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ence of the debt, and the debtor can assert against the subrogee any defenses he had against the original creditor.³² If the subrogation is partial, the debtor can require the joinder of both the partial subrogor and the partial subrogee, avoiding the possibility of multiple suits.³³ Thus, even in cases of partial subrogation, the debtor is not prejudiced and the court correctly viewed his lack of consent as immaterial.

Susan Kelly

CONTRIBUTION IN NON-COLLISION MARITIME CASES

Sessions, a longshoreman, was employed by Mid-Gulf Stevedores, Inc. to load a vessel in the Port of Houston. While walking atop cargo previously loaded in Mobile by Cooper Stevedoring Co., he stepped into a concealed gap, sustaining injury. Thereafter, Sessions recovered damages from the vessel and the vessel sought contribution from Cooper Stevedoring. In affirming the Fifth Circuit Court of Appeals,¹ the United States Supreme Court *held* that contribution is permissible between joint tortfeasors in non-collision maritime cases if the party against whom contribution is sought is not immune from liability by statute. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

32. *E.g.*, *St. Paul Fire & Marine Ins. Co. v. Gallien*, 111 So. 2d 571 (La. App. 1st Cir. 1959); *Motor Ins. Corp. v. Employers' Liability Assurance Corp.*, 52 So. 2d 311 (La. App. 1st Cir. 1951); *International Paper Co. v. Arkansas & Louisiana M. Ry. Co.*, 35 So. 2d 769 (La. App. 2d Cir. 1948). Since the subrogee is subject to all defenses available to the debtor against the original creditor, and the subrogee can recover only the amount expended, a third party will seldom pay the debt of another and request a conventional subrogation from the original creditor, unless it is in his own interest to do so. While the general contractor in the instant case could have let the supplier file his lien, requested that the subcontractor bond the lien, and paid the supplier only in case the subcontractor refused, it was more advantageous to the general contractor to keep the supplier from filing the lien. See *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Security Devices*, 35 LA. L. REV. 321, 325-26 (1975), discussing the instant case.

33. LA. CODE CIV. P. art. 697 provides: "An incorporeal real right to which a person has been subrogated, either conventionally or by effect of law, shall be enforced judicially by: (1) the subrogor and the subrogee, when the subrogation is partial; or (2) the subrogee, when the entire right is subrogated." The official comment to the article indicates that both the partial subrogee and the partial subrogor are necessary parties to a suit enforcing the subrogated claim, and the defendant waives his exception unless he timely objects to the nonjoinder of a necessary party. Since in most cases the debtor will be able to join both partial subrogee and partial subrogor, the instant case poses no significant impediment to judicial economy.

1. *Sessions v. Fritz Kopke, Inc.*, 479 F.2d 1041 (5th Cir. 1973).

In maritime law, the rule of contribution or division of damages between joint tortfeasors in collision cases is one of ancient origin.² However, in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Co.*,³ the United States Supreme Court refused to allow contribution between joint tortfeasors in a non-collision case.⁴ The *Halcyon* rule has affected two lines of factually distinguishable cases. One line of cases involves basically the same fact situation as arose in *Halcyon*:⁵ the party against whom the shipowner sought contribution was the plaintiff's employer who was exempt from tort liability under the Longshoremen's and Harbor Workers' Compensation Act.⁶ Even in such situations, before the 1972 amendments to the Act,⁷ the strict rule of no-contribution was circumvented by the doctrine of *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*⁸ which allowed a shipowner an action in indemnity against the longshoreman's employer based on a breach of an implied contractual obligation to perform in a safe manner.⁹

2. *The North Star*, 106 U.S. 17 (1882). See also *The Chattahoochee*, 173 U.S. 540 (1899); *The Atlas*, 93 U.S. 302 (1876); *The Alabama*, 92 U.S. 695 (1875); *The Washington*, 76 U.S. (9 Wall.) 513 (1869). See generally Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304, 305 (1957).

3. 342 U.S. 282 (1952).

4. "[I]t is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained This maritime rule . . . has been applied in many cases, but this Court has never expressly applied it to non-collision cases." *Id.* at 284. Accord, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). But cf. *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947) (referred to in *Halcyon* as "only incidental," 342 U.S. at 284 n.5); *White Oak Transp. Co. v. Boston, Cape Cod & New York Canal Co.*, 258 U.S. 341 (1922); *Atlee v. Pocket Co.*, 88 U.S. (21 Wall.) 389 (1874).

5. Plaintiff, longshoreman, brought an action for unseaworthiness (see *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946)) against the shipowner who, in turn, was denied contribution from the negligent employer of plaintiff, because he was immune from suit by statute. See, e.g., *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

6. 33 U.S.C. § 905(a) (Supp. 1972) provides in part: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

7. The 1972 amendment to the Act foreclosed the possibility of an action for indemnity against the employer by providing that an "employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U.S.C. § 905(b) (Supp. 1972). See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 n.6 (1974).

8. 350 U.S. 124 (1956).

9. See, e.g., *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404 (1969); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*,

The second line of cases affected by *Halcyon* involves an important distinction: the party against whom contribution was sought was not immune by statute from suit by the plaintiff. Under these circumstances the courts were confronted with whether the broad prohibition against contribution in non-collision cases announced in *Halcyon* should be invoked to prevent contribution or whether the *Halcyon* holding should be limited to its particular facts.¹⁰ Some federal courts strictly applied the language of *Halcyon* to exclude contribution,¹¹ although in some instances expressly questioning the equity of such a decision.¹² In prohibiting contribution, courts echoed the Supreme Court's reservations in *Halcyon*¹³ about taking judicial initiative in light of anticipated complexities in administering contribution and determined that any solution should await Congressional action.¹⁴ Some of these courts were also influenced or confused by common law concepts barring contribution between joint tortfeasors.¹⁵ The inequitable result of the failure to distinguish *Halcyon* from cases involving no statutory employer immunity was that, as between mutual wrongdoers, the party against whom the plaintiff chose to bring suit was forced to bear the entire burden.

On the other hand, the Second Circuit, in *In re Seaboard Ship-*

376 U.S. 315 (1964); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958).

10. See generally Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304, 345 (1957).

11. See, e.g., *Mendez v. States Marine Lines, Inc.*, 421 F.2d 851 (3d Cir. 1970); *Hartford Accident & Indem. Co. v. Gulf Ref. Co.*, 230 F.2d 346, 354 (5th Cir. 1956); *Wilkinson v. Yamashita-Shinnihon Kisen, K.K.*, 366 F. Supp. 110 (D. Md. 1973); *Coggins v. James W. Elwell & Co.*, 356 F. Supp. 612 (E.D. Pa. 1973); *In re Standard Oil Co.*, 325 F. Supp. 388, 390 (N.D. Calif. 1971); *Dingler v. Halcyon Lines*, 305 F. Supp. 1, 2 (E.D. Pa. 1969).

12. "It is ironic that admiralty, normally so hospitable to equitable principles, should deny contribution except in a strictly limited category of 'collision' cases. But this is the doctrine of [*Halcyon*]." *Mendez v. States Marine Lines, Inc.*, 421 F.2d 851, 854 (3d Cir. 1970) (Freedman, J., concurring).

13. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952).

14. See, e.g., *Saus v. Delta Concrete Co.*, 368 F. Supp. 297, 298-99 (W.D. Pa. 1974); *In re Standard Oil Co.*, 325 F. Supp. 388, 390 (N.D. Calif. 1971).

15. "We reiterate the view . . . that *Halcyon* merely reflects the long standing maritime rule which, like the common law, bars contribution between joint tortfeasors." *In re Standard Oil Co.*, 325 F. Supp. 388, 390 (N.D. Calif. 1971) (emphasis added). See also *Simpson Timber Co. v. Parks*, 390 F.2d 353, 356 (9th Cir. 1968). See generally 1 F. HARPER & F. JAMES, *THE LAW OF TORTS*, § 10.2 (1956); W. PROSSER, *THE LAW OF TORTS*, § 50 (1971); Bohlen, *Contribution and Indemnity between Tort-feasors*, 21 CORN. L.Q. 552 (1936).

ping Corp.¹⁶ and the Fifth Circuit, in *Horton & Horton v. T/S J.E. Dyer*¹⁷ and *Watz v. Zapata Off-Shore Co.*,¹⁸ distinguished *Halcyon* and allowed contribution where the joint tortfeasor from whom it was sought was not exempt by statute.¹⁹ According to the Second Circuit, *Halcyon* concerned an area of law covered by the Longshoremen's and Harbor Workers' Compensation Act and thus was "inapplicable in cases where the joint tort-feasor against whom contribution is sought is not immune from tort liability by statute."²⁰ The Fifth Circuit used similar logic in distinguishing *Halcyon*.²¹

The instant case, which was an appeal from the Fifth Circuit's application of the *Horton* and *Watz* exceptions to *Halcyon*, limited *Halcyon* to its particular facts.²² The decision in *Kopke* to allow contribution even in non-collision cases when neither of the joint tortfeasors is insulated from liability by statute will eliminate the disparity of approach which has characterized the lower court decisions.²³ However, the question of how contribution is to be effected remains unanswered.²⁴ In collision cases, although the equal division of damages is a well established rule,²⁵ it has been criticized²⁶ because it

16. 449 F.2d 132, 139 (2d Cir. 1971), noted in 21 J. Pub. L. 479 (1972).

17. 428 F.2d 1131 (5th Cir. 1970).

18. 431 F.2d 100 (5th Cir. 1970).

19. "Regardless of whether we consider the restrictive language of *Halcyon* as dictum or determine that it should be confined to its own particular facts . . . we agree . . . that the *Halcyon* doctrine is not applicable here." *Horton & Horton, Inc. v. T/S J.E. Dyer*, 428 F.2d 1131, 1134 (5th Cir. 1970). See also *Hurdich v. RCA Corp.*, 359 F. Supp. 1222 (S.D.N.Y. 1973); *Dow Chemical Co. v. Tug Thomas Allen*, 349 F. Supp. 1354 (E.D. La. 1972); *Armstrong v. Chambers*, 340 F. Supp. 1220 (S.D. Tex. 1972); *Coca-Cola Co. v. S.S. Norhalt*, 333 F. Supp. 946 (S.D.N.Y. 1971).

20. *In re Seaboard Shipping Corp.*, 449 F.2d 132, 139 (2d Cir. 1971).

21. *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 120 (5th Cir. 1970).

22. Suit was commenced prior to the 1972 amendments to the L.H.W.C.A., 33 U.S.C.A. § 905(b) (Supp. 1972) which prohibits actions against the shipowner based on absolute liability for unseaworthiness; thus, the amendments were inapplicable. *Cooper Stevedoring v. Fritz Kopke, Inc.*, 417 U.S. 106, 107 n.1 (1974). However, the result would have been affected only to the extent that the vessel's liability was based on no-fault liability for "unseaworthiness," leaving the rule announced still viable.

23. See notes 11, 19 *supra*.

24. See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 108 n.3 (1974): "[W]e have no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties."

25. See, e.g., *The Catherine v. Dickinson*, 58 U.S. (17 How.) 170, 177-78 (1855); *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 603 (1963); *Movable Offshore, Inc. v. M/V Wilken A. Falgout*, 471 F.2d 268, 274 (5th Cir. 1973); *In re Bloomfield S.S. Co.*, 422 F.2d 728, 735 (2d Cir. 1970). An unsuccessful attempt to divide damages by comparative fault can be found in *N.M. Paterson & Sons, Ltd. v. City of Chicago*, 209 F. Supp. 576 (N.D. Ill. 1962), *rev'd*, 324 F.2d 254 (7th Cir. 1963).

forces parties disproportionately at fault to share the damages equally.²⁷ At the same time, apportionment of fault has been allowed in order to mitigate damages in non-collision cases involving injuries to contributorily negligent maritime plaintiffs.²⁸ In spite of the obvious equitable advantages, considerations of judicial efficiency²⁹ make it uncertain whether apportionment of damages based on a proportional degree of fault will be utilized in effecting contribution pursuant to the *Kopke* decision. Even those courts allowing contribution before *Kopke* consistently divided the damages equally.³⁰ However, because of the Supreme Court's refusal to decide this issue, the question remains open and may produce differing results in the lower courts.

Len Kilgore

The United States Supreme Court in *Union Oil Co. v. The San Jacinto*, 409 U.S. 140, 141 (1972), granted certiorari "to consider petitioner's request that we abandon the divided damages rule," but found no liability on the part of one vessel and did not reach the issue of damages.

26. *Dwyer Oil Transp. Co. v. The Edna M. Matton*, 255 F.2d 380, 383 (2d Cir. 1958); *Ahlgrem v. Redstar Towing & Transp. Co.*, 214 F.2d 618, 620-21 (2d Cir. 1954). See generally G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, § 7-20 at 438 (1957) [hereinafter cited as GILMORE & BLACK].

27. The inflexibility of dividing damages equally when one party's degree of fault greatly outweighs the other has been tempered somewhat by the "major-minor fault doctrine" designed "to relieve a party whose fault was only technical from the harshness of the divided damages rule" by releasing the party whose fault was only "minor." *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684, 690 (5th Cir. 1970). See also *The City of New York*, 147 U.S. 72 (1893). See generally GILMORE & BLACK § 7-4, at 402-03.

28. See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936).

29. One commentator in considering judicial efficiency as an argument against apportionment of damages has determined: "[T]he proportional negligence rule . . . seems in principle and in operation more just than the cruder . . . rule of divided damages. The only objection that really has any plausibility is the one based on the difficulty of assigning degrees of fault in exact percentages. The answer is, of course, that judges would simply approximate, as best they could, as is done every day in other cases in matters of amount of damages, degree of disability, etc. An attempt at a division on the basis of degree of fault would at least not be foredoomed to go badly wrong in a large number of cases, as is the present rule." GILMORE & BLACK § 7-20 at 439.

30. E.g., *In re Seaboard Shipping Co.*, 449 F.2d 132 (2d Cir. 1971); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970); *Horton & Horton v. T/S J.E. Dyer*, 428 F.2d 1131 (5th Cir. 1970).