

LAW REVIEW¹ 26041

August 2026

Captain LeRoy Torres Hits a Bump in the Road in his Two-Decade Quest To Enforce USERRA against the State of Texas, But This Case Is Not Over.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.2.9—Accommodations for disabled veterans.

1.4—USERRA enforcement.

***Texas Department of Public Safety v. Torres*, 2026 Tex. App. LEXIS 4317
(15th Court of Appeals of Texas, May 7, 2026).³**

¹ I invite the reader's attention to [Law Center | ROA](#). You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

³ This is a very recent decision of one of the 15 intermediate appellate courts in the court system of the State of Texas. For many decades, Texas has had 14 intermediate appellate courts, above the trial court (called the

Captain LeRoy Torres, USA (Ret.) is a life member of the Reserve Organization of America (ROA), and for many years ROA has supported his efforts to enforce his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) against the Texas Department of Public Safety (DPS), his former employer.

How did we get here?

On 6/29/2022, the United States Supreme Court decided an extraordinarily important case and determined that Texas and the other 49 states cannot invoke sovereign immunity to prevent lawsuits in State courts against State agencies, as employers, for violating USERRA. The *Torres Syllabus* sets forth the facts and the issue as follows:

Petitioner Le Roy Torres enlisted in the Army Reserve in 1989. In 2007, he was called to active duty and deployed to Iraq. While serving, Torres was exposed to toxic burn pits, a method of garbage disposal that sets open fire to all manner of trash, human waste, and military equipment. Torres received an honorable discharge. But he returned home with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult. Unfortunately, his condition was latent and did not manifest itself for nearly a year and a half after he returned from Iraq.

District Court) and below the Texas Supreme Court (for civil cases) or the Texas Court of Criminal Appeals (for criminal cases). In 2023, the Texas Legislature created the 15th Court of Appeals, which sits in Austin (the state capital). “The court has statewide civil intermediate appellate jurisdiction over matters arising from or related to civil appeals brought by or against the state or a board, commission, department, office, or other agency within the executive branch of the state government.” <https://www.txcourts.gov/fifteenth-court-of-appeals/>.

These ailments, Torres says, eventually left him unable to work his old job as a state trooper. At that point, Torres asked his former employer, respondent Texas Department of Public Safety (Texas), to accommodate his condition by reemploying him in a different role. Texas refused. So, Torres sued Texas in state court to enforce his rights under USERRA. §4313(a)(3).

Texas tried to dismiss the suit by invoking sovereign immunity. The trial court denied the State's motion. An intermediate appellate court reversed, reasoning that, under this Court's case law, Congress could not authorize private suits against nonconsenting States pursuant to its Article I powers except under the Bankruptcy Clause, citing *Central Va. Community College v. Katz*, 546 U. S. 356, 126 S. Ct. 990, 163 L. Ed. 2d 945. The Supreme Court of Texas denied discretionary review.

After the decision below, this Court issued *PennEast Pipeline Co. v. New Jersey*, 594 U. S. 482, 141 S. Ct. 2244, 210 L. Ed. 2d 624. *PennEast* held that the States waived their sovereign immunity as to the federal eminent domain power pursuant to the "plan of the Convention." The Court then granted Torres' petition for certiorari to determine whether, in light of that intervening ruling, USERRA's damages remedy against state employers is constitutional.

USERRA provides that a veteran or service member who meets the five USERRA conditions for reemployment and who returns to work with a temporary or permanent disability incurred during the period of service must be reemployed as follows:

- (1)** In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—
- (A)** *in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or*
- (B)** if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.⁴

LeRoy Torres met the five USERRA conditions and returned to work at the Texas Department of Public Safety (DPS) without initial complication. After he returned to work as a State trooper, the symptoms of his lung disease became manifest, and it was then clear that he was not qualified, because of the disability, to be a police officer. DPS put him on administrative duties for a brief time, but when it became clear that the disability was long-term, DPS failed to make permanent accommodation for his disease and ultimately forced him to resign.

⁴ 38 U.S.C. § 4313(a)(3) (emphasis supplied).

Torres was not qualified to perform the duties of a police officer, but there were many other State of Texas jobs⁵ for which he was qualified or could become qualified with reasonable employer efforts (like training). The State of Texas violated USERRA when it refused to transfer Torres to another position, perhaps in a different department, after it became clear that he had suffered a disability during his 2007-08 military service and that the disability precluded him from serving as a police officer.

Torres chose not to file a formal, written USERRA complaint against DPS with DOL-VETS. Instead, he retained attorney Brian Lawler⁶ and sued DPS in State court⁷ in Corpus Christi, Texas. Representing DPS, the Attorney General of Texas moved to dismiss the lawsuit for lack of jurisdiction, contending that DPS, as a State agency, has sovereign immunity and cannot be sued in State court. The trial judge rejected that motion but then, in accordance with the Texas Rules of Civil Procedure, permitted the Attorney General to make an interlocutory appeal⁸ to the intermediate appellate court, the Court of Appeals of Texas, 13th District.⁹ The intermediate appellate court agreed with the

⁵ For purposes of the employer's duty to find another position for the returning disabled veteran, Torres' employer was the State of Texas (the State government as a whole), not just DPS. See Law Review 0640 (December 2006).

⁶ Brian Lawler, who retired from the Marine Corps Reserve as a Lieutenant Colonel, is a life member of ROA. He has a nationwide USERRA practice.

⁷ Because the defendant-employer was a State government agency, the lawsuit had to be brought in State court, not federal court. "In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2). It is possible for an individual to bring a USERRA action in his or her own name, and with his or her own attorney, if the individual has chosen not to request DOL-VETS assistance. See 38 U.S.C. § 4323(a)(3)(A).

⁸ Ordinarily, a party is not permitted to appeal to the appellate court until there has been a decision on the merits in the trial court. In unusual circumstances, a party can be permitted to make an interlocutory appeal on a preliminary question and not wait until the trial court has made a dispositive decision.

⁹ In 2023, the Texas Legislature established the new 15th Court of Appeals, in Austin. That court has statewide appellate jurisdiction over matters arising out of or related to civil appeals brought by or against State agencies. This explains why Texas' second appeal, after the remand by the United States Supreme Court, went to the 15th rather than the 13th Appeals Court.

Attorney General and reversed the trial judge's decision not to dismiss the lawsuit based on sovereign immunity. The court held:

In this case of first impression, we are asked whether sovereign immunity bars claims by private individuals against units of state government under the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). *See* 38 U.S.C.A. §§ 4301-4335 (West, Westlaw through P.L. 115-223). The trial court denied a plea to the jurisdiction on those grounds filed by appellant, the Texas Department of Public Safety (DPS), in a suit brought by appellee LeRoy Torres.

By one issue on appeal, DPS contends that the trial court erred in denying its plea because sovereign immunity applies and has not been validly abrogated by Congress or waived by the legislature. A review of the relevant case law compels us to agree. Therefore, we will reverse and render judgment granting DPS's plea.¹⁰

In civil cases in the Texas court system, the losing party at the trial court has the right to appeal to the intermediate appellate court. The losing party in the intermediate appellate does not have the right to get the Texas Supreme Court to hear and decide the case. The State's high court has discretion to hear or to decline appeals. After first indicating that it would hear Torres' appeal, the Texas Supreme Court decided not to hear the case. Thus, the decision of the intermediate appellate court became the final decision of the Texas court system.

In the final appellate step available to him, LeRoy Torres, through his attorney Brian Lawler, applied to the United States Supreme Court for a

¹⁰ *Texas Department of Public Safety v. Torres*, 583 S.W.3d 221, 223 (Tex. App. Corpus Christi; Nov. 20, 2018).

writ of certiorari. Certiorari is granted only if four or more of the nine Justices vote for certiorari at a conference where the Justices consider hundreds of cases and grant certiorari in a handful of them. Certiorari is denied in 97-99% of the cases where it is sought.

ROA filed an amicus curiae (“friend of the court”) brief in the Supreme Court, urging the Court to grant certiorari. Brian Lawler, Torres’ attorney, has said that the ROA amicus brief was a critical part of the successful effort to persuade the Supreme Court to agree to hear and decide the *Torres* case.

The Supreme Court granted certiorari in *Torres* in December 2021. ROA filed a new amicus brief on the merits. The oral argument was held in March 2022. The decision came down on 6/29/2022, at the end of the Supreme Court’s 2021-22 term. The Court held:

The Constitution vests in Congress the power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy.” Art. I, §8, cls. 1, 12-13. Pursuant to that authority, Congress enacted a federal law that gives returning veterans the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate them. See Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U. S. C. §4301 *et seq.* This case asks whether States may invoke sovereign immunity as a legal defense to block such suits.

In our view, they cannot. Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up their immunity from congressionally authorized suits pursuant to

the “plan of the Convention,” as part of “the structure of the original Constitution itself.” *PennEast Pipeline Co. v. New Jersey*, 594 U. S. 482, 141 S. Ct. 2244, 210 L. Ed. 2d 624, 641 (2021) (quoting *Alden v. Maine*, 527 U. S. 706, 728, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).

Congress has “broad and sweeping” power “to raise and support armies.” *United States v. O’Brien*, 391 U. S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). It has long exercised that power to encourage service in the Armed Forces in a variety of ways. See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 58, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (campus recruiting); *Johnson v. Robison*, 415 U. S. 361, 376, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974) (educational benefits).

Since before the United States’ entry into World War II, Congress has sought, in particular, to smooth volunteers’ reentry into civilian life by recognizing veterans’ “right to return to civilian employment without adverse effect on . . . career progress” in the federal work force and private employment. H. R. Rep. No. 105-448, p. 2 (1998); see Selective Training and Service Act of 1940, §§8(b)(A)-(B), (e), 54 Stat. 890, 891 (damages remedy against private employers).

The Vietnam War prompted Congress to extend these protections to employment by States. Amidst political opposition to the war, “some State and local jurisdictions ha[d] demonstrated a reluctance, and even an unwillingness, to reemploy” returning servicemembers. S. Rep. No. 93-907, p. 110 (1974). So, Congress authorized private damages suits against States to ensure that

“veterans who [had] previously held jobs as schoolteachers, policemen, firemen, and other State, county, and city employees” would not be denied their old jobs as reprisal for their service. *Ibid.* The statute at issue, USERRA, embodies these protections today.¹¹

As a result of *Torres*, State courts in Texas and the other 49 States are now required to hear and adjudicate USERRA claims against State agencies as employers, without regard to State law or State claims of sovereign immunity. This is exceedingly important because many National Guard and Reserve part-timers have civilian jobs working for State agencies.¹²

After the Supreme Court decided *Torres* on 6/29/2022, the Supreme Court remanded the case to the Court of Appeals of Texas, 13th District. That intermediate appellate court remanded the case back to the State trial court in Corpus Christi. A jury trial was held in September 2023, and Torres won, getting a judgment for \$2.49 million in back pay plus prejudgment interest, attorney fees, and other relief, including almost \$1 million in attorney fees. The Texas Attorney General appealed again to the intermediate appellate court.¹³ This time, the appeal was on the merits, because the United States Supreme Court has definitively resolved the sovereign immunity issue.

¹¹ *Torres v. Texas Department of Public Safety*, 597 U.S. 580, 584-85 (2022).

¹² See

<https://www.bing.com/search?q=What+percentage+of+Reserve+and+National+Guard+service+members+have+civilian+jobs+working+for+state+governments%3F&form=ANNTH1&refig=1c6482a2e80049eaa7141d7869324718&pc=HCTS>.

¹³ Because Texas filed a timely appeal to the intermediate appellate court, no funds have been paid to Torres or his lawyer.

How did the Texas 15th Court of Appeals decide this case?

In a unanimous decision by the three Justices of the Texas 15th Court of Appeals, the court held:

This appeal presents an issue of first impression under the Uniformed Services Employment and Reemployment Rights Act (USERRA): if an employee's military service-related disability is discovered *after* he is already reemployed, do the statutory reemployment rights "restart" under USERRA? *See* 38 U.S.C. §§ 4312, 4313. Here, it is undisputed that Le Roy Torres was reemployed by the Department of Public Safety (DPS) after returning from military service and was diagnosed with a service-related disability nearly 2 years later. He sued DPS for violating his reemployment rights under USERRA for failing to accommodate his disability after it was diagnosed.

But the only issue he pressed at trial was Section 4313 of the Act, which provides that "a person entitled to reemployment" after returning from military service "shall be promptly reemployed" in the position he or she would have attained absent that service. DPS did exactly that; it was almost two years later when his disability was finally diagnosed that Torres first requested an accommodation. Every court to address this issue (and there aren't many) has construed the text of Sections 4312 and 4313 to apply only to *initial* reemployment, not latent disabilities recognized only later. Perhaps that is not what Congress intended, but it is what Congress said. Because the trial court erroneously instructed the jury that a delayed discovery of a service-related

disability restarted the reinstatement process at the beginning, the trial court's judgment must be reversed. But for the reasons noted in the Conclusion, we remand to the trial court for further proceedings.¹⁴

The 15th Court of Appeals decision relied upon two published appellate court decisions holding that the employer's duty to accommodate the returning employee's disability incurred during the period of service only applies to disabilities that were apparent at the time of reemployment, not to disabilities that were manifested and diagnosed later. The court held:

In response to these authorities, Torres relies solely on the Department of Labor's commentary in the preamble to Section 1002.226 of the Code of Federal Regulations when it was promulgated in 2005. Section 1002.226 itself provides:

If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

(a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable

¹⁴ *Texas Department of Public Safety v. Torres*, 2026 Tex. App. LEXIS 4317, *1-2.

efforts by the employer, qualify for the appropriate reemployment position.

20 C.F.R. § 1002.226(a).

The Department's commentary in the preamble to this regulation instructs that:

The disability must have been incurred or aggravated when the service member applies for reemployment, even if it has not yet been detected. **If the disability is discovered after the service member resumes work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions.**

70 Fed. Reg. 75246, 75277, 2005 WL 3451172 (Dec. 19, 2005) (emphasis added).

Based on this commentary, Torres requested that the trial court instruct the jury that the reinstatement process should be restarted if the disability is discovered after the employee resumes work.

No cases relevant to this issue consider this commentary from the Department. We are aware of only one federal district court case that even references the Department's commentary, *Murray v. Mayo Clinic*, No. CV-14-01314-PHX-SPL, 2015 WL 13655672, at *6 (D. Ariz. 2015). In *Murray*, the plaintiff relied on the Department's commentary to argue that the post-reemployment "emergence of his PTSD symptoms should have restarted the reemployment

process." *Id.* at *4. But the plaintiff's disability was "discovered" prior to his application for reemployment, not "after [he] resumed[d] work." *Id.* at *6 (quoting 70 Fed. Reg. at 75277). The *Murray* court was "not persuaded by [p]laintiff's tortured attempt to shoehorn himself into this particular paragraph of the USERRA Preamble." *Id.* The district court did not reach the situation, as presented here, in which a service member returns from service, is reemployed, and is subsequently diagnosed with a service-related disability. *Id.*

The Department's commentary in the preamble to the regulations appears to be the only authority for the interpretation that the reemployment process should be restarted if a service-related disability is discovered after reemployment. But as a preamble, it lacks the force and effect of law. *See Kisor v. Wilkie*, 588 U.S. 558, 583, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019). Moreover, an agency's interpretation of its own regulation receives deference only if the regulation is "genuinely ambiguous." *Id.* at 573 (explaining limits of *Auer* deference). Here, Torres does not argue Section 1002.226 of the Code of Federal Regulations is ambiguous or otherwise explain how the Department's commentary is supported by the plain text of USERRA and the corresponding regulations.

In reviewing the USERRA statutory scheme as a whole, including the related regulations, we agree with the case law interpreting USERRA, and conclude reemployment rights under Sections 4312 and 4313 apply only at the time of reemployment. *See, e.g., Butts*, 844 F.3d at 432-33; *Huff*, 292 Va. at 437-43. Here, there is no dispute that DPS reemployed Torres into his escalator position

when he returned from his military service, and at that time Torres did not claim he was unqualified for such a position due to a disability. DPS further had no notice of Torres's disability at the time of reemployment. As a result, Torres's sole available claim for actions by DPS after his reemployment was under Section 4311, a claim he expressly abandoned.

Accordingly, we conclude that the jury was instructed on an invalid legal theory in this case, and we reverse the trial court's judgment.¹⁵

Because the jury was instructed on an invalid theory of liability, we reverse the trial court's judgment. Generally, we render rather than remand a judgment when a party submits the case on an invalid theory. *See BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 403 n.6 (Tex. 2017). Yet "even when rendition would otherwise be warranted, our rules of appellate procedure allow discretion for a remand when 'the interests of justice require' it." *FieldTurf USA, Inc. v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 836 (Tex. 2022) (quoting Tex. R. App. P. 43.3(b)). This discretion may apply when our decision in a pending case "substantially clarifies [a] novel issue." *Rogers*, 623 S.W.3d at 358. We think that applies here.

This litigation has had a nest of novel issues. The first five years here were consumed by DPS's interlocutory appeal asserting it was immune to any USERRA claim, an argument that succeeded in the Thirteenth Court of Appeals, but was eventually rejected when the U.S. Supreme Court granted certiorari and in a 5-4

¹⁵ Id. at 13-16.

opinion reversed and remanded for trial. No Texas court has addressed the merits of a USERRA claim (a mere handful have even mentioned it), and no pattern jury charge exists to guide a trial court in submitting it to a jury.

We do not fault Torres or his attorneys in such uncertain circumstances for choosing to proceed on his reemployment claim under Sections 4312 and 4313 (which do not require proof of discrimination) rather than his Section 4311 claim (which does). Nor do we fault DPS for its five-year detour through the U.S. Supreme Court. Both may have been due to uncertainty about what to do in this novel case. Assuming we have correctly decided some of the uncertainties here, the issues that remain should be decided by a jury. Accordingly, in the interest of justice we reverse the trial court's judgment and remand to the trial court for further proceedings.¹⁶

What happens now?

This case has been remanded to the trial court in Corpus Christi. On remand, Torres and his attorneys may choose to espouse a different theory and to present different evidence. There will be a new trial unless the parties agree to a settlement. We will keep the readers informed of developments in this important case.

Do we need to get Congress to amend USERRA?

Yes. ROA will advocate for an amendment to adopt the DOL idea that a later-discovered disability results in a restart of the reemployment process.

¹⁶ Id. at 16-18.

If Congress amends USERRA, will the new provisions apply to Torres?

Possibly. Legal scholar Jeffrey M. Hager has written:

A question about the application of law sometimes arises when a statute is amended, or the Legislature enacts a new statute that governs a particular issue. In this regard, the question concerns whether the new law or amendment should be applied retroactively or prospectively.

There are “two axioms of statutory interpretation” that are relevant in determining whether a statute or amendment should be given retroactive effect. “Amendments are presumed to have prospective application unless the Legislature’s preference for retroactivity is explicitly stated or clearly indicated.” However, “remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose.” “Remedial statutes are those designed to correct imperfections in prior law, by generally giving relief to the aggrieved party.” Courts also consider a statute or amendment to be remedial where: the Legislature has conveyed a sense of urgency; the statute was designed to rewrite an unintended judicial interpretation; and the enactment itself reaffirms a legislative judgment about what the law in question should be. While the foregoing principles serve as guides, a court must discern the legislative intent either from the particular words used or from the nature of the legislation.

In *Pacheco v. P.V.E. Co., LLC*, 2023 N.Y. Slip Op. 23279 (Sup. Ct., Kings County Sept. 6, 2023) (here), the court was asked to determine whether the Justice for Injured Workers Act (N.Y. Work.

Comp. § 118-a) (the “Act”), enacted on December 30, 2022, should be applied retroactively or prospectively. As discussed below, the court held that the Act should be applied retroactively.

Pacheco is an action to recover damages for personal injuries. Defendants/third-party plaintiffs/third third-party plaintiffs P.V.E. CO., LLC, P.V.E. II CO., LLC, and 70 NARDOZZI LLC (“PVE/Nardozzi”) moved pursuant to CPLR § 3025 (b) and (c) for leave to amend its verified answer to assert a proposed affirmative defense of collateral estoppel. Plaintiff cross-moved for the imposition of costs and sanctions against PVE/Nardozzi for interposing a frivolous motion.

Plaintiff commenced the action against PVE/Nardozzi and Suffolk Construction Company, Inc., alleging that he sustained injuries as a result of an accident that occurred at a construction site located in New Rochelle, New York. On or about March 17, 2021, PVE/Nardozzi filed its answer to the complaint. Subsequently, the parties received a Notice of Decision from the Workers’ Compensation Board (the “Board decision”), in which, inter alia, the Workers’ Compensation Board determined that treatment for plaintiff’s neck injury had not been established and disallowed the neck injury claim.

PVE/Nardozzi moved for leave to amend its answer to assert a proposed affirmative defense of collateral estoppel based upon the Board decision. In opposition, plaintiff argued that the Act, which was enacted on December 30, 2022, warranted the denial of PVE/Nardozzi’s motion. Under Work. Comp. § 118-a, “no finding or decision by the workers’ compensation board, judge or

other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer employee relationship.” Plaintiff moved for costs and sanctions against defendants for refusing to withdraw the motion and for willfully interposing a frivolous motion. PVE/Nardozzi opposed the cross-motion, arguing that Work. Comp. § 118-a was not applicable as it should be applied prospectively to actions filed post-enactment.

The court denied both motions. In denying the motion to amend, the court observed that, although there was “no express directive” in Work. Comp. § 118-a instructing that it should be applied retroactively, “it clear that is a remedial law intended to ‘correct recent court decisions that granted preclusive effect to decisions of the Workers’ Compensation Board (WCB), barring injured workers from seeking justice through the courts because of an administrative decision of the WCB.’”⁷ The court explained that the “legislative history, specifically the sponsor memorandum, highlight that administrative hearings before a Worker’s Compensation Law Judge sacrifice basic procedures and evidentiary rules of trials to swiftly decide the claims and that NY WORK COMP § 118-a ‘needed to ensure that findings from cursory Worker’s Compensation Board hearings not prevent workers from exercising their constitutional right to a jury trial.’”⁸

Apart from the legislative history, the court noted that “the statute took effect immediately,” thereby evincing “a sense of urgency.”⁹ The court also noted that “retroactive application not result in unfairness or impair substantive rights.”¹⁰ The court explained that “retroactive application not increase liability but

rather provide plaintiff with an opportunity to exercise his right to a fair trial.”¹¹ “These factors together,” concluded the court, “weigh in favor of the finding that the remedial purpose of NY WORK COMP § 118-a should be effectuated through retroactive application.”¹²

Takeaway: In determining whether a statute should be given retroactive effect, the New York Court of Appeals has identified two competing axioms of statutory interpretation. On the one hand, new statutes and amendments are presumed to have prospective application unless the Legislature states a preference for retroactivity that is explicitly stated or clearly indicated. On the other hand, remedial legislation or statutes governing procedural matters should be applied retroactively, unless such application would “impair vested rights or bestow additional rights.”¹³ Courts must discern the Legislature’s intent, first by looking to the language of the statute and, if necessary, considering legislative history and other guides, such as those discussed above.

In Pacheco, the court examined a number of the factors discussed above, including legislative history, whether retroactive application would result in unfairness or impair substantive rights, and whether there was a sense of urgency in passing the legislation, to conclude that Work. Comp. § 118-a should be applied retroactively.

Footnotes

1. Matter of Gleason (Michael Vee, Ltd.), 96 N.Y.2d 117, 122 (2001); see also Nelson v. HSBC Bank USA, 87 A.D.3d 995, 997 (2d Dept. 2011).
2. Id.; see also Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 584 (1998); Matter of OnBank & Trust Co., 90 N.Y.2d 725, 730 (1997); People v. Duggins, 192 A.D.3d 191 (3d Dept. 2021).
3. Matter of Gleason, 96 N.Y.2d at 122; Majewski, 91 N.Y.2d at 584; Matter of OnBank & Trust Co., 90 N.Y.2d at 730.
4. Nelson, 87 A.D.3d at 998 (internal quotation marks omitted).
5. E.g., Matter of OnBank & Trust Co., 90 N.Y.2d at 730.
6. See Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d 332, 370 (2020); Matter of OnBank & Trust Co., 90 N.Y.2d at 730.
7. Slip Op. at *3 (quoting 2021 N.Y. Senate Bill S9149).
8. Id. (quoting id.).
9. Id. (quoting Matter of Gleason, 96 N.Y.2d at 122).
10. Id.
11. Id.
12. Id.
13. See Matter of City of New York (Long Is. Sound Realty Co.), 160 A.D.2d 696, 697 (2d Dept. 1990).¹⁷

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the

¹⁷ <https://www.fhnylaw.com/statutory-construction-should-a-new-statute-be-applied-retroactively-or-prospectively>.

Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an “of counsel” role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

<https://www.lawyersdefendingwarriors.com/about>.

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