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Labor Law - Employment Discrimination - Joint Violation by Employer and Labor Union of Title VII of the Civil Rights Act of 1964 - Settling Employees' Claim in Full Entitles Employer to Contribution from Labor Union

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LABOR LAW—EMPLOYMENT DISCRIMINATION—JOINT VIOLATION BY EMPLOYER AND LABOR UNION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—SETTLING EMPLOYEES' CLAIM IN FULL ENTITLES EMPLOYER TO CONTRIBUTION FROM LABOR UNION.

Glus v. G.C. Murphy Co. (3d Cir. 1980) *

In the years between 1964 and 1971, workers at a warehouse operated by the G.C. Murphy Company (Murphy) were covered by collective bargaining agreements under which women were paid less than men performing the same work.[1] Nineteen named plaintiffs filed a class action on behalf of Murphy's female employees,[2] alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII).[3] Murphy was named as a defendant, along with the International Union of Wholesale and Department Store Union, AFL-CIO (the International) and the Retail, Wholesale and Department Store Union, Local 940 (Local 940), the unions which represented the women at the warehouse.[4]

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* *Editor's Note*: As a matter of policy, the *Villanova Law Review* generally treats decisions of the United States Court of Appeals for the Third Circuit in a single annual *Third Circuit Review* issue. This Note is being published separately in view of the fact that the United States Supreme Court currently has *sub judice* the related case of *Northwest Airlines, Inc. v. Transport Workers,* 20 Fair Empl. Prac. Cas. (BNA) 969 (D.D.C. July 7, 1977), *aff'd in part and remanded in part,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 100 S. Ct. 3008 (1980). For a discussion of *Northwest Airlines, see* notes 57-65 and accompanying text *infra.*

1. Glus v. G.C. Murphy Co., 629 F.2d 248, 250 (3d Cir.), *cert. denied,* 101 S. Ct. 351 (1980).

2. Glus v. G.C. Murphy Co., 329 F. Supp. 563, 565 (W.D. Pa. 1971). The complaint alleged that the collective bargaining agreements provided for separate job classifications, pay scales, and seniority systems for male and female employees at Murphy's McKeesport, Pennsylvania warehouse. 629 F.2d at 250. In addition, the plaintiffs alleged that the labor unions which had represented them during negotiation of the agreements had violated the duty of fair representation, imposed by the National Labor Relations Act and the Labor-Management Relations Act, by acquiescing in and abiding by the allegedly discriminatory provisions of the agreements. *See* Glus v. G.C. Murphy Co., 562 F.2d 880, 882 (3d Cir. 1977) (prior opinion on jurisdictional issue).

3. 42 U.S.C. §§ 2000e-2000e-17 (1976). For discussion of the provisions of Title VII, *see* notes 50-56 and accompanying text *infra.* The plaintiffs also alleged violations of the federal Equal Pay Act, 29 U.S.C. § 206(d) (1976). 629 F.2d at 250. The Equal Pay Act prohibits wage differentials on the basis of sex for work requiring equal skill, effort, and responsibility, performed under similar working conditions, unless the differentials arise out of a merit or seniority system based upon any factor other than sex. 29 U.S.C. § 206(d)(1) (1976). The Equal Pay Act also provides that it is unlawful for a labor organization to cause or attempt to cause an employer to violate the Act. *Id.* § 206(d)(2) (1976).

4. 629 F.2d at 250. A second class action was brought in the Western District of Pennsylvania against Murphy and the General Teamsters, Chauf-

Murphy filed a cross-claim against the International, Local 940,[5] and a third union, the General Teamsters, Chauffeurs and Helpers, Local Union No. 249 (Local 249), the successor collective bargaining agent to Local 940 for the female employees at the warehouse,[6] contending that the unions were solely responsible for the allegedly discriminatory provisions in the collective bargaining agreements, and demanding judgment against the unions for any recovery awarded the plaintiffs against Murphy.[7] Prior to trial, Murphy reached a settlement with the plaintiff class [8] and also settled its cross-claim against Local 940.[9] Murphy then prosecuted its cross-claim against the International and Local 249.[10]

The district court found that Murphy and the unions were equally at fault [11] and thus equally liable for the employees' financial losses arising from the discrimination.[12] Accordingly, the district court held

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feurs, and Helpers, Local Union No. 249, which replaced Local 940 as the collective bargaining agent for the female employees at the warehouse on January 30, 1971. *See* Denicola v. G.C. Murphy Co., 562 F.2d 889, 891 (3d Cir. 1977). The claim by the employees against Local 249 was based upon its failure to rectify retroactively the disparity in wages between male and female employees and its refusal to accept Murphy's offer of retroactive parity. Glus v. G.C. Murphy Co., 562 F.2d 880, 883 n.1 (3d Cir. 1977) (prior opinion on jurisdictional issue).

5. 629 F.2d at 250.

6. *Id.* The two class actions were joined by the district court for determination of Murphy's cross-claim. *Id.* at 250-51.

7. *Id.* at 250. Murphy based its cross-claim on the grounds that the allegedly discriminatory provisions had been incorporated into the collective bargaining agreements at the insistence of the unions and were accepted in good faith by Murphy. Glus v. G.C. Murphy Co., 562 F.2d 880, 883 (3d Cir. 1977) (prior opinion on jurisdictional issue).

8. 629 F.2d at 250. The settlement was for $648,000. Of that amount, $448,000 was allocated to the employees' Title VII claim, $100,000 to their Equal Pay Act claim, and the remaining $100,000 was to pay the employees' attorneys fees. *Id.*

9. *Id.* The settlement was for $4,146, an amount which represented Local 940's total treasury. *Id.*

10. *Id.* at 250-51.

11. *Id.* at 251. The district court based its finding of equal liability upon the fact that Murphy and the International had jointly participated in the negotiations which produced the collective bargaining agreements. Glus v. G.C. Murphy Co., 562 F.2d 880, 883-84 (3d Cir. 1977) (prior opinion on jurisdictional issue). Local 940 was found to share in the International's liability since the International's representative at the negotiations represented Local 940's interests as well as those of the International. *Id.* Further, the agreements had been signed by representatives of Murphy, the International, and Local 940. *Id.* at 883 n.2.

Similarly, Local 249 was held to be equally liable with Murphy for the discriminatory effects of the collective bargaining agreement executed after Local 249 took over as the employees' agent because both Murphy and Local 249 jointly failed to promptly provide for retroactive parity in wages and employment opportunities among male and female employees. Denicola v. G.C. Murphy Co., 562 F.2d 889, 891-92 (3d Cir. 1977).

12. 629 F.2d at 251. *See* 29 U.S.C. § 216(b)-216(c). *See also* Denicola v. G.C. Murphy Co., 562 F.2d 889, 892 (3d Cir. 1977) (equal liability of Local

that Murphy was entitled to contribution from the unions [13] and calculated the judgment in favor of Murphy.[14] The United States Court of Appeals for the Third Circuit [15] affirmed, *holding* that a defendant who settles for the full amount of damages of a Title VII complaint has a right of contribution from a non-settling co-defendant who is jointly liable. *Glus v. G.C. Murphy Co.*, 629 F.2d 248 (3d Cir.), *cert. denied*, 101 S. Ct. 351 (1980).

Contribution is generally understood to involve the payment, by each of several joint tortfeasors, of a proportionate share of the plaintiff's damages to another tortfeasor who has paid more than his proportionate share.[16] Each tortfeasor's proportionate share may be determined ac-

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249 and Murphy for agreements executed after Local 249 took over as employees' collective bargaining agent); Hodgson v. Baltimore Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, 462 F.2d 181, 182 (4th Cir. 1972) (union held liable for illegally withholding wages).

13. 629 F.2d at 251.

14. *Id.* *See* note 8 *supra*. In accordance with its findings that Murphy and the unions were equally responsible for the employees' financial losses, the district court held the International and Local 249 liable together for one-half of the $448,000 settlement of the Title VII claim. *Id.* at 251, 257. The liabilities of the unions were prorated according to the respective durations of each's representation of the female employees at the warehouse. Glus v. G.C. Murphy Co., 562 F.2d 880, 884 (3d Cir. 1977) (*Glus I*) (prior opinion on jurisdictional issue).

In *Glus I*, the Third Circuit remanded to the district court for a determination of whether the employees' failure to name the International as a defendant in their original claim before the Equal Employment Opportunity Commission deprived the district court of subject matter jurisdiction when the employees filed suit in the district court. *Id.* at 888. *See* note 83 *infra*.

Since Local 940 and the International had acted jointly throughout their part in the negotiations and Local 940's $4,146 settlement with Murphy exhausted its financial resources, the district court also held the International liable for Local 940's share of the award of contribution. 629 F.2d at 258. However, the International's liability was credited in the amount of the settlement made by Local 940 with Murphy. 562 F.2d at 884.

Murphy was denied contribution as to the $100,000 of the settlement allocated to the Equal Pay Act claim. *Id.* The district court based its determination upon its observation that the Equal Pay Act does not purport to allow employees a cause of action against a labor union, but only against an employer. *See* 29 U.S.C. § 216(b) (1976). This conclusion was subsequently affirmed by the Third Circuit. Denicola v. G.C. Murphy Co., 562 F.2d at 894-95 (3d Cir. 1977).

The district court also apportioned the $100,000 attorneys' fees between the Title VII recovery and the Equal Pay Act recovery. 562 F.2d at 884. Just as Murphy was denied contribution as to the Equal Pay Act recovery itself, Murphy was similarly disallowed contribution as to the attorneys' fees allocated thereto. *Id.* Of the attorneys' fees allocated to the Title VII claim, one-half was charged against the International and Local 249 on the same basis as was the Title VII recovery itself. *Id.*

15. The case was heard by Judges Gibbons, Higginbotham, and Sloviter. Judge Higginbotham wrote the opinion of the court. Judge Sloviter filed a dissenting opinion.

16. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 150 (1967).

cording to his relative fault in causing the plaintiff's injury[17] or may simply involve dividing the damages by the number of tortfeasors taking part in causing the injury.[18] Further, the share of an absent or insolvent tortfeasor may be borne by his cohorts if the court so directs.[19] It is commonly stated that a common law right of contribution involves two elements: 1) the contribution defendant must have been in some part responsible for the plaintiff's injury; and 2) the contribution defendant's role must be such that he would have been liable in a direct action by the tort plaintiff.[20]

Contribution is often confused with indemnity, and the two terms are often used interchangeably,[21] but there is a distinction between the two concepts: while contribution involves the payment of proportionate shares; indemnity, which arises from an express or implied contract, involves a complete shift of the liability to another tortfeasor rather than partial reimbursement.[22] It has been suggested that indemnity arose in response to the common law's general prohibition of contribution between joint tortfeasors.[23]

The common law rule in England prohibiting contribution between joint tortfeasors can be traced to 1799 and the leading case of *Merryweather v. Nixan*,[24] which held that no contribution would be allowed between joint tortfeasors when the tort victim's original recovery had been for an intentional tort.[25] The *Merryweather* court stated, how-

17. *See* Bielski v. Schulze, 16 Wis. 2d 1, 6, 114 N.W.2d 105, 107 (1962).

18. *See* Early Settlers Ins. Co. v. Schweid, 221 A.2d 920, 923 (D.C. App. 1966).

19. *See* Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 38, 134 A.2d 761, 772 (1957).

20. *See* Northwest Airlines, Inc. v. Transport Workers, 20 Fair Empl. Prac. Cas. (BNA) 969, 973 (D.D.C. July 7, 1977), *aff'd in part and remanded in part*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 100 S. Ct. 3008 (1980). *See generally*, W. PROSSER, LAW OF TORTS 309 (4th ed. 1971). For further discussion of *Northwest Airlines*, *see* notes 57-65 and accompanying text *infra*.

The requirement of a common liability to the tort plaintiff allows the contribution defendant a defense to a claim for contribution whenever the latter has a defense to an action brought by the former. *See, e.g.*, Yellow Cab Co. v. Dreslin, 181 F.2d 626, 627 (D.C. Cir. 1950) (family immunity); Shonka v. Campbell, 260 Iowa 1178, 1182, 152 N.W.2d 242, 244 (1967) (assumption of risk); Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 571, 75 S.E.2d 768, 777 (1953) (substitution of Workmens' Compensation for common law liability); Hill Hardware Corp. v. Hesson, 198 Va. 425, 429-30, 94 S.E.2d 256, 258-59 (1956) (automobile guest statute).

21. *See* W. PROSSER, *supra* note 20, at 310.

22. *See* McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952).

23. *See* Comment, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 126 (1965). *See also* notes 24-31 and accompanying text *infra*.

24. 101 Eng. Rep. 1337 (1799).

25. *Id.* at 1337. Merryweather and Nixan had jointly converted the machinery in a mill. *Id. See also* W. PROSSER, *supra* note 20, at 305. The owner of the mill brought an action for trover and procured a judgment against both Merryweather and Nixan, but levied the whole judgment

ever, that its decision would not affect cases involving claims for indemnity where the consideration for the promise of indemnity was an act not in itself unlawful.[26] Expanding upon this distinction, later English cases allowed *contribution* between joint tortfeasors unless the contribution claimant had acted wilfully and consciously in injuring the tort victim.[27]

In the United States, *Merryweather* was enthusiastically adopted during the nineteenth century and contribution was denied in a variety of cases,[28] but the American courts soon came to disregard the later

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against Merryweather. 101 Eng. Rep. at 1337. Merryweather sought reimbursement from Nixan for part of the damages, arguing that his full payment raised an implied assumpsit for contribution from Nixan. *Id.* Merryweather was denied recovery. *Id. See generally* Reath, *Contribution Between Persons Jointly Charged With Negligence—Merryweather v. Nixan,* 12 HARV. L. REV. 176 (1898).

26. 101 Eng. Rep. at 1337 (dictum). A case antedating *Merryweather* permitted *indemnity* between joint intentional tortfeasors. *See* Battersey's Case, 124 Eng. Rep. 41 (1623) (false imprisonment). *See also* Fletcher v. Harcot, 123 Eng. Rep. 1097 (1623) (action for indemnity by Fletcher against Harcot following Battersey's full recovery of damages for false imprisonment from Fletcher in *Battersey's Case*).

Harcot arrested Battersey and brought him to an inn operated by Fletcher. *See* Fletcher v. Harcot, 123 Eng. Rep. at 1097. Harcot asked Fletcher to hold Battersey overnight as prisoner at the inn and promised to indemnify Fletcher if the imprisonment proved to be unlawful. *Id.* Harcot's promise of indemnity was held to be enforceable since the request to hold Battersey had been made under color of legal right and the act requested of Fletcher did not appear on its face to be unlawful. *Id.* This distinction was explained in *Battersey's Case:*

> [I]f I request [you] to enter into another mans [sic] ground, and in my name to drive out the beasts [thereon], and impound them, and promise to save you harmless, this is a good assumpsit, and yet the act is tortious . . . [but] if I request you to beat another, and promise to save you harmless, this assumpsit is not good, for the act appears in it self [sic] to be unlawful . . . .

Battersey's Case, 124 Eng. Rep. at 41.

27. *See* W. PROSSER, *supra* note 20, at 306. The determinative factor in denying contribution has been whether the contribution claimant may be presumed to have known that he was committing an unlawful act. Pearson v. Skelton, 150 Eng. Rep. 533 (1836). Accordingly, *indemnity* has been allowed where the claimant had innocently participated in the commission of an intentional tort. Adamson v. Jarvis, 130 Eng. Rep. 693 (1827) (conversion). *See also* note 26 *supra.*

One English case interpreted the distinction drawn in *Merryweather* to mean, not that contribution was completely disallowed, but merely that an implied promise to indemnify was not raised by the fact that one tortfeasor had discharged the whole of a joint liability. *See* The Englishman & the Australia, [1895] P. 212, 217. Criticizing this interpretation, one commentator has suggested that *Merryweather* states not the general rule but rather the exception; the general rule being that among persons jointly liable, the law implies an assumpsit for either indemnity or contribution unless wilful wrongdoing was involved. *See* Reath, *supra* note 25, at 177, 193 n.2.

28. *See, e.g.,* Rhea v. White, 40 Tenn. (3 Head) 121 (1859) (joint conversion); Atkins v. Johnson, 43 Vt. 78 (1870) (joint publication of libel); Spalding v. Oakes' Adm'r, 42 Vt. 343 (1869) (keeping ram known to be vicious). *See generally* Reath, *supra* note 25, at 180-83.

English cases' limitation of the doctrine to the wilful and conscious wrongdoer [29] and eventually began to cite *Merryweather* as authority for the broad proposition that there may be no contribution among joint tortfeasors.[30] More recently, however, the trend has been to allow contribution in a wide range of cases.[31]

29. *See, e.g.,* Adams v. White Bus Line, 184 Cal. 710, 195 P. 389 (1921) (concurrent negligence causing auto accident); Royal Indem. Co. v. Becker, 122 Ohio St. 582, 173 N.E. 194 (1930) (concurrent negligence). *But see* Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949) (allowing contribution in auto accident case). The *Knell* court limited the rule of *Merryweather* to cases involving intentional rather than wilful and conscious wrongdoing, a limitation somewhat narrower than that of the English cases after *Merryweather. Id.* at 666. *See also* note 27 and accompanying text *supra.*

The source of the confusion with the scope of the rule of *Merryweather* has been an object of speculation by several commentators. Dean Prosser suggested that the English view of the rule was generally applied by the American courts until modern procedure allowed joinder of all persons who had caused the same injury; at which time, "the origin of the rule and the reason for it were lost to sight." W. PROSSER, *supra* note 20, at 306. Reath attributes the confusion to the overly broad statement of the holding in the syllabus of the *Merryweather* decision as written by the court reporter. Reath, *supra* note 25, at 183, *quoting* J. CLERK & W. LINDSELL, TORTS 56 (2d ed. 1896). Reath also notes that in 1799 the word "torts" was not generally thought to include negligence cases, but rather only what are called today the intentional torts. Reath, *supra,* at 178.

30. *See* Washington Gaslight Co. v. Lansden, 172 U.S. 534, 552 (1899) (libel). *See also* Union Stockyards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217 (1905) (concurrent negligence). The *Union Stockyards* Court based its decision to disallow contribution upon distinctions between active and passive negligence and distinctions between primary and secondary negligence, and concluded that it did not have before it one of the "exceptional cases" where contribution or indemnity would be permitted. *Id.* at 228. The exceptional cases were those in which a less culpable defendant sought contribution from a co-defendant who was principally liable for an injury. *Id.* at 224. As an example of a case in which contribution or indemnity would be allowed, the Court suggested a situation where a municipality satisfied a judgment held by a plaintiff injured by a defect in a sidewalk where the defect was caused by the negligence or active fault of a property owner. *Id.*

31. *See, e.g.,* Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) (admiralty); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) (antitrust); Northwest Airlines, Inc. v. Transport Workers, 20 Fair Empl. Prac. Cas. (BNA) 969 (D.D.C. July 7, 1977), *aff'd in part and remanded in part,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 100 S. Ct. 3008 (1980) (Title VII); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974) (midair collision); Chicago & N.W. Ry. v. Minnesota Trans. Ry., 371 F.2d 129 (8th Cir. 1967) (Federal Employers' Liability Act); Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976) (sex discrimination); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds,* 535 F.2d 761 (3d Cir. 1976) (Securities Exchange Act of 1934); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971) (Securities Act of 1933). *But see* Halcyon Lines v. Haenn Ship. Corp., 342 U.S. 282 (1952) (denying contribution in admiralty); El Camino Glass v. Sunglo Glass Co., [1977-1] TRADE REG. REP. (CCH) ¶ 61,533 (N.D. Cal. 1976) (denying contribution in antitrust); Sabre Ship. Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969) (denying contribution in antitrust).

Halcyon Lines and *Cooper Stevedoring* are illustrative of the changing judicial attitudes towards contribution in the context of similar factual situa-

The common law concept of contribution represented by *Merryweather* and its progeny may be supplanted, however, by an explicit statutory grant of a right of contribution [32] or by the judicial creation of such a right through statutory construction.[33] The contribution claimant seeking redress as a matter of federal law need not depend upon an act of Congress for explicit allowance of a right of contribution since, despite the pronouncement in *Erie R.R. v. Tompkins* [34] that there is no federal general common law,[35] there has developed a "specialized federal common law" in areas of national concern.[36] Two of the areas

tions. Both cases involved negligently caused injuries to dockworkers aboard a ship at port. *See* Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. at 107; Halcyon Lines v. Haenn Ship. Corp., 342 U.S. at 283. Further, both were decided in the context of the general admiralty rule allowing contribution for damages arising from collisions at sea. *See generally* The Max Morris, 137 U.S. 1, 8-9 (1890). *Halcyon Lines* refused to extend the admiralty rule to a non-collision case, stating: "In 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." 342 U.S. at 285 (footnote omitted). Choosing not to follow the reasoning in *Halcyon Lines,* the *Cooper Stevedoring* Court distinguished the earlier case, and read it as standing for a "more limited rule" rather than an absolute bar against contribution in noncollision cases: "On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors." 417 U.S. at 111, 113.

32. Several jurisdictions have enacted statutes authorizing contribution. *See, e.g.,* DEL. CODE ANN. tit. 10, §§ 6301, 6302(d) (1974) (allocation of liability according to relative fault; no requirement that all defendants be joined by the plaintiff); KY. REV. STAT. § 412.030 (1972) (declaration of a right of contribution between negligent joint tortfeasors; details left to be filled in by the courts); MISS. CODE ANN. § 85-5-5 (1972) (requirement of joinder of all defendants; defendants share equally in payment of damages); N.J. STAT. ANN. § 2A:53A-3 (West 1952) (provision for pro rata allocation of liability; no requirement of joinder of all defendants). *See generally* W. PROSSER, *supra* note 20, at 307-08 (commenting on the variations among the statutes); Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases,* 68 YALE L.J. 964, 981-54app. (1959) (collection and classification of statutory contribution provisions).

As a matter of federal statutory law, Congress has provided express rights of contribution in the Securities Act of 1933 and the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 77k(f), 78i(e), 78r(b) (1976).

33. *See* notes 40-46 and accompanying text *infra.* A failure by Congress to expressly provide a remedy such as contribution is not inevitably inconsistent with an intent to make a remedy available under a statute; such an intent may be found implicitly in the language or structure of the statute or in the circumstances surrounding its enactment. Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18 (1979).

34. 304 U.S. 64 (1938).

35. *Id.* at 78. The *Erie* Court wrote: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law." *Id.*

36. *See* Friendly, *In Praise of* Erie—*And of the New Federal Common Law,* 39 N.Y.U. L. REV. 385, 405 (1964). Indeed, this development began on the very day that *Erie* was handed down. *See* Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (apportionment between two states of water from an interstate stream to be determined as a question of federal common law).

in which federal common law has developed are: [37] 1) the implication of a private cause of action on behalf of an individual harmed by the violation of a federal statute; [38] and 2) judicial "filling" of the interstices of a federal statute.[39]

When a statute specifies a standard of conduct but does not create a private cause of action for an individual harmed by a violation of that statute, a federal court may nevertheless find an implied cause of action on behalf of the injured individual.[40] The process involves an inquiry into whether the statute's legislative history and intent support judicial recognition of the remedy.[41] In *Cort v. Ash*,[42] the United States Supreme Court identified four factors as relevant in determining whether an implied cause of action should be created: 1) whether the plaintiff seeking the remedy is a member of the class for whose "especial benefit" the statute was enacted; 2) whether there is any indication of congressional intent to create or deny such a remedy; 3) whether the remedy is consistent with the statutory scheme; and 4) whether the remedy to be implied is one traditionally relegated to state law, such that it would be inappropriate to create the remedy solely on the basis of federal law.[43] Later decisions from the Supreme Court stress that the *Cort* test is merely a guide in defining the legislative intent, so the central inquiry is still whether the legislature intended to allow the remedy sought by the

37. A third area in which federal law has been developed, but not involving judicial supplementation of federal statutes, has been in cases where the federal courts assert jurisdiction pursuant to a federal statute granting jurisdiction but not prescribing substantive law. *See* Illinois v. Milwaukee, 406 U.S. 91 (1972) (creation of a federal common law of nuisance through federal question jurisdiction grant of 28 U.S.C. § 1331 (1976)).

Judge Friendly suggests that the new specialized federal common law has developed in four areas: 1) through "spontaneous generation" in areas of particular federal concern, such as in the interpretation of government contracts and in the resolution of interstate disputes; 2) when federal courts are asked to imply a private cause of action on behalf of an individual harmed by violation of a federal statute; 3) where a jurisdictional grant by Congress mandates that the federal courts fashion substantive law; and 4) filling in the interstices of federal statutes through the resolution of issues not provided for in the relevant statutes. Friendly, *supra* note 36, at 421. Similarly, Professor Hill has identified four "zones" where federal common law has been created: 1) in cases where a state is a party, particularly controversies between states; 2) admiralty cases; 3) cases involving the proprietary duties of the United States; and 4) international law. Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1069 (1967). *See generally*, Comment, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

38. *See* notes 40-46 and accompanying text *infra*.

39. *See* note 46 and accompanying text *infra*.

40. Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24-25 (1977).

41. *Id.* at 25.

42. 422 U.S. 66 (1975). For discussion of the *Cort* test, *see* Crawford & Schneider, *The Implied Private Cause of Action and the Federal Aviation Act: A Practical Application of* Cort v. Ash, 23 VILL. L. REV. 657 (1978).

43. 422 U.S. at 78.

plaintiff.[44] Thus, the *Cort* test will not be applied once it can be shown that Congress did not intend to allow any such remedy.[45]

Federal common law may also be created as a matter of statutory construction when a court is called upon to resolve an issue not contemplated by the drafters of an applicable statute; in such a case, the court is said to be "filling in" the interstices of the statute.[46] Since *Textile Workers Union v. Lincoln Mills*,[47] it has been clear that overriding federal interests, the need for uniformity in the law, and invocation of the commerce clause in federal statutes have established a federal preeminence in the field of labor law.[48] As part of the Civil Rights Act of 1964, Title VII was enacted pursuant to Congress' commerce power, thereby strengthening the supremacy of federal law in this area.[49]

The primary objective of Title VII is to assure equality of employment opportunities by eliminating discrimination on the basis of race, color, sex, religion, or national origin.[50] Its comprehensive remedial provisions,[51] applicable to employers[52] and unions[53] alike, suggest a

44. *See* Touche Ross & Co. v. Redington, 422 U.S. 560, 575-76 (1979).

45. *See* Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 24 (1979).

46. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (jurisdictional grant of the Labor-Management Relations Act mandates that the federal courts create a body of federal common law labor law). The *Lincoln Mills* Court wrote:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbras of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id. at 457.

47. 353 U.S. 448 (1957). *See also* note 46 *supra.*

48. 353 U.S. at 456-57. In the *Lincoln Mills* case, the Court found in the federal jurisdictional provisions of the Labor Management Relations Act "a mandate to federal judges to fashion a body of contract law consistent with the policy of federal labor statutes and binding in all courts." Friendly, *supra* note 36, at 412.

49. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding the constitutionality of Title II of the Civil Rights Act of 1964 as within the commerce power).

50. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 457 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

51. *See* 42 U.S.C. § 2000e-5(g) (1976). Title VII authorizes injunctions and other remedies, including, but not limited to, reinstatement or hiring of employees, backpay awards payable by an employer or labor union, and any other equitable relief which the court may deem appropriate. *Id.*

52. Title VII provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to hiring, firing or compensation for services, or to classify employees on the basis of race, color, religion, sex, or national origin in any way which would deprive or tend to deprive the employees of employment opportunities or would otherwise adversely affect their status as employees. *Id.* § 2000e-2(a).

53. It is an unlawful employment practice for a labor organization to discriminate against an individual or to classify its membership in any way which

strong policy that unions and employers should be held jointly liable to the extent that each is responsible for Title VII violations.[54] Notwithstanding the broad range of judicial remedies explicitly authorized by Title VII,[55] the statute also embodies a policy favoring extrajudicial conciliation and settlement of employees' claims.[56]

The question of whether a violator of Title VII may obtain contribution against a fellow wrongdoer was recently answered in the affirmative by one federal court of appeals in *Northwest Airlines, Inc. v. Transport Workers.*[57] In *Northwest Airlines,* an employer sought a declaratory judgment that two unions which had participated in the negotiation of collective bargaining agreements discriminating against female employees were liable in contribution for a recovery had by the women against the employer for violations of Title VII [58] and the Equal Pay Act.[59]

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would deprive or tend to deprive its members of employment opportunities or otherwise adversely affect the employees, or to cause or attempt to cause an employer to discriminate on the basis of race, color, religion, sex, or national origin. *Id.* § 2000e-2(c).

54. *See* 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).

55. *See* note 51 *supra.*

56. 42 U.S.C. § 2000e-5(c) (1976).

57. 20 Fair Empl. Prac. Cas. (BNA) 969 (D.D.C. July 7, 1977), *aff'd in part and remanded in part,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 100 S. Ct. 3008 (1980).

58. 20 Fair Empl. Prac. Cas. (BNA) at 970. *See* notes 61-65 and accompanying text *infra.*

59. 20 Fair Empl. Prac. Cas. (BNA) at 970. The discrimination involved pay at lower rates for women than for men doing the same work. *Id. See also* Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973) & 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part and vacated in part,* 567 F.2d 429 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978) (class action by female employees).

Applying the four part test of *Cort v. Ash,* the district court refused to imply a cause of action for contribution in the Equal Pay Act since the employer was not a member of the class for whose benefit the statute was enacted. 20 Fair Empl. Prac. Cas. (BNA) at 971. For a discussion of *Cort, see* notes 42-45 and accompanying text *supra.* On appeal, the District of Columbia Circuit affirmed the result reached by the district court, but on the grounds that an implied cause of action was inconsistent with the statutory scheme of the Equal Pay Act; the Court of Appeals viewed the "especial class" prong of the test of *Cort* as satisfied, reasoning that employees would be the ultimate beneficiaries of an implied cause of action for contribution on behalf of the employer. 606 F.2d at 1354-55.

The district court also rejected the employer's claim that a right of contribution should be gleaned from the interstices of the Equal Pay Act. 20 Fair Empl. Prac. Cas. (BNA) at 972. The district court reasoned that a right of contribution would frustrate the policy of the Act. *Id.* at 971-72. Since the purpose of the Act was to prevent a competitive edge from accruing to an employer who cut costs by paying lower wages, such a competitive advantage would still be enjoyed by an employer to the extent that a union shared in payment of the backpay liability. *Id.* Further, the district court opined that, since the Equal Pay Act authorizes a suit by employees against an employer but not a labor union, the requisite common liability to the

While rejecting the Equal Pay Act claim,[60] the district court held that the employer was entitled to contribution under Title VII.[61] The court criticized the reasoning behind the rule disallowing contribution, maintaining that such a rule was basically unfair in visiting the entire loss upon one defendant while another escaped all liability.[62] The district court opined that a right of contribution would provide an increased deterrent against Title VII violations and prevent collusion between a tort plaintiff and one of several defendants.[63] On appeal, the District of Columbia Circuit remanded the employer's claim for Title VII contribution for a determination of whether that claim was barred by laches because the employer had not raised it in the original class action suit brought by the employees.[64] The United States Supreme Court has granted certiorari.[65]

Against this background, the Third Circuit heard the International's appeal from the district court's grant of contribution in *Glus*.[66] The majority prefaced its analysis by acknowledging that Title VII makes no express provision for contribution.[67] The court noted, however, that the emerging trend in the federal courts has been to allow contribution in a wide range of cases,[68] and stated that fundamental fairness demands that the liabilities of joint wrongdoers be shared.[69]

The majority interpreted the fact that Title VII is silent on the existence of a right to contribution to mean only that contribution was

tort plaintiff was absent. *Id.* at 972. *See* note 20 and accompanying text *supra*. On appeal, the Court of Appeals agreed that a right of contribution was inconsistent with the language and purpose of the Equal Pay Act. 606 F.2d at 1353.

60. *See* note 59 *supra*.

61. 20 Fair Empl. Prac. Cas. (BNA) at 972-76.

62. *Id.* at 975.

63. *Id.*

64. 606 F.2d at 1356. The Equal Employment Opportunity Commission (EEOC) had filed an amicus curiae brief with the Court of Appeals in support of contribution under Title VII when the claim is made promptly by the employer in the employees' original suit. *Id.* The EEOC has since reversed its position. *See* Reply Brief for Petitioner at 1b-2b app. Northwest Airlines, Inc. v. Transport Workers, No. 79-1056 (filed Jan. 4, 1980).

65. 100 S. Ct. 3008 (1980).

66. 629 F.2d at 250. *See* notes 13-14 and accompanying text *supra*.

67. 629 F.2d at 252.

68. *Id.* at 257. The majority noted that the United States Supreme Court has not heard a contribution case outside the admiralty context since *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), which the lower courts have read quite broadly. 629 F.2d at 253. The majority rejected the International's reliance on *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952), reasoning instead that the more recent *Cooper Stevedoring* case was indicative of a broad federal policy favoring contribution. 629 F.2d at 253. For a discussion of *Halcyon Lines* and *Cooper Stevedoring, see* note 31 *supra*.

69. 629 F.2d at 252. The majority reasoned that contribution promoted fundamental fairness by preventing one of several joint wrongdoers from escaping liability for his actions solely because of the plaintiff's choice of defendants. *Id.*

not contemplated by Congress.[70] Therefore, the majority reasoned, the resolution of Murphy's claim for contribution involved an inquiry into the interstices of Title VII.[71] The majority opined that it may be necessary to create federal common law in order to fill in the interstices of congressional acts in two types of cases: 1) through the establishment of remedies or standards not provided for by the legislation but essential to the realization of the legislative purpose; or 2) through the implication of a private cause of action on behalf of an individual harmed by violation of a federal statute.[72] The majority reasoned that, although the instant case did not fit neatly into either of these two categories, the analytical procedure followed in such cases provided the tools for its resolution of Murphy's claim to contribution.[73] This procedure was said to involve an inquiry into the legislative purpose and intent underlying the statute to determine which rule urged upon the court by the parties to the litigation was consistent with the congressional policy.[74] The majority, unable to ascertain any indication of whether Congress intended to allow a right of contribution in Title VII,[75] reviewed the policies implicit in Title VII and discussed the effect which the creation of a federal common law right of contribution might have upon those policies.[76]

Considering the dominant policy of Title VII to be to stamp out discrimination against employees, the court concluded that a right of contribution among Title VII violators would increase the likelihood of each wrongdoer's payment of damages, thus increasing the deterrent effect of Title VII and keeping both employers and labor unions vigilant to avoid Title VII infractions.[77] Secondly, the majority found that a denial of contribution would frustrate the Title VII policy in favor of joint liability of employers and unions to the extent that each was responsible for unlawful employment practices.[78] Finally, the majority determined that a right of contribution in Title VII would encourage conciliation and settlement of employees' claims.[79] The Third Circuit opined that the denial of contribution might discourage settlements since violators would prefer to litigate employees' claims in the hope that

70. *Id.* at 253. The Third Circuit observed that the legislative history of a statute that neither expressly authorizes nor denies a particular remedy sought by a plaintiff will characteristically be equally silent or ambiguous on the question. *Id.* at 255. *See* notes 40-41 and accompanying text *supra.*

71. 629 F.2d at 253. *See* note 46 and accompanying text *supra.*

72. 629 F.2d at 253-54.

73. *Id.* at 255.

74. *Id.*

75. *Id.*

76. *Id.* at 255-57. *See* notes 50-56 and accompanying text *supra.*

77. 629 F.2d at 256.

78. *Id.* at 255-56.

79. *Id.* at 256.

judgments would also be rendered against any other violators.[80] In addition, the majority warned that, without contribution, employees could be unjustly enriched through collusion with one of several defendants or through extorting unjust settlements by threatening to sue only one defendant.[81]

The majority concluded that the policies and goals implicit in Title VII would be more fully realized by a right of contribution among violators of the statute.[82] Although no indication could be found as to whether Congress intended to allow such a remedy, the Third Circuit reasoned that Congress would have approved any remedy for allocation of liability among Title VII wrongdoers which would advance the legislative purposes inherent in the statute.[83]

In dissent, Judge Sloviter objected to the majority's creation of a right to contribution in Title VII, a statute which she characterized as not expressly providing for contribution, as not implicitly authorizing contribution, and as not necessarily requiring contribution to effectuate its purposes.[84] Although the dissent acknowledged in principle the

80. *Id.*

81. *Id.*

82. *Id.* at 257.

83. *See id.* at 255. The majority also affirmed the district court's calculation of the International's liability. *Id.* at 257-58. *See* note 14 *supra.* Further, the Third Circuit held that the employees' failure to name the International as a defendant in the employees' original claim before the Equal Opportunity Employment Commission (EEOC) did not deprive the district court of jurisdiction when the employees sought judicial resolution of their claim. 629 F.2d at 252. Jurisdiction over the International was affirmed on the basis of four factors enumerated in the court's earlier opinion on this issue:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named [party] are so similar as [sic] the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id. at 251, *quoting* Glus v. G.C. Murphy Co., 562 F.2d 880, 888 (3d Cir. 1977). The majority further held that Murphy was not entitled to recover interest paid to the employees on deferred installments of the settlement payments, since Murphy had enjoyed the present use of those funds; that it was not an abuse of the district court's discretion to deny recovery to Murphy of prejudgment interest against the International; and that the International had waived any objections to the amount of Murphy's settlement with the employees. 629 F.2d at 258-59.

Significantly, since Murphy had failed to raise the issue in its pleadings, the majority refused to decide whether federal question jurisdiction might exist over Murphy's claim for contribution. *Id.* at 252 n.1. *See* note 37 *supra.*

84. 629 F.2d at 259 (Sloviter, J., dissenting).

existence of a federal common law and the pressing need for a uniform federal rule allowing or prohibiting contribution,[85] Judge Sloviter argued that the majority had improperly treated Murphy's claim for contribution as an invitation to fashion federal common law rather than an occasion for filling in the statutory interstices of Title VII.[86]

To Judge Sloviter, the judicial tasks of creating common law and filling statutory interstices involve wholly different procedures. She urged that the distinction between these two judicial functions is in the nature of the statute involved: if the statute involves a bare jurisdictional grant, the courts are free to fashion common law; however, if the statute prescribes a substantive rule of law, the courts are limited to filling any interstices therein.[87] Since Title VII provides substantive law, in Judge Sloviter's view, federal common law could not be created. Consequently, any rights to contribution could only lie in the interstices of the statute.[88] Since the statute provides for enforcement procedures and has operated effectively without contribution in the past, Judge Sloviter would hold that the statutory scheme embodied in Title VII precludes the judicial supplementation of the statute through creation of additional remedies such as contribution.[89] Moreover, according to the dissent, Congress would have expressly authorized contribution if it had intended to make the remedy available.[90]

Finally, Judge Sloviter questioned the majority's conclusions that contribution would provide a strong deterrent against Title VII infractions and promote settlement of employees' claims.[91] In her view, the possibility of sole liability without contribution would prove a stronger deterrent.[92] Furthermore, Judge Sloviter reasoned that the prospect of liability in contribution would discourage settlements.[93] At best, the dissent concluded, the arguments favoring and opposing rights of contribution among Title VII violators were inconclusive, calling for close

85. *Id.*

86. *Id.* at 259-60 (Sloviter, J., dissenting).

87. *Id.* at 264-65 (Sloviter, J., dissenting). The dissent argued that courts exercising common law jurisdiction enjoy a wide discretion to adopt the rule of law which seems fairest and most appropriate under the circumstances, while courts filling in the interstices of federal statutes have their discretion narrowed by their duty to construe the statute in accordance with the legislative intent. *Id.* at 263-64 (Sloviter, J., dissenting).

88. *Id.* at 263-65 (Sloviter, J., dissenting).

89. *Id.* at 265 (Sloviter, J., dissenting).

90. *Id.* at 265-66 (Sloviter, J., dissenting). Judge Sloviter reasoned that Congress was aware of the general policy against judicially created rights of contribution and, if it had intended to create such a right, it would have done so expressly. *Id.* at 265 (Sloviter, J., dissenting).

91. *Id.* at 268 (Sloviter, J., dissenting). *See* notes 77 & 79-80 and accompanying text *supra.*

92. 629 F.2d at 268 (Sloviter, J., dissenting).

93. *Id.*

policy determinations more appropriately made by Congress than by the courts.[94]

In reviewing the *Glus* opinion, it is submitted that, although the federal common law may properly be invoked to declare a right of contribution among Title VII violators,[95] the Third Circuit majority may have overestimated the deterrent effect of contribution and the concomitant furtherance of the Title VII policy favoring settlement of employees' claims.[96] Consequently, it is suggested that the majority's foundation of Title VII policy represents an unsound rationale for the creation of a federal common law right of contribution. While it appears that the strong national interest in a uniform national labor law [97] would support the creation of a federal common law right of contribution, and that the *Glus* majority properly considered the policies underlying Title VII as controlling upon the court's decision, [98] it is suggested that a right of contribution in Title VII will neither significantly promote the attractiveness of settlement of employees' claims nor provide an increased deterrent against Title VII violations.[99]

It is important to note that the *Glus* litigation involved a claim for contribution arising from the full settlement of the employees' claim.[100] Where there is no such full settlement involved, a rule allowing contribution may actually discourage settlement since a defendant may refrain from settling out of fear that he may be held liable for contribution to co-defendants who choose to litigate the employees' claim.[101] Unless, as in the full settlement context of *Glus,* the settling defendant can be assured that he will not be held liable to other defendants who proceed to trial, settlement would lose its attractiveness since no defendant could thereby achieve a final and complete termination of his involvement with a case.[102]

Further, a right of contribution in Title VII may not provide an increased deterrent against Title VII violations. Manifestly, contribution alters the liabilities of joint wrongdoers in two respects. While the possibility that all of the defendants will share in the payment of the plaintiff's judgment is *increased* since the fortunate wrongdoer who somehow escapes the plaintiff's lawsuit is less likely to also evade the retributive demands of his less fortunate cohorts, the magnitude of the

94. *Id.*

95. *See* notes 72-76 and accompanying text *supra.*

96. *See* notes 77 & 79-80 and accompanying text *supra.*

97. *See* notes 47-49 and accompanying text *supra.*

98. *See* notes 74-83 and accompanying text *supra.*

99. *See* notes 50-56, 77 & 79-80 and accompanying text *supra.*

100. 629 F.2d at 257.

101. *See* W. PROSSER, *supra* note 20, at 309-10. The *Glus* majority recognized this problem, but stated that this disincentive to settlement was not serious enough to require a denial of contribution. *See* 629 F.2d at 256 n.2.

102. *See* 629 F.2d at 268 (Sloviter, J., dissenting).

potential liability of any single wrongdoer is *decreased* since no single defendant will be held liable for the entire amount of damages awarded to the plaintiff. When the effects of contribution are viewed in this light, it appears that the Third Circuit's conclusion that a right of contribution would provide an increased deterrent against Title VII violations is implicitly founded on the arguable assumption that an increased probability of a relatively smaller liability will be a greater deterrent than the relatively smaller possibility of a larger liability.[103]

In their reluctance to treat negligent wrongdoers too harshly, it is submitted that the courts have overlooked the narrow rule of *Merryweather* which denied contribution to the wilful and conscious wrongdoer.[104] *Glus* is representative of the emerging federal common law [105] as well as the growing trend in statutes and court decisions in favor of contribution notwithstanding the nature of the wrongdoing involved.[106] While a right of contribution may further certain policy goals underlying Title VII in fact situations akin to those of *Glus* [107] those same policies may not be advanced [108] or may actually be frustrated [109] if *Glus* is read too broadly.

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103. *See id.* Judge Sloviter reasoned that:

> [A] rule against contribution might very well encourage deterrence because potential violators would be more likely to refrain from violations if they knew that any injured party could impose the full burden of recovery on any one of them even though it played only a relatively minor role in the activity.

Id.

104. *See* notes 24-31 and accompanying text *supra.*

105. *See* notes 32-39 and accompanying text *supra.*

106. *See* notes 31-33 and accompanying text *supra.*

107. *See* note 100 and accompanying text *supra.*

108. *See* note 103 and accompanying text *supra.*

109. *See* notes 101-02 and accompanying text *supra.*