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Union Held Liable in Contribution to Employer for Title VII Violations: *Glus v. G.C. Murphy Co.*

The issue of contribution between joint tortfeasors has perplexed the federal judiciary for years.¹ A number of federal courts have allowed a right of contribution in federal law claims,² but others have held that "no federal common law right of contribution exists."³ Recently the controversy caused a split in the circuit courts over contribution in antitrust suits.⁴ In title VII actions, several federal courts have held employers and unions jointly liable for back pay and attorneys' fees,⁵ but prior to *Glus v. G.C. Murphy Co.*⁶ only one court had ruled directly on contribution.⁷ The Third Circuit's holding in *Glus* that a federal

1. The federal common law rule denying contribution was first established by the Supreme Court in *Union Stock Yards Co. v. Chicago, B. & Q.R.R.*, 196 U.S. 217 (1905). In an admiralty case almost fifty years later, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), the Court again denied a contribution claim stating that "[i]n the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors." *Id.* at 285. For many years federal courts relied on this language to deny claims for contribution brought under federal law. *See, e.g.*, *Goldlawr, Inc. v. Shubert*, 276 F.2d 614, 616-17 & n.3 (3d Cir. 1960) (antitrust law). Not until the Supreme Court's dictum in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), over twenty years after *Halcyon*, did the apparent federal common law ban on contribution begin to weaken. In *Cooper Stevedoring*, the Court stated that "*Halcyon* stands for a more limited rule than the absolute bar against contribution . . .," explaining that under the facts of *Halcyon* contribution was inconsistent with the Harbor Workers Act. *Id.* at 111.

2. *E.g.*, *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (antitrust law); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (aviation law).

3. *DiBenedetto v. United States*, 35 Am. Fed. Tax Rep. 2d 75-1502, 75-1504 (D.R.I. 1974). *See also Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1343 (S.D.N.Y. 1969).

4. *Compare Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (allowed contribution), *with Olson Farms, Inc. v. Safeway Stores, Inc.*, [1979-2] Trade Cas. 79,699 (10th Cir. 1979) (denied contribution) *and Wilson P. Abraham Constr. Corp. v. Texas Indus. Inc.*, 604 F.2d 897 (5th Cir. 1979) (denied contribution).

5. *E.g.*, *Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). *See also Note, Union Liability Under Title VII for Employer Discrimination*, 68 GEO. L.J. 959 (1980).

6. 629 F.2d 248 (1980).

7. *Northwest Airlines, Inc. v. Transport Workers Union*, 14 Empl. Prac. Dec. 5591

common law right of contribution exists under title VII, is one of the most significant developments in the area to date.

In 1971 a class action was brought on behalf of all women employed by the G.C. Murphy Company (Murphy) from July 1965 to January 1971.⁸ Named as defendants were Murphy, the International Union of Wholesale and Department Store Union, the AFL-CIO (the International) and two local unions.⁹ The plaintiffs alleged, *inter alia*, that Murphy and the unions had violated title VII of the Civil Rights Act of 1964¹⁰ and the Equal Pay Act of 1963¹¹ by entering into and maintaining a discriminatory collective bargaining agreement.¹² Murphy filed a cross claim against the unions asserting that they were solely responsible for the alleged sex discrimination and claiming a right to contribution if it were found liable. Before trial Murphy settled with the plaintiff class for a sum of \$648,000.¹³ Murphy continued to press for contribution from the unions and settled with one local for \$4,146.¹⁴ Trial proceeded on Murphy's claim against the other two unions.

At trial, the district court concluded that Murphy and the defendant unions had violated title VII.¹⁵ The court held that they were equally liable for the discrimination and thus equally

(D.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 902 (1980). The district court granted contribution as a matter of policy, citing deterrence and equitable considerations as reasons for doing so. 14 Empl. Prac. Dec. at 5596. The court did refer to cases where other federal courts had confronted the issue of contribution. However, these cases ruled on contribution on procedural grounds only. *Id.* at 5595. See *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976); *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973); *Gilbert v. General Elec. Co.*, 59 F.R.D. 267 (E.D. Va. 1973), *aff'd* 519 F.2d 661 (1975), *rev'd on other grounds*, 429 U.S. 125 (1976), *rehearing denied*, 429 U.S. 1079 (1977); *Osborne v. McCall Printing Co.*, 4 Fair Empl. Prac. Cas. 276 (S.D. Ohio 1972); *Blanton v. Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162 (N.D. Ga. 1970). These cases only confront the issue of whether contribution can be brought as a cross claim under Federal Rules of Civil Procedure 13 and 14 since the contribution issue was dependent upon an adjudication of a third party's liability.

8. 629 F.2d at 250.

9. The two local unions were the Retail Wholesale and Department Store Union, Local 940, and the Teamster's Local 249. *Id.*

10. 42 U.S.C. § 2000e (1976).

11. 29 U.S.C. § 206 (1976).

12. The collective bargaining agreement provided for separate job classifications, pay scales, and seniority systems for Murphy's male and female employees. 629 F.2d at 250.

13. The settlement provided for payment of \$548,000 in damages and \$100,000 in attorneys' fees; \$100,000 of the \$548,000 was allocated to the Equal Pay Act charge. *Id.*

14. This figure represented the total amount in Local 940's treasury. *Id.*

15. *Glus v. G.C. Murphy Co.*, Civ. No. 71-264 (W.D. Pa. Apr. 29, 1976).

responsible for the plaintiffs' financial losses.¹⁶ The district court divided the damages among the defendants and entered judgment against the International setting its share of the damages at \$242,337.¹⁷

The International appealed from that judgment, asserting that the district court did not have jurisdiction over it under title VII because the International had not been named in the complaint filed by the plaintiffs with the Equal Employment Opportunity Commission (EEOC). It also contended that no right of contribution could be claimed for violations of title VII or the Equal Pay Act. On appeal, the Third Circuit held that Murphy had no right of contribution against the International under the Equal Pay Act,¹⁸ but remanded for further proceedings on the issue of whether the district court had jurisdiction under title VII.¹⁹

On remand, the district court found that the plaintiffs had not named the International in the EEOC complaint, but held that the omission did not defeat jurisdiction.²⁰ The International appealed for a second time, challenging the district court's conclusion on jurisdiction and its decision on the right of contribution under title VII. In this latest appeal, Murphy argued that the district court did not properly calculate the amount due under the right of contribution.

In reaching its decision in *Glus*, the Third Circuit relied on Supreme Court²¹ and recent federal circuit court cases²² to find that a right of contribution exists in the federal common law, and stated that "fundamental fairness demands a sharing of the liability."²³ The court noted that even though no right of contribution is expressly provided for in title VII and that nothing in the legislative history indicates that Congress intended for such

16. 629 F.2d at 251.

17. *Id.*

18. *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 894 (3d Cir. 1977). The court found no evidence of congressional intent to make a union liable to an employee or an employer for a violation of the Equal Pay Act and thus could not allow contribution without holding the union jointly liable. *Id.*

19. *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977).

20. *Glus v. G.C. Murphy Co.*, Civ. No. 71-264 (W.D. Pa. Feb. 14, 1979).

21. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) and *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

22. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) and *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

23. 629 F.2d at 252.

a right to exist, several title VII policy goals would be achieved by allowing contribution in this case. First, the express terms of title VII demonstrate a congressional intent to hold both unions and employers financially liable for unlawful employment practices. The court explained that a denial of contribution in these cases would wrongfully release some individuals from liability.²⁴ Secondly, a right of contribution would encourage conciliation and settlement of claims. The court determined that “[i]f Murphy had felt that it had no right of contribution against the unions it might have been unwilling to reach a settlement . . . choos[ing] instead to proceed with the litigation so that the unions would be held responsible for a share of the damages.”²⁵ Finally, the majority concluded that by allowing contribution “[b]oth union and employer will know that they both must be vigilant to eschew unlawful discrimination.”²⁶ The court acknowledged that there were arguments on both sides of the issue and that the policy choice was a difficult one, but rejected the argument that it was usurping legislative power by deciding the issue in favor of contribution.

Circuit Judge Sloviter, in a vigorous dissent, argued that the majority misinterpreted the relevant precedents in its determination that a right of contribution exists under federal common law.²⁷ He further took issue with the majority’s willingness to fill in what it termed the “statutory interstices of Title VII.”²⁸ He contended that the facts before the court were not analogous to those in contexts where the Supreme Court had fashioned a common law cause of action.²⁹ He then referred to the numerous administrative and policy issues raised by the court’s holding and recommended that Congress consider changing the current rule.³⁰

In spite of the court’s attempt to limit the decision to its facts and its failure to adequately treat all of the pertinent issues, *Glus* represents a welcome extension of the right of contribution to defendants in title VII cases. This case note will ana-

24. *Id.* at 256.

25. *Id.*

26. *Id.* (quoting *Northwest Airlines, Inc. v. Transport Worker’s Union*, 14 *Empl. Prac. Dec.* 5591, 5596 (D.D.C. 1977), *rev’d on other grounds*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 902 (1980)).

27. *Id.* at 260 (Sloviter, J., dissenting).

28. *Id.* at 263-68.

29. *Id.* at 260-63.

30. *Id.* at 268.

lyze the court's reasoning and the potential impact of its holding on title VII actions.

The Third Circuit exercised considerable judicial leverage when it allowed a cause of action for contribution based on "the interstices of Title VII." The court began its analysis by asserting that because no right of contribution is provided for in title VII, the drafters of the legislation may not have considered it.³¹ However, the absence of a right of contribution in the statute equally raises an inference of congressional intent that such a right should not be allowed. Apart from the statute's language, the legislative history of title VII is, as the court acknowledged,³² silent on the subject of contribution. However, title VII of the Civil Rights Act of 1964 was enacted during a period when the federal courts consistently denied contribution under federal common law.³³ Also, at about the time title VII was enacted, the Supreme Court made it clear in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.* that the creation of an enforceable right of contribution under the federal law generally requires legislation.³⁴ For example, in the Securities Act of 1933,³⁵ Congress explicitly provided for contribution. Thus, even though the *Glus* court mentioned congressional intent in its analysis, a right of contribution under title VII cannot be based on real evidence of congressional intent or lack thereof.

The *Glus* court cited several Supreme Court cases as support for its holding, but these cases dealt with situations where no statute applied to the facts,³⁶ no specific remedies were provided by statute,³⁷ or no private cause of action existed for an individual harmed by the statutory violation.³⁸ None of the cases

31. *Id.* at 253 (majority opinion).

32. *Id.* at 255.

33. *See, e.g.,* *Union Stock Yards Co. v. Chicago, B. & Q.R.R.*, 196 U.S. 217, 224 (1905).

34. 342 U.S. 282, 285 (1952).

35. 15 U.S.C. § 77k(f) (1976).

36. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Supreme Court established a federal common law action of nuisance. Although Congress had enacted laws in this area, such as the Federal Water Pollution Control Act, ch. 758, § 1, 62 Stat. 1155 (1948), no federal statute granted the remedy sought, which was the abatement of the pollution of Lake Michigan.

37. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court addressed itself to the task of fashioning a common law action under the Labor Management Relations Act of 1947, § 301, 29 U.S.C. § 185 (1976). The statute "expressly furnished some substantive law," 353 U.S. at 457, but failed to provide express sanctions and remedies for its enforcement.

38. In *Texas and Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916), the Supreme Court created

cited provided precedent for creating an equitable remedy, such as contribution, for a defendant when the governing statute was silent on the matter. They were all cases in which the plaintiffs were seeking a common law remedy for a harm done when no federal statutory provision explicitly provided one. By contrast, in *Glus* Murphy was seeking only to lessen its total liability for damages despite title VII's express provision that it should bear the full burden.

Whether the Third Circuit's extension of the right to contribution is justified by Supreme Court case law or as a "statutory interstice" is certainly debatable. However, the court justified its extension of the rule on other grounds as well. The court implied that there is a trend toward allowing contribution in state and federal courts³⁹ and concluded that to deny such a right in this case would be inequitable.⁴⁰ Although the court's action may be justifiable on equity grounds, this alone does not adequately justify the judicial creation of a right of contribution under title VII. The lack of real congressional or judicial support for the Third Circuit's new rule in *Glus* is troubling.

Despite the fact that the Third Circuit alluded to a general right of contribution throughout the opinion, the *Glus* holding is expressly limited to its facts. The court held that contribution will be allowed in the unique case where one defendant settles for the entire amount of damages before trial and requests contribution from non-settling co-defendants who are jointly liable.⁴¹ The Third Circuit may have felt compelled to narrowly define the *Glus* holding for several reasons. First, a case with similar facts and the same issue now is scheduled for review by the Supreme Court.⁴² Secondly, although there is a trend in the

a private cause of action for an individual who was harmed by the violation of a federal statute. The statute required that certain safety devices be installed on trains, but it did not provide a remedy for persons harmed because of failure to properly install such devices.

39. 629 F.2d at 252-53.

40. Prosser reasons:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50, at 307 (4th ed. 1971).

41. 629 F.2d at 257.

42. *Northwest Airlines, Inc. v. Transport Workers Union*, 14 Empl. Prac. Dec. 5591 (D.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 445

federal courts toward allowing contribution in other areas, no substantial precedent exists for granting contribution under title VII.⁴³ Finally, a narrow holding minimizes the number of policy considerations associated with contribution beyond this set of facts.⁴⁴ Nevertheless, even though this narrow holding pertains directly to the *Glus* facts and thereby limits the *Glus* holding's future application, the court's reasoning can be read to suggest that the right of contribution should be much more inclusive.⁴⁵

A broad reading of the court's rationale indicates that the court would have granted contribution in all cases where one defendant had paid more than its share of the damages.⁴⁶ Yet, the court failed to address the pertinent issues raised by this extension of the right of contribution. For example, the court in *Glus* allowed contribution when a defendant paid a complete pre-trial settlement, but the court did not specifically rule that it would allow contribution when a defendant pays the full amount of damages resulting from a trial judgment. Also, a defendant might settle with the plaintiff for more than his share of the damages but less than the full amount. Here the question of whether the defendant can still receive contribution is left unanswered. Finally, in a situation where a defendant settled for less than his share, the court did not decide whether he could be required to contribute the difference to a co-defendant. Commentators have suggested that contribution be allowed in all circumstances but the last,⁴⁷ since no defendant would want to settle if he were to find himself still liable for damages at trial.⁴⁸

The court also failed to consider how monetary responsibility should be allocated among defendants—whether by pro-rata share, comparative fault, or some other method.⁴⁹ Nor did the

U.S. 902 (1980).

43. See note 1, 2 & 4 and accompanying text *supra*.

44. 629 F.2d at 267-68 (Sloviter, J., dissenting).

45. See *id.* at 255-57 (majority opinion).

46. *Id.*

47. See generally Schwartz, Simpson & Arnold, *Contribution in Private Actions under the Federal Antitrust Laws*, 33 S.W.L.J. 779, 779-90 (1979); Comment, *Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979, 981-82 (1979); Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829, 843-48 (1979).

48. See, e.g., *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969).

49. For a general treatment of how the Uniform Contribution among Tortfeasors Acts of 1939 and 1955 divided damages among defendants, and for a unique proposition regarding division of liability called the "pro-rata reduction rule," see 18 STAN. L. REV. 486 (1966).

court address the issue of intent. Traditionally, the right of contribution has been denied to willful wrongdoers.⁵⁰ Since the violation in *Glus* was intentional, the court sidestepped a crucial issue. The court's failure to address these issues weakens the holding and undercuts the case's precedential value.

Despite the questions left unanswered by the *Glus* holding, the remedy it provides is welcome. Because a defendant who settled had no guarantee of contribution from nonsettling co-defendants, before *Glus* a defendant was less likely to settle with the plaintiff for what might turn out to be more than his share of the damages. A right of contribution gives the defendant recourse under those circumstances and therefore encourages settlement. It affords plaintiffs a greater opportunity to receive the full amount of damages and provides an equitable sharing of the burden by defendants who are jointly liable. It helps eliminate the possibility of a plaintiff being unjustly enriched through collusion with one of several defendants.⁵¹ A right of contribution also prevents unjustified settlements where the plaintiff threatens a defendant that suit will be brought against him only.⁵² If the *Glus* decision is followed, it will afford an opportunity for more open, efficient, and perhaps expeditious conciliation between plaintiffs and defendants.

Furthermore, a right of contribution may deter future violations of title VII. Some controversy exists over whether contribution enhances or diminishes a statute's deterrent effect.⁵³ The arguments for both positions are often based on business economics. An example is whether the smaller chance of paying all the damages is a greater deterrent than a larger chance of paying only a proportion. Without a right of contribution, a potential title VII violator gambles on the plaintiff's choice of whom to sue. On the other hand, with a right of contribution, a defendant knows that he must pay either way if caught. Indeed it may be asked whether a right of contribution will really make a dif-

50. See W. PROSSER, *supra* note 40, § 50, at 306 & nn.41, 42, 45 & 46.

51. See 18 STAN. L. REV. 486, 490 (1966).

52. *Id.*

53. See Comment, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1544-48 (1980); Comment, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 702-03 (1978). See also S. REP. NO. 428, 96th Cong., 1st Sess. 12 (1979) (Report on S. 1468, Antitrust Equal Enforcement Act of 1979). The *Northwest Airlines v. Transport Workers Union* case also deals with this issue. 14 Empl. Prac. Dec. 5591, 5596 (D.D.C. 1977), *rev'd on other grounds*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 445 U.S. 902 (1980).

ference. It has not been shown that employers or unions even consider what might happen if they are found in violation of title VII. Nonetheless, the possibility of escaping all liability when no right of contribution exists may cause many to be more willing to engage in unlawful discrimination.⁵⁴ This argument, combined with contribution's equitable logic, is most persuasive.⁵⁵

On balance, the arguments in favor of a right of contribution outweigh the disadvantages and overcome the weaknesses in the *Glus* court's reasoning. When viewed in this light *Glus* represents a substantial step forward in contribution law under title VII. Yet, more judicial development and refining is necessary to establish a uniform rule applicable to all title VII joint liability cases.

J. David Gowdy

54. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

55. The Supreme Court stated in *Cooper Stevedoring Co. v. Fritz Kopke Inc.* that "where two parties 'are both in fault, they should bear the damage equally, to make them more careful.'" 417 U.S. 106, 111 (1974) (quoting *The Alabama*, 92 U.S. 695, 697 (1876)).