NOTES

THE PRIMARY JURISDICTION DOCTRINE AS A BAR TO STOCKHOLDERS' DERIVATIVE SUITS*

"PRIMARY jurisdiction" is a court-devised doctrine designed to reduce conflict between courts and administrative agencies, and as a result to further the intent of the legislature in creating the agency.[1] Although only loosely defined, the doctrine comprises a conscious policy of judicial self-restraint in hearing or reviewing disputes in areas subject to an agency's jurisdiction.[2] Desiring not to disrupt uniformity of regulation or to encroach upon the administrative expertise agencies provide,[3] courts will not entertain original actions in the regulated area once primary jurisdiction has been established.[4]

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*Glassberg v. Boyd, 116 A.2d 711 (Del. Ch. 1955).

1. See Jaffe, *Primary Jurisdiction Reconsidered. The Anti-trust Laws*, 102 U. PA. L. REV. 577, 581 (1954); Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L.J. 315, 336 (1956). See also Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907); Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 290 (1921).

2. The doctrine embraces two major concepts: "primary jurisdiction" and "exhaustion of administrative remedies." This Note deals principally with primary jurisdiction, which is applied to determine whether a court or agency should hear an original suit. See note 4 *infra*. Exhaustion of remedies usually is applied to questions of timing review of agency rulings. Under the exhaustion rule courts will hear the action, but only after all recourse to administrative processes. See Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Transcontinental & Western Airlines, Inc. v. Koppal, 345 U.S. 653 (1952); Adler v. Chicago & So. Air Lines, 41 F. Supp. 366 (E.D. Mo. 1941).

The jurisdiction of an administrative agency is derived from its regulatory statute. Variations in the scope of the authority delegated to agencies are almost as numerous as the agencies themselves. *Compare, e.g.*, the limited authority of the FPC, 52 STAT. 821 (1938), 15 U.S.C. § 717 (1952) and 41 STAT. 1063 (1920), as amended, 16 U.S.C. §§ 791-825 (1952), *with* the extensive authority granted the ICC, 24 STAT. 379 (1887), as amended, 49 U.S.C. § 1 (1952). *Cf.* 52 STAT. 977 (1938), as amended, 49 U.S.C. § 401 (1952) (CAB). This has resulted in wide variation in the application of primary jurisdiction. The doctrine has not been clearly differentiated in the various fields in which it is applied, nor have the different uses of the phrase been carefully distinguished. See cases *supra*; DAVIS, ADMINISTRATIVE LAW 674 (1951) (hereinafter cited as DAVIS). For criticism of judicial definition of the doctrine, see Convisser, *supra* note 1.

3. Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 290-91 (1922); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907) (uniformity); Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., 173 F.2d 784, 788 (6th Cir. 1949).

4. See Texas & Pac. Ry. v. American Tie & Timber Co., 234 U.S. 138 (1914); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 442 (1907); Philco v. American Tel. & Tel. Co., 80 F. Supp. 397 (E.D. Pa. 1948); Convisser, *supra* note 1, at 316; DAVIS 664-73. *Cf.* Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 767-73 (1947) (Tax Court).

When only a particular issue necessary to decision in a suit is within agency jurisdiction, the court will entertain the suit, but only after prior resort to the agency for

The question has been posed whether the primary jurisdiction doctrine can be applied to bar remedies available in the courts but beyond the authority of the agency. The problem arises when a defending party in a court action is subject to agency regulation but the agency is not empowered to redress the wrong alleged. Recently in *Glassberg v. Boyd* [5] the doctrine was applied for the first time to dismiss a shareholder's derivative action [6] against corporate directors for breach of their fiduciary duty even though the court recognized that the wrong alleged would remain unremedied because of the agency's limited power.

In *Glassberg* the shareholder alleged that directors of a natural gas pipeline corporation subject to Federal Power Commission regulation had breached their fiduciary duty to the corporation by unnecessarily revising upward contract rates for gas purchases from a producing company in which they were substantial stockholders.[7] In 1947 the corporation, El Paso Natural Gas Co.,[8]

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determination of the issue. See Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 290-91 (1922); Texas & Pac. Ry. v. Abilene Cotton Oil Co., *supra*. See also note 36 *infra*.

5. 116 A.2d 711 (Del. Ch. 1955).

6. In the derivative action the shareholder sues on behalf of his corporation to enforce corporate rights when corporate management will not act. The corporation is joined as a nominal party defendant. When the action is successful the corporation is beneficiary of the recovery. Derivative actions may be brought to enforce rights against corporate fiduciaries or against outside third parties. See Meyer v. Fleming, 327 U.S. 161, 167 (1946); Davenport v. Dows, 85 U.S. (18 Wall.) 626 (1873); BALLANTINE, CORPORATIONS 333-74 (rev. ed. 1946); STEVENS, CORPORATIONS 783-837 (2d ed. 1949).

7. Three of eleven directors of the pipeline corporation were alleged to have dominated the board and arranged the transactions attacked. The other directors were alleged to have been unable to exercise independent judgment. 116 A.2d at 713 n.1. In addition to owning substantial stock in the independent producer, the directors in fact controlled that company through their dominance over the pipeline company which also held large amounts of the producer's stock. *Id.* at 713-15.

The plaintiff in *Glassberg* maintained that the directors' stockholdings in the producing company created a conflict of interest with their fiduciary duties to El Paso. *Id.* at 714. The common law holds corporate officials to a fiduciary's standard of conduct. In most states, when a director has a personal interest in a transaction adverse to that of the corporation a rebuttable presumption is created that this conflicting interest results in injury to the corporation. The presumption shifts the burden of proof to the director and requires him to demonstrate the fairness of the transaction. See Pepper v. Litton, 308 U.S. 295, 306-10 (1939); Geddes v. Anaconda Mining Co., 254 U.S. 590, 599 (1921); Wardell v. Railroad Co., 103 U.S. 651, 657-58 (1880); BALLANTINE, CORPORATIONS 167-69, 175, 183 (rev. ed. 1946); STEVENS, CORPORATIONS § 149 (2d ed. 1949). *Cf.* 1 BOGERT, TRUSTS § 16, at 85-89 (1951); 3 *id.* §§ 492-93 (1946).

The *Glassberg* court apparently sought to reject any presumption of unfairness from interlocking directorates by applying the dictum in Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 252-53 (1951) that fraud should not be presumed solely because of interlocking directorates when they have been expressly approved by the Commission. See Glassberg v. Boyd, 116 A.2d 711, 716-17 (Del. Ch. 1955). This seems irrelevant, however, since in *Glassberg* the conflicting interest caused by the directors' stock ownership in Western could be the basis for the common law presumption. Furthermore, the Natural Gas Act contains no counterpart to the Federal Power Act

concluded a thirty-year contract with the producer, Western Natural Gas Co.,[9] for the purchase of gas for resale. The contract was filed with the Federal Power Commission and became the legal rate between the two companies.[10] In 1953 El Paso's directors executed a revised contract with Western, approximately doubling the rate El Paso was to pay. The revised contract was also filed with the FPC and the new rate accepted as a proper item of cost.[11]

The court dismissed the suit for want of jurisdiction.[12] It conceded that a traditional shareholder's action had been pleaded and that no other remedy

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provision permitting the FPC to approve interlocking management of electric public utilities. Thus it can be argued that the presumption of unfairness from interlocking directorates was not negated in gas utility operations by *Montana-Dakota, supra. Compare* 52 STAT. 821 (1938), 15 U.S.C. § 717 (1952) (*n.b.* § 717k), *with* 49 STAT. 847 (1935), 16 U.S.C. § 825d (1952).

8. El Paso, a publicly held corporation, is the nation's second largest natural gas pipeline company. It serves primarily the far west and southwest. 116 A.2d at 713; Time, Dec. 5, 1955, p. 94.

9. Western, a codefendant, was created by the merger of a wholly owned El Paso subsidiary with a firm controlled personally by El Paso's directors. 116 A.2d at 713. Western is an "independent producer" for purposes of rate regulation. *Ibid.* See 18 C.F.R. § 154.91 (Supp. 1956) (definitions and regulations for "independent producer" filing procedures).

10. Under the Natural Gas Act all rates charged for sales subject to FPC jurisdiction must be filed with the Commission whether established unilaterally or by contract. All rates are then subject to FPC review for compliance with statutory requirements. 52 STAT. 821 (1938), 15 U.S.C. § 717c (1952).

The filing procedures do not guarantee the legality of transactions among parties subject to Commission jurisdiction, since absent protest, hearing or investigation they result only in FPC acceptance of the tariffs and contracts filed. FPC acceptance of a rate does not constitute approval. See 18 C.F.R. § 154.23 (1949); *id.* § 154.101 (Supp. 1956).

A new rate schedule may become legally "effective" under the statute and FPC regulations as a result of:

1) a seller's unilateral filing of a rate schedule which becomes effective automatically thirty to sixty days after filing and giving notice;

2) the bilateral filing of a rate contract, which is likewise automatically effective; or

3) direct action by the Commission to fix rates after hearings either on petition of a proper party or on its own motion. 52 STAT. 822 (1938), 15 U.S.C. § 717c(c), (d), (e) (1952); 18 C.F.R. § 154 (1949) (regulations on filing procedures).

Generally, on petition or on its own motion, the Commission may temporarily suspend proposed rates filed with it pending investigation and/or hearing, and may at any time modify, reject or rescind approval of rates after hearings. 52 STAT. 822 (1938), 15 U.S.C. § 717c(e) (1952).

11. See FPC Opinion #278, Nov. 26, 1954, p. 7, approving in part proposed rate increases for sales by El Paso to its customers after formal hearings by the Commission. These rate increases were based in part upon the higher cost to El Paso for the gas it purchased from Western which was allowed as a proper element of cost to El Paso.

Formal approval of a rate by the Commission is based on a finding that it meets the "reasonable and just" requirements of the statutes. See notes 28-31 *infra* and accompanying text. As a basis for this finding the Commission allows certain items of cost claimed by the proponent of the rates. The contract between El Paso and Western was expressly conditioned on the Commission's finding that the rate was a proper cost item. 116 A.2d at 715.

12. *Id.* at 717.

would be available to the plaintiff.[13] But interpreting the fraud action as an attempt to contest the reasonableness of interstate natural gas rates, it held that Congress had conferred jurisdiction over these rates on the Federal Power Commission, leaving no residual jurisdiction for original court action.[14]

The court's dismissal of the shareholder's suit was based on an overly broad interpretation of the Supreme Court's opinion in *Montana-Dakota Utility Co. v. Northwestern Public Service Co.*[15] In *Montana-Dakota* one electric utility attempted to recover damages from another for past unreasonable rates imposed on it while both companies had been under common management. The Court dismissed the action, holding that the suit could not be brought under the Federal Power Act because Congress had intended to omit a damage remedy from the statute.[16] The Court reached this result by pointing out that Congress had not empowered the Federal Power Commission to grant damages for past unreasonable rates. It then argued that courts were likewise precluded from awarding damages under the act or referring damage issues to the Commission because these procedures would achieve indirectly what Congress had disallowed directly.[17] If the action were viewed as based on common law fraud, federal jurisdiction was lacking, reasoned the Court.[18] Since the Power Act added no new dimension to this remedy, diversity of citizenship, absent in *Montana-Dakota,* would have to be shown. Thus the Court did not declare the fraud action nonexistent but held only that the remedy was unavailable in a federal tribunal under the facts presented. Significantly, the issue of whether the action would be maintainable in a state court was left unanswered.[19] Consequently *Glassberg's* holding that *Montana-Dakota* precluded such a suit entirely is inaccurate. The question remains, therefore, whether the *Glassberg* decision was proper when considered in the framework of the primary jurisdiction doctrine itself.

When measured against the recognized purposes for which the doctrine is employed, *Glassberg* is an unwarranted extension of primary jurisdiction. The intent of Congress in enacting the Federal Power Act[20] and the Natural Gas Act[21] was not furthered by dismissal of the shareholder's suit against El Paso's directors. The federal statutes established a system of utility regula-

13. See *id.* at 714-17. The shareholder alleged other breaches of duty by the directors. Some claims were barred by the statute of limitations; others were either dismissed as attacking a valid exercise of business judgment or withdrawn at argument. *Id.* at 713-14.

14. *Id.* at 717.

15. 341 U.S. 246 (1951). See Glassberg v. Boyd, 116 A.2d 711, 715-17 (Del. Ch. 1955).

16. 341 U.S. at 253.

17. *Id.* at 254.

18. *Id.* at 250, 252.

19. The implication is strong that the Court assumed the common law remedy in state courts was unaffected. See *id.* at 252 and dissenting opinion at 261, 263; 65 HARV. L. REV. 700, 701 (1952).

20. 41 STAT. 1063 (1920), 16 U.S.C. §§ 791-825 (1952).

21. 52 STAT. 821 (1938), 15 U.S.C. § 717 (1952).

tion to complement state regulatory schemes in order to protect consumers from paying excessive power rates.[22] But the Federal Power Commission's authority over rates under the statutes was decidedly limited. Congress delegated to the FPC only the power to establish rates prospectively;[23] the authority to award damages for improper past rates or other violations of the statutes was specifically withheld from the Commission.[24] By not transferring to the Commission power to grant damage awards, Congress impliedly left the damage remedy with the courts. It is unreasonable to assume that Congress would have destroyed existing judicial remedies without providing adequate administrative substitutes.[25] As a rule of statutory construction, legislation is not deemed to abrogate an established judicial remedy, such as that afforded in a stockholders' derivative suit, unless an intent to do so is shown by express language or a direct conflict between the existing remedy and the operation of the statute.[26] Since the remedy sought in *Glassberg* was not expressly abrogated by the federal power statutes, the court should have entertained the suit unless conflict between the FPC's statutory authority and the judicial remedy would result.

Such conflict would not occur, however, because it was unnecessary for the court to decide issues within the Commission's jurisdiction in order to award damages for a breach of fiduciary duty by El Paso's directors. The 1953 contract rates had been accepted by the Commission after filing in compliance

22. FPC v. Hope Natural Gas Co., 320 U.S. 591, 609-10 (1944); Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U.S. 507, 513-24 (1940). FPC regulation has not extended to the broad limits of federal commerce power. Regulatory policy in this area has restricted federal supervision and encouraged state regulation where possible. Thus certain utilities may apply for exemptions from FPC control on a showing that they are supervised by a state commission. 18 C.F.R. § 152 (Supp. 1956). Almost all states have some commission regulation of gas and electric utility rates and practices. 11 BOOK OF THE STATES 440 (1956).

23. See 52 STAT. 822-24 (1938), 15 U.S.C. § 717c, d, f (1952); 49 STAT. 851-53 (1935), 16 U.S.C. § 824d, e, f (1952).

24. S. REP. No. 621, 74th Cong., 1st Sess. 20 (1938); Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 254 (1951).

Furthermore, the FPC cannot use its rate setting power to set future rates for the purpose of assessing penalties or reparations for past conduct. See *Re* Atlantic Seaboard Corp., 94 P.U.R.(n.s.) 235, 239 (FPC 1952); *cf.* Cleveland v. Hope Natural Gas Co., 44 P.U.R.(n.s.) 1, 33-34 (FPC 1942), *aff'd sub nom.* FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

25. Inadequacy of administrative remedies justifies exercise of court jurisdiction without further administrative action. See Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 773 n.38 (1947); Georgia v. Pennsylvania R.R., 324 U.S. 439, 454-60 (1945); Slick Airways v. American Airlines, 107 F. Supp. 199, 211-12, 217 (D.N.J. 1952), *appeal dismissed,* 204 F.2d 230 (3d Cir.), *cert. denied,* 346 U.S. 806 (1953); Hawaiian Airlines v. Trans-Pacific Airlines, 78 F. Supp. 1, 7, 8 (D. Hawaii 1948). *Cf.* Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 200, 205 (1924).

26. FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 252-53 (1954); Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir.), *cert. denied,* 340 U.S. 906 (1950). See Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 436-37 (1906).

with its procedures.[27] But neither acceptance of a rate as a proper cost item nor a finding that a rate is reasonable means that a power contract meets all the requirements of corporate or contract law.[28] When inquiring into a proposed rate, the Commission considers primarily whether the rate will reimburse the seller for his costs and provide a fair profit on his investment without causing unduly high consumer power rates.[29] Thus even the FPC's approval of a rate does not include an evaluation of all the elements that would be considered in a judicial finding on the issue of breach of duty by El Paso's directors.

Furthermore, a finding for the shareholder would not necessarily imply a finding that the contract rate was unreasonable within the meaning of the power statutes. The statutes require only that a rate be within a range that is not unreasonable to the consumer at the upper limit and not confiscatory to the seller at the lower.[30] Reasonableness under the power acts is not a pin-point standard but rather covers an area within which any rate would meet the statutory criteria.[31] A judicial finding that directors had breached

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27. Glassberg v. Boyd, 116 A.2d 711, 715 (Del. Ch. 1955). See notes 10 and 11 *supra.*

28. *Cf.* Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir.), *cert. denied,* 340 U.S. 906 (1950) (compliance with antitrust laws not concluded by Commission); Consolidated Gas, Elec. Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89 (4th Cir. 1952) (same); United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 340, 342, 344 (1956) (other rights of parties under rate contracts); Otis & Co. v. Pennsylvania R.R., 61 F. Supp. 905 (E.D. Pa. 1945) (fiduciary duty).

This factor is particularly relevant in *Glassberg* since the contract between Western and El Paso was not the major issue before the Commission. See note 11 *supra.* The Commission was primarily passing on El Paso's rates to its customers, not Western's rate to El Paso, and the decision does not reveal that the latter rate came under close scrutiny.

Some of the factors which affect the contract interests of the parties would not be relevant to Commission consideration of the "reasonableness" of the rate. *Cf.* note 29 *infra* (limited criteria for rate evaluation); FPC v. Sierra Pac. Power Co., 350 U.S. 348, 354-55 (1956).

29. FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944); Cities Serv. Gas Co. v. FPC, 155 F.2d 694 (10th Cir.), *cert. denied,* 329 U.S. 773 (1946). Under the rate setting formula employed by the FPC the rates at which a pipeline may sell are derived from the Commission-approved costs of the company, including the purchase cost of the gas, plus an amount computed to yield a "reasonable" percentage return on its "rate base" capital investment. The "cost" figure plus the reasonable return figure gives the expected income of the pipeline for a fixed time period. The "rate" to the pipeline's customers is obtained by apportioning the expected income over the volume of gas to be sold in the same period. See note 46 *infra; Re* Panhandle Eastern Pipe Line Co., 3 P.U.R.3d 396 (FPC 1955); SCHAPIRO & WIENSHIENK, LAW AND ACCOUNTING 466-67 (1949).

30. See, *e.g.,* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); Mississippi River Fuel Corp. v. FPC, 163 F.2d 433, 450 (D.C. Cir. 1947).

31. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951).

Parties are legally entitled only to that "reasonable" rate established under FPC procedures, however, and not to the lowest "reasonable" rate. *Ibid.*

The authority of the Commission is exclusive on the issue of rate "reasonableness"

their fiduciary duty to the corporation could rest on proof of failure to bargain effectively and honestly for the lowest reasonable rate because of conflicting personal interest.[32] A finding of fraud by a court under this theory would not upset the Commission's determination that the rate in the power contract was reasonable,[33] although in practical effect such a decision would collaterally force a renegotiation of the entire contract by the two firms.

Nor does such a solution to the jurisdictional problem raised in *Glassberg* conflict with the need for uniform regulation and administrative expertise. Questions of fiduciary loyalty do not affect industry-wide regulation since a court would neither apply the statutory criteria nor approve rates. And a question of fraud contains no complex economic and technical issues requiring decision by a tribunal specially trained in the regulated field.[34] Any advantage from experience in handling similar issues would presumably lie with a court.

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and may be attacked only by appeal to the United States Court of Appeals. See 52 STAT. 831 (1938), 15 U.S.C. § 717r (1952); Colorado Interstate Gas Co. v. FPC, 209 F.2d 717, 724, 732 (10th Cir. 1954); Safe Harbor Water Power Corp. v. FPC, 124 F.2d 800, 803 (3d Cir. 1941), *cert. denied*, 316 U.S. 663 (1942). An express finding of "unreasonableness" invalidates any rate—either existing or proposed. A finding of "reasonableness" alone, while conclusive as to the legality of the rate involved, does not imply the unreasonableness of other rates because of the "range of reasonableness" concept. See FPC v. Sierra Pac. Power Co., 350 U.S. 348, 353-54 (1956); *cf.* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

32. This finding would satisfy the requirements of an action for breach of fiduciary duty. See BALLANTINE, CORPORATIONS 173-76, 183-84, 201-10 (rev. ed. 1946); Zahn v. Transamerica Corp., 162 F.2d 36, 43, 45, 46 (3d Cir. 1947); Goldboss v. Reimann, 44 F. Supp. 756, 759 (S.D.N.Y. 1942). See also cases cited in note 7 *supra* and note 42 *infra*.

33. This analysis is supported by cases not involving derivative actions. Courts have declared power supply contracts void for violation of the antitrust laws although the contract rates had been expressly approved by the FPC. See Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950); Consolidated Gas, Elec. Light & Power Co. v. Pennsylvania Water & Power Co., 194 F.2d 89 (4th Cir. 1952). *But see* Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952) (FPC can use rate setting power to *order* activities which would violate antitrust laws if accomplished by private contract). The filing of rate contracts with the Commission does not infringe the contracting power of the parties, nor their rights under the contracts. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

In another area of regulation, express ICC approval of railroad refinancing plans, or changes in rail terminal facilities and service, did not restrict the rights of shareholders to maintain derivative actions against corporate officers to challenge the plans. Otis & Co. v. Pennsylvania R.R., 61 F. Supp. 905 (E.D. Pa. 1945) (refinancing); Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479, 488-89 (1930) (dictum) (facilities and service).

See also Whitam v. Chicago, Rock I. & Pac. Ry., 66 F. Supp. 1014 (N.D. Tex. 1946) (fraud action for freight overcharges by railroad under ICC jurisdiction); Emerald Coal & Coke Co. v. Equitable Gas Co., 378 Pa. 591, 107 A.2d 734 (1954) (injunctive relief against storage practices of regulated gas utility). *But see* Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F.2d 388 (5th Cir. 1947); Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., 173 F.2d 784 (6th Cir. 1949).

34. See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 265

The shareholder's action need not be dismissed even if a court disagrees with the foregoing analysis and finds that an adjudication of fraud in procuring the power contract would necessarily decide issues within the Commission's exclusive authority. Court-agency conflict may still be avoided without denying a judicial remedy, for the court could refer to the Commission those questions found to be within the agency's jurisdiction. For example, the court might wish to refer to the agency whether a lower rate which could have been negotiated would meet the agency's tests of reasonableness. The court could thus entertain the action and suspend the proceedings pending the Commission's decision on the referred issues. Using the Commission's findings on these issues and its own findings on retained issues, the court could then grant appropriate relief.[35] This procedure has been recognized where specific questions necessary for judicial decision have been within the exclusive jurisdiction of an administrative body.[36]

Under either theory proposed for the exercise of judicial jurisdiction, however, a court will face a difficult damage problem. Generally, recovery in derivative suits is predicated either on a showing that the corporation suffered actual injury[37] or that its directors received profits the corporation might

(1951) (dissenting opinion) (loyalty of directors; disposition of recovered fund); Interstate Natural Gas Co. v. FPC, 181 F.2d 833 (5th Cir. 1950) (disposition of fund); Convisser, *supra* note 1, at 325 (damages).

35. Much of the jurisdictional confusion that has plagued relations between courts and administrative agencies, and which "primary jurisdiction" has but inadequately solved, could be corrected by transferring to judicial bodies jurisdiction over controversies in which judicial remedies are appropriate. This transfer could be either to the presently constituted federal district courts or to a new system of administrative courts. Transfer to administrative courts has been suggested by the Hoover Commission on Organization of the Executive Branch of the Government in its 1955 report. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE 84-93 (1955). See also COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 239-82 (1955). Under either solution administrative agencies would remain specially trained expert bodies charged with policy and rule making, and available for fact-finding through referral procedures. Suits could be brought in the courts by private parties or by the agencies themselves. This arrangement would avoid questions of the appropriate forum for an action.

36. General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940); United States v. Kansas City So. Ry., 217 F.2d 763, 769 (8th Cir. 1954); S.S.W., Inc. v. Air Transport Ass'n, 191 F.2d 658 (D.C. Cir.), *cert. denied*, 343 U.S. 955 (1952); Apgar Travel Agency, Inc. v. International Air Transport Ass'n, 107 F. Supp. 706 (S.D. N.Y. 1952). See also Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 266 (1951) (dissenting opinion). *But see* Convisser, *supra* note 1, at 335-36; Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495 (1953).

37. This theory is typically applied when corporate assets have been wasted, embezzled or diverted to the directors' personal use. See Citrin v. Greater N.Y. Industries, Inc., 79 F. Supp. 692 (S.D.N.Y. 1948); Steckler v. Pennroad Corp., 44 F. Supp. 800, 804 (E.D. Pa. 1942).

have earned.[38] The manner in which income is measured in regulated industries, however, may preclude either proof of injury to the corporation or a showing that the directors' profits were made at the corporation's expense. The resale rates of natural gas pipelines, like all utilities, are determined by the cost to them of the natural gas sold to customers plus a fixed percentage return on capital investment.[39] Since the cost of the gas to the utility is borne by the ultimate consumer, a higher price paid by the utility for natural gas would not result in a direct loss to it.[40] Accordingly it could be argued, as El Paso's directors did, that the corporation was not injured by their actions and that their profits were not at the corporation's expense.[41]

But modern decisions awarding recovery in derivative suits for misconduct of directors have emphasized that this action is mainly designed to assure a corporation of the undivided loyalty of its fiduciaries.[42] Recovery in these cases has rested on the ground that directors had realized improper profits from their fiduciary position, and not that detriment to the corporation resulted. This theory appears particularly appropriate where fraud has been demonstrated in a suit against directors of a public utility. The public has a greater interest in the honest management of these corporations, legal monopolies whose services are necessary to the consumer, than in the operation of firms in competitive industries. In a sense, therefore, a derivative suit by a utility shareholder is a suit on behalf of the consumer as well as the corpora-

38. This theory is availed of when the directors have themselves taken an opportunity that should have been enjoyed by the corporation; a constructive trust is imposed on the entire profits obtained. Central Ry. Signal Co. v. Longden, 194 F.2d 310, 324 (7th Cir. 1952); Irving Trust Co. v. Deutsch, 73 F.2d 121 (2d Cir. 1934), *cert. denied*, 294 U.S. 708 (1935); Canada Safeway Ltd. v. Thompson, [1951] 3 D.L.R. 295 (B.C. Sup. Ct.).

39. See notes 23 and 29 *supra* and accompanying text.

40. See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Corp., 341 U.S. 246, 254 (1951).

41. In *Glassberg* the court noted that the increased rate to El Paso was passed on to its consumers. Once established, the market for natural gas is largely inelastic. Consumers are tied to one end of a pipe line and can change power sources only at considerable expense for conversion to other fuels. Consequently, a price change will not have substantial short range effect on consumption. See Glassberg v. Boyd, 116 A.2d 711, 715 (Del. Ch. 1955). See also 101 CONG. REC. 1523 (daily ed. Feb. 1, 1956); *id.* at 1718 (daily ed. Feb. 3, 1956). *But see* text at note 46 *infra.*

42. Guth v. Loft, Inc., 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Del. Sup. Ct. 1939) (recovery "does not rest upon the narrow ground of injury or damage to the corporation . . . but upon . . . public policy that . . . extinguishes all possibility of profit flowing from a breach of the confidence. . . ."); Overfield v. Pennroad Corp., 42 F. Supp. 586, 608 (E.D. Pa. 1941); Dwyer v. Tracey, 118 F. Supp. 289, 296 (N.D. Ill. 1954) (recovery based on breach of duty although no damage was shown); Howell v. McCloskey, 375 Pa. 100, 106, 99 A.2d 610, 613 (1953) (immaterial whether corporation was harmed; the test is whether directors were unjustly enriched); Milam v. Cooper, 258 S.W.2d 953, 956 (Tex. Civ. App. 1953) (immaterial that corporation was not damaged or even that it benefited by the transaction). See also Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E.2d 825 (1944); Ripley v. International Ry. of Central America, 276 App. Div. 1006, 95 N.Y.S.2d 871 (1st Dep't 1950); Price v. Standard Oil, 55 N.Y.S.2d 890, 896 (Sup. Ct. 1945); Bailey v. Jacobs, 325 Pa. 187, 194, 189 Atl. 320, 324 (1937).

tion. Furthermore, a utility in an original action or its shareholders in a derivative suit are best able to discover and prosecute the directors' fraud or mismanagement.[43] True, in most cases the improper profits recovered would remain with the utility.[44] But the consumer would still benefit from the prospective lowering of rates and effective policing of corporate fiduciaries. Where the court can obtain jurisdiction over the necessary parties, conceivably the improper profits recovered could be rebated pro rata to the utility's customers.[45] Even in these cases, however, a substantial portion of the amount recovered should be awarded to the utility in order to preserve incentive for the derivative suit.

If a court demands proof of some injury to the corporation or that directors' profits were at the corporation's expense, the required harm can be found in the effect of increased prices on the profits of the utility and on its competitive position in the power market it serves. It can be contended that increases in consumer purchases of gas were inhibited by the higher cost price, thus limiting profits the corporation would have made.[46] Secondly, while natural gas is a cheap power source, it still must compete with other sources. To the

43. See BALLANTINE, CORPORATIONS 375-413, 873-78, 885 (rev. ed. 1946); STEVENS, CORPORATIONS 487-99, 535-44 (2d ed. 1949) (shareholders' rights and access to information).

44. Utilities are sometimes permitted to collect the higher of two rates under bond but they must repay the excess charged if the higher rate is disapproved after investigation. The fund under bond must then be distributed to those from whom it had been collected. Often, serious administrative difficulties arise. See Panhandle Eastern Pipe Line Co. v. FPC, 154 F.2d 909 (8th Cir.), *cert. denied,* 329 U.S. 761 (1946); Natural Gas Pipeline Co. v. FPC, 131 F.2d 137 (7th Cir. 1942); Natural Gas Pipeline Co. v. FPC, 129 F.2d 515 (7th Cir. 1942).

The difficulty of rebate procedures should not bar the utility's right to recovery, however. *Cf.* Central States Elec. Co. v. City of Muscatine, 324 U.S. 138, 145 (1944); Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918). And even if recovery gives a "windfall" to the recovering utility, it should have a right in the fund superior to that of the fraudulent party. See Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Corp., 341 U.S. 246, 265 (1951) (dissenting opinion).

45. See note 44 *supra.*

Rebates could be based on a theory of unjust enrichment. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Corp., 341 U.S. 246, 265 (1951) (dissenting opinion). The procedures used in the rebate of disapproved rate increases collected under bond could be followed. See Panhandle Eastern Pipe Line Co. v. FPC, 154 F.2d 909 (8th Cir.), *cert. denied,* 329 U.S. 761 (1946); Natural Gas Pipeline Co. v. FPC, 131 F.2d 137 (7th Cir. 1942); Natural Gas Pipeline Co. v. FPC, 129 F.2d 515 (7th Cir. 1942).

46. Generally, a utility's rate is computed as follows: the total income (A) the utility will receive during a given period equals its cost items (C) plus a fair return on its rate base (R). $A = C + X\%(R)$. The rate to customers (r) equals the total income divided by the estimated number of units of gas the company will sell (U). $r = \frac{A}{U}$. See note 29 *supra.* Thus if C were 100, R 5% of a rate base of 100, and U 105 units, the rate to customers would be $1 per unit. If sales were to increase from 105 to 115, and costs only from 100 to 105—fixed costs, such as interest on debt, remaining constant—the company would recoup an excess of $5 over costs and fair return, at least until the rate was revised. It is this $5 "opportunity" from increased sales which the higher rate precluded.

extent its price is raised, it will be less able to compete effectively. This is particularly true in the power market, for conversion by consumers from one power source to another requires significant capital expenditures for equipment.[47] Thus when a new power source such as natural gas is introduced into a market already using other sources, it must be offered at a substantial price advantage to justify the cost of conversion. Since the precise amount of injury would be difficult to prove, it could be presumed that some injury to El Paso's sales and profits resulted from the directors' breach of duty. This presumption should be a sufficient basis for the recovery of the directors' improper profits.

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47. This is true for both industrial and home consumers. Different power sources require different types of equipment for utilization and often different architectural design. See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344 (1956).