Judicial Overruling

TIME FOR A NEW GENERAL RULE

BY HOWARD YALE LEDERMAN

On January 12, 2002, the owners, operators, employees, and customers of Detroit's three gambling casinos woke up wondering whether the city would have to shut down the casinos and reopen the selection process for casino developers. The day before, the U.S. Court of Appeals had struck down the Detroit Casino Selection Ordinance's preference provision favoring certain competing developers as unconstitutional.[1] Would the casinos have to shut down? Would the city have to reopen the developer selection process?

On November 17, 2003, the Michigan Supreme Court granted leave in a case and directed the parties to brief whether the Court should overrule an earlier decision defining condemnation law projects prospectively or retroactively.[2] Would extensive development projects have to stop? Would other such projects never get off the ground?

On April 2, 2002, the Michigan Supreme Court held that the common law governmental immunity rule's trespass nuisance exception no longer existed.[3] Would the Court's decision be retroactive, thus leaving thousands of uninsured businesses and homeowners with huge cleanup debts from predecisional water and sewer floods?

Since 1999, the Michigan Supreme Court has been an activist court, overruling many earlier decisions.[4] How can courts make such changes the least disruptive for all concerned? By adopting a fair, principled, and practical prospectivity-retroactivity (p-r) jurisprudence.

This means repudiating the general rule of full retroactivity. Michigan appellate courts are building a fair, principled, and practical p-r jurisprudence around limited retroactivity and prospectivity. About three years ago, Timothy Baughman wrote an article calling for adoption of the U.S. Supreme Court's rigid retroactivity rule.[5] I disagree. Full retroactivity should not be the rule but the exception.

Preconditions and Terms

Let's confront ideology. In the U.S. Supreme Court, full retroactivity, limited retroactivity, and prospectivity have had conservative and liberal supporters.[6] In the Michigan appellate courts, the same is true.[7] Therefore, ideological divisions need not block the new p-r jurisprudence. Using limited retroactivity and prospectivity to expand or restrict the effect of overruling decisions for ideological reasons is not legitimate. Any legitimate p-r jurisprudence must apply to the 2003 conservative court and any future liberal court. Over time, repudiation of full retroactivity as the general rule will thus apply to overruling conservative and liberal decisions.

Let's define our terms. P-R is "a choice of law" issue.[8] Full retroactivity usually means that the overruling decision applies to actions, events, and transactions predating the decision subject to res judicata, collateral estoppel, and statutes of limitations.[9] Limited retroactivity usually means that the overruling decision applies to actions, events, and transactions predating the decision by a certain length of time.[10] Selective prospectivity usually means that the overruling decision applies to the overruling case's and certain other cases' actions, events, and transactions, but not to others predating the decision.[11] Complete prospectivity means that the overruling decision applies only to future actions, events, and transactions.[12]

The Retroactivity Rule and the Prospectivity Test

In 1993, the U.S. Supreme Court readopted a rigid, full retroactivity rule.[13] Before 1993, the Court recognized a prospectivity exception and developed a test to determine whether an overruling decision should apply prospectively.[14] In 1988, the Michigan Supreme Court adopted this test for civil cases:

1. *Whether the overruling decision is a new decision, because:*
   A. *It has overruled settled precedent; or*
   B. *It has decided an issue of first impression, where at least one earlier case has not foreshadowed the overruling decision.*
2. *If the overruling decision meets 1A or 1B above, the issue becomes how limited any retroactivity should be, or whether prospectivity is appropriate. Michigan appellate courts consider:*
   A. *The purpose of the new rule of law;*
   B. *The extent of reliance on the old rule of law;*
   C. *The effect of retroactivity on the administration of justice.*[15]

This test is not rigid: Michigan appellate courts "may also incorporate into our analysis any other facts or considerations relevant to the instant dispute . . . ."[16] Use of Factors A–C is not mandatory.[17] "Resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy."[18] When overruling decisions, "the Court must . . . seek a just and realistic solution of the problems occasioned by the change."[19]

The Trend in P-R Law

As Justice Moody wrote, "the more recent trend is to deny *full* retroactivity(,) unless an unusual situation requires it."[20] The Court had expressed great "concern over the reliance of the bench and bar upon the state of the law prior to [an overruling] decision. Failure to protect those reliance interests would . . . require judges and attorneys to anticipate future changes rather than to pattern their behavior after laws presently in effect."[21] Such a requirement "would undercut respect for current appellate pronouncements, a respect which forms the basis for our legal system."[22] Thus, the Court's "application of the . . . test represent[ed] a conscious effort to limit the retroactive effect of law-changing decisions."[23]

Since 1982, the Michigan appellate courts have continued their "more flexible approach" to p-r, giving holdings limited retroactive or prospective effect.[24] In *Pohutski v City of Allen Park,*[25] the Court overruled *Hadfield v Oakland County Drain Commissioner*[26] and *Li v Felt* (Aft Remand),[27] and held that the common law trespass-nuisance exception to the governmental immunity rule no longer existed.[28] Applying the new law and three-part factors described above, the Court held its decision prospective.[29] The Court found its decision "akin to . . . a new rule of law."[30] While the purpose factor favored retroactivity, the Court found extensive reliance on *Hadfield* and *Li:*

> *[M]unicipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same. Prospective application acknowledges that reliance.*[31]

Prospective application minimized the change's impact on the administration of justice. Therefore, the Court opted for prospective application of *Pohutski* as best for all concerned.

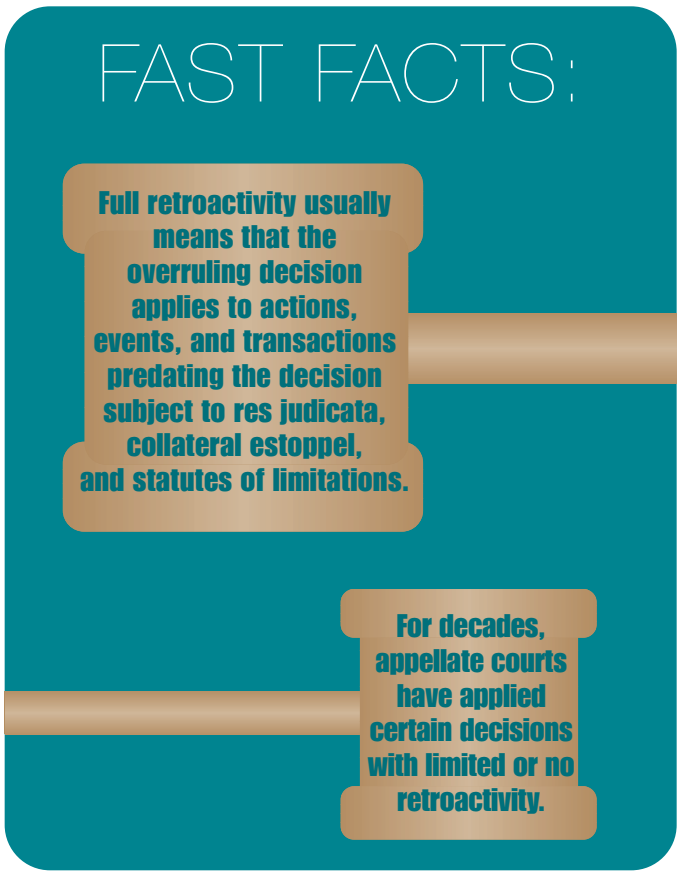
In *Lesner v Liquid Disposal, Inc*[32] the Michigan Court of Appeals affirmed a workers' compensation award but remanded for recalculation of benefits. The Court later recalculated benefits under the controlling decision, *Weems v Chrysler Corp.*[33] The Michigan Supreme Court overruled *Weems* and adopted a different formula.

However, the Court concluded that its decision would have only limited retroactive effect. The Court found its decision to be a new rule. After declaring its purpose as "to correct the [*Weems* Court's] flawed construction" of MCL 418.321, the Court recognized that *Weems* had "been controlling authority for over six-and-one-half years."[34] Thus, reliance on *Weems* had been "widespread."[35] Moreover, compelling recalculation of benefits for the *Weems* period decisions would "impos[e] an enormous burden on the workers' compensation system . . . ."[36] Therefore, the Court limited retroactive application to cases pending before administrative law judges and cases on appeal from their decisions.

The Court's p-r decisions were correct and practical. In *Pohutski* and *Lesner,* application of the present full retroactivity rule would have had an unjustified and severe negative impact. Mr. Baughman has criticized the above test and would criticize these decisions as "freeing the Court from concern for the practical effect of law-changing decisions."[37] However, *Pohutski, Lesner,* and other decisions show more concern about such decisions' practical impact than full retroactive decisions would have shown.

Authority

The Court's decisions were within its rightful authority. The power to define the law implies the power to change the law. The power to change the law implies the power to define the new law's scope of application. The U.S. Constitution does not mandate any particular state law p-r decisionmaking.[38] For decades, appellate courts have applied certain decisions with limited or no retroactivity.



"Resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." When overruling decisions, "the Court must . . . seek a just and realistic solution of the problems occasioned by the change."

Appellate courts have always performed two different functions: deciding cases and establishing and changing the rules governing and guiding future conduct.[39] Accordingly, the Court's authority to decide how to apply its changes is broad.

Mr. Baughman's criticisms of the above test and decisions like *Lesner* and *Pohutski* as "removing an important restraint against legislating in the guise of deciding cases"[40] are unjustified. Mr. Baughman cited Justice Scalia's statement that "historically 'full retroactive decisionmaking was considered a principal distinction between the judicial and legislative power.'"[41] However, Mr. Baughman overlooks that "judges are legislators within certain restricted limits,"[42] and that "the drawing of lines of distinction between different types of cases" is "the essence of the judicial process."[43] Deciding p-r issues exemplifies this process.[44] Finally, preserving a historical distinction does not justify locking the courts into a punitive, rigid full retroactivity rule. Thus, limited retroactivity and prospectivity are well within the Court's authority.

The Future

A fair, principled, and practical Michigan p-r jurisprudence means repudiation of the full retroactivity rule and continuation of the movement to limited retroactivity and prospectivity. Only where imperative to accomplish the new decision's purpose, as in *Shelley v Kraemer,* where the purpose was to break racially restrictive covenants,[45] should a court choose full retroactivity. Limited retroactivity and prospectivity should be the first two choices. Michigan p-r jurisprudence is heading in the right direction. Let's keep it rolling that way. ✦

Howard Yale Lederman received a B.A. from Oakland University and a J.D. from Wayne State University Law School. As an attorney with Norman Yatooma & Associates, PC, he practices in certain commercial, constitutional, employment, and other civil areas. From writing briefs on retroactivity, he has developed an interest in the subject.

Footnotes

1. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v Michigan Gaming Control Board (Lac Vieux II),* 276 F3d 876 (CA 6, 2002), on remand Case No 2:97-CV-67, 2002 WL 1592596 (WD Mich 2002) (Unpub Decision).
2. *County of Wayne v Hathcock,* 671 NW2d 40 (2003).
3. *Pohutski v City of Allen Park,* 465 Mich 675; 641 NW2d 219 (2002).
4. Eg, *Pohutski,* 465 Mich 675, overruling *Hadfield v Oakland County Drain Commissioner,* 430 Mich 139; 422 NW2d 205 (1988) and *Li v Feldt,* 434 Mich 584; 456 NW2d 55 (1990); *Nawrocki v Macomb County Road Commission,* 463 Mich 143; 615 NW2d 702 (2000), overruling *Pick v Szymczak,* 451 Mich 607; 548 NW2d 603 (1996); *Lesner v Liquid Disposal, Inc,* 466 Mich 95; 643 NW2d 553 (2002), overruling in part *Weems v Chrysler Corp,* 448 Mich 679; 533 NW2d 287 (1995).
5. T. Baughman, "Justice Moody's Lament Unanswered: Michigan's Unprincipled Retroactivity Jurisprudence," 79 Mich B J 664 (June 2000).
6. Eg, *James B Beam Distilling Co v Georgia,* 501 US 529, 547–550 (1991) (plurality decision) (Scalia, Blackmun and Marshall, JJ, concurring in the judgment); Id at 550–552 (O'Connor, Rehnquist, and Kennedy, JJ, dissenting), *Lemon v Kurtzman,* 411 US 192, 211; (1973) (Douglas, J, dissenting), *Chevron Oil Co v Huson,* 404 US 97, 105–109 (1971) (majority opin of Stewart, J), *Desist v US,* 394 US 244, 255–259 (1969) (Douglas, J, dissenting) and (Harlan, J, dissenting).
7. Eg, *Lesner,* 466 Mich 95, 108–110 (majority opin of Young, J), *Adams v Dept of Transportation,* 253 Mich App 431, 434–440; 655 NW2d 625 (2003) (majority opin of Zahra, J), Id at 440–443 (Hood and Jansen, JJ, dissenting), *Sturak v Ozomaro,* 238 Mich App 549, 559–568 (2000) (majority opin of Gage, J), *Hall v Novik,* Michigan Court of Appeals Docket No 232260, 2003 WL 197353 (April 29, 2003) (majority opin of Bandstra, J).
8. *Beam,* 501 US 529, 535, quoting *Great Northern Railroad Co v Sunburst Oil & Refining Co,* 287 US 358, 364; 53 S Ct 145; 77 L Ed 360 (1932).
9. *Beam,* 501 US 529, 535–537, 541.
10. Sturak, 238 Mich App 549, 564, *Crego v Coleman,* 232 Mich App 284, 329; 591 NW2d 277 (1998) *(Crego III)* (Whitbeck, J, dissenting), overruled on other grounds *Crego v Coleman,* 463 Mich 248; 615 NW2d 218 (2000) *(Crego IV),* cert den 531 US 1074 (2001), Justice Blair Moody, Jr., "Retroactive Application of Law-Changing Decisions in Michigan," 28 Wayne L Rev 439, 469–470 (Winter 1982).
11. *Beam,* 501 US 529, 537.
12. Id at 536.
13. *Harper v Virginia Dept of Taxation,* 509 US 86, 97 (1993).
14. *Chevron Oil,* 404 US 97, 106–107.
15. *Pike v City of Wyoming,* 431 Mich 589, 603–604; 433 NW2d 768 (1988).
16. *Sturak,* 238 Mich App 549, 560. Accord, *Stanton v Lloyd Hammond Produce Farms,* 400 Mich 134, 147; 253 NW2d 114 (1977).
17. *Hall,* p 6 fn 8.
18. *Michigan Educational Employees Mutual Insurance Co (MEEMIC) v Morris,* 460 Mich 180, 190; 596 NW2d 142 (1999). Accord, *Riley v Northland Geriatric Center* (Aft Remand), 431 Mich 632, 644–646; 433 NW2d 787 (1988).
19. *Hall,* p 4, quoting *Riley,* 431 Mich 632, 644–645.
20. Moody, supra, p 447. Accord, *Hall,* p 7.
21. Moody, supra, p 465.
22. Moody, supra, p 465.
23. Moody, supra, p 468.
24. *Pohutski,* 465 Mich 675, 696, quoting *Lindsey v Harper Hospital,* 455 Mich 56, 68; 564 NW2d 861 (1997).
25. *Pohutski,* 465 Mich 675.
26. *Hadfield,* 430 Mich 139.
27. *Li,* 434 Mich 584.
28. *Pohutski,* 465 Mich 675, 690.
29. Id at 696–697.
30. Id.
31. Id at 697.
32. *Lesner,* 466 Mich 95.
33. *Weems v Chrysler Corp,* 448 Mich 679; 533 NW2d 287 (1995).
34. *Lesner,* 466 Mich 95, 109.
35. Id.
36. Id.
37. Baughman, supra, p 666.
38. *Sunburst Oil & Refining Co,* 287 US 358, 364.
39. B. H. Levy, *Realist Jurisprudence & Prospective Overruling,* 109 U Pa L Rev 1, 3 (November 1960).
40. Baughman, supra, p 666.
41. Baughman, supra, p 666, quoting *Harper,* 509 US 86, 107 (Scalia, J, concurring).
42. Levy, supra, p 5, fn 11, quoting Chief Justice H Stone, 10/16/41 Letter. Accord, F V Cahill, Jr, *Judicial Legislation* (The Arnold Press 1952), pp 39–40, citing and quoting Justice O W Holmes, *Common Carriers & The Common Law,* 13 Am L Rev 609, 630–631 (1879); Cahill, supra, p 85, citing and quoting A L Corbin, *Review of C K Allen's Law in the Making,* 38 Yale L J 270, 274 (1928); Cahill, supra, p 86, citing and quoting Justice B L Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921), pp 31–32.
43. *US ex rel Angelet v Fay,* 333 F2d 12, 21 (CA 2, 1964), aff'd 381 US 654 (1965).
44. Eg, *White v GMC,* 431 Mich 387, 391; 429 NW2d 576 (1988), *Franks v White Pine Copper Division,* 422 Mich 636, 672; 375 NW2d 715 (1985).
45. *Shelley v Kraemer,* 334 US 1 (1948).