ADMINISTRATIVE LAW—Trucking Companies Charging Less than Their Tariff Filed with the Interstate Commerce Commission May Recover Undercharges from Shippers Despite Deregulation of the Trucking Industry—*Maislin Industries v. Primary Steel*, 110 S. Ct. 2759 (1990).

I. INTRODUCTION

In 1982, Primary Steel Corporation ("Primary Steel") orally negotiated a decrease in the rates charged by Quinn Freight Lines ("Quinn Freight"), a trucking company and subsidiary of Maislin Industries.[1] A new "rate sheet"[2] was prepared reflecting the decrease.[3] Thereafter, Primary Steel and Quinn Freight negotiated a rate calculated by mileage for destination rates not listed on the rate sheets.[4] Because Primary Steel's representative in the negotiations was not trained in tariffs, Primary Steel relied on Quinn Freight to file the rates properly with the Interstate Commerce Commission ("ICC").[5] However, Quinn Freight never filed the negotiated rates.[6]

In 1983, Maislin Industries filed for bankruptcy.[7] The bankruptcy trustees discovered Quinn Freight had charged Primary Steel rates below those filed with the ICC for 1081 interstate shipments of steel.[8] An audit of Quinn Freight's accounts revealed it undercharged Primary Steel $188,000, and the trustees requested payment from Primary Steel.[9] When Primary Steel refused to pay, the trustees brought suit in federal district court seeking the difference between the filed rates and the negotiated rates for the transportation of the steel.[10]

Because the federal district court found the issues raised by the dispute within the "primary jurisdiction"[11] of the ICC, the court stayed the proceeding

1. Maislin Indus. v. Primary Steel, 110 S. Ct. 2759, 2764 n.6 (1990).

2. A rate sheet is "a statement by the carrier to the possible shippers that it will furnish certain services under certain conditions for a certain price." Union Wire Rope Corp. v. Atchison T. & S.F. Ry., 66 F.2d 965, 966 (8th Cir.), *cert. denied*, 290 U.S. 686 (1933).

3. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2764-65 n.6.

4. *Id.*

5. *Id.* at 2765 n.7.

6. *Id.* at 2764.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Such suits must be brought within a statute of limitations established by the Interstate Commerce Act ("ICA"). 49 U.S.C. § 11706(a) (1988). The ICA provides in part: "A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . must begin a civil action to recover charges for transportation or service provided by the carrier within [three] years after the claim accrues." *Id.*

11. "Primary jurisdiction" is a doctrine of law based on the principle of judicial self-restraint. It is applied when a court determines an issue is "within the special competence of an administrative body." United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956). "By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for

and referred the case to the ICC.[12] The ICC found it would be an "unreasonable practice now to require Primary [Steel] to pay the undercharges."[13] When the ICC returned the case to the district court, the court granted Primary Steel's motion for summary judgment on the grounds that "the Commission's final determination should be accorded substantial deference."[14] The Eighth Circuit Court of Appeals affirmed on the grounds that "the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the [Interstate Commerce Act[15] ('ICA')]."[16]

On appeal the United States Supreme Court *held*, reversed and remanded.[17] Trucking companies charging less than their tariff filed with the Interstate Commerce Commission may recover undercharges from shippers despite deregulation of the trucking industry. *Maislin Indus. v. Primary Steel,* 110 S. Ct. 2759 (1990).

II. Regulation of the Trucking Industry

The resolution of the *Maislin* dispute over undercharges for the transportation of steel is important because it may result in significant financial liability for shippers, like Primary Steel, that rely on negotiated rates in shipping their goods. *Maislin* is also important because it provides insight into the role of the judiciary in reviewing the actions of administrative agencies.

In 1935, Congress amended the ICA to regulate competition in the trucking industry.[18] The legislation authorized the ICC to control entry of trucking companies into the marketplace by requiring all companies obtain certificates of convenience and necessity.[19] In addition, the ICC was autho-

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reviewing courts to substitute their discretion for that of the agency." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-21 (1966).

12. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2764. *See* Primary Steel v. Maislin Indus., No. MC-C-10961 (ICC Jan. 12, 1988).

13. Primary Steel v. Maislin Indus., No. MC-C-10961, 10 (ICC Jan. 12, 1988).

14. Maislin Indus. v. Primary Steel, 705 F. Supp. 1401, 1402 (W.D. Mo. 1988); *see also* Maislin Indus. v. Primary Steel, 110 S. Ct. at 2765.

15. *See supra* note 10 for further discussion of the Interstate Commerce Act.

16. Maislin Indus. v. Primary Steel, 879 F.2d 400, 406 (8th Cir. 1989).

17. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2771. The Court remanded the case to the district court for further proceedings consistent with the majority opinion. *Id.*

When the case reached the Supreme Court, four other U.S. circuit courts had agreed with the Eighth Circuit's reasoning in *Maislin*. *Id.* at 2772 n.1 (Stevens, J., dissenting). *See* Delta Traffic Serv. v. Transtop, 902 F.2d 101 (1st Cir. 1990); Orscheln Bros. Truck Lines v. Zenith Elec. Corp., 899 F.2d 642 (7th Cir.), *vacated*, 111 S. Ct. 334 (1990); West Coast Truck Lines v. Weyerhaeuser Co., 893 F.2d 1016, *vacated*, 912 F.2d 1130 (9th Cir. 1990). The only circuit holding to the contrary was the Fifth Circuit. *See In re* Caravan Refrigerated Cargo 864 F.2d 388 (5th Cir. 1989).

18. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2775-76 n.10 (Stevens, J., dissenting).

19. *Id.* (Stevens, J., dissenting).

rized to establish minimum and maximum rates "to protect the railroads from motor carrier competition as well as to safeguard the motor carrier industry from 'destructive' competition within its own ranks."[20]

The statutory framework authorizing the ICC to regulate rates is extensive. Section 10741 of the ICA prohibits trucking companies from setting discriminatory rates.[21] Section 10762 requires carriers to publish their rates in a tariff filed with the ICC,[22] and section 10761 imposes a duty on carriers to charge only the rate filed with the ICC.[23] Section 10701 also requires that rates and practices be "reasonable."[24]

To enforce the statutory prohibition on price discrimination, the courts developed the "filed rate doctrine."[25] This judicial doctrine requires a trucking company to charge only the rate the company filed with the ICC.[26] The doctrine also prohibits shippers from using common law contract defenses, such as estoppel and mistake, to resist trucking companies' demands that the

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20. *Id.* (Stevens, J., dissenting) (quoting REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMM'N TO STUDY THE ANTITRUST LAWS 265 (1955)).

21. Section 10741 provides:

> (a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered. . . . A common carrier that charges or receives a different compensation for that service unreasonably discriminates.
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> (b) 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 . . . .

49 U.S.C. § 10741(a), (b) (1988).

22. Section 10762(a)(1) provides in part: "A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs." 49 U.S.C. § 10762(a)(1) (1988).

23. Section 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title 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 whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. § 10761(a) (1988).

24. Section 10701(a) provides in part: "A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable . . . ." 49 U.S.C. § 10701(a) (1988).

25. Maislin Indus. v. Primary Steel, 110 S. Ct. 2759, 2766 (1990).

26. *Id.*

filed rate be paid.[27] In 1915, Justice Brandeis explained the filed rate doctrine:

> "Under 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 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. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. 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 commerce in order to prevent unjust discrimination."[28]

The filed rate doctrine does recognize one statutory exception: if the ICC finds a rate or billing practice unreasonable, the rate or practice is not enforceable.[29] "The ICC has primary responsibility for determining whether a rate or practice is reasonable."[30] If the ICC finds a rate or practice is not reasonable, the ICA authorizes the Commission to "prescribe the rate . . . or practice to be followed."[31]

For one hundred years, the filed rate doctrine has been used by the judiciary to interpret the ICA and to adjudicate rate disputes among shippers and carriers.[32] Although working a "'hardship in some cases,'"[33] the Court found the doctrine useful because it was simple to apply, reflected Congressional transportation policy, and complemented ICC interpretation and administration of price regulation.[34]

III. DEREGULATION OF THE TRUCKING INDUSTRY

When President Jimmy Carter signed the Motor Carrier Act ("MCA") of 1980[35], the "intricate rules and ritualized protection" surrounding the

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27. *Id.*

28. *Id.* (quoting Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97 (1915)).

29. *Id.* at 2767 (citing Arizona Grocery v. Atchinson, T. & S.F. Ry. Co., 284 U.S. 370, 384-85 (1932)).

30. *Id.* at 2762 (citing Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-42 (1907)).

31. 49 U.S.C. § 10704(b)(1) (1988).

32. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2766. (The Senate Report quoted by the Court dates from the 19th century).

33. *Id.* (quoting Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97 (1915)).

34. *See id.* at 2776 (Stevens, J., dissenting). According to Justice Stevens, "In its applications during the period of regulatory control over motor carrier ratemaking, the doctrine was for the most part applied to reinforce the policies and decisions of the regulatory agency." *Id.* (Stevens, J., dissenting). Justice Stevens also noted that "[a]s the Court's opinion makes clear, there was no tension between judicial interpretation and agency policy in the cases that developed the filed rate doctrine." *Id.* at 2776 n.12 (Stevens, J., dissenting).

35. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).

trucking industry were relaxed.[36] The express purpose of the MCA was to "'promote competitive and efficient transportation services.'"[37] Using authority granted under the MCA, the ICC moved accordingly to deregulate the trucking industry by (1) loosening entry controls, (2) establishing a "zone of reasonableness" in which carriers can raise rates without ICC approval, (3) allowing motor carriers to operate as both common carriers[38] and contract carriers,[39] and (4) allowing common carriers to put decreased rates into effect one day following the filing of a tariff.[40]

These statutory changes resulted in "deregulation rate wars [and] several thousand motor carrier bankruptcies in the 1980's [sic], thus turning loose a horde of bankruptcy trustees looking for assets."[41] According to the Supreme Court in *Maislin*, these statutory changes also resulted in "a growing trend . . . whereby carriers and shippers negotiate rates lower than those on file with the ICC and the shippers are billed for and remit payment at the negotiated rate. In many instances, however, the negotiated rate is never filed with the ICC."[42]

In response to the "growing trend" of below tariff billing and the resulting carrier-shipper disputes, the ICC adopted a "Negotiated Rates" policy in 1986.[43] This policy stated the collection of undercharges by trucking

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36. Rene Sacasas & Nicholas A. Glaskowsky, Jr., *Motor Carrier Deregulation: A Decade of Legal and Economic Conflict*, 18 TRANSP. L.J. 189, 189 (1990).

37. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2769 (quoting Pub. L. 96-296, § 4).

38. A common carrier is any carrier that offers services to the public generally for the transportation of persons or property and is required by law to convey passengers or freight without refusal if the approved fare or charge is paid. *See* Tilson v. Ford Motor Co. 130 F. Supp. 676, 678 (E.D. Mich. 1955).

39. "A contract carrier transports property under exclusive agreement with a shipper . . . ." Maislin Indus. v. Primary Steel, 110 S. Ct. at 2769 (citing 49 U.S.C. § 10102(14) (1982)). The MCA of 1980 allowed motor carriers to operate as both common carriers and contract carriers for the first time. *Id.* (citing Pub. L. No. 96-296 § 10(b)(1), amending 49 U.S.C. § 10930(a)(1982)). The impact of this provision is that "a carrier and shipper who want to get out from under tariff regulation altogether have only to negotiate a contract of carriage, and then the lawful price is the price in the contract rather than in any filed tariff." *Id.* at 2777 (Stevens, J., dissenting) (citing Orscheln Bros. Truck Lines v. Zenith Elec. Corp., 899 F.2d 642 (7th Cir.), *vacated*, 111 S. Ct. 334 (1990)).

40. *Id.* at 2770 (citing Short Notice Effectiveness for Independently Filed Rates, 1 I.C.C.2d 146 (1984), *aff'd sub nom.* Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985)).

41. Sacasas & Glaskowsky, *supra* note 36, at 192.

42. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2763. "Given the rate wars resulting from deregulation, and the pricing concessions made by many motor carriers desperate to generate cash flow, it was inevitable that many new tariffs—including many not filed with the ICC—would reflect lower rates than earlier tariffs." Sacasas & Glaskowsky, *supra* note 36, at 191.

43. *See* National Industrial Transportation League—Petition to Institute Rule Making on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) [hereinafter "Negotiated Rates I"]. Negotiated Rates I stated that "'it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim for undercharges'" and that the ICC had the authority to determine whether the collection of an undercharge would constitute an unreasonable practice.

companies or their bankruptcy trustees was an "unreasonable practice" under the ICA.[44] According to the ICC, its new policy did not represent a "relaxed interpretation" of a trucking company's duty to charge only a rate filed with the Commission.[45] Rather, the ICC said that its new policy merely provided for a "separate determination" of whether a trucking company's rates or billing practices were reasonable.[46] The ICC asserted that the promulgation of this policy was "well within this agency's authority (and indeed duty) to reinterpret the Interstate Commerce Act, based upon experience gained and changing circumstances."[47]

IV. THE ICC AND *MAISLIN*

When the federal district court referred *Maislin* to the ICC, it asked the Commission to consider "whether Maislin's freight *rates* and charges were unreasonable and whether Maislin's *practice* of assessing and rebilling Primary Steel for tariff rates higher than those originally negotiated by the parties constituted an unreasonable practice."[48]

The ICC began its analysis of the Maislin-Primary Steel dispute with an investigation of "whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts."[49] Reviewing the relationship between Quinn Freight and Primary Steel, the ICC found: (1) Quinn Freight had offered non-tariff rates to Primary Steel, (2) the rates were accepted by Primary Steel, and (3) Primary Steel had reasonably relied on Quinn Freight's rate quotations.[50]

After making these factual findings, the ICC applied its Negotiated Rates I policy to the facts. The ICC found Quinn Freight "had engaged in an unreasonable *practice* in violation of [section] 10701 that should preclude it from collecting the filed rate."[51] The Commission did not, however, determine

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Maislin Indus. v. Primary Steel, 110 S. Ct. at 2763 (quoting Negotiated Rates I, 3 I.C.C.2d at 103).

The Commission later modified this policy in NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) [hereinafter "Negotiated Rates II"]. In Negotiated Rates II, the ICC stated its policy did not recognize "equitable defenses" but rather applied the statutory requirement that a carrier's practices be reasonable. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2763 (citing Negotiated Rates II, 5 I.C.C.2d at 631 n.18).

44. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2764 (citing Negotiated Rates II, 5 I.C.C.2d at 103).

45. *Id.* at 2763 n.4 (citing Negotiated Rates II, 5 I.C.C.2d at 631).

46. *Id.* (citing Negotiated Rates II, 5 I.C.C.2d at 631).

47. *Id.* (citing Negotiated Rates II, 5 I.C.C.2d at 631).

48. Maislin Indus. v. Primary Steel, 879 F.2d 400, 402 (8th Cir. 1989) (emphasis added).

49. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2764 (citing App. to Pet. for Cert. 35a).

50. *Id.* at 2764-65; *see also* Maislin Indus. v. Primary Steel, 705 F. Supp. 1401, 1406-07 (W.D. Mo. 1988).

51. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2767 (emphasis added).

whether the filed *rates* sought to be collected by Maislin Industries were reasonable.[52]

V. THE MAJORITY OPINION IN *MAISLIN*

In *Maislin*, the Supreme Court discussed whether the ICC's interpretation of the term "unreasonable practice" in its Negotiated Rates policy was consistent with the purpose and text of the ICA.[53] Both the district court and the Eighth Circuit Court of Appeals found the ICC Negotiated Rates policy was a reasonable response to congressional deregulation of the trucking industry and consistent with the ICC's authority under the ICA.[54]

The Supreme Court reversed, determining the ICC had no statutory authority to replace the filed rate doctrine with the Negotiated Rates policy.[55] Justice Brennan's majority opinion undertook a three-part analysis of the ICC policy change, and concluded the Negotiated Rates policy "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular."[56]

First, the Court stated judicial review of the ICC Negotiated Rates policy must be guided by the doctrine of *stare decisis*.[57] "For a century," the majority opinion stated, "this Court has held the [ICA], as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. Congress has not diverged from this interpretation and we decline to revisit it ourselves."[58]

Second, the Court found the Negotiated Rates policy inconsistent with the purpose and language of the ICA. The "core purpose" or policy goal of the ICA, in the Court's opinion, is to prevent price discrimination.[59] According to the Court, when the ICC replaced the filed rate doctrine's insistence on the collection of the filed rate with a reasonableness review under the Negotiated

52. *Id.* at 2767 n.10.

53. *Id.* at 2768. The Court limited its opinion to the "justification for departure from the filed tariff schedule that the ICC set forth in its Negotiated Rates policy." *Id.* at 2768. According to the Court, "We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule. But we need not resolve that issue today." *Id.* at 2767-68.

54. Maislin Indus. v. Primary Steel, 879 F.2d 400, 406 (8th Cir. 1989). "The ICC may therefore alter its past interpretation and we must accept that change if the new interpretation is reasonable." *Id.* (citing Chevron, U.S.A. v. NRDC, 467 U.S. 837, 844-45 (1984)). "Nothing prohibits the ICC from changing its policy on enforcing the 'unreasonable practice' provision of section 10701(a)." Maislin Indus. v. Primary Steel, 705 F. Supp. 1401, 1405 (W.D. Mo. 1988).

55. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2762.

56. *Id.* at 2768.

57. *Id.*

58. *Id.* (quoting California v. FERC, 495 U.S. 490, 499 (1990) ("recognizing the respect 'th[is] Court must accord to long-standing and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes'")).

59. *Id.* at 2769.

Rates policy, it "permitted the very price discrimination the [ICA] by its terms seeks to prevent."[60] Justice Brennan's majority opinion also discussed the inconsistencies between the ICC Negotiated Rates policy and the scheme, structure, and language of the ICA.[61] The structure and language of the ICA, referred to by the majority, is the "close interplay between the duties [of carriers to charge shippers only the filed rate] and the statutory prohibition on discrimination."[62]

Third, the Court rejected the argument that congressional deregulation of the trucking industry in 1980 made the filed rate doctrine obsolete. According to the Court, "Nothing in the MCA repeals [sections] 10761 and 10762 or casts doubt on our prior interpretation of those sections. Generalized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements."[63] Thus, although the Motor Carrier Act made many changes in the ICA, it did not alter the text of the requirements that rates be filed and that only the filed rate be charged. The failure of Congress to specifically address these requirements convinced the Court that preventing price discrimination was still the major policy goal of the statute. "If strict adherence to [sections] 10761 and 10762 as embodied in the filed rate doctrine has become an anachronism in the wake of the MCA," the majority opinion stated, "it is the responsibility of Congress to modify or eliminate these sections."[64]

In a concurring opinion, Justice Scalia endorsed reliance on the text of the ICA rather than the "regulatory climate" in which the ICA operates to determine its meaning.[65] According to Scalia, the ICC's statutory authority to find a pricing practice unreasonable does not include authority to dismiss a shipper's liability for undercharges.[66] The ICC could not interpret the term

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60. *Id.* at 2768 (citing 49 U.S.C. § 10741 (1988)). In identifying the purpose of the ICA the Court stated: "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." Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908).

61. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2768-69.

62. *Id.* at 2766. See *supra* notes 22-23 for text of sections 10761(a) and 10762(a)(1) of the ICA.

63. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2770 (citing Square D Co. v. Niagara Frontier Traffic Bureau, 476 U.S. 409, 420 (1986) (regarding another long-standing interpretation of the ICA, "'Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and . . . Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980.'")).

64. *Id.* at 2771. Similarly, Justice Scalia wrote in his concurring opinion that although the Motor Carrier Act of 1980 "reflects an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme*. Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours." *Id.* at 2772 (Scalia, J., concurring).

65. *Id.* at 2771 (Scalia, J., concurring).

66. *Id.* (Scalia, J., concurring).

"unreasonable practice" to have many meanings. In Scalia's view, however, the term "unreasonable practice" could not be used to label as "unreasonable" a practice designed to prevent price discrimination because it is used in a statute designed primarily to prevent price discrimination.[67]

The Court's resolution of the Maislin-Primary Steel dispute is important because it reaffirms the vitality of the filed rate doctrine. Despite amendment of the ICA in 1980 to deregulate the trucking industry, the Court found Congress did not modify the ICA's goal of preventing price discrimination.[68] One practical lesson learned from *Maislin* is that shippers must continue to pay close attention to the statutory requirements of the Interstate Commerce Act when negotiating rates with common carriers.[69]

Importantly, *Maislin's* holding addresses only the ICC's authority to declare the recovery of undercharges an unreasonable *practice*. The opinion does not address the ICC's ability to determine that filed *rates* are unreasonable. Because the ICC did not consider the reasonableness of Quinn Freight's filed rates, the Court assumed for purposes of its decision the rates were reasonable.[70] The Court stated, however, that the reasonableness of the rates filed by Quinn Freight was "open for exploration on remand."[71]

VI. *MAISLIN* AND ADMINISTRATIVE LAW

At a practical level, *Maislin* involved a conflict between a trucking company and a shipper over undercharges for the transportation of steel. At a more fundamental level, however, *Maislin* also involved a conflict of administrative law[72] between the ICC and the Supreme Court over the agency's power to declare the collection of undercharges an unreasonable practice.

The conflict over ICC authority in *Maislin* arose from congressional efforts to deregulate the trucking industry by providing trucking companies with substantially more authority to set their own rates.[73] When large

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67. *Id.* (Scalia, J., concurring).

68. *Id.* at 2768.

69. Shippers defending an undercharge suit by a carrier or a bankruptcy trustee should also pay close attention to the statute of limitations on suits brought under the ICA. *See supra* note 10.

70. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2767 n.10.

71. *Id.* Presumably, if the reasonableness of the filed rates was an issue on remand, the district court would again send the case to the ICC. Among the considerations that could be raised to determine whether filed rates are unreasonable are: Comparing rates of other carriers for similar services, determining whether the shipper would have moved the freight at the filed rate, and arguing that class rates have "'lost their role as a standard of reasonableness'". *Shippers Ask the ICC to Set Guidelines for Unreasonable Rates*, DISTRIBUTION, Jan. 1991 at 16.

72. Administrative law "sets forth the powers which may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action." BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1 (1976).

73. Deregulation has been defined as "cutting back Federal controls." S. REP. NO. 1018, 96th Cong., 2d Sess. 2 (1980).

numbers of undercharge disputes began to develop between carriers and shippers in the new competitive environment, the ICC looked to its governing statute for authority to settle the disputes.[74] Although the ICC found Congress' 1980 amendment of the Interstate Commerce Act gave it authority to declare the collection of undercharges an unreasonable practice,[75] the Supreme Court in *Maislin* held the ICC overstepped its statutory authority.[76] *Maislin* thus raises an important issue of administrative law: what are the appropriate roles for the judiciary and administrative agencies in the interpretation of regulatory statutes?

Two opposing views of the proper functions of courts and administrative agencies in interpreting regulatory statutes have emerged over the years.[77] In one view, the responsibility for interpreting a statute rests principally with the court. The court merely weighs the administrative agency's reading of the statute as one factor in its analysis of the powers granted to the agency by Congress.[78] In the opposing view, the agency has principal responsibility for interpreting its governing statute.[79] The court determines only whether the agency's interpretation is a "rational" reading of the statute and not whether it is the "correct" reading.[80]

In 1983, however, the Supreme Court ended "judicial vacillation" between these two views with its holding in *Chevron U.S.A. v. NRDC*.[81] *Chevron* established the principle that "[t]he federal judiciary must defer to an agency's reasonable construction of a statute it is charged with enforcing, if Congress has not directly addressed the question at issue."[82] The *Chevron* Court outlined a two-step analytical process for application of the deference principle. First, a court must determine whether Congress has "directly addressed" the issue presented.[83] Second, if Congressional intent is not clear,

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74. *See supra* text accompanying note 43.

75. *See supra* text accompanying note 44.

76. *See supra* text accompanying note 55.

77. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989).

78. *Id.* at 452-53.

79. *Id.* at 453.

80. *Id.*

81. Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984). Justice Scalia has called *Chevron* "[a] highly important decision, perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*." Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989) (citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978)).

82. Lawrence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990).

83. Chevron, U.S.A. v. NRDC, 467 U.S. at 842-43. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

a court should examine the reasonableness of the agency's construction of the statute.[84]

The ICC's assertion in *Maislin* that it had statutory authority to declare the collection of undercharges an unreasonable practice presented exactly the kind of issue to which *Chevron* was intended to apply. Despite the importance assigned by the Court and administrative law commentators to *Chevron*, however, the *Maislin* Court chose not to apply the framework.[85]

At least two reasons can be suggested for the Court's failure to invoke *Chevron* in *Maislin*. First, the two-step analysis suggested by *Chevron* is artificial and awkward. The *Maislin* court, for example, blurred all distinctions between the two steps when it wrote:

> The ICC argues that its conclusion is entitled to deference because [section] 10701 does not specifically address the types of practices that are to be considered unreasonable *and* because its construction is rational and consistent with the statute. . . . We disagree.[86]

Neither here, nor anywhere in the majority opinion did the majority clearly indicate whether the agency's interpretation of the ICA failed because it was in conflict with an unambiguous expression of congressional intent, or whether it failed because it was an impermissible interpretation of an ambiguous statute. Presumably, if the Court viewed the statute as unambiguous, it would not have undertaken a detailed review of its purpose, text, and policy environment. Yet, the majority seemed to suggest the ICC's interpretation failed to pass even the first part of the *Chevron* analysis. At one point, the court stated the ICC "does not have the power to adopt a policy that *directly conflicts* with its governing statute."[87]

A second possible reason for the *Maislin* Court's failure to invoke *Chevron* is the lack of consensus on how to determine whether Congress has spoken to the precise question at issue. Justice Stevens' opinion in *Chevron*, for example, argued the "traditional tools of statutory construction," including legislative history, may be used to determine congressional intent.[88] Scalia, however, has sharply criticized the use of legislative history to determine Congressional intent.[89] This debate continued in *Maislin*—Scalia wrote

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84. *Id.* at 843. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. *Id.* Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

85. Justice Stevens, the author of the Court's *Chevron* opinion, criticized the Court for not considering "*Chevron*—or any other case involving deference to agency action—worthy of extended discussion." Maislin Indus. v. Primary Steel, 110 S. Ct. at 2779.

86. *Id.* at 2768 (emphasis added) (citation omitted).

87. *Id.* at 2770 (emphasis added).

88. Chevron, U.S.A. v. NRDC, 467 U.S. at 837, 843 n.9, 851-53 (1984).

89. INS v. Cardoza-Fonsesca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

separately to support the Court's reliance on the text of the statute and to criticize Stevens' reliance on "the regulatory climate within which the statute then operated."[90]

Maislin is important to administrative law because it raises questions about the vitality of *Chevron*. The Court's failure to give *Chevron* serious consideration and its inability to reach a consensus on how to apply the principle of deference reflect weaknesses in the application of the deference principle that may become fatal. As Justice Scalia noted, "the chink in *Chevron*'s armor . . . that prevents it from being an absolutely clear guide to future judicial decisions" is this question: "How clear is clear?"[91]

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90. Maislin Indus. v. Primary Steel, 110 S. Ct. at 2771 (Scalia, J., concurring).
91. Scalia, *supra* note 81, at 520.