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I. Antitrust Law

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I. Antitrust Law

A. Retroactive Application of New Decisions—*Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir.), rev'd, 396 U.S. 13 (1969).

The Ninth Circuit's recent decision in *Simpson v. Union Oil Co.*¹ presents the second noteworthy development in the law occasioned by this unusual antitrust case—a case in which the same two parties have litigated over the same cause of action for more than a decade.

Some acquaintance with the first development is a prerequisite of understanding the second. In 1964, the *Simpson* case afforded an opportunity for the United States Supreme Court to undertake a significant reshaping of the case law governing resale price maintenance. The contours of that reshaping can be discerned only against a background composed of several older decisions.

Over half a century ago, in *Dr. Miles Medical Co. v. John D. Park & Sons, Inc.*,² the Supreme Court laid down the basic rule that resale price maintenance—the “vertical” price-fixing technique whereby a manufacturer sells his products to retailers under enforced contracts prescribing the prices at which the retailers may resell them—is a restraint of trade prohibited by section 1 of the Sherman Anti-Trust Act.³ *Dr. Miles* did not win approval in every quarter. Whether or not the economic advantages of resale price maintenance outweigh its economic disadvantages, and whether or not it ultimately tends to foster or to suppress competition, have always been vigorously disputed questions in academic and business circles.⁴ It was therefore quite predictable that the absolute prohibition embodied in the *Dr Miles* decision would be substantially emasculated in the ensuing years by several broad exceptions.⁵

1. 411 F.2d 897 (9th Cir.), rev'd, 396 U.S. 13 (1969).

2. 220 U.S. 373 (1911).

3. 15 U.S.C. § 1 (1964).

4. For a comprehensive analysis of the arguments for and against resale price maintenance see Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955).

5. The most far-reaching and important of these exceptions is the network of state fair-trade laws. In 1937, Congress passed the Miller-Tydings Act, ch. 690, tit. VIII, 50 Stat. 693 (codified in two provisions of 15 U.S.C. § 1 (1964)). This Act provides in substance that wherever a state statute expressly authorizes the practice, manufacturers of trademarked or branded commodities may contract with their retailers for the establishment of minimum prices at which those commodities are to be resold, anything in the federal antitrust laws to the contrary notwithstanding.

The Supreme Court itself sanctioned one large exception in *United States v. General Electric Co.*,⁶ a noted 1926 case involving some subtle interplay between antitrust policy and patent policy. General Electric, the defendant patentee, had contrived a marketing system in which it consigned its patented incandescent lamps to numerous other companies designated as its agents. These agents in turn sold the lamps to consumers at prices determined solely by General Electric. Assailing the entire scheme as a transparent subterfuge designed to circumvent the ban on resale price maintenance, the government sued for an injunction against the defendant's marketing practices. The case was decided in favor of General Electric. The arrangements in question, the Court held, did not, strictly speaking, constitute resale price maintenance.

The Court emphasized the clear distinction in law between the independent retailer, who purchases goods from a supplier and then resells them to consumers on his own behalf, and the consignee retailer, who takes possession of the supplier's goods and then sells them on the supplier's behalf.⁷ From a technical, legal standpoint, there can obviously be no resale price maintenance in the latter instance, for the sales made by a consignee are first sales, not "re-sales." Hence, when a supplier who dictates prices to his consignee retailer is charged with practicing resale price maintenance, courts will sustain the charge only if it is demonstrated that the consignment agreement is a mere legalistic disguise for what really amounts to a sale by supplier to retailer. Concluding on the basis of evidence in the record that the relationships between General Electric and its distributors and retailers were indeed genuine agency relationships between a consignor and its consignees, as distinguished from vendor-purchaser relationships artfully camouflaged by paper contracts of agency, the Supreme Court rejected the government's charge of resale price maintenance.⁸

As an alternative argument, government counsel had also urged that, irrespective of whether the defendant's consignment arrangements were genuine or not, the Court should nevertheless condemn the consignment price-fixing in this particular case, inasmuch as "the system of distribution is so complicated and involves such a very large number of agents, distributed throughout the entire country, that the very

State legislatures were by no means unresponsive to such strong encouragement. The great majority have enacted "fair-trade" laws, the minimum effect of which is to permit the maintenance of minimum resale prices on trademarked or branded goods. A recent tabulation reveals that as of 1967, fair-trade laws were in force in 42 states. 2 CCH TRADE REG. REP. ¶ 6017, at 9032 (1967). For a specimen statute, see California's Fair Trade Act, CAL. BUS. & PROF. CODE §§ 16900-05.

6. 272 U.S. 476 (1926).

7. *Id.* at 481-85.

8. *Id.* at 485.

size and comprehensiveness of the scheme brings it within the Anti-Trust law."⁹ The Court rejected this argument also, noting that the consigned products were patented, and that "the comprehensiveness of a patentee's control of the business in the sale of a patented article is not necessarily an indication of illegality of his method."¹⁰ Fortified by the *General Electric* decision, patentees prepared to inaugurate marketing operations modeled after General Electric's anticipated no difficulties with the *Dr. Miles* rule.

Among many perplexities engendered by *General Electric* was the question whether the Court's reasoning served to validate price-fixing by large-scale consignment marketing of *nonpatented* goods as well. There was widespread and persistent belief that it did.¹¹ However, since *General Electric* involved patented products only, all language in the opinion to that effect should no doubt be set down as dictum.¹² Notwithstanding the Supreme Court's powerful encouragement, vast systems of vertical price-fixing by consignment remained relatively uncommon for many years after 1926; not only are such programs economically impracticable for all but the most powerful and well-financed manufacturers,¹³ but for many years the fair trade laws in force in most states permitted resale price maintenance and thus rendered recourse to the *General Electric* loophole unnecessary.¹⁴ In consequence, the legality of resale price maintenance by consignment of nonpatented goods was seldom litigated, and the courts had almost no opportunity to decide the question directly.¹⁵

The *General Electric* exception to the *Dr. Miles* rule—or perhaps more accurately, any assumed extension of that exception to large-scale consignment marketing of nonpatented products—received its quietus four years ago in *Simpson v. Union Oil Co.*¹⁶ The Court adjudged that the "consignment agreements" under which large oil companies dictated to their service station managers the retail prices to be charged for gasoline were in reality contracts for vertical price-fixing in viola-

9. *Id.*

10. *Id.*

11. *Id.* at 478-88.

12. *Sun Oil Co. v. FTC*, 350 F.2d 624, 633 (7th Cir. 1965).

13. See generally Klaus, *Sale, Agency and Price Maintenance*, 28 COLUM. L. REV. 312 (1928).

14. See note 5 *supra*.

15. In a 1949 case, the government once again attacked General Electric's practice of marketing and maintaining the prices on its incandescent lamps by consignment. By this time the patents on the lamps had expired. The court upheld the legality of the arrangement even though patented products were no longer involved. It should be noted, however, that the court rested this conclusion in part upon the doctrine of collateral estoppel, and that the legality of consignment price-fixing was only one minor issue in a very complex case, which the government won on other grounds. *United States v. General Elec. Co.*, 82 F. Supp. 753, 827 (D.N.J. 1949).

16. 377 U.S. 13 (1964).

tion of the Sherman Act. The legality of such agreements, the Court declared, could no longer be vindicated—as it was in the *General Electric* case—by conventional legal theorizing to the effect that they are merely an employer's instructions to his sales agent, as distinguished from contracts between a manufacturer and retailer both of whom are independent entrepreneurs.¹⁷ Universally acknowledged to be a minor landmark, the Supreme Court's *Simpson* decision has naturally become the subject of extensive comment in the reviews.¹⁸

The Supreme Court opinion announcing the new "*Simpson* rule" concluded with some rather unusual and—as is borne out by subsequent developments—rather troublesome language. The opinion of the Court, after directing a remand to the district court for trial, declared that "we reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."¹⁹

Thus the Court raised—but did not answer—a vexing question: Should the *Simpson* rule be limited to purely prospective application, or should it operate retroactively, thereby imposing treble-damage liability on Union Oil and other antitrust defendants for business activities undertaken in alleged reliance upon the superseded *General Electric* rule? Absent an unambiguous pronouncement from the high Court, the lower federal courts were obliged to cull their own answers from the standard authorities. However, such guidance as precedent affords in this matter is analogical and generally meager. For not only is the legal theory of retroactivity "still in a developing stage,"²⁰ but "in antitrust cases, the question of retroactivity is still open."²¹ Compelled by the course of events to explore this *terra incognita*, the Ninth Circuit in an opinion written by Judge James M. Carter, affirmed an order of the district court on remand, dismissing Simpson's action on the ground that the equities of the case did not warrant applying the Supreme Court's *Simpson* rule retroactively against Union Oil.²² The Supreme Court granted certiorari and reversed per curiam.²³

It is the purpose of this Note to discuss and evaluate the Ninth

17. *Id.* at 21-22.

18. *E.g.*, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 282 (1964); 17 STAN. L. REV. 519 (1965); 18 VAND. L. REV. 222 (1964); 10 VILL. L. REV. 366 (1965).

19. *Simpson v. Union Oil Co.*, 377 U.S. 13, 25 (1964).

20. *Desist v. United States*, 394 U.S. 244, 260 (1969) (Harlan, J., dissenting).

21. *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 377 F.2d 776, 789 (3d Cir. 1967).

22. *Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir. 1969), *aff'g* 270 F. Supp. 754 (N.D. Cal. 1967).

23. See note 129 *infra*.

Circuit's treatment of the retroactivity issue in its most recent *Simpson* opinion. In order to furnish background and perspective for the discussion, it is necessary to recount briefly the operative facts and procedural history of the case.

Background

From 1956 to 1958, Richard S. Simpson, plaintiff-appellant, operated a service station in Fresno, California, which he subleased for renewable one-year terms from the Union Oil Company, the defendant-appellee. Like many other²⁴ station managers, Simpson obtained gasoline from Union by virtue of a standardized "Retail Dealer Consignment Agreement." The terms of this agreement were drafted in such fashion as to constitute Simpson an agent or consignee of Union rather than an independent retail dealer. Whenever Union delivered or "consigned" gas to Simpson, the latter merely took possession thereof. "Legal title" to the gas technically remained vested in Union until it was sold to motorists.

The consignment agreement also fixed or "authorized" a definite, and invariable retail price for the gasoline—in this case, 29.9 cents per gallon. Early in 1958, in an effort to meet a local competitor's reduced price, Simpson began selling gas for 27.9 cents per gallon. Union demanded that he maintain the authorized price in accordance with their agreement. Simpson refused to comply. Union thereupon retaliated by terminating the consignment agreement and declining to renew Simpson's lease. After a federal district court denied Simpson's petition for an injunction restraining nonrenewal of the lease,²⁵ Union finally evicted its uncooperative station manager by bringing an unlawful detainer action in a state court.²⁶

Some months thereafter, Simpson counter-attacked by filing a civil action against Union under section 4 of the Clayton Act.²⁷ The complaint alleged, *inter alia*, that the "Retail Dealer Consignment Agreement," insofar as it established retail prices, was a contract in restraint of trade, and that the antitrust laws gave him a right of action to recover damages caused by Union's coercive enforcement of the unlawful agreement.

The district court granted Union's pretrial motion for summary

24. As of December 31, 1967, Union had consignment agreements with more than 3000 of its service station managers. *Simpson v. Union Oil Co.*, 377 U.S. 13, 15 (1964).

25. *Simpson v. Union Oil Co.*, 162 F. Supp. 746 (N.D. Cal. 1958).

26. This general statement of the facts is taken from *Simpson v. Union Oil Co.*, 311 F.2d 764, 765-66 (9th Cir. 1963).

27. 15 U.S.C. § 15 (1964).

judgment.²⁸ Simpson appealed and the Ninth Circuit affirmed.²⁹ Disposition of the appeal was accomplished without reference to any substantive issues raised in the complaint. The court expressed no opinion on the legality of Union's price-fixing by consignment,³⁰ but rather affirmed on the ground that Simpson suffered no actionable damage as a consequence of Union's refusal to renew the lease.³¹ Simpson petitioned for certiorari, which the Supreme Court granted.³²

In a 5-3 decision, the Supreme Court reversed the Ninth Circuit's affirmance.³³ Justice Douglas, writing for the majority, determined that the consignment agreement in question violated the Sherman Act as an agreement for resale price maintenance. Moreover, the Supreme Court disagreed with the court of appeals that there was no actionable damage if a Sherman Act violation were assumed.³⁴ Although there is nothing intrinsically illegal about consignment agreements, the Court explained, and although they may indeed be "useful in allocating risks between the parties and determining their rights *inter se*,"³⁵ nevertheless "when the consignment device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the anti-trust laws prevent calling the consignment an agency, for then . . . [the antitrust laws] would be avoided merely by clever manipulation of words, not by differences in substance."³⁶

There has been considerable uncertainty concerning the impact of *Simpson* on the old *General Electric* decision. Did the Supreme Court overrule *General Electric*, either expressly or by implication? Or was that decision merely distinguished, narrowed, or limited in *Simpson*? The consensus of opinion seems to be that *General Electric* was distinguished or limited, but not overruled outright.³⁷ Such a conclusion appears warranted by certain language in the *Simpson* decision: "[W]hatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here."³⁸ On the other hand, the express language of the *Simpson*

28. *Simpson v. Union Oil Co.*, 1961 TRADE CAS. ¶ 69,936, at 77,693 (N.D. Cal. 1960).

29. *Simpson v. Union Oil Co.*, 311 F.2d 764 (9th Cir. 1963).

30. *Id.* at 769.

31. *Id.*

32. *Simpson v. Union Oil Co.*, 373 U.S. 901 (1963).

33. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (Harlan, J., did not participate).

34. *Id.* at 16.

35. *Id.* at 17.

36. *Id.* at 21-22.

37. See, e.g., *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 280-82 (1964). But see *Simpson v. Union Oil Co.*, 377 U.S. 13, 29 (1964) (Stewart, J., dissenting).

38. *Simpson v. Union Oil Co.*, 377 U.S. 13, 23 (1964).

opinion would seem to foreclose any doubts that the Court was consciously announcing a new rule of law. The Court concluded its opinion by remanding the cause to the district court for trial "on all other issues," including the question whether or not the equities of the case "would warrant only prospective application in damage suits of the rule governing price-fixing by the 'consignment' device which we announce today."³⁹

On remand to the district court, the case was finally tried to a jury. The jury returned a verdict for Simpson in the amount of \$160,000. However, the court reserved to itself the decision of the "equities" issue and decided that issue in favor of Union. The new rule enunciated by the Supreme Court, so the district court reasoned, should not be applied retroactively. If it were, Union would be subject to treble-damage liability for executing and enforcing contracts which, at the time of execution, it had every reason to regard as lawful and unassailable under the antitrust laws as expounded in the *General Electric* case. Accordingly, the district court dismissed Simpson's action with prejudice on the "equities" or retroactivity issue.⁴⁰

Obviously somewhat unsure of itself and apprehensive about reversal on the delicate and complex issue of retroactivity, the court went one step further. It entered an order setting aside the jury's verdict—which it regarded as preposterously out of proportion to any actual damages sustained—and granted Union's motion for a new trial, should that prove necessary.⁴¹ From both the order of dismissal and the order granting a new trial, Simpson appealed.

The Ninth Circuit Disposition of Simpson's Appeal

Discussion of the Ninth Circuit's affirmance of the lower court's order granting Union a new trial involves various "measure of recovery" issues, all of which are outside the scope of this Note. Suffice it to mention that the court did affirm the order, agreeing with the district court that the \$160,000 verdict far exceeded any actual financial loss sustained by Simpson, who immediately after his removal from the Union station began operating a Mobil station at approximately the same rate of profit.⁴²

The truly formidable difficulties placed before the Ninth Circuit by Simpson's appeal arose not from the issue of damages, but from the issue of retroactivity. Was the district court correct in concluding that Union's reliance on the *General Electric* decision necessitated purely

39. *Id.* at 24-25.

40. *Simpson v. Union Oil Co.*, 270 F. Supp. 754 (N.D. Cal. 1967).

41. *Id.*

42. *Simpson v. Union Oil Co.*, 411 F.2d 897, 907-10 (9th Cir. 1969).

prospective application of the *Simpson* rule, and that therefore even Simpson himself should be denied recovery under the rule first announced in the course of his own lawsuit? The Ninth Circuit's resolution of this issue was divided into two parts. First, the court considered whether any provisions of the United States Constitution had decisive bearing on the choice between prospectivity and retroactivity. Second, various general considerations of fairness and justice were weighed with a view to determining whether or not the "balance of equities" tilted the scales—as the district court had thought—in favor of prospective limitation of the new rule.

Simpson's counsel interposed two "constitutional objections" to the lower court's decree of prospective limitation. First, it was contended that the resulting denial of recovery deprived Simpson of his property without due process, in violation of the fifth amendment. The second objection was that since the Constitution vests only "judicial power" in the federal courts, they are precluded from announcing new rules of law without at least applying them to the litigants in the particular case; otherwise the court's action would amount to an unconstitutional judicial exercise of "legislative power." The court made short work of these constitutional arguments for two reasons—one procedural, the other substantive.⁴³ In the first place, Simpson apparently had not propounded any such arguments in the court below.⁴⁴ Under a standard rule of appellate procedure, long established in the Ninth Circuit and most other appellate courts, questions not raised or argued in the court of first instance need not be entertained on appeal.⁴⁵ In the second place, the court indicated that even if these constitutional questions were properly before it, it could scarcely approve Simpson's position in the light of such controlling precedents as *Linkletter v. Walker*,⁴⁶ in which the Supreme Court reiterated its settled doctrine that "the Constitution neither prohibits nor requires retrospective effect."⁴⁷

Having considered and rejected as insubstantial Simpson's constitutional arguments, the court next proceeded to determine whether general considerations of fairness and justice—the "balance of equities"—supported the lower court's limitation of the *Simpson* rule to purely prospective application. Here the court ventured upon more treacherous ground, since this aspect of the retroactivity problem, unlike the constitutional aspect, could not be solved by routine citation of a single governing precedent.

Two prior decisions were, however, selected as analytical guidelines.

43. *Id.* at 901.

44. *Id.*

45. *Williamson v. Weyerhaeuser Timber Co.*, 221 F.2d 5, 15 (9th Cir. 1955).

46. 381 U.S. 618 (1965).

47. *Id.* at 629.

The first was *Linkletter v. Walker*,⁴⁸ a criminal case in which the Supreme Court held that the decision whether or not to apply a new rule retroactively depends upon "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."⁴⁹ The second was *Hanover Shoe Inc. v. United Shoe Machinery Corp.*,⁵⁰ in which the Third Circuit indicated that a defense to retroactive application of new rules of antitrust law might be established whenever

(1) there was a clearly declared judicial doctrine, (2) upon which the defendant relied and (3) under which his conduct was lawful; (4) a doctrine which was overruled (5) in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful.⁵¹

Under the *Linkletter* test, the court seemed to believe, Simpson might very well have made out a plausible case for retroactivity. That test attaches great and perhaps decisive importance to the question whether the purpose of a particular new rule may be furthered by retroactive application. In this connection, the Ninth Circuit correctly observed that almost all the new decisional rules limited to purely prospective application have been rules of criminal procedure whose primary purpose—to deter future police misconduct—would not be appreciably promoted by retroactive application to past transactions.⁵² New rules of antitrust law are different in this respect. One very important purpose of any rule of antitrust law is to provide compensation for individuals injured by the particular practice which the rule condemns. A compensatory purpose of this sort is obviously furthered rather than retarded by retroactive application of the new rule in question.

Moreover, the court noted that there is an additional compelling reason for applying a new rule of antitrust law retroactively in favor of the particular plaintiff who succeeded in persuading a court to adopt the rule.⁵³ To deny that plaintiff his recovery by applying the rule prospectively might well discourage other plaintiffs from bringing actions. Especially is this true in the case of individual or "one-time" plaintiffs who, unlike "institutional plaintiffs," can expect to benefit

48. 381 U.S. 618 (1965).

49. *Id.* at 629.

50. 377 F.2d 776 (3d Cir. 1967), *rev'd on other grounds*, 392 U.S. 481 (1968).

51. *Simpson v. Union Oil Co.*, 411 F.2d 897, 902 (9th Cir. 1969). The Ninth Circuit quoted appellant's formulation of the *Hanover* test which was a verbatim extract from *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968). The Supreme Court in *Hanover* expressly refrained from passing on the validity of the test. *Id.* at 496.

52. *Simpson v. Union Oil Co.*, 411 F.2d 897, 902-03 (9th Cir. 1969).

53. *Id.* at 903-05.

solely by their recovery in the particular case. Judicial discouragement of private antitrust actions is manifestly out of keeping with the legislative policy underlying section 4 of the Clayton Act, which authorizes such actions as a means of encouraging private parties to assist in enforcement of the antitrust laws.⁵⁴

However, once the court mentioned these various factors favoring retroactivity, it rather abruptly dismissed them from consideration on the ground that since Simpson had not brought them to the attention of the district court, the Ninth Circuit panel was not bound to entertain them on appeal.⁵⁵

Since the court foreclosed serious consideration of Simpson's equities because of this procedural technicality, its affirmance of the lower court's order of dismissal was virtually a foregone conclusion. Applying the five-point *Hanover* test, the Court determined that prior to the Supreme Court's *Simpson* decision, the *General Electric* rule had indeed been "clearly declared judicial doctrine"; that Union Oil justifiably relied on the doctrine in framing and enforcing its consignment agreements; that under the *General Electric* rule these agreements did not violate the antitrust laws; and that the *Simpson* case, whether or not it "overruled" *General Electric*, at least represented a palpable departure from the *General Electric* doctrine.⁵⁶ The court was persuaded that Union Oil's conduct satisfied the five *Hanover* requirements. It was apparently also persuaded that once the *Hanover* requirements were satisfied, then absent any entertainable equities in favor of Simpson, Union had established its case for nonretroactivity of the *Simpson* rule. The district court's order of dismissal was affirmed.

The judges expressed a guarded conclusion: "The problem is fraught with difficulties, and we only hold that the trial court proceeded in a proper manner to consider the 'equities' which should save Union from liability to appellant."⁵⁷

One writer's comment on the Supreme Court's 1964 *Simpson* decision was that "the problems involved are complex, and probably not entirely capable of solution by traditional methods of legal research."⁵⁸ This statement applies equally to the latest *Simpson* decision rendered by the Ninth Circuit. The issue of retroactivity is complex in whatever particular context it arises. In antitrust cases, the dearth of guiding precedent magnifies the inherent difficulties. Moreover, analysis of the *Simpson* case must take account of an additional complicating factor:

54. *Id.*

55. *Id.* at 905.

56. *Id.* at 905-07.

57. *Id.* at 905.

58. Rahl, *Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis*, 61 Nw. U.L. Rev. 1, 6 (1966).

According to the general consensus, the Supreme Court's *Simpson* decision was not an "overruling decision."⁵⁹ Most legal writers who have discussed the general subject of retroactivity have concentrated primarily on "the retroactivity of overruling decisions."⁶⁰ Are there different considerations involved in the case of a new rule of law produced by a decision that did not overrule a prior decision? Some say yes,⁶¹ others say no.⁶² The remainder of this Note is devoted to an evaluation of the Ninth Circuit's decision in the light of existing law on retroactivity of judicial decisions. Though the term "overruling decision" will be occasionally used for convenience sake and by way of close analogy, it must always be remembered that the Supreme Court's *Simpson* decision was something slightly—perhaps significantly—different.

At the outset, it is desirable to formulate working definitions of "prospectivity" and "retroactivity." Neither term has been used in a univocal sense throughout the pertinent literature.⁶³ Generally speaking, a court charged with the duty of applying a new rule of decisional law has three alternative lines of action available.⁶⁴ First, it may decree that the new rule will be accorded prospective operation only—*i.e.*, it will be applied solely to cases in which the plaintiff's cause of action arose after the promulgation of the new rule. In technical parlance, this alternative alone is the one denominated "prospective overruling" or "pure prospectivity."⁶⁵ Second, the court may decree that the new rule will be applied retroactively in certain specified cases—in the case in which the rule was enunciated, for example—but prospectively in all others. This alternative may be referred to as "limited retroactivity." Third, the court may decree that the new rule will apply retroactively to all cases, irrespective of who the parties are or when the action arose. This is "unlimited retroactivity."

It is important to bear clearly in mind the distinctions between these three alternatives. It is also important to understand that in *Simpson*, the Ninth Circuit was not directly concerned with the third alternative. The panel's exclusive concern was to decide between the first alternative as advocated by Union and the second as advocated by

59. See note 37 *supra*.

60. In this connection, note the titles of articles cited at notes 61 & 65 *infra*.

61. See Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 441 (1947).

62. See Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 65 n.34 (1965).

63. See, *e.g.*, *Desist v. United States*, 394 U.S. 244, 256 (1969) (Douglas, J., dissenting): "At least the Court should not say as respects *Katz* that it is given 'wholly prospective application,' when it was made retroactive in his case."

64. Cf. Annot., 10 A.L.R.3d 1371, 1378-79 (1966).

65. Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 911 (1962).

Simpson. Deciding between the first and the second alternatives is substantially different from—and quite probably more difficult than—deciding between the first and the third. As will be demonstrated presently, decisions in this area are always the end-product of a court's delicate evaluation and balancing of a number of elusive and highly variable determinants. The balance of variables that ultimately conditions a decision between pure prospectivity and limited retroactivity is different from the balance of variables that ultimately conditions a decision between pure prospectivity and unlimited retroactivity. These important differences were implicitly acknowledged in another antitrust case several years ago, wherein the district court, rejecting the plaintiff's contention that the Supreme Court's *Simpson* rule should apply retroactively, observed that "even if the Supreme Court ultimately applies the new doctrine retroactively to the Union Oil Co. in the particular case before it, it does not follow that the rule should be given a general retroactive effect in other cases."⁶⁶

Prospective or Retroactive: The Relevant Factors

Once the various forms of retroactivity are defined and clearly distinguished, the next step is to determine what principles and considerations should guide the courts when they undertake to decide whether, and to what extent, a new rule of decisional law should operate retroactively.

It is settled beyond much doubt that no provisions of the Constitution are determinative of the retroactivity issue. "[T]he Federal Constitution," in Justice Cardozo's sententious phrase, "has no voice upon the subject."⁶⁷ To be sure, the "subject" specifically referred to by Cardozo was the challenged power of a state court to decree that an overruling decision shall be purely prospective in its operation.⁶⁸ But the proposition is no less valid for federal courts than for state courts, nor for all degrees of retroactivity than for prospectivity. In *Linkletter v. Walker*,⁶⁹ it was stated simply that "the Constitution neither prohibits nor requires retrospective effect."⁷⁰

More particularly, the Supreme Court has on different occasions ruled: (1) that the retroactive application of overruling decisions in actions ex contractu cannot be assailed as an unconstitutional impairment of contractual obligations, inasmuch as the constitutional proscription of all such impairments "is directed only against impairment

66. *Lyons v. Westinghouse Elec. Corp.*, 235 F. Supp. 526, 536 (S.D.N.Y. 1964).

67. *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932).

68. *Id.*

69. 381 U.S. 618 (1965).

70. *Id.* at 629.

by legislation, and not by judgments of courts";⁷¹ (2) that overruling decisions retroactively applied do not come under the constitutional prohibition of ex post facto laws, inasmuch as that interdiction also extends to "legislative action only, and does not reach . . . decisions by the courts";⁷² and finally, (3) that neither purely prospective application nor any degree of retroactive application in itself contravenes either the due process clause or the equal protection clause of the fifth and fourteenth amendments.⁷³

In view of the fact that the great constitutional concepts—especially those relating to "due process of law" and "equal protection of the laws"—are by no means frozen or timebound, it is not inconceivable that certain aspects of the retroactivity question may at some future day be deemed controlled by principles of constitutional law.⁷⁴ Pending the advent of that future day, however, there remains the longstanding and overwhelming array of authorities, all of which compel the conclusion that the Ninth Circuit was abundantly justified in rejecting appellant Simpson's "constitutional objections" to nonretroactivity, just as the court would have been equally justified in rejecting constitutional objections to retroactivity, had any been interposed by Union.

Assuming that constitutional doctrine in its present state of development does not dictate the choice between prospectivity and retroactivity in any particular case, the question remains to be answered: How do courts determine what measure of retroactivity, if any, is to be given to a new decisional rule? An examination of the cases in point discloses five principal criteria, all of them flexible and pragmatic, that courts facing the problem have commonly adopted as guidelines. Taken together, these five criteria furnish a rough analytical framework within which the courts have, consciously or subconsciously, balanced "equities" of the sort adverted to by the Supreme Court at the conclusion of its *Simpson* opinion. In the overwhelming majority of cases, no

71. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924); *accord*, *Washington v. Maricopa Co.*, 152 F.2d 556, 560 (9th Cir. 1945), *cert. denied*, 327 U.S. 799 (1946).

72. *Frank v. Mangum*, 237 U.S. 309, 344 (1915).

73. *Linkletter v. Walker*, 381 U.S. 618 (1965).

74. There are occasional intimations, for example, that limited retroactivity, which accords the benefit of a new rule to certain selected parties while denying it to others, may in some instances fail to meet the requirements of due process and equal protection. Consider the following:

"The most notorious example is *Miranda v. Arizona*, 384 U.S. 436, where, as I recall, some 80 cases were presented raising the same question. We took four of them and held the rest and then disposed of each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any relief.

"It still remains a mystery how some convicted people are given new trials for unconstitutional convictions and others are kept in jail without any hope of relief though their complaint is equally meritorious." *Desist v. United States*, 394 U.S. 244, 255-56 (1969) (Douglas, J., dissenting).

one criterion alone proves decisive. The final resolution of the retroactivity issue turns upon a combined consideration and skillful balancing of the competing claims of all five criteria as applied to the unique factual situation at bar. Furthermore, it is not pretended that a list of five criteria constitutes an exhaustive enumeration. There are doubtless additional considerations influencing the judicial mind in many cases. It is contended only that the following five criteria are those most frequently and most decisively taken into account by courts seeking to resolve the retroactivity problem.

Criterion 1: The extent to which retroactive operation, limited or unlimited, may serve to further the purposes that underlie the new rule. Judicial utilization of this first criterion is perhaps best exemplified in recent Supreme Court decisions concerning criminal procedure.

Linkletter v. Walker,⁷⁵ one of the most notable of these decisions, sets forth a detailed (and for the time being, apparently definitive) analysis of the retroactivity question. In *Linkletter*, the Court addressed itself to the task of determining whether and to what extent one of its own overruling decisions, *Mapp v. Ohio*,⁷⁶ should operate retroactively. The majority in *Mapp* had overruled *Wolf v. Colorado*⁷⁷ by holding that the exclusionary rule first enunciated in *Weeks v. U.S.*⁷⁸ precluded the admission of unlawfully seized evidence in *state* criminal trials.

The *Mapp* decision was handed down on June 19, 1961. In *Linkletter* it was decided that the new *Mapp* rule should be given only limited retroactivity: that is, only those defendants whose judgments of conviction had not become final before June 19, 1961 could claim the benefit of the *Mapp* rule.⁷⁹

The *Linkletter* Court found justification for this limited retroactivity in the very purpose the *Mapp* rule was intended to serve. The fundamental purpose of enforcing an exclusionary rule in state criminal prosecutions, so the majority reasoned, is to provide an effective deterrent to unlawful searches and seizures by state law enforcement officers.⁸⁰ "We cannot say," the Court continued, "that this purpose would be advanced by making the rule [unlimitedly] retrospective . . . the ruptured privacy of the victims' homes cannot be restored. Reparation comes too late."⁸¹ To be sure, the fact that unlimited

75. 381 U.S. 618 (1965).

76. 367 U.S. 643 (1961).

77. 338 U.S. 25 (1949).

78. 232 U.S. 383 (1914).

79. "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*." 381 U.S. at 622 n.5.

80. *Id.* at 636.

81. *Id.* at 637.

retroactivity could not appreciably further the purpose underlying an exclusionary rule was not the only reason for denying unlimited retroactivity.⁸² But there is no question that this fact weighed heavily in the balance.

Linkletter v. Walker thus affords an illuminating example of the manner in which a court applies the "purpose" criterion in order to determine the extent of a new rule's retroactivity. However, one caveat should be kept in mind. The exclusionary rule is somewhat unusual in that its prime purpose is deterrence. Most other rules of law, including rules of antitrust law, are designed to effectuate at least two important purposes: deterrence of wrongdoers and compensation of the victims for the wrongdoing. In the ordinary case, therefore, application of the "purpose" criterion is more difficult than in the case of the exclusionary rule. A court must first identify the overriding or paramount purpose, and then consider whether that purpose could be promoted by retroactive operation of the rule.⁸³

Criterion 2: The extent to which retroactive operation may "open the floodgates of litigation," thereby overburdening the courts and obstructing the administration of justice. This criterion is of prime importance in criminal cases, where the courts frequently express fearful apprehensions that unlimited retroactivity of an overruling decision would inspire thousands of habeas corpus petitions and perhaps necessitate the release of innumerable guilty prisoners.⁸⁴ This criterion would seem applicable also in at least some civil cases. For example, there were more than 3000 gas station operators with whom Union Oil had concluded "Retail Dealer Consignment Agreements." The possibility that any substantial portion of these potential plaintiffs might bring suit against Union would surely militate against *unlimited* retroactivity of the *Simpson* rule.

Criterion 3: The extent to which retroactive operation may prove

82. The Court also noted that "[t]here are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost . . ." *Id.*

83. See Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 943-44 (1962).

84. See, e.g., *Tehan v. Shott*, 382 U.S. 406 (1966). The Court held that the new rule laid down in *Griffin v. California*, 380 U.S. 609 (1965), would not be given unlimited retroactivity. The *Griffin* rule is that adverse comment by a prosecutor or trial judge upon a defendant's failure to testify in a state criminal trial violates the defendant's federal constitutional privilege against self-incrimination. Justice Stewart, writing for the majority in *Tehan*, observed that "to require all those states [*i.e.*, states which prior to *Griffin* permitted adverse commentary by judge or prosecutor on a defendant's failure to testify] now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration." 382 U.S. at 419 (emphasis added).

necessary in order to compensate a successful plaintiff for his exertions, and thereby to provide an incentive for other plaintiffs to challenge obsolescent precedents. Because the "incentive factor" comes into play only when a court decides between pure prospectivity and limited retroactivity, it is particularly germane to a discussion of the Ninth Circuit's latest *Simpson* decision.

Some commentators have sought to minimize the importance of this factor by pointing out that the rather remote possibility that a court will overrule a precedent and announce a new rule of law is seldom sufficient to induce reasonable men to institute lawsuits.⁸⁵ On the other hand, it is a truism that departures from the doctrine of *stare decisis* are far from infrequent in our enlightened times. Numerous "test cases" are commenced for the express purpose of provoking such departures. Often the plaintiffs not only win their cases, but win consequent acclaim as public benefactors.

Notwithstanding all that may be said for or against its underlying rationale, the decided cases should dissolve any doubts that this third criterion has in fact been considered by courts confronting the retroactivity question. Many courts that have in recent years stricken down the age-old tort immunity of charitable or governmental corporations have applied the new rule of liability in the overruling case itself, and have explicitly justified such "limited retroactivity" by pointing to the necessity of rewarding the pathbreaking plaintiff.⁸⁶

Finally, it is in connection with this criterion that courts have drawn the important distinction between "one-time litigants" and "institutional litigants," a distinction adverted to by the Ninth Circuit in *Simpson*.⁸⁷ Owing to the multiplicity of their potentially friction-producing contacts with the general public, such "institutional litigants" as public utilities, insurance companies and other large business concerns are frequently involved in litigation. Therefore, the institutional plaintiff who succeeds in persuading a court to overrule a precedent stands to benefit not only from its recovery in the overruling case itself, but also from future judicial application of the new rule. Retroactivity need not be decreed in order to reward the institutional plaintiff in such cases. The situation differs markedly, however, with respect to the "one-time litigant" or private individual. His only substantial recom-

85. *E.g.*, von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426 (1924).

86. *E.g.*, *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). "[T]o refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it." *Id.* at 28, 163 N.E.2d at 97.

87. *Simpson v. Union Oil Co.*, 411 F.2d 897, 903 (9th Cir. 1969).

pense for persuading a court to overrule a precedent and establish a new rule is recovery of damages in his own case. The third criterion, therefore, should incline a court to give at least limited retroactivity to an overruling decision in which the plaintiff happens to be a private party.

Criterion 4: The extent of the detriment incurred by a losing litigant in reliance upon the former rule. This criterion is seldom explicitly mentioned in the cases. Courts usually treat "reliance" as a single undifferentiated concept without distinguishing between its "reasonableness" and its "detrimental character." However, a separate consideration of each of these two aspects of reliance will facilitate and sharpen analysis. There are two categories of "overruling decisions" which have almost always been restricted to purely prospective operation: the municipal bond cases and the "substantive" criminal cases. It is submitted that the *extreme detriment* which losing litigants would suffer in these cases as a result of reliance on overruled decisions goes far to explain why overruling decisions in these two areas are seldom, if ever, retroactively applied.

In one very recent decision,⁸⁸ the Supreme Court held that municipal bond issues are invalid where the voters in the municipal election authorizing the bond issue were required to pass a property-qualification test that the Court deemed violative of the equal protection clause. This was an altogether novel holding, and the Court decreed that the new rule would be purely prospective in its operation. Though the Court's reasoning was not set forth at any great length,⁸⁹ the true explanation of the decreed prospectivity is not difficult to fathom. The invalidation of a municipal bond issue that has been finalized would occasion tremendous administrative inconvenience for the municipality, probably including the cancellation of many large contracts. For these reasons, pure prospectivity has been decreed in a long line of previous "overruling" bond cases.⁹⁰

The same is true of the criminal cases where retroactive application of an overruling decision would make possible the conviction of a defendant whose allegedly criminal conduct was lawful under the over-

88. *Cipriano v. Houma*, 395 U.S. 701 (1969).

89. "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. . . . Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold prior to this decision and pursuant to such final authorization." *Id.* at 706.

90. *E.g.*, *Gelpke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1864); *Payne v. Covington*, 276 Ky. 380, 123 S.W.2d 1045 (1938); *State v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963).

ruled decisions.⁹¹ Even in these cases pure prospectivity has not been the absolutely unvarying rule.⁹² However, principle and authority unite to pronounce it by far the better rule.⁹³ And again the reason is because retroactivity would cause the defendant to suffer the extreme detriment of criminal penalties as a result of his reliance on former decisions.⁹⁴ After all, what "detriment" could conceivably be greater than loss of life, loss of liberty, or the enduring stigma of criminality?

Thus the authorities lend support to the proposition that the choice between prospectivity and retroactivity of a new rule should depend in some measure on how much a defendant is likely to lose if the rule is applied retroactively. In most civil cases, there will quite obviously be a considerable difference in this respect between limited retroactivity, which might compel a defendant to pay only one judgment for damages, and unlimited retroactivity, which might compel him to pay a thousand. A final interesting question presents itself: Might not the aforementioned distinction between one-time litigants and institutional litigants in the context of incentives to plaintiffs prove useful in connection with the "detriment"-to-defendants criterion? It would seem so at first sight; a \$10,000 judgment, for example, would not be nearly so burdensome a detriment to a multimillion dollar corporation as it would be to a private individual of ordinary means.

Criterion 5: The reasonableness or justifiability of a losing litigant's reliance upon overruled or "narrowed" former decisions. This criterion comes into play only when the new rule of law in question has altered or supplanted a former rule.

91. Unguarded language in some of the cases may give rise to a mistaken belief that conviction under such circumstances contravenes the constitutional prohibition of ex post facto laws. In *State v. Koonce*, 89 N.J. Super. 169, 214 A.2d 428 (App. Div. 1965), the court stated: "It is uniformly recognized that it would be fundamentally unjust to render criminal, by an overruling decision, conduct which was not criminal when it occurred. This would be equivalent in effect on the accused to an ex post facto statute." *Id.* at 185, 214 A.2d at 436-37. The statement is perfectly correct in the sense that both retroactive operation of overruling criminal decisions and ex post facto penal statutes are objectionable on the same general philosophical grounds. But it should not be misinterpreted as implying that an overruling criminal decision, retroactively applied, comes within the constitutional prohibition of ex post facto laws. Those prohibitions apply only to legislative enactments, not judicial decisions. *Frank v. Mangum*, 237 U.S. 309, 344 (1915).

92. See *State v. Striggles*, 202 Iowa 1318, 210 N.W. 137 (1926). In this case the defendant storeowner was convicted of maintaining a gambling device on his premises despite the fact that he relied on an overruled decision of an inferior court which had held that the device in question was lawful under the applicable statute.

93. See R. PERKINS, *CRIMINAL LAW* 815 (1st ed. 1957).

94. One court laid significant stress on the "heavy penalties and the stigma of criminal convictions" that would necessarily result from retroactivity of overruling decisions concerning substantive criminal law. *State v. Jones*, 44 N.M. 623, 630, 107 P.2d 324, 329 (1940).

Reliance upon an existing rule of case law is deemed reasonable or justifiable if the rule itself fulfills two requirements. First, it must be clearly defined; second, it must be well-received by both the legal community and the informed public.⁹⁵ The necessity of imposing the first requirement is largely a matter of common sense. Reliance presupposes the existence of something that may be relied upon; obviously there can be no reasonable reliance upon an alleged "rule" so vague, indeterminate and unsettled that reasonable men may disagree widely upon its exact import or even upon its existence. But the wisdom of imposing the second requirement is perhaps more debatable. Rules of law by which important personal and business affairs are regulated must possess some measure of stability and predictability. An individual, so it might be argued, should be able to act in conformance with a settled precedent today, even a vehemently criticized precedent, without having to fear that tomorrow a court will overturn the precedent and apply the overruling decision retroactively, thereby penalizing him for abiding by the law. On the other hand, courts all too frequently perpetuate, or at least refrain from abolishing, well-settled precedents which the majority of legal writers and other informed citizens denounce as anachronistic and oppressive. Given such a state of affairs, a widespread awareness that reliance on the existing rule is unreasonable and that consequently the inevitable overruling decision will be applied retroactively may well produce salutary results by discouraging conduct that, though condemned by popular sentiment, has nevertheless been condoned by an inert judiciary.⁹⁶

Whatever may be the theoretical advantages and disadvantages of regarding the acceptability of a settled rule as a prerequisite for reasonable reliance thereon, the fact is that courts have often proceeded upon this premise. Thus in a 1959 decision,⁹⁷ the Supreme Court of New Jersey made use of this criterion in deciding that one of its own 1958 decisions,⁹⁸ abolishing tort immunity of charitable institutions, would apply retroactively, and would bar the defendant YMCA from asserting the immunity in a negligence action commenced in 1958 by a plaintiff

95. See Comment, *supra* note 65, at 945-47.

96. Cf. Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965). "[E]ven when 'new law' must be made, it is often in fact a matter of the court articulating particular clear implications of values so generally shared in the society that the process might well be characterized as declaring a preexisting law. Moreover, this must inevitably be so. For it is the basic role of courts to decide disputes after they have arisen. That function requires that judicial decisions operate (at least ordinarily) with retroactive effect. In turn, unless those decisions (at least ordinarily) reflect pre-existing values, such retroactivity would be intolerable." *Id.* at 60.

97. *Terracciona v. Magee*, 53 N.J. Super. 557, 148 A.2d 68 (Super. Ct. 1959).

98. *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22, 141 A.2d 273 (1958).

seeking to recover for personal injuries suffered in 1954. Relying on overruled decisions upholding the immunity, the defendant had not protected itself with appropriate liability insurance. Reliance was held not to preclude retroactivity, inasmuch as the overruling decision was preceded by an immense volume of criticism from judges and legal writers hostile to the immunity. Such criticism was deemed sufficient to forewarn the defendant of the immunity's impending demise and hence to destroy any "reasonable basis for reliance."⁹⁹

A similar line of argument was adopted by the Fifth Circuit when it retroactively applied one of its recent overruling decisions, *United States v. Cocke*.¹⁰⁰ *Cocke* was a tax case concerning "carried-interest" oil and gas transactions. The court held that during the recoupment period, when all gross profits from oil- and gas-producing property are payable solely to the owner of the carrying interest, the owner of the carried interest is not entitled to tax deductions for depletion, depreciation, and drilling and development costs. *Cocke* thus overruled a 20 year-old precedent, *Commissioner v. J. S. Abercrombie Co.*,¹⁰¹ in which the court had held that the owner of a carried interest was entitled to such deductions during the recoupment period. The taxpayers asserted that they acquired their carried interest in reliance upon the overruled *Abercrombie* decision. Therefore, they argued, the overruling *Cocke* decision should not be retroactively applied against them. The argument proved unpersuasive. Though the court did not deal with the problem at length, it did note that the *Abercrombie* rule had long been denounced by a multitude of legal writers and by the Internal Revenue Service itself: "[O]ur reappraisal of carried interest taxation need have no agonizing overtones," said the court, "because it has been presaged."¹⁰² Here again, *unreasonable* reliance could support no objections to retroactivity.

Finally, a criminal case recently decided by the Supreme Court throws some new light on the relationship between reasonable reliance and retroactivity. In *Desist v. United States*,¹⁰³ the Court held that *Katz v. United States*¹⁰⁴ would not be given unlimited retroactivity. In *Katz*, the Court overruled *Olmstead v. United States*¹⁰⁵ by holding that "nontrespassory" electronic eavesdropping is a "search" within the meaning of the fourth amendment, and that if unlawfully performed, its fruits will be suppressed under the exclusionary rule. Adhering closely

99. 53 N.J. Super. at 565, 148 A.2d at 72.

100. 399 F.2d 433 (5th Cir. 1968).

101. 162 F.2d 338 (5th Cir. 1947).

102. 399 F.2d at 448.

103. 394 U.S. 244 (1969).

104. 389 U.S. 347 (1967).

105. 277 U.S. 438 (1928).

to the *Linkletter* rationale, the Court reasoned that because the deterrent purpose of the *Katz* rule would not be served by retroactive application, and because under the *Olmstead* dispensation law enforcement officers had used electronic eavesdropping to gather evidence on which many convictions had been based, *Katz* should not be allowed unlimited retroactivity.¹⁰⁶

Four Justices dissented; three wrote separate dissenting opinions. Justice Fortas took sharp issue with the Court on the justifiability of law enforcement officers' reliance on *Olmstead*. He emphasized that in the 30 year interim between *Olmstead* and *Katz*, the *Olmstead* rule, with its implausibly narrow construction of the fourth amendment term "search" as denoting only such physical intrusions as would amount to a common law trespass, had been subjected to withering criticism in both scholarly journals and judicial pronouncements—criticism that clearly marked it a "moribund doctrine."¹⁰⁷ *Katz* merely "administered the coup de grace."¹⁰⁸ During the last decade or so, Fortas argued, no well-informed person could seriously have doubted that *Olmstead* was destined for deserved oblivion. The only real question was when the formal overruling decision would come down.

Such being the state of affairs, Justice Fortas thought it inconceivable that law-enforcement personnel or anyone else could "reasonably" or "justifiably" rely on *Olmstead*. When the Court held that they could, and disallowed unlimited retroactivity of *Katz* on that ground, it in effect made petitioner *Desist's* fourth amendment rights dependent upon nothing more substantial than the vagaries of calendar composition. Considering the climate of judicial opinion, there could be little doubt that had *Desist* and its companion case come before the Supreme Court "a day, a year, or a number of years before *Katz*, we would have held that the petitioners' constitutional rights had been violated, and that the petitioners were entitled, like any other citizens, to their constitutional rights."¹⁰⁹

106. 394 U.S. at 244-54.

107. *Id.* at 273 (dissenting opinion).

108. *Id.*

109. *Id.* at 279. The fact that Justice Fortas' opinion in *Desist* was a dissent does not diminish its authoritativeness as much as one might think. For one thing, *Desist* was decided by an evenly divided court—four Justices dissented from the opinion of the Court and one did not participate. Moreover, the Fortas dissent is cited herein only as exemplifying judicial insistence that reliance on an overruled decision must, if it is to preclude retroactive application of the overruling decision, be reasonable or justifiable, and that reasonableness or justifiability is determined in part by the degree of approval or disapproval generally given to the overruled decision. The Court's decision that *Katz* should not be unlimitedly retroactive does not necessarily reflect disagreement with this basic premise. On the contrary, the Court indicated in *Johnson v. New Jersey*, 384 U.S. 719 (1966), that retroactive application may be warranted if the announcement of the new rule has been "clearly foreshadowed." *Id.* at

These cases all reinforce the same essential point: Only *reasonable* or *justifiable* reliance on an overruled precedent should support a defense to retroactive application of the overruling decision, and in this connection, one crucial determinant of reasonableness is the extent to which the overruled precedent was well-received by the legal community.

Prospectivity and Simpson

Assuming that the foregoing list of five criteria encompasses the principal factors that a court should take into account when resolving the issue of retroactivity, one is inclined to conclude that the Ninth Circuit's limitation of the *Simpson* rule to pure prospectivity may not have been supported by a comprehensive consideration of all the relevant determinants.

As regards the first criterion, it is evident that one of the purposes of the *Simpson* rule—to insure compensation for retailers whose businesses have been damaged or destroyed by coercive enforcement of a price-fixing consignment arrangement—could be served by retroactive application. Yet for some unexplained reason, nowhere in its opinion did the Ninth Circuit make mention of the rule's compensatory function or of the possibility that it could be promoted, however slightly, by the limited retroactivity *Simpson* sought. In a recent antitrust case arising out of facts almost identical with the facts in *Simpson*, the federal district court in Rhode Island indicated the more correct approach. Discussing the *Simpson* rule and its possible applicability to transactions occurring prior to 1964, that court noted that a rule of nonretroactivity is unsatisfactory insofar as it "totally ignores the compensatory aspect of a treble damages award."¹¹⁰

The second criterion, the burden on the administration of justice that retroactivity might impose, was not relevant, and was thus properly disregarded by the court. *Unlimited* retroactivity of certain overruling antitrust decisions might conceivably impose a tremendous burden. *Simpson*, however, was seeking only the most limited form of retroactivity—retroactivity limited to himself alone.

731. The Court's refusal to hold *Katz* unlimitedly retroactive was perhaps dictated by a belief that in recent times *Olmstead* had not been as moribund as Fortas thought, and that consequently reliance thereon was not really so unreasonable; or perhaps the Court may have considered that the unreasonableness of law enforcement officers' reliance on *Olmstead*—which militated in favor of unlimited retroactivity—was outweighed in the balance by the deterrent purpose of the *Katz* rule, which militated against it. This latter explanation is probably correct. It was noted in the opinion of the Court that "[f]oremost among the factors determining retroactivity is the purpose served by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule." 394 U.S. at 249.

110. *Stanton v. Texaco, Inc.*, 289 F. Supp. 884, 889 (D.R.I. 1968).

The court did give some serious consideration to the third criterion—the necessity of rewarding the plaintiff who persuades a court to adopt a new rule. In this connection, the court correctly observed that *Simpson* is a one-time litigant, and that section 4 of the Clayton Act, authorizing treble damage suits by private antitrust plaintiffs, rests on a legislative policy of “enlisting persons injured by antitrust violations as enforcers by providing an inducement, treble damages plus expenses.”¹¹¹ The transcendent importance of this second point cannot be emphasized too strongly. Characterizing the private treble-damage action as a “bulwark of antitrust enforcement,”¹¹² the Supreme Court has declared that “the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”¹¹³ If there is any likelihood whatever that denying *Simpson* the benefit of the new *Simpson* rule would tend to discourage future antitrust plaintiffs from bringing private actions to challenge obsolete rules, then the Ninth Circuit’s prospective limitation of the *Simpson* rule was to that extent ill-advised.

Of course, both these considerations—*Simpson*’s status as a one-time litigant and the legislative policy of encouraging private antitrust actions—tipped the balance in favor of *Simpson* and *limited* retroactivity. As was previously mentioned, the Ninth Circuit dismissed them, with perceptible misgivings, on the technical procedural ground that *Simpson* had not brought them to the attention of the trial court.¹¹⁴ It might be plausibly argued that this dismissal was unwise and that a court resolving the retroactivity issue should consider *all* the relevant factors, irrespective of whether or not the litigants so insist.

The fourth criterion, the extent of the detriment that retroactivity would cause Union to suffer as a result of its reliance on the old *General Electric* rule, was not applied by the court. Had it been applied, it would have yielded results favorable to *Simpson*. At least one writer has suggested that retroactive application of overruling antitrust decisions should generally be avoided, inasmuch as retroactivity could impose extremely great financial liability on a large business concern whose operations “involving the potential of antitrust illegality” necessarily entail great expenditure of time and capital and bring it into contact with numerous potential plaintiffs.¹¹⁵ Because Union did have consignment agreements with more than three thousand service-station oper-

111. *Simpson v. Union Oil Co.*, 411 F.2d 897, 904 (9th Cir. 1969).

112. *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

113. *Id.*

114. *Simpson v. Union Oil Co.*, 411 F.2d 897, 905 (9th Cir. 1969).

115. Note, *Retroactive Application of Overruling Decisions in Antitrust Treble Damage Suits*, 1967 U. ILL. L.F. 837, 843.

ators, this point is well-taken. The writer, however, was referring to *unlimited* retroactivity. Retroactive application of the *Simpson* rule to *Simpson* alone would not be open to the objection that it would cause Union to incur extreme financial detriment as a result of its reliance on *General Electric*. Especially is this so in view of the indications that *Simpson's* damages may not have been very large.¹¹⁶ Paradoxically, *Simpson's* inability to recover a large judgment against Union may actually be a point in his favor, since it eliminates a possible objection to retroactivity.

Finally, there remains the fifth criterion: Was Union's reliance on *General Electric* reasonable and justifiable? The Ninth Circuit devoted a considerable part of its opinion to a discussion of Union's reliance on *General Electric*. It concluded that *General Electric* had embodied a clearly defined doctrine under which Union's program of consignment price-fixing was lawful, and that therefore Union's reliance was reasonable.¹¹⁷

The court's inquiry was not misdirected; as was previously shown, reliance can be termed reasonable only if the rule relied upon was clearly defined. However, other authorities have not shared the Ninth Circuit's view that *General Electric*, which dealt with consignment marketing of patented products, "clearly" upheld the lawfulness of consignment price-fixing when nonpatented products are involved. For example, when an antitrust defendant advanced this contention in support of its motion for summary judgment, the federal district court in Rhode Island suggested that the Supreme Court's *Simpson* decision "was not nearly the radical departure from established antitrust law which defendant claims it to be."¹¹⁸ The suggestion is supported by Justice Douglas's majority opinion in *Simpson*, which purported to distinguish *General Electric* rather than overrule it; it was asserted that "whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here."¹¹⁹ Obviously if the factual situation in the *Simpson* case was not parallel to that in *General Electric*, Union could not convincingly plead its reliance on the latter decision as a defense to retroactivity of the former. As one commentator noted, "Mr. Justice Douglas's insistence that *G.E.* was not apposite raises doubts as to the justifiability of Union Oil's reliance on that decision."¹²⁰

On the other hand, as the Ninth Circuit observed, Justice Douglas' concluding remarks about "the rule governing price-fixing which we

116. See *Simpson v. Union Oil Co.*, 411 F.2d 897, 907-10 (9th Cir. 1969).

117. *Id.* at 906-07.

118. *Stanton v. Texaco, Inc.*, 289 F. Supp. 884, 889 (D.R.I. 1968).

119. 377 U.S. at 23.

120. *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 282 (1964).

announce today"¹²¹ seem to imply that the Court knew it was changing a rule laid down in *General Electric*.¹²² The whole problem is complicated further by the fact that the legality of consignment price-fixing in situations involving nonpatented goods was a question never considered by the Supreme Court during the 40 year interval between *General Electric* and *Simpson*.¹²³ Those who contend that this precise question was settled by *General Electric* are unable to cite any later Supreme Court cases in support of their contention. This fact, together with the widespread confusion and disagreement over both the precise ratio decidendi of *General Electric* and the precise effect of the *Simpson* holding upon *General Electric*, cast considerable doubt on any facile conclusion that the *General Electric* rule was, prior to the *Simpson* decision, a "clearly defined judicial doctrine."

But even assuming arguendo that the *General Electric* doctrine, superseded by *Simpson*, was a "clearly defined" doctrine under which Union's consignment price-fixing was lawful, that fact alone does not necessarily make Union's reliance on *General Electric* reasonable. Reliance is reasonable only if the rule relied upon is both clearly defined and generally approved by the legal community.¹²⁴ Assuming that the legality of vertical price-fixing by consignment was clearly established in the *General Electric* case, several important questions still remain. Was the practice generally approved? Were there, in the years intervening between *General Electric* and *Simpson*, any judicial pronouncements indicating that the Supreme Court would not continue to sanction the practice much longer?

As early as 1942, the Supreme Court manifested its opposition to the use of agency arrangements as a subterfuge by which to evade the antitrust laws. In the well-known *Masonite*¹²⁵ case, decided that year, the Court declared that section 1 of the Sherman Act prohibited a scheme whereby the Masonite Corporation marketed its patented hardboard products through nine erstwhile competitors appointed as del credere agents. These "agents" sold the products at uniform prices determined by Masonite. By a literal application of the *General Electric* rule, this arrangement would have been perfectly legal. The Court, however, elected not to apply *General Electric*, reasoning that "[s]o far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency,' but

121. *Simpson v. Union Oil Co.*, 377 U.S. 13, 25 (1964).

122. "We . . . have held that the Supreme Court in *Simpson* knew it was announcing a new rule and so stated." *Simpson v. Union Oil Co.*, 411 F.2d 897, 907 (9th Cir. 1969).

123. Cf. note 15 *supra*.

124. See note 65 *supra*.

125. *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

on the significance of the business practices in terms of restraint of trade."¹²⁶ To be sure, the "agency" price-fixing combination condemned in *Masonite* was a horizontal combination between former competitors, not a vertical combination between manufacturer and retailer. But considering the established antitrust doctrine that all forms of price-fixing are illegal per se,¹²⁷ one could argue that it was but a short and quite predictable step from *Masonite* to *Simpson*. One could also plausibly argue that *Masonite* diminished the reasonableness of Union's reliance on *General Electric*.

Conclusions

The foregoing analysis has demonstrated that whenever a court disallows retroactive operation of a new case-law rule, it does so for one or more—usually more—of the following reasons: (1) because retroactivity would not subserve the purposes underlying the new rule, (2) because retroactivity is not necessary in order to reward the plaintiff who successfully persuaded the court to adopt a new rule, (3) because retroactivity would hamper the administration of justice, (4) because retroactivity would cause a losing defendant who relied on an overruled precedent to suffer extreme detriment or inconvenience, or (5) because the losing defendant's reliance on an overruled precedent was reasonable and justifiable.

By the same token, however, the foregoing analysis has also demonstrated, at least to this writer's satisfaction, that a strong case can be made that these reasons do not apply to the *Simpson* case. The very limited form of retroactivity that *Simpson* asked the Ninth Circuit to allow in his case would have promoted the compensatory purpose of the *Simpson* rule, it was necessary in order to reward the "pathbreaking" plaintiff, it would not hamper the administration of justice, nor would it cause Union to suffer extreme detriment as a result of reliance on *General Electric*, a reliance that was marginally justifiable at best. These conclusions raise considerable doubt concerning the soundness of the latest Ninth Circuit *Simpson* decision.

Nevertheless, the decision should not be dismissed as clearly erroneous. To do so would be to evince a fundamental misunderstanding of the retroactivity issue and all its unavoidable complexities. However ardently the proponents of mechanical jurisprudence and the seekers of "certainty in the law" may wish it otherwise, there simply exist no micro-sensitive balance-scales on which such imponderables as "reasonableness" of reliance—to mention only one example—can be weighed

126. *Id.* at 280.

127. Compare *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), with *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), and *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).

and compared with quasi-mathematical precision. Hence each decision in this area is to an extraordinary degree the resultant of an individual court's necessarily intuitive exercise of informed judgment. The Ninth Circuit recognized this when it acknowledged, with overtones of resignation, that "[t]he problem is fraught with difficulties,"¹²⁸ and that "what the [Supreme] Court does, when this case again reaches it, will determine whether the *Simpson* rule is retrospective or prospective and whether it should be applied to the *Simpson* case."¹²⁹

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128. *Simpson v. Union Oil Co.*, 411 F.2d 897, 905 (9th Cir. 1969).

129. *Id.* at 902. In *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969), the Supreme Court granted certiorari—limited to the retroactivity issue—and in a brief per curiam opinion reversed the Ninth Circuit's decision. In what was perhaps a belated clarification of the concluding sentence in its 1964 *Simpson* opinion, the Court stated that its reference there to equities possibly warranting prospective application "was not an invitation to deny the fruits of successful litigation to this petitioner." *Id.* at 14. The ground of reversal was set forth in a single sentence: "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative." *Id.* (emphasis added).

Ascertainment of the reasoning that underlies a cryptic per curiam opinion can be a rather speculative and hazardous enterprise. It seems safe to assume, however, that the Court's language does not constitute an endorsement of the generally discredited thesis that the case-or-controversy requirement (U.S. CONST. art. III, § 2) precludes federal courts from according purely prospective operation to a new case-law principle. However "unusual" pure prospectivity may be, never has the Supreme Court held it to be unconstitutional. An eminent authority on federal procedure makes the following cogent argument in support of his conclusion that the case-or-controversy requirement furnishes no constitutional impediment to pure prospectivity in the federal courts: "The overruling decision is rendered in an actual controversy between adverse parties. The continued soundness of a controlling precedent is certainly a matter properly before the court when the precedent is under attack. If the court decides to overrule that precedent, the question whether the newly announced rule should be applied to the case at bar is then also properly before the court." 1B J. MOORE & T. CURRIER, *MOORE'S FEDERAL PRACTICE* ¶ 0.402 [3-2 to -3], at 191 (2d ed. 1965).

It seems equally safe to assume, in view of the italicized portion of the quotation in the first paragraph above, that the Supreme Court refuses to regard its 1964 *Simpson* decision as having established any revolutionary new doctrine. Whether or not the *Simpson* rule was "innovative" is surely a debatable point. The Ninth Circuit considered that it was. *Simpson v. Union Oil Co.*, 411 F.2d 897, 907 (9th Cir. 1969). But assuming that the Supreme Court was correct in thinking otherwise, it follows that the Ninth Circuit's decision had to be reversed. To say that the *Simpson* rule was not innovative is tantamount to saying that even prior to 1964, the 1926 *General Electric* decision would not reasonably have been read as legalizing large-scale consignment price-fixing in a situation involving nonpatented products. That being the case, Union Oil should not be heard to claim, as a defense to retroactive application of the *Simpson* rule, that it reasonably relied on *General Electric*. The Supreme Court's latest *Simpson* decision, therefore, underscores the critical importance, in antitrust litigation raising the issue of retroactivity, of the fifth criterion discussed herein—reasonableness of reliance.

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B. Antitrust Jurisdiction of the Maritime Commission—*Matson Navigation Co. v. Federal Maritime Commission*, 405 F.2d 796 (9th Cir. 1968).

Matson Navigation Co. v. Federal Maritime Commission,¹ a case of first impression, was brought before the Ninth Circuit on the petition of Matson to have a Federal Maritime Commission (FMC) order and decision approving the merger of three shipping lines² set aside and suspended. The principal issue to be resolved was whether or not the FMC has authority under section 15 of the Shipping Act³ to approve written merger agreements submitted to it under the provisions of the Act and to immunize such agreements from subsequent antitrust prosecution.

Section 15 of the Shipping Act provides that a memorandum of all agreements between carriers by water must be filed with the FMC if these agreements have certain enumerated effects on rates, regulate, prevent or destroy competition, or "in any manner [provide] for an exclusive, preferential, or cooperative working arrangement." The FMC is empowered to disapprove, cancel or modify any agreement found to be unjustly discriminatory or unfair. The implementation of any unfiled agreement of the type mentioned is a violation of the Act, and the United States can prosecute the offenders and recover fines.

In the case at hand, the three companies submitted to the FMC an agreement stipulating that they agreed to consolidate "in the form and by the procedures as the directors and stockholders of the three companies should approve."⁴ Matson, an unsubsidized common carrier by water competing in the California-Hawaii offshore domestic trade, recognizing that the company to be formed under the proposed plan would have the largest fleet of subsidized vessels in the Pacific under the United States flag,⁵ intervened in the proceedings and argued against approval of the merger agreement on three alternative grounds. First, it maintained that the FMC lacked jurisdiction under section 15 to approve merger agreements. Second, even if jurisdiction were assumed, the merger lacked finality and therefore could not be approved. Finally, Matson claimed that the merits of the merger did not warrant approval.⁶ Nevertheless, the FMC approved the agreement.

On appeal, the Ninth Circuit upheld the FMC's ruling that section

1. 405 F.2d 796 (9th Cir. 1968).

2. The three companies were American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc.

3. 46 U.S.C. § 814 (1964).

4. 405 F.2d at 800.

5. Brief for Matson as Petitioner at 3.

6. *Id.* at 5-6.

15 empowers the FMC to approve mergers between shippers and thereby immunize such agreements from antitrust prosecution, but remanded for further proceedings because the proposal presented to the FMC was not a proper merger agreement.⁷

Lack of Statutory Authority for Merger Jurisdiction

Matson is the first case in which the FMC has asserted jurisdiction under section 15 of the Shipping Act to approve merger agreements between domestic carriers. The FMC attempted to support its decision by referring to its earlier decision in *Isbrandtsen Steamship Co.*,⁸ where a section 15 agreement for the sale of steamship assets, which also contained a covenant not to compete, was approved.⁹ That case, however, is inapposite to the question of merger jurisdiction. Although the FMC had asserted in *Isbrandtsen* that the agreement was subject to section 15, it is unclear whether it based its jurisdiction on the covenant not to compete, which is clearly within section 15,¹⁰ or the proposed merger agreement. Likewise, the report to the Celler Committee,¹¹ which the FMC relied on as proof that *Isbrandtsen* gave notice of the FMC's power over merger agreements, indicates that merger jurisdiction extends only to the type of agreement approved in that particular case—agreements containing covenants not to compete.¹² There was no FMC precedent upon which to base the type of merger jurisdiction claimed in *Matson*.

7. 405 F.2d at 800.

8. *Isbrandtsen S.S. Co.*, 7 F.M.C. 125 (1962).

9. Brief for Matson as Petitioner at 25.

10. Section 15 specifically mentions agreements that regulate or prevent competition.

11. *Hearings on the Progress Report from the Federal Maritime Commission Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962).

12. *Id.* at 22. The important testimony given by former FMC Chairman Stakem was:

"Mr. Appel: . . . Are shipping lines to be on notice that if they desire to merge, they must submit the proposal under Section 15 of the Act?

"Mr. Stakem: I think . . . if the plan calls for a non-compete or has noncompete clauses in it, that it falls within the sphere that this Commission should look at."

A later statement by Chairman Stakem (which was relied on by the FMC as giving merger jurisdiction) is as follows: "I believe that Section 15 and our decision in the *Isbrandtsen-Export Merger* case constitute notice that merger agreements between common carriers subject to the Shipping Act, 1916, which control, regulate, prevent, or destroy competition or in any way provide for exclusive, preferential, or cooperative working arrangements, must be filed with the Commission . . ." *Id.* at 23 (emphasis added). The italicized phrase has the effect of limiting or modifying the type of mergers over which the Commission has jurisdiction. The conclusion indicated is that the merger must contain a covenant not to compete or some other type of working arrangement.

The text of section 15 offers little assistance in determining whether any merger jurisdiction is conferred by the Shipping Act. It states:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or . . . a true and complete memorandum, of every agreement with another such carrier or person . . . [1] fixing or regulating transportation rates or fares; [2] giving or receiving special rates, accommodations, or other special privileges or advantages; [3] controlling, regulating, preventing, or destroying competition; [4] pooling or apportioning earnings, losses or traffic; [5] allotting ports or restricting . . . sailings . . . [6] limiting or regulating . . . the volume or character of freight or passenger traffic . . . [7] or in any manner providing for an exclusive, preferential or cooperative working arrangement.

The section does not mention merger, and unless it can be successfully argued that a merger falls within the category of an "exclusive, preferential or cooperative working arrangement,"¹³ the actions of the FMC appear to be without statutory sanction. Construing the statute as a whole, item 7 is simply an extension of the working arrangements enumerated in 1 through 6.¹⁴ It seems inconsistent for the framers of the Act to have conscientiously listed the type of agreements to be subject to FMC jurisdiction in six instances, and then to have used a general phrase to include such an important area of shipping policy as mergers.¹⁵

It seems somewhat naive to argue that the word "merger" was omitted because of a congressional oversight. Prior to the Shipping Act, Congress had passed the Sherman¹⁶ and Clayton Acts,¹⁷ and was well aware of the scope and operation of statutes regulating business activity. Furthermore, Congress has not been shy about using the term. Mergers have been specifically mentioned in statutes giving authority to the ICC,¹⁸ CAB¹⁹ and FCC.²⁰ In view of the fact that Congress did not specifically mention merger jurisdiction in the Shipping Act, the

13. Brief for Matson as Petitioner at 13 and Brief for United States as Respondent at 17 argued that such an interpretation was erroneous. Although the United States was a party defendant in the proceeding, it filed a brief taking issue with the FMC's finding as to merger jurisdiction.

14. Brief for Matson as Petitioner at 13.

15. Despite the *Matson* decision, it is difficult to see a merger as a "working arrangement." Section 15 of the Act obligates the FMC to maintain supervision over agreements approved under the Act; this would not be possible in the case of a merger, since all FMC control would effectively end once the merger was completed. 405 F.2d at 799.

16. 15 U.S.C. §§ 1-7 (1964).

17. 15 U.S.C. §§ 12-27 (1964).

18. Interstate Commerce Act § 5(2), 49 U.S.C. § 5(2) (1964).

19. Federal Aviation Act § 408, 49 U.S.C. § 1378 (1964).

20. Federal Communications Act § 221, 47 U.S.C. § 221 (1964) (the word used here is consolidation).

more logical conclusion is that Congress did not intend to include merger agreements within the scope of the Act.

Recognizing the possible effects on national economic policy that might result from immunizing agreements from antitrust prosecution, the Supreme Court has held that statutes exempting commercial activities from the effects of the antitrust laws will be strictly construed.²¹ "Repeals of the antitrust laws . . . from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."²²

The legislative history of the Act also indicates that Congress did not intend to include mergers among the agreements to be approved by the FMC. The Alexander Report,²³ which contains the findings of an extensive investigation into the practices of steamship conferences, supplied the impetus and information used by Congress in enacting the Shipping Act.²⁴ The Report includes the results of a questionnaire sent to United States vessels in foreign trade inquiring about agreements they had entered into with other carriers and a discussion of several types of agreements prevalent in the industry at the time.²⁵ It is significant that merger agreements were not among those discussed;²⁶ all agreements mentioned concerned cooperative working arrangements. The Report endorsed a policy of not outlawing these cooperative arrangements. The basis of the Alexander Committee's recommendation was its belief that permitting the shippers to continue operating under the conference agreements would forestall rate wars and other competitive activities which would result in "a monopoly fully as effective . . . [as] can exist by virtue of an agreement."²⁷ The Alexander Committee argued, in effect, that the desired result, the preservation of competition, could most nearly be achieved by continuation of the conference agreement, subject to the supervision of a regulatory agency. Mergers seem to be singularly out of place in the Alexander Committee scheme; in fact, such consolidations are undoubtedly a type of monopolistic activity that the Committee sought to prevent.

The Effect of the Doctrine of Primary Jurisdiction

The foregoing analysis casts serious doubt on the rationale of the

21. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *California v. FPC*, 369 U.S. 482 (1962); *Maryland & Va. Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

22. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963).

23. H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

24. *Volkswagenwerk A.G. v. FMC*, 390 U.S. 261, 275 (1968).

25. H.R. Doc. No. 805, 63d Cong., 2d Sess. 21-280 (1914).

26. Brief for Matson as Petitioner at 15 and Brief for United States as Respondent at 19-20 agree on the absence of discussion of mergers in the Report.

27. H.R. Doc. No. 805, 63d Cong., 2d Sess. 416 (1914).

court's decision in *Matson*. The Ninth Circuit's decision, however, may find some support in the doctrine of primary jurisdiction, judicially manufactured and first espoused in the well-noted case of *Texas & Pacific Railway v. Abilene Cotton Oil Co.*²⁸ This doctrine maintains that when an issue may be brought before either a court or a regulatory agency, it must go first to the agency, with resort to judicial review by way of appeal.²⁹ The doctrine rests on two basic premises: First, that reference to the agency in all possible cases will provide more uniform decisions; and second, that the quality of decisions made by the experts in the administrative agencies will be superior.³⁰

Giving merger jurisdiction to the Federal Maritime Commission, however, will do little to achieve uniform decisions within the shipping industry. As noted previously,³¹ the FMC understands its jurisdiction to extend only to mergers by agreement. Clearly, the wording of section 15 prevents it from extending further.³² Therefore, a merger which can be accomplished unilaterally without an agreement, such as by stock acquisition, will be beyond the scope of FMC proceedings. It is interesting to note, therefore, that the parties proposing to merge in the *Matson* case may be able to avoid an unfavorable FMC determination. Since the Ninth Circuit remanded the case for further proceedings before the FMC because the parties had not submitted a final agreement on which the FMC could act,³³ the parties have the option of trying to achieve their merger without FMC approval by accomplishing their aim without an agreement. This possibility is illustrated by the fact that Natomas Co., a company which is not subject to the jurisdiction of the FMC, controls American President Lines (APL) and Pacific Far East Lines, while APL owns 93 percent of the stock in

28. 204 U.S. 426 (1907); *accord*, *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956); *Far E. Conference v. United States*, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

29. See generally *Fremlin, Primary Jurisdiction and the Federal Maritime Commission*, 18 HASTINGS L.J. 733 (1967); Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964); Jaffe, *Primary Jurisdiction Reconsidered—The Anti-Trust Laws*, 102 U. PA. L. REV. 577 (1954); Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495 (1953); von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

30. *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956); see Comment, *Accommodations of Antitrust Law and Ocean Shipping Regulation*, 4 TEX. INT'L L.F. 393, 401 (1968).

31. See text accompanying notes 8-12 *supra*.

32. Section 15 covers only enumerated agreements, and modifications or cancellations thereof, *between* persons subject to the Act. See text accompanying note 12 *supra*. If *Matson* is given full effect, mergers by agreement between two shippers will be handled by the FMC, whereas mergers between a shipper and a nonshipping company will be under the jurisdiction of the federal courts.

33. 405 F.2d at 800-01.

American Mail Lines. These interests were acquired without any regulatory supervision from the FMC.³⁴ Thus, if it appears that the FMC will not approve the merger, the merging companies may try to accomplish the merger by means not subject to FMC approval. Therefore, under the regulatory scheme set forth in *Matson*, one of the basic justifications for submitting mergers to the FMC, uniformity of decision, is an illusion.

Another argument for referring merger decisions to the FMC is that they will be better decided by the expert Commissioners than by the courts. While regulatory agencies are not infallible, their expertise has long been recognized:

The determination of whether an agreement . . . is for the benefit of the industry or is an unreasonable and oppressive burden which cannot be justified requires a special fact finding tribunal having an intimate acquaintance with the needs and practices of the business and constant experience in resolving the merits of conflicting interests in a vast and complicated industry. . . .

. . . . [T]he remedies afforded under the act . . . ought to be exhausted before recourse may be had to the courts. . . .³⁵

Nevertheless, judges are not without expertise in issues which are usually brought before a regulatory agency.³⁶ For example, in at least two cases involving disputes with labor unions, a court has passed over the National Labor Relations Board to make its own determinations.³⁷ In one case the court noted that it felt it had the ability to reach a proper decision since it had determined similar issues involving the Norris-LaGuardia Act.³⁸ While it would be dogmatic to insist that antitrust enforcement *must* be judicial,³⁹ surely the courts have had sufficient experience with antitrust violations to qualify them to adjudicate mergers between shippers.

A further justification for invoking primary jurisdiction, that the agency can administer a pervasive regulatory scheme,⁴⁰ disappears under the conditions of the present problem. The Shipping Act, as the basic regulatory pattern for shipping in United States foreign com-

34. Brief for Matson as Petitioner at 37-38.

35. *United States Navigation Co. v. Cunard S.S. Co.*, 50 F.2d 83, 88-90 (1931).

36. See Schwartz, *Legal Restrictions of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 473-74 (1954); Comment, *Primary Jurisdiction: A Reappraisal*, 27 U. CHI. L. REV. 192, 198 (1957).

37. *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

38. *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965).

39. See Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1070 (1964).

40. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

merce,⁴¹ can only be implemented by the FMC if its power extends to foreign as well as domestic shipping.⁴² Subpoenas may be served on foreign parties doing business within the United States,⁴³ and it has been held that this subpoena power extends to documents outside the United States.⁴⁴ The FMC, however, would have little control over mergers between foreign-owned companies. Likewise, as mentioned before it has no control over mergers by acquisition or with a party not subject to the Act.⁴⁵ In brief, the holding in *Matson* does not give the FMC the type of overall control it has in other recognized fields of administration.⁴⁶

Thus, there is little to be gained by invoking jurisdiction of the FMC over mergers. Moreover, some indications of the harmful aspects of agency intervention cannot be ignored.

Referring mergers to the FMC may interfere with litigants' rights to collect treble damages under the antitrust laws.⁴⁷ The Shipping Act does not preserve general remedies;⁴⁸ a party forced to proceed before the FMC must settle for damages authorized by the Act,⁴⁹ or suffer the considerable delay caused by presenting the FMC's findings before the court as prima facie evidence.⁵⁰ In *Carnation Co. v. Pacific Westbound Conference*,⁵¹ petitioners filed a treble damage suit, alleging that the Pacific Westbound and Far East Conferences were using a rate-fixing agreement which had not been approved by the Federal Maritime Commission, and that treble damages were recoverable because implementation of such agreement was unlawful per se under the antitrust laws. The Supreme Court reversed an order dismissing the action and remanded to the district court to stay the proceedings pending a decision by the FMC on whether the present activities were covered by

41. See generally May, *The Status of Federal Maritime Commission Shipping Regulation under Principles of International Law*, 54 GEO. L.J. 794, 799 (1966).

42. *Montship Lines, Ltd. v. Federal Maritime Bd.*, 295 F.2d 147, 154 (D.C. Cir. 1959); *Kerr S.S. Co. v. United States*, 284 F.2d 61 (2d Cir. 1960).

43. See May, *The Status of Federal Maritime Commission Shipping Regulations under Principles of International Law*, 54 GEO. L.J. 794, 816 (1966).

44. *FMC v. DeSmeldt*, 366 F.2d 464 (2d Cir. 1966), *cert. denied* 385 U.S. 974 (1966).

45. See text accompanying note 31-34 & note 32 *supra*.

46. There is nothing to prevent shippers from designing mergers to incur or evade FMC jurisdiction, whichever appears more beneficial. As a rule, they have more to gain by filing a section 15 agreement because they thereby gain immunity from antitrust prosecution in the federal courts and from treble damage suits.

47. P. HADLICK, *TREBLE DAMAGES UNDER THE ANTITRUST LAWS* 4 (1940).

48. See *S.S.W., Inc. v. Air Transp. Ass'n of America*, 191 F.2d 658, 663 (D.C. Cir. 1951).

49. *Cf. Keough v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922) (discussing the Interstate Commerce Act).

50. Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495, 500 (1953).

51. 383 U.S. 213, 224 (1966).

a 1952 agreement which had received FMC approval. Treble damages were recoverable in this case only because the petitioner was allowed to remain in district court while awaiting the FMC's decision.

Although *Matson* might at first glance appear to be in conflict with *Carnation*, the two cases can be reconciled. The decision in *Carnation* is based on a strict construction of the provisions of the Shipping Act. Antitrust immunity is available only for agreements filed before the FMC; *Carnation* held that until an agreement was actually filed before the FMC, there would be no jurisdiction conferred on that body under the Shipping Act.⁵² Obviously, since the FMC does not obtain jurisdiction until the agreement is filed, the Justice Department must be free to proceed against any unfiled agreements. If the Justice Department could not act in that situation, mergers could take place unimpeded by any government regulation or control. Nevertheless, *Carnation*, although not directly contrary to the Ninth Circuit decision in *Matson*, seems to have found a better approach to the problem of maritime merger agreements.

There had been a tendency in the older cases to dismiss a case commenced in court once it was claimed that the FMC had to be consulted because a section 15 agreement was involved.⁵³ The approach adopted in the recent *Carnation* decision was to leave the case in court, apply the antitrust laws to it, and refer to the FMC only those segments of the proceedings that are peculiarly within its field of expertise.⁵⁴ There is no apparent reason why an injunction issued to prevent the continuation of illegal conduct would interfere with the FMC's activities.⁵⁵ Nor does it appear essential always to stay the proceedings while the FMC decides a question outside the court's domain but necessary to the final determination of an issue in the case. The FMC may make its decision while the court is in the process of hearing the rest of the case.⁵⁶ Although the final ruling cannot be made before the FMC has acted, the judicial process in many instances will be accelerated by permitting the court, acting concurrently with the FMC, to decide issues whose outcomes are not dependent on the FMC's findings but are necessary to the ultimate determination of the case.

52. *Id.* at 218-20.

53. *See* *Far E. Conference v. United States*, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

54. *See Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216-17, 219, 222 (1966).

55. *Georgia v. Pennsylvania R.R.*, 327 U.S. 439 (1945); *United States Navigation Co. v. Cunard S.S. Co.*, 50 F.2d 83, 89 (1931); *see* Comment, *Accommodation of Antitrust Law and Ocean Shipping Regulation*, 4 TEX. INT'L L.F. 393, 407 (1968).

56. *Firestone Tire & Rubber Co. v. American Pres. Lines, Ltd.*, 266 F. Supp. 76 (S.D.N.Y. 1966).

Competition and Control

The decision in the *Matson* case cannot be discussed without giving some thought to its pervasive effect on the national economic policy. While the practice of referring mergers to the FMC does not necessarily imply a supersession of antitrust principles,⁵⁷ the FMC quite probably will not vigorously enforce those principles.⁵⁸ This was made clear in *McLean Trucking Co. v. United States*,⁵⁹ where the Court held that the Interstate Commerce Commission, in determining cases before it, was to "consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy."⁶⁰ But all the ICC had to do was consider; it was not required, as suggested in the dissent, to agree to subordinate competitive interests only when no other viable alternative exists.⁶¹ These considerations apply equally to the Federal Maritime Commission, which is allowed to use its discretion in deciding how much emphasis to place on maintaining competition.⁶²

The antitrust acts are generally considered to have been designed to promote competition.⁶³ The Federal Maritime Commission, however, has shown a tendency to treat competition as one of many variables, exchanging it freely to obtain desired results rather than making an effort to preserve it intact.⁶⁴ One writer maintains that the FMC, more than other regulatory agencies, has been indifferent to the maintenance of competition in its field.⁶⁵ Plaintiffs, acting under the belief that the FMC has a strong industry orientation and that defendants ought to be subject to the exacting provisions of the antitrust laws, generally seek to bring their cases before the courts rather than the FMC.⁶⁶

Since the language of the Shipping Act does not compel the inclusion of mergers within section 15,⁶⁷ and the arguments usually es-

57. Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 50 (1963); Note, *The Isbrandtsen Decision: Anti-trust Laws, Regulated Industries and the Doctrine of Primary Jurisdiction*, 53 NW. U.L. REV. 803, 805-6 (1959).

58. Hale & Hale, *supra* note 57, at 50.

59. 321 U.S. 67 (1944).

60. *Id.* at 87.

61. *Id.* at 94 (Douglas, J.). *Contra*, *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).

62. See *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88 (1944).

63. Hale & Hale, *Competition or Control I: The Chaos in the Cases*, 106 U. PA. L. REV. 641, 682 (1958).

64. See Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 449 (1954).

65. *Id.* at 466.

66. See von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929, 941 (1954).

67. See text accompanying notes 13-22 *supra*.

poused in favor of primary jurisdiction are far from persuasive in the present case,⁶⁸ it seems unwise to bypass the federal courts in order to give merger jurisdiction to the FMC. The FMC members are not selected on the basis of their knowledge of antitrust law, nor can they be expected to acquire much skill in that field. On the other hand, federal judges, by reason of their tenure on the bench, may be expected to gain considerable experience in antitrust matters, even if they lack exposure in that area when they are first appointed. The best solution would be to permit wronged parties to receive the full protection of the judicial process under the antitrust laws while receiving the benefits of the agency process by referring to the FMC those issues that, because of its experience, it is uniquely qualified to determine.

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C. Advertising Allowances to Retailers—*Clairol Inc. v. FTC*, 410 F.2d 647 (9th Cir. 1969).

In *Clairol Inc. v. FTC*,¹ the Ninth Circuit broadened the scope of section 2(d) of the Robinson-Patman Act,² which imposes controls against price discrimination. Section 2(d) prohibits payments to any buyer in consideration for the buyer's promotion of the manufacturer's products unless the manufacturer provides similar advertising allowances to all of its buyers. The Ninth Circuit affirmed with modifications an order of the Federal Trade Commission directing Clairol to cease and desist from granting advertising discounts to certain beauty salons "competing in the distribution" of Clairol products, unless Clairol provided discounts on "proportionally equal terms" to its other customers. In holding the allowances afforded to these beauty salons discriminatory, the Ninth Circuit made two important findings: first, that

68. See text accompanying notes 31-34 *supra*.

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1. 410 F.2d 647 (9th Cir. 1969).

2. 15 U.S.C. § 13(d) (1964). Section 2(d) provides in full: "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

for purposes of the Robinson-Patman Act, a beauty salon was a retailer of Clairol products; second, that all retailers, regardless of the number of intermediate wholesalers between the retailer and the manufacturer, are "customers" of the manufacturer for the purposes of Section 2(d).

The beauty salons in question purchased beauty products directly from Clairol and used them in serving salon customers. Advertisements were displayed by the salons to encourage customers to request that Clairol products be used in the course of beauty treatments. The Federal Trade Commission held that even though a salon customer paid a unitary price for both the product and the service of a beautician, the transaction constituted a resale of Clairol's product, thus bringing the advertising allowances granted to the direct-buying beauty salons within the Robinson-Patman Act. Since Clairol provided advertising allowances only to direct-buying beauty salons and not to wholesalers, the FTC directed Clairol to grant similar advertising programs and allowances to its wholesalers.

The Robinson-Patman Act, an amendment to the Clayton Act, was intended to strengthen the prohibitions against supplier price-discount practices which inured to the benefit of the large, volume-buying chain store and to the detriment of the small retail businessman.³ Section 2(d) of that Act deals with the form of discount whereby suppliers, instead of granting cash kickbacks, grant advertising allowances, which large retailers use to lower consumer prices of products below levels that could be matched by retailers who are unable to obtain the allowances.⁴

Price Discrimination by Clairol

In argument before the Ninth Circuit, Clairol admitted that it provided advertising allowances to beauty salons but maintained that section 2(d) did not apply to those allowances, on the grounds that the beauty salons in question were not "competing [with retailers] in the distribution" of Clairol products because they did not resell Clairol products but exhausted them while serving their customers. Therefore, it claimed, the products were used only as equipment in the performance of a service.⁵

The Ninth Circuit rejected the argument that the complete consumption of the product at the salon prevented a finding that the transaction constituted a resale. It noted that Clairol's products were not supplied in bulk but in individual packets "as would be secured in a

3. A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 217-18 (1966).

4. *Id.* at 251.

5. 410 F.2d at 648.

drugstore sale"; moreover, the advertising encouraged customers to ask for Clairol products. Accordingly, said the court, the customer, not the salon, was the final purchaser.⁶

The Robinson-Patman Act does not define the term "resale,"⁷ nor is a definition attempted in the *FTC Guides for Advertising Allowances and Other Merchandising Payments and Services*,⁸ which offers definitions for other terms left undefined in the Act. While the distinction between a contract for sale and a contract for services in another branch of the law is not necessarily applicable to the Robinson-Patman Act,⁹ the definition of "resale" in cases arising outside the Act is in sharp contrast to the Ninth Circuit's definition under section 2(d).

In accord with the definition advanced by Clairol, these cases hold that in contracts for the rendering of a professional skill, the consideration paid is for a service, and any material furnished in the process is incidental to the service.¹⁰ The courts, to determine the subject matter of transactions between contracting parties, have attempted to ascertain whether the fundamental purpose of the customer is to receive a service or to obtain a product.¹¹ This test, applied in other legislative contexts, has placed beauty salons in the category of service establishments.¹²

Although the few cases in point arising under the Act have neither offered a definition of "resale" nor, before *Clairol*, considered the categorization of beauty salons, they do, nevertheless, reflect the same approach taken by cases arising outside the Act. A recent Fifth Circuit case advanced the general test that "the dominant nature of the transaction must control" in determining whether there was a service ren-

6. *Id.*

7. Definitions for certain terms of the Act are given in 15 U.S.C. §§ 12, 13 (1964).

8. The discussion of the guides in this Note is directed toward recent amendments of the guides. The guides as they appeared before amendment are in 16 C.F.R. § 240 (1969). The first proposed amendments appear in 33 Fed. Reg. 10616 (1968). The second draft of the amendments can be found in 34 Fed. Reg. 4926 (1969). The third and final draft is in 34 Fed. Reg. 8285 (1969). A definition of resale appears in none of these four documents.

9. The Seventh Circuit, in reviewing a price discrimination issue in *Corn Products Ref. Co. v. FTC*, 144 F.2d 211, 219 (7th Cir. 1944), warned against the use of such analogies in developing definitions for terms used in the Robinson-Patman Act.

10. See, Comment, *Contracts for Services Distinguished from Those to Sell Goods*, 15 *FORDHAM L. REV.* 92, 106-07 (1946).

11. *Id.*

12. *E.g.*, *Fleming v. A.B. Kirschbaum Co.*, 124 F.2d 567, 572-73 (3d Cir. 1941); *Stucker v. Roselle*, 37 F. Supp. 864, 867 (W.D. Ky. 1941).

dered or a sale of goods.¹³ Other Robinson-Patman cases have declared that the use of bricks in construction did not constitute a resale of the bricks,¹⁴ that the purchase of a shave in a barber shop is not a purchase of shaving cream,¹⁵ and that the purchase of a shoe shine does not involve a sale of shoe polish.¹⁶ Particularly if an analogy is drawn between beauty salons and barber shops, these prior cases provide a definition of "resale" that conflicts with the *Clairol* holding.

The term "resale" must, of course, be examined within the context of the entire Act. The Act deals with "sellers who sell products for resale, *with or without processing*."¹⁷ In presenting its argument to the Ninth Circuit, the FTC in *Clairol* relied heavily on the Supreme Court case of *Corn Products Refining Co. v. FTC*,¹⁸ which interpreted the phrase "with or without processing" as a comprehensive term enlarging the scope of the term "resale."¹⁹ In *Corn Products*, the Court held that even though the defendant processed dextrose into candy and then sold the candy, this still constituted a resale of dextrose.²⁰ Nonetheless, the Supreme Court's broad definition of resale does not justify the *Clairol* decision; beauty salons do not process or change cosmetics but merely use them in the performance of a service.

Before condemning the Ninth Circuit for failing to follow analogous cases, however, it is necessary to determine whether there are factors which distinguish *Clairol* from the general rule. The court clearly thought there were:

Here the service rendered by the salon is not a generalized service provided alike to all comers and the product is not consumed by the salon in performing or equipping itself to perform such a service. The service rather is individualized and the product is used directly on the customer herself. The products are not used in bulk but in individual packages such as would be secured in a drugstore sale. The product used is chosen to meet the individual needs or desires of the salon's customer and the choice is the customer's. It is the customer, and not the salon,

13. *Tri-State Broadcasting Co. v. United Press Int'l, Inc.*, 369 F.2d 268, 270 (5th Cir. 1966).

14. *General Shale Prods. Corp. v. Struck Constr. Co.*, 37 F. Supp. 598, 602 (W.D. Ky. 1941).

15. *Mueller v. United States*, 262 F.2d 443, 447-48 (5th Cir. 1958).

16. *Id.* at 448.

17. Although the phrase "with or without processing" appears only in section 2(e) of the Act, 15 U.S.C. § 13(e) (1964), the courts read sections 2(d) and 2(e) together. *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 154 F. Supp. 471, 474 (N.D. Ill. 1957). The FTC guides interpret the term to cover both sections. 16 C.F.R. § 240.2 (1969), *as amended*, 34 Fed. Reg. 4926, § 240.2 (1969).

18. 324 U.S. 726 (1945).

19. *Id.* at 744.

20. *Id.*

who is the ultimate consumer. The fact that the product is also wholly consumed on salon premises does not alter this fact.²¹

The attempted distinction is unconvincing because of the difficulty in ascertaining any difference between the activities of the beauty salons in the instant case and what the court considered normal beauty salon procedure. In determining whether the predominant nature of the transaction is the sale of goods or a service, it makes little difference that the customers of the beauty salons were not all given identical treatment, or that customers could choose, if they wished, the brand of cosmetics to be used by the beauticians. The customers were still interested primarily in receiving professional service.

The Ninth Circuit attempted to bolster its holding by reference to the policy basis of the Act:

It was precisely this sort of discrimination that § 2(d) was intended to reach. "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power."²²

This underlying policy, however, in all probability would not have been thwarted by a contrary decision in *Clairol*. It is highly doubtful that beauty salons are within that class of "large buyers" meant to be curbed by the Act. Even more tenuous, it seems, is the finding of a potentially destructive competitive relationship between beauty salons, drug stores, and other retail distributors of *Clairol* products. It is difficult to believe that the framers of the Act foresaw a threat to small retailers from equally small service establishments that charge considerably more for a service utilizing a particular product than is charged for the sale of that product alone.

The Protected Competitor

The other important aspect of *Clairol* was the Ninth Circuit's determination of the class of competitors protected by the Act. In coming to its determination, the Ninth Circuit relied on and interpreted the recent case of *FTC v. Fred Meyer, Inc.*²³

In *Fred Meyer*, the FTC had issued an order holding supplier advertising discounts for selected retailers to be discriminatory when similar allowances were not afforded to wholesalers purchasing from the supplier.²⁴ On appeal, the Supreme Court held that section 2(d) provided protection only for those customers of the supplier competing

21. 410 F.2d at 648.

22. *Id.*, quoting *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960).

23. 390 U.S. 341 (1968).

24. *Id.*

against the favored purchaser on the same level of distribution. The FTC order was accordingly modified to require the supplier to grant similar allowances to its other retailers, not to its wholesalers.²⁵

The Court, in a complete reversal of existing law,²⁶ then ruled that retailers were protected whether they purchased directly from the supplier or indirectly through the supplier's wholesalers.²⁷ Prior to *Fred Meyer*, the supplier was not required to provide advertising allowances to indirect-purchasing retailers unless the supplier was attempting to avoid his obligation of equal treatment by using an intermediate wholesaler merely as a guise.²⁸

This new interpretation of the Act was based on the Court's interpretation of Congress' intent "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."²⁹ The Court felt economic realities were such that the goal of Congress would be thwarted unless indirect-purchasing retailers were afforded the protection of the Act in all circumstances.³⁰

The FTC order in *Clairol* had originally required that Clairol in granting advertising allowances cease discriminating against its wholesalers in favor of the direct-purchasing beauty salons. In the interim, however, the Supreme Court handed down its decision in *Fred Meyer*. When Clairol appealed the order to the Ninth Circuit, the FTC conceded that its order should be modified to conform to the holding in *Fred Meyer*. It asked the court to modify the order so that Clairol would be required to give all its retailers the same advertising allowances it gave the direct-buying beauty salons.³¹ Clairol contended that *Fred Meyer*, on its facts,³² required equal treatment by the supplier only of those customers buying from direct-purchasing wholesalers.³³ The Ninth Circuit, however, adopted the FTC's counter-argument that the *Fred Meyer* decision, despite its limited fact situation, called for no

25. *Id.* at 356.

26. The FTC guides prior to *Fred Meyer* defined "customer" as one who buys directly from the seller. 16 C.F.R. § 240.3 (1968).

27. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 348-50 (1968).

28. This practice was thwarted by the "doctrine of indirect purchaser" which required direct dealing between the supplier and the retailer controlled by the supplier. *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876 (S.D.N.Y. 1968), has said the *Fred Meyer* decision has eliminated the direct dealing and control requirements of the doctrine. *Id.* at 887.

29. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

30. *Id.*

31. 410 F.2d at 649.

32. In *Fred Meyer*, the supplier and retailer were separated by only one wholesaler. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 344-45 (1968).

33. 410 F.2d at 649.

such limitation but indicated rather that the Supreme Court felt that the framers of the Robinson-Patman Act wanted to protect *all* competitors at the same distribution level, regardless of the number of intervening distributors.³⁴

This position seems to be supported by the language of the Supreme Court in *Fred Meyer*:

We conclude that the most reasonable construction of § 2(d) is one which places on the supplier the responsibility for making promotional allowances available to those retailers *who compete directly with the favored buyer*.³⁵

Nowhere did the Court indicate that this construction would apply only in cases of retailers buying from direct-purchasing wholesalers.³⁶ In fact, in a more recent case, the Court seemed to approve, at least indirectly, a broad construction of its decision in *Fred Meyer* when it interpreted "customer" in section 2(a) of the Act, a companion price discrimination section, to include retailers separated from the supplier by two levels of distributors. Drawing an analogy to section 2(d), the Court said:

In *Meyer*, the Court stated that to read "customer" narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act. Similarly, to read "customer" more narrowly in this section than we did in the section involved in *Meyer* would allow price discriminations to avoid the sanctions of the Act by the simple expedient of *adding an additional link* to the distribution chain.³⁷

The Ninth Circuit's extension of section 2(d)'s protection to retailers purchasing from indirect- as well as direct-purchasing wholesalers is undeniably in harmony with the spirit, if not the facts, of *Fred Meyer*. The decision, however, by making immaterial the number of intervening wholesalers, increases the difficulties for the supplier in acquitting his responsibilities under section 2(d). The court's meager discussion of the nature and extent of this responsibility is ambiguous and contradictory.

In *Fred Meyer*, the Supreme Court in no uncertain terms placed responsibility upon the supplier to insure that all retail customers are afforded similar promotional plans and that they receive similar payments.³⁸ Except for several offhand suggestions, however, it left open the issue of how this responsibility was to be implemented. Justice Harlan in his dissent in *Fred Meyer* had pointed out that since the sup-

34. *Id.*

35. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 347 (1968).

36. *See id.* at 347.

37. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647 (1969).

38. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 358 (1968).

plier is often unaware of the identity of indirect-purchasing retailers, it would be difficult for him to formulate similar promotional plans for unknown recipients and inform unknown retailers of the availability of advertising allowances.³⁹ The majority of the Court suggested that the supplier's problem could be solved by the use of wholesalers to communicate the plan.⁴⁰ This solution has been criticized as lacking protection against uncooperative or unreliable wholesalers.⁴¹ Another suggestion that the supplier attach notices to shipments of its products also has drawbacks in that most promotional campaigns are short-termed; under these circumstances some retailers would probably not be notified in time to take advantage of the campaign.⁴² Since retailers can sue the supplier for treble damages for failing to meet section 2(d) obligations,⁴³ these difficulties are of very real significance to suppliers.

Although Clairol urged the same arguments of "impracticability" before the Ninth Circuit,⁴⁴ the court summarily dismissed them by stating:

The fact that Clairol's problems may be more complex than those of Meyer's suppliers does not call for a different result. The purpose of the Robinson-Patman Act was to strike down all discriminatory promotional schemes of this sort. If the form of a promotional arrangement is such that discrimination is unavoidable that fact does not render the arrangement immune; rather it renders it unacceptable.⁴⁵

This language suggests an absolute responsibility for notice by the supplier to all retailers regardless of the number of intervening levels of wholesalers. A preceding footnote to the opinion, however, calls into question the absoluteness of this responsibility. The court quotes from a portion of the *FTC Amended Guides for Advertising Allowances* which defines the term "competing customer," and includes the following example:

*Example 1. A manufacturer sells to some retailers directly and to others through wholesalers. Retailer "X" purchases the manufacturer's products from a wholesaler and resells some of it to retailer "Y". Retailer "X" is a customer of the manufacturer. Retailer "Y" is not a customer unless the fact that he purchased the manufacturer's product is known to the manufacturer.*⁴⁶

39. *Id.* at 359-62 (dissenting opinion).

40. *Id.* at 358.

41. Note, *Trade Regulations—Robinson-Patman Act Section 2(d)—Promotional Allowances*, 47 N.C.L. REV. 243, 251 (1968).

42. *Id.* at 251-52 & n.47.

43. 15 U.S.C. § 15 (1964).

44. 410 F.2d at 649.

45. *Id.* at 650.

46. *Id.* at 649-50 n.3, quoting 34 Fed. Reg. 4926, § 240.3(b), example 1 (1969); see text accompanying note 38 *supra*.

According to the court, the FTC "[b]y placing the burden on retailer 'Y' to inform the manufacturer, [removes] the onerous aspect of this requirement"⁴⁷ Thus the guidelines may, in certain cases, render unavoidable discrimination immune rather than unacceptable, a situation quite contrary to the express language in the body of the *Clairol* opinion.⁴⁸

The confusing state of the law arising from the inconsistencies of the *Clairol* decision would appear to make future litigation almost imperative. Its definition of "resale" to encompass the service-oriented beauty treatment appears to be out of step with other cases arising both within and outside the Act. There appears to be no compelling policy reason or factual distinction to support such a decision. On the other hand, the Ninth Circuit's declaration that all retailers on the same distribution level are to be protected by the Act regardless of the number of intermediate distributors develops a proper interpretation of the *Fred Meyer* holding. Nevertheless, it seems incongruous, if not totally inconsistent, for the court, in one portion of its opinion, to take the emphatic position that on the basis of *Fred Meyer* any program which

47. 410 F.2d at 649-50 n.3.

48. The guidelines footnoted by the court represent the second of three drafts for amending the FTC *Guides*. In the first draft, the Commission took essentially the same view of the absoluteness of the supplier's responsibility to notify the retailer as did the Ninth Circuit in the text of its opinion in *Clairol*. In this draft, the FTC followed to the letter the mandate of the *Fred Meyer* decision, stating that the "seller must take *effective action* to inform *all* his competing customers of the availability of the advertising allowance plan." 33 Fed. Reg. 10616, § 240.8 (1968) (emphasis added). And the responsibility of giving such notice "rest[ed] squarely upon [the] sellers." *Id.* § 240.11. Compare *Clairol Inc. v. FTC*, 410 F.2d 647, 649-50 (9th Cir. 1969).

Eight months after the publication of the first draft, the FTC issued a second draft, which evidenced a noticeable change of policy by the Commission. It changed the supplier's responsibility from an absolute one to one conditioned by a rule stating that the "seller must take *reasonable action*, in *good faith*, to inform all his competing customers of the availability of his promotional program." 34 Fed. Reg. 4926, § 240.8(2) (1969) (emphasis added). The use of the terms "reasonable" and "in good faith" constitute more than a slight change. When this language is read in conjunction with the qualification on the definition of "competing customer" in section 240.3(b), example 1 (quoted by the court in *Clairol*, 410 F.2d at 649-50 n.3), it is clear that the FTC has retreated from its position of absolute responsibility adopted in the first draft of the regulation.

The Commission's policy shift undoubtedly occurred as a result of pressure exerted by large manufacturers and from efforts by the Commission to provide a workable solution to the problems inevitably to be visited upon business by the *Fred Meyer* decision, and particularly by the Commission's extension of that decision in its regulations. See 34 Fed. Reg. 4926, § 240.3 (1969), *upheld in Clairol Inc. v. FTC*, 410 F.2d 647 (9th Cir. 1969). The FTC has maintained its position in the third draft, which was very similar to the second. 34 Fed. Reg. 8285, §§ 240.1-17 (1969).

does not inure to the equal benefit of all customers, no matter how far removed from the manufacturer, is unacceptable, and then to drop a footnote endorsing the new FTC guides which take a less rigorous position. This inconsistency places businessmen in the unenviable position of having to guess which of the conflicting statements in *Clairol* the Ninth Circuit will follow in future decisions. They can only hope their choice avoids an adverse judgment in a treble damage action.

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