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Toppling the House of Cards That Flowed  
From an Unsound Supreme Court Decision:  
End Inadmissibility of Railroad Disability Benefits  
in FELA Cases

VICTOR E. SCHWARTZ  
CARY SILVERMAN

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Victor E. Schwartz\*  
Cary Silverman\*\*

I. INTRODUCTION

A forty-year-old railroad employee is injured on the job and claims that he is unable to return to work. He and his attorney file a claim under the Federal Employers' Liability Act ("FELA") demanding a large sum for past and future lost wages. At the same time, the worker has applied for and is receiving \$2,200 each month in disability benefits through a program established under another federal statute, the Railroad Retire-

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\* Victor E. Schwartz is a senior partner in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He is co-author of the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (10th ed. 2000), and author of COMPARATIVE NEGLIGENCE (4th ed. 2002). He served on the Advisory Committees to the Restatement of the Law of Torts projects on Products Liability and Apportionment of Liability, and currently sits on the Advisory Committee to the Restatement of the Law of Torts: General Principles. Mr. Schwartz obtained his B.A. summa cum laude from Boston University in 1962 and his J.D. magna cum laude from Columbia University in 1965.

\*\* Cary Silverman is an associate in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He received a B.S. in Management Science from the State University of New York College at Geneseo in 1997, an M.P.A. from The George Washington University in 2000, and a J.D. with honors from The George Washington University Law School in 2000, where he served as Managing Editor of *The Environmental Lawyer*.

ment Act ("RRA"). His employer has contributed about two-thirds of the resources that fund this benefit. Nevertheless, in deciding the FELA case, the jury will not hear that the plaintiff is already receiving over \$26,000 annually in disability payments. Instead, the jury will decide the amount due to the plaintiff in a vacuum and award the full amount of his or her past and future lost wages. The basic principle of tort law, making the injured person whole, is ignored, and the fairness of allowing a defendant to rebut the plaintiff's case with relevant evidence is undermined. Ultimately, railroad companies are made to pay twice for the same injury in cases based on the slightest amount of negligence on their part.

Despite FELA's language authorizing a railroad to offset its liability by payments made on a worker's behalf, this scenario occurs because courts have improperly interpreted a forty-year-old Supreme Court case, *Eichel v. New York Central Railroad Co.*<sup>1</sup> This article also will show that even if courts have correctly interpreted this precedent, the barely three-page opinion is on shaky legal and unsound public policy ground. This article will suggest that trial and appellate courts construe *Eichel* narrowly, and that the Supreme Court should revisit the issue and either reject the collateral source rule as applied to FELA cases or rule that disability payments are not a collateral source. The Supreme Court should recognize that, in the context of FELA, a payment attributable to the railroad is deductible from a damage award. Courts should allow juries to consider offsetting FELA awards in light of the railroads' contribution to the funding of disability benefits and allow introduction of such evidence to show malingering and for other relevant purposes.

## II. THE COLLATERAL SOURCE RULE

### A. PURPOSE AND HISTORY OF THE COLLATERAL SOURCE RULE

The collateral source rule, which has been treated both as a rule of evidence and a substantive rule of law provides that, in computing damages against a tortfeasor, recovery will not be reduced by compensation the plaintiff received from sources other than the defendant, even if the payments mitigated the plaintiff's actual monetary loss.<sup>2</sup> Evidence of payments coming from third parties are barred by the rule and an injured party may recover lost wages or medical expenses from the tortfeasor even if he or she has already recovered full damages from a third party.<sup>3</sup> The most typical example of a collateral source may be health benefits, either paid for by an employer or by a plaintiff. The first American application of the collateral source rule would appear to have occurred in the

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1. 375 U.S. 253 (1963).

2. See RESTATEMENT (SECOND) OF TORTS § 920A (1977).

3. See *id.*, cmt. b.

1854 case of *Propeller Monticello v. Mollison*.<sup>4</sup> The rule continues in many contexts today, but its public policy weakness has caused a number of state legislatures and courts to reduce its reach or eliminate it altogether.<sup>5</sup>

Courts recognize that the collateral source rule allows plaintiffs to collect twice for the same injury.<sup>6</sup> While contrary to the fundamental principle that the purpose of tort law is to make a person whole, not “more than whole,” courts have allowed this exception to persist under the premise “that the wrongdoer ought not to benefit—in having what he owes diminished—by the fact that the victim was prudent enough to have other sources of compensation, which he was probably paying for.”<sup>7</sup> As a public policy matter, those who support the collateral source rule view the problem of “windfall” recovery as secondary to relieving a tortfeasor of liability due to a plaintiff’s foresight in obtaining insurance or taking other action to mitigate the costs of the injury. The collateral source rule also is based on the premise that a “wrongdoer” should not benefit from the fact that the plaintiff received compensation from another party.<sup>8</sup>

The collateral source rule has also been thought to protect against the risk that a jury may find no liability if it knew the plaintiff received compensation from other sources. Such evidence may also be deemed prejudicial or confuse the jury under Rule 403 of the Federal Rules of Evidence, or the state rule equivalent.<sup>9</sup>

#### B. CRITICISM OF THE COLLATERAL SOURCE RULE

The collateral source rule has been called one of “the oddities of

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4. 58 U.S. 152 (1854).

5. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S CASES AND MATERIALS ON TORTS 542 (10th ed. 2000) [hereinafter PROSSER, WADE & SCHWARTZ] (noting that over half of the states have modified the collateral source rule by statute).

6. See, e.g., *Estate of Farrell v. Gordon*, 770 A.2d 517, 520 (Del. 2001) (“Double recovery by a plaintiff is acceptable so long as the source of such payment is unconnected to the tortfeasor.”).

7. JEFFREY O’CONNELL & ROGER C. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 114 (1975); see also *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66 (Cal. 1970) (stating that the rule “embodies the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim’s providence.”).

8. See Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 571 (1986) (citing 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22, at 1345 (1957)).

9. Some scholars have argued that the rule can be justified on the grounds that the plaintiff may otherwise be left compensated before he or she must pay one-third or more of the recovery to a contingency fee lawyer. See *Helfend*, 465 P.2d at 68. This theory, however, is in derogation of the “American Rule” of each party paying his or her own attorney’s fees and steps on the legislature’s ability to provide for the recovery of attorney’s fees by statute in circumstance it deems appropriate as a matter of public policy.

American accident law."<sup>10</sup> As one commentator observed, "[t]he question of mitigation for benefits from a collateral source reflects a potential conflict between guiding objectives of tort law. The first is to compensate the injured party, to make him whole; the second and more dubious one is to burden the tortfeasor with the loss."<sup>11</sup>

The rule encourages litigation because it creates incentives to sue, even if a person has already received or is receiving substantial compensation. Such litigation and the attendant transactional costs, such as attorneys and expert witness fees and court expenses, increase insurance premiums and may needlessly use judicial resources. Because awards in such cases serve little or no compensatory purpose, their primary result is punishment of a defendant,<sup>12</sup> a purpose better suited to awarding punitive damages within the constitutional framework established by the Supreme Court.<sup>13</sup> Moreover, the vast expansion of the availability of punitive damages between the 1960s and 1980s has further weakened the call to use the collateral source rule as a backdoor means to punish a defendant.<sup>14</sup>

The bases for the collateral source rule, which came into being prior to the New Deal, are often not applicable in today's world of public bene-

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10. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

11. Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 (1964).

12. See *Hubbard Broad., Inc. v. Loescher*, 291 N.W.2d 216, 222 (Minn. 1980).

13. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

14. In the past thirty years, the underpinnings of the rule have further unraveled. First, state legislatures and courts drastically expanded the availability of punitive damages. Historically, and at the time of adoption of the collateral source rule, punitive damages were generally limited to cases of "the traditional intentional torts," designed to punish an individual's purposeful bad act against another. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47, 49 (2002). These included "assault and battery, libel and slander, malicious prosecution, false imprisonment, and intentional interferences with property." *Id.* at 50 (citations omitted). In the late 1960s, however, American courts radically expanded the availability of punitive damages beyond the traditional intentional torts. See *Toole v. Richardson-Merrell, Inc.*, 60 Cal. Rptr. 398 (1967). "Reckless disregard" became a popular standard for punitive damages liability. See, e.g., UTAH CODE ANN. § 78-18-1(1)(a) (2002), and even "gross negligence" became enough to support a punitive damages award in some states. See e.g., *Wisker v. Hart*, 766 P.2d 168, 173 (Kan. 1988). By the late 1970s and early 1980s, unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface and the size of punitive damage awards "increased dramatically." George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

fits and trust funds.<sup>15</sup> Payments from these sources are not a result of any foresight on the part of the plaintiff, but the result of government-mandated programs, which are often at least partially, if not predominantly, funded by the same party that is subject to the lawsuit.<sup>16</sup> Some courts, however, continue to strictly apply the collateral source rule to bar the jury from considering such payments to offset a defendant's liability. As times have changed, they have adhered rigorously to precedent and outdated reasoning. This is precisely the case in the FELA context, discussed in greater depth in Section III, where railroad companies pay the greatest share of the money used to finance railroad retirement disability benefits, yet courts do not permit benefits paid to the plaintiff to be deducted from the defendant's liability or even considered by the jury in computing an award. Courts also have applied the rule regardless of the degree of wrongdoing on the part of the defendant. They have applied it even when defendants are strictly liable.<sup>17</sup>

### III. RAILROAD RETIREMENT BENEFITS AND FELA

Railroad workers benefit from a pension and disability compensation system that is more generous than what others receive through social security. In addition, rather than be eligible for traditional workers' compensation, which has a wage loss and permanent disability component, railroad workers may sue under FELA and collect these payments in addition to receiving compensation for pain and suffering and other losses.

#### A. THE RAILROAD RETIREMENT ACT: HISTORY, SOURCES OF FINANCING, AND BENEFITS

##### 1. Purpose, History, and Coverage

The Railroad Retirement Act ("RRA")<sup>18</sup> is a unique federal law that provides a system of benefits for railroad employees and their dependents and survivors. The system, which first awarded annuities in 1936, is administered by the Railroad Retirement Board, with three members appointed by the President of the United States: one labor, one manage-

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15. There are also other situations where application of the collateral source rule no longer makes sense, such as in strict product liability cases. See generally Schwartz, *supra* note 8, at 573-75.

16. Even in cases in which the collateral payment resulted from the plaintiff's purchase of insurance, some have questioned whether the purchaser has already received "the benefit of the bargain." As one commentator noted, "the insured is purchasing security—prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants." Note, *supra* note 11, at 751.

17. See generally Schwartz, *supra* note 8.

18. 45 U.S.C § 231.

ment, and one neutral.<sup>19</sup> The Railroad Retirement Board administers programs that provide sickness benefits, retirement annuities, Medicare, unemployment, and disability benefits.<sup>20</sup>

If an employee is injured and unable to return to work, then he or she may be eligible for either an "occupational disability annuity" or a "total and permanent disability annuity."<sup>21</sup> Occupational disability payments are available to railroad workers who are unable to work in their regular jobs, including as a result of an on-the-job injury.<sup>22</sup> In order to qualify for an occupational disability annuity, a worker must: (1) have a current connection with the railroad industry; (2) have twenty years of railroad service, or be at least age sixty and have ten years of railroad service; and (3) be "permanently disabled" for work in his or her "regular railroad occupation."<sup>23</sup> Railroad workers who are unable to work in any kind of regular job may receive a total and permanent disability annuity. To receive total and permanent disability payments, a worker must (1) stop all work; (2) have ten years of railroad service or have at least five years of railroad service after 1995; and (3) be permanently disabled for any kind of "regular employment."<sup>24</sup> To be eligible for total and permanent disability benefits, workers must meet the same requirements as someone applying for Social Security Disability Benefits. A recipient of RRA disability payments is permitted to earn up to \$400 per month.<sup>25</sup> If he or she earns more than this amount, then the RRA award is correspondingly reduced.<sup>26</sup> This creates a disincentive for a recipient to work, as a person qualifying for a disability benefit effectively receives early retirement with full benefits.

## 2. Sources of Financing

Six sources provide funding for these benefits, with payroll taxes on railroad employers and employees under the Railroad Retirement Tax Act serving as the primary source.<sup>27</sup> Other sources include employee contributions, fund transfers under the financial interchange with the social security system, investment earnings from the trust funds, general revenue appropriations for vested dual benefit payments, income taxes

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19. *See id.* § 231f(a).

20. *See id.* § 231f(b).

21. *See id.* § 231a(1)(iv)-(v).

22. *See id.* § 231a(a)(1)(iv).

23. *See id.* § 231a(a)(1)(iv)-(v).

24. *See id.* § 231a(a)(1).

25. U.S. RAILROAD RETIREMENT BD., 2002 RAILROAD RETIREMENT AND UNEMPLOYMENT INSURANCE SYSTEM HANDBOOK 36, available at <http://www.rrb.gov/handbook.html> [hereinafter RRB HANDBOOK] (last visited Apr. 26, 2004).

26. *Id.*

27. *Id.* at 68.

on benefits, and a work hour tax paid by railroad employers under the Railroad Retirement Tax Act.<sup>28</sup>

Employers and employees covered by the RRA pay higher retirement taxes than those covered by the Social Security Act, so that railroad retirement benefits remain substantially higher than social security benefits. Railroad retirement benefits consist of two components: Tier I and Tier II. Tier I is essentially the social security benefit that would be paid based on the employee's lifetime earnings from employment under both the RRA and the Social Security Act.<sup>29</sup> Railroad employees and employers pay Tier I taxes at the same level as social security taxes, 7.65%, consisting of 6.20% on earnings up to \$87,000 in 2003 and 1.45% for Medicare hospital insurance on all earnings.<sup>30</sup> Permanent and total disability benefits are funded out of Tier I payroll taxes.<sup>31</sup>

In addition, rail employees and employers both pay tier II taxes which are used to finance railroad retirement benefit payments over and above social security levels, and are based only on an employee's railroad service.<sup>32</sup> Occupational disability benefits, which account for the majority of disability benefits paid, are financed by Tier II payroll taxes.<sup>33</sup> The 2003 tier II tax rate on employees is 4.90%.<sup>34</sup> Rail employers and rail labor organizations are taxed at a rate of 14.20% on employee earnings.<sup>35</sup> Beginning with taxes payable for calendar year 2004, tier II taxes on both employers and employees will be based on an average account benefits ratio.<sup>36</sup> Depending on that ratio, the tier II tax rate for employers will range between 8.20% and 22.1%, while the tier II tax rate for employees will be between 0 and 4.9%.<sup>37</sup> Thus, railroad companies are responsible for funding approximately two thirds to three quarters of the occupational disability benefits paid to injured workers.<sup>38</sup>

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28. See *Hearing on House Concurrent Resolution 52: Before the R.R. Subcomm., House Comm. on Trans. & Infrastructure*, 105th Cong. (1998) (statement of Cheryl T. Thomas, Chair, Railroad Retirement Board), available at <http://www.rrb.gov/legthomas0998.html> (last visited Apr. 26, 2004).

29. RRB HANDBOOK, *supra* note 25, at 8.

30. *Id.* at 49, 68.

31. *Id.* at 25.

32. *Id.* at 50.

33. *Id.* at 25.

34. *Id.* at 50.

35. *Id.* at 50, 68. Until 2002, rail employers were taxed at a rate of 16.1%. See *id.* at 68.

36. *Id.* at 68.

37. See *id.*

38. One court has recognized that railroad companies contribute approximately two-thirds of the annual total contributions to the RRA disability fund, yet felt constrained to follow the dicta of *Eichel* after finding RRA payments to be a fringe benefit based on the statutory length of service requirement for eligibility. *Laird v. Ill. Cent. Gulf R.R.*, 566 N.E.2d 944, 956 (Ill. App. 1991).



### 3. Amount of Disability Benefits

Disability benefits under the RRA are more generous than those provided by the Social Security system. For example, disabled railroad workers retiring directly from the railroad industry at the end of fiscal year 2002 were awarded \$2,165 a month on the average while awards for disabled workers under social security averaged about \$890.<sup>39</sup>

## B. FELA

Injured railroad workers may also be able to recover funds under the Federal Employers' Liability Act ("FELA").<sup>40</sup> FELA is a fault-based statute enacted by Congress in 1908 designed to compensate employees suffering work-related injuries and to "shif[t] part of the 'human overhead' of doing business from employees to their employers."<sup>41</sup> It provides a claim for injuries resulting "in whole or in part" from the negligence of the railroad, its supervisors, its agents, and employees.<sup>42</sup>

### 1. Liability and Compensation Under FELA

In *Rogers v. Missouri Pacific Railroad Co.*,<sup>43</sup> the Supreme Court ruled that, under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer [sic] negligence played any part, even the slightest, in producing the injury or death for which damages are sought."<sup>44</sup> This statement was in the context of whether the plaintiff had submitted sufficient evidence of causation to

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39. See U.S. Railroad Retirement Bd., *Benefits Under Railroad Retirement and Social Security* (Mar. 2003), available at [www.utu1252.org/Download%20Files/rrb\\_feb\\_2003.pdf](http://www.utu1252.org/Download%20Files/rrb_feb_2003.pdf) (last visited Apr. 26, 2003).

40. 45 U.S.C. § 51 (1908).

41. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (quoting *Tiller v. Atl. Coast Line R. Co.*, 318 U.S. 54, 58 (1943)). FELA has been severely criticized as obsolete and contrary to public policy. See generally Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act*, 29 HARV. J. ON LEGIS. 79 (1992); Arnold I. Havens & Anthony A. Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987). Since the enactment of this fault-based program, no-fault workers' compensation laws have been adopted by every state to cover virtually all other American workers. FELA requires both employer and employee to prove the other is at fault following an accident, thereby creating antagonism between railroads and their workers, and creating a disincentive to cooperate in order to determine the true causes of workplace accidents. FELA is characterized by excessive transaction costs, with a large portion of the monies paid out as compensation to trial lawyers rather than injured employees. Because of its reliance on litigation, FELA can also create a disincentive for employees to seek speedy rehabilitation and return to work.

42. See 45 U.S.C. § 51 (1908).

43. 352 U.S. 500 (1957).

44. *Id.* at 506. In enacting FELA, Congress also abolished several common law defenses to reduce barriers to railroad worker recovery including "the fellow servant rule" and "the doctrine of contributory negligence in favor of . . . comparative negligence. . ." and the assumption of risk

reach a jury.<sup>45</sup> Over the years, however, many lower courts have interpreted *Rogers* to establish a lower standard of liability for recovery under FELA than in ordinary negligence cases, upon which a jury is to be instructed.<sup>46</sup>

They have looked upon FELA as being based on almost an absolute liability standard, a substitution for a workers' compensation law. Some state courts have gone so far as to characterize a plaintiff's burden to show causation as "featherweight."<sup>47</sup> If a worker meets this standard, then he or she may recover lost wages and benefits.<sup>48</sup> Also, unlike workers' compensation, the plaintiff recovers for pain and suffering.<sup>49</sup> Additionally, unlike workers' compensation, damages are uncapped.<sup>50</sup> Jury awards can easily reach into the millions of dollars.<sup>51</sup>

## 2. FELA and Collateral Sources

FELA expressly incorporates a congressional policy of allowing consideration of collateral source payments in certain conditions.<sup>52</sup> This is

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defense, and prohibited employers from exempting themselves from FELA through contract. See *Gottshall*, 512 U.S. at 542-43; see also 45 U.S.C. §§ 51-55 (1908).

45. *Rogers*, 352 U.S. at 501. The *Rogers* Court granted certiorari to consider whether the lower court's decision to find, as a matter of law, that the plaintiff's conduct had been the sole cause of his injury "invaded the jury's function." *Id.*

46. See, e.g., *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) (construing FELA as creating a relaxed standard for negligence and causation); *Syversen v. Consol. Rail Corp.*, 19 F.3d 824, 825 (2d Cir. 1994) (holding that "under FELA and the case law construing it, the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted. . ."); *Ackley v. Chi. & N. W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987) (holding that the "duty to provide a reasonably safe place to work . . . is broader under [FELA] than a general duty of due care"); *Kelson v. Cent. of Ga.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (finding that only slight negligence, defined as a failure to exercise great care, is necessary to support a FELA action).

47. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1997) (citing *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988); *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 162 (5th Cir. 1985)).

48. *Baker*, *supra* note 41, at 84.

49. *Id.*

50. *Id.*

51. See, e.g., *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (affirming jury verdict to plaintiffs who alleged that the railroad negligently exposed them to asbestos and thereby caused them to contract the occupational disease asbestosis and suffer from fear of cancer between \$770,000 to \$1.2 million each); *Trans. Ins. Co., Inc. v. Post Exp. Co., Inc.*, 138 F.3d 1189, 1190 (7th Cir. 1998) (considering bad faith claim against insurance company for failing to cover a \$2 million FELA award to a railway worker for a back injury); *DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678, 687-89 (7th Cir. 1995) (affirming a \$4.2 million FELA award, including \$1.5 million for disability, \$1.5 million for past and future pain and suffering, \$51,000 for past lost earnings, and \$1.2 million for the value of lost future earnings reduced to present value, as "not monstrously excessive"); *Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925-26 (7th Cir. 1993) (affirming \$2,300,000 judgment in FELA lawsuit related to a permanent back injury as not excessive).

52. H.R. 1386, 60th Cong., at 7 (1st Sess. 1908).

contrary to courts' interpretation of FELA as not permitting the jury to consider evidence of railroad retirement benefits in mitigation of damages. At the time of FELA's adoption, Congress had not yet enacted the RRA. Nevertheless, Congress dealt with the issue of collateral sources in the context of "relief departments," which railroad companies had established and administered as a "species of insurance for the employee against the hazards of employment."<sup>53</sup> Railroad employees could become members of these departments, which entitled the employee to certain payment should they be injured at work in exchange for discharging the railroad from further liability.<sup>54</sup> As one court described the practice, "It was manifestly the intention of the parties, when [the employee] became a member of the relief association, that the pursuit of one remedy should operate as an abandonment of the other. [The employee] had his choice of one of the two methods of relief, but could not resort to both."<sup>55</sup>

Prior to the 1908 enactment of FELA, courts upheld these practices as valid.<sup>56</sup> Congress, however, then enacted Section 55 of FELA, which overturned this legal immunity,<sup>57</sup> and voided such agreements.<sup>58</sup> 45 U.S.C. § 55 provides:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against *any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.*<sup>59</sup>

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53. *Id.* See also *Phila., Balt., & Wash. R.R. Co. v. Schubert*, 224 U.S. 603, 612-13 (1912) ("The practice of maintaining relief departments, which had been extensively adopted, and of including in the contract of membership provision for release from liability to employees who accepted benefits, was well known to Congress . . .").

54. See *id.* Section 55 did not restrict an employer and employee from entering into settlement agreements "after the accident occurred and the liability of the defendant arose." *Patton v. Atchison, T. & S.F. Ry. Co.*, 158 P. 576, 577 (Okla. 1916) (explaining "only contracts which attempt to relieve the railroad company from its liability in anticipation of possible injury come within the purview of this act of Congress." *Id.* at 578.).

55. *Balt. & O. R. Co. v. Miller*, 107 N.E. 545, 546 (Ind. 1915) (citing *Pittsburgh R. Co. v. Moore*, 53 N.E. 290 (Ind. 1899)).

56. *Id.*

57. See *Schubert*, 224 U.S. at 612-13.

58. See *Miller*, 107 N.E. at 546.

59. 45 U.S.C. § 55 (1908) (emphasis added). Section 5 of the Employer's Liability Act of April 22, 1908, ch. 149, 35 Stat. 65, was identical to the present Section 55 except for a few minor stylistic changes. This article treats the Section 5 and Section 55 interchangeably, and refers to Section 55 to avoid confusion.

Although Congress believed that it was necessary to stop railroad practices that eliminated a worker's ability to sue, Congress believed that it was fair and reasonable to reduce a railroad's liability for injury in consideration of amounts it had already paid on the workers' behalf. For this reason, Section 55's proviso allowed employers to offset their contribution payments to the relief fund from their liability under FELA "any sum the company had contributed toward any benefit paid to the employee," so long as it did not purport to discharge the employer from liability.<sup>60</sup> Congress indicated that this setoff "would seem to be entirely fair and all that ought to be required of the employee."<sup>61</sup>

Courts have recognized that Section 55 ensures that an employee is fully compensated for the extent of his or her loss,<sup>62</sup> while preventing "the imposition upon an employer of double liability for one loss."<sup>63</sup> One federal appellate court recognized that "[t]he history also shows that the proviso . . . was included in order to ensure that the employer was given credit for money it had already paid to the employee on account of the injury."<sup>64</sup> Courts have permitted employers to use this set off in FELA cases when they establish supplemental sickness benefits programs or their own disability plans and pay such benefits to railroad employees.<sup>65</sup> Courts have also allowed railroads to offset their FELA liability by payments from an employer-funded healthcare insurance policy to an employee, or the premiums paid by the railroad,<sup>66</sup> provided that the railroad voluntarily established the program, paid at least a portion of the related premiums, and the benefit was not in part compensation for the em-

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60. *Schubert*, 224 U.S. at 612-13.

61. H.R. 1386, 60th Cong., at 7 (1st Sess. 1908).

62. See *Brice v. Nat'l R.R. Passenger Corp.*, 664 F. Supp. 220 (D. Md. 1987) (allowing the plaintiff to introduce evidence of the full amount of his medical expenses, but permitting Amtrak to introduce evidence showing to what extent it had paid those bills on the employee's behalf).

63. *Welsh v. Burlington N., Inc., Employee Benefits Plan*, 54 F.3d 1331, 1337 (8th Cir. 1995).

64. *Folkestad v. Burlington N., Inc.*, 813 F.2d 1377, 1380 (9th Cir. 1987).

65. See, e.g., *Clark v. Burlington N., Inc.*, 726 F.2d 448, 451 (8th Cir. 1984) (reducing the FELA award by the full amount of disability payment paid to the worker through the railroad's short and long term disability plan for nonunion workers); *Kalanick v. Burlington N. R.R. Co.*, 788 P.2d 901, 908-09 (Mont. 1990) (ruling that railroad was entitled to setoff with regard to supplemental sickness benefits paid under terms of collective bargaining agreement); *W.T. Washington v. Atchison, Topeka & Santa Fe Ry. Co.*, 834 P.2d 433, 437 (N.M. Ct. App. 1992) (ruling that railroad was entitled to setoff with regard to supplemental sickness benefits paid under terms of collective bargaining agreement).

66. See, e.g., *Walton v. Nat'l R.R. Passenger Corp.*, 673 F. Supp. 744, 746 (D. Md. 1986) (ruling that medical payments provided to the plaintiff under a group medical policy, which was required under the railroad's collective bargaining agreement, were admissible in an employee's lawsuit under FELA); *Lucht v. Chesapeake & Ohio Ry. Co.*, 489 F. Supp. 189, 190 (W.D. Mich. 1980) (holding that employer is entitled to set off health insurance premiums paid on behalf of the employee when he or she brings suit under FELA).

ployee's work.<sup>67</sup> These cases generally look to a collective bargaining agreement as evidence that the provision of such benefits was not in part consideration for the employee's labor, and therefore was not subject to the collateral source rule.

While lawyers can argue that Section 55 does not precisely apply to Railroad Retirement Act contributions or payments because they stem from a federal statutory obligation rather than a "contract, rule, regulation, or device" imposed by the railroad,<sup>68</sup> the public policy behind the section is right on point. Workers should receive full compensation for their injury, but resources needed for such injuries should not be wasted on providing workers with double compensation. Section 55 provides public policy guidance to courts when they consider the applicability of the collateral source rule in FELA lawsuits where the plaintiff is already receiving disability benefits that were primarily paid for by his or her employer.

#### IV. *EICHEL v. NEW YORK CENTRAL RAILROAD*

A forty-year-old Supreme Court case, *Eichel v. New York Central Railroad Co.*,<sup>69</sup> is responsible for lower courts' vigorous adherence to the collateral source rule in FELA cases today. The case blocks public policy considerations that strongly suggest that a jury should consider railroad disability benefits in calculating damages and evidence relevant to other issues, such as malingering.<sup>70</sup> Does a three-page, forty-year-old, *per curiam* opinion, in which application of the collateral source rule was never argued, deserve such blind deference? We suggest not; this is why.

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67. See, e.g., *Folkestad*, 813 F.2d at 1383; *Lyons v. S. Pac. Transp. Co.*, 684 F. Supp. 909, 911 (W.D. La. 1988); *Gonzalez v. Ind. Harbor Belt R.R. Co.*, 638 F. Supp. 308, 310 (N.D. Ind. 1986). But cf. *Perry v. Metro-North Commuter R.R.*, 716 F. Supp. 61, 63-64 (D. Conn. 1989) (ruling that the employer's group insurance plan, which did not extend to on-the-job accidents, was "a general benefit, not one restricted to medical costs arising from circumstances that give rise to FELA claims" and was therefore not entitled to setoff); *Brady v. Nat'l R.R. Passenger Corp.*, 714 F. Supp. 601, 603-04 (D. Conn. 1989) (ruling that short term disability benefits paid wholly by employer were subject to setoff, while CIGNA insurance policy proceeds for long term disability did not show an intent to specifically cover liability for FELA claims). At least one appellate court has even allowed a railroad company to bring a separate action to recover the full amount of funds that it provided to the employee through its supplemental sickness benefit program following a judgment against the employer in the employee's FELA claim. See *Burlington N. R.R. Co. v. Strong*, 907 F.2d 707, 712-14 (7th Cir. 1990) (ruling that such an action was not a compulsory counterclaim and that the employer had a right to set off of the full amount, not just the premiums paid, pursuant to a collective bargaining agreement).

68. See, e.g., *N.Y., New Haven & Hartford R. Co. v. Leary*, 204 F.2d 461, 467-68 (1st Cir. 1953), cert. denied, 346 U.S. 856 (1953) (finding that the RRA's "retirement fund is not an 'insurance, relief benefit, or indemnity' . . ." permitting a setoff under Section 55 of FELA).

69. *Eichel*, 375 U.S. 253 (1963).

70. *Id.* at 255.

A. FINDING THE HOLDING OF *EICHEL*

*Eichel* involved a claim by a railroad worker for an alleged permanent disabling injury that he incurred during his employment for New York Central Railroad.<sup>71</sup> During the trial, the plaintiff claimed that he was unable to return to work due to the permanency of his injuries.<sup>72</sup> The defense sought to introduce evidence that the plaintiff was receiving \$190 per month in disability pension payments to show “a motive for [petitioner] not continuing work, and for his deciding not to continue going back to work after the last accident.”<sup>73</sup> The evidence was offered for impeachment purposes, to show that the plaintiff had chosen to live off his pension instead of returning to work, although he was able to do so.<sup>74</sup> This is known as “malingering,” where an able claimant, because he or she is receiving disability or other benefits, opts to stay home rather return to his or her job.<sup>75</sup> The trial court excluded the evidence on the plaintiff’s objection and the jury returned a \$51,000 verdict.<sup>76</sup> The Second Circuit reversed, finding it prejudicial error to not allow the jury to consider such evidence to support the defendant’s theory of malingering, and ordered a new trial on damages.<sup>77</sup>

The Supreme Court in *Eichel* reversed the Second Circuit and upheld the trial court’s discretion in excluding the evidence of disability benefits.<sup>78</sup> The core of the Supreme Court’s ruling in *Eichel* is that “[i]nsofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.”<sup>79</sup> Thus, the Court did not hold that evidence that a plaintiff had or was receiving railroad disability payments was inadmissible in any circumstance. Rather, it held that, given the particular facts of the case, and in consideration of other available persuasive evidence, introduction of such evidence would have insufficient probative value in regard to malingering.

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71. *Id.* at 253.

72. *Id.*

73. *Id.* at 254-55.

74. *Id.* at 254.

75. The First Circuit has defined malingering as “feigning physical disability to avoid work and to continue receiving disability benefits.” *McGrath v. Consol. Rail Corp.*, 136 F.3d 838, 840 (1st Cir. 1998).

76. *Eichel*, 375 U.S. at 253-54.

77. See *Eichel v. N.Y. Central R. Co.*, 319 F.2d 12, 19-20 (2nd Cir. 1963), *rev’d* 375 U.S. 253 (1963).

78. *Eichel*, 375 U.S. at 255-56.

79. *Id.* at 255.

## B. DICTA, DICTA, AND MORE DICTA

In law school, one is taught to distinguish between a court's holding, that is, what determination is essential to the issues actually litigated and the outcome of the case, and dicta, which include judicial musings that are not essential to the outcome. The rigid adherence of some lower courts to the principle that railroad disability benefits should not to be considered by the jury for any purpose are based on dicta in the *Eichel* court's ruling.

Lower courts should recognize that the issue of whether evidence of a plaintiff's railroad disability benefits for the purpose of offsetting the plaintiff's total damages was *never* argued in *Eichel*. In fact, the Supreme Court's discussion begins with the acknowledgment that the railroad "does not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner."<sup>80</sup> In support of this statement, the Court cited a 1953 First Circuit case, *New York, New Haven & Hartford Railroad Co. v. Leary*, which, in a half-page of analysis, with little legal precedent, decided to follow the "familiar principle that payments received by a plaintiff from a collateral source are not in mitigation of damages."<sup>81</sup> The *Leary* court reasoned that "[w]e think these age and service requirements for disability payments remove these payments from the coverage of § 55 . . ." and noted that benefits resulting of social legislation are "not directly attributable to the contributions of the employer."<sup>82</sup> The flaw in this reasoning is that, as a payment required by law, the employer's contributions to the railroad retirement benefit were not due to the employee's labor, and, thus, not a pension benefit.

In addition to its reliance on *Leary*, the *Eichel* Court also noted that it had "recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury."<sup>83</sup> The Court was referring to *Tipton v. Socony Mobil Oil Co.*,<sup>84</sup> another short *per curiam* decision, involving the suit of a roughneck<sup>85</sup> under the Jones Act,<sup>86</sup> for an injury that occurred during his work on a drilling barge.<sup>87</sup> The employer's liabil-

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80. *Id.* at 254.

81. *Id.* (citing *Leary*, 204 F.2d at 468).

82. *Leary*, 204 F.2d at 468.

83. *Eichel*, 375 U.S. at 255.

84. 375 U.S. 34 (1963).

85. Although some dictionaries define "roughneck" as a "rough or uncouth person" (Merriam-Webster Online Dictionary, "roughneck," available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=roughneck>) (last visited Apr. 26, 2004)), in the oil industry, a roughneck is a worker who carries out the drilling operation on an oil rig (OilCareer, "Roughneck oil rig job," available at <http://www.oil-rig-jobs.com/roughneck.html>) (last visited Apr. 26, 2004)).

86. 46 U.S.C. app. § 688 (1915).

87. *Tipton*, 375 U.S. 34, 34 (1963).

ity under the Jones Act turned on whether he was a "seaman," and hence covered under the Act, or an offshore drilling employee that would not be covered by the Act.<sup>88</sup> The defense introduced evidence that the roughneck was receiving compensation for the same injury through the Longshoreman's and Harbor Workers' Compensation Act to demonstrate his status as an offshore employee, since Longshoreman's benefits are not available to a "member of a crew of any vessel."<sup>89</sup>

The Supreme Court found that the admission of evidence of the Longshoreman's benefits was prejudicial error because it was "pressed upon the jury."<sup>90</sup> The Court noted that counsel for the defense repeatedly emphasized throughout the trial that the plaintiff "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act . . . ." and the judge had further prejudiced the jury by providing an elaborate discussion of compensation under the Longshoreman's Act in his instructions.<sup>91</sup> Had this been the end of the Court's ruling, lower courts following *Eichel* might be on firmer ground when interpreting the Supreme Court's binding precedent as not permitting the introduction of railroad retirement benefits under any circumstances. Lower courts need to be aware of the fact that the *Tipton* Court went on to recognize that the judge had failed "to frame a cautionary instruction" that the evidence was only to be used to determine the roughneck's status, demonstrating that collateral benefits might be properly introduced for some purposes, but not others.<sup>92</sup>

### C. THE AFTERMATH OF *EICHEL*

Following *Eichel*, courts have with near unanimity held that a railroad may not introduce evidence of RRA payments received by an employee as an offset or for any other purpose. Many of these courts have read *Eichel* to require the "strict and absolute exclusion" of evidence of railroad disability payments in FELA cases.<sup>93</sup> Some courts have recog-

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88. *Id.* at 34.

89. *Id.* at 34-35 (citing Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c)(1) (1953)).

90. *Id.* at 35.

91. *Id.* at 35-36.

92. *Id.* Justice Harlan dissented from the Court's opinion and would not have disturbed the intermediate appellate court's ruling that the admission of the collateral source evidence, for the purpose for which it was offered, to show the plaintiff's status, was "sufficiently relevant" and "not clearly inadmissible," and, if it was improper, such admission was not prejudicial. *Id.* at 37-38.

93. *Morse v. S. Pac. Trans. Co.*, 133 Cal. Rptr. 577, 580 (Cal. Ct. App. 1976) (citing several federal appellate level decisions); *Finley v. Nat'l R.R. Passenger Corp.*, 1 F. Supp. 2d 440, 443-45 (E.D. Pa. 1998) (ruling that evidence of plaintiff's receipt of disability benefits is prejudicial as a matter of law and its admission requires a mistrial); *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 685 A.2d 994, 997 (Pa. 1996) (ruling that *Eichel* involves "a straightforward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff has received



nized a narrow exception when the plaintiff puts his financial condition at issue, thereby "opening the door" to the railroad's introduction of his or her receipt of RRA disability payments.<sup>94</sup> These courts' adherence to *Eichel* does not comport with the purposes of the collateral source rule. For example, in a 1995 case, the Tenth Circuit began its analysis by correctly recognizing the rationale behind the collateral source rule:

First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy reduced liability simply because the plaintiff received compensation from an independent source. Second, by assuring a plaintiff's payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. The collateral source rule generally does not apply when the collateral source is somehow identified with the tortfeasor in a suit against the tortfeasor. Under those circumstances, the additional compensation will be used to offset tortfeasor liability because it is as if the tortfeasor himself paid.<sup>95</sup>

Under these principles, the collateral source rule should not apply in the RRA context because the source of the benefits is primarily employer contributions and the "insurance" is mandated by statute. Nevertheless, the court treated the benefits as "payments from the public treasury" to which the employee also contributed, and, as such, a collateral source.<sup>96</sup> The court purported to follow *Eichel*, despite the railroads' argument that the Court's narrow holding was on the issue of malingering.<sup>97</sup>

#### V. OVERCOMING *EICHEL*

Courts can in a fair and just manner address situations where, under current FELA jurisprudence a plaintiff would receive double compensation through a FELA lawsuit. In these situations, his or her employer will

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compensation on account of his injury from a source other than the defendant"). In analogous contexts, however, such as the admissibility of workers' compensation benefits for the purpose of showing malingering, courts have declined to follow "a rule of per se admissibility." See, e.g., *DeMedeiros v. Koehring Co.*, 709 F.2d 734, 740-41 (1st Cir. 1983).

94. See, e.g., *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3d Cir. 1967), cert. denied, 390 U.S. 1013 (1968); *Lange v. Mo. Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir. 1983). Cf. *Giddens v. Kan. City S. Ry. Co.*, 937 S.W.2d 300, 304-05 (Mo. Ct. App. 1996) (recognizing that "there are exceptions to the rule set forth in *Eichel*," but finding that an expert witness's testimony that the plaintiff was motivated to return to work was insufficient to "open the door" to the railroad's introduction of evidence of the plaintiff's receipt of RRA disability benefits); *Toth v. Grand Truck R.R.*, 306 F.3d 335, 353-55 (6th Cir. 2002) (ruling that a closing argument skirted the line of a pretrial order excluding the plaintiff from arguing that FELA was the plaintiff's sole remedy and therefore invited the trial court's error in instructing the jury that plaintiff would receive compensation from other sources, and finding the error harmless).

95. *Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995), cert. denied, 516 U.S. 1009 (1995) (internal quotations, citations, and alterations omitted).

96. *Id.*

97. See *id.* at 1033.

pay both a substantial portion of the contributions to the RRA fund and the entire FELA award. To achieve equitable results, courts should not and need not feel constrained by precedent that blindly follows those rulings. *Eichel*, when properly read, allows admission into evidence of RRA disability benefits for certain purposes, such as to show malingering or to rebut evidence of a plaintiff's allegedly poor financial situation. In addition, in light of the inapplicability of the historic justifications for the collateral source rule and the public policy expressed by Congress in Section 55, the Supreme Court should clarify that a jury may consider a plaintiff's receipt of disability benefits in reaching a fair determination of a damages.

A. RE-READING *EICHEL*: EVIDENCE OF RRA DISABILITY BENEFITS IS ADMISSIBLE FOR SOME PURPOSES

Courts wisely have begun to break from strict adherence to the absolute exclusionary rule purportedly required by *Eichel* and admitted evidence of the plaintiff's receipt of RRA disability benefits for certain purposes. For example, in *McGrath v. Consolidated Rail Corp.*,<sup>98</sup> the First Circuit did "not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases" and found that *Eichel* simply involved the trial court's broad discretion to exclude evidence in a particular factual situation when the potential for prejudice is greater than its probative value.<sup>99</sup> Thus, the First Circuit found that a trial court did not abuse its discretion in admitting evidence of a plaintiff's RRA disability payments to show his lack of motivation for returning to work.<sup>100</sup> The trial court was able to reduce any prejudice from this admission through issuing cautionary instructions,<sup>101</sup> precisely as the Supreme Court had suggested in *Tipton*. The First Circuit concluded, "[i]f there is little likelihood of prejudice and no strong potential for improper use, and a careful qualifying jury instruction is given, then receipt of compensation benefits may be admissible for the limited purpose of proving another matter."<sup>102</sup>

The United States District Court for the Northern District of Illinois, citing *McGrath*, has also recognized that:

The *Eichel* ruling is . . . based not on the lack of relevance of collateral source income, but rather on the potential for prejudice. As a result, courts generally have considered the exclusion of collateral source income *not* to be an absolute rule, but instead a determination that will turn on the particular

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98. 136 F.3d 838 (1st Cir. 1998).

99. *Id.* at 841.

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1236 (5th Cir. 1986)).

