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Contribution Between Parties to a Discriminatory Collective Bargaining Agreement

Title VII of the Civil Rights Act of 1964 authorizes persons injured by a discriminatory collective bargaining agreement to sue the responsible employer or union for back pay. Title VII's back pay relief serves two purposes: it compensates the victims of discrimination and deters discriminatory practices. The Supreme Court recently agreed to consider whether an employer sued for back pay can seek contribution from a union that "participated in" a collective bargaining agreement containing a discriminatory term. To decide this issue, the Court will have to consider the effect of contribution on title VII's compensatory and deterrent purposes.

Courts and scholars have often failed to distinguish rules of liability under title VII from rules for the apportionment of a back pay judgment. Rules of liability determine whom an injured employee can sue for back pay; rules of apportionment, including rules of contribution and indemnification, determine whom a defendant can force to contribute to a judgment in favor of an injured plaintiff. Because joint and several liability is a necessary but not sufficient condition for contribution among parties who are liable to the plaintiff, it is necessary to identify the nature of union and employer liability for title VII back pay before considering rights to contribution.

This Note examines rules of title VII back pay liability and apportionment. Part I argues that all signatories to a discriminatory

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3. Contribution enables a joint tortfeasor who has been sued by a victim to force other wrongdoers to contribute to the victim's judgment. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50 (4th ed. 1971).
5. The term "apportionment" as used here denotes a determination of a defendant's liability to other violators rather than to the plaintiff. The term has another meaning in certain tort cases. When two or more defendants cause separately measurable harms to the plaintiff, one breaking the plaintiff's leg and the other breaking his arm, for example, the court will find each defendant liable for only the injury he himself caused. This determination of each defendant's separate liability to the plaintiff is also called "apportionment." See W. PROSSER, supra note 3, at § 52. In this Note, however, the term refers only to a determination of one defendant's liability to another.
6. This Note does not address the question whether employers who violate the Equal Pay Act of 1963 have a cause of action for contribution against unions that participate in or cause that violation. In Northwest Airlines, Inc. v. Transport Workers Union of America, 606 F.2d 1350 (D.C. Cir. 1979), cert. granted, 100 S. Ct. 3008 (1980), the Supreme Court granted certiorari on this question along with the question of contribution in title VII cases. Although both

173
collective bargaining agreement should be jointly and severally liable to injured persons for back pay. Although a union or employer may object to joint and several liability if its opponent in collective bargaining proposed and bargained for the discriminatory term, the purposes of title VII require that the parties become jointly and severally liable upon signing the agreement. Since joint and several liability fully serves the compensatory purpose of the statute, Part II of the Note looks to deterrence alone in selecting appropriate rules of apportionment. Part II concludes that when a plaintiff sues only one

questions concern contribution in employment discrimination cases, the differences between the Equal Pay Act and title VII raise issues beyond the scope of this Note.


The lack of a direct action by employees against unions under the Equal Pay Act has led some courts to find that the employer has no right of contribution against the union for Equal Pay Act liability. "[A]n essential prerequisite to contribution, where a right to contribution is recognized, is common liability. Since labor organizations and employers do not share common liability to employees under the Equal Pay Act, there can be no contribution, which is not true with Title VII." Northwest Airlines, Inc. v. Transport Workers Union of America, 14 Emp. Prac. Dec. ¶ 7730, at 5597 (D.D.C. 1977), affd. in part, revd. in part, 606 F.2d 1350 (D.C. Cir. 1979), cert. granted, 100 S. Ct. 3008 (1980). See Denicola v. G.C. Murphy Co., 562 F.2d 889 (3d Cir. 1977).

Proponents of contribution respond in two ways. First, they argue that the union is jointly liable with employers for conduct violating the Equal Pay Act. Joint liability arguably arises because the union is liable in suits brought by the government, see Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971), affd. per curiam sub nom. Hodgson v. Baltimore Regional Joint Bd., 462 F.2d 180 (4th Cir. 1972); see also Dunlop v. Beloit College, 411 F. Supp. 398, 402 (W. D. Wis. 1976), and because the legislative history supports an implied cause of action for damages by aggrieved employees against the union, see Brief for Petitioner at 24-25, Northwest Airlines, Inc. v. Transport Workers Union of America, cert. granted, 100 S. Ct. 3008 (1980). Second, they argue that contribution is appropriate where the union is liable under other doctrines of federal law for the same conduct that violates the Equal Pay Act, see generally Fischbach & Moore Intl. Corp. v. Crane Barge R-14, 476 F. Supp. 282, 287 (D. Md. 1979), and that any conduct violating the Equal Pay Act will also violate title VII, see § 703(h), 42 U.S.C. § 2000e-2(h) (1976).

party to a discriminatory collective bargaining agreement, the defendant should be able to require other parties to the agreement to contribute to any back pay judgment, except when requiring an employer to pay the entire judgment will best deter the formation of discriminatory contracts.

I. JOINT AND SEVERAL LIABILITY AND THE COMPENSATORY PURPOSE OF TITLE VII

Title VII should be interpreted as imposing joint and several liability on the parties to a discriminatory collective bargaining agreement. Title VII forbids discrimination by employers and unions, and prohibits unions from causing or attempting to cause an employer to discriminate along racial, sexual, ethnic, or religious lines. Individual victims may sue discriminating unions and employers in federal district court. The statute authorizes courts not only to enjoin employer and union discrimination, but also to impose back pay liability. The legislative history reveals that Congress intended these provisions to combat contractual discrimination by imposing back pay liability on both unions and employers.

7. Section 703(c), 42 U.S.C. § 2000e-2(c) (1976), provides:
   It shall be an unlawful employment practice for a labor organization —
   (1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.


9. Section 706(g), 42 U.S.C. § 2000e-5(g) (1976), provides in pertinent part:
   (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

10. See, e.g., 110 Cong. Rec. 7206-07 (1964) (Department of Justice statement in remarks of Sen. Clark), reprinted in LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3244 (1968). ("[T]itle VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now. On the other hand, where the procedures of Title VII are invoked, the remedies available are . . . injunctive relief against continued discrimination, plus appropriate affirmative action including the payment of backpay"); HOUSE COMM. ON EDUCATION AND LABOR, EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1962, H.R. No. 1370, 87th Cong., 2d Sess. 4-5 (1962); HEARINGS ON CIVIL RIGHTS BEFORE SUBCOMM. NO. 5 OF THE HOUSE JUDICIARY COMM., 89th Cong., 1st Sess. 1944 (1963) (statement of Walter Reuther).
To observe that unions and employers are simultaneously liable for discriminatory collective bargaining agreements, however, does not establish that a plaintiff may recover the entire amount of his injury from either party. Some courts, while holding both unions and employers liable, fail to specify whether they are imposing joint and several liability. Other courts have spoken of dividing liability in various manners between union and employer, implying, perhaps, that collection of the entire judgment from one party would not be allowed.

Although only a few cases directly confront the question of whether unions and employers are jointly and severally liable, the Supreme Court's decision in *Albemarle Paper Co. v. Moody* supports an affirmative conclusion. The Court in *Albemarle* held that both employer and union should be liable for back pay except "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Lower courts' general recognition of some


These declarations of simultaneous liability are ambiguous, however, because they do not preclude the possibility of a plaintiff recovering all his damages from one defendant. The decisions leave unclear whether, on the one hand, the declaration of equal 50% shares of liability, for instance, would preclude a plaintiff from collecting more than 50% from one of the parties, or whether, on the other hand, the even division presents a formula for final shares after contribution.


15. 422 U.S. 405 (1975). The Court in *Albemarle* did not have to reach the question of joint union-employer liability because the district court had refused to hold either union or employer liable for back pay. No issue of union liability relative to the employer was presented.

16. 422 U.S. at 421.
form of union liability for back pay is consistent with the Albemarle requirement that back pay be awarded so as to deter discrimination.\textsuperscript{17} It is the statute’s compensatory policy, however, that requires joint and several liability.\textsuperscript{18} If unions and employers were not jointly and severally liable for contractual discrimination, the inability of one party to pay would make it impossible for a victim of discrimination to recover the full amount of his damages. Without joint and several liability, many victims of discrimination would not be made whole. A rule of joint and several liability would allow an injured person to sue a solvent party for all his damages.

Signatories of a discriminatory collective bargaining agreement should therefore be jointly and severally liable for back pay under title VII. Once a rule of joint and several liability is established, the problem of apportionment of back pay judgments among violators immediately arises.\textsuperscript{19}

\section{II. APORTIONMENT OF A BACK PAY JUDGMENT}

\subsection{A. The Case for Contribution}

If courts hold unions and employers jointly and severally liable for signing a discriminatory collective bargaining agreement, an injured person can choose any or all of the signatories as defendants in a title VII suit. If a union or employer singled out for suit is denied contribution, it alone must pay the entire back pay award. Employees and other victims almost invariably sue either the employer alone,\textsuperscript{20} or both the employer and the union.\textsuperscript{21} Often the union itself

\begin{itemize}
  \item \textsuperscript{17} See text at notes 70-79 infra.
  \item \textsuperscript{18} Some courts have recognized that unions and employers are jointly and severally liable for back pay. \textit{E.g.}, Glus v. G.C. Murphy Co., 23 Fair Emp. Prac. Cas. 86, 91 (3d Cir. 1980) (under title VII, “the union and the employer may be held jointly liable when the unlawful activity was a joint undertaking”); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978) (“A union is jointly liable with the employer for discrimination caused in whole or in part by the provisions of a collective bargaining agreement”); Myers v. Gilman Paper Corp., 544 F.2d 837, 848-49 (5th Cir.), modified, 556 F.2d 758 (5th Cir.), cert. dismissed, 434 U.S. 801 (1977); Winfield v. St. Joe Paper Co., 15 Fair Emp. Prac. Cas. 1497, 1500 (N.D. Fla. 1977). None of these cases expressly claims to impose joint liability because of title VII’s compensatory purpose.
  \item \textsuperscript{19} \textit{Cf.} Winfield v. St. Joe Paper Co., 15 Fair Emp. Prac. Cas. 1497, 1500 (N.D. Fla. 1977) (“[T]he company and the labor unions are ‘correctly viewed . . . as joint wrongdoers whose concurrent acts caused plaintiffs’ injuries . . . .’ The disposition of the case is bifurcated, with the initial proceeding limited to a determination of the liability, if any, of the defendants. If joint liability is found, the second phase is for the purpose of apportioning liability among the defendants”) (citation omitted).
\end{itemize}
sues the employer as the representative of a class of injured employ­ees.22 Thus a rule allowing contribution would most often benefit employers at the expense of unions.

Contribution claims arise in different ways, depending upon who is suing and who is being sued. If an employee sues the union or employer alone, the defendant may file a third-party claim before trial for contribution against other parties to the agreement, or may commence a separate suit for contribution after judgment.23 If a union represents the plaintiff class of employees, the employer may file a counterclaim for contribution.24 Finally, if both union and employer are sued, each may file a cross-claim against the other for contribution or indemnification25 in the event it is found liable at trial.26

Title VII is silent regarding contribution claims by parties jointly and severally liable for back pay.27 Partly as a result of this silence, title VII contribution claims have had a mixed reception in the courts. The Third Circuit Court of Appeals has endorsed contribution claims by parties who settle before trial.28 The Fifth Circuit has permitted contribution, but apparently requires that a party be guilty of some degree of involvement in discrimination beyond the mere signing of the agreement before it will be forced to contribute.29 The District of Columbia Circuit has declined to decide the issue, saying it is "a complex and sensitive question."30 No district court has upheld a motion to dismiss a title VII contribution claim as a matter of


23. Northwest Airlines attempted to obtain contribution by both of these procedures in the litigation now before the Supreme Court. A federal district court dismissal of a third-party claim for contribution from the Transport Workers Union was upheld by the District of Columbia Circuit Court of Appeals. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 476-78 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978). The company also commenced a separate suit for contribution. See Northwest Airlines, Inc. v. Transport Workers Union of America, 606 F.2d 1350 (D.C. Cir. 1979), cert. granted, 100 S. Ct. 3008 (1980).

24. See cases cited at note 22 supra.

25. Indemnification shifts the entire loss from one joint tortfeasor to another who is deemed responsible for making the full payment. See Heizer Corp. v. Ross, 601 F.2d 330, 331 (7th Cir. 1979).


law, but some have expressed serious doubts as to whether contribution claims will succeed. The standard governing when contribution will be allowed therefore remains unclear. Since contribution does not affect the plaintiff's ability to recover back pay, courts should look to title VII's deterrent purpose to decide: (1) whether contribution is appropriate; and (2) when it is appropriate, how contribution shares should be determined.

When the Supreme Court in Albemarle endorsed the Eighth Circuit's conclusion that the "reasonably certain prospect of a back pay award" would provide "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate" discriminatory practices, it did not explicitly address the question of joint and several liability for discriminatory collective bargaining agreements, and it therefore failed to reach the issue of contribution. Allowing a right of contribution between union and employer, however, would increase the effectiveness of the "spur or catalyst" of back pay at the bargaining table.

One theoretical view of the bargaining process suggests that the presence or absence of contribution would not affect the level of deterrence. Such a view would assume that, given any particular allocation of liability, either party (union or employer) during bargaining would trade away a valuable benefit to achieve a discriminatory contract so long as the utility to that party of the discriminatees what they would have received had it not been for discrimination in the past. It cannot be permitted now to pass on any of that obligation merely because it has been deferred." Youngdahl, supra at 646. This same commentator also suggested that money damages are more properly paid by the employer than by the union because the employees represented by the union will have to pay the cost of being displaced by the past victims of discrimination, while the employer will not suffer such displacement. Ibid. at 648. However, the employer-as-sole-paymaster argument begins with an unsound premise: the employer will not be the sole paymaster if the union abuses the bargaining process so as to achieve a discriminatory shifting of benefits from a disfavored to a favored class of employees.

33. See text at notes 14-19 supra.
34. Some commentators have ignored the need to preserve the deterrent effects of back pay liability. See, e.g., Youngdahl, Suggestions for Labor Unions Faced with Liability under Title VII of the Civil Rights Act of 1964, 27 Ark. L. Rev. 631 (1973) (discussed infra); Comment, The Union as Title VII Plaintiff: Affirmative Obligation to Litigate?, 126 U. Pa. L. Rev. 1388, 1412 (1978) (apparently assuming that the only deterrent effect of back pay would be to force unions to sue in court). One early commentator suggested that back pay liability for discriminatory contracts should not be imposed on unions, because "[t]he employer is the 'paymaster.' [The employer] would have paid the discriminatees what they would have received had it not been for discrimination in the past. It cannot be permitted now to pass on any of that obligation merely because it has been deferred." Youngdahl, supra at 646. This same commentator also suggested that money damages are more properly paid by the employer than by the union because the employees represented by the union will have to pay the cost of being displaced by the past victims of discrimination, while the employer will not suffer such displacement. Ibid. at 648. However, the employer-as-sole-paymaster argument begins with an unsound premise: the employer will not be the sole paymaster if the union abuses the bargaining process so as to achieve a discriminatory shifting of benefits from a disfavored to a favored class of employees.
37. 422 U.S. at 417.
tory provision exceeded the potential back pay liability. Similarly, either party would trade away a valuable benefit to get rid of a discriminatory term if the potential liability for the term exceeded its utility. For example, if an employer believed that by discriminating it could improve its profitability by an amount greater than its potential liability for back pay, it would be willing to bargain away other less valuable terms to keep the discriminatory term. Conversely, a union that found no utility in the term itself and that feared back pay liability would offer concessions to the employer to get rid of the term. If bargaining proceeded ideally, the term would be included in the final agreement if and only if the total amount the parties were willing to pay to include the term exceeded the amount they would pay to keep it out. Stated somewhat differently, if the total utility of the term to both parties exceeded the potential total back pay liability, the term would be included; if the potential liability exceeded the utility, bargaining would remove the term. Thus, the inclusion or exclusion of the discriminatory term would be independent of the particular rule of allocation. Any change in the allocation of potential back pay liability would make one party more eager to include the term (or less eager to exclude it) but would have exactly the opposite and offsetting effect on the other party.

But in the real world, deterrence is improved by threatening both parties with liability. The improved deterrence arises because parties to real world bargaining are not omniscient, and may inaccurately assess the utility and liability that accompany a discriminatory term. Imperfect information about potential liability or utility can lead to irrational results. For example, the employer may be unaware that the contract discriminates, and may remain unaware during bargaining, if the union has no incentive to reveal the discrimination. The employer may also misperceive the utility of the

39. If both parties are willing to “pay” — i.e., give up a valuable benefit — to keep the term, then it will be included in the agreement. If both are willing to pay to remove the term (though it is not likely, then, that it would have been proposed at all), then the term will be taken out. If one party wants to keep the term while the other wants to remove it, the party willing to pay the most will achieve its desire.

40. For example, suppose that the employer bears all the liability for back pay. Suppose further that the potential liability is $100, the utility to the employer is $50, and the utility to the union is $40 (total utility to both parties of $90). A rational employer would offer the union $41 in benefits to agree to delete the discriminatory term, and both parties would gain. The employer would give up $50 utility plus $41 in benefits but would gain $100 in lost liability for a net gain of $9. The union would give up $40 in utility for $41 in benefits for a $1 net gain. Now suppose the utility to the employer is $70. He will not give up $111 ($70 utility plus $41 in benefits to the union) in order to escape liability of only $100. Nor is the result changed by making each party liable for half the back pay, or $50 each. The employer now has a $70 utility and faces $50 potential liability. To give up that $70 utility, the employer will want at least $21 from the union; $21 plus $50 lost liability minus $70 utility yields a $1 net gain. But, the union cannot afford to give up that $21 in benefits plus another $40 in utility in order to escape a $50 liability. The outcome, then, is the same no matter how the liability is apportioned.
discriminatory term to the union and thus may not even attempt to bargain for its removal. Requiring both parties to bargain against discriminatory contracts will improve deterrence by increasing the flow of information between the parties. For this reason, both parties should be encouraged by the threat of liability to bargain against discriminatory contracts.41

Thus far, this argument establishes only that both the union and the employer should be threatened by liability, not that contribution should be available. If joint and several liability were the rule, and if plaintiffs were just as likely to sue unions as to sue employers, then both parties would be equally threatened by liability whether or not contribution were allowed. But the cases reported suggest that victims of discrimination will sue unions much less often than they will sue employers.42 Such a pattern would reduce the threat of back pay liability to unions under a no-contribution rule. The only way to ensure a balance of threats against union and employer is to allow contribution.

Concern for fairness offers additional support for a rule allowing contribution in title VII back pay litigation. Denying contribution seems unfair because it "places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss."43 As the Supreme Court recently observed, contribution promotes "a more 'equal distribution of justice' . . . by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two violators to bear the entire loss, though the other may have been equally or more to blame."44 Partly out of concern for fairness, federal courts have extended contribution rights in securities,45 antitrust,46 and admiralty47 cases.

Four possible arguments against contribution in title VII back pay suits seem unpersuasive after close examination. One objection is that courts have traditionally allowed contribution only between unintentional tortfeasors,48 while only "intentional" violators are lia-

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42. See text at notes 20-22 supra.
43. Gomes v. Brodhurst, 394 F.2d 465, 467 (3d Cir. 1968).
45. See, e.g., Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979).
48. The English common law denied contribution to intentional tortfeasors, see Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799), as did the 1955 revision of the 1939 Uniform Contribution Among Joint Tortfeasors Act in section 1(c). A mistaken interpretation of the Merryweather doctrine led most American jurisdictions to deny contribution to both
ble for back pay under title VII. This objection fails for two reasons. First, a very low level of intent is sufficient to violate title VII. Proof of discriminatory intent is usually unnecessary; rather, "[i]ntentional unfair employment practices are those engaged in deliberately and not accidentally." All that the plaintiff ordinarily need show is a discriminatory effect to make out a prima facie case. Failure to rebut the prima facie case with evidence of a valid business purpose will leave the defendant liable even though its intentions were laudable. Second, the rule barring contribution between intentional tortfeasors is neither absolute nor unquestioned. Some courts have allowed intentional violators to receive contribution, and several commentators have urged abolition of the rule barring contribution to intentional violators. In short, the rule is archaic and should not apply to title VII violations: courts should look elsewhere for reasons to grant or deny contribution in title VII cases.

A second objection to contribution in title VII cases is that it violates legislative intent. In a recent dissent from a Third Circuit opinion


49. Title VII empowers the court to order payment of back pay where it finds that the defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice. . . ." Section 706(g), 42 U.S.C. § 2000e-5(g) (1976).


51. Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 246 (3d Cir. 1973) (holding that "discrimination based on reliance on conflicting state statutes is an intentional unfair employment practice").


56. See text at notes 41-47 supra.
ion approving a title VII contribution award, Judge Sloviter argued that Congress intended to deny contribution when it left express contribution provisions out of the Civil Rights Act of 1964. Like some courts that deny contribution among joint antitrust violators, Judge Sloviter reasoned that the eighty-eighth Congress was aware that federal common law barred contribution, and that it must therefore have intended to deny contribution under title VII. Judge Sloviter's objection should be rejected for several reasons. First, it seems more likely that Congress never considered the possibility of contribution claims than that it intended to deny them. The statute fails clearly to specify that parties to a collective bargaining agreement are jointly and severally liable for discriminatory terms, which suggests that Congress was unsure about joint and several liability, let alone about the apportionment problems that accompany it. Second, one can read the back pay provisions of title VII as implicitly endorsing contribution rights. Finally, ambiguous legislative intent seems a poor justification for rejecting a rule that would promote the deterrent purpose that lay at the heart of congressional resolve to pass the Civil Rights Act.

A third argument against title VII contribution rights is equally unpersuasive. Some have warned that contribution claims will unduly complicate title VII suits. Yet contribution in securities suits, which commonly involve more defendants than title VII cases, has not produced excessive complexity. Should a court become seriously concerned that the complexity caused by a contribution claim will impose excessive burdens upon a plaintiff, it can sever the contribution claim from the suit under Federal Rule of Civil Procedure 42(b).

A final argument against contribution is that it will frustrate a strong statutory policy favoring pre-trial settlement of title VII disputes. Contribution might in some cases discourage settlement:

59. 23 Fair Emp. Prac. Cas. at 99.
61. 23 Fair Emp. Prac. Cas. at 88.
62. See text at notes 35-42 supra.
65. See Note, supra note 55, at 916.
defendants could not achieve repose by settling, if after settlement they still faced potential contribution claims by non-settling violators. Courts, however, could remove such disincentives to settle by barring contribution against settling defendants. Such an exception to a general rule permitting contribution would have to be accompanied by close judicial scrutiny of “bad faith” or “collusive” settlements between the plaintiff and one of the parties to the agreement. Even if courts allow contribution claims against settling parties, the disincentive to settle may be outweighed by the post-settlement incentive created when courts permit contribution claims by settling defendants against joint violators.

Having established that contribution will promote deterrence and not impede other Title VII policies, we must ask which rule for the division of shares between union and employer will maximize deterrence. The answer comes in part from the preceding analysis: if we seek to ensure the greatest possible deterrent effect on both parties, a half-and-half division is ordinarily best. Courts could adopt other rules, but if the desideratum is “self-examination” by both parties of the proposed terms of employment, no other rule will so strongly promote the exchange of information between the parties.

A half-and-half rule of apportionment is prima facie reasonable because courts cannot predict in advance from which side of the bargaining table a discriminatory proposal will come. A half-and-half rule would deter discriminatory proposals from both sides equally. But some courts might prefer to adjust contribution shares to impose heavier burdens on those who propose discriminatory terms or on those who seem more likely to benefit from the term’s inclusion.
Such changes, however, would be responsive only to vague and irrelevant notions of fairness and to improper notions of causation, and seem unlikely to improve deterrence.

The purpose of a rule of contribution is to encourage parties to examine potentially discriminatory contract terms, not to punish the culpable. Merely being a proposer or a potential beneficiary of a discriminatory term does not make a party more likely to examine carefully the discriminatory effect of the term. Contribution shares should be apportioned so as to insure that the party most likely to respond to the threat of contribution liability by bargaining against discrimination will face the largest possible threat. Since we cannot predict in advance which party will be the more responsive, an even apportionment of contribution shares best achieves this goal.

It remains to decide what formula for apportionment should be used when more than two parties negotiate an agreement. Frequently, both a local union and an international union will be represented at the bargaining table. The principle of even apportionment might dictate either that each bargaining party contribute equally to any judgment, or that each side in bargaining (labor and management) contribute equally. Apportioning half of the judgment to labor and half to management would maximize deterrence if, as it seems safe to assume in most cases, the various groups on either side will pool their informational resources and confront the other side as a single entity.

The two most carefully reasoned appellate decisions confronting the question of multiple-party apportionment provisions, because “[m]ost other employment practices described in a labor contract are not as likely to be union-inspired, and their inclusion in the contract does not alone lead to a presumption that there is a nexus between the discrimination they cause and the union involved.” Id. at 985. Because the Georgetown Note argues that unions should not be liable unless they “cause” discrimination, it is hard to assert confidently that that Note’s conclusions would apply if the problem were recast as a question of contribution. For a broader definition of the word “cause,” one closer to this Note’s analysis and (it is submitted) the bulk of the case law, see Note, supra note 11, at 705.

See generally id.


Cf. Stevenson v. International Paper Co., 432 F. Supp. 390, 409 (W.D. La. 1977) (“The International and Local 582 operate as a single entity as a practical matter. Together they constitute one side of the table in collective bargaining sessions. With respect to the back pay liability to employees, then, they should be considered together as one joint wrongdoer. Thus,
tionment have approved half-and-half apportionment.79

No title VII policy requires that contribution be barred between parties that sign a discriminatory collective bargaining agreement, and allowing contribution usually increases deterrence of discrimination. As a general rule, courts should therefore allow contribution among unions and employers jointly liable to workers for back pay. Nevertheless, in some cases, barring contribution might better promote deterrence than allowing it. Section B identifies this category, and recommends that district courts deny contribution in such cases.

B. Limiting the Right to Contribution: A Bargaining-Resistance Defense

A rule allowing contribution assures that a union or employer fortunate enough not to be singled out for a title VII suit will still contribute to any back pay award. The prospect of contribution should usually increase incentives to bargain against a discriminatory term in a collective bargaining agreement. Nevertheless, in some cases the threat of contribution will do little to deter a party from accepting a discriminatory term even if it opposes the term.80 If one party to collective bargaining decides that the benefits it will

they should bear one-half the burden, not two-thirds the burden, as if each were a separate wrongdoer.

The Stevenson court pronounced the unions liable for 50% of the damages, but suggested, following Myers v. Gilman Paper Corp., 544 F.2d 837 (5th Cir.), modified, 556 F.2d 758 (5th Cir.), cert. dismissed, 434 U.S. 801 (1977), that the unions might be able to get a reduction of their “ultimate financial burden” “through the assertion of cross-claims of contribution or indemnity between the unions and the company,” 432 F. Supp. at 408. This Note suggests that the 50% share of union responsibility should be altered only in accordance with the bargaining-resistance defense, see notes 83-96 infra.


80. For a cursory approval of a rule of automatic liability for both parties in all cases, see Note, supra note 11, at 702-07 (arguing that “[b]oth the language and purpose of Title VII are better served when a union is judged by the product of its negotiations rather than by its unsuccessful bargaining efforts”). The Harvard Note rests on two arguments. First, a union signatory to a discriminatory contract “causes” discrimination in violation of section 703(c)(3); mere bargaining resistance does not negate causation. Second, the absolute liability “results” rule will more strongly deter the creation of discriminatory contracts.

The first of these arguments is irrelevant to the question of back pay: a violation of section 703(c)(3) does not necessarily imply back pay liability. Under section 706(g), a court may enjoin both the employer and the union from enforcing the term and yet hold the employer solely liable for back pay. The second argument assumes that a strict liability rule would increase bargaining resistance in all cases. But see text at notes 87-92 infra. The Harvard Note reluctantly admits that under its proffered “results” test a union is expected to make unlimited economic sacrifice to achieve a nondiscriminatory contract. The Note apparently prefers such an unrealistic expectation to what it concludes would be the impossible task under an “efforts test” of prescribing “the economic value which a union should place on negotiating a nondiscriminatory contract.” Id. at 706 n.24. The present Note argues that such an inquiry is not impossible. Under the rule suggested here, courts would not have to price the value of workers’ rights in a speculative market of human dignity; they would merely inquire whether or not back pay would deter discrimination in similar cases.
have to surrender (or the costs it will have to bear)\(^{81}\) to bargain away a discriminatory term exceed its expected contribution liability,\(^{82}\) that party will cease bargaining against the discriminatory term. In other words, the "bargaining resistance" inspired by contribution is limited by the potential contribution liability, and the resistance dissipates once the party desiring the discriminatory term offers benefits (or imposes costs) in return for the term that exceed the other party's expected contribution share. This limit to rational bargaining resistance suggests that deterrence might be increased by barring contribution claims against a party that had bargained against a discriminatory term until it received a benefit that exceeded its potential liability.\(^{83}\) Allowing contribution in such a case would not alter the bargaining behavior of similarly situated parties — they would continue to prefer title VII liability to the costs of removing the discriminatory term.

Two examples illustrate a bargaining-resistance "defense" to a

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81. A union might, for example, face an employer's demand that the union accept lower wage scales in return for exclusion of the discriminatory term. Or, a majority of union members might face the loss of benefits to be gained by minority members. In either case, the potential lost value may be termed the "bargaining cost" to the union of gaining a non-discriminatory contract. The cost of a strike, in the event the parties reached impasse over the term, would also be a cost of removal, to be compared with potential liability costs.

82. A party might actually compare bargaining costs with its expected contribution liability as discounted by the likelihood of suit. Merely requiring a showing that bargaining costs exceeded undiscounted contribution liability costs would not produce bargaining by an amoral cost-efficient union at a level in excess of the discounted contribution liability costs. But the bargaining-resistance defense presented infra at notes 83-96 should nevertheless not be based on a party's assessment of discounted liability costs, for two reasons.

The factual complexity of assessing the proper amount of discount would itself be a reason to set the threshold at the undiscounted level. Parties will have varying degrees of risk-aversity. A small union, for instance, with limited self-insurance reserves, might fear a single large back pay judgment so much that it would pay bargaining costs approaching the full amount of potential liability costs, while a large union responsible for many different contracts, possessing large cash reserves, would tend to bargain only up to the level of discounted liability costs, especially where the potential liability costs were small. Because of this unpredictable variation, courts should simply presume that all unions will bargain at the undiscounted level. See generally, Coffee, Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, 17 AM. CRIM. L. REV. 419, 468 (1980) (arguing that a strategy of punishment for organizational criminal behavior should be designed to deter both risk-preferrers and risk-aversers because "[t]here may be substantial numbers of both risk preferrers and risk averters in the relevant pool of potential offenders"); see also Breit & Elzinga, Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis, 86 HARV. L. REV. 693, 705 (1973).

Moreover, one must not assume that all unions will see the problem solely as a matter of avoiding liability. Some unions might evaluate the problem of bargaining against discrimination as a matter of total cost and benefit to the membership as a whole. Such a union would, to remove a discriminatory term, pay bargaining costs equal to the full undiscounted liability costs. If the defense's hurdle were lowered to the level of discounted liability costs, such "good" unions would be given an incentive to minimize the likelihood of employee suits by means of secrecy or misstatement. To avoid this unwanted incentive effect, the defense threshold should be set at the level of undiscounted liability costs.

83. At least one court of appeals has absolved a union that bargained persistently and vocally against the employer's discriminatory term, but the court did not indicate why title VII permitted such a result. See Williams v. Norfolk & Western Ry., 530 F.2d 539 (4th Cir. 1975). For a similar EEOC result, see EEOC Decision No. 70112, 2 Fair Emp. Prac. Cas. 410 (1969).
contribution claim. 84 Consider first an employer who wants to make employees and outside applicants for a certain position take a test that a union believes to be discriminatory. During collective bargaining, the employer may offer a union wage increases or fringe benefits in return for its acceptance of the discriminatory test. If the value of the benefits exceeds the amount the union expects it would pay in contribution claims, the union may accept the employer's offer. 85 Imagine second that the employer offers no benefit in exchange for the union's acceptance of the test, but instead insists that the union must strike to excise the term it believes to be discriminatory. 86 If the union believes that the costs of a strike exceed its potential liability for contribution, it may choose to sign an agreement containing the offensive term. In these two cases, allowing contribution will not increase deterrence. The question then becomes whether some other apportionment scheme might increase deterrence in these cases, and whether the costs of identifying these cases outweigh the additional deterrence that might result from creating an exception to a rule allowing contribution.

Denying employer claims for contribution from unions 87 that have bargained to the limit of their rational resistance would promote deterrence in three ways. First, employee plaintiffs may be less reluctant to bring title VII suits against employers if courts recognize

84. Although this Note discusses the desirability of a bargaining-resistance defense to a contribution claim, the same reasoning might support a bargaining-resistance cause of action for indemnification. If a plaintiff sues an employer alone, and the employer sues a union for contribution, the bargaining-resistance defense comes into play. If a plaintiff sues both the employer and the union, and if the union would have had a bargaining-resistance defense to contribution had the employer alone been sued, the union should be able to sue the employer for indemnification.

85. If a union decided that the cost of bargaining away a discriminatory term exceeded the potential cost of back pay liability for the inclusion of the term, it might decide as a matter of economic prudence to incur liability rather than pay the bargaining costs. Even a union that took its minority members' rights seriously might make the same calculation in cost/benefit terms. The union's potential liability could be considered equal to the minority employees' lost benefits. If the cost to all employees of obtaining that benefit exceeded the value of the benefit, the union would have no reason to make the trade.

86. An employer might insist upon a discriminatory term even when the term offered him a marginal benefit, if he wished to establish his credibility in later bargaining. See C. Stevens, Strategy and Collective Bargaining Negotiation 86-87 (1963); N. Chamberlain, Collective Bargaining 219 (1951).

87. A resisting employer faced with union insistence on a discriminatory term might also be entitled to a bargaining-resistance defense in some cases. The employer in such cases occupies an analogous position to a resisting union, but not an identical one. The concern that employees would be deterred from suing their union would not necessarily apply to the employer. As a practical matter, a union's inability to pay large back pay awards might cause jointly liable employers to pay a judgment regardless of contribution rules. Cf. Rios v. Steamfitters Local 638, 400 F. Supp. 993 (S.D.N.Y. 1975) (recognizing need to adjust title VII attorneys' fee award in light of union's being a relatively shallow-pocketed organization not operated for profit), affd., 542 F.2d 579 (2d Cir.), cert. denied, 430 U.S. 911 (1976). Most of the arguments in this Note supporting a defense for the resisting union, however, support a defense for the resisting employer as well.
a bargaining-resistance defense to contribution claims against unions. If contribution is always allowed, union members may be reluctant to sue because they know that their union will be forced to contribute to any back pay award. The employee may be particularly reluctant to sue where the union has bargained actively against the discriminatory term, but has accepted it because the employer demanded an unacceptably high price for its removal. The deterrent rationale for back pay remedies under title VII depends on the encouragement of private title VII actions; to the extent a universal contribution rule inhibits private suits, a bargaining-resistance defense would enhance deterrence.

Second, protecting a union with a bargaining-resistance defense might encourage it to bargain against a discriminatory term in cases where it would otherwise remain silent. If employers had a uniform right to contribution, a union desiring to excise a discriminatory term might decide that to try and fail is worse than never having tried at all. If the union were unsure that it could successfully negotiate for the term’s omission, it might prefer complete passivity because a vigorous attack on the term would publicize the existence of the term and increase the likelihood of employee suits. It might also conclude that if it did try to bargain against the term, it would risk trading away employee benefits without gaining a freedom from back pay liability. A bargaining-resistance defense would establish

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89. If a union had perfect information about each party’s utility and potential liability, and if each party were rational, then the union could always predict the outcome of negotiations for the removal of discriminatory terms. In the real world, however, imperfect information and stubborn parties make such prediction hazardous in many cases. See lecture by Maurice J. Tobin (May 16 and 18, 1949), reprinted in INSTITUTE OF PUBLIC RELATIONS, THE ECONOMICS OF COLLECTIVE BARGAINING, 76, 81-82 (C. Knight ed. 1950); text at note 41 supra.

90. Cf. R. Gorman, Basic Text on Labor Law 719 (1976) (discussing, in a slightly different context, the relatively high “level of visibility” of a union’s contract negotiation, making it subject to thorough review by the membership).

91. See C. Stevens, supra note 86, at 103-07. Professor Stevens observes that a party to collective bargaining faces “a rather delicate problem,” id. at 105, in attempting to change an “ostensible position, with the intention of conveying information to one’s opposite number about one’s equilibrium position [the minimum bargaining point at which one is willing to conclude an agreement],” id.; J. Dunlop & J. Healy, Collective Bargaining: Principles and Cases 65 (rev. ed. 1953) (Despite the bargaining convention that all offers in a “package” proposal “are provisions and may be formally withdrawn if there is not settlement of the total dispute. . . . [o]ffers made are seldom effectively withdrawn, except when one side or the other has suffered serious defeat in a strike or lockout.”).

A union that has decided to remain passive during bargaining might attempt to minimize its losses by suing the employer over the discriminatory term as quickly as possible after signing the agreement, thereby reducing the period over which back pay would be calculated. See Comment, supra note 34, at 1411. The union would not escape liability for its share of back pay by bringing such a suit. See Communications Workers of America v. New York Tel. Co., 8 Emp. Prac. Dec. 5356 (S.D.N.Y. 1974) (union improper class representative because union could itself face liability if contract term proved discriminatory). One author argues that the strict liability rule encourages union suits in this fashion. See Comment, supra note 34, at 1412. But see Note, supra note 11, at 704 n.16. To the extent that allowing contribution en-
a threshold of resistance beyond which a union would not have to go; the existence of this horizon would allow unions to bargain affirmatively without fearing that their resistance, if followed by failure, would be worse than no resistance at all.

Finally, denying contribution in these cases would do more than encourage employees to sue and unions to resist; it would double the potential liability of employers who insist upon discriminatory terms. This doubling of potential liability might cause some employers to consider for the first time the value of a long established discriminatory practice. It might also cause some employers to abandon terms that they would have desired if they were certain that unions would bear half of any back pay award.

Allowing unions to assert a bargaining-resistance defense to employer contribution claims would therefore significantly increase title VII deterrence through its effects on employees, unions, and employers. It remains to establish a workable standard that district courts can apply in granting or denying a bargaining-resistance defense to contribution claims. Since the rationale behind the bargaining-resistance defense rests upon deterrence, the standard should turn upon the deterrent effect of contribution. When a union asserts a bargaining-resistance defense to contribution, the district court should ask whether allowing contribution will in the future deter similarly situated unions from signing discriminatory collective bargaining agreements. Contribution will not deter if the union’s encouragement to sue over discriminatory terms, rather than negotiate their removal, it undermines the policies of the statute. A plaintiff union in such a suit would be unlikely to provide the best possible challenge to alleged discrimination:

[U]nions forced into the courtroom by fear of Title VII liability would be less than ideal advocates. Motivated solely by its desire to avoid liability, the union would have absolutely no stake in the outcome of the "test case." If the court invalidated the questionable provision, the threat of liability would be removed. If no Title VII violation were found, the union would likewise emerge "victorious." Regardless of the outcome, the union’s sole objective — avoidance of liability — would be achieved.

Comment, supra note 34, at 1412. Inexplicably, this Comment seems to assume that a union would be immune to back pay claims if it were a plaintiff. Plaintiff unions have no such immunity, for employers can file counterclaims for contribution. See cases cited at note 22 supra. A union strategy of bargaining passivity followed by a quick suit undermines the goal of title VII to promote compliance with the statute at the bargaining table rather than in the courtroom. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

92. The bargaining-resistance defense may encourage separate discussion of discriminatory terms, thereby causing parties to assess carefully the value of discrimination. Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (recommending that employers and unions examine and evaluate their employment practices). Without a bargaining-resistance defense, bargaining over the discriminatory term may become enmeshed with other issues in a "package deal," and the employer may never be forced to reevaluate the value of the practice to him. See C. Stevens, supra note 86, at 44 (discussing the phenomenon of "package" settlements of collective bargaining disagreements). Some troublesome terms may be settled by placing them in a package with other terms and reaching a "covert agreement" to include them in the final agreement without specific discussion of the troublesome terms. To parties reaching such a package settlement, "it is the total cost of that package that matters," not the cost of individual items in the package. Id.
expected liability falls short of the costs of bargaining away the discriminatory term. The court should therefore bar contribution where a union can show that it bargained against a discriminatory term and reasonably concluded that the costs of removing the term exceeded the potential back pay liability.

This standard is, admittedly, difficult to apply. Each of the variables the court must balance — the potential liability and the costs of removing the term — defies precise measurement. And the standard requires courts to examine the machinations of collective bargaining, a task some judges have found distasteful. Nevertheless, the standard has much to recommend it. Combined with joint and several liability and a general right to contribution, the bargaining-resistance defense assures that back pay awards will effectively promote the compensatory and deterrent purposes of title VII. The standard also assures that experienced district judges will retain a limited, but desirable, measure of discretion in adjudicating title VII contribution claims. These advantages make it worthwhile for courts to assume the administrative burden incident to a bargaining resistance defense. The next section considers a final objection to the defense.

C. Preserving the Incentive to Seek Relief Under Section 8(a)(5)

Unions need not rely on bargaining alone to get rid of discrimi-

93. Potential back pay liability is speculative even at the time of suit. Courts will have to consider what the union reasonably believed to be the potential liability at the time of bargaining. The time period during which back pay is assessed is fairly certain during bargaining, however: it is the life of the contract or of the discriminatory provision, subject to the two-year limitation provided in section 706(g). See note 9 supra.

94. These costs include the value of benefits the union received in return for accepting the discriminatory term and the costs of a strike (if necessary) to remove the term. Neither cost is easily measured.

95. See generally Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 719-20 (1965) (Goldberg, J., concurring and dissenting) (in determining whether the labor exemption from the antitrust laws applies, "an attempted inquiry into the motives of employers or unions for entering into collective bargaining agreements on subjects of mandatory bargaining is totally artificial"); R. GORMAN, supra note 90, at 561-62 (some courts reluctant to examine bargaining history as evidence of arbitrability as a disputed issue). But cf. id. at 339-41, where Professor Gorman discusses the necessary intrusion by the NLRB into the collective bargaining process when determining whether and when an economic strike is converted by an employer's bad-faith bargaining into an unfair labor practice strike:

particularly in a complex bargaining situation where many issues are discussed and many compromises necessary before an economic strike will be settled, it may be difficult to ascertain whether any one issue, economic or otherwise, is preventing settlement. In such instances, the Board must turn to such evidence of union motive as union telegrams, union newspaper advertisements, statements made at union meetings, and personal recollections of collective bargaining sessions.

96. See United States v. United States Steel Corp., 520 F.2d 1043, 1060 (5th Cir. 1973) ("The apportionment problem is initially one for the district judge. . ."). cert. denied sub nom. United States Steel v. Ford, 429 U.S. 817 (1976); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 655 (5th Cir. 1974) ("apportionment of the responsibility for equitable relief in a case such as this one falls within the sound discretion of the district court").
natory contract terms. Rather than bargain for the term’s omission, a union can seek a determination that the term is illegal under section 8(a)(5) of the National Labor Relations Act. If the National Labor Relations Board ("NLRB") decides that the term is illegal and that the employer has either insisted on it to the point of impasse or made it a condition of agreement, the Board may order the employer to withdraw the term and proceed with bargaining. Although there is no general duty to file unfair labor practice charges, a union may be spurred to initiate a section 8(a)(5) proceeding by the fear of liability under title VII. Indeed, if section 8(a)(5) proceedings were truly a cost-free and infallible means of excluding discriminatory terms from collective bargaining agreements, unions would always resort to them rather than attempt to bargain away the illegal discriminatory term. A bargaining-resistance defense would be undesirable if section 8(a)(5) proceedings involved little cost because the defense might encourage unions to sign discriminatory agreements that could easily have been challenged before the NLRB.

Section 8(a)(5) proceedings, however, do entail significant costs for the union that initiates them. One such cost is the poisoned bargaining atmosphere that may follow the union’s resort to the NLRB. After the conclusion of the section 8(a)(5) proceedings, the employer might adopt a much tougher bargaining stance with regard to such mandatory subjects as wages and pension benefits. This would effectively force the union to purchase the employees’ title VII entitlements at a substantial cost. However, in the procedural context in which this question would arise, the cost would be largely conjectural. A second cost of section 8(a)(5) proceedings is delay: bargaining on all issues may be suspended while the section 8(a)(5) charges are pending. If the NLRB eventually finds that the employer has violated section 8(a)(5), some retroactive relief may be possible, but the portion of the employees’ lost wages in the form of delayed contractual benefits will not be recoverable. Finally, the union risks that the NLRB will find the employer not to have vio-

99. If the cost of a section 8(a)(5) proceeding is greater than the potential liability, the rational union will forgo the section 8(a)(5) proceeding and suffer the consequences. If the cost of a section 8(a)(5) proceeding is less than the potential liability but exceeds the cost of bargaining for the term’s removal, the rational union will simply pay those bargaining costs.
100. The issue will not arise unless the union has not filed a section 8(a)(5) complaint. Only during a subsequent lawsuit by the injured parties would the question arise of what the union would have lost in wages and benefits had it filed a section 8(a)(5) complaint.
101. Even where the employer has in fact refused to bargain in violation of section 8(a)(5), the Supreme Court has held that the Board may not award the equivalent of forgone contractual benefits to the employees damaged by this refusal. The NLRA does not allow the Board to decide what terms the parties would have agreed to had the employer not refused to bargain. See H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).
lated section 8(a)(5).

Even if section 8(a)(5) proceedings cost nothing, some unions might forgo them for reasons unrelated to the availability of the bargaining-resistance defense. Not all proposals that expose unions to title VII liability can be removed by resort to the NLRB during bargaining. The employer violates section 8(a)(5) only if it insists on an illegal term to the point of impasse, or conditions agreement to mandatory terms on the union's agreement to the illegal proposal. By disguising its insistence on a discriminatory term as a mere proposal, an employer with great bargaining power may be able to evade section 8(a)(5) liability, yet still secure agreement to the discriminatory term. A weak union facing a powerful employer might therefore decide that a section 8(a)(5) complaint would be pointless.

The bargaining-resistance defense only eliminates the incentive to file section 8(a)(5) actions when the union's bargaining costs exceed its potential back pay liability and the costs of the section 8(a)(5) proceeding are less than its potential liability. In such a case, the union could eliminate the discriminatory term at a cost less than its potential liability by initiating section 8(a)(5) proceedings, yet it will choose to accept the discriminatory contract because that choice costs nothing. While it would be theoretically desirable to eliminate the bargaining-resistance defense where these inequalities hold, it would be hard to prove that a case falls within the exception. The costs of a poisoned bargaining atmosphere or of delay in bargaining, though potentially great, are inherently speculative. If the union were given the burden of proving that the costs of section 8(a)(5) proceedings exceeded its potential liability, it could rarely meet that burden, and the bargaining-resistance defense (and its added deterrence) would never be utilized. To avoid this undesirable result, courts should instead afford employers a chance to prove that unions

102. The likelihood of NLRB error is another cause of delay. Title VII questions are complex. See, e.g., Southwestern Pipe, Inc. v. NLRB, 444 F.2d 340 (5th Cir. 1971) (reversing NLRB findings that employer's proposal was illegal under title VII). Section 8(a)(5) actions would probably be the only context in which the NLRB would ever be called upon to decide title VII issues. The likelihood of NLRB error might encourage the losing party to seek appellate review by refusing to abide by the NLRB's order. See Labor Management Relations Act of 1947 § 10(f), 29 U.S.C. § 160(f) (1976).

103. See R. GORMAN, supra note 90, at 497-98. Professor Gorman criticizes the Supreme Court's distinction in the Borg-Warner case between permissive and mandatory terms; his observations are equally true of bargaining over illegal terms. The Borg-Warner rule, writes Gorman, makes the existence of an unfair labor practice turn upon the very nice distinction between proposing and insisting, a distinction that is foreign to the practicalities of collective bargaining. . . . [I]t is doubtful that it is practicable to forbid insistence on permissive [and, by extension, illegal] subjects, since a strong party at the bargaining table can realistically do so without much fear of legal reprisal, if only by disguising its insistence as related to a mandatory subject (and then relenting on that insistence when the other party makes a concession on the truly desired permissive [or illegal] subject).
would have prevailed in section 8(a)(5) proceedings at a reasonable cost when unions assert a bargaining-resistance defense to contribution.\textsuperscript{104} If the employer fails to carry this burden, the courts should recognize the bargaining-resistance defense even though the union has failed to attack the discriminatory proposal through a section 8(a)(5) proceeding.

\textbf{CONCLUSION}

Courts could fashion rules of back pay liability and apportionment that would promote the compensatory and deterrent purposes of title VII. For a variety of reasons, they have failed to do so. This Note identifies the most desirable set of rules, and urges courts to adopt them:

1. Parties that sign a discriminatory collective bargaining agreement should be jointly and severally liable for back pay.

2. When a plaintiff sues only one party to a discriminatory agreement for back pay, the party should usually have a right to contribution from other signatories.

3. Contribution shares should be apportioned among the signatories such that management and labor each bear one half of any back pay award.

4. Unions that have unsuccessfully resisted a discriminatory term during collective bargaining should be immune from contribution claims if the costs of removing the discriminatory term appeared to exceed their potential back pay liability.

5. An employer should be able to overcome this "bargaining-resistance defense" to a contribution claim if it can prove that the union could have removed the term through section 8(a)(5) proceedings at a cost below its potential back pay liability.

\textsuperscript{104} Where the discriminatory term proposed by the employer was clearly illegal under existing precedent (which reduces the likelihood of NLRB error) and the employer was relatively weak (which reduces both the likelihood that the employer could successfully disguise its insistence on the term as a mere proposal and that the employer would reduce employee benefits punitively in the bargaining following the NLRB's order), the costs of section 8(a)(5) proceedings probably would have been quite low, and contribution should probably be allowed.