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Sanelli v. Glenview State Bank: The Illinois General Assembly Enacts Retroactive Legislation to Save the Banking Industry - The Illinois Supreme Court Stays out of the Way, 19 J. Marshall L. Rev. 523 (1986)

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SANELLI v. GLENVIEW STATE BANK:* THE ILLINOIS GENERAL ASSEMBLY ENACTS RETROACTIVE LEGISLATION TO SAVE THE BANKING INDUSTRY — THE ILLINOIS SUPREME COURT STAYS OUT OF THE WAY

Historically, authorities have viewed retroactive legislation[1] as that which impairs or extinguishes rights available under pre-existing law.[2] Such legislation is considered constitutionally vulnerable

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* 483 N.E.2d 226 (Ill. 1985).

1. Retroactive legislation is that which gives a different legal effect to preenactment conduct than it would have had if the legislation had never been passed. Hochman, *The Supreme Court and The Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960). When a law is applied retroactively it is, in effect, reaching back in time to affect transactions or occurrences arising prior to the statute's effective date. *See, e.g.*, Forbes Pioneer Boat Line v. Bd. of Comm's., 285 U.S. 338 (1922); de Rodulfa v. United States, 461 F.2d 1240, 1247-53 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972). A definition of retroactivity, however, is easier to state than it is to apply. A distinction between prospective and retroactive legislation cannot always be clearly drawn. 2 C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 41.01 at 245 (4th ed. 1973). Legislation can be, and often is, considered both. *Id.* Attempting to classify legislation as one or the other, then, may result in a value judgment concerning the interpretation or validty of the statute under consideration, based upon other grounds. *Id.* For an in depth discussion of retroactive legislation, see generally C. SANDS at §§ 41.01-41.22; J. SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND (1953); W. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS (1880). For the historical background of retroactive legislation, see generally Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

2. There are three distinct ideas underlying the concept of retroactivity: 1) undoing the effects of laws under which existing rights were maintained; 2) undoing of such laws by reason of a past event upon which prospective duties are made to depend; and 3) undoing of laws by reason of a past event upon which prospective and retroactive duties are made to depend. Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 232-33 (1927) (pt. I). However, this distinction may be more confusing than useful. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 544 n.22 (1956). Regardless of the distinction, "legal effects of past acts are changed and the rights and duties which depend on such acts are reordered." *Id.*

Retroactive legislation, in and of itself, has encountered much opposition. One of the reasons that retroactive laws have encountered opposition is that they disturb "the comfortable feeling men indulge that whatever the future may hold in store, the past, at least, is secured." Smith, *Retroactive Law and Vested Rights*, 6 TEX. L. REV. 409, 418 (1928) (pt. II). One of the most basic reasons retroactive legislation is held suspect is because "a person should be able to plan his conduct with reasonable certainty of the legal consequences." Hochman, *supra* note 1, at 692. Stability, especially with respect to pre-existing law, is expected not only in the application of laws to past transactions, but also, in the setting of standards to govern future conduct. *Id.* at 692-93. Another reason why retroactive legislation is suspect is because it may be enacted with the knowledge of the parties who will benefit from its passage. *Id.* at

because it reaches into the past and changes the legal ramifications of completed events.[3] A statute is not rendered unconstitutional *per se*, however, merely because it is retroactive.[4] When a court is faced with a challenge to retroactive legislation, it must carefully balance and discriminate between reasons for and against a finding of constitutionality.[5] In *Sanelli v. Glenview State Bank*,[6] the Illinois Supreme Court addressed the issue of whether a retroactivity provision contained in legislation,[7] which was enacted in response to a prior decision of the court,[8] violated the Illinois separation of powers doctrine.[9] Finding that the province of the Illinois judiciary had not been invaded, the court held that the retroactivity provision of the land trust legislation[10] did not violate the Illinois separation of powers doctrine.[11]

In 1968, Alfred Sanelli ("Sanelli") and his wife entered into an Illinois land trust agreement[12] with Glenview State Bank

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693. For additional commentary on retroactive legislation, see generally C. SANDS, *supra* note 1, at § 41.02; W. WADE, *supra* note 1, at 3; Greenblatt, *supra*, at 540-50; Hochman, *supra* note 1, at 693-97; Smead, *supra* note 1, at 775; Smith (pts. I & II), *supra*.

3. The terms retrospective and retroactive describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act. C. SANDS, *supra* note 1, at § 41.01. Once again, this concept is stated in various verbal formulations. One formulation holds that it was the legislature's intent to design a statute that applies to existing interests. J. SCURLOCK, *supra* note 2, at 1. Another holds that retroactive statutes reach "back to attach new legal rights and duties to already completed transactions." Hochman, supra note 1, at 692. Yet another maintains that a statute is retroactive "if it assumes to give effect to a past event, in order to create a present right or duty." Smith (pt. I), *supra* note 2, at 232.

4. Smith (pt. II), *supra* note 2, at 421. Smith stated that "[b]etween lawful and unlawful there is no absolute opposition; there is only a relative difference. . .all depends upon the measure and there is no absolute measure." Smith (pt. II), *supra* note 2, at 421 (quoting from Kar Kunov, *Theory of Law*, 4 *Modern Legal Philosophy Series* 73, 74).

5. Smith (pt. II), *supra* note 2, at 431. Smith asserts that whatever rule is formulated, the method to be pursued is not the unerring pursuit of a fixed legal principle to an inevitable conclusion. Rather, it is the method of intelligently balancing and discriminating between reasons for and against. When lawyers have a precedent to follow, it is proper that they follow it. *Id.*

6. 483 N.E.2d 226 (Ill. 1985).

7. Public Act. No. 82-891. ILL. REV. STAT. ch. 148, §§ 81-84 (1983).

8. *See* Home Federal Savings and Loan Assoc. of Chicago v. Zarkin, 89 Ill. 2d 232, 432 N.E.2d 841 (1982).

9. *Sanelli*, 483 N.E.2d at 227-28.

10. Public Act 82-891. ILL. REV. STAT. ch.148, §§ 81-84 (1983).

11. *Sanelli*, 483 N.E.2d at 234.

12. *Id.* at 227. The Illinois land trust has become a "unique creation of the Illinois bar. . . ." People v. Chicago Title and Trust Co., 75 Ill. 2d 479, 487, 389 N.E.2d 540, 543 (1979). Land trusts have been defined as "revocable inter vivos trusts, the corpus of which usually consist solely of real estate." Haswell and Levine, *The Illinois Land Trust: A Fictional Best Seller*, 33 DEPAUL L. REV. 277, 278 (1984). *Accord* Kessler, Merci, and Lochner, Inc. v. Pioneer Bank & Trust Co., 101 Ill. App. 3d 502, 428 N.E.2d 608 (1981) (a trustee *can* be an agent of the beneficiary where the beneficiary's signature on a contract requiring arbitration *could* be binding on the beneficiary; however, the beneficiary's direction to the trustee to execute a contract is not,

("Bank").[13] Under this agreement, the Bank held title to the land in trust for the benefit of the Sanellis.[14] Ten years later, the Sanellis assigned their beneficial interest[15] in the trust property to the Bank as security for a loan.[16] The Bank, therefore, held the land both as trustee and as secured creditor.[17] The Sanelli's subsequently defaulted on the loan and in December, 1981, the Bank purchased the beneficial interest in the trust property at a public sale.[18]

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in and of itself, sufficient to create an agency). *Contra* H. KENOE, KENOE ON LAND TRUSTS § 1.22, at 18 (1981 and Supp. 1983) (when a trustee is acting under the direction of a beneficiary, he is *not* acting as an agent; rather, he is acting as a principal for himself at the direction of the beneficiary) (emphasis added). In contrast to a conventional trust, the Illinois land trust gives the beneficiary full and complete control over the management, use, and disposition of the property. *Id.* During the life of the land trust, the trustee can act only upon the direction of the beneficiary. *Id.* Unlike the conventional trust, the beneficiary of a land trust is the true owner of the property. *Id.* at 279. The trustee of the land trust is actually the equivalent of an agent for the beneficiary, because the trustee can legally bind the beneficiary when, the trustee acts at the direction of the beneficiary. *Id.*

The interest of a land trust beneficiary is described in the trust documents as personal property. Haswell and Levine, *supra*, at 283. Both the legal and equitable title to the real estate lie with the trustee. *Id.* Illinois courts continually give effect to these representations. *Id.* In conventional trusts, where the corpus is real estate, the beneficiaries' interests are only considered personal property if their interests are limited to the earnings and proceeds of sale and if the trustees retain effective control over the property. *Id. Cf.* ILL. REV. STAT. ch. 148, § 82(a) (1983): 'land trust' means any express agreement or arrangement whereof a use, confidence or trust is declared of any land, or of any charge upon land, for the use or benefit of any beneficiary, under which the title to real property, both legal and equitable, is held by a trustee, subject only to the execution of the trust, which may be enforced by the beneficiaries who have the exclusive right to manage and control the real estate, to have possession thereof, to receive the net proceeds from the rental, sale, hypothecation or other disposition thereof, and under which the interest of the beneficiary is personal property only. *Id.*

For a general discussion of Illinois land trusts, see H. KENOE, KENOE ON LAND TRUSTS (1981 and Supp. 1983); Hawell and Levine, *The Illinois Land Trust: A Fictional Best Seller*, 33 DEPAUL L. REV. 277 (1984).

13. *Sanelli*, 483 N.E.2d at 227.

14. *Id.* at 228.

15. *Id. Compare* Black's Law Dictionary's definition of a beneficial interest as the "[p]rofit benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control," BLACK'S LAW DICTIONARY 142 (5th ed. 1979), *with* a definition in the land trust context:

> In the typical managed trust arrangement, legal title in the corpus is vested in the trustee and the beneficiaries hold equitable title in the corpus. Such is not the case with the land trust. In a land trust, the trustee holds both legal and equitable title to the real estate. The beneficiaries of the trust have only a personal property interest in the trust rather than an equitable interest in the real estate.

Lindberg, *Assignments of Beneficial Interests in Illinois Land Trusts as Security for a Debt*, 70 ILL. B.J. 576 (1982).

16. *Sanelli*, 483 N.E.2d at 228.

17. *Id.*

18. *Id.* A public sale is a sale "made in pursuance of a notice, by auction or sheriff." BLACK'S LAW DICTIONARY 1201 (5th ed. 1979).

It should be noted that Glenview State Bank was not only the highest bidder at the public sale; but, it was also the only bidder. Thus, the Bank purchased the Sanellis' property interest and applied the proceeds to the Sanellis' outstanding loan bal-

In January, 1982, the Illinois Supreme Court in *Home Federal Savings and Loan v. Zarkin*[19] held that Illinois land trustees are subject to the fiduciary duties that the law imposes in all traditional trust relationships.[20] Further, the *Zarkin* court found that a bank-land trustee may take an assignment of the beneficial interest as security for a loan.[21] The burden is on the fiduciary, however, to prove that the transaction was fair.[22] In *Zarkin*, the court held that the bank-land trustee breached its duty of loyalty to the land trust beneficiaries when it purchased the trust property for its own advantage.[23] *Zarkin* was remanded to allow the bank-land trustee to show that its purchase was "fair."[24] Once proven, the bank, under *Zarkin*, would be allowed to recover on its claim of default.[25] Three months after *Zarkin* was decided, the Sanellis filed suit[26] against the

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ance. Brief for Appellee at 2, Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985).

19. Home Federal Savings and Loan Assoc. of Chicago v. Zarkin, 89 Ill. 2d 232, 432 N.E.2d 841 (1982). The Zarkins entered into an Illinois land trust agreement with Devon National Bank. *Id.* at 236, 432 N.E.2d at 844. At the Zarkin's direction, the bank executed a first mortgage on the trust property with Home Federal Savings and Loan. *Id.* Several years later, the Zarkins ran into financial difficulty, and borrowed $14,000 from the bank. *Id.* Unable to repay the loan as it came due, the Zarkins assigned their beneficial interest in the trust property to the bank to secure repayment of the loan. *Id.* The bank was the secured creditor and trustee.

Home Federal then sued to foreclose the mortgage. *Id.* The property was sold at a Sheriff's sale, and Home Federal bid the amount it had received in the judgment of foreclosure. *Id.* During the redemption period, the bank, without notifying the Zarkins, purchased the certificate of sale from Home Federal. *Id.* The Zarkins sued the bank alleging the bank breached its fiduciary duty as trustee. *Id.* The Illinois Supreme Court held that land trusts are to be treated no differently than any other trust. *Id.* at 239, 432 N.E.2d at 845. The decision was rendered in January of 1982. The case was remanded on grounds not relevant to *Sanelli*.

20. *Id.* A traditional trust fiduciary's relation has been defined as follows:

> Out of such a relation, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with knowledge and consent of that other, business shrewdness, hard bargaining, and astuteness to take advantage of the forgetfulness or negligence of another being totally prohibited as between persons standing in such a relation to each other.

BLACK'S LAW DICTIONARY 754 (5th ed. 1979). *But see* H. KENOE, KENOE ON LAND TRUSTS § 1.3 at 7 (1981 and Supp. 1983) (the author recognizes that a distinctive feature of a land trust is that "[t]he trustee has no duties or powers other than to convey, mortgage or deal with the real estate as directed by the beneficiaries").

21. Home Federal Savings & Loan Assoc., 89 Ill. 2d at 901, 432 N.E.2d at 845 (1982).

22. *Id.* at 902, 432 N.E.2d at 846.

23. *Id.* at 904, 432 N.E.2d at 848.

24. *Id.* at 905, 432 N.E.2d at 849.

25. *Id.*

26. Actually, Sanelli filed his complaint against approximately 185 banks and savings and loan associations. All defendants except Glenview State Bank were dismissed on various procedural grounds. Brief of Appellee at 1, Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985).

Bank alleging that the Bank had breached its fiduciary duty when it purchased their beneficial interest in the trust.[27] The Sanellis' theory of recovery was based on *Zarkin*.[28]

In August, 1982, the Illinois legislature passed an "Act in relation to land trusts and the power and authority of trustees of land trusts to deal with trust property" (the "Act").[29] The Act was passed in response to the *Zarkin* court's interpretation of an accepted practice in the banking industry.[30] In Illinois, it is well established that a bank can be both a land trustee and a secured creditor in a loan transaction, holding the trust property as collateral.[31] The Act codified this practice and expressly permits a land trustee to become a secured creditor without breaching its fiduciary duties.[32] The Bank

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27. Home Federal Savings and Loan v. Zarkin, 89 Ill. 2d 232, 432 N.E.2d 841 (1982).

28. *Sanelli*, 483 N.E.2d at 227.

29. ILL. REV. STAT. ch. 148, § 81 (1983). The relevant language of the Act reads as follows:

81. Legislative Findings — Purpose

1. (a) The General Assembly finds:

* * * *

(4) *** [B]eneficiaries will frequently select a financial institution as trustee simply because that institution will be asked by the beneficiaries to extend credit to the trust or to the beneficiaries secured by their interest in the trust. (5) Recently, this accepted practice of a creditor lending money to itself as trustee or to the beneficiaries upon the security of an interest in the land trust of which it is trustee, has been scrutinized by the Illinois Supreme Court.

(b) It is the purpose of this act to codify the accepted practice of creditor-lending to the trustee of a land trust or the beneficiaries thereof upon the security of trust property or their interest in the trust, even though the creditor and the trustee are the same, and to foster and encourage the availability of financing for owners and developers of real estate.

82. Trustee as creditor — Effect — Definitions

2. If a debt is secured by a security interest in a beneficial interest in a land trust or by a mortgage on land trust property, neither the validity or enforceability of the debt, security interest or mortgage, nor the rights, remedies, powers and duties of the creditor with respect to the debt or the security shall be affected by the fact that the creditor and the trustee are the same person, and the creditor may extend credit, obtain such security interest or mortgage, and acquire and deal with the property comprising the security as though the creditor were not the trustee.

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83. Breach of fiduciary duty

3. The fact that a trustee of a land trust is or becomes a secured or unsecured creditor of the land trust, the beneficiaries of the land trust, or a third party whose debt to such creditor is guaranteed by a beneficiary of the land trust, shall not be a breach of, and shall not be deemed evidence of a breach of any fiduciary duty owed by said trustee to the beneficiaries.

84. Application of Act

4. This Act applies to all security interests in a beneficial interest in land trust and all mortgages on land trust property and to all debts secured thereby, *whether arising before, on, or after the effective date of this Act.*

ILL. REV. STAT. ch. 148, §§ 81-84 (1983) (emphasis added).

30. ILL. REV. STAT. ch. 148, § 81 (1983).

31. *Id.* § 82.

32. *Id.*

moved to dismiss the Sanellis' complaint on the ground that the Act barred their claim.[33] The lower court dismissed their claim and granted a direct appeal to the Illinois Supreme Court.[34]

In its first consideration of *Sanelli*, the Illinois Supreme Court unanimously concluded that the Act was unconstitutional because it violated the Illinois separation of powers doctrine.[35] The court construed the retroactivity provision as a legislative attempt to reverse the *Zarkin* decision.[36] Upon rehearing, however, the court considered the Bank's claim that the legislature did not intend to nullify *Zarkin* when it passed the Act.[37] The issue presented for review was whether the retroactivity provision of the Act, as it applied to the dispute between Sanelli and the Bank, violated the Illinois separation of powers doctrine.[38] In a four to three decision, the *Sanelli* court held that the Act did not constitute an invasion of the judicial province.[39] The court found that the act only changed the "effect" of *Zarkin* and did not represent an attempt to overturn that decision.[40] Accordingly, the court held that the Act did not violate the Illinois separation of powers doctrine.[41]

The court began its analysis with the observation that retroactive legislation is not unconstitutional *per se*.[42] The court recognized that determining the validity of this type of legislation depended upon the scope of the separation of powers doctrine.[43] The applica-

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33. *Sanelli*, 483 N.E.2d at 235.

34. *Id.* at 226. Sanelli's direct appeal was allowed pursuant to Illinois Supreme Court Rule 302(b) which provides that:

> After the filing of the notice of appeal to the Appellate Court in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal be taken directly to it. . . .From that point the case shall proceed in all respects though the appeal had been taken directly to the Supreme Court.

ILL. REV. STAT. ch. 110A, § 302(b) (1983).

35. Sanelli v. Glenview State Bank, No. 57935, slip op. (Ill. April 27, 1984), *rev'd*, 483 N.E.2d at 226 (1985). The unpublished opinion is available at The John Marshall Law Review Office.

36. *Id.*

37. *Id.* at 229.

38. *Id.* at 226-39. The other issue presented for review was whether the retroactivity provision violated the prohibition against laws which impair the obligations of contracts, or the due process clause. *Id.* at 226. For the court holding see *infra* note 57.

39. *Sanelli*, 483 N.E.2d at 238-39.

40. *Id.*

41. *Id.*

42. *Id.* at 229. *See* Smith (pts. I & II), *supra* note 2.

43. *Sanelli*, 483 N.E.2d at 229. *See In re* Barker's Estate, 63 Ill. 2d 113, 345 N.E.2d 484 (1976) (true meaning of doctrine: whole power of two or more branches shall not be lodged in the same hands); City of Waukegan v. Pollution Control Bd., 57 Ill. 2d 170, 311 N.E.2d 146 (1974) (same principle); Hill v. Relyea, 34 Ill. 2d 552, 216 N.E.2d 795 (1966) (same principle and definition of "hands," i.e., whether one or many). *See also* Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952) (each department performs duties assigned to it and exercises no powers properly belonging

tion of the doctrine to retroactive legislation is necessary because there is an express separation of powers provision in the Illinois Constitution.[44] The court also observed that prior case law interpreted the separation of powers doctrine to invalidate legislation which constitutes an invasion of the judiciary's province.[45] The court concluded that the separation of powers doctrine should be narrowly applied.[46] Accordingly, the court held that the legislature may enact retroactive legislation that changes the "effect" of prior decisions in pending or future cases.[47] The legislature may enact this form of retroactive legislation regardless of whether the circumstances which gave rise to the litigation accrued before, on, or after the statute's effective date.[48]

The *Sanelli* court noted the general rule that a statute may not change a prior decision of a reviewing court.[49] Statutes may only,

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to either of the other two); People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950) (same principle). *But see* Stamp v. C.I.R., 579 F. Supp. 168 (1984) (separation of powers is not enforceable independently of a constitutional provision).

44. The Illinois Constitution provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, cl.1.

45. *Sanelli*, 483 N.E.2d at 230. *See* Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978). The application of the Illinois Marriage and Dissolution of Marriage Act to pending actions and actions commenced prior to its effective date did not unconstitutionally prevent a trial court from adjudicating rights. *Id. See also* Worley v. Idleman, 285 Ill. 214, 220, 120 N.E.2d 472, 475 (1918) (passing a curative act does not constitute an invasion of the province of the judiciary or set aside any judgment or decree of the court); W. WADE, *supra* note 1, at 36 (citing Cooley's Const. Lim. 113, 114 (the legislature cannot act upon past controversies and reverse a decision which the courts, "in their exercise of undoubted authority," have rendered)).

46. *Sanelli*, 483 N.E.2d at 229.

47. *Id.* at 229-30. The court explicitly provides that "[T]he General Assembly may enact retroactive legislation which changes the *effect* of a prior decision of a reviewing court with respect to others whose circumstances are similar but whose rights have been finally decided." *Id.*

48. *Sanelli*, 483 N.E.2d at 229.

49. *Id. See, e.g.*, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). If subsequent to a judgment and before a decision of a reviewing court, a new law intervenes and changes the then governing law, the new law must be obeyed. *Id.*; Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948). The Portal-to-Portal Act, which took away the right to recover overtime pay under the Fair Labor Standards Act, did not in any manner affect adjudications already made. *Id.* In a case involving a judgment against the United States for a violation of a consent decree requiring the government to provide resources to the Board for Chicago's desegregation plan, the court held no legislative change in the law can retroactively effect a judicial determination brought to a final judgment prior to that change. United States v. Board of Education of Chicago, 580 F. Supp. 132, *vacated*, 744 F.2d 1300 (1984), *cert. denied*, 105 S. Ct. 2358 (1985); Schlenz v. Castle, 84 Ill. 2d 196, 417 N.E.2d 1336 (1981) (subsequent to an Illinois Supreme Court's decision that publication dates in an assessment statute were mandatory, the legislature enacted legislation retroactively validating untimely assessments which did not violate the separation of powers doctrine because it did not reflect a construction contrary to the decision), *appeal dismissed*, 454 U.S. 804 (1981). In upholding the validity of the retroactive application of the Messages Tax Act, the Illinois Supreme Court stated that what the legislature could not do is constitutionally overrule a decision of the court when giving a statute retro-

however, change the effect of a prior decision with respect to those parties whose rights have yet to be fully adjudicated.[50] The court stressed that legislation which is otherwise valid may be applied to transactions or events which occurred prior to the statute's effective date.[51]

The *Sanelli* court also stressed that its holding applied regardless of whether the retroactive legislation was enacted in response to a court's interpretation of a statute[52] or the common law.[53] An in-

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active effect. General Telephone Co. of Ill. v. Johnson, 103 Ill. 2d 363, 469 N.E.2d 1067 (1984). *See also In re* Marriage of Cohn, 93 Ill. 2d 190, 443 N.E.2d 541 (1982) (a statute giving a court discretion to enter judgments of dissolution of marriage while reserving other issues not given retroactive effect to reverse decisions that invalidated judgments of dissolutions). A statute amending the Cannabis Control Act was held to retroactively overrule a decision of a reviewing court. Roth v. Yackley, 77 Ill. 2d 423, 396 N.E.2d 520 (1979). The court held that the General Assembly cannot constitutionally overrule a decision of the Illinois Supreme Court through the retroactive application of legislation. *Id.* In another decision, the Illinois Supreme Court found the retroactivity provision of the Illinois Marriage and Dissolution of Marriage Act constitutional: "[it] applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered." Kujawinski v. Kujawinski, 71 Ill. 2d 563, 570, 376 N.E.2d 1382, 1385 (1978); People *ex rel.*, Coen v. Henry, 301 Ill. 51, 133 N.E. 636 (1921) (entering an order is a judicial function and legislature has the function of changing laws; courts will dispose of cases under the law in force at the time the court's judgment is rendered); Worley v. Idleman, 285 Ill. 214, 120 N.E. 472 (1918). Until an adjudication of rights between the taxpayers and the town had been made, the legislature had the right to enact curative legislation to validate what would otherwise be an invalid tax assessment. *Id.*; Steger v. Traveling Men's Building & Loan Ass'n, 208 Ill. 236, 70 N.E. 236 (1904) (courts giving legal effect to a statute providing for the written execution of deeds, mortgages, etc., because the legislation did not purport to settle disputes or controversies).

50. *Sanelli*, 483 N.E.2d at 229. The court specifically stated: "[w]hat the General Assembly may not do is pass a statute in an attempt to change the result of a decision which has been finally decided as between the parties to that case." *Id.* The court cited to the *Roth* court's finding that "the General Assembly cannot constitutionally overrule a decision of this court by declaring that an amendatory act applies retroactively to *cases decided before* its effective date." *Id.* It also cited to the *Cohn* court's finding that the legislature "attempt to attribute to a statute, at the time of the reviewing court's opinion and attempts to validate *all judgments*. . .that were *entered prior to the effective date of the amendment*. . . . *Sanelli*, 483 N.E.2d at 232-33. *See also* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) (no violation of the separation of powers because the regulatory legislation did not attempt to change decisions in any way; "It left valid final judgments."). *See also* Western Union Telegraph Co. v. Louisville and Nashville Railroad Co., 258 U.S. 13 (1922) (a valid withholding of power [i.e., the state could legislate] before "conditions" were "established and adjudicated, and this not preliminary or dependent, but [a] final and unreviewable determination").

51. *Sanelli*, 483 N.E.2d at 233. The court provided that "the legislature had the authority to change the law for future cases arising from facts existing prior to the effective date of the legislation which made the change." *Id.*

52. *Id.* at 230. *See, e.g.*, General Telephone Co., of Ill. v. Johnson, 103 Ill. 2d 363, 469 N.E.2d 1067 (1984) (retroactive legislation involving valid amendment to the Message Tax Act); *In re* Marriage of Cohn, 93 Ill. 2d 190, 443 N.E.2d 541 (1982) (statute amending the Illinois Marriage and Dissolution of Marriage Act); Schlenz v. Castle, 84 Ill. 2d 196, 417 N.E.2d 1336 (1981) (retroactive legislation amending the requirements set out for tax assessment publication dates in the Revenue Act of 1939), *appeal dismissed*, 454 U.S. 804 (1981); Roth v. Yackley, 77 Ill. 2d 423, 396

fringement of the judiciary's province can only occur when the legislative enactment attempts to reverse a reviewing court's decision[54] or when it explicitly construes a statute's meaning contrary to a reviewing court's construction in the context of a case that has already been decided.[55] The court reasoned that because Sanelli's rights had yet to be fully adjudicated when the Act became effective, and because the Act was passed to change the effect of *Zarkin* and not the decision itself, the retroactive application of the Act to the dispute between Sanelli and the Bank was constitutionally valid.[56] The retroactive application of the law did not constitute an invasion of the judicial province and, therefore, did not violate the Illinois separation of powers doctrine.[57]

The *Sanelli* court was justified in holding that the retroactivity

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N.E.2d 520 (1979) (statute involving amendment to the Cannabis Control Act); People v. Holmstrom, 8 Ill. 2d 401, 134 N.E.2d 246 (1956) (the statute in question curing the irregularities of publication lists in the Revenue Act of 1939).

53. *Sanelli*, 483 N.E.2d at 230. *See, e.g.*, Chevron Chemical Co. v. Superior Court, 131 Ariz. 432, 641 P.2d 1275 (1982) (a retroactively applied statute allowing an injured employee a third-party claim to be reassigned to the third-party after he had assigned it to his employer); Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969) (a statute replacing the law of contributory negligence with comparative negligence constitutionally applied retroactively).

54. *Sanelli*, 483 N.E.2d at 231-32.

55. *Id.*

56. *Id.* at 233-34.

57. *Id.* Finding the separation of powers doctrine intact, the court addressed the issue regarding the prohibition of laws that impair contracts provision and the due process clause. *Id.* The court cited Greenblatt, to justify its considering the two as one issue:

> Although it has been suggested that the standards maybe more rigid under the contract clause than under the due process clause, and thus that contract rights may be better protected against retroactive state legislation than other rights, it is probable that since the adoption of the fourteenth amendment the former clause has been largely absorbed by the latter.

Id. (quoting Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U. L. Rev. 540, 543-44 (1956)). The court recognized that balancing the various interests involved would result in an accurate determination of whether this retroactive legislation violated the contract clause. *Sanelli*, 483 N.E.2d at 234-39. The interests that the court balanced were those of society in "foster[ing] and encourag[ing] the availability of financing for owners and developers of real estate." *Id.* at 235, and of the individuals' rights, *id.* at 234, arising out of *Zarkin*. The court found Sanelli's rights to be minimal at best: the possibility that he relied on *Zarkin* did not appear likely to the court as the court had never given an indication that "Zarkin-type" transactions would be condemned. *Id.* at 235-37. Sanelli never alleged factors to be considered in applying the appropriate balancing test set out in General Telephone Co. of Ill. v. Johnson, 103 Ill. 2d 363, 378-79, 469 N.E.2d 1067, 1081 (1984). *Sanelli*, 483 N.E.2d at 237. The court then considered the rights Sanelli might have had under *Zarkin* and concluded that "it would not be unfair to apply the legislative enactment retroactively so as to impair whatever rights Sanelli may have acquired." *Id.* The court also found that any impairment that may have occurred due to the acts passage was a reasonable exercise of legislature's authority to provide for the public welfare and to protect society's interest. *Id.* at 236-37. For an academic analysis of the test that the court applied to the second issue, see Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

provision of the Act did not violate the Illinois separation of powers doctrine. Rehearing the constitutionality issue, the court accurately applied a narrow construction of the doctrine. This narrow construction allowed the court to avoid the potential misapplication of the court's final decision in *Zarkin*. The court's analysis highlighted the differences between a reversal and a clarification of a final judgment. Moreover, the court's holding can be justified on the ground that it implicitly recognized the legislature's intent to alleviate the banking industry's concern that *Zarkin* might be misapplied.

Prior case law has consistently affirmed the principle that a legislative enactment may change the effect of a prior decision if the final result among the parties to that decision is not affected.[58] When the *Sanelli* court was originally faced with the dispute over the validity of the Act's retroactivity provision,[59] the court based its decision on a broad application of the separation of powers doctrine.[60] Consequently, the court failed to give effect to the principle that retroactive legislation may only be applied to cases in which a final judgment has yet to be rendered.[61] Initially, therefore, the court incorrectly held that the retroactivity provision invaded the province of the judiciary and was, as a result, unconstitutional.[62]

On rehearing, however, the *Sanelli* court's reapplication of the separation of powers doctrine[63] highlighted that a statute which changes the effect of a prior decision may be applied retroactively where parties' rights have not been fully adjudicated.[64] The court appropriately recognized that a broad application of the separation of powers doctrine serves to severely restrict the legislature's authority.[65] The court, then, explicitly defined the separation of powers

58. *Sanelli*, 483 N.E.2d at 229. For a list of Illinois cases emphasizing that a prior decision must not be affected see *supra* note 49.

59. *Sanelli*, No. 57935, slip op. (Ill. April 27, 1984), *rev'd*, 483 N.E.2d 226 (1985).

60. *Id.* at 4-9. The court appears to have challenged the legislation by questioning whether the changes are declaratory of existing law and are therefore applicable in relation to events which occurred before the effective date of the Act and whether the terms and conditions specified in the act were in effect before the Act's effective date. *Id.* This type of challenge is bound to find every retroactive statute that deals with the subject matter of a past decision unconstitutional.

61. *Id.* It should be noted that the court never emphasized "finality." *Sanelli*, No. 57935, slip op. (Ill. April 27, 1984), *rev'd*, 483 N.E.2d 226 (1985). The precedent on which the court relied consisted of the following language: "annual a prior *decision* of this court" from Roth v. Yackley, 77 Ill. 2d at 426, 396 N.E.2d at 522 (1979) (emphasis added) and "retroactively overruling a *decision* of a reviewing court" from *In re* Marriage of Cohn, 77 Ill. 2d at 197, 443 N.E.2d at 548 (1982) (emphasis added). *Id.*

62. *Id.* at 9.

63. *Sanelli*, 483 N.E.2d 230-34.

64. *See supra* note 49.

65. If the court were to construe the separation of powers doctrine broadly, any attempt of the legislature to correct an error in or a misapplication of preexisting law to parties whose rights have yet to be fully adjudicated would be an invasion of the

doctrine narrowly,[66] consistent with the scope of Illinois precedent, as well as the decisions in other jurisdictions.[67] The court applied this traditional construction and accurately held that the Act's retroactivity provision did not invade the judicial province,[68] because the court could not find a specific legislative intent to reverse *Zarkin*.[69]

Additionally, the *Sanelli* court's holding demonstrates the propriety of applying the separation of powers doctrine to similar disputes. Resolving the internal conflict over the scope of the separation of powers doctrine in favor of a narrow construction facilitates the application of the doctrine to future controversies involving retroactive legislative enactments. Thus, the *Sanelli* court's definition of the separation of powers doctrine as a determinant of retroactive legislations' validity has significant precedential value. Moreover, a narrow application of the separation of powers doctrine necessitates that a distinction be drawn between a legislative attempt to reverse a decision and an attempt to clarify that decision so as to avoid its misapplication.

Although the court did not explicitly draw a line between a reversal and a clarification, its findings accurately reflect that this dis-

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judiciary and, thus, unconstitutional.

66. *Sanelli*, 483 N.E.2d at 229. Specifically, the question to be asked is whether the retroactive legislation "changes the *effect* of a prior decision of a reviewing court with respect to others whose circumstances are similar but whose rights have not been finally decided." *Id. Cf.* United States v. Board of Education of Chicago, 588 F. Supp. 132, *vacated*, 744 F.2d 1300 (1984) (final judgments cannot be retroactively affected by changes made in the law subsequent to adjudication); W. WADE, *supra* note 1, at § 36 (citing Cooley from COOLEY'S CONST. LIM. 113, 114) ("legislature cannot. . . reverse decisions which the courts, in the exercise of their undoubted authority, have made;" for this would not only be the exercise of the judicial power, but it would be its exercise in the "most objectionable and offensive form, since the legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the court.").

67. For an extensive list of Illinois cases applying a narrow construction of the separation of powers doctrine, see *supra* note 49. *See also* Marine Power v. Washington State Human Rights Comm'n Hearing Tribunal, 39 Wash. App. 609, 694 P.2d 697 (1985). The Court of Appeals of Washington declared that a statutory amendment limiting damages for humiliation and suffering in an employment discrimination dispute applied retroactively and was constitutional. *Id.* The court held that what the legislature may not do is overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute. *Id.* In Schwarz-Kopf v. Sac County Bd. of Supervisors, 341 N.W.2d 1 (Iowa 1983), the Supreme Court of Iowa held that a curative act extending the scope of a county's easement-granting powers did not offend the constitutional separation of powers. *Id.* The court held that while the effect of a court's prior decision was nullified, the legislature was not attempting to nullify the decision itself, nor was it mandating to the judiciary how it should interpret the statute in question. *Id.*

68. *Sanelli*, 483 N.E.2d at 234. The court also found that Sanelli's contract obligations or rights were not impaired, nor was the due process clause violated. *Id.* at 238-39.

69. *Id.* at 230-34.

tinction is what separates constitutional retroactive legislation from that which is unconstitutional. The *Zarkin* court held that land trustees are subject to all fiduciary duties[70] imposed in a traditional trust relationship.[71] The Act provides that being a secured creditor and land trustee at the same time did not constitute a breach of any fiduciary duty.[72] Logically, it does not follow that the legislature was attempting to reverse *Zarkin* because, on the one hand, *Zarkin* established that land trustees have fiduciary duties and, on the other, the Act defined a practice that did not constitute a breach of duty. Rather, it is apparent that the act was passed in order to avoid the misapplication of *Zarkin* to any controversy that might arise out of similar circumstances. The legislature was simply clarifying the scope of the term "fiduciary duty" as it applies to land trusts.

Because the retroactivity provision served to clarify rather than nullify *Zarkin*, the *Sanelli* court was justified in holding that the Act applies to *Zarkin*-type disputes where a lending institution is concurrently land trustee and secured creditor.[73] In particular, the Act governed the *Sanelli* case because the Act was the law "in effect" when the court considered the dispute.[74] Consequently, any

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70. For a definition of a fiduciary relation see *supra* note 20.

71. Home Federal Savings and Loan Assoc. of Chicago v. Zarkin, 89 Ill. 2d at 236, 432 N.E.2d at 845 (1982). It should be noted that *Zarkin* was remanded to determine the reasonableness of the loan and subsequent assignment of the Zarkin's beneficial interest, not to reconsider the fiduciary duty issue. Therefore, *Zarkin* was a final decision. *Id.*

72. Amicus Curiae Brief of the Illinois Bankers Ass'n at 15, Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985). The Act explicitly provides that

> [t]he fact that a trustee of a land trust is or becomes a secured or unsecured creditor of the land trust, the beneficiaries of the land trust, or a third party whose debt to such creditor is guaranteed by a beneficiary of the land trust, shall not be a breach of, and shall not be deemed evidence of a breach, of any fiduciary duty owed by said trustee to the beneficiaries.

ILL. REV. STAT. ch. 148, § 83 (1983).

73. *Sanelli*, 483 N.E.2d at 230-34.

74. *See* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). Courts must decide according to existing laws and when a holding cannot be affirmed without being in violation of an existing law, it must be set aside. *Id.* People *ex rel.* Bauer v. Elmhurst-Villa Park-Lombard Water Comm'n, 20 Ill. 2d 139, 169 N.E.2d 350 (1960) (the general rule being that even though a judgment has been entered and a cause is pending on appeal, the reviewing court must dispose of the case under the law in force at the date the decision is rendered). Where the legislature has changed the law pending an appeal, a reviewing court must dispose of a case under the law as it *then* exists, and not under the law as it was when the trial court made its decision. Illinois Chiropractic Society v. Giello, 18 Ill. 2d 306, 164 N.E.2d 47 (1960); Hughes v. Ill. Public Aid Comm'n, 2 Ill. 2d 374, 118 N.E.2d 14 (1954) (decisions rendered applying the law as it stands at the time of the court's decision and not as it stands at time the cause of action accrued or at the time of the trial court's decision); People *ex rel.* Coen v. Henry, 301 Ill. 51, 133 N.E. 636 (1921) (the legislature changes the law, and the court decides cases pending at the time of the change, disposing of them under the law in force at the time of the judgment). *See also*, W. WADE, *supra* note 1, at § 38, Laws governing men in all their transactions are those which are *in force* at that time, and not those which they believe may go into operation at a future day. *Id.*

court considering *Zarkin*-type disputes on or after August 6, 1982 must apply the Act. Thus, the *Sanelli* court accurately found that the retroactive application of the Act to the dispute between Sanelli and the Bank was constitutional.[75]

The *Sanelli* court's ruling is further justified because it promotes the underlying purpose of valid retroactive legislation. Courts and other authorities have historically found retroactive legislation unfair[76] based upon people's expectations and their right to have notice of the laws governing their activities before they engage in them.[77] These same authorities, however, recognize exceptions to

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Until then, they are not laws. *Id.*

75. *Sanelli*, 483 N.E.2d at 238-39.

76. Hochman maintains that the United State Supreme Court's attitude toward retroactive legislation is that "it is impossible to reduce the potentially infinite variety of situations in which the problem of retroactivity can arise to a single common denominator." Hochman, *supra* note 1, at 727. Precedent seems to indicate, however, that one consideration of the Court is the extent to which parties have relied on preexisting law. *Id.* The reason this factor is given a great deal of weight is because the interests that are balanced in making a determination of constitutionality are: "the strength of the public interest it serves and the unfairness created by its retroactive operation." *Id.* Reliance is a very accurate indicator of fairness. *Id.*

The opinions of courts, in general, are "replete with vapid verbalizations of standards which purport to govern decisions as to the legal permissibility of the retroactive application of new law." C. SANDS, *supra* note 1, at § 41.05. The propositions flowing from these decisions, however, rarely reflect a conclusion regarding the validity of retroactive legislation. *Id.* Rather, this problem of constitutionality has ended up being defined in a number of ways. *Id.* Thus, courts continue to search for a meaningful standard by which to review the validity of retroactive legislation. *Id.* "Justice Holmes once remarked with reference to the problem of retroactivity that 'perhaps the reasoning for the case has not always been as sound as the instinct which direct the decisions' and suggested that the criteria which really governed decisions are the 'prevailing views of justice'." *Id.*

Smith maintains that "from the very beginning retroactive laws were under suspicion as instruments of oppression, within the spirit though not within the terms of ex post facto prohibition." Smith (pt. I), *supra* note 2, at 234. For further discussion *see generally* C. SANDS, *supra* note 1, at § 41.02; W. WADE, *supra* note 1, at § 3; Greenblatt, *supra* note 1, at 540-50; Hochman, *supra* note 1, at 693-97; Smead, *supra* note 1; Smith (pts. I & II), *supra* note 2.

77. *See* C. SANDS, *supra* note 1, at § 41.02, wherein the author observes:

> It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible as to law which has not yet been made.

Id.

Several commentators have addressed the same point: For example, Hochman, *supra* note 1, at 692, asserts that "[p]erhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences." *Id.* Whereas Wade provides that "[i]n all retroactive laws there must be an element of surprise, by which the persons whose rights are affected are taken unaware. They are called upon to act in a manner different from what they had been led by the previous state of the

this general principle.[78] One such exception occurs when a statute is passed to cure a non-conformity between declarations of the content of rights and relationships and people's expectations of those rights and relationships.[79] The purpose of this type of retroactive legislation is not only to regulate the rights and liabilities growing out of past transactions, but also, to set clear standards to govern transactions in the future.[80] Because the *Sanelli* court recognized the Act to be an attempt to cure a potential non-confirmity apparent in *Zarkin*, it was vindicated in holding that the retroactive application of the Act was valid.

Traditionally, courts have given great deference to the legislature's intent.[81] The *Sanelli* court recognized the legislature's concern over the potential problems the *Zarkin* decision posed.[82] *Zarkin's*

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law to anticipate." W. WADE, *supra* note 1, at § 34. Scurlock maintains that retroactive legislation "destroys one's feeling of security. . . .Moreover, a retroactive statute gives the person affected no opportunity to avoid the consequences by rearranging his affairs." J. SCURLOCK, *supra* note 1, at 9.

78. *See* C. SANDS, *supra* note 1, at § 41.02. Sands provides several exceptions to the general rule that retroactive laws are unfair: 1) it is not unfair for a law to retroactively confer benefits unless its enactment "arbitrarily deprives some people of the opportunity to establish their eligibility" for such benefit; 2) it is not unfair to bring legal rights "into conformity" with what people believed them to be; 3) it is not unfair to confirm official acts or amend charters; and 4) it is not unfair to impose legal responsibilities where a choice as to those responsibilities would be impractical anyway. *Id.*; W. WADE, *supra* note 1, at § 38. "Exception to the strictness of [the general rule which states that every reasonable doubt as to the intention of the legislature is resolved against the retroactive operation of a statute] have been maintained in favor of the retrospective operation of remedial statutes." *Id.* Statutes of Limitations are also given retrospective effect so long as the litigation process has not yet begun. *Id.* at 48.

79. C. SANDS, *supra* note 1, at § 41.02.

80. W. WADE, *supra* note 1, at § 1. Wade explicitly asserts that retroactive legislation "undertakes, not only to regulate rights and liabilities growing out of past transactions, but sets up a standard by which they shall be governed in the future." *Id.*

81. It is a long-standing principle that when a court is faced with interpreting a statute, it has the duty to determine and effectuate the intent of the statute's drafters. Further, the best indication of the legislature's intent can be found in the ordinary meaning of the statute's language. *See* Sayles v. Thompson, 99 Ill. 2d 122, 457 N.E.2d 440 (1983); *In re* Criffen, 92 Ill. 2d 48, 440 N.E.2d 852 (1982); People v. Brown, 92 Ill. 2d 248, 442 N.E.2d 136 (1982); Greenholdt v. Illinois Bell Telephone, 107 Ill. App. 3d 748 (1982). *But see* Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), wherein the court replaced the doctrine of contributory negligence with the doctrine of comparative negligence where the legislature's intent was clearly to retain the contributory negligence rule. *Id.* This intent was apparent in the legislature's failure (the related bill was introduced and voted upon, on six separate occasions) to enact comparative negligence legislation. *Id.* at 22, 421 N.E.2d at 895.

82. Amicus Curiae Brief of the Illinois Bankers Ass'n at 5, Sanelli v. Glenview State Bank, 483 N.E.2d at 226. The legislature's concern for the problems raised was evidenced in the fact that the Act which was introduced on March 30, 1982, as Senate Bill 1488 passed the Senate 56-0 on May 6, and passed the House 162-0 on June 17. *Id.* Further, both the Senate and the House recognized that *Zarkin* "caused considerable doubt and confusion as to the law of Illinois concerning the rights and duties of financial institutions which serve in a dual capacity as land trustee and secured credi-

mandate that land trustees are subject to the same fiduciary duties imposed on all trustees[83] was sufficiently ambiguous[84] to give rise to a potential for misapplication. Over the course of the seven months following *Zarkin*, Illinois courts decided a number of cases under the *Zarkin* rationale.[85] One court, in particular, misapplied *Zarkin* and found a breach of a fiduciary duty where the Act, had it been applied, would probably have barred the claim.[86] The Act clarifies what a land trustee's fiduciary duties, as established in *Zarkin*, are

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tor." 82nd Ill. Gen. Assem., Transcript of Senate Proceedings, May 6, 1982, at 39. *Accord* 82nd Ill. Gen. Assem., Transcript of House Proceedings, June 17, 1982 at 9-10.

83. Home Federal Savings and Loan Ass'n of Chicago v. Zarkin, 89 Ill. 2d 232, 432 N.E.2d 841 (1982).

84. *Id.* Duty prohibits "dealing with the trust property for his own *individual* benefit," also, nowhere does the *Zarkin* court address a "trustee-credit" lending institution with regard to a foreclosure and sale of trust property. *Id.* (emphasis added).

85. *See In re* Estate of Swiecki, 106 Ill. 2d 111, 477 N.E.2d 488 (1985). A bank acting as a guardian of a minor's estate was required to account to the estate for profits it realized through investments in its own accounts. *Id.* The court relied on *Zarkin* to analogize the fiduciary duty of loyalty of a trustee to that of a guardian. *Id. In re* Estate of Neisewander, 130 Ill. App. 3d 1031, 474 N.E.2d 1378 (1985), the distribution of an estate's assets, consisting of stock, to a beneficiary who was an executor as well and the subsequent sale to the coexecutor was not a breach of the executor's fiduciary duty. *Id.* The court interpreted *Zarkin's* dicta to mean that a fiduciary may not purchase any encumbrance against his principal's property and that he is not prohibited from having direct dealings with his beneficiaries so long as the dealings are fair. *Id.* In David v. Russo, 119 Ill. App. 3d 290, 456 N.E.2d 342 (1983), the appellate court affirmed an order allowing reimbursement to constructive trustees from the beneficiaries of the trust. *Id.* The court relied on *Zarkin's* holding that the trustee's fiduciary duty is to serve the interest of the beneficiary with loyalty and, thus, he is prohibited from dealing with the trust property for his individual benefit. *Id. In re* Estate of Nuyen, 111 Ill. App. 3d 216, 443 N.E.2d 1099 (1982) distinguished an executor's fiduciary duties from a trustee's. *Id.* The court noted that even though the responsibilities might be similar, the executor's duties involve a duty to the creditors for the estate as well as obtaining court approval for certain acts. In Ford City Bank & Trust Co. v. Ford City Bank & Trust Co., 110 Ill. App. 3d 123, 441 N.E.2d 1192 (1982), the beneficiary of a land trust was granted his motion to vacate the court's earlier order which approved a sheriff's sale of the trust property to the sole bidder, bank-trustee of the trust property. The appellate court interpreted *Zarkin* to mean that such a sale constituted a breach of the bank's duty of loyalty to the beneficiary. *Id.*

86. *Ford City Bank & Trust Co.*, 110 Ill. App. 3d at 123, 441 N.E.2d at 1192. The court found that *Zarkin* provided that a bank-trustee's purchase for his own account of property of his trust constitutes a breach of the fiduciary duty of loyalty. *Id.* According to the *Ford* court, under *Zarkin*, a trustee "may not purchase trust property in a private transaction, or at a public auction or foreclosure, or other judicial sale that was brought about by the trustee, or at a sale held on foreclosure of a third party's lien." *Id.* at 126, 441 N.E.2d at 1195. Not only was the *Ford* court's interpretation of *Zarkin* erroneous, it should have resolved the dispute between the beneficiary and the bank applying the "Act" as it had been in effect since August of 1982. The result in *Ford*, even though it was reached through an erroneous application of *Zarkin*, is nevertheless justifiable because the bank was found not to have fully disclosed the 1971 appraisal value of $500,000 to the beneficiaries prior to its purchase of the trust property for $40,000. *Id.* Thus, the breach did not arise out of the bank's purchase of the trust property at a public sale; rather, it arose out of the bank's failure to comply with its fiduciary duty of disclosure.

because it states what they are not.[87] The language of the Act,[88] as well as the legislature's unanimity in passing it,[89] reflects an attempt to cure the potential for future misapplications of the *Zarkin* holding.[90] Thus, precedent has been set for future controversies involving potential misapplication of the court's interpretation of law, be it common or statutory.

If the *Sanelli* court would have allowed the *Zarkin* rule to be misapplied, the most significant ramification would be its effect on the banking industry.[91] In a survey of the 185 banks involved in the *Sanelli* case, 73 indicated that their institutions had over 5,500 land trusts on which credit had been extended.[92] At a minimum this number would be five times as great if it included all interested banks,[93] and if the minimum loan was only $10,000, there would be over $300 million at risk.[94] A misapplication of *Zarkin* would not only have jeopardized the future of the banking industry,[95] but it

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87. ILL. REV. STAT. ch. 18, § 83 (1983).

> The fact that a trustee of a land is or becomes a secured or unsecured creditor of the land trust, the beneficiaries of the land trust, or a third party whose debt to such creditor is guaranteed by a beneficiary of the land trust, shall not be a breach of, and shall not be deemed evidence of a breach of, any fiduciary duty owed by said trustee to the beneficiaries.

Id.

88. *See* ILL. REV. STAT. ch. 148, §§ 81-84 (1983). *See supra* note 29 for text of statute. *See also* Chicago Federal Savings & Loan Ass'n v. Cacciatore, 25 Ill. 2d 535, 547, 185 N.E.2d 670, 676 (1962) ("the law of this State and the decisions of reviewing courts for more than 80 years have encouraged public reliance upon the real property concepts exemplified in the land trust now before us."); 82nd Ill. Gen. Assem., Transcript of Senate Proceedings, May 6, 1982, at 39. (Senator Berman explained, "Senate Bill 1488 recognizes and approves a long standing and widely used practice by Illinois financial institutions to serve their customers by acting as both the trustee of land trusts and also as a creditor with the security interest in that same trust").

89. *See supra* note 82.

90. Both the Senate and the House, when debating PA82-891, recognized that it "will make clear" the law in Illinois with respect to a financial institution which is concurrently land trustee and secured creditor, and an individual who is concurrently beneficiary of a land trust and debtor. 82nd Ill. Gen. Assem., Transcript of Senate Proceedings, May 6, 1982 at 40. *Accord* 82nd Ill. Gen. Assem., Transcript of House Proceedings, June 17, 1982 at 10.

91. Various banks and trust companies throughout the state of Illinois claim that the *Zarkin* decision "poses practical and legal problems affecting the proper and sound operation of banks and trust companies throughout the state." Affidavit of the Comm'r of Banks and Trust Co.'s for the State of Illinois at 1, Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985).

92. Amicus Curiae Brief of the Illinois Bankers Ass'n at 4, Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985).

93. *Id.* "All interested banks" would include all banks, especially Illinois banks, that enter into land trust agreements and receive pledges for the beneficial interest in the trust properties as security for a loan. *Id.*

94. *Id.*

95. *See supra* notes 85 and 86 and accompanying text. Affidavit of the Comm'r of Banks and Trust Co.'s for the State of Illinois at 2, Sanelli v. Glenview State Bank, 483 N.E.2d 226 (Ill. 1985). The commissioner asserts that a misapplication of *Zarkin* and any voiding of the Act would have a substantial impact on all banks which have taken assignments of beneficial interests under land trusts established with those

would have jeopardized the future of the entire economy as well. The banking industry would have been forced to tighten its lending policies which would have automatically resulted in a drastic decrease in the market's money supply. Consequently, the legislature, in order to "foster and encourage" financing opportunities, unanimously passed the Act.[96] Thus, finding the Act's retroactive application constitutional, the *Sanelli* court appropriately furthered the legislature's intent.

Had the Act not been given retroactive effect, it is evident that a debtor-beneficiary of a land trust agreement, relying solely on *Zarkin* and a "traditional trustee-beneficiary relationship" could allege a breach of duty after defaulting on his loan and, thereby, effectively extinguish his debt. The *Zarkin* court surely did not intend this result. Thus, the *Sanelli* court concurred with the legislature's recognition of the need to correct the potential misapplication of a judicial decision.[97] Concluding that the retroactive application of the Act is valid,[98] the *Sanelli* court has set valuable precedent for the resolution of future controversies where the protection of a substantial interest involves the retroactive application of the law.

The *Sanelli* court justifiably vindicated the legislature's authority to enact retroactive legislation because the Act did not invade the judicial province, and because the court deferred to the legislature's intent to cure a potential misapplication of a judicial decision. The court's decision has significant precedential value in that future controversies involving the retroactive application of a law will be resolved with a narrow application of the separation of powers doctrine. Retroactive legislation enacted to secure the public's expecta-

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banks. *Id.* Such an impact poses the following problems: 1) it would complicate litigation pertaining to the loan transaction with issues that would not otherwise have been raised, i.e., the validity of the loan; 2) it would prevent or at least deter the bank from bidding for the property at a public sale because of the risks of liability for a breach of a fiduciary duty of loyalty and the ability to transfer good marketable title to any third party purchaser because the bank's purchase was arguably a breach of loyalty; and 3) it would cause substantial hardship and expense as banks would attempt to exchange existing land trusts with other banks in order to avoid being assignees of beneficial interests under their own existing land trust agreements. *Id.* (The present trustee would have to resign, a different trustee being appointed as successor. This could only provide a solution in a limited number of cases because it would require the consent of beneficiaries who would have an incentive to withhold such consent in order to take further advantage of the *Zarkin* decision).

96. *See supra* note 82.

97. The legislature's intent to avoid a misapplication is evident in its interpretation of the Act. It recognized that the Act gives "reassurance" to both financial institutions and their customers who have their property in a land trust that the law has not been changed regarding their respective rights and duties, which were identified in *Zarkin*. 82nd Ill. Gen. Assem., Transcript of Senate Proceedings, May 6, 1982 at 40. *Accord* 82nd Ill. Gen. Assem., Transcript of House Proceedings, June 17, 1982 at 10.

98. *Sanelli*, 483 N.E.2d at 226.

tions rather than to reverse a lower court's decision will meet the requirements set out in *Sanelli* provided that a greater interest is not impaired. The *Sanelli* court acknowledged this when it correctly observed that it would not be fair to allow a beneficiary to assign his beneficial interest to a trustee as security for a loan, obtain the loan, and not have to repay the money simply because the trustee had followed the beneficiary's directions.[99] The *Sanelli* court, therefore, effectively saved the banking industry from disaster when it decided that the retroactive application of the Act was constitutional.

Margaret Rosalie O'Brien

99. *Id.* at 235.