

IMPLYING A RIGHT OF CONTRIBUTION UNDER SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULE 10b-5: THE SUPREME COURT FINDS POWER WHERE NONE EXISTS

On June 1, 1993, in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, the United States Supreme Court finally ended twenty-five years of uncertainty by holding that defendants in an action under section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 of the Securities Exchange Commission (the "SEC") have an implied right of action for contribution against others jointly responsible for violating those provisions.¹ Despite the uncertainty that previously existed with respect to the existence of an implied right to contribution, the federal courts, with the approval of the Supreme Court, have long recognized an implied private cause of action under section 10(b) and Rule 10b-5.² In reaching its decision

¹ 113 S. Ct. 2085, 2092 (1993).

² *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 & n.16 (1975). A private cause of action was first implied under § 10(b) and Rule 10b-5 in 1946 when the United States District Court for the Eastern District of Pennsylvania decided *Kardon v. National Gypsum Company*. 69 F. Supp. 512 (E.D. Pa. 1946).

By its terms, § 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") makes it unlawful for any person:

[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1988) (corresponds to Securities Exchange Act of 1934, ch.404, title I, § 10, 48 Stat. 891).

Pursuant to the authority conferred by § 10(b), the Securities and Exchange Commission (the "SEC") promulgated Rule 10b-5 which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1992).

in *Musick*, the Supreme Court reasoned that because the judiciary had created the private right of action under section 10(b) and Rule 10b-5, the federal courts have the power to shape the contours of that private right of action.³ In determining that a right of contribution is within the contours of the section 10(b) action and ancillary to it, the Supreme Court reasoned that the federal courts should use their power to create a right of contribution by making reference to the contribution provisions contained in other analogous express antifraud sections of the Exchange Act, and concluded that the 1934 Congress would have included a right to contribution within the contours of section 10(b).⁴ Moreover, the Supreme Court noted that in the twenty-five years since the federal courts first implied a right of contribution, neither the SEC nor the federal courts have suggested that a right to contribution detracts from the effectiveness of the implied cause of action under section 10(b) and Rule 10b-5 or that it frustrates the purposes underlying the federal securities laws.⁵

Prior to the Supreme Court's decision in *Musick*, a majority of the lower federal courts and Courts of Appeal had already recognized an implied right to contribution under section 10(b) and Rule 10b-5.⁶ These courts, like the Supreme Court in *Musick*, view the right to contribution as ancillary to the implied cause of action under those provisions and reason, therefore, that because several of the sections of the federal securities laws that allow for a private cause of action also contain express provisions for contribution, the same remedy should be available when liability is based on an implied cause of

³ *Musick*, 113 S. Ct. at 2088-89.

⁴ *Id.* at 2090-91 (In attempting to infer how 1934 Congress would have addressed issue of contribution had right of action under § 10(b) and Rule 10b-5 been included as express provision in Exchange Act, Supreme Court analogized to §§ 9 and 18 of Exchange Act which both provide express provisions for right to contribution).

⁵ *Id.* at 2091-92.

⁶ See *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 577 (9th Cir. 1992) (recognizing established implied right of contribution under § 10(b) and Rule 10b-5), *cert. granted*, 113 S. Ct. 54 (1992); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991) (noting established right to contribution under § 10(b) and rule 10b-5); *Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987) (holding implied right of contribution exists under § 10(b) and Rule 10b-5); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir. 1982) (same); *Tucker v. Arthur Anderson & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 559 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979); *In re Crazy Eddie Sec. Litig.*, 802 F. Supp. 804, 814-15 (E.D.N.Y. 1992); *McCoy v. Goldberg*, 778 F. Supp. 201, 203 (S.D.N.Y. 1991); *Baker v. BP America, Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990); *Globus, Inc. v. Law Research Serv. Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied sub nom. Law Research Serv., Inc. v. Blair & Co.*, 404 U.S. 941 (1971); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815-16 (D. Colo. 1968).

action.⁷ In addition, these courts in finding an implied right to contribution under section 10(b) and Rule 10b-5 rely on the fact that such a right furthers the deterrence policies underlying the federal securities laws.⁸

Despite the great weight of federal authority that recognized an implied right to contribution prior to the Supreme Court's decision in *Musick*, there was an emerging minority rule denying such an implied right.⁹ This emerging minority rule was primarily based on the United States Supreme Court decisions in *Texas Industries, Inc. v. Radcliff Materials, Inc.* and *Northwest Airlines, Inc. v. Transport Workers Union*.¹⁰ In these cases, the Supreme Court declined to imply a right to contribution under three federal statutes that provided an express private cause of action for their violation but did not expressly provide for a right to contribution.¹¹ The federal courts following this minority rule reasoned that the analytical framework used in *Texas Industries* and *Northwest Airlines* for determining the existence of an implied right to contribution precluded them from finding such a right under section 10(b) and Rule 10b-5 without a statutory or federal common law basis.¹² These courts note that the majority of federal court decisions

⁷ See, e.g., *Huddleston*, 640 F.2d at 558; *Heizer*, 601 F.2d at 332; *Globus*, 318 F. Supp. at 957-58; *deHaas*, 286 F. Supp. at 815-16. It appears that Congress, with two exceptions, expressly provided for a right of contribution under those private action sections where it contemplated the possibility of multiple defendants. See Mark J. Loewenstein, *Implied Contribution under the Federal Securities Laws: A Reassessment*, 1982 DUKE L.J. 543, 544. Thus, Congress included the right to contribution in § 11(f) of the Securities Act of 1933 and in §§ 9(e) and 18(b) of the Securities and Exchange Act of 1934, all of which contemplate the possibility of multiple defendants. 15 U.S.C. § 77k(f) (1988); 15 U.S.C. § 78i(e), r(b) (1988). Congress, however, did not provide for a right of contribution in § 15 of the Securities Act of 1933 and § 20(a) of the Exchange Act of 1934, which also contemplate the possibility of multiple defendants. 15 U.S.C. § 77o (1988); 15 U.S.C. § 78t(a) (1988).

⁸ See, e.g., *Huddleston*, 640 F.2d at 559; *Heizer*, 601 F.2d at 332; *Globus*, 318 F. Supp. at 958; *Baker v. BP America, Inc.*, 749 F. Supp. 840, 843 (N.D. Ohio 1990).

⁹ See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723-24 (8th Cir. 1992) (holding no right to contribution under § 10(b) or Rule 10b-5); *First Fin. Sav. Bank v. American Bankers Ins. Co.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,824, at 94,447 (E.D.N.C. 1989); *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989); *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1286 (D. Minn. 1988).

¹⁰ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *Northwest Airlines, Inc. v. Transport Workers Union, AFL-CIO*, 451 U.S. 77 (1981).

¹¹ See *Texas Indus.*, 451 U.S. at 646 (holding no implied right of contribution under Sherman and Clayton Acts); *Northwest Airlines*, 451 U.S. at 98 (holding no implied right of contribution or federal common law right to contribution under federal Equal Pay Act or Title VII).

¹² See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723 (8th Cir. 1992) (holding absent statutory or federal common law basis, federal courts are powerless to create right of contribution under § 10(b) and Rule 10b-5); *Robin*, 730 F. Supp. at 125 (holding no private cause of action for contribution may be implied under Rule 10b-5).

that found an implied right to contribution predated the Supreme Court's decisions in *Texas Industries* and *Northwest Airlines* and therefore failed to address the threshold question of whether the federal courts have the power to imply such a right.¹³

Facing the uncertainty surrounding the existence of an implied right of contribution under section 10(b) and Rule 10b-5, the United States Supreme Court finally seized the opportunity to resolve the matter when it granted certiorari to hear *Musick, Peeler & Garrett v. Employers Insurance of Wausau*.¹⁴ As noted above, the Supreme Court in *Musick* held that the federal courts do have the power to imply a right of contribution under section 10(b) and Rule 10b-5.¹⁵ In so holding, the Supreme Court adopted the reasoning of the majority of federal courts that had previously found that such a right exists and rejected the emerging minority rule that had denied such a right.¹⁶ Thus, by holding that an implied right to contribution exists under section 10(b) and Rule 10b-5, the Supreme Court distinguished *Texas Industries* and *Northwest Airlines* and thereby declined to apply the analytical framework adopted in those decisions.¹⁷

This Note examines the disparity that existed in the federal courts prior to the Supreme Court's decision in *Musick*, with respect to the availability of an implied right of contribution under section 10(b) of the Exchange Act and Rule 10b-5. Acknowledging that this disparity was primarily created by the Supreme Court's decisions in *Texas Industries* and *Northwest Airlines*, the Note concludes by arguing that the Supreme Court erred in *Musick* by refusing to adopt the analysis applied in those decisions and, therefore, improperly found that the federal courts have the power to imply a right of contribution. Section I provides a brief overview of the right to contribution and how it has developed under the law.¹⁸ Section II surveys earlier federal court decisions finding an implied right of contribution under section 10(b) and Rule 10b-5 and the basis employed by those courts in finding such a right.¹⁹ Section III addresses the analytical framework adopted in *Texas Industries* and *Northwest Airlines* for implying a private right of action, namely contribution, under federal statutes.²⁰ Section IV exam-

¹³ See *Chutich*, 960 F.2d at 722-23; *In re Professional Fin. Management*, 683 F. Supp. 1283, 1287 & n.7 (D. Minn. 1988).

¹⁴ See *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 54 (1992).

¹⁵ See *Musick*, 113 S. Ct. at 2086, 2092.

¹⁶ See *id.* at 2091-92.

¹⁷ See *id.* at 2087-88.

¹⁸ See *infra* notes 25-32 and accompanying text.

¹⁹ See *infra* notes 33-77 and accompanying text.

²⁰ See *infra* notes 78-123 and accompanying text.

ines the uncertain status of an implied right of contribution under section 10(b) and Rule 10b-5 that existed following *Texas Industries* and *Northwest Airlines* and prior to the Supreme Court's decision in *Musick*.²¹ Section V analyzes the Supreme Court's decision in *Musick* that ended the uncertainty surrounding an implied right to contribution.²² Section VI analyzes the power of federal courts to create a right of contribution among violators of section 10(b) and Rule 10b-5.²³ Finally, this section concludes by arguing that it is improper for the federal courts to create such a right, primarily because there is no statutory or federal common law basis for doing so, and argues that the Supreme Court erred in *Musick* by refusing to apply the analysis adopted in *Texas Industries* and *Northwest Airlines* when it held that defendants in an action under section 10(b) and Rule 10b-5 have an implied right to contribution against those jointly responsible for violating those provisions.²⁴

I. AN OVERVIEW OF CONTRIBUTION

Contribution is a doctrine founded upon the principles of equity and arises where two or more parties are liable to the same plaintiff for the same remedy.²⁵ Typically, a right to contribution is recognized where one of multiple joint tortfeasors has discharged the shared liability on behalf of the others or has paid more than his or her proportionate share.²⁶ Thus, contribution refers to the right of the discharging party to recover from the other joint tortfeasors that portion of the damages for which they are responsible.²⁷ Such a right reflects the rationale that when two or more parties share responsibility for a wrong, it would be inequitable for one of the parties to absorb the entire liability, and furthers the policy of deterring all wrongdoers by reducing their chances of escaping liability entirely.²⁸

²¹ See *infra* notes 124-244 and accompanying text.

²² See *infra* notes 245-307 and accompanying text.

²³ See *infra* notes 308-347 and accompanying text.

²⁴ See *infra* notes 308-347 and accompanying text.

²⁵ See, e.g., 18 AM. JUR. 2D *Contribution* § 1 (1985); 18 C.J.S. *Contribution* § 2 (1990).

²⁶ See RESTATEMENT (SECOND) OF TORTS § 886A cmt. b (1982).

²⁷ See, e.g., 18 AM. JUR. 2D *Contribution* § 1 (1985); 18 C.J.S. *Contribution* § 2 (1991). It is significant to note that contribution is distinguishable from indemnification. See David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 647 (1972). According to Professor Ruder, indemnification "entails shifting the entire loss from one tortfeasor who has been compelled to pay it to another who, for equitable reasons, should bear it instead. In essence, contribution results in a sharing of the burden, whereas indemnity results in shifting it." *Id.*

²⁸ See *Northwest Airlines, Inc. v. Transport Workers Union of America*, AFL-CIO, 451 U.S. 77, 88 (1981).

At early common law, the courts refused to allow a right to contribution among joint tortfeasors.²⁹ Despite the common law rule, the majority of states today have enacted statutes permitting contribution among tortfeasors in various situations, and in some jurisdictions the common law rule has been changed by judicial decision.³⁰ One commentator has pointed out that while the trend in American jurisdictions has been toward favoring contribution, this trend has been generally limited to negligent torts.³¹ That commentator notes that where a party's conduct has been found to be reckless, intentional or fraudulent, that party has generally not been entitled to contribution.³²

II. EARLY COURT DECISIONS ESTABLISHING AN IMPLIED RIGHT TO CONTRIBUTION UNDER SECTION 10(b) AND RULE 10b-5

The express terms of section 10(b) of the Exchange Act and Rule 10b-5 do not provide for a private right of action for their violation.³³ As early as 1946, however, the federal courts have implied such a right.³⁴ This implied right of action has become a firmly established remedy under section 10(b) and Rule 10b-5 and has been approved and upheld by the United States Supreme Court.³⁵ In addition, many early federal court decisions recognized this implied right of action, and have also implied a right of contribution under section 10(b) and Rule 10b-5.³⁶

²⁹ See *Merryweather v. Nixan*, 8 Term. Rep. 186, 186, 101 Eng. Rep. 1337, 1337 (K.B. 1799). While *Merryweather* created the common law rule of no-contribution, it has been interpreted as only barring contribution in cases of intentional wrongdoing. See, e.g., *Northwest Airlines*, 451 U.S. at 86 n.16.

³⁰ See RESTATEMENT (SECOND) OF TORTS § 886A (1982). The Restatement notes that eighty percent of the states recognize the right of contribution and no longer follow the early common law rule. *Id.* Although the change in most of the states has come about through legislative enactment, about a third of the jurisdictions now recognizing contribution have done so through judicial decision. *Id.*

³¹ Loewenstein, *supra* note 7, at 556. See also Uniform Contribution Among Tortfeasors (1955 Revised Act) § 1(c) ("There is no right to contribution in favor of any tortfeasor who has intentionally . . . caused or contributed to the injury . . ."); RESTATEMENT (SECOND) OF TORTS § 886A cmt. j (1982), which notes jurisdiction denying contribution to intentional tortfeasors.

³² Loewenstein, *supra* note 7, at 556.

³³ See 15 U.S.C. § 78j(b) (1988); 17 C.F.R. § 240.10b-5 (1992). See also *supra* note 2.

³⁴ See *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513-14 (E.D. Pa. 1946) (first case to recognize private damage suit under § 10(b) of Exchange Act).

³⁵ See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976) (Supreme Court noted existence of private cause of action under § 10(b) of Exchange Act and Rule 10b-5 has been continually recognized by federal courts and such right is well established).

³⁶ See, e.g., *Huddleston v. Herman & MacLean*, 640 F.2d 534, 558-59 (5th Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815-16 (D. Colo. 1968).

The first court to directly address the issue of a right to contribution under Rule 10b-5 was the United States District Court for the District of Colorado in its 1968 decision, *deHaas v. Empire Petroleum Co.*³⁷ The court in *deHaas* implied a right to contribution in favor of a defendant whose liability was based on the implied right of action under section 10(b).³⁸ The plaintiffs in *deHaas* alleged that the defendants obtained consent to a corporate merger through the use of false and misleading proxy solicitations in violation of Rule 10b-5.³⁹ The defendants filed a third-party complaint against their legal counsel seeking indemnification and contribution claiming that he assisted in preparing the allegedly fraudulent proxies and that he had a duty to make the proper disclosures.⁴⁰ In finding that there was an implied right of action for contribution, the *deHaas* court noted that while section 10(b) does not expressly provide for contribution, civil liability under that section has been implied by the courts.⁴¹ The court reasoned that because other express civil liability provisions in both the Securities Act of 1933 (the "Securities Act") and the Exchange Act typically provide for contribution, contribution should be implied when the underlying liability has been implied, as in section 10(b).⁴²

Similarly, two years after *deHaas* was decided, the United States District Court for the Southern District of New York, in *Globus, Inc. v. Law Research Service* ("*Globus I*"), held that contribution was available to defendants found jointly and severally liable for violations of sections 12(2) and 17(a) of the Securities Act and section 10(b) of the Exchange Act.⁴³ The court in *Globus II*, recognizing that the general trend in the law had been toward the allowance of contribution among joint tortfeasors, ordered that two defendants pay their proportionate share of liability to a third defendant who had already discharged the entire liability.⁴⁴ As part of the basis for its holding, the *Globus II* court relied

³⁷ 286 F. Supp. 809 (D. Colo. 1968). See also *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 614 (N.D. Ill. 1987) (noting *deHaas* was first case to address issue of contribution in federal securities case).

³⁸ *deHaas*, 286 F. Supp. at 815-16.

³⁹ *Id.* at 811-12.

⁴⁰ *Id.* at 815.

⁴¹ *Id.*

⁴² *Id.* at 815-16 ("Since the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b)."). See also Securities Exchange Act of 1934, §§ 9, 18, 15 U.S.C. § 78i, r (1988) (both of which contain express civil liability and contribution); Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1988) (providing for express civil liability and contribution).

⁴³ 318 F. Supp. 955, 958 (S.D.N.Y. 1970) [hereinafter *Globus II*]. *Globus I* was the predecessor case. See *Globus, Inc. v. Law Research Serv., Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968), *aff'd in part, rev'd in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

⁴⁴ 318 F. Supp. at 957, 958.

on the reasoning in *deHaas*, noting that the analogy of express provisions in the securities acts to implied rights of action "is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia*."⁴⁵ Construing section 10(b) together with the express liability provisions in other sections of the federal securities laws, the court determined that a right of action for contribution should be implied under section 10(b).⁴⁶

A second rationale adopted by the *Globus II* court in finding an implied right of contribution was that such a right would further the deterrent policies underlying the federal securities laws.⁴⁷ The court reasoned that the same ground for disallowing indemnification under the federal securities laws could be applied for allowing a right of contribution.⁴⁸ The court noted that allowing a defendant indemnification and, thus, complete absolution from liability "dilutes the impact of the securities laws, which seek 'to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages.'"⁴⁹ Denying contribution, the court reasoned, would have the same effect of diluting these deterrent policies, because those non-contributing defendants would escape liability completely, and leave the entire burden to be borne by their joint defendants who have been more prompt and diligent.⁵⁰

Other federal courts considering the question of an implied right of contribution under section 10(b) and Rule 10b-5 have determined that the availability of such a right is a matter of federal common law.⁵¹ In making this determination, at least one of these courts has expressly dismissed the analytical inquiry of whether the federal courts even have the power to infer such a right, noting that this inquiry has already been made in implying a private right of action under section 10(b)

⁴⁵ *Globus II*, 318 F. Supp. at 958.

⁴⁶ *Id.* The United States Supreme Court has noted that the Securities Act of 1933 and Securities Exchange Act of 1934 are interrelated components of the federal regulatory scheme and that the interdependence of the different sections "is certainly a relevant factor in any interpretation of the language Congress has chosen . . ." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976) (quoting *SEC v. National Sec., Inc.*, 393 U.S. 453, 463 (1969)).

⁴⁷ See *Globus II*, 318 F. Supp. at 958.

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting *Globus v. Law Research Serv., Inc.*, 418 F.2d 1286, 1289 (1969)).

⁵⁰ *Id.* at 958.

⁵¹ See, e.g., *Huddleston v. Herman & Maclean*, 640 F.2d 534, 557 (5th Cir. 1981) (because action under Rule 10b-5 is implied under federal statute, right to contribution under Rule 10b-5 is determined by federal law); *Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979) (availability of contribution under federal securities laws is matter of federal law and matter of federal common law where availability is implied).

and Rule 10b-5.⁵² These courts, like the court in *Globus II*, note that although the common law rule does not recognize a right to contribution among intentional joint tortfeasors, the underlying policies of the federal securities laws are reinforced by allowing contribution.⁵³ Moreover, these courts invoke an additional rationale for allowing contribution by noting that fundamental fairness requires that losses caused by joint wrongdoers be apportioned among them.⁵⁴

Following the precedents in *deHaas* and *Globus II*, the United States Court of Appeals for the Seventh Circuit, in *Heizer Corp. v. Ross*, also held that a right of contribution was available under Rule 10b-5 and acknowledged that judicial implication of this right under section 10(b) was a matter of federal common law.⁵⁵ *Heizer* involved claims of contribution and indemnification against a former chief executive officer and director of a corporation that had been held liable under Rule 10b-5.⁵⁶ Although in 1975, the United States Supreme Court, in *Cort v. Ash*, set out a four-part test for determining whether to imply a private cause of action under a federal statute, the *Heizer* court expressly declined to apply this test.⁵⁷ The *Heizer* court simply noted that application of the *Cort* test was unnecessary to find an implied right of contribution under Rule 10b-5 because the test had already been successfully applied in finding an implied civil right of action under section 10(b) and Rule 10b-5.⁵⁸ The court reasoned that contribution is ancillary to this implied civil remedy and furthers the same policy considerations.⁵⁹ Noting that an implied private cause of action under

⁵² See *Heizer*, 601 F.2d at 333 n.6 (finding it unnecessary, with respect to contribution under § 10(b) and Rule 10b-5, to apply analysis developed by the Supreme Court to determine whether private remedy is implicit in statute not expressly providing for it).

⁵³ See, e.g., *Huddleston*, 640 F.2d at 557, 559; *Heizer*, 601 F.2d at 331-32.

⁵⁴ See, e.g., *Huddleston*, 640 F.2d at 559; *Heizer*, 601 F.2d at 332, 333.

⁵⁵ 601 F.2d 330, 331, 334 (7th Cir. 1979).

⁵⁶ *Heizer*, 601 F.2d at 330-31.

⁵⁷ *Id.* at 333 n.6. The four factors set forth by the Supreme Court in *Cort v. Ash* in determining whether a private remedy may be implied under a federal statute that does not expressly provide for one were: (1) whether the plaintiff is one of the class for whose especial benefit Congress enacted the statute; (2) whether there is any explicit or implicit legislative intent, either to create or deny a remedy; (3) whether the desired remedy was consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally governed by state law so that it would be improper to infer a federal remedy. 422 U.S. 66, 78 (1975).

⁵⁸ *Heizer*, 601 F.2d at 333 n.6. But see *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 123 (N.D. Ill. 1989) (noting once court implies right of action, it has broad flexibility in determining remedies available under cause of action; when remedy creates independent substantive rights, such as contribution, however, courts must apply same standard used to imply any other private right of action).

⁵⁹ *Heizer*, 601 F.2d at 333 n.6.

Rule 10b-5 is well established, the *Heizer* court concluded that an implied right of contribution should necessarily follow.⁶⁰

Moreover, the court in *Heizer*, echoing the reasoning in *deHaas*, indicated that the rule allowing an implied right of contribution finds further support in that of the seven express civil remedies under the federal securities laws, three expressly provide for contribution.⁶¹ The court noted that this indicates Congress's desire to allow contribution when it expressly provided for a civil cause of action that might involve joint tortfeasors.⁶² The *Heizer* court concluded that "[i]nasmuch as three specific liability provisions include the remedy of contribution, that ancillary remedy should be implied when the remedy itself has been implied as under Section 10(b) of the 1934 Act and Rule 10b-5."⁶³

Noting that private remedies may be implied under the federal securities laws, the *Heizer* court went on to address the deterrence and fairness justifications for allowing contribution in section 10(b) cases.⁶⁴ The *Heizer* court concluded that apportioning the loss among joint tortfeasors, even intentional tortfeasors, will ensure that all culpable parties feel the deterrent effect of judgment and that plaintiffs will have a broader source of reimbursement.⁶⁵ The court further noted that justice is more equally distributed by improving the common law rule against contribution that permits a plaintiff to force one of two wrongdoers to bear the entire loss, while the other was equally or more at fault.⁶⁶

Similarly, in 1981, the United States Court of Appeals for the Fifth Circuit, in *Huddleston v. Herman & MacLean*, held that the rule allowing contribution under section 10(b) and Rule 10b-5 is an equitable result that achieves the deterrence that underlies the federal securities laws.⁶⁷ The *Huddleston* court acknowledged that the courts have traditionally denied contribution to intentional tortfeasors, insofar as courts should not aid those who deliberately do harm, and that denying such a shift in the loss to other fraud participants may create an even greater deterrent to violating Rule 10b-5.⁶⁸ The court noted, however, that these reasons do not take into account the possibility that denying

⁶⁰ *Id.* at 331-32, 334.

⁶¹ *Id.* at 332.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Heizer*, 601 F.2d at 332, 333.

⁶⁵ *Id.* at 332.

⁶⁶ *Id.*

⁶⁷ 640 F.2d 534, 559 (5th Cir. 1981).

⁶⁸ *Id.* at 557-58.

contribution does not deter those co-conspirators that are unlikely to be named as defendants in a Rule 10b-5 action.⁶⁹ In fact, such a co-conspirator, the court noted, may be deterred by the prospect of complete liability or encouraged by the possibility that another co-conspirator will be the only one sued and therefore be responsible for the entire fault.⁷⁰

The *Huddleston* court also noted that a "no-contribution rule" would promote an undesirable rush to settlement.⁷¹ The court indicated that the common law rule precluding contribution among intentional joint tortfeasors developed before the modern concept of multiparty litigation involving enormous monetary claims and litigation costs.⁷² The court noted that the disallowance of contribution in such a context would promote:

. . . a rush to settlement whereby certain defendants can purchase freedom from litigation and the ultimate court judgment, simultaneously providing the plaintiffs with funds to finance the continuation of the suit against the non-settling defendants. Moreover, the settling defendants may well extricate themselves from litigation in exchange for small settlement amounts, leaving the non-settling defendants to bear a much larger liability in the form of the final court judgment.⁷³

The *Huddleston* court indicated that such a no-contribution rule would allow plaintiffs to play one defendant against another in the hopes that some will settle.⁷⁴ Furthermore, the court noted that although the law favors compromise over litigation, the type of settlement that a no-contribution rule would promote neither terminates litigation nor fosters efficient court administration.⁷⁵

As the foregoing discussion indicates, even prior to the Supreme Court's recent decision in *Musick, Peeler & Garrett v. Employers Insurance of Wausau* wherein the Court finally recognized an implied right to contribution, these and other earlier decisions established a majority rule recognizing the availability of an implied right of contribution for parties jointly liable for violating section 10(b) and Rule 10b-5.⁷⁶ Two

⁶⁹ *Id.* at 558.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Huddleston*, 640 F.2d at 558.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 113 S. Ct. 2085, 2092 (1993). See *infra* notes 245-307 and accompanying text.

subsequent decisions by the Supreme Court and an emerging minority rule denying such a right, however, began to call this majority rule into question and created uncertainty among the federal courts as to the existence of an implied right of contribution under section 10(b) and Rule 10b-5.⁷⁷

III. CONTRIBUTION AS AN IMPLIED RIGHT UNDER THE SUPREME COURT'S ANALYSIS IN *NORTHWEST AIRLINES* AND *TEXAS INDUSTRIES*

It has been pointed out by at least one court that the recognition of an implied right of contribution under the federal securities laws has been judicially developed without the courts addressing an important threshold question: whether federal courts have the power to create a right of action for contribution in the absence of congressional intent.⁷⁸ Where a statute does not expressly provide for a particular right of action, such as contribution, a federal court must construe that statute to determine if it implies such a right.⁷⁹ If an implied right of action cannot be determined through statutory construction, a federal court may then look to the limited area of federal common law.⁸⁰

As has already been noted, the Supreme Court, in *Cort v. Ash*, established a four-factor test in order to determine whether to imply a private cause of action under a federal statute.⁸¹ The Supreme Court in formulating this test outlined the following inquiry:

First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?⁸²

⁷⁷ See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 722, 723-24 (8th Cir. 1992); *In re Professional Fin. Management*, 683 F. Supp. 1283, 1286 (D. Minn. 1988).

⁷⁸ *Chutich*, 960 F.2d at 722.

⁷⁹ See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *Northwest Airlines v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 91 (1981).

⁸⁰ See *Texas Indus.*, 451 U.S. at 640 (Court considered limited area of federal common law only after examining statutory language); *Northwest Airlines*, 451 U.S. at 94-95 (after reviewing statutory construction, Court turned to federal common law).

⁸¹ See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

⁸² *Id.* at 78.

Although the Supreme Court continues to apply these factors, it has done so in a more restrictive manner.⁸³ The Court has made it clear that the second factor of the *Cort* test, congressional intent, has become the principle focus in implying a private right of action under a federal statute.⁸⁴

Since the court in *Heizer* expressly declined to apply the *Cort* test in finding an implied right of contribution under section 10(b), the Supreme Court has applied the modified *Cort* test, focusing on congressional intent, in trying to determine an implied right to contribution under other federal statutes.⁸⁵ In May 1981, in *Northwest Airlines, Inc. v. Transport Workers Union of America*, the Court held that there was no right to contribution under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964.⁸⁶ Similarly, one month later, the Court, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, found no implied right to contribution under the Sherman and Clayton Acts.⁸⁷ Prior to the Supreme Court's decision in *Musick*, it had been noted that the analysis in these two cases could also be applied to claims for contribution under the federal securities laws thereby restricting the implication of such claims.⁸⁸

In *Northwest Airlines v. Transport Workers Union of America*, the United States Supreme Court denied an employer's claim for contribution under Title VII of the Civil Rights Act and the Equal Pay Act.⁸⁹ This case was brought by Northwest Airlines after judgment was entered against it in a class action brought against Northwest Airlines by female flight attendants.⁹⁰ In this class action, Northwest was held liable to the class for back pay because wage differentials between male and female flight attendants were found to violate the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.⁹¹ Subsequently, Northwest brought a separate action against the Transport Workers Union of America AFL-CIO seeking contribution on the theory that the wage differentials were embodied in the collective bargaining agreement.⁹²

⁸³ See *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 123 (N.D. Ill. 1989).

⁸⁴ See *King v. Gibbs*, 876 F.2d 1275, 1280-81 (7th Cir. 1989) (describing recent pronouncements of Supreme Court applying more restrictive reading of *Cort* test).

⁸⁵ See *Texas Indus.*, 451 U.S. at 639-40; *Northwest Airlines*, 451 U.S. at 91.

⁸⁶ 451 U.S. 77, 98 (1981).

⁸⁷ 451 U.S. 630, 646 (1981).

⁸⁸ See *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 722 (8th Cir. 1992); *In re Professional Fin. Management*, 683 F. Supp. 1283, 1285 (D. Minn. 1988).

⁸⁹ *Northwest Airlines*, 451 U.S. at 98.

⁹⁰ See *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in part, vacated and remanded in part*, 567 F.2d 429 (D.C. Cir. 1976).

⁹¹ *Northwest Airlines*, 451 U.S. at 81.

⁹² *Id.* at 80-81.

Because neither the Equal Pay Act nor Title VII provide for an express right of contribution, the Court had to determine whether such a right could be implied under the statute or, in the alternative, whether it could create a right of contribution as a matter of federal common law.⁹³ Focusing first on whether contribution could be implied, the Court noted that the ultimate inquiry was whether Congress intended to create the private remedy.⁹⁴ The Court invoked the *Cort* factors as a means to determine if the requisite congressional intent surrounded the statute.⁹⁵

The Court first noted that Northwest, as an employer, did not fall within the class for whose "especial benefit" the Equal Pay Act or Title VII were enacted.⁹⁶ In fact, the Court determined that these statutes were expressly directed against employers for the benefit of employees.⁹⁷ Furthermore, the Court found that there was a comprehensive remedial scheme embodied in the statutes, and that such a scheme indicates Congress's intent not to authorize additional remedies.⁹⁸ Finally, the Court found that there was nothing in the legislative histories of the Equal Pay Act and Title VII to indicate that Congress had considered whether contribution should be available to violators of those acts.⁹⁹ The Court concluded that unless congressional intent to create a right of action can be inferred from the language or structure of the statute, or from some other source, there is no predicate for implying a private remedy.¹⁰⁰ Thus, because the Court was unable to find any manifestation of intent by Congress to create a right to contribution under the statutes, no such right should be implied.¹⁰¹

Having found that a right to contribution could not be implied under the statutes, the Court next addressed the power of a federal court to create such a right under federal common law.¹⁰² The Court noted that federal courts have limited law making power and that "federal common law is 'subject to the paramount authority of Congress.'"¹⁰³ The very limited areas in which the Court recognized the power of the federal courts to fashion federal common law were those

⁹³ *Id.* at 91, 95.

⁹⁴ *Id.* at 91.

⁹⁵ *Id.*

⁹⁶ *Northwest Airlines*, 451 U.S. at 92.

⁹⁷ *Id.*

⁹⁸ *Id.* at 93-94.

⁹⁹ *Id.* at 94.

¹⁰⁰ *Id.*

¹⁰¹ *Northwest Airlines*, 451 U.S. at 94-95.

¹⁰² *Id.* at 95.

¹⁰³ *Id.* (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)).

areas raising issues of uniquely federal concerns, such as the rights and obligations of the United States, interstate disputes and admiralty cases.¹⁰⁴ Given the paramount authority of Congress, the Court concluded that where Congress has enacted such a comprehensive legislative scheme, the absence of a remedy can be presumed to be deliberate.¹⁰⁵ In the Court's view, both the Equal Pay Act and Title VII were such schemes; therefore, the federal courts may not "fashion new remedies that might upset carefully considered legislative programs."¹⁰⁶ In view of its analysis, the Court held that it would be improper to add a right to contribution to the statutory rights already provided for by Congress under the statutes.¹⁰⁷

Similarly, one month after its decision in *Northwest Airlines*, the United States Supreme Court, in *Texas Industries, Inc. v. Radcliff Materials*, held that there was no implied right to contribution under the federal antitrust laws.¹⁰⁸ Applying the same analysis it had adopted in *Northwest Airlines*, the Court concluded that a right to contribution could neither be implied nor created by the federal courts under the Sherman and Clayton Acts.¹⁰⁹ The Court determined that there was nothing in the legislative history or statutory scheme of the Sherman and Clayton Acts to indicate Congress's intent to allow contribution in antitrust actions.¹¹⁰ Furthermore, the Court found that the petitioner seeking contribution was not a member of the class that the statute was intended to benefit, noting that the antitrust laws "were not adopted for the benefit of the participants in a conspiracy to restrain trade."¹¹¹ The Court concluded, therefore, that Congress did not intend to imply a right of contribution under these laws.¹¹²

The Court then considered whether a right of contribution could be judicially created under federal common law.¹¹³ As it had done in *Northwest Airlines*, the Court indicated again that the power of federal courts to fashion federal common law is very limited, especially absent some congressional authorization to formulate substantive rules of decision.¹¹⁴ The Court indicated that contribution among antitrust

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 97.

¹⁰⁶ *Northwest Airlines*, 451 U.S. at 97.

¹⁰⁷ *Id.* at 98.

¹⁰⁸ 451 U.S. 630, 646 (1981).

¹⁰⁹ *Id.* at 640, 646.

¹¹⁰ *Id.* at 639.

¹¹¹ *Id.*

¹¹² *Id.* at 640.

¹¹³ *Texas Indus.*, 451 U.S. at 640.

¹¹⁴ *Id.* at 641.

wrongdoers does not fall into any of the narrow categories that have been recognized as appropriate for the development of a federal common law.¹¹⁵ Moreover, the Court noted that there is no indication that Congress intended to empower the federal courts to formulate remedies to enforce the provisions of the antitrust laws.¹¹⁶ The Court reasoned, instead, that the comprehensiveness of the legislative scheme indicates a presumption that any remedy not specifically mentioned was deliberately omitted by Congress.¹¹⁷ Accordingly, the Court also concluded that the federal courts are powerless to create a right of contribution under the Sherman or Clayton Acts.¹¹⁸

In the course of its decisions in *Northwest Airlines* and *Texas Industries*, wherein it was analyzing federal statutes containing express private rights of action, the Supreme Court did not address whether there is an implied right of contribution when the underlying liability is based on an *implied* right of action.¹¹⁹ In fact, as one lower court noted, it appears that the Supreme Court had expressly reserved judgment on the applicability of the analysis it advanced in *Northwest Airlines* and *Texas Industries* to contribution cases under section 10(b) and Rule 10b-5.¹²⁰ Moreover, the Supreme Court in both *Northwest Airlines* and *Texas Industries* declined to comment on the policy considerations that the petitioners advanced in each case for allowing a right of contribution.¹²¹ The validity of these considerations, the Court noted, are a matter for Congress to resolve, not the courts.¹²² As Section V discusses, the Supreme Court in *Musick* eventually declined to apply the analysis set forth in *Northwest Airlines* and *Texas Industries* to an implied right of contribution under section 10(b) and Rule 10b-5 by noting that those cases were distinguishable because they involved federal statutes that contained an express private cause of action.¹²³

IV. AN IMPLIED RIGHT TO CONTRIBUTION AFTER *NORTHWEST AIRLINES* AND *TEXAS INDUSTRIES* BUT PRIOR TO *MUSICK*

After *Northwest Airlines* and *Texas Industries* were decided and before the *Musick* decision, a number of lower courts faced the issue

¹¹⁵ *Id.* at 642.

¹¹⁶ *Id.* at 643-44.

¹¹⁷ *Id.* at 645.

¹¹⁸ *Texas Indus.*, 451 U.S. at 646.

¹¹⁹ See *id.* at 640 n.11; *Northwest Airlines*, 451 U.S. at 91 n.24.

¹²⁰ See *Baker v. BP America, Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990).

¹²¹ See *Texas Indus.*, 451 U.S. at 646-47; *Northwest Airlines*, 451 U.S. at 98 n.41.

¹²² See *Texas Indus.*, 451 U.S. at 646-47; *Northwest Airlines*, 451 U.S. at 98 n.41.

¹²³ See *infra* notes 245-307 and accompanying text.

of whether an implied right of contribution is available under section 10(b) of the Exchange Act and Rule 10b-5.¹²⁴ Although some of these courts continued to imply a right to contribution by adopting the "policy approach" of earlier courts, a minority rule began to emerge denying such a right.¹²⁵ This minority view was based primarily on the analysis the Supreme Court adopted in *Northwest Airlines* and *Texas Industries*.¹²⁶ These courts refused to create an implied right of contribution under section 10(b) and Rule 10b-5 in the absence of congressional intent to do so.¹²⁷

A. *Cases still finding an Implied Right to Contribution under Section 10(b) and Rule 10b-5*

Many of the cases decided after *Northwest Airlines* and *Texas Industries* that continued to imply a right to contribution under section 10(b) and Rule 10b-5 simply followed earlier precedent without considering or applying the analysis adopted in these Supreme Court decisions.¹²⁸ Some of these cases, however, addressed *Northwest Airlines* and *Texas Industries*, but found these decisions distinguishable, and continued to look to the policies of deterrence and fairness in implying a right of contribution.¹²⁹ In addition, at least one court adopting the analysis in *Northwest Airlines* and *Texas Industries* questioned the judicial power to imply contribution, but upheld the right as precedent required.¹³⁰

Prior to the Supreme Court's decision to grant certiorari in *Musick*, other courts also continued to follow earlier precedent, noting that the Supreme Court had previously denied certiorari to cases finding an implied right of contribution, and therefore, had not yet

¹²⁴ See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 724 (8th Cir. 1992) (no implied right of contribution); *In re Crazy Eddie Sec. Litig.*, 802 F. Supp. 804, 814-15 (E.D.N.Y. 1992) (finding implied right of contribution based on precedent); *McCoy v. Goldberg*, 778 F. Supp. 201, 203 (S.D.N.Y. 1991) (finding implied right of contribution); *Baker*, 749 F. Supp. at 844 (same); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989) (no implied right of contribution).

¹²⁵ See, e.g., *Chutich*, 960 F.2d at 724; *Crazy Eddie*, 802 F. Supp. at 814-15; *McCoy*, 778 F. Supp. at 203; *Baker*, 749 F. Supp. at 844; *Robin*, 730 F. Supp. at 125.

¹²⁶ See, e.g., *Chutich*, 960 F.2d at 723; *Robin*, 730 F. Supp. at 125; *In re Professional Fin. Management*, 683 F. Supp. 1283, 1285-86 (D. Minn. 1988).

¹²⁷ See, e.g., *Chutich*, 960 F.2d at 723-24; *Robin*, 730 F. Supp. at 125.

¹²⁸ See, e.g., *Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir. 1982), *cert. denied*, 459 U.S. 838 (1982); *McCoy*, 778 F. Supp. at 203.

¹²⁹ See, e.g., *Baker*, 749 F. Supp. at 842-44; *Seiler v. E.F. Hutton*, 102 F.R.D. 880, 885-86 (D.N.J. 1984). See also *Noonan v. Granville*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982).

¹³⁰ See *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 616 (N.D. Ill. 1987).

restricted contribution rights under the federal securities laws.¹³¹ Thus, in September 1992, in *In re Crazy Eddie Securities Litigation*, the United States District Court for the Eastern District of New York allowed a claim for contribution under section 10(b) based on the fact that the controlling Second Circuit case, *Sirota v. Solitron Devices, Inc.*, decided after *Northwest Airlines* and *Texas Industries*, also held there was an implied right of contribution.¹³² The court in *Crazy Eddie* noted that although *Sirota* did not recognize the Supreme Court decisions, the Supreme Court subsequently denied certiorari and the Second Circuit has not since disavowed any of its analysis in *Sirota*.¹³³ Accordingly, the court in *Crazy Eddie*, acknowledging that *Sirota* remains the law in the Second Circuit, held that contribution was available under section 10(b).¹³⁴

Similarly, in 1981, the United States District Court for the District of Columbia, in *In re National Student Marketing Litigation*, concluded that because the Supreme Court in *Northwest Airlines* and *Texas Industries* expressly declined to comment on the availability of contribution under the federal securities laws, it had not yet restricted the implication of such a right.¹³⁵ Moreover, the *National Student Marketing* court observed that the Supreme Court declined an opportunity to do so when it denied certiorari to *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*,¹³⁶ which was decided several months after *Texas Industries*.¹³⁷ The court in *National Student Marketing* reasoned that the "[d]enial of certiorari in the *Laventhol* case leaves the lingering assumption that rights of contribution may be implied under § 10(b)."¹³⁸ Consequently, the *National Student Marketing* court concluded that this "lingering assumption" gives the federal courts the power to imply such a remedy and indicates that *Northwest Airlines* and *Texas Industries* did not overrule any previous implication of a right to contribution under section 10(b) and Rule 10b-5.¹³⁹

¹³¹ See, e.g., *In re Crazy Eddie Sec. Litig.*, 802 F. Supp. 804, 814-15 (E.D.N.Y. 1992); *In re National Student Mkt. Litig.*, 517 F. Supp. 1345, 1349 (D.D.C. 1981).

¹³² *Crazy Eddie*, 802 F. Supp. at 814 (citing *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982)).

¹³³ *Id.* at 814-15.

¹³⁴ *Id.* at 815.

¹³⁵ *National Student Mkt.*, 517 F. Supp. at 1348-49.

¹³⁶ *Id.* at 1349 (citing *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981)).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *id.* at 1348-49.

The basis for the decision in *In re National Student Marketing*, however, was called into question in 1987, when the United States District Court for the Northern District of Illinois decided *In re Olympia Brewing Co. Securities Litigation*.¹⁴⁰ The *Olympia Brewing* court stated that it is well established that the Supreme Court's views on the merits of a case cannot be implied when the Court denies a petition for certiorari on that case.¹⁴¹ Furthermore, the court in *Olympia Brewing* noted that the two footnotes in *Northwest Airlines* and *Texas Industries*, wherein the Supreme Court stated that it expressed no view as to contribution in federal securities cases, were not an indication of the Court's approval of such a right.¹⁴² Consequently, the *Olympia Brewing* court declined to adopt the reasoning that *National Student Marketing* used to find judicial authority for creating a right of contribution under section 10(b) and Rule 10b-5.¹⁴³

Nevertheless, the *Olympia Brewing* court went on to determine whether the federal courts do in fact have the power to create a right of indemnification and contribution under the federal securities laws.¹⁴⁴ In making this determination the *Olympia Brewing* court focused on congressional intent, thereby employing the same analysis used in *Northwest Airlines* and *Texas Industries*.¹⁴⁵ Although the court recognized the lack of judicial power to imply a right of action for indemnification under section 10(b), the court continued to imply a right of contribution, noting that it was bound by precedent.¹⁴⁶ During its analysis, the *Olympia Brewing* court stated that there is a strong presumption against the creation of private rights of action by implication.¹⁴⁷ The court observed that federal courts should exercise judicial restraint and that federal lawmaking power is vested in Congress.¹⁴⁸ Moreover, the *Olympia Brewing* court explained that this is especially true when it comes to the federal securities laws because the "Supreme Court repeatedly has admonished the federal courts to pay greater attention to legislative intent when the courts interpret the liability sections of the securities laws."¹⁴⁹

¹⁴⁰ 674 F. Supp. 597 (N.D. Ill. 1987).

¹⁴¹ *Id.* at 615.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See id.* at 612, 615.

¹⁴⁵ *Olympia Brewing*, 674 F. Supp. at 612, 615.

¹⁴⁶ *Id.* at 613, 616.

¹⁴⁷ *Id.* at 609.

¹⁴⁸ *Id.* at 612.

¹⁴⁹ *Id.*

In addressing whether the judiciary has the authority to create or imply a right of contribution, the *Olympia Brewing* court first noted that a federal court lacks this authority if a provision of either the Securities Act or Exchange Act expressly provides for a private right of action but not for contribution.¹⁵⁰ The court reasoned that "if Congress had intended to allow for a right of contribution under one of those provisions Congress would have provided for one expressly."¹⁵¹ The *Olympia Brewing* court observed, however, that with regard to section 10(b) its analysis must be different.¹⁵² The court determined that because the private right of action had been implied under section 10(b), it would be "incongruous" for the federal courts to focus on legislative intent in deciding the availability of contribution under that section.¹⁵³

The *Olympia Brewing* court reasoned that in order to determine whether contribution under section 10(b) "should" be implied, it would be necessary to address the policy considerations surrounding such a right.¹⁵⁴ The court pointed out that earlier circuit precedent, in *Heizer*, determined that contribution reinforced the deterrent policies underlying the federal securities laws.¹⁵⁵ The *Olympia Brewing* court called this reasoning into question, however, observing that contemporary analysis has suggested that a no-contribution rule in section 10(b) cases may be as great a deterrent as a rule allowing contribution.¹⁵⁶ Nevertheless, the court, stating that it was bound by the precedent set forth in *Heizer*, concluded that contribution was available under section 10(b) and Rule 10b-5.¹⁵⁷

Significantly, in the 1989 case of *King v. Gibbs*, the United States Court of Appeals for the Seventh Circuit expressly disavowed the policy analysis it adopted when it decided *Heizer*.¹⁵⁸ In *King*, the Seventh Circuit held that indemnification was not available under Rule 10b-5.¹⁵⁹ Although the *King* court criticized its reasoning in *Heizer*, it did not expressly overrule its precedent establishing an implied right to contribution.¹⁶⁰

¹⁵⁰ *Olympia Brewing*, 674 F. Supp. at 615.

¹⁵¹ *Id.* at 615-16.

¹⁵² *Id.* at 616.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Olympia Brewing*, 674 F. Supp. at 616.

¹⁵⁶ *Id.* at 616 n.20 (citing Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331, 349 (1980)).

¹⁵⁷ *Id.* at 616.

¹⁵⁸ 876 F.2d 1275, 1280 & n.8 (7th Cir. 1989).

¹⁵⁹ *Id.* at 1282.

¹⁶⁰ *Id.* at 1280 & n.8.

The *King* court noted that *Heizer* was decided before *Northwest Airlines* and *Texas Industries*, wherein the Supreme Court applied the *Cort* test to two statutes that contained express causes of action.¹⁶¹ The Seventh Circuit, in *King*, indicated that once a private right of action has been implied by the courts, as in section 10(b), the courts have broad "flexibility and discretion" in determining the available remedies under that cause of action.¹⁶² The court noted, however, that when a remedy creates independent substantive rights, the same standard used to imply any private right of action must be used to determine the availability of that remedy.¹⁶³ The *King* court determined that an implied right to indemnification under Rule 10b-5 would create independent substantive rights, because it expanded the category of possible plaintiffs and gave the court subject matter jurisdiction it would not otherwise have.¹⁶⁴ Consequently, the *King* court concluded that the *Cort* test should be applied in order to determine if a right of indemnification may be implied under section 10(b) and Rule 10b-5.¹⁶⁵ After applying this test, the *King* court held that indemnification was not available.¹⁶⁶

Other courts facing the issue of contribution under section 10(b) and Rule 10b-5 after the decisions in *Northwest Airlines* and *Texas Industries* and before the Supreme Court's decision in *Musick* have held that an implied right to contribution was still available by maintaining that the Supreme Court decisions in *Northwest Airlines* and *Texas Industries* are distinguishable.¹⁶⁷ This was the holding of the United States District Court for the Northern District of Ohio in the 1990 case of *Baker v. BP America, Inc.*¹⁶⁸ The plaintiffs in *Baker* were investors in a corporation that was formed to acquire a venture from the defendant, BP America, which was divesting itself of holdings outside the petroleum industry.¹⁶⁹ The plaintiffs subsequently brought a securities fraud claim under section 10(b) against the defendant, claiming that the defendant had materially misrepresented the ven-

¹⁶¹ *Id.* at 1280 n.8.

¹⁶² *Id.* at 1279.

¹⁶³ *King*, 876 F.2d at 1280.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 1280-82.

¹⁶⁷ *See, e.g., Baker v. BP America, Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990); *Seiler v. E.F. Hutton*, 102 F.R.D. 880, 885-86 (D.N.J. 1984); *Noonan v. Granville*, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982).

¹⁶⁸ 749 F. Supp. 840, 844 (N.D. Ohio 1990).

¹⁶⁹ *Id.* at 841.

ture's potential.¹⁷⁰ Allegedly, the principal source of the misrepresentations was a BP America employee, who, like the plaintiffs, was also an investor in the acquiring corporation.¹⁷¹ The defendant in turn responded with a counterclaim against the plaintiffs and a third-party complaint against the acquiring corporation, for contribution and indemnification.¹⁷²

At the time *Baker* was decided, the question of whether contribution was available in a private cause of action brought under section 10(b) was an open one in the Sixth Circuit.¹⁷³ The *Baker* court refused to accept that the Supreme Court decisions in *Northwest Airlines* and *Texas Industries* barred recognition of a right to contribution in cases arising under section 10(b).¹⁷⁴ The *Baker* court first noted that the Supreme Court in both decisions expressly reserved judgment on the question of whether the reasoning adopted in those cases should be applied to cases arising under section 10(b) of the Exchange Act.¹⁷⁵ Moreover, the court in *Baker* distinguished the two Supreme Court cases as being fundamentally different from the case at hand.¹⁷⁶ The *Baker* court reasoned that those cases dealt with statutes that expressly created a private right of action, while at the same time omitting any right of contribution, whereas a private right of action has itself been judicially implied under section 10(b).¹⁷⁷ Finally, the court stated that, under the facts of this case, the defendant would not "unfairly benefit" by seeking contribution.¹⁷⁸ The court reasoned that the policies behind the federal securities laws would clearly be defeated if parties could escape liability by simply positioning themselves as plaintiffs or because the plaintiffs failed to name all possible defendants.¹⁷⁹

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Baker*, 749 F. Supp. at 842.

¹⁷⁴ *Id.* at 844.

¹⁷⁵ *Id.* (referring to the footnotes in *Texas Industries* and *Northwest Airlines*, declining to address correctness of reasoning used by lower courts in finding implied right of action under § 10(b)).

¹⁷⁶ *Id.* at 844. Similarly, the District Court for the Southern District of New York distinguished *Texas Industries* and *Northwest Airlines*, noting that the decisions expressly left open the continued viability of an implied right of contribution under § 10(b). Noonan v. Granville, 532 F. Supp. 1007, 1008 (S.D.N.Y. 1982). Moreover, the court in *Noonan* noted that § 10(b) is a private cause of action that has been judicially implied, whereas, the Supreme Court was dealing with an explicit statutory remedy. *Id.*

¹⁷⁷ *Baker*, 749 F. Supp. at 844.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

In addition to distinguishing *Northwest Airlines* and *Texas Industries*, the *Baker* court relied on the same general equitable principles and deterrence considerations that earlier courts used to imply contribution under section 10(b).¹⁸⁰ The court agreed with the reasoning advanced by these earlier decisions, noting that contribution "promotes a fair and equitable allocation of the plaintiff's losses among all wrongdoers and prevents a section 10(b) defendant from risking undue liability resulting from arbitrary or tactical decisions by plaintiffs regarding which parties to name as defendants to lawsuits."¹⁸¹ The court also advanced the same analogy to the express liability provisions of the federal securities laws that was initially set forth in *deHaas*.¹⁸² While the *Baker* court acknowledged that Congress did not recognize a right to contribution in all of these sections, it found significant the fact that Congress provided for contribution in the majority of sections where it envisioned probable multiple defendants.¹⁸³

B. The Emerging Minority Rule: Cases denying an Implied Right to Contribution under Section 10(b) and Rule 10b-5

Before the Supreme Court finally answered the question in *Musick*, there was an emerging minority rule which used the Supreme Court decisions in *Northwest Airlines* and *Texas Industries* to deny an implied right to contribution under section 10(b) and Rule 10b-5.¹⁸⁴ Those courts that adopted this minority position argued that the bulk of cases finding an implied right of action were decided prior to these Supreme Court decisions and therefore were of questionable authority.¹⁸⁵ These courts contended that the focus on congressional intent adopted in *Northwest Airlines* and *Texas Industries* should also be ap-

¹⁸⁰ *Id.* at 843.

¹⁸¹ *See id.* (citing *Heizer Corp. v. Ross*, 601 F.2d 330, 332 (7th Cir. 1979)).

¹⁸² *Compare Baker*, 749 F. Supp. at 842 & n.1 with *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815-16 & n.9 (D. Colo. 1968).

¹⁸³ *Baker*, 749 F. Supp. at 842 n.1. The *Baker* court noted that only § 15 of the Securities Act of 1933, 15 U.S.C. § 77o (1988), and § 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a) (1988) potentially impose liability on multiple defendants without providing for contribution. *Id.*

¹⁸⁴ *See Baker*, 749 F. Supp. at 843 (recognizing "emerging minority rule" but finding its reasoning unpersuasive). While the only court of appeals to adopt the minority rule has been the United States Court of Appeals for the Eighth Circuit, a number of lower courts have also held that there is no right of contribution under § 10(b) and Rule 10b-5. *See, e.g., Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723, 724 (8th Cir. 1992); *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989); *In re Professional Fin. Management*, 683 F. Supp. 1283, 1286 (D. Minn. 1988).

¹⁸⁵ *See Chutich*, 960 F.2d at 722; *In re Professional Fin. Management*, 683 F. Supp. at 1286-87.

plied to determine whether the federal courts have the power to create a right of contribution under the federal securities laws, where such a right is not provided for expressly.¹⁸⁶ These courts concluded that applying such an analysis, rather than the prior policy approach adopted by other courts, indicates that the federal courts lack the power to imply a right of contribution under section 10(b) and Rule 10b-5.¹⁸⁷

In determining that the Supreme Court's analysis in *Northwest Airlines* and *Texas Industries* should be applied in the section 10(b) context, these courts reasoned that although the courts have implied a private right of action under section 10(b), whether an implied right of contribution exists is a separate inquiry.¹⁸⁸ A right of contribution, these courts noted, is a separate remedy that creates independent substantive rights.¹⁸⁹ These courts determined that before implying a right to contribution under section 10(b) and Rule 10b-5, a court must apply the same analysis used to imply any other private right of action.¹⁹⁰

Only one circuit court had expressly denied the availability of contribution under section 10(b) and Rule 10b-5.¹⁹¹ Applying the analysis set forth in *Northwest Airlines* and *Texas Industries*, the United States Court of Appeals for the Eighth Circuit, in the March 1992 case of *Chutich v. Touche Ross & Co.*, held that there was no right of contribution under section 10(b) and Rule 10b-5.¹⁹² The *Chutich* court recognized the great weight of authority implying a right of contribution, but reasoned that this authority had developed without the courts addressing the threshold question of whether federal courts have the power to create a right of contribution under section 10(b) and Rule 10b-5.¹⁹³ The Eighth Circuit noted that *Northwest Airlines* and *Texas Industries* "restrict the implication of contribution rights under the

¹⁸⁶ See *Chutich*, 960 F.2d at 722-23; *In re Professional Fin. Management*, 683 F. Supp. at 1285.

¹⁸⁷ See *Chutich*, 960 F.2d at 723-24; *Robin*, 730 F. Supp. at 125.

¹⁸⁸ See, e.g., *Robin*, 730 F. Supp. at 123-24.

¹⁸⁹ See, e.g., *id.* But cf. *Heizer Corp. v. Ross*, 601 F.2d 330, 333 n.6 (7th Cir. 1979) (noting it is unnecessary to determine if contribution is implicit under § 10(b) because civil remedy has already been implied under section and contribution is ancillary to that remedy).

¹⁹⁰ See, e.g., *Robin*, 730 F. Supp. at 123.

¹⁹¹ See *Chutich*, 960 F.2d at 723-24 (federal courts powerless to create right of action for contribution under § 10(b) and Rule 10b-5 without statutory or federal common law basis and no such basis exists). It is significant that in 1989, in *King v. Gibbs*, the United States Court of Appeals for the Seventh Circuit disavowed its earlier policy approach in *Heizer*, when it held that indemnification was not available under Rule 10b-5, after applying the *Northwest Airlines* and *Texas Industries* analysis. *King*, 876 F.2d at 1280 & n.8. Although the Seventh Circuit in *King* criticized its *Heizer* decision, it did not expressly overrule it. *Id.*

¹⁹² See *Chutich*, 960 F.2d at 723-24 (8th Cir. 1992).

¹⁹³ *Id.* at 722.

securities laws" and require a different analysis than that taken by earlier courts in determining the existence of such rights.¹⁹⁴ The *Chutich* court concluded that the same analysis that the Supreme Court used in *Northwest Airlines* and *Texas Industries*, which involved statutes with express private rights of action, should also be applied when the underlying liability is based on an implied right of action as in section 10(b).¹⁹⁵

In determining that the *Northwest Airlines* and *Texas Industries* analysis should apply to a claim for contribution under section 10(b), the *Chutich* court noted that the Supreme Court has consistently attempted to follow congressional intent when defining the contours of that section.¹⁹⁶ Moreover, the court observed that a double standard for implying rights of contribution would result if this analysis were only applied in cases in which the underlying private right of action was express rather than implied.¹⁹⁷ Thus, as a matter of judicial restraint, the *Chutich* court concluded that the analysis in *Northwest Airlines* and *Texas Industries* should also be applied in cases involving implied private rights of action.¹⁹⁸ Otherwise, courts would be free to create new rights of action, such as contribution, when there is an implied private right of action, but restricted to congressional intent or federal common law when there was an express private right of action.¹⁹⁹

In applying the two-part analysis in *Northwest Airlines* and *Texas Industries*, the Eighth Circuit accepted the determination that there was no basis for implying a right of contribution under section 10(b) or Rule 10b-5.²⁰⁰ In reaching this conclusion, the court deferred to the careful analysis by the district court.²⁰¹ The *Chutich* court noted that the district court found that the legislative history, statutory scheme and other *Cort* factors indicated a lack of congressional intent that would allow a court to imply a right of contribution.²⁰²

¹⁹⁴ See *id.*

¹⁹⁵ *Id.* at 722-23.

¹⁹⁶ *Id.* at 723 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479-80 (1977) (examining statutory language and purpose behind 1934 Act to determine whether § 10(b) covers corporate mismanagement); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197-211 (1976) (examining statutory language and legislative history to determine whether § 10(b) requires scienter)).

¹⁹⁷ *Chutich*, 960 F.2d at 723.

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.*

²⁰² See *Chutich*, 960 F.2d at 723 (citing *Chutich v. Touche Ross & Co.*, 759 F. Supp. 1403, 1407 (D. Minn. 1991)).

The *Chutich* court next addressed whether a right of action for contribution could be created through federal common law.²⁰³ The party seeking contribution in *Chutich* asserted that the courts have the power to fashion federal common law in the area of securities fraud, because the private right of action for violations of section 10(b) and Rule 10b-5 were judicially created.²⁰⁴ The *Chutich* court rejected this assertion.²⁰⁵ The court reasoned that contribution among securities laws violators did not fall within any of the narrowly drawn categories recognized by the Supreme Court as areas in which the federal courts have the power to fashion federal common law.²⁰⁶

In addition, the *Chutich* court determined that there was no congressional authorization for the federal courts to formulate common law in this area, noting that there is no provision in the Exchange Act that confers upon the federal courts a broad power to develop a federal common law of securities regulation.²⁰⁷ Although federal courts have broad discretion in determining appropriate remedies once a right of action has been implied, the *Chutich* court determined that such discretion does not provide the courts with the power to create a "new" right of action.²⁰⁸ The court reasoned that, unlike the discretion to allow appropriate relief, the power to create a new cause of action for contribution broadens federal judicial power into an area that has been properly reserved for the executive and legislative branches of government.²⁰⁹ The court concluded that absent congressional authorization to formulate federal common law for securities regulation, the federal courts have no common law power to create a right of action for contribution under section 10(b) and Rule 10b-5.²¹⁰

In an earlier decision in 1989, the United States District Court for the Northern District of Illinois, in *Robin v. Doctors Offcenters Corp.*, also held that a private cause of action for contribution could not be

²⁰³ *Id.* at 724.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Chutich*, 960 F.2d at 724. Indeed, the Court in *Texas Industries* noted that: absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (emphasis added).

²⁰⁸ *Chutich*, 960 F.2d at 724.

²⁰⁹ *Id.* (quoting *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1037 (1992)).

²¹⁰ *Id.*

implied under section 10(b) and Rule 10b-5.²¹¹ The plaintiffs in *Robin* were investors in a public offering of stock of Doctors Offcenters Corporation.²¹² These investors brought an action asserting claims of common law fraud and violations of section 10(b) and Rule 10b-5.²¹³ Subsequently, the defendants in the action filed a third-party complaint seeking contribution under both claims.²¹⁴

In attempting to discern whether contribution was available to these defendants, the *Robin* court first addressed the fundamental question of whether the implied right of action under Rule 10b-5 "includes" contribution, or whether "a separate right of contribution had to be implied."²¹⁵ Adopting the reasoning that the Seventh Circuit used in *King v. Gibbs*, the *Robin* court noted that in order to imply a remedy that creates independent substantive rights, a court must apply the same analysis as it does to imply any other private right of action.²¹⁶ Thus, just as the Seventh Circuit in *King* determined that a right to indemnification under Rule 10b-5 was a substantive right, the *Robin* court determined that a right of contribution was also substantive.²¹⁷ The *Robin* court observed that contribution, like indemnification, would create both a new class of plaintiffs under Rule 10b-5 and confer subject matter jurisdiction on the federal courts over a new class of cases.²¹⁸ The *Robin* court concluded that in order to imply a right of contribution under Rule 10b-5, a court must first apply the *Cort* test as it was applied in *King*.²¹⁹

²¹¹ 730 F. Supp. 122, 125 (N.D. Ill. 1989).

²¹² *Id.* at 122.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 123.

²¹⁶ *Robin*, 730 F. Supp. at 123. The Seventh Circuit in *King* noted that once courts have recognized an implied right of action, as in § 10(b) and Rule 10b-5, then the courts normally would have "broad flexibility and discretion" in determining the available remedies under that section. *King v. Gibbs*, 876 F.2d 1275, 1279 (7th Cir. 1989). This broad discretion, however, is only available when the remedy is ancillary to the cause of action that has already been implied and does not create independent substantive rights. *Id.* at 1280. The court determined, therefore, that because a right to indemnification creates additional substantive rights for plaintiffs, it is not simply an "adjunct to the § 10(b) and Rule 10b-5 cause of action." *Id.* Thus, the *King* court concluded that the standard for creating a right of contribution must be the same standard that is used to imply any other private right of action. *Id.*

²¹⁷ See *Robin*, 730 F. Supp. at 123-24. The Ninth Circuit, in *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, also determined that the right of contribution was substantive in nature. 954 F.2d 575, 577 (9th Cir. 1992). The Ninth Circuit, however, did not apply the *Cort/King* analysis to imply a private right of action. See *id.* Rather, the court simply followed circuit precedent that had recognized that § 10(b) and Rule 10b-5 imply a right of contribution. *Id.*

²¹⁸ *Robin*, 730 F. Supp. at 124.

²¹⁹ *Id.*

The *Robin* court went on to apply the *Cort* test, recognizing that the Supreme Court in a number of recent decisions, including *Northwest Airlines* and *Texas Industries*, had made it clear that the primary focus of the four-part test is on the second factor—whether Congress intended to create a private cause of action under the statute.²²⁰ Addressing the first factor of the *Cort* test, the *Robin* court looked to whether the defendants seeking contribution were “of the class for whose *especial* benefit the statute was enacted.”²²¹ The court determined that, like the parties seeking indemnification in *King*, those seeking contribution in this case would be of the same class, namely, those accused of violating the securities laws, and that there was no indication that Congress was concerned with the protection of such parties and, thus, certainly did not enact section 10(b) for their “*especial* benefit.”²²²

Next, the *Robin* court turned to the second factor of the *Cort* test, whether there was any indication of legislative intent that would allow implying a right of contribution.²²³ The court noted that the legislative history was not helpful in discerning congressional intent because the private right of action under section 10(b) and Rule 10b-5 has itself been implied.²²⁴ Moreover, the *Robin* court rejected the defendants’ argument that contribution should be implied because other provisions of the securities laws expressly permit it.²²⁵ The court reasoned that because Congress only provided for contribution in three of the seven express civil liability provisions, the defendants’ argument is “neutral” as to whether Congress would have provided for contribution under section 10(b), had it expressly provided for a cause of action

²²⁰ *Id.* at 124–25. In making its assessment that the *Cort* test has been modified to focus on legislative intent, the *Robin* court referred to a statement in the *King* decision wherein the Seventh Circuit cited to a number of recent Supreme Court decisions applying the *Cort* test. *Id.* (citing *King*, 876 F.2d at 1280–81). Indeed, the Supreme Court has noted that the first and third factors of the *Cort* test act as aids in determining congressional intent. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575–76 (1979). Furthermore, the Seventh Circuit in *King* noted that it is “unclear” whether the fourth factor, which looks at whether the cause of action is a matter of state concern, has any continuing significance. *King*, 876 F.2d at 1280. Moreover, the Supreme Court in *Northwest Airlines* indicated that the *Cort* test should focus on congressional intent when it stated that unless such intent “can be inferred from the legislative language of the statute, the statutory structure, or some other source, the essential predicate for implication of a remedy simply does not exist.” *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 94 (1981).

²²¹ *Robin*, 730 F. Supp. at 125.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *id.*

under that section.²²⁶ Thus, finding that a party seeking contribution is not a member of the protected class and that there is an absence of legislative intent favoring contribution, the *Robin* court concluded that no further analysis under *Cort* was required, and that a right of contribution could not be implied under section 10(b) and Rule 10b-5.²²⁷

In addition, the court in *Robin* addressed the policy considerations for implying a right of contribution.²²⁸ The court acknowledged that there was ample authority suggesting that contribution would further the deterrent objectives of section 10(b) and Rule 10b-5.²²⁹ The court noted, however, that while these policy considerations may favor contribution, "policy analysis has no role in the implication of a right to contribution."²³⁰

Similarly, in 1988, in *In re Professional Financial Management*, the United States District Court for the District of Minnesota, using the analysis adopted in *Northwest Airlines* and *Texas Industries*, held that no implied right to contribution exists under section 10(b) and Rule 10b-5.²³¹ Although the Supreme Court in those decisions expressly declined to issue a ruling with respect to contribution under the securities laws, the *Professional Financial Management* court explained that nowhere did the Supreme Court suggest that its analysis was inapplicable to such a claim under those laws.²³² Applying this analysis, the court found that it is very unlikely that section 10(b) was enacted to benefit parties that have allegedly engaged in securities fraud.²³³ In fact, the *Professional Financial Management* court reasoned that parties seeking contribution were actually members of the class that Congress intended to regulate in order to benefit "an entirely different class."²³⁴ Moreover, the court observed that when Congress desires to provide for contribution it knows how to, because it has expressly provided for such a right in other sections of the federal securities laws.²³⁵ The

²²⁶ *Robin*, 730 F. Supp. at 125.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ 683 F. Supp. 1283, 1286 (D. Minn. 1988).

²³² *Id.* at 1286.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*; see also *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 n.11 (1981) (express provisions in certain sections of securities acts indicate Congress knows how to define right to contribution); *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 91 n.24 (1981) (limited number of provisions for contribution under federal securities laws demonstrates when Congress intended to allow for contribution it did so expressly).

Professional Financial Management court reasoned that Congress's failure to provide for a right of contribution under section 10(b) suggests that it did not intend that one be created by the courts.²³⁶ The court also questioned whether as a policy matter contribution furthers the deterrence purposes of the federal securities laws.²³⁷ Finally, with respect to the idea of fairness, the *Professional Financial Management* court reasoned that because scienter is necessary to establish liability under Rule 10b-5, it would not be unfair to deny contribution in such actions.²³⁸

Another lower court, following the analysis in *Northwest Airlines* and *Texas Industries* to determine whether there is an implied right of action for contribution, was the United States District Court for the Eastern District of North Carolina in the 1989 case of *First Financial Savings Bank v. American Bankers Insurance Co.*²³⁹ The *First Financial* court held that there is no implied right of contribution under section 10(b) of the Exchange Act.²⁴⁰ The *First Financial* court relied on the Fourth Circuit's reasoning in *Baker, Watts & Company v. Miles & Stockbridge*, wherein that court held that there was no right of action for contribution or indemnity among violators of section 12(2) of the Securities Act.²⁴¹ Thus, focusing on whether Congress intended a right of action for contribution to exist under section 10(b), the court in *First Financial* determined that because the history and purpose of the federal securities laws, as well as their plain language and structure, do not suggest that implied rights of contribution be recognized generally, then it would be unlikely that an implied right of contribution was meant to be recognized under § 10(b).²⁴² In support of its holding, the court in *First Financial* noted that there have been many recent Supreme Court decisions indicating a reluctance on the part of that Court to recognize private rights of action in the absence of express statutory direction.²⁴³ The *First Financial* court found that these Supreme Court decisions constituted a "clear and pervasive trend" that supported a denial of an implied right of contribution under section 10(b).²⁴⁴

²³⁶ *Professional Fin. Management*, 683 F. Supp. at 1286.

²³⁷ *Id.* at 1287 (citing Loewenstein, *supra* note 7, at 573).

²³⁸ *Id.*; see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (scienter required under Rule 10b-5).

²³⁹ [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,824 at 94,444.

²⁴⁰ *Id.* at 94,447.

²⁴¹ *Id.* See *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1106 (4th Cir. 1989).

²⁴² *First Financial*, [1989-90 Transfer Binder] Fed. Sec. L. Rep. at 94,447.

²⁴³ *Id.* at 94,446.

²⁴⁴ *Id.* at 94,447.

V. THE SUPREME COURT ANSWERS THE QUESTION: *MUSICK, PEELER & GARRETT v. EMPLOYERS INSURANCE OF WAUSAU*

The uncertainty created by the decisions in *Northwest Airlines* and *Texas Industries* and the emerging minority rule denying an implied right to contribution under section 10(b) and Rule 10b-5 was finally addressed by the United States Supreme Court when it decided *Musick, Peeler & Garrett v. Employers Insurance of Wausau*.²⁴⁵ In *Musick*, the Supreme Court held that defendants in an action under section 10(b) and Rule 10b-5 have a private right of action for contribution against others who are jointly responsible for violating those provisions.²⁴⁶ In reaching its decision in *Musick*, the Supreme Court declined to address the merits of the actual contribution claim in the case; however, for purposes of this Note a discussion of the Ninth Circuit's opinion is appropriate before the Supreme Court's decision is analyzed.²⁴⁷

In January 1992, in *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, the United States Court of Appeals for the Ninth Circuit held that the provisions of section 10(b) and Rule 10b-5 imply a right of contribution, and that a settlement agreement cannot be relied upon to bar subsequent actions for contribution by settling parties against parties not involved in the original suit.²⁴⁸ In *Musick*, Cousins Home Furnishing, Inc. made a public offering of its stock.²⁴⁹ Shareholders who purchased shares in the offering subsequently filed a class action against Cousins, its holding company, certain of its officers and directors, and its underwriters.²⁵⁰ The complaint alleged certain violations of the federal securities laws, including section 10(b) and Rule 10b-5.²⁵¹ The complaint, however, did not name the attorneys and accountants who were involved in the offering.²⁵²

The defendants eventually settled the class action by agreeing to pay the plaintiff shareholders \$13.5 million, and this settlement was

²⁴⁵ *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085 (1993).

²⁴⁶ *Id.* at 2092.

²⁴⁷ *Id.* at 2086. In order to resolve the conflict among the Circuits which was created by the Eighth Circuit's decision in *Chulich v. Touche Ross & Company*, the Supreme Court granted *Musick, Peeler & Garrett*'s petition for a writ of certiorari on the sole question of "[w]hether federal courts may imply a private right to contribution in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities & Exchange Commission." *Id.* at 2087.

²⁴⁸ *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 577, 579 (9th Cir. 1992).

²⁴⁹ *Id.* at 576.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 577.

²⁵² *Id.* at 576.

approved by the district court after a "good faith" hearing to determine the defendants' fair share of damages.²⁵³ Employers Insurance of Wausau ("Wausau") and Federal Insurance Co. ("Federal"), the insurers of the settling defendants, paid their appropriate percentages of the settlement amount.²⁵⁴ After settling, Wausau and Federal commenced an action seeking contribution against the attorneys and accountants involved in the public offering.²⁵⁵ The district court dismissed the action, holding that the settling defendants had paid no more than their "fair share" of the total liability and therefore Wausau and Federal were not entitled to contribution under the federal securities laws.²⁵⁶ The Ninth Circuit reversed, however, holding that Wausau and Federal had stated a valid claim for contribution under section 10(b) and Rule 10b-5.²⁵⁷

In reaching its decision the Ninth Circuit noted that, although the right of contribution is not expressly provided for in section 10(b) and Rule 10b-5, circuit precedent had recognized that these provisions imply such a right.²⁵⁸ The Ninth Circuit went on to note that a right of contribution is substantive in nature, and that such a claim may be brought in a separate suit against parties not involved in the original suit.²⁵⁹ Furthermore, while observing that an action for contribution is only available when a party has paid more than its fair share of common liability, the Ninth Circuit noted that the meaning of the term "fair share" depends upon the context in which it is used.²⁶⁰ The court reasoned, therefore, that although the defendants may have paid their fair share of damages "relative to the other defendants involved in the litigation," a claim for contribution depends on whether an individual tortfeasor has paid his or her fair share relative to all possible joint tortfeasors, including those not parties to the original suit.²⁶¹ Thus, the court held that the settlement agreement cannot be relied upon to deny actions for contribution by defendants who have settled against other possible joint tortfeasors who were not a party to the original suit.²⁶²

²⁵³ *Musick*, 954 F.2d at 576-77.

²⁵⁴ *Id.* at 577.

²⁵⁵ *Id.* at 576.

²⁵⁶ *Id.* at 577.

²⁵⁷ *See id.* at 577.

²⁵⁸ *See Musick*, 954 F.2d at 577 (citing *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1226 (9th Cir. 1989); *Smith v. Mulvaney*, 827 F.2d 558, 561 (9th Cir. 1987)).

²⁵⁹ *Id.* at 577.

²⁶⁰ *Id.* at 578.

²⁶¹ *See id.* at 578-79.

²⁶² *Id.* at 579.

The Ninth Circuit further concluded that policy considerations also favored allowing contribution.²⁶³ The court noted that contribution against nonparties assures that all culpable parties will be punished, and furthers the deterrent objectives of the federal securities laws by not allowing an entire category of joint tortfeasors to escape liability.²⁶⁴ Furthermore, the Ninth Circuit observed that contribution against nonparties promotes fairness by limiting liability to a joint tortfeasor's relative culpability.²⁶⁵ The court also pointed out that allowing contribution would encourage settlement because named defendants are more likely to settle when they know they will not be prohibited from seeking subsequent claims of contribution against other joint tortfeasors.²⁶⁶ Although the Ninth Circuit recognized that contribution claims require additional litigation, the court reasoned that Congress has deemed such litigation costs acceptable in the context of securities law because it has expressly provided for contribution under other sections of the federal securities laws.²⁶⁷ Moreover, the court pointed out that its holding would not create an "endless stream of contribution claims" because such claims only arise when a party has paid more than its share of the common liability and once this share is paid, a party becomes immune from any subsequent contribution claims.²⁶⁸

Following the Ninth Circuit's decision in *Musick*, the United States Supreme Court, in October 1992, granted *Musick, Peeler & Garrett's* petition for certiorari.²⁶⁹ The Supreme Court affirmed the decision of the Ninth Circuit that defendants have a right to contribution under section 10(b) and Rule 10b-5 and that federal courts have the power to imply such a right.²⁷⁰ In his majority opinion, Justice Kennedy, joined by Justices Rehnquist, White, Stevens, Scalia and Souter, first distinguished the precedents set forth in *Northwest Airlines* and *Texas Industries* and determined it was "futile" to look for congressional intent to allow a right to contribution where the underlying private cause of action under section 10(b) and Rule 10b-5 is itself created by judicial implication.²⁷¹ Rather, the Court in *Musick* determined that a right of contribution is within the contours of the implied private cause of

²⁶³ *Musick*, 954 F.2d at 579-80.

²⁶⁴ *Id.* at 579.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 580.

²⁶⁷ *Id.*

²⁶⁸ *Musick*, 954 F.2d at 580.

²⁶⁹ 113 S. Ct. 54 (1992), *granting cert.* in 954 F.2d 575 (9th Cir. 1992).

²⁷⁰ *See Musick*, 113 S. Ct. at 2092.

²⁷¹ *See id.* at 2087-88.

action under section 10(b) and Rule 10b-5 and that the federal courts have the power to shape the contours of that action.²⁷² Thus, by relying on two analogous provisions under the Exchange Act that provide for an express right to contribution, the Court in *Musick* inferred that the 1934 Congress in enacting section 10(b) would have provided for a right of contribution among joint tortfeasors if it had considered the issue.²⁷³

In finding an implied right to contribution under section 10(b) and Rule 10b-5, the Court in *Musick* first distinguished its decisions in *Northwest Airlines* and *Texas Industries*.²⁷⁴ The Court noted that unlike the express private causes of action under the statutes in those cases, the private cause of action under section 10(b) and Rule 10b-5 is itself implied.²⁷⁵ Accordingly, the Court determined that the inquiries into congressional intent that were applied in *Northwest Airlines* and *Texas Industries* are "not helpful" in the context of an action under section 10(b) and Rule 10b-5.²⁷⁶ The Court noted that where the private cause of action has itself been created by implication, it would be "futile" to ask whether the 1934 Congress intended to allow a right to contribution for that action.²⁷⁷

After rejecting the congressional intent analysis adopted in *Northwest Airlines* and *Texas Industries*, the Court in *Musick* determined that it has the power to shape the contours of the section 10(b) and Rule 10b-5 private right of action as a matter of federal common law.²⁷⁸ Although it acknowledges that a right to contribution is a separate, independent cause of action, the Court determined that an action for contribution under section 10(b) and Rule 10b-5 is inextricably bound to the private cause of action under those provisions.²⁷⁹ According to the Court, a violation of the federal securities laws gives rise to the private cause of action under section 10(b) and Rule 10b-5, and the question of contribution is merely ancillary to that action because it only involves how damages are to be shared among those joint tortfea-

²⁷² *Id.* at 2089.

²⁷³ *Id.* at 2089-91.

²⁷⁴ *Id.* at 2087.

²⁷⁵ *Musick*, 113 S. Ct. at 2087-88.

²⁷⁶ *Id.* at 2088. The Court noted that "[t]he private right of action under Rule 10b-5 was implied by the judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given an unequivocal direction to the courts to do so." *Id.* (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 737 (1975)).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 2088-89.

²⁷⁹ *Id.* at 2088.

sors that are already subject to liability.²⁸⁰ Because the underlying liability in an action under section 10(b) and Rule 10b-5 has itself been implied, the Court noted that it would be unfair to those defendants against whom damages are assessed if the federal courts lacked the authority to allocate those damages under the theory that Congress did not address the issue.²⁸¹

In discerning whether Congress intended the federal courts to shape the contours of the implied right of action under section 10(b) and Rule 10b-5, the Court in *Musick* relied on two congressional statutes.²⁸² The first statute was the Insider Trading and Securities Fraud Enforcement Act of 1988, wherein Congress expressly provided that nothing contained in that Act "shall be construed to limit or condition . . . the availability of any cause of action implied from a provision of this chapter."²⁸³ The second statute that the Court relied on was Congress's adoption of section 27A of the Exchange Act which limited the retroactive application of the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,²⁸⁴ relating to the appropriate statute of limitations to be applied in a Rule 10b-5 action.²⁸⁵ The *Musick* Court inferred from these statutes "an acknowledgment of the 10b-5 action without any further legislative intent to define it. . . . That task, it would appear, Congress has left to us."²⁸⁶

Having determined that the federal courts have the power to shape the contours of the private right of action under section 10(b) and Rule 10b-5, the *Musick* Court next addressed whether the right to contribution is within the contours of that action.²⁸⁷ The Court first refused to address the various policy arguments concerning whether a rule of contribution or no contribution is more efficient or more equitable.²⁸⁸ Instead, the *Musick* Court attempted to infer how the 1934 Congress would have addressed the issue had the private cause of

²⁸⁰ *Musick*, 113 S. Ct. at 2088.

²⁸¹ *Id.*

²⁸² *Id.* at 2089.

²⁸³ See *id.* See also Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4680 (codified at 15 U.S.C. § 78t-1 (1988)).

²⁸⁴ 111 S. Ct. 2773 (1991).

²⁸⁵ See *Musick*, 113 S. Ct. at 2089.

²⁸⁶ *Id.* at 2089.

²⁸⁷ *Id.* at 2089-92.

²⁸⁸ *Id.* at 2089. The *Musick* Court noted that just as it had declined to rule on the policy considerations regarding a right to contribution in *Northwest Airlines* and *Texas Industries*, it would also decline to do so with respect to a right to contribution under § 10(b) and Rule 10b-5. *Id.*

action under section 10(b) and Rule 10b-5 been included as an express provision in the Exchange Act.²⁸⁹

In inferring what the 1934 Congress would have done, the Court took into account the portions of the Exchange Act most analogous to the implied cause of action under section 10(b) and Rule 10b-5, to ensure that the rules established to govern that action are "symmetrical and consistent with the overall structure of the Act."²⁹⁰ Thus, the *Musick* Court found congressional approval of a right to contribution from the express liability provisions contained in sections 9 and 18 of the Exchange Act.²⁹¹ The Court noted that these sections are analogous to section 10(b) and Rule 10b-5 in that they target the same type of conduct and have the same purpose of deterring fraudulent and manipulative practices.²⁹² Moreover, the Court pointed out that of the eight express liability provisions contained in the Securities Act and the Exchange Act, sections 9 and 18 impose liability upon defendants that are the most similarly situated to those defendants in an action under section 10(b) and Rule 10b-5 in determining whether they should be entitled to contribution.²⁹³ Thus, because sections 9 and 18 both confer an express right to contribution, the *Musick* Court determined that consistency within the federal securities laws requires that a similar right of contribution be adopted in actions under section 10(b) and Rule 10b-5.²⁹⁴

Finally, the Court in *Musick* acknowledged that its conclusion that an implied right to contribution exists under section 10(b) and Rule 10b-5 is consistent with the rule adopted by the majority of federal courts that had previously considered the issue.²⁹⁵ Thus, the Court noted that over the twenty-five years that a right to contribution was first implied by the court in *deHaas*, neither the SEC nor the federal courts have suggested that such a right detracts from the implied

²⁸⁹ *Id.* at 2089-91.

²⁹⁰ *Musick*, 113 S. Ct. at 2090.

²⁹¹ *Id.* at 2090-91.

²⁹² *Id.* at 2090.

²⁹³ *Id.* The Court pointed out that like the implied cause of action under § 10(b) and Rule 10b-5, the express causes of action under §§ 9 and 18 of the Exchange Act: (1) impose direct, rather than derivative, liability on defendants; (2) require a showing that the defendants acted with scienter; and (3) impose liability on multiple defendants acting in concert. *Id.* at 2090-91. But see *Baker v. BP America, Inc.*, 749 F. Supp. 840, 842 & n.1 (N.D. Ohio 1990) (noting § 15 of Securities Act of 1933, 15 U.S.C. § 77o (1988), and § 20(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78t(a) (1988) potentially impose liability on multiple defendants without providing for express right of contribution).

²⁹⁴ *Musick*, 113 S. Ct. at 2091.

²⁹⁵ *Id.*

private cause of action under section 10(b) and Rule 10b-5 or that such a right interferes with the purposes underlying the federal securities laws.²⁹⁶

The dissent in *Musick* was written by Justice Thomas, who was joined by Justices Blackmun and O'Connor.²⁹⁷ Justice Thomas disagreed with the majority's assumption that a right to contribution is merely ancillary to the implied private cause of action under section 10(b) and Rule 10b-5.²⁹⁸ Rather, Justice Thomas noted that contribution, unlike a statute of limitations or a defense to liability, is a separate cause of action distinct from the implied private cause of action.²⁹⁹ Justice Thomas pointed out that a right to contribution is not a question of shaping the contours of the implied private cause of action under section 10(b) and Rule 10b-5, but is a question of whether a defendant in such an action "enjoys a distinct right to recover from a joint tortfeasor."³⁰⁰

According to Justice Thomas, the proper analysis for determining whether an implied right to contribution exists under section 10(b) and Rule 10b-5 is that set out in *Northwest Airlines* and *Texas Industries*.³⁰¹ In applying this analytical framework, Justice Thomas concluded that there is no right to contribution under section 10(b) and Rule 10b-5.³⁰² He first noted that the federal courts lack the power to fashion a federal common law right to contribution.³⁰³ In addition, by focusing on the language of the statute and congressional intent, Justice Thomas determined that Congress neither expressly nor by clear implication intended a right of contribution under section 10(b) and Rule 10b-5.³⁰⁴

Finally, Justice Thomas pointed out that without addressing the threshold question of whether the federal courts have the power to create a right of contribution absent congressional intent to do so, the Court joins the debate over the advantages and disadvantages of allowing a right to contribution.³⁰⁵ He indicated that it is irrelevant whether the answer to this threshold question is "most unfair" to litigants in an

²⁹⁶ *Id.*

²⁹⁷ *See id.* at 2092 (Thomas, J., dissenting).

²⁹⁸ *Id.* at 2093 (Thomas, J., dissenting).

²⁹⁹ *Musick*, 113 S. Ct. at 2093 (Thomas, J., dissenting).

³⁰⁰ *Id.* (Thomas, J., dissenting).

³⁰¹ *See id.* at 2094 (Thomas, J., dissenting). *See supra* notes 84-122 and accompanying text.

³⁰² *See Musick*, 113 S. Ct. at 2094-95 (Thomas, J., dissenting).

³⁰³ *Id.* at 2094 (Thomas, J., dissenting).

³⁰⁴ *See id.* at 2094-95 (Thomas, J., dissenting).

³⁰⁵ *See id.* at 2095-96 (Thomas, J., dissenting).

action under section 10(b) and Rule 10b-5.³⁰⁶ Thus, according to Justice Thomas, the courts "should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwilling to do," and although section 10(b) and Rule 10b-5 do not afford a right to contribution, Congress remains free to create one.³⁰⁷

VI. DO THE FEDERAL COURTS HAVE THE POWER TO IMPLY A PRIVATE RIGHT OF ACTION FOR CONTRIBUTION UNDER SECTION 10(b) AND RULE 10b-5?

Until the Supreme Court's decision in *Musick*, whether a right of contribution existed under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 was a question that the lower federal courts had been facing for the past twenty-five years.³⁰⁸ If in drafting section 10(b), Congress had expressly provided or prohibited a private right of action for contribution, then the issue would have been settled and the uncertainty that existed prior to *Musick* with respect to such a right would never have surfaced. Congress, however, did not do so, and the question of whether contribution is available to defendants in cases arising under section 10(b) and Rule 10b-5 was left to the federal courts. Although the Supreme Court in *Musick* finally answered this question in the affirmative, the analysis the Court used in implying a right to contribution under section 10(b) and Rule 10b-5 is questionable.

In analyzing whether contribution properly exists under section 10(b) and Rule 10b-5, it is necessary to address the fundamental threshold issue of whether the federal courts have the power to create such a right.³⁰⁹ Prior to *Musick*, the great weight of federal authority that had recognized an implied right of contribution overlooked this threshold issue and was based mainly on policy considerations.³¹⁰ The Supreme Court has since restricted the implication of such a right by adopting an analytical framework that focuses on congressional intent and federal common law.³¹¹ Although rejected by the Supreme Court

³⁰⁶ See *id.* at 2096 (Thomas, J., dissenting).

³⁰⁷ *Musick*, 113 S. Ct. at 2096 (Thomas, J., dissenting).

³⁰⁸ In 1968, the United States District Court for the District of Colorado was the first court to directly address the issue of the availability of contribution under § 10(b) and Rule 10b-5. See *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968); *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 614 (N.D. Ill. 1987) (noting *deHaas* was first case to address issue).

³⁰⁹ See *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 722 (8th Cir. 1992).

³¹⁰ *Id.*

³¹¹ See *id.* See also *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981)

in *Musick*, the proper analysis for determining whether contribution can be judicially created under section 10(b) and Rule 10b-5 appears to be the analytical framework that was adopted in *Northwest Airlines, Inc. v. Transport Workers Union* and *Texas Industries, Inc. v. Radcliff Materials, Inc.*³¹² In both of these decisions, the Court applied the *Cort* test that is used to determine whether a private right of action can be implied under a federal statute.³¹³

Some courts have pointed out that the application of the *Cort* test is unnecessary when it comes to implying a right of contribution under section 10(b) and Rule 10b-5.³¹⁴ For instance, in *Heizer*, the Seventh Circuit reasoned that the test had been successfully applied in implying the private cause of action under section 10(b) and that a right of contribution should simply follow because it is only ancillary to the existing cause of action under section 10(b).³¹⁵ The rationale is that once a court has implied a private right of action, it has broad discretion to determine the remedies and parameters under that cause of action.³¹⁶ This is the same approach that the Supreme Court took when it decided *Musick*, where it determined that a right to contribution is ancillary to the implied cause of action under section 10(b) and Rule 10b-5 because it involves the question of how damages are to be shared among those already subject to liability under those provisions.³¹⁷

The reasoning in *Musick* and *Heizer* appears to be unsound because it fails to recognize that a right to contribution is substantive in nature and requires a wholly separate cause of action.³¹⁸ As noted in *Robin*, a right to contribution creates independent substantive rights because it creates a new class of plaintiffs and would confer subject matter jurisdiction to the federal courts over a new class of cases.³¹⁹ Thus, in order to imply an independent substantive right such as contribution, the *Cort* test should be applied as it is to any other

(regardless of merits of conflicting policy arguments, federal court may not have authority to create contribution absent congressional intent or without federal common law basis); *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 98 n.41 (1981) (despite assumption that policies favor contribution, court lacks power to create such right absent legislative intent or without federal common law basis).

³¹² See 451 U.S. 77, 90-91 (1981); 451 U.S. 630, 638 (1981).

³¹³ See *Texas Indus.*, 451 U.S. at 639; *Northwest Airlines*, 451 U.S. at 91.

³¹⁴ See, e.g., *Heizer Corp. v. Ross*, 601 F.2d 330, 333 n.6 (7th Cir. 1979).

³¹⁵ *Id.* It is significant to note that the Seventh Circuit, while not expressly overruling *Heizer*, has subsequently disavowed the analysis it used there. See *King v. Gibbs*, 876 F.2d 1275, 1280 & n.8 (7th Cir. 1989).

³¹⁶ See, e.g., *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 123 (N.D. Ill. 1989).

³¹⁷ See *Musick*, 113 S. Ct. at 2088.

³¹⁸ See *id.* at 2093 (Thomas, J., dissenting).

³¹⁹ *Robin*, 730 F. Supp. at 124.

putative private right of action.³²⁰ In applying the *Cort* test for determining contribution under the federal securities laws, as it was applied in *Northwest Airlines* and *Texas Industries*, a court addresses the threshold issue of whether it has the power to create such a right.

Other courts, including the Supreme Court in *Musick*, confronting the analysis that the Supreme Court adopted in *Northwest Airlines* and *Texas Industries* have found the cases distinguishable and have refused to apply the analysis to determine if a right to contribution is properly created by the courts.³²¹ These courts reason that the Supreme Court decisions involved statutes with express private rights of action and no express right of contribution, whereas the private right of action in section 10(b) has been judicially implied.³²² This rationale is faulty for two reasons. First, as noted above, contribution is a substantive right and the power of the courts to create such a right relies on the analysis in *Northwest Airlines* and *Texas Industries*. Secondly, refusing to apply this analysis in cases in which the underlying private action is implied would create a double standard for implying rights of contribution.³²³ Courts would be free to create new rights of action when there is an implied private right of action, but these courts would be restricted in creating such rights by the analysis in *Northwest Airlines* and *Texas Industries*, when the case involves an express private right of action.³²⁴

Although the Supreme Court in *Musick* declined to do so, when the two-part analysis in *Northwest Airlines* and *Texas Industries* is applied to the availability of contribution under section 10(b) and Rule 10b-5 it is apparent that the federal courts lack the power to create such a right.³²⁵ First, by focusing on legislative intent, it is apparent that Congress did not create a right of action by implication.³²⁶ There is no indication that parties seeking contribution are members of the class whom Congress intended to protect when it enacted section 10(b). In fact, such parties are defendants in section 10(b) actions and constitute

³²⁰ See *id.* at 123-24.

³²¹ See, e.g., *Musick*, 113 S. Ct. at 2087-88; *Baker v. BP America, Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990).

³²² See, e.g., *Musick*, 113 S. Ct. at 2087-88; *Baker*, 749 F. Supp. at 844.

³²³ See *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723 (8th Cir. 1992).

³²⁴ See *id.*

³²⁵ See *id.* at 723-24 (applying analysis in *Texas Industries* and *Northwest Airlines* indicates there is no statutory or federal common law basis for creating implied right of contribution under § 10(b) and Rule 10b-5).

³²⁶ See, e.g., *Chutich*, 960 F.2d at 723, *aff'g* *Chutich v. Green Tree Acceptance, Inc.*, 759 F. Supp. 1403 (D. Minn. 1991); *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989).

the members of the class that Congress intended to regulate for the benefit of an entirely distinct class.³²⁷

Furthermore, the legislative history and statutory scheme of the federal securities laws do not provide a basis on which to imply an intent to create contribution rights. The legislative history is not helpful in finding congressional intent to make contribution available to section 10(b) defendants because the private right of action under that section has been judicially implied.³²⁸ Moreover, the fact that Congress provided express rights to contribution in three of the seven express liability provisions under the federal securities laws is not persuasive of Congress's intent with respect to section 10(b).³²⁹ This fact, as one court has noted, is neutral at best.³³⁰ The fact that Congress has provided a right to contribution in some sections of the securities acts and not others indicates that Congress knows how to provide for such a right when it desires to do so. Furthermore, Congress may have intended to limit contribution rights only to those sections where it expressly provided for such rights. Thus, because those seeking contribution are not in the class protected by the securities laws and there is no congressional intent favoring contribution, the federal courts lack the power to create such a right by implication.

This reasoning is also true with respect to the *Musick* Court's reliance on sections 9 and 18 of the Exchange Act when it attempts to infer what the 1934 Congress would have done had it addressed the issue of contribution under section 10(b). As sections 9 and 18 demonstrate, when Congress wished to provide for a right of contribution it had no trouble doing so expressly. Furthermore, the absence of a right to contribution in certain express liability provisions of the federal securities laws, in light of the fact that other express liability provisions provide for such a right, does not support an inference that the 1934 Congress would have wanted a right of contribution under section 10(b).

Application of the second part of the analysis in *Northwest Airlines* and *Texas Industries* indicates that the federal courts also lack a federal common law basis for creating a right of contribution under section 10(b) and Rule 10b-5. Although the federal courts, unlike state courts, do not generally have lawmaking powers, the Supreme Court has

³²⁷ See, e.g., *Robin*, 730 F. Supp. at 125; *In re Professional Fin. Management*, 683 F. Supp. 1283, 1286 (D. Minn. 1988).

³²⁸ See *Robin*, 730 F. Supp. at 125.

³²⁹ See *id.*; *Chutich v. Green Tree Acceptance, Inc.*, 759 F. Supp. 1403, 1407 (D. Minn. 1991), *aff'd sub nom* *Chutich v. Touche Ross & Co.*, 960 F.2d 721 (8th Cir. 1992).

³³⁰ See *Robin*, 730 F. Supp. at 125.

recognized the need to allow the creation of federal common law in a few limited areas.³³¹ Like the claims in *Northwest Airlines* and *Texas Industries*, however, a claim for contribution under section 10(b) does not come within any of those narrowly drawn categories that the Supreme Court has recognized as areas where the federal courts have the power to establish federal common law.³³²

The Supreme Court in *Texas Industries* noted that the federal courts could also formulate common law where there is "congressional authorization to formulate substantive rules of decision."³³³ The Exchange Act, however, does not contain any provision conferring power on the federal courts to fashion federal common law in securities regulation.³³⁴ In addition, because contribution is a separate substantive right, it goes beyond the power of the federal courts to afford appropriate relief under implied causes of action and enters an area of lawmaking that is more suited for the legislature.³³⁵ Because a claim for contribution under section 10(b) does not fall within one of the categories available for fashioning common law and because there is no authorization by Congress allowing the courts to fashion federal common law in securities regulation, the federal courts also lack the common law power to create a right of contribution under section 10(b) and Rule 10b-5.

The foregoing indicates that under the analysis adopted in *Northwest Airlines* and *Texas Industries* the federal courts do not have the power to create a private right of action for contribution under section 10(b) and Rule 10b-5, either through implication or federal common law. Because the Supreme Court in *Musick* found *Northwest Airlines* and *Texas Industries* distinguishable it declined to adopt the analysis in those decisions and held that the federal courts do in fact have the power to imply a right of contribution under section 10(b) and Rule 10b-5.³³⁶ Accordingly, when it decided *Musick*, the Supreme Court, like many earlier courts finding a right of contribution, ignored the inquiries into congressional intent that guided the decisions in *Northwest Airlines* and *Texas Industries*.

Instead, the *Musick* Court determined that such an inquiry would be futile where the private cause of action under section 10(b) and Rule 10b-5 was itself implied by the federal courts and not expressly

³³¹ See, e.g., *Texas Indus.*, 451 U.S. at 640; *Northwest Airlines*, 451 U.S. at 95.

³³² See *Chutich*, 960 F.2d at 724.

³³³ See *Texas Indus.*, 451 U.S. at 641.

³³⁴ See *Chutich*, 960 F.2d at 724.

³³⁵ See *id.* at 724.

³³⁶ See *Musick*, 113 S. Ct. at 2087-88, 2092.

created or clearly implied by Congress. Under this analysis, however, the inquiry into congressional intent in *Northwest Airlines* and *Texas Industries* would be equally futile, because although Congress had provided an express cause of action under the federal statutes in those cases, it clearly did not create any right to contribution.³³⁷ If Congress had expressly created a right to contribution under those statutes, it would not have been necessary for the Court in *Northwest Airlines* and *Texas Industries* to attempt to discern some intent by Congress that such a right could be implied.³³⁸ It appears, therefore, that the futility in inquiring whether Congress intended to create a right to contribution is no basis for distinguishing *Northwest Airlines* and *Texas Industries*.³³⁹ Thus, the Supreme Court in *Musick* erred by failing to apply the analytical framework in those cases which, as noted earlier, is the proper analysis in deciding whether the federal courts have the power to imply a right of contribution under section 10(b) and Rule 10b-5.³⁴⁰ Had the Supreme Court applied this analysis in *Musick*, it would have determined that defendants in an action under section 10(b) and Rule 10b-5 do not have a right to contribution against others who are jointly responsible for violating those provisions.

Although the Supreme Court in *Musick* expressly declined to rule on the policy considerations underlying a right to contribution, the Court asserted that its decision to uphold a right of contribution under section 10(b) and Rule 10b-5 is consistent with the majority of federal courts that had previously considered the question.³⁴¹ Many of these federal courts, however, had recognized a right to contribution under section 10(b) and Rule 10b-5 by primarily relying on these very policy considerations.³⁴² Moreover, the dissent in *Musick* pointed out that by failing to resolve the threshold question of whether the federal courts have the power to imply a right to contribution absent congressional intent, the Court had joined the debate over the advantages and disadvantages of contribution under section 10(b) and Rule 10b-5.³⁴³

³³⁷ See *Securities Litigation: Damages* (CBC 1993 Supp.) § 13:08.190, at 176.

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ See *Musick*, 113 S. Ct. at 2094 (Thomas, J., dissenting); *Chutich*, 960 F.2d at 722-23; *In re Professional Fin. Management*, 683 F. Supp. at 1285.

³⁴¹ See *Musick*, 113 S. Ct. at 2091.

³⁴² See, e.g., *Huddleston v. Herman & Maclean*, 640 F.2d 534, 559 (5th Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Globus, Inc. v. Law Res. Serv. Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir. 1971), *cert. denied sub nom. Law Res. Serv., Inc. v. Blair & Co.*, 404 U.S. 941 (1971).

³⁴³ See *Musick*, 113 S. Ct. at 2095-96 (Thomas, J., dissenting).

Some of the policy considerations adopted by the lower courts prior to *Musick* have been questioned. The main policy consideration put forth by those courts recognizing an implied right of contribution is that such a right furthers the deterrent policies of the federal securities laws. The rationale is that contribution deters wrongdoers because it assures that culpable parties will be exposed to liability, not just those parties whom the plaintiff in a section 10(b) action decides to name. Other courts have called this reasoning into question, noting that a no-contribution rule may be just as good or greater a deterrent because a wrongdoer may be faced with having to bear the entire loss. Moreover, allowing contribution under section 10(b) and Rule 10b-5 goes against the traditional common law rule denying contribution to intentional tortfeasors because Rule 10b-5 requires *scienter*. In denying the right to intentional tortfeasors, it has been reasoned that the courts should not aid those who deliberately do harm.

Another policy consideration that the lower federal courts recognizing a right to contribution have adopted is that allowing contribution promotes fairness. The rationale behind this policy is that contribution creates a more equitable distribution of justice by apportioning the loss among all culpable parties. Again, because of the *scienter* requirement, section 10(b) and Rule 10b-5 actions involve defendants that have intentionally done wrong and it is not unfair to deny contribution in such actions.³⁴⁴ In addition, disallowing contribution, it has been noted, may promote a rush of undesirable settlement, where defendants can extricate themselves from litigation in exchange for small settlement amounts. The counterargument to this is that allowing contribution would discourage settlement, because a party to a suit will be less inclined to settle if he or she must later face the prospect of a contribution claim from another defendant.

Thus, there are conflicting arguments with respect to the policy considerations surrounding a right of action for contribution under section 10(b) and Rule 10b-5. As the Supreme Court noted in both *Northwest Airlines* and *Texas Industries*, such policy questions are for Congress to resolve, not the courts.³⁴⁵ The range of factors that must be weighed in order to determine whether a right to contribution *should* exist under section 10(b) and Rule 10b-5 indicates that it would be inappropriate for the courts to consider such factors.³⁴⁶ While the *Musick* Court expressly declined to rule on policies underlying a right

³⁴⁴ *In re Professional Fin. Management*, 683 F. Supp. 1283, 1287 (D. Minn. 1988).

³⁴⁵ *Northwest Airlines*, 451 U.S. at 98 n.41; *Texas Indus.*, 451 U.S. at 646-47.

³⁴⁶ See *Texas Indus.*, 451 U.S. at 646-47.

to contribution, it cited to a great deal of lower court precedent that had taken such policy considerations into account and noted that there is no evidence that a right to contribution frustrates the purposes of the federal securities laws.³⁴⁷

VII. CONCLUSION

In *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, the United States Supreme Court finally ended the uncertainty that existed in the lower federal courts and held that the federal courts have the power to imply a right of contribution under section 10(b) and Rule 10b-5. In reaching its decision, the Supreme Court in *Musick* refused to apply the analytical framework for determining an implied right of contribution that had been adopted in *Northwest Airlines* and *Texas Industries*. Because a right to contribution is a separate substantive right, rather than merely ancillary to the existing implied right of action under section 10(b) and Rule 10b-5, it appears that the *Musick* Court erred in refusing to apply the analysis in *Northwest Airlines* and *Texas Industries*. Had the *Musick* Court adopted the congressional intent inquiry put forth in *Northwest Airlines* and *Texas Industries*, it would have denied a right to contribution under section 10(b) and Rule 10b-5.

By refusing to apply this analysis, the *Musick* Court failed to address the threshold question of whether the federal courts have the power to create such a right. Rather, the *Musick* Court found the power to imply a right of contribution under section 10(b) and Rule 10b-5 because the private cause of action under these provisions was not created by Congress, but was implied by the judiciary. The Court noted, therefore, that the federal courts have the power to shape the contours of that cause of action. Determining that a right of contribution is within the contours of the implied private action under section 10(b) and Rule 10b-5 and relying on sections 9 and 18 of the Exchange Act, the *Musick* Court inferred that if the 1934 Congress had addressed the issue it would have included a right of contribution. Consequently, after twenty-five years, the issue is finally resolved and defendants in an action under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 have a right to seek contribution as a matter of federal law.

CHRISTOPHER R. STONE

³⁴⁷ See *Musick*, 113 S. Ct. at 2091.