

1992

Kennecott Corporation v. Salt Lake County and The Utah State Tax Commission of Utah : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David E. Yocum; Salt Lake County Attorney; Karl Hendrickson; Deputy Salt Lake County Attorney; Bill Thomas Peters; Special Deputy County Attorney; Paul Van Dam; Utah State Attorney General; Joseph T. Dunbeck, Jr.; Assistant Attorney General.

James B. Lee; Kent W. Winterholler; Parsons, Behle & Latimer; Attorneys for Kennecott Corp..

Recommended Citation

Reply Brief, *Kennecott Corporation v. Salt Lake County and The Utah State Tax Commission of Utah*, No. 920149.00 (Utah Supreme Court, 1992).

https://digitalcommons.law.byu.edu/byu_sc1/4100

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCKET NO.

DOCKET NO.

PRIORITY 15

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT
STATE OF UTAH

KENNECOTT CORPORATION,)	
)	
Plaintiff/Respondent,)	
)	
v.)	
)	
SALT LAKE COUNTY and THE STATE)	
TAX COMMISSION OF UTAH,)	APPEAL NO. 92-0149
)	
Defendants/Appellants.)	PRIORITY 15

REPLY BRIEF OF THE STATE TAX COMMISSION OF UTAH

APPEAL FROM AN ORDER AND JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, JUDGE RIGTRUP
DATE FEBRUARY 28, 1992

JAMES B. LEE
KENT W. WINTERHOLLER
PARSONS, BEHLE & LATIMER
201 South Main Street, #1800
P.O. Box 11898
Salt Lake City, UT 84147-0898
Attorneys for Kennecott Corp.

PAUL VAN DAM - 3312
Utah State Attorney General
JOSEPH T. DUNBECK, JR. - 3645
Assistant Attorney General
36 South State Street, #1100
Salt Lake City, UT 84114
Attorneys for the Tax
Commission

DAVID E. YOCOM - 3851
Salt Lake County Attorney
KARL HENDRICKSON - 1464
Deputy Salt Lake County
Attorney
BILL THOMAS PETERS - 2574
Special Deputy County Attorney
310 South Main Street, #1100
Salt Lake City, UT 84101
Attorneys for Salt Lake County

TABLE OF CONTENTS

INTRODUCTION	1
I. THE UTAH SUPREME COURT IN RIO ALGOM CONSCIOUSLY AND UNAMBIGUOUSLY REFUSED TO APPLY ITS HOLDING ON THE VALIDITY OF § 59-5-109 TO CASES PENDING AT THE TIME OF THE RULING.	2
II. THE UTAH SUPREME COURT SHOULD NOT REVERSE RIO ALGOM OR ABANDON UTAH'S COMMON SENSE APPROACH TO RETROACTIVITY. .	6
A. The United States Constitution Provides States With The Freedom To Develop Retroactivity Rules Which Reflect That State's Supreme Court's Judicial Philosophy.	7
B. Rio Algom And Other Utah Supreme Court Cases Create A Rational, Workable Framework For Assessing The Competing Retroactivity Interests. .	8
C. The Rationale Of Justice Souter's Opinion In Beam Does Not Provide A Sufficient Basis For Utah To Abandon The Rio Algom Approach To Retroactivity.	10
1. Equitable Considerations Have An Important Role In The United States Supreme Court's Rulings In <u>Chevron Oil</u> And <u>McKesson</u>	11
2. The Various Opinions In <u>Beam</u> Contain No Unifying Analysis Which Justifies Reversing <u>Rio Algom</u>	14
a. The Rationale For Automatic Retroactivity In All Cases Exalts Theoretical Purity At The Expense Of Litigants' Reasonable Expectation Interests.	15
b. Principles Of "Stare Decisis" And "Rule of Law" Do Not Require An Abandonment Of Utah's Approach To Retroactivity.	17
c. The Complexity Of Retroactivity Determinations Requires The Application Of A Flexible Standard.	20

III.	THE APPLICATION OF RIO ALGOM'S RETROACTIVITY RULING DOES NOT VIOLATE KENNECOTT'S DUE PROCESS OR EQUAL PROTECTION RIGHTS.	22
A.	Under McKesson, An Individual's Due Process Rights Are Not Involved Until After The Court Determines That The "New" Law Applies To The Individual's Actions.	22
B.	Kennecott's Equal Protection Rights Are Not Violated By Rio Algom's Retroactivity Ruling. . .	23

TABLE OF AUTHORITIES

CASES:

<u>Bacchus Imports, Ltd. v. Dias,</u> 468 U.S. 263 (1984)	13
<u>Carter v. Beaver County Service Area No. One,</u> 16 Utah 2d 280, 283, 399 P.2d 440, 442 (1965)	5, 9
<u>Chevron Oil Co. v. Huson,</u> 404 U.S. 97 (1971)	11
<u>Cronk v. Intermountain Rural Electric Ass'n.,</u> 765 P.2d 619 (Colo. App. 1988)	21
<u>Great Northern Railway Co. v. Sunburst Oil & Refining Co.,</u> 287 U.S. 358, 364-365 (1932)	8
<u>James B. Beam Distilling Co. v. Georgia,</u> 115 L.Ed.2d 481 (1991)	1, 6, 10
<u>Loyal Order of Moose v. County Bd. of Equalization,</u> 657 P.2d 257, 264 (Utah 1982)	8
<u>Martin Marietta Corp. v. Lorenzo,</u> 823 P.2d 100 (Colo. 1992)	21
<u>McKesson Corp. v. Division of Alcoholic Beverages,</u> 496 U.S. 18, 110 L.Ed.2d 17 (1990)	12
<u>Quill Corporation v. North Dakota,</u> 119 L.Ed.2d 91 (1992)	17
<u>Rio Algom Corp. v. San Juan County,</u> 681 P.2d 184 (Utah 1984)	1, 2
<u>Smith v. Travis County Education District,</u> 791 F. Supp. 1170 (W.D. Tx 1992)	22
<u>Van Dyke v. Chappell,</u> 818 P.2d 1023, 1025 (Utah 1991)	8

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, Article III	15
Utah Code Ann. § 59-5-109 (Supp. 1981)	1, 2, 22, 24

INTRODUCTION

In Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984), the Utah Supreme Court expressly held that its ruling on the constitutionality of § 59-5-109 (Supp. 1981) applied prospectively only, except as to the six Rio Algom plaintiffs. The Court made this ruling, in part, because of the undue hardships to local governments if the ruling were applied to pending actions, such as Kennecott's. In addition, the Court made this ruling after a conscious review of the law on the propriety of limiting the retroactive effect of a ruling to the parties. The Rio Algom Court's analysis was correct at the time and remains good law under current constitutional principles.

The only issue in the instant case is whether the District Court properly ignored the Utah Supreme Court's express holding and applied Rio Algom's ruling on the validity of § 59-5-109 to Kennecott.

Kennecott defends the District Court's actions on three grounds. First, notwithstanding Rio Algom's explicit language to the contrary, Kennecott contends that the Rio Algom Court did not limit its ruling to the plaintiffs in that case. Second, Kennecott seeks reversal of Rio Algom's prospectivity ruling and the adoption of the approach suggested by two justices in James B. Beam Distilling Co. v. Georgia, 501 U.S._____, 111 S.Ct. 2439, 115 L. Ed. 2d 481 (1991), even though that approach is not constitutionally mandated and is contrary to established Utah precedent which creates a common sense framework for balancing the hardships involved with retroactive rulings. Finally,

Kennecott, without citing any relevant authority, asserts that its due process and equal protection rights would be violated unless this Court reverses Rio Algom's prospectivity ruling. As discussed fully below, the Court should reject Kennecott's challenges to Rio Algom's prospectivity ruling and should reverse the District Court's judgment ignoring that ruling.

I. THE UTAH SUPREME COURT IN RIO ALGOM CONSCIOUSLY AND UNAMBIGUOUSLY REFUSED TO APPLY ITS HOLDING ON THE VALIDITY OF § 59-5-109 TO CASES PENDING AT THE TIME OF THE RULING.

The Utah Supreme Court's decision in Rio Algom Corp. v. San Juan County, 681 P.2d 184 (Utah 1984) could not have used clearer language in describing the retroactive effect of its invalidation of § 59-5-109. The Court unambiguously and unequivocally states that its ruling was prospective only, except as to the Rio Algom plaintiffs. The pertinent language is: "[W]e direct that our holding of unconstitutionality be prospective As to the six plaintiff - taxpayers . . . , this decision shall be retroactive for the year for which this suit for refund was brought." Id. at 196.¹ No fair, reasoned reading of this language supports Kennecott's claim to the benefits of the Rio Algom holding. Notwithstanding its unequivocal holding, Kennecott claims that Rio Algom "did not address the situation of parties who, at the time of the decision, had litigation pending challenging the constitutionality of Utah Code Ann. § 59-5-109. . . ." Brief of

¹ It is worth noting that the Rio Algom plaintiffs could only rely on the ruling for the 1981 tax year, "the year for which this suit for refund was brought." Id.

Respondent pg. 15. To support this assertion, Kennecott suggests that the Court relied upon cases which dealt with pure prospectivity and which did not address the issue of the retroactive application of a rule to pending cases. Brief of Respondent pg. 16 & Note 4. The implication of this argument is that the Court was confused about the nature of its holding as it applied to pending cases. Brief of Respondent pg. 15-16.

The Rio Algom Court's thorough analysis of the factual and legal basis for its retroactivity holding belies any notion that the Court was confused about the scope of its holding. The Court specifically discussed the hardship on local government if its ruling were applied to pending cases. In addition, the Court cited to cases where the holdings were limited to the parties only and the Court highlighted those cases' prospectivity rulings by parenthetically noting the importance of the holdings to the Court's analysis. Thus, the Rio Algom Court's analysis makes clear that the Court carefully and consciously chose to limit its holding to the parties only.

The Court's analysis began with an assessment of the potentially devastating effect on local government of retroactively invalidating a tax statute, especially when the ruling applied to assessments which were not yet final or which were the subject of pending appeals. Specifically, the Court held:

Since 1981, a number of owners of state-assessed properties have paid their taxes under protest or have filed formal complaints with the Tax Commission. Retroactive effect to a decision altering the relative tax burden between locally

assessed and state-assessed properties would require reopening the assessment process as to tax obligations not yet final. To the extent that this might result in refunds of taxes paid on state-assessed properties, it would impose indebtedness for future repayments from locally assessed properties. Such indebtedness could be huge in counties that derive high proportions of their budgets from state-assessed properties.

Id. at 195 (emphasis supplied). Having identified the harsh burdens associated with a retroactive ruling, the Court canvassed the law in other jurisdictions to determine whether it could avoid these harsh results by giving its ruling prospective application. Based upon these authorities and the burden on local governments, the Rio Algom Court concluded that it's holding should be given prospective effect. Id. at 196.

The Court's analysis however was not completed. The Court was concerned that giving a ruling only prospective effect would deprive "the litigants, who have sustained the burden of attacking an unconstitutional statute, of the fruits of their victory." Id. at 196.² Specifically, the Court was concerned about prospective rulings discouraging challenges to statutes of questionable validity. Addressing these criticisms, the Court determined to make its ruling prospective only, except as to the parties, and held:

In response to these considerations, some decisions that give only prospective effect to a holding of unconstitutionality as to all other parties give the holding retroactive effect as to the litigants or others who have litigation pending. Stickland v. Newton County, supra (Ga-parties only); Kansas City Millwright Co. v. Kalb, supra

² The Court also noted that giving prospective effect only made the Court's opinion an advisory opinion or dicta. Id. at 196.

(Kan.-parties and others with action pending); Perkins v. County of Albermarle, supra (Va.-parties only). . . . We gave this kind of limited retroactive effect to a decision that local government legislation was unconstitutional, a decision that was otherwise prospective only. Carter v. Beaver County Service Area No. One, 16 Utah 2d 280, 283, 399 P.2d 440, 442 (1965).

Id. at 196 (emphasis supplied). The Court then held that for the same reasons expressed in these opinions, it's ruling should be prospective only, except for the plaintiffs.

The Rio Algom Court's analysis of the retroactivity issue establishes that it consciously chose to limit its ruling to the parties and to exclude those with pending claims. In its discussion of the hardship of a retroactive ruling, it expressly refers to the unfair burden on local governments if its constitutionality ruling were applied retroactively to taxpayers with pending claims. Again, in analyzing whether to give the Rio Algom plaintiffs the benefit of the ruling, the Court cites to cases which limited their ruling to the parties and parenthetically noted that the rulings applied only to the parties.³ These are the case which persuaded the Court of the importance of rewarding the litigants and thereby encouraging challenges to statutes of questionable validity.

The Court's ruling reflects a balance between the need to reward litigants and the hardship of a retroactive ruling. The

³ Kennecott quotes from the portion of the Rio Algom decision which cites to cases applying rulings retroactively to the parties only. Kennecott, however, deletes these citations from it's block quote, thereby eliminating the parenthetical references explaining that the holdings limited the retroactive effect to the parties only. See Brief of Respondent at pg. 14.

Court addressed the first concern by giving the litigants the benefit of the ruling. It addressed the later issue by making the ruling otherwise prospective and by refusing to apply it to pending cases, even going so far as to limit the retroactive effect for the litigants to one tax year. The ruling thus must be viewed as a carefully tailored response to a complex issue.

In light of the Rio Algom Court's careful consideration of the issue of whether it's ruling should apply to pending cases, the Court must reject Kennecott's contention that Rio Algom did not address this issue.

II. THE UTAH SUPREME COURT SHOULD NOT REVERSE RIO ALGOM OR ABANDON UTAH'S COMMON SENSE APPROACH TO RETROACTIVITY.

Rio Algom and Utah's other retroactivity rulings provide a workable framework for balancing the competing interests involved when a court declares a statute unconstitutional or makes a new ruling. This Court has effectively applied this analysis in a number of situations. The proven effectiveness of Utah's approach to retroactivity strongly counsels against abandoning it, especially in light of the current chaos in the United States Supreme Court's opinions on this issue. Fortunately, Utah is not constitutionally mandated to follow the United States Supreme Court's opinions in this area.

Kennecott urges this Court to reverse the prospectivity approach adopted in Rio Algom and to rule that Utah courts may never limit the retroactive effect of their rulings to the parties only. Brief of Respondent pg. 19 Note 6. For support, Kennecott cites the opinion of Justice Souter in James B. Beam

Distilling Co. v. Georgia, 501 U.S.____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). This ruling was not constitutionally mandated but was based on Justice Souter's views of the principles of stare decisis and the rule of law generally.

The issue of whether this Court should adopt Justice Souter's approach in Beam however should not be addressed in a vacuum. Rather, it must be considered in the light of what, if any, limits the United States Constitution puts on state court's retroactivity rulings and in the light of how the Utah Supreme Court has effectively dealt with this issue in a number of cases. With this background, a careful review of the current disarray in the United State Supreme Court's opinions on retroactivity will convince this Court not to abandon its time tested approach to retroactivity.

A. The United States Constitution Provides States With The Freedom To Develop Retroactivity Rules Which Reflect That State's Supreme Court's Judicial Philosophy.

Under the United States Constitution, state courts are generally free to follow their own judicial philosophies in determining the retroactive effect of their declarations of state law. More than a half century ago, Justice Cardozo described the interrelationship between the federal constitution and state retroactivity rules as follows:

We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. . . . On the other hand, it may hold to the ancient dogma that the law declared by its courts had a

Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-365 (1932)(emphasis supplied).

The Utah Supreme Court is thus free to develop its own rules of retroactivity using "the juristic philosophy of the judges of her courts." The United State Supreme Court's opinion on the retroactive effect of that Court's rulings on federal law do not bind this Court. To the extent that this Court finds those opinions persuasive, it may choose to adopt them as the law of Utah. However, Utah's law on retroactivity is not in need of repair and would not benefit from an infusion of "juristic philosophy" of other courts.

B. Rio Algom And Other Utah Supreme Court Cases Create A Rational, Workable Framework For Assessing The Competing Retroactivity Interests.

The Utah Supreme Court's judicial philosophy is to approach the retroactivity issue pragmatically. The issue "is not a question of judicial power," Van Dyke v. Chappell, 818 P.2d 1023, 1025 (Utah 1991) and its resolution is not constrained by constitutional limitations. Loyal Order of Moose v. County Bd. of Equalization, 657 P.2d 257, 264 (Utah 1982). Rather, the retroactive effect of a ruling depends "solely upon an appraisal of the relevant judicial policies to be advanced." Van Dyke,

supra, 818 P.2d at 1025. The Court has described the factors guiding the retroactivity analysis as follows: "When we conclude that there has been justifiable reliance on the prior state of the law or the retroactive operation of the new law may otherwise create undue burden, the Court may order that the decision apply only prospectively." Id. at 1025. This balancing approach permits the Court to assess fully the actual impact of its ruling and to minimize any harshness.⁴

Rio Algom illustrates the effectiveness of Utah's approach to the retroactivity issue. In each case, the Court faced the prospect of retroactively overturning a state statute on which local governments had relied in serving their citizens. The Court also faced litigants who had successfully challenged the statute and had some claim to the fruits of their labors. By balancing these interests and limiting its holding to the parties, the Court was able to limit the undue burden of a retroactive ruling, yet reward the litigants and thereby encourage future challenges to questionable statutes.

⁴ An early example of Utah's realistic approach to retroactivity is Carter v. Beaver County Service Area, 399 P.2d 440 (Utah 1965). There, the plaintiff challenged the creation of the Beaver County service area claiming that the statute under which it was created violated the Utah constitution by usurping local governmental powers. The Court held the statute unconstitutional but limited the retroactive effect of its ruling to the parties only. Although not expressly stated, the Court was apparently concerned about the potential disruptive effect of a retroactive ruling invalidating service areas already created, some of which may have partially completed their projects. By limiting its ruling to the parties, the Court was able to tailor its ruling to eliminate the hardship of a retroactive ruling.

C. The Rationale Of Justice Souter's Opinion In Beam Does Not Provide A Sufficient Basis For Utah To Abandon The Rio Algom Approach To Retroactivity.

Kennecott urges the Court to reverse Rio Algom's retroactivity ruling because it limited its holding to the parties only. Kennecott does not challenge the underlying ruling's rationale which was to avoid the undue hardship of retroactivity while not discouraging challenges to statutes of questionable validity. Instead, Kennecott offers the reasoning of Justice Souter's opinion in James B. Beam Distilling Co. v. Georgia, 115 L.Ed.2d 481 (1991).

Whatever confusion has arisen because of the United States Supreme Court's seemingly irreconcilable opinions, no question can exist of their limited applicability to the issue of the retroactive effect of state court decisions on state law. First, the Beam opinions concerned only the retroactive effect of decisions establishing federal law.⁵ Second, none of the Beam opinions suggests that the United States Constitution requires state courts to adopt federal retroactivity analysis in cases dealing with state law.⁶ As a result, the Utah Supreme Court is

⁵ This fact is made clear by Justice Souter whose opinion stated that "the antecedent choice-of-law question is a federal one where the rule at issue derives from federal law, constitutional or otherwise" Beam, supra, 115 L.Ed.2d at 488, and who framed the issue as "whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the decision had already done so." Beam, supra, 115 L.Ed.2d at 491.

⁶ Justice Scalia relies on Article III of the United States Constitution in finding that all federal court decisions are automatically retroactive. Beam, supra, 115 L.Ed. 2d at 497. Justice Souter on the other hand finds support for his rejection

not bound by these rulings but may adopt them as the law of Utah to the extent it finds their reasoning persuasive.

The discussion that follows describes the analyses of the Beam opinions. It is divided into two parts. The first part is a brief discussion of two United State Supreme Court rulings which help put the Beam opinions in prospective. The second part is a discussion of the conflicting rationales and approaches evidenced by the separate opinions of Justices Scalia, Souter and O'Connor in Beam. This later part highlights how Justices Scalia's and Souter's opinions, which reject selective prospectivity, are inconsistent with Utah's retroactivity law and shows why they should not be adopted as the law in Utah.

1. Equitable Considerations Have An Important Role In The United States Supreme Court's Rulings In Chevron Oil And McKesson.

Before addressing Chevron Oil and McKesson, it is important to distinguish between retroactivity as a choice-of-law issue and retroactivity as a remedy issue. The choice-of-law issue is simply whether a new rule should apply to facts or cases which arose before the new rule was declared. Stated differently, the issue is whether the court should choose to apply the new or old rule. When the new or old rule concerns federal law, the choice-of-law issue is governed by federal law. This aspect of retroactivity is addressed in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

of selective prospectivity, in part, in the principles of stare decisis and the rule of law without relying on the constitution. Beam, supra, 115 L.Ed. 2d at 489.

The remedy aspect of retroactivity comes into play after the court chooses to apply new law to the parties whose actions occurred before the new ruling. At that point, the court must determine what remedy should govern the application of the new law. This aspect of the retroactivity analysis is addressed in McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 110 L.Ed.2d 17 (1990).

The United States Supreme Court's opinion in Chevron Oil addresses the question of whether a prior ruling concerning the appropriate statute of limitations should be given retroactive effect so as to bar the plaintiff's claim.⁷ In analyzing this issue, the Court adopted a three part test:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation. Finally, [a court must] weigh the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding on nonretroactivity.

Id. at 106-07 (emphasis supplied). Applying this test, the Court refused to apply the new rule to bar the plaintiff's claim retroactively. The analysis set forth in Chevron has been

⁷ Under the new rule, the plaintiff's claims would have been barred before the new ruling was issued. Chevron Oil, supra, 404 U.S. at 105.

followed in many federal cases and adopted by several state courts.

In McKesson, the Court discusses the remedy aspect of the retroactivity issue. McKesson was part of the litigation flowing from the ruling in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) that declared unconstitutional under the Commerce Clause state taxing statutes which preferred local business. After the Bacchus ruling, Florida amended its statute making superficial changes but effectively retaining the local preferences found objectionable in Bacchus. The plaintiff in McKesson challenged the statute in Florida's state court. The Florida Supreme Court found the statute unconstitutional under Bacchus, granted injunctive and declaratory relief, but refused to award a refund for taxes paid under the new statute.

On appeal, Justice Brennan summarily disposed of the choice-of-law issue, i.e. whether the Florida Supreme Court's decision declaring the tax unconstitutional should be applied retroactively to taxes arising prior to that decision. As Justice Brennan noted regardless of which choice-of-law approach applied, the Florida Supreme Court's decision applied retroactively. McKesson, supra, 110 L.Ed.2d at 32 Note 15. Thus, there was no question that the taxes were collected pursuant to a statute, unconstitutional as to the plaintiff.

Since Florida had collected a tax unconstitutional under the Commerce Clause, the McKesson Court addressed remedy issue and held that prospective relief did not satisfy federal law and the

state was required "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." McKesson, supra, 110 L.Ed.2d at 32. The Court however made clear that the state had some flexibility in fashioning a retrospective remedy. McKesson, supra, 110 L.Ed.2d at 37-40.

2. The Various Opinions In Beam Contain No Unifying Analysis Which Justifies Reversing Rio Algom.

The various opinions in Beam contain no unifying analysis which justifies reversing Rio Algom. This is illustrated by considering the rationales underlying the three approaches championed by Justices Scalia, Souter and O'Connor. These opinions describe the approaches offered in the various opinions.⁸

⁸ In Beam, the justices issued five opinions none of which garnered more than three justices support. Justice Souter's opinion was joined by Justice Stevens. Justice White wrote a concurring opinion. Justices Scalia and Blackmun wrote separate concurring opinions in which they each joined the others and in which Justice Marshall joined. Justice O'Connor wrote a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined.

In American Trucking Assn's. v. Smith, 110 L.Ed.2d 148 (1990), the Court also addressed the choice-of-law retroactivity issue. This case resulted in three opinions which for the most part track the views expressed in Beam. Justice O'Connor wrote the plurality opinion and was joined by the Chief Justice and Justices White and Kennedy. Justice Scalia concurred in the judgment because of his disagreement with the substantive law issues, not because of his opinion on retroactivity. He thereby made Justice O'Connor's opinion the opinion of the Court. Justice Stevens wrote a dissent in which Justices Brennan, Marshall and Blackmun joined.

Beam, like McKesson, involves Bacchus's invalidation of state tax laws under the Commerce Clause.⁹ However, unlike McKesson, the challenged statute was enacted and the challenged tax was paid before the Bacchus ruling. The issue thus was whether the Bacchus ruling should be applied retroactively to make invalid a tax which had been valid when incurred.¹⁰ A sharply divided Court determined that the Bacchus decision should be applied retroactively to invalidate the taxes incurred before Bacchus was decided.¹¹

a. The Rationale For Automatic Retroactivity In All Cases Exalts Theoretical Purity At The Expense of Litigants' Reasonable Expectation Interests.

Justice Scalia, Marshall, and Blackmun espouse the theory of automatic retroactivity in all cases. The rationale for this approach is found in Article III of the United States Constitution and these justices' philosophical beliefs about the role of courts. According to this view, the judicial role is to declare what the law already is; it is not to create the law.

⁹ In American Trucking, the taxpayer sought retroactive application of the United States Supreme Court's decision in American Trucking Association v. Scheiner, 483 U.S. 266 (1987) which, like Bacchus, found a state statute invalid under the Commerce Clause.

¹⁰ In American Trucking, the taxpayer also challenged taxes arising after the Scheiner decision established the new rule. All the Justices agreed that taxes arising after the Court's ruling declaring the statute unconstitutional must be refunded.

¹¹ In American Trucking, the Court, in a plurality opinion written by Justice O'Connor refused to retroactively apply the ruling in Scheiner.

Once this role is defined, Justice Scalia and those adopting his view then easily conclude that all constitutional "declarations" must be retroactive. Justice Scalia reasoned as follows: "Since the constitution does not change from year to year; since it does not conform to our decisions, but our decision are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." American Trucking Ass'n, supra, 110 L.Ed. 2d at 174-75 (Opinion of Justice Scalia). Although courts theoretically declare law, Justice Scalia concedes that "in a real sense" courts make law. Beam, supra, 115 L.Ed.2d at 497. However, to be consistent with the judicial role, Justice Scalia believes that judges must make law "as though they were 'finding' it" even though this raises practical problems when precedents are overruled. Justice Scalia, however, finds these difficulties to be a "one of the understood checks upon the judicial law making power," since these difficulties make it harder to overrule precedent. Beam, supra, 115 L.Ed.2d at 497.

In Rio Algom, this Court rejected the theory that a law, once declared unconstitutional, is void from its inception. Rio Algom, supra, 681 P.2d at 196. However the most telling critique of Justice Scalia's view is Justice White's opinion in Beam.

Plainly enough, Justices Scalia, Marshall, and Blackmun would depart from our precedents [including Chevron Oil]. Justice Scalia would do so for two reasons, First, even though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggest that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover

it, hence suggesting that there are citizens who are naive enough to believe them. Second, Justice Scalia, fearful of our ability and that of other judges to resist the temptation to overrule prior cases, would maximize the injury to the public interest when overruling occurs, which would tend to deter them from departing from established precedent.

I am quite unpersuaded by this line of reasoning. . . .

Beam, supra, 115 L.Ed.2d at 495.

This Court should also be unpersuaded by Justice Scalia's unrealistic view of the role of judges and the real world costs of changes in the law, costs which in some cases cannot be avoided as courts' understanding of the law evolves, grows, and improves. As Justice White has noted, these costs may become so high that absent a method by which courts can control the costs by making rulings prospective, cases which ought to be overruled may not be. Quill Corporation v. North Dakota, 119 L.Ed.2d 91, 120 (1992)(White, J., Concurring in part and dissenting in part). The real world requires a common sense approach to what courts really do when they make law.

b. Principles Of "Stare Decisis" And "Rule of Law" Do Not Require An Abandonment Of Utah's Approach To Retroactivity.

Justice Souter's Beam opinion rejects the notion that a ruling may never be retroactively applied to the parties only. He bases this conclusion on the belief that limiting retroactivity to the parties in civil cases is not necessary to foster challenges to laws of questionable validity. In addition, Justice Souter believes that selective prospectivity is inconsistent with stare decisis and the rule of law generally.

Neither of these rationales constitutionally binds this Court, nor should they persuade this Court to reverse Rio Algom.

Justice Souter's view of incentives is directly contrary to this Court's view. Justice Souter's position as expressed in Beam is that selective prospectivity is not necessary as an incentive because even purely prospective relief provides sufficient incentive to a litigant to challenge the constitutionality of questionable statutes.

When the Rio Algom Court addressed this issue, it reached the opposite conclusion. In Rio Algom, the Court first found that the "new" rule should be applied prospectively because of the hardships of a retroactive ruling. The Court however then considered the issue of incentives and found that selective prospectivity fostered challenges to questionable statutes. Justice Souter's opinion offers nothing new to refute the Rio Algom analysis and his analysis of the incentives issue should be rejected for the reasons set forth in Rio Algom.

Justice Souter's other rationale for rejecting selective prospectivity is that it "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally." Beam, supra, 115 L.Ed.2d at 489. Justice Souter does not rely upon the Equal Protection Clause for his position on equal treatment and it apparently has its origin in the opinions of Justice Harlan. More importantly, he recognizes that even under his approach similarly situated persons are treated differently. However, in

Justice Souter's view, the cost of providing equality in those situations justifies disparate treatment that some might deem arbitrary. Beam, supra, 115 L.Ed,2d at 492-93.

The Court ought not accept Justice Souter's view of where the retroactivity line should be drawn. His view creates an absolute rule prohibiting selective prospectivity and does not permit the court to properly take into account the dual concerns of protecting local governments from the harshness of retroactive rulings and of rewarding litigants who successfully challenge a law.

These dual concerns are not more evident than when a tax statute is challenged. In such a case, retroactive invalidation will almost always cause huge hardships to local governments who have collected and spent taxes in reliance on presumptively valid statutes. Litigants on the other hand would have little incentive to challenge a statute if the prospects of a purely prospective ruling were substantial. The incentive for these litigants would be simply to wait for someone else to incur the expense of challenging a questionable statute. Once the statute is declared unconstitutional, all will benefit from the ruling without incurring the risk or expense.¹²

¹² Assuming arguendo that Justice Souter's equality concerns justified the rejection of selective prospectivity, which they do not, any ruling reversing Rio Algom's retroactivity analysis should be prospective only so as not to defeat the very fairness and equality concerns espoused by Justice Souter. Unlike the Court in Beam, this Court faces an earlier holding which expressly limited the retroactive application of a ruling to the parties for a specific tax year. Needless to say, many taxpayers (including the Rio Algom parties) and the courts have

c. The Complexity Of Retroactivity Determinations Requires The Application Of A Flexible Standard.

Justice O'Connor's discussion of the Chevron Oil test shows that a careful consideration of the equities is necessary to insure fairness. First, Justice O'Connor notes: "If Justice Souter is concerned with fairness, he cannot ignore Chevron Oil; the purpose of the Chevron Oil test is to determine the equities of retroactive application of a new rule." She also analyzes the stare decisis implications of the Chevron Oil test and that a decision not to apply a law is consistent with stare decisis.

A decision not to apply a new rule retroactively is based on principles of stare decisis. By not applying the law-changing decision retroactively, a court respects the settled expectations that have built up around the old law. If a Chevron Oil analysis reveals, as it does, that retroactive application of Bacchus would unjustly undermine settled expectations, stare decisis dictates strongly against the Court's holding [that Bacchus be applied retroactively].

Beam, supra, 115 L.Ed.2d at 498, 499. Based on the Chevron Oil test, Justice O'Connor would have found that the Bacchus ruling should not have been given retroactive effect in either Bacchus or Beam.

Although Justice O'Connor did not address the issue of whether selective prospectivity is consistent with Chevron Oil,

accepted Rio Algom at face value and have not pursued or have dismissed challenges to assessments which have now become final. The only difference between these persons and Kennecott is that the former accepted the Rio Algom's plain language limiting its holding to the parties for a specific tax year. To avoid this unfairness and unequal treatment, any rejection of selective prospectivity should be prospective only.

the Supreme Court of Colorado has confronted that issue in Martin Marietta Corp. v. Lorenzo, 823 P.2d 100 (Colo. 1992). Prior to Marietta, the Colorado Court of Appeals had recognized a public policy exception to the at-will employment doctrine and applied the holding to the parties. Cronk v. Intermountain Rural Electric Ass'n., 765 P.2d 619 (Colo. App. 1988). The issue before the Colorado Supreme Court in the Marietta case was whether persons whose cause of action arose before Cronk could benefit from the ruling. In addressing the applicability of the Chevron Oil test to this issue after Beam, the Court first noted Justice Souter's refusal to follow Chevron Oil and held:

In the instant case, we could employ Justice Souter's analysis and conclude that, as a matter of state law, once a new rule of substantive law, such as the Cronk rule, is applied to litigants then before the court, it must be applied to all others not barred by procedural requirements or res judicata. We decline, however, to follow such a course. Because we deal in this case with the issue of the retroactive application of a state judicial decision announcing a rule of tort law and not a rule deriving from federal constitutional or statutory law, we continue to adhere to the Chevron analysis in resolving the issue of retroactive or prospective application of the state judicial decision.

Id. at 112 Note 7. Having rejected Justice Souter's analysis, the Colorado Supreme Court weighed the equities under the Chevron Oil test and found the new rule retroactive.

The Utah Supreme Court should also reject Justice Souter's analysis and reaffirm its flexible retroactivity analysis found in Rio Algom and followed in its other cases. This analysis permits the Court to assess fully the competing fairness, equity, and policy interests at stake when a retroactivity issue arises.

This analysis, more importantly, permits the Court to tailor its ruling to the needs of a particular case without the unnecessary limits and inflexibility which would come with the adoption of automatic retroactivity or the rejection of selective prospectivity.

III. THE APPLICATION OF RIO ALGOM'S RETROACTIVITY RULING DOES NOT VIOLATE KENNECOTT'S DUE PROCESS OR EQUAL PROTECTION RIGHTS.

A. Under McKesson, An Individual's Due Process Rights Are Not Involved Until After The Court Determines That The "New" Law Applies To The Individual's Actions.

Kennecott asserts that a refusal to give it the benefit of Rio Algom's invalidation of § 59-5-109 would violate Kennecott's due process rights as described in McKesson. That decision however does not recognize a due process limitation on a court's choice between applying an "old" law or applying a "new" law retroactively. In McKesson, there was no dispute that the "new" law applied retroactively. The only issue was what relief was required to remedy the violation of the new law.

McKesson has no application here, because it deals with remedy, not choice-of-law issues. In the instant case, the "new" law is Rio Algom's invalidation of § 59-5-109 and it does not apply to Kennecott because the Court limited its ruling to the parties only. Since this "new" rule does not apply to Kennecott, § 59-5-109 was valid as to Kennecott for the years prior to Rio Algom and remedy is not an issue.

For these same reasons, Smith v. Travis County Education District, 791 F. Supp. 1170 (W.D. Tx 1992) vacated on other grounds 968 F.2d 453 (Cir. 5 1992) also has no application here.

It should however be noted that Travis dealt with the issue of whether due process required a state to give taxpayers a remedy for taxes collected after a statute was declared unconstitutional. The Court specifically noted that no due process violations existed as to taxes incurred before the statute was declared unconstitutional. Travis, supra, 791 F. Supp. at 1201. Since Kennecott's tax liability was incurred before Rio Algom invalidated the statute, Travis stands for the proposition that Kennecott's tax payment does not violate the Due Process Clause.

A. Kennecott's Equal Protection Rights Are Not Violated By Rio Algom's Retroactivity Ruling.

Kennecott claims that its equal protection rights are violated by Rio Algom's retroactivity ruling. Kennecott supports this proposition by citing Justice Souter's opinion in Beam. However, Justice Souter's references to equality of treatment were not founded on the Equal Protection Clause of the United States Constitution but rather found their origins in the principles of "stare decisis and the rule of law generally." Beam, supra, 115 L.Ed.2d at 489. Thus, Justice Souter's opinion does not support Kennecott's equal protection claims and the other cases cited by Kennecott do not address the equal protection implications, if any, of rulings limiting the retroactivity application of new laws.

In addition, Kennecott's equal protection claim cannot withstand close factual scrutiny. As a threshold matter, Kennecott is not treated differently from the Rio Algom

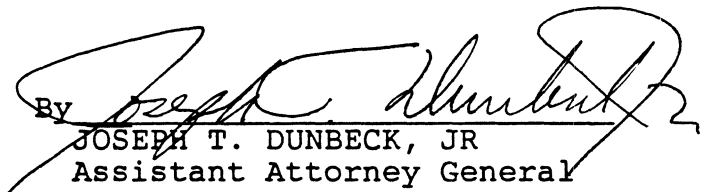
plaintiffs. Under the Rio Algom ruling, the plaintiffs were limited to challenging their taxes for 1981 and were not permitted to use the invalidation of § 59-5-109 to challenge assessments for subsequent years. Thus, the Rio Algom plaintiffs, like Kennecott in the instant case, can not use Rio Algom's invalidation of the statute to challenge their 1983 taxes. In other words, for the 1983 tax year, Kennecott is treated the same as the Rio Algom plaintiffs.

More importantly, Kennecott has failed to prove that any difference in treatment between Kennecott and the Rio Algom plaintiffs is not reasonably related to a legitimate governmental purpose. The Rio Algom Court set forth in some detail the reasons why its ruling was prospective only, except for the parties. Kennecott has not sustained its burden of showing that these reasons are not legitimate governmental purposes or that the classification drawn are not reasonably related to those purposes. Without such a showing, Kennecott's equal protection claim must fail.

DATED this 23 day of November, 1992.

PAUL VAN DAM

By



JOSEPH T. DUNBECK, JR
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of November, 1992, I caused a true and correct copy of the foregoing REPLY BRIEF OF THE STATE TAX COMMISSION OF UTAH to be mailed, first class, postage prepaid, to the following:

JAMES B. LEE
KENT W. WINTERHOLLER
PARSONS, BEHLE & LATIMER
201 South Main Street, #1800
P.O. Box 11898
Salt Lake City, UT 84147-0898
Attorneys for Kennecott Corp.

DAVID E. YOCOM - 3851
Salt Lake County Attorney
KARL HENDRICKSON - 1464
Deputy Salt Lake County Attorney
BUTL THOMAS PETERS - 2574
Special Deputy County Attorney
310 South Main Street, #1100
Salt Lake City, UT 84101
Attorneys for Salt Lake County

A handwritten signature in cursive script, reading "Joseph C. Hendrickson", written over a horizontal line.