OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MUSICK, PEELER & GARRETT, ET AL., Petitioners

v. EMPLOYERS INSURANCE OF WAUSAU, ET AL.

CASE NO: 92-34

PLACE: Washington, D.C.

DATE: Monday, March 1, 1993

PAGES: 1 - 40

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IN THE SUPREME COURT OF THE UNITED STATES

- X

MUSICK, PEELER & GARRETT, ET AL. :

Petitioners :

v. : No. 92-34

EMPLOYERS INSURANCE OF WAUSAU, :

ET AL. :

- X

Washington, D.C.

Monday, March 1, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 p.m.

APPEARANCES:

CHARLES A. BIRD, ESQ., San Diego, California; on behalf of the Petitioners.

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Respondents.

ROBERT A. LONG, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(2:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-34, Musick, Peeler & Garrett, et al. v. Employers Insurance of Wausau.

Mr. Bird, you may proceed.

ORAL ARGUMENT OF CHARLES A. BIRD

ON BEHALF OF THE PETITIONERS

MR. BIRD: Mr. Chief Justice, and may it please the Court:

This case concerns the implication of a cause of action for contribution in a Federal statute. The statute in question is section 10(b) of the 1934 Securities Exchange Act. It is a statute in which courts have previously implied a cause of action for people who suffer losses as a result of purchases or sales of securities where the -- as a result of damage -- or, pardon me, as a result of violations of section 10(b).

My theme today is simple. The Court should apply its intent-based jurisprudence of implied rights, a standard which respondents concede they cannot meet when asked to apply a cause of action for a contribution in a statute in which a victim's civil claim has previously been implied.

Respondents and their amici assert that the

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Court should apply a different line of cases. That is, a line of cases involving fleshing out the victim's remedy itself. My burden today is to show that a contribution claim is a separate claim, and it should be treated as any other potential implied right of action in this Court's jurisprudence.

Implied contribution is to be treated like any other request for an implied action, first, because this Court has said so. In the Northwest Airlines and Texas Industries cases, the unsuccessful petitioners made arguments which are indistinguishable from the arguments made by the respondents in this case. The Court treated contribution there as an implied claim over those arguments.

In Texas Industries, the petitioner asserted that contribution was not at all a new cause of action, but only a supplement to the victim's express remedy in that statute for damages under section 4 of the Clayton Act. The respondent -- petitioner in that case also argued that contribution was a necessary corollary to judicial creation under the antitrust laws of joint and several liability among violators of that law, and amici in that case actually argued that contribution was somehow within the penumbra of the statute itself.

The court in that case said that in almost any

statutory scheme, courts may have to interpret ambiguous or incomplete provisions, but the authority to construe a statute differs fundamentally from the authority to fashion new remedies.

The court also said that the judicial determination that defendants shall be jointly and severally liable does not suggest that courts have the power to order contribution among the defendants, for joint and several liability only assures that the victims whom Congress intended to protect shall have full recovery from some, if not all, of the perpetrators.

Were there any lingering doubt that somehow Texas Industries and Northwest Airlines differed from this Court's general jurisprudence of implied rights of action, I would suggest that was put to rest last year in footnote 6 of Franklin v. Gwinnett County Public Schools, where the Court cited all of those cases as a single line and said that it's intent-based jurisprudence shall apply to all such cases.

Implied contribution is to be treated like any other request for an implied claim, second, because contribution is a distinct action and --

QUESTION: I suppose that footnote sort of grandfathered the implied cause of action under 10(b).

MR. BIRD: That footnote did not discuss the

implied contribution under section 10(b).

QUESTION: No, not contribution, just cause of action.

MR. BIRD: The implied cause of action under 10(b) itself was grandfathered as far back as Bankers Life. I think the Court has accepted the fact that lower courts have adopted that implied cause of action for victims and repeatedly in a number of cases the Court has fleshed out that cause of remedy, but as -- the Court has never addressed the issue whether there shall be implied contribution.

Contribution is a separate action because it always involves a different plaintiff, and that different plaintiff is someone whose claim has not been recognized, that different plaintiff is someone who is always a perpetrator of a violation of the statute, always a member of the class that Congress intended to regulate, never a member of the class that Congress intended to protect.

Second, contribution very often involves a different defendant. Even if contribution is sought in the same action where the victims seek their compensation, third party practice permits other parties, other defendants to be brought in by contribution actions, and often, as is the case here, contribution brings to Federal court a new suit.

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Implying contribution truly extends Federal jurisprudence to embrace a dispute which Congress has not assigned the Federal courts to resolve, and that is a dispute for adjustment of damages among defendants as opposed to a suit for compensation by a victim. Unless Congress tells the Federal courts that it wants them to embrace that dispute, to reach out --

QUESTION: Did we ever pretend when we created the 10(b) cause of action that Congress intended that cause of action to exist?

MR. BIRD: No, Justice Scalia, you acquiesced in the lower court's 10b-5 cause of action under standards which differ profoundly from the standards that this Court now uses to determine whether there shall be implied rights of --

QUESTION: So under a Lampf kind of analysis, having created 10b-5 actions, which you might say without any express indication of congressional intent, why shouldn't we continue to round out the scheme without any indication of congressional intent?

MR. BIRD: Contribution is not rounding out. There is -- the rounding-out cases, of which Lampf is one, start from the -- start with the assumption that the court must reach an answer.

To illustrate with an example even simpler than

Lampf, the court cannot walk away from the question whether the standard for liability under section 10(b) shall be negligence, shall be scienter. The court cannot say, well, Congress didn't instruct us on this so we simply won't answer the question.

There is absolutely no need, in rounding out the victim's cause of action, to develop an entirely new jurisprudence of what should be the rights of perpetrators.

QUESTION: You think we're just -- we think we'd just be off-base if we tried to devine what Congress' intention might be if it thought about it.

MR. BIRD: I do, Your Honor, very much so. I believe the kind of analysis which exists in the respondent's brief in this case is a kind of analysis in which this Court should never indulge in the process of deciding whether to create a cause of action.

The question is an attempt -- Your Honor put it very succinctly. What would Congress have done if it had known? That is not an effort to determine legislative intent, it is an effort to impute intent to a mind which had none whatsoever.

QUESTION: Congress -- don't you think Congress has embraced the notion of a cause of action under 10(b)?

MR. BIRD: I believe Congress has -- beyond any

question, has embraced the notion that victims of violations of section 10(b) --

QUESTION: So your answer's yes.

MR. BIRD: Yes.

QUESTION: It's just plain yes.

MR. BIRD: Yes. Congress has said that victims shall have a cause of action against perpetrators it has seen and approved of this Court's jurisprudence. It has not said in any way whatsoever that perpetrators shall have remedies against each other to adjust what they --

QUESTION: But it has said in comparable sections -- maybe you don't think they're comparable -- that there should be contribution.

MR. BIRD: I do not believe they are comparable, though I would --

QUESTION: What if they were? What if 9 and 18 you could say are sort of fellow travelers with 10(b) and Congress has expressly provided for contribution?

MR. BIRD: I would still argue that the Court should not engage in that kind of reasoning by analogy that says well, Congress did it here, and Congress did it there, so Congress would have done it if it had only known.

QUESTION: Well, we did it for the statute of limitations.

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MR. BIRD: But that was an entirely different situation, Your Honor where you were --

QUESTION: Well, it always is.

(Laughter.)

QUESTION: No, but why? You said that we had no choice, that we had to come up with some -- we didn't have to pick a statute of limitations. We could have said, there is no statute of limitations. There are such things. Just the law of laches governs, and nothing else. Why couldn't we have said that?

MR. BIRD: The analysis in -- you could have, but you did not.

QUESTION: Right.

MR. BIRD: The Court did not do that, Your Honor.

The analysis in Lampf commences with a phrase which says, "excepting that some limitation must apply," and by saying that this Court squarely placed the analysis of Lampf within the same line of cases that says, we will determine what is the standard of liability, that says, we will determine whether purchasers or sellers or perhaps someone else shall have a cause of action.

That was not the creation of the cause of action. It is not a form of reasoning which should be applied in a case like this.

QUESTION: Well, why doesn't -- I'm sorry.

QUESTION: Go ahead, please. No, go ahead.

QUESTION: Why doesn't this form of reasoning apply? One of our sort of rounding-out theories is that if there is in fact a class of plaintiffs who are given an implied cause of action, and there are other potential plaintiffs who are in essentially the same equitable kind of position that we ought to round out and extend to that second group of plaintiffs, why don't we have sort of the converse situation here -- that if in fact there is a group of defendants who are in some comparable position and have a right of contribution, then we ought to round out our cause of action to do the same thing for defendants under 10(b)?

As Justice White referred a moment ago to the section -- what is it, the section 9 and section 18 causes of action, there is contribution. Why isn't the same equitable argument for the sake of defendants an appropriate argument to make here as the equitable argument in the case of plaintiffs that we recognized in Virginia Bankshares?

MR. BIRD: Because initially, Your Honor, you do not approach these people as defendants. You approach these people as plaintiffs. They have brought to court -- and this case is a classic illustration. They have

brought to court a lawsuit separate from the victim's lawsuit, in which they assert an entirely new cause of action against new defendants. That is an extension of Federal --

QUESTION: Well, if -- may I just interrupt you and ask this: if we get over the question of whether to call them plaintiffs or whether to call them defendants, do they not have essentially the same equitable argument to make:

We are in a worse position than those who have been subjected to express causes of action where express rights of contribution apply, and therefore we ought, as a matter of equity, be accorded the same right, whether you call us a plaintiff or whether you call us a defendant?

MR. BIRD: Justice Souter, that is an issue of pure policy. They can make that argument. The fundamental question is whether the Federal courts should entertain an argument of pure policy when what is before them is the question whether Congress authorized a -- the courts to create a cause of action.

QUESTION: May I -- first of all, you don't really draw a distinction between whether the contribution claim is asserted after a judgment or after settlement or before, do you?

MR. BIRD: I do not, Justice Stevens.

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QUESTION: I just wanted to be sure, because then it wouldn't matter whether you call them plaintiff or defendant in that context.

But what about the reasoning in the Blue Chip case, where you talked about the acorn growing into a judicial oak, and that therefore it's too late to chop the oak down, in effect. Don't we in a -- to a certain extent have a judicial oak here, in that courts of appeals have rather consistently found a right of contribution over the years, and that's sort of what the law, with one exception, is today?

MR. BIRD: Your Honor, you do not. Contribution in Federal security -- in 10b-5 cases at this point is not a judicial oak. What the Court is being asked to do here is to plant --

QUESTION: It's certainly more than an acorn, and there are a lot of cases out there and there have been for a good many years.

QUESTION: And it's a hard nut to crack, too.

(Laughter.)

MR. BIRD: Well, perhaps it's a little sapling, but it certainly does not have the dignity that the 10b-5 cause of action had when it reached this Court in Bankers Life, nor does it have even the theoretical underpinnings of that.

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When this Court first met the implied cause of action under section 10(b), it had been recognized by far more courts, including the courts of appeal, and it also had an underpinning that that cause of action was implied, under whatever theory of jurisdiction, for the very people investors, who were the people to be protected when Congress enacted section 10(b).

This is not a class of people who were to be protected when Congress enacted section 10(b). Congress enacted section 10(b) as an extremely broad regulatory statute, not simply the disclosure statute which the Court sees most often.

There is no reason to suggest that in attempting to regulate disclosures markets and anything else the Securities and Exchange Commission thought was necessary to protect the public and investors Congress intended to do anything to adjust the rights and liabilities of perpetrators of violations of the section.

Implied contribution also is to be treated like any other implied action, because abandoning the intent-based jurisprudence in this case is bad judicial policy. The real -- if the real intent-based standard is abandoned, Federal courts will face countless arguments like the colloquy we have just had here suggesting that through some reasoning by analogy, or some principle of

equity, some party is entitled to assert a cause of action because some other party is entitled to do so.

This reasoning by analogy is like looking at legislative history through dark glasses. Two things are true of it --

QUESTION: Or at all.

MR. BIRD: Or at all, but in this case certainly, first it's obscure, and second, what one sees depends on the color of the glasses, because whenever the Court begins trying to create causes of action by analogy, the question is, what analogy is valid?

The validity of an analogy depends on adopting the same premises that Congress adopted when it enacted the statute, and the sort of reasoning which is being urged on this Court today is a kind of reasoning which attempts to create intent in congressional minds which was not there.

QUESTION: Were there pendant State law claims in this case?

MR. BIRD: Justice Kennedy, there were.

QUESTION: Does State law allow a contribution?

MR. BIRD: State law would allow contribution for certain purposes. In California, it's called comparative equitable indemnification.

The claims alleged in State law in this case

were dismissed by the district court at the same time that all other claims were dismissed and there would remain an issue in the district court, upon dismissal of the 10b-5 or 10(b) attempted contribution claim, whether any of the State law claims would be valid. The State law claims obviously are not here before this Court.

A second critical issue of judicial policy in applying the intent-based standard is that any time the Court departs from it, especially with respect to a right of contribution, that --

QUESTION: Mr. Bird, what point in time do you think Congress' intent is relevant when you're talking about intent-based standards, back in '34, or more recently? Because all the way back to '34, the general rule was if they passed the statute, why, they expected the judges to figure out the appropriate remedy, so I'm wondering whether you're talking about intent in '34, or intent since we changed the law a few years ago.

MR. BIRD: Well, the Court has uniformly applied its intent-based jurisprudence looking at the intent when the statute was created.

QUESTION: So we're looking at '34.

MR. BIRD: You would be looking at '34, Your Honor, although that's one of the very issues that comes up once one starts to reason by analogy, and that is, what

Congress does one look at?

The secondary jurisprudence in this case already includes what's the effect of partial settlement without guidance of Congress, whether contribution, if allowed, would be pro rata or by relative fault, some guidance by Congress in section 11 of the 1933 act, none any place else.

In this very case, if one were to look to sections 9 and 18 and say well, Congress might have done the same thing, in any case where there is both a section 10 claim and a 1933 section 11 claim, it's possible for the section 10 contribution analysis utterly to overwhelm the plain language of section 11, which says that those who were intentional wrongdoers shall not have contribution against those whose violation was recklessness or of some lesser character.

And I think, Justice Stevens, although in general one would look at 1934, it is certainly valid in this case to say, once one gets into the analysis of contribution, should we look at section 20A and see if in section 20A, which Congress passed in 1988. it had learned something about whether contribution was efficacious or not, and explicitly declined to adopt it as part of the Insider Trading Act.

I think that secondary jurisprudence is one

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which cautions this Court not to attempt to create causes of action for contribution where they did not exist before.

The Court should set a clear and simple principle to apply to requests for implied contribution wherever the Court has previously accepted an implied victim's cause of action. This is not the only case in which a request for implied contribution could come to the Court.

It could arrive in the Commodity Exchange Act, it could arise under title IX, it could arise under the Rehabilitation Act -- perhaps most importantly, in terms of volume impact on the Federal court, it could arise, it has arisen, it has created a conflict in the circuits under the Civil Rights Act, and I would urge the Court to take the opportunity in this case to write clear, simple, principled, intent-based jurisprudence which will guide the lower Federal courts in all of those cases and prevent the necessity for resolving them on a case-by-case basis using the kind of analysis that comes out of hypotheticals.

The Court has never fleshed out one implied right with another. This is not the first time to do it. I would urge that the Court in this case ask itself the question, in writing a decision in this case, is this the

end, or is it a beginning? The entire fleshing out line of cases defines, it often limits, a section 10(b) cause of action.

Or is this a beginning? Is it the planting of an oak, or perhaps the cultivation of what's now only a sapling, does this case shape an old claim, or does it create a new claim? Emphatically, this case creates a new claim which this Court should not recognize.

If there are no further questions, Mr. Chief Justice, I would reserve the remainder of my --

QUESTION: Could I ask you if, in developing intent-based jurisprudence, would you say that -- just have a real simple rule, Congress either provides a cause of action, or you just never imply one? I suppose that would be your choice. You either imply -- Congress either expressly creates it, or courts don't imply it, period.

MR. BIRD: That goes beyond the Court's current rule, and I would not urge that the Court has to adopt a position that is that strict.

QUESTION: So we're going to be constantly, as we have been for years, trying to divine congressional intent from almost any source.

MR. BIRD: What I've urged, Justice White, is that the Court's jurisprudence under the Touche Ross and Transamerica line of cases is a currently successful

analysis which provides adequate guidance.

If the Court were to choose to say, if it's not in the statute it's not there, that's certainly a sustainable basis to decide this case. It's not a necessary basis.

QUESTION: Very well, Mr. Bird. Mr. Olson, we'll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE RESPONDENTS

MR. OLSON: Mr. Chief Justice, and may it please the Court:

With the Court's permission, I would like first to place the question presented in this case in its proper context and then emphasize four points concerning its resolution.

The context is that for 22 years, and over the course of 10 decisions, this Court has been engaged in a continuous process of defining the configurations and contours of the 10(b) implied remedy to make it consistent with the regulatory scheme from which it is derived. This case is simply part of that continuum.

The Court must decide how 10(b) defendants will allocate among themselves the damages for which 10(b) makes each of them liable. The only question is how that issue will be decided: in favor or against contribution

among 10(b) defendants.

QUESTION: Well, is this contribution between defendants, or contribution from nonparty defendants?

MR. OLSON: It's contribution among the persons who would be liable to the plaintiff under section --

QUESTION: So they are people who weren't parties.

MR. OLSON: They are people who may not necessarily have been parties, but people whose liability was established by the conduct that gave rise to the 10(b) action or in the comparable Securities Act express remedies, the violation of section 9, section 18, and section 11.

There are four reasons, we submit --

QUESTION: That's point to be tried, though, isn't it, or not -- whether, indeed, their conduct made them liable for this damage?

MR. OLSON: Yes, it would be, but their liability would be established by the conduct that occurred at the time of the violation of section 10(b).

We submit that there are four reasons why this Court's jurisprudence and the choice Congress has already made require a decision in favor of contribution over no contribution. The first relates to the means by which the decision should be made, the second is the outcome that

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that method ordains, the third responds to petitioner's central argument, and the fourth concerns the consequences of a decision against contribution.

First, the methodology. Petitioner suggests that there's some sort of dichotomy between divining the intent of Congress and filling out the contours of the section 10(b) remedy. We submit that the Court has applied a consistent, fundamental, jurisprudential principal in defining the 10(b) remedy.

The Court looks to the 73rd Congress, the interrelated '33 act and '34 act, to the express statutory remedies that are the analogues of section 10(b), and then decides what Congress would have intended had it considered the issue, and what result would conform the 10(b) implied remedy most faithfully to the statutory regime.

This approach, we submit, has three very strong and powerful virtues. It respects the separation of powers, leaving the policymaking decision to the policymaking branch.

It yields consistent results by consulting with the same oracle on each occasion a 10b-5 issue or a 10(b) issue is presented, and it provides a clear and predictable path for lower courts deciding future 10(b) cases as well as guidance for those who must litigate past

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inventions.

QUESTION: If it's such a terrific approach, why have we abandoned it --

MR. OLSON: You have not abandoned --

QUESTION: For everything except 10(b)?

MR. OLSON: We submit that the Court has considered 10(b) cases -- 10 10(b) cases over the last 22 years, and for all intents and purposes that precise methodology, visited most recently 2 years ago in Lampf, involved that same process, consulting the statutory framework from which 10(b) arose, the analogue -- most comparable provisions of the section comparable to section 10(b) section -- in that case section 11, section -- and particularly section 9 and 18 of the 1934 act, and that is the methodology that the Court applied.

The Court applied a similar and virtually identical methodology to the other 10(b) cases, so far from abandoning any approach that the Court has applied in 10(b) cases, we're asking the Court consistently to do what it has done over and over again and what it did most recently in Lampf.

QUESTION: Well, Mr. Olson, though, don't Texas Industries and Northwest Airlines indicates that a contribution action is separate? It's separate from the underlying cause of action --

MR. OLSON: Well, we have --

QUESTION: Which might move it beyond Lampf.

MR. OLSON: I've several responses to that. That is the central and exclusive core to the petitioner's argument in this case.

In the first place, the reference in those two cases to the phrase, cause of action, was not necessary to the decisions in either of those two cases. What the Court was doing in those two cases, we respectfully submit, and the Court did unanimously, was look to the intention of Congress.

In each of those cases, Congress had created an explicit statutory remedy, and in each of those cases Congress had not included a cause of action or a claim or a remedy for contribution as a part of the explicit cause of action. As a result, the Court determined Congress created this cause of action explicitly, did not want contribution as a part of it, and we will adhere to the judgment of Congress.

The phrase, cause of action, really had very little to do with it. What we submit is what is happening in the Securities Act -- and by the way, in the Northwest Airlines case the court said specifically when -- in a footnote, the Court specifically said, when Congress did want to create a cause of action or a remedy or a right

for contribution, it did so, and the Court in that footnote pointed explicitly to the securities laws, the '33 and '34 acts.

Those -- the rule of contribution explicitly provided in the Securities Acts is very unusual in Federal law. There are very few explicit rights to contribution. Thus, Congress knew what it was doing when it included a rights -- rights to contribution in the Securities Acts.

In fact, in section 11 and in section 9 and in section 18, the reference to contribution is included in the definition of the right or the remedy itself, thus suggesting that Congress felt that contribution was a part of the cause of action or a part of the remedy, and suggesting that Congress felt that that contribution right was an important essential feature of the remedy itself.

Thus, we don't believe that contribution is a separate cause of action, but even if it were a separate cause of action, the very same methodology would apply. The Court would try to determine whether implying the cause of action, if that's what's going to be done, would be most consistent with the statutory framework.

We submit that, again, it would be most consistent with the statutory framework, because every time the -- when Congress did create a mechanism for securities fraud in 1933 and 1934, it repeatedly put

contribution as a part of those rights.

This Court has determined over and over again that the provisions to which I've referred are most like section 10(b). Section 10(b) is a part of them, it's a judicial overlay to section 10(b). In the same rules Congress would have wanted to include a right of contribution in a 10(b) remedy just as it did -- it wanted to include a right of contribution with respect to the sections 11, 9, and 18 remedy.

Probably most telling is the consequences of what might occur if the Court were to hold a noncontribution right in this case. Because section 10(b) is an overlay to these explicit Securities Act provisions, the parade of horribles that the plaintiffs refer to about -- that result allegedly from contribution are going to exist anyway.

Petitioner's concern about the complexity in settlements and so forth we submit is going to occur anyway because contribution does exist, it will exist, and it will continue to exist in section 10b-5 cases because sections 9, 11, and 18 are also going to be involved in those cases.

In fact, what would happen if this Court adopted a no-contribution rule in section 10(b) cases, it would give the plaintiffs a choice to write out of existence the

contribution rights that Congress so explicitly intended. In 10(b) cases or in securities fraud cases, you'd have a choice of the plaintiff to select contribution or no contribution.

Because section 10(b) overrides everything else, if the plaintiffs chose to select 10(b), it could write out the provisions of contribution that exist in sections 9, 11, and 18. Thus, you would involve -- as a result of the judicial creation of section 10(b), involve yourself in a judicial implied repeal of the contribution rights that Congress so explicitly intended.

QUESTION: Well, maybe --

QUESTION: Are those acts -- excuse me.

QUESTION: Go ahead.

QUESTION: Are those actions exclusive? Do you have to elect between --

MR. OLSON: You don't have to elect, but --

QUESTION: Why can't you just plead them all and ask for contribution as to the former but not as to 10(b)?

MR. OLSON: You could do that. Plaintiff could do that, and then you would have what the -- the concern that the plaintiff is worried about, that you would have complexity involved in contribution.

You're going to have a further complexity of the court having to resolve contribution and noncontribution

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in the same case and try to assign the amount of liability that was a result --

QUESTION: Well, that may be true. My only point was that's not necessarily a repealer of the contribution, as you indicated.

MR. OLSON: Well, but it could be used by a plaintiff as a repealer to avoid --

QUESTION: Only if he elects.

MR. OLSON: If he elects, but Congress, when it established a mechanism for enforcement through private remedies of securities fraud clearly wanted contribution to be a part. Contribution ensures that the wrongdoers cannot completely escape. Even if the plaintiffs don't select out the wrongdoers, the defendants may select out the wrongdoers.

In addition to that, as this Court indicated in Bateman Eichler, there's affirmative value in the enforcement process to allow the wrongdoers to sue one another. It allows them, the defendants, to bring cases against other potential defendants to bring to the attention of the law enforcement authorities possible violations of the securities laws.

That's why the Securities & Exchange Commission has filed a brief and is here today supporting the inclusion of contribution, because contribution is such a

necessary -- as perceived by Congress, inclusion in the Securities Act.

If you give plaintiffs an opportunity to repeal contribution, and plaintiffs may well choose to decide not to plead violations of the statute that do involve contribution because they may decide that may give them some leverage against some of the defendants, or they may decide to dismiss some of the cases if they can make a deal with some of the defendants because of joint and several liability.

That would allow section 10(b), the no-contribution rule of section 10(b) to be used as a judicial implied repeal of the contribution rights in the other sections.

Furthermore, a decision against contribution would, as Justice Stevens suggested in his questions a moment ago, overturn 25 years of consistent lower court case law. Until a few months ago, when the Eighth Circuit decided the Chutich case, there was 25 years of consistent law.

Now, earlier, we -- there was some debate by Mr. Bird as to the size of the judicial oak. It's interesting, and I think quite compelling, that when section 10(b) got to this Court for the first time in 1971, it was 25 years old. It had first been recognized

25 years before in the Kardon case.

In the Blue Chip case, when this case first reached the Birnbaum rule, that rule, which came from the Second Circuit, was 22 years old, and the Blue Chip case, in the words of the Chief Justice speaking -- Justice -- then Justice Rehnquist, speaking for the Court, was that the 25 years of consistent judicial interpretation should not -- was significantly persuasive in and of itself.

Today, we are facing the decision with respect to contribution or no contribution. Contribution has been around in the Federal courts in the securities fraud area for 25 years, the same length of time, and with about the same judicial pedigree -- Mr. Bird said contribution hadn't been approved by as many courts as section 10(b) at the time section 10(b) got here, but there are seven -- five or six circuits that have approved contribution, and I suspect the weight of judicial authority is about the same. The same is true of the Birnbaum rule.

So the contribution rule comes to this Court with the same weight of judicial authority behind it from the lower courts as did the 10(b) rule itself and the purchaser-seller rule found by the Court to continue to be appropriate in the Blue Chip case.

In summary, the choice is an outcome consistent with congressional intent as expressed in section 10(b)'s

closest analogues, with 25 years of judicial interpretation, the SEC's view of the enforcement scheme and how it can best be administered, and the framer's decision as to where policy decisions should be made.

The alternative cannot possibly be said to be consistent with congressional intent. In fact, it would repeal congressional decisions, and it would fail to fulfill this Court's duty to complete the task it undertook beginning in 1971 to make the section 10(b) remedy as close as possible to the instrument Congress would have created and as compatible as possible with the regulatory and enforcement regime Congress did create.

To summarize, we are only asking this Court to do what the Court has consistently done with section 10(b). Having created the judicial remedy, what are its configurations and contours going to be, and how can we best make it more closely approximate what Congress would have intended and how may we make it the closest possible approximation to what will not interfere with the enforcement provisions of the remaining provisions of the Securities Act and how best to fulfill the purposes of those acts?

Thank you.

QUESTION: Thank you, Mr. Olson. Mr. Long, we'll hear from you.

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ORAL ARGUMENT OF ROBERT A. LONG, JR.

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENTS

MR. LONG: Thank you, Mr. Chief Justice, and may it please the Court:

The Securities and Exchange Commission has concluded that the Court should recognize a right of contribution under section 10(b) and rule 10b-5. The Commission has made that conclusion for essentially two reasons.

First, Congress provided for contribution in provisions of the 1934 act that create express private rights of action for securities fraud, that is, sections 9 and 18.

Because section 10(b) is part of a family of rights that should be construed as a coherent whole, Congress' decision to recognize a right to contribution in the comparable express causes of action should govern in actions under section 10(b).

Second, the Court has the power to recognize a right of contribution. The section 10(b) right of action is an implied right. Defendants are liable under section 10(b) only because courts have said so. In prior cases, this Court has defined the contours of the section 10(b) right of action to maintain evenhanded administration of

the securities laws. The Court can and should exercise that power in this case to recognize a right to contribution.

Now, let me address the second point, the power point, first.

QUESTION: Mr. Long, do you think in recent cases we've said that the courts have the power to create causes of action?

MR. LONG: Well,I think what we have here is, we would agree this is a cause of action, but it's not an independent cause of action. Contribution is entirely derivative of the underlying section 10(b) cause of action.

The parties are all parties who either were present in the original action or they could have been present if the plaintiff had named them, and the liability is the liability that's established in the original action.

So we do not view this as a case in which it's appropriate to apply the Texas Industries or Northwest Airlines type of analysis. That analysis is appropriate where Congress has expressly created a cause of action but has omitted a right of contribution.

QUESTION: Well, you might think that if Congress has expressly created the cause of action and we

lack the power to create a right of contribution that a fortiori there wouldn't be such a right if it's only an implied cause of action in the first place.

MR. LONG: Well, again, the approach the Court has followed is when it has implied the cause of action it has undertaken the necessary process of defining the contours of that action of rounding it out, and where the question is whether there should be a right of contribution, we see no essential difference between answering that question and answering the kinds of questions that this Court has answered in many prior cases under section 10(b), whether to recognize a defense, the measure of damages -- this is really, we think, just another question in that line.

QUESTION: Well, to the extent that it is a new cause of action, it seems to me it's a step beyond questions about whether there should be a statute of limitations or a defense.

MR. LONG: I would agree with you that it's a step beyond in that sense, but again, I would emphasize this is quite different from implying a freestanding cause of action.

And in the situation the Court is presented with here, when section 10(b) really sits among some express causes of action that Congress created, where Congress

expressly recognized rights of contribution and section 10(b) not only sits in the middle of those but in fact is a kind of catch-all that overlaps to a great degree, for the Court to not imply, or not recognize a right of contribution we think would in fact be less respectful to the intent of Congress than to apply the same policy choice, the same weighing of policy considerations that Congress made in 1934.

QUESTION: I wonder what underlies that policy choice in these other sections, or under 10b-5. Why is the Commission so intent on furnishing retribution in 10(b) cases -- or, retribution? Contribution.

(Laughter.)

MR. LONG: The Commission reached this conclusion because it decided as a matter of fairness and as a matter of evenhanded administration of the securities laws that a contribution right ought to be recognized under section 10(b).

QUESTION: Well, how does that work out? You mean these people who are jointly and severally liable, if somebody gets stuck for the whole bill it's fairer to dig out the other fellows who should share the liability, is that it?

MR. LONG: That's part of it. It is -- under section 10(b), a very wide variety of defendants may be

sued, and there may be quite a range of responsibility, and it is possible for a defendant with a deep pocket but with rather less serious culpability to be stuck, as you say, for the entire liability. That's part of the fairness argument.

As I say, the other part is a desire to harmonize the securities laws and give these defendants the right to contribution that Congress gave them in the comparable express causes of action.

QUESTION: In our --

QUESTION: I suppose you could always be fair by just limiting recoveries to the named defendants' fair share.

MR. LONG: To the -- well, of course, that would -- it's possible for the plaintiff, the victim, not to name all the possible defendants. That's why contribution may be a cause of action. It can result in some cases in an additional action.

QUESTION: But that would be within the plaintiff's own power?

MR. LONG: Yes. The plaintiff would have the power to --

QUESTION: So I mean, if the plaintiff suffers, it's the plaintiff's own fault --

MR. LONG: Oh --

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QUESTION: On Justice White's hypothesis.

MR. LONG: Well, the plaintiff may be quite confident, or reasonably confident on getting a full recovery, because it is joint and several liability, and if the plaintiff knows it's got a deep pocket --

QUESTION: Well, wouldn't you -- would you guess that most plaintiffs would be in favor of the Commission's suggested policy -- contribution? Would they rather have contribution or not?

MR. LONG: I think most plaintiffs would not want to have contribution.

QUESTION: Because --

MR. LONG: The absence of contribution I think gives plaintiffs additional control over the lawsuit, I think is the short answer to that.

Let me say, then, just a word about the second point I have, why the Commission believes that the comparable provisions in the securities laws evince a congressional intent to allow contribution in private actions for damages for securities fraud.

In Lampf, the Court identified the express rights of action that are most analogous to the implied right of action under section 10(b). They are found in sections 9 and 18 of the 1934 act.

Sections 9 and 18 target the precise dangers

that are the focus of section 10(b), and they provide remedies for investors injured by manipulative practices or false or misleading statements, and of course both sections 9 and 18 expressly provide for contributions -- contribution rights.

Section 10(b) is the catch-all provision. It overlaps both sections 9 and 18. It provides a general remedy for manipulative or deceptive practices.

Because sections 9, 10(b), and 18 are integral elements of a complex web of regulations, as the Court said in Lampf, they should be construed to form a coherent whole. Consequently, Congress' express determination to allow contribution under sections 9 and 18 should also govern under section 10(b).

Unless there are further questions, I thank the Court.

QUESTION: Thank you, Mr. Long. Mr. Bird, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF CHARLES A BIRD

ON BEHALF OF THE PETITIONERS

MR. BIRD: Thank you, Mr. Chief Justice.

Contribution is a new cause of action whether the underlying victim's claim is expressed in a statute, implied in a statute, or arising from the common law. That is a simple error I believe I heard one of the

respondents make.

Respondents referred to footnote 11 in the Texas Industries case. In footnote 11, the Court wrote, "We intimate no view as to the correctness of" and followed with citation to the three cases which then said there would be contribution in 10b-5 actions. If contribution in 10b-5 actions is a sapling, it was never cultivated by this Court.

Complexity of contribution is an issue of policy. Fleshing out a new cause of action for contribution is an Article 1, Article 3 problem. That is our point.

Finally, this case is at the intersection of two lines of authority. One line of authority says that as to all causes of action there shall be implication if, in a Federal statute, if, and only if, Congress affirmatively intended that that be so.

Another line of cases says, we have this 10b-5 victim's cause of action. We must flesh it out, and because we have no other signpost, we must look to what Congress would have done if Congress had realized there was going to be this cause of action.

The question is which of those lines of authority shall govern the cause of action, if any, for contribution under section 10b-5. The would-have-done

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analysis is exactly what got this Court to the Borak cause of action, and it is exactly what this Court rejected in Touche Ross, in Transamerica Mortgage Advisers, in Texas Industries, and in Northwest Airlines, and it is exactly what this Court should reject here.

From this intersection, the Court should say the intent-based jurisprudence implies -- applies to all implied causes of action, whether for contribution or for anything else.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bird. the case is submitted.

(Whereupon, at 2:53 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)