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In The
Supreme Court of the United States

October Term, 1992

MUSICK, PEELER & GARRETT, LEONARD CASTRO,
ROBERT SCHUCHARD, J.H. COHN & CO., ED BACANI
and ROBERT TORKAR,

Petitioners,

vs.

EMPLOYERS INSURANCE OF WAUSAU and
FEDERAL INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE
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COMMERCIAL LAW ATTORNEYS IN
SUPPORT OF PETITIONERS

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**I. INTRODUCTION AND INTEREST OF AMICUS
CURIAE**

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys located throughout the United States. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States securities markets operate freely and efficiently. NASCAT's members frequently represent

plaintiffs in a variety of individual, class action and derivative cases prosecuted under the federal securities laws. NASCAT and its members have an interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities fraud violations upon investors in this country. Accordingly, NASCAT is *strongly opposed* to the judicial creation of an implied cause of action for contribution to benefit those who commit securities fraud prohibited by Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5. NASCAT previously filed an *amicus curiae* brief in this case urging the Court to grant a writ of certiorari. All parties have consented to filing of this *amicus curiae* brief on the merits.

The Ninth Circuit's holding in this case that there is a right to contribution under Section 10(b) cannot be reconciled with this Court's precedents and, therefore, must be reversed. The Ninth Circuit's decision¹ conflicts with this Court's precedents establishing when and how federal courts may create an implied cause of action for contribution to benefit *wrongdoers* liable under a federal statute that does not expressly provide for contribution.² *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), hold that a right to contribution may not be created by implication absent legislative intention to create such a cause of action. As detailed herein, no

¹ The Ninth Circuit's decision is reported as *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 954 F.2d 575 (9th Cir.), *cert. granted*, No. 92-34, 1992 U.S. LEXIS 5564 (1992).

² The court below acknowledged that "[n]o explicit right to contribution is provided for" in Section 10(b) or Rule 10b-5. *Employers Ins.*, 954 F.2d at 577. Nevertheless, the Ninth Circuit stated, "[w]e have recognized . . . that these provisions imply a right of contribution." *Id.* (citations omitted).

such intention can be found under Section 10(b) or Rule 10b-5.

The Ninth Circuit's decision in this case also conflicts with *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), which governs when and how federal courts will imply causes of action under Section 10(b) of the Exchange Act. Although an implied cause of action under Section 10(b) has long been recognized by this Court³ and has been expressly approved by Congress,⁴ the scope of such actions is strictly limited to providing relief to victims of materially misleading statements or omissions and market manipulation. This Court's decision in *Santa Fe Industries* holds that additional causes of action, such as one for contribution among violators of the provision, may not be created under Section 10(b) to serve what is, at best, a subsidiary purpose of Congress when it enacted the statute to prohibit fraud.

In addition, creation of a right to contribution under Section 10(b) is contrary to sound considerations of public policy and would interfere with effective enforcement of the law and is, therefore, inconsistent with congressional intent in enacting the statute. By spreading the cost of a judgment an implied cause of action for contribution seriously undermines the intended deterrent effect of the anti-fraud provisions of the federal securities laws. In addition, a judicially created cause of action for contribution impedes early consensual resolution of securities fraud actions, and greatly complicates litigation of such claims. Judicial creation of a cause of action to benefit those who commit securities fraud is unfair to their victims.

³ See *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976).

⁴ In the recently enacted Section 27A of the Exchange Act, for example, Congress expressly provided for reinstatement of implied private civil actions under Section 10(b) that might otherwise be barred by this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991). See 15 U.S.C. § 78aa-1.

For these reasons, NASCAT respectfully submits that the Ninth Circuit's decision in this case should be reversed and this Court should hold that a right to contribution cannot be implied under Section 10(b) or Rule 10b-5.

II. ARGUMENT

A. The Federal Courts May Not Imply A Private Right Of Action For Contribution Under Section 10(b) Of The Exchange Act Or SEC Rule 10b-5 Because Congress Did Not Intend To Provide For One

In *Northwest Airlines* and *Texas Industries*, this Court held that the federal courts may not imply a right of contribution in federal statutes if Congress did not intend to provide for one. Although this Court did not consider in those cases whether an implied cause of action for contribution could be created under Section 10(b) of the Exchange Act or Rule 10b-5 in order to benefit those who commit fraud, the principles set forth in *Northwest Airlines* and *Texas Industries* properly control the question presented here. See, e.g., *Chutich v. Touche Ross & Co.*, 960 F.2d 721, 723 (8th Cir. 1992).

Whether the underlying private right of action is express or implied, the federal courts have applied the *Northwest Airlines* and *Texas Industries* analytical framework in determining whether to create a right of action for contribution.⁵ In *Chutich*, where the Eighth Circuit

⁵ See *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991) (refusing to create right of contribution among participants in scheme to defraud federal government under False Claims Act); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27-28 (1st Cir. 1990) (declining to create a right of contribution under the Commodity Exchange Act); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 n.6 (1st Cir. 1990) (refusing to use common law to create a right of contribution

held that the federal courts have no power to create a right of action for contribution among violators of Section 10(b) and Rule 10b-5, the court stated that "the analytical framework in *Texas Industries* applies to this case," noting that "the failure to follow *Texas Industries* in cases in which the underlying private right of action is implied rather than express would create a double standard for implying rights of action for contribution." 960 F.2d at 723. Circuit courts have also applied the *Northwest Airlines/Texas Industries* analytic framework in determining whether a right to indemnification exists under the securities laws.⁶ No other standard may be followed here and,

against settlor of a CERCLA suit); *Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715, 722 (4th Cir. 1990) (refusing to create a common law right to sue under the Federal Credit Union Act); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1191 (7th Cir. 1989) (no right of contribution under Tax Code § 6672(a)); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988) (refusing to create a common law right of contribution under the Lanham Act's trademark infringement provisions), *cert. denied*, 490 U.S. 1006 (1989); *Green v. United States Dept. of Labor*, 775 F.2d 964, 971 (8th Cir. 1985) (finding no implied right to contribution or indemnity under § 8132 of Federal Employees' Compensation Act); *Friedman v. Hartmann*, 787 F. Supp. 411, 415-18 (S.D.N.Y. 1992) (refusing to find right of contribution under RICO); *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2 (W.D. Mo. 1991) (no contribution under Section 10(b)); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93 (D. Minn. 1989) (no contribution under Section 10(b)); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988) (no contribution under Section 10(b)); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989) (no contribution under Section 10(b)).

⁶ See, e.g., *King v. Gibbs*, 876 F.2d 1275, 1280-82 (7th Cir. 1989) (declining to create right to indemnification under Section 10(b) of the Exchange Act); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1106 (4th Cir. 1989) (refusing to create right to either contribution or indemnification under Section 12(2) of

as noted above (*see supra* note 2), the Ninth Circuit did not offer one. *See Employers Ins.*, 954 F.2d at 577.

An analysis of this Court's decisions in *Northwest Airlines* and *Texas Industries* precludes the implication of contribution rights under Section 10(b) and Rule 10b-5 and mandates reversal of the Ninth Circuit's decision in this case. In *Northwest Airlines*, plaintiff Northwest Airlines sought contribution from labor unions for a judgment rendered against the airline in a class action brought under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 and complaining of discriminatory pay practices against female flight attendants.⁷ The Court held that the "ultimate question" in such cases is "whether Congress intended to create the private remedy for . . . contribution." 451 U.S. at 91. Justice Stevens observed that the relevant factors include "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing State remedies." *Id.* (citations omitted). The first factor was easily disposed of because neither the Equal Pay Act nor Title VII "expressly

the Securities Act of 1933, (the "Securities Act") 15 U.S.C. § 771(2)).

⁷ During the period in question, the airline paid higher wages to its male cabin attendants (who were classified as pursers) than to its female cabin attendants (who were classified as stewardesses), both of whom were represented by the Transit Workers Union and, later, by the Airline Pilots Association, International. The basis of the airline's contribution claim against the labor unions was that the employees' wages were fixed by collective bargaining agreements negotiated and executed in response to union demands. 451 U.S. at 80-82.

creates a right to contribution in favor of employers." *Id.* at 93. Similarly, as the Eighth Circuit more recently concluded in *Chutich*, 960 F.2d at 722-23, neither Section 10(b) nor Rule 10b-5 expressly creates a right to contribution.⁸

In *Northwest Airlines*, Justice Stevens observed that a cause of action for contribution might be implied "if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which the [party seeking contribution] is a member." 451 U.S. at 91-92 (citation omitted). This Court held that no right to contribution could be implied from the statutory language, however, because "it cannot possibly be said

⁸ In this case, the Ninth Circuit agreed, stating that no "explicit right to contribution is provided for" in Section 10(b) or Rule 10b-5. *Employers Ins.*, 954 F.2d at 577. In *Northwest Airlines*, Justice Stevens noted that Congress "expressly provided" for contribution among joint wrongdoers *only* in Section 11(f) of the Securities Act, 15 U.S.C. § 77k(f), and in Sections 9(e) and 18(b) of the Exchange Act, 15 U.S.C. §§ 78i(e), 78r(b), stating that "when Congress wanted to provide a right to contribution, it did so expressly." 451 U.S. at 92 n.24. As one district court has read footnote 24 of the *Northwest Airlines* opinion, Congress' failure to provide an explicit right to contribution under Section 12(2) of the Securities Act, 15 U.S.C. § 77l(2), and Section 10(b) of the Exchange Act "suggests that it did not intend to provide for contribution under those sections." *Professional Financial Management*, 683 F. Supp. at 1286. The *Northwest Airlines* Court also observed that the Second and Seventh Circuits had previously recognized an implied right to contribution under other provisions of the federal securities laws where the underlying liability resulted from an implied private right of action, but declined to address "the merit of this reasoning." 451 U.S. at 92 n.24. As the Eighth Circuit has subsequently stated, these early circuit court decisions either predate this Court's controlling decisions in *Northwest Airlines* and *Texas Industries*, simply follow earlier precedent without considering this Court's decisions, or have been subsequently overruled in their respective Circuits. See *Chutich*, 960 F.2d at 723; see also *King v. Gibbs*, 876 F.2d at 1280 n.8; *Robin*, 730 F. Supp. at 124.

that employers are members of the class for whose special benefit either the Equal Pay Act or Title VII was enacted," *id.* at 92 (citation omitted):

To the contrary, both statutes are expressly directed against employers; Congress intended in these statutes to regulate their conduct for the benefit of employees. In light of this fact, [an employer held liable under these statutes] "can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."

Id. (footnote omitted) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977)). Similarly, as detailed below, it cannot be said that Section 10(b) or Rule 10b-5 were enacted or promulgated for the benefit of persons who violate the securities laws.

Finally, the *Northwest Airlines* Court held that no principles of federal common law permit a court to fashion a cause of action for contribution where Congress did not intend to provide one. *Id.* at 95-98. Similarly, the federal courts do not have authority under Section 10(b) or Rule 10b-5 to fashion a federal common law rule of contribution, because contribution does not implicate uniquely federal interests of the kind that oblige courts to fashion federal common law and because the Exchange Act contains no provision giving federal courts broad power to develop a federal common law to benefit those who commit securities fraud. *See Chutich*, 960 F.2d at 724.

In *Northwest Airlines*, this Court left open the question whether contribution could be implied under the antitrust laws. 451 U.S. at 98 n.42. Five weeks later, however, in *Texas Industries*, this Court applied the *Northwest Airlines* analytical framework and held that no implied cause of action for contribution may be created under either the Sherman or Clayton Acts because, *inter alia*, those statutes "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639.

In *Texas Industries*, a construction company which had purchased concrete from a manufacturer and seller of ready-mixed concrete charged that the manufacturer and certain unnamed concrete firms had conspired to raise prices in violation of Section 1 of the Sherman Act. Through discovery, the defendant manufacturer learned of the certain other concrete producers that had participated in the alleged price-fixing scheme and filed a third-party complaint seeking contribution from them should it be held liable in the action filed by the construction company. In its decision, this Court noted that the federal antitrust laws do not expressly establish a right of action for contribution and rejected the view that such a right exists by implication under the antitrust laws. 451 U.S. at 639-40.⁹ Chief Justice Burger emphasized the deterrent purpose of the Sherman and Clayton Acts:

[I]t is . . . clear that the Sherman Act and the provision for treble-damage actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary, [the concrete manufacturer] "is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class." The very idea of

⁹ Writing for the Court, Chief Justice Burger noted that the parties and various amici had discussed how a right to contribution should be structured and, in particular, "how to treat problems that may arise with the allocation of damages among the wrongdoers and the effect of settlements." *Id.* at 637. Without reaching a decision, this Court acknowledged that "[i]n addition to the question of allocation, a right to contribution may have a serious impact on the incentive of defendants to settle," *id.*, and observed that "[r]egardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation." *Id.* at 638. As noted below, similar public policy considerations are raised by the question presented in this case. *See infra* Part II.C.2.

treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.

Id. at 639 (emphasis in original) (quoting *Piper*, 430 U.S. at 37). Once again, as in *Northwest Airlines*, this Court held that nothing in principles of federal common law could justify creation of an implied cause of action for contribution. *Id.* at 640-46.

Taken together, this Court's decisions in *Northwest Airlines* and *Texas Industries* compel the conclusion that federal courts should not create a right of action for contribution among violators of Section 10(b) or Rule 10b-5. In its well-reasoned decision in *Chutich*, 960 F.2d at 722-24, the Eighth Circuit concluded that there is no basis for implying a right of action for contribution in the first way provided in *Texas Industries* – through congressional intent. This Court's precedent prohibits implication of a right to contribution under Section 10(b) or Rule 10b-5 if they were not designed for the "especial benefit" of those who commit securities fraud.

As detailed herein, this statute and rule were no more designed to protect those who defraud investors than were the Equal Pay Act and Title VII designed to protect employers, *see Northwest Airlines*, 451 U.S. at 92, or the antitrust laws were designed to protect those who conspire in restraint of trade, *see Texas Industries*, 451 U.S. at 639. Instead, Section 10(b), as a part of the Exchange Act, was "designed to protect investors against manipulation of stock prices," *Basic*, 485 U.S. at 230, by "implementing a 'philosophy of full disclosure.'" *Santa Fe Industries*, 430 U.S. at 477-78 (citation omitted). By its own terms, Section 10(b) authorizes promulgation of rules and regulations that are "in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (emphasis added). Thus, Rule 10b-5 fulfills the same public purposes, and the statute and rule are *not* for the protection of those who commit securities fraud. Under this Court's decisions in *Northwest Airlines* and *Texas Industries*, no cause

of action for contribution may be judicially implied under Section 10(b) or Rule 10b-5.¹⁰

B. This Court's Decisions Governing The Scope Of Actions That May Be Implied Under Section 10(b) Prohibit The Creation Of A Right To Contribution To Benefit Wrongdoers As A Matter Of Federal Common Law

As the Eighth Circuit stated in *Chutich*, federal courts "have authority to formulate federal common law in two narrow situations: when 'a federal rule of decision is "necessary to protect uniquely federal interests," and [when] Congress has given the courts the power to develop substantive law.' " 960 F.2d at 724 (quoting *Texas Industries*, 451 U.S. at 640). In *Texas Industries*, this Court held that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." 451 U.S. at 642; *see also Chutich*, 960 F.2d at 724. Nevertheless, a few district court decisions hold that because the private cause of action under Section 10(b) and Rule 10b-5 arises by judicial implication, courts are free to create an implied cause of action for contribution without regard to legislative intent or the usual limitations on such judicial lawmaking.¹¹

These decisions correctly observe that the private cause of action under Section 10(b) and Rule 10b-5 arises by judicial implication and has been shaped through a process of common law adjudication. As this Court

¹⁰ *See Chutich*, 960 F.2d at 724; *Biben*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,512, at 92,331 n.2; *Nelsen*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93,192-93; *Professional Financial Management*, 683 F. Supp. at 1285-87; *Robin*, 730 F. Supp. at 124.

¹¹ *See, e.g., Baker v. BP America, Inc.*, 749 F. Supp. 840, 842-44 (N.D. Ohio 1990); *In re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 615-16 (N.D. Ill. 1987).

explained in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975):

When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it

Id. at 737 (citation omitted). It does not follow, however, that because the private cause of action under Section 10(b) and Rule 10b-5 is itself an implied cause of action – that is defined by a developing common law of judicial decisions – the federal courts should create a right to contribution to benefit those who violate the statute and rule.

As the Eighth Circuit correctly held in *Chutich*, “[b]ecause federal courts implied the private right of action for substantive violations of section 10(b) and Rule 10b-5, federal courts have discretion to award appropriate relief to *plaintiffs* pursuing that right of action.”¹² “It does not follow, however, that federal courts have common law power to create a new right of action for contribution accruing to *defendants*.” *Chutich*, 960 F.2d at 724 (emphasis added) (citing *Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S. Ct. 1028, 1037 (1992), and *Texas Industries*, 451 U.S. at 97).

Lower court decisions creating a right to contribution conflict irreconcilably with this Court’s precedents limiting the nature and scope of actions that may judicially be created under Section 10(b) and Rule 10b-5. In *Santa Fe Industries*, 430 U.S. at 477-78, for example, this Court held that the implied cause of action arising under Section 10(b) *may not* be extended to actions that serve a subsidiary purpose of the statute and are not necessary to the fundamental protection of investors, stating that, “[a]lthough we have recognized an implied cause of

¹² *Chutich*, 960 F.2d at 724 (emphasis added). The implied action under Section 10(b) has been explicitly endorsed as such by Congress. *See supra* note 4.

action [under Section 10(b)] in some circumstances, we have also recognized that *a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act.'* *Id.* at 477 (citations omitted, emphasis added).

One fundamental purpose of the securities laws generally, and of Section 10(b) in particular, is to guarantee full disclosure of information about securities and to prevent fraud. This statutory provision is part of a legislative enactment which was "designed to protect investors against manipulation of stock prices," *Basic*, 485 U.S. at 230, by "implementing a 'philosophy of full disclosure.'" *Santa Fe Industries*, 430 U.S. at 477-78. In addition, under Section 10(b) Congress did not authorize the SEC to prescribe rules or regulations *for the benefit* of those who commit securities fraud.¹³ Instead, Congress authorized the SEC to promulgate such rules and regulations as are "necessary or appropriate in the public interest or *for the protection of investors.*" 15 U.S.C. § 78j(b) (emphasis added). Thus, the SEC promulgated Rule 10b-5 thereunder *to outlaw fraud*, not to protect those who commit fraud. The Commission has never purported to promulgate any rule that would create a right to contribution to benefit those who commit securities fraud.

Moreover, only a small portion of the statutory provisions imposing express liability under the securities laws create an additional right to contribution for those who are held liable thereunder. *See* Mark J. Loewenstein, *Implied Contribution Under The Federal Securities Laws: A Reassessment*, 1982 Duke L.J. 543, 550. Thus, Judge Renner

¹³ *Cf. King v. Gibbs*, 876 F.2d at 1281 ("[W]e cannot infer from the language of Section 10(b) or Rule 10b-5 a congressional intent to permit indemnification of those who were either alleged to have engaged in the deceptive and manipulative practices or those who have been proven guilty of utilizing such practices.").

