THE PERMISSIBLE SCOPE OF RELEASES WITHIN FELA CLAIMS

Kaylee Secor [1]

I. INTRODUCTION

The Federal Employers' Liability Act (FELA), enacted in 1908 and codified as 45 U.S.C. §§ 51–60, established liability for railroads if the railroad's negligence causes an employee's injury or death.2 Section 5 of FELA provides that "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[.]"3 The language in Section 5 creates uncertainty as to whether certain releases of FELA claims are enforceable. A three-way circuit split has developed between the Sixth, Third, and Fifth Circuits concerning whether a release that extinguishes future claims regarding undiagnosed injuries is valid under FELA.4 The Supreme Court of the United States has failed to rule on this particular issue but has ruled in general that releases are not per se invalid.5

This Note discusses the scope of releases and their validity under FELA while arguing that the Supreme Court should adopt the Third Circuit's fact-intensive standard for determining whether a release is valid under Section 5.6 The Third Circuit's approach seems to allow employers and employees to settle the controversy on their own terms while safeguarding employees from waiving unknown claims. Part II of this Note discusses the history of the Supreme Court's case law surrounding releases under FELA. Part III analyzes the three-way circuit split between the Sixth, Third, and Fifth Circuits and discusses case law that has developed around the split. Finally, Part IV explores why the Supreme Court should adopt the Third Circuit's fact-intensive standard and why it should not adopt the other circuit's approaches.

II. HISTORY OF THE SUPREME COURT'S INTERPRETATION OF RELEASES UNDER FELA

The purpose of FELA, as established by 45 U.S.C. § 51, is to hold every common carrier by railroad liable for the injuries of an employee due to the carrier's negligence.7 Also, according to Section 5, any contract that attempts to exempt a

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[1] J.D. Expected 2024, University of Kentucky J. David Rosenberg College of Law; B.S. Political Science 2021, University of Louisville
[2] Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (1908).
[3] 45 U.S.C. § 55.
[4] *See* Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 91 (6th Cir. 1997); Wicker v. Consol. Rail Corp., 142 F.3d 690, 690 (3d Cir. 1998); Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698, at *2 (5th Cir. Apr. 14, 2022).
[5] Callen v. Pa. R.R. Co., 332 U.S. 625, 631 (1948).
[6] *Wicker*, 142 F.3d at 696.
[7] 45 U.S.C. § 51; *Babbitt*, 104 F.3d at 91.

common carrier from FELA liability is void.[8] After FELA was adopted, the Supreme Court of the United States began to set the outer limits of Section 5.[9]

A. The Supreme Court Upholds the Validity of Section 5 of FELA

In *Mondou v. N.Y., New Haven, & Hartfield R.R. Co.*, the Supreme Court upheld Section 5 as valid and noted that "if Congress possesses the power to impose that liability … it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it."[10] Later that same year, in *Philadelphia, Baltimore & Washington Railroad Co. v. Schubert*, the Supreme Court found that an employee's application for a relief fund membership that stipulated the employee's receival of benefits constituted a release of all claims against the employer and was invalid under Section 5.[11] The Court reasoned that the stipulation was an attempt by the employer to avoid liability through contract, which violates FELA.[12]

B. The Supreme Court Determines that Releases are not Per Se Invalid

The Supreme Court, however, has acknowledged an exception to Section 5's rule against exempting an employer's liability through contract.[13] In *Callen v. Pennsylvania Railroad Co.*, the plaintiff brought an action under FELA for injuries that he sustained due to his employer's alleged negligence.[14] After the plaintiff's injuries, he signed a release exempting his employer from liability for the injuries he sustained during the accident and in exchange the plaintiff received two hundred and fifty dollars.[15]

In *Callen*, the Supreme Court held that a release is not a way for an employer to exempt itself from liability but is rather a "means of compromising a claimed liability and to that extent recognizing its possibility."[16] The Court's opinion in *Callen* also acknowledges that when there are controversies surrounding whether liability exists or how much exists, Congress has not said that an employer and its employee cannot settle their dispute without litigation.[17] Thus, a release is not per se invalid and can survive Section 5 if it is executed "as part of a settlement of disputed liability for work-related injuries."[18]

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[8] 45 U.S.C. § 55.
[9] *Wicker*, 142 F.3d at 696.
[10] Mondou v. N.Y., New Haven & Hartfield R.R. Co., 223 U.S. 1, 52 (1912).
[11] Phila., Balt., & Wash. R.R. Co. v. Schubert, 224 U.S. 603, 612 (1912).
[12] *Id.*
[13] Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 92 (6th Cir. 1997); Callen v. Pa. R.R. Co., 332 U.S. 625, 631 (1948).
[14] *Callen*, 332 U.S. at 626.
[15] *Id.* at 626–27.
[16] *Id.* at 631.
[17] *Id.*
[18] *Babbitt*, 104 F.3d at 92.

It is disputed as to what precisely qualifies as "compromising a claimed liability," but employers and employees can settle their disputes whenever there are controversies surrounding liability.19 The only "explicit requirement" is that there must be an actual controversy that the employer and employee are trying to settle.20 The circuit split between the Sixth, Third, and now the Fifth Circuit revolves around what qualifies as a "controversy" as stated in *Callen*, with each circuit finding the meaning of the word to be slightly different.

III. Different Interpretations of the Enforceability of Releases Under FELA

Despite the Supreme Court's rulings on Section 5 and releases under FELA, there seems to be disagreement on the proper application of this section and what can be included in releases.21 This disagreement has led to the three-way circuit split between the Sixth, Third, and Fifth Circuit.22 The Sixth Circuit, in *Babbitt v. Norfolk & Western Railway Co.*, created a bright-line rule in which releases are limited to injuries known to the employee at the time the release agreement is signed.23 The Third Circuit, in *Wicker v. Consolidated Rail Corp.*, rejected the Sixth Circuit's bright-line rule and created a "known risk" or "fact-intensive" standard in which releases are limited to "risks which are known to the parties at the time the release is signed."24 In an unpublished opinion, *Mendoza-Gomez v. Union Pacific Railroad Co.*, the Fifth Circuit rejected both standards set forth by the Sixth and Third Circuits and, by looking to the plain language of the release, created a standard with virtually no limits.25

A. The Sixth Circuit's Bright-Line Rule Allowing for Only Known Injuries Within Releases

In *Babbitt*, the Sixth Circuit was one of the first circuits to establish a standard to determine whether railroads could absolve themselves from liability of "known or unknown" claims through a general release.26 The plaintiffs in *Babbitt* were former employees of Norfolk & Western Railway Company and were seeking damages under FELA.27 The plaintiffs alleged they experienced hearing loss because of their exposure to excessive noise during their employment.28

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[19] *Callen*, 332 U.S. at 631.
[20] Wicker v. Consol. Rail Corp., 142 F.3d 690, 697 (3d Cir. 1998).
[21] *Id.* at 698.
[22] *See Babbitt*, 104 F.3d at 89; *Wicker*, 142 F.3d at 690; Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698 (5th Cir. Apr. 14, 2022).
[23] *Babbitt*, 104 F.3d at 93.
[24] *Wicker*, 142 F.3d at 701.
[25] *See* Mendoza-Gomez v. Union Pac. R.R. Co., No. 4:19-CV-4742, slip op. at *4 (S.D. Tex. July 28, 2021); *See* Fisher v. BNSF Ry. Co., 650 S.W.3d 880, 887 (Tex. App.—Fort Worth 2022).
[26] *Babbitt*, 104 F.3d at 91, 93.
[27] *Id.* at 90.
[28] *Id.*

When the plaintiffs left Norfolk, they signed a "Resignation and Release Agreement," which was a part of Norfolk's "Voluntary Separation Program."29 The program included early retirement, a "lump sum payment," and "continuation of health, and other benefits."30 Norfolk argued that the Release "was an attempt to settle all claims as part of the cessation of a worker's employment relationship with the railroad" and that the purpose was for the railroad to "'buy its peace'" from former employees.31 Norfolk argued that the Release barred the plaintiffs' claims because the plaintiffs knew of their claims before the Release was signed.32 On the other hand, the plaintiffs contend that they did not know of their claims until they no longer worked for Norfolk.33

The Sixth Circuit began its analysis by looking at the language of FELA and, in doing so, the court determined that "the purpose of FELA, as stated in 45 U.S.C. §§ 51 and 55, is to require negligent railroads to assume liability for injuries to employees in the course of their employment."34 The court goes on to acknowledge the exception to Section 5, as laid out in *Callen*, that "FELA claims can have the same effect as any other release, in that it may constitute a settlement or compromise, rather than an attempt to escape liability.35 Focusing on the release at issue in *Callen*, the Sixth Circuit found that "the employer and employee executed a contract that settled an actual controversy, i.e., liability for the plaintiff's specific injuries."36

The Sixth Circuit adopted a rule stating that for a release to be valid it must "reflect a bargained-for settlement of a known claim for a specific injury," rather than act as an attempt on the employer's behalf to extinguish an employee's future claims arising out of injuries that may be "known or unknown" to the employee.37 The Sixth Circuit reversed the district court's summary judgment in favor of Norfolk and remanded the case to the district court because the district court did not determine if the release executed was for the specific injuries regarding the plaintiffs' hearing loss.38

The rule adopted by the Sixth Circuit in *Babbitt* is known as the "bright-line rule approach," meaning that a release can only be valid for "the specific injury at issue and cannot go beyond that specific injury to any other injury or conditions that may later develop."39 Other federal circuit courts and lower courts have declined to

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 91.
[35] *Id.* at 92.
[36] *Id.*
[37] *Id.* at 93.
[38] *Id.*
[39] Brooke Granger, *Known Injuries vs. Known Risks: Finding the Appropriate Standard for Determining the Validity of Releases Under the Federal Employers' Liability Act*, 52 HOUS. L. REV. 1463, 1476 (2015).

follow the Sixth Circuit's bright-line rule approach, making this approach one of the least favored outside of the Sixth Circuit.40

B. The Third Circuit's Fact-Intensive Standard Allowing for Known Injuries and Known Risks Within Releases

Only one year after the Sixth Circuit's opinion in *Babbitt*, the Third Circuit adopted its own approach in determining whether a release is valid under Section 5 of FELA.41 In *Wicker v. Consolidated Rail Corp.*, the Third Circuit rejected the Sixth Circuit's bright-line rule and created the initial circuit split by adopting a fact-intensive standard to determine the enforceability of releases.42 The plaintiffs in *Wicker* were all injured during their employment at Consolidated Railroad Corporation (Conrail).43 Most of the plaintiffs signed a release that exempted Conrail from any liability for past or future claims the plaintiffs may have, regardless of whether the claims or injuries were known or unknown by the plaintiffs at the time.44

After the plaintiffs signed the releases and left Conrail, they began to experience injuries unrelated to the initial injury for which they signed the release.45 For example, one plaintiff suffered from a back injury that occurred during his employment and signed a release.46 The plaintiff testified exposure to toxic chemicals during his employment at Conrail caused him to experience many symptoms, such as "swollen eyes, infected tear ducts, nosebleeds," etc.47 The plaintiff claimed that some of the symptoms were present when he signed the release, however, many of the symptoms were developments that occurred after the release was executed.48

The plaintiffs each brought a FELA suit against Conrail for alleged exposure to toxic chemicals during the duration of their employment, causing each of them various injuries.49 Conrail argued that the plaintiffs' claims were barred because of the releases that each plaintiff signed.50 The plaintiffs argued that the releases only

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[40] *Id.* at 1477; *See e.g.*, Sea-Land Serv., Inc. v. Sellan, 231 F.3d 848, 852 (11th Cir. 2000) (adopting the Third Circuit's standard); Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998) (Third Circuit creates its own standard); Fisher v. BNSF Ry. Co., 650 S.W.3d 880, 886–88 (Tex. App. 2022) (declines to adopt the Sixth Circuit's standard but does not decide on whether to adopt the Third Circuit's or Fifth Circuit's approach because the result would be the same regardless of which standard the court chooses to apply).
[41] *Wicker*, 142 F.3d at 701.
[42] *Id.*
[43] *Id.* at 692–93.
[44] *Id.* at 693–94.
[45] *Id.* at 692–93.
[46] *Id.* at 692.
[47] *Id.*
[48] *Id.* at 692–93.
[49] *Id.* at 694.
[50] *Id.*

barred claims relating to their initial injuries at the time of signing the release and that the releases were not valid under Section 5.[51]

The Third Circuit's approach involved a compromise between protecting employees' FELA rights while, at the same time, allowing employers and employees to settle controversies through contracts about potential liability relating to known risks of future injuries.[52] The Third Circuit held that Section 5 is not violated if a release "is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed."[53] The Third Circuit goes on to say that claims regarding unknown risks cannot be waived under Section 5 because they "do not constitute 'controversies,'" as acknowledged in *Callen*.[54]

The Third Circuit specifies that:

> a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed—for example toxic exposure—allowing the employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate § 5 of FELA.[55]

The court notes, however, that the validity of a release does not turn on the way the release is written, even though a release that specifies the known risks would serve as strong support for the release defense.[56] There was concern that employers could easily write "detailed boiler plate agreements" that "include an extensive catalog of every chemical and hazard known to railroad employment."[57] In response, the court resorts to an additional "fact-intensive process" that involves discerning the parties' intent when executing the release.[58] The court goes on to say that "[w]here a specific known risk of malady is not mentioned in the release, it would seem difficult for the employer to show it was known to the employee and that he or she intended to release liability for it."[59]

The Third Circuit found that the releases in question were not valid because there was no demonstration that the employees knew of the risks that they were exposed to and the releases attempted to settle all the claims against Conrail regardless of whether or not the parties knew about the risks.[60] For example, some of the releases

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[51] *Id.*
[52] *Id.* at 700–01.
[53] *Id.* at 701.
[54] *Id.* (citing Callen v. Pa. R.R. Co., 332 U.S. 625, 631 (1948)).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 701–02.

at issue were "short, *pro forma* waivers," and did not indicate any negotiation between the parties other than the settlement amount.61 Other examples of releases that were signed by the plaintiffs were "more detailed, blanket releases" that attempted to exempt Conrail from all potential liabilities.62 Overall, none of the releases demonstrated that "the employees knew of the actual risks to which they were exposed and from which the employer was being released."63

The court acknowledges that *Babbitt*'s bright-line rule is more predictable than the fact-intensive standard set forth, however, the court believes that the trial courts are able to apply the fact-intensive process to determine the parties' intent and whether the release is valid.64 The standard announced by the Third Circuit in *Wicker* is known as the "known risk or fact-intensive standard," meaning that a release is valid if it was a "negotiated settlement of a controversy that is limited to those injuries and risks that are known to the parties' at the time the release is executed."65

Many lower courts have adopted the Third Circuit's fact-intensive approach, making it the more popular standard for determining whether a release is valid under Section 5.66 Even the Eleventh Circuit adopted the Third Circuit's fact-intensive approach in *Sea-Land Serv., Inc. v. Sellan*.67 The plaintiff in Sea-Land was an employee who experienced lower back pain while aboard one of Sea-Land's ships.68 Sea-Land paid all of the plaintiff's medical expenses, including surgery, however, the plaintiff was deemed permanently disabled and unable to perform his duties.69 The parties signed a release and a "'Settlement Agreement Not to Sail or Work'" and in exchange, Sea-Land paid the plaintiff $364,500.70

The agreement stated that the plaintiff agreed to "not work, sail and/or navigate, and/or seek to sail, navigate or work, in any capacity, including shore relief, aboard vessels owned, managed, and/or operated by Sea-Land Service, Inc., and/or any of

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[61] *Id.* at 701.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 700–01.
[65] Granger, *supra* note 39, at 1481–82.
[66] *See e.g.*, Murphy v. Union Pac. R.R. Co., 574 S.W.3d 676, 682 (Ark. Ct. App. 2019) (adopting the Third Circuit's standard); Jaqua v. Canadian Nat'l R.R., 734 N.W.2d 228, 229 (Mich. Ct. App. 2007) (adopting the Third Circuit's standard); Loyal v. Norfolk S. Corp., 507 S.E.2d 499, 502 (Ga. Ct. App. 1998) (adopting the Third Circuit's standard); Ward v. Ill. Cent. R.R. Co., 271 So. 3d 466, 472–73 (Miss. 2019) (applying the Third Circuit's standard); Cole v. Norfolk S. Ry. Co., 803 S.E.2d 346, 352 (Va. 2017) (adopting the Third Circuit's standard); Sinclair v. Burlington N. & Santa Fe Ry. Co., 200 P.3d 46, 59 (Mont. 2008) (adopting the Third Circuit's standard); Ill. Cent. R.R. Co., v. Acuff, 950 So.2d 947, 960 (Miss. 2006) (adopting the Third Circuit's approach); Oliverio v. Consol. Rail Corp., 822 N.Y.S.2d 699, 702 (N.Y. Sup. Ct. 2006) (adopting the Third Circuit's approach).
[67] *See* 231 F.3d 848, 852 (11th Cir. 2000).
[68] *Id.* at 849.
[69] *Id.*
[70] *Id.*

its affiliates and/or subsidiaries, in the future."[71] If the plaintiff was eventually able to come back to work for Sea-Land, the agreement stated that "he shall do so at his own risk, and the company will bear no responsibility for an illness and/or injuries he may suffer while in service aboard any such vessel."[72]

Two years later, the plaintiff received a union physical to determine his duty status and was deemed fit for duty, but he did not inform the doctor who performed the physical of his medical history.[73] After the plaintiff returned as an employee at Sea-Land, he reported that he re-injured his back.[74] Sea-Land brought suit to obtain a judgment that declared the agreement between the parties enforceable, so the plaintiff could not seek damages for his re-injured back.[75] The district court found in favor of Sea-Land and ruled that the agreement was enforceable under FELA.[76] Relying on the Sixth Circuit's approach, the plaintiff appealed to the Eleventh Circuit arguing that the agreement violates Section 5 of FELA because the agreement "exempts Sea-Land, a common carrier, from liability under the Act by releasing it from future claims."[77]

The Eleventh Circuit adopted the Third Circuit's standard and said that "cases involving the validity of releases are fact-driven."[78] The court upheld the district court's decision that the agreement was enforceable because the agreement forbid "future employment by a totally disabled seaman that would expose him to known and unacceptable risks" and since it was a "valid overall settlement of a specific claim of injury," the agreement does not violate FELA.[79]

C. The Fifth Circuit's New and More Expansive Approach to Releases

A new approach has recently emerged from the Fifth Circuit, in an unpublished opinion, to determine whether a release is valid, creating a three-way circuit split between the Sixth, Third, and Fifth Circuit.[80] In *Mendoza-Gomez v. Union Pacific Railroad*, the plaintiff was a Union Pacific Railroad (Union) employee and alleged that he encountered exposure to toxic substances while employed there.[81] In 2019, the plaintiff was diagnosed with asbestosis and cancer and, thereafter, filed a FELA suit against Union.[82] Union argued that the plaintiff's

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[71] *Id.* at 850.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 849.
[78] *Id.* at 852.
[79] *Id.* at 852–53.
[80] *See* Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698, at *3 (5th Cir. Apr. 14, 2022).
[81] *Id.* at *1.
[82] *Id.*

claims were barred because, in 2012, the plaintiff pursued a toxic tort claim against Union and the two parties signed a release to resolve that claim.83

The language of the release agreement stated that the plaintiff accepted payment as a "complete compromise" of all claims against Union as a result of the plaintiff's "alleged illnesses, injuries, cancers, future cancers, diseases, and/or death, or any fears or psychological disorders relating to contracting same, as a result of Alleged Exposures while [Mendoza-Gomez] was employed by [Union]."84 The release included not only claims that the plaintiff knew of at the time of the release, but also ones that could develop after the release was executed.85 The plaintiff argued that the release was unenforceable under Section 5 because FELA prohibits employers from extinguishing liability through contracts.86

The District Court for the Southern District of Texas declined to adopt either of the approaches in *Wicker* or *Babbitt* and instead relied on the language of the release agreement finding the release valid.87 Citing *Callen*, the district court determined that "[a]greements that allow parties to settle their claims without litigation is a permissible 'full compromise' under Section 55."88 In determining whether the release was valid under Section 5, the Fifth Circuit relied on the Supreme Court's decision in *Callen*, stating that "'a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility.'"89 The Fifth Circuit agreed with the district court's ruling that the plaintiff's claims were barred because of the release's "plain language" regarding what the release encompassed.90

The plaintiff tried to draw the Fifth Circuit's attention to *Hartman v. Illinois Railroad Co.*, a district court case that involved a release similar to the one in *Mendoza-Gomez*.91 Applying *Wicker*, the district court in *Hartman* found that the release was a "'boiler-plate list of hazards'" and did not bar the plaintiff's claims.92 The Fifth Circuit found that the plaintiff's case was distinguishable from *Hartman*.93 Since the release was specific to the injuries within the plaintiff's original toxic tort complaint against Union and the injuries he developed years later, including "cancers" and "future cancers," the court did not find the release to be a "boilerplate list" of injuries unrelated to the plaintiff's present claims.94 The Fifth Circuit,

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at *2.
[87] Mendoza-Gomez v. Union Pac. R.R. Co., No. 4:19-CV-4742, slip op. at *4 (S.D. Tex. Jul. 28, 2021).
[88] *Id.* (citing Callen v. Pa. R. Co., 332 U.S. 625, 631 (1948)).
[89] *Mendoza-Gomez*, No. 21-20397, 2022 WL 1117698 at *3; *Callen*, 332 U.S. at 631 (1948).
[90] *Mendoza-Gomez*, No. 21-20397, 2022 WL 1117698 at *2.
[91] *Id.* at *4 n.1.
[92] *Id.* (citing *Hartman v. Ill. R.R. Co.*, No. 20-1633, slip op. at *2 (E.D. La. Mar. 29, 2022).
[93] *Id.*
[94] *Id.*

instead, found that the release was a contract and the language of the release governed.[95]

Relatively few cases have discussed the Fifth Circuit's approach in *Mendoza-Gomez*, however, in *Fisher v. BNSF Railway Co*., the Court of Appeals of Texas, Fort Worth analyzes the district court's and Fifth Circuit's approach to determine the validity of a release.[96] The Court of Appeals of Texas states that the district court granted summary judgment to Union "on the face of the release."[97] Since the release disclosed future risks on its face, such as cancer relating to asbestos, it was "executed as part of a full compromise of litigation."[98]

Therefore, the Fifth Circuit's approach appears to determine whether a release is valid by turning to the language "on the face of the release."[99] Unlike *Wicker*, there seems to be no fact-finding performed by the court to determine if the release is valid or if it was the intent of the parties to release the possible risks.[100] Instead, the Fifth Circuit seems to rely heavily on *Callen*'s language that "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility."[101] Under *Babbitt*, the release at issue in *Mendoza-Gomez* would not be found valid and under *Wicker*, the release would at least create a question of fact.[102] Under the Fifth Circuit's approach, however, the release is found to be completely valid.[103]

The Fifth Circuit's approach creates a new split in the federal circuit courts by citing to Callen and holding broadly that Section 5 imposes very few limits on FELA claims.[104] The plaintiff in *Mendoza-Gomez* filed a Petition for Writ of Certiorari with the Supreme Court of the United States claiming that the case could resolve the circuit split.[105] This could have been the perfect opportunity for the Supreme Court to shed some light on the controversy surrounding FELA claims and releases; however, the Petition was dismissed.[106]

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[95] 2022-7061 Mealey's Daily News Update 3.
[96] Fisher v. BNSF Ry. Co., 650 S.W.3d 880, 886–88 (Tex. App. 2022).
[97] *Id.* at 887.
[98] *Id.*
[99] *Id.*
[100] Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998).
[101] Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698 at *3 (5th Cir. Apr. 14, 2022) (citing Callen v. Pa. R.R. Co., 332 U.S. 625, 631 (1948)).
[102] 2022-7061 Mealey's Daily News Update 3.
[103] *Id.*
[104] *Id.*
[105] Petition for Writ of Certiorari at 6, Mendoza-Gomez v. Union Pac. R.R. Co., No. 21-20397, 2022 WL 1117698 (5th Cir. Apr. 14, 2022) (No. 22-225); 2022-7061 Mealey's Daily News Update 3.
[106] Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698 (5th Cir. Apr. 14), *cert. dismissed*, 143 S. Ct. 420 (2022).

IV. THE U.S. SUPREME COURT SHOULD ADOPT THE THIRD CIRCUIT'S FACT-INTENSIVE APPROACH TO RESOLVE THE THREE-WAY CIRCUIT SPLIT

The resolution of the three-way circuit split will substantially affect the outcome of FELA cases in the future. If the Supreme Court adopts one of the circuit's approaches, it will aid workers and common carriers in determining whether or not the release they are trying to execute is valid. Also, the resolution of the three-way circuit split could significantly affect the way common carriers draft releases.107 By clarifying the proper standard for FELA releases, the Court could "equip the railroad companies with the knowledge of what language they need to include in a FELA release in order for the release to be deemed valid and to protect the employer from liability in additional suits."108 Additionally, by adopting one of the three approaches, the Court would finally end the long debate of whether or not the parties are allowed to release only known injuries, known injuries as well as known risks, or even risks that the plaintiff did not intend to release but were found to be included on the face of the release.

Even though the Supreme Court dismissed Mendoza-Gomez's petition for review,109 the issue of what standard applies in determining whether a release is valid under Section 5 still exists. The Supreme Court could still choose to rule on this issue if the opportunity presents itself, and if the Court does choose to address the split, it should adopt the Third Circuit's fact-intensive approach in *Wicker*. *Wicker*'s rationale is the best compromise between the three approaches by allowing employers and employees to "negotiate and settle" their claims without litigation110 and is the most widely adopted approach by a majority of state and federal courts.111

A. Why the Sixth Circuit's Bright Line Rule Should Not Be Adopted by the U.S. Supreme Court

Although the Sixth Circuit's bright-line rule has some advantages, the Third Circuit's fact-intensive standard is superior in many ways. Under *Babbitt*'s bright line rule, "a release must reflect a bargained-for-settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him."112 It is clear, and acknowledged by the Third Circuit itself, that the bright line approach presented in *Babbitt* may be easier to apply than *Wicker*'s fact-intensive standard and has the "benefit of predictability."113 In other words, *Babbitt*'s rule appears predictable because it only allows employees to sign a release for a specific injury

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[107] Granger, *supra* note 39, at 1483.
[108] *Id.*
[109] Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698 (5th Cir. Apr. 14), *cert. dismissed*, 143 S. Ct. 420 (2022).
[110] Jaqua v. Canadian Nat'l R.R., 734 N.W.2d 228, 229 (Mich. Ct. App. 2007).
[111] Fisher v. BNSF Ry. Co., 650 S.W.3d 880, 886 (Tex. App. 2022).
[112] Babbitt v. Norfolk & W. Ry. Co., 104 F.3d 89, 93 (6th Cir. 1997).
[113] Wicker v. Consol. Rail Corp., 142 F.3d 690, 700 (3d Cir. 1998).

that has already occurred and the employer will know when a release will or will not be considered valid.[114]

Even though it may appear that the Sixth Circuit's approach provides an easier resolution to the enforcement of releases, the result may actually be a "more complicated inquiry into the exact nature and scope of the injury compromised" or have "a chilling effect on the resolution by compromise of any claims."[115] For example, the effects of exposure to asbestos "may be latent for a considerable period of time."[116] Under *Babbitt*'s approach, a new claim would be permitted against the employer for every new manifestation of asbestos exposure, "regardless of the extent of the parties' awareness of such risks."[117] This would result in a decrease in settlements because "there would be no incentive" for the employer to compromise.[118] Therefore, *Babbitt*'s bright-line rule would require injured workers to litigate claims against negligent employers, resulting in employees waiting long periods of time to receive compensation for their injuries as well as more attorney's fees due to extended litigation.

Additionally, it can be argued that *Babbitt*'s bright line rule is more protective of workers as compared to the Third Circuit's standard because of the "unequal bargaining power" between the employer and the employees.[119] Employers and their attorneys obviously will try to obtain a cheaper settlement of known injuries and known risks, and it is argued that plaintiff attorneys "will be quick to settle in order to get their cut of the settlement with no regard to the future liability claims they are releasing."[120] Yet, there are at least two reasons why this argument fails.

First, plaintiff attorneys will usually want to obtain the highest settlement possible for the plaintiff because they will receive a percentage of the settlement amount. Just because the employer and its attorney attempt to obtain the lowest settlement amount for themselves, it does not follow that the plaintiff and their attorney will not be successful in procuring a higher settlement. By allowing for a settlement of future known risks, the plaintiff would be able to bargain for an amount that would compensate them for the potential development of those risks. To determine an appropriate amount of compensation, the parties could take into account the probability of the plaintiff developing injuries from these known risks and the cost of treatment if they do develop. Therefore, the parties will have full knowledge of the probability and costs of the known risks, which would counteract the issue of "unequal bargaining power."

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[114] Granger, *supra* note 39, at 1493.
[115] Oliverio v. Consol. Rail Corp., 822 N.Y.S.2d 699, 701–02 (N.Y. Sup. Ct. 2006).
[116] *Id.* at 702.
[117] *Id.*
[118] *Id.*
[119] Granger, *supra* note 39, at 1491.
[120] *Id.*

The second reason this argument fails is because *Wicker*'s fact-intensive standard allows courts to thwart the issue of "unequal bargaining power" between the employer and the employee. Even though *Wicker*'s fact-intensive standard looks to whether it was the intention of the parties to release known risks,121 the fact-intensive process could reveal if the employer used its "unequal bargaining power" over the employee to coerce them into signing a release that they actually did not want to sign. Courts should be able to recognize coercion through the fact-intensive process and not allow the release to bar the plaintiff's claims. In other words, *Wicker*'s standard is just as protective of workers as *Babbitt*'s bright line rule.

The Supreme Court should also not adopt the Sixth Circuit's bright line rule in *Babbitt* because it is too restrictive and paternalistic. The Sixth Circuit approach limits the plaintiff's settlement to only known injuries at the time the release is signed even if both parties would rather settle all future claims.122 "[I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement."123 The employer obviously would want a permanent settlement to reduce the amount of future liabilities it may be subject to.124 On the other hand, the employee may want an immediate settlement to get compensation for their potential injuries now, rather than waiting on injuries that may or may not develop in the future.125

Other federal and state courts have also adopted the Third Circuit's fact-intensive approach over the Sixth Circuit's bright-line rule, making it the more popular of the two standards among courts.126 In *Jaqua v. Canadian National Railroad, Inc.*, the Court of Appeals of Michigan adopted *Wicker*'s standard and stated that "[t]he rationale in *Wicker* allows the employer and the employee the freedom to negotiate and settle claims, but protects the employee from releasing the employer for unknown liability that was not considered and resolved in an informed manner."127 In *Loyal v. Norfolk Southern Corp.*, the Court of Appeals of Georgia stated that an industry "that has a number of known occupational risks and diseases, it is important to both the employer and employee to be able to settle potential claims regarding

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[121] Wicker v. Consol. Rail Corp., 142 F.3d 690, 700 (3d Cir. 1998).
[122] Ill. Cent. R.R. Co. v. Acuff, 950 So. 2d 947, 960 (Miss. 2006).
[123] *Wicker*, 142 F.3d at 700.
[124] *Id.*
[125] *Id.*
[126] *See e.g.*, Murphy v. Union Pac. R.R. Co., 574 S.W.3d 676, 682 (Ark. Ct. App. 2019) (adopting the Third Circuit's standard); Jaqua v. Canadian Nat'l R.R., 734 N.W.2d 228, 229 (Mich. Ct. App. 2007) (adopting the Third Circuit's standard); Loyal v. Norfolk S. Corp., 507 S.E.2d 499, 502 (Ga. Ct. App. 1998) (adopting the Third Circuit's standard); Ward v. Ill. Cent. R.R. Co., 271 So. 3d 466, 472–73 (Miss. 2019) (applying the Third Circuit's standard); Cole v. Norfolk S. Ry. Co., 803 S.E.2d 346, 352 (Va. 2017) (adopting the Third Circuit's standard); Sinclair v. Burlington N. & Santa Fe Ry., 200 P.3d 46, 59 (Mont. 2008) (adopting the Third Circuit's standard); Ill. Cent. R.R. Co., v. Acuff, 950 So. 2d 947, 960 (Miss. 2006) (adopting the Third Circuit's approach); Oliverio v. Consol. Rail Corp., 822 N.Y.S.2d 699, 702 (N.Y. Sup. Ct. 2006) (adopting the Third Circuit's approach).
[127] *Jaqua*, 734 N.W.2d at 229.

injuries or diseases prior to actual discovery."128 Also adopting the Third Circuit's standard, the Supreme Court of Mississippi, in *Illinois Central Railroad Co. v. Acuff*, found that "*Babbitt*'s rule barring the release of future claims unfairly restricts the ability of an employer and employee to knowingly and voluntarily settle both current and future claims, should the parties so desire."129

Overall, the Supreme Court should not adopt the Sixth Circuit's bright-line rule because of its many disadvantages. *Babbitt*'s ruling is too restrictive of the employees' ability to release known risks if they choose to do so.130 Allowing releases only for known injuries may also decrease the number of settlements that employers will agree to because there is less of an incentive for them to participate in these settlements.131 This would result in more litigation, causing the injured plaintiff to wait longer for compensation as well as higher attorney's fees. The Supreme Court should instead adopt the Third Circuit's approach because it allows the parties to negotiate while still protecting the employee from releasing the employer from unknown risks.132

B. Why the Fifth Circuit's New and More Expansive Approach Should Not Be Adopted by the U.S. Supreme Court

While the Sixth Circuit's bright-line rule is too restrictive and paternalistic, the Fifth Circuit's approach is on the opposite end of the spectrum by placing barely any restrictions on what can be included in releases.133 Rather, the District Court for the Southern District of Texas and Fifth Circuit in *Mendoza-Gomez* found that the release at issue disclosed the future risks of cancer on its face, so it was deemed valid.134 The Supreme Court should not adopt the Fifth Circuit's approach because, as compared to the Third Circuit's standard, it completely undermines the purpose of FELA.

By looking at the language of the release on its face, there is no fact-intensive process conducted, as in *Wicker*, to determine if the parties actually intended to include certain future claims in the release.135 According to the Fifth Circuit, the analysis in determining the intentions of the parties "begins and ends with the contract's express language."136 The result of the Fifth Circuit's approach will likely find a release valid even if there is no evidence that the parties, specifically the plaintiffs, knew of the specific risks they were exposed to. As long as the "express

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[128] *Loyal*, 507 S.E.2d at 502.
[129] *Acuff*, 950 So. 2d at 960.
[130] *Id.*
[131] *Oliverio*, 822 N.Y.S.2d at 702.
[132] *Jaqua*, 734 N.W.2d at 229.
[133] Petition for Writ of Certiorari at 6, Mendoza-Gomez, Union Pac. R.R. Co., No. 21-20397, 2022 WL 1117698 (5th Cir. Apr. 14, 2022) (No. 22-225).
[134] Fisher v. BNSF Ry. Co., 650 S.W.3d 880, 887 (Tex. App. 2022).
[135] Wicker v. Consol. Rail Corp., 142 F.3d 690, 701 (3d Cir. 1998).
[136] Mendoza-Gomez v. Union Pac. R.R., No. 21-20397, 2022 WL 1117698 at *3 (5th Cir. Apr. 14, 2022) (citing Huckaba v. Ref-Chem, L.P., 892 F.3d 686, 689 (5th Cir. 2018)).

language" of the release provides that the plaintiff accepts a settlement amount as consideration for "full and complete release of any and all claims" resulting from a specific instance, such as exposure to toxic chemicals, then the release will be found valid and the plaintiff's future claims for any injuries will be barred against the employer.[137]

The Fifth Circuit's new approach runs contrary to FELA's purpose of holding common carriers liable to their injured employees.[138] This approach will result in injured workers' claims being barred because they signed blanket releases in which they were unaware included certain risks. It will encourage employers to write very broad releases, resulting in boilerplate language. The Third Circuit's approach conducts a fact-intensive process that seeks to determine the parties' intent, which combats the issues the Fifth Circuit's approach creates.[139]

Even though the Fifth Circuit's approach has the advantage of allowing the parties the freedom of contract, like the Third Circuit's standard, it does not properly protect workers because it does not specifically disallow releases of unknown risks.[140] Since unknown risks could potentially be released under the Fifth Circuit's approach, undermining the purpose of FELA, the Supreme Court should instead adopt the Third Circuit's fact-intensive standard that provides the parties the freedom of contract while protecting workers at the same time.

V. CONCLUSION

In sum, to resolve the three-way circuit split the Supreme Court should adopt the Third Circuit's fact-intensive standard that allows known risks to be included in FELA releases.[141] *Wicker*'s standard is the proper compromise between the three approaches as it allows employers and employees to negotiate and settle their claims without litigation,[142] and it is the most widely adopted approach by a majority of state and federal courts.[143] The Third Circuit's standard allows parties the freedom of contract to determine what is best for themselves, while still adhering to FELA's purpose by protecting workers by not allowing unknown risks to be waived.[144]

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[137] *Id.*
[138] 45 U.S.C. § 51.
[139] *Wicker*, 142 F.3d at 701.
[140] *Compare Mendoza-Gomez*, No. 21-20397, 2022 WL 1117698 at *3 (acknowledging that the analysis "begins and ends with the contract's express language," which does not involve the fact-intensive process of determining whether the risk was known or unknown to the plaintiff), *with Wicker*, 142 F.3d at 701 (stating that "[c]laims relating to unknown risks do not constitute 'controversies,' and may not be waived under § 5 of FELA").
[141] *Wicker*, 142 F.3d at 701.
[142] Jaqua v. Canadian Nat'l R.R., 734 N.W.2d 228, 229 (Mich. Ct. App. 2007).
[143] Fisher v. BNSF Ry. Co., 650 S.W.3d 880, 886 (Tex. App. 2022).
[144] *Wicker*, 142 F.3d 690, 701 (3d. Cir. 1998).