Notes

No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers

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I. INTRODUCTION

In order to allow passenger rail to use freight rail property, freight rail companies require passenger rail agencies to assume all liability when sharing rights-of-way.[1] Passenger rail agencies assume liability through indemnity provisions when negotiating shared use agreements to operate on freight owned rail corridors.[2] With rising interest in public transportation, these issues could become increasingly contested.

There exists a conflict between the public's desire for expanded pas-

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1. KEVIN M. SHEYS, STRATEGIES TO FACILITE ACQUISITION AND USE OF RAILROAD RIGHT OF WAY BY TRANSIT PROVIDERS, TRANSIT COOPERATIVE RESEARCH BOARD 6 (1994), *available at* http://onlinepubs.trb.org/Onlinepubs/tcrp/tcrp_lrd_01.pdf.

2. *See* U.S. GEN. ACCOUNTING OFFICE, COMMUTER RAIL: INFORMATION AND GUIDANCE COULD HELP FACILITATE COMMUTER AND FREIGHT RAIL ACCESS NEGOTIATIONS 17 (2004).

senger rail service at a minimal cost to taxpayers and the public policy goal of holding tortfeasors accountable to civil liability for reckless and negligent behavior. This issue affects both intercity rail, such as Amtrak, and inner-city commuter and light rail. This paper addresses this controversy. First, it outlines the terms and historical background surrounding the issue. Second, it presents state case studies dealing with indemnification as expansion of the rail system in states across the country illustrates this concern. Next, it covers the lofty insurance burden for passenger rail agencies and addresses the disregard for tort law principles if indemnity is granted. Finally, it offers potential solutions to resolve this debate.

II. Terminology and the Definition of "Sharing"

In discussing the development of rail indemnification law it is helpful to understand the types of passenger rail vehicles sharing property with freight railroads and to define these cooperative relationships.

A. Types of Rail Vehicles

Freight rail companies traditionally have led in ownership and rail rights. "In almost all circumstances, Class I and regional railroads are the owners/operators of the rail rights-of-way of interest to transit systems."[3] Four types of passenger rail vehicles interact with freight railroads: light rail systems, commuter rail, heavy capacity rail, and intercity passenger rail (Amtrak).

Light rail systems, also known as streetcars, tramways, or trolleys, are passenger rail cars operating individually or in short trains on fixed rails with rights-of-way in automobile traffic.[4] Light rail often does not share track, but may share a corridor, with freight railroads.[5] Interaction may occur when crossing a right-of-way grade.[6]

Commuter rail is an electric or diesel propelled railway for urban passenger service consisting of local short distance travel operating between a central city and adjacent suburbs.[7] These long trains are strong enough to operate on freight train tracks.[8] Services generally extend upwards of 70 to 80 miles from the city center and stop only at main population centers.[9]

Heavy capacity rail is called "metro, subway, rapid transit or rapid

3. Sheys, supra note 1, at 4.

4. Dr. Rongfang Liu, N.J. Inst. of Tech., Survey of Transit and Rail Freight Interaction, Final Report 15 (2004).

5. *Id.* at 17.

6. *See id.* at 15.

7. *Id.*

8. *Id.*

9. *Id.*

rail . . . ." It is electric railway with high traffic capacity.[10] "These systems interact with freight only where there is adequate exclusive right-of-way alongside a freight railroad."[11]

Intercity passenger rail vehicles, which Amtrak utilizes, employ a combination diesel and electric locomotive driven vehicle with attached passenger cars.[12]

B. Property Sharing

There are four categories of freight/passenger property sharing. First, is "Shared Track and Mixed Operation: transit trains and freight trains are separated by headway intervals measured in minutes in an operating schedule."[13] The second type is "Shared Track and Time-Separated Operations: both transit and freight trains utilize the same track but are separated by time windows."[14] The final two types of sharing arrangements are shared right-of-way and shared corridor.[15] The term "shared right-of-way," means that the freight and passenger tracks are less than 25 feet apart from one another.[16] If the tracks are more than 25 feet, but less than 200 feet, apart, then the term of art is a "shared corridor."[17]

III. The Fall and Rise of Commuter Rail

A. Public Takeover of Passenger Rail

In 1887, Congress created the Interstate Commerce Commission (ICC) to regulate the railroad industry and determined that railroad companies had a common carrier obligation to provide both freight and passenger service to support interstate travel and the transport of goods.[18] Private railroad companies could not abandon a passenger or freight line without permission from the ICC.[19] However, "[i]n 1958, Congress passed legislation that allowed railroads to discontinue passenger trains with ICC approval."[20]

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10. *Id.*
11. *Id.*
12. *See* Nat'l R.R. Passenger Corp., Annual Report 13 (2007), *available at* http://www.amtrak.com/pdf/AmtrakAnnualReport_2007.pdf.
13. Liu, *supra* note 4, at 17.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *See* Charles A. Spitulnik & Jamie Palter Rennert, *Use of Freight Rail Lines for Commuter Operations: Public Interest, Private Property*, 26 TRANSP. L. J. 319, 321 (1999).
19. *See* Spitulnik & Rennert, *supra* note 18, at 322.
20. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L. J. 235, 276 (2003).

By 1970, passenger ridership plummeted resulting in a drop in the number of passenger trains from 20,000 in 1929 to less than 500.[21] Therefore, due to a lack of financial sustainability for passenger rail, Congress created Amtrak through the Rail Passenger Service Act of 1970, thus relieving private rail companies of their passenger service obligation.[22] By paying Amtrak to take over passenger lines, private rail relinquished the passenger requirement.[23] In return, Amtrak could operate on the freight railroad's line, but also was given the statutory right to force its way on to a line in the future if demand for passenger service reemerged.[24] Other passenger rail agencies do not share this statutory right and therefore lack Amtrak's ability to negotiate for shared use of a freight railroad's line.[25]

Amtrak's relationship with freight companies is helpful to understand rail indemnification for all passenger rail agencies because Amtrak contractually indemnifies freight rail companies in the case of injury and because "over 95 percent of Amtrak's 22,000-mile network operates on freight railroad tracks."[26] To protect the freight railroad from liability, Amtrak contractually indemnifies through no fault liability agreement for injuries "resulting from any damages that occur to Amtrak passengers, equipment, or employees regardless of fault if an Amtrak train is involved."[27]

B. Amtrak's Indemnity Agreements Are Threatened

A fatal accident in 1987 tested Amtrak's liability and track sharing relationship with freight railroads.[28] A Conrail locomotive collided with an Amtrak train in Chase, Md. killing fifteen passengers and the Amtrak engineer, and causing numerous injuries to Amtrak passengers and employees.[29] Fault for the accident lay directly on the Conrail engineer and crew. The engineer in control of the Conrail locomotive pled guilty to manslaughter and admitted that the crew had been under the influence of marijuana, was speeding, and failed to follow many safety regulations.[30]

21. Spitulnik & Rennert, *supra* note 18, at 322.
22. *See* U.S. Gen. Accounting Office, *supra* note 2, at 8.
23. *See* Spitulnik & Rennert, *supra* note 18, at 324.
24. *Id.*
25. *Id.* at 327.
26. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 9 n.8.
27. U.S. Gov't. Accountability Office, Intercity Passenger Rail: National Policy and Strategies Needed to Maximize Public Benefits from Federal Expenditures 148 (2006).
28. *See* Walt Bogdanich, *Amtrak Pays Millions for Others' Fatal Errors*, N.Y. Times, Oct. 15, 2004, at A1, *available at* 2004 WLNR 5560164.
29. *See* Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 892 F.2d 1066, 1067 (D.C. Cir. 1990).
30. *See id.* at 1067.

Amtrak attacked on public policy grounds the indemnity provision in its contract with Conrail, which stated:

> Amtrak agrees to indemnify and save harmless Conrail and Conrail Employees, irrespective of any negligence or fault of Conrail or Conrail Employees, or howsoever the same shall occur or be caused, from any and all liability for injury to or death of any Amtrak Passenger, or for loss of, damage to, or destruction of the property of such Amtrak Passenger.[31]

The issue at the District court was Conrail's contention that liability must first be settled through an arbitration clause that was part of Amtrak's operating agreement with Conrail.[32] Amtrak prevailed in District Court in which the Court held that "public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue."[33] However, the Appellate Court reversed the District Court and required the issued be settled via the arbitration clause.[34] Because of the indemnification clause, the recklessness of the Conrail crew cost Amtrak $9.3 million in compensatory damages.[35] This was not the only incident in which Amtrak has had to pay for a host railroad's negligence. Between 1984 and 2004, Amtrak paid an estimated $186 million for accidents that were caused by host freight railroad companies.[36]

In the Conrail case, although the District Court's public policy argument was overturned, the potential that future courts may weaken indemnity provisions in rail sharing contracts motivated congressional action to reinforce indemnification agreements.[37] The 1997 Amtrak reauthorization legislation included a $200 million liability cap for all rail passengers and it reinforced that "[a] provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims."[38] The Senate report accompanying the legislation notes that this legislation will help inner-city transit agencies enforce indemnity agreements with owners of rights-of-way.[39] Significantly, the authors of the Senate report believed this liability cap would protect passenger rail agencies from freight railroads demands for higher compensation to cover the risk incurred for shared rights-of-way.[40]

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31. *Id.* at 1068.
32. *Id.*
33. *Id.* at 1067.
34. *Id.*
35. Bogdanich, *supra* note 28.
36. *Id.*
37. *Id.*
38. 49 U.S.C. § 28103 (a)(2), (b) (1996).
39. S. REP. No. 105-85, at 3063 (1997), *reprinted in* 1997 U.S.C.C.A.N. 3055, 3059.
40. *Id.*

This provision in the Amtrak reauthorization legislation has yet to be tested by the courts. Nevertheless, local transit agencies believe it gives them the power to enter into indemnity agreements.[41] As will be discussed below, the escalating cost of indemnification insurance to passenger rail agencies may prove that the author's desire of controlling this cost is unrealized. Additionally, it has not alleviated state and local policy makers concerns that releasing freight railroads of all liability is bad public policy.[42]

The 1970 Amtrak authorization legislation provided relief for the railroad companies from intercity passenger rail obligations. However, Congress did not authorize Amtrak to take over inner-city commuter rail lines.[43] In Boston, Chicago, New York City, New Jersey, and Philadelphia the major railroad companies attempted to maintain commuter rail lines despite declining profitability.[44] Federal, state, and local policy makers recognized that commuter rail operations were hindering the railroads from successfully providing freight services and commuter rail services were transferred to local transportation authorities.[45] Although local transit agencies took over failing commuter lines, their ability to expand service is hindered by lack of authority to force themselves onto freight railroad lines if they wanted to expand service.[46] As a result, commuter rail agencies have to build their own right-of-way or negotiate access to a freight company's right-of-way if they wish to expand commuter service.[47]

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41. Although the liability cap has not been tested, courts have upheld transit agencies indemnity agreements. *See also* Deweese v. Nat'l R.R. Passenger Corp., No. 06-4455, 2009 WL 222986, at *9 (E.D.Pa. 2009) (enforcing a liability agreement between Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak requiring SEPTA to indemnify Amtrak for injuries to SEPTA passenger struck by an Amtrak train, and Pennsylvania sovereign immunity act did not prevent Amtrak from enforcing the agreement). *See generally* Mass Transit Admin. v. CSX Transp., Inc., 708 A.2d 298, 314-16 (Md. 1998) (holding MTA, a commuter rail service, was liable for damage to a backhoe through an indemnity provision when a commuter train struck a CSX contractor's backhoe that was negligently left too close to the tracks).

42. *Contra* Association of American Railroads, *Support Passenger Rail, But Not at the Expense of Freight Rail*, Jan. 2009, *available at* http://www.aar.org/InCongress/~/media/AAR/PositionPapers/290.ashx (last visited Oct. 4, 2009) (stating freight railroad companies believe it is bad public policy to require companies to shoulder the burden of liability for a public good because freight corridors are private property and by not providing adequate liability coverage, the freight rail companies are subsidizing passenger services).

43. Spitulnik & Rennert, *supra* note 18, at 325.

44. *Id.* at 326.

45. *Id.* (stating newly formed agencies included the Chicago Transit Authority, the Southeastern Pennsylvania Transportation Authority, The New Jersey transit Corporation, and the Massachusetts Bay Transportation Authority).

46. *Id.* at 327.

47. *Id.*

C. The Impending Rise

If demand for commuter transit rail remained stagnant at its 1970 levels, perhaps issues over right-of-way would have disappeared. But, interest in public transportation is increasing across the country.[48] In 2008, light rail systems saw ridership growth greater than ten percent in Baltimore, Buffalo, Dallas, Denver, Minneapolis, Philadelphia, Sacramento, Salt Lake City, and New Jersey.[49] Commuter rail agencies also witnessed ridership growth over ten percent in Oakland, Cal.; San Carlos, Cal.; Stockton, Cal.; New Haven, Conn.; Pompano Beach, Fla.; Portland, Me.; Albuquerque, N.M.; Harrisburg-Philadelphia, Pa.; Dallas-Fort Worth, Tex.; and Seattle, Wash.[50] Amtrak is growing as well with the help of Virginia state government which "will provide $25.2 million in state funding to run two round-trip Amtrak trains serving Washington, D.C., over a three-year period."[51]

IV. Freight Rail's Bargaining Position of Strength

The no-fault demands of the freight railroads on passenger rail agencies to enter into shared use agreements have not always been standard operating procedure. Older shared use agreements did not include "but for" liability; however, new shared agreements that require "but for" liability now are the standard.[52] The simple explanation for no-fault indemnity requirements in shared operating agreements is that freight railroads have the negotiating advantage because they own well-established rights-of-way through developed areas.[53] Federal law preempts passenger rail agencies from exercising eminent domain powers over freight railroads if the taking or local regulation will unreasonably burden the ability of the railroad to fulfill its common carrier obligation in interstate commerce.[54]

48. Press Release, American Public Transportation Association, 10.7 Billion Trips Taken on U.S. Public Transportation in 2008—Highest Level in 52 Years; Ridership Increased as Gas Prices Decline and Jobs Were Lost (Mar. 9, 2009), *available at* http://www.apta.com/mediacenter/pressreleases/2009/Pages/090309_ridership.aspx (last visited Oct. 4, 2009).

49. *Id.*

50. *Id.*

51. *Virginia Commits State Funds to Add Amtrak Service*, RailwayAge, *available at* http://www.railwayage.com//index.php?option=com_content&task=view&id=652&Itemid=121 (last visited Oct. 4, 2009).

52. Kevin Sheys, Passenger Trains on Freight Railroads Negotiating Insurance and Liability Issues: Constructive Solutions, Address at the Railway Age (Oct. 21-22, 2008), at 3, *available at* http://www.klgates.com/files/Publication/048000df-36ee-42a9-87c6-57ca3ded7638/Presentation/PublicationAttachment/1675d6b4-bd23-4c46-a9ef-5f1fdccfb9d6/DC-%231246992-v1-Railway_Age_Conference_Speech.pdf (last visited Oct. 4, 2009) [hereinafter Sheys Address]. *See generally* Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 698 F. Supp. 951, 972 (D.D.C. 1988), *vacated*, 892 F.2d 1066 (D.C. Cir. 1990) (for a history of Amtrak indemnity agreements).

53. Sheys Address, *supra* note 52, at 2.

54. 49 U.S.C. § 10501(b) (2008); *see also* Hillsborough County v. Automated Med. Labs.,

Since local transit agencies lack the option to take railroad property, they must negotiate with rights-of-way owners. But, these agencies lack options. A transit agency displeased with an offer made by a freight railroad has limited options and cannot conveniently turn to another potential seller with a right-of-way through the heart of an urban center. The deficiency in the legal standing of transit systems creates problems "negotiating a reasonable and publicly acceptable purchase price."[55]

Freight railroads can demand no-fault indemnity agreements because they do not need the passenger services on their lines. For the railroads, denying access has little negative impact. Since the 1980s, the freight railroad companies have experienced a revival in their financial health.[56] In 2008, Class I railroads saw their rate of return on investment climb to 11.21 percent from 10.10 percent in 2007.[57] Sharing of lines has the potential to help freight railroads maintain profitability by helping to defray the cost of track maintenance.[58] But, the existence of passenger rail agencies not only creates additional potential liability, it also decreases freight access and challenges their ability to service their customers.[59] Freight railroad officials argue that they are publicly traded companies with a duty to their shareholders to maximize shareholder returns on investments.[60] One way to do this is to minimize liability and to transfer liability insurance premiums on to the passenger rail entities.

V. The Indemnification Debate in the States

Forty-one passenger rail agencies operating in the United States (exclusive of Amtrak) share property with freight railroads.[61] These include commuter rail agencies, such as the Massachusetts Bay Transportation Authority, that share track and mixed operations, to Denver's light rail system, that shares a right-of-way.[62] Shared property arrangements are

Inc. 471 U.S. 707, 712-13 (1985) ("It is a familiar and well-established principle that the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law . . . Congress is empowered to pre-empt state law by so stating in express terms.").

55. Sheys, *supra* note 1, at 4.

56. United States Government Accountability Office, Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed 9 (DIANE Publishing 2006), *available at* http://www.gao.gov/new.items/d0794.pdf (last visited Oct. 4, 2009).

57. *Rail Rate of Return Rises to 11.21% in 2008*, RailwayAge, *available at* http://www.railwayage.com//index.php?option=com_content&task=view&id=650&Itemid=121 (last visited Oct. 4, 2009.)

58. Sheys, *supra* note 1, at 3.

59. *Id.* at 4.

60. United States General Accounting Office, *supra* note 2, at 17-18.

61. *See* Rongfang, *supra* note 4.

62. Rongfang, *supra* note 4, at 69.

contractual in nature and thus are not publicly debated; however, some transit agencies lack the authority to grant indemnification and therefore must get State Legislative approval.[63] This debate was made public in Colorado in 2007 and is currently an open discussion in Florida and Massachusetts.[64] It also has been up for debate in other states.[65]

A. COLORADO

In 2004, Denver voters passed the FasTracks Referendum, authorizing a sales tax to add additional passenger rail lines to its current system to connect the metropolitan area to the Denver International Airport and suburban communities.[66] The original expansion plans included use of Burlington Northern Santa Fe (BNSF) and Union Pacific (UP) rail corridors.[67] The plans soon required state legislative intervention after BNSF and UP refused to grant the Regional Transportation District (RTD) access to their property unless the companies were released from any liability regardless of fault involving an accident with a passenger rail vehicle.[68] This would mean that an accident caused by a negligent or reckless BNSF involving an RTD light rail train that resulted in the death of an RTD passenger would result in no liability to BNSF. Any tort damages awarded against BNSF to an RTD passenger would be paid by RTD through insurance on behalf of the negligent or reckless freight rail company. This is known as a "but for" arrangement—"but for the presence of the commuter rail service, the freight railroad would not be exposed to certain risks."[69] Despite this, and fearing additional cost and time overruns of FasTracks, the Colorado legislature passed legislation allowing RTD to carry insurance covering BNSF and UP if an accident occurred even if it was the fault of the host freight rail company.[70]

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63. *See* Kevin Flynn, *Railroad Demands Immunity BNSF Refuses to Sell Tracks to RTD without Liability Protection*, ROCKY MTN. NEWS, Nov. 6, 2006, at 18A, *available at* 2006 WLNR 19223322; Megan Woolhouse, *Stalemate on Commuter Rail Tied to CSX,* BOSTON GLOBE, Mar. 23, 2008, at 1, *available at* 2008 WLNR 5757261; Editorial, *Put Commuter Rail on the Right Track*, ST. PETERSBURG TIMES, Feb. 22, 2009, at 2P, *available at* 2009 WLNR 3501032 [hereinafter Editorial, *Put Commuter Rail on the Right Track].*

64. *See* Flynn, *supra* note *63; see* Woolhouse, *supra* note 63; *see* Editorial, *Put Commuter Rail on the Right Track*, *supra* note 63.

65. *See* discussion *infra* Sections V.B., V.C., V.D.

66. Jeffrey Leib, *Voters Climb Aboard FasTracks: Tax Boost Six New Metro-Area Rail Lines*, DENV. POST, Nov. 3, 2004, at B01, *available at* 2004 WLNR 4933421.

67. Jeffrey Leib, *FasTracks Bill Carrying a lot of Freight: A Senate Committee Approves Giving Railroads Immunity from Liability if Commuter Rail is Allowed in Their Corridors*, DENV. POST, Mar. 20, 2007, at B05, *available at* 2007 WLNR 5301589.

68. *Id.*

69. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2.

70. Jeffrey Leib, *Liability Pact Eases Path for FasTracks*, DENV. POST, Apr. 26, 2007, at B01, *available at* 2007 WLNR 7900183.

When Colorado voters passed the FasTracks initiative in 2004, it was with the assumption that BNSF and UP would permit a shared usage agreement without a waiver of complete liability.[71] In fact, not all shared use agreements require complete hold harmless indemnity clauses.[72] But, as shared use agreements expire, freight companies are putting new demands on passenger rail agencies for greater liability protection, even for the railroads' negligence and recklessness.[73]

A change in position on the indemnity requirement by BNSF and UP in Colorado was the result of a January 2005 accident in Glendale, California.[74] A suicidal individual caused the accident when he parked his vehicle on a Metrolink track ahead of an oncoming commuter train.[75] The individual fled the scene prior to the crash, but left his vehicle causing the death of 11 people and injuries to 180 more. The UP, which shares tracks with Metrolink, was initially a named defendant in the case. Later it was removed because Metrolink owned the Glendale tracks.[76]

During the legislative debate over Colorado Senate Bill 07-219, there was much indignation aimed at the freight companies for their demands. The Senate sponsor stated, "I literally had to gag to do it [sponsor the bill]" and another legislator accused the freight railroads of "holding up" rail expansion and posing a "take it or leave it" situation for the legislature.[77] Lawmakers' anger appeared to be rooted in the process of the bill's origin as much as in the substance of the bill. The rail lines in question were far into the planning stages, environmental impact statements were complete, and abandoning the plan to share lines would delay the completion of the rail line.[78]

Lawmakers also struggled with the totality of the indemnity language in the bill. The legislation gives freight railroads "blanket indemnity" of "willful and wanton" conduct.[79] This language allows RTD to enter into a shared usage agreement with a freight line in which RTD would pay all

71. *See* Kevin Flynn, *Calif. Crash Ties up RTD Rail Plans: Railroads Want Legal Protection on FasTracks Lines*, ROCKY MTN. NEWS, Apr. 9, 2007, at 4, *available at* 2007 WLNR 6741480 [hereinafter Flynn, *Calif. Crash Ties up RTD Rail Plans*].

72. RONGFANG, *supra* note 4, at 58.

73. U.S. GEN. ACCOUNTING OFFICE, *supra* note 2, at 17-18.

74. Flynn, *Calif. Crash Ties up RTD Rail Plans*, *supra* note 71.

75. *Id.*

76. *Id.*

77. Flynn, *Calif. Crash Ties up RTD Rail Plans*, *supra* note 71; Jeffrey Leib, *Bill Railed Against but OK'd Freight Lines Wont't be Liable in Wrecks*, DENV. POST, Apr. 12, 2007, at B05, *available at* 2007 WLNR 7002883.

78. *Limitations on the Liability of Railroads that Make their Property Available for the Provision of Public Passenger Rail Service: Hearing on S. 07-219 Before the H. Jud. Comm.*, 66th Gen. Assem. (2007) (statement of Cal Marsella, Gen. Manager, Reg'l Transp. Dist.)[hereinafter Marsella, *testimony*].

79. *Id.*

damages if an RTD train were involved in an accident with a freight railroad even if the freight engineer was under the influence of drugs, as was the case in Chase, Md., in 1987. In addition, the statute folds the railroads into the state's government immunity status by removing punitive damages for recklessness by a freight railroad that results in a passenger's death or injury.[80] The legislation, now law, in Colorado states the following:

> A railroad operating in interstate commerce that sells to a public entity, or allows the public entity to use, such railroad's property or tracks for the provision of public passenger rail service shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct to any person for any accident or injury arising out of the operation and maintenance of the public passenger rail service by a public entity.[81]

Lawmakers approved the legislation based on the strong public support for the FasTracks plan and any other option would result in more condemnations of private property along any new corridor.[82] This indemnification legislation likely faced little opposition because voters already had approved rail expansion and the public expected it to be completed.

B. Florida

The debate in Florida is operating prior to the implementation of a rail expansion plan and has seen much more opposition from state lawmakers. In the 2008 legislative session, Florida failed to pass a bill allowing indemnification because of liability concerns.[83] The measure returned in the 2009 legislative session, but with the same apprehension over indemnity.[84]

Under the plan, the state would purchase and renovate an existing CSX freight line into a commuter rail system for $150 million.[85] Florida also would pay $496 million for improvements to CSX facilities and track separate of the passenger line.[86] The federal, state, and local governments would pay $615 million on the commuter line; "That money would double-track the line to accommodate both rail and freight traffic."[87] De-

80. Colo. Rev. Stat. §24-10-114(b) (2007); Telephone Interview with Marla Lien, General Counsel, Regional Transportation District, in Denver, Col. (March 25, 2009).

81. Colo. Rev. Stat. §24-10-114(b) (2007).

82. Marsella, *testimony, supra* note 78 (At the Senate and House Judiciary hearings on the indemnity legislation, there was no testimony from opponents of the bill. Elected officials from the metro area testified in support, as did representatives from the real estate industry).

83. Editorial, *Put Commuter Rail on the Right Track*, *supra* note 63.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

spite the infrastructure improvements promised by the different levels of government, Florida must first pass legislation to indemnify CSX in order to get a deal.

C. Massachusetts

Likewise, the Lieutenant Governor of Massachusetts, Timothy Murray, also has publicly complained about CSX's demand for indemnity coverage.[88] As in Florida, his concern is that the taxpayers will have to pay for the freight railroad's recklessness in the event of an accident.[89] In Massachusetts, the state wants to purchase additional lines from CSX to add commuter trips and would allow CSX to use the state owned right-of-way. However, CSX wants the deal to include no-fault liability, which Lieut. Gov. Murray declares a "deal breaker."[90] Political pressure for increased passenger rail is a major reason why lawmakers have accepted no fault indemnity agreements. In his statements, Lieut. Gov. Murray attempts to deflect that pressure to the freight railroad saying, "their demand for this unreasonable no-fault clause blocks what would otherwise be an important economic development, public safety, and environmental opportunity for Worcester and the Commonwealth as a whole."[91]

D. Other States

Similar to Colorado, Minnesota and Virginia also have statutes allowing a transit agency to enter into a contract that allocates liability and allows the agency to purchase insurance to cover such liability.[92] These broad statutory powers permit the transit agencies the flexibility to enter into indemnity provisions without restricting the agencies to specific agreements on a particular right-of-way.[93]

In contrast, the New Mexico Department of Transportation entered into a joint use agreement with BNSF for a specific right-of-way.[94] The shared use agreement for the Rail Runner Passenger train included an indemnity provision that did not require legislative approval.[95] In order

88. Woolhouse, *supra* note 63 (where Lieut. Gov. Murray is quoted as saying, "This whole issue of indemnification is outrageous").

89. *Id.*

90. Lieutenant Governor Timothy P. Murray, *Address at the Massachusetts Rail Summit* (May 9, 2008), http://www.timmurray.org/CSX0509_speech.html_copy (last visited Mar. 10, 2009).

91. *Id.*

92. Minn. Stat. Ann. § 174.82 (West 2006); Va. Code Ann.. § 56-446.1 (West 2006).

93. *See generally*, Colo. Rev. Stat. § 24-10-114 (West 2007); Minn. Stat. Ann. § 174.82 (West 2006); Va. Code Ann. § 56-446.1 (West 2006).

94. Jeff Jones, *Rail Runner Gets Madrid's OK*, Albuquerque J., March 3, 2006, *available at* WLNR.

95. *Id.*

to fund the insurance premium, New Mexico created a funding mechanism paid for with transportation bonds.[96] Due to the innovative nature of this funding mechanism, the state's department of transportation did not proceed with the agreement until the state's Attorney General issued an advisory letter stating that such a shared use agreement was within state law.[97]

The lesson learned from Colorado is that if legislative approval is needed, it is better to get a broad grant of authority that permits the transit agency to negotiate multiple indemnity agreements without fighting the same political battles multiple times. Although the New Mexico Department of Transportation was able to forego the legislative debate, the advisory letter lacks the authority of state legislative approval and leaves it more susceptible to judicial interpretation.

VI. The High Cost of Indemnification Insurance

Indemnification agreements with freight railroads come at a cost to the passenger rail agency. Through these agreements, the passenger rail agency must pay any judgment awarded to a plaintiff against a freight railroad.[98] To provide this indemnification, the passenger rail agency agrees to carry insurance to cover any judgment.[99] Premiums for this type of insurance can cost a passenger rail agency up to "20 percent of their annual operating budget."[100] Freight rail companies demand a range of insurance coverage ranging from $100-500 million.[101]

The cost of carrying indemnity insurance varies according to the operating agreement and the freight railroad. For the heavier commuter rail systems that share track, there are two insurance options: "1) [O]perators or transit systems maintain the insurance and hold freight harmless," or "2) [I]nsurance liability is settled by [a] trackage agreement or service contract."[102] The cost of insurance to a transit agency for light rail depends on the "size . . . of services and strict separation" between the

96. Advisory Letter from Patricia A. Madrid, Attorney General, New Mexico, to Rhonda G. Faugh, Transportation Secretary, New Mexico (Feb. 28, 2006) (on file with New Mexico Attorney General's Office and *available at* 2006 WL 1067862.)

97. *Id.*

98. *See* CSX Transp., Inc. 708 A.2d 298, *supra* note 41 (finding commuter rail service liable for damages through an indemnity provision when a commuter train struck a backhoe that was on the tracks due to freight operator negligence); *see also* Deweese 2009 WL 222986 (enforcing a liability agreement between Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak that required SEPTA to indemnify Amtrak for injuries to SEPTA passenger struck by an Amtrak train).

99. U.S. Gen. Accounting Office, *supra* note 2, at 18.

100. *Id.*

101. *Id.*

102. Liu, *supra* note 4, at 36.

freight and passenger lines.[103]

In Massachusetts, the Massachusetts Bay Transportation Association (MBTA) negotiated (a separate agreement from the issue discussed above) to use a section of Conrail track cost MBTA $3.8 million a year for $75 million of coverage.[104] This amount of coverage was determined by the state legislature, which capped any tort damages for accidents on this line at $75 million.[105]

The indemnification debate in Colorado developed around the same time that the FasTracks expansion began to face other budgetary pressures.[106] When voters passed the FasTracks initiative the project was estimated to cost $4.7 billion. Over four years that price increased to $7.9 billion.[107] Compounding the increased construction cost of FasTracks, RTD will pay an estimated $2 million a year for insurance to indemnify the freight railroads of all liability for shared usage of certain rights-of-way.[108]

New Jersey has a complex liability and insurance agreement with Conrail. In the agreement, New Jersey Transit "pays Conrail $1.2 million annually" that are "funds that Conrail uses to defray its cost of insurance for operating" on a shared line.[109] In totality, New Jersey Transit has paid as much as $4.2 million in a year for insurance that includes "$10 million of self-insurance per incident and up to $250 million in excess coverage per incident."[110]

The North County Transit District in San Diego, CA, pays an insurance premium of $1.7 million for insurance coverage.[111] In their shared use agreement with BNSF, the transit district assumes liability for any damages up to $10 million and over $85 million.[112]

The passenger rail industry is fortunate to have had relatively few accidents that resulted in death. However, when accidents do occur, they often result in damages that are financially crippling to both private and public entities. The cost of insurance is part of doing business, but the negative impact of indemnification agreements on a passenger rail

103. *Id.* at 41.

104. Murray, *supra* note 90.

105. *Id.*

106. Kevin Flynn, *Half of FasTracks Soaring Cost Tied to North Metro, DIA Lines*, ROCKY MTN. NEWS, Sept. 3, 2008, at 4, *available at* 2008 WLNR 16637516.

107. *Id.*

108. Flynn, *Calif. Crash Ties up RTD Rail Plans*, *supra* note 71.

109. OFFICE OF RESEARCH, DEMONSTRATION, AND INNOVATION, U.S. DEP'T TRANSP., SHARING OF TRACK BY TRANSIT AND FREIGHT RAILROADS: LIABILITY AND INSURANCE ISSUES 6 (2005), *Available at* http://www.fta.dot.gov/documents/Shared_Track.pdf.

110. *Id.*

111. *Id.* at 3.

112. *Id.* at 5.

agency's operating budget impacts the broader public policy goal of expanded, safe, and timely transit service. By reducing the cost of insurance premiums, the savings could be used to improve services provided by these agencies. In the United States, at least forty-one passenger rail agencies—either commuter, light, or heavy rail—have some type of shared use operating agreement with a freight railroad.[113] If all of these agencies have to dedicate yearly operating cost to indemnify freight railroads for their own negligence or recklessness, then millions of dollars a year are being diverted from passenger rail services to insurance costs.

VII. Tort Law Principles

This paper has reviewed criticism of indemnity provisions that shift liability from the freight host railroads to the passenger rail agencies based on the cost to the transit agency and the inequities in the bargaining process. Underlying the criticisms of the agreements is the general proposition that these agreements erode the public policy goals of tort law that punishes and discourages negligent or reckless behavior. Indemnity agreements vary in scope. Some jurisdictions indemnify for negligence, while others indemnify freight railroads for willful and wanton conduct in addition to negligence.[114] Freight railroads limit their liability by demanding hold harmless indemnity agreements using the theory of "but for" liability.[115] This theory "is the freight railroad's requirement that the passenger rail operator must bear all losses of any party (freight operator, itself or third-parties) that would not have occurred if the passenger rail operator had never arrived on the property."[116] "But for" liability places a contractual duty on passenger rail agencies to assume the tort liabilities of the freight railroad.[117]

A. Florida Accident

The freight railroads demand for "but for" liability is said to deprive accident survivors and their families of the justice gained through civil litigation. In 1991, negligent track maintenance by CSX in South Carolina caused multiple deaths and injuries to Amtrak passengers.[118] A vic-

113. *See* Liu, *supra* note 4, at 67-70.

114. U.S. Gov't Accountability Office, Intercity Passenger Rail: Commuter Rail: Many Factors Influence Liability and Indemnity Provisions, and Options Exist to Facilitate Negotiations 14 (2009).

115. Sheys, Address, *supra* note 52.

116. *Id.*

117. U.S. Gen. Accounting Office, *supra* note 2, at 18.

118. Nat'l Transp. Safety Bd. Railroad Accident Report, PB93-91603 NTSB/RAR-93/02, Derailment and Subsequent Collision of Amtrak Train 82 with Rail Cars on Dupont Siding of CSX Transportation Inc. at Lugoff, S.C., on July 31, 2001 37-38 (1993).

tim's widow sued CSX for punitive damages in the hopes of finding justice but Amtrak, rather than CSX, paid the judgment to her.[119] The widow believed that the verdict was fair and that the punishment would encourage CSX to correct their behavior.[120] However, after receiving her judgment, the widow soon realized that it was Amtrak that paid and not CSX; "First came disbelief, then anger, and finally tears. 'I'm mortified,' she said. 'Everything I've been living under is a lie. I was feeling on a personal level at least I did my part, and now I find out I didn't.'"[121]

When the Colorado legislature passed the indemnification statute, they also removed a plaintiff's ability to sue for punitive damages if a freight railroad's behavior was reckless.[122] Although this did not sit well with the state legislators, it is part of the required legislation for a freight railroad to allow passengers on their lines.[123] Minnesota's statute allows indemnification "for all types of claims or damages" and Virginia does not limit the types of claims that may be indemnified.[124]

B. Freight Railroads Lack of Concern for Safety?

The pursuit of justice is one tort law principle; another tort law principle is to encourage safety.[125] According to the trial judge in the Florida case, the indemnity provision with Amtrak removed CSX's motivation to improve safety.[126]

The evidence referred to in the Florida court's opinion at least in part was a Federal Railroad Administration safety audit criticizing the railroad for failing properly to train employees and not providing their personnel adequate time to perform track maintenance.[127] It is doubtful that an indemnity agreement shifting Conrail's liability to Amtrak was part the Conrail engineer's thinking when he decided to smoke marijuana prior to the Chase, Maryland crash; but critics of the railroads do draw

119. Bogdanich, *supra* note 28.

120. *Id.*

121. *Id.*

122. Marsella, *testimony*, *supra* note 78.

123. *Limitations on the Liability of Railroads that Make Their Property Available for the Provision of Public Passenger Rail Service: Hearing on S. 07-219 Before the H. Jud. Comm.*, 66th Gen. Assem. (2007) (statement by Rep. Terrance Carroll, Chairman, H. Jud. Comm.) ("I just have a certain distaste in my mouth for feeling like I've been bullied by the railroad industry into providing them additional indemnification. It just doesn't sit well with me.").

124. Minn. Stat. Ann. § 174.82 (West 2006); Va. Code Ann. § 56-446.1 (2009).

125. Arthur Best et al., Basic Tort Law 8 (2nd ed. 2007).

126. CSX Transp., Inc. v. Palank, 743 So. 2d 556, 563-64 (Fla. Dist. Ct. App. 1999) ("This evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.").

127. *Id.* at 560-61.

such conclusions between managerial decisions regarding staffing levels and indemnity agreements.[128]

The concern for safety and the misbalance in negotiating position between the freight railroads and passenger rail agencies was the concern of the district court in the Amtrak Conrail accident. The court held "public policy will not allow enforcement of indemnification provisions that appear to cover such extreme misconduct because serious and significant disincentives to railroad safety would ensue."[129] The Supreme Court stated as far back as 1852 "when carriers undertake to convey persons by the powerful but dangerous agency of steam . . . public policy and safety required that they be held to the greatest possible care and diligence."[130] What the court did not consider in this early railroad tort case was the fact that the carriers would be operating separately from the owners of the track on which passenger trains were operating.

Indemnity agreements may discourage safety simply because those in charge of safety are not faced with the responsibility of keeping those in their charge safe. However, Congress has determined that it is valid public policy to remove passenger carrier obligation from freight companies when it created Amtrak. For this reason, whether it is Amtrak or a local transit agency operating on freight rail lines, indemnity agreements may in fact be good public policy despite the cost to the passenger rail agency. Good policy because one entity is charged with safety and it puts the onus on the passenger rail entity to ensure those maintaining the passenger lines are behaving properly. In addition, freight railroads have little incentive to act so willfully negligent that an accident would occur on their lines that would also cause the freight railroad financial harm.[131]

VIII. Solutions

The indemnity provision required by BNSF and UP was not such a problem that Colorado lawmakers refused to allow the RTD the power to enter into such agreements. Of course, Colorado lawmakers were stuck between a rock (the voters) and a hard place (the railroads). The indemnity legislation in Colorado did not pass with reasonable debate; it passed because of pressure to continue with the voter-approved FasTracks plan.[132] Not all legislative bodies hoping to expand passenger rail service will be willing to legislate under the same conditions. If both intercity and inner-city passenger rail is going to expand, indemnity provisions may restrict the growth of this valuable policy objective.

128. *See* Bogdanich, *supra* note 28.
129. *Nat'l R.R. Passenger Corp.*, 698 F. Supp. at 972.
130. James W. Ely, Jr., Railroads and American Law 211 (2001).
131. *See* Bogdanich, *supra* note 28.
132. Jeffrey Leib, *Liability Pact Eases Path for FasTracks, supra* note 70.

The problem is twofold. First, indemnity agreements transfer reckless liability of a private party on to the public. This considerable expense to the passenger rail agencies diverts millions of dollars a year to insurance policies instead of expanding passenger service. Additionally, statutes and contracts that limit damages against reckless conduct deprive a plaintiff justice through civil litigation. However, indemnity agreements provide a mechanism to lower costs that permit transit agencies to develop passenger rail and allows Amtrak to expand intercity rail. States have tried to solve this issue, but as passenger rail expands, a national solution may be required.

The decision by states and transit agencies to indemnify the freight railroads is a solution on its own. Policy makers consciously decide that access to freight right-of-way is more valuable than holding freight railroads accountable to tort claims if their negligence results in harm to a passenger.

Working within this framework, if states want to lower their liability and therefore lower the monthly insurance premium state legislatures could cap the amount of damages a passenger may receive in the event of an injury or fatality. Massachusetts capped damages to $75 million when it entered into a right-of-way agreement with Conrail.[133] Obviously, this cap permitted the state to buy lower insurance to indemnify Conrail. Similar legislation in Florida during the 2008 legislative session would have required a cap on damages.[134] This measure failed to pass in part because of opposition by trial lawyers.[135] The new legislation for the 2009 session does not require a cap on damages.[136]

A seemingly simple solution is for states to buy rights of way from the freight railroads. This is an easy fix if a freight railroad is abandoning a line and they will not have a presence on the right-of-way. An example of this is the limited liability faced by the UP after the California Metrolink crash that resulted from the suicidal individual that parked his SUV on the passenger rail tracks. Initially, UP was named as a codefendant, but was dropped from the lawsuit because Metrolink owned the tracks outright.[137] However, as demonstrated in Florida, Massachusetts, and New Mexico, even when purchasing a section of line, the agency still may have to contract back with the freight railroad to allow access.[138] In

133. Murray, *supra* note 90.

134. S.B. 1666, 2008 Leg., 110th Sess. (Fla. 2008).

135. Editorial, *Put Commuter Rail on the Right Track*, *supra* note 63.

136. *Id.*

137. Flynn, *Calif. Crash Ties up RTD Rail Plans*, *supra* note 71.

138. Editorial, *Put Commuter Rail on the Right Track*, *supra* note 63; Murray, *supra* note 90; Jones, *supra* note 94.

this case, the freight railroads are still demanding indemnity.[139] It is no matter who owns the right-of-way, if it is shared between freight and passenger rail, the freight railroads will not sell right-of-way without liability protection.[140]

Another solution to lower insurance premiums is through pooled insurance programs. This option would reduce premiums by allowing all transit agencies that share right-of-way to all by into a program together but the federal government would have to contribute if liability exceeded a certain amount.[141]

A further option "could include establishing a federally funded railroad liability and indemnity program to which all U.S. transportation properties could subscribe and contribute that would provide the required railroad-required liability indemnification protection at less cost than when pursued on an individual basis."[142]

The best solution, though, is increased public and private investment in both passenger and freight rail. The public wants more passenger service and the best way to accomplish expanded service is to invest in improvements that improves service for both freight and passenger railroads. Public money invested into passenger rail lines to expand dedicated passenger rail decreases the need for indemnity insurance and helps to increase customer satisfaction. Additionally, public investment in freight railroad lines provides added incentive for freight railroads to negotiate with transit agencies over shared rights-of-way.

Congress appears to be recognizing that the commuter railroad's lack of bargaining power is limiting their ability to negotiate shared use agreements with the freight railroads. In October 2008, Congress passed the Amtrak reauthorization bill entitled the Passenger Rail Investment and Improvement Act (PRIAA).[143] PRIAA authorizes the Surface

139. *Id.*

140. *Id.*

141. *Rail Capacity Constraints and Investment Needed to Maintain Efficient and Reliable Rail Passenger Service: Hearing on Rail Capacity and Infrastructure Requirements Before the Surface Transportation Board* (2007) [hereinafter Zehner, *testimony*] (testimony of Dale J. Zehner, CEO, Va. Ry. Express on behalf of Am. Pub. Transp. Ass'n); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 114, at 33 ("A group of organizations with similar characteristics, such as a group of commuter rail agencies, pool their assets to obtain a single commercial insurance policy, rather than obtaining individual commercial insurance policies.").

142. Zehner, *testimony*, *supra* note 141; *accord* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note114, at 33 (GAO identified additional insurance options called captive insurance and risk retention group. "*Captive insurance.* A privately held insurance company that issues policies, collects premiums, and pays claims for its owners, but does not offer insurance to the public. *Risk retention group.* Similar businesses with similar risk exposures create their own liability insurance company to self-insure their risks as a group.").

143. Passenger Rail Investment and Improvement Act of 2008, H.R. 6003, 110th Cong. (2008).

Transportation Board to conduct nonbinding mediation between the parties if after a "reasonable period of negotiation, a public transportation authority cannot reach agreement with a rail carrier" for shared usage of track.[144] The Board is to model the mediation from its current process it uses to settle rate cases.[145] It is unclear whether this provision will assist commuter railroads because the provision calls for nonbinding mediation. This process still does not provide commuter railroads with the same leverage they would enjoy if they could utilize the power of eminent domain or if Congress would have simply made the arbitration binding.

Congress is poised to address commuter railroad's lack of bargaining further by creating model indemnity language. In the appropriations legislation for the Department of Transportation is language in the accompanying report that authorizes the Surface Transportation Board to identify indemnification language that may be used as a model for shared use agreements.[146]

> [T]he Committee directs the STB to review the issues surrounding the inclusion of indemnification in agreements between entities responsible for passenger rail service and rail carriers. This review should address historic precedent, current practice, and should identify draft contractual language that, in the opinion of the STB, would reasonably address rail carriers' concerns over liability resulting from passenger rail operations while balancing the needs of public transportation authorities, as well as Amtrak, and other entities providing or operating passenger rail service to develop improved and expanded passenger rail service, and while providing appropriate incentives to assure safe operation of passenger trains.[147]

Assuming the appropriations bill passes with the above language, railroads will have boilerplate language to guide their negotiations. Model contract language may in fact prove helpful in these shared use negotiations. The model language could identify what the industry considers a reasonable indemnity provision. A party that is deviating from the reasonable provision could then be coaxed into a reasonable indemnity agreement through the mediation process. However, if Congress were interested in leveling the playing field between the parties, at minimum it would create a binding arbitration process to accompany the model contract language.

IX. Conclusion

As ridership increases and more and more cities add rail to their

144. 49 U.S.C.A. § 28502 (West 2008).

145. *Id.*; 49 C.F.R. § 1109.4 (2009) (governing the mediation process for rate cases).

146. H.R. Rep. No. 111-218, at 138 (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=F:hr218.111.pdf.

147. *Id.*

transportation portfolio, a shift in political attitudes toward passenger rail on a national level also will increase the need for shared rights-of-way and will further shine a spotlight on indemnification agreements. The stimulus package President Obama signed into law in reaction to the 2009 recession provides "$17.7 billion for mass transit, Amtrak, and high-speed rail."[148] And this appears to be only the beginning of the Administration's investment in rail. According to Transportation Secretary Ray LaHood, "President Obama wants to make high-speed rail a signature achievement of his presidency."[149]

Indemnity agreements for shared rights-of-way are in fact a solution to a problem. But, the solution itself creates controversy because it requires other policy goals to be compromised. States such as Colorado, Minnesota, and Virginia have made a decision that access to right-of-way trumps the cost of indemnity insurance and allowing reckless behavior to go unpunished. Not all legislatures will agree and this constraint threatens to hinder passenger rail expansion. But, as passenger rail service grows and until policy makers decide that it is worth additional investment, indemnity agreements will be the crutch on which transit agencies rely.

148. Editorial, *An $80 Billion Start*, N.Y. TIMES, Feb. 18, 2009, at A26, *available at* 2009 WLNR 3129883.

149. Garance Franke-Ruta, *High Speed Rail to the White House*, WASH. POST, Feb. 19, 2009, at A13, *available at* 2009 WLNR 3229486.