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 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.19

This test is not rigid; Michigan appellate courts "may also incorporate into our analysis any other facts or considerations relevant to the instant dispute."20 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 represented 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 Commissioner26 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, Inc32 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 "impose[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.

FAST FACTS:

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.

For decades, appellate courts have applied certain decisions with limited or no retroactivity.
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.

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veloped an interest in the subject.

Footnotes

5. T. Baughman, “Justice Moody’s Lament Unanswered: Michigan’s Unprinci-
   rality decision) (Scalia, Blackmun and Marshall, JJ, concurring in the judge-
   ment); Id at 550–552 (O’Connor, Rehnquist, and Kennedy, JJ, dissenting),