

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: ) Chapter 11  
)  
EDISON BROTHERS STORES, INC., ) Case No. 95-1354-PJW  
)  
Debtors. ) (Jointly Administered)

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EBS LITIGATION, L.L.C., )  
a Delaware limited liability )  
company, )  
) Adv. Proc. No. A-97-171  
Plaintiff, )  
)  
v. ) Civil Action No. 98-547-SLR  
)  
BARCLAYS GLOBAL INVESTORS, )  
N.A., a California )  
corporation; GREENWAY )  
PARTNERS, L.P., a Delaware )  
limited liability partnership; )  
and GREENTREE PARTNERS, L.P., )  
a Delaware limited )  
partnership, )  
)  
Defendants and )  
Third-Party )  
Plaintiffs, )  
)  
v. )  
)  
DAVID B. COOPER, JR; )  
JULIAN I. EDISON; PETER A. )  
EDISON; JANE EVANS; MICHAEL )  
H. FREUND; KARL W. MICHNER; )  
ALAN D. MILLER; ANDREW E. )  
NEWMAN; ERIC NEWMAN; ALAN A. )  
SACHS; CRAIG D. SCHNUCK; )  
MARTIN SNEIDER; DAVID O. )  
CORRIVEAU; JAMES W.L. CORELY; )  
WALTER S. HENRION; MARK LEVY; )  
MARK B. VITTERT, and DAVE & )  
BUSTER'S INC., a Missouri )  
corporation, )  
)  
Third-Party Defendants. )

**MEMORANDUM ORDER**

At Wilmington this 12th day of January, 2001, having reviewed various motions for reargument;

IT IS ORDERED that said motions (D.I. 144, 145) are granted, for the reasons that follow:

1. As count III of the third-party complaint was dismissed as time barred and count III was the only claim asserted against the Dave & Buster defendants, said defendants' motion to dismiss (D.I. 81) is granted.

2. With respect to count IV asserted against the Edison Director defendants, the court concludes that count IV does not state a claim upon which relief can be granted and, therefore, the motion to dismiss filed by said defendants (D.I. 86) must also be granted.

a. Third-party plaintiffs argue in response to defendants' motion for reargument that if plaintiff

EBS is successful in demonstrating that the distribution challenged by EBS violated federal and state statutory law, and is awarded a recovery against Third-Party Plaintiffs, the sole reason for such success would be the wrongdoing of the Edison Directors. Under the equitable doctrine of contribution, therefore, any damages realized by Third-Party Plaintiffs greater than the value of the shares of Dave & Buster's common stock received by the stockholders of Edison . . . should be paid by the principal (and only) wrongdoers - the Edison Directors. See, e.g., Clark v. Teeven Holding Co., Inc., 625 A.2d 869, 877 (Del. Ch. 1992) (the right to contribution exists where two or more

parties having an obligation are sued on that obligation and one party is forced to pay more than his, her or its share of the obligation).

(D.I. 147 at 7)

b. The court in Clark v. Teeven Holding explains generally that

[e]quity has traditionally recognized a right to contribution among co-guarantors . . . . Under Delaware law . . . there was no right to contribution among joint tort-feasors until the enactment of the Uniform Contribution Among Tort-Feasors Act on May 7, 1949. 10 Del. Ch., Ch. 63.

625 A.2d at 877.

c. In order to pursue a claim for contribution, then, third-party plaintiffs must establish that they share a common liability with the Edison Director defendants. See, e.g., New Zealand Kiwifruit Mktg. Bd. v. City of Wilmington, 825 F. Supp. 1180, 1186 (D. Del. 1985); Chamison v. Healthtrust, Inc., 735 A.2d 912, 925 (Del. Ch. 1999); Estate of Keil, 145 A.2d 563, 565 (Del. Supr. 1958) (it is a "well-settled principle that where two or more persons are under a common burden or liability the joint debtor who is compelled to pay more than his share is entitled to contribution from his co-obligors.").

d. By virtue of the motions for reargument, the court has focused on the legal underpinnings of the claim, i.e., whether third-party plaintiffs have asserted a legal theory to establish the common liability required to maintain their claim

for contribution.

e. The court concludes that neither the complaint<sup>1</sup> nor the third-party complaint<sup>2</sup> provides a legal basis for third-party plaintiffs' contribution claim, as there is neither a pre-existing joint obligation (as in a contract) nor an outstanding claim for liability based upon a tortious or statutory cause of action.

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United States District Judge

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<sup>1</sup>Fraudulent transfer claims belong exclusively to plaintiff representing the creditors of the estate. See In re Cybergenics Corp., 226 F.3d 237, 245 (3d Cir. 2000).

<sup>2</sup>Recall that counts I and II, asserting liability based upon breach of the fiduciary duty of loyalty and the duty of disclosure, respectively, were dismissed as time barred. While 8 Del. C. § 174 provides for joint and several liability on the part of directors who have authorized an unlawful dividend, there is no legal claim presently asserted by which third-party plaintiffs can establish the existence of an unlawful dividend. Significantly, even if plaintiff's fraudulent transfer claim could be deemed a basis for establishing an "unlawful dividend," the beneficiary of § 174(a) in this instance would be plaintiff, representing the "creditors" of the insolvent corporation, not third-party plaintiffs, the shareholders who received the dividend. Indeed, § 174(c) provides a right of subrogation as against shareholders who received the dividend "with knowledge of facts, indicating that such dividend . . . was unlawful."