

# Akerman Practice Update

TAXATION

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## And the Dead Shall Rise: The Perils of Retroactive Tax Laws

**Michael Bowen**  
Akerman Senterfitt  
michael.bowen@akerman.com

As we approach Halloween, no topic could be more fitting than the horrifying aspects of retroactive tax legislation. A mere mention of the topic strikes fear into the hearts of CFOs and Tax Directors everywhere. Keeping with the Halloween theme, retroactive tax laws are much like zombies. They appear out of nowhere seeking to devour .... your bottom-line. Retroactive tax laws take many forms including retroactive tax rate changes, definitional changes and changes in the applicable statute of limitations for assessment.

What is the weapon of choice in fending off these “zombies”? The only weapon that has demonstrated any chance for success is the United States Supreme Court decision in *United States v. Carlton*, 512 U.S. 26 (1994). In *Carlton*, the Court stated that retroactive tax legislation violates the due process rights of a taxpayer unless it is enacted with a legitimate legislative purpose and has a “modest” period of retroactivity. Unfortunately, this “weapon” has been somewhat ineffective because the Court has yet to explain when a legislative purpose is illegitimate or when a period of retroactivity violates the modesty requirement.

Arguably, the most egregious type of retroactive tax law is currently being challenged in *Ford Motor Credit Company v. Dep’t of Treasury*, 782 N.W.2d 771 (Mich. 2010), *petition for cert. pending*, Docket No. 10-481 (filed October 7, 2010). In brief, the genesis of this zombie attack stems from the decision in *DaimlerChrysler Services North America LLC v. Dep’t of Treasury*, 723 N.W.2d 569 (Mich. Ct. App. 2006). In *DaimlerChrysler*, the court held that a motor vehicle finance company was a “taxpayer” entitled to refunds of sales tax paid and remitted by its branded dealerships. The Michigan Legislature immediately



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amended the tax law at issue in *DaimlerChrysler* with indefinite retroactive effect to correct the court’s “misinterpretation.” Due in part to the new law’s unlimited period of retroactivity, the zombie onslaught was unmitigated. Ford Motor Credit, which had several pending refund claims prior to the passage of the retroactive legislation, fought valiantly, but could not prevail in the Michigan courts. It is hoped that the United States Supreme Court will weigh in on the *Ford Motor Credit* appeal and define – at the very least – the outer boundaries of the test outlined in *Carlton*.

There is no question that state and local governments are looking for easy and creative ways to fill budget shortfalls. If retroactive tax laws such as at issue in *Ford Motor Credit* are allowed to stand, legislatures will have been given *carte blanche* to raise the “zombie hordes” as a cure to their fiscal woes. For businesses looking for certainty in their financial affairs, retroactive tax laws are – at best – unsettling. Absent guidance from the United States Supreme Court regarding the efficacy of *Carlton* as a weapon, businesses should prepare for the worst and hope for the best.

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