Washington and Lee Law Review

Volume 27 | Issue 1 Article 10

Spring 3-1-1970

Indemnity Actions Against The United States Under The Exclusive Liability Provision Of The Federal Employees' Compensation Act.

section 10(a) of the Administrative Procedure Act gave it an independent basis for standing,[57] although the ultimate result of the decision was the same as though the court had accepted ICI's contention. Nevertheless, standing was granted in order to reach what the court felt were the important questions raised by the merits of the case.

Though the court does not reveal any particular rationale behind the grant of standing, the presence of several elements seemed to have substantially influenced the court in making its decision. Both concurring judges stressed the fact that ICI was factually aggrieved by the action of the Comptroller.[58] In addition, a matter of public interest was involved[59] and ICI was probably the only party, practically speaking, who would raise the issue before a court.[60] The cumulative effect of these factors makes a persuasive case for standing.

Presented with such a strong case, the court adopted an elastic approach to the question of standing. This approach does not seem to have been stretched to its outer limit, however, for it does not appear that the court went so far as to adopt a theory of discretionary standing. Nevertheless, it may fairly be said that *National Association of Securities Dealers* did extend the private attorney general doctrine by no longer requiring that an aggrieved party statute be present in order to confer standing.

LARRY W. WERTZ

INDEMNITY ACTIONS AGAINST THE UNITED STATES UNDER THE EXCLUSIVE LIABILITY PROVISION OF THE FEDERAL EMPLOYEES' COMPENSATION ACT.

When a government employee is injured while in the course of his employment and the injury is due, at least in part, to the negligence of a third person, the employee has two alternatives in seeking satisfaction for his injuries. He may recover limited compensation under the Federal Employees' Compensation Act[1] or he may sue the negligent

---

the Glass-Steagall Act contained no aggrieved party provision. National Ass'n of Sec. Dealers, Inc. v. SEC, No. 20,164 at 32 (D.C. Cir., July 1, 1969).

[57]National Ass'n of Sec. Dealers, Inc. v. SEC, No. 20,164 at 34, 40 (D.C. Cir., July 1, 1969).

[58]Text accompanying note 14 *supra*.

[59]Text accompanying note 15 *supra*.

[60]Text accompanying note 16 *supra*.

[1]Federal Employees' Compensation Act, 5 U.S.C. § 8102 (Supp. IV, 1968) [hereinafter referred to as FECA].

third party for damages in tort.[2] In the event that the employee chooses the latter alternative and a settlement is reached, the third party may then attempt to bring an action against the United States for indemnity or contribution by alleging that the Government was either primarily or partially to blame for the injury.[3]

The United States may then invoke the exclusive liability section of FECA,[4] contending that this provision bars any action against the Government arising out of an injury to one of its employees.[5] This argument, however, has not always been accepted by the federal courts.[6] Thus, the question as to whether the United States may in fact be sued in this situation, and if so, under what circumstances recovery may be allowed, enjoys a current vitality.

A recent case illustrative of this problem is *Bremen v. United States*.[7] In *Bremen* a United States agricultural inspector was injured in a fall from a gangway while debarking the *M/V Martha* after an inspection of the ship's food stores. The inspector brought suit against Bremen, the shipowner, seeking damages for his injuries allegedly resulting from Bremen's negligence. Bremen settled for $110,000 and then brought action against the United States for indemnity on the theory that the United States knew or should have known that the inspector was physically unfit to perform his duties safely and that these infirmities caused or contributed to his fall.[8] The lower court, in

---

[2]*Id.* §§ 8131, 8132. As a third alternative, the injured employee could pursue both avenues of recovery. In such a case, however, section 8131 provides that the United States may require the employee either to assign his right of action against the third party to the United States or to prosecute the action in his own name. If the employee sues the third party and recovers money or property in satisfaction of that liability, section 8132 provides that as a result of this suit or settlement, and after deducting the reasonable expenses of the suit, he must refund the amount of compensation paid by the United States and credit any surplus toward any future payments under FECA for that particular injury.

[3]*See generally* W. PROSSER, TORTS § 48 (3d ed. 1964).

[4]Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (Supp. IV, 1968), *formerly* ch. 691, § 201, 63 Stat. 861 (1949).

[5]Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D.D.C. 1954).

[6]*See, e.g.*, Weyehaeuser S.S. Co. v. United States, 372 U.S. 597 (1963).

[7]409 F.2d 994 (4th Cir. 1969), *petition for cert. filed*, 38 U.S.L.W. 3079 (U.S. Aug. 26, 1969) (No. 498).

[8]Bremen v. United States, 409 F.2d 994 (4th Cir. 1969).

> Such allegations, fleshed out in the complaint, presented a three-pronged theory of recovery. Conceivably Bremen might be entitled to recover on either (1) a strict tort indemnity theory, or because of (2) implied warranty or contract of indemnity said to arise from the conduct of the United States in requiring the ship to submit to agricultural inspection. It was also contended that Bremen was entitled to recover on (3) an independent tort theory based upon an alleged breach of a duty of care not to Inspector Mitchell but to the ship.

Id. at 995.

granting the Government's motion for summary judgment, held that since the United States could not be sued by the injured employee under FECA, it was protected from an indemnity action by the third party defendant.[9] However, the United States Court of Appeals for the Fourth Circuit reversed the district court's decision and held, in effect, that indemnity actions against the Government are not barred per se under FECA.[10] In remanding the case for a determination of whether or not Bremen might be entitled to recover under any of the claims originally advanced,[11] the court rejected the theory of indemnity relied on by the lower court, *i.e.,* that there must be a common liability between the indemnitor and indemnitee to the injured party for indemnity to be allowed.[12]

In reaching its decision, the circuit court looked to the exclusive liability section of FECA as it was *originally* enacted. The Act provided in part:

> The liability of the United States . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and *anyone otherwise entitled* to recover damages from the United States . . . because of the injury or death . . . in a civil action, or in admiralty . . . or under a Federal tort liability statute.[13]

---

[9]Bremen v. United States, 290 F. Supp. 195 (E.D. Va. 1968).

[10]Bremen v. United States, 409 F.2d 994, 997 (4th Cir. 1969).

[11]In addition to the non-contractual tort indemnity theory advanced in the district court, the lower court on remand was instructed to consider whether recovery might also be allowed on a contractual theory of indemnity. *Id.* at 998-99.

[12]*Id.* at 998. In rejecting the theory of common liability as a necessity to support an action for idemnity, the court advanced its own theory. It said: "As for the law of indemnity we think the better rule is that which rests the right of indemnity upon violation of a duty of care to the injured person rather than upon tort 'liability'." *Id.* It appears that the court was wavering a bit here for it referred to the duty owed to the injured person rather than a separate duty owed by the employer to the third party, which was one of the theories the shipowner had advanced.

[13]Federal Employees' Compensation Act, ch. 691, § 201, 63 Stat. 861 (1949) (emphasis added). The wording "anyone otherwise entitled" was used when the exclusive liability provision was originally enacted in 1949. Federal Employees' Compensation Act, ch. 691, § 201, 63 Stat. 861 (1949), *as amended* 5 U.S.C. § 8116(c) (Supp. IV, 1968). In 1966, however, the wording "any other person otherwise entitled" was used in place of "anyone otherwise entitled." Federal Employees' Compensation Act, 5 U.S.C. § 8116(c) (Supp. IV, 1968), *formerly* ch. 691, § 201, 63 Stat. 861 (1949).

A survey of the legislative history neither reveals any intent for nor any suggested reason behind this change. *See* S. REP. No. 1285. 89th Cong., 2d Sess. (1966). Although it seems as if the language in the 1966 version is broader, this change in language has never been cited in support of the proposition that all possible actions arising out of an injury to a government employee are barred.

Using the theory of *ejusdem generis*,[14] the court reasoned that the phrase "anyone otherwise entitled" relates back and is limited to those who may derive their claims from a "personal relationship" with the employee.[15] The rationale behind this was that such claimants have already been compensated by the statutory remedy and should be barred from further recovery against the Government.[16] Persons not standing in such a relationship to the injured employee, however, are afforded no such relief. Thus, the court concluded that FECA did not, ipso facto, bar indemnity actions by a third party defendant against the Government.[17]

This conclusion was further supported by the court's analysis of the legislative history of the exclusive liability provision of FECA. The court reasoned that since there was no mention of the rights of third parties against the United States, Congress did not intend to bar such actions by the statute.[18] Rather the real purpose of the Act was

---

[14]This theory has been defined as follows:

> In the construction of laws, wills, and other instruments, the 'ejusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. [citations omitted] The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.

BLACK'S LAW DICTIONARY 608 (4th ed. rev. 1968).

[15]409 F.2d at 995. The court further explained:

> The catch-all category simply expresses congressional caution, typical in the drafting of statutes, to exclude all deriving their claims from a personal relationship to the government employee. Ejusdem generis would, for example, perhaps exclude from any other remedy an adopted child, neither next of kin nor dependent, but would not exclude a stranger.

Id.

[16]*Id. Contra,* Rhoades v. United States, 216 F. Supp. 732 (S.D. Cal. 1962). In *Rhoades,* two government employees were killed when a United Air Lines plane, in which they were riding, collided with a military aircraft. The decedents' heirs settled their claims with United Air Lines, who in turn tried to sue the government for indemnity or contribution. When the government argued that the exclusive liability section of FECA barred such suit, United Air Lines invoked the *ejusdem generis* theory, claiming that only the class of persons mentioned in the statute were barred from suit. In rejecting this argument, the court stated that the word "otherwise" in the phrase "anyone otherwise entitled" indicated that the statute included anyone who might be able to recover from the United States because of the injury or death to the employee, including those unlike the previous types mentioned. *Id.* at 733.

[17]409 F.2d at 998.

[18]*Id.* at 996. *See* S. REP. No. 836, 81st Cong., 1st Sess. 23 (1949). The report provided in part:

> The purpose of the latter [exclusive liability section] is to make it

to limit any recovery from the United States by an injured employee solely to that compensation which FECA provides.[19]

A survey of the two lines of cases that have been concerned with the question of whether recovery-over[20] should be allowed under the exclusive remedy provision of FECA reveals that courts have, more often than not, been disposed to deny contribution and indemnity.[21] On the one hand, the courts that have protected the Government from such actions generally have used two different approaches. Some courts have strictly construed the statute and have held that the phrases "anyone

---

clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States... Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly....

Id.

[19]409 F.2d at 996. *Accord,* Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963). Addressing itself to this point the Supreme Court said:

The purpose of § 7(b), added in 1949, was to establish that, as between the Government on the one hand and its employees and their representatives or dependents on the other, the statutory remedy was to be exclusive. There is no evidence whatever that Congress was concerned with the rights of unrelated third parties....

Id. at 601. *But see* Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964). In *Busey* the court reasoned that if a third party were allowed to recover contribution or indemnity from the United States, it would violate the expressed congressional purpose of limiting the Government's damages and place an additional burden on the treasury. Furthermore, since FECA is the Government's form of workmen's compensation, to allow recovery here would violate an underlying principle of placing a limited and determinate liability on the employer. *Id.* at 422-23.

[20]"Recover-over" is a term used when referring to both indemnity and contribution. Generally it signifies that act of a third party recovering money from a primary or secondary wrongdoer in the amount the third party has had to pay by virtue of a suit by the injured party against the third party. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 76.10 (1968) [hereinafter cited as LARSON].

[21]The cases can be generally classified in two categories: (1) Those where recovery has been allowed as between a third party defendant and the United States for an injury to a government employee: Treadwell Const. Co. v. United States, 372 U.S. 772 (1963), *vacating per curiam sub. nom.* Drake v. Treadwell Constr. Co., 299 F.2d 789 (3d Cir. 1962); Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963); Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963); and (2) those where recovery has not been allowed: Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968); Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967); Wien Alaska Airlines, Inc. v. United States, 375 F.2d 736 (9th Cir.), *cert. denied,* 389 U.S. 940 (1967); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed,* 379 U.S. 951 (1964); Scarbrough v. Murrow Transfer Co., 277 F. Supp. 92 (E.D. Tenn. 1967); Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964); Drumgoole v. Virginia Elec. & Power Co., 170 F. Supp. 824 (E.D. Va. 1959); Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D.D.C. 1954).

otherwise entitled" and "under a Federal tort liability statute" preclude any action against the United States arising out of an injury to a government employee.[22] Most of the courts which have denied contribution or indemnity, however, follow the rationale of *United Air Lines, Inc. v. Wiener*[23] where the court by-passed the strict construction argument in reaching the same result by invoking the theory that contribution and indemnity actions necessitate a common liability between the Government and the third party. While the third party is liable in tort, the Government is only liable for limited compensation under the provisions of FECA, and since the parties do not stand in the same relationship of liability, there is no basis for recovery.[24]

On the other hand, the leading case allowing recovery to a third person under FECA is *Weyerhaeuser Steamship Co. v. United States.*[25] There, the Supreme Court allowed contribution and held that the admiralty rule[26] governing the correlative rights and duties of two vessels involved in a mutual fault collision took precedence over the exclusive remedy section of the Act. Although other courts have fol-

[22]*See, e.g.,* Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D.D.C. 1954). *In Christie,* where a third party defendant brought an action under the Federal Tort Claims Act, 28 U.S.C.A. § 2674 (1964), seeking indemnity or contribution for damages it had paid to an injured civilian employee of the United States, it was held that the only recovery allowed against the Government for injuries to its employees is compensation under FECA. Any other recovery against the United States is automatically precluded by the terms and wording of the exclusive liability provision of FECA. *Id* at 694.

[23]335 F.2d 379 (9th Cir. 1964). In *Wiener,* two government employees were killed in a mid-air plane collision between a commercial airliner and an Air Force jet. The lower court found both planes were partially at fault. Wiener v. United Air Lines, 216 F. Supp. 701, 705 (S.D. Cal. 1962). When the airline company sought indemnity from the United States for the damages it had paid to the decendents' heirs, the court denied the action. Although it was conceded that such indemnity actions were not expressly barred by the exclusive liability section of FECA, it was concluded that since there was no underlying tort liability of the Government to its employees, there was no basis for indemnification to a third party. United Air Lines, Inc. v. Wiener, 335 F.2d 379, 402 (9th Cir. 1964).

[24]The cases where the courts have relied in the theory of common liability to the injured party as necessary to sustain an action by the third party to recover-over from Government under FECA have been: Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968) (contribution); Maddux v. Cox, 382 F.2d 119 (8th Cir. 1967) (contribution); Wien Alaska Airlines, Inc. v. United States, 375 F.2d 736 (9th Cir. 1967) (indemnity); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964) (based on indemnity, but contribution was also said to apply); Scarbrough v. Murrow Transfer Co., 277 F. Supp. 92 (E.D. Tenn. 1967) (contribution and indemnity); Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964) (contribution); Drumgoole v. Virginia Elec. & Power Co., 170 F. Supp. 824 (E.D. Va. 1959) (contribution and indemnity).

[25]372 U.S. 597 (1963).

[26]The "North Star," 106 U.S. 17 (1882).

lowed the *Weyerhaeuser* reasoning in allowing contribution,[27] no court has specifically allowed indemnity under FECA. It is evident, however, that in a proper case of implied contract,[28] or where an independent duty[29] between the third party and the Government is found, indemnity could be allowed.

This possibility was indicated in the recent case of *Murray v. United States.*[30] In *Murray,* a government employee was injured in a falling elevator and sued the building owner for negligence. The employee was awarded compensation under FECA and also recovered damages from the owner in tort. The owner then sought contribution from the United States alleging that the Government was a joint tortfeasor. Although the court denied contribution on the ground that there was no joint liability of the parties to the injured employee,[31] it recognized that "if the case fairly presented a claim for non-contract indemnity we would be confronted with a difficult question."[32] The difficulty of the question apparently stems from the fact that there have been two conflicting views on whether the common liability theory

[27]Less than a month after *Weyerhaeuser* was decided, the Supreme Court vacated the judgment of the lower court in *Drake v. Treadwell Construction Co.,* which had denied contribution to a third party who had paid damages to an injured government employee. 299 F.2d 789 (3d Cir. 1962). In a per curiam opinion, the case was remanded to be considered "in light of *Weyerhaeuser.*" Treadwell Constr. Co. v. United States, 372 U.S. 772 (1963). On remand, contribution was allowed and the Government did not appeal. *See* Murray v. United States, 405 F.2d 1361, 1364-65 n.12 (D.C. Cir. 1968). *See* Brief for Appellant at 8, Bremen v. United States, 409 F.2d 994 (4th Cir. 1969).

In the next year, another case arose in Pennsylvania where a NASA employee was injured by an electric shock from an allegedly faulty machine manufactured by the third party. Relying on *Weyerhaeuser* and *Treadwell,* the district court allowed the third party to maintain an action for contribution. Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963). It is interesting to note, however, that the ultimate settlement provided that the third party claim for contribution should be dismissed. *See* Murray v. United States, 405 F.2d 1361, 1365 n.12 (D.C. Cir. 1968).

[28]Since the federal district courts have original jurisdiction for contract claims against the United States "not exceeding $10,000," a third party's claim for indemnity based on a theory of express or implied contract in those courts would have to limited to that amount. Tucker Act, 28 U.S.C. § 1346(a) (1964). It appears that if the third party is going to use the contract theory for indemnity, he must intend to limit his claim to $10,000 or less, or else his claim on this theory will be dismissed in the district court. Murray v. United States, 405 F.2d 1361, 1366 (D.C. Cir. 1968). In *Bremen,* although express and implied contract were two of the theories on which the shipowner claimed recovery, there is no indication that the shipowner intended to limit his claim against the Government. 409 F.2d at 995. Therefore his recovery on a contract theory will probably fail.

[29]*See* Murray v. United States, 405 F.2d 1361, 1366-68 (D.C. Cir. 1968).

[30]405 F.2d 1361 (D.C. Cir. 1968).

[31]*Id.* at 1364.

[32]*Id.* at 1367.

should be applied only to contribution cases, or extended to indemnity as in *Wiener*.[33]

Courts have often confused the distinction between contribution and indemnity,[34] and when dealing with the right to recover under workmen's compensation statutes, this has been a particular problem.[35] Those tribunals which have construed the Longshoremen's and Harbor Workers' Compensation Act,[36] whose basic principles are very similar to those of FECA,[37] have established a general rule that where an employer is not liable to an employee under the Act, the employer cannot be sued for contribution.[38] The reason is that since he is not liable to the employee in tort, he cannot be a joint tortfeasor. Where, however, it may be found that the employer has breached some duty to the third party and thereby caused a payment of damages to an injured employee, the courts have used this independent duty as a point of departure from the common liability theory, and have allowed indemnity where such breach of duty has primarily caused the injury.[39] Although

---

[33]*Id.* In *Murray* the court saw a problem in reconciling *Wiener* which had applied the common liability theory to cases of non-contractual indemnity with the cases that have arisen under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, 905 (1964), that have allowed indemnity on the basis of an independent duty. Murray v. United States, 405 F.2d 1361, 1365 (D.C. Cir. 1968). *Compare* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *with* Coates v. Potomac Elec. Power Co., 95 F. Supp. 779 (D.D.C. 1951).

[34]W. PROSSER, TORTS § 48 (3d ed. 1964).

[35]2 LARSON § 76.10 (1968). *See also,* Sykes, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts,* 42 VA. L. REV. 959 (1956).

[36]Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1964). The Act provides in part:

> The liability of an employer ... shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. ...

Id. § 905.

[37]*Compare,* Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, 905 (1964) *with* Federal Employees' Compensation Act, 5 U.S.C. §§ 8102, 8116(c) (Supp. IV, 1968). The Supreme Court recognized the similarity between this section and the exclusive liability section of FECA when it termed the two provisions as "nearly identical." Weyerhauser S.S. Co. v. United States. 372 U.S. 597, 602 (1963).

[38]2 LARSON § 76.21 (1968); *accord,* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952); Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953); American Mut. Liab. Ins. Co. v. Matthew, 182 F.2d 322 (2d Cir. 1950); Coates v. Potomac Elec. Power Co., 95 F. Supp. 779 (D.D.C. 1951).

[39]Some courts have allowed indemnity on the basis of a duty found in an implied contract. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315 (1964); Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 597 (1956); *see* Crawford v. Pope & Talbot, Inc., 206 F.2d 784 (3d Cir. 1953). *But see* note 28 *supra.*

Other courts have allowed indemnity on the basis of an independent duty

no court has held that these rules should be applied in cases arising under FECA, both the construction given to the Longshoremen's Act[40] and the reasoning as expressed in *Murray*[41] would seem to dictate that result.

Recognizing that FECA is the Government's form of workmen's compensation,[42] an important consideration in applying the above rules to the Act is whether or not such an application may in fact violate an underlying principle of limiting the liability of the employer.[43] By allowing the third party to recover indemnity, the Government-employer is indirectly liable for a greater amount than is contemplated under the Act.[44] Not only is a greater burden forced upon the public

---

owed by the employer to the third party. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950) (where when the wife of an injured employee sued his employer for loss of consortium, the court allowed recovery based upon the breach of an independent duty owed to her by the employer); Rich v. United States, 177 F.2d 688 (2d Cir. 1949) (an action for indemnity was allowed where it was alleged that the employer was negligent in fastening a ladder insecurely for the employee's use causing him to fall into a cleaning tank); *see* Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941) (indemnity was allowed as between a building owner and an employer-contractor whose failure to comply with a New York statute prescribing certain equipment to be used in scaffolding caused an employee to fall while cleaning the building's windows); Green v. War Shipping Adm'n., 66 F. Supp. 393 (E.D. N.Y. 1946) (when an employee who was injured while repairing a vessel sued the owner of the vessel, the court allowed the employer to be impleaded for any damages the owner had to pay on account of the employer's negligence).

Some courts, although not deciding the point directly, have also indicated that in the proper setting an indemnity action may be maintained on the basis of an independent duty. *See* Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951) (where the court denied indemnity because there was no contract or other "legal relationship" between the parties); Coates v. Potomac Elec. Power Co., 95 F. Supp. 779 (D.D.C. 1951) (where the court, in dictum, said that if the third party had claimed indemnity on the theory that the employer was the primary wrongdoer, the complaint would have been for the breach of an independent duty, and the employer would not be protected by the exclusive remedy provision of the Longshoremen's and Harbor Workers' Compensation Act).

Contra Drumgoole v. Virginia Elec. & Power Co., 170 F. Supp. 824 (E.D. Va. 1959). In *Drumgoole,* the third party claimed contribution or indemnity should be allowed on the basis of an independent tort liability. The court dismissed this argument as "not wholly sound" and denied recovery since "neither contribution nor indemnity may succeed without the support of the initial negligence." *Id.* at 825.

[40]Another statute that has similar wording in its exclusive liability section as FECA is N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965). The leading case decided under an independent duty theory was Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938).

[41]405 F.2d at 1366-68.

[42]S. REP. No. 836, 81st Cong., 1st Sess. 23 (1949).

[43]Busey v. Washington, 225 F. Supp. 416, 423 (D.D.C. 1964).

[44]*Cf.* Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) (dissenting opinion).

treasury in contravention of congressional sanction,[45] but there is also a refutation of the *quid pro quo* idea whereby the Government makes itself absolutely liable for limited compensation as a substitute for an employee's excluded claims.[46] When considered from the point-of-view of the third party, however, it seems that there is more justification for allowing indemnity. He has received no such *quid pro quo* from the Government.[47] Furthermore, since workmen's compensation is strictly a relationship between the employer and employee, it should have no effect on the rights of third parties against the employer, especially when those rights are based on a separate duty.[48]

In addition to balancing the arguments from the standpoint of the principles of workmen's compensation, it must also be recognized that if the indemnity action is not allowed to be heard on the merits, the Government not only may avoid any liability to the third party, but also may recover from the employee any compensation paid under the Act.[49] Thus, the United States may be relieved of all liability simply because there has been a third party tortfeasor. When it is further considered that the Government may well be a primary wrongdoer, it becomes increasingly apparent that any summary dismissal of an indemnity action under these circumstances may lead to a result which offends any sense of fairness and justice.

The rejection of the *Wiener* theory of common liability as applied to indemnity in *Bremen* is a divergence from the general trend of the cases decided under FECA. Thus, the issue is squarely before the courts, and if they choose to follow *Bremen,* indemnity actions will no

---

[45]Busey v. Washington, 225 F. Supp. 416, 422 (D.D.C. 1964).

[46]Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 129 (1956).

[47]*See* Burnside Shipping Co. v. Federal Marine Terminals, 284 F. Supp. 740, 749 (N.D. Ill. 1967).

[48]Sykes, *Contribution and Indemnity: The Effect of Workmen's Compensation Acts,* 42 VA. L. REV. 959 (1956) and 2 Larson §§ 76.51-53 (1968) provide full discussions of the rights of third parties against employers under workmen's compensation laws.

[49]*See* note 2 *supra.* Compare, Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933 (1964) *with* Federal Employees' Compensation Act, §§ 8131, 8132 (Supp. IV, 1968). *See also* Federal Marine Terminal. Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969). In this case a stevedoring contractor paid compensation benefits pursuant to the Longshoremen's Act to the administratrix of one of its employees who was killed while working aboard the defendant's ship. In allowing indemnity for these payments in a direct action in tort against the defendant shipowner, the court held that the shipowner owed a duty of care to the stevedoring company. Since the breach of this duty gave rise to the employee's recovery against the stevedoring company, the company was allowed recovery from the shipowner. *Id.* Although this is the converse of the situation in *Bremen,* there is no apparent reason why a breach of duty owed by the employer to the shipowner would not give rise to a like recovery.