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AN IMPLIED RIGHT OF CONTRIBUTION UNDER RULE 10b-5: AN ESSENTIAL ELEMENT OF ATTAINING THE GOALS OF THE SECURITIES EXCHANGE ACT OF 1934

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INTRODUCTION

Suppose that you are an attorney whose firm has participated in an initial public offering. This offering has sparked a law suit against your firm under federal anti-fraud securities laws. You are amazed to find that your firm is the sole defendant in the case. The investors have not sued the accountants, underwriters, broker/dealers, or the corporation’s officers involved in the offering. If your firm loses the suit, is it fair that it will have to pay the entire amount of damages set at trial even though it has been but one of many players involved in the deal?

If your firm does not have a right to institute an action for contribution against the other joint tortfeasors, this inequitable result may occur. Rather than risk having to pay huge damages, your firm may choose to settle the case, even if it is somewhat confident that it could prevail at trial. Additionally, the settlement amount may be increased because the plaintiff is in a bully’s position.

This lopsided outcome certainly seems at odds with our sense of fairness and our legal system’s focus on just compensation and allocation of liability. Indeed, it raises the question of whether securities fraud defendants should have the right to be compensated for any amount they are required to pay over and above their fair share of damages.

The United States Supreme Court has granted certiorari to hear this issue in Musick, Peeler & Garrett v. Employers Insurance of Wausau. In this case, the Supreme Court will decide whether federal courts may imply a private right of contribution in actions under section 10(b) of the Securities Exchange Act of 1934 and, more specifically, under Rule 10b-5 of the Securities and Exchange Commission.

The issue of contribution arises often in Rule 10b-5 actions because, generally, there numerous parties involved in securities deals who may have perpetrated a fraud on investors. The list of potentially liable parties includes accountants, attorneys, underwriters, brokers, dealers, and corporate officials.

The traditional view has been that federal courts may imply a right of contribution in Rule 10b-5 actions. Recently, however, a minority view

2. 113 S. Ct. 54 (1992) (granting certiorari to Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575 (9th Cir. 1992)).
3. See Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575 (9th Cir. 1992); Smith v. Mulvaney, 827 F.2d 558, 560 (9th Cir. 1987); Sirota v. Solitron Devices, Inc., 673 F.2d 566, 578 (2d Cir. 1982); Huddleston v. Herman & MacLean, 640
has emerged proposing that courts may not imply such a right.\(^4\) The
Eighth Circuit, in adopting the minority view, admitted it was going
against "the great weight of federal court authority" in concluding that
federal courts have incorrectly "presumed they were authorized to ex-
 pand the federal courts' power."\(^5\)

This Note will address the question presented to the Supreme Court in
Musick regarding whether federal courts should imply a right of contribu-
tion in Rule 10b-5 actions. Specifically, this Note will examine the
arguments on both sides of this issue, outline the likely ramifications of a
decision either way, and conclude that the Supreme Court should uphold
a right of contribution for defendants in Rule 10b-5 actions.

Part I of this Note will present the background of the right of contri-
bution and Rule 10b-5. First, it will examine the purpose, history and
policy of actions for contribution. Second, it will examine the purpose
and history of both the Securities Exchange Act of 1934 and Rule 10b-5.
Part II will discuss the opposing views regarding contribution in Rule
10b-5 actions. Part III will focus on the possible effects of the Supreme
Court's decision in Musick. Specifically, Part III will recommend that
the Supreme Court adopt the view that, in an action under Rule 10b-5,
federal courts should imply a right of contribution for alleged violators
of the Rule. Finally, this Note will conclude that implying a right of contribu-
tion in Rule 10b-5 actions reflects the intent of Congress and serves to
allocate damages equitably.

I. Background

A. Contribution

Civil defendants whom courts find liable for money damages can use
contribution, a type of tort action, to recover from joint tortfeasors. The
equitable doctrine of contribution provides that where two or more per-
sons are liable for the same injury, any one person who pays more than
his or her proportionate share has a right of contribution against the
other liable persons.\(^6\) Specifically, it distributes plaintiff's damages
among the joint tortfeasors by requiring each to contribute to the total

\(^4\) See Chutich v. Touche Ross & Co., 960 F.2d 721, 723 (8th Cir. 1992); King v.
Gibbs, 876 F.2d 1275, 1281 (7th Cir. 1989) (abandoning its earlier analysis in Heizer
Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979), which allowed for contribution in securities
cases).

\(^5\) Chutich, 960 F.2d at 722.

\(^6\) See Restatement (Second) of Torts § 886A (1979).
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 damages in proportion to his or her culpability. Contribution, which involves proportionate sharing of liability, is distinguishable from indemnity, which is a complete shift of all responsibility from one party to another.

The main purpose of contribution is to "assure fairness in the allocation of liability." When several parties combine to cause an injury, contribution prevents the unjust enrichment of some wrongdoers at the expense of other wrongdoers. Where a party establishes that it has paid its fair share relative to other parties to the suit, but more than its fair share relative to the universe of all joint tortfeasors, then that party has an action for contribution.

Historically, contribution developed along with the general law of torts. As early as 1799 in England, contribution was not permitted because the law's primary objective was to discourage tortious behavior with punitive measures. Accordingly, courts were not concerned with a wrongdoer's disproportionate share of responsibility for damages. American common law also generally prohibited contribution in tort actions.

As the goal of tort law changed from punishment of wrongdoers to compensation of victims, courts became more concerned with compensating a wrongdoer who had paid more than his proportionate share of damages. Accordingly, nineteenth century courts in the United States began allowing contribution, although a clear distinction was drawn between intentional and negligent tortfeasors' rights to the action. A right of contribution was recognized for negligent tortfeasors because courts were predominantly concerned with compensating the victim, rather than meting out punishment to the negligent wrongdoer. Later decisions blurred the distinction and allowed intentional, as well as negligent, tortfeasors a right of contribution. This was a particularly important development for the securities fraud area because violations of securities

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11. See Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575, 578 (9th Cir. 1992). Actions for contribution may be brought in third party actions or in separate actions. See id. at 577. Separate actions are allowed because the right of contribution creates a substantive right, and is not merely procedural in nature. See id.
13. See Leflar, supra note 10, at 134.
regulations involve intentional or reckless, not negligent, acts.\textsuperscript{18}

In 1939, the American Law Institute attempted to codify the law of contribution by proposing a Uniform Contribution Among Tortfeasors Act in response to England's Law Reform Act of 1935, which abolished its rule against contribution actions. Congress did not pass this proposed Act.\textsuperscript{19} An amended Uniform Act was proposed in 1955 and was, again, rejected. By the 1970s, after years of harsh criticism of the no-contribution rule, most states passed their own contribution-permitting laws.\textsuperscript{20} Although many of the states have passed versions of the Uniform Act itself,\textsuperscript{21} Congress has not passed the Uniform Contribution Among Tortfeasors Act in any form.\textsuperscript{22}

There are three elements necessary to make a viable claim for contribution: first, there must be overlapping liability between or among the parties;\textsuperscript{23} second, there must be support in the applicable substantive law for distribution of liability between or among the parties;\textsuperscript{24} and third, there must be a procedural device for distributing the liability.\textsuperscript{25}

The second element, requiring substantive law support for the claim, is the source of the inquiry into contribution rights in Rule 10b-5 actions. In order to allow defendants to recover in an action for contribution, courts must find that a substantive right to contribution exists under the statutory scheme engendering the initial suit. Such a right to contribution may originate in one of two ways: first, through the affirmative creation of the right by Congress in a statute, either expressly or by clear implication; or second, through the federal courts' power to fashion common law relief.\textsuperscript{26} Courts must first look to the language of the statute to see if contribution is expressly provided for by Congress.\textsuperscript{27} If it is not, as in the case of Rule 10b-5, then courts must determine if a right to an action for contribution may be implied.\textsuperscript{28}

If no right to contribution is found to have been implied by Congress, then courts must decide if their power to fashion common law relief allows them to create a right of contribution in the particular instance.\textsuperscript{29}

\textsuperscript{18} See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) (scienter required for actions under § 10(b) and Rule 10b-5).
\textsuperscript{19} See Franklin v. Kaypro Corp., 884 F.2d 1222, 1227 n.6 (9th Cir. 1989).
\textsuperscript{20} See id. at 1227; see also Contribution And Claim Reduction in Antitrust Litigation, A.B.A. Sec. of Antitrust Law, 6 & nn.37-39 (1986) (listing 39 states with laws permitting contribution).
\textsuperscript{21} See Kaypro, 884 F.2d at 1227.
\textsuperscript{22} See id.
\textsuperscript{24} See id.
\textsuperscript{25} See id.
\textsuperscript{27} See Texas Indus., 451 U.S. at 639.
\textsuperscript{28} See infra notes 75-78 and accompanying text for a discussion of the modified Cort test.
\textsuperscript{29} See Texas Indus., 451 U.S. at 638.
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There are limited, narrow areas in which federal courts have the power to create "federal common law," even though there is no actual "federal general common law." The Supreme Court, however, has not enunciated a complete list of circumstances governed by a federal common law. Therefore, the concept remains somewhat nebulous.

There are two categories of cases in which federal courts have the power to create a federal common law: first, those cases involving the protection of "uniquely federal interests"; and second, cases where Congress has given the courts the power to develop substantive law. "Uniquely federal interests" include interstate and international disputes implicating conflicting states' rights, foreign relations or admiralty.

Because contribution has evolved from federal common law, its legislative inclusion in some statutes and implication into others sparks debate between those who find strong policy reasons in support of contribution and those who find more policy reasons to exclude it from practice.

1. Arguments Supporting and Criticising Contribution

The controversy surrounding contribution actions can best be analyzed by first examining the policy reasons enunciated for and against them. Support for contribution has been widespread. One argument articulated in support of contribution actions is that they create a more equitable outcome by allocating liability among joint tortfeasors according to their individual responsibility for the tort. According to Professor Prosser,

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally... responsible, to be shouldered onto one alone, according to the accident

30. See id. at 640.
33. See id.
35. See id. at 724. Admiralty is an example of an area in which federal courts have the power to fashion rules of federal common law because of the uniquely federal interests involved. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979). Consequently, the Court upheld a right of contribution in admiralty cases. See Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) (shipowner may receive contribution from tortfeasor jointly responsible for injury to longshoreman, based on ancient admiralty doctrine).

The Court also based this federal common law contribution relief on its history of allocating damages among tortfeasors in admiralty since the nineteenth century. See Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170, 177-78 (1854) (Court adopted rules of equal division of total damages among parties); Strout v. Foster, 42 U.S. (1 How.) 89, 92 (1843) (recognizing equal division of damages rule); see also United States v. Reliable Transfer Co., 421 U.S. 397, 410-11 (1975) (changing the standard to comparative fault in response to severe criticism of equal division of damages rule).
of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or the plaintiff's collusion with the other wrongdoer, while the latter goes scott free.\textsuperscript{36}

Secondly, a no-contribution rule may promote collusion between plaintiffs and tortfeasors who are not being sued, against the interests of the tortfeasor who is being sued for the entire damage amount.\textsuperscript{37} Moreover, such a rule would allow plaintiffs to extract a large settlement from individual defendants by singling them out and threatening suit. Minor participants may end up paying plaintiffs simply to avoid suit while other tortfeasors may pay nothing. Each defendant may settle for more than his share to avoid the possibility of total liability. Consequently, the tortfeasors, together, may end up paying more in settlements than the total injury caused.\textsuperscript{38}

A third argument supporting contribution is that it permits joinder of all potential defendants and, thereby, creates a larger group from which a plaintiff can demand compensation. A plaintiff has a greater chance of full recovery when the number of liable parties increases.\textsuperscript{39} Finally, contribution broadens the scope of the deterrent effect of judgments by reducing the likelihood that any tortfeasor will escape liability in any given tort action.\textsuperscript{40}

Critics of contribution claim that it complicates and extends the duration of litigation, thereby wasting judicial time and energy.\textsuperscript{41} This criticism, however, seems to value judicial expediency above equitable solutions. Contribution actions facilitate granting full recovery to injured plaintiffs, as well as apportioning liability according to degree of fault. Congress's goal in enacting the securities laws was to protect investors.\textsuperscript{42} In light of that goal, equitable solutions seem to be more important than judicial expediency for its own sake.

In addition, critics argue that contribution may discourage settlement because a settling defendant may still be liable to other defendants in an

\textsuperscript{39} See Fleming James, Jr., Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses, 21 NACCA L.J. 360, 361-62 (1958).
\textsuperscript{40} See O'Shaughnessy, supra note 32, at 989; Note, supra note 15, at 124; see also Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 88 (1981) (right to contribution among joint tortfeasors "deter[s] all wrongdoers by reducing the likelihood that any will entirely escape liability"); Cooper Stevedoring Co. v. Fritz Kope, Inc., 417 U.S. 106 (1974) (explaining the deterrent effect of contribution); Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575, 578 (9th Cir. 1992) (explaining the deterrent effect of contribution).
\textsuperscript{41} See Ernest M. Jones, Contribution Among Tortfeasors, 11 U. Fla. L. Rev. 175, 216-17 (1958).
\textsuperscript{42} See infra notes 52-54 and accompanying text.
action for contribution. This problem can be eliminated, however, by barring contribution claims against settling defendants. Many courts have barred such claims in order to encourage settlement.

Those opposed to contribution further contend that contribution is socially undesirable because insured defendants may shift the burden to uninsured defendants. This would concentrate the loss rather than distribute it throughout society through insurance premiums. The reverse phenomenon happens far less frequently because, generally, when choosing among joint tortfeasors in a civil action, plaintiffs first bring actions against insured tortfeasors rather than uninsured ones. Yet, one of the effects of allowing contribution actions will be that it will encourage more parties involved in securities transactions to procure insurance to protect themselves against the increased possibility of being found jointly liable in any given action, even if they are not made parties by the plaintiffs.

A final criticism of the right to contribution is that implying a right of contribution “expands federal judicial power far beyond defining the limits of a fraud victim’s implied claim under section 10(b) and invents a new cause of action.” This claim undercuts itself. In recognizing the right to a private action under Rule 10b-5, courts were essentially “inventing” a new cause of action by implying it from the Rule, but this was permitted because it fulfilled congressional intent. If courts can discern that Congress intended a right of contribution in addition to a private action under Rule 10b-5, then it follows that they are similarly able to “invent” another cause of action to fulfill that intention.

Courts created private actions under Rule 10b-5 only to fulfill Congress’s intent to provide for private actions under the Rule. Similarly, courts can imply contribution in Rule 10b-5 actions only if doing so follows the intent of Congress and furthers the purpose of the securities laws. It is necessary, therefore, to examine the purpose and intent of Congress in enacting the Securities Exchange Act of 1934.

43. See O'Shaughnessy, supra note 32, at 987.
46. See Fleming James, Jr., Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156, 1165-67 (1941).
47. See id at 1167.
49. See infra notes 71-73 and accompanying text.
50. See supra note 28 and accompanying text.
B. Securities Exchange Act of 1934

Congress enacted the Securities Exchange Act of 193451 (the "1934 Act") to protect investors against stock price manipulation by both regulating securities transactions and requiring regular reporting by companies with stock listed on the national securities exchanges.52 As the Supreme Court has recognized, the purpose of the 1934 Act and its companion legislative enactments53 is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor . . . in the securities industry."54

In recognition of the complicated nature of the securities industry, Congress designed the 1934 Act to be flexible so that it could be applied to the many varied situations which would inevitably arise in that industry.55 Congress created some express civil remedies and some express criminal penalties for perpetrators of fraud upon investors, but recognized that a rigid statutory scheme would not enable it to regulate securities transactions as efficiently as a flexible one would.56 One example of the flexibility of the 1934 Act is the broad language of Section 10(b). Section 10(b) makes it "unlawful . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."57

In a further attempt to enable efficient enforcement of the 1934 Act through a flexible scheme, Congress created the Securities and Exchange Commission (the "SEC") and gave it broad rulemaking powers.58 Rulemaking power, though, is not lawmaking power. Rather, it is the "power to adopt rules to carry into effect the will of Congress as

expressed by the statute.’” 59 This means that the SEC, in its rulemaking capacity, is bound to follow congressional intent.

The SEC promulgated Rule 10b-5 pursuant to its rulemaking powers under section 10(b) of the 1934 Act to reflect and implement congressional intent.60 The Rule was hastily drafted and adopted; consequently, there is very little legislative history or background to Rule 10b-5 itself.61 Adopted on May 21, 1942, it was drafted in response to a situation in which the president of a corporation was spreading false rumors that his company was failing, and then purchasing shares in the company at depressed prices.62 At that time, there appeared to be no mechanism through which the SEC could prohibit this conduct. In order to correct this gap in the anti-fraud rules, the SEC drafted and approved the Rule on the same day the SEC Regional Commissioner in Boston reported this activity.63

The purpose of Rule 10b-5 was to close the “loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.”64 The language of Rule 10b-5 seems to have been derived from section 17 of the Securities Act of 1933 (the “1933 Act”).65 The similarity in the language is logical because, in enacting Rule 10b-5,

60. Rule 10b-5 provides as follows:
   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 of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, ... or (c) [t]o 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.
62. See Ernst & Ernst, 425 U.S. at 212-13 n.32.
63. See id.
64. Exchange Act Release No. 3230 (May 21, 1942) (promulgation of Rule 10b-5); accord Fischman v. Raytheon Mfg., 188 F.2d 783, 787 n.2 (2d Cir. 1951).

Section 17 provides as follows:
   It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly-
   (1) to employ any device, scheme, or artifice to defraud, or
   (2) to obtain money or property by means of any untrue statement of a material fact or any omission 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
   (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
the SEC was trying to apply to both sellers and purchasers the prohibitions of section 17, which apply only to sellers.\textsuperscript{66}

\section*{C. \textit{Implied Private Actions Under Rule 10b-5}}

Justice Marshall stated that section 10(b) and Rule 10b-5 may be "the most litigated provisions in the federal securities laws."\textsuperscript{67} Rule 10b-5, however, does not expressly provide for any private remedies. In fact, there is no evidence that the SEC, in adopting Rule 10b-5, considered the question of private remedial actions.\textsuperscript{68} Consequently, the right to a private cause of action under the Rule has been recognized by way of implication.

In 1946, the District Court for the Eastern District of Pennsylvania was the first court to imply a private action into Rule 10b-5. In \textit{Kardon v. National Gypsum Co.},\textsuperscript{69} the plaintiff charged that the three defendants conspired and misrepresented the truth to the plaintiffs, causing them to sell their stock in two corporations for an amount far less than its actual value.\textsuperscript{70} Although Rule 10b-5 does not expressly provide for private civil suits, the court held that, because the violation of a statute is a tort, the maxim \textit{ubi jus ibi remedium} (where there is a right there is a remedy) requires the allowance of private actions in order for plaintiffs to recover for violations of section 10(b) and Rule 10b-5.\textsuperscript{71} The \textit{Kardon} court recognized that the general purpose of the 1934 Act is the most directing factor in determining whether or not a right to a private action can be implied. Moreover, the mere omission of an express provision for such a private action does not, itself, negate the general implication of the law.\textsuperscript{72}

The Supreme Court has affirmed the notion set forth in \textit{Kardon}, stating that actions under Rule 10b-5 are to be implied under the statute.\textsuperscript{73}

The Supreme Court has devised a general test to determine whether or not to imply private causes of action under federal statutes that do not expressly provide for them. The test emerged from the idea that when a

\begin{thebibliography}{99}
\addcontentsline{toc}{section}{Notes}
\bibitem{66}See Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952) (section 17 and Rule 10b-5 are exactly the same except for the substitution of "any person" (10b-5) in the place of "the purchaser" (§ 17) and the addition of "in connection with the purchase or sale of any security" in Rule 10b-5).
\bibitem{68}See Exchange Act Release No. 3230 (May 21, 1942) (includes no mention of contribution); see also \textit{Blue Chip Stamps}, 421 U.S. at 730 (noting lack of SEC discussion of contribution in passing Rule 10b-5).
\bibitem{69}69 F. Supp. 512 (E.D. Pa. 1946).
\bibitem{70}See \textit{id.} at 513.
\bibitem{71}See \textit{id.}
\bibitem{72}See \textit{id.} at 514.
\bibitem{73}See \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 749 (1975); Affiliated Ute Citizens v. United States, 406 U.S. 128, 150-54 (1972); Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) (expressly acknowledging, for the first time, that a "private right of action is implied under § 10(b)"). Recently, the Court reaffirmed its position on this issue. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2779-80 (1991) ("[s]uch claims are of judicial creation, having been implied under the statute for nearly half a century").
\end{thebibliography}
federal statute makes an act illegal but leaves the question of its consequences to judicial determination, the answers are to be derived from the statute and its federal policy.\textsuperscript{74} In outlining its test in \textit{Cort v. Ash},\textsuperscript{75} the Supreme Court set out four factors to be used in determining if a private remedy is implicit in any statute not expressly providing one. First, the court must determine if the plaintiff is of the class for whose benefit the statute was enacted. Second, the court must examine any legislative intent, express or implicit, either to deny or to create such a remedy. Third, the court must decide if the remedy would be consistent with the overall purpose of the legislative scheme. Finally, the action must not be one traditionally relegated to the states because, if it is, it would be inappropriate to create it on the basis of federal law.\textsuperscript{76}

The Supreme Court has modified the \textit{Cort} test and now relies most heavily on the congressional intent prong, utilizing the other prongs only as secondary considerations to determine congressional intent.\textsuperscript{77} The Supreme Court has used this modified \textit{Cort} test to determine whether to imply rights to actions for contribution under various statutes not expressly providing for them.\textsuperscript{78} In addition to Rule 10b-5 satisfying the modified \textit{Cort} test, the Supreme Court also recognized the practical necessity for implying private actions under Rule 10b-5. The Court stated that private enforcement of SEC rules may provide "a necessary supplement to Commission action."\textsuperscript{79} In \textit{J.I. Case Co. v. Borak},\textsuperscript{80} the Court found that the federal courts have a duty to provide remedies to effectuate the congressional purpose of the securities laws.\textsuperscript{81} Because the chief purpose of the securities laws is to protect investors, the availability of judicial relief to defrauded investors is "certainly imply[ed]" to achieve that purpose.\textsuperscript{82}


\textsuperscript{75} 422 U.S. at 78.

\textsuperscript{76} See \textit{id.}

\textsuperscript{77} See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 24 (1979) (using \textit{Cort} factors only insofar as they give indication of congressional intent); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) (stating \textit{Cort} factors do not get equal consideration; congressional intent is of utmost importance); Cannon v. University of Chicago, 441 U.S. 677, 688 & n.9 (1979) (other factors of \textit{Cort} test are indicia of congressional intent).


\textsuperscript{79} J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

\textsuperscript{80} \textit{id.}

\textsuperscript{81} See \textit{id.} at 433.

\textsuperscript{82} See \textit{id.} at 432.
II. ACTIONS FOR CONTRIBUTION UNDER RULE 10b-5

A. Implication of the Right to Contribution

Implied private actions under Rule 10b-5 have been universally accepted by the judiciary. Implying actions for contribution, however, creates more complicated questions for courts. In actions under Rule 10b-5, defendants may seek to be reimbursed by joint-tortfeasors through an action for contribution. Because there is no express right to contribution in the statute, courts must decide if they can go one step beyond the initial implication of a private remedy and imply a right to an action for contribution under Rule 10b-5.

The general question of implying a right of contribution arises in two very different contexts. The fundamental cause of the controversy over this issue is the confusion over these two different contexts. The first context in which the question of implication of a right of contribution arises is in cases where a statute provides express remedies but makes no specific mention of contribution. The second context involves cases where a statute provides no express remedies at all.

In the first situation—where a federal statute provides an express remedy but does not include a right of contribution in that remedy—courts generally do not imply such a right over and above the remedy provided in the relevant statute. Where Congress has taken the time to design express remedies and enforcement mechanisms, yet contribution is not mentioned, there is a presumption that Congress intentionally left out contribution. The absence of contribution provisions in the presence of other specific recovery provisions is thought to demonstrate that Congress never intended to include a right of contribution in those actions.

Rule 10b-5, however, is an example of the second context in which the question of implying contribution rights arises—where Congress provided no express remedies and the very action in which the question of contribution arises is, itself, an implied action. The traditional view allowing for contribution in Rule 10b-5 cases is correctly based on the rec-

83. See supra note 73 and accompanying text.
84. See supra note 11 and accompanying text.
86. See Northwest Airlines, 451 U.S. at 97.
87. See Texas Indus., 451 U.S. at 639.

The only way to imply contribution rights in such a case, where Congress has neither explicitly or implicitly provided for them, would be through federal common law. The Supreme Court has noted, however, that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." Id. at 642. Under the second possible justification for creating federal common law, the Court found that Congress had not authorized courts to develop substantive law under either of the two statutory schemes discussed in Texas Indus., id. at 641, and Northwest Airlines, 451 U.S. at 98. The mere authority to construe a statute is very different from the authority to fashion a new remedy which Congress itself did not adopt. See id. at 97.
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Ocognition that the Rule provided no express remedies, and that all its private remedies exist only by way of judicial implication in accordance with congressional intent.\(^8\) Courts, nonetheless, disagree over the analysis to be used in deciding whether to imply a right of contribution in Rule 10b-5 actions. The crux of this controversy stems from the failure of some courts to recognize the underlying distinction between the two types of statutes—express rights and implied rights—and the resulting failure to apply the correct, corresponding rationale to Rule 10b-5—the implied rights rule.

In reviewing Rule 10b-5 cases, both the Seventh and Eighth Circuits mistakenly relied on the Supreme Court’s reasoning in two cases\(^9\) arising in the express rights context. Unlike Rule 10b-5, however, the statutes at issue in these other two cases included express provisions for remedies which neglected to mention contribution and it was, therefore, presumed that contribution was intentionally left out.\(^0\) In the Seventh Circuit case, \textit{King v. Gibbs},\(^9\) investors brought a securities fraud action against the corporation, its president, controller, and board members.\(^9\) The controller maintained his innocence and sought to recover, from the other defendants, the money he expended in defending the suit.\(^9\) The court dismissed the controller’s cross claims.\(^9\) The Seventh Circuit affirmed.\(^9\) In the Eighth Circuit case, \textit{Chutich v. Touche Ross & Co.},\(^6\) stockholders brought a class action against Green Tree Acceptance, Inc. and certain directors and officers charging violations of federal securities laws.\(^9\) The corporation’s chairman of the board brought a third party complaint seeking contribution from the corporation’s president, attor-

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\(^8\) See, e.g., Smith v. Mulvaney, 827 F.2d 558, 560 (9th Cir. 1987) (holding that an 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) (permitting contribution even though § 10(b) does not expressly provide for it); Huddleston v. Herman & MacLean, 640 F.2d 534, 556-59 (5th Cir. 1981) (permitting contribution); Seiler v. E.F. Hutton & Co., 102 F.R.D. 880, 885 (D.N.J. 1984) (refusing to decline to find an implied action for contribution); \textit{In re National Student Mktg. Litig.}, 517 F. Supp. 1345, 1347-49 (D.D.C. 1981) (holding that a non-settling § 10(b) defendant has an implied right to assert a cross claim for contribution against a settling defendant); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970) (one defendant who paid plaintiffs the full amount of judgment, reserving any rights it might have to contribution from other tortfeasors, was permitted to recover from the two remaining defendants), \textit{aff'd}, 442 F.2d 1346 (2d Cir.), \textit{cert. denied}, 404 U.S. 941 (1971); deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968) (allowing implication of contribution), \textit{aff'd in part and vacated in part}, 435 F.2d 1223 (10th Cir. 1970).


\(^2\) See \textit{id.} at 1276.

\(^3\) See \textit{id.} at 1277.

\(^4\) See \textit{id.} at 1276.

\(^5\) See \textit{id.} at 1276.

\(^6\) See \textit{id.} at 1276.

\(^7\) See \textit{id.} at 1276.

\(^8\) See \textit{id.} at 722.
The district court dismissed the action for contribution. The Eighth Circuit affirmed.

If the Seventh and Eighth Circuits followed their express rights context analysis to its logical conclusion, however, then they would have to find that no private remedy exists at all under Rule 10b-5 because Congress did not provide for any remedy even though it did so in other provisions of the 1934 Act. Such a finding would be unsound, however, because the right to private remedies under Rule 10b-5 has been well established by judicial implication. The Supreme Court's logic in the express rights cases, where Congress provided express remedies, does not work in the implied rights cases, where the very cause of action which engendered the suit for contribution is not expressly written and has, itself, been created by implication. Therefore, the Seventh and Eighth Circuits' adoption of this logic in King and Chutich was erroneous.

In analyzing implied rights cases, courts must examine the contribution question in the same manner as they previously examined the Rule 10b-5 private remedy question. In order to imply a right of contribution under federal statutes, courts must either find the congressional intent to provide for contribution or use their own power to fashion federal common law relief in that area. There is no express congressional direction on contribution in the language of Rule 10b-5 or in section 10(b) of the 1934 Act. Therefore, courts must determine, first, if they can infer congressional intent to provide such a right of contribution in Rule 10b-5 actions. If not, then the only possible way to find a right to contribution is through courts' federal common law power.

There is evidence of congressional intent to provide for a right of contribution among Rule 10b-5 violators in the other sections of the 1934 Act where private remedies and contribution are expressly provided.

98. See id.
99. See id.
100. See id. at 724.
103. King v. Gibbs, 876 F.2d 1275 (7th Cir. 1989).
105. See supra notes 74-78 and accompanying text.
107. See supra notes 83-88 and accompanying text.
108. See supra note 29 and accompanying text.
109. See deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968), aff'd in part and rev'd in part on other grounds, 435 F.2d 1223 (10th Cir. 1970) (finding defendant liable under § 10(b) of the 1934 Act and pointing out that §§ 9 & 18 of the 1934 Act, which are the sections that expressly provide for private remedies, provide for
There is also evidence of such intent in the very nature and purpose of the 1934 Act itself. An examination of the Cort factors illustrates the limits of inferring such congressional intent.

One of the prongs of the Cort test involves the definition of the class of intended beneficiaries of a statute. Critics of contribution under Rule 10b-5 cite this as a basis for disallowing the action. Although the Securities Exchange Act of 1934 was not drafted primarily to protect those who violate the law and defraud investors, the fact that certain provisions in the 1934 Act provide for contribution illustrates that Congress did consider violators within the broader scope of protected beneficiaries of the Act.

Another Cort factor concerns the overall purpose of the Act, which was to protect investors. A right of contribution serves this interest by deterring a wider group of possible defrauders, and by increasing the likelihood of full recovery on a judgment. The legislative history prong of the Cort test is difficult to apply in Rule 10b-5 cases because Congress never debated the Rule and enacted it so quickly.

The final Cort factor, concerning state authority, is also inapplicable because the contribution question under Rule 10b-5 arises from an action under a federal statute. It does not involve an area traditionally relegated to state authority because it is not an action generated separately.

At least one federal district court found that the fact that federal securities regulations are to be administered in pari materia encouraged courts to look to the other provisions of the 1934 Act for guidance on contribution. Section 18 of the 1934 Act provides that "every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. § 78r(b) (1988); see also Amicus Curiae Brief for Securities Exchange Commission at 9-10, Employers Insurance of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575 (9th Cir.), cert. granted, 113 S. Ct. 54 (1992) (asserting that Congress intended to include contribution in Rule 10b-5 actions).

110. See supra note 76 and accompanying text.
111. See supra note 76 and accompanying text.
112. See supra note 76 and accompanying text.
113. See supra notes 39-40 and accompanying text.
114. See supra note 76 and accompanying text.
115. See supra notes 61-62 and accompanying text.
116. See supra note 76 and accompanying text.
117. See supra note 76 and accompanying text.
118. See Huddleston v. Herman & MacLean, 640 F.2d 534, 557 (5th Cir. 1981).
120. SEC v. National Sec., Inc., 393 U.S. 453, 466 (1969). "Section 10(b) and Rule 10b-5 together constitute one of the several broad antifraud provisions contained in the securities laws." Id.
Statutes should be applied in pari materia when it is "reasonable to think that members of the legislature [when considering a statute]. . . would think about another statute, and have their impressions thereby derived."\textsuperscript{121}

The Seventh and Eighth Circuits' views\textsuperscript{122} follow the incompatible maxim of expressio unius est exclusio alterius. Under this principle, it is presumed that the omission of a remedy in a particular section of a statute is deliberate if that remedy appears elsewhere in the statute.\textsuperscript{123} Once again, application of this maxim leads to the conclusion that because some sections of the 1934 Act provide for express remedies, the sections that do not so provide, omit them purposely to prohibit all private causes of action under those sections. This logic leads to the conclusion that Congress intended to prohibit all private actions under Rule 10b-5. As mentioned above, the existence of private remedies under Rule 10b-5 has been judicially implied and clearly approved by the Supreme Court.\textsuperscript{124} Therefore, application of this maxim would be erroneous.

Congress never considered the specific question of whether a violator of Rule 10b-5 has a right of contribution against fellow tortfeasors. Recognition of such a right, however, would further Congress's main objective of protecting investors and discouraging fraud in the securities markets by broadening the possible range of liable parties in any case. Compared to a situation without contribution, this would both deter more potential defrauders and assure a larger pool from which plaintiffs can recover on judgments for damages.\textsuperscript{125}

Thus, there is ample evidence from which to infer Congressional intent for implying a right of contribution in Rule 10b-5 cases.

Courts, therefore, need not look to the possibility of creating a right to contribution under federal common law. Nevertheless, a complete analysis requires examining the federal common law possibilities.\textsuperscript{126}

In both Texas Industries, Inc. v. Radcliff Materials, Inc.,\textsuperscript{127} and Northwest Airlines, Inc. v. Transport Workers Union,\textsuperscript{128} the Supreme Court held that federal courts could not create a right of contribution as a matter of federal common law because those particular cases did not fall within any of the narrow categories governed by federal common law.\textsuperscript{129} Securities laws, like the statutes examined by the Court in Texas Indus-

\textsuperscript{121} See supra note 4 and accompanying text.
\textsuperscript{122} See supra note 119, § 51.03.
\textsuperscript{123} See Sutherland, supra note 119, § 47.23.
\textsuperscript{124} See supra notes 69-73 and accompanying text.
\textsuperscript{125} See supra note 117, § 47.23.
\textsuperscript{126} See supra notes 29-35 and accompanying text.
\textsuperscript{127} 451 U.S. 630 (1981).
\textsuperscript{128} 451 U.S. 77 (1981).
\textsuperscript{129} See Texas Indus., 451 U.S. at 645 (discussing antitrust provisions); Northwest Airlines, 451 U.S. at 97 (discussing employment discrimination provisions).
tries and Northwest Airlines, fall outside of the narrow categories where federal courts have power to fashion common law relief. The securities laws do not operate in an area of "unique[] federal concern" which has been limited to cases implicating the rights or duties of the United States or the resolution of interstate controversies.\footnote{130. See Northwest Airlines, 451 U.S. at 95. The Seventh Circuit held a wider view of "unique federal interests" in granting a federal common law remedy to ousted members of a federally created union, but this would still not apply to securities laws because the interests are still basically private ones. See Barany v. Buller, 640 F.2d 726, 735 (7th Cir. 1982).} Courts have been able to fashion common law relief in admiralty, where there is constitutional authority for the federal judiciary to create federal common law, and in labor law, where Congress has both vested jurisdiction in the federal courts and empowered the federal courts to create common law.\footnote{131. See U.S. Const. art. III, § 2; Fitzgerald v. United States Lines, Co., 374 U.S. 16, 20-21 (1963) (holding that federal courts have the power to fashion the rule of law in admiralty cases); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455-56 (1957) (finding labor law subject to federal common law).}

When courts fashion the contours of remedies under a federal statute, like the 1934 Act, they should not act as common law courts. Rather, they must act within the strictures of congressional intent as embodied in the legislative scheme under which the judicially created or defined action arises.\footnote{132. See Mark J. Loewenstein, Implied Contribution Under the Federal Securities Laws: A Reassessment, 1982 Duke L.J. 543, 568.} Courts are within their power to imply a right of contribution in Rule 10b-5 cases.

\section*{III. Ramifications of the \textit{Musick} Decision}

The Supreme Court will decide the issue of whether courts may imply a right of contribution for defendants in Rule 10b-5 actions in the case of \textit{Musick, Peeler & Garrett v. Employers Insurance of Wausau}.\footnote{133. No.84-1821-B(IEG).} This case arose as a result of a settlement of \textit{In re Cousins Securities Litigation}\footnote{134. No.84-1821-B(IEG).} ("Cousins"). Cousins was a class action in which shareholders of the Cousins Corporation charged the corporation, its holding company, corporate officers and directors, and two underwriters with violating the federal securities laws.\footnote{135. See Employers Ins. of Wausau v. Musick, Peeler & Garrett, No. 89-0705-JLI(BTM), 1990 WL 74371, at *1 (S.D. Cal. Apr. 9, 1990).} The shareholders charged that during an initial public offering in 1983, the defendants omitted material facts in connection with the sale of stock. This engendered a class action against Cousins (who is the insured of the plaintiffs in the \textit{Musick} case), along with its holding company, certain of its officers and directors, and its two lead underwriters.\footnote{136. See id.} The Cousins defendants' attorneys and ac-
accountants were neither sued nor impleaded. The case was eventually settled with the defendants' insurers agreeing to pay plaintiffs $13,500,000. The settlement contained a release from liability to investors for the non-party attorneys and accountants.

The insurers of Cousins sought to recover from the attorneys and accountants in Employers Insurance of Wausau v. Musick, Peeler, & Garrett. Musick is an action for contribution based on the assertion that the attorneys and accountants caused the insureds (Cousins) to make misrepresentations to investors which led to the class action suit that settled for $13.5 million. The defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court dismissed the action for failure to state a claim. Employers Insurance of Wausau and Federal Insurance Co. appealed this dismissal. The Ninth Circuit reversed and remanded, finding that the plaintiffs had stated a valid claim for contribution.

There will be significant, widespread consequences of the Supreme Court's decision in this case because there are a myriad of participants in most securities transactions. The entire securities industry needs to know what kind of liability to expect for different parties in Rule 10b-5 cases. If a Rule 10b-5 plaintiff chooses to sue only one of the joint tortfeasors for the entire damage amount, and the Supreme Court holds that that defendant has no right to an action for contribution against other joint tortfeasors, then a truly inequitable situation will exist where, by pure luck or even collusion, some tortfeasors will be severely punished for securities fraud while others will profit from it.

If the Supreme Court holds that Rule 10b-5 defendants do not have a right to an action for contribution, it will close a long-recognized safety valve in securities fraud cases which has enabled defendants to present the entire "story" of the case to courts so that fair allocations of liability may be designed. There seems to be no logic to a rule which gives plaintiffs the power not only to be compensated, but also to selectively punish. If the right to contribution in Rule 10b-5 actions is not upheld, securities transactions will become a higher risk business for the various participants because the amount of their potential liability will increase from their proportional share of the transaction to the entire damages in a

137. See Employers Ins. of Wausau v. Musick, Peeler & Garrett, 954 F.2d 575, 576 (9th Cir. 1992).
139. See Employers Ins. of Wausau, 954 F.2d at 577.
140. No. 89-0705-JLI(BTM), 1990 WL 74371 (S.D. Cal. Apr. 9, 1990). As insurers, the plaintiffs are subrogees of their insured's rights and can, therefore, sue in the subrogor's place.
141. See id. at *1.
142. See id. at *2.
143. See id. at *5.
144. See Employers Ins. of Wausau, 954 F.2d at 576.
145. See id. at 581.
146. See supra notes 36-37 and accompanying text.
Rule 10b-5 suit. Consequently, the cost of doing securities work will increase as firms must insure themselves to a greater degree. Without a right to contribution in Rule 10b-5 actions, disreputable firms will be more likely to commit fraud upon investors because it will be less likely that they will be brought into any subsequent Rule 10b-5 action.\textsuperscript{147}

If the Supreme Court decides against a right of contribution, legislative lobbying to reverse the decision would likely be heavy.\textsuperscript{148} Legislative proposals to expressly allow contribution in Rule 10b-5 actions have been floated on Capitol Hill over the years, but were largely ignored as unnecessary because courts implied actions for contribution virtually without exception.\textsuperscript{149} A Supreme Court decision against this traditional implication of contribution rights would likely spark lobbying from investor protection advocates who dominate congressional securities committees.\textsuperscript{150}

The Supreme Court should uphold the right to contribution in Rule 10b-5 cases because contribution actions assure a more equitable outcome both at trial or in settlement. If actions for contribution are brought by the party originally sued under Rule 10b-5, especially if brought as third party actions, discovery will yield more information about what actually transpired and a more equitable outcome will result at trial or in settlement.

The purpose of the private cause of action under Rule 10b-5 is to compensate the victims of fraud, not to penalize some defrauders and reward others. Criminal sanctions serve to punish. Conversely, courts in civil cases should seek outcomes, be they settlements or judgments, that serve to allocate damages fairly according to relative culpabilities.\textsuperscript{151} If contribution actions are not allowed, some defrauders will be penalized by the amount of damages they are required to pay, while other wrongdoers will benefit by paying nothing.\textsuperscript{152}

Having a larger group of wrongdoers in the pool responsible for damages will increase the likelihood of full compensation.\textsuperscript{153} Without contribution actions, a plaintiff may win a large judgment against a party who is unable to pay the entire amount. If, on the other hand, that responsible party can bring an action for contribution, it may be able to recover the amount it is unable to pay alone, and then pay the entire damage amount to the plaintiff who was defrauded.

Another important consideration is deterrence. The availability of contribution actions serves to deter more potential defrauders because, instead of there being a likelihood that only one of every group of four or

\textsuperscript{147} See supra note 40 and accompanying text.
\textsuperscript{149} See id.
\textsuperscript{150} See id.
\textsuperscript{151} See supra note 15 and accompanying text.
\textsuperscript{152} See supra note 36 and accompanying text.
\textsuperscript{153} See supra note 39 and accompanying text.
five parties involved in defrauding investors will be sued, the likelihood becomes that all of the defrauders will be sued. If contribution is allowed, the deterrent effect is likely to be felt by all potentially liable parties, rather than just those parties that plaintiffs are most apt to sue. The accounting industry is expected to lobby against such a right of action because "[a]ccountants would have the potential to get sued under yet another theory of law."156

The possibility of being sued in an action for contribution will discourage non-party wrongdoers from colluding with the plaintiff in an effort to railroad another tortfeasor. Plaintiffs would no longer be able to threaten one wrongdoer with total liability and extract a larger settlement than that party's proportionate share of culpability. This result would, therefore, be more equitable. Without rights to contribution, "securities fraud plaintiffs and their counsel would have the unfettered discretion to select which actors, among all of those potentially liable under Rule 10b-5, are called to account for their conduct."159

Although federal courts do not have federal common law power to create a right of contribution in actions under Rule 10b-5, they do have the power to imply such a right based on legislative intent. Rule 10b-5 does not have a long, thoroughly debated history from which courts can glean a clear expression of legislative intent. The general purpose of the 1934 Act, however, the provision for contribution actions elsewhere in the Act, the increased deterrent effect and the fairness of the outcome, all indicate that a right of contribution serves to promote the intent of Congress in enacting the 1934 Act and the intent of the SEC in promulgating Rule 10b-5.

Although the Supreme Court generally is not inclined to decide a case based on legal theory rather than on express provisions of securities laws, the right of contribution in securities fraud cases has been so commonly upheld in the lower courts that the Court may be swayed away from this natural inclination. Additionally, equity compels the Court to imply

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154. See supra note 40 and accompanying text.
157. See supra note 37 and accompanying text.
158. See supra note 38 and accompanying text.
159. Amicus Curiae Brief for the Securities Industry Association at 1, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 54, granting cert. in 954 F.2d 575 (9th Cir. 1992).
160. See supra note 130 and accompanying text.
161. See supra notes 109, 125, and accompanying text.
162. See supra note 61 and accompanying text.
163. See supra notes 40, 109, 125, and accompanying text.
164. See supra notes 52-54 and accompanying text.
165. See supra note 3 and accompanying text.
the right of contribution. Nevertheless, the Supreme Court has followed a "cautionary" trend in recent years, which would appear to sway the decision away from creating a right to contribution. The history of implied contribution in securities fraud areas, however, and the Court's approach to congressional intent in the 1991 statutes of limitations decision in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson—that Congress, had it considered the issue of a statute of limitations when enacting the 1934 Act, would have included an express provision for one in the Act—will likely lead the Court to find that had Congress considered the issue of implied contribution under the 1934 Act, it would have expressly provided for it.

**Conclusion**

The Supreme Court must recognize the difference between statutes expressly providing private remedies but not including contribution, and statutes, like Rule 10b-5, providing no express remedies at all, where the very private action engendering the contribution action was itself implied by the judiciary. The Court will have an opportunity to do so this term in Musick, Peeler & Garrett v. Employers Insurance of Wausau.

The traditional allowance of contribution actions in Rule 10b-5 cases must continue in order to further the goals of Congress and to ensure equitable resolutions of securities fraud cases for plaintiffs and defendants alike.

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167. 111 S. Ct. 2773 (1991) (holding that securities fraud claim was time barred because the proper statute of limitations for actions under § 10(b) and Rule 10b-5, which do not expressly provide their own, was the one provided elsewhere in analogous provisions of the 1934 Act).