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ADMINISTRATIVE AGENCY CHOICE OF ADJUDICATION: THE NINTH CIRCUIT'S ARBITRARY NEW RULE

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A. INTRODUCTION

In *Ford Motor Co. v. Federal Trade Commission* (hereinafter *Francis Ford*),[1] a panel of the United States Court of Appeals for the Ninth Circuit ruled that the FTC did not have the discretion to act by adjudication against three auto makers, their financing subsidiaries, and three auto dealers in matters involving consumer credit practices. Because the adjudication "change[d] existing law, and ha[d] widespread application,"[2] the unanimous three-judge panel wrote sweepingly, the matter could be addressed only through a formal rulemaking proceeding.

The *Francis Ford* decision was immediately recognized in the legal press as having potentially farreaching application in all areas of federal administrative law.[3] As it stands, the ruling severely limits the FTC's options in dealing with unfair trade practices in the Ninth Circuit,[4] and circumscribes the scope of discretion of other federal agencies as well. The decision was appealed, and the United States Supreme Court denied certiorari on November 8, 1982.[5] Justices White and O'Connor dissented from the denial of review.[6]

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1. 673 F.2d 1008 (9th Cir. 1981) (per Goodwin, J.; the other panel members were Kennedy and Alarcon, JJ.) (rehearing and rehearing en banc denied, April 5, 1982. Reinhardt, J. dissented from denial of rehearing en banc), *cert. denied*, 103 S. Ct. 358 (1982).
2. 673 F.2d at 1010.
3. Los Angeles Daily Journal, Sept. 2, 1981, at 1, col. 4.
4. *Id. See also* ANTITRUST & TRADE REG. REP. (BNA) A-8 (Sept. 2, 1981).
5. 103 S. Ct. 358 (1982).
6. *Id.*

After summarizing the facts in the case[7] and the decision and analysis of the *Francis Ford* court,[8] the opinion will be examined in light of the relevant case law. It will be demonstrated that *Francis Ford* relied on wrongly decided Ninth Circuit precedent,[9] and failed to recognize or apply the decisional methodology of the three United States Supreme Court cases which delineate the general scope of administrative agency discretion to proceed through adjudication rather than rulemaking.[10] It will be argued that the rule of *Francis Ford* is inconsistent with the proper principles of decision which emerge from the three High Court cases,[11] and has severe workability problems.[12] It will be concluded that, as a radical and unjustified departure from tested and sound principles of review, the *Francis Ford* decision should be overruled at the first opportunity.

B. The Facts

The unfair practice that was the target of the adjudicatory proceedings was that practice whereby auto dealers would, in concert with the automakers and their financing subsidiaries, credit consumer debtors with merely the *wholesale* value of cars which had been repossessed from them, charge the debtors with both direct expenses (e.g., repair) and *indirect* expenses, including "lost profits," and subsequently resell the cars *at retail,* pocketing the surpluses.[13]

The FTC brought administrative actions against nine companies—each of the Big 3 automakers, their financing subsidiaries, and three dealerships. All but Francis Ford, a Portland, Oregon dealer, signed consent agreements: they would cease and desist from the challenged practice, and make restitution totaling some $2 million to injured consumers.[14] The action continued against Francis Ford, and an administrative law judge held that Francis Ford's practices violated section 5 of the FTCA.[15]

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7. *See infra* text accompanying notes 13-15.
8. *See infra* text accompanying notes 16-24.
9. *See infra* text accompanying notes 28-43.
10. *See infra* text accompanying notes 44-92.
11. *See infra* text accompanying notes 93-100.
12. *See infra* text accompanying notes 101-108.
13. 673 F.2d at 1009.
14. 93 F.T.C. 402 (1979), *modified,* 96 F.T.C. 32 (1980).
15. *Id. See* 5 U.S.C. § 5 (1976).

Francis Ford appealed, making numerous allegations of error.

C. The Decision

The Ninth Circuit panel characterized the issue presented as "narrow": "whether the F.T.C. should have proceeded by rulemaking in this case rather than by adjudication."[16] The court then set forth the general principles it believed governed the case. While noting that administrative agencies are not precluded from announcing new policies through adjudication, and that the choice between rulemaking and adjudication lies in the first instance with the agency, the court underscored that there may be situations in which the use of adjudication would be an abuse of discretion.[17] The problem, the *Francis Ford* court recognized, was one of line-drawing. The court quoted the Supreme Court's statement in *NLRB v. Bell Aerospace Co.*: "It is doubtful whether any generalized standard could be framed which would have more than marginal utility."[18]

With the general principles sufficiently invoked, the *Francis Ford* court then turned to recent Ninth Circuit precedent. In *Patel v. INS*,[19] decided in 1980, a Ninth Circuit panel had held that the INS should have proceeded by rulemaking rather than by adjudication in adding a requirement to a regulation governing immigration to the United States. "The thrust of the *Patel* holding," the *Francis Ford* court wrote, "is that . . . *an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application.*"[20] "Framed according to *Patel*, the precise issue therefore is whether this adjudication changes existing law, and has widespread application. [If] [i]t does, . . . the matter should be addressed by rulemaking."[21]

Having isolated the law it believed determinative, the *Francis Ford* court then applied it to the facts at hand. The court found that since the FTC had cited no cases in accord with its interpretation of Francis Ford's credit practices as violative of

16. 673 F.2d at 1009.
17. *Id.*
18. 416 U.S. 267, 294 (1974), quoted at 673 F.2d at 1009.
19. 638 F.2d 1199 (9th Cir. 1980).
20. 673 F.2d at 1009 (emphasis added).
21. *Id.* at 1010.

state law (the Oregon enactment of UCC 9-504), the adjudication therefore "changed existing law."[22] Since the FTC had deemed it appropriate to address other credit practices under UCC 9-504 through rulemaking, "it should also address the problem of accounting for surpluses by a rulemaking proceeding, and not by adjudication."[23] Finally, the *Francis Ford* court found that "because the rule of the case made below will have general application,"[24] it must necessarily be addressed through rulemaking.

D. Analysis of Francis Ford

In its summary analysis and conclusory sweep, the *Francis Ford* court erred in reliance on *Patel v. INS*, a decision which is demonstrably incorrect. The *Francis Ford* court also failed to understand or apply the decisional methodology established by the three Supreme Court cases—*SEC v. Chenery Corp. (Chenery II)*,[25] *NLRB v. Wyman-Gordon Co.*,[26] and *NLRB v. Bell Aerospace Co.*[27]—which control the vital question of administrative discretion to proceed by adjudication rather than rulemaking. Instead, making questionable use of precedent and allowing unresolved internal inconsistencies, the *Francis Ford* court arrived at and applied a dubious "generalized standard" to determine whether the agency had made an allowable use of its discretion. This generalized standard has severe workability problems and serves as nothing less than a *sub rosa* repudiation of *Chenery II* in the Ninth Circuit.

1. Francis Ford *erred in reliance on* Patel

Patel is the only case authority cited by the *Francis Ford* court to support its conclusion that when an adjudication changes existing law and has widespread application, rulemaking should be employed. Therefore, if *Patel* can be shown to have been incorrectly decided, *Francis Ford* is rendered highly suspect.

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22. *Id.*

23. *Id.*

24. *Id.*

25. 332 U.S. 194, *reh'g denied*, 332 U.S. 783 (1947). This case is referred to as *Chenery II* to distinguish it from an earlier, related case involving the same parties, SEC v. Chenery Corp., 318 U.S. 80 (1943).

26. 394 U.S. 759 (1969).

27. 416 U.S. 267 (1974).

The *Patel* court in turn relied on the Supreme Court's decision in *Wyman-Gordon.* In order to understand why *Patel* was erroneously decided, it is necessary to understand the facts and *ratio decidendi* of both *Patel* and *Wyman-Gordon.*

Material to *Patel* was an "investor exemption" in the INS regulation under scrutiny. To qualify for the exemption, and thereby permanent immigration into the United States, the investor must show at least one year's experience in the particular investment field, and an investment of at least $40,000.[28] In *In re Heitland*[29] in 1974, the INS, by adjudication, added a third requirement to the investor exemption: the alien's investment "must tend to expand job opportunities"[30] in this country. Patel, the investor who wished to immigrate, met the first two requirements, which had been codified in the Code of Federal Regulations. Although he had notice of the third requirement, he did not meet it. He challenged the last requirement on the ground that the INS had abused its discretion in announcing the requirement in the context of an adjudication rather than through rulemaking. The *Patel* court held that there was such an abuse.[31]

Wyman-Gordon also involved a prior adjudication. In its 1966 decision in *Excelsior Underwear, Inc.*,[32] the National Labor Relations Board (NLRB) "purported to establish the general rule [that employers must furnish a list of employees to unions for election purposes], . . . but it declined to apply its new rule to the companies involved"[33] in the case. After not applying the *Excelsior* rule to the *Excelsior* case, the NLRB then sought to apply it against the Wyman-Gordon Company.

The Supreme Court found an explicit statutory violation on the part of the NLRB: section 6 of the National Labor Relations Act[34] directed the NLRB to make rules in the manner prescribed by the Administrative Procedure Act (APA). The rule

28. 8 C.F.R. § 212.8(b)(4) (1982).
29. 14 I. & N. Dec. 563 (1974).
30. *Id.* at 567.
31. 638 F.2d at 1205.
32. 156 N.L.R.B. 1236 (1966).
33. 394 U.S. at 763.
34. 29 U.S.C. § 156 (1976).

the NLRB sought to make in the *Excelsior* adjudication was unquestionably a "rulemaking rule" as contrasted with an "adjudicative rule," because, under the APA, a "rulemaking rule" is one of "future effect,"[35] one which is purely prospective in operation. In *Excelsior,* the NLRB sought to make a rule of only prospective application through the adjudicative process. This it could not do: "There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention," stated the Court.[36]

Nothing in *Wyman-Gordon* precludes the use of adjudication in the formulation of agency policy; however, a valid adjudication may still create binding precedent. *Wyman-Gordon* merely clarified that adjudication may not be used to make purportedly quasi-legislative rules, or to make adjudicative rules which are not binding on the parties to the adjudication, but only on parties to future adjudications.[37]

Patel relied heavily on *Wyman-Gordon.* The *Patel* court analogized *Heitland* to *Excelsior,* and although in *Heitland* the new rule *had* been applied to the parties to the adjudication, declared that *"Heitland,* like *Excelsior,* created a broad requirement of prospective application . . . . Under the authority of *Wyman-Gordon,* we conclude that if the INS wished to add the job-creation criterion, it should have done so in a rulemaking procedure."[38]

The reliance on *Wyman-Gordon* and the analogy of *Heitland* to *Excelsior* reveal that the *Patel* court completely failed to isolate the outcome-determinative elements of *Wyman-Gordon;* indeed, failed to recognize what that case *held.* The gravamen of *Wyman-Gordon* was that the NLRB abused its discretion in *Excelsior* by purporting to make a legislative-type rule through an adjudicative proceeding.[39] What was the factor which made the rule a legislative-type one? It was that the rule was

35. 394 U.S. at 763-64. 5 U.S.C. § 551(4) (1976) provides that a " 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."

36. 394 U.S. at 765.

37. *Id.*

38. 638 F.2d at 1203-04.

39. 394 U.S. at 765.

prospective only in application. It was not applied to the parties to the adjudication; it had only future effect. Thus, it fell squarely within the definition of what a legislative rule is: "an agency statement of general or particular applicability and *future effect.*"[40]

Since the *Heitland* rule was applied in *Heitland,* it was not, contrary to the *Patel* court's assumption, a rule of future effect within the meaning of that phrase as interpreted by the Supreme Court. As the *Wyman-Gordon* dissent makes clear, the entire case turns on this point.[41]

The *Patel* court's misuse of Supreme Court precedent was not limited to *Wyman-Gordon* however; the Ninth Circuit panel additionally misconstrued both *Chenery II* and *Bell Aerospace* in assuming, without analysis, that the examples given in each decision of instances where adjudication would be appropriate were meant to be exclusive, rather than illustrative, of proper agency exercise of discretion.[42] The *Patel* court further rigidified the scope of discretion in writing that the *Heitland* rule was not valid because it "does not call for a case-by-case determination. It may be stated and applied as a general rule even though the result may vary from case to case."[43] Under this reasoning, however, since the SEC's rule at issue in *Chenery II,* restricting stock trading by corporate management during corporate reorganizations, was a rule which could be stated and applied generally, although the result would vary from case to case, it too would have to fall. On this point, *Patel* conflicts directly with the superior precedent of *Chenery II.*

To give operative effect to the *Patel* court's assumptions regarding *Chenery II* and *Bell Aerospace* would be to drastically undercut the central theme of both decisions—that there is *broad* agency discretion to proceed by adjudication rather than rulemaking—not narrow discretion from a circumscribed list of adjudicatory procedures found appropriate at other times for other agencies.

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40. 5 U.S.C. § 551(4) (1976), quoted at 394 U.S. at 763-64.

41. 394 U.S. at 769, 774 (Black, J., dissenting).

42. 638 F.2d at 1204-05, citing *Chenery II,* 332 U.S. at 202-03, and *Bell Aerospace,* 416 U.S. at 1294.

43. 638 F.2d at 1205.

2. Francis Ford *erred in failing to follow* Chenery II *and* Bell Aerospace

In addition to its reliance on the incorrectly decided *Patel,* the *Francis Ford* court erred in failing to understand or apply the decisional methodology established by the Supreme Court in *Chenery II* and *Bell Aerospace.* These cases, read together with *Wyman-Gordon,* delineate the governing analytic framework by which federal courts should determine whether an administrative agency has abused its discretion by proceeding through adjudication in a given matter.

a. Chenery II

In *Chenery II,* the question was whether the SEC could apply a newly formulated policy—that members of corporate management could not trade in their company's securities during the period of a corporate reorganization, even where there was no allegation of fraud or concealment—against the parties to the case without first proceeding through formal rulemaking.[44] The Supreme Court held that the SEC could validly proceed without promulgating a rule.[45]

While the Court's opinion in *Chenery II* is not a model of structural clarity, several major analytic themes unmistakably emerge to provide the proper principles for judicial review of an administrative agency decision to proceed by adjudication.

The controlling principle, reiterated no less than five times in the course of the Court's opinion,[46] is that of judicial deference to administrative judgment. The reason for such deference is fundamental: administrative agencies are expert in their fields, and are best equipped to make judgments in them. This is not merely tautological; the expertise of administrative judgment no less than "justifies the use of the administrative process."[47] *Chenery II* establishes a strong presumption against finding an abuse of administrative discretion.[48]

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44. 332 U.S. at 196-99.
45. *Id.* at 209.
46. *See* 332 U.S. at 213 (Jackson, J., dissenting).
47. 332 U.S. at 209.
48. *Id.* at 202-03, 207.

In determining whether there has been an abuse of discretion, the Court looked at the nature and structure of the underlying legislation empowering the agency to act. How broad is the agency's discretion as envisioned by Congress?[49] In *Chenery II*, the Court found that Congress had intended the SEC to have "broad powers to protect the various interests at stake . . . . The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters."[50]

The Court additionally considered the appropriateness of proceeding without formal rulemaking *in the particular case*. Is there a "reasonable basis" for doing so?[51] "[W]e are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation . . . ."[52]

Finally, *Chenery II* calls for an explicit balancing test. First, the reviewing court is to consider the "retroactive effect" of allowing the adjudication to stand.[53] ("Every case of first impression has a retroactive effect . . . .")[54] The retroactive effect in *Chenery II* was that stock transactions by the defendants completed prior to the adjudication and application of the new rule would be stripped of profit.[55] Second, "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."[56]

b. Bell Aerospace

Twenty-seven years after it first addressed the problem of administrative discretion to proceed by adjudication, the Supreme Court confirmed the validity of its earlier decision by methodically applying the principles announced in *Chenery II* to

49. *Id.* at 208.
50. *Id.*
51. *Id.* at 202-03, 207.
52. *Id.* at 207.
53. *Id.* at 203.
54. *Id.*
55. *Id.* at 197-98, 203.
56. *Id.* at 203.

find, in *NLRB v. Bell Aerospace Co.*,[57] that the NLRB would not abuse its discretion in proceeding through adjudication to make an employee classification.

Prior to *Bell Aerospace,* the NLRB had excluded all managerial employees from National Labor Relations Act coverage.[58] In this case, the NLRB sought to include buyers under the Act's coverage even though it was believed that they were "managerial employees," and certified a union, after requisite election, as the exclusive bargaining agent of Bell Aerospace's buyers. The company refused to bargain, however, and litigation resulted.[59] The Supreme Court found, first, that all employees properly classified as "managerial" were excluded from coverage.[60] The second issue was whether the NLRB was required in the future to proceed by rulemaking rather than adjudication in determining whether buyers were or were not managerial employees. The Court held, unanimously on the issue, that the NLRB was not precluded from proceeding through adjudication in making such a determination.[61]

As the *Bell Aerospace* Court was not reviewing a past agency adjudication to determine whether an agency had in fact abused its discretion, it was not logically necessary to invoke the principle of judicial deference to past administrative judgment. Nevertheless, the Court quoted extensively from *Chenery II* and *Wyman-Gordon* on the broad scope of agency discretion,[62] stating that those cases "make plain that the Board is not precluded from announcing new principals in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."[63]

The second part of the judicial inquiry concerned the agency's statutory authority to act. In *Bell Aerospace,* the Court

57. 416 U.S. 267 (1974).

58. *Id.* at 275-79.

59. *Id.* at 269-72.

60. *Id.* at 289.

61. *Id.* at 289-90. Four Justices dissented from the view that managerial employees as a class were not covered under the NLRA, but concurred without separate comment in the holding that the NLRB was not precluded from proceeding by adjudication in the case. 416 U.S. at 295 (White, J., dissenting in part).

62. *Id.* at 292-94.

63. *Id.* at 294.

considered and brought to the forefront the NLRB's authority to act in an early part of the opinion, dealing with congressional intent to exclude from NLRA coverage all employees properly classified as "managerial," but to leave the determination of which employees were in fact "managerial" with the Board.[64]

Next, the Court turned to whether there was a reasonable basis for proceeding by adjudication in the present case. It found "ample indication that adjudication is especially appropriate . . . "[65] because of the particular nature of the determination the NLRB had to make: whether buyers in any number of contexts were managerial.

In conclusion, the *Bell Aerospace* Court performed the balancing required by *Chenery II:* It found that there was a failure to demonstrate adverse consequences for the parties involved by virtue of past good faith reliance on Board decisions.[66] By clear implication, retroactivity was approved.

The Court also noted that the rulemaking which it refused to mandate would indeed provide a forum for the views of those affected in industry and labor. But such a forum is not an end in itself. The *purpose* of providing such a forum, the Court stressed, was simply to supply the agency with "the relevant information necessary to mature and fair consideration of the issues."[67] It was well within the Board's discretion in the instant case to decide that adjudication might also produce such data. Any suggestion that non-parties to the adjudication had a "right to be heard" in a rulemaking forum was summarily foreclosed; due process was satisfied because "[t]hose most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination."[68]

c. Wyman-Gordon *reconciled*

NLRB v. Wyman-Gordon Co.[69] is the only Supreme Court

64. *Id.* at 279-84.
65. *Id.* at 294.
66. *Id.* at 295.
67. *Id.*
68. *Id.*
69. 394 U.S. 759 (1969).

case to find that an agency actually had abused its discretion in proceeding through adjudication. As such, it appeared to Professor Kenneth Davis, the noted administrative law commentator, to "pull in the opposite direction" from *Bell Aerospace.*[70] But *Wyman-Gordon* is entirely consistent with *Bell Aerospace*, and with *Chenery II* as well.

While the controlling principle is one of deference to administrative judgment, in *Wyman-Gordon* the agency had clearly acted outside the scope of its statutory authority. It had purported to promulgate a legislative-type rule without adhering to the congressionally-mandated procedures to be followed in making a legislative-type rule.[71] Thus, it had abused its discretion. Therefore, it was unnecessary for the Court to reach the inquiry as to the appropriateness of adjudication in *Wyman-Gordon,* or to perform the balancing test of *Chenery II.* On the other hand, if the NLRB *had* applied the rule it promulgated in *Excelsior* to the parties in that case, as the Court declared it could validly have done,[72] there would have been no abuse of discretion. The *Bell Aerospace* Court, citing approvingly to *Wyman-Gordon,*[73] clearly recognized there was no conflict between the cases.

d. *Synthesis*

The decisional methodology delineated by the Supreme Court for use in deciding whether an administrative agency has abused its discretion by proceeding through adjudication in a given matter is not rigid or mechanical. Instead, it is sensitive to several factors and principles. First, the presumption that an agency has not abused its discretion is to be taken seriously. Second, the reviewing court should look to the statutory structure and legislative intent to gauge the extent of the agency's discretionary scope. Third, the court should consider whether there is a rational basis for proceeding by adjudication in the instant case. Finally, the court should perform the balancing test of *Chenery II* and *Bell Aerospace.*

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70. 2 DAVIS, ADMIN. LAW TREATISE § 7:25, at 122 (1980).

71. 394 U.S. at 763-64.

72. *Id.* at 765.

73. 416 U.S. at 293-94, quoting *Wyman-Gordon,* 394 U.S. at 765-66.

3. *Precedent ignored*

The *Francis Ford* court failed to apply the decisional methodology of the Supreme Court to the facts before it.

The Ninth Circuit panel did make a perfunctory invocation of the principle that the choice between rulemaking and adjudication lies in the first instance with the agency.[74] But there is no evidence of any intent on the part of the court to give this principle any actual weight, and the concept of judicial deference to administrative judgment is not mentioned in the opinion.

Just as legislatures are presumed to have acted rationally, administrative agencies must be presumed to have acted within the scope of their discretion. This principle is material and basic. As the Court in *Chenery II* declared: "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress."[75]

The *Francis Ford* court did not examine the statutory language or legislative history to determine what the proper scope of the FTC's discretion to proceed by adjudication might be in light of those controlling considerations. Yet the structure and purpose of the Federal Trade Commission Act and its amendments clearly indicate that the FTC has been empowered with broad discretion to proceed by adjudication in enforcing the Act.[76]

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74. 673 F.2d 1008, 1009.

75. 332 U.S. at 207 (citations omitted).

76. This footnote will proceed chronologically through the FTCA and its amendments in demonstrating that Congress empowered the FTC with broad discretion to proceed by adjudication in enforcing the Act.

A. The Federal Trade Commission Act of 1914

Section 5 of the original FTCA read: "unfair methods of competition in commerce are hereby declared unlawful." Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45 (1976)). Section 5 provides for hearings, and for the ability to issue cease and desist orders to impose fines. *Id.* Note that the FTC was to enforce *not* "rules made pursuant to the statutory authority," but the broad prohibition of unfair methods itself.

The court's analysis of whether adjudication was appropri-

The legislative history of the 1914 Act indicates that the FTC was designed to enforce the Act specifically through adjudication. This is reflected in the fact that the FTC did not even attempt the issuance of a formal substantive rule until 1963. *See* 16 C.F.R. § 400.1 (1975). *See also* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

The congressional rationale for leaving the FTC without the explicit power to proceed through promulgation of legislative-type rules, and the rationale for not providing a definition of what constitutes unfair practices, are closely related:

> It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited it would at once be necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

Joint Conference Report, H.R. REP. No. 1142, 63d Cong., 2d Sess. 19 (1914). *Accord* S. REP. No. 597, 63d Cong., 2d Sess. 14 (1914). This rationale applies equally to congressional definitions of unfair practices and to the Commission's definition of unfair practices through legislative-type rules, and is central to the FTC's statutory mission.

B. The Wheeler-Lea Amendments of 1938

The 1938 amendments enlarged the jurisdiction of the FTC to include "unfair or deceptive acts or practices in commerce," irrespective of whether such conduct injured competitors. Federal Trade Commission Act, ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45(a) (1976)).

The chief purpose of the expansion of the FTC's jurisdiction was to supercede the Supreme Court's decision in FTC v. Raladam Co., 283 U.S. 643 (1931). *Raladam* had held that section 5 was aimed at unfair methods of competition and therefore an adverse effect on competitors, not merely on consumers, was required under the Act as a requisite for FTC action. *Id.* at 654. The result was that if all the competitors in an industry practiced the same unfair methods, each would be immune from section 5. *See* Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651, 658 (1975). In adding the phrase "unfair or deceptive acts or practices in commerce," Congress expanded the FTC's jurisdiction and reemphasized the purpose of the Act and Commission *to protect consumers.*

Consider *Francis Ford* in light of *Raladam:* In *Raladam* the judiciary limited the FTC's enforcement power by ruling that if unfair methods did not tend to affect a competitor's economic health, they were beyond the FTC's reach. This had the practical effect that where unfair practices had *widespread application* in an industry, so that adverse effects on competitors could not be demonstrated although adverse effects on consumers could be, the FTC, under *Raladam*, could not reach them. Under *Francis Ford*, where a business can show that its unfair practices have widespread application in an industry, and the remedy "changes existing law" (and what remedy for existing widespread unfair practices which would be effective for a whole industry would not "change" law?), the FTC is precluded from proceeding by the only means allowed to it at the time of *Raladam:* adjudication.

Yet Congress clearly rejected the *Raladam* thinking:

> Under the present [unamended] act, it has been intimated in court decisions that the Commission may lose jurisdiction of a case of deceptive and similar unfair practices if it should develop in the proceeding that all competitors in the industry practiced the same methods . . . . Under the proposed

ate in the instant context—whether it had a reasonable ba-

> amendment, the Commission would have jurisdiction to stop the exploitation or deception of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices.

S. REP. No. 221, 75th Cong., 1st Sess. 3 (1937).

C. The Trans-Alaska Oil Pipeline Amendments of 1973

These amendments worked a three-fold expansion of FTC authority. First, the maximum penalty for cease and desist order violations was doubled to $10,000. Second, the FTC could represent itself in federal courts if the Justice Department did not act. Third, the Commission could seek injunctive relief in court upon a reasonable belief that any law it enforced was being violated. Federal Trade Commission Act, Pub. L. No. 93-153, § 408, 87 Stat. 591, 591-92 (1973) (current version at 15 U.S.C. §§ 45(a), 45(m), 53(g) & 56 (1976)).

The purpose of these changes, especially the third, was to strengthen the FTC in its consumer protection role, and to allow it to proceed against potential violators *even though* they may have no prior cease and desist orders outstanding against them. *See* S. REP. No. 93-151, 93d Cong., 1st. Sess. 9-10 (1973). Thus, the discretion of the FTC to proceed by adjudication was again confirmed.

D. The FTC Improvement Act of 1975

The Magnuson-Moss Warranty Act—Federal Trade Commission Act of 1975—extended the FTC's reach to matters "in or affecting" commerce, clarified and affirmed the FTC's power to promulgate trade regulation rules, and expanded the FTC's adjucative remedies to include actions for civil penalties and consumer restitution. Act of Jan. 4, 1975, Pub. L. No. 93-637, §§ 201-206, 88 Stat. 2193, 2200 (1975).

Section 18 of the FTCA confirmed the authority of the Commission to issue substantive rules, and made explicit the procedure for doing so. The legislative history shows that Congress candidly recognized that the FTC had been making rules without unambiguous authority since 1963, and sought to legitimize and formalize that practice, making its own changes in the process. But the conference report did not suggest that rulemaking was anything other than a complementary instrument to be used in conjunction with adjudication in filling in the interstices of the Act. There is some language in the House Report which suggests a preference for rulemaking over adjudication:

> Substantial sentiment has developed over the years that in many instances the desirable manner of implementing the broad standards of section 5(a) of the Federal Trade Commission Act should be by means of rule-making with the complaint-cease and desist order procedure used as a means of enforcing the rules. Rule-making offers the obvious advantages that (a) each person who could be affected by the proposed rule is afforded an opportunity to be heard on it in a well defined and well understood procedure, (b) the rules are developed in advance of their application to any person or practice and apply with uniformity, and (c) judicial review of any rule is available as well as of the procedures used in adopting it.

H.R. REP. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7702, 7714. However, it would be clearly erroneous to bootstrap this legislative dicta into a general rule: the language appears only in a House Report, and thus cannot be said to represent the belief of the entire Congress. And the language itself is hardly conclusive—although it suggests that rulemaking would be appropriate "in many instances," it fails to specify in *which* instances rulemaking is preferable to adjudication. The inescapable inference is that such determinations are to be made by the Commission itself. Nowhere does Congress suggest the FTC has abused its adjudicative authority in

sis—was founded on an apparent *non sequitur*. The court fo-

any case, nor that it wished to *replace* adjudication with rulemaking. Rather, the entire tenor of the legislative history indicates that the section 18 rulemaking power is to be viewed as an addition to the Commission's remedial armamentarium. The strongest support for this view lies in the fact that other legislative provisions added in 1975 markedly indicate that Congress intended to considerably expand the FTC's authority to proceed in the first instance through adjudication.

Section 19 of the FTCA, Act of Jan. 4, 1975, Pub. L. No. 93-637 § 206(a), 88 Stat. 2201, (current version at 15 U.S.C. § 57b(a) (1976)), implements the theme of consumer protection in its most direct form, by providing for consumer money damages and other relief as an FTC remedy. It is inherent in Congress' structuring of this section that it contemplated the FTC would in its informed discretion proceed in some matters through rulemaking and others through adjudication. Section 19 provides for consumer redress actions to be brought by the FTC in two circumstances: (1) for violations of trade regulation rules; and (2) where the FTC has proceeded against a party and the Commission had issued a final cease and desist order with regard to a practice which a reasonable man under the circumstances would have known was dishonest or fraudulent. 15 U.S.C. § 57b(1), (2) (1976). It is crucial to note that redress is available not only for practices committed after the cease and desist order was issued, but for those practices *resulting* in a cease and desist order—such as that practice at issue in the *Francis Ford* adjudication.

The second major expansion of the FTC's adjudicative authority was in the power to seek civil penalties. Previously, the FTC could only seek such penalties from parties against whom a cease and desist order had become final. The FTC Improvement Act gave the FTC the power to seek civil penalties in two additional circumstances: (1) where a party has violated a trade regulation rule with actual or fairly imputed knowledge that the act is unfair or deceptive and prohibited by 15 U.S.C. § 45(m)(1)(a) (1976); and, (2) where the FTC has obtained a final cease and desist order against an act or practice, and where the party to the civil penalty action, *who need not have been a party to the cease and desist order* had actual knowledge that the act or practice was unfair or deceptive and unlawful. 15 U.S.C. § 45(m)(1)(b) (1976).

The creation of the latter section quite clearly reveals that Congress intended that the FTC have the power to proceed against individual violators of section 5, as well as against violators of the trade regulation rules, and that in adjudicative proceedings against such violators could formulate adjudicative "rules" which, if other parties had knowledge of them, would apply against them with the same force as would the trade regulation rules. "[T]he section seems to authorize rulemaking by adjudication." Kintner & Smith, *supra*, 26 MERCER L. REV. at 682.

E. The FTC Improvement Act of 1980

The 1980 amendments made a number of important changes in rulemaking procedure, including making trade regulation rules subject to congressional veto. Act of May 28, 1980, Pub. L. No. 96-252, § 21(a)-(h), 94 Stat. 376-379 (codified at 15 U.S.C. § 57a (Supp. V 1981)).

The 1980 amendments grew out of congressional hearings into the overall operation of the FTC. From those comprehensive hearings one overriding congressional purpose arose: to prevent the FTC from overreaching in the area of *rulemaking*. Each of the examples provided in the Senate Report as "Background and Need for the Legislation" dealt with a case in which the FTC had, in the view of Congress, gone beyond its statutory authority in the area of rulemaking. No similar criticism was leveled at the FTC's adjudicative activities. S. REP. No. 96-500, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 1102, 1102-1105.

The legislative history of the 1980 amendments illuminates Congress' view of the wide scope and purpose of the FTC's discretion to proceed by adjudication rather than

cused on a pending rulemaking proceeding also relating to credit practices of auto dealers:[77]

> The pending rulemaking proceeding and this adjudication seek to remedy, more or less, the same credit practices. Although the former is directed against the practices, *inter alia,* of car dealers in their accounting of deficiencies, and the latter is directed against a car dealer by reason of his practices in failing to account for surpluses, both matters are covered by UCC § 9-504. If the rule for deficiencies is thought by the F.T.C. to be "appropriately addressed by rulemaking," it should also address the problem of accounting for surpluses by a rulemaking proceeding, and not by adjudication.[78]

Aside from the court's inexact equation of two distinct credit practices (Francis Ford's practice of selling repossessed cars at retail and crediting consumers with only wholesale value is emphatically *not* "the same credit practice, more or less" as that of selling repossessed cars at wholesale and charging the consumer debtor with the resultant deficiency; the practices are mutually exclusive in any given case), the somewhat startling proposition that "appropriate for rulemaking" *necessarily* means "inappropriate for adjudication" is not explained or supported with authority by the *Francis Ford* court. Nor could the

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rulemaking. The Senate version of the amendments allowed the FTC to proceed with rulemaking only if it had " 'reason to believe' that unfair or deceptive acts or practices . . . were 'prevalent'. Prevalence exists only if the Commission has issued cease and desist orders regarding acts and practices that are addressed by the rule, or if other information available . . . indicates a 'pattern' of unlawful conduct." *Id.* at 1121. Although this provision was later dropped as too restrictive of the Commission, the Conference Report indicated approval of its basic philosophy. *Id.* at 1147. And it appears, from the language indicating that the first way to establish prevalence was to proceed through discrete adjudication within the area of potential rulemaking, that Congress intended that the FTC would use adjudication to develop its knowledge of areas for potential rulemaking, and that adjudication is a desirable and appropriate first step in dealing with practices which are widespread and not currently remedied in the law. *Id.* at 1121.

F. Summary of the Statutory Inquiry

The statutory structure and the legislative history of the FTCA and its amendments overwhelmingly indicate that the FTC has been empowered by Congress with broad discretion to proceed by adjudication in enforcing section 5's broad prohibition against unfair or deceptive acts or practices.

77. 40 Fed. Reg. 16,347 (1975).

78. 673 F.2d at 1010.

proposition be said to be a logical one. Yet it undercuts the repeated emphasis in all three Supreme Court decisions that there is to be *broad* agency discretion to be responsive to changing circumstances in the fields of regulatory expertise.

The inquiry into whether the *Francis Ford* adjudication had a reasonable basis under the circumstances need not have been an exhaustive one. The unfair practice which formed the basis for the adjudications against nine companies, including Francis Ford, was that the auto dealers, in collusion with the auto companies and their financing subsidiaries, had failed to credit consumers who had their cars repossessed and resold by the dealers with the actual value the dealers received on resale. By consent agreement, the other eight companies agreed to return some $2 million to consumers.[79] The purpose and result of the adjudicatory proceedings was consumer redress. And as the legislative history of the FTCA and the language of section 19 unmistakably indicate, consumer protection in the form of consumer redress actions based on cease and desist orders are specifically authorized by Congress, for the dual purposes of achieving consumer redress in the instant case, and developing experience in an area which may serve as a prelude to formal rulemaking.[80]

The argument that it is "unfair" to single out one violator, or a very few, for a practice followed by many, ignores both the fact that Francis Ford was required to adjudicate, not the practices of an industry as a whole, but merely its own practices. In addition, it overlooks the fact that Congress intends that the FTC have the option to develop experience with individual violators in a significant number of instances before a formal rulemaking proceeding is commenced.[81] Far from an abuse of discretion, the *Francis Ford* adjudication, with its significant consumer redress results, may be close to an exemplar of the congressionally-intended FTC adjudication.

4. *The Balancing*

The next phase of the inquiry turns to the balancing of *Chenery II* and *Bell Aerospace*. (In *Chenery II* the balancing

79. *See supra* note 14.
80. 15 U.S.C. § 57b(1), (2) (1976). *See supra* note 76.
81. *See supra* note 76.

test was announced in the middle of the opinion;[82] in *Bell Aerospace,* it was the final consideration of the opinion.[83]) The "retroactive effect" of allowing the adjudication to stand—i.e., the undesirable consequence which might flow from application of the adjudicatory rule announced in a case of first administrative impression—is to be balanced against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."[84]

The *Francis Ford* court failed to apply, or even recognize the existence of, the balancing test of *Chenery II* and *Bell Aerospace.*

If the legislative history is sparse and ambiguous, as it might be with state statutes creating administrative agencies, or if an administrative agency has attempted to extend its reach through adjudication into unfamiliar areas of unclear jurisdiction,[85] then this phase of the inquiry into whether an agency has abused its discretion might be a critical, case-determinative one. But this was not the case in *Francis Ford.*[85.1]

The factors the *Bell Aerospace* Court looked to are illustrative: Was there reliance by industry on agency decisions contrary to the new adjudicative rule?;[86] Was the reliance if any justifiable and in good faith?;[87] Are fines and damages to be imposed?[88] These considerations point to possible adverse consequences of retroactive effect.

Applied to the facts of *Francis Ford,* these factors make an unconvincing case for finding an abuse of discretion. As the *Francis Ford* court admitted, there were no past FTC adjudications indicating a contrary result from this proceeding.[89] Thus, there could not be any reliance at all upon nonexistent decisions,

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82. 332 U.S. at 203.

83. *Bell Aerospace,* 416 U.S. at 294-95.

84. *Chenery II,* 332 U.S. at 204.

85. *Cf.* NLRB v. Insurance Agents Int'l Union, AFL-CIO, 361 U.S. 447, 449 (1960).

85.1 *See supra* note 76 for a discussion of the history of the Federal Trade Commission Act.

86. 416 U.S. at 295.

87. *Id.*

88. *Id.*

89. 673 F.2d at 1010.

let alone a justifiable, good faith reliance. And even where there might be such reliance, as the *Bell Aerospace* Court indicated might be the case regarding the NLRB's past decisions holding buyers to be non-managerial employees,[90] the party against whom the adjudication would apply must show *substantial adverse consequences.*[91]

The *Bell Aerospace* Court's inquiry into fines or damages may be seen as another aspect of its concern with results which are both equitable and consistent with statutory purpose. In *Francis Ford,* as in *Bell Aerospace,* the punitive element of fines was not at issue; thus the anomaly of punitive damages resulting from good faith reliance was not present in either case. In the adjudication on which *Francis Ford* was based, the consent agreement had resulted in $2 million being paid back to consumers who had been the targets of the unfair trade practice. These were not punitive in nature, but direct compensatory damages capable of fairly precise ascertainment in each case. The FTC sought in the adjudication similar damages in the form of direct consumer redress from Francis Ford. In this respect the remedy was similar to that approved by the Supreme Court in *Chenery II,* where members of corporate management who had traded in corporate stock during a reorganization were ordered to surrender their stock at cost—i.e., to forego the profit made on the transaction determined illegal, just as the companies in *Francis Ford* agreed to restitution for the profits they made from the unfair practice. Thus, the imposition of damages could not be said to weigh heavily against the allowance of adjudication in *Francis Ford.*

The final consideration is that of the mischief done by a result which is contrary to statutory design or legal and equitable principles. Because the result achieved in *Francis Ford* defeats the congressional intent, expressed in definite statutory design, to give the FTC the power to proceed by adjudication in enforcing section 5, as a primary means of enforcement and as a developmental tool for formulating agency policy which may later result in formal rulemaking, the disallowance of adjudication is

90. 416 U.S. at 295.

91. *Id.* "It has not been shown that the *adverse consequences* ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding." *Id.*

contrary to statutory design. The decision defeats the congressionally mandated goals of consumer protection from unfair trade practices, and consumer redress as a major remedy.[91.1] The consumer victims of Francis Ford's unfair credit practices remain uncompensated for the definite harm they have suffered,[92] and Francis Ford and all other dealers remain apparently free to continue practices which have been adjudicated unfair, at least until the FTC promulgates a rule specifically governing such practices. The result reached by the Ninth Circuit in the instant case is contrary to basic principles of fairness.

5. *Inadvertent irony*

Misusing precedent and allowing unresolved internal inconsistency in its opinion, the *Francis Ford* court promulgated and applied a dubious "generalized standard" without adequate support in the law.

On the question of "drawing the line" for agency abuse of discretion, the *Francis Ford* court quoted *Bell Aerospace:* "It is doubtful whether any generalized standard could be framed which would have more than marginal utility."[93] This quotation is clearly taken out of context by the *Francis Ford* court; in its original, it referred to generalized standards to determine whether buyers were managerial or non-managerial employees. The point the *Bell Aerospace* Court sought to make was that this would vary according to the duties of the buyers in each employment situation.[94] It is *not* what the *Francis Ford* court

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91.1 *See supra* note 76.

92. Hypothetically, of course, each consumer wrongfully denied a surplus could sue to recover under state law. However, the sums involved from each consumer, generally only a few hundred dollars, and the probable lack of knowledge on the part of consumers of this particular accounting practice, make this remedy unlikely to be pursued, and ineffective as a general remedy.

93. 673 F.2d at 1009, quoting *Bell Aerospace,* 416 U.S. at 294.

94. The passage in which the "marginal utility" language appears is as follows:

> As the Court of Appeals noted, "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." 475 F.2d at 496. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company.

took it to be, a statement about the doubtful wisdom of making general rules regarding the choice between rulemaking and adjudication. But in the context in which the Ninth Circuit panel misquoted the statement, it is inadvertently ironic.

The irony—and the internal inconsistency—arises in that after reciting that generalized standards regarding the choice between rulemaking and adjudication have marginal utility, a scant two paragraphs later the *Francis Ford* court framed such a generalized standard, and applied it. "Framed according to *Patel,* the precise issue therefore is whether this adjudication changes existing law, and has widespread application. It does, and the matter should be addressed by rulemaking."[95] This test, drawn from an entirely different regulatory field, immigration, and applied to the FTC, is transparently a generalized standard of the sort the court inveighed against two paragraphs earlier.

6. Sub rosa *repudiation of precedent*

The "generalized standard" of *Francis Ford* is inconsistent with *Wyman-Gordon* and *Bell Aerospace* and, if allowed to stand, would effect a *sub rosa* repudiation of *Chenery II.*

In *Bell Aerospace,* the adjudication in question "changed existing law" in that prior to 1970, a long line of cases had consistently excluded buyers from NLRA coverage. The Supreme Court nevertheless ruled that the agency could adjudicatively determine that buyers were capable of being non-managerial.[96] And the change at issue had "widespread application": no company was exempt from the possibility that its buyers would be classed as non-managerial and thus accorded bargaining rights. Even though the determination of buyers' status was to be made under a case by case application, *the rule itself* applied to all.[97]

In *Wyman-Gordon,* eight Justices would have upheld the *Excelsior* "rule" against the Wyman-Gordon Company, had it been applied in the original adjudication against the Excelsior

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416 U.S. at 294.

95. 673 F.2d at 1010.

96. 416 U.S. at 290.

97. *See supra* note 94.

Underwear Company.[98] The adjudicative rule in that case "changed existing law" in the sense that previously, there had been no requirement that an employer could be compelled to furnish a list of employees to the union, but thereafter the Board could so mandate. And the new rule was to have "widespread application"—to apply to all employers.

In *Chenery II*, the Supreme Court held adjudication appropriate for formulation of a policy regarding management trading in corporate stock during corporate reorganizations. This was clearly a rule of widespread application: it applied to all corporate officers of publicly-held corporations undergoing reorganizations. And at least to the extent that there was no law prohibiting the practice previously,[99] the adjudication "changed existing law" in the exact sense that the action against *Francis Ford* for practices which had not previously been proscribed by the FTC "changed existing law." The "generalized standard" of *Francis Ford* is facially inconsistent with *Chenery II*. *Francis Ford* must therefore be understood as a *sub rosa* repudiation of that decision on its own terms.

It might, of course, be argued that the *Chenery II* adjudicative rule did not "change existing law" because there was no prior SEC regulation on the subject. Even accepting this argument however, there is a thin distinction left for *Francis Ford*: there was no prior FTC law on the subject of the adjudication, but there was existing state law (UCC 9-504).[100] But to find that the FTC adjudication changed existing state law is perforce to assume, as did the *Francis Ford* court without so stating, that the FTC has the power to "change" existing state law. Of course it does not.

7. *The problem of "existing law"*

The "generalized standard" of *Francis Ford* has severe workability problems; the requirement that the adjudication not "change existing law" is problematical in the extreme. It requires a determination that may often be quite difficult. Professor Davis spoke to a closely related point: "An *impossible* line to

98. 394 U.S. at 765, 775.
99. 332 U.S. at 200-01.
100. 673 F.2d at 1010.

draw is the theoretical one between creating new law through interpretation and discovering the meaning that is already there; the line cannot be drawn because the two items commonly overlap."[101]

An illustration of the problem is that one could very plausibly argue that what the FTC attempted to do in *Francis Ford* was not to change existing law, but rather to change *its interpretation* of existing law. This comports with the traditional understanding of agency adjudicative proceedings as quasi-judicial and agency rulemaking proceedings as quasi-legislative: what courts do in interpreting statutes is not to "change law" — it is to interpret the law that already exists. Administrative agencies such as the FTC, interpreting statutes through adjudication, do not "change existing law" any more than courts do through statutory interpretation.

It may be forecast with assurance that the *Francis Ford* test in application will lead to inconsistent results: what is one judge's "change in existing law" will quite likely be another's "clarification." In many cases the determination, instead of lending greater certainty to the law, will be, or seem, arbitrary.

Professor Davis had drawn perhaps the most useful line between what is a change in existing law and what is not. Ironically, the *Francis Ford* panel cited his views in support of the proposition that "courts should require agencies to use rulemaking procedures when the agency retroactively adopts new law or where the parties have relied on the precedents."[102] But it is apparent from a review of the cited material that what Professor Davis contemplated by this concept were those situations where an agency "changes a former rule"[103] and where an "agency through adjudication makes a change in clear law, as when it overrules a batch of its own decisions."[104] Where, as in *Francis Ford,* there was no prior rule changed or batch of decisions overruled — i.e., there was no retroactive change in settled law — Professor Davis' concept would not apply on its own terms. Neither the FTC nor any court had ruled that Francis Ford's

101. 2 DAVIS, ADMIN. LAW TREATISE § 7:25, at 155 (1980) (emphasis added).
102. 673 F.2d at 1009, quoting 2 DAVIS, ADMIN. LAW TREATISE, § 7:25, at 124 (1980).
103. 2 DAVIS, ADMIN. LAW TREATISE § 7:25, at 124 (1980).
104. *Id.* at 122.

credit practices or similar ones were not violative of the FTCA. The basis on which the *Francis Ford* court determined that the dealer had not violated existing Oregon law, UCC 9-504, was specious: the court found that since no Oregon court had held these practices violative of the Oregon enactment of the UCC, Francis Ford could not be held in violation of existing state law.[105] But the court admitted that Oregon courts had never had the question before them.[106] Necessarily, therefore, it cannot be held that there was prior existing law on the question which the FTC sought to "change." Rather, there was no prior law on the subject whatsoever.

E. Conclusion

Administrative agencies exist because they are uniquely able to develop and implement expert judgment in specialized fields, in a manner beyond the capability of courts of general jurisdiction. In order to function effectively, agencies must be free to develop expertise, and able, within the bounds of due process, to implement judgments based on that special competence. The Ninth Circuit's decision in *Francis Ford* adversely strikes at both aspects of this general idea.

Agencies develop judgment in a field through actual experience dealing with individual violators. It is manifest that, for example, Congress intended the FTC to utilize individual administrative adjudications in particular areas in exploring whether the making of formal legislative rules was feasible and desirable.[107]

This article has demonstrated that, under the rule of *Francis Ford,* agencies may not safely rely on adjudication as a key means by which to develop knowledge within areas of potential rulemaking. Those violators whose unfair or deceptive practices seem widespread and are *arguably* not remedied in existing interpretations of the applicable statutes, are placed beyond the effective reach of administrative adjudication in the Ninth Circuit. Agencies may not develop expertise with such violators.

Deprived of a critical means of developing administrative

105. 673 F.2d at 1010.
106. *Id.*
107. *See supra* note 76.

expertise, agencies must resort to other means. They must rely on the techniques of formal rulemaking—the second-hand experience of administrative hearings, rather than the direct knowledge that springs from dealing with suspected violators. The net result is decreased agency effectiveness. The net loss is the public's.

In contrast, the four-part inquiry which courts reviewing an agency choice of adjudication must perform in following *Chenery II* and *Bell Aerospace* does not artificially limit the scope of administrative discretion. Rather, the Supreme Court's tested analytic methodology utilizes familiar equitable concepts in light of legislative intent and the circumstances of the particular case.

Because the Ninth Circuit's novel approach is both an unjustified departure from tested principles of review, and analytically unsound, *Francis Ford* should be overruled at the earliest opportunity.[108]

ARONSEN V. CROWN ZELLERBACH: UNDERSTANDING PERPLEXING ADEA PROCEDURES

A. Introduction

In *Aronsen v. Crown Zellerbach,*[1] the Ninth Circuit held that a grievant bringing an action under the Age Discrimination in Employment Act (ADEA),[2] in a deferral state,[3] has 300 days

108. Judge Reinhardt, dissenting from the Ninth Circuit's denial of rehearing en banc, suggested that the *Francis Ford* decision might be limited in future cases to situations in which the adjudicative rule *could* have been addressed in a contemporaneous rulemaking process which dealt with separate but related matters. 673 F.2d at 1012 n.2. However, as this article has demonstrated, there is little in the reasoning of the *Francis Ford* opinion which suggests to potential litigants that the Ninth Circuit would consider the applicability of its "generalized standard" to be limited to such situations. "Ultimately, however, we are persuaded to set aside this order because the rule of the case made below will have general application," wrote the Ninth Circuit judges. 673 F.2d at 1010.

1. 662 F.2d 584 (9th Cir. 1980) (per Tang, J.; other panel memebers were Pregerson, J. and Kelleher, D.J., sitting by designation, concurring), *cert. denied*, 103 S. Ct. 1183 (1983).

2. 29 U.S.C. §§ 621-634 (1970) *amended by* Age Discrimination in Employment Act

in which to file notice of intent to sue.[4] The court further held that a grant of summary judgment had been inappropriate because a material issue of fact existed as to whether plaintiff knew or should have known that he was a victim of an unlawful practice. In so holding, the court announced a method to determine when an unlawful practice occurs.[5]

The plaintiff, age fifty-two, was terminated by the defendant after twenty-eight years of employment with the company.[6] He alleged that the sole basis for his termination was defendant's general plan to replace employees nearing retirement with younger employees.[7] Plaintiff claimed that his last day with the company was April 21, 1976 and that he gave notice of intent to sue to the Secretary of Labor on January 19, 1977, approximately 270 days later.[8]

The defendant argued that on March 31, 1975, plaintiff was informed of his pending termination and given a choice between taking a demotion or accepting the termination and staying with the company during a transition period.[9] Plaintiff remained on the payroll until March 31, 1976.[10] He received payments for accumulated benefits until April 21, 1976.[11]

Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978).

3. A deferral state is one in which state law exists prohibiting age discrimination and an agency is authorized to grant or seek relief on behalf of the grievant. *See The Procedural Requirements of the Age Discrimination in Employment Act of 1967*, 9 RUTGERS CAMDEN L. REV. 540, 550 (1978).

4. The *Aronsen* opinion noted a change in the relevant statute since the case in question was heard:

> In 1978, this section was amended so that only a "charge alleging unlawful discrimination" need be filed. According to the legislative history of this amendment, the charge requirement is satisfied by a written statement identifying the potential defendant and describing generally the action believed to be discriminatory. The change from "notice of intent to sue" to "charge" was not intended to alter the basic purpose of the prior law.

662 F.2d at 587 n.3. (Citations omitted).

5. *Id.* at 593-94.

6. *Id.* at 585.

7. *Id.*

8. *Id.*

9. *Id.* at 586.

10. *Id.*

11. *Id.* at 585.

The date of termination was pivotal to an ADEA claim since March 31, 1975 was far outside the 300 day filing limit, while March 31, 1976 or April 21, 1976 were within the period allowed. The district court held that March 31, 1975 was the applicable date of termination. It reasoned that it was on that date that plaintiff knew he was being terminated, and ceased his active employment with the company. The court dismissed the complaint because it was not filed within 300 days of March 31, 1975.[12] The appeal was based on the factual dispute over the date of termination.

B. BACKGROUND

Statutory Filing Period

The statutory language of 29 U.S.C. section 626(d)[13] does not expressly mandate resort to a deferral state's own remedy as a prerequisite to a private action under ADEA. As a result there has been considerable controversy over whether initiation of state proceedings is optional.[14] Since the grievant must give notice of intent to sue within the applicable 180 or 300 day period

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12. *Id.*

13. 29 U.S.C. § 626(d) (1976) as in effect at the time of plaintiff's suit provided:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
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> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
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> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

See note 16 *infra* for text of 29 U.S.C. § 633(b) (1976).

14. *See* Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) (grievant need not file with the state in order to preserve a federal action); Ciccone v. Textron, Inc., 616 F.2d 1216 (1st Cir. 1980) (state proceeding must be commenced within 180 days to preserve a federal action), *vacated and remanded*, 449 U.S. 914 (1981), *rev'd and remanded*, 664 F.2d 884 (1981); Ewald v. Great Atlantic & Pacific Tea Co., 620 F.2d 1183 (6th Cir. 1980) (grievant must file with the state agency to preserve a federal action), *vacated and remanded*, 449 U.S. 914 (1981), *rev'd and remanded*, 664 F.2d 884 (1981); Bean v. Crocker Nat'l Bank, 600 F.2d 754 (9th Cir. 1979) (grievant need not file with the state to preserve a federal action).

after the alleged act of discrimination, courts have struggled to define whether filing within 180 days is also necessary in a deferral state to preserve the 120 day extention. The Supreme Court has not made a decision which directly controls the issue. Consequently, circuit courts have extrapolated language and reasoning used by the Court in deciding issues closely related to section 626(d).[15]

Section 633(b)[16] applies when a complaint is filed in a deferral state. Interpreting this section, the Supreme Court, in *Oscar Mayer & Co. v. Evans*,[17] held that grievants must resort to state administrative proceedings before bringing suit in federal court.[18] The Court also held that commencement of these proceedings need not be timely under state law in order to preserve a private federal right under ADEA.[19]

The *Evans* decision concerned the relationship between filing a federal suit and commencing a state action, rather than that between commencing a state action and filing a federal notice of intent to sue. The Court gave no direct answer as to whether a grievant must commence a state action within 180 days as a prerequisite to filing a federal notice.[20] The decision

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15. *See supra* note 14.

16. 29 U.S.C. § 633(b) (1976) provides in pertinent part:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceeding is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

17. 441 U.S. 750 (1979).

18. *Id.* at 758.

19. *Id.* at 753.

20. The Court merely noted that provisions of Title VII require filing with state agencies first, and that filing under ADEA is different: "Under the ADEA, by contrast, grievants may file with state and federal agencies simultaneously." 441 U.S. at 756.

did, however, give lower courts a tool to use in interpreting ADEA language, and hence section 626, by stating that analogies to similar provisions in Title VII are appropriate.[21]

The Eighth Circuit's opinion in *Olson v. Rembrandt Printing Co.*[22] has been extensively relied upon by the circuits in interpreting Title VII filing provisions, and ADEA provisions by analogy. In *Olson* the complainant filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) more than 180 days after the alleged unlawful practice. She did not institute a state proceeding. The court held that in a deferral state, a charge of employment discrimination must be filed with the state agency within 180 days in order to trigger the 300 day filing period with the EEOC.[23]

"ADEA grievants may file with the State before or after they file with the Secretary of Labor." *Id.* at 756 n.4.

21. The *Evans* Court analogized § 14(b) of ADEA (29 U.S.C. § 633(b) (1979)) to § 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) (1976):

> Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14(b) is almost *in haec verba* with § 706(c), and since the legislative history of § 14(b) indicates that its source was § 706(c), we may properly conclude that Congress intended that the construction of § 14(b) should follow that of § 706(c).

441 U.S. at 756. The analogous Title VII provision, 42 U.S.C. § 2000e-5(c) (1976) provides:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

22. 511 F.2d 1228 (8th Cir. 1975).

23. *Id.* at 1233.

In determining whether filing of a state grievance within 180 days is optional, the *Evans* Court offered conflicting guidance. Thus, the dilemma of the circuits has been one of interpretation. On one hand, the Court stressed the identical purpose and language of ADEA and Title VII provisions, thereby encouraging analogy between the two.[24] On the other hand, it noted the inherant difference in regard to jurisdiction between ADEA and Title VII since unlike Title VII, ADEA permits concurrent state and federal jurisdiction in order to aid older citizens who have fewer productive years remaining.[25]

In *Bean v. Crocker National Bank*,[26] the Ninth Cicuit held that in deferral states ADEA grievants have 300 days in which to file with the Secretary of Labor.[27] *Bean* interpreted *Evans* to mean that, while a grievant must resort to appropriate state remedies, compliance with applicable state procedures need only occur sixty days prior to a federal suit. *Bean* reasoned that since the only stated requirement in *Evans* was filing with the agency prior to a federal suit, it was not logical to infer that the grievant meet the 180 day deadline as a prerequisite to a federal right.[28] The *Bean* court specifically rejected the application of the *Olson* approach in Title VII filing matters to ADEA complaints.[29]

Following *Bean*, two circuits examined both the language of the statute and the *Evans* decision and reached a contrary conclusion. The First Circuit in *Ciccone v. Textron*[30] and the Sixth Circuit in *Ewald v. Great Atlantic & Pacific Tea Co.*[31] held that filing with a state agency within 180 days *is* a prerequisite to

24. 441 U.S. at 756.

25. *Id.* at 757.

26. 600 F.2d 754 (9th Cir. 1979).

27. *Id.* at 758.

28. *Id.* at 758-59.

29. *Id.* at 758. The *Bean* Court asserted that in light of the Supreme Court's decision in *Evans*, the *Olson* reasoning relating to Title VII claims does not apply to filing limitation periods under the ADEA. *Bean* reasoned that since the Supreme Court held in *Evans* that state limitation periods are irrelevant for purposes of commencing state proceedings in relationship to commencing federal actions, compliance with state time limitations in a deferral state must also be deemed irrelevant for purposes of determining whether a complainant has 180 or 300 days to file notice of intent to sue with the Secretary. *Id.* at 759.

30. 616 F.2d 1216 (1st Cir. 1980), *vacated and remanded*, 449 U.S. 914 (1981), *rev'd and remanded*, 651 F.2d 1 (1981).

31. 620 F.2d 1183 (6th Cir. 1980), *vacated and remanded*, 449 U.S. 914 (1981), *rev'd and remanded*, 644 F.2d 884 (1981).

federal filing.[32] These courts reasoned that: first, a literal reading of the statute underestimates the intent of the legislature;[33] and second, that analogies to Title VII in *Evans* provide the proper approach to similar ADEA provisions.[34] Both cases specifically declined to follow *Bean*.[35]

Looking at the language of the statute, the *Ewald* court opposed a "casual" reading,[36] while the *Ciccone* court warned against reading the statute "simplistically".[37] Both opinions reasoned that where section 633(b) applies, it does so on the condition that "the complainant has diligently sought a state remedy."[38] Neither found an arbitrary award of 120 days to claimants who happen to reside in a deferral state in keeping with their reading of congessional goals. *Ciccone* argued that:

> The evident purpose of the extended filing period is to give the plaintiff a grace period within which to pursue state remedies he has invoked before being compelled to institute a federal charge. This purpose would in no way be furthered by providing a windfall of 120 days to plaintiffs living in deferral states even though they had not instituted a charge with the state agency within the initial filing period.[39]

In addition the First and Sixth Circuits relied on analogies to Title VII provisions—an approach taken by the *Evans* Court. Using the *Olson* formula, i.e., a grievant obtains the extended filing period in a deferral state only if the state mechanism has been used within 180 days, these circuits ruled against grievants who had not filed within the applicable 180 day period.[40]

In a decision after *Evans*, the Supreme Court unraveled

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32. 616 F.2d at 1221; 620 F.2d at 1187.
33. 616 F.2d at 1220; 620 F.2d at 1186.
34. 616 F.2d at 1220; 620 F.2d at 1187.
35. 616 F.2d at 1221; 620 F.2d at 1186.
36. 620 F.2d at 1186.
37. 616 F.2d at 1220.
38. *Id.*; *see also* 620 F.2d at 1186.
39. 616 F.2d at 1220-21.
40. *See* Silver v. Mohasco Corp., 602 F.2d 1083, 1087 (2d Cir. 1979) (300 days to file), *rev'd on other grounds*, Mohasco Corp. v. Silver, 447 U.S. 807 (1980); Doski v. M. Goldseker Co., 539 F.2d 1326, 1330-33 (1976). In Wiltshire v. Standard Oil Co., 652 F.2d 837, 839 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1737 (1982), the Ninth Circuit rejected *Olson* and found that 300 days was the proper time limit.

much of the confusion over appropriate filing periods in deferral states. The Court held, in *Mohasco Corp. v. Silver*,[41] that a grievant bringing a claim with the EEOC in a deferral state has 300 days to file; however, state proceedings must terminate sixty days prior to the EEOC commencing any action.[42]

Mohasco is important to the resolution of controversies surrounding ADEA filing periods because of the Court's disagreement with the Eighth Circuit's approach in *Olson* to filing limitations and its application in the *Ciccone* and *Ewald* decisions.[43] *Mohasco* objected to the restrictive approach in which a complainant under all circumstances must file with either the state or federal agencies within 180 days. *Mohasco* stated that a court should not read in a time limitation provision that Congress has not seen fit to include.[44] The Court thereafter vacated and remanded both *Ciccone* and *Ewald* for consideration consistent with the reasoning of *Mohasco*.[45]

Determination of the Occurrence of an Unlawful Practice

Disputes over whether or not a grievant has filed within the allotted period often focus on the date the unlawful practice occurred. It is on this day that the applicable time limitation begins to run. Since determining exactly when a grievant has been subjected to an unlawful practice may be difficult, courts have devised methods to assist this process.

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41. 447 U.S. 807 (1980).

42. *Id.* at 814 n.16. *Mohasco* thus adopts the Seventh Circuit's interpretation of Title VII filing periods in Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). *Mohasco* notes:

> Under the *Moore* decision, which we adopt today, a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of the 300-day period.

447 U.S. at 814 n.16.

43. 447 U.S. at 816 n.19.

44. *Id.*

45. 449 U.S. 914 (1981). Upon further consideration both decisions were reversed by the circuit courts. 651 F.2d 1 (1st Cir. 1981); 644 F.2d 884 (6th Cir. 1981).

The Third Circuit in *Bonham v. Dresser Industries*[46] ruled that where unequivocal notice of termination coincides with the employee's last day of work, the unlawful practice will be deemed to have occurred and the filing period begins to run.[47] The Eighth Circuit attempted to devise a clearcut standard in *Moses v. Falstaff Brewing Corp.*,[48] concluding that the official termination date as it appeared in company personnel records was the date on which the filing period began to run.[49]

The Supreme Court in *Delaware State College v. Ricks*[50] announced a rationale that differed from both *Bonham* and *Moses*. *Ricks* involved a dispute in a Title VII action. The petitioner was denied tenure by the employer and given a terminable one-year contract. Although the petitioner claimed that the filing period began to run when the terminable contract expired, the Supreme Court did not agree, holding that the unlawful act of discrimination occurred when the "tenure decision was made and communicated to Ricks."[51] Thus the Supreme Court announced a subjective method for determining the actual occurrence of an unlawful act. The grievant's knowledge that an unlawful practice has taken place will be the crucial element in initiating the time period in which to seek redress.

C. The Court's Analysis

Statutory Filing Period

In deciding *Aronsen*, the Ninth Circuit first addressed the issue of the appropriate statutory filing period in an ADEA action. The statute provides that a grievant file notice of intent to sue within 180 days of the alleged violation, or within 300 days in a deferral state. The court noted that in *Bean* the Ninth Circuit had construed the requirement time in a deferral state to be 300 days.[52] However, the defendant urged the court to recon-

46. 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

47. 569 F.2d at 191.

48. 525 F.2d 92 (8th Cir. 1975).

49. *Id.* at 94.

50. 449 U.S. 250 (1980).

51. *Id.* at 258. The Court found support for this conclusion in the Ninth Circuit case of Abramson v. University of Hawaii, 594 F.2d 202 (1979). *Abramson* held that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 209 (emphasis added).

52. *See Bean*, 600 F.2d 754, 756.

sider its position in light of the contrary circuit court decisions in *Ewald* and *Ciccone*. In reaffirming the Ninth Circuit's stand on this issue, the *Aronsen* court examined the plain language of the statute, recalled its prior reasoning in *Bean*, and considered and dispensed with the interpretations of ADEA filing periods advanced by other circuits.

Examining the words used by Congress to enact this legislation, the court found that the statute explicitly states that grievants have 300 days in which to file an ADEA action.[53] Section 626(d)(2) indicates that where section 633(b) applies (complaints filed in a deferral state) 300 days is allotted. The court saw no reason to depart from this plain congressional language.[54]

Second, the court reiterated the Ninth Circuit's decision in *Bean*. The *Bean* analysis relied heavily on the Supreme Court in *Evans*. *Bean* extended the *Evans* rationale—that state limitations are irrelevant for purposes of commencing state proceedings in ADEA actions—to further indicate that state limitations were also irrelevant for purposes of determining whether a complainant has 180 or 300 days in which to file notice of intent to sue.[55]

The *Aronsen* court found the plain language of the statute, and the analysis of the code in *Bean*, sufficient to support its refusal to change the Ninth Circuit position. However, in an effort to fully dispense with the controversy stemming from other circuit decisions, the court examined the aspects of these decisions which it found to be unpersuasive.[56]

The court opposed the conclusion reached by the *Ewald* and *Ciccone* decisions that the legislative purpose of section 626(d) required that the plain language of the statute not be controlling, and that the statute be construed consistent with the intention of Congress. The *Aronsen* court did not agree with reasoning that would discern from legislative history a procedure which is more restrictive than a plain reading of the statute's

53. *See supra* note 13 for applicable statutory language.
54. 662 F.2d 584, 588.
55. 600 F.2d 754, 759.
56. 662 F.2d 584, 588-90.

text.[57]

Although the court found little direction in the record regarding the 1967 enactment of ADEA section 626(d), the court noted that the history behind the 1978 amendment of this section revealed no ambiguity about filing periods in deferral states:

> Section 7(d) of the Act requires that an individual must give the Department of Labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. This period is extended to 300 days where the alleged unlawful practice occurs in a state which has an age discrimination statute which provides a remedy.[58]

The *Aronsen* court thus found that the statutory history and language were clear and that the construction given to 626(d) by other circuits imposed time restrictions "patently absent"[59] from the language used by Congress.

Finally, the court objected to arguments offered by the First and Sixth Circuits which relied on restrictive interpretation of similar language in Title VII. The court noted that although analogies to Title VII are validated by the Supreme Court's decision in *Evans,* disputes have consistently existed on the issue of whether a grievant must commence a state proceeding within 180 days in order to preserve the 300 days for federal filing. While *Ewald* and *Ciccone* relied on the *Olson* court's interpretation, other circuits did not agree.[60]

The court was further satisfied that the Supreme Court's

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57. The *Aronsen* opinion noted:

> In interpreting statutes, we are not free to substitute legislative history for the language of the statute. Statutory interpretation must begin with the statute itself. The court in *Ciccone* inverted this process. Although there is no *per se* bar preventing resort to legislative history even when the statute, as here, is plain on its face, we question *Ciccone*'s reliance on legislative history to restrict access to the federal courts by imposing time restraints patently absent from and contrary to the statute's text.

662 F.2d at 588 n.7 (citations omitted).

58. *Id.* at 589, *quoting* H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 523-24.

59. 622 F.2d at 588 n.7.

60. *Id.* at 589.

decision in *Mohasco,* in which the *Olson* approach was openly disapproved, resolved the disagreement regarding the proper interpretation of filing periods.[61] The *Mohasco* court cited *Ciccone* as following substantially the same reasoning as *Olson* and therefore equally in error.[62] *Aronsen* concluded that both *Ewald* and *Ciccone* could not be used as persuasive authority in the Ninth Circuit, and thereby reaffirmed its position in *Bean* that in deferral states, grievants have 300 days in which to file their charges.[63]

Determination of the Occurrence of an Unlawful Practice

The *Aronsen* court held that a material issue of fact was in dispute at the time of the district court's decision. There had been no conclusive determination of when the plaintiff was actually terminated for purposes of establishing when the filing period began to run. The court also announced a procedure for determining when the alleged unlawful practice occurred based on the Supreme Court's decision in *Delaware State College v. Ricks.*[64]

The district court had relied on *Bonham v. Dresser Industries*[65] in making its decision, and had rejected *Moses v. Falstaff Brewing Co.*[66] The Ninth Circuit briefly examined these holdings and found that the objective standards outlined in *Bonham* (receipt of written notice and cessation of work), or *Moses* (termination on personnel records), were useful but not satisfactory. The *Aronsen* court concluded that the case-by-case method advanced in *Ricks* was the better approach.[67]

Aronsen construed the *Ricks* holding to mean that the plaintiff's knowledge that he or she had been the victim of an unlawful practice is the central factor in determining when the unlawful practice occurred.[68] *Aronsen* thus held that the applicable filing period begins to run when the grievant knew or

61. *Id.* at 590.
62. *Id.*
63. *Id.* at 590-91.
64. 449 U.S. 250, 259 (1980).
65. 569 F.2d 187 (3d Cir. 1977), *cert. denied,* 439 U.S. 821 (1978).
66. 525 F.2d 92 (8th Cir. 1975).
67. 662 F.2d 584, 593-94.
68. *Id.* at 593.

should have known that an unlawful practice had occurred, and that this knowledge could be based on a number of factors including notice, termination or work and personal records. The factual situations in each case must therefore be determined.[69]

D. CRITIQUE

The first issue in *Aronsen* presented a simple question: in a deferral state, how many days does a claimant have in which to file a notice of intent to sue with the Secretary of Labor? The Ninth Circuit had previously addressed and dispensed with this issue in *Bean,* but the First and Sixth Circuit's express disagreement with *Bean*'s statutory interpretation challenged the court to reaffirm its position.

Under the *Ewald* and *Ciccone* holdings, it was necessary for the grievant to file with a state agency within 180 days in order to qualify for, or preserve, the additional 120 days in which to file with the Department of Labor. These courts analogized to Title VII in reaching their decisions, relying heavily on *Olson.* However, at the time *Aronsen* was decided, the *Aronsen* panel was aware that the Supreme Court had summarily vacated both *Ciccone* and *Ewald* for further consideration in light of *Mohasco.*[70] The Ninth Circuit decison on the issue of proper filing periods was thus of questionable length and complexity since *Mohasco,* by rejecting the *Olson* approach, and by equating *Ciccone* with *Olson,* undercut the force of the *Ciccone* and *Ewald* holdings. A concise affirmation of *Bean,* supported by the *Mohasco* opinion, making special note of the remand of both *Ewald* and *Ciccone,* would therefore have been sufficient.

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69. 662 F.2d at 594. The court also noted that the doctrine of equitable modification may affect the tolling period on an ADEA action. *See* Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981). Such modifications are of two types: the first, equitable tolling, is based on the excusable ignorance of the plaintiff; the second, equitable estoppel, focuses on actions of the defendant which mislead the plaintiff and thereby induce him to delay filing of notice of intent to sue. Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided Court,* 434 U.S. 99 (1977).

To determine whether equitable relief is warranted, a case-by-case review of the factual circumstances is necessary. *Naton,* 649 F.2d at 696. The *Aronsen* court concluded that further factual development was needed to resolve the issue of equitable modification, and therefore the grant of summary judgment to defendant was also reversible on this basis. 662 F.2d at 595.

70. *See supra* note 45.

The *Aronsen* court provides some clear guidance on the second question of how an occurrence of an unlawful employment practice should be identified. The court articulated a new method for pinpointing the unlawful practice by adopting the rule announced by the Supreme Court in *Ricks*. The *Ricks* approach involves two elements: the unlawful practice, and the employee's knowledge of its occurrence. When both of these elements are fulfilled, the filing period begins to run.

As *Aronsen* points out, this approach is not an objective, clear-cut standard. Rather, the approach is subjective since it focuses on the employee's knowledge to determine when the filing period begins. It is a fair standard for two reasons. First, it discourages employers from failing to inform employees of federal employment guarantees because the employee's lack of knowledge would simply prolong the availability of a remedy. Second, it encourages employees to file their grievance as soon as they become aware of an unlawful occurrence or else lose their remedy for failing to file in a timely fashion.

E. Conclusion

The *Aronsen* decision is definitive in two areas of ADEA procedure. As intractable as the statute itself may seem, *Aronsen* correctly reaffirmed the Ninth Circuit interpretation that in a deferral state a grievant has 300 days within which to file a claim with the Secretary of Labor. The opinion also announced a fair and flexible method for triggering the time limitation, based on the factual situation of each occurrence. As perplexing as asserting one's right under ADEA may be, *Aronsen* does clarify the initial steps of the procedure.

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OTHER DEVELOPMENTS IN ADMINISTRATIVE LAW

A. No Implied Right of Action Under VA Home Loan Guarantee Program

In *Rank v. Nimmo*,[1] the Ninth Circuit held that: (1) no implied right of action exists under the Veterans Administration (VA) Home Loan Guarantee Program[2] against either the VA or a private lender for failure to assist a borrower under that program to avoid foreclosure; (2) the VA's lender's handbooks or circulars[3] or its broad discretion create no duty in the VA to take reasonable measures to avoid foreclosure; and, (3) foreclosure by a private lender who had serviced a VA loan does not involve federal action sufficient to invoke constitutional due process rights.

Plaintiffs purchased a home in California for $16,950, financing the entire price through a VA guaranteed loan. The loan was assigned to the Government National Mortgage Association with Kissell Company, a private mortgage firm, acting as GNMA's agent for payment collection and servicing in the event of foreclosure. Plaintiffs experienced difficulty meeting their loan obligations, eventually ceasing their loan payments altogether. The VA informed plaintiffs that it could do nothing to prevent a potential foreclosure. Kissell foreclosed on the mortgage, and pursuant to the guarantee arrangement, it was conveyed to the VA.[4]

The court held that "neither the statutory language nor the history of the VA Act itself provides any indication of legislative intent . . . to create" a private remedy against the VA or a private lender for failure to help a veteran borrower avoid foreclosure.[5] Instead, the court noted, the program was designed to in-

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1. 677 F.2d 692 (9th Cir. 1982) (per Wallace, J.; the other panel members were Norris, J. and Reinhardt, J., dissenting) (as amended on denial of rehearing and rehearing en banc, May 6, 1982), *cert. denied*, 103 S. Ct. 210 (1982).

2. 38 U.S.C. §§ 1801-1827 (1976 & Supp. V 1981).

3. *See* VA Lender's Handbook, VA Pamphlet No. 26-7 (Revised) which begins: "[The Handbook is] designed to guide lenders in the processing of applications for loans . . . and in the treatment of defaults and claims arising through loans made. Nothing contained here shall be construed to modify or otherwise alter any provisions of the [Code of Federal Regulations relating to VA loans]." 677 F.2d at 694. *See also* VA Circular 26-75-8 (Jan. 1974) and VA Manual M26-3, Change 46, 2.35.

4. 677 F.2d at 695-96.

5. The same conclusion was reached in Simpson v. Cleland, 640 F.2d 1354 (D.C. Cir.

duce private lenders to extend home loans to veterans. The program therefore "relies on financial incentives to accomplish a welfare objective and does not purport to confer enforceable federal rights directly on the veteran-borrower."[6]

In addition, the court noted the availability of apparently adequate remedies under the VA Act[7] as well as the availability of state law remedies to protect mortgagors from improper mortgagee practices. Regarding the latter point, the court speculated as to the likelihood that Congress intended to establish a "federal common law of mortgages" to assist or displace the parallel laws of the states.[8]

As to whether the VA Act imposed a particular duty upon the VA to undertake supplemental servicing of its guaranteed loans and whether the VA's refusal to take an assignment of plaintiffs' loan was a judicially reviewable abuse of discretion, the court noted first that the VA Act itself imposes no duty upon the VA to service VA loans.[9] Therefore, any duty must flow from the VA Lender's Handbook and circulars. The latter publications would only be granted the force of law if they were first considered legislative in nature and not mere statements of administrative policy or practice.[10]

1981).

6. 677 F.2d at 697.

7. The court referred to 38 U.S.C. §§ 1804(d) and 1816(a) (1976). Section 1804(d) authorizes the VA to deny participation in the loan guarantee program to private lenders who fail to provide adequate servicing of VA guaranteed loans. Section 1816(a) allows the VA to refund the unpaid balance of the loan obligation to the lender and receive an assignment of the loan and its security from the lender. 677 F.2d at 697 n.9. As the dissent noted, neither "remedy" appears to give borrowers any rights against either the VA or the private lender. *Id.* at 704 n.5.

8. 677 F.2d at 697. Since *Rank* only concerned the indirect or guaranteed VA loan program, the question remains whether a private right of action may still lie against the VA under the direct loan program, 38 U.S.C. § 1811 (1976).

9. 677 F.2d at 699 n.12.

10. The court cited the two-part test of Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979), as controlling. Under *Brown* the VA publications would be given the force of law if they (1) announce substantive rules, rather than recite general statements of administrative policy, and (2) conform to certain procedural requirements. 677 F.2d at 698.

Courts have consistently held that no duty arises under administrative handbooks which essentially are interpreted as general statements of agency policy and procedure. *See, e.g.*, Chasse v. Chasen, 595 F.2d 59 (1st Cir. 1979) (Custom Service Circular created no private right of action); First State Bank of Hudson County v. United States, 599 F.2d 558 (3d Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) (FDIC manual creates no duty on part of FDIC to inform bank of incorrect use of bank funds by bank president);

The court found that neither publication prescribed substantive " 'legislative-type' rules enforceable . . . against the VA."[11] Rather, since some publications were issued merely in response to the economic recession of 1974-75, and none were published in the Federal Register nor available for public scrutiny, no intent to grant them legal force and effect was apparent. To do so, the court indicated, would hamper the communication within the agency that the circulars provided.[12]

Addressing the issue of whether the VA abused its discretion in not taking an assignment of plaintiff's loan, the court held that the VA statute leaves no doubt that the VA is granted the "widest possible discretion" to opt for assignment/refunding, depending on numerous factors such as VA budget and personnel, risk of loss to the VA, the adequacy of prior loan servicing and the circumstances of the default.[13] The court concluded that the statute was narrowly drafted, specifically granting the VA the option to take or refuse an assignment and left no room for judicial review of its decision.[14]

The court also found the VA was not required to exercise the assignment/refunding option according to the language of the statute. Even though this issue was judicially reviewable as compared to the issue regarding abuse of discretion in failing to opt for assignment/refund, the court nevertheless found no congressional intent requiring the VA to exercise the option.[15]

Finally, the Ninth Circuit held that no violation of due process occurred because there was an insufficient nexus between the VA and the private lender, since the private lender's action in foreclosing could not be attributed to the federal

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Brown v. Lynn, 392 F. Supp. 559 (N.D. Ill. 1975) (HUD handbook directing private lenders servicing HUD-insured mortgages to forebear from foreclosure in face of alternatives was intended as policy guideline and without legal force or effect).

11. 677 F.2d at 698.

12. *Id.*

13. *Id.* at 700.

14. The decision would be reviewable by showing the VA's improper consideration of factors or consideration of factors outside those described by the court. 677 F.2d at 700.

15. The court stated the VA was free to exercise the option fully or not at all, reserving the option for the "exceptional or unusual case." While not elaborating, the court was apparently further underlining its view that the entire matter was not appropriate for judicial review. 677 F.2d at 700.

government.[16]

Judge Reinhardt dissented from that part of the court's opinion concerning the VA's discretion under the VA Act. He argued that the VA's failure to take any action regarding plaintiffs' loan constituted an illegal failure to exercise its discretion thereby requiring the VA to consider opting for assignment/refund.

The dissent argued that the majority had ignored the sum total of congressional intent behind the VA statutes, adopting a "newly discovered principle of administrative law" allowing the VA to ignore a statute's operating standards and policy.[17] He contended that in light of the objectives and techniques set out in the laws to accomplish them—to provide incentives for lending to veteran borrowers and for reasonable forbearance from and insurance in the event of foreclosure—it was unlikely that Congress had intended such techniques not be considered or used.[18] The dissent argued that Congress merely intended to leave practical decisions to the discretion of the VA, not to allow it to completely disregard the mandates inherent in the statutes.

The dissent also criticized the majority's lack of consistency. While agreeing with the court's general view that decisions of the agency are not judicially reviewable, the dissent found it inconsistent and erroneous that the court had later sanctioned the VA's failure to make any decision as to plaintiffs' loan. Further, the majority's recitation of the "remedies" already available under section 1816(a) unpersuasively supported a holding that veterans have no private right of action. The section 1816(a) remedies, the dissent implied, have nothing to do with whether a private remedy also inures to the benefit of veterans.[19]

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16. *Id.* at 701-02. *Cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974).

17. 677 F.2d at 703.

18. In partial support of this contention, Judge Reinhardt summarized the conditions of notice to the VA as demonstrative of Congress' intent to compel the VA and private lenders to carry out the legislative intent. 677 F.2d at 704 n.5.

19. 677 F.2d at 705.

B. No Private Right of Action Under Section 503 of the Rehabilitation Act of 1973

In *Fisher v. City of Tucson,*[20] the Ninth Circuit found that there was no implied provision for private enforcement of the anti-discriminatory policy in contracting situations under section 503 of the Rehabilitation Act of 1973.[21] In so finding, the court applied the four factors, set forth by the Supreme Court in *Cort v. Ash,*[22] relevant to determine whether a private right of action may be implied to enforce the provisions of a statute which does not expressly provide a right of action.[23]

The court found that section 503 creates a federal right on behalf of a protected class—that of handicapped individuals.[24]

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20. 663 F.2d 861 (9th Cir. 1981) (per Hug, J.; the other panel members were Farris, J. and Fletcher, J., concurring and dissenting), *cert. denied,* 103 S. Ct. 178 (1982).

21. Section 503 provides that: "Any contract in excess of $2,500 entered into by any Federal department or agency . . . shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals." 29 U.S.C. § 793(a) (1976).

Section 793(b) provides:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

22. 422 U.S. 66 (1975).

23. The factors are:

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

Id. at 78-79 (citations omitted).

24. 663 F.2d at 863-64. This finding was contrary to that of Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1079-80 (5th Cir.), *cert. denied,* 449 U.S. 889 (1980), where the Fifth Circuit also concluded that section 503 does not create a private right of action. Other circuits have considered the question presented in *Fisher,* and have found that no private right of action exists. *See* Davis v. United Airlines, 662 F.2d 120 (2d Cir. 1981); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1981).

However, examining the legislative intent, the court concluded that the federal right did not provide such individuals with a private right of action. This conclusion turned upon several observations. First, the affirmative action requirement reflects congressional concern for the class, rather than the individual.[25] Second, the court was aware of no situation in which Congress had expressly granted a private right of action to enforce affirmative action law.[26] Third, Congress did not make discrimination against handicapped persons unlawful in section 503. Rather, it "mandated that contractors discriminate *in favor* of handicapped individuals by implementing affirmative action programs."[27] Finally, where a handicapped person has been discriminated against, that individual may file a complaint with the Department of Labor.[28]

With regard to the underlying purpose of the legislative scheme, the panel noted that "the provision of an express administrative remedy . . . created at least some basis to conclude that a private right of action would be inconsistent with the purposes of the legislative scheme."[29] Considering the presence of the administrative enforcement mechanism and section 503's instruction that contractors undertake affirmative action to employ handicapped persons, the court concluded that Congress intended that the Department of Labor supervise affirmative action programs.[30] Under these circumstances, the court chose not to imply what Congress failed to expressly provide.[31]

Judge Fletcher concurred with the majority's finding that section 503 creates no private right of action. However, she further found that Congress did intend to create a private right of action to enforce section 503. In 1978, the Rehabilitation Act was amended to allow a private party to recover attorney's fees

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25. 663 F.2d at 864-65. The court also found that section 503 does not, on its face, prohibit discrimination against handicapped persons. *Id.* at 864. *See* text of statute at note 21, *supra*. Therefore, section 503 is distinguishable from section 504 of the Act which provides a private right of action for handicapped individuals discriminated against in any program or activity receiving federal financial assistance. *Id.* at 864.

26. 663 F.2d at 865.

27. *Id.* at 864 (emphasis in original).

28. *Id.* at 865. *See* 29 U.S.C. § 793(b) (1976), quoted at note 21, *supra*.

29. 663 F.2d at 866, quoting *Rogers, supra* note 24, at 1084.

30. 663 F.2d at 866-67.

31. *Id.* at 867.

as part of costs incurred in enforcing any provision of the Act.[32] The dissent found that this amendment indicated that Congress assumed a private right of action under the Act already existed.[33] Further, the 1978 amendment committee and the 1973 committee responsible for enacting section 503 were composed of many of the same members of Congress, several of whom stated that they intended to create a private right of action.[34]

The dissent also found the underlying purpose of the legislative scheme to be consistent with allowing a private right of action. The dissent disagreed with the majority's position that since a remedy exists with the Department of Labor, a private action under section 503 is foreclosed. The dissent observed that dual enforcement schemes are commonplace.[35] Further, the Department of Labor, the agency charged with enforcement, supports the private right of action as a complement to the administrative mechanism.[36] Finally, section 503 is analogous to Title IX as both have similar objectives—to confer benefits on a specific class of persons. Since the Supreme Court found an implied right of action consistent with the Title IX enforcement scheme,[37] the same result should be reached with respect to section 503.[38]

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32. 29 U.S.C. § 749a(b) (Supp. II 1978).

33. 663 F.2d at 868. The majority agreed that the addition of the attorney's fees provision created an inference that Congress assumed a private right had been created in 1973. However, the majority found that because there was no indication that Congress intended "to launch into a new area by providing a private right of action to enforce an affirmative action law" and no "indication of how such a right would be enforced," Congress did not intend to create a private right of action when it enacted section 503. *Id.* at 866.

34. *Id.* at 869.

35. *Id.* at 870. *See* 42 U.S.C. § 2000d-1 (1976) (Title VI) and 20 U.S.C. § 1682 (1976) (Title IX). *See also* 42 U.S.C. § 2000e-5(b) (1976) (Title VII) (allowing private right of action after exhausting administrative remedies); Allen v. State Board of Education, 393 U.S. 544 (1969) (finding private right of action under Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976), despite provisions for enforcement by the Attorney General).

36. 663 F.2d at 870.

37. Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

38. 663 F.2d at 870-71.