

# **REITER v. COOPER AND UNREASONABLE RATES: ARE REPORTS OF THE FILED RATE DOCTRINE'S DEATH GREATLY EXAGGERATED?**

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## INTRODUCTION

On the eve of the Supreme Court's *Reiter v. Cooper* decision,<sup>1</sup> a \$27-billion cloud looms ominously above the trucking industry and those shippers who transport goods with these interstate motor carriers. Throughout the twentieth century the Supreme Court has periodically examined the regulation of motor carrier pricing schemes; such decisions—coupled with the Interstate Commerce Commission's policy initiatives—have culminated in what will be, in all likelihood, shippers' last possible means of circumventing an inflexible, anachronistic, regulatory regime. The central concern facing the *Reiter* Court is whether shippers' use of an equitable defense, insulating them from severe financial hardship, is compatible with the statutory and judicial framework that has regulated the motor carrier industry for over a century.

Until the 1980s, carriers and shippers in the trucking industry conducted their operations within the context of a strict regulatory scheme established in the late nineteenth century by the Interstate Commerce Act (ICA).<sup>2</sup> The central tenet of this regulatory policy—the filed rate doctrine—requires that motor carriers charge shippers of goods only those rates that the carriers have filed with the Interstate Commerce Commission (ICC)<sup>3</sup> and that the ICC

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1. *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express)*, 949 F.2d 107 (4th Cir. 1991), *cert. granted sub nom. Reiter v. Cooper*, 112 S. Ct. 1934 (1992) (No. 91-1496).

2. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10101-11917 (1988)).

3. Section 10761(a) of the ICA serves as the basis of the filed rate doctrine and provides in pertinent part:

has found to be "reasonable."<sup>4</sup> The deregulatory fervor that characterized the 1980s, however, led members of the trucking industry to distance themselves from the practice of adhering to filed rates. With the cooperation of the ICC, carriers and shippers began to negotiate rates privately, most often agreeing on prices lower than those filed under the ICA. The most important aspect of this ICC-constructed *Negotiated Rates* policy was the creation of an unreasonable practice defense, designed to ensure that shippers would only be responsible for payment of the rates privately negotiated with carriers, not for the higher filed rates.<sup>5</sup> This practice was well established by 1990 when the Supreme Court, in its *Maislin Industries, U.S. v. Primary Steel, Inc.* decision,<sup>6</sup> reinvigorated the filed rate doctrine, holding that the unreasonable practice defense was incompatible with the maintenance of the ICA's regulatory scheme.<sup>7</sup> By refusing to recognize the legality of non-filed rates, the Court eliminated the shippers' defense against carriers' demands for the difference between the previously collected negotiated rates and the higher filed rates.<sup>8</sup> The magnitude of the *Maislin* victory was not lost upon motor carriers, who need the approximately \$27 billion of undercharges to subsidize unemployed workers' pension funds.<sup>9</sup>

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[A] carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff . . . .

4. See 49 U.S.C. § 10701(a) (1988) (requiring that carriers' rates be reasonable).

5. NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (*Negotiated Rates I*), 3 I.C.C.2d 99 (1986); NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (*Negotiated Rates II*), 5 I.C.C.2d 623 (1989). The ICC held that an unreasonable practice is a course of conduct consisting of: "(1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing, and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payments at higher rates." *Id.* at 628 n.11.

6. 110 S. Ct. 2759 (1990).

7. *Id.* at 2768.

8. *Id.* at 2765–66. The motor carrier industry refers to the difference between the rate filed with the ICC and the lower negotiated rate as the "undercharge." Typically, undercharge cases arise when trustees for bankrupt motor carriers attempt to collect the difference between the negotiated rate actually paid by a shipper and the higher rate on file with the ICC.

9. John D. Shulz, *ICC Makes "Conservative" Estimate of Undercharges—Over \$27 Billion*, *TRAFFIC WORLD*, Dec. 16, 1991, at 31, 31. The figure of \$27 billion was compiled by adding the potential undercharge liability for 1988, 1989, and 1990. For example,

Recognizing the devastating effect such litigation could have on the industry and the impotence of the unreasonable *practice* defense, shippers are now attempting to insulate themselves from this liability by questioning the reasonableness of the filed rates themselves. A shipper who offers an unreasonable *rate* defense asserts that the carrier's filed rate is unreasonable.<sup>10</sup> The first opportunity the Court had to consider the validity of this alternative defense came on December 1, 1992, when it heard oral arguments in *Reiter v. Cooper*.<sup>11</sup>

The purpose of this Note is to demonstrate that an unreasonable rate defense should remain available to those shippers fighting undercharge claims. In so doing, this Note considers three particular reasons why the *Reiter* Court should accept the legitimacy of an unreasonable rate defense. Part I establishes rate reasonableness as an integral component of the statutory scheme that governs the motor carrier industry and of the judicial precedent that continues to define the parameters within which carriers and shippers operate. After examining the applicable ICA provisions and the Supreme Court decisions that shape this area of law, Part I concludes that to satisfy the primary goal of motor carrier regulation—the prevention of unjust discrimination in carriers' pricing schemes<sup>12</sup>—there must be a mechanism designed to ensure that shippers do not have to pay unreasonable rates. An unreasonable *rate* defense, which stays a district court proceeding regarding the merits of an undercharge dispute pending ICC evaluation of whether the carrier's rates are reasonable, is the proper mechanism to ensure that shippers pay only those undercharges that are

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the ICC estimated that carriers received \$14.4 billion in total revenue in 1988 (had filed rates been adhered to, the figure would have been \$21.98 billion). Therefore, from 1988 alone, \$7.58 billion in potential liability exists for carriers (or their creditors) to collect. *Id.*

10. Because of the predominance of the unreasonable practice defense during the 1980s, it was not until after *Maislin* that shippers turned their attention to the unreasonable rate defense. See *infra* notes 89–91 and accompanying text.

11. *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express)*, 949 F.2d 107 (4th Cir. 1991), cert. granted sub nom. *Reiter v. Cooper*, 112 S. Ct. 1934 (1992) (No. 91–1496).

12. See, e.g., *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922) (noting that the legislative branch's "paramount purpose" in regulating motor carriers is to prevent unjust discrimination); see also *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 415–17, 424 (1986) (affirming the Court's holding in *Keogh* that once rates have been duly submitted with the ICC, these rates become lawful under the ICA).

based on reasonable rates. Part II focuses on the fact that the Supreme Court's recent repudiation of the ICC-constructed unreasonable *practice* defense, coupled with failed congressional attempts to repeal the filed rate doctrine, have left the unreasonable *rate* defense as the last possible means for shippers to protect themselves from incurring complete liability for undercharges.

Nevertheless, mere recognition that rate reasonableness concerns are a central part of the statutory and judicial framework that governs motor carrier regulation does not sufficiently legitimate the use of an unreasonable rate defense. Likewise, the *Reiter* Court should not permit the use of an unreasonable rate defense simply because shippers have no other alternatives at their disposal. Rather, it is necessary to focus on the unique benefits of such a defense. Part III focuses on the ways to structure this defense to provide shippers with adequate protection from undercharge liability while ensuring that a sufficient amount of the \$27 billion in undercharge claims will remain available to supply the pension funds of bankrupt motor carriers' unemployed workers. In addition, Part III recommends specific tests that district and circuit courts can apply to determine whether the unreasonable rate defense is consistent with the broad regulatory scheme governing the motor carrier industry. Implementation of such tests will provide the safeguards necessary to ensure both that shippers will not be subjected to unjust pricing discrimination and that the unreasonable rate defense and filed rate doctrine can coexist.

#### I. RATE REASONABLENESS: FOUNDATIONS FOR A REGULATORY REGIME

To best understand the body of statutory and judicial law that presently governs motor carrier regulation, it is first necessary to consider the primary factor that motivated the creation of the regulatory policy. Prior to the passage of the ICA in the late nineteenth century, the public had complained about the discriminatory behavior of the railroads, particularly with regard to setting rates.<sup>13</sup> Consequently, Congress focused on creating a policy designed to eliminate unjust discrimination in railroad companies' pricing procedures.<sup>14</sup> The ICA's language reflected the country's

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13. See René Sacasas, *The Filed Tariff Doctrine: Casualty or Survivor of Deregulation?*, 29 DUQ. L. REV. 1, 7 & n.14 (1990).

14. Although regulations were initially imposed upon the railroads exclusively, such

determination to rid the railroad industry of the predatory pricing schemes that larger companies used to price smaller companies out of the market; section 10741(b) emphatically proclaims that “a common carrier providing transportation or service subject to the jurisdiction of the Commission . . . may not subject a person, place, port or type of traffic to *unreasonable discrimination*.”<sup>15</sup> The Supreme Court quickly echoed Congress’s sentiments, noting that the legislative branch’s “paramount purpose” in regulating motor carriers is to prevent unjust discrimination.<sup>16</sup>

It is not entirely clear from the text of section 10741(b) what Congress intended to prohibit when it warned carriers not to create pricing schemes that would unreasonably discriminate among their customers. Fortunately, the Supreme Court provided substantial guidance in one of its earliest rate reasonableness decisions when it held that the ICA’s main purpose is to “secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination.”<sup>17</sup> It is only against this backdrop—rooted in a desire to establish equal rates and to remove favoritism from carriers’ pricing practices—that one can effectively analyze the importance of the ICA’s provisions.

This concern for equality and fairness that sparked the initial regulation of motor carrier pricing schemes also manifested itself in the rate reasonableness language that guided the construction of the ICA and the early-twentieth-century Supreme Court decisions interpreting the ICA. To realize its goal of eliminating motor carriers’ discriminatory practices, Congress had to construct the ICA in a way that conveyed the importance of fair pricing schemes. Section 10701(a) fulfills this purpose by stating that “a rate . . . classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . *must be reasonable*.”<sup>18</sup> To

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policies were ultimately absorbed into the regulatory law governing the other components of the transportation industry. For further consideration of the historical development of regulation of the railroad industry, see *id.* at 6–16.

15. 49 U.S.C. § 10741(b) (1988) (emphasis added).

16. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922).

17. *New York, N.H. & H. R.R. v. ICC*, 200 U.S. 361, 391 (1906).

18. 49 U.S.C. § 10701(a) (1988) (emphasis added). Similar reasonableness requirements are found in the governing statutes of other industries as well. See, e.g., Natu-

provide more specific guidelines, Congress created section 10701(e) to detail the method the ICC should use in assessing the reasonableness of rates.<sup>19</sup> Rate levels that are "adequate under honest, economical, and efficient management to cover total operating expenses . . . plus a reasonable profit" will be authorized.<sup>20</sup>

To ensure that motor carrier pricing practices do not violate section 10741(b)'s prohibition against unjust discrimination, Congress deemed it necessary to include in the ICA more specific regulations that would go beyond the mere rate reasonableness requirement. The ICA's filed rate doctrine has been the touchstone of much congressional regulation since the early twentieth century,<sup>21</sup> "forbid[ing] a regulated entity [from charging] rates for its services other than those properly filed with the appropriate federal regulatory authority."<sup>22</sup> Section 10762(a) states that "a motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle."<sup>23</sup> The Supreme Court has continually reasserted the importance of enforcing the filed rate doctrine and has ruled that the published rate is "made, for all purposes, the legal rate, as between carrier and shipper."<sup>24</sup> The fastidiousness with which the

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ral Gas Act, 15 U.S.C. § 717c(a) (1988) (requiring that all rates charged by a natural gas company for the transportation or sale of gas be "just and reasonable").

19. 49 U.S.C. § 10701(e) (1988) (requiring the ICC to conduct an economic evaluation of the challenged rate in the context of the motor carrier's costs).

20. *Id.* Like the ICA, the Natural Gas Act requires rates to be evaluated in light of pipelines' costs. *See* 18 C.F.R. § 154.63 (1992) (requiring that the filing of rates and rate changes in tariffs be supported by detailed cost information).

21. Other regulated industries are governed by similar provisions. *See, e.g.*, Federal Power Act, 16 U.S.C. § 824d(c) (1988) (requiring utilities to file rate schedules with the Federal Energy Regulatory Commission). Such a provision prohibits "a regulated seller of [power] from collecting a rate other than the one filed with the Commission . . ." *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

22. *Arkansas Louisiana Gas*, 453 U.S. at 577. Although initially developed to regulate the railroad industry, the filed rate doctrine has become an integral component in the regulation of other areas of the transportation industry, such as the motor carrier sector. The energy and telecommunication industries also rely on the filed rate doctrine as support for their regulatory schemes. *Arkansas Louisiana Gas*, for example, involved federal regulation of natural gas prices. *Id.* at 577-78. *See generally* Sacasas, *supra* note 13, at 2 nn.2-3 (providing a succinct history of the filed rate doctrine as it applies to the energy and telecommunications industries).

23. 49 U.S.C. § 10762(a) (1988).

24. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922); *see also* *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 343-44 (1982); *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

Court has repeated this message reflects its desire to deter carriers from intentionally misquoting rates to shippers as a means of offering rebates or discounts to favored shippers.<sup>25</sup>

The combination of requiring that motor carriers not charge rates other than those filed with the ICC and requiring that those rates be reasonable is the ICA's chief means of preventing unreasonable discrimination in the motor carrier industry. Rather than considering these two requirements as wholly independent, section 10761(a)'s filed rate restriction should be viewed as derivative of section 10701(a)'s broader reasonableness requirement. Because section 10761(a) expressly limits acceptable rates to those included in a carrier's tariff, it would be *unreasonable*—and therefore contrary to the express requirements of section 10701(a)—to enforce any non-tariff rate. Consequently, compliance with the filed rate requirement is a *necessary* condition for fulfillment of the ICA's reasonableness requirement.<sup>26</sup>

The Supreme Court recognized the symbiotic nature of the rate reasonableness and filed rate requirements in a series of early-twentieth-century decisions.<sup>27</sup> The Court's clearest articulation of the filed rate doctrine and how closely it is related to rate reasonableness came in *Louisville & Nashville Railroad Co. v. Maxwell*.<sup>28</sup> In forbidding shippers from avoiding filed rates, the *Maxwell* Court held that

[u]nder the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers . . . as well as . . . carrier[s] must abide by it, *unless it is found by the Commission to be unreasonable . . .*. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate

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25. *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

26. Note, however, that compliance with § 10761(a) is not a *sufficient* condition of the § 10701(a) rate reasonableness requirement. Rather, a rate is only considered reasonable if, in addition to its being a filed rate, it also passes the economic evaluation conducted under § 10701(e).

27. *See, e.g., Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440–42 (1907) (noting that an “indissoluble unity” exists between filed rate and reasonableness requirements); *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908) (“If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.”).

28. 237 U.S. 94 (1915).

commerce in order to prevent unjust discrimination.<sup>29</sup>

No judicial opinion since *Maxwell* has been as effective in crystalizing the nexus between rate reasonableness and the filing of motor carrier rates. *Maxwell's* synthesis of sections 10701(a) and 10761(a) offers the most cogent insight into what the regulatory regime defining the motor carrier industry is designed to accomplish—the assurance that shippers and carriers will only operate under filed, reasonable rates.

Rate reasonableness has also played a significant role in the distinction that the Court has drawn between rates that are *merely* legal and those that are lawful *as well as* legal. Although the *legality* of a given rate is satisfied by strict adherence to section 10761(a), a determination of that rate's *lawfulness* can be made only after its reasonableness is considered. In *Arizona Grocery Co. v. Atchison T. & S.F. Railway Co.*,<sup>30</sup> the Court made clear that rate reasonableness is an integral component of the ICA's regulatory scheme: "Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable."<sup>31</sup> This pronouncement elevated section 10701(a) to a prominent position in motor carrier regulation and indicated that filing rates with the ICC in compliance with section 10761(a) addresses only one aspect of the ICA's regulatory scheme.<sup>32</sup> A carrier's price is not lawful unless it satisfies the rate reasonableness requirement.<sup>33</sup>

Two possibilities exist for the handling of rate reasonableness evaluations. One possibility is to have district courts stay undercharge proceedings, refer the question of rate reasonableness to the ICC, and then determine the merits of the undercharge claim

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29. *Id.* at 97 (emphasis added).

30. 284 U.S. 370 (1932).

31. *Id.* at 384. In fact, seventeen years before *Arizona Grocery*, the Court had already begun to link the concepts of rate reasonableness and lawful charges to one another. See *Maxwell*, 237 U.S. at 97 ("[T]he rate of the carrier duly filed is the only lawful charge . . . unless it is found by the Commission to be unreasonable.") (emphasis added).

32. The concept of reasonableness articulated in § 10701(a) is not limited to rates alone, but refers also to transportation practices. Although early Supreme Court decisions dealt solely with rate reasonableness, the unreasonable practice concept became the center of litigation during the 1980s. For further discussion of this point, see *infra* Section II(A).

33. *Arizona Grocery*, 284 U.S. at 384.

only if the ICC finds that the given rate is reasonable. Another possibility requires shippers to pay the undercharge claim without knowing if the rate against which the undercharge is measured is reasonable. Questions regarding rate reasonableness would be raised only later, in a separate reparations proceeding conducted by the ICC.

This issue of *when* the courts or the ICC should make a determination of rate reasonableness is currently the main issue concerning rate reasonableness. The *Reiter* Court will determine whether rate reasonableness can be raised in undercharge suits as a defense to carriers' undercharge claims. If this unreasonable rate defense is upheld, the courts would refer the reasonableness issue to the ICC. Under this referral system, district courts would be powerless to rule on the merits of undercharge disputes until the ICC has concluded its investigations—thereby preventing carriers from receiving any money from shippers until *after* the ICC has determined the reasonableness of the filed rates. From the shippers' perspective, the significant advantage of this process is that undercharge liability will have to be paid only if the ICC makes an initial determination that the rates are reasonable. Without such a defense mechanism, shippers' sole chance of limiting their liability would be in reparations proceedings occurring only after they have already paid the carriers. Considering that the majority of undercharge claims pending in state and federal courts have been brought by the trustees of *bankrupt* motor carriers, shippers desperately want to avoid claiming reparations as unsecured creditors.<sup>34</sup>

In determining whether a referral or reparations system should be used, one particular question must be answered: Which procedure is most faithful to the statutory and judicial regime that has dominated motor carrier regulation throughout the twentieth century? The Supreme Court's motor carrier rate decisions, particularly those from the early part of this century, make clear that the Court placed great emphasis on carrier rates' being reasonable.<sup>35</sup>

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34. For a discussion of the impact that bankruptcy proceedings have on undercharge cases, see, e.g., *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express)*, 949 F.2d 107, 113 (4th Cir. 1991) (Hall, J., dissenting), *cert. granted sub nom. Reiter v. Cooper*, 112 S. Ct. 1934 (1992) (No. 91-1496). Although it is beyond the scope of this Note to consider bankruptcy law's impact on shippers' reparations claims, the vigor with which shippers are fighting for an unreasonable rate defense provides substantial insight into how much weaker a position those companies see themselves in as unsecured creditors.

35. See, e.g., *Arizona Grocery*, 284 U.S. at 370; *Louisville & Nashville R.R. Co. v.*

If the *Reiter* Court only permits shippers to guard against unreasonable rates within the context of reparations proceedings, the distinct possibility exists that carriers will receive undercharges that have been determined based on *unreasonable* rates. As the *Arizona Grocery* Court noted, a rate is only lawful if it is reasonable.<sup>36</sup> Therefore, to ensure that carriers and shippers function only under lawful pricing schemes, it is critical that reasonableness determinations are made prior to the exchange of any money. The unreasonable rate defense guarantees that Congress's and the Court's most immediate concern of eliminating rate discrimination will always be addressed. More important, as Part II makes clear, this defense provides shippers with their only hope of avoiding the \$27 billion of undercharges that carriers are attempting to collect.

## II. RATE REASONABLENESS UNTESTED: JUDICIAL AND CONGRESSIONAL ACTIONS

Although the rate reasonableness requirement historically has been one of the most significant constraints upon motor carrier pricing schemes, other considerations dominated motor carrier regulation during the 1980s. The ultimate failure of these recent initiatives—namely, the ICC-constructed unreasonable practice defense and congressional attempts to repeal the filed rate doctrine—has left the unreasonable rate defense as the only mechanism available to insulate shippers from mounting undercharge liability. Rate reasonableness, virtually ignored during the past decade, takes on added significance when one considers the impact of the Supreme Court's *Maislin Industries, U.S. v. Primary Steel, Inc.* decision<sup>37</sup> and corresponding congressional actions. This Part first focuses on the ephemeral unreasonable practice defense; it then considers the reasons why shippers are unlikely to find any congressional protection from undercharge liability.

### A. *The Rise and Fall of the Unreasonable Practice Defense*

It is as important to analyze the development of the ICC-constructed unreasonable practice defense as it is to consider the implications of its June 1990 dismissal. The first part of this Sec-

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Maxwell, 237 U.S. 94 (1915).

36. 284 U.S. at 384.

37. 110 S. Ct. 2759 (1990).

tion considers the changes in ICC policy following passage of the Motor Carrier Act of 1980 (MCA),<sup>38</sup> focusing attention on the Commission's *Negotiated Rates* decisions. Shortly after the ICC had completed its construction of the unreasonable practice defense, the *Maislin* Court razed the entire project. The second part of this Section considers the *Maislin* litigation, specifically addressing the Court's dismissal of the unreasonable practices concept.

1. *The Rise of Unreasonable Practices: ICC Development.* As discussed earlier, for nearly a century, regulatory policy has been dominated by two principles: First, as described in section 10761(a) of the ICA, carriers could charge only those rates that were on file with the ICC; and second, carriers could charge only rates found to be "reasonable" under section 10701(a). It was only after the passage of the MCA that significant changes in regulatory policy developed.<sup>39</sup> In an attempt "to promote competitive and efficient transportation services," the MCA relaxed the regulations surrounding motor carriers' pricing schemes.<sup>40</sup> The MCA did not, however, repeal the filed rate doctrine. Instead, the modified statutory framework merely allowed shippers and carriers to conduct business more flexibly *within* a larger regulated environment.<sup>41</sup> Interestingly, the ICC's response to the MCA's passage, not the Act itself, had the most profound impact on motor carrier regulation.

The ICC viewed the partial deregulation of the industry as an opportunity to redefine completely its regulatory policies. Invoking the "post-Motor Carrier Act of 1980 environment,"<sup>42</sup> the ICC

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38. Pub. L. No. 96-296, 94 Stat. 793.

39. An examination of the unreasonable rate defense's merits can be made without considering the MCA's impact on the motor carrier industry. Because this Note is concerned with demonstrating the legitimacy of the unreasonable rate defense, it is more valuable to concentrate on the history of the unreasonable practice defense (starting with its conception in the *Negotiated Rates* decisions and ending with its demise in *Maislin*) than on the 1980 legislation. For a discussion of deregulation's impact on the motor carrier industry, see René Sacasas & Nicholas A. Glaskowsky, Jr., *Motor Carrier Deregulation: A Decade of Legal and Economic Conflict*, 18 *TRANSF. L.J.* 189, 191-92 (1990).

40. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, § 4 (formerly codified at 49 U.S.C. § 10101(a)(7) (1976 ed., supp. V)).

41. See *Maislin Indus., U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2772 (1990) (Scalia, J., concurring) (observing that although the MCA plainly reflects "an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme*").

42. NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier

determined that its pre-1980 "policy of applying Section 10761 strictly regardless of the circumstances [was] inappropriate and unnecessary to deter discrimination today."<sup>43</sup> Further, recognizing that the Supreme Court's steadfast application of the filed rate doctrine prevented shippers from asserting any *legal* defense to a carrier's attempt to collect the filed rates, the ICC developed a policy that permitted shippers to assert *equitable* defenses.<sup>44</sup> Known collectively as the *Negotiated Rates* doctrine, the ICC's newly formulated policy was based on the idea that "in the highly competitive motor carrier industry . . . equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis."<sup>45</sup>

Although it turned to section 10701(a) for support for its newly developed policy, the ICC did not direct its attention to the *rate* reasonableness requirement. Instead, the ICC relied on that section's previously overlooked requirement that a carrier's *practices* be reasonable. Without the benefit of any judicial precedent concerning this portion of section 10701(a), the ICC determined that a carrier commits an unreasonable practice when it: (1) negotiates a rate; (2) agrees to a rate that the shipper has reasonably relied upon as having been lawfully filed; (3) fails, willfully or otherwise, to publish the rate; (4) bills and accepts payment at the negotiated rate for (sometimes) numerous shipments; and (5) demands additional payments at higher rates.<sup>46</sup>

Although section 10701(a)'s prohibition of unreasonable practices had never previously been invoked by the courts or the Commission to strike down as unlawful a given carrier's filed rates, the ICC believed it was necessary to develop an equitable defense that would counter what it considered to be unreasonable motor carrier practices.<sup>47</sup> *Negotiated Rates* offered hope to wary shippers who were facing an explosion in undercharge litigation. The ICC policy created a means by which shippers could circumvent the previously

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Rates (*Negotiated Rates I*), 3 I.C.C.2d 99 (1986).

43. *Id.* at 106.

44. *See id.* at 99; NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates (*Negotiated Rates II*), 5 I.C.C.2d 623 (1989) (stating that the ICC would accept initial jurisdiction of negotiated rate-undercharge cases without awaiting court referral).

45. *Negotiated Rates I*, 3 I.C.C.2d at 106.

46. *Negotiated Rates II*, 5 I.C.C.2d at 628 n.11.

47. *Id.*

unassailable filed rate requirement of section 10761(a) without having to demonstrate that the carrier's rates were unreasonable. Essentially, *Negotiated Rates* provided shippers with a second way to avoid the payment of undercharges based on carriers' filed rates. Ironically, the newly formed unreasonable practice defense, and not a defense based on the more frequently tested concept of rate reasonableness, dominated undercharge litigation in the 1980s. In fact, the ICC recently noted that, subsequent to the MCA and prior to the Supreme Court's dismissal of the unreasonable practice defense in 1990, there were *no* motor carrier rate reasonableness decisions.<sup>48</sup>

Only three years after the ICC had issued its initial *Negotiated Rates* opinion, questions began to surface regarding the legitimacy of the unreasonable practice defense,<sup>49</sup> and the ICC had to justify its policy initiative vigorously. The ICC insisted that the filed rate requirement of section 10761(a) was "only part of an overall regulatory scheme; [and] . . . should not be elevated over the unreasonable practices provision of section 10701."<sup>50</sup> Rather than viewing section 10761 as the touchstone of motor carrier regulation, as the Supreme Court had done throughout the twentieth century, the ICC's *Negotiated Rates* policy created a new balance indicating that strict adherence to filed rates was not more central to the overall regulatory scheme than was the reasonableness of carriers' rates and practices. Nonetheless, the Court of Appeals for the Fifth Circuit, finding this position untenable, offered a reply which symbolized the beginning of the end for the unreasonable practice defense:

A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine . . . . Any other decision would constitute legislation on our part; it would create

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48. *General Mills, Inc.—Petition for Declaratory Order—Certain Rates and Practices of United Shipping Company, Inc.*, 3 Fed. Carr. Rep. (CCH) ¶ 47,593 (ICC 1992).

49. The Fifth Circuit expressed its belief that an unreasonable practice exception to the filed rate doctrine would, in effect, destroy the entire regulatory scheme. *Supreme Beef Processors v. Yaquinto (In re Caravan Refrigerated Cargo)*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3254 (1990). *But see Maislin Indus., U.S. v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989) (viewing *Negotiated Rates* as a justified policy modification consistent with the ICC's practices under the ICA rather than as an abandonment of the filed rate doctrine), *rev'd*, 110 S. Ct. 2759 (1990).

50. *Negotiated Rates II*, 5 I.C.C.2d at 627. The tension between §§ 10761 and 10701 became a key issue in the Supreme Court's *Maislin* decision. *See infra* notes 74–80 and accompanying text.

an exception that swallows the doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.<sup>51</sup>

Despite the incisiveness of the Fifth Circuit's opinion, several other circuits chose to uphold the validity of the unreasonable practice defense.<sup>52</sup> Consequently, it was left to the Supreme Court, in *Maislin Industries, U.S. v. Primary Steel, Inc.*,<sup>53</sup> to determine whether the ICC's *Negotiated Rates* policy in general, and the unreasonable practice defense in particular, would continue to coexist with section 10701(a)'s rate reasonableness requirement as a means for shippers to counter carriers' undercharge claims.

2. *The Fall of Unreasonable Practices: Justice Brennan's Blueprint.* Following a description of what occurred in the initial stages of the *Maislin* litigation, this subsection analyzes the Supreme Court's rejection of the unreasonable practice defense. It focuses first on the *Maislin* Court's attempt to determine the relative importance of sections 10701(a) and 10761(a). Then it considers the Court's interpretation of the MCA and the effect of this on the filed rate doctrine. Finally, this subsection's examination of developments in the *Maislin* litigation after the Court remanded the case to the Eighth Circuit provides the springboard for a discussion of how shippers are attempting to protect themselves from undercharge claims now that the unreasonable practice defense is no longer a viable option.

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51. *Caravan*, 864 F.2d at 392. The Fifth Circuit's final point—that Congress had visited and chosen to leave the filed rate policy intact—is a reference to the Motor Carrier Act of 1980. Presumably, by modifying the regulatory structure of the motor carrier industry without eliminating strict adherence to filed rates under § 10761(a), see *supra* notes 39–41 and accompanying text, Congress expressed its desire to preserve the filed rate doctrine. See also *Maislin*, 110 S. Ct. at 2771 (inferring a congressional intent to eradicate the filed rate doctrine based upon the relaxation of regulation in specific and limited circumstances—namely through the exemption provided contract carriers—ignores the plain language of the ICA which Congress “has deliberately chosen not to disturb . . . with respect to motor common carriers”).

52. See, e.g., *Orscheln Bros. Truck Lines v. Zenith Elec. Corp.*, 899 F.2d 642 (7th Cir.), cert. granted and judgment vacated, 111 S. Ct. 334 (1990); *West Coast Truck Lines v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir.), withdrawn, 912 F.2d 1130 (9th Cir. 1990); *Delta Traffic Serv. v. Appco Paper & Plastics*, 893 F.2d 472 (2d Cir.), cert. granted and judgment vacated, 111 S. Ct. 425 (1990); *Seaboard Sys. R.R. v. United States*, 794 F.2d 635 (11th Cir. 1986).

53. 110 S. Ct. 2759 (1990).

*Maislin* is paradigmatic of typical undercharge litigation: A carrier negotiates rates lower than those in its filed tariff, fails to file the negotiated rates with the ICC, and, in the process of subsequent bankruptcy proceedings, files a claim to collect the undercharges from the shipper. The *Maislin* litigation arose from an action filed by Quinn Freight Lines, Inc., a subsidiary of Maislin Industries, for the collection of freight rate undercharges. From January 1981 through mid-1983, Quinn transported 1,081 shipments for Primary Steel, Inc., charging rates that were lower than those Quinn had on file with the ICC.<sup>54</sup> In July 1983, Maislin Industries filed for bankruptcy.<sup>55</sup> A subsequent audit of its accounts revealed that Quinn had undercharged Primary Steel by \$187,923.36 on the shipments.<sup>56</sup> The bankruptcy trustee then billed Primary Steel for the difference between the amounts previously billed and paid and those prescribed by the tariff rates on file with the ICC.<sup>57</sup> Upon Primary Steel's refusal to pay the amounts demanded, the Maislin estate filed an action pursuant to section 11706(a) of the ICA<sup>58</sup> to recover the undercharges.<sup>59</sup>

In light of the ICC's existing *Negotiated Rates* policy, Primary Steel asserted three independent defenses: first, that the practice of negotiating rates lower than the filed tariff rates and rebilling at the higher rates was unreasonable; second, that the rates sought were unreasonable,<sup>60</sup> and third, "that the asserted tariff rates were otherwise inapplicable to the shipments at issue."<sup>61</sup> Finding that these defenses raised issues within the "primary jurisdiction"<sup>62</sup> of the ICC, the district court stayed the proceedings and referred the matter to the Commission.<sup>63</sup> The ICC ruled in favor of Primary Steel, concluding that Quinn's negotiation of a non-

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54. *Id.* at 2764.

55. *Id.*

56. *Id.*

57. *Id.*

58. 49 U.S.C. § 11706(a) (1982).

59. 705 F. Supp. 1401 (W.D. Mo. 1988) *aff'd*, 879 F.2d 400 (8th Cir. 1989), *rev'd*, 110 S. Ct. 2759 (1990).

60. *Maislin*, 110 S. Ct. at 2764. This second defense—unreasonable rates—soon disappeared from the litigation and did not resurface for nearly three years. See *infra* notes 87-91 and accompanying text.

61. 110 S. Ct. at 2764.

62. For a discussion of the primary jurisdiction doctrine and its impact upon the judicio-administrative balance created in undercharge legislation, see *infra* Section III(A).

63. 110 S. Ct. at 2764.

filed rate and subsequent attempt to collect undercharges constituted an unreasonable practice.<sup>64</sup> The ICC referred the case back to the district court without considering the inherent reasonableness of the filed rates.<sup>65</sup> The district court then granted,<sup>66</sup> and the Eighth Circuit affirmed,<sup>67</sup> summary judgment in favor of Primary Steel. The district court's reasoning in awarding summary judgment, although quite predictable in light of the ICC's findings, is of great importance: "In sum, we find and conclude that the Commission's determination that a negotiated rate existed and that the collection of the alleged undercharges would be an *unreasonable and unlawful practice* is supported by substantial evidence and thus should be affirmed."<sup>68</sup>

The early *Maislin* litigation—specifically, the ICC and district court determinations—is typical of undercharge litigation prior to the Supreme Court's 1990 decision. District courts had referred numerous cases to the ICC for consideration of unreasonable practice *and* unreasonable rate defenses. However, because of the existence of the *Negotiated Rates* policy and its clearly defined unreasonable practice defense, the ICC had been determining whether undercharge claims should be allowed without considering shippers' unreasonable rate defenses. It was not until after the Supreme Court disposed of the unreasonable practice defense in *Maislin*<sup>69</sup> that shippers remembered that the district courts had sent *two* defenses to the ICC for consideration.<sup>70</sup>

In reversing the Eighth Circuit's decision, the Court held 7-2 that "the filed rate governs the legal relationship between shipper and carrier."<sup>71</sup> Consequently, the Court stated that the ICC's *Negotiated Rates* policy—which relieved a shipper from the obligation

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64. *Id.* at 2764-65.

65. *Id.* at 2765.

66. 705 F. Supp. 1401, 1407 (W.D. Mo. 1988), *aff'd*, 879 F.2d 400 (8th Cir. 1989), *rev'd*, 110 S. Ct. 2759 (1990).

67. 879 F.2d 400, 406 (8th Cir. 1989), *rev'd*, 110 S. Ct. 2759 (1990).

68. 705 F. Supp. at 1407 (emphasis added).

69. 110 S. Ct. at 2768.

70. For a discussion of litigation engendered by the unreasonable *rate* defense, see *infra* Part III.

71. 110 S. Ct. at 2765. This statement reaffirmed the Court's ongoing commitment to the preeminence of the filed rate doctrine in motor carrier regulatory policy. See *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907); *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 416 (1986).

of paying the filed rate when the shipper and carrier had privately negotiated a lower rate—undermined the basic structure of the ICA.<sup>72</sup> Noting that the ICC's finding focused on the unreasonableness of the carrier's *practice* rather than on the sensibility of the filed *rates*, Justice Brennan stated: "We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule."<sup>73</sup> The Court continued its assault on the *Negotiated Rates* policy on two independent levels. First, it held very different views from those of the ICC of the relationship between sections 10761 and 10701 and of the sections' relative importance to the filed rate doctrine. Second, it rejected the ICC's attempt to expand the deregulatory tendencies of the MCA beyond justifiable limits, arguing that such a task is in Congress's domain and cannot be accomplished by an administrative agency.<sup>74</sup>

According to the Court, the ICC's interpretation of unreasonable practices was "flatly inconsistent with the statutory scheme as a whole, . . . and §§ 10761 and 10762 in particular."<sup>75</sup> Allowing the ICC to determine the reasonableness of carrier practices under section 10701(a) would amount to excusing the requirements of section 10761(a)—that the carrier "may not charge or receive a different compensation . . . than the rate specified in the tariff . . . ." For the Court, unlike for the ICC, the filed rate requirement was more than just a part of an overall regulatory scheme.<sup>76</sup> On the contrary, requiring strict adherence to filed rates provided the Court with the necessary means for ensuring that section 10741—prohibiting unjust discrimination in motor carrier pricing—would not be overlooked.<sup>77</sup> Moreover, the Court admonished

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72. 110 S. Ct. at 2769. Specifically, "[b]y refusing to order collection of the filed rate solely because the parties have agreed to a lower rate, the ICC has permitted the very price discrimination the Act by its terms seeks to prevent." *Id.* at 2768.

73. *Id.* at 2767. In *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 100 (1915), for example, it had been the unreasonableness of a carrier's *rate*—not practice—that operated as a caveat to the filed rate rule. See *supra* text accompanying note 29; see also *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577–78 (1981) (emphasizing that the purpose of the filed rate doctrine is first, to preserve the regulating agency's authority to determine the reasonableness of *rates*; and second, to insure that the regulated entities charge only those rates approved of by the agency).

74. *Maislin*, 110 S. Ct. at 2771.

75. *Id.* at 2768 (citations omitted).

76. See *id.* at 2769 (noting that adherence to the filed rate requirements of §§ 10761 and 10762 is "utterly central" to the administration of the ICA).

77. Since the Court's first interpretation of the ICA in the early twentieth century, prevention of discriminatory pricing has been of central concern. As the Court noted in

that the ICA "forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate."<sup>78</sup> Justice Brennan observed that "[s]tripped of its semantic cover, the *Negotiated Rates* policy and, more specifically, the Commission's interpretation of 'unreasonable practices' . . . [are] flatly inconsistent with the statutory scheme as a whole . . . ."<sup>79</sup> The ICC's premise that a carrier's unreasonable practices could create an exception to the previously unassailable filed rates doctrine was thereby rejected by the Court.<sup>80</sup>

The Court further noted that if the reasons underlying the filed rate doctrine were no longer sound, Congress, not the courts or the ICC, should change the policy.<sup>81</sup> Congress had not demonstrated an intent to permit motor common carriers, shippers, or the ICC to undermine the statutory tariff adherence requirements.<sup>82</sup> Instead, Congress defined specific and limited circumstances in which the filed rate doctrine is not applicable.<sup>83</sup> The ICC's unreasonable practice defense, created to circumvent the strict requirements of section 10761(a), ignored the plain language of the ICA.<sup>84</sup> Therefore, the *Maislin* Court overruled the *Negoti-*

*Armour Packing Co. v. United States*, 209 U.S. 56 (1908):

[The Act] has provided for the establishing of *one rate* . . . and that rate to be while in force the only legal rate. Any other construction of the statute opens the doors to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

*Id.* at 81 (emphasis added).

78. 110 S. Ct. at 2768.

79. *Id.* (citations omitted).

80. In a footnote important for future litigation, the Court did recognize, however, that the ICC had not determined whether the tariff rates were reasonable. *Id.* at 2767 n.10. It is not surprising, in light of *Louisville & Nashville R.R. Co. v. Maxwell's* concern for the reasonableness of rates, 237 U.S. 94, 97 (1915), that the *Maislin* Court held that "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." 110 S. Ct. at 2767 n.10. A salvo had been fired—and shippers breathed a sigh of relief as they realized that although round one had gone the carriers' way, footnote 10 signalled that there could (and would) be a round two.

81. 110 S. Ct. at 2771. For a consideration of such congressional attempts, see *infra* Section B.

82. Had Congress desired to carve exceptions into, or even to eliminate, these requirements, it could have easily done so, as it had done for motor contract carriers in § 10761(b) of the ICA. 49 U.S.C. § 10761(b) (1988) (permitting the ICC to "grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title.").

83. See, e.g., 49 U.S.C. § 10708 (a)(2)(d), (a)(4) (1988) (creating a zone of rate freedom to allow carriers to raise and lower rates without ICC interference).

84. The *Maislin* Court concluded that Congress is aware of the exception provided contract carriers and "has deliberately chosen not to disturb it with respect to motor

ated Rates policy as an attempt to deregulate the industry beyond the levels achieved by the MCA, reversed the Eighth Circuit's decision, and remanded the case for further proceedings.<sup>85</sup>

On remand, the Eighth Circuit denied Primary Steel's subsequent motion to refer the case to the ICC and remanded the case because the district court was in the best position to consider reference to the ICC.<sup>86</sup> The district court noted that the ICC's consideration in 1988 of Primary Steel's equitable defenses addressed only whether requiring Primary Steel to pay the difference between the negotiated rate and the higher tariff rate would constitute an unreasonable practice.<sup>87</sup> Citing Justice Brennan's tenth footnote in the *Maislin* decision, the district court made clear that all hope was not lost for the shipper:

Primary Steel's reasonableness claim is an entirely separate issue than its negotiated rate claim. Under the latter, the issue is whether *Maislin* is equitably estopped from claiming undercharges when it negotiated for and was paid a lesser rate. Under the [rate] reasonableness claim, it must be determined whether *Maislin*'s published tariff rate was reasonable within the meaning of 49 U.S.C. § 10701(a) in light of the factors and standards of 49 U.S.C. § 10701(e).<sup>88</sup>

Thus, post-*Maislin* undercharge litigation began to take form in the District Court for the Western District of Missouri and in other courts.<sup>89</sup> Although section 10701(a) of the ICA suggests that practices related to carriers' transportation services must be reasonable, the concept of rate reasonableness—far more central both to the ICA and to controlling Supreme Court precedent<sup>90</sup>—

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common carriers." 110 S. Ct. at 2771.

85. *Id.*

86. *Maislin Indus., U.S. v. Primary Steel, Inc.*, 911 F.2d 1312 (8th Cir. 1990).

87. *Maislin Indus., U.S. v. Primary Steel, Inc.*, No. 85-0021-CV-W-JWO-5, 1990 WL 264536 (W.D. Mo. 1990).

88. *Id.* at \*2.

89. A general pattern began to develop in this type of litigation: Shipper X had initially obtained from a district court an order staying the carrier's suit and referring the unreasonable practice defense to the ICC. Thereafter, the Supreme Court invalidated the ICC's *Negotiated Rates* policy and precluded an unreasonable practice defense to a motor carrier's suit to collect unpaid freight charges. In light of *Maislin*, shipper X now seeks leave to exchange its unreasonable practice defense for an unreasonable rate defense. See, e.g., *Duffy v. BMC Indus.*, 938 F.2d 353 (2d Cir. 1991); *Horn's Motor Express v. Harrisburg Paper Co.*, 765 F. Supp. 211 (M.D. Pa. 1991); *Covey v. Conagra Inc.*, 758 F. Supp. 644 (D. Colo.), *amended*, 763 F. Supp. 479 (D. Colo. 1991).

90. To gain statutory legitimacy for its *Negotiated Rates* policy, the ICC continually

provides shippers with their only remaining hope of counteracting the seemingly clear pronouncements of the filed rate doctrine.<sup>91</sup>

### B. *Congressional Responses to Undercharge Litigation*

A rate reasonableness defense represents shippers' last chance for protection from undercharge liability, not only because of the *Maislin* Court's refusal to accept the unreasonable practice defense, but also because of Congress's inability to repeal the remnants of the regulatory scheme that burdens shippers.<sup>92</sup> This congressional inaction is not due to any perceived lack of authority or the dictates of the *Maislin* Court. In fact, the *Maislin* Court indicated that Congress, and not an administrative agency, is the one to undo the filed rate doctrine.<sup>93</sup> Thus, selecting the means to resolve the undercharge problem is Congress's responsibility.<sup>94</sup>

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had to refer to § 10701(a)'s admonition against unreasonable practices. *See, e.g., Negotiated Rates I*, 3 I.C.C.2d 99, 107-08 (1986); *Negotiated Rates II*, 5 I.C.C.2d 623, 627 (1989). Ironically, once one reads past the opening sentence of § 10701(a), the remainder of § 10701 is devoted entirely to clarification of *rate* reasonableness. *See* 49 U.S.C. § 10701(c) (1988) (prohibiting discrimination in one carrier's *rates* against another carrier's connecting lines); *id.* § 10701(d) (limiting the type of evidence that may be used in determining *rate* reasonableness); *id.* § 10701(e) (providing standards by which the Commission can evaluate the economic validity of a challenged *rate*).

Similarly, when the Supreme Court has sought to qualify the requirement of strictly adhering to filed rates, it has been concerned foremost with the reasonableness of carriers' rates, not with their practices. *See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 384 (1932) (expressing the "common-law duty to charge no more than a reasonable *rate*") (emphasis added); *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("[T]he rate of the carrier duly filed is the only lawful charge . . . Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be *unreasonable*.") (emphasis added).

91. Shippers did not miss this point after the Court's *Maislin* decision, and they began to seek referral to the ICC on the rate reasonableness issue. *See, e.g., Horn's Motor Express*, 765 F. Supp at 217; *Oneida Motor Freight v. Ormond Shops, Inc.*, 126 B.R. 431, 433-35 (D.N.J. 1991); *Overland Express v. International Multifoods*, 765 F. Supp. 1386, 1388 (S.D. Ind. 1990); *see also* Petition for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement, 3 Fed. Carr. Rep. (CCH) ¶ 37,909, at 47,415 n.2 (ICC 1991) (recognizing that since the rejection of the *Negotiated Rates* policy, there has been an increase in the number of rate reasonableness defenses being asserted in the courts and in front of the ICC).

92. Part of that task has already been accomplished by the Motor Carrier Act of 1980. *See supra* notes 39-41 and accompanying text.

93. *Maislin Indus., U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2771 (1990). Moreover, Justice Brennan intimated that strict adherence to the provisions of the filed rate doctrine may have become anachronistic in light of present deregulatory policies. *Id.*

94. Since *Maislin*, several attempts have been made by Congress to provide legis-

Countless shippers, who in light of *Maislin* have at least temporarily lost their immunity from undercharge liability, desperately seek congressional action. The ICC has attempted to estimate the total potential magnitude of this liability, and has predicted a "conservative" figure of \$27 billion.<sup>95</sup> Not surprisingly, shippers eagerly support measures to repeal the filed rate doctrine.<sup>96</sup> Elimination of section 10761(a)'s filed rate requirement would result in the disappearance of billions of dollars in undercharges. Only one rate of any consequence would exist—the one negotiated by a carrier and a shipper. As there would be no higher filed rates, "undercharges" would no longer exist.

The solution to the shippers' woes certainly appears simple—have Congress repeal the filed rate doctrine so that ordinary contract law may govern the motor carrier industry, and allow carriers and shippers to rely on privately negotiated rates. However, pressure by the powerful Teamsters Union, which opposes repeal of the filed rate doctrine, has prevented Congress from helping the shippers.<sup>97</sup> The Union's primary concern is the welfare of its members—workers who lose jobs as a result of bankruptcies in the motor carrier industry.<sup>98</sup> Any legislative attempt to mitigate the harshness of undercharge liability will continue to be met with fierce opposition from the Teamsters, because these charges represent the primary source of income that can be used to subsidize unemployed union workers' pension funds. Elimination of the filed

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lative relief from the undercharge claims. See, e.g., S. 1675, 102d Cong., 1st Sess. (1991); H.R. 4406, 102d Cong., 2d Sess. (1992).

95. Shulz, *supra* note 9, at 31. A significant percentage of the \$27 billion is directly attributable to the claims being filed by bankruptcy trustees of some of the nation's largest trucking companies. Lloyd Whitaker, for example, the trustee for PIE Trucking Company, has sent out nearly \$700 million in balance due bills to former shipping clients. Recently, Whitaker has filed new undercharge claims at a rate of one thousand a week. *60 Minutes: You're Kidding!*, transcript at 20 (CBS television broadcast, Oct. 4, 1992).

96. William Augello, Vice President of the Transportation Claims and Prevention Council, "called the filed-rate doctrine an 'anachronism,' and added: 'it is unworkable, impracticable and inequitable . . . It has no place in today's transportation regulatory regime.'" John D. Shulz, *Shippers Beset by Undercharges Urge Repeal of "Filed-Rate" Doctrine*, *TRAFFIC WORLD*, Mar. 16, 1992, at 20, 20 (omission in original).

97. Augello reluctantly observed that "[t]he Teamsters union can single-handedly stop any piece of legislation in this country." *Id.* at 21.

98. More than 100,000 Teamsters lost jobs when trucking companies filed for bankruptcy. Owed millions of dollars in back pay and pension benefits, they see the undercharge bills as the only chance they have of ever receiving the money. *60 Minutes: You're Kidding!*, *supra* note 95, at 22.

rate doctrine would signal the immediate evaporation of all \$27 billion worth of undercharges; therefore, until a compromise is developed that takes into account the very desperate situation of Teamsters Union members, shippers' lobbying efforts will continue to be unsuccessful.<sup>99</sup>

No longer shielded by the protective cloak of the unreasonable practice defense and faced with the distinct possibility of perpetual congressional inaction, shippers recognize that the legitimacy of their final defense is about to be tested. The concept of rate reasonableness has always been a mainstay of the statutory framework and judicial opinions that drive motor carrier regulation. Now the reasonable rate principle takes on added significance—without it, shippers have no means of shielding themselves from \$27 billion of liability. It is up to the Supreme Court to determine whether such a protective device is warranted.

### III. RATE REASONABLENESS REVISITED: STRUCTURING A VALID DEFENSE

The *Maislin* decision has had a profound impact on the way circuit courts are handling undercharge litigation.<sup>100</sup> Although *Maislin* simplified one aspect of the undercharge issue by holding that shippers cannot seek refuge behind an unreasonable practice defense,<sup>101</sup> it rapidly has become evident to the circuit courts that other difficult questions—concerning the unreasonable rate de-

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99. One possible solution is that offered by the Coalition for an Undercharge Relief Bill (CURB), which is attempting to garner support for a proposal that would limit the number of shipments susceptible to undercharge claims. Essentially, CURB offers a compromise—appease the shippers by decreasing the exorbitant level of undercharge claims while still providing the Teamsters Pension Fund with the means to protect its unemployed union members. *Carrier-Shipper Roundtable Focuses on Undercharges, Regulation*, TRAFFIC WORLD, Apr. 20, 1992, at 15, 15.

100. A majority of the undercharge cases that are presently before district and circuit courts initially entered the judicial system prior to the Court's decision in *Maislin*. Most of these disputes began with referral to the ICC on unreasonable practice grounds over two and a half years ago.

101. With a quick cite to *Maislin*, district and circuit courts were able to dismiss shippers' unreasonable practice defenses. See, e.g., *Delta Traffic Serv. v. Appco Paper & Plastics Corp.*, 931 F.2d 5, 7 (2d Cir. 1991); *Lovett v. Honeywell, Inc.*, 930 F.2d 625, 627-28 (8th Cir. 1991); *West Coast Truck Lines v. Weyerhaeuser Co.*, 912 F.2d 1130, 1131 (9th Cir. 1990); *Delta Traffic Serv. v. Transtop, Inc.*, 902 F.2d 112 (1st Cir. 1992), *modifying* 902 F.2d 101 (1st Cir. 1990); *Horn's Motor Express v. Harrisburg Paper Co.*, 765 F. Supp. 211, 212-13 (M.D. Pa. 1991); *Overland Express v. International Multifoods*, 765 F. Supp. 1386, 1387 (S.D. Ind. 1990).

fense—still must be resolved.<sup>102</sup> ICC and Supreme Court recognition of the importance of rate reasonableness does not automatically justify an unreasonable rate *defense*. By definition, such a defense requires the ICC to address questions of rate reasonableness prior to a court's ruling on the merits of an undercharge claim.

A dispute concerning the validity of an unreasonable rate defense does not necessarily center on whether rate reasonableness is an important aspect of motor carrier regulation. In fact, carriers could concede the importance of such a requirement while still contending that it is inappropriate to make such determinations prior to the settling of the undercharge claims. Consequently, the remainder of this Note focuses on the key questions that must be asked when evaluating the legitimacy of a rate reasonableness defense. First, courts must decide whether a determination of rate reasonableness falls within the primary jurisdiction of the ICC. Second, courts need to determine whether the staying of district court proceedings and the subsequent referral of rate reasonableness disputes to the ICC are appropriate, or whether rate reasonableness determinations should only be made in separate reparations proceedings. If a referral mechanism is found appropriate, then courts may find it necessary to develop certain standards to evaluate whether a shipper's unreasonableness claim is, in fact, worthy of referral. An application of such precepts would provide the unreasonable rate defense with a type of flexibility that the unreasonable practice defense has never had.

#### A. *Primary Jurisdiction Concerns*

A shipper's ability to have the ICC evaluate its unreasonable rate defense prior to a district court's judgment on the undercharge claim is inextricably tied to whether the courts consider rate reasonableness determinations to be within the ICC's primary jurisdiction.<sup>103</sup> The Supreme Court regards the "maintenance of a

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102. Justice Brennan's tenth footnote, providing for the exploration of rate reasonableness on remand, *Maislin Indus., U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2767 n.10 (1990), immediately became the focus of the shippers' and courts' attention. *See, e.g.*, *Duffy v. BMC Indus.*, 938 F.2d 353, 355 (2d Cir. 1991); *Lovett*, 930 F.2d at 628; *Orr v. ICC*, 912 F.2d 119, 122 (6th Cir. 1990); *Covey v. ConAgra, Inc.*, 763 F. Supp. 479, 480-81 (D. Colo. 1991).

103. "Primary jurisdiction is invoked in situations where the courts have jurisdiction

proper relationship between the courts and the Commission in matters affecting transportation policy to be of continuing public concern";<sup>104</sup> and therefore, when claims "have been placed within the special competence of an administrative body . . . the judicial process [must be] suspended pending referral of such issues to the administrative body for its views."<sup>105</sup> The Court has recognized that the evaluation of tariff rates falls specifically within the primary jurisdiction of regulatory agencies.<sup>106</sup>

In defining the discrete roles of the judiciary and of administrative agencies, the Court has concerned itself with which body could more effectively handle a given dispute. Recognizing that a body of experts is best-equipped to make rate reasonableness determinations,<sup>107</sup> and hoping that such determinations could be made uniformly,<sup>108</sup> the Court has held that the ICC should be the first entity to consider the reasonableness issue. In *United States v. Morgan*,<sup>109</sup> the Court emphasized the importance of coordinated action by the courts and the agency, neither of which should "be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its pre-

over the claim from the very outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body." *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376 (10th Cir. 1989) (citations omitted).

104. *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956).

105. *Id.* at 64.

106. *See, e.g.*, *Nader v. Allegheny Airlines*, 426 U.S. 290, 304 (1976) (recognizing that the primary jurisdiction doctrine has been applied when "an action otherwise within the jurisdiction of the court raises a question of the validity of the rate . . . included in a tariff filed with an agency") (citations omitted). The origins of referring rate reasonableness claims to the ICC can be traced back seventy years. *See Great Northern Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922) (determining that the ICC must first be consulted when a rate is charged with being unreasonable or discriminatory); *see also Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) (holding that the ICC has the exclusive right to determine reasonableness).

107. These determinations are "reached ordinarily upon voluminous and conflicting evidence . . . [and an] adequate appreciation of . . . many intricate facts of transportation . . ." *Great Northern Ry.*, 259 U.S. at 291.

108. "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort . . . to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952); *see also Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 196 (1913) (describing the vesting of power "in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals").

109. 307 U.S. 183 (1939).

scribed statutory duty without regard to the appropriate function of the other *in securing the plainly indicated objects of the statute.*"<sup>110</sup> Keeping with this principle of coordinated action, some district courts require shippers to make an initial showing of unreasonableness to the district court prior to the invocation of the ICC's primary jurisdiction.<sup>111</sup> Where shippers "must make a threshold showing that the ICC could find the filed rates unreasonable" to justify referral,<sup>112</sup> the courts can still influence the manner by which shippers attempt to prove a given rate unreasonable. In *Atlantis Express v. Standard Transportation Services*,<sup>113</sup> for example, the court granted referral to the ICC only after it had determined that the shipper's attack on the reasonableness of the carrier's rates consisted of more than just an empty assertion. The shipper in that case had rooted its claim of unreasonableness in a series of concrete factors.<sup>114</sup>

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110. *Id.* at 191 (emphasis added). As expressed in *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94 (1915), the "plainly indicated object" of the ICA was to prevent unjust discrimination in interstate commerce by requiring strict adherence to filed rates "unless . . . found by the Commission to be unreasonable." *Id.* at 97 (emphasis added). Securing the plainly indicated object of the ICA, therefore, requires that the ICC and courts coordinate their efforts. The courts determine whether § 10761(a)'s filed rate requirement is fulfilled, and the Commission establishes the reasonableness of the rate. To properly effectuate transportation regulatory policies, "neither can rightly be regarded by the other as an alien intruder . . ." *Morgan*, 307 U.S. at 191.

111. See, e.g., *Covey v. ConAgra, Inc.*, 763 F. Supp. 479, 482 (D. Colo. 1991). This requirement, by prohibiting shippers from merely asserting unreasonableness, prevents abuse of the primary jurisdiction doctrine. See *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 68-69 (1956) ("[T]he mere fact that the issue is phrased . . . as a matter of reasonableness should not be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader.").

112. *Atlantis Express v. Standard Transp. Servs.*, 955 F.2d 529, 537 (8th Cir. 1992); see also *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip op. at 4 (3d Cir. Aug. 14, 1990) (The "mere mention of rate unreasonableness, entirely unsupported even now, is not sufficient to give [the shipper] a second bite at the apple."); *Oneida Motor Freight v. Ormond Shops*, 126 B.R. 431, 442 (D.N.J. 1991) ("[I]n order to merit referral of a matter to the ICC, a shipper must provide more than a bald, conclusory allegation of rate reasonableness."); *Covey*, 763 F. Supp. at 481 (rejecting the idea that a shipper "simply by mouthing the magic words, 'unreasonable rate,' wins an automatic trip to the ICC").

113. 955 F.2d 529 (8th Cir. 1992).

114. Factors applied by the ICC on a case-by-case basis to determine rate reasonableness include: "(a) relevant rate comparisons, (b) a carrier's proffer of a particular rate, (c) whether the rate would have moved the traffic had it been assessed at the time the shipment took place, (d) the class rates for like traffic, and (e) tariff analysis." *Petition for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 3 Fed.

## B. Referral v. Reparations

Although Supreme Court precedent suggests that rate reasonableness determinations fall within the primary jurisdiction of the ICC, the circuits are split as to whether the Commission should make such evaluations before or after the conclusion of district court proceedings.<sup>115</sup> The most common question that courts face regarding the rate reasonableness issue is whether shippers should assert unreasonable rate claims as defenses to carriers' undercharge actions or as independent claims in separate, subsequent, reparations actions.<sup>116</sup> The referral versus reparations dispute is the

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Carr. Rep. (CCH) ¶ 37,909, at 47,421 (ICC 1991). *Atlantis* specifically referred to the submission of "an extensive comparison of rates between [sic] Atlantis and other 'healthy' carriers that offered the same or similar services in the same territory during the same time period." 955 F.2d at 537-38 (citation omitted). Evidence that a carrier's rates exceeded competitors' rates has been found sufficient to warrant referral to the ICC. See, e.g., *Bergquist v. 7/24 Freight Sales (In re Sharm Express)*, 122 B.R. 999, 1004-05 (D. Minn. 1991) (finding that referral to the ICC is warranted based on shipper's assertion that carrier charged fifty percent more than competitors; the court inferred that, because it can be presumed that the competitors were earning a profit at the significantly lower rate, the carrier's rates were unreasonably high); *Horn's Motor Express v. Anchor Glass Container*, No. 1:CV-90-1030, 1991 WL 124621, at \*2 (M.D. Pa. Feb. 14, 1991) (determining that evidence of carrier's negotiated rates being half of its filed rate and information indicating that other shippers would have shipped goods over the same route for a substantially lower price than the carrier's rate is sufficient to justify referral to the ICC).

115. This division regarding the appropriate time for administrative consideration of rate reasonableness defenses was firmly established prior to *Maislin*. Compare *Delta Traffic Serv. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990) (permitting administrative challenge to carrier's presumably reasonable rates prior to payment of undercharge), modified by 902 F.2d 112 (1st Cir. 1992) with *Supreme Beef Processors v. Yaquinto (In re Caravan Refrigerated Cargo)*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254 (1990) (prohibiting administrative challenge prior to payment). Although the Fifth Circuit's position prevailed in *Maislin*, it was only a partial victory. *Caravan* held that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." 864 F.2d at 392. The *Maislin* Court agreed with *Caravan* only on that court's evaluation of the unreasonable practice defense. The Court did not hold that courts were prohibited from referring all unreasonableness defenses (including those addressing carriers' rates) to the ICC. Consequently, when a new undercharge case came before the Fifth Circuit in the summer of 1992, a panel of judges different from that which had decided *Caravan* issued an opinion that provided for the assertion of a reasonableness defense. See *Advance United Expressways v. Eastman Kodak Co.*, 965 F.2d 1347, 1352 (5th Cir. 1992) (holding that, in light of *Maislin*, shippers may assert rate unreasonableness as a defense and that district courts should refer such defenses to the ICC).

116. See, e.g., *Duffy v. BMC Indus.*, 938 F.2d 353, 355 (2d Cir. 1991); *Covey v. ConAgra, Inc.*, 763 F. Supp. 479, 484 (D. Colo. 1991). The Second Circuit argued that *Maislin* created much of the uncertainty surrounding the appropriateness of referral to the ICC. See *Duffy*, 938 F.2d at 355 (noting an apparent contradiction between *Maislin's*

most significant wrinkle in current undercharge litigation; its resolution hinges on an interpretation of the primary jurisdiction doctrine.<sup>117</sup> Circuit courts have expressed great concern about the effect a general referral or reparations policy would have on the shipper and carrier in particular, and the motor carrier industry in general. The First Circuit, for example, concluded that a referral system requiring the staying of district court proceedings is consistent with primary jurisdiction policies: "To stay the instant collection action, pending ICC determination of the tariffs' reasonableness, will not preclude eventual collection of any filed rate; it is not inequitable . . . [and] will permit decisionmaking by the expert body . . . ."<sup>118</sup> Most important, a system that refers rate

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emphasis on strict adherence to filed rates and the escape-hatch made available by footnote 10's allowance for the exploration of rate reasonableness on remand).

117. One of the most common mistakes found in the literature is the treatment of this dispute as a *Chevron*-based issue rather than as a problem that must be solved according to primary jurisdiction principles. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court articulated a standard of review for an agency's interpretation of its governing statute: Where Congress has not spoken directly to the question at issue, the Court will uphold an agency's interpretation if it "is based on a permissible construction of the statute." *Id.* at 843. In instances where the Court has clearly expressed its opinion as to the meaning of a statute, it is no longer appropriate to provide the administrative agency with *Chevron* freedom. Many commentators refuse to see *Maislin* as anything but a *Chevron* case. *See, e.g.*, Dennis L. Murphy, Comment, *Maislin Industries, U.S. v. Primary Steel, Inc.: What Happened to Deference?*, 41 CASE W. RES. L. REV. 627, 638 (1991) ("Since *Maislin* reviews an administrative agency decision, *Chevron* is the appropriate standard for reviewing that decision . . . ."). *Maislin*, however, established an exception to the deference normally afforded an administrative agency "where the agency's interpretation of statutory language conflicts with well established Supreme Court precedents." *International Bhd. of Teamsters v. ICC*, 921 F.2d 904, 907 (9th Cir. 1990) (citing *Maislin*, 110 S. Ct. at 2768). Specifically, the *Maislin* Court held that "once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Maislin Indus., U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990). For example, the Court established the ICA's clear meaning in the early twentieth century: To prevent unreasonable discrimination in the motor carrier industry, the shipper and carrier must adhere to those rates on file with the ICC unless the Commission declares them unreasonable. *See supra* notes 17-25 and accompanying text.

Probably no better evidence exists that undercharge litigation is not *Chevron*-driven than the briefs filed in *Reiter v. Cooper* by shipper, carrier, and *amicus* interests. *See, e.g.*, Brief for Respondent, *Reiter v. Cooper*, decision pending (U.S. 1993) (No. 91-1496); Reply Brief for Petitioners, *Reiter v. Cooper*, decision pending (U.S. 1993) (No. 91-1496); Brief of *Amici* National Industrial Transportation League (NITL), *Reiter v. Cooper*, decision pending (U.S. 1993) (No. 91-1496) (none of which make even a passing reference to *Chevron*).

118. *Delta Traffic Serv. v. Transtop, Inc.*, 902 F.2d 101, 106 (1st Cir. 1990), *modified*

reasonableness to the ICC directly protects shippers from paying potentially unreasonable rates until after a determination is made concerning the reasonableness of those rates.<sup>119</sup>

Sometimes, appellate courts, not sure of whether to adopt a referral or reparations system, stay district court proceedings and refer the rate reasonableness issue to the ICC. In *Duffy v. BMC Industries*,<sup>120</sup> the Second Circuit confronted a carrier that did not attempt to collect the undercharge until after the shipper's two-year reparations remedy, as delineated in 49 U.S.C. § 11706(c)(2), had expired.<sup>121</sup> Because a three-year limitations period governs carriers' undercharge claims,<sup>122</sup> preclusion of the shipper's unreasonable rate defense in *Duffy* would have effectively barred the shipper from ever being able to protect itself against potentially unreasonable rates.<sup>123</sup> The Second Circuit, although not prepared to settle the broad issue of referral versus reparations, chose to refer this particular case to the ICC, implicitly reaffirming the view that a referral mechanism is appropriate, at least under certain circumstances.<sup>124</sup>

Those courts that seek to prohibit referral mechanisms and to limit shippers to reparations actions<sup>125</sup> find the greatest support in *T.I.M.E., Inc. v. United States*.<sup>126</sup> The *T.I.M.E.* Court held that shippers have no right to assert a reasonableness defense, and that neither the ICC nor the Court has the power to question the reasonableness of common carriers' past filed rates.<sup>127</sup> The most

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by 902 F.2d 112 (1st Cir. 1992).

119. *Id.* Decisions such as *Advance United Expressways v. Eastman Kodak Co.*, 965 F.2d 1347, 1353 (5th Cir. 1992), suggest that only in instances in which "the district court finds that it can resolve the issues before it, using the plain language of the tariffs and the ordinary rules of construction, should the court then proceed to resolve the issues without referral to the Commission."

120. 938 F.2d 353 (2d Cir. 1991).

121. *Id.* at 357.

122. 49 U.S.C. § 11706(a) (1988).

123. 938 F.2d at 357-58.

124. *See also* *Atlantis Express v. Standard Transp. Servs.*, 955 F.2d 529, 536 (8th Cir. 1992) (recognizing the validity of the unreasonable rate defense in the limited context of parties agreeing to a negotiated rate and a shipper not having an adequate reparations remedy at the time of the undercharge litigation).

125. The right of reparations against carriers that charge unreasonable rates is found in 49 U.S.C. §§ 11705(b)(3) and 11706(c)(2) (1988). In addition, under § 11705(b)(2), if the ICC finds a rate unreasonable, the Commission is authorized to order the carrier to pay the shipper damages for overcharges.

126. 359 U.S. 464 (1959).

127. *Id.* at 470-72.

important feature of the *T.I.M.E.* decision was the Court's unwillingness to provide shippers with an unreasonableness defense, which sparked congressional legislation that provided shippers with the right to seek reparations against common carriers who had imposed unreasonable rates.<sup>128</sup> Noting that the congressionally enacted reparations proceedings would provide shippers with protection from unreasonable undercharge payments, the Fifth Circuit held in *In re Caravan Refrigerated Cargo*<sup>129</sup> that shippers must first pay the undercharges and only afterwards, in a separate proceeding, seek determinations from the ICC that the rates were unreasonable.<sup>130</sup>

The First Circuit challenged this "no referral" rule in *Delta Traffic Service v. Transtop, Inc.*<sup>131</sup> The court distinguished future rates from historic rates, noting that earlier Supreme Court decisions limited shippers to reparations when the disputes concerned rates not yet paid, but provided protection for shippers when carriers sought to collect existing undercharges. Again, the fact that so many of these carriers had gone bankrupt strongly influenced the court. Barring referral for ICC review of previously paid historic rates would increase the chances that shippers would be unable to protect themselves adequately by utilizing the ICA's reparations mechanism. *Transtop* maintained that referral procedures, although possibly not appropriate in all filed rate disputes, should be accepted when the undercharge is measured off of a historic rate.

The Second Circuit developed a middle ground between the shipper-favored referral system and the carrier-preferred reparations regime in *Delta Traffic Service v. Georgia-Pacific Corp.*<sup>132</sup> Although it held that the ICC should determine the reasonableness of the filed rate prior to carrier collection of the undercharge,<sup>133</sup> the Second Circuit chose not to vacate the district court's decision to award the carrier the underpayment.<sup>134</sup> Instead, the court required that the shipper's payments "be made to the district court

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128. The provision is now codified at 49 U.S.C. §§ 11705(b)(3) and 11705(c)(2).

129. *Supreme Beef Processors v. Yaquinto (In re Caravan Refrigerated Cargo)*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 3254 (1990).

130. *Id.* at 391-92.

131. 902 F.2d 101 (1st Cir. 1990), *modified by* 902 F.2d 112 (1st Cir. 1992).

132. 936 F.2d 64 (2d Cir. 1991).

133. *Id.* at 66.

134. *Id.*

and retained there until the ICC has decided how much, if any, should be repaid . . . by way of reparation."<sup>135</sup> The court reasoned that if Georgia-Pacific were left merely to seek reparations after it paid the undercharge to the carrier, little chance existed that the shipper would ever receive any money.<sup>136</sup> Impounding all payments made by the shipper, pending resolution of the rate reasonableness issue by the ICC, offered something for both sides. First, carriers were assured that funds for undercharge payments would be available even if the ICC took its time considering the reasonableness of the rates.<sup>137</sup> Second, because a majority of the carriers seeking collection of undercharges have been bankrupt since the mid-1980s, impounding the funds assured shippers that monies would be available for reparations.

### C. *Evaluating the Appropriateness of Rate Reasonableness Defenses*

It is somewhat of a misnomer to use the term "referral" when describing what shippers seek in the post-*Maislin* environment. Although shippers such as Primary Steel initially raised alternative defenses to the carriers' undercharge claims, the ICC—fully confident of the unreasonable practice defense—never addressed rate reasonableness.<sup>138</sup> Often, the reason why the ICC made no finding on rate reasonableness was because the shipper—suffering from similar overconfidence—did not pursue the issue before the ICC on referral.<sup>139</sup> Consequently, shippers' requests for the ICC to consider rate reasonableness defenses after June 1990 amount to requests for *re-referral*. Uncomfortable with the game-playing quality of such maneuvering, some district courts have searched for ways to limit shippers' ability to undermine the filed rate doctrine's regulatory structure while still allowing shippers to question the reasonableness of carriers' rates.<sup>140</sup> By applying the fol-

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135. *Id.*

136. The court noted that the carrier's Chapter 11 debtor status raised questions as to its ability to comply with a reparations order in the future. *Id.*

137. Taking too much time to render a decision could be a disservice to the shipper, however, because an unreasonable delay by the ICC would enable the carrier to petition the district court for earlier release of the undercharge award. *Id.*

138. See, e.g., *supra* notes 60-65 and accompanying text.

139. See, e.g., *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip op. at 3 (3d Cir. Aug. 14, 1990) (observing that no evidence had been provided by the shipper to support its contention that Branch's rates were unreasonable).

140. See, e.g., *Oneida Motor Freight v. Ormond Shops, Inc.*, 126 B.R. 431, 437 (D.N.J.

lowing qualifications to the rate reasonableness defense, the *Reiter* Court would be developing the type of compromise that both carriers and shippers could find palatable.

The first task of any court that considers granting re-referral to the ICC on the basis of a shipper's unreasonable rate claim is to distinguish between referral on the grounds of *rate* reasonableness and *practice* reasonableness.<sup>141</sup> Because the *Maislin* opinion condemned only one of these defenses, some courts have found it necessary to remind shippers and carriers of the distinctions between the two defenses. In *Branch Motor Express Co. v. Caloric Corp.*,<sup>142</sup> the Third Circuit acknowledged that the two defenses are independent of one another: "In principle, a shipper could have claimed both that it had a negotiated deal at a rate lower than the filed rate, and also that the filed rate was so high, in light of the carrier's cost, etc., as to be unreasonable under § 10701(e)."<sup>143</sup> Such a pronouncement makes clear the principle that an unreasonable rate defense can continue to operate despite the rejection of an unreasonable practice defense.

Because the two defenses are distinguishable, merely defining one in terms of the other could potentially cause the already prohibited unreasonable practice defense to engulf the unreasonable rate defense. In *Atlantis Express v. Standard Transportation Services*,<sup>144</sup> the Eighth Circuit correctly preempted shippers from masking unreasonable practice defenses in the guise of unreasonable rate defenses by noting that "if the ICC were to find a filed rate unreasonable simply because the carrier had negotiated a lower rate[,] . . . the filed rate doctrine [would] be under-

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1991). The court pointed out that the shipper never sought reconsideration or appeal after the ICC failed to address the issue of rate reasonableness when the case was initially referred to the Commission. *Id.* Only after *Maislin* struck down the *Negotiated Rates* policy—and with it the shippers' hopes of avoiding the undercharge with an unreasonable practice defense—did the shippers begin to grumble about the fact that the unreasonableness of the rates had not been considered.

141. See, e.g., *Atlantis Express v. Standard Transp. Servs.*, 955 F.2d 529 (8th Cir. 1992). The Eighth Circuit, not wanting the *Atlantis* decision to meet the same fate as its earlier *Maislin* opinion, 879 F.2d 400 (8th Cir. 1989), *rev'd*, 110 S. Ct. 2759 (1990), distinguished between unreasonable rate and practice defenses. "[U]nlike the ICC policy overturned in *Maislin*, the ability to challenge the reasonableness of filed rates in an action to collect rate undercharges does not render nugatory the filed rate doctrine." 955 F.2d at 537 (citations omitted).

142. No. 89-1130 (3d Cir. Aug. 14, 1990).

143. *Id.*, ship op. at 4.

144. 955 F.2d 529 (8th Cir. 1992).

mined."<sup>145</sup> Therefore, the mere fact that carrier and shipper have negotiated a lower rate is not sufficient evidence of a tariff rate's unreasonableness.<sup>146</sup> Requiring evidence of a given rate's unreasonableness, beyond a mere showing that the filed rate is higher than the negotiated rate, is one measure that courts can employ to keep the unreasonable rate and unreasonable practice defenses distinct. Consequently, to standardize the procedures for referring rate reasonableness to the ICC, the *Reiter* Court should implement a bright-line rule. Under such a rule, requests for referral of rate reasonableness defenses that are based on nothing more than a claim that the tariff rate is unreasonable in light of lower negotiated rates would be summarily denied, while those rate reasonableness defenses that make a good-faith attempt to consider the types of factors the ICC considers relevant in such circumstances would be granted.<sup>147</sup>

In addition to requiring more specificity in the shipper's rate reasonableness claim, the *Reiter* Court should attempt to measure the sincerity of the shipper's claim prior to granting referral on rate reasonableness grounds. One method involves restricting the shipper's rate reasonableness defense to the record created in the initial proceedings before the ICC.<sup>148</sup> In many instances, such a policy provides a good indication of how unreasonable the shipper

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145. *Id.* at 537; *cf.* *Oneida Motor Freight v. Ormond Shops, Inc.*, 126 B.R. 431, 442 (D.N.J. 1991) (holding that "a party seeking referral to the ICC must substantiate a challenge to the reasonableness of a filed rate so as to render it more than a bare allegation").

146. *See* *Covey v. ConAgra, Inc.*, 763 F. Supp. 479, 482 n.2 (D. Colo. 1991); *see also* *Branch Motor*, slip op. at 3-4 (where the only evidence presented as to rate unreasonableness was the difference between the filed and negotiated rates, referral to the ICC would not be granted). *But cf.* *Overland Express v. International Multifoods*, 765 F. Supp. 1386, 1387-88 (S.D. Ind. 1990) (noting that while substantial similarity among negotiated rates of several carriers does not necessarily prove a filed rate's unreasonableness, it does lend support to a showing of the negotiated rate's economic soundness and compliance with 49 U.S.C. § 10701(e) (1988)).

147. *See supra* note 114. The Court will have an opportunity to clarify the rate reasonableness defense this Term. *See* *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express)*, 949 F.2d 107 (4th Cir. 1991), *cert. granted sub nom. Reiter v. Cooper*, 112 S. Ct. 1934 (No. 91-1496).

148. *Oneida*, 126 B.R. at 443. The court considered any failure by shippers not to have litigated fully their rate reasonableness defenses to be "wholly unjustified." *Id.* *But see* *Bergquist v. 7/24 Freight Sales (In re Sharm Express)*, 122 B.R. 999, 1005 (D. Minn. 1991) (detailing shipper's position that it was not unreasonable not to present rate reasonableness prior to *Maislin* since such a defense "requires different and more technical evidence than the unreasonable practice defense . . . [and] would have been time-consuming, costly and superfluous").

actually considered the rates. Presumably, a shipper who believed it was truly paying unreasonable rates would have provided such information at the first available chance.<sup>149</sup>

A third means of evaluating the legitimacy of a shipper's unreasonable rate defense is to consider the timeliness of the request for referral on the unreasonable rate issue. It was only because the *Maislin* Court rejected the unreasonable practice defense that the issue of rate reasonableness arose. Because shippers may have avoided full development of their rate reasonableness defenses for strategic reasons prior to *Maislin*,<sup>150</sup> courts may find what the parties did immediately following *Maislin* to be of particular interest.<sup>151</sup> Courts are more likely to limit referral to the ICC when the shipper never asserted a rate reasonableness defense during the initial litigation. A judge can quickly distinguish between a shipper such as Primary Steel, which made a good faith effort to develop a timely unreasonable rate defense,<sup>152</sup> and one which only decided to assert the defense *after* the unreasonable practice theory had been eliminated by *Maislin*.<sup>153</sup> Timeliness considerations provide a further means of evaluating the sincerity of a shipper's unreasonable rate defense.<sup>154</sup>

In addition to being concerned about the sincerity and timeliness of shippers' defenses, the *Reiter* Court could limit the reach of shippers' rate reasonableness claims by empowering district court judges to evaluate the merits of the defenses on a case-by-

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149. In *Branch Motor*, the court refused to grant the shipper's request for referral—believing that the shipper had merely switched to an unreasonable rate defense after the *Maislin* decision foreclosed its negotiated rates-unreasonable practice defense. Slip op. at 3.

150. See *supra* text accompanying notes 69–70.

151. Compare *In re Sharm*, 122 B.R. at 1005 (observing that within two weeks of *Maislin*, the carrier moved the ICC to reopen proceedings and to permit new evidence regarding the rate reasonableness defense) with *Oneida, Inc.*, 126 B.R. at 437 (noting that the affidavits and exhibits presented by the defendants in support of their rate reasonableness defense actually spoke more to the reasonableness of the carrier's practices).

152. See, e.g., *Maislin Indus., U.S. v. Primary Steel, Inc.*, 1990 WL 264536, at \*2 (W.D. Mo. Nov. 21, 1990) (“A review of the record in the instant case convinces this Court that Primary Steel clearly pled the reasonableness claim in this Court and presented that issue to the ICC for determination on reference from this Court.”).

153. See, e.g., *Delta Traffic Serv. v. Appco Paper & Plastics Corp.*, 931 F.2d 5, 7 (2d Cir. 1991) (“[U]nlike the carrier in *Maislin*, *Oneida* never properly asserted a defense of rate unreasonableness and has failed to advance a persuasive basis for its interposition at this late date.”).

154. See, e.g., *id.* (declining “to remand to the district court for consideration of a defense which has been raised for the first time on appeal”).

case basis. Rather than placing an absolute bar on the use of the unreasonable rate defense, as the *Maislin* Court did to the unreasonable practice defense, the *Reiter* Court should qualify the use of the rate reasonableness defense by enabling the lower courts to determine whether the defense is worthy of referral to the ICC. Having lower courts initially consider the legitimacy of unreasonable rate defenses does not severely infringe on the ICC's primary jurisdiction. Rather, the courts would be serving a useful pre-screening function, by separating legitimate defenses that are worthy of referral from those that are not. The unreasonable rate defense's legitimacy could be measured by determining whether the unreasonable rate defense is more than just a reworded unreasonable practice defense.

The unreasonable rate defense took center stage in the Fourth Circuit's 1991 *Cooper v. Delaware Valley Shippers* decision.<sup>155</sup> The scenario was the familiar one: a motor carrier, Carolina Motor Express (CMX), provided transportation services to shippers at privately negotiated rates; shippers believed that those rates would be filed with the ICC; shippers paid the negotiated rates in full, incorrectly assuming that CMX's rates had been published; CMX filed for bankruptcy, and an auditor discovered the undercharge; the bankruptcy trustee filed suit on behalf of CMX to recover the difference between the collected negotiated rate and the applicable filed rate.<sup>156</sup> Realizing that an unreasonable practice defense would be of no assistance in the post-*Maislin* environment, defendants argued that referral to the ICC should be granted to determine whether the carrier's filed rates were reasonable.<sup>157</sup> The validity of rate reasonableness determinations, in general, was not disputed in *Cooper*.<sup>158</sup> Rather, the court divided on the same question that had created a split between the First and Fifth Circuits:<sup>159</sup> "whether the shippers should be allowed to dispute the

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155. *Cooper v. Delaware Valley Shippers (In re Carolina Motor Express)*, 949 F.2d 107 (4th Cir. 1991), cert. granted sub nom. *Reiter v. Cooper*, 112 S. Ct. 1934 (1992) (No. 91-1496).

156. *Id.* at 109.

157. *Id.*

158. The Fourth Circuit, like so many other courts, see, e.g., *Duffy v. BMC Indus.*, 938 F.2d 353, 355 (2d Cir. 1991); *Orr v. ICC*, 912 F.2d 119, 122 (6th Cir. 1990); *Oneida Motor Freight v. Ormond Shops, Inc.*, 126 B.R. 431, 440-41 (D.N.J. 1991), recognized that *Maislin's* tenth footnote supported the consideration of the rate reasonableness issue on remand. 949 F.2d at 110.

159. See *supra* note 115.

reasonableness of the rates in the context of the undercharge action [through referral to the ICC], or whether their sole recourse should be an independent reparations action under 49 U.S.C. § 11705(b)(3)."<sup>160</sup>

The most interesting aspect of the *Cooper* decision involves the Fourth Circuit's rationale for why a rate reasonableness defense should not stay district court proceedings. Writing for the majority, Judge H. Emory Widener rejected a referral system, believing that it "would provide a strong incentive for shippers routinely to contest the validity of the carrier's rates in order to delay paying the carrier's filed rate."<sup>161</sup> The court considered referral to be first and foremost a strategic ploy designed to circumvent the filed rate doctrine's requirement that carriers and shippers strictly adhere to those rates on file with the ICC.<sup>162</sup>

The Fourth Circuit correctly noted that the issue of a tariff rate's reasonableness can be raised in a separate proceeding either before or after the undercharge suit is filed, and that payment of reparations is available to the shipper.<sup>163</sup> However, the mere existence of a reparations system which can theoretically protect a shipper's interests does not justify the complete elimination of a referral-based mechanism. To prevent excessive delay in rate reasonableness determinations and to eliminate unsubstantiated unreasonableness claims, the *Cooper* court should not have considered that its only option was to limit shippers to reparations proceedings. If the court were genuinely concerned that the availability of a referral system would promote abusive tactics on the part of shippers, then it should have included a consideration of safeguards that would insulate the referral process from shippers' subversive actions.<sup>164</sup>

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160. *Cooper*, 949 F.2d at 112 (Hall, J., concurring in part and dissenting in part) (footnote omitted).

161. *Id.* at 110.

162. 49 U.S.C. § 10761(a) (1988); *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). The *Cooper* majority—devoted to the reparations provisions afforded under the ICA—"would give automatic judgment to the trustee and make the shipper pay a possibly unreasonable, unlawful and unenforceable rate." 949 F.2d at 113 n.3 (Hall, J., concurring in part and dissenting in part).

163. *Cooper*, 949 F.2d at 110.

164. Judge Kenneth K. Hall, concurring in part and dissenting in part, was not prepared to abandon the referral process merely because it is potentially prone to abuse. Instead, he contended that "a complaining shipper should be required to present a threshold level of evidence of unreasonableness before referral is warranted . . ." *Id.* at

## IV. CONCLUSION

The most effective way to gain insight into the status of motor carrier regulation is to consider *Maislin* and the upcoming *Reiter* decision jointly. In 1990, the Court commenced its most recent analysis of the filed rate doctrine by evaluating the legitimacy of the ICC-engineered unreasonable practice defense. Two years later, as part of the same dialogue, the Court is poised to determine what role, if any, unreasonable rate defenses ought to play in undercharge litigation. At first glance, it might appear that *Maislin's* rejection of the *Negotiated Rates* policy would necessarily entail treating rate reasonableness in a similar fashion. After all, both defenses share a common purpose—limiting the ICA's mandate that carriers and shippers adhere to filed rates. Upon closer examination, however, it becomes evident that rejection of the unreasonable practice defense and acceptance of its unreasonable rate counterpart are not necessarily inconsistent.

The unreasonable practice defense is an ICC construct. Although the text of section 10701(a) includes "practices" in its prohibition of unreasonableness, neither the language of the ICA nor Supreme Court precedent interpreting the congressional enactment forbids a carrier from collecting undercharges after it has already collected lower, negotiated rates. In fact, *Maislin* represents the first time the Court has even considered the reasonableness of carriers' pricing practices. The principle that rates must be reasonable, however, has been—for over a hundred years—an integral component of transportation regulatory policy. Maintaining the reasonableness of carrier rates is necessary to ensure that Congress's paramount purpose in regulating motor carriers—the prevention of unjust discrimination—is preserved. The ICA, primarily through sections 10701(a) and 10701(e), articulates specific means for evaluating reasonableness. Additionally, the Supreme Court has always made rate reasonableness considerations an important part of its analysis of the filed rate doctrine. Analyzing the reasonableness of carrier rates in the context of referral proceedings is most faithful to the statutory and judicial regime that has dominated motor carrier regulation throughout the twentieth century. Only by ensuring that reasonableness determinations are

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113. Similar stipulations—driven by the concern that claims of rate unreasonableness not be mere allegations—have been announced by other courts. See *supra* notes 141–54 and accompanying text.

made prior to the exchange of any money will the Court be able to guarantee that carriers and shippers will function under lawful pricing schemes. The *Maislin* Court's elimination of shippers' unreasonable practice defense, when coupled with the Teamsters Union's ability to thwart congressional attempts to repeal the filed rate doctrine, has magnified the importance of the rate reasonableness defense.

Competing public policies, defined by the economic realities that accompany undercharge litigation, make resolution of the undercharge dilemma a difficult task.<sup>165</sup> On the one hand, the economic interests of unemployed workers in the motor carrier industry must be considered. The \$27 billion in potential undercharges represents the only hope these individuals have of ever receiving back pay and pension benefits that evaporated when their employers went bankrupt. On the other hand, shippers desperately seek the repeal of the antiquated filed rate doctrine. The MCA, although deregulating the motor carrier industry, never eliminated the filed rate doctrine. Consequently, shippers have been unable to benefit from the application of ordinary contract interpretation to the agreements they have formed with motor carriers. Instead, section 10761(a)'s requirement that the industry operate exclusively under filed rates preserves the regulatory scheme of another era; it thus keeps a \$27-billion cloud looming ominously over shippers' heads. For shippers, the overriding public policy consideration is that their industry must be protected from the undercharge claims, whether such protection comes from an ICC-created policy prohibiting carriers from collecting the differ-

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165. Although beyond the scope of this Note, strong public policy concerns dictate that the undercharge dilemma must not be resolved without also examining the issue of which branch of the government should modify the filed rate doctrine's provisions. Is government being faithful to time-honored separation of powers principles if, in the face of an absolutely clear congressional enactment, it permits executive branch agencies to create rules and regulations that abrogate the law? It is critical to ask whether administrative involvement in the resolution of undercharge litigation collapses the distinctions made between the three branches of government. The ICC's *Negotiated Rates* policy raised the distinct possibility that an administrative agency had gone beyond mere interpretation of its governing statute and crossed into the legislature's domain. For an informative discussion of the evolution of ICC carrier regulation, see generally RICHARD D. STONE, *THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY 100-94* (1991) (analyzing procedural, organizational, and philosophical changes within the ICC over the past fifteen years).

ence between filed and negotiated rates, or from judicial protection from unreasonable rates.

Because of the *Maislin* decision, the ICC's alternative is no longer an option. The unreasonable practice defense would have effectively barred the collection of all undercharges because the negotiation of a rate, followed by a carrier's attempt to collect the difference between that rate and a higher filed rate, would, by definition, have been illegitimate. Permitting an unreasonable rate defense does not necessarily implicate the same type of all-or-nothing scenario. Specifically, limitations can be placed on the availability of such a defense that would prevent it from operating as an absolute bar to carriers' claims. In the last two years, several district and circuit courts have suggested qualifications that would make an unreasonable rate defense compatible with the filed rate doctrine.<sup>166</sup> If the *Reiter* Court chooses to provide shippers with a certain degree of protection from undercharge liability, it should recognize that its options extend beyond the traditional, and somewhat inflexible, referral and reparations mechanisms. The Court can apply any of the following series of tests to a proposed unreasonable rate defense to create a more flexible system:

- (1) whether the record demonstrates that the shipper has offered evidence suggesting that the rate is unreasonable for reasons other than the fact that the tariff rate is significantly higher than the negotiated rate (permitting a rate reasonableness defense without other evidence would amount to implicit acceptance of the unreasonable practice defense);
- (2) whether the shipper's claim of rate unreasonableness appeals to section 10701(e) market concerns rather than merely being a bald assertion;
- (3) whether limiting the shipper to the record created during initial referral to the ICC on the unreasonable practice issue would assist in determining the sincerity of a rate reasonableness claim;
- (4) whether the shipper's assertion of a rate reasonableness defense was timely (timeliness should be measured either by how soon after *Maislin*'s dismissal of the unreasonable practice defense the shipper offered new evidence to support the unreasonable rate claim or by a determination that the shipper did not assert an unreasonable rate defense until after *Maislin* dismissed the *Negotiated Rates* policy);

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166. See *supra* notes 141-54 and accompanying text.

- (5) whether the shipper will have a reparations mechanism available to it if the rate reasonableness defense is disallowed (it is possible that the carrier could be bringing the undercharge suit after the two-year period available for reparations actions has expired);
- (6) whether requiring district court impoundment of the undercharge payment will provide the shipper with sufficient protection in a subsequent reparations proceeding; and
- (7) whether a rate reasonableness defense should be allowed at least in a situation in which the carrier is bankrupt and collection of reparations will be more difficult.

Permitting district courts to stay proceedings pending ICC determination of rate reasonableness will not result in the death of the filed rate doctrine. The unreasonable practice theory was agency-driven, and the *Maislin* Court correctly prevented the ICC from abrogating the ICA. An unreasonable rate defense, on the other hand, is driven by specific statutory provisions and clearly articulated Supreme Court precedent. Preservation of an unreasonable rate defense and the continued existence of an overall regulatory scheme are not mutually exclusive.

