

Elections matter

What effect the November elections may have on Michigan business **Interviewed by Chelan David**

There is an old saying that all politics are local. While the national elections held in November will likely affect tax issues, regulatory issues and other areas of great significance to Michigan businesses, it is important to examine the local elections to appreciate the effect of last November's events on business. The most significant state election could be a race that received relatively little fanfare or coverage.

"Potentially, the greatest impact from the November elections is in the change to the Michigan Supreme Court," says John Mitchell, executive partner at Secrest Wardle. "So often, voters pay little attention to the nonpartisan portion of their ballot, where the judges are elected, without recognizing the significant impact these elections could have on day-to-day activities."

Smart Business spoke with Mitchell about how the Supreme Court elections could impact business in Michigan and what specific issues the court is expected to take up.

What effect has the Supreme Court elections had on Michigan business?

At this point, the effect is more what people forecast will occur as opposed to what has actually occurred. What everyone needs to recognize is the fact that the court, as a result of the election of a new justice replacing the former chief justice, no longer has a solid, four-justice majority voting block of those most often characterized as conservative republicans. The court now has only a three-member voting block, with the presumption being that the other four justices will form a new voting coalition. This change means that decisions that often, over the past few years, were decided by the four-person conservative majority, with such decisions being frequently viewed as being favorable to the business community, may now be revisited by a court made up of a majority of justices who may not follow such precedent.

What particular issues are expected to be of significance?

At this point, no one can speak with certainty as to what will happen. We do not yet



John Mitchell
Executive partner
Secrest Wardle

know what cases will be taken up by the court. We do not yet know how the votes will be counted. However, we still know, or at least we like to think we know, what may happen.

An issue that most lawyers presume will be reviewed by the court is the standard required to be able to bring a personal injury claim arising out of a motor vehicle accident. The prior Michigan Supreme Court had set the standard in *Kreiner v. Fischer* (2004). Most people believe that the new court will take the opportunity to review this issue and may well revise the standard. As a result, the threshold required to bring such an action may be changed and functionally lowered, which could result in appreciably greater numbers of claims, and certainly more viable claims, for liability arising out of motor vehicle accidents. This would be a very specific and direct consequence of the recent election.

Are there any other issues that may come up for review by the Supreme Court?

There are certainly those who believe, and I would be one of them, that we may see a revisitation of the current law as it pertains to common law liability for own-

ers of premises. This would certainly affect all property managers, business owners, retailers and others. This would be, specifically, with respect to the extent to which those who own, possess or control property can avoid liability for alleged hazards that are deemed to be **open and obvious**.

There is also a belief that there may be a revisitation of what has historically been known as the **discovery rule**. Recently, the Supreme Court decided that there was no provision, under common law as well as the statutes, to allow a cause of action to be brought once it is discovered or should have been discovered by the person who is bringing the claim. This conceivably, therefore, will be an area to be revisited.

Do you have any projections as to what will happen with these issues?

I must concede that trying to predict the future actions of the Court is, at best, an uncertain science, but let me venture an educated guess with the help of my crystal ball. First, I think it is reasonable to believe that these issues will be re-visited and that current defenses, available to businesses to limit exposure to tort liability, will be re-examined by the Michigan Supreme Court. Second, I think it is likely that the Court will lessen the applicable standard to bring an action for injuries from a motor vehicle accident. I also think we may well see an easing of restrictions on the ability of those who bring claims involving claimed defects on business premises.

In each instance, how the Court will decide these questions will depend upon how the issues are presented and the particular facts of the given case. My concern is not so much that there will be changes, but that people need to recognize, that as a direct effect of the recent elections, what has been presumed to be the common law of the State of Michigan may well undergo, within the coming year, specific and potentially significant revisions with a direct impact on Michigan business. <<

JOHN MITCHELL is executive partner at Secrest Wardle. Reach him at (248) 851-9500 or jmitchell@secrestwardle.com.

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