1995


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Recommended Citation
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COMMENT

RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991: LANDGRAF v. USI FILM PRODUCTS AND RIVERS V. ROADWAY EXPRESS, INC.

I. INTRODUCTION

The 102nd Congress enacted the Civil Rights Acts of 1991\(^1\) ("Act"). The Act in part responded to a number of 1989 Supreme Court decisions\(^2\) which curtailed the rights of employees under the Civil Rights Acts of 1866\(^3\) and 1964.\(^4\) The Act also provided "additional remedies under Federal law . . . needed to deter unlawful harassment and intentional discrimination in the workplace" and "provide[d] additional protections against unlawful discrimination in employment."\(^5\) Missing from the Act, however, was a clear congressional statement indicating whether the Act was to be applied retroactively or prospectively. It was unclear whether the Act was to be applied prospectively—i.e., only to cases where the cause of action arose after the effective date of the enactment—or if it was to be applied retroactively—i.e., to cases pending on appeal as of the effective date, to cases in which there had been no decision as of the effective date, and to cases where the conduct took

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place before the effective date but in which the complaint was filed post-enactment. To resolve this issue, the courts were left with an ambiguous statute, the Act's legislative history which provided no reliable guidance, and two conflicting judicial presumptions. Unable to resolve this ambiguity, the federal courts were split on the issue of the Act's application, forcing the Supreme Court to grant certiorari in Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc. to determine whether the Civil Rights Act of 1991 would be applied retroactively or prospectively.

After a bench trial in Landgraf, the District Court found that although the plaintiff, Barbara Landgraf, had been sexually harassed by a co-worker at USI Film Products, the harassment was not severe enough to justify Landgraf's resignation. Thus, Landgraf's employment was not terminated in violation of Title VII and she was denied equitable relief. While her appeal was pending, the Civil Rights Act of 1991 was enacted. The Fifth Circuit Court of Appeals rejected Landgraf's argument for retroactive application of section 102 of the Act, which

6. See, e.g., Butts v. City of New York Dep't of Hous. Preservation & Dev., 990 F.2d 1397, 1406 (2nd Cir. 1993); Davis v. City of San Francisco, 976 F.2d 1536, 1553 (9th Cir. 1992); Gersman v. Group Health Ass'n, 975 F.2d 886, 892 (D.C. Cir. 1992), cert. denied, 114 S. Ct. 1642 (1994); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 227 (7th Cir. 1992), cert. denied, 114 S. Ct. 1641 (1994); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1372 (5th Cir. 1992), cert. denied, 114 S. Ct. 1641 (1994); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 934 (7th Cir.), cert. denied, 113 S. Ct. 207 (1992); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir.), cert. denied, 113 S. Ct. 86 (1992); cf. Fray v. Omaha World Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992) (finding the Act's legislative history dispositive of the issue of retroactivity—"[w]hen a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only").

7. See Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974) (setting forth the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."). Contra Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (setting forth the principal that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). This conflict was recognized by the Supreme Court in Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990), but was left unresolved. Id. at 837.

10. Landgraf, 114 S. Ct. at 1488.
11. Id.
would have entitled her to compensatory and punitive damages, as well as a jury trial.\(^3\)

In Rivers, the petitioners, Rivers and Davison, filed a claim pursuant to 42 U.S.C. § 1981, alleging that they were discharged from their employment due to "baseless charges because of their race and because they had insisted on the same procedural protections afforded white employees."\(^4\) Before trial, the Supreme Court announced its decision in Patterson v. McLean Credit Union, which interpreted the "make and enforce contracts" clause of section 1981 not to apply to "conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."\(^5\) The district court dismissed Rivers's and Davison's section 1981 claims based upon the Patterson decision.\(^6\) While the Rivers case was pending on appeal, the Civil Rights Act of 1991 was enacted. Petitioners argued for application of section 101 of the Act\(^7\) which abrogated the decision in Patterson. The Sixth Circuit Court of Appeals rejected the argument that section 101 of the Act applied retroactively to the case pending.\(^8\)

Part II of this Comment discusses the history of the enactment of the Civil Rights Act of 1991 and provides an overview of the effect of its changes. Part III addresses the split among the federal courts and the reasoning that supported the conclusions reached—i.e., whether the Act

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13. Landgraf v. USI Film Prods., 968 F.2d 427, 433 (5th Cir. 1992), aff'd, 114 S. Ct. 1483 (1994). Section 102(a)(1) provides in pertinent part:

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination ... and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.


17. Section 101(b) of the Act provides: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Pub. L. No. 102-166, § 101(b), 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981(b) (1994)).
is to be applied retroactively or prospectively. Part IV examines the
Supreme Court’s decisions in Landgraf and Rivers, both of which hold
that the Act is to have prospective application. Part IV.C of the
Comment discusses the strengths and weaknesses of the Court’s analysis,
the questions left unanswered by the decisions, and how the lower federal
courts have responded to the Supreme Court’s holdings in Landgraf and
Rivers. Finally, Part V concludes that the Court failed in its duty as
“final arbiter” thus leaving room for disagreement and speculation among
the federal courts.

II. THE HISTORY OF THE CIVIL RIGHTS ACT OF 1991 AND ITS
OVER-SWEEPING EFFECT

In response to a number of Supreme Court cases in 1989 that
severely restricted the rights guaranteed to employees under the Civil
Rights Acts of 1866 and 1964 to be free from unlawful discrimination,
the 101st Congress passed the Civil Rights Act of 1990. The 1990 Act
sought to overrule these decisions as well as to restore and strengthen
civil rights. President Bush eventually vetoed the Bill, asserting
disapproval of the effect that the 1990 Act would have on
employers—i.e., creating “powerful incentives for employers to adopt
hiring and promotion quotas.” Congress failed to override the veto.

Sent back to the drawing board, Congress passed the Civil Rights
Act of 1991 after a series of compromises. One of the most controver-
sial issues was the effective date of the enactment. The 1990 Act had

19. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1508 (1994); Rivers, 114 S. Ct. at 1515.
recognizing that “last year’s Supreme Court decisions dealt a crippling blow to the ability of victims
of job discrimination to litigate cases under Federal civil rights statutes”).
(S. 2104)).
In the past year, however, the Supreme Court has issued a series of rulings that
mark an abrupt and unfortunate departure from its historic vigilance in protecting civil
rights. The fabric of justice has been torn. Significant gaps have been opened in the
existing laws that prohibit racism and other types of bias in our society.
The Civil Rights Act of 1990 is intended to overturn these Court decisions and
restore and strengthen these basic laws.

Id.
24. Id.
broad retroactivity provisions, which went so far as to open up final judgments, provided that certain criteria were met. However, section 402(a) of the 1991 Act provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Meanwhile, sections 109(c) and 402(b) explicitly provide for prospective application. There were also a number of conflicting statements made on the floor of the Senate, discussing whether the Act was intended to be applied retroactively or prospectively. Senator Kennedy, one of the sponsors of the bill, recognized that "it will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment." To the contrary, Senator Danforth, also a sponsor of the bill, recognized the conflicting precedent, i.e. Bradley and Bowen, but specifically stated that the sponsors disapprove of the Bradley line of cases and do not intend for the bill to have retroactive effect. After much debate, the Civil Rights Act of 1991 was passed in the Senate on October 30, 1991, and in the House on November 6, 1991. President Bush signed the Act into law on November 21, 1991.

29. Section 109(c) provides as follows: “The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(c), 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e note (1994)).
30. See 137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth: “I simply want to state that a court would be well advised to take with a large grain of salt floor debate and statements placed into the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us.”).
32. See supra note 7.
33. See 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth: “Our intention in drafting the effective date provision was to adhere to the principle followed by the vast majority of Supreme Court cases and exemplified by Bowen and Justice Scalia’s concurrence in Bonjorno.”).
As one of the purposes of the Act was to respond to a number of Supreme Court decisions, section 101 of the 1991 Act abrogated the decision in *Patterson v. McLean Credit Union*. *Patterson* limited section 1981 claims to conduct which occurs at the initial formation of the contract and conduct which interferes with the right to enforce established contract obligations. On the other hand, section 101 of the Act expands the scope of section 1981 claims by defining the "make and enforce contracts" clause to include all contractual relations.

Section 107 of the 1991 Act also abrogated the decision in *Price Waterhouse v. Hopkins*, which allowed a respondent to a Title VII claim to avoid liability by proving by a preponderance of the evidence that the same decision would have been made absent the discriminatory factors. To the contrary, section 107 provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Section 105 of the 1991 Act abrogated the decision in *Wards Cove Packing Co. v. Atonio*, which shifted the burden of proof in disparate impact cases from employers to employees. Consequently, employees were faced with the difficult burden of proving that the discrimination was caused by a specific employment practice. Section 105 of the Act shifts the burden of persuasion to the respondent "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."

In addition, section 108 of the Act limited the decision in *Martin v.
Wilks, which held that parties who failed to intervene in earlier employment discrimination proceedings in which consent decrees were entered, would be permitted to challenge employment decisions made pursuant to those decrees. Section 108 of the Act limits the circumstances where consent decrees may be reopened.

Finally, section 112 of the Act extends the statute of limitations period for filing a claim of discrimination based on a seniority system. This provision abrogated the Supreme Court decision in Lorance v. AT & T Technologies, Inc., which held that the statute of limitations begins to run at the time of the adoption of the seniority system.

In short, the 1991 Act "restores" many of the rights eroded by the Supreme Court's recent decisions, as well as provides additional remedies and protections to victims of discrimination. For example, the section involved in Landgraf v. USI Film Products provides an additional remedy of compensatory damages in cases of intentional discrimination, as well as punitive damages in grievous cases. In addition, section 109 of the Act extends civil rights protection to American employees who work in foreign countries for United States employers.

The above are only a few of the areas of employment discrimination that were amended by the 1991 Act. Because of the controversy that surrounded the passage of the bill, however, Congress was unable to agree on the proper application of the Act to pending cases and left this issue for the courts to resolve. It is this ambiguity that lead to the split among the federal courts.

III. THE SPLIT AMONG THE FEDERAL COURTS

After the passage of the Act, cases before the court arose in the context of three different procedural postures which may have been determinative in the courts' analysis of the application of the Act to
preenactment conduct: (1) cases that were decided before the 1991 Act came into effect, but were still pending on appeal when the effective date occurred;55 (2) cases in which there was no decision as of the effective date of the Act,56 and (3) cases in which the conduct took place before the effective date but the complaint was filed post-enactment.57 A majority of the federal courts took the position that the Act was to be prospective only.58 However, while many of these courts agreed that the Act was to be applied prospectively, they reached this conclusion on a very different analysis of the law.

In deciding the issue of retroactivity, the Second Circuit in Butts v.
City of New York Department of Housing Preservation & Development\(^5\) examined the Act's legislative history, the language of the Act, and the significance of the two prospective-only provisions\(^6\) and struggled with the two conflicting judicial presumptions.\(^6\) Recognizing that Congress intentionally left the issue of retroactivity to the courts, the circuit court found that the legislative history of the Act and the Act's language provided no helpful guidance in resolving the issue.\(^6\) The court looked to the floor speeches made by the Senators and Representatives but noted that the "contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history."\(^6\) Furthermore, in rejecting the interpretation adopted by the Ninth Circuit in Estate of Reynolds v. Martin,\(^6\) the court read the two provisions which explicitly provided for prospective-only application as "insurance policies" against the possibility that a court would deem the entire Act to apply retroactively.\(^6\) The court did agree with the Reynolds court, in stating that "it is the duty of reviewing courts to give effect to every clause and word of a statute where possible."\(^6\) However,
in doing so, it did not resolve the retroactivity issue. Rather, the court gave significance to the clause "except as otherwise specifically provided" in section 402(a) of the Act, as referring to those provisions in the Act which required reports and appointments to be made in the future. Concluding that the legislative history and the language of the Act did not resolve the issue of retroactivity, the court turned to two established judicial presumptions to be applied when a statute is silent with respect to retroactivity.

In 1974, the Supreme Court set forth the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in [a] manifest injustice or there is statutory direction or legislative history to the contrary." By contrast, in 1988 the Supreme Court noted that "[r]etroactivity is not favored in the law [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language [specifically] requires this result." To resolve what seems to be an apparent controversy between these two cases, the Second Circuit adopted the view set forth by Justice Scalia in his concurrence in Kaiser Aluminum & Chemical Corp. v. Bonjorno. "Justice Scalia wrote: 'It is doubtful... that the Thorpe-Bradley presumption of retroactivity survives at all. If it does,

538 (1955) (stating that "[t]he cardinal principle of statutory construction is to save and not to destroy") (quoting National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

67. See supra text accompanying note 28 for the full text of § 402(a).

68. See Butts, 990 F.2d at 1408 (referring to §§ 204(b) and 303(b)(4) of the Act); cf. Estate of Reynolds v. Martin, 985 F.2d 470, 473 (9th Cir. 1993) (interpreting § 402(b) in conjunction with §§ 109(c) and 402(a) which provided for explicit prospective application, to conclude that the 1991 Act was to be applied retroactively). For the full text of §§ 204(b) and 303(b)(4) of the Act, see Pub. L. No. 102-166, 105 Stat. 1071, 1084-85, 1089 (codified as amended at 42 U.S.C. § 2000e note (1994) and 2 U.S.C. § 1203(b)(4) (1994) respectively).


[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional... I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will..., by a retrospective operation, affect the rights of parties, but in great national concerns... the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside. Thorpe, 393 U.S. at 282 (quoting United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801)).


however, it only survives (as it was begotten) as a special rule applicable to changes in law after initial adjudication. Consequently, since there had been no adjudication at the time of the passage of the 1991 Act and since the cause of action accrued prior to the 1991 Act's effective date, the court followed the presumption in Bowen and decided that the Act should be applied prospectively.

On the other hand, the Eighth Circuit decided the issue of retroactivity without ever resolving the apparent conflict between Bradley and Bowen. In Fray v. Omaha World Herald Co., the court found that under either presumption the Act would be applied prospectively. The court found the Act's legislative history to be dispositive of the issue, and that therefore under the Bradley presumption there was "legislative history to the contrary" which supported prospective application. The court reasoned:

[T]he President vetoed a bill containing an explicit retroactivity provision. That veto could not be overridden and a compromise bill omitting those provisions was then enacted. Whatever ambiguities may be found elsewhere in the Act and its legislative history, we think this history is dispositive, even under Bradley. When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.

The Fifth Circuit also decided that the Act was to have prospective application, but again, this decision was based upon a different analysis. After finding the Act's legislative history and language ineffectual in resolving the retroactivity issue, the circuit court in Johnson v. Uncle Ben's, Inc. also turned to judicial presumptions. However, rather than choosing between Bradley and Bowen, the court turned to yet

72. Butts v. City of N.Y. Dep't of Housing, 990 F.2d 1397, 1410 (2d Cir. 1993) (quoting Kaiser, 494 U.S. at 854 (Scalia, J., concurring)).
73. Butts, 990 F.2d at 1411.
74. 960 F.2d 1370 (8th Cir. 1992).
75. Id. at 1378.
76. Id. The Eighth Circuit was the only circuit to find the legislative history of the Act to be dispositive of the issue. For cases that found the legislative history to provide no reliable guidance, see supra note 6.
77. Fray, 960 F.2d at 1378 (citing Norman J. Singer, 2A Sutherland Statutory Construction § 48.04 (5th ed. 1992)).
78. 965 F.2d 1363 (5th Cir. 1992), cert. denied, 114 S. Ct. 1641 (1994).
79. Id. at 1373.
another canon of construction. The court relied on a 1985 Supreme Court decision in which "[i]n distinguishing Bennett from Bradley, the Supreme Court noted that the rule in Bradley was limited by 'another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.'" Without further explanation, the Johnson court concluded that section 101 of the Civil Rights Act of 1991 affects substantive rights. Thus, the circuit court refused to apply the Act retroactively, and affirmed the district court's finding under the law previously established by the Supreme Court's decision in Patterson v. McLean Credit Union.

A minority of the federal courts decided that the Act was to have retroactive effect. However, similar to the majority of federal courts, while they agreed on the ultimate conclusion of retroactive application, they reached this conclusion by widely divergent analyses.

The Ninth Circuit was the only court of appeals to decide that the Act was to be applied retroactively. In Davis v. City and County of San Francisco, the circuit court found clear Congressional intent that the majority of the provisions of the Act be applied to cases pending on the effective date of the Act. Without ever reconciling the apparent tension between the Bradley and Bowen presumptions, the court based its decision on the language of the statute and the "elementary canon of construction that a statute should be interpreted so as not to render one

80. Id. at 1374 (finding that "statutes affecting substantive rights 'are ordinarily addressed to the future and are to be given prospective effect only'" (quoting Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969)).
82. Johnson, 965 F.2d at 1374 (quoting Bennett v. New Jersey, 470 U.S. 632, 639 (1985)).
83. Id.
84. Id. Section 101 of the Act abrogated the decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). See supra note 17 for the text of § 101(b).
87. Davis, 976 F.2d at 1550.
part inoperative." The court decided that the language in sections 109(c) and 402(b) providing for explicit prospectivity would be superfluous, unless the remainder of the Act was interpreted to have a retroactive effect. The court further rejected the analysis of the Eighth Circuit in Fray v. Omaha World Herald Co., stating that "[t]he fact that the Act as passed does not contain the explicit retroactivity language of the 1990 bill appears no more probative than the fact that it omits language found in the Administration's 1991 bill which would have expressly provided for the Act's prospective application."

The District Court for the Northern District of California also held that the Act was to be applied retroactively to cases pending at the time of its enactment. The court in Stender v. Lucky Stores, Inc. found that the language of the Act supports a retroactive interpretation. The court also looked to the legislative history of the Act and noted that "Congress enacts [a] statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture," the Act must be applied retroactively. Finally, the court chose to follow the Ninth Circuit and apply the Bradley presumption of retroactivity.

In addition, the court in Duplessis v. Training & Development Corp. also adopted the Bradley presumption. However, its decision was based on the fact that the provisions of the Civil Rights Act at issue did not affect substantive rules of conduct. Before conclu-

88. Id. at 1551 (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)).
89. See supra note 29 for the text of these sections. Accord Reynolds v. Martin, 985 F.2d 470, 472-76 (9th Cir. 1993).
90. Davis, 976 F.2d at 1551. The court stated that "[w]here Congress intended that certain sections of the Act should not be applied retroactively, it made specific pronouncements as to those. We will not render those pronouncements a nullity by holding that the rest of the Act is likewise to have no retroactive effect." Id. at 1553; see also Reynolds, 985 F.2d 470.
91. See supra text accompanying notes 74-77.
92. Davis, 976 F.2d at 1554; see H.R. 1375, 102nd Cong., 1st Sess. § 14 (1991) (declaring that "[t]his Act and the amendments made by this Act shall take effect upon enactment. The amendments made by this Act shall not apply to any claim arising before the effective date of this Act").
94. Id. at 1305.
95. Id. at 1305 (quoting Ayers v. Allain, 893 F.2d 732, 754-55 (5th Cir.), vacated on other grounds, 914 F.2d 676 (5th Cir. 1990) (en banc), cert. granted on other grounds, 499 U.S. 958 (1991)).
96. Stender, 780 F. Supp. at 1307.
98. At issue were the provisions providing for the additional remedies of compensatory and punitive damages, as well as recovery of expert and attorneys fees. Id. at 45-46; see Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 102(a)(1), 113(a), 113(b), 105 Stat. 1071, 1072, 1079 (codified
sively deciding that the sections of the Act applied retroactively under the *Bradley* presumption, the court first analyzed whether retroactive application would result in a manifest injustice. To determine whether a manifest injustice will result, a three-part test was conducted which involved examining: "'(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in the law upon those rights."

The court found that the nature and identity of the parties favored prospective application based on the reasoning of a case in the First Circuit in which it was stated that "'if the party against whom the statute is to be applied is a public party, then the "struggle" against the so-called retroactive application is not as hard.'"

Turning to the second prong, the *Duplessis* court stated that "This Court does not believe it would be unfair to subject defendants to higher damages when their conduct violates a standard which has not been altered. . . . We do not believe the rights involved demonstrate that retroactive application would result in manifest injustice.'"

Finally, "[g]iven that the law has never countenanced that an employer may weigh the legal consequences of his discrimination and choose to continue his unlawful conduct," the court concluded that no manifest injustice would result from applying the provisions of the 1991 Act providing for compensatory and punitive damages, attorney’s fees, and expert witness fees retroactively.

Thus, the federal courts were not only split on the issue of retroactivity, but even those courts that agreed on the “proper” application of the Act reached their conclusion on entirely different rationales. It was this uncertainty and inconsistency that led the Supreme Court to grant certiorari in *Landgraf v. USI Film Products, Inc.* and *Rivers v. Roadway Express, Inc.*

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99. *Duplessis*, 821 F. Supp. at 47. The court referred to the canon of construction set forth in *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985), where the Supreme Court stated that "'statutes affecting substantive rights and liabilities are presumed to have only prospective effect.'" *Duplessis*, 821 F. Supp. at 46.


104. *Id.*

105. *Id.* at 50.
IV. THE SUPREME COURT'S DECISIONS

A. Landgraf v. USI Film Products

In *Landgraf v. USI Film Products*, the Court began its analysis of whether the 1991 Act should be applied to cases pending on the date of its enactment, with the petitioner, Landgraf's, textual argument based upon three provisions of the 1991 Act: sections 402(a), 402(b), and 109(c). The majority rejected petitioner's argument that sections 109(c) and 402(b) would be entirely superfluous, unless it is inferred that since these two provisions provided for explicit prospective application, the remainder of the Act was to be applied to cases pending on the date of its enactment. The Court concluded that it was unlikely that Congress intended the clause "[e]xcept as otherwise specifically provided" in section 402(a) to carry such critically important significance. Rather, "[t]he drafters of a complicated piece of legislation containing more than 50 separate sections may well have inserted the 'except as otherwise provided' language merely to avoid the risk of an inadvertent conflict in the statute." Furthermore, the Court reasoned that it was entirely probable that because of Congress's inability to resolve the retroactivity issue, and because there were conflicting judicial precedents concerning the retroactivity of a statute when ambiguous congressional intent exists, Congress wanted to ensure prospective application of sections 109(c) and 402(b).

The Court then turned to the legislative history of the Act and concluded, as many of the lower federal courts have done, that the "legislators agreed to disagree." Finding no solution to the retroactivity question from the language of the Act or its legislative history, the Court then confronted the two conflicting canons of construction set forth

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107. Id. at 1483, 1493. See supra note 29 and text accompanying note 28 for the text of these provisions. See also supra notes 10-13 and accompanying text for a brief statement of the case.
108. Landgraf's argument was based on the elementary canon of construction "that a court should give effect to every provision of a statute and thus avoid redundancy among different provisions." *Landgraf*, 114 S. Ct. at 1494. See supra note 66 for cases supporting this principle.
111. Id. at 1494-95.
112. Id. at 1496. See supra note 6 for cases noting that the legislative history of the Act provided no reliable guidance.
in Bradley and Bowen.\textsuperscript{113} The Court noted that "there is no tension between the holdings in Bradley and Bowen,"\textsuperscript{114} since the presumption against retroactivity is deeply rooted in our jurisprudence.\textsuperscript{115} However, civil legislation may be retroactive if "Congress first make[s] its intention clear [which] helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."\textsuperscript{116}

The Court further indicated that a statute is not made retroactive merely because it applies to cases where the conduct at issue took place before the statute's enactment.\textsuperscript{117} Rather, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."\textsuperscript{118} It is only then that the presumption against retroactivity will be invoked.\textsuperscript{119} The Court then reconciled Bradley with the presumption against retroactivity, stating that the attorney's fee provision at issue in Bradley did not invoke the presumption, since "[a]ttorney's fee determinations . . . are 'collateral to the main cause of action.'"\textsuperscript{120} Therefore, when Congress fails to provide for the intended application of a statute, a court must first decide if the statute would have retroactive effect.\textsuperscript{121} For example, a court would decide "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."\textsuperscript{122} If the statute would not operate retroactively, then Bradley applies. If the statute would operate retroactively, then it will not apply to cases arising before its enactment, unless there is clear congressional intent mandating its application.\textsuperscript{123} The Court concluded that section 102 of the Act, which provides for compensatory and punitive damages as well as a jury trial, is the kind of provision that

\begin{itemize}
  \item \textsuperscript{113} Landgraf, 114 S. Ct. at 1496.
  \item \textsuperscript{114} Id. (emphasis omitted). The Court noted that its "opinion in Bowen did not purport to overrule Bradley or to limit its reach." Id. at 1497.
  \item \textsuperscript{115} See id. at 1496-1501 (discussing statutory retroactivity and constitutional impediments to same).
  \item \textsuperscript{116} Id. at 1498; see also id. at 1501 (discussing the instances where "[e]ven absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper").
  \item \textsuperscript{117} Id. at 1499.
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 1503.
  \item \textsuperscript{121} Id. at 1505.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
\end{itemize}
would operate retroactively.\textsuperscript{124} Absent clear congressional intent to the contrary, it will not apply to events occurring prior to its enactment.\textsuperscript{125}

In his dissenting opinion, Justice Blackmun criticized the majority stating that "[p]erhaps from an eagerness to resolve the 'apparent tension' between Bradley and Bowen, the Court rejects the 'most logical reading' of the Civil Rights Act of 1991 and resorts to a presumption against retroactivity."\textsuperscript{126} Blackmun premised his opinion on \textit{Landgraf}'s textual analysis of the language in sections 402(a), 402(b), and 109(c) and invoked "the 'settled rule that a statute must, if possible, be construed in such [a] fashion that every word has operative effect.'"\textsuperscript{127} Blackmun noted that "if the entire Act were inapplicable to pending cases, [sections] 402(b) and 109(c) would be 'entirely redundant.' Thus, the clear implication is that, while [section] 402(b) and [section] 109(c) do not apply to pending cases, other provisions—including [section] 102—do."\textsuperscript{128} He continued that even if a textual analysis does not support retroactive application, "procedural and remedial statutes [such as section 102] that do not take away vested rights are presumed to apply to pending actions."\textsuperscript{129} He concluded that since

[section] 102 of the Act expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination . . . [t]here is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} The Court also noted that each provision of the Act must be analyzed separately, stating that: "we understand the instruction that the provisions are to 'take effect upon enactment' to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct." \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 1508 (Blackmun, J., dissenting) (citations omitted).
\item \textsuperscript{127} \textit{Id.} (Blackmun, J., dissenting) (citing United States v. Nordic Village, Inc., 503 U.S. 30 (1992)).
\item \textsuperscript{128} \textit{Id.} at 1509 (Blackmun, J., dissenting) (citation omitted).
\item \textsuperscript{129} \textit{Id.} at 1510 (Blackmun, J., dissenting) (citing NORMAN J. SINGER, 2 SUTHERLAND ON STATUTORY CONSTRUCTION § 41.04, at 349 (4th ed. 1986)). Note, however, that Justice Blackmun did not express an opinion with respect to the punitive damages provision, since "the imposition of punitive damages for pre-enactment conduct represents a more difficult question, one not squarely addressed in this case." \textit{Id.} at 1509 n.3 (Blackmun, J., dissenting). The majority of the Court also noted that "[r]etroactive imposition of punitive damages would raise a serious constitutional question." \textit{Id.} at 1505.
\item \textsuperscript{130} \textit{Id.} at 1510 (Blackmun, J., dissenting).
\end{itemize}
B. Rivers v. Roadway Express, Inc.

In Rivers v. Roadway Express, Inc.,131 the Court upheld the decision of the court of appeals that section 101 of the Civil Rights Act of 1991 did not apply retroactively to cases pending at the time of its enactment.132 Section 101 of the Act codified Congress’s disagreement with the Supreme Court’s decision in Patterson v. McLean Credit Union,133 which severely limited the application of the “make and enforce contracts” clause in 42 U.S.C. § 1981.134 The Court concluded that the “new legal obligations [section] 101 imposes bring it within the class of laws that are presumptively prospective.”135 In addition to dismissing the petitioner’s textual argument, that was also rejected in Landgraf,136 the Court rejected the petitioner’s argument that “there is a ‘presumption in favor of application of restorative statutes’ to cases arising before their enactment.”137 The Court rejected this argument on the theory that a legislative response does not, by itself, “reveal whether Congress intends the ‘overruling’ statute to apply retroactively to events that would otherwise be governed by the judicial decision.”138 Relying on the test set forth in Landgraf,139 the Court refused to apply section 101 retroactively, absent a clear expression of congressional intent.140

In interpreting the text of section 101 and its legislative history, the Court found that it did not support the argument that the purpose of section 101 was “restorative.”141 Congress’s “intent to reach conduct

132. Id. at 1514.
134. See supra notes 38-40 and accompanying text for a more detailed discussion.
135. Rivers, 114 S. Ct. at 1515.
136. See supra part IV.A. (denoting a detailed discussion of the Court’s analysis).
137. Rivers, 114 S. Ct. at 1515 (quoting Petitioner’s Brief 37).
138. Id.
139. See supra notes 114-23 and accompanying text.
140. Rivers, 114 S. Ct. at 1516.
141. Id. at 1517. The Court gave significance to the fact that the 1990 version of the bill specifically stated that “it was intended to ‘respond to the Supreme Court’s decisions by restoring the civil rights protections that were dramatically limited by those decisions.’” Id. at 1516 (emphasis added) (quoting Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., § 2(b)(1)). Compare § 3(4) of the Civil Rights Act of 1991, stating that one of the purposes of the Act is “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” Pub. L. No 102-166, § 3(4), 105 Stat. 1071, 1071 (emphasis added) (codified at 42 U.S.C. § 1981 note (1994)).
preceding a ‘corrective’ amendment must clearly appear.’ Absent such an intent, as in the instant case, and because section 101 “creates liabilities that had no legal existence before the Act was passed, [section] 101 does not apply to preenactment conduct.”

Justice Blackmun again wrote a dissenting opinion, setting forth the basic proposition that since at the time of respondent’s discriminatory conduct, Patterson had not yet limited the interpretation of the “make and enforce contracts” clause to contract formation, application of section 101 of the Act could not be claimed to disturb the parties vested rights or settled expectations. Blackmun went on to harmonize Bradley, Bowen, and Bennett, by stating that they can be properly understood as follows: “Bradley establishes a presumption that new laws apply to pending cases in the absence of manifest injustice, and Bowen and Bennett stand for the corresponding presumption against applying new laws when doing so would cause the very injustice Bradley is designed to avoid.” Finally, Justice Blackmun noted that “[w]hen a law purports to restore the status quo in existence prior to an intervening Supreme Court decision, the application of that law to conduct occurring prior to the decision would obviously not frustrate the expectations of the parties concerning the legal consequences of their actions at that time.”

C. The Strengths and Weaknesses of the Court’s Analyses

Consistent with the decisions of a majority of the federal courts, the Supreme Court held that the Act did not apply retroactively to cases pending at the time of its enactment. Like many of the federal courts, the Landgraf Court began its analysis of the issue with the statutory language of the Act and its legislative history. Although petitioner’s textual argument concerning section 402(a)’s qualifying

142. Rivers, 114 S. Ct. at 1519.
143. Id. at 1519-20. Compare Petitioner’s argument that “respondent has no persuasive claim to unfair surprise, because, at the time the allegedly discriminatory discharge occurred, the Sixth Circuit precedent held that § 1981 could support a claim for discriminatory contract termination.” Id. at 1517-18 n.9.
144. Id. at 1520 (Blackmun, J., dissenting).
145. Id. at 1521 (Blackmun, J., dissenting).
146. Id. (Blackmun, J., dissenting) (quoting Gersman v. Group Health Ass’n, Inc., 975 F.2d 886, 907 (D.C. Cir. 1992) (Wald, J., dissenting)), cert. denied, 114 S. Ct. 1642 (1994)).
147. See supra note 58.
149. Id. at 1493.
clause "except as otherwise specifically provided" was persuasive, the Court dismissed this argument stating that

"[g]iven the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect."

Perhaps this is the most plausible interpretation, taking into consideration that the 1990 bill which provided for broad retroactivity provisions was vetoed by President Bush for its "unfair retroactivity rules." By contrast, a version of the 1991 bill was specifically rejected due to its explicit prospectivity provision. Like many of the federal courts, the Court made the most probable conclusion that the "legislators agreed to disagree" on the issue of retroactivity. However, the Court's analysis fails when it attempts to reconcile the principles set forth in Bradley and Bowen. In lieu of choosing between the presumptions set forth in these cases, the Court stated that there was "no tension" between the two and attempted to give both of them validity. The Court determined that a retroactive effect exists only if a provision attaches new legal consequences to conduct that took place before the statute was enacted. If new legal consequences would attach, then the presumption against retroactivity established in Bowen prevails. Impliedly then, if no new legal consequences would attach, a court must apply Bradley—i.e., "the law in effect at the time it renders its decision, unless doing so would result in [a] manifest injustice." But the test applied to determine if there would be a manifest injustice is, in effect, the same as the "new legal consequences" determination under the Landgraf analysis.

150. Id. at 1493.
151. In his dissent, Justice Blackmun argued that "[a] straightforward textual analysis of the Act indicates that [it is applicable] to cases pending on appeal on the date of enactment [since] § 402(a)'s qualifying clause, . . . cannot be dismissed as mere surplusage or an 'insurance policy' against future judicial interpretation." Id. at 1508; see also cases cited supra note 66.
152. Landgraf, 114 S. Ct. at 1493-94.
154. See supra note 92 and accompanying text.
155. Landgraf, 114 S. Ct at 1496.
156. Id.
157. Id. at 1499.
158. Id. at 1505.
To determine whether a manifest injustice will result, a court must examine: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." On the face of it, if a provision would attach new legal consequences to past conduct, then a manifest injustice would result. Thus, it is difficult to see what the Court's analysis has added to the Bradley and Bowen principles.

While, I cannot disagree with the Court's conclusion in Landgraf that the retroactive application of the compensatory and punitive damages provision of section 102 would attach "new legal consequences" to past conduct, it is much more difficult to understand the Court's conclusion in Rivers.

At the time of the discriminatory conduct alleged in Rivers, the Sixth Circuit interpreted section 1981 claims to apply to discriminatory contract termination. Only after the claim was pending did the Supreme Court announce its decision in Patterson v. McLean Credit Union which limited that interpretation of the "make and enforce contracts" clause. Therefore, application of section 101 to the Rivers case would not attach "new legal consequences" to past conduct. It would have been logical for the Court to apply the Bradley principle, unless doing so would result in a "manifest injustice." Of course, there is nothing manifestly unjust about holding an employer liable for conduct that was impermissible at the time of its occurrence.

It should also be noted that the decisions in Landgraf and Rivers have not ended the inquiry of the retroactive application of the Civil Rights Act of 1991. In Landgraf, before analyzing whether section 102 of the Act was to be applied retroactively, the Court stated that:

[T]here is no special reason to think that all the diverse provisions of the Act must be treated uniformly . . . . [W]e understand the instruction that the provisions are to ‘take effect upon enactment’ to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct.

Therefore, the retroactivity of specific provisions of the 1991 Act

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160. Id. at 717.
162. 491 U.S. 164 (1989); see also supra notes 38-40 and accompanying text (articulating a discussion of Patterson and § 101 of the Act which abrogates its decision).
163. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1505 (1994).
will depend on the procedural posture of the case as well as the particular section of the Act at issue. Thus, in applying the “new” *Landgraf* analysis, there will continue to be room for speculation and disagreement among the federal courts.

Since the decisions in *Landgraf* and *Rivers*, the majority of courts have found application of the Act to be prospective only.\(^{164}\) Those cases involving section 1981 claims, also at issue in *Rivers*, have found the Court’s holding dispositive of the issue and have not applied section 101 of the 1991 Act to claims accruing before the effective date of the enactment.\(^{165}\)

However, there are some courts that have recognized the limitations of the decisions in *Landgraf* and *Rivers*, and have therefore applied sections of the Act retroactively, depending upon the timing of the discriminatory conduct and the commencement of the case. For example, the District Court for the Eastern District of Missouri has recognized the limitations of the holdings in *Landgraf* and *Rivers*.\(^{166}\) In *Schulte v. Consolidated Freightways Corp.*, the court had to decide the application of section 102 of the Act\(^{167}\) where the conduct at issue arose before the effective date of the enactment, but the complaint was filed post-enactment. The court acknowledged that “[s]ince by its terms *Landgraf*

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167. Id. at 1-2. Section 102 of the Civil Rights Act of 1991 contains the compensatory and punitive damages provision that was also at issue in *Landgraf*. 

http://scholarlycommons.law.hofstra.edu/hlr/vol24/iss2/12
is specifically limited to cases where both the wrongful conduct and the filing of the suit occurred before November 21, 1991, it . . . is not strictly on point."\(^{168}\) However, the court concluded that *Landgraf* was instructive and provided a "compelling rationale" towards the conclusion that, even in these circumstances, the Act should not be applied retroactively.\(^{169}\)

Likewise, in *McQueen v. Marsh Supermarkets*,\(^{170}\) the District Court for the Southern District of Indiana held that plaintiff was not entitled to application of section 102 of the 1991 Act, where the unlawful termination occurred on November 11, 1991, ten days prior to the effective date of the Act.\(^{171}\) Conversely, the District Court of Colorado has held that a plaintiff is entitled to seek the additional remedies afforded by the passage of the 1991 Act provided the action was commenced after the effective date of the 1991 Act, regardless of when the discriminatory conduct took place.\(^{172}\)

The District Court of Maryland was faced with a scenario in which the discriminatory conduct occurred both before and after the effective date of the 1991 Act and the complaint was filed post-enactment.\(^{173}\) Although the court recognized that *Landgraf* involved a case in which the action was pending on the effective date of the enactment and all the discriminatory conduct took place prior to the 1991 Act, the court concluded that *Landgraf* proposed that new laws affecting substantive liabilities should not be applied retroactively to conduct that occurred prior to their enactment.\(^{174}\) Accordingly, in determining the proper application of section 102 of the Act, the court found that the plaintiff was entitled to compensatory and punitive damages for that retaliatory conduct that took place subsequent to the 1991 Act, but not for the conduct which occurred prior to November 21, 1991.\(^{175}\)

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169. *Id.* at *2.


171. *Id.* at 332.

172. See *Craig v. O'Leary*, 870 F. Supp. 1007, 1010 (D. Colo. 1994) (limiting the holdings in *Landgraf* and *Rivers* as applicable to cases pending at the time the 1991 Act was enacted).


174. *Id.* at 1376 n.5.

175. *Id.* at 1378-79; see also *Mills v. Amoco Performance Prods., Inc.*, 872 F. Supp. 975, 985 (S.D. Ga. 1994) (stating that "the Supreme Court made clear that the remedial provisions of the 1991 Act for compensatory and punitive damages and trial by jury do not apply to pre-enactment conduct," thus only permitting plaintiff to recover damages for that conduct which occurred post-enactment (emphasis added)).
To the contrary, in *Boyce v. Board of Commissioners* the District Court of Kansas held that section 102 of the 1991 Act was applicable to plaintiff's action, distinguishing *Landgraf*, since the case was not pending on the date of enactment and the discriminatory conduct occurred both before and after the effective date. However, rather than fragmenting the retaliatory conduct into pre- and post-Act conduct like the court in *Munday v. Waste Management, Inc.*, the court merely held that plaintiff was entitled to recover compensatory damages. It is this disparity in result that the rulings in *Landgraf* and *Rivers* were intended to prevent. As exemplified in the above discussion, there continues to be inconsistent application of the 1991 Act, depending upon the forum court's interpretation of the holdings in *Landgraf* and *Rivers*, the procedural posture of the case, and the period of discriminatory conduct.

As a result of the Court's holdings, many claims of employment discrimination that occurred prior to November 21, 1991 will be without redress. From the viewpoint of the employer/businessman this decision is equitable, since an employer is entitled to conduct his business affairs with full knowledge of the legal consequences of his actions. However, there is something disingenuous about permitting an employer to violate another's civil rights while giving him a reliance interest in the extent of his liability. That is, should we permit an employer to conduct a cost-benefit analysis of his actions? For example, in *Landgraf*, although the respondent's conduct was discriminatory both before and after the 1991 Act, the Court refused to apply the Act retroactively because at the time of the alleged conduct, Ms. Landgraf was only entitled to equitable relief under Title VII, and not compensatory and punitive damages under section 102 of the 1991 Act.

However, from the viewpoint of the "wronged" employee it is a greater injustice to permit this conduct to take place without any

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177. Id. at 797 n.1.
179. Boyce, 857 F. Supp. at 787; see also Park v. Howard Univ., 863 F. Supp. 14, 17 (D.D.C. 1994) (permitting recovery of compensatory damages where the discriminatory conduct was of a continuing nature spanning the periods both before and after the effective date of the 1991 Act).
180. When a person's civil liberties are at issue, should our analysis be similar to the analysis developed by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (explaining $B<PL$—if the burden ($B$) of adequate precaution is less than the probability ($P$) and gravity of the harm ($L$)—then it would be negligence not to take that extra precaution)?
181. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1506-08 (1994).
ramifications. After all, since the first Civil Rights Act of 1866 the legislature has continuously been working towards protecting civil rights. Since the legislature responded to a number of 1989 court decisions which curtailed these rights and, therefore, abrogated the decisions, it would seem consistent with their action to further protect these rights by permitting retroactive application. Yet, as a consequence of the Court’s decisions, in many cases an employee will be without redress because of the fortuitous timing of his employer’s discriminatory actions, or in some cases, the unfortunate circumstance that the employee’s attorney filed the complaint on November 20, 1991, and not November 22, 1991.182

V. CONCLUSION

After two years of debate in Congress and three years of indecision in the federal courts, the Supreme Court granted certiorari to resolve the controversial issue of retroactivity which plagued the passage of the Civil Rights Act of 1991. However, rather than resolving the issue, the Court has handed down another test that the federal courts must apply when deciding the retroactivity of specific provisions of the Act.

It is clear from the legislative history of the Act that the legislative branch of government could not agree on the retroactivity issue. Instead, Congress left the decision to the judiciary. However, in the Court’s decisions in Landgraf and Rivers, the Supreme Court failed in its duty as “final arbiter.”183 As a result of the narrow holdings in these two cases, there continues to be room for disagreement and speculation among the federal courts, until all cases in which the conduct took place before the effective date of the Act have been fully litigated.

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