GLOBUS: A PROLIFIC GENERATOR OF NICE QUESTIONS

Federal Common Law: There is a general federal common law; Contribution: Contribution among joint tortfeasors under 10b-5 and Clayton Act § 4; Statutes of Limitation: Application by reference of the express limitations of the Securities Exchange Act to actions brought under 10b-5.

I. INTRODUCTION

The litigation generated by section 10(b) of the Securities Exchange Act has had a great deal to do with the congestion of federal courts.[1] Section 10(b) does not expressly provide for a private right of action but has been construed as implicitly creating a private right of action sounding in tort.[2] This construction follows from the tort principle that a private right of action may be implied from a statute in favor of those whose interests the statute was designed to protect.[3] Besides the delicate and knotty problems involved in interpreting the substantive aspects of private rights of action under § 10(b) and rule 10b-5 issued pursuant thereto, there are two rather important ancillary questions which continue to generate confusion. First, is there a right of contribution between tortfeasors held jointly liable under § 10(b), and second, what statute of limitations applies to these actions? A recent decision, *Globus, Inc. v. Law Research Services, Inc.*,[4] may supply the principles with which to answer both of these questions.

The original suit[5] underlying the opinion in *Globus, Inc. v. Law Research Services, Inc.* was a 10b-5 action by Globus and other purchasers of an original issue of stock against the issuer, Law Research Services, Inc. (hereinafter LRS), and the president of the issuer, Ellias C. Hoppenfeld, and against the underwriters, Blair & Co. (hereinafter Blair). The complaint, based on § 17 (a) of the Securities Act of 1933[6] (hereinafter the 1933 Act), § 10(b) of the Securities Exchange Act of 1934[7] (hereinafter the 1934 Act), and common law fraud, alleged material omissions in the offering circular by which the stock was offered to the public. LRS was formed to engage in the business of providing computerized legal research services. The offering circular prepared in connection with LRS's public

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[1] A. BROMBERG, SECURITIES LAW FRAUD—SEC RULE 10B-5, at 347, 501 (1967). The table of cases originally included in this service lists slightly over 300 cases under 10b-5 decided in federal courts as of 1967. The 1969 supplement to the table of cases lists over 250 additional 10b-5 cases

[2] Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).

[3] RESTATEMENT (SECOND) OF TORTS § 286 (1965).

[4] 318 F. Supp. 955 (S.D.N.Y. 1970) *aff'd*, 442 F.2d 1346 (2d Cir 1971), *cert. denied*, 404 U.S. 941 (1971).

[5] Globus, Inc. v. Law Research Services, 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).

[6] 15 U.S.C. § 77q (1970).

[7] 15 U.S.C. § 78j (1970).

offering of stock[8] prominently featured a valuable contract between LRS and Sperry Rand Corporation for the use of one of Sperry Rand's computers. The circular, however, did not indicate that Sperry Rand had terminated service under the contract because of serious contract disputes with LRS.

After a ten day trial on the merits, the jury returned a verdict for all defendants on the state common law fraud counts and against all defendants on the federal securities law counts and awarded compensatory and punitive damages. The action was brought in the federal courts because of the federal court's exclusive jurisdiction over actions based on the 1934 Act.[9] Since the action was between Globus, Inc., a New York corporation, and Law Research Services, Inc., a corporation doing business in New York, the state common law fraud element of the action was based on the common law of New York, but this state law element was pendent to the federal question raised by the securities law action. Since the jury found for the defendants on the state issue of common law fraud, the judgment rendered against the defendants rested entirely on federal securities law.

Also at issue in the case were various cross-claims between the defendants. On the underwriter's cross-claim against the two other defendants for indemnity, the jury decided for the underwriter, Blair, based on an indemnity clause in the underwriting agreement. The trial judge sustained a motion to set aside the verdict on the cross-claim for indemnity on the grounds that Blair knew of the material omissions and enforcement of the indemnity clause would, "dilute the deterrent impact of the securities laws."[10] The Court of Appeals for the Second Circuit affirmed the judgment in all respects except for the award of punitive damages which it reversed.[11]

Subsequent to the affirmation by the appellate court, Blair paid the judgment in full and sought contribution from Hoppenfeld and LRS. In *Globus, Inc. v. Law Research Services, Inc.*, which is the opinion on Blair's motion, Judge Frankel granted contribution among joint tortfeasors in a 10b-5 action, where one of the judgment debtors had paid the full amount of the judgment.

As indicated, the liability of the three defendants was based totally on federal securities law and the validity of defendants' contractual agreement for indemnification was determined solely on the basis of federal policy. Nevertheless, New York law might have been used to determine the issue

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[8] The offering was made under Regulation A. 17 C.F.R. § 230.251 to 230.263 (1956).

[9] 15 U.S.C. § 78aa (1970). "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

[10] 318 F. Supp. 955, 958 (S.D.N.Y. 1970).

[11] 418 F.2d 1276 (2d Cir. 1969).

of contribution between the defendants, but the common law of New York, as elsewhere, does not permit contribution.[12] New York has a joint judgment act,[13] but this act applies only where a recovery has been had against all defendants for a personal injury or property damage, and this act in derogation of the common law is strictly construed by the New York courts.[14] It seems clear that neither the New York joint judgment act nor the New York common law would permit contribution in this case and it is also clear that the *Globus* opinion did not treat New York law as the basis for the decision.[15]

Judge Frankel seems to have taken the view expressed by Judge Hastie in *American Dredging Co. v. Gulf Oil Corp.*,[16] that issues ancillary to federally created rights are federal issues. In that action a shipowner sought contribution from a riparian owner for damages paid by the shipowner for the wrongful death of a seaman employed by it. The liability of the shipowner was based on the Jones Act,[17] and that of the riparian owner on common law negligence. The court said:

> The obligation which libellant has satisfied and respondents are now asked to share . . . (is) . . . a federally created right under the Jones Act. In these circumstances state law did not and could not play any part in imposing liability on libellant. By the same token attendant and incidental obligations in the nature of rights over against others are derived, if at all, from the same source. The entire complex of substantive rights thus arising in this maritime cause is a creation of national law.[18]

If it is accepted, as it seems it must be accepted, that *Globus* was decided on the basis of federal law, then the result seems explainable in only two ways and indeed the opinion seems to rest squarely on both approaches. The first is that the case gives effect to a federal common law right of contribution. The validity of this approach necessitates the conclusion that there is federal common law and that this is an appropriate case for its application. The second approach is that the portions of the 1934 Act which expressly provide for a right of contribution are properly "incorporated by reference" in to § 10(b) of the 1934 Act. A third possible explanation, that is, that the applicable state law was merely adopted as the federal rule, is necessarily negated by the results of the opinion.

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[12] Baidach v. Togut, 7 N.Y.2d 128 (1959).

[13] N.Y. CIV. PRAC. § 1401 (1964).

[14] Baidach v. Togut, 7 N.Y.2d 128 (1959).

[15] 318 F. Supp. 955, 958 n.2 (S.D.N.Y. 1970). "There is no basis for doubting that the subject of contribution, like indeminity (as has been held in this case), is governed here by federal law."

[16] 175 F. Supp. 882 (E.D. Pa. 1959).

[17] 46 U.S.C. § 688 (1970).

[18] 175 F. Supp. 882, 885 (E.D. Pa. 1959). In this case the court denied contribution on the grounds that the national maritime law as expressed in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952), would not permit contribution in non-collision cases.

II. Contribution as a Matter of Federal Common Law

An important question developed by viewing the *Globus* decision as granting contribution on the basis of federal common law is how far such a decision should reach. That is, if Judge Frankel has exercised basic rule making power, has he created a rule limited in its application to cases under the implied rights of action fostered by the 1934 Act or has he created a rule which can be extended to encompass a federal common law rule of contribution of general application to all federal torts? The answer to this question depends, to a great extent, upon the source of the rule making power.

A. *The Development of Federal Common Law*

Erie R.R. v. Tompkins[19] does not exclude the possibility of a federal common law. The statement, "There is no federal general common law," must be put in perspective. The doctrine of *Erie* is a limitation on the jurisdiction of federal courts, in the sense that jurisdiction is "the power to make, declare, or apply the law."[20] The powers of jurisdiction limited by *Erie* were the powers exercised by federal courts under the doctrine of *Swift v. Tyson*.[21] Following the doctrine of *Swift v. Tyson*, federal courts freely exercised what are essentially regarded as the powers of common law courts, i.e., they fashioned substantive rules of decisions absent constitutional or statutory direction.

The extent of the common law powers of federal courts prior to *Swift v. Tyson* was a matter of some uncertainty. In the early stages after the adoption of the Constitution, federal courts began to develop a federal common law of crimes. By 1812, however, federal common law criminal jurisdiction had all but ended.[22] At the same time, however, there seems generally to have been presumed a national common law in civil matters applied concurrently by state and federal courts. Deference was given to state court decisions by the Supreme Court, but whether this was a matter of acquiescence or compelled by statute or the Constitution was unclear.[23] There emerged certain areas in which the federal courts felt compelled to follow the state decisions. These were deemed purely local matters and included title to land, construction of wills, statutes of limitations and fraud.[24]

In 1842 *Swift v. Tyson* defined the limits of the federal common law

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[19] 304 U.S. 64 (1938).

[20] Comment, *Swift v. Tyson Exhumed*, 79 Yale L.J. 284, 289 (1969).

[21] 41 U.S. (16 Pet.) 1 (1842).

[22] United States v. Hudson, 11 U.S. (7 Cranch.) 32 (1812).

[23] Comment, *Swift v. Tyson Exhumed*, *supra* note 19, at 291.

[24] *Id.* at 293.

power and gave it a foundation which supported it for nearly a century. Federal courts in the absence of state statutes were to have the power to determine the just rule of general commercial law upon the "general principles and doctrines of commercial jurisprudence" without the requirement of deference to the decisions of the state tribunals. This power was founded not on the Constitution, but on what was believed to be the nature of law itself.

The existence of concurrent common law powers over the same subject matter in both state and federal courts, combined with diversity jurisdiction, led to intolerable difficulties. State courts were not bound by the common law decisions of the federal courts, but remained free to reach their own conclusions as to the just rule. This lead invariably to the well-known problem of "forum shopping" in diversity actions.

Erie effected a limitation on federal jurisdiction by overruling *Swift v. Tyson*. The underlying philosophy of *Swift v. Tyson* was declared a fallacy: "[L]aw . . . does not exist without some definite authority behind it."[25] The authority of the federal government and, therefore, its courts to make substantive rules is derived from the Constitution and not from a philosophy of the law. "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."[26]

Much writing has dealt with the general nature of federal common law power after *Erie*. All agree that when *Erie* applies, state law governs even in the federal courts and any attempt on the part of such courts independently to fashion substantive rules of decision would be an unconstitutional usurpation of state power. The question of national common law arises in those areas outside the reach of *Erie* and ipso facto outside the reach of independent state competence where the national legislature has not yet exercised its power by enacting statutory rules of decision. It is in this area that the federal courts are put to the task of determining the nature and extent of their own power as common law tribunals.

B. *The Approaches to Federal Common Law*

Judge Friendly seems to have favored an expansive role for the federal common law based on his reading of *Textile Workers of America v. Lincoln Mills*.[27] His approach would depend upon affirmative action by Con-

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[25] 304 U.S. 64, 79 (1938).

[26] *Id.* at 78.

[27] 353 U.S. 448 (1957).

gress to establish areas of federal common law competence.[28] Professor Albert Hill's point of view is that within the area which is outside *Erie*, yet untouched by federal legislation, the law making power of the federal courts depends upon some type of federal preemption, arising from a federal statute or the Constitution. Hill argues that though the areas of federal judicial law making power are limited by the areas of preemption, within the areas in which federal courts legitimately exercise power, their power is not qualitatively different from that of state judicial power.[29]

In an article entitled, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules For Decision*,[30] Paul J. Mishkin puts the emphasis on the power of federal courts to choose local law as the applicable federal rule. He foresees uniformity and predictability arising from the development of a national body of choice of law rules which could be "established on a firm base—and kept up-to-date—by fewer Supreme Court decisions. . . ."[31]

Another author argues that within this area outside the reach of *Erie* the constraints of federalism impose a presumption in favor of applying state law. Under this analysis the federal power to formulate substantive rules in this area is limited to cases in which the presumption has been "undermined" by the needs of national sovereignty or by congressional delegation of law making authority or where the presumption has been "overriden" by federal policy or the need for uniformity.

There are applications of post-*Erie* federal common law which are consistent with these various approaches. *Textile Workers Union of America v. Lincoln Mills*[32] exemplifies one area in which federal courts exercise common law powers. In this case involving the question of whether or not federal courts could compel arbitration pursuant to a collective-bargaining agreement, the court eschewed the common law rule against enforcement of executory agreements to arbitrate and proceeded to develop applicable federal contract rules, saying, "We conclude that the substantive law to apply in suits under § 301(a) [Labor Management Relations Act] is federal law, which the courts must fashion from the policy of our national labor laws."[33]

The court found its mandate to fashion such rules in a presumed intent

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[28] Friendly, *In Praise of Erie—and of The New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

[29] Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967).

[30] 105 U. PA. L. REV. 797 (1957).

[31] *Id.* at 832.

[32] 353 U.S. 448 (1957).

[33] *Id.* at 456. *See* § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185 (1970).

on the part of Congress to occupy the whole field of labor law.[34] Such an intent is interpreted to effect a congressional or statutory preemption of the rule making power within that area of the law. The action of the federal courts in fashioning such rules, however, is not merely that of statutory interpretation. The court in *Lincoln Mills* recognized that some of the rule making will "lack express statutory sanction"[35] but will nonetheless be authorized by the fact of preemption.

In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[36] federal courts exercised common law powers from the mere fact of federalism. The decision in this case was handed down on the same day as *Erie*. The Court's opinion, given through Justice Brandeis who also wrote the *Erie* decision, said, "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive."[37] The dispute was between citizens of Colorado and New Mexico over water rights in an interstate stream. Brandeis, without reference to any federal statute or specific constitutional provision, based the court's rule making power on the needs of federalism.

Kardon v. National Gypsum Co.[38] illustrates another aspect of federal court's common law power. It was this decision which established that § 10 of the 1934 Act and Rule 10b-5 provide a private right of action to members of the class for whose special benefit the statute was enacted. Judge Kirkpatrick made it plain that he did not imply this right of action by statutory interpretation alone. He speaks principally of "what the general law implies," and quotes from the Restatement of Torts.[39] Implementation of a cause of action on the basis of the general law is the type of power associated with common law courts. This function was recognized as an exercise of federal common law powers in Justice Brennan's dissent in *Wheeldin* v. *Wheeler*.[40]

> [I]n a wide variety of cases federal courts have assumed to fashion common-law rights. Ordinarily, to be sure, such fashioning is done under the aegis of a more specific jurisdictional grant than 28 U.S.C. § 1331(a). But I . . . would recognize the existence of federal common-law rights of action "wherever necessary or appropriate" for dealing with "essentially federal matters."[41]

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[34] *See* Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969), for argument that § 301 does not justify attributing a preemptive intent to Congress.

[35] 353 U.S. 448, 457 (1957).

[36] 304 U.S. 92 (1938).

[37] *Id.* at 110.

[38] 69 F. Supp. 512 (E.D. Pa. 1946).

[39] *Id.* at 513.

[40] 373 U.S. 647 (1962).

[41] *Id.* at 663-64.

Wheeldin was an attempt on the part of petitioner to get money damages from a federal officer for abuse of Congressional subpoena power. The abuse was clearly established and the action was deemed properly before the court on federal question jurisdiction, but the complaint was dismissed for failure to state a cause of action. The majority opinion distinguished this case from the implied preemption areas such as labor law and refused to exercise common-law power to establish a cause of action for petitioner:

> As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins*. . . . [I]t is difficult for us to see how the present statute, which only grants power to issue subpoenas, implies a cause of action for abuse of that power.[42]

The conflict between the majority and dissenting opinions in this case illustrates a pivotal point in the development of federal common law powers. The majority refused to find a federal cause of action for abuse of the subpoena power because it could not gleen a Congressional intent to create such a cause from the language of the statute. This approach restricts the federal courts' power of remedial implementation to that of statutory interpretation. Justice Brennan, however, would not so limit the federal courts. Under his "necessary or appropriate" test expressed in the passage from his dissent in *Wheeldin* quoted above, a federal court could find a cause of action implied by a statute without finding a Congressional intention to create such a cause of action. Brennan's dissenting opinion is, in this respect, much more in line with the reasoning of *Kardon*.

The difference is subtle, but dramatic. Operating under the majority principle, no general federal rule could be established because each rule laid down would derive its force only from the statute interpreted. Beyond actions based on that statute it could not have the force of law. Whereas, rules founded upon Brennan's test or the *Kardon* opinion, because they are derived from general principles, may have coercive effect beyond the statute under which they arise.

Clearfield Trust Co. v. United States[43] is the principal case illustrating an area of federal judicial law making justified by the proprietary interests of the United States. The case involved a suit by the United States against Clearfield Trust Co. for paying a government check on a forged indorsement. The district court had ruled that Pennsylvania law governed and that since the United States had unreasonably delayed in giving notice of the forgery to Clearfield it was barred from recovery. That decision, however, was reversed in the circuit court and the Supreme Court affirmed,

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[42] *Id.* at 651. The Supreme Court's refusal to imply a federal cause of action for abuse of the subpoena power does not negate a state cause of action on the same grounds.

[43] 318 U.S. 363 (1943).

stating that *Erie* did not apply and "in absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[44]

Relying on pre-*Erie* cases, the Court concluded that the federal rule was that the drawee would be barred from recovery for delay in giving notification only upon a clear showing that the delay caused damages to the party paying over a forged indorsement. The authority of the federal courts to fashion common law rules to protect the proprietary interests of the United States seems to have been derived generally from the Constitution and the statutes of the United States.

The type of judicial law making found here is to be distinguished from that in the areas of statutory and Constitutional preemption. Here neither the Constitution nor any statute has reserved the area of negotiable instrument law for the federal government. It is only the fact that the federal government has a proprietary and monetary interest in its own checks which justifies the actions of federal courts in fashioning common law rules for their governance:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty.[45]

Clearfield does not seem to depend on any theory of either Constitutional or legislative preemption, but on a balancing of federal and state interests. Such a balancing for the purpose of determining whether to create a federal rule was expressly stated as the grounds for decision in *Wallis v. Pan American Petroleum Corp.*,[46] a case in which the balance, however, was found to favor the application of state law. *Wallis* involved oil lease rights to several "mud lumps" or islands owned by the United States and located in the mouth of the Mississippi. Wallis had made application for a lease to exploit the tracts under the Mineral Leasing Act for Acquired Lands.[47] He subsequently sold Pan American an option to acquire any lease he might acquire under the application. Concerned that his application might have been wrongly filed, Wallis made a new application under the Mineral Leasing Act of 1920[48] and was eventually awarded a lease pursuant thereto. Pan American and another interested party then brought diversity suits against Wallis to compel Wallis to perform the option agreements. The district judge held that Louisiana

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[44] *Id.* at 367.

[45] *Id.*

[46] 384 U.S. 63 (1966).

[47] 30 U.S.C. §§ 351-359 (1970).

[48] 30 U.S.C. §§ 181 *et seq.* (1970).

law governed the option agreements and that under Louisiana law a written agreement was required to transfer any interest in a mineral lease. The court then awarded judgment to Wallis on the grounds that the written agreements only applied to leases obtained under the Mineral Leasing Act for Acquired Lands and not for leases acquired under any other law. Before the Supreme Court, respondents argued that "the federal interest in government-granted mineral leases requires supplanting Louisiana law, in which event the federal rule would normally govern any such case whether in state or federal court."[49]

The Constitution does not expressly grant to Congress or the federal courts power to preempt the whole area of law dealing with transfer and assignment of leases; however, the federal proprietary interest in its own lands could, by analogy to *Clearfield*, be conceived as implying preemption in matters concerning rights to leased federal land. Speaking of this possibility, the Court said:

> In deciding whether rules of federal common law should be fashioned, *normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.* It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that "Congress acts . . . against the background of the total *corpus juris* of the states. . . ."[50]

C. *The Power of Federal Courts to Fashion Common Law Rules as a Choice of Laws Problem*

Wallis v. Pan American Petroleum Corp. suggests the need to look at the matter from the other side. Given a problem requiring a substantive rule which is outside the reach of *Erie*, but has not been considered by Congress, what considerations have influenced the federal courts not to fashion a federal rule? Put differently: What limitations have the federal courts established for their own law making abilities and what considerations have influenced the creation of these limitations? *Wheeldin v. Wheeler* and *Wallis v. Pan American Petroleum Corp.* were two instances in which a federal court declined the opportunity to fashion a substantive rule. In *Wheeldin* the Court declined because it could not imply from a statute granting subpoena power, a cause of action for abuse of that power. In *Wallis* the Court expressed its belief that the proprietary interests of the United States would not justify fashioning a federal rule

[49] 384 U.S. 63, 67 (1966).

[50] *Id.* at 68 (emphasis supplied).

absent a clear showing of significant conflict between state law and federal policy.

The opinion in *Clearfield* points to another consideration which influences federal courts to decline to fashion a uniform federal rule. "In our choice of the applicable federal rule we have occasionally selected state law."[51] This choice is never compelled by *Erie*, but is influenced by the kinds of considerations which led to *Erie*. Once the choice is made, the state law becomes the applicable federal rule for that state. Such a case is *De Sylva v. Ballentine*[52] in which the Supreme Court turned to the state domestics relation law to determine if the illegitimate son of a copyright proprietor is one of the "children" of the proprietor within the meaning of the copyright statute.

Another case in which the federal courts refused to fashion a federal cause of action based upon federal proprietary interests was *United States v. Standard Oil Co.*,[53] which was cited in Justice Brennan's dissent in *Wheeldin*. This suit involved an attempt by the United States to recover damages for the loss of services of one of its soldiers, John Etzel, resulting from injuries sustained by Etzel when one of respondent's trucks struck him at an intersection in Los Angeles.

The Court was quite clear in its belief that this case was not within the reach of *Erie* and that the federal courts had the power to fashion a rule:

> As in the *Clearfield* case, . . . quite apart from any positive action by Congress, the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the *Erie* decision. The great object of the *Erie* case was to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits. It was the so-called "federal common law" utilized as a substitute for state power, to create and enforce legal relationships in the area set apart in our scheme for state rather than for federal control, that the *Erie* decision threw out. Its object and effect were thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control.
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> . . . [A]lthough federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.[54]

The court was also of the opinion that state law should not be selected as the federal rule for this matter:

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[51] 318 U.S. 363, 367 (1943).

[52] 351 U.S. 570 (1956).

[53] 332 U.S. 301 (1947).

[54] *Id.* at 307.

> And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.[55]

Nonetheless, the court did not act to create this new common law liability, apparently feeling that its powers of independent judicial rule making were more limited than those of state courts even with regard to matters clearly within the federal ambiance: "But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities. . . ."[56] What clearly is lacking in this survey of approaches to the exercise of judicial law making powers by the federal courts is a unifying, governing principle. It is not even evident from what source such a principle should be derived. As the federal government expands its range of activity it comes increasingly into contact with the private sector. These contacts generate larger and larger amounts of litigation which increasingly involve legal questions for which neither *Erie* nor the federal statutes provide answers. Caught between two sovereign sources of the law, the federal courts must choose one set of laws and apply it.

Clearly federal courts exercise common law powers. The problem is how broadly that power should sweep. It is at the least a misplaced emphasis to attempt to solve that problem by attempting to define the nature of the federal common law power. What is at issue is the choice between federal common law and state law and in order to infuse a unifying principle into the problem of the exercise of federal common law power attention should be focused upon developing a rational set of considerations to govern the choice. That is to say the question of the common law rule making power of the federal courts may be distilled to a type of conflicts of laws problem and the answers to this question may be found by reference to traditional conflicts considerations. The various rationales displayed in the cases that have been discussed may be viewed as no more than conflicts stategies designed to harmonize the new developments in this area with the more constitutionally and statutorially based areas of federal judicial power.

A statement made by Professor Leflar in an article dealing with conflicts of laws seems particularly applicable to the present state of judicial development of approaches to the exercise of federal common law power:

> [F]lexibility is available, even with so-called rules, because there really is no rule. It is in such areas that the search for truly relevant considerations,

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[55] *Id.* at 311.

[56] *Id.* at 313.

> and frank recognition of their controlling effect, is particularly needed. The variety is already there, presumably as it should be, but what is lacking is a reasonably clear explanation of what it is that justifies now one choice of law and next a different one.[57]

In his article, Professor Leflar distills from the body of conflicts law five basic choice of law considerations which should be taken as guides to solutions of choice of law problems:

A. Predictability of results;
B. Maintenance of interstate and international order;
C. Simplification of the judicial task;
D. Advancement of the forum's governmental interests;
E. Application of the better rule of law.[58]

A frank recognition of the relevance of these or similar considerations to the choice between federal and state law could reduce the wisdom in this area to a set of manageable principles upon which federal courts could rely to develop a set of federal common law principles which rationally relate to national policy.

The fear of the impact of unrestrained judicial law making on our constitutional system of separation of powers has played a part in prompting the federal courts to foster self-imposed limitations on their common law powers. This consideration was alluded to by the majority in *United States v. Standard Oil Co. of California*:

> In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid. . . .[59]

Indeed, the need to keep viable the legislative processes inherent in our federal constitutional system, in order to protect the justifiable reliance interests of the public from possible unfair surprise arising from judicial law making, should be added as an additional choice-influencing consideration to be weighed with the conflicts considerations in making the choice between federal common law and state law. For this reason federal judicial common law making should proceed slowly, always keeping in fairly close contact with legislative and constitutional developments.

As indicated earlier, however, Judge Frankel may have done more than create a rule limited in its application to cases under the implied rights of action fostered by the 1934 Act. The rule created by this decision was not merely a matter of interpretation of the '34 Act, nor was the power to

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[57] Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 326 (1966).

[58] *Id.* at 282.

[59] 332 U.S. 301, 316 (1947).

create the rule derived from a presumption of Congressional intent to occupy the area of securities law. The choice to create the rule was influenced by much more general considerations than that and there is no reason to think that the rule of *Globus* is anything less than a federal general common law rule of contribution.

There can be federal common law of general application which is not in conflict with the *Erie* doctrine and a rule of contributions which is applicable to all federally created tort actions, if such has been created by *Globus*, would be such a rule. But the nature of the problem and the considerations bearing upon the choice must be kept in mind and the federal courts should not shrink from choosing to make federal common law when an analysis of "choice-influencing considerations" points to such a choice.

D. *Application of Choice of Laws Principles to the Question of Contribution*

Briefly put, it seems clear that a federal rule of contribution applicable for all federally created torts would be the proper law to apply using almost any choice of law principle. If state law is chosen, predictability is lost. There are fifty state rules and which applies, more often than not, will be a matter of doubt. Clearly the judicial task would be simplified by the uniform application of a federal rule.

Furthermore, federally created tort liability, like all other tort liability contains both compensatory and deterrent elements. That is to say, in creating tort liability for certain types of activity, Congress not only intended to compensate those injured by these activities, but also intended the threatened burden of liability to deter individuals from engaging in the proscribed course of action. On whom the burden of tort liability falls and to what extent is often a function of the rule of contribution which is applied. There is something slightly irrational about permitting the impact of federal securities law to be controlled by a rule developed in a state legislature or a state court to fit the needs and the policies of, for example, the state's motor vehicles laws. State contracts law was not permitted to "dilute the deterrent impact" of the 1933 Act in *Globus*; clearly state contribution rules should not be permitted to do so.

E. *The Impact of a Federal Common Law Right of Contribution*

As indicated, an additional factor in choosing to create a federal common law rule of contribution is the impact such a choice would have upon the area of federal torts. There are relatively few federal torts. Some of these are of statutory creation, such as actions under § 4 of the Clayton Act, while others have been created by implication in the same manner as private rights of action under rule 10b-5. Discussion of these two

examples should be sufficient to demonstrate the impact a rule of contribution would have on federal torts.

1. Contribution in 10b-5 Actions

For 10b-5 actions, the status of contribution is in doubt. *Globus* will be treated as having established a federal common law tort rule granting a right of action for contribution among joint tortfeasors. Turning back to the opinion in *Globus*, this assumption is supported by the language of Frankel's opinion. He clearly seems to be making a common law decision when he says, "Departing from the rugged flintiness of traditional common law, the general drift of the law today is toward the allowance of contribution among joint tortfeasors."[60]

Only a few cases other than *Globus* have dealt with the problem. One, *Shea v. Ungar*,[61] was decided in the same district as was *Globus*. Another, *Johns Hopkins University v. Hutton*,[62] was decided in the District Court of Maryland.

There are three situations which call for an action to enforce a right of contribution. First, if a plaintiff brings an action against less than all of those liable to him, the defendant may seek to join the other potential defendants under federal rule 14(a). Second, a judgment debtor may bring an action against potential defendants who were not joined. Third, a judgment debtor who has paid more than his share of the awarded damages may try to recover from his judgment co-debtors. The *Globus* case involved the third situation. *Shea* and *Johns Hopkins* involved the first situation.

The defendant in *Shea*, a promoter and organizer of a real estate syndicate, was sued under § 17 of the 1933 Act and § 10(b) of the 1934 Act and rule 10b-5. The defendant had offered and sold to the public interests in a real estate syndicate without revealing that he had made a $100,000 profit on sale to the syndicate of its sole asset, an office building. The defendant attempted to join as third-party defendants the two other members of the syndicate. The decision cited is on a motion by the third-party defendants to strike the third-party complaint for improper joinder of the third-party defendants. Since rule 14(a)[63] clearly states that the liability must run from the third-party defendant to the third-party plaintiff before joinder can be had,[64] third-party plaintiff must possess some sub-

[60] 318 F. Supp. 955, 957 (S.D.N.Y. 1970). He follows this statement with a long list of citations from the decisions of state and federal courts; from state statutes; and from PROSSER, TORTS (3rd ed. 1964).

[61] CCH FED. SEC. L. REP. [1964-1966 Transfer Binder] ¶ 91,558 (S.D.N.Y. 1965).

[62] 40 F.R.D. 338 (D. Md. 1966).

[63] FED. R. CIV. P. 14 (a).

[64] 3 J. MOORE, FEDERAL PRACTICE ¶ 14.11, at 572 (2d ed. 1968). "Formerly, defendant could implead the third party for the purpose of showing that he was liable to the plaintiff either solely or jointly with the defendant, but this provision has been deleted from the rule."

stantive right as against the third-party defendant upon which to found an action for joinder under that rule. A right of contribution, where it exists, would be such a right. The court, however, granted the third-party defendant's motion to strike, saying:

> Since nothing in the Act or Exchange Act creates a right of joinder under Rule 14 applicable to this case, such right could only arise by virtue of the substantive law of the State of New York. However, New York substantive law as interpreted by both New York and Federal Courts does not provide for contribution between active and joint tortfeasors.[65]

The judge's statement that absent a specific federal statute granting a right of contribution, such right could only arise "by virtue of the substantive law of the State of New York" impliedly excludes the power of the federal court to fashion its own substantive rule. The conclusion reached in *Shea* is directly opposite that reached in *Globus*. The conclusion in *Globus*, however, was affirmed by the Court of Appeals for the Second Circuit and since both cases arose in that Circuit seems to have *sub silentio* overruled *Shea*.

The *Johns Hopkins* case is another case of the first type and again the court granted the motion to strike the third party complaint. The opinion in *Johns Hopkins*, however, may be support for the *Globus* conclusion. In this case Johns Hopkins University brought a 10b-5 action against Hutton, a broker, for alleged misrepresentations in connection with the sale of certain oil production payments purchased by the university. The factual issues in this case were very complex. After three years of discovery and over 1500 pages of depositions, Hutton filed a motion seeking leave to bring in Johns Hopkins' investment counselor as a third-party defendant. Allegedly the investment counselor had owned undisclosed interests in the now bankrupt oil company from which the production payments were purchased. Both Johns Hopkins and the investment counselor resisted defendant's motion. The court apparently concluded that impleader was proper,[66] but denied defendant's motion on the joint ground of laches and that the proposed third-party complaint would create serious confusion of issues and unreasonable delay.

Shea and *Johns Hopkins* read together do not indicate any clear rule. Against this backdrop the *Globus* decision which speaks with a clear voice declaring that there is a federal right of contribution among co-violators of rule 10b-5 cannot be said to have unduly surprised the defendants or to have excessively encroached on the legislative function of Congress.

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[65] Shea v. Ungar, [1964-1966 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,558, at 95,108 (S.D.N.Y. 1964).

[66] The grounds upon which the court concluded that impleader would be proper are not disclosed. It should be noted, however, that Maryland law would grant contribution in this case. "The right of contribution exists among joint tortfeasors." MD. ANN. CODE art. 50, § 17(a) (1957).

2. Contribution in Antitrust Actions

Section 4 of the Clayton Act[67] provides for private antitrust suits. Though these actions commonly involve several co-violators, the question of contribution has arisen in only four reported cases.

In *Webster Motor Car Co. v. Zell Motor Car Co.*,[68] the fourth circuit indicated that it understood the applicable rule of contribution to be that of the state where the claim arose. In this case plaintiff brought two conspiracy actions against the two members of the alleged conspiracy in different districts. Anticipating full relief in the District of Columbia action against Packard Motor Company [hereinafter Packard], plaintiff consented to an order which would dismiss its Maryland action against Zell Motor Car Co. [hereinafter Zell], with prejudice, upon a favorable determination in the District of Columbia action. However, when the order was entered in the Maryland action dismissing Zell, Packard attempted to set up the dismissal as a defense on appeal. To avoid this defense plaintiff appealed the order dismissing his Maryland action. In the opinion reversing the dismissal order, the court said:

> In this connection it should be remembered that Packard has been found by the District of Columbia Court to be a co-conspirator with [Zell], and that, under Maryland law, [Zell] would be liable for contribution to Packard as joint tort-feasors.[69]

However, the Court of Appeals for the District of Columbia reversed the judgment against Packard on the merits[70] which, of course, mooted the issue of contribution.

The second case, *Kohn v. Teleprompter Corp.*,[71] involved an attempt by private suit defendants to join alleged co-violators under Rule 14(a). District Judge Dimock granted a motion to vacate the *ex parte* order permitting service of the third-party complaint on the grounds that the third-party complaint alleged a separate and independent claim:

> It is clear that a substantial part of the complaint, whether or not it states a sufficient claim, alleges acts which directly injured [the plaintiff]. Rule 14(a) does not provide for impleading a party who is or may be liable to plaintiff directly. A plaintiff cannot be forced to bring an action against a person whom it does not wish to sue.[72]

The court then indicated the third-party complaint would be permitted to stand if it alleged facts substantially the same as the original complaint,

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[67] 15 U.S.C. § 15 (1970).

[68] 234 F.2d 616 (4th Cir. 1956).

[69] *Id.* at 619.

[70] Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

[71] 1958 TRADE CAS. ¶ 69,013 (S.D.N.Y. 1958).

[72] *Id.* at 74-013-14.

such that would pass on to the third-party defendant liability for all or part of the claim against the third-party plaintiff. Since rule 14(a) provides for impleader only of a person "who is or may be liable to him [the third-party plaintiff] for all or part of the plaintiff's claim against him,"[73] the unstated premise of this dictum is that there is some operative rule of law such as a right of contribution which will shift liability.

This case, like *Globus*, came out of the Southern District of New York and the laws of New York would be applicable if state law were applied. New York law does not permit contribution in this type of action. To the extent that this case implies a right of contribution in antitrust cases, it is authority that federal law is the source of that right.

The case of *Goldlawr, Inc. v. Shubert*[74] presents the same type problem as does *Kohn*. The complaint alleged that defendants monopolized the booking of legitimate theatre in Philadelphia and conspired to prevent the showing of first run films in plaintiff's theatre. Defendant sought to join, as third-party defendant, an officer of plaintiff corporation who had sold the theatre in question to plaintiff corporation. The third-party complaint alleged that the third-party defendant had, prior to sale of the theatre, conspired to prevent the showing of first run films in the theatre, in order to improve the position of other theatres owned by him. The trial court vacated its order permitting joinder of a third-party on the grounds that no joint tort was alleged.

The court, however, indicated that both the complaint and the third-party complaint alleged facts actionable solely by reason of federal law and that consequently there was "strong justification for [plaintiff's] contention that the tort asserted to lie in the third party complaint is governed by federal common law with no right of contribution between tort feasors."[75] The *Goldlawr* court cites *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[76] as authority for its view that federal common law does not allow an action for contribution between joint tortfeasors.

The fourth case which raises the issue of contribution in the context of an antitrust suit also cites *Halcyon* to establish that there is no federal right of contribution. This case is *Sabre Shipping Corp. v. American President Lines, Ltd.*[77] In this action plaintiffs brought suit against 30 defendants for violation of the Sherman and Clayton Acts. Twenty-five of the defendants settled with the plaintiff and entered into "covenants not to sue," the other five defendants refused to settle. The five non-settling defendants filed a third party complaint against 17 of those who had settled. The third party complaint alleged the same violations as had the original complaint and

[73] FED. R. CIV. P. 14 (a).

[74] 276 F.2d 614 (3d Cir. 1960).

[75] *Id.* at 616.

[76] 342 U.S. 282 (1952).

[77] 298 F. Supp. 1339 (S.D.N.Y. 1969).

alleged that if these acts had occurred they were joint acts of all the original defendants and that the third party defendants would be liable over to the third party plaintiffs by way of contribution for any liability that would arise out of their joint acts.

The court recognized that federal rules should govern the issue of contribution and did not consider adopting the local rule as the federal law. The court maintained that "deep-rooted in our jurisprudence is the common law rule against contribution. . . ."[78] The court found these deep roots beginning in the pre-*Erie* case of *Union Stock Yards Co. of Omaha v. Chicago B. & Q R.R.*[79] and appearing again fifty years later in *Halcyon*.

In *Halcyon*, Salvador Baccile, an employee of a shoreside contractor, was injured while making repairs aboard a ship moored in navigable waters. He sued the shipowner alleging that his injuries were caused by the shipowner's negligence and the unseaworthiness of the ship. The shipowner brought the contractor in as a third-party defendant on the grounds that the contractor's negligence had contributed to the injuries. The district court divided the liability equally between the defendant and the third-party defendant.

The court of appeals agreed, but limited the amount of the contractor's liability to that the contractor would have been compelled to pay had Baccile brought suit under the Longshoremen's and Harbor Workers' Compensation Act. The Supreme Court reversed and remanded with instructions to dismiss the contribution proceedings against the contractor.

The *Halcyon* Court, however, never attempted to state that the federal common law rule was against contribution. A close reading of that case will show that the Court there was asked to do one of two things: extend to non-collision cases the ancient maritime rule that mutual wrongdoers share equally the damages sustained by each as well as the liability to third parties or, in the alternative, fashion a new maritime rule of contribution for non-collision cases. The Court refused to extend the collision rule and declined to fashion a new admiralty rule, not because it believed the federal rule denied a right of contribution but because the Court was not "wholly convinced that it would best serve the ends of justice."[80]

As can be seen from these four cases the rule applicable to contribution in antitrust actions is no more clear than that in 10b-5 actions. The weight of authority provided by *Sabre* and *Goldlawr* and possibly *Kohn* indicates that it is federal law which controls this issue. True, in so indicating, *Sabre* and *Goldlawr* interpret the federal law to say that there can be no contribution between joint tortfeasors, but this interpretation seems to rest on a misreading of the *Halcyon* decision. It is more interesting that *Sabre*

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[78] *Id.* at 1344.

[79] 196 U.S. 217 (1905).

[80] Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952).

and, to a great extent *Goldlawr*, found federal law to be the applicable source for a rule with respect to contribution in the area of antitrust violations and that in so doing they did not find the rule within the narrow confines of the federal antitrust statutes, but rather in the wider area of federal tort law.

It appears, then, that in the antitrust field, both on choice of law grounds and upon consideration of the federal courts' proper role the indicators point toward the creation of a federal rule of contribution.[81] *Sabre* looked to admiralty law for its contributions rule, while *Globus* drew upon "the general drift of law today." If *Globus* is to be viewed as an expression of general federal common law, *Globus* may have overturned the *Sabre* rule.

F. *Conclusion*

It is federal policy considerations which have created these liabilities and any rule which controls the impact of these liabilities should be developed to serve those policy considerations. Use of varying state rules developed without regard to the policies behind these federal actions can only accidentally lead to a desirable result. The development of a federal rule for contribution specifically designed to advance the policies of federally created liabilities is more likely to coincide with the requirements of a rational set of choice-influencing considerations.

Consideration of the impact of federal judicial law making upon our system requires the federal courts to act with restraint in fashioning new common law rules. This restraint should act to protect justifiable expectations based upon previous applications of state law and to avoid unnecessary surprise as to the content of federal law. This does not, however, limit federal courts to creating separate rules of decision for each federal statute. They may fashion general rules applicable in a whole range of similar statutes without impinging on Congressional or state prerogatives. That is, federal courts can and do fashion general federal common law and *Globus* is a statement of the general federal common law rule of contribution.

III. CONTRIBUTIONS AS A MATTER OF FEDERAL SECURITIES LAW

A. *Incorporation by Reference and the 1934 Act*

There is a second way in which the decision in *Globus* can be read. Both the 1933 Act and the 1934 Act have sections expressly providing

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[81] *See* Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U.L. REV. 263 (1970) for considerations bearing upon the formation of a contribution rule for antitrust actions.

for private rights of action and both of these expressly provide for a right of contribution. Section 11 of the 1933 Act provides:

> [E]very person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.[82]

While sections 9 and 18 of the 1934 Act provide:

> Every person who becomes liable to make [any] 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.[83]

Quoting from an earlier decision, *deHaas v. Empire Petroleum Co.*,[84] Judge Frankel wrote, in *Globus*:

> [T]hose sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers. 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).[85]

In *deHaas* the court denied a motion to dismiss defendant's claim for contribution in 10b-5 action on the sole grounds that contribution is provided for where a cause of action is expressly provided for under the 1934 Act.

Globus and *deHaas* represent a type of referential incorporation. Under the doctrine of incorporation by reference the provisions of a document being interpreted may be deemed to include the provisions of another document even though the provisions do not expressly appear in the document being interpreted. With regard to the securities law these cases argue that incorporation of the provisions of the sections which expressly provide a cause of action into the sections which have been determined to imply a cause of action is authorized by the unified nature of the 1934 Act.

Though *Globus* and *deHaas* place great weight on this rationale, *McClure v. Borne Chemical Co., Inc.*[86] rejects this approach. In this case defendant argued that the portions of § 18 of the 1934 Act[87] which provide for a discretionary undertaking for the payment of costs should be in-

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82 15 U.S.C. § 77k(f) (1970).

83 15 U.S.C. §§ 78i(e) and 78r(b) (1970). The word "any" does not appear in § 78r(b).

84 286 F. Supp. 809 (D. Colo. 1968).

85 318 F. Supp. 955, 958 (S.D.N.Y. 1970). (Citations omitted).

86 292 F.2d 824 (3d Cir. 1961).

87 15 U.S.C. § 78r(a) (1970): "In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant."

corporated into § 10(b) and that the plaintiff in this 10b-5 action should be required to post security for defendant's expenses. Speaking for a unanimous court, Chief Judge Biggs not only affirmed the lower court's discretionary decision not to require an undertaking for costs, but indicated that the undertaking for costs element could *not* be incorporated into the implied rights of action.

> We conclude therefore that a shareholder who brings a derivative suit to enforce a cause of action arising under Section 10(b), as implemented by Rule 10b-5, and Section 29(b) of the Securities Exchange Act of 1934, *may not be* required to post security for expenses.[88]

The conflict between these cases does not concern exercise of common law power to fashion rules of decision under § 10 of the 1934 Act. The controversy is over the proper interpretation of the 1934 Act. *Globus* and *deHaas* hold that a proper interpretation of the Act requires that §§ 9 and 18 "are to be administered *in pari materia*"[89] with § 10. If these sections are properly to be read *in pari materia* a cause of action implied under § 10 would be deemed to carry with it a right of contribution between joint defendants as a matter of statutory law rather than judicial rule making.

Whether or not *Globus* and *deHaas* are in conflict with *McClure* depends upon what is implied by reading the two sections *in pari materia.* Chief Judge Biggs in the *McClure* opinion distinguishes the security for cost elements of § 9 from the other elements on the grounds that there is no clear federal policy in favor of such undertakings as evidenced by the fact that they are discretionary only even where expressly provided for. Referring to defendant's argument for incorporation he wrote, "This argument is, of course, tenable only where the statute evinces a clear policy in favor of security for expenses limitations."[90]

Contribution, however, is not discretionary under the securities acts and as *Globus* points out to withhold contribution subverts the policy of the Act.[91] Reliance upon this distinction to harmonize *Globus* and *deHaas* with *McClure* justifies the conclusion that the mandatory provisions of §§ 9 and 18 of the 1934 Act are to be incorporated by reference into any cause of action implied from any other section of the 1934 Act.

B. *Incorporation of Other Provisions of the Express Rights of Action*

Both §§ 9 and 18 of the 1934 Act provide a statute of limitations for actions brought under them. The limitations provisions of both sections are substantially the same and provide as follows:

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[88] McClure v. Borne Chemical Co., 292 F.2d 824, 837 (3d Cir. 1961) (emphasis supplied).

[89] Globus, Inc. v. Law Research Center, Inc., 318 F. Supp. 955, 958 (S.D.N.Y. 1970).

[90] McClure v. Borne Chemical Co., 292 F.2d 824, 836 (3d Cir. 1961).

[91] 318 F. Supp. 955, 958 (S.D.N.Y. 1970).

> No action shall be maintained to enforce any liability created under this section unless brought within one year after discovery of the facts constituting the cause of action and within three years after such cause of action accrued.[92]

Under the incorporation principle as developed in *Globus* and *deHaas* these limitation provisions should also be incorporated into 10b-5 actions as the applicable federal statute of limitations.

Many 10b-5 cases have raised the issue of the applicable statute of limitations. In none of these cases, however, has a court concluded that the federal statute of limitations of §§ 9 and 18 apply. The usual rule, when a federal statute has created a right of action without stating the time within which such action is to be brought, is to apply the most appropriate statute of limitations of the forum state.[93] This rule has consistently been followed in 10b-5 cases.

The use of state statutes of limitations for 10b-5 actions seems first to have been decided in the case of *Osborne v. Mallory*.[94] This case involved alleged violations of several sections of the 1933 Act for which specific limitations are provided by the Act and upon which defendant successfully raised the defense of the statute of limitations. The case also involved alleged violations of § 17 of the 1933 Act and § 10(b) of the 1934 Act and rule 10b-5. The defenses to these charges was that no civil action could be maintained under these sections because they do not expressly provide for such an action. After rejecting this defense, the Court added:

> The applicable statute of limitation to actions under § 17 of the 1933 Act and § 10(b) of the 1934 Act would be that of the forum, since the two Federal Acts do not provide any period within which suits must be brought under those sections.[95]

There was no further discussion of the issue. As authority for this position the *Osborne* court cited: *Seabord Terminals Corp. v. Standard Oil Co. of New Jersey*;[96] *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*;[97] and *Cope v. Anderson*.[98] The *Seabord* and *Dipson* cases involved application of a state's statute of limitations to civil actions under the antitrust statutes, while *Cope* involved limitations under 12 U.S.C. §§ 63 and 64,[99] relating to statutory double liability of shareholders of insolvent national banks.

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[92] 15 U.S.C. § 78r(c) (1970). 15 U.S.C. § 78i(e) substitutes the word "violation" for the phrase "cause of action accrued."

[93] Cambell v. Haverhill, 155 U.S. 610 (1895); C. WRIGHT, LAW OF FEDERAL COURTS, 251 (2d ed. 1970); Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953).

[94] 86 F. Supp. 869 (S.D.N.Y. 1949).

[95] *Id.* at 879.

[96] 24 F. Supp. 1018 (S.D.N.Y. 1938).

[97] 8 F.R.D. 86 (W.D.N.Y. 1948).

[98] 331 U.S. 461 (1947).

[99] *Repealed*, Act of Sept. 8, 1959 PUB. L. NO. 86-230, § 7, 73 Stat. 457.

None of these three cases could have involved the issue of incorporation because none of the statutes involved then provided for limitations in any of their sections. These cases are authority for the rule that where there is no federal limitation provided the state rule must be applied, but in the face of the *Globus* argument for incorporation of the statute of limitations from §§ 9 and 18 of the 1934 Act into § 10 of that act, they are not impressive authority for the *Osborne* conclusion. Nevertheless, the *Osborne* conclusion has been followed without significant discussion in all 10b-5 cases which have raised the issue.

One such decision, *Phillip v. J. H. Lederer Co., Inc.*,[100] involved alleged violations of sections of the 1933 Act and of section 10(b) and rule 10b-5 of the 1934 Act. The defendants raised the defense of statute of limitations and were successful with respect to the alleged violations of the 1933 Act. The defendants, apparently, also argued that the action based on § 10(b) of the 1934 Act was barred by the three year statute of limitation of the 1933 Act. Referring to the 10(b) action the court wrote:

> Defendants contend that such actions are also barred by the three year statute of limitations provided in the Security Act of 1933, 15 U.S.C. § 77(m). No statute of limitations is provided by the 1934 Act. Defendants urge that where the facts upon which a civil suit for alleged violation of the 1934 Act and SEC Rule 240.10 (b)-5 is based, are the same as those upon which a suit under the 1933 Act is brought, the limitations in 15 U.S.C. § 77(m) must be applied.
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> . . .
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> The cases are clear that the applicable statute of limitations for an action based upon violations of the 1934 Act and the rules of the SEC are governed by the statute of limitations of the forum.[101]

The cases cited by the court as clear authority are *Osborne*, *Fischman v. Raytheon Mfg. Co.*,[102] and *Fratt v. Robinson*.[103] The *Fishman* case's entire discussion of the issue is as follows, "As the suit here is 'at law,' the New York six-year statute of limitations—New York Civil Practice Act, § 48(2) and (5)—applies."[104] In *Fratt* both parties conceded that the state statute of limitations applied and the only issue was which of two relevant statutes was to be used.

The *Osborne-Phillip* rule for 10b-5 actions has little more than its longevity to justify its continued existence. It has led to a great deal of uncertainty and inconsistency over the applicable limitation to 10b-5 actions. The litigation in *Fratt* concerned whether to apply one of Washington's laws which provided for a two year limitation or one which provided for a

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[100] CCH FED. SEC. L. REP. [1957-61 Transfer Binder] ¶ 91,039 (S.D.N.Y. 1961).

[101] *Id.* at 93,496-97.

[102] 188 F.2d 783 (2d Cir. 1951).

[103] 203 F.2d 627 (9th Cir. 1953).

[104] 188 F.2d 783, 787 (2d Cir. 1951).

three year limitation. The issue was eventually resolved in favor of the three year limitation. According to *Fischman* a similar action in New York would be subject to a six year limitation. In California section 10(b) actions are governed by a three year statute,[105] while in Michigan the limitation is six years.[106]

Nor was the use of state statutes of limitations for federal actions fostered by any policy of federalism. *Campbell v. Haverhill*,[107] an early Supreme Court decision establishing the use of state limitations for federal actions where there was no applicable federal limitation, put its principle reliance on an assumed federal policy in favor of statutes of limitations.[108] This policy was to be served by adopting the state limitation only if the state statute gave a reasonable time.[109]

Even considering the *McClure* distinction, the *Osborne-Phillip* rule does not suggest any countervailing policy which should prevent the application of the *Globus* principle of referential incorporation to the limitations provisions of the 1934 Act.

C. *The Effects of Applying the 1934 Act Limitations to 10b-5 Actions*

The result of applying the 1934 Act limitation to private actions for violation of rule 10b-5 will in most cases be to shorten the time in which these actions may be brought. Sections 9 and 18 both provide for a limitation of one year after discovery of the facts and three years after the cause of action accrued. As indicated in part B, the state statutes of limitations which have been applied often run as long as six years. This difference is accentuated by the fact that in applying state statutes of limitations to § 10(b) actions the courts have used the federal tolling rule to the effect that the statute of limitations does not begin o run until the fraud has been discovered.[110] The Securities Act limitation, however, is an absolute three year limitation which overrides the federal tolling rule.

IV. CONCLUSION

The opinion in *Globus* rests on two independent grounds. On the one hand it holds that there is a federal common law right of contribution in federal tort actions; on the other that the provision of the express rights of action of the Securities Exchange Act may be referentially incorporated

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[105] Turner v. Lundquist, 377 F.2d 44 (9th Cir. 1967).

[106] Charney v. Thomas, 372 F.2d 97 (6th Cir. 1967).

[107] 155 U.S. 610 (1895).

[108] *Id.* at 615.

[109] Carpenter v. Hall, 311 F. Supp. 1099 (S.D. Tex. 1970).

[110] Batchelor v. Legg & Co., 52 F.R.D. 553 (D. Md. 1971).

into the implied rights of action under § 10(b) of that Act. Either argument standing alone is sufficient to support the *Globus* conclusion. Neither may therefore be treated as dictum.

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