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The Construction of Indemnity Agreements Under the Federal Employers Liability Act: a Conflict of Public Policy and Contract Law

Comment

THE CONSTRUCTION OF INDEMNITY AGREEMENTS UNDER THE FEDERAL EMPLOYERS LIABILITY ACT: A CONFLICT OF PUBLIC POLICY AND CONTRACT LAW

INTRODUCTION

In 1908 the Federal Employers Liability Act[1] was enacted to make it reasonably possible for railroad workers to recover for personal injuries sustained in the course of their employment.[2] The Act supplanted the inadequate common law rules of recovery[3] for railroad injuries and created a federal cause of action[4] grounded in a railroad's failure to provide its employees with a safe place to work.[5] This statutory scheme stops short of imposing absolute liability upon the railroad for injuries to its employees by requiring that the injury or death result in whole or in part from the negligence of the carrier, including the railroad's negligent failure to furnish its employees with adequate equipment or safe surroundings.[6] The burden of proving negligence under the statute is mitigated, however, by the fact that the existence of an unsafe condition may itself be viewed as evidence of negligence which will permit the case to go to the jury if causation might be inferred.[7]

As a practical matter, therefore, any failure to maintain a safe place to work will usually constitute negligence under the FELA standard, even when the injury or death occurs on premises which are neither maintained

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1. 45 U.S.C. §§ 51-60 (1970) [hereinafter referred to as FELA or the Act].

2. In Justice Douglas' words, "[t]he Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). Lewis, *Federal Employers Liability Act,* 14 S.C.L.Q. 447, 447 (1962) reports that the average life expectancy of a railroad switchman in 1893 was seven years and that in 1907, the year before the Act was passed, 4,534 railroad men were killed in railroad work and 87,634 were injured.

3. 45 U.S.C. § 53 (1970) removes contributory negligence as a bar to recovery and provides for a diminution of damages in proportion to the plaintiff's contributory negligence, while §§ 51 and 54 together eliminate the defenses of assumption of risk and the fellow servant rule.

4. 45 U.S.C. § 56 (1970) provides for concurrent jurisdiction in state and federal courts.

5. Although the Act does not speak of a duty to provide a "safe place to work," this term is frequently employed by courts to describe the railroad's FELA liability for injuries caused by negligent defects in its roadbed, rolling stock, or other equipment. *See, e.g.,* Terminal R.R. Ass'n v. Fitzjohn, 165 F.2d 473, 476-77 (8th Cir. 1948).

6. 45 U.S.C. § 51 (1970).

7. *E.g.,* Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring); Bailey v. Central Vt. Ry., 319 U.S. 350, 351-53 (1943). *See generally* Richter & Forer, *Federal Employers' Liability Act,* 12 F.R.D. 13 (1952).

nor controlled by the railroad.[8] The duty to maintain safe conditions is nondelegable,[9] and the fact that the railroad does not own the place at which its employee works and is therefore under no primary obligation to keep it safe, does not relieve the railroad of the liability created by the statute.[10] In cases where a railroad employee is injured in the course of employment but on unsafe premises owned by a third party, the railroad's negligence is usually described in terms of a failure either to secure the correction of the offending condition or to warn its employee of the danger created by it.[11]

Railroads which incur liability by virtue of this nondelegable statutory duty to maintain safe working conditions often claim indemnity from those third parties whose actual maintenance of an unsafe condition results in a compensable injury to a railroad employee. Such claims commonly arise in connection with the operation of trains on spur tracks constructed over property owned by a private industry in order to connect the industry's plant or warehouse with the railroad's main right of way. The contracts executed by railroads with various industries for the construction and maintenance of such privately owned sidetracks usually contain an indemnity agreement[12] composed of two clauses: The first clause typically provides that the industry shall fully indemnify the railroad for losses resulting from any negligent act or omission of the industry or any unsafe condition on or about the sidetrack (occasionally referring specifically to unsafe track clearances),[13] while the second clause stipulates more generally that losses incurred

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8. *E.g.*, Denver & R.G.W.R.R. v. Conley, 293 F.2d 612, 613 (10th Cir. 1961); Kooker v. Pittsburgh & L.E.R.R., 258 F.2d 876, 878 (6th Cir. 1958); Terminal R.R. Ass'n v. Fitzjohn, 165 F.2d 473, 476-77 (8th Cir. 1948); Porter v. Terminal R.R. Ass'n, 327 Ill. App. 645, 649, 65 N.E.2d 31, 33 (1946).

9. *E.g.*, Payne v. Baltimore & O.R.R., 309 F.2d 546, 549 (6th Cir.), *cert. denied*, 374 U.S. 827 (1962).

10. *E.g.*, Chicago G.W. Ry. v. Casura, 234 F.2d 441, 447 (8th Cir. 1956).

11. *See, e.g.*, Booth-Kelly Lumber Co. v. Southern Pac. Co., 183 F.2d 902, 912 (9th Cir. 1950).

12. It is generally recognized that because the railroad is not required to furnish sidetracks to industries as part of its duties to the public as a common carrier, it may condition its consent to provide one upon the execution of a contract of indemnity. *See, e.g.*, Sunlight Carbon Co. v. Saint Louis & S.F.R.R., 15 F.2d 802, 805 (8th Cir. 1926).

13. *See, e.g.*, text accompanying note 23 *infra*. Some sidetrack agreements refer only to "acts or omissions" of the industry in the indemnity clause, but contain an additional covenant in which the industry promises to maintain safe track clearances. *See, e.g.*, Booth-Kelly Lumber Co. v. Southern Pac. Co., 183 F.2d 902, 905 (9th Cir. 1950). Under such agreements, the industry's failure to maintain safe clearances is, of course, interpreted as a negligent "act or omission" within the meaning of the indemnity clause. *See, e.g., id.* at 911. Other agreements refer to the railroad's right to be held harmless for injuries resulting from unsafe clearances in a third clause which is not merely a covenant in that it expressly provides for indemnity. *See, e.g.*, text accompanying note 88 *infra*. Each of these three drafting alternatives appears to express, with varying degrees of specificity, the intent of the parties that the railroad be fully indemnified for losses resulting from the industry's failure to maintain safe track clearances along the sidetrack.

through the joint or concurrent negligence of the railroad and the industry shall be borne by them equally.[14] This second clause entitles the railroad to contribution from the industry, rather than full indemnity.

The vast majority of cases in which the construction and application of these two clauses have been litigated have arisen out of a recurrent situation in which a railroad employee is killed or injured as a result of the railroad's operation of a train over a spur track rendered unsafe by a condition (usually an encroachment on safe track clearances) created or maintained by the industry. The railroad, after being found negligent under the statute or reaching a settlement, sues under the indemnity contract to recover amounts paid to its employee or his estate. The application of these dual-clause contracts to this recurrent fact pattern has consistently generated an interesting conflict between elementary canons of contract construction — which suggest that the parties must have intended the full indemnity clause to apply — and a fundamental public policy principle which suggests that the contribution clause should be applied to prevent the indemnification of the railroad for the consequences of its own negligence.[15] Although a majority of courts have applied the indemnity clause on such facts, a substantial minority of decisions have held, for reasons of public policy, that the rights of the parties should be governed by the contribution clause which limits the railroad's recovery to one-half of its loss.

This Comment will examine the majority view regarding the reconciliation and application of these clauses in this common factual context and conclude that it represents a sensible synthesis of contract principles and public policy considerations. Having explicated the principles underlying the majority view that the indemnity clause applies, a critical analysis will be made of several significant lines of departure from it, each of which results in the application of the contribution clause. Finally, it will be suggested that the failure of the courts to determine consistently the rights of the parties under these contracts stems from a failure to identify and to balance in light of the particular circumstances of FELA liability, the interests underlying the neutral construction of written contracts and the ostensibly countervailing policy considerations. While it is clear that the majority view effectuates the expressed intent of the parties through the neutral construction of a written instrument, it is not at all clear that the departures from it are in fact justified by safety policy considerations when a railroad seeks indemnification for liability incurred under the liberal provisions of the statute.

BACKGROUND

Although tort liability under the FELA is in no way dependent upon state law, a railroad's right to indemnity or contribution for FELA

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14. *See, e.g.*, text accompanying note 24 *infra*.

15. *See generally* United States v. Seckinger, 397 U.S. 203 (1970); 41 AM. JUR. 2d *Indemnity* § 15 (1968).

liability depends entirely upon state law,[16] and all states subscribe to the policy that contractual insulation from the legal consequences of negligent acts should be judicially restricted.[17] This policy is expressed in the general rule that an indemnity contract will not be construed to indemnify a party against losses resulting from his own negligence unless such intention is expressed in clear and unequivocal terms.[18] In conformance with this general rule, courts have been tempted to apply the contribution clause when the railroad seeks full indemnity for its FELA liability, on the theory that the railroad's losses resulted at least in part from its own negligence because the presence of some railroad negligence is a prerequisite to FELA liability. According to this reasoning, the contribution clause should be applied because allowing full indemnity would effectively insulate the railroad from losses occasioned by its (statutory) negligence, and the combination of mutually exclusive indemnity and contribution clauses, each of which arguably applies to the same occurrence, creates an ambiguity which falls short of the requisite clear and unequivocal expression of intent that the indemnity clause apply. This line of analysis dictates that the contribution clause be applied whenever the existence of a contractual ambiguity permits a strict construction of the contract against the railroad to avoid indemnifying the railroad for its role, however minor, in the negligent injury of one of its employees.

As a matter of neutral contract construction, however, a majority of courts have been inclined to apply the indemnity clause where the industry created or maintained the unsafe condition, despite the existence of the railroad's FELA negligence, on the theory that when read together in accordance with basic contract principles, the clauses clearly express without real ambiguity the parties' intention that the indemnity clause govern. This argument proceeds as follows: because the railroad could not

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16. Brenham v. Southern Pac. Co., 328 F. Supp. 119, 123 (W.D. La. 1971) (citing cases), *aff'd*, 469 F.2d 1095 (5th Cir.), *cert. denied*, 409 U.S. 1061 (1972).

17. *See* United States v. Seckinger, 397 U.S. 203, 213-17 (1970).

18. In United States v. Seckinger, 397 U.S. 203 (1970), the United States Supreme Court stated:

> [W]e agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for its own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American Jurisdictions.

Id. at 211. The Court's opinion also articulated the two prevailing views as to how this intent must be manifested:

> A number of courts take the view, frequently in a context in which the indemnitee was solely or principally responsible for the damages, that there can be indemnification for the indemnitee's negligence only if this intention is explicitly stated in the contract. [citations].
>
> Other cases do not require that indemnification for the indemnitee's negligence be specifically or expressly stated in the contract if this intention otherwise appears with clarity. [citations].

Id. at 211 n.15. *See generally* 41 AM. JUR. 2d *Indemnity* § 15 (1968).

incur (FELA) liability in the absence of some negligence, the parties must have intended that the indemnity clause apply in some instances where the railroad was negligent. The automatic application of the contribution clause when the railroad has been found negligent under the statute would therefore defeat the expressed intention of the parties by effectively reading out of the contract the indemnity clause which the parties themselves included — a result which is totally at odds with the principle that courts construe contracts so as to effectuate the manifested intent of the parties. This basic analysis is expressed in three fundamental rules of contract construction: the intention of the parties must be gathered from the contract as a whole, not one clause in isolation; meaning and effect must be given to all of the contract's provisions; where two clauses arguably encompass the same occurrence, the more specific must prevail over the more general. The rule that the indemnity clause, which either expressly refers to or more clearly contemplates losses resulting from unsafe clearances created by the industry, should prevail over the more general language of the contribution clause[19] also assures that meaning and effect is given to both clauses because the application of the more general clause in instances where either clause might apply necessarily deprives the more specific clause of its intended application.

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19. Although it is perhaps not entirely clear from the wording of the clauses (except where unsafe conditions are specifically referred to in the indemnity clause) that the indemnity clause is more narrowly focused than the contribution clause, a brief examination of the evolution of sidetrack agreements strongly suggests this to be the case. Dual-clause agreements appear to have developed in response to various problems emanating from single-clause agreements which provided for indemnity only. In construing single-clause agreements, courts generally focused on the language employed rather than the relative negligence of the parties. Such agreements were often phrased in terms of losses arising out of the operation of trains over the sidetrack rather than the acts or omissions of the industry. *See, e.g.*, Cacey v. Virginian Ry., 85 F.2d 976 (4th Cir. 1936), *cert. denied*, 300 U.S. 657 (1937). If the exculpatory clause was worded so as to convince the court that the parties intended the railroad to be held harmless for the consequences of its own negligent acts, it would be enforced regardless of the nature and extent of the railroad's negligence. *See, e.g., id.*; Louisville & N.R.R. v. Atlantic Co., 66 Ga. App. 791, 19 S.E.2d 364 (1942). These agreements were intended to protect the railroad against losses arising out of the additional exposure to liability which was concomitant with the normal operation of its trains over premises that it neither owned nor controlled, but, in the unusual situation in which the railroad was primarily responsible for the loss, such agreements obviously did more. In addition, some courts (understandably) tended to require much more specificity when the loss resulted largely from the negligence of the railroad, thereby importing an element of comparative fault into what was otherwise a purely contractual determination. *See, e.g.*, Southern Pac. Co. v. Layman, 173 Or. 275, 145 P.2d 295 (1944) (citing cases). *See generally* note 18 *supra*. The dual-clause agreements evolved as an attempt to rectify this situation by neutralizing the obvious risk of additional exposure to liability arising out of the existence of unsafe conditions created or maintained by the industry, while making it clear that the industry would not bear the entire burden if the railroad's independent negligence significantly *broadened* the element of causation (*e.g.*, where a train collides with an obstruction because its brakes are defective or the engineer is intoxicated).

THE MAJORITY VIEW

The majority rule for construing the indemnity and contribution clauses in effect synthesizes contract and public policy principles by recognizing that the rights of the parties are governed solely by their contract[20] while relying on the policy principles embodied in the rules of common law indemnity[21] to help determine the parties' contractual intent. The seminal case of *Booth-Kelly Lumber Co. v. Southern Pacific Co.*[22] contains a carefully reasoned analysis of the mechanics of this synthesis. In that case a railroad brakeman was injured when he was caught between the caboose on which he was riding and a cart left near the track by a lumber company employee in violation of an agreement respecting minimum track clearances. The brakeman recovered a substantial judgment against the railroad under the FELA on the theory that the railroad was negligent in permitting the cart to remain on the track and in failing to warn him of the presence of the obstruction. After the award, the railroad sued the lumber company on the contract for the amounts it had paid to its employee under the statute. The contract's indemnity clause stated that the industry would " 'indemnify and hold harmless [the] Railroad for loss, damage, injury or death from any act or omission of [the] Industry . . . to the person or property of the parties hereto and their employees . . . while on or about said track.' "[23] It was followed by a contribution clause providing that " 'if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally.' "[24]

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20. For a detailed discussion of the rationale of the rule that a contractual obligation supersedes and abrogates the common law rules respecting the rights to indemnity and contribution as it applies to sidetrack agreements, see Southern Pac. Co. v. Morrison-Knudsen Co., 216 Or. 398, 338 P.2d 665 (1959) (to interpret an indemnity provision as a restatement of the common law would be to treat it as surplusage because the railroad would acquire no greater rights of indemnity than it already enjoyed without recourse to the covenant). *See* 6 A. CORBIN, CONTRACTS § 1471, at 864 (1950) for the accepted rule that "[a] railroad may lawfully contract with one permitted to use a spur track or occupy part of the right of way . . . to exempt itself from liability caused by its own negligence or that of its servants."

21. The public policy implications of the common law rules of indemnity are evident in Dean Prosser's conclusion that, in the broadest sense, they embody "a shifting of responsibility from the shoulders of one person to another; and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 313 (4th ed. 1971). The promotion of justice in this instance is also viewed as the promotion of safety in that placing the burden of ultimate liability upon the "real" wrongdoer provides an incentive to act safely. *See* text accompanying notes 154 & 155 *infra*.

22. 183 F.2d 902 (9th Cir. 1950). *See also* Union Pac. R.R. v. Bridal Veil Lumber Co., 219 F.2d 825 (9th Cir. 1955); Baltimore & O.R.R. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955); Louisiana & Ark. Ry. v. Anthony, 199 F. Supp. 286 (W.D. Ark. 1961), *rev'd*, 316 F.2d 858 (8th Cir.), *cert. denied*, 375 U.S. 830 (1963).

23. 183 F.2d at 906.

24. *Id.* at 907 n.3.

After finding that negligence on the part of the railroad had concurred with that of the industry to cause the accident, the trial court applied the contribution clause, ruling that the loss should be borne by the parties equally.[25] Without disturbing this finding of railroad negligence, the Court of Appeals for the Ninth Circuit reversed the decision, construing the contract to provide full recovery under the provisions of the indemnity clause. The appellate court's analysis of the scope of the clauses started from the plausible assumption that when the parties contemplated the possibility of claims for indemnity, they must have understood that in the ordinary situation no occasion for seeking indemnity would arise unless the indemnitee had been found guilty of some fault, for otherwise no judgment could have been recovered from him.[26] It follows that the parties could not have intended that any finding of negligence on the part of the railroad would automatically trigger the contribution clause because this would leave the indemnity clause with virtually no application.[27] Because the court believed that the parties must have intended the indemnity clause to have some application, it perceived its primary task as one of elucidating that intent and, by implication, the intended scope of each clause. In so doing, the court in *Booth-Kelly* reasoned that although liability must stem from the terms of the contract rather than from common law obligations, an examination of the common law rules of indemnity and contribution, as important circumstances surrounding the execution of the contract, would provide the key to determining its meaning. In analyzing the contractual terms against the background of the common law, the *Booth-Kelly* court concluded that the indemnity clause *enunciates* the rule of section 95 of the *Restatement of Restitution,* which provides that:

> Where a person has became [*sic*] liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of another or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition.[28]

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25. *Id.* at 906. The district court's opinion was not published.

26. *Id.* at 907.

27. *Id.*

28. RESTATEMENT OF RESTITUTION § 95 (1937). Comment a to this section goes on to explain that

> [t]he rule stated in this Section applies to situations where a carrier is responsible for the condition of its right of way or a municipality is responsible for the condition of a public highway and a third person by negligence creates a condition dangerous to travelers thereon, or, having undertaken to make safe a dangerous condition, fails to do so. It applies also to cases where a municipality is made liable for harm caused by the unsafe condition of a road or sidewalk and where as between the two the primary responsibility is upon an adjacent landowner or upon a public utility which

On the same analysis, the court determined that the contribution clause was intended to *supersede* the rule precluding contribution between joint tortfeasors[29] stated in section 102 as follows:

> Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the third person, one of them who has made expenditures in discharge of their responsibility is not entitled to contribution from the other.[30]

In reaching this conclusion, the court reasoned that because these sections comprised the rules under which the parties would have been required to function had there been no contract, it was fair to assume that they had them in mind as they considered to what extent they would alter or reaffirm those obligations by their writing.[31] The *Booth-Kelly* construction is supported by the fact that it expands the railroad's common law right to compensation rather than contracting it as the lower court's reading would.[32] This interpretation is therefore consistent with the presumption that the indemnity agreement was executed primarily for the purpose of protecting the railroad against exposure to additional liability arising out of circumstances largely beyond its control, as part of the consideration for furnishing the sidetrack on the industry's property.[33] According to this view, the contract preserved the railroad's section 95 right to full indemnity when it was passively or secondarily negligent in failing to make safe a condition created by the industry's active or primary negligence[34] in placing the cart

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uses the road. The rule is also applicable to situations in which a person has a non-delegable duty with respect to the condition of his premises but has entrusted the performance of his duty to a third person, either a servant or an independent contractor.

29. Joint tortfeasors are persons in *pari delicto* or equal fault in relation to an injury. *See generally* W. PROSSER, *supra* note 21, § 52, at 313-23.

30. RESTATEMENT OF RESTITUTION § 102 (1937).

31. 183 F.2d at 907.

32. "An important factor in bringing us to this view is our belief that the parties would not have intended that Southern Pacific's rights to indemnity, which it might have claimed in the absence of such a paragraph [containing the indemnity agreement], were to be trimmed down, or in any manner diminished." *Id.* at 910.

33. *See* note 19 *supra.*

34. Although the classification of negligence as either active or passive is a somewhat confused area of the law, *see* notes 173 to 175 and accompanying text *infra*, it can be generally stated that passive negligence is commonly associated with the violation of a duty through inaction, usually the failure to discover or correct a dangerous condition for which another is primarily responsible. Conversely, active negligence is usually said to consist in the violation of a duty through action and is often associated with primary responsibility for the creation of an unsafe condition. *See generally* Annot., 19 A.L.R.3d 928 (1966) for a comprehensive collection of railroad cases dealing with active and passive negligence in the context of common law rights of indemnity and contribution for railroad injuries.

in dangerous proximity to the track, and created a right to contribution[35] where both parties were actively negligent joint tortfeasors by superceding the rule embodied in section 102 of the *Restatement*.[36] Thus, under the majority rule as enunciated in *Booth-Kelly*, the indemnity clause will apply in the normal situation where the industry's creation or maintenance of an unsafe condition and the railroad's routine operation of its train on the sidetrack combine to produce a compensable injury to a railroad employee. It is only when the railroad's negligence "actively" concurs with the industry's negligent act or omission that the more general[37] contribution clause is brought into play. For example, if defective brakes[38] had prevented Southern Pacific's train from stopping in time to avoid the accident, or if some independently negligent conduct on the part of railroad employees[39] had contributed to the injury, the concurrence of Booth-Kelly's negligent creation of an unsafe condition and the railroad's independent, active negligence would have triggered the contribution clause.

The analysis underlying the majority view's synthesis of contract principles and common law indemnity rules appears fundamentally sound, but it fails adequately to account for one important fact: section 95 of the *Restatement of Restitution* — which provides for full indemnity for liability incurred through a failure to make safe a dangerous condition created by another — concludes with the proviso that one who is passively or

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35. Because this construction modifies the parties' common law rights it is not subject to the criticism that it effectively deprives the contract of meaning by reading it as failing to create new rights and duties. Rather, it comports with the common sense notion that parties do not ordinarily execute contracts to secure the benefits of the common law. *See* note 20 *supra*.

36. It should be noted that the continued vitality of this interpretation is undermined by the trend toward statutory abolition of the rule stated in § 102. W. PROSSER, *supra* note 21, § 50 reports that nine American jurisdictions recognize a common law right of contribution among joint tortfeasors and that at least 23 others permit such contribution to a greater or lesser extent by statute. These jurisdictions are collected and classified in Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 982 (1959). As of 1976, at least 17 states had adopted the Uniform Contribution Among Joint Tort Feasors Act. It might, however, nevertheless be argued that the majority rule interpretation remains meaningful in that it clarifies the rights of the parties in a particular situation, thereby creating greater certainty and predictability.

37. The contribution clause may be viewed as being more general in that it was intended to encompass a broader spectrum of negligence and causation. *See generally* note 19 *supra*.

38. *See* Union Stock Yards Co. v. Chicago B. & Q.R.R., 196 U.S. 217 (1940) (discoverable defect in brakes of railroad's car ruled active negligence). The *Booth-Kelly* court cited *Union Stock Yards* as an example of the active negligence that would trigger the contribution clause.

39. *See, e.g.*, Ratigan v. New York Cent. R.R., 181 F. Supp. 228 (N.D.N.Y. 1960) (engineer's "fumbling of instructions" ruled active negligence and a proximate cause of brakeman's collision with industry's obstruction), *aff'd*, 291 F.2d 548 (2d Cir. 1961). Independent railroad negligence is, by definition, of greater consequence than a mere failure to warn its employees of a danger created by the negligence of the industry.

secondarily negligent is entitled to indemnity "*unless* after discovery of the danger, he acquiesced in the continuation of the condition."[40] The *Booth-Kelly* opinion deals with the question of the applicability of this qualification in a conclusory manner by simply stating that a finding that the industry was actively, directly, and casually negligent "negatives the existence of" the railroad's acquiescence.[41] The opinion offers no explanation of why the indemnity clause's enunciation of section 95 was intended to exclude that section's acquiescence provision, or why such acquiescence by the railroad would not, on the court's analysis, constitute independent negligence sufficient to trigger the contribution clause. This is an important question and one which is at the heart of the departures from the majority rule discussed in the following section.[42]

Another apparent flaw in the majority view arises from the fact that the United States Supreme Court has seemingly disapproved of the intrusion of common law principles into the construction of indemnity agreements, stating that "in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."[43] This admonition has been adhered to in a number of cases construing single-clause indemnity contracts to provide for full indemnity[44] for FELA losses arising out of spur track accidents,[45] but because the contracts contained only one clause, the central construction problem of giving meaning and effect to both an indemnity clause and a contribution clause did not arise. It is only in the context of the potential ambiguity created by the coexistence of two arguably applicable but mutually exclusive clauses that the court need look beyond the contract to common law theories of active and passive negligence.[46] On analysis, therefore, this shortcoming seems to be more apparent than real.

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40. RESTATEMENT OF RESTITUTION § 95 (1937) (emphasis added).

41. 183 F.2d at 911.

42. *See* text accompanying notes 78 to 122 *infra*.

43. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 569 (1958). The fact that *Weyerhaeuser* was an admiralty case has not been viewed as significant. *See, e.g.*, cases cited in note 45 *infra*.

44. *See generally* note 19 *supra*.

45. *E.g.*, Seabolt v. Pennsylvania R.R., 290 F.2d 296, 298 (3d Cir. 1961); Ratigan v. New York Cent. R.R., 181 F. Supp. 228, 233 (N.D.N.Y. 1960), *aff'd*, 291 F.2d 548 (2d Cir. 1961). For cases refusing to apply active-passive negligence analysis to dual-clause contracts, see Miller & Co. v. Louisville & N.R.R., 328 F.2d 73, 75 (5th Cir. 1964) (following *Weyerhaeuser* without discussion); Anthony v. Louisiana & Ark. Ry., 316 F.2d 858, 866 (8th Cir.), *cert. denied*, 375 U.S. 830 (1963) (expressly rejecting trial court's application of active-passive negligence analysis and applying indemnity clause without a persuasive explanation of the intended application of the contribution clause); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 193 F. Supp. 471, 479 n.3 (E.D. Pa. 1961), *rev'd*, 302 F.2d 843 (3d Cir. 1962).

46. The *Booth-Kelly* opinion clearly indicates that the extensive analysis outlined above would have been unnecessary had the contract consisted of a single indemnity clause: "If [the contract] contained only that part of the above quoted paragraph down to the semicolon [the indemnity clause], it would have appeared unquestionably

From a somewhat different perspective it can be seen that the majority view, while resorting to common law principles to discern the intent of the parties and harmonize the indemnity clause with the more general contribution clause, resists the public policy temptation of either denying recovery altogether or applying the contribution clause in derogation of the contract principle that where two mutually exclusive clauses seem to apply, the more specific prevails over the more general. The trial court in *Booth-Kelly* had applied the contribution clause because it found that the railroad was in some measure also at fault and that this fault contributed to the accident. On appeal, the industry argued both that the contribution clause, "in providing that the consequences of liability arising from joint or concurring negligence shall be borne equally, is an attempt to indemnify against the consequences of Southern Pacific's own negligence, and is against public policy and void,"[47] and that "a contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee [himself] unless such an intention clearly appears."[48] The court rejected these public policy arguments and proceeded to determine the intended application of each clause rather than summarily applying the contribution clause because the railroad was guilty of some negligence in its violation of the statute. Consistent with basic principles of contract construction, it read the clauses together in an attempt to gather the parties' intent from the entire contract and concluded that each clause was intended to have its own scope:

> In approaching the determination of the meaning of this whole paragraph, it appears to us, initially, that each part of the paragraph was intended to cover certain kinds or types of cases, and that each part refers to a situation different from that contemplated by the other.[49]

The court's subsequent analysis makes clear its view that the indemnity clause is the more specific in that it was intended to cover the narrower situation in which the loss is occasioned primarily by the industry's negligent creation of an unsafe condition, and that the contribution clause was intended to apply in situations where causation is broadened by the existence of significant railroad negligence — such as mechanical defects in

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sufficient to require complete indemnity." 183 F.2d at 907. Other cases utilizing active-passive negligence analysis to reconcile these basic clauses on similar facts include: Steed v. Central Ry., 529 F.2d 833 (5th Cir.), *cert. denied*, 429 U.S. 966 (1976); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Zimmerman v. Timpany, 396 F. Supp. 91 (S.D.N.Y. 1975); Lehigh Valley R.R. v. American Smelting and Ref. Co., 256 F. Supp. 534 (E.D. Pa. 1966); Union Camp Corp. v. Louisville & N.R.R., 130 Ga. App. 113, 202 S.E.2d 508 (1973).

47. 183 F.2d at 911.

48. *Id.* Although this argument seemed to be directed against the railroad's right to recovery under either clause of the contract, it is obviously more forceful with respect to the railroad's right to full recovery under the indemnity clause.

49. *Id.* at 907.

railroad equipment or human error in the operation of trains — which concurs with the unsafe condition to produce an accident.[50] It is only in this second situation that the parties may be said to be in *pari delicto* or equally at fault.

It should also be noted that if a court both follows the view expressed in the single-clause cases[51] that theories of active and passive negligence are not applicable in contract cases, and views the indemnity clause as being more specific than the contribution clause, it might construe the contract to provide an absolute[52] right to indemnity on a showing of an industry-created unsafe condition, despite the presence of the contribution clause and the concurrence of "active" railroad negligence.[53] The problem with such a construction is that it would effectively read the *contribution* clause out of the contract by allowing full indemnity whenever an industry-created unsafe condition is a causal factor in the accident, regardless of railroad negligence. By embracing the active-passive negligence distinction as an interpretive aid to determining the parties' contractual intent, the majority view steers a middle course. Its interpretation appears to comport with basic public policy considerations by maintaining substantial responsibility for negligent acts without abandoning basic principles of contract construction or overriding the intent of the parties. Not all courts have exhibited this retraint.

DEPARTURES FROM THE MAJORITY RULE

I. *Reliance on Train Movement — The Distortion of Active-Passive Negligence Analysis*

There are a number of cases, factually indistinguishable from *Booth-Kelly,* which reason from the major premises of the majority view to the conclusion that it expressly rejects. In *Freed v. Great Atlantic & Pacific Tea Co.,*[54] the industry's warehouse was serviced by a sidetrack under an agreement providing for indemnity for losses resulting from the act or omission of the industry, and contribution for liability arising from the joint or concurrent negligence of the parties.[55] The railroad sued the industry to

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50. *Id.* at 907-11.

51. *See, e.g.,* Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Seabolt v. Pennsylvania R.R., 290 F.2d 296 (3d Cir. 1961); Ratigan v. New York Cent. R.R., 181 F. Supp. 228 (N.D.N.Y. 1960), *aff'd,* 291 F.2d 548 (2d Cir. 1961).

52. The right would not be truly absolute because the court would almost certainly decline to read the contract as providing for indemnity against intentional torts or losses attributable to willful and wanton misconduct. *See, e.g.,* Palmetto Lumber Co. v. Southern Ry., 154 S.C. 129, 151 S.E. 279 (1929).

53. *See* note 44 *supra.*

54. 401 F.2d 266 (6th Cir. 1968).

55. "The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from any act or omission of the Industry or of the licensee, or the employees, agents or servants of either or both of them, to the persons or property of either of the parties hereto or of the

recover the balance of a $75,000 settlement which it had paid to a brakeman who had been injured when he collided with a pile of ice while riding on the side of a freight car.[56] The ice, like the cart in *Booth-Kelly,* had been placed in dangerous proximity to the track by a person for whom the industry was responsible under the contract, in this case the industry's lessee.[57]

Relying on the principle stated in section 95 of the *Restatement of Restitution,*[58] the railroad argued that it was at most guilty of passive negligence for failure to discover or eliminate the dangerous condition, and that it was therefore entitled to full indemnity under the contract. Rejecting this argument, the court found that the movement of the train with a brakeman on the side of the car constituted active negligence which triggered the contribution clause where, as in *Booth-Kelly,* the railroad either knew or should have known of the dangerous condition.[59]

In comparing the *Freed* decision with *Booth-Kelly* it is apparent that, despite the fact that the operative language of the clauses, the industry's negligence, and the negligence of the railroad were virtually identical, the courts reached different conclusions on the basis of their active-passive negligence analysis. In labeling the railroad's negligence "active," the *Freed* court emphasized the fact that the railroad was moving its train at the time of the accident,[60] but this factor certainly cannot distinguish the cases, as train movement played exactly the same role in the *Booth-Kelly* accident.[61]

Similarly, in *Dery v. Wyer*[62] the Court of Appeals for the Second Circuit held that the railroad was "concurrently" negligent in moving its train past a gate post which the industry had placed dangerously close to the sidetrack. Although it was undisputed that the industry had created the dangerous condition, the court nevertheless ruled that the railroad's operation of its train over the track without having taken steps to correct the condition constituted negligence which fell within the scope of the contribution clause of a contract substantially identical to that construed in *Booth-Kelly.*[63] The railroad's recovery from the industry of amounts paid in

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licensee, or any two or more of them, or to the person or property of any other person or corporation, while on or about said sidetrack; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto and the licensee, or of the Railroad Company and either the Industry or the licensee, it shall be borne equally by the parties hereto."

Id. at 268-69 (quoting agreement).

56. *Id.* at 267.

57. *Id.*

58. *See* text accompanying note 28 *supra.*

59. 401 F.2d at 268-69. In *Booth-Kelly,* the railroad was found to have been (passively) negligent in failing to remove the cart or to warn its employee of its presence. 183 F.2d at 910-11.

60. 401 F.2d at 268.

61. 183 F.2d at 904.

62. 265 F.2d 804 (2d Cir. 1959).

63. "The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage, or injury from any act or omission of the Industry

satisfaction of its FELA liability to the estate of a brakeman who had been killed when he collided with the post and was knocked from the side of a moving freight car was therefore limited to contribution.[64] The court deemed it unnecessary to hold specifically that the railroad's negligence was active, but it stated that the railroad's negligence was no less active than that of the industry, in effect ruling that the parties were in *pari delicto*.[65]

The Court of Appeals for the Fifth Circuit reached a similar result on similar facts in *Colonial Stores, Inc. v. Central Railway*.[66] In that case a railroad employee was injured when he stepped from a moving train onto an industry loading platform which was littered with debris. The contract under which the sidetrack was furnished and maintained provided for indemnity or contribution in language substantially identical to that applied in *Booth-Kelly, Dery,* and *Freed*.[67] The *Colonial Stores* court, like the courts in *Dery* and *Freed,* limited the railroad's recovery in accordance with the contribution clause.[68] It concluded that the railroad was concurrently negligent in permitting the accumulation of debris and in requiring or permitting its employee to step from its moving train onto a platform which it knew or should have known to be unsafe, without warning him of the danger.

> . . . to the person or property of the parties hereto . . . while on or about said side track and switch connection; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto . . . it shall be borne equally by the Industry and the Rail Road Company."

Id. at 809 n.6 (quoting agreement). The language of this agreement is almost identical to that of the *Booth-Kelly* agreement, *quoted in* text accompanying notes 23 & 24 *supra.*

64. *Id.* at 810. In a rather puzzling discussion, the opinion seemed to rely on the parties' having been in *pari delicto* as a prerequisite to application of the contribution clause; however, the court also indicated that the contribution clause was sufficiently clear to require contribution in circumstances in which the common law would permit indemnity. *Id.* This suggests that the contract was intended to secure additional rights for the industry rather than the railroad, a proposition that must be viewed with skepticism. *See* note 19 *supra* and text accompanying note 33 *supra.*

65. 265 F.2d at 810.

66. 279 F.2d 777 (5th Cir. 1960).

67. "The Tenant [Colonial] also agrees to indemnify and hold harmless the Railway [Central] from loss, damage or injury from any act or omission of the Tenant . . . to the person or property of the parties hereto and their employees . . . while on or about said tracks; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto, it shall be borne equally by them."

Id. at 778 (quoting agreement).

68. *Id.* at 778–80. The court expressly affirmed the trial court's finding that the railroad's negligence was "active and primary," but also dismissed the railroad's contention that its negligence was merely passive as being inapplicable in cases where the injured employee is an invitee rather than a licensee. *Id.* This one-sentence "argument" was neither explained nor related to the construction of the contract.

In *Spielman v. New York, New Haven & Hartford Railroad,*[69] a railroad employee was injured when he was knocked from the side of a moving freight car by a post which had been erected dangerously close to the spur track. The jury found that the industry was negligent in creating the dangerous condition and that the railroad was negligent under the FELA in failing to warn its employee of the industry-created condition.[70] In holding that the contribution clause controlled on these facts, the court expressly rejected the railroad's argument that it was only passively negligent in failing to warn its employee, stating that:

> Negligence is both positive and negative in character, and may consist of acts of commission or omission or both. However, acts of commission or omission are not divided, respectively, into the categories of active and passive negligence, inasmuch as both types of fault may constitute active negligence.
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> . . . .
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> . . . If the Railroad Company failed to warn plaintiff of such a condition on its own premises, it would be actively negligent, *owing to the fact that it was operating the train at the time.* Surely the Railroad's entrance upon [the industry's] premises, over which it had a right of way, did not transform its actions into passive negligence.[71]

A possible rationale of these unorthodox active-passive negligence classifications was articulated by Judge Van Pelt in his dissenting opinion in *Anthony v. Louisiana & Arkansas Railway.*[72] In that case a railroad employee was injured while riding on the side of a train when he collided with a shed which a lumber company had erected close to the track in violation of a clearance agreement.[73] Theorizing that passive negligence entails the creation of a hazardous condition while active negligence consists in negligent action upon that condition, the dissenting opinion reasoned that

> the one who brought about the condition in the instant case was the shipper who built the shed in violation of the clearance requirement and that the one who acted upon the condition was the railroad in moving cars over the track. Without the movement of the cars I conclude that Cloudy would not have been injured.[74]

Although this conceptualization of passive and active negligence is perhaps as semantically plausible as the more generally accepted contrary

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69. 147 F. Supp. 451 (E.D.N.Y. 1956).
70. *Id.* at 452.
71. *Id.* at 453 (emphasis added).
72. 316 F.2d 858 (8th Cir. 1963); (Van Pelt, J., dissenting).
73. *Id.* at 860, 863.
74. *Id.* at 867.

formulation implicit in the majority view,[75] it is far less likely to reflect the contractual intent of the parties. At the time of the accident, it is of course true that the railroad's train is moving or "acting upon" a previously created condition which is in some sense "passive"; but because the operation of trains over the sidetrack will almost inevitably be a factor when the industry's creation of an unsafe condition results in the losses contemplated by the agreement, a definition of active negligence founded upon train movement and the presence of an unsafe condition can be of little value in interpreting the contract. If the movement of railroad cars over a track rendered unsafe by an industry's act or omission is action upon an unsafe condition which is, by definition, active negligence triggering the contribution clause, there can be almost no case in which the railroad is both liable to its employee under the statute and entitled to full indemnity under the contract which was executed to protect the railroad against statutory liability. Because it results in the automatic application of the contribution clause, this active-passive negligence analysis effectively reads the indemnity clause out of the agreement and is therefore subject to the very objections which prompted the majority view, as typified by *Booth-Kelly,* to resort to common law theories of active and passive negligence in the first instance. It fails to give meaning and effect to both clauses and conflicts with the presumption that the agreement was executed for the benefit of the railroad, to protect it against the forseeable risks incident to its furnishing of the spur track.[76] The fact that some of the opinions which rely on train movement to characterize the railroad's negligence as "active" also rely on failure to warn is of little significance because such a failure is also a constant factor, one which tends to make the movement of the train negligent.

The foregoing cases illustrate the manner in which the tendency to associate active negligence with movement can be combined with the notion that negligence may consist of "acts" of omission (such as a failure to warn) to characterize as active, negligence which is considered passive under the majority view. A number of cases focus on the "acts of omission" aspect of this conception of active negligence, recognizing it under the rubric of the separate defense of "acquiescence."

II. *Acquiescence as Active Negligence or Waiver*

As previously mentioned, section 95 of the *Restatement of Restitution* provides that a person incurring liability because of the negligent failure to make safe a dangerous condition created by another is entitled to indemnity *unless* after discovery of the danger, he acquiesced in the continuation of the

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75. *See* text accompanying notes 34 to 39 *supra.*

76. It appears that the inclusion of the contribution clause evolved as an attempt to mitigate the harsh consequences of single-clause full-indemnity agreements in the unusual situation where the railroad's negligence was substantial, sufficiently distinct from the unsafe condition, and outside the realm of normal railroad operations. *See* note 19 *supra.*

condition.[77] The cases holding that the railroad's acquiescence[78] in a dangerous condition triggers the contribution clause do so on the basis of two closely related theories. Acquiescence is viewed as either a species of active negligence that is affirmatively controlled by the contribution clause or as an implied waiver of the right to rely on the indemnity clause which leaves the contribution clause to govern the rights of the parties. These two conceptualizations are (at least theoretically) distinguishable from each other and from the convoluted active-passive negligence analysis discussed above, although the three concepts tend to overlap in their application. The concept of acquiescence does not rely or focus on train movement in order to characterize the railroad's negligent failure to act as "active." Cases which approach the railroad's failure to act in the face of an industry-created danger from an acquiescence perspective require that the railroad have had actual knowledge of the danger, as one obviously cannot acquiesce in a condition without being aware of it. This is true whether the court emphasizes the implied waiver, or the active negligence aspect of acquiescence. In contrast, the cases focusing on the element of train movement do not require actual knowledge as prerequisite to a finding of active negligence, but deny indemnity where the railroad either knew, *or should have known* of the danger.[79] Moreover, it is often stated that "bare knowledge" alone is insufficient to uphold the acquiescence defense to full indemnity; "[a]nother, more general requirement is that the indemnitee's conduct be so seriously wrongful as to make full restitution inequitable."[80] These distinctions, though subtle, become meaningful in several of the cases and provide some insight into the rationales of various decisions applying the contribution clause.

A. *Acquiescence in the Dual-Clause Agreements*

In *Emonz v. New York, New Haven and Hartford Railroad*[81] a New York state court held that the railroad's right to recovery under the *Booth-*

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77. RESTATEMENT OF RESTITUTION § 95 (1937).

78. There is no settled judicial definition of the term "acquiescence" but one court has stated that, basically,

> the concept covers comprehensively a variety of situations in which courts think that a party should be denied indemnity because his own conduct has been so blameworthy and has so contributed to the harm in question that full restitution is inequitable or cannot properly be viewed as within the intended coverage of an agreement to indemnify.
>
> One hallmark of such acquiescence is long continued awareness of a dangerous situation by the indemnitee without either taking any corrective measure or calling upon the indemnitor to do so.

Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843, 848 (3d Cir. 1962).

79. *See* text accompanying notes 54 to 68 *supra*.

80. Missouri Pac. R.R. v. Rental Storage and Transit Co., 524 S.W.2d 898, 911 (Mo. App. 1975). *See also* Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962), *quoted at* note 78 *supra*.

81. 42 Misc. 2d 957, 249 N.Y.S.2d 506 (Sup. Ct. 1964).

Kelly contract was governed by the contribution clause where the railroad had actual knowledge of an unsafe condition created by the industry on the sidetrack. The court stated that "[t]he knowledge of the defendant [railroad] of this dangerous condition and its failure to correct it or to direct the third-party defendant [industry] to correct it makes the defendant equally responsible with the third-party defendant . . . ,"[82] and characterized the railroad's negligence as active.[83]

In *Rouse v. Chicago, Rock Island and Pacific Railroad,*[84] the Court of Appeals for the Eighth Circuit was confronted with a dual-clause agreement which expressly stipulated that the railroad would be entitled to full indemnity for losses resulting from unsafe clearances.[85] Despite the fact that the injury resulted from an unsafe clearance, the court construed the contract to provide for contribution because the railroad had acquiesced in the danger. In contrast to *Emonz,* the *Rouse* court did not feel compelled to characterize the railroad's acquiescence as active negligence. In an opinion that suggests reliance on a theory of implied waiver, the court merely stated that the defense of acquiescence served to bring the contribution clause into play, limiting the industry's contractual liability to fifty percent of the verdict against the railroad.[86]

B. *Acquiescence in the Three-Clause Agreements*

The defense of acquiescence is often raised when, in addition to the two standard clauses discussed above, the indemnity agreement contains a third and presumably unambiguous clause which provides that the industry will hold the railroad harmless for injuries resulting from reduced clearances. The addition of this third clause tends to focus the conflict between the majority view's reliance on contract principles and the reliance on public policy exhibited by the departures from the majority view, because the specificity of the additional language appears to eliminate the ambiguity which arguably justifies policy-oriented construction in the first instance.

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82. *Id.* at 961, 249 N.Y.S.2d at 510.

83. *Id. See also* Southern Ry. v. Foote Mineral Co., 384 F.2d 224 (6th Cir. 1967) (equating knowledge of dangerous condition coupled with failure to alleviate it with active negligence and denying full indemnity for FELA loss).

84. 474 F.2d 1180 (8th Cir. 1973).

85. The court described the agreement as follows:

> should the [industry] fail to observe clearance requirements it "will assume all liability therefor and agrees to indemnify and save harmless the [railroad] . . . against any and all claims for loss, damage, injury or death resulting therefrom." A general provision of the lease further provided for indemnity for claims arising out of injury or death of the parties and their employees or other persons while on or about the leased premises and stipulated that "if any claim or liability due to some other cause than fire shall result from the joint or concurring negligence of both parties hereto it shall be borne by them equally."

Id. at 1182 (quoting agreement).

86. *Id.* at 1184.

When the contract is unambiguous there is no need to resort to the common law doctrine of acquiescence and little justification for disregarding an express contractual right. A number of cases have nevertheless declined to apply the additional indemnity clause, demonstrating the lengths to which some courts have been willing to go in injecting policy considerations into contract construction.

Perhaps the most instructive analysis of the application of the acquiescence doctrine to three-clause spur track agreements was framed in the trial and appellate court opinions issued in *Pennsylvania Railroad v. Erie Ave. Warehouse Co.*,[87] a case in which a brakeman had been killed when he was crushed between a moving train and the warehouse company's retaining wall. The indemnity agreement dealt specifically with this situation in a third indemnity clause which provided that

> [t]he Industry shall at all times hereafter establish and maintain on its property a clear and safe space above and on each side of the side track sufficient to insure the safety of employees and equipment of the Railroad Company, and the Industry shall indemnify and save harmless the Railroad Company from loss, damage, and expense for failure so to do.[88]

The district court found that the railroad had acquiesced in the dangerous condition but concluded that acquiescence is no defense where there is an "express" indemnity provision.[89] Its opinion argued persuasively that the defense of acquiescence simply has no application to indemnity rights claimed under contract, at least not when the contract specifically refers to the type of condition which causes the accident and resulting loss.[90] In essence, the lower court's ruling was predicated on both the principle that acquiescence is no defense to the terms of a contract, and the conclusion that, in any event, neither the *Restatement* in general nor sections 95 and 102 in particular purports to describe rights arising out of the breach of an indemnity *contract*.[91] After deciding that the agreement had to be viewed from a pure contract perspective without resorting to common law principles

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87. 193 F. Supp. 471 (E.D. Pa. 1961), *rev'd*, 302 F.2d 843 (3d Cir. 1962).

88. 302 F.2d at 846 n.2.

89. 193 F. Supp. at 479.

90. *Id.* at 480.

91. Both the General Scope Note to the RESTATEMENT OF RESTITUTION, at 1-3, and the Introductory Note to Topic 3, which includes sections 95 and 102, at 327-31, make clear that the RESTATEMENT is not concerned with rights arising upon breach of an express contract. The General Scope Note contains this language at page 2: "The restitutionary rights which arise upon the breach or non-performance of a contract and those which arise from the performance or non-performance of a trust are included only by cross-reference to The Restatements of Contracts and Trusts, except where a constructive trust arises." The Introductory Note uses these words at page 329: "The Restatement of this Subject does not deal with liability based solely upon breach of contract . . . nor with the measure of damages arising therefrom." 193 F. Supp. at 480.

which might otherwise be used to resolve the more substantial ambiguity generated in a dual-clause contract, the trial court had little difficulty in concluding that the three-clause contract provided for full indemnity on these facts.

Although the trial court's conclusion was firmly rejected on appeal, the Court of Appeals for the Third Circuit qualified its holding that the defense of acquiescence applies to contractual, as well as common law, indemnity rights by requiring that the fault of the railroad be both "blameworthy" and "sufficiently distinct from" that of the industry.[92] In the course of its analysis the reviewing court frankly acknowledged the public policy implications of the acquiescence doctrine, stating:

> Basically, we think the concept covers comprehensively a variety of situations in which courts think that a party should be denied indemnity because his own conduct has been so blameworthy and has so contributed to the harm in question that full restitution is inequitable *or* cannot properly be viewed as within the intended coverage of an agreement to indemnify.[93]

The opinion also relied on the policy considerations implicit in the fact that "the Pennsylvania cases repeatedly express the reluctance of the courts of that state to read indemnity contracts as intended to protect the indemnitee from loss attributable to his own blameworthy conduct"[94] to support its construction of the agreement.

In its application of this analysis, the court emphasized the fact that the railroad had received a conductor's report warning that the hazards on the siding were such that cars should be moved only in daylight but continued to conduct switching operations at night, at times with personnel who were unfamiliar with the sidetrack. The industry's liability was limited to contribution.[95]

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92. 302 F.2d at 849. *Accord,* Missouri Pac. R.R. v. Winburn Tile Mfg. Co., 461 F.2d 984 (8th Cir. 1972) (railroad's acquiescence in shipper's negligent maintenance of gate across sidetrack not sufficiently distinct from shipper's negligence and not serious enough to warrant defense of acquiescence; liability assessed under contribution clause).

93. 302 F.2d at 848 (emphasis added).

94. *Id.* at 849.

95. Although the opinion appears to analyze the case in terms of acquiescence as implied waiver without labeling the railroad's negligence "active," its analysis is consistent with a finding that the railroad's negligence was active:

> Although the fault of the railroad was serious enough and sufficiently distinct from Erie's fault to preclude the railroad from recovering full indemnity from Erie, the combination of distinct blameworthy acts and omissions of the two parties brought the case within the provision of paragraph 9 [contribution clause] of the siding agreement that the parties shall bear equally liabilility arising from their joint or concurring negligence.

Id.

In *Pennsylvania Railroad v. M.K.W. Corp.*[96] the contribution clause was applied to limit the railroad's recovery for losses arising out of the death of a railroad employee who was crushed between a moving train and the industry's gate which encroached upon safe clearances. In addition to the standard indemnity and contribution clauses, the contract again contained a provision requiring the industry to establish and maintain safe clearances and to "indemnify and save harmless the Railroad Company from loss, damage and expense for failure so to do."[97] In analyzing the agreement, the court started from the well-settled premise that contracts of indemnity shall not be construed to indemnify against the negligence of the indemnitee unless such an intention is expressed in clear and unequivocal terms.[98] After finding that the railroad's knowledge of the unsafe clearance constituted acquiescence[99] which would bar full recovery absent a definite provision of nonliability for negligence,[100] the *M.K.W.* court applied the contribution clause but failed to explain why the unsafe clearance indemnity clause was not sufficiently clear and unequivocal to create an express contract right to indemnity in these circumstances. At one point in the opinion the court appears to have relied on the acquiescence as active negligence principle, characterizing the railroad's continued use of the unsafe sidetrack as "an absolute failure to maintain that standard of care necessary to insure the reasonable safety of its employees."[101] In the following paragraph, however, the opinion suggests additional reliance upon an implied waiver (of the contractual right to full indemnity) analysis: "The Railroad, clearly aware of the possiblity of serious injury to its employees, by its continued operation contributed to the negligent acts of [the] Industry *and gave its assent to the increased possibility of injury.*"[102]

The Court of Appeals for the Eighth Circuit, in *Missouri Pacific Railroad v. Arkansas Oak Flooring Co.*,[103] relied more heavily upon the implied waiver theory of acquiescence in holding that acquiescence is a defense to a claim for full indemnity under a three-clause agreement. The district court had rejected as immaterial, evidence which tended to show acquiescence by the railroad in the continuation of the reduced clearance created by the industry's protruding loading dock.[104] Despite the fact that the indemnity contract provided both that the industry "indemnify and hold harmless" the railroad against any damages arising out of the industry's failure to maintain the agreed upon track clearances,[105] and that the industry waived all rights to question the railroad's right or power to enforce

96. 301 F. Supp. 991 (N.D. Ohio 1969).
97. *Id.* at 992.
98. *Id.* at 994 (applying Ohio law).
99. *Id.* at 995.
100. *Id.* at 944-95.
101. *Id.* at 995.
102. *Id.* (emphasis added).
103. 434 F.2d 575 (8th Cir. 1970).
104. *Id.* at 577.
105. *Id.*

this indemnity provision;[106] the court of appeals ruled that the railroad's right to full indemnity was limited by section 95's common law acquiescence doctrine. In holding that the district court's failure to admit evidence of the railroad's acquiescence in the unsafe clearance was erroneous, the opinion reasoned that the common law doctrine of acquiescence constitutes a defense to a contractual claim for indemnity unless the parties expressly contract against its application.[107] Moreover, the court refused to read the industry's express waiver of the right to question the railroad's right to enforce the clearance-violation indemnity clause as a contractual provision against the common law acquiescence defense,[108] citing the general rule against construing indemnity agreements to permit the indemnitee to recover for its own negligence unless the court is firmly convinced that such was the intent of the parties.[109] In a closing paragraph the court observed that, although the question was not then before it, the industry's success in establishing an acquiescence defense also establishes its own joint or concurring negligence within the meaning of the contribution clause.[110] This final comment makes clear the court's view that the industry need not itself be free from fault in order to argue successfully that, in acquiescing in the unsafe condition, the railroad has in effect waived (or is estopped from asserting) its claim for full indemnity under a specific contractual provision.

The cases which view the acquiescence issue from a strict contract perspective, on the other hand, analyze the effect of the railroad's failure to act independently from the common law concept of acquiescence, in terms of the contract doctrines of estoppel and waiver. In *Boston & Maine Railroad v. Howard Hardware Co.*,[111] it was held reversible error to submit the defense of acquiescence to the jury even though the railroad had known of the inadequate clearance for many years and was further aware that railroad cars had on several previous occasions struck the side of the building against which its brakeman was crushed. The court ruled that the very purpose of the three-clause indemnity agreement was to transfer the risk of liability in such situations from the railroad to the industry and declined to apply the contribution clause in spite of the railroad's continued acquiescence in an obviously dangerous condition.[112] The *Howard Hardware* court

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106. *Id.* at 579.

107. *Id.*

108. *Id.* The opinion distinguished an earlier Eighth Circuit case which had held that the following language was sufficiently clear and unambiguous to preclude the assertion of an acquiescence defense: " 'Carrier's knowledge of such obstructions and its continued operation of the Switch shall not be a waiver of this covenant, nor of the Carrier's right to recover for such damages to persons or property as may result therefrom.' " *Id.* at 578 (quoting Anthony v. Louisiana & Ark. Ry., 316 F.2d 858, 862-63 (8th Cir.), *cert. denied,* 375 U.S. 830 (1963)).

109. *Id.* at 579.

110. *Id.* at 581.

111. 123 Vt. 203, 186 A.2d 184 (1962). *See also* New York Cent. R.R. v. General Motors Corp., 182 F. Supp. 273 (N.D. Ohio 1960).

112. 123 Vt. at 211, 186 A.2d at 191.

in effect ruled that the specific clause entitling the railroad to indemnity for damages caused by industry-created unsafe clearances[113] placed the industry in the position of an insurer with respect to accidents caused by unsafe clearances.[114] In rejecting the industry's section 95 acquiescence argument, the opinion cited *Williston on Contracts* for the proposition that "[t]he fundamental basis for estoppel in the law of contracts is the *justification for the conduct of the party claiming it.*"[115] Consistent with this contract-oriented approach, the court concluded that the unsafe clearance indemnity clause must prevail over the more general contribution clause, relying on *Booth-Kelly* and secondary contract sources as authority:

> The second section of provision 7 [contribution clause] is general in its application. It was designed to cover accidents that might occur on the siding from unspecified causes where joint and concurring negligence of the railroad and the shipper might be involved. Paragraph 8 [third, unsafe clearance indemnity clause] is specific and is confined to instances where liability arises from obstructions to passage along the railroad siding. It relates directly to accidents of the type that is involved in this controversy. Since it appears that the purpose of paragraph 8 was directed particularly to accidents produced by obstructions, it must prevail over the general terms of the preceding clause. Deep Vein Coal Co. v. Chicago & E.I. Rwy. Co., 7 Cir., 71 F.2d 963, 964; Booth-Kelly Lumber Co. v. Southern Pacific Company, supra, 183 F.2d at page 906, 20 A.L.R.2d at 703; 17 C.J.S. Contracts § 313, p. 731; 12 Am. Jur. Contracts, § 244, p. 779.[116]

Similarly, *Lehigh Valley Railroad v. American Smelting and Refining Co.*,[117] rejected the application of an acquiescence defense to a three-clause agreement, holding that the industry had "contracted away its right to rely on the doctrine of acquiescence" where the agreement appeared to contemplate the existence of the close clearance which resulted in the death of a railroad employee.[118] The court found that the railroad was guilty only of passive negligence in conducting operations with knowledge of the

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113. "8. No obstruction of any kind whatsoever shall be permitted within the distances shown by the lines of the Clearance Diagram upon this agreement without first obtaining the consent of the Chief Engineer of the Railroad and the Shipper shall at all times save harmless and indemnify the Railroad from and against all loss, cost, damage and expense which the Railroad may directly or indirectly suffer or be subject to caused wholly or in part or in any way referable to the existence of such obstruction, whether with or without the consent of the Chief Engineer."

Id. at 205, 186 A.2d at 187 (quoting agreement).

114. *See id.* at 211, 186 A.2d at 188.

115. *Id.* at 211, 186 A.2d at 191 (citing 3 S. WILLISTON, CONTRACTS § 692, at 1998 (rev. ed. 1936)) (emphasis added).

116. 123 Vt. at 213, 186 A.2d at 192.

117. 256 F. Supp. 534 (E.D. Pa. 1966).

118. *Id.* at 537.

dangerous condition,[119] and reasoned that application of the acquiescence defense in such circumstances would effectively nullify the close clearance indemnity clause because "[t]he Railroad would never be able to recover except possibly where the third-party defendant [industry] suddenly erected a new structure close to the tracks and the Railroad had not as yet had an opportunity to object before the accident."[120] On this analysis, the opinion plausibly concluded that the parties could not have intended the railroad's acquiescence to defeat its contractual claim for indemnity.

Because they construe contracts which contain a third clause that seems to remove the apparent ambiguity generated by the dual-clause agreements, the *Howard Hardware* and *American Smelting* cases bring the general (contract) analysis of why the doctrine of acquiescence is insufficient to defeat a contractual claim of indemnity into sharp focus: the industry, in every case, is seriously at fault in creating the dangerous condition and cannot, therefore, be permitted to claim an estoppel against the railroad. Where the indemnity clause or clauses either expressly or by fair implication contemplate the accident which results in the loss, it is unlikely that the parties intended that a mere failure to act to correct the unsafe condition would defeat the right to indemnity created by the contract — if the parties did intend such an extreme result they could have included a provision to that effect in their contract.

The contract-oriented three-clause cases do not, however, adequately explain the intent underlying the more general indemnity and contribution clauses. It would appear that the unsafe clearance clause was intended to provide an absolute right to indemnity for losses occasioned by unsafe clearances, while the remaining clauses were intended to cover injuries arising out of other unsafe conditions created by the industry.[121] Not all cases have construed three-clause contracts in this manner,[122] however, and it can be argued that the analysis described above results in a construction which severely limits the application of the contribution clause. Because nearly all of the accidents contemplated by sidetrack indemnity agreements are caused by unsafe clearances, the contribution clause is applicable under this construction only when the accident is caused by an unusual occurrence, and then only in the unusual situation in which the railroad's negligence can be deemed primary or active. The issue of the scope and application of each of the clauses in a three-clause agreement is puzzling and no decision has carefully analyzed the question, but the possibility that the parties simply bargained for clauses which appeared favorable individually without fully considering their concurrent effect should not be overlooked.

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119. *Id.*

120. *Id.* at 538.

121. *See* text accompanying note 116 *supra.*

122. *See, e.g.,* Missouri Pac. R.R. v. Arkansas Oak Flooring Co., 434 F.2d 575 (8th Cir. 1970); Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962); Pennsylvania R.R. v. M.K.W. Corp., 301 F. Supp. 991 (N.D. Ohio 1969).

ATTEMPTS TO DRAFT AROUND THE RECONCILIATION OF CLAUSES PROBLEM TO ACHIEVE A PARTICULAR RESULT

The construction issues discussed thus far are ultimately a reflection of the principle that although public policy does not flatly prohibit a railroad's utilization of a spur track agreement to shift the burden of liability which arises in whole or in part from its own negligence, such agreements will not be construed to permit the railroad to recover losses attributable to its FELA negligence unless the court is "firmly convinced" that such a construction reflects the intention of the parties. The construction problems previously described stem from the wider problem of drafting an unequivocal expression of intent within the framework of a multi-clause agreement that will provide for indemnity in some instances and contribution in others. The problem is, of course, complicated by the fact that courts must be firmly convinced of the parties' intention that the railroad be fully indemnified for its FELA liability in a legal atmosphere influenced, to varying degrees, by policy considerations which suggest that the railroad's recovery be limited to contribution. The task is not, however, impossible, even in the most policy-oriented jurisdictions.

In single-clause agreements the problem of drafting an unequivocal expression of intent can be bluntly disposed of through explicit reference to the negligence of the indemnitee.[123] The phrase "regardless of any negligence or alleged negligence on the part of any employee of the Railroad" passed muster in *Western Constructors v. Southern Pacific Co.*,[124] as did "*notwithstanding* any possible negligence (whether sole, concurrent or otherwise) on the part of [the Railroad], its agents or employés" in *Missouri Pacific Railroad v. Rental Storage and Transit Co.*[125] Such a drafting strategy would, in essence, create a contract of insurance which would withstand attacks on public policy grounds in nearly all jurisdictions[126] by virtue of its clear and unequivocal expression of intent that the railroad be indemnified for the consequences of its own negligence. Single-clause contracts preceded the development of the two and three-clause agreements[127] which, through the contribution clause, tend to protect the industry in situations where the railroad is seriously at fault. Such protection can be dispensed with effectively by restricting the contract to a single explicit indemnity clause.

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123. In United States v. Seckinger, 397 U.S. 203, 211 n.15 (1970), the Supreme Court outlined the two prevailing views among the states concerning clarity of expression. One requires an explicit reference to the indemnitee's negligence, and the other dispenses with this requirement when the intention to indemnify the indemnitee for his own negligence otherwise appears with sufficient clarity. *See generally* Annot., 175 A.L.R. 8 (1948). *See also* note 18 *supra*.

124. 381 F.2d 573, 575 (9th Cir. 1967).

125. 524 S.W.2d 898, 908 (Mo. App. 1975) (emphasis, parentheses, and brackets in original).

126. *See* United States v. Seckinger, 397 U.S. 203, 211 (1970).

127. *See* note 19 *supra*.

Where the parties desire to afford the industry some protection by combining indemnity and contribution clauses, the draftsman's task is to indicate clearly the relative scope of each of the clauses and to provide for the contingency of an acquiescence defense which would deprive the railroad of its right to indemnity. The spur track agreement in *Missouri Pacific Railroad v. Winburn Manufacturing Co.*[128] is noteworthy because it combined an explicit reference to the railroad's negligence with a clearly drafted limitation on the scope of the contribution clause to express forcefully the intention that the industry hold the railroad harmless for all losses arising from unsafe clearances in a dual-clause agreement. The clause requiring the industry to indemnify the railroad for losses attributable to unsafe clearances concluded with the words "notwithstanding any possible negligence (whether sole, concurrent or otherwise) on the part of the Carrier, its agents or employees,"[129] and the joint or concurring negligence-contribution clause was preceded by the phrase "*except as otherwise provided* in this agreement."[130] This formulation enabled the railroad to recover its entire loss despite the fact that the injury to a railroad switchman was caused by the industry's clearance violation *and* the concurrence of the railroad's active negligence, as a lower court decision applying the contribution clause was reversed.[131] By making clear that the indemnity clause applied specifically to losses occasioned by unsafe clearances regardless of railroad negligence through an express reference to such negligence and a clear limitation on the scope of the contribution clause, the contract removed all ambiguity regarding indemnification for the most common class of accidents. On balance, the drafting technique illustrated in *Winburn Manufacturing* increases the indemnity rights of the railroad over those accruing under the basic dual-clause agreement as construed in majority view cases such as *Booth-Kelly*. More importantly from the railroad's perspective, it affords protection against the policy-oriented constructions of the standard two-clause agreement found in cases such as *Freed v. Atlantic & Pacific Tea Co.*,[132] *Dery v. Wyer*,[133] and *Colonial Stores, Inc. v. Central Railway*,[134] discussed previously.[135]

In *Ruddy v. New York Central Railroad*[136] it was held that a safe clearance indemnity clause controlled "despite the presence of the railroad's active negligence and the absence of exact words to void such negli-

128. 461 F.2d 984 (8th Cir. 1972).
129. *Id.* at 986.
130. *Id.* (emphasis in original).
131. *Id.* at 988-89.
132. 401 F.2d 266 (6th Cir. 1968).
133. 265 F.2d 804 (2d Cir. 1959).
134. 279 F.2d 777 (5th Cir. 1960).
135. *See* text accompanying notes 54 to 76 *supra*.
136. 124 F. Supp. 470 (N.D.N.Y. 1954), *modified on other grounds*, 224 F.2d 96 (2d Cir. 1955).

gence."[137] Noting that the contribution clause followed the phrase "except as herein otherwise specifically provided,"[138] the court pointedly stated that

> [t]o overlook this important exception and read this general paragraph with the particular and definite paragraph would be a strained meshing and directly against the express words in [clearance indemnity clause] "to assume and indemnify and hold harmless."[139]

By inserting the words "except as herein otherwise specifically provided," the draftsman of the contract was able to prevent the application of the contribution clause in a situation where the dual-clause contract contemplated full indemnity. This result would have followed from neutral principles of contract construction as applied to the standard dual-clause agreement — both because the more specific indemnity clause should prevail over the more general contribution clause and for the related reason that the application of the more general clause when the more specific one seems to apply inevitably reads the more specific clause out of the contract by failing to give it meaning and effect — but the added language *expressly* indicates the relative scope of the clauses and eliminates the possibility of the contrary result produced by a departure from such principles. Some courts have applied the contribution clause despite the fact that a more specific indemnity clause seems to apply.[140] The drafting employed in *Ruddy* is calculated to defeat such constructions.

Problems posed by the waiver or estoppel element of the acquiescence doctrine can usually be avoided by including a nonwaiver provision such as: "Neither the Railway Company's knowledge or notice of any such non-observance, nor its failure to notify its employees thereof, nor its continued operation of said spur tracks, shall be in any wise deemed a waiver of the foregoing covenant of indemnity."[141] Such nonwaiver provisions would also seem to provide strong, if indirect, support for an argument against the application of the contribution clause under an expansive active negligence theory.[142]

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137. *Id.* at 474.

138. *Id.* at 473. (quoting contract).

139. *Id.* at 475. *Accord,* Gollick v. N.Y. Cent. R.R., 138 F. Supp. 384 (E.D. Mich. 1956).

140. *See* text accompanying notes 54 to 101 *supra.*

141. Minneapolis-Moline Co. v. Chicago, M., St. P. & Pac. R.R., 199 F.2d 725, 729 (8th Cir. 1952) (full indemnity awarded where railroad employee was injured due to unsafe clearance despite industry's arguments based on railroad's passing of cars along track after learning of danger). *See also* Miller and Co. v. Louisville & N.R.R., 328 F.2d 73, 74 (5th Cir. 1974); Anthony v. Louisiana & Ark. Ry., 316 F.2d 858, 862-63 (8th Cir.), *cert. denied,* 375 U.S. 830 (1963). *But see* Missouri Pac. R.R. v. Arkansas Oak Flooring Co., 434 F.2d 575, 579 (8th Cir. 1970) (applying contribution clause despite nonwaiver provision stating that either party "may waive any default at any time of the other without affecting, or impairing any right arising from any subsequent default," on the ground that the provision did not unequivocally express an intent to indemnify against own negligence).

142. *See* text accompanying notes 55 to 72 *supra.*

Although the various drafting strategies discussed above do not all produce the same rights and liabilities as do the majority rule construction of the basic two-clause agreement interpreted in *Booth-Kelly* or the contract-oriented constructions of the three-clause agreements,[143] they all illustrate ways in which the parties, particularly the railroad, can shield themselves from policy-oriented construction of their contracts. While it is thus clear that policy-oriented construction can be avoided through careful (albeit strongly worded) draftsmanship, it is equally clear that the justifications underlying the policy-oriented departures from more neutral principles of contract construction, which sometimes necessitate such exacting draftsmanship, need to be articulated carefully and examined closely. The fact that the departures can be "drafted around" does not, of course, provide any justification for their existence. Their justification must be found in the policy interests they ostensibly promote.

POLICY CONSIDERATIONS

I. *Construction in Light of the Purpose and Intent of the FELA*

Two basic themes permeate the various descriptions of the legislative intent of the Federal Employers Liability Act. First, the Act was intended to require the railroad industry to internalize some of the cost of railroad injuries and thereby "lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them."[144] Second, it was designed to promote railroad safety.[145]

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143. *See, e.g.*, Lehigh Valley R.R. v. American Smelting Co., 256 F. Supp. 534 (E.D. Pa. 1966); Boston & M.R.R. v. Howard Hardware Co., 123 Vt. 203, 186 A.2d 184 (1962). These cases are discussed in the text accompanying notes 111 to 122 *supra*.

144. Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). The legislative history of the Act contains the following explanation of this element of its purpose:

> The passage of the original act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to change radically, as far as congressional power can extend, those rules of the common law which the president, in a recent speech at Chicago, characterized as "unjust." President Taft, in his address at Chicago, September 16, 1909, referred "to the continuance of unjust rules of law exempting employers from liability for accidents." The public policy which we now declare is based upon the failure of the common law to meet the modern industrial conditions, and is based not alone upon the failure of those who are in the United States, but their failure in other countries as well. Mr. Asquith, present Prime Minister of England, said that it was "revolting to sentiment and judgment that men who met with accidents through the necessary exigencies of daily occupation, should be a charge upon their own families."

S. REP. NO. 432, 61st Cong., 2d Sess. 2 (1910).

145. In Saint Louis, Iron Mt. & S. Ry. v. Conley, 187 F. 949, 952 (8th Cir. 1911), the Eighth Circuit stated that "[t]he primary object of the act was to promote the safety of employés of railroads . . . ." Similarly, Justice Douglas in his concurring opinion in *Wilkerson* stated that the Act was intended to abolish the common law defenses of assumption of risk, the fellow servant rule, and contributory negligence which often

As a prophylactic measure, section 55 of the Act broadly proscribes contractual exemption from FELA liability: "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 . . . ."[146] This provision seems to be suceptible to an expansive reading on the basis of its broad language and apparent intention that the railroad bear the burden of FELA liability. It has been uniformly held, however, that the concern of section 55 was to ensure that railroad employees be compensated to the full extent of their loss, not that the railroad be precluded from indemnifying itself against FELA liability.[147] It is clear that section 55 was directed at the particular problem of employer-employee releases and was not enacted to prevent carriers from shifting the

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insulated the railroad from liability arising from unsafe working conditions, and to thereby protect railroad employees from the "risks and hazards *which 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." Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (quoting from H.R. REP. No. 1386, 60th Cong., 1st Sess. 2 (1908)) (emphasis added).

146. 45 U.S.C. § 55 (1970).

147. *E.g.*, Hall v. Minnesota Transfer Ry., 322 F. Supp. 92, 95 (D. Minn. 1971). An important distinction has been drawn between indemnity for liability incurred, and exemption from liability in the first instance:

> It is suggested that the so-called indemnity clause of the Protective Service Contract amounts to a violation of [45 U.S.C. § 55]. But inasmuch as this clause is one merely of indemnity, it does not have the effect of exempting the railroads from their liability as common carriers under the Act. Hence in no sense may it be considered a violation of [§ 55].

Gaulden v. Southern Pac. Co., 78 F. Supp. 651, 655–56 (N.D. Cal. 1948), *aff'd*, 174 F.2d 1022 (9th Cir. 1949).

This distinction figured prominently in Culmer v. Baltimore & O.R.R., 1 F.R.D. 765 (W.D. Pa. 1941), where a brakeman had been injured because of the insufficient clearance between the train on which he was riding and the industry's building. The court expressly rejected the industry's § 55 defense to the railroad's indemnity claim on the basis of its conclusion that § 55 contemplates agreements between employer and employee, and not agreements with third parties. *Id.* at 766. A similar result obtained in Chicago & N.W. Ry. v. Davenport, 205 F.2d 589 (5th Cir. 1953), an action by a railroad to recover from circus owners under an indemnity agreement providing for liability arising in the course of haulage of the circus' train over the railroad's line. The court held that the railroad could sue on the contract for injuries to its employee, stating at 594:

> We are not able to follow the learned district judge in holding that, so construed, this is a contract by which the Railroad seeks to exempt itself from liability created by the Federal Employers' Liability Act or the Federal Safety Appliance Act and, hence, void under 45 U.S.C.A. § 55. The Railroad did not seek to escape liability to its employee. To the contrary, it settled with him fairly and honorably. The contract, construed as contended for by Appellant Railroad, seems to us to provide for indemnification and not for a limitation of liability.

The conclusion that § 55 was enacted to protect employees from their employers is firmly entrenched in the case law and amply supported by the legislative

ultimate burden of their statutory liability to third parties. Its primary purpose was to protect railroad employees from economic coercion in order to assure an effective system of compensation for personal injuries.[148] Because there is nothing in the language of the statute or its legislative history to prevent the railroad from contractually indemnifying itself against the consequences of its negligence, any justification for strictly construing sidetrack indemnity agreements must be found in broader public policies embodied in state law.

II. *The Broader Policy Issues*

Any analysis of the policies underlying the practice of strictly construing contracts which attempt to indemnify a party against the consequences of his own negligence must take into account the strong public policy favoring freedom of contract and the societal interest in preserving the integrity of written instruments.[149] A construction which derogates the parties' intent as fairly expressed in the language of their contract obviously runs afoul of these important policy considerations.[150] Consequently, the process of construing, as distinguished from merely interpreting,[151] spur

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history of that section. At the time of its enactment, the purpose of § 55 was explained on the Senate floor as follows: "The proposed bill undertakes to modify somewhat the common law applicable to certain agreements or contracts *made between employers and their workmen,* in which the latter agree, in consideration of some form of insurance or indemnity fund, to give up the right to sue in the courts." 60 CONG. REC. 4527 (1908) (emphasis added). *See generally* W. THORNTON, FEDERAL EMPLOYERS' LIABILITY ACT 265–74 (3d ed. 1916); Richter & Forer, *Federal Employers' Liability Act,* 12 F.R.D. 13, 52–57 (1952).

148. Although the fact that this section was directed at a particular mischief does not obviate the broader safety goals of the Act, it is perhaps significant that Congress did not utilize the nonexemption provision to limit or proscribe contracts purporting to relieve the railroad of monetary responsibility for statutory violations.

149. *See, e.g.,* Sante Fe, P. & P. Ry. v. Grant Bros. Const. Co., 228 U.S. 177 (1913) ("the highest public policy is found in the enforcement of the contract which was actually made").

150. Respect for these policies has led a few courts to reject the strict construction principle as applied to indemnity contracts. *E.g.,* Batchkowsky v. Penn Cent. Co., 525 F.2d 1121 (2d Cir. 1975) (sidetrack indemnity agreement should be construed to effectuate the parties' intent, and where that is debatable or ambiguous, it should be viewed realistically as an effort by businessmen to allocate as between them the cost of expense of the risk of accidents apt to arise on a fairly predictable basis); Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226 (1939) (contract of indemnity against damages resulting from the indemnitee's own negligence should be construed fairly to accomplish its purpose rather than subjected to an arbitrary or strict construction which would defeat the intent of the parties).

151. 3 A. CORBIN, CONTRACTS § 534, at 9 (rev. ed. 1960) explains: "By 'interpretation of language' we determine what ideas that language induces in other persons. By 'construction of the contract,' as that term is used here, we determine its legal operation — its effect upon the action of courts and administrative officials." Contractual language can, as a matter of interpretation, induce ideas which embody

track indemnity agreements must often be viewed as a process of balancing conflicting policy interests.[152]

The policy favoring strict construction[153] of agreements which purport to hold the indemnitee harmless for damages arising from his own negligence is summarized in the comment to section 572 of the *Restatement of Contracts*. Section 572 declares that "a bargain to indemnify another against the consequences of committing a tortious act is illegal unless the performance of the tortious act is only an undesired possibility in the performance of the bargain, and the bargain does not tend to induce the act."[154] The rationale of this rule is obviously that agreements which insulate a party from the financial consequences of his negligent acts tend to promote, or at least fail to discourage, negligent acts.[155]

As a matter of public policy courts have understandably been reluctant to construe contracts in a manner which might encourage negligence rather than inhibit it. The principal shortcoming of the spur track indemnity cases is found in their application of this safety policy to FELA liability as a matter of unexamined assumption rather than thoughtful analysis. In declining to follow "the cases which seem to thwart contractual intention solely upon the ground that to give literal effect thereto would relieve a

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the parties' intent and at the same time be construed so as to have a legal effect different from this expressed intent because the court's action is also affected by external policy considerations. The contract can thus be interpreted as meaning *X* and construed as meaning *Y*. *See generally* Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939 (1967).

152. *Compare* Missouri, Kan. & Tex. Ry. v. Carter, 95 Tex. 461, 68 S.W. 159 (1902) (indemnity contract relieving the railroad of losses from its liability for property damage caused by its own negligence held not void as contrary to public policy in view of the paramount public policy, fundamental to freedom of contract, requiring that contracts be given the meaning which the parties ascribed to them) *and* Santa Fe, P. & P. Ry. v. Grant Bros. Const. Co., 228 U.S. 177, 188 (1913) ("the highest public policy is found in the enforcement of the contract which was actually made") *with* Aetna Ins. Co. v. Atlantic Coast Line R.R., 79 F.2d 463 (4th Cir. 1935), *cert. denied*, 297 U.S. 704 (1936) (because the public has an interest in the life and safety of human beings, indemnity contracts with respect to personal injuries are governed by a different rule from that applying to contracts indemnifying against property damage).

153. Annot., 175 A.L.R. 8, 18 (1948) ("Limiting Liability for Own Negligence") concludes that "[b]y construing every exemption clause which does not expressly refer to negligence, as not intended to include negligence, the courts have succeeded in emasculating liability exemption conditions generally and by this device have found a convenient subterfuge for practically invalidating stipulations limiting liability for negligence." Although this conclusion is perhaps overstated, it is illustrative of the policy which impels courts to apply the contribution clause rather than the indemnity provision when the railroad is negligent under the FELA standard.

154. RESTATEMENT OF CONTRACTS § 572 (1932).

155. Comment a to § 572 explains: "The tendency of a bargain to indemnify against the consequences of committing a tort is to induce its commission. Therefore, the objection to such bargains is similar to the objection to a bargain to pay directly for the commission of a tort."

contractor from the legal result of his own negligence,"[156] one of the few railroad injury cases addressing the encouragement of negligence issue declared:

> Quite fanciful is the suggestion that to hold as we do is "to put a premium on negligence rather than to discourage it." Particularly in the field of railroads and construction contractors, the results of negligence are so onerous and, the humanities and money aside, so altogether annoying, that only the extreme of inexperience would harbor the thought that a contract of the instant sort would operate in the slightest degree as a premium on and so an inducement to negligence.[157]

It is the "onerous" and "altogether annoying" nature of initial liability in FELA cases which presumably renders the tortious act giving rise to FELA liability "only an undesired possibility," but the argument quoted above must be evaluated in light of the fact that "[i]n 1907, the year before the Act was passed, 4,534 railroad men were killed in railroad work and 87,634 were injured. In 1950, more men were engaged in railroad work, but only 329 were killed and 22,000 injured . . . ."[158] These figures can certainly be read as an indication that the burden imposed by statute has had a substantial impact upon railroad safety and that the railroad should bear the full burden of FELA liability for spur track accidents. There are of course many factors in addition to the enactment of FELA which may have influenced this pattern,[159] but the decisions construing sidetrack indemnity contracts have failed to explore either the safety impact of the statute in general, or the safety implications of strict versus neutral construction of the indemnity agreements in particular. This evaluative process is of obvious importance in a rational balancing of the policies which militate in favor of either strict or neutral construction. It is especially important when the court is departing from contract principles on the theory that its departure will promote the public policy of encouraging railroad safety. The wider policy considerations would seem to dictate that departures from traditional principles of contract construction, and the abandonment of the policies which these principles embody, be undertaken only on the basis of clearly articulated and empirically sound principles of public policy. Such principles are not evident in the case law.

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156. Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 197, 288 N.W. 226, 228 (1939).

157. *Id.* (citations omitted). The case concerned a contract for indemnity against property damage but its conclusion, if sound, would seem to apply with even greater force to personal injury liability under the FELA. *See* Aetna Ins. Co. v. Atlantic Coast Line R.R., 79 F.2d 463 (4th Cir. 1935), *cert. denied*, 297 U.S. 704 (1936).

158. Lewis, *Federal Employers Liability Act*, 14 S.C.L.Q. 447, 447 (1962).

159. Most conspicuous are mechanical improvements in railroad equipment and the promulgation of explicit safety requirements both by statute and regulation.

III. *The Balance Struck by the Majority Rule Synthesis and the Departures from it*

By holding that the parties' rights under an agreement which provides for either indemnity or contribution, according to the nature of the accident, are governed by their contract, but that common law principles of active and passive negligence control the reconciliation of an apparent conflict generated by its clauses, the majority view merges construction and interpretation into a rational synthesis. As a matter of interpretation it is reasonable to assume that the parties considered the common law rules of indemnity and contribution in formulating the language of their contract and that their contractual intent can therefore best be discerned against this background. Although there are cases holding that the existence of a written indemnity contract precludes any application of common law active-passive negligence principles,[160] these principles appear to provide the most sensible means of determining the parties' intent when a combination of indemnity clauses has created an ambiguity which must be resolved. From a construction perspective, it is significant that active-passive negligence theory was developed at common law as a means of placing the ultimate burden of liability on the principal wrongdoer. Hence the majority view's utilization of active-passive negligence analysis advances to a significant degree the policy promoted through strict construction. Whenever the railroad's negligence rises to the level of the industry's negligence, the railroad's right to recovery is limited to contribution. The railroad is thus unable to insulate itself completely from the consequences of its own *serious* negligence. The majority rule's restrained application of active and passive negligence principles provides a theoretical framework for limited policy-oriented construction while pursuing the important policies of neutral construction and the preservation of the parties' manifested intent. However, the central question in this analysis — what constitutes "active" or primary negligence and what policy considerations are *in fact* implicated by permitting indemnity for FELA liability? — has not been addressed adequately by the courts. This analytical failure is particularly evident in the decisions which engage most heavily in policy-oriented construction.

Reasoned analysis has too often been replaced by word formulae in this area of the law.[161] As one court has stated, "[t]he unanalyzed terminology of 'active' and 'passive' conduct . . . results . . . in beclouding of the crucial issue. The phrasing shows what confusion will arise if we attempt to fit

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160. *See* notes 43 & 45 and accompanying text *supra*.

161. The inadequacies of active-passive negligence analysis have been documented and analyzed at length by numerous commentators. *See, e.g.*, Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947); 30 MO. L. REV. 624 (1965). Moreover, Davis concludes that "theories of active and passive negligence are least appropriate in certain indemnity cases involving the safety of one's premises." Davis, *supra*, at 542.

specific cases into bar cubicles of easy nomenclature."[162] Another commentator has articulated the essence of the problem by stating that

> while certain considerations of policy may justify the shifting of a loss from an injured plaintiff to a defendant, the same or different policies may require a further shift of loss from that particular defendant to another. A layman might say: "Yes, it's a good thing to make the original defendant pay the injured plaintiff, but the real wrongdoer (with the accent on the 'real') is another and he should be required to repay the original defendant."
>
> Of course, the important question is: what constitutes one of the two tortfeasors the "real" wrongdoer, *or what policy justifies the shifting of loss from one tortfeasor to another.*[163]

In the context of a dual-clause sidetrack agreement the question becomes: when does the railroad's fault in breaching its FELA duty place it in *pari delicto* with the industry and what policy justifies the application of the contribution clause in order to prevent the railroad from shifting its entire loss to the industry in accordance with the apparent intent of the parties? In answering this question, it is necessary to consider the importance of allowing the parties to allocate contractually the risk of FELA liability, and the importance of respecting the contract that the parties actually made (or thought they were making).

Reliance on the doctrine of acquiescence or manipulated theories of active and passive negligence[164] so as to apply the contribution clause in virtually all cases clearly defeats the parties' contractual intent in many instances, while strongly emphasizing the safety policies thought to be advanced through the strict construction doctrine. Almost without exception, sidetrack indemnity agreements are executed for the purpose of protecting the railroad against the increased exposure to liability concomitant with the operation of its trains on property owned by another and thus beyond the railroad's control. This purpose is not effectuated unless the contract is construed to provide full indemnity when the railroad's negligence consists of the operation of its train after a failure to discover, or to request the correction of, an unsafe condition created by the industry. The

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162. Falk v. Crystall Hall, 105 N.Y.S.2d 66, 70–71 (Sup. Ct. 1951).

163. Hodges, *supra* note 161, at 160 (emphasis added).

164. As Davis points out, the active-passive negligence classification can be (and is) made to depend on the manner of expression of a fact situation:

> The inconclusiveness of distinguishing between "active" and "passive" negligence by application of the test of "commission" or "omission" is patent. The result can depend on how a particular bit of conduct is described. For example, *A* might be considered as "actively" negligent in digging a hole in the street or only "passively" negligent in failing to barricade the hole. Again *A* might be "actively" negligent for driving his car too fast, or "passively" negligent in failing to bring it to a timely stop.

Davis, *supra* note 161, at 541.

cases which apply the contribution clause on variations of the theory that the railroad negligently "acted" on the condition created by the industry[165] tend to employ active-passive negligence analysis as a rather blunt instrumentality of public policy, not as a guide to the parties' intent.[166]

Acquiescence as implied waiver, a doctrine distinguishable from active negligence,[167] is similarly inconsistent with the policy favoring neutral construction and freedom of contract. "To constitute an estoppel by silence or acquiescence, it must appear that the party to be estopped was bound in equity and good conscience to speak, and that the party claiming estoppel relied upon the acquiescence and was misled thereby to change his position to his prejudice."[168] None of the spur track cases, particularly none of the three-clause cases discussed above, purports to apply the acquiescence doctrine on this contract-oriented basis. They rely instead on the doctrine as expressed in the caveat at the end of section 95 of the *Restatement of Restitution*,[169] without attempting to rationalize the application of this common law concept to contract cases or to answer the objection that the industry has "contracted away" its right to rely on the common law defense of acquiescence. It is unlikely that the parties intended that the (often express) contractual right to indemnity created by their agreement be defeated on the same terms that the common law indemnity right described in section 95, which would have existed had there been no contract, may be defeated. While this fact alone does not compel the conclusion that policy-oriented construction is *necessarily* misguided, it does suggest that substantial safety policies must in fact be promoted through strict construction if that policy-oriented approach is to be justified.

In striking a balance between neutral construction and fidelity to manifested intent, and the safety policy against contractual insulation from the consequences of one's own negligence, the departures from the majority rule tip the scales heavily in favor of public policy without undertaking the analysis necessary to justify this position. Attention must be focused both on the interests which are sacrificed and interests which are actually promoted through a particular theory of construction. The departures, and to a lesser extent the majority view, have failed to do this.

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165. *See* text accompanying notes 69 to 72 *supra*. It is difficult to ascertain what policy is served by making motion an operative criterion of active negligence without further inquiry into the relative faults and duties of the parties, but this has been done. *See, e.g.*, Detroit, Gr. H. & M.R.R. v. Boomer, 194 Mich. 52, 160 N.W. 542 (1916). The railroad not only has the right to operate its trains over the track but does so in the service of the industry.

166. *See* text accompanying notes 54 to 107 *supra*.

167. As a species of active negligence, the acquiescence doctrine generates the problems of imprecision and fidelity to contractual intent discussed in notes 162 to 165 *supra*.

168. Sherlock v. Greaves, 106 Mont. 206, 217, 76 P.2d 87, 91 (1938), *quoted in* BLACK'S LAW DICTIONARY 40 (4th ed. 1951).

169. *See* note 28 *supra*.

IV. *Toward a More Rational Balance*

The question of what policy *should* be furthered by the construction of FELA indemnity agreements is clouded by a lack of empirical evidence which would support reliable conclusions as to the relative safety incentives of allowing the railroad either full indemnity or contribution. It seems reasonable to assume that the prospect of financial responsibility for serious injuries and deaths would exert some influence upon the behavior of both railroads and industries. From this perspective, the temptation is to divide the loss between them in order to encourage both parties to act safely. On the other hand, the expense and annoyance of litigating the issue of primary liability, in addition to humanitarian considerations, must be regarded as a substantial safety incentive to the railroad regardless of whether or not it must ultimately share the burden it seeks to shift.

The resolution of the safety incentive dilemma must also turn on the question of who is the most effective risk avoider. If railroads can in fact effectively exercise control over safety conditions on industry property, their presumed superiority in recognizing and evaluating potential hazards would seem to make them a centralized and efficient risk avoider and, hence, the logical focal point of judicially-fashioned safety incentives. However, if the railroads cannot exercise such control, then restricting their ability to shift the burden of FELA liability cannot be justified on the theory that this would diminish their incentive to provide railroad employees with a safe place to work.[170] Moreover, such a restriction might well reduce the industries' incentive to ensure safe conditions on property which they control. In this circumstance, therefore, safety would be more effectively promoted through a neutral construction policy which allows the railroad, consistent with the expressed intent of the parties, to shift its statutory burden to the owner-industry as the party in the best position to avoid the liability-producing risks. Finally, equitable considerations based on perceived relative fault and fundamental fairness ought to be recognized. All things being equal, justice dictates that the more "blameworthy" party should bear the loss or at least a portion of it.

These considerations of control and blameworthiness might well form the nucleus of a more clearly articulated, rational public policy against which the countervailing societal interests of freedom of contract and the integrity of written instruments could be weighed. Policy considerations currently play an important, if unexamined, role in the construction of sidetrack agreements; but concepts of relative fault have been applied mechanically with a minimum of judicial attention to the question of what

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170. In this context it should be noted that § 95 of the RESTATEMENT OF RESTITUTION, the rule which according to the majority view is enunciated by the indemnity clause, applies to a landowner's negligent failure to make safe a condition created on his land by another. Because a landowner presumably is able to exercise greater control over his land than is the railroad over land owned by an industry, the argument for indemnity would appear to be even stronger in the spur track cases.

exactly determines which of the tortfeasors is the "real" wrongdoer, and what policy justifies the restrictions placed on the shifting of FELA loss to third parties who own sidetracks used by railroads.

On a more general level, several theories have been advanced by commentators in an effort to resolve the "indemnity tangle" which has resulted from confusion in the jurisprudence of relative fault. It has been suggested that the fundamental error in the use of active and passive negligence terminology[171] is its focus on the character of the breach rather than on a disproportion or difference in the character of duties owed by the potential defendants to the plaintiff.[172] Another commentator has focused on the nature of the duties between the indemnitor and indemnitee: "When there are two tortfeasors, either or both of whom has breached a duty which he owed to his co-tortfeasor and to the injured third person, then the tortfeasor who, to his co-tortfeasor, is blameless, should be allowed indemnity."[173] Finally, it is often said that the right to indemnity is predicated on a great difference in the gravity of the fault of the two tortfeasors.[174]

Each of these broad theoretical perspectives has some relevance to the problem of determining the policies that should be furthered in the construction of spur track indemnity agreements and to the determination of the most appropriate approach to the mechanics of construction in furtherance of those policies. Some form of relative fault-duty analysis is necessary to harmonize the indemnity and contribution clauses, and the

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171. Other catch words [in addition to active-passive and primary-secondary negligence] which have been used by the courts [in various contexts] include: "constructive" and "actual" negligence, "party immediately in fault," "positive tort" and "primary and efficient cause," "primary and active wrongdoer," "principal wrongdoer," "principal delinquent," "primary cause," "real cause," "principal and moving cause," "the wrongdoer in the physically participative sense and the wrongdoer in the legally relative sense," "concurrent or joint tort-feasors as distinguished from related tort-feasors," "active wrongdoer or primarily negligent party."

Davis, *supra* note 161, at 543-44 (footnotes omitted).

172. It is more important that most of us act like ordinary men with respect to the safety of our fellow humans than that a few of us observe a level of conduct far above the ordinary.

. . . It seems entirely proper for the law to say that, as between two persons liable to an injured person, the one who breached the less exacting duty should have to bear the full loss, as a matter of morals or as a matter of public policy. But if the difference is just one of *degree of causation,* and the duties which are owed to the injured person are roughly *equal,* then the case seems more proper for *contribution.*

To put it another way, negligent tort-feasors who breach different qualities of duties toward an injured person can be considered to be on different "planes of fault" — which difference is important enough to warrant a complete *shifting* of the loss from one to another. But tortfeasors who breach substantially equal duties are on the same "plane of fault" and should *share* the loss.

Id. at 547 (emphasis in original).

173. Hodges, *supra* note 161, at 162 (emphasis omitted).

174. *See* W. PROSSER, *supra* note 21, at 313 and cases cited in n.4 of § 51.

majority view's restrained application of common law indemnity rules may thus be viewed as a necessary departure from pure contract principles. The larger task is to formulate a reasoned public policy with regard to the purposes served by the strict construction of FELA indemnity agreements, to develop a relative fault-duty negligence terminology which will consistently express that policy, and to balance the interests underlying the restrictive construction policy against the interests inherent in the neutral construction of written contracts.

CONCLUSION

The recurrent issues generated by the application of multi-clause indemnity agreements to FELA liability arising out of spur track accidents have not been resolved consistently. For a variety of reasons, courts continue to reach disparate conclusions in the course of applying substantially identical contract language to substantially identical facts. This inconsistency is largely a reflection of a conflict between neutral contract principles and the generally accepted policy against construing a contract as indemnifying a party against the legal consequences of his own negligence.

The jurisdictions that have emphasized policy considerations over contract principles have done so largely on the basis of unexamined policy assumptions and a mechanical application of confused terminology, without confronting the policy ramifications of the particular facts before them.[175] It is by no means clear that the practice of strict construction in fact encourages safety or directs the burden of liability to the "real" wrongdoer in the special circumstances of negligence and liability under the Federal Employers Liability Act.[176] What is clear is that in many cases the doctrine

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175. It is also possible that courts have been influenced by the fact that the lower standard of liability established by the Act allows the railroad in effect to make the industry (indirectly) liable to the plaintiff in situations where it would not be liable if the injured employee had proceeded against the industry directly. The most common example of this situation is contributory negligence on the part of the railroad employee, which is no bar to his FELA claim against the railroad but would often bar the employee's claim had he sued the industry directly. Another possible influence is an intuitive feeling that Congress (for reasons of loss distribution, etc.) intended that the burden of these injuries should fall on the railroad. No court has made this argument but its potential influence should not be overlooked.

176. It is generally acknowledged that the statute holds railroads to a much higher standard of care than did the common law. *See, e.g.*, Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) ("slight negligence" necessary to support an action under the FELA is defined as a failure to exercise great care and the burden of proof is much less than the burden required to sustain recovery in ordinary negligence actions); Slaughter v. Atlantic Coast Line R.R., 302 F.2d 912 (D.C. Cir.) ("negligence" under the FELA does not mean negligence in the common law sense and is a term of broader significance), *cert. denied*, 371 U.S. 827 (1962). Because the railroad is liable under the statute for negligent acts over which it has little or no control, the deterrent effect of restricting its ability to shift FELA liability is obviously diminished.

of strict construction frustrates the expressed intent of the parties. A conclusion as to the "correct" approach to the construction of dual-clause indemnity agreements must be based on a thoughtful reconciliation of ostensibly conflicting interests, an approach which is now conspicuously lacking in the case law.