

THE RETROACTIVE APPLICATION OF OHIO STATUTES

The propriety of retroactive application of state statutes has long plagued Ohio courts. The recent cases of *Kilbreath v. Rudy*¹ and *Bagsarian v. Parker Metal Co.*² have caused the problem to surface once again. In *Kilbreath*, plaintiff alleged an injury resulting from a medical prescription which had been incorrectly refilled on or about March 3, 1965. The petition was filed January 23, 1967, and service of summons on one of the three defendants, a foreign corporation, was undertaken pursuant to the Ohio Long Arm Statute.³ The cause of action arose six months before the Ohio Long Arm Statute became effective.⁴ The foreign corporation appeared specially and moved to quash the service, on the ground that the Ohio Long Arm Statute was inapplicable to this case because of the general policy against retroactivity. The Court of Common Pleas of Franklin County agreed, and dismissed the petition as to the foreign corporation.⁵ The court of appeals reversed that judgment⁶ and certified the record to the Ohio Supreme Court on the ground that the decision was in conflict with judgments of the Court of Appeals for Cuyahoga County.⁷ The Ohio Supreme Court held the Ohio Long Arm Statute applicable to causes of action existing, but not filed, before the effective date of that statute.⁸

In *Bagsarian*, a products liability case in the United States District Court for the Northern District of Ohio, jurisdiction was based on diversity of citizenship. Service of process was made on defendant company under the provisions of the Ohio Long Arm Statute. The defendant metal company appeared specially for the purpose of contesting jurisdiction. Service of process in cases brought in the district courts is effective if the method used would be effective under the laws of the state in which the court sits.⁹ The defendant claimed that

¹ 16 Ohio St. 2d 70 (1968).

² 15 Ohio Misc. 80, 282 F. Supp. 766 (N.D. Ohio 1968).

³ OHIO REV. CODE ANN. §§ 2307.381-385 (Page Supp. 1967).

⁴ *Id.* These sections became effective September 28, 1965.

⁵ *See* *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 71 (1968).

⁶ *Kilbreath v. Rudy*, No. 8788 (Ct. App. Franklin County, November 14, 1967).

⁷ *See* *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 71 (1968).

⁸ *Id.* at 72.

⁹ FED. R. CIV. P. 4(d)(7), 4(e).

personal jurisdiction was not obtained because the Ohio Long Arm Statute may not be applied retroactively. The alleged injury occurred on June 10, 1965, more than three months prior to the effective date of the statute. Defendant's motion to dismiss was overruled. Due to a judicially created exception to the common law rule against retroactivity, remedial statutes such as the Ohio Long Arm Statute are available in causes of action arising prior to their effective dates, but not then the subject of litigation in any court.¹⁰

Before *Kilbreath*, decisions ruling on the retroactivity of the Ohio Long Arm Statute presented the following anomalous situation. A plaintiff who attempted service of process under the Ohio Long Arm Statute where the cause of action arose prior to the effective date of the statute, would have found his action dismissed in the Ohio courts of Cuyahoga¹¹ and Lake¹² counties. However, the United States District Court encompassing those counties would have allowed the service to stand.¹³ The opposite was true in the Southern District of Ohio. There the United States District Court would have quashed such service¹⁴ while the state courts in Hamilton¹⁵ and Franklin¹⁶ counties would have allowed the plaintiff to proceed. Much of this confusion was due to the failure to distinguish between the several issues involved. The following discussion is an attempt to set forth criteria for judicial determination of the retroactivity question in whatever context it may arise. Where examples are helpful, the Ohio Long Arm Statute will generally be utilized.

Before considering the question of retroactivity, the courts must determine whether the statutory terminology may constitutionally apply to the facts alleged. In the case of long arm statutes, after finding that the defendant is one whom the statute covers by its terms, the court must determine whether he had such minimum contacts with the forum state so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."¹⁷ Af-

¹⁰ *Bagsarian v. Parker Metal Co.*, 15 Ohio Misc. 80, 90, 282 F. Supp. 766, 772 (N.D. Ohio 1968).

¹¹ *Lantsbury v. Tilley Lamp Co.*, No. 28085 (Ct. App. Cuyahoga County, May 15, 1967).

¹² *Crilley v. Cooper*, No. 46965 (C.P. Lake County).

¹³ *Busch v. Service Plastics, Inc.*, 261 F. Supp. 136, 144-45 (N.D. Ohio 1966); *Bagsarian v. Parker Metal Co.*, 15 Ohio Misc. 80, 282 F. Supp. 766 (N.D. Ohio 1968).

¹⁴ See *Partin v. Hassan Motors, Inc.*, 363 F.2d 104, 105 (6th Cir. 1966).

¹⁵ *O'Mara v. Alberto-Culver Co.*, 6 Ohio Misc. 132, 215 N.E.2d 735 (C. P. Hamilton County 1966).

¹⁶ *Kilbreath v. Rudy*, No. 8788 (Ct. App. Franklin County, November 14, 1967).

¹⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). See also *Hanson*

ter this determination, the question of retroactivity must be considered. This involves analyzing any constitutional prohibitions against retroactivity, applicable statutes and legislative intent with regard to the statute. Absent any clear legislative intent, the court must apply its own criteria and decision making rules on the question of retroactive application of the statute.

The Constitution of the United States provides that "No state shall . . . pass any . . . ex post facto law, . . ."¹⁸ This provision prohibits the punishment of any act that was not prohibited when committed, and bars infliction of greater punishment than was previously provided for.¹⁹ This prohibition secures substantial personal rights against subsequent legislation, but does not limit legislative control of remedies or modes of procedure which do not affect matters of substance.²⁰ The contract clause provides equivalent limitations on civil legislation.²¹ Consequently, the contract clause is not a constitutional bar to providing new or altered civil remedies for prior events.

Ohio is one of several states which have constitutional provisions specifically prohibiting retroactive legislation.²² The Ohio Constitution provides: "The general assembly shall have no power to pass retroactive laws, . . ."²³ In *Smith v. New York Central R.R.*,²⁴ the Ohio Supreme Court held this provision should not be construed to apply to legislative enactments which are remedial in nature. This is because a statute which is remedial in its operation on existing rights, obligations, duties or interests is not within the class of mischiefs against which the provision was to safeguard.²⁵ Ohio courts have often held that a procedural change in the law may apply to any proceedings commenced after the effective date even though the right or cause of action arose prior thereto.²⁶ Consequently, it would

v. Denckla, 357 U.S. 235 (1958); *Sun-X International Co. v. Witt*, 413 S.W.2d 761 (Tex. Civ. App. 1967).

¹⁸ U.S. CONST. art. I, § 10.

¹⁹ See, e.g., *Gibson v. Mississippi*, 162 U.S. 565, 589-90 (1896).

²⁰ *Id.*

²¹ See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960).

²² Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 544 (1956).

²³ OHIO CONST. art. II, § 28. See also note 16 *supra*.

²⁴ 122 Ohio St. 45, 170 N.E. 637 (1930).

²⁵ *Id.* at 48, 170 N.E. at 638.

²⁶ See, e.g., *State ex rel. Holdridge v. Industrial Comm'n*, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967).

appear that these federal and state constitutional barriers to retroactive application of statutes result in identical restrictions on legislative actions. They bar retroactivity where the statute is substantive.

Application of the remedial-substantive distinction is difficult because of the elusive nature of these concepts. The Ohio Supreme Court recently noted:

It is doubtful if a perfect definition of "substantive law" or "procedural or remedial law" could be devised. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress.²⁷

Perhaps a more precise definition, though equally difficult to apply, is set forth in *General Industries Co. v. Jones*.²⁸ Citing Justice Story, the court said:

Upon principle, . . . [no] . . . statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations past, . . .²⁹

may be applied retroactively. The traditional argument that a statute may not abrogate a vested right results in circular reasoning since a right is generally said to be vested only when it has been so far perfected that it cannot be taken away by statute.³⁰ Decisions based solely on apparent remedial-substantive distinctions tend to oversimplify the constitutional issues involved. The federal courts have traditionally interpreted the constitutional bars against retroactive application of laws in the light of the due process clause.³¹ In the states which have similar prohibitions in their own constitutions, interpretations of such provisions tend to follow due process criteria closely.³² The first test of whether a statute may be applied retroac-

²⁷ *Id.* at 178, 228 N.E.2d at 623.

²⁸ 89 Ohio App. 43, 100 N.E.2d 703 (1950).

²⁹ *Id.* at 44, 100 N.E.2d at 704.

³⁰ Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960); Note, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 245-48 (1927).

³¹ See generally, Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Rubin, *Interpretive Problems of Ohio's Long-Arm Statute*, 19 CASE W. RES. L. REV. 347 (1968); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960); Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105 (1963).

³² Greenblatt, *Judicial Limitations on Retroactive Lawmaking*, 51 NW. U.L. REV. 540, 544 (1966).

tively is, then, essentially a question of substantive due process.

This due process test requires a balancing of the public interests involved with the severity of the statutory modification or abrogation of the pre-statute right. When the statute remedies some serious evil resulting from an emergency situation, such as the depression, the public interest may outweigh almost any abrogation of rights.³³ Another consideration must be the availability of alternative methods, not involving retroactive application of a statute, of carrying out the avowed public interest.

The decisions indicate that a legislature may modify remedies for the assertion or enforcement of a right, but may not abolish the right itself.³⁴ However, the relevant factor is not whether the statute abolishes rights or remedies, but rather the degree to which it changes the legal incident or effect of a claim arising from a pre-statute event.³⁵

The reliance interest must be considered as a factor in measuring the justification for abridging legal interests. Where a statute has become a likely basis for reasonable and substantial reliance by persons who may have changed their position, the policy against retroactivity is strong. The nature of the interest affected must also be weighed. The interest itself may be of such magnitude as to deserve protection. Analysis of the interest asserted in light of the reliance interest may prove conclusively that the public's interest is so outweighed as to prohibit retroactive application. The public interest in statutory stability must also be balanced against the needs of a fluid and changing society. Application of these balancing tests is not an easy task for the courts. The point at which these multitudes of conflicting interests balance cannot be determined by any general formula.³⁶

In Ohio, once the court has determined retroactive application of a statute does not violate due process, it must examine the stat-

³³ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). Substantive statutes which are not applied retroactively may nonetheless affect pre-existing rights. This was true, for example, in *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911), where the public policy which prompted the prohibition of giving free transportation on railroads was sufficiently strong to bar enforcement of a contract for free passage executed for consideration prior to enactment of the statute.

³⁴ See, e.g., *League v. Texas*, 184 U.S. 156 (1902).

³⁵ See *Ocha v. Hernandez y Morales*, 230 U.S. 139 (1939), where the order by the military governor reducing the time needed to gain title by adverse possession from 20 to 6 years was held invalid when applied to someone against whom the 6 years had elapsed at the time the order was issued, but not as to those who could still reasonably contest the claim of adverse possession.

³⁶ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

utory restrictions on retroactive application of statutes. Section 1.20 of the Ohio Revised Code provides:

When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions or proceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.³⁷

The first sentence of this statute generally prohibits retroactive application of statutes which repeal or amend existing legislation. However, the subsequent sentence recognizes the common law exception which allows remedial statutes to be applied retroactively in cases where the statute in question involves either the repeal or amendment of an existing statute. In such a case, the statute is to be applied retroactively only if the legislature addresses itself to this question in the act itself and provides explicitly for retroactive application.

The coverage of section 1.20 extends only to legislation that amends or repeals existing legislation. Amending statutes alter, change or add to existing legislation without destroying it,³⁸ whereas repealing statutes abolish or cancel existing legislation.³⁹ Statutes can be repealed or amended by implication. The courts are very reluctant to hold that a statute is impliedly repealed or amended, but where an intention to repeal or amend existing legislation must be inferred from subsequent irreconcilable legislation, the last word of the legislature is controlling.⁴⁰ Whether an amendment or repeal is implicit or explicit, there must be pre-existing legislation covering the specific subject matter of the amending or repealing statute if section 1.20 is to apply.⁴¹

³⁷ OHIO REV. CODE ANN. § 1.20 (Page 1953).

³⁸ State *ex rel.* Bd. of Educ. v. Ach, 113 Ohio St. 482, 149 N.E. 405 (1925); State *ex rel.* Forchheimer v. LeBlond, 108 Ohio St. 41, 50, 140 N.E. 491, 494 (1923).

³⁹ Cincinnati, Wilmington, & Zanesville R.R. v. Clinton County, 1 Ohio St. 77 (1852).

⁴⁰ See Cleveland & Western Coal Co. v. O'Brien, 98 Ohio St. 14, 120 N.E. 214 (1918).

⁴¹ There seems to be dictum to the contrary in Cincinnati H. & D. R.R. v. Hedges, 63 Ohio St. 339, 58 N.E. 804 (1900), which states that the principle of what is now section 1.20, Ohio Revised Code, is a declaration of the policy of our law, which forbids giving a statute retroactive effect, even though remedial in character, unless the act contains an express provision to that effect. It has also been held that statutes are not

Where there is no such existing legislation, section 1.20 is entirely inapplicable on the question of retroactivity. The court is not bound by the requirement of explicit legislative attention to retroactivity, and must consider the propriety of retroactive application of a statute on its own merits. There are several tests for making such a decision. The courts might conclude that section 1.20 has fostered a legislative custom of expressing its intention in each statute which it wishes to be retroactively applied. This would mean that, absent any legislative statements to the contrary, no statute is to be applied retroactively.⁴² However, the converse could also be argued. The practice of indicating when a statute should be applied retroactively might also reasonably be limited to only amending or repealing legislation. This would be sound legislative policy, since section 1.20 requires a statement of intent only in these situations. Consequently, section 1.20 appears to offer no assistance in determining legislative intent.

Another approach, applied in *Agrashell, Inc. v. Sirota Co.*,⁴³ would be to assume that the legislature intended to make a statute as broad as the federal and state constitutions allow, and therefore all remedial statutes are to be applied retroactively unless a contrary legislative intention is expressed. Such a rule has little to do with legislative intent, however. It is simply a judicial policy judgment that remedial innovations should have maximum accessibility. It may also be a method for easing administration of the court's business by minimizing the need for calendar references in every case in which the statute may be applied. Such bothersome attention to dates is necessary where different procedures apply to cases arising at different times. However, the advisability of retroactive application may vary from one statute to another, and should be examined anew with the enactment of each new statute. Presumptions of a legislative intention to maximize the impact of a new statute avoid important analysis of the legitimacy of such extensions.

In Ohio, the courts could conclude, given the section 1.20 require-

to be construed retroactively applicable unless, on the face of the instrument or enactment, the legislature has expressed its contrary intention. This dictum has been overruled in a long line of subsequent cases, and new legislation which neither repeals nor amends existing legislation may be applied retroactively if the statute is remedial. *Bagarian v. Parker Metal Co.*, 15 Ohio Misc. 80, 282 F. Supp. 766 (N.D. Ohio 1968); *Kilbreath v. Rudy*, 16 Ohio St. 2d 70 (1968).

⁴² *Schlagheck v. Winterfeld*, 108 Ohio App. 299, 161 N.E.2d 498 (1958).

⁴³ 344 F.2d 583, 587 (2d Cir. 1965); *Simonson v. International Bank*, 14 N.Y.2d 281, 200 N.E.2d 427 (1964).

ments that the legislature must address itself explicitly to the question of retroactivity in instances of amending or repealing legislation only, that it is up to the courts to decide on the retroactive application of all other types of statutes where the legislature is silent. The legislature may have intended that existing legislation invites reliance and that therefore changes in existing laws should be made retroactive only when the legislature feels that retroactivity is needed to carry out its policy, and the legislature so explicitly states in the statute. However, with new legislation, where reliance is not so strongly warranted, the question of retroactivity is best adapted to judicial determination. Absent any legislative expression of intent to the contrary, it would seem that it is up to the courts to decide retroactivity.

With regard to the long arm statute the courts much reach this policy decision by balancing several countervailing interests. Reliance on local laws and the laws of other jurisdictions, the inconvenience to a defendant of having to defend in a foreign forum, the possibility of a large number of default judgments, nuisance suits, and other such considerations tend to disfavor retroactivity. Against this the courts must weigh the state's interest. In the case of long arm statutes this is the interest in expanding its jurisdiction over persons to the constitutionally permissible limits in order to protect its citizens against acts of nonresidents by providing a convenient forum, the desirability of having improved remedies available to all, the desirability of uniform laws and the possibility of confusion resulting from the use of different remedies in similar causes of action arising at different times. Basically, there must be a balancing between the countervailing interests of the state and the parties affected by new legislation.

In both *Kilbreath* and *Bagsarian*, there can be little doubt that there were no constitutional prohibitions against applying the Ohio Long Arm Statute retroactively. The Illinois Long Arm Statute,⁴⁴ which is generally considered to be the model for all legislation similar to the Ohio Long Arm Statute, was held to be retroactively applicable by the Illinois Supreme Court.⁴⁵ The United States Supreme Court has held that legislation which deals with substituted service of process similar to the Ohio Long Arm Statute is remedial, and that a defendant has no vested right not to be sued in a particular state.⁴⁶

Any argument based on reliance by the defendants in cases where

⁴⁴ ILL. ANN. STAT. ch. 110, §§ 16, 17 (Smith-Hurd 1968).

⁴⁵ *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

⁴⁶ *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

the Ohio Long Arm Statute would be applicable is, at best, tenuous. The trend toward the expansion of personal jurisdiction to the limits allowed by due process has been readily discernible since *McGee v. International Life Ins. Co.*⁴⁷ and *Nelson v. Miller*.⁴⁸ It would also seem that there is very little danger of defeating reasonable expectations where a statute modifies jurisdictional requirements in tort cases.⁴⁹

The Ohio legislature must have considered the interests mentioned above in determining the value of long arm statutes, and since the legislature has decided in favor of the prospective plaintiff by passing such a statute, there would have to be strong interests on the defendant's side before the court could have decided against the retroactive application of the Ohio Long Arm Statute.

While the conclusion reached in *Kilbreath* and *Bagsarian* is correct, it is believed the foregoing more adequately sets forth the analytical path to be followed in solving problems of retroactive application of Ohio statutes.

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⁴⁷ *Id.*

⁴⁸ 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

⁴⁹ *Id.* at 382, 143 N.E.2d at 676. Also, while the conduct involved in such tort cases as assault and battery, trespass, nuisance, and libel might conceivably be undertaken in reliance upon the lack of jurisdiction, such reliance would not be deserving of protection and would not outweigh the state's interest in providing a convenient local forum for its citizens. *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 72-73 (1968).