions interpreting it. For instance, in *Chacon v. Union Pacific Railroad*,[159] a California Court of Appeal's analysis of the Supreme Court's decisions in *Schubert*[160] and *Duncan*[161] led it to question the *Wicker* court's justification for "why the payment of compensation for possible injuries from future claims should be treated any differently just because such compensation is paid in connection with the settlement of some existing, unrelated claim."[162] The *Chacon* court refused to adopt an expansive reading of *Callen*, stating that the Supreme Court's ruling in that case "did not suggest that the parties settling an existing claim would be free to expand a release to include future unrelated risks."[163] Additionally, after examining the language of section 5, the court found that the mere fact that a release is negotiated is largely irrelevant because the statute "does not create an exception for situations in which an employee knowingly assents to the employer's 'purpose or intent' in return for negotiated compensation."[164]

The *Chacon* court determined that two public policy considerations counsel against reading such an exception into section 5.[165] First, the unequal distribution of knowledge between employers and employees about potential risks demonstrates that an employer is both more likely to know about such risks and better able to devise strategies to avoid conduct that could lead to a negligence claim under FELA.[166] Even if both employer and employee comprehend the potential risks and

157. *See, e.g.*, Fannin v. Norfolk & W. Ry. Co., 666 N.E.2d 291 (Ohio Ct. App. 1995) (determining that settlement of unaccrued claims is precluded under section 5 of FELA); Anderson v. A.C. & S., Inc., 797 N.E.2d 537 (Ohio Ct. App. 2003) (explicitly adopting *Babbitt* standard); Arpin v. Consol. Rail Corp., 75 N.E.3d 948 (Ohio Ct. App. 2016) (same); Knoth v. Ill. Cent. R.R. Co., No. 2005-CA-001882, 2006 WL 1510782, at *1 (Ky. Ct. App. June 2, 2006).

158. *See, e.g.*, Chacon v. Union Pac. R.R., 270 Cal. Rptr. 3d 521 (Ct. App. 2020).

159. *Id.* at 529–30.

160. *See* Phila., Balt., & Wash. R.R. Co. v. Schubert, 224 U.S. 603, 612 (1912).

161. *See* Duncan v. Thompson, 315 U.S. 1, 7 (1942).

162. *Chacon*, 270 Cal. Rptr. 3d at 530.

163. *Id.* at 531.

164. *Id.* at 530 (internal references and quotations omitted).

165. *See id.* at 530–31.

166. *See id.* at 530.

future liability involved in the working environment and wish to permanently settle, the court found that "nothing in [the text of section 5] indicates that such a release would be permissible."[167] Second, the court found that a brightline rule offers predictability and uniformity in determining liability under FELA in federal and state courts.[168] In contrast, the court suggested that adopting "a fact-intensive, case-by-case analysis" would likely lead to inconsistent and unequal results "in similar cases, [thereby] undermining the goal of uniform application of federal law."[169]

Moreover, courts adopting the *Babbitt* bright-line rule are skeptical of general releases and waivers populated with boilerplate language which limits the railroad's liability in a manner that contravenes section 5 of FELA.[170] In *Arpin v. Consolidated Railroad Corporation*, the Court of Appeals of Ohio adopted the *Babbitt* bright-line rule while holding that an employee, who sued his former employer after he developed lung cancer from toxic exposure, was entitled to recover despite a release executed in 2004 as part of a prior claim for exposure to toxic chemicals in the workplace.[171] Focusing on the language of the 2004 release, the court found that it "was of the boilerplate variety warned against in *Wicker*."[172] The *Arpin* court noted that "the release did not detail the quantity, location, and duration of potential risks to which Arpin had been exposed, or the probability that he would develop [] cancer."[173]

Similarly, in *Anderson v. A.C. & S., Incorporated*,[174] the Ohio Court of Appeals analyzed the broad language of a release which attempted to limit the defendants' liability for "any claim, demands, rights, and causes of action of whatever kind, nature or description," including "injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion of any substance whatsoever whether or not presently alleged or manifested."[175] "Reading this language in conjunction with the very broad language of the first paragraph of the release," the court held, "it is apparent that the release goes well beyond merely compromising a claimed liability and impermissibly

167. *Id.*
168. *See Chacon*, 270 Cal. Rptr. 3d at 531.
169. *Id.*
170. *See, e.g.*, Arpin v. Consol. Rail Corp., 75 N.E.3d 948, 955 (Ohio Ct. App. 2016).
171. *See id.* at 950, 955.
172. *Id.* at 955.
173. *Id.*
174. 797 N.E.2d 537 (Ohio Ct. App. 2003).
175. *Id.* at 545.

purports to exempt [the defendants] from all 'potential future claims the employee might have arising from injuries known or unknown by him.'"[176]

However, some courts adopting the *Babbitt* approach have questioned the extent to which the bright-line rule invalidates releases for future claims arising from the same conduct by a railroad employer without reaching a conclusion on that precise issue.[177] Still, these courts hold that, at minimum, section 5 acts as a bar to releases that limit employer liability for unrelated future claims.[178] For instance, the *Chacon* court declined to consider "whether possible future injury from the same negligent conduct underlying the settlement is part of the claimed liability that the parties are settling" because the facts of the case showed that the claims presented concerned alleged injuries resulting from conduct entirely unrelated to the plaintiff's prior settlement with the defendants.[179]

3. Some Courts Decline to Choose One Approach Over the Other

Adding complexity, some courts have declined to choose one approach over the other. Within this group, there are two sub-sets: (a) courts that attempt to reconcile both *Babbitt* and *Wicker*, and (b) courts that determine that, because the releases at issue in the case would be void under either approach, no choice is necessary.

a. Reconciling Babbitt *and* Wicker *as Applicable in Different Fact Patterns*

The Supreme Court of Appeals of West Virginia's decision in *Ratliff v. Norfolk Southern Railway Company* exemplifies the position that "the *Babbitt* and *Wicker* cases actually set out different standards to be applied in different circumstances."[180] The *Ratliff* court elaborated that:

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176. *Id.* (quoting Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 93 (6th Cir. 1997)).

177. *See, e.g.*, Chacon v. Union Pac. R.R., 270 Cal. Rptr. 3d 521, 530–31 (Ct. App. 2020).

178. *Id.* at 530.

179. *Id.* (internal quotations omitted).

180. Ratliff v. Norfolk S. Ry. Co., 680 S.E.2d 28, 38 (W. Va. 2009). Other courts have analyzed the circuit split similarly without explicitly holding as such. *See* Wicker v. Consol. Rail Corp., 142 F.3d 690, 700 (3d Cir. 1998) (noting that *Babbitt* "was based in part on the fact that the releases formed part of a voluntary separation program, and were not the product of negotiations settling a claim"); *see also* Wells v. Union Pac. R.R. Co., No. 9:07cv27, 2008 WL 4500735, at *4 (E.D. Tex., Oct. 3, 2008) (distinguishing the release at issue therein, executed in connection with a prior claim

> [C]areful review of *Babbitt* and *Wicker* demonstrates a key difference between the two cases. *Babbitt* involved employees who signed a general release in connection with a voluntary separation (or early retirement) program, and who were not engaged in settling any specific FELA claims with their employer. Notably, *Babbitt* found that the facts before it were distinguishable from *Callen* and applied other Supreme Court precedent. *Wicker*, on the other hand, dealt with employees who had executed general releases in the course of *settling FELA claims*, and represents an extension of *Callen* . . . . The rationale for such a distinction lies with the posture of the employee in executing a release.[181]

Turning to the facts of the case before it, the *Ratliff* court found that the release signed by the plaintiff was executed in the context of a voluntary separation program, and therefore fell into the *Babbitt* category of cases.[182] The plaintiff in *Ratliff* was the wife of a deceased railroad worker who applied for an early retirement program after 40 years of employment.[183] As a prerequisite for program consideration, the railroad required the employee to execute a resignation agreement that functioned as "a total and absolute release of any employment rights with any Norfolk Southern Company and of any claims of any kind whatsoever arising from [his] employment relationship with the Company."[184] Nearly 20 years after signing up for the retirement program, Mr. Ratliff developed mesothelioma and subsequently passed away.[185] His wife then filed a claim against the company on behalf of his estate.[186] At the trial level, the plaintiff argued that the *Wicker* standard should apply.[187] However, the defendants successfully moved for summary judgment, with the court noting that there is "no direct evidence bearing on the issue of Mr. Ratliff's intent, since [he] died without testifying about the [r]elease."[188]

On appeal, the *Ratliff* court held that because the plaintiff's waiver was executed in the context of a voluntary separation program, as opposed to being executed in the compromise of a claimed liability,

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of injury, with that at issue in *Babbitt*, which involved a release executed as part of an early retirement program).

181. *Ratliff*, 680 S.E.2d at 38 (emphasis in original).

182. *Id.* at 39.

183. *Id.* at 31.

184. *Id.* (internal citations omitted).

185. *See id.*

186. *See id.* at 32.

187. *Ratliff*, 680 S.E.2d at 31 (noting that the trial court held "that a jury trial on the factual issue of intent would serve the interests of judicial economy").

188. *Id*. (quoting trial court) (internal citations omitted).

Babbitt's bright-line rule applied and the release was required to reflect a bargained-for settlement of a claim for mesothelioma in order to be valid under section 5.[189] Therefore, because the trial court failed to consider evidence about whether the release that Mr. Ratliff signed specifically contemplated mesothelioma, the *Ratliff* court reversed and remanded for further proceedings consistent with its opinion.[190]

b. With the Same Result Either Way, No Need to Pick an Approach

Other courts have declined to take a position with respect to the split in authority if the specific facts of the case allow.[191] Interestingly, these courts engage in an inherently fact-driven analysis to conclude that a particular release is void under section 5, but they do not explicitly adopt the *Wicker* standard. Several of these cases[192] indicate that the court's ruling turned on an analysis of *Callen*, *Babbitt*, and *Wicker* resulting in the conclusion that "a valid release under FELA must relate to a specific claim."[193]

For instance in *Ribbing v. Union Pacific Railroad Company*, a Nebraska district court found that the releases in question would be void as a matter of law under either approach.[194] There, after a railway worker became permanently disabled due to a workplace injury to his back, he signed a general release in connection with that injury that included "any and all other personal injury claims or grievances of any nature whatsoever, including, but not limited to, labor disputes, hearing loss, repetitive trauma, chemical exposure, and exposure to

189. *See id*. at 28, 39.

190. *See id*. at 39.

191. *See, e.g.*, Aurand v. Norfolk S. Ry. Co., No. 3:08-CV-398 PPS, 2010 WL 1972786, at *3 (N.D. Ind., May 14, 2010) ("The distinction between the approaches taken by the Sixth Circuit and Third Circuit is immaterial . . . ."); Molder v. Burlington N. & Santa Fe Ry. Co., No. 2:18-CV-0257-TOR, 2019 WL 691399, at *3 (E.D. Wash. Feb. 19, 2019) ("However, under either approach, '[a] FELA release may be set aside on the basis of mutual mistake of fact in executing the release.'") (quoting Counts v. Burlington N. Ry. Co., 952 F.2d 1136, 1141 (9th Cir. 1991)); Presley v. Union Pac. R.R. Co., No. CIV-10-252-SPS, 2012 WL 4120906, at *3 (E.D. Okla. Sept. 18, 2012) ("Although these standards are not identical, the Release at issue in this case is void upon the application of either rule.").

192. *See* Langrell v. Union Pac. R.R. Co., No. 8:18CV57, 2020 WL 3036113, at *4 (D. Neb. June 5, 2020) (holding that "[u]nder the rationale expressed in *Callen*, *Babbitt*, and *Wicker*, a release must [be] about a controversy involving the railroad's liability, and/or the extent of that liability for a particular accident or exposure") (internal quotations omitted); Ribbing v. Union Pac. R.R. Co., 484 F. Supp. 3d 676, 681 (D. Neb. 2020) (same).

193. *Ribbing*, 484 F. Supp. 3d at 681.

194. *See id*. at 681–82.

diesel fumes growing out of [his] employment."[195] Nearly 20 years later, the employee developed cancer and subsequently passed away.[196] His widow brought suit against his former employer, alleging that workplace exposure to carcinogenic substances caused her late husband's cancer and resulted in his death.[197] The railroad moved for summary judgment, contending that the plaintiff's claims were barred by the release signed by the employee in connection with his back injury decades prior.[198]

The court denied the railroad's motion, holding that the release did not preclude the plaintiff's claims.[199] Under the *Babbitt* bright-line rule, the court determined that "extending the release to cover injuries other than those incurred in the accident would be an impermissible attempt to extinguish potential future claims."[200] Applying *Wicker*, the court found that the release did not prevent the plaintiff's claims for injuries resulting from toxic exposure for three reasons. First, the release contained no reference to the specific risk the employee faced — developing cancer — thus rendering it void[201] under *Wicker* because it simply recited a list of "generic hazards to which [the employee] might have been exposed rather than specific risks the employees faced during the course of their employment."[202] Second, there was no evidence to establish that the parties fully intended to release claims beyond those connected to the back injury.[203] Finally, without a specific instance of related potential liability on which to attach, the court held that "a release that shows an intent to preclude a claim that is not related to the claim compromised is void under [section 5] because there is no controversy or dispute about a potential claim for the parties to settle."[204] The *Ribbing* court's analysis exemplifies the position that some courts have taken when the facts of the case permit: that if a release is void under either *Wicker* or *Babbitt*, there is no need to pick between those competing approaches.

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195. *Id*. at 679.
196. *See id.* at 678.
197. *See id.*
198. *See id.* at 681–82.
199. *See Ribbing*, 484 F. Supp. 3d at 683.
200. *Id.* at 682 (internal citations and quotations omitted).
201. *See id.* at 681–83.
202. Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (1998).
203. *See Ribbing*, 484 F. Supp. 3d at 683.
204. *Id.* at 681.

C. Forging a New Path 23 Years Later — The Fifth Circuit's Decision in *Mendoza-Gomez v. Union Pacific Railroad Company*

After nearly a quarter century without much change in the landscape of the circuit split, the Fifth Circuit's ruling in *Mendoza-Gomez v. Union Pacific Railroad Company*[205] upended the *Babbitt* and *Wicker* duality by presenting a distinct approach through which to analyze whether a release is valid under section 5 of FELA.

In 2012, the plaintiff in *Mendoza-Gomez* pursued a claim alleging personal injury based on occupational exposure to various toxic substances, including asbestos, silica sand, diesel fumes, and secondhand cigarette smoke.[206] The plaintiff signed a release to resolve the 2012 claim as part of a settlement agreement.[207] Union Pacific Railroad Corporation ("Union") required that the release include not only the 2012 exposure claim, but also "any and all claims, accruing then and in the future, against Union as a consequence of any 'alleged illnesses, injuries, cancers, future cancers, diseases, and/or death' that purportedly resulted from [the plaintiff's] exposure to toxic chemicals while working for Union."[208]

Several years later, in 2019, the plaintiff was diagnosed with lung cancer and asbestosis.[209] He subsequently filed suit against Union, alleging personal injury claims under FELA.[210] Like the defendants in both *Babbitt* and *Wicker*, Union raised the affirmative defense that the plaintiff's claim was barred by the earlier executed release.[211] Though the plaintiff argued that the 2012 release failed to provide sufficient notice of the defense, the district court noted that "Mendoza-Gomez signed the release that Union references in its affirmative defense before a notary and pursuant to the advice of counsel."[212] The district court thus held that the 2012 release constituted a valid and enforceable contract barring the plaintiff's suit and granted summary judgment in favor of Union.[213]

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205. No. 21-20397, 2022 WL 1117698 (5th Cir. Apr. 14, 2022).

206. *Id.* at *1.

207. *See id.*

208. *Id.* at *3.

209. *See id.* at *1.

210. *See id.*

211. *See Mendoza-Gomez*, 2022 WL 1117698, at *3; *see also* Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 90 (1997); Wicker v. Consol. Rail Corp., 142 F.3d 690, 694 (1998).

212. *Mendoza-Gomez,* 2022 WL 1117698, at *3.

213. *See id.*

On appeal, the Fifth Circuit affirmed the district court's ruling.[214] The majority of the court's opinion is devoted to dismissing the plaintiff's claim that Union's affirmative defense was procedurally deficient.[215] The court's discussion of the plaintiff's argument that the release was void under section 5 of FELA is brief, and never directly addresses either *Wicker* or *Babbitt*.[216] However, in a footnote, the court expressly rejected the plaintiff's assertion that the standard applied by a district court in a similar case should control.[217]

The footnote constitutes the court's response to the plaintiff's Rule 28(j)[218] letter, which references a case decided by the District Court for the Eastern District of Louisiana, *Hartman v. Illinois Railroad Company*.[219] In that case, an employee injured his middle finger and ultimately settled a claim for that injury.[220] Part of the settlement included a release for future claims of any type against the company, including claims for exposure to toxic chemicals.[221] The plaintiff subsequently developed cancer and filed a claim under FELA.[222] The *Hartman* court adopted the *Wicker* standard to resolve the dispute, recognizing that the release lacked the intent needed to establish its validity.[223]

However, the Fifth Circuit was unpersuaded by the plaintiff's section 5 arguments in *Mendoza-Gomez*.[224] First, the Circuit Court of Appeals stated that they are not bound by the reasoning of a district court.[225] However, even if bound by the *Hartman* decision, the Fifth Circuit found that the facts and circumstances were different in Mendoza-Gomez's case.[226] The court emphasized the specificity of the injuries released in 2012,[227] and noted a clear link to the injuries claimed in the

214. *See id.*
215. *See id.* at *1–3.
216. *See id.* at *1–4.
217. *See id.* at *4 n.1.
218. FED. R. APP. P. 28(j).
219. Hartman v. Ill. R.R. Co., No. 20-1633, 2022 WL 912102, at *1 (E.D. La. Mar. 29, 2022).
220. *See id.*
221. *See id.*
222. *See id.*
223. *See id.* at *2.
224. *See* Mendoza-Gomez v. Union Pac. R.R. Co., No. 21-20397, 2022 WL 1117698, at *3 (5th Cir. Apr. 14, 2022).
225. *See id.* at *4 n.1.
226. *See id.*
227. The release covered "alleged illnesses, injuries, cancers, future cancers, diseases, and/or death, or any fears or psychological disorders." *Id.* at *1.

present suit.[228] Specifically, the court noted that the original claim and the present claim both involved the plaintiff's alleged exposure to toxic chemicals.[229] In so deciding, the Fifth Circuit held that "the list of claims Mendoza-Gomez released was not a boilerplate list of hazards unrelated to his current claims and he cannot now claim that the release did not evince his clear intent to release Union [Pacific] from liability for his alleged cancer in this suit."[230]

The Fifth Circuit interpreted the language of the *Callen* decision differently than both *Wicker* and *Babbitt*. It read *Callen* broadly to state that the text of section 5 does not preclude boilerplate language because such releases are not intended to exempt from liability, but rather to compromise over an admitted liability.[231] This reading of *Callen* suggests that *Mendoza-Gomez* articulates an approach separate and distinct from either *Babbitt* or *Wicker*, namely that section 5 does not prohibit railroads from settling future unrealized claims through generalized boilerplate waivers and releases.

III. ANALYSIS OF THE THIRD, FIFTH, AND SIXTH CIRCUIT DECISIONS

Part III of this Note analyzes the legal reasoning behind the three Circuit Court of Appeals decisions that articulate approaches for determining whether a waiver or release is valid under section 5 of FELA. First, this part contends that the reasoning of the Third and Fifth Circuits is grounded in public policy considerations that fail to adhere to Congress' intent in crafting section 5 and represent an erroneous reading of the Supreme Court's decision in *Callen*. Next, this Part suggests that an analysis of the basic elements of a negligence action and the distinction between rights and claims under FELA demonstrates the Sixth Circuit is correct in contending that a FELA claim must be accompanied by a presently manifesting injury to be settleable through a waiver or release as a matter of law.

A. The Third and Fifth Circuit Incorrectly Assert that a Waiver May Include the Release of Future Unrelated Claims

An analysis of the legal reasoning and public policy considerations offered by the Third and Fifth Circuits demonstrates that the rulings in *Wicker* and *Mendoza-Gomez* are in direct conflict with the text,

228. *Id.* at *4 n.1.
229. *See id.*
230. *Mendoza-Gomez,* 2022 WL 1117698, at *4 n.1.
231. *See id.* at *3.

legislative history, and purpose of FELA.[232] However, this Note contends that this conflict is not the result of a resurgence of "freedom of contract" principles designed to limit employees' remedies under tort law, but rather an erroneous reading of the Supreme Court's interpretation of section 5 in *Callen*, which both decisions rest upon.

There is an ongoing power struggle between tort law and contract law in the American judicial system. Since the late 1970s and early 1980s, some scholars have argued that contract is slowly encroaching upon, and will eventually eliminate, the ability of aggrieved persons to recover in tort.[233] Others have argued that there is a general trend toward mandatory arbitration provisions and strict enforcement in the context of waivers and releases, which will accelerate the aforementioned process.[234] Several legal scholars have written obituaries, along the line of Grant Gilmore's *The Death of Contract*,[235] for tort law.[236] The arguments of these scholars reflect the emergence of a modern "freedom of contract" doctrine reminiscent of the days of *Lochner*.[237]

It is tempting to see this trend as the primary motivation behind the Third and Fifth Circuit decisions in *Wicker* and *Mendoza-Gomez*. In both cases, contractual devices were deployed to deprive an injured railroad worker of their statutory right to pursue negligence claims against their employer.[238] However, upon closer inspection of those opinions' policy rationales, it is clear that they are grounded in the

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232. *See supra* Sections I.A–B; *see also infra* Sections IV.A–B.

233. *See, e.g.*, Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 533 (1978); John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1195 (1984). *But see* John C.P. Goldberg, *Ten Half Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1270 (2008) (arguing, in part, that the increasing tendency of civil claimants to settle during the litigation process does not "signal[] the death of tort law").

234. *See* Ryan Martins et al., *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1294–98 (2020).

235. G. GILMORE, THE DEATH OF CONTRACT (1974).

236. *See, e.g.*, PATRICK ATIYAH, THE DAMAGES LOTTERY (1997) (concluding tort law is in decline because it fails to set an adequate system of compensation); PETER CANE, THE ANATOMY OF TORT LAW (1997) (arguing that tort law is inherently weak because it is not a unified whole, but rather a series of loosely related principles protecting certain interests and sanctioning some conduct).

237. *See, e.g.*, Tony Weir, *Reviewed: The Damages Lottery by P. S. Atiyah: The Anatomy of Tort Law by Peter Cane*, 57 CAMBRIDGE L.J. 204, 204–06 (1998); *see also* CANE, *supra* note 236, at 207.

238. *See* Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (1998); *see also* Mendoza-Gomez v. Union Pac. R.R. Co., No. 21-20397, 2022 WL 1117698, at *1–4 (5th Cir. Apr. 14, 2022).

concept of res judicata — specifically claim preclusion — rather than a conscious adoption of "freedom of contract" principles.

The Supreme Court has long held that the doctrine of res judicata, with respect to claim preclusion, reflects the public policy "that there be an end of litigation."[239] To indulge the opposite view the Court reminds us, "would result in creating elements of . . . uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."[240] Moreover, it would "impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution."[241]

Similarly, in *Wicker*, the Third Circuit articulated public policy rationales that resemble those traditionally associated with res judicata.[242] The *Wicker* court suggested that "it is entirely conceivable that both employee and employer could . . . want an immediate and permanent settlement."[243] Other lower courts adopting the *Wicker* standard have also proffered such rationales, with some going further to contend that the public interest in preserving judicial economy and preventing repeated litigation necessitates an approach for evaluating waivers and releases that precludes successive settlements each time an injury manifests.[244]

Even if "freedom of contract" and policy rationales for claim preclusion played some role in the *Wicker* and *Mendoza-Gomez* decisions, other courts have recognized that the statutory language of section 5 does not demonstrate that these considerations deserve blind adherence.[245] One reading of section 5 indicates that whether a claim was previously negotiated or settled between the parties is not materially relevant.[246] Rather, section 5 invalidates releases "the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability."[247] As the *Chacon* court deftly noted, "that section does not create an exception for situations in which an

239. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931).

240. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398–99 (1981) (quoting Reed v. Allen, 286 U.S. 191, 201 (1932)).

241. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107–08 (1991).

242. *See Wicker*, 142 F.3d at 700.

243. *Id*.

244. *See supra* notes 133–52 and accompanying text.

245. *See, e.g.*, Chacon v. Union Pac. R.R., 270 Cal. Rptr. 3d 521, 530 (Ct. App. 2020).

246. *See* 45 U.S.C. § 55 (2022).

247. *Id.*

employee knowingly assents to the employer's 'purpose or intent' in return for negotiated compensation."[248]

The Supreme Court's holding in *Schubert* supports this conclusion. There, the Court held that "the evident purpose of Congress [in re-enacting section 5 in 1908] was to enlarge the scope of the section, and to make it more comprehensive by a generic, rather than a specific description."[249] The court went on to state:

The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view.[250]

Moreover, as the Court noted in *Duncan*, the legislative history of the 1908 Act demonstrates that Congress considered adopting less restrictive language, but the stronger language ultimately survived consideration.[251]

Read in this context, *Callen*'s "controversies" requirement initially appears out of place. Though the *Callen* Court held that "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility,"[252] that holding aligns neither with Congress's stated intent in passing FELA nor the clear statutory text. More likely, it indicates a judicial decision to invoke claim preclusion as a policy rationale for barring successive causes of action in the context of FELA.

Thus, given the apparent irreconcilability of section 5's statutory text and *Callen*'s decisive language, any approach that indicates unrelated claims may be contracted away so long as the employee has knowledge of the potential risks, as in the *Wicker* and *Mendoza-Gomez* rulings, is built upon an insufficient foundation. Insofar as the standards set by the Third and Fifth Circuits intimate that "parties settling an existing claim [are] free to expand a release to include future unrelated

248. *Chacon*, 270 Cal. Rptr. 3d at 530 (quoting 45 U.S.C. § 55 (2022)).
249. *See* Phila., Balt., & Wash. R.R. Co. v. Schubert, 224 U.S. 603, 611 (1912).
250. *Id.* at 613.
251. *See* Duncan v. Thompson, 315 U.S. 1, 5 (1942); *see also infra* Section IV.B.
252. Callen v. Pa. Ry. Corp., 332 U.S. 625, 631 (1948).

risks,"[253] that conclusion is not explicitly supported by the Supreme Court's holding in *Callen* or the text of section 5.

B. The Sixth Circuit is Right About the Need for a Presently Manifesting Injury

In contrast, the Sixth Circuit's ruling in *Babbitt* is on a stronger footing. The four basic elements of a negligence claim[254] demonstrate that a claim under FELA must be accompanied by a presently manifesting injury to be actionable. Thus, the Sixth Circuit's contention that "a [valid] release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown"[255] correctly conceptualizes the role that the injury requirement plays when determining the allowable breadth of releases under section 5 of FELA.

As discussed in Part I of this Note,[256] "in response to mounting concern about the number and severity of railroad employees' injuries," Congress enacted FELA to provide "a compensation scheme for railroad workplace injuries . . . sounding in negligence."[257] It is axiomatic that a claim alleging negligence requires actual loss or damage.[258] Indeed, as torts scholar Dean William Prosser once observed, in the context of negligence, "the threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it . . . except in the case of some individual whose interests have suffered."[259]

Tort scholars consistently recognize that "a tort plaintiff must establish the occurrence of a realized wrong before liability may attach."[260] In this sense, the injury requirement "is a requirement of standing set by tort law."[261] For some scholars, like Benjamin C.

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253. *Chacon*, 270 Cal. Rptr. 3d at 531.

254. The four elements of a negligence claim are duty, breach, causation, and injury. *See* BENJAMIN C. ZIPURSKY ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 50 (5th ed. 2021).

255. Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 93 (1997).

256. *See supra* Sections I.A–B.

257. Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165 (2007).

258. *See* ZIPURSKY ET AL., *supra* note 254, at 50.

259. *See* W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS at 165 (5th ed. 1984).

260. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 U. VA. L. REV. 1625, 1634 (2002).

261. *Id.* at 1643.

Zipursky and John C.P. Goldberg, the realization of an injury prior to the ability to seek redress is what designates tort law as a form of private law, separate from public law arenas such as criminal and regulatory law.[262]

Courts, too, have considered the injury requirement in many contexts. With respect to FELA, the Supreme Court has not ruled directly on whether a presently manifested injury is a requirement to establish a valid negligence claim under the Act. However, in *Urie v. Thompson*,[263] the Court held that, for statute of limitations purposes, a FELA action brought for personal injury resulting from the inhalation of silica dust accrues when a silica-related injury manifests itself.[264]

Nevertheless, lower courts have considered this precise issue in the past. For instance, in *Brophy v. Cincinnati, New Orleans, & Texas Pacific Railway Company*,[265] the District Court for the Southern District of Ohio considered the validity of a release under section 5 of FELA several years prior to the *Babbitt* and *Wicker* decisions. In that case, the plaintiff sued his former employer for hearing loss allegedly sustained on the job.[266] The defendant moved for summary judgment, arguing that a settlement agreement between the parties over a previous FELA claim, filed after the plaintiff fell from a moving locomotive, acted as a bar to his new claim.[267] The settlement agreement stated that the plaintiff "waive[d] any rights to assert in the future any claims not now known or suspected."[268]

In opposition, the plaintiff argued, *inter alia*, that "because his cause of action for the hearing loss had not accrued at the time of the execution of the release, he could not waive his right to file a claim."[269] "Accepting as fact the [p]laintiff's claim that he had no knowledge of [his] hearing loss" at the time he signed the release, the court found that "clearly [the plaintiff's] claim had not accrued at the time he signed the release."[270] Analogizing the situation to property law, where "one cannot sell what one does not own," the court reasoned that "[b]y

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262. *See id.* at 1646.

263. Urie v. Thompson, 337 U.S. 163, 169 (1949).

264. *See id.* at 170–71.

265. Brophy v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 855 F. Supp. 213, 216 (S.D. Ohio 1994).

266. *See id.* at 214.

267. *See id.*

268. *Id.*

269. *See id.* at 216.

270. *Id.* at 216 (internal citations omitted).

extension, if one does not have a right, he may not exchange consideration for his ability to assert that right."[271]

Initially appearing to argue against its eventual holding, the *Brophy* court volunteered the same policy rationales that the *Wicker* court would articulate several years later.[272] However, it quickly questioned the validity of such reasoning, asking:

> [I]s such freedom of contract [and judicial economy] inherently more valuable than the policies that Congress intended the FELA to promote? A reading of [section 5] indicates that Congress intended to remove the ability of employees to sell off their FELA rights in exchange for short term gains as well as the ability of employers to pressure or defraud their employees into signing away those same rights . . . . In the instant case, the release goes beyond merely compromising a claimed liability and purports to exempt Defendant for all FELA liability arising out of Plaintiff's employment.[273]

As the *Brophy* court suggests, when determining whether a waiver is valid under section 5, the distinction between FELA *claims* and FELA *rights* is essential. *Callen*'s statement that parties may settle claims "where controversies *exist* as to whether there is liability"[274] suggests that while parties are permitted to settle FELA claims using waivers and releases, such freedom is limited to controversies which have already arisen at the time the release is signed. In this respect, it is clear that contractual devices may be used to waive FELA claims as they relate to a specific controversy. However, a close reading of the text of section 5 and an understanding of the basic elements of a negligence claim demonstrate that waiver of FELA claims which have not yet accrued is not permitted by section 5. Therefore, the Sixth Circuit's requirement that "a [valid] release must reflect a bargained-for settlement of a known claim for a specific injury"[275] adequately reflects the requirement that a FELA plaintiff must have a presently manifesting injury to have a valid claim.

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271. *Brophy*, 855 F. Supp. at 216 (citing Manis v. CSX Transp., Inc., 806 F. Supp. 177 (N.D. Ohio 1992)).

272. Lower courts adopting the *Wicker* standard also rely on similar policy rationales to justify extending the allowable breadth of releases to encompass known risks in addition to presently manifesting injuries. *See generally supra* Section II.B.1.

273. *Brophy*, 855 F. Supp. at 216.

274. Callen v. Pa. Ry. Corp., 332 U.S. 625, 631 (1948) (emphasis added).

275. Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 93 (1997).

IV. ARTICULATING A NEW STANDARD: THE "RIPENESS-PLUS-PRECLUSION" APPROACH

In *Dice v. Akron C. & Y. R.*, the Supreme Court recognized that "uniform application throughout the country [is] essential to effectuate [FELA's] purposes."[276] However, as Part II of this Note explains, the approaches articulated by several of the federal circuit courts are at odds with one another.[277] It is clear from the Court's precedents and the text of section 5 that a railroad can resolve an existing controversy and obtain a release of claims within that existing controversy without violating section 5.[278] But, the Court has not directly addressed the proper scope of the statutory prohibition in the context of a release — specifically, how far an existing controversy extends when settling a claim under FELA.

The Third, Fifth, and Sixth Circuits have each articulated methods for evaluating waiver validity that fail to provide a generally applicable approach which fully comports with section 5 of FELA. Part IV of this Note attempts to resolve this uncertainty by devising a new approach that better reflects when a waiver or release is valid or invalid under section 5. The "ripeness-plus-preclusion" approach, as this Note calls it, enjoys the advantages of the Sixth Circuit's bright-line approach while accommodating some of the justifiable concerns of the Third Circuit. Rooted in FELA's text, the ripeness-plus-preclusion approach respects both the history of the statute and the interpretive norms of the Supreme Court.

The ripeness-plus-preclusion approach sanctions devices that purport to waive related, presently accrued claims arising out of a single specified controversy where the requisite injury has manifested itself. However, releases that use boilerplate language to waive unrelated claims that have yet to accrue must be considered void as a matter of law under section 5 of FELA.

At least one other writer has previously argued that the courts should adopt the Sixth Circuit's bright-line rule without modification.[279] While the ripeness-plus-preclusion approach and the

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276. Dice v. Akron C. & Y.R., 342 U.S. 359, 362 (1952).

277. *Compare Babbitt*, 104 F.3d at 92–93 (holding that releases must reflect bargained-for settlement of a known claim for a specific injury), *with* Wicker v. Consol. Rail Co., 142 F.3d 690, 700–01 (1998) (rejecting the *Babbitt* standard and holding that releases identifying known risks do not violate Section 5). *See also supra* Part II.

278. *See Callen*, 332 U.S. at 629–31; *see also supra* Section I.C.

279. *See* Brooke Granger, Comment, *Known Injuries vs. Known Risks: Finding the Appropriate Standard for Determining the Validity of Releases Under the Federal Employers' Liability Act*, 52 HOUS. L. REV. 1463, 1484–93 (2015).

Babbitt bright-line rule are similar, there is one critical difference: whether section 5 precludes a railroad employee's release of future claims for injury arising out of a single controversy that was previously settled. The broad language of the *Babbitt* rule suggests that section 5 grants plaintiffs the right to violate the principle of claim preclusion by bringing successive claims for injuries resulting from a single controversy as they manifest.[280] The ripeness-plus-preclusion approach assumes the opposite — that section 5 reasonably restrains plaintiffs' ability to litigate a claim after settlement to facilitate judicial economy.

Under the ripeness-plus-preclusion approach, releases are invalid when they prevent a plaintiff from bringing future claims for injury arising out of conduct unrelated to the controversy at the center of the release. Take the example of a railway employee who is injured after falling from a moving locomotive.[281] He signs a settlement agreement, which includes a device designed to "waive any rights to assert in the future any claims not now known or suspected."[282] Several years later, he develops significant hearing loss and brings a new claim.[283] Under the standard proposed here, the waiver signed by the employee would not act as a bar to pursuing a subsequent claim for hearing loss because it is unrelated to the controversy targeted in the release. However, if instead the employee's new claim were for some sort of latent injury caused by their original fall from the moving locomotive, the standard proposed by this Note would recognize that the new claim is fundamentally linked to the controversy already settled and bar the plaintiff from pursuing it. Tethering a valid release to a specific existing claim is most consistent with the Supreme Court's holding in *Callen*, which states that the FELA is not violated when a release constitutes "a means of compromising a claimed liability."[284]

Ultimately, neither the Court nor Congress appear eager to resolve the present uncertainty as to the extent of waiver validity anytime soon. The Supreme Court has not ruled directly on what the allowable breadth of waivers and releases is under section 5 in over 75 years.[285] FELA litigants have previously petitioned the Court in the hopes of

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280. *See Babbitt*, 104 F.3d at 92–93.

281. *See* Brophy v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 855 F. Supp. 213, 216 (S.D. Ohio 1994) (involving similar facts).

282. *Id.*

283. *See id.*

284. *Callen*, 332 U.S. at 631.

285. *See id.*

securing a ruling that clarifies what the appropriate approach is.[286] However, that ruling never manifested because parties consistently settle their claims out of court after litigation has commenced,[287] and the Court routinely denies certiorari on this issue.[288] Moreover, intervention by Congress seems increasingly unlikely given the prospective difficulty of passing legislation in the politically divided 118th Congress.[289] Adding to the complexity is the fact that Congress has not amended FELA since 1939.[290]

For these reasons, this Note suggests that lower courts, who are the first to consider cases in which this issue presents itself, adopt the ripeness-plus-preclusion approach — at least until instructed otherwise by a higher authority. Part IV begins with an analysis of the text of FELA, arguing that its broad language and the interpretive norms of the U.S. Supreme Court compel correspondingly expansive application by lower courts and counsels against permitting the use of waivers to dispose of unrelated and unaccrued claims. Next, this Part suggests that even if the statutory language is ambiguous, the legislative history and purpose of FELA section 5 also demand the same result. Finally, this Part discusses public policy rationales that underpin the approach articulated above.

A. Analysis of the Text of Section 5 of FELA

At its heart, the question of whether a waiver or release is valid under section 5 is a question of statutory interpretation. When presented with controversies where statutory interpretation is required, the Supreme Court has instructed that the analysis begin with

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286. *See, e.g.*, Ill. Cent. R.R. Co. v. McDaniel, 951 So. 2d 523 (Miss. 2006), *cert. denied,* 549 U.S. 1208 (2007); Ill. Cent. R.R. Co. v. Acuff*,* 950 So. 2d 947 (Miss. 2006), *cert. denied,* 549 U.S. 1280 (2007); Anderson v. A. C. & S.*, Inc.,* 797 N.E.2d 537 (Ohio Ct. App. 2003), *cert. denied*, Norfolk & W. Ry. Co. v. Anderson*,* 543 U.S. 926 (2004).

287. For instance, the parties in the *Mendoza-Gomez* controversy described in Section II.C agreed to dismiss their appeal pursuant to a negotiated agreement. *See* Agreed Request for Dismissal at 1, Mendoza-Gomez v. Union Pacific R.R. Co., 2022 WL 17364934 (Oct. 20, 2022) (No. 22-225).

288. *See, e.g.*, *supra* note 282 and accompanying text.

289. *See* German Lopez, *Divided Government: A Split Congress Could Lead to Government Shutdowns and Economic Turmoil*, N.Y. TIMES (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/world/republican-house-divided-government-us.html [https://perma.cc/4J7N-TWL8].

290. *See* Karen D. Sitzman, *A Look at the Federal Employers' Liability Act in the Eighth Circuit*, 21 CREIGHTON L. REV. 1073, 1075 (1988) (noting that Congress has not amended the statute since 1939).

the text of the statute itself.[291] Section 5 of the FELA states, in relevant part: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."[292]

The major question posed by the language above is whether the statutory reference to "[a]ny contract, rule, regulation, or device whatsoever" includes waivers and releases for unrelated injuries that have yet to accrue.[293] A plain reading of section 5 indicates that all waivers and releases entered into by a railroad are invalid as a matter of law if they attempt to limit the railroad's liability. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[294] However, the expansive nature of the term "any" does not definitively determine whether releases purporting to extinguish an unrelated claim that has yet to accrue are valid. The Supreme Court has held that legislatures may use the term "any" in a context that reins in the extent to which it applies.[295] "Thus, even though the word 'any' demands a broad interpretation, we must look beyond that word itself."[296]

The Court routinely notes that "just as a single word cannot be read in isolation, nor can a single provision of a statute."[297] Rather, the Court instructs us:

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings

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291. *See, e.g.*, Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.").

292. 45 U.S.C. § 55 (2022).

293. *Id.*

294. United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)); *see also* United States v. Alvarez-Sanchez, 511 U.S. 350, 357–58 (1994) (providing that a statute referring to "any" law enforcement officer includes all law enforcement officers — federal, state, or local — capable of arresting for a federal crime).

295. *See, e.g.*, United States v. Palmer, 3 Wheat. 610, 631 (1818) (Marshall, C.J.) (establishing that "general words" such as the word "any" must "be limited" in their application "to those objects to which the legislature intended to apply them"); Nixon v. Mo. Mun. League, 541 U.S. 125, 132 (2004) (finding that "any" means "different things depending upon the setting").

296. Small v. United States, 544 U.S. 385, 388 (2005) (internal citation omitted).

297. Smith v. United States, 508 U.S. 223, 234 (1993) (holding that context of statutory scheme demonstrates the transport, sale, export, or trade of a firearm constitutes "use" for purpose of criminal conviction).

> produces a substantive effect that is compatible with the rest of the law.[298]

To the extent that there is uncertainty here about the scope of the phrase "any contract, rule, regulation, or device whatsoever," the rest of the statutory context sets it to rest.[299]

For instance, in section 1 of FELA, Congress sets forth the standard for when liability attaches under the statutory scheme. The statute notes that "every common carrier by railroad . . . shall be liable in damages to any person *suffering* injury . . . resulting in whole or in part from the negligence of any . . . such carrier."[300] This language reinforces the conclusion that claims for injuries that have not manifested themselves do not satisfy the threshold requirement that a negligence plaintiff must show some sort of loss, damage, or harm before their claim accrues.[301] The language indicating that a plaintiff must be "suffering injury" for liability to attach is repeated in sections 2 and 9 of FELA.[302] Moreover, section 6 states that the statute of limitations begins to run on "the day the cause of action accrue[s]."[303] Importantly, the text of FELA does not indicate that Congress intended to permit liability to attach where persons knew of the *potential* for an injury to manifest, as the rulings in *Wicker* and *Mendoza-Gomez* suggest.[304] Instead, Congress chose statutory language in accordance with the readily accepted notion that to recover for the negligence of another, a plaintiff must be "suffering" some sort of injury for which liability would normally attach.[305] Although the phrase "any contract, rule, regulation, or device whatsoever" was likely not intended to invalidate *every single* waiver or release entered into by a railroad, an analysis of the whole statutory context demonstrates that any such device that attempts to extinguish a claim before it has accrued must be invalid as a matter of law.[306]

Still, any reading of section 5 that purports to invalidate waivers or releases that extinguish claims directly related to a single controversy that was previously litigated or settled is unjustifiably expansive. The

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298. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (citation omitted).

299. 45 U.S.C. § 55 (2022).

300. *Id.* § 51 (emphasis added).

301. *See generally supra* Section III.B.

302. *See* 45 U.S.C. §§ 52, 59 (2022).

303. *Id.* § 56.

304. *See id.* §§ 52, 59 (2022); *see also supra* Section III.A.

305. *See supra* Section III.B.

306. 45 U.S.C. § 55 (2022).

Supreme Court has consistently subscribed to the idea that judges may deviate from even the clearest text when a given application would otherwise produce absurd results.[307] Here, that presumption against absurdity counsels strongly against adopting a standard that permits plaintiffs to violate the well-established doctrine of claim preclusion.[308] This presumption likely informed the Court's resolution of this issue with respect to section 5 of FELA in the *Callen* decision, where the Court held that the Act is not violated when a release constitutes a compromise where controversies exist.[309] Thus, the ripeness-plus-preclusion approach articulated here maintains that section 5 permits releases to extend only to related claims that arise out of a single controversy, and therefore claims unrelated to that controversy may not be extinguished by contractual device.

Moreover, a close reading of section 5 indicates that there is no statutory requirement, nor any textual basis, for a court to consider the parties' knowledge when analyzing whether a waiver or release is valid as a matter of law. In fact, a plain reading of section 5 indicates that whether a claim was previously negotiated or settled between the parties is not materially relevant.[310] Section 5 invalidates releases "the purpose or intent of which shall be to enable any common carrier to exempt itself from liability."[311] As the Supreme Court previously identified in *Duncan*, the "purpose" referenced in section 5 is best conceptualized as a reference to the eventual effect of the release, not the actual "intent" of the persons or entities who are party to it.[312] Therefore, the ripeness-plus-preclusion approach "does not create an exception for situations in which an employee knowingly assents to the employer's 'purpose or intent' in return for negotiated compensation."[313] Because Congress did not include a specific and direct reference to the knowledge of the parties, and the Supreme Court has previously held that courts should strive to avoid creating exceptions beyond those specified by Congress,[314] the ripeness-plus-preclusion approach to evaluating waiver validity properly reflects the

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307. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 429 (1998); Church of the Holy Trinity v. United States, 143 U.S. 457, 465, 472 (1892); *see also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 986 (1995).

308. *See supra* notes 234–36 and accompanying text.

309. *See* Callen v. Pa. Ry. Corp., 332 U.S. 625, 631 (1948).

310. *See* 45 U.S.C. § 55 (2022).

311. *Id.*

312. *See* Duncan v. Thompson, 315 U.S. 1, 4 (1942).

313. Chacon v. Union Pac. R.R., 270 Cal. Rptr. 3d 521, 530 (2020) (quoting 45 U.S.C. § 55 (2022)).

314. *See, e.g.*, United States v. Smith, 499 U.S. 160, 166–67 (1991).

clear text of section 5 by avoiding consideration of the parties' knowledge and intent regarding workplace-related risks.

B. The Legislative History of FELA Supports the Ripeness-plus-Preclusion Approach

However, even if one concedes that the text of section 5 is ambiguous to some extent, the express purpose and legislative history of FELA supports adopting the ripeness-plus-preclusion approach, where releases purporting to extinguish unrelated and unaccrued future claims are invalid as a matter of law. When confronted by ambiguities in other sections of FELA, the Supreme Court has consistently declined to adopt a restricted interpretation by relying on the humanitarian purpose and clear legislative history of the Act.[315] In the context of waivers and releases related to railroad employment, this unrestricted interpretive framework compels a broad reading that can accommodate the approach proffered here: that contractual devices with boilerplate language that function to deprive railroad workers of their FELA rights are invalid under section 5.

Put simply, the purpose of FELA is to safeguard railroad workers from the historically abusive environment that railroad companies maintain.[316] Cognizant of physical danger that railroad employees regularly face, Congress created a statutory remedy to shift the human cost of doing business from employees to their employers.[317] The Supreme Court has consistently interpreted FELA in line with the humanitarian purpose Congress enacted it to accomplish and instructs lower courts to "liberally construe[] FELA to further Congress' remedial goal."[318] For instance, the Court has determined that FELA was "a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work,"[319] and are helpless to provide adequately for their own safety."[320] Moreover, the Court has acknowledged that FELA was "designed to put on the railroad

315. *See, e.g.*, Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 533 (1994) (holding that the FELA's broad remedial scope suggests that the term "injury" can stretch to encompass emotional damage); Urie v. Thompson, 337 U.S. 163, 180–81 (1949) (finding that occupational diseases such as silicosis constitute compensable physical injuries under FELA, rejecting the argument that the statute covered only injuries and deaths caused by accidents).

316. *See supra* Sections I.A–B; *see also* Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

317. *See generally* Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 57–58 (1949).

318. *Gottshall*, 512 U.S. at 543.

319. Sinkler v. Mo. Pac. R.R. Co., 356 U.S. 326, 329 (1958).

320. *Id.* at 329.

industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."[321]

This Note has already traced the story of FELA's first enactment in 1906, its subsequent invalidation by the Supreme Court, and Congress' re-enactment and amendment of the Act in 1908 and 1939, respectively.[322] However, the legislative history surrounding section 5 itself also demonstrates that the text of the statute was purposefully designed to be as expansive as possible in response to employer efforts to contract themselves out of liability that had been imposed by similarly structured statutory regimes at the state level across the nation.[323]

As enacted in the original 1906 Act, section 3 of FELA set forth limitations on an employer's attempts to exempt itself from liability through contract.[324] The language chosen by the original enacting Congress was more specific and far less comprehensive than that found in the present Act.[325] Rather than voiding "any contract, rule, regulation, or device whatsoever,"[326] section 3 of the 1906 FELA stated "that no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee . . . shall constitute any bar or defense to any action brought to recover damages."[327] After the 1906 FELA was struck down as an impermissible exercise of Congress' power to regulate interstate commerce,[328] Congress responded by re-enacting FELA with several substantive alterations — including major changes to the language that now makes up section 5 of the Act.[329]

An inspection of the Congressional committee hearings and reports related to the 1908 re-enactment reveals that two different versions of the bill were introduced in the Senate.[330] While one version copied verbatim the more restricted language found in section 3 of the 1906

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321. *Wilkerson*, 336 U.S. at 68 (Douglas, J., concurring).

322. *See supra* Sections I.A–B.

323. *See generally* Duncan v. Thompson, 315 U.S. 1, 5–6 (1942).

324. *See* FELA of 1906, Pub. L. 59-219, § 3, 34 Stat. 232, 232–33.

325. *Compare id*., *with* 45 U.S.C. § 55 (2022).

326. 45 U.S.C. § 55 (2022).

327. § 3, 34 Stat. 232 (1906).

328. *See* The Employers' Liability Cases, 207 U.S. 463, 504 (1908).

329. *See generally* H.R. REP. NO. 60-1386 (1908).

330. *Compare Liability of Common Carriers to Employees: Hearing on S. 3080 Before a Subcomm. Of the S. Comm. On the Judiciary*, 60th Cong. 3 (1908) (reprinting Senate bill 3080 which contains the language of section 5 seen today), *with* S. REP. NO. 60-460, at 4 (1908) (reprinting Senate bill 5307 with the more restricted language of the original section 3).

Act, it was the version which presented the broad language of section 5 seen today that survived consideration.[331] That change, from "contract" to "any contract, rule, regulation, or device, whatsoever," is more than significant enough to suggest that section 5's applicability extends to every variety of agreement that seeks to limit liability set forth under FELA. Further evidence that Congress intended to significantly expand the scope of the clause defining which contracts and arrangements are invalid of may be found in the history of the proviso clause of section 5.[332] That clause permits railroads to reduce the amount the employee is entitled to recover if the employer contributed to a benefits program which the employee has access to.[333] Unlike the clause that defines which contracts and arrangements are invalid, the proviso clause was retained by Congress without any change or alteration from the 1906 Act,[334] demonstrating that the choice to expand the language of section 5 to be as broad as possible was intentional.

Moreover, the members of Congress who passed the 1908 Act paid close attention to similar laws enacted at the state level, as well as the experience of workers under those statutory regimes.[335] At the time, there were widespread attempts by employers to contract themselves out of liability that the state-level acts were designed to impose.[336] The House Judiciary Committee report on the 1908 FELA set forth all of the state statutes then in effect, which varied in both scope and language.[337] While some declared agreements attempting to exempt employers from liability invalid only when they were part of employment contracts,[338] others specifically restricted the language as applying to agreements entered into before an injury occurs.[339] Still others invalidated agreements of any type, regardless of when made.[340] The fact that the various state statutes targeting such contractual

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331. *See* S. REP. NO. 60-460, at 4 (stating that the language of Senate bill 5307 would be struck out and replaced with language of Senate bill 3080).

332. *See* 45 U.S.C. § 55 (1908) ("Provided, That in any action brought against any such common carrier or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . .").

333. *See id.*

334. *Compare* 45 U.S.C. § 55 (2022), *with* FELA of 1906, Pub. L. 59-219, § 3, 34 Stat. 232, 232–33.

335. *See* H.R. REP. NO. 60-1386, at 6.

336. *See* Duncan v. Thompson, 315 U.S. 1, 6 (1942).

337. *See* H.R. REP. NO. 60-1386, at 30–75.

338. *See id.* at 38 (reprinting Georgia's law).

339. *See id.* at 39 (reprinting Indiana's law).

340. *See id.* at 34 (reprinting California's law).

agreements were explicitly presented to Congress demonstrates that the rejection of the restrictive language of section 3 of the 1906 FELA constitutes an explicit abandonment of the limitations such language would have imposed. Further, as the Court in *Duncan* suggests, the adoption of section 5 of the present Act without any of the limitations found in the state statutes "argues persuasively that Congress wanted [s]ection 5 to have the full effect that its comprehensive phraseology implies."[341]

Thus, even if one concedes the text of section 5 is facially ambiguous as to the allowable scope of waivers and releases under FELA, the legislative history of the Act puts any such ambiguity to rest. Congress' intent in re-enacting the FELA in 1908 was, in part, to enlarge the scope of section 5 and make it more comprehensive by imbuing it with broad and expansive language rather than a specific, restricted, and restrained description. Moreover, given Congress' overarching humanitarian purpose in enacting FELA in the first place, any interpretation of section 5 that works to deny recovery to injured railroad workers functions to stymie Congressional intent. As a result, the ripeness-plus-preclusion approach properly reflects the legislative history of section 5 and Congress' express purpose in enacting FELA. Contractual devices that waive an employee's right to pursue unrelated and unaccrued claims in the future must be invalid under section 5.

C. Public Policy Rationales Underpinning the Ripeness-plus-Preclusion Approach

Beyond the text, purpose, and legislative history of section 5 of FELA, there are several pragmatic policy considerations that weigh in favor of the approach to evaluating waiver validity articulated above. First is that the significant gap in bargaining power between employee and employer, and the increasing ease with which FELA claims are waived or released, creates perverse incentives for employers to rid themselves of the obligations imposed by FELA at the lowest possible cost. Moreover, the use of general boilerplate releases that include all future claims, beyond those presently accrued, is contrary to the rule of law and subverts our democratic process. Lastly, the current system promotes uneven settlements for all parties because there is no uniform method for negotiating the settlement of potential claims for future risks where actual loss or damage to a party has not yet occurred.

Though this Note does not argue that the *Mendoza-Gomez* and *Wicker* courts explicitly support some sort of judicially-engineered

341. *Duncan*, 315 U.S. at 6.

return to the *Lochner*-era concept that employees and employers should be able to strike a bargain without government oversight, it does contend that those courts have tacitly assumed that equal bargaining power exists between employees and employers when attempting to negotiate settlements in the context of railroad employment. That erroneous assumption, when combined with the increasing frequency with which FELA claims are settled,[342] sets a dangerous precedent that runs counter to the well-established purpose of FELA: to protect an inherently vulnerable class of laborers.[343] According to a report prepared by the Transportation Research Board, at least 80% of FELA claims are settled quickly without litigation.[344] For 70% of all claims, the employee and railroad negotiate a settlement directly without the employee retaining legal representation.[345] One railroad that participated in generating the report indicated that it makes the first offer to the employee in about 95% of such cases "because it knows from experience what such cases are worth."[346]

However, the simple fact remains that "[m]ost individual workers need[] a job more than their employers need[] any particular worker."[347] As a result, employees are far more willing to compromise when forced to decide between returning to work and pursuing a FELA claim.[348] This phenomenon is most visible in the context of voluntary cash advances between the railroad and its injured employee where a potential settlement has not been finalized. Because sickness benefits and private insurance, at best, cover only about half of the average employee's earnings, injured railroad employees are often "faced with a significant loss of income during periods of recovery from injury."[349] As the Transportation Research Board explains:

> [R]ailroad employees have expressed the view that railroads use advances to try to force workers to settle their claims early. By providing some money but not enough to maintain the worker's normal income, the employer "starves out" the employee, who returns to work too soon or settles for less than he or she is due.[350]

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342. *See infra* notes 344–46 and accompanying text.

343. *See supra* Sections I.A–B, IV.B.

344. *See* TRANSP. RSCH. BD., COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT: SPECIAL REPORT 241, at 68 (1994).

345. *See id.* at 66–68.

346. *Id.* at 67.

347. SAM BAGENSTOS, ECON. POLICY INST., LOCHNER LIVES ON 1, 5 (2020), https://files.epi.org/pdf/215889.pdf [https://perma.cc/4P86-8LC5].

348. *See* TRANSP. RSCH. BD., *supra* note 344, at 60–73.

349. *Id.* at 64.

350. *Id.*

Thus, settlement agreements that contain waivers or releases of unrelated and unaccrued claims deserve greater scrutiny than the rulings in *Wicker* and *Mendoza-Gomez* suggest. Seen in this context, the Third Circuit's fact-intensive standard, which accommodates the railroad industry's interest in immediate and permanent settlement to limit future liabilities runs counter to the text and purpose of FELA and fails to account for the unequal bargaining power present in the railroad employment context.[351] As the Supreme Court has previously indicated, the "reining in employer liability . . . is both unprovided for by the language of FELA and inconsistent with the Act's overall recovery facilitating thrust."[352] In contrast, the ripeness-plus-preclusion approach, which states that waivers purporting to give up unaccrued and unrelated claims are invalid as a matter of law, adequately recognizes how unequal bargaining power between employers and employees has a "pervasive and insidious impact on workers."[353]

Moreover, the growing trend of general boilerplate releases, as exemplified in the *Mendoza-Gomez* case, is contrary to the rule of law and presents a turn toward a kind of "democratic degradation," both of which Margaret Jane Radin warns against in her book, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*.[354] Radin describes "democratic degradation" as the way in which important legislatively created rights can be diminished or waived through contractual agreement.[355] In essence, she argues that businesses should not be able to undo, through simple contractual provisions, rights which have been created through popular, democratic lawmaking processes.[356] Additionally, Radin contends, "[w]hen [employers can easily divest employees] of rights that are part of a legislative regime arrived at only with much difficulty, debate, and compromise, it makes a sham of the apparatus of democratic governance."[357] Here, allowing

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351. *See* Wicker v. Consol. Rail Corp., 142 F.3d 690, 700 (3d Cir. 1998).

352. Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 161 (2003).

353. *See* BAGENSTOS, *supra* note 347, at 3.

354. *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW 33–51 (2013).

355. *See id.* at 40. Radin also argues that some of these waivers of rights "erase the legal rights that form the infrastructure that makes contractual private ordering possible [and that firms using such waivers] . . . are using contract to destroy the underlying basis of contract." *Id*. at 36 (emphasis omitted).

356. *See id.* at 39–40.

357. Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, *in* PRIVATE LAW & THE RULE OF LAW 288, 298 (L.M. Austin & D. Klimchuk eds., 2014) [hereinafter Radin, *A Threat to the Rule of Law?*]; *see also* Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate*, *in* PHILOSOPHICAL

waivers for unrelated and unaccrued claims would circumvent Congress' intent to create the legal right for railroad employees to seek redress from railroad companies for their negligence.[358]

Radin also argues that the deletion of rights created using the democratic lawmaking process is fundamentally contrary to the rule of law.[359] This is especially true in the context of railroad employment, where, as Radin writes:

> People cannot watch their backs every hour of every day. They cannot find out which firms hire employees that are trustworthy and competent and supervise them properly, which firms use machines that are well-made and routinely maintained and implement safety standards for their use, which firms do not use toxic substances, and so on.[360]

States have a duty to recognize and protect the rights of their citizens, and that duty is violated when the state's power is used to enforce contractual boilerplate that deprives a person of those rights.[361] By permitting the state to abdicate its responsibility in this context, and shifting the duty to be cognizant of all present dangers to the individual, waivers that utilize boilerplate language function in an arbitrary and inequitable manner.[362]

For example, the waiver at the center of the *Mendoza-Gomez* case prevented an injured railroad worker from exercising his statutory right to bring a claim for negligence against his former employer.[363] There, the waiver stipulated that "any and all claims, accruing then and in the future, against Union as a consequence of any 'alleged illnesses, injuries, cancers, future cancers, diseases, and/or death' that purportedly resulted from [the plaintiff's] exposure to toxic chemicals while working for Union."[364] The court saw no issues with the contractual language, despite the fact that it failed to specify the scope, duration, or particular chemicals the plaintiff may have risked

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FOUNDATIONS OF CONTRACT LAW 215, 230 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

358. *See supra* Sections I.A–B, IV.B.

359. *See* Radin*, A Threat to the Rule of Law?*, *supra* note 357, at 297.

360. *Id.*

361. *See id.*

362. *See id.* "It is arbitrary because [it is] deployed at the will of firms for firms' benefit. It is contrary to equality before the law because society becomes divided into groups that retain legal redress of grievances and those that do not." *Id.* at 297.

363. *See* Mendoza-Gomez v. Union Pac. R.R. Co., No. 21-20397, 2022 WL 1117698, at *1–4 (5th Cir. Apr. 14, 2022).

364. *Id.* at *1.

exposure to through employment with the defendant.[365] Instead, it found that the release was specific to the injuries the plaintiff suffered at the time it was signed and those he was currently seeking redress for, explicitly stating that "the list of claims Mendoza-Gomez released was not a boilerplate list of hazards unrelated to his current claims and he cannot now claim that the release did not evince his clear intent to release [the defendant] from liability for his alleged cancer in this suit."[366]

However, the Fifth Circuit's ruling in *Mendoza-Gomez* appears to be an outlier. Generally speaking, courts recognize the potential threat that boilerplate language poses in the FELA context and are skeptical of devices that employ it.[367] For instance, in *Hartman v. Illinois Central Railroad Company*,[368] the case at the heart of the Rule 28(j) letter in *Mendoza-Gomez*, the court considered a boilerplate release with language similar to the language in *Mendoza-Gomez*.[369] There, the court found that the release's failure to specifically identify and discuss the scope and duration of the risks faced by the plaintiff rendered it "a boilerplate list of hazards to which he may have been exposed."[370] Because "the rule of law at its most basic level requires that some rights not be privatized such that they can be curtailed and sometimes eradicated by firms," this Note argues that waivers containing boilerplate language must be invalid under section 5 because of the danger that they could be employed by railroad employers to deprive employees of statutorily-guaranteed rights.[371]

Lastly, waivers for unrelated and unaccrued future FELA claims promote uneven settlements across the railroad industry and must therefore be avoided. Under the fault-based system of injury compensation created by FELA, "there is a potential for different settlements for the same injury."[372] This is especially true for the

365. *See id.* at *4 n.1.

366. *Id.*

367. *See, e.g.*, Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998) (noting that "where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boiler plate").

368. No. 20-1633, 2022 WL 912102, at *1 (E.D. La. Mar. 29, 2022).

369. *See id.* The language of the release stated that the plaintiff agreed to waive "any and all claims, losses, damages, injuries or diseases directly or indirectly caused by or resulting from any alleged exposure to fumes, diesel fumes, fuel fumes, paint vapors, methyl bromide, ammonia gas, lead, PCB, dioxins or other toxic or noxious chemical exposure and all other fumes, dusts, mists, gases and vapors from any chemical or agent." *Id.* at *1.

370. *Id.* at *2.

371. Radin, *A Threat to the Rule of Law?*, *supra* note 357, at 292.

372. TRANSP. RSCH. BD., *supra* note 344, at 161.

limited number of claims that go to trial, as different juries and jurisdictions may produce different results.[373] However, the danger is also present in the nearly 80% of FELA claims that are settled out of court.[374]

Railroad workers have long recognized that disparities exist between the size of settlements for similar injuries.[375] One factor that likely contributes to the uneven results is that "in [FELA] negotiation[s], both sides tend to use rules of thumb to decide what they are seeking and for what they will settle."[376] The common result of this process is that the parties develop and employ tacit formulas and arbitrary justifications to ensure that their settlement offers match their perceived level of liability.[377] This result is reinforced by the adversarial nature of the fault-based compensation system set up under FELA, which tends to reduce the willingness of the parties to conduct themselves in a collaborative or cooperative manner.[378]

However, the danger posed by uneven settlements is compounded under the Third Circuit's standard, which permits parties to contract away claims for risks that were known at the time the device was executed.[379] The problems posed by the tacit use of arbitrary formulas and justifications are amplified when parties must quantify damages to be paid for future claims based on hypothetical injuries which have yet to manifest. Some scholars have recognized that, even where some specific harm or damage is well established by the record, "valuations of personal injury vary enormously for injuries of the same basic severity, and the variation remains considerable even controlling for obvious differences in circumstances like age, income, and medical

373. *Id.*

374. *Id.*; *see also* TRANSP. RSCH. BD., *supra* note 344, at 161 and accompanying text.

375. *See* Michael R. Crum, Frank J. Dooley & Paula C. Morrow, *Employee Attitudes About Railroad Injury Compensation*, 35 TRANSP. J. 15, 22 (1995) (noting that in empirical study on employee satisfaction with FELA settlement process, "[t]he second lowest level of satisfaction was expressed on the fairness or equity question — the size of settlement relative to those with similar injuries").

376. TRANSP. RSCH. BD., *supra* note 344, at 67. The report further clarifies that these "rules of thumb" include various factors such as "their view of the comparative negligence, the likelihood of a favorable jury outcome given the venue, the nature of the injury, the character of the employee, and the pattern of settlements in similar cases." *Id.*

377. *See id.* at 5, 67, 72, 161.

378. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-96-199, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED 16–17 (1996).

379. *See* Wicker v. Consol. Rail Corp., 142 F.3d 690, 700–01 (1998).

bills."[380] If the risk of uncertain and uneven settlement agreements exists in situations where a present injury is available for inspection, that risk is amplified in the context of an injury that has yet to manifest. Thus, the ripeness-plus-preclusion approach for evaluating waivers and releases under section 5 does not permit the waiver of unrelated and unaccrued claims because doing so will promote the uneven settlement of FELA claims.

CONCLUSION

Without action from the Supreme Court or Congress, uncertainty as to the permissible scope of waivers and releases under section 5 of FELA will persist. With three competing standards, courts across the country must grapple with the decisions of the Third, Fifth, and Sixth Circuits when deciding if a waiver negotiated as part of a FELA settlement is valid. As the law currently stands, releases that extinguish a railroad employer's liability for unrelated claims that have yet to accrue may be valid depending on which standard is applied. However, as previously discussed in this Note, the purpose and intent of FELA and an analysis of the text of section 5 demands that such contractual devices must be invalid as a matter of law.

Despite its popularity among lower courts across the country, the Third Circuit's fact-intensive standard erroneously permits the release of claims which are unrelated to the initial controversy and have yet to accrue, so long as the parties intended to do so. Moreover, the Fifth Circuit's recent ruling in *Mendoza-Gomez*, incorrectly suggests that section 5 is not offended by the use of boilerplate language to waive future FELA claims as part of a negotiated settlement. While the Sixth Circuit's bright-line rule correctly identified that the scope of waiver validity does not extend to mere risks that have yet to accrue into fully actionable FELA claims, it ultimately fails to account for the principle of claim preclusion and mistakenly suggests that employees may bring renewed claims each time a new injury arising out of a settled dispute manifests itself.

Therefore, this Note suggests that lower courts adopt the ripeness-plus-preclusion approach articulated above. Section 5 of FELA permits only those releases which waive accrued claims arising out of a single specified controversy where the requisite injury has manifested. Additionally, public policy considerations demand that waivers using boilerplate language designed to waive unaccrued and unrelated claims

380. James F. Blumstein et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 YALE J. ON REGUL. 171, 174 (1990).

are considered void as a matter of law. Adopting this approach will bolster the worker-protective purpose of FELA and ensure that this inherently vulnerable class of laborers receives the protection that Congress originally intended.