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Dale, Cully

From: Levin, Benjamin
Sent: Tuesday, June 09, 2015 10:15 AM
To: Dale, Cully
Subject: Retroactive Rulemaking

Below are some passages from relevant law re: retrospective rulemaking.

Statutes are generally presumed to operate prospectively, "unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication." *Lincoln Credit Co. v. Peach,* 636 S.W.2d 31, 34 (Mo. banc 1982), appeal dismissed 459 U.S. 1094, 103 S.Ct. 711, 74 L.Ed.2d 942. If the presumption normally favoring prospective operation is overcome, the inquiry focuses on whether the statute falls within the proscription against retrospective laws. This constitutional ban against retrospective laws applies only when the statute takes away or impairs any existing vested right.[5] *Lincoln Credit Co. v. Peach, supra,* at 34–35; *Barbieri v. Morris,* 315 S.W.2d 711, 714 (Mo.1958); *Clark v. Kansas City, St. Louis & Co. R. Co.,* 219 Mo. 524, 118 S.W. 40 (1909); *Hope Mutual Ins. Co. v. Flynn,* 38 Mo. 483, 484 (1866).

Dep't of Soc. Servs. v. Villa Capri Homes, Inc., 684 S.W.2d 327, 332 (Mo. 1985)

"A law is 'retroactive' in its operation when it looks or acts backward from its **effective date** and is retrospective 'if it has the same effect as to past transactions or considerations as to future ones....' " *Id.* at 459–60, (quoting *State ex rel. Meyer v. Cobb,* 467 S.W.2d 854, 856 (Mo.1971)). In other words, " '[t]he constitutional inhibition against laws retrospective in operation ... does not mean that no statute relating to past transactions can be constitutionally passed, but rather, that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice of parties interested.' " *Id.* at 460 (quoting *Fisher v. Reorganized Sch. Dist. No. R–V of Grundy County,* 567 S.W.2d 647, 649 (Mo. banc 1978)).

Missouri Real Estate Comm'n v. Rayford, 307 S.W.3d 686, 690 (Mo. Ct. App. 2010)

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

Mo. Const. art. I, § 13

As discussed, the upshot is that if the statute doesn't clearly seek retroactive effect, and the effect of the regulations are substantive, the party seeking retroactive effect will probably be out of luck.

As for the interim period between the enacting of legislation and the promulgation of rules, the bolded language in *Rayford* to me suggests that a law will not be considered retroactive if it tries to look not backward from promulgation (the date it becomes effective).

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Other case law backs this up:

The doctrine that procedural statutes operate retrospectively is applicable to administrative rules. *State v. Kummer,* 741 S.W.2d 285, 289 (Mo.App.1987). The converse of this proposition must also prove true; laws affecting substantive rights shall not be applied retrospectively in administrative cases.

State ex rel. W. Outdoor Adver. Co. v. State Highway & Transp. Comm'n of State of Mo., 813 S.W.2d 360, 363 (Mo. Ct. App. 1991)

The *ex post facto* clauses also apply to an agency's duly-promulgated substantive regulations, as they have the force and effect of laws. *See Cosada Villa of Missouri, Inc. v. Missouri Dept. of Social Services,* 868 S.W.2d 157, 160 (Mo.App.1994). This is so because in promulgating regulations, the agency is exercising delegated legislative authority; thus, "the rules are as if made by [the legislature]." *Prater v. U.S. Parole Com'n,* 802 F.2d 948, 954 (7th Cir.1986).

Miller v. Mitchell, 25 S.W.3d 658, 663 (Mo. Ct. App. 2000)

Generally, it seems that "rules and regulations" will not be given retroactive effect, while "policies and procedures" will be allowed to apply retroactively.

Please let me know if you want me to get deeper into any of this!

Sincerely,

Ben