#36.32 1/8/73

Memorandum 73-13

Subject: Study 36.32 - Condemnation (Indemnification Requirement in Joint Use Cases)

Introduction

When an existing public user of property is subjected to a compatible use, the problem arises as to the manner in which any loss or damage arising out of the compatible use, is to be borne by or shared between the parties, whether that loss or damage is caused by one party or by their joint conduct. How can the original user be adequately protected against the intrusion of the compatible use? Should the parties be governed only by the existing law including the rules on express and implied indemnity and on contribution between joint tortfeasors? Do these rules deal fairly with the case of joint negligence or should a special rule be included in the compatible use provisions?

The discussion of these problems in this memorandum is outlined below.

Existing Law

A. Generally

B. Express Indemnity
   1. Statutory limitations on express liability
   2. Power to agree on indemnity
   3. Insurance against indemnity liability

C. Express Apportionment of Libility

D. Implied Indemnity
   1. Law of implied indemnity
   2. "Special relationship" requirement

E. Contribution Between Joint Tortfeasors

F. Summary

Proposals

The suggestions and proposals contained in the discussion are implemented in the draft statute attached as Exhibit I.

Existing Law

1. Generally

The alternatives open to the original user under existing law are either to:

a. negotiate an express indemnity or apportionment of liability agreement with the compatible user to cover loss or damage arising from separate or joint negligence or even from faultless behavior,

b. rely on the common law principles of restitution for loss or damage caused by the compatible user and rely on the common law rules of implied indemnity where the original user incurs a liability to a third party which is attributable to the omission of the compatible user, or,

c. rely on the right of contribution between joint tortfeasors where both have been negligent if, in the circumstances of the case and under the provisions of Section 875 of the Code of Civil Procedure, the original user is entitled to claim contribution.

Generally speaking, the right of contribution serves to split the damages evenly among the joint tortfeasors, while the right of implied indemnity shifts the whole burden of liability to one of the tortfeasors. This common law distribution of liability can be altered, or liability can be shifted, by express agreements of indemnity or of apportionment of risks.

A more detailed analysis of this existing law follows. (The sources of the discussion on indemnity are: Conley and Sayre, Indemnity Revisited: Insurance of the Shifting Risk, 22 Hastings L.J. 1201 (1971); Molinari, Tort Indemnity in California, and 8 Santa Clara Lawyer 159 (1968).)

2. Express Indemnity

Though fairly strictly construed, express indemnity agreements are enforceable. Problems arise where the indemnitee is seeking to indemnify itself against its own negligence or willful misconduct, whether that negligence be the sole cause of any damage or whether it be a contributing cause. In the context of a joint use, the original user may be particularly anxious to be indemnified against damage caused by its own negligent acts, which would not have been caused but for the presence of the compatible use and/or the contributing negligence of the compatible user.

Statutory limitations on indemnity. In several areas the California Legislature, presumably at the instance of special interests, has by statute limited rights to indemnity. Thus, Civil Code Section 2782, enacted in 1967, provides as follows:

> All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for damages for (a) death or bodily injury to persons, (b) injury to property, (c) design defects or (d) any other loss, damage or expense arising under either (a), (b), or (c) from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to such promisee, are against public policy and are void and unenforceable; provided, however, that this provision shall not affect the validity of any insurance contract, workmen's compensation or agreement issued by an admitted insurer as defined by the Insurance Code.

The language of the statute seems to limit the scope of its application to situations where the cause of the accident is sole negligence of the indemnitee. It is probable that the risk of loss may still be shifted from indemnitee to indemnitor by contract even when both were negligent. Nor does this code section appear to prohibit a redistribution of a loss by means of insurance, secured and paid for by the potential indemnitor, which would serve to protect the indemnitee, although he may be negligent.

Thus, under Section 2782, in a joint use situation involving a construction project, any express indemnity agreement would have to be restricted to liability arising from joint negligence of the public entities.

Where these statutory provisions do not apply, the governing rules are found in the cases.

The cases demonstrate that the courts have employed a number of differing approaches in resolving the question of contractual indemnity where the party seeking indemnity has himself been negligent. In some cases, the court has considered the contractual language only, denying indemnity unless the language clearly and explicitly requires that it be granted. Other decisions have turned on the relative participation of the indemnitor and the indemnitee in the circumstances leading up to the loss; disposition of these cases has been based on concepts of "active and passive" negligence.

Power to Agree on Indemnity. Presumably, public entities, both state and local, have the power to enter into indemnity agreements under their general powers. (See as to counties, Government Code Section 25207, and as to districts, Government Code Sections 61616 and 61622.) In some cases, specific authorization has been given for entities to enter into indemnity undertakings. (In the Water Code, Section 11578, and the Public Utilities Code, Section 5012.1, the relevant departments are empowered to enter into indemnity undertakings when they occupy land in the course of their projects. In the Government Code, Section 895.6, public entities which are parties to "joint agreements," are empowered to provide for contribution and indemnification between themselves in respect of liability arising out of the performance of the agreement. See also Public Resources Code § 5012.1.)

The existence of these specific provisions raises the question of whether the power to enter into express indemnity agreements is not included in the general powers of public entities. It is suggested that, in an appropriate case, it is unlikely that any such agreement would be held to be outside the power of a

public entity but, nevertheless, for the sake of clarity it seems preferable specifically to include such a power in the compatible use provisions.

Insurance against indemnity liability. It is appropriate to raise the question of a public entity insuring against any liability incurred under an express indemnity agreement because, in at least one case, the Legislature has deemed it appropriate to empower a public entity to arrange such insurance. (See Public Resources Code Section 5012.1.) In addition, it is suggested that insurance would be appropriate in an indemnity arrangement between compatible users.

Both state and local agencies are empowered generally to: "Insure . . . against all or any part of any tort or inverse condemnation liability for any injury." (Government Code Section 11007.6 and Section 990 respectively.) It is suggested that this would not entitle a public entity to insure against liability arising out of a contract of indemnity in which case specific provision should be made to allow for this if it is agreed that insurance is appropriate in a compatible use indemnity situation.

3. Express Apportionment of Liability

Because indemnity is a complete shifting of all liability, it may be quite inappropriate in certain cases, especially in complex joint use situations where there may be no clear distinction between causes of any particular damage. Accordingly, just as private parties enter into agreements whereby liability for loss or damage arising out of the separate or joint negligence is specifically apportioned, (see, e.g., the Railway Terminal Agreement, Exhibit II), it may be appropriate for public entities to negotiate similar agreements in compatible use situations, to split the responsibility for any liability in proportions that reflect the nature of the joint use. Furthermore, the circumstances of a particular joint use

may make it inappropriate to rely upon the pro rata division of liability under the rules on contribution. The parties may prefer different proportions.

The Civil Code restrictions in Section 2782 do not apply to such agreements though this assertion is rendered somewhat tentative by the express allowance of allocation of liability for design defects in Section 2782.5. If this express provision is necessary, query whether in all other cases, apportionment is prohibited under Section 2782. However, it is suggested that this is not a strong argument and that Section 2782.5 is rather a clarifying section.

The question of the power to enter into an apportionment of liability agreement arises again here and, while presumably this power exists in public entities, it seems preferable to clarify the point. In the "joint agreements" provisions (Government Code Section 895.4) referred to above, specific authority is given to agree as to contribution. It seems appropriate to be specific in this area, in case of doubt, though what is recommended here is allocation according to agreed proportions rather than contribution on a pro rata basis.

4. Implied Indemnity

Active-passive distinction. The right to implied indemnity rests not upon any agreement between the parties, but on the general principle that one should not be held responsible for the obligation of another. This principle conflicts with the rationale of the common-law rule against contribution among joint tortfeasors, which rationale is that negligence is equated with fault and that one who is at fault may not be heard to complain that part of the burden he bears may belong to a fellow tortfeasor. The clash of these principles has resulted in an extension of the area wherein the right to indemnity will be implied and a consequent erosion of the legal territory over which the rule of noncontribution formerly held sway.

In a landmark case, Herrero v. Atkinson, 227 Cal. App.2d 69, 74, 38 Cal. Rptr. 490, ___ (1966), the court commented at length about the difficulty of determining when the right to indemnity should be implied:

> A right to implied indemnity among tortfeasors may arise out of some contractual relationship between the parties, or from equitable considerations. . . .
>
> [N]umerous theories have been advanced to support the allowance of indemnity in particular cases, among them distinctions between primary and secondary liability, constructive liability, derivative liability, a difference in the respective duties owed by the tortfeasors, active and passive negligence, and even the doctrine of last clear chance. . . . No one explanation appears to cover all cases. . . .
>
> The duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case.

This candid admission that factual considerations and not legal principles are dispositive of individual cases goes against the grain of the judicial mind, and the decisions in this area reflect a valiant attempt to rationalize the results reached in terms of the legal principles. The courts, in attempting to delineate the areas of implied indemnity, often have expressed themselves negatively: They have held that, for certain types of conduct, indemnity should not be allowed.

Thus, when two motor vehicles collide, injuring a third person, neither operator will be permitted to recover indemnity from the other on the theory that the other's negligence was greater in degree or different in kind. Likewise, the courts have said that, where one "participates" in causing the injury to the third party, he is precluded from indemnity. The difficulty, of course, is in defining the meaning of "participation." According to the well-

considered opinion in Cahill Bros., Inc. v. Clementina Co., "participation" means something beyond the "mere" violation of a duty imposed by law. The court stated:

> The crux of the inquiry is [whether] participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury [went] beyond the mere failure to perform the duty imposed upon him by law. [Citations omitted.] The thrust of these cases is that if the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity. In other words, the person seeking indemnity cannot recover if his negligence is active or affirmative as distinguished from negligence which is passive. [208 Cal. App.2d 367, 381 (1962).]

In the context of joint use situations, the active/passive dichotomy would presumably entitle the original user to implied indemnity where it failed to inspect equipment installed and maintained by the compatible user on property owned by the original user (e.g., power lines installed on highway property). Thus it is suggested that the active/passive dichotomy is a realistic concept as applied to joint use situations.

Special Relationship. One of the assumptions of the earlier California cases was that the right to indemnity would not be implied if the parties were not in a special relationship, e.g., master-servant, contractor-subcontractor. Herrero v. Atkinson, supra, is authority for the proposition that a special relationship is not always necessary to sustain a recovery of indemnity. Likewise, it was stated in Lewis Avenue Parent Teachers Association v. Hussey, a pleading case involving the sufficiency of an indemnity cross-complaint, that:

> failure to allege the existence of an agreement of indemnity of a special relationship is not fatal to the cross-complaint if another basis of relief is shown. [250 Cal. App.2d 232, 236, 58 Cal. Rptr. 499, 501-502 (1967).]

In City of Sausalito v. Ryan, 65 Cal. Rptr. 391 (1968), the court of appeal squarely held that a claim of indemnity will lie even in the absence of a special relationship. The City of Sausalito case is no authority as precedent, for the Supreme Court later granted a hearing, thus vacating the decision of the lower court. While the case was pending before the Supreme Court, the appeal was dismissed when the parties agreed upon a settlement. Although the appellate decision has no legal force, the case is of considerable interest because it probably represents the next step in the gradual expansion of the application of the indemnity concept in California.

In City of Sausalito, Gray was an occupant of Ryan's vehicle which collided with a car driven by Kelley on Bridgeway Boulevard in Sausalito. The Ryan vehicle went over the unrailed sidewalk into San Francisco Bay, drowning Gray. Gray's heirs sued Ryan, alleging that he was intoxicated at the time of the accident, and Kelley, claiming that he negligently operated his automobile. Also joined was the City of Sausalito, on the ground that it had violated Government Code Section 835 in maintaining the street without a guardrail. The city cross-complained for indemnity against the two drivers, alleging that its negligence, if any, was passive and secondary. Demurrers to the cross-complaints were sustained without leave to amend. In reversing, the court of appeal stated:

> Ryan and Kelley's chief contention is that in the absence of a special relationship between them and the City, there is no basis for the application of the independent doctrine of equitable indemnity. Although this was the law at the time the first implied indemnity case was decided in California [Citation omitted.], it is clear that the right can now be invoked even in the absence of any special relationship between the tortfeasors.

Having thus concluded that the action could be maintained in the absence of a special relationship, the court of appeal was faced with the necessity of finding a new basis for the application of indemnity. The court's rationale

was that because the respective liabilities of the parties rested upon different legal bases--negligence of the drivers and statutory liability of the city--the claimant could properly recover indemnity. The court stated:

> Likewise, here, the alleged liabilities to the plaintiff of Ryan and Kelley on one hand and the City, with its statutory obligations on the other, are based on breaches of different qualities of duties toward Gray. They can be considered to be on different planes of fault and this difference, if established at the trial, would warrant a complete shifting of the loss from one to the other. If the facts prove to be as here alleged, it would seem equitable and just that implied indemnity be allowed to the city against Ryan and Kelley. We conclude that the City's first amended cross-complaint stated a cause of action in implied indemnity and that the trial court erred in sustaining the demurrers of Ryan and Kelley without leave to amend.

As authority for this "plane of fault" theory, the court cited the Ninth Circuit decision of United Airlines, Inc. v. Wiener, 33 F.2d 379 (9th Cir. 1964).

It remains to be seen whether some other California appellate court will apply the reasoning of the City of Sausalito decision to a similar situation in which the defendants owe different legal duties to the plaintiff, thus occupying different "planes of fault," or where the degree of culpability of two defendants is so "disparate" as to warrant shifting the entire loss to the guiltier defendant. In any event, it does seem clear that the California courts will no longer impose the requirement of "special relationship" as a prerequisite to indemnity.

Even if a special relationship were still required, it is suggested that the relationship between a compatible user and an original user would be sufficiently special to satisfy any such requirement.

5. Contribution Between Joint Tortfeasors

Failing an express agreement and failing a right to implied indemnity, an original user may be entitled to contribution from the compatible user in the event of loss or damage caused by joint negligence provided that the

restrictive provisions of Code of Civil Procedure Section 875 et seq. are satisfied. Under these provisions, the right to a pro rata equal contribution can only arise when judgment is obtained against tortfeasors jointly. This means that, if an injured party proceeds only against the original user, no contribution can be had. Further, any contribution is on an equal share basis (Section 876) which is prejudicial to a joint tortfeasor whose conduct has only minimally (but actively) contributed to the damage.

6. Summary

It is clear that, under the present law, in the absence of an express apportionment of liability, there is no certainty that liability for joint negligence will be appropriately shared between the tortfeasors. Indemnity is a complete shifting of liability. Contribution, if it is available, is on an equal pro rata basis.

It is suggested that, in the context of compatible use situations, it would be preferable to have some mechanism for liability sharing in the absence of express agreement between the parties.

Proposals

The preceding discussion suggests that there is a need for a section in the compatible use provisions dealing with indemnity and apportionment of liability.

It seems far preferable for the parties to agree on indemnity or apportionment because, in complex situations, they will be best able to evaluate the comparative risks. The power to enter into such an agreement should be clarified. Any agreement could then be incorporated in the terms and conditions fixed by the court.

Failing agreement, the parties could be left to their rights under existing law, but it seems preferable to attempt to make some provision to cover the situation. Two alternatives suggest themselves:

1. A provision could be included stating the liability of each party for damage separately or jointly caused. This provision could reflect the policies apparent in the existing law or could state a compromise position. But a single test may not be workable or appropriate in all situations.

2. Alternatively, the court could be empowered to fix a condition which is reasonable in the circumstances of the case. This approach seems preferable because it is more flexible. The court could be given guidelines in fixing such a condition which reflects the policy of the existing law. If this policy does not seem appropriate for joint use situations, the guidelines could reflect a compromise policy.

The main policy that emerges from the existing law of indemnity (both express and implied) is that there is a tendency to discourage indemnity against an indemnitee's negligence: First, Section 2782 of the Civil Code prohibits agreements to this effect in construction contracts; second, courts

construe strictly any express indemnity clause where an indemnitee is seeking to recover for his own negligence; and, third, implied indemnity is denied an "actively negligent" tortfeasor.

It is suggested that this antipathy towards indemnity against one's own negligence arises from the fact that indemnity involves a complete shifting of liability and that it is improper to absolve completely a tortfeasor who is blameworthy in some real sense. Accordingly, a rule allowing apportionment of liability seems to be more fair in joint negligence cases.

On the other hand, the main policy emerging from the law of contribution is that contribution is to be available in limited circumstances only, though the commentators point out that the law of implied indemnity has developed partly in response to the unfairness and inadequacy of this policy, and it is for this reason that it is suggested that there should be scope for apportionment of liability.

Therefore, the court should be free to provide for whatever indemnity or apportionment is reasonable. So the court would be free to provide: (1) that the compatible user indemnify the original user for all loss, damage, or liability that the original user would not have incurred but for the compatible use including damage caused by the latter's negligence; (2) that the indemnity cover all loss, damage, or liability except that caused by the sole negligence or willful misconduct of the original user; or (3) that the indemnity be limited to loss, damage, or liability attributable solely to the negligence or willful misconduct of the compatible user and that damage jointly caused be apportioned.

The next problem is whether the guidelines on jointly caused liability should reflect the active/passive dichotomy of the law of implied indemnity

or whether that dichotomy is too unsatisfactory to be used here. As mentioned above, it does seem to have a real application in the area of joint use because public entities are subject to various statutory duties that would probably qualify as "passive" duties in the sense in which the cases use that term. Thus, it is suggested that the concept of active and passive negligence is appropriate in this context.

If apportionment can be ordered, the next problem is whether the court should once and for all fix the relative shares of any jointly-caused liability having regard to the comparative risks involved in the joint use or whether the relative shares should be determined subsequently according to the extent to which each party actually contributed to any particular liability. To adopt the first course would reduce the likelihood of subsequent litigation, but this first course will not be easy for the court and may tend to result in arbitrary apportionment. Nevertheless, it may inject certainty into the relationship between the parties and, as it is envisaged that each party will be able to insure against any liability undertaken in the joint use, the first course of action may be preferable.

The better course seems to be to leave the court free to adopt either course. The attached draft seeks to leave the solution open.

The foregoing suggestions are consolidated in the draft statute attached as Exhibit I.

Respectfully submitted,

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EXHIBIT I

§ 1240.540. Indemnity and apportionment of liability

1240.540. (a) Where property is taken under Section 1240.510, the court shall include as a condition upon which the property is taken a provision fixed by agreement of the parties indemnifying the defendant or apportioning between the parties any liability, loss, damage, or injury arising out of or attributable wholly or in part to the use of the property by the plaintiff. If the parties are unable to agree, the court shall fix a provision that is reasonable under the circumstances of the project and that takes into consideration the principle that the plaintiff shall bear any liability, loss, damage, or injury that would not have occurred but for the plaintiff's use of the property, unless the active participation of the defendant is a cause thereof, in which case there shall be a reasonable apportionment of the liability, loss, damage, or injury between the parties.

(b) A public entity may insure itself against any liability incurred by it under this section.

Comment. Section 1240.540 provides a means whereby the original public user of property may protect itself against liability caused by the imposition of a compatible use under Section 1240.510. Prior to the court's approval of the compatible use, a provision is to be fixed either by the parties or by the court specifying how any liability arising out of the compatible use is to be borne. The provision may shift all liability to the plaintiff by way of indemnity (see generally on indemnity, both express

and implied, Conley & Sayre, Indemnity Revisited: Insurance of the Shifting Risk, 22 Hastings L.J. 1201 (1971); Molinari, Tort Indemnity in California, 8 Santa Clara Lawyer 159 (1968)). But a complete shift of liability may be inappropriate under the circumstances of a particular project. Accordingly, Section 1240.540 provides that the provision may apportion liability between the parties. The section authorizes apportionment rather than contribution so that the parties are not restricted to an equal sharing of liability. See Code Civ. Proc. § 876. Where apportionment is chosen, Section 1240.540 leaves it open as to whether the relative shares of the parties are to be determined subsequently at the time of a particular injury or whether the provision is to state predetermined relative shares for all future liability.

Where the court fixes the provision, it must act reasonably and must have regard to the general policy of the law, disfavoring indemnity against a person's own negligence. See, e.g., Vinnell Co. v. Pacific Electric Ry., 52 Cal.2d 411, 340 P.2d 604 (1959)(express indemnity agreement strictly construed); Cahill Bros., Inc. v. Clementina Co., 208 Cal. App.2d 367, 25 Cal. Rptr. 301 (1962)(no implied indemnity for active negligence); Civil Code § 2782 (prohibiting certain express indemnity agreements). However, in an appropriate case, the court can provide that the defendant is to be indemnified even against its sole negligence where the liability would not have been incurred but for the compatible use.

As used in subdivision (a), the phrase "liability, loss, damage, or injury" is intended to cover all types of injuries to both parties and third persons, whether property damage or personal injury is involved.

Subdivision (b) makes clear that public entities have authority to obtain insurance against their potential liability under Section 1240.540. Cf. Govt. Code §§ 990 and 11007.4 (authorizing insurance against tort and inverse condemnation liability).

§ 1240.631. Indemnity and apportionment of liability

1240.631. (a) Where the court determines the defendant is entitled to continue the public use to which the property is appropriated under Section 1240.630, the court shall include as a condition upon which the defendant may continue the public use a provision fixed by agreement of the parties indemnifying the plaintiff or apportioning between the parties any liability, loss, damage, or injury arising out of or attributable wholly or in part to the use of the property by the defendant. If the parties are unable to agree, the court shall fix a provision that is reasonable in the circumstances of the project and that takes into consideration the principle that the defendant shall bear any liability, loss, damage, or injury that would not have occurred but for the defendant's use of the property, unless the active participation of the plaintiff is a cause thereof, in which case there shall be a reasonable apportionment of the liability, loss, damage, or injury between the parties.

(b) A public entity may insure itself against any liability incurred by it under this section.

Comment. Section 1240.631 provides a means whereby the more necessary public user may protect itself from liability caused by the continuance of the public use to which the property is appropriated under Section 1240.630. Section 1240.631 is similar to the provision for indemnity or apportionment of liability in cases of acquisition of property for compatible use. See Section 1240.540 and Comment thereto.

EXHIBIT II

RAILWAY TERMINAL AGREEMENT

LIABILITY.

Section 33. (1) The term "Loss or Damage" as used in this Section relates to loss or damage arising at or adjacent to the Terminal and on the Continuity Track, and embraces all losses and damages growing out of the death of or injury to persons and all losses and damages growing out of the loss of or damage to property, including property belonging to any of the Proprietary Companies, and also embraces all costs and expenses incident to any such losses or damages.

Wherever used in this Section the term "employe" includes officers.

The term "joint employes" as used in this Section includes all employes of the Terminal Agency except during such time as they may be performing any service for or on behalf of or in respect to the use of the Terminal solely for any one or any two of the Proprietary Companies, it being agreed that when so employed any such employe shall be deemed for the time being the sole employe of the Proprietary Company or Companies for whom or on whose behalf or in respect to whose use of the Terminal such service is being performed; and said term shall also include employes of any of the Proprietary Companies while they are performing any work for the Terminal Agency.

Loss or Damage due

(a) To the negligence or wrongful act or omission of the sole employe or employes of one of the Proprietary Companies, or

(b) To the concurring negligence or wrongful act or omission of a joint employe and of the sole employe or employes of one of the Proprietary Companies, or

(c) To the failure or defect of the exclusive property of one of the Proprietary Companies, except work equipment and switch engines mentioned in subdivision (h) of this section,

shall be borne by the Proprietary Company whose sole employe or employes or whose exclusive property so caused or contributed to such loss or damage.

Loss or Damage due

(d) To the concurring negligence or wrongful act or omission of the sole employe or employes of two or more of the Proprietary Companies, or

(e) To the concurring negligence or wrongful act or omission of a joint employe or employes and of the sole employe or employes of two or more of the Proprietary Companies, or

(f) To the concurring failure or defect of the exclusive property of two or more of the Proprietary Companies, except work equipment and switch engines mentioned in subdivision (h) of this section,

shall be borne equally by the Proprietary Companies concerned except that each such Proprietary Company shall bear all such Loss or Damage to its own exclusive property or to property in its custody or on its cars and as to its sole employes, passengers or persons upon its locomotives, cars or trains.

Loss or Damage due

(g) To the negligence or wrongful act or omission of a joint employe or employes, or

(h) To the failure or defect of any part of the Terminal or of the work equipment or switch engines of any of the Proprietary Companies engaged in Terminal work or operations, or

(i) To unknown causes, or

(j) To the acts of third persons not in the employ or under the control of the Terminal Agency or any of the Proprietary Companies,

shall be borne by each Proprietary Company as to its own exclusive property or property in its custody or upon its cars and as to its sole employes, passengers or persons upon its locomotives, cars or trains, but all cost and expense incident to Loss or Damage so caused and sustained by other persons and property and by joint employes, and all Loss or Damage to Terminal property and to the work equipment or switch engines of any of the Proprietary Companies engaged in Terminal work or operations, shall be included in Operating Expenses for the month in which such cost or expense is paid by the Terminal Agency and shall be paid by the Proprietary Companies as provided in Section 24, except that in cases of accidents in which the locomotives, cars, trains or sole employes of one or more of the Proprietary Companies are concerned, then, unless otherwise specifically provided for in

the foregoing portion of this Section 33, the liability for any resulting Loss or Damage shall, as to such other persons, joint employes, the Terminal and as to the work equipment and switch engines of any Proprietary Company engaged in Terminal work or operations, be borne solely by the Proprietary Company, if only one, or jointly and equally by the Proprietary Companies, if more than one, whose locomotives, cars, trains or sole employes are concerned.

In the event arrangements are made for the use of the exclusive tracks of the Proprietary Companies in the vicinity of Alhambra Avenue and the Los Angeles River by switch engines in the service of the Terminal in turning the equipment of the Proprietary Companies, it is agreed that all Loss or Damage resulting from such use shall in the first instance be borne wholly by the Terminal Agency, regardless of cause, and that it shall thereupon be assumed by the Proprietary Companies under the foregoing paragraphs (a) to (j) inclusive, the same as though the service had been performed within the Terminal Area.

(2) Each of the Proprietary Companies will assume and bear all losses resulting to it from the defalcations or thefts of any joint employe or employes. If in case of any such defalcation or theft the ownership of any moneys or property lost or stolen cannot be determined, the loss shall be borne by the Proprietary Companies in proportion to the average amount of monthly cash receipts handled for their respective accounts by the joint employe or employes involved during the six (6) months preceding said defalcation or theft, or during the period of operation if the defalcation or theft occurs within six (6) months after the date the operation of the Terminal shall commence, but if such average amount of monthly cash receipts is not ascertainable, then such loss shall be borne on a Use Percentage basis for the month in which the defalcation shall occur.

In the collection or receipt of money by employes of the Terminal Agency for and on behalf of any Proprietary Company, such employe while so acting shall be considered the sole agent and employe of such Proprietary Company and shall report and remit direct to such Proprietary Company; and the other Proprietary Companies shall not be liable for the acts, neglects or defaults of any such employe while so acting.

(3) For the purposes of this Section, passengers and other Passenger Train Traffic shall be deemed in the custody of the Proprietary Company over whose line of railroad the same

are to be or have been transported, except that in the event of an interline movement on through tickets or billing, custody shall pass to the receiving Proprietary Company when a passenger shall have safely alighted on the platform of the Terminal, or, in the case of other Passenger Train Traffic delivered to Terminal Agency employes, when the same shall have been safely unloaded. In case a car is interchanged from one Proprietary Company to another at the Terminal, custody thereof shall be deemed to have passed to the receiving Proprietary Company when the car has come to rest on a Terminal track and the delivering Proprietary Company's engine has been uncoupled or when a switch engine couples onto the train for the purpose of switching out said car, if the latter event occurs before the delivering Proprietary Company's engine has been uncoupled.

(4) Anything hereinabove to the contrary notwithstanding, no Proprietary Company shall have any claim against either of the other Proprietary Companies or the Terminal Agency for Loss or Damage of any kind caused by or resulting from interruption or delay to its business.

(5) Each Proprietary Company may make settlement of all claims for Loss or Damage for which it and any other Proprietary Company or Companies shall be jointly liable hereunder but no payment in excess of Five Hundred Dollars ($500) except in emergency cases for the settlement of personal injury claims and then not exceeding Two Thousand Five Hundred Dollars ($2,500) shall be voluntarily made by any Proprietary Company in settlement of any such claim without first having obtained in writing the consent of the other interested Proprietary Company or Companies, and in making voluntary settlements as aforesaid the Company making the same shall in all cases procure from each claimant and deliver to the other interested Proprietary Company or Companies a written release from liability in the premises.

(6) The Proprietary Companies agree that whenever any Loss or Damage shall occur which any of them shall be required hereunder to bear, either in whole or in part, the Proprietary Company or Companies so liable shall, to the extent and in the proportion it or they may be required to bear any such Loss or Damage, (a) indemnify and save harmless the other Proprietary Company or Companies from and against any suits, proceedings, causes of actions, claims, demands, attorneys' fees, costs, and other expenses arising

from or growing out of any such Loss or Damage, and (b) upon demand reimburse the other Proprietary Company or Companies for any such Loss or Damage borne by it or them in the first instance; and the Proprietary Company or Companies so liable shall assume and conduct the defense of any and all suits or proceedings brought against the other Proprietary Company or Companies on account of any such Loss or Damage and pay any final judgments recovered therein; provided, however, that the Proprietary Company or Companies against which any such suit or proceeding is brought shall give reasonable notice of the institution thereof to the Proprietary Company or Companies required hereunder to bear in whole or in part the Loss or Damage on account of which any such suit or proceeding is brought.

(7) Each Proprietary Company undertakes and agrees with respect to its use of the Terminal and the operation of equipment and appliances thereon and thereover, to comply with all laws, and rules and regulations of any governmental agency having jurisdiction thereover, for the protection of employes or other persons or parties, and if any failure on its part so to comply therewith shall result in any fine, penalty, cost or charge being assessed, imposed or charged against the Terminal Agency or any other Proprietary Company or Companies, promptly to reimburse and indemnify the Terminal Agency and such other Proprietary Company or Companies for or on account of such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in defending any action which may be brought on account thereof, and further agrees in the event of any such action, upon notice thereof being given by the Terminal Agency or such other Proprietary Company or Companies, to defend such action, free of cost, charge and expense to the Terminal Agency or such other Proprietary Company or Companies.

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Sacramento, California
January 17, 1973

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Claim and Delivery - #967

Dear Mr. DeMoully:

We have prepared the enclosed draft of a bill relating to claim and delivery for introduction pursuant to your request.

The proposal, among other things, authorizes an ex parte writ of possession for property feloniously taken and for credit cards. In this connection, while we have not had an opportunity to consider the matter fully, we think this might raise issues of procedural due process in that the defendant may be deprived of his property without prior notice and hearing (see Sniadach v. Family Finance Corp. (1969), 23 L. ed. 2d 349).

Very truly yours,

George H. Murphy
Legislative Counsel

By Mirko A. Milicevich
Deputy Legislative Counsel

MAM:vw