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Administrative Adjudication—A New Legal Standard for Its Use—Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 103 S. Ct. 358 (1982)

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ADMINISTRATIVE ADJUDICATION—A NEW LEGAL STANDARD FOR ITS USE—*Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1982).

In many situations, federal agencies are statutorily permitted to make policy by either adjudication or rulemaking.[1] It is not always clear, however, when agencies must use one procedure rather than the other. Although courts have traditionally refused to specify situations in which an agency must use rulemaking or adjudication,[2] a change away from this judicial deference toward agency discretion may now be occurring.

In *Ford Motor Co. v. FTC*,[3] the Ninth Circuit Court of Appeals established guidelines for when rulemaking alone must be used. *Ford* involved an appeal from a prior Federal Trade Commission finding that an automobile dealer, Francis Ford, Inc., had violated section 5 of the Federal Trade Commission (FTC) Act[4] by failing to refund to defaulting consumers surpluses gained upon resale of repossessed cars. Such refunds are required by the Uniform Commercial Code (U.C.C.), section 9-504.[5] Although important substantive questions were at issue on appeal,[6] the court refused to reach the merits of the case and dismissed it on procedural

1. Agencies use rulemaking and adjudication to formulate legislative-type rules, and to secure compliance with existing rules and regulations. The general procedures for both rulemaking and adjudication are set out in the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–59 (1976). Rather than limiting agencies to one of the two available procedures, Congress often provides agencies with the power to use either. *See, e.g.*, Federal Communication Act, 47 U.S.C. § 303 (1976); Federal Trade Commission Act, 15 U.S.C. §§ 47, 57a (1976); Labor Management Relations Act, 29 U.S.C. §§ 156, 160 (1976); Occupational Safety and Health Act, 29 U.S.C. §§ 655, 659 (1976).

2. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 290–95 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969); SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947); Florida Power & Light Co. v. FERC, 617 F.2d 809, 816 (D.C. Cir. 1980); NLRB v. St. Francis Hospital, 601 F.2d 404, 414 (9th Cir. 1979); Colby-Bates-Bowdoin Educ. Telecasting Corp. v. FCC, 574 F.2d 639, 643 (1st Cir. 1978); Arkansas-Best Freight Syss., Inc. v. OSHRC, 529 F.2d 649, 656 (8th Cir. 1976).

3. 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1982).

4. 15 U.S.C. § 45(a)(1) (1976), which provides that "[u]nfair methods of competition in or affecting commerce . . . are declared unlawful."

5. In Oregon, where this action originated, U.C.C. § 9-504 has been enacted as OR. REV. STAT. § 79.5040 (1981). Both U.C.C. § 9-504 and OR. REV. STAT. § 79.5040 (1981) provide in relevant part:

> (1) A secured party after default may . . . dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing . . . . The proceeds of disposition shall be applied in the order following to (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like . . . (b) the satisfaction of indebtedness secured by the security interest . . . .
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> (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus . . . .

6. The primary substantive issue presented to the court involved the delineation of items that could be included among the reasonable expenses deductible from resale proceeds under U.C.C. § 9-504. *See infra* note 39.

grounds, ruling that the agency had abused its discretion by relying on adjudication. Such an abuse occurs, the *Ford* court held, when an agency uses adjudication to change existing law and to establish rules of widespread application.[7]

This Note examines prior case law concerning agency use of adjudication for policy formulation. It also analyzes policy considerations both for and against that practice. The Note concludes that the Ninth Circuit's formula for abuse of discretion represents a new, and inadvisable, legal standard. Although *Ford* may have been an appropriate case for rulemaking, the court created an overly broad standard for when rulemaking must be used. This standard may preclude judicial consideration of policy factors favoring adjudication when the result of the adjudication is one which changes existing law and has widespread application. Furthermore, the *Ford* standard might deprive agencies of flexibility in deciding how to proceed in the face of a particular problem, a flexibility long recognized as critical for an effective administrative process.

I. LEGAL BACKGROUND

A. Statutory Requirements

The formal procedures[8] for rulemaking and adjudication are outlined in the Administrative Procedure Act (APA).[9] *Ford* concerned the question of when one of those procedures, adjudication, could not be used. There are no clear answers to this question. It is not specifically addressed by the APA, which only defines the two terms. Furthermore, the APA definitions that are provided are so broad as to be of only marginal utility. One commentator, for example, has characterized the APA definition of rulemaking[10] as encompassing "virtually all agency action having future

7. 673 F.2d at 1010.

8. Although not covered by the federal APA, informal procedures also exist for securing compliance to agency policies.

> For example, the "lifted eyebrow," backed by a veiled or express threat of prosecution, of nonrenewal of a license, or of publicity, can be an effective means of declaring and applying a given policy free from the restraints of judicial review. There is also the private ruling or advisory opinion, which may or may not receive general publicity and may or may not be binding on the agency. Speeches and press releases are frequently resorted to for the announcement of important policies or views.

Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV 921, 923–24 (1965).

9. 5 U.S.C. §§ 551–59 (1976).

10. 5 U.S.C. § 551(5) (1976) defines rulemaking as the "agency process for formulating, amending, or repealing a rule." A rule means:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, pro-

effect."[11] A similarly broad definition is accorded adjudication, which is defined as the agency process for formulating an order, or the "final disposition . . . [by] an agency in a matter other than rulemaking."[12] In short, the APA defines adjudication as being that which rulemaking is not.

APA legislative history also fails to answer the question of when adjudication cannot be used. The main historical source, the *Attorney General's Manual on the Administrative Procedure Act,*[13] gives the following guidelines:

> The object of the rulemaking proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate . . . to the policy- making conclusions to be drawn from the [evidentiary] facts. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally . . . the proceeding is characterized by an accusatory flavor and may result in disciplinary action.[14]

These guidelines establish that rulemaking is oriented towards the future, whereas adjudication is oriented towards the past. The distinction between the two procedures remains unclear, however, when a particular problem involves both past conduct and future policy. *Ford* typifies this problem. The proceeding had two purposes: (1) to create future policy regarding refund of surpluses; and (2) to determine whether Francis Ford, Inc. should be liable for its past conduct. Neither the APA nor the Attorney General's comments specify what procedure should be used in such a dual purpose proceeding. Consequently, the answer to this dilemma must be derived almost solely from case law.

B. Judicially Created Requirements

As a general rule, courts have allowed agencies to use their own discretion in choosing whether to use rulemaking or adjudication.[15] Courts have, however, made exceptions to this rule, especially when they per-

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cedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

5 U.S.C. § 551(4) (1976).

11. Shapiro, *supra* note 8, at 924.

12. 5 U.S.C. § 551(6)–(7) (1976).

13. U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947).

14. *Id.* at 14 (citation omitted).

15. *See* cases cited *supra* note 2.

ceive an abuse of discretion by the agency.[16] Typically, an abuse of discretion is found when the use of adjudication imposes substantial hardship on one of the parties involved.[17]

1. Rule of Deference to Agency Discretion

The United States Supreme Court first announced a policy of judicial deference to an agency's choice between rulemaking and adjudication in *SEC v. Chenery Corp. (Chenery II)*.[18] Reasoning that the nature of agency tasks requires flexibility of procedure, the *Chenery II* Court stated that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[19] The court did note that adjudication is most appropriate when a case involves unforeseeable situations, when agency experience with a particular problem is limited, or when a problem is so unique that a rule would have no future application.[20] Nevertheless, the Court refused to create any rigid requirements regarding when general rules should be promulgated, as that "would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."[21]

The Court's deference to agency discretion was not wholly without limits. Although it refused to specify situations in which rulemaking must be used, the Court did express a preference for rulemaking procedures, stating that "[t]he function of filling in the interstices of the [Public Utility Holding Company] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."[22]

Despite these qualifications, *Chenery II* has generally been interpreted as permitting agencies to make new law through adjudication.[23] Agencies

16. *See infra* notes 25–36 and accompanying text.

17. *See infra* notes 27–33 and accompanying text.

18. 332 U.S. 194 (1947). *Chenery II* involved an attempt by the defendant corporation to have the SEC adopt an order permitting the corporation's management to purchase its corporate stock during reorganization under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79–79z (1976). The SEC denied the order, using an adjudicative process. The Supreme Court upheld the Commission's choice of adjudication, as the Commission had stated that it might have allowed the order under a different set of facts.

19. *Id.* at 203.

20. *Id.* at 202–03.

21. *Id.* at 202.

22. *Id.*

23. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.25 (2d ed. 1978).

therefore have frequently used adjudicatory proceedings to formulate policies, a practice widely criticized for its often unfair effects.[24]

2. *Limits on Agency Discretion*

Perhaps in response to this criticism, courts have created judicial limits on an agency's discretion to use adjudication.[25] The United States Supreme Court announced one of the most important limits on agency discretion in *NLRB v. Bell Aerospace Co.*[26] Although the Court upheld the agency's use of adjudication in *Bell Aerospace,* it stated that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion."[27] According to the *Bell Aerospace* Court, an abuse of discretion occurs when an adjudication results in substantial hardship to the parties involved.[28]

Substantial hardship may result if a party has relied upon published rules or policies that are subsequently changed by adjudication. This can happen not only when the change occurs in the case at bar, but also when the change occurred in a prior adjudication of which the party had no notice. *Ruangswang v. Immigration and Naturalization Service*[29] illustrates this latter situation. In a prior adjudication the Immigration and Naturalization Service had added a new requirement for changing alien status. The new requirement would have resulted in a denial of Ruangswang's request for a change of alien status even though he had complied with other published requirements. It would also have resulted in Ruangswang's deportation. Because Ruangswang had no notice of the adjudicatory requirement, and because that lack of notice resulted in a

24. *See, e.g.,* 2 K. DAVIS. *supra* note 23; Baker, *Policy by Rule or Ad Hoc Approach—Which Should it Be?,* 22 LAW & CONTEMP. PROBS. 658 (1957); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 YALE L.J. 728 (1961); Shapiro, *supra* note 8.

25. One such limitation was provided by the Court in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), in which the Court held that agencies may not announce a rule in an adjudication without applying it in the particular case. In *Wyman-Gordon,* the NLRB had attempted to apply a rule announced prospectively in a prior adjudication, Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966). The *Wyman-Gordon* court found the *Excelsior* rule to be invalid because it had not been applied in the *Excelsior* case. Nevertheless, the Court ruled that the NLRB could formulate the same rule in *Wyman-Gordon,* and that the newly stated rule was valid so long as it applied to the Wyman-Gordon Corporation.

26. 416 U.S. 267 (1974).

27. *Id.* at 294.

28. The *Bell Aerospace* Court provided specific examples of when adjudicatory results would yield a finding of abuse of agency discretion. These examples included imposing liability for past actions taken in good faith reliance on agency pronouncements, imposing significant fines or damages for conduct seemingly lawful when engaged in, and imposing liability when application of a new and different rule would cause substantial adverse consequences because of a party's reliance upon prior agency decisions. *Id.* at 295.

29. 591 F.2d 39 (9th Cir. 1978).

substantial adverse effect—deportation—the court ruled that application of the requirement was an abuse of agency discretion.[30]

Courts have also found that agencies have abused their discretion when they create rules through adjudication that have substantial impact on the public as well as the party involved.[31] Thus, in *Texaco, Inc. v. Federal Power Commission*,[32] the Third Circuit Court of Appeals found that the Federal Power Commission (FPC) had improperly circumvented rulemaking procedures by using adjudication to impose a compound interest rate on gas companies. The court refused to enforce the FPC's order because the amount of money involved was potentially large and therefore significant, and because the higher utility rates would affect the public.[33]

3. *Additional Factors*

Several other factors may influence a court in finding an abuse of agency discretion. One is that the adjudicatory rule would retroactively impose a penalty on a party when no rule had previously governed the conduct at issue.[34] Another is the lack of non-party participation when rules are made in an adjudication.[35] Courts have also suggested that hardship sufficient to amount to an abuse of discretion might occur if an agency formulated an adjudicative rule requiring one party to cease a practice while permitting a competitor to continue to engage in the practice without sanction.[36] To permit the agency to proceed against one vio-

30. *Id.* at 44. *See also* Hirunpidok v. Immigration and Naturalization Serv., 641 F.2d 778, 780 (9th Cir. 1981) (application of subsequent judicially created job-opportunity expansion requirement to alien investor improper when petition met requirements of regulation in effect at time of application); Bahat v. Sureck, 637 F.2d 1315, 1320 (9th Cir. 1981) (investment requirement imposed by Immigration and Naturalization Service Board of Appeals could not be applied to petitioner because he had not had adequate notice of requirement at time of application); Patel v. Immigration and Naturalization Serv., 638 F.2d 1199, 1205 (9th Cir. 1981) (judicially created job expansion requirement improperly implied to alien seeking investor exemption because alien received "confusing signals" from Immigration and Naturalization Service).

31. Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740, 743 (3rd Cir. 1969). *See also* Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972) (abuse of discretion to issue directive without publication and notice when directive makes it more difficult for aliens to find jobs and for employers to fill vacancies); Nat'l Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90, 96 (D.C. Cir. 1967) (abuse of agency discretion not to use formal rulemaking when establishing procedure for reparations to shippers from carriers because form and scope of procedure are important to the industry and the public), *aff'd mem.*, 393 U.S. 16 (1968).

32. Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3d Cir. 1969).

33. *Id.* at 743.

34. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (may be abuse of discretion to use adjudication where fines or damages involved).

35. *See infra* notes 75–78 and accompanying text.

36. *See* FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967) (FTC "does not have unbri-

lator among many would place that party at a severe competitive disadvantage.

II. THE *FORD* COURT'S REASONING

On February 10, 1976, the FTC issued nine complaints[37] against automobile dealers, manufacturers, and financers for violating section 5 of the FTC Act.[38] The FTC claimed that these companies had violated section 5 by improperly calculating the reasonable expenses deductible from any surplus due the defaulting consumer upon resale of a repossessed car.[39] The subsequent administrative adjudication involved only defendant Francis Ford, Inc., as all other defendants had settled with the Commission.[40] At the adjudication, the Administrative Law Judge (ALJ) found that due to its improper calculation of reasonable expenses, Francis Ford

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dled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry"). *But see* Johnson Prod. Co. v. FTC, 549 F.2d 35, 41 (7th Cir. 1977) (FTC has discretionary power to enter a cease and desist order "against one firm that is practicing an industry-wide illegal trade practice") (quoting L.G. Balfour Co. v. FTC, 442 F.2d 24 (7th Cir. 1971)).

37. In addition to the complaint against Francis Ford, complaints were issued against Ford Motor Co., the Ford Motor Credit Co., General Motors Corp., General Motors Acceptance Corp., Chuck Olson Chevrolet, Chrysler Motors Co., Chrysler Motors Credit Corp., and Aurora Chrysler Plymouth. Brief for Respondent at 6–7, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981).

38. *See supra* note 4.

39. When a consumer purchases an automobile on credit, he or she normally executes a monthly installment contract granting the creditor a security interest in the vehicle as protection against nonpayment. Then, if the customer defaults on his or her monthly payments, the creditor repossesses the automobile and resells it, either wholesale or retail. Under the provisions of U.C.C. § 9-504, any surpluses realized upon resale, less reasonable expenses, must be refunded to the defaulter.

One of the principal substantive issues presented to the court was whether it should uphold that part of the Commission's order establishing what were "reasonable expenses" deductible from resale proceeds under U.C.C. § 9-504. Prior to the FTC order issued against Francis Ford, dealers typically interpreted reasonable expenses as including overhead costs as well as direct out-of-pocket expenses. Overhead costs are the general, continuing costs of a business, such as rent, taxes, utility payments and fixed wages. As such, they are incurred regardless of whether a vehicle is repossessed. The FTC order prohibited including overhead as a deductible reasonable expense. Instead, reasonable expenses included only: (1) costs of repossession, towing, etc.; (2) court costs, registration, title fees, and inspection fees; (3) amounts paid to others for storage; (4) labor and parts for reconditioning the repossessed vehicle; (5) sales commissions to the sales person if the vehicle was resold at retail; (6) advertising costs directly related to the vehicle; (7) auction expenses if the vehicle was disposed of through an auction; (8) telephone and postage costs related to the vehicle; and (9) amounts paid to the financing institution. Ford Motor Co., 94 F.T.C. 564, 636–38 (1979), *vacated,* Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 358 (1982).

40. The other defendants consented both to desist from the challenged practices and to repay more than $2.5 million in surpluses to over 10,000 persons whose vehicles had previously been repossessed. The figures pertaining to the amount and numbers of refunds are from the FTC's Petition for Rehearing and Suggestion for Rehearing En Banc at 4, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 358 (1982) (copy on file with the *Washington Law Review*). The consent order is printed at 45 Fed. Reg. 14,870–80 (1980).

had failed to make refunds as required by U.C.C. section 9-504.[41] The ALJ concluded that Francis Ford had thereby violated section 5 of the FTC Act by engaging in an unfair or deceptive act or practice.[42]

Francis Ford appealed the Commission's decision to the Ninth Circuit Court of Appeals.[43] Although several issues were argued on appeal,[44] the court addressed only one question: "whether the FTC should have proceeded by rulemaking . . . rather than by adjudication."[45] Noting that the FTC order would have widespread effect,[46] and would change existing interpretations of U.C.C. section 9-504,[47] the *Ford* court answered the question affirmatively. Consequently, the court vacated the order.

Unlike prior abuse of discretion cases which had focused on the presence of substantial hardship,[48] the *Ford* court based its finding of abuse of discretion on two factors: (1) that the rule established by the FTC would have widespread application; and (2) that the rule would change existing law.[49] In adopting these two factors, the *Ford* court relied heavily on a

41. Ford Motor Co., 94 F.T.C. 564, 588–94, *aff'd by the Commission*, 94 F.T.C. 564, 607, 616 (1979), *vacated*, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1982).

42. *Id.* at 594–96. *See supra* note 4 (text of § 5). Accordingly, Francis Ford was ordered to cease its refund calculation methods and to calculate and repay all future surpluses in accordance with procedures specified by the FTC. *Id.* at 636–47. Whether a surplus existed was to be determined by subtracting the sum of the debtor's contract balance plus reasonable expenses from the actual proceeds gained upon resale of a repossessed automobile. *Id.* For an itemization of what the FTC considered to be reasonable expenses, see *supra* note 39.

Francis Ford was also ordered to notify customers whose automobiles had been repossessed after issuance of the FTC complaint that they may be due a refund. Francis Ford was not ordered to pay these refunds, however, as the Commission felt that it lacked power to issue such an order.

The Commission reasoned that an order to repay "unlawfully witheld" past surpluses would conflict with Heater v. FTC, 503 F.2d 321 (9th Cir. 1974). 94 F.T.C. at 622–23. The *Heater* court held that the Commission lacked authority to order restitution for violations of law committed prior to the entry of a cease and desist order. After *Heater*, Congress amended the FTC Act to permit restitution after a cease and desist order by means of a district court proceeding in which "the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent." Magnuson-Moss Act, Pub. L. No. 93-637, § 206(a), 88 Stat. 2201–02 (1975) (codified at 15 U.S.C. § 57b(a)(2) (1976)). Accordingly, the Commission expressly reserved its right in *Ford* to bring a § 57b(a)(2) action against Francis Ford. 94 F.T.C. at 624 n.19.

43. *See* 15 U.S.C. § 45(c) (granting any person required by an FTC order to "cease and desist from any method of competition or act or practice" the right to obtain a review of such order in a United States court of appeals).

44. Brief for Respondent at 1–2; Brief for Petitioner at 1–2; Ford Motor Co. v. FTC, 673 F.2d 1008 (1981), *cert. denied*, 103 S. Ct. 358 (1982).

45. 673 F.2d at 1009.

46. The *Ford* court reasoned that the rule of the *Ford* adjudication would have widespread effect because credit practices similar to those of Francis Ford are widespread in the car dealership industry and because U.C.C. § 9-504 has been enacted into law in 49 states. *Id.* at 1010.

47. *Id.* at 1009–10.

48. *See supra* text accompanying notes 25–32.

49. 673 F.2d at 1009–10.

previous Ninth Circuit decision, *Patel v. Immigration and Naturalization Service*,[50] which it characterized as establishing a general standard specifying when an agency's reliance on adjudication is impermissible. According to the *Ford* court, the thrust of *Patel* was that "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application."[51] Therefore, under *Patel*, whether adjudication is an abuse of agency discretion depends upon "whether [the] adjudication changes existing law and has widespread application."[52] The court found both of these elements present in the FTC's proceeding against Ford.

The *Ford* court found that the FTC's interpretation of U.C.C. section 9-504 changed existing law, because the Commission had cited no cases that had similarly interpreted the statute.[53] The court also reasoned that because the provision is part of the law in forty-nine states, the adjudication against *Ford* would have widespread effect by creating "a national interpretation of U.C.C. section 9-504."[54]

III. ANALYSIS OF THE *FORD* COURT'S REASONING

The decision handed down in *Ford* severely limits agencies' freedom of choice to decide whether to proceed by rulemaking or adjudication. Some limitation on this freedom is perhaps desirable for, as the abuse of discretion cases illustrate,[55] agencies do not always exercise their discretion wisely. The court's decision in *Ford*, however, is unsupported by prior case law, is unnecessary to achieve policy objectives, and adopts a rule that is overly broad.[56]

50. 638 F.2d 1199 (9th Cir. 1980).

51. 673 F.2d at 1009.

52. *Id.* at 1010.

53. *Id.*

54. *Id.* The practices found unlawful in *Ford* are widespread in the automobile dealership industry. *Id.* at 1008–10. It should be noted, however, that the FTC believes Francis Ford's practices are particularly violative of the FTC Act and U.C.C. § 9-504. Brief for Respondent at 12–15.

55. *See supra* text accompanying notes 29–32.

56. Although *Ford* does not fit within any of the prior rationales advanced by courts for finding an abuse of discretion, it does not necessarily follow that the FTC should have used adjudication. As the Supreme Court stated in *Chenery II*, adjudication is properly used when a case involves unforeseeable situations, limited agency experience, or a unique problem. SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947). Unlike other cases that upheld use of adjudication over arguments of impropriety, such as NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), and SEC v. Chenery Corp., 332 U.S. 194 (1947), *Ford* did not involve unique facts. Unlike *Bell Aerospace*, for example, it cannot be said of *Ford* that "[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility." 416 U.S. at 294. Indeed, the case arose from complaints issued to

A. *Prior Case Law on Abuse of Agency Discretion*

1. Patel v. Immigration and Naturalization Service

The *Ford* court cited only one case, *Patel v. Immigration and Naturalization Service*,[57] as precedent for its abuse of discretion standards. *Patel*, however, is fully distinguishable from *Ford*. *Patel*, like *Ruangswang v. Immigration and Naturalization Service*,[58] turned on a finding of extreme hardship due to reliance on a prior rule. Like *Ruangswang*, *Patel* involved denial of a change in status to an alien on the basis of a requirement added in a previous adjudication. The court concluded that application of the requirement to Patel would improperly circumvent rulemaking procedures.[59] More importantly, the court found that the Immigration and Naturalization Service had sent aliens "confusing signals" about the change in status requirements, and therefore had abused its discretion in applying the new requirement to Patel.[60] This finding was clearly influenced by the harsh result of applying the rule in question to Patel—depor-

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nine parties encompassing most of the American automobile industry and its financing subsidiaries. *See supra* note 37; Brief for Respondent at 6–7.

Nor did the FTC in *Ford* need to preserve its freedom to develop a rule on a case-by-case basis due to lack of experience with the particular problem. The "Synopsis of Determinations," *see infra* note 73, issued in the *Ford* adjudication was anything but tentative. Rather, it appeared to be a final statement on the subject of calculating refunds.

Finally, the case did not involve unforeseeable problems to which the Commission had to respond quickly, or for which the agency lacked expertise. The FTC's longstanding concern with this problem is apparent from a prior proposed rule concerning credit practices. 40 Fed. Reg. 16,347 (1975). Unlike the *Ford* adjudication, which concerned a previously uninterpreted section of the U.C.C., this proposed rule concerned credit practices expressly permitted by the laws of many states but allegedly harmful to consumers. FTC Petition for Rehearing and Suggestion for Rehearing En Banc at 13, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1982) (copy on file with the *Washington Law Review*). One aspect of that proceeding involved deficiencies in repossession cases—an area closely related to repossession surpluses. *Id.* The court found that this rulemaking proceeding was significant because it indicated the propriety of rulemaking for this type of case. 673 F.2d at 1010.

Thus, *Ford* did not involve a situation in which adjudication was more appropriate than rulemaking. That does not mean, however, that the agency abused its discretion by using adjudication. As the Supreme Court first stated in 1947, "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). This statement of the Supreme Court has been quoted innumerable times. *See, e.g.*, Nicholson v. Brown, 599 F.2d 639, 648 (5th Cir. 1979); NLRB v. Q-T Shoe Mfg. Co., 409 F.2d 1247, 1252 (3rd Cir. 1969); Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 27 (D.C. Cir. 1954). It follows that even though the FTC's choice of adjudication in this case might have been unwise, it was a choice the Commission was free to make.

57. 638 F.2d 1199 (9th Cir. 1980).

58. *See supra* notes 29–31 and accompanying text.

59. 638 F.2d at 1203–04.

60. *Id.* at 1205.

tation.[61] Unlike *Patel, Ford* did not involve the presence of substantial hardship. *Ford* was the FTC's first statement of how it believed U.C.C. section 9-504 applied to the deduction of reasonable expenses from surplus refunds.[62] Thus, Francis Ford had not relied on prior agency policy to its detriment.

2. *Other Case Law*

The *Ford* case also does not involve any of the situations in which courts have previously found adjudication to be an abuse of agency discretion. One such situation is when a party has acted in reliance on a preexisting agency policy.[63] To change that policy in an adjudication and then hold the party liable for complying with the old policy rather than the unannounced new one is clearly unfair. *Ford* did not involve this type of unfairness.

Another situation in which courts have found an abuse of discretion is when an adjudicatory rule will have a substantial impact on *both* the regulated entity and the public.[64] These factors were also not present in *Ford.* Although the order could have substantial impact on the industry by requiring dealers to calculate and refund surpluses, it would not significantly affect the public. Because repossession is relatively infrequent,[65] the total cost to dealers of calculating and refunding surpluses should not result in substantial price increases for consumers.

Therefore, prior case law does not support the *Ford* court's ruling that an abuse of agency discretion exists when an adjudication changes existing law and has widespread application. The case cited by the court as the source of its standards is easily distinguished. Moreover, the *Ford* case did not involve any of the primary reasons given by courts for preferring

61. The court noted that the "hardship Patel has experienced as a result of his failure to comply with the job-creation criterion is great." *Id.* at 1205. It then quoted from Bridges v. Wixon, 326 U.S. 135, 154 (1945), regarding deportation: "deportation . . . visits a great hardship on the individual . . . . That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." 638 F.2d at 1205.

62. Brief of Amicus Curiae National Automobile Dealers Association in Support of Opposition to Petition for Rehearing and Suggestion for Rehearing En Banc at 12, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 358 (1982) [hereinafter cited as Brief for Amicus Curiae NADA] (copy on file with the *Washington Law Review*); *see* 673 F.2d at 1010.

63. *See supra* notes 29–30 and accompanying text.

64. *See supra* text accompanying notes 31–32.

65. For example, during 1974–75 the FTC found that the total money that should have been refunded by Francis Ford totalled $15,000. Ford Motor Co., 94 F.T.C. 564, 618 (1979), *vacated,* Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 358 (1982). This amount is of little significance when compared with Francis Ford's total revenues of $26,000,000, and profits of approximately $131,440, for the same period. *Id.* at 566.

rulemaking over adjudication: reliance, substantial impact on both the public and the party, hardship resulting from retroactivity, lack of non-party participation, and anti-competitive effect. Thus, the test established by the *Ford* court clearly constitutes a new legal standard.

B. Policy Concerns

Finally, the *Ford* case does not invoke any of the policy concerns that courts and commentators have suggested would make adjudication an abuse of discretion. One important policy concern is the retroactive effect of adjudication.[66] Retroactivity may cause substantial hardship for a party if it results in significant penalties being imposed.[67] Such punitive retroactivity was not present in *Ford*. The only retroactive portion of the FTC order required Francis Ford to notify those customers whose automobiles it had repossessed after issuance of the complaint that they may be due a refund.[68] Presumably, the FTC required this notice so that the customers could pursue private actions against Francis Ford. Because the FTC lacked power to order restitution for past acts, however,[69] it did not impose damages or require a retroactive refund.[70]

Another important policy concern is the anti-competitive effect of ordering a party to cease a practice in which its competitors remain free to engage.[71] This concern, like the others, does not apply to *Ford*. Not only have the three major United States automobile manufacturers ordered their dealers to comply with the FTC consent order,[72] but the FTC has sought to notify all dealers of the new requirements through publication of a "Synopsis of Determinations," which was attached to the FTC *Ford* order.[73] The FTC thus ordered Francis Ford to comply with a refund technique similar to that which all dealers will have to follow in the future.[74]

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66. Retroactive application is required in an adjudication by NLRB v. Wyman-Gordon, 394 U.S. 759 (1969). *See supra* note 25.

67. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (no abuse where adverse consequences are not substantial, as when fines or damages are not involved); SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (an action's retroactive effect not necessarily fatal to its validity since all cases of first impression have retroactive effect).

68. *See supra* note 42.

69. *Id.*

70. Under 15 U.S.C. § 57b(a)(2) (1976), such penalties can be imposed in FTC proceedings only after a finding by the district court that the act or practice to which the cease and desist order related was one that a reasonable person would have known was dishonest or fraudulent.

71. *See supra* note 36 and accompanying text.

72. *See supra* note 40 and accompanying text.

73. The Synopsis was attached under the authority of 15 U.S.C. § 45(m)(1)(B) (1976), and provides:

> It is unfair and unlawful under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for a party to engage in the following practices:

Yet another important policy concern is that adjudication does not afford interested non-parties notice of, and an opportunity to comment on, the proposed rule prior to its adoption.[75] By limiting effective participa-

(A) Failing to account for and pay a defaulting customer within a reasonable time after repossession and resale (or lease) of the collateral, any surplus to which the customer is entitled under state law, and which the party is obliged to pay the customer under state law.

(B) Failing to credit to the defaulting customer, for purposes of determining any surplus or deficiency:

1. The full amount of unearned finance charges, including the proportionate shares of the dealer and the financing institution.

2. The full amount of any unearned insurance premiums, including but not limited to the dealer's (sales commission) share of premiums attributable to the remaining term of the insurance.

3. The full amount of proceeds received from or credited by an insurance firm or other source as compensation for damage to the repossessed collateral, except where such proceeds are offset by actual repair of that damage.

4. The full amount of proceeds realized upon an actual sale (or lease) of the repossessed collateral to an independent third party, in good faith, for the best possible price.

5. The underallowance realized on any property taken in trade upon the sale (or lease) of the repossessed collateral; i.e., the amount by which the established wholesale value of such trade-in property exceeds the trade-in allowance given therefor.

(C) Failing to exclude, for purposes of calculating the amount of any surplus or deficiency:

1. All amounts for repair and reconditioning above and beyond the direct (out-of-pocket) expense incurred by a secured party in or for performance of such repair or reconditioning of the particular repossessed collateral in preparing it for sale (or lease).

2. All amounts paid upon the sale (or lease) of the repossessed collateral as commissions for the sale of insurance and financing, and all amounts paid to supervisorial and administrative/support personnel without regard to whether they participated directly in the process of promoting that particular sale (or lease).

3. All amounts for advertising other than a proportionate share of expenditures for advertisements which specifically mention the particular collateral.

4. All indirect or fixed expenses (overhead), including but not limited to costs of real property, rent, depreciation, capital, supervision, administration, insurance and other expenses which are not directly increased as a result of the repossession, storing, reconditioning or reselling (or leasing) of the particular collateral.

5. All costs and expenses other than unreimbursed out-of-pocket expenses actually incurred as a direct result of the repossession, storing or sale (or lease) of the particular collateral, or of preparing it for such sale or lease.

6. Any amount of overallowance greater than the lawful excess of trade-in allowance given upon the sale (or lease) of the repossessed collateral, over the established wholesale value of property taken in trade thereon.

(D) Taking any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the secured party intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business.

Ford Motor Co., 94 F.T.C. 564, 634–35 (1979), *vacated,* Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 358 (1982).

74. The *Ford* court viewed the Synopsis as evidence of the Commission's intent to use the *Ford* adjudication as a rule with general application. 673 F.2d at 1010.

75. *See, e.g.,* 2 K. DAVIS, *supra* note 23, at 119. Although not cited as a determinative factor by

tion by broad segments of the public, adjudication may prevent an agency from hearing the full range of divergent interests represented by the general public. This reasoning, however, overlooks common agency practices for permitting public participation in adjudications. These practices range from accepting informal statements or amicus briefs to allowing interested persons full intervention as parties.[76] Moreover, it is questionable whether comments by the general public can meaningfully affect the creation of administrative policy. The very facet of rulemaking that permits broad public participation may serve to keep the depth of public involvement minimal and the treatment of specific, complex issues shallow.[77] Adjudication, on the other hand, can arguably provide an opportunity for more meaningful involvement by non-parties.[78]

Meaningful outside involvement did occur in *Ford*. The National Automobile Dealers Association (NADA), which represents approximately 20,000 automobile dealers,[79] participated vigorously in the *Ford* proceedings.[80] It is likely that the FTC afforded significantly more weight to NADA's arguments than it would have to the comments of individual dealers. Furthermore, in this case all the parties likely to appear in a rulemaking proceeding on repossession surpluses have appeared in the adjudication proceeding.[81]

C. *The* Ford *Test*

The *Ford* case did not involve any of the major legal or policy concerns that courts and commentators have advanced as reasons for finding that adjudication is an abuse of discretion. Perhaps in recognition of this, the *Ford* court based its decision on two factors never before found to constitute an abuse of discretion: (1) that the rule established by the FTC would have widespread application; and (2) that the rule changed existing law.

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the *Ford* court, lack of notice was mentioned as a reason why adjudication was inappropriate in this case. 673 F.2d at 1010.

76. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedural Reform*, 118 U. PA. L. REV. 485, 515 (1970).

77. *Id.* at 516.

78. *Id.*

79. Brief for Amicus Curiae NADA, *supra* note 62, at 3.

80. It is a matter of dispute between the parties whether NADA was granted status as a full intervenor in the hearing. The ALJ granted NADA status as an intervenor with full party rights on issues relating to any remedy to be imposed, but denied it permission to intervene on liability issues. Brief for Respondent at 7–8, 59–60. NADA, Francis Ford and the court interpreted this limitation as a denial of full intervention. 673 F.2d at 1009; Brief for Amicus Curiae NADA, *supra* note 62, at 3; Brief of Francis Ford, Inc. in Opposition to Petition for Rehearing at 4, Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1982) (copy on file with the *Washington Law Review*).

81. *See supra* text accompanying notes 37–40.

The first factor, the widespread application rationale, has been rejected by other courts as a sufficient reason to find an abuse of discretion. In *British Caledonian Airways, Ltd. v. Civil Aeronautics Board,*[82] the District of Columbia Circuit stated: "That the result of the Board's adjudication will have wide-ranging application in the future, is, if not irrelevant, certainly not dispositive of the question of whether the agency abused its discretion in opting for adjudication rather than rulemaking."[83] Indeed, the Ninth Circuit had previously rejected the widespread application rationale. In *NLRB v. St. Francis Hospital,*[84] the Ninth Circuit rejected the argument that because the Board's adjudicatory decision was to be generally applied, it was tantamount to a rule, and therefore required rulemaking procedures.[85]

The other factor relied on by the *Ford* court, the change in existing law rationale, has also been generally rejected as a reason to find an abuse of discretion.[86] A leading commentator on administrative procedure has stated that "[t]he simple answer to the question whether an agency may make new law through adjudication, instead of using its rulemaking power, is yes."[87] Of course, if it is shown that the party relied on a prior statement of the law, fairness may dictate a contrary answer.[88] But, as shown above, no such reliance existed in *Ford* as no prior law existed.

IV. CONCLUSION

In *Ford Motor Co. v. FTC,* the Ninth Circuit Court of Appeals found an abuse of agency discretion because an FTC adjudication changed existing law and had widespread application. The court's decision did not follow judicial precedent or consider appropriate policy factors. The standards for abuse of discretion established by the *Ford* court are overly broad and may severely interfere with needed agency flexibility. Application of the standard may preclude agency and judicial consideration of policy factors favoring adjudication in future cases.[89] Unfortunately,

82. 584 F.2d 982 (D.C. Cir. 1978).

83. *Id.* at 994. *See also* Chisholm v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976) (the choice to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application), *cert. denied,* 429 U.S. 890 (1976).

84. 601 F.2d 404 (9th Cir. 1979).

85. *Id.* at 414.

86. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (NLRB not precluded from announcing new principles in adjudication); SEC v. Chenery Corp, 332 U.S. 194, 203 (1947) (case-by-case approach retains a definite place in evolution of statutory standards).

87. 2 K. DAVIS, *supra* note 23, at 118–19.

88. *See supra* notes 29–30, 66–67 and accompanying text.

89. The Ninth Circuit already appears to have limited *Ford.* In Montgomery Ward & Co. v.

these new standards have survived agency attack. Thus, the new rule will govern agency behavior until it becomes so riddled with exceptions that, like all broad inflexible rules, it ceases to have legal effect.

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FTC, 691 F.2d 1322 (9th Cir. 1982), inconsistent agency behavior, such as adjudicative standards at variance with standards promulgated by rule, was noted as a significant factor in *Ford*. *Id.* at 1329 & n.13. Although this is not an accurate characterization of *Ford*, *see supra* note 56, *Montgomery Ward* indicates that the *Ford* rule may already be perceived by the court as being overly broad.