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diction of the objective reality of what occurred is contrary to general tax convention.[105] The *Willis* decision, accordingly, provides little guidance to practitioners attempting to characterize the nature of a loss deduction resulting from a lapsed option when the identity of the underlying property is ambiguous.

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VIII. TORTS

A. *Defining Punitive Damages Under the Federal Tort Claims Act*

In 1946, Congress enacted the Federal Tort Claims Act[1] (FTCA) to allow injured parties the right to initiate tort claims against the United States.[2] The

105. *See supra* notes 64-76 and accompanying text (analysis of tax convention that intent not relevant to determination of tax consequences unless statute turns on intent).

1. Federal Tort Claims Act, ch. 753, tit. iv, 60 Stat. 843 (1946) (codified at 28 U.S.C. §§ 1346(b), 2671-2680 (1982)). The Federal Tort Claims Act (FTCA) grants exclusive jurisdiction to United States district courts over civil claims against the United States for injury caused by a government employee, acting within the scope of his employment, under circumstances in which a private individual would be liable. 28 U.S.C. § 1346(b) (1982). The FTCA states that the United States shall be held liable in the same manner and to the same extent as a private individual under similar circumstances. 28 U.S.C. § 2674 (1982). The liability of the United States under the FTCA is subject to certain qualifications and exceptions. *See* 28 U.S.C. §§ 2671-2680 (1982). For example, § 2674 of the FTCA states that the United States shall not be liable for interest accrued on damage awards prior to judgment or for punitive damages. 28 U.S.C. § 2674 (1982). *See infra* note 6 and accompanying text (discussing § 2674 of FTCA).

2. H.R. REP. No. 1287, 79th Cong., 1st Sess. 1 (1945). Prior to enactment of the FTCA, courts held that the federal government was immune to tort actions under the common law doctrine of sovereign or governmental immunity. *See* German Bank v. United States, 148 U.S. 573, 579 (1893) (well settled rule of law that government is not liable for nonfeasances, misfeasances or negligence of its officers). Under the doctrine of sovereign immunity, a sovereign or government is immune from any suit to which it has not consented. *See* Feres v. United States, 340 U.S. 135, 139 (1950). The United States Supreme Court in *Kawananakoa v. Polyblank* summarized the rationale of sovereign immunity by stating that no legal right can exist against the authority that makes the law on which the right depends. 205 U.S. 349, 353 (1907). *See generally* Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925); *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 751, 1039 (1926-1927); *Government Responsibility in Tort*, 28 COLUM. L. REV. 577, 734 (1928) (eight-part series comprehensive critical review of government's tort liability prior to passage of FTCA).

While the doctrine of sovereign immunity stood as a bar to initiating suit on a tort claim against the United States, relief was available through passage of a private relief bill in Congress. H.R. REP. No. 1287, *supra*, at 2. A private relief bill was an appeal to the legislature for relief by a private individual who had been injured by the tortious conduct of the United States. *See*

FTCA holds the federal government liable for tortious acts that government employees commit while acting within the scope of their employment.[3] The FTCA mandates that courts must determine the government's liability in accordance with the law of the state where the tort occurred.[4] As a result, a court may hold the United States liable for its tortious acts in the same manner and to the same extent as a court would hold a private citizen liable under the law of the state where the tort occurred.[5] The FTCA, however, does limit the liability of the United States by proscribing punitive damage awards.[6] In *Flannery v. United States*,[7] the Fourth Circuit considered whether damages defined as compensatory under the law of the state where the tort occurred, but which exceed the plaintiff's compensable losses, fall within the punitive damage proscription of the FTCA.[8]

In *Flannery*, an automobile owned by the United States and operated by a government employee on official business struck plaintiff Michael Flannery's car.[9] As a result of extensive brain damage suffered in the accident,

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Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 LAW & CONTEMP. PROB. 311, 322 (1942). Passage of a private relief bill resulted in either a direct appropriation for payment of the claim or a grant of the privilege to sue in either the Court of Claims or a United States district court. *Id.* at 322-26. *See* Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1688-93 (1965-1966) (describing procedural aspects of private bills). The private relief bill system was criticized as being burdensome to Congress, unjust to claimants and non-uniform in application. H.R. REP. No. 1287, *supra*, at 2. In response to the rapid expansion of governmental activities, the growing burden of the private relief bill system on Congress, and the injustice to claimants, Congress created the FTCA to grant to private individuals the right to sue the federal government for tortious conduct. *Id.* at 2-3. *See generally* L. JAYSON, 1 PERSONAL INJURY: HANDLING FEDERAL TORT CLAIMS §§ 51-64 (1984) (tracing legislative history of FTCA); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 GEO. L.J. 1 (1946-1947) (discussing legislative history of and analyzing FTCA).

3. 28 U.S.C. §§ 1346(b), 2674 (1982).

4. *See* Indian Towing Co., Inc. v. United States, 350 U.S. 61, 64-65 (1955) (test for determining federal government liability under FTCA is whether private person would be liable for similar acts of negligence under laws of state where wrong occurred); 28 U.S.C. §§ 1346(b), 2674 (1982) (United States shall be liable for tort claims in same manner and to same extent as private individual under similar circumstances).

5. *See* Feres v. United States, 340 U.S. 135, 141 (1950) (purpose of FTCA was not to create new causes of action but to force United States to accept liability under circumstances that would result in liability to private defendants); 28 U.S.C. §§ 1346(b), 2674 (1982).

6. 28 U.S.C. § 2674 (1982). Section 2674 of the FTCA specifically provides that while the United States shall be liable for tort claims under circumstances that would result in private liability, the United States shall not be liable for interest on damage awards prior to judgment or for punitive damages. *Id. See, e.g.*, Fitch v. United States, 513 F.2d 1013, 1016 (6th Cir.) (district court's award of punitive damages in action brought under FTCA violated explicit bar of punitive awards under § 2674), *cert. denied*, 423 U.S. 866 (1975); Knouff v. United States, 74 F.R.D. 555, 557 (W.D. Pa. 1977) (plaintiff not entitled to punitive damages in action against United States brought under FTCA for injuries arising out of plane crash); Platis v. United States, 288 F. Supp. 254, 274 (D. Utah 1968) (punitive damages are not recoverable in wrongful death action brought under § 2674 of FTCA), *aff'd*, 409 F.2d 1009 (10th Cir. 1969).

7. 718 F.2d 108 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2679 (1984).

8. *Id.* at 110-13; *see infra* notes 24-42 and accompanying text (discussing Fourth Circuit's holding in *Flannery v. United States*).

9. 718 F.2d at 110-13. In *Flannery v. United States*, William F. Willien, an employee of

the plaintiff became permanently comatose.[10] William Flannery, as committee[11] for Michael Flannery, filed a personal injury claim under the FTCA against the United States in the United States District Court for the Southern District of West Virginia.[12] The district court applied West Virginia law in separate trials on the issues of liability and damages and found the United States liable for the injuries to the plaintiff.[13] Consequently, the district court

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the United States Coast Guard, was driving a United States government automobile that struck Michael Flannery's car. Flannery v. United States, No. 76-0306-H, slip op. at 1 (S.D. W. Va., Jan. 22, 1980). The accident occurred at an intersection in Huntington, West Virginia on October 27, 1974. *Id.* at 1-2.

10. Slip op. at 10. In *Flannery*, the plaintiff, Michael Flannery, was 22 years old at the time of the accident. *Id.* at 2. The plaintiff was hospitalized from October 28, 1974 through April 22, 1975. *Id.* After the accident, the plaintiff was diagnosed as permanently comatose and had a life expectancy of only 30 years (as measured from 1978). *Id.* The district court noted that while it was unlikely that the plaintiff would require sophisticated medical treatment, he would demand constant nursing and custodial care. *Id.* Plaintiff's parents had provided custodial care since April 1975 and planned to continue to do so as long as they were capable. *Id.*

A person is permanently comatose when in a state of profound unconsciousness from which he cannot be roused. STEDMAN'S MEDICAL DICTIONARY (5th ed. 1982). A person is semicomatose when in a state of unconsciousness from which he is capable of being aroused. *Id.* The record in *Flannery* is ambiguous as to the exact medical condition of the plaintiff. *See* 718 F.2d at 110-11. The Fourth Circuit referred to the plaintiff as permanently comatose with no likelihood that he would ever become aware of events around him. *Id.* at 111. The district court referred to the plaintiff's condition as being both permanently semicomatose and permanently irreversibly comatose. Slip op. at 2, 9, 10. The district court also described plaintiff as "non-sentient." *Id.* at 8 n.5. A person is non-sentient when that person is incapable of sensation. *See* STEDMAN'S MEDICAL DICTIONARY, 1274 (5th ed. 1982) (defining sentient). The West Virginia Supreme Court of Appeals described the plaintiff as permanently semicomatose but unaware of his injuries and losses because of the severity of his injuries. Flannery v. United States, 297 S.E.2d 433, 438 (W. Va. Sup. Ct. App. 1982). The brief of the United States, in the statement of the case, described the plaintiff's condition as a permanent, irreversible comatose state. Brief for Appellant at 2, Flannery v. United States, 718 F.2d 108 (4th Cir. 1983). The plaintiff's brief did not contain its own statement of the case but agreed substantially with the statement of the case contained in the United States' brief. Brief for Appellee at 1, 718 F.2d 108. The plaintiff's brief thus concurs with the United States' description of the plaintiff as in a permanent, irreversible comatose state. *Id.* Whether the plaintiff's condition is defined as semicomatose or comatose, all of the courts and parties in *Flannery* are in general agreement that the plaintiff is unaware of his injuries and losses, and that his condition is permanent.

11. Flannery v. United States, 649 F.2d 270, 271 (4th Cir. 1981). A committee, guardian or next friend means one authorized to maintain an action for and in the name of another who is *non suis juris*, or legally incompetent to appear in a cause by himself or through an attorney. Lockhart's Guardian v. Bailey Pond Creek Coal Co., 235 Ky. 278, 280, 30 S.W.2d 955, 957 (1930). In his permanently comatose state, Michael *Flannery* is *non suis juris* because he is incompetent to appear in his FTCA action by himself or through an attorney. *See supra* note 10 and accompanying text (discussing medical condition of plaintiff in *Flannery*).

12. *Flannery*, slip op. at 1.

13. *Id.* The FTCA directs a trial court to determine liability and assess damages in accordance with the law of the state where the tort occurred. 28 U.S.C. §§ 1346(b), 2674 (1982); *see* Hatahley v. United States, 351 U.S. 173, 182 (1956) (damages determined by law of state where tortious act committed, subject to limitations that United States is not liable for interest

awarded the plaintiff approximately 2.2 million dollars in damages.[14] The district court's damage award included 535,855 dollars for impairment of earning capacity and 1,300,000 dollars for loss of the ability to enjoy life.[15]

The United States appealed the district court's calculation of damages to the United States Court of Appeals for the Fourth Circuit.[16] The United States argued that West Virginia law does not allow a damage award for loss of ability to enjoy life.[17] The United States also asserted that a court must deduct federal income taxes when calculating an award for impairment of earning capacity.[18] The Fourth Circuit found that existing West Virginia case law provided an ambiguous answer on the issue of whether a court may

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prior to judgment or for punitive damages); Arnhold v. United States, 284 F.2d 326, 328 (9th Cir. 1960) (court must determine whether United States, if it had been a private party, would have been liable for losses under state law), *reh'g denied*, 289 F.2d 924 (9th Cir. 1961), *cert. denied*, 368 U.S. 876 (1961); Mandelbaum v. United States, 251 F.2d 748, 750 (2d Cir. 1958) (state law controls amount of government's tort liability).

The district court in *Flannery* ruled that the United States, by and through its employee Willien, negligently and solely caused the injuries suffered by the plaintiff. Slip op. at 1. The district court, therefore, held the United States liable to the plaintiff for his injuries under the FTCA. *Id.* at 10-11; *see* 28 U.S.C. §§ 1346(b), 2674 (United States shall be liable for tort claims in same manner and to same extent as private individual under similar circumstances).

14. *Flannery*, slip op. at 11.

15. *Id.* at 11. The district court in *Flannery*, over the United States' objection, calculated the plaintiff's loss of earning capacity without deducting an amount equal to the federal income taxes that would be levied on such earnings. *Id.* at 4-8. The district court ruled that West Virginia law does not require consideration of federal income taxes when calculating impaired earning capacity. *Id.*; *see infra* notes 69-73 and accompanying text (analysis of whether federal income taxes must be considered when calculating an award for impaired earning capacity under FTCA).

The district court also awarded $1,300,000 to the plaintiff on the ground that as a result of the United States' negligence, the plaintiff, in his permanent comatose state, had been deprived of the capacity to enjoy life. *Flannery*, slip op. at 9. The district court stated that the $1,300,000 award was compensation for the plaintiff's total and permanent loss of the capacity to enjoy life. *Id.*; *see infra* notes 59-68 and accompanying text (analysis of whether a comatose plaintiff may recover for loss of capacity to enjoy life under FTCA). The district court also awarded the plaintiff $48,174.80 for pretrial medical expenses and $316,984.00 for future medical expenses. *Flannery*, slip op. at 10.

16. *Flannery v. United States*, 649 F.2d 270 (4th Cir. 1981). The United States in *Flannery* accepted the district court's finding that the United States was liable for the plaintiff's injuries. *Id.* at 271.

17. *Id.* at 271-72; *see infra* note 19 and accompanying text (discussing relevant West Virginia law). The United States in *Flannery* argued that loss of the capacity to enjoy life is an element of pain and suffering and therefore is necessarily dependent upon the plaintiff's consciousness of his injury. *Id.* at 272. The United States also asserted that unless the plaintiff can sense his loss of ability to enjoy life he cannot recover for that loss. *Id.*; *see infra* notes 59-68 and accompanying text (analysis of whether a comatose plaintiff may recover for loss of capacity to enjoy life under FTCA).

18. 649 F.2d at 272. The United States in *Flannery* argued on appeal that the court must use net wages after taxes to calculate lost future earnings because had the plaintiff not been injured, the plaintiff would have had to deduct federal income taxes from his earnings. *Id.*; *see infra* notes 69-73 and accompanying text (analysis of whether federal income taxes must be considered when calculating an award for impaired earning capacity under FTCA). Alternatively, the United States in *Flannery* argued that both the award for loss of capacity to enjoy life and

award damages for loss of the ability to enjoy life.[19] The Fourth Circuit also found West Virginia law unclear as to whether a court must deduct federal income taxes when calculating an award for impairment of earning capacity.[20] As a result, the Fourth Circuit certified the questions on calculation of damages to the West Virginia Supreme Court of Appeals.[21] The West Virginia Supreme Court of Appeals ruled that under the West Virginia law a permanently comatose plaintiff could recover for loss of ability to enjoy life.[22]

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the award for lost future earnings were excessive. 649 F.2d at 272.

19. 649 F.2d at 272. The Fourth Circuit in *Flannery* stated that under West Virginia law ambiguity existed as to whether the loss of the ability to enjoy life was separable from pain and suffering. *Id.* at 272. If under West Virginia law loss of the capacity to enjoy life was not separable from pain and suffering, then a comatose plaintiff could not recover for such a loss because of his inability to sense and experience the loss. *Id.* West Virginia case law recognizes the loss of capacity to enjoy life as an injury but does not clarify whether such an injury is separable from pain and suffering thereby entitling a comatose plaintiff to recover for such an injury. *Id.*; *see* Nees v. Julian Goldman Stores, Inc., 109 W. Va. 329, 154 S.W. 769 (1930). In *Nees*, the West Virginia Supreme Court of Appeals discussed some of the elements of damages that an injured plaintiff could recover under the law of West Virginia. 109 W. Va. at 340, 154 S.W. at 774. The West Virginia court stated that the injured plaintiff in *Nees* could recover damages for physical pain, mental anguish and impairment of capacity to enjoy life. *Id.* The *Nees* opinion is unclear as to whether mental anguish and impairment of capacity to enjoy life are separable elements of damages. *Id.* The *Nees* court discussed mental anguish and impairment of capacity to enjoy life in both conjunctive and disjunctive terms and thus failed to distinguish whether those injuries are separable or inseparable. *Id.*; *see also* Warth v. Jackson County Court, 71 W. Va. 184, 76 S.E. 420 (1912). In *Warth*, the West Virginia Supreme Court of Appeals listed mental anguish and impairment of capacity to enjoy life in conjunctive terms, thereby implying that the two injuries are inseparable. 71 W. Va. at 190, 76 S.E. at 423.

20. 649 F.2d at 272-73. The Fourth Circuit in *Flannery* stated that the ambiguity surrounding the question of whether income taxes should be deducted from an award for lost future earnings is the result of an absence of clear precedent on the issue. *Id.* The district court in *Flannery* decided that West Virginia law did not require the deduction of federal income taxes in computing lost future earnings. *Flannery*, slip op. at 5-8; *see* Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (1961). In *Crum*, the West Virginia Supreme Court of Appeals refused to allow the consideration of federal income taxes in computing lost future earnings on the ground that it would only confuse the jury. 146 W. Va. at 444, 122 S.E.2d at 31. The Fourth Circuit in *Flannery* ruled that *Crum* is limited to jury trials and therefore whether federal income tax should be considered in computing lost future earnings in situations where a judge is the finder of fact, as in all FTCA actions, is a proper question for certification to a state supreme court. 649 F.2d at 273. *See* 28 U.S.C. § 2402 (1982) (any FTCA action brought against United States shall be tried by court without jury).

21. 694 F.2d at 271. The Fourth Circuit in *Flannery* certified two questions to the West Virginia Supreme Court of Appeals pursuant to West Virginia's certification statute. *Id.*; *see* W. VA. CODE § 51-1A-1-10 (1981) (setting forth power and procedure of West Virginia Supreme Court of Appeals to answer question of law certified to it by federal and state appellate courts). The Fourth Circuit first asked whether under West Virginia law a semicomatose plaintiff is entitled to recover for the impairment of his capacity to enjoy life despite his inability to sense his injuries. *Flannery*, 694 F.2d at 273. The Fourth Circuit also questioned whether under West Virginia law the trial court, when sitting as the finder of fact, must deduct from a plaintiff's lost future earnings the amount of federal income taxes that would have been levied had the plaintiff earned the money. *Id.*

22. Flannery v. United States, 297 S.E.2d 433, 439 (W. Va. Sup. Ct. App. 1982). The West Virginia Supreme Court of Appeals in *Flannery* stated that loss of the capacity to enjoy life was a separate element of damages. *Id.* at 438. The Court held that a plaintiff in a personal

The West Virginia court also held that a court need not deduct federal income taxes when calculating an award for lost future earnings.[23]

After receiving the responses to the certified questions from the West Virginia Supreme Court of Appeals, the Fourth Circuit decided to reconsider the *Flannery* case on other grounds.[24] Specifically, the Fourth Circuit stated that it would address the federal question of extra-compensatory damages raised by the defendant that the Fourth Circuit had failed to consider when it originally heard the *Flannery* case.[25] The defendant in the *Flannery* case had raised the issue of whether the FTCA allows damages that state law labels as compensatory but which exceed the damages necessary to compensate the actual losses sustained.[26] The Fourth Circuit stated in *Flannery* that courts may award only compensatory damages in an action brought under the FTCA.[27] The *Flannery* court therefore ruled that any damages which compensate a plaintiff in an amount greater than the actual loss suffered are punitive and barred by the FTCA.[28]

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injury action who has been rendered permanently semicomatose may recover for impaired capacity to enjoy life. *Id.* at 439. The West Virginia court ruled that damages for impaired capacity to enjoy life are a measure of the permanency of the plaintiff's injuries and do not require the plaintiff to be conscious of his injuries. *Id.* at 438-39; *see* Jordan v. Bero, 158 W. Va. 28, 54, 210 S.E.2d 618, 623 (1974) (future effects of injury that have reduced capability of individual to function as whole person are element of damages separable from pain and suffering). The West Virginia court in *Flannery* thus avoided the ambiguity created by the *Nees* and *Warth* decisions by labeling the award for impaired capacity to enjoy life a permanent injury award, independent of the plaintiff's consciousness. *Flannery*, 297 S.E.2d at 437-39; *see supra* note 19 (discussing *Nees* and *Warth*).

23. *Flannery*, 297 S.E.2d at 441. In determining whether a court must deduct an amount for federal income taxes in damage awards, the West Virginia court in *Flannery* refused to make a distinction between a trial before a judge and a trial before a jury. *Id.* at 439. The court accepted as the majority view the *Crum* court's reasoning that the impact of income taxes need not be considered in calculating an award for impairment of future earning capacity. *Id.* at 441; *see supra* note 20 (discussing *Crum*).

24. 718 F.2d at 110.

25. *Id.*

26. Brief for Appellant at 13, Flannery v. United States, 718 F.2d 108 (4th Cir. 1983). The United States in *Flannery* argued that all non-compensatory damages are barred under the FTCA. *Id.* The Fourth Circuit in *Flannery* ruled that questions concerning the extent of the waiver of sovereign immunity, specifically whether a damage claimed under the act is punitive or compensatory, is a matter of federal law. 718 F.2d at 110. The *Flannery* court stated that the courts should interpret the FTCA under a uniform federal standard rather than under the widely varying state laws. *Id.*

27. 718 F.2d at 110. The Fourth Circuit in *Flannery* stated that the FTCA provides a waiver of sovereign immunity from suit on behalf of the United States. *Id.* The Fourth Circuit further stated that the courts must strictly enforce the limitations on damages attached to the FTCA because Congress did not intend to expose the United States to unlimited liability. *Id.* The Fourth Circuit concluded that the FTCA's proscription of punitive damages dictates that courts must limit the United States' waiver of sovereign immunity to the extent that plaintiffs may only recover compensatory damages. *Id.*; *see* 28 U.S.C. § 2674 (1982); *infra* note 28 and accompanying text (discussing Fourth Circuit's distinction in *Flannery* between punitive and compensatory damages).

28. 718 F.2d at 111. The *Flannery* court cited several cases in support of its ruling that the FTCA authorizes only compensatory damage awards. *Id.*; *see* D'Ambra v. United States,

The Fourth Circuit in *Flannery* specifically held that the district court's award of 1,300,000 dollars for plaintiff's loss of the capacity to enjoy life was punitive in nature and exceeded the parameters of the FTCA.[29]The *Flannery* court stated that while the plaintiff did lose his capacity to enjoy life, the plaintiff would never be conscious of his loss.[30] The Fourth Circuit also reasoned that since the plaintiff would never be aware of his loss of capacity to enjoy life or be able to benefit from the monetary damages awarded for that loss, the district court's award provided no benefit or compensation to the plaintiff.[31] Thus the Fourth Circuit concluded that the

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481 F.2d 14, 16-18 (1st Cir. 1973), *cert. denied*, 414 U.S. 1075 (1973). In *D'Ambra v. United States*, plaintiffs brought an action under the FTCA for the wrongful death of their son in an accident that occurred in Rhode Island. *Id.* at 15. The trial court applied the Rhode Island Wrongful Death Act to determine damages. *Id.* The Rhode Island Wrongful Death Act provides for an award to the surviving parents based upon the decedent child's economic loss. *Id.* at 16. Under the Rhode Island Wrongful Death statute a decedent's economic loss is determined by estimating the decedent's gross earnings over his lifetime, reducing the estimated gross earnings by the estimated personal expenses of the decedent, and finally, discounting the result to present value. *Id.* The United States Court of Appeals for the Fifth Circuit held that the Rhode Island Wrongful Death Act was not applicable as the proper measure of damages because it was punitive to the extent that it compensated the plaintiffs beyond their actual loss. *Id.* at 17. The Fifth Circuit reasoned that the plaintiffs' loss in *D'Ambra* was the loss of society and companionship of their child and not the child's economic loss. *Id.* at 20-21. In essence, the *D'Ambra* court held that to the extent which an award under the FTCA exceeds the amount necessary to compensate the plaintiffs' actual loss, it is punitive and not allowable under the FTCA. *See id.*

The Fourth Circuit in *Flannery* also relied on a recent decision by the United States Court of Appeals for the Ninth Circuit. 718 F.2d at 111. In *Felder v. United States*, the Ninth Circuit held that a damage award for lost future earnings which does not deduct federal income taxes overcompensates the plaintiff in violation of the FTCA's proscription of punitive damages. 543 F.2d 657, 670 (9th Cir. 1976). The *Felder* court reasoned that since an uninjured, working plaintiff's earnings would be subject to federal income taxation, an award that does not deduct taxes would overcompensate the plaintiff by awarding him more than the plaintiff would have had if the injury had not occurred. *Id.* The *Flannery* court stated that an award which gives a plaintiff more than the actual loss sustained is punitive under the FTCA, regardless of the lack of the deterrent and punishing features normally connected with punitive damages. 718 F.2d at 111; *see infra* notes 50-58 and accompanying text (analysis of view that only actual or compensatory damages are recoverable under FTCA).

29. 718 F.2d at 111; *see infra* notes 59-68 and accompanying text (analysis of whether comatose plaintiff may recover damages for loss of enjoyment of life under FTCA).

30. 718 F.2d at 111. The *Flannery* court stated that the plaintiff was conscious of nothing in his comatose condition and that no likelihood existed that the plaintiff would regain consciousness. *Id.* Therefore, the Fourth Circuit reasoned that the plaintiff would never be conscious of his loss of enjoyment of life and could not be compensated for a loss of which he is unaware. *Id.*

31. *Id.* The Fourth Circuit in *Flannery* stated that the district court's awards for future medical care and lost future earnings would provide all of the plaintiff's future needs. *Id.* The *Flannery* court then stated that since the plaintiff is permanently comatose, he cannot spend or give away, nor derive any benefit from an award of $1,300,000 for loss of the capacity to enjoy life. *Id.* The *Flannery* court stated that the district court's award for loss of capacity to enjoy life would only benefit the plaintiff's surviving relatives. *Id.* The *Flannery* court concluded that since the award for loss of capacity to enjoy life could not compensate the plaintiff, the award was punitive under the terms of the FTCA. *Id.*; *see supra* notes 26-28 and accompanying text (only actual or compensatory damages recoverable under FTCA).

amount of damages awarded for loss of capacity to enjoy life were punitive under the terms of the FTCA.[32]

The Fourth Circuit in *Flannery* also held that the district court's award for lost future earnings, as calculated without deducting federal income taxes, overcompensated the plaintiff in violation of the terms of the FTCA.[33] The *Flannery* court stated that if the plaintiff had not been injured his earnings would have been subject to the deduction of federal income taxes.[34] The Fourth Circuit reasoned, therefore, that an award for lost future earnings calculated without deducting federal income taxes awards the plaintiff an amount greater than that which he would have earned had the plaintiff not been injured.[35] The Fourth Circuit concluded that since the FTCA's proscription of punitive damages only allows compensatory damage awards, an award for lost future earnings that overcompensates a plaintiff by failing to deduct federal income taxes is not permissible under the FTCA.[36]

Finally, the Fourth Circuit in *Flannery* held that the district court must reduce the award to the plaintiff for lost future earnings because the award partially duplicated the plaintiff's award for future medical expenses.[37] The Fourth Circuit stated that although in most cases an injured plaintiff would pay his living expenses from the award for lost future earnings, the plaintiff in *Flannery* would not have to do so because the award for future medical expenses included an amount for the plaintiff's total care in a nursing home for the rest of his life.[38] The Fourth Circuit stated that as a result the United States would be forced to pay the plaintiff's future living expenses twice, once in the form of lost future earnings and again as future medical expenses.[39] The Fourth Circuit reasoned that the award for future medical expenses resulted in the plaintiff being overcompensated in violation of the

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32. 718 F.2d at 111.

33. 718 F.2d at 111; *see infra* notes 69-73 and accompanying text (analysis of whether courts must deduct federal income taxes when calculating an award for impaired earning capacity under FTCA).

34. 718 F.2d at 111. The Fourth Circuit in *Flannery* noted that a living person's earnings are subject to federal income taxation. *Id.*

35. *Id.* at 111-12.

36. *Id.*; *see supra* notes 26-28 and accompanying text (discussing Fourth Circuit's ruling in *Flannery* that court may allow only compensatory awards under FTCA); *infra* notes 50-58 and accompanying text (analysis of view that only actual or compensatory damages are recoverable under FTCA).

37. *Id.* at 112. The United States in *Flannery* did not question the district court's award for lost future earnings on the ground that the award partially duplicated the award of future medical expenses, thereby overcompensating the plaintiff in violation of the FTCA's proscription of punitive damages. *Id.*; *see* Brief for Appellant, Flannery v. United States, 718 F.2d 108 (4th Cir. 1983). The Fourth Circuit in *Flannery* raised the issue of duplicative awards *sua sponte*. *Id.*

38. 718 F.2d at 112-13.

39. *Id.* at 112. The *Flannery* court stated that the plaintiff would receive living expenses from both the lost future earnings award and from the nursing home component of the medical expenses award. *Id.*; *see infra* notes 74-81 and accompanying text (analysis of whether award for future medical expenses partially duplicates award for lost future earnings).

FTCA's proscription of punitive damages.[40] As a result, the Fourth Circuit held that the district court's awards to the plaintiff for loss of capacity to enjoy life and lost future earnings overcompensated the plaintiff in violation of the FTCA.[41] The *Flannery* court vacated the district court's judgment and remanded the case for a redetermination of the damage awards in a manner consistent with the Fourth Circuit's opinion.[42]

In contrast, the dissent in *Flannery* argued that although the district court's awards to the plaintiff may have exceeded the plaintiff's actual losses, the awards did not violate the punitive damage proscription of the FTCA.[43] The *Flannery* dissent rejected the majority's premise that any damage award which allows a plaintiff an amount greater than the actual loss is punitive and thus barred by the FTCA.[44] The dissent argued that the purpose of ordinary tort damages is both to compensate the plaintiff and to deter the tortfeasor.[45] In contrast, the dissent argued, courts award punitive damages for the sole purpose of punishing the wrongdoer.[46] The dissent reasoned, therefore, that courts may award tort damages to a plaintiff that exceed the plaintiff's actual loss without actually awarding "punitive" damages.[47] The dissent argued that Congress proscribed punitive damages awards under the FTCA only to prevent retributive punishment against the United States and not to prohibit all awards which exceed a plaintiff's actual loss.[48] The

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40. 718 F.2d at 112. The Fourth Circuit in *Flannery* ruled that a successful plaintiff should be made only as financially secure as he would have been had no injury occurred. *Id.*; *see infra* notes 50-58 and accompanying text (only actual or compensatory damages are recoverable under FTCA).

41. 718 F.2d at 112.

42. *Id.* at 113.

43. *Id.* at 114-15 (Hall, J., dissenting); *see infra* notes 44-49 and accompanying text (discussing *Flannery* dissent's interpretation of punitive damages under FTCA).

44. 718 F.2d at 114-15. The dissent in *Flannery* cited *Kalavity v. United States* to support the view that not all damages awarded to a plaintiff in excess of the plaintiff's actual loss are punitive within the terms of the FTCA. *Id.* (citing 584 F.2d 809, 811 (6th Cir. 1978)). In *Kalavity*, the United States Court of Appeals for the Sixth Circuit stated that damages are punitive when awarded for the sole purpose of punishing a wrongdoer who acted maliciously or wantonly. 584 F.2d at 811. The *Kalavity* court ruled, therefore, that in a wrongful death action brought under the FTCA, a compensatory damage award to the decedent's spouse could not be reduced on the ground that the spouse had remarried and received support from her new husband. *Id.* The *Kalavity* court held that such an award did not constitute an award of punitive damages in violation of the FTCA. *Id.*

45. 718 F.2d at 114-15 (citing 584 F.2d at 811 (6th Cir. 1978)).

46. *Id.* Punitive damages are an exception to the rule that courts award damages for the purpose of compensation. C. McCORMICK, LAW OF DAMAGES § 77 at 275 (1935). Courts award punitive damages to punish the defendant for wanton conduct and not to compensate for any loss of the plaintiff. *Id.*

47. 718 F.2d at 114-15. In essence, the dissent in *Flannery* argued that damages which overcompensate a plaintiff are not punitive unless the court awards the damages for the purpose of punishing the defendant. *See id.*

48. *Id.* The dissent in *Flannery* did not cite any legislative history supporting its position that the FTCA's proscription of punitive damages does not prohibit all awards which exceed a plaintiff's actual loss. *See id.* at 113-15.

Flannery dissent concluded that since the district court did not award any damages to the plaintiff for the purpose of punishing the United States, the damages were not punitive under the terms of the FTCA, and therefore the law of West Virginia controlled the question of damages.[49]

The Fourth Circuit in *Flannery* based its holding on a proper interpretation of the FTCA's proscription of punitive damage awards.[50] The FTCA directs a district court to determine liability and damages in an action brought under the FTCA in accordance with the law of the state where the tort occurred.[51] An express exception to the FTCA's mandate that courts must determine damages in accordance with state law is that courts shall not impose punitive damages on the United States even if state law provides for a punitive damage sanction.[52] Thus, in an FTCA action in which the court's application of state law would result in a punitive damage award if the defendant were a private citizen, a court may not impose such punitive damages against the United States.[53] The question whether the application of state law results in compensatory or punitive damages under the terms of the FTCA is a question of federal law, since only federal law can interpret the meaning of terms in federal statutes.[54] Although the FTCA does not

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49. 718 F.2d at 113-15. The dissent in *Flannery* noted that the FTCA states that the amount of damages are a matter of state law so long as the state does not hold the United States liable for interest prior to judgment or punitive damages. *Id.*; *see* 28 U.S.C. § 2674 (1982). The dissent reasoned, therefore, that the West Virginia Supreme Court of Appeals' responses to the Fourth Circuit's certified questions were dispositive on the issue of damages, since the damages awarded were not punitive under the FTCA. 718 F.2d at 113-14; *see supra* notes 21-23 and accompanying text (discussing West Virginia law as applied to certified questions in *Flannery*); *see also supra* notes 43-49 and accompanying text (discussing *Flannery* dissent's view that district court's damage awards were not punitive).

50. *See* 28 U.S.C. § 2674 (1982); *see infra* notes 51-58 and accompanying text (analysis of meaning of punitive damages as proscribed by FTCA).

51. *See* 28 U.S.C. §§ 1346(b), 2674 (1982) (United States shall be liable for tort claims in same manner and to same extent as private individual under similar circumstances); *see supra* note 13 and accompanying text (discussing application of state law to determine liability and damages under FTCA).

52. *See* 28 U.S.C. § 2674 (1982) (United States shall not be liable for punitive damages under FTCA); *see supra* note 6 and accompanying text (discussing FTCA's proscription of punitive damages); *see also infra* notes 55-58 and accompanying text (discussing what constitutes punitive damages under FTCA).

53. *See* 28 U.S.C. § 2674 (1982). In *Ferrero v. United States*, the United States Court of Appeals for the Fifth Circuit ruled that, in an action brought under the FTCA, a court must determine damages according to the law of the state where the tort occurred except that the state may not impose punitive damages on the United States. 603 F.2d 510, 512 (5th Cir. 1979). In an earlier decision, *Hartz v. United States*, the United States Court of Appeals for the Fifth Circuit ruled that to the extent a state wrongful death statute allows recovery in an FTCA action by a survivor, any amount that a court awards in excess of the actual loss suffered by the survivor was punitive. 415 F.2d 259, 264 (5th Cir. 1969). The *Hartz* court held, therefore, that the FTCA precluded the trial court from awarding a judgment in excess of the survivor's actual loss. *Id.*

54. *See* D'Ambra v. United States, 481 F.2d at 18. The Fifth Circuit in *D'Ambra* held that the application of the Rhode Island Wrongful Death Act, in an action brought under the FTCA, resulted in punitive damages in violation of the FTCA. *Id.*; *see supra* note 28 and

define punitive damages specifically, most federal courts have interpreted the FTCA's proscription against punitive damages as meaning that plaintiffs may recover only compensatory or actual damages in actions brought under the FTCA.[55] Compensatory or actual damages are those which compensate a plaintiff's actual losses.[56] Punitive damages as proscribed by the FTCA are damages that exceed an FTCA claimant's actual losses.[57] Therefore, the

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accompanying text (discussing *D'Ambra*). The *D'Ambra* court ruled that whether a damage award received under the Rhode Island Wrongful Death Act is punitive or compensatory, within the terms of the FTCA, shall be determined by the practical effect of the Wrongful Death Act's application. 481 F.2d at 18. The *D'Ambra* court stated that the language of the Wrongful Death Act and the state's characterization of the act as punitive or compensatory were not controlling. *Id.* The Fifth Circuit in *D'Ambra* ruled that whether damages are punitive or compensatory within the terms of the FTCA is a federal question. *Id.*; *see also* Laird v. Nelms, 406 U.S. 797, 798-99 (1972) (application of FTCA is federal question); Southern Pacific Transp. Co. v. United States, 471 F. Supp. 1186, 1188 (E.D. Cal. 1979) (federal law governs interpretation of terms in FTCA).

55. *See* 28 U.S.C. §§ 1346(b), 2671-2680 (1982). The legislative history of the FTCA does not define the term punitive damages. *See* H.R. REP. No. 1287, 70th Cong., 1st Sess. 1-7 (1945); Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978). In *Birnbaum v. United States*, two individuals whose letters to and from the Soviet Union were opened and copied by the CIA brought suit against the United States under the FTCA seeking compensatory damages for alleged mental anguish. *Id.* at 321. The United States Court of Appeals for the Second Circuit affirmed the district court's holding that the United States was liable to each claimant for $1,000. *Id.* at 335. In upholding the damage award, the Second Circuit ruled that the FTCA limits recovery to compensatory damages and provides that the United States shall not be liable for punitive damages. *Id.* at 333. The *Birnbaum* court defined punitive damages as damages beyond compensatory damages that are awarded to deter repetitive conduct. *Id.* at 334. The *Birnbaum* court upheld the district court's damage award of $1,000 since the evidence supported a finding that the plaintiffs had suffered personal anguish worth $1,000, thereby making the award compensatory and not punitive. *Id.* at 335; *see* Occhino v. United States, 686 F.2d 1302, 1306 (8th Cir. 1982) (only compensatory damages recoverable under FTCA); United States v. English, 521 F.2d 63, 70 (9th Cir. 1975) (where state law allows punitive damages or application of state law results in award which exceeds compensatory damages, only compensatory damages may be awarded under FTCA); Abille v. United States, 482 F. Supp. 703, 711 (N.D. Cal. 1980) (state law determines amount of damages under FTCA but FTCA limits damages to compensatory damages). *But see* Kalavity v. United States, 584 F.2d at 811 (award of damages in excess of plaintiff's actual loss, in FTCA action, is not punitive under terms of FTCA).

The primary goal of tort damages is to place the injured person as nearly as possible in the condition he would have occupied had the wrong not occurred. *See* C. MCCORMICK, LAW OF DAMAGES § 137 at 560 (1935). The Fourth Circuit's interpretation in *Flannery* of the FTCA as limiting damages to compensatory damages is consistent with the primary aim of tort damages. *See* 718 F.2d at 111; MCCORMICK, *supra*, at 560. An award which compensates an FTCA claimant's actual loss, and no more, places that claimant as nearly as possible in the condition he would have occupied had the wrong not occurred.

56. *See* Birdsall v. Coolidge, 93 U.S. 64 (1876). In *Birdsall v. Coolidge*, the Supreme Court stated that compensatory and actual damages are the same concept. *Id.* at 64. The Supreme Court in *Birdsall* defined compensatory or actual damages as damages resulting from the proven injury. *Id.* The Court further stated that courts should only award damages that compensate equally for the injury that a plaintiff has suffered. *Id.*; *see* United States v. State Road Dept. of Florida, 189 F.2d 591, 596 (5th Cir. 1951) (compensatory damages are damages awarded in satisfaction of loss sustained), *cert. denied*, 342 U.S. 903 (1952).

57. *See* 28 U.S.C. § 2674 (1982). Since the FTCA's proscription of punitive damages permits courts to award only compensatory damages, any award which exceeds the amount

FTCA's proscription of punitive damages limits an FTCA claimant's recovery to an amount that will compensate and not exceed the claimant's actual losses.[58]

The FTCA's provision barring the award of any damages beyond those that compensate a plaintiff's actual losses justifies the Fourth Circuit's holding in *Flannery* that the plaintiff should not receive a damage award for loss of the ability to enjoy life.[59] The plaintiff in *Flannery* is permanently comatose and thus unable to sense his loss.[60] Since the plaintiff is not conscious of his loss of ability to enjoy life, no monetary award could compensate the plaintiff for that loss.[61] Therefore, awarding the plaintiff in *Flannery* damages for loss of capacity to enjoy life would overcompensate the plaintiff in violation of the FTCA.[62] The Fourth Circuit's holding in *Flannery* also derived support from case law.[63] Although some courts have held that loss of the ability to enjoy life is a proper element of damages,[64] no court ever has awarded damages to a permanently comatose tort victim for loss of the ability to enjoy life.[65] Courts have awarded only damages for

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sufficient to compensate the plaintiff for his actual losses is punitive under the FTCA. *See supra* notes 55-56 and accompanying text (analysis of FTCA's proscription of punitive damages).

58. *See* 28 U.S.C. § 2674 (1982); *see also supra* notes 55-57 and accompanying text (analysis of FTCA's proscription of punitive damages).

59. *See supra* notes 29-32 and accompanying text (discussing Fourth Circuit's holding in *Flannery* that FTCA's proscription of punitive damages bars award for loss of capacity to enjoy life to comatose plaintiff); *see also infra* notes 60-64 and accompanying text (analysis of whether FTCA's proscription of punitive damages bars award for loss of capacity to enjoy life).

60. 718 F.2d at 110; *see supra* note 10 and accompanying text (discussing physical and mental condition of plaintiff in *Flannery*).

61. 718 F.2d at 110. The district court's awards in *Flannery* for lost earnings and medical expenses covered all of the plaintiff's past obligations and future needs resulting from his injuries. *Flannery*, slip op. at 10-11. Since the plaintiff is incapable of sensation and all his needs are met by the awards for lost earnings and medical expenses, the award for loss of enjoyment of life cannot further compensate the plaintiff.

62. *See* 28 U.S.C. § 2674 (1982); *supra* notes 50-58 and accompanying text (FTCA's proscription of punitive damages means that only compensatory damages are awardable under FTCA).

63. *See infra* notes 64-66 and accompanying text (discussing relevant case law supporting Fourth Circuit's position in *Flannery* that FTCA's proscription of punitive damages bars award for loss of ability to enjoy life to comatose plaintiff).

64. *See, e.g.*, Culley v. Pennsylvania R. Co., 244 F. Supp. 710, 714-15 (D. Del. 1965) (loss of enjoyment of usual or familiar things in life is proper element of damages in personal injury action by plaintiff who sustained painful back injury); McAlister v. Carl, 233 Md. 446, ___, 197 A.2d 140, 146 (1964) (damages claimed for loss of enjoyment of life due to an enforced change in vocation are submissible to jury); Warth v. Jackson County Court, 71 W. Va. 184, 190, 76 S.E. 420, 423 (1912) (loss of impairment of capacity to enjoy life is recoverable element of damages in personal injury action by plaintiff who suffered broken arm in horse and buggy accident).

65. *See* Note, *Nonpecuniary Damages for Comatose Tort Victims*, 61 GEO. L.J. 1547, 1556 (1973). To date, cases awarding damages for loss of enjoyment of life involved victims who were conscious of their loss. *See id.* For example, in *Frankel v. United States*, the United States District Court for the Eastern District of Pennsylvania awarded $650,000, for physical and mental pain and suffering, loss of enjoyment of life, inconvenience, disfigurement and permanent injuries, to an FTCA claimant who suffered brain damage and other injuries in an

loss of capacity to enjoy life in cases in which the plaintiff was conscious of his loss.[66] Likewise, the Fourth Circuit held that the court in *Flannery* should not award damages to the comatose plaintiff for loss of capacity to enjoy life because no monetary award could return the plaintiff to the condition he would have occupied had the injury not occurred.[67] The Fourth Circuit correctly concluded, therefore, that awarding a permanently comatose plaintiff damages for loss of the ability to enjoy life is noncompensatory and violates the punitive damage proscription of the FTCA.[68]

The FTCA's provision barring the award of any damages beyond those that compensate a plaintiff's actual losses also justifies the Fourth Circuit's holding in *Flannery* that courts must deduct federal income taxes from the plaintiff's award for lost future earnings.[69] The majority of the federal circuit courts of appeals have held that courts must deduct federal income taxes when computing an award for lost future earnings in an FTCA action.[70] The

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auto collision. 321 F. Supp. 1331, 1338-39 (E.D. Pa. 1970), aff'd, 466 F.2d 1226 (3rd Cir. 1972). The plaintiff in *Frankel* was fully conscious of her loss of enjoyment of life. *Id.* at 1338. Similarly, in *Haynes v. Waterville & O. Street R. Co.*, the Maine Supreme Court awarded loss of enjoyment of life damages to a young boy whose hand had to be amputated. 101 Me. 335, ___, 64 A. 614, 615 (1906). The plaintiff in *Haynes* was fully conscious of his loss of capacity to enjoy life which resulted from the amputation. *Id.*

In contrast, the plaintiff in *Flannery* is completely unaware of his loss of capacity to enjoy life because he is permanently comatose. 718 F.2d at 110-11; *see supra* note 10 and accompanying text (discussing medical condition of plaintiff in *Flannery*).

66. *See supra* note 65 and accompanying text (discussing plaintiff's consciousness as requirement for loss of enjoyment of life).

67. 718 F.2d at 111.

68. *Id.*; *see supra* notes 60-62 and accompanying text (plaintiff in *Flannery* cannot be compensated for loss of capacity to enjoy life); *see also supra* note 50-58 and accompanying text (FTCA limits plaintiff's recovery to compensatory damages).

69. 718 F.2d at 111; *see* 28 U.S.C. § 2674 (1982); *see also supra* notes 33-36 and accompanying text (discussing Fourth Circuit's holding in *Flannery* that court must deduct federal income taxes from plaintiff's award for lost future earnings).

70. *See* Harden v. United States, 688 F.2d 1025, 1029 (5th Cir. 1982). In *Harden*, plaintiffs brought an FTCA suit against the United States for the wrongful death of their son. *Id.* at 1026. Under the law of the state of Georgia where the wrongful death occurred, taxes and other personal expenses of a decedent are not deducted from wrongful death awards. *Id.* at 1029. Nevertheless, the United States Court of Appeals for the Fifth Circuit held that the district court did not err in deducting income taxes from the decedent's expected earnings. *Id.* at 1030. The *Harden* court noted that the FTCA limits recovery to compensatory damages. *Id.* at 1029. The *Harden* court reasoned, therefore, that a court must deduct income taxes from future earnings awarded under the FTCA in order to avoid an award of punitive damages. *Id.* The *Harden* court thus ruled that a noncompensatory damage award constitutes punitive damages under the FTCA. *See id.* Similarly, in *Felder v. United States* the United States Court of Appeals for the Ninth Circuit held that when calculating lost earnings on incomes greater than $30,000, failure to deduct income taxes in calculating lost earnings results in a punitive damage award in violation of the FTCA. 543 F.2d 657, 670 (9th Cir. 1976). The *Felder* court reasoned that failure to deduct income taxes would result in the plaintiff receiving greater compensation that he would have if he had not been injured. *Id.* The *Felder* court ruled that such overcompensation would render the award punitive in effect. *Id.*; *see also* Hartz v. United States, 415 F.2d 259, 264 (5th Cir. 1969) (trial court may properly consider impact of federal income taxes when calculating lost future earnings); *cf.* Norfolk & W. Ry. Co. v. Liepelt, 444

courts of appeals have reasoned that a healthy, working person may only spend his earnings after federal income taxes have been deducted from his earnings.[71] Courts have held, therefore, that an award for lost future earnings calculated without deducting federal income taxes gives the plaintiff an amount greater than he would have received had he not been injured.[72] Therefore, an award of damages for lost future earnings calculated without deducting taxes overcompensates the plaintiff in violation of the FTCA's proscription of punitive damages.[73]

The Fourth Circuit in *Flannery* may have held erroneously that the plaintiff's award for lost future earnings should also be reduced by the amount of the award for future medical expenses.[74] The Fourth Circuit stated that an award for lost future earnings after taxes is compensatory and provides for, among other expenses, a plaintiff's living expenses.[75] The *Flannery* court noted that, in the plaintiff's comatose state, the award for future medical expenses would cover all of the plaintiff's future living expenses since the medical expenses award included total care in a nursing home for the remainder of the plaintiff's life.[76] The Fourth Circuit in *Flannery* reasoned that the court must reduce the plaintiff's future earnings award after taxes by the award for future medical expenses in order to avoid double payment of living expenses which would overcompensate the plaintiff in violation of the FTCA.[77] While the Fourth Circuit properly was concerned with avoiding any overcompensation of the plaintiff, the court may have erred by assuming that the district court's award for future medical expenses was equivalent to the amount of the plaintiff's living expenses had he not been injured.[78] If the award for future medical expenses was less than the

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U.S. 490, 494 (1980) (evidence of effect of income taxes on future earnings is admissible in wrongful death action brought under Federal Employers' Liability Act).

In *Flannery*, the plaintiff's lost future earnings were calculated by using projections that the plaintiff's annual income would rise from $17,481 in 1978 to $182,795 in 2017. 718 F.2d at 112. This range of projected income falls within the rationale of *Felder*, which deducts income taxes from incomes in excess of $30,000. *See* Felder, 543 F.2d at 670.

71. *See* United States v. Furumizo, 381 F.2d 965, 971 (9th Cir. 1967) (reasonable certainty exists that FTCA claimant, if uninjured, only would have had taxed earnings available for disposal, as opposed to untaxed earnings).

72. *Id.*; *see* Felder v. United States, 543 F.2d 657, 670 (9th Cir. 1976). The *Felder* court ruled that failure to deduct income taxes from an award for lost future earnings would be punitive under the FTCA since such an award would result in the plaintiff receiving more money that he would have had the injury not occurred. *Id.*

73. *See supra* notes 69-72 and accompanying text (analysis of whether federal income taxes must be deducted when caluclating award for lost future earnings under FTCA).

74. 718 F.2d at 112-13; *see supra* notes 37-41 and accompanying text (discussing Fourth Circuit's holding in *Flannery* that district court's award for lost future earnings partially duplicates award for future medical expenses).

75. 718 F.2d at 112.

76. *Id.*

77. *Id.*

78. *See* 28 U.S.C. § 2674 (1982); *see supra* notes 50-58 and accompanying text (analysis of FTCA's proscription of punitive damages as limiting recovery to compensatory damages); *see infra* notes 79-81 and accompanying text (analysis of how Fourth Circuit in *Flannery* may

plaintiff's personal living expenses if uninjured, the plaintiff would be overcompensated in violation of the FTCA.[79] However, if the award for future medical expenses exceeded the plaintiff's personal living expenses if uninjured, the plaintiff would be undercompensated for his losses.[80] To properly compensate the plaintiff in *Flannery*, the district court, on remand, should reduce the plaintiff's award for lost future earnings after taxes by the estimated amount of the plaintiff's personal living expenses had he not been injured.[81]

The Fourth Circuit in *Flannery v. United States* correctly interpreted the FTCA's proscription of punitive damages to limit a plaintiff's recovery to compensatory damages for actual losses.[82] The *Flannery* court's decision is consistent with the primary goal of both the FTCA and tort law, which seek to restore an injured plaintiff as nearly as possible to the condition he would have occupied if the wrong had not occurred.[83] The *Flannery* court properly rejected the reasoning of the dissent, which advocated an interpretation of the FTCA's proscription of punitive damages that would bar only damages that a court awarded separately for the sole purpose of punishing the United States.[84] The dissent's interpretation would have resulted in overcompensating the plaintiff in violation of the FTCA without furthering the goal of tort damages.[85] After *Flannery*, FTCA claimants in the Fourth Circuit will be limited justly to recovering compensatory damages for their actual losses, regardless of the damages allowed by the law of the state where the tort occurred.[86] The *Flannery* doctrine will eliminate the variance in compensatory

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have erred by assuming that district court's award for future medical expenses was equivalent to plaintiff's future living expenses had he not been injured).

79. *See* 28 U.S.C. § 2674 (1982). If the award for future medical expenses was less than the amount of the plaintiff's future living expenses if uninjured, then deducting the award for future medical expenses from the award for lost future earnings would give the plaintiff more than he would have had if he had not been injured. The plaintiff thus would be overcompensated in violation of the FTCA. *See supra* note 55 and accompanying text (FTCA limits plaintiff's recovery to compensatory damages).

80. *See* McCormick, *supra* note 55, at 560 (primary goal of tort damages is to place injured person as nearly as possible in condition he would have occupied had wrong not occurred).

81. *See* 28 U.S.C. § 2674. Only by reducing the award for lost future earnings by an amount equivalent to an accurate estimate of the plaintiff's living expenses if uninjured, will the plaintiff be placed as nearly as possible in the condition he would have occupied had the wrong not occurred.

82. *See supra* notes 50-58 and accompanying text (analysis of FTCA's proscription of punitive damages as limiting recovery to compensatory damages).

83. *See supra* note 55 and accompanying text (analyzing FTCA proscription of punitive damages and primary goal of tort damages).

84. *See supra* notes 43-49 and accompanying text (discussing *Flannery* dissent).

85. *See supra* notes 43-49 and accompanying text (discussing *Flannery* dissent); *see also supra* notes 50-58 and accompanying text (analysis of FTCA's proscription of punitive damages).

86. *See supra* notes 59-81 and accompanying text (analysis of *Flannery* court's reduction of district court's awards to compensatory amount).

damages awarded under state law by promoting the evenhanded treatment of compensatory damages under the FTCA.[87]

DANA JAMES BOLTON

B. *The FELA and an Employer's Right to Sue: Property Damages Resulting from Employee Negligence*

In 1908, Congress enacted the Federal Employers' Liability Act[1] (FELA) to ensure the liability of railroads engaged in interstate commerce for personal injuries or death sustained by their employees while employed in interstate commerce.[2] The FELA states that railroads are liable to their employees for

87. *See supra* notes 50-58 and accompanying text (analysis of FTCA's proscription of punitive damages as limiting recovery to compensatory damages).

1. Federal Employers' Liability Act, ch. 149 §§ 1-8, 35 Stat. 65, 66 (1908), *amended by* ch. 143, § 2, 36 Stat. 291 (1910) (adding § 9 to Federal Employers' Liability Act) and ch. 685, § 3, 53 Stat. 1404 (1939) (adding § 10 to Federal Employers' Liability Act) (codified as amended at 45 U.S.C. §§ 51-60 (1982)). Congress first enacted the Federal employers' Liability Act in 1906. *See* ch. 3073, §§ 1-3, 34 Stat. 232 (1906). The United States Supreme Court held the Act of 1906 unconstitutional on the grounds that the Act exceeded Congress' power to regulate interstate commerce, as granted in Article 1, section 8, clause 3 of the United States Constitution, because the Act applied to employees who were injured while employed in interstate and intrastate commerce. *See* Employers' Liability Cases, 207 U.S. 463, 496-502, 504 (1908); U.S. CONST. art. 1, § 8, cl. 3. Congress responded with the Federal Employers' Liability Act (FELA) of 1908 which applies only to employees of railroads engaged in interstate commerce who are injured or killed while employed in interstate commerce. 45 U.S.C. § 51 (1982). The FELA of 1908 is within the constitutional power of Congress to regulate interstate commerce. Walsh v. New York, N.H. & H.R. Co., 173 F. 494, 495 (C.C. D. Mass., 1909), *aff'd*, 223 U.S. 1 (1912); Watson v. St. Louis, I.M. & S. Ry. Co., 169 F. 942, 955 (C.C. E.D. Ark., 1909), *aff'd*, 223 U.S. 745 (1912). *See generally* P. DOHERTY, THE LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES (1911) (discussing nature and scope of FELA).

2. 45 U.S.C. §§ 51-60 (1982). The FELA was a statement of public policy that reformed unjust rules of the common law that exempted railroads from liability for injuries to their employees. S. REP. No. 432, 61st Cong., 2d Sess. 2 (1910). The FELA abolished the common-law rule of liability which barred recovery against a railroad for the injury or death of an employee resulting from the negligence of a fellow employee. *See* 45 U.S.C. § 51 (1982) (railroad liable for injury or death of employee resulting from negligence of another employee); S. REP. No. 460, 60th Cong., 1st Sess. 1 (1908); H.R. REP. No. 1386, 60th Cong., 1st Sess. 1-3 (1908). The rationale for holding an employer liable for the negligence of an employee which results in injury or death to another employee is that the injured employee has no control or voice in the selection of his fellow employees. Watson v. St. Louis, I.M. & S. Ry. Co., 169 F. 942, 949 (C.C. E.D. Ark., 1909), *aff'd*, 223 U.S. 745 (1912).

The FELA also moderated the common-law rule of contributory negligence which barred an injured employee's recovery when the trier of fact found any negligence on the part of the employee. *See* 45 U.S.C. § 53 (1982) (contributory negligence on part of employee does not bar recovery but court will reduce damages in proportion to employee's negligence); S. REP. No. 460, *supra*, at 2-3; H.R. REP. No. 1386, *supra*, at 1, 3-6. Since railroad employees must work

injuries caused in whole or in part by the negligence of the railroad.[3] Some sections of the FELA specifically preclude negligent railroads from avoiding the liability imposed by the Act.[4] For example, section 5 of the FELA provides that any contract, rule, regulation or device designed to exempt a railroad from liability under the FELA is invalid.[5] In addition, section 10 voids any contract, rule, regulation or device which has the purpose, intent, or effect of preventing railroad employees from providing voluntary information to an FELA claimant concerning the facts surrounding the injury or death.[6]

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in the constant presence of danger, Congress precluded contributory negligence from providing negligent railroads with a total defense to an FELA claim. S. REP. No. 460, *supra*, at 3.

The FELA also bars a railroad from asserting the common law defense of assumption of the risk under certain circumstances. *See* 45 U.S.C. § 54 (1982); S. REP. No. 460, *supra*, at 2; H.R. REP. No. 1386, *supra*, at 6. Under the FELA, an employee is held not to have assumed the risks of employment when the injury resulted in whole or in part from the railroad's negligence. 45 U.S.C. § 54 (1982). The FELA also states that an employee has not assumed the risks of employment in any case where injury resulted from a railroad violation of an employee safety statute. *Id.* The rationale for limiting the defense of assumption of the risk is that in a complex industry an employee cannot be expected to have notice of and assume all the risks of his employment. S. REP. No. 460, *supra*, at 2.

Finally, the FELA abolishes the common-law right of railroads to exempt themselves from liability for injured employees through employment contracts or other arrangements between the railroad and its employee. *See* 45 U.S.C. § 55 (1982) (any contract, rule, regulation or device designed to exempt railroad from liability under FELA is void); S. REP. No. 470, *supra*, at 3; H.R. REP. No. 1386, *supra*, at 6-8. Congress enacted § 5 of the FELA to prevent railroads from exempting themselves from all FELA liability through contracts with their employees. S. REP. No. 460, *supra*, at 4.

Prior to enactment of the FELA, many states enacted similar statutes reforming the common-law liability of railroads. *See, e.g.*, VA. CODE § 1294K (1904); N.C. GEN. STAT. § 56 (1897); GA. CODE § 2297 (1895). Congress enacted the FELA to provide uniformity in the area of railroad liability. H.R. REP. No. 1386, *supra*, at 3.

3. 45 U.S.C. § 51 (1982). Specifically, the FELA holds railroads liable to their employees for injury or death resulting in whole or in part from the negligence of any officers, agent or employees of the railroad, or as a result of any defect or insufficiency in the railroad's equipment due to the railroad's negligence. *Id.*

4. *See infra* notes 5-7 and accompanying text (discussing §§ 5 and 10 of FELA).

5. 45 U.S.C. § 55 (1982) (codifying Federal Employers' Liability Act § 5). Section 5 of the FELA provides that in any FELA action, the railroad may set off any sum it has contributed to any insurance relief benefit or indemnity funds, which may have been paid to the injured employee as a result of the injury or death that is the basis for the FELA claim. *Id.* The primary purpose of § 5 of the FELA is to prevent railroads from utilizing employment contracts that release the railroad from liability for injuries sustained by their employees. *See* S. REP. No. 460, *supra* note 2, at 3; H.R. REP. No. 1386, *supra* note 2, at 6; *see also* Kozar v.Chesapeake & Ohio Ry. Co., 320 F. Supp. 335, 384-85 (W.D. Mich. 1970) (public policy of § 10 of FELA is to disallow releases and other similar devices for avoiding railroad's FELA liability), *aff'd in part, vacated in part*, 449 F.2d 1238 (6th Cir. 1971).

6. 45 U.S.C. § 60 (1982) (codifying Federal Employers' Liability Act § 10). Section 10 of the FELA provides that any person convicted of attempting to prevent another person from providing an FELA claimant with information concerning the facts of the injury or death, or who attempts to discharge or discipline an employee for doing the same, shall be punished by a fine of up to $1,000 or imprisoned for up to one year, or both, for each offense. *Id.* The purpose of § 10 of the FELA is to ensure that an injured employee can obtain freely all

An injured railroad employee who seeks recovery under the FELA in a federal court must file a complaint in a federal district court to commence the action.[7] The railroad must answer the complaint.[8] Federal Rule of Civil Procedure 13(a)[9] (rule 13(a)) compels each defendant to assert in its answer any claim it has which arises out of the transaction or occurrence that is the basis of the plaintiff's claim.[10] In *Cavanaugh v. Western Maryland Ry. Co.*,[11] the Fourth Circuit considered whether, in an FELA action, a compulsory counterclaim for property damages brought by a railroad constituted a device to avoid liability under the FELA or to impede the availability of evidence to an FELA claimant.[12]

In *Cavanaugh*, the plaintiff served as an engineer on a Baltimore and Ohio Railroad Company (B&O) train that collided with another B&O train in West Virginia.[13] Cavanaugh initiated an FELA action in the United States District Court for the Northern District of West Virginia, seeking recovery for personal injuries sustained in the collision.[14] Pursuant to West Virginia

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available information to substantiate his claim. Hendley v. Central of Georgia R. Co., 442 F. Supp. 482, 484 (D. Ga. 1977) (purpose of § 10 is to prevent coercion or intimidation of persons upon whom FELA claimant depends to substantiate his claim), *rev'd on other grounds*, 609 F.2d 1146 (5th Cir.), *cert. denied*, 449 U.S. 1093 (1980).

7. *See* 45 U.S.C. § 56 (1982) (FELA action may be brought in United States district court); FED. R. CIV. P. 3 (action must be commenced by plaintiff's filing complaint with court). The injured employee must serve the summons and complaint on the railroad. *See* FED. R. CIV. P. 4 (explaining service of process).

8. FED. R. CIV. P. 12(a). A defendant must serve his answer within 20 days after summons and complaint have been served upon him. *Id.*

9. FED. R. CIV. P. 13(a). A party to an action in federal court must include in his answer, as a counterclaim, any claim he has against the opposing party if such claim arises out of the occurrence that is the basis of the opposing party's claim. *Id.* The purpose of requiring a party to assert a rule 13(a) compulsory counterclaim is to promote judicial efficiency. *See* C. WRIGHT, FEDERAL COURTS 390 (3rd ed. 1976); *see also* United States v. Heyward-Robinson Co., 430 F.2d 1077, 1082 (2d Cir. 1970) (purpose of rule 13(a) is to prevent fragmentation of litigation and multiplicity of suits), *cert. denied*, 400 U.S. 1021 (1971). A court may preclude a party who fails to assert a rule 13(a) compulsory counterclaim from later bringing an action on the claim. FED. R. CIV. P. 13(a) advisory committee note 7; WRIGHT, *supra*, at 390; 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1417 (1971); *see* Mesker Bros. Iron Co. v. Donata Corp., 401 F.2d 275, 279 (4th Cir. 1968) (final judgment on merits of primary claim is res judicata as to that claim and any compulsory counterclaims that defendant failed to assert).

10. *See supra* note 9 and accompanying text (discussing FED. R. CIV. P. 13(a)).

11. 729 F.2d 289 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 222 (1985). In *Cavanaugh v. Western Maryland Ry. Co.*, the plaintiff named the Western Maryland and Baltimore and Ohio railroad companies as defendants. *Id.* at 290. The facts are not clear whether one railroad or both employed the plaintiff. *Id.* at 290 n.2. Both railroads admitted that at least one of them employed the plaintiff as a railroad engineer. *Id.* The Fourth Circuit chose to leave the question of whether either or both railroads employed the plaintiff to the district court. *Id.*

12. *Id.* at 290.

13. 729 F.2d at 290. In *Cavanaugh*, the plaintiff worked as an engineer on a B&O train that collided with another B&O train moving in the opposite direction on a B&O track in Morgan County, West Virginia. *Id.* The collision in *Cavanaugh* occurred on February 12, 1980. *Id.*

law and rule 13(a), the defendant railroads answered and asserted a counterclaim for property damages resulting from the collision.[15] The plaintiff filed a motion to dismiss the railroads' counterclaim on the ground that the counterclaim violated sections 5 and 10 of the FELA.[16] The district court agreed and dismissed the railroads' counterclaim on the ground that the counterclaim constituted a device designed to avoid FELA liability in violation of section 5 of the FELA.[17] The district court further ruled that the railroads' counterclaim constituted a device designed to impede the plaintiff's access to information concerning his FELA claim in violation of section 10 of the FELA.[18] The railroads appealed the order of the district court dismissing their counterclaim, contending that the provisions of the FELA do not bar a railroad's compulsory counterclaim for property damages.[19] The Fourth Circuit reversed the district court's dismissal of the railroads' counterclaim, and held that the FELA does not prevent railroads from asserting a compulsory counterclaim for property damages stemming from an employee's negligence.[20]

In examining the procedural issues in *Cavanaugh*, the Fourth Circuit stated that under the common law of West Virginia an employer has a cause of action against his employee for any property damages resulting from negligent acts that an employee has committed within the scope of his employment.[21] The Fourth Circuit in *Cavanaugh* also stated that rule 13(a)

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14. *Id.* The plaintiff in *Cavanaugh* filed his FELA action on November 19, 1981. *Id.* The plaintiff sought $1,500,000 in damages for injuries sustained in the collision. *Id.*

15. *Id.* The defendant railroads in *Cavanaugh* counterclaimed for $1,700,000 in property damages for damage to their trains and related property sustained as a result of the collision. *Id.*

16. *Id.* The plaintiff in *Cavanaugh* argued that the railroads' counterclaim constituted a device intended to avoid liability under the FELA in violation of § 5, and that this device would deprive the plaintiff of his right to an adequate recovery under the FELA. *Id.* at 291; *see* 45 U.S.C. § 55 (1982). The plaintiff also argued that maintenance of the railroads' counterclaim would discourage persons privy to the accident from coming forward with information for fear of being held liable on the railroads' counterclaim. 729 F.2d at 293. The plaintiff argued, therefore, that maintenance of the railroads' counterclaim also would violate § 10 of the FELA. *Id.*; *see* 45 U.S.C. § 60 (1982).

17. 729 F.2d at 291.

18. *Id.*

19. *Id.* at 290.

20. *Id.* at 294. The Fourth Circuit held in *Cavanaugh* that nothing in the FELA prevents the railroads from filing a counterclaim for property damage in an FELA action. *Id.*; *see infra* notes 21-34 and accompanying text (discussing Fourth Circuit's reasoning in *Cavanaugh*).

21. 729 F.2d at 290-91. The Fourth Circuit in *Cavanaugh* cited *National Grange Mut. Ins. Co. v. Wyoming County Ins. Agency, Inc.* as supporting the proposition that under West Virginia law an employer has a cause of action against his employee for damages arising out of negligent acts the employee commits within the scope of his employment. *See id.* at 291 (citing *National Grange*, 156 W. Va. 521, 524, 195 S.E.2d 151, 154 (1973). In *National Grange*, an insurance agent allegedly negligently failed to keep a fire insurance policy in force. 156 W. Va. at 522, 195 S.E.2d at 152. When a loss subsequently occurred, the insurance company settled the policy holder's claim and filed suit against the insurance agent for his negligence in failing to maintain the policy. *Id.* The *National Grange* court ruled that the agent had a duty

requires a party in federal court to assert as a counterclaim any claims arising out of the transaction or occurrence that gave rise to the opposing party's action.[22] In addition, the Fourth Circuit noted that failure to assert a compulsory counterclaim may result in a waiver of the claim.[23] The Fourth Circuit then reasoned that the railroads had to assert their compulsory counterclaim for property damages in their answer to the plaintiff's FELA claim or risk forfeiting the cause of action.[24] The Fourth Circuit concluded that the railroads were entitled to assert their rule 13(a) counterclaim unless the FELA prohibited the counterclaim.[25]

In analyzing whether the FELA barred the defendant railroads from asserting the compulsory counterclaim, the Fourth Circuit examined the language of sections 5 and 10 of the FELA,[26] the legislative history of the FELA[27] and relevant case law.[28] The *Cavanaugh* court found no language in sections 5 and 10 of the FELA that would bar the railroads' counterclaim for property damages.[29] The Fourth Circuit also found nothing in the

to obey all reasonable instructions and to exercise reasonable care in carrying out the insurance company's orders. 156 W. Va. at 524, 195 S.E.2d at 154. The *National Grange* court held that the agent's violation of the duty to keep the insurance policy in force was simple negligence and imposed liability on the agent to the company. *Id.* The Fourth Circuit in *Cavanaugh* stated that, based on the common-law cause of action enunciated in *National Grange*, the railroads had a cause of action against the plaintiff for alleged negligence resulting in damages to the railroads' property. 729 F.2d at 290-91.

22. 729 F.2d at 291. The Fourth Circuit in *Cavanaugh* stated that if an employee sues his employer in federal court for injuries arising out of a collision and the employer has a claim for property damages against the employee arising out of the same collision, rule 13(a) compels the employer to assert its claim as a counterclaim. *Id.*; *see supra* note 9 and accompanying text (discussing FED. R. CIV. P. 13(a)).

23. 729 F.2d at 291; *see* Mesker Bros. Iron Co. v. Donata Corp., 401 F.2d 275, 279 (4th Cir. 1968) (final judgment on merits of primary claim is res judicata as to that claim and any compulsory counterclaim that defendant failed to assert); FED. R. CIV. P. 13(a) advisory committee note 7 (court may preclude party who fails to assert rule 13(a) counterclaim from later bringing action on claim); 6 C. WRIGHT & A. MILLER, *supra* note 9, at § 1417.

24. 729 F.2d at 291. The Fourth Circuit in *Cavanaugh* stated that the railroads would be barred from bringing their claim for property damages against Cavanaugh in any future action if they did not assert that claim as a counterclaim and if the court rendered a final judgment on the merits of Cavanaugh's FELA claim. *Id. See* FED. R. CIV. P. 13(a); Mesker Bros. Iron Co. v. Donata Corp., 401 F.2d 275, 279 (4th Cir. 1968) (final judgment on merits of primary claim is res judicata as to that claim and any compulsory counterclaim that defendant failed to assert).

25. 729 F.2d at 291.

26. 729 F.2d at 291-93; *see infra* notes 51-55 and accompanying text (discussing language of §§ 5 and 10 of FELA).

27. 729 F.2d at 292-94; *see infra* notes 56-73 and accompanying text (discussing legislative history of FELA).

28. 729 F.2d at 294; *see infra* notes 74-109 and accompanying text (discussing case law relevant to *Cavanaugh* holding).

29. 628 F.2d at 291-93. The Fourth Circuit in *Cavanaugh* ruled that the language of §§ 5 and 10 of the FELA prohibiting any contract, rule, regulation, or device does not include rule 13(a) counterclaims. *Id.* at 292. The plaintiff argued that § 5 of the FELA proscribes any device a railroad might use to gain an exemption from FELA liability including, by implication, a counterclaim for property damages brought by a railroad. *Id.* The Fourth Circuit disagreed with the plaintiff and ruled that a valid counterclaim for property damages brought by a railroad is not a device calculated to exempt the railroad from liability because regardless of

legislative history of the FELA to indicate congressional intent to bar compulsory counterclaims in FELA actions.[30] Finally, the Fourth Circuit stated that relevant case law was in conflict over whether the FELA bars a railroad from asserting a counterclaim for property damages.[31] Although no other United States circuit court of appeals has considered the issue, the Fourth Circuit examined several United States district court and state court decisions that discussed whether the FELA bars a railroad from asserting a counterclaim for property damages.[32] The Fourth Circuit in *Cavanaugh* specifically rejected the reasoning of the Washington Supreme Court in *Stack v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*,[33] the only reported case supporting the view that sections 5 and 10 of the FELA bar counterclaims

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the counterclaim, the railroad could still be held liable to the plaintiff for any damages awarded for the plaintiff's FELA claim. *Id.* The Fourth Circuit stated that the railroads' counterclaim was simply a claim for the railroads' damages and not an attempt to gain exemption from liability. *Id.*

Similarly, the *Cavanaugh* court rejected the plaintiff's contention that the railroads' counterclaim constituted a device designed to prevent persons from voluntarily furnishing information to FELA claimants in violation of § 10 of the FELA. *Id.* at 293-94. The plaintiff argued that the railroads' counterclaim violated § 10 of the FELA because maintenance of the counterclaim would discourage parties who were involved in the accident from coming forward with information for fear of being named in the counterclaim. *Id.* at 293. The majority in *Cavanaugh* refuted the plaintiff's argument and noted that the plaintiff's interpretation of § 10 of the FELA would require that all parties privy to an accident be granted immunity from liability lest they be discouraged from furnishing information to an FELA claimant. *Id.* In other words, the Fourth Circuit stated that § 10 of the FELA does not deny a railroad's right to counterclaim for property damages when employees involved in the accident, who may have been negligent, would be discouraged from testifying. *See id.* The Fourth Circuit denied that any such purpose exists in § 10 of the FELA. *Id.*

30. *Id.* at 292-93. In *Cavanaugh*, the Fourth Circuit cited the legislative history of the FELA to support the view that the proscription of any "device" in § 5 of the FELA refers to contractual arrangements between a railroad and its employees designed to release the railroad from liability for personal injuries. 729 F.2d at 292-93 (citing H.R. REP. No. 1386, 42 CONG. REC. 4436 (1908)). The Fourth Circuit stated that a railroad's counterclaim for property damages, based on as common-law cause of action, is not a contractual device designed to exempt the railroad from FELA liability. 729 F.2d at 293. The Fourth Circuit ruled, therefore, that a counterclaim is not the type of device Congress intended to invalidate by enacting § 5 of the FELA. *Id.*

The *Cavanaugh* court also rejected the plaintiff's contention that Congress intended § 10 of the FELA to prohibit a railroad's counterclaim for property damages because other parties privy to the accident would be reluctant to come forward with information for fear of being named in the counterclaim. *Id.* The Fourth Circuit cited the United States District Court for the District of Colorado's opinion in *Stark v. Burlington Northern, Inc.*, to support the view that the primary purpose of § 10 of the FELA was to prohibit railroad from adopting company rules and practices that would impede an FELA claimant's access to information concerning his claim. 729 F.2d at 293 (citing *Stark v. Burlington Northern, Inc.*, 538 F. Supp. 1061, 1062 (D.C. Colo. 1982)). The Fourth Circuit ruled, therefore, that a counterclaim is not a company rule or practice designed to discourage witnesses from furnishing information to an FELA claimant. 729 F.2d at 293 (citing 538 F. Supp. at 1061).

31. 729 F.2d at 294.

32. *Id.*; *see infra* notes 33-34 and accompanying text (discussing federal district court and state court decisions on whether FELA bars railroad from asserting counterclaim for property damages).

33. 94 Wash.2d 155, 615 P.2d 457 (1980).

by railroads for property damages.[34] The Fourth Circuit concluded that nothing in the FELA expressly or implicitly bars a railroad from filing a counterclaim for property damages in an FELA action.[35]

The dissent in *Cavanaugh* argued, however, that allowing the railroads to maintain a counterclaim violates sections 5 and 10 of the FELA.[36] The dissent in *Cavanaugh* cited with approval the reasoning of the Washington Supreme Court in *Stack*.[37] The dissent argued that the railroads' counterclaim

34. 729 F.2d at 294. In *Stack v. Chicago, M., St. P., & P. R. Co.*, an injured brakeman and the widow of an engineer who was killed in a train collision brought actions under the FELA against the railroad to recover damages. 94 Wash.2d at 156-57, 615 P.2d at 458. The defendant railroad filed a counterclaim against the deceased engineer and third party claims against the engineer's crew members for property damage allegedly caused by their negligence. 94 Wash.2d at 157, 615 P.2d at 458. The *Stack* court ruled that the railroad had a common-law right to sue an employee for property damage resulting from acts of negligence committed by an employee within the scope of his employment. 94 Wash.2d at 158, 615 P.2d at 459.

The *Stack* court then examined whether the FELA had an effect on the railroad's common-law cause of action for property damages. 94 Wash.2d at 159-62, 615 P.2d at 459-61. The *Stack* court ruled that the railroad's third party claims would inhibit the testimony of the third party defendant crew members regarding the extent of their negligence in causing the collision which injured the plaintiffs. 94 Wash.2d at 159, 615 P.2d at 460. The *Stack* court also stated that the third party claims by the railroad might inhibit the testimony of the plaintiff's fellow employees. *Id.* The *Stack* court held, therefore, that the railroad's third party claims violated § 10 of the FELA, which prohibits any device that has the purpose, intent or effect of preventing an employee from furnishing information to an FELA claimant. 94 Wash.2d at 162, 615 P.2d at 460-61. The *Stack* court further held that the railroad's counterclaim and third party claims violated § 5 of the FELA by discouraging injured employees from filing FELA actions and by reducing an employee's FELA recovery by the amount of property damages attributable to the employee's negligence. 94 Wash.2d at 160, 615 P.2d at 460. Consequently, the *Stack* court ruled that the railroad's counterclaim would in effect limit the railroad's FELA liability in violation of § 5 of the FELA. *Id.* The *Stack* court affirmed the lower court's dismissal of the counterclaim and third party claims. 94 Wash.2d at 162, 615 P.2d at 461.

The Fourth Circuit in *Cavanaugh* rejected the reasoning of the *Stack* court on the same grounds that it rejected the plaintiff's arguments, which were based on the *Stack* court's rationale. 729 F.2d at 294. The Fourth Circuit noted that substantial authority existed, most of it unreported, for the view that a railroad may counterclaim for property damages in an FELA action brought against the railroad. 729 F.2d at 294. *See, e.g.*, Consolidated Rail Corp. v. Dobin, No. 82-2539 (E.D. Pa. 1981) (provisions of FELA do not bar railroad's common law right to assert counterclaims against employees for property damages allegedly caused by their negligence); Key v. Kentucky & Indiana Terminal R. Co., No. C-78 0313-L(A) (W.D. Ky. 1979) (court denied plaintiff FELA claimant's motion to dismiss defendant railroad's counterclaim for property damages); Cook v. St. Louis-San Francisco R. Co., No. Civ. 75-0791-D (W.D. Okla. 1977) (FELA claimant held liable on counterclaim of defendant railroad for property damages); Kentucky & Indiana Terminal R. Co. v. Martin, 437 S.W.2d 944,951 (Ky. 1969) (court allowed maintenance of counterclaim for property damages by defendant railroad but later dismissed counterclaim on finding of contributory negligence); Capitola v. Minneapolis, St. P. & S.M.R. Co., 258 Minn. 206, ____, 103 N.W.2d 867, 869 (1960) (court recognized right of railroad to maintain counterclaim for property damages against FELA claimant); *see supra* notes 29-30 and accompanying text (discussing Fourth Circuit's rejection of plaintiff's arguments in *Cavanaugh*).

35. 729 F.2d at 294. The Fourth Circuit in *Cavanaugh* reversed the district court's dismissal of the defendant railroads' counterclaim and remanded the case for further proceedings not inconsistent with its decision. *Id.*

36. *Id.* at 295 (Hall, J., dissenting); *see infra* notes 37-40 and accompanying text (discussing reasoning of dissent in *Cavanaugh*).

37. 729 F.2d at 295. In essence, the dissent in *Cavanaugh* adopted the arguments and

was a device to exempt the railroads from FELA liability by intimidating the plaintiff into abandoning his FELA claim.[38] The dissent agreed, therefore, with the *Stack* court's holding that a railroad's counterclaim for property damages violates section 5 of the FELA as a device designed to exempt the railroads from liability under the FELA.[39] The dissent in *Cavanaugh* also agreed with the *Stack* court's contention that the railroads' counterclaim violated section 10 of the FELA by effectively preventing other employees from coming forward with information for fear of being named in the counterclaim as possible third party defendants.[40]

Both rule 13(a) and the common-law right of an employer to sue an employee for damages resulting from the employee's negligence support the Fourth Circuit's holding in *Cavanaugh* that the railroads may maintain a counterclaim for property damages against an FELA claimant.[41] The common-law rule states that an employer may assert a claim against his employee for damages resulting from negligent acts committed by the employee within the scope of his employment.[42] The Western Maryland and B&O railroads claimed in *Cavanaugh* that the plaintiff's negligence, carelessness, and wanton, reckless misconduct solely and proximately caused the collision and resulting property damage to the railroads' train and equipment.[43] The railroads in *Cavanaugh* thus had a common-law right to assert the claim that the plaintiff's negligence resulted in damage to their property.[44] Rule 13(a) requires a defendant to assert any claim, including a common-law claim for property damages, that the defendant has against a plaintiff if the

reasoning of the *Stack* decision. *See id.*; *see also Stack*, 94 Wash.2d at 158-62, 615 P.2d at 458-61 (*Stack* decision). The dissent in *Cavanaugh* also criticized the majority in *Cavanaugh* for citing unpublished decisions to support its holding. 729 F.2d at 297. The dissent noted that citation of unpublished decisions is disfavored in the Fourth Circuit. *Id.*; *see* 4TH CIR. R. 18(d)(ii); *see also supra* note 33 and accompanying text (discussing reasoning in *Stack*); *infra* note 76 (analysis of whether Fourth Circuit's use of unpublished decisions in *Cavanaugh* was proper).

38. 729 F.2d at 296. The dissent in *Cavanaugh* reasoned that since the railroads' counterclaim could deter the plaintiff from asserting his rights under the FELA, the railroads could exempt themselves from liability in violation of § 5 of the FELA. *Id.*

39. 729 F.2d at 296; *see Stack*, 94 Wash.2d at 159-62, 615 P.2d at 459-60 (railroad's counterclaim violates § 5 of FELA).

40. 729 F.2d at 296. The dissent in *Cavanaugh* reasoned that the threat of a counterclaim for property damages would discourage witnesses from providing information to the FELA claimant. *Id.*; *see Stack*, 94 Wash.2d at 158-62, 615 P.2d at 459-60 (railroad's counterclaim violates § 10 of FELA).

41. *See infra* notes 42-49 and accompanying text (analysis of defendant railroads' counterclaim in *Cavanaugh*).

42. *See* Greenleaf v. Huntington & B.T.M.R. & Coal Co., 3 F.R.D. 24, 25 (E.D. Pa. 1942) (servant is liable to his master for loss caused to master by servant's breach of duty); Stack v. Chicago, M., St. P. & P.R. Co., 94 Wash.2d 155, 158, 615 P.2d 457, 459 (1980) (employer has common-law right to sue employee for property damage arising from acts of negligence committed within scope of employment, unless otherwise barred); National Grange Mut. Ins. Co. v. Wyoming County Ins. Agency, Inc., 156 W. Va. 521, 524, 195 S.E.2d 151, 154 (1973) (insurance agent liable to insurance company for loss resulting from simple negligence of agent); *see also supra* note 21 and accompanying text (discussing *National Grange*).

43. Brief for Appellant at 3, Cavanaugh v. Western Maryland Ry. Co., 729 F.2d 289 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 222 (1985).

44. *See supra* note 42 and accompanying text (discussing common law right of employer

claim arises out of the same transaction or occurrence that is the subject matter of the plaintiff's claim.[45] In *Cavanaugh*, the plaintiff's claim for personal injury damages and the defendant railroads' claim for property damages both arose from the same occurrence, the train collision on February 12, 1980.[46] Courts have defined a collision as an "occurrence" within the meaning of rule 13(a).[47] The train collision in *Cavanaugh* was therefore an occurrence within the meaning of rule 13(a) and since the defendant railroads' claim for property damages arose from that occurrence, the claim was a compulsory counterclaim.[48] The Fourth Circuit in *Cavanaugh* then considered whether the FELA barred the defendant railroads from bringing an otherwise valid rule 13(a) compulsory counterclaim for property damages.[49]

The plain meaning of the FELA, the legislative history of the FELA and relevant case law support the Fourth Circuit's decision to allow the railroads to assert a rule 13(a) counterclaim for property damages in an FELA action.[50] The FELA does not bar expressly the assertion of compulsory counterclaims for property damages by railroads.[51] In contrast, the FELA specifically bars any contract, rule, regulation or device designed to avoid FELA liability or to impede an FELA claimant's access to information concerning his claim.[52]

to claim damages resulting from employee's negligence).

45. FED. R. CIV. P. 13(a). Rule 13(a) requires a party to an action in federal court to include as a counterclaim in his answer any claim he has against the opposing party if such claim arises out of the occurrence that is the basis of the opposing party's claim. *Id.*

46. 729 F.2d at 290. In *Cavanaugh*, both the plaintiff's claim for personal injury damages and the defendants' claim for property damages arose from the train collision of February 12, 1980 in Morgan County, West Virginia. *Id.*

47. *See* Sinkbeil v. Handler, 7 F.R.D. 92, 97 (D. Neb. 1946). In *Sinkbeil*, the plaintiff brought a wrongful death action arising from an automobile collision. *Id.* at 95. The defendant counterclaimed for personal injury and property damages resulting from the collision. *Id.* The plaintiff moved to strike the defendant's counterclaim. *Id.* at 96. The *Sinkbeil* court denied the plaintiff's motion to dismiss the counterclaim. *Id.* at 97. The *Sinkbeil* court ruled that since the defendant's counterclaim arose out of the same collision as the plaintiff's claim, the collision was an occurrence within rule 13(a), and thus made compulsory the filing of the defendant's counterclaim. *Id.*; *see* Williams v. Robinson, 1 F.R.D. 211, 213 (D. D.C. 1940) (rule 13(a) occurrence is happening, incident, or event); *see also* BLACK'S LAW DICTIONARY 974 (5th ed. 1979) (defining occurrence as happening, incident, or event).

48. *See* FED. R. CIV. P. 13(a); *supra* notes 46-47 and accompanying text (discussing rule 13(a) meaning of "occurrence"). Under rule 13(a) the defendant railroads had to assert their counterclaim for property damages or risk waiving the right to assert the claim later. *See* FED. R. CIV. P. Rule 13(a) advisory note 7.

49. 729 F.2d at 291-95. The Federal Rules of Civil Procedure state that the rules shall not abridge, enlarge or modify any substantive right. 28 U.S.C. § 2072 (1982). In *Cavanaugh*, the railroads were entitled to assert a rule 13(a) compulsory counterclaim for property damages unless the application of rule 13(a) would have abridged, enlarged or modified the injured plaintiff's rights under the FELA. *See id.*

50. *See infra* notes 51-115 and accompanying text (analysis of whether FELA bars railroad's assertion of counterclaim for property damages).

51. 45 U.S.C. §§ 51-60 (1982). The FELA contains no language which would bar a railroad from bringing a compulsory counterclaim for property damages in an FELA action. *See id.*

52. 45 U.S.C. §§ 55, 60 (1982) (codifying Federal Employers' Liability Act §§ 5 and 10). Section 5 of the FELA expressly provides that any contract, rule, regulation, or device designed to exempt a railroad from FELA liability shall be invalid. 45 U.S.C. § 55 (1982); *see supra* note 5 and accompanying text (discussing § 5 of FELA). Section 10 of the FELA expressly

The language of the FELA demonstrates that a rule 13(a) counterclaim based on a common-law cause of action has not been held to be and was not intended to be, a contract, rule, or regulation within the meaning of the FELA.[53] Consequently, a court only may bar a railroad's counterclaim under the FELA if the court finds that the counterclaim is a device to avoid liability or impede a claimant's access to information.[54] The FELA provides no express explanation of the meaning of the term device as used in sections 5 and 10 of the FELA.[55]

The Fourth Circuit in *Cavanaugh* also examined the legislative history of the FELA to determine the meaning of the term "device."[56] The legislative history of the FELA supports the Fourth Circuit's holding that a counterclaim for property damages brought by a railroad in an FELA action was not a device within the meaning of a section 5.[57] Congress enacted section 5 of the FELA to thwart a railroad's attempt to escape liability through the use of contractual arrangements with its employees.[58] Historically, railroads

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provides that any contract, rule, regulation, or device, the purpose, intent, or effect of which shall be to prevent a railroad employee from providing voluntary information to an FELA claimant, shall be invalid. 45 U.S.C. § 60 (1982); *see supra* note 6 and accompanying text (discussing § 10 of FELA).

53. *See* FED. R. CIV. P. 13(a); 45 U.S.C. §§ 55, 60 (1982). No court has ever held that a rule 13(a) counterclaim is a contract, rule, or regulation within the meaning of the FELA. In addition, the legislative history of the FELA does not support the contention that Congress intended to bar a rule 13(a) counterclaim as a contract, rule, or regulation. *See* S. REP. No. 432, *supra* note 2, at 1-5; S. REP. No. 460, *supra* note 2, at 1-4; H.R. REP. No. 1386, *supra* note 2, at 1-9. Moreover, the legislative history of the FELA indicates that Congress used the terms contract, rule, or regulation to refer to any contracts, rules or regulations that a railroad might establish to exempt itself from FELA liability or impede an FELA claimant's access to information concerning his claim. *See* H.R. REP. No. 1386, *supra* note 2, at 6-7; S. REP. No. 661, 76th Cong., 1st Sess., 5 (1939) (purpose of § 10 of FELA is to prohibit railroads from promulgating rules that discourage employees from giving information concerning accident to anyone but company officials). As an example of the type of railroad practices that Congress intended the FELA to invalidate, the House Report quoted a paragraph, entitled "Rules governing employment by this company," from a railroad company's employment contract. H.R. REP. No. 1386, *supra* note 2, at 6-7. The "Rules" included a clause stating that, in the event of injury to the employee during his employment, the employee agrees to sign and deliver to the railroad a release of all causes of action arising out of the injury. *Id.* Similarly, the Senate Report referred to the practice by railroads of establishing company rules that prohibit railroad employees from providing information concerning an accident to the injured FELA claimant or his representative. S. REP. No. 661, *supra*, at 5. A rule 13(a) counterclaim is not a contract, rule, or regulation established by a railroad. *See* FED. R. CIV. P. 13(a). A rule 13(a) counterclaim, therefore, is not a contract, rule, or regulation within the meaning of the FELA.

54. 45 U.S.C. §§ 55, 60 (1982). If a rule 13(a) counterclaim is not a contract, rule or regulation under the FELA, then the counterclaim is only invalid if it is a "device" under the FELA. *See id.*

55. 45 U.S.C. §§ 51-60 (1982) (codifying the Federal Employers' Liability Act). The provisions of the FELA neither define nor explain the term "device." *See id.*

56. 729 F.2d at 292-94; *see supra* note 30 and accompanying text (discussing Fourth Circuit's interpretation in *Cavanaugh* of FELA's legislative history).

57. *See infra* notes 58-67 and accompanying text (discussing congressional intent underlying enactment of § 5 of FELA).

58. *See* S. REP. No. 460, *supra* note 2, at 3. Section 5 of the FELA affects arrangements that involve a waiver, either by the employee or by his dependents, of the right to recover damages for the employee's injury or death caused by the negligence of the railroad. *Id.*

used employment contracts, liability release forms and other similar arrangements with their employees to avoid liability.[59] The legislative history of section 5 of the FELA does not discuss the purpose underlying the inclusion of the terms "rule," "regulation," or "device."[60] The United States Supreme Court in *Philadelphia, Baltimore & Washington R. Co. v. Schubert*[61] has suggested, however, that by including these terms in the FELA Congress did not expand the stated purpose of section 5, which was to void contractual arrangements railroads used to avoid liability.[62] Instead, the Supreme Court stated that the terms "rule," "regulation," and "device" only seek to effectuate the purpose of section 5 in situations other than those involving actual contracts.[63] The railroads' counterclaim in *Cavanaugh* was not a

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Arrangements that relieve the employer's liability for negligence, such as liability release forms and employment contract provisions, are void. *Id.*; *see* H.R. REP. No. 1386, *supra* note 2, at 7. At the time of the enactment of the FELA, the House Committee found that many railroad employees were working under employment contracts that released the railroad from liability for injuries caused by the negligence of other employees. *Id.* The Committee also found that some railroads had established relief departments which compensated an employee for injuries arising out of his employment in exchange for an employee agreement not to sue. *Id.* Under the railroad relief program, the railroad would contribute money to the relief fund, and in return the employee would sign a release form which discharged the railroad from all liability for injury to the employee. *Id.* The House Committee found that the enactment of the FELA was necessary to invalidate such inequitable contracts which prevented railroad employees from recovering full damages for their injuries. *Id.* at 1. Section 5 of the FELA thus prohibits employment contracts and other similar arrangements that a railroad might use to escape FELA liability. *Id.* at 7.

59. *See* S. REP. No. 460, *supra* note 2, at 3; H.R. REP. No. 1386, *supra* note 2, at 1, 6-7 (discussing railroads use of employment contracts, liability release forms and other similar arrangements with its employees to avoid liability for employee injuries).

60. *See* S. REP. No. 432, *supra* note 2, at 1-5; S. REP. No. 460, *supra* note 2, at 1-4; H.R. REP. No. 1386, *supra* note 2, at 1-9.

61. 224 U.S. 603 (1912).

62. *Id.* In *Philadelphia, Baltimore & Washington R. Co. v Schubert*, the United States Supreme Court considered whether a stipulation contained in a contract for membership in a railroad relief fund fell within § 5 of the FELA's proscription of any contract, rule, regulation or device designed to exempt a railroad from liability. 224 U.S. at 608. The contract stipulation stated that if an employee accepted benefits from the relief fund, the employee could not recover against the railroad for damages in a subsequent lawsuit. *Id.* The defendant railroad argued that § 5 did not specifically preclude a relief fund contract stipulation. *Id.* at 611. The Supreme Court ruled that the purpose of Congress in employing the phrase "contract, rule, regulation or device" in § 5 of the FELA was to expand the scope of the section and make it broader through a generic, rather than a specific, description. *Id.* Therefore, the Court stated, § 5 covers every variety of agreement or arrangement whose purpose or intent is to enable a railroad to escape FELA liability. *Id.* The Court held the railroad liable on the basis that § 5 of the FELA voided the relief fund contract stipulation which otherwise would have released the railroad from liability. *Id.* The *Schubert* decision supports the Fourth Circuit's view in *Cavanaugh* that Congress intended § 5 of the FELA to invalidate contractual arrangements that directly exempt railroads from FELA liability. The assertion of a common law claim for property damages under a rule 13(a) counterclaim, however, is not a contractual arrangement that would exempt the railroads from FELA liability.

63. *Id.* at 611. In essence, the United States Supreme Court in *Schubert* held that although § 5 of the FELA does not expressly invalidate a relief fund contract stipulation that releases a railroad from liability, the policy underlying § 5 prohibits a railroad from using the contract to exempt itself from FELA liability. *See id.*

contractual or similar arrangement established by the railroads to exempt themselves from liability.[64] Regardless of the railroads' counterclaim, the railroads still could be held liable on the plaintiff's FELA claim.[65] The railroads' counterclaim was a valid common-law counterclaim for property damages allegedly caused by an employee acting within the scope of his employment.[66] The legislative history of section 5 of the FELA reveals no intent to prevent a railroad from asserting a valid common-law claim for property damages.[67]

The legislative history of the FELA also supports the Fourth Circuit's holding in *Cavanaugh* that a counterclaim for property damages brought by a railroad in an FELA action is not barred as a device within the meaning of section 10.[68] Congress enacted section 10 of the FELA to prohibit railroads from preventing persons with information concerning an FELA claim from giving that information to the claimant.[69] Historically, railroads enacted company rules that prohibited railroad employees, under penalty of discharge, from giving information concerning an accident to anyone but a company official.[70] The railroads' counterclaim for property damages in *Cavanaugh* is not a railroad company rule designed to prevent employees from furnishing information concerning an FELA claim.[71] Rather, the rail-

64. *See* FED. R. CIV. P. 13(a). The railroads' claim for property damages in *Cavanaugh* derives from the common-law right of an employer to sue his employee for the employee's negligent acts. *See supra* note 42 and accompanying text (discussing common-law right of employer to sue employee for damages resulting from negligent acts employee committed within scope of employment). Federal practice compels the railroads to assert their common-law claim as a counterclaim to the plaintiff's claim. FED. R. CIV. P. 13(a) advisory note 7; *see supra* note 9 and accompanying text (discussing mechanics of rule 13(a)). The existing common-law right and rule 13(a) are not, therefore, contractual or similar arrangements established by the railroads to avoid FELA liability.

65. *See* 45 U.S.C. § 51 (1982) (railroad is liable in damages for injury or death of employee resulting from negligence of railroad).

66. *See supra* note 42 and accompanying text (discussing common-law right of employer to sue employee for property damages resulting from employee's negligence).

67. *See* S. REP. No. 432, *supra* note 2, at 1-5; S. REP. No. 460, *supra* note 2, at 1-4; H.R. REP. No. 1386, *supra* note 2, at 1-9 (revealing no intent to prevent a railroad from asserting a valid common-law claim for property damages against employee).

68. *See infra* notes 69-73 and accompanying text (discussing congressional intent underlying enactment of § 10 of FELA).

69. S. REP. No. 661, *supra* note 53, at 5. The Senate Report on the FELA stated that the interests of society and justice require that injured railroad employees and railroads have equal access to the facts surrounding an injury allegedly caused by a railroad's negligence. *Id.*

70. *Id.* The Senate Report on the FELA further stated that the railroads maintain well-organized and highly efficient claim departments to protect the railroads from possible employee suits for damages. *Id.*

71. *See* FED. R. CIV. P. 13(a). The railroads' claim for property damages in *Cavanaugh* derives from the common-law right of an employer to sue his employee for the employee's negligent acts. *See supra* note 42 and accompanying text (discussing common-law right of employer to sue employee for damages resulting from negligent acts employee committed within scope of employment). Federal practice compels the railroads to assert their common-law claim as a counterclaim to the plaintiff's claim. FED. R. CIV. P. 13(a) advisory note 7; *see supra* note 9 and accompanying text (discussing mechanics of rule 13(a)). The existing common-law right

roads' counterclaim in *Cavanaugh* is a federally compelled assertion of the common-law right of an employer to recover for property damages caused by a negligent employee.[72] The railroads' counterclaim, therefore, will not prevent, within the meaning of section 10 of the FELA, a person from providing the plaintiff with information concerning his claim.[73]

Cases interpreting the FELA also support the Fourth Circuit's conclusion that a counterclaim is not a device designed to avoid FELA liability or to impede an FELA claimant's access to information concerning his claim.[74] Prior to the Fourth Circuit's decision in *Cavanaugh*, neither the United States Supreme Court nor any of the federal courts of appeals had ever addressed the issue of whether the FELA bars a rule 13(a) counterclaim for property damages asserted by a railroad in an FELA suit. Several federal district courts, however, have decided the same issue.[75] For example, in *Consolidated Rail Corp. v. Dobin*,[76] an FELA claimant moved to dismiss a railroad's counterclaim for property damages on the ground that the railroad's claim violated the provisions of the FELA.[77] In *Dobin*, the United States District Court for the Eastern District of Pennsylvania ruled that the provisions of the FELA do not bar the common-law right of a railroad to

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and rule 13(a) are not, therefore, railroad company established rules to prevent railroad employees from providing voluntary information to an FELA claimant concerning the facts surrounding the injury or death.

72. *See supra* notes 41-46 and accompanying text (discussing common-law right of employer to sue employee for property damages, and employer's right to assert counterclaim under rule 13(a)).

73. *See* 45 U.S.C. § 60 (1982). Congress intended § 10 of the FELA to prohibit railroads from promulgating rules that directly prevent employees from providing information to FELA claimants by threatening discharge from employment or disciplinary action. *See* S. REP. No. 661, *supra* note 53, at 5. While a counterclaim for property damages may discourage some employees who were involved in the injury from providing information to an FELA claimant for fear of possibly being held accountable for their own negligence, such indirect discouragement of negligent employees is not the equivalent of direct action by a railroad that Congress intended to prohibit. *See id.*

74. *See infra* notes 75-109 and accompanying text (discussing FELA case law).

75. *See infra* notes 76-92 and accompanying text (discussing district court cases that have examined whether FELA bars rule 13(a) counterclaim for property damages asserted by railroad in FELA suit).

76. No. 81-2539 (E.D. Pa., Sept. 29, 1981) (appended to Brief for Appellant, Cavanaugh v. Western Maryland Ry. Co., 729 F.2d 239 (4th Cir. 1984) *cert. denied*, 105 S.Ct. 222 (1985)). The case of *Consolidated Rail Corp. v. Dobin* is an unreported decision. Nevertheless, the majority in *Cavanaugh* cited *Dobin* and other unreported decisions as precedent. 729 F.2d at 294. The dissent in *Cavanaugh* criticized the majority's use of unreported cases and correctly noted that the rules of the Fourth Circuit disfavor the use of unpublished decisions as precedent. 729 F.2d at 297; *see* 4TH CIR. R. 18(d)(ii). The dissent in *Cavanaugh* failed to note, however, that the rules of the Fourth Circuit allow the use of unpublished decisions when the unreported cases are related to the material issue and when no published opinions on point exist. *See* 4TH CIR. R. 18(d)(iii). The paucity of published decisions with precedential value on the material issue in *Cavanaugh* justifies the Fourth Circuit's use of unpublished dispositions in *Cavanaugh*. *See id.*

77. *Dobin*, No. 81-2539 at 1.

sue its employees for property damages allegedly caused by their negligence.[78] Without further comment, the *Dobin* court expressly rejected the reasoning of the Washington Supreme Court in *Stack* which held that a railroad's counterclaim for property damages constituted a device in violation of sections 5 and 10 of the FELA.[79]

The only federal district court decision supporting the view that the FELA bars a counterclaim brought by a railroad is *Shields v. Consolidated Rail Corp.*[80] In *Shields*, three employees of the defendant railroad brought an FELA action against the railroad for injuries sustained in an automobile accident.[81] The railroad counterclaimed against Shields, one of the plaintiffs, for indemnification in the event that the railroad was held liable to the other two plaintiffs.[82] The defendant railroad in *Shields* alleged that the plaintiff's negligence had caused the accident and the injuries to the other plaintiffs.[83] The United States District Court for the Southern District of New York noted that section 1 of the FELA provides that a railroad is liable in damages for injuries to employees resulting from the negligence of any employee of the railroad.[84] The *Shields* court also noted that section 5 of the FELA prevents a railroad from using any contract, rule, regulation or device to exempt itself from FELA liability.[85] The *Shields* court, therefore, dismissed the railroad's counterclaim for indemnification on the ground that the counterclaim contravened the express purpose of section 1 of the FELA of holding railroads liable for the negligence of their employees.[86] The *Shields*

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78. *Id.* at 1-2. The United States District Court for the Eastern District of Pennsylvania in *Consolidated Rail Corp. v. Dobin* stated that an employer has a common-law right of action against its employee for property damage arising out of ordinary acts of negligence committed within the scope of employment. *Id.* at 1. The *Dobin* court ruled that although the FELA provides that a railroad is liable for its negligence resulting in injury to an employee, the provisions of the FELA do not prevent a railroad from asserting a common-law right against its employees for property damage caused by their negligence. *Id.* at 1-2.

79. *Id.* at 2. The *Dobin* court rejected without comment the view espoused by the Supreme Court of Washington in *Stack* that a counterclaim brought by a railroad against its employee for property damages is a "device" designed to exempt the railroad from liability or to impede an FELA claimant's access to information concerning his claim in violation of §§ 5 and 10 of the FELA. *Id.*; *see supra* note 33 and accompanying text (discussing *Stack*).

80. No. 81 Civ. 4204, slip op. (S.D.N.Y. Dec. 16, 1981) (available on LEXIS, Genfed library, Dist. file).

81. *Id.* at 2. The plaintiffs in *Shields v. Consolidated Rail Corp.* were riding in a truck owned by the defendant railroad and operated by one of the plaintiffs when the truck in which they were riding collided with another truck. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*; *see* 45 U.S.C. § 51 (1982) (railroad liable in damages for injury or death of employee resulting from negligence of another employee).

85. *Shields*, slip op. at 4; *see* 45 U.S.C. § 55 (1982) (any contract, rule, regulation or device designed to exempt railroad from liability under FELA is void).

86. *Shields*, slip op. at 4-5. The *Shields* court reasoned that the express purpose of § 1 of the FELA, which holds railroads liable for the negligence of their employees, would be defeated if a railroad could pass its FELA liability on to a negligent employee through a counterclaim for indemnification. *Id.*

court also dismissed the railroad's counterclaim for indemnification on the ground that the counterclaim violated section 5 of the FELA as a device to exempt the railroad from section 1 liability.[87]

The *Shields* court's proscription of a railroad's counterclaim for indemnification as violative of the FELA is distinguishable from the Fourth Circuit's decision in *Cavanaugh*.[88] In *Shields*, the railroad's counterclaim for indemnification attempted to pass the railroad's total liability on to the negligent employee, in violation of section 1 of the FELA which expressly holds railroads liable in damages for injuries to an employee caused by the negligence of other employees.[89] In contrast, the railroads' counterclaim for property damages in *Cavanaugh* was not an attempt by the railroads to exempt themselves from FELA liability.[90] Regardless of the railroads' counterclaim in *Cavanaugh*, the railroads could still be held liable on the FELA claim for the plaintiff's injuries.[91] The railroads' counterclaim in *Cavanaugh* was, therefore, a valid common-law claim for property damages and did not contravene the purpose of the FELA to hold railroads liable for injuries sustained by employees as a result of railroad negligence.[92]

At the state court level, *Stack v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, is the only state supreme court decision to address whether a railroad may bring a counterclaim for property damages in an FELA suit.[93] While the *Stack* decision stands in direct conflict with the Fourth Circuit's opinion in *Cavanaugh*,[94] other lower state court decisions support the *Cavanaugh*

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87. *Shields*, slip op. at 5-6. The *Shields* court stated that the railroad's counterclaim against Shields for indemnification could directly exempt the railroad from liability, under section 1 of the FELA, for the other two plaintiff's injuries. *Id.* The *Shields* court held, therefore, that the counterclaim constituted a device designed to exempt the railroad from FELA liability, in violation of § 5 of the FELA. *Id.*

88. *See infra* notes 89-92 and accompanying text (distinguishing *Shields* from *Cavanaugh*).

89. *See Shields*, slip op. at 3-6 (railroad counterclaimed for indemnification to exempt itself from FELA § 1 liability); 45 U.S.C. § 51 (1982) (railroad is liable for injuries to employees resulting in whole or in part from negligence of any employee of railroad).

90. *See* 729 F.2d at 292 (railroads' counterclaim in *Cavanaugh* for property damages is not an exemption from liability for injuries to employees); 45 U.S.C. § 55 (1982) (any contract, rule, regulation or device designed to exempt railroad from liability is invalid); *see supra* note 42 and accompanying text (discussing railroad's common-law right to sue employees for negligence).

91. 45 U.S.C. § 51 (1982) (railroad is liable in damages for injury or death of employee resulting from negligence of railroad). If the court finds that the railroads in *Cavanaugh* were negligent then the railroads will be liable in damages to the plaintiff. *See id.* Thus, while the railroads' counterclaim in *Cavanaugh* may hold the plaintiff liable for any damages attributable to the plaintiff's negligence, the counterclaim will not exempt the railroads from liability for the plaintiff's injuries resulting from the railroads' negligence. *Id.*

92. *See supra* notes 90-91 and accompanying text (distinguishing *Cavanaugh* from *Shields*).

93. *See Stack*, 615 P.2d at 459-61 (holding that railroad's counterclaim for property damages constituted device in violation of FELA §§ 5 and 10); *see supra* note 34 and accompanying text (discussing *Stack*).

94. *Compare Stack*, 615 P.2d at 459-61 (railroad's counterclaim for property damages dismissed as violation of FELA §§ 5 and 10) *with Cavanaugh*, 729 F.2d at 290-94 (railroads' counterclaim for property damages does not violate FELA §§ 5 and 10).

decision.[95] For example, in *Van Cleve v. Consolidated Rail Corp.*[96] an Ohio court overruled an FELA claimant's motion to dismiss the defendant railroad's counterclaim for property damages allegedly caused by the plaintiff's negligence.[97] The *Van Cleve* court ruled that no language in the FELA expressly or implicitly addresses the right of an employer to sue his employee for property damage caused by the alleged negligence of the employee.[98] The *Van Cleve* court stated that the FELA was aimed entirely at the reformation of the common law to ensure an employee's right to recover for injuries caused by a railroad's negligence.[99] The *Van Cleve* court further stated that the railroad's counterclaim for damages did not interfere with the FELA's purpose of holding railroads liable for negligent acts that result in injury to an employee.[100] The *Van Cleve* court held, therefore, that the FELA has no effect on the common-law right of an employer to sue his employee for the employee's negligent acts.[101] Several other state courts decisions similarly support the Fourth Circuit's decision in *Cavanaugh* allowing a counterclaim for property damages brought by a railroad in an FELA suit.[102]

Relevant case law discussing and construing the terms of sections 5 and 10 of the FELA also supports the holding of the Fourth Circuit in *Cavanaugh* that a railroad's compulsory counterclaim for property damages is not a device under section 10 of the FELA.[103] A number of courts have considered the meaning of the term "device" as used in the FELA. For example, in *Apitsch v. Patapsco & Back Rivers R. Co.*,[104] the United States District Court for the District of Maryland ruled that a railroad's agreement with the employee's union to process claims under the FELA in accordance with

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95. *See infra* notes 96-102 and accompanying text (discussing state court decisions supporting *Cavanaugh*).

96. No. 79CV-01-93 (Ohio, July 26, 1979) (appended to Brief for Appellant, Cavanaugh v. Western Maryland Ry. Co., 729 F.2d 239 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 222 (1985)). In *Van Cleve v. Consolidated Rail Corp.*, the plaintiff, a railroad engineer brought an FELA suit against the defendant railroad for injuries sustained in a train collision. *Id.* The defendant railroad alleged that the plaintiff's negligence was the sole cause of the collision. *Id.* The railroad, therefore, filed a counterclaim for property damages against the plaintiff. *Id.* The plaintiff moved to dismiss the railroad's counterclaim for property damages on the grounds that the counterclaim constituted a device designed to exempt the railroad from FELA liability in violation of § 5 of the FELA. *Id.*

97. *Id.*; *see infra* text accompanying notes 98-101 (discussing *Van Cleve* court's reasoning).

98. No. 79CV-01-93 at 1.

99. *Id.*; *see supra* note 2 and accompanying text (discussing FELA impact on common-law liability of employees).

100. No. 79CV-01-93 at 1.

101. *Id.*

102. *See* Kentucky & Indiana Terminal R. Co. v. Martin, 437 S.W.2d 944, 951 (Ky. 1969) (court allowed maintenance of counterclaim for property damages by defendant railroad in FELA action but later dismissed counterclaim on finding of contributory negligence); Capitola v. Minneapolis, St. P. & S.M.R. Co., 258 Minn. 206, ____, 103 N.W.2d 867, 869 (1960) (court recognized right of railroad to maintain counterclaim for property damages against FELA claimant).

103. *See infra* notes 104-109 and accompanying text (discussing judicial interpretation of device under FELA).

104. 385 F. Supp. 495 (D. Md. 1974).

state Workman's Compensation Act procedures was void as a device designed to enable the railroad to avoid the full scope of its liability under the FELA.[105] Similarly, in *Culver v. Kurn*,[106] an injured railroad employee, whose employment had been terminated by his injury, released the railroad from liability in consideration of re-employment.[107] The Supreme Court of Missouri held in *Culver* that the injured employee's release of the railroad from liability was invalid because it was a device designed to exempt the railroad from FELA liability.[108] The interpretation of device in *Apitsch* and *Culver* is consistent with the traditional definition of device which implies an affirmative action, such as a release or a contractual agreement, taken with the intent to deprive an injured employee of his right to recover.[109] In contrast, the defendant railroads in *Cavanaugh* merely acted upon the common-law right to sue an employee for property damages by properly bringing a counterclaim under rule 13(a).[110] A compulsory counterclaim, therefore, is not an express contract, release or similar device initiated by a railroad to exempt the railroad from liability under the FELA or to impede an FELA claimant's access to the facts surrounding his claim.[111] Therefore,

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105. *Id.* at 504. In *Apitsch v. Patapsco & Back Rivers R. Co.*, the plaintiff, a railroad employee, brought an action under the FELA against the defendant railroad to recover damages for injuries sustained as a result of a fellow employee's negligence. *Id.* at 497. The defendant railroad argued that the plaintiff executed a settlement and release of his FELA rights which barred the plaintiff from recovering in an FELA action. *Id.* at 497-98. The railroad specifically argued that the plaintiff voluntarily elected to accept amounts payable to him in accordance with the provisions of the Maryland Workman's Compensation Act in exchange for the plaintiff's release of any possible FELA claims. *Id.* at 498. The United States District Court for the District of Maryland noted that potential recovery under the FELA greatly exceeded the amount recoverable under the Workmen's Compensation Act. *Id.* at 499. The *Apitsch* court also found that the statement of rights accompanying the release agreement failed to explain fully the plaintiff's rights under the FELA. *Id.* at 504. Therefore, the *Apitsch* court held that the release agreement constituted a device designed to avoid the full scope of FELA liability in violation of § 5 of the FELA. *Id.*

106. 354 Mo. 1158, 193 S.W.2d 602 (1946).

107. 354 Mo. at ____, 193 S.W.2d at 604. The defendant railroad in *Culver v. Kurn* terminated the employment of the plaintiff when the plaintiff was injured in the course of his employment. 354 Mo. at ____, 193 S.W.2d at 603. The defendant railroad had terminated the plaintiff's employment in accordance with the defendant's policy of not retaining in their employment any employee who had an unadjusted claim against the railroad. *Id.* In consideration of re-employment the plaintiff signed an agreement releasing the railroad from all liability for the plaintiff's injuries. *Id.*

108. 354 Mo. at ____, 193 S.W.2d at 604. The court in *Culver* reasoned that the release prevented the plaintiff from claiming and suing for FELA liability and thus exempted the railroads from FELA liability in violation of § 5 of the FELA. *Id.*; *see* Kozar v. Chesapeake & Ohio Ry. Co., 320 F. Supp. 335, 384-85 (W.D. Mich. 1970) (FELA § 5 invalidates releases and other exculpatory devices designed to exempt railroad from FELA liability).

109. *See* BLACK'S LAW DICTIONARY 407 (5th ed. 1979). BLACK'S defines device as "[a]n invention or contrivance; a result of design;... [a] plan or project; a scheme to trick or deceive; a stratagem or artifice...." *Id.*

110. *See supra* note 9 and accompanying text (discussing rule 13(a)).

111. *See supra* notes 109-110 and accompanying text (distinguishing a railroad's compulsory counterclaim for property damages from a contract, release or similar device initiated by railroad to exempt railroad from FELA liability).