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Prior decision on statutory construction applied retroactively

A judicial decision typically establishes the law governing causes of action that accrue before and after the decision is rendered, thereby operating both retrospectively and prospectively. Some courts, however, have engaged in "retroactivity analysis" to determine whether a denial of retrospective effect is warranted. At times, they have declined to give retroactive effect to their rulings, especially where the edict overturns long-standing precedent. This "prospective overruling," it has been asserted,

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121 See, e.g., Linkletter v. Walker, 381 U.S. 618, 636-40 (1965). Seminal in the area of retroactivity is the Supreme Court decision of Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932). In that case, the Court held that a Montana court, in refusing to apply a decision retroactively, did not infringe upon fourteenth amendment rights. Id. at 361-62. The Court stated that it was constitutionally permissible for a state to delineate the extent to which it would adhere to precedent that had been declared no longer valid. Id. at 364. See generally Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960). Indeed, subsequent cases expanded the application of the nonretroactivity doctrine. See, e.g., Linkletter v. Walker, 381 U.S. 618, 639-40 (1965) (limiting retroactive effect of prior decision involving constitutional rights); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) (extending retroactivity analysis to a decision declaring a statute unconstitutional).

122 Chevron Oil Co. v. Huson, 404 U.S. 37, 106 (1971); Gager v. White, 53 N.Y.2d 475, 483-84, 425 N.E.2d 851, 854, 442 N.Y.S.2d 463, 466 (1981); Incorporated Village of Northport v. Guardian Fed. Sav. & Loan Ass'n, 87 Misc. 2d 344, 349, 384 N.Y.S.2d 923, 928 (Sup. Ct. Suffolk County), aff'd, 54 App. Div. 2d 893, 387 N.Y.S.2d 1015 (2d Dep't 1976). New York courts have long recognized that a decision may be stripped of its retrospective effect. In Harris v. Jex, 55 N.Y. 421 (1874), for instance, the defendant paid two mortgages in legal tender notes. Id. at 422. Prior to the time of payment, however, a Supreme Court decision had indicated that the payee in such a transaction was entitled to receive payment in gold. Id. at 422. Although that decision was overruled prior to the trial in Harris, the Court of Appeals nevertheless stated that "[t]he plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land," id. at 424, and refused to apply retro-
tends to protect justifiable reliance upon established principles of law.\textsuperscript{124} Recently, in \textit{Gurnee v. Aetna Life & Casualty Co.},\textsuperscript{125} the

\textsuperscript{124} A court prospectively overrules when it enunciates a new rule of law to be followed only in future cases, thereby eliminating the decision's retroactive effect. Fairchild, \textit{Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting."}, 51 Marq. L. Rev. 254, 254 (1968); see 55 Wash. L. Rev. 833, 837 n.26 (1980). The technique is also called "sunbursting" after the Supreme Court decision endorsing its validity in \textit{Great N. Ry. v. Sunburst Oil & Ref. Co.}, 287 U.S. 358, 364 (1932). Fairchild, \textit{supra}, at 255.

New York Court of Appeals, despite applying retroactivity analysis,\(^{126}\) held that a prior decision on a question of statutory interpretation should be applied retrospectively.\(^{127}\)

In *Gurnee*, two actions involving identical issues were consolidated on appeal.\(^{128}\) Both plaintiffs were injured in automobile accidents, and each thereafter lost wages in excess of $1,000 per month.\(^{129}\) In accordance with New York State Insurance Department regulations then in effect interpreting section 671 of the Insurance Law,\(^{130}\) each plaintiff's insurance carrier paid $800 per month as first-party benefits, the maximum amount payable for lost wages.\(^{131}\) The Court of Appeals subsequently decided *Kurcsics v. Merchants Mutual Insurance Co.*,\(^{132}\) which rejected the Superintendent of Insurance's interpretation of the applicable no-fault law and established that an injured plaintiff is entitled to a maximum of $1000 per month for lost earnings.\(^{133}\)

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\(^{127}\) Id. at 191-94, 433 N.E.2d at 147-48.

\(^{128}\) Id. at 190, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.

\(^{129}\) Id. at 184, 433 N.E.2d at 128, 448 N.Y.S.2d at 145.

\(^{130}\) Id. at 190-91, 433 N.E.2d at 129, 448 N.Y.S.2d at 146. Morris Gurnee, one of the plaintiffs, was injured in November 1977, in an accident involving a car insured by Aetna Life & Casualty Company. Id. at 190, 433 N.E.2d at 129, 448 N.Y.S.2d at 146. He claimed that, as a result of his injuries, he lost wages in excess of $3,200 per month. Id. Moshe Weinreich was injured in July 1975, in an accident involving an automobile insured by State-Wide Insurance Company, and, he, like Gurnee, claimed lost wages of at least $1,000 per month. Id. at 191, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.

\(^{131}\) 11 N.Y.C.R.R. § 65.6(n)(2)(xi). Section 671(1)(b) of the Insurance Law provides that "basic economic loss" includes "loss of earnings from work which the injured person would have performed had he not been injured . . . up to one thousand dollars per month." N.Y. Ins. Law § 671(1)(b) (McKinney Supp. 1982). The section further states that "first party benefits" do not include "twenty percent of lost earnings pursuant to paragraph (b) of subdivision one." Id. § 671(2)(a). The Superintendent of Insurance interpreted section 671 to mean that the $1,000 monthly limitation should be reduced by the 20-percent offset, thereby resulting in a maximum payable first-party benefit of $800 per month. [1982] 11 N.Y.C.R.R. § 65.6(n)(2)(xi).

\(^{132}\) Id. at 184-85, 433 N.E.2d at 128, 448 N.Y.S.2d at 145.

\(^{133}\) 55 N.Y.2d at 190-91, 433 N.E.2d at 129, 448 N.Y.S.2d at 146.


\(^{135}\) Id. at 458-59, 403 N.E.2d at 163, 426 N.Y.S.2d at 458. The Court in *Kurcsics* ruled that a covered person is entitled to 80 percent of actual lost earnings, up to a maximum recovery of $1,000 per month, id. at 458, 403 N.E.2d at 163, 426 N.Y.S.2d at 457-58, reason-
upon brought suit against their respective insurance carriers to recover the difference between the two maximum amounts. Special term granted the defendants' motions to dismiss for failure to state a cause of action, ruling that Kurcsics should not be applied retroactively. The Appellate Division, First and Fourth Departments, affirmed in each case.

The Court of Appeals reversed, holding that there was "no persuasive reason" to prohibit retroactive application of the Kurcsics decision. Writing for a unanimous Court, Chief Judge Cooke initially questioned the applicability of retroactivity analysis to a decision of first impression interpreting statutory language, since such analysis typically was restricted to cases overruling prior decisional mandates. The Court, however, found it unnecessary to resolve this question, as it determined that "traditional" retroactivity analysis nevertheless would dictate that Kurcsics apply retroactively to the plaintiffs' petitions. Balancing the three factors that the Supreme Court has determined are relevant to the retroactivity inquiry, the Court first observed that Kurcsics involved

ing that the legislature did not intend to limit recovery to $800, id. A dissenting opinion urged that "a plain reading" of the statute compelled a contrary result. Id. at 460, 403 N.E.2d at 164, 426 N.Y.S.2d at 459 (Gabrielli, J., dissenting).

134 Gurnee v. Aetna Life & Casualty Co., 104 Misc. 2d 840, 845, 428 N.Y.S.2d 992, 995 (Sup. Ct. Erie County 1980). Applying the standards enunciated by the United States Supreme Court, see infra note 141 and accompanying text, the Gurnee Court initially noted that the Kurcsics panel had referred to the litigation as "a question of first impression." 104 Misc. 2d at 842-43, 428 N.Y.S.2d at 994; see Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 454, 403 N.E.2d 159, 160, 426 N.Y.S.2d 454, 455 (1980). It further noted that since the purpose of the legislation was to ensure victim compensation, retroactivity was contraindicated to avoid the possible insolvency of insurers and the consequent loss of future benefits that might result from insurers being held for retroactive payments. 104 Misc. 2d at 843, 428 N.Y.S.2d at 994. Moreover, retroactive application, the court concluded, would entail "substantial inequitable results." Id. at 844, 428 N.Y.S.2d at 994.


136 Id.

137 55 N.Y.2d at 195, 433 N.E.2d at 132, 448 N.Y.S.2d at 149.

138 Id. at 194, 433 N.E.2d at 131, 448 N.Y.S.2d at 148.

139 Id. at 191, 433 N.E.2d at 130, 448 N.Y.S.2d at 147. The Court noted that retroactivity analysis generally had been utilized "where there has been an abrupt shift in controlling decisional law." Id.

140 Id.

141 Id. at 192-93, 433 N.E.2d at 130-31, 448 N.Y.S.2d at 147-48; see Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). In Chevron, the Supreme Court delineated the three factors of retroactivity analysis as follows:

First, the decision to be applied nonretroactively must establish a new principle of
merely the construction of statutory language rather than the establishment of a new principle of law. Additionally, stated the Chief Judge, the legislative intent of ensuring swift and full compensation for motor vehicle accident victims would be better served by giving retroactive effect to the Kurcsics ruling. Finally, the Court concluded that because no-fault insurance requires plaintiffs to relinquish their right to sue for pain and suffering incurred in minor injuries, it would be manifestly inequitable to deny them their statutory quid pro quo by permitting only a partial recovery for their covered economic loss.

The Court of Appeals decision in Gurnee represents New York's first significant encounter with the standards of retroactivity analysis previously enunciated by the United States Supreme Court. Other courts, particularly the federal courts of appeals,
have treated the first factor, whether the decision in question alters established legal principles, as a threshold inquiry which, if not satisfied, automatically mandates retrospective application.\(^4\) New York, however, apparently has joined the ranks of other jurisdictions that tend to apply the test in a factor-balancing manner.\(^1\) It is submitted that this is the preferable approach insofar

\(^4\) Kremer v. Chemical Constr. Corp., 623 F.2d 786, 789 (2d Cir. 1980) ("unless the first factor is satisfied there is no occasion to consider the other two"); United States v. Bowen, 500 F.2d 960, 976 (9th Cir. 1974) ("[t]he first step in deciding whether a case is to have retroactive effect is to apply a threshold test to determine whether the decision establishes a new rule"), aff'd, 422 U.S. 916 (1975); Jordan v. Weaver, 472 F.2d 985, 996 (7th Cir. 1973), rev'd on other grounds sub nom. Edelman v. Jordan, 415 U.S. 651 (1974); see Desist v. United States, 394 U.S. 444, 248 (1969) (retroactivity analysis appropriate where decision represented a "clear break with the past"); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) (decision not constituting "avulsive change which caused the current of the law thereafter to flow between new banks" applied retroactively); Ferguson v. United States, 515 F.2d 1011, 1012-13 (2d Cir. 1975) ("[r]etroactivity analysis is appropriate for cases departing radically from precedent . . . . But it is irrelevant to that application of well-established principles to varying fact situations which represents the bulk of judicial decision-making"). Justice Stewart, who authored the Chevron decision, made it clear in Milton v. Wainwright, 407 U.S. 371 (1972), that the first factor was intended as a threshold inquiry, by stating that "[a]n issue of the 'retroactivity' of a decision . . . is not even presented unless the decision in question marks a sharp break in the web of the law." \(\text{Id.}\) at 381 n.2 (Stewart, J., dissenting). Several state courts also have adhered to this view. See, e.g., Wiggins v. State, 275 Md. 689, 701, 344 A.2d 80, 98 (1975); Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 622, 375 A.2d 1285, 1289 (1977). In Crabtree v. St. Louis-San Francisco Ry., 89 Ill. App. 3d 35, 411 N.E.2d 19 (App. Ct. 1980), the court clearly indicated that a decision that did not establish a new rule of law would be applied retroactively. \(\text{Id.}\) at 42, 411 N.E.2d at 24; see Mertes v. Lincoln Park Fed. Sav. & Loan Ass'n, 34 Ill. App. 3d 557, 559-61, 340 N.E.2d 25, 26-27 (App. Ct. 1975).

\(^1\) The Gurnee Court ruled that retrospective application was mandated by consideration of "all the applicable criteria." 55 N.Y.2d at 194, 433 N.E.2d at 131, 448 N.Y.S.2d at 148. Other courts have exhibited a similar inclination to weigh the three Chevron factors equally.
as the tripartite evaluation better assures that reliance interests will be protected, the primary purpose underlying retroactivity analysis.\cite{footnote146} Indeed, given a decision that usurps substantial justified reliance upon established rules, but nonetheless fails to constitute a significant upheaval in the law, the federal paradigm seemingly would require retrospectivity,\cite{footnote149} while under the Court’s approach the likelihood of solely prospective operation would still exist.\cite{footnote150}

It is suggested further that the less restrictive approach taken by the *Gurnee* Court is appealing from a theoretical as well as a policy standpoint. Underlying the retroactive application of law has been the traditional notion that an overruling court simply enunciates the law as it has always existed.\cite{footnote151} By making retro-
spectivity more difficult to achieve, however, the Court's approach to retroactivity analysis reflects the contemporary awareness that courts in fact do create new law\textsuperscript{102} and that affected reliance interests should be protected.\textsuperscript{103} Indeed, the Court of Appeals in \textit{Gurnee} appears to have adopted an approach to retrospectivity analysis which is both consonant with the underlying policy rationale of retrospectivity and consistent with modern jurisprudential reality.

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\textsuperscript{102} As early as 1869, the theory of retroactive case application underwent criticism. John Austin, for example, derided "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity, and merely declared from time to time by the judges." 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 655 (London 1869) (emphasis in original). A more contemporary critic, Justice Traynor, referred to the notion that the law "had been there all along in the bushes" as a fable. Traynor, \textit{Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility}, 28 HASTINGS L.J. 533, 535 (1977). Indeed, the basic assumption of declaratory theory—the existence of a body of predetermined, immutable law—has little to recommend itself. Munzer, \textit{supra} note 151, at 375; see DeMatteis v. Eastman Kodak Co., 520 F.2d 409, 410 (2d Cir. 1975). The modern trend is to recognize that the judiciary does, in fact, create new law. As one commentator has stated, "the creative theory of law must be regarded as the most widely accepted view of the judicial process." E. BODENHEIMER, JURISPRUDENCE 439 (1974). Additionally, the practice of prospective overruling, whereby courts decline to give retrospective effect to their rulings, see \textit{supra} note 123, is itself a recognition of the fact that the courts create new law. Mishkin, \textit{Foreward: The High Court, the Great Writ, and the Due Process of Time and Law}, 79 HARV. L. REV. 56, 58 (1965) see Linkletter v. Walker, 381 U.S. 618, 623-25 (1965).

\textsuperscript{103} See \textit{supra} note 124 and accompanying text; \textit{supra} text accompanying note 148.