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### Implied Contribution Under the Federal Securities Laws: A Reassessment

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# IMPLIED CONTRIBUTION UNDER THE FEDERAL SECURITIES LAWS: A REASSESSMENT

MARK J. LOEWENSTEIN\*

I.	Introduction .....	543
II.	Implied Contribution Under the Federal Securities Laws .	548
	A. A Synopsis .....	548
	B. The First Rationale — Analogy to Express Liability Provisions .....	550
	1. The Express Liability Provisions With a Right to Contribution .....	552
	2. The Controlling Person Provisions .....	554
	C. The Second Rationale—The Trend in the Law .....	555
	D. The Third Rationale—Deterrence .....	556
	E. The Fourth Rationale—Fairness .....	558
III.	Supreme Court Cases on Contribution .....	559
	A. Contribution at Common Law .....	559
	B. <i>Northwest Airlines</i> and <i>Texas Industries</i> : Recent Cases on Implied Contribution .....	561
IV.	Applying Analysis to Rule 10b-5 .....	563
	A. Legislative Policy .....	564
	B. Federal Common Law .....	567
	C. The Case for Denying Contribution Under Rule 10b-5 .....	572
V.	Implied Contribution Under Other Sections of the Securities Laws .....	574
	A. The Other Implied Liability Provisions .....	574
	B. The Express Liability Provisions .....	576
VI.	Conclusion .....	577

## I. INTRODUCTION

The Securities Act of 1933 (Securities Act)<sup>1</sup> and the Securities Ex-

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\* Associate Professor of Law, University of Colorado School of Law. The author thanks his colleagues, Professors Clifford Calhoun, Homer Clark, and Ted Fiflis for their helpful comments and suggestions in the preparation of this article.

1. 15 U.S.C. §§77a-77aa (1976).

change Act of 1934 (Exchange Act)<sup>2</sup> contain eight different sections that afford express causes of action to private parties.<sup>3</sup> The federal courts have also found private rights of action for the benefit of persons injured by violations of several other sections, principally sections 10(b)<sup>4</sup> and 14(a)<sup>5</sup> and 14(e)<sup>6</sup> of the Exchange Act. In the private action sections in which it is likely that Congress envisioned multiple defendants, Congress, with two exceptions, provided for an express right of contribution.<sup>7</sup> Consequently, the federal courts have almost uniformly found a right to contribution when the underlying cause of action was itself an implied private action.<sup>8</sup> Moreover, as liability under sections

2. 15 U.S.C. §§78a-78kk (1976).

3. The provisions of the Securities Act expressly authorizing private causes of action are: section 11(a), 15 U.S.C. § 77k(a) (1976); section 12(1), 15 U.S.C. § 771(1) (1976); section 12(2), 15 U.S.C. § 771(2) (1976); and section 15, 15 U.S.C. § 77o (1976). The provisions of the Exchange Act expressly authorizing such actions are: section 9(e), 15 U.S.C. § 78i(e) (1976); section 16(b), 15 U.S.C. § 78p(b) (1976); section 18(a), 15 U.S.C. § 78r(a) (1976); and section 20(a), 15 U.S.C. § 78t(a) (1976).

4. 15 U.S.C. § 78j(b) (1976) (prohibiting the use of manipulative or deceptive devices or contrivances in connection with the purchase or sale of any security). See *Superintendent of Ins. v. Bankers Life and Cas. Co.*, 404 U.S. 6 (1971).

5. 15 U.S.C. § 78n(a) (1976) (prohibiting the solicitation of proxies by means of false or misleading statements or omissions). See *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

6. 15 U.S.C. § 78n(e) (1976) (prohibiting material misrepresentations or omissions and fraud, deception and manipulation in connection with a tender offer). See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 55 (1977) (Stevens, J., dissenting); *O'Connor Assoc. v. Dean Witter Reynolds, Inc.*, 529 F.Supp. 1179 (S.D.N.Y. 1981).

7. In section 11(f) of the Securities Act and in sections 9(e) and 18(b) of the Exchange Act, all of which contemplate multiple defendants, Congress included the right to contribution. In section 15 of the Securities Act and section 20(a) of the Exchange Act, which also contemplated multiple defendants, Congress omitted the right to contribution. See notes 58-64 *infra* and accompanying text.

8. *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982) (rule 10b-5); *Huddleston v. Herman & MacLean*, 640 F.2d 534, *modified*, 650 F.2d 815 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1766 (1982) (rule 10b-5); *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979) (rule 10b-5); *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) (rule 10b-5); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975) (Securities Act § 17(a)); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976) (Exchange Act § 14(a)); *Globus, Inc. v. Law Research Serv. (Globus II)*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970) (rule 10b-5). *But see* *State Mut. Life Assurance Co. v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202 (S.D.N.Y. 1969). *Peat, Marwick* was subsequently rejected in *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976); and *Shea v. Ungar*, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,558 (S.D.N.Y. 1965). *Shea* denied contribution but has not been cited in any subsequent decision. The District Court for the Southern District of New York recently certified to the Second Circuit, on an interlocutory appeal, the question of whether in light of the Supreme Court's decisions in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) and *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) a private right of action could still be found under the federal securities law.

12(1)<sup>9</sup> and 12(2)<sup>10</sup> of the Securities Act has been expanded by the courts to include multiple defendants, the federal courts have also found an implied right to contribution in actions based on those sections.<sup>11</sup>

A federal district court decision in 1968, *deHaas v. Empire Petroleum Co.*,<sup>12</sup> was the first decision by a federal court allowing a right to contribution under the federal securities laws.<sup>13</sup> The *deHaas* case arose under section 10(b) of the Exchange Act and rule 10b-5;<sup>14</sup> other courts soon followed *deHaas*, allowing a right to contribution under other sections of both the Securities Act and the Exchange Act.<sup>15</sup> During this period, there was little critical comment, either from the courts or legal scholars, on the propriety of allowing a right to contribution under these various provisions,<sup>16</sup> even though the *deHaas* decision departed from the only other case that had passed on the availability of contribution under section 10(b) and rule 10b-5.<sup>17</sup> While the courts have recognized a right to contribution under several sections of both Acts, certain sections of the Acts, however, more readily lend themselves to

Noonan v. Granville-Smith 535 F.Supp. 333 (S.D.N.Y. 1982). The district court had earlier concluded that it could. Noonan v. Granville-Smith, 532 F.Supp. 1007 (S.D.N.Y. 1982).

9. 15 U.S.C. § 77e(1) (1976).

10. 15 U.S.C. § 77e(2) (1976).

11. *See, e.g.*, Wassel v. Eglowsky, 399 F. Supp. 1330, 1362, 1365-71 (D. Md. 1975) (permitting contribution under section 12(1)), *aff'd*, 542 F.2d 1235, 1236 (4th Cir. 1976); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 958 (S.D.N.Y. 1975) (permitting contribution under section 12(2)).

12. 286 F. Supp. 809 (D. Colo. 1968).

13. *Id.* at 815-16.

14. 17 C.F.R. § 240.10b-5 (1980). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or 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 the light of the circumstances under which they were made, not misleading, or

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

15. *See* cases cited in notes 8 and 11 *supra*.

16. Several subsequent articles have discussed contribution under the federal securities laws. *See, e.g.*, Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 IOWA L. REV. 533 (1981); Fischer, *Contribution in 10b-5 Actions*, 33 BUS. LAW. 1821 (1978); Ruder, *Multiple Defendants In Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification and Contribution*, 120 U. PA. L. REV. 597, 647-51 (1972). Note, *Apportioning Contribution Shares Under the Federal Securities Acts: A Suggested Approach for an Unsettled Area*, 50 FORDHAM L. REV. 450 (1981); Note, *Contribution Under the Federal Securities Laws*, 1975 WASH. U.L.Q. 1256 (1975). These articles, however, explore various aspects of the right to contribution, generally accepting the reasoning of the courts establishing the right.

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

the implication of contribution than other sections.<sup>18</sup> Although thirteen years have passed since *deHaas* was decided, several recent developments make a contemporary analysis of that decision and its progeny timely.

In two recent decisions the United States Supreme Court has denied an implied right to contribution. In *Northwest Airlines, Inc. v. Transport Workers Union*,<sup>19</sup> the Court refused to find a right to contribution in favor of an employee against a union where the employer's liability was based on the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. In a case decided one month later, *Texas Industries v. Radcliff Materials, Inc.*,<sup>20</sup> the Court denied contribution among antitrust defendants in a case arising under the federal antitrust laws. In each of these cases, the Court reviewed statutes that provided express causes of action for their violation, but no express right to contribution. These decisions should apply to the implication of a right to contribution under section 15 of the Securities Act<sup>21</sup> and section 20(a) of the Exchange Act<sup>22</sup> because those sections create express causes of action, yet omit a right to contribution. The Court's recent decisions also may be relevant to the implication of a right to contribution under rule 10b-5 and the other implied liability provisions because the Court dealt explicitly with the legal process of inferring a right to contribution.

A second development is the Supreme Court's recent tendency to limit implied causes of action. As the Court recognized in *Northwest Airlines* and *Texas Industries*,<sup>23</sup> inferring a right to contribution is tantamount to recognizing a new implied cause of action and, therefore, is

18. See text accompanying notes 155-72 *infra*.

19. 451 U.S. 77 (1981).

20. 451 U.S. 630 (1981).

21. 15 U.S.C. § 77o (1976). This section provides:

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

22. 15 U.S.C. § 78t(a) (1976). This section provides:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

23. See *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634-46 (1981); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 91-99 (1981).

beyond the power of the federal courts except in very limited circumstances.<sup>24</sup> The cases that developed this line of reasoning, starting with *Cort v. Ash*<sup>25</sup> in 1974, were decided after most of the principal decisions finding an implied right to contribution under various sections of federal securities laws. Moreover, an analysis of Supreme Court cases that refuse to infer a cause of action leads to the conclusion that the Court today would find no private cause of action under rule 10b-5.<sup>26</sup> It is appropriate, therefore, to examine what effect, if any, *Cort v. Ash* and its progeny have on the securities law contribution cases.

A final development prompting an examination of the federal courts' implication of a right to contribution under the securities laws is the restrictive manner in which the Court has interpreted the liability sections of the securities laws. In a series of decisions starting with *Blue Chip Stamps v. Manor Drug Stores*,<sup>27</sup> the Court admonished the lower federal courts to pay greater attention to legislative intent, as reflected in the statutory language and legislative history, when interpreting the securities laws. In *Santa Fe Industries v. Green*,<sup>28</sup> for instance, the Court refused to read section 10(b) of the Exchange Act as creating a federal cause of action for breach of fiduciary duty. These restrictive rules of interpretation may affect the power of the federal courts to permit contribution under the federal securities laws.

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24. See *Texas Indus.*, 451 U.S. at 645-46; *Northwest Airlines*, 451 U.S. at 94.

25. 422 U.S. 66 (1975). See also notes 100-105 *infra* and accompanying text. Numerous articles have analyzed these cases. See generally Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981), and sources referred to therein.

26. Under the Court's recent cases, finding an implied a private right of action is a matter of statutory construction, and the sole issue is whether Congress, in enacting the statute, intended to authorize the private remedy being sought. See, e.g., *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (refusing to find a private right of action under section 17(a) of the Exchange Act). The implied private remedy under rule 10b-5 has never been justified on the basis of congressional intent. The Supreme Court acquiesced in the lower federal courts' decisions finding an implied private remedy because the lower courts had developed an extensive jurisprudence under rule 10b-5 for almost three decades before the Court announced its decisions limiting implied private actions under federal statutes. *Id.* at 577 n.19. See also *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). See generally Frankel, *supra* note 25, at 562.

27. 421 U.S. 723 (1975). Subsequent decisions applying this analysis include: *Aaron v. SEC*, 446 U.S. 680, 695-700 (1980); *Chiarella v. United States*, 445 U.S. 222, 226 (1980); *Sante Fe Indus. v. Green*, 430 U.S. 462, 472 (1977); and *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201-14 (1976).

28. 430 U.S. 462 (1977).

## II. IMPLIED CONTRIBUTION UNDER THE FEDERAL SECURITIES LAWS

### A. *A Synopsis.*

Predictably, in view of the amount of litigation in the 1960s and 1970s based on rule 10b-5 and other provisions of the securities laws, and the increased potential for higher damage awards, defendants have sought to mitigate their losses either by filing cross-claims against one another for contribution or by adding third-party defendants to the litigation as a source for contribution in any damage award. In *Shea v. Ungar*,<sup>29</sup> the first reported case to rule on the availability of contribution under section 10(b) and rule 10b-5, the defendant, who allegedly had violated section 17(a) of the Securities Act and section 10(b) and rule 10b-5 of the Exchange Act, filed a third-party complaint for contribution. The court dismissed the third-party complaint apparently because it found no right to contribution under section 17(a) of the Securities Act, under section 10(b), or rule 10b-5 of the Exchange Act, or under the substantive law of New York.<sup>30</sup>

The District Court for the District of Colorado in its 1968 decision, *deHaas v. Empire Petroleum Co.*,<sup>31</sup> did not follow or cite *Shea*. In *deHaas* the plaintiffs alleged that the defendants obtained their consent to a corporate merger by the use of false and misleading proxy materials in violation of rule 10b-5. The defendants filed a third-party complaint for indemnification and contribution against their attorney, claiming that it was his duty to make the proper disclosures in the proxy materials. The court refused to dismiss the third-party complaint for contribution, reasoning that because the express liability provisions of the Securities Act and the Exchange Act provide for contribution, contribution should be permitted when the underlying cause of action is an implied cause of action, as it is under section 10(b) of the Ex-

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29. [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,558 (S.D.N.Y. 1965). It is possible that the defendant argued that contribution should be allowed. The court did, however, look at the availability of contribution under the substantive law of New York. Presumably, if the court had found that "active joint tortfeasors" were entitled to contribution under New York law, it would have found an implied a right under federal law.

30. *Id.* The court analyzed the issue in terms of an improper joinder. The court reasoned that under Rule 14 of the Federal Rules of Civil Procedure a defendant may, as a third-party plaintiff, bring in as a third-party defendant a person who "is or may be liable" to the third-party plaintiff for all or part of plaintiff's claim against him. Indemnity would have been available in *Shea* only if the third-party plaintiff had a right to contribution against the third-party defendant. The court did not say that there was no right to contribution; rather it said that neither the Securities Act nor the Exchange Act "creates a right to joinder under Rule 14 applicable to this case . . ." *Id.* The court did not explain why the presence or absence of a right to contribution under New York law should influence the outcome of the case. See note 29 *supra*.

31. 286 F. Supp. 809 (D. Colo. 1968).



change Act.<sup>32</sup>

Two years after the decision in *deHaas*, the District Court for the Southern District of New York, in a decision by Judge Frankel, ordered contribution in a case involving sections 12(2) and 17(a) of the Securities Act and section 10(b) of the Exchange Act.<sup>33</sup> In *Globus, Inc. v. Law Research Service (Globus II)*<sup>34</sup> the court ordered two defendants to reimburse a third defendant for a pro rata portion of the judgment paid by that third defendant to the plaintiff. Judge Frankel reasoned that the trend of the law was toward the allowance of contribution among joint tortfeasors, and that denying contribution would dilute the deterrent impact of the securities laws.<sup>35</sup> The court did not explain how a denial of contribution would dilute deterrence, except to say that denying contribution would permit the two nonpaying defendants in this case to "effectively nullify" their liability for compensatory damages.<sup>36</sup> For this reason, the court pointed out, the decision in *Globus I*<sup>37</sup> denied one defendant the right to enforce a claim for contractual indemnity against another defendant.<sup>38</sup> The court in *Globus I* reasoned that if a party could enforce a contractual right to indemnification, it could avoid liability for its wrongful conduct, and that party's incentive to comply with the securities laws would be reduced.<sup>39</sup>

Thus, the courts in *deHaas* and *Globus II* gave three reasons for allowing contribution: the analogy to the express liability provisions of the securities acts, the trend of the law, and the deterrent effect. A fourth rationale, relied upon by several courts, is fairness.<sup>40</sup> The courts have reasoned that when one or more joint wrongdoers pay more than their share of a common burden, the other wrongdoers are unjustly

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32. *Id.* at 816. The court also cited Professor Loss' treatise as authority for its decision. *See id.*, citing III L. LOSS, SECURITIES REGULATION 1739 n.178 (2d ed. 1961).

33. *Globus, Inc. v. Law Research Serv. (Globus II)*, 318 F. Supp. 955 (S.D.N.Y. 1970).

34. *Id.*

35. *Id.* at 957-58.

36. *Id.* at 958.

37. *Globus, Inc. v. Law Research Serv. (Globus I)*, 287 F. Supp. 188 (S.D.N.Y. 1968), *modified in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

38. Indemnity shifts the entire loss from one tortfeasor who has been compelled to pay it to another who should bear it instead. By comparison, contribution distributes the loss among the tortfeasors by requiring each to pay his proportionate share. *See* W. PROSSER, LAW OF TORTS § 50, at 310 (4th ed. 1971).

39. *See, e.g., Globus I*, 418 F.2d at 1289.

40. *See, e.g., Huddleston v. Herman & MacLean*, 640 F.2d 534, 559 (5th Cir.), *modified*, 615 F.2d 815 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1766 (1982) ("We conclude that a rule permitting contribution provides an equitable result that sufficiently satisfies the objective of deterrence under the securities laws."); *McLean v. Alexander*, 449 F.Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) ("[F]undamental fairness demands a sharing by wrongdoers in setting the wrong right.")

enriched. Such a result presumably lacks justice and, therefore, cannot be tolerated by the courts. While the fairness rationale is in part responsible for the trend in the law favoring contribution, it is convenient, for purposes of discussion, to treat the two rationales independently.

The court in *Globus II* did not consider whether the resolution of the contribution issue would differ depending on which section of the securities laws was the basis for the plaintiff's recovery. The complaint in *Globus II* named several different sections; none provided for contribution.<sup>41</sup> The court proceeded, however, as though it made no difference which sections were involved. Because rule 10b-5 has developed into the principal liability section under the securities laws, this article will proceed first with an examination of the four rationales for allowing contribution as they apply to private actions brought under that rule. Closer examination of these rationales will show that they are not entirely persuasive, in part because of a change in the way the courts have interpreted rule 10b-5, and in part because the fairness and deterrence rationales may not require that contribution be allowed.

#### B. *The First Rationale — Analogy to Express Liability Provisions.*

Under the Exchange Act and the Securities Act, which the courts construe *in pari materia*,<sup>42</sup> eight provisions expressly grant a private cause of action for damages.<sup>43</sup> Only three of these provisions contain a right to contribution.<sup>44</sup> Sections 12(1) and 12(2) of the Securities Act, which grant express rights of action in favor of purchasers of securities against any person who sold the security in violation of the registration provisions<sup>45</sup> and against any person who sold a security by means of a false or misleading prospectus or oral communication, contain no right to contribution.<sup>46</sup> Section 15 of the Securities Act and section 20(a) of the Exchange Act, which, in similar language, impose joint and several liability on "controlling persons" for any civil liability assessed against the persons controlled by them, contain no right to contribution.<sup>47</sup> Fi-

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41. See 318 F. Supp. at 956-57.

42. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976). See generally 5 A. JACOBS, THE IMPACT OF RULE 10b-5 § 7, 1-153 & n.21 (1980) and cases cited therein.

43. See note 3 *supra*.

44. The three provisions that include a right to contribution are section 11(f) of the Securities Act and sections 9(e) and 18(b) of the Exchange Act. See notes 54-57 *infra* and accompanying text.

45. 15 U.S.C. § 771 (1) (1976).

46. 15 U.S.C. § 771 (2) (1976).

47. These sections are set out in full in notes 21 and 22 *supra*.

nally, section 16(b) of the Exchange Act,<sup>48</sup> which grants a cause of action to the issuer of a security against its own officers, directors, and ten percent owners for any short-swing profits these individuals realize by trading the issuer's securities, also fails to provide for contribution. The absence of a contribution provision is understandable in sections 12(1) and 12(2); Congress probably assumed that only one person could be liable for a violation of those provisions since the language of those sections imposes liability on any person who sells a security in violation of the sections "to the person purchasing such security from *him*."<sup>49</sup> Similarly, the defendant in an action brought under section 16(b) of the Exchange Act stands liable to the issuer only for "any profit realized by *him* from any purchase and sale." It seems clear that Congress thought a right to contribution unnecessary in either of those sections.<sup>50</sup>

By comparison, the controlling person provisions clearly contemplated liability for at least two persons whenever a claim was made under those provisions because controlling persons are "jointly and severally" liable with and to the same extent as the controlled person. Despite the inclusion of joint and several liability in the controlling person sections, these sections do not mention contribution. The omission is not easily explained.<sup>51</sup> Because Congress did not uniformly provide the right to contribution in all situations where multiple defendants are possible, the analogy rationale must be closely examined. In particular, it is important to determine if liability under section 10(b) is sufficiently similar to liability under the express liability provisions which allow contribution to infer that Congress would have included a right to contribution in section 10(b) had it made section 10(b) an express liability provision; or, alternatively, whether section 10(b) bears enough similarity to the controlling person provisions to justify judicial denial of a right to contribution under section 10(b).

The Supreme Court has held that *scienter* is required to establish

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48. 15 U.S.C. § 78p(b) (1976).

49. 15 U.S.C. § 77i (1976) (emphasis added). The courts have found multiple parties liable under section 12(2) of the Securities Act either for aiding and abetting, *see, e.g., In re Caesar's Palace SEC Litigation*, 360 F. Supp. 366, 380 (S.D.N.Y. 1973); or on a participation theory, *see, e.g., Lawler v. Gilliam*, 569 F.2d 1283, 1287-88 (4th Cir. 1978). *See also Croy v. Campbell*, 624 F.2d 709, 714 (5th Cir. 1980).

50. *See L. Loss, supra* note 32, at 1739 n.178.

51. *See Douglas & Bates, The Federal Securities Act of 1933*, 43 YALE L. J. 171 (1933). The authors conclude that defendants liable under § 15 of the Securities Act are not entitled to contribution under § 11(f). *Id.* at 179. The omission of a right to contribution in the controlling person provisions may be explained by other forms of relief that exist for a controlled or controlling person who is required to pay the entire judgment.

liability under section 10(b).<sup>52</sup> That is, the defendant must have acted with an intent to defraud. Because common law courts have traditionally been unwilling to provide a right to contribution when the defendant seeking contribution committed an intentional tort or acted recklessly,<sup>53</sup> the federal courts should be reluctant to find a right to contribution under rule 10b-5 unless allowing contribution would advance the purposes of the Exchange Act.

1. *The Express Liability Provisions With a Right to Contribution.* The express liability provisions of the securities laws that include a right to contribution are section 11(a) of the Securities Act, which grants a cause of action to persons who purchase securities covered by a false or misleading registration statement; and sections 9(e) and 18(a) of the Exchange Act, which, respectively, provide causes of action on behalf of persons damaged by a manipulation of securities prices and by misleading statements in documents filed with the SEC.

The contribution provisions contained in each of these sections are similar to one another. For instance, the right to contribution set forth in section 11(f), which applies to actions based on section 11(a), provides:

All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.<sup>54</sup>

The contribution provisions applicable to sections 9(e) and 18(a) do not include the clause beginning with the word "unless." In other respects

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52. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1975). The Court defined "scienter" as "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12. The Court expressly left undecided the question of whether reckless behavior is sufficient to impose civil liability under section 10(b) and rule 10b-5. *Id.* The courts of appeals that have ruled on this question have decided that recklessness satisfies the *scienter* requirement of *Hochfelder*. See, e.g., *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982); *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 979 (5th Cir. 1981); *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978); *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978). Given its narrowest reading, *Hochfelder* holds that a defendant who is merely negligent does not have the mental state required to violate section 10(b) and rule 10b-5. This article uses *scienter* in that sense: a mental state embracing something more than simple negligence. See generally *Bucklo, Scienter and Rule 10b-5*, 67 Nw. U. L. REV. 562 (1972).

53. See W. PROSSER, *supra* note 38, § 50, at 308 n.67. See also, Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326, 330 n.26 (1965).

54. 15 U.S.C. § 77k(f) (1976).

they are substantially the same as section 11(f).<sup>55</sup>

An examination of section 11(f) discloses that the section does not necessarily preclude defendants guilty of fraudulent conduct from obtaining contribution. The "unless" clause of that section precludes contribution in favor of a party guilty of fraud from a party innocent of fraud. Presumably, a party guilty of a fraudulent misrepresentation could obtain contribution from another party who was also guilty of a fraudulent misrepresentation. The contribution provisions in sections 9(e) and 18(a) of the Exchange Act do not include any limitation on who may recover contribution thereunder. Apparently, Congress did not intend to limit the contribution right of a defendant whose violation of those sections also included an element of *scienter*. Moreover, under sections 9(e) and 18(a) of the Exchange Act, a plaintiff must prove that the defendant was guilty of something more than ordinary negligence,<sup>56</sup> and under all three sections fraudulent conduct may be a basis for suit. Therefore, contribution ought not to be denied under rule 10b-5 actions merely because it contemplates a finding of *scienter*, unless an implied limitation on contribution among parties who acted with *scienter* is read into the contribution clauses of the express liability provisions. Such a limitation would be inconsistent, however, with the language of section 11(f) of the Securities Act, which implies that contribution is available among parties guilty of fraud. Moreover, the limitation would eliminate contribution in many actions brought under sections 9(e) and 18(a), because the proof required to establish a violation of those sections borders on proof of fraud.<sup>57</sup> Finally, there is no

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55. The applicable portion of section 9(e) provides: "Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. § 78i(e) (1976).

The contribution section applicable to section 18(a) provides: "Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U.S.C. 78r(b)(1976).

56. Section 9(e) creates potential civil liability for any person who "willfully participates" in the manipulation of securities on a national securities exchange. 15 U.S.C. § 78i(e) (1976). Section 18(a) creates potential civil liability for filing misleading statements with the SEC, but provides a defendant with the defense that "he acted in good faith and had no knowledge that such statement was false or misleading." 15 U.S.C. § 78r(a) (1976). The Court noted in *Hochfelder* that each of the Exchange Act provisions other than section 16(b) "contains a state-of-mind condition requiring something more than negligence." 425 U.S. at 209 n.28. See also, L. Loss, *supra* note 32, at 1748, where the author, commenting on section 9(e), notes that while section 9(e) does not require proof of *scienter*, "it contains a causation requirement which is probably stricter than the burden the plaintiff would face in a common law deceit action based on the defendant's manipulation." Loss also refers to plaintiff's burden of proof under section 18(a) as "a first cousin to *scienter*." *Id.* at 1752.

57. See authorities cited in note 56 *supra*.

basis in the language of the various sections or in the legislative history for limiting the right to contribution only to those not guilty of fraud. Not surprisingly, no reported decision has so limited the express contribution provisions.

2. *The Controlling Person Provisions.* The Securities Act and the Exchange Act each include provisions imposing civil liability on persons who control other persons found liable under other sections of each act,<sup>58</sup> and each act includes a defense for the controlling person. Under section 15 of the Securities Act, the controlling person avoids liability if he "had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist."<sup>59</sup> To avoid liability under section 20(a) of the Exchange Act, the controlling person must demonstrate that he "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."<sup>60</sup> The exculpatory language in the controlling person provisions is similar to the exculpatory language of section 18(a) of the Exchange Act, which relieves a person from liability for false or misleading statements in documents filed with the SEC if that person proves "that he acted in good faith and had no knowledge that such statement was false or misleading."<sup>61</sup> Thus, if the available defenses are considered, the controlling person provisions, like the other express liability provisions of the securities laws, impose a burden of proof on plaintiffs that approaches proof of scienter and exceeds negligence as the required state of mind.<sup>62</sup> Because each of the express liability provisions requires that the defendant be something more than negligent to be liable, and because some of those provisions include a right to contribution while others do not, it is unclear whether a right to contribution in section 10(b) should be inferred. Thus, the analogy rationale is not a sound basis for per-

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58. See 15 U.S.C. §§ 77o, 78t(a) (1976). See notes 21 and 22 *supra* for the texts of these provisions.

59. 15 U.S.C. § 77o (1976).

60. 15 U.S.C. § 78t (1976).

61. 15 U.S.C. § 78r(a) (1976).

62. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 209 n.28 (1976). See also, *G. A. Thompson & Co. v. Partridge*, 636 F.2d 945 (5th Cir. 1981); *Carpenter v. Harris, Upham & Co.*, 594 F.2d 388, 394 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979) ("The controlling persons provisions contain a state-of-mind condition that requires a showing of something more than negligence to establish liability."); *Haynes v. Anderson & Strudwick, Inc.*, 508 F. Supp. 1303, 1315 (E.D. Va. 1981) (noting that the difference between section 10(b) and section 20(a) "is the placement of the burden of proof as to the defendant's state of mind.").

mitting contribution in rule 10b-5 cases.<sup>63</sup>

C. *The Second Rationale — The Trend in the Law.*

The court in *Globus II* stated that “the general drift of the law today is toward the allowance of contribution among joint tortfeasors” and that this drift constitutes a departure from “the rugged flintiness of traditional common law.”<sup>64</sup> The court cited ten decisions—three from the federal courts and seven from the state courts—in support of its statement. The court failed to note, however, that each of the decisions applying state law involved contribution among tortfeasors whose joint liability was based on negligence; no trend allowing contribution among tortfeasors whose conduct was intentional, reckless, or fraudulent was identified.

The American common law of contribution finds its origins in the English case *Merryweather v. Nixan*,<sup>65</sup> in which Lord Kenyon held that there was no right to contribution when both tortfeasors had committed an intentional tort. Early American courts applying this decision also denied contribution among tortfeasors guilty only of negligence.<sup>66</sup> Early in this century, however, some state courts began to recognize a right to contribution among negligent tortfeasors.<sup>67</sup> At about that time, the American Law Institute proposed a Uniform Contribution Among Tortfeasors Act and several states adopted it or other legislation modifying the common law to permit contribution among joint tortfeasors.<sup>68</sup> Although the Uniform Act, which provided for a right to contribution among joint tortfeasors, did not differentiate between negligent and non-negligent torts, the statutes adopted by some states did deny contribution to intentional tortfeasors<sup>69</sup> and few decisions allowed contribution among intentional tortfeasors.<sup>70</sup> Furthermore, the revised

63. In *McClure v. Borne Chem. Co.*, 292 F.2d 824, 835-36 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961), the court concluded that the securities laws “do not manifest sufficiently clear or uniform policy favoring security for expenses” to justify imposing such a limitation from section 10(b). The court noted that although sections 11 and 12 of the Securities Act and 9(e) and 18(a) of the Exchange Act each contain such a requirement, sections 16(b) and 29(b) of the Exchange Act do not.

64. 318 F.Supp. at 957.

65. 101 Eng. Rep. 1337 (1799). *See generally* Reath, *Contribution Between Persons Jointly Charged with Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

66. *See* W. PROSSER, *supra* note 38, § 50 at 306.

67. *Id.* at 307.

68. *Id.* By 1959 roughly one-half of American jurisdictions permitted some form of contribution among joint tortfeasors, either by judicial decision or by statute. *See* Comment, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L. J. 964, 981-82 (1959).

69. *See, e.g.*, KY. REV. STAT. § 412.030 (1970); VA. CODE § 8.01-34 (1977 Repl. Vol.).

70. *See* W. PROSSER, *supra* note 38, § 50 at 308. *See also* Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326, 329-30 (1965).

Uniform Contribution Among Tortfeasors Act, which was approved in 1955 and was in existence at the time the district court decided *Globus II*, retained contribution for negligent tortfeasors but included a section denying intentional tortfeasors the right to contribution.<sup>71</sup> Thus, while there has certainly been a trend in this century favoring contribution, this trend has been generally limited to negligent torts. Parties guilty of more serious culpability, such as reckless, intentional, or fraudulent conduct, generally have not been entitled to contribution.<sup>72</sup>

Although *Globus II* was decided in the pre-*Hochfelder* era, when several federal circuits did not require proof of *scienter* in an action based on rule 10b-5,<sup>73</sup> the jury in *Globus I* found the defendants who would later litigate the contribution question guilty of fraudulent conduct sufficiently egregious to justify an award of punitive damages.<sup>74</sup> Moreover, defendants in rule 10b-5 actions must now be shown to have acted with *scienter*, which apparently means acting with an intent to defraud or, in some circuits, with recklessness.<sup>75</sup> In either case, such defendants ought not be treated as tortfeasors guilty of simple negligence; therefore, the trend of the state courts to allow contribution in negligence cases is not now a valid rationale even if it was in 1970 when *Globus II* was decided.

#### D. *The Third Rationale — Deterrence.*

In justifying contribution, the court in *Globus II* relied partially on Judge Mansfield's decision in *Globus I*, which denied contractual indemnification against an issuer of securities in favor of an underwriter.<sup>76</sup> Judge Mansfield reasoned that the purpose of the federal securities laws is to ensure that investors will benefit from a thorough

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71. UNIFORM CONTRIBUTION AMONG TORTFEASORS (1955 Revised Act) § 1(c) provides: "There is no right to contribution in favor of any tortfeasor who has intentionally. . . caused or contributed to the injury. . . ." The Uniform Act, or variations thereof, has been adopted in 19 states. 12 UNIFORM LAWS ANNOTATED 44 (Supp. 1981). See also RESTATEMENT (SECOND) OF TORTS § 886A(3) (1977), which also denies a right to contribution in favor of intentional tortfeasors and tortfeasors guilty of reckless conduct. Similarly, the Commissioner's comment to the Uniform Comparative Fault Act points out that "[t]he Act does not include intentional torts." 12 UNIFORM LAWS ANNOTATED, Comment to § 1 (1980 Supp.).

72. Parties guilty of reckless, intentional, or fraudulent conduct would be acting with *scienter* as defined in this article. See note 52 *supra*.

73. See, e.g., SEC v. Texas Gulf Sulfur, 401 F.2d 833, 855 (2d Cir. 1968) (*en banc*), cert. denied, 394 U.S. 976 (1969); Ellis v. Carter, 291 F.2d 270, 274 (9th Cir. 1961). See generally Bucklo, *supra* note 52.

74. 287 F. Supp. at 194.

75. See note 52 *supra*.

76. 287 F. Supp. at 199.



investigation by the underwriters of the facts set forth in a prospectus or offering circular. Accordingly:

[i]f an underwriter were to be permitted to escape liability for its own misconduct by obtaining indemnity from the issuers, it would have less of an incentive to conduct a thorough investigation and to be truthful in the prospectus distributed under its name, than it would be if the indemnity was enforceable under such circumstances.<sup>77</sup>

Judge Frankel in *Globus II* correctly viewed indemnity as a means for avoiding liability, but went on to hold that denying contribution would suffer from the same vice, because parties who escaped the obligation to make a payment in contribution would “nullify their ‘liability for compensatory damages’ . . . .”<sup>78</sup> The court, however, failed to discuss the large difference between permitting contractual indemnification and denying a right to contribution: a party with an enforceable contractual right to indemnity may well be lax in fulfilling his obligations under the securities laws because he knows in advance that he can always deflect any loss to his indemnitor, but a party who knows he may have to bear all of the damages arising from a securities law violation because contribution will not be available may well have an incentive to exercise extreme diligence. One recent economic analysis by Professors Easterbrook, Landes, and Posner concludes that a no-contribution rule and a contribution rule yield the same deterrent effect on antitrust conspirators.<sup>79</sup> Further, if a conspirator is “risk averse,” that is, if he would prefer a greater chance of a small loss to a smaller chance of a greater loss, a rule of no-contribution will provide greater deterrence than a rule of contribution.<sup>80</sup> This analysis should apply to potential securities laws violators as well.

While this analysis may not be definitive, it does suggest a re-examination of Judge Frankel’s decision in order to determine how he reached his conclusion on the deterrence issue. He did so, it appears, solely on the reasoning that contribution is merely indemnity “on the other foot.”<sup>81</sup> A sound conclusion on the deterrent effect of allowing or

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77. *Id.*

78. 318 F. Supp. at 958. (citing *Globus, Inc. v. Law Research Serv.*, 418 F.2d 1276, 1286 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970)).

79. Easterbrook, Landes, & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. LAW & ECON. 331, 349 (1980). *But see* Littman & Van Buskirk, *The “Dogmas” of Antitrust Actions: A New Perspective*, 24 ANTITRUST BULL. 687 (1979).

80. Easterbrook, note 79 *supra*, at 351. *See also* *El Camino Glass v. Sunglo Glass Co.*, [1977-1] Trade Cas. (CCH) ¶ 61,533, at 71,112 (N.D. Cal. April 28, 1976); Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 452-55 (1981). *But see* *Huddleston v. Herman & MacLean*, 640 F.2d 534, 558-59 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1766 (1982).

81. 318 F. Supp. at 958.

denying contribution requires an extensive analysis that would include an examination of the economic consequences of the decision. Judge Frankel and subsequent judges have failed to do this. This failure is understandable, because the nature of the issue requires an examination that courts are not well equipped to undertake. Nevertheless, no court has cited any empirical data to support the conclusion that a rule of contribution enhances, or for that matter, impedes deterrence. Like the analogy rationale, the deterrence rationale supports contradictory conclusions concerning the propriety of contribution.

E. *The Fourth Rationale — Fairness.*

Arguments of "fairness" are frequently raised in judicial decisions and in the literature as a rationale favoring contribution.<sup>82</sup> Prosser is frequently cited as support:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.<sup>83</sup>

Prosser was, however, expressly concerned with instances in which the defendants were "unintentionally responsible." When the defendant seeking fairness through contribution is himself guilty of more than simple negligence, the fairness question takes on a different hue. Such a tortfeasor either knowingly or recklessly was responsible for his predicament and cannot make the strong case based on fairness available to a merely negligent tortfeasor.<sup>84</sup>

Moreover, it may be unfair to permit a rule 10b-5 defendant to seek contribution. The contribution aspects of a case might substantially complicate an already complicated securities fraud case. The original defendant would have to implead third-party defendants and prove their culpability, thus delaying the plaintiff's case or causing confusion among the members of the jury. If the court decides to adopt a rule of comparative culpability in determining the portion of the judgment each defendant must contribute, further complexity is added and the cost of administering the securities laws increases. It may indeed be

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82. See note 40 *supra*.

83. W. PROSSER, *supra* note 38, § 50 at 307 (citation omitted).

84. In its recent decision in *Texas Industries*, the Supreme Court reiterated the traditional reason for denying contribution among intentional tortfeasors: "traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts, and, in the context of one wrong doer suing a co-conspirator, these standards similarly suggest that parties generally *in pari delicto* should be left where they are found." 451 U.S. at 635.

fairer to let the plaintiff control the litigation and choose the defendants while denying the guilty defendants the right to seek contribution. Additionally, a no-contribution rule would encourage settlement because a settling defendant will have the assurance that his settlement with the plaintiff terminates his involvement in the litigation and precludes non-settling defendants from later bringing suit for contribution.<sup>85</sup>

Because the courts have used dubious rationales to support contribution, and because a question may be raised in any event as to the power or authority of the federal courts to order contribution, a re-determination of the issue is appropriate. A reasonable starting point for such an undertaking is a discussion of the Supreme Court decisions on contribution in contexts other than securities laws violations.

### III. SUPREME COURT CASES ON CONTRIBUTION.

The Supreme Court has taken up the question of contribution in three different settings. The Court's first case on contribution, which pre-dated its decision in *Erie Railroad v. Tompkins*,<sup>86</sup> concerned the availability of contribution in common law tort actions. Some time later, in the course of exercising its appellate jurisdiction over admiralty cases, the Court considered whether the right to contribution should be judicially provided in noncollision tort actions arising in admiralty.<sup>87</sup> Finally, and most recently, the Court considered the appropriateness of finding a right to contribution when the underlying liability is based on an express private cause of action in a federal statute.<sup>88</sup>

#### A. *Contribution at Common Law.*

*Union Stock Yards Co. of Omaha v. Chicago, Burlington & Quincy Railroad*,<sup>89</sup> decided in 1905, is the Supreme Court's only decision on

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85. Cf. *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972). The court in *Altman* refused to approve a partial settlement in a class action brought under rule 10b-5 because the settlement contained a bar against the non-settling defendants seeking contribution from the settling defendant. The court acknowledged, however, that its decision

may be read to cut athwart the policy consideration in favor of settlements of litigations, including class actions. Indeed, from the point of view of the plaintiff and the class which he represents in this case, it is at least theoretically possible that this ruling may work a deprivation of their contemplated partial recovery now of a substantial amount of money.

*Id.* at 625.

86. 304 U.S. 64 (1938).

87. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

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

89. 196 U.S. 217 (1905).

the availability of contribution at common law. The holding of the case is not clear, but it appears that the Court recognized and left undisturbed the common law rule generally denying contribution among joint tortfeasors.<sup>90</sup> Because the *Union Stock Yards* case was prior to the Court's 1938 decision in *Erie Railroad v. Tompkins*,<sup>91</sup> which generally prohibited federal courts from making federal common law, the case appears to be of little precedential value today.<sup>92</sup>

It is possible, however, to apply common law precedents in a rule 10b-5 action if one characterizes the action as a tort. The first case finding a private right of action under rule 10b-5 adopted the tort theory as the basis for its holding.<sup>93</sup> If rule 10b-5 is indeed based in tort, then it is at least arguable that common law remedies should apply, including the common law precedents on contribution.

In recent years, however, the Supreme Court has repeatedly denied the existence of an implied private right of action in a federal statute under any theory other than congressional intent: it has required that the statute in question clearly indicate that Congress intended the federal courts to provide a private remedy.<sup>94</sup> Although the Court has acquiesced, apparently with some reluctance, in the implication of a

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90. The Court framed the issue in the case as whether "the terminal company [inay] recover contribution, or more strictly speaking, indemnity from the railroad company because of the damages which it has been compelled to pay . . .?" 196 U.S. at 223. It is reasonable to conclude that the Court was concerned only with indemnity, because the cases it cited as establishing an exception to the "general rule" denying contribution or indemnity were cases in which indemnity was granted. *Id.* at 224-26. The Court's concern with the indemnity issue, as opposed to the availability of contribution, can probably be attributed to the overwhelming common law precedent that, at the time, denied contribution among joint tortfeasors. See W. PROSSER, *supra* note 38, § 50, at 306. Nevertheless, in *Northwest Airlines and Texas Industries* the Court cited *Union Stock Yards* as a case in which it had denied contribution at common law. See *Texas Indus.*, 451 U.S. at 634; *Northwest Airlines*, 451 U.S. at 86 n.16.

91. 304 U.S. 64 (1938).

92. If the Court should decide that the federal courts have limited common law rulemaking authority when interpreting rule 10b-5, a common law precedent like *Union Stock Yards* may be helpful in resolving the contribution question. See generally note 125 *infra*.

93. See *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946).

94. See notes 25 and 26 *supra* and accompanying text. Justice Rehnquist identified this shift in doctrine by contrasting the majority opinion in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) with the Court's earlier decision in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964):

[T]he approach of the Court, reflected in its analysis of the problem in this case [and other recent decisions] is quite different from the analysis in earlier cases such as *J.I. Case Co. v. Borak*. The question of the existence of a private right of action is basically one of statutory construction. And while state courts of general jurisdiction still enforcing common law as well as statutory law may be less constrained than are federal courts enforcing laws enacted by Congress, the latter must surely look to those laws to determine whether there was an intent to create a private right of action under them.

441 U.S. at 717-18 (Rehnquist, J., concurring) (citations omitted).

private right of action under rule 10b-5,<sup>95</sup> it has not interpreted private actions under rule 10b-5 as common law tort actions independently from the remaining provisions of the securities laws. Instead, the Court has sought to define the contours of rule 10b-5 actions in a manner consistent with those other provisions.<sup>96</sup> It would, therefore, be inappropriate to conclude that because a private right of action under rule 10b-5 is, in its origins, a common law tort action, contribution should be denied.<sup>97</sup>

B. Northwest Airlines and Texas Instruments: *Recent Cases on Implied Contribution.*

The Supreme Court recently addressed the problem of implied contribution in *Northwest Airlines v. Transport Workers Union*<sup>98</sup> and *Texas Industries v. Radcliff Materials, Inc.*<sup>99</sup> The Court began its analysis in these cases by noting that a right to contribution can arise in either of two ways: Congress may create the right, either expressly or by implication, or the federal courts may fashion a federal common law right of contribution. Because the statutes involved in these cases did not expressly create a right of contribution, the Court looked to *Cort v. Ash*<sup>100</sup> and its progeny<sup>101</sup> to determine whether a right to contribution should be inferred.

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95. See *Touche Ross & Co. v. Redington*, 442 U.S. at 577 n.19. Similarly, the Court has not overruled its decision in *J.I. Case Co. v. Borak*, 327 U.S. 426 (1964), which found an implied cause of action under section 14(a) of the Exchange Act on a theory other than congressional intent. See notes 159-64 *infra* and accompanying text.

96. See text accompanying note 137 *infra*. Interpretation of § 10(b) and rule 10b-5 without regard to the statute from which they originated may also raise constitutional questions. Cf. *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 259-68 (3d Cir.) (Sloviter, J., dissenting) (pointing out constitutional problems in finding an implied right to contribution in Title VII of the Civil Rights Act of 1964), *cert. denied*, 101 S. Ct. 331 (1980).

97. The Supreme Court has also addressed the problem of implied contribution in cases arising under the Court's admiralty jurisdiction. In *Cooper Stevedoring Co. v. Fritz Kapke, Inc.*, 417 U.S. 106 (1974), the Supreme Court held that a defendant shipowner may obtain contribution from a third-party defendant stevedore, at least in cases where the plaintiff longshoremen could have sued either tortfeasor. Subsequently, however, the Court expressly denied that *Cooper Stevedoring* established a general federal right to contribution. See *Northwest Airlines*, 451 U.S. at 96-97. Because federal courts have unique power to fashion remedies in admiralty, it is doubtful that any admiralty decision on contribution will apply directly in the federal securities laws context. To the extent that the federal courts can exercise common law rulemaking authority to decide the contribution question under section 10(b) and rule 10b-5, they may, however, be influenced by admiralty precedents. For instance, *Cooper Stevedoring* permitted contribution in favor of a party guilty of simple negligence, a result consistent with the trend in the state courts permitting contribution among negligent tortfeasors. See notes 64-72 *supra* and accompanying text.

98. 451 U.S. 77 (1981).

99. 451 U.S. 630 (1981).

100. 422 U.S. 66 (1975). In both *Northwest Airlines* and *Texas Industries* the Court noted that lower federal courts had recognized an implied right to contribution under the federal securities

In *Cort*, the Court set out four factors that should be considered in determining whether a private cause of action is implied by federal statute:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>102</sup>

In subsequent opinions the Court has emphasized that when the question is whether a private cause of action should be inferred from a federal statute, the inquiry must focus on whether Congress *intended* to create the private remedy asserted. The *Cort* factors are to be used only insofar as they aid in determining legislative intent.<sup>103</sup> In one of its more recent cases on implied rights of action,<sup>104</sup> the Court indicated that the third and fourth *Cort* factors are relevant only if an examination of the first two factors indicates a congressional intent to create the remedy.<sup>105</sup>

Using these cases as precedent, the Court examined the relevant legislation in *Texas Industries* and *Northwest Airlines* to determine if a right to contribution was implicitly created. In *Texas Industries*, which arose under the federal antitrust laws, the Court first noted that there was nothing in the legislative history of the Sherman Act or the Clayton Act to indicate that Congress had considered whether contribution should be available to defendants in antitrust actions.<sup>106</sup> The Court

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law, but intimated no view as to the correctness of those decisions. See *Texas Indus.*, 451 U.S. at 640 n. 11; *Northwest Airlines*, 451 U.S. at 91 n.24.

101. *Cort's* progeny are, by now, numerous. In *Northwest Airlines* and *Texas Industries* the Court relied primarily on its four most recent decisions: *California v. Sierra Club*, 451 U.S. 287 (1981); *Universities Research Ass'n. v. Coutu*, 450 U.S. 754 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

102. 422 U.S. at 78 (citations omitted).

103. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23-24 (1979).

104. *California v. Sierra Club*, 451 U.S. 287 (1981).

105. *Id.* at 298 ("factors are only of relevance if the first two factors give indication of congressional intent to create the remedy"). Logically, the *Cort* analysis should begin with an examination of the second factor, which asks whether there is any indication of legislative intent to create or deny a remedy. Any indication one way or another should preclude an examination of the other factors. Justice Rehnquist wrote a concurring opinion, which was joined by three other justices, to emphasize the preeminence of the second factor and the relative unimportance of the remaining *Cort* factors. *Id.* at 302. Presumably, these factors are relevant in discerning legislative intent when an examination of the statutory language, the scheme of the legislation and its legislative history indicate that Congress *may* have intended to create a private cause of action.

106. 451 U.S. at 639.

then found that the antitrust laws "were not adopted for the benefit of the participants in a conspiracy to restrain trade."<sup>107</sup> Thus, the Court concluded that "[t]he absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of [the] other factors [in *Cort v. Ash*] unnecessary."<sup>108</sup> Using a similar analysis in *Northwest Airlines*, the Court concluded that Congress did not intend to create a right of contribution in favor of employers against unions under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.<sup>109</sup>

After concluding that Congress did not intend to imply a right of contribution in these laws, the Court considered the question of whether a right to contribution could be judicially provided under principles of federal common law. In its analysis, the Court was unequivocal: the power of the federal courts to fashion federal law in the common-law tradition is very limited and

absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.<sup>110</sup>

Because neither case fell within one of those narrow categories, the Court refused to provide a federal common law a right to contribution.

#### IV. *Applying Analysis to Rule 10b-5.*

While the decisions in *Texas Industries* and *Northwest Airlines* appear to provide a framework for analyzing the question of contribution under rule 10b-5, it is important to note the critical difference between those cases and cases brought under rule 10b-5 insofar as determining the relevance of legislative intent. In the former cases, the Court could quite legitimately look at legislative history and other factors in order to decide whether Congress intended for the courts to provide a right to contribution in enforcing the antitrust laws. A parallel inquiry under rule 10b-5 would be inapposite, however, because the courts have created the plaintiff's cause of action under rule 10b-5, based on factors other than implication on congressional intent.<sup>111</sup> It is therefore illogical to ask whether Congress ever intended the courts to infer a right to

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107. *Id.*

108. *Id.*

109. 451 U.S. at 94.

110. *Texas Indus.*, 451 U.S. at 641 (footnotes omitted).

111. See notes 94-96 *supra* and accompanying text.

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.

Even though actions under section 10(b) are not based on legislative intent, it is useful to examine the securities laws to determine if there is some clear legislative policy favoring contribution. If there is such a policy, one might legitimately argue that the policy should control in the implied actions because in implied actions the courts should, to the extent possible, fashion those rules that Congress would have adopted if it had created an express cause of action.<sup>112</sup> It is also useful to examine whether, even in the absence of such a showing of legislative policy, the courts have the authority to impose a rule of contribution. In interpreting an implied cause of action, the courts by necessity arrogate some lawmaking authority to themselves. The question is, of course, what limitations, if any, there are on this lawmaking authority. This latter question will be explored after a review of the legislative policy of the securities laws.

#### A. *Legislative Policy.*

A clear legislative policy favoring contribution does not emerge from examination of the Securities Act and the Exchange Act. Because the controlling person provisions omit a right to contribution while other express liability provisions include the right, it is questionable whether Congress would have included a right to contribution had it created an express right of action under section 10(b). Where Congress wanted a particular rule to apply to all private damage actions, it placed that rule in a separate section, as it did with the controlling person provisions. Section 20(a) of the Exchange Act, for instance, provides that every person who controls any person liable "under any provision of this title or of any rule or regulation thereunder" is jointly and severally liable with such controlled person (unless the good faith defense in the statute applies).<sup>113</sup> Similarly, the provisions of sections 29(b)<sup>114</sup> and 32(a)<sup>115</sup> of the Exchange Act, which relate to the voidability of contracts and criminal penalties respectively, apply to all sections of that Act and the rules and regulations thereunder. By plac-

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112. The goal would seem to be guessing what Congress "would have intended on a point not present to its mind, if the point had been present." GRAY, *THE NATURE AND SOURCES OF THE LAW* 173 (1963 ed.), quoted in Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 410 (1964).

113. 15 U.S.C. § 78t (1976).

114. 15 U.S.C. § 78cc (1976).

115. 15 U.S.C. § 78ff(a) (1976).



ing a right to contribution in some sections and not others, Congress may have intended to limit the right to contribution to those instances where it was specifically provided.<sup>116</sup>

Approaching the issue by applying a *Cort v. Ash* analysis yields unclear results. The first factor, whether the defendant is a member of the class for whose especial benefit the statute was enacted, on its face argues against providing contribution. The rule 10b-5 defendant finds himself in the same position as the antitrust conspirator in *Texas Industries*: “‘a member of a class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class . . .’”<sup>117</sup> The second *Cort* factor, focusing on the legislative history, is difficult to apply. One can hardly expect the legislative history to indicate Congress intended the federal courts to provide a right to contribution in private actions based on rule 10b-5, since Congress could never have contemplated the judicial creation of a private action based on a then unwritten SEC rule.

The third *Cort* factor, whether contribution would be consistent with the purpose of the securities laws, may be argued either way. On the one hand, the purpose of the securities laws was to protect investors<sup>118</sup> and thus parties guilty of violating the law ought not derive any benefit from them. On the other hand, if contribution enhances deterrence, a rule favoring contribution would help protect investors and thus be consistent with the securities laws.

The fourth factor, which requires an examination of whether the cause of action is one traditionally relegated to state law, may not apply because the whole inquiry deals with what might be regarded as merely an aspect of a federal cause of action. In the typical case using the *Cort* factors, the court will compare the cause of action that it is being asked to find with state law to see if state law provides relief for the injury allegedly suffered by plaintiff. When the issue is whether a defendant ought to have a right to contribution, however, an examination of state law may not be meaningful because it is difficult to identify a distinct state cause of action for contribution. On the other hand, if a defend-

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116. Arguably, the omission of a right to contribution in the controlling person provisions was an oversight on the part of the legislature that the courts should correct. However, establishing that the omission was inadvertent is quite difficult and in any event, the courts are reluctant to rewrite statutes. “If the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it . . . would be tantamount to adding to a statute a meaning not intended by the Legislature.” *Mitchell v. Mitchell*, 312 Mass. 154, 161, 43 N.E.2d 783, 787 (1942) (construing a Massachusetts statute dealing with the appointment of guardians). See also *FTC v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963).

117. 451 U.S. at 639 (emphasis added by Court in quoting from *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37 (1977)).

118. *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964).

ant seeking contribution under rule 10b-5 can also allege that the person from whom the defendant is seeking contribution breached some common law duty to the defendant that resulted in the imposition of liability under 10b-5, the defendant may be able to maintain a separate cause of action against that person for indemnity under state law.<sup>119</sup> If that is the case, then the fourth *Cort* factor would, if anything, indicate that contribution ought not be provided as a federal remedy because a state remedy exists.

Although the Court relied on the *Cort v. Ash* test in *Texas Industries* and *Northwest Airlines*, it may be inappropriate to apply *Cort* to the question of contribution under the securities laws. In the typical case using the *Cort* factors, the defendant has violated the statute in question, harming the party seeking to establish a private cause of action. In *Cort*, for instance, a shareholder attempted to bring a derivative action for damages a corporation suffered as a result of the violation by the corporation's directors of 18 U.S.C. § 610, the criminal statute prohibiting corporations from making campaign contributions in connection with presidential elections. In fact situations similar to *Cort*, it makes sense to ask whether the plaintiff is a member of the class for whose benefit the statute was enacted. It makes no sense to ask that same question in the context of the contribution issue because the party seeking contribution is a wrongdoer and not an intended beneficiary of the statute.<sup>120</sup> Unlike the plaintiff in *Cort*, the party seeking contribution cannot argue injury resulting from a violation of a statute. Applying the remaining factors is similarly questionable because contribution is so collateral to the legislation that an analysis of the legislation, as suggested in *Cort*, is unlikely to provide any useful guidance. Thus, a *Cort* analysis should not control the question of implied contribution under the securities laws. Because the legislative policy is un-

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119. *Maryville Academy v. Loeb Rhoades & Co.*, 530 F.Supp. 1061 (N.D. Ill. 1981). See also RESTATEMENT (SECOND) OF AGENCY § 401, Comment d (1958) ("Unless he has been authorized to act in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or other wrongful act is subject to liability to the principal for the loss which results therefrom."); *Behar v. Savard*, 21 F.R.D. 367, 369-70 (S.D.N.Y. 1958); *Stawasz v. Aetna Insur. Co.*, 99 Ill. App. 2d 131, 240 N.E.2d 702 (1968).

120. Recognizing an implied cause of action on behalf of someone other than the "intended beneficiary" may benefit the intended beneficiary. In *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), the court recognized an implied cause of action for injunctive relief under section 14(e) of the Exchange Act on behalf of a tender offeror, notwithstanding the Supreme Court's earlier ruling in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), which denied standing to a tender offeror seeking money damages from the target company under section 14(e). The court in *Mobil* reasoned that allowing the tender offeror to seek injunctive relief would enhance the protection of investors afforded by the Williams Act in a way that an action for money damages could not.

clear, the issue becomes whether the federal courts have the *power* to provide a right to contribution, and if so, whether they should exercise it. These questions turn on the power of the federal courts to "make" common law.

### B. *Federal Common Law.*

In *Texas Industries* and *Northwest Airlines* the Court rejected the notion that it was appropriate for it to create a right to contribution as a matter of federal common law because those cases did not fall within one of the narrow categories specified by the Court. If the Court applied a similar analysis to determine whether the federal courts should invoke federal common law to create a right to contribution under the securities laws, it would reach the same conclusion. When construing the federal securities laws the federal courts are not operating in an area of "unique federal concern" as the Court views that concept because "unique federal concerns" are limited to cases such as those implicating the rights or duties of the United States or the resolution of interstate controversies.<sup>121</sup> Aside from those cases, the Court has limited federal court freedom in making common law to admiralty, where there is Constitutional authority for lawmaking by the federal judiciary,<sup>122</sup> and labor law, where Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law.<sup>123</sup> To the extent that creating a right to contribution in a securities case is an act of judicial lawmaking, it does not appear to have been specifically authorized by the Supreme Court. Because the courts have provided a private right of action under section 10(b), however, the courts must fix the contours of that action in a way necessarily involving an element of lawmaking.<sup>124</sup> The courts must determine the elements of

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121. *Northwest Airlines*, 451 U.S. at 95. At least one court considering the scope of the common law since *Northwest Airlines* and *Texas Industries* has read "unique federal interests" more broadly. In *Barany v. Buller*, 640 F.2d 726, 735 (7th Cir. 1982), the court held that the federal interest in federally chartered credit unions was sufficient to justify the court's decision finding an implied federal *quo warranto* remedy on behalf of two ousted members of the credit union's credit committee.

122. U.S. CONST. art. III, § 2 vests jurisdiction over admiralty and maritime cases in the federal courts. Congress has largely left to the federal courts the task of fashioning the controlling rules of admiralty law. See *Fitzgerald v. United States Lines*, 374 U.S. 16, 21 (1962).

123. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

124. In this regard, the federal courts are acting much as they do in the labor law area. While Congress has not expressly empowered the federal courts to make governing rules of law in implied private actions under the securities laws, as a practical matter that is just what the federal courts are doing. The Supreme Court cannot continue to recognize implied private actions under sections 10(b) and 14(a) without, at the same time, recognizing that the federal courts are making federal common law. Consider, in this regard, Judge Posner's reflection on *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979), which recognized a right to contribution in rule 10b-5 actions:

the cause of action, appropriate defenses, and, by necessity, the availability of contribution.<sup>125</sup> When engaging in this function, the federal courts have not, or at least should not have, proceeded as common law courts construing a common-law, as opposed to a statute-based cause of action. Rather, the federal courts are bound by the congressional policies embodied in the securities acts. Only when a policy is not discernable or is ambiguous should the courts proceed in a common law tradition in fixing the contours of an implied cause of action.<sup>126</sup> The Court has not yet had an occasion to rule on outer limits of the federal judiciary's authority when construing an implied cause of action.

In private actions based on rule 10b-5 the Court has begun by examining the language of section 10(b) as an indication of how private actions should be implemented.<sup>127</sup> The Court has then compared and contrasted section 10(b) to the express liability provisions of the securities laws, with a view to reading the various sections in harmony.<sup>128</sup> The Court has seemed particularly concerned with avoiding a result

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"Heizer shows, incidentally, that creating federal common law to decide the liabilities *inter se* of violators of the federal securities laws is not out of the question; *Heizer* was a federal common law case." *Cenco, Inc. v. Seidman*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,615, at 93,057 (7th Cir. 1982).

125. The *dictum* in *Texas Industries* and *Northwest Airlines* specifying the limited areas of federal common law recognized by the Court ought not to be read as limiting the discretion of the federal courts in fixing the contours of private actions under rule 10b-5 and specifically deciding whether to allow contribution. In both cases the Court reserved judgment on the appropriateness of permitting contribution under federal securities laws. See *Northwest Airlines*, 451 U.S. at 91 n.24; *Texas Indus.*, 451 U.S. at 640 n.11. The implied contribution question under the securities laws is clearly distinguishable from the contribution question faced by the Court in *Texas Industries* and *Northwest Airlines*. In each of those cases the Court was persuaded that the statutes in question "were detailed and specific", *Texas Industries*, 451 U.S. at 644, and "comprehensive" *Northwest Airlines*, 451 U.S. at 97, and, therefore, it was "improper" to add a right to contribution to the statutory rights Congress created. Rather, if there was to be a right to contribution, it would have to come from Congress. By contrast, Congress created no statutory rights under section 10(b) or 14(a) for private plaintiffs and the federal courts should not defer to Congress for a determination of the contribution question. Such deference would mean that while the federal courts may create a cause of action against a group of defendants, it must defer to Congress to decide if any judgments under that cause of action are to be shared by the defendants. In short, it is too late for the federal courts to defer to Congress as to the elements of a private cause of action under rule 10b-5 and §14(a). Rather, if the Court is going to continue to recognize private actions under these provisions, the federal courts must give shape to those actions by applying sound common law principles. Since federal common law applies to these judicially created actions, the federal courts should have the power to permit a right to contribution. As the Supreme Court recognized in *Texas Industries*: "In areas where the federal common law applies, the creation of a right to contribution may fall within the power of the federal courts." 451 U.S. at 641.

126. See *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all sources of the common law in cases such as the present.")

127. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1975).

128. *Id.* at 205-11.

that would grant plaintiffs greater rights under an implied action than they would have if limited to one of the express liability provisions.<sup>129</sup> Finally, the Court has looked beyond the statutes to the implications of its decisions in various contexts.<sup>130</sup> *Blue Chip Stamps v. Manor Drug Stores*,<sup>131</sup> the first major 10b-5 case of the Burger Court, typifies the mode of analysis employed by the Court.

In *Blue Chip Stamps*, the issue was whether offerees of a stock offering who did not purchase shares might nevertheless maintain an action under rule 10b-5. The Court was thus called upon to review the rule denying standing to nonpurchasers first established by the Second Circuit in 1952 in *Birnbaum v. Newport Steel Corp.*<sup>132</sup> The Court held that plaintiffs could not maintain the suit, reasoning first that the wording of section 10(b) "which is directed towards injury suffered 'in connection with the purchase or sale' of securities, argues significantly in favor of acceptance of the *Birnbaum* rule by this Court."<sup>133</sup> The Court then contrasted the language of section 10(b) to that of section 17(a) of the Securities Act, which prohibits fraud "in the offer or sale" of securities, to demonstrate that Congress was aware that a fraud could occur in the offer of securities and that appropriate language could have been used if Congress wanted to cover such fraud.<sup>134</sup> The Court also referred to section 16(b) of the Exchange Act and concluded that "[w]hen Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly."<sup>135</sup> Further, the Court noted that the express liability provisions of the securities laws are limited to purchasers and sellers of securities. The Court felt that it would be anomalous for Congress to expand the plaintiff class for a judicially created cause of action beyond the bounds that it had set for comparable express actions.<sup>136</sup>

The Court recognized, however, that its analysis had not gone far enough, because it could not divine from the language of section 10(b) the "express 'intent of Congress' as to the contours of a private cause of

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129. In *Hochfelder*, for instance, the Court refused to read section 10(b) of the Exchange Act as reaching negligent wrongdoing, because doing so "would allow causes of action covered by §§ 11, 12(2) and 15 [of the Securities Act] to be brought instead under § 10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions." *Id.* at 210 (footnote omitted).

130. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1974).

131. 421 U.S. 723 (1974).

132. 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

133. 421 U.S. at 733.

134. *Id.* at 734-35.

135. *Id.* at 735.

136. *Id.* at 736.

action under rule 10b-5."<sup>137</sup> It was thus proper, the Court said, to weigh "what may be described as policy considerations" in deciding the case.<sup>138</sup> The Court went on to decide that such considerations supported adoption of the *Birnbaum* rule, because, among other things, the failure to adopt that rule would make it too easy to bring an action under rule 10b-5 and present real danger of vexatious litigation.<sup>139</sup>

In the case of contribution, however, nothing in the language of section 10(b) will aid the Court; because the section does not grant an express cause of action, it is bereft of any mention of contribution. Examination of the other sections of the securities laws will, as noted above, be inconclusive.<sup>140</sup> And while *Blue Chip Stamps* legitimizes an inquiry into considerations beyond statutory interpretation, that opinion is not as broad as it seems because the Court was merely determining the scope of section 10(b) in terms of who had standing to bring suit under the section. The Court did not need to go beyond the section and find a second cause of action as it would if it were asked to provide a right to contribution. In fact, none of the rule 10b-5 cases thus far decided by the Court have required it to go beyond the language of section 10(b) in the same sense that a contribution case would. The lower courts have, on occasion, decided these "peripheral" issues in which the language of section 10(b) or rule 10b-5 was irrelevant. The availability of punitive damages as part of the remedy under rule 10b-5<sup>141</sup> or the obligation of a party to post security for expenses<sup>142</sup> under rule 10b-5 are two examples of peripheral issues where the scope of judicial authority in 10b-5 actions became a factor. These decisions demonstrate an uncertainty on the limitation of judicial authority in implied actions that is absent from virtually all of the contribution cases.

In the area of punitive damages the lower courts have been nearly unanimous in deciding that a plaintiff may not obtain punitive dan-

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137. *Id.* at 737.

138. *Id.*

139. *Id.* at 736-49. In *Texas Industries*, by comparison, the Court would not consider the policies favoring and opposing contribution in antitrust cases because, the Court decided, this was a matter for Congress, not the courts. 451 U.S. at 646. Thus, the Court implicitly recognized in *Blue Chip Stamps* that fixing the contours of the implied cause of action under section 10(b) may require the federal courts to engage, at least to a certain extent, in the common law technique of fashioning rules.

140. See notes 54-64 and 113-116 *supra* and accompanying text.

141. See cases cited at note 143 *infra*.

142. See, e.g., *McClure v. Borne Chem. Co.*, 292 F.2d 824 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951).

ages in an action based on rule 10b-5.<sup>143</sup> The decisions have not, however, turned on whether the federal courts have the power to read punitive damages into section 10(b), as the analysis employed by the Tenth Circuit in *deHaas v. Empire Petroleum Co.*<sup>144</sup> demonstrates. In *deHaas*, a typical case, the court first noted that section 28(a) of the Exchange Act, which limits recovery under that Act to "actual damages,"<sup>145</sup> does not dispose of the question because this section may refer only to actions expressly created by the Act and not to implied actions.<sup>146</sup> The court then looked to the legislative history of section 28(a), but found no guidance in resolving the problem before it.<sup>147</sup> Finally, the court engaged in an extensive analysis of the benefits and detriments of allowing a right to punitive damages in section 10(b) and concluded, on balance, that policy considerations weighed against allowing recovery of punitive damages.<sup>148</sup> At no point did the court question its authority to allow punitive damages if policy considerations favored such a result.

In contrast, the few cases which have discussed whether the plaintiff in a rule 10b-5 action might be required to post security for expenses demonstrate a concern with the limitations on judicial authority. In *Fischman v. Raytheon Manufacturing Co.*,<sup>149</sup> for instance, the Court of Appeals for the Second Circuit held that the trial court had no authority to order a bond to cover expenses. A subsequent decision in the third circuit, *McClure v. Borne Chemical Co.*<sup>150</sup> discussed the issue at greater length. In responding to the argument that the court should impose a security for expense provision where the private remedy is implied because security for expense provisions are part of the provisions in which private rights of action have been granted explicitly, the court said:

This argument is, of course, tenable only where the statute evinces a clear policy in favor of security for expenses limitations. Even then,

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143. See, e.g., *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969). *Green* and *deHaas* are the two leading cases on the subject. See also, 5B JACOBS, *supra* note 42, § 2603[e], at 11-106 n.1, collecting numerous cases.

144. 435 F.2d 1223 (10th Cir. 1970).

145. 15 U.S.C. § 78bb (1976) ("[N]o person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.")

146. 435 F.2d at 1230.

147. *Id.*

148. *Id.* at 1231-32. Cf. *Globus, Inc. v. Law Research Serv.*, 418 F.2d 1276 (2d Cir. 1969) (employing a similar policy analysis in concluding that punitive damages are not available in an action based on section 17(a) of the Securities Act.)

149. 188 F.2d 783, 788-89 (2d Cir. 1951).

150. 292 F.2d 824 (3d Cir.), cert. denied, 368 U.S. 939 (1961).

we believe, there would be a serious question whether a court, in the proper exercise of its judicial function, could carry the traditional tort doctrine of implication of private remedies to such a length.<sup>151</sup>

The court did not have to resolve this question because it decided that the Securities Act and the Exchange Act do not manifest a sufficiently clear or uniform policy favoring security for expenses to allow the court to impose such a limitation as a part of section 10(b).<sup>152</sup>

The concern over judicial authority expressed by the courts in *Fischman* and *McClure* should not be a factor in the contribution question for two reasons. First, the conclusion reached by those courts should not be read too broadly. The courts did not identify the point at which their authority to fashion rules to implement rule 10b-5 ceases. Because of the nature of an action based on rule 10b-5, the federal courts must be free to apply traditional common law techniques in fixing its contours when the legislative policy is unclear. Second, even if the courts in *Fischman* and *McClure* were correct in their assessment of judicial authority, the question of whether to allow contribution can be distinguished from the question of whether plaintiff can be required to post a bond for expenses. The latter is generally based on some provision of a statute or rule of court.<sup>153</sup> By comparison, courts exercising common law powers have ordered joint tortfeasors to pay contribution, at least where the tortfeasors were guilty of negligence. Moreover, the common law courts that have rejected adoption of a common law rule favoring contribution have done so either because they perceived contribution as contrary to public policy or because precedent so required, not because they felt that they lacked the authority to adopt such a rule.<sup>154</sup> Thus, while there may be some limits on the power of federal courts in deciding peripheral issues under rule 10b-5, the availability of contribution would not appear to be one of them.

### C. *The Case for Denying Contribution Under Rule 10b-5.*

A rather simple conclusion results from the foregoing analysis: the federal courts have the authority to adopt a federal rule of contribution in private actions based on rule 10b-5, but the rationales offered to support a rule of contribution are not compelling. The courts should reexamine the policies underlying contribution to determine whether the existence of such a right would deter future violations of rule 10b-5 and to determine whether considerations of fairness require the adoption of

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151. *Id.* at 836.

152. *Id.* at 837. See also L. Loss, *supra* note 32, at 1842.

153. *Gainey v. Brotherhood of Ry. & S.S. Clerks*, 34 F.R.D. 8, 12 (E.D. Pa. 1963).

154. See generally cases cited in Annot., 60 A.L.R.2d 1366 (1965).



such a rule. Although courts have uniformly offered deterrence as a rationale for allowing contribution, thoughtful contemporary analysis indicates that a rule denying contribution in rule 10b-5 actions may actually operate as a greater deterrent than a rule permitting contribution.<sup>155</sup> Moreover, the nature of a rule 10b-5 action, requiring as it does proof that the defendant acted with *scienter*, suggests that it is not unfair to deny contribution in such actions. In short, in the absence of persuasive evidence demonstrating that a rule favoring contribution would further deterrence, the wiser approach seems to be to opt for the traditional common law rule which denies contribution among tortfeasors who acted intentionally or recklessly. Because an intentional or reckless violation of 10b-5 apparently satisfies the *scienter* required by that rule, contribution should be denied under a uniform federal rule.<sup>156</sup>

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155. See notes 76-81 *supra* and accompanying text.

156. The foregoing analysis assumes that the federal courts would adopt a uniform federal rule regarding contribution, as they have in the past. In fact, even this aspect of past practice is subject to reexamination because it ignores the possible role that state law should play in resolving the issue. See generally T. FIFLIS, *Choice of Federal or State Law for Attorneys' Professional Responsibility*, 56 N.Y.U.L. REV. 1236 (1981); Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823 (1970). While *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) clearly does not apply because the interpretation and implementation of the federal securities laws is a federal question requiring the application of federal law. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 557 (5th Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979). See also 5B A. JACOBS, *supra* note 42, §264.02[c], at 11-328. The federal courts may still look to state law for the applicable federal rule of decision when a federal statute is silent on a particular question. Indeed, some recent decisions suggest that the Rules of Decision Act, 28 U.S.C. §1652 (1976), not only requires the use of state law in diversity cases, but also in non-diversity cases where the federal statute contains a gap and Congress did not specify a choice of law. See T. FIFLIS, *supra* at 1257. In any event, the importance of uniformity as a ground for ignoring state law in fashioning a federal rule, a consideration so prevalent in the Court's 1943 decision of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (see T. FIFLIS, *supra*, at 1257), is clearly not controlling when there is little need for a nationally uniform body of law. *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 728 (1979). In cases where the need for uniformity is not paramount, the Court has weighed the federal and state interests involved, with a view towards accommodating important state interests as a necessary incident to federalism. See, e.g., *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979); *Miree v. DeKalb County*, 433 U.S. 25, 28-29 (1977). Professor FIFLIS has succinctly described this process of accommodation:

When the federal interests underlying federal law would be totally defeated by observing the state interest through adoption of the state rule, the federal interests will be given supremacy and a uniform federal rule will be announced. If no direct conflict exists, a court must then determine whether the federal interests, including any interest in maintaining a uniform rule to effectuate underlying federal policies, compete with identified state interests, in the sense that adoption of the state rule would partially hinder the full implementation of the federal interest. If this lesser conflict is found to exist, the court must measure the relative strengths of the federal and state interests to determine whether adoption of the state rule or determination of a uniform federal rule would yield the maximum satisfaction of all interests. In the event that federal interests do not compete with the state interests, the state rule should be adopted.

T. FIFLIS, *supra* at 1269-70 (footnotes omitted). A resolution of the several questions suggested by the above analysis is beyond the scope of this article; however, should the courts decide that the

## V. IMPLIED CONTRIBUTION UNDER OTHER SECTIONS OF THE SECURITIES LAWS

### A. *The Other Implied Liability Provisions.*

While the federal courts have, from time to time, found implied private rights of action under various provisions and rules of the Securities Act and the Exchange Act,<sup>157</sup> the Supreme Court has expressly approved of implied private rights of action under only two provisions: sections 10(b) and 14(a)<sup>158</sup> of the Exchange Act. The latter was at issue in *J.I. Case Co. v. Borak*,<sup>159</sup> a case that pre-dates *Cort* and stands in sharp contrast to it. Unlike *Cort* and its progeny, the *Borak* decision was not based on congressional intent, but rather was justified on a theory of a need for private enforcement to supplement the work of the SEC and thereby add a deterrent for potential violators.<sup>160</sup> The Court has abandoned this rationale in subsequent decisions.<sup>161</sup> Moreover, while it is unlikely that the Court will overrule its decision in *Borak*,<sup>162</sup> it is clear that the court is moving cautiously in this area and has shown a reluctance to infer a private right of action for damages under other provisions of the federal securities laws.<sup>163</sup> In any event, an analysis of

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federal courts have the authority to recognize a right to contribution under the federal securities laws, they should address the adoption issue.

157. For a recent collection of sections and rules of the federal securities laws that have generated implied private rights of action, see ALI FED. SEC. CODE § 1722 (Comment (1)) (Proposed Official Draft 1978).

158. 15 U.S.C. § 78n(a) (1976).

159. 377 U.S. 426 (1964).

160. *Id.* at 432 ("Private enforcement of the proxy rules provides a necessary supplement to Commission action.").

161. *See*, Frankel, *supra* note 25, at 559-63.

162. *See*, Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979) ("We do not now question the actual holding of [*Borak*] . . .").

163. *See*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

In *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977) the Court held that a defeated tender offeror did not have standing to seek money damages under section 14(e) of the Exchange Act. The Court left open the possibility that the shareholder-offerees or the target company would have standing. 430 U.S. at 42, n.28. The lower federal courts have consistently held that the former do have standing. *See, e.g.*, *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974); *O'Connor & Assoc. v. Dean Witter Reynolds, Inc.*, 529 F. Supp. 1179 (S.D.N.Y. 1981); *Hurwitz v. R.B. Jones Corp.*, 76 F.R.D. 149 (W.D. Mo. 1977); *McCloskey v. Epko Shoes, Inc.*, 391 F. Supp. 1279 (E.D. Pa. 1975); and *Dyer v. Eastern Trust & Banking Co.*, 336 F.Supp. 890 (D. Me. 1971). Justice Stevens, dissenting in *Piper*, observed: "No one seriously questions the premise that Congress implicitly created a private right of action when it enacted §14(e) in 1968." 430 U.S. at 55. *See also* ALI FED. SEC. CODE § 1722 (Comment (2)) (Proposed Official Draft 1978) ("The negative Supreme Court holdings [in cases seeking implied private rights of action under the securities laws and other federal statutes] throw grave doubt on the continued viability of *any* of these lower court holdings [finding an implied private right of action under various provisions and rules of the securities law]. The Court, in effect, has grandfathered its own affirma-

the contribution question as it applies to section 14(a) and rule 10b-5 is applicable to the availability of contribution under other implied liability provisions of the federal securities laws.<sup>164</sup>

Section 14(a) of the Exchange Act authorizes the SEC to adopt rules and regulations governing the solicitation of proxies for registered securities.<sup>165</sup> The SEC's rule 14a-9(a), which was at issue in *Borak*, prohibits the use of false or misleading statements in proxy solicitations.<sup>166</sup> Unlike rule 10b-5, which requires proof that the defendant acted with *scienter*, liability has been imposed under rule 14a-9(a) when the defendant acted only negligently.<sup>167</sup> This should be an important consideration for courts if they adopt a uniform rule on contribution under rule 14a-9(a): a defendant guilty of negligence should be able to obtain contribution from another who violated the rule because the principle of fairness that supports allowing contribution is most compelling when the party seeking contribution was merely negligent. Because of considerations of fairness and because permitting contribution may reduce deterrence, a defendant who acted with a *scienter* should be precluded from obtaining contribution from others, at least from parties who were only negligent.<sup>168</sup> Such a rule of contribution would be consistent with the uniform rule proposed above for actions based on rule 10b-5 and with the statutory rule of contribution in section 11 of the Securities Act. It is appropriate to look to section 11 for guidance, moreover, because the operative language of rule 14a-9(a) prohibiting the use of a false or misleading proxy solicitation is similar to the operative language of section 11(a).<sup>169</sup> Furthermore, both provisions have a similar purpose: to protect investors from damage that

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tive holdings with respect to Rule 10b-5 and § 14(a).") (emphasis in original) (citations omitted). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S.Ct. 1825 (1982) (five to four decision where the Court recognized a private cause of action for damages under the Commodity Exchange Act). *See also* Fogel v. Chestnutt, 668 F.2d 100 (2d Cir. 1981) (finding an implied cause of action under the Investment Advisors Act.)

164. *See* note 170 *infra*.

165. 15 U.S.C. § 78n(a) (1976).

166. 17 C.F.R. § 240.14a-9 (1980).

167. *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 777-78 (3d Cir. 1976); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1298-1301 (2d Cir. 1973). *But see* *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 442 (6th Cir.), *cert. denied*, 449 U.S. 1067 (1980) (*scienter* should be an element of liability in private suits under the proxy rules as they apply to outside accountants).

168. *See* notes 79, 80, 84 *supra* and accompanying text and note 156 *supra*.

169. Section 11(a), 15 U.S.C. § 77k(a), provides, in relevant part: "In case any part of registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." Similarly, rule 14a-9, 17 C.F.R. § 240.14a-9 (1980), provides:

No solicitation subject to this regulation shall be made by means of any proxy statement . . . or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or mislead-

might result from making an investment decision (section 11(a)) or a voting decision (section 14(a)) on the basis of false or misleading information.<sup>170</sup>

### B. *The Express Liability Provisions.*

For purposes of the present inquiry, the five express liability provisions of the securities laws that do not include a right to contribution are divisible into two categories: those provisions that originally contemplated multiple defendants and those that probably did not. The former category includes the controlling person provisions of each Act, while the latter includes sections 12(1) and 12(2) of the Securities Act and section 16(b) of the Exchange Act. The *Northwest Airlines* and *Texas Instruments* decisions may well have decided the contribution issue as it applies to the controlling person provisions. The Court held in those cases that the federal courts should not provide a right to contribution as a part of federal laws that include detailed and specific remedial provisions, at least where there is no indication that Congress intended a right to contribution. It would be difficult to argue that Congress intended that the courts provide a right to contribution in the controlling person provisions because Congress expressly provided that right in several other sections but omitted it there.<sup>171</sup> The absence of a right to contribution in the controlling persons provision can mean only that Congress did not intend such a right or that it was overlooked. In either case, the courts should deny the right, because, if the former is true, the courts are bound by congressional intent, and, if the latter is the case, the courts should look to Congress to correct the oversight.<sup>172</sup>

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ing with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

170. The analysis of contribution under rule 10b-5 and section 14(a) is applicable to other implied liability provisions. For instance, if the courts have correctly recognized an implied private cause of action for shareholder-offerees under section 14(e) of the Exchange Act, see note 163, *supra*, the availability of contribution under section 14(e) should be analyzed in the same fashion as under rule 10b-5. The courts have noted that the two provisions (section 14(e) and rule 10b-5) are nearly identical, except for the "in connection with" language and, therefore, the two provisions would be construed *in pari materia*. *Panter v. Marshall Field & Co.*, 646 F.2d 271, 282 (7th Cir.), *cert. denied*, 102 S. Ct. 658 (1981). The courts have noted that *scienter* is a necessary element to a violation of section 14(e). See *e.g.*, *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278 (9th Cir. 1982). Thus, contribution ought not be available under section 14(e).

171. See *Northwest Airlines*, 451 U.S. at 91 n.24 ("[W]hen Congress wanted to provide a right to contribution, it did so expressly.")

172. See note 116 *supra*. If the federal courts determine that they lack the authority to formulate a right to contribution under the controlling person provisions, state law on the subject should continue to operate, as there is no apparent preemption problem. Section 28 of the Exchange Act,

The decisions in *Northwest Airlines* and *Texas Instruments* do not appear to prohibit contribution in those express liability provisions that probably did not contemplate multiple defendants. For those provisions, it cannot be said that Congress intended to deny a right to contribution.<sup>173</sup> Because the judicial determination that multiple defendants may be found liable under section 12 is akin to the recognition of an implied cause of action against those additional defendants who do not fall within the narrow definition of a "seller," courts should have the power to allow contribution among such defendants. If a uniform rule is adopted, contribution actions should be prohibited for violators who acted with *scienter* but allowed for these who were merely negligent.

The only other express liability provision which does not contain a right of contribution is section 16(b) of the Exchange Act, prohibiting insiders from retaining their short-swing profits. As discussed above, no court has found multiple defendants liable under this section and, therefore, the contribution question is unlikely to arise. Moreover, if a section 16(b) defendant were able to obtain contribution he would not be relinquishing the full amount of his profits, a result inconsistent with the policy of section 16(b).

## V. CONCLUSION

The long-standing rule allowing contribution in actions brought under rule 10b-5 and other sections of the securities laws that do not expressly provide for contribution does not rest on sound analysis. Private actions based on rule 10b-5 are not congressionally mandated, and it can hardly be maintained that Congress intended that the courts allow contribution in such actions. Further, the Securities Act and Exchange Act do not unambiguously favor contribution, so logic does not dictate the implication of a right to contribution where it is not otherwise provided. Federal courts do have the judicial power to allow a right to contribution, at least under rule 10b-5 and section 14(a) of the Exchange Act, and probably under section 12 of the Securities Act. This power should be exercised cautiously, however, because allowing contribution might affect the deterrence function of the securities laws and might be unfair to plaintiffs. The fairness argument raised by de-

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15 U.S.C. § 78bb (1976), provides in part: "The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity . . . ."

173. The decisions holding that multiple parties may be liable for violations of section 12 of the Securities Act have been criticized. See D. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 109-10 (1981).

fendants seeking contribution can best be satisfied by permitting contribution on behalf of a defendant who negligently violated the securities laws, but denying that right to violators who acted with *scienter*.