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THE UNITED STATES SUPREME COURT RECOGNIZES AN IMPLIED
RIGHT OF CONTRIBUTION FOR DEFENDANTS IN RULE 10b-5
ACTIONS IN *MUSICK, PEELER & GARRETT v. EMPLOYERS
INSURANCE OF WAUSAU*: A JUDICIAL OAK GROWS FROM THE
SAND

I. INTRODUCTION

"When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn."¹ When Justice William Rehnquist penned these words in 1974, he could not have known how large the oak tree would grow or how often his analogy would be quoted. At that time, the United States Supreme Court recognized that the judiciary would be primarily responsible for defining the branches and shape of Rule 10b-5, even though Congress had never provided explicit authority for the courts to do so.² For instance, the federal courts have interpreted Rule 10b-5 to imply certain rights and causes of action.³

Defining the precise extent of the federal courts' power to continue to imply rights through Rule 10b-5 has created considerable controversy.⁴

1. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (reaffirming that, in context of alleged securities fraud violations under § 10(b) of Securities Exchange Act of 1934 and Rule 10b-5 of Securities and Exchange Commission, only purchasers and sellers of securities may maintain private cause of action under Rule 10b-5).

2. *Id.* at 730-37 (discussing history of judicial actions under Rule 10b-5 and concluding that Supreme Court must "flesh out" Rule 10b-5 because "neither the congressional enactment nor the administrative regulations offer conclusive guidance" for interpreting Rule 10b-5).

3. For a full discussion of implied causes of action generally and the development of the Rule 10b-5 implied cause of action in particular, see *infra* notes 44-95 and accompanying text.

4. For a discussion of the controversy surrounding implied rights under Rule 10b-5, see *infra* notes 65-95 and accompanying text. The debate over the shaping of Rule 10b-5 actions revolves around divergent views regarding the extent to which federal courts should exercise powers that are essentially legislative in nature. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) (arguing that "[r]aising up causes of action where a statute has not created them" is improper action for federal courts). In *Lampf*, the Supreme Court established a statute of limitations for actions brought under Rule 10b-5. *Id.* at 2776-82. This case brought the controversy surrounding the shaping of Rule 10b-5 into public focus; causing Congress to react by amending the Securities Act of 1934 to limit the scope of the *Lampf* decision. See Securities Exchange Act of 1934 § 27A, 15 U.S.C. § 78aa-1 (Supp. IV 1992) (limiting retroactivity of *Lampf* ruling). Some courts have rejected the congressional response to *Lampf*, characterizing the amendment as an unconstitutional violation of separation of powers principles. See, e.g., *Treiber v. Katz*, 796 F. Supp. 1054, 1059 (E.D. Mich. 1992) (holding § 27A unconstitutional because it "purports to reopen

For example, while several courts have extended contribution rights to defendants in Rule 10b-5 cases,⁵ other courts have questioned whether the judiciary should continue to expand implied rights without legislative support.⁶ One court opposing judicial expansion of implied contribution

cases in which courts have rendered final judgments"); *Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231, 235 (E.D. Ky. 1992) (stating that "§ 27A(b) is an unconstitutional exercise of legislative power, and cannot be permitted to interfere with defendants' final judgment and their vested rights therein"), *aff'd*, 1 F.3d 1487 (6th Cir. 1993). *But see, e.g., Brown v. Hutton Group*, 795 F. Supp. 1307, 1313-14 (S.D.N.Y. 1992) (upholding constitutionality of § 27A because statute does not prescribe decisions of judicial branch without changing underlying law); *Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 579 (E.D.N.C. 1992) (dismissing plaintiff's securities claim in 1991 pursuant to *Lampf* decision and, in conformity with § 27A, reinstating claim in 1992), *aff'd without op. sub nom. Heritage Capital Corp. v. Deloitte Haskins & Sells*, 933 F.2d 228 (4th Cir. 1993). For a comprehensive list of cases addressing the constitutionality of § 27A, see *Treiber*, 796 F. Supp. at 1057 n.4. For a thorough discussion of the constitutionality of § 27A, see Craig W. Palm, *The Constitutionality of Section 27A of the Securities Exchange Act: Is Congress Rubbing Lampf the Wrong Way?*, 37 VILL. L. REV. 1213, 1325-28 (1992).

5. *See, e.g., In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991) ("[I]t is well established that there is a right to contribution for parties jointly liable for violating Section 10(b) and Rule 10b-5." (citing *In re Atlantic Fin. Management, Inc. Sec. Litig.*, 718 F. Supp. 1012, 1015 (D. Mass. 1988))); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1226 (9th Cir. 1989) (stating that "contribution exists under claims based on section 10(b) . . . and Rule 10b-5"), *cert. denied*, 498 U.S. 890 (1990); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.) ("[T]his circuit . . . permit[s] contribution in section 10(b) cases even though section 10 of the Securities Exchange Act, unlike sections 9 and 18, does not expressly provide therefore."), *cert. denied*, 459 U.S. 838 (1982); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 556-59 (5th Cir. 1981) (detailing arguments for and against contribution in Rule 10b-5 actions and concluding that contribution in Rule 10b-5 actions provides "equitable result"), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979) (concluding that "contribution is available in a Rule 10b-5 situation"). For a complete discussion of cases recognizing contribution under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission Rules, see *infra* notes 69-83 and accompanying text.

6. *See, e.g., Chutich v. Touche Ross & Co.*, 960 F.2d 721, 724 (8th Cir. 1992) (holding that there is "no Congressional authorization for the judicial creation of a federal common law . . . power to create a right of action for contribution among violators of section 10(b) and Rule 10b-5"); *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989) (finding that "[n]either the legislative history nor the language of Section 10(b) and Rule 10b-5 supports an implied right of contribution"); *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1286 (D. Minn. 1988) ("The court . . . finds that no implied right to contribution exists under section 10(b) of the 1934 Act and Rule 10b-5."); *see also King v. Gibbs*, 876 F.2d 1275, 1280-81 (7th Cir. 1989) (stating in dicta that contribution rights should not be recognized under § 10(b)); *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 614 (N.D. Ill. 1987) (arguing that contribution should not be granted in Rule 10b-5 actions because of questionable reasoning of precedent, but holding that contribution allowed under § 10(b) because bound by precedent). For a complete discussion of cases refusing to recognize contribution rights under § 10(b) and Rule 10b-5, see *infra* notes 84-95 and accompanying text.

rights under Rule 10b-5 has maintained that precedent supporting implied contribution rights is "built on a foundation of sand."⁷

Nineteen years after Justice Rehnquist made his judicial oak analogy, his words were invoked again during the oral argument of *Musick, Peeler & Garrett v. Employers Insurance of Wausau*.⁸ *Musick* began as a class action suit brought by the shareholders of Cousins Corporation, a California corporation alleging, along with other charges, fraudulent activity in violation of section 10(b) of the Securities Exchange Act of 1934 (1934 Act).⁹ The corporation settled with the shareholders out of court and Employers Insurance of Wausau (Wausau), which provided indemnity insurance to all but two of the defendants, paid a \$13.5 million settlement.¹⁰ Subrogated to the rights of the insureds, Wausau sought contribution from the corporation's lawyers and accountants who were involved in the public offering.¹¹ The United States Supreme Court ultimately granted certiorari on the issue of whether an implied right to contribution exists under Rule 10b-5.¹² The Supreme Court resolved a split among the circuits and added another branch to the "judicial oak" by holding that defendants in a

7. *Olympia Brewing*, 674 F. Supp. at 614.

8. See Oral Argument for Petitioners, *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085 (1993), reprinted in 17 RICO L. REP. 523, 529 (Mar. 1993). During oral argument, one Justice, responding to an argument by counsel for petitioners that implied contribution rights are not yet a "judicial oak," stated that contribution rights in Rule 10b-5 cases are "certainly more than an acorn, and there are a lot of cases out there, and there have been for a good many years." *Id.* Counsel for petitioners finally conceded, "Well, perhaps it's a little sapling" *Id.*

9. *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2086-87 (1993). The shareholders charged Cousins, the holding company of Cousins, several officers and directors of Cousins and two lead underwriters with "the omission of material facts in connection with the sale of stock during a December 1983 public offering." *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,208 (Apr. 9, 1990), *rev'd*, 954 F.2d 575 (9th Cir. 1992), *aff'd*, 113 S. Ct. 2085 (1993). For a full discussion of the facts and procedural history of the *Musick* decision, see *infra* notes 96-107 and accompanying text.

10. *Musick*, 113 S. Ct. at 2086.

11. *Id.* For a complete record of the claims and parties involved in the original contribution and indemnification action brought by Wausau, see *Employers Ins.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,208.

12. *Musick*, 113 S. Ct. at 2086 (deciding on sole issue of "[w]hether federal courts may imply a private right to contribution in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission"). Contribution rights in Rule 10b-5 actions were already firmly established in the Ninth Circuit at the time of that court's 1992 decision in *Employers Insurance*. See *Smith v. Mulvaney*, 827 F.2d 558, 560 (9th Cir. 1987) ("We hold that an implied right of contribution exists under Section 10(b) and Rule 10b-5."). Thus, little attention was given to the issue of whether contribution among defendants accompanies liability in Rule 10b-5 actions. See *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 577 (9th Cir. 1992) (stating that "[w]e have recognized . . . that [§ 10(b) and Rule 10b-5] imply a right of contribution"), *aff'd*, 113 S. Ct. 2085 (1993).

Rule 10b-5 action have a right to seek contribution from other wrongdoers.¹³

The *Musick* decision is one of a series of cases through which the Supreme Court has refined and shaped the branches of the Rule 10b-5 action over the past twenty years.¹⁴ Over the past few years, however, certain members of Congress and some interest groups have become increasingly unhappy with the Rule 10b-5 action.¹⁵ The discontent of Congress and interest groups stems from the expanding number of meritless cases filed in hope of settlement, and the prevalence of skyrocketing damage awards that, although lucrative for attorneys, severely threaten some professions.¹⁶ Congress' failure to address these problems has made it neces-

13. *Musick*, 113 S. Ct. at 2092.

14. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991) (establishing statute of limitations for Rule 10b-5 actions); *Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (defining remedies and measures of damages available under Rule 10b-5); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (setting forth standard of proof required for investor to establish cause of action under Rule 10b-5); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (delineating standard of conduct investor must show to establish cause of action under Rule 10b-5); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (defining persons entitled to bring Rule 10b-5 action). The Supreme Court has also held that no action for aiding and abetting exists under § 10(b) and Rule 10b-5. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1455 (1994). For further discussion of *Central Bank*, see *infra* notes 178-81 and accompanying text.

15. See *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs*, 103d Cong., 1st Sess. (1993) [hereinafter *Hearings*] (compiling testimony of Senators, Congresspersons, corporate executives, attorneys, accountants and academics addressing private securities litigation crisis and hotly debating reform issues). The President of the United Shareholders Association, Ralph V. Whitworth, argued that attorneys and "professional plaintiffs," not shareholders, are the true beneficiaries of Rule 10b-5. *Id.* at 304. However, William R. McLucas, Director of the Division of Enforcement of the SEC, testified that "private actions will continue to be essential to the maintenance of investor protection," and that "the implied private right of action under Section 10(b) and Rule 10b-5 thereunder is critically important to the effective operation of the Federal securities laws." *Id.* at 113.

16. See *id.* at 299-305. Jake L. Netterville, the Chairman of the Board for the American Institute of Certified Public Accountants, testified that "[t]he evidence is unmistakable. The securities laws are working exactly contrary to the principles of investor protection and civil justice. The problem cries out for reform." *Id.* at 302. The Chairman of the Public Oversight Board of the American Institute of Certified Public Accountants, A.A. Sommer, Jr., testified on behalf of accountants that securities litigation settlements may "ruin" many major firms and that reform is needed. *Id.*; see also 138 CONG. REC. S12,599 (daily ed. Aug. 12, 1992) (Sen. Domenici (R-NM) arguing that excessive and frivolous litigation "has reached epidemic dimensions in the court-created private actions brought under section 10(b)"); 138 CONG. REC. E2463 (daily ed. Aug. 12, 1992) (Rep. Tauzin (D-LA) explaining how Rule 10b-5 actions are used by speculators and "unscrupulous" attorneys to recoup losses from risky investments, through settlements without regard to merits of case).

sary for the Supreme Court to repeatedly step in, as it did in *Musick*, to limit and define the Rule 10b-5 action.¹⁷

This Note explores the background of implied private causes of action under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission (SEC).¹⁸ This Note then examines two 1981 Supreme Court cases involving implied contribution rights, which set the foundation for and influenced the Supreme Court's decision in *Musick*.¹⁹ This Note also examines the rationales of the lower courts in both granting and denying implied rights to contribution under section 10(b) and Rule 10b-5.²⁰ After presenting the relevant background, this Note sets forth the facts and procedural history of the *Musick* case²¹ and then analyzes the reasoning of both the *Musick* majority and dissent.²² While agreeing with the outcome of the *Musick* decision, this Note asserts that the basis of Justice Kennedy's majority opinion rests on questionable reasoning.²³ Further, this Note suggests that the effects of this decision will necessitate future judicial restriction of implied causes of action and also compel congressional reform of Rule 10b-5.²⁴ Finally, this Note concludes by suggesting that the *Musick* decision raises separation of powers issues and may open the door for indemnification rights for defendants in Rule 10b-5 actions.

17. For a discussion of various Supreme Court cases defining the scope of Rule 10b-5, see *supra* note 14. Although Congress has remained silent thus far, legislation addressing Rule 10b-5 reform is currently gaining support in the House of Representatives and in the Senate. See Private Securities Litigation Reform Act of 1994, S. 1976, 103d Cong., 2d Sess. (1994) (Senate bill); Securities Private Enforcement Reform Act, H.R. 417, 103d Cong., 1st Sess. (1993) (House bill). For further discussion of this legislation, see *infra* notes 183-85 and accompanying text.

18. For a complete discussion of implied causes of action under § 10(b) and Rule 10b-5, see *infra* notes 25-52 and accompanying text.

19. For a discussion of Supreme Court cases which influenced the *Musick* Court, see *supra* note 14 and *infra* notes 53-64 and accompanying text.

20. For a discussion of the rationales of the various lower courts in both denying and granting implied rights to contribution under § 10(b) and Rule 10b-5, see *infra* notes 65-95 and accompanying text.

21. For a discussion of the facts and procedural history of the *Musick* case, see *infra* notes 96-107 and accompanying text.

22. For a full discussion of the reasoning of the *Musick* Court, see *infra* notes 108-45 and accompanying text.

23. For a critical analysis of the *Musick* case, see *infra* notes 146-67 and accompanying text.

24. For a discussion of the impact of the *Musick* case, see *infra* notes 168-87 and accompanying text.

II. BACKGROUND

A. *The Birth of Rule 10b-5 and the Implied Private Cause of Action: The Acorn Takes Root*

Securities fraud and rampant speculation in the stock market precipitated "Black October" and the devastating crash of 1929.²⁵ The ensuing national economic crisis made a congressional response necessary.²⁶ Congress sought to assure the country, through comprehensive legislation, that the events leading up to the crash would not be repeated.²⁷ Consequently, Congress passed the Securities Exchange Act of 1934 to control excessive speculation on securities and to curtail manipulation of security prices.²⁸ Specifically, section 10(b) of the 1934 Act was created to protect against fraud in the sale and purchase of securities.²⁹

In 1942, the Securities and Exchange Commission created Rule 10b-5 to provide additional protection to investors by expanding the application of section 10(b).³⁰ Rule 10b-5 broadened the scope of existing legislation

25. Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 407-13 (1990) (citing, among others, Franklin D. Roosevelt: "The people of this country are . . . fully aware of the fact that unregulated speculation in securities and in commodities was one of the most important contributing factors in the artificial and unwarranted 'boom' which had so much to do with the terrible conditions of the years following 1929.").

26. *Id.* at 408-09 (stating that "[c]onventional wisdom holds that the Exchange Act was passed in response to the 1929 crash").

27. *Id.* at 424-42 (outlining and analyzing the legislative history of the 1934 Act; see *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-201 (1976) (reviewing history of § 10(b) and Rule 10b-5, stating that "[f]ederal regulation of transactions in securities emerged as part of the aftermath of the market crash in 1929").

28. Thel, *supra* note 25, at 424-60 (detailing legislative history of 1934 Act and arguing that major goal of 1934 Act was to stop speculation and manipulation of security values).

29. *Id.* Section 10(b) of the 1934 Act 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—

. . . .

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

15 U.S.C. § 78j (1988 & Supp. IV 1992).

30. Rule 10b-5 of the SEC 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) To employ any device, scheme, or artifice to defraud,

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

by extending the 1934 Act, which applied only to brokers and dealers, to protect all individuals and corporations transacting in securities.³¹

Although section 10(b) and Rule 10b-5 set out prohibitions against fraud and deceit in securities transactions, neither provision provided for a private right of action as an enforcement mechanism.³² The SEC has limited power to enforce the securities laws, but it has no power to force violators to compensate injured victims.³³ Individuals who are injured under the securities laws can bring a private suit to recover damages if the provision violated explicitly creates a cause of action,³⁴ or if the provision violated does not explicitly provide for a private suit, courts may imply the right.³⁵ In 1946, courts began to imply a private cause of action in Rule 10b-5 to further protect investors and to provide a means for them to recover damages from section 10(b) violations.³⁶

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

17 C.F.R. § 240.10b-5 (1993).

31. *Ernst & Ernst*, 425 U.S. at 212-13 n.32 (noting that Rule 10b-5 "closes a 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" (quoting SEC Release No. 3230 (May 21, 1942))).

32. *E.g.*, William H. Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 COLUM. L. REV. 1361, 1366 (1965) (stating that "[n]either [Rule 10b-5] nor [§ 10(b)] expressly provides for a civil remedy"). Section 10(b) only acts to forbid violation of SEC Rules. *See* 15 U.S.C. § 78j. Also, Rule 10b-5 does not create a civil remedy. *See* 17 C.F.R. § 240.10b-5. *See generally* Conference on Codification of the Federal Securities Laws, 22 BUS. LAW. 793 (1967) (presenting papers and discussions concerning codification of federal securities laws and including discussion of civil remedies under these laws). For the text of § 10(b), see *supra* note 29. For the text of Rule 10b-5, see *supra* note 30.

33. *See* William F. Schneider, *Implying Private Rights and Remedies Under the Federal Securities Acts*, 62 N.C. L. REV. 853, 859-63 (1984) (detailing statutory enforcement powers of SEC and explaining various private action remedies for individuals injured by violations of securities law).

34. *See, e.g.*, Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1988) (providing for civil liability against any person who knowingly participates in price manipulation in securities transaction); *id.* § 18(b), 15 U.S.C. § 78r(a) (1988) (providing for civil liability against any person who makes false or misleading statement on document filed with SEC).

35. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 430-31 (1964) (recognizing implied right of action for breach of § 14(a) of 1934 Act).

36. *See* Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). *Kardon* was the first court to imply a private cause of action under § 10(b) and Rule 10b-5, holding that "the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies." *Id.* In reaching this decision, the *Kardon* court relied on *Texas & Pacific Railway v. Rigsby*, 241 U.S. 33 (1916). *Kardon*, 69 F. Supp. at 513. Although *Texas & Pacific Railway* was subsequently overruled by *Cort v. Ash*, 422 U.S. 66 (1975), the case is generally considered to have laid the foundation for the doctrine of implied rights of action. *See* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 559-84 (1981) (discussing historical trends in Supreme Court decisions dealing with implied rights of action and comparing various policies underlying implied rights of action in securities cases).

Twenty-five years after the United States District Court for the Eastern District of Pennsylvania first implied a private cause of action under section 10(b) in *Kardon v. National Gypsum Co.*,³⁷ the decision had received such widespread support that the Supreme Court affirmed the right without debate.³⁸ Subsequently, although Congress has had ample opportunity, it has refrained from any amendment or alteration of section 10(b), thereby tacitly approving this judicially created remedy.³⁹

While the Supreme Court has recognized the Rule 10b-5 private cause of action, it has generally taken a restrictive view of implied causes of action.⁴⁰ According to the Court, the existence of an implied right of action is a question of both statutory construction and congressional intent.⁴¹ Thus, the Court has attempted to construct the Rule 10b-5 private action within the contours of the other sections of the 1934 Act that permit a private right of action, reasoning that this best accommodates congress-

37. 69 F. Supp. 512 (E.D. Pa. 1946).

38. *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971) (stating that "[i]t is now established that a private right of action is implied under § 10(b)"); see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577-78 n.19 (1979) (stating that Court in *Superintendent* "simply explicitly acquiesced in the 25-year-old acceptance of an implied action under § 10(b)"); see also *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (unanimously recognizing that "[t]he existence of this implied remedy is simply beyond peradventure").

39. See, e.g., *Insider Trading and Securities Fraud Enforcement Act of 1988*, Pub. L. No. 100-704, 102 Stat. 4680 (1988) (making comprehensive changes in Securities Exchange Act of 1934, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C. § 78), but specifically not amending § 10(b)). Originally, part of the 1988 Act was designed to expressly codify private actions under Rule 10b-5, but this section was removed by amendment. See H.R. REP. NO. 910, 100th Cong., 2d Sess. 25, 27 (1988) ("The [Energy and Commerce] Committee's intention in this amendment was to avoid creating an express private cause of action which might have the unintended effect of freezing the law or in any way restricting the potential rights of action which have been implied by the courts in this area."); see also *Herman & MacLean*, 459 U.S. at 386 ("Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action.").

40. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (declining to recognize implied rights of action unless necessary to protect congressional intent); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1974) (stating that judicial extension of 10b-5 action must be limited until Congress addresses issue); see also *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2763-64 (1991) (holding, in context of defining scope of implied private action under § 14(a) of 1934 Act, that "the breadth of the [implied] right once recognized should not . . . grow beyond the scope congressionally intended," but, in face of congressional silence, court can "look[] to policy reasons for deciding where the outer limits of the right should lie").

41. See *Cannon v. University of Chicago*, 441 U.S. 677, 717-18 (1979) ("[F]ederal courts enforcing laws enacted by Congress . . . must . . . look to those laws to determine whether there was an intent to create a private right of action under them.") (Rehnquist, J., concurring); see also *Touche Ross*, 442 U.S. at 571 ("[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.").

sional intent.⁴² Moreover, the Court has generally held that contribution rights may be implied if clear congressional intent exists to provide for these rights.⁴³

B. *Contribution and the Supreme Court's View of Implied
Contribution Rights Generally*

Courts generally recognize a right of contribution in cases where two or more defendants are liable to the same plaintiff and one defendant has paid more than its proportionate share of the damages.⁴⁴ Although, under common law, courts were reluctant to recognize a right to contribution,⁴⁵ most states have since enacted legislation recognizing some form of contribution between co-defendants.⁴⁶

Contribution has become increasingly important in today's world of complex litigation where numerous defendants may each be liable for po-

42. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2780 (1991) (creating statute of limitations for Rule 10b-5 actions by analogizing to similar provisions in Securities Exchange Act of 1934 and stating that "[w]hen the statute of origin contains comparable express remedial provisions, the inquiry [into congressional intent] usually should be at an end").

43. See, e.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981) (debating existence of implied right of contribution in expressed remedial provision of Clayton Act, Court noted that its "focus, as it is in any case involving the implication of a right of action, is on the intent of Congress"); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91 (1981) (stating that "[t]he ultimate question . . . is whether Congress intended to create the private remedy—for example, a right to contribution—that the plaintiff seeks to invoke"). For a more detailed discussion of *Texas Industries* and *Northwest Airlines*, see *infra* notes 53-61 and accompanying text.

44. See RESTATEMENT (SECOND) OF TORTS § 886A (1990) (stating that right of contribution among tortfeasors is generally available when two or more persons are tortiously liable to same person for same harm); James M. Fischer, *Contribution in 10b-5 Actions*, 33 BUS. LAW. 1821, 1821-22 (1978) ("Contribution involves distributing losses among persons who are jointly and severally liable by requiring each to pay a proportionate share . . . usually related to fault . . . or degree of participation in the wrongful conduct.").

45. See *Texas Indus.*, 451 U.S. at 634 ("The common law provided no right to contribution among joint tortfeasors." (citing *Union Stock Yards Co. v. Chicago, Burlington & Quincy Railroad*, 196 U.S. 217, 227 (1905) and citing WILLIAM L. PROSSER, LAW OF TORTS § 50, 305-07 (4th ed. 1971))); Francis H. Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 552 (1936) (stating that "[t]he rule which, except modified by statute, is accepted in [almost] every common-law jurisdiction . . . is that there can be no contribution between joint tortfeasors," but arguing that contribution rights should exist).

46. See Brief for Respondents at 6 n.1, *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085 (1993) (No. 92-34) (stating that only four states remain without some form of statutory contribution rights between joint tortfeasors); M. Patricia Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 IOWA L. REV. 533, 536-37 (1981) ("[M]ost states permit contribution among joint tortfeasors to some extent, although there is little uniformity among the various state statutes or decisions as to the measure of damages and effect of a settlement on the right of contribution.").

tentially disastrous damages.⁴⁷ Although certain cases discuss contribution as a well-settled right, many secondary issues surround contribution rights that continue to create confusion and controversy.⁴⁸

One issue courts face concerning contribution rights is whether to imply the right to contribution in actions when the legislature has not yet addressed the question.⁴⁹ When contribution rights are not expressly granted by statute, most courts have refused to grant them to joint wrongdoers, reasoning that if the legislature intended a right of contribution to exist, it would have expressly provided for such a right.⁵⁰ However, some courts have implied contribution rights when a statute expressly provides for a cause of action,⁵¹ and others have implied contribution rights when the underlying cause of action was also implied.⁵²

The United States Supreme Court closely examined the question of implied contribution rights in *Northwest Airlines v. Transport Workers*

47. Diane P. Carey, *Rule 10b-5 Developments—Damages and Contribution*, 39 WASH. & LEE L. REV. 997, 1010 (1982) (discussing various ways of calculating damages under Rule 10b-5 and examining contribution and settlement issues surrounding damage awards).

48. See Fischer, *supra* note 44, at 1824. Fisher discusses several unresolved problems surrounding contribution including:

1. Whether the availability of contribution is a matter of federal or state law;
2. Whether pro rata or proportionate contribution is the appropriate measure of loss allocation;
3. Whether settlement will operate as a bar against a request for contribution by the non-settling defendant against a settling defendant;
4. How the number of persons who must contribute to a settlement may be determined; and,
5. The time period within which an action for contribution must be brought.

Id.

49. For a discussion of implied causes of action in general, see *supra* notes 43-48, *infra* notes 50-64 and accompanying text. For a discussion of implied contribution rights in Rule 10b-5 cases, see *infra* notes 65-95 and accompanying text.

50. See, e.g., *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 213 (9th Cir. 1991) (refusing to imply right of contribution under False Claims Act); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27-28 (1st Cir. 1990) (Commodities Exchange Act); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1102-04 (4th Cir. 1989) (en banc) (Securities Act of 1933 § 12(2)); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988) (Lanham Trade-Mark Act), *cert. denied*, 490 U.S. 1006 (1989); *Green v. United States Dep't of Labor*, 775 F.2d 964, 971 (8th Cir. 1985) (Federal Employees' Compensation Act); *Freidman v. Hartmann*, 787 F. Supp. 411, 415-18 (S.D.N.Y. 1992) (Racketeer Influenced and Corrupt Organizations Act).

51. For a discussion of implied contribution in cases involving expressed private causes of action, see *infra* notes 53-61 and accompanying text.

52. For a discussion of the debate as to whether contribution should be implied in an implied cause of action, see *infra* notes 65-83 and accompanying text. See generally James S. O'Shaughnessy, Note, *Judicial Implication of Contribution Under Section 10(b) of the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Construction?*, 16 SUFFOLK U. L. REV. 983 (1982) (discussing how Supreme Court's strict construction of implied causes of action, especially in *Texas Industries* and *Northwest Airlines*, threatened implied contribution rights under § 10(b), and explaining how these cases caused confusion over whether to imply contribution into implied causes of action).

*Union*⁵³ and *Texas Industries v. Radcliff Materials, Inc.*⁵⁴ These cases involved statutes that expressly provided for a private cause of action but did not provide for contribution rights.⁵⁵ Despite the lack of an express provision for contribution, the Court determined that a right to contribution could exist in one of two situations.⁵⁶ First, Congress could expressly or by clear implication provide for contribution rights.⁵⁷ Second, the courts could adopt a federal common law of contribution.⁵⁸ Under a congressional intent test, the Court held that no right to contribution existed under the statutes in question.⁵⁹ Furthermore, the Court held that no

53. 451 U.S. 77 (1981). In *Northwest Airlines*, the Court declined to imply a right to contribution under the Equal Pay Act of 1963 and Title VII of Civil Rights Act of 1964. *Id.* at 79.

54. 451 U.S. 630 (1981). In *Texas Industries*, the Court declined to imply contribution rights under the Sherman and Clayton Acts. *Id.* at 632.

55. See *Texas Indus.*, 451 U.S. at 632 (involving cause of action for violation of Sherman Act, ch. 647, § 1, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1 (1980))); *Northwest Airlines*, 451 U.S. at 79 (involving cause of action for violation of Title VII of Civil Rights Act of 1964 § 703, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2 (1988 & Supp. III 1991))). A remedy for violation of the anti-trust laws involved in *Texas Industries* was expressly established by the Clayton Act. Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15 (1988)) (stating that "[a]ny person who shall be injured . . . by reason of anything forbidden in the anti-trust [sic] laws may sue"). The Act is silent regarding contribution. *Id.*

Likewise, Title VII of the Civil Rights Act, at issue in *Northwest Airlines*, expressly provides for private actions but not contribution. 42 U.S.C. §§ 2000e-5(f), 2000e-5(g) (1988 & Supp. III 1991). However, *Northwest Airlines* also involved violations of the Equal Pay Act, 77 Stat. 56, 29 U.S.C. § 206(d) (1988), which does not expressly provide for a private cause of action or contribution. The Equal Pay Act allegations were brought under an implied cause of action theory. *Northwest Airlines*, 451 U.S. at 88-89 n.20. The Court refused to imply contribution into express causes of action and refused to rule on whether or not contribution could be implied from an implied cause of action. *Id.*

56. *Texas Indus.*, 451 U.S. at 638 (citing *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 90-91 (1981)).

57. *Id.* (stating that "[w]e concluded [in *Northwest Airlines*] that a right to contribution may arise . . . through the affirmative creation of a right of action by Congress, either expressly or by clear implication").

58. *Id.* (stating that "a right to contribution may arise . . . through the power of federal courts to fashion a federal common law of contribution").

59. *Id.* at 630-47. The *Texas Industries* Court relied upon the congressional intent test derived from *Cort v. Ash*, 422 U.S. 66 (1975), and subsequently modified by *California v. Sierra Club*, 451 U.S. 287 (1981). *Texas Industries*, 451 U.S. at 639. In *Cort*, the Court set out the factors to be weighed when considering whether or not to imply a private cause of action in a federal statute. *Cort*, 422 U.S. at 78. The factors include: 1) whether the plaintiff was in a class protected by the statute, 2) the legislative intent behind the statute, 3) whether the new remedy is consistent with the legislative scheme and 4) whether the cause of action is appropriately addressed by federal and not state law. *Id.* In *Sierra Club*, the Court emphasized that the *Cort* analysis is essentially a congressional intent test. *Sierra Club*, 451 U.S. at 297-98 (stating that "the focus of the inquiry is on whether Congress intended to create a remedy" and that last two *Cort* factors are only relevant "if the first two factors give indication of congressional intent to create a remedy"). For a complete discussion of the application of the *Cort* analysis in *Texas Industries* and *North-*

federal common law should be created unless unique federal interests existed⁶⁰ or Congress had "given the courts the power to develop substantive law."⁶¹ Until 1993, the Court would not address the issue of whether or not contribution could be implied from an implied cause of action.

Rule 10b-5 would be the springboard for contribution to be implied from an implied cause of action. Once the Supreme Court had definitively recognized the Rule 10b-5 private cause of action, the Court then had to define and limit the scope of its use.⁶² Although Congress has acted several times to refine and clarify the 1934 Act, it has generally acquiesced to judicial authority in the area of section 10(b).⁶³ Despite these developments, neither the Supreme Court nor Congress ever created an implied right to contribution in the section 10(b) context until *Musick*.⁶⁴

west Airlines, see Mark J. Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 DUKE L.J. 543, 563-67 (1982) (concluding that "a *Cort* analysis should not control the question of implied contribution under the securities laws" because "[i]t is illogical to ask whether Congress ever intended the courts to infer a right to contribution under section 10(b); because it has never been demonstrated that Congress ever intended the courts to sanction a private cause of action in the first instance"). For a more detailed discussion of the *Cort* test and subsequent cases reinterpreting the *Cort* analysis, see Schneider, *supra* note 33, at 873-96.

60. *Texas Indus.*, 451 U.S. at 640-41. Admiralty law is one example of a unique federal interest where the Court has created an implied right to contribution based on the long tradition of division of damages in admiralty cases. See *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974) (holding that shipowner can seek contribution from joint tortfeasor and stating that "[w]here two vessels collide due to the fault of each, an admiralty doctrine of ancient lineage provides that the mutual wrongdoers shall share equally the damages sustained by each").

61. *Texas Indus.*, 451 U.S. at 640 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). For a general discussion of the various ways the United States Supreme Court has developed federal common law, see Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964) (concluding that in years since *Erie Railroad v. Tompkins*, Supreme Court has "forged" federal common law into "incalculably useful" tool).

62. For a discussion of Supreme Court cases refining Rule 10b-5, see *supra* note 14.

63. See *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2089 (1993) (stating that Congress has left task of defining features of Rule 10b-5 actions to courts). For a discussion of congressional modifications of the 1934 Act that demonstrate congressional acquiescence to judicial control of Rule 10b-5, see *supra* note 39 and accompanying text.

64. For a discussion of the development of the implied right to contribution under § 10(b) in the lower federal courts, see *infra* notes 69-95 and accompanying text.

C. *The History and Debate Concerning the Implied Right to Contribution Under Rule 10b-5: The Young Oak Grows*

In 1968, in *deHaas v. Empire Petroleum Co.*,⁶⁵ the United States District Court for the District of Colorado became the first federal court to imply a right to contribution in a Rule 10b-5 action.⁶⁶ Since the *deHaas* decision, at least forty-five cases have held that an implied right to contribution exists under section 10(b) and Rule 10b-5.⁶⁷ Concurrently, however, a minority of federal courts have refused to imply this right.⁶⁸

1. *The Majority View: A Right to Contribution is Properly Implied into Section 10(b) and Rule 10b-5*

The majority of lower federal courts that have implied a right to contribution have invoked three major rationales.⁶⁹ First, many courts have relied upon other sections of the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 in reasoning that if Congress had expressly provided for a private cause of action for securities fraud, it would have also created a right to contribution.⁷⁰ Specifically, because section

65. 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part and rev'd in part on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

66. *Id.* at 816 (reasoning that because several express liability provisions in both Exchange Acts allow contribution, "contribution should be permitted when liability is implied under Section 10(b)" (citing Securities Exchange Act of 1934 §§ 9, 11, 18, 15 U.S.C. §§ 78i(e), 77k(f), 78r(b) (1988))).

67. See Brief for Respondents at 7 & n.3, *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085 (1993) (No. 92-34). Some of the most recent cases from various circuits recognizing an implied right of contribution under § 10(b) include: *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 160 (4th Cir. 1991); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1226 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 578 (2d Cir.), *cert. denied*, 459 U.S. 838, *and cert. denied*, 459 U.S. 908 (1982); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 556-59 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979).

68. See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 722-24 (8th Cir. 1992) (applying analysis of *Northwest Airlines* and *Texas Industries* and holding that no right to contribution exists under § 10(b) or Rule 10b-5); *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989) (finding that "[n]either the legislative history nor the language of Section 10(b) and Rule 10b-5 supports an implied right of contribution"); *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1286 (D. Minn. 1988) (relying on *Northwest Airlines* and *Texas Industries* to decline to imply right of contribution under § 10(b) and Rule 10b-5); see also *King v. Gibbs*, 876 F.2d 1275, 1280-81 (7th Cir. 1989) (stating in dicta that in light of *Texas Industries* and *Northwest Airlines*, contribution rights in § 10(b) should not be recognized).

69. For a discussion of each of the three rationales that courts most commonly invoke to support implied contribution rights in Rule 10b-5 actions, see *infra* notes 70-83 and accompanying text.

70. See *Heizer*, 601 F.2d at 332 ("Inasmuch as three specific liability provisions include the remedy of contribution, that ancillary remedy should be implied when the remedy itself has been implied under Section 10(b) . . . and Rule 10b-5."); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 816 (D. Colo. 1968) ("Since

11(f) of the 1933 Act and sections 9(e) and 18(b) of the 1934 Act expressly provide for a right to contribution, these courts have reasoned that section 10(b) and Rule 10b-5 should also include a right to contribution.⁷¹ For example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,⁷² the Supreme Court recently endorsed the use of express remedial provisions of other sections of the 1933 and 1934 Acts as analogies for implying similar provisions in other sections.⁷³

Second, courts have held that because the judiciary has implied the underlying cause of action, it also has the authority to provide contribution rights.⁷⁴ Specifically, these courts have suggested that it would be unfair for courts to be able to imply a cause of action and then be powerless to imply a right to contribution for that action.⁷⁵ In *Heizer Corp. v. Ross*,⁷⁶ the United States Court of Appeals for the Seventh Circuit held that the common law rule against contribution should be "ameliorated" even when the underlying remedy is implied.⁷⁷ The *Heizer* court stated that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies."⁷⁸

Finally, courts have relied heavily upon the policy considerations surrounding contribution rights to support implying contribution under sec-

the specific liability provisions of the [1934 Act] provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b)."), *aff'd in part and rev'd in part*, 435 F.2d 1223 (10th Cir. 1970). *But see* *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1105 (4th Cir. 1989) (arguing that because other sections of Securities Acts of 1933 and 1934 expressly provide for contribution, "Congress knows how to define such a right of action . . . and we infer a lack of congressional intent to do so when the particular provision at issue is silent as to the existence of such a remedy").

71. *See* Securities Act of 1933 § 11(f), 15 U.S.C. § 77k(f) (1988) (stating that "every person who becomes liable to make payment under this section may recover contribution . . . from any person who, if sued separately, would have been liable to make the same payment"); Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1988) (using similar language); *id.* § 18(b), 15 U.S.C. § 78r(b) (1988) (using similar language).

72. 111 S. Ct. 2773 (1991).

73. *Id.* at 2780 (Scalia, J., concurring) ("When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end."). For a further discussion of the *Lampf* decision, see *supra* note 4.

74. *Heizer*, 601 F.2d at 332 ("The power to make the right of any recovery effective implies the power to utilize any of the procedures . . . available to the litigant" (quoting *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940))).

75. *Id.*

76. 601 F.2d 330 (7th Cir. 1979).

77. *Id.* The *Heizer* court relied in part on *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110-11 (1974) (implying right to contribution from underlying action which was also implied under admiralty law). The Supreme Court has subsequently limited the applicability of *Cooper* to admiralty cases. *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2087 (1993).

78. *Heizer*, 601 F.2d at 332 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)).

tion 10(b) and Rule 10b-5.⁷⁹ In *Huddleston v. Herman & MacLean*,⁸⁰ the United States Court of Appeals for the Fifth Circuit concluded that "a rule permitting contribution [under section 10(b) and Rule 10b-5] provides an equitable result that sufficiently satisfies the objective of deterrence under the securities laws."⁸¹ Supporters of contribution rights argue that without shared liability, defendants will be pressured to settle or to otherwise face the consequences of severe damage awards.⁸² In addition, these settlements will not necessarily end litigation because, in multiparty suits, plaintiffs will often use settlement funds to fuel further litigation against non-settling defendants.⁸³

2. *The Minority View: Contribution Rights Cannot be Implied into Section 10(b) and Rule 10b-5*

A minority of courts have refused to imply a right to contribution in Rule 10b-5 actions.⁸⁴ These courts have relied primarily on *Texas Industries* and *Northwest Airlines* for the proposition that federal courts lack any

79. See, e.g., *Huddleston v. Herman & MacLean*, 640 F.2d 534, 557-58 (5th Cir. 1981) (holding that denying contribution causes "rush to settlement" to avoid huge damage awards which cannot be divided), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer*, 601 F.2d at 332 (holding that deterrence is enhanced by allowing contribution); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970) (finding that deterrence is enhanced with contribution because all wrongdoers are punished), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); see also David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 646-65 (1972) (discussing why allocating liability in multiple defendant cases is fair to defendants). See generally John H. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1071-92 (1991) (presenting detailed analysis of policy issues presented by contribution rights and concluding that increasing certainty of punishment through contribution is more effective deterrent than increasing severity of punishment under no contribution rule).

80. 640 F.2d 534 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983).

81. *Id.* at 559.

82. *Id.* at 558 ("The disallowance of contribution in the context of . . . modern multiparty litigation encourages the presentation of enormous claims against numerous defendants in the hope that at least some of those named will . . . pay a settlement amount rather than defend the action."). For a further discussion of this aspect of the policy debate, see *supra* note 15.

83. *Huddleston*, 640 F.2d at 558.

84. See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 724 (8th Cir. 1992) (stating that "we lack federal common law power to create a right of action for contribution in this case"); *Robin v. Doctors Offcenters Corp.*, 730 F. Supp. 122, 125 (N.D. Ill. 1989) (holding that "[n]either the legislative history nor the language of Section 10(b) and Rule 10b-5 supports an implied right of contribution"); *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1286 (D. Minn. 1988) (applying factors set forth in *Texas Industries* and *Northwest Airlines* and finding that no right to contribution exists under § 10(b) because "Congress . . . did not intend to provide for contribution under th[at] section[]").

statutory or common law basis for implying a contribution right.⁸⁵ In *Texas Industries* and *Northwest Airlines*, the Supreme Court declined to imply a right of contribution into statutes that provided an express private right of action.⁸⁶ As stated earlier, the Court declined to imply a contribution right on the basis that no express or implied congressional intent to provide contribution rights existed; and that any extension of federal common law to create contribution rights would be inappropriate.⁸⁷ Lower federal courts were uncertain, however, as to whether the tests utilized by *Texas Industries* and *Northwest Airlines* should apply in the context of implied private causes of action.⁸⁸

Some courts have applied these tests to implied causes of action, reasoning that if they did not, a double standard would result.⁸⁹ In *Chutich v. Touche Ross & Co.*,⁹⁰ the United States Court of Appeals for the Eighth Circuit held that under *Texas Industries* and *Northwest Airlines*, "federal courts are powerless to create a right of action for contribution among violators of section 10(b) and Rule 10b-5 without a statutory or federal common law basis."⁹¹

In addition, some courts that have refused to imply contribution rights under Rule 10b-5 emphasize the countervailing policy reasons for

85. For a full discussion of *Texas Industries* and *Northwest Airlines*, see *supra* notes 53-61 and accompanying text. See also *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1104 (4th Cir. 1989) (holding no implied right of contribution in action brought under § 12(2) of the 1933 Act based in part on Supreme Court's analysis in *Texas Industries* and *Northwest Airlines*).

86. *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 98 (1981).

87. See *Texas Indus.*, 451 U.S. at 638. For a further discussion of these tests, see *supra* notes 56-61 and accompanying text.

88. Compare *Baker v. BP Am., Inc.*, 749 F. Supp. 840, 844 (N.D. Ohio 1990) (reading *Texas Industries* and *Northwest Airlines* to apply only to express statutory causes of action) and *In re National Student Marketing Litig.*, 517 F. Supp. 1345, 1348-49 (D.D.C. 1981) (reading *Texas Industries* and *Northwest Airlines* as limited to the statutory schemes presented therein and holding that implied right to contribution under § 10(b) exists) with *Chutich*, 960 F.2d at 722 (concluding that *Texas Industries* and *Northwest Airlines* restrict "the implication of contribution rights under securities laws") and *Professional Fin. Management*, 683 F. Supp. at 1286-87 ("The factors identified in *Northwest Airlines* and *Texas Industries* indicate that [a right to contribution under § 10(b)] should not be implied.") and *King v. Gibbs*, 876 F.2d 1275, 1280-82 (7th Cir. 1989) (noting in dicta that after *Texas Industries* and *Northwest Airlines*, analysis in *Heizer*, the leading Seventh Circuit case supporting contribution under § 10(b), was questionable, and also concluding that there should be no implied right of action for indemnification under § 10(b) and Rule 10b-5).

89. *Chutich*, 960 F.2d at 723 (discussing double standard that would be created if *Texas Industries* test was not also applied to implied causes of action by stating that "[a]lthough courts would follow the *Texas Industries* analysis in cases involving express private rights of action, courts would be free to create new rights of action like contribution regardless of statutory or common law authority in cases in which the courts had initially implied the private right of action").

90. 960 F.2d 721 (8th Cir. 1992).

91. *Id.* at 723.

denying these rights.⁹² These courts have reasoned that a “no contribution” rule actually generates more effective deterrence because the risk of catastrophic loss is enhanced.⁹³ In *Chutich*, however, the Eighth Circuit declined to reach such policy considerations after deciding that federal courts do not have the power to create a right to contribution.⁹⁴ Moreover, because contribution has historically been denied to defendants who have acted with scienter, the minority of courts refusing to imply contribution have maintained that contribution should not be extended to Rule 10b-5 defendants because scienter is required under Rule 10b-5.⁹⁵

III. ANALYSIS OF THE *MUSICK* DECISION

A. *The Musick Case: Facts and Procedural History*

In 1984, stock purchasers of Cousins Home Furnishings, Inc., a California corporation, brought a class action in the United States District Court for the Southern District of California against the issuing company, its parent company, several officers and directors and two lead underwriters.⁹⁶ The shareholders alleged violations of federal securities laws and California corporation law in connection with a 1983 stock offering.⁹⁷ The attorneys and accountants involved in the corporation’s stock offering were not named in the original action.⁹⁸ All of the defendants settled with the stockholders for \$13.5 million, of which \$13 million was paid by Em-

92. See, e.g., *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981) (holding that contribution results “in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation” (citing *Illinois Brick Co., v. Illinois*, 431 U.S. 720, 737-47 (1977))); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 201-04 (1987) (outlining various problems that arise under contribution).

93. See *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 616 n.20 (N.D. Ill. 1987) (“[C]ontemporary analysis exists indicating that a rule denying contribution in section 10(b) cases may provide as great a deterrent to future wrongdoing as a rule permitting contribution.” (citing Frank H. Easterbrook et al., *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980) (discussing incentives to settle under various rules of contribution))).

94. *Chutich*, 960 F.2d at 724 (“Like the Supreme Court, we recognize policy ‘is a matter for Congress, not the courts, to resolve.’” (quoting *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981))).

95. See *In re Professional Fin. Management, Ltd.*, 683 F. Supp. 1283, 1287 (D. Minn. 1988) (“Because scienter is required for liability under Rule 10b-5, it is . . . not unfair to deny contribution in such actions.” (citing Mark J. Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 DUKE L.J. 543, 573 (1982))). The Supreme Court has held that scienter is required under Rule 10b-5. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (holding no action for damages will lie under § 10(b) and Rule 10b-5 in absence of any allegation of intent to deceive, manipulate or defraud).

96. *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2086 (1993).

97. *Id.* The allegations included violations of §§ 11 and 12 of the 1933 Act and § 10(b) of the 1934 Act. *Id.*

98. *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575, 576 (9th Cir. 1992), *aff’d*, 113 S. Ct. 2085 (1993).

ployers Insurance of Wausau, provide the indemnity insurance to all but two of the defendants.⁹⁹ The settlement agreement contained a release from liability, including a release of claims by the stockholders against the accountants and attorneys of the insureds.¹⁰⁰ Employers Insurance of Wausau, subrogated to the rights of the defendants, brought an action for contribution against the attorneys and accountants who were involved in the original transaction.¹⁰¹ Employers Insurance alleged that the accountants and attorneys were jointly responsible for the securities fraud violations.¹⁰²

The district court dismissed the action, reasoning that because the defendants had all paid their "fair share," no contribution right existed.¹⁰³ The United States Court of Appeals for the Ninth Circuit reversed, holding that although the defendants had paid their "fair share" of the damages in proportion to all of the defendants before the district court, they had paid more than their "fair share" in proportion to all the joint wrongdoers, which included the accountants and attorneys not originally named as defendants.¹⁰⁴

Three months after the Ninth Circuit decision in *Employers Insurance of Wausau v. Musick, Peeler & Garrett*, the Eighth Circuit, in *Chutich v. Touche Ross & Co.*, held that no right to contribution existed in a Rule 10b-5 action.¹⁰⁵ The attorneys and accountants, who were the defendants in *Employers Insurance*, petitioned the Supreme Court to resolve the circuit split, arguing that no right to contribution should exist in a Rule 10b-5 action.¹⁰⁶ The Supreme Court granted certiorari in *Musick* on the issue of whether defendants may seek contribution from joint tortfeasors in an action based on an implied private right of action under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission.¹⁰⁷

99. *Musick*, 113 S. Ct. at 2086.

100. *Employers Ins.*, 954 F.2d at 577. This was done even though the statute of limitations had run on claims by the plaintiff class against the non-party lawyers and accountants. *Id.*

101. *Musick*, 113 S. Ct. at 2086.

102. *Id.*

103. *Employers Ins.*, 954 F.2d at 577.

104. *Id.* at 578 (stating that "[i]t is axiomatic that a defendant may pay her fair share relative to other parties in the suit and yet pay more than her fair share relative to the universe of all joint tortfeasors").

105. 960 F.2d 721, 724 (1992).

106. *Musick*, 113 S. Ct. at 2087.

107. *Id.* ("We grant [] [petitioner's request] for a writ of certiorari on the sole question presented: 'Whether federal courts may imply a private right to contribution in Section 10(b) . . . and Rule 10b-5'" (quoting original grant of certiorari, *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 54 (1992))).

B. *The Majority Opinion: Justice Kennedy Waters the Oak*

The United States Supreme Court, in a 6-3 decision, resolved the circuit split by holding that defendants in a Rule 10b-5 action have a right to seek contribution as a matter of federal law.¹⁰⁸ The Court reached this conclusion by determining that federal courts have the authority to imply a right to contribution, and that a right to contribution is within the parameters of the Rule 10b-5 action.¹⁰⁹

1. *Federal Courts Have the Authority to Imply a Right to Contribution*

Writing for the majority, Justice Kennedy set forth a two-pronged rationale for granting federal courts the authority to imply a right to contribution.¹¹⁰ First, Justice Kennedy stated that once courts have implied the underlying liability of the Rule 10b-5 action, they should not be denied the authority to imply contribution actions.¹¹¹ Second, Justice Kennedy opined that Congress left the power to imply contribution rights to the courts by explicitly recognizing judicial authority in this area.¹¹²

Justice Kennedy's first point focused on an analysis of precedent surrounding contribution rights in federal law.¹¹³ Recognizing that the Court declined to provide for a contribution right in *Texas Industries* and *Northwest Airlines*, Justice Kennedy distinguished these cases on the basis that the underlying actions in both cases were created by express statutory provisions.¹¹⁴ Justice Kennedy reasoned that because Congress expressly created the causes of action involved in *Texas Industries* and *Northwest Airlines*, Congress would have expressly included contribution rights if it so desired.¹¹⁵ Because the Rule 10b-5 action is implied, Justice Kennedy concluded that it would be wholly inappropriate to examine congressional intent.¹¹⁶

108. *Musick*, 113 S. Ct. at 2086.

109. *Id.* at 2087-92.

110. *Id.*

111. *Id.* at 2088 ("Having implied the underlying liability in the first place, to now disavow any authority to allocate it . . . would be most unfair to those against whom damages are assessed.")

112. *Id.* at 2089 (stating that prior congressional responses to Supreme Court decisions involving Rule 10b-5 "not only treat[] the 10b-5 action as an accepted feature of our securities laws, but avoid[] entangling Congress in its formulation. That task . . . Congress has left to us.")

113. *Id.* at 2088-89.

114. *Id.* at 2087-88 ("[T]he instruction we receive from [*Texas Industries* and *Northwest Airlines*] is that they are distinguishable from . . . the matter now before us. The federal interests in both [cases] were defined by statutory provisions that were express in creating the substantive damages liability for which contribution was sought.")

115. *Id.* at 2088.

116. *Id.* Justice Kennedy stated that because a private right of action under Rule 10b-5 was implied, "it would be futile to ask whether the 1934 Congress also displayed a clear intent to create a contribution right collateral to the remedy." *Id.* Later in his opinion, Justice Kennedy addressed this issue by noting that, "where a

After summarily establishing that *Texas Industries* and *Northwest Airlines* were not controlling, Justice Kennedy still faced the issue of whether it was appropriate for the Court to create an entirely new cause of action for contribution in the Rule 10b-5 context.¹¹⁷ Justice Kennedy held that it was appropriate for the Court to do so because he considered the right to contribution "ancillary" to the Rule 10b-5 private cause of action.¹¹⁸

The second prong of Kennedy's rationale for granting authority to the federal courts to imply a right to contribution rested on an analysis of congressional action recognizing judicial authority in this area.¹¹⁹ Specifically, Justice Kennedy observed that Congress enacted the Insider Trading and Securities Fraud Enforcement Act of 1988, which expressly refused to limit any cause of action "implied from a provision of this chapter."¹²⁰ Also, Justice Kennedy noted that in responding to the Supreme Court's decision in *Lampf* by legislatively limiting the retroactive effect of the *Lampf* holding, Congress had explicitly recognized the Court's power to imply a statute of limitations.¹²¹

2. *A Right to Contribution Is Within the Contours of the Rule 10b-5 Action*

After establishing that federal courts have the authority to imply a right to contribution, the *Musick* Court had to determine whether it should actually establish the right.¹²² Once Justice Kennedy determined that the right to contribution was "ancillary" to the Rule 10b-5 implied private right of action, he then examined the objectives and purposes of the 1934 Securities Exchange Act.¹²³ Based upon an examination of the overall structure of the 1934 Act and an analysis of comparable sections

legal structure of private statutory rights has developed without clear indications of congressional intent,' a federal court has the limited power to 'define the contours of that structure.' " *Id.* at 2089 (quoting *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2764 (1991)).

117. *Id.* at 2088.

118. *Id.* ("The violation of the securities laws gives rise to the 10b-5 private cause of action, and the question before us is the ancillary one of how damages are to be shared among persons or entities already subject to that liability.")

119. *Id.* at 2089. For a complete discussion of congressional action concerning § 10(b) and Rule 10b-5, see *supra* notes 4, 39 and accompanying text and *infra* notes 183-85 and accompanying text.

120. *Musick*, 113 S. Ct. at 2089 (citing Insider Trading and Securities Enforcement Act of 1988, Pub. L. No. 100-107, § 20A(d), 102 Stat. 4680 (1988)). Justice Kennedy stated that "[t]he existence of [the Rule 10b-5] action, and our cumulative work in its design, have been obvious legislative considerations in the enactment of [the Insider Trading and Securities Enforcement Act of 1988]." *Id.* For a discussion of the 1988 Act, see *supra* note 39 and accompanying text.

121. *Musick*, 113 S. Ct. at 2089. For a discussion of the congressional response to *Lampf*, see *supra* note 4 and accompanying text.

122. *Musick*, 113 S. Ct. at 2089.

123. *Id.* at 2089-90 ("Our task is not to assess the relative merits of the competing [policy issues surrounding contribution], but rather to attempt to infer how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act.")

within it, Justice Kennedy concluded that an implied right to contribution was consistent with the objectives of the 1934 Act.¹²⁴

Specifically, Justice Kennedy focused on sections 9 and 18 of the 1934 Act because these sections involved the same protections and were motivated by the same rationale underlying the adoption of section 10(b).¹²⁵ Justice Kennedy noted that defendants in a section 9 or 18 claim stand in a similar position to Rule 10b-5 defendants for purposes of contribution rights.¹²⁶ Also, all three sections of the 1934 Act were enacted by the 73rd Congress.¹²⁷ Because sections 9 and 18 expressly provide for contribution, the Court held that if a private remedy had been granted under section 10(b), the 73rd Congress would have adopted a right to contribution as well.¹²⁸

Kennedy also recognized that the vast majority of lower federal courts have adopted the contribution right.¹²⁹ He considered this important because even though the right to contribution for Rule 10b-5 cases had been in existence for over twenty years, “neither the Securities and Exchange Commission nor the federal courts have suggested that the contribution right detracts from the effectiveness of the 10b-5 implied action or interferes with the effective operation of the securities laws.”¹³⁰

124. *Id.* at 2091. Although admitting that “[i]nquiring about what a given Congress might have done, [is] not a promising venture,” Justice Kennedy reasoned that because (1) the language of § 10(b) “provides little guidance” towards refining specific elements of Rule 10b-5 actions and (2) little evidence of actual congressional intent exists, examining comparable sections of the 1934 Act “does in this case yield an answer we find convincing.” *Id.* at 2090.

125. *Id.* The Court noted that the three sections are close in “structure, purpose and intent.” *Id.* The Court continued by stating that “[e]ach confers an explicit right of action in favor of private parties and, in so doing, discloses a congressional intent regarding the definition and apportionment of liability among private parties.” *Id.*

126. *Id.* at 2090-91 (“All three causes of action [under §§ 9, 18 and 10(b)] impose direct liability on defendants for their own acts as opposed to derivative liability for the acts of others; all three involve defendants who have violated the securities law with scienter; [and] all three operate in many instances to impose liability on multiple defendants acting in concert” (citations omitted)).

127. *Id.* at 2091 (noting that some sections of 1934 Act, such as § 20A, which was added in 1988, should not be examined to determine congressional intent of 1934 Congress).

128. *Id.* The Court stated that “[g]iven the identity of purpose behind §§ 9, 10(b) and 18, and similarity in their operation, we find no ground for ruling that allowing contribution in 10b-5 actions will frustrate the purposes of the statutory section from which it is derived.” *Id.*

129. *Id.* For a discussion of the lower federal courts that have adopted contribution rights in Rule 10b-5 actions, see *supra* notes 84-95 and accompanying text.

130. *Musick*, 113 S. Ct. at 2091.

C. *The Dissenting Opinion: Justice Thomas Refuses to "Cultivate this New Branch of Rule 10b-5 Law"*

Justice Thomas, joined by Justices Blackmun and O'Connor, wrote the dissent and argued that Congress never intended for an implied right of contribution to exist in Rule 10b-5 actions and, therefore, the Court was overstepping its authority by creating such a right.¹³¹ Justice Thomas relied on three rationales to support his position.¹³² First, Justice Thomas stated that the Court should have declined to create a completely new private right of action for contribution in Rule 10b-5 actions without finding compelling reasons for doing so.¹³³ Justice Thomas reasoned that the Court should continue its judicial policy of limiting the scope of the Rule 10b-5 action.¹³⁴

Second, Justice Thomas contended that the majority was incorrect in holding that the right to contribution is an "ancillary" element of the implied cause of action.¹³⁵ Instead, Justice Thomas characterized a right to contribution as an entirely separate cause of action.¹³⁶ In addition, he argued that because no common law right to contribution exists and jurisdictions that recognize contribution rights rely on legislation to establish such rights, the Court was overstepping its bounds by creating a new cause of action.¹³⁷ Justice Thomas distinguished *Lampf* by explaining that a statute of limitations was a necessary and ancillary part of any action, whereas a right to contribution was not.¹³⁸

Third, Justice Thomas asserted that the majority used the wrong methodology for determining congressional intent.¹³⁹ Justice Thomas argued that a proper analysis would have focused on the express language of

131. *Id.* at 2092 (Thomas, J., dissenting).

132. *Id.* at 2092-95 (Thomas, J., dissenting). For a discussion of each of Justice Thomas' rationales, see *infra* notes 133-45 and accompanying text.

133. *Musick*, 113 S. Ct. at 2093 (Thomas, J., dissenting). Justice Thomas stated that "[i]n the absence of any compelling reason to allow contribution in private 10b-5 suits, we should seek to keep 'the breadth' of the 10b-5 action from 'growing beyond the scope congressionally intended.'" *Id.* (quoting *Virginia Bankshares, Inc., v. Sandberg*, 111 S. Ct. 2749, 2765 (1991)).

134. *Id.* (Thomas, J., dissenting) (citing *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2765 (1991), and citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975)).

135. *Id.* (Thomas, J., dissenting).

136. *Id.* (Thomas, J., dissenting) ("Unlike a statute of limitations, a reliance requirement or a defense to liability . . . contribution requires a wholly separate cause of action.").

137. *Id.* (Thomas, J., dissenting) ("A court that recognizes an implied right to contribution must endorse a remedy contrary to the common law and perhaps even the legislative policy of the relevant jurisdiction.").

138. *Id.* (Thomas, J., dissenting).

139. *Id.* at 2093-94 (Thomas, J., dissenting) ("[T]he Court errs in placing dispositive weight on the existence of contribution rights under §§ 9 and 18 of the Act. The proper analysis flows from our well-established approach to implied causes of action in general and to implied rights of contribution in particular." (citation omitted)).

section 10(b) and Rule 10b-5 and the "structure of the statutory scheme."¹⁴⁰ According to Justice Thomas, an analysis of the language of section 10(b) and Rule 10b-5, and the statutory scheme, "negates the existence of a 10b-5 contribution action."¹⁴¹ Justice Thomas construed section 10(b) and Rule 10b-5 to protect the individual victims of fraud, and not to protect the interests of joint tortfeasors.¹⁴² Moreover, Justice Thomas argued that an analysis of the structure of the 1934 Act revealed that if Congress wanted to provide for a right of contribution, it could have done so expressly.¹⁴³ Instead, Congress only expressly provided for contribution in certain sections of the 1934 Act.¹⁴⁴ In addition, Justice Thomas observed that Congress has had numerous opportunities to adopt the right to contribution for Rule 10b-5 actions but has failed to do so.¹⁴⁵

IV. CRITICAL ANALYSIS: A TREE CANNOT GROW IN THE SAND

This Note contends that the *Musick* majority's conclusions rest on assertions that may lead to an equitable result, but that do not rest on the granite foundation of Supreme Court precedent or clear congressional intent. The *Musick* majority held that: (1) the Supreme Court has the power to create a new cause of action for contribution without congressional consent¹⁴⁶ and (2) contribution should be allowed in the section 10(b) context simply because two other similar provisions of the 1934 Act provide for contribution.¹⁴⁷

140. *Id.* at 2095 (Thomas, J., dissenting) (quoting *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 91 (1981)).

141. *Id.* (Thomas, J., dissenting).

142. *Id.* (Thomas, J., dissenting) (explaining that "only actual purchasers and sellers of securities are entitled to press private 10b-5 suits," and arguing that, if majority view was taken, 10b-5's "requirement of actual purchase or sale would virtually evaporate in . . . contribution dispute[s] embroiling only separate groups of professionals who had merely advised or facilitated a tainted securities transaction" and concluding that this undermines intent of Congress and SEC).

143. *Id.* (Thomas, J., dissenting) ("When Congress wished to provide a [contribution] remedy . . . it had little trouble in doing so expressly." (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975))).

144. *Id.* (Thomas, J., dissenting) (noting presence of express contribution rights under §§ 9 and 18 of the 1934 Act).

145. *Id.* (Thomas, J., dissenting) Justice Thomas cited the Insider Trading and Securities Fraud Enforcement Act of 1988 and the limitation of the *Lampf* decision in Amendment 27A of the 1934 Act for the proposition that if Congress wanted to provide for contribution rights for 10b-5 defendants, "a single enactment could have given effect to this policy." *Id.* For a further discussion of these congressional actions, see *supra* notes 4, 39 and accompanying text.

146. *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2087-89 (1993).

147. *Id.* at 2089-92.

A. *The Supreme Court's Power to Create an Action for Contribution*

The *Musick* majority held that the Supreme Court has the power to create a cause of action for contribution in Rule 10b-5 actions.¹⁴⁸ The *Musick* majority supported its holding simply by labelling contribution in the section 10(b) context as an "ancillary" claim, thereby distinguishing a strong line of cases that caution against creating new causes of action.¹⁴⁹

The Court admitted that "the creation of new rights ought to be left to legislatures, not courts."¹⁵⁰ Justice Kennedy also conceded that, whether created by state statute or by common law, "in both instances the right [to contribution] is thought to be a separate or independent cause of action."¹⁵¹ However, he then added that this "separate or independent" cause of action was "ancillary" to the 10b-5 action.¹⁵²

Consequently, the Court now has precedent for implying new causes of action simply by classifying the cause of action as "ancillary."¹⁵³ Because the Court has provided no identifiable test for determining when a right is "ancillary" to a 10b-5 claim, it would appear that indemnification rights could be just as "ancillary" to a Rule 10b-5 claim as contribution rights. Implying indemnification rights, however, would be contrary to the weight of authority denying such a right in securities actions.¹⁵⁴

148. *Id.*

149. *Id.* at 2088 (citing *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 770 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); and *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-77 (1979), for proposition that "creation of new rights ought to be left to legislatures, not courts," but distinguishing those cases by stating that "the question before us is the ancillary one of how damages are to be shared among persons or entities already subject to . . . liability").

150. *Id.*

151. *Id.*

152. *Id.* ("The violation of the securities laws gives rise to the 10b-5 private cause of action, and the question before us is the ancillary one of how damages are to be shared among persons or entities already subject to that liability.")

153. See Joseph M. Hassett, *Aiding and Abetting Liability for 10b-5 Violations*, REV. SEC. & COMMODITIES REG., Sept. 15, 1993, at 152, 154. Hassett ignores Justice Kennedy's use of the "ancillary" terminology and states that:

The Court's decision . . . in *Musick* . . . shows that the Court is prepared to create an entirely new private right of action, without any indication of congressional intent that it do so, in order to discharge what [the Court] sees as its responsibility to tend to the development of the judicially-created doctrines surrounding [R]ule 10b-5 liability.

Id.

154. See *Employers Ins. v. Musick, Peeler & Garrett*, 954 F.2d 575, 580 (9th Cir. 1992) (stating that there is "a long-standing bar against claims for indemnification in securities cases"), *aff'd*, 113 S. Ct. 2085 (1993); *In re Olympia Brewing Co. Sec. Litig.*, 674 F. Supp. 597, 611 (N.D. Ill. 1987) ("[T]he federal courts consistently state that indemnity is not available in cases of intentional violation of the federal securities laws . . ."). The cases denying implied indemnification rights rely on the policy reasons set forth in *Globus v. Law Research Service, Inc.*, 418 F.2d 1276, 1288-89 (2d Cir. 1969) (refusing to grant indemnification rights in order to promote enforcement of federal securities laws and deter negligence), *cert. denied*, 397 U.S. 913 (1970). However, some courts have relied on a lack of judicial authority,

The majority's understanding of congressional inaction, inferring that no action means approval of judicial action, may be appropriate for determining that Congress approves of the Rule 10b-5 cause of action generally.¹⁵⁵ However, congressional inaction does not necessarily signify congressional approval of a judicially created new cause of action.¹⁵⁶ Even if Congress remains silent after *Musick*, the Court should not infer congressional approval of implying new causes of action.¹⁵⁷

B. *Application of Judicial Power to Create a Cause of Action for Contribution Under Section 10(b)*

After determining that federal courts can create an implied cause of action for contribution, the *Musick* majority then specifically held that contribution rights existed for defendants in Rule 10b-5 cases.¹⁵⁸ The *Musick* majority set forth a framework for shaping the Rule 10b-5 action that relied on sections 9 and 18 of the 1934 Act as models for section 10(b), thereby reaffirming the Court's methodology in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.¹⁵⁹

not policy concerns, to deny implication of indemnification rights. See, e.g., *Olympia Brewing*, 674 F. Supp. at 612 & n.12 (holding that no judicial authority exist to create action for indemnity under security laws). These courts might now argue that they can avoid the *Texas Industries* and *Northwest Airlines* strict test for implying causes of action simply by holding that the indemnification claim is ancillary to the original cause of action.

155. *Musick*, 113 S. Ct. at 2089 (concluding, after analysis of references to Rule 10b-5 in recent amendments to securities laws, that Court can "infer from these references an acknowledgement of the 10b-5 action without any further expression of legislative intent to define it").

156. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1452-53 (1994) (holding that private plaintiff may not maintain action for aiding and abetting under § 10(b)). In *Central Bank*, Justice Kennedy, once again writing for the majority, stated that congressional failure to act does not represent "affirmative congressional approval of the [courts'] statutory interpretation," and that "congressional inaction cannot amend a duly enacted statute." *Id.* at 1453 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 & n.1 (1989)).

157. *Id.* (explaining, in context of aiding and abetting liability, that Court should not infer that "Congress [], by silence, ha[s] acquiesced in the judicial interpretation of § 10(b)"). For a discussion of possible congressional action to finally reform Rule 10b-5, see *infra* notes 183-85 and accompanying text.

158. *Musick*, 113 S. Ct. at 2091-92.

159. *Id.* at 2091 (concluding that "these explicit provisions for contribution [in §§ 9 and 18 of the 1934 Act] are an important, not an inconsequential, feature of the federal securities laws and that consistency requires us to adopt a like contribution rule for the right of action existing under Rule 10b-5"); see *Lampf, Pleva, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2780-81 (1991) (concluding that "where . . . the claim asserted is one implied under a statute that also contains an express cause of action . . . , a court should look first to the statute of origin to ascertain the proper limitations period," and using §§ 9 and 18 of 1934 Act as models to adopt statute of limitations for Rule 10b-5); see also John C. Coffee, Jr., *Aiding, Abetting Liabilities Uncertain Future*, N.Y.L.J., Sept. 30, 1993, at 5 (stating that Supreme Court "shape[s] the 'contours' of the implied cause of action under Rule 10b-5 by looking to the most closely analogous express causes of action in the 1934

Comparisons between section 10(b) and sections 9 and 18 of the 1934 Act are problematic for two main reasons. First, the sections are not, in fact, totally analogous, as Justice Kennedy explained in his dissent in *Lampf*, because “[n]either [section 9 or 18] relates to a cause of action of the scope and coverage of an implied action under § 10(b). Nor does either rest on the common law fraud model underlying most § 10(b) actions.”¹⁶⁰

Second, the language of sections 9 and 18, which provides for contribution, indicates that these two sections envision separate causes of action for contribution.¹⁶¹ These separate causes of action may even be brought by plaintiffs who were previously denied the right to bring an action under Rule 10b-5.¹⁶² This is inconsistent with characterizing contribution as an “ancillary” claim.

The *Musick* Court worked diligently to frame the rationale behind granting contribution rights in Rule 10b-5 actions within a strict statutory construction analysis, purposefully attempting to avoid questions of public policy.¹⁶³ However, Justice Kennedy revealed the true impetus of the majority’s decision when he stated, “[h]aving implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory

Act,” and that after *Musick* “§§ 9 and 18 of the 1934 Act [have been] enshrined as the official models to which the implied cause of action under Rule 10b-5 must conform”).

160. *Lampf*, 111 S. Ct. at 2789 (Kennedy, J., dissenting) (“It is of even greater importance to note that both of the statutes in question [§§ 9 and 18] relate to express causes of action which in their purpose and underlying rationale differ from causes of action implied under § 10(b).”).

161. Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1988); *id.* § 18(b), 15 U.S.C. § 78r(b) (1988) (providing that “[e]very 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”). The language “if joined in the original suit” can be interpreted as explicitly providing for the possibility of separate causes of action for contribution. *See Employers Ins. v. Musick, Peeler & Garrett*, 954 F.2d 575, 577 (9th Cir. 1992) (using this analysis to hold that contribution is not limited to parties involved in original suit), *aff’d*, 113 S. Ct. 2085 (1993).

162. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975) (limiting class of persons eligible to maintain action under Rule 10b-5 to actual buyers and sellers of securities); *Musick*, 113 S. Ct. at 2095 (Thomas, J., dissenting) (arguing that “contribution is inconsistent with our established views of the 10b-5 action” and stating that “*Blue Chip Stamps*’ requirement of actual purchase or sale would virtually evaporate in a contribution dispute embroiling only separate groups of professionals who had merely advised or facilitated a tainted securities transaction”).

163. *Musick*, 113 S. Ct. at 2089 (stating that although “[t]he parties have devoted considerable portions of their briefs to debating whether a rule of contribution or of no contribution is more efficient or more equitable . . . we decline to [rule on those matters] here”). Justice Thomas, in dissent, also avoided questions of public policy. *Id.* at 2095-96 (Thomas, J., dissenting) (arguing that Court should decline invitation to join “vigorous debate over the advantages and disadvantages of contribution and various contribution schemes” (quoting *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981))).

that Congress has not addressed the issue would be most unfair to those against whom damages are assessed."¹⁶⁴ If the *Musick* decision is, in fact, policy based, the Court is improperly practicing judicial legislation, and even if the *Musick* decision is not policy based, implying a right to contribution in Rule 10b-5 actions will have diverse policy implications.¹⁶⁵ Either way, policy issues are more appropriately addressed by Congress.¹⁶⁶ The *Musick* decision may be, finally, an invitation to Congress to legislate in this field.¹⁶⁷

V. IMPACT

Musick resolves a split among the United States Courts of Appeals and conclusively establishes contribution rights for defendants in Rule 10b-5 cases.¹⁶⁸ The *Musick* decision will have important ramifications on future

164. *Id.* at 2088; see Joseph M. Hassett, *Contribution in Rule 10b-5 Cases: Musick, Peeler and Beyond*, 9 INSIGHTS 22 (Prentice Hall L. & Bus., Sept. 1993). Hassett argues that policy considerations were involved in the *Musick* outcome, but he also states that:

[H]aving castigated the development of implied private rights of action under the securities laws as legislative policy-making by judges, a majority of the Court is uneasy about legislating its own policy on contribution. It feels better about the enterprise if it is described, not as legislating, but as divining how Congress would have legislated had it had the prescience to do so.

Id.

165. See John H. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1098-1107 (1991) (discussing issues concerning who can sue for contribution and how to apportion liability among settling parties and other wrongdoers in context of § 12 of 1933 Act).

166. See *Diamond v. Chakrabarty*, 447 U.S. 303 (1980). In this case, the Court suggested that policy decisions are better left to Congress and the executive branch, stating:

The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.

Id. at 317.

167. See Hassett, *supra* note 164, at 22 (arguing that Court in *Musick* "subtly focused attention on the fact that the present Congress should be resolving the most important policy decisions as to how liability for federal securities fraud should be fairly allocated among multiple wrongdoers"); Harvey L. Pitt & Karl A. Groskaufmanis, *Musick Clarified Defendants' Obligations*, 15 NAT'L L.J., Aug. 30, 1993, at 21 (arguing that Congress may step in because of broad scope of *Musick* decision, stating "[t]here were few echoes in the *Musick* decision of earlier pronouncements by the [C]ourt about the need to restrain the reach of burgeoning Rule 10b-5 litigation. Instead, the [C]ourt concluded that 'Congress has left to us' the task of formulating the parameters of Rule 10b-5 actions." (footnotes omitted)); see also Coffee, *supra* note 159, at 5 (speculating that "[a]t some point, Congress could get fed up" with Supreme Court's regulation of Rule 10b-5).

168. *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 113 S. Ct. 2085, 2087-92 (1993).

actions brought under Rule 10b-5 because the case clearly provides a framework for analysis in cases where the scope of Rule 10b-5 is at issue.¹⁶⁹ Within this framework, either the Supreme Court or Congress will have to address many controversial questions.¹⁷⁰ In the meantime, courts will inconsistently apply securities laws, thus causing some confusion about Rule 10b-5 actions until Congress, the Supreme Court or the SEC develop uniform rules for contribution under section 10(b).¹⁷¹

In addition, the *Musick* decision will have an important impact on the unsettled law regarding settlements in securities litigation, especially because parties settle a large majority of claims brought under Rule 10b-5.¹⁷² In order to accomplish secure settlements, the parties usually attempt to obtain a judicial order that bars contribution claims from non-settling defendants.¹⁷³ Federal law in this area is divided as to the proper method for applying these settlement bars.¹⁷⁴ Accordingly, either the Supreme Court or Congress will need to determine whether or not a rule of settlement bar exists for Rule 10b-5 actions.

Heated issues surround settlements and contribution bars, including the choice of methods for calculating the extent to which settlement

169. *Id.* at 2090-92 (reaffirming method of determining scope of § 10(b) that requires courts to examine analogous sections of 1934 Act). The Court used this framework for shaping the contours of Rule 10b-5 in the *Lampf* decision. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991); see also *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988) (holding that reliance is required under § 10(b) and stating that § 18(a), which expressly requires reliance, is appropriate model for § 10(b)).

170. See *Hassett*, *supra* note 164, at 22 (discussing questions raised by *Musick* decision and stating that issues "will ultimately have to be resolved by the Supreme Court or Congress"); see also *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) ("The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue.").

171. See *Hearings*, *supra* note 15, at 1-27 (opening statements of members of Senate Committee discussing critical need for reform of private securities litigation, especially § 10(b), and recognizing "enormous controversy" surrounding private litigation of securities laws).

172. See *Pitt & Groskaufmanis*, *supra* note 167, at 26 (explaining that parties settle majority of securities class actions "primarily to put the risk, expense and distractions of litigation behind them").

173. *Id.*

174. See generally Paul H. Dawes et al., *The Effect of Indemnity and Contribution Upon Partial Settlements in Federal Securities Actions*, PRACTICING L. INST., Sept. 1, 1989, at 345 (explaining effects of indemnity and contribution on securities action settlements). No federal statute provides for a settlement bar rule. *Id.* Federal courts have treated settlement bars differently. See, e.g., *Nelson v. Bennett*, 662 F. Supp. 1324, 1338 (E.D. Cal. 1987) (creating rule for settlement bars); *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029, 1032 (S.D.N.Y. 1986) (applying forum state's settlement bar rule). But see *Harrison v. Sheats*, 608 F. Supp. 502, 506-07 (E.D. Cal. 1985) (refusing to allow settlement bar in securities claim).

amounts affect the liability of non-settling defendants.¹⁷⁵ Currently, a split in the circuits exists as to whether a "proportionate fault" or a "pro tanto" system of allocating liability should be used.¹⁷⁶ Certainly *Musick* has again made it absolutely necessary for Congress or the Supreme Court to create a uniform rule for allocating liability in these situations.¹⁷⁷

The Supreme Court has begun to answer the many issues raised by *Musick* in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹⁷⁸ The Court held that no implied private right of action exists for aiding and abetting violations of section 10(b) of the 1934 Act and Rule 10b-5.¹⁷⁹ Although relying on a textual analysis, the Court reaffirmed the framework of *Musick* for analyzing the elements of a Rule 10b-5 claim.¹⁸⁰ The Court demonstrated that precedent will not stand in the way of its securities law analysis, ignoring "hundreds of judicial and administrative proceedings in every circuit in the federal system" that have concluded that aiding and abetting liability exists under section 10(b).¹⁸¹

The *Musick* decision, the *Central Bank* decision and pressure for reform from strong interests groups may finally force Congress into the Rule 10b-5 arena.¹⁸² Several members of the United States House of Repre-

175. See *Cortec Indus., Inc. v. Sum Holding L.P.*, 839 F. Supp. 1021, 1027-30 (S.D.N.Y. 1993) (post-*Musick* decision explaining debate over apportioning liability in securities litigation in context of § 10(b) action); Pitt & Groskaufmanis, *supra* note 167, at 26 (explaining controversy surrounding different methods of apportioning liability in securities litigation settlements and concluding that "the issue of non-settling defendants' liability remains unresolved").

176. See *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230-31 (9th Cir. 1989) (endorsing proportionate fault approach, allowing non-settling defendants to be liable only up to extent of culpability, regardless of previous settlement amounts), *cert. denied*, 111 S. Ct. 232 (1990). But see *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600-01 (2d Cir. 1989) (endorsing pro tanto approach, allowing non-settling defendants to be liable for entire amount of damages, reduced by amounts of any related prior settlement), *cert. denied*, 493 U.S. 1024 (1990).

177. See *Cortec Indus.*, 839 F. Supp. at 1027-30 (granting contribution to Rule 10b-5 defendants under pro tanto apportionment method, after considering which liability method (pro rata, proportionate fault or pro tanto) was appropriate to apply, and remanding for extensive discovery on fairness of settlement).

178. 114 S. Ct. 1439 (1994).

179. *Id.* at 1443-55.

180. *Id.* at 1448-50. The *Central Bank* majority primarily relied on the text of § 10(b) to deny aiding and abetting causes of action to private litigants, stating that if "Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not." *Id.* at 1448. Under this test, no contribution would exist under § 10(b) because the word "contribution" is not in the section. However, the Court distinguished cases concerning the scope of conduct prohibited by § 10(b), which require analysis of the statutory text, from cases defining the elements of the Rule 10b-5 scheme, which require an attempt to infer the intent of the 1934 Congress. *Id.* at 1445-48.

181. *Id.* at 1456 (Stevens, J., dissenting).

182. For a discussion of interest groups calling for Rule 10b-5 reform, see *supra* note 15 and accompanying text. See also Brief for National Association of Securities and Commercial Law Attorneys, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 113 S. Ct. 2085 (1993) (No. 92-34) (arguing that *Musick* outcome

sentatives have sponsored a bill, the Securities Private Enforcement Reform Act, which would substantially reform several aspects of Rule 10b-5.¹⁸³ The United States Senate has also taken up securities reform with its own bill, the Private Securities Litigation Reform Act of 1994.¹⁸⁴ The Senate bill includes a provision for contribution for defendants in Rule 10b-5 actions.¹⁸⁵

Obviously, Congress is preparing to respond to the securities litigation crisis in some way. Hopefully, Congress will carefully examine the implications of securities litigation reform in light of the issues raised and addressed in the forty years of judicial reform in this area. Congress has the rare opportunity to analyze the effectiveness of reform measures before they are adopted by evaluating the success of reform proposals in the jurisdictions that have already attempted them.

The United States Supreme Court took a bold step in *Musick*, squarely establishing the power of the Court in defining the development of Rule 10b-5, even to the point of creating new causes of action. Eventually, the Supreme Court will once again provoke Congress to legislate concerning

will lead to additional complexity and additional litigation which was not necessary to fulfill the deterrent and compensatory goal of Rule 10b-5.). Some commentators, however, including Securities and Exchange Commissioner, Richard Roberts and SEC Director of Enforcement, William McLucas, feel that Congress should stay out of the Rule 10b-5 fray and let the courts develop the contours of the Rule. See *Securities Litigation Reform Efforts Could Harm Investors, Roberts Declares*, SEC. REG. & L. REP., July 9, 1993, at 933 (stating that "Roberts advocated 'using the judicial system itself' to 'make the fine, qualitative judgements necessary to sift out the meritless securities litigation from all securities litigation' rather than using rules or statutes"); see also Adam F. Ingber, Note, *10b-5 or Not 10b-5?: Are the Current Efforts to Reform Securities Litigations Misguided?*, 61 FORDHAM L. REV. S351 (1993) (examining specific reform proposals and concluding Congress should abandon 10b-5 reform and redirect efforts towards reform of overlapping securities fraud remedies).

183. H.R. 417, 103d Cong., 1st Sess. (1993). This Act, if passed, would amend the 1934 Act to provide for joint and several liability only if a defendant "knowingly" engages in securities fraud. *Id.* § 20B(a)(1). Otherwise, proportionate liability would exist. *Id.* § 20B(a)(2). Also, attorneys' fees would be awarded to the prevailing party in an implied private action, unless the court determined that the position of the losing party was substantially justified. *Id.* § 20B(B)(1). The proposed Act also has provisions for a higher burden of proof, § 20B(d), aiding and abetting liability, § 20B(f), and a longer statute of limitations than provided for by *Lampf*. See *id.* § 36 (extending limit from three years to five years with one year "discovery" period).

184. S. 1976, 103d Cong., 2d Sess. (1994) (amending 1934 Act). In April, 1994, the bill was referred to the Committee on Banking, Housing, and Urban Affairs.

185. *Id.* § 203 (outlining proportionate liability and joint and several liability amendments to 1934 Act and including contribution rights for defendants in implied private actions). Specifically, the bill states that "[a] person who becomes liable for damages in an implied private action may recover for contribution from any person who, if joined in the original suit, would have been liable for the same damages." *Id.* § 203(G). The bill also addresses many of the issues surrounding contribution rights that were ignored by the *Musick* court, such as a settlement bar rule and a statute of limitations for contribution actions. *Id.* § 203(F), (H).

Rule 10b-5,¹⁸⁶ especially if a future Court ruling based on congressional intent in 1934 goes against the clear congressional intent of today.¹⁸⁷

The Rule 10b-5 judicial oak has grown strong from the legislative acorn planted in 1934. Nevertheless, even a judicial oak, if it springs from a weak foundation, must ultimately bow to the powerful, albeit ever-changing, winds of Congress.

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186. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2783 (1991) (opposing weight of authority by implying restrictive limitations period on securities fraud actions, and causing uproar which culminated in congressional limitation on decision). For a further discussion of the *Lampf* decision, see *supra* note 4. See also Gregory P. Crinion, *Limitations Limbo: More Confusion for Rule 10b-5 Litigants*, 30 Hous. Law. 22 (1993) (explaining controversy and confusion surrounding *Lampf* decision and congressional response).

187. See Hassett, *supra* note 153, at 152, 154 (arguing that this confrontation may take place after *Central Bank* decision); see also Securities Private Enforcement Reform Act, H.R. 417, 103d Cong., 1st Sess. (1993) (calling for aiding and abetting liability in private securities litigation, and, although not yet enacted, directly conflicting with *Central Bank*).

