NOTE

NONTRADITIONAL TAKINGS AND THE COAL ACT

I. INTRODUCTION

On June 25, 1998, the Supreme Court held that the 1992 Coal Industry Retiree Health Benefit Act (Coal Act)[1] placed a severe retroactive burden on Eastern Enterprises, a former member of the coal industry, and violated the Takings Clause of the Fifth Amendment of the Constitution.[2] Under the Coal Act, companies that were no longer in the coal business were required to pay benefits to retired miners. In a 5-4 plurality opinion, the Court overruled both the District Court and the United States Court of Appeals, First Circuit decisions which relied more heavily on the Due Process Clause. This Note discusses how the Supreme Court's decision applied the Takings Clause of the Fifth Amendment in a different manner than any past court.

This Note first addresses the climate that existed in the coal industry leading up to benefits such as those rendering application of the Coal Act. Historical information on compensation acts in the coal industry and why they are important to the coal miners illustrate this point. The Coal Act's objective was to prevent a looming health benefits crisis from occurring in the coal industry.[3] The next section of the Note details the specific facts of *Eastern Enterprises v. Apfel*. Lastly, the Note explains why the Supreme Court's application of the Takings Clause in this case sets new constitutional limits that will affect the coal industry. This section also discusses the possible impacts of a broad application of the decision in the future. The decision in *Eastern Enterprises* is already raising questions of application in the area of CERCLA retroactive legislation. The remaining question is what other areas of retroactive liability *Eastern Enterprises* may impact?

II. HISTORY OF COMPENSATION ACTS FOR RETIREES IN THE COAL INDUSTRY

A. The Early Years

Health benefits in the coal industry have been a major concern over the years. Beginning in 1929, coal employers began to meet with the United Mine Workers of America (UMWA) to establish health benefits for employees of the

1. 26 U.S.C. §§ 9701-9722 (1992).

2. Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131 (1998). [A U.S. cite has been given, but as of the time of print, official pagination has not been released. Therefore, all *Eastern Enterprises* cites will reflect the Supreme Court Reporter edition.]

3. *Agency Management of the Implementation of the Coal Act*, Congressional Testimony by Federal Document Clearing House (Oct. 6, 1998) *available in* 1998 WL 18089029 [hereinafter Brownback]. In this testimony, Senator Brownback acknowledged that one of the main purposes behind the Coal Act was to ensure funding for health benefits for retired miners and their families.

coal industry.[4] In 1946, after a nationwide strike and the issuance of an Executive Order by President Truman, the subject of miners' health care benefits came to the forefront and began to gain the attention of coal companies.[5] Intense negotiations between coal companies and the UMWA resulted in an agreement giving miners, their dependents, and survivors compensation for lost wages caused by death, disability or retirement.[6]

In 1947, the UMWA[7] and many coal operators agreed to form the United Mine Workers of America Welfare and Retirement Fund (Retirement Fund). This fund would compensate miners and their families by using the proceeds of a royalty from coal production. Also, the fund called for three trustees who were appointed by the parties to make the determinations of coverage, amount of benefits, and all other related decisions.[8] However, in 1950, amendments were made to the previous agreement. The Retirement Fund amendments changed the royalty but kept the authority, delegated to the three trustees, of determining the level of benefits.[9]

B. The Middle Years

During the time period of 1950-1974, reductions were often made in the benefits given to coal miners by the selected trustees.[10] Increasing reductions led to a new agreement in 1974. The main difference between the 1974 and the 1950 agreements was that the 1974 agreement expressly mentioned health benefits for retirees and provided all retired miners and their widows with health cards.[11] This express inclusion of the 1974 Act caused the coverage of the Act to be broadened and placed some financial strain on the fund.[12] This broadening led to more changes in the Act in 1978. Such changes included assigning responsibility to "signatory employers" to provide funding for the health care of

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4. *Eastern Enterprises,* 118 S. Ct. at 2137.

5. *The Supreme Court 1997 Term, Leading Cases: Takings Clause*, 112 HARV. L. REV. 212, 213 (1998).

6. *Eastern Enterprises*, 118 S. Ct. at 2137-2138. *See generally* MAIER B. FOX, UNITED WE STAND: THE UNITED MINE WORKERS OF AMERICA 1890-1990, 410-411 (1990). Fox explained that the goal of the UMWA was to replace the "company doctor," who was paid by the company through deductions from the employees wages, with a health insurance system paid for by all the coal companies. This would hopefully improve the quality and quantity of treatment available to miners and their families.

7. *Implementation of Coal Act*, Congressional Testimony by Federal Document Clearing House (Oct. 6, 1998) *available in* 1998 WL 18089033 [hereinafter Fagnoni]. The National Bituminous Coal Wage Agreement (NBCWA) created the UMWA Welfare and Retirement Fund.

8. *Eastern Enterprises,* 118 S. Ct. at 2138.

9. *Id. See generally* Grant Crandall et al., *Hiding Behind the Corporate Veil: Employer Abuse of the Corporate Form to Avoid or Deny Workers' Collectively Bargained and Statutory Rights*, 100 W. VA. L. REV. 537, 580 (1998). This article provided an overview of the progression of benefits provided for the miners. Originally, black lung and rehabilitation clinics were set up as well as pharmacies and doctors' offices. In later years, the goal of the Fund has been as an insurer and as collection agents for the miners.

10. *Eastern Enterprises,* 118 S. Ct. at 2139.

11. *Id. Eastern Enterprises* brought to light that this was the first time retirees were expressly mentioned in an agreement. Before, the trustees had chosen to include retirees in the benefits package. Also, the health cards (issued by Health Services) were provided to the retired miner until his death and to his widow until she remarried or died and to any dependent children.

12. *Eastern Enterprises,* 118 S. Ct. at 2140.

their own active and retired employees.[13] Even with the changes in the 1978 Act, problems remained in the industry over the next few years.

Throughout the 1980s, tensions were rising due to exiting coal operators along with the continuous rise in health care costs.[14] Some coal operators dealt with increasing health costs by hiring nonunion employees while some, like Eastern Enterprises, quit the coal business completely. The quick exit of coal operators from the coal industry, the refusals by companies like Pittston Coal Company to sign benefit agreements and the use of nonunion employees by others caused those union operators remaining in the coal business to absorb the cost of the benefits.[15] By the late 1980s, the financial state of the funds was deficient by over $100 million.[16] In 1988, the reaction to the departure of several coal operators, who were signatories to the Benefit Plan, involved an attempt to charge those coal operators exiting the business with withdrawal liability.[17] This was done in hopes of deterring several of the signatories from leaving the business.

It became apparent that a stalemate had been reached between the coal companies and those looking out for the welfare of the retired coal workers. At this point, the Department of Labor created an Advisory Commission on United Mine Workers of America Retiree Health Benefits (the Coal Commission).[18] The appointed Coal Commission was to "[recommend] a solution for ensuring that orphan retirees in the 1950 and 1974 Benefit Trusts [would] continue to receive promised medical care."[19] The Commission Report served as the basis for the formulation of the Coal Act.[20]

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13. *Id.* Also included in the 1978 Act was a "guarantee clause" and an "evergreen clause." The "guarantee clause" required that signatories make enough contributions to maintain benefits during the agreement. The "evergreen clause" required that signatories continue to contribute to benefits as long as they remained in the coal business. It did not matter if they did or did not sign a subsequent agreement.

14. Crandall, *supra* note 9, at 582. Crandall described the Pittston Coal Company's refusal to make health care payments for retirees and their ultimate withdrawal from the fund. This resulted in a 321 day strike regarded as "one of the most bitter strikes in recent labor history." *Id.*

15. *Eastern Enterprises*, 118 S. Ct. at 2140.

16. *Written Statement for the Record Treasury Acting Deputy to the Benefits Tax Counsel Deborah Walker*, Congressional Testimony by Federal Court Clearing House (Oct. 6, 1998) *available in* 1998 WL 18089034 [hereinafter Walker].

17. *Eastern Enterprises,* 118 S. Ct. at 2140.

18. *Id.*

19. *Eastern Enterprises*, 118 S. Ct. at 2140. *See also* Walker, *supra* note 16. Walker explained the reach of the 1950 and 1974 Funds. Miners who retired as of December 31, 1975 were covered by the 1950 Fund. Those who retired after 1975 looked to their employers for health benefits. If the employer went out of business or exited the industry, the retirees and their family were covered by the 1974 Fund. This resulted in those retirees being "orphans" since no financial contribution was coming in from their former employers. In terms of numbers, about half of the retirees under the 1950 Fund ended up being orphaned. *Eastern Enterpries*, 118 S. Ct. at 2141. The Coal Commission said:

> Health care benefits are an emotional subject in the coal industry, not only because coal miners have been promised and guaranteed health care benefits for life, but also because coal miners in their labor contracts have traded lower pensions over the years for better health care benefits.

Also, the Commission stated:

> [A] statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWA].

After receiving the Coal Commission's Report, Congress began holding hearings regarding several possible health benefits proposals. The hearings were chaired by Senator Jay Rockefeller, a Democrat from West Virginia who was a very strong supporter of a plan to protect the interests of the retired miners.[21] In speaking of the problems facing the coal industry, Senator Rockefeller said the following in his opening statement:

> [T]his problem affects the entire industry and in fact the entire country. . . . We are talking about tens of thousands of elderly and often infirm people who long ago earned these benefits by firing the furnaces of American industry in war and in peace. The industry and national commitments to health care for these miners and their families must and will be kept.[22]

Congress was determined to do something about the crisis involving the health benefits of the retired miners. In 1992, the Coal Act was passed and guidelines were created for coal operators to fund retiree health benefits.

C. The Coal Act of 1992[23]

Enacted as part of the Energy Policy Act of 1992,[24] the Coal Act was an attempt to make sure that retirees received the lifetime health benefits they were promised. The Coal Act included the requirement that former employers of the retired coal miners be partly responsible for financing the health benefits that had previously been negotiated by the UMWA for the miners and their families.[25] The Coal Act created new benefit funds from which health benefits could be drawn for retirees. The first, the UMWA Combined Benefit Fund, served those retirees receiving health benefits from the 1950 and 1974 Fund as of July 20, 1992. Second, the UMWA 1992 Benefit Plan, served retirees who retired between July 20, 1992 and September 30, 1994 and were not receiving benefits from their last signatory employer. Third, if employees retired after September 20, 1994 and did not fall under the above two funds, their health benefits coverage depended on future bargaining agreements.[26]

Also, the Coal Act included an evergreen clause which allowed for the Funds to "reach back." Those coal companies that signed the 1978 and later agreements but that were not currently signatories to a current agreement were known as "reachback" operators. Coal operators that signed agreements dating

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However, the Commission disagreed as to "whether the entire [coal] industry should contribute to the resolution of the problem of orphan retirees." *Id.* (quoting Coal Comm'n Report, Executive Summary vii-viii, App. (CA1) 1324-25).

20. 26 U.S.C. §§ 9701-9702 (1992).

21. *Eastern Enterprises,* 118 S. Ct. at 2141.

22. *Id.* Sen. Dave Durenberger (described the issue as involving "a whole bunch of promises made to a whole lot of people back in the 1940s and 1950s when the cost consequences of those problems were totally unknown"). *Id.* Also, Sen. Orrin Hatch (stated that "miners and their families . . . were led to believe by their own union leaders and the companies for which they worked that they were guaranteed lifetime [health] benefits"). *Id.*

23. 26 U.S.C. §§ 9701-9722 (1992).

24. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

25. Walker, *supra* note 16.

26. *Id.*

back before 1978 but who had not signed an agreement since then were known as "super reachback" operators.[27] This "super reachback" status meant that a company that signed any agreement before 1978 could be assigned retirees regardless of whether they remained in the coal business. The requirement was that they were still in "business of any kind."[28]

Responsibilities for administering the Coal Act (specifically the Combined Fund) was given to three separate parties, the Social Security Administration (SSA), Trustees of the Combined Fund, and the Department of the Treasury.[29] The Coal Act assigned the SSA three responsibilities. First, the SSA was in charge of calculating the premium. Calculating the premium was based on dividing "the aggregate amount of payments from both the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under the plans for such plan year."[30] The aggregate cost divided by the number of individuals, increased by the approximate percentage increase in the medical component of the Consumer Price Index from 1992 to the year in which the plan year began, produced the premium per individual.[31]

The SSA was also responsible for assignment procedures. This involved assigning each coal operator miners, for whom they would pay premiums. This was done using wage records that were under the control of the SSA.[32] Under the Combined Fund, approximately 80,000 miners were identified. Of these 80,000, only about 15,000 actually had coal operators claiming responsibility for their premiums. Those remaining, some 65,000, were assigned using criteria specified in the Coal Act.[33] Specifically, miners were to be assigned to coal operators by following a certain priority scheme. First, miners were to be assigned by looking to the last active operator that had signed an UMWA

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27. Walker, *supra* note 16. This was the category into which Eastern Enterprises fell.

28. 26 U.S.C. §§ 9701-9722 (1992).

29. Walker, *supra* note 16. The main focus of this Note is on the responsibilities of the SSA, discussed *infra,* since they are the party to the suit brought by Eastern Enterprises. The responsibilities of the Trustees include:

> [E]stablish[ing] the Combined Fund, determin[ing] benefits to be paid from the Combined Fund, establish[ing] and maintain[ing] accounts of the premiums that are required to be paid to the Combined Fund, collect[ing] the premiums, and provid[ing] information to the SSA, as necessary for carrying out the SSA's duties under the Coal Act.

Id. The responsibilities of the Department of the Treasury involve enforcing "the Internal Revenue Code [which] imposes a penalty upon an assigned operator for failure to pay a required premium." *Id.* The IRS is charged with collecting the penalty. *Id.*

30. 26 U.S.C § 9704 (b)(2)(A)(i) (1992).

31. *Statement of Marilyn O'Connell Associate Commissioner for Program Benefits,* Congressional Testimony by Federal Document Clearing House (Oct. 6, 1998) *available in* 1998 WL 18089032 [hereinafter O'Connell]. *See also* 26 U.S.C. § 9704 (b)(2)(B) (1992).

32. O'Connell, *supra* note 31. Also, before assignments could begin, the SSA had to compile lists of assignable coal operators. The Bituminous Coal Operators Association (BCOA) and UMWA along with the SSA's records were used in this process.

33. *Id.* Factors involved in the assignment included such things as the length of the miner's employment with the operator that had signed an UMWA agreement, the recency of the employment, and the date when the operators and the UMWA signed the agreement.

agreement and the 1978 UMWA agreement. The operator must have employed the miner for at least two years. If an operator was inactive, a related company would be responsible if in existence.[34] If a miner was not assigned under this scheme, the SSA was to look to the last operator who signed an UMWA agreement and was also a 1978 UMWA signatory. If the operator was inactive, once again the responsibility was placed on the related company.[35] The last resort listed for assigning the premium was to look to an active operator of any agreement for whom the miner had worked for the longest period of time under an UMWA agreement in the period prior to the 1978 agreement. If the operator was inactive, the related company was charged with the premium. If no assignment was possible under the above criteria, the miner was deemed "unassigned" and placed aside for the time being and later assigned by the Commissioner of the SSA.[36] Under these plans, the two-year working requirement of the miner was not considered.

The final responsibility of the SSA was reviewing assignment decisions if a coal operator requested the review. Basically, the coal operator had thirty days from the date of receiving the notice of assignment to request that the SSA provide them with the information upon which the SSA based the assignment. If unsatisfied by this information, the operator had an additional thirty days from the receipt of the information to ask the SSA to review the assignment.[37]

All of these various plans were designed to provide retired coal miners with the health benefits that they were promised before they entered the coal mine. Health issues have always been important to the coal miners. Coal miners have risked mine accidents, daily exposure to coal dust, and other dangerous working conditions. The push for health benefits in general likely began with the emergence of Black Lung Disease.[38] Since retired miners could also develop health problems, the various compensation acts were ways in which they protected themselves. The above explanations of the compensation acts help to place the issues before the Court in *Eastern Enterprises* in context. In the next section, the decisions of the lower courts and the Supreme Court decision in the *Eastern Enterprises* case are considered. The rationales for these decisions are discussed as well as the dissenting and concurring opinions.

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34. O'Connell, *supra* note 31.

35. *Id.*

36. O'Connell, *supra* note 31. Eastern Enterprises was assigned the miners for whom it would pay premiums under the Coal Act under this phase of the plan (the "third priority test").

37. *Id.* As of the date of Marilyn O'Connell's testimony, she testified that over 50,000 records of miners were requested as well as the basis on which they were assigned. She further indicated that around 665 coal operators had asked for review of the assignments of over 30,000 miners. She indicated that the *Eastern Enterprises* decision would likely increase the number of reviews for the SSA increasing their workload as well as depleting their funding. The funding for the SSA does not come from the Coal Act but was appropriated by Congress.

38. BARBARA E. SMITH, DIGGING OUR OWN GRAVES: COAL MINERS AND THE STRUGGLE OVER BLACK LUNG DISEASE (1987).

III. EASTERN ENTERPRISES AND ITS CONFLICT WITH THE COAL ACT

As previously discussed, the Coal Act required all coal companies that were signatories to collective bargaining agreements with coal miners as far back as 1946 be responsible for premiums to pay health benefits of retired miners and their families, even when no such benefits were actually contracted for until 1978.[39] Eastern Enterprises was a "super reach back" company as defined by the SSA.

Eastern Enterprises entered the coal industry in Massachusetts in 1929 as a business trust by the name of Eastern Gas and Fuel Associates. It primarily mined coal in the states of West Virginia, Pennsylvania,[40] and Kentucky.[41] Eastern was a coal operator signatory to those agreements signed between the years of 1947 and 1964. Eastern made contributions totaling more than $60 million to the compensation funds during this time period.[42] It was in 1965 that Eastern departed from the coal industry, transferring the coal-related operations of its business to a subsidiary, Eastern Associated Coal Corporation.[43] However, Eastern retained stock in the company by using another subsidiary known as Coal Properties Corporation.[44] Eastern Associated Coal Corporation continued to be a signatory to agreements between the NBCWA and the UMWA after the 1965 transfer by Eastern Enterprises.[45] However, in 1987, Eastern Enterprises sold its remaining stock to the Peabody Holding Company.[46] Currently, Eastern's Boston Gas Company is New England's largest natural gas distributor.[47] Also, Eastern Enterprises owns Midland Enterprises, Inc. which is a barge and towboat company.[48]

The SSA assigned Eastern Enterprises to pay premiums to the Combined Fund. Eastern fell into this position under the third priority test. At the time Eastern filed suit against the Commissioner of Social Security in the United

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39. *Eastern Enterprises Prevails in Miner's 'Reachback' Case; UMWA Angered*, COAL WK. (June 29, 1998) *available in* 1998 WL 10025937 [hereinafter *Eastern Enterprises Prevails*]. *See also* How You Can Help Eastern Enterprises (visited Nov. 15, 1998) <http://www.efu.com/>. It was not until 1978 when the Bituminous Coal Operators Association (BCOA) and the UMWA reached a compromise that lifetime benefits were expressly contracted. In exchange for the BCOA agreeing to expand those individuals entitled to benefits and agreeing to provide lifetime benefits, the UMWA agreed to intermediate increases in wages and pensions.

40. *Eastern Enterprises*, 118 S. Ct. at 2143.

41. Richard Carelli, *Court Rules for Mining Companies*, AP ONLINE (June 25, 1998) *available in* 1998 WL 6686837.

42. *Eastern Enterprises*, 118 S. Ct. at 2143.

43. *Id.*

44. *"Takings Clause" Relieves Firm of Coal Act Obligation*, EMPLOYEE BENEFIT REVIEW (Aug. 1, 1998) *available in* 1998 WL 17420328.

45. *Eastern Enterprises*, 118 S. Ct. at 2143.

46. *Id.* An agreement was reached between all parties involved that Peabody, Eastern Associated Coal Corporation and the Coal Properties Corporation would take over the payments to certain benefit plans. This included payments under the 1950 and 1974 funds.

47. *U.S. Supreme Court Declares Coal Act Unconstitutional as Applied to Eastern Enterprises* (visited Nov. 15, 1998) <http://www.businesswire.com/cnn/efu.htm>.

48. *Id.* The Boston Gas Company currently serves 530,000 residential, commercial and industrial customers in Boston as well as over 70 eastern and central Massachusetts cities. Midland Enterprises has over 2,000 barges and over 80 towboats. It is the leading carrier of coal and also transports other cargo.

States District Court for the District of Massachusetts,[49] Eastern had paid approximately $100 million under the Coal Act to the lifetime benefits for retired miners and their families.[50] Eastern described the following situation, "[t]his enormous liability has a direct impact on all of Eastern's operations. These are funds that cannot be utilized to invest in the growth and development of our established business operations. Moreover, this enormous burden hampers our ability to compete in the rapidly changing energy marketplace."[51]

Eastern claimed two Constitutional violations by the Coal Act. First, they claimed the Coal Act violated their substantive due process rights either on its face or as it was applied by the SSA. Second, Eastern claimed that a taking of their property occurred under the Fifth Amendment's Takings Clause.[52] The District Court upheld the SSA's interpretation of the Coal Act and said it was constitutional. Summary judgment was granted to the SSA on all claims.[53] The District Court reasoned that the application of the Coal Act to the crisis that had evolved was a rational response to the problems in the coal industry during the 1970s and 1980s.[54]

Eastern Enterprises appealed the decision to the United States Court of Appeals, First Circuit. The First Circuit said the Coal Act was "entitled to the most deferential level of judicial scrutiny... [w]here, as here, a piece of legislation is purely economic and does not abridge fundamental rights, a challenger must show that the legislature acted in an arbitrary and irrational way."[55] The court further stated that retroactive liability imposed by the Coal Act was permissible "[a]s long as the retroactive application... is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."[56]

The First Circuit denied Eastern's claim that the Coal Act's application was a taking. To come to this decision, the court used the factors laid out in the case

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49. *Eastern Enterprises*, 118 S. Ct. at 2143.

50. *How You Can Help Eastern Enterprises, supra* note 39.

51. *Id.* Also, Eastern thought the question of "who should pay" must be answered. They believed that current coal operators pushed for the enactment of the Coal Act to burden someone else with their funding obligations. Eastern's big problem with the assignment by the Commissioner was its retroactive effect; they exited the coal industry over thirty years ago. *Id.*

52. *Eastern Enterprises*, 118 S. Ct. at 2143. *See generally Opening Brief of Eastern Enterprises* at 20-21, Eastern Enters., No. 97-42. In addition Eastern claimed that the retroactive liability of the Coal Act was "arbitrary and irrational." Eastern believed that the liability under the Coal Act had been passed to Peabody Holding Company since Eastern had sold it remaining stock interest to Peabody.

53. Eastern Enterprises v. Shalala, 942 F. Supp. 684 (D. Mass. 1996).

54. *Courts—Supreme/Appeals*, THE WASHINGTON DAYBOOK (Mar. 4, 1998) *available in* 1998 WL 2067548. These problems were characterized by the District Court as beginning "when industry consolidation left fewer and fewer companies to fund the health care benefits of retirees and their dependents, including an increasing number of elderly retired miners and children orphaned by black lung contracted in mining operations."

55. Eastern Enterprises v. Chater, 110 F.3d 150, 155-156 (1st Cir. 1997).

56. *Id.* at 156. The purpose of the Coal Act according to the court was legitimate. Eastern's role under the Coal Act was seen as rational since Eastern was a contributor to prior benefits agreements. These contributions by Eastern contributed to the expectations of miners that they would receive lifetime health benefits. *Id.* at 157.

of *Connolly v. Pension Benefit Guaranty Corp.*[57] The factors included: (1) the economic impact of the regulation in question on the claimant; (2) the extent to which the claimant's investment backed expectations were interfered with by the regulation; and (3) the nature of the governmental action.[58] The court reasoned that the economic impact was lacking since it was not a total deprivation of an asset and since Eastern was only assigned to pay premiums for those coal miners who had actually worked for them during a relatively long period of time. Also, this step in the assignment process occurred only if no post-1977 signatory could be found.[59] The First Circuit ultimately reasoned that Eastern Enterprises was involved in the process of contributing to the miner's expectations of lifetime health benefits and should have expected a certain financial burden if ever called upon for funds.[60] The court found it hard to invalidate the Coal Act under the Takings Clause when it found no due process violation by the Act.[61]

Following the defeat in the Court of Appeals, Eastern Enterprises appealed and the Supreme Court granted certiorari.[62] The plurality in *Eastern Enterprises* consisted of Chief Justice Rehnqist and Justices O'Conner (who wrote the opinion), Scalia, and Thomas. Justice Kennedy concurred in the decision of the plurality but for different reasons.[63]

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57. Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986).

58. *Id.* at 224-225.

59. *Eastern Enterprises*, 110 F.3d at 160.

60. *Id.* at 161. The court said the application of the Coal Act to Eastern was not a physical invasion as such. The court said the burden of the Coal Act on Eastern merely "adjust[ed] the benefits and burdens of economic life to promote the common good." *Id.* The court also said there was no basis for applying the Takings Clause to the Coal Act since the premiums that were collected by the Act go into the Combined Fund, which is privately operated, and not a governmental entity. *Id.*

61. *Courts-Supreme/Appeals*, *supra* note 54. The court was hesitant to go against the 1993 Supreme Court ruling in Concrete Pipe & Products of Calif. v. Construction Laborers Pension Trust, 508 U.S. 602, 641 (1993). In this case the court had reasoned that the finding of a takings violation would be surprising if there was no due process violation.

62. The granting of certiorari for the Court to hear the case was not expected. *See generally* Robert Meltz, *Takings Claims Against the Federal Government*, SC 43 ALI- ABA 57, 75 (1998). In this article, Meltz gave several reasons why it was unexpected for the Supreme Court to grant certiorari. One reason was that Eastern Enterprises was just a regulation case involving economics. Another was that the First Circuit along with six other federal courts of appeals had consistently decided cases quite similar to the decision in *Eastern Enterprises*. In other words, there was no split among the circuits in cases of this kind. Three of the appellate decisions had actually been denied certiorari by the Supreme Court. The cases that came before the Court included: Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (dealing with black lung benefits); Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) (dealing with multi-employer pension plans); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) (dealing with multi-employer pension plans); Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) (dealing with multi-employer pension plans).

63. Although there was a jurisdictional issue raised by the SSA, the analysis primarily focused on the due process and takings analysis of the Court. The jurisdictional issue was raised in Apfel's answer to Eastern Enterprises complaint. Apfel claimed that the United States Court of Federal Claims had jurisdiction instead of the Federal District Court. *Eastern Enterprises,* 118 S. Ct. at 2144. According to the Tucker Act, if compensation of over $10,000 is sought, the Federal Claims court has jurisdiction. However, the Court reasoned that Eastern Enterprises was not seeking money damages but was seeking a declaratory judgment and injunction. According to the Court, an equitable remedy was within the district court's power not the Court of Federal Claims. United States v. Mitchell, 463 U.S. 206, 216 (1983). *See also* Bowen v. Massachusetts, 487 U.S. 879, 905 (1988).

The majority's analysis under the Takings Clause began with consideration of its overall purpose.[64] In considering the normal purpose of the Takings Clause, the Court recognized that *Eastern Enterprises* was not the "classic takings" case.[65] According to the Court, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[66] The Court acknowledged that the Coal Act, as any other form of governmental action, entailed some possibility of use or economic exploitation of private property[67] and not every governmental action was a taking even if it did cause destruction or injury to the property.[68] The Court used the same three-factor test used by the First Circuit[69] to determine the "justice and fairness" of the governmental action.[70] In conducting its analysis of *Eastern Enterprises*, the Court examined previous decisions. As discussed earlier, all of these similar decisions upheld the retroactivity of the statutes involved.[71]

To begin its analysis, the Court first considered its decision in *Usery v. Turner Elkhorn Mining Co.*[72] This case involved benefits given to coal miners under the Black Lung Benefits Act of 1972 (BLBA). These benefits required that coal operators provide miners and their survivors compensation for black lung disease contracted from their work in the coal mine. The challenge to the BLBA came under the Due Process Clause of the Fifth Amendment. Coal operators believed the BLBA was unconstitutional because it allowed the legislature to impose "an unexpected liability for past, completed acts that were legally proper and, at least in part, unknown to be dangerous at the time."[73] However, even under this argument, the Court held that retroactive liability for the black lung benefits was "just and fair" and "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor."[74]

In another group of cases, the Court faced several challenges to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The MPPAA was created as a supplement to the overarching Employee Retirement Income

64. Armstrong v. United States, 364 U.S. 40, 49 (1960) (the purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

65. United States v. Security Industrial Bank, 459 U.S. 70, 78 (1982). The Court explained that the economic regulation of the Coal Act could constitute a taking even if no actual physical invasion of the property had occurred.

66. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

67. Andrus v. Allard, 444 U.S. 51, 65 (1979).

68. *Armstrong*, 364 U.S. at 48.

69. *Connolly*, 475 U.S. at 224-225. The three factors were: (1) the regulation's economic impact; (2) the interference with investment backed expectations; and (3) the character of the governmental action.

70. *Eastern Enterprises*, 118 S. Ct. at 2145-2146. The Court stated there was no set formula for evaluating what is or is not "justice and fairness." Basically, the Court saw the evaluation as fact intensive. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

71. *See* cases cited *supra* note 62.

72. *Usery*, 428 U.S. 1 (1976).

73. *Id.* at 15.

74. *Id.* at 18.

Security Act of 1974 (ERISA). The purpose of MPPAA was to obligate an employer that was withdrawing from any multi-employer pension plan to continue to be responsible for payments. The amount of the payment was dependent upon any of the plan's unfunded vested benefits that could be attributed to the employer's share. If a withdrawal occurred within five months prior to enactment of the MPPAA, it applied retroactively. [75]

The *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.* case, one such MPPAA case, involved a due process claim by an employer who had withdrawn from the plan four months prior to the enactment of the MPPAA.[76] The Court relied on its decision in *Usery* saying it was rational that retroactive liability was imposed by Congress "to prevent employers from taking advantage of a lengthy legislative process [by] withdrawing while Congress debated necessary revisions in the statute."[77] The Court reasoned its decision in *Gray* by indicating that the retroactive nature of the MPPAA was okay since it was confined to "short and limited periods."[78]

In another MPPAA case, the *Connolly v. Pension Benefit Guaranty Corp.*[79] case, the issue before the Court was even more similar to the issue in *Eastern Enterprises*. Surrounding *Connolly* was the question of whether or not the withdrawal liability under the MPPAA resulted in an unconstitutional taking. Trustees of a multi-employer pension plan that received payments from employers, based on the number of hours worked by employees, were responsible for bringing the action.[80] The Court recognized that "Congress routinely creates burdens for some that directly benefit others."[81] Using the three-factor test previously discussed, the Court found that the Takings Clause was not violated.[82]

The final MPPAA case the Court previously considered before *Eastern Enterprises* was *Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust.*[83] In this case, the Court found no violation of the Due Process or the Takings Clause by the MPPAA. Even though the MPPAA imposed more liability on employers than expressed in the contract, the Court nonetheless rejected the Due Process claim.[84] The Court rejected the Takings Clause by

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75. *Pension Benefit Guaranty Corp.*, 467 U.S. at 721-25.

76. *Gray*, 467 U.S. 717 (1984).

77. *Id.* at 731.

78. *Gray*, 467 U.S. at 731.

79. *Connolly*, 475 U.S. 211 (1986).

80. *Id.* at 222.

81. *Connolly*, 475 U.S. at 223. The Court further stated that legislation destroying or frustrating existing contractual rights was not necessarily an illegal taking.

82. *Id.* at 225. Specifically, the Court determined that "fairness and justice" were maintained since the only parties required to bear the burden of funding the employees' benefits were the withdrawing employers and those who remained parties to the pension agreements. *Id.* at 226.

83. *Concrete Pipe*, 508 U.S. 602 (1993).

84. *Id.* at 636-41. The Court reached its decision on the due process claim by referring to its previous decisions in *Gray* and *Usery*. The Court reasoned that the employer had no reason to believe that the "legislative ceiling" for the amount of the contract would never be lifted. *Id.* at 646.

using the three-part test from *Connolly*. The employer's property was not taken or destroyed,[85] the impact of the MPPAA on the employer was not "out of proportion to its experience with the plan,"[86] and reasonable investment-backed expectations of the employer were not violated since "pension plans had long been subject to federal regulation."[87]

The Court considered all of these cases in reaching its decision in *Eastern Enterprises*. The Court said that under *Gray*, Congress may apply retroactive liability in some degree if it is "confined to short and limited periods required by the practicalities of producing national legislation."[88] The Court reasoned that *Eastern Enterprises* was different from the other cases since it fell into the loophole left open by these decisions. This loophole was characterized by the Court as allowing for retroactive legislation to be found unconstitutional if there was "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability [was] substantially disproportionate to the parties' experience."[89]

In reaching its decision, as in the previous cases, the Court applied the three-factor test from *Connolly*. The first factor considered by the Court was the economic impact on Eastern Enterprises from the Coal Act. The financial burden on Eastern was considered substantial since the Act required Eastern to pay the premium set by Commissioner Apfel in a set amount of time or face severe penalties for not complying with the Coal Act.[90] The Court acknowledged that Eastern might be able to seek indemnification from its obligation under the Coal Act, but emphasized that even if Eastern was indemnified from its obligation, it was not entitled to any reimbursement.[91] The Court rejected the argument raised by Commissioner Apfel that the economic impact on Eastern was mitigated since Eastern was not responsible for lifetime benefits to all of its former employees but only for those employees that fell under the third priority.[92]

The second factor the Court considered was whether or not the Coal Act interfered with Eastern's investment-backed expectations. The Court seemed to have a problem with the Act being enacted to ensure the payment of future health benefits, yet it "attache[d] new legal consequences to [an employment relationship] completed before its enactment."[93] Retroactive legislation has been

85. *Concrete Pipe*, 508 U.S. at 643-44.

86. *Id.* at 645.

87. *Concrete Pipe,* 508 U.S. at 645.

88. *Gray*, 467 U.S. at 731 (internal quotations omitted).

89. *Eastern Enterprises*, 118 S. Ct. at 2149.

90. *Id.* The Court said Eastern's case was different from those cases involving the MPPAA. The application of the MPPAA to employers was "proportion[al] to its experience with the plan." Eastern had contributed to the early Benefit Plans, but it was not until later agreements that the industry commitment to lifetime health benefits for the retirees and their families were actually agreed to by the coal operators—and Eastern Enterprises was not one of these coal operators.

91. *Eastern Enterprises,* 118 S. Ct. at 2150.

92. *Id.* at 2150-51.

93. *Eastern Enterprises*, 118 S. Ct. at 2151. *See also* Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994).

allowed by the Court in certain circumstances, but is generally not favored.[94] Retroactive legislation in the Court's view "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."[95] The liability imposed on Eastern Enterprises was seen as very different from the liability imposed in *Connolly* and *Concrete Pipe*. In those cases, the premiums paid were connected to the companies past actions to agreements that the companies had actually made. Eastern Enterprises never made any agreement, implicit or otherwise, that they would pay lifetime benefits to miners.[96]

The last factor the Court considered in its takings analysis was the character of the governmental action involved. The Court did not debate the general purpose of the Coal Act, to provide lifetime benefits to retired coal miners, but did dispute that the Act singled out a single employer. Singling out specific employers to face a substantial financial burden that was primarily based on the conduct of the employer from years past and unrelated to any agreement they ever made, could violate the "justice and fairness" principles that underlie the Takings Clause.[97] For these reasons, the Court held that the "Coal Act improperly placed severe, disproportionate, and extremely retroactive burden on [the] operator and, thus, as applied, effected an unconstitutional taking."[98]

Eastern Enterprises also believed that the Coal Act violated their substantive due process rights.[99] The Court did not consider this claim since they found that an unconstitutional taking had occurred. The Court further expressed its concern of finding a due process violation for invalidating economic legislation.[100] Ironically, it was the concurrence of Justice Kennedy that allowed for Eastern Enterprises to prevail on its claim. However, Justice Kennedy disagreed that the application of the Coal Act was a taking and believed it to be a violation of Eastern's due process rights instead. He argued that the Coal Act did imply retroactive liability on Eastern Enterprises, but "regulate[d] the former mine owner without regard to property."[101] The general rule in takings analysis has been that property can be regulated as long as the regulation does not go too far. If a regulation exceeds its limits, it will be considered a taking.[102] Justice

94. Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988). Historically, retroactive legislation has always been questionable. According to Justice Story, "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." *See* J. Story, 2 COMMENTARIES ON THE CONSTITUTION SEC 1398 (5th ed. 1891).

95. General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

96. *Eastern Enterprises*, 118 S. Ct. at 2152.

97. *Id.* at 2153.

98. *Eastern Enterprises*, 118 S. Ct. at 2131.

99. In order for substantive due process to be violated in *Eastern*, they must show that the Act as applied to them was "arbitrary and irrational." *Id.* at 2153.

100. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955); *see also* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963).

101. Justice Kennedy could not see a requirement anywhere in the Coal Act that specified what property should be used to comply or the method of compliance. *Eastern Enterprises*, 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part).

102. *Pennsylvania Coal Co.*, 260 U.S. at 415.

Kennedy recognized the general rule but believed the Court must be certain that a specific property right or interest is at stake before applying the Takings Clause to legislation.[103]

Ultimately, Justice Kennedy invalidated the Coal Act's application to Eastern under the Due Process Clause. To invalidate retroactive legislation using due process, an inquiry must be made into whether or not the legislature acted in an "arbitrary and irrational" way when it enacted the retroactive legislation.[104] The purpose of protecting against retroactive legislation by the Due Process Clause is to provide security in the stability of investments and to ensure continuing confidence in the constitutional system.[105] Without a doubt Justice Kennedy saw the Coal Act as applied to Eastern Enterprises as creating "a retroactive effect of unprecedented scope."[106]

The dissenters in *Eastern Enterprises* consisted of Justices Stevens, Souter, Ginsburg, and Breyer. The dissenters agreed with the analysis of the lower courts over that of the majority. Justice Stevens viewed the agreements reached in the 1950s and 1960s as a kind of uneasy truce between the two groups. He believed the value of a handshake meant more in that day than a written document. This truce, in his judgment, allowed for the coal industry to survive and provided an implicit understanding between the miners and the coal operators that miners were entitled to lifetime health benefits.[107] Ultimately, Stevens was concerned that the majority had substituted their own judgment of fairness for that of the Coal Commission and Congress. The retroactive effect of the Coal Act did not violate due process or effect a taking since it was merely acknowledging the reasonable expectations of the implicit agreement made between miners and coal operators before the agreement was put in writing.[108]

Justice Breyer concurred in Justice Stevens' opinion, but also wrote his own dissenting opinion. He agreed with Justice Stevens' opinion and he also agreed with Justice Kennedy's analysis of the application of the Takings Clause. However, Justice Breyer believed the Takings Clause should not have applied to the Coal Act and its effect on Eastern Enterprises.[109] He reasoned that the money Eastern was asked to pay under the Coal Act was not going to the government but was being assessed for third parties (the miners).[110] Justice Breyer found that Eastern's due process rights were not violated even though the legislation had a

103. Justice Kennedy believed the Court's interpretation of the Takings Clause in the case would allow for the clause to be applied to a vast category of cases that it would not have under the traditional interpretation of a taking. *Eastern Enterprises*, 118 S. Ct. at 2155.

104. *Id.* at 2159. Justice Kennedy stated that retroactive legislation had always been a concern of the Court since there was always a "tempt[ation] [for the legislature] to use retroactive legislation as a means of retribution against unpopular groups or individuals." *See also Landgraf*, 511 U.S. at 266.

105. *Eastern Enterprises*, 118 S. Ct. at 2159.

106. *Id.*

107. *Eastern Enterprises*, 118 S. Ct. at 2160. Stevens believed that this understanding between the miners and coal operators enabled companies like Eastern to profit in the coal industry before exiting from the coal business. (Stevens, J., dissenting in the judgment).

108. *Id.* at 2161.

109. *Eastern Enterprises*, 118 S. Ct. at 2161 (Breyer, J.J., dissenting in the judgment).

110. *Id.* at 2162. *See also Connolloy*, 475 U.S. at 225 (taking does not occur where "the Government does not physically invade or permanently appropriate any . . . assets for its own use.").

retroactive effect. To reach this decision, he looked at the principles of justice and fairness.[111] Justice Breyer found several reasons why due process was not violated and why the Coal Act was not unconstitutional as applied to Eastern Enterprises.[112]

In summary, the Court in *Eastern Enterprises* (with a vote of four justices) allowed for a taking to extend beyond actual property (land) and to a company's financial assets.[113] Initial reactions to the decision were mixed. Eastern Enterprises was overjoyed with the decision.[114] In fact, the company reported that its second quarter of 1998 would result in a $75 million gain and an increase in stock of $2.35 a share.[115] Unlike Eastern, Coal Act supporters were understandably upset by the decision. Senator Jay Rockefeller from West Virginia vowed to continue protecting coal miners' health benefits even in light of the Court's decision. Rockefeller said:

> While miners benefits are not at risk right now, I am worried about the short and long term financing of the Coal Act. To honor the commitment to miners, Congress must carefully consider the effects of the *Eastern* decision and other court rulings to determine the appropriate way to protect health benefits. Whatever action we take regarding the Coal Act, my test remains that miners and their families must come first.[116]

Other groups such as the UMWA were also upset by the Eastern decision. Cecil Roberts, the UMWA president, reported that the union was "outraged."[117]

The decision has also led to questions of what effect the decision will have on retired miners' benefits and what future impacts it may have on other areas of retroactive legislation. Some say that the inability of the Court to reach a precedential consensus will not allow for the case to change other retroactive statutes similar in impact to the Coal Act.[118] However, others believe that

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111. *Eastern Enterprises*, 118 S. Ct. at 2164.

112. Justice Breyer mentioned a few factors to back up his reasoning: (1) The liability the Coal Act places on Eastern was only for those employees Eastern once employed. *Id.* (2) Eastern contributed to the promise that was eventually made to the miners of lifetime health benefits. *Id.* at 2165. (3) Even after Eastern's departure from the coal industry, they still received profits from their subsidiary. *Id.* at 2166. (4) With past governmental intervention in the industry over the years, Eastern should have known it was possible they might one day be called on to help fund the expectations of health benefits for retirees. *Id.* at 2167.

113. *Obligation Narrowed for Mine Retiree Care*, WASH. POST, June 26, 1998, at A19.

114. *U.S. Supreme Court Declares Coal Act Unconstitutional as Applied to Eastern Enterprises, supra* note 47, at 1. The Chairman and Chief Executive of Eastern, J. Atwood Ives, said,

> We are extremely gratified by the Supreme Court's decision which recognized the inherent unfairness of the Coal Act. With the removal of the potential liability imposed on Eastern by the Coal Act, we can focus all of our energy and financial resources on enhancing shareholder value. *Id.*

115. Edward Felsenthal, *Supreme Court, in Setback for Starr, Fortifies Attorney-Client Privilege*, WALL ST. J., June 26, 1998, at B5.

116. Don Marshall, *Rockefeller Testifies in Support of Miners' Health Benefits* (visited Nov. 5, 1998) <http://www.senate.gov/~rockefeller/html/press/releases/1998/pr100698.html>.

117. *Eastern Enterprises Prevails, supra* note 39. The UMWA issued a statement that the Court's decision only applied to the special circumstances of the *Eastern* case and "should not" have an impact on other employees covered by the UMWA. *Id.*

118. *Obligation Narrowed for Mine Retiree Care, supra* note 113, at A19.

retroactive legislation is in danger from the Court's decision under *Eastern Enterprises*.[119]

IV. FUTURE IMPACTS OF THE EASTERN ENTERPRISES DECISION

A. The Coal Industry and Retired Miners Benefits

It is hard to say exactly how *Eastern Enterprises* will affect the Coal Act, but the decision is likely to raise questions. According to the UMWA, funding for benefits will only last through the year 2000.[120] However, Cynthia Fagnoni testified at an oversight committee hearing that it was very difficult to determine the future solvency of the Combined Fund.[121] Marilyn O'Connell who testified at the same hearing discussed the effects of *Eastern Enterprises* in terms of the workload it would create for the SSA. Immediately, the SSA became aware that there were six pending court cases that were very similar to *Eastern Enterprises* in the way the Coal Act was applied. The SSA voided these companies miner assignments.[122] O'Connell also testified that with the help of the Department of Justice in interpreting the Court's decision, they have found at least 124 other companies very similar to the 'reachback' status afforded to Eastern Enterprises under the Coal Act. Having discovered this, the SSA suspended the companies liability under the Act and must now try to place over 6,000 miners under the Coal Act's remaining assignment rules.[123] In essence, more work is needed by all those involved with the Coal Act in order to ensure that the promise of health benefits to retired miners remains a reality.

B. The Future of Retroactive Legislation

The Court's decision was primarily based on the severe retroactive effect the Coal Act had on Eastern Enterprises. This has caused many to ask if *Eastern Enterprises* can be applied in other areas of retroactive legislation. CERCLA is one such area of concern. Since the Court's decision, companies dealing with CERCLA retroactive legislation have tried to use *Eastern Enterprises* to show they have also suffered from "severe retroactive liability."[124] One such case involves Alcan Aluminum Corporation. In this case, Alcan disposed of waste at a hazardous waste site that was later placed on the National Priority List (NPL)

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119. Harold J. Krent, *Supreme Court Slams Retroactive Lawmaking*, 144(30) CHI. DAILY L. BULL. 6 (July 6, 1998). *See also* Donald M. Falk, *In Focus: Supreme Court Review*, 20(50) NAT'L L.J. B11 (col. 1) (1998).

120. *Eastern Enterprises Prevails*, *supra* note 39.

121. Fagnoni, *supra* note 7. Fagnoni further stated that the year 2000 was likely a good estimate. *Id.* The Combined Fund with the loss of companies due to the *Eastern* decision will possibly have a deficit of between $107 million and $619 million by the year 2007.

122. O'Connell, *supra* note 31.

123. *Id.*

124. In fact, liability under CERCLA may in some cases be more extreme than the retroactive liability applied by the Coal Act to Eastern Enterprises. CERCLA has a scheme that includes joint, several, and strict liability "based solely on lawful acts performed decades earlier by a small minority of surviving, potentially responsible parties." Bruce Howard, *A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law*, 42 ST. LOUIS U. L.J. 847, 863 (1998).

for cleanup by the EPA. Alcan argued that the Department of Environmental Conservation directed it to dispose of its waste at the site. Even still, the EPA asked Alcan for $5 million to aid in the cleanup of the site.[125] Under joint and strict liability as well as CERCLA's retroactive liability, anyone who owned, transported, or disposed of waste at the site was liable for cleanup costs if the site was placed on the NPL.[126] Alcan took its case to the District Court and lost. The decision was appealed and the United States Court of Appeals, Second Circuit sent the case back down to the District Court with instructions that Alcan must show that the waste it disposed of at the site did not contribute to its contamination.[127] Alcan is asking the District Court to dismiss the case since CERCLA is effecting an unconstitutional taking on Alcan.[128]

Another case asserting the Court's decision in *Eastern Enterprises* involves ASARCO, Inc. ASARCO is being sued for $1 billion by the United States for certain environmental injuries (arsenic contamination of the soil) the government claims it inflicted over fifty years ago.[129] The government admits the conduct was not unlawful at the time. However, under the retroactive liability provisions of CERCLA, ASARCO is being asked to help fund the cleanup site that they used a few decades ago.[130]

By attacking the retroactivity of the Coal Act in the manner that it did, the Court has potentially opened the door to further suits with the same sort of

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125. *New York: Alcan Attacks Superfund Retroactivity*, LIAB. WK. (Sept. 28, 1998) *available in* 1998 WL 12498660.

126. *Id.* According to George Baker, member of a group lobbying to relax the burden imposed by CERCLA, *Eastern Enterprises* and Alcan are very similar. Baker said, "Alcan was disposing of its waste properly, at a licensed facility recommended by the state's environmental authorities. There was no expectation that Alcan was doing anything that would give rise to liability. Moreover, the extent of the liability it has been assessed is vastly disproportionate to its disposal activity at the site." *Id.*

127. *Alcan Seeks to Discredit EPA's Habit of Applying Superfund Retroactively*, HAZARDOUS WASTE NEWS (Oct. 13, 1998) *available in* 1998 WL 10240014.

128. *Id.* The EPA is not worried that the case will be dismissed because the Alcan case deals with environmental liability and not health benefits. Also, the EPA views the Court's decision in *Eastern Enterprises* as lacking precedential effect since the decision was a divided plurality.

129. *ASARCO Files Summary Judgment Motion in Idaho River Contamination Suit*, MEALEY'S LITIG. REP.: SUPERFUND (Oct. 1998) *available in* Westlaw database TP-ALL. The action under scrutiny in this case occurred in February of 1912. The standards the government wishes to impose on ASARCO stem from the Model Toxics Control Act (MTCA) passed in 1988. Under *Eastern Enterprises*, ASARCO is claiming that 1988 legislation applied to action taken in 1912 is "fundamentally unfair" in its effect on ASARCO. *See* Bruce Ramsey, *Arsenic and Old Everett-Questions of Science and Law*, SEATTLE-POST INTELLIGENCER, Aug. 9, 1998, at C1.

130. ASARCO's argument against the MTCA is that they are being singled out "to bear the burden that is substantial in amount, based on the [their] conduct far in the past and unrelated to any commitment that [they] made or to any injury they caused." *ASARCO Inc. Challenges Retroactive Liability Under Washington State Law*, MEALEY'S LITIG. REP.: SUPERFUND (Nov. 6, 1998) *available in* Westlaw database TP-ALL. The MTCA wants them to pay between $41 million and $86 million when they are only liable for approximately twenty percent of the cost. *Id.* However, the federal government believes that *Eastern Enterprises'* effect on CERCLA legislation has too many flaws. The government argues that "CERCLA liability is constitutionally sound because there is a connection between the cleanup cost liability and ASARCO's mining." *Id.* The government argues that this was the connection missing in the *Eastern Enterprises* case. *See Federal Government Rebuts ASARCO's Challenge to CERCLA Retroactive Liability*, MEALEY'S LITIG. REP.: SUPERFUND (Dec. 11, 1998) *available in* Westlaw database TP-ALL.

character as *Eastern Enterprises*. Even though retroactive laws can be dangerous, they are sometimes necessary to balance the power between the coal miner and the company or whoever the parties may be.[131] Also, it is important that the Court consider the many positive purposes served through retroactive lawmaking. Some of the purposes include curing past mistakes, allocating societal burdens more equitably, and closing up loopholes more efficiently.[132] The question has been posed whether retroactive liability is any worse than an "activist judicial review of congressional regulation at the request of financial titans."[133]

Possibly the most serious effect of the Court's decision in *Eastern Enterprises* is its potential application in other areas of retroactive legislation. As demonstrated above, companies challenging other forms of legislation have already discovered that the nontraditional taking found by the Court in *Eastern Enterprises* might have an effect on the retroactive liability applied to them. The facts of each case must be considered separately to give *Eastern Enterprises* the proper application and to prevent inconsistency with other established legal precepts.

Some might argue that a narrow application is exactly what the *Eastern Enterprises* case has already been afforded.[134] For example, the District Court for the Eastern District of Arkansas ordered two companies, Uniroyal and Hercules, to split the $102 million bill to cleanup a Superfund site even though the two companies tried to use the *Eastern Enterprises* decision to declare CERCLA's application as unconstitutional retroactive legislation.[135] The District Court found that even with the application of the *Eastern Enterprises* case, CERCLA should survive the retroactive argument and continue to be constitutional.[136] However, CERCLA will not always be the only area under attack by the *Eastern Enterprises* decision.

To date, *Eastern Enterprises* has only been used to challenge retroactive liability in the area of CERCLA. In the future, *Eastern Enterprises* may create methods for others to avoid complying with legislation that also appears to be retroactive in nature. The nontraditional application of the Takings Clause in *Eastern Enterprises* is also likely to raise questions from many other industries that pay benefits to employees. As a result, the courts may find themselves

131. Some believe the Court was protecting the coal company from congressional legislation. However, the Court could have considered that the coal company could have received a concession from Congress in another area in exchange for their agreement to the retroactive application of the Coal Act. The coal company likely had many ways and means to protect itself and to influence pertinent legislation. Krent, *supra* note 119.

132. *Id.*

133. Krent, *supra* note 119.

134. For example, ASARCO's use of *Eastern Enterprises* to challenge the retroactive effects of CERCLA was answered by the United States saying that a 5-4 decision does not set precedent in the area of retroactive liability. The United States argued that a four justice plurality following one rationale with a fifth justice concurring with a completely different rationale should have no bearing on statutes such as CERCLA. *Federal Government Rebuts ASARCO's Challenge to CERCLA Retroactive Liability*, *supra* note 130.

135. *Arkansas Court Orders Uniroyal, Hercules to Pay $102 Million Cleanup Bill*, MEALEY'S LITIG. REP. : SUPERFUND (Nov. 6, 1998) *available in* 1998 WL 11588555. Specifically, Uniroyal and Hercules believed they caused no harm and should not be required to pay any costs for the cleanup.

136. *Id.*

burdened with increased litigation. For this reason, the broad reach given to the Takings Clause in *Eastern Enterprises* should continue to be applied narrowly in other areas similar to CERCLA that directly effect the welfare of the public. Even though retroactive legislation is frowned upon in most instances, the constitutionality of such legislation could include consideration of the possible fall out from finding such legislation unconstitutional based on a very broad interpretation of the Fifth Amendment's Takings Clause. To make these difficult decisions, the courts, with careful consideration of all possible consequences, can fully face the challenges brought before them.

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